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2010 - Present

STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION

In the Matter of I&W's Request for Order
Hearing and Answer to Compliance Order
NMEMNRD/OCD

WQCC 10-03(A)

I&W, INC.'S REPLY IN SUPPORT OF ITS
MOTION TO QUASH PURPORTED COMPLIANCE ORDER

INTRODUCTION

I&W, Inc.'s Motion to Quash demonstrates that the compliance order issued by the Oil Conservation Division ("OCD"), which purports to initiate an OCD proceeding under the Water Quality Act, §§ 74-6-1 to 74-6-17 NMSA 1978 ("WQA" or the "Act"), was void *ab initio*. By captioning the order as a matter pending before the OCD, the OCD erroneously asserts that it has powers beyond the scope of its expressly delegated authority under the WQA. Specifically, the OCD suggests that it has the power to *enforce* civil penalties for WQA violations within an OCD proceeding, without any involvement of the Water Quality Control Commission ("WQCC" or "Commission"), despite the fact that the WQCC is the only regulatory body with the power to enforce civil penalties under the Act.

In its response to I&W's motion, the OCD fails to acknowledge that the OCD's compliance order lacks any enforcement mechanism whatsoever. The purported order was void and unenforceable as a matter of law because it was issued within an OCD proceeding instead of within a WQCC proceeding. Consequently, the Commission should grant I&W's Motion to Quash.

ARGUMENT

I. The OCD Cannot Issue a Compliance Order within an OCD Proceeding Because the OCD has No Authority to Enforce Civil Penalties.

The OCD misapprehends the scope of its power under the WQA, as well as the division of responsibilities between the OCD and the WQCC. As a WQA “constituent agency,” the OCD has limited, delegated authority to administer the WQA as the Commission’s subordinate agency. §§ 74-6-1 to 74-6-17 NMSA 1978; *see also* § 70-2-12(B)(22) NMSA 1978. Among other specifically enumerated powers, the OCD can issue an order that requires corrective action and assesses a civil penalty for alleged violations of the WQA. *See* § 74-6-10 NMSA 1978.

However, the OCD mistakenly equates the power to *assess* civil penalties with the power to *enforce* civil penalties. The OCD has no authority to enforce civil penalties directly under the Act. Instead, the OCD must seek enforcement through one of two mechanisms: (1) by docketing a compliance order with the WQCC from its inception; or (2) by filing a civil action in district court. *See* § 74-6-10 NMSA 1978 (stating that constituent agencies may file a civil action in district court for “appropriate relief” from alleged violations of the Act and granting constituent agencies the power to assess – but not enforce – civil penalties).

The WQCC is the only regulatory body with the power to enforce civil penalties under the WQA. *See* §§ 74-6-9 & 74-6-10 NMSA 1978. Thus, when the OCD issues a compliance order that assesses a civil penalty, the order must be issued within a WQCC proceeding to have effect as an enforceable order. The OCD cannot issue its compliance order within an OCD proceeding because the compliance order could never become “final” and automatically enforceable, as contemplated by the Act. § 74-6-10(G) NMSA 1978. In short, by issuing the

compliance order within an OCD proceeding, the civil penalty assessed by the OCD is unenforceable and, therefore, effectively meaningless.

II. The OCD has Failed to Validate its Purported Compliance Order by Alleging that the Order is Typical of WQA Constituent Agencies.


The OCD's response offers no explanation regarding how it would enforce civil penalties in an OCD proceeding or how its purported compliance order could be enforced against I&W without any involvement by the WQCC. Instead, the OCD seeks to validate its purported order by characterizing it as a typical example of a compliance order issued by a WQA constituent agency. The fundamental flaw in the OCD's position is that the OCD has no power to enforce civil penalties. *See* § 74-6-10 NMSA 1978. In disregarding the difference between assessment and enforcement of civil penalties, the OCD seeks to usurp the Commission's authority and exert powers that it does not have under the WQA. The OCD's issuance of the purported compliance order was an *ultra vires* act and the order was void from its inception.

CONCLUSION

For the reasons set forth above and in its Motion to Quash and supporting memorandum, I&W requests that the Commission conclude that the OCD's compliance order was void *ab initio* and grant I&W's Motion to Quash the OCD's purported order.

Respectfully submitted,

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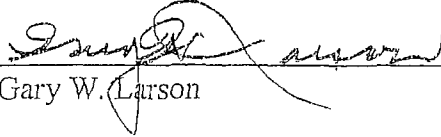
CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of April, 2010, I sent a true and correct copy of *I&W, Inc.'s Reply in Support of Its Motion to Quash Purported Compliance Order* via first class mail and electronic mail to:

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Gary W. Larson

STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION

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In the Matter of I&W's Request for Order
Hearing and Answer to Compliance Order
NMEMNRD/OCD

WQCC 10-03(A)

**I&W, INC.'S RESPONSE IN OPPOSITION TO
THE OIL CONSERVATION DIVISION'S MOTION TO DISMISS**

I. INTRODUCTION

On January 21, 2010, the Oil Conservation Division ("OCD") of the New Mexico Energy, Minerals and Natural Resources Department, issued a compliance order to I&W, Inc. ("I&W") under color of the OCD's delegated authority under the Water Quality Act, §§ 74-6-1 to 74-6-17 NMSA 1978 ("WQA" or the "Act"). The compliance order was captioned as a matter pending before the OCD, instead of as a proceeding before the Water Quality Control Commission ("WQCC" or "Commission"). By purporting to initiate an OCD proceeding, the order was void *ab initio* because it wrongly asserted that the OCD had powers to seek relief in an OCD proceeding for alleged WQA infractions. *See* I&W's Motion to Quash. Nonetheless, the purported order seeks to compel I&W to take corrective action, put up a \$1,000,000 surety bond, reimburse the OCD \$563,420 for monitoring and early warning systems, and pay \$2,637,000 in civil penalties. The OCD now seeks to impose these draconian fines without any hearing whatsoever.

On February 19, 2010 – prior to the deadline specified in the WQA and its regulations – I&W filed its Request for Order Hearing and Answer to Compliance Order with the OCD in accordance with the caption on the order. The OCD's only indication that it intended I&W to file its request with the WQCC, instead of with the OCD, was buried on page 23 of the 25 page order.

Despite the fact that the OCD received I&W's request prior to the deadline, the OCD failed to take any action to docket the request with the WQCC. Instead, rather than placing a telephone call to I&W counsel disclosing that the runner had filed I&W's request with the OCD – and that the OCD had accepted the response for filing – the OCD held the request until the deadline had passed, then docketed it with the Commission. Now, asserting that the request was untimely filed with the Commission, the OCD has moved to dismiss the very matter that it docketed in the first place. I&W never had a hearing on the purported compliance order, and the OCD seeks to prevent I&W from ever responding to and litigating the issues raised in the order.

The OCD should not be permitted to divest I&W of its right to a hearing based on its untenable and self-contradictory view of its own authority under the WQA. Either the OCD issued a void order and I&W's Motion to Quash should be granted or both the order – and I&W's timely response – must be accepted and the matter must progress to hearing. In either case, the OCD's Motion to Dismiss should be denied.

II. ARGUMENT

A. I&W Timely Filed its Request with the OCD, an Agent of the WQCC.

If the OCD issued its compliance order pursuant to its delegated authority under the WQA, then the OCD commenced this proceeding by issuing the order. Neither the WQA nor the regulations enacted pursuant to the statute expressly define a “proceeding.” However, the WQA is consistent with New Mexico Administrative Procedures Act, §§ 12-8-1 to 12-8-25 NMSA 1978 (the “APA”), which clearly states that an “[a]gency proceeding” is “any agency process in connection with . . . orders, adjudication, [and the] . . . imposition or withholding of sanctions or the granting or withholding of relief.” § 12-8-2(L) NMSA 1978 (emphasis added). After the OCD initiated the proceeding, I&W responded by filing its *answer* and request for hearing, and

the OCD was under a regulatory mandate to docket I&W's request as soon as the OCD received it. 20.1.3.400(A)(2) NMAC (stating that the Request for Order Hearing must also serve as an Answer); 20.1.3.112(B) NMAC (stating that the hearing clerk must docket a request for hearing).

According to both statute and rule, I&W timely responded to the order by filing its request within thirty (30) days of receiving the OCD's purported compliance order. § 74-6-10 NMSA 1978; 20.1.3.400 NMAC. As directed by the caption on the order, I&W delivered its request to the OCD, and the OCD both accepted and file-stamped it. Because the WQCC is the only agency with the power to adjudicate compliance orders, however, the only way the OCD's order could be valid under the WQA is if the OCD issued the order solely on behalf of the WQCC as the Commission's subordinate – or “constituent” – agency. *See* §§ 74-6-1 to 74-6-17 NMSA 1978 (OCD's only power to issue compliance orders is as a constituent agency acting on behalf of the Commission); § 74-6-10 NMSA 1978 (the WQCC has sole authority to adjudicate compliance orders). Thus, when I&W filed its timely request with the WQCC's subordinate agency I&W, earned the right to a hearing on the merits of the order.

B. I&W did not Waive its Right to a Hearing.

I&W never waived its earned right to a hearing. In *D'Antonio v. Garcia*, 2008-NMCA-139, 194 P.3d 126 (Ct. App. 2008), a case involving facts materially different than those present here, the New Mexico Court of Appeals determined that a defendant waived his statutory right to an administrative hearing through its consistent failure to comply with multiple requirements of the hearing examiner's scheduling order, as well as his failure to respond to the state engineer's motion for summary judgment. Acknowledging the established principle that dismissals should be granted “sparingly,” the Court of Appeals determined that the defendant's *willful* failure to act

according to the hearing examiner's clear instructions could justify the rare remedy of dismissal without a hearing. *Id.* ¶¶ 17-18, 132.

I&W's actions bear stark contrast to the defendant's in *D'Antonio v. Garcia*, where the Court noted that the waiver was constituted by "willful" conduct. Here, I&W met the deadline for submitting its request and filed its Verified Answer with the WQCC's subordinate agency, the OCD, as clearly invited by the OCD's caption. I&W's Answer itself presents substantial questions as to why the OCD would proceed in such a precipitous manner and issue an *ex parte* order of forfeiture in these circumstances. As set forth in its Verified Answer, I&W has certainly done everything that that OCD has asked of it and has not intentionally relinquished its right to be heard on this matter. Rather than act within the bounds of fairness, however, OCD seeks to act as prosecutor, judge, and jury, and to abruptly conclude a substantial matter by denying I&W the fundamental right to a hearing. However, I&W did what it was asked to do and its acts of compliance cannot be construed as a waiver of I&W's right to a hearing and cannot provide a basis for dismissal.

C. The WQA must be Read as to Prevent Forfeiture.

If the WQA is read so as to deny I&W the right to a hearing – despite the timely filing of its request with the WQCC's subordinate agency – then it will result in the forfeiture of I&W's personal property pursuant to the order's civil penalty provisions. That result would fly in the face of the long-standing principle that statutes must be "strictly construed against forfeiture" because "[f]orfeitures are not favored at law." *State v. Ozarek*, 91 N.M. 275, 573 P.2d 209, (1978). The WQA must be read so as to prevent forfeiture, and I&W must be afforded the hearing it has earned before the OCD may require more than \$3 million in payments.

D. I&W's Request for Order Hearing Cannot be Dismissed for Lack of Jurisdiction Based on the OCD's Delay in Docketing the Matter with the WQCC.

Illogically, the OCD suggests that it had WQA authority to issue the compliance order within an OCD proceeding and yet simultaneously disclaims authority to accept I&W's response. The WQA cannot – and does not – support these clearly contradictory positions. The Act only authorizes compliance orders issued within WQCC proceedings – not orders issued within OCD proceedings – because the WQCC is the only administrative agency that has authority to adjudicate the matters raised in a compliance order. *See* § 74-6-10 NMSA 1978. Thus, the OCD's compliance order was void *ab initio*.

The OCD made no attempt to remedy the effect of its void order. Instead, when it received and file-stamped I&W's timely request for hearing, OCD counsel held the request until I&W's filing deadline had expired and then docketed the matter with the WQCC. Now, the OCD claims that I&W must be denied its right to a hearing because Commission received I&W's request too late, despite the obvious fact that the OCD has not incurred, and could not possibly incur, any conceivable prejudice.

On these facts, the WQCC's receipt of I&W's request cannot be grounds for dismissal because the thirty-day time limit is not an absolute jurisdictional requirement. In *Trujillo v. Serrano*, 117 N.M. 273, 278, 871 P.2d 369, 374 (1994), the Supreme Court determined that “the timely filing of a notice of appeal is . . . not an absolute jurisdictional requirement” and that untimely appeals may be allowed in unusual circumstances. Unlike in the present case, in *Trujillo*, the matter had already been heard on the merits, yet the Court of Appeals still held that the untimely notice of appeal could not be dismissed automatically for lack of jurisdiction. Here,

the OCD seeks to preempt any hearing whatsoever. Additionally, the WQCC received I&W's request after the statutory deadline due to extremely unusual circumstances: the OCD issued a void order that purported to initiate an invalid proceeding, the OCD received I&W's request for hearing in advance of the statutory deadline, and the OCD failed to docket the request with the Commission until it was too late. The OCD's extremely unusual and unjustified behavior cannot provide a basis on which to deny I&W its right to a hearing.

Moreover, a ministerial filing error does not deprive the WQCC of jurisdiction. I&W unquestionably filed its request before the statutory deadline. § 74-6-10 NMSA 1978. The fact that I&W submitted its request to the OCD - WQCC's subordinate agency - rather than to the WQCC itself cannot be misconstrued as anything more than a technical error, committed by a law firm's filing clerk, and induced by the OCD's misleading caption. This technical mistake does not impact the WQCC's jurisdiction over the request, and provides no basis for dismissal. *Healthsource, Inc. v. X-Ray Assoc. of N.M.*, 2005-NMCA-097, ¶15, 116 P.3d 861, 866 (Ct. App. 2005) (holding that the court had jurisdiction to hear plaintiff's appeal despite plaintiff's untimely filing of a notice of appeal because the untimely notice was "the sort of technicality that should not result in a dismissal" and that cases should be determined "on their merits").

E. The OCD Should be Estopped from Claiming that I&W's Request is Untimely.

The OCD's behavior squarely meets all the elements of equitable estoppel and the OCD should be prevented from dismissing I&W's request as untimely. *See Capo v. Century Life Ins. Co.*, 94 N.M. 373, 377, 610 P.2d 1202, 1206 (1980) (providing that the essential elements of equitable estoppel are: "(1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are . . . inconsistent with [the facts] which the party subsequently attempts to assert; (2) intention that

such conduct shall be acted upon by the other party . . . ; and (3) knowledge, actual or constructive, of the real facts”). Thus, the OCD seeks nothing more than to deny I&W a hearing based on the OCD’s own misconduct, thereby allowing the OCD to avoid its burden of proving the violations alleged in the compliance order. 20.1.3.400(J) NMAC (stating that the constituent agency has the “burden of going forward with the evidence” and of proving a WQA violation by a preponderance of the evidence”).

The OCD should be estopped from seeking a dismissal of I&W’s request as untimely based on the OCD’s own misconduct. Even the OCD does not claim that it has suffered any conceivable prejudice, nor could it so claim under these circumstances. The OCD issued its compliance order under color of its WQA authority, and it should have been aware of the scope of its powers under the Act. Still, the OCD incorrectly represented its authority and captioned its compliance order as an OCD proceeding. *See* § 74-6-10 NMSA 1978. The OCD clearly intended for I&W to act upon its misrepresentation because the OCD not only failed to take any action to remedy the effect of its error, but actually exacerbated the harm caused by the mistake by holding onto I&W’s request, waiting until I&W’s filing deadline had passed, docketing the request with the WQCC, and then moving to strike the request as untimely. The OCD must be estopped under these circumstances. *See Capo v. Century Life Ins. Co.*, 94 N.M. 373, 377, 610 P.2d 1202, 1206 (1980).

F. Dismissing I&W’s Request for a Hearing Would Violate I&W’s Constitutional Right to Procedural Due Process.

Finally, the Commission should not condone the OCD’s attempt to extinguish I&W’s constitutional right to procedural due process, by moving to dismiss I&W’s request and seeking to enforce the OCD’s purported order without a hearing. *See* N.M. Const., art II, § 18. I&W

has the right to a meaningful opportunity for a hearing before it is divested of its property as specified in the compliance order. See N.M. Const., art II, § 18; see also *State of N.M. ex rel. CYFD v. William M.*, 2007-NMCA-055, 161 P.3d 262 (Ct. App. 2007) (recognizing that that the “essence of due process is notice and an opportunity to be heard at a meaningful time and in a meaningful manner”). Notwithstanding this constitutional right – and the fact that the OCD’s errors and omissions caused the WQCC’s late docketing of I&W’s request – the OCD seeks to dismiss the request, asserting that I&W’s right to a hearing was contingent upon I&W ignoring the OCD’s caption, heeding the brief instruction on page 23 of the 25 page order, and filing its request with the WQCC. I&W’s right to due process requires that I&W have a *meaningful* opportunity for a hearing, however, and it cannot be extinguished on such tenuous grounds. Cf. *Abluquerque v. Chavez*, 125 N.M. 809, 965 P.2d 928 (1998) (determining that a public employee had a property right in his job and that pre-termination hearing deprived him of procedural due process because the hearing officer limited the presentation of the employee’s attorney at the hearing).

III. CONCLUSION

The OCD cannot assert that it had WQA authority to initiate an OCD proceeding and simultaneously disclaim authority to accept I&W’s response. Either: (1) I&W is entitled to a hearing because it timely filed its Request for Order Hearing and Answer to Compliance Order with the OCD, operating solely on behalf of and subordinate to the WQCC, or (2) I&W’s Motion to Quash should be granted, because the OCD had no WQA authority to initiate an OCD proceeding in its independent capacity and the order was void *ab initio*. In either case, the OCD’s Motion to Dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of April, 2010, I sent a true and correct copy of the foregoing documents, *I&W, Inc.'s Response in Opposition to the Oil Conservation Division's Motion to Dismiss* via first class mail and electronic mail to:

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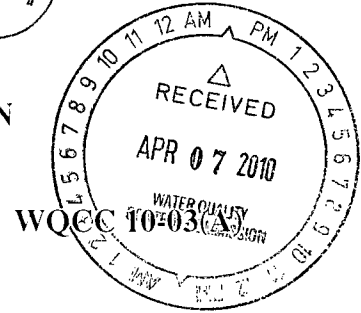
Attorneys for the Oil Conservation Division



Thomas M. Hnasko

STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION

In the Matter of I&W's Request for Order
Hearing and Answer to Compliance Order
NMEMNRD/OCD



**RESPONSE OF THE OIL CONSERVATION DIVISION
TO I&W'S MOTION TO QUASH PURPORTED COMPLIANCE ORDER**

The New Mexico Energy, Minerals and Natural Resources Department Oil Conservation Division (OCD) issued a Compliance Order to I&W, Inc. (I&W) pursuant to the Water Quality Act alleging that I&W violated certain conditions of its discharge permit. I&W, however, failed to file a Request for Order Hearing with the Water Quality Control Commission (WQCC), and OCD's Compliance Order is "final." NMSA 1978, § 74-6-10(G). Instead, I&W served a Request for Order Hearing on OCD. The OCD's Motion to Dismiss I&W's Request for Order Hearing is pending before the WQCC. To avoid a proper dismissal of its Request for Order Hearing, I&W moves to quash the Compliance Order itself, arguing that the order is without legal effect because the OCD did not issue the order in the name of the WQCC, and did not docket the Compliance Order as a case before the WQCC.

I&W's argument has no basis in the plain language of the Water Quality Act, and is based on a mischaracterization of the requirements for issuing Compliance Orders under the Water Quality Act. The OCD's issuance of the Compliance Order under its own authority correctly followed the requirements of the Water Quality Act and WQCC rules, and is consistent with current practice of constituent agencies of the WQCC. The WQCC should see I&W's motion to quash the compliance order for what it is -- I&W's attempt to avoid the consequences of its failure to file a Request for Order Hearing with the Commission. The WQCC should deny I&W's motion to quash.

I. The OCD Issued the Compliance Order Consistent with the Requirements of the Water Quality Act and WQCC Rules, Following Current Practices of Other Constituent Agencies.

A review of the Water Quality Act, WQCC rules and the current practices of constituent agencies shows that the OCD issued the Compliance Order against I&W correctly.

A. Water Quality Act Requirements.

Under the Water Quality Act, the WQCC and its constituent agencies are separately defined legal entities with separately defined powers and duties. NMSA 1978, § 74-6-2(J) (defining “commission”) and NMSA 1978, § 74-6-2(K) (defining “constituent agency”); compare, e.g., NMSA 1978, §§ 74-6-4 (duties and powers of WQCC) and NMSA 1978, § 74-6-9 (powers of constituent agencies). The Oil Conservation Commission (OCC) is a constituent agency of the WQCC. NMSA 1978, § 74-6-2(K)(4). OCD is the administrative arm of the OCC, and has authority to administer the Water Quality Act. NMSA 1978, § 70-2-12(B)(22). The legislature gave the authority to issue compliance orders to constituent agencies, not to the WQCC. See NMSA 1978, § 74-6-10. The legislature set forth the following requirements for a constituent agency to issue a Compliance Order:

Whenever, on the basis of any information, a constituent agency determines that a person violated or is violating a requirement, regulation or water quality standard adopted pursuant to the Water Quality Act or a condition of a permit issued pursuant to that act, the constituent agency may:

(1) issue a compliance order requiring compliance immediately or within a specified time period or issue a compliance order assessing a civil penalty, or both.

NMSA 1978, § 74-6-10(A) (1) (emphasis added). Plainly, it is a constituent agency, not the WQCC, that has the authority to issue a compliance order under the Water Quality Act.¹

¹ A constituent agency, not the WQCC, also has the authority to commence a civil action in district court for violation of the Water Quality Act. NMSA 1978, § 74-6-10(A)(2).

The legislature also set out the requirements for contesting a compliance order issued by a constituent agency:

Any compliance order issued by a constituent agency pursuant to this section shall become final unless, no later than thirty days after the compliance order is served, any person named in the compliance order submits a written request to the commission for a public hearing....

NMSA 1978, § 74-6-10(G) (emphasis added). If a request for hearing is not filed or is not timely filed with the WQCC, the compliance order issued by the constituent agency is final. Id. If a request for hearing is timely filed with the WQCC, the WQCC makes a final decision regarding the compliance order after a public hearing. NMSA 1978, § 74-6-10(G) & (I). The WQCC, therefore, is the administrative body that reviews compliance orders issued by constituent agencies. The WQCC does not issue compliance orders under the Water Quality Act. The division of labor under the Water Quality Act between constituent agencies and the WQCC, as it applies to compliance orders, is thus simple and straightforward.

B. WQCC Rule Requirements.

The WQCC adopted rules consistent with the Water Quality Act, respecting the roles assigned to constituent agencies and to the WQCC by statute. Section 20.6.2 NMAC sets out the rules for constituent agencies and the regulated entities with regard to ground and surface water protection. Various activities prior to review by the WQCC are undertaken by the “secretary,” which the rules define as “the secretary of the New Mexico department of environment or the director of a constituent agency designated by the commission.” 20.6.2.7.PP NMAC (emphasis added). The actions taken by a constituent agency include the approval, disapproval, modification or termination of discharge permits, 20.6.2.3109 NMAC, and, significantly for this proceeding, the issuance of compliance orders when discharge permit conditions are violated, 20.6.2.1220 NMAC. These actions occur without WQCC participation, recognizing that the

constituent agency has the power to issue and administer discharge permits, and issue compliance orders when those permits are violated.

Section 20.1.3 NMAC, titled “Adjudicatory Procedures - Water Quality Control Commission,” sets out the rules for proceedings before the WQCC, including review of compliance orders issued by constituent agencies. 20.1.3.2.A(3) NMAC. A proceeding to challenge a compliance order

... shall be initiated by the filing of a Request for Order Hearing within thirty (30) days after the Compliance Order is served. The Respondent shall file the original of the Request for Order Hearing with the Commission and serve a copy on the Department.

20.1.3.400.A(1) NMAC; see also 20.1.3.7.A(9) NMAC (defining “Order Hearing” as “a proceeding before the Commission initiated by the timely filing of a Request for Order Hearing”). The legal proceeding before the WQCC is not initiated until the filing of the Request for Order Hearing. At that point, there is a “proceeding” before the WQCC to be docketed:

The Hearing Clerk shall, as soon as practicable after initiation of a proceeding under this part [20.1.3 NMAC], issue and serve upon the parties and each Commissioner a Notice of Docketing, containing the caption and docket number of the case, and the date upon which the Petition or Request for Order Hearing was received by the Hearing Clerk....

20.1.3.112.A NMAC (emphasis added). There is no provision for docketing issuance by the constituent agency of the underlying compliance order with the WQCC because there is no “proceeding” before the WQCC at that time.

C. Practice of Other Constituent Agencies.

OCD’s issuance of the Compliance Order to I&W, under its own authority and name, is consistent with the practice of other constituent agencies, specifically the New Mexico Environment Department (NMED). NMED issues compliance orders pursuant to Section 74-6-10(A)(1) of the Water Quality Act under its own authority and under its own name. Affidavit of

Tannis L. Fox, ¶ 9 (attached as Ex. A). When NMED issues a compliance order, it initiates a legal proceeding before NMED, and not before the Commission, because it is the constituent agency, not the Commission, that has the authority to issue compliance orders under the WQA and to assess civil penalties for the violations alleged. Id. NMED captions the compliance order as before the “New Mexico Environment Department”, not as before the WQCC. Id. ¶¶ 12, 14, 15. The NMED Hearing Clerk gives the compliance order a docket number reflecting that it is a legal proceeding before NMED, not before the WQCC. Id. ¶¶ 13, 14. Similarly, the Compliance Order issued by OCD to I&W reflected, simply, that OCD (not the WQCC) was the issuing agency under the Water Quality Act.

I&W attaches to its motion to quash a copy of one compliance order issued by NMED with a caption that the proceeding is before the WQCC and with a docket number designating “WQCC.” See Administrative Compliance Order to Bill Evans and Sean Curtis, dba Savoy Travel Center (attached as Ex. C to Mot. to Quash). Based on this one compliance order, which I&W claims is “illustrative” of compliance orders issued by NMED, I&W argues that the caption “invokes the Commission’s jurisdiction . . . as a matter originating from the Commission.” Mot. to Quash, ¶ 6.

First, the caption of the compliance order relied upon by I&W is not illustrative or representative of the captions of compliance orders issued by NMED pursuant to the WQA. Aff. of T. Fox, ¶ 17. Rather, it appears to be an anomaly (and in error), and the general practice of NMED is to caption compliance orders as before NMED, not the WQCC. Id. ¶¶ 12, 14, 15, 17. Moreover, a mistaken caption on a compliance order cannot confer subject matter jurisdiction on the WQCC where no such jurisdiction exists. Finally, by its terms, the compliance order relied upon by I&W does not invoke the jurisdiction of the WQCC. Rather, the compliance order

invokes the jurisdiction of NMED. The compliance order expressly stated that NMED as a constituent agency has the authority to issue compliance orders and that the order is issued by the Director of the NMED Water and Waste Management Division. Savoy Travel Center Compliance Order, p. 1, ¶¶ 2, 3. As a matter of substance, the compliance order was issued under the authority of NMED as a constituent agency under Section 74-10-6(A)(1) of the WQA, and not under the authority or jurisdiction of the Commission.

D. The OCD Issued the Compliance Order Consistent with All Statutory and Regulatory Requirements.

The OCD acted correctly in issuing the Compliance Order under the heading “State of New Mexico Oil Conservation Division.” As a constituent agency, the OCD had the statutory power to issue a compliance order. That issuance did not initiate a “proceeding” before the WQCC, however, and there is no statutory or regulatory requirement that the Compliance Order be “docketed” with the WQCC.

II. The Compliance Order Became Final When I&W Failed to File a Timely Request for Hearing with the WQCC.

Underlying I&W’s Motion to Quash is the argument that because the Compliance Order was issued under the name of the OCD, the request for hearing should be filed with the OCD. I&W claims that it filed a Request for Order Hearing with the OCD “and thereby satisfied the statutory and regulatory deadline for filing such a request.” I&W, Inc’s Memorandum in Support of its Motion to Quash Purported Compliance Order, page 1. I&W’s argument fails.

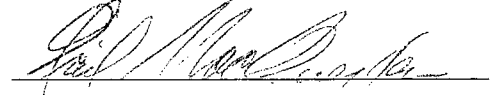
As discussed above, the Water Quality Act provides that constituent agencies issue compliance orders. And a compliance order issued by a constituent agency becomes final unless a person named in the compliance order submits a written request to the WQCC no later than thirty days after the compliance order is served. NMSA 1978, § 74-6-10(G). Filing a request

for hearing with the OCD would not satisfy the statutory requirement that the request be filed with the WQCC. See Lowe v. Bloom, 110 N.M. 555, 556, 798 P.2d 156, 157 (1990) (finding that the filing of a notice of appeal with the clerk of the court of appeals did not satisfy requirement that the notice be filed in the clerk of the district court). Furthermore, I&W did not “file” its request for hearing with the OCD. The OCD received one copy of I&W’s Request for Order Hearing, which it date stamped. The certificate of service at the end of I&W’s Request indicates that I&W was serving a copy on Mr. Fesmire, the OCD Division Director. Providing a service copy is not “filing.” Lowe, 110 N.M. at 556, 798 P.2d at 157. I&W simply failed to file its request for hearing with the WQCC within the thirty-day statutory deadline.

Conclusion.

The OCD filed a Motion to Dismiss I&W’s Request for Order Hearing because I&W did not file a request for hearing with the WQCC as required by the Water Quality Act and WQCC rules. Faced with dismissal of its Request for Order Hearing, I&W attacks the validity of the Compliance Order itself with an argument that has no merit. The Water Quality Act is clear and straightforward: constituent agencies are vested with authority to issue compliance orders assessing penalties; the WQCC is vested with authority to review those orders if, and only if, a timely request for hearing is filed. NMSA 1978, § 74-6-10(A), (D), (G). Otherwise, the compliance order issued by the constituent agency is “final.” NMSA 1978, § 74-6-10(G). The Compliance Order issued to I&W by OCD, under its own authority and in its own name, complied with the substantive and procedural requirements of the Water Quality Act and all applicable WQCC rules. Accordingly, the OCD respectfully requests the WQCC to deny I&W, Inc.’s Motion to Quash.

Respectfully submitted,



Gail MacQuesten, Asst. General Counsel

Mark Fesmire, Asst. General Counsel

New Mexico Energy, Minerals and Natural
Resources Department

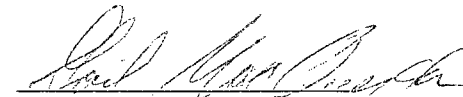
Attorneys for the Oil Conservation Division

1220 S. St. Francis Drive

Santa Fe, NM 87505

CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2010 I mailed and e-mailed a copy of the foregoing Response, and the supporting affidavit with exhibits, to Zachary Shandler, Asst. Atty. General. P.O. Box 1508, Santa Fe, NM 87504, zshandler@nmac.gov ; and to Thomas M. Hnasko, Esq. and Gary W. Larson, Esq., Hinkle Law Firm, P. O. Box 2068, Santa Fe, NM 87504-2068, thnasko@hinklelawfirm.com, glarson@hinklelawfirm.com.



Gail MacQuesten, Attorney for the
Oil Conservation Division

STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION

In the Matter of I&W's Request for Order
Hearing and Answer to Compliance Order
NMEMNRD/OCD.

WQCC 10-03(A)

AFFIDAVIT OF TANNIS L. FOX

STATE OF NEW MEXICO §
§
COUNTY OF SANTA FE §

I, Tannis L. Fox, having been duly sworn, state the following:

1. My name is Tannis L. Fox. This affidavit is based on personal knowledge, and is true and correct to the best of my knowledge.
2. I am Deputy General Counsel for the New Mexico Environment Department ("NMED"). I have served in this capacity since January 2001. I became employed with NMED in July 1999 as an Assistant General Counsel.
3. Prior to my employment with NMED, I served as an Assistant Attorney General with the Office of the New Mexico Attorney General. As part of responsibilities, from 1998 to 1999, I served as counsel to the Water Quality Control Commission ("Commission").
4. I have practiced law since 1984. A substantial part of my practice over the last 25 years has been in complex litigation.
5. As a lawyer with NMED, I have been responsible for enforcement, permitting and rulemaking actions pursuant to the Water Quality Act ("WQA"), the Hazardous Waste Act, the Air Quality Control Act, and the Solid Waste Act, among other statutes administered by NMED. A substantial part of my practice with NMED has involved enforcement of the WQA. I have represented NMED in at least ten proceedings to enforce the WQA under Section 74-6-10 of the WQA. As such, I am familiar with the WQA's provisions regarding issuance of compliance

orders by constituent agencies, NMSA 1978, § 74-6-10; the Commission's regulations governing issuance of compliance orders by constituent agencies, 20.6.2.1220 NMAC, and requests for order hearings before the Commission to contest compliance orders, *e.g.*, 20.1.3.2.A(3) and 20.1.3.400 NMAC; and NMED's practices issuing compliance orders. In my role as Deputy General Counsel, I assist in training, advising, and assisting other lawyers within the NMED Office of General Counsel in matters related to compliance orders issued pursuant to the WQA.

6. As a constituent agency of the Commission, NMED has authority to issue compliance orders to enforce the provisions of the WQA, regulations or water quality standards promulgated under the WQA, and permits issued under the WQA. NMSA 1978, § 74-6-10(A)(1). The authority to issue compliance orders assessing civil penalties lies with constituent agencies of the Commission, and not with the Commission. *Id.*

7. The Commission has authority to review a compliance order, through conducting a public hearing, if a person "submits a written request to the commission for a public hearing" within 30 days of service by the constituent agency of the compliance order. NMSA 1978, § 74-6-10(G); *see also* 20.1.3.400.A(1) NMAC. If a person does not file a request for hearing or does not file a timely request for hearing with the Commission, the compliance order issued by the constituent agency becomes "final." NMSA 1978, § 74-6-10(G).

8. Because constituent agencies are responsible for issuance of compliance orders, NMED develops the factual and legal basis for its compliance orders and prepares the penalty assessments for the violations alleged. Most compliance orders issued by NMED assess civil penalties. NMED legal staff, with the assistance of NMED technical staff, draft the compliance orders. NMED management, generally the NMED Director of the Water and Waste Management Division, through a delegation from the Secretary of NMED, review and issue the

compliance orders. The Commission plays no role in preparing or issuing NMED compliance orders under the WQA.

9. When NMED issues a compliance order pursuant to the authority of the WQA, NMED initiates a legal proceeding before NMED. NMED does not initiate a legal proceeding before the Commission. NMED issues its compliance orders under its own authority as a constituent agency, and not under the authority or jurisdiction of the Commission. NMSA 1978, § 74-6-10(A)(1).

10. If a respondent to a compliance order does not request a hearing before the Commission, the compliance order issued by NMED is final, and does not come before the Commission. The Commission only exercises jurisdiction over compliance orders issued by NMED if a respondent files a timely request for hearing with the Commission.

11. NMED is not required by statute or regulation to caption compliance orders or to assign a case or docket number to compliance orders issued under the WQA. However, for administrative tracking purposes, NMED does caption and assign a case or docket number to its compliance orders.

12. Because issuance of a compliance order is a legal proceeding initiated by and under the authority of NMED, the practice of NMED, since I began my employment with the agency, is to caption compliance orders stating, "State of New Mexico/New Mexico Environment Department," or similar wording indicating that the legal proceeding is before NMED.

13. The current docket numbering system used by NMED provides certain information: the bureau within NMED that is responsible for the compliance order, the year of issuance of the compliance order, a unique number assigned by the NMED Hearing Clerk (not

the Commission Administrator)¹ indicating the order the matters come before her, and a designation of the type of proceeding before NMED. For example, “CO” means it is a compliance order proceeding, “P” means it is a permit proceeding, and “R” means it is a rulemaking proceeding.

14. The following is an example of a caption from a compliance order issued by NMED under the WQA in 2006. This example is representative of how compliance orders issued by NMED under the WQA are captioned and docketed:

**STATE OF NEW MEXICO
NEW MEXICO ENVIRONMENT DEPARTMENT**

**In the Matter of
HELENA CHEMICAL COMPANY,**

No. GWQB 06-02 (CO)

Respondent.

This caption reflects that NMED issued a compliance order; that it was issued to Helena Chemical Company; that the NMED Ground Water Quality Bureau was the bureau responsible for preparing the compliance order; that it was issued in 2006; and that it was the second legal proceeding to come before the NMED Hearing Clerk for assignment of a case or docket number.²

15. To prepare this affidavit, I reviewed the captions of all compliance orders for which I was NMED counsel. Each of those compliance orders was issued in the name of NMED (and not in the name of the Commission).

¹ The NMED Hearing Clerk serves as clerk for compliance order, permit, rulemaking and other legal proceedings that are before NMED. The Commission Administrator serves as administrator for matters that are before the Commission.

² Prior to the NMED Hearing Clerk taking on responsibility for assigning case or docket numbers to NMED legal proceedings, NMED used the designation “WQA” in its captions for its compliance orders issued under the WQA instead of “GWQB.” The NMED Hearing Clerk began to assign case or docket numbers in 2006; prior to that, NMED bureaus assigned case numbers.

16. I have reviewed the Motion to Quash Purported Compliance Order filed by I&W, Inc. ("I&W"), supporting memorandum, and exhibits. In particular, I have reviewed the Administrative Compliance Order issued by NMED to Bill Evans and Sean Curtis, dba Savoy Travel Center, attached as Exhibit C to the motion, which I&W states is:

. . . an illustrative compliance order issued through another WQCC constituent agency, the New Mexico Environment Department . . . which properly invokes the Commission's jurisdiction from its inception by designating and captioning the order as a matter originating from the Commission and thereafter docketing the order with the Commission.

Mot. to Quash, ¶ 6. The caption of the Savoy Travel Center compliance order indicates that it is before the Commission and the docket number has a "WQCC" designation.

17. The caption and docket number of the Savoy Travel Center compliance order are not illustrative or representative of NMED practice in captioning and docketing compliance orders issued pursuant to the WQA. The practice of NMED, as I have stated, is to issue compliance orders under the authority of and in the name of NMED and to assign an NMED case or docket number. NMED's practice is not to file compliance orders with the Commission or to request the Commission Administrator to assign a Commission docket number to a compliance order. That NMED, in this instance, mistakenly entitled a compliance order as before the Commission and assigned a docket number with a "WQCC" designation does not either invalidate the compliance order as one issued by NMED or turn the compliance order into an order issued by or under the jurisdiction of the Commission. The compliance order states that it is issued by the Director of the NMED Water and Waste Management Division, that NMED as a constituent agency has the authority to issue compliance orders, that a civil penalty is assessed, that the compliance order is final unless a request for hearing is timely filed with the Commission, and that respondents may request settlement discussions with NMED. Savoy

Travel Center Compliance Order, p. 1, ¶¶ 2, 3, 32-36, 39, 42. By its terms, the Savoy Travel Center compliance order was issued under the authority of NMED as a constituent agency under Section 74-10-6(A)(1) of the WQA and not under the authority or jurisdiction of the Commission.

TLO Fox

Tannis L. Fox

Subscribed and sworn to before me this 7th day of April, 2010.

Melissa Y. Mysorens

Notary Public

My commission expires:

April 3, 2011

**STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION**

**In the Matter of I&W's Request for Order
Hearing and Answer to Compliance Order
NMEMNRD/OCD**

WQCC 10-03(A)

I&W, INC.'s MOTION TO QUASH PURPORTED COMPLIANCE ORDER

I&W, Inc. ("I&W") submits this Motion to Quash the New Mexico Energy, Minerals and Natural Resources Department, Oil Conservation Division's ("OCD's") January 21, 2010 purported compliance order. In support of its Motion, I&W states:

1. As a constituent agency of the Water Quality Control Commission, the OCD can issue compliance orders under the Water Quality Act, §§ 74-6-1 to 74-6-17 NMSA 1978 ("WQA"), only when: (a) the OCD invokes the jurisdiction of the Commission by captioning and docketing a compliance order as a Commission proceeding; or (b) the OCD captions and designates the order as a Commission matter within the Commission's jurisdiction.

2. The OCD's purported compliance order is captioned as originating from and pending before the "State of New Mexico Oil Conservation Division."

3. The OCD has no authority under the WQA to issue compliance orders within an OCD proceeding.

4. Moreover, despite captioning and designating the matter as an OCD proceeding, the OCD's purported order incorrectly asserts that the matter would be final without any involvement of the Commission. The WQA does not authorize the OCD to assess civil penalties within an OCD proceeding.

5. Accordingly, the OCD's purported compliance order, issued within an unauthorized OCD proceeding, should be quashed as a violation of the WQA.

6. This Motion is supported by: (a) a copy of a March 3, 2010 letter from OCD counsel to the Commission, indicating that I&W had made a timely request for hearing and that I&W had not previously notified the Commission of that request, attached to this Motion as Exhibit "A"; (b) the Commission's "Corrected Notice of Docketing," indicating that the matter was docketed as a Commission proceeding on March 23, 2010, attached as Exhibit "B"; and (c) an illustrative compliance order issued through another WQCC constituent agency, the New Mexico Environment Department, attached as Exhibit "C", which properly invokes the Commission's jurisdiction from its inception by designating and captioning the order as a matter originating from the Commission and thereafter docketing the order with the Commission.

7. OCD does not concur in the relief requested in this Motion.

WHEREFORE, I&W requests that the Commission enter an order quashing the OCD's purported compliance order because it is in violation of the Water Quality Act.

Respectfully submitted,

HINKLE, HENSLEY, SHANOR & MARTIN, LLP



Thomas M. Hnasko
Gary W. Larson
P.O. Box 2068
Santa Fe, NM 87504
(505) 982-4554

Counsel for I&W, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of March, 2010, I sent a true and correct copy of the foregoing documents, *I&W, Inc. 's Opposed Motion to Quash Compliance Order* and *I&W, Inc. 's Memorandum Brief in Support of its Motion to Quash Compliance Order* via first class mail and electronic mail to:

Gail MacQuesten, Asst. General Counsel
Mark Fesmire, Asst. General Counsel
New Mexico Energy, Minerals and Natural
Resources Dept.
1220 South St. Francis Drive
Santa Fe, NM 87505

Zachery Shandler, Asst. Atty. General
P.O. Box 1508
Santa Fe, NM 87504

Attorneys for the Oil Conservation Division



Thomas M. Hnasko

12w

New Mexico Energy, Minerals and Natural Resources Department

Bill Richardson
Governor

Jon Goldstein
Cabinet Secretary

Jim Noel
Deputy Cabinet Secretary

Mark Fesmire
Division Director
Oil Conservation Division



March 3, 2010

Joyce Medina, Administrator
Water Quality Control Commission
NM Environment Department
Runnels Building Rm. N2150
1190 St. Francis Drive
Santa Fe, NM 87505

Re: I&W, Inc.'s Request for Order Hearing and Answer to Compliance Order


Dear Ms. Medina,

As we discussed by e-mail yesterday, on January 21, 2010 the Oil Conservation Division (OCD) issued a Compliance Order to I&W, Inc. related to violations of its discharge permit BW-006. On February 19, 2010 the OCD received from I&W, Inc. a copy of a Request for Order Hearing and Answer to Compliance Order. The pleading does not indicate whether it was served on the Water Quality Control Commission (WQCC), as required by 20.1.3.400 NMAC, and as specified in the Compliance Order itself. You indicated that the WQCC has not received a copy of the pleading from I&W, Inc.

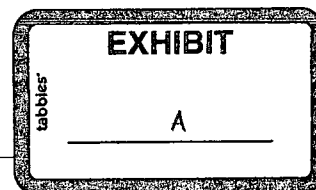
Attached to this letter is a copy of I&W, Inc.'s Request for Order Hearing and Answer to Compliance Order. I have also attached a copy of the Compliance Order, which according to WQCC rules the Respondent is to provide with its Request.

Please let me know if a hearing is scheduled.

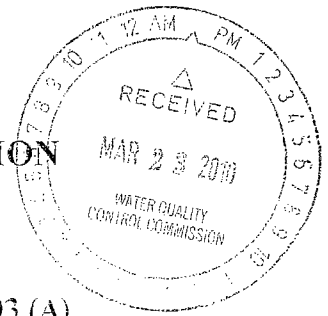
Sincerely,


Gail MacQuesten,
OCD Attorney
505 476-3451

Cc, w/o attachments: Thomas M. Hnasko and Gary W. Larson,
Attorneys for I&W, Inc.



STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION




In the Matter of I & W's Request for Order
Hearing and Answer to Compliance Order
NMEMNRD/OCD

WQCC 10-03 (A)

CORRECTED NOTICE OF DOCKETING


The above-captioned case is hereby docketed pursuant to the New Mexico Water Quality Control Act, NMSA 1978, §§74-6-1 through 74-6-17, and the Adjudicatory Procedures for the Water Quality Control Commission §20.1.3.200 NMAC. The Administrator received the Request for Order Hearing and Answer to Compliance Order on March 10, 2010.



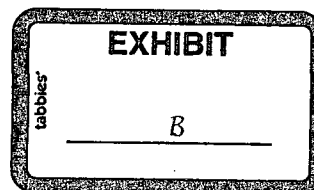
Joyce Medina, Administrator
Water Quality Control Commission
P. O. Box 5469
Santa Fe, New Mexico 87502
(505) 827-2425 (P)
(505) 827-0310 (F)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Corrected Notice of Docketing was sent by first class mail to Gail MacQuesten, Asst. General Counsel, NM Energy, Minerals and Natural Resources Department, 1220 St. Francis Drive, Chino Building, Oil Conservation Division, Santa Fe, New Mexico 87505; Zachary Shandler, Asst. Atty. General, P. O. Box 1508, Santa Fe, New Mexico 87504; and to Thomas M. Hnasko, Esq. and Gary W. Larson, Esq., Hinkle Law Firm, P. O. Box 2068, Santa Fe, NM 87504-2068, this 24th day of March, 2010.



Joyce Medina, Administrator



STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION

IN THE MATTER OF BILL EVANS AND
SEAN CURTIS, dba SAVOY TRAVEL CENTER

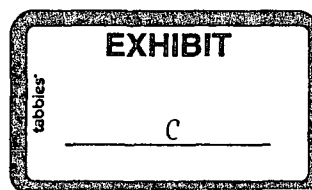
No. WQCC 07-28 (CO)

ADMINISTRATIVE COMPLIANCE ORDER

Pursuant to the New Mexico Water Quality Act ("WQA"), NMSA 1978, §§74-6-1 *et seq.*, and the New Mexico Water Quality Control Commission ("WQCC") Regulations, 20.6.2 NMAC - *Ground and Surface Water Protection*, the Director of the Water and Waste Management Division ("Division") of the New Mexico Environment Department ("Department") issues this Administrative Compliance Order ("Order") to Bill Evans and Sean Curtis dba Savoy Travel Center ("Respondents") to require compliance and assess a civil penalty for violations of the WQA and WQCC Regulations.

I. FINDINGS OF FACT

1. Pursuant to the Department of Environment Act, NMSA 1978, §9-7A-1 *et seq.*, the Department is an executive agency within the government of the State of New Mexico.
2. Pursuant to the WQA, §74-6-2(K)(1), the Department is a constituent agency of the WQCC.
3. Pursuant to the WQA, §74-6-10(A)(1), a constituent agency of the WQCC may issue a compliance order requiring compliance and assessing a civil penalty whenever it determines that a person violated or is violating a regulation adopted pursuant to the WQA.
4. The Respondents operate Savoy Travel Center which provides fuel, shower, and



restaurant services to members of the public.

5. Savoy Travel Center is located on a 14.678 acre parcel of land situated approximately fourteen (14) miles west of Deming, New Mexico, on Interstate 10, Section 8, T24S, R11W, Luna County. The depth to ground water beneath Savoy Travel Center is approximately one hundred and seventy-five (175) feet.

6. Since at least April 17, 2001, Savoy Travel Center has operated a sewerage system that collects, treats, and disposes approximately 5,900 gallons per day of domestic liquid waste from restaurant and shower services. The sewerage system consists of conveyance pipes that collect and transport the domestic liquid waste, two (2) approximately 1,200 gallon septic tanks in series that store the domestic liquid waste, a leachfield for the disposal of effluent from the septic tanks, and three (3) holding tanks with a total approximate storage volume of 5,100 gallons.

7. The WQCC Regulations, 20.6.2.3104 NMAC, prohibit any person from discharging effluent or leachate directly or indirectly into ground water without a discharge permit issued by the Department.

8. On March 9, 2006, the Department's Ground Water Quality Bureau ("GWQB") notified the Respondents that the operation of the existing sewerage system at Savoy Travel Center without a discharge permit violated the WQCC regulations.

9. On March 28, 2006, the Respondents requested a Temporary Permission to Discharge for the existing sewerage system at Savoy Travel Center.

10. On April 6, 2006, pursuant to 20.6.2.3106.B NMAC, the GWQB issued a Temporary Permission to Discharge to the Respondents conditionally authorizing the operation of the existing sewerage system at Savoy Travel Center until August 4, 2006. One condition

required the Respondents to submit a discharge permit application to the GWQB no later than August 4, 2006.

11. The Respondents did not submit a discharge permit application by August 4, 2006, and have not submitted an application as of the issuance date of this Compliance Order.

12. The WQCC Regulations, 20.6.2.1203.A NMAC, require any person who discharges a water contaminant in such quantity as may with reasonable probability injure or be detrimental to human health, animal or plant life, or property, or unreasonably interfere with the public welfare of the use of property to: (a) no later than twenty four (24) hours after learning of the discharge, orally notify the GWQB Chief; (b) no later than one (1) week after the discharge, submit written notification to the GWQB Chief; (c) as soon as possible after learning of the discharge, take corrective action to contain and remove or mitigate the damage caused by the discharge; and (d) no later than fifteen (15) days after learning of the discharge, file a corrective action report with the GWQB Chief.

13. Domestic liquid waste and its effluent or leachate contain pathogens and total Kjeldahl nitrogen, consisting of ammonia nitrogen and organic nitrogen, which are water contaminants within the meaning of the WQCC Regulations, 20.6.2.7.AAA NMAC.

14. On May 30, 2007, the Department's Environmental Health Division ("EHD") conducted an inspection of the existing sewerage system at Savoy Travel Center. During the inspection, the EHD observed conveyance pipes connected to the outlets of the three (3) holding tanks and discharging into a stormwater impoundment located at the southern edge of the property. The EHD also observed domestic liquid waste and its effluent or leachate in the stormwater impoundment in the immediate vicinity of the conveyance pipes. NMED Exhibit 1.

15. The domestic liquid waste and its effluent or leachate in the stormwater

impoundment observed by the EHD on May 30, 2007 constituted a discharge of a water contaminant in a quantity that would, with reasonable probability, injure or be detrimental to human health, animal or plant life, or property, or unreasonably interfere with the public welfare.

16. The Respondents did not orally notify the GWQB Chief no later than twenty four (24) hours after learning of the discharge.

17. The Respondents did not submit written notification to the GWQB Chief no later than one (1) week after the discharge.

18. The Respondents did not take corrective action to contain and remove or mitigate the damage caused by the discharge as soon as possible after learning of the discharge.

19. The Respondents did not file a corrective action report with the GWQB Chief no later than fifteen (15) days after learning of the discharge.

20. The WQCC regulations, 20.6.2.1202.C NMAC, require that any person proposing to modify a sewerage system in a manner that will change substantially the quantity or quality of the system's discharge to ground water shall file plans and specifications with the GWQB prior to the commencement of construction.

21. On May 30, 2007, the EHD observed conveyance pipes connected to the outlets of the three (3) holding tanks and discharging into a stormwater impoundment located at the southern edge of the property.

22. The conveyance pipes and stormwater impoundment were not part of the existing sewerage system at Savoy Travel Center authorized by the Temporary Permission to Discharge on April 6, 2006.

23. The construction of the conveyance pipes and their discharge into the stormwater impoundment constitute a modification of the existing sewerage system at Savoy Travel Center

that changes substantially the quantity or quality of the system's discharge to ground water

24. The Respondents did not file plans and specifications for the conveyance pipes and their discharge into the stormwater impoundment with the GWQB before commencing construction.

II. CONCLUSIONS OF LAW

24. The Respondents are "person[s]" as defined by the WQA, §74-6-2(I), and the WQCC Regulations, 20.6.2.7.JJ NMAC.

25. The discharge of domestic liquid waste and its effluent or leachate is subject to the requirements of the WQA and the WQCC Regulations.

VIOLATION 1

26. The WQCC Regulations, 20.6.2.3104 NMAC, prohibit the discharge of domestic liquid waste and its effluent or leachate that may move directly or indirectly into ground water without a permit issued by the Department.

27. Since August 5, 2006, the Respondents violated the WQCC Regulations, 20.6.2.3104 NMAC, by discharging domestic liquid waste and its effluent or leachate that may move directly or indirectly into ground water without a discharge permit issued by the Department.

VIOLATION 2

26. The WQCC Regulations, 20.6.2.1203.A NMAC, require any person who discharges a water contaminant in such quantity as may with reasonable probability injure or be detrimental to human health, animal or plant life, or property, or unreasonably interfere with the public welfare of the use of property to: (a) no later than twenty four (24) hours after learning of the discharge, orally notify the GWQB Chief; (b) no later than one (1) week after the discharge,

submit written notification to the GWQB Chief; (c) as soon as possible after learning of the discharge, take corrective action to contain and remove or mitigate the damage caused by the discharge; and (d) no later than fifteen (15) days after learning of the discharge, file a corrective action report with the GWQB Chief.

27. The Respondents violated the WQCC Regulations, 20.6.2.1203.A NMAC, by (a) failing to orally notify the GWQB Chief no later than twenty four (24) hours after learning of the discharge of domestic liquid waste and its effluent or leachate on or about May 30, 2007; (b) failing to submit written notification to the GWQB Chief no later than one (1) week after the discharge on or about May 30, 2007; (c) failing to take corrective action to contain and remove or mitigate the damage caused by the discharge after learning of the discharge on or about May 30, 2007; and (d) failing to file a corrective action report with the GWQB Chief no later than fifteen (15) days after learning of the discharge on or about May 30, 2007.

VIOLATION 3

28. The WQCC regulations, 20.6.2.1202.C NMAC, require that any person proposing to modify a sewerage system in a manner that will change substantially the quantity or quality of the discharge shall file plans and specifications with the GWQB prior to the commencement of construction.

29. The Respondents violated 20.6.2.1202.C NMAC by failing to file plans and specifications with the GWQB before modifying the existing sewerage system to add conveyance pipes from the holding tanks to the stormwater impoundment prior to the commencement of construction.

III. COMPLIANCE ORDER

30. The Respondents are ordered to implement the following corrective actions in

order to comply with the WQA and WQCC Regulations:

a. No later than thirty (30) days after receipt of this Order, the Respondents shall submit a discharge permit application for the Savoy Travel Center sewerage system. Due to the site-specific soil conditions at Savoy Travel Center, the Department will not approve a discharge permit for a conventional subsurface fluid distribution system (i.e., conventional leachfield), but will consider subsurface drip irrigation and above-ground reclaimed effluent usage. The plans and specifications for the proposed sewerage system shall be certified by a licensed New Mexico professional engineer. Additionally, the application shall include:

1. An assessment of the existing sewerage system, including the identification of components that the Respondents intend to use in the proposed sewerage system; and
2. A closure plan for the components of the existing sewerage system that the Respondents do not intend to use in the proposed sewerage system.

b. Upon receipt of this Order, the Respondents shall implement a corrective action plan that includes the following items:

1. Remove the conveyance pipes connected to the outlets of the three (3) holding tanks, plug the tank outlets to prevent the discharge of domestic liquid waste or its effluent or leachate, and have the tanks pumped dry by a licensed hauler;
2. Install a high-level water alarm system in the final septic tank and the holding tanks; the alarm system shall be located at the appropriate level to ensure that pumping occurs before domestic liquid waste or its effluent or leachate overflows from each tank.
3. Have both septic tanks pumped by a licensed hauler on an as-

needed basis to ensure that the domestic liquid waste or its effluent or leachate does not reach the ground surface;

4. Have the stormwater impoundment located at the southern edge of the property pumped dry by a licensed hauler;

5. Disinfect with granular chlorine or the equivalent all areas where domestic liquid waste or its effluent or leachate has reached the ground surface;

6. Construct berms and fencing around the septic tanks and holding tanks; and

7. On a weekly basis, submit pumping records for the septic and holding tanks until the Department approves a discharge permit.

c. No later than thirty (30) days after receipt of this Order, the Respondents shall submit a corrective action report that includes the following items:

1. A description of the corrective actions taken and dates of completion;

2. Proof of compliance for the following corrective actions: holding tank pipe removal, pumping, and outlet plugging; high water alarm system installation; berm and fencing construction; stormwater impoundment pumping; and ground surface chlorination.

d. The Department may approve, modify, or reject the corrective actions taken by the Respondents, and may require the Respondents to implement amended and additional corrective actions as it deems necessary. If the Department requires the Respondents to implement amended or additional corrective actions, no later than thirty (30) days after receipt of the Department's notification of amended or additional corrective actions, the Respondents shall submit an amended corrective action report, with appropriate proof demonstrating that the

amended or additional corrective actions have been completed.

31. The Respondents' failure to comply with the corrective action requirements set forth above may result in the assessment of an additional civil penalty. The WQA, §74-6-10(F), authorizes the assessment of an additional civil penalty not to exceed \$25,000 for each day of noncompliance with each corrective action specified in this Order.

IV. CIVIL PENALTY

32. The WQA, §74-6-10(C)(1), authorizes the Department to assess a civil penalty not to exceed \$15,000 per day for each violation of a regulation adopted pursuant to the WQA, §74-6-5.

33. The WQA, §74-6-10(C)(2), authorizes the Department to assess a civil penalty not to exceed \$10,000 per day for each violation of a regulation adopted pursuant to a provision of the WQA other than §74-6-5.

34. The Department assesses a civil penalty in the amount of two hundred fifty-seven thousand one hundred and sixty-eight dollars (\$257,168) for the violations set forth above.
NMED Exhibit 2.

V. NOTICE OF OPPORTUNITY TO ANSWER AND REQUEST A HEARING

35. Pursuant to the WQA, §74-6-10(G), the Respondents have the right to request a public hearing and file an answer to this Order.

36. To request a public hearing and file an answer to this Order, the Respondents shall file a written request for hearing and answer, and attach a copy of this Order, no later than thirty (30) days after receipt of this Order, at the following address:

Joyce Medina
WQCC Administrator
1190 St. Francis Drive, N2150

Santa Fe, New Mexico 87505
Telephone: (505) 827-2425

37. The answer shall clearly and directly admit, deny, or explain each of the factual allegations contained in the Order with regard to which the Respondents have any knowledge. If the Respondents have no knowledge regarding a factual allegation, the Respondents should so state and may deny the allegation on that basis. Any factual allegation not specifically denied shall be deemed admitted. Additionally, the answer shall include each affirmative defense upon which the Respondents intend to rely, and the Respondents' failure to assert an affirmative defense, except a defense asserting lack of subject matter jurisdiction, shall be deemed waived.

38. The public hearing, if any, shall be governed by the WQCC's Adjudicatory Procedures, 20.1.3 NMAC.

VI. FINALITY OF ORDER

39. This Order shall become final unless the Respondents file a request for hearing and answer as specified above no later than thirty (30) days after receipt of this Order.

40. The Respondents' failure to file an answer constitutes an admission of the factual allegations therein.

41. If the Respondents request a hearing and file an answer, the civil penalty assessed in this Order shall become due and payable without further proceedings no later than thirty (30) days after receipt of this Order.

VII. SETTLEMENT

42. Regardless whether the Respondents request a hearing and file an answer, the Respondents may confer with the Department concerning settlement at any time.

43. The Department encourages settlement consistent with the objectives and

provisions of the WQA and WQCC Regulations.

44. To discuss settlement of this Order, the Respondents should contact:

Eric Ames, Esq.
Office of General Counsel
New Mexico Environment Department
1190 St. Francis Drive, Suite N-4050
Santa Fe, New Mexico 87505
Telephone: (505) 758-8808 Ext. 111

45. Settlement discussions shall not extend the Respondents' deadline for filing of a request for hearing and answer nor alter the deadlines in Section III of this Order. Settlement discussions may be pursued as an alternative to and simultaneously with the hearing proceedings.

46. The Respondents may participate in settlement discussions alone or represented by legal counsel.

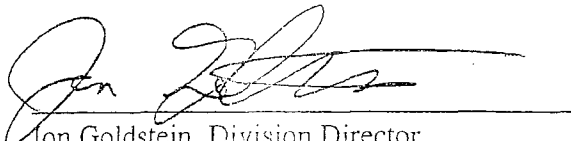
47. Any settlement shall be in writing, resolve all issues raised in this Order, and bind all parties, and may not be appealed.

VIII. COMPLIANCE WITH OTHER LAWS AND WAIVER

48. Compliance with this Order shall not relieve the Respondents of their obligation to comply with all other applicable laws and regulations.

IX. TERMINATION

49. This Order shall terminate when the Secretary of the Department approves a Stipulated Final Order.


Jon Goldstein, Division Director
Water & Waste Management Division

8-3-07
Date

CERTIFICATE OF SERVICE

I certify that on August 31st, 2007, I served this ADMINISTRATIVE COMPLIANCE

ORDER by U.S.P.S. first class mail, certified mail-return receipt requested, to:

Messrs. Bill Evans and Sean Curtis
dba Savoy Travel Center
P.O. Box 1220
Deming, New Mexico 88031

for Eric Ames

**STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION**

**In the Matter of I&W's Request for Order
Hearing and Answer to Compliance Order
NMEMNRD/OCD**

WQCC 10-03(A)

**I&W, INC'S MEMORANDUM IN SUPPORT OF
ITS MOTION TO QUASH PURPORTED COMPLIANCE ORDER**

I. Introduction

On January 21, 2010, the New Mexico Energy, Minerals and Natural Resources Department, Oil Conservation Division ("OCD") issued a compliance order to I&W that purports to initiate a proceeding within the OCD. That is, the order is captioned as a matter pending before the OCD, as opposed to a proceeding before the Water Quality Control Commission (the "WQCC" or "Commission"), and it has no case number identification. On February 19, 2010, I&W filed a Request for Order Hearing and Answer to Compliance Order with the OCD - consistent with the caption of the matter - and thereby satisfied the statutory and regulatory deadline for filing such a request. The OCD accepted the filing that same day.

In March 2010, OCD counsel appears to have first notified the Commission that the OCD believed it had issued a compliance order under the auspices of the Commission, and not within an OCD proceeding, as the purported order represented. See Exhibit A. As a consequence of this notification, the WQCC docketed the proceeding for the first time on March 23, 2010, captioned as *I&W's Request for Order Hearing and Answer to Compliance Order*, and gave the proceeding a case number of WQCC 10-03(A). Exhibit B.

The WQA does not authorize compliance orders issued within OCD proceedings. Consequently, OCD's purported Order was a nullity and unenforceable from its inception because it was neither docketed with the Commission, nor designated as a proceeding before the

Commission in which the OCD had acted on behalf of the Commission as a constituent agency. *See* §§ 74-6-1 to 74-6-17 NMSA 1978 (OCD's only power to issue such compliance orders is as a constituent agency acting on behalf of the Commission).

Additionally, by docketing its purported order as an unnumbered and apparently non-existent OCD proceeding, the purported order lacked any enforcement mechanism whatsoever. Under the WQA, the WQCC alone has the power to enforce the civil penalties assessed under the WQA. Accordingly, if I&W elected not to respond, the so-called order would not have received any WQCC approval and would remain a nullity *ad infinitum*. Thus, the purported compliance order was void from the outset under the WQA because the OCD had no authority either to initiate an OCD proceeding under the WQA, or to assess a civil penalty under the WQA in an OCD proceeding.

Moreover, as amplified below, the WQCC's constituent agency with the most experience in these matters, the New Mexico Environment Department ("NMED"), routinely issues compliance orders under the WQA in the proper manner. *See Exhibit C*. Unlike the OCD, the NMED captions and designates compliance orders as originating within the jurisdiction of the Commission, through a constituent agency acting on behalf of the Commission. Also unlike the defective OCD order in this case – where the matter purports to emanate from the OCD itself and is not docketed anywhere – the NMED docket its compliance orders with the Commission, leaving no question as to when or how a response ought to be filed. This is in stark contrast to the OCD's legally deficient action, where the matter is improperly captioned as one within the OCD, and includes a one line instruction buried on pages 23 and 25 for the respondent to ignore the caption altogether and to file a new case with the Commission.

II. Legal Standard

A motion to quash should be granted when a court or administrative agency issues an order that is unsupported by law. *See State v. Heinsen*, 2005-NMSC-35, ¶¶ 2, 4-5, 138 NM 441, 444-445 (affirming the quash of an order which granted an appeal even though the basis of the appeal was a non-final, non-appealable order); *Charles P. Young, Co. v. Anaya*, 119 N.M. 449, 451; 891 P.2d 1205 (1995) (affirming the quash of improperly issued subpoenas).

As a “constituent agency” of the Water Quality Control Commission, the OCD operates as an administrative arm of the Commission, acting as the agent of the Commission in order to effect the Water Quality Act by issuing orders under the jurisdiction and auspices of the Commission. §§ 74-6-1 to 74-6-17 NMSA 1978; *see also* § 70-2-12(B)(22) NMSA 1978. The OCD’s powers to administer the Water Quality Act are necessarily limited by that statute, and those powers do not include the authority to adjudicate compliance orders or to assess civil penalty provisions within an OCD proceeding. *Marbob Energy Corp. v. New Mexico Oil Conservation Comm’n*, 2009-NMSC-013 ¶ 24, 206 P.3d 135, 143 (holding that state agency’s authority was limited to the powers granted by statute).

The order in the present matter is captioned as *In the Matter of I&W, Inc.*, and designated as being under the jurisdiction of the “State of New Mexico Oil Conservation Division”. In addition, the order states that, unless I&W files a Request for Order Hearing in the proceeding within thirty (30) days, the order “shall become final” – its civil penalty provisions included – without any apparent involvement of the WQCC. In short, because the order purports to emanate from an OCD proceeding, as opposed to a WQCC proceeding, the OCD is seeking to

manufacture powers within an OCD proceeding that it does not possess.¹ Accordingly, the purported compliance order has been issued without a legal basis and should be quashed. *See State v. Heinsen*, 2005-NMSC-35, ¶¶ 2, 4-5, 138 NM 441, 444-445; *Charles P. Young, Co. v. Anaya*, 119 N.M. 449, 451; 891 P.2d 1205 (1995).

III. Argument

A. When Seeking to Enforce the Water Quality Act, the OCD Acts as an Agent of the Water Quality Control Commission and Must Properly Invoke the Jurisdiction of the Commission.

Enforcement proceedings under the Water Quality Act, including proceedings for the enforcement of penalties, are within the exclusive jurisdiction of the district courts and this Commission. § 74-6-10(A) NMSA 1978. The WQA allows the Commission, through its constituent agencies, to enforce the WQA through the filing of complaints in district court or through the issuance of *ex parte* compliance orders in appropriate, but unusual, circumstances. § 74-6-10(A) NMSA 1978. However, the WQA does not allow a constituent agency to act on its own accord, independent of and apart from, the Commission. Thus, the constituent agency acts as agent of the Commission and must initiate and maintain actions solely in the name of the Commission. *See Exhibit C*, NMED – issued compliance order.

The purported order issued by the OCD fails to recognize the OCD's limited role as a constituent agency seeking to enforce the WQA on behalf of the Commission. The caption of the purported order clearly states that it has originated from and is before "the State of New

¹ As will be discussed in I&W's response to the OCD's Motion to Strike, I&W timely filed its response to the purported order issued in the OCD proceeding. OCD now seeks to enforce that illegal forfeiture order, without notice or hearing, based on one single reference to the filing of a response with the WQCC, found at page 23 & 25 in the OCD's purported order. Based on this trickery, OCD essentially requests that I&W ignore the caption designating the proceeding in which the invalid order originated (the OCD) and institute an entirely new proceeding in a separate administrative body (the WQCC).

Mexico, Oil Conservation Commission.” That is a fatally flawed jurisdictional designation, as it is indisputable that penalties for alleged Water Quality Act violations cannot emanate from any *ex parte* OCD order in any OCD proceeding. This legal deficiency is underscored by the absence of any case number assigned to the phantom OCD proceeding from which the *ultra vires* order originated.

In order to comply with the WQA, the matter had to be designated and captioned as one originating from, and within the jurisdiction of, the Water Quality Control Commission, acting through one of its statutorily-designated constituent agencies. Because the OCD’s purported order is captioned as a matter that originated within the OCD itself, as opposed to a proceeding invoked under the jurisdiction of the Water Quality Control Commission, the purported order is a nullity from the outset. Accordingly, this Commission should quash the OCD’s purported order as contrary to and in violation of the WQA.

B. The Commission’s Other Constituent Agencies Routinely Comply With and Honor Their Role as Agents of the Commission in Seeking to Enforce the Water Quality Act.

The NMED has had no quarrel with or difficulty implementing the legal requirement that it acts under the WQA solely as an agent of the WQCC: it routinely implements the WQCC’s powers in accordance with the WQA and issues compliance orders under the authority, caption, designation, and jurisdiction of the WQCC. As exemplified in Exhibit C, the NMED also routinely docketed the compliance orders as a WQCC matter from the inception (and not as an NMED matter), thereby correctly invoking the WQCC’s jurisdiction to adjudicate the order, or, if no hearing is requested, to enforce the civil penalties included within the order.

By docketing and thereby acknowledging that the matter emanates from the WQCC, the NMED also ensures that WQCC jurisdiction is present to enforce any penalties ultimately

adjudicated by the WQCC. This is not true in the present circumstances, where the OCD issued a legally deficient order without WQCC designation or involvement. Thus, if I&W had not responded to and denied the OCD's allegations within the OCD proceeding, the OCD's purported compliance order – issued from the wrong administrative body and without any assigned case – would remain a nullity, without any enforcement or jurisdiction invoked by this Commission. Thus, the purported order would languish within an OCD proceeding, without effect under the WQA.

C. The WQCC alone has the authority to enforce civil penalties under the WQA.

While the OCD has no authority to *assess* WQA penalties within an OCD proceeding, the OCD also has no authority to *enforce* civil penalties where, unlike the present circumstances, a proper proceeding has been initiated under the auspices of the Water Quality Control Commission. Under the WQA, the power to enforce civil penalties is reserved exclusively to the WQCC. §§ 74-6 - 9, - 10, NMSA 1978.

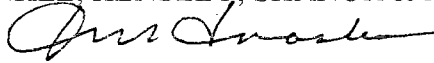
Nonetheless, the OCD appears to suggest that – if I&W did not request any hearing – the assessed penalties would somehow become final under the WQA without any involvement of the WQCC. This notion is clearly at odds with the Water Quality Act. § 74-6-10 NMSA 1978. The assessed penalties could not become enforceable “automatically” unless the OCD had properly docketed the order with the Commission from its inception, or otherwise initiated, issued, and captioned the order as the action of the WQCC and invoked the jurisdiction of the Commission as its constituent agency.

D. Conclusion

Based on the foregoing, I & W respectfully requests that the Commission determine that the purported OCD order is void *ab initio* and that the Commission enter an order quashing the purported compliance order.

Respectfully submitted,

HINKLE, HENSLEY, SHANOR & MARTIN, LLP



Thomas M. Hnasko
Gary W. Larson
P.O. Box 2068
Santa Fe, NM 87504
(505) 982-4554

Counsel for I&W, Inc.

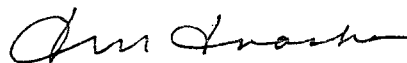
CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of March, 2010, I sent a true and correct copy of the foregoing documents, *I&W, Inc.'s Motion to Quash Compliance Order* and *I&W, Inc.'s Memorandum in Support of its Motion to Quash Compliance Order* via first class mail and electronic mail to:

Gail MacQuesten, Asst. General Counsel
Mark Fesmire, Asst. General Counsel
New Mexico Energy, Minerals and Natural
Resources Dept.
1220 South St. Francis Drive
Santa Fe, NM 87505

Zachery Shandler, Asst. Atty. General
P.O. Box 1508
Santa Fe, NM 87504

Attorneys for the Oil Conservation Division



Thomas M. Hnasko



STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION
1190 St. Francis Drive
P.O. Box 26110
Santa Fe, New Mexico 87502
(505) 827-2425

CONSTITUENT AGENCIES:

Environment Department
State Engineer & Interstate Stream Commission
Game and Fish Department
Oil Conservation Division
Department of Agriculture
Department of Health
State Parks Division
Soil and Water Conservation Commission
Bureau of Mines and Mineral Resources
Members-at-Large

REVISED DRAFT
AGENDA
NM WATER QUALITY CONTROL COMMISSION MEETING
April 13-16, 2010
9:00 a.m.
New Mexico State Capitol Building Room 307
490 Old Santa Fe Trail
Santa Fe, NM 87501

1. Roll Call
2. Approve the Agenda
3. Approve minutes of March 9, 2010 meeting.
4. Request for hearing in re: WQCC 10-02 (R) Amendments to 20.1.3 NMAC.
Jennifer Hower, NMED/OGC. Time estimate: 15 minutes
5. Request for Order Hearing and Answer to Compliance Order in re: WQCC 10-03 (A) I&W, Inc. Thomas M. Hnasko, Esq. and Gary W. Larson, Esq., Hinkle Law Firm, appearing for I&W. Time estimate: 15 minutes
 - a. Motion to Dismiss Request for Order Hearing in WQCC 10-03 (A), Gail MacQuesten, NMEMNRD/OGC. Time estimate: 15 minutes
 - b. I&W Motion to Quash Purported Compliance Order in WQCC 10-03 (A) Tom Hnasko, Esq., Hinkle Law Firm, for Respondent. Time estimate: 15 minutes
6. Request for Order Hearing and Answer to Compliance Order in re: WQCC 10-04 (A) Harold Daniels. Michael Gregory, Esq., for Mr. Daniels; Adolfo Mendez, Asst. General Counsel, NMED/OGC. Time estimate: 15 minutes
7. Approval of final draft TMDL Middle Rio Grande Watershed, San Marcial to Angostura. Heidi Henderson, NMED/SWQB. Time estimate: 20 minutes
8. Final review and approval of the State of New Mexico 2010-2012 Integrated Clean Water Act §303 (d)/§305 (b) Report and List of Assessed Surface Waters. Lynette Guevara, NMED/SWQB. Time estimate: 1.5 hours

9. Hearing in re: WQCC 09-13 (R) Proposed Amendments to 20.6.2 NMAC, Dairy Rules. Adolfo Mendez, Asst. General Counsel and Chuck Noble, Asst. General Counsel, NMED/OGC; Dalva Moellenberg, Esq. and T. J. Trujillo, Esq., Gallagher & Kennedy, appearing for DIGCE; Bruce Frederick, Esq., NMELC, appearing for Amigos Bravos, Caballo Concerned Citizens, Food and Water Watch and the Sierra Club, Rio Grande Chapter. Time estimate: multiple days
10. Other business
11. Next meeting: May 11, 2010, 9:00 a.m., State Capitol Room 317, 490 Old Santa Fe Trail, Santa Fe, NM.
12. Adjournment



**STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION
1190 St. Francis Drive
P.O. Box 26110
Santa Fe, New Mexico 87502
(505) 827-2425**

CONSTITUENT AGENCIES:

Environment Department
State Engineer & Interstate Stream Commission
Game and Fish Department
Oil Conservation Division
Department of Agriculture
Department of Health
State Parks Division
Soil and Water Conservation Commission
Bureau of Mines and Mineral Resources
Members-at-Large

***REVISED DRAFT*
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April 13-16, 2010
9:00 a.m.
New Mexico State Capitol Building Room 307
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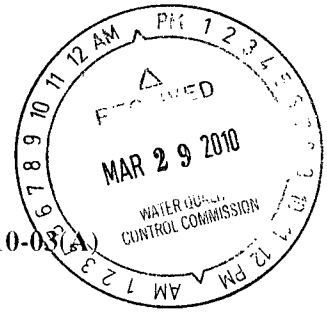
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6. Request for Order Hearing and Answer to Compliance Order in re: WQCC 10-04 (A) Harold Daniels. Michael Gregory, Esq., for Mr. Daniels; Adolfo Mendez, Asst. General Counsel, NMED/OGC. Time estimate: 15 minutes
7. Approval of final draft TMDL Middle Rio Grande Watershed, San Marcial to Angostura. Heidi Henderson, NMED/SWQB. Time estimate: 20 minutes
8. Final review and approval of the State of New Mexico 2010-2012 Integrated Clean Water Act §303 (d)/§305 (b) Report and List of Assessed Surface Waters. Lynette Guevara, NMED/SWQB. Time estimate: 1.5 hours

9. Hearing in re: WQCC 09-13 (R) Proposed Amendments to 20.6.2 NMAC, Dairy Rules. Adolfo Mendez, Asst. General Counsel and Chuck Noble, Asst. General Counsel, NMED/OGC; Dalva Moellenberg, Esq. and T. J. Trujillo, Esq., Gallagher & Kennedy, appearing for DIGCE; Bruce Frederick, Esq., NMELC, appearing for Amigos Bravos, Caballo Concerned Citizens, Food and Water Watch and the Sierra Club, Rio Grande Chapter. Time estimate: multiple days
10. Other business
11. Next meeting: May 11, 2010, 9:00 a.m., State Capitol Room 317, 490 Old Santa Fe Trail, Santa Fe, NM.
12. Adjournment

STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION

In the Matter of I&W's Request for Order
Hearing and Answer to Compliance Order
NMEMNRD/OCD

WQCC 10-03(A)



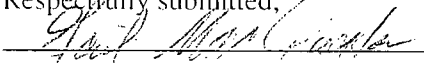
MOTION TO DISMISS REQUEST FOR ORDER HEARING

Pursuant to 20.1.3.112.B NMAC, the Oil Conservation Division (OCD) moves for an order dismissing I&W, Inc.'s Request for Order Hearing on the ground that I&W, Inc. failed to meet the statutory deadline for filing a request for hearing as set out in NMSA 1978, Section 74-6-10(G), and failed to meet the filing requirements set out by Water Quality Control Commission rule 20.1.3.400.A NMAC.

This motion is accompanied by an affidavit and exhibits that establish the failure of I&W, Inc. to meet the filing requirements, and a memorandum brief. See 20.1.3.113.C NMAC.

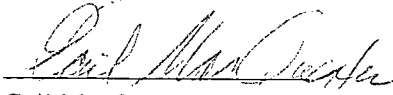
I&W, Inc. opposes this motion.

Respectfully submitted,


Gail MacQuesten, Asst. General Counsel
Mark Fesmire, Asst. General Counsel
New Mexico Energy, Minerals and Natural
Resources Department
Attorneys for the Oil Conservation Division
1220 S. St. Francis Drive
Santa Fe, NM 87505

CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2010, I mailed a copy of the foregoing motion to Zachary Shandler, Asst. Atty. General, P.O. Box 1508, Santa Fe, NM 87504; and to Thomas M. Hnasko, Esq. and Gary W. Larson, Esq., Hinkle Law Firm, P. O. Box 2068, Santa Fe, NM 87504-2068.


Gail MacQuesten, Attorney for the
Oil Conservation Division

**STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION**

**In the Matter of I&W's Request for Order
Hearing and Answer to Compliance Order
NMEMNRD/OCD**

WQCC 10-03(A)

**MEMORANDUM BRIEF IN SUPPORT OF
MOTION TO DISMISS REQUEST FOR ORDER HEARING**

The Oil Conservation Division (OCD) files this memorandum brief in support of its motion for an order dismissing I&W, Inc.'s Request for Order Hearing, as permitted by 20.1.3.113.C NMAC.

By statute, a compliance order issued under the Water Quality Act becomes final unless a person named in the compliance order submits a written request for hearing with the Water Quality Control Commission (WQCC) no later than thirty days after the compliance order is served. NMSA 1978, Section 74-6-10(G). On January 21, 2010, the OCD served I&W, Inc. with a compliance order issued under the Water Quality Act. I&W never submitted a request for hearing with the WQCC, as required by NMSA 1978, Section 74-6-10(G) and by WQCC rules. The deadline set by statute for filing a request has passed. By operation of statute, the OCD's compliance order is final. The WQCC is without jurisdiction to hear this matter.

The OCD respectfully moves for an order dismissing I&W's Request for Order Hearing pursuant to NMSA 1978, Section 74-6-10(G) and 20.1.3.112.B NMAC.

Factual and Legal Background:

The OCD is the administrative arm of the Oil Conservation Commission, a "constituent agency" of the WQCC under the Water Quality Act, Chapter 74, Article 6 NMSA. See NMSA 1978, Section 74-6-2(J)(4). The OCD has express statutory authority to administer the Water Quality Act. See NMSA 1978, Section 70-2-12(B)(22).

The OCD issued a discharge permit to I&W to operate a brine well facility. Brine wells are Class III wells which must be operated pursuant to a discharge permit meeting WQCC rules. See 20.6.2.5101.B NMAC.

The Water Quality Act provides that whenever a constituent agency determines that a person violated or is violating a condition of a permit issued pursuant to the Water Quality Act, the constituent agency may issue a compliance order requiring compliance, assessing a penalty, or both. NMSA 1978, Section 74-6-10(A). The OCD determined that I&W violated, and was continuing to violate, specific terms of its discharge permit. On January 21, 2010, the OCD issued a compliance order to I&W requiring I&W to comply with its permit terms and assessing a penalty. WQCC rules allow service of documents by telefax or mail. 20.1.3.111.C NMAC. The OCD served I&W by both methods. On January 21, 2010 the OCD faxed the compliance order to I&W, and to the attorneys who represented I&W during the informal enforcement actions that led up to the issuance of the compliance order. Also on January 21, 2010, the OCD mailed hard copies of the compliance order to I&W by certified mail, return receipt requested, using the two addresses the OCD had for I&W. The return receipt cards show that I&W signed for the mailings on January 25 and 26, 2010.

The Water Quality Act sets out the process for obtaining review of a compliance order:

“Any compliance order issued by a constituent agency pursuant to this section [NMSA 1978, Section 74-6-10] shall become final unless, no later than thirty days after the compliance order is served, any person named in the compliance order submits a written request to the commission for a public hearing.”

NMSA 1978, Section 74-6-10(G). The “commission” referred to in this section is the Water Quality Control Commission. See NMSA 1978, Section 74-6-2(J).

The rules adopted by the WQCC for hearings challenging compliance orders track the statutory requirements, and contain the same thirty-day filing deadline. Under WQCC rules, a request for a hearing on a compliance order filed pursuant to NMSA 1978, Section 74-6-10(G) is called a “Request for Order Hearing.” 20.1.3.7.A(16) NMAC. The WQCC rules provide:

“20.1.3.400 ORDER HEARING:
 A. Initiation of Order Hearing:

(1) Filing of Request: An Order Hearing shall be initiated by the filing of a Request for Order Hearing within thirty (30) days after the Compliance Order is served. The Respondent shall file the original of the Request for Order Hearing with the Commission and serve a copy on the Department.”

20.1.3.400.A(1) NMAC. (“Department,” in this rule, means either the Environment Department or the other constituent agency that issued the compliance order. See 20.1.3.7.A(5) NMAC.)

The compliance order the OCD issued to I&W provided I&W with explicit instructions on how to obtain a hearing, and the consequences of not filing a timely request for hearing, citing the relevant statutes and rules. Section VI of the compliance order, titled “Right to Answer and Request a Hearing,” notified I&W of its right to request a hearing to contest the order, and referred I&W to NMSA 1978, Section 74-6-10(G), the statutory provision setting out the thirty-day filing deadline. Section VI told I&W exactly how to file its request, tracking the language of the applicable rule and providing a rule citation:

“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 Water Quality Control Commission, and serve a copy on the OCD. See 20.1.3.400.A(1) NMAC.”

Section VII of the compliance order, titled “Finality of Order,” provides:

“This Order shall become final unless the Respondent files a Request for Order Hearing with the Water Quality Control Commission within 30 days of receipt of this Order...Unless the Respondent files a Request for Order Hearing the Order shall become final.”

On Friday, February 19, 2010, the OCD received from I&W a copy of I&W’s “Request for Order Hearing and Answer to Compliance Order” (“Request”). The OCD did not receive a transmittal letter with the Request. The Request did not have a copy of the Compliance Order attached, as required by WQCC rule. See 20.1.3.400.A(2)(d) NMAC. The certificate of service at the end of the Request indicated that the Request was being served on Mark Fesmire, the Director of the OCD, by first class mail.

WQCC rules provide that as soon as practicable after a proceeding is initiated, the Hearing Clerk shall issue and serve upon the parties and each Commissioner a Notice of Docketing. 20.1.3.112.A NMAC.

The OCD did not receive a Notice of Docketing from the WQCC Hearing Clerk. On March 2, 2010, the OCD contacted the Hearing Clerk and learned that the WQCC had not received I&W's Request. On March 3, 2010, the OCD mailed a copy of the Request to the Hearing Clerk. The OCD also provided the Hearing Clerk with a copy of the Compliance Order.

According to WQCC rules, the Hearing Clerk "shall docket any ...Request for Order Hearing, without regard to whether it appears to be timely; but the Commission or any party may move to dismiss an untimely... Request for Order Hearing." 20.1.3.112(B) NMAC. The Hearing Clerk docketed the I&W Request for Order Hearing on March 22, 2010. The Notice of Docketing states that the Hearing Clerk received the Request on March 10, 2010.

On March 29, 2010 the OCD moved to dismiss the Request for Order Hearing under NMSA 1978, Section 74-6-10(G) and 20.1.3.112.B NMAC as untimely.

Argument.

I&W's Request for Order Hearing is untimely under statute and rule, and must be dismissed.

When the New Mexico legislature established compliance orders as a means of obtaining compliance with permits issued under the Water Quality Act, it also established a process for challenging compliance orders. A person named in the order could file a written request to the WQCC for a public hearing. But the legislature set a time limit on that remedy:

"Any compliance order issued by a constituent agency pursuant to this section [NMSA 1978, Section 74-6-10] shall become final unless, no later than thirty days after the compliance order is served, any person named in the compliance order submits a written request to the commission for a public hearing."

NMSA 1978, Section 74-6-10(G). Once an order is "final," it ends the litigation between the parties and leaves nothing to be done but the enforcement of what has been determined. See Black's Law Dictionary, Fifth Edition, 1979, "Final Order."

The WQCC rules track the thirty-day filing period set by statute. The respondent must file within thirty days after the compliance order is served. 20.1.3.400.A(1) NMAC. Other WQCC rules acknowledge the importance of this time limit: 20.1.3.112.B NMAC expressly provides that either the Commission or a party may move to dismiss an untimely Request for Order Hearing. The definition of “Order Hearing” even refers to the time requirement: “‘Order Hearing’ means a proceeding before the Commission initiated by the timely filing of a Request for Order Hearing.” 20.1.3.7.A(9) NMAC (emphasis added).

The WQCC was correct in adopting rules that incorporate the thirty-day filing requirement and recognize motions to dismiss untimely Requests for Order Hearings. Where a time limit for filing an action is set by statute, that time limit is a jurisdictional requirement. See Bowles v. Russell, 551 U.S. 205, 127 S. Ct. 2360, 2366, 168 L. Ed. 2d 96 (2007), and Dill v. General American Life Ins. Co., 525 F.3d 612, 616 (8th Cir. 2008). In Bowles, the United State Supreme Court dismissed as untimely the appeal of a convicted murderer from denial of a petition for habeas corpus:

“Because Congress decides, within constitutional bounds, whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them...And when an ‘appeal has not been prosecuted in the manner directed, within the time limited by the acts of congress, it must be dismissed for want of jurisdiction.’....Because Bowles’ error is one of jurisdictional magnitude, he cannot rely on forfeiture or waiver to excuse his lack of compliance.”

Bowles, 551 U.S. at 206. The New Mexico legislature granted jurisdiction to the Water Quality Control Commission to hear challenges to Compliance Orders. But the legislature set a time limit on that authority, and that time limit has passed, ending the Commission’s jurisdiction.

New Mexico has recognized statutory time limits as jurisdictional, even before the Supreme Court issued its decision in Bowles. In Mathieson v. Hubler, 92 N.M. 381, 588 P.2d 1056 (Ct. App. 1978), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978), the New Mexico Court of Appeals considered language in the probate statute that provides that a disallowed claim is “barred” unless a petition is filed “not later than” sixty days after mailing of notice of disallowance. The district court had granted the claimant an extension of time in which to file a petition against the personal representative, and the

personal representative appealed. The claimant argued that the rules of civil procedure allowed the district court to extend the statutory time limits. But the Court of Appeals disagreed, finding that the rules of civil procedure did not allow courts to extend periods of time definitively fixed by statute:

“We hold that the trial court had no authority, under 3-804(C) [of the probate code] to extend the time for proceeding against the personal representative after the sixty-day period had expired. This holding is consistent with New Mexico decisions prior to enactment of the Probate Code which required actions based on the denial of a claim to be brought within the statutory time period.”

Mathieson, 588 P.2d at 1069.

It is important to distinguish dismissal of an action for failure to meet a statutory time limit for filing a claim, and dismissal used as a sanction for violating a procedural rule. Gila Resources Information Project v. New Mexico Water Quality Control Com’n, 2005-NMCA-139, cert. denied, 2005-NMCERT-9, illustrates dismissal as a sanction for a procedural rule violation. Gila Resources Information Project (GRIP) sought to challenge a discharge permit issued to Chino Mines Company by the New Mexico Department of the Environment. The WQA provided that a petition for review must be filed within thirty days from the date notice is given of the permitting action, otherwise the decision would be final. WQCC procedural rules recognized the thirty-day filing requirement set by statute, but offered petitioners the choice of filing a “formal petition” or an “informal petition.” A formal petition would be set for hearing within 90 days. A petitioner filing an informal petition would waive its right to a hearing within 90 days. It could then use that time to negotiate a resolution of the matter. If the parties could not resolve the matter within 90 days, the petitioner would have to file a formal petition or obtain additional time to negotiate by filing a “stipulated or unopposed motion” for an extension of time. GRIP filed a timely informal petition, satisfying the thirty-day filing requirement set by statute. But it later violated a WQCC procedural rule when it tried to extend its time for negotiation by filing a stipulated motion. It obtained the concurrence of the Environment Department, but did not realize that it needed to obtain the concurrence of Chino. When negotiations failed, and GRIP filed its formal petition, Chino objected. Chino argued that because GRIP failed to obtain its concurrence on the motion to extend, the WQCC’s order extending the time to file the formal petition was invalid, and GRIP’s petition was

therefore untimely under WQCC rules. The WQCC granted Chino's motion to dismiss, and GRIP appealed. The Court of Appeals viewed the case as one involving WQCC procedural rules: "a violation by GRIP of procedural regulations relating to motion practice." Gila Resources, 2005-NMCA-139, paragraph 35. The Court of Appeals found that the WQCC had dismissed the petition as a sanction for Chino's violation of the rules on obtaining concurrences. The Court found the sanction excessive under the circumstances, and reversed the dismissal.

The case before the WQCC today, however, is very different from the Gila Resources case. I&W's failure is not a failure to follow a procedural rule set by a court or an administrative agency. I&W's failure is a failure to meet a statutory time limit for filing an action. The court in Dill v. General American Life Ins. Co. discussed the Supreme Court's decision in Bowles, and distinguished between statutory time limits- which are jurisdictional- with what it called "claims processing rules:"

"Time limits prescribed by statute are jurisdictional, whereas court-promulgated rules and limits, which are not enacted by Congress, are properly classified as 'claim-processing' rules. See Bowles, 127 S.Ct. at 2364-65 (noting "the jurisdictional distinction between court-promulgated rules and limits enacted by Congress")."

Dill, 525 F.2d at 616. Where the time limit is jurisdictional, it cannot be forfeited or waived, even for equitable reasons. Id. at 620, citing Bowles, 127 S.Ct. at 2366.

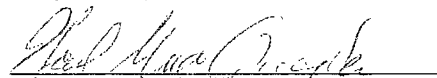
The OCD didn't solve I&W's problem when it provided a copy of the Request to the Hearing Clerk. The burden for filing a timely Request for Order Hearing is on the person seeking the hearing, and I&W did not meet that burden. And no matter how the thirty-day period is calculated, the WQCC did not receive the Request within the statutory thirty-day period. For example, using January 26, 2010, as the date of service for the Compliance Order (that's the date I&W signed for the second certified mail letter -- five days after mailing, five days after it received the fax, and one day after it signed for the first certified mail letter), the thirty-day filing deadline would be February 25, 2010. I&W should not be able to add three days for mailing onto that date ("The three day extension does not apply to any deadline under the [Water Quality] Act." 20.1.3.110.A NMAC), but even adding three days would only bring the deadline to Monday, March 1, 2010. The OCD did not mail the Request to the Hearing Clerk until March 3, 2010,

and according to the Notice of Docketing the Hearing Clerk did not receive the Request until March 10, 2010.

Conclusion.

The statutory time limit is clearly set out in the Water Quality Act. It is clearly set out in the WQCC rules. And the compliance order itself cited the relevant statute and rules, and gave I&W clear directions on how to file its Request for Order Hearing. I&W simply failed to meet the statutory and regulatory time requirement for filing its Request. The Water Quality Control Commission is without jurisdiction to hear I&W's Request for Order Hearing. The Request should be dismissed.

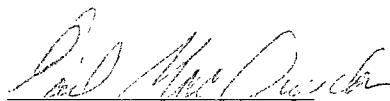
Respectfully submitted,



Gail MacQuesten, Asst. General Counsel
Mark Fesmire, Asst. General Counsel
New Mexico Energy, Minerals and Natural
Resources Department
Attorneys for the Oil Conservation Division
1220 S. St. Francis Drive
Santa Fe, NM 87505

CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2010 I mailed a copy of the foregoing Brief in Support of Motion to Dismiss Request for Order Hearing, and the supporting affidavit with exhibits, to Zachary Shandler, Asst. Atty. General, P.O. Box 1508, Santa Fe, NM 87504; and to Thomas M. Hnasko, Esq. and Gary W. Larson, Esq., Hinkle Law Firm, P. O. Box 2068, Santa Fe, NM 87504-2068.



Gail MacQuesten, Attorney for the
Oil Conservation Division

STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION

In the Matter of I&W's Request for Order
Hearing and Answer to Compliance Order
NMEMNRD/OCD

WQCC 10-03(A)

AFFIDAVIT OF GAIL MACQUESTEN

STATE OF NEW MEXICO)
) SS.
COUNTY OF SANTA FE)

Gail MacQuesten, being first duly sworn on oath, states as follows:

1. I represent the Oil Conservation Division of the New Mexico Energy, Minerals and Natural Resources Department in the above-captioned action, and file this affidavit in support of the Motion to Dismiss the Request for Order Hearing in WQCC 10-03(A), as permitted by 20.1.3.113(A) NMAC.

2. On January 21, 2010, the Oil Conservation Division (OCD) issued a Compliance Order to I&W, Inc. Exhibit A, attached, is a copy of the Compliance Order.

3. On January 21, 2010, I took the following actions to serve I&W, Inc. with the Compliance Order:

- I faxed a copy of the Compliance Order to I&W, Inc., using the fax number the OCD had successfully used in previous correspondence with I&W, Inc. Exhibit B, attached, is a copy of the transmittal cover sheet for the fax, and the confirmation sheet showing the transmittal.

- I faxed a copy of the Compliance order to attorneys T. Calder Ezzell, Jr. and Lucas M. Williams, at the Roswell office of the Hinkle Law Firm. Mr. Ezzell and Mr. Williams represented I&W, Inc. in the informal enforcement discussions leading up to the filing of the Compliance Order. Exhibit C, attached, is a copy of the transmittal cover sheet for the fax, and the confirmation sheet showing the transmittal.
- I mailed a hard copy of the Compliance Order to I&W, Inc. by certified mail, return receipt requested, using the two addresses the OCD had for I&W, Inc. Exhibit D, attached, is a copy of the transmittal letter. Exhibit E, attached, is a copy of the return receipt cards, showing receipt of the mailings on January 25 and 26, 2010.

4. The OCD's copy of the "Request for Order Hearing and Answer to Compliance Order" is date stamped February 19, 2010. I did not see the Request until several days later. When the Request was given to me it did not have a transmittal letter, and did not have a copy of the Compliance Order attached.

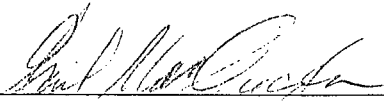
5. I did not receive a Notice of Docketing from the Hearing Clerk, so on March 2, 2010, I sent an e-mail to Joyce Medina, Hearing Clerk for the Water Quality Control Commission, asking if I&W, Inc. had filed a Request for Order Hearing. Exhibit F, attached, is a copy of my e-mail. Ms. Medina told me that the Water Quality Control Commission had not received I&W, Inc.'s Request for Order Hearing.

6. The next day, March 3, 2010, I mailed a copy of I&W, Inc.'s Request for Order Hearing to Ms. Medina, with a copy of the Compliance Order. I sent a copy of the transmittal letter to the attorneys who had submitted the Request: Thomas M. Hnasko and Gary W. Larson of the Santa Fe Office of the Hinkle Law Firm. Exhibit G, attached, is a copy of my transmittal letter.

7. On March 22, 2010, Ms. Medina issued a Notice of Docketing, indicating that she received the Request for Order Hearing on March 10, 2010.

8. On March 25, 2010, I spoke to Ms. Medina, and confirmed that the only copy of the Request for Order Hearing received by her was the copy I had sent; she had never received a copy of the Request for Order Hearing from I&W, Inc.

9. On March 26, 2010, I sent an e-mail to Mr. Hnasko and Mr. Larson, telling them the OCD planned to file a motion to dismiss I&W, Inc.'s Request for Order Hearing because I&W, Inc. did not meet the statutory deadline for filing set out in NMSA 1978, Section 74-6-10(G), and failed to meet the filing requirements set out by Water Quality Control Commission rule 20.1.3.400 NMAC, and asked if they opposed the motion. He responded, "We oppose." Exhibit H, attached, is a copy of that e-mail exchange.


Gail MacQuesten

SUBSCRIBED AND SWORN to before me this 29th day of March 2010.


Notary Public

My Commission Expires: 01-09-12

STATE OF NEW MEXICO
OIL CONSERVATION DIVISION

IN THE MATTER OF

I &W INC.,
Respondent.

COMPLIANCE ORDER

Pursuant to the New Mexico Water Quality Act ("WQA"), Chapter 74, Article 6 NMSA 1978, the Oil Conservation Division ("OCD") issues this Compliance Order ("Order") to Respondent I &W, Inc. ("I&W" or "Respondent").

I. FINDINGS OF FACT

Parties:

1. The OCD is a division of the New Mexico Energy, Minerals and Natural Resources Department, and is the administrative arm of the Oil Conservation Commission (OCC). The OCC is a "constituent agency" of the Water Quality Control Commission (WQCC) under the WQA. NMSA 1978, Section 74-6-2(J)(4). The OCD has express statutory authority to administer the WQA. NMSA 1978, Section 70-2-12(B)(22).

2. I&W is a domestic profit corporation that since 1995 has operated a facility under OCD discharge permit BW-006 ("Facility"). The Facility is located in Units L and M of Section 17, Township 22 South, Range 27 East, NMPPM, Eddy County, New Mexico.

Background:

Compliance Order
I & W, Inc.
BW-006
Page 1 of 25

*Affidavit in Support of
Motion to Dismiss
Exhibit A*

3. The Facility includes trucking operations and a solution mining operation to produce brine sold for use in oil and gas operations.

4. In a solution mining operation to produce brine, a well is drilled into the salt zone. The operator injects fresh water into the salt zone, where it dissolves the salt. The resulting brine is pumped and sold. As the mining process continues, the salt zone dissolves, leaving an underground cavern filled with brine.

5. The Facility first began producing brine in August of 1978, using a single well: the Eugenie #1 (API 30-015-22574). The depth from ground surface to salt observed during the drilling of this well was 456 feet, and casing was set to this depth. The total drilled depth of the hole was 663 feet.

6. In 1979 the operator installed a second well at the Facility: the Eugenie #2 (API 30-015-23031). Casing on the Eugenie #2 was set to 285 feet with tubing advanced to 583 feet. The operator hydraulically fractured the salt zone between the two wells. The Facility then operated as a two-well system, with fresh water introduced down the Eugenie #2 and brine produced from the Eugenie #1.

7. The depth to ground water beneath the Facility is approximately 50 feet.

8. I&W acquired the Facility in 1995, notifying the OCD of the transfer by letter dated August 10, 1995.

9. During a cavern integrity test in November 1999, the Eugenie #2 well, which was being used to inject fresh water, showed brine leakage at the surface. I&W plugged the Eugenie #2 in January 2000.

10. I&W returned to single-well brine production using the Eugenie #1 in June 2000.

11. On July 16, 2008 Jim's Water Service brine well (BW-005) collapsed.
12. On July 18, 2008, two days after the collapse at Jim's Water Service, the OCD recommended to I&W that it cease producing brine from the Eugenie #1 well. The depth to salt at I&W's Facility is similar to the depth to salt at Jim's Water Service, and the production history at the two facilities is similar.
13. On July 22, 2008, I&W shut in the Eugenie #1 well.
14. On August 1, 2008, as part of its review of brine well operations after the collapse at Jim's Water Service, the OCD sent a "Brine Well Information Request" to all brine well operators in New Mexico, including I&W. The four-page form requested information about the operator's brine well(s), including information on well construction, well operations, and monitoring. The cover letter sent with the form required operators to return the completed form by September 5, 2008. I&W did not respond.
15. I&W plugged the Eugenie #1 on October 31, 2008.
16. On November 3, 2008 the Loco Hills Water Disposal Company brine well (BW-021) collapsed. This well had been plugged on June 19, 2008.
17. On January 29, 2009 the OCD increased the area of review for any Application for Permit to Drill to one-half mile from the I&W Facility. Any such application would have to be jointly approved by the OCD office in Santa Fe and the OCD's District II office in Artesia.
18. On March 11, 2009 OCD urged I&W to cease truck operations above the existing cavern and develop an adequate contingency plan incorporating the local

emergency response infrastructure and notification of neighboring property owners who may be adversely affected by a collapse.

19. In March 2009 the OCD hosted a Brine Well Workgroup to discuss potential causes of brine well collapses, and methods for evaluating the potential for brine well collapses. Numerous participants expressed concern that the brine wells at I&W's Facility could or would collapse because they were similar in geology and production life to the two wells that had already collapsed.

20. If the I&W brine wells collapse, fresh water in the overburden will mix with the brine in the salt cavern. Brine produced at the I&W Facility contains approximately 193,000 milligrams/liter (mg/l) chloride according to I&W's January 2006 analysis of brine in the cavern. The maximum concentration of chloride allowed in ground water is 250 mg/l. See 20.6.2.3103.B(1) NMAC. One gallon of brine therefore has the potential to contaminate 772 (193,000/250) gallons of fresh water. Based on the available information, the OCD estimates that the underground cavern at the Facility presently contains 34 million gallons of brine. If the cavern roof fails and the falling overburden displaces the brine upward where it can mix with the overlying fresh ground water, more than 26 billion gallons of water (approximately 80,600 acre-feet) will be contaminated.

21. Because the Facility is located in a developed area of the City of Carlsbad, between two major highways and adjacent to the Carlsbad Irrigation Canal, a church, a feed store and a mobile home park, a collapse has serious potential for injury or loss of life, and property damage.

22. During the period April 1 through April 27, 2009, OCD staff spoke by telephone with I&W and its counsel and met with I&W and its counsel to request that I&W cease all operations at the Facility. The OCD also retained a contractor to provide technical assistance on data review, to survey the site to determine subsidence and tilt rates at the surface, remotely confirm the cavern configuration, make technical recommendations, and establish a continuously operating subsidence monitoring system which might yield warning of imminent or ongoing collapse.

23. On April 27, 2009, I&W agreed to cease trucking operations at the site and allow OCD access to the site to install monitoring equipment.

24. OCD contractors have since conducted a seismic reflection survey to determine the extent of the cavern. The data has been evaluated by independent experts. They interpret the survey to indicate a cavern with lateral dimensions of more than 500 feet by 300 feet, with significant salt removal in the area of Eugenie #1.

25. Independent studies of salt cavern collapses indicate that roof failure is not likely to occur when the ratio of cavern diameter to cavern depth is significantly smaller than 0.67. The ratio of diameter to depth for the cavern at the I&W Facility ranges between 0.66 and 1.10 based on the seismic reflection survey. According to OCD estimates, the cavern that collapsed at Jim's Water Service (BW-005) had a ratio of 1.13, and the cavern that collapsed at Loco Hills Water Disposal Company (BW-021) had a ratio of 0.70.

26. OCD contractors established a surface subsidence monitoring system, which includes installation of surface monitoring points that are surveyed with a theodolite and the installation of surface tiltmeter plates, along with the installation of

continuously monitored subsurface borehole tiltmeters and pressure transducers placed into existing ground water monitor wells. Information from the borehole tiltmeters and pressure transducers is transmitted to an early warning system.

27. The OCD's outside costs for these efforts to date total \$563,420.00. Some costs associated with the monitoring are paid through June 30, 2010. Continued monitoring using the existing subsidence monitoring system and early warning system is expected to cost between \$2,000.00 and \$10,000.00 per month, depending on the level of maintenance and data analysis required.

28. As discussed in more detail below, I&W is in violation of multiple conditions of Discharge Permit BW-006:

- I&W has failed to provide a subsidence monitoring program and a health and safety plan;
- I&W has failed to provide capacity/cavity configuration data along with geologic and engineering information demonstrating the integrity of the solution mining system;
- I&W has failed to maintain a ground water monitoring program;
- I&W has failed to provide production/injection volumes; and
- I&W has failed to provide analysis of the injection fluid and brine.

Claim 1: Failure to Provide a Subsidence Monitoring Program and a Health and Safety Plan

29. The requirement for a subsidence survey first appeared in the 1996 renewal of BW-006, issued April 15, 1996:

“Subsidence Survey: I&W will design and install a series of survey points over the area of the facility and the salt cavern by December 31, 1996 to monitor any future surface subsidence. The OCD will be notified at least 72 hours prior to all testing so that an OCD representative may witness the testing.”

BW-006, Discharge Permit Approval Conditions, Paragraph 7 (1996).

30. OCD records show no evidence that I&W installed subsidence survey points as required by the 1996 renewal.

31. The next renewal of BW-006, issued July 16, 2001, contained the following requirements for subsidence monitoring:

“I&W, Inc. shall submit for OCD approval a method to detect long-term subsidence. Please submit the plan by August 15, 2001.”

BW-006, Discharge Permit Approval Conditions, Paragraph 25 (2001).

32. By letter dated August 17, 2001, the OCD extended the deadline for submittal of the plan until January 31, 2002.

33. OCD records show that I&W did not submit a plan for subsidence detection by the January 31, 2002 deadline.

34. By letter dated December 11, 2007, I&W indicated to the OCD that it intended to set monitoring points in the ground in the next few weeks.

35. The next renewal of BW-006, issued January 24, 2008, is the current Discharge Plan. It contains the following requirements for subsidence monitoring:

“Subsidence Monitoring System: I&W, Inc. shall submit for long-term subsidence, a report displaying all subsidence monitoring stations and monitoring completed to date to address the requirements of the prior discharge plan by June 30, 2008. The report shall summarize and include subsidence tables and graphs to 0.01 ft. A map shall depict the facility and monitoring points to scale with verification of certified surveyor geodetic datums or elevations are properly recorded. The report shall propose a schedule for long-term surveying to ensure public safety subsidence/collapse issues are addressed due to the shallow nature of the brine cavity. The report shall also include: a health and safety plan for alerting the proper authorities, ensuring prompt evacuation of the community, and protection health and safety of the general public.”

BW-006, Discharge Permit Approval Conditions, Paragraph 20(B) (2008).

36. On July 2, 2008, after the due date set by the 2008 renewal, OCD personnel e-mailed I&W regarding the subsidence monitoring requirement.

37. The "Brine Well Information Request Form" the OCD sent to I&W on August 1, 2008 requested information on subsidence monitoring and asked if the operator had submitted all reports to the OCD. I&W did not respond to the OCD's request for information.

38. On November 4, 2008 OCD personnel e-mailed I&W requiring it to submit a contingency plan, and describing the issues to be included in the plan. According to a subsequent e-mail from the OCD to I&W dated November 17, 2008, it appears that I&W provided some information to the OCD, but the OCD informed I&W that it was insufficient.

39. By letter dated April 9, 2009 the OCD notified counsel for I&W regarding the OCD's concerns about the lack of subsidence monitoring. The letter included the following demand:

"Cooperate with monitoring. The OCD has been working with I&W to establish a monitoring program for the site, but has not seen proof that the monitoring is in place, and has not received monitoring data. As we have discussed, the OCD's experience is that weekly or daily monitoring will not provide adequate warning of a collapse. The OCD is working to determine if a real-time monitoring system can be designed that will provide sufficient warning to prevent loss of life or property, and will require I&W's cooperation in that monitoring program."

40. A demand letter from OCD to counsel for I&W on April 23, 2009 included a demand that I&W "[p]rovide the monitoring data it has previously promised the OCD." In addition, the letter put I&W on notice that the OCD considered I&W to be in violation of its permit conditions regarding monitoring:

“Paragraph 20(B) requires I&W to submit a plan for long-term subsidence, including a schedule for long-term surveying to ensure public safety subsidence/collapse issue, a health and safety plan for alerting the proper authorities, ensuring prompt evacuation of the community, and protection of the health and safety of the general public. I&W has not provided the plans required by Paragraph 20(B).

....Paragraph 21(F) also allows the OCD to require installation of subsidence monitoring in order to demonstrate the integrity of the system. The OCD previously required I&W to provide weekly subsidence monitoring; as discussed in my letter of April 9, 2009, I&W has not provided the monitoring data, nor does it appear to have fully implemented subsidence monitoring in the past. Given the probability of a collapse, the OCD is now requiring real-time subsidence monitoring and an early-warning system....”

41. On April 27, 2009, the OCD received an e-mail from I&W containing limited subsidence data, describing a total of 22 monitoring events starting on May 9, 2008 and ending April 13, 2009. The data show no elevation changes to an accuracy of 0.001 feet at the Eugenie #1, the Eugenie #2, or at three established benchmarks.

42. The April 27, 2009 e-mail did not provide the additional information required by the terms of BW-006, such as the proposed schedule for long-term surveying or the health and safety plan.

43. The subsidence survey conducted by OCD’s own contractor between May 6 and September 18, 2009 contradicts the subsidence data provided by I&W. The subsidence survey indicates rates of subsidence and heaving at the surface approaching one inch per year. Review of available information by OCD’s contractor indicates ground movements not inconsistent with a possible catastrophic failure of the cavern roof at some as yet undetermined time in the foreseeable future.

44. A July 2, 2009 demand letter from the OCD to the attorney for I&W, seeking reimbursement of the costs incurred by the OCD, offered I&W the option of

assuming control of and responsibility for the subsidence monitoring system and the early warning system.

45. The November 20, 2009 demand letter from the OCD to I&W specifically referenced the 2008 renewal condition requiring I&W to provide a subsidence report including a schedule for long-term surveying and a health and safety plan. The letter required that information to be submitted as part of a closure plan. As authority for requiring a closure plan including this information, the letter cited BW-006, Discharge Permit Approval Conditions, Paragraph 23, which provides that I&W must submit a closure plan upon the OCD's request, and the following regulations under the Water Quality Act: 20.6.2.3107.A(10) and (11) NMAC (contingency plans and closure plans for discharge permits); 20.6.2.5005 NMAC (closure requirements for brine wells); 20.6.2.5209 NMAC (plugging and abandonment of brine wells); and 20.6.2.5210(B)(17) NMAC (measures necessary to prevent contamination after cessation of operations, including proper closing and post-operational monitoring).

46. In addition, the November 20, 2009 demand letter required I&W to post a financial assurance in the amount of \$1,000,000.00 in the form of a surety bond to provide funding for the continued operation of the subsidence monitoring system and early warning system in the event I&W fails to maintain those systems. BW-006 specifically provides that the OCD may require I&W to provide additional financial assurance. See BW-006, Discharge Permit Approval Conditions, Paragraph 23.

47. To date, I&W has not submitted additional subsidence data, has not taken any action to assume responsibility for subsidence monitoring or the early warning system, has not submitted a contingency/health and safety plan, has not posted the

required financial assurance, and has not reimbursed the OCD for its expenditures to provide the cavern delineation, subsidence monitoring and early warning system that I&W failed to provide.

Claim 2: Failure to Provide a Capacity/Cavity Configuration and Subsidence Survey

48. In its August 10, 1995 letter notifying the OCD that it had acquired the Facility and was assuming the obligations under BW-006, I&W stated that it would “[p]erform a sonar log before the expiration of the active discharge plan on June 19, 1996.”

49. I&W failed to perform the sonar survey by its self-assumed June 19, 1996 deadline.

50. The 1996 permit renewal contained the following requirement:

“Capacity and Cavity Configuration: The capacity and configuration of the salt cavern will be determined by December 31, 1996 by sonar survey or an alternate method approved by the OCD. The OCD will be notified at least 72 hours prior to all testing so that an OCD representative may witness the testing.”

BW-006, Discharge Permit Approval Conditions, Paragraph 6 (1996).

51. During 1995 and 1996 the OCD repeatedly tried to schedule integrity testing and a cavern survey without success. On October 11, 1996, the OCD ordered I&W to cease brine production because of its failure to schedule mechanical integrity tests and a sonar survey.

52. Eight days later, on October 18, 1996, I&W completed a sonar survey of the Eugenie #1, the brine extraction well. The cavern roof appeared to be 135 feet across, but only the uppermost 45 feet of the solution cavern was logged, with a calculated

capacity of less than 31,000 barrels. The logging tool could not be lowered to greater depth due to interbedding. I&W did not perform a sonar test of the Eugenie #2.

53. Although production records are incomplete, historic brine production by October 1996 may have reached 4.5 million barrels. Assuming a 15% salt content by volume in brine, the solution cavern would have been 673,000 barrels. Therefore the area of the salt cavern logged by the sonar survey would represent only a small fraction of the cavern.

54. The 2001 permit renewal referenced receipt of the 1996 survey log. BW-006, Discharge Permit Approval Conditions, Paragraph 25 (2001).

55. On August 30, 2007 a firm under contract to I&W conducted sonar logging on the Eugenie #1. The depth interval that was imaged by that log spanned from 434.7 feet to 473.8 feet below surface and indicated a cavern volume of 47,823 barrels between depths of 444 and 473 feet which at its maximum was approximately 170 feet across.

56. Estimated historic brine production by the time of the 2007 sonar logging was in excess of 5 million barrels, which should have left a cavern with a volume of more than 800,000 barrels. Therefore, the sonar logging in 2007 probably imaged only 6% of the cavern. This is most likely due to an inability to lower the sonar tool any deeper. Total depth on the Eugenie #1 when it was drilled was 663 feet, and records indicate tubing depths during production of at least 587 feet. It appears that only 49 vertical feet were logged, leaving anywhere from 114 to 190 vertical feet of cavern unlogged.

57. The 2008 permit renewal contained the following requirement:

“Capacity/Cavity Configuration and Subsidence Survey: The operator shall provide information on the size and extent of the solution cavern and geologic/engineering data demonstrating that continued brine extraction will not cause surface subsidence, collapse or damage to property, or become a threat to public health and the environment. This information shall be supplied in each annual report. OCD may require the operator to perform additional well surveys, test, and install subsidence monitoring in order to demonstrate the integrity of the system. If the operator cannot demonstrate the integrity of the system to the satisfaction of the Division then the operator may be required to shut-down, close the site and properly plug and abandoned (sic) the well.”

BW-006, Discharge Permit Approval Conditions, Paragraph 21(F)(2008).

58. A separate provision in the 2008 permit renewal provides that the annual report is due on January 31 of each year. BW-006, Discharge Permit Approval Conditions, Paragraph 21(L)(2008).

59. I&W did not file an annual report for 2008, which would have been due January 31, 2009.

60. The “Brine Well Information Request Form” the OCD sent to I&W on August 1, 2008 requested information on sonar logs, cavern configuration (dimensions and volume) and the method or methods used to estimate the cavern size, and asked if the operator had submitted all reports to the OCD. I&W did not respond to the OCD’s request for information.

61. In an April 23, 2009 letter to I&W’s counsel, the OCD put I&W on notice that it considered I&W to be in violation of its permit terms:

“I&W is in violation of Paragraph 21(F) because it cannot demonstrate the integrity of the brine well system. The OCD has outlined its concerns in several telephone conversations with you, at a meeting in your offices on April 6, 2009, in a letter faxed and mailed to you on April 9, 2009, and at a meeting in Carlsbad on April 9, 2009 hosted by New Mexico Homeland Security and Emergency Management. To summarize, based on the age of I&W’s operations, the amount of brine produced, the well

configuration, and the limited sonar data currently available, the OCD concludes that the cavern under the wells is large with a broad roof, and is relatively close to the surface. I&W's operation shares these features with the two brine wells that suffered catastrophic collapses last year: Jim's Water Service (BW-5) and Loco Hills Water Disposal (BW-12). I&W's operation has additional factors that make it vulnerable to collapse: fresh water infiltrating the ground from the unlined irrigation ditch that runs adjacent to the facility may be dissolving the salt zone from the top, and vibrations from the truck yard currently being operated over the cavern could trigger a collapse."

62. The April 23, 2009 letter went on to state, "I&W cannot demonstrate that its brine well system has integrity both because of the circumstances summarized above and because it is in violation of other provisions of its permit," specifically citing the requirement in Paragraph 21(F) that I&W provide information in each annual report on the size and extent of the solution cavern and geologic/engineering data demonstrating that continued brine extraction will not be a hazard, and requiring, and the requirements in Paragraph 21(F) and Paragraph 20(B) for subsidence monitoring.

63. Because of I&W's failure to provide information on the configuration of the cavern, and its failure to demonstrate that the system had integrity, the OCD hired contractors to delineate the cavern. The OCD's demand letter of July 20, 2009, seeking reimbursement for those costs, offered I&W the opportunity to take over the evaluation and remediation efforts.

64. The OCD's November 20, 2009 demand letter to I&W reiterated that "I&W failed to comply with the terms of its permit that required it to provide information necessary to determine the size and extent of the cavern and the integrity of the system," and that the OCD had to take the actions I&W failed to take. As discussed above, the letter further required that I&W to submit a closure plan for the facility.

65. Delineation of the cavern is necessary to develop an appropriate closure plan. By the express terms of BW-006 the OCD may require submittal of a closure plan. See BW-006, Discharge Permit Approval Conditions, Paragraph 23. Proper monitoring and closure are required under Water Quality Control Commission rules. See 20.26.2.3107.A(10) and (11) NMAC (contingency plans and closure plans for discharge permits); 20.6.2.5005 NMAC (closure requirements for brine wells); 20.6.2.5209 NMAC (plugging and abandonment of brine wells); and 20.6.2.5210(B)(17) NMAC (measures necessary to prevent contamination after cessation of operations, including proper closing and post-operational monitoring).

Claim 3: Failure to Provide Ground Water Monitoring

66. The 2001 renewal of BW-006 was the first renewal after the discovery of brine leakage at the surface of the Eugenie #1. The 2001 renewal contained the following provision:

Groundwater Monitoring Program: OCD requires I&W Inc. to maintain a groundwater monitoring program to provide detection for any excursion of formation fluids outside of the extraction area. The following will be initially required:

A. Collect annual water samples from the two on-site monitor wells. These wells shall be purged, sampled and analyzed for General chemistry, total dissolved solids, pH (EPA method CFR 40 136.3) and New Mexico Water Quality Control Commission (WQCC) metals, all using EPA approved methods and quality assurance/quality control (QA/QC) procedures. Submit the analytical results in the annual report. All sampling shall be witnessed by OCD....

BW-006, Discharge Permit Approval Conditions, Paragraph 8 (2001).

67. The 2008 renewal of BW-006 contains the same requirements at Paragraph 20.A.

68. The "Brine Well Information Request Form" the OCD sent to I&W on August 1, 2008 requested information on ground water monitoring, and asked if the operator had submitted all reports to the OCD. I&W did not respond to the OCD's request for information.

69. To date, I&W has provided ground water analysis information on only three occasions: April 2000, September 2001 and December 2002.

Claim 4: Failure to Provide Injection/Production Volumes.

70. Injection and production volumes can be used to calculate the amount of salt dissolved, and the size of the resulting salt cavern.

71. BW-006 requires the operator to report injection and production volumes. See BW-006, Discharge Permit Approval Conditions, Paragraph 6 (2001) and BW-006, Discharge Permit Approval Conditions, Paragraph 21.G (2008).

72. The "Brine Well Information Request Form" the OCD sent to I&W on August 1, 2008 required the operator to provide information on injection and production, including the total volume of fresh water injected into the brine well to date, the total volume of brine water produced to date, and how the operator determined those volumes. The form also asked the operator if it had submitted all reports to the OCD. I&W did not respond to that request.

73. I&W's most recent report of injection and production volumes is for the first quarter of 2007. I&W did not shut in the Eugenie #1 well until July 22, 2008.

Claim 5: Failure to Provide Analysis of Brine and Fresh Water

74. In its August 10, 1995 letter notifying the OCD that it had acquired the Facility and was assuming the obligations under BW-006, I&W stated that it would “submit annual fresh and brine water analysis.”

75. The permit renewals for BW-006 in 2001 and 2008 require the operator to provide an analysis of the injection fluid and brine with each annual report. The analysis is for General Chemistry (Method 40 CFR 136.3) using EPA methods. See BW-006, Discharge Permit Approval Conditions, Paragraph 7 (2001) and BW-006, Discharge Permit Approval Conditions, Paragraph 21.H (2008).

76. OCD files contain information on analysis of brine water from the I&W Facility on the following occasions after I&W’s August 10, 1995 acquisition of the Facility: 10/6/95, 1/24/01, 12/4/01, and 1/25/06. OCD files contain information on analysis of fresh water injected at the I&W Facility on the following occasions after I&W’s August 10, 1995 acquisition of the Facility: 10/9/95, 1/24/01 and 12/4/01.

77. The “Brine Well Information Request Form” the OCD sent to I&W on August 1, 2008 asked if the operator had submitted all reports to the OCD. I&W did not respond to the OCD’s request for information.

II. APPLICABLE STATUTES AND RULES

1. The Environmental Protection Agency granted primacy to the WQCC, 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 147.1601. In the grant of primacy, the Environmental Protection Agency cited and incorporated by reference New Mexico’s Water Quality Act.

2. The Environmental Protection Agency classifies brine wells as Class III underground injection control wells, 40 CFR 144.6(c)(3).
3. The WQCC enacted regulations specifically governing brine wells as Class III wells. See 20.6.2.5002 NMAC.
4. The WQCC delegated authority over Class III brine wells to the OCD. The OCD is the administrative arm of the OCC, a constituent agency of the WQCC under NMSA 1978, Section 74-6-2(J)(4).
5. Operation of a Class III well must be pursuant to a discharge permit. See 20.6.2.5101.B NMAC.
6. The WQA provides that the WQCC may require persons to obtain discharge permits from a constituent agency. NMSA 1978, Section 74-6-5.
7. When a constituent agency determines that a person violated or is violating a condition of a permit issued pursuant to that WQA, 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).
8. Under the express terms of Respondent's discharge permit, and under WQA rules, the OCD may require Respondent to file a facility closure plan. BW-006, Discharge Permit Approval Conditions, Paragraph 23 (2008). 20.6.2.3107.A(10) and (11) NMAC (contingency plans and closure plans for discharge permits); 20.6.2.5005 NMAC (closure requirements for brine wells); 20.6.2.5209 NMAC (plugging and abandonment of brine wells); and 20.6.2.5210(B)(17) NMAC (measures necessary to

prevent contamination after cessation of operations, including proper closing and post-operational monitoring).

9. Under the express terms of Respondent's discharge permit, and under WQA rules, the OCD may require Respondent to post financial assurances. BW-006, Discharge Permit Approval Conditions, Paragraph 23 (2008). 20.6.2.5210(B)(17) NMAC and 20.6.2.3107.A(10) NMAC.

10. 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 for each day of continued noncompliance with the compliance order. NMSA 1978, Section 74-6-10(F)(1).

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

III. CONCLUSIONS OF LAW

1. I&W is a "person" as defined in NMSA 1978, Section 74-6-2(I).

2. I&W's operation of the Facility is subject to the provisions of the WQA, the rules adopted pursuant to the WQA, and the conditions of BW-006.

3. I&W is in violation of discharge permit BW-006 because it has failed to provide:

- A report displaying all subsidence monitoring stations and monitoring completed, summarizing all subsidence tables and graphs to 0.01 feet, a map depicting the facility and monitoring points to scale with verification of certified surveyor geodetic datums or elevations;
- A proposed schedule for long-term surveying to ensure public safety subsidence/collapse issues; and

- A health and safety plan for alerting the proper authorities, ensuring prompt evacuation of the community, and protection health and safety of the general public.

4. I&W is in violation of discharge permit BW-006 because it has failed to provide:

- Information on the size and extent of the solution cavern and geologic/engineering data demonstrating that continued brine extraction will not cause surface subsidence, collapse or damage to property, or become a threat to public health and the environment; and
- Subsidence monitoring.

5. I&W is in violation of discharge permit BW-006 because it has failed to provide the ground water monitoring program as required, including the submittal of annual analytical results.

6. I&W is in violation of discharge permit BW-006 because it has failed to provide injection/production volumes.

7. I&W is in violation of discharge permit BW-006 because it has failed to provide analyses of brine and fresh water.

8. OCD has authority under the WQA rules as the conditions of BW-006 agreed to by I&W to require I&W to close the site and to impose additional requirements on I&W to prevent a collapse or damages to property or public health.

9. The OCD may issue a compliance order requiring corrective actions under NMSA 1978, Section 74-6-10(A)(1).

IV. COMPLIANCE ORDER

Based upon the foregoing findings and conclusions, I&W is hereby ordered to take the following corrective actions by April 22, 2010:

Compliance Order
I & W, Inc.
BW-006
Page 20 of 25

1. Submit the following information to the OCD as required by BW-006:
 - a subsidence monitoring system report, as required by Paragraph 20.B of discharge permit BW-006 (2008);
 - a health and safety plan, as required by Paragraph 20.B of discharge permit BW-006 (2008);
 - Capacity/cavern configuration information, as required by Paragraph 21.F of discharge permit BW-006 (2008);
 - Ground water monitoring analytical reports, as required by Paragraph 20.A of discharge permit BW-006 (2008);
 - Injection/production volume reports as required by Paragraph 21.6 of discharge permit BW-006 (2008); and
 - Analyses of brine and fresh water, as required by Paragraph 21.H of discharge permit BW-006 (2008).
2. Reimburse the OCD for the \$563,420.00 in costs incurred to establish and monitor the survey system and early warning system.
3. Post a financial assurance in the amount of \$1,000,000 in the form of a surety bond to provide funding for the continued operation of the subsidence monitoring system and early warning system.
4. Submit a Facility closure plan to prevent exceeding the standards of Section 20.6.2.3103 NMAC or the presence of a toxic pollutant in ground water in the event of a cavern collapse. The Facility closure plan shall include, at a minimum:
 - A report on closure, plugging and abandonment measures already taken for the Eugenie #1 and the Eugenie #2;
 - A plan for assuming financial responsibility for the monitoring system put in place by the OCD and continued monitoring by an independent third party acceptable to the OCD;
 - A plan for assuming financial responsibility for the early warning system put in place by the OCD and continued operation of the early warning system by an independent third party acceptable to the OCD;
 - Run-on/run-off controls to prevent water ponding over the area of the brine well cavern;
 - A maintenance plan for the run-on/run-off controls;
 - A maintenance plan, including security of all monitoring benchmarks, survey points and utilities that support the early warning system;

- An annual post-closure report;
- A proposal for closing the facility providing for either the safe backfilling of the salt cavern in place, or for the acquisition of surrounding properties which may be adversely affected along with long-term site security and monitoring;
- Additional financial assurance to support the proposal for closing the facility; and
- A contingency plan to remediate ground water that will be impacted by a collapse of the cavern.

V. CIVIL PENALTY

1. NMSA 1978, Section 74-6-10(C) authorizes assessment of a civil penalty of up to \$15,000 per day for each violation of NMSA 1978, Section 74-6-5, any regulation adopted pursuant to that section, or any permit issued pursuant to that section. Section 74-6-10(C) also authorizes assessment of a civil penalty of up to \$10,000 per day for each violation of a provision of the WQA other than the provisions in Section 74-6-5 or of a regulation or water quality standard adopted pursuant to the WQA.

2. The OCD hereby assesses a penalty of \$2,637,000.00 against I&W for I&W's failure to comply with the terms of BW-006 requiring submittal of a subsidence monitoring system report, a health and safety plan, capacity/cavern configuration information, ground water monitoring analytical reports, injection/production volume reports, and brine and fresh water analyses. In calculating the penalty amount, the OCD considered: the number of violations; the serious nature of the violations; the potential risk to public health, welfare, environment and property posed by the violations; the length of time I&W has been out of compliance; the willfulness of the violations; and the economic benefit to I&W of the non-compliance.

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 Water Quality Control Commission, and serve a copy on the OCD. See 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 defense 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 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 Water Quality Control Commission within 30 days of receipt of Compliance Order

I & W, Inc.

BW-006

Page 23 of 25

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 Water Quality Control Commission encourages settlement consistent with the provisions and objectives of the WQA and applicable rules. Settlement discussions do not extend the thirty (30) day deadline for filing the Respondent's Request for Order Hearing, or alter the deadlines for compliance with this Order. See 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 Water Quality Control Commission must approve a stipulated final order.

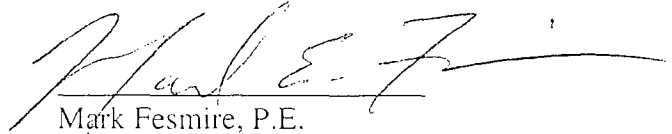
3. To explore the possibility of settlement in this matter, contact Glenn von Gonten, Environmental Bureau, New Mexico Oil Conservation Division, 1220 S. St. Francis Drive, Santa Fe, NM 87505, (505) 476-3488.

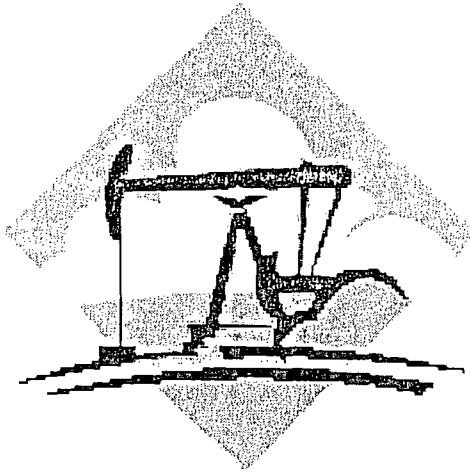
4. Compliance with the requirements of this Order does not relieve Respondent of the obligation to comply with all other applicable laws and rules.

IX. TERMINATION

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 Water Quality Control Commission.

1/21/10
Date


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



Transmittal Cover Sheets

Oil Conservation Division

1220 S. Saint Francis Drive

Santa Fe, NM 87505

Phone (505) 476-3440 Fax (505) 476-3462

Please Deliver This Fax:

Date: 1-21-10

Pages Including Cover Page: 27

To: Mr. Eugene Libby 14 W Inc.

Fax: 575 885 8477

From: Gail MacQuisten OGD

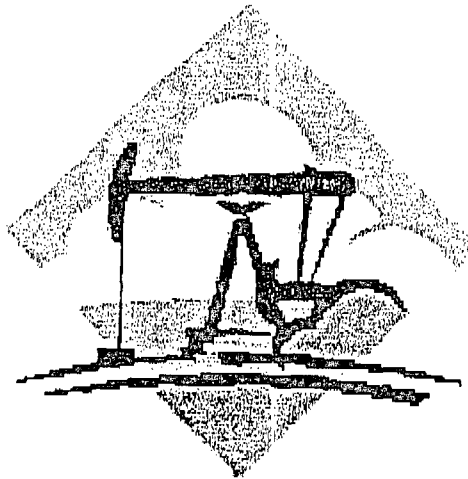
Subject: 14 W Inc. compliance order

*Affidavit in Support of
Motion to Dismiss
Exhibit B*

TRANSMISSION VERIFICATION REPORT

TIME : 01/21/2010 15:10
NAME : OIL CONSERVATION DIS
FAX : 505-476-3462
TEL : 505-476-3440
SER.# : BROH8J847603

DATE, TIME	01/21 15:00
FAX NO./NAME	915758858477
DURATION	00:10:03
PAGE(S)	27
RESULT	OK
MODE	STANDARD



Transmittal Cover Sheets

Oil Conservation Division

1220 S. Saint Francis Drive

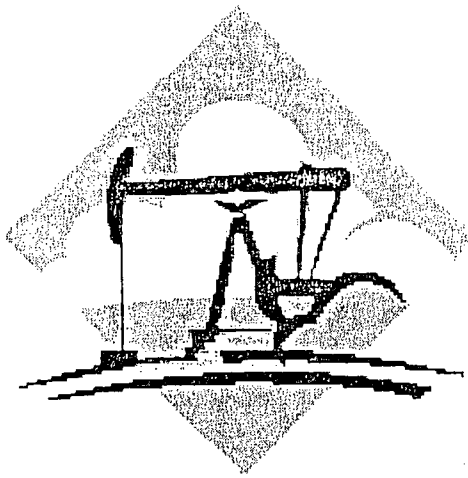
Santa Fe, NM 87505

Phone (505) 476-3440 Fax (505) 476-3462

Please Deliver This Fax:

Date: 1-31-10

Pages Including Cover Page: 27



Transmittal Cover Sheets

Oil Conservation Division

1220 S. Saint Francis Drive

Santa Fe, NM 87505

Phone (505) 476-3440 Fax (505) 476-3462

Please Deliver This Fax:

Date: 1-21-10

Pages Including Cover Page: 27

To: T. Calder Ezell Jr. / Lucas M. Williams

Fax: 575 623 9332

From: Gail MacQuistan

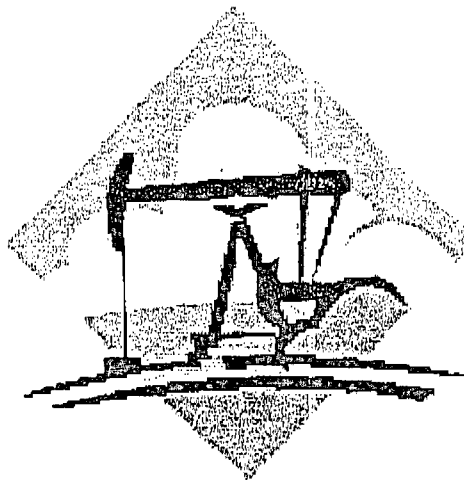
Subject: 1st W Inc. compliance order

*Affidavit in Support of
Motion to Dismiss
Exhibit C*

TRANSMISSION VERIFICATION REPORT

TIME : 01/21/2010 15:28
NAME : OIL CONSERVATION DIS
FAX : 505-476-3462
TEL : 505-476-3440
SER.# : BROH8J847603

DATE, TIME	01/21 15:19
FAX NO./NAME	915756239332
DURATION	00:09:19
PAGE(S)	27
RESULT	OK
MODE	STANDARD



Transmital Cover Sheets

Oil Conservation Division

1220 S. Saint Francis Drive

Santa Fe, NM 87505

Phone (505) 476-3440 Fax (505) 476-3462

Please Deliver This Fax:

Date: 1-21-10

New Mexico Energy, Minerals and Natural Resources Department

Bill Richardson
Governor

Jon Goldstein
Cabinet Secretary

Jim Noel
Deputy Cabinet Secretary

Mark Fesmire
Division Director
Oil Conservation Division



January 21, 2010

Mr. Eugene Irby, Owner
I&W, Inc.
P.O. Box 1685
Carlsbad, NM 88220

Certified Mail No.: 7001 1940 0004 7923 5396

Mr. Eugene Irby, Owner
I&W, Inc.
P.O. Box 98
Loco Hills, NM 88255

Certified Mail No.: 7001 1940 0004 7923 5389

Re: I&W Inc. brine production and water hauling operations in Carlsbad, New Mexico
Discharge Permit BW-006

Dear Mr. Irby:

Enclosed is a compliance order issued to I&W Inc. pursuant to the Water Quality Act.

Sincerely,

A handwritten signature in dark ink, appearing to read "Mark Fesmire", written over a horizontal line.

Mark Fesmire, PE
Director, Oil Conservation Division

*Affidavit in Support of
Motion to Dismiss
Exhibit D*



6m

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY
<p><input checked="" type="checkbox"/> Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.</p> <p><input checked="" type="checkbox"/> Print your name and address on the reverse so that we can return the card to you.</p> <p><input checked="" type="checkbox"/> Attach this card to the back of the mailpiece, or on the front if space permits.</p> <p>1. Article Addressed to:</p> <p style="margin-left: 40px;">Mr. Eugene Irby, Owner I & W, Inc. P.O. Box 1685 Carlsbad, NM 88220</p>	<p>A. Signature X <i>[Signature]</i> <input type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> <p>B. Received by (Printed Name) C. Date of Delivery</p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No</p>
<p>2. Article Number (Transfer from service label)</p> <p style="text-align: center; font-size: 1.2em;">7001 1940 0004 7923 5396</p>	<p>3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.</p> <p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes</p>

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

6m

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY
<p><input checked="" type="checkbox"/> Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.</p> <p><input checked="" type="checkbox"/> Print your name and address on the reverse so that we can return the card to you.</p> <p><input checked="" type="checkbox"/> Attach this card to the back of the mailpiece, or on the front if space permits.</p> <p>1. Article Addressed to:</p> <p style="margin-left: 40px;">Mr. Eugene Irby, Owner I & W, Inc. P.O. Box 93 Loco Hills, NM 88255</p>	<p>A. Signature X <i>[Signature]</i> <input type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> <p>B. Received by (Printed Name) C. Date of Delivery DENNIS R. SAVAGE</p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No</p>
<p>2. Article Number (Transfer from service label)</p> <p style="text-align: center; font-size: 1.2em;">7001 1940 0004 7923 5389</p>	<p>3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.</p> <p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes</p>

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

*Affidavit in Support of
Motion to Dismiss
Exhibit E*

Macquesten, Gail, EMNRD

From: Macquesten, Gail, EMNRD
Sent: Tuesday, March 02, 2010 11:40 AM
To: Medina, Joyce, NMENV
Subject: Request for order hearing - I&W, Inc.

Hi Joyce –

Can you tell me if I&W, Inc. has filed a request for order hearing and answer to compliance order with the WQCC?

The OCD issued a compliance order to I&W, Inc. on January 21, 2010 regarding violations of their brine well permit (BW-006). We sent it by fax and mail on that day. The order stated that it would become final unless I&W filed a request for order hearing with the WQCC within 30 days of receipt, and cited the applicable rule.

We received a request for order hearing and answer to compliance order from I&W, Inc. on February 19, 2010. But it doesn't indicate whether they filed anything with the WQCC.

Thanks for any info you can give me, Joyce. Hope everything is going well for you.

Gail
467-3451

*Affidavit in Support of
Motion to Dismiss
Exhibit F*

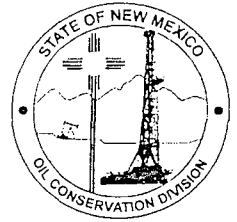
New Mexico Energy, Minerals and Natural Resources Department

Bill Richardson
Governor

Jon Goldstein
Cabinet Secretary

Jim Noel
Deputy Cabinet Secretary

Mark Fesmire
Division Director
Oil Conservation Division



March 3, 2010

Joyce Medina, Administrator
Water Quality Control Commission
NM Environment Department
Runnels Building Rm. N2150
1190 St. Francis Drive
Santa Fe, NM 87505

Re: I&W, Inc.'s Request for Order Hearing and Answer to Compliance Order

Dear Ms. Medina,

As we discussed by e-mail yesterday, on January 21, 2010 the Oil Conservation Division (OCD) issued a Compliance Order to I&W, Inc. related to violations of its discharge permit BW-006. On February 19, 2010 the OCD received from I&W, Inc. a copy of a Request for Order Hearing and Answer to Compliance Order. The pleading does not indicate whether it was served on the Water Quality Control Commission (WQCC), as required by 20.1.3.400 NMAC, and as specified in the Compliance Order itself. You indicated that the WQCC has not received a copy of the pleading from I&W, Inc.

Attached to this letter is a copy of I&W, Inc.'s Request for Order Hearing and Answer to Compliance Order. I have also attached a copy of the Compliance Order, which according to WQCC rules the Respondent is to provide with its Request.

Please let me know if a hearing is scheduled.

Sincerely,


Gail MacQuesten,
OCD Attorney
505 476-3451

*Affidavit in Support of
Motion to Dismiss
Exhibit G*

Cc, w/o attachments: Thomas M. Hnasko and Gary W. Larson,
Attorneys for I&W, Inc.



Macquesten, Gail, EMNRD

From: Tom Hnasko [thnasko@hinklelawfirm.com]
Sent: Friday, March 26, 2010 11:29 AM
To: Macquesten, Gail, EMNRD; Gary Larson
Subject: RE: I&W, Inc. Request for Order Hearing WQCC 10-03(A)

We oppose

CONFIDENTIALITY NOTICE

This message (including attachments) is subject to attorney-client privilege or is otherwise a confidential communication from the law firm of Hinkle, Hensley, Shanor & Martin, LLP, that is covered by the Electronic Communications Privacy Act, 18 U.S.C. Sections 2510-2521, and is intended solely for the use of the addressee. It is not intended for transmission to, or receipt by, any unauthorized person. If you are not the intended recipient or received these documents by mistake, please do not read it and immediately notify us by collect telephone call to (505) 982-4554 for instructions on its destruction or return. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution, action or reliance upon the contents of the documents is strictly prohibited.

Thomas M. Hnasko
Hinkle, Hensley, Shanor & Martin, LLP
P.O. Box 2068
Santa Fe, New Mexico 87504
505.982.4554 - office
505.982.8623 - fax
505.660.3397 - cellular

From: Macquesten, Gail, EMNRD [mailto:gail.macquesten@state.nm.us]
Sent: Friday, March 26, 2010 10:29 AM
To: Gary Larson; Tom Hnasko
Subject: I&W, Inc. Request for Order Hearing WQCC 10-03(A)

Mr. Larson and Mr. Hnasko-

The Oil Conservation Division will be filing a motion to dismiss I&W Inc.'s Request for Order Hearing, because I&W did not meet the statutory deadline for filing set out in NMSA 1978, Section 74-6-10(G), and failed to meet the filing requirements set out by Water Quality Control Commission rule 20.1.3.400 NMAC.

The Water Quality Control Commission rules require written motions to state whether the motion is opposed or unopposed. We intend to file the motion on Monday. Please let me know I&W's position.

I&W's Request for Order Hearing states that it requests a settlement conference. The Compliance Order issued by the OCD set out the process for settlement conferences, and asked I&W to contact Glenn von Gonten of the OCD's Environmental Bureau if it wanted to explore settlement options. Mr. von Gonten has not been contacted. The OCD remains willing to discuss settlement. If you wish to set up a conference, please contact Mr. von Gonten at (505) 476-3488 or you may contact me at (505) 476-3451.

Thank you.

Gail MacQuesten
OCD Attorney

*Affidavit in Support of
Motion to Dismiss
Exhibit H*

Confidentiality Notice: This e-mail, including all attachments is for the sole use of the intended recipient(s) and may contain confidential and privileged information. Any unauthorized review, use, disclosure or distribution is prohibited unless specifically provided under the New Mexico Inspection of Public Records Act. If you are not the intended recipient, please contact the sender and destroy all copies of this message. -- This email has been scanned by the Sybari - Antigen Email System.



STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION
1190 St. Francis Drive
P.O. Box 26110
Santa Fe, New Mexico 87502
(505) 827-2425

CONSTITUENT AGENCIES:

Environment Department
State Engineer & Interstate Stream Commission
Game and Fish Department
Oil Conservation Division
Department of Agriculture
Department of Health
State Parks Division
Soil and Water Conservation Commission
Bureau of Mines and Mineral Resources
Members-at-Large

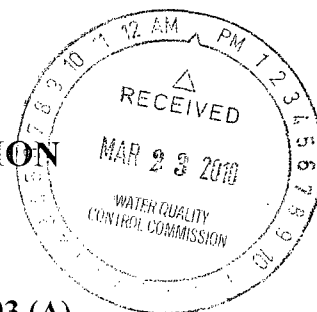
DRAFT
AGENDA
NM WATER QUALITY CONTROL COMMISSION MEETING
April 13-16, 2010
9:00 a.m.
New Mexico State Capitol Building Room 307
490 Old Santa Fe Trail
Santa Fe, NM 87501

1. Roll Call
2. Approve the Agenda
3. Approve minutes of March 9, 2010 meeting.
4. Request for hearing in re: WQCC 10-02 (R) Amendments to 20.1.3 NMAC.
Jennifer Hower, NMED/OGC. Time estimate: 15 minutes
5. Request for Order Hearing and Answer to Compliance Order in re: WQCC 10-03 (A) I&W, Inc. Thomas M. Hnasko, Esq. and Gary W. Larson, Esq., Hinkle Law Firm, appearing for I&W. Time estimate: 15 minutes
 - a. Motion to Dismiss Request for Order Hearing in WQCC 10-03 (A), Gail MacQuesten, NMEMNRD/OGC. Time estimate: 15 minutes
6. Request for Order Hearing and Answer to Compliance Order in re: WQCC 10-04 (A) Harold Daniels. Michael Gregory, Esq., for Mr. Daniels; Adolfo Mendez, Asst. General Counsel, NMED/OGC. Time estimate: 15 minutes
7. Approval of final draft TMDL Middle Rio Grande Watershed, San Marcial to Angostura. Heidi Henderson, NMED/SWQB. Time estimate: 20 minutes
8. Final review and approval of the State of New Mexico 2010-2012 Integrated Clean Water Act §303 (d)/§305 (b) Report and List of Assessed Surface Waters. Lynette Guevara, NMED/SWQB. Time estimate: 1.5 hours

9. Hearing in re: WQCC 09-13 (R) Proposed Amendments to 20.6.2 NMAC, Dairy Rules. Adolfo Mendez, Asst. General Counsel and Chuck Noble, Asst. General Counsel, NMED/OGC; Dalva Moellenberg, Esq. and T. J. Trujillo, Esq., Gallagher & Kennedy, appearing for DIGCE; Bruce Frederick, Esq., NMELC, appearing for Amigos Bravos, Caballo Concerned Citizens, Food and Water Watch and the Sierra Club, Rio Grande Chapter. Time estimate: multiple days
10. Other business
11. Next meeting: May 11, 2010, 9:00 a.m., State Capitol Room 317, 490 Old Santa Fe Trail, Santa Fe, NM.
12. Adjournment

RECEIVED

2010 MAR 25 PM 1 23 WATER QUALITY CONTROL COMMISSION

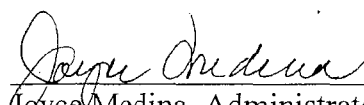


In the Matter of I & W's Request for Order
Hearing and Answer to Compliance Order
NMEMNRD/OCD

WQCC 10-03 (A)

CORRECTED NOTICE OF DOCKETING

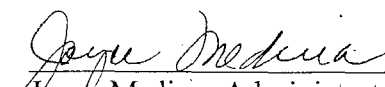
The above-captioned case is hereby docketed pursuant to the New Mexico Water Quality Control Act, NMSA 1978, §§74-6-1 through 74-6-17, and the Adjudicatory Procedures for the Water Quality Control Commission §20.1.3.200 NMAC. The Administrator received the Request for Order Hearing and Answer to Compliance Order on March 10, 2010.



Joyce Medina, Administrator
Water Quality Control Commission
P. O. Box 5469
Santa Fe, New Mexico 87502
(505) 827-2425 (P)
(505) 827-0310 (F)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Corrected Notice of Docketing was sent by first class mail to Gail MacQuesten, Asst. General Counsel, NM Energy, Minerals and Natural Resources Department, 1220 St. Francis Drive, Chino Building, Oil Conservation Division, Santa Fe, New Mexico 87505; Zachary Shandler, Asst. Atty. General, P. O. Box 1508, Santa Fe, New Mexico 87504; and to Thomas M. Hnasko, Esq. and Gary W. Larson, Esq., Hinkle Law Firm, P. O. Box 2068, Santa Fe, NM 87504-2068, this 24th day of March, 2010.



Joyce Medina, Administrator

New Mexico Energy, Minerals and Natural Resources Department

Bill Richardson
Governor

Jon Goldstein
Cabinet Secretary

Jim Noel
Deputy Cabinet Secretary

Mark Fesmire
Division Director
Oil Conservation Division



March 3, 2010

Joyce Medina, Administrator
Water Quality Control Commission
NM Environment Department
Runnels Building Rm. N2150
1190 St. Francis Drive
Santa Fe, NM 87505

Re: I&W, Inc.'s Request for Order Hearing and Answer to Compliance Order

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Please let me know if a hearing is scheduled.

Sincerely,


Gail MacQuesten,
OCD Attorney
505 476-3451

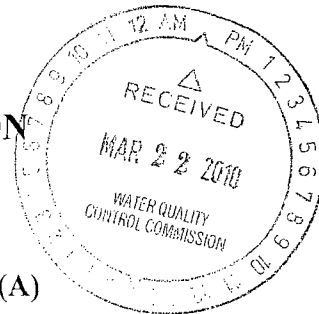
Cc, w/o attachments: Thomas M. Hnasko and Gary W. Larson,
Attorneys for I&W, Inc.



RECEIVED

STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION

2010 MAR 23 PM 1 23

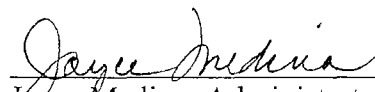


In the Matter of I & W's Request for Order
Hearing and Answer to Compliance Order
NMEMNRD/OCD

WQCC 10-02 (A)

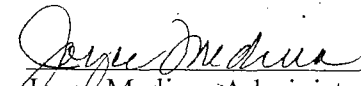
NOTICE OF DOCKETING

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Joyce Medina, Administrator
Water Quality Control Commission
P. O. Box 5469
Santa Fe, New Mexico 87502
(505) 827-2425 (P)
(505) 827-0310 (F)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Docketing was sent by first class mail to Gail MacQuesten, Asst. General Counsel, NM Energy, Minerals and Natural Resources Department, 1220 St. Francis Drive, Chino Building, Oil Conservation Division, Santa Fe, New Mexico 87505; Zachary Shandler, Asst. Atty. General, P. O. Box 1508, Santa Fe, New Mexico 87504; and to Thomas M. Hnasko, Esq. and Gary W. Larson, Esq., Hinkle Law Firm, P. O. Box 2068, Santa Fe, NM 87504-2068, this 22nd day of March, 2010.


Joyce Medina, Administrator

STATE OF NEW MEXICO
OIL CONSERVATION DIVISION

RECEIVED OCD
2010 FEB 19 A 11: 23

IN THE MATTER OF

I&W INC.,
Respondent.

**REQUEST FOR ORDER HEARING
AND ANSWER TO COMPLIANCE ORDER**

Pursuant to NMSA 1978, Section 74-6-10(G), Respondent I&W, Inc. ("I&W") submits this Request for Order Hearing and Answer to the Compliance Order:

I. FINDINGS OF FACT

Parties:

1. The allegations in Paragraph 1 assert legal conclusions to which no response is required.
2. Responding to Paragraph 2, I&W admits that it is a corporation organized under the laws of the state of New Mexico. I&W denies that since 1995 it has operated a facility under OCD discharge permit BW-006, or that it continues to operate any facility within the geographical locations asserted in Paragraph 2.
3. I&W denies the allegations in Paragraph 3.
4. I&W admits the allegations in Paragraphs 4, 8 through 10, 13, and 15.
5. I&W is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 5 through 7, 11, 16, 17, 19, 21, 24 through 26, and 27.
6. Responding to Paragraph 12, I&W denies that OCD purportedly "recommended" that I&W cease producing brine from the Eugenie #1 well. I&W is without knowledge or

information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 12.

7. Responding to Paragraph 14, I&W admits that the OCD sent a “Brine Well Information Request” to I&W, but is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations concerning OCD’s purported basis for submitting such a request, or whether the cover letter allegedly sent by the OCD to operators required completion of the form by a particular date. I&W denies that it failed to respond to OCD’s request.

8. Responding to Paragraph 18, I&W denies that OCD “urged” it to cease truck operations above the existing cavern and develop an adequate contingency plan for emergency response.

9. I&W denies the allegations set forth in Paragraph 20 and 23. With respect to the allegations set forth in Paragraph 23, I&W was evicted from its site and was compelled to cease trucking operations.

10. Answering Paragraph 22, I&W denies the allegation that OCD, during the period April 1 through April 27, 2009, made a “request” that I&W cease all operations. On the contrary, OCD staff sought to compel I&W to cease all operations. I&W is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 22.

11. I&W denies the allegations in Paragraph 28.

Claim 1: Alleged Failure to Provide a Subsidence Monitoring Program and a Health and Safety Plan

12. I&W admits the allegations in Paragraphs 29, 31, 32, 34, 35, 39, and 44.

13. I&W is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 30, 33, 36 through 38, and 43.

14. Responding to Paragraph 40, I&W admits that OCD provided a letter to I&W counsel on or about April 23, 2009, but denies the characterization concerning monitoring data that I&W allegedly “previously promised” to provide to the OCD.

15. Responding to Paragraph 41, I&W admits that it transmitted to the OCD subsidence data describing a total of twenty-two (22) monitoring events beginning on May 9, 2008, and ending on April 13, 2009. I&W denies OCD’s characterization of that data.

16. I&W denies the allegations in Paragraph 42.

17. Responding to Paragraph 45, I&W admits that, on November 20, 2009, the OCD sent I&W a letter referencing the 2008 permit renewal condition to provide subsidence reports, including a schedule for long-term surveying and a health and safety plan. I&W denies the accuracy of OCD’s purported citation of authority for requiring certain information as part of a closure plan.

18. Responding to Paragraph 46, I&W admits that OCD’s November 20, 2009 letter demanded the posting of financial assurance in the form of a surety bond. I&W denies that BW-006 requires the submission of additional security, for the reason that BW-006 expired by its own terms.

19. Responding to Paragraph 47, I&W admits that, after the OCD approved the closure plan for BW-006, I&W undertook no further post-closure activities. I&W denies the remaining allegations in Paragraph 47.

Claim 2: Alleged Failure to Provide a Capacity/Cavity Configuration and Subsidence Survey

20. I&W admits the allegations in Paragraph 48 through 50, 54, 57 through 59, 62 and 64.

21. Responding to Paragraph 51, I&W admits that, on October 11, 1996, the OCD ordered I&W to cease brine production. I&W is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 51.

22. Responding to Paragraph 52, I&W admits that it completed a sonar survey of the Eugenie #1 brine extraction well on or about October 18, 1996. I&W also admits that it did not perform a sonar test of the Eugenie #2 on that date. I&W is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 52.

23. I&W is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 53 and 56.

24. Responding to Paragraph 55, I&W admits that, on or about August 30, 2007, it retained a third-party to conduct a sonar logging on the Eugenie #1 well. I&W is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 55.

25. Responding to Paragraph 60, I&W admits that, on or about August 1, 2008, the OCD sent to I&W a "Brine Well Information Request Form." I&W denies that it did not respond to the OCD's request for information.

26. Responding to Paragraph 61, I&W admits that OCD provided I&W's counsel with a letter dated April 23, 2009, in which OCD stated its belief that I&W could not demonstrate the integrity of the brine well system. I&W denies the remaining allegations in that Paragraph, including any implication that I&W has violated any condition or term of its permit. I&W affirmatively states that the OCD required I&W to plug and abandon its wells, thereby

preventing a determination of the integrity of the brine well system and further compliance with any applicable permit conditions.

27. I&W denies the allegations in Paragraphs 63 and 65.

Claim 3: Alleged Failure to Provide Ground Water Monitoring

28. I&W admits the allegations in Paragraphs 66 and 67.

29. Responding to Paragraph 68, I&W admits that the “Brine Well Information Request Form”, sent by the OCD on August 1, 2008, requested information concerning ground water monitoring. I&W denies the remaining allegations in Paragraph 68.

30. Responding to Paragraph 69, I&W admits that it provided ground water analyses in April 2000, September 2001, and December 2002. I&W denies any implication in that Paragraph that the analyses were insufficient for any purpose.

Claim 4: Alleged Failure to Provide Injection/Production Volumes

31. I&W is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 70.

32. I&W denies the allegations in Paragraphs 71 and 72.

33. Responding to Paragraph 73, I&W admits that it shut in the Eugenie #1 well on July 22, 2008. I&W denies the remaining allegations in Paragraph 73.

Claim 5: Alleged Failure to Provide Analysis of Brine and Fresh Water

34. I&W admits the allegations in Paragraphs 74 and 75.

35. I&W is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 76.

36. Responding to Paragraph 77, I&W admits that the “Brine Well Information Request Form” submitted by the OCD requested whether the operator had submitted all reports to the OCD. I&W denies the remaining allegations in Paragraph 77.

II. APPLICABLE STATUTES AND RULES

37. Paragraphs 1 through 11 of Section II set forth legal conclusions to which no response is required. However, I&W denies that the Water Quality Act and/or the Water Quality Control Commission Regulations permit the OCD to issue a Compliance Order purporting to impose significant penalties.

III. CONCLUSIONS OF LAW

38. The purported legal conclusions set forth in Paragraph 1 through 9 of Section III do not require a response. However, to the extent that a response is permitted, I&W admits the allegations in Paragraph 1 and denies the allegations in Paragraphs 2 through 9.

IV. COMPLIANCE ORDER

39. The matters set forth in Section IV do not require a response, but are barred by the denials and affirmative defenses set forth in this Response.

V. CIVIL PENALTY

40. The matters set forth in Paragraphs 1 and 2 of Section V do not require a response from I&W. However, I&W affirmatively states that the OCD’s purported imposition of a penalty through a Compliance Order is *ultra vires* and contrary to law. Additionally, I&W has not violated any requirement, regulation, or water quality standard, or any condition of a permit issued pursuant to the Water Quality Act.

VI. RIGHT TO ANSWER AND REQUEST A HEARING

41. Pursuant to NMSA 1978, Section 74-6-10(G), I&W hereby requests a hearing to contest this Order.

VII. FINALITY OF ORDER

42. The matters set forth in Section VII do not require a response from I&W.

VIII. SETTLEMENT CONFERENCE

43. Concurrently with the hearing proceedings requested by I&W to contest the validity of the Order, I&W requests a settlement conference consistent with the provisions and objectives of the Water Quality Act.

FIRST AFFIRMATIVE DEFENSE

Section 74-6-10 of the Water Quality Act does not allow the assessment of penalties that the OCD seeks against I&W through the issuance of a Compliance Order.

SECOND AFFIRMATIVE DEFENSE

The OCD's issuance of a Compliance Order, which seeks to impose substantial civil penalties, is *ultra vires* and contrary to the Clean Water Act because I&W has not violated any requirement, regulation or water quality standard adopted pursuant to the Water Quality Act, nor has I&W violated any condition of a permit issued pursuant to the Act

THIRD AFFIRMATIVE DEFENSE

As a result of the appropriate plugging and abandonment of wells, as approved by the OCD, I&W's performance of further investigative, remedial, or corrective action is barred by the doctrine of frustration of purpose and/or commercial impracticability.

FOURTH AFFIRMATIVE DEFENSE

As a result of the OCD's demand for and approval of the plugging and abandonment of the I&W wells, the OCD's claims in this proceeding are barred by the doctrine of estoppel.

FIFTH AFFIRMATIVE DEFENSE

The OCD's claim for substantial civil penalties constitutes a claim for punitive damages that is barred by the due process clause of the United State Constitution, Amendment V and Amendment ,XIV, § 31, and the Constitution of the State of New Mexico, Article II, § 18, because New Mexico law governing punitive damages does not provide adequate procedural protections against arbitrary or capricious awards of such damages.

SIXTH AFFIRMATIVE DEFENSE

OCD's claim for substantial civil penalties is a claim for punitive damages that is barred by the due process clause of the United States Constitution, Amendment V and Amendment XIV, § 18, and the due process clause of the Constitution of the State of New Mexico, Article II, § 18, because punitive damages, as awarded in New Mexico may impermissibly discriminate against corporate defendants, including I&W.

SEVENTH AFFIRMATIVE DEFENSE

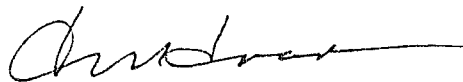
The OCD's purported imposition of civil penalties that are so extreme constitutes the imposition of criminal liability, without the protections of due process of law afforded by the United States and New Mexico Constitutions.

EIGHTH AFFIRMATIVE DEFENSE

I&W presently has insufficient knowledge or information sufficient to form a belief as to whether it has or may have additional, as yet unstated, affirmative defenses available to it and reserves the right to assert additional affirmative defenses in the event they would be appropriate.

Respectfully submitted,

HINKLE, HENSLEY, SHANOR &
MARTIN, L.L.P.



Thomas M. Hnasko
Gary W. Larson
Post Office Box 2068
Santa Fe, New Mexico 87504-2068
(505) 982-4554

Counsel for I&W, Inc.

CERTIFICATE OF SERVICE

I certify that on this 19th day of February 2010, I served a true and correct copy of the foregoing *Request for Order Hearing and Answer to Compliance Order* by first-class mail to the following:

Mark Fesmire, P.E.
Director, Oil Conservation Division
1220 South St. Francis Drive
Santa Fe, NM 87505



STATE OF NEW MEXICO
OIL CONSERVATION DIVISION

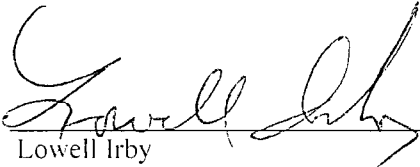
IN THE MATTER OF
I&W, INC.

Respondents.

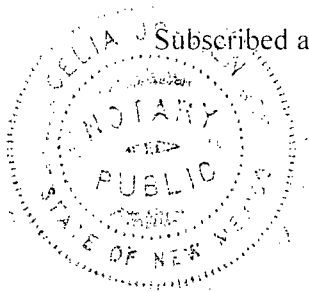
VERIFICATION

EDDY COUNTY)
) §
STATE OF NEW MEXICO)

My name is Lowell Irby. I am the President of I&W, Inc. ("I&W"). I have reviewed I&W's Request for Order Hearing and Answer to Compliance Order and the information contained therein is, to the best of my knowledge and belief, true and correct.

By: 
Lowell Irby

Subscribed and sworn to before me this 16th day of February, 2010, by Lowell Irby.



By: 
Notary Public

My Commission Expires: 7-17-11

Verification

Chavez, Carl J, EMNRD

From: Chavez, Carl J, EMNRD
Sent: Thursday, October 09, 2008 3:46 PM
To: Price, Wayne, EMNRD
Cc: Sanchez, Daniel J., EMNRD
Subject: Preliminary BW C&E Evaluation
Attachments: Class III Well C-E Preliminary Assessment10-9-2008.xls; BW Form 2008_08_01_08 final.doc

FYI, please find attached the preliminary operator responses to the OCD questionnaire or information request subsequent to the BW-5 collapse and this preliminary OCD C&E evaluation..

Permit Conditions:

In general, none of the operators have geophysical or subsidence monitoring on site. Many of the operators stopped reporting several years back; however, some of the operators continued to report on a quarterly basis, but not consistently. None of them provided annual reports. Sonar testing was conducted by only one operator ((I&W) at BW-6 near Carlsbad (voluntarily shut down on 7/21/2008 after BW-5 collapse) before the collapse of BW-5. One operator (Gandy) attempted sonar testing after the BW-5 collapse at 2 BWs, but had trouble completing the sonars because the sonar w/ centralizer got stuck in BW-22 (Quality Brine- Tatum) and they couldn't pull the tubing out of the casing in BW-4 (Eidson/Wasserhund at Buckeye).

Of the respondents, only 2 BWs have their casing shoe set into the salt: BW-27 (4 ft.) and BW-30 (55 ft.). The rest have casing shoes set just above the salt where fresh water is currently being injected into the top of the salt cavern and brine is being extracted through the tubing. Consequently, most of the operators are actively expanding the size of the salt cavern roofs.

BWs that appear to be at least 4 active brine wells that have reached their life expectancy (see attachment) based on Wayne's total volume of brine produced algorithm and the depth to the casing shoe (see table below):

BW-2	Basic Energy Services, LLC	Eunice #1	30-025-26884	N 32 25' 47" W 103 8' 58"	(UL-O)34-21S-37E	I
BW-5	JIMS WATER SERVICE	JIMS WATER SERVICE (State 24 Well #1) - LOCO HILLS	30-015-02036	N 32.73199 W 104.12791	(UL-J)24-18S-28E	E
BW-6	I & W INC	I & W EUGENIE Well # 001 BRINE -CARLSBAD	30-015-22574	N 32.38813 W 104.21817	(UL-M)17-22S-27E	E
BW-12	The Permian Corporation	SCURLOCK/PERMIAN -HOBBS (Saline #1 Well)	30-025-12803	N 32.69825 W 103.21043	(UL-M)36-18S-37E	I
BW-25	Basic Energy Services, LLC.	SALADO BRINE WELL NO. 2	30-025-32394	N 32.12093 W 103.18388	(UL-A) 20-25S-37E	I
BW-27	MESQUITE SWD (Dunaway No. 2), INC	Mesquite-CARLSBAD	30-015-28084	N 32.38160 W104.16210	(UL-F) 23-22S-27E	E
	Collapsed 7/16/08					
	Voluntary Shut-Down 7/21/2008					

In conclusion, I am working to get information forms from Jims Water Service, Zia Transports, Key Energy Services and Loco Hills to complete the C&E evaluation. It appears that the OCD may have some Notice of Violations with fines on the reporting (annual reports) and lack of sonar testing and subsidence monitoring by most of the operators. Wayne, you

verbally informed me today to begin work on the NOV for BW-5 and this could also be used and modified for any of the other operators that OCD decides to issue NOVs to. Most importantly, based on your (Wayne's) Algorithm (last question on attached OCD info. form) and brine well life expectancy, the OCD may want to proceed to issue notice for the PA of BWs 2, 12, 25 and 27 or immediately require the operators to conduct sonar testing to evaluate salt cavern size. Also, the general rule-of-thumb (50 ft overburden for 178,100 bbl. of produced brine) for produced brine and overburden coincides with your algorithm. Note that many of the operators (info. form completed by Eddy Seay) did not appear to use accurate total brine production figures; consequently, the OCD had to review the records to derive a more accurate total production estimate based on flow rate info. in the files in order to calculate brine well life expectancy.

I'll keep you posted as we receive the final information forms (hopefully by October 20, 2008). Please contact me if you have questions or if we need to have a meeting to discuss penalties, etc. for the NOV.

Carl J. Chavez, CHMM
New Mexico Energy, Minerals & Natural Resources Dept.
Oil Conservation Division, Environmental Bureau
1220 South St. Francis Dr., Santa Fe, New Mexico 87505
Office: (505) 476-3491
Fax: (505) 476-3462
E-mail: CarlJ.Chavez@state.nm.us
Website: <http://www.emnrd.state.nm.us/oed/index.htm>
(Pollution Prevention Guidance is under "Publications")

Chavez, Carl J, EMNRD**From:** Chavez, Carl J, EMNRD**Sent:** Thursday, October 09, 2008 3:46 PM**To:** Price, Wayne, EMNRD**Cc:** Sanchez, Daniel J., EMNRD**Subject:** Preliminary BW C&E Evaluation**Attachments:** Class III Well C-E Preliminary Assessment10-9-2008.xls; BW Form 2008_08_01_08 final.doc

FYI, please find attached the preliminary operator responses to the OCD questionnaire or information request subsequent to the BW-5 collapse and this preliminary OCD C&E evaluation..

Permit Conditions:

In general, none of the operators have geophysical or subsidence monitoring on site. Many of the operators stopped reporting several years back; however, some of the operators continued to report on a quarterly basis, but not consistently. None of them provided annual reports. Sonar testing was conducted by only one operator ((I&W) at BW-6 near Carlsbad (voluntarily shut down on 7/21/2008 after BW-5 collapse) before the collapse of BW-5. One operator (Gandy) attempted sonar testing after the BW-5 collapse at 2 BWs, but had trouble completing the sonars because the sonar w/ centralizer got stuck in BW-22 (Quality Brine- Tatum) and they couldn't pull the tubing out of the casing in BW-4 (Eidson/Wasserhund at Buckeye).

Of the respondents, only 2 BWs have their casing shoe set into the salt: BW-27 (4 ft.) and BW-30 (55 ft.). The rest have casing shoes set just above the salt where fresh water is currently being injected into the top of the salt cavern and brine is being extracted through the tubing. Consequently, most of the operators are actively expanding the size of the salt cavern roofs.

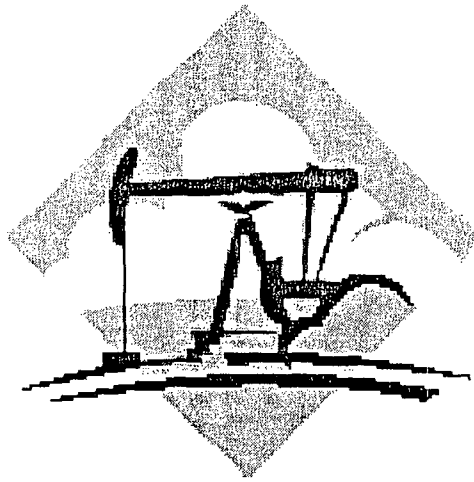
BWs that appear to be at least 4 active brine wells that have reached their life expectancy (see attachment) based on Wayne's total volume of brine produced algorithm and the depth to the casing shoe (see table below):

BW-2	Basic Energy Services, LLC	Eunice #1	30-025-26884	N 32 25' 47" W 103 8' 58"	(UL 21
BW-5	JIMS WATER SERVICE	JIMS WATER SERVICE (State 24 Well #1) -LOCO HILLS	30-015-02036	N 32.73199 W 104.12791	(UI 18
BW-6	I & W INC	I & W EUGENIE Well # 001 BRINE -CARLSBAD	30-015-22574	N 32.38813 W 104.21817	(UL 22
BW-12	The Permian Corporation	SCURLOCK/PERMIAN - HOBBS (Saline #1 Well)	30-025-12803	N 32.69825 W 103.21043	(UL 18
BW-25	Basic Energy Services, LLC.	SALADO BRINE WELL NO. 2	30-025-32394	N 32.12093 W 103.18388	(UI 25
BW-27	MESQUITE SWD (Dunaway No. 2), INC	Mesquite-CARLSBAD	30-015-28084	N 32.38160 W104.16210	(UL 22
	<i>Collapsed 7/16/08</i>				
	<i>Voluntary Shut-Down 7/21/2008</i>				

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I'll keep you posted as we receive the final information forms (hopefully by October 20, 2008). Please contact me if you have questions or if we need to have a meeting to discuss penalties, etc. for the NOV.

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Transmittal Cover Sheets

Oil Conservation Division

1220 S. Saint Francis Drive

Santa Fe, NM 87505

Phone (505) 476-3440 Fax (505) 476-3462

Please Deliver This Fax:

Date: 1-21-10

Pages Including Cover Page: 27

To: Mr. Eugene Ikey, I+W Inc.

Fax: 575 885 8477

From: Gail MacQuisten OGD

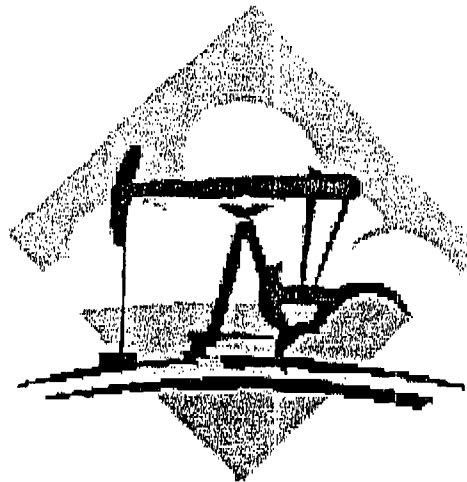
Subject: I+W Inc. compliance order

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TIME : 01/21/2010 15:10
NAME : OIL CONSERVATION DIS
FAX : 505-476-3462
TEL : 505-476-3440
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Transmittal Cover Sheets

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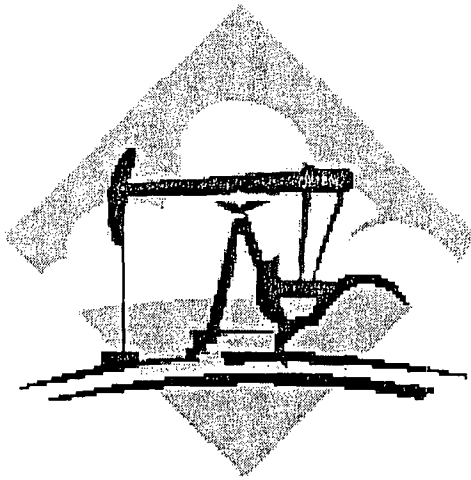
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1220 S. Saint Francis Drive

Santa Fe, NM 87505

Phone (505) 476-3440 Fax (505) 476-3462

Please Deliver This Fax:

Date: 1-21-10

Pages Including Cover Page: 27

To: T. Calder Ezzell Jr. / Lucas M. Williams

Fax: 575 623 9332

From: Gail MacQuistan

Subject: I + W Inc. compliance order

New Mexico Energy, Minerals and Natural Resources Department

Bill Richardson
Governor

Jon Goldstein
Cabinet Secretary

Jim Noel
Deputy Cabinet Secretary

Mark Fesmire
Division Director
Oil Conservation Division



January 21, 2010

Mr. Eugene Irby, Owner
I&W, Inc.
P.O. Box 1685
Carlsbad, NM 88220

Certified Mail No.: 7001 1940 0004 7923 5396

Mr. Eugene Irby, Owner
I&W, Inc.
P.O. Box 98
Loco Hills, NM 88255

Certified Mail No.: 7001 1940 0004 7923 5389

Re: I&W Inc. brine production and water hauling operations in Carlsbad, New Mexico
Discharge Permit BW-006

Dear Mr. Irby:

Enclosed is a compliance order issued to I&W Inc. pursuant to the Water Quality Act.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Fesmire".

Mark Fesmire, PE
Director, Oil Conservation Division



**STATE OF NEW MEXICO
OIL CONSERVATION DIVISION**

IN THE MATTER OF

**I &W INC.,
Respondent.**

COMPLIANCE ORDER

Pursuant to the New Mexico Water Quality Act (“WQA”), Chapter 74, Article 6 NMSA 1978, the Oil Conservation Division (“OCD”) issues this Compliance Order (“Order”) to Respondent I &W, Inc. (“I&W” or “Respondent”).

I. FINDINGS OF FACT

Parties:

1. The OCD is a division of the New Mexico Energy, Minerals and Natural Resources Department, and is the administrative arm of the Oil Conservation Commission (OCC). The OCC is a “constituent agency” of the Water Quality Control Commission (WQCC) under the WQA. NMSA 1978, Section 74-6-2(J)(4). The OCD has express statutory authority to administer the WQA. NMSA 1978, Section 70-2-12(B)(22).

2. I&W is a domestic profit corporation that since 1995 has operated a facility under OCD discharge permit BW-006 (“Facility”). The Facility is located in Units L and M of Section 17, Township 22 South, Range 27 East, NMPM, Eddy County, New Mexico.

Background:

Compliance Order
I & W, Inc.
BW-006
Page 1 of 25

3. The Facility includes trucking operations and a solution mining operation to produce brine sold for use in oil and gas operations.

4. In a solution mining operation to produce brine, a well is drilled into the salt zone. The operator injects fresh water into the salt zone, where it dissolves the salt. The resulting brine is pumped and sold. As the mining process continues, the salt zone dissolves, leaving an underground cavern filled with brine.

5. The Facility first began producing brine in August of 1978, using a single well: the Eugenie #1 (API 30-015-22574). The depth from ground surface to salt observed during the drilling of this well was 456 feet, and casing was set to this depth. The total drilled depth of the hole was 663 feet.

6. In 1979 the operator installed a second well at the Facility: the Eugenie #2 (API 30-015-23031). Casing on the Eugenie #2 was set to 285 feet with tubing advanced to 583 feet. The operator hydraulically fractured the salt zone between the two wells. The Facility then operated as a two-well system, with fresh water introduced down the Eugenie #2 and brine produced from the Eugenie #1.

7. The depth to ground water beneath the Facility is approximately 50 feet.

8. I&W acquired the Facility in 1995, notifying the OCD of the transfer by letter dated August 10, 1995.

9. During a cavern integrity test in November 1999, the Eugenie #2 well, which was being used to inject fresh water, showed brine leakage at the surface. I&W plugged the Eugenie #2 in January 2000.

10. I&W returned to single-well brine production using the Eugenie #1 in June 2000.

11. On July 16, 2008 Jim's Water Service brine well (BW-005) collapsed.
12. On July 18, 2008, two days after the collapse at Jim's Water Service, the OCD recommended to I&W that it cease producing brine from the Eugenie #1 well. The depth to salt at I&W's Facility is similar to the depth to salt at Jim's Water Service, and the production history at the two facilities is similar.
13. On July 22, 2008, I&W shut in the Eugenie #1 well.
14. On August 1, 2008, as part of its review of brine well operations after the collapse at Jim's Water Service, the OCD sent a "Brine Well Information Request" to all brine well operators in New Mexico, including I&W. The four-page form requested information about the operator's brine well(s), including information on well construction, well operations, and monitoring. The cover letter sent with the form required operators to return the completed form by September 5, 2008. I&W did not respond.
15. I&W plugged the Eugenie #1 on October 31, 2008.
16. On November 3, 2008 the Loco Hills Water Disposal Company brine well (BW-021) collapsed. This well had been plugged on June 19, 2008.
17. On January 29, 2009 the OCD increased the area of review for any Application for Permit to Drill to one-half mile from the I&W Facility. Any such application would have to be jointly approved by the OCD office in Santa Fe and the OCD's District II office in Artesia.
18. On March 11, 2009 OCD urged I&W to cease truck operations above the existing cavern and develop an adequate contingency plan incorporating the local

emergency response infrastructure and notification of neighboring property owners who may be adversely affected by a collapse.

19. In March 2009 the OCD hosted a Brine Well Workgroup to discuss potential causes of brine well collapses, and methods for evaluating the potential for brine well collapses. Numerous participants expressed concern that the brine wells at I&W's Facility could or would collapse because they were similar in geology and production life to the two wells that had already collapsed.

20. If the I&W brine wells collapse, fresh water in the overburden will mix with the brine in the salt cavern. Brine produced at the I&W Facility contains approximately 193,000 milligrams/liter (mg/l) chloride according to I&W's January 2006 analysis of brine in the cavern. The maximum concentration of chloride allowed in ground water is 250 mg/l. See 20.6.2.3103.B(1) NMAC. One gallon of brine therefore has the potential to contaminate 772 (193,000/250) gallons of fresh water. Based on the available information, the OCD estimates that the underground cavern at the Facility presently contains 34 million gallons of brine. If the cavern roof fails and the falling overburden displaces the brine upward where it can mix with the overlying fresh ground water, more than 26 billion gallons of water (approximately 80,600 acre-feet) will be contaminated.

21. Because the Facility is located in a developed area of the City of Carlsbad, between two major highways and adjacent to the Carlsbad Irrigation Canal, a church, a feed store and a mobile home park, a collapse has serious potential for injury or loss of life, and property damage.

22. During the period April 1 through April 27, 2009, OCD staff spoke by telephone with I&W and its counsel and met with I&W and its counsel to request that I&W cease all operations at the Facility. The OCD also retained a contractor to provide technical assistance on data review, to survey the site to determine subsidence and tilt rates at the surface, remotely confirm the cavern configuration, make technical recommendations, and establish a continuously operating subsidence monitoring system which might yield warning of imminent or ongoing collapse.

23. On April 27, 2009, I&W agreed to cease trucking operations at the site and allow OCD access to the site to install monitoring equipment.

24. OCD contractors have since conducted a seismic reflection survey to determine the extent of the cavern. The data has been evaluated by independent experts. They interpret the survey to indicate a cavern with lateral dimensions of more than 500 feet by 300 feet, with significant salt removal in the area of Eugenie #1.

25. Independent studies of salt cavern collapses indicate that roof failure is not likely to occur when the ratio of cavern diameter to cavern depth is significantly smaller than 0.67. The ratio of diameter to depth for the cavern at the I&W Facility ranges between 0.66 and 1.10 based on the seismic reflection survey. According to OCD estimates, the cavern that collapsed at Jim's Water Service (BW-005) had a ratio of 1.13, and the cavern that collapsed at Loco Hills Water Disposal Company (BW-021) had a ratio of 0.70.

26. OCD contractors established a surface subsidence monitoring system, which includes installation of surface monitoring points that are surveyed with a theodolite and the installation of surface tiltmeter plates, along with the installation of

continuously monitored subsurface borehole tiltmeters and pressure transducers placed into existing ground water monitor wells. Information from the borehole tiltmeters and pressure transducers is transmitted to an early warning system.

27. The OCD's outside costs for these efforts to date total \$563,420.00. Some costs associated with the monitoring are paid through June 30, 2010. Continued monitoring using the existing subsidence monitoring system and early warning system is expected to cost between \$2,000.00 and \$10,000.00 per month, depending on the level of maintenance and data analysis required.

28. As discussed in more detail below, I&W is in violation of multiple conditions of Discharge Permit BW-006:

- I&W has failed to provide a subsidence monitoring program and a health and safety plan;
- I&W has failed to provide capacity/cavity configuration data along with geologic and engineering information demonstrating the integrity of the solution mining system;
- I&W has failed to maintain a ground water monitoring program;
- I&W has failed to provide production/injection volumes; and
- I&W has failed to provide analysis of the injection fluid and brine.

Claim 1: Failure to Provide a Subsidence Monitoring Program and a Health and Safety Plan

29. The requirement for a subsidence survey first appeared in the 1996 renewal of BW-006, issued April 15, 1996:

“Subsidence Survey: I&W will design and install a series of survey points over the area of the facility and the salt cavern by December 31, 1996 to monitor any future surface subsidence. The OCD will be notified at least 72 hours prior to all testing so that an OCD representative may witness the testing.”

BW-006, Discharge Permit Approval Conditions, Paragraph 7 (1996).

30. OCD records show no evidence that I&W installed subsidence survey points as required by the 1996 renewal.

31. The next renewal of BW-006, issued July 16, 2001, contained the following requirements for subsidence monitoring:

“I&W, Inc. shall submit for OCD approval a method to detect long-term subsidence. Please submit the plan by August 15, 2001.”

BW-006, Discharge Permit Approval Conditions, Paragraph 25 (2001).

32. By letter dated August 17, 2001, the OCD extended the deadline for submittal of the plan until January 31, 2002.

33. OCD records show that I&W did not submit a plan for subsidence detection by the January 31, 2002 deadline.

34. By letter dated December 11, 2007, I&W indicated to the OCD that it intended to set monitoring points in the ground in the next few weeks.

35. The next renewal of BW-006, issued January 24, 2008, is the current Discharge Plan. It contains the following requirements for subsidence monitoring:

“Subsidence Monitoring System: I&W, Inc. shall submit for long-term subsidence, a report displaying all subsidence monitoring stations and monitoring completed to date to address the requirements of the prior discharge plan by June 30, 2008. The report shall summarize and include subsidence tables and graphs to 0.01 ft. A map shall depict the facility and monitoring points to scale with verification of certified surveyor geodetic datums or elevations are properly recorded. The report shall propose a schedule for long-term surveying to ensure public safety subsidence/collapse issues are addressed due to the shallow nature of the brine cavity. The report shall also include: a health and safety plan for alerting the proper authorities, ensuring prompt evacuation of the community, and protection health and safety of the general public.”

BW-006, Discharge Permit Approval Conditions, Paragraph 20(B) (2008).

36. On July 2, 2008, after the due date set by the 2008 renewal, OCD personnel e-mailed I&W regarding the subsidence monitoring requirement.

37. The “Brine Well Information Request Form” the OCD sent to I&W on August 1, 2008 requested information on subsidence monitoring and asked if the operator had submitted all reports to the OCD. I&W did not respond to the OCD’s request for information.

38. On November 4, 2008 OCD personnel e-mailed I&W requiring it to submit a contingency plan, and describing the issues to be included in the plan. According to a subsequent e-mail from the OCD to I&W dated November 17, 2008, it appears that I&W provided some information to the OCD, but the OCD informed I&W that it was insufficient.

39. By letter dated April 9, 2009 the OCD notified counsel for I&W regarding the OCD’s concerns about the lack of subsidence monitoring. The letter included the following demand:

“Cooperate with monitoring. The OCD has been working with I&W to establish a monitoring program for the site, but has not seen proof that the monitoring is in place, and has not received monitoring data. As we have discussed, the OCD’s experience is that weekly or daily monitoring will not provide adequate warning of a collapse. The OCD is working to determine if a real-time monitoring system can be designed that will provide sufficient warning to prevent loss of life or property, and will require I&W’s cooperation in that monitoring program.”

40. A demand letter from OCD to counsel for I&W on April 23, 2009 included a demand that I&W “[p]rovide the monitoring data it has previously promised the OCD.” In addition, the letter put I&W on notice that the OCD considered I&W to be in violation of its permit conditions regarding monitoring:

“Paragraph 20(B) requires I&W to submit a plan for long-term subsidence, including a schedule for long-term surveying to ensure public safety subsidence/collapse issue, a health and safety plan for alerting the proper authorities, ensuring prompt evacuation of the community, and protection of the health and safety of the general public. I&W has not provided the plans required by Paragraph 20(B).

....Paragraph 21(F) also allows the OCD to require installation of subsidence monitoring in order to demonstrate the integrity of the system. The OCD previously required I&W to provide weekly subsidence monitoring; as discussed in my letter of April 9, 2009, I&W has not provided the monitoring data, nor does it appear to have fully implemented subsidence monitoring in the past. Given the probability of a collapse, the OCD is now requiring real-time subsidence monitoring and an early-warning system....”

41. On April 27, 2009, the OCD received an e-mail from I&W containing limited subsidence data, describing a total of 22 monitoring events starting on May 9, 2008 and ending April 13, 2009. The data show no elevation changes to an accuracy of 0.001 feet at the Eugenie #1, the Eugenie #2, or at three established benchmarks.

42. The April 27, 2009 e-mail did not provide the additional information required by the terms of BW-006, such as the proposed schedule for long-term surveying or the health and safety plan.

43. The subsidence survey conducted by OCD’s own contractor between May 6 and September 18, 2009 contradicts the subsidence data provided by I&W. The subsidence survey indicates rates of subsidence and heaving at the surface approaching one inch per year. Review of available information by OCD’s contractor indicates ground movements not inconsistent with a possible catastrophic failure of the cavern roof at some as yet undetermined time in the foreseeable future.

44. A July 2, 2009 demand letter from the OCD to the attorney for I&W, seeking reimbursement of the costs incurred by the OCD, offered I&W the option of

assuming control of and responsibility for the subsidence monitoring system and the early warning system.

45. The November 20, 2009 demand letter from the OCD to I&W specifically referenced the 2008 renewal condition requiring I&W to provide a subsidence report including a schedule for long-term surveying and a health and safety plan. The letter required that information to be submitted as part of a closure plan. As authority for requiring a closure plan including this information, the letter cited BW-006, Discharge Permit Approval Conditions, Paragraph 23, which provides that I&W must submit a closure plan upon the OCD's request, and the following regulations under the Water Quality Act: 20.6.2.3107.A(10) and (11) NMAC (contingency plans and closure plans for discharge permits); 20.6.2.5005 NMAC (closure requirements for brine wells); 20.6.2.5209 NMAC (plugging and abandonment of brine wells); and 20.6.2.5210(B)(17) NMAC (measures necessary to prevent contamination after cessation of operations, including proper closing and post-operational monitoring).

46. In addition, the November 20, 2009 demand letter required I&W to post a financial assurance in the amount of \$1,000,000.00 in the form of a surety bond to provide funding for the continued operation of the subsidence monitoring system and early warning system in the event I&W fails to maintain those systems. BW-006 specifically provides that the OCD may require I&W to provide additional financial assurance. See BW-006, Discharge Permit Approval Conditions, Paragraph 23.

47. To date, I&W has not submitted additional subsidence data, has not taken any action to assume responsibility for subsidence monitoring or the early warning system, has not submitted a contingency/health and safety plan, has not posted the

required financial assurance, and has not reimbursed the OCD for its expenditures to provide the cavern delineation, subsidence monitoring and early warning system that I&W failed to provide.

Claim 2: Failure to Provide a Capacity/Cavity Configuration and Subsidence Survey

48. In its August 10, 1995 letter notifying the OCD that it had acquired the Facility and was assuming the obligations under BW-006, I&W stated that it would “[p]erform a sonar log before the expiration of the active discharge plan on June 19, 1996.”

49. I&W failed to perform the sonar survey by its self-assumed June 19, 1996 deadline.

50. The 1996 permit renewal contained the following requirement:

“Capacity and Cavity Configuration: The capacity and configuration of the salt cavern will be determined by December 31, 1996 by sonar survey or an alternate method approved by the OCD. The OCD will be notified at least 72 hours prior to all testing so that an OCD representative may witness the testing.”

BW-006, Discharge Permit Approval Conditions, Paragraph 6 (1996).

51. During 1995 and 1996 the OCD repeatedly tried to schedule integrity testing and a cavern survey without success. On October 11, 1996, the OCD ordered I&W to cease brine production because of its failure to schedule mechanical integrity tests and a sonar survey.

52. Eight days later, on October 18, 1996, I&W completed a sonar survey of the Eugenie #1, the brine extraction well. The cavern roof appeared to be 135 feet across, but only the uppermost 45 feet of the solution cavern was logged, with a calculated

capacity of less than 31,000 barrels. The logging tool could not be lowered to greater depth due to interbedding. I&W did not perform a sonar test of the Eugenie #2.

53. Although production records are incomplete, historic brine production by October 1996 may have reached 4.5 million barrels. Assuming a 15% salt content by volume in brine, the solution cavern would have been 673,000 barrels. Therefore the area of the salt cavern logged by the sonar survey would represent only a small fraction of the cavern.

54. The 2001 permit renewal referenced receipt of the 1996 survey log. BW-006, Discharge Permit Approval Conditions, Paragraph 25 (2001).

55. On August 30, 2007 a firm under contract to I&W conducted sonar logging on the Eugenie #1. The depth interval that was imaged by that log spanned from 434.7 feet to 473.8 feet below surface and indicated a cavern volume of 47,823 barrels between depths of 444 and 473 feet which at its maximum was approximately 170 feet across.

56. Estimated historic brine production by the time of the 2007 sonar logging was in excess of 5 million barrels, which should have left a cavern with a volume of more than 800,000 barrels. Therefore, the sonar logging in 2007 probably imaged only 6% of the cavern. This is most likely due to an inability to lower the sonar tool any deeper. Total depth on the Eugenie #1 when it was drilled was 663 feet, and records indicate tubing depths during production of at least 587 feet. It appears that only 49 vertical feet were logged, leaving anywhere from 114 to 190 vertical feet of cavern unlogged.

57. The 2008 permit renewal contained the following requirement:

“Capacity/Cavity Configuration and Subsidence Survey: The operator shall provide information on the size and extent of the solution cavern and geologic/engineering data demonstrating that continued brine extraction will not cause surface subsidence, collapse or damage to property, or become a threat to public health and the environment. This information shall be supplied in each annual report. OCD may require the operator to perform additional well surveys, test, and install subsidence monitoring in order to demonstrate the integrity of the system. If the operator cannot demonstrate the integrity of the system to the satisfaction of the Division then the operator may be required to shut-down, close the site and properly plug and abandoned (sic) the well.”

BW-006, Discharge Permit Approval Conditions, Paragraph 21(F)(2008).

58. A separate provision in the 2008 permit renewal provides that the annual report is due on January 31 of each year. BW-006, Discharge Permit Approval Conditions, Paragraph 21(L)(2008).

59. I&W did not file an annual report for 2008, which would have been due January 31, 2009.

60. The “Brine Well Information Request Form” the OCD sent to I&W on August 1, 2008 requested information on sonar logs, cavern configuration (dimensions and volume) and the method or methods used to estimate the cavern size, and asked if the operator had submitted all reports to the OCD. I&W did not respond to the OCD’s request for information.

61. In an April 23, 2009 letter to I&W’s counsel, the OCD put I&W on notice that it considered I&W to be in violation of its permit terms:

“I&W is in violation of Paragraph 21(F) because it cannot demonstrate the integrity of the brine well system. The OCD has outlined its concerns in several telephone conversations with you, at a meeting in your offices on April 6, 2009, in a letter faxed and mailed to you on April 9, 2009, and at a meeting in Carlsbad on April 9, 2009 hosted by New Mexico Homeland Security and Emergency Management. To summarize, based on the age of I&W’s operations, the amount of brine produced, the well

configuration, and the limited sonar data currently available, the OCD concludes that the cavern under the wells is large with a broad roof, and is relatively close to the surface. I&W's operation shares these features with the two brine wells that suffered catastrophic collapses last year: Jim's Water Service (BW-5) and Loco Hills Water Disposal (BW-12). I&W's operation has additional factors that make it vulnerable to collapse: fresh water infiltrating the ground from the unlined irrigation ditch that runs adjacent to the facility may be dissolving the salt zone from the top, and vibrations from the truck yard currently being operated over the cavern could trigger a collapse."

62. The April 23, 2009 letter went on to state, "I&W cannot demonstrate that its brine well system has integrity both because of the circumstances summarized above and because it is in violation of other provisions of its permit," specifically citing the requirement in Paragraph 21(F) that I&W provide information in each annual report on the size and extent of the solution cavern and geologic/engineering data demonstrating that continued brine extraction will not be a hazard, and requiring, and the requirements in Paragraph 21(F) and Paragraph 20(B) for subsidence monitoring.

63. Because of I&W's failure to provide information on the configuration of the cavern, and its failure to demonstrate that the system had integrity, the OCD hired contractors to delineate the cavern. The OCD's demand letter of July 20, 2009, seeking reimbursement for those costs, offered I&W the opportunity to take over the evaluation and remediation efforts.

64. The OCD's November 20, 2009 demand letter to I&W reiterated that "I&W failed to comply with the terms of its permit that required it to provide information necessary to determine the size and extent of the cavern and the integrity of the system," and that the OCD had to take the actions I&W failed to take. As discussed above, the letter further required that I&W to submit a closure plan for the facility.

65. Delineation of the cavern is necessary to develop an appropriate closure plan. By the express terms of BW-006 the OCD may require submittal of a closure plan. See BW-006, Discharge Permit Approval Conditions, Paragraph 23. Proper monitoring and closure are required under Water Quality Control Commission rules. See 20.26.2.3107.A(10) and (11) NMAC (contingency plans and closure plans for discharge permits); 20.6.2.5005 NMAC (closure requirements for brine wells); 20.6.2.5209 NMAC (plugging and abandonment of brine wells); and 20.6.2.5210(B)(17) NMAC (measures necessary to prevent contamination after cessation of operations, including proper closing and post-operational monitoring).

Claim 3: Failure to Provide Ground Water Monitoring

66. The 2001 renewal of BW-006 was the first renewal after the discovery of brine leakage at the surface of the Eugenie #1. The 2001 renewal contained the following provision:

Groundwater Monitoring Program: OCD requires I&W Inc. to maintain a groundwater monitoring program to provide detection for any excursion of formation fluids outside of the extraction area. The following will be initially required:

A. Collect annual water samples from the two on-site monitor wells. These wells shall be purged, sampled and analyzed for General chemistry, total dissolved solids, pH (EPA method CFR 40 136.3) and New Mexico Water Quality Control Commission (WQCC) metals, all using EPA approved methods and quality assurance/quality control (QA/QC) procedures. Submit the analytical results in the annual report. All sampling shall be witnessed by OCD....

BW-006, Discharge Permit Approval Conditions, Paragraph 8 (2001).

67. The 2008 renewal of BW-006 contains the same requirements at Paragraph 20.A.

68. The “Brine Well Information Request Form” the OCD sent to I&W on August 1, 2008 requested information on ground water monitoring, and asked if the operator had submitted all reports to the OCD. I&W did not respond to the OCD’s request for information.

69. To date, I&W has provided ground water analysis information on only three occasions: April 2000, September 2001 and December 2002.

Claim 4: Failure to Provide Injection/Production Volumes.

70. Injection and production volumes can be used to calculate the amount of salt dissolved, and the size of the resulting salt cavern.

71. BW-006 requires the operator to report injection and production volumes. See BW-006, Discharge Permit Approval Conditions, Paragraph 6 (2001) and BW-006, Discharge Permit Approval Conditions, Paragraph 21.G (2008).

72. The “Brine Well Information Request Form” the OCD sent to I&W on August 1, 2008 required the operator to provide information on injection and production, including the total volume of fresh water injected into the brine well to date, the total volume of brine water produced to date, and how the operator determined those volumes. The form also asked the operator if it had submitted all reports to the OCD. I&W did not respond to that request.

73. I&W’s most recent report of injection and production volumes is for the first quarter of 2007. I&W did not shut in the Eugenie #1 well until July 22, 2008.

Claim 5: Failure to Provide Analysis of Brine and Fresh Water

74. In its August 10, 1995 letter notifying the OCD that it had acquired the Facility and was assuming the obligations under BW-006, I&W stated that it would “submit annual fresh and brine water analysis.”

75. The permit renewals for BW-006 in 2001 and 2008 require the operator to provide an analysis of the injection fluid and brine with each annual report. The analysis is for General Chemistry (Method 40 CFR 136.3) using EPA methods. See BW-006, Discharge Permit Approval Conditions, Paragraph 7 (2001) and BW-006, Discharge Permit Approval Conditions, Paragraph 21.H (2008).

76. OCD files contain information on analysis of brine water from the I&W Facility on the following occasions after I&W’s August 10, 1995 acquisition of the Facility: 10/6/95, 1/24/01, 12/4/01, and 1/25/06. OCD files contain information on analysis of fresh water injected at the I&W Facility on the following occasions after I&W’s August 10, 1995 acquisition of the Facility: 10/9/95, 1/24/01 and 12/4/01.

77. The “Brine Well Information Request Form” the OCD sent to I&W on August 1, 2008 asked if the operator had submitted all reports to the OCD. I&W did not respond to the OCD’s request for information.

II. APPLICABLE STATUTES AND RULES

1. The Environmental Protection Agency granted primacy to the WQCC, 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 147.1601. In the grant of primacy, the Environmental Protection Agency cited and incorporated by reference New Mexico’s Water Quality Act.

2. The Environmental Protection Agency classifies brine wells as Class III underground injection control wells. 40 CFR 144.6(c)(3).
3. The WQCC enacted regulations specifically governing brine wells as Class III wells. See 20.6.2.5002 NMAC.
4. The WQCC delegated authority over Class III brine wells to the OCD. The OCD is the administrative arm of the OCC, a constituent agency of the WQCC under NMSA 1978, Section 74-6-2(J)(4).
5. Operation of a Class III well must be pursuant to a discharge permit. See 20.6.2.5101.B NMAC.
6. The WQA provides that the WQCC may require persons to obtain discharge permits from a constituent agency. NMSA 1978, Section 74-6-5.
7. When a constituent agency determines that a person violated or is violating a condition of a permit issued pursuant to that WQA, 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).
8. Under the express terms of Respondent's discharge permit, and under WQA rules, the OCD may require Respondent to file a facility closure plan. BW-006, Discharge Permit Approval Conditions, Paragraph 23 (2008). 20.6.2.3107.A(10) and (11) NMAC (contingency plans and closure plans for discharge permits); 20.6.2.5005 NMAC (closure requirements for brine wells); 20.6.2.5209 NMAC (plugging and abandonment of brine wells); and 20.6.2.5210(B)(17) NMAC (measures necessary to

prevent contamination after cessation of operations, including proper closing and post-operational monitoring).

9. Under the express terms of Respondent's discharge permit, and under WQA rules, the OCD may require Respondent to post financial assurances. BW-006, Discharge Permit Approval Conditions, Paragraph 23 (2008). 20.6.2.5210(B)(17) NMAC and 20.6.2.3107.A(10) NMAC.

10. 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 for each day of continued noncompliance with the compliance order. NMSA 1978, Section 74-6-10(F)(1).

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

III. CONCLUSIONS OF LAW

1. I&W is a "person" as defined in NMSA 1978, Section 74-6-2(I).

2. I&W's operation of the Facility is subject to the provisions of the WQA, the rules adopted pursuant to the WQA, and the conditions of BW-006.

3. I&W is in violation of discharge permit BW-006 because it has failed to provide:

- A report displaying all subsidence monitoring stations and monitoring completed, summarizing all subsidence tables and graphs to 0.01 feet, a map depicting the facility and monitoring points to scale with verification of certified surveyor geodetic datums or elevations;
- A proposed schedule for long-term surveying to ensure public safety subsidence/collapse issues; and

- A health and safety plan for alerting the proper authorities, ensuring prompt evacuation of the community, and protection health and safety of the general public.

4. I&W is in violation of discharge permit BW-006 because it has failed to provide:

- Information on the size and extent of the solution cavern and geologic/engineering data demonstrating that continued brine extraction will not cause surface subsidence, collapse or damage to property, or become a threat to public health and the environment; and
- Subsidence monitoring.

5. I&W is in violation of discharge permit BW-006 because it has failed to provide the ground water monitoring program as required, including the submittal of annual analytical results.

6. I&W is in violation of discharge permit BW-006 because it has failed to provide injection/production volumes.

7. I&W is in violation of discharge permit BW-006 because it has failed to provide analyses of brine and fresh water.

8. OCD has authority under the WQA rules as the conditions of BW-006 agreed to by I&W to require I&W to close the site and to impose additional requirements on I&W to prevent a collapse or damages to property or public health.

9. The OCD may issue a compliance order requiring corrective actions under NMSA 1978, Section 74-6-10(A)(1).

IV. COMPLIANCE ORDER

Based upon the foregoing findings and conclusions, I&W is hereby ordered to take the following corrective actions by April 22, 2010:

Compliance Order
I & W, Inc.
BW-006
Page 20 of 25

1. Submit the following information to the OCD as required by BW-006:
 - a subsidence monitoring system report, as required by Paragraph 20.B of discharge permit BW-006 (2008);
 - a health and safety plan, as required by Paragraph 20.B of discharge permit BW-006 (2008);
 - Capacity/cavern configuration information, as required by Paragraph 21.F of discharge permit BW-006 (2008);
 - Ground water monitoring analytical reports, as required by Paragraph 20.A of discharge permit BW-006 (2008);
 - Injection/production volume reports as required by Paragraph 21.6 of discharge permit BW-006 (2008); and
 - Analyses of brine and fresh water, as required by Paragraph 21.H of discharge permit BW-006 (2008).
2. Reimburse the OCD for the \$563,420.00 in costs incurred to establish and monitor the survey system and early warning system.
3. Post a financial assurance in the amount of \$1,000,000 in the form of a surety bond to provide funding for the continued operation of the subsidence monitoring system and early warning system.
4. Submit a Facility closure plan to prevent exceeding the standards of Section 20.6.2.3103 NMAC or the presence of a toxic pollutant in ground water in the event of a cavern collapse. The Facility closure plan shall include, at a minimum:
 - A report on closure, plugging and abandonment measures already taken for the Eugenie #1 and the Eugenie #2;
 - A plan for assuming financial responsibility for the monitoring system put in place by the OCD and continued monitoring by an independent third party acceptable to the OCD;
 - A plan for assuming financial responsibility for the early warning system put in place by the OCD and continued operation of the early warning system by an independent third party acceptable to the OCD;
 - Run-on/run-off controls to prevent water ponding over the area of the brine well cavern;
 - A maintenance plan for the run-on/run-off controls;
 - A maintenance plan, including security of all monitoring benchmarks, survey points and utilities that support the early warning system;

- An annual post-closure report;
- A proposal for closing the facility providing for either the safe backfilling of the salt cavern in place, or for the acquisition of surrounding properties which may be adversely affected along with long-term site security and monitoring;
- Additional financial assurance to support the proposal for closing the facility; and
- A contingency plan to remediate ground water that will be impacted by a collapse of the cavern.

V. CIVIL PENALTY

1. NMSA 1978, Section 74-6-10(C) authorizes assessment of a civil penalty of up to \$15,000 per day for each violation of NMSA 1978, Section 74-6-5, any regulation adopted pursuant to that section, or any permit issued pursuant to that section. Section 74-6-10(C) also authorizes assessment of a civil penalty of up to \$10,000 per day for each violation of a provision of the WQA other than the provisions in Section 74-6-5 or of a regulation or water quality standard adopted pursuant to the WQA.

2. The OCD hereby assesses a penalty of \$2,637,000.00 against I&W for I&W's failure to comply with the terms of BW-006 requiring submittal of a subsidence monitoring system report, a health and safety plan, capacity/cavern configuration information, ground water monitoring analytical reports, injection/production volume reports, and brine and fresh water analyses. In calculating the penalty amount, the OCD considered: the number of violations; the serious nature of the violations; the potential risk to public health, welfare, environment and property posed by the violations; the length of time I&W has been out of compliance; the willfulness of the violations; and the economic benefit to I&W of the non-compliance.

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 Water Quality Control Commission, and serve a copy on the OCD. See 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 defense 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 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 Water Quality Control Commission within 30 days of receipt of Compliance Order

I & W, Inc.

BW-006

Page 23 of 25

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 Water Quality Control Commission encourages settlement consistent with the provisions and objectives of the WQA and applicable rules. Settlement discussions do not extend the thirty (30) day deadline for filing the Respondent's Request for Order Hearing, or alter the deadlines for compliance with this Order. See 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 Water Quality Control Commission must approve a stipulated final order.

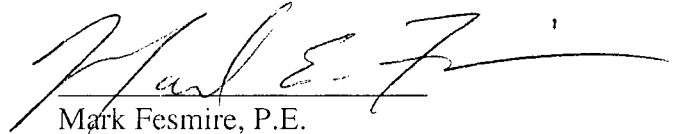
3. To explore the possibility of settlement in this matter, contact Glenn von Gonten, Environmental Bureau, New Mexico Oil Conservation Division, 1220 S. St. Francis Drive, Santa Fe, NM 87505, (505) 476-3488.

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

IX. TERMINATION

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 Water Quality Control Commission.

1/21/10
Date


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

HINKLE, HENSLEY, SHANOR & MARTIN, L.L.P.

Attorneys at Law
400 Penn Plaza, Suite 700
P.O. Box 10
Roswell, New Mexico 88202
(575) 622-6510
Fax: (575) 623-9332

FAX COVER SHEET**DATE:** January 20, 2010**PLEASE DELIVER THE FOLLOWING PAGE(S) TO:****TO:** Mark Fesmire**Fax No.:** (505) 476-3462**FROM:** Lucas M. Williams, Esq.**RE:** *Your Letter of November 20, 2010***TOTAL NUMBER OF PAGES, INCLUDING COVER SHEET:** *Three (3)***ORIGINAL OF THIS DOCUMENT TO FOLLOW BY U.S. MAIL:** ☐ Yes ☐ No**IF YOU DO NOT RECEIVE ALL THE PAGES, PLEASE CALL US BACK AS SOON AS POSSIBLE AT (575) 622-6510.****CLIENT/MATTER #:** 0910080**TIME:** _____ a.m./p.m.**TELECOMMUNICATOR:** Ashley**NOTES:**

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**HINKLE, HENSLEY, SHANOR & MARTIN, L.L.P.**

ATTORNEYS AT LAW

400 PENN PLAZA, SUITE 700

PO BOX 10

ROSWELL, NEW MEXICO 88202

575-622-6510 (FAX) 575-623-9332

WRITER:

Lucas M. Williams, Esq.
lwilliams@hinklelawfirm.com

January 20, 2010

Mark Fesmire
Oil Conservation Division
1220 South St. Francis Drive
Santa Fe, New Mexico 87505
(505) 476-3440 telephone
(505) 476-3462 facsimile

VIA FACSIMILE

Re: Your Letter of November 20, 2010

Dear Mr. Fesmire:

Contrary to your letter of November 20, 2010, I&W, Inc. ("I&W") does not operate a brine production and water hauling facility under permit no. BW-006. As you know, and as reflected in your letter, I&W voluntarily plugged and abandoned ("P&Aed") the subject well under threat of litigation by the New Mexico Oil Conservation Division ("OCD"). On or about August 6, 2008, Wayne Price formally approved the proposed plan to P&A the subject well. (Exhibit A.) Pursuant to and relying upon that approval, I&W P&Aed the well. On or about January 8, 2009, the OCD unconditionally approved the P&A. (Exhibit B.)

I&W does not operate any wells pursuant to BW-006 nor does it conduct any operations of any sort on the subject property. The OCD acknowledges as much in your letter: "I&W subsequently ceased operations at the site."

OCD's Demand for Reimbursement. Your letter states that "[t]he OCD requires I&W to reimburse it for its costs." The OCD does not have the power to make that requirement, especially under these facts.

Closure Plan. The OCD approved I&W's closure plan on or about August 6, 2008, and approved its execution unconditionally on or about January 8, 2009.

Financial Assurances. I&W does not possess a current discharge permit and has previously, with OCD approval, closed the subject well. No further financial assurance is necessary or appropriate.

PO BOX 10
ROSWELL, NEW MEXICO 88202
(575) 622-6510
FAX (575) 623-9332

PO BOX 3580
MIDLAND, TEXAS 79702
(432) 683-4691
FAX (432) 683-6518

PO BOX 2068
SANTA FE, NEW MEXICO 87504
(505) 982-4554
FAX (505) 982-8823

Page 2 of 2
January 20, 2010

If you have any questions about this or any other matter, please feel free to contact me.

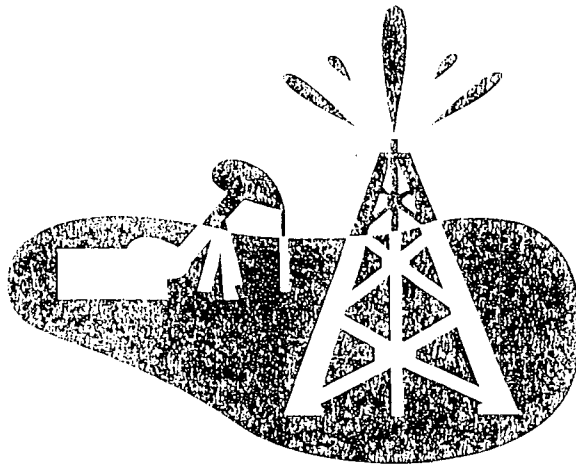
Very truly yours,

HINKLE, HENSLEY, SHANOR & MARTIN, L.L.P.

A handwritten signature in black ink, appearing to read 'L. Williams', with a long horizontal flourish extending to the right.

Lucas M. Williams, Esq.

CC: Client



TRANSMITTAL COVER SHEET

OIL CONSERVATION DIVISION
1220 S. ST. FRANCIS DRIVE
SANTA FE, NM 87505
(505) 476-3460
(505) 476-3462 (Fax)

PLEASE DELIVER THIS FAX:

TO: T. Calder Ezell, Jr. 575-623-9332

FROM: Mark Fesmire ltds

DATE: November 20, 2009

PAGES: 13

SUBJECT: November 20, 2009 Demand Letter

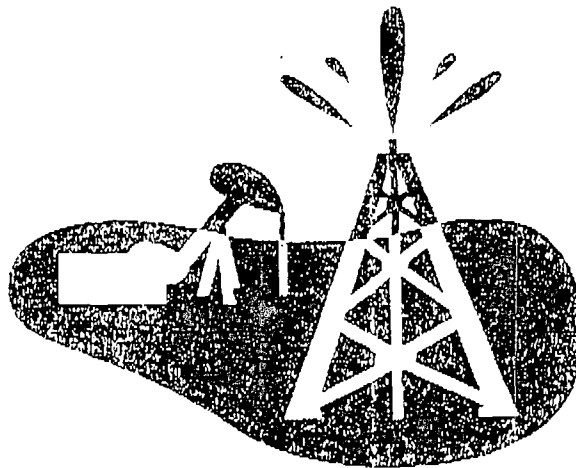
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TRANSMITTAL COVER SHEET

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SANTA FE, NM 87505
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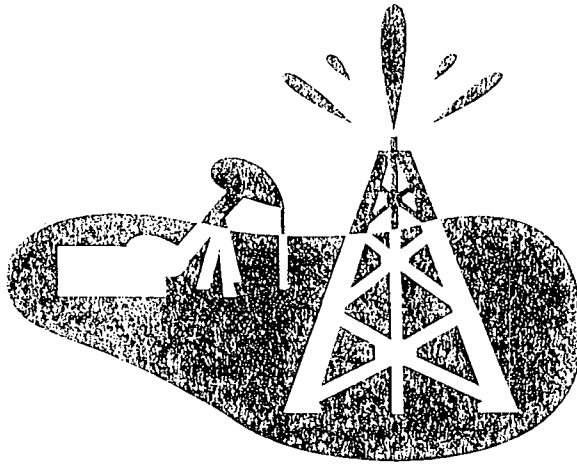
H. Calder Ezell, Jr. 575-623-9332

FROM:

Mark Fesmire 1 tds

DATE:

November 20 2009



TRANSMITTAL COVER SHEET

OIL CONSERVATION DIVISION
1220 S. ST. FRANCIS DRIVE
SANTA FE, NM 87505
(505) 476-3460
(505) 476-3462 (Fax)

PLEASE DELIVER THIS FAX:

575-885-8477

TO:

Eugene Torby - LEW Inc.

FROM:

Mark Fesmire / tds

DATE:

November 20, 2009

PAGES:

13

SUBJECT:

November 20, 2009 Demand Letter

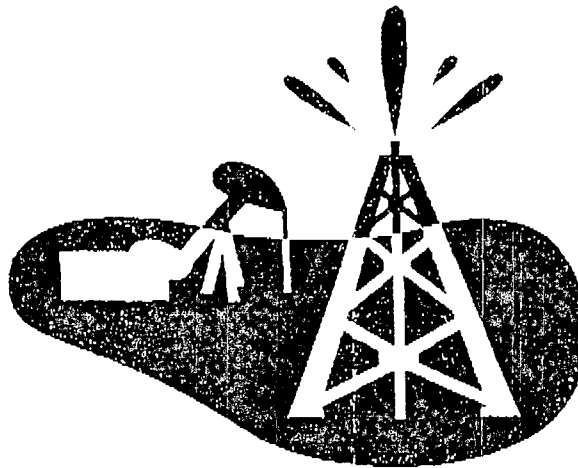
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FAX : 505-476-3462
TEL : 505-476-3440
SER.# : BROH8J847603

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OIL CONSERVATION DIVISION
1220 S. ST. FRANCIS DRIVE
SANTA FE, NM 87505
(505) 476-3460
(505) 476-3462 (Fax)

PLEASE DELIVER THIS FAX:

575-885-8477

TO:

Eugene Taby L&W Inc.

FROM:

Mark Fesmire / L&W

DATE:

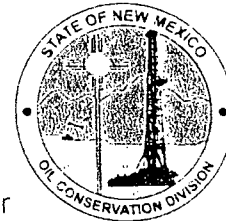
November 20, 2009

New Mexico Energy, Minerals and Natural Resources Department

Bill Richardson
Governor

Joanna Prukop
Cabinet Secretary

Mark Fesmire
Division Director
Oil Conservation Division



November 20, 2009

Mr. Eugene Irby, Owner
I&W, Inc.
P.O. Box 1685
Carlsbad, NM 88220

Certified Mail No. 7002 0510 0003 5125 1747

Re: I&W Inc. brine production and water hauling operations in Carlsbad, New Mexico
Discharge Permit BW-006, API #30-015-22574
Section 17, Township 22 South, Range 27 East

Dear Mr. Irby:

I&W, Inc. (I&W) is in violation of discharge permit BW-006 for its brine production and water hauling facility in Carlsbad, New Mexico. The Oil Conservation Division (OCD) approved the renewal of I&W's permit BW-006 in February 2008, with conditions including the requirement that I&W provide certain reports. I&W did not submit the following items:

- The 2008 annual report, due January 31, 2009, which would have included:
 - Information to determine the size and extent of the solution cavern caused by I&W's commercial brine operation
 - Geologic information demonstrating the integrity of the system
- A long-term subsidence report, due June 30, 2008, which would have included:
 - I&W's schedule for long-term surveying to address subsidence/collapse issues
 - I&W's health and safety plan for subsidence/collapse to alert the proper authorities, ensure prompt evacuation of the community, and protect the health and safety of the general public.

As a result of I&W's failure to comply with the conditions of its discharge permit, the OCD took actions to delineate the cavern caused by I&W's operations, establish a

system to monitor for subsidence activity, and establish an early warning system to alert the public in the event of a collapse.

Therefore, the OCD requires I&W to complete the following actions within 60 days of the date of this letter:

1. Reimburse the OCD for \$563,420.00 in costs incurred to date to delineate the cavern created by the extraction of brine sold by I&W, provide subsidence monitoring, and establish an early warning system.
2. Submit an acceptable closure/post-closure plan for I&W's Carlsbad facility in accordance with Permit Approval Conditions 20.B, 21.F, 21.L, and 23 and pursuant to 20.6.2.3107.A(10) and (11) NMAC, 20.6.2.5005 NMAC, and 20.6.5209 NMAC. The plan must include, at a minimum:
 - A plan for assuming financial responsibility for the maintenance of the early warning system established by the OCD, or the establishment of an equivalent system; and,
 - A plan for assuming financial responsibility for the maintenance of the subsidence monitoring system established by the OCD, or the establishment of an equivalent system.
3. Post \$1,000,000.00 in additional financial assurance that will allow the OCD to maintain the operation of the subsidence monitoring system and the early warning system in the event I&W fails to maintain those systems.

If I&W cannot complete these actions within 60 days but has made significant progress and has acted in good faith, then upon request the OCD may grant an extension of time for compliance. If I&W does not meet the compliance deadline or obtain an extension of that deadline, then OCD will take action to modify I&W's permit to include specific closure terms, including reimbursement of the OCD and the posting of additional financial assurances. See NMSA 1978, Section 74-6-5 regarding permit modification. The OCD will enforce the terms of I&W's permit through a compliance order, and may seek to impose penalties for I&W's failure to comply with that compliance order or the terms of BW-006. See NMSA 1978, Section 74-6-10. The OCD may also seek legal remedies outside the Water Quality Act. See NMSA 1978, Section 74-6-13.

Background

I&W holds discharge permit BW-006 to operate a brine well facility and water hauling operation in Carlsbad, New Mexico. The facility is located on private property in a developed area of the city of Carlsbad, at the intersection of two busy highways and adjacent to the Carlsbad Irrigation District ditch that serves farmers in the southern portion of the state. Neighboring properties include a church, a feed store and a mobile home park.

The OCD approved the renewal of BW-006 in February 2008. Conditions imposed on the renewal included the following:

"The operator shall provide information on the size and extent of the solution cavern and geologic/engineering data demonstrating that continued brine extraction will not cause surface subsidence, collapse or damage to property, or become a threat to public health and the environment. This information shall be supplied in each annual report. OCD may require the operator to perform additional well surveys, test, and install subsidence monitoring in order to demonstrate the integrity of the system. If the operator cannot demonstrate the integrity of the system to the satisfaction of the Division then the operator may be required to shut-down, close the site and properly plug and abandoned (sic) the well."

BW-006, Discharge Permit Approval Conditions, Paragraph 21(F). In addition, the approval conditions included in the permit renewal required I&W to submit a long-term subsidence report by June 30, 2008, with a proposed

"schedule for long-term surveying to ensure public safety subsidence/collapse issues are addressed due to the shallow nature of the brine cavity. The report shall also include: a health and safety plan for alerting the proper authorities, ensuring prompt evacuation of the community, and protection health and safety of the general public."

BW-006, Discharge Permit Approval Conditions, Paragraph 20(B). BW-006 also provides that the OCD may require a closure plan and additional financial assurances. BW-006, Discharge Permit Approval Conditions, Paragraph 23.

I&W did not submit its annual report for 2008, and did not provide information that would allow the OCD to determine the size and extent of the solution cavern or the integrity of the system. I&W did not submit the required long-term subsidence report, schedule for long-term surveying, and health and safety plan that were due June 30, 2008.

In 2008, New Mexico suffered two catastrophic brine well collapses. Each collapse happened suddenly, leaving a sinkhole several hundred feet in diameter and at least one hundred feet deep. These wells were located in oil and gas production areas away from residences or other development. The collapses did not result in injury or loss of life, but did cause damage to the immediate location, loss of the operator's equipment and, in one case, the closure of a nearby road. Information arising from these collapses caused the OCD to request action at I&W's facility.

On July 16, 2008, the brine well at Jim's Water Service collapsed. The OCD became concerned about the potential for collapse at I&W's facility, given its similar geologic setting and age, and because it is located within a populated area. The OCD requested that I&W shut in its brine operations. I&W shut down its brine operations, and plugged its one remaining brine well in October 2008. It continued trucking operations at the facility.

On November 3, 2008, the brine well at the Loco Hills Disposal Facility collapsed. The OCD continued its review of brine operations in New Mexico. On March 11, 2009, the OCD asked I&W to terminate its operations at the facility and to submit a contingency plan.

The OCD hosted a working group of brine well experts on March 26-27, 2009, and the workgroup's concerns quickly focused on the I&W facility. After the workgroup meeting, the OCD again requested that I&W cease operations. The OCD outlined its concerns to I&W in several telephone calls, at a meeting on April 6, 2009, in a letter faxed and mailed on April 9, 2009, and at a meeting in Carlsbad on April 9, 2009 hosted by the New Mexico Department of Homeland Security and Emergency Management. Finally, in a letter to I&W's counsel dated April 23, 2009, the OCD stated:

"Given that I&W's continued operations may trigger a collapse, I&W has not complied with its permit requirements for monitoring and has not been willing to cease operations so that an early-warning system can be installed and operated. OCD has no option but to pursue whatever courses are available to preserve public safety to the best of its ability."

The letter further advised that "although installation and maintenance of monitoring systems are I&W's responsibility under the permit, due to the exigent circumstances the OCD will take the necessary actions and seek reimbursement from I&W at a later time."

I&W subsequently ceased operations at the site. The OCD hired a contractor to install a subsidence monitoring system and an early warning system, and to delineate the cavern to determine its size and extent.

Reimbursement

I&W failed to comply with the terms of its permit that required it to provide information necessary to determine the size and extent of the cavern and the integrity of the system, and to provide a contingency plan for the protection of the public in the event of a collapse. To protect public health and safety, the OCD had to take the actions I&W failed to take. The OCD hired a contractor to delineate the cavern, establish a subsidence monitoring system and establish an early warning system. Costs to date are \$563,420.00. Copies of the invoices are attached.

The OCD requires I&W to reimburse it for its costs.

Closure Plan

As discussed above, I&W's current discharge permit provides that I&W must submit a closure plan upon OCD's request. BW-006, Discharge Permit Approval Conditions, Paragraph 23. The discharge permit also specifically requires I&W to provide long-term surveying and a health and safety plan, which would be essential components of a closure plan. Proper monitoring and closure are required under Water Quality Control Commission rules. See 20.6.2.3107(10) and (11) NMAC (contingency plans and closure plans for discharge permits); 20.6.2.5005 NMAC (closure requirements for brine

wells); 20.6.2.5209 NMAC (plugging and abandonment of brine wells); and 20.6.2.5210(B)(17) NMAC (measures necessary to prevent contamination after cessation of operations, including proper closing and post-operational monitoring).

The OCD requires I&W to submit a closure/post-closure plan meeting the terms of its discharge permit and the Water Quality Control Commission rules. Given the danger of collapse, and the location of the facility in a populated area, the OCD requires that the closure plan address maintenance of a subsidence monitoring system and an early warning system. I&W may make arrangements to assume financial responsibility for the existing systems, or may propose to establish equivalent systems.

The OCD suggests that I&W work with the OCD staff in the preparation of the closure plan.

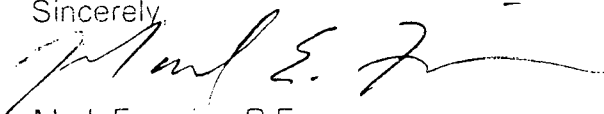
Financial Assurances

As discussed above, I&W's current discharge permit provides that the OCD may require I&W to provide additional financial assurances. BW-006, Discharge Permit Approval Conditions, Paragraph 23. The Water Quality Control Commission rules allow for financial assurances for closure. See 20.6.2.5210(B)(17) NMAC and 20.6.2.3107.A(10) NMAC.

The OCD requires I&W to post an additional financial assurance of \$1,000,000.00 in the form of a surety bond to provide funding for the continued operation of the subsidence monitoring system and the early warning system in the event I&W fails to maintain those systems. Additional financial assurance may be required in the future, to assure compliance with the terms of I&W's closure plan.

We look forward to your prompt response.

Sincerely,




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

Encl: Invoices

CC: T. Calder Ezell, Jr., Attorney for I&W, Inc.
Hinkle, Hensley, Shanor & Martin, LLP
P.O. Box 10
Roswell, NM 88202

ORACLE

New Window | Help | Customize Page | 

Vouchers for a Payment

Back To Payment Inquiry

Bank Name: Bank of America Master Warrant
Pymnt Ref ID: 1001719205

Bank Account #: 004276144466
Accounting Date: 10/14/2009

Pay Cycle: DAILY Seq Num: 903
Payment Date: 10/14/2009

Vendor Name: RESPEC, INC.
Days Outstanding: 2

Address: 5971 JEFFERSON NE STE 101
Payment Clear Date: 10/16/2009

ALBUQUERQUE NM 87109 USA
Reconcile Date: 10/19/2009
Value Date: 10/14/2009

Payment Amount: 250,000.00 USD
Payment Method: CHK

Description:

Business Unit		Voucher ID Seq		Advice Date		Invoice Number		Gross Paid Amount		Paid Amount Currency		Discount Taken		Late Charge		Source	
52100	00043310	1		08/28/2009		INV-0809-007		250,000.00		250,000.00	USD					Accounts Payab	



Invoice
August 28, 2009

To:
Oil Conservation Division
Attn: Jim Griswold
1220 South St. Francis Drive
Santa Fe NM 87505

Remit Payment To:
RESPEC
Attn: Accounts Receivable
5971 Jefferson NE
Albuquerque NM 87109
(505) 263-2661
(505) 263-0040 (FAX)

Contract Number:
Purchase Order No. 52100-0000016823
RESPEC Project Number: 01336.0003

Invoice Date: 08/25/2009
Payment Terms: Net 30
Invoice No. INV-0809-007

Consulting Services

\$233,918.13

Continued surface subsidence Monitoring and brine
cavern delineation by seismic inflection survey at
I & W Inc. Facility in Carlsbad NM

Tax 6.875%

\$16,081.87

TOTAL DUE THIS INVOICE

\$250,000.00

Approved By

David E. White
Treasurer
RESPEC

Invoice
USAF Facility
Cairdco, MA
Our file No. 1356 1

Vendor No: 30700589-5
Contract ID: 80-305-00-0337747

AE SPE1 rc
Purchase Order # 62100 0001010275

Item	Quantity	Unit	Description	Unit Price	Total Price
0001	252.50	Hour	Principal	\$113.00	\$28,532.50
0002	203.00	Hour	Senior Scientist	\$25.00	\$5,075.00
0003	308.00	Hour	Project Scientist/Engineer	\$80.00	\$24,640.00
0005	121.00	Hour	Field Technician II	\$55.00	\$6,655.00
0008	17.25	Hour	Administrator	\$40.00	\$690.00
0058	15.50	Each	Per Diem / Overnight	\$115.00	\$1,772.50
0059	2.50	Each	Partial Per Diem	\$100.00	\$250.00
0060	3,355.67	Mile	Vehicle Mileage	\$0.585	\$1,962.85
			Airfares, parking, taxis, misc	\$2,713.84	\$2,713.84
			Misc. supplies	\$483.05	\$483.05
			Kcel Energy	\$350.52	\$350.52
			EZ Rentals	\$237.08	\$237.08
			Basic Energy	\$275.22	\$275.22
			Plateau Telecommunications	\$70.75	\$70.75
			Madron's Services Inc	\$2,372.68	\$2,372.68
			Bay Geophysical Inc	\$141,446.25	\$141,446.25
			Bay Geophysical Inc	\$4,620.00	\$4,620.00
			Subtotal		\$239,259.35
			NMGRF	6.8750%	\$16,451.18
			Total Costs		\$255,710.53
			Amount Withheld Oil		-\$5,741.13
			TOTAL DUE		\$250,000.00

ORACLE

File Edit View Window Help Customize Page

New Window | Help | Customize Page |

Vouchers for a Payment

Bank Name: Bank of America Master Warrant
Bank Account #: 001276144400
Pay Cycle: DAILY Seq Num: 852
Vendor Name: RESPEC, INC.
Address: 5971 JEFFERSON NE STE 101

Back To Payment Inquiry
Pymnt Ref ID: 10016155505
Accounting Date: 08/03/2009
Payment Date: 08/03/2009
Days Outstanding: 4
Payment Clear Date:
Reconcile Date:
Value Date: 08/03/2009

ALBUQUERQUE NM 87109 USA
Payment Amount: 647,950.81 USD
Payment Method: CHK
Description:

Business Unit	Voucher ID	Advice Seq	Advice Date	Invoice Number	Gross Paid Amount	Paid Amount	Currency	Discount Taken	Late Charge	Source
52100	00040502	1	06/30/2009	INV-06009-069	334,530.81	334,530.81	USD			Accounts Payab
52100	00040501	1	06/30/2009	INV-06009-068	129,810.00	129,810.00	USD			Accounts Payab
52100	00040500	1	06/30/2009	INV-06009-070	183,610.00	183,610.00	USD			Accounts Payab



Invoice

Bill To:

Oil & Gas Division
Attn: Mr. George E.
220 South St. Third Floor
Spartan, NM 87505

Remit Payment To:

RESPEC
Attn: Mr. George E.
675 Highway 88, Suite 100
Albuquerque, NM 87106
505-262-1828 or 505-262-1829 FAX

Contract Number:

Purchase Order No. 52100-0000018323

RESPEC Project Number: 07380002

Invoice Date: 6/30/2006

Payment Terms: NET 30

Invoice No. INV-0609-070

1. Consulting Services

\$172,000.00

Acquisition and installation of early warning and monitoring systems for
I&W Inc. facility in Carlsbad, NM

Final billing to close out Purchase Order 52100-0000018323

2. Tax 6.7500%

\$11,610.00

3. Total Due This Invoice

\$183,610.00

David E. Withee

ORACLE

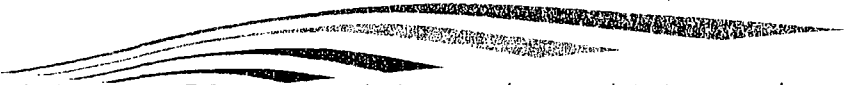
Vouchers For a Payment

Bank Name: Bank of America Master Warrant
Bank Account #: 004276144465
Pay Cycle: DAILY Seq Num: 852
Vendor Name: RESPEC, INC.
Address: 5971 JEFFERSON NE STE 101

Back To Payment Inquiry
Pymnt Ref ID: 1001615505
Accounting Date: 08/03/2009
Payment Date: 08/03/2009
Days Outstanding: 4
Payment Clear Date:
Reconcile Date:
Value Date: 08/03/2009

Payment Amount: 647,950.81 USD
Description:
Payment Method: CHK

Business Unit		Voucher ID	Seq	Advice	Invoice	Date	Invoice Number	Gross Paid Amount	Paid Amount	Currency	Discount Taken	Late Charge	Source
52100	00040502	1	06/30/2009	INV-0609-069				334,530.81	334,530.81	USD			Accounts Payab
52100	00040501	1	06/30/2009	INV-0609-068				129,810.00	129,810.00	USD			Accounts Payab
52100	00040500	1	06/30/2009	INV-0609-070				183,610.00	183,610.00	USD			Accounts Payab



New Mexico Energy, Minerals and Natural Resources Department

Bill Richardson
Governor

Joanna Prukop
Cabinet Secretary

Office of the Secretary

COPY

August 27, 2009

Mr. Bayless E. Irby
PO Box 98
Loco Hills, NM 88255

Dear Mr. Irby:

I am in receipt of your letter dated August 19, 2009 making inquiry of the Oil Conservation Division (OCD) as to why I&W, Inc. should repay money expended by OCD to try to ameliorate the issues created by I&W's operation of its brine wells. I have been dealing with Attorney T. Calder Ezell, Jr. on these issues relative to I&W, Inc. If I&W continues to be represented by Mr. Ezell I will forward a response to him. If not, I need confirmation in writing that he is no longer representing I&W, Inc. in this matter so that I do not violate the Rules of Professional Responsibility by communicating with a represented entity directly rather than through its attorney. Thank you for your cooperation.

Sincerely,



C. Brian James
Assistant General Counsel

Cc: T. Calder Ezell, Jr.





P.O. BOX 98
LOCO HILLS, NEW MEXICO 88255

August 19, 2009

Oil Conservation Division
1220 South Street Francis Drive
Santa Fe, NM 87505

Dear Sirs:

We have received your demand for repayment letter. We do not believe that we owe this invoice. Please explain why you think that I & W, Inc. owe this.

Sincerely,

A handwritten signature in cursive script, appearing to read 'Bayless E. Irby', is written over the typed name.

Bayless E. Irby
General Manager

RECEIVED OCD
2009 AUG 24 AM 11:28

COPY

New Mexico Energy, Minerals and Natural Resources Department

Bill Richardson
Governor

Joanna Prukop
Cabinet Secretary

Mark Fesmire
Division Director
Oil Conservation Division



July 24, 2009

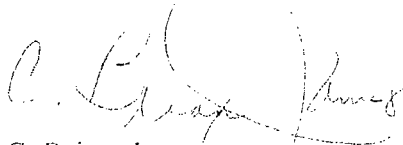
T. Calder Ezell, Jr., Esq.
PO Box 10
Roswell, NM 88202-0010

RE: I & W, Inc. demand for repayment- brine well BW-6

Dear Mr. Ezell:

In the event that you found the earlier transmittal confusing due to the billing attachments, I am writing to confirm the appropriate amount for which OCD is requesting reimbursement. Totaling the adjusted invoices, the amount requested is \$313,420.00. If you look at the backup documentation for the invoices the totals on the backup documentation are higher than the amount requested by OCD for reimbursement. The discrepancy between the backup documents and the actual approved to pay bill resulted from OCD staff reviewing the bills and having downward adjustments made thereto by the contractor for various reasons. As always please feel free to make any additional inquiry if you have any questions. Thank you for your cooperation.

Sincerely,


C. Brian James
Assistant General Counsel



COPY

New Mexico Energy, Minerals and Natural Resources Department

Bill Richardson
Governor

Joanna Prukop
Cabinet Secretary

Mark Fesmire
Division Director
Oil Conservation Division



July 20, 2009

T. Calder Ezell, Jr., Esq.
PO Box 10
Roswell, New Mexico 88202-0010

RE: I & W, Inc. demand for repayment- brine well BW-6

Dear Mr. Ezell:

Enclosed please find an invoice representing the financial expenditures advanced, to date, on behalf of your client I&W, Inc.(I&W), by the Department of Energy, Minerals, and Natural Resources, Oil Conservation Division (OCD). Additionally I will be forwarding to your attention a digital copy of the report from the expert's hired by OCD, RESPEC, to help address the situation created by I&W's operation of its brine well in Carlsbad. The report contains more specific information as to the efforts expended on behalf of I&W and indeed the report itself is a portion of the costs for which reimbursement is hereby demanded.

OCD asserts this demand based upon facts as have now been confirmed relative to the nuisance created by I&W operating its brine well in Carlsbad as well as violation(s) of its brine well permit from OCD. Please feel free to call if you have questions about the invoice provided or the services represented by that invoice. Additionally if I&W would like to assume control of the necessary monitoring, evaluation and remediation efforts at their site in Carlsbad, OCD once again extends that option to I&W. I don't know if taking over the monitoring, evaluation and remediation efforts at their site will save I&W any money but at least they would enjoy direct control over the balance of the monitoring, evaluation and remediation process that is now underway.

Please have your client forward a check in the proper amount made payable to EMNRD-OCD. In the seemingly unlikely event that I&W, or its agents, do not acknowledge responsibility for the problem they created and will not provide prompt payment please so advise so that OCD can evaluate its response to that decision. Thank you Calder, keep them on the fairway.

Sincerely,

A handwritten signature in dark ink, appearing to read "C. Brian James".

C. Brian James
Assistant General Counsel

A handwritten mark or signature in dark ink, possibly a stylized "X" or a signature.



Invoice

RECEIVED OOD

Bill To:

Oil Conservation Division
Attn: Jim Griswold
1220 South St. Francis Drive
Santa Fe, NM 87505

Remit Payment To: A 9:17

RESPEC
Attn: Accounts Receivable
5971 Jefferson, NE, Suite 101

Albuquerque, NM 87109
(505) 268-2661, (505) 268-0040 (FAX)

Contract Number :		Invoice Date :	6/30/2009
Purchase Order No.	52100-0000018490	Payment Terms :	NET 30
RESPEC Project Number :	01886.0001	Invoice No.	INV-0609-068

- | | | |
|----|--|--------------|
| 1. | <u>Consulting Services</u> | \$121,601.87 |
| | Review, develop and evaluate matters relating to mitigation of potential brine well collapse at I&W, Inc. facility in Carlsbad, NM
Final billing to close out Purchase Order 52100-0000018490 | |
| 2. | <u>Tax</u> 6.7500% | \$8,208.13 |
| 3. | <u>Total Due This Invoice</u> | \$129,810.00 |

A handwritten signature in dark ink, appearing to read "David E. Withee", is written over a horizontal line.

Approved by:
David E. Withee

Invoice
I & W Facility
Carlsbad NM
Our file No: 1886.1

Vendor No: 0000059915
Contract ID: 80-805-00-03377AF

RE/SPEC Inc.
Purchase Order # 52100-0000018490

Item	Quantity	Unit	Description	Unit Price	Total Price
0001	885.50	Hour	Principal	\$113.00	\$100,061.50
0002	172.75	Hour	Senior Scientist	\$85.00	\$14,683.75
0003	185.00	Hour	Project Scientist/Engineer	\$80.00	\$14,800.00
0005	26.00	Hour	Field Technician II	\$55.00	\$1,430.00
0008	68.50	Hour	Administrator	\$40.00	\$2,740.00
0058	17.00	Each	Per Diem / Overnight	\$115.00	\$1,955.00
0059	2.00	Each	Partial Per Diem	\$100.00	\$200.00
0060	2,609.00	Mile	Vehicle Mileage	\$0.585	\$1,526.27
			Airfare		\$288.45
			Taxi		\$20.35
			Federal Express		\$185.61
			Supplies		\$4.06
			Alb. Reprographics		\$28.18
			Subtotal		\$137,923.17
			Amount Written Off		- \$16,321.30
			Subtotal		\$121,601.87
			NMGRT	6.7500%	\$8,208.13
			Total Costs		\$129,810.00
			TOTAL DUE		\$129,810.00



RECEIVED OGD

Invoice

2009 JUL 20 A 9:17

Bill To:

Oil Conservation Division
Attn: Jim Griswold
1220 South St. Francis Drive
Santa Fe, NM 87505

Remit Payment To:

RESPEC
Attn: Accounts Receivable
5971 Jefferson, NE, Suite 101

Albuquerque, NM 87109
(505) 268-2661, (505) 268-0040 (FAX)

Contract Number :

Purchase Order No. 52100-0000018823

RESPEC Project Number : 01886.0002

Invoice Date : 6/30/2009

Payment Terms : NET 30

Invoice No. INV-0609-070

1. Consulting Services

\$172,000.00

Acquisition and installation of early warning and monitoring systems for
I&W Inc. facility in Carlsbad, NM
Final billing to close out Purchase Order 52100-0000018823

2. Tax 6.7500%

\$11,610.00

3. Total Due This Invoice

\$183,610.00

A handwritten signature in black ink, reading "David E. Withee". The signature is written in a cursive style with a large, stylized 'D' and 'W'.

Approved by:
David E. Withee

Invoice
I & W Facility
Carlsbad, NM
Our file No: 1886.2

Vendor No: 0000059915
Contract ID: 80-805-00-03377AF

RE/SPEC Inc.
Purchase Order # 52100-0000018823

Item	Quantity	Unit	Description	Unit Price	Total Price
0002	318.25	Hour	Senior Scientist	\$85.00	\$27,051.25
0003	493.50	Hour	Project Scientist/Engineer	\$80.00	\$39,480.00
0005	151.00	Hour	Field Technician II	\$55.00	\$8,305.00
0008	17.50	Hour	Administrator	\$40.00	\$700.00
0058	50.50	Each	Per Diem / Overnight	\$115.00	\$5,807.50
0059	10.00	Each	Partial Per Diem	\$100.00	\$1,000.00
0060	5,261.00	Mile	Vehicle Mileage	\$0.585	\$3,077.69
			Airfares, parking, taxis	\$1,692.63	\$1,692.63
			Misc. supplies	\$1,832.34	\$1,832.34
			Mobile Mini - trailer rental	\$1,498.52	\$1,498.52
			Applied Geomechanics-piezometer	\$57,366.99	\$57,366.99
			Holman's	\$37,333.74	\$37,333.74
			Taylor Water Well Service	\$3,950.10	\$3,950.10
			Plateau Telecommunications	\$176.23	\$176.23
			Budwine Service Electric	\$7,602.94	\$7,602.94
			Subtotal		\$196,874.93
			Amount Written Off		<u>-\$24,874.93</u>
			Subtotal		\$172,000.00
			NMGRT	6.7500%	\$11,610.00
			Total Costs		\$183,610.00
			TOTAL DUE		\$183,610.00

mobile mini inc.

7420 S Kyrene Rd Suite # 101
 Tempe, AZ 85283
 Phone: (800) 456-1751
 Fax: (480) 894-1505
 www.mobilemini.com

Invoice
 June 16, 2009
 For Pickup/Delivery Inquiries.
 Please call (800) 950-6464

11931 Trans Park Drive
 El Paso TX 79927

Customer Billing Address:
 Respec
 5971 Jefferson NE
 Ste 101,
 ALBUQUERQUE NM 87109

Container Location:
 Respec
 Respec
 3005 S Canal St
 CARLSBAD NM 88220

Remit Payment To:
 Mobile Mini I, Inc.
 P O BOX 79149
 PHOENIX AZ 85062-9149

Rental Period from June 11, 2009 to July 8, 2009

Page: 1	Account Number: 21114251	Invoice Number: 121084805	Contract Number: 121005888	Invoice Date: June 16, 2009	Due Date: July 6, 2009
------------	-----------------------------	------------------------------	-------------------------------	--------------------------------	---------------------------

Purchase Order: 8x10 carlsbad nm

Container/Item	Quantity	Price/Rate	Amount
10' Open bay office SN: AS10UYW0059 MODEL: 10W 268566	1.00	\$190.00 Rental	\$190.00
Fuel Surcharge Pick Up MODEL: PUFSCG	1.00	\$15.00 Misc.	\$15.00
Pick up MODEL: PICKUP	1.00	\$510.00 Misc.	\$510.00
Delivery MODEL: DELIVERY	1.00	\$510.00 Misc.	\$510.00
Fuel Surcharge Delivery MODEL: DELFSCG	1.00	\$15.00 Misc.	\$15.00
Personal Property Expense MODEL: PPE1	1.00	\$6.65 Rental	\$6.65
Loss Limitation Waiver MODEL: LLW	1.00	\$22.80 Rental	\$22.80

Total Rentals \$219.45
 Total Misc. Charges \$1,050.00
 Tax \$92.83
 Total Current Invoice \$1,362.28

Balance Due \$1,362.28

For billing inquiries, please call customer service at (800) 456-1751
 (M-F) 6AM - 5PM MST or email custsvc@mobilemini.com
 PAY ONLINE at www.mobilemini.com

Late charge/finance charge includes late fee of \$15 in addition to finance
 charge of 1.5% per billing cycle assessed 21 days after invoice date

THANK YOU, MOBILE MINI

Pd by Visa
#1886.2
DN

mobile mini inc.

7420 S Kyrene Rd Suite # 101
 Tempe, AZ 85283
ADDRESS SERVICE REQUESTED

Phone: (800) 456-1751
 Fax: (480) 894-1505
 www.mobilemini.com

Invoice
 June 16, 2009

Account Number: 21114251
 Invoice Number: 121084805
 Total Invoice: **\$1,362.28**

Amount Paid: _____

TO ENSURE PROPER CREDIT,
 PLEASE RETURN THIS PORTION WITH YOUR PAYMENT

☐ Check here for address change
 enter new address on reverse side.

Respec
 5971 Jefferson NE
 Ste 101,
 ALBUQUERQUE NM 87109

Remit payment to:
 Mobile Mini I, Inc.
 P O BOX 79149
 PHOENIX AZ 85062-9149

000001114251312108480500000000001362285

000001114251312108480500000000001362285

000021114251312108480500000000001362285



Applied Geomechanics, Inc.
140 Chestnut Street
San Francisco, CA 94111
Phone: (415) 364-3200
Fax: (415) 861-1448

PHIL

INVOICE

Invoice No. IN-100914
Invoice Date 6/17/2009

Bill To: RESPEC
P.O. Box 725
Rapid City, SD 57709-0725

Customer ID: RESP
Project No.: DIAG5604 | 5604
Description: Respec, Piezos & Logger
PO No.: 14265
Terms: Net 30

Summary of Charges:

Notes: Job #1886.2

DETAIL	QTY	UNITS	PRICE/UNIT	DISC %	PRICE
MISC	1.00000	EA	475.000000	0.00	475.000000
Vented Vibrating Wire Piezometer, 350kPa Range					
MISC	1.1500000	FT	1.180000	0.00	1,357.000000
Yellow Polyurethane Cable with vent, 2 twisted pairs					
90798-01	1.00000	EA	5,220.000000	0.00	5,220.000000
798-A Handi-Logger: sn 8378					
80610	1.00000	EA	608.000000	0.00	608.000000
AVW200 Vibrating Wire Interface, 2 channel					
79213	1.00000	EA	736.000000	0.00	736.000000
Loggemet Datalogger Software					
MISC	1.00000	EA	475.000000	0.00	475.000000
Vented Vibrating Wire Piezometer, 700kPa Range					

Sales Total	8,871.00
Shipping & Handling	305.81
Misc. Charges	0.00
Tax Total	0.00
	9,176.81
Less Amount Paid	0.00
TOTAL AMOUNT DUE	\$ 9,176.81

Remittance advice:

Mail checks to Applied Geomechanics, Inc. Dept #34092 P.O. Box 39000 San Francisco, CA 94139
Submit wires to Scott Valley Bank 1111 Broadway, Suite 1510 Oakland, CA 94607-4036, U.S.A.
ABA #1211-06252, Credit to Account #10002730



Applied Geomechanics, Inc.
140 Chestnut Street
San Francisco, CA 94111
Phone: (415) 364-3200
Fax: (415) 861-1448

1886.2

INVOICE

Invoice No. IN-100947
Invoice Date 6/30/2009

Bill To: Accounts Payable
RESPEC
P.O. Box 725
Rapid City, SD 57709-0725

Customer ID: RESP
Project No.: DIAG5554 | 5554
Description: RESPEC, LILY-RS485 Install
PO No.: 14261
Terms: Net 30

DETAIL	QTY	UNITS	PRICE/UNIT	DISC %	PRICE
98020-01	3.00000	EA	8,500.000000	0.00	25,500.000000
LILY Borehole Tiltmeter, +/-10deg, RS485: sn 8260, 8291,8292					
89072:	3.00000	EA	375.000000	0.00	1,125.000000
LILY Test Cable, RS485					
70369-02	1,050.00000	FT	0.700000	0.00	735.000000
Tiltmeter Cable, 10 Conductor					
MISC	1.00000	EA	5,550.000000	0.00	5,550.000000
Tuff Com Software for wireless tiltmeter communications (up to 12 stations)					
MISC	1.00000	EA	200.000000	0.00	200.000000
AGI Atlas Setup Fee for up to 50 sensors					
MISC	12.00000	EA	200.000000	0.00	2,400.000000
AGI Atlas Monthly Fee for web data service (up to 50 sensors)					
MISC	8.00000	EA	150.000000	0.00	1,200.000000
Programming and/or Testing, per hour					
MISC	3.00000	EA	1,500.000000	0.00	4,500.000000
On-Site Support, per day (Installation, Training, Supervision)					
MISC	1.00000	EA	557.910000	0.00	557.910000
Round-trip Travel to & from site					

Continued

Remittance advice:

Mail checks to Applied Geomechanics, Inc. Dept #34092 P.O. Box 39000 San Francisco, CA 94139
Submit wires to Scott Valley Bank. 1111 Broadway, Suite 1510 Oakland, CA 94607-4036, U.S.A.
ABA #1211-06252, Credit to Account #10002730



Applied Geomechanics, Inc.
140 Chestnut Street
San Francisco, CA 94111
Phone: (415) 364-3200
Fax: (415) 861-1448

INVOICE

Invoice No. IN-100947
Invoice Date 6/30/2009

Bill To Accounts Payable
RESPEC
P.O. Box 725
Rapid City, SD 57709-0725

Customer ID: RESP
Project No.: DIAG5554 | 5554
Description: RESPEC, LILY-RS485 Install
PO No.: 14261
Terms: Net 30

DETAIL	QTY	UNITS	PRICE/UNIT	DISC %	PRICE
MISC	1.00000	EA	660.490000	0.00	660.490000
Lodging & Meals					
0254-02	3.00000	EA	49.950000	0.00	149.850000
110-220 AC Power Supply					

Sales Total	42,578.25
Shipping & Handling	396.75
Misc. Charges	0.00
Tax Total	0.00
	<hr/>
	42,975.00
Less Amount Paid	0.00
TOTAL AMOUNT DUE	<hr/>
	\$ 42,975.00

Remittance advice:

Mail checks to Applied Geomechanics, Inc. Dept #34092 P.O. Box 39000 San Francisco, CA 94139
Submit wires to Scott Valley Bank 1111 Broadway, Suite 1510 Oakland, CA 94607-4036, U.S.A.
ABA #1211-06252, Credit to Account #10002730

HOLMANS

Precision Surveying & Computing Solutions

6201 JEFFERSON ST NE
ALBUQUERQUE NM 87109-3431
(505) 343-0007

1320 S PRIEST DR STE 101
TEMPE AZ 85281-6959
(480) 967-0032

3991 1st ST STE C
LIVERMORE CA 94551-4947
(866) 443-3544

704 S ILLINOIS AVE STE C103
OAKRIDGE TN 37830-7900
(865) 220-5600

DEPOSIT ORDER

INVOICE

INVOICE
NUMBER
INVOICE
DATE

0001-195799

06/22/09

018380
S RE/SPEC INC.
O ATTN: CHARLES BARBER
L 5971 JEFFERSON NE, SUITE 101
D ALBUQUERQUE, NM 87109-3413
T (505) 268-2661
O

S RE/SPEC INC.
H ATTN: CHARLES BARBER
I 5971 JEFFERSON NE, SUITE 101
P ALBUQUERQUE, NM 87109-3413
T (505) 268-2661
O

PURCHASE ORDER NO.		SLSMN.	CONTROL NO.	DATE SHIPPED	SHIP VIA	F.O.B.	TERMS
CC		0001	275842	06/22/09	PICKUP		NET 30 DAYS
LINE NO	QUANTITY	STOCK NO.	MFG NO.	DESCRIPTION		UNIT PRICE	TOTAL
1	1	643461	60702	TOPCON A7R PRISM		1295.00	1295.00
2	1	000999	COMMENT	THANK YOU EE			

SALES DRAFT

HOLMANS INC
6201 JEFFERSON ST NE
ALBUQUERQUE, NM 87109-

MERCHANT # : 4381336816467993
TERMINAL ID : 00000006

ACCOUNT # : *****6544 V1
BATCH : 146
DATE : 06/22/09 TIME : 11:51
AUTH CODE : 846882

SALES TAX : \$97.41
REF # : 009
AMOUNT : \$1382.41

CHARLES BARBER

THANK YOU.
PLEASE COME AGAIN.

*** CUSTOMER COPY ***

Job 1886
Task 2

Repaired for
Broken Prism

Chas Barber

Subtotal 0.00
Tax 0.00
Total 0.00
Deposit 1382.41

USA

1382.41

Further terms and conditions of sale, including certain limitations on warranties and remedies, are set forth on the reverse side of this invoice and are incorporated herein.

CUSTOMER DUPLICATE

ACKNOWLEDGED & RECEIVED BY

DATE

HOLMAN'S

Precision Surveying & Computing Solutions

Repec Engineering

5971 Jefferson Street, Suite 101

Albuquerque, NM 87109

Attention: Mr. Dave Henard

Phone #: 505-268-2661 Email: dave.henard@respec.com

Date: 4/27/09

Quote Number: MLE042709

Availability: 3 Weeks ARO

Terms: Cash

Shipped Via: Customer P/U

FOB: Albuquerque, NM

Quoted By: Michelle Egusquiza

Page 1 of 2

Subject: Request for Quote - Topcon GPT-9003A 3" Reflectorless Robotic Total Station

We are pleased to offer the following quotation for your consideration:

ITEM	QTY	Part #	Description	Unit	Price	Extended Price
Reflectorless Robotic Total Station:						
1	1	Topcon	Topcon GPT-9003A 3" Robotic Total Station w/ Radio & BT (60428) Includes (2) BT-65Q Li-Ion Batteries (60487), (2) BC-30B Chargers (60241), GPT-9000 Carrying Case, Tool Kit, Bar Pin, Silicon Cloth, Lens Cap, Plumb bob, Tribrach, Manuals, & 2 Year Limited Warranty parts & labor. Topcon FC-2500 Radio Robotic Kit (60758) Includes FC-2500 TopSURV Robotics 256MB RAM, 2GB ROM, 624MHz XScale Processor, 5 Megapixel Camera, Bluetooth & WiFi connectivity, RS-1 Radio Modem for FC-2500 (60618), RC-3 Complete (60430), A7R 360 Prism for RC-3 (60702), FC-2500 Cradle (60743), FC-2500 Pole Clamp (60742), Robotic Carbon Fiber Pole (60218), and TP-10 HD Wood Tripod (59010). Topcon A7R 360 Backsight Prism (60702)	sys	\$39,590.00	\$39,590.00
2	1	999	Topcon Promotional Discount Applied	ea	(\$10,000.00)	(\$10,000.00)
3	1	999	Holman's Promotional Discount Applied	ea	(\$1,750.00)	(\$1,750.00)
Spare Power Kit for GPT-9003A:						
4	1	PS-90	Daysaver Battery Pack w/ Charger & Carry Case/Tripod Clip	ea	\$170.00	\$170.00
5	1	50056M	Topcon Power Cable w/ Cigarette Lighter Adapter for PS-90	ea	\$145.00	\$145.00
Recommended Robotic Accessories:						
6	1	5219-03	Seco Thumb Release Bipod - Carbon Fiber	ea	\$274.00	\$274.00
7	1	580112	Topcon Instrument Cable	ea	\$75.00	\$75.00
8	1	728333	Edge Flash Drive USB 2.0 4GB	ea	\$49.00	\$49.00
9	1	604202	NLU HD ScreenGuardz - 3/pk for FC-2500	ea	\$15.95	\$15.95
Sub-Total						\$28,568.95
Shipping						N/A
Applicable Tax						Continued
Total						Continued

Thank you for this opportunity to quote. We hope to be favored with your order, which will receive our prompt and careful attention. If you have any questions, please call me at (505) 449-3800 or fax me at (505) 343-3562. Email: megusqui@holmans.com

Quote Valid for 30 Days

Prepared By _____ Date _____ Accepted By _____ Date _____

6201 Jefferson St. NE, Albuquerque, NM 87109 / Phone (505) 449-3800 / Fax (505) 343-3562

HOLMAN'S

Precision Surveying & Computing Solutions

Repec Engineering

5971 Jefferson Street, Suite 101

Albuquerque, NM 87109

Attention: Mr. Dave Henard

Phone #: 505-268-2661 Email: dave.henard@respec.com

Date:	4/27/09
Quote Number:	MLE042709
Availability:	3 Weeks ARO
Terms:	Cash
Shipped Via:	Customer P/U
FOB:	Albuquerque, NM
Quoted By:	Michelle Eguisquiza

Page 2 of 2

Subject: Request for Quote - Topcon GPT-9003A 3" Reflectorless Robotic Total Station

We are pleased to offer the following quotation for your consideration:

ITEM	QTY	Part #	Description	Unit	Price	Extended Price
			SUB-TOTAL FROM PAGE 1:			\$28,568.95
			<u>Backsight Accessories:</u>			
10	1	90551*	Crain Trimax Heavy Duty Composite Tripod *Temporary Sale Price.	ea	\$210.00	\$210.00
11	1	91458	Crain Padded A7R Prism Bag	ea	\$20.00	\$20.00
12	1	60722	Topcon A7 Sighting Pole Mount	ea	\$30.00	\$30.00
13	1	6330-10	Seco Sighting Pole for A7 Prism	ea	\$9.40	\$9.40
14	1	642741	Seco Tribrach with Optical Plummet	ea	\$138.00	\$138.00
15	1	2070-00	Seco Rotating Tribrach Adapter	ea	\$61.00	\$61.00
16	1	91458	Crain Padded Tribrach Bag	ea	\$20.00	\$20.00
			<u>Topcon Intermediate Robotic Total Station Product Training:</u>			
17	1	990147	Topcon Intermediate Robotic Total Station Product Training (2 Days) Includes equipment system setup, total station and job settings using field controller, topo/stakeout features, file transfer, and Student Training Guides. Training is conducted at Holman's Inc (Albuquerque, NM) by a GIS/Survey Training Specialist during normal business hours M-F. Limit (4) students per class.	ea	\$3,500.00	\$3,500.00
			Holman's Training courses are customized for each client. Training will not be conducted in a multiple-customer environment. This "one-on-one" method will maximize instructor & student communication and is designed for best productivity & value. All classes are measured for quality of instruction & learning.			
			Holman's Inc. is an Authorized Topcon Regional Repair Center. Our Technical Services Specialists are factory trained and have a combined (28) years of experience in servicing optical/electronic instruments & GPS systems.			
Sub-Total						\$32,557.35
Shipping						N/A
Applicable Tax						\$2,497.62
Total						\$34,754.97

Thank you for this opportunity to quote. We hope to be favored with your order, which will receive our prompt and careful attention. If you have any questions, please call me at (505) 449-3800 or fax me at (505) 343-3562. Email: megusqui@holmans.com

Quote Valid for 30 Days

Prepared By _____ Date _____ Accepted By _____ Date _____

6201 Jefferson St. NE, Albuquerque, NM 87109 / Phone (505) 449-3800 / Fax (505) 343-3562
CONFIDENTIAL - This proposal contains data that shall not be duplicated, used, or disclosed in whole or part for any purpose other than to evaluate and approve this proposal.

get w¹
+ Jrs.

Taylor Water Well Service

7317 Etcheverry Rd.
Carlsbad, NM 88220

RECEIVED
JUN 15 2009

BY: _____

182
Invoice

DATE	INVOICE #
6/12/2009	5952

BILL TO
RESPEC 5971 Jefferson NE, Suite 101 Albuquerque, NM 87109-3413

SHIP TO
1886.2

P.O. NUMBER	TERMS	REP	SHIP	VIA	F.O.B.	PROJECT
14264			6/12/2009			
QUANTITY	ITEM CODE	DESCRIPTION	PRICE EACH	AMOUNT		
3	R1	Move In And Rig Up	300.00	900.00T		
60	Drilling	Drilling Cost Per/Ft	20.00	1,200.00T		
60	4" SCH40	4" Sch 40 Casing	4.85	291.00T		
3	GRT	Grout each casing in place with portland cement.	125.00	375.00T		
3	SRFC COM	Surface Completion 2'x2' Pad+Metal Box	275.00	825.00T		
		Sales Tax	5.625%	201.99		
					3591.00	
			Total		33,792.99	

OK
1886.2
22



PLATEAU



Account Number
Invoice Number
Invoice Date

V833
00001867886
001774777
07/01/2009
Page 1 of 5
PB1DFT-1274

Visit us at www.plateautel.com

Previous Balance	Payments Received	Current Charges	Total Amount Due
0.00	107.26CR	160.21	160.21

Billing Summary

Previous Amount Due	0.00
Payments Received	107.26CR
Other Charges and Credits	99.95
Other Charges and Credits Taxes	7.31
Late Payment Charges	0.00
Usage Charges	0.00
Recurring Charges	99.34
Nonrecurring Charges	49.95
Discounts	0.00
Taxes, Surcharges or Assessments	10.92
Total Amount Due by 07/20/2009	160.21

OK to pay. *[Signature]* Idw Task 2

Account Num
Invoice Num
Bill ID

PLATEAU

News and Inforr

PLATEAU

Account Number 00001867886
Invoice Number 001774777
Bill Date 07/01/2009
Page 3 of 5
PB1DFT-1276

News and Information

PLATEAU

Account Number 00001867886
Invoice Number 001774777
Bill Date 07/01/2009
Page 4 of 5
PB1OFT-1277

Details for account 1867886 CHARLES BARBER
Payment Details

Payment Received On 06/11/2009 107.26CR
Total Payments Received 107.26CR

Other Charges and Credits Detail

06/11/2009 PLATEAU MMDS MODEM # 900-0082-8001
Taxes 99.95
7.31

Total 107.26

Current Billing Summary

Summary of Charges for Account

Recurring	Non-Recurring	Taxes	Total
99.34	49.95	10.92	160.21

Taxes, Surcharges or Assessments

NM STATE GROSS RECEIPTS TAX 10.92

Total Taxes, Surcharges or Assessments

10.92

Summary for Account Charges

Internet

Summary for respec

Total Charges	149.29
NM STATE GROSS RECEIPTS TAX	7.47
COUNTY GROSS RECEIPTS TAX	0.37
CITY GROSS RECEIPTS TAX	3.08
Total	160.21

1822

Post-It™ brand fax transmittal memo 7671		# of pages > 3
To <u>Carly Hansen</u>	From <u>Wes DeYoung</u>	
Co.	Co.	
Dept.	Phone #	
Fax #	Fax #	

~~885-9329~~
885-9329

WES DEYOUNG
FAX 234-6061

INVOICE



Commercial and Industrial Electrical and Contracting
Budwine Service Electric Co., Inc.



PO Drawer 1589

Phone (575) 885-3185

Carlsbad New Mexico 88220

RESPEC Consulting Service 302 N Canal Ste A Carlsbad, NM 88220		Invoice Date: <u>June 17, 2008</u> Invoice No.: <u>23358</u> Job No.: <u>CRDSHP</u> Location: <u>Carlsbad NM</u>
Quantity and Description	Unit Price	Amount
Install and Permit New 100A service on Rental Building at 3005 S. Canal. <div style="border: 1px solid black; border-radius: 50%; padding: 10px; display: inline-block;"> Job 1886 / Task 2 </div> NM OCD - Low Base Cavern Project Installation of Electrical Service at on-site Control Shed was completed on 6/16/09 WDS 6/23/09	Permit: \$77.00 Labor: \$1,125.00 Material: \$781.05 Subtotal: \$1,983.05 Tax: \$145.01 TOTAL: \$2,128.06	

JOB INVOICE

TO *Respec*
ADDRESS
ATTENTION *Wes*

DATE ORDERED 6-11-09	ORDER TAKEN BY
PHONE NO.	CUSTOMER ORDER #
JOB LOCATION <i>3rd monitor office</i>	
JOB PHONE	STARTING DATE 6-11-09
TERMS	

QTY	MATERIAL	UNIT	AMOUNT	DESCRIPTION OF WORK
1	200A 1Ø meter base			Install 100A service on
1	100A 3R QO load center			rental bldg. @ I&W site
1	QO 2100 breaker			
1	QO 120 "			
1	2" weatherhead			
1	2" strat straps			
1	" hub for meter			
20'	1 1/2" slotted galv. strut			
10'	2" RGS			
1	1/4" S.D. Hub			
1	" x cl. nips			
2	" ST Horiz. conn. (str.)			
8'	" " "			
2	" minnies			
60'	#2 THWN			Journeyman 15
30'	#6 SDEE			
2	5/8" X 8' Cuclad rods			
2	Acorn clamps			
1	500w 120V Quarte w/lamp			
See back side (Nes has copy)				

WORK ORDERED BY
DATE ORDERED
DATE COMPLETED 6-16-09

CUSTOMER APPROVAL
SIGNATURE _____

AUTHORIZED SIGNATURE

TOTAL LABOR		
TOTAL MATERIALS		
TOTAL MISCELLANEOUS		
SUBTOTAL		
TAX		
GRAND TOTAL		

[illegible]

DATE	MECHANIC	WORK DONE	HRS	RATE	AMOUNT
6-11-09	J.M.L.	site survey	2		
6-18-09	}	start service install	8		
6-16-09	}	Finish . .	5		
TOTAL LABOR COST					

JOB COMPLETE? <input type="checkbox"/> YES <input type="checkbox"/> NO DATE BILLED: _____	TOTAL MATERIAL COSTS		TOTAL SELLING PRICE	
	TOTAL LABOR COSTS		LESS TOTAL COST	
	SUBCONTRACT COSTS		GROSS PROFIT	
	OTHER DIRECT COSTS		LESS OVERHEAD	
	TOTAL COST		NET PROFIT	

INVOICE



Commercial and Industrial Electrical and Contracting

Budwine Service Electric Co., Inc.

PO Drawer 1599

Phone (575) 885-3195

Carlsbad New Mexico 88220

Respec Consulting Service 302 N Canal St, Ste A Carlsbad, NM 88220	Invoice Date: <u>June 23, 2009</u> Invoice No.: <u>23374</u> Job No.: <u>CRDSHP</u> Location: <u>Carlsbad NM</u>
---	---

Quantity and Description	Unit Price	Amount
<p>I & W Monitor Stations</p> <p>Job 1886 / Task 2</p> <p>NM OCO - I & W Bore Cavern Project</p> <p>Installation of Instrumentation Conduit Runs between the Control Shed and (3) Tiltmeter Boreholes + (2) Monitoring Wells.</p> <p>Completed on 6/16/09.</p> <p>WDB 6/24/09</p>	<p>Labor \$1,200.00</p> <p>Material \$3,257.73</p> <p>Subtotal \$4,457.73</p> <p>Tax \$325.97</p> <p>TOTAL \$4,783.70</p>	

Post-It™ brand fax transmittal memo 7671		# of pages > 3
To <u>Carly Hawn</u>	From <u>Wes DeYonge</u>	
Co.	Co.	
Dept.	Phone #	
Fax #	Fax #	

JOB INVOICE

TO: *Respec*
ADDRESS: *[illegible]*
ATTENTION: *Wes*

DATE ORDERED 6-16-09	ORDER TAKEN BY G.M.S.
PHONE NO.	CUSTOMER ORDER #
JOB LOCATION ISW Monitor Stations	
JOB PHONE	STARTING DATE 6-17-09
TERMS	

[illegible]

WORK ORDERED BY	
DATE ORDERED	
DATE COMPLETED	6-18-09

TOTAL LABOR		
TOTAL MATERIALS		
TOTAL MISCELLANEOUS		
SUBTOTAL		
TAX		
GRAND TOTAL		

CUSTOMER APPROVAL
SIGNATURE _____

AUTHORIZED SIGNATURE

8: ~~adams~~ NC2817
MADE IN USA

JOB INVOICE

New Mexico Energy, Minerals and Natural Resources Department

Bill Richardson
Governor

Joanna Prukop
Cabinet Secretary

Mark Fesmire
Division Director
Oil Conservation Division



April 30, 2009

T. Calder Ezzell, Jr., Esq.
P.O. Box 10
Roswell, New Mexico 88202-0010


Re: I & W, Inc.

Dear Mr. Ezzell:

Reiterating the email I sent along earlier today, please understand that the Oil Conservation Division is not insisting upon, recommending or even encouraging the removal of the large brine storage tanks from the I & W, Inc. facility in Carlsbad. OCD does acknowledge that OCD asked that the tanks be emptied of their contents to decrease their weight, and thereby also decrease the likelihood that the weight would expedite or even trigger a subsidence of the land surface.

Assuming that the tanks will need to be removed by crane and hauled away on trucks, OCD's position is that the crane and trucks themselves pose a threat of causing catastrophic subsidence. Therefore the risk of removal likely outweighs any benefit. The risk is similar to the risk warning to OCD included by your litigation staff in the access agreement. The "collegial" nature of which document, by the way, I am still trying to explain to folks here in our agency. Thank you for your cooperation.

Sincerely,



C. Brian James
Assistant General Counsel

Cc: Mark Fesmire



Mark Fesmire, Director
Oil Conservation Division
New Mexico Energy, Minerals and Natural Resources Department
1220 South St. Frances Drive
Santa Fe, New Mexico 87505

RESPEC, Inc.
3824 Jet Drive
P.O. Box 725
Rapid City, South Dakota 57709-725

April 28, 2009

Dear Mr. Fesmire and Respec, Inc.:

This letter confirms I & W, Inc.'s (I&W) understanding that RESPEC, Inc. ("RESPEC") is acting as an agent of the Oil Conservation Division ("OCD"). This letter is written in an effort to settle OCD's continued threats of litigation.

I&W grants the employees of RESPEC a limited license to enter at reasonable times I&W's yard overlying the abandoned wells at 3005 South Canal Street in Carlsbad, New Mexico, (the "Premises") until such time as the license is terminated at I&W's sole discretion, subject to the following conditions:

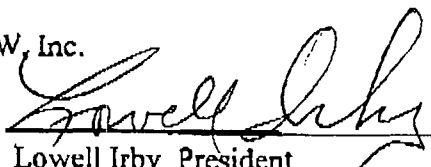
1. I&W, Inc. may require RESPEC employees to present identification prior to entry upon the Premises; and
2. RESPEC's license will immediately terminate when it is no longer acting as OCD's agent regarding the Premises.

PLEASE BE ADVISED that I&W is informed that OCD believes that the Premises will catastrophically collapse without warning and the OCD further believes that this will result in the loss of life and property. I&W urges RESPEC to be aware of the possibility of catastrophic collapse and not to exercise its license to enter the Premises.

Very Truly Yours,

I & W, Inc.

By:


Lowell Irby, President



Macquesten, Gail, EMNRD

From: James, Brian, EMNRD
Sent: Tuesday, April 28, 2009 10:08 AM
To: Calder Ezzell
Cc: Fesmire, Mark, EMNRD; Leach, Carol, EMNRD; Macquesten, Gail, EMNRD
Subject: RE: I & W

Good morning Calder- Thanks for the email. As I understand our current situation the fuel tanks are, or will be today, removed from the site. The utilities are being turned off today. I&W is completing the move of the balance of their property from the site. I&W people will meet with OCD people today to discuss the location of the 4 strand barbed wire fence and subsequent access to the property. In the interim "police" tape or some similar marker will be used to keep the public away from the site. The access agreement will be faxed here today so we can have the OCD folks and the consultants on site tomorrow to begin the installation of the monitoring devices. OCD will hold in abeyance the Compliance Order since the I&W people have thus far accomplished that which OCD was immediately concerned about. I am asking that we send to you the expert's proposed Affidavit with regard to the prognosis for the site. At any rate, we paid for it and to the extent it is useful to the property owner or others in understanding the problem it should be made available. The affidavit is in draft form but it contains persuasive numeric evaluations of the situation as we now understand it. The expert conclusions may evolve as, or if, we learn more about the cavern size, location, subsidence and relationship to adjoining properties or interests. Once we receive the executed access agreement and until we hear that we have a problem from the onsite staff we will have concluded addressing the emergency issues presented by these plugged brine wells. Thank you and your clients for the cooperation in trying to protect life and property in Carlsbad. Please don't hesitate to call if questions arise during the study phase we are about to embark upon.

C. BRIAN JAMES

Assistant General Counsel
Energy, Minerals & Natural Resources Department
1220 South St. Francis Drive
Santa Fe, NM 87505
Tel 505.476.3216 ~ Fax 505.476.3220
brian.james@state.nm.us

From: Calder Ezzell [<mailto:cezzell@hinklelawfirm.com>]
Sent: Monday, April 27, 2009 4:40 PM
To: James, Brian, EMNRD
Cc: Macquesten, Gail, EMNRD; Fesmire, Mark, EMNRD
Subject: RE: I & W

Thanks for the update. I have e-mailed the reports of I&W's monitoring from 5/08 to 4/09 to Jim Griswald.
Calder

From: James, Brian, EMNRD [<mailto:Brian.James@state.nm.us>]
Sent: Monday, April 27, 2009 4:31 PM
To: Calder Ezzell
Cc: Macquesten, Gail, EMNRD; Fesmire, Mark, EMNRD
Subject: I & W

Good afternoon Calder- We have a draft of some documents to resolve this matter. They are under review and we will get them to you tomorrow at the earliest. This has been complicated by I&W's desire not to be under a court order. I think we have it done in a manner that is not a court order nor do they assign liability. Thanks for your patience and cooperation.



C. BRIAN JAMES

Assistant General Counsel

Energy, Minerals & Natural Resources Department

1220 South St. Francis Drive

Santa Fe, NM 87505

Tel 505.476.3216 ~ Fax 505.476.3220

brian.james@state.nm.us

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New Mexico Energy, Minerals and Natural Resources Department

Bill Richardson
Governor

Joanna Prukop
Cabinet Secretary

Mark Fesmire
Division Director
Oil Conservation Division



April 23, 2009

T. Calder Ezzell, Jr.
Lucas M. Williams
Hinkle, Hensley, Shanor & Martin, LLP
P.O. Box 10
Roswell, NM 88202

Via facsimile transmission 575 623 9332 and email

Re: I&W, Inc. brine facility operations in Carlsbad, New Mexico
BW 006 (API #30-015-22574), SW/4, SW/4 of Section 17, Township 22 South,
Range 27 East, NMPM, Eddy County

Dear Mr. Ezzell and Mr. Williams,

Let me begin by thanking you and your client for your timely response to yesterday's email correspondence. However, your client's response, while indicative of some progress toward our required goal, is not adequate. Without belaboring the number of previous contacts with I&W, Inc. (I&W) and its public assurances that they would be cooperative in the resolution of this issue, I&W has not made enough progress fast enough to protect public health, safety and welfare. Under normal circumstances I&W's efforts thus far may be both reasonable and timely. Given the potential scope of the problem I&W's brine well operation has caused, their actions thus far are neither timely nor reasonable.

In addition to the steps previously taken, I &W must forthwith:

1. Execute and deliver to OCD the Access Agreement requested.
2. Empty and/or then remove the propane and diesel tanks from their site;
3. Recover any equipment and supplies I&W intends to remove from the facility;
4. Cease operations including truck repair and office activities;
5. Install a fence around the facility sufficient to prevent public access.
6. Provide the monitoring data it has previously promised the OCD.

As you know, two (2) other brine wells similarly situated and configured as the brine well on the I&W site have collapsed into sinkholes since the I&W permit was renewed in



January 2008. This is not speculation. These collapses have occurred, resulting, in both instances, in enormous holes in the ground. Fortunately, unlike the I&W wells, the wells that have already collapsed were in isolated outlying areas, not located in the City of Carlsbad. As outlined in earlier telephone conversations and meetings with OCD staff, and by April 9, 2009 letter, the danger posed by the I&W operation is both real and substantial for certain; and, could also be immediate. A well collapse at I&W's location threatens human life on two well-traveled highways, South Canal Street, Highway 285 and National Parks Hwy, Highway 180 and massive property damage including the Carlsbad Irrigation District Canal. The I&W location is in a developed area, and is also adjacent to a mobile home park, a feed store and a church.

Continuing to insist that I&W be allowed to bring trucks onto the property is an unconscionable risk of human life. Continued truck use will also compromise the efficacy of the monitoring and warning devices OCD is prepared to install. To allow the continued use of the I&W property for truck traffic will require that the warning devices be calibrated to take into account the rumbling of trucks on the site. That reduces the protections afforded by the warning devices, if any, as well as increases the chance for false alarms to be reported to the emergency responders.

The Oil Conservation Division (OCD) demands that your client, I&W immediately cease operations at its facility identified above and provide an access agreement allowing the OCD and its contractors on site. In addition, the OCD demands that you complete, and confirm in writing, the actions detailed above on or before Wednesday, April 29, 2009.

The OCD makes these demands because of the distinct probability that a subsurface cavern under I&W's Eugenie #1 and Eugenie #2 wells will collapse. Operations must cease at the location both to protect public safety and to allow the OCD to take immediate steps to install a monitoring and early warning system, and delineate the cavern. OCD's contractors stand ready to begin work Wednesday, April 29, 2009.

The OCD has made repeated requests for I&W's cooperation since our initial telephone conversation with Mr. Williams on April 3, 2009. On April 21, 2009, during a telephone conversation with Mr. Ezzell and in a follow-up e-mail, the OCD demanded that I&W cease operations and demanded that I&W provide a timeline for completing the three actions outlined above. Mr. Ezzell's e-mailed response, dated April 22, is inadequate. Although Mr. Ezzell states that I&W has removed all but one of its trucks, he also states that I&W intends to continue to use its truck shop on site and intends to maintain its business office on site. Mr. Ezzell also stated that the propane and diesel tanks had not been emptied, and gave no timeline for removing the fuel. He also provided no timeline for installing a fence to restrict public access to the site.

I&W's response indicates that it does not recognize the seriousness and the immediacy of the situation. The OCD will file an application for an injunction to obtain an enforceable order requiring I&W to take the actions described above. The OCD will hold off on seeking an injunction only if I&W agrees to a compliance order under the Water Quality Act or a consent order requiring the actions described above. The OCD must receive I&W's response by 8 a.m. on Monday, April 27 or it will file for injunction.

The OCD will proceed under two statutes: NMSA 1978, Section 74-6-10(A) and NMSA 1978, Section 74-10-11(A).

Section 74-6-10(A)

Section 74-6-10(A) provides that a constituent agency may seek injunctive relief when it determines that a person has violated or is violating a condition of a permit issued pursuant to the Water Quality Act, Chapter 74, Article 6 NMSA 1978. I&W operates its facility pursuant to discharge permit BW-006, issued under the Water Quality Act. Paragraph 21(F) of the discharge permit approval conditions provides, in relevant part, "If the operator cannot demonstrate the integrity of the system to the satisfaction of the Division then the operator may be required to shut-down, close the site and properly plug and abandoned (sic) the well."

I&W is in violation of Paragraph 21(F) because it cannot demonstrate the integrity of the brine well system. The OCD has outlined its concerns in several telephone conversations with you, at a meeting in your offices on April 6, 2009, in a letter faxed and mailed to you on April 9, 2009, and at a meeting in Carlsbad on April 9, 2009 hosted by New Mexico Homeland Security & Emergency Management. To summarize, based on the age of I&W's operations, the amount of brine produced, the well configuration, and the limited sonar data currently available, the OCD concludes that the cavern under the wells is large with a broad roof, and is relatively close to the surface. I&W's operation shares these features with the two brine wells that suffered catastrophic collapses last year: Jim's Water Service (BW-5) and Loco Hills Water Disposal (BW-12). I&W's operation has additional factors that make it vulnerable to collapse: fresh water infiltrating the ground from the unlined irrigation ditch that runs adjacent to the facility may be dissolving the salt zone from the top, and vibrations from the truck yard currently being operated over the cavern could trigger a collapse.

I&W cannot demonstrate that its brine well system has integrity both because of the circumstances summarized above and because it is in violation of other provisions of its permit:

1. Paragraph 21(F) requires I&W to provide information in each annual report on the size and extent of the solution cavern and geologic/engineering data demonstrating that continued brine extraction will not cause surface subsidence, collapse or damage to property, or become a threat to public health and the environment. I&W has not filed an annual report for 2008 and has not provided sufficient information to evaluate subsidence risks.
2. Paragraph 20(B) requires I&W to submit a plan for long-term subsidence, including a schedule for long-term surveying to ensure public safety subsidence/collapse issue, a health and safety plan for alerting the proper authorities, ensuring prompt evacuation of the community, and protection of the health and safety of the general public. I&W has not provided the plans required by Paragraph 20(B).
3. Paragraph 21(F) also allows the OCD to require installation of subsidence monitoring in order to demonstrate the integrity of the system. The OCD previously required I&W to provide weekly subsidence monitoring; as discussed in my letter of April 9, 2009, I&W has not provided the monitoring data, nor does it appear to have fully implemented subsidence monitoring in the past. Given the

probability of a collapse, the OCD is now requiring real-time subsidence monitoring and an early-warning system. If truck traffic continues at the site those systems may not be adequately effective or may generate false alarms.

It is clear that I&W has violated its permit terms. It is equally clear that the facility must be closed, and a subsidence monitoring system and early warning system must be installed as quickly as possible. The OCD will seek an order from the court forcing I&W to cease operations, provide an access agreement, remove the obvious fire hazards posed by the diesel and propane on site, and secure the facility with a fence. This will allow the OCD to move forward with installation of a monitoring and early-warning system. Although installation and maintenance of monitoring systems are I&W's responsibility under the permit, due to the exigent circumstances the OCD will take the necessary actions and seek reimbursement from I&W at a later time. We renew our request to be contacted by I&W's insurance carrier.

Section 74-6-11(A)

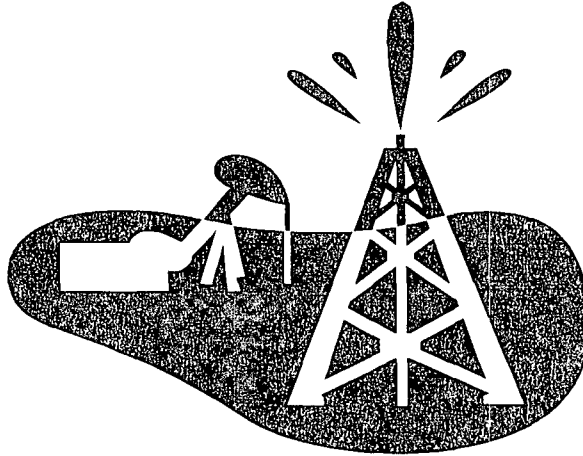
Section 74-6-11(A) provides that if a constituent agency determines that a source over which it has been delegated authority poses an imminent and substantial danger to public health, it may bring suit to restrain any person causing or contributing to the alleged condition from further causing or contributing to the condition or take such other action as deemed necessary and appropriate.

While the OCD cannot provide an exact timetable for a collapse at the site, the collapse is a virtual certainty. Given that I&W's continued operations may trigger a collapse, I&W has not complied with its permit requirements for monitoring and has not been willing to cease operations so that an early-warning system can be installed and operated. OCD has no option but to pursue whatever courses are available to preserve public safety to the best of its ability. OCD will appreciate I&W immediate and complete efforts to reach the same goal.

Sincerely;



C. Brian James
Assistant General Counsel



TRANSMITTAL COVER SHEET

OIL CONSERVATION DIVISION
1220 S. ST. FRANCIS DRIVE
SANTA FE, NM 87505
(505) 476-3440
(505) 476-3462 (Fax)

PLEASE DELIVER THIS FAX:

TO: T. Calder Eccell, Jr.

FROM: Brian James

DATE: 4-23-09

PAGES: 5, including cover

SUBJECT: 1 & W, Inc.

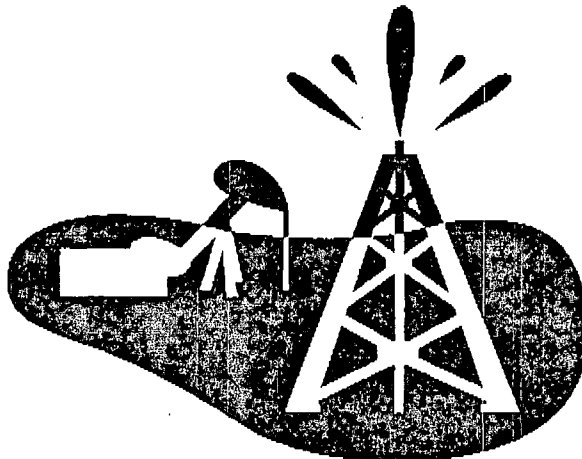
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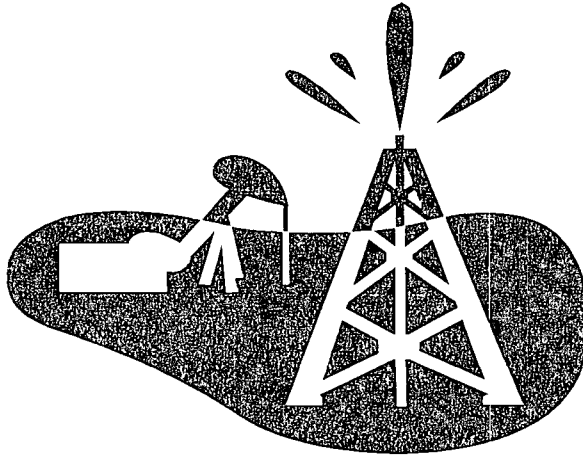
F. Calder Eccell, Jr.

FROM:

Brian James

DATE:

4-23-09



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1220 S. ST. FRANCIS DRIVE
SANTA FE, NM 87505
(505) 476-3440
(505)476-3462 (Fax)

PLEASE DELIVER THIS FAX:

TO: Lucas Williams

FROM: Brian James

DATE: 4-23-09

PAGES: 5 including cover

SUBJECT: Id W, Inc.

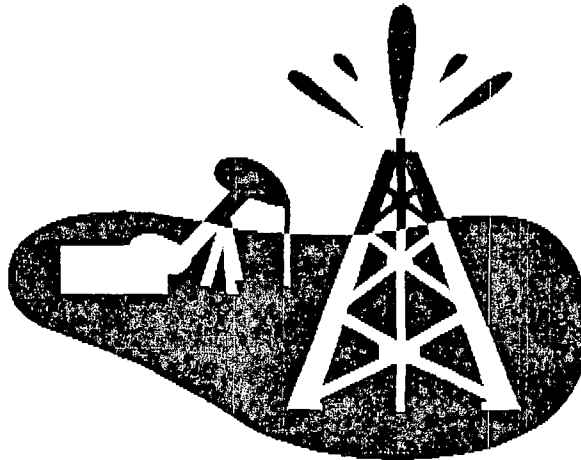
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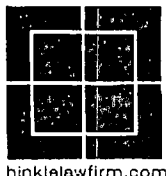
OIL CONSERVATION DIVISION
1220 S. ST. FRANCIS DRIVE
SANTA FE, NM 87505
(505) 476-3440
(505) 476-3462 (Fax)

PLEASE DELIVER THIS FAX:

TO: Lucas Williams

FROM: Brian James

DATE: 4-23-09



HINKLE, HENSLEY, SHANOR & MARTIN, L.L.P.

ATTORNEYS AT LAW

400 PENN PLAZA, SUITE 700

PO BOX 10

ROSWELL, NEW MEXICO 88202

575-622-6510 (FAX) 575-623-9332

WRITER:

T. Calder Ezzell, Jr.
cezzell@hinklelawfirm.com

April 22, 2009

VIA E-MAIL

(brian.james@state.nm.us)

Mr. Brian James
Assistant General Counsel
Energy Minerals and Natural
Resources Department

Re: I & W, Inc.

Dear Mr. James:

Please accept this letter as a status report of I & W, Inc.'s voluntary compliance with the requests made by the Oil Conservation Division regarding the I & W yard in Carlsbad, New Mexico.

1. Truck Traffic: As I told you on the phone yesterday, all third party truck traffic ceased immediately after the April 6th meeting with OCD personnel in Roswell. With respect to I & W's tank trucks, I & W has today executed a short term lease with the City of Carlsbad for a location in the Carlsbad Industrial Park. It is my understanding that when executed by the mayor this afternoon, they will fax me a copy. I also understand that I & W's trucks will be gone from their yard at the close of business today, with the possible exception of one truck. That truck cannot be moved because I & W cannot find the keys and they assume the truck's operator, who is off today, has the keys in his pocket.

I & W is looking for a suitable facility to which they can relocate their maintenance shop, but until one is found, I & W plans to continue to use the shop for work that cannot be performed elsewhere. This traffic will be routed so that trucks will not drive through the part of the yard where the brine well was located. Will this minimum amount of traffic interfere with the OCD's monitoring program?

2. Contents of Tanks: The four 1,000 barrel brine tanks located at the site of the No. 1 Well have all been drained down to the valves. There is a 500 barrel fresh water tank that is essentially full. There is a propane tank and a diesel tank which currently contain fuel. I & W cannot relocate the fuel tanks to the temporary site at the Carlsbad Industrial Park because the temporary site has no electricity. I & W is actively seeking another location for these two tanks.

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(505) 982-4554
FAX (505) 982-8623

Mr. Brian James
April 22, 2009
Page Two

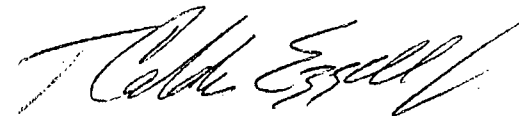
When?
3. Public Access: I & W will fence the property to restrict public access. I understand that four strand barbwire will be sufficient, although I have questions over the actual location of the fence and how it should be gated to provide access for monitoring. I assume that it is acceptable that the fence not go up until the monitoring devices are installed. I & W would also like to visit with OCD regarding the ongoing use of their office pending the move to the new location and during the OCD's monitoring program.

4. Monitoring: I & W continues to voluntarily conduct the monitoring program that was requested by the OCD after approval of the plugging of the brine well. I & W is providing me with copies of every report which I will forward to you. If the reports can be easily scanned, they will e-mail them to me and I will forward them to you. If scanning is impractical, they will hand deliver the reports and I will overnight them to you.

Please do not hesitate to contact me if you have any questions.

Yours very truly,

HINKLE, HENSLEY, SHANOR & MARTIN, L.L.P.



T. Calder Ezzell, Jr.

TCE/tw

New Mexico Energy, Minerals and Natural Resources Department

Bill Richardson

Governor

Joanna Prukop
Cabinet Secretary

Reese Fullerton
Deputy Cabinet Secretary

Mark Fesmire
Division Director
Oil Conservation Division



April 9, 2009

Lucas Williams, Esq.
Hinkle, Hensley, Shanor & Martin, LLP
P.O. Box 10
Roswell, NM 88202-0010

Fax: 505-476-3462-

575-623-9332

Via fax and mail

Dear Mr. Williams,

I am writing in response to your letter of April 3, 2009, in which you describe our telephone conversations of that date. I am concerned that your letter mischaracterizes those conversations in several important respects and I want to clarify both the nature of the issues and the position of the Oil Conservation Division (OCD).

On Friday, April 3, 2009, I spoke with you in a series of phone conversations regarding the OCD's concerns regarding I&W Inc.'s ("I&W") brine facility operations in Carlsbad, New Mexico. Mr. Jim Griswold of the OCD's Environmental Bureau had made several attempts the day before to speak with the owners of I&W about OCD's concerns. He was able to contact Mr. Kevin Wilson, I&W's operations manager, but was not able to reach the owners of I&W directly. On Friday morning, Mr. Wilson told Mr. Griswold that I&W had retained counsel in the matter, and gave him your name and the name of Mr. Calder Ezzell, Jr. Mr. Wilson told Mr. Griswold that Mr. Ezzell would be out of town until Monday. I therefore called you.

During our first conversation on April 3 I was joined on speaker phone by Mr. Griswold and by Glenn von Gonten, also of the OCD's Environmental Bureau. The following summarizes our conversation:

Mr. Griswold and Mr. von Gonten told you that New Mexico had experienced two sudden and catastrophic brine well collapses in the prior year. Those incidents caused the OCD to re-examine its other permitted brine wells. The OCD also hosted a brine well workgroup on March 26 and 27, 2009. Participants at the meeting included OCD,

April 9, 2009

Page 2

the Environmental Protection Agency, the Department of Energy, the National Cave and Karst Research Institute, the Solution Mining Research Institute, and New Mexico industry representatives. The workgroup discussed the two collapses, the collapse potential of existing brine wells in New Mexico, and what could be done in future operations to avoid collapses. During the workgroup, participants discussed I&W's operations. The members of the workgroup were concerned because I&W's operations share physical features with the two brine wells that had collapsed and because the facility is located in a developed area, posing special risks to life and property in the event of a collapse.

After the workgroup, members of the OCD's Environmental Bureau briefed Cabinet Secretary Joanna Prukop of the Energy, Minerals and Natural Resources Department ("EMNRD") on the workgroup's concerns. On April 2, 2009, Secretary Prukop and OCD staff briefed representatives of New Mexico's Department of Homeland Security and Emergency Management ("Homeland Security"), and the two departments planned additional meetings in Santa Fe with representatives of potentially affected state agencies in Santa Fe, and in Carlsbad with local responders. (Mr. Griswold and Mr. von Gonten participated in a meeting the next day, April 3, 2009, with Homeland Security and Santa Fe representatives of the Department of Public Safety, the Highway Department and the Environment Department. Homeland Security has scheduled a meeting in Carlsbad with the OCD and local responders for April 9, 2009.)

As we explained during our telephone conversation, as a result of the concerns raised by the workgroup and the April 2, 2009 meeting with Homeland Security, EMNRD made the decision to contact I&W to request that it take actions to protect human life and property, and to inform I&W that it intended to take legal action if necessary to protect human life and property. The requested actions, described in more detail below, were to cease truck traffic at the facility, remove the contents of tanks at the facility, restrict public access, and cooperate with a monitoring program.

After OCD's first phone call to you on April 3, 2009, you indicated that you would speak to your client and call us back. In our second phone call that day you indicated that your client was not willing to cease its normal business operations at the site, and that you considered the requested restrictions on its activities to constitute a "taking" of the property.

I called you back later that afternoon to arrange a meeting at your offices in Roswell for Monday, April 6, 2009 at 1:00 PM, so that the OCD could brief you and your clients on the situation in more detail. OCD Division Director Mark Fesmire, Glenn von Gonten, Jim Griswold and I attended the meeting for the OCD. You, Mr. Ezzell, Mr. Wilson, and I&W owners Lowell and Eugene Irby attended.

Mr. von Gonten and Mr. Griswold briefed you in detail on the two collapses and on the conditions at the I&W brine well that caused the concern about another collapse. They explained that, like the two brine wells that collapsed, I&W's Eugenie #1 brine well had been in operation for decades and is located in an area where the salt zone is shallow – approximately 400 feet BGS. And like the two brine wells that collapsed, I&W's Eugenie #1 brine well was configured to inject fresh water down the annulus, and extract brine through the tubing. As the fresh water dissolves the salts in the salt zone, this

configuration generally results in a cavern with a shape that resembles an upside-down Christmas tree: a broad "roof" at the top and narrowing at the bottom. A broad-roofed cavern is more vulnerable to collapse. (The opposite configuration – injection of fresh water down the tubing and extraction of brine through the annulus – would have created a cavern with a more stable cylindrical or teardrop shape.)

As Mr. von Gonten and Mr. Griswold discussed, I&W's brine operations have additional features that are troubling. First, for some period of time, the brine operation used a second well, the Eugenie #2, located approximately 325 feet northwest of the first well. Fresh water was injected down the Eugenie #2, and brine was extracted from the Eugenie #1, creating a cavern running between the Eugenie #2 and the Eugenie #1. If the Eugenie #1 were to collapse, the collapse could extend to the Eugenie #2. Second, the Eugenie #1 is located adjacent to an unlined irrigation ditch. Water infiltrating the ground from the irrigation ditch could increase the risk of collapse. If water were flowing at the time of collapse, the erosion of the sink hole could be increased. We believe that the only shutoff for the irrigation canal is approximately 10 miles upstream at Lake Avalon. After our meeting, Mr. von Gonten and Mr. Griswold thought of a third troubling feature: at I&W's facility, trucks drive in the area immediately surrounding the wellhead. The two brine wells that collapsed did not have truck traffic in the immediate vicinity of the wellhead.

Finally, the location of I&W's brine operation poses special dangers in the event of collapse. The facility where the brine operations are located is in the city of Carlsbad, between US 285 and US 180/62 where those two highways meet at a "Y"-shaped intersection. The site contains I&W's administrative offices, liquid storage tanks, and areas for vehicle parking and servicing, including a truck wash. A feed store is located on the adjacent property to the west, a church is located on the property to the east. The Carlsbad Irrigation District canal borders the I&W facility on the south, and a trailer park is located immediately across the canal from the I&W facility. If the I&W brine well collapses in a manner similar to the collapses of the other two wells, the initial collapse and subsequent surface cracks and sidewall caving could affect not only I&W's yard, but the infrastructure in the area, including commercial buildings, roadways, the canal, residences at the trailer park, and above- and underground utilities.

At our meeting, Mr. von Gonten and Mr. Griswold provided additional technical information on estimating cavern size and shape at the I&W site, and the calculations they used for determining the size of the cavern based on the available sonar (which covered only the uppermost portions of the cavern) and the available production records. Mr. Griswold indicated that the OCD was retaining experts to advise on methods to determine the cavern size, establish a monitoring program, and advise on possible methods for preventing a collapse or mitigating the damage in the event of a collapse.

Mr. von Gonten and Mr. Griswold stressed that in the two prior incidents, the wells collapsed suddenly, catastrophically and without warning, with additional subsidence continuing to this date. Mr. von Gonten's presentation included photographs showing the growth of the two sinkholes. Jim's Water Service is now more than 300 feet across and the Loco Hills sinkhole is as much as 290 feet across. The collapse at Jim's Water Service occurred at approximately 8:15 a.m. when an employee drove on site to check

the well head. He saw what appeared to be puffs of dirt, and got out of his truck to investigate, leaving the motor running. When he realized that the well was collapsing, he got back into the truck and drove away. The operator of the Loco Hills facility noticed the initial subsidence at midday and called the OCD: the collapse occurred while he was on the phone. Although the Loco Hills site had a program of daily visual monitoring in place, the monitoring provided no advance warning of the collapse. Seismic readings – studied after the fact – showed some seismic activity prior to the collapse of one of the sites but not at the other.

During the meeting, the OCD provided you with hard copies of the photos that were used in the presentation, and provided you with an electronic version of the presentation materials. The OCD also directed you and I&W to additional information on OCD's website, which contains imaged documents from the brine well workgroup meeting (BW-999), and imaged documents and other records regarding individual brine wells, including Jim's Water Service (BW-5) and Loco Hills Water Disposal (BW-21). The OCD also invited I&W and its counsel to the briefing portion of the meeting to be hosted by Homeland Security at the Pecos River Valley Conference Center in Carlsbad at 3 p.m. on April 9, 2009.

With this letter the OCD is asking, again, that I&W voluntarily take the following common-sense precautions to reduce risk to life and property at I&W's facility and at neighboring locations:

1. Cease truck traffic at the facility. The concern is that vibrations from truck traffic over the cavern could trigger a collapse.
2. Remove the contents of tanks at the facility, if removal can be accomplished safely. Removal of liquids will reduce weight on the overburden, and hazardous liquids should be removed to prevent release of those liquids during a collapse. The OCD is particularly concerned about tanks containing propane, which could spark an explosion in the event of a collapse.
3. Restrict public access to the facility.
4. Cooperate with monitoring. The OCD has been working with I&W to establish a monitoring program for the site, but has not seen proof that the monitoring is in place, and has not received monitoring data. As we have discussed, the OCD's experience is that weekly or daily monitoring will not provide adequate warning of a collapse. The OCD is working to determine if a real-time monitoring system can be designed that will provide sufficient warning to prevent loss of life or property, and will require I&W's cooperation in that monitoring program.

As we have previously stated, the OCD is considering legal action to obtain a court order forcing I&W to adopt these precautions to protect life and property. Such actions may include but are not limited to obtaining an order under NMSA 1978, Section 74-6-11.

In your letter of April 3, 2009, you characterize the OCD's request and any possible legal action to require safety measures to be a "taking" of property by the state. The OCD views the situation as one in which the state is putting the operator on notice of unsafe conditions at a site that pose a serious risk to human life and property, and is asking the operator to take reasonable actions to mitigate that risk. During our

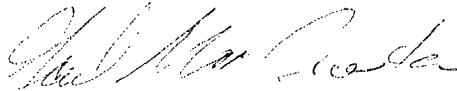
April 9, 2009

Page 5

telephone conversations and in your April 3, 2009 letter, you stated that there is no evidence of subsidence or any indication that the well is going to collapse. I hope that the additional briefing the OCD has provided to you and your clients has clarified that brine well collapses can and have occurred with little or no advance warning, and that the I&W well poses a serious risk of collapse. Further, the location of the I&W brine well in a developed area poses a significant danger to human life and property in the event of a collapse. Under the circumstances, I&W's insistence on a timeline for a collapse and evidence of actual subsidence before taking precautions could have tragic consequences.

The OCD looks forward to your participation in Homeland Security's April 9, 2009 meeting to brief local officials and responders, and hopes that I&W will reconsider its refusal to cooperate in light of the additional information that has been provided.

Sincerely,



Gail MacQuesten
Assistant General Counsel

Cc: Joanna Prukop, Cabinet Secretary, Energy, Minerals and Natural Resources
Mark Fesmire, Director, Oil Conservation Division
Glenn von Gonten, Environmental Bureau, Oil Conservation Division
Jim Griswold, Environmental Bureau, Oil Conservation Division
Timothy Manning, State Director, Department of Homeland Security and
Emergency Management
John Wheeler, Department of Homeland Security and Emergency Management

HINKLE, HENSLEY, SHANOR & MARTIN, L.L.P.

Attorneys at Law
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FAX COVER SHEET

DATE: April 3, 2009

PLEASE DELIVER THE FOLLOWING PAGE(S) TO:

TO: Gail McQuesten, Esq

Fax No.: (505) 476-3462

FROM: Lucas M. Williams, Esq.

RE: *NMOCD's Proposed Actions Against I & W, Inc.
Two Telephone Conversations of April 3, 2009*

TOTAL NUMBER OF PAGES, INCLUDING COVER SHEET: *Three (3)*

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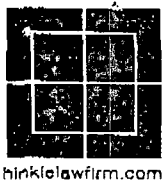
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HINKLE, HENSLEY, SHANOR & MARTIN, L.L.P.

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WRITER:

Lucas M. Williams, Esq.
lwilliams@hinklelawfirm.com

April 3, 2009

Gail McQuesten, Esq.
Conservation Division, EMNRD
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Santa Fe, New Mexico 87505-4000
(505) 476-3451 telephone
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VIA USPS &
FACSIMILE

Re: NMOCD's Proposed Actions Against I & W, Inc.
Two Telephone Conversations of April 3, 2009

Dear Ms. McQuesten:

My name is Lucas Williams. I am an attorney representing I & W, Inc. ("I&W"). I am writing to follow up on our two (2) telephone conversations earlier today. In our first conversation at approximately 10:40 AM this morning, I spoke with you, Mr. Jim Griswold, and Mr. Glenn VonGonten. During that conversation you indicated that unless I&W voluntary, completely, and immediately vacated the surface estate surrounding the now-abandoned Eugenie No. 1 well and removed its vehicles, tanks, and other equipment, the NMOCD would seek a temporary restraining order in the Fifth Judicial District Court in Eddy County, New Mexico, to force I&W from its property.

Mr. VonGonten spoke extensively about concerns that had arisen as a result of meetings of the Brine Well Work Group and specifically talked about concerns that had arisen regarding the Eugenie No. 1 well. Mr. VonGonten expressed concern that the Eugenie No. 1 might collapse after being plugged and abandoned pursuant to NMOCD direction and approval. When I asked Mr. VonGonten whether the NMOCD had any evidence of subsidence at the Eugenie No. 1 well or any indication that the well was going to collapse, he twice stated "no." Mr. VonGonten did go on to note that persons outside of the NMOCD believed that it was possible that the well could someday collapse and referred to unidentified employees of the Department of Energy and the Environmental Protection Agency.

As part of that conversation Mr. VanGonten confirmed that the State of New Mexico intended to take I&W's property.

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April 3, 2009

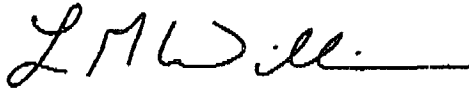
In our second conversation at approximately 1:00 PM today, you indicated that the NMOCD was exploring alternative means of taking I&W's property, including declaring an emergency under NMSA 1978, § 74-6-11 (1993).

In the event that NMOCD, itself or through a sister agency or otherwise, seeks to take action against I&W, please notify me immediately at (575) 622-6510 or via email at lwilliams@hinklelawfirm.com so that I & W may be represented in any attendant proceeding.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

HINKLE, HENSLEY, SHANOR & MARTIN, L.L.P.

A handwritten signature in cursive script, appearing to read "L M Williams", followed by a horizontal line.

Lucas M. Williams, Esq.

CC: Client



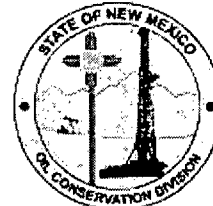
New Mexico Energy, Minerals and Natural Resources Department

Bill Richardson
Governor

Jon Goldstein
Cabinet Secretary

Jim Noel
Deputy Cabinet Secretary

Mark Fesmire
Division Director
Oil Conservation
Division



NEWS RELEASE

Contact:

Jodi McGinnis Porter, Public Information Officer
505.476.3226

January 21, 2010

Energy, Minerals and Natural Resources Department Issues \$2.6 Million Compliance Order to Carlsbad Brine Well Operator for Failure to Address Subsidence Issues

SANTA FE, NM – The New Mexico Energy, Minerals and Natural Resources Department's Oil Conservation Division issued a Compliance Order today with a proposed civil penalty of \$2,637,000.00 to I&W, Inc. for violating multiple conditions of its discharge permit for its brine well facility operated in the City of Carlsbad.

Violations include:

- Failure to provide a subsidence monitoring program and a health and safety plan;
- Failure to provide capacity/cavity configuration data along with geologic and engineering information demonstrating the integrity of the solution mining system;
- Failure to maintain a ground water monitoring program;
- Failure to provide production/injection volumes; and
- Failure to provide analysis of the injection fluid and brine.

"The Oil Conservation Division has taken numerous steps to work with the operator," stated Cabinet Secretary Jon Goldstein. "Their failure to accept responsibility for the brine well they own, operate and profit from has forced the department to step in and require them with this enforceable order to do the right thing to protect human health and safety."

The Oil Conservation Division made numerous verbal and written requests to I&W concerning permit compliance, most recently in a November 20, 2009, letter. I&W did not comply with these requests. The Compliance Order issued to I&W requires it to take the actions it agreed upon when it accepted its permit. The division is reviewing all brine wells in the state on permit compliance.

"Brine well permits contain monitoring systems and health and safety plans," stated Oil Conservation Division Director Mark Fesmire. "Operators in New Mexico are responsible for knowing the terms of their permits and complying with them."

The Oil Conservation Division has been investigating and studying brine wells in New Mexico since two brine wells catastrophically collapsed without warning last year in Eddy County. The I&W facility in Carlsbad with two brine wells raised red flags for the Oil Conservation Division due to its location, which is between US 285 and US 180/62 where those two highways meet at a Y-shaped intersection. Certain aspects of the Carlsbad facility, such as the shallow depth and length of time in service, are similar to the two wells that already collapsed and the Oil Conservation Division has concluded that the site poses a serious risk to human life and to property. The division has spent over \$563,000 monitoring the site, characterizing the underground cavity and installing an early warning system.

The Compliance Order states that I&W, Inc. is ordered to take the following corrective actions by April 22, 2010:

- Submit the following information:
 - A subsidence monitoring report;
 - A health and safety plan;
 - Capacity/cavern configuration information;
 - Ground water monitoring analytical reports;
 - Analyses of brine and fresh water;
- Reimburse the Oil Conservation Division for the \$563,000 in costs incurred to establish and monitor the survey system and early warning system;
- Post a financial assurance in the amount of \$1,000,000 in the form of a surety bond to provide funding for the continued operation of the subsidence monitoring system and early warning system
- Submit a closure plan for the facility to prevent exceeding the standards of Section 20.6.2.3103 NMAC or the presence of a toxic pollutant in ground water in the event of a cavern collapse. The plan shall include, at a minimum:
 - A health and safety plan;
 - A report on closure measures already taken for the Eugenie #1 and the Eugenie #2;
 - A plan for assuming financial responsibility for the monitoring system put in place by the Oil Conservation Division and continued monitoring by an independent third party acceptable to the Oil Conservation Division;
 - A plan for assuming financial responsibility for the early warning system put in place by the Oil Conservation Division and continued operation of the early warning system by an independent third party acceptable to the Oil Conservation Division;
 - Run-on/run-off controls to prevent water ponding over the area of the brine well cavern;
 - A maintenance plan for the run-on/run-off controls;
 - A maintenance plan, including security of all monitoring benchmarks, survey points and utilities that support the early warning system;
 - An annual post-closure report;
 - A proposal for closing the facility providing for either the safe backfilling of the salt cavern in place, or for the acquisition of surrounding properties which may be adversely affected along with long-term site security and monitoring;
 - Additional financial assurance to support the proposal for closing the facility; and
 - A contingency plan to remediate ground water that will be impacted by a collapse of the cavern.

I&W has 30 days from the receipt of this order to acknowledge the violation and pay the \$2,637,000.00 civil penalty, request a public hearing or initiate settlement discussions. See order attached below.

#30#

The Energy, Minerals and Natural Resources Department provides resource protection and renewable energy resource development services to the public and other state agencies.



**STATE OF NEW MEXICO
OIL CONSERVATION DIVISION**

IN THE MATTER OF

**I &W INC.,
Respondent.**

COMPLIANCE ORDER

Pursuant to the New Mexico Water Quality Act (“WQA”), Chapter 74, Article 6 NMSA 1978, the Oil Conservation Division (“OCD”) issues this Compliance Order (“Order”) to Respondent I &W, Inc. (“I&W” or “Respondent”).

I. FINDINGS OF FACT

Parties:

1. The OCD is a division of the New Mexico Energy, Minerals and Natural Resources Department, and is the administrative arm of the Oil Conservation Commission (OCC). The OCC is a “constituent agency” of the Water Quality Control Commission (WQCC) under the WQA. NMSA 1978, Section 74-6-2(J)(4). The OCD has express statutory authority to administer the WQA. NMSA 1978, Section 70-2-12(B)(22).

2. I&W is a domestic profit corporation that since 1995 has operated a facility under OCD discharge permit BW-006 (“Facility”). The Facility is located in Units L and M of Section 17, Township 22 South, Range 27 East, NMPM, Eddy County, New Mexico.

Background:

Compliance Order
I & W, Inc.
BW-006
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3. The Facility includes trucking operations and a solution mining operation to produce brine sold for use in oil and gas operations.

4. In a solution mining operation to produce brine, a well is drilled into the salt zone. The operator injects fresh water into the salt zone, where it dissolves the salt. The resulting brine is pumped and sold. As the mining process continues, the salt zone dissolves, leaving an underground cavern filled with brine.

5. The Facility first began producing brine in August of 1978, using a single well: the Eugenie #1 (API 30-015-22574). The depth from ground surface to salt observed during the drilling of this well was 456 feet, and casing was set to this depth. The total drilled depth of the hole was 663 feet.

6. In 1979 the operator installed a second well at the Facility: the Eugenie #2 (API 30-015-23031). Casing on the Eugenie #2 was set to 285 feet with tubing advanced to 583 feet. The operator hydraulically fractured the salt zone between the two wells. The Facility then operated as a two-well system, with fresh water introduced down the Eugenie #2 and brine produced from the Eugenie #1.

7. The depth to ground water beneath the Facility is approximately 50 feet.

8. I&W acquired the Facility in 1995, notifying the OCD of the transfer by letter dated August 10, 1995.

9. During a cavern integrity test in November 1999, the Eugenie #2 well, which was being used to inject fresh water, showed brine leakage at the surface. I&W plugged the Eugenie #2 in January 2000.

10. I&W returned to single-well brine production using the Eugenie #1 in June 2000.

11. On July 16, 2008 Jim's Water Service brine well (BW-005) collapsed.
12. On July 18, 2008, two days after the collapse at Jim's Water Service, the OCD recommended to I&W that it cease producing brine from the Eugenie #1 well. The depth to salt at I&W's Facility is similar to the depth to salt at Jim's Water Service, and the production history at the two facilities is similar.
13. On July 22, 2008, I&W shut in the Eugenie #1 well.
14. On August 1, 2008, as part of its review of brine well operations after the collapse at Jim's Water Service, the OCD sent a "Brine Well Information Request" to all brine well operators in New Mexico, including I&W. The four-page form requested information about the operator's brine well(s), including information on well construction, well operations, and monitoring. The cover letter sent with the form required operators to return the completed form by September 5, 2008. I&W did not respond.
15. I&W plugged the Eugenie #1 on October 31, 2008.
16. On November 3, 2008 the Loco Hills Water Disposal Company brine well (BW-021) collapsed. This well had been plugged on June 19, 2008.
17. On January 29, 2009 the OCD increased the area of review for any Application for Permit to Drill to one-half mile from the I&W Facility. Any such application would have to be jointly approved by the OCD office in Santa Fe and the OCD's District II office in Artesia.
18. On March 11, 2009 OCD urged I&W to cease truck operations above the existing cavern and develop an adequate contingency plan incorporating the local

emergency response infrastructure and notification of neighboring property owners who may be adversely affected by a collapse.

19. In March 2009 the OCD hosted a Brine Well Workgroup to discuss potential causes of brine well collapses, and methods for evaluating the potential for brine well collapses. Numerous participants expressed concern that the brine wells at I&W's Facility could or would collapse because they were similar in geology and production life to the two wells that had already collapsed.

20. If the I&W brine wells collapse, fresh water in the overburden will mix with the brine in the salt cavern. Brine produced at the I&W Facility contains approximately 193,000 milligrams/liter (mg/l) chloride according to I&W's January 2006 analysis of brine in the cavern. The maximum concentration of chloride allowed in ground water is 250 mg/l. See 20.6.2.3103.B(1) NMAC. One gallon of brine therefore has the potential to contaminate 772 (193,000/250) gallons of fresh water. Based on the available information, the OCD estimates that the underground cavern at the Facility presently contains 34 million gallons of brine. If the cavern roof fails and the falling overburden displaces the brine upward where it can mix with the overlying fresh ground water, more than 26 billion gallons of water (approximately 80,600 acre-feet) will be contaminated.

21. Because the Facility is located in a developed area of the City of Carlsbad, between two major highways and adjacent to the Carlsbad Irrigation Canal, a church, a feed store and a mobile home park, a collapse has serious potential for injury or loss of life, and property damage.

22. During the period April 1 through April 27, 2009, OCD staff spoke by telephone with I&W and its counsel and met with I&W and its counsel to request that I&W cease all operations at the Facility. The OCD also retained a contractor to provide technical assistance on data review, to survey the site to determine subsidence and tilt rates at the surface, remotely confirm the cavern configuration, make technical recommendations, and establish a continuously operating subsidence monitoring system which might yield warning of imminent or ongoing collapse.

23. On April 27, 2009, I&W agreed to cease trucking operations at the site and allow OCD access to the site to install monitoring equipment.

24. OCD contractors have since conducted a seismic reflection survey to determine the extent of the cavern. The data has been evaluated by independent experts. They interpret the survey to indicate a cavern with lateral dimensions of more than 500 feet by 300 feet, with significant salt removal in the area of Eugenie #1.

25. Independent studies of salt cavern collapses indicate that roof failure is not likely to occur when the ratio of cavern diameter to cavern depth is significantly smaller than 0.67. The ratio of diameter to depth for the cavern at the I&W Facility ranges between 0.66 and 1.10 based on the seismic reflection survey. According to OCD estimates, the cavern that collapsed at Jim's Water Service (BW-005) had a ratio of 1.13, and the cavern that collapsed at Loco Hills Water Disposal Company (BW-021) had a ratio of 0.70.

26. OCD contractors established a surface subsidence monitoring system, which includes installation of surface monitoring points that are surveyed with a theodolite and the installation of surface tiltmeter plates, along with the installation of

continuously monitored subsurface borehole tiltmeters and pressure transducers placed into existing ground water monitor wells. Information from the borehole tiltmeters and pressure transducers is transmitted to an early warning system.

27. The OCD's outside costs for these efforts to date total \$563,420.00. Some costs associated with the monitoring are paid through June 30, 2010. Continued monitoring using the existing subsidence monitoring system and early warning system is expected to cost between \$2,000.00 and \$10,000.00 per month, depending on the level of maintenance and data analysis required.

28. As discussed in more detail below, I&W is in violation of multiple conditions of Discharge Permit BW-006:

- I&W has failed to provide a subsidence monitoring program and a health and safety plan;
- I&W has failed to provide capacity/cavity configuration data along with geologic and engineering information demonstrating the integrity of the solution mining system;
- I&W has failed to maintain a ground water monitoring program;
- I&W has failed to provide production/injection volumes; and
- I&W has failed to provide analysis of the injection fluid and brine.

Claim 1: Failure to Provide a Subsidence Monitoring Program and a Health and Safety Plan

29. The requirement for a subsidence survey first appeared in the 1996 renewal of BW-006, issued April 15, 1996:

“Subsidence Survey: I&W will design and install a series of survey points over the area of the facility and the salt cavern by December 31, 1996 to monitor any future surface subsidence. The OCD will be notified at least 72 hours prior to all testing so that an OCD representative may witness the testing.”

BW-006, Discharge Permit Approval Conditions, Paragraph 7 (1996).

30. OCD records show no evidence that I&W installed subsidence survey points as required by the 1996 renewal.

31. The next renewal of BW-006, issued July 16, 2001, contained the following requirements for subsidence monitoring:

“I&W, Inc. shall submit for OCD approval a method to detect long-term subsidence. Please submit the plan by August 15, 2001.”

BW-006, Discharge Permit Approval Conditions, Paragraph 25 (2001).

32. By letter dated August 17, 2001, the OCD extended the deadline for submittal of the plan until January 31, 2002.

33. OCD records show that I&W did not submit a plan for subsidence detection by the January 31, 2002 deadline.

34. By letter dated December 11, 2007, I&W indicated to the OCD that it intended to set monitoring points in the ground in the next few weeks.

35. The next renewal of BW-006, issued January 24, 2008, is the current Discharge Plan. It contains the following requirements for subsidence monitoring:

“Subsidence Monitoring System: I&W, Inc. shall submit for long-term subsidence, a report displaying all subsidence monitoring stations and monitoring completed to date to address the requirements of the prior discharge plan by June 30, 2008. The report shall summarize and include subsidence tables and graphs to 0.01 ft. A map shall depict the facility and monitoring points to scale with verification of certified surveyor geodetic datums or elevations are properly recorded. The report shall propose a schedule for long-term surveying to ensure public safety subsidence/collapse issues are addressed due to the shallow nature of the brine cavity. The report shall also include: a health and safety plan for alerting the proper authorities, ensuring prompt evacuation of the community, and protection health and safety of the general public.”

BW-006, Discharge Permit Approval Conditions, Paragraph 20(B) (2008).

36. On July 2, 2008, after the due date set by the 2008 renewal, OCD personnel e-mailed I&W regarding the subsidence monitoring requirement.

37. The “Brine Well Information Request Form” the OCD sent to I&W on August 1, 2008 requested information on subsidence monitoring and asked if the operator had submitted all reports to the OCD. I&W did not respond to the OCD’s request for information.

38. On November 4, 2008 OCD personnel e-mailed I&W requiring it to submit a contingency plan, and describing the issues to be included in the plan. According to a subsequent e-mail from the OCD to I&W dated November 17, 2008, it appears that I&W provided some information to the OCD, but the OCD informed I&W that it was insufficient.

39. By letter dated April 9, 2009 the OCD notified counsel for I&W regarding the OCD’s concerns about the lack of subsidence monitoring. The letter included the following demand:

“Cooperate with monitoring. The OCD has been working with I&W to establish a monitoring program for the site, but has not seen proof that the monitoring is in place, and has not received monitoring data. As we have discussed, the OCD’s experience is that weekly or daily monitoring will not provide adequate warning of a collapse. The OCD is working to determine if a real-time monitoring system can be designed that will provide sufficient warning to prevent loss of life or property, and will require I&W’s cooperation in that monitoring program.”

40. A demand letter from OCD to counsel for I&W on April 23, 2009 included a demand that I&W “[p]rovide the monitoring data it has previously promised the OCD.” In addition, the letter put I&W on notice that the OCD considered I&W to be in violation of its permit conditions regarding monitoring:

“Paragraph 20(B) requires I&W to submit a plan for long-term subsidence, including a schedule for long-term surveying to ensure public safety subsidence/collapse issue, a health and safety plan for alerting the proper authorities, ensuring prompt evacuation of the community, and protection of the health and safety of the general public. I&W has not provided the plans required by Paragraph 20(B).

....Paragraph 21(F) also allows the OCD to require installation of subsidence monitoring in order to demonstrate the integrity of the system. The OCD previously required I&W to provide weekly subsidence monitoring; as discussed in my letter of April 9, 2009, I&W has not provided the monitoring data, nor does it appear to have fully implemented subsidence monitoring in the past. Given the probability of a collapse, the OCD is now requiring real-time subsidence monitoring and an early-warning system....”

41. On April 27, 2009, the OCD received an e-mail from I&W containing limited subsidence data, describing a total of 22 monitoring events starting on May 9, 2008 and ending April 13, 2009. The data show no elevation changes to an accuracy of 0.001 feet at the Eugenie #1, the Eugenie #2, or at three established benchmarks.

42. The April 27, 2009 e-mail did not provide the additional information required by the terms of BW-006, such as the proposed schedule for long-term surveying or the health and safety plan.

43. The subsidence survey conducted by OCD’s own contractor between May 6 and September 18, 2009 contradicts the subsidence data provided by I&W. The subsidence survey indicates rates of subsidence and heaving at the surface approaching one inch per year. Review of available information by OCD’s contractor indicates ground movements not inconsistent with a possible catastrophic failure of the cavern roof at some as yet undetermined time in the foreseeable future.

44. A July 2, 2009 demand letter from the OCD to the attorney for I&W, seeking reimbursement of the costs incurred by the OCD, offered I&W the option of

assuming control of and responsibility for the subsidence monitoring system and the early warning system.

45. The November 20, 2009 demand letter from the OCD to I&W specifically referenced the 2008 renewal condition requiring I&W to provide a subsidence report including a schedule for long-term surveying and a health and safety plan. The letter required that information to be submitted as part of a closure plan. As authority for requiring a closure plan including this information, the letter cited BW-006, Discharge Permit Approval Conditions, Paragraph 23, which provides that I&W must submit a closure plan upon the OCD's request, and the following regulations under the Water Quality Act: 20.6.2.3107.A(10) and (11) NMAC (contingency plans and closure plans for discharge permits); 20.6.2.5005 NMAC (closure requirements for brine wells); 20.6.2.5209 NMAC (plugging and abandonment of brine wells); and 20.6.2.5210(B)(17) NMAC (measures necessary to prevent contamination after cessation of operations, including proper closing and post-operational monitoring).

46. In addition, the November 20, 2009 demand letter required I&W to post a financial assurance in the amount of \$1,000,000.00 in the form of a surety bond to provide funding for the continued operation of the subsidence monitoring system and early warning system in the event I&W fails to maintain those systems. BW-006 specifically provides that the OCD may require I&W to provide additional financial assurance. See BW-006, Discharge Permit Approval Conditions, Paragraph 23.

47. To date, I&W has not submitted additional subsidence data, has not taken any action to assume responsibility for subsidence monitoring or the early warning system, has not submitted a contingency/health and safety plan, has not posted the

required financial assurance, and has not reimbursed the OCD for its expenditures to provide the cavern delineation, subsidence monitoring and early warning system that I&W failed to provide.

Claim 2: Failure to Provide a Capacity/Cavity Configuration and Subsidence Survey

48. In its August 10, 1995 letter notifying the OCD that it had acquired the Facility and was assuming the obligations under BW-006, I&W stated that it would “[p]erform a sonar log before the expiration of the active discharge plan on June 19, 1996.”

49. I&W failed to perform the sonar survey by its self-assumed June 19, 1996 deadline.

50. The 1996 permit renewal contained the following requirement:

“Capacity and Cavity Configuration: The capacity and configuration of the salt cavern will be determined by December 31, 1996 by sonar survey or an alternate method approved by the OCD. The OCD will be notified at least 72 hours prior to all testing so that an OCD representative may witness the testing.”

BW-006, Discharge Permit Approval Conditions, Paragraph 6 (1996).

51. During 1995 and 1996 the OCD repeatedly tried to schedule integrity testing and a cavern survey without success. On October 11, 1996, the OCD ordered I&W to cease brine production because of its failure to schedule mechanical integrity tests and a sonar survey.

52. Eight days later, on October 18, 1996, I&W completed a sonar survey of the Eugenie #1, the brine extraction well. The cavern roof appeared to be 135 feet across, but only the uppermost 45 feet of the solution cavern was logged, with a calculated

capacity of less than 31,000 barrels. The logging tool could not be lowered to greater depth due to interbedding. I&W did not perform a sonar test of the Eugenie #2.

53. Although production records are incomplete, historic brine production by October 1996 may have reached 4.5 million barrels. Assuming a 15% salt content by volume in brine, the solution cavern would have been 673,000 barrels. Therefore the area of the salt cavern logged by the sonar survey would represent only a small fraction of the cavern.

54. The 2001 permit renewal referenced receipt of the 1996 survey log. BW-006, Discharge Permit Approval Conditions, Paragraph 25 (2001).

55. On August 30, 2007 a firm under contract to I&W conducted sonar logging on the Eugenie #1. The depth interval that was imaged by that log spanned from 434.7 feet to 473.8 feet below surface and indicated a cavern volume of 47,823 barrels between depths of 444 and 473 feet which at its maximum was approximately 170 feet across.

56. Estimated historic brine production by the time of the 2007 sonar logging was in excess of 5 million barrels, which should have left a cavern with a volume of more than 800,000 barrels. Therefore, the sonar logging in 2007 probably imaged only 6% of the cavern. This is most likely due to an inability to lower the sonar tool any deeper. Total depth on the Eugenie #1 when it was drilled was 663 feet, and records indicate tubing depths during production of at least 587 feet. It appears that only 49 vertical feet were logged, leaving anywhere from 114 to 190 vertical feet of cavern unlogged.

57. The 2008 permit renewal contained the following requirement:

“Capacity/Cavity Configuration and Subsidence Survey: The operator shall provide information on the size and extent of the solution cavern and geologic/engineering data demonstrating that continued brine extraction will not cause surface subsidence, collapse or damage to property, or become a threat to public health and the environment. This information shall be supplied in each annual report. OCD may require the operator to perform additional well surveys, test, and install subsidence monitoring in order to demonstrate the integrity of the system. If the operator cannot demonstrate the integrity of the system to the satisfaction of the Division then the operator may be required to shut-down, close the site and properly plug and abandoned (sic) the well.”

BW-006, Discharge Permit Approval Conditions, Paragraph 21(F)(2008).

58. A separate provision in the 2008 permit renewal provides that the annual report is due on January 31 of each year. BW-006, Discharge Permit Approval Conditions, Paragraph 21(L)(2008).

59. I&W did not file an annual report for 2008, which would have been due January 31, 2009.

60. The “Brine Well Information Request Form” the OCD sent to I&W on August 1, 2008 requested information on sonar logs, cavern configuration (dimensions and volume) and the method or methods used to estimate the cavern size, and asked if the operator had submitted all reports to the OCD. I&W did not respond to the OCD’s request for information.

61. In an April 23, 2009 letter to I&W’s counsel, the OCD put I&W on notice that it considered I&W to be in violation of its permit terms:

“I&W is in violation of Paragraph 21(F) because it cannot demonstrate the integrity of the brine well system. The OCD has outlined its concerns in several telephone conversations with you, at a meeting in your offices on April 6, 2009, in a letter faxed and mailed to you on April 9, 2009, and at a meeting in Carlsbad on April 9, 2009 hosted by New Mexico Homeland Security and Emergency Management. To summarize, based on the age of I&W’s operations, the amount of brine produced, the well

configuration, and the limited sonar data currently available, the OCD concludes that the cavern under the wells is large with a broad roof, and is relatively close to the surface. I&W's operation shares these features with the two brine wells that suffered catastrophic collapses last year: Jim's Water Service (BW-5) and Loco Hills Water Disposal (BW-12). I&W's operation has additional factors that make it vulnerable to collapse: fresh water infiltrating the ground from the unlined irrigation ditch that runs adjacent to the facility may be dissolving the salt zone from the top, and vibrations from the truck yard currently being operated over the cavern could trigger a collapse."

62. The April 23, 2009 letter went on to state, "I&W cannot demonstrate that its brine well system has integrity both because of the circumstances summarized above and because it is in violation of other provisions of its permit," specifically citing the requirement in Paragraph 21(F) that I&W provide information in each annual report on the size and extent of the solution cavern and geologic/engineering data demonstrating that continued brine extraction will not be a hazard, and requiring, and the requirements in Paragraph 21(F) and Paragraph 20(B) for subsidence monitoring.

63. Because of I&W's failure to provide information on the configuration of the cavern, and its failure to demonstrate that the system had integrity, the OCD hired contractors to delineate the cavern. The OCD's demand letter of July 20, 2009, seeking reimbursement for those costs, offered I&W the opportunity to take over the evaluation and remediation efforts.

64. The OCD's November 20, 2009 demand letter to I&W reiterated that "I&W failed to comply with the terms of its permit that required it to provide information necessary to determine the size and extent of the cavern and the integrity of the system," and that the OCD had to take the actions I&W failed to take. As discussed above, the letter further required that I&W to submit a closure plan for the facility.

65. Delineation of the cavern is necessary to develop an appropriate closure plan. By the express terms of BW-006 the OCD may require submittal of a closure plan. See BW-006, Discharge Permit Approval Conditions, Paragraph 23. Proper monitoring and closure are required under Water Quality Control Commission rules. See 20.26.2.3107.A(10) and (11) NMAC (contingency plans and closure plans for discharge permits); 20.6.2.5005 NMAC (closure requirements for brine wells); 20.6.2.5209 NMAC (plugging and abandonment of brine wells); and 20.6.2.5210(B)(17) NMAC (measures necessary to prevent contamination after cessation of operations, including proper closing and post-operational monitoring).

Claim 3: Failure to Provide Ground Water Monitoring

66. The 2001 renewal of BW-006 was the first renewal after the discovery of brine leakage at the surface of the Eugenie #1. The 2001 renewal contained the following provision:

Groundwater Monitoring Program: OCD requires I&W Inc. to maintain a groundwater monitoring program to provide detection for any excursion of formation fluids outside of the extraction area. The following will be initially required:

A. Collect annual water samples from the two on-site monitor wells. These wells shall be purged, sampled and analyzed for General chemistry, total dissolved solids, pH (EPA method CFR 40 136.3) and New Mexico Water Quality Control Commission (WQCC) metals, all using EPA approved methods and quality assurance/quality control (QA/QC) procedures. Submit the analytical results in the annual report. All sampling shall be witnessed by OCD....

BW-006, Discharge Permit Approval Conditions, Paragraph 8 (2001).

67. The 2008 renewal of BW-006 contains the same requirements at Paragraph 20.A.

68. The "Brine Well Information Request Form" the OCD sent to I&W on August 1, 2008 requested information on ground water monitoring, and asked if the operator had submitted all reports to the OCD. I&W did not respond to the OCD's request for information.

69. To date, I&W has provided ground water analysis information on only three occasions: April 2000, September 2001 and December 2002.

Claim 4: Failure to Provide Injection/Production Volumes.

70. Injection and production volumes can be used to calculate the amount of salt dissolved, and the size of the resulting salt cavern.

71. BW-006 requires the operator to report injection and production volumes. See BW-006, Discharge Permit Approval Conditions, Paragraph 6 (2001) and BW-006, Discharge Permit Approval Conditions, Paragraph 21.G (2008).

72. The "Brine Well Information Request Form" the OCD sent to I&W on August 1, 2008 required the operator to provide information on injection and production, including the total volume of fresh water injected into the brine well to date, the total volume of brine water produced to date, and how the operator determined those volumes. The form also asked the operator if it had submitted all reports to the OCD. I&W did not respond to that request.

73. I&W's most recent report of injection and production volumes is for the first quarter of 2007. I&W did not shut in the Eugenie #1 well until July 22, 2008.

Claim 5: Failure to Provide Analysis of Brine and Fresh Water

74. In its August 10, 1995 letter notifying the OCD that it had acquired the Facility and was assuming the obligations under BW-006, I&W stated that it would “submit annual fresh and brine water analysis.”

75. The permit renewals for BW-006 in 2001 and 2008 require the operator to provide an analysis of the injection fluid and brine with each annual report. The analysis is for General Chemistry (Method 40 CFR 136.3) using EPA methods. See BW-006, Discharge Permit Approval Conditions, Paragraph 7 (2001) and BW-006, Discharge Permit Approval Conditions, Paragraph 21.H (2008).

76. OCD files contain information on analysis of brine water from the I&W Facility on the following occasions after I&W’s August 10, 1995 acquisition of the Facility: 10/6/95, 1/24/01, 12/4/01, and 1/25/06. OCD files contain information on analysis of fresh water injected at the I&W Facility on the following occasions after I&W’s August 10, 1995 acquisition of the Facility: 10/9/95, 1/24/01 and 12/4/01.

77. The “Brine Well Information Request Form” the OCD sent to I&W on August 1, 2008 asked if the operator had submitted all reports to the OCD. I&W did not respond to the OCD’s request for information.

II. APPLICABLE STATUTES AND RULES

1. The Environmental Protection Agency granted primacy to the WQCC, 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 147.1601. In the grant of primacy, the Environmental Protection Agency cited and incorporated by reference New Mexico’s Water Quality Act.

2. The Environmental Protection Agency classifies brine wells as Class III underground injection control wells. 40 CFR 144.6(c)(3).

3. The WQCC enacted regulations specifically governing brine wells as Class III wells. See 20.6.2.5002 NMAC.

4. The WQCC delegated authority over Class III brine wells to the OCD. The OCD is the administrative arm of the OCC, a constituent agency of the WQCC under NMSA 1978, Section 74-6-2(J)(4).

5. Operation of a Class III well must be pursuant to a discharge permit. See 20.6.2.5101.B NMAC.

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

7. When a constituent agency determines that a person violated or is violating a condition of a permit issued pursuant to that WQA, 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).

8. Under the express terms of Respondent's discharge permit, and under WQA rules, the OCD may require Respondent to file a facility closure plan. BW-006, Discharge Permit Approval Conditions, Paragraph 23 (2008). 20.6.2.3107.A(10) and (11) NMAC (contingency plans and closure plans for discharge permits); 20.6.2.5005 NMAC (closure requirements for brine wells); 20.6.2.5209 NMAC (plugging and abandonment of brine wells); and 20.6.2.5210(B)(17) NMAC (measures necessary to

prevent contamination after cessation of operations, including proper closing and post-operational monitoring).

9. Under the express terms of Respondent's discharge permit, and under WQA rules, the OCD may require Respondent to post financial assurances. BW-006, Discharge Permit Approval Conditions, Paragraph 23 (2008). 20.6.2.5210(B)(17) NMAC and 20.6.2.3107.A(10) NMAC.

10. 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 for each day of continued noncompliance with the compliance order. NMSA 1978, Section 74-6-10(F)(1).

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

III. CONCLUSIONS OF LAW

1. I&W is a "person" as defined in NMSA 1978, Section 74-6-2(I).
2. I&W's operation of the Facility is subject to the provisions of the WQA, the rules adopted pursuant to the WQA, and the conditions of BW-006.
3. I&W is in violation of discharge permit BW-006 because it has failed to provide:
 - A report displaying all subsidence monitoring stations and monitoring completed, summarizing all subsidence tables and graphs to 0.01 feet, a map depicting the facility and monitoring points to scale with verification of certified surveyor geodetic datums or elevations;
 - A proposed schedule for long-term surveying to ensure public safety subsidence/collapse issues; and

- A health and safety plan for alerting the proper authorities, ensuring prompt evacuation of the community, and protection health and safety of the general public.

4. I&W is in violation of discharge permit BW-006 because it has failed to provide:

- Information on the size and extent of the solution cavern and geologic/engineering data demonstrating that continued brine extraction will not cause surface subsidence, collapse or damage to property, or become a threat to public health and the environment; and
- Subsidence monitoring.

5. I&W is in violation of discharge permit BW-006 because it has failed to provide the ground water monitoring program as required, including the submittal of annual analytical results.

6. I&W is in violation of discharge permit BW-006 because it has failed to provide injection/production volumes.

7. I&W is in violation of discharge permit BW-006 because it has failed to provide analyses of brine and fresh water.

8. OCD has authority under the WQA rules as the conditions of BW-006 agreed to by I&W to require I&W to close the site and to impose additional requirements on I&W to prevent a collapse or damages to property or public health.

9. The OCD may issue a compliance order requiring corrective actions under NMSA 1978, Section 74-6-10(A)(1).

IV. COMPLIANCE ORDER

Based upon the foregoing findings and conclusions, I&W is hereby ordered to take the following corrective actions by April 22, 2010:

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1. Submit the following information to the OCD as required by BW-006:
 - a subsidence monitoring system report, as required by Paragraph 20.B of discharge permit BW-006 (2008);
 - a health and safety plan, as required by Paragraph 20.B of discharge permit BW-006 (2008);
 - Capacity/cavern configuration information, as required by Paragraph 21.F of discharge permit BW-006 (2008);
 - Ground water monitoring analytical reports, as required by Paragraph 20.A of discharge permit BW-006 (2008);
 - Injection/production volume reports as required by Paragraph 21.6 of discharge permit BW-006 (2008); and
 - Analyses of brine and fresh water, as required by Paragraph 21.H of discharge permit BW-006 (2008).
2. Reimburse the OCD for the \$563,420.00 in costs incurred to establish and monitor the survey system and early warning system.
3. Post a financial assurance in the amount of \$1,000,000 in the form of a surety bond to provide funding for the continued operation of the subsidence monitoring system and early warning system.
4. Submit a Facility closure plan to prevent exceeding the standards of Section 20.6.2.3103 NMAC or the presence of a toxic pollutant in ground water in the event of a cavern collapse. The Facility closure plan shall include, at a minimum:
 - A report on closure, plugging and abandonment measures already taken for the Eugenie #1 and the Eugenie #2;
 - A plan for assuming financial responsibility for the monitoring system put in place by the OCD and continued monitoring by an independent third party acceptable to the OCD;
 - A plan for assuming financial responsibility for the early warning system put in place by the OCD and continued operation of the early warning system by an independent third party acceptable to the OCD;
 - Run-on/run-off controls to prevent water ponding over the area of the brine well cavern;
 - A maintenance plan for the run-on/run-off controls;
 - A maintenance plan, including security of all monitoring benchmarks, survey points and utilities that support the early warning system;

- An annual post-closure report;
- A proposal for closing the facility providing for either the safe backfilling of the salt cavern in place, or for the acquisition of surrounding properties which may be adversely affected along with long-term site security and monitoring;
- Additional financial assurance to support the proposal for closing the facility; and
- A contingency plan to remediate ground water that will be impacted by a collapse of the cavern.

V. CIVIL PENALTY

1. NMSA 1978, Section 74-6-10(C) authorizes assessment of a civil penalty of up to \$15,000 per day for each violation of NMSA 1978, Section 74-6-5, any regulation adopted pursuant to that section, or any permit issued pursuant to that section. Section 74-6-10(C) also authorizes assessment of a civil penalty of up to \$10,000 per day for each violation of a provision of the WQA other than the provisions in Section 74-6-5 or of a regulation or water quality standard adopted pursuant to the WQA.

2. The OCD hereby assesses a penalty of \$2,637,000.00 against I&W for I&W's failure to comply with the terms of BW-006 requiring submittal of a subsidence monitoring system report, a health and safety plan, capacity/cavern configuration information, ground water monitoring analytical reports, injection/production volume reports, and brine and fresh water analyses. In calculating the penalty amount, the OCD considered: the number of violations; the serious nature of the violations; the potential risk to public health, welfare, environment and property posed by the violations; the length of time I&W has been out of compliance; the willfulness of the violations; and the economic benefit to I&W of the non-compliance.

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 Water Quality Control Commission, and serve a copy on the OCD. See 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 defense 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 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 Water Quality Control Commission within 30 days of receipt of

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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 Water Quality Control Commission encourages settlement consistent with the provisions and objectives of the WQA and applicable rules. Settlement discussions do not extend the thirty (30) day deadline for filing the Respondent's Request for Order Hearing, or alter the deadlines for compliance with this Order. See 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 Water Quality Control Commission 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 S. St. Francis Drive, Santa Fe, NM 87505, (505) 476-3488.

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

IX. TERMINATION

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 Water Quality Control Commission.

Date

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