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September 6, 2007

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Re: *New Mexico Environment Dep't v. San Juan Refining Co. and Giant Industries Arizona, Inc.*, No. HWB 07-34 (CO)
Cleanup Order for the Giant Bloomfield Refinery

Dear Ned:

I am writing to formally respond to your letters of April 4, 2007 and June 6, 2007, in which you suggested revisions to the draft order for the environmental cleanup of the Giant Bloomfield Refinery, a petroleum refinery owned and operated by San Juan Refining Co. and Giant Industries Arizona, Inc (collectively, Giant). As you know, the New Mexico Environment Department (Department) issued the final Order on July 27, 2007. Also on that date, the Department issued a Response to Comments addressing the comments received during the public comment period. The Department received your April 4 and June 6 letters during discussions held after the comment period, so they were not addressed in the formal Response to Comments. Nevertheless, a written response to your letters is warranted to make the record in this matter clear and complete.

The procedural history of the Order is rather complex, so I will briefly summarize it. The Department released a draft of the cleanup order for public comment on June 21, 2006. The draft order cited sections 74-4-10.1 and 74-4-13 of the Hazardous Waste Act, and included a finding that the handling of hazardous and solid waste at the Giant Bloomfield Refinery may present an imminent and substantial endangerment to health and the environment. The comment period lasted for sixty days, through August 21, 2006. On that date, Giant submitted lengthy comments on the draft order. After the public comment period, the Department had further discussions with Giant on the draft order in an effort to resolve the significant outstanding issues. The Department met with Giant on March 27, 2007 and on June 28, 2007. In addition, Giant submitted two letters commenting on subsequent drafts of the order, on April 4, 2007 and June 6, 2007. Based on these discussions and the comments in the letters, the Department made several revisions to the final Order. Perhaps most

significantly, the Department issued the Order under the authority of section 74-4-10(A) and (E) of the Hazardous Waste Act, rather than sections 74-4-10.1 and 74-4-13 of the Act, and it removed the finding of an imminent and substantial endangerment. Consequently, Giant agreed not to appeal the final Order in a written agreement filed on July 27, 2007. On July 27, 2007, the Department issued the final Order. It also issued its Response to Comments addressing the comments received during the public comment period.

The Department's response to your letters of April 4, 2007 and June 28, 2007 follow.

A. April 4, 2007 Letter

1. *Benzene Strippers*

In your April 4, 2007 letter, you first suggested that the Department revise certain provisions of the Order to "reflect the 40 C.F.R. "§ 268.1(c)(4) method of operation" once the benzene strippers are installed to treat the wastewater from the API separator at the refinery. The Department agrees that several changes to the Order are appropriate to account for installation of the benzene strippers, scheduled for October 2007, which will trigger closure of the interim status hazardous waste surface impoundment known as the North Aeration Lagoon and South Aeration Lagoon.

To allow for the orderly and efficient closure of the impoundment, with minimal disruption of facility operations, closure and post-closure care will be accomplished through several legal mechanisms. The Department will require Giant to submit a closure plan, pursuant to the interim status regulations at section 20.4.1.600 NMAC (incorporating 40 C.F.R. part 265, subpart G), to implement initial closure measures to remove hazardous waste from the impoundment.[1] After these measures are completed, the Department will require Giant to submit an application for a post-closure care permit, which will provide for long-term monitoring.[2] Subsequent closure measures, addressing subsurface contamination, will be implemented under the Order, according to the schedule set forth in the Order. These measures are described in the Department's April 25, 2007 letter to Troy Hill of the Multimedia Planning and Permitting Division, EPA Region 6.

In the final Order, the Department has revised the Findings of Fact in Section II.A, Paragraphs 51 and 63 and added a new Paragraph 122 to reflect the requirements of the EPA Consent Agreement and Final Order. It has also added the EPA Order as a new reference for the Findings of Fact, listed as item 25. The Department has also revised Section IV.B.5 and

[1] The Department has not issued a hazardous waste permit for the surface impoundment, but the impoundment is authorized to operate under interim status pursuant to section 74-4-9 of the Hazardous Waste Act.

[2] Once the Department issues the post-closure care permit, the surface impoundment will no longer be an interim status unit.

the schedule in Section XI to provide for submission of a closure plan for the North and South Aeration Lagoons, due on September 1, 2007.

2. *Dispute Resolution*

Second, you suggested two revisions to the Dispute Resolution provision in section III.R (now III.Q) of the Order. You suggested that the following sentence be added to the provision: "Unless, specifically set forth herein, the failure to provide expressly for dispute resolution in any section of this Order is not intended and shall not bar Respondents from invoking this Section as to any dispute under this Order." The Department does not believe that this addition is necessary. Section III.Q applies by its express terms to "[a]ny dispute that arises under this Order."

You also suggested that another sentence be added: "The decision or other action forming the basis of the dispute shall be deemed final for purposes of judicial review once the negotiations in this Section III.R [now III.Q] are complete." The Department finds this addition problematic. A Department decision made after completion of the dispute resolution process would, in many cases, be a "final" agency action for purposes of judicial review, but not in every case. Some decisions might be subject to dispute resolution under the Order, but might not be ripe for judicial review. For example, Giant might seek an extension of time on submitting a work plan or a report, alleging good cause, and the Department might deny the request. The denial would be subject to dispute resolution under Section III.Q. However, the denial would not be ripe for judicial review unless and until Giant actually missed the deadline, and the Department took some action such as assessing a civil penalty for the untimely submittal. As an alternative, the Department has added the following sentence to Section III.Q of the final Order: "Whether a disputed decision is final for purposes of judicial review shall be determined according to established principles of administrative law."

3. *Financial Assurance*

Third, you made several suggestions regarding the Financial Assurance provision in Section III.Q 9now III.P) of the Order. The Department does not agree that any revisions to this provision are necessary. You suggested that a "pay-in period" be allowed for financial assurance for closure and post-closure case; that that a corporate guarantee of a parent corporation be allowed as one mechanism to meet the financial assurance requirements; and that Giant be allowed to deduct estimated closure and post-closure costs from total liabilities and add that amount to net worth in determining whether Giant (or its guarantor) meets the financial test. While the Department has not made final decisions on these issues, it is willing to discuss them with Giant in implementing the financial assurance requirements of the Order. Section III.P of the Order, as written, intentionally allows the Department flexibility in implementing the financial assurance requirements. That flexibility is adequate to adopt your suggestions, if the Department decides they are appropriate. Indeed, as we understand your suggestions, they are already part of the regulations, 20.4.1.500 NMAC (incorporating 40 C.F.R. part 264, subpart H).

4. *Binding Effect*

Fourth, you suggested several revisions to the Binding Effect provision in Section III.E of the Order. The Department agrees to a less extensive list of parties bound under this provision. In the final Order, the Department has deleted the phrase "and all other persons, including but not limited to, firms, corporations, subsidiaries, contractors, and consultants, acting under or on behalf of either or both of the Respondents and within the scope of their employment" from the first paragraph of Section III.E.

5. *Factual Errors*

Fifth, you noted several "factual errors" in the Order, and you requested that they be corrected. The Department has corrected Section II.B.2 and II.B.3 of the final Order to reflect that Giant Industries Arizona, Inc. is the operator and San Juan Refining Company is the owner of the refinery. However, the other "factual errors" you noted are simply dates that certain reports were due to the Department under the Order. Although these dates have passed, the underlying reports are nevertheless important requirements of the Order. As you mentioned, Giant submitted each of the reports to the Department prior to the date it was due and is therefore in compliance with the schedule. The Department has revised Sections V.A.1, V.A.2, and V.B.1 of the Order to note parenthetically that these items were submitted.

6. *Imminent Hazard Finding*

Sixth, you requested that the Department consider deleting the imminent and substantial endangerment claim under section 74-4-13 of the Hazardous Waste Act. The Department considered your request and, in consideration of Giant's agreement not to appeal the Order, it has agreed to delete the claim. The final Order is based, instead, on section 74-4-10(A) ands (E), as explained above.

7. *Unilateral Order*

Finally, you suggested that the Department issue a consent order rather than a unilateral order for cleanup of the refinery. The Department considered your suggestion and has decided to issue a unilateral order. The Department wishes to avoid the potentially protracted and time-consuming negotiations that would undoubtedly be necessary to reach an agreement on the terms of a consent order. Even if Giant were willing to agree to the terms of the final Order without further negotiation – a concession not suggested in your letter – the Department would insist on additional provisions in a consent order, such as provisions for stipulated penalties and force majeure. Negotiation of such provisions, as we have seen in the past, can take considerable time and effort. The Department wishes to avoid further delay in issuing an enforceable order. Nonetheless, Giant has had significant input on the final Order, as summarized above.

B. June 28, 2007 Letter

1. *Benzene Strippers*

In your June 6, 2007 letter, you first addressed the factual statements referring to the installation of the benzene stripper and tank system. Paragraphs 51 (at page 12) and 120 (at page 25) of the draft order referred to the Consent Agreement and Final Order entered by the Environmental Protection Agency (EPA) on May 18, 2006. The EPA Final Order, as originally issued, required Giant to install, by July 18, 2007, equipment to treat the wastewater from the API separator and reduce the benzene concentration to non-hazardous levels before it is placed into the aeration ponds. You requested that the references to the date of operation of the equipment be deleted because Giant is discussing with EPA an extension to that date. Subsequently, the Department has received confirmation that EPA agreed to extend the deadline to October 18, 2007. The final Order has been revised to reflect the October 18, 2007 deadline.

2. *Dispute Resolution*

Second, you repeated your request, first made in your April 4 letter, for revisions to the Dispute Resolution provision in Section III.Q of the Order. The Department has declined to make these revisions for the reasons explained above.

3. *Financial Assurance*

Third, you repeated your April comments on the Financial Assurance provision in Section III.P of the Order, addressed above. The Department has made a few clarifications to the Financial Assurance provision, as discussed during our June 28 meeting.

4. *Factual Errors*

Fourth, your repeated your comment that the Order contains factual errors in the dates for submission of certain documents, addressed above.

5. *Description of API Separator*

Fifth, you stated that the description of the API Separator in Paragraph 63 (page 15) is not correct because it states that the API separator generates K051 listed waste. You explained that the waste is recycled in an oil recovery process and is therefore exempt. Section II.A.6.1 of the final Order has been revised to reference the exemption in 40 C.F.R. § 261.4(a)(12)(i).

6. *Refinery History*

Sixth, you objected to findings in the Order suggesting that the presence of contaminants at the refinery is solely the result of Giant's activities. You noted that Giant is the latest in a series of owners and operators of the refinery. However, as current owner and operator of the refinery, Giant is responsible for the contamination. The Department therefore has not revised these findings.

7. *Force Majeure*

You next requested that a force majeure provision be added to the order. The Department has modified Section III.G.3 of the final Order to reference force majeure as a possible cause for an extension request.

8. *Cleanup Standards*

You objected to the requirement in Section VI.C.3 of the Order, which allows cleanup based on a risk analysis only if cleanup standards cannot be achieved. You suggest that cleanup levels based on a risk analysis should always be available. The Department disagrees with this objection. All cleanup levels, whether derived from numerical standards, screening level guidance, or a risk assessment, are risk based.

9. *Interim Measures*

You next stated a concern that the Department could require interim measures, as described in Section VI.A, as a normal practice. Apparently, Giant is concerned that the Department will require ad hoc interim measures to implement cleanup. The Department does not believe this concern is well-founded. The Order sets forth a remedy selection process that will normally be followed. You further stated that any interim measures should be consistent with, and integrated into, long-term corrective measures at the refinery. The Department agrees, and Section VI.A.1 of the final Order has been modified to incorporate this concept.

10. *Risk Assessment*

You objected to the first sentence of Section VI.B, Section VIII.E, and Section VIII.G of the Order because these provisions appear to require Giant to perform human heath and ecological risk assessments without the Department showing that such assessments are needed or otherwise appropriate. That is not the intent of these provisions. The Department has revised Section VI.B of the final Order to clarify the distinction between evaluation of risk (e.g., comparing detections to the New Mexico soil screening levels) and a risk assessment. Sections VIII.E and VIII.G of the Order set forth the requirements for performance of a risk assessment.

11. *Groundwater Clean-Up Levels*

You next suggested that Section VII.A of the Order, which governs groundwater clean-up levels, should specify a target risk level of 10^{-5} for establishing cleanup levels for carcinogens for which no water quality standards or maximum contaminant levels have been set. The Department disagrees with this suggestion. Although the EPA Region VI Human Health Medium-Specific Screening Levels for tap water are based on a risk level of 10^{-6} for carcinogens, which is more protective than the Department's *general* policy, the Department consistently follows this guidance. Moreover, water quality standards or MCL's have been established for all the contaminants that have been discovered to date at the refinery.

12. *Technical Impracticability*

You requested that the Department not impose an unduly onerous or expensive clean-up measure if a clean-up level is determined to be technically impracticable. The Department believes that this issue is adequately addressed in the Order. The corrective measures evaluation processes set forth in Section VI.C describes the criteria for evaluation remedies. Those criteria include both implementablity and cost as part of the evaluation process.

13. *Survey of Soil Borings and Test Pits*

You objected to the requirement in Section VIII.A.7 of the Order requiring that a professional surveyor must locate and obtain the elevation of each soil boring and test pit. Department agrees with this comment and has modified the final Order to allow for alternate survey methods.

14. *Groundwater Samples from Borings*

You next objected to the requirement in Section VIII.B.2 that groundwater samples must be collected from all exploratory borings not intended to be completed as monitoring wells prior to abandonment of the borings, where practicable. You explained that such sampling may not be appropriate at every soil boring. The Department agrees with this comment. Section VIII.B.2 of the final Order has been modified to allow for alternative requirements in Department-approved work plans.

15. *Schedule*

You requested that the dates in the Table I Schedule will be adjusted to reflect the date of the final Order. However, the Department does not agree that any of the dates in this schedule need to be revised based on the effective date of the final Order.

16. *Imminent Hazard Finding*

You also repeated your April 4 request that the Department not issue an order based on an imminent and substantial endangerment, which is addressed above.

17. *Unilateral Order*

Finally, you repeated your April 4 request that the Department enter into a consent order rather than issuing a unilateral order, which is also addressed above.

The Department appreciates your comments and suggestions on the draft order. While the Department has decided to issue the Order unilaterally, we hope to work cooperatively with Giant to implement the Order and complete the environmental investigation and cleanup of the Giant Bloomfield Refinery. We look forward to your continued cooperation in this matter. If you have any questions, please call me at (505) 827-2985.

Sincerely,

Charles de Saillan
Assistant General Counsel

cc: James Bearzi, Hazardous Waste Bureau
Dave Cobrain, Hazardous Waste Bureau
Hope Monzeglio, Hazardous Waste Bureau