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**NEW MEXICO  
ENVIRONMENT DEPARTMENT**



*Hazardous Waste Bureau*

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TOM BLAINE, P.E.  
Director  
Environmental Health Division

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

July 31, 2013

Mr. Ed Riege  
Environmental Manager  
Western Refining, Southwest Inc., Gallup Refinery  
Route 3, Box 7  
Gallup, New Mexico 87301

**RE: HYDROCARBON RELEASE NOTIFICATION  
WESTERN REFINING SOUTHWEST INC., GALLUP REFINERY  
EPA ID # NMD000333211  
HWB-WRG-MISC**

Dear Mr. Riege:

The New Mexico Environment Department (NMED) has received Western Refining Southwest, Inc.'s (Western Refining) letter dated July 16, 2013, regarding a hydrocarbon release notification at the Gallup Refinery. The letter contends that the "RCRA permit" is not applicable to the hydrocarbon release, and makes several arguments to support that contention. By this letter, NMED explains that the Hazardous Waste Facility Permit (Permit), dated August 2000, issued by NMED for the Western Refining Gallup Refinery is applicable to the release, and responds to each of the arguments that Western Refining makes to the contrary.

Western Refining states in the July 16 letter that "without making any admissions concerning the potential applicability of the RCRA Permit to this release, Western sent a copy of the C-141 to the Bureau on July 11, 2013 concurrent with submission of the form to OCD [the Oil Conservation Division]. This hydrocarbon release is regulated by OCD under the Oil and Gas Act, and therefore, consistent with past practice, please be advised that Western will work with OCD to assess and respond to the hydrocarbon release." The Permittee does not have the authority of the ability to choose which regulations to follow. Aside from its obligations under

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the New Mexico Oil and Gas Act, Western Refining must comply with its obligations under the New Mexico Hazardous Waste Act, and in particular the Permit issued thereunder. Section II.F.2 of the Permit requires Western Refining to report NMED, within 24 hours of becoming aware of the circumstances, "information concerning the release or discharge of any hazardous waste or hazardous constituent that could threaten human health or the environment at and outside the facility." Section II.F.2 of the Permit requires a subsequent written notice within 15 days. This permit condition is based on the federal hazardous waste regulations at 40 CFR 270.30(l)(6), which has been incorporated into the New Mexico Hazardous Waste Management Regulations, 20.4.1.900 NMAC. It is mandatory. To avoid unnecessary paperwork, NMED has accepted receipt of the information on C-141 forms submitted to OCD to fulfill the release reporting requirements of the Permit, and it will continue to do so. However, it is important for Western Refining to understand that the permit imposes a reporting requirement that is separate and independent from any OCD requirements.

Western Refining argues, first, that the Permit is not applicable because, "based on currently available information, the release is an on-site release of fresh, refined gasoline. There is no documented release of hazardous waste or a hazardous constituent derived from hazardous waste, historical or otherwise, to which RCRA corrective action requirements are intended to apply. As you know, Western believes that this type of release, and any cleanup, is subject to an ongoing regulatory program under the jurisdiction of the OCD." Gasoline is an ignitable hazardous waste (D001) under the regulations. 40 CFR 261.21. It may also be toxic hazardous waste for benzene (D018). 40 CFR 261.24. Moreover, gasoline is comprised of hundreds of compounds, some of which are hazardous constituents. The term "hazardous constituent" is defined in Section I.D of the Permit to include any constituent identified in 40 CFR Part 261, Appendix VII and Appendix VIII and any constituent identified in 40 CFR Part 264 Appendix IX. Gasoline contains multiple hazardous constituents, including benzene, toluene, ethylbenzene, xylenes, polycyclic aromatic hydrocarbons, and naphthalene. Moreover, once the gasoline was released into the environment, it became a "waste" for purposes of corrective action under the HWA. *See Agric. Excess & Surplus Ins. Co. v. A.B.D. Tank & Pump Co.*, 878 F. Supp. 1091, 1095 (N.D. Ill. 1995) ("once gasoline leaked into the soil, the gasoline itself was no longer a useful material and instead became abandoned or discarded material"); *Craig Lyle Ltd. P'ship v. Land O'Lakes, Inc.*, 877 F. Supp. 476, 482 (D. Minn. 1995) ("spilt or leaked petroleum from commercial operations satisfies RCRA's definition of 'solid waste'"); *Zands v. Nelson*, 779 F. Supp. 1254, 1262 (S.D. Cal. 1991) ("gasoline is no longer a useful product after it leaks into, and contaminates, the soil"; rather, "the gasoline has been abandoned via the leakage . . . into the soil"); *accord Dydio v. Hesston Corp.*, 887 F. Supp. 1037, 1048 (N.D. Ill. 1995) (following *Zands*).

Western Refining argues that "even if the release was a hazardous waste, Section IV.B.2 of the RCRA permit is inapplicable. As quoted in your letter, Section IV.B.2 requires written notification within 15 days of discovery of any "new" SWMU or AOC. However, as we think

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you will agree, it is not the case that every spill creates a new SMWU or AOC.” NMED disagrees. NMED has determined that the release is at least potentially a SWMU or AOC. The C-141 report submitted July 11, 2013 contained additional details regarding the release including the fact that 400 barrels had been recovered from the site and water and non-aqueous phase liquid continued to be recovered from the site. The presence of 400 barrels (or more) of gasoline in the soil indicates that the leak went undetected for some time. While Western Refining has been diligent in performing corrective action once the leak was discovered, the amount of petroleum product present in the environment is as yet unquantified and indicates a systematic and routine release to the environment, which is part of the definition for a SWMU. Furthermore, the area may be determined to be an area of concern (AOC) which is defined in section I.D of the Permit as “any area that may have a release of hazardous waste or hazardous constituents which is not from a solid waste management unit and is suspected or determined by the Secretary to pose a threat to human health or the environment.” An area of concern may include releases resulting from one time and accidental events as well. Therefore this release may be defined as an AOC or a SWMU. Groundwater in the area of the release moves toward the north east (toward the New API Separator) and may be contributing to existing groundwater contamination. Further investigation of this release is warranted.

Western Refining also argues that there is no information to support, stating, “[f]inally, we note that your letter appears to make the assumption that Tanks 101 and 102 are the source of the release. We have no information that would suggest this is correct.” Western Refining originally described the release to NMED by using Tanks 101 and 102 as a reference point for the location of the release. Unless or until another source is identified, the assumption that the tanks may be a source is not unwarranted. Western Refining also stated “[i]n addition, please note that we disagree with the assertion that any generated materials would be listed as K169 hazardous wastes. The K169 listing is only for crude oil tank *sediment* from petroleum refining operations. Even if Tanks 101 and 102 were the source of the release, the release would be expected to be crude oil itself, not the sediment formed by gravity in those tanks.” Since the tanks are above ground and Western Refining has not reported observed leaks from the sides of the tanks, such leaks would most likely be from the bottom of the tanks; thus the sediment and entrained liquids associated with it, would leak before the crude oil. Regardless whether the release originated from these tanks, the release is subject to HWA corrective action authority for the reasons explained above. Western Refining must manage any gasoline-tainted soil removed from the site as hazardous waste unless and until analytical results confirm that the soil is not toxic hazardous waste for benzene (D0018) or listed hazardous waste based on the source of the release.

Section IV.B.2.a of the Permit requires Western Refining to submit to NMED, within 15 days after discovery of a suspected new SWMU or AOC, a notification containing all available information on the nature of the release. By letter dated July 8, 2013, NMED requested that Western Refining submit such a notification (report) by July 19, 2013. Western Refining has not

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done so. Western Refining's failure to submit the notification in accordance with section IV.B.2.a of the Permit is a continuing violation of the Permit. Western Refining must submit to NMED a written notification (report) describing all investigation and clean-up actions conducted to date and any analytical results collected, in accordance with Permit Section IV.B.2.a, by no later than **August 19, 2013**. Western Refining must also submit to NMED a SWMU assessment report in accordance with Permit Section IV.B.2.b by **September 16, 2013**.

If you have questions regarding this letter, please contact Kristen Van Horn of my staff at 505-476-6046.

Sincerely,

A handwritten signature in black ink, appearing to read "John E. Kieling", with a small "for" written below it.

John E. Kieling  
Chief  
Hazardous Waste Bureau

cc: D. Cobrain, NMED HWB  
N. Dhawan, NMED HWB  
C. deSaillen, NMED OGC  
A. Haines, WRG  
A. Allen, WRG  
C. Chavez, OCD  
G. von Gonten, OCD

File: Reading File and WRG 2013 File  
HWB-WRG-MISC