

August 27, 2013



Via Email and Certified Mail, Return Receipt Requested (#70060810000136230168)

Mr. John E. Kieling
Chief, Hazardous Waste Bureau
Environmental Health Division
New Mexico Environment Department
2905 Rodeo Park Drive East, Building 2
Santa Fe, NM 87505-6303

**Re: Hydrocarbon Release Notification
Western Refining Company Southwest, Inc. ("Western")
Gallup Refinery
EPA ID #NMD000333211**

Dear Mr. Kieling:

On July 31, 2013, you sent a letter to Western's Gallup Refinery responding to Western's July 16, 2013 reply to the Hazardous Waste Bureau's ("Bureau") July 8, 2013 letter concerning Western's June 27, 2013 oral notification of a hydrocarbon release at the Refinery. Subsequently, without addressing the substantive positions asserted in the Bureau's July 31st letter, Western requested, and the Bureau granted, postponements of the dates for the deliverables sought in the Bureau's July 8th letter. Western, however, has significant concerns about and disagreements with many of the Bureau's jurisdictional assertions in its July 31st letter. As we believe that clear communication on these issues is important, below we provide Western's responses to the positions asserted by the Bureau in its July 31st letter.

1. On page 1 of your letter, in response to Western's statement that it provided notice of the hydrocarbon release without admission concerning the applicability of the RCRA permit, you state that Western "does not have the authority [or] the ability to choose which regulations to follow." Contrary to your assertion, Western is not choosing which regulations to follow. As discussed in more detail below, oversight of the investigation and remedial activities for this incident belongs exclusively to the Oil Conservation Division ("OCD") of the Energy, Minerals and Natural Resources Department, not the Bureau, pursuant to applicable law and rules. The spilled material cannot be presumed to be a release of a hazardous waste or hazardous waste constituents.

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2. On page 2 of the letter, you incorrectly assert that spilled gasoline is a hazardous waste. EPA currently takes the position that media contaminated by releases of products are not solid wastes. Under EPA's policy, if a petroleum product is spilled into soil then the soil is contaminated media and not a solid waste.¹ Therefore, the media cannot be a hazardous waste.

Additionally, the cases cited on page 2 are not controlling in this context. The holdings in those cases *are limited to interpretation of the scope of RCRA citizen suits in connection with releases of petroleum*. They do not make any holding relative to the scope of EPA's RCRA corrective action jurisdiction.

These statutory private citizen suit actions also were decided long ago (i.e. the early to mid-1990s). There has since been significant refinement in EPA's regulatory position on the nature of releases of materials into soil and groundwater especially relative to EPA's "contained-in policy."²

All of the decisions cited by the Bureau on page 2 held that petroleum products released were "solid waste." There was no holding that the petroleum is a hazardous waste. (The *Dydio* court was less clear on this point in its holding that leaking petroleum was "a solid or hazardous waste." However, the opinion offers no support for the position that petroleum product would be hazardous waste when spilled.) Even if, *arguendo*, leaked or spilled petroleum can be deemed solid waste, OCD should have jurisdiction over corrective action because the waste is not deemed hazardous. Under the Oil and Gas Act, NMSA 1978, § 70-2-12.B(22) (2004), OCD has authority "to regulate the disposition of nondomestic wastes from . . . the refinement of crude oil to protect public health and the environment." See NMSA 1978, § 74-9-3.N(1) (1990) excluding "nondomestic wastes associated with the . . . refinement of crude oil" from the definition of "solid waste."

It is interesting to note that the Bureau, on the one hand, seeks to advance its position that spilled petroleum products are solid waste under NMED jurisdiction, but then, on the other, attempts to further buttress its jurisdiction by suggesting that such products also contain "hazardous constituents." Does NMED mean to say that spilled materials do not even need to be wastes for NMED to have corrective action jurisdiction? Where is the support for that under the Hazardous Waste Act?

¹ See: http://www.epa.gov/wastes/hazard/correctiveaction/pdfs/workshop/mrw_slides.pdf at 6.

² See generally: http://www.epa.gov/wastes/hazard/correctiveaction/pdfs/workshop/mrw_slides.pdf, a module in EPA's "Corrective Action Workshop" website at: <http://www.epa.gov/wastes/hazard/correctiveaction/workshop/#General>

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Furthermore, the cited cases recognize that, under RCRA, UST releases are governmentally- regulated under a separate program (i.e. Subchapter IX) than the one for hazardous wastes (Subchapter III). Indeed, the court in *Agric. Excess and Surplus Ins. Co. v. A.B.D. Tank and Pump Co.*, 878 F. Supp. 1091, 1096, states that “petroleum leakage from underground storage tanks should be regulated under Subchapter IX [i.e. the UST program], not Subchapter III [the hazardous waste program]...” So, even at the federal level, there is authority for regulation of, and corrective action for, UST releases outside the hazardous waste program. Why should this be different for above-ground releases in New Mexico where OCD has express jurisdiction over such releases?

3. The Bureau appears to take the position that every spill or release is either a “solid waste management unit” or an “area of concern.” As a threshold matter, definitions of these terms in Section I.D. of the Hazardous Waste Facility Permit (“Permit”) render those terms virtually indistinguishable. An AOC is an 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.” However, the term “solid waste management unit” includes places where there have been “one time and accidental events that were not remediated.” If such releases *are* remediated, then, by definition, they would not be “solid waste management units.” Moreover, if they are remediated pursuant to the existing OCD regulatory program, then what basis would there be for such areas to even be “areas of concern” on the basis of a threat to human health or the environment? Since such areas are being remediated pursuant to OCD authority, there is no reason to cover them with duplicative NMED permit requirements.

4. Just because Western described the hydrocarbon release area with reference to the location of Tanks 101 and 102 does not mean that NMED may presume that there has been a release of a listed hazardous waste. RCRA policy at the federal level makes this point quite clearly.³

Finally, we note that Western is not in violation of its Permit, as previously explained. However, Western respectfully requests the Bureau to withhold judgment on this issue pending a meaningful dialogue among NMED, OCD, and Western. Western has made a good faith effort to promote such a dialogue by scheduling a meeting with the Secretaries of NMED and EMNRD on August 30, 2013.

³ See <http://www.epa.gov/osw/hazard/correctiveaction/training/vision/mod9.pdf> at 10.

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We would be glad to discuss these issues with you and your staff at your request.
Please note Western reserves all applicable rights and defenses relevant to this matter.

Sincerely,



Leslie Ann Allen
Senior Vice-President
Environmental and Regulatory Affairs

cc: T. Blaine, P.E., NMED EHD *(via e-mail)*
D. Cobrain, NMED HWB *(via e-mail)*
N. Dhawan, NMED HWB *(via e-mail)*
A. Hains, Western *(via e-mail)*
L. Gould, Western *(via e-mail)*
E. Riege, Western *(via e-mail)*
J. Bailey, EMNRD OCD *(via e-mail)*
C. Chavez, EMNRD OCD *(via e-mail)*
G. von Gonten, EMNRD OCD *(via e-mail)*