

*Via E-Mail and
Certified Mail No. 7006 0810 0004 3770 8878*

October 9, 2013

Mr. John E. Kieling, Chief
Hazardous Waste Bureau
New Mexico Environment Department
2905 Rodeo Park Drive East, Building I
Santa Fe, New Mexico 87505

RECEIVED**OCT 11 2013****NMED
Hazardous Waste Bureau**

**Re: Draft Hazardous Waste Permit for Western Refining Southwest, Inc.,
Gallup Refinery/Public Notice 11-05/
Additional Comments of the Permit Applicant**

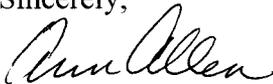
Dear Mr. Kieling:

As you know, by letter dated December 14, 2011, Western Refining Southwest, Inc. ("Western") submitted comments ("December 2011 Comments") on the above-referenced draft hazardous waste permit ("Permit"). The Hazardous Waste Bureau ("HWB") responded to these comments in a draft "Response To Public Comments" dated September 6, 2012 ("RTPC"). Western replied to the HWB's responses by letter dated March 6, 2013. In addition, the parties met at your offices on November 7, 2012 and April 24, 2013 to discuss the issues and concerns that had been raised by both sides and to develop a path forward on the permit renewal. I want to thank you and Tom Blaine for meeting with Mr. Allen Hains and me on October 4, 2013 to discuss settlement of the 2011 RCRA Post-Closure Permit.

The purpose of this letter is to submit additional comments to the Permit. The comments are in the form of a Memorandum – Settlement Communication to Tom Blaine dated September 4, 2013. The Memorandum is attached to this letter.

We trust that the attached settlement communication will lead to actions that will further both parties' goals to make timely progress toward completion of the RCRA Corrective Action obligations at the Gallup Refinery. Western will have additional comments as we proceed with the permit renewal process. If you have any questions, please contact me or my colleague, Allen Hains.

Sincerely,



Leslie Ann Allen
Senior Vice-President
Environmental and Regulatory Affairs

Attachment

MEMORANDUM

Settlement Communication

To: Tom Blaine, P.E.
Director, Environmental Health Division
New Mexico Environment Department

From: L. Ann Allen
Senior Vice-President, Environmental and Regulatory Affairs
Western Refining Southwest, Inc.

Date: September 4, 2013

As you know, Western Refining Southwest, Inc. ("Western") has recently raised concerns with the Hazardous Waste Bureau of the New Mexico Environment Department ("HWB") regarding the HWB's corrective action jurisdiction over product spill areas under the proposed RCRA permit for Western's petroleum refinery near Gallup. The purpose of this memorandum is to summarize those concerns and propose a solution that Western believes is consistent with New Mexico law and the interests of human health and the environment.

I. Background

Western operates its Gallup Refinery under a Hazardous Waste Treatment, Storage and Disposal Facility Permit (Permit) issued in 2000. The permit addresses post-closure care for a now closed unit, the Land Treatment Unit, at the Refinery. No treatment, storage or disposal of hazardous waste requiring a permit is conducted at the Gallup Refinery. Western is currently in the process of renewing its Permit with the HWB under the Hazardous Waste Act ("Renewal Permit").

In the draft permit renewal, the HWB has proposed to require Western to investigate and remediate possible releases (spills and leaks) from crude oil and refined product storage tanks and oil processing units at the Gallup Refinery. These areas are referred to as "areas of concern" or "AOCs" in the Renewal Permit. None of the AOCs that are the subject of the Renewal Permit requirements is related to hazardous waste treatment storage and disposal at the refinery.

Western has commented in opposition to proposed investigation and corrective action requirements of the Renewal Permit. The HWB has prepared responses to comments and has advised Western that the HWB intends to issue the permit with most of the challenged conditions remaining in the permit. *Additionally, by letter dated July 8, 2013, the HWB notified Western that it was required to notify the HWB and conduct corrective action for releases of petroleum, including refined product, at the Gallup Refinery under the current hazardous waste Permit.* The parties have subsequently exchanged correspondence anticipating the different views of the HWB's jurisdiction over such releases. NMED position conflicts with long-standing practice at the Western Gallup and Bloomfield refineries. See Diagram #1A attached. See also Western's August 27, 2013 letter to John Kieling, Chief of the HWB, attached.

II. The Problem

The HWB maintains that it has corrective action authority over *all* releases of hazardous waste and hazardous constituents as well as releases of non-hazardous waste substances such as groundwater “contaminants” listed by the Water Quality Control Commission, toxic pollutants listed in 20.6.2.7 NMAC, any contaminant for which EPA has promulgated an MCL, and even MTBE. See the definition of “hazardous waste” in Section I.I (page 5) of the Renewal Permit.) See also Diagram #1B attached.

NMED’s assertion of jurisdiction over *all* releases at the Gallup Refinery conflicts with – and effectively swallows -- historic corrective action oversight for those areas exercised by the New Mexico Energy, Minerals and Natural Resources Department’s Oil Conservation Division (“OCD”). Such assertion of limitless jurisdiction by the HWB is expected to likely lead to duplicative and conflicting corrective action requirements between HWB and OCD. For example, Western recently reported discovering hydrocarbon contamination, which partially may be from a release of refined gasoline, at the refinery. The discovery was reported to OCD under the applicable OCD requirements and Western is conducting an investigation and possible corrective action under OCD’s oversight. If Western complies with the directives in the HWB’s July 8th letter, Western will be investigating and remediating the contamination already under oversight of OCD.

Both NMED and OCD assert jurisdiction over remediation of the subject AOCs, including groundwater. NMED asserts jurisdiction pursuant to its RCRA permitting authority under Section 74-4-4.2 of the Hazardous Waste Act. OCD asserts jurisdiction pursuant to its authority over non-hazardous, non-domestic petroleum refining wastes under the Oil and Gas Act, the release notification/corrective action requirements of 19.15.29.8 NMAC, and remediation pursuant to 19.15.29.11 NMAC or an Abatement Plan under 19.15.30 NMAC. See attached OCD letter dated February 15, 2012.

Thus, the agency conflict is, in part, related to legal authority and, in part, the customary and historic practices of the agencies. Western believes that, based on law and practice, agency jurisdiction should be determined according to whether a release is comprised of hazardous waste or hazardous waste constituents (i.e., subject to HWB jurisdiction) versus a release of petroleum products or non-hazardous solid waste (i.e., subject to OCD jurisdiction). See Diagram #1C.

For the most part, the New Mexico hazardous waste program mirrors the federal RCRA program. Under the federal RCRA program, the EPA is authorized to require corrective action as a condition of all RCRA permits for all releases of hazardous waste or hazardous constituents from solid waste management units (“SWMUs”). RCRA §3004(u). EPA also maintains that it has corrective action jurisdiction over such releases from areas other than SWMUs even if such releases are not derived from waste materials. See RCRA §3005(c)(3), the so-called “omnibus provision.” See also, e.g., 55 Fed. Reg. 30797, 30809 (1990). Similarly, NMED is authorized to require corrective action as a condition of all hazardous waste permits for such releases. NMSA 1978 § 74-4-4.2.B (2006). *However, unlike federal law, HWB’s jurisdiction over non-hazardous solid wastes or product releases at refineries runs into OCD’s jurisdiction over such materials.*

There simply is no express statutory authority for the proposition that the New Mexico Hazardous Waste Act can be extended to cover releases of wastes or other materials subject to OCD jurisdiction. See Diagram #2 attached.

The HWB's proposed AOCs in the draft Renewal Permit are not attributable to documented spills of hazardous waste or hazardous waste constituents. Instead, they include spills of product or product intermediates, which create contaminated media. Moreover, some of the AOCs identified in the draft Renewal Permit are not associated with any known spills, but rather were included simply because liquids are managed in these areas and HWB staff contends there could have been a release. EPA has made it clear that contaminated media are not solid or hazardous waste for purposes of remediation/corrective action. See citations in Western's August 27, 2013 letter to John Kieling, Chief of the HWB, attached.

III. The Solution

Although Western and the HWB have differences in their view of the legal jurisdiction of HWB and OCD in connection with corrective action authority, Western believes that there is a legal basis available for avoiding conflicting jurisdiction: Even if, *arguendo*, NMED has jurisdiction over the AOCs, Western believes that the HWB is not required to impose corrective action on them under the Renewal Permit. Section 74-4-4.2 B and C of the New Mexico Hazardous Waste Act can be interpreted to mean that corrective action of historic releases at SWMUs is mandatory, but AOCs (again, assuming they are subject to NMED corrective action jurisdiction) are covered by a more discretionary provision: "the secretary *may* issue a permit or permit subject to any conditions necessary to protect human health and the environment for the facility." (italics added) (The quoted language appears to be, with certain differences, the state counterpart of Section 3005(c)(3) of RCRA (42 U.S.C. §6925(c)(3)), the so-called "omnibus provision," that EPA uses to justify EPA's discretionary authority to impose corrective action at AOCs.)

In light of the preceding perspective, Western believes that the HWB could and should issue the RCRA Renewal permit now without the subject AOCs. As a matter of discretion, NMED can agree to allow AOCs to be addressed under OCD jurisdiction, which approach is protective of human health and the environment. See Diagram #3.

Finally, Western also believes that the renewed RCRA permit should have a dispute resolution clause. A dispute resolution process will promote resolution of disputes at an early stage without the need for litigation. This would benefit both parties. NMED has previously agreed to dispute resolution clauses in RCRA permits. *See, e.g., Sandia National Laboratories (September 2012), Safety Kleen Systems (September 2003), and Holloman Air Force Base (February 2004).* Western believes that its Renewal Permit should be afforded the same alternative.

The preceding comments are being submitted in the interest of promoting a resolution of the current differences between the parties on the relevant issues. Nothing herein shall be deemed as an admission of any kind, and Western reserves all applicable rights, claims, and defenses in connection with same.