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**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

November 8, 2013

Ms. Ann Allen  
Senior Vice-President  
Environmental and Regulatory Affairs  
Western Refining, Southwest Inc.  
123 W. Mills Avenue, Suite 200  
El Paso, TX 79901

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

Dear Ms. Allen:

The New Mexico Environment Department (Department) has received and by this letter responds to the letter from Western Refining Southwest, Inc. (Western Refining) dated August 27, 2013. Western Refining sent the letter in response to the Department's letter of July 31, 2013. The Department's letter explained Western Refining's responsibility for corrective action under the Hazardous Waste Facility Permit (Permit), dated August 2000, issued by the Department for Western Refining's petroleum refinery in Gallup, New Mexico (Facility). The Department issued the permit under the authority of the New Mexico Hazardous Waste Act (HWA), NMSA 1978, §§ 74-4-1 to 74-4-14. Corrective action is necessary to address the release into the environment of petroleum hydrocarbons, apparently gasoline and diesel fuel, at the Facility. The Department continues to disagree with the positions that Western refining advances in this matter, as explained below.

Ms. Ann Allen  
Gallup Refinery  
November 8, 2013  
Page 2

### **Point 1**

In "Point 1" of its letter, Western Refining asserts that the "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." This statement is not correct as a matter of law, and it is contrary to the Department's practice and policy.

The Facility is regulated under both the New Mexico Water Quality Act, implemented by OCD, and the HWA, implemented by the Department. Western Refining, as owner and operator of the Facility, must meet the requirements of both statutes and their implementing regulations.

The Department has the authority to require corrective action to address releases of hazardous waste and hazardous substances at the Facility. The HWA specifically provides that "[h]azardous waste permits issued after April 8, 1987 shall require corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage or disposal facility seeking a permit under this section." NMSA 1978, § 74-4.2(B). The HWA also provides that the Department "may issue . . . a permit subject to any conditions necessary to protect human health and the environment for the facility." NMSA 1978, 74-4-4.2(C). This latter provision is sometimes referred to as the "omnibus provision." The Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 to 6992k, the federal analogue to the HWA, contains similar provisions. Section 3004(u) of RCRA provides that "a permit issued after November 8, 1984, by [EPA<sup>1</sup>] or a State shall require corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage, or disposal facility seeking a permit under [RCRA], regardless of the time at which waste was placed in such unit." 42 U.S.C. § 6924(u). Section 3005(c)(3), the federal omnibus provision, provides that "[e]ach permit issued under this section shall contain such terms and conditions as the [EPA] (or the State) determines necessary to protect human health and the environment." 42 U.S.C. § 6925(c)(3). The omnibus provision is repeated in the RCRA regulations, and incorporated into the State hazardous waste regulations. 20.4.1.900 (incorporating 40 C.F.R. § 270.32(b)(2)).

EPA, which implements the hazardous waste regulatory program under RCRA, has concluded that corrective action authority, particularly when coupled with the omnibus authority, is not limited to releases of hazardous waste or hazardous constituents from solid waste management units (SWMUs) where wastes have been "routinely and systematically released." Instead, the authority extends to so-called "areas of concern" (AOCs), where hazardous waste or hazardous constituents have been spilled or otherwise released into the environment infrequently or as a one-time occurrence. EPA has stated in guidance on this issue:

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<sup>1</sup> The United States Environmental Protection Agency.

Ms. Ann Allen  
Gallup Refinery  
November 8, 2013  
Page 3

To reflect a more holistic approach, permits and orders often use the term “area of concern” to refer to releases which warrant investigation or remediation under the authorities discussed above, regardless of whether they are associated with a specific SWMU as the term is currently used. For example, when an overseeing agency believes one-time spills of hazardous waste or hazardous constituents have not been adequately cleaned up, these releases are often addressed as areas of concern.

EPA, Corrective Action for Releases from Solid Waste Management Units at Hazardous Waste Management Facilities, 61 Fed. Reg. 19432, 19443 (May 1, 1996). The Environment Department agrees with this statement.

Moreover, the Environment Department is the State agency authorized by EPA under RCRA to implement the hazardous waste program – including corrective action – in New Mexico. 61 Fed. Reg. 2450 (Jan. 26, 1996). Consequently, the Department has an obligation to implement and enforce the corrective action requirements under the HWA. And it does so under continuous EPA oversight.

Finally, there is no exemption in the HWA or the hazardous waste management regulations (or in RCRA or the federal regulations) from corrective action requirements for facilities that are also subject to regulation under the WQA or similar authority. Those corrective action requirements are fully applicable to the Facility. Conversely, the regulations under the WQA do include an exemption from the abatement requirements for facilities that are conducting corrective action under the authority of the HWA. The regulations provide that the groundwater abatement regulations – sections 20.6.2.4104 and 20.6.2.4106 NMAC – “do not apply to a person who is abating water pollution . . . under the authority of the [Environment Department] pursuant to the Hazardous Waste Management Regulations (20.4.1 NMAC) adopted by the New Mexico Environmental Improvement Board.” 20.6.2.4105.A NMAC.

The Department recognizes that there is some overlap between the regulatory authority of the Department under the HWA and the regulatory authority of OCD under the WQA. The Department will continue to work with OCD to ensure that regulation of the Facility is applied fairly and consistently, while also ensuring that the environment is protected. However, Western Refining is not correct in asserting that OCD has exclusive jurisdiction over cleanup activities at the Facility.

Western Refining also asserts that “[t]he spilled material cannot be presumed to be a release of hazardous waste or hazardous waste constituents.” However, the Department has not made any “presumptions” about the chemical composition of the hydrocarbon spill. In its initial request letter, dated July 8, 2013, the Department requested information on the “nature of the release,”

Ms. Ann Allen  
Gallup Refinery  
November 8, 2013  
Page 4

including the “hazardous constituents released.” In its letter of July 16, 2013, Western Refining responded that the release was one of “fresh, refined gasoline.” On August 20, 2013, Western Refining submitted to the Department a Hydrocarbon Release Notification Report that confirmed the release was, at least in part, gasoline and, in addition, diesel fuel. The report contained a distillation analysis, plotted on a graph, of the spilled hydrocarbons. It showed gasoline range hydrocarbons through light gas-oil (diesel) range hydrocarbons. Gasoline and diesel fuel contain numerous hazardous substances, including benzene, ethylbenzene, toluene, and xylene, and polycyclic aromatic hydrocarbons such as naphthalene. This is a fact, not a presumption. Benzene, toluene, and naphthalene, moreover, are hazardous constituents as defined in the hazardous waste management regulations. 40 C.F.R. Part 261, Appendix VIII. And gasoline meets the statutory definition of “hazardous waste” under the HWA as explained more fully under Point 2 below.

## **Point 2**

Western Refining next states that the Department “incorrectly assert[s] that spilled gasoline is a hazardous waste.” There is nothing “incorrect” in the Department’s assertion. The HWA defines “hazardous waste” broadly as:

Any solid waste or combination of solid wastes which because of their quantities, concentration or physical, chemical or infectious characteristics may:

(1) cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness; or

(2) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of or otherwise managed. “Hazardous waste” does not include any of the following until the [Environmental Improvement Board] determines that they are subject to Subtitle C of the federal Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. § 6901 et seq.:

(a) drilling fluids, produced waters and other wastes associated with the exploration, development or production of crude oil or natural gas or geothermal energy;

(b) fly ash waste;

(c) bottom ash waste;

(d) slag waste;

(e) flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels;

(f) solid waste from the extraction, beneficiation or processing of ores and minerals, including phosphate rock and overburden from the mining of uranium ore; or

(g) cement kiln dust waste.

Ms. Ann Allen  
Gallup Refinery  
November 8, 2013  
Page 5

NMSA 1978, §74-4-3. Section 1004(5) of RCRA contains a substantively identical definition of “hazardous waste,” although the exemptions are scattered in section 2008(b)(2)(A) and (b)(3)(A). 42 U.S.C. §§ 6903(5), 6917(b)(2)(A), (b)(3)(A).

For corrective action and other cleanup programs under RCRA, EPA applies the statutory definition – as opposed to the narrower regulatory definition – of hazardous waste. EPA guidance states:

RCRA section 3004(u) requires corrective action for releases of “hazardous wastes or constituents.” As discussed in the 1990 proposal, EPA interprets the term “hazardous waste,” as used in RCRA section 3004(u) to include all wastes that are hazardous within the statutory definition in RCRA section 1004(5), not just those that are listed or identified by EPA pursuant to section 3001.

EPA, Corrective Action for Releases from Solid Waste Management Units at Hazardous Waste Management Facilities, 61 Fed. Reg. 19432, 19443 (May 1, 1996). The Environment Department agrees with this interpretation.

Further, as explained in the Department’s July 31, 2013 letter, spilled gasoline may be ignitable hazardous waste (D001). 40 C.F.R. § 261.21. Spilled gasoline also may be toxic for benzene (D018). 40 C.F.R. § 261.24.

Western Refining further states that the “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. Therefore, the media cannot be a hazardous waste.” Western Refining has misinterpreted the meaning and significance of the referenced EPA document.

In support of these statements, Western Refining references an EPA Power Point presentation, which is undated and unattributed, given at an EPA training workshop on remediation waste.<sup>2</sup> But EPA expressly cautions that the document is for limited purposes. The cover page states, “[t]his document is part of the training materials for the RCRA Corrective Action Workshop on Results-Based Project Management. It contains summaries of EPA statutory authorities, regulations, and guidance materials. This document does not substitute for any of these authorities or materials. In addition, this document is not an EPA regulation and therefore cannot impose legally binding requirements on EPA, States, or the regulated community.” The Power Point presentation is not a guidance document or an official statement of EPA policy. It has little if any evidentiary weight on this issue.

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<sup>2</sup> The Power Point presentation is available at:  
[http://www.epa.gov/wastes/hazard/correctiveaction/pdfs/workshop/mrw\\_slides.pdf](http://www.epa.gov/wastes/hazard/correctiveaction/pdfs/workshop/mrw_slides.pdf)

Ms. Ann Allen  
Gallup Refinery  
November 8, 2013  
Page 6

More importantly, the Power Point document addresses a very different issue from the issue that Western Refining has raised with the hydrocarbon release. The document discusses the regulation of remediation waste, and particularly contaminated media that contain hazardous or other solid wastes. Remediation waste is defined by the regulations as “all solid and hazardous wastes, and all media (including groundwater, surface water, soils, and sediments) and debris, that are managed for implementing cleanup.” 40 C.F.R. § 260.10. The regulation of remediation waste – particularly the application of the RCRA land disposal restrictions to remediation waste – has been a difficult and controversial issue for EPA for decades, and it is addressed in the EPA training workshop that included the referenced Power Point presentation. But there is an important distinction between the initial release of hazardous or solid waste that contaminates soil or other environmental media, and the subsequent management of that contaminated media during cleanup. As should be obvious, the initial release is subject to regulation through corrective action. Otherwise, there would be no remediation and no remediation waste. The Power Point presentation focuses only on remediation. EPA’s point is that the soil or other environmental media itself is not solid waste but, during remediation, the contaminants contained in the media are solid waste and may be regulated as hazardous waste depending on their characteristics. Thus, the release of hydrocarbons at the Facility is subject to corrective action authority. During cleanup, the soil itself would not be a solid waste, but the spilled hydrocarbons contained in the soil would remain solid waste and, if this remediation waste is ignitable or toxic (e.g., for benzene), the remediation waste would need to be managed as hazardous waste.

Western Refining also denigrates the judicial decisions that the Department had cited in its July 31, 2013 letter as “not controlling in this context.” Western Refining asserts that the holdings in the 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.” While it is true that these cases are citizen suits under Section 7002 of RCRA, they nevertheless address the same issue that Western Refining is raising here: whether spilled gasoline or petroleum is a solid waste subject to RCRA cleanup authority. Each of the decisions resolved this issue in the affirmative. These cases remain good law. While these decisions date back to the 1990s, there are not any recent decisions (or even any older decisions) that hold to the contrary; the issue appears to be well settled.

Finally, the Department disagrees with Western Refining’s assertion that “[t]here has been significant refinement in EPA’s regulatory position on the nature of releases of materials into soil and groundwater.” The Department works closely with EPA in implementing the hazardous waste laws, and is very familiar with EPA policy. Aside from remediation waste, addressed above and not in issue here, there has been no significant change in EPA policy on cleanup of contaminated soil.

In sum, spilled gasoline is a solid waste under the HWA (and RCRA), it is a “hazardous waste” as defined in the HWA (and RCRA), it may be a characteristic hazardous waste under the

Ms. Ann Allen  
Gallup Refinery  
November 8, 2013  
Page 7

hazardous waste regulations, and it contains hazardous constituents. It therefore is subject to corrective action authority.

### **Point 3**

Western Refining next asserts, “[t]he 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.”

The Department disagrees with this assertion. The Department will not necessarily add all recent spills or releases as SWMUs or AOCs to the new Permit. However, if a spill results in contamination that exceeds risk-based cleanup standards, or may otherwise present a risk to human health or the environment, it is appropriate for the Department to list the spill at least as an AOC and to require corrective action. Moreover, current spills and releases may indicate a history of routine or systematic spills and releases that have occurred and were not addressed in the past. Further investigation may reveal that the area should be classified as a SWMU. It is significant that the refinery has been in operation since the 1950s, and environmental standards have changed considerably since then.

Western Refining then asks “if [the spills 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.” Again, the Department disagrees. The requirements are not necessarily “duplicative,” as the hazardous waste laws address somewhat different issues from the WQA. Moreover, it would be equally valid to argue – and perhaps more valid given the regulatory exemption describe under Point 1 – that the OCD requirements are duplicative. There is some overlap between the two regulatory programs. But such overlap is not necessarily problematic. The solution is simply for the Department and OCD to work together and coordinate their actions to ensure that the investigation and cleanup requirements are fair and consistent. The agencies have done so in the past and will continue to do so in the future.

### **Point 4**

Western Refining next states that “[j]ust 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.” The Department has not made such a presumption. However, there has been a release of solid waste and data shows that this solid waste contains hazardous constituents

Ms. Ann Allen  
Gallup Refinery  
November 8, 2013  
Page 8

such as benzene, toluene, and naphthalene. At a minimum, further investigation is appropriate to determine the need for further corrective action.

### **Sampling**

Western Refining reports in an August 20, 2013 letter addressed to OCD that “[w]aste characterization samples have been collected from soils generated during excavation for the sumps and the drill cuttings from the temporary well installations. The analyses are enclosed for each and demonstrate the soils generated to-date are not characteristically hazardous, but do contain petroleum hydrocarbons.” Western Refining collected only two soil samples for analysis of some hazardous constituents (the samples were named “Soil Pile Behind 101/102” and “Soil Drill Cuttings” in the laboratory report – none of the samples were undisturbed samples). As Western Refining is aware, the Department has noted problems with the methods for collecting samples for volatile organic compound (VOC) analysis. Samples collected for VOCs from soil piles and drill cuttings may not be representative of contaminant concentrations in subsurface soils and may not accurately capture constituents of concern. Another problem is that the soils were analyzed for toxicity characteristic leaching procedure (TCLP) metals concentrations and not total metals. TCLP results for solid materials are always lower than total metals results. Western Refining must collect additional soil samples for chemical analysis of total metals and VOCs.

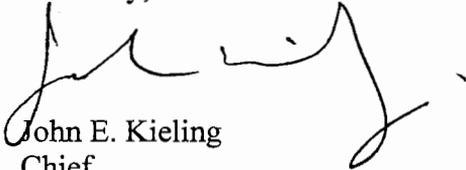
The Department also has concerns regarding the adequacy of the sampling conducted at the hydrocarbon seep as reported to date. The information Western Refining has provided is not adequate to evaluate whether the soil and groundwater around the seep have been affected by hazardous constituents, which may be the result of inadequate sampling techniques. Western Refining has not determined the source of the seep. At this time the Department considers the hydrocarbon seep area (to the west of Tanks 101 and 102 and the Marketing Tanks) to be a SWMU.

Further, the Department questions the quality of Western Refining’s in-house laboratory results. Samples must be sent for fuel fingerprint analysis at an independent laboratory to provide a more accurate picture of the hydrocarbons present at the site. The Department also recommends that Western Refining compare the product stored in the Marketing Tanks to the hydrocarbons found in the seep as it seems that the greatest thickness of separate phase hydrocarbons measured in the groundwater table are nearest to the Marketing Tanks.

Ms. Ann Allen  
Gallup Refinery  
November 8, 2013  
Page 9

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

Sincerely,



John E. Kieling  
Chief  
Hazardous Waste Bureau

cc: D. Cobrain, NMED HWB  
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