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CERTIFIED MAIL - RETURN RECEIPT REQUESTED

December 2, 2013

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

**RE: RESPONSE TO PERMIT LETTERS
WESTERN REFINING SOUTHWEST INC., GALLUP REFINERY
EPA ID # NMD000333211
HWB-WRG-10-008**

Dear Ms. Allen:

The New Mexico Environment Department (Department) is in receipt of correspondence from Western Refining Southwest, Inc. (Western Refining) dated March 6, 2013 and May 17, 2013 regarding the draft RCRA Post-Closure Care Permit for the Petroleum Refinery in Gallup, New Mexico (Draft Permit), dated September 2011. This letter responds to those two letters.

On September 16, 2011, the Department issued a public notice that the Draft Permit was available for public review, and that the Department would accept comments on the Draft Permit for 60 days, until November 15, 2011. On November 30, 2011, in response to a written request by Western Refining, the Department announced that it was extending the public comment period until December 16, 2011. The Department received comments from only one person, Western Refining. The comment period closed on December 16, 2012. Subsequently, Western Refining sent the Department two additional letters, dated March 6, 2013 and May 13, 2013, commenting on the draft permit. The Department issued the final Post-Closure Care Permit (Permit), pursuant to its authority under the New Mexico Hazardous Waste Act (HWA), NMSA

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1978, §§ 74-4-1 to 74-1-14, on October 31, 2013. The Department also released its Response to Public Comments, (October 2013) responding to all written comments it received during the comment period. Although the March 6 and May 13 letters were dated and received by the Department after the close of the comment period, the Department nevertheless carefully considered the issues Western Refining raised in these letters, as set forth below.

Legal Authority

In the March 6, 2013 letter Western Refining raised purported jurisdictional conflicts between the Department and the Oil Conservation Division (OCD) of the New Mexico Energy, Minerals and Natural Resources Department. Attached to the letter was a February 12, 2012 letter from OCD which, according to Western Refining, says that OCD has jurisdiction over the areas of concern (AOCs) the Department added to the Permit. The May 17, 2013 letter again raised the issue, arguing that corrective action is governed by the Oil and Gas Act. The Department thoroughly addressed this issue in its Response to Public Comments, at pages 2-4 (Response to Comment 3), and addressed the issue further in its letter to you dated November 8, 2013.

Acknowledgement of Work Done

Western Refining has argued that significant work may have to be repeated or started over again. The Department has never said or insinuated that work will need to be repeated or started over, nor is there any mention of a requirement to start work over in the Permit. Valid work conducted in the past may be used to move forward on SWMUs and AOCs at the refinery. In fact, prior work aids in understanding sites and any concerns there may be regarding potential contamination. Work plans will highlight conclusions from previous investigations through the background section (required by Permit Section IV.L.2.e). Prior useable work is used to justify the approach to any additional investigation, if it is required. The Department addressed this issue in its Response to Public Comments, at page 18 (Response to Comment 7).

CAFO

Western Refining has requested that the Corrective Measures Work Plan for the Aeration Basin (SWMU #1) be approved to close out the Consent Agreement and Final Order (CAFO) with the EPA before the issuance of the Permit. The CAFO and the Permit are not connected in any way. Cleanup required at the Aeration Basin will continue to be addressed as part of the Permit since the Aeration Basin is a listed SWMU.

Background

In the May 17, 2013 letter, Western Refining contended that since the Department has stated that previous work conducted at the facility is well-documented in the administrative record that the

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background section (required by Permit Section IV.L.2.e) of work plans and reports submitted by Western Refining can refer back to the administrative record. This is inappropriate. The background section of submittals must include a short summary of the previous work and highlight any results that may affect the current work. Each submittal should be a self-contained document, but may reference prior submittals. The background section aids in the understanding of site conditions and any concerns that may or may not remain regarding the site. The background section may also be used to justify the approach to any additional investigations if they are required.

Force Majeure

Western Refining requested that a force majeure provision be included in the permit. It contended that providing relief for delays (Permit Section I.J.12, Extensions of Time) would not address non-compliance with permit conditions that are beyond the control of Western Refining. As an example, Western Refining raised the potential technical impossibility of implementing or completing certain remedial measures, and noted that the technical impracticability provisions in Permit Section IV.E.2 appear to relate only to cleanup levels. The Department added a force majeure provision to the Permit; it is located in Permit Section IV.J.13.

Dispute Resolution

Western Refining asserted that dispute resolution process will promote resolution of disputes at an early stage without the need for litigation. Western Refining cites several permits where the Department has included dispute resolution. The permits cited by Western Refining are draft permits or permit modifications; it is not the policy of the Department to include dispute resolution in its permits. There are other established avenues to resolve issues and to avoid hearings. The Department addressed this issue in its Response to Public Comments, at page 19 (Response to Comment 9).

Expanded Corrective Action

Western Refining sought assurances and additional terms in the Permit providing that there will be meaningful consultation prior to any final determination by the Department regarding corrective action remedies. Western Refining will have opportunities to comment on any remedy selected during public comment periods (required by the regulations). The process of submittal and review will also provide opportunities to consult on any issues as they come up. The Department addressed this issue in its Response to Public Comments, at page 19 (Response to Comment 10).

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Deadlines for Transfer of Property

Western Refining asserted that 90 days is too long of a notice regarding transfer of the property. Such a time period is not required by 40 CFR 270.30(1)(3). As a function of such transactions, prior notice may not always be possible. Other permits issued by the Department do not explicitly state the 90 day requirement. Permit Section I.J.3 refers to 40 CFR 270.30(1)(3) which in turn refers the reader to 40 CFR 270.40 which states “the new owner or operator must submit a revised permit application no later than 90 days prior to the scheduled change.” Whether or not the Permit states the 90 day requirement, the regulations contain the requirement. The Department addressed this issue in its Response to Public Comments, at page 20 (Response to Comment 13).

Health and Safety

Western Refining requested that the Permit require Department personnel to comply with the facility’s health and safety plans when on the refinery property. The Permit is issued to Western Refining, and it does not impose obligations on the Department. Nevertheless, the Department has always followed the safety and health requirements required by the facility during site visits and will continue to do so. The Department addressed this issue in its Response to Public Comments, at page 20 (Response to Comment 16).

Review Process

Western Refining has asserted that the Permit should require the Department to inform Western Refining of a deficiency in a work plan or other submittal to provide an opportunity to cure prior to the formal administrative process. The Permit provides that the Department may approve, approve with modifications, disapprove, or reject a work plan or other submittal, and that it will notify Western Refining in writing of its action. If the Department disapproves or rejects a submittal, it will state the reasons for such action. Western Refining may then submit a revised document that “cures” the deficiencies. This process appropriately creates a formal, written administrative record on the issue. Nevertheless, the Department is available to discuss informally any issues regarding submittals. The Department addressed this issue in its Response to Public Comments, at page 21 (Response to Comment 17). The Department has also revised Permit Section I.J.11 to state expressly that the Department may approve, approve with modifications, disapprove, or reject a submittal, rather than merely referencing the regulations.

Planned Changes vs. Planned Activities

Western asserted that the Permit should reference “planned changes” rather than “planned activities” in Section II.C.2 Reporting Requirements. This is a cut and paste error. Permit Section II.C.2.a has been changed to read “Reporting Activities” and quotes the regulations

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directly from 40 CFR 270.30(l)(1). Text was also edited to follow the language in the regulations. The Department addressed this issue in its Response to Public Comments, at page 21 (Response to Comment 19).

Certification

Western Refining argued that the certification requirements are overly broad and that certification should be limited to reports, applications, and work plans, and for other submissions when certification is specifically requested by the Department. Although the wording of this provision was taken directly from the regulations, the Department agreed to narrow the applicability of this provision to “applications, reports required under this permit, and other substantive information requested by the Department for implementation or enforcement of the permit.” This wording is reflected in the final Permit. The Department addressed this issue in its Response to Public Comments, at page 21-22 (Response to Comment 22).

Submission Dates

Western Refining requests that submittal dates be met by email. Submittals to the Department must be delivered and date stamped by the Department for record keeping. The Department addressed a similar issue in its Response to Public Comments, at page 22 (Response to Comment 23).

Incorporation vs. Infiltration

Western asserted the abbreviation “ZOI” as used in the permit should mean “zone of incorporation” rather than “zone of infiltration”. Section III.E.1 of the Draft Permit used “incorporation,” while the post-closure care plan (Attachment D of the Draft Permit) erroneously used the word “infiltration.” The Department corrected the post-closure care plan consistently to use the term “infiltration” throughout in reference to the “ZOI.”

No Further Action Petitions

Western Refining requested that the Department delay issuing the permit until after the Department has acted on several old “No Further Action” petitions. On August 10, 2001, Giant Refining Company, the previous owner of the facility, submitted to the Department petitions for a determination that no further action would be necessary for several solid waste management units. Shortly after receiving the petitions, the Department requested additional information. Giant Refining provided some of the requested information, but not all of it. The response expressly stated, in several instances, that information was “to be provided.” However, this information was never submitted to the Department. Furthermore, neither Giant Refining nor Western Refining followed the regulatory requirements for a “No Further Action” petition. Such

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a petition is synonymous with a petition for a determination that corrective action is complete. It requires a Class 3 permit modification, and the petitioner must follow the requirements of 40 CFR 270.42(c), including publication of a public notice. This was not done. Consequently, the Department did not act on the petitions; they were incomplete and insufficient. The Department therefore did not postpone issuing the final Permit. The Department will act on the petitions once they are complete and submitted according to regulatory procedures.

Previous Data Collection

In its May 17 letter, Western Refining disputed the problems that the Department has raised with previous soil sampling. Soil samples were previously collected at many of the SWMUs at the facility. The Department has raised questions over the use of a stainless steel pan to collect samples prior to placement into laboratory containers. In a letter titled Supplemental Information for Giant Ciniza SWMUs, dated October 2, 2002 in response to the Department's request for additional information on sample collection methods related to VOC analysis the letter states that the "Generic Sampling Plan" (Section 3.4, Soil Sampling Techniques) describes a procedure for immediate transfer of the soil sample from the collection device directly into the laboratory container. However, this procedure was not followed. Western Refining maintained, "[i]t is extremely doubtful that placing the sample in a clean pan prior to placing in a sample jar could have removed all but one VOC and one SVOC as shown in the sample results." Western Refining claimed that placing the sample in the bowl did not significantly impact the results.

The fact is that VOCs will volatilize and biodegrade during sample collection and transport, which typically results in significant losses of initial VOC concentrations. Precautions must be taken when collecting and preparing soil samples for VOC analysis to limit the impacts of volatilization and biodegradation. When VOCs are released to the soil, they immediately start to partition from the liquid phase to the gaseous phase. The rate of volatilization is compound specific and various soil properties also impact the rate. VOCs within disturbed soil samples tend to volatilize at faster rates. In most solid materials, the molecular diffusion coefficients of VOCs in the gaseous phase are high enough to allow for the immediate volatilization of those VOCs from a freshly exposed sample surface. Using a bowl as an in-between step allowed VOCs to volatilize, potentially affecting the sampling results. A critical consideration in VOC sample collection is to minimize or eliminate the loss of VOCs through direct volatilization; this was not done during the investigation conducted in 1994. Imposition of corrective action requirements is typically done in separate phases over varying periods of time. The decision to proceed from one step to the next depends in part on the quantity and quality of information gathered in the previous step. As a result of this sample collection procedure, the quality of the data from the 1994 Report is suspect. The Department has nevertheless concluded that this sampling procedure – though improper – is not a sufficient justification for starting work over. The Department is not requiring Western Refining to start the investigations over again;

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however, the Department may require Western Refining to collect additional samples for VOC analysis.

Additional Areas of Concern (AOCs)

Western has argued incessantly that there is not sufficient justification for the addition of several areas of concern (AOCs) to the permit. The Department addressed this issue in considerable detail in its Response to Public Comments, at pages 4-18 (Response to Comment 5).

Permit Attachments E and G

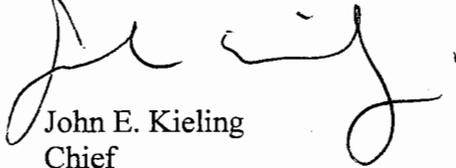
Finally, in its May 17 letter, Western Refining requested that the Department change the due date of the annual closure cost estimate to March 31st for financial assurance and to allow calculation of annual inflation factor using economic data published by the federal government each February. Western Refining also asked the Department to change the due date for the Facility-wide Groundwater Monitoring Work Plan to odd numbered years. Western Refining proposed a revised Table E-1 and Table E-2 to reflect these changes. The Department expected Western Refining to propose alternate dates for the submittal schedule the Department proposed in the Draft Permit; however, Western Refining has never submitted an alternate schedule other than to propose to delete all of the new AOCs from Appendix E and Appendix G of the Permit.

The Department has made some changes to the schedule in the final Permit to accommodate Western Refining's requests. In the final Permit, the Department changed the date of the annual cost estimate to March 31st as Western requested. The Facility-wide Groundwater Monitoring Work Plan due date was not changed. The Department modified Table E-2 to include corrective action submittals rather than specifically work plans. The new AOCs remain on the table, requiring Release Assessments, for the reasons stated in the Department's Response to Public Comments; submittal dates were modified to reflect the delay in issuing the permit.

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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
N. Dhawan, NMED HWB
C. de Saillan, NMED OGC
A. Hains, WRG
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File: Reading File and WRG 2013 File
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