

**NEW MEXICO ENVIRONMENT DEPARTMENT'S  
RESPONSE TO PUBLIC COMMENTS  
ON THE DRAFT RCRA POST-CLOSURE CARE PERMIT  
FOR THE WESTERN REFINING SOUTHWEST, INC. PETROLEUM  
REFINERY IN GALLUP, NEW MEXICO**

**October 2013**

**Introduction.** The New Mexico Environment Department (Department or NMED) is hereby responding to comments it received from the public on the draft RCRA Post-Closure Care Permit for The Western Refining Company Southwest, Inc. (successor to Giant Refining Company) Petroleum Refinery in Gallup, New Mexico (Draft Permit), dated September 2011. The Department proposes to issue the permit pursuant to its authority under the New Mexico Hazardous Waste Act (HWA), NMSA 1978, §§ 74-4-1 to 74-1-14. 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 Southwest, Inc. (Western Refining). The Department carefully considered these comments, and has made several revisions to the Draft Permit based on these comments. A summary of the comments, and the Department's response, follows. Changes the Department is making to the Draft Permit in response to these comments are indicated in italics in the responses below.

**A. Process**

**1. Comment:** Western Refining raises concerns regarding the process that the Department has undertaken leading to the issuance of the Draft Permit. Western Refining states that the Department should have consulted with Western Refining before issuing the Draft Permit for public comment. Western Refining claims that because such consultation did not occur, it has been denied a meaningful opportunity to participate fully in the permit process and denied due process of law.

**Response:** The Department disagrees with this comment. The Department carefully followed the process for issuance of a draft permit set forth in the Hazardous Waste Management Regulations, specifically the applicable provisions of section 20.4.1.901 NMAC. The regulations require public notice and a minimum of 45 days for the public to submit comments. 20.4.1.901.A(3) NMAC. In this case, the Department published a notice in the *Albuquerque Journal* and the *Gallup Independent*, and sent notice by letter to interested persons including Western Refining, stating that the Draft Permit was available for review and public comment. The public including Western Refining had an initial 60 days, plus an additional 30-day extension, to review the Proposed Permit, submit comments on the Proposed Permit, and request a hearing on the Proposed Permit.

This procedure meets the requirements of the regulations. 20.4.1.901.A and C NMAC. It fully meets the requirements of due process. *See Maso v. N.M. Taxation & Revenue Dep't*, 2004-NMCA-025, ¶ 19, 135 N.M. 152, 157, 85 P.3d 276, 281 (“[D]ue process mandates notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”); *N.M. Children, Youth & Families Dep't v. Mafin*, 2003-NMSC-015, ¶ 18, 133 N.M. 827, 831-32, 70 P.3d 1266, 1270-71 (“Procedural due process mandates that a person be accorded an opportunity to be heard at a meaningful time and in a meaningful manner.”). It is also entirely consistent with the procedure the Department has followed in issuing hazardous waste permits for other facilities in the State. Furthermore, in October 2012, the Department met with Western Refining to discuss the Draft Permit and the comments that Western Refining submitted. Such a meeting is also in accordance with the regulations, 20.4.1.901.A(4) NMAC, and is entirely consistent with the Department’s past practice in issuing hazardous waste permits for other facilities.

**2. Comment:** Western Refining contends that it has been unable to identify the administrative record for the Draft Permit. It further contends that there is no nexus between requirements in the Draft Permit and documents in the administrative record, particularly requirements relating to the identification of solid waste management units and the work schedule.

**Response:** The Department disagrees with this comment. The administrative record for this permit proceeding is defined in a written index that identifies each of the documents in the record by title, author (if applicable), and date. The record includes, among other things, the Permit Application (Parts A and B), the previous permit and associated application, records of site inspections, reports and data produced as part of corrective action, correspondence between Western Refining (or its predecessor Giant Industries) and the Department, and correspondence between the United States Environmental Protection Agency (EPA) and the Department. The Department prepared the Draft Permit based on these documents and other documents in the administrative record.

According to Department records, no representative of Western Refining visited the Department’s Hazardous Waste Bureau to review any portion of the administrative record during the 90-day public comment period.

## **B. Legal Authority**

**3. Comment:** Western Refining contends that the Environment Department does not have the authority to require corrective action for solid waste management units at petroleum refineries.

**Response:** The Department disagrees with the comment. In support of this comment, Western Refining cites the New Mexico Water Quality Act (WQA), NMSA 1978, §§ 74-6-1 to 74-6-17, and the New Mexico Oil and Gas Act (OGA), NMSA 1978, §§ 70-2-1 to 70-2-38, and makes a legal argument that is rather difficult to follow and most

unpersuasive. The gist of the argument seems to be that disposal of solid wastes – that do not meet the regulatory definition of “hazardous waste” – at a petroleum refinery, is regulated under the WQA and the OGA, and therefore that the Department cannot require corrective action for such solid wastes under the HWA.

But this argument is wrong. The HWA provides:

Hazardous 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, § 74-4-4.2(B). The term “hazardous constituent” is defined in the Draft Permit,<sup>1</sup> at Section I.I, page 6, to mean “any constituent identified in 40 CFR Part 261, Appendix VIII and any constituent identified in 40 CFR Part 264, Appendix IX.” Such hazardous constituents need not be derived from hazardous waste to be addressed through corrective action under the HWA. In interpreting corrective action authority under federal law,<sup>2</sup> EPA has stated:

[C]orrective action authority was not intended to be limited to hazardous waste, and extends to hazardous constituents regardless whether they also fall within the term “hazardous waste,” or whether they were derived from hazardous waste. Under this interpretation, constituents that were contained within nonhazardous solid wastes may be addressed through corrective action.

EPA, *Corrective Action for Releases from Solid Waste Management Units at Hazardous Waste Management Facilities*, 61 Fed. Reg. 19432, 19443 (May 1, 1996). The Department follows this interpretation. Thus, the Department has the statutory authority to require corrective action for releases of hazardous constituents from solid waste management units; and that authority includes hazardous constituents derived from nonhazardous solid waste.

Furthermore, nothing in the WQA or the OGA limits or restricts the Department’s corrective action authority under the HWA. Those laws are not relevant.

Western Refining also cites – and attaches to its comments – a document entitled “Documentation of Responsibilities to Environmental Improvement Division and Oil Conservation Division” issued by the Water Quality Control Commission in July 1989. But this document does not lend any support to Western Refining’s argument. The delegation assigns responsibilities to implement the WQA to the two State agencies. It has nothing to do with the Department’s authority under the HWA.

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<sup>1</sup> Western Refining erroneously states in its comments that “[t]he Draft Permit does not define the term ‘hazardous constituents.’” Comments, p. 3, fn. 1.

<sup>2</sup> Section 3004(u) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6924(u). Section 74-4-4.2(B) of the HWA is substantially identical to section 3004(u) of RCRA.

In sum, the Department has the express legal authority under the HWA to require corrective action for a release of hazardous constituents into the environment from solid waste management units. That authority applies to hazardous constituents regardless whether they originated in hazardous wastes or in other solid wastes. Nothing in the WQA or the OGA limits that authority.

**4. Comment:** Western Refining states that it has begun the corrective action process to address groundwater contamination at the facility, working with the Oil Conservation Division of the Energy, Minerals and Natural Resources Department. Western Refining raises concern about “potentially conflicting or overlapping remediation requirements.”

**Response:** The Department recognizes that the Oil Conservation Division has authority over some of the environmental issues at the facility. The Department has been working with the Oil Conservation Division to ensure that there are no conflicting or inconsistent regulatory requirements. However, the Environment Department, pursuant to its authority under the HWA, has exclusive authority to require corrective action for soil and groundwater contamination at the facility.

### C.

#### **Solid Waste Management Units**

**5. Comment:** Western Refining states that the Draft Permit lists fifteen solid waste management units (SWMUs) that had never been listed before, and that there is no justification in the administrative record for listing these SWMUs. Western Refining further states that some of these SWMUs are process areas from which there is no evidence of a release, and that the full panoply of corrective action is not warranted for minor, one-time spills.

**Response:** The lists of SWMUs and areas of concern (AOCs) in Appendix G to the Draft Permit are based on documents in the administrative record, including spill reports and staff notes taken during or shortly after visits to the facility. The administrative record contains evidence that there have been releases of hazardous waste or hazardous constituents at each of these sites.

One source of information on spills and releases of petroleum and chemicals at the facility are the Release Notification and Corrective Action reports (Form C-141), which are required by the Department of Energy, Minerals and Natural Resources, Oil Conservation Division. Beginning in 2006, Western refining has also submitted these reports to the Department and the Department has accepted these forms as fulfilling the reporting requirements under the existing Permit. The C-141 release reports in the administrative record show that spills have occurred at many of these AOCs since 2006. Facility records show that vacuum trucks were used to recover some of the released hydrocarbons from the newly identified AOCs on several occasions. Observations made during site visits and inspections, and associated records, also support the Department’s

conclusion that spills and releases have occurred at these AOCs. Groundwater monitoring data provides additional evidence of releases of petroleum from some of these AOCs.

The term “solid waste management unit” or “SWMU” is not defined in the HWA (Or RCRA) or the hazardous waste management regulations. But the generally accepted definition, from EPA’s proposed Subpart S regulations, is:

Any discernible unit at which solid wastes have been placed at any time, irrespective of whether the unit was intended for the management of solid or hazardous waste. Such units include any area at a facility at which solid wastes have been routinely and systematically released.

EPA Proposed Rule, Corrective Action for Solid Waste Management Units at Hazardous Waste Management Facilities, 55 Fed. Reg. 30,798, 30,808-09 (July 27, 1990).<sup>3</sup>

Yet EPA has repeatedly recognized that conclusive proof of “routine and systematic releases” is not always necessary for an area to properly be designated as a SWMU, especially in the early stages of investigation when information is incomplete. A SWMU may be designated if there is a “likely or suspected release.” For example, EPA has stated through its Environmental Appeals Board:

In deciding whether an area is a SWMU it must be kept in mind that conclusive proof of routine and systematic releases is not required. 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 a previous step. Obviously, in seeking to discover if significant contamination has occurred and, if so, its extent, less is known at the beginning stages than at the end; consequently decisions that are made during the earlier stages may reflect the relative lack of hard facts that one otherwise comes to expect near the end of the corrective action process. We have therefore held that the early stages of corrective action, especially the early identification of a SWMU, need not be based on irrefutable proof but can instead be grounded on reasonable suspicions. . . . This approach of not demanding conclusive evidence is necessitated by the fact that determining subsurface contamination must proceed incrementally, in steps, often beginning with very incomplete information; thus, the quantum of evidence needed for the initial classification of an area as a SWMU must necessarily make allowances for uncertainties associated with locating hidden, subterranean releases.

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<sup>3</sup> Proposed 40 C.F.R. part 264, subpart S. Although EPA never issued this proposal as a final rule, it nevertheless relies on the preamble to the proposed rule as guidance. 61 Fed. Reg. 19,432, 19,434 (May 1, 1996).

*In re GMC Delco Remy*, 7 E.A.D. 136, 160 (EAB 1997); *see also In re GSX Servs. of S.C., Inc.*, 4 E.A.D. 451, 456 (EAB 1992) (“It is well settled that the Agency need not definitively establish that a release has occurred before imposing corrective action requirements[; r]ather, the Agency may impose such requirements where it suspects a release or determines that a release is likely to have occurred.”); *In re American Cyanamide Co.*, 3 E.A.D. 657, 665, n.28 (Adm’r 1991) (“The RCRA corrective action authority is not limited to known or detected releases, but also extends to likely or suspected releases.”); *In re Shell Oil Co.*, 3 E.A.D. 116, 119 (Adm’r 1990) (“To require an owner/operator to conduct further investigation of a SWMU, [EPA] need not have conclusive evidence of a release, but instead only evidence of a likely or suspected release.”).

Many of the SWMUs and AOCs listed in the draft permit are in the early stages of investigation, and they are sites of likely or suspected releases. The refinery has been in operation for over 50 years, and for more than half that history there has been no regular documentation of releases of petroleum and other contaminants. Prior to the promulgation of environmental regulations, the refinery did not create or maintain systematic, detailed records of releases of contaminants and waste management practices. And there have been no prior environmental investigations for the following AOCs: AOC 21 (Crude Slop and Ethanol Unloading Facility), AOC 26 (Tank 573 -- Kerosene tank), AOC 30 (Equipment Yard and Drum Storage Area), AOC 32 (Tanks 27 and 28), and AOC 35 (Scrap Yard). Release Assessments are therefore necessary to determine the likelihood of past releases of contaminants.

Moreover, the Department has the authority to require corrective action for AOCs, or “areas of concern,” which are areas needing further investigation, both under corrective action authority and under the omnibus authority. 40 CFR 270.32(b)(2), incorporated by 20.4.1.900 NMAC. EPA explained the concept of an AOC in some detail in its 1996 corrective action guidance:

The definition of a SWMU is often a point of disagreement when corrective action permits or orders are issued. Facility owners/operators and representatives of the regulated community often argue that Congress intended the RCRA corrective action program to be focused on waste management units (i.e., SWMU) and that non-waste management releases (e.g., spills) should be addressed by other cleanup programs or authorities. EPA notes that authority exists for requiring corrective action for releases that are not attributable to SWMUs. Given the legislative history of RCRA section 3004(u), which emphasizes that RCRA facilities should be adequately cleaned up, in part, to prevent creation of new Superfund sites, EPA believes that corrective action authorities can be used to address all unacceptable risks to human health or the environment from RCRA facilities. In the permitting context, remediation of non-SWMU related releases may be required under the “omnibus” authority (see 40 CFR

270.32(b)(2)) which allows EPA to impose such permit conditions as are necessary to protect human health and the environment. . . . Therefore, extended debate or litigation over a particular SWMU designation will in many cases be unproductive for all parties and, as a general principle, EPA discourages debate on these issues, believing that discussions should more properly focus on whether there has been a release that requires remediation.

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 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 Proposed Rule, Corrective Action for Releases from Solid Waste Management Units at Hazardous Waste Management Facilities, 61 Fed. Reg. 19432, 19443 (May 1, 1996).

Given the incomplete information on these units, and given that many of the units are the sites of occasional spills or suspected spills, the Department has concluded that all fifteen newly-identified units should be listed in the Permit (Appendix G) as AOCs rather than SWMUs. These units are more appropriately designated as AOCs given the definition of “AOC” in the Draft Permit:

Area of Concern (AOC) means any area having a known or suspected release of hazardous waste or hazardous constituents that is not from a solid waste management unit and that NMED has determined may pose a current or potential threat to human health or the environment. An area of concern may include buildings, structures at which releases of hazardous waste or constituents have not been remediated, including releases resulting from one time and accidental events.

Finally, the Department emphasizes that designation of a SWMU in the Permit does not mean that extensive remedial action will be required in the face of evidence demonstrating that none is actually necessary. Under the Draft Permit, Western Refining would not necessarily be required to implement “the full panoply of corrective action” for all of the newly listed units. It would be required to conduct a release assessment, as defined in Draft Permit Section IV.H.1, to characterize potential releases from these units. Based on the results of this assessment, the Department will decide whether or not further corrective action is necessary. Further, investigation of certain areas where investigation is not currently practicable, such as the Process Area, will be deferred until refinery operations cease or a significant portion of the area can be safely accessed for long enough to complete any necessary work.

There are no physical sampling and testing of materials involved in release assessments. Discussions of the types of units present at the AOCs, design features (including the presence of sumps, drains, leak detection units, etc.), operating practices (both past and present), the period of operation, the locations of the units, and the physical conditions of the units should be included in the assessments. The types of waste (and any hazardous constituents) placed in the AOCs, prior inspections reports, monitoring data, visual evidence (both past and present) of discolored soil, seepage, discolored surface water or runoff, and sampling data may also be used as part of AOC release assessments.

**SWMU 3: Empty Container Storage Area/Heat Exchanger Bundle Cleaning Pad.**

This SWMU was not added to the Permit; however because the use of the unit has changed and the unit has continued to be used, additional work may be required. Heat exchanger bundle elements are pressure washed to remove scale deposits on a partially-enclosed concrete pad at SWMU 3. The sludge from the cleaning is collected using vacuum hoses. This sludge is a hazardous waste (K050). In September 2007, EPA inspectors noted in their report the improper storage of hazardous waste at SWMU 3. During years of operations, some of this sludge has been released into the environment. NMED representatives observed the storage of contaminated drilling equipment and other waste on the pad during a site visit conducted in conjunction with OCD in March 2002.

The likely releases of hazardous waste and hazardous constituents from the cleaning pad at SWMU 3 may have resulted in soil contamination above health-based limits, or they may have contributed to groundwater contamination above standards. To ensure protection of human health and the environment, at a minimum, further investigation is necessary to characterize the nature and extent of any releases at SWMU 3.

**AOC 15: New API Separator.** The Department has received from Western Refining eight C-141 Release Notification and related reports for spills at AOC 15 since 2006. These reports document the following releases: on June 23, 2007, approximately 10 barrels (420 gallons) of process waste water was spilled when a weir box became clogged with trash (Release Notification dated June 25, 2007); on July 19, 2007, approximately 5 to 10 barrels (210 to 420 gallons) of process waste water was released from a weir box that had become partially clogged during a rainstorm (Release Notification dated July 20, 2007); on June 10, 2009, approximately 2 barrels (84 gallons) of oil spilled onto the ground from the API Separator and the Baker Tank overflow system during a heavy rainstorm (Release Notification dated June 22, 2009); on September 5, 2009, approximately 6.5 barrels (273 gallons) of oil overflowed from the API Separator in two events during heavy rain (Release Notification dated July 21, 2009); on December 8, 2009, approximately 739 barrels (31,038 gallons) of oily water spilled during intermittent overflows from the API Separator as a result of a power outage (Release Notification dated Dec. 18, 2009); on July 30, 2010, approximately 230 barrels (9,660 gallons) of oily water overflowed onto the ground from the API Separator during a rainstorm (Release Notification dated Aug. 13, 2010); on August 2, 2010, approximately 159 barrels (6678 gallons) of oily water overflowed onto the ground from the API Separator during a

rainstorm (Letter from Beck Larson dated Oct. 29, 2010); on April 12, 2012, approximately 17 barrels (714 gallons) of oily water spilled onto the ground from the API Separator due to a pump failure. In each instance, some of the spilled material was reported to have been recovered, but not all of it. In addition, records show that petroleum substances were removed by vacuum truck at the API and overflow (Baker) tanks repeatedly from August 2009 through February 2010. (Vacuum Truck Logsheets for Aug. 26, 2009, Aug. 27, 2009, Aug. 29, 2009, Sept. 2, 2009, Oct. 16, 2009, Oct. 20, 2009, Oct. 22, 2009, Oct. 23, 2009, Oct. 26, 2009, Oct. 27, 2009, Oct. 28, 2009, Oct. 29, 2009, Nov. 3, 2009, Nov. 4, 2009, Nov. 5, 2009, Nov. 13, 2009, Dec. 8, 2009, Dec. 9, 2009, Dec. 10, 2009, Dec. 17, 2009, Jan. 7, 2010, Jan. 8, 2010, Jan. 18, 2010, Jan. 19, 2010, Jan. 25, 2010, and Feb. 5, 2010). Inspection records contain photographs that show oil stains on the ground from the overflows at AOC 15.

API Separator sludge is a listed hazardous waste (K051).

Furthermore, ground water in monitoring wells NAPIS-2, NAPIS-3, and KA-3 located in the vicinity of AOC 15 (and AOC 16) contains benzene, ethyl benzene, and MTBE at concentrations in excess of the EPA RSLs for Tap Water, the EPA MCL and the WQCC standards for water quality as reported in the Facility-Wide Groundwater Monitoring Reports.

These documented and suspected releases of hazardous waste and hazardous constituents from the API Separator at AOC 15 may have resulted in soil contamination above health-based limits, or they may have contributed to nearby groundwater contamination above standards. To ensure protection of human health and the environment, at a minimum, further investigation is necessary to characterize the nature and extent of any contamination at AOC 15.

**AOC 16: New API Separator Overflow Tanks.** Many of the spills reported at AOC 15 also affected the overflow tanks (Baker Tanks) at AOC 16, including the spills on June 23, 2007, June 10, 2009, September 5, 2009, December 8, 2009, July 30, 2010, and August 2, 2010. Similarly, log sheets cited above for AOC 15 show that the petroleum substances removed by vacuum truck were removed from the “API Baker” area. Inspection photographs also show oil stains at AOC 16. Further, AOC 16 is a likely source of groundwater contamination in the vicinity of AOC 15 and AOC 16.

These documented and suspected releases of hazardous constituents from the tanks at AOC 16 may have resulted in soil contamination above health-based limits, or they may have contributed to nearby groundwater contamination above standards. To ensure protection of human health and the environment, at a minimum, further investigation is necessary to characterize the nature and extent of any contamination at AOC 16.

**AOC 17: Railroad Loading/Unloading Facility.** Loading and unloading of petroleum products at AOC 17 is conducted using movable pipes and hoses temporarily connected to rolling stock; such operations inevitably result in occasional leaks and spills. As EPA notes in corrective action guidance:

Another example [of a solid waste management unit] might be a loading/unloading area at a facility, where coupling and decoupling operations, or other practices result in a relatively small but steady amount of spillage or drippage, that, over time results in highly contaminated soils.

EPA Proposed Rule, Corrective Action for Solid Waste Management Units, 55 Fed. Reg. 30,798, 30,808-09 (July 27, 1990). There is a long history of petroleum transfer at this AOC; the site is an area where coupling and uncoupling operations take place incident to refueling activities. It is not unreasonable to expect that spills may have occurred in the course of transferring material. Coupling and uncoupling activities at loading areas may result in steady drippage over time and result in heavily contaminated soils. No investigation has been conducted to determine the extent to which releases of petroleum products or crude oil have occurred in the past.

Inspection records show that water and oil have been vacuumed from the railroad rack and east of the tracks at AOC 17 in August 2009 and February 2010. (Vacuum Truck Logsheets for Aug. 28, 2009, and Feb. 19, 2010). An old sump at AOC 17 received oily water, which was discharged through a pipe to SWMU 8 (Railroad Rack Lagoon) and is the source of waste petroleum at SWMU 8.

In addition, nearby groundwater wells (RW-1, RW-2, OW-14, and OW-30) contain petroleum-related contamination. Groundwater samples obtained from well OW-14 contain contamination at concentrations above WQCC standards for benzene, ethylbenzene, and MTBE. Since its initial detection in 2006, the concentration of benzene has increased. MTBE has been detected in groundwater samples obtained from OW-30 at concentrations greater than the NMED Tap Water standard. Groundwater samples collected from Recovery wells RW-1 and RW-2 contain benzene, toluene, ethylbenzene, total xylenes, and MTBE at concentrations above WQCC levels. SVOC concentrations above the applicable standards are also present in groundwater in these wells.

The documented and suspected releases of hazardous constituents from the coupling and uncoupling of pipes and hoses at the loading and unloading facilities at AOC 17 may have resulted in soil contamination above health-based limits, or they may have contributed to nearby groundwater contamination above standards. To ensure protection of human health and the environment, at a minimum, further investigation is necessary to characterize the nature and extent of any contamination at AOC 17.

**AOC 18: Asphalt Tank Farm.** There is a long history of petroleum transfer at AOC 19. Storage tanks and piping are potential sources of releases from AOC 19. These tanks are single-walled tanks. The containment for the asphalt tanks is soil and gravel which would not properly contain any leaks or spills from the tanks.

The Department has received two C-141 Release Notification reports for spills at AOC 19. On September 16, 2007, approximately 200 barrels (8,400 gallons) of heavy oil (feed oil for fluidized catalytic cracking) was spilled when operators erroneously attempted to pump the oil into a fill tank (Release Notification dated Sept. 19, 2007); on March 19, 2008, approximately 5 to 6 barrels (210 to 252 gallons) of fuel oil were spilled when a pump failed (Release Notification dated March 26, 2008). Again, some but not all of the spilled material was recovered. A vacuum truck was also used to remove hydrocarbons released from several spills at AOC 19 in 2010 (Vacuum Truck Logsheet for (November 5, 2009). Photographs taken during an inspection in 2001 show streaks of oil on pipes and valves, oil and oil staining on the ground, and other evidence of spills around the asphalt tanks. No investigation has been conducted to determine whether releases of petroleum products or crude oil have resulted in soil or groundwater contamination.

The documented and suspected releases of hazardous constituents from the tanks and connective piping at AOC 19 may have resulted in soil contamination above health-based limits, or they may have contributed to nearby groundwater contamination above standards. To ensure protection of human health and the environment, at a minimum, further investigation is necessary to characterize the nature and extent of any contamination at AOC 17.

**AOC 19: East Fuel Oil Loading Rack.** There is a long history of petroleum transfer at AOC 20. The loading of petroleum products at AOC 20 is conducted using an overhead flexible hose temporarily connected to trucks, which inevitably results in occasional leaks and spills. *See* EPA Proposed Rule, 55 Fed. Reg. at 30,808-09. Coupling and uncoupling activities at loading areas may result in steady drippage over time and result in heavily contaminated soils.

A vacuum truck was used to remove some hydrocarbons released during several spills at AOC 20 in 2010 (Vacuum Truck Logsheet for 2010). The March 19, 2007 spill at AOC 19, which is almost adjacent to AOC 20, also affected AOC 20. No investigation has been conducted to determine to what extent releases of petroleum products or crude oil may have resulted in contamination of soil and groundwater.

The documented and suspected releases of hazardous constituents from the coupling and uncoupling of hoses at the loading rack at AOC 20 may have resulted in soil contamination above health-based limits, or they may have contributed to groundwater contamination above standards. To ensure protection of human health and the environment, at a minimum, further investigation is necessary to characterize the nature and extent of any contamination at AOC 20.

**AOC 20: Crude Slop and Ethanol Unloading Facility.** There is a long history of petroleum transfer at AOC 21. The unloading of petroleum products at AOC 21 is conducted using movable pipes and hoses temporarily connected to trucks, which inevitably results in occasional leaks and spills. *See* EPA Proposed Rule, 55 Fed. Reg. at 30,808-09. Coupling and uncoupling activities at loading areas may result in steady drippage over time and result in heavily contaminated soils. No investigation has been conducted to determine whether releases of petroleum products or crude oil have contaminated soil or groundwater.

The suspected releases of hazardous constituents from the coupling and uncoupling of pipes and hoses at AOC 21 may have resulted in soil contamination above health-based limits, or they may have contributed to groundwater contamination above standards. To ensure protection of human health and the environment, at a minimum, further investigation is necessary to characterize the nature and extent of any contamination at AOC 21.

**AOC 21: Main Loading Racks.** Again, there is a long history of petroleum transfer at AOC 22. The loading of petroleum products at AOC 22 is conducted using overhead hoses temporarily connected to trucks, which inevitably results in occasional leaks and spills. *See* EPA Proposed Rule, 55 Fed. Reg. at 30,808-09. Coupling and uncoupling activities at loading areas may result in steady drippage over time and result in heavily contaminated soils. The underground piping is also a potential source of leaks.

The Department has received two C-141 Release Notification reports for spills at AOC 22. On December 4, 2007, approximately 6,800 gallons of gasoline was spilled when a truck driver operator erroneously opened a valve on a tanker truck (Release Notification dated Dec. 7, 2007); on December 23, 2009, approximately 44 barrels (1,848 gallons) of diesel fuel was spilled from a leaking underground pipeline at the west end of the loading rack (Release Notification dated Dec. 29, 2009). Not all of the material spilled in these incidents was recovered. No investigation has been conducted to determine whether releases of petroleum products or crude oil have occurred in the past.

The documented and suspected releases of hazardous constituents from the coupling and uncoupling of pipes and hoses at the main loading rack at AOC 22 may have resulted in soil contamination above health-based limits, or they may have contributed to groundwater contamination above standards. To ensure protection of human health and the environment, at a minimum, further investigation is necessary to characterize the nature and extent of any contamination at AOC 22.

**AOC 22: Loading Rack Additive Tank Farm.** There is a long history of petroleum transfer at AOC 23. The loading of gasoline additives, such as methyl tertiary butyl ether (MTBE), at AOC 23 is conducted using overhead hoses temporarily connected to trucks, which inevitably results in occasional leaks and spills. *See* EPA Proposed Rule, 55 Fed.

Reg. at 30,808-09. Coupling and uncoupling activities at loading areas may result in steady drippage over time and result in heavily contaminated soils. The storage tanks and underground piping are also potentially susceptible to leaks.

MTBE has been detected in groundwater downgradient of AOC 23, and AOC 23 is the likely source. MTBE is a toxic pollutant under New Mexico groundwater quality regulations. 20.6.2.7.WW(31) NMAC. No investigation has been conducted to determine whether releases of additives such as MBTE from AOC 23 may have resulted in soil or groundwater contamination.

The likely releases of hazardous constituents from the coupling and uncoupling of hoses at AOC 23 may have resulted in soil contamination above health-based limits, or they may have contributed to nearby groundwater contamination. To ensure protection of human health and the environment, at a minimum, further investigation is necessary to characterize the nature and extent of any contamination at AOC 23.

**AOC 23: Retail Fuel Tank Farm.** Storage tanks and associated piping are potential sources of releases from AOC 24. EPA has recognized that even a single tank, especially a fuel tank, may be a SWMU. *In re GMC Delco Remy*, 7 E.A.D. 136, 159 (EAB 1997).

The Department has received two C-141 Release Notification reports for spills at AOC 24. On March 7, 2008, approximately 20 barrels (840 gallons) of diesel fuel was spilled during an “auto fill” when the transfer pump did not switch off at the preselected level (Release Notification dated March 10, 2008); on December 31, 2007, approximately 32 barrels (1,344 gallons) of ethanol was spilled when a pressure gauge on Tank 5 became loose and began leaking (Release Notification dated Jan. 2, 2008). AOC 24 is also a possible source of MBTE contamination in groundwater. No investigation has been conducted to determine whether releases of petroleum products may have resulted in soil or groundwater contamination.

The documented and suspected releases of hazardous constituents from the tanks and piping at AOC 24 may have resulted in soil contamination above health-based limits, or they may have contributed to groundwater contamination above standards. To ensure protection of human health and the environment, at a minimum, further investigation is necessary to characterize the nature and extent of any contamination at AOC 24.

**AOC 24: Crude Oil Tank Farm.** Storage tanks and associated underground piping are potential sources of releases from AOC 24. EPA has recognized that even a single tank, especially a fuel tank, may be a SWMU. *In re GMC Delco Remy*, 7 E.A.D. at 159.

The Department has received a C-141 Release Notification report for AOC 25; on December 31, 2006, approximately 6 barrels (250 gallons) of crude oil was spilled onto the ground when a process sewer drain line from the water draw on Tank 102 became

clogged causing the drain box to overflow (Release Notification dated Jan 2, 2006). No investigation has been conducted to determine whether releases of crude oil may have resulted in soil or groundwater contamination.

The documented and suspected releases of hazardous constituents from the tanks and piping at AOC 25 may have resulted in soil contamination above health-based limits, or they may have contributed to groundwater contamination above standards. To ensure protection of human health and the environment, at a minimum, further investigation is necessary to characterize the nature and extent of any contamination at AOC 25.

**AOC 25: Tank 573 (Kerosene Tank).** The storage tank and associated piping at AOC 26 are potential sources of leaks. EPA has recognized that even a single tank, especially a fuel tank, may be a SWMU. *In re GMC Delco Remy*, 7 E.A.D. at 159.

The likely releases of hazardous constituents from the tank and piping at AOC 26 may have resulted in soil contamination above health-based limits, or they may have contributed to groundwater contamination above standards. To ensure protection of human health and the environment, at a minimum, further investigation is necessary to characterize the nature and extent of any contamination at AOC 26.

**AOC 26: Process Units.** Drains and underground piping, valves, and connectors, and various process units are potential sources of leaks at AOC 27.

The Department has received three C-141 Release Notification reports for spills at AOC 27. On October 19, 2009, approximately 30 barrels (1,260 gallons) of oily water was discovered in a ditch immediately to the north of AOC 27 (Release Notification dated Oct. 20, 2009); on December 3, 2009, somewhat less than 2 barrels (approximately 79 gallons) of gasoline was found to have leaked from a product line in the process area (Release Notification dated Dec. 4, 2009). Department personnel have observed oil stains on the ground at AOC 27. No investigation has been conducted to determine whether releases of petroleum products or crude oil may have resulted in soil or groundwater contamination.

The documented and suspected releases of hazardous constituents from the process units, and associated piping, drains, valves, and connectors at AOC 27 may have resulted in soil contamination above health-based limits, or they may have contributed to groundwater contamination above standards. To ensure protection of human health and the environment, at a minimum, further investigation is necessary to characterize the nature and extent of any contamination at AOC 27.

Because the Process Units are currently operating, and it would be largely impractical to conduct corrective action during operations, corrective action for AOC 27 will be deferred until operations cease.

**AOC 27: Boiler and Cooling Unit Area.** Oily water was removed from the boiler house drain sump and sewer boxes at AOC 28 in 2009 and 2010 (Vacuum Truck Logsheets for Sept. 2, 2009, Jan. 6, 2010, Feb. 4, 2010, Feb. 5, 2010, Feb. 10, 2010, Feb. 12, 2010, and Mar. 3, 2010). According to a C-141 Release Notification report, on April 24, 2010 somewhat less than 18 barrels (740 gallons) of sour naphtha leaked from an underground pipe near the cooling unit (Release Notification dated April 26, 2010). Chromate was historically used as a descaler/biocide in cooling units nationwide and undoubtedly was used in the past in the cooling unit. There have been no investigations of soil or groundwater at AOC 28.

The documented and suspected releases of hazardous constituents from the boiler and cooling unit area at AOC 28 may have resulted in soil contamination above health-based limits, or they may have contributed to groundwater contamination above standards. To ensure protection of human health and the environment, at a minimum, further investigation is necessary to characterize the nature and extent of any contamination at AOC 28.

**AOC 28: Warehouse and Maintenance Shop Area.** Floor drains and underground piping at AOC 29 are potential sources of releases. These facilities have managed used oil and industrial solvents. Used oil and oil sludge was vacuumed from the site in October 2009 and January 2010 (Vacuum Truck Logsheets for Oct. 23, 2009, Jan. 18, 2010). There have been no investigations of soil or groundwater at AOC 29.

The documented and suspected releases of hazardous constituents from the warehouse and maintenance shop at AOC 29 may have resulted in soil contamination above health-based limits, or they may have contributed to groundwater contamination above standards. To ensure protection of human health and the environment, at a minimum, further investigation is necessary to characterize the nature and extent of any contamination at AOC 29.

**AOC 29: Equipment Yard and Drum Storage.** AOC 30 has been used to store old equipment, which may have leaked residual petroleum or used oil, and drums containing various chemicals, including liquids. There have been no investigations of soil or groundwater at AOC 30.

The suspected releases of hazardous constituents from the equipment yard and drum storage area at AOC 30 may have resulted in soil contamination above health-based limits, or they may have contributed to groundwater contamination above standards. To ensure protection of human health and the environment, at a minimum, further investigation is necessary to characterize the nature and extent of any contamination at AOC 30.

**AOC 30: Laboratory.** Laboratory sinks, floor drains, and underground piping at AOC 31 are potential sources of releases. On October 26, 2005, Department inspectors observed at the Laboratory two containers of cuprous chloride, a corrosive hazardous waste (D002), that were leaking their contents. Consequently, the Department sent Giant Refining Co. (predecessor to Western Refining) a notice of violation for mishandling corrosive hazardous waste on October 25, 2006. There have been no investigations of soil or groundwater at AOC 31.

The documented and suspected releases of hazardous constituents from the laboratory at AOC 31 may have resulted in soil contamination above health-based limits, or they may have contributed to groundwater contamination above standards. To ensure protection of human health and the environment, at a minimum, further investigation is necessary to characterize the nature and extent of any contamination at AOC 31.

**AOC 31: Tanks 27 and 28.** The storage tanks and associated piping, including old underground piping, at AOC 32 are potential sources of leaks. This was also the location of the former 90-day storage area. There have been no investigations of soil or groundwater at AOC 32.

The likely releases of hazardous constituents from the tanks and former storage area at AOC 32 may have resulted in soil contamination above health-based limits, or they may have contributed to groundwater contamination above standards. To ensure protection of human health and the environment, at a minimum, further investigation is necessary to characterize the nature and extent of any contamination at AOC 32.

**AOC 32: Flare and Ancillary Tanks.** The storage tanks and associated piping at AOC 33 are potential sources of releases. EPA has recognized that even a single tank, especially a fuel tank, may be a SWMU. *In re GMC Delco Remy*, 7 E.A.D. at 159.

The Department has received two C-141 Release Notification reports for spills at AOC 33. On January 2, 2011, approximately 12 barrels (504 gallons) of slop oil was spilled when a pipeline connecting Tank 105 and tank 107 ruptured due to a freeze in the line (Release Notification dated Jan. 14, 2011); on January 4, 2011, approximately 9527 pounds of sodium hydroxide was spilled from the caustic tank line due to corrosion and a line and valve freeze (Release Notification dated Jan. 14, 2011). Department inspectors observed oil stains near the flare and ancillary tanks during a site visit in 2007 and during a subsequent site visit in 2009. There has been no investigation of soil or groundwater at AOC 33.

The documented and suspected releases of hazardous constituents from the tanks and associated piping at AOC 33 may have resulted in soil contamination above health-based

limits, or they may have contributed to groundwater contamination above standards. To ensure protection of human health and the environment, at a minimum, further investigation is necessary to characterize the nature and extent of any contamination at AOC 33.

**AOC 33: Storm Water Collection System.** The storm water collection system receives process water from the process area and other parts of the refinery. Much of the system is or was located underground, and many points in the system are susceptible to leaks.

The Department has received two C-141 Release Notification reports for spills at AOC 34. On December 27, 2006, approximately 5 barrels (200 gallons) of diesel fuel was released into the Storm Water Collection System when a heater tube in a process unit failed (Release Notification dated Dec. 29, 2006); on July 7, 2007, approximately 200 gallons of water mixed with kerosene was released into the Storm Water Collection System when a heater tube failed (Release Notification dated July 10, 2007). There has been no investigation of soil or groundwater at AOC 34. In addition, since 2006, Western unsuccessfully attempted to eliminate process water discharges to the Storm Water Collection System as evidenced by a continuous low flow of water to the Old API Separator after process water was diverted to the new API Separator. This indicates that releases from the Storm Water Collection System contained refinery process water that contained hazardous constituents and generated F037/F038 waste once lateral flow ceased at the release location.

The documented and suspected releases of hazardous constituents from the storm water collection system at AOC 34 may have resulted in soil contamination above health-based limits, or they may have contributed to groundwater contamination above standards. To ensure protection of human health and the environment, at a minimum, further investigation is necessary to characterize the nature and extent of any contamination at AOC 34.

**AOC 34: Scrap Yard.** AOC 35 has been used to store old machinery, tanks, piping and valves, steel drums, paint cans, and other scrap. Old machinery may have leaked used oil or hydraulic fluid. Old tanks, pipes, and valves may have leaked residual liquid petroleum.

On June 14, 1995, Department inspectors observed and photographed nearly 100 old one-gallon and five-gallon paint cans, some of them rusted or otherwise in poor condition, stored in the Scrap Yard ("Bone Yard"). On October 26, 1995, the Department sent Giant Refining Company (predecessor to Western Refining) a notice of violation for failure to make a hazardous waste determination for the contents of these containers. There has been no investigation of soil or groundwater at AOC 35.

The observed and suspected releases of hazardous constituents from the scrap yard at AOC 35 may have resulted in soil contamination above health-based limits, or they may have contributed to groundwater contamination above standards. To ensure protection of human health and the environment, at a minimum, further investigation is necessary to characterize the nature and extent of any contamination at AOC 35.

*The Department is revising Appendix G of the Draft Permit to list the fifteen newly-identified SWMUs as AOCs.*

#### **D. Schedule**

**6. Comment:** Western Refining states that the schedule for corrective action in the Draft Permit is unreasonable, and proposes submitting a proposed schedule for Department approval within sixty days after issuance of the final permit.

**Response:** The Department prepared the schedule in the Draft permit based on available information in the administrative record. [To be discussed with Western Refining.]

#### **E. Prior Work**

**7. Comment:** Western Refining states that the Draft permit does not contain any significant recognition of corrective action work that Western Refining has already performed. It contends that such recognition is necessary to prevent unnecessarily and unduly burdensome duplicative measures.

**Response:** The Department recognizes that Western Refining and its predecessor have already conducted substantial corrective action work at the facility. That work is well documented in the administrative record. Any work that has been satisfactorily completed prior to issuance of a final permit can be used to satisfy the requirements of the permit. The Department has no interest in requiring unnecessary duplicative measures. Moreover, the Draft Permit in large part addresses this issue through the reporting requirements in section IV.L. Specifically, section IV.L.2.e provides that investigation work plans must include a background section with a brief summary of the results of previous investigations. Section IV.L.3.e has a similar provision for investigation reports. The Department disagrees, however, that the permit itself needs to recount all the work that has been completed in order to prevent unnecessary duplicative measures.

#### **F. General Issues with Permit Terms**

**8. Comment:** Western Refining proposes that the Department add a force majeure provision to the permit.

**Response:** The Department does not include force majeure provisions in hazardous waste permits it issues. However, Section I.J.12 of the Draft Permit would allow extensions of time on schedule deadlines to be granted for good cause shown. A force majeure that causes an unavoidable delay would be considered good cause.

**9. Comment:** Western Refining proposes that the Department add a dispute resolution provision to the permit.

**Response:** There is no requirement to include provisions for dispute resolution in Hazardous Waste Permits under the regulations, 40 CFR 270, incorporated by 20.4.1.900 NMAC. It is neither the Department's policy or its general practice to include such provisions in Hazardous Waste Permits.

**10. Comment:** Western Refining states that it cannot consent now to greatly expanded corrective action requirements when the scope and nature of the corrective action and the ultimate remedies are unknown. It further states that to require such corrective action, without any meaningful consultation, is unreasonable, arbitrary and capricious.

**Response:** The Department disagrees that the corrective action requirements of the Draft Permit would be unreasonable, arbitrary, or capricious. Corrective action for releases of hazardous waste or hazardous constituents into the environment is required by the HWA. But that does not mean that the Department would impose corrective action requirements unilaterally and without consultation. The Draft Permit, in Section IV.H, would establish a process for Western Refining to conduct site assessments, which may result in a determination that no further action is required; to conduct investigations of contamination at the SWMUs and AOCs, as necessary; and to evaluate and recommend corrective measures. Extensive consultation between the Department and Western Refining would be essential throughout each step of this process. Moreover, under Section IV.H.6.g of the Draft Permit, Western Refining would have the opportunity to request a public hearing on any remedy that the Department selects. Under section 74-4-14 of the HWA, Western Refining would have the right to appeal the Secretary's final decision on that remedy.

#### **G. Detailed Issues with Permit Terms**

**11. Comment:** Section I.C. Permitted Activity: Western Refining proposes that a reference should be added to the previous post-closure permit issued in 2000. The Draft Permit creates an impression that it is the first such permit issued for the site.

**Response:** *The Department is modifying the Draft Permit to add a sentence referring to the previously issued permit.*

**12. Comment:** Section I.J.1 Duty to Comply: Western Refining proposes that force majeure events should be added to the list of exceptions to compliance.

**Response:** This provision is taken from the regulations, which do not mention force majeure. *See* 40 CFR 270.30(a), incorporated by 20.4.1.900 NMAC. As stated in response to Comment #8, Section I.J.12 of the Draft Permit would allow extensions of time on schedule deadlines to be granted for good cause shown, which could include a force majeure.

**13. Comment:** Section I.J.3 Transfer of Permit: Western Refining proposes that a statement should be added that the parties may shorten the deadlines by mutual agreement.

**Response:** The deadlines in Section I.J.3 would only establish the outer limit for conducting the specified actions. Any of those actions could be conducted or completed before their respective deadlines.

The 90 day deadline is explicitly stated in 40 CFR 270.40(b).

Transfer of the permit and this the property also requires environmental assessments similar to those required by new AOC Release Assessments.

**14. Comment:** Section I.J.4 Need to Halt or Reduce Activity Not a Defense: Western Refining suggests that the word “the” should be inserted before the word “Permit” in the second line.

**Response:** *The Department is adding the word “the” to correct the typographical error.*

**15. Comment:** Section I.J.8 Duty to Provide Information: Western Refining proposes that this section be revised to clarify that Western Refining only need to submit “non-privileged” information.

**Response:** This provision is taken from the regulations, which do not limit the requirement to “non-privileged” information. *See* 40 CFR 270.30(h), incorporated by 20.4.1.900 NMAC. Submittal of confidential information is addressed in 40 CFR 260.2 incorporated by 20.4.1.100 NMAC and 40 CFR 270.12 incorporated by 20.4.1.900 NMAC.

**16. Comment:** Section I.J.9 Inspection and Entry: Western Refining proposes that sentence should be added stating that all parties with access to the facility shall comply with facility health and safety plans.

**Response:** The Department does not agree with this proposal. The Draft Permit would not place requirements on any person or entity other than the Permittee. Nevertheless, the Department agrees that all Department representatives accessing the facility will comply with facility health and safety plans.

**17. Comment:** Section I.J.11 Approval of Work Plans and Other Documents: Western Refining proposes that this section should be modified to state that the Department will not modify a submission without first informing Western Refining of the basis of the submission's deficiency and providing Western Refining with an opportunity to cure such deficiency.

**Response:** Most of the documents that Western Refining would prepare and submit to the Department under the Draft Permit would be subject to the Hazardous Waste Permit and Corrective Action Fee regulations, part 20.4.2 NMAC, and these regulations are expressly cited in this provision of the Draft Permit. Under these regulations, the Department is required to provide the owner or operator with written notice of the reasons for any disapproval, denial, or rejection. *See* 20.4.2.201.B(4). All decisions related to hazardous waste management and corrective action are documented and placed in Department's administrative record.

**18. Comment:** Section I.J.11 Approval of Work Plans and Other Documents: Western Refining suggests that the third paragraph of this section is duplicative of the last sentence in the second paragraph.

**Response:** *The Department is deleting the duplicative sentence in this section.*

**19. Comment:** Section II.C.2.a Reporting Planned Changes: Western Refining states that Section II.C.2.a is duplicative of Section II.C.2.b, and that it should reference "planned changes" instead of "activities"

**Response:** *The Department is deleting the duplicative section. The Department is also changing the term "planned changes" to "activities" to conform to 40 CFR 270.30(l)(1).*

**20. Comment:** Section II.C.2.c 24 Hour and Subsequent Reporting: Western Refining notes that the numbering of sections II.C.2.c, II.C.2.d, and II.C.2.e is incorrect.

**Response:** *The Department is correcting these section numbers.*

**21. Comment:** Section II.C.2.d Oral report: Western Refining proposes that the 24 hour reporting requirement for any non-compliance that may endanger human health or the environment should be extended to three days from the date of discovery.

**Response:** This provision is taken from the regulations, which require an oral report within 24 hours of the time the permittee becomes aware of the circumstances. *See* 40 CFR 270.30(l)(6), incorporated by 20.4.1.900 NMAC.

**22. Comment:** Section II.C.6 Signatory and Certification Requirement: Western Refining contends that this provision is overly broad in requiring "any other information submitted to or requested by the [Department]" to be signed and certified. It states that this provision would apply even to routine e-mails.

**Response:** This provision is taken from the regulations, which are equally inclusive. 40 CFR 270.30(k), 270.11, incorporated by 20.4.1.900 NMAC. However, the Department agrees that the wording is broader than necessary. *The Department is revising this provision to clarify that it applies to applications, reports required under the permit, and other substantive information requested by the Department for implementation or enforcement of the permit.*

**23. Comment:** Section II.C.7 Submissions to the Environment Department: Western Refining proposes a clarification that submissions under the Permit are deemed to be submitted on the day that they are mailed to the Department or placed in the custody of an express mail service.

**Response:** The Department disagrees with this proposal. All document submittals must be delivered to the Department on the day the document is due as specified in the Permit Schedule or other due date established by the Department.

**24. Comment:** Section II.C.7 Submissions to the Environment Department: Western Refining notes that this section requires two paper copies of reports in the second sentence, and one paper copy of reports in the final sentence.

**Response:** *The Department is revising the second sentence of section II.C.7 to require two paper copies.*

**25. Comment:** Section III.A Post-Closure Care Introduction: Western Refining proposes that the last sentence of the first paragraph should be revised to state that the “LTU meets the definition of a land treatment facility” rather than “land treatment unit” to be consistent with the definition in 40 CFR 260.10.

**Response:** The term used in 40 CFR 264 Subpart M and has been used in the past; however, the Department agrees with this proposed revision to avoid confusion. The Department does not perceive or intend any substantive difference between the terms “land treatment unit” and “land treatment facility.” *The Department is revising this section to reference the definition of “land treatment facility.”*

**26. Comment:** Section III.B.1 Post-Closure Activities: Western Refining states that the requirements in paragraph 3 are inappropriate. The requirements of 40 CFR 264.309 and 264.310(b) are applicable to post-closure care of a closed landfill and do not apply to a closed LTU.

**Response:** The Department agrees with this proposed revision. *The Department is deleting Paragraph 3 of this section.*

**27. Comment:** Section III.C General Inspection: Western Refining states that under the regulations, the requirements to inspect the unit for improper functioning of erosion

controls or deterioration of vegetative cover apply to operating land treatment facilities, not to a closed facility in post-closure care. *See* 40 CFR 264.273(g).

**Response:** The Department agrees that 40 CFR 264.273(g) applies to operating land treatment facilities, and 40 CFR 264.280(c) applies to land treatment facilities in post-closure care. Although section 280(c) does not require inspections, it does require maintenance of erosion controls and the vegetative cover. Regular inspections are necessary to ensure proper maintenance. *The Department is changing the reference in this section to 40 CFR 264.280(c) and 270.32(b).*

**28. Comment:** Section III.C.1 Inspection Schedule: Western Refining states that under the regulations, the requirements to inspect the unit periodically and after storms apply to operating land treatment facilities, not to a closed facility in post-closure care. *See* 40 CFR 264.273(g).

**Response:** The Department agrees that 40 CFR 264.273(g) applies to operating land treatment facilities, and 40 CFR 264.280(c) applies to land treatment facilities in post-closure care. Although section 280(c) does not require inspections, it does require maintenance of the closed unit. Regular inspections are necessary to ensure proper maintenance. *The Department is changing the reference in this section to 40 CFR 264.280(c) and 270.32(b).*

**29. Comment:** Section IV.B.1 Corrective Action Beyond the Facility Boundary: Western Refining states that the requirement to report off-site migration of contaminants within 24 hours is unjustifiably short and unwarranted. It proposes that the deadline be seven days from the date of discovery.

**Response:** This provision is based on the regulation requiring an oral report within 24 hours of the time the permittee becomes aware of circumstances that may endanger health or the environment. *See* 40 CFR 270.30(l)(6), incorporated by 20.4.1.900 NMAC. In most cases, an off-site release of contaminants would be the result of a spill or other surface overflow that would potentially threaten health or the environment off-site. In such circumstances it is critical for the Department to be notified immediately.

**30. Comment:** Section IV.B.3 Newly Discovered Releases: Western Refining contends that it is not feasible to prepare the notification for new releases, which must include “all available information pertaining to the site history and nature of the release” within the 15-day deadline. It proposes a 30-day deadline.

**Response:** The Department believes 15 days is ample time to prepare such a notification.

**31. Comment:** Section IV.C.1 Identification of SWMUs and AOCs Requiring Corrective Action: Western Refining states that it is not aware of any information to support the conclusion that all 35 SWMUs at the facility require corrective action.

**Response:** The Department agrees that a corrective action remedy may not be necessary for all of these units, some of which the Department is re-designating as AOCs (*see* Response to Comment #5). Nevertheless, at a minimum, a release assessment would be necessary for each of these units that has not already been addressed, as provided in Section IV.H.1 of the Draft Permit. A release assessment is a component of corrective action within the meaning of the Draft Permit. Thus, each SWMU and AOC would be subject to some form of corrective action. *To clarify the meaning of corrective action, the Department is amending the definition of that term in draft Permit Section I.I to incorporate the definition of corrective action at 20.4.2.7.I NMAC*

**32. Comment:** Section IV.C.1 Identification of SWMUs and AOCs Requiring Corrective Action: Western Refining notes that there is no deadline for the requirement to provide a map that contains all SWMUs and AOCs listed in Attachment G.

**Response:** *The Department has revised Section IV.C.1 of the Draft Permit, and Attachment E, Table E-1, to require submittal of the map within 90 days of the effective date of the Permit.*

**33. Comment:** Section IV.D Cleanup Levels: Western Refining notes that this section anomalously uses the term “Permit Part.”

**Response:** *The Department has replaced the term “Permit Part” with “Permit Section.”*

**34. Comment:** Section IV.D.I Groundwater Cleanup Levels: Western Refining proposes that the requirements for groundwater cleanup levels include a direction that cleanup levels derived from Regional Screening Levels (RSLs) issued by the Environmental Protection Agency (EPA) be adjusted by a factor of 10 to account for the fact that EPA uses a target human health risk level of  $10^{-6}$  when developing the RSLs while the Department uses a target human health risk level of  $10^{-5}$ . Western Refining notes that such an adjustment is included in the provision on soil cleanup levels, Section IV.D.2.

**Response:** The Department disagrees with this comment. The Draft Permit already clearly provides that, in the absence of federal or State standards, a target human health risk level of  $10^{-5}$  would be used to establish groundwater cleanup levels for carcinogens. The additional “direction” that Western Refining proposes is unnecessary.

**35. Comment:** Section IV.G Permit Modification for Corrective Action Complete: Western Refining notes that several references to Attachment K and Tables K-1, K-2, and K-3 should be to Attachment G, and Tables G-1, G-2, and G-3.

**Response:** *The Department has corrected these errors in the cross-references.*

**36. Comment:** Section IV.H.2 Interim Measures: Western Refining proposes that a provision be added to this section stating that any interim measures performed may qualify as final corrective measures. Western Refining also proposes that work already performed or underway should be recognized.

**Response:** While the Department agrees that an interim measure can be a final remedy, an express statement in the permit is not necessary. Section IV.H.6.a of the Draft Permit provides that the Department will determine the need for corrective action at a given site if “there has been a release of contaminants into the environment” at the site and “corrective action is necessary to protect human health and the environment.” The Department would make this determination “based on the Investigation Report and other relevant information,” which would include the results of the interim measures.

As explained in response to Comment #7, the Department disagrees that the permit needs to recount all the work that has been completed.

**37. Comment:** Section IV.H.3 Emergency Interim Measures: Western Refining proposes that the one business day notification requirement for discovery of immediate threat to human health or the environment should be extended to three days from the date of discovery

**Response:** An immediate threat health or the environment must be reported to the Department immediately.

**38. Comment:** Section IV.H.6.b Corrective Measures Evaluation Report: Western Refining states that item 14 (design criteria for the selected remedy) and item 15 (proposed schedule for implementation of the preferred remedy) should not be included in the Corrective Measures Evaluation Report, and should be deleted.

**Response:** The Department disagrees with this comment. The corrective measures evaluation reports should include a preliminary design for the preferred remedy. A detailed design will then be included in the corrective measures implementation plans. The corrective measures evaluation reports should also include a proposed schedule so that the Department can evaluate the estimated length of time needed to implement the remedy.

*For clarification, the Department has changed item 14 from “design criteria of the selected remedy” to “preliminary design for the preferred remedy.”*

**39. Comment:** Section IV.J.2.d.vii Soil, Rock, and Sediment Sample Types: Western Refining suggests that a sentence be added to allow flexibility in the number of QA/QC samples submitted to the laboratory with soil, rock, and sediment samples.

**Response:** Under the Draft permit, Western Refining would have the option to propose alternate methods and approaches for site investigations and cleanup in the associated work plans.

*The Department is adding the following new provision in Section I.J.11 of the Draft Permit to make this option clear: “The work plans may propose to the Department methods and procedures that differ from those in this Permit. Any such proposal shall be in writing, shall specifically identify each proposed method or procedure and explain how it differs from this Permit, and shall be accompanied by a written justification. If the Department approves in writing a work plan with such different method or procedure, the method or procedure of the approved work plan, rather than the method or procedure of this Permit, shall be applicable and enforceable.”*

**40. Comment:** Section IV.J.2.h.iv Groundwater and Surface Water Sample Types: Western Refining suggests that a sentence be added to allow flexibility in the number of QA/QC samples submitted to the laboratory with groundwater samples.

**Response:** See response to Comment #39.

**41. Comment:** Section IV.J.2.i Sample Handling: Western Refining notes that paragraph 2 provides that samples collected in Shelby tubes or thin wall samplers must be capped as is done with brass sleeves. It contends that Shelby tubes and thin wall samplers are not designed to be capped, but are designed to be used with an Encore or similar sampling device. Western Refining proposes that this requirement be deleted.

**Response:** The Department disagrees with this comment. Shelby tube samplers can be capped in the same manner as brass sleeves. However, the use of Encore samplers for these types of samples is also acceptable. The specific sampling methods must be described both as proposed in work plans and in reports that include summaries of sampling activities.

**42. Comment:** Section IV.J.2.m Collection and Management of Investigation Derived Waste: Western Refining notes that text is missing from the first sentence of the second paragraph of this section.

**Response:** *The Department has revised this sentence to read: “All water generated during sampling and decontamination activities shall be temporarily stored at satellite accumulation areas or transfer stations in labeled 55-gallon drums or other containers approved by the NMED until proper characterization and disposal can be arranged or the water is disposed in the refinery’s waste water treatment system upstream of the API Separator”*

**43. Comment:** Section IV.J.4.a.v Toxicity Assessment: Western Refining states that this section refers to the “currently acceptable hierarchy of sources” but does not provide any guidance on what the acceptable sources are.

**Response:** The hierarchy is listed in the Department's Risk Assessment Guidance for Site Investigations and Remediation (February 2012). The hierarchy is also listed in EPA's Risk Assessment Guidance (1989 as updated).

**44. Comment:** Section IV.K.3.a Well Construction Materials: Western Refining notes that this section seems to prohibit the use of polyvinyl chloride (PVC) for construction of monitoring wells that will be used to monitor organic constituents, but also seems to allow the use of rigid PVC for monitoring wells. It suggests that the prohibition be clarified to prohibit only flexible PVC.

**Response:** *The Department has revised the last sentence of the first paragraph to read: "PVC (other than rigid PVC as provided below) should not be used for monitoring wells where organic constituents will be analyzed due to its potential for sorption and leaching of contaminants."*

**45. Comment:** Section IV.L.5.i Risk Screening Levels: Western Refining notes the Draft Permit references the EPA Region 6 soil screening values. It states that the EPA Region 6 screening values have been replaced with new Regional Screening Levels, which should be referenced.

**Response:** *The Department has changed the reference to EPA Region 6 screening levels to reference the EPA Regional Screening Levels. (The EPA Regional Screening Levels are also referenced in Section IV.D.1 of the Draft Permit).*

**46. Comment:** Attachment C: Inspection Plan, Section C.1 Weekly Inspections and Table C-1 Inspection Schedule: Western Refining notes that the Inspection Plan, in Section C.1 and Table C-1, requires inspections of the LTU on a weekly basis and after major precipitation events, but that Section III.C.1 of the Draft permit seems to require inspections on a monthly basis.

**Response:** *The Department has changed the Draft Permit Section III.C.1 to correspond to the schedule in Attachment C, Section C.1 and Table C-1.*

**47. Comment:** Attachment D: Post-Closure Care Plan, Section D.1 Introduction: Western Refining proposes that the second sentence of this section should be revised as follows: "The post-closure care plan consists of two monitoring sequences: detection monitoring below the treatment zone..."

**Response:** *The Department has changed Draft Permit Attachment D, Section D.1 to reference monitoring below the treatment zone.*

**48. Comment:** Attachment D: Post-Closure Care Plan, Section D.3 Detection Monitoring: Western Refining proposes that the term "ZOI" should be defined as the "zone of incorporation" rather than the "zone of infiltration."

**Response:** The Department disagrees with this comment. Monitoring of the zone of potential infiltration more accurately describes the required detection monitoring.

**49. Comment:** Attachment D: Post-Closure Care Plan, Section D.5 Inspections: Western Refining notes that the Post-Closure Care Plan, in Section D.5, requires inspections of the LTU on a weekly basis and after major precipitation events, but that Section III.C.1 of the Draft Permit seems to require inspections on a monthly basis.

**Response:** *The Department has changed the Draft Permit Section III.C.1 to correspond to the schedule in Attachment D, Section D.5.*