

42 U.S.C. § 6928 and is simultaneously commenced and concluded through the issuance of this CAFO under 40 C.F.R. § 22.13(b) and 22.18(b)(2) and (3).

- 2) NMED and Respondent agreed to settlement of NMED's action before the filing of a complaint and, thus, NMED simultaneously commences and concludes its action pursuant to Rules 22.13(b) and 22.18(b) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (the "CROP"), 40 C.F.R. §§ 22.13(b) and 22.18(b). NMED is the designated State Agency responsible for carrying out the RCRA program in New Mexico. The State of New Mexico's authority to implement the base RCRA program is the New Mexico Statutes 1978 Annotated (NMSA), Sections 74-1-8 and 74-4-4 (as amended). The New Mexico Administrative Code ("NMAC") Title 20, Chapter 4, Part 1, was promulgated and adopted under the NMSA, Hazardous Waste Act. The NMAC incorporates by reference certain sections of the federal hazardous waste regulations found in Title 40, Code of Federal Regulations (40 C.F.R.). NMED hereby joins as a party of interest pursuant to 40 C.F.R. § 22.11(a), because it has an interest relating to the cause of action, this final order would impair its ability to protect its interest, and no existing party adequately represents its interests. All parties consent to NMED's joinder in this proceeding.
- 3) Respondent admits the jurisdictional allegations herein; however, Respondent neither admits nor denies the specific factual allegations and conclusions of law contained in this CAFO. This CAFO states a claim upon which relief may be granted.
- 4) Respondent explicitly waives any right to contest the allegations and its right to appeal the proposed final order contained in this CAFO, and waives all defenses which have been raised or could have been raised to the claims set forth in the CAFO. This CAFO shall not be

admissible against Respondent in a civil proceeding unless the proceeding is brought by EPA and/or Respondent-Intervenor to enforce this CAFO.

- 5) This CAFO resolves only those claims of EPA and the NMED for the violations which are alleged herein.
- 6) Respondent consents to the issuance of the CAFO hereinafter recited and consents to the assessment and payment of stated civil penalty in the amount and by the method set out in this CAFO.

II.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

- 7) Western Refining Southwest, Inc. ("Respondent") was qualified to do business in the State of New Mexico on February 20, 1974. Respondent is an Arizona Corporation.
- 8) Respondent owns and operates a petroleum refinery in Jamestown, New Mexico, approximately 17 miles East of Gallup, New Mexico.
- 9) Respondent is a "person" as the term is defined in Section 1004 (15) of RCRA, 42 U.S.C. § 6903 (15), NMAC § 20.4.1.100 [40 CFR § 260.10].
- 10) Respondent is the "owner" and "operator" of the facility described, above, as those terms are defined at NMAC § 20.4.1.100 [40 CFR § 260.10].
- 11) Respondent is a "Large Quantity Generator" of hazardous waste as that term is defined in NMAC § 20.4.1.100 [40 CFR § 260.10]. Respondent's EPA Identification Number is NMD000333211.
- 12) Respondent's operations, along with all Respondent-owned contiguous land and structures, other appurtenances and improvements on Respondent-owned land, is a "facility" as the term is defined in the New Mexico Administrative Code ("NMAC") § 20.4.1.100 [Title 40 Code of Federal Regulations ("CFR") § 260.10].

- 13) Pursuant to RCRA 3007(a), 42 U.S.C. § 6928, on September 11-13, 2007, Representatives of EPA conducted a RCRA Compliance Evaluation Inspection (Inspection) at Respondent's facility. Respondent engaged in written and oral exchanges of information with EPA on a voluntary basis thereafter relating to RCRA compliance issues at Respondent's facility.

III.
EPA VIOLATIONS

- 14) Complainant incorporates by reference the facts, allegations, and conclusions of law contained in paragraphs 1-13 of this Complaint and CAFO.

EPA VIOLATION I - LAND-DISPOSING PROHIBITED HAZARDOUS WASTE

- 15) During the Inspection, EPA Representatives observed two Benzene/Air Strippers and an American Petroleum Institute ("API") oil/water separator (known as the "New API Separator").
- 16) Respondent's Representatives stated that the New API Separator treats the facility's process wastewater to remove oily secondary materials. Respondent's Representatives stated that oily secondary materials that are removed from the New API Separator are routed to tanks for storage. Respondent's Representatives stated that the wastewater from the New API Separator is pumped to the top of the Benzene Strippers. The water flows down through the strippers while air is blown upward to remove benzene from the wastewater. Respondent's Representatives stated that after the wastewater flows through the Benzene Strippers, it is discharged to Aeration Lagoon #1 ("AL-1").
- 17) During the Inspection, EPA Representatives observed the pipe that discharges flows from the Benzene Strippers to AL-1.

- 18) During the Inspection, Respondent's Representatives provided the EPA Representatives with analytical data showing the concentration of Benzene in water discharged to AL-1. The data indicated that the concentration of Benzene was 4.4 milligrams per Liter (mg/L).
- 19) During the Inspection, EPA Representatives observed another pipe that discharges into AL-1. The pipe was discharging liquids at the time of the observation.
- 20) Respondent's Representatives stated that the pipe was the Overflow Pipe from the New API Separator. Respondent's Representatives stated that when wastewater flow to the New API Separator exceeded the unit's ability to process the volume, the overflow was directly discharged to AL-1. The Overflow Pipe was removed from service the week of January 5, 2009, and overflows since that time have been routed to a semi-permanent/temporary tank.
- 21) During the Inspection, Respondent's Representatives provided the EPA Representatives with analytical data showing the concentration of Benzene in wastewater discharged from the New API Separator. The data indicated that the concentration of Benzene was between 11.0 and 16.0 mg/L.
- 22) The wastewater being discharged to AL-1 was being "disposed" as that term is defined at NMAC § 20.4.1.200 [40 CFR 261.2], by being discarded into a surface impoundment, a land-based unit.
- 23) The wastewater is therefore a "solid waste" as that term is defined at NMAC § 20.4.1.200 [40 CFR 261.2].
- 24) A solid waste which contains benzene in concentrations above 0.5 mg/L is also a "hazardous waste" as that term is defined at NMAC § 20.4.1.200 [40 CFR 261.3], carries the characteristic of toxicity, and has the EPA Hazardous Waste Number of D018 as listed in NMAC 20.4.1.200 [40 CFR § 261.24].

- 25) Pursuant to the Land Disposal Restrictions at NMAC § 20.4.1.800 [40 CFR § 268.40] and RCRA § 3004, untreated hazardous waste with the toxicity characteristic of benzene (D018) is prohibited from land disposal unless it meets the treatment standards listed in NMAC § 20.4.1.800 [40 CFR § 268.40 & 268.48].
- 26) Respondent failed to comply with the Land Disposal Restrictions listed in Paragraph 25, above.
- 27) Therefore, Respondent violated NMAC § 20.4.1.800 [40 CFR § 268.40], by land disposing untreated hazardous waste.
- EPA VIOLATION II – OPERATING A SURFACE IMPOUNDMENT WITHOUT A RCRA PERMIT
- 28) As presented in Violation I above, during the Inspection, EPA Representatives observed wastewater from the New API Separator and wastewater from the benzene strippers being discharged into AL-1.
- 29) AL-1 is a "Surface Impoundment" as that term is defined at NMAC § 20.4.1.100 [40 CFR § 260.10].
- 30) AL-1 is a "Hazardous Waste Management Unit", as that term is defined at NMAC § 20.4.1.100 [40 CFR § 260.10].
- 31) Pursuant to NMAC 20.4.1.900 & 901 [40 C.F.R. § 270.1, 270.10, & 270.17 & RCRA § 3005 & 3004], owners and operators of hazardous waste management units must have permits during the active life of the facilities. Owners/operators of surface impoundments must have post-closure permits, file a part B permit application, and meet the specific requirements – minimum technology requirements ("MTR") – for surface impoundments.
- 32) At the time of the Inspection, Respondent did not have a RCRA Permit to operate the surface impoundment for hazardous waste management, and the impoundment did not meet MTR.

33) Therefore, Respondent violated NMAC 20.4.1.900 & 901 [40 C.F.R. § 270.1, 270.10, & 270.17 & RCRA § 3005 & 3004], by failing to have a RCRA Permit.

EPA VIOLATION III – STORING HAZARDOUS WASTE IN TANKS WITHOUT A RCRA PERMIT

34) During the Inspection, EPA Representatives observed two storage tanks Z-84-T1 and Z-84-T2.

35) Respondent's Representatives stated that tanks Z-84-T1 and Z-84-T2 were storing oily wastewater – specifically, oil-bearing hazardous secondary materials that were recovered from an overflow event from the New API Separator into Aeration Lagoons AL-1 and AL-2, and Evaporation Pond 1.

36) Respondent's Representative stated that the spill occurred in August 2005.

37) In Respondent's letter to EPA, dated October 24, 2007, Respondent stated that the material stored in tanks Z-84-T1 and Z-84-T2 was recovered oil from Respondent's lagoons and ponds and that the material was being sent to the Motiva Refinery in Norco, Louisiana for recycling. Respondent provided analytical results of samples taken on September 17, 2007, of the material stored in tanks Z-84-T1 and Z-84-T2. The analytical data indicated that the materials contained benzene at a concentration of 21 mg/L.

38) Pursuant to NMAC 20.4.1.200 [40 C.F.R. Section 261.4(a)(12)(ii)], oil-bearing hazardous secondary materials generated at petroleum refineries are not solid wastes if they are returned to the refining process, without first being accumulated speculatively.

39) Pursuant to NMAC § 20.4.1.200 [40 CFR 261.1(c)(8)], a material is "accumulated speculatively" if 75% of the material has not been recycled during the calendar year (commencing on January 1).

- 40) The oil-bearing hazardous secondary materials stored in tanks Z-84-T1 and Z-84-T2 were generated in August 2005 and were still being stored on site during the time of the Inspection in September 2007. The material subsequently was sent to the Motiva Refinery in Norco, Louisiana for recycling by the end of 2007.
- 41) At the time of the Inspection, Respondent could not provide documentation that 75% of the material had been recycled.
- 42) Therefore, the materials referenced in Paragraphs 35 - 37, above, are not excluded from the definition of solid waste, and are, therefore "solid wastes" as that term is defined at NMAC § 20.4.1.200 [40 CFR 261.2].
- 43) The materials referenced in Paragraphs 35 - 37, above, are also "hazardous waste" as that term is defined at NMAC § 20.4.1.200 [40 CFR 261.3], because they contain benzene in concentrations above 0.5 mg/L. These materials exhibit the characteristic of toxicity, and carry the EPA Hazardous Waste Number of D018 as listed in NMAC 20.4.1.200 [40 CFR § 261.24].
- 44) Tanks Z-84-T1 and Z-84-T2 are a "Hazardous Waste Management Unit", as that term is defined at NMAC § 20.4.1.100 [40 CFR § 260.10].
- 45) Pursuant to NMAC 20.4.1.900 & 901 [40 C.F.R. § 270.1 & 270.10], owners/operators of hazardous waste storage units [tanks] must have a permit during the active life of the units unless they meet the requirements for exemption in NMAC 20.4.1.300 [40 C.F.R. § 262.34].
- 46) Pursuant to the permit exemption requirements in NMAC 20.4.1.300 [40 C.F.R. § 262.34], large quantity generators of hazardous waste may store hazardous waste in tanks for less than ninety days, without a permit, provided that the tanks meet the requirements of NMAC 20.4.1.600 [40 C.F.R. § 265, Subpart J].

- 47) Tanks Z-84-T1 and Z-84-T2 were not built and/or designed as hazardous waste storage tanks and do not meet the requirements of NMAC 20.4.1.600 [40 C.F.R. § 265, Subpart J].
- 48) On January 1, 2007, the materials stored in tanks Z-84-T1 and Z-84-T2 became solid wastes and hazardous wastes as described in paragraphs 42 and 43, above.
- 49) At the time of the Inspection, Respondent was storing hazardous waste for longer than ninety days.
- 50) Therefore, Respondent failed to meet the permit exemption requirements in NMAC 20.4.1.300 [40 C.F.R. § 262.34].
- 51) Respondent does not have a RCRA permit.
- 52) Therefore, Respondent failed to meet the requirements of NMAC 20.4.1.900 & 901 [40 C.F.R. § 270.1 & 270.10], by failing to obtain a RCRA permit.

EPA VIOLATION IV – OPERATING A WASTE PILE WITHOUT A RCRA PERMIT

- 53) During the Inspection, EPA Representatives observed a concrete pad used for cleaning heat exchanger bundle [tubes] – (the “Bundle Cleaning Pad”). EPA Representatives further observed a pile of unknown material on the Bundle Cleaning Pad and a heat exchanger bundle lying on top of the pile.
- 54) EPA Representatives observed that sludge had fallen off the heat exchanger bundle onto the pile
- 55) Respondent’s Representatives stated they did not know what the pile of material was at the time when the EPA Representatives observed it, but later stated that the material was soil which was excavated near the Acid Soluble Oil (“ASO”) neutralization drum in the Alkylation unit – ASO soil.
- 56) In Respondent’s October 24, 2007 letter to EPA, Respondent reaffirmed that the material was ASO soil.

- 57) The ASO soil described above, is a "solid waste" as that term is defined at NMAC § 20.4.1.200 [40 CFR 261.2].
- 58) Pursuant to NMAC 20.4.1.200 [40 CFR § 261.32], waste generated from cleaning heat exchanger bundles, at petroleum refineries, is classified by EPA as a hazardous waste from a specific source and has the EPA Hazardous Waste Number of K050.
- 59) Pursuant to NMAC 20.4.1.200 [40 CFR § 261.3(a)(2)(iv)], a mixture of a solid waste and a waste listed in 20.4.1.200 [40 CFR § 261.32], is also a listed hazardous waste.
- 60) Therefore the ASO soil is a hazardous waste.
- 61) Respondent's Representatives stated that Respondent also dewater sludge from the New API Separator on the Bundle Cleaning Pad.
- 62) Pursuant to NMAC 20.4.1.200 [40 CFR § 261.32], wastes generated from API Separator Sludge, at petroleum refineries, is classified by EPA as a hazardous waste from a specific source and has the EPA Hazardous Waste Number of K051.
- 63) The ASO soil and the API Separator Sludge are managed as hazardous waste piles, a "hazardous waste management unit" as that term is defined at NMAC § 20.4.1.100 [40 CFR § 260.10].
- 64) Pursuant to NMAC 20.4.1.900 & 901 [40 C.F.R. § 270.1, 270.10, & 270.18 and RCRA § 3005], owners and operators of hazardous waste management units must have permits during the active life of the facilities. Owners/operators of waste piles must have post-closure permits, file a part B permit application, and meet the specific technical requirements for waste piles.
- 65) Respondent does not have a RCRA permit and Respondent's waste piles do not meet the technical requirements.

66) Therefore, Respondent has violated NMAC 20.4.1.900 & 901 [40 C.F.R. § 270.1, 270.10, & 270.18 and RCRA § 3005] by failing to obtain a RCRA permit.

EPA VIOLATION V – STORING HAZARDOUS WASTE WITHOUT A PERMIT

67) During the Inspection, EPA Representatives observed an open, unlabeled container (“drum”) of oily material near the Bundle Cleaning Pad.

68) Respondent’s Representatives stated that the drum contained sludge from the weir box of the New API Separator.

69) Pursuant to NMAC 20.4.1.200 [40 CFR § 261.3], sludge generated from primary oil/water/solids separation, at petroleum refineries, is classified by EPA as a hazardous waste from a non-specific source and has the EPA Hazardous Waste Number of F037.

70) Pursuant to the permit exemption requirements in NMAC 20.4.1.300 [40 C.F.R. § 262.34], large quantity generators of hazardous waste may store hazardous waste in containers without a permit as long as the containers are labeled with the words “Hazardous Waste” and marked with the date upon which accumulation [storage] began, and the generator complies with container storage requirements of NMAC 20.4.1.600 [40 C.F.R. § 265, Subpart I] (keeps containers closed).

71) Respondent did not label the drum with the words “Hazardous Waste”, did not mark the date that accumulation began, and did not close the drum.

72) Therefore, Respondent failed to meet the permit exemption requirements in NMAC 20.4.1.300 [40 C.F.R. § 262.34].

73) Respondent does not have a RCRA permit.

74) Therefore, Respondent failed to meet the requirements of NMAC 20.4.1.900 & 901 [40 C.F.R. § 270.1 & 270.10], by failing to obtain a RCRA permit.

EPA VIOLATION VI – FAILING TO MAKE HAZARDOUS WASTE DETERMINATIONS

- 75) During the Inspection, EPA Representatives observed "super sacks" of charcoal filter material, which had been removed from the Thiosulfate Unit, being stored at the less-than-ninety-day hazardous waste storage area.
- 76) Respondent's Representatives did not have analytical data which could identify the hazardous characteristics of the material identified in Paragraph 75, nor did they have documentation that could attest to its potential listing as a hazardous waste.
- 77) During the Inspection, EPA Representatives also observed a leaking vacuum truck contaminating surface soil.
- 78) Respondent's Representatives did not know the identity of the material that was leaking from the vacuum truck.
- 79) The materials identified in Paragraphs 75 - 78, above are "solid waste" as that term is defined at NMAC § 20.4.1.200 [40 CFR 261.2].
- 80) Pursuant to NMAC § 20.4.1.300 [40 C.F.R. § 262.11], a person who generates a solid waste, must determine if that waste is a hazardous waste.
- 81) Pursuant to NMAC § 20.4.1.300 [40 C.F.R. § 262.40], a generator must keep records of hazardous waste determinations for three years.
- 82) Respondent had not made hazardous waste determinations on the two waste streams identified in Paragraphs 75 - 78, above, and/or had not kept records of hazardous waste determinations.
- 83) Therefore, Respondent has failed to meet the requirements of NMAC § 20.4.1.300 [40 C.F.R. § 262.11] and/or NMAC § 20.4.1.300 [40 C.F.R. § 262.40].
- EPA VIOLATION VII - TREATING HAZARDOUS WASTE WITHOUT A RCRA PERMIT*
- 84) During the Inspection, EPA Representatives observed two Benzene/Air Strippers used by Respondent to remove benzene from contaminated process wastewater.

- 85) The Benzene/Air Strippers are used by Respondent for "treatment" of hazardous waste, as that term is defined at NMAC § 20.4.1.100 [40 CFR § 260.10].
- 86) The Benzene/Air Strippers are a "Hazardous Waste Management Unit", as that term is defined at NMAC § 20.4.1.100 [40 CFR § 260.10].
- 87) Pursuant to NMAC 20.4.1.900 [40 C.F.R. § 270.1, 270.10 and RCRA § 3005], owners and operators of hazardous waste management units must have permits during the active life of the facilities, unless they meet the requirements for exemption in NMAC 20.4.1.300 [40 C.F.R. § 262.34].
- 88) Pursuant to the permit exemption requirements in NMAC 20.4.1.300 [40 C.F.R. § 262.34], large quantity generators of hazardous waste may store [and treat] hazardous waste in containers or tanks for less than ninety days, without a permit, provided that the containers and/or tanks meet all of the requirements listed in this subpart, including NMAC 20.4.1.600 [40 C.F.R. § 265, Subpart J] for containers and 20.4.1.600 [40 C.F.R. § 265, Subpart J] for tanks.
- 89) The Benzene/Air Strippers do not meet the definition of "container(s)" as that term is defined at NMAC § 20.4.1.100 [40 CFR § 260.10].
- 90) The Benzene/Air Strippers do not meet the definition of tanks as described at NMAC 20.4.1.600 [40 C.F.R. § 265, Subpart J].
- 91) Therefore, Respondent has failed to meet the permit exemption requirements in NMAC 20.4.1.300 [40 C.F.R. § 262.34].
- 92) Respondent does not have a RCRA permit.
- 93) Therefore, Respondent failed to meet the requirements of NMAC 20.4.1.900 & 901 [40 C.F.R. § 270.1 & 270.10], by failing to obtain a RCRA permit.

EPA VIOLATION VIII -- FAILING TO MEET SOLID WASTE EXCLUSION

REQUIREMENTS

- 94) At the time of the Inspection, Respondent's representatives stated that oil-bearing hazardous secondary materials were being stored on site.
- 95) Respondent's Representatives stated that oil-bearing hazardous secondary materials are recycled off-site at the Motiva Refinery in Norco, Louisiana.
- 96) Pursuant to NMAC 20.4.1.200 [40 C.F.R. § 261.4(a)(12)], oil-bearing hazardous secondary materials generated at a petroleum refinery which are inserted back into the refining process (thermal cracking/coking units) are not solid wastes.
- 97) However, to enjoy the above stated exclusion, Respondent must keep documentation to demonstrate that the coke products do not exhibit a characteristic of hazardous waste.
- 98) At the time of the Inspection, Respondent did not have analytical data to show that the coke products did not exhibit a characteristic of hazardous waste.
- 99) Therefore, Respondent failed to meet the solid waste exclusion requirements for oil-bearing hazardous secondary materials.

IV.

COMPLIANCE ORDER

- 100) Pursuant to 42 U.S.C. § 6928, Respondent is hereby ORDERED to take the following actions and provide evidence of compliance within the time period specified below:
- A. Respondent, pursuant to RCRA regulation, shall provide documentation demonstrating completion of the selected remedy at AL-1 and AL-2 in accordance with the plan and schedule established in a Lagoon Corrective Measures Implementation

Workplan¹ when approved by NMED. The Respondent has submitted a workplan for the closure of AL-1 and AL-2 to NMED, another submission is due on or before July 31, 2009. The Lagoon Corrective Measures Implementation Workplan must be approved by NMED. The Respondent must comply with all NMED's requirements for closure including any established schedules. NMED will respond to the submitted Lagoon Corrective Measures Implementation Workplan within the timeframe outlined in 20.4.2. NMAC. Upon NMED approval, all deadlines, work/design requirements, and sampling and monitoring requirements in the Lagoon Corrective Measures Implementation Workplan shall become part of, and enforceable under, this CAFO.

B. Respondent shall cease the operation of, and dismantle, all existing Benzene/Air Strippers at its facility. All Benzene Strippers must be permanently removed from service within 90 days of demonstrating that the upgraded wastewater treatment system is achieving treatment criteria as specified in an approved Process Design Report for Wastewater Treatment Plant Workplan (described in paragraph C below).

C. Respondent shall design, construct, properly permit, and commence operation of an upgraded wastewater treatment system as approved by NMED and the New Mexico Energy, Minerals and Natural Resource Department, Oil Conservation Division ("OCD") and that is capable of treating all wastewater in accordance with the schedule established in a Process Design Report for Wastewater Treatment Plant Workplan² when approved by the NMED and the OCD. The Respondent submitted, on May 30, 2009, a Process Design Report for Wastewater Treatment System Workplan for NMED and OCD

¹ Respondent has informed EPA that this will be the title of the described Workplan. Any change in title of the Workplan shall not circumvent the obligation to submit the described Workplan.

² Respondent has informed EPA that this will be the title of the described Workplan. Any change in title of the Workplan shall not circumvent the obligation to submit the described Workplan.

approval for the design and construction of the upgraded wastewater treatment system. Upon NMED and OCD approval, all deadlines, work/design requirements, and sampling and monitoring requirements in a Process Design Report for Wastewater Treatment System Workplan shall become part of, and enforceable under, this CAFO.

D. Respondent shall, within 30 days following the effective date of this CAFO, submit to NMED for approval an Interim Measures Workplan for ceasing the discharge of any hazardous wastewater to any surface impoundment, unless such discharge complies with applicable RCRA standards. Discharge of any hazardous wastewater to any surface impoundment shall cease within 120 days following NMED's approval of the Interim Measures Workplan, unless such discharge complies with applicable RCRA requirements. If air strippers are used during this interim period under the approved Interim Measures Workplan, this CAFO shall constitute authorization, for purposes of RCRA compliance, for such air strippers. However, all air strippers shall be subject to the removal described in paragraph B (except for dismantling) once the upgraded wastewater treatment system is achieving treatment criteria as specified in an approved Process Design Report for Wastewater Treatment Plant Workplan. All deadlines, work/design requirements, and sampling and monitoring requirements in the Interim Measures Workplan, as approved by NMED, shall become part of, and enforceable under, this CAFO.

E. Western shall commence operation of the upgraded wastewater treatment system by a date certain established in the approved Process Design Report for Wastewater Treatment System Workplan. The tanks and ancillary equipment in the upgraded wastewater treatment system that are in operation downstream of the API Separator shall be compliant with 40 C.F.R. § 262.34(a) (RCRA Permit Exemption Requirements for

Generators) and Respondent, if needed, shall secure any necessary permitting. Upon commencing operation of the upgraded wastewater treatment system, Respondent shall, at the same time, commence operation of a diversion tank system to handle wastewater that does not meet discharge standards from the above described upgraded wastewater treatment system. The construction of the diversion tank system shall be addressed in the Process Design Report for Wastewater Treatment System Workplan which must be approved by NMED and OCD. Upon NMED and OCD approval, all deadlines, work/design requirements, and sampling and monitoring requirements in a Process Design Report for Wastewater Treatment System Workplan shall become part of, and enforceable under, this CAFO.

F. In regard to the upgraded wastewater treatment system and diversion tank system, as described in paragraphs 100 C and 100 E, Respondent shall be responsible for the proper design, construction, and, if needed, permitting of all associated tanks, pipes, and ancillary equipment, in addition to, and including, the upgraded waste water treatment system and diversion tank system. The tanks and ancillary equipment in the upgraded wastewater treatment system that are in operation downstream of the API Separator and any diversion tank that is in operation downstream of the API Separator shall be compliant with 40 C.F.R. § 262.34(a) (RCRA Permit Exemption Requirements for Generators) and Respondent, if needed, shall secure any necessary permitting.

G. Respondent shall limit volatile organic ("VO") air emissions from the upgraded waste water treatment system described in paragraph 100 C and 100 E to the limits in 40 CFR 265 subpart CC. If after the upgraded wastewater treatment system is operable, Respondent exceeds this RCRA air emission level, Respondent shall, within 90 days from the date on which Respondent becomes aware that it is exceeding this RCRA air

emission level, submit a VO Air Emissions Workplan for review and approval to NMED for the design and construction of a mechanism to capture, treat, and/or recycle the benzene air emissions from the waste water treatment system. Upon NMED approval, all deadlines, work/design requirements, and sampling and monitoring requirements in the VO Air Emissions Workplan shall become part of, and enforceable under, this CAFO.

H. In order to financially assure the closure of AL-1 and AL-2 and the removal of the benzene strippers under this CAFO, Respondent shall establish and provide financial assurance for the benefit of the EPA utilizing one of the financial mechanisms established pursuant to the New Mexico authorized hazardous waste regulations. Respondent shall provide to EPA and NMED a detailed written cost estimate, including supporting documentation, for the work within 60 days of the effective date of this CAFO. If Respondent already utilizes the corporate financial test or the corporate guarantee for any environmental obligations or financial assurance it is required to meet or provide to the State of New Mexico, Respondent shall submit to New Mexico an updated financial mechanism. Respondent will provide the financial assurance or update the existing financial assurance mechanism within 30 days of EPA's approval of the cost estimate.

101) In all instances in which this CAFO requires written submissions to EPA and NMED, each submission must be accompanied by the following certification signed by a "responsible official:"

I certify that the information contained in or accompanying this submission is true, accurate and complete. As to those identified portions of this submission for which I cannot personally verify the truth and accuracy, I certify as the company official having supervisory responsibility for the person(s) who, acting upon my direct instructions, made the verification, that this information is true, accurate, and complete.

For the purpose of this certification, a "responsible official" of a Respondent means a person with the authority to bind Respondent as to the truth, accuracy, and completeness of all certified information.

- 102) All documents required under this CAFO shall be sent to the following persons:

Joel Dougherty (GEN-HE)
Hazardous Waste Enforcement Branch
U.S. EPA Region 6, Suite 1200
1445 Ross Ave.
Dallas, TX 75202-2733

Chief
Hazardous Waste Bureau
New Mexico Environment Department
2905 Rodeo Park Drive East, Building 1
Santa Fe, NM 87505-6303

V.
**CIVIL PENALTY AND
TERMS OF SETTLEMENT**

A. **PENALTY PROVISIONS**

EPA PENALTY

- 103) Pursuant to the authority granted in Section 3008 of RCRA, 42 U.S.C. § 6928, and upon consideration of the entire record herein, including the above referenced Findings of Fact and Conclusions of Law, which are hereby adopted and made a part hereof, and upon consideration of the extent of deviation from the statutory or regulatory requirement, the duration of the violations, the economic benefit derived from non-compliance, and the Respondent's compliance history and/or good faith efforts to comply with the applicable regulations, and the October 1990 RCRA Civil Penalty Policy (as revised in 2003), it is ORDERED that Respondent be assessed a civil penalty of Seven Hundred Thirty Four Thousand and Eight Dollars and No Cents (\$734,008.00).

104) Within sixty (60) days of Respondent's receipt of this fully executed CAFO, Respondent shall pay the assessed civil penalty by cashier's or certified check, made payable to "Treasurer, United States of America, EPA - Region 6" or in one of the alternatives provided in the collection information section below:

A. CHECK PAYMENTS:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000

B. WIRE TRANSFERS:

Wire transfers should be directed to the Federal Reserve Bank of New York

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, NY 10045

Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental Protection Agency"

C. OVERNIGHT MAIL:

U.S. Bank
1005 Convention Plaza
Mail Station SL-MO-C2GL
St. Louis, MO 63101
Contact: Natalie Pearson
314-418-4087

D. ACH (also known as REX or remittance express)

Automated Clearinghouse (ACH) for receiving U.S. currency
PNC Bank
808 17th Street, NW
Washington, DC 20074
Contact -- Jesse White 301-887-6548
ABA = 051036706

Transaction Code 22 - checking
Environmental Protection Agency
Account 310006
CTX Format

E. ON LINE PAYMENT:

There is an On Line Payment Option available through the Dept. of Treasury.
This payment option can be accessed from the information below:

WWW.PAY.GOV

Enter "sfo 1.1" in the search field;

Open form and complete required fields.

105) The case name and docket number (In the Matter of Western Refining Southwest, Inc.,

Docket No. RCRA-06-2009-0936) shall be clearly typed on the check to ensure proper credit. Respondent shall send simultaneous notices of such payments, including copies of the money order, cashier's check or certified check to the following:

Lorena S. Vaughn (6RC-D)
Regional Hearing Clerk
U.S. EPA - Region 6
1445 Ross Avenue
Dallas, TX 75202-2733

Ragan Broyles (6EN-H)
Associate Director, Hazardous Waste Enforcement Branch
U.S. EPA - Region 6
1445 Ross Avenue, Suite 1200
Dallas, TX 75202-2733

David Bdelstein (6RC-ER)
RCRA Legal Branch
Office of Regional Counsel
U.S. EPA - Region 6
1445 Ross Avenue, Suite 1200
Dallas, TX 75202-2733

106) Your adherence to this request will ensure proper credit is given when penalties are received in the Region.

107) Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, unless otherwise prohibited by law, EPA will assess interest and late payment penalties on outstanding debts owed to the United States and a charge to cover the costs of processing and handling a delinquent claim. Interest on the civil penalty assessed in this CAFO will begin to accrue on the effective date of the CAFO and will be recovered by EPA on any amount of the civil penalty that is not paid within sixty (60) calendar days of the effective date of the CAFO and will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 40 C.F.R.

§ 13.11(a). Moreover, the costs of the Agency's administrative handling of overdue debts will be charged and assessed monthly throughout the period the debt is overdue. 40 C.F.R.

§ 13.11(b). EPA will also assess a \$15.00 administrative handling charge for administrative costs on unpaid penalties for the first thirty (30) day period after the payment is due and an additional \$15.00 for each subsequent thirty (30) day period the penalty remains unpaid.

In addition, a penalty charge of up to six percent per year will be assessed monthly on any portion of the debt which remains delinquent more than ninety (90) days. 40 C.F.R.

§ 13.11(c). Should a penalty charge on the debt be required, it shall accrue from the first day payment is delinquent. 31 C.F.R. § 901.9(d). Other penalties for failure to make a payment may also apply.

NMED PENALTY

108) NMED does not seek a penalty upon consideration of the entire record herein, including the above referenced Findings of Fact and Conclusions of Law.

B. GENERAL PROVISIONS

PARTIES BOUND

109) The provisions of this CAFO shall apply to and be binding upon the parties to this action, their officers, directors, agents, employees, successors, and assigns. The undersigned

representative of each party to this CAFO certifies that he or she is fully authorized by the party whom he or she represents to enter into the terms and conditions of this CAFO and to execute and to legally bind that party to it.

STIPULATED PENALTIES

110) In addition to any other remedies or sanctions available to EPA, if Respondent fails or refuses to comply with any provision of this CAFO, Respondent shall pay stipulated penalties in the following amounts for each day during which each failure or refusal to comply continues:

<u>Period of Failure to Comply</u>	<u>Penalty Per Violation Per Day</u>
1st through 15th day	\$ 1000.00
16th through 30th day	\$ 1500.00
31st day and beyond	\$ 2000.00

111) Penalties shall accrue from the date of the noncompliance until the date the violation is corrected, as determined by EPA.

112) The payment of stipulated penalties shall be made by mailing a cashier's check or certified check payable to the Treasurer of the United States, within thirty (30) days of receipt of a demand letter for payment to the following address:

Regional Hearing Clerk (6RC-D)
U.S. EPA, Region 6
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000

113) The case name and docket number (In the Matter of Western Refining Southwest, Inc., Docket No. RCRA-06-2009-0936) shall be clearly typed on the check to ensure proper credit. Respondent shall send simultaneous notices of such payments, including copies of the money order, cashier's check or certified check to the following:

Lorena S. Vaughn (6RC-D)
Regional Hearing Clerk
U.S. EPA - Region 6
1445 Ross Avenue
Dallas, TX 75202-2733

Ragan Broyles (6EN-H)
Associate Director, Hazardous Waste Enforcement Branch
U.S. EPA - Region 6
1445 Ross Avenue, Suite 1200
Dallas, TX 75202-2733

David Edelstein (6RC-ER)
RCRA Legal Branch
Office of Regional Counsel
U.S. EPA - Region 6
1445 Ross Avenue, Suite 1200
Dallas, TX 75202-2733

- 114) Adherence to these procedures will ensure proper credit when payments are received.

In addition, the provisions of Paragraph 107 concerning interest, penalties, and administrative costs also apply.

DISPUTE RESOLUTION

- 115) If Respondent objects to any decision or directive of EPA or NMED in regard to compliance with this CAFO, Respondent shall notify the following persons in writing of its objections, and the basis for those objections, within fifteen (15) calendar days of receipt of EPA's or NMED's decision or directive:

Ragan Broyles (6EN-H)
Associate Director, Hazardous Waste Enforcement Branch
U.S. EPA - Region 6
1445 Ross Avenue, Suite 1200
Dallas, TX 75202-2733

David Edelstein (6RC-ER)
RCRA Legal Branch
Office of Regional Counsel
U.S. EPA - Region 6
1445 Ross Avenue, Suite 1200
Dallas, TX 75202-2733

Chief
Hazardous Waste Bureau
New Mexico Environment Department
2905 Rodeo Park Drive East, Building I
Santa Fe, NM 87505-6303

- 116) The Associate Director for Hazardous Waste Enforcement or his designee, and Respondent shall then have an additional thirty (30) calendar days from EPA's receipt of Respondent's written objections to attempt to resolve the dispute informally. If an agreement is reached between the Associate Director for Hazardous Waste Enforcement or his designee, and Respondent, the agreement shall be reduced to writing and signed by the Associate Director for Hazardous Waste Enforcement or his designee, and Respondent and incorporated by reference into this CAFO.
- 117) If no agreement is reached between the Associate Director for Hazardous Waste Enforcement or his designee and Respondent within that time period, the dispute shall be submitted to the Director of the Compliance Assurance and Enforcement Division or his/her designee ("Division Director") for formal dispute resolution. The Division Director and Respondent shall then have a 15-day period to resolve the dispute. If an agreement is reached between the Division Director and Respondent, the resolution shall be reduced to writing and signed by the Division Director and Respondent and incorporated by reference into this CAFO. If the Division Director and Respondent are unable to reach agreement within this 15-day period, the Division Director shall provide a written statement of EPA's decision to Respondent, which shall be binding upon Respondent and incorporated by reference into the CAFO.

- 118) If the Dispute Resolution process results in a modification of this CAFO, the modified CAFO must be approved by the Regional Judicial Officer and filed pursuant to the Modification Section.

FORCE MAJEURE

- 119) Respondent shall perform all requirements under this CAFO with the time limits established under this CAFO, unless the performance is delayed or made impossible by a force majeure. For purposes of this CAFO, a force majeure is defined as any event arising from causes beyond the anticipation or control of the Respondent, including but not limited to acts of nature (e.g., floods, tornados, hurricanes) and acts of people (e.g., riots, strikes, wars, terrorism). Force majeure and impossibility do not include financial inability to complete the Work required under this CAFO or increased cost of performance or any changes in Respondents' business or economic circumstances. Force majeure does include inability to perform caused by a permit authority's delay in permit approval, or authorization necessary to performance when Respondent has timely and completely applied for or sought a permit, approval, or authorization to which it is entitled.
- 120) If any event occurs or has occurred that may delay or make impossible the performance of any obligation under this CAFO, whether or not caused by a force majeure event, the affected Respondent shall notify EPA within 72 hours (phone, email, or written correspondence) of when the Respondent knew or should have known that the event might cause a delay or impossibility of performance. Such notice shall: identify the event causing the delay or impossibility, or anticipated to cause delay or impossibility, and, if delay, the anticipated duration of the delay; provide Respondent's rationale for attributing such delay or impossibility to a force majeure event; state the measures taken or to be taken to prevent or minimize the delay or impossibility; estimate the timetable for implementation of those

measures; and a statement as to whether, in the opinion of Respondent, such event may cause or contribute to an endangerment to public health or the environment. Respondent shall undertake best efforts to avoid and minimize the delay or impossibility. Failure to comply with the notice provision of this action shall waive any claim of force majeure by the Respondent. Respondent shall be deemed to have notice of any circumstances of which its contractors had or should have had notice.

121) If EPA determines that a delay in performance or anticipated delay of a requirement under this CAFO is or was attributable to a force majeure, then the time period for performance of that requirement will be extended as deemed necessary by EPA and stipulated penalties shall not be assessed for any such delay. If EPA determines that impossibility of performance of a requirement under this CAFO is or was attributable to a force majeure, then the deadline for that requirement shall be waived, and the time periods for any other requirements that are directly affected by the impossibility of performance shall be extended as deemed necessary by EPA, and stipulated penalties shall not be assessed for any waived or extended requirements. If EPA determines that the delay or impossibility, or anticipated delay or impossibility, has been or will be caused by a force majeure, then EPA will notify Respondents, in writing, of the length of the extension or waivers, if any, for performance of such obligations affected by the force majeure. Any such extensions or waivers shall not alter Respondents' obligation to perform or complete other tasks required by the CAFO which are not directly affected by the force majeure.

122) If EPA disagrees with Respondent's assertion of a force majeure, then Respondent may elect to invoke the dispute resolution provision, and shall follow the procedures set forth in the Dispute Resolution section. In any such proceeding, Respondent shall have the burden of demonstrating by a preponderance of the evidence that the delay or impossibility, or

anticipated delay or impossibility, has been or will be caused by a force majeure, that the duration of the delay or the extension or waiver sought was or will be warranted under the circumstances, and that best efforts were exercised to avoid and mitigate the effects of the delay or impossibility. If Respondent satisfies this burden, then the time for performance of such obligation will be extended by EPA for such time as is necessary to complete such obligation as determined by EPA, or waived if performance is impossible, and no stipulated penalties shall be assessed for any such delay, extension, or waiver.

NOTIFICATION

123) Unless otherwise specified elsewhere in this CAFO, whenever notice is required to be given, whenever a report or other document is required to be forwarded by one party to another, or whenever a submission or demonstration is required to be made, it shall be directed to the individuals specified below at the addresses given (in addition to any other notices required by law or regulation), unless these individuals or their successors give notice in writing to the other parties that another individual has been designated to receive the communication:

EPA: Ragan Broyles (6EN-H)
Associate Director, Hazardous Waste Enforcement Branch
U.S. EPA Region 6, Suite 1200
1445 Ross Ave.
Dallas, TX 75202-2733
Broyles.ragan@epa.gov

NMED: Chief
Hazardous Waste Bureau
New Mexico Environment Department
2905 Rodeo Park Drive East, Building 1
Santa Fe, NM 87505-6303

Respondent: Mark Turri
Western Refining Southwest, Inc., Gallup Refinery
Route 3, Box 7
Gallup, NM 87301

MODIFICATION

- 124) The terms, conditions, and compliance requirements of this CAFO may not be modified or amended except upon the written agreement of all parties, and such modification or amendment being filed with the Regional Hearing Clerk. Where a modification agreed upon by all parties constitutes a material change to any term of this CAFO, it shall be effective upon approval by a Regional Judicial Officer.

RETENTION OF ENFORCEMENT RIGHTS

- 125) EPA and NMED do not waive any rights or remedies available to EPA and NMED for any other violations by Respondent of Federal or State laws, regulations, or permitting conditions.
- 126) Except as specifically provided in this CAFO, nothing herein shall limit the power and authority of EPA, NMED, The State of New Mexico, or the United States to take, direct, or order all actions to protect public health, welfare, or the environment, or prevent, abate or minimize an actual or threatened release of hazardous substances, pollutants, contaminants, hazardous substances on, at or from Respondent's facility. Furthermore, nothing in this CAFO shall be construed to prevent or limit EPA's or NMED's civil and criminal authorities, or that of other Federal, State, or local agencies or departments to obtain penalties or injunctive relief under other Federal, State, or local laws or regulations.

INDEMNIFICATION OF EPA

- 127) Neither EPA, NMED, The State of New Mexico, nor the United States Government shall be liable for any injuries or damages to person or property resulting from the acts or omissions of Respondent, their officers, directors, employees, agents, receivers, trustees, successors, assigns, or contractors in carrying out the activities required by this CAFO, nor

shall EPA, NMED, The State of New Mexico, or the United States Government be held out as a party to any contract entered into by Respondent in carrying out the activities required by this CAFO.

RECORD PRESERVATION

128) Respondent shall preserve, during the pendency of this CAFO, all records and documents in its possession or in the possession of its divisions, employees, agents, contractors, or successors which are required to be prepared pursuant to this CAFO regardless of any document retention policy to the contrary.

COSTS

129) Each party shall bear its own costs and attorney's fees. Furthermore, Respondent specifically waives its right to seek reimbursement of its costs and attorney's fees under the Equal Access to Justice Act, 5 U.S.C. § 504, as amended by the Small Business Regulatory Enforcement Fairness Act, 5 U.S.C. § 801 *et. seq.*, and any regulations promulgated pursuant to those Acts.

TERMINATION

130) At such time as Respondent believes that it has complied with all terms and conditions of this CAFO, it may request that EPA concur whether the requirements of this CAFO have been satisfied. Such request shall be in writing and shall provide the necessary documentation to establish whether there has been full compliance with the terms and conditions of this CAFO. EPA will respond to said request in writing within 90 days of receipt of the request. This CAFO shall terminate when all actions required to be taken by this CAFO have been completed, and Respondent has been notified by the EPA in writing that this CAFO has been satisfied and terminated.

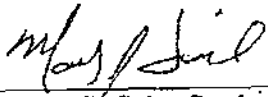
EFFECTIVE DATE

131) This CAFO, and any subsequent modifications, become effective upon filing with the Regional Hearing Clerk.

THE UNDERSIGNED PARTIES CONSENT TO THE ENTRY OF THIS CONSENT AGREEMENT AND FINAL ORDER:


FOR RESPONDENT:

Date: 8/14/09


Western Refining Southwest, Inc.


FOR THE COMPLAINANT:

Date: 8/20/09


John Blevius
Director, Compliance Assurance
and Enforcement Division
US EPA, Region 6

FOR THE PLAINTIFF-INTERVENOR:

Date: 8/18/09


Marcy Leavitt, Director
Water and Waste Management Division
New Mexico Environment Department

FINAL ORDER

Pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. Part 22, the foregoing Consent Agreement is hereby ratified. This Final Order shall not in any case affect the right of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. This Final Order shall resolve only those causes of action alleged herein. Nothing in this Final Order shall be construed to waive, extinguish or otherwise affect Respondent's (or its officers, agents, servants, employees, successors, or assigns) obligation to comply with all applicable federal, state, and local statutes and regulations, including the regulations that were the subject of this action. Respondent is ordered to comply with the terms of settlement and the civil penalty payment instructions as set forth in the Consent Agreement. Pursuant to 40 C.F.R. § 22.31(b) this Final Order shall become effective upon filing with the Regional Hearing Clerk.

Date: August 26, 2009


Regional Judicial Officer

CERTIFICATE OF SERVICE

I hereby certify that on the 26 day of Aug, 2009, the original of the foregoing Consent Agreement and Final Order ("CAFO") was hand delivered to the Regional Hearing Clerk, U.S. EPA - Region 6, 1445 Ross Avenue, Dallas, Texas 75202-2733, and that a true and correct copy of the CAFO was sent to the following by the method identified below:

The Corporation Process Company
205 E Bender Ste 150 Hobbs New Mexico 88240
As Registered Agent for Western Refining Southwest, Inc.

CERTIFIED MAIL - RETURN RECEIPT REQUESTED: 70073030000015271529

Leri Jackson