

**BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING**

FILED

JAN 12 2009

In the Matter of the Appeal)
Of the June 2, 2008 Denial of Frontier) Docket No. 08-3804
Refining Inc.'s Force Majeure Claim)

*Jim Ruby, Executive Secretary
Environmental Quality Council*

**FRONTIER REFINING INC.'S SUPPLEMENTAL MEMORANDUM IN
RESPONSE TO WYOMING DEQ'S REPLY TO FRONTIER'S RESPONSE TO
DEQ'S MOTION TO DISMISS APPEAL**

Frontier Refining Inc. (Frontier) files this Supplemental Memorandum in response to DEQ's November 18, 2008 reply (Reply) to Frontier's response (Response) to DEQ's October 15, 2008 Motion to Dismiss Frontier's Appeal (Motion to Dismiss). As detailed in its November 4, 2008 Response, Frontier opposes DEQ's Motion to Dismiss. This Supplemental Memorandum responds to new arguments raised by DEQ for the first time in its Reply based on events that occurred after DEQ filed its Motion to Dismiss. This Supplemental Memorandum details why such new arguments are outside the scope of the grounds asserted by DEQ in its Motion to Dismiss and should not be considered by the EQC.

BACKGROUND

As explained in Frontier's original Petition and in Frontier's Response to DEQ's Motion to Dismiss, DEQ issued a final decision on February 19, 2008 requiring Frontier to build a groundwater barrier wall in order to satisfy the boundary control requirement of the Joint Stipulation. Because DEQ required that part of the barrier wall be constructed on land owned by an adjacent property owner, Old Horse Pasture, Inc. (OHP), DEQ agreed with Frontier that a force majeure situation existed due to Frontier's lack of access to the OHP property. However, even though DEQ agreed that a force majeure situation

existed, DEQ refused to extend the impending October 2008 deadline for completion of the barrier wall. Consequently, on July 2, 2008 Frontier filed its Petition at issue in this docket, in which certain appeals were made concerning the boundary control deadline and the barrier wall schedule.

On August 15, 2008 DEQ ruled that a force majeure situation no longer existed, based on the fact that OHP had offered to sell part of the OHP property to Frontier. Although Frontier disagreed with DEQ's assertion that Frontier was required to purchase OHP property in order to comply with the boundary control requirement of the Joint Stipulation, Frontier entered into negotiations with OHP to purchase 133 acres of OHP property adjacent to Frontier's refinery.

On September 26, 2008, prior to Frontier's purchase of any OHP property, DEQ unilaterally and improperly issued to Frontier a revised schedule for barrier wall construction that contained numerous interim construction deadlines and extended the deadline for completion of the barrier wall to October 15, 2009. On October 3, 2008, Frontier completed purchase of the 133 acres of OHP property adjacent to Frontier's refinery and encompassing the area where the proposed barrier wall was required by DEQ to be located. On October 15, 2008, DEQ filed its Motion to Dismiss Frontier's appeal in Docket No. 08-3804 on the grounds that DEQ's September 26, 2008 issuance of a revised barrier wall schedule rendered Frontier's pending appeal based on the original schedule moot and that the EQC therefore lacked subject matter jurisdiction to hear the appeal.

Frontier filed a Response to DEQ's Motion to Dismiss on November 4, 2008. DEQ filed its Reply to Frontier's Response on November 18, 2008.

DISCUSSION

DEQ's Motion to Dismiss is based on one—and only one—argument: that DEQ's September 26, 2008 unilateral issuance of a revised barrier wall schedule rendered Frontier's appeal of DEQ's original schedule moot, such that the EQC therefore lacks subject matter jurisdiction to hear the appeal. As detailed in Frontier's November 4, 2008 Response, DEQ's argument is flawed because Frontier's July 2, 2008 appeal raises issues concerning the boundary control deadline and the barrier wall schedule that were not resolved by DEQ's September 26 schedule. In its November 18, 2008 Reply to Frontier's Response, DEQ asserted a **new argument** for dismissal based on a revised schedule that DEQ issued on October 27, 2008--almost two weeks *after* DEQ filed its Motion to Dismiss.

As a preliminary matter, Frontier notes that DEQ never amended its October 15, 2008 Motion to Dismiss to include any information or assertions concerning its October 27, 2008 schedule. Accordingly, DEQ's October 27, 2008 schedule should not be considered in evaluating the merits of DEQ's Motion to Dismiss. However, even though DEQ's Motion to Dismiss is limited to the issue of whether DEQ's September 26, 2008 unilateral issuance of a revised schedule renders Frontier's appeal moot, events subsequent to September 26, 2008 are important in demonstrating—contrary to DEQ's assertions—that issues raised in Frontier's appeal concerning the boundary control deadline and the barrier wall schedule remain unresolved.

As Frontier explained in its November 4, 2008 Response, Frontier management and DEQ continued to discuss, subsequent to DEQ's October 15, 2008 Motion to Dismiss, issues concerning the legal effect of Frontier's OHP property purchase. At the

same time, technical personnel for Frontier and DEQ were discussing a revised schedule for the barrier wall (provided such barrier wall was still required). As part of DEQ's and Frontier's technical discussions, Frontier provided, at DEQ's insistence, a new draft schedule on October 24, 2008, *after DEQ's Motion to Dismiss was filed*. Contrary to DEQ's assertions, Frontier did not intend for such schedule to be a final determination on the issue, as demonstrated by the fact that Frontier management and the Director of the DEQ, John Corra, had a meeting scheduled on November 7, 2008 to discuss whether or not Frontier was still obligated to construct the barrier wall in light of Frontier's purchase of the OHP property.

The fact that Frontier and DEQ were still meeting and discussing issues concerning the boundary control deadline and the barrier wall schedule – more than three weeks *after* the date that DEQ filed its Motion to Dismiss *and* more than one week *after* DEQ unilaterally issued a revised schedule – clearly demonstrates that DEQ's Motion to Dismiss Frontier's appeal concerning the barrier wall deadline and schedule on the grounds of mootness is unfounded. DEQ's Motion to Dismiss should therefore be denied.

RELIEF REQUESTED

Since this matter is not moot and presents an active controversy that has not been resolved by Frontier and DEQ, Frontier respectfully requests that the EQC deny DEQ's Motion to Dismiss.

Dated this 12th day of January, 2009.



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CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2009, I served the foregoing by placing a true and correct copy thereof in the United States mail, postage prepaid and properly addressed to the following:

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