

**JUL 02 2008**

Terri A. Lorenzon, Director  
Environmental Quality Council

Mark R. Ruppert, Bar No. 6-3593  
HOLLAND & HART LLP  
2515 Warren Ave., Suite 450  
P. O. Box 1347  
Cheyenne, WY 82003  
(307) 778-4200 Telephone  
(307) 778-8175 Facsimile

Attorney for the Petitioner

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

In the Matter of the Appeal                    )  
Of the Denial of June 2, 2008                )  
Force Majeure Claim by                        )     Docket No. \_\_\_\_\_  
Frontier Refining Inc.                         )

**PETITION FOR REVIEW AND REQUEST FOR HEARING**

Frontier Refining Inc. (Frontier) petitions the Wyoming Environmental Quality Council (EQC) to review the Department of Environmental Quality’s (DEQ’s) June 2, 2008 determination denying Frontier’s Force Majeure claim with respect to the October 15, 2008 completion deadline to achieve boundary control through the installation of a barrier wall. Frontier further requests a contested case hearing before the EQC on the issues raised and relief requested in this Petition.

**STATEMENT OF FACTS**

1. Frontier is located at 2700 East 5<sup>th</sup> Street, Cheyenne, Wyoming, 82007 and its legal counsel is Mark Ruppert, Holland & Hart LLP, 2515 Warren Avenue, Suite 450, Cheyenne, Wyoming, 82001.

2. Under Wyo. Stat. § 35 -11-112(a)(iii), the EQC “shall conduct hearings in any case contesting the administration or enforcement of any law, rule, regulation, standard or order issued or administered by DEQ or any division thereof.”

3. Frontier operates a refinery in Cheyenne, Wyoming (the refinery). In connection with the historical operation of the refinery, some petroleum-based contaminants have entered the groundwater beneath the refinery. Groundwater sampling indicates that some of this contaminated groundwater has migrated off-site to the south and east of Frontier's refinery and onto adjacent property owned by Old Horse Pasture, Inc.

4. DEQ and Frontier entered into an Administrative Order on Consent (AOC) in March of 1995 and Frontier then entered into a Joint Stipulation for Modification of the AOC (Joint Stipulation) on October 17, 2006. The Joint Stipulation contains a "Special Stipulated Corrective Action Schedule" to Section VI of the AOC which, among other things, includes an October 15, 2008 deadline for Frontier to achieve boundary control. The technology or specific remedy that Frontier is required to use to achieve boundary control is not specified in the Joint Stipulation.

5. Frontier had, at the request of DEQ, previously authorized its consultant to prepare a Conceptual Design Report for a groundwater barrier wall near the south and east boundaries of the refinery. Frontier submitted this report to DEQ in January 2006. Due to the design and layout of the refinery, the Conceptual Design Report indicated that a large portion of any future barrier wall would need to be located on the adjacent land owned by Old Horse Pasture, Inc.

6. Following entry of the Joint Stipulation in October 2006, Frontier and its consultant met and spoke with DEQ on multiple occasions concerning potential boundary control options. Due to access and other technical issues associated with a groundwater barrier wall, Frontier indicated to DEQ that it proposed to achieve required boundary

control through installation of a system of overlapping groundwater recovery wells instead of a barrier wall. In October 2007 Frontier submitted to DEQ a Pilot Test Work Plan for the hydraulic groundwater control system.

7. On February 19, 2008 DEQ issued a Final Decision requiring construction of a slurry bentonite wall (barrier wall). The February 19, 2008 Final Decision by DEQ provides, to a certain degree, specifications for the barrier wall as well as a schedule with interim construction deadlines and a final October 15, 2008 deadline for completion of the barrier wall.

8. Frontier informed DEQ in a March 26, 2008 letter that, although it was surprised by DEQ's February 19 Final Decision requiring a barrier wall, Frontier agreed to install a barrier wall and was mobilizing to comply with the various requirements in DEQ's decision. Frontier's letter identified several construction interference issues -- known to Frontier and to DEQ at that time -- that needed to be resolved prior to beginning construction of the barrier wall. Frontier's letter to DEQ also asserted a force majeure claim, under Section XVII of the AOC, based upon Frontier's inability to obtain access to the Old Horse Pasture, Inc. property needed to proceed with work required for installation of the barrier wall.

9. On May 16, 2008, DEQ determined that the lack of access to a third party property "*currently constitutes a Force Majeure situation under Section XVII of the AOC, and that [t]his determination, and corresponding extension of access-dependent deadlines only, will terminate on June 16, 2008, unless the Administrator determines Frontier has been unable to obtain necessary access to third party property despite documented best efforts during the period ending June 16, 2008.*"

10. In a May 23, 2008 letter to Frontier, DEQ clarified which boundary control related deadlines it considers to be “access dependent” (and thus extended by Frontier’s force majeure claim for non-access) and which are non-access dependent (and thus not extended). The May 23 letter also instituted new interim construction deadlines and stated that the October 15, 2008 deadline for completion of the barrier wall was still in effect.

11. As Frontier worked with its consultants and potential barrier wall contractors to prepare information required to construct a barrier wall, it received, for the first time, a draft schedule from its consultant indicating that at least twenty-two months are required to properly design and construct the barrier wall. Consequently, Frontier responded to DEQ’s May 23, 2008 letter by noticing a new force majeure claim and invoking the AOC dispute resolution procedures concerning DEQ’s barrier wall deadlines. Frontier’s new force majeure claim was based on two points: i) the deadlines for construction of the barrier wall are technically impracticable (including the fact that they apparently do not contain any meaningful opportunity for regulatory approvals by DEQ); and ii) DEQ’s February 19, 2008 determination requiring a barrier wall was not made reasonably in advance of the applicable deadlines under the Joint Stipulation to allow compliance by Frontier.

12. On June 2, 2008, the DEQ denied Frontier’s new claim of force majeure in a letter which further stated that while “[t]he DEQ agrees with Frontier that the October 15, 2008 deadline for installation of the barrier wall along the approved alignment is access-dependent, but at this time it is not a near-term deadline that is extended by the May 16 [2008] Force Majeure Decision, which is effective only until June 16<sup>th</sup>. If the

DEQ determines that the access-based force majeure situation persists beyond June 16<sup>th</sup>, the October 15, 2008 deadline for installation of the barrier wall along the approved alignment can be re-evaluated in view of Frontier's documented diligent efforts to meet it up to that point."

13. Frontier now requests that the EQC review and set for hearing DEQ's June 2, 2008 decision denying Frontier's new Force Majeure claim and refusing to extend the October 15, 2008 barrier wall deadline.

14. Frontier believes that compliance with the barrier wall deadline is practically and technically impossible due to access issues as well as a delay in agency action in determining the required technology to effectuate the boundary control general remedy identified by the Joint Stipulation.

**GOVERNING LAW ENTITLING FRONTIER  
TO ITS FORCE MAJEURE CLAIMS**

15. The AOC specifies a dispute resolution process requiring Frontier to appeal a DEQ decision within thirty days of receiving written notice of decision.<sup>1</sup> AOC XVI(1). Frontier's request for review and hearing of DEQ's June 2, 2008 written decision regarding Frontier's New Force Majeure claim with respect to the barrier wall deadline is timely and appropriate.<sup>2</sup>

16. Section XVII of the AOC, entitled "FORCE MAJEURE AND EXCUSABLE DELAY" defines a force majeure as "any event arising from causes not

---

<sup>1</sup> Although Frontier has notified the DEQ of its intent to invoke the Dispute Resolution process as provided for in the AOC at Section XVI, DEQ has made clear to Frontier that as to the issue regarding the Barrier Wall deadline *its June 2, 2008 determination is final* and DEQ will not entertain the more detailed process outlined in the AOC. In fact, the DEQ invited Frontier to file this Petition for Review and Hearing by the EQC in lieu of proceeding with the AOC Dispute Resolution procedures.

<sup>2</sup> The DEQ's June 2, 2008 decision was sent by certified mail on that date and Frontier received the decision following June 2, 2008.

foreseeable and beyond the control of Frontier which could not be overcome by due diligence and which delays or prevents performance by a date required by this [AOC]. Force majeure events are limited to . . . delays in obtaining access to property not owned or controlled by Frontier despite best efforts to obtain such access in a timely manner and any delays directly resulting from [DEQ] failure to submit oral or written comments or approvals to Frontier within a reasonable time where the cause of such failure is not attributable omissions or deficiencies in Frontier's work product."

17. Frontier's Force Majeure Claim with respect to the barrier wall deadline of October 15, 2008 should be granted as Frontier's basis for the claim falls squarely within two circumstances specified in the AOC's definition of "Force Majeure": 1) delays in obtaining access to property not owned or controlled by Frontier despite best efforts to obtain such access in a timely manner; and, 2) delays directly resulting from DEQ failure to submit oral or written comments or approvals to Frontier within a reasonable time where the cause of such failure is not attributable omissions or deficiencies in Frontier's work product.

**FRONTIER'S FORCE MAJEURE CLAIM SHOULD  
BE GRANTED DUE TO UNRESOLVED ACCESS ISSUES**

18. DEQ's February 19, 2008 Final Decision required Frontier to install a barrier wall according to the alignment proposed in the Conceptual Design Report. A large portion of that alignment is located on property adjacent to the refinery and owned by Old Horse Pasture, Inc. At the time of the filing of this Request for Review and Hearing, there is no access agreement or easement agreement in place between Frontier and Old Horse Pasture, Inc., which is necessary in order for Frontier to build the barrier wall specified by the DEQ's February 19, 2008 Final Decision. Although Frontier has

worked diligently to obtain these necessary approvals needed to build the barrier wall, it has not been able to obtain the necessary agreements.

19. DEQ agrees that Frontier has satisfied the requirements of Section XVII of the AOC to properly establish a force majeure claim with respect to 'near-term' deadlines. *See* May 16, 2008 and June 16, 2008 DEQ determinations granting Frontier's Force Majeure Claims as to all dates running prior to June 16, 2008 and July 16, 2008, respectively. With respect to 'non-near-term' deadlines such as the barrier wall October 15, 2008 completion deadline, DEQ has refused to apply the same analysis it applied to the 'near-term' deadlines, although for all practical matters if Frontier cannot meet the near-term deadlines it cannot meet non-near-term deadlines either. Design and construction of the barrier wall is an iterative process. When lack of access prevents the initiation of tasks on the front end of the schedule, the dates for completion of all future tasks are necessarily impacted and must be extended as well.

20. While Frontier continues to try to resolve access issues so it can perform its obligations under the Joint Stipulation, it has been put in the impossible situation where DEQ continues to grant Frontier's Force Majeure claims in thirty (30) day increments, yet unreasonably refuses to extend the ultimate deadline for completion of the barrier wall. Without the appropriate access, Frontier cannot install the barrier wall as required by DEQ. Even if Frontier were granted the appropriate access today, due to the *design and construction time required for the barrier wall*, it would be impossible for Frontier to meet the October 15, 2008 deadline.

**FRONTIER'S FORCE MAJEURE CLAIM SHOULD BE GRANTED  
DUE TO DELAY IN DEQ APPROVAL**

21. Following entry of the Joint Stipulation in October 2006, Frontier planned to use a connected system of overlapping groundwater recovery wells to achieve boundary control, as Frontier originally proposed to DEQ. Frontier believes this is a feasible and appropriate technology for boundary control, and one which could have been implemented by the October 15, 2008 deadline.

22. After receiving DEQ's February 19, 2008 determination requiring a barrier wall as the technology to achieve boundary control, Frontier was forced to abandon plans for the hydraulic well system and begin rapidly working to design a barrier wall to meet DEQ requirements. As a result of information developed during that time, it became apparent that even if Frontier had the needed access today, the design and construction time involved in completing the barrier wall would take significantly longer than three (3) months remaining between now and the current October 15, 2008 deadline.

23. While Frontier continues to work to resolve access issues, it has also been working with its consultant to complete any pre-construction tasks that can be accomplished without a formal access or easement agreement. Nevertheless, the deadlines imposed by DEQ are technically impracticable due to the fact that the pre-construction activities required for the barrier wall are much more extensive than DEQ has acknowledged or that Frontier could have known at the time of DEQ's February 19, 2008 Final Decision. The draft schedule that Frontier recently received from its consultant indicates that once access is obtained, approximately twenty-two (22) months will be required to design and construct the barrier wall.



24. Section XVII of the AOC specifically allows for specified deadlines to be extended due to “delays directly resulting from [DEQ’s] failure to submit oral or written comments or approvals to Frontier within a reasonable time where the cause of such failure is not attributable omissions or deficiencies in Frontier’s work product.”

25. In this case, the Joint Stipulation that was entered into on October 17, 2006 did not specify the required technology for the implementation of the boundary control. Frontier planned to utilize a technology (hydraulically connected recovery wells) that would have achieved boundary control by the October 15, 2008 deadline. Frontier met and spoke with DEQ multiple times concerning its plans. It wasn’t until February 19, 2008 -- less than eight (8) months before boundary control was required to be implemented -- that DEQ informed Frontier that a barrier wall would be required. At that point, the October 15, 2008 deadline for achieving boundary control through use of a barrier wall was technically impracticable.

26. DEQ’s February 19, 2008 approval was not made reasonably in advance of the applicable deadlines under the Joint Stipulation to allow for compliance by Frontier. Although Frontier has no objection to installing the barrier wall, as Frontier has proceeded with detailed planning of the barrier wall, it has now become clear that the barrier wall design and construction is a much longer process than Frontier’s proposed system of recovery wells, which could have been completed by the October 15, 2008 deadline. Frontier is working with its consultant to compress the schedule for the barrier wall construction as much as possible; however, due to the unreasonably late determination by DEQ, Frontier cannot under any circumstances complete the installation of the barrier wall by the October 15, 2008 deadline for boundary control.

**RELIEF REQUESTED**

Frontier respectfully requests that the EQC: (1) order that Frontier is excused from completing the installation of the barrier wall by the October 15, 2008 boundary control deadline set by DEQ; (2) vacate and reverse the June 2, 2008 DEQ determination and decision regarding the barrier wall deadline for boundary control; and (3) order that the barrier wall deadline for boundary control be suspended until such time as Frontier is able to obtain the necessary accesses and negotiate an amendment to the AOC to proceed with the work on a feasible schedule.

Dated this 2 day of July, 2008.



Mark R. Ruppert, # 6-3593  
HOLLAND & HART LLP  
2515 Warren Ave., Suite 450  
P. O. Box 1347  
Cheyenne, WY 82003  
(307) 778-4200 Telephone  
(307) 778-8175 Facsimile

Attorney for the Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this 2 day of July, 2008, in accordance with the requirements of Chapter 1, Section 3(b) of the Department of Environmental Quality Rules of Practice and Procedure, two copies of this Petition for Review and Request for Hearing, via registered mail, return receipt requested, were served on the following:

Chairman of the Environmental Quality Council,  
122 West 25<sup>th</sup> Street  
Herschler Building, Room 1714  
Cheyenne, WY 82002

Director of the Department of Environmental Quality  
122 West 25<sup>th</sup> Street  
Herschler Building, 4<sup>th</sup> Floor West  
Cheyenne, WY 82002

Mr. Mike Barrash  
Assistant Attorney General State of Wyoming  
123 Capitol Building  
Cheyenne, WY 82002

