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**FILED**

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Jim Ruby, Executive Secretary  
Environmental Quality Council

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

In the Matter of Frontier Refining Inc.'s )  
Appeal of DEQ's October 27, 2008 )  
Incorporation of the Barrier Wall Schedule ) Docket No. \_\_\_\_\_  
Into the AOC and November 7, 2008 Denial )  
That Frontier Has Achieved Boundary Control )

**PETITION FOR REVIEW, REQUEST FOR HEARING AND  
REQUEST FOR CONSOLIDATION**

Frontier Refining Inc. (Frontier) petitions the Wyoming Environmental Quality Council (EQC) to review: i) the Department of Environmental Quality's (DEQ's) October 27, 2008 determination that improperly incorporated a barrier wall schedule into the March 1995 Administrative Order on Consent (AOC); and ii) DEQ's November 7, 2008 determination that Frontier has not achieved boundary control pursuant to the October 17 Joint Stipulation for Modification of the AOC (Joint Stipulation). 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. Wyo. Stat. § 35-11-112(a)(iii) provides that the EQC will 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.

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 previously owned by Old Horse Pasture, Inc. (OHP) and now owned by Frontier following purchase of the property on October 3, 2008.

4. DEQ and Frontier entered into an AOC in March of 1995 and Frontier then entered into a 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. On February 19, 2008 DEQ issued a Final Decision requiring construction of a slurry bentonite wall (barrier wall) to achieve boundary control. 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.

6. Frontier informed DEQ in a March 26, 2008 letter that, although it was surprised by DEQ's February 19, 2008 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 (Original Force Majeure Claim) under Section XVII of the AOC, based upon Frontier's inability to obtain access to the adjacent OHP property needed to proceed with work required for installation of the barrier wall.

7. 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.”

8. 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.

9. Frontier responded to DEQ's May 23, 2008 letter by noticing a new force majeure claim (Second Force Majeure Claim) and invoking the AOC dispute resolution procedures concerning DEQ's barrier wall deadlines. Frontier's Second 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.

10. On June 2, 2008, the DEQ denied Frontier's Second Force Majeure Claim 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."

11. On July 2, 2008 Frontier filed a Petition for Review and Request for Hearing appealing DEQ's June 2, 2008 determination denying Frontier's Second Force Majeure Claim and refusing to extend the October 15, 2008 barrier wall deadline. The EQC assigned Docket Number 08-3804 to Frontier's petition, and DEQ filed a response to the petition on August 15, 2008.

12. On July 21, 2008 DEQ issued an Administrative Order to OHP ordering it to grant Frontier and its contractors access to the OHP property as needed for Frontier to install the barrier wall. By letter dated July 31, 2008, OHP offered to sell Frontier a 100-foot wide strip (about 12 acres) along the proposed barrier wall alignment for a price of \$20,642.20 per acre.

13. Citing to OHP's offer to sell property to Frontier, on August 12, 2008 DEQ filed a Notice of Compliance with its prior Administrative Order to OHP. The Notice of Compliance stated that OHP's offer to sell property to Frontier (for a price that Frontier had previously offered) constituted providing reasonable access to Frontier for purposes of complying with the Administrative Order.

14. On August 12, DEQ filed a Notice of Compliance with its prior Administrative Order to OHP. The Notice of Compliance stated that OHP's offer to sell property to Frontier for a price that Frontier had previously offered constituted providing reasonable access to Frontier for purposes of complying with the Administrative Order.

15. On August 15, 2008, DEQ issued a Final Decision stating that "there is no longer a Force Majeure situation under Section XVII of the AOC due to lack of access to third party property." The basis for DEQ decision was that the AOC's requirement that Frontier use "best efforts" to obtain access required Frontier to accept OHP's offer to sell the property. The decision further stated that, because the sale of OHP property had not yet been completed, access-dependent deadlines were extended until September 15, 2008 or until the purchase transaction was completed, whichever came first.

16. On September 15, 2008, Frontier filed a Petition for Review, Request for Hearing, and Request for Consolidation with the EQC, in which Frontier asked the EQC to review DEQ's August 15, 2008 determination that Frontier's Original Force Majeure claim was no longer valid and requesting that the appeal be consolidated into one action with Frontier's pending appeal in Docket No. 08-3804 because the issues in the two appeals overlapped. The EQC assigned Docket Number 08-3806 to Frontier's new petition.

17. On September 26, 2008, DEQ 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 a purchase of approximately 133 acres of OHP property adjacent to Frontier's refinery and encompassing the area where the proposed barrier wall was to be located. On October 15, 2008, DEQ filed its Motion to Dismiss both of Frontier's appeals on the alleged grounds that DEQ's September 26, 2008 unilateral issuance of a revised barrier wall schedule rendered Frontier's two pending appeals based on the original schedule moot.

18. Following Frontier's purchase of the OHP property on October 3, 2008, Frontier and DEQ began discussions regarding: i) the effect of the property purchase under the Joint Stipulation requirement for boundary control; and ii) a revised schedule for the barrier wall provided such barrier wall was still required. On October 27, 2008 DEQ sent a letter to Frontier stating that a barrier wall construction schedule "is approved and deemed incorporated into the AOC under the Dispute Resolution provisions in Section XVI."

19. On November 4, 2008, Frontier filed its Response to DEQ's Motion to Consolidate and Dismiss Frontier's Appeals. In its Response, Frontier agreed with DEQ's assertion that Frontier's purchase of OHP property rendered Frontier's appeal in Docket No. 08-3806 moot and that it should be dismissed. However, Frontier disagreed with DEQ that Frontier's appeal in Docket No. 08-3804 was moot, due to the fact that the appeal raised issues concerning the boundary control deadline and barrier wall schedule

that have not yet been resolved. Consequently, Frontier opposed DEQ's motion to dismiss that appeal.

20. Also on November 4, 2008, Frontier submitted a letter to DEQ objecting to DEQ's attempted October 27, 2008 unilateral incorporation of the revised barrier wall schedule into the AOC and invoking the dispute resolution procedures in the AOC. The basis for Frontier's dispute is that: i) Sections XVI and XXI of the AOC require that, following a finding of force majeure, the relevant workplan be extended by mutual agreement between Frontier and DEQ, which has not been reached; and ii) Frontier's October 3, 2008 purchase of the OHP property satisfied Frontier's obligations under the Joint Stipulation to achieve boundary control by October 15, 2008 because all of contaminated groundwater plume is now contained on property owned by Frontier.

21. On November 7, 2008, DEQ sent a letter to Frontier asserting that the revised barrier wall schedule was based on mutual agreement and stating that, therefore, "there is no basis for further dispute resolution proceedings".

22. Due to DEQ's refusal to participate in dispute resolution (scheduled for November 7, 2008) concerning Frontier's objection to DEQ's October 27, 2008 unilateral incorporation of the revised barrier wall schedule into the AOC, Frontier now requests that the EQC review and set for hearing Frontier's appeal of DEQ's October 27 and November 7, 2008 letters that improperly purport to incorporate a new barrier wall schedule into the AOC and effectively denied Frontier's claim that boundary control required by the Joint Stipulation has now been achieved. Because the issues associated with this appeal overlap in many ways with Frontier's pending appeal in Docket Number 08-3804, Frontier requests that the two appeals be consolidated into one action.

## GOVERNING LAW

23. The AOC specifies a dispute resolution process requiring Frontier to appeal a DEQ decision within thirty days of receiving written notice of decision. AOC XVI(1). Frontier's request for review and hearing of DEQ's October 27, 2008 written determination regarding incorporation of the revised barrier wall schedule into the AOC and DEQ's November 7, 2008 decision refusing dispute resolution and effectively denying Frontier's assertion that it has achieved boundary control required by the Joint Stipulation is timely and appropriate.

24. The Joint Stipulation modified Section VI, entitled "WORK TO BE PERFORMED", of the AOC by requiring Frontier to perform certain corrective action, including "implementation of boundary control" by October 15, 2008. The method required of Frontier to achieve boundary control is not specified.

25. Section XVII of the AOC, entitled "FORCE MAJEURE AND EXCUSABLE DELAY" defines a force majeure as "any event arising from causes not 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." AOC XVII(1).



26. Section XVII of the AOC requires that, following a finding of force majeure, the relevant workplan be extended “through an amendment to the [AOC] pursuant to Section XXI”. AOC XVII(5). Section XXI of the AOC requires that such amendment be made “by mutual agreement” between Frontier and DEQ. AOC XXI(1).

**DEQ’S UNILATERAL INCORPORATION OF A REVISED BARRIER WALL SCHEDULE INTO THE AOC IS INCONSISTENT WITH THE TERMS OF THE AOC AND SHOULD BE OVERTURNED**

27. On May 16, 2008, DEQ determined that a force majeure situation existed due to lack of access by Frontier to OHP property and that access-dependent deadlines for barrier wall construction were suspended. Section XVI of the AOC requires that, following a finding of force majeure, the relevant workplan will be extended “through an amendment to the [AOC] pursuant to Section XXI.” Section XXI requires that such amendment be made by mutual agreement between Frontier and DEQ. Following Frontier’s October 3, 2008 purchase of the OHP property, staff for Frontier and DEQ began discussions concerning a potential revised schedule for the barrier wall. At the same time, Frontier representatives and DEQ were discussing whether boundary control was still required by the Joint Stipulation and, in light of Frontier’s purchase of the former OHP property, possible alternatives to a barrier wall.

28. Following an October 27, 2008 meeting between Frontier and DEQ staff regarding a potential construction schedule for the barrier wall, DEQ sent a letter to Frontier stating that a barrier wall construction schedule “is approved and deemed incorporated into the AOC under the Dispute Resolution provisions in Section XVI.” Frontier had not, however, agreed to incorporation of such a revised barrier wall schedule into the AOC as required by Sections XVII and XXI of the AOC, as evidenced by the

fact that Frontier had a meeting scheduled with DEQ on November 7, 2008 to discuss potential alternatives to the barrier wall. Moreover, Section XXI(1) of the AOC specifically states that amendments to the AOC “shall be in writing, shall have as their effective date the date on which a fully executed copy is received by Frontier, and shall be incorporated into [the AOC]...” This language clearly contemplates that both parties have to agree to and sign any amendment of the AOC, and that has not occurred.

29. DEQ’s modification of the AOC by unilateral incorporation of a revised barrier wall schedule is also inconsistent with other terms of the AOC requiring agreement on a revised schedule. Section XXI(1) of the AOC states: “In the event that a mutual agreement of the parties to modify this Order is not reached and if the [DEQ] denies any request for modification by Frontier, or if Frontier denies any request for modification by [DEQ], such disagreement shall be subject to the dispute resolution provisions of Section XVI herein.” Although DEQ’s November 7, 2008 letter stated that the revised schedule is based on mutual agreement, Frontier has not agreed to such schedule and, as is clear from the above language in the AOC, Frontier has the right to deny DEQ’s request to modify the AOC with the new schedule and is entitled to dispute resolution on the issue. DEQ’s November 7, 2008 letter improperly denied such dispute resolution to Frontier. Consequently, DEQ’s incorporation of the revised barrier wall schedule into the AOC on the alleged basis of mutual agreement is improper and should be overturned.

**FRONTIER'S PURCHASE OF THE ADJACENT OHP PROPERTY  
SATISFIES THE JOINT STIPULATION REQUIREMENT TO  
ACHIEVE BOUNDARY CONTROL**

30. 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 implement boundary control. The technology or specific remedy that Frontier is required to use to achieve boundary control is not specified in the Joint Stipulation. On February 19, 2008, DEQ issued a Final Decision requiring construction of a barrier wall that ran along the property line between the OHP property and the Frontier refinery.

31. The purpose of the barrier wall proposed by DEQ was to prevent migration of contaminated groundwater onto property not controlled by Frontier. Although the plume of contaminated groundwater had already migrated across the OHP property line, a barrier wall was consistent with the Joint Stipulation requirement to implement boundary control by October 15, 2008. Following Frontier's October 3, 2008 purchase of OHP property, however, the Frontier property now extends beyond the leading edge of the groundwater plume. Accordingly, the plume is no longer impacting offsite property so boundary control was effectively achieved on October 3, 2008, prior to the October 15, 2008 deadline in the Joint Stipulation. Thus, a barrier wall along the former property line is no longer required.

32. Frontier acknowledges the need for preventing potential migration of contaminated groundwater to Crow Creek. Prior to its October 3, 2008 purchase of the OHP property, Frontier was not able to take action at the downgradient end of the groundwater plume to halt potential migration. Therefore, the barrier wall was a required

measure given the mixed ownership of the affected property. Now that Frontier owns the 133 acre property adjacent to the refinery, Frontier can begin plans to address the plume in its entirety instead of executing the interim barrier wall solution. In addition to no longer being required by the Joint Stipulation, a barrier wall cutting through the middle of a groundwater plume along a former property line makes no sense technically or environmentally.

33. Following DEQ's February 19, 2008 determination that a barrier wall was required as a final remedy for implementing boundary control under the Joint Stipulation, Frontier requested in its March 26, 2008 letter to DEQ that DEQ submit its remedy determination for public comment as required by Section IX of the AOC. DEQ, however, refused to do so at the time, and the October 27, 2008 revised schedule that DEQ is improperly attempting to incorporate into the AOC still makes no provision for public comment or participation. If DEQ's barrier wall remedy determination is submitted for public comment as required, Frontier is confident that public input would strongly support a remedy that addresses the plume as a whole instead of DEQ's barrier wall remedy that is no longer the most effective remedy available in light of Frontier's property purchase.

34. As detailed above, because Frontier has now achieved boundary control under the Joint Stipulation, Frontier is no longer required to construct the barrier wall. DEQ's October 27, 2008 incorporation of a revised barrier wall construction schedule into the AOC is therefore improper. Further, DEQ's November 7, 2008 refusal to discuss this boundary control issue with Frontier pursuant to the dispute resolution provisions of

the AOC effectively denies Frontier's claim that boundary control has been achieved. DEQ's determinations in both letters should be overturned.

### **MOTION TO CONSOLIDATE ACTIONS**

35. Currently pending before the EQC are Frontier's: i) Appeal of the Denial of June 2, 2008 Force Majeure Claim by Frontier Refining Inc., Docket No. 08-3804; and ii) Petition for Review, Request for Hearing and Request for Consolidation, Docket No. 08-3806. On November 4, 2008, Frontier filed its Response to DEQ's Motion to Consolidate and Dismiss Frontier's Appeals, in which Frontier agreed to dismiss its petition in Docket No. 08-3806, but opposed DEQ's motion to dismiss Frontier's appeal in Docket No. 08-3804. Because a substantial amount of the facts relevant to this Petition for Review and Request for Hearing are shared by Docket No. 08-3804, Frontier respectfully requests the two matters be consolidated into one matter. Both matters have common parties, involve the same property, and the same administrative compliance issues. Consolidating the two actions would not prejudice the parties and promotes contested case economy.

### **RELIEF REQUESTED**

Frontier respectfully requests that the EQC: i) consolidate this Appeal with Docket No. 08-3804; ii) vacate and reverse the DEQ's October 27 and November 7, 2008 determinations concerning incorporation of a revised barrier wall schedule into the AOC; and iii) order that Frontier's purchase of the former OHP property satisfied the Joint Stipulation requirement to implement boundary control.

Dated this 19th day of November, 2008.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that, on this 19th day of November, 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  
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Director of the Department of Environmental Quality  
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