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 into the AOC and November 7, 2008 Denial that Frontier has Achieved Boundary Control	)))))	Docket No. 08-3808

DEQ'S BRIEF IN SUPPORT OF MOTION TO DISMISS FRONTIER'S PETITION FOR REVIEW

Introduction

Frontier Refining Inc. (Frontier) filed a Petition for Review and Request for Hearing (Petition) before the Wyoming Environmental Quality Council (EQC) in Docket No. 08-3808 on November 19, 2008. Frontier raises two claims. First, Frontier contends that a October 27, 2008 Dispute Resolution Decision letter it received from LeRoy Feusner, Administrator of the Solid and Hazardous Waste Division (SHWD) of the Wyoming Department of Environmental Quality (DEQ), "improperly incorporated a barrier wall schedule" into the 1995 Administrative Order on Consent (AOC). This claim is based on Frontier's erroneous interpretation of plain language in provisions of the AOC. Under the dispute resolution provisions in Section XVI.2 of the AOC, which Frontier invoked to reach agreement on a revised schedule for barrier wall construction, the SHWD Administrator's October 27, 2008 written "Dispute Resolution Decision" approving the revised barrier wall schedule Frontier proposed during that process became binding and was deemed incorporated into the AOC "without further order or process."

Therefore, the EQC should dismiss Frontier's first claim for failure to state a claim on which relief can be granted. WYO. R. CIV. P. 12(b)(6).

For its second claim, Frontier contends that a November 7, 2008 letter from the SHWD Administrator (Administrator) to Frontier is an appealable "determination that Frontier has not achieved boundary control." Frontier is indirectly and belatedly asking the EQC, through its November 19, 2008 petition, to review the Administrator's uncontested February 19, 2008 "boundary control" decision requiring Frontier to install a barrier wall at the boundary of the "existing refinery," because Frontier now argues that its subsequent purchase of adjacent non-refinery property satisfies the boundary control requirement without installation of the barrier wall. Frontier is collaterally estopped from attempting to re-litigate the Administrator's February 19, 2008 "boundary control" decision through its November 19, 2008 petition for review, because Frontier did not appeal that decision to the EQC during the 60 day appeal period (and in fact agreed in writing to comply with it). The EQC lacks subject matter jurisdiction to adjudicate this issue under the doctrine of collateral estoppel. WYO. R. CIV. P. 12(b)(1).

Frontier's First Claim Should be Dismissed for Failure to State a Claim on Which Relief Can Be Granted

In its first claim in this petition for review, Frontier contends that the Administrator's October 27, 2008 dispute resolution decision letter "improperly incorporated a barrier wall schedule" into the AOC. Petition, p.1; Exh. J. DEQ is entitled to dismissal of this claim as a matter of law, because the terms of AOC Section

XVI expressly authorize the manner in which this issue was resolved through the dispute resolution process and confirmed in the Administrator's October 27, 2008 letter. Exhs. G & J. Frontier's procedural objection to DEQ's approval and incorporation of the specific revised barrier wall schedule Frontier itself proposed is incorrect on its face under AOC Section XVI.2. Exh. G. AOC Section XVI.1 requires the parties to work in "good faith" to reach a mutually agreeable resolution of the dispute. Exh. G. If Frontier is permitted to come back now and attack the result of that dispute resolution process, which adopted Frontier's own proposal, then the "good faith" requirement will be trivialized and the process will be rendered useless.

In October 2006, Frontier and DEQ filed a Joint Stipulation to modify the 1995 AOC (EQC Docket No. 06-5400). The Joint Stipulation ("20.i.") requires Frontier to complete implementation of "DEQ approved" boundary control by October 15, 2008. Exh. L; Petition, ¶4. The Administrator's February 19, 2008 "Final Decision" letter to Frontier specified a slurry bentonite wall (barrier wall) as the "DEQ approved" technology for boundary control "at the existing refinery boundary." Exh. A; Petition, ¶¶5, 30. In July 2008, after DEQ determined that Frontier's lack of access to a 12 acre strip of adjacent ranch land needed to proceed with construction of the barrier wall constituted a temporary force majeure under AOC Section XVII (Exh. G), Frontier filed a petition for EQC review in Docket No. 08-3804, contesting DEQ's force majeure decision for not extending the October 15, 2008 completion deadline at that time. Petition, ¶¶ 7-12). While that petition for review was pending, on October 3, 2008

Frontier bought 133 acres of the adjacent ranch land, although it had the option of buying only 12+ acres for the per acre price Frontier had previously offered, which would have provided enough access to proceed with construction of the barrier wall. Exh. I; Petition ¶¶ 12, 17. Based on Frontier's purchase of the adjacent ranch land, DEQ revised and extended the barrier wall completion deadline by 12 months (until October 26, 2009), as well as interim deadlines for various completion-related tasks. Exh. B; Petition ¶ 17. With this extension of the completion deadline, Frontier's petition for review in Docket 08-3804 was rendered moot, and as noted above, DEQ moved to dismiss that petition for that reason.

However, Frontier objected to the extended interim and completion deadlines in DEQ's revised barrier wall schedule, and by letter dated October 3, 2008 invoked dispute resolution under the AOC regarding that schedule. Exh. C. Representatives of Frontier and DEQ met on October 17, 2008 to entertain Frontier's dispute of the revised schedule. Exhs. D & E. Following the October 17th meeting, DEQ, by letter dated October 21, 2008, asked Frontier to provide its own proposed schedule for DEQ to review, which, by letter dated October 24, 2008, Frontier did. Exhs. D & E. Three days later, the Administrator issued his October 27, 2008 "Dispute Resolution Decision" letter, which approved the "proposed schedule, as specified in [Frontier's] October 24, 2008 letter" and deemed it incorporated into the AOC under the Dispute Resolution provisions in Section XVI. Exh. J; Petition, ¶18. The Administrator's October 27, 2008 dispute

resolution decision letter thereby properly completed the dispute resolution process under AOC Section XVI Frontier had invoked in its October 3, 2008 letter. Exhs. C, G & J.

On November 4, 2008, only 8 days after DEQ confirmed in writing the resolution of the scheduling dispute by adoption of the specific schedule Frontier had proposed, Frontier contended in its "Response" to DEQ's Motion to Dismiss in Docket No. 08-3804 that there had been no mutual agreement to that barrier wall construction schedule. *See* Frontier Refining, Inc.'s Response to Wyoming DEQ's Motion to Consolidate and Dismiss Frontier Refining, Inc.'s Appeals, EQC Docket Nos. 08-3804 and 08-3806, at 6 (Nov. 4, 2008). Frontier also argued that DEQ's written decision approving and incorporating into the AOC the revised schedule Frontier proposed acceptance did not comply with "Section XVI, paragraph 5" & Section XXI of the AOC. *Id.* at 6; Exh. G.

As DEQ explained in its Reply to Frontier's Response in Docket No. 08-3804, the AOC sections Frontier cites in its Response do not support Frontier's procedural argument or defeat the mutual agreement DEQ and Frontier reached in the dispute resolution process. Frontier's citation to "Section XVI, paragraph 5" apparently refers to Section XVII.5 (Force Majeure), because there is no Section XVI.5. Exh. G. Frontier corrected the citation in its latest petition (Docket No. 08-3808). Petition, ¶¶ 26-29. However, in its latest petition Frontier does not mention that AOC Section XVII.5 provides for disagreements on the length of extensions due to a force majeure to be resolved under the Section XVI dispute resolution process. Nor does Frontier acknowledge that the Administrator's October 27, 2008 decision letter was issued in the

context of a dispute resolution process Frontier invoked in its October 3, 2008 letter. Frontier ignores that Sections XVII & XXI prescribe procedures for mutual modification of the AOC *outside* the Section XVI dispute resolution process. Frontier also does not discuss AOC Section XVI.**2**, which applies specifically to this situation. Exhs. C, G & J. Consequently AOC Sections XVII & XXI do not apply to the mutual agreement for revising the barrier wall schedule that was accomplished through the Section XVI dispute resolution process. Exhs. G & J.

The AOC Section XVI.2, which specifically applies to dispute resolution, expressly provides that the procedure for modification of the AOC under Section XXI does not govern the incorporation into the AOC of agreements or decisions made pursuant to the dispute resolution process under Section XVI. Exh. G. Section XVI.2 states: "Notwithstanding the provisions of Section XXI, 'Subsequent Modification', of this Consent Order, any agreement or decision made pursuant to this Section [XVI] by the Department shall be reduced to writing, shall be deemed incorporated into this Consent Order without further order or process, and shall be binding on the parties." Exh. G. In accordance with AOC Section XVI.2, the Administrator's October 27, 2008 "Dispute Resolution Decision" letter reduced to writing his decision to approve the specific schedule Frontier had proposed in its October 24, 2008 letter, which was thereby deemed incorporated into the AOC without further order or process, and became binding on the parties. Exhs G & J.

As explained above, Frontier's claim that the Administrator's October 27, 2008 dispute resolution decision letter "improperly incorporated" a barrier wall schedule into the AOC is patently wrong as a matter of law. Petition at 1. Therefore, the EQC should dismiss Frontier's first claim in this petition for review for failure to state a claim on which relief can be granted. Wyo. R. Civ. P. 12(b)(6).

Frontier's Second Claim is Barred by Collateral Estoppel and Should Be Dismissed for Lack of Subject Matter Jurisdiction

Frontier contends in its second claim in this petition for review that a November 7, 2008 letter from the Administrator to Frontier is an appealable "determination that Frontier has not achieved boundary control." Petition at 1 and ¶¶ 22-23 & 34; Exh. K. However, the Administrator clearly made no decision regarding boundary control in his November 7th letter, and had no reason to make such a decision at that time, since he had already decided in his February 19, 2008 "Final Decision" letter (from which Frontier did not timely seek EQC review) that the DEQ approved method by which Frontier must achieve boundary control is a barrier wall at the "existing refinery boundary." Exhs. A (pp.1-2) & K; Petition ¶¶ 5-6 & 30).

Frontier's claim that the Administrator's November 7, 2008 letter is an appealable determination should be dismissed because it is nothing more than an improper attempt to collaterally attack the February 19, 2008 "Final Decision" letter. Exh. A. That letter expressly required Frontier to install a barrier wall as the DEQ approved technology to "halt outward migration of contaminants *at the existing refinery boundary*" (emphasis

added). Exh. A (pp.1-2); Petition ¶¶ 5 & 30. Frontier had a full and fair opportunity to litigate that issue by appealing it to the EQC within 60 days after February 19, 2008, but did not do so. On the contrary, Frontier affirmatively agreed to that decision in a letter to DEQ dated March 26, 2008. Exh. F; Petition ¶ 6. Frontier's failure to appeal the Administrator's February 19, 2008 "Final Decision" during the opportunity provided by rule, collaterally estops it from raising that issue again 9 months later in its November 19, 2008 petition for review. Any other result would undermine the finality of agency decisions needed to avoid impeding their timely implementation (in this case further delaying a stipulated environmental response action that is already behind schedule).

A. A Timely Appeal from the Administrator's Decision is Jurisdictional

Chapter I, Section 16(a) of the DEQ Rules of Practice & Procedure provides 60 days in which to appeal final actions of the Administrator. The SHWD Administrator's February 19, 2008 barrier wall decision became final and binding when Frontier did not appeal it in 60 days. Timely filing of a request for administrative review of an agency decision is mandatory and jurisdictional. *Antelope Valley Improvement and Service District of Gillette v. State Board of Equalization*, 992 P.2d 563, 567 (Wyo. 1999). Where untimely filing of a notice of appeal deprives an administrative tribunal of subject matter jurisdiction over the appeal, dismissal is appropriate. *Id.*

The 60 day period for Frontier to appeal the Administrator's February 19, 2008 final decision elapsed 7 months before Frontier filed its latest petition for review on

November 19, 2008. Faced with this jurisdictional problem, Frontier now seeks EQC review of what it alleges to be a November 7, 2008 DEQ decision "*effectively* denying Frontier's assertion that it has achieved boundary control required by the Joint Stipulation" through its purchase of the OHP ranch property next to the refinery. Petition, p.1, ¶¶ 22-23 & 34 (emphasis added). The Joint Stipulation (at 20.i.) expressly requires Frontier to implement "DEQ approved" boundary control by October 15, 2008, which the Administrator's February 19, 2008 decision letter determined to be a barrier wall at the *existing refinery boundary*. Exhs. A & L. The Administrator's November 7, 2008 letter simply states that there is no basis for Frontier to re-invoke the dispute resolution process concerning his October 27, 2008 decision letter, in which he approved the extended barrier wall schedule that Frontier itself had requested.[1] Exhs. J & K. The Administrator's November 7, 2008 letter did not revisit his February 19, 2008 final decision requiring a barrier wall. Exh. K. In that letter, Mr. Feusner wrote:

> Dear. Mr. Faudel:
>
> Your November 4, 2008 letter to me states "this letter constitutes notice of a dispute, pursuant to the dispute resolution procedures in Section XVI of the AOC" concerning my October 27, 2008 decision letter to Mr. David Danforth approving the extended schedule for barrier wall construction proposed in Frontier Refining Inc.'s (Frontier) October 24, 2008 letter to me. Both Frontier's October 24, 2008 letter proposing the extended schedule for barrier wall construction and my October 27, 2008 "Dispute

[1] Mr. Feusner's November 7, 2008 letter was correct. There is no basis in the AOC for Frontier to invoke dispute resolution, obtain written DEQ approval of the resolution Frontier specifically proposed, and then 11 days later re-invoke dispute resolution to re-address the scheduling issue that was just resolved in the manner Frontier itself had proposed. The AOC dispute resolution process can resolve disputes as intended only if once a resolution is reached in "good faith" it becomes binding and is not subject to re-invocation of the process to re-dispute the same issue.

> Resolution Decision" letter approving it were part of the dispute resolution process invoked by Frontier in Mr. Danforth's October 3, 2008 letter to me.
>
> This dispute has been resolved by the DEQ's decision based on mutual agreement as documented in the referenced October 24, 2008 and October 27, 2008 letters. Re-invoking dispute resolution concerning my October 27, 2008 decision letter, which resulted from the dispute resolution process already invoked by Frontier, is not called for under AOC Section XVI. There is no basis for further dispute resolution proceedings.

Frontier's November 19, 2008 appeal from the Administrator's November 7, 2008 letter is actually an untimely collateral attack on his February 19, 2008 decision requiring Frontier to install a barrier wall at the existing refinery boundary, which is now barred by the doctrine of collateral estoppel. Exhs. A & K. Under that doctrine, if a party to an administrative proceeding had a full and fair opportunity to contest an issue before an agency, but failed to do so, it cannot raise the issue again in a later proceeding. *Bender v. Uinta County Assessor*, 14 P.3d 906, 910 (Wyo. 2000). Subsequent actions are barred when the initial administrative decision was not appealed, and will be dismissed with prejudice based on the doctrine of collateral estoppel. *Id.* at 911. Moreover, Wyoming Rules of Appellate Procedure governing judicial review of agency actions do not provide an exception to the doctrine of collateral estoppel. *University of Wyoming v. Gressley*, 978 P.2d 1146, 1154 (Wyo. 1999).

Frontier was well aware of the Administrator's February 19, 2008 decision that required installation of a barrier wall to halt outward migration of contaminants at the boundary of the "existing refinery," but instead of filing a timely petition for review with the EQC, Frontier notified DEQ of its agreement to comply with that decision by letter

dated March 26, 2008. Petition, ¶6; Exh. F. Frontier now claims that it "is no longer required to construct the barrier wall" because its October 3, 2008 purchase of adjacent OHP ranch property "satisfied Frontier's obligations under the Joint Stipulation to achieve boundary control." Petition, ¶¶ 20, 31 & 34. This claim is a belated collateral attack on the Administrator's February 19, 2008 decision, which unequivocally specifies the DEQ approved technology for boundary control to be a slurry bentonite wall at the "existing refinery boundary." Exh. A; Petition, ¶¶ 5 & 30. Frontier acknowledges that the Administrator's February 19, 2008 "Final Decision requir[ed] construction of a barrier wall that ran along the property line between the OHP property and the Frontier refinery." Petition, ¶ 30. Nevertheless, Frontier now tries to avoid this requirement by contending that although DEQ's stated purpose in requiring a barrier wall is "to halt outward migration of contaminants at the existing refinery boundary," the actual but unstated purpose was "to prevent migration of contaminated groundwater *onto property not controlled by Frontier*." Exh. A (pp.1-2); Petition, ¶ 31 (emphasis added).

If the claims and parties are the same, and no appeal has been taken as provided by statute or rule, the agency's decision acts to collaterally estop the litigant from raising the same issues in a subsequent action, and redetermination of the issues is beyond the jurisdiction of the tribunal. *Joelson v. City of Casper*, 676 P.2d 570, 572-573 (Wyo. 1984). Frontier's present attempt to re-write the Administrator's February 19, 2008 final decision, which Frontier had the opportunity to contest but did not, is an improper collateral attack.

On October 24, 2008, in the context of a process Frontier invoked to dispute DEQ's revised schedule extending deadlines for installing the barrier wall, Frontier proposed its own schedule to resolve that dispute. Exhs. C & E. In its November 19, 2008 petition for review, Frontier never mentions its October 24, 2008 letter or the fact that the schedule the Administrator approved in his October 27, 2008 letter is the specific schedule Frontier itself proposed in its October 24th letter. Exhs. E & J; Petition, ¶¶ 18 & 28. If, as Frontier's latest petition now implies, installation of a barrier wall at the existing refinery boundary was not the DEQ approved technology for boundary control required by the Joint Stipulation and agreed to by Frontier, then the process Frontier invoked to dispute the schedule for installing that barrier wall and the schedule Frontier proposed to resolve that dispute would have been pointless.

In summary, the collateral estoppel doctrine bars Frontier's untimely attempt in this petition to re-litigate the Administrator's uncontested February 19, 2008 final decision requiring installation of a barrier wall *at the existing refinery boundary* to halt outward migration of contaminants. The EQC should therefore dismiss the second and final claim in Frontier's latest petition for lack of subject matter jurisdiction, which will confirm the need for Frontier to proceed with installation of the barrier wall along the DEQ-approved alignment under the schedule Frontier itself proposed. Wyo. R. Civ. P. 12(b)(1).

B. Frontier's Subsequent Purchase of Non-Refinery Acreage Does Not Alter the Binding Effect of the Administrator's February 19, 2008 Decision

In its November 19, 2008 petition for review, Frontier contends that the Administrator's November 7, 2008 letter is a determination that Frontier has not achieved boundary control as required by the 2006 Joint Stipulation. Petition, p.1, ¶¶ 22 & 34. Frontier admits that the Joint Stipulation requires it to implement boundary control by October 15, 2008. Petition, ¶ 4. In fact, the Joint Stipulation expressly requires Frontier to implement "DEQ approved" boundary control. Exh. L (at "20.i."). Frontier also admits that the Administrator's February 19, 2008 "Final Decision" letter identifies the required (DEQ approved) technology for boundary control to be installation of a barrier wall "along the property line between OHP property and the Frontier refinery" (*the existing refinery boundary*) Exh. A (pp.1-2); Petition, ¶ 30. Frontier now argues that its October 3, 2008 purchase of 133 acres of OHP ranch land adjacent to, but never part of, the actual refinery satisfies the boundary control requirement without installation of a barrier wall. Petition, ¶¶ 20, 34.

Frontier's November 19, 2008 petition *does not allege* that it has installed the barrier wall to halt outward migration of contaminants at the existing refinery boundary. Petition, ¶ 34. Frontier *does not allege* that it has halted at the historical refinery boundary the outward (off-site) migration of petroleum-based contaminants from the "historical operation of the refinery" onto the adjacent OHP property it purchased in October. Petition, ¶¶ 3, 20, 31. Frontier *does not allege* that all refinery sources of

contaminants which have entered the groundwater beneath the refinery and migrated off-site have been identified and controlled and no longer feed the plume. Petition, ¶¶ 3, 31.

A stated "purpose" of the AOC and "mutual objective" of DEQ and Frontier is to "prevent or mitigate any *migration* or releases of hazardous waste or hazardous constituents at or *from the Facility*" (emphasis added). Exh. G, AOC § III. The AOC defines "The Facility" as the Frontier Refinery in Cheyenne consisting of 116.78 acres located adjacent to Fifth Street and Camp Stool Road on the north, Morrie Avenue to the west, and the flood plain of Crow Creek to the south and east, as well as open fields to the east. Exh. G, AOC § IV.2a. While the 133 acres of ranch land Frontier purchased from OHP on October 3, 2008 had become contaminated by releases from sources at the actual, historic Facility that migrated off-site, that acreage was never part of the 116.78 acre historic refinery described in the AOC. Exh. G, AOC § IV.2a.; Petition, ¶ 3.

Consistent with the AOC definition of the refinery boundary, the Administrator's uncontested February 19, 2008 final decision explicitly called for the barrier wall "to halt outward migration of contaminants *at the existing refinery boundary*." Exh. A, p.2 (emphasis added); Petition, ¶ 30. The required barrier wall is not, as Frontier now argues, simply "to prevent migration of contaminated groundwater *onto property not controlled by Frontier*." Petition, ¶ 31 (emphasis added). Frontier's purchase of the OHP ranch property secured access, which had been a problem, so Frontier could proceed to install the barrier wall along the DEQ-approved alignment to halt outward migration of

contaminants at the existing (historic) refinery boundary.[2] Frontier's acquisition of the new property did not make that property part of the actual, historic refinery or change the requirement to install the barrier wall along the DEQ-approved alignment.

Frontier's second claim here relies solely on the notion that its subsequent purchase of adjacent, non-refinery property relieves it of the obligation to comply with the Administrator's uncontested February 19, 2008 final decision requiring installation of a barrier wall along the historic refinery boundary. Petition, ¶¶ 20, 30-31, 34. As Frontier would have it, sources of contamination at the actual, active refinery can continue to feed the groundwater plume that is migrating off-site, so long as the off-site property is "controlled by Frontier." Petition, ¶¶ 3, 20, 31. Frontier overlooks the purpose of the Wyoming Environmental Quality Act (Act), reiterated in the AOC, which is to prevent, reduce and eliminate pollution of, and retain control over, the water of the state, which includes all groundwater in Wyoming. WYO. STAT. ANN. §§ 35-11-102 & 103(c)(vi); Exh. G, AOC § III. Frontier also overlooks the Act's rejection of the concept that the purchase of land in itself is generally a substitute for its remediation. WYO.

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[2] DEQ addressed the access problem in EQC Docket No. 08-5201, which resulted in OHP's July 31, 2008 written offer to sell Frontier the 12+ acre strip needed to install the barrier wall at the per acre price Frontier had already offered for a 43 acre parcel. Exh. I. For whatever reason, Frontier made a unilateral decision to purchase 133 acres from OHP rather than the minimal 12+ acres needed to install the barrier wall. Petition, ¶¶ 12, 17. Frontier's purchase of the 133 acres (120 more than needed) in October 2008 was *not* based on a reasonable expectation that such a purchase would alter the Administrator's February 19, 2008 barrier wall decision, because Frontier's counsel was told it would not when he inquired about it in June 2008. Exh. H (June 2008 e-mails).

STAT. ANN. §§ 35-11-1802(a) & 1803(a) (an innocent owner is not liable for remediation or other response action for contamination on his property from release or migration of contaminants, but any person who knowingly obtains an interest in land to avoid liability for contamination or remediation shall not be an innocent owner). The Administrator's February 19, 2008 decision precludes that approach.

Both Section III of the AOC and the Administrator's February 19, 2008 decision call for Frontier to actually prevent migration of contamination from its refinery by halting it close to its sources at the refinery, not by redefining the boundary to be further from those sources by changing the name on a deed to adjacent non-refinery property. Exhs. A & G, AOC § III; Petition, ¶¶ 20, 31. Frontier's argument that it makes no sense to install "a barrier wall cutting through the middle of a groundwater plume" along the boundary to the active refinery misses the point of the barrier wall. Petition ¶ 32. The plume is not static, and as noted above Frontier does not allege that it has identified or controlled all refinery sources that feed the plume. Installation of the barrier wall along the "existing refinery boundary," as the Administrator's February 19, 2008 decision requires, will cut off continuing migration of contaminated groundwater close to its refinery sources, thereby allowing cleanup of the plume outside the barrier wall to proceed effectively, which cannot be done if the barrier wall is pushed to the outer edge of the plume before refinery sources feeding it have been controlled. Petition, ¶ 31. In any event, Frontier agreed to comply with the Administrator's February 19, 2008 decision requiring a barrier wall at the existing refinery boundary, and with the time for

appealing that decision long since expired, Frontier cannot collaterally attack it now. Petition, ¶¶ 5, 6, 30.

In summary, Frontier cannot use the Administrator's November 7, 2008 letter rejecting Frontier's re-invocation of the dispute resolution process under Section XVI of the AOC as a mechanism to collaterally attack the Administrator's February 19, 2008 final barrier wall decision after the 60-day appeal period has lapsed. Frontier cannot avoid the consequences of collateral estoppel by claiming that its subsequent purchase of contaminated adjacent non-refinery property is a substitute for installation of the barrier wall as required by the Administrator's February 19, 2008 final decision.

Conclusion

The EQC should dismiss Frontier's petition in its entirety for the reasons set forth above.

DATED this 2nd day of January, 2009.

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CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the foregoing DEQ'S BRIEF IN SUPPORT OF MOTION TO DISMISS FRONTIER'S PETITION FOR REVIEW, with exhibits, was served this 2nd day of January, 2009 by hand delivery or United States mail, first class postage prepaid, and also by e-mail, addressed as follows:

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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 into the AOC and November 7, 2008 Denial that Frontier has Achieved Boundary Control	)	Docket No. 08-3808

EXHIBIT LIST FOR DEQ'S BRIEF IN SUPPORT OF MOTION TO DISMISS

Exh. A. SHWD Administrator's February 19, 2008 "Final Decision" letter to Frontier

Exh. B. SHWD Administrator's September 26, 2008 letter to Frontier, with revised schedule

Exh. C. Frontier's October 3, 2008 letter to SHWD Administrator invoking dispute resolution

Exh. D. SHWD Administrator's October 21, 2008 letter to Frontier

Exh. E. Frontier's October 24, 2008 letter to DEQ with proposed schedule

Exh. F. Frontier's March 26, 2008 letter to DEQ

Exh. G. 1995 Administrative Order on Consent (AOC), Sections I, III, IV, XVI, XVII, XXI (EQC Doc. No. 06-5400)

Exh. H. "06/06/08" & "6/13/2008" e-mails between counsel for Frontier and counsel DEQ

Exh. I. July 31, 2008 letter from counsel for OHP to Frontier and DEQ

Exh. J. SHWD Administrator's October 27, 2008 "Dispute Resolution Decision" letter to Frontier

Exh. K. SHWD Administrator's November 7, 2008 letter to Frontier

Exh. L. 2006 Joint Stipulation for Modification of AOC (EQC Doc. No. 06-5400)