

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

FILED

JAN 30 2009

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)

Jim Ruby, Executive Secretary
Environmental Quality Council
Docket No. 08-3808

DEQ'S REPLY TO FRONTIER'S RESPONSE TO MOTION TO DISMISS

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 (08-3808) on November 19, 2008. The Wyoming Department of Environmental Quality (DEQ) filed a Motion to Dismiss on January 2, 2009. Frontier filed a Response to DEQ's Motion to Dismiss on January 26, 2009. Pursuant to the EQC's January 28, 2009 Order Setting Motion Hearing, DEQ Replies to Frontier's Response as follows:

The only remaining issues in Frontier's appeal in Docket No. 08-3808 relate to the boundary control requirement. Frontier's (Fr.) Response (08-3808) at 1, n1. Frontier acknowledges that "[o]n February 19, 2008, DEQ issued a Final Decision requiring [Frontier's] construction of a barrier wall that ran along the property line between OHP property and the Frontier Refinery." Fr. Petition (08-3808), ¶30. Frontier contends that the issue of boundary control presented by this appeal involves "DEQ's refusal to reconsider that [February 19, 2008] decision in light of materially changed facts and circumstances." Fr. Response (08-3808) at 1, 3.

Frontier Is Attempting to Relitigate the DEQ's February 19, 2008 Decision

Frontier argues that the doctrine of collateral estoppel does not bar its appeal in 08-3808, because Frontier is “not attempt[ing] to relitigate DEQ’s February 19, 2008 letter, but instead seeks confirmation of a different issue that boundary control—as required by the Joint Stipulation—has been achieved through changed circumstances, namely, Frontier’s purchase of the former OHP property on which the groundwater plume is contained.” Fr. Response (08-3808) at 3, 6. The Joint Stipulation (20.i.) requires Frontier to implement “DEQ approved” boundary control. DEQ Exh L. The Administrator’s February 19, 2008 Final Decision letter requires Frontier to install a slurry bentonite (barrier) wall as the technology approved by DEQ to “halt outward migration of contaminants *at the existing refinery boundary*” (emphasis added). DEQ Exh. A (pp.1-2); Fr. Petition (08-3808), ¶¶ 5 & 30.

Frontier contends that it has now achieved boundary control without a barrier wall through its purchase of adjacent OHP property. Fr. Petition (08-3808), ¶¶ 31, 34; Fr. Response (3808) at 3, 6. However, Frontier has *not alleged* in either its Petition or its Response in 08-3808:

- that all on-going refinery sources of contaminants which enter the groundwater beneath the refinery and migrate off-site have now been eliminated or controlled and are no longer feeding the plume;¹

¹ The Joint Stipulation also requires “DEQ approved” elimination and/or remediation of *on-going sources* of contamination (“e.g., underground pipes, above ground pipes, tanks”) by October 15, 2008, which Frontier does not claim to have completed. Fr. Petition (08-3808), ¶3; DEQ Exh. L (20.i.).

- that Frontier has actually halted the outward migration of contaminants at the existing refinery boundary;
- that the plume of contamination from on-going refinery sources that has already migrated beyond the boundary of the actual refinery is static; or
- that Frontier's purchase of the adjacent OHP ranch property will halt the outward migration of contaminants from on-going refinery sources to Crow Creek.

Instead, Frontier contends that it "is no longer required to construct the barrier wall," because Frontier has now achieved boundary control through its purchase of adjacent ranch property. Fr. Petition (08-3808), ¶¶ 31, 34; Fr. Response (3808) at 3, 6. By arguing that it is not required to comply with the terms of the Administrator's February 19, 2008 Final Decision, Frontier *is* attempting to relitigate that final decision, which it already had the opportunity to contest but did not. Frontier is barred from doing so now by the doctrine of collateral estoppel, because the issue is still the same: whether Frontier is required to install a barrier wall to halt the outward migration of contaminants at the boundary of the actual refinery.

Frontier argues that this appeal is not an attempt to relitigate DEQ's February 19, 2008 Final Decision, but instead seeks confirmation that boundary control as required by the Joint Stipulation has been achieved through Frontier's recent purchase of the adjacent OHP ranch property. Fr. Response (08-3808) at 3. While the Joint Stipulation itself does "not specify the technology or specific remedy that Frontier is required to use to achieve boundary control," it does expressly require Frontier to implement "DEQ approved" boundary control. Fr. Response (08-3808) at 2, 4; DEQ Exh. L (20.i).

The Administrator's February 19, 2008 Final Decision unequivocally specifies that the "DEQ approved" technology for boundary control is a slurry bentonite (barrier) wall "to halt outward migration of contaminants at the existing refinery boundary." DEQ Exh. A (pp.1-2); Fr. Petition (08-3808), ¶¶ 5 & 30; Fr. Response (08-3808) at 2. Frontier's argument is flawed, because the Administrator's February 19, 2008 final barrier wall decision *is* the "DEQ-approved" boundary control that the Joint Stipulation requires.

Frontier's Purchase of OHP Property Is Not A "Material" Changed Circumstance

Frontier argues that "[t]he issue of boundary control presented by this appeal has not been decided by DEQ's February 19, 2008 decision . . . in light of materially changed facts and circumstances." Fr. Response (08-3808) at 1. The only changed fact or circumstance that Frontier identifies is its purchase of the adjacent OHP ranch property in October, 2008, which Frontier claims raises "an entirely new issue" and makes collateral estoppel inapplicable. Fr. Response (08-3808) at 3, 5. Frontier's purchase of the OHP ranch property may be a changed fact or circumstance, but it is not a change that is "material" to the boundary control requirement under the February 19, 2008 decision or the 2006 Joint Stipulation or the 1995 Administrative Order on Consent (AOC).

The stated objective of the AOC (which Frontier agreed to twice, first with EPA in 1990, and again with DEQ in 1995), is to prevent or mitigate any migration or releases of hazardous wastes or hazardous constituents *at or from the Facility*. Fr. Response (08-3808) at 4; DEQ Exh. G (§III). Frontier's recent purchase of adjacent ranch property

does not change the stated objective of the AOC from preventing migration of contaminants from the refinery to preventing migration of contaminants from Frontier's newly acquired, non-refinery property.

The Facility is the historic refinery, the boundaries of which are described in the AOC and correspond to the site *actually used as a refinery*. Fr. Response (08-3808) at 4; DEQ Exh. G (§IV.2a.). Frontier acknowledges that “[t]he AOC’s definition of the Facility reflects the boundaries of the Frontier refinery as they existed at the time the AOC was drafted.” Fr. Response (08-3808) at 4. Frontier’s recent purchase of adjacent ranch property does not change the boundaries of the site that has been *actually used for refinery operations*, and it does not change the refinery boundary for the purpose of boundary control.²

Frontier recognizes that the Joint Stipulation does not specify the technology required to achieve boundary control. Fr. Response (08-3808) at 2, 4. Instead, the Joint Stipulation requires Frontier to implement “DEQ approved” boundary control. DEQ Exh. L (20.i.). Accordingly, the Administrator’s February 19, 2008 Final Decision specifying a slurry bentonite barrier wall at the existing refinery boundary as the DEQ-approved technology for boundary control *is* the boundary control technology required by the Joint Stipulation. DEQ Exh. A (pp.1-2). Although Frontier claims that “boundary control--as

² The EQC determined that a tract of land owned by the Town of Torrington constituted a new solid waste disposal site, rather than an extension of the town’s existing facility. The Court affirmed the EQC’s decision based on the fact that a facility did not previously exist on that particular area of land, and “not upon ownership of the land.” *Town of Torrington v. Environmental Quality Council*, 557 P.2d 1143, 1147-48 (Wyo. 1976).

required by the Joint Stipulation--has been achieved” through purchase of the OHP property, *there is no separate boundary control requirement under the Joint Stipulation other than the “DEQ approved” one for Frontier to have achieved.* Fr. Response (08-3808) at 3.

The applicable boundary control requirement is the one specified in the Administrator’s February 19, 2008 Final Decision: a *barrier wall* to halt the migration of contaminants at the existing *refinery boundary*. A barrier wall to halt the migration of contaminants at the existing refinery boundary is consistent with the stated objective of the AOC to prevent migration or releases of hazardous constituents from the actual refinery. DEQ Exh. G (§III). The releases and migration of hazardous constituents come from “on-going sources of contamination” at the refinery, such as “underground pipes, above ground pipes, tanks.” DEQ Exh. L (Joint Stipulation (20.i)). To effectively prevent the migration from the refinery of contaminants released from such “on-going sources of contamination” within the refinery, DEQ required Frontier to install a barrier wall at the boundary of the actual refinery. The fact that Frontier now owns contaminated, adjacent, non-refinery, ranch land is not a “material” change of circumstances that changes the nature or location of the “on-going sources of contamination.”

The fact that the contamination plume has extended under the adjacent ranch land Frontier recently purchased does not change the objective of the halting migration of contaminants at the existing “refinery” boundary (not at the Frontier *property* boundary). Fr. Response (08-3808) at 3. Frontier talks about “address[ing] the plume in its entirety

instead of DEQ's barrier wall remedy." Fr. Response (08-3808) at 8. DEQ required the barrier wall as one component of the three prong approach to "Site Stabilization" identified in the Joint Stipulation:

- "On-site source control" (DEQ Exh. L (20.i., 20.ii., 21.));
- "boundary control" (DEQ Exh. L (20.i., 20.iii., 20.iv., 20.v.)); and
- "remediation of off-site releases" (DEQ Exh. L (20.i.)).

The function of boundary control is to prevent on-going sources at the actual refinery from continuing to migrate off-site and feed the contamination plume. The function of boundary control is to contain on-going refinery sources feeding the plume, not to contain the plume itself, which would require a longer wall. The plume cannot be cleaned up effectively until on-going refinery sources which continue to feed it have been contained within the refinery boundary.

Frontier argues that it has achieved boundary control simply by its "purchase of the former OHP property on which the groundwater plume is contained." Fr. Response (08-3808) at 3. Frontier's statement is not accurate even as a practical matter, because *no* boundary has been controlled, the plume is not static, and on-going refinery sources continue to feed the plume. The fact that Frontier now owns contaminated, adjacent, non-refinery, ranch land is not a "material" change of circumstances that changes the objective for boundary control under the AOC, the Joint Stipulation, or the DEQ's February 19, 2008 final barrier wall decision.

The Joint Stipulation requires Frontier to implement “DEQ approved” boundary control. DEQ Exh. L (20.i.). The Administrator’s February 19, 2008 Final Decision specifies the “DEQ approved” technology for boundary control to be a slurry bentonite (barrier) wall. DEQ Exh. A (pp.1-2). Frontier did not timely appeal that decision to contest the specified technology for boundary control. Frontier now “claim[s] that it has *achieved boundary control through ownership of the [OHP] property.*” Fr. Response (08-3808) at 6 (emphasis added). In other words, Frontier is suggesting that “changed circumstances” make a property transfer alone a substitute for a physical barrier wall as the required technology for boundary control. Fr. Response (08-3808) at 3. The mere fact that Frontier now owns contaminated, adjacent, non-refinery, ranch land is not a “material” change of circumstances that changes the need for a barrier wall as the approved *technology* for boundary control.

Section IX of the AOC Does Not Apply to the DEQ’s February 19, 2008 Decision

Frontier alleges that “DEQ’s February 19, 2008 barrier wall decision did not comply with the requirements of the AOC and is therefore *not a final agency determination* to which the doctrine of collateral estoppel can apply.” Fr. Response (08-3808) at 2, 7 (emphasis in original). The AOC requirement with which Frontier alleges DEQ did not comply relates to public notice and comment under AOC Section IX.1.& 2. Fr. Response (08-3808) at 8. The terms of the AOC and the Joint Stipulation do not support Frontier’s allegation that DEQ’s February 19, 2008 barrier wall decision was subject to AOC Section IX. Fr. Response (08-3808) at 2, 7.

Frontier represents that Section IX.1. of the AOC requires that, upon approval by DEQ of “a corrective action measure final report,” DEQ shall make available for public review and comment “the corrective action measure study final report” and DEQ’s justification for selection of the corrective measure. Fr. Response (08-3808) at 7. AOC Section IX.1. calls for public review and comment on the “Corrective Measure Study Final Report” following its approval by DEQ. AOC § IX.1. (DEQ Exh. M).

AOC Section VI.8. (p.9) obligates Frontier to “conduct a Corrective Measure Study in accordance with the approved CMS Workplan.” AOC § VI.8. (DEQ Exh. M). Frontier does not yet have an approved CMS Workplan. Frontier has not yet conducted a Corrective Measure Study in accordance with an approved CMS Workplan. Frontier cannot submit the “Corrective Measure Study Final Report” until it has conducted the Corrective Measure Study. When Frontier has performed that work, DEQ will make the “Corrective Measure Study Final Report” available for public review and comment pursuant to AOC Section IX.1.

The Corrective Measure Study is part of a process to develop “corrective action” alternatives to be taken at the refinery. AOC § VI.9. (DEQ Exh. M). The Frontier / DEQ Joint Stipulation for modification of the AOC distinguishes between “the standard Corrective Action process under the original AOC” and “Site Stabilization described in this Special Stipulation Corrective Action Schedule.” DEQ Exh. L (18.v.). The Special Stipulation Corrective Action Schedule established an expedited schedule for actions to achieve Site Stabilization by October 15, 2008, including “DEQ approved” boundary

control (which implies Frontier's submittal of boundary control proposals for DEQ to approve). DEQ Exh. L (20.i.). The Special Stipulation Corrective Action Schedule does not call for public review and comment of each separate Frontier submittal or DEQ decision under the Joint Stipulation, but it does reserve Frontier's right to invoke dispute resolution. DEQ Exh. L (20.i.). However, when DEQ issued the February 19, 2008 decision approving a barrier wall as the technology for boundary control under the Joint Stipulation, Frontier neither invoked dispute resolution nor timely appealed that decision to the EQC. Fr. Petition (08-3808), ¶6; DEQ Exh. F. Therefore, the DEQ's February 19, 2008 barrier wall decision is final and was not subject to AOC Section IX.

Frontier's Response Raises New and Inaccurate Allegations

In its Response to DEQ's motion to dismiss, Frontier makes some new and inaccurate allegations of fact regarding its purchase of the adjacent OHP property.

Frontier alleges that:

On August 15, 2008, DEQ notified Frontier that a force majeure situation no longer existed, based on the fact that OHP had offered to sell approximately 12 acres of the OHP property to Frontier. After Frontier's consultant determined that the 12 acres were not sufficient to allow construction of the barrier wall as specified by DEQ, Frontier offered to purchase 43 acres of OHP property. OHP however, informed Frontier that it was not interested in selling the 43 acres and that Frontier would have to purchase the entire 133 acre tract adjacent to Frontier's refinery.

Fr. Response (8-3808) at 2-3.

The documented facts are these:

By letter dated July 15, 2008, Frontier re-asserted its force majeure claim based on Frontier's continued inability to obtain access to third party (OHP) property needed to

proceed with work required for installation of the barrier wall, despite Frontier's continued "diligent efforts to obtain access." DEQ Exh. N (Frontier's July 15, 2008 letter to LeRoy Feusner). The "summary of Frontier's access efforts" in the **July 15th** letter listed Frontier's **May 22nd** written offer to purchase 43 acres of OHP property adjacent to the refinery for a specified price, to which OHP made a counter offer on **June 5th** to sell 133 acres for a specified price. DEQ Exh. N (p.2). On July 16, 2008, based on the representations in Frontier's July 15th letter, DEQ issued a determination that lack of access to OHP property despite Frontier's best efforts to obtain it continued to constitute a force majeure situation. Fr. Petition (08-3806), ¶14.

On July 21, 2008, DEQ issued an Administrative Order (#43 16-08) to OHP and Arp & Hammond (A&H) ordering them to grant Frontier and its contractors access to OHP property adjacent to the refinery as needed to install a barrier wall essentially along the refinery boundary. On July 31, 2008, A&H and OHP filed an appeal with the EQC (Docket No. 08-5201) to contest the DEQ's Administrative Order. Also on July 31, 2008, by letter addressed to both DEQ and Frontier, OHP offered to sell a 100-foot wide 12 acre strip of land for the same per acre price that Frontier had previously offered OHP to buy 43 acres. DEQ Exh. I. The representations in Frontier's own July 15, 2008 letter contradict the allegation in Frontier's Response that Frontier offered to buy 43 acres of

OHP property and OHP countered with an offer to sell 133 acres *after* OHP's July 31st offer to sell the 12 acre strip.³ Fr. Response (08-3808) at 2-3; DEQ Exh. N (p.2).

Frontier's January 26, 2009 Response in Docket No. 08-3808 is the first of Frontier's many pleadings in related Docket Nos. 08-5201, 08-3806, and 08-3808 to allege that "Frontier's consultant determined that the 12 acres were not sufficient to allow construction of the barrier wall as specified by DEQ." Fr. Response (08-3808) at 2. After DEQ's July 16, 2008 determination that lack of access to OHP property continued to constitute a force majeure situation, DEQ issued the July 21, 2008 Administrative Order ordering OHP to provide the necessary access. On July 31, 2008, OHP filed a Petition for Review with the EQC (Doc. No. 08-5201) contesting DEQ Administrative Order (#4316-08). Based on OHP's July 31, 2008 written offer to sell Frontier the minimum 12 acre strip needed to install the barrier wall, DEQ issued a Notice of Compliance (NOC) to OHP on August 12, 2008. Fr. Petition to Intervene (EQC Doc. No. 08-5201), ¶9. On August 14, 2008, Frontier filed a Petition for Leave to Intervene in Doc. No. 08-5201 requesting that the EQC vacate DEQ's NOC for Administrative Order #4316-08. Fr. Petition to Intervene (EQC Doc. No. 08-5201), p.5. If, as Frontier now alleges in its January 26, 2009 Response, Frontier's consultant had "determined that the 12 acres were not sufficient to allow construction of the barrier wall as specified by DEQ," that is an

³ Frontier contemplated purchasing 133 acres from OHP at least as early as June 2008, as documented in e-mails between counsel for Frontier and counsel for DEQ. DEQ Exh. H (June 2008 e-mails). OHP offered to sell Frontier the minimal 12 acre strip by letter dated July 31, 2008. DEQ Exh. I.

allegation Frontier would be expected to make in its Petition to Intervene (08-5201) contesting DEQ's issuance of the NOC based on OHP's offer to sell the 12 acres. Fr. Response (08-3808), p.2. However, Frontier never alleged that the 12 acres would not be enough to install the wall in its Petition to Intervene (08-5201), or in its September 15, 2008 Petition for Review or subsequent pleadings in EQC Doc. No. 08-3806, or in its Petition for Review in EQC Doc. No. 08-3808. Nor did Frontier inform DEQ of this alleged problem.

Conclusion

The EQC should dismiss Frontier's Petition in its entirety for the reasons set forth above and in DEQ's Motion to Dismiss and Brief in Support of Motion to Dismiss.

DATED this 30th day of January, 2009.



Mike Barrash (Bar No. 5-2310)
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CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the foregoing DEQ'S
REPLY TO FRONTIER'S RESPONSE TO MOTION TO DISMISS, with
exhibits, was served this 30th 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
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DEQ'S EXHIBIT LIST IN DOCKET NO. 08-3808

EXHIBITS TO 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)

**ADDITIONAL EXHIBITS TO DEQ'S REPLY TO FRONTIER'S
RESPONSE TO MOTION TO DISMISS:**

Exh. M. 1995 Administrative Order on Consent (AOC), Sections VI.8. (p.9) & IX (p.11) (EQC Doc. No. 06-5400)

Exh. N. Frontier's July 15, 2008 letter to DEQ

CORRECTIVE MEASURES STUDY (CMS)

8. Frontier shall incorporate the CMS Workplan into the RFI Workplan required above. The CMS Workplan shall be submitted within 60 calendar days of EPA's and the Department's approval of the Final RFI Report. Upon completion of the RCRA Facility Investigation, Frontier shall conduct a Corrective Measure Study in accordance with the approved CMS Workplan and the CMS Scope of Work in Attachment II attached hereto and incorporated by reference as if fully set forth herein.

9. The purpose of the Corrective Measure Study (CMS) is to develop and evaluate the corrective action alternative or alternatives and to recommend the corrective measure or measures to be taken at Frontier's facility. Frontier shall furnish the personnel, materials, and services necessary to prepare the CMS, except as otherwise specified in Attachment II.

SUBMISSIONS/AGENCY APPROVAL/ADDITIONAL WORK

10. Within thirty (30) calendar days of approval or modification by EPA and the Department of any workplan, Frontier shall commence work and implement the tasks required by the workplan submitted pursuant to the Scopes of Work contained in Attachments I, II and III in accordance with the standards, specifications and schedule stated in the workplan as approved or modified by the Department.

11. Beginning with the month following the effective date of this Order, Frontier shall submit to the Department progress reports for each month on the tenth day of the following month. The progress reports shall conform to requirements in relevant Scopes of Work contained in Attachments I, II and III. Frontier may request in writing that the Department limit the scope or frequency of Progress Reports. Such modification of the scope or frequency of progress reports may only be made with the Department's approval.

12. Frontier shall submit draft and final RCRA Facility Investigation and Corrective Measure Study reports to the Department in accordance with the schedule contained in this Order and its attachments.

13. The Department will review all draft or final reports or workplans, and shall notify Frontier in writing of the Department's approval, disapproval or approval with modifications, of the report, workplan or any part thereof. In the event of any disapproval or approval with modification, the Department shall specify the deficiencies and reasons for such disapproval or approval with modification. Within ninety (90) calendar days of receipt of the Department's disapproval or approval with modification of any report or workplan, Frontier shall amend such report or workplan and submit a revised report or workplan. The Department approved reports shall be deemed incorporated into and part of this Order.

14. The Department shall coordinate review of all Frontier submissions with EPA, in conjunction with EPA's administration of the EPA Order, in order to ensure that review periods under this Order and the EPA Order run concurrently.

15. Two (2) copies of all documents, including workplans, preliminary and final reports, progress reports, and other correspondence to be submitted pursuant to this Order shall be hand delivered or sent by certified mail, return receipt requested, to the Department Project Coordinator designated pursuant to section XIII of this Order.

This will remain place at the EPA.

and in the

Doc. No. 08-3808

DEQ EXH. M

16. All work performed pursuant to this Order shall be under the direction and supervision of a professional engineer or geologist with expertise in hazardous waste site cleanup. Frontier shall notify the Department in writing of the name, title, and qualifications of the engineer or geologist, and of any contractors or subcontractors and their personnel to be used in carrying out the terms of this Order within thirty (30) calendar days after the effective date of this Order or date of retention. If the Department objects to the qualifications of the engineer or geologist, the Department will notify Frontier within thirty (30) calendar days after receipt of Frontier's notification pursuant to this section.

17. Based on the results of the RFI, the Department may determine that some solid waste management units or areas of concern pose no significant risk of harm to human health and the environment. The Department shall inform Frontier of any such solid waste management units and areas of concern with no significant risk in the final RFI approval. Frontier may exclude any such solid waste management units or areas of concern with no significant risk from consideration under the CMS.

VII. ADDITIONAL WORK

The Department may determine that certain tasks, including investigatory work or engineering evaluations are necessary to effectuate the purposes of this Consent order, in addition to the tasks and deliverables specifically included in this Consent Order and the approved workplans. If the Department determines that such additional work is necessary, the Department shall request in writing that Frontier perform the additional work, and shall specify the basis and reasons for the Department's determination that the additional work is necessary. Frontier shall respond within fourteen (14) calendar days to the Department's request that Frontier perform additional work. If Frontier disagrees with the Department's determination that additional work is necessary, Frontier shall specify in its response the basis and reasons for disagreeing with the Department's determination. If within fourteen (14) calendar days of Frontier's response the parties are unable to resolve a dispute concerning additional work, the Dispute Resolution provisions in Section XVI may be invoked. Any additional work agreed upon by the parties or added as a result of the dispute resolution procedures shall be incorporated into this Consent Order pursuant to the provisions of Section XXI of this Consent Order, and shall be performed in a manner consistent with this Consent Order.

VIII. QUALITY-ASSURANCE

Throughout all sample collection and analysis activities, Frontier shall use Department-approved quality assurance, quality control, and chain-of-custody procedures as specified in the approved workplans. In addition, Frontier shall:

1. Ensure that laboratories used by Frontier for analyses perform such analyses according to the EPA methods included in "Test Methods for Evaluating Solid Waste" (SW-846, November 1986), or other methods deemed satisfactory to EPA. If methods other than EPA methods are to be used, Frontier shall submit all protocols to be used for analyses to the Department for approval fourteen (14) calendar days prior to the commencement of analyses.

2. Ensure that laboratories used by Frontier for analyses participate in a quality assurance/quality control program equivalent to that which is followed by the Department. As part of such a program, and upon request by the Department, such laboratories shall perform analyses of samples provided by the Department to demonstrate the quality of the analytical data.

3. Inform the Department Project Coordinator fourteen (14) calendar days in advance which laboratories will be used by Frontier and ensure that Department personnel and Department authorized representatives have reasonable access to the laboratories and personnel used for analyses.

4. Use relevant EPA and Department guidance to evaluate all data to be used in the proposed plans and the RFI Report required by Section VI of this Order. This evaluation shall be provided to the Department as part of the RFI Workplan required by Section VI of this Order, and shall be updated as required by the Department.

IX. PUBLIC COMMENT AND PARTICIPATION

1. Upon approval by the Department of a Corrective Measure Study Final Report, the Department shall make both the RCRA Facility Investigation Final Report (or summary of report) and the Corrective Measure Study Final Report (or summary of report) and a summary of the Department's proposed corrective measure and the Department's justification for proposing selection of that corrective measure available to the public for review and comment for at least twenty-one (21) calendar days.

2. Following the public review and comment period, the Department will notify Frontier of the corrective measure selected by the Department. If the corrective measure recommended in the Corrective Measure Study Final Report is not the corrective measure selected by the Department after consideration of public comments, the Department will notify Frontier in writing of the reasons for such decision, and Frontier, subject to its rights under Section XVI herein, shall modify the RFI/CMS as directed to do so by the Department, provided that nothing in this Consent Order shall limit or bar Frontier's right to contest the basis or justification for the Department's corrective measures determination in any subsequent proceedings or procedures for decisionmaking under state laws or regulations, including, but not limited to a Department initiated judicial proceeding associated with implementation or proposed implementation of such measures.

3. Final agency action shall occur when Frontier is subject to a final order directing Frontier to implement the measures in the Corrective Measure Study Final Report, provided that nothing herein shall alter rights of appeal as provided in Section XVI.

4. The Administrative Record supporting the selection of the corrective measure will be available for public review at the following location during normal business hours:

United States Environmental Protection Agency
Region VIII, Library
One Denver Place, 2nd Floor
999 18th Street
Denver, CO 80202-2405

and the

Solid and Hazardous Waste Division
Wyoming Department of Environmental Quality
Herschler Building, 4th Floor
122 West 25th Street
Cheyenne, Wyoming 82002

X. ON-SITE AND OFF-SITE ACCESS

1. The Department and/or any duly authorized Department representative is authorized to enter and move about the Facility during the effective dates of this Order, at reasonable times and in a reasonable manner and without unnecessary interference with Frontier's operations. Upon gaining entrance to the facility, the Department and/or its designated representatives in non-emergency situations, will undergo an orientation briefing not to exceed fifteen minutes in duration on refinery safety rules. The Department's access to the Facility includes, but is not limited to, the following purposes: interviewing Facility personnel and contractors; inspecting records, operating logs, and contracts related to this Order; reviewing the progress of Frontier in carrying out the terms of this Order, using a camera, sound recording, or other documentary type equipment; and to verify any reports and data submitted to the Department by Frontier for purposes of this Order. Frontier shall permit such persons to inspect and copy all records, files, photographs, documents, and other writings, including all sampling and monitoring data that pertains to work undertaken pursuant to this Order, except for information or other materials subject to attorney-client or attorney work product privileges. The Department will afford Frontier the opportunity to be present during all phases of the Department's site visit or inspection. The Department also shall afford Frontier a reasonable opportunity to assert available business confidentiality claims pursuant to applicable state laws and regulations.

The Department will allow Frontier to collect split samples of any samples taken by the Department, and upon request by Frontier, will provide Frontier copies of raw data and/or analytical results, and copies or prints of any recordings, photographs, or other documented materials obtained or developed by the Department to the extent the Department would be required to provide such materials pursuant to applicable state laws or regulations.

2. To the extent that work required by this Order, or workplans prepared pursuant hereto, must be done on property not owned or controlled by Frontier, Frontier shall use its best efforts to obtain site access agreements from the present owner(s) and/or, if appropriate, other persons in control of such property within thirty (30) calendar days of approval of any workplan for which site access is required. Best efforts as used in this paragraph shall include, at a minimum, a certified letter from Frontier to the present owners and other persons in control of such property requesting access agreements to permit Frontier and the Department and its authorized representatives to access such property. Any such access agreement shall be incorporated by reference into this Order. In the event that agreements for access are not obtained within thirty (30) calendar days of the approval by the Department of appropriate workplans or project plans requiring such access, Frontier shall notify the Department in writing within seven (7) calendar days thereafter regarding both the efforts undertaken to obtain access and its failure to obtain such agreements. In the event the Department obtains access, Frontier shall undertake Department approved work on such property. If the lack of access affects any requirement under this Order, Frontier and the Department agree to amend the work plan and its schedules pursuant to Section XXI herein.

3. Nothing in this section limits or otherwise affects the Department's rights of access and entry pursuant to applicable law or regulations.

XI. SAMPLING AND DATA/DOCUMENT AVAILABILITY

1. Frontier shall submit to the Department the results of all sampling, tests, raw data, and all other data generated by or on its behalf pursuant to this Order, in accordance with the requirements of this Order and its attachments. Similarly, the Department shall make such

July 15, 2008

VIA E-MAIL AND REGULAR MAIL

Mr. LeRoy Feusner
Administrator; Solid & Hazardous Waste Division
Wyoming Department of Environmental Quality
122 West 25th Street
Cheyenne, WY 82002

Re: Frontier Refining Inc./Force Majeure Claim

Dear Mr. Feusner:

Your June 16, 2008 letter to Mr. Gerald Faudel determined that Frontier's "lack of access to third party property needed to proceed with work required for remediation of the Porter Draw reservoir and installation of the barrier wall currently continues to constitute a force majeure situation under Section XVII of the AOC" and granted an extension of all access dependent deadlines. Your letter further stated that such deadline extension would terminate in 30 days, unless DEQ determines that Frontier has been unable to obtain necessary access to third party property despite documented best efforts during that 30 day period ending July 16, 2008.

Since the date of your letter, Frontier has continued its diligent efforts to obtain access to the Lummis family property. Despite such efforts, Frontier has been unable to obtain access to the off-site property and, by this letter, reasserts its prior force majeure claims.

A summary of Frontier's access efforts appears below.

Ranch Headquarters Property:

- On May 16, Frontier submitted a revised, redlined access agreement to Elizabeth Temkin, counsel for the Lummis family. Terms of Frontier's access agreement included greater than fair market compensation in exchange for access. After not receiving a reply to Frontier's proposed access agreement, I sent Ms. Temkin a letter on June 26, 2008 inquiring as to whether she or the Lummis family had any comments on the draft agreement. However, as of the date of this letter, Frontier has still not received a response from Ms. Temkin to Frontier's access proposal.

Attorneys and Counselors

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- Although Frontier has not received access to perform remedial activities at the Ranch Headquarters property, Frontier requested and received permission from the Lummis family to proceed with certain pre-construction activities at the Ranch Headquarters Property. Under such authority, from June 25 to June 27 Frontier collected ground water elevation data and sampled monitoring wells on the Lummis property pursuant to the DEQ-approved Unified Sampling Plan.
- During the month of July, Frontier completed installation of a portion of the recovery wells on its own property as part of boundary control efforts.
- On May 22, Frontier submitted a written offer to the Lummis family to purchase 43 acres of Ranch Headquarters property adjacent to the refinery for a total of [REDACTED]. On June 5, 2008, Al Wiederspahn submitted a counteroffer to sell 133 acres of ranch Headquarters property to Frontier for a total of [REDACTED]. Multiple discussions between Frontier and Mr. Wiederspahn concerning the potential sale occurred over the next three weeks.

On June 27, 2008, Mr. Wiederspahn sent a letter to Frontier (a copy of which is attached hereto as Exhibit "A") stating that the Lummis family's offer to sell the 133 acres would terminate at 5 P.M. on July 9, 2008. The letter further stated: "Absent a sales agreement, [the Lummis family] will not grant access for barrier wall construction activities."

Following receipt of Mr. Wiederspahn's letter, Frontier ordered an appraisal (a copy of which is attached hereto as Exhibit "B") of the 133 acre property from one of the leading commercial appraisers in Wyoming. The appraisal estimated the total market value of the 133 acre property at [REDACTED]. Given this valuation, Frontier did not accept the Lummis family's offer to sell the property for more than three times market value.

On July 9, 2008, according to the terms of Mr. Wiederspahn's June 27 letter to Frontier, the Lummis family withdrew its offer to sell to Frontier the property where the barrier wall is required to be located. Given the Lummis family's statement that it will not allow access for barrier wall construction absent a sales agreement, Frontier is currently in an impossible situation - and one which clearly constitutes force majeure under Section XVII of the AOC.

Mr. LeRoy Feusner
July 15, 2008
Page 3


Porter Draw Property

- On May 16, Frontier submitted a revised, redlined access agreement to Elizabeth Temkin, counsel for the Lummis family. Terms of Frontier's access agreement included greater than fair market compensation in exchange for access. After not receiving a reply to Frontier's proposed access agreement, I sent Ms. Temkin a letter on June 26, 2008 inquiring as to whether she or the Lummis family had any comments on the draft agreement. However, as of the date of this letter, Frontier has still not received a response from Ms. Temkin or the Lummis family to Frontier's access proposal.
- Although Frontier does not have access to perform remedial activities at Porter Draw, Frontier continues with efforts to remove the remaining water from Porter Draw. Frontier has removed over 90% of the water in Porter Draw but has been unable to pump water due to the high concentration of algae present and BOPU's refusal to accept the water with those concentrations. Frontier believes those issues have now been resolved and pumping of water from Porter Draw is scheduled to resume today, July 15.

As detailed above, Frontier continues to make best efforts to obtain access to Lummis family property and, to the extent possible, has been performing all pre-construction activities at the Lummis property that it can while access for remedial activities is pending. As such, a force majeure situation continues to exist pursuant to Section XVII of the AOC, and the deadlines for performance of Porter Draw remediation and boundary control activities under the AOC and Joint Stipulation should continue to be extended.

Please let me know if you have any questions. Thank you.

Sincerely,



Kyle Ballard

cc: Mr. Gerald B. Faudel
Mr. John V. Corra
Mr. Mike Barrash
Ms. Lily Barkau
Mr. Tom Aalto
Ms. Brenda Morris
Ms. Elizabeth Temkin
Mr. Al Wiederspahn

