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

ATTORNEY FOR PETITIONER

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

In the Matter of Frontier Refining Inc.'s November 19, 2008 Petition for Review	))))	Docket No. 08-3808

FRONTIER REFINING INC.'S RESPONSE TO WYOMING DEQ'S MOTION TO DISMISS FRONTIER REFINING INC.'S PETITION FOR REVIEW

Frontier Refining Inc. (Frontier) files this response to the Wyoming Department of Environmental Quality's (DEQ's) January 2, 2009 Motion to Dismiss Frontier's Petition for Review (Motion to Dismiss) in Docket No. 08-3808. As detailed below, DEQ's motion is without merit and Frontier requests that the Wyoming Environmental Quality Council (EQC) deny DEQ's motion.[1] The issue of boundary control presented by this appeal has not been decided by DEQ's February 19, 2008 decision, and DEQ's refusal to reconsider that decision in light of materially changed facts and circumstances leads to the inescapable result that the EQC should hear this appeal on its merits.

[1] Frontier's petition in this appeal raised issues concerning the boundary control requirement under the Joint Stipulation, as well as DEQ's incorporation of a barrier wall schedule into the Administrative Order on Consent. Because the schedule issues were disposed of in Frontier's previous appeal in Docket No. 08-3804, this response only addresses issues related to boundary control.

BACKGROUND

DEQ and Frontier entered into an Administrative Order on Consent (AOC) in March of 1995 and Frontier then entered into a Joint Stipulation for Modification of the AOC (Joint Stipulation) on October 17, 2006. The Joint Stipulation contains a "Special Stipulated Corrective Action Schedule" to Section VI of the AOC which included an October 15, 2008 deadline for Frontier to achieve boundary control. The Joint Stipulation did not specify the technology or specific remedy that Frontier is required to use to achieve boundary control. On February 19, 2008, DEQ issued a letter to Frontier requiring construction of a slurry bentonite wall (barrier wall). The February 19, 2008 letter required that a substantial part of the barrier wall be located on property adjacent to the refinery and owned by Old Horse Pasture, Inc. (OHP).

In a March 26, 2008 letter to DEQ, Frontier asserted a force majeure claim under Section XVII of the AOC, based upon Frontier's inability to obtain access to the adjacent OHP property to construct the barrier wall. Frontier also requested that DEQ submit its barrier wall remedy determination for public comment as required by Section IX of the AOC. DEQ acknowledged that the lack of access to the OHP property constituted a force majeure situation under Section XVII of the AOC. However, DEQ refused to submit the barrier wall remedy determination for public comment.

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. On October 3, 2008, Frontier therefore completed purchase of the 133 acres of OHP property.

Following purchase of the OHP property, DEQ and Frontier discussed issues concerning the boundary control requirement in light of Frontier's property purchase. Following DEQ's refusal to reconsider the barrier wall decision, Frontier filed this petition for review on November 19, 2008.

ARGUMENT

The Doctrine of Collateral Estoppel Does Not Bar Frontier's Appeal

DEQ argues that Frontier's appeal should be dismissed because it is an "improper attempt to collaterally attack" DEQ's February 19, 2008 barrier wall determination, a determination that DEQ argues Frontier had a "full and fair opportunity to litigate" but chose not to do so. DEQ's Brief in Support of Motion to Dismiss, p. 7, 8. Contrary to DEQ's assertions, however, Frontier's appeal does not attempt 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.

"The doctrine of collateral estoppel prevents the relitigation of issues which were involved actually and necessarily in the prior action between the same parties." *Osborn v. Manning*, 798 P.2d 1208, 1210 (Wyo. 1990). The factors used in analyzing the application of collateral estoppel are: 1) whether the issue decided in the prior adjudication was identical with the issue presented in the present action; 2) whether the

prior adjudication resulted in a judgment on the merits; 3) whether the party against whom the collateral estoppel is asserted was a party in privity with a party to the prior adjudication; and, 4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issues in the prior proceeding. *RCR Inc. v. Deline*, 190 P.3d 140 (Wyo. 2008). "Collateral estoppel does not apply if the facts and circumstances have changed since the resolution of the first matter." *Osborn v. Manning, supra,* citing *Montana v. United States*, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979) ("It is, of course, true that changes in facts essential to a judgment will render collateral estoppel inapplicable in a subsequent action raising the same issues." *Id.* at 440 U.S. 159 and cited in *Worman v. Carver*, 44 P.3d 82, 88 (Wyo. 2002)).

The stated purpose of the AOC is to "identify and evaluate corrective action alternatives necessary to prevent or *mitigate* any migration or releases of hazardous wastes or hazardous constitutes at or from the Facility."[2] [emphasis added]. AOC Section III. The AOC's definition of the Facility reflects the boundaries of the Frontier refinery as they existed at the time the AOC was drafted. AOC Section IV.2a.

In October 2006, DEQ and Frontier agreed to a modification of the AOC regarding Section VI (Work to be Performed). Included within the agreed modification is a requirement for "implementation of boundary control." Joint Stipulation ¶20. The Joint Stipulation did not specify the method or definition of boundary control.

---

2 In its argument, DEQ incorrectly states that Section III of the AOC and the February 19, 2008 letter call for Frontier to actually "prevent migration of contamination" by "halting it close to its sources at the refinery. . ." DEQ's Brief in Support of Motion to Dismiss, p. 16. Neither Section III of the AOC nor the Joint Stipulation discusses a requirement of building a barrier wall "close to its sources at the refinery."

On February 19, 2008, based upon the facts and circumstances as they existed, DEQ issued its letter determining a barrier wall remedy. At the time of DEQ's decision, Frontier did not have access to the OHP property and Frontier had no way to address groundwater contaminants that had migrated onto that property.

Several months after the DEQ's February 19, 2008 letter, however, the facts and circumstances upon which DEQ based its remedy – and on which Frontier did not appeal this remedy to the EQC at that time – significantly changed. On October 3, 2008, after DEQ notified Frontier that it was required to purchase OHP property as part of "best efforts" to obtain access, Frontier purchased the OHP property adjacent to the facility such that Frontier's property now extends beyond the leading edge of the groundwater plume. As a result, the facts and circumstances upon which the DEQ based its remedy no longer exist.[3] As such, Frontier brought an entirely new issue to light as a result of its purchase of the OHP property, namely, whether boundary control has been satisfied as a result of Frontier's purchase of the OHP property. Such an unforeseen change in facts and circumstances is exactly why there is well-recognized authority dictating that collateral estoppel does not apply in circumstances like the instant one. *See* Restatement (Second) of Judgments Section 28 comment i (1982) ("preclusion should not operate to foreclose redetermination of an issue if it was unforeseeable when the first action was litigated that the issue would arise in the context of the second action, and if that lack of foreseeability may have contributed to the losing party's failure to litigate the issue fully").

---

[3] Further, if Frontier had owned the OHP property at the time DEQ and Frontier were considering an appropriate remedy for boundary control, the remedy specified in the February 19, 2008 letter would neither have been proposed nor executed.

DEQ asserts that Frontier is precluded from arguing that this new factual circumstance satisfies the Joint Stipulation requirement for "implementation of boundary control" because it is a collateral attack on DEQ's February 19, 2008 decision. The error in such an argument is that Frontier is not "relitigating" the February 19, 2008 decision, but is instead asserting that new facts and circumstances have arisen which allow Frontier the opportunity to appeal the DEQ's November 7, 2008 determination that ownership of the former OHP property does not constitute boundary control.

In evaluating the four criteria necessary for the doctrine of collateral estoppel to apply and bar Frontier's appeal, only one of the four factors are met by the circumstances in this matter. DEQ has not (and cannot) demonstrate that the other three criteria are met.

First, the issues in DEQ's February 19, 2008 remedy letter and DEQ's denial of Frontier's claim that it has achieved boundary control through ownership of the property are not identical issues. Second, as discussed below in the next section of this response, DEQ's February 19, 2008 letter did not constitute a "judgment on the merits" because it failed to meet all of the required procedural conditions of the AOC necessary to constitute final agency action. Finally, Frontier did not have the opportunity to litigate the issues now before the EQC because they had not yet arisen. Because Frontier's appeal centers around unforeseen and significant changes in facts and circumstances that did not exist when DEQ issued its barrier wall decision in February 2008, the doctrine of collateral estoppel simply does not apply under Wyoming law, and DEQ's Motion to

Dismiss Frontier's appeal on the grounds of collateral estoppel must therefore be denied.[4]

DEQ's February 19, 2008 Barrier Wall Determination Is Not Subject To Collateral Estoppel Because DEQ Failed to Comply With Public Notice Requirements Necessary To Become Final Agency Action

As discussed above, Frontier's petition in this proceeding is not a direct appeal of DEQ's February 19, 2008 barrier wall decision and therefore is not barred by collateral estoppel. Additionally, as detailed below, 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 in any event.

Section IX of the AOC requires that, upon approval by DEQ of a corrective action measure final report, DEQ shall make the corrective action measure study final report, the facility investigation final report, and DEQ's justification for selection of the corrective measure available to the public for review and comment for at least twenty-one calendar days. AOC Section IX.1. When DEQ approved Frontier's final report for the barrier wall on February 19, 2008, Frontier reminded DEQ in a March 26, 2008 letter (Exhibit 1) that DEQ's decision must be submitted for public comment pursuant to Section IX of the AOC. DEQ, however, refused to do so.

The doctrine of collateral estoppel only applies to final determinations by administrative agencies. *Bender v. Uinta County Assessor*, 14 P.3d 906, 910 (Wyo.

---

[4] DEQ cites to *University of Wyoming v. Gressley*, 978 P.2d 1146, 1154 (Wyo. 1999) for the proposition "Wyoming Rules of Appellate Procedure governing judicial review of agency actions do not provide an exception to the doctrine of collateral estoppel." DEQ's Brief in Support of Motion to Dismiss, p, 10. DEQ's abbreviated summary of the Court's holding misleading. *Gressley* holds that W.R.A.P. 12.12 (a provision allowing a party the right to bring an independent cause of action in district court) does not constitute a statutory exception to the collateral estoppel doctrine. *Gressley* in no way relieves the DEQ from demonstrating that all four requirements of the collateral estoppel doctrine must be met in order for the doctrine to bar Frontier's appeal and in fact lists these four prerequisites to foreclose relitigation. *Gressley* at 1153.

2000); *Gressley*, supra at 1153; *Slavens v. Board of County Com'rs for Uinta County*, 854 P.2d 683, 685 (Wyo. 1993)(collateral estoppel applies to "determinations of administrative bodies that have attained finality"). Paragraph 3 of Section IX of the AOC clearly states that final agency action on a corrective action measure does not occur until DEQ issues a final order to Frontier, which can only occur *after the public notice and comment requirements* in Paragraphs 1 and 2 of Section IX have been satisfied. AOC Section IX.3. Although DEQ asserted in its February 19, 2008 letter to Frontier that the barrier wall determination was "final agency action", DEQ failed to comply with the AOC requirements that actually dictate when a determination becomes final.

Because DEQ has never submitted the barrier wall remedy for public comment, DEQ's February 19, 2008 barrier wall determination does not yet constitute final agency action—and therefore cannot legally serve as the basis for a collateral estoppel claim. Moreover, when DEQ's barrier wall remedy determination is submitted for public comment as required by the AOC, Frontier is confident that public input will strongly support a remedy that addresses the plume in its entirety instead of DEQ's barrier wall remedy that is no longer the most effective or practical remedy available in light of Frontier's purchase of the OHP property.

CONCLUSION AND RELIEF REQUESTED

DEQ's reliance on the doctrine of collateral estoppel to bar Frontier's appeal is misplaced. Collateral estoppel does not apply because of the significant and unforeseen change in facts and circumstances that impact the issue of boundary control. Moreover, DEQ failed to follow the AOC requirements for its decision to be final, such that collateral estoppel cannot apply anyway. Frontier desires to work with DEQ on an

environmentally sensible solution that addresses the groundwater plume in its entirety as opposed to the current remedy that only deals with part of the plume. Granting DEQ's Motion to Dismiss would constitute legal error and ignore the significant change in circumstances bearing on the issue of boundary control. Frontier respectfully requests that the EQC deny DEQ's Motion to Dismiss and set this matter for hearing.

DATED January 26, 2009.

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

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2009, I served the foregoing by placing a true and correct copy thereof in the United States mail, postage prepaid and properly addressed to the following:

Department of Environmental Quality
122 West 25th Street, Herschler Building
4th Floor West
Cheyenne, WY 82002

4434095_1.DOC

Exhibit 1

FRONTIER REFINING INC.
a Subsidiary of Frontier Refining & Marketing Inc.

P.O. BOX 1588
CHEYENNE, WYOMING 82003-1588
(307) 634-3551
FAX (Main Office) (307) 771-8794
FAX (Purchasing) (307) 771-8795

March 26, 2008

Mr. LeRoy C. Feusner, P.E., BCEE
Administrator, Solid and Hazardous Waste Division
Wyoming WDEQ
Herschler Building
122 West 25th St.
Cheyenne, WY 82002

RE: Frontier Refining Inc.
Response to February 19, 2008 WDEQ Letter On Boundary Control Design Report & Implementation
Notice of Force Majeure Claim Under Section XVII of the Administrative Order On Consent

Dear Mr. Feusner:

Frontier Refining Inc. has received your letter dated February 19, 2008 concerning boundary control at the refinery. Although your letter and WDEQ's final decision on the boundary wall came as a surprise to Frontier, Frontier is mobilizing to comply with the requirements set forth in the letter and offers the following response. Also, a detailed response to each of the eleven requirements outlined in your correspondence is included as Attachment A to this letter.

Frontier agrees to install a barrier wall around the refinery and meet the submittal deadlines for: (i) construction and plans for the barrier wall and monitoring system by April 1, 2008; and (ii) a Soils Management Plan by May 1, 2008. Although your letter states that the Joint Stipulation requires boundary control for "the entire boundary" by October 15, 2008, I note that the Joint Stipulation only requires boundary control for the east, south and west portions of the refinery. I do not believe this will be an issue since Frontier agrees, in principle, to the boundary requirements set forth in requirement #4 of your letter. However, some issues remain as to the exact path of the barrier wall, which are discussed in more detail in the attachment to this letter.

Construction activities can begin by June 1, 2008 but will likely be limited to installation of hydraulic control wells on the refinery side of a portion of the barrier wall. Construction of the barrier wall has several complicating issues, including access to the Lummis family property to the east and south, construction interferences with city sanitary and storm sewer lines, several underground pipeline crossings, and overhead power lines. Construction is further complicated by the pond reconstruction project which is required by the January 2007 Consent Decree with WDEQ.

In order to construct the barrier wall, Frontier must obtain an access agreement and a permanent easement from the Lummis family for the areas of the Lummis property on which the barrier wall will be located. Frontier previously attempted to purchase this property and the property around Porter Draw from the Lummis family for a total of $7.5 million in May 2007. However, when the Lummis family refused to sell Frontier a portion of its land and insisted that Frontier purchase all of its land at a total of $30,207,500, no deal was reached. (Correspondence between Frontier and the Lummis family concerning the proposed property purchase is included as Attachment B. Because the proposed purchase related to the Porter Draw property, as well as property adjacent to the refinery, Frontier requests that this attached information also be included as part of Frontier's force majeure claim that was submitted for Porter Draw Work Plan activities on March 20, 2008.)

Following receipt of your February 19, 2008 letter, Frontier submitted an access agreement for the barrier wall to counsel for the Lummis family, Alvin Wiederspahn, on March 19, 2008. Frontier has not received a response from Mr. Wiederspahn to Frontier's request for access, but Frontier was contacted last week by Elizabeth Temkin, an attorney in Denver, Colorado, who stated that she will be lead counsel for the Lummis family for all outstanding access issues. Frontier's counsel has since had preliminary discussions with Ms. Temkin concerning access issues, but no access agreement or easement for the barrier wall has been finalized. Frontier has requested that Ms. Temkin provide documentation from the Lummis family indicating the scope of her authority in dealing with Frontier.

Although Frontier is continuing to work diligently to resolve the construction interference issues noted above and to obtain access to the Lummis family property for areas where the barrier wall will be located, Frontier will not be able to meet the deadlines in your February 19 letter if access is not timely provided. Consequently, Frontier is hereby providing notice that, under Section XVII, Paragraph 4 of the Final Administrative Order on Consent, Frontier's lack of access is a force majeure event. Frontier cannot estimate the length of delay caused by the landowner's failure to provide access. Frontier remains hopeful that access can be obtained and the deadlines in your February 19 letter met, but the force majeure event will continue until the Lummis family grants access. In the meantime, Frontier will proceed with all activities that do not require access and will be prepared to commence all activities that do require access as quickly as possible upon its receipt.

Frontier proposes a meeting during the week of March 31 to discuss the issues in your letter and Frontier's response. Also, since your letter states that it is a "final decision" of WDEQ, Frontier requests that the decision be submitted for public comment pursuant to Section IX of the Administrative Order on Consent.

Finally, with the installation of a barrier wall, which provides an impermeable boundary for groundwater migration from the refinery, Frontier believes there is no longer a need for synthetic liners in surface impoundments 1, 3, 4, and 5. This condition was included under the January 2007 Consent Decree on Water and Waste. Frontier would like to discuss this issue with the agency further.

Please feel free to contact me at 771-8819 so we may arrange a date and time for a meeting.

Sincerely,

David J. Danford

David J. Danford, P.E.
Environmental Manager

cc: Carl Anderson
Lily Barkau (Two Copies by Hand Delivery)
Mike Barrash
Tom Alto
Scott Denton
Alvin Wiederspahn