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UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 8

FILED  
EPA REGION VIII  
HEARING CLERK

Docket No.: RCRA-08-2009-0002

In the Matter of:

Frontier Refining, [sic] Inc.  
2700 East 5<sup>th</sup> Street  
Cheyenne, Wyoming  
82007

§  
§  
§ MOTION TO DISMISS AND BRIEF  
§ IN SUPPORT, ANSWER TO  
§ COMPLAINT AND  
§ COMPLIANCE ORDER AND  
§ REQUEST FOR HEARING

RCRA ID No.: WYD051843613

**Respondent**

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COMES NOW Respondent Frontier Refining Inc. ("Frontier") and files this Motion to Dismiss the Complaint and Compliance Order of the U.S. Environmental Protection Agency Region 8 ("EPA") (the "Complaint"), and such Motion to Dismiss and Brief in Support is followed by Frontier's Answer to the Complaint and Request for Hearing in the above-styled matter.

**MOTION TO DISMISS AND BRIEF IN SUPPORT**

**I.  
INTRODUCTION**

EPA's Complaint alleges Frontier committed Resource Conservation and Recovery Act ("RCRA") violations by routing primary treated wastewaters to a lined pond for temporary holding. As a result of these alleged violations, which notably are void of any assertion that

Frontier actually released a hazardous waste into the environment, EPA is seeking a penalty of nearly seven million dollars.

EPA's Complaint and Compliance Order should be dismissed because EPA has failed to state a claim for which relief can be granted and EPA's allegations are based upon fundamental factual and legal errors by the Agency. More specifically, EPA not only misinterprets the language of the applicable regulations in an effort to manufacture violations where there are none but the Agency also erroneously manipulates the penalty computation to grossly inflate the proposed civil penalty.

## **II. STANDARD OF REVIEW**

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension Permits ("Rules of Practice"), 40 C.F.R. Part 22. The Rules of Practice address motions to dismiss at 40 C.F.R. § 22.20. Section 22.20(a) provides in pertinent part that:

The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

The Environmental Appeals Board considers motions to dismiss under Section 22.20(a) to be analogous to motions for dismissal under Rule 12 (b) (6) of the Federal Rules of Civil Procedure (“FRCP”).<sup>1</sup>

Rule 12 (b) (6) of the FRCP provides for dismissal when the complaint fails to establish “enough facts to raise a reasonable expectation” that discovery will reveal evidence of the claim or element.<sup>2</sup> The complaint is required to provide “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”<sup>3</sup> Furthermore, “[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact.)”<sup>4</sup>

This newly articulated standard replaces the older standard that required the respondent to establish “beyond doubt that the complainant can prove no set of facts in support of [its] claim which would entitle [it] to relief.”<sup>5</sup> The pleading burden now governing the avoidance of dismissal is meaningfully greater because the complainant must now plead “enough facts to state a claim to relief that is plausible on its face.”<sup>6</sup> In considering a respondent’s motion to dismiss the court may not rely upon conclusory allegations or legal conclusions that are

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<sup>1</sup> *In the Matter of Asbestos Specialists, Inc.*, TSCA Appeal No. 92-3, 4 E.A.D. 819, 827 (EAB 1993).

<sup>2</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007).

<sup>3</sup> *Id.* at 55.

<sup>4</sup> *Id.* (citations omitted).

<sup>5</sup> *Id.* at 563 (“The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard”).

<sup>6</sup> *Twombly*, 550 U.S. at 570

disguised as factual allegations, nor should it assume that the complainant can prove facts that it has not alleged.<sup>7</sup>

### **III. DISMISSAL IS APPROPRIATE**

#### **A. EPA Has Failed to State A Claim Upon Which Relief Can Be Granted**

EPA's entire Complaint is dependent upon its assertion that Frontier "received" a specific type of hazardous sludge, (which EPA regulations define as "F037"), in a surface impoundment. However, EPA has only alleged that Frontier sent or "diverted" wastewaters that clearly do not meet EPA's own definition of F037 sludge. (Complaint ¶¶ 43 & 44) As such, EPA fails to allege sufficient facts to state a claim for relief that is plausible on its face as required by law.

Counts 1 – 50 of EPA's Complaint allege that the Frontier violated RCRA by "receiving" F037 waste on fifty separate occasions. Specifically, EPA alleges that "Respondent diverted dry weather flow of untreated wastewater to surface impoundment 2 (also referred to as Pond 2) on at least fifty separate occasions, as detailed on Exhibit A to the Complaint. (Complaint ¶ 43) EPA then leaps directly to the allegation on which its entire Complaint is based: "Respondent's receipt of F037 hazardous waste, on at least fifty distinct occasions into surface impoundment 2, constitutes fifty separate violations of RCRA sections 3005(j)(1) and (6), 42 U.S.C. Sections 6925(j)(1) and (6)." (Complaint ¶ 44) Together, these paragraphs allege that "dry weather flow of untreated wastewater" constitutes "F037 hazardous waste" and that "receipt" of such wastewater in surface impoundment 2 was a

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<sup>7</sup> *Norris v. Hearst Trust*, 500 F.3d 454, 464 (5<sup>th</sup> Cir. 2007).

violation of RCRA. (As a point of interest, Frontier notes that EPA's factual allegation is incorrect and that the wastewater at issue is, in fact, treated, although EPA's Complaint would still be legally insufficient even if it properly pleaded this fact.) EPA's allegations are entirely dependent upon whether the wastewaters that were "diverted" constituted F037 sludge at the point of "receipt" of such wastewaters in Frontier's surface impoundment.

The designation "F037" is given to waste sludges meeting the following description:

Petroleum refinery primary oil/water/solids separation sludge—Any sludge generated from the gravitational separation of oil/water/solids during the storage or treatment of process wastewaters and oil cooling wastewaters from petroleum refineries. Such sludges include, but are not limited to, those generated in oil/water/solids separators; tanks and impoundments; ditches and other conveyances; sumps; and stormwater units receiving dry weather flow. Sludge generated in stormwater units that do not receive dry weather flow, sludges generated from non-contact once-through cooling waters segregated for treatment from other process or oily cooling waters, sludges generated in aggressive biological treatment units as defined in §261.31(b)(2) (including sludges generated in one or more additional units after wastewaters have been treated in aggressive biological treatment units) and K051 wastes are not included in this listing. This listing does include residuals generated from processing or recycling oil-bearing hazardous secondary materials excluded under §261.4(a)(12)(i), if those residuals are to be disposed of.<sup>8</sup>

The operative word in the description is "sludge." This is a sludge specific hazardous waste listing. F037 hazardous wastes are certain sludges that form from certain wastewaters at petroleum refineries. The F037 listing explicitly applies only to the sludges, not to the wastewaters from which they may form.<sup>9</sup> Moreover, F037 sludges are generated only under

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<sup>8</sup> 40 C.F.R. 261.31

<sup>9</sup> This is not to say that wastewaters cannot be classified as "hazardous" under RCRA. They can, if they meet another qualifying criterion, but they would not under any circumstances be identified as "F037." However, EPA bases its entire case on its erroneous belief that Frontier's diversion of wastewater automatically constituted "receipt" of "diverted" F037.

very specific circumstances described in the regulation, i.e. those “generated from gravitational separation of oil/water/solids during the storage or treatment of such wastewaters.” F037 sludges do not, by the definition above, exist until after they have separated, or been generated, from certain types of wastewaters at petroleum refineries. Consequently, F037 sludges cannot exist “in” a wastewater, and a wastewater itself cannot be, and is not, F037 sludge. EPA recognizes that the designation “F037” is applicable only to a sludge. (Complaint ¶¶ 9 & 23) Nevertheless, EPA alleges that F037 sludge has been “received” in a surface impoundment based entirely on its allegation that Frontier “diverted” an untreated wastewater.<sup>10</sup>

In paragraph 21 of the Complaint, EPA highlights portions of the sentence in the F037 listing that states that F037 sludges can include those generated in impoundments and stormwater units receiving dry weather flow. (Complaint ¶ 21) However, EPA failed to highlight the words “generated in” from that sentence which makes it clear that wastewaters themselves entering a surface impoundment are not F037 hazardous waste.

EPA has not alleged that Frontier “diverted” a sludge to surface impoundment 2. Rather EPA has alleged that Frontier “diverted” wastewater<sup>11</sup> and that the “receipt” of such wastewaters in surface impoundment 2 constituted “receipt” of F037. (Complaint ¶¶ 43 & 44) Since F037 is, unambiguously by definition, a sludge that forms from wastewaters, EPA’s

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<sup>10</sup> Frontier notes that EPA’s allegation also is based upon a mistake of fact, although the facts as pled still fail. As documented in Exhibit A of the Complaint, all wastewaters that are the subject of EPA’s complaint were treated wastewaters.

<sup>11</sup> Again, EPA is factually incorrect in alleging that the wastewater at issue is “untreated.” In fact, the wastewater received by Pond 2 in the 50 instances cited by EPA had been through primary treatment prior to going to Pond 2.

allegations in Counts 1 – 50 are impossible, defective and fail to state a claim upon which relief can be granted. Moreover, Counts 51-59 are wholly dependent upon the facts alleged in Counts 1-50 and are therefore also defective and should be dismissed.

**B. EPA’s Penalty Assessment Exceeds the RCRA Statutory Maximum Civil Penalty**

Section 3008(a) of the RCRA, 42 U.S.C. 6928 establishes the authority of the Administrator of the EPA to issue orders assessing civil penalties for any past or current violation of RCRA. Section 3008(g) of RCRA, 42 U.S.C. 6928(g), entitled “Civil Penalty,” sets forth the statutory maximum amount of a person’s liability to the United States for a civil penalty under RCRA. That section states:

Any person who violates any requirement of this subchapter shall be liable to the United States for a civil penalty in an amount not to exceed \$25,000 for each such violation. Each day of such violation shall, for purposes of this subsection, constitute a separate violation. (emphasis added)

The maximum penalty of \$25,000 has been increased several times since RCRA was enacted pursuant to the Federal Civil Penalties Inflation Adjustment Act as amended by the Debt Collection Improvement Act of 1996.<sup>12</sup> Two adjustments to the maximum allowable penalty during the relevant time period set the civil penalty amount at: (i) \$32,500 for violations occurring between March 15, 2004 and January 12, 2009; and (ii) \$37,500 for violations occurring after January 12, 2009. These adjustments were implemented by EPA in

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<sup>12</sup> Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. 3701.

two separate rulemakings.<sup>13</sup> These amounts represent the maximum statutory civil penalties that can be imposed under the laws administered by EPA, including RCRA.<sup>14</sup>

EPA's Complaint states that it is brought under the authority of RCRA. (Complaint ¶ 1) The Complaint has 59 separate Counts alleging 59 violations. Some violations are alleged to be one-time, non-continuing violations, while others are alleged to be multi-day or continuing violations.<sup>15</sup> The RCRA civil penalty that EPA seeks to assess is set forth by Count, in a Section of the Complaint entitled "Proposed Civil Penalty." In this Complaint there are several circumstances, described below, where EPA impermissibly seeks to assess penalties that far exceed the RCRA statutory maximum civil penalties. All occur where EPA alleges discrete violations, as opposed to violations where EPA could assess a multi-day penalty. EPA has no authority to seek or collect penalties that exceed the statutory maximum civil penalty set forth in RCRA.

The specific instances in which EPA illegally attempts to collect more than allowed by law are:

- Paragraph 44 of the Complaint, concerning Counts 1 - 50, alleges "fifty separate violations of RCRA." EPA proposes to assess a penalty of \$4,590,057 for these fifty separate alleged violations. Even assessing a maximum \$37,500 penalty for each and

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<sup>13</sup> Civil Monetary Inflation Adjustment Rule, 69 Fed. Reg. 7121 (Feb. 13, 2004), effective March 15, 2004 amending 40 CFR Part 19 and 2008 Civil Monetary Penalty Inflation Adjustment Rule, 73 Fed. Reg. 75340-46 (Dec. 11, 2008), effective January 12, 2009 amending 40 CFR Part 19.

<sup>14</sup> See *U.S. v. Bethlehem Steel Corp.*, 829 F.Supp. 1023, 1044 (N.D. Indiana 1993).

<sup>15</sup> EPA has developed a RCRA Civil Penalty Policy (the "Policy") that describes how EPA calculates penalties assessed under RCRA. Penalties for discrete violations are calculated as one violation, while penalties for continuing violations may be calculated daily for a determined period of time. There are several components of a penalty under the Policy that, combined, yield the total. The significant components under the Policy are: (i) a gravity based amount, (ii) a multi-day component, if appropriate, and (iii) an amount that is intended to recover the economic benefit of a violation. See *infra* at Footnote 17. EPA has developed a computer model, BEN, that it uses to calculate economic benefit. However, in no case, can a penalty exceed the statutory maximum, despite the output EPA may receive on running its BEN economic benefit analysis.



every of the fifty alleged violations (which Frontier believes would be inappropriate under the circumstances) would yield a penalty of only \$1,875,000.<sup>16</sup>

- Paragraph 61 of the Complaint concerning Count 54, alleges “a violation” of RCRA. EPA proposes to assess a penalty of \$578,772 for this one alleged violation. This is well over ten times in excess of the maximum statutory penalty.
- Paragraph 79 of the Complaint concerning Counts 56 - 57 alleges “two violations” of RCRA. EPA proposes to assess a penalty of \$40,090 per violation for a total of \$80,194. Even assessing a maximum \$37,500 penalty for each of the two alleged violations (which Frontier believes would be inappropriate under the circumstances) would yield only a penalty of \$75,000.
- Paragraph 85 of the Complaint concerning Count 59 alleges “a violation” of RCRA. EPA proposes to assess a penalty of \$247,082 for this one alleged violation. This is approximately six and a half times the maximum statutory penalty.

Furthermore, EPA improperly calculates the economic benefit penalty. In assessing the proposed civil penalty under RCRA, typically EPA considers three factors set forth in the RCRA Penalty Policy: (1) gravity-based component, (2) multi-day component, and (3) economic benefit of noncompliance.<sup>17</sup> However, in this particular case EPA did not follow its own policy and it did not consider the economic benefit of noncompliance as a “factor” in determining the total penalty assessed against Frontier. Instead, EPA erroneously added the economic benefit calculation to its total penalty calculation and in doing so, exceeded the maximum statutory amount. Even if such economic benefit was warranted (which Frontier denies), it is not permitted by RCRA.

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<sup>16</sup> In fact, EPA alleges that thirty-eight of the fifty instances occurred during the time period when the statutory maximum was \$32,500, so the actual statutory maximum allowed would be \$1,685,000.

<sup>17</sup> *Titan Wheel Corp. v. EPA*, 291 F.Supp.2d 899, 920 (S.D. Iowa 2003).

EPA cannot assess or collect a penalty in excess of the RCRA statutory maximum.<sup>18</sup> To allow EPA to do otherwise would render the civil penalty provisions of RCRA meaningless and violate Frontier's right to due process. EPA's penalty assessment on Counts 1-50, 54, 56-57, and 59 must therefore be dismissed as impermissible.<sup>19</sup>

**IV.**  
**CONCLUSION AND REQUEST FOR RELIEF**

As detailed above, EPA's Complaint fails to state a claim upon which relief can be granted. Further, even if EPA meets the pleading burden, its claims still fail to the extent that it seeks a penalty in excess of the statutory maximum. Therefore, Frontier respectfully requests that all claims asserted against Frontier in the Complaint be dismissed.

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<sup>18</sup> *Id.*

<sup>19</sup> Although the Complaint stands alone for the purposes of this Motion to Dismiss, Frontier notes that EPA's Penalty Computation Worksheet and narrative explanation of EPA's determination of the number of violations and the individual components of the total penalty amounts, filed by EPA with the Regional Hearing Clerk, substantiates and confirms the above points. EPA provided the penalty calculation document to Frontier upon request after the Complaint was filed.

## **ANSWER AND REQUEST FOR HEARING**

Now comes Respondent Frontier Refining Inc. (“Frontier”) and, subject to its previously filed Motion to Dismiss and Brief in Support, files this Answer to the Complaint and Requests a Hearing in the above-referenced matter.

### **I.** **INTRODUCTION**

The Complaint alleges Frontier committed several RCRA violations as a result of routing primary treated wastewaters to a lined pond for temporary holding. EPA carries the burden of proving such acts constitute RCRA violations and that such act occurred. Frontier will present legal arguments and factual evidence controverting EPA’s allegations. Frontier will show that in the context of the Complaint EPA has ignored the explicit language of the applicable regulations and disregarded the clear factual evidence. Frontier denies all of the violations alleged by EPA in the Complaint.

### **II.** **FRONTIER’S ADMISSIONS AND DENIALS** **OF COMPLAINT ALLEGATIONS**

The introductory paragraph of the Complaint contains allegations about: (i) the authority under which the Complaint is issued; (ii) the legal authority of the Administrator of the U.S. Environmental Protection Agency (“EPA”) to issue complaints and compliance orders; (iii) delegation of such authority; and (iv) identification of the Complainant and applicable procedural rules. Such allegations constitute conclusions of law which Frontier is not required to admit or deny. Further, Frontier is without knowledge or information sufficient

to form a belief as to the truth of the allegations regarding the delegation of authority referenced in this the introductory paragraph, and therefore cannot admit same. To the extent any allegation in the introductory paragraph of the Complaint is not specifically admitted, it is denied and Frontier demands strict proof thereof.

**A. Frontier's Admissions and Denials of EPA's General Allegations**<sup>20</sup>

The headings specifically recited in the following paragraphs reflect the headings contained in the Complaint and do not constitute Frontier's agreement with the substance or accuracy of such headings.

**Nature of Action**

1. Paragraph 1 of the Complaint contains allegations about the authority under which the Complaint is issued, conclusions about the regulatory status of certain materials, and the legality of the management thereof. Such allegations constitute conclusions of law which Frontier is not required to admit or deny. Further, Frontier is without knowledge or information sufficient to form a belief as to the truth of the allegations regarding the authority under which the Complaint is issued, conclusions about the regulatory status of certain materials, and the legality of the management thereof and therefore cannot admit same. Furthermore, Exhibit A (referenced by footnote in paragraph 1 of the Complaint) is a document which speaks for itself and Frontier is not required to admit or deny the allegations in the footnote or Exhibit A to the Complaint and thus they are denied. Finally, to the extent

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<sup>20</sup> The citations to specific mitigating factors and affirmative defenses throughout Frontier's Answer are for explanatory purposes, however, the absence of a citation to a defense or factor in connection with any given allegation should not be deemed to preclude Frontier from raising any of the defenses or factors. Further, Frontier reserves the right to raise any defense or mitigating factor in response to any allegation in the Complaint.

any allegation in paragraph 1 of the Complaint is not specifically admitted, it is denied and Frontier demands strict proof thereof.

### **Jurisdiction**

2. Paragraph 2 of the Complaint contains allegations regarding EPA's jurisdiction over this matter. Such allegations constitute conclusions of law which Frontier is not required to admit or deny. Further, Frontier is without knowledge or information sufficient to form a belief as to the truth of such allegations and therefore cannot admit same. Finally, to the extent any allegation in paragraph 2 of the Complaint is not specifically admitted, it is denied and Frontier demands strict proof thereof.

3. Paragraph 3 of the Complaint contains allegations about EPA's authority. Such allegations constitute conclusions of law which Frontier is not required to admit or deny. Further, Frontier is without knowledge or information sufficient to form a belief as to the truth of such allegations and therefore cannot admit same. Finally, to the extent any allegation in paragraph 3 of the Complaint is not specifically admitted, it is denied and Frontier demands strict proof thereof.

4. Frontier is without knowledge or information sufficient to form a belief as to the truth of allegations in paragraph 4 of the Complaint and therefore cannot admit same. More specifically, Frontier has no independent knowledge of notice given to the State, the timing of such alleged notice, or whether such alleged notice complies with any cited statutory requirement. Finally, to the extent any allegation in paragraph 4 of the Complaint is not specifically admitted, it is denied and Frontier demands strict proof thereof.

## **Statutory and Regulatory Framework**

5. Paragraph 5 of the Complaint states dates of enactment, a summary of a program established by statute, and citation to regulatory authority. Such allegations constitute summaries and conclusions of law which Frontier is not required to admit or deny. Further, Frontier is without knowledge or information sufficient to form a belief as to the truth of such allegations and therefore cannot admit same. Finally, to the extent any allegation in paragraph 5 of the Complaint is not specifically admitted, it is denied and Frontier demands strict proof thereof.

6. Paragraph 6 of the Complaint contains allegations about delegation of authority by EPA to the State of Wyoming. Such allegations constitute conclusions of law which Frontier is not required to admit or deny. Further, Frontier is without knowledge or information sufficient to form a belief as to the truth of such allegations and therefore cannot admit same. Finally, to the extent any allegation in paragraph 6 of the Complaint is not specifically admitted, it is denied and Frontier demands strict proof thereof.

7. Paragraph 7 of the Complaint purports to summarize a provision of statutory authority. Such allegations constitute conclusions of law which Frontier is not required to admit or deny. Finally, to the extent any allegation in paragraph 7 of the Complaint is not specifically admitted, it is denied and Frontier demands strict proof thereof.

8. Paragraph 8 of the Complaint purports to summarize a provision of statutory authority. Such allegations constitute conclusions of law which Frontier is not required to

admit or deny. Finally, to the extent any allegation in paragraph 8 of the Complaint is not specifically admitted, it is denied and Frontier demands strict proof thereof.

9. Paragraph 9 of the Complaint purports to summarize a promulgation of rules by EPA and the authority under which such rules were promulgated. Such allegations constitute conclusions of law which Frontier is not required to admit or deny. Finally, to the extent any allegation in paragraph 9 of the Complaint is not specifically admitted, it is denied and Frontier demands strict proof thereof.

### Allegations

10. Frontier admits the allegation in paragraph 10 of the Complaint.

11. Paragraph 11 of the Complaint contains legal conclusions and Frontier is not required to admit or deny the contents thereof and therefore denies the allegations of paragraph 11 of the Complaint. Finally, to the extent any allegation in paragraph 11 of the Complaint is not specifically admitted, it is denied and Frontier demands strict proof thereof.

12. Paragraph 12 of the Complaint contains allegations which are legal conclusions and Frontier is not required to admit or deny the contents thereof and therefore denies the allegations of paragraph 12 of the Complaint. Finally, to the extent any allegation in paragraph 12 of the Complaint is not specifically admitted, it is denied and Frontier demands strict proof thereof.

13. Frontier denies it purchased the petroleum refining facility located at 2700 East 5<sup>th</sup> Street, Cheyenne, Wyoming in 1988. The entity known as Frontier Refining Inc. acquired

the Cheyenne Refinery assets in 1988 following a corporate reorganization. Frontier admits the remainder of Paragraph 13 of the Complaint.

14. Frontier denies the allegations of paragraph 14 of the Complaint to the extent it is vague and ambiguous in its use of the undefined terms 'Plant 1' and 'Plant 2' and to the extent the terms 'Plant 1' and 'Plant 2' are used with respect to the refinery as such terms are used informally and do not represent independent operations; in fact, the operation is considered one entity. Further, to the extent any allegation in paragraph 14 of the Complaint is not specifically admitted, it is denied and Frontier demands strict proof thereof.

15. Frontier denies the allegations of the first sentence of paragraph 15 of the Complaint because the use of the term "virtually" is vague and ambiguous and therefore Frontier demands strict proof of such allegation. Further, Frontier admits the remaining allegations of Paragraph 15 of the Complaint. Finally, to the extent any allegation in paragraph 15 of the Complaint is not specifically admitted, it is denied and Frontier demands strict proof thereof.

16. Frontier admits that surface impoundment 2 (referred to herein by Frontier as "Pond 2" or surface impoundment) was constructed in 1989. However, Frontier denies the remainder of the allegations contained in paragraph 16 of the Complaint which contains incomplete and misleading information. Frontier further denies the allegations contained in paragraph 16 of the Complaint as the use of the undefined term "diversions" is misleading. Furthermore, Frontier denies the allegations of paragraph 16 of the Complaint, specifically the second sentence, and demands strict proof thereof. Finally, to the extent any allegation in



paragraph 16 of the Complaint is not specifically admitted, it is denied and Frontier demands strict proof thereof. See Section VIII, ¶¶ 5 & 7.

17. Frontier denies that the depth to groundwater from the bottom of Pond 2 is approximately 5 feet. Depth to groundwater is variable and dependent upon many factors. Frontier admits the remainder of Paragraph 17 of the Complaint. Finally, to the extent any allegation in paragraph 17 of the Complaint is not specifically admitted, it is denied and Frontier demands strict proof thereof. See Section VIII, ¶ 20.

18. Paragraph 18 of the Complaint contains allegations which are legal conclusions and Frontier is not required to admit or deny the contents thereof and therefore denies the allegations of paragraph 18 of the Complaint. Finally, to the extent any allegation in paragraph 18 of the Complaint is not specifically admitted, it is denied and Frontier demands strict proof thereof.

19. Paragraph 19 of the Complaint contains allegations which are legal conclusions and Frontier is not required to admit or deny the contents thereof and therefore denies the allegations of paragraph 19 of the Complaint. Further, Frontier denies the allegations of the first sentence of paragraph 19 of the Complaint because the use of the undefined term “process wastewater” is vague and ambiguous and therefore Frontier cannot admit any allegation in the first sentence of paragraph 19. Furthermore, Frontier specifically denies that all ‘process wastewater’ is diverted to Pond 2 from the headworks of the API separator. Finally, to the extent any allegation in paragraph 19 of the Complaint is not specifically admitted, it is denied and Frontier demands strict proof thereof. See Section VIII, ¶¶ 5 & 7.

20. Frontier denies each and every allegation in paragraph 20 of the Complaint because the use of the undefined terms “numerous times,” “diversions,” “process wastewater,” and “dry weather flow” are vague and ambiguous and therefore Frontier cannot admit any allegation in paragraph 20 of the Complaint. Accordingly, Frontier denies each and every allegation in paragraph 20 of the Complaint and demands strict proof thereof. See Section VIII, ¶¶ 2, 3, 4, 5 & 7.

21. Frontier denies each and every allegation in paragraph 21 of the Complaint because it contains an incomplete and misleading definition of F037 hazardous waste and therefore Frontier cannot admit any allegations in paragraph 21 of the Complaint. Further, Paragraph 21 of the Complaint contains allegations which are legal conclusions and Frontier is not required to admit or deny the contents thereof and therefore denies the allegations of paragraph 21 of the Complaint. Accordingly, Frontier denies each and every allegation in paragraph 21 and demands strict proof thereof.

22. Frontier specifically denies that diverted wastewater meets the definition of F037 and as such denies the allegations asserted in paragraph 22 of the Complaint. Further, paragraph 22 of the Complaint contains allegations which are legal conclusions and Frontier is not required to admit or deny the contents thereof and therefore denies the allegations of paragraph 22 of the Complaint. Accordingly, Frontier denies each and every allegation in paragraph 22 and demands strict proof thereof. See Section VIII, ¶¶ 1, 3, 4, 5, 6 & 7.

23. Frontier denies each and every allegation in paragraph 23 of the Complaint because it contains undefined terms, it purports to summarize a complex regulatory

determination, is incomplete and/or misleading and therefore Frontier cannot admit any of the allegations in paragraph 23 of the Complaint. Further, paragraph 23 of the Complaint contains allegations which are legal conclusions and Frontier is not required to admit or deny the contents thereof and therefore denies all the allegations of paragraph 23 of the Complaint. Accordingly, Frontier denies each and every allegation in paragraph 23 of the Complaint and demands strict proof thereof.

24. Paragraph 24 of the Complaint contains legal conclusions and Frontier is not required to admit or deny the contents thereof. Accordingly, Frontier denies all the allegations of paragraph 24 of the Complaint and demands strict proof thereof.

25. Paragraph 25 of the Complaint contains allegations which are legal conclusions and Frontier is not required to admit or deny the contents thereof and therefore denies all the allegations of paragraph 25 of the Complaint. Accordingly, Frontier denies each and every allegation in paragraph 25 and demands strict proof thereof.

26. Paragraph 26 of the Complaint contains allegations which are legal conclusions and Frontier is not required to admit or deny the contents thereof and therefore denies all the allegations of paragraph 26 of the Complaint. Accordingly, Frontier denies each and every allegation in paragraph 26 and demands strict proof thereof.

27. Paragraph 27 of the Complaint contains allegations which are legal conclusions and Frontier is not required to admit or deny the contents thereof and therefore denies all the allegations of paragraph 27 of the Complaint. Accordingly, Frontier denies each and every

allegation in paragraph 27 and demands strict proof thereof. See Section VIII, ¶¶ 16, 17 & 19.

28. Frontier admits paragraph 28 of the Complaint. See Section VIII, ¶¶ 26 & 47.

29. Frontier is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 29 of the Complaint because it fails to provide any context or date for the actions described therein. Without withdrawing its denial, Frontier admits that on March 2, 2009, Linda Tekrony of EPA National Enforcement Investigations Center (“NEIC”) arrived at the facility for the purpose of conducting an inspection (acting as the ‘lead inspector’ with respect to March 2, 2009 inspection) and identified herself to Mr. David Danford who was Frontier’s Environmental Manager on that date. Frontier denies the allegation that, “access to the facility was granted” to the extent that it implies that Frontier voluntarily agreed or consented to the inspection or its scope in any way. Frontier received a letter dated February 26, 2009 from Gene Lubieniecki, Civil Program Coordinator, NEIC stating that NEIC “will conduct a RCRA inspection at Frontier Refinery, Cheyenne, Wyoming facility beginning March 2, 2009.” Ms. Tekrony’s entry to the facility was based upon that letter and her assertion and exercise of legal enforcement authority to do so. Finally, to the extent any assertion in paragraph 29 of the Complaint is not specifically admitted, it is denied and Frontier demands strict proof thereof. See Section VIII, ¶¶ 26 & 47.

30. Frontier is without knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence of paragraph 30 of the Complaint because it refers to the actions and intentions of parties other than Frontier and therefore Frontier must deny

such allegations. Further, Frontier denies the first sentence of Paragraph 30 of the Complaint because it does not distinguish between the focuses of NEIC, EPA Region 8, EPA headquarters and WDEQ. Frontier cannot know with any certainty the focus of each individual inspector. Moreover, WDEQ is not a party to the Complaint so the Complaint may not speak to WDEQ's focus. Frontier is without knowledge or information sufficient to form a belief as to the truth of the allegations in the second sentence of paragraph 30 because it refers to the actions and intentions of parties other than Frontier and therefore Frontier must deny such allegations. More specifically, with respect to the second sentence of paragraph 30 of the Complaint, Frontier cannot know what areas of compliance NEIC, EPA Region 8, EPA headquarters or WDEQ were not evaluating during the inspection. Accordingly, Frontier denies each and every allegation in paragraph 30 of the Complaint and demands strict proof thereof. See Section VIII, ¶¶ 26 & 47.

31. Frontier is without knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence of paragraph 31 of the Complaint because it is vague and ambiguous in that it does not identify the inspectors who conducted the alleged activities or the dates on which such activities were conducted and therefore Frontier must deny the allegations of paragraph 31. Frontier admits that certain inspectors from NEIC, EPA Region 8, EPA headquarters and/or WDEQ conducted the alleged activities between March 2, 2009 and March 5, 2009, but denies each and every allegation in paragraph 31 in all other respects and demands strict proof thereof. Finally, to the extent any allegation in paragraph 31

of the Complaint is not specifically admitted, it is denied and Frontier demands strict proof thereof. See Section VIII, ¶¶ 26 & 47.

32. Frontier admits it provided Linda Tekrony with a document described as Daily Processing Unit Turnover Reports from May 3, 2006 through March 11, 2009; however, Frontier denies every allegation in paragraph 32 of the Complaint. Finally, to the extent any allegation in paragraph 32 of the Complaint is not specifically admitted, it is denied and Frontier demands strict proof thereof. See Section VIII, ¶ 47.

33. Frontier is without knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence of paragraph 33 because it is vague and ambiguous in that it contains undefined terms such as “diverted flow,” “at least 50 occasions,” and “dry weather events.” Accordingly, Frontier must deny each and every allegation in paragraph 33 of the Complaint and demands strict proof thereof. See Section VIII, ¶¶ 2, 3, 4, & 47.

34. The document identified as Exhibit A to the Complaint speaks for itself and Frontier is not required to admit or deny either Exhibit A or the allegations of paragraph 34 of the Complaint. Accordingly, Frontier denies each and every allegation in paragraph 34 of the Complaint and Exhibit A to the Complaint and demands strict proof thereof. Further, Frontier is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 34 of the Complaint because it is vague and ambiguous in that it contains undefined terms such as “separate diversion occasions.” Accordingly, Frontier must deny

each and every allegation in paragraph 34 of the Complaint and demand strict proof thereof. See Section VIII, ¶¶ 2, 3, 4 & 5.

35. Paragraph 35 of the Complaint purports to summarize the content of a document without directly quoting from it. As such, EPA's attempt to summarize such document is vague and ambiguous and the allegations in paragraph 35 of the Complaint are misleading and must be denied. Further, Frontier denies each and every allegation in paragraph 35 of the Complaint because Frontier did not make any admission of any kind in the September 15, 2009 letter referenced in paragraph 35 of the Complaint. See Section VIII, ¶¶ 18 & 47.

36. Paragraph 36 of the Complaint contains legal conclusions and Frontier is not required to admit or deny the contents thereof. Accordingly, Frontier denies each and every allegation in paragraph 36 of the Complaint and demands strict proof thereof. See Section VIII, ¶¶ 1, 2, 3, 4, 5, 6, 7 & 16.

37. Paragraph 37 of the Complaint purports to summarize provisions of state and federal regulations. Such allegations constitute conclusions of law which Frontier is not required to admit or deny. Accordingly, Frontier denies each and every allegation in paragraph 37 of the Complaint and demands strict proof thereof.

38. Paragraph 38 of the Complaint purports to summarize provisions of state and federal regulations. Such allegations constitute conclusions of law which Frontier is not required to admit or deny. Accordingly, Frontier denies each and every allegation in paragraph 38 of the Complaint and demands strict proof thereof.

## COUNTS 1-50

39. Paragraph 39 of the Complaint purports to summarize provisions of federal law. Such allegations constitute conclusions of law which Frontier is not required to admit or deny. Accordingly, Frontier denies each and every allegation in paragraph 39 of the Complaint and demands strict proof thereof.

40. Paragraph 40 of the Complaint purports to summarize provisions of federal law. Such allegations constitute conclusions of law which Frontier is not required to admit or deny. Accordingly, Frontier denies each and every allegation in paragraph 40 of the Complaint and demands strict proof thereof.

41. Paragraph 41 of the Complaint contains legal conclusions which Frontier is not required to admit or deny. Accordingly, Frontier denies each and every allegation in paragraph 41 of the Complaint and demands strict proof thereof. See Section VIII, ¶¶ 1, 2, 3, 4, 5, 6, 7 & 16.

42. Paragraph 42 of the Complaint contains legal conclusions which Frontier is not required to admit or deny. Accordingly, Frontier denies each and every allegation in paragraph 42 of the Complaint and demands strict proof thereof.

43. Frontier is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 43 because it is vague and ambiguous in that it contains undefined terms such as “at least fifty separate occasions,” and “diverted dry weather flow.” Further, Frontier denies each and every allegation in paragraph 43 of the Complaint because Exhibit A does not reflect any “diversions” of “untreated process wastewater” to Pond 2 and



as such demands strict proof of such allegations. Accordingly, Frontier must deny each and every allegation in paragraph 43 of the Complaint and demands strict proof thereof. See Section VIII, ¶¶ 1, 2, 3, 5, 7, 27 & 41.

44. Frontier specifically denies paragraph 44 of the Complaint with respect to the receipt of F037 waste because Frontier did not “receive” F037 hazardous waste and because it is vague and ambiguous in that it contains undefined terms such as “at least fifty distinct occasions.” Further, paragraph 44 of the Complaint contains legal conclusions which Frontier is not required to admit or deny. Accordingly, Frontier denies each and every allegation in paragraph 44 of the Complaint and demands strict proof thereof. See Section VIII, ¶¶ 1, 2, 3, 4, 5, 6, 7 & 16.

#### **COUNT 51**

45. Paragraph 45 of the Complaint contains legal conclusions which Frontier is not required to admit or deny. Accordingly, Frontier denies each and every allegation in paragraph 45 of the Complaint and demands strict proof thereof.

46. Paragraph 46 of the Complaint contains legal conclusions which Frontier is not required to admit or deny. Accordingly, Frontier denies each and every allegation in paragraph 46 of the Complaint and demands strict proof thereof. See Section VIII, ¶¶ 1, 2, 3, 4, 5, 6, 7 & 16.

#### **COUNTS 52 and 53**

47. Paragraph 47 of the Complaint purports to summarize provisions of federal regulations. Such allegations constitute conclusions of law which Frontier is not required to

admit or deny. Accordingly, Frontier denies each and every allegation in paragraph 47 of the Complaint and demands strict proof thereof.

48. Paragraph 48 of the Complaint restates the location of certain terms defined by federal regulation and such regulations speak for themselves and constitute conclusions of law which Frontier is not required to admit or deny. Accordingly, Frontier denies each and every allegation in paragraph 48 of the Complaint and demands strict proof thereof.

49. Paragraph 49 of the Complaint purports to summarize provisions of federal regulations. Such allegations constitute conclusions of law which Frontier is not required to admit or deny. Accordingly, Frontier denies each and every allegation in paragraph 49 of the Complaint and demands strict proof thereof.

50. Paragraph 50 of the Complaint purports to summarize provisions of federal regulations. Such allegations constitute conclusions of law which Frontier is not required to admit or deny. Accordingly, Frontier denies each and every allegation in paragraph 50 of the Complaint and demands strict proof thereof.

51. Paragraph 51 of the Complaint contains legal conclusions which Frontier is not required to admit or deny. Accordingly, Frontier denies each and every allegation in paragraph 51 of the Complaint and demands strict proof thereof.

52. Paragraph 52 of the Complaint contains legal conclusions which Frontier is not required to admit or deny. Accordingly, Frontier denies each and every allegation in paragraph 52 of the Complaint and demands strict proof thereof. See Section VIII, ¶¶ 1, 2, 3, 4, 5, 6, 7 & 16.

#### COUNT 54

53. Paragraph 53 of the Complaint purports to summarize provisions of state and federal regulations. Such allegations constitute conclusions of law which Frontier is not required to admit or deny. Accordingly, Frontier denies each and every allegation in paragraph 53 of the Complaint and demands strict proof thereof.

54. Paragraph 54 of the Complaint purports to summarize provisions of state and federal regulations. Such allegations constitute conclusions of law which Frontier is not required to admit or deny. Accordingly, Frontier denies each and every allegation in paragraph 54 of the Complaint and demands strict proof thereof.

55. Frontier admits it constructed Pond 2 in 1989 but denies the remainder of the allegations in paragraph 55 of the Complaint. Finally, to the extent any allegation in paragraph 55 of the Complaint is not specifically admitted, it is denied and Frontier demands strict proof thereof. See Section VIII, ¶¶ 1, 2, 3, 4, 5, 6, 7, 16, 17, 27 & 41.

56. Paragraph 56 purports to summarize provisions of state regulations. Such allegations constitute conclusions of law which Frontier is not required to admit or deny. Accordingly, Frontier denies each and every allegation in paragraph 56 of the Complaint and demands strict proof thereof.

57. Frontier is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 57 of the Complaint because it is vague and ambiguous in that it does not identify the source of the requirement set forth therein. Further paragraph 57 purports to summarize provisions of some legal requirement and such allegations

constitute conclusions of law which Frontier is not required to admit or deny. Accordingly, Frontier denies each and every allegation in paragraph 57 of the Complaint and demands strict proof thereof.

58. Paragraph 58 of the Complaint purports to summarize the contents of a response Frontier sent to EPA in 1991. This response is a document which speaks for itself and Frontier is not required to admit or deny a summary of the contents of the document. Further, to the extent paragraph 58 of the Complaint attempts to summarize the content of the document without quoting it, it is vague and ambiguous and Frontier must deny each and every allegation in paragraph 58 and demands strict proof thereof.

59. Paragraph 59 of the Complaint contains legal conclusions and Frontier is not required to admit or deny the contents thereof. Accordingly, Frontier denies each and every allegation in paragraph 59 of the Complaint and demands strict proof thereof. See Section VIII, ¶¶ 16, 17, 19, 27 & 41.

60. Paragraph 60 of the complaint contains speculative allegations with Frontier is not required to admit or deny. Accordingly, Frontier denies each and every allegation in paragraph 60 of the Complaint and demands strict proof thereof. See Section VIII, ¶¶ 10, 11, 12, 13, 15, 16, 17, 19, 20, 27, & 41.

61. Paragraph 61 of the Complaint contains legal conclusions and Frontier is not required to admit or deny the contents thereof. Accordingly, Frontier denies each and every allegation in paragraph 61 of the Complaint and demands strict proof thereof. See Section VIII, ¶¶ 10, 11, 12, 13, 15, 16, 17, 19, 20, 27 & 41.

## COUNT 55

62. Paragraph 62 of the Complaint purports to summarize provisions of state and federal regulations. Such allegations constitute conclusions of law which Frontier is not required to admit or deny. Accordingly, Frontier denies each and every allegation in paragraph 62 of the Complaint and demands strict proof thereof.

63. Paragraph 63 of the Compliant purports to summarize provisions of state and federal regulations. Such allegations constitute conclusions of law which Frontier is not required to admit or deny. Accordingly, Frontier denies each and every allegation in paragraph 63 of the Complaint and demands strict proof thereof.

64. Paragraph 64 of the Compliant purports to summarize provisions of state and federal regulations. Such allegations constitute conclusions of law which Frontier is not required to admit or deny. Accordingly, Frontier denies each and every allegation in paragraph 64 of the Complaint and demands strict proof thereof.

65. Paragraph 65 of the Complaint purports to summarize provisions of state and federal regulations. Such allegations constitute conclusions of law which Frontier is not required to admit or deny. Accordingly, Frontier denies each and every allegation in paragraph 65 of the Complaint and demands strict proof thereof.

66. Paragraph 66 of the Complaint purports to summarize provisions of state and federal regulations. Such allegations constitute conclusions of law which Frontier is not required to admit or deny. Accordingly, Frontier denies each and every allegation in paragraph 66 of the Complaint and demands strict proof thereof.

67. Paragraph 67 of the Complaint purports to summarize provisions of state and federal regulations. Such allegations constitute conclusions of law which Frontier is not required to admit or deny. Accordingly, Frontier denies each and every allegation in paragraph 67 of the Complaint and demands strict proof thereof.

68. Paragraph 68 of the Complaint purports to summarize provisions of state and federal regulations. Such allegations constitute conclusions of law which Frontier is not required to admit or deny. Accordingly, Frontier denies each and every allegation in paragraph 68 of the Complaint and demands strict proof thereof.

69. Paragraph 69 of the Complaint purports to summarize provisions of state and federal regulations. Such allegations constitute conclusions of law which Frontier is not required to admit or deny. Accordingly, Frontier denies each and every allegation in paragraph 69 of the Complaint and demands strict proof thereof.

70. Frontier admits the allegations in paragraph 70 of the Complaint in that it accurately summarizes a portion of the noted document.

71. Frontier is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 71 of the Complaint because it is vague and ambiguous in that it does not identify or define “the inspection” and therefore Frontier must deny any and all allegations in paragraph 71 of the Complaint and demands strict proof thereof.

72. Frontier denies each and every allegation in paragraph 72 of the Complaint because Frontier did not make any admissions as described in paragraph 72 of the Complaint

Accordingly, Frontier denies each and every allegation in paragraph 72 of the Complaint and demands strict proof thereof.

73. Paragraph 73 of the Complaint contains legal conclusions and Frontier is not required to admit or deny the contents thereof. Accordingly, Frontier denies each and every allegation in paragraph 73 of the Complaint and demands strict proof thereof. See Section VIII, ¶¶ 11, 13, 19 & 20.

#### **COUNTS 56 and 57**

74. Paragraph 74 of the Complaint contains allegations about, and summaries of, state and federal regulatory requirements and Frontier is not required to admit or deny the contents thereof. Accordingly, Frontier denies each and every allegation in paragraph 74 of the Complaint and demands strict proof thereof.

75. Paragraph 75 of the Complaint contains allegations about, and summaries of, state and federal regulatory requirements and Frontier is not required to admit or deny the contents thereof. Accordingly, Frontier denies each and every allegation in paragraph 75 of the Complaint and demands strict proof thereof.

76. Paragraph 76 of the Complaint, and its footnote, contain legal conclusions and Frontier is not required to admit or deny the contents thereof. Accordingly, Frontier denies each and every allegation in paragraph 76 of the Complaint and demands strict proof thereof.

77. Paragraph 77 of the Complaint contains legal conclusions and Frontier is not required to admit or deny the contents thereof. Accordingly, Frontier denies each and every allegation in paragraph 77 of the Complaint and demands strict proof thereof.

78. Paragraph 78 of the Complaint contains legal conclusions and Frontier is not required to admit or deny the contents thereof. Accordingly, Frontier denies each and every allegation in paragraph 78 of the Complaint and demands strict proof thereof. See Section VIII, ¶¶ 16, 17, 19, 20, 27 & 41.

79. Paragraph 79 of the Complaint contains legal conclusions and Frontier is not required to admit or deny the contents thereof. Accordingly, Frontier denies each and every allegation in paragraph 79 of the Complaint and demands strict proof thereof. See Section VIII, ¶¶ 16, 17, 19, 20, 27, 29 & 41.

#### **COUNT 58**

80. Paragraph 80 of the Complaint contains allegations about, and summaries of, state and federal regulatory requirements and Frontier is not required to admit or deny the contents thereof. Accordingly, Frontier denies each and every allegation in paragraph 80 of the Complaint and demands strict proof thereof.

81. Paragraph 81 of the Complaint contains allegations about, and summaries of, state and federal regulatory requirements and Frontier is not required to admit or deny the contents thereof. Accordingly, Frontier denies each and every allegation in paragraph 81 of the Complaint and demands strict proof thereof.

82. Paragraph 82 of the Complaint contains legal conclusions and Frontier is not required to admit or deny the contents thereof. Further, Frontier denies all the allegations contained in paragraph 82 of the Complaint as the use of the undefined or identified terms “rules and regulations” is vague and ambiguous thus Frontier is not able to admit any of the



allegations in paragraph 82 of the Complaint. Accordingly, Frontier denies each and every allegation in paragraph 82 and demands strict proof thereof.

83. Paragraph 83 of the Complaint contains legal conclusions and Frontier is not required to admit or deny the contents thereof. Accordingly, Frontier denies each and every allegation in paragraph 83 of the Complaint and demands strict proof thereof. See Section VIII, ¶¶ 16, 17, 19, 20, 27, 29 & 41.

### **COUNT 59**

84. Paragraph 84 of the Complaint contains allegations about, and summaries of, state and federal regulatory requirements and Frontier is not required to admit or deny the contents thereof. Accordingly, Frontier denies each and every allegation in paragraph 84 of the Complaint and demands strict proof thereof.

85. Paragraph 85 of the Complaint contains legal conclusions and Frontier is not required to admit or deny the contents thereof. Accordingly, Frontier denies each and every allegation in paragraph 85 of the Complaint and demands strict proof thereof. See Section VIII, ¶¶ 16, 17, 19, 20, 27, 29 & 41.

### **III.**

#### **RESPONSE TO PROPOSED CIVIL PENALTY**

The portion of the Complaint entitled "Proposed Civil Penalty" does not require a specific response in the Respondent's Answer; however, to the extent the proposed civil penalty is considered, Frontier has not committed the violations specified in the Complaint and specifically denies each and every allegation contained within the "Proposed Civil Penalty"

section of the Complaint and demands strict proof thereof. See Section VIII, ¶¶ 24, 28, 29 & 30. Further, the proposed civil penalty is erroneous on its face because it exceeds the RCRA statutory maximum civil penalty. See Respondent's previously filed Motion to Dismiss. Moreover, EPA's Penalty Computation Worksheet provided to Frontier specifically makes reference to "the attached BEN run" as an explanation of the significant economic benefit calculation. However, that attachment was not included and, despite request by counsel, still has not been provided to Frontier. Consequently, Frontier has been denied a reasonable opportunity to evaluate or formulate a response to that portion of the assessed penalty. Frontier reserves the right to amend this Answer when and if it receives the "BEN run."

To the extent it is determined in this proceeding that Frontier did violate RCRA as provided in the Complaint in any respect, Frontier asserts the proposed civil penalty is arbitrary, capricious, excessive, erroneous, illegal, inconsistent, legally and factually unfounded, and impermissible as proposed in the aggregate as well as the specific. See Frontier's Motion to Dismiss Section III B; 3008(a) of RCRA 42 U.S.C §6928(a) and EPA's RCRA Civil Penalty Policy.

With respect to Counts 1-50, Frontier denies any violation occurred to support the proposed civil penalty. To the extent it is otherwise determined in this proceeding, Frontier states that the Complaint's proposed civil penalty grossly exceeds statutory maximum by at least 2.4 times and ignores the constraints of the applicable statutory penalties. Such a proposed civil penalty is arbitrary, capricious, excessive, erroneous, illegal, inconsistent, legally and factually unfounded and impermissible and should not be assessed. See Frontier's

Motion to Dismiss at Section III B; 3008(a) of RCRA 42 U.S.C. §6928(a) and EPA's RCRA Civil Penalty Policy.

With respect to Count 51, Frontier denies any violation occurred to support the proposed civil penalty. To the extent that it is otherwise determined in this proceeding, Frontier states that the Complaint's proposed civil penalty grossly exceeds the statutory maximum and ignores the constraints of the applicable statutory penalties. Such proposed civil penalty is arbitrary, capricious, excessive, erroneous, illegal, inconsistent, legally and factually unfounded and impermissible and should not be assessed. See Frontier's Motion to Dismiss at Section III B; 3008(a) of RCRA 42 U.S.C. §6928(a) and EPA's RCRA Civil Penalty Policy.

With respect to Counts 52-53, Frontier denies any violation occurred to support the proposed civil penalty. To the extent it is otherwise determined in this proceeding, Frontier states that the Complaint's proposed civil penalty grossly exceeds the statutory maximum and ignores the constraints of the regulations. Such proposed civil penalty is arbitrary, capricious, excessive erroneous, illegal, inconsistent, legally and factually unfounded, and impermissible and should not be assessed. See Frontier's Motion to Dismiss at Section III B; 3008(a) of RCRA 42 U.S.C. §6928(a) and EPA's RCRA Civil Penalty Policy.

With respect to Count 54, Frontier denies any violation occurred to support the proposed civil penalty. To the extent it is otherwise determined in this proceedings, Frontier states that the Complaint's proposed civil penalty is well over 10 times the maximum allowable statutory penalty. Such a proposed civil penalty is arbitrary, capricious, excessive,

erroneous, illegal, inconsistent, legally and factually unfounded and impermissible and should not be assessed. See Frontier's Motion to Dismiss at Section III B; 3008(a) of RCRA 42 U.S.C §6928(a) and EPA's RCRA Civil Penalty Policy. Further, Count 54 specifies violations of State of Wyoming regulations, and then EPA impermissibly seeks to enforce federal penalties for the alleged State of Wyoming violations.<sup>21</sup>

With respect to Count 55, Frontier denies any violation occurred to support the proposed civil penalty. To the extent it is otherwise determined in this proceeding, Frontier states the proposed civil penalty is without adequate support for the assessment. Such a proposed civil penalty is arbitrary, capricious, excessive, erroneous, illegal, inconsistent, legally and factually unfounded and impermissible and should not be assessed. See Frontier's Motion to Dismiss at Section III B; 3008(a) of RCRA 42 U.S.C. §6928(a) and EPA's RCRA Civil Penalty Policy. Further, Count 55 specifies violations of State of Wyoming regulations, and then EPA impermissibly seeks to enforce federal penalties for the alleged State of Wyoming violations.

With respect to Counts 56-57, Frontier denies any violation occurred to support the proposed civil penalty. To the extent it is otherwise determined in this proceeding, Frontier states the proposed civil penalty exceeds the statutory maximum and fails to provide adequate support for the assessment. Such a proposed civil penalty is arbitrary, capricious, excessive, erroneous, illegal, inconsistent, legally and factually unfounded and impermissible and should not be assessed. See Frontier's Motion to Dismiss at Section III B; 3008(a) of RCRA 42

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<sup>21</sup> The state penalties associated with the alleged violations do not exceed \$10,000.00 per day per violation (Wyoming Environmental Quality Act § 35-11-901(a)).

U.S.C. §6928(a) and EPA's RCRA Civil Penalty Policy. Further, Counts 56-57 specify violations of State of Wyoming regulations, and then EPA impermissibly seek to enforce federal penalties for the alleged State of Wyoming violations.

With respect to Count 58, Frontier denies any violation occurred to support the proposed civil penalty. To the extent it is otherwise determined in this proceeding, Frontier states the proposed civil penalty is without adequate support for the assessment. Such a proposed civil penalty is arbitrary, capricious, excessive, erroneous, illegal, inconsistent, legally and factually unfounded and impermissible and should not be assessed. See Frontier's Motion to Dismiss at Section III B; 3008(a) of RCRA 42 U.S.C. §6928(a) and EPA's RCRA Civil Penalty Policy. Further, Count 58 specifies violations of State of Wyoming regulations, and then EPA impermissibly seeks to enforce federal penalties for the alleged State of Wyoming violations.

With respect to Count 59, Frontier denies any violation occurred to support the proposed civil penalty. To the extent it is otherwise determined in this proceeding, Frontier states that the Complaint's proposed civil penalty is 6.5 times the statutory maximum and is without adequate support for the assessment. Such a proposed civil penalty is arbitrary, capricious, excessive, erroneous, illegal, inconsistent, legally and factually unfounded and impermissible and should not be assessed. See Frontier's Motion to Dismiss at Section III B; 3008(a) of RCRA 42 U.S.C. §6928(a) and EPA's RCRA Civil Penalty Policy. Further, Count 59 specifies violations of State of Wyoming regulations, and then EPA impermissibly seeks to enforce federal penalties for the alleged State of Wyoming violations.

Further, Frontier denies and contests EPA's assertion that the proposed civil penalty "was calculated in accordance with EPA's RCRA Civil Penalty Policy ..." (Complaint p. 18) EPA's proposed civil penalty fails to track or comply with the RCRA Civil Penalty Policy in any meaningful way. Further, EPA's Complaint wholly fails to comply with 40 C.F.R. 22.14(a) (4) to the extent it does not provide an adequate statement explaining the reasoning behind the proposed penalty. Such a failure, combined with the EPA's manipulation of the RCRA's Civil Penalty Policy, makes it nearly impossible for Frontier to understand the rationale of the proposed penalty. As such, the Complaint should be dismissed in its entirety.

#### **IV. RESPONSE TO COMPLIANCE ORDER**

The portion of the Complaint entitled "Compliance Order," including but not limited to Paragraphs 86 through 95 of the Complaint, does not require a specific response in Respondent's answer. However, Frontier states it is already in compliance and denies the legitimacy and appropriateness of required actions of the Compliance Order. Further, Frontier responds that the required actions are unreasonable and inappropriate and make no provision for the pond remediation activities underway at the refinery pursuant to the January 2007 Consent Decree with the WDEQ. By way of further explanation of these statements, please see Section VIII at paragraphs 21 and 30. In addition, such required actions are overly harsh and burdensome. Accordingly, Frontier denies same and demands strict proof of each assertion contained in the EPA's proposed Compliance Order.

Frontier states that it is already in compliance with the relevant regulations; however, to the extent it is otherwise determined in these proceedings, Frontier states the direction contained in paragraph 86 of the Complaint is unreasonable in all respects and taking such action is in complete contradiction to the pond remediation activities underway at the refinery pursuant to the January 2007 Consent Decree with the WDEQ.

Frontier states that it is already in compliance with the relevant regulations, however, to the extent it is otherwise determined in these proceedings, Frontier states that the proposed Compliance Order dictating pre-closure and closure activities with respect to Pond 2, (as specified in paragraphs 87, 88, 89, 90, 91, 92, 93, 94 and 95 of the Complaint), are wholly unnecessary, unreasonable, overly harsh and burdensome. The proposed Compliance Order advocates the closure of Pond 2 as a hazardous waste management unit, the status which Frontier denies. Further, even if Pond 2 could be classified as a hazardous waste management unit, it is not ripe for closure and as such the actions dictated in paragraphs 87, 88, 89, 90, 91, 92, 93, 94 and 95 of the Complaint are unwarranted, unnecessary, unreasonable, and should be denied.

#### V.

#### **RESPONSE TO POTENTIAL LIABILITY FOR ADDITIONAL PENALTIES**

The portion of the Complaint entitled "Potential Liability for Additional Penalties" does not require a response in Respondent's Answer, however, Frontier specifically denies it should be subject to any penalties, including any additional penalties, as a result of this proceeding as Frontier is in compliance with the relevant regulations and to the extent it is

otherwise determined, the proposed additional penalties are unreasonable, overly harsh, burdensome and unsupported by fact or law. See Frontier's Motion to Dismiss and Section VIII of Frontier's Answer.

**VI.**  
**REQUEST FOR A HEARING**

Pursuant to Section 3008(b) of RCRA, 42 U.S.C. Section 6928(b), Frontier timely requests an administrative hearing to: (i) contest material facts on which the Complaint is based; (ii) contest the amount of the penalty and the Compliance Ordering provisions as inappropriate; and (iii) seek judgment as a matter of law. The material facts at issue are those that Frontier has denied in the preceding answers to the specific allegations contained in the Complaint, which are explained more fully in the Defenses/Mitigating Factors section of this Answer and Request for Hearing below.

**VII.**  
**SETTLEMENT CONFERENCE**

The portion of the Complaint entitled "Settlement Conference" does not require a response. Respondent has previously indicated its interest in a Settlement Conference and reasserts its interest herein.

**VIII.**  
**DEFENSES/MITIGATING FACTORS**

Without admission of any issues of fact or law, except as expressly stated above, and with full reservation of all applicable rights and defenses, Frontier requests dismissal or



mitigation of the allegations based upon the following factors, all of which are based upon Frontier's information and belief.

**Specific Defenses/Mitigating Factors**

1. Pond 2 did not receive F037 hazardous waste on the fifty occasions set forth in Exhibit A attached to the Complaint. Rather, the water at issue was supernatant that does not meet the regulatory description of F037 waste. The F037 hazardous waste listing is for a sludge, and there is no allegation or evidence of any sludge being "diverted" into Pond 2.

2. The fifty separate occasions of diversions set forth in Exhibit A to the Complaint were not "dry weather flow of untreated process wastewater." On every such occasion, the water had already received primary treatment in the API Separator.

3. Some of the fifty separate occasions involving treated wastewater flow set forth in Exhibit A attached to the Complaint, may have resulted from wet weather events.

4. The F037 hazardous waste listing does not define, among other crucial terms, "wet weather" and "dry weather" and is, therefore ambiguous and void for vagueness.

5. During the relevant time period, Frontier did not "divert" any "dry weather flow" from the headworks of the API Separator.

6. The F037 hazardous waste listing and background documents do not address incidents in which sludges result from intermittent flow and/or upset conditions.

7. To the extent that any wastewater flow was actively sent to Pond 2 during the relevant time period, such flow had been through primary treatment which includes gravitational separation of sludges, removal of solids and skimming of any oily layer.

Additionally, any such flow would have been intermittent, not continuous, or sent to Pond 2 in response to an upset condition.

8. Any treated waters from the API separator that went to Pond 2 would not have contained materials that could form sludges, or would have contained such materials only in *de minimis* quantities.

9. During the relevant period of time, Frontier inspected Pond 2 daily for freeboard, and weekly inspected Pond 2 for deterioration.

10. During the relevant time period and to the present, Pond 2 has and had a 2-foot clay liner and a synthetic liner and, therefore, the potential for migration of any contaminant from Pond 2 is extremely low or non-existent.

11. Frontier has, from time to time, visually inspected the synthetic liner in Pond 2 and has determined it to be sound.

12. Frontier has an extensive groundwater monitoring and groundwater recovery system to address any potential groundwater contamination. In addition, Frontier has constructed a groundwater barrier wall that is downgradient of the refinery and ponds, which would prevent contaminants from reaching Crow Creek or moving off-site of refinery property in groundwater.

13. There is no evidence of releases from Pond 2.

14. There is no sensitive environmental receptor that is threatened by the operation of Pond 2. Moreover, EPA seeks to exaggerate potential harm associated with the operation

of Pond 2 by treating Pond 2 as though it were not located at a controlled-access site that has been operated for nearly a century as a heavy industrial refinery.

15. The contents of Pond 2 consist primarily of wastewaters rather than sludges. Such waters are not F037 hazardous wastes.

16. Respondent did not operate Pond 2 for the management of hazardous waste, contrary to the allegations in the Complaint.

17. Aggressive biological treatment (“ABT”) took place in Pond 2 prior to the time Pond 2 was cleaned out in 2000. The sludges that were removed from Pond 2 in 2000 did not qualify as F037.

18. The sludges removed from Pond 2 were mistakenly identified as F037, albeit in good faith, and disposed as hazardous waste in 2000. The fact that F037 was incorrectly entered on the disposal manifests does not change the actual regulatory status of the sludges as non-F037 wastes, has no adverse impact on the environment, and such prior identification is not dispositive as to the regulatory status of any sludges generated during the relevant time period.

19. Frontier was not required to construct Pond 2 in accordance with the Wyoming hazardous waste regulatory requirements cited in the Complaint because it was an ABT unit and/or because it was not intended or designed to manage so-called “dry weather flow” within the meaning of EPA’s F037 hazardous waste listing.

20. The depth to groundwater from the bottom of Pond 2 is variable. Pond 2 was often empty after 2000 and was routinely examined for deterioration and/or tears.

21. The penalty is based on incorrect facts and assumptions that greatly exaggerate the potential harm associated with the alleged violations.

22. The penalty is excessive and unreasonable under the circumstances.

23. The Compliance Order is unreasonable, overly harsh, and inappropriate in light of the circumstances. It seeks to force Frontier to permanently close a lined storm-water management pond with no evidence of any releases from that pond. The Complaint itself highlights this complete lack of evidence by stating that "...there is no reason to believe that the original liner is functioning as designed..." (Complaint, ¶ 60) In other words, EPA simply assumes that a lined pond is leaking, despite having no demonstrable evidence. The pond is a well-constructed and useful part of Frontier's overall water management practices, and should only require, at a maximum, a periodic cleaning, inspection and, if appropriate, repair. Furthermore, the Compliance Order attempts to force Frontier into treating this pond as though it were a hazardous waste TSDF, with all of the attendant interim status permitting requirements, despite a complete lack of evidence that F037 has ever formed in Pond 2 during the relevant period. Finally, the Order makes no provision for the ongoing pond remediation activities at the refinery pursuant to the January 2007 Consent Decree with the WDEQ.

24. EPA's penalty is illegal on its face because it seeks a penalty that exceeds the applicable statutory maximum penalties allowed by RCRA. In addition to other calculation errors, EPA's own penalty calculation worksheet provided to Frontier by EPA, clearly shows the economic benefit calculations for Counts 1-50, Count 54, Count 56, Count 57, and Count 59 each are added over and above a calculation of the statutory maximum penalty. EPA has

no authority to either seek or collect a penalty that exceeds the maximum penalty provided by law.

25. To the extent the preamble to the rule promulgating the F037 hazardous-waste listing purports to impose obligations that are not in the regulation, the preamble is not a rule and EPA should not be allowed to enforce preamble language that exceeds the authority of the rule itself.

26. Frontier never has received a copy of the NEIC inspection report on which the Complaint and Compliance Order purport to be based, despite requesting it. Frontier reserves the right to amend this Answer and all filed pleadings when, and if, it receives a copy of said report.

27. EPA and DEQ have regularly viewed Pond 2 during inspections and have been aware of the use of Pond 2 for almost two decades and have prejudiced Frontier by their silence. In fact, Frontier's WPDES permit specifically references pond 2 as a lined pond that accepts comingled process water and storm water. As such, any allegations regarding the insufficiency of the construction of Pond 2 are prohibited by estoppel, laches, waiver, and/or the statute of limitations.

28. EPA impermissibly assesses two or more mutually exclusive and incompatible economic benefits scenarios and aggregates the amounts of such calculations resulting in calculations which are riddled with errors and inconsistencies and which therefore cannot be used as a basis for establishing civil penalties.

29. EPA seeks to penalize as independent violations alleged failure to comply with numerous requirements that do not require any different elements of proof. In other words, EPA is impermissibly “double dipping” on penalties.

30. Count 59 seeks to penalize Frontier for an unfounded and purely hypothetical scenario. Even if every allegation of EPA was proven true, Frontier would only be required to establish post-closure care financial assurance if it did not “clean close” the unit in question.

31. EPA fails to meet its burden of proof that Frontier is receiving, managing, and storing F037 hazardous waste in Pond 2. All other alleged violations are dependent upon EPA meeting this burden and, therefore, they fail as well.

32. To the extent that EPA’s findings are based upon unsubstantiated hearsay, such findings fail to support any alleged violations.

33. The numerous critical undefined terms, such as “dry weather” and “wet weather,” create a Complaint so vague as to prevent EPA from establishing a rational and enforceable legal standard under RCRA.

34. Frontier denies that issuance of the Complaint is reasonable or consistent with applicable law because, among other things, many of the alleged violations are entirely past occurrences for which corrective action has been taken.

35. Frontier has demonstrated good-faith efforts to comply with the applicable requirements and has demonstrated a willingness to cooperate with the applicable regulatory authorities.

36. The Complaint in whole or in part fails to state a claim upon which relief can be granted.

37. The Complaint does not consider appropriate mitigating circumstances.

38. The Complaint violates both Frontier's substantive due process and equal protection rights under the U.S. Constitution and the Wyoming Constitution, and has no rational relationship to the legitimate ends of the Resource Conservation and Recovery Act or the Wyoming hazardous waste statutes.

39. The Complaint is arbitrary, capricious, discriminatory, and otherwise not in compliance with law.

40. The Complaint and the methods prescribed for responding thereto do not provide for a fair hearing with respect to Frontier's defenses and therefore violates Frontier's procedural due process rights.

41. EPA's action is barred by estoppel, waiver, laches, statute of limitations or other time-related reasons.

42. Frontier reserves the right to amend or supplement this Answer and/or to assert additional defenses or facts as necessary or appropriate in this proceeding.

43. Frontier is a "small business entity" as defined under regulations promulgated by the U.S. Small Business Administration and the penalty is excessive in view of Frontier's financial status. Further, given the size of the proposed civil-penalty, Frontier reserves its rights to assert an "ability to pay" defense.

44. Frontier reserves its rights to procedures established to protect small business entities under the Small Business Regulatory Enforcement Fairness Act.

45. EPA's Complaint specifically cites to and, in part, relies upon State of Wyoming regulations. EPA then impermissibly seeks to enforce federal penalties for those alleged State of Wyoming violations. Such pleadings are arbitrary, capricious, unsupported by fact or law, inconsistent and any allegation associated with such pleading should be dismissed.

46. The Complaint fails and should be dismissed because it does not include an adequate statement explaining the reasoning behind the proposed penalty as required by 40 C.F.R. 22.14(a) (4).

47. At no time has EPA demonstrated that the inspection that took place was based on probable cause and Frontier objects to the use of any evidence from the inspection that was derived from activities that exceed EPA's statutory and constitutional authority.

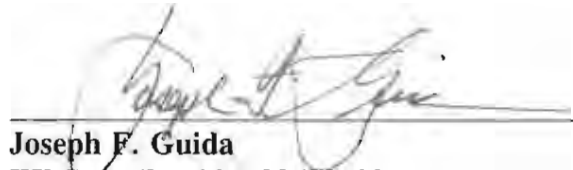
**IX.**  
**PRAYER**

WHEREFORE, Frontier prays that the Complaint be withdrawn with prejudice in whole or in part as it pertains to Frontier, and for such other relief, at law or in equity, to which Frontier may show itself to be justly entitled.



**Respectfully Submitted,**

**GUIDA, SLAVICH & FLORES, P.C.**



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**ATTORNEYS FOR RESPONDENT  
FRONTIER REFINING INC.**

## CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of November 2009, the original Motion to Dismiss and Brief in Support, Answer to Complaint and Compliance Order, and Request for Hearing were filed with the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region 8 and a copy of the same has been sent via certified mail return receipt requested to:

**CERTIFIED MAIL NO. 7160 3901 9845 1529 5476**  
**RETURN RECEIPT REQUESTED**

Brenda L. Morris  
Senior Enforcement Attorney  
U.S. EPA, Region 8  
1595 Wynkoop Street (ENF-L)  
Denver, CO 80202-1129

A handwritten signature in cursive script, appearing to read "Brenda L. Morris", is written over a horizontal line.