

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 8

Docket No.: RCRA-08-2009-0002

2009 DEC 11 PM 2:32

FILED  
EPA REGION VIII  
HEARING CLERK

In The Matter Of: )

Frontier Refining, Inc. )

2700 East 5<sup>th</sup> Street )

Cheyenne, Wyoming )

82007 )

Respondent. )

**MOTION TO AMEND COMPLAINT  
AND SUPPORTING MEMORANDUM**

**MOTION TO AMEND COMPLAINT**

Complainant, the United States Environmental Protection Agency Region 8 (EPA) through the filing of this Motion to Amend Complaint and Memorandum in Support, hereby moves to file a First Amended Complaint, attached as Exhibit 1. EPA is also filing today a Response to Respondent's Motion to Dismiss.

**MEMORANDUM IN SUPPORT OF MOTION TO AMEND**

**I. Background and Procedural History**

The original Complaint was filed on September 30, 2009. On October 6, 2009, Respondent's agent for service of process refused service. On October 15, 2009, Complainant sent the Complaint to Respondent's subsequently named alternate agent for service of process, and service was accepted on October 19, 2009. On October 20, 2009, Complainant provided Respondent with penalty calculations and narratives and filed a status report with the Region 8 Regional Judicial Officer, apprising her of Respondent's agent for service and the date service was accepted and providing copies of the penalty calculations and narratives. On November 17, 2009, Respondent filed its Motion to Dismiss and Brief in Support, Answer to the Complaint and

Compliance Order and Request for Hearing which was served on Complainant on November 19, 2009. On November 19, 2009, the Court ordered the parties to notify her office by December 3, 2009, if the parties wanted to participate in Alternative Dispute Resolution (ADR). On November 25, 2009, Complainant filed a Motion for a one-week extension of time to respond to Respondent's Motion to Dismiss. On December 3, 2009, Complainant declined to participate in ADR prior to responding to the Motion to Dismiss and Respondent conditioned acceptance of ADR on the Motion to Dismiss and Response being allowed to be fully briefed. On December 4, 2009, Administrative Law Judge Barbara A. Gunning, was designated as the Administrative Law Judge to preside in this proceeding.

The Administrative Complaint and Compliance Order filed against the Respondent alleges fifty-nine violations of the Solid Waste Disposal Act, as amended by and hereafter referred to as the Resource Conservation and Recovery Act or RCRA, subtitle C, 42 U.S.C. §§ 6921-6939d, and its implementing regulations<sup>1</sup>. Counts 1-50 of the Complaint allege that Respondent, an owner or operator of a surface impoundment (Pond 2) which failed to meet minimum technology standards and failed to qualify for interim status, received and managed F037 listed hazardous waste in Pond 2 on at least 50 distinct occasions in violation of RCRA sections 3005(j)(1) and (6), 42 U.S.C. §§ 6925(j)(1) and (6). Count 51 alleges that Respondent's storage of F037 listed hazardous waste in Pond 2 from December 26, 2006, through the present, constitutes a continuing violation of RCRA sections 3005(j)(1) and (6), 42 U.S.C. §§ 6925(j)(1)

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<sup>1</sup>Pursuant to section 3006(b) of RCRA, 42 U.S.C. § 6926(b), EPA authorized the State of Wyoming (the State or Wyoming Department of Environmental Quality or WDEQ) to operate a hazardous waste program in lieu of the federal program. (See also, 55 Fed. Reg. 51707 - RCRA Cluster I, HSWA where the equivalent Wyoming regulation for F037 and F038 became the federal requirements in Wyoming.)

and (6). Counts 52 and 53 allege that Respondent failed to manage the P037 hazardous waste in accordance with the applicable requirements of Subpart CC in violation of 40 C.F.R. § 265.231. Count 54 alleges that Respondent failed to construct Pond 2 in accordance with minimum technology requirements and design and operating requirements in violation of Wyoming HWRR, Chapter 11, Section 12(b) (40 C.F.R. § 265.221). Count 55 alleges that Respondent failed to adequately monitor and inspect Pond 2 and record such monitoring and inspections in violation of Wyoming HWRR Chapter 11, Section 12(h)(I) (40 C.F.R. § 265.226) Wyoming HWRR Chapter 11, Section 4(f) (40 C.F.R. § 265.15). Counts 56 and 57 allege that Respondent failed to prepare a closure plan and a post closure plan on or before May 2, 1992, for Pond 2. Count 58 alleges that Respondent's failure to perform a cost estimate for closure of Pond 2 is a continuing violation of Wyoming HWRR Chapter 5, Section 1(c) (40 C.F.R. §§ 265.142(a) and 265.144(a)) and Chapter 11, Sections 9(h) through (i) (40 C.F.R. §§ 265.111 through 265.115), Sections 9(h) through (k) (40 C.F.R. §§ 265.117 through 265.120) and Section 12(j) (40 C.F.R. § 265.228). Lastly, Count 59 alleges that Respondent's failure to establish financial assurance for the closure and post-closure of Pond 2 is a violation of Wyoming HWRR Chapter 5, Section 1(d) (40 C.F.R. §§ 265.143 and 265.145). The Complaint set forth each of the counts with its specific associated penalty and provided notice to Respondent that section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3) authorized the assessment of civil penalty of up to \$37,500 per day per violation. Complainant proposed a penalty of \$6,749,075 against Respondent for these RCRA violations.

## II. The Applicable Standard

Section 22.14(c) of the Consolidated Rules of Practice Governing the Administrative

Assessment of Civil Penalties, Issuance of Compliance or Correction Action Orders, and the Revocation, Termination or Suspension Permits ("Rules of Practice") provides that after an Answer has been filed, the Complainant may amend the complaint only upon motion granted by the Presiding Officer. The Rules of Practice, however, do not provide standards for determining when such motion to amend should be granted. Rule 15(a) of the Federal Rules of Civil Procedure is instructive in that it provides that "leave [to amend a complaint] shall be freely given when justice so requires." The Supreme Court has interpreted Rule 15(a) to mean that leave to amend should be given freely absent undue delay, bad faith, or dilatory motive on the movant's part, repeated failure to cure deficiencies by previous amendment, undue prejudice, or futility of amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962). The most significant of the *Foman* factors is whether the amendment would unduly prejudice the opposing party. *Carroll Oil Company*, 10 E.A.D. 635, 650, 2002 EPA App. LEXIS 14 (EAB 2002). "Injustice resulting to the opposing party which weighs against granting a motion to amend may result from need for additional discovery, delayed litigation, or presentation of new legal theories shortly before trial with attendant legal costs and burdens to the opposing party." *Carroll Oil*, 2002 EPA App. LEXIS 14 \* 42; *Block v. First Blood Associates*, 988 F.2d 344, 350 (2<sup>nd</sup> Cir. 1992). "The need for additional discovery does not conclusively establish prejudice." *Nassetto v. Allegheny Energy, Inc.*, Civ. No. 06-01390 2007 U.S. Dist. LEXIS 79147 \*14-15 (W.D. Pa., Oct. 25, 2007) (no prejudice where trial date was not set, case was less than a year old, and additional discovery could be worked into case schedule). Prejudice may be undue where granting the motion to amend would require opponent to expend significant additional resources to conduct discovery and prepare for trial or significantly delay resolution of the dispute. *Stephanson v. Dan*

*Chemical Co.*, 220 F.R.D. 22, 25 (E.D. NY 2004), citing *Block v. First Blood Associates*, 988 F.2d at 350. In addition, “the court should consider judicial economy and whether the amendments would lead to expeditious disposition of the merits of the litigation.” *Chittmacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F.2d 1157, 1163 (5<sup>th</sup> Cir. 1982).

Prior decisions by the Environmental Appeals Board (EAB) and the Administrative Law Judges also provide some guidance. See, *Matter of Asbestos Specialists, Inc.*, 4 E.A.D. 819, 827-30 (EAB Oct. 6, 1993); *Matter of City of Orlando, Florida*, Dkt. No. CWA-04-501-99 (Aug. 24, 1999) (ALJ Nissen); *Matter of City of West Chicago*, Dkt. No. CWA-5-99-013 (Feb. 25, 2000) (ALJ Gunning); *Matter of Pepperell Associates*, Dkt. No. CWA-2-1-97-1088 (Sept. 16, 1998) (ALJ Gunning), affirmed in part and reversed in part on other grounds, 2000 EPA App. LEXIS 14 (EAB May 10, 2000); *Matter of Richard M. Stern, et al.*, Dkt. No. 5-1SCA-97-007 (Sept. 3, 1997) (ALJ Gunning). Administrative pleadings are intended to be liberally construed and easily amended. See, *Matter of Asbestos Specialists*, 4 E.A.D. at 828 (quoting *Yaffe Iron and Metal Company, Inc. v. U.S. Environmental Protection Agency*, 774 F.2d 1008, 1012 (10<sup>th</sup> Cir. 1985)); *City of Orlando*, supra, slip op. at 3. The EAB has held that a complainant should be given leave to amend the Complaint consistent with the liberal policy of Rule 15(u) of the Federal Rules of Civil Procedure so as to promote accurate decisions on the merits. See, *Matter of Asbestos Specialists*, 4 E.A.D. at 330; *Matter of Part of Coldwell and Great Lakes Dredge and Dock Company*, 4 E.A.D. at 205.

### III. Discussion

Complainant is seeking to amend the Complaint in the following ways:

(1) to consolidate counts 1-51 and count 54 into a single count of illegal storage of F037 listed

hazardous waste in Pond 2 from December 26, 2006, through the present, constituting a continuing violation of RCRA sections 3005, 42 U.S.C. §§ 6925;

(2) to modify and consolidate counts 52 and 53 to more specifically plead the relevant violation cited in the original Complaint;

(3) to change the form of the penalty assessments from a specific penalty assessment to a general penalty reference as allowed under 40 C.F.R. § 22.14(a)(4)(ii); and

(4) to clarify several factual allegations related to the violations cited in the First Amended Complaint.

A. No Undue Prejudice Will Inure to the Respondent

The Motion to Amend the Complaint should be granted because it will not result in any undue prejudice to Respondent. This matter is in the very early stages of litigation as the Complaint was served on Respondent on October 19, 2009, and the Respondent's Answer was filed on November 17, 2009. There has been no schedule established for prehearing exchange, nor has a hearing date been set. Furthermore, the First Amended Complaint is not the result of undue delay, bad faith, or dilatory motive.

Respondent will not be subject to undue prejudice if the First Amended Complaint is allowed because the amendments in fact reduce the number of cited violations and reduce the number of issues upon which there may be contested litigation. The amendments also withdraw the specific penalty assessment to ensure that a revised assessment will reflect not only the reduced number of cited violations, but also any information regarding Respondent's financial condition. See Respondent's Answer at Section VIII, paragraph 43. Finally, the amendments clarify specific factual allegations upon which portions of the cited violations are based, giving

Respondent a clearer indication of Complainant's basis for the alleged violations.

In sum, the First Amended Complaint, rather than resulting in undue prejudice, actually provides a clearer and more succinct pleading for the next steps in this litigation.

B. Denial of the Motion to Amend Would Create Unnecessary Inefficiencies

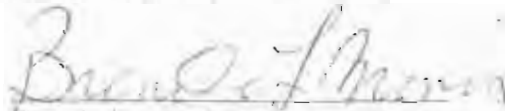
Substantial inefficiencies would result if amendment of the Complaint was not allowed at this time. Complainant might be forced to withdraw the Complaint altogether and re-file the case anew if the Motion was not allowed. Alternatively, the case may proceed to litigation over issues that are addressed and resolved in the First Amended Complaint. Either scenario would require more resources to be expended by the parties and the Tribunal than if amendment were allowed.

As discussed above, the amendments result, in part, with a reduced set of alleged violations, thus reducing the scope and universe of the issues to be litigated.

IV. Conclusion

For the foregoing reasons, Complainant respectfully moves to amend the Complaint with the filing of the First Amended Complaint attached hereto as Exhibit J. A copy of the proposed First Amended Complaint has been served on Respondent as an attachment to this motion.

RESPECTFULLY SUBMITTED this 11th day of December 2009



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Exhibit 1 to Motion to Amend Complaint



UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 8

Docket No.: RCRA-08-2009-0002

In The Matter Of: )  
Frontier Refining Inc. ) FIRST AMENDED COMPLAINT,  
2700 East 5<sup>th</sup> Street ) COMPLIANCE ORDER  
Cheyenne, Wyoming ) AND NOTICE OF OPPORTUNITY  
82007 ) FOR HEARING  
)  
)  
RCRA ID No.: WYD051843613 )  
)  
Respondent. )

FIRST AMENDED COMPLAINT

This civil administrative action is authorized by section 3008 of the Solid Waste Disposal Act, as amended by and hereafter referred to as the Resource Conservation and Recovery Act or RCRA, 42 U.S.C. § 6928. RCRA § 3008 authorizes the Administrator of the United States Environmental Protection Agency (EPA) to issue complaints and compliance orders whenever she determines that any person has violated or is in violation of any requirement of subtitle C of RCRA, 42 U.S.C. §§ 6921-6939d. Complainant in this action is the Assistant Regional Administrator, Office of Enforcement, Compliance and Environmental Justice, EPA Region 8, who has been delegated the authority to issue complaints and compliance orders under RCRA § 3008. This proceeding is subject to EPA's "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits," 40 C.F.R. part 22.

GENERAL ALLEGATIONS

The following paragraphs apply to and are hereby incorporated by this reference into each of the counts of the First Amended Complaint:

### Nature of Action

1. Complainant brings this action under RCRA, as amended, 42 U.S.C. §§ 6901 *et seq.*, to obtain compliance and civil penalties from Frontier Refining Inc. (Respondent) for violations of RCRA and its implementing regulations, including the State of Wyoming's federally authorized hazardous waste program with regard to the illegal management of P037 hazardous waste diverted to surface impoundment 2.

### Jurisdiction

2. EPA has jurisdiction of this matter under section 3008 of RCRA, 42 U.S.C. § 6928.

3. EPA retains full authority to implement the federal hazardous waste program, including the right to conduct inspections under section 3007 of RCRA, 42 U.S.C. § 6927, and to take enforcement actions under sections 3008, 3013, and 7003 of RCRA, 42 U.S.C. §§ 6928, 6834, and 6973.

4. Pursuant to section 3008(a)(2) of RCRA, 42 U.S.C. § 6928(a)(2), EPA has given notice of this action to the State.

### Statutory and Regulatory Framework

5. RCRA was enacted on October 21, 1976, and amended thereafter by, *inter alia* the Hazardous and Solid Waste Amendments of 1984. RCRA establishes a comprehensive program for regulating the generation, transportation, treatment, storage, and disposal of hazardous waste, 42 U.S.C. §§ 6901, *et seq.* Pursuant to its authority under RCRA, EPA has promulgated regulations at 40 C.F.R. parts 260 through 272, which generally prohibit the treatment, storage, or disposal of hazardous waste without a permit or equivalent "interim status."

6. Pursuant to section 3006(b) of RCRA, 42 U.S.C. § 6926(b), EPA authorized the State of Wyoming (the State of Wyoming Department of Environmental Quality or WDEQ) to operate a hazardous waste program in lieu of the federal program. Such authorization was effective on October 18, 1995. All references in this First Amended Complaint and compliance order to State regulations are those State regulations authorized by EPA under section 3006(b) of RCRA through the year 2001. See, 60 Fed. Reg. 38537 (July 27, 1995), 60 Fed. Reg. 51925 (October 4, 1995), 64 Fed. Reg. 09278 (February 25, 1999); 64 Fed. Reg. 19925 (April 23, 1999) and 66 Fed. Reg. 40911 (August 6, 2001).

7. RCRA section 3005(a), 42 U.S.C. § 6925(a), requires that all treatment, storage, and disposal facilities have a permit to operate.

8. RCRA section 3005(e), 42 U.S.C. § 6925(e), establishes that a facility may be treated as having been issued an operating permit until such time as a final permit is issued if the requirements of 3005(e) are met.

9. RCRA section 3005(j)(1), 42 U.S.C. § 6925(j)(1), states that, except for specific cases where an exemption has been met or a variance has been granted, a surface impoundment shall not receive, store, or treat hazardous waste after November 8, 1988, unless it is in compliance with RCRA section 3004(o)(1)(A), 42 U.S.C. § 6924(o)(1)(A), which sets forth the minimum technology standards for new surface impoundments, and qualifies for interim status under RCRA section 3005(e), 42 U.S.C. § 6925(e).

10. Section 3005(j)(6) of RCRA, 42 U.S.C. § 6925(j)(6), specifies that, if a surface impoundment becomes subject to regulation as a result of the listing of a new hazardous waste

under section 3001 of RCRA, 42 U.S.C. § 6921, after November 8, 1988, the four-year period of compliance extends from the date of the promulgation of the newly listed waste<sup>1</sup>.

11. Pursuant to section 3001 of RCRA, 42 U.S.C. § 6921, EPA promulgated two refinery wastewater treatment sludge listings,<sup>2</sup> F037 and F038, on November 2, 1990.<sup>3</sup>

### **Allegations**

12. Respondent is a corporation organized under the laws of Delaware and authorized to do business in Wyoming.

13. Respondent is a "person" as defined in section 1004(15) of RCRA, 42 U.S.C. § 6903(15) and Wyoming's Hazardous Waste Management Rules and Regulations (Wyoming HWRR<sup>4</sup>) Chapter 1, Section (f), (40 C.F.R. § 260.10), and thus, is subject to regulation under RCRA.

14. Respondent is and was at all times relevant to this First Amended Complaint, a generator (commonly referred to as a large quantity hazardous waste generator that generates greater than 1,000 kilograms of hazardous waste per month).

15. Respondent purchased the petroleum refining facility in 1988, located at 2700 East 5<sup>th</sup> Street, Cheyenne, Wyoming (facility). The facility has a crude oil capacity of 52,000 barrels

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<sup>1</sup> November 2, 1994.

<sup>2</sup> See, 55 Fed. Reg. 46354 (November 2, 1990).

<sup>3</sup> *Id.* (See also, 55 Fed. Reg. 51707 - RCRA Cluster I, HS WA where the equivalent Wyoming regulation for F037 and F038 became the federal requirements in Wyoming.)

<sup>4</sup> Section 35-11-503 of the Wyoming Environmental Quality Act gives the State of Wyoming the authority to promulgate rules and regulations for solid waste management facilities and for the management of hazardous wastes.

(bbls) per day and is rated by the North American Industry Classification System (NAICS) and assigned a code of 324110.

16. The refinery is divided into two main processing areas: Plant 1 and Plant 2. Plant 1 contains the delayed coking unit, the storage tank farm, and truck loading dock. Process units in Plant 2 include: a crude oil processing unit, a fluidized catalytic cracker unit (FCCU), a gas concentration unit, a hydrofluoric acid alkylation unit, a butamer unit, a distillate hydrotreater, a naptha hydrotreater, a scaniiner, a platformer, an amine unit, a sulfur recovery unit, a sour water stripper, a hydrogen plant, and a wastewater treatment plant (WWTP).

17. Respondent's WWTP receives process wastewater and storm water from virtually every plant and unit at the facility. Some sources of water to the WWTP include: oily water from the desalter unit that can bypass the oil recovery tank (1K-41) when maintenance is being performed; wastewater from TK-41, coker API separator water; and water from storm water basin 101 (otherwise referred to as surface impoundment 2).

18. Surface impoundment 2, also known as SWB 101 or Pond 2, was constructed in 1989 and collects diversions from the API oil/water separator at the Respondent's WWTP. These diversions occur, in part, when the Respondent's WWTP is not capable of treating the volume of flow coming into the WWTP.

19. The surface impoundment 2 liner consists of 2 feet of clay covered by a high density polyethylene (HDPE) liner. The approximate dimensions of surface impoundment 2 are 190 ft. x 180 ft. x 10 ft. The depth to groundwater from the bottom of the impoundment is approximately 5 ft.

20. Surface impoundment 2 does not meet minimum technical requirements of RCRA section 3004(o)(1)(A) and/or Wyoming HWRR, Chapters 5 and 10 and Chapter 11, Section 1 and Section 12, because it was not constructed with an appropriate double liner system and a leachate collection system.

21. All process wastewater is a "solid waste" as defined in RCRA section 1004(27), 42 U.S.C. § 6903(27), and Wyoming HWRR, Chapter 1, Section (f), and is diverted to surface impoundment 2 from the headworks of the API separator and/or before secondary (biological) treatment.

22. Diversions of process wastewater from the API oil/water separator and/or before secondary (biological) treatment to surface impoundment 2 have occurred numerous times during dry weather flow.

23. Wyoming HWRR, Chapter 2, Section 4(b) defines F037 hazardous waste as "[p]etroleum 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 oily cooling wastewaters from petroleum refineries. Such sludges include, but are not limited to, those generated in oil/water/solids separators; tanks and impoundments ... and stormwater units receiving dry weather flow..." (Emphasis added.)

24. Sludges in, or from, waste water diverted to surface impoundment 2 during dry weather are a "hazardous waste"<sup>5</sup> as defined at section 1004(5) of RCRA, 42 U.S.C. § 6903(5), and listed hazardous waste code F037. (Wyoming HWRR, Chapter 1, Section (f), Chapter 2, Section 1(c) and 40 C.F.R. § 261.3.)

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<sup>5</sup> A "hazardous waste" is a subset of a "solid waste."

25. The F037 hazardous waste listing is assigned to sludges resulting from the first stage of primary treatment where gravitational oil/water/solids separation is performed.

26. Any person whose act or process produces hazardous waste identified or listed in Chapter 2 of the Wyoming HWRR (40 C.F.R. part 261), or whose act first causes a hazardous waste to be subject to regulation, is subject to regulation as a generator of hazardous waste under Wyoming HWRR, Chapter 1(f). (40 C.F.R. § 260.10.)

27. EPA has no evidence that Respondent has ever performed the average VO concentration determination required by Subpart CC.

28. Respondent, to date, has not filed a notification of hazardous waste activity pursuant to RCRA section 3010, 42 U.S.C. §6930 or a Part A permit application under section 3005(e) of RCRA, 42 U.S.C. § 6925(e), by November 2, 1992, for management of the F037 hazardous waste in surface impoundment 2.

29. Respondent, the owner and operator of surface impoundment 2, failed to qualify surface impoundment 2 for operation pursuant to interim status permitting pursuant to Section 3005(e) of RCRA, 42 U.S.C. § 6925(e).

30. Respondent has been prohibited from receiving, storing, or treating hazardous waste in surface impoundment 2 since November 3, 1994. (RCRA sections 3005(j)(1) and (6); 42 U.S.C. § 6925(j)(1) and (6).)

31. On or about March 2, 2009, through March 5, 2009, inspectors from EPA's National Enforcement Investigations Center (NEIC) conducted an on-site inspection of Respondent's facility. The inspection included representatives from NEIC, EPA Region 8, EPA headquarters,

and, for a portion of that time, Wyoming Department of Environmental Quality (WDEQ); hereinafter, collectively referred to as the Inspectors.

32. Linda Jacobson, the EPA Region 8 inspector, presented her credentials to the facility's representative, Mr. David Danforth, Frontier Environmental Manager, and access to the facility was granted.

33. The inspection focused on (1) identifying solid wastes generated on-site and the subsequent management and handling of that waste; and (2) compliance with RCRA at the on-site surface impoundments. Other areas of RCRA compliance were not evaluated during this inspection.

34. During the inspection, the inspectors reviewed facility documents and records, conducted interviews with facility personnel, and participated in a physical inspection of the surface impoundment areas, including surface impoundment 2.

35. As follow-up to the inspection, the Respondent provided Linda Tekrony, NEIC, with a copy of the Daily Processing Unit Turnover Reports from May 3, 2006, through March 11, 2009.

36. Those reports document diverted flow from the API oil/water separator and/or before secondary (biological) treatment to surface impoundment 2 during dry weather events.

37. From, at least, December 26, 2006 through March 11, 2009, process wastewaters have been diverted to surface impoundment 2.

38. In a letter to the NEIC Inspector dated September 15, 2009, Respondent stated the following:

- a. Surface impoundment 2 was last cleaned in 2000;



- b. The sludge cleaned out of surface impoundment 2 in the year 2000, was shipped off-site as a listed hazardous waste (F037);
- c. No samples were taken of the sludge shipped in the year 2000 because the sludge was determined by Respondent based on knowledge of process to be a listed hazardous waste due to dry weather flow of untreated process water;
- d. No specific hazardous constituent or other analyses are done on any water diverted to surface impoundment 2;
- e. No diversions have occurred since July 9, 2009, due to the installation of two new Dissolved Air Floatation (DAF) units and a new equalization tank. The old equalization tank was converted into a diversion tank for handling upsets and the manual diversion pipe from the effluent end of the API influent water to Pond 2 was scheduled to be closed off once the conversion is complete;
- f. Overflow diversion of the API influent water to Pond 2 will still be possible; and
- g. Respondent intended to clean out Pond 2 sometime during or after 2009 and intended to handle and dispose any sludge as a listed (F037) hazardous waste.

39. Respondent has received, stored, and treated hazardous waste in surface impoundment 2, without qualifying for interim status or obtaining a permit or a variance from the State of Wyoming, or meeting any statutory or regulatory exemptions.

40. Wyoming HWRR, Chapter 11, Section 1(i) sets forth minimum standards that define acceptable management of hazardous waste during the period of interim status and until certification of final closure or, if the facility is subject to post-closure requirements, until post-closure responsibilities are fulfilled. (40 C.F.R. § 265.1(a).)

41. Wyoming HWRR, Chapter 11, Section 1(ii) extends the interim status standards to hazardous waste management facilities which have failed to provide timely notification as required by Chapter 1, Section 1(i) and W.S. 35-11-503(d) and/or failed to file a Part A of the permit application as required by Chapter 3, Section 2(a)(v) and (vi). (40 C.F.R. § 265.1(b).)

42. In a letter to the NEIC inspector, dated September 15, 2009, Respondent stated that it checks for freeboard once a day; dikes and vegetation surrounding the dike, at least once a week to detect leaks, deterioration, or failures; and that its personnel routinely observe the available capacity and condition of surface impoundment 2, noting and reporting any problems encountered.

43. During the inspection, Respondent was requested to provide copies of its inspection and monitoring records for surface impoundment 2.

44. Respondent admitted that it did not have any written inspection and/or monitoring records for surface impoundment 2.

#### FOURTH

##### **Storage of Hazardous Waste in an Unauthorized Hazardous Waste Management Unit**

45. RCRA section 3005(j)(1), 42 U.S.C. § 6925(j)(1), states that except for specific cases where an exemption has been met or a variance has been granted, a surface impoundment shall not receive, store, or treat hazardous waste after November 8, 1988, unless it is in compliance with RCRA section 3004(c)(1)(A), which sets forth the minimum technology standards for new surface impoundments, and qualifies for interim status under RCRA section 3005(e), 42 U.S.C. § 6925(e).

46. Section 3005(j)(6) of RCRA, 42 U.S.C. § 6925(j)(6), specifies that if a surface impoundment becomes subject to regulation as a result of the listing of a new hazardous waste under section 3001 of RCRA, 42 U.S.C. § 6921, after November 8, 1988, the four-year period of compliance extends from the date of the promulgation of the newly listed waste.

47. Respondent failed to achieve interim status or obtain a permit for the storage and management of F037 in surface impoundment 2.

48. Surface impoundment 2 does not meet the minimum technical standards set forth in section 3004(o)(1)(A).

49. From, at least, December 26, 2006, through the present, Respondent has stored F037 listed hazardous waste resulting from diverted dry weather flow of process wastewater that fails to meet secondary (biological) treatment to surface impoundment 2.

50. Respondent's storage of F037 hazardous waste in surface impoundment 2 from, at least, December 26, 2006 through the present, constitutes a continuing violation of RCRA sections 3005(a) and (j), 42 U.S.C. §§ 6925(a) and (j).

**COUNT 2**  
**Failure to Control Air Emissions**

51. 40 C.F.R. § 265.231<sup>9</sup> requires the owner or operator to manage hazardous waste placed in a surface impoundment in accordance with the applicable requirements of subpart CC, 40 C.F.R. §§ 265.1080 through 265.1090, which refers to air emission standards for tanks, surface impoundments, and containers.

52. 40 C.F.R. § 265.1083(b) requires owners or operators that manage hazardous waste in surface impoundments to comply with the standards articulated in § 265.1086 or meet the exemption in § 265.1083(c)(1) and determine the average VO concentration at the point of waste origin.

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<sup>9</sup>This First Amended Complaint cites to the federal requirements because Wyoming is not authorized for Subpart CC.

53. Respondent failed to comply with the surface impoundment standards in § 265.1086 during the December 2006 to March 2009 time frame.

54. Respondent's failure to manage the F037 hazardous waste in accordance with the applicable requirements of Subpart CC constitutes a continuing violation of 40 C.F.R. § 265.231.

### COUNT 3

#### Failure to Conduct Monitoring and Inspections at Surface Impoundment 2

55. Wyoming HWRR Chapter 11, Section 12(h)(i) (40 C.F.R. § 265.226) requires owners and operators of facilities that use surface impoundments to treat, store, or dispose of hazardous waste to inspect: (A) the freeboard level at least once each operating day to ensure compliance with Section 12(c), and (B) the surface impoundment, including dikes and vegetation surrounding the dike, at least once a week to detect any leaks, deterioration, or failures in the impoundment.

56. Wyoming HWRR, Chapter 11, Section 4(f)(i) (40 C.F.R. § 265.15(i)), requires owners and operators to inspect for malfunctions, deterioration, operator errors, and discharges which may be causing or may lead to a release of hazardous waste constituents to the environment or a threat to

57. Wyoming HWRR, Chapter 11, Section 4(f)(i)(C) (40 C.F.R. § 265.15(i)(3)), requires owners and operators to identify types of problems which are to be examined during the inspection.

58. Wyoming HWRR, Chapter 11, Section 4(f)(iv) (40 C.F.R. § 265.15(d)) requires the owner or operator to record inspections in an inspection log or summary that is to be kept for three years from the date of inspection.

59. The Respondent's failure to adequately monitor and inspect surface impoundment 2 and record such monitoring and inspections constitutes an ongoing violation of Wyoming HWRR

Chapter 11, Section 12(h)(i) (40 C.F.R. § 265.226) Wyoming HWRR Chapter 11, Section 4(D) (40 C.F.R. § 265.15).

**COUNTS 4 and 5**  
**Failure to Develop Closure and Post-Closure Plans**  
**for Surface Impoundment 2**

60. Wyoming HWRR Chapter 11, Section 9 (40 C.F.R. § 265 subpart G) regulates the closure and post-closure activities of hazardous waste management facilities.

61. Wyoming HWRR Chapter 11, Section 12(j) (40 C.F.R. § 265.228) sets forth the closure and post-closure requirements for surface impoundments.

62. Wyoming HWRR, Chapter 11, Section 9(c) requires Respondent to have had a written closure plan, by May 2, 1992.<sup>7</sup> (40 C.F.R. § 265.112.)

63. Wyoming HWRR Chapter 11, Section 9(i) requires Respondent to have had a written post-closure plan by May 2, 1992. (40 C.F.R. § 265.118.)

64. Respondent failed to prepare a closure plan and a post closure plan on or before May 2, 1992, through the present, for surface impoundment 2.

65. Respondent's failure to develop a closure plan and a post-closure plan for surface impoundment 2, constitutes two continuing violations of Wyoming HWRR, Chapter 11, Section 9 (40 C.F.R. 265 subpart G).

**COUNT 6**  
**Failure to Perform Cost Estimate for Closure of Surface Impoundment 2**

66. Wyoming HWRR Chapter 5, Section 1(c) (40 C.F.R. §§ 265.142(a) and 265.144(a))

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<sup>7</sup>This date represents two years from the date the F037 hazardous waste listing was first promulgated. This state requirement became a requirement of federal law in October 1995. Prior to October 1995, the federal requirement in Wyoming was found at 40 C.F.R. § 265.112.

requires the owner or operator to have a detailed written estimate, in current dollars, of the cost of closing the facility in accordance with the requirements in Chapter 11, Section 9(b) through (f) (40 C.F.R. §§ 265.111 through 265.115) and Chapter 11, Section 12(j) (40 C.F.R. § 265.228).

67. The owner or operator of an interim status hazardous waste management unit must have a detailed written estimate, in current dollars, of the annual cost of post-closure monitoring and maintenance of the facility in accordance with the applicable post-closure regulations in Chapter 11, Sections 9(h) through (k) and 12(j) (40 C.F.R. §§ 265.117 through 265.120 and 40 C.F.R. 265.228).

68. Upon Complainant's information and belief, Respondent, has not performed a cost estimate for closure of surface impoundment 2 in accordance with the rules and regulations.

69. Respondent's failure to perform a cost estimate for closure of surface impoundment 2 constitutes a continuing violation of Wyoming HWRR Chapter 5, Section 1(c) (40 C.F.R. §§ 265.142(a) and 265.144(a)) and Chapter 11, Sections 9(b) through (f) (40 C.F.R. §§ 265.111 through 265.115), Sections 9(h) through (k) (40 C.F.R. §§ 265.117 through 265.120) and Section 12(j) (40 C.F.R. § 265.228).

#### **COUNT 7**

#### **Failure to establish Financial Assurance for Closure and Past-Closure of Surface Impoundment 2**

70. Wyoming HWRR Chapter 5, Section 1(d) (40 C.F.R. §§ 265.143 and 265.145) requires an owner or operator to establish financial assurance for the closure of the facility, and, if that facility is or shall, by virtue of closure with waste in place, become a disposal facility, the facility must establish financial assurance for the post-closure of the disposal units.

71. Respondent failed to establish financial assurance for closure and post-closure of surface impoundment 2, and such failure to establish financial assurance for the closure and post-closure of surface impoundment 2 through the present date, constitutes a continuing violation of Wyoming HWRR Chapter 5, Section 1(d) (40 C.F.R. §§ 265.143 and 265.145).

#### **PROPOSED CIVIL PENALTY**

Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3), authorizes the assessment of a civil penalty of up to \$25,000 per day per violation. The Civil Monetary Inflation Adjustment Rule, 69 Fed. Reg. 7121 (Feb. 13, 2004), effective March 15, 2004, amending 40 C.F.R. Part 19 and 2008 Civil Monetary Penalty Inflation Adjustment Rule, 73 Fed. Reg. 75340-46 (Dec. 11, 2008), effective January 12, 2009, amending 40 C.F.R. Part 19, allows EPA to assess penalties up to \$32,500 per day per violation for violations occurring between March 15, 2004 and January 12, 2009, and \$37,500 per day per violation for violations occurring after January 12, 2009.

Pursuant to 40 C.F.R. 22.14(a)(4)(ii), in lieu of a specific penalty assessment, Complainant herein provides the number and duration of violations for which a penalty is being sought, a brief explanation of the severity of each violation alleged, and a recitation of the statutory penalty authority for each violation alleged in the First Amended Complaint. The severity of each of the violations is based on the circumstances and facts particular to this Respondent's facility.

Since, at least December 2006, the Respondent has been illegally storing F037 hazardous waste in a surface impoundment which lacks a permit, fails to meet interim status requirements, and does not meet minimum technological standards to ensure the prevention and detection of

releases of hazardous waste to the environment<sup>5</sup>. The surface impoundment also poses potential exposure of hazardous waste or constituents to humans, wildlife, or other environmental receptors given that groundwater occurs so close (approximately five feet) to the base of Pond 2. Even if Respondent maintained a two-foot freeboard, the capacity of Pond 2 is over two million gallons of wastewaters and sludges. Pond 2 is located along the southern boundary of the refinery in very close proximity to Crow Creek and a wooded area which attracts wildlife and other ecological receptors. Uncontrolled air emissions from Pond 2 may pose an unacceptable risk to ecological receptors and refinery workers. The Respondent's actions have or may have a substantial adverse effect on the statutory or regulatory purposes and procedures for implementing the RCRA program. Respondent's failure to monitor, inspect, and record observations at Pond 2 prevent Frontier from systematically identifying, correcting, and implementing policies to prevent repeated occurrences.

Respondent's lack of action with regard to closure and post closure of Pond 2, the preparation of cost estimates, and the lack of financial assurance may have a substantial adverse effect on statutory and regulatory purposes or procedures for implementing the RCRA program. The Respondent has no financial assurance established for the illegal impoundment. The potential for an adverse impact on the state and federal governments and the citizens is critical should the Respondent continue to fail to meet this requirement. In Respondent's Answer to the Complaint, Section VIII, paragraph 43, the Respondent's financial viability is raised.

Based on the forgoing Allegations, and pursuant to the authority of Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), and 40 CFR § 10.4, the Complainant proposes that, after considering

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<sup>5</sup>The hazardous constituents for which waste stream F037 was listed include benzene, benzo(a)pyrene, chrysene, lead, and chromium.



the statutory penalty factors set forth at Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3) of RCRA, a Final Order be issued assessing administrative penalties against the Respondent in an amount not to exceed \$32,500 per day per violation for violations occurring between March 15, 2004 and January 12, 2009, and \$37,500 per day per violation for violations occurring after January 12, 2009.

### COMPLIANCE ORDER

Based upon the allegations of the First Amended Complaint, and pursuant to section 3008(a) of RCRA, 42 U.S.C. § 6928(a), and 40 C.F.R. § 22.37, it is hereby ORDERED:

72. Respondent shall immediately halt the addition of any new wastes or waste waters to surface impoundment 2.

73. Pending closure of surface impoundment 2 as required by the approved Closure Plan as defined below, Respondent shall amend the existing Contingency Plan to include surface impoundment 2. The amended plan shall be submitted to EPA within 30 days of the effective date of this order. Wyoming HWRR, Chapter 11, Section 6(e). (40 C.F.R. § 265.54)

74. Pending closure of surface impoundment 2 as required by the approved Closure Plan as defined below, Respondent shall determine the applicability of and the need for an air emission control device by conducting sampling of the wastes in surface impoundment 2 pursuant to the procedures and requirements of 40 C.F.R. §§ 265.231 and 265.1084 and submit the results to EPA within 45 days of the effective date of this order. Pending results of the sampling, further measures to control air emissions from surface impoundment 2, pursuant to 40 CFR § 265.1086, may be warranted and shall be implemented as directed by EPA.

75. Respondent shall assess the adequacy of the existing groundwater monitoring network to determine releases from this unit in accordance with Wyoming HWRR, Chapter 11, Section 8(b) (40 C.F.R. § 265.91) and submit the results of this assessment along with a Groundwater Sampling and Analysis Plan, developed pursuant to the requirements of Wyoming HWRR, Chapter 11, Section 8(c) (40 C.F.R. § 265.92), and a groundwater quality assessment program developed pursuant to Wyoming HWRR, Chapter 11, Section 8(d) (40 C.F.R. 265.93), to EPA within 60 days of the effective date of this order.

76. Within 60 days of the effective date of this order, Respondent shall develop and submit a closure plan for surface impoundment 2 which complies with the closure requirements of Wyoming HWRR Chapter 11, Section 9 (40 C.F.R. 265 subpart G) , and includes the requirements of Wyoming HWRR Chapter 11, Section 12(j) (40 C.F.R. § 265.228) specific to closure of a surface impoundment (Closure Plan).

77. Concurrent with submission of the Closure Plan, Respondent shall submit a cost estimate for closure of surface impoundment 2, consistent with the requirements of Wyoming HWRR Chapter 5, Section 19 The Civil Monetary Inflation Adjustment Rule, 69 Fed. Reg. 7121 (Feb. 13, 2004), effective March 15, 2004, amending 40 C.F.R. Part 19 and 2008 Civil Monetary Penalty Inflation Adjustment Rule, 73 Fed. Reg. 75340-46 (Dec. 11, 2008), effective January 12, 2009, amending 40 C.F.R. Part 19, allows EPA to assess penalties up to \$32,500 for violations occurring between March 15, 2004 and January 12, 2009, and \$37,500 for violations occurring after January 12, 2009. (c) (40 C.F.R. §§ 265.142(a) and 265.144(a)) and Chapter 11, Sections 9(b) through (f) and Section 12(j) (40 C.F.R. § 265.228).

78. Simultaneously with the submittal of the cost estimate, Respondent shall propose the option to be used to establish financial assurance for closure, pursuant to the requirements of Wyoming HWRR Chapter 5, Section 1 (40 C.F.R. §§ 265.143 and 265.145). Upon EPA's approval, Respondent shall establish financial assurance for the closure and post-closure care of surface impoundment 2.

79. Within 60 days of completion of closure of the hazardous waste surface impoundment and within 60 days of completion of final closure, Respondent shall submit a certification that the unit has been closed in accordance with the specifications in the approved Closure Plan. In compliance with Wyoming HWRR, Chapter 11, Section 9(f) (40 C.F.R. § 265.115), Respondent shall submit to the local zoning authority or the authority with jurisdiction over local land use a survey plat, indicating the location and dimensions of hazardous waste disposal units with respect to permanently surveyed benchmarks pursuant to Wyoming HWRR, Chapter 11, Section 9(g) (40 C.F.R. § 265.115).

80. Within 60 days of the effective date of this order, Respondent shall submit for EPA review and approval a post-closure care plan and post-closure care cost estimate for surface impoundment 2, pursuant to the requirements of Wyoming HWRR, Chapter 11, Section 9(i) (40 C.F.R. §§ 265.118) and Chapter 5, Section 1(c) (40 C.F.R. §§ 265.144).

81. Within 30 days of approval of the post-closure plan, cost estimate, and proposed option for establishing financial assurance, Respondent shall establish the financial instrument for post-closure care Wyoming HWRR, Chapter 5, Section 1(d) (40 C.F.R. §§ 265.145). Alternatively and consistent with Wyoming HWRR, Chapter 5, Section 1(g) (40 C.F.R. 265.146), Respondent may

satisfy the requirements for financial assurance for both closure and post-closure care by using one mechanism that meets the specifications in Section 1(d) of Chapter 5.

### **POTENTIAL LIABILITY FOR ADDITIONAL PENALTIES**

Pursuant to section 3008(c) of RCRA, 42 U.S.C. § 6928(c), a respondent who fails to achieve compliance within the time specified in a compliance order is liable for an additional civil penalty of up to \$37,500 for each day of continued noncompliance. Such continued noncompliance may also result in suspension or revocation of any RCRA permits issued by EPA.

### **OPPORTUNITY TO REQUEST A HEARING**

As provided in section 3008(b) of RCRA, 42 U.S.C. § 6928(b), you have the right to request a public hearing within 30 days of service of this First Amended Complaint. If you wish to (1) contest any material fact upon which the First Amended Complaint is based; (2) contend that the amount of the penalty, revocation or suspension proposed is inappropriate; or (3) contend that you are entitled to judgment as a matter of law, you must file a written answer in accordance with 40 C.F.R. §§ 22.15 and 22.37 within 30 days of the filing of this First Amended Complaint.

Your answer must (1) clearly and directly admit, deny, or explain each of the factual allegations contained in the First Amended Complaint; (2) briefly state the circumstances or arguments which are alleged to constitute grounds of defense; (3) state the facts intended to be placed at issue, and (4) specifically request an administrative hearing, if desired. 40 C.F.R. § 22.15(b). The denial of any material fact or the raising of any affirmative defense in your answer shall be construed as a request for a hearing. Failure to deny any of the factual allegations in this First Amended Complaint will constitute an admission of the undenied allegations.

The original of the answer and all other documents served in this proceeding must be filed with the Regional Hearing Clerk, U.S. EPA Region 8, (8RC), 1595 Wynkoop St, Denver, Colorado 80202-1129. A copy of the answer and all other documents filed in this action must be served on the attorney listed below.

**IF YOU FAIL TO REQUEST A HEARING, YOU WILL WAIVE YOUR RIGHT TO CONTEST FORMALLY ANY OF THE ALLEGATIONS SET FORTH IN THE FIRST AMENDED COMPLAINT.**

**IF YOU FAIL TO FILE A WRITTEN ANSWER WITHIN THE THIRTY (30) DAY TIME LIMIT, A DEFAULT JUDGMENT MAY BE ENTERED PURSUANT TO 40 C.F.R. § 22.17. THIS JUDGMENT MAY IMPOSE THE PENALTY PROPOSED IN THE FIRST AMENDED COMPLAINT.**

#### SETTLEMENT CONFERENCE

EPA encourages the exploration of settlement possibilities through an informal settlement conference. Please note that a request for, scheduling of, or participation in a settlement conference does not extend the period for filing an answer and request for hearing as set out above. The settlement process, however, may be pursued simultaneously with the administrative litigation procedures found in 40 C.F.R. Part 22. If a settlement can be reached, its terms shall be expressed in a written consent agreement, signed by the parties and incorporated into a final consent order by the Regional Judicial Officer.

A request for a settlement conference, or any questions that you may have regarding this First Amended Complaint and compliance order, should be directed to the undersigned attorney.

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 8, Office of Enforcement, Compliance  
and Environmental Justice, Complainant.

Date: 12/16/09 Michael T. Bioner  
for Andrew M. Gaydoski,  
Assistant Regional Administrator  
Office of Enforcement, Compliance  
and Environmental Justice

Date: 12-11-09 Brenda L. Morris  
Brenda Morris, Enforcement Attorney  
U.S. EPA, Region 8

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and one true copy of the Motion to Amend Complaint and Supporting Memorandum, was hand-carried to the Regional Hearing Clerk, EPA Region 8, 1595 Wynkoop St., Denver, Colorado, and that a true copy of the same was sent via USEPA Pouch mail to:


The Honorable Barbara A. Gunning  
Administrative Law Judge  
Office of Administrative Law Judges  
U. S. EPA. Mail Code 1900L  
Ariel Rios Building  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

and sent, via first class U.S. mail to:

Joseph F. Guida  
Guida, Slavich & Flores, P.C.  
750 N. St. Paul Street, Suite 200  
Dallas, Texas 75201-3205

Date: December 11, 2009

By:

  
Judith M. McLernan