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:	)	**RESPONSE TO MOTION TO DISMISS AND BRIEF IN SUPPORT**
	)	
Frontier Refining, Inc.	)	
	)	
2700 East 5th Street Cheyenne, Wyoming 82007	)	
	)	
Respondent.	)	

Complainant, the United States Environmental Protection Agency Region 8 (EPA) files this Response to the Motion to Dismiss and Brief in Support filed by Frontier Refining, Inc. (Frontier or Respondent) on November 17, 2009. Simultaneously with this Response to Motion to Dismiss, EPA is filing a Motion to Amend the Complaint and First Amended Complaint as separate pleadings in this matter.

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.

RESPONSE TO MOTION TO DISMISS

I. Introduction

Respondent's Motion to Dismiss and Brief in Support asserts that EPA failed to state a claim upon which relief can be granted and exceeded the RCRA section 3008(a) statutory maximum civil penalty. In support of its position, Respondent selectively ignores the factual and legal bases clearly stated in the Complaint for the violations asserted and creates the illusion of an insufficient claim for relief based upon EPA's use of the statutory term, "received." Additionally, as pled in the Complaint, "Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3), authorizes the assessment of a civil penalty of up to $37,500 per day per violation." EPA has filed a separate Motion to Amend the Complaint and First Amended Complaint, which if granted, would appear to render Respondent's arguments moot in that the amendments 1) consolidate counts to obviate the issues raised by Respondent; and 2) withdraw the specific penalty assessment in favor of a general penalty authority recitation as provided for in 40 C.F.R. § 22.14(a)(4(ii).

II. Standard of Review

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), govern this proceeding. 40 C.F.R. Part 22. The Rules of Practice provide that the Presiding Officer may dismiss a proceeding "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." 40 C.F.R. § 22.20(a). The Environmental Appeals Board considers motions to dismiss under Section 22.20(a) analogous to motions to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *In the Matter of Asbestos Specialists, Inc.*, TSCA Appeal No. 92-3, 4 E.A.D. 819, 827 (EAB 1993).

To survive a Rule 12 (b) (6) Motion to Dismiss, a plaintiff is obligated to provide the grounds of his entitlement to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 556 (2007). This requirement "simply calls for enough facts to raise a reasonable expectation" that discovery will reveal evidence of the claim. Id. A complaint attacked by a 12 (b) (6) motion does not need detailed factual allegations, however, a "formulaic recitation of the elements of a cause of action will not do." Id. at 555. This newly articulated standard requires a complainant to plead "enough facts to state a claim to relief that is plausible on its face." Id. at 570. Accordingly, even "a well-pleaded complaint may proceed…if it strikes a savvy judge that actual proof of these facts is improbable." Id. Rule 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." The statement need only "give the defendants fair notice of what the… claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007), citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). In addition, when ruling on a

defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint. Id.

III. Argument

Respondent claims that EPA failed to allege sufficient facts to state a claim for relief. Respondent focuses on counts 1-50 which are comprised of the dry weather diversion events that are the key discharges of waste material to the impoundment (Pond 2).

First, as stated above, EPA's First Amended Complaint filed simultaneously with this Response consolidates the relevant counts in the complaint into a single count of continuous illegal storage. Therefore, Respondent's claims are no longer germane to this action as set forth in the First Amended Complaint, assuming Complainant's Motion to Amend is granted.

Second, even if the original Complaint is not amended, EPA has alleged sufficient facts to establish the claim that Respondent's illegal surface impoundment impermissibly stored regulated hazardous waste (designated as F037 waste). EPA alleged that wastewater was diverted to Pond 2 during dry weather events; EPA alleged that the wastewater contained components that make up the sludge material; EPA alleged that in fact this sludge material was (and may still be) present in the pond; and EPA alleged that Respondent has neither a RCRA permit nor interim status approval for storage of hazardous waste in Pond 2. These allegations clearly form the basis for EPA's claims. Furthermore, EPA alleged the fact that Respondent itself characterized the sludge material that was present in the impoundment as F037 hazardous waste the last time Respondent cleaned the material from the impoundment in a letter sent to EPA just 15 days prior to the date the original Complaint was filed. In fact, this same letter

indicates Respondent's intention that any sludge removed during a planned clean out of Pond 2 (to occur as early as this month) will be handled as F037 hazardous waste. See Attachment 1.

Third. Respondent's motion is not premised on a denial of any of the key allegations referenced above. Rather. Respondent scrutinizes the language of the pleading. making what is essentially a semantics argument about Complainant's organization of the Complaint. Respondent's claim is not sufficient for a Motion to Dismiss and must be denied

Respondent also claims that EPA's penalty assessment has exceeded the statutory maximum. Specifically, Respondent claims that EPA exceeded the statutory maximum for counts 1-50, 54, 56-57 and 59. For the following reasons. Respondent's Motion to Dismiss on this basis must be denied.

First, as stated above, EPA's First Amended Complaint filed simultaneously with this Response withdraws the specific penalty assessment and is being replaced by a general statutory penalty authority reference in accordance with 40 C.F.R. § 22.14(a)(4)(ii). Therefore. Respondent's claims are no longer germane to this action as set forth in the First Amended Complaint. assuming Complainant's Motion to Amend is granted.

Second. 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 for violations occurring between March 15. 2004 and January 12. 2009. and $37,500 for violations occurring after January 12. 2009. EPA pled in its Complaint

that "Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3), authorizes the assessment of a civil penalty of up to $37,500 per day per violation." (Complaint at p. 17.) Respondent acknowledges and cites to the Civil Penalty Inflation Adjustment Rule. Respondent had notice of the maximum statutory penalty EPA could seek. Additionally, EPA provided a copy of the Civil Penalty Policy dated June 2003, to the Respondent when it filed its Complaint. As is evidenced from Respondent's Motion to Dismiss and Answer, Respondent has a good working knowledge of that policy. Where a facility, such as Frontier, has repeatedly violated the same statutory or regulatory requirement, the violations begin to appear as continuous, ongoing violations even if they are in fact independent and distinguishable violations. Therefore, EPA has the discretion to treat such violations as continuous violations. In this case, even the statutory maximum of $32,500 per day per violation would yield a penalty calculation in excess of the amount assessed by EPA. To the extent the penalty assessment does not indicate a multi-day component for some of the counts, Complainant admits the calculations are confusing and appear to not be treated as continuing violations. This confusion is, in part, why Complainant is seeking to withdraw the [illegible]ment[1].

Where a facility, such as Frontier has repeatedly violated the same statutory or regulatory requirement, the violations begin to appear as continuous, ongoing violations even if they are in fact independent and distinguishable violations. Therefore, EPA has the discretion to treat such violations as continuous violations. In this case with regards to Counts 1-50, even the statutory

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[1]. 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 .

maximum of $32,500 per day per violation, if these counts were viewed as continuous violations would yield a penalty calculation in excess of the amount assessed by EPA. With regards to counts 54, 56-57, and 59, the penalty assessment does not indicate a multi-day component and Complainant admits the calculations are confusing and appear to not be treated as continuing violations. Complainant believes that at least some of these counts may in fact be viewed as continuing violations and will reassess the penalty calculation. This is, in part, why Complainant is seeking to withdraw the assessment at this time.

Wherefore, Complainant prays that the Administrative Law Judge, Barbara A. Gunning, will deny Respondent's Motion to Dismiss and Brief in Support, and grant such other and further relief as she may deem appropriate.

RESPECTFULLY SUBMITTED this 11th day of December, 2009.

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

September 15, 2009

Ms. Linda TeKrony
Environmental Engineer - NEIC Inspection Leader
USEPA National Enforcement Investigation Center
Building 25, Box 25227
Denver Federal Center
Denver, CO 80225

Re: Frontier Refining Inc.
Information Requested In Your E-Mail Dated August 27, 2009

Dear Ms. TeKrony

Frontier is providing the following information in response to your email request of August 27, 2009. For clarity, your questions are reprinted here in italics with Frontier's responses following.

1. *How often is sludge removed from Pond 2?*
   Pond 2 is cleaned on an "as-needed" basis.

   When was the last time sludge was removed from Pond 2?
   Pond 2 was last cleaned in 2000.

   For the last 3 years, how much sludge (volume or weight) was removed from Pond 2 during each removal and what was the timing of each removal?
   No sludge has been removed from Pond 2 in the last three years.

   Where was the sludge removed from Pond 2 been disposed (name, and location of facility)?
   The sludge from Pond 2 was shipped as a listed hazardous waste (F037) to Clean Harbors in Kimball, Nebraska and to Safety Kleen in Aragonite, Utah (now owned by Clean Harbors).

   Provide any waste determinations completed on the removed sludge from Pond 2. Include analytical results if available.
   No samples were taken of the sludge. It was determined to be a listed hazardous waste (F037) due to dry weather flow of untreated process water.

2. *Does Frontier inspect Pond 2 for the following:*
   a. Freeboard at least once each operation day
   b. Dikes and vegetation surrounding the dike, at least once a week to detect any leaks, deterioration, or failures.

   The Frontier refinery is manned 24 hours per day, 7 days per week, 365 days per year. WWTP Operators and Supervisors, refinery Shift Supervisors, refinery Environmental Department personnel, and Refinery Security personnel routinely (i.e. several times per day) observe the available capacity (freeboard) and condition of Pond 2. If the pond is full or there are problems with the dike(s), these will be noted and reported promptly.

3. *In the document "NEIC Pond Table" provided to NEIC after our inspection, Frontier states that for Pond 2 "periodic WWTP operational analyses" are conducted on material discharged into the impoundment. Provide additional information (what analyses are conducted, how often, etc.) regarding these analyses and provide documentation for the past 3 years.*

   The WWTP Operators check the API effluent water for pH, ammonia, chemical oxygen demand (COD) and fluoride twice daily. No specific analyses are done on any water diverted to Pond #2; therefore no documentation is attached.

4. *At the time of the NEIC Inspection Frontier was in the process of installing an equalization tank and dissolved air flotation units at the wastewater treatment plant. What is the status of the installation of these units? If they have been installed, on what date were they operational? Since this date, have there been an diversions into Pond 2? If there have been diversions, provide documentation on when these diversions happened and the cause for the diversion.*

   The new DAF Units and the new equalization tank (Tank 121) are installed at this time. They began operation on July 9, 2009. No diversions have occurred since this date. Additionally, Conversion of the old equalization tank (Tank 101) into a diversion tank for handling upsets from the Coker API and Crude Desalter is progressing. Anticipated completion date is November, 2009. Once this conversion project is complete, the manual diversion pipe from the effluent end of the API will be closed off with a blind flange. Overflow diversion of API influent water to Pond 2 will still be possible during storm events and is a necessary safety measure to handle high wet weather flow (Frontier does not have a segregated storm sewer in the operating units). Once the conversion project is complete, Pond 2 will be cleaned and any sludge will be disposed of as a listed (F037) hazardous waste.

I hope this information answers your questions. As always, feel free to call or email me if you require additional clarification.

Sincerely,

Scott M. Denton
Environmental Engineer – Waste and Corrective Action
Frontier Refining Inc.
307.771.8831

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and one true copy of the Response to Motion to Dismiss and Brief in Support 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
Arial 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. McTernan