UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8
Docket No.: RCRA-08-2009-0002

In the Matter of:	§	
	§	
Frontier Refining, [*sic*] Inc.	§	**FRONTIER'S RESPONSE IN**
2700 East 5th Street	§	**OPPOSITION TO EPA'S MOTION**
Cheyenne, Wyoming	§	**TO AMEND COMPLAINT AND**
82007	§	**BRIEF IN SUPPORT**
	§	
RCRA ID No.: WYD051843613		
Respondent		

Respondent Frontier Refining Inc. ("Frontier" or "Respondent"), by and through its undersigned counsel, files this Response in Opposition to EPA's Motion to Amend Complaint and Brief in Support ("Response") filed on December 11, 2009. (EPA's Motion to Amend Complaint is referred to herein as "Motion to Amend.") Simultaneously with this Response, Frontier has filed its Reply to EPA's Response to Frontier's Motion to Dismiss.[1]

[1] Attached hereto in Attachment "1" are certain Objections of Frontier to the "Procedural History" set forth in EPA's Motion to Amend. EPA's "Procedural History" contains numerous assertions that, while not necessarily germane to the merits of the Motion to Amend or this Response, are simply incorrect or misleading. Frontier includes this Attachment "1" in an effort to correct the record.

I.
THRESHOLD PROCEDURAL MATTER

EPA has filed simultaneously two pleadings with this Court: (i) EPA's Response to Frontier's Motion to Dismiss; and (ii) EPA's Motion to Amend. As discussed in greater detail in Frontier's Reply to EPA's Response to Frontier's Motion to Dismiss, EPA's Response to Frontier's Motion to Dismiss focuses almost entirely on the merits of EPA's Motion to Amend rather than contesting the merits of Frontier's Motion to Dismiss. Moreover, EPA's Motion to Amend provides no explanation whatsoever as to why it is entitled to such amendment or the basis for such amendment and provides only a cursory and incomplete description of the proposed amendment and legal conclusions about the effect of such amendment. The instant Response addresses the merits of EPA's Motion to Amend. Because of EPA's linkage of the two pleadings mentioned above, there is some overlap between the instant Response and Frontier's Reply to EPA's Response to Frontier's Motion to Dismiss. However, each of EPA's two pleadings should be considered on its own merits rather than muddled together as EPA apparently would prefer.

II.
INTRODUCTION

A. Summary of Argument

EPA seeks to amend its original Complaint (the "live Complaint") in two primary and significant ways.[2] First, EPA seeks to undertake a so-called "consolidation" of Counts 1-51

[2] EPA purports to describe its proposed amendments in the introductory paragraph of Section III of its Motion. However, EPA's description does not adequately identify the major revisions it seeks to make in the First Amended Complaint attached to its Motion to Amend as Exhibit 1.

and 54 into a single count of "illegal storage." Second, EPA seeks to "change the form of the penalty assessments from a specific penalty to a general penalty" and seeks to re-characterize every single alleged violation as a continuing violation. (Significantly, EPA fails to note this re-characterization in its Motion to Amend.)[3]

For the reasons set forth below, EPA's Motion to Amend should be denied because: i) the attempted "consolidation" of legally flawed claims is made in bad faith; ii) the proposed withdrawal of a specific penalty assessment and re-characterization of all alleged violations as "continuing" is made in bad faith; (iii) the proposed Amended Complaint is legally insufficient under 40 C.F.R. §22.14(a)(4)(ii); (iv) the proposed Amended Complaint is based on the same underlying facts of which EPA was well aware when it filed the live Complaint; and (v) the amendment EPA seeks does not cure the legal deficiencies of the live Complaint and, therefore, is futile.

Alternatively, if this tribunal is inclined to grant EPA's Motion to Amend in whole or in part, such motion should only be granted subject to certain conditions as set forth in detail in Section IV. below.

B. Standard of Review

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (the

[3] EPA also seeks to make a number of primarily editorial revisions to the live Complaint which EPA terms as "clarifications" in the proposed Amended Complaint. Frontier notes that there are many factual inaccuracies in the proposed Amended Complaint and reserves its right to object to those allegations, if necessary, at the appropriate time, as well as any other allegations.

"Rules of Practice"), 40 C.F.R. §§ 22.01 *et seq*. Section 22.14(d) of the Rules of Practice provides that the Complainant, after the answer is filed, may amend the complaint only upon a motion granted by the Presiding Officer. 40 C.F.R. § 22.14(d). The Rules of Practice do not, however, illuminate the circumstances when amendment of the complaint is or is not appropriate. Nonetheless, some parameters have been developed through various administrative decisions. In particular, the Environmental Appeals Board ("EAB") has offered guidance on the subject, informed by the Federal Rules of Civil Procedure ("FRCP").

The EAB and the FRCP adopt a generally permissive stance toward amending pleadings. However, this permissive attitude is not without limitation. As EPA cites to in its Motion to Amend, the leading case on this issue is *Foman v. Davis*, 371 U.S. 178 (1962), which expresses the liberality of the stance as well as recognizing its limitations.

Foman makes clear that that the decision whether to grant or deny a motion to amend is "of course . . . within the discretion of the [court]." *Foman*, 371 U.S. at 182. *Foman* provides the following set of frequently cited factors for courts to consider in exercising their discretion in this context:

> In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendments, futility of amendments, etc. – the leave sought should, as the rules require, be 'freely given.'

Id. a 182 (quoting FED. R. CIV. P. 15(a)).

Accordingly, the *Foman* factors specifically allow denial of motions to amend a pleading that is made in bad faith. Bad faith in this context is described as a motion designed to punish, harass or gain an unfair advantage. *The Matter of City of Orlando, FL*, Docket No. CWA-040501, Order Granting Motion to Amend Complaint (ALJ Aug. 24th 1999) citing *Nassau County Department of Public Works, et al*, Docket No. MPRSA –II-92-02, Order Granting Motion to Amend Complaint, 1992 (ALJ, Sept. 11, 1992).[4]

Leave to amend may also be denied where, as in the instant case, "the moving party was aware of the facts on which the amendment was based for some time prior to the filing of the motion to amend." *Koch v. Koch Industries*, 127 F.R.D. 206, 210 (D. Kan. 1989).[5] Further, where it would reward the movant for its own negligence in failing to assert the alleged claim before it can no longer do so by right, as in this case, courts have reasoned that the movant's neglect should not form the basis for a decided advantage to it and have denied the motion to amend. *See, e.g. Banking & Trading Corp. v. Reconstruction Finance Corp.*, 15 F.R.D. 360 (D. N.Y. 1954). Finally, where an amendment would prove futile because a complainant could not assert a litigable claim, a motion to amend is appropriately denied. *Brown v. De Fillipia,* 717 F.Supp 172 (S.D. N.Y. 1989).

[4] While *Nassau County* correctly articulates the standard for denying an amendment sought in bad faith, the underlying facts in support of the bad faith assertion were much weaker than in those raised by Frontier in the instant case. In *Nassau County,* the claim of bad faith was based primarily on the fact that the motion to amend increasing the penalty by 100% was not filed until after respondents rejected complainant's offer to settle for the penalty sought in the initial complaint. The Court determined that this circumstance warranted scrutiny and required an explanation, but was not, without more, sufficient to warrant denial of the motion. As shown in Section III below of Frontier's Response to EPA's Motion to dismiss, Frontier's claim of bad faith is fully supported by the record under review by this tribunal.

[5] Citing *Federal Insurance Co. v Gates Learjet*, 823 F.2d 383, 387 (10th Cir. 1987).

III.
EPA'S MOTION TO AMEND SHOULD BE DENIED

A. EPA's Proposed "Consolidation" Is Made In Bad Faith Because Such Action Is An Attempt to Avoid Adjudication, Hide Legally Flawed Claims, and Gain An Unfair Advantage

EPA's live Complaint describes in detail EPA's theory that "receipt" of wastewaters in Frontier's Pond 2 on fifty (50) separate occasions constituted "receipt" of a hazardous waste sludge identified as F037. EPA uses that theory as the basis for Counts 1-50 of the live Complaint. Frontier's Motion to Dismiss these Counts revealed the fundamental legal error underpinning EPA's theory. In response, EPA seeks now to engage in what it terms "consolidation" of those Counts 1-50 and 54, into "a single count of illegal storage of F037 hazardous waste in Pond 2 from December 26, 2006, through the present, constituting a continuing violation of RCRA..." EPA fails to note that Count 51 of the live Complaint, paragraph 46, already alleges that "storage of F037 hazardous waste in surface impoundment 2 [Pond 2] from December 26, 2006 through the present, constitutes a violation of RCRA..." EPA's Penalty Computation Worksheet[6] filed October 26, 2009 by EPA explains EPA's view that Count 51 describes an ongoing violation of RCRA and consistent with the Penalty Policy capped the penalty at 180 days.[7] Consequently, the only amendment EPA is seeking through this alleged "consolidation" is the disappearance of Counts 1-50 and 54.

[6] Although the Penalty Policy requires that a Penalty Computation Worksheet accompany a complaint seeking a specific penalty, EPA failed to attach its Penalty Computation Worksheet in this matter to the live Complaint. Instead, after numerous requests by Frontier, EPA provided a copy of its Penalty Computation Worksheet to Frontier on October 20, 2009, and filed a copy with the Regional Judicial Officer with a Status Report filed October 26, 2009.

[7] EPA's Penalty Computation Worksheet, p. 2, ¶ 1(c).

Frontier supports the elimination of Counts 1-50 and 54 but vehemently opposes EPA's attempt to cloak and camouflage these Counts as some kind of "consolidation." This is important because, even though EPA's proposed "consolidation" of Counts 1-50 and 54 (which depend upon the alleged "receipt" of hazardous waste theory) has the surface appearance of an abandonment of such Counts, in actuality EPA retains its "receipt" theory in the factual allegations of the proposed Amended Complaint (for example in Paragraph 39 of the Proposed Amended Complaint). EPA's proposed Amended Complaint is, therefore, a shell game that essentially seeks to avoid a judicial determination on the "receipt" of hazardous waste issue, yet maintains such allegations as support for the re-characterization of the remaining claims as continuing.

EPA does not offer any evidence or argument that there has been any change in the underlying facts which justify its proposed amendment. EPA should not be allowed to avoid a substantive ruling on its underlying legal theory by disingenuously asserting that "consolidation" addresses the fatal legal flaw underlying Counts 1-50. If amendment is granted, EPA's successful attempt to hide flawed claims would result in an enormously unfair advantage to EPA because Frontier will be forced to face the same legally insufficient claims that exist in the live Complaint without the benefit of this Court's ruling on the substantive issues raised in the Motion to Dismiss. As such, the proposed amendment is made in bad faith and should be denied.

B. EPA's Proposed Withdrawal of Its Specific Penalty Assessment and Re-characterization of All Alleged Violations as "Continuous" Constitutes Bad Faith

As shown below, EPA's Motion to Amend appears to fall squarely within the bad faith exception to the court's discretion when considering a request to amend a complaint. Having had the legal deficiencies of the live Complaint exposed, EPA filed an abbreviated Response to Frontier's Motion to Dismiss in conjunction with a Motion to Amend in an attempt to salvage EPA's claims without lowering the first-proposed penalty (which EPA alleges is supported by the Penalty Computation Worksheet filed by EPA on October 26, 2009). Further, as detailed below, the attempted re-characterization of alleged violations from "single" to "continuous" that have already been the subject of detailed and documented analysis by EPA is improper. Such re-characterization would not only punish Frontier arbitrarily, it would also give EPA an unfair advantage by allowing EPA to recalculate a clearly erroneous penalty determination without regard to EPA's own Penalty Policy. If EPA's Motion to Amend, filed under these bad faith circumstances, is granted, Frontier would be left in the hopeless position of defending itself against an ever moving target. EPA should be required to stand behind enforcement-related determinations that are supposed to be based on a principled application of its own Penalty Policy rather than arbitrary considerations calculated to yield a large penalty.

EPA's Motion to Amend notes EPA's desire to withdraw the specific penalty assessment that appears in the live Complaint. The only purported explanation for this proposed amendment is that it will allow for a revised penalty assessment that reflects the reduced number of cited violations and any information on Frontier's financial condition. EPA, however, has completely failed to point out to this Court that EPA is actually seeking to

re-characterize every single remaining alleged violation as continuing. This omission results in no discussion of the effect that such amendment could have on the penalty amount. In fact, although the proposed Amended Complaint would have many fewer alleged violations, the penalty that could be calculated for continuing violations could equal or exceed the current penalty assessment.[8]

In assessing a penalty under RCRA, EPA is required to follow its June 2003 "RCRA Civil Penalty Policy" (the "Penalty Policy") which provides a detailed process for analyzing and developing a penalty amount. The Penalty Policy includes a Penalty Computation Worksheet that EPA is instructed to use in this process. EPA engaged in precisely this process in preparing the live Complaint and its attendant penalty. While Frontier has significant objections to many of the determinations EPA made in its penalty calculation in the live Complaint, Frontier, as required by law, was at least afforded the opportunity to review and assess the methodology of EPA in arriving at the penalty.[9]

One of the most significant determinations required to be made by EPA under the Penalty Policy is whether an individual violation continues uninterrupted for more than one day and, if so, whether it is appropriate to penalize that violation as a multi-day violation. The Penalty Policy provides EPA discretion to treat violations after the first in a series as multi-day violations (assessable at penalty rates set forth in a "Multi-Day Matrix") "if to do so would

[8] EPA itself acknowledges this in an obscure passage in EPA's Response to Frontier's Motion to Dismiss. (EPA's Response to Frontier's Motion to Dismiss, p. 6.)

[9] However, it should be noted that, despite repeated requests by Frontier, EPA failed to provide the BEN "run" referenced in EPA's Penalty Computation Worksheet as support for the economic benefit component of the assessed penalty until January 6, 2010.

produce a more equitable penalty calculation."[10] Such discretion is to be exercised based on the facts at hand and in light of the guidance provided in the Penalty Policy. The Penalty Policy also states: "In determining whether to assess multi-day penalties and what penalty amount is appropriate to select from the multi-day matrix, the Regions must analyze carefully the specific facts of the case."[11]

In EPA's analysis under the Penalty Policy, performed prior to filing the live Complaint, EPA documented in detail the method it used to calculate the penalty it believed to be appropriate under the Policy for every Count. In particular, EPA determined whether or not a particular Count should be treated as a single violation, or as a continuing one. The live 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. EPA *explicitly* made the determination that multi-day penalties were not appropriate for certain Counts in the following instances:

- Paragraph 44 of the live Complaint, concerning Counts 1 – 50, alleges "fifty separate violations of RCRA." In the corresponding Penalty Calculation Worksheet, EPA stated "These violations were appropriately viewed as individual instances in which the facility redirected flow to pond 2 during dry weather refinery events. No multi-day component was calculated."

- Paragraph 52 of the live Complaint, concerning Counts 52 and 53, alleges "two separate violations of 40 CFR Section 265.231." In the corresponding Penalty Calculation Worksheet, EPA stated: "This violation is appropriate [sic] viewed as being a single instance rather than a multi-day."

[10] Penalty Policy Section VII.A.3.
[11] Penalty Policy Section VII.B.

- Paragraph 61 of the live Complaint concerning Count 54, alleges "a violation" of RCRA. In the corresponding Penalty Calculation Worksheet, EPA stated: "No multi-day component was applied."

- Paragraph 79 of the live Complaint concerning Counts 56 - 57 alleges "two violations" of RCRA. In the corresponding Penalty Calculation Worksheet, for Count 56, EPA stated: "No multi-day component was applied" and for Count 57, EPA stated: "No multi-day component was applied."

- Paragraph 83 of the live Complaint concerning Count 58 alleges a continuing violation but in the corresponding Penalty Calculation Worksheet, EPA assessed two separate penalties and specifically stated that the Multi-day component was not applicable.

- Paragraph 85 of the live Complaint concerning Count 59 alleges "a violation" of RCRA. For Count 59, EPA stated: "No multi-day component was applied."

Consequently, after applying the Penalty Policy, in the live Complaint EPA *explicitly* made the affirmative determination that *only* Count 51 (alleging illegal storage of hazardous waste in a surface impoundment not meeting minimum technology standards) and Count 55 (alleging failure to comply with monitoring and inspection requirements applicable to certain surface impoundments) were appropriately considered to be continuing violations.

Now, in the proposed Amended Complaint, EPA seeks to retain Count 51 (renumbered as Count 1) and Count 55 (renumbered as Count 3) as continuous, and, in a complete reversal of position and without explanation, to make Counts 52 and 53 (renumbered as Count 2), Counts 56 and 57 (renumbered as Counts 4 and 5), Count 58 (renumbered as Count 6), and Count 59 (renumbered as Count 7) continuous. In the case of the live Complaint and as reflected in EPA's Penalty Computation Worksheet, Counts 52, 53, 56, 57, 58, and 59 are all specifically identified in the live Complaint as non-continuing violations. EPA has, without explanation, re-characterized those Counts in the Amended Complaint as continuing violations.

(*See* proposed Amended Complaint ¶¶ 54, 65, 69, and 71.) EPA does not allege *any* new information or *any* new factual allegations that might support this proposal.

Although the Motion to Amend does not provide any substantive reason for allowing this revision to the live Complaint, EPA did attempt to provide some rationale in its separately filed Response to Frontier's Motion to Dismiss.[12] In that Response - and as a result of Frontier having pointed out that the live Complaint seeks impermissible penalties above the statutory maximum - EPA "admits" that its penalty calculation is "confusing." (EPA's Response to Frontier's Motion to Dismiss, p. 6.) EPA states that the Counts at issue "appear to not be treated as continuing violations" in the live Complaint. *However, there is nothing confusing at all about how EPA calculated the original penalty as documented by EPA in their own Penalty Computation Worksheet.* As demonstrated above, EPA specifically identified Counts 1-50, 52, 53, 56, 57, 58, and 59 as single violations in the live Complaint after analysis and preparation of supporting documentation. Such Counts "appear not to be treated as continuing violations" because EPA made specific determinations that it was not appropriate to treat them as continuing. If EPA is allowed to re-characterize every alleged violation as continuing, it will be in a position to seek penalties that far exceed the originally assessed penalty – even though Frontier demonstrated in its Motion to Dismiss that EPA's proposed penalty exceeded the applicable statutory maximum. Notably, this is an argument by Frontier that EPA did not deny in its response to Frontier's Motion to Dismiss.

[12] As stated in Section I of this Response, Frontier does not believe it is appropriate for this tribunal to consider arguments of EPA that do not appear in EPA's Motion to Amend. However, Frontier addresses such arguments herein to show that they have no merit regardless of where they appear.

EPA also includes in its Response to Frontier's Motion to Dismiss a semblance of an argument as to why it should be allowed to re-characterize the alleged violations as continuing. EPA explains that this should be permitted because EPA could have sought even higher penalties in the live Complaint by assessing the statutory maximum on a continuing basis. This is precisely the failed argument that EPA attempted in *In the Matter of F.C. Haab Company*, Docket No. EPCRA-III-154, Initial Decision Determining Penalty (June 30, 1998). In that matter, the presiding officer stated that the fact that EPA could have, but chose not to, seek higher penalties was not support for an assessed penalty and, therefore, rejected EPA's comparison of a theoretical statutory maximum penalty to the assessed penalty.

Frontier submits that this enforcement action, in whole, has been end-driven from the outset. In fact, it appears that EPA filed its Motion to Amend because it recognizes that Respondent's Motion to Dismiss reveals fatal legal errors in EPA's live Complaint, which would force EPA to reduce its maximum penalty by millions of dollars. In view of EPA's public announcement in a press release (attached as Attachment "2") of EPA's intent to seek nearly 7 million dollars in penalties from Frontier in this matter, EPA is now desperate to find an alternative way to get to the same penalty amount even if it means ignoring its own Penalty Policy. Unless this Court denies EPA's Motion to Amend, EPA will be allowed the extremely unfair advantage of assessing a penalty in excess of the statutory maximum by engaging in a game of deception relative to the methodology for arriving at such penalty in bad faith.

C. EPA's Proposed Amended Complaint Is Insufficient As A Matter of Law

EPA's proposed Amended Complaint purports to contain a general penalty recitation. EPA's alleged 'general penalty authority recitation' does not satisfy the requirements of 40 C.F.R. §22.14(a)(4)(ii). That rule states that when a specific penalty demand is not made, a complaint must include "the number of violations (where applicable, days of violation) for which a penalty is sought, a brief explanation of the severity of each violation alleged and a recitation of the statutory penalty authority applicable for each violation alleged in the complaint." EPA wholly fails to provide the days of violation alleged and any information about the severity of each violation. EPA attempts to skirt these specific, mandatory requirements by including a vague, narrative restatement of incorrect conclusions that is not legally sufficient under 40 C.F.R. §22.14(a)(4)(ii).

The Penalty Policy provides very specific, gravity-based classifications of severity for violations. Numerous factors are to be considered by EPA in determining the severity of a violation for penalty purposes. After weighing all of the available facts, EPA must classify each violation using established labels (e.g. Major/Major, Major/Moderate, etc.) and is then instructed to select the appropriate cell from a Penalty Assessment Matrix. Clearly, 40 C.F.R. §22.14(a)(4)(ii) requires EPA to convey more than just a mere general statement that it seeks an unspecified penalty. EPA must provide a respondent with enough information to understand in some way the magnitude of the action against it. Given that the Penalty Policy itself provides a clear method for describing severity of a violation, EPA's failure to give that information makes EPA's proposed Amended Complaint insufficient as a matter of law.

D. EPA's Motion to Amend Should Be Denied Because It Is Not Based On Any New Information

Since EPA filed the live Complaint on September 30, 2009, the underlying facts alleged to support EPA's claims have not changed in any way. EPA had all of the facts in front of it before it filed the live Complaint. Now, EPA disingenuously seeks the proposed amendment not because of newly discovered evidence but because EPA claims that the live Complaint and accompanying specific penalty calculation are "confusing." The only thing that has changed between September 30, 2009 and today is that Respondent filed a Motion to Dismiss which called the statutory basis for EPA's pleading into question. Now, with no new facts whatsoever, EPA requests leave to file EPA's proposed Amended Complaint, which, in a complete reversal of EPA's previous position, would penalize every single alleged violation as a continuing one. Leave to amend should be denied because the same facts underlying the proposed Amended Complaint were fully known to EPA when the live Complaint was filed.[13] EPA should not be rewarded by being permitted to change its theory of recovery and the method of penalty computation under the Penalty Policy without any new information.

E. EPA's Motion to Amend Should Be Denied Because the Amendment is Futile

Frontier's Motion to Dismiss revealed fatal legal flaws in, *inter alia*, EPA's Counts 1-50. EPA's Motion to Amend seeks simply to shift those claims through "consolidation" into the proposed Amended Complaint. As such, EPA makes no effort to cure the legal

[13] *See e.g. Koch v. Koch Industries*, 127 F.R.D. 206 (D. Kan. 1989); *see also In re James Eugene*, 399 B.R. 453, 458 (N.D. Tex. 2009).

deficiencies of its live Complaint. Consequently, EPA's proposed amendment would prove futile and EPA's Motion to Amend should be appropriately denied.[14]

IV.
UNDUE PREJUDICE AND UNNECESSARY INEFFICIENCIES

In Sections III.A. and B. of EPA's Motion to Amend, EPA makes the conclusory statements that: (i) Frontier will suffer no undue prejudice as a result of the amendment EPA seeks; and (ii) denial of the Motion to Amend would create inefficiencies. Neither of these conclusions has merit and Frontier specifically denies both assertions.

With respect to undue prejudice, as detailed above, Frontier will, in fact, suffer prejudice if EPA is permitted to hide legally flawed Counts in the proposed Amended Complaint by claiming they are being "consolidated, by re-characterizing as "continuing" violations those alleged violations that currently are documented by EPA to be single violations, and by withdrawing all information about what penalty EPA is seeking against Frontier.

With respect to creating unnecessary inefficiencies, EPA states that it might be forced to withdraw the live Complaint and re-file the case anew if the amendment is not allowed. However, withdrawal of the fatally flawed live Complaint would be an appropriate response by EPA, provided it is done timely prior to this tribunal's dismissal with prejudice. If EPA is allowed to make the amendments it seeks, this Court will then be forced to hear, again, a

[14] *See e.g. Brown v. De Fillipia*, 717 F.Supp 172 (S.D.N.Y. 1989).

Motion to Dismiss that would have disposed of the legally flawed claims in the live Complaint and which will not be resolved by the proposed Amended Complaint. Denial of the Motion to Amend would result in a more economical use of resources by all parties.

V.
ALTERNATIVE RELIEF

Although Frontier believes EPA's Motion to Amend should be unconditionally denied, Frontier argues, in the alternative, that in the event that this Court is inclined to grant the Motion to Amend in whole or in part, the amendment be allowed only upon certain conditions. In *Armstrong Cork Co. v. Patterson-Sargent Co.* 10 F.R.D. 534 (D. Ohio 1950), the court allowed an amendment to a pleading. However, in an attempt to cure the prejudicial factors created by the allowance of the amendment, the court conditioned leave to amend. The court required the movant to stipulate to the admitted facts in the original answer. The court further reasoned that where prejudice could be eliminated by conditional approval of the motion to amend, the amendment would be granted. *Id.* In the instant case, the only means to eliminate the legal infirmities that Frontier has raised would be to: (i) require EPA to stipulate that existing Counts 1-50 and 54 are being dismissed with prejudice (not "consolidated"); and (ii) condition the amendment on retention of EPA's documented determination in the live Complaint and Penalty Computation Worksheet with respect to whether a particular violation is continuing or not.

VI.
CONCLUSION

As set forth above, there is ample authority for this Court to deny EPA's Motion to Amend on a number of grounds. First, EPA's purported attempt at "consolidation" is

misleading and made in bad faith since it would allow EPA to avoid a judicial determination on the "receipt" of hazardous waste issue while forcing Frontier to face the same legally insufficient claims that exist in the live Complaint. Second, EPA's attempt to withdraw its specific penalty assessment constitutes bad faith because EPA is putting itself in an unfairly advantageous position to assess penalties in excess of the statutory maximum. Third, EPA's attempted reversal of its position on the record to re-characterize all violations as "continuing" constitutes bad faith since it is a shell game that would allow EPA to arrive at the same penalty it originally sought without regard to the Penalty Policy and the determinations EPA previously made thereunder before filing its live Complaint and the Penalty Computation Worksheet. Fourth, the proposed Amended Complaint is legally insufficient as it does not meet the mandatory requirements of 40 C.F.R. §22.14(a)(4)(ii). Fifth, the proposed Amended Complaint is based on the same underlying facts of which EPA was well aware when it filed the live Complaint. Sixth, the amendment EPA seeks does not cure the legal deficiencies of the live Complaint and, therefore, is futile.

In the alternative, if the Motion to Amend is granted in whole or in part, it should be granted only on the conditions set forth in Section IV. above to avoid the unfair advantage of the bad faith amendment sought by EPA.

PRAYER

WHEREFORE, Frontier prays that EPA's Motion to Amend Complaint and Supporting Memorandum be denied 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.

Joseph F. Guida
TX State Bar No. 08593100
Tonya L. Meier
TX State Bar No. 00797064
Jean M. Flores
TX State Bar No. 13755500
R. Kyle Ballard
TX State Bar No. 01651300
750 N. St. Paul Street
Suite 200
Dallas, Texas 75201
(214) 692-0009
(214) 692-6610 - Facsimile

ATTORNEYS FOR RESPONDENT
FRONTIER REFINING INC.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Frontier's Response in Opposition to EPA's Motion to Amend Complaint and Brief in Support, dated January 7, 2010, was sent January 7, 2010 in the following manner to the addressees listed below:

Original and 1 Copy by Overnight Mail to:

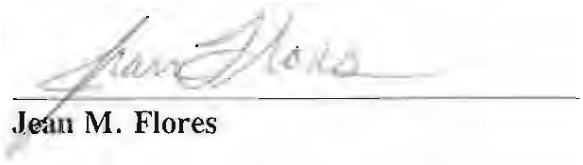
Regional Hearing Clerk
EPA Region 8
1595 Wynkoop St.
Denver, Colorado 80202-

Copy by Certified Mail, Return Receipt Requested and Facsimile [202-565-0044] 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 20406

Copy by Certified Mail, Return Receipt Requested to:

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



Jean M. Flores

ATTACHMENT "1"

FRONTIER'S OBJECTIONS TO EPA'S "PROCEDURAL HISTORY"

In the interest of correcting the record, Frontier submits the following objections to portions of EPA's recitation of the Procedural History stated in both EPA's Response to Frontier's Motion to Dismiss filed on December 11, 2009 ("Response"), and EPA's Motion to Amend Complaint filed on December 11, 2009:

- EPA asserts, "On October 15, 2009, Complainant sent the live Complaint to Respondent's subsequently named alternative agent for service of process and service was accepted on October 19, 2009." This statement implies that Frontier's registered agent refused service of the live Complaint. This is not the case. Frontier denies that EPA attempted to accomplish service through Frontier's registered agent as provided by the Procedural History section in EPA's Response. When EPA made Frontier's counsel aware that EPA purportedly needed assistance to accomplish service of the live Complaint, counsel for Frontier agreed to accept service on behalf of Frontier and did in fact accept service of the live Complaint on October 19, 2009.
- Frontier further objects to EPA's assertion in the Procedural History stating that EPA provided Frontier with penalty calculations and narratives. In fact, EPA failed to provide the BEN "run" referenced in EPA's Penalty Computation Worksheet until January 6, 2010 (2 days before the pleadings to which this

Attachment are appended) despite numerous requests by Frontier for same.[1] As a result, Frontier was deprived of any opportunity to analyze or respond in its Answer to the penalty component that comprised the majority of the total penalty assessed.

- Frontier further objects to EPA's assertion that Frontier served EPA with its Motion to Dismiss and Brief in Support and Answer to the Complaint and Compliance Order and Request for Hearing on November 19, 2009. In fact, Frontier served EPA with its Motion to Dismiss, and Brief in Support, Answer to the Complaint and Compliance Order and Request for Hearing on November 17, 2009.[2]
- Frontier further objects to EPA's characterization of participation in Alternative Dispute Resolution ("ADR"). According to Frontier's understanding, EPA specifically declined to participate in ADR by informing the Chief Administrative Law Judge's office by phone of this decision. Frontier, by letter dated December 3, 2009, agreed to participate in ADR. Frontier was surprised to learn that EPA declined participation in ADR.

Frontier does not believe that any of the above misstatements by EPA are necessarily germane to the merits of either Frontier's Reply to EPA's Response to the

[1] Moreover, Frontier notes that the BEN "run" provided by EPA to Frontier on January 6, 2010 indicates in a footnote that it was generated on September 15, 2009, almost 4 months earlier.

[2] 40 C.F.R. § 22.7 (c) ("Service of all other documents is complete upon mailing or when placed in the custody of a reliable commercial delivery service."). As specified in the Certificate of Service filed in conjunction with Frontier's Motion to Dismiss, Answer and Request for Hearing, Frontier served EPA by first class mail on November 17, 2009. Frontier also provided EPA a courtesy copy of its Motion to Dismiss, Answer and Request for Hearing by email on November 17, 2009.

Frontier's Motion to Dismiss or Frontier's Response to EPA's Motion to Amend. Frontier submits these objections in the interest of correcting the record.

EPA: United States Environmental Protection Agency

News Releases from Region 8

A-Z index

EPA files administrative enforcement action against Wyoming's Frontier Refining, Inc.

Release date: 10/01/2009

Contact Information: Michael Risner, EPA, 303-312-6890, risner.michael@epa.gov

Frontier assessed penalty of nearly $7 million for violations of surface impoundment regulations

(Denver, Colo. – October 1, 2009) The U.S. Environmental Protection Agency filed an enforcement and compliance action yesterday against a Frontier Refining, Inc., petroleum facility in Cheyenne, Wyo., for illegal storage of hazardous waste into a wastewater management pond (Pond 2). This and other violations of the Resource Conservation and Recovery Act (RCRA) were discovered during an EPA-lead inspection in March 2009.

Frontier is alleged to have violated the law by storing hazardous wastes in a wastewater pond that was neither constructed nor operated properly to allow prevention and detection of leaks. Other violations relate to closing the pond and providing financial assurance for its proper closure.

The order portion of the action requires the refinery to properly take Pond 2 out of service, remove wastewaters and sludges, determine whether the wastes leaked into soils or groundwater, remove the existing pond structure and contaminated soils and cap the area in accordance with RCRA requirements for closure of a surface impoundment. This enforcement action seeks a penalty of nearly $7 million for the operation of an unauthorized hazardous waste management unit.

"EPA is investigating ponds such as this, referred to as surface impoundments, as part of a nationwide initiative," said Eddie Sierra, Acting Assistant Regional Administrator for Enforcement. "Placing hazardous waste in improperly designed surface impoundments can present serious environmental impacts to surface water, groundwater and air quality.

Search This Collection | Search All Collections

Get Region 8 news releases by email

- Region 8 home