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January 7, 2010

EPA REGION VIII
HEARING CLERK

FEDERAL EXPRESS

Regional Hearing Clerk
U.S. EPA Region 8 (8RC)
1595 Wynkoop Street
Denver, Colorado 80202-1129

RE: United States Environmental Protection Agency, Region 8
Docket No. RCRA-08-2009-0002
In the Matter of: Frontier Refining, [sic] Inc., 2700 East 5th Street, Cheyenne,
Wyoming 82007
RCRA ID No.: WYD05843613

Dear Regional Hearing Clerk:

Please find enclosed the original, plus two (2) copies of the following regarding the above-noted matter:

1. Frontier's Reply to EPA's Response to Frontier's Motion to Dismiss and Brief in Support; and
2. Frontier's Response in Opposition to EPA's Motion to Amend Complaint and Brief in Support.

Please file the originals and one copy per 40 C.F.R. 22.15(a). Please return file marked/stamped copies in the enclosed self-addressed stamped envelope. If you have any problems or questions, please feel free to contact me at the direct dial number below.

Sincerely,



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The Honorable Barbara A. Gunning
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Washington, DC 20406

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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

FILED
EPA REGION VIII
HEARING CLERK

Docket No.: RCRA-08-2009-0002

In the Matter of: §
§
Frontier Refining, [sic] Inc. § FRONTIER'S REPLY TO EPA'S
2700 East 5th Street § RESPONSE TO FRONTIER'S
Cheyenne, Wyoming § MOTION TO DISMISS AND BRIEF
82007 § IN SUPPORT
§

RCRA ID No.: WYD051843613

Respondent

Respondent Frontier Refining Inc. ("Frontier" or "Respondent"), by and through its undersigned counsel, files this Reply to the EPA Response to Frontier's Motion to Dismiss and Brief in Support ("Reply"). Simultaneously but separately filed with this Reply is Frontier's Response in Opposition to EPA's Motion to Amend Complaint.¹

**I.
INTRODUCTION**

In this Section, Frontier provides a brief summary of its argument in Reply, and rebuts EPA's claim that Frontier's Motion to Dismiss is moot.

¹Attached 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.

A. Summary of Argument

Frontier's Motion to Dismiss addresses the original Complaint (the "live Complaint") that has been pending before this tribunal since September 30, 2009. As detailed in the Motion to Dismiss, the live Complaint is fatally flawed. EPA's Response to the Motion to Dismiss focuses almost entirely on a proposed Amended Complaint that is not a live pleading. In fact, in its effort to redirect all attention away from the live Complaint and toward the theoretical Amended Complaint, EPA provides almost no direct response to the grounds on which the Motion to Dismiss is based. In consideration of the Motion to Dismiss, however, this tribunal should remain focused on the live claims against Frontier that appear in the existing Complaint.

Frontier's Motion to Dismiss is based upon two independent grounds: 1) EPA's failure to state a claim upon which relief can be granted; and 2) EPA's attempt to assess a penalty in excess of the statutory maximum civil penalty under RCRA section 3008(a). These are independent arguments and each of them independently entitles Frontier to an order of dismissal with prejudice. As shown in Section II below, EPA's Response does not attempt to refute either of Frontier's grounds for dismissal. Rather, EPA discusses a completely separate Motion to Amend the Complaint ("Motion to Amend") that it filed only after Frontier pointed out the fatal flaws in the existing live Complaint. Not only is it improper in this context for EPA to utilize a pending (but unadjudicated) Motion to Amend in a purported Response to the Motion to Dismiss, EPA's maneuvering obscures the fact that EPA does not meet its burden to

address the grounds on which dismissal is sought. As a matter of law, Frontier's Motion to Dismiss should be granted and an order of dismissal with prejudice should be entered.

B. Frontier's Motion to Dismiss is Not Moot

EPA asserts that Frontier's Motion to Dismiss is moot due to EPA's proposed Amended Complaint. This position is incorrect in that it conceal the facts that (i) EPA has no substantive rejoinder to the Motion to Dismiss and (ii) EPA's proposed Amended Complaint has the same flaws as the live, original Complaint.² Consequently, since EPA is not seeking to cure the existing legal deficiencies by amendment, Frontier's Motion to Dismiss will still be relevant and will still require consideration even if EPA is allowed to amend the live Complaint. A motion should be decided based on the live pleadings, and Frontier's Motion to Dismiss remains germane to the live Complaint. EPA cannot moot Frontier's Motion to Dismiss the live Complaint by seeking leave to amend.³

Further, EPA's Response assumes that its Motion to Amend will be granted in full. This is presumptuous given the procedural prerequisites⁴ limiting amendments and the fact that Frontier has filed an opposition to EPA's Motion to Amend. Frontier's arguments regarding its opposition to the Motion to Amend are set forth in a proper pleading being filed simultaneously with the instant one. However, to the extent it is relevant, Frontier

² See Frontier's Response in Opposition to EPA's Motion to Amend being filed simultaneously with the instant pleading.

³ Moreover, the proposed Amended Complaint is flawed and legally insufficient. For further explanation of the failings of the proposed Amended Complaint, see Respondent's Response to EPA's Motion to Amend filed contemporaneously with this Reply.

⁴ 40 C.F.R. § 22.14 (c) ("Otherwise the complainant may amend the complaint *only* upon motion granted by the Presiding Officer." (*emphasis added*)).

incorporates by reference its Response to EPA's Motion to Amend Complaint and Brief in Support as if set forth in full herein.

**II.
REPLY TO RESPONSE TO MOTION TO DISMISS**

A. EPA Does Not Contest the First Grounds for Dismissal; Therefore, the Live Complaint Fails to State a Claim Upon Which Relief Can Be Granted

Counts 1 – 50 of the live Complaint contain EPA's allegation that Frontier received hazardous waste in Pond 2.⁵ The Motion to Dismiss reveals the legal flaws of Counts 1-50 of the live Complaint and explains that they should be dismissed because EPA fails to state a claim upon which relief can be granted, as well as Counts 51-59 to the extent that they are dependent upon Counts 1-50. In response to Frontier's argument, EPA does not deny that its "receipt" of hazardous waste theory is flawed, but instead references its separately filed Motion to Amend in which it seeks to "consolidate" Counts 1 – 50 and Count 54 into the already existing Count 51 alleging "continuous illegal storage" of hazardous waste. (EPA's Response to Frontier Motion to Dismiss p.4)

Not only is EPA's narrative not a substantive response to Frontier's Motion to Dismiss, EPA's use of the word "consolidate" is disingenuous since a close reading of EPA's pleading demonstrates that, in fact, EPA cannot in any way support its allegations involving receipt of hazardous waste (i.e. Counts 1 – 50).⁶ None of EPA's arguments in the Response attempt to support its "receipt" of hazardous waste theory that appears in the live Complaint. Instead, EPA chooses only to discuss its claim of illegal storage, an allegation which already appears in the

⁵ Pond 2, also known as the storm water basin, is a lined surface impoundment at Frontier's refinery in Cheyenne, Wyoming.

⁶ It appears that EPA is attempting to salvage or cloak its "receipt" claims without being forced to provide legal support in the context of the Motion to Dismiss.

live Complaint at Count 51.⁷ Where EPA fails to state objections to a Motion to Dismiss in a timely manner, the Environmental Appeals Board has ruled that 40 C.F.R. § 22.16 (b) of EPA's Consolidated Rules of Practice allows a presiding officer to deem EPA to have waived any objections to the granting of the motion. In *In the Matter of Asbestos Specialists, Inc.*, 4 E.A.D. 819, 1993 LW 473845 (EPA), the Environmental Appeals Board stated:

The obvious purpose of this provision is to clear the path for a ruling on the motion when no response has been filed and the time for responding to the motion has lapsed. [footnote omitted] It lets the presiding officer rule as he [she] sees fit based solely on the presiding officer's assessment of the merits of the motion. In that way the presiding officer can rule promptly with assurance that the ruling does not have to be reconsidered if the other party subsequently expresses misgivings about not opposing the motion prior to entry of the ruling.⁸

In the instant case, it is clear that EPA is not merely late in filing a response. EPA actually timely filed a document entitled "Response to Motion to Dismiss," but did not include any objections to the grounds on which dismissal by Frontier is sought. Frontier, therefore, is entitled as a matter of law to dismissal of the live Complaint based upon the arguments set forth by Frontier and EPA's failure to oppose such arguments.

⁷ EPA asserts in its Response that Frontier's Motion to Dismiss does not deny any of the so-called "key assertions" set forth in EPA's Response. However, all of those alleged "key assertions" are completely irrelevant to Frontier's Motion to Dismiss and relate only to existing Count 51, not to Counts 1 – 50 which were the subject of the relevant portion of Respondent's Motion to Dismiss. As such, EPA has failed to respond to Section III. A. of Respondent's Motion to Dismiss. In addition, among other things, Frontier notes that EPA's assertion regarding the alleged admission by Frontier concerning the F037 hazardous waste classification has been specifically denied in Frontier's Answer, a fact which EPA chooses to ignore.

⁸ *Id.* The Environmental Appeals Board granted the Motion to Dismiss on other grounds but elected not to deem EPA to have waived its objections to a Motion to Dismiss because the presiding officer had actual knowledge that EPA did, in fact, object, despite failing to respond in a timely manner. This is significant because in the instant case EPA's position is known by this tribunal due to EPA's filed Response, and that position does not contain any objection to Frontier's Motion to Dismiss.

B. EPA Does Not Deny the Second Ground for Dismissal Concerning the Fact that the Penalty Exceeds the Statutory Maximum

As demonstrated in Frontier's Answer and Motion to Dismiss, the live Complaint (confirmed by the narrative of EPA's Penalty Computation Worksheet⁹) clearly and unambiguously seeks to assess a penalty that grossly exceeds the applicable statutory maximum. Accordingly, Frontier moved to dismiss all of EPA's claims. In its Response, EPA neither disagrees with nor controverts Frontier's assertion that the penalty assessment exceeds the statutory maximum. Instead, EPA discusses its separately filed Motion to Amend that seeks to withdraw the specific penalty calculation in the live Complaint and replace it with an unspecified, general penalty. As such, EPA confuses its burden under the Motion to Dismiss and impermissibly argues its separate Motion to Amend, completely failing to object or respond to the actual grounds on which dismissal is sought. Based on the Environmental Appeals Board's construction of 40 C.F.R. § 22.16 (b) in *In the Matter of Asbestos Specialists, Inc.*, dismissal of the live Complaint is appropriate.

Although Frontier is not required to address EPA's Motion to Amend in this Reply, Frontier is uncomfortable allowing EPA's statements about the proposed Amended Complaint to stand uncontested, as they are confusing to this instant proceeding. EPA states that it "admits" its penalty assessment is "confusing"¹⁰ and (apparently) promotes an unspecified, general penalty as more clear. In fact, however, EPA's penalty assessment in the live

⁹ Although EPA's 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 in a Status Report filed October 26, 2009.

¹⁰ Response p. 5.

Complaint is clear and unambiguous on the issue of whether a violation is “single” or “continuing.” The live Complaint on its face methodically identifies the exact number of alleged violations and the penalty that is attached to each one. The Penalty Computation Worksheet prepared by EPA and filed on October 26, 2009 not only provides complete, line-by-line, calculations on each Count, but also includes a detailed narrative explaining how each line item was selected. There is no confusion whatsoever on this aspect of the penalty assessment. What is clear is that EPA wants to withdraw its flawed penalty calculation and replace it with an unspecified, general statutory penalty. EPA implies that this action will “fix” any problems with the penalty assessment in the live Complaint. In reality, however, it would only allow EPA freedom to manipulate its RCRA Civil Penalty Policy (the “Penalty Policy”) to arrive at the same, predetermined number that it improperly seeks in its live Complaint.

EPA does not deny that its penalty assessment in the live Complaint exceeds the statutory maximum. Based upon the arguments set forth in Frontier’s Motion to Dismiss and EPA’s failure to disagree with or controvert such argument, this tribunal should grant Frontier’s Motion to Dismiss and enter an Order dismissing all of EPA’s claims against Frontier with prejudice.

III. CONCLUSION

EPA’s Response to Frontier’s Motion to Dismiss fails to provide this tribunal with any substantive basis for retaining EPA’s claims. EPA does not object to or deny the legal grounds on which the Motion to Dismiss was filed. Rather, EPA impermissibly argues in favor of an

amendment to the live Complaint that has neither been considered nor granted. Consequently, EPA has completely failed to meet its burden that is required to defeat a Motion to Dismiss. As a matter of law, this tribunal should grant Frontier's Motion to Dismiss and enter an Order dismissing the live Complaint with prejudice.

PRAYER

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

Respectfully Submitted,

GUIDA, SLAVICH & FLORES, P.C.



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**ATTORNEYS FOR RESPONDENT
FRONTIER REFINING INC.**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Frontier's Reply to EPA's Response to Frontier's Motion to Dismiss 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
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20406

Copy by Certified Mail, Return Receipt Requested to:

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Jean M. Flores

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.