BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

FILED

JUN 0 8 2007

Terri A. Lorenzon, Director
Environmental Quality Council

In the Matter of the Administrative Order on Consent Issued to Frontier Refining, Inc., A Delaware Corporation	))))	Docket No. 06-5400

ARP & HAMMOND'S OBJECTION AND MOTION TO STRIKE OR, ALTERNATIVELY, RESPOND TO DEQ'S SUPPLEMENTAL MEMORANDUM REGARDING ARP & HAMMOND HARDWARE COMPANY'S REPLY

Arp & Hammond Hardware Company ("Arp & Hammond"; "Movant"), pursuant to Chapter 2, Section 14 of the Department of Environmental Quality ("DEQ") Rules of Practice & Procedure and Rule 6(c)(1) of the Wyoming Rules of Civil Procedure (W.R.Civ.P.), hereby submits its Objection and Motion to Strike or, Alternatively, Respond to DEQ's Memorandum Supplementing DEQ's Response (the "Response") to Arp & Hammond's Motion to Intervene and to Supplement Joint Stipulation for Modification of Administrative Order on Consent (the "Motion") relating to the above-captioned matter before the Environmental Quality Council ("EQC"; the "Council").

INTRODUCTION

By filing dated June 7, 2007, DEQ submitted its Memorandum supplementing DEQ's Response to the Motion. Therein, DEQ chooses to plead, in connection with a motion to intervene, that Movant may be subject to the provisions of W.S. § 35-11-18 concerning "Innocent Landowners." Arp & Hammond objects to DEQ's Supplemental Memorandum and asks that it be stricken from the record.

The Council's Order Setting Hearing in this matter provides that the hearing set for June 11, 2007 will be held on the Motion for Leave to Intervene and to Supplement Joint Stipulation for Modification of Administrative Order on Consent.

It is Arp & Hammond's view that the matters set forth in DEQ's Supplemental Memorandum are irrelevant to the issue of Arp & Hammond's intervention or any other matter set forth in the Motion.

DEQ's Argument is Not Relevant to the Matters before the Council and Should be Stricken.

The question of whether Arp & Hammond may or may not be an "innocent landowner" is not relevant to the disposition of its Motion to Intervene and Supplement, which is the matter pending before the Council. At no point in its Supplemental Memorandum does DEQ cite cogent legal authority for the proposition that, should Arp & Hammond not be found to be within the definition of W.S. § 35-11-18, it may not be granted leave to intervene in this matter. The legal grounds for intervention are set out at page 2 of Arp & Hammond's reply to the Response and are found at W.S. § 16-3-101(b)(vi) and Wyoming Rules of Civil Procedure Rule 19. Therefore, DEQ's Supplemental Memorandum is irrelevant to the matter coming on for hearing.

The Motion (at Motion for Order Supplementing Joint Stipulation; Motion, p. 4, III, 1-13) does not request a finding or an order that Arp & Hammond is an "innocent landowner" as that term is defined in W.S. § 35-11-18. Nor are any of items sought in supplementation of the Joint Stipulation (1-13, *ibid*) contingent on, or related to, such a determination.

WHEREFORE, Arp & Hammond respectfully requests that the Council grant its Objection to DEQ's Supplemental Memorandum and strike it from the record.

Alternatively, if the Council Admits DEQ's Supplemental Memorandum into the Record Hereof, Arp & Hammond Responds by Stating that DEQ's Interpretation of W.S. § 35-11-118 is Incorrect. Arp & Hammond is an Innocent Landowner Pursuant to the Definition set forth at W.S. § 35-11-118(a)(i).

In the alternative, should the Council admit DEQ's Supplemental Memorandum, Arp & Hammond responds thereto as follows:

The Wyoming Environmental Quality Act, at W.S. § 35-11-18, provides in pertinent part as follows:

> (a) "Innocent owner" means a person who did not cause or contribute to the source of contamination and is one (1) of the following:

(i) an owner of real property that has become contaminated as a result of a release or migration of contamination from a source not located on or at the real property;

(balance of W.S. § 35-11-18 deleted)

Even if it were pertinent to the matters before the Council, DEQ's interpretation of the statute is in error.

Arp & Hammond is an innocent landowner in accord with the definition set out at W.S. § 35-11-1801(a)(i). Arp & Hammond has not caused or contributed to the contamination of its land by Frontier. While Frontier (and apparently DEQ) may wish to argue that a lease constitutes a joint venture, black letter law holds that it does not. Arp & Hammond's real property has been polluted by Frontier Refinery as the result of the release of contamination from a source not located on its property; the source of that contamination is the Frontier Refinery. Although it is located at a distance from the main plant, Porter Draw was used by Frontier as an integral part of its refining operations, and consequently is subject to regulation as an operating facility. Frontier's releases of water into Porter Draw are from a source not located on or at the real property. Arp & Hammond does not refine petroleum; Arp & Hammond does not release contaminants into the ground; Arp & Hammond does not generate the water shipped to Porter Draw. Frontier does. Water produced at the Refinery is transported by conveyance pipeline to Porter Draw. The water so transported originates at the Refinery.

DEQ Permitted Frontier's Porter Draw Facility and Should be Estopped from Its Attempts to Transfer Responsibility to Arp & Hammond.

According to Trihydro Corporation ("Trihydro"), Frontier's environmental consultant, the Porter Draw reservoir was originally permitted in 1975 and constructed during 1977. In Husky Oil Company v. the State of Wyoming, Docket Number 78-373, In the District Court, First Judicial District, annexed hereto identified as Exhibit A, paragraph 16 reads, "*Subsequently, on or about October 14, 1975, the Department of Environmental Quality issued an Authorization for Construction for the pipeline and impoundment, pursuant to its Review of Plans and Specifications.*" Also, as established in the settlement language of Docket Number 78-373, the

Wyoming State Engineer's Office was to officially review construction designs for the impoundment and pipeline and the Department of Environmental Quality was to revise the existing National Pollutant Discharge Elimination System ("NPDES") permit for the refinery, retroactive to 1978, to allow the transfer of water to Porter Draw and establish discharge limitations. The Porter Draw reservoir and pipeline were formally permitted in 1981 (see Application For Permit to Appropriate Surface Water for Permit #8331 and #27362). Trihydro (2007- Remediation Work Plan for Porter Draw Reservoir) indicates that seepage at the dam face of the Porter Draw reservoir resulted in the issuance of a NPDES permit for wastewater discharge from the reservoir. Discharges to the Porter Draw channel were terminated in 2003 as part of the settlement agreement of a lawsuit by down-gradient landowners.

Based on this documented history, DEQ originally permitted the facility and has been aware of its design and operation. DEQ knew that the reservoir was unlined and knowingly has allowed Frontier to transfer its wastewater to Porter Draw for thirty years. The lease for the construction and use of Porter Draw reservoir was developed by Husky Oil representatives and signed by Arp & Hammond representatives in 1977 for the purpose of storage of wastewater. The lease states that the Lessee will not permit any deleterious substances to escape from its reservoir. The fact that the reservoir is unlined and that discharges occurred under the NPDES permit program is contrary to the provisions of the lease. Arp & Hammond operates a cattle ranch and has never been in the business of wastewater handling or construction design for such systems.

Counsel for DEQ goes further afield to raise the issue of immunity. None of the matters contained in this docket address immunity. Nonetheless, if anything, DEQ's argument supports Arp & Hammond's Motion by reinforcing that Arp & Hammond may have legal interests at stake if the remediation of Frontier's contamination is not competently and comprehensively done. DEQ's position, simply stated, is that Arp & Hammond may have legal liability, yet should not enjoy the right to participate in the decisions that affect such matters.

Should the Council admit DEQ's Supplemental Memorandum, Arp & Hammond further requests that the Council order briefs and set a briefing schedule and oral argument on the matters therein contained.

CONCLUSION

Arp & Hammond's status as an innocent landowner is irrelevant to its right to intervene or supplement the Joint Stipulation in this matter. Even if such status were relevant, Arp & Hammond is an innocent landowner within the definition of W.S. § 35-11-1801(a)(i).

Submitted this 8th day of June, 2007.

ARP & HAMMOND HARDWARE COMPANY

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of June, 2007, a true and correct copy of the foregoing document was served by facsimile transmission and by first-class mail, postage prepaid, addressed to:

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_____
Alvin Wiederspahn

STATE OF WYOMING)
) ss.
COUNTY OF LARAMIE)

IN THE DISTRICT COURT

FIRST JUDICIAL DISTRICT

HUSKY OIL COMPANY, a corporation,

Plaintiff,

-vs-

STATE OF WYOMING, by and through the STATE BOARD OF CONTROL and GEORGE L. CHRISTOPULOS, WILLIAM LONG, EARL MICHAEL, PAUL KAURELOK, and JOHN TEICHERT, its members; GEORGE L. CHRISTOPULOS, State Engineer of the State of Wyoming; ENVIRONMENTAL QUALITY COUNCIL and ROBERT E. SUNDIN, TIMOTHY FLEMING, GLEN A. GOSS, PHOEBE L. HOLZINGER, LEE E. KEITH, DAVID B. PARK and RONALD C. SURDAM, its members; DEPARTMENT OF ENVIRONMENTAL QUALITY, by and through ROBERT E. SUNDIN, its Director; and the CITY OF CHEYENNE, a municipal corporation,

Defendants,

-vs-

ALBERT GLASSBURN, CALVIN FOGG, JOHN BAUMAN, K. D. KNAUSS, MARVIN McNALLY, DEAN FOGG, HENRY MILLER and DARRELL NAFFZIGER,

Interveners.

FILED

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GERRIE E. BISHOP
CLERK DISTRICT COURT

Docket No. 78, No. 373

R4280

SECOND AMENDED COMPLAINT FOR DECLARATORY RELIEF

Plaintiff Husky Oil Company hereby files its Second Amended Complaint for Declaratory Relief and alleges:

IDENTITY OF PARTIES

1. Plaintiff is a corporation organized under the laws of the State of Delaware and is authorized to transact business in the State of Wyoming where its principal place of business is located.

2. The Defendant State Board of Control of the State of Wyoming is an agency of the state created pursuant to Article 8 of the Wyoming Constitution, having "general supervision of the waters of the state and of their appropriation, distribution and diversion, and of the various officers connected therewith." Defendants George L. Christopulos, William Long, Earl Michael, Paul Kaurelok and John

Teichert are members of the State Board of Control are sued in their official capacities.

3. Defendant George L. Christopulos is the duly appointed, qualified and acting State Engineer for the State of Wyoming with capacity to sue and be sued and is a member of the State Board of Control and its administrative officer in administering the laws of the State of Wyoming relating to the appropriation and use of the natural waters in the state and is sued in his official capacity.

4. Defendant Environmental Quality Council is an agency of the state created pursuant to statute and has general supervision and direction over environmental quality laws of the State of Wyoming with the right to sue and be sued; and Defendants Robert E. Sundin, Timothy Fleming, Glen A. Goss, Phoebe L. Holzinger, Lee E. Keith, David B. Park and Ronald C. Surdam are members of the said Environmental Quality Council and are sued in their official capacities.

5. Defendant Robert E. Sundin is the duly appointed, qualified and acting Director of the Department of Environmental Quality for the State of Wyoming with capacity to sue and be sued and delegated with authority to administer the statutes of the State of Wyoming relating to environmental quality, including the prevention of pollution and contamination of waters and water sources of the State of Wyoming and is sued in his official capacity.

6. Defendant City of Cheyenne is a municipal corporation, a body corporate and politic of the State of Wyoming with authority to sue and be sued.

7. Interveners are parties to this action by reason of their having been granted the right to intervene and assert that they have rights which will or may be affected by a determination of the claims of the parties to the action.

JURISDICTION

8. This action is brought pursuant to the provisions of Sections 1-37-101 through 1-37-115, Wyoming

Statutes, 1977 (commonly referred to as the Uniform Declaratory Judgments Act).

9. Plaintiff is a person within the definition of said Act whose rights, status or other legal relations are affected by the provisions of Section 41-3-301, 41-3-305 or 41-3-104, Wyoming Statutes, 1977, or similar provisions of the law; and as such, Plaintiff is entitled to a determination and declaration of such rights, status or other legal relations.

FACTUAL ALLEGATIONS

10. Plaintiff has for many years last past purchased and now purchases from the Defendant City of Cheyenne through its Board of Public Utilities in the State of Wyoming, through the culinary water system of said city, substantial quantities of water which Plaintiff used in the process of refining crude oil at its refinery in Cheyenne. Plaintiff pays approximately $15,000.00 per month for such water. The original source of such water is not known to Plaintiff, but Plaintiff is informed and believes and therefore alleges that in excess of 75% of the water utilized by Defendant City of Cheyenne comes from trans-mountain diversions and from wells, neither of which are tributary to Crow Creek.

11. All of the water purchased by Plaintiff is applied to municipal and industrial use in refining, during which process a considerable part has in the past been and now is consumed and evaporated.

12. A portion of the water not immediately consumed and evaporated is contaminated with chemicals and other foreign substances which render the same unsuitable for culinary and domestic use. In the past a portion of this waste and residue has been utilized for agricultural purposes and the balance has been discharged into the channel of Crow Creek, a non-navigable natural stream bed.

13. Section 35-11-301, Wyoming Statutes, 1977, adopted by the legislature of the State of Wyoming, in part provides:

"(a) No person, except when authorized by a permit issued pursuant to the provisions of this act, shall:

"(1) Cause, threaten or allow the discharge of any pollution or wastes into the waters of the state..."

14. After notice and public hearing, and acting under statutory authority and in accordance with the Federal Water Pollution Control Act (33 U.S.C. Sec. 1251, et seq., as amended), the U. S. Environmental Protection Agency, with the consent and approval of the Defendant Robert E. Sundin, or his predecessor, Director of the Department of Environmental Quality, on August 27, 1973, issued a permit to Plaintiff authorizing Plaintiff to discharge into Crow Creek the liquid effluent resulting from the refinery process.

15. Subsequently, on or about May 9, 1975, the Director of the Department of Environmental Quality, after due notice, issued a revised permit which imposed additional limitations on the discharge into Crow Creek of said effluent on and after November 1, 1975.

16. Subsequently, on or about October 14, 1975, the Department of Environmental Quality issued an Authorization for Construction for the pipeline and impoundment, pursuant to its Review of Plans and Specifications.

17. Subsequently, on or about February 27, 1976, the Defendant Department of Environmental Quality, after due notice, issued a revised permit which inter alia authorized and approved the construction of a total impoundment system for the waste effluent theretofore discharged by Plaintiff into the natural channel of Crow Creek for the purpose of complying with the provisions of Section 35-11-301 of the Wyoming Statutes referred to hereinabove.

18. Subsequently, on or about November 14, 1977, Defendant Department of Environmental Quality, after due notice, issued another revised permit authorizing and approving continued use of said total impoundment system for the period from January 1, 1978, through December 31, 1982.

19. Subsequently, on or about May 21, 1978, Defendant Department of Environmental Quality, after due

issued another revised permit authorizing and approving increased effluent limitations due to an expansion of Plaintiff's refinery and authorizing and approving continued use of said total impoundment system for the period through April 30, 1983.

20. Thereafter, and in compliance with said amended permits, Plaintiff constructed and is presently using a pipeline and an impoundment pond to transport, capture and retain waste effluent from Plaintiff's refinery for the purpose of storing and impounding and, to the extent feasible, recycling for further use in the refinery process, a portion of said effluent so as to prevent any being discharged into Crow Creek in violation of Wyoming Statute 35-11-301.

21. Since the completion of said impoundment pond and particularly since on and after July 1, 1977, Plaintiff has not discharged any effluent into Crow Creek in violation of Wyoming Statute 35-11-301 and said permits hereinabove referred to.

22. The provisions of the federal statute hereinabove referred to (specifically 33 U.S.C. Sec. 1311(b)(1) and (2)) and Chapter II of the rules adopted by the Defendant Environmental Quality Council require Plaintiff not only to meet the limitations imposed by law not later than July 1, 1977 (called BPCTCA "Best Practicable Control Technology Currently Available"), but also to achieve other, more stringent limits identified and referred to as BATEA ("Best Available Technology Economically Achievable) by July 1, 1983.

23. The Federal Act further prescribes a goal of no discharge of pollutants by 1985 (33 U.S.C. Sec. 1251(a)(1)), which goal Plaintiff is informed and believes is a binding and controlling limitation on Plaintiff.

24. The Clean Water Act of 1977 further affects Plaintiff by placing new requirements for control of toxic substances contained in said effluent waste by adding to Sec. 1311(b)(2) provisions requiring compliance with effluent limitations on certain toxic pollutants by July 1, 1984

(Section C), and requiring compliance with discharge of other toxic pollutants not yet identified within three years of identification of such toxic pollutants and in setting of effluent limitations thereon (Section D). Neither the Federal Environmental Protection Agency nor the State of Wyoming has yet adopted implementing regulations therefor.

25. In order for Plaintiff to comply with the 1977 and 1983 requirements and the 1985 goal, it has, under the authority of the Authorization for Construction issued by Defendant Department of Environmental Quality, expended approximately $1,000,000.00 to construct the impoundment pond and pipeline facilities incident thereto to capture and retain the effluent not otherwise utilized or consumed.

26. Plaintiff is informed and believes and therefore alleges that by its construction and use of the impoundment pond, Plaintiff not only complies with the provisions of its present permit, but will also achieve the 1983 limits, the 1985 goal and any other limitations on the discharge of toxic pollutants and any other new or revised requirements which either government may impose on Plaintiff in future years. Plaintiff is further informed and believes and therefore alleges that its procedures are the only feasible method reasonably designed and calculated to meet both the existing limitations and the limitations not yet established but which will apply to Plaintiff.

27. Defendants State Board of Control and particularly Defendant George L. Christopulos as the State Engineer of the State of Wyoming seek to invoke the provisions of Wyoming Statutes, Sections 41-3-104, 41-3-301 and 41-3-305, in respect to Plaintiff's action in impounding and recycling a portion of the effluent and waste resulting from the refinery process in which water purchased from the City of Cheyenne is used.

28. Plaintiff alleges that the water which it purchases from the City of Cheyenne through its culinary system is not "unappropriated waters" within the meaning and definition of said statutes and that Plaintiff is not required

to file an application for appropriation and obtain the issuance of a permit by said Defendants in order to construct and maintain the impoundment pond in which effluent from Plaintiff's refinery is recycled and impounded.

29. Plaintiff further alleges, in any event, that if the provisions of the Wyoming Environmental Quality Act (Section 35-11-301, Wyoming Statutes) and the provisions of the Federal Water Pollution Control Act (33 U.S.C. Sec. 1251, et seq.) are constitutional and have been properly applied to Plaintiff, then Plaintiff has fully complied with all conditions precedent to said construction and impoundment.

30. If the Defendants State Board of Control and State Engineer have authority to limit, control or prevent Plaintiff from proceeding with its plan, then such authority is in derogation of the asserted authority and power of the Defendants Environmental Quality Council and Robert E. Sundin, Director of the Department of Environmental Quality of the State of Wyoming, who have encouraged, permitted and authorized Plaintiff to impound the waste effluent from its refinery processes so as not permit any of the same to be discharged into Crow Creek and in derogation of the provisions of the Environmental Quality Act expressed in Wyoming Statute 35-11-102.

31. By reason of the public notices given by Defendants Environmental Quality Council and Robert E. Sundin, Director of the Department of Environmental Quality, Plaintiff's plan for total impoundment of any unused waste and effluent from its refinery and the failure of the other Defendants and Interveners to object thereto, Defendants and Interveners are now estopped and precluded from challenging said action and authorization to construct and utilize such impoundment method for recycling and disposing of the effluent and waste from Plaintiff's Cheyenne refinery.

32. Plaintiff has heretofore requested the Defendant City of Cheyenne through its Board of Public Utilities to permit discharge of Plaintiff's effluent waste into the

sewage treatment system of said City, which request has been rejected.

33. Plaintiff's plan of total containment of its waste effluent not otherwise used is the most reasonable, economical and practical method of disposing of such effluent; and unless the Court determines that Plaintiff may do so or in the alternative may continue to discharge such effluent into Crow Creek, Plaintiff will be unable to continue to maintain and operate its refinery at Cheyenne, Wyoming, and will be deprived of its property without just compensation therefor in violation of Plaintiff's constitutional rights.

WHEREFORE, Plaintiff demands judgment that this Court determine the matter and that upon such determination adjudge:

1. That the water which Plaintiff purchases from the City of Cheyenne and uses in its refinery process is not thereafter subject to control and jurisdiction of the State Engineer or the Board of Control of the State of Wyoming.

2. That the Defendant George L. Christopulos, the State Engineer of the State of Wyoming, and the Defendants State Board of Control and its members have no jurisdiction to review and consider Plaintiff's treatment of the effluent waste.

In the alternative,

3. That the Court determine that the provisions of Wyoming Environmental Quality Act and particularly Section 35-11-301, Wyoming Statutes, as applied to Plaintiff's treatment and disposal of its effluent waste are unconstitutional and void and that the Defendants Environmental Quality Control and Robert E. Sundin, Director of the Department of Environmental Quality, and said Department of Environmental Quality are without authority to prohibit, limit or otherwise prevent Plaintiff from discharging into Crow Creek any waste remaining from the use of water in its refining process, regardless of whether such waste is or will be contaminated with chemicals or other pollutants.

4. Or as a further alternative that the Defendants and Interveners, and each of them are estopped and precluded from challenging Plaintiff's right to construct and maintain an impoundment pond to retain and impound and recycle waste and effluent from Plaintiff's Cheyenne refinery in keeping with a permit approved and issued by Defendants Environmental Quality Council and the Department of Environmental Quality after public notice.

Plaintiff prays for such other and further declaratory relief as may be just and proper in the premises.

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