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Terri A. Lorenzon, Director
Environmental Quality Council

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

In the Matter of the Administrative Order)
on Consent Issued to Frontier Refining Inc.,)
a Delaware corporation)

Docket No. 06-5400

**DEQ'S SUPPLEMENTAL MEMORANDUM REGARDING
ARP & HAMMOND HARDWARE COMPANY'S REPLY**

The Wyoming Department of Environmental Quality (DEQ), pursuant to Chapter 2, Section 14 of the DEQ Rules of Practice & Procedure and Rule 6(c)(1) of the Wyoming Rules of Civil Procedure (W.R.C.P.), submits this Supplemental Memorandum Regarding Arp & Hammond Hardware Company's (Arp & Hammond) Reply (Reply) to DEQ's Response to Arp & Hammond's Motion (Motion) to Intervene and to Supplement Joint Stipulation for Modification of Administrative Order on Consent, relating to the above-captioned matter before the Environmental Quality Council (EQC or Council). Hearing on the Motion is set for Monday, June 11, 2007 at 2:00 PM. This Supplemental Memorandum addresses the specific contention in Arp & Hammond's Reply that "Arp & Hammond is an Innocent Landowner." Reply pp. 6-7.

According to Arp & Hammond's *Motion* and *Reply*, these are the facts:

1. Arp & Hammond owns land within Porter Draw on which the Porter Draw reservoir is located. Motion p. 1 (¶1).
2. Thirty (30) years ago (1977)¹ Arp & Hammond leased its Porter Draw property to Frontier for the purpose of discharging wastewater and effluent by means of a conveyance pipeline and reservoir. Motion p. 1 (¶1); Reply p. 6.
3. The lease obligated Frontier, as Lessee, to "not permit any deleterious substances to escape from its reservoir." Reply p. 7.

¹ For historical context, the Wyoming Environmental Quality Act was enacted in 1973.

4. "Frontier has never lined the pond at Porter Draw and has thereby continued to allow pollutants to percolate into the ground and groundwater at that site." Reply p. 7.

5. The lease expired as of June 30, 2006 and Frontier has ceased operating the Porter Draw reservoir. Motion p. 3 (§13).

6. Arp & Hammond has proposed to extend the lease of Porter Draw reservoir to Frontier for forty-five thousand dollars (\$45,000.00) per month. Reply p. 6 (FN 2).

These facts indicate that:

- a) Arp & Hammond voluntarily leased its land in Porter Draw to Frontier for use as a reservoir for managing refinery wastewater and effluent;
- b) The lease language expressly obligating Frontier to "not permit any deleterious substances to escape from its reservoir" reflect that Arp & Hammond was aware at the time the lease was executed that such refinery wastewater and effluent could contain "deleterious substances" which could escape from the reservoir;
- c) Although aware that refinery wastewater and effluent could contain "deleterious substances" which could escape from the reservoir, Arp & Hammond's lease either did not require Frontier to line the reservoir, or, if it did, Arp & Hammond did not enforce that requirement of its lease;
- d) Had Arp & Hammond not allowed Frontier to use its Porter Draw property to manage refinery wastewater and effluent in an unlined reservoir, pollutants may not have continued to percolate into the ground and groundwater at that site;
- e) Despite the continued percolation of pollutants into the ground and groundwater at that site, Arp & Hammond proposed to extend the lease of the unlined Porter Draw reservoir to Frontier for forty-five thousand dollars (\$45,000.00) per month.

Arp & Hammond's Reply does not cite any legal authority supporting its contention that "Arp & Hammond is an Innocent Landowner." Reply p. 6. Article 18 of the Wyoming Environmental Quality Act (WEQA) specifically addresses the issue of "Innocent Owners." An

“innocent owner” is one who did not cause or contribute to the source of contamination *and* is one 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*;
- (ii) an owner of real property who can show with respect to the property that the owner has no liability for contamination under section 107(a) of CERCLA (42 U.S.C. § 9607(a)), because the owner *can show a defense as provided in CERCLA section 107(b)* (42 U.S.C. § 9607(b));
- (iii) an owner of real property who at the time of becoming the owner of the property did not know or should not have reasonably known about the presence of contamination on the property;
- (iv) a *lender or fiduciary who owns or holds a security interest* in the land, unless the lender or fiduciary participated in the management of the site at the time the owner or operator caused a release or migration of contaminants; or
- (v) a *unit of state or local government* which acquired ownership or control by virtue of its functions as a sovereign, unless the state or local government contributed to the contamination.

WYO. STAT. ANN. § 35-11-1801(a).

Furthermore, no person who owns or operates lands or facilities subject to permitting or corrective action requirements of the hazardous waste rules and regulations promulgated under W.S. 35-11-503(d) shall be considered an innocent owner. WYO. STAT. ANN. § 35-11-1801(b).

The statute provides immunity for “innocent owners” from liability for investigation, monitoring, remediation or other response action regarding contamination attributable to a release, discharge or migration of contamination on his property, subject to certain conditions.

WYO. STAT. ANN. § 35-11-1802(a)&(b).

Under Article 18 of the WEQA, Arp & Hammond is not an “innocent owner” of the Porter Draw reservoir site because:

- (a)(i) the source of contamination *is* located on or at that site;
- (a)(ii) Arp & Hammond cannot show a defense to liability with respect to the Porter Draw reservoir site as provided in CERCLA section 107(b) (42 U.S.C. § 9607(b)), because the release(s) there were not caused solely by (1) an act of God, (2) an act of war, or (3) the act or omission of a third party with whom Arp & Hammond did not have an existing “contractual relationship,”²
- (a)(iii) Arp & Hammond already owned the real property in Porter Draw when it leased it to Frontier for use as a reservoir, from which contamination “percolate[d] into the ground and groundwater at that site;”
- (a)(iv) Arp & Hammond is not a lender or fiduciary who owns or holds a security interest in the Porter Draw site;
- (a)(v) Arp & Hammond is not a unit of state or local government; and
- (b) Arp & Hammond owns the Porter Draw reservoir site, which is subject to corrective action requirements of the hazardous waste rules and regulations promulgated under W.S. 35-11-503(d).

WYO. STAT. ANN. § 35-11-1801(a)&(b).

The point of this supplemental memorandum, which addresses contentions in Arp & Hammond’s Reply to DEQ’s Response to Arp & Hammond’s Motion to Intervene, is not to detract from Frontier Refining Inc.’s liability and obligations relating to corrective actions involving the Porter Draw reservoir site, but rather to explain why Arp & Hammond is not an “innocent owner” under Wyoming law, which is one reason why it is not appropriate for Arp & Hammond to become a party in DEQ’s prospective administration of Administrative Order on

² For the purpose of section 9607(b)(3), the term “contractual relationship” includes “leases.” 42 U.S.C. § 9601(35)(A).

Consent (AOC) for the Frontier refinery.

As discussed in DEQ's Response to Arp & Hammond's Motion to Intervene, the AOC does not relieve Frontier or deprive Arp & Hammond of any obligations or private remedies based on their lease, including requiring additional or stricter clean-up measures or standards that do not conflict with requirements under the AOC. The EQC's role under WYO. STAT. ANN. § 35-11-112 does not include adjudicating private contract, lease, or damage claims. *Preferred Energy Properties v. Wyoming State Bd. of Equalization*, 890 P.2d 1110, 1113 (Wyo. 1995).

DATED this 7th day of June, 2007.



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CERTIFICATE OF SERVICE

True and correct copies of the foregoing DEQ'S SUPPLEMENTAL MEMORANDUM REGARDING ARP & HAMMOND HARDWARE COMPANY'S REPLY were served this 7th day of June, 2007 by United States mail, first class postage paid, facsimile transmission and/or e-mail, addressed as follows:

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