

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

FILED

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

Docket No. 06-5400

MAR 14 2007

Terri A. Lorenzon, Director
Environmental Quality Council

**REPLY OF ARP & HAMMOND HARDWARE COMPANY TO THE OPPOSITION OF
FRONTIER REFINING INC. AND THE RESPONSE OF THE WYOMING DEPARTMENT
OF ENVIRONMENTAL QUALITY FOR LEAVE TO INTERVENE AND TO
SUPPLEMENT *JOINT STIPULATION FOR MODIFICATION OF ADMINISTRATIVE
ORDER ON CONSENT***

Arp & Hammond Hardware Company ("Arp & Hammond") submits hereby its reply to the Opposition of Frontier Refining Inc. ("Frontier") and the Response of the Wyoming Department of Environmental Quality ("DEQ") to its Motion to Intervene and Supplement the Administrative Order on Consent (the "AOC") in respect of the above captioned matter before the Environmental Quality Council (the "EQC," the "Council").

I. INTRODUCTION

In its Motion to Intervene, Arp & Hammond moved 1) for leave to intervene and be admitted as a party in all matters now and in the future pending and pertaining to this Docket; 2) that the Joint Stipulation be approved; and 3) that the parties be granted sixty (60) days to negotiate supplementation of the Joint Stipulation modifying the AOC, failing which, Arp & Hammond may petition the EQC to convene a contested case hearing.

II. FACTS

Arp & Hammond incorporates the Statement of Facts set out in its Motion to Intervene and to Supplement the AOC by this reference, as if fully set out herein.

III. ARGUMENT SUMMARY

Arp & Hammond has standing in this Docket and is entitled by right to intervene as a party. Arp & Hammond has consistently supported EQC approval of the Joint Stipulation Modifying the Administrative Order on Consent; it did so in its Motion and it again does so now. Arp & Hammond believes, however, that more needs to be done to assure that Porter Draw is properly

remediated and, as a result, asks that certain provisions be added to the AOC for that specific purpose. Further, Arp & Hammond believes that what should be done, should be done now, not at the end of a protracted legal debate that feeds the lawyers but does not clean up the environment. The most expeditious way to do so is to allow Arp & Hammond to intervene and to then grant the parties, including Arp & Hammond, a sixty (60) day period to negotiate additions to the AOC.

IV. ARGUMENT

Arp & Hammond is entitled to admission as a party.

Arp & Hammond has standing and is entitled by both the Rules and Regulations of the EQC and the Wyoming Administrative Procedure Act to be admitted as a party.

Section 3, Initiation of Proceedings, of Chapter 1, General Rules of Practice and Procedure before the Environmental Quality Council, states at subparagraph (a) that: “All hearings before the EQC, appeals or otherwise, shall be held pursuant to these Rules and the Wyoming Administrative Procedure Act.” The Rules do not define a “party”; however, the Administrative Procedure Act does: ““Party” means each person named or admitted as a party or properly seeking and entitled as of right to be admitted as a party” (W.S. § 16-3-101(b)(vi)). A hearing was instituted by the Council for consideration of the approval of the Joint Motion, it was assigned a docket number and the date and time for hearing were set. This matter is not an appeal and therefore is not subject to the sixty-day requirement of Section 16 of the Rules.

Arp & Hammond is entitled by right to be admitted in this matter because it is an indispensable party. Wyoming Rules of Civil Procedure (W.R.C.P.) Rule 19, *Joinder of Persons Needed for Adjudication*, has been incorporated by reference in the EQC’s Rules of Practice and Procedure. While “necessary” or “proper” parties *may* be joined to save further litigation or protect the interest of another party (*Reilly v. Reilly*, 671 P.2d 330 (Wyo. 1983)), an indispensable party must be joined.¹

Wyoming law defines an indispensable party as one without whose presence a final decree could not be made without either affecting its interest or leaving the controversy in such a condition

¹ Arp & Hammond is not only a proper and necessary party whose interests in this matter warrant the exercise of Council discretion to intervene, its interests are clearly such that it is an indispensable party hereto.

that its final determination might be wholly inconsistent with equity and good conscience. *American Beryllium & Oil Corp. v. Chase*, 425 P.2d 66 (Wyo. 1967). There is no particular formula available to determine whether or not one is an indispensable party because “the facts peculiar to each case are determinative of that question.” (*Ibid.*) Arp & Hammond has the interest of an indispensable party because it owns all the land under and surrounding the Porter Draw reservoir and discharge facilities and 95% of the land through which the conveyance pipeline passes. It is the only person seeking admittance as a party hereto.

Arp & Hammond will be aggrieved and adversely affected in fact by EQC action in this docket. Frontier has polluted its land. Its legal rights in relation to those lands are being adjudicated by the Council’s consideration of the Joint Stipulation and its efforts to participate in the decisions adversely affecting it have been rebuffed by the parties who now oppose its intervention.

As a result of their exclusion of Arp & Hammond from discussions relating to settlement of the Notice of Violation filed against Frontier (*People of the State of Wyoming v. Frontier Refining, Inc.*, State of Wyoming, First Judicial District Docket No. 169-196; Notice of Violation, DEQ Docket No. 3538-04) and the Joint Stipulation Modifying AOC (Environmental Quality Council Docket No. 06-5400), Frontier and DEQ should be estopped from banning Arp & Hammond from intervention in this matter. In short, they cannot have it both ways. They cannot exclude Arp & Hammond from participating in their discussions and negotiations related to how Porter Draw will be remediated, while at the same time argue that the EQC should preclude Arp & Hammond from participating in the resolution of these matters through this forum. Arp & Hammond should and must be admitted as a party hereto.

Arp & Hammond Motion items and Frontier and DEQ response.

Arp & Hammond has requested that the Joint Stipulation be approved and that the EQC enter an order supplementing the provisions of the Joint Stipulation as follows regarding Arp & Hammond land impacted by Frontier’s operations:

- 1) That Frontier be directed to conduct environmental investigations along the entire length of the wastewater conveyance pipeline that connects Frontier Refinery to the Porter Draw reservoir to determine whether there are any environmental impacts or

contamination associated with that pipeline or whether such pipeline should be removed to prevent such impacts or contamination in the future; and that any impacts identified be addressed by Frontier for remediation not later than November 30, 2008.

2) That remediation be completed to no less than established background conditions.

3) That Frontier be directed to develop a work plan for remediation of Porter Draw and to complete additional investigations to address soil and sediment sampling data gaps near the conveyance pipeline discharge, the drainage basin leading to the reservoir and the inlet in the southwest corner of the reservoir.

4) That Frontier be directed to complete additional sampling within the high wastewater line of the reservoir to further define sediment quality, depth of subsurface soil impacts and groundwater impacts.

5) That Frontier be directed to complete additional groundwater assessment to establish background groundwater quality and the depth and areal extent of groundwater impact beneath the reservoir and well as down gradient of the reservoir; and that such investigations shall not be limited to RCRA regulated compounds, but shall include constituents of the wastewater that potentially impact waters of the State of Wyoming.

6) That Frontier be directed to remove all wastewater remaining at the Porter Draw reservoir no later than June 1, 2007.

7) That Frontier be directed to remove all impacts to the land, surface water and groundwater associated with its use of the Porter Draw reservoir; and that such impacts be deemed to be inclusive of both regulated and non-regulated compounds contained within the wastewater which have impacted sediment, soil, surface water and groundwater at Porter Draw.

8) That Frontier be directed to remediate Porter Draw to no less than established background concentrations.

None of the above items are specifically addressed by Frontier in its opposition; DEQ only addresses item 8.

9) That characterization and remediation of the Porter Draw be completed no later than November 30, 2008, and that penalties for non-compliance as provided in the AOC shall apply.

Frontier only partially addresses this item at I., Summary of Argument, page 2 “g) the Joint Stipulation and AOC addresses (*sic*) remediation at Porter Draw Reservoir” and III., Argument, G., pages 8 and 9, “A&H’s concerns are addressed.” DEQ addresses this item in F.45 page 10.

10) That Frontier and DEQ be directed to keep Arp & Hammond informed of all activities associated with this matter and to include Arp & Hammond in the review, comment and participation in any and all negotiations relating to Frontier actions and compliance addressed to offsite impacts specific to and/or in relation to Arp & Hammond lands.

Frontier only partially addresses this item at III., Argument, H., page 9, “Frontier will continue to cooperate with A&H.” DEQ partially addresses this item at F.48, page 11.

11) That Porter Draw and other lands associated with the conveyance system be remediated to their established background condition.

12) That Frontier and DEQ and Arp & Hammond be provided sixty (60) days from this date to negotiate and settle the matters set forth in this *Motion to Supplement Joint Stipulation for Modification of Administrative Order on Consent* pursuant to Section 11 of the Rules of Practice and Procedure before the EQC. If no settlement is reached by the expiration of the sixty days, Arp & Hammond may at that time petition the EQC to convene a contested case hearing to resolve the issues in dispute among the parties.

Items 11 and 12 are not substantively addressed by Frontier; DEQ provides procedural comments on items 11 and 12.

Items 1 through 9 of the Arp & Hammond Motion were recommended by Arp & Hammond's environmental consultants as matters that are ignored or insufficiently addressed in the investigation and assessment of Porter Draw prepared by Frontier's consultants. Arp & Hammond believes that in its capacity of representing the People of the State of Wyoming, DEQ would come to the Council and urge that Arp & Hammond be granted leave to intervene and that the sixty-day period sought by Arp & Hammond be granted to determine in a discussion, among qualified experts representing all three parties, what the best procedures are to remediate the contamination of land and water at Porter Draw. Unfortunately, that has not been the case.

Frontier has not cooperated with Arp & Hammond.

In its response to Item 10 above, Frontier asserts its willingness to cooperate with Arp & Hammond, yet in fact it has not done so. Arp & Hammond prepared and submitted to Frontier a Stipulation (attached hereto as Exhibit A) prior to the date set for hearing of this matter, setting out the terms under which it agreed not to seek leave to intervene in this matter. Frontier declined to provide its comments on, or to enter into, the Stipulation.

Arp & Hammond prepared and submitted to Frontier a proposed plan of remediation for Porter Draw (attached hereto as Exhibit B) prior to the date set for hearing of this matter, asking that Frontier simply commit in writing that which it intends to do in remediation of its pollution of Porter Draw. Frontier declined to provide its comments on, or enter into, the plan of remediation.

Arp & Hammond is an Innocent Landowner.

Arp & Hammond leased property to Frontier for the conveyance pipeline and the Porter Draw reservoir. The lease of Porter Draw was executed thirty (30) years ago by the then principals of Arp & Hammond, all of whom were at that time in their late eighties.²

² With respect to the termination of the lease and Frontier's comments thereon, the proposed rent to extend the lease was commensurate with the market price for treatment of produced water, which is the purpose for which Frontier utilizes Porter Draw. Frontier has entered into an agreement with the City of Cheyenne to discharge water of a certain quality, comparable to that discharged into Porter Draw, into the City sewer system. Frontier agreed to pay the City a \$2 million hook-up fee plus \$2.50/1,000 gallons of water so discharged (or \$45,000-\$55,000 per month) for the privilege. The proposal from Arp & Hammond approximates that market price.

Inter alia, the lease included the following promise: “Lessee covenants that Lessee will not permit any deleterious substances to escape from its reservoir...”

Frontier, in its selective reading of the lease, suggests that its contamination of land and water at Porter Draw is countenanced by the lease; this is not true. Frontier has violated the law (including the Clean Water Act) in its operation of Porter Draw discharge. Frontier cannot attempt to avoid its responsibilities for such violations by attempting to rely upon a lease that never contemplated such violations. In other words, the lease did not relieve Frontier’s responsibility to comply with all State and Federal laws. A Notice of Violation (“NOV”) was issued against Frontier for transgressing its National Pollution Discharge Elimination Standards (“NPDES”) permit (Notice of Violation, DEQ Docket No. 3538-04). Frontier settled the NOV by entering into the Consent Decree (*People of the State of Wyoming v. Frontier Refining, Inc.*; First Judicial District Docket No. 169-196) with DEQ. Further, Frontier discharged water out of the Porter Draw reservoir without having an NPDES permit to do so. Frontier’s discharges were challenged by downstream property owners whose lands were also improperly contaminated by Frontier’s actions. Frontier reached a settlement with those downstream landowners, while at the same time offering a token money payment to Arp & Hammond in exchange for its claims, which Arp & Hammond declined to accept. 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.³

Frontier’s investigations at Porter Draw are, on their face and in the opinion of Arp & Hammond’s environmental consultant, inadequate; on their face because they do not address leaks from the conveyance pipeline and technically because they do not identify or address a variety of contaminants and conditions found at Porter Draw.

V. CONCLUSION

Arp & Hammond seeks an Order which will result in the cleanup of Porter Draw without the unconscionable delay that has characterized this effort over the past sixteen years and which has brought the United States Environmental Protection Agency to the brink of revoking the State of Wyoming’s primacy in directing the needed remediation. Arp & Hammond has offered a practical

³ With respect to the purchase of the Porter Draw land, Frontier sought to buy a piece of ground in the middle of Arp & Hammond pasture land, thereby diminishing the value of the adjoining land and not offering to pay the market price for what they proposed to take.

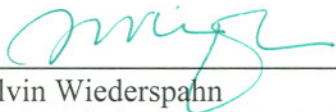
means to do so, yet Frontier and DEQ prefer to continue pursuing the same tack that has resulted in zero progress. Their refusal to negotiate with Arp & Hammond, at the same time that they are working so diligently to preclude Arp & Hammond from participating in this process, speaks volumes. Their conduct confirms Arp & Hammond's concerns regarding their commitment to cleaning up Porter Draw and makes it clear that Arp & Hammond must be given a voice in this matter.

Therefore, Arp & Hammond respectfully requests that the Council grant its Motion for Leave to Intervene and to Supplement the AOC by the grant of a sixty-day period to negotiate the particulars of the supplementation or, in the alternative, that the Council grant Arp & Hammond leave to intervene and that it order that the AOC be amended to incorporate the supplementation set forth in Arp & Hammond's Motion.

Submitted this 14th day of March, 2007.

ARP & HAMMOND HARDWARE COMPANY

By:



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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of March, 2007, a true and correct copy of the foregoing document was served by first-class mail, postage prepaid, addressed to:

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