Department of Environmental Quality

To protect, conserve and enhance the quality of Wyoming's environment for the benefit of current and future generations.

Dave Freudenthal, Governor

John Corra, Director

July 21, 2008

CERTIFIED MAIL#7005 1820 0005 1478 3700
RETURN RECEIPT REQUESTED

Alvin Wiederspahn
Attorney for
Arp & Hammond Hardware Co.
and/or Old Horse Pasture, Inc.
2015 Central Avenue, Suite 200
Cheyenne, Wyoming 82001

RE: Administrative Order

Dear Mr. Wiederspahn:

Please find enclosed an Administrative Order (AO) to Arp and Hammond Hardware Co. and/or Old Horse Pasture, Inc. regarding access for purposes of installation of a barrier wall system along the boundary of the Frontier Refinery adjacent to land owned by Arp and Hammond Hardware Co. and/or Old Horse Pasture, Inc.

Should you have any questions regarding this correspondence or the AO, please feel free to contact me, Mr. Carl Anderson or Ms. Lily Barkau at 307.777.7752.

Sincerely,

LeRoy C. Feusner, P.E., BCEE
Administrator, Solid and Hazardous Waste Division
Wyoming Department of Environmental Quality

ENC: AO

C: Carl Anderson, SHWD
Lily Barkau, SHWD

THE DEPARTMENT OF ENVIRONMENTAL QUALITY
STATE OF WYOMING

IN THE MATTER OF THE	)	
ADMINISTRATIVE ORDER	)	
ISSUED TO ARP & HAMMOND	)	
HARDWARE CO. AND/OR OLD	)	DOCKET NO. 4316-08
HORSE PASTURE, INC.	)	
2015 CENTRAL AVE., SUITE 200	)	
CHEYENNE, WYOMING 82001	)	

ADMINISTRATIVE ORDER

1. Frontier Refining Inc. (Frontier) owns and operates a petroleum refinery at Cheyenne, Wyoming.

2. Arp & Hammond Hardware Company and/or Old Horse Pasture, Inc. (collectively "A&H") own(s) land adjacent to the southern boundary of the Frontier refinery.

3. The EPA issued to Frontier Administrative Order On Consent (AOC) No. RCRA 3008(h)-VIII-88-08 in September of 1990, pertaining to Frontier's petroleum refinery in Cheyenne, Wyoming.

4. The Wyoming Department of Environmental Quality (DEQ) received authorization to administer the federal hazardous waste program under the Resource Conservation and Recovery Act (RCRA) in lieu of the EPA in 1995, pursuant to WYO. STAT. ANN. § 35-11-503(d) and 42 U.S.C. § 6926.

5. The DEQ took over administration of the AOC and re-issued it as an equivalent state order in 1995, pursuant to WYO. STAT. ANN. § 35-11-518(b).

6. By letter dated August 15, 2006, EPA Region 8 notified the DEQ of the need to accelerate corrective action at the Frontier refinery, including an enforceable schedule under the AOC for site stabilization and boundary control by October 15, 2008.

7. On October 17, 2006, Frontier and the DEQ filed with the Wyoming Environmental Quality Council (EQC) a Joint Motion and Joint Stipulation for Modification of Administrative Order On Consent, which, among other things, calls for Site Stabilization, including boundary control, by October 15, 2008.

8. On October 18, 2006, the DEQ faxed a copy of the Joint Motion and Joint Stipulation for Modification of Administrative Order On Consent to counsel for A&H, owners of property adjacent to the Frontier refinery.

9. On February 12, 2007, A&H filed with the EQC a Motion to Intervene and to Supplement the Joint Stipulation for Modification of Administrative Order On Consent (EQC Docket No. 06-5400), which, among other things:

a) claimed that land owned by A&H adjacent and contiguous to the refinery has been materially and adversely affected by Frontier's operations, which have resulted in contamination of the soil, surface water and groundwater and damage to the aesthetic value of A&H's property, (pp.1, 4),

b) recognized that "cleanup and remediation of land and water within Arp & Hammond's property and adversely affected by Frontier is governed by the Final Administrative Order On Consent ('AOC')" (p.1),

c) recognized that the Joint Stipulation established completion dates for site stabilization (which includes boundary control) (p.2), and

d) supported EQC approval of the Joint Stipulation (p.4).

10. By Order dated November 28, 2007, filed November 30, 2007, the EQC approved the Joint Stipulation for Modification of Administrative Order On Consent, but denied A&H's Motion to Intervene at that time.

11. By letter to DEQ dated November 23, 2007, A&H's consultant, Casey Resources, Inc. (CRI):

a) expressed its understanding that the DEQ had suggested that Frontier consider a bentonite slurry wall for boundary control (p.2),

b) stated its "considered opinion that a barrier wall and collection system is required in order to provide satisfactory protection to the R.I.P. [Refinery Impacted Property]" (p.2), and

c) further stated that "[t]he boundary control issue is extremely important for the protection of not only Arp & Hammond land but also other adjacent and downgradient land owners" (p.3).

12. By letter dated February 19, 2008, the DEQ notified Frontier of its final decision that Frontier must install a slurry bentonite barrier wall along the DEQ-

approved alignment for boundary control subject to the October 15, 2008 deadline, and must begin construction of the barrier wall no later than June 1, 2008.

13. Frontier did not contest the DEQ's February 19, 2008 final decision requiring a barrier wall for boundary control within the 60 day period under Chapter I, Section 16 of the DEQ Rules of Practice & Procedure.

14. By letter dated March 26, 2008, which was copied to counsel for A&H, Frontier agreed to install the barrier wall for boundary control, but notified the DEQ that it was asserting a Force Majeure event under Section XVII of the AOC based on lack of necessary access to A&H land adjacent to the refinery to proceed with work on the barrier wall.

15. By letters dated May 16, 2008, June 16, 2008, and July 16, 2008, based on documented information submitted by Frontier, the DEQ notified Frontier of its determination that lack of necessary access to A&H land adjacent to the refinery constituted a force majeure event and that those determinations would terminate in 30 days, unless Frontier documented continued lack of access despite best efforts to obtain it in the interim.

16. By letters from A&H's attorney to Frontier (G. Faudel) dated June 5, 2008 and June 27, 2008, A&H conditioned access to its land for installation of the barrier wall boundary control system on Frontier's purchase of 133 acres adjacent to the refinery (much more than the area needed for that purpose) for $9,727,000 plus unspecified costs and expenses.

17. WYO. STAT. ANN. § 35-11-1801(a)(i) defines an "innocent owner" as an owner of real property that has become contaminated as a result of a release or migration of contaminants from a source not located on or at the real property.

18. WYO. STAT. ANN. § 35-11-1802 provides that an innocent owner is not liable for response action regarding contamination attributable to release, discharge or migration of contaminants on his property, unless he fails to grant reasonable access to that land for DEQ-approved remediation.

19. WYO. STAT. ANN. § 35-11-1802 should be construed so that no part is inoperative or superfluous and with the assumption that the Legislature did not intend futile things by making immunity for innocent owners from liability for response actions contingent upon their granting reasonable access to their land for remediation of contamination. *Corkill v. Knowles*, 955 P.2d 438, 444-445 (Wyo. 1998).

20. All property rights are subject to the state's police powers, if exercised reasonably. *Salt Creek Transp. Co. v. Public Serv. Comm'n of Wyoming*, 263 P. 621, 622 (Wyo. 1928).

21. WYO. STAT. ANN. § 35-11-301(a)(i) provides that no person, except when authorized by a permit, shall "cause, threaten or allow" the discharge of any pollution into the waters of the state.

22. WYO. STAT. ANN. § 35-11-103(c)(vii) defines "discharge" to mean any addition of any pollution to waters of the state.

23. The requirement that Frontier install a barrier wall boundary control system under the AOC is an exercise of the state's police power, which may be invoked only for a public purpose. *Bulova Watch Co. v. Zale Jewelry Co. of Cheyenne*, 371 P.2d 409, 417 (Wyo. 1962).

24. Conditioning necessary access to adjacent land for installation of the required barrier wall boundary control system upon payment of compensation for private damage claims and/or purchase of private property (which may be pursued in a separate private action) is not a public purpose.

25. Frontier's compliance with the requirement for installation of a barrier wall boundary control system will not relieve Frontier of liability for damages to A&H resulting from releases of pollutants or the measures required in response to such releases. Chapter 4, Section 6 of the Wyoming Water Quality Rules & Regulations.

26. WYO. STAT. ANN. § 35-11-904(g) preserves A&H's right to pursue its private legal remedies against Frontier for damages arising from any violation of an order issued under the Wyoming Environmental Quality Act. *Belle Fourche Pipeline Co. v. Elmore Livestock Co.*, 669 P.2d 505, 510-511 (Wyo. 1983) (discussing W.S. 35-11-902(g), which is now § 904(g)).

27. WYO. STAT. ANN. § 35-11-701(c) authorizes the DEQ to issue administrative orders.

28. Under WYO. STAT. ANN. § 35-11-1802, A&H has an obligation to grant access necessary for installation of the barrier wall boundary control system required by the DEQ's February 19, 2008 Final Decision under the Frontier AOC for remediation of contamination from the unpermitted discharge or threatened discharge of pollution to waters of the state in violation of WYO. STAT. ANN. § 35-11-301(a)(i).

ORDER

WHEREFORE, IT IS HEREBY ORDERED THAT:

A&H shall, within one (1) business day after receiving this order, grant Frontier and its contractors access to A&H property adjacent to the refinery as needed for installation of the barrier wall boundary control system required by the Administrator's February 19, 2008 Final Decision Letter.

This order does not limit any legal remedy available to A&H to pursue existing or future claims for recovery of any damages, costs or compensation for contamination of A&H property from Frontier's acts or omissions and/or which may arise out of installation of the barrier wall boundary control system in response to that contamination, nor does it relieve Frontier of liability, if any, for such claims.

Pursuant to WYO. STAT. ANN. § 35-11-701(c)(ii), this order is final unless, not later than 10 days after service, the person named therein files a written request for a hearing before the EQC.

DATED this 21st day of July, 2008.

John Corra
Director, Department of
Environmental Quality

for
LeRoy Feusner, P.E., BCEE,
Administrator, Solid & Hazardous
Waste Division