

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

FILED

FEB 29 2008

IN THE MATTER OF A NOTICE OF VIOLATION)
VIOLATION ISSUED TO LANDRICA)
DEVELOPMENT COMPANY, KFX MINE)
P.O. BOX 1777, GILLETTE, WY 82717-1777)
PERMIT NO. 486-T5, NOV NO. 100516)
DOCKET NO. 3928-06)

Terri A. Lorenzon, Director
Environmental Quality Council

EQC Docket No. 06-4806

PRE-HEARING MEMORANDUM OF LANDRICA DEVELOPMENT COMPANY

Summation of Facts and Legal Issues

This matter arises from an NOV issued alleging that Landrica Development was disposing of liquid, hazardous materials in the pit area of the Fort Union Mine. The materials constituting the subject of the NOV primarily originates from the plant's water treatment process and are coal fines and light oils native to the coal driven off and recovered from the coal fines. Response to Request for Admissions No. 17.

The materials were placed within a bermed area in the pit. Unusually large precipitation events at the time resulted in ponding within the bermed area. This resulted in the erroneous conclusion that Landrica Development had been disposing of a liquid waste stream to the bermed area. The existence of the bermed area within the permit area was a technical and minor violation of the permit. When notified by LQD that the bermed area constituted an "impoundment" and was not allowed by the terms and conditions of the permit, Landrica Development immediately removed the berm. As

discussed below, this was a small and technical violation of the permit which does not justify the imposition of a \$25,000.00 or \$15,000.00 (when abated) penalty. This technical violation is more akin to having a temporary breach in a bar ditch around a topsoil stock pile or inadvertently having some topsoil in an overburden pile. The history of penalty assessments establishes that these types of infractions result in no or minor (typically less than \$3,000.00) penalties.

Landrica did not dispose of liquids in the bermed area. The solid materials deposited into the pit were non-hazardous wastes as determined by the Solid and Hazardous Waste Division (exempt under the Bevill Amendment¹). The Land Quality Division has subsequently determined that these materials may be disposed into the pit area of the mine. Any light oils present in the stream are native to the coal fines. The only materials disposed of in the bermed areas were solids and native light oils with no incremental danger to, or impact on, the environment.

Without including any of the internal staff costs, effort and expenses, Evergreen Energy (Landrica Development) has spent in excess of \$74,500.00 in drilling, surveys, professional analysis analytical and lab work to respond to the NOV. Landrica

¹The "Bevill" amendment exempts certain wastes specified under RCRA 3001(b)(3)(A)(I-iii) from regulation as RCRA hazardous wastes, under certain conditions. 42 U.S.C. 6921(b)(3)(A), 6921(b)(3)(C) as added Pub. L. No. 96-482, Section 7, 94 Stat. 2337-2338 (October 21, 1980).

Development's primary, independent consultant (Tetra Tech) has considerable expertise in this area, and its conclusions that no contamination or environmental damage occurred are well-supported and consistent with the history of this matter.

Even if the existence of the berm is found to be a violation meriting a monetary penalty, the proposed penalty far exceeds any amount justified by the facts and the considerations set forth in the Land Quality Rules and Regulations, Chapter 16, Section 3:²

Section 3. Civil Penalties.

(a) Amount - In determining the amount of the penalty, if any, to be assessed, consideration shall be given to:

(I) The operator's history of previous violations at the particular surface coal mining operation, regardless of whether any led to a civil penalty assessment. Special consideration shall be given to violations contained in or leading to a cessation order. However, a violation shall not be considered if the notice or order containing the violation:

(A) Is or may become the subject of pending administrative or judicial review;

or

(B) Has been vacated.

(ii) The seriousness of the violation based on the likelihood and extent of the potential or actual impact on the public or environment, both within and outside the permit or exploration area.

(iii) The degree of fault of the operator in

²Additional legal authority for Landrica Development's position is set forth in Exhibit D, incorporated herein by reference.

causing or failing to correct the violation, either through act or omission. Such degree shall range from inadvertent action causing an event which was unavoidable by the exercise of reasonable care to reckless, knowing or intentional conduct.

(iv) The operator's demonstrated good faith, by considering whether he took extraordinary measures to abate the violation in the shortest possible time, or merely abated the violation within the time given for abatement. Consideration shall also be given to whether the operator gained any economic benefit as a result of a failure to comply.

(v) Inability to comply, unless caused by lack of diligence.

(vi) Any information submitted to the Director by the operator within 15 days of the service of the notice or order relating to the facts surrounding the violation or the amount of penalty.

A review of NOV's applying these standards for the past six years clearly demonstrates that the proposed penalty arbitrarily punishes Landrica Development for being a processor of coal, while imposing much smaller or no penalties on miners of coal even though the history, severity and potential environmental impact was (or is) much greater.

The primary legal issue is whether the facts and circumstances, when evaluated under the factors set forth in the Land Quality Rules and Regulations, Chapter 16, Section 3 as historically applied for the past six years, justify the proposed penalty.

Respondents Exhibits

<u>No.</u>	<u>Description</u>	<u>Offered</u>	<u>Admitted</u>
A	Letter dated June 27, 2006 from Timothy Link, Program Principal, Solid and Hazardous Waste Division to Scott Benson of Knight Technologies, Inc.		
B	2006 August Monthly Inspection Report: KFx Mine, Permit No. 486-T5 (Inspection Date: September 27, 2006)		
C	Letter dated September 1, 2006 to Victor Bozic of Landrica Development Company from Mark Rogaczewski, DEQ with attached Coal Operation Notice of Violation No. 100516, Docket No. 3928-06		
D	Letter dated September 27, 2006 to John Corra, Director, DEQ from Victor Bozic, KFx Environmental Coordinator re: Request for Review by Director (without attachments)		
E	Letter dated October 25, 2006 to Victor Bozic of Landrica Development Company from John Corra, Director, DEQ re penalty		
F	Memorandum dated October 23, 2006 to John Corra, Director, DEQ from Richard Chancellor, Administrator, Land Quality Division re Assessment Memo for Notice of Violation		
G	Letter dated September 26, 2006 to Victor Bozic of Landrica Development Company from Mark Rogaczewski, Supervisor, LQD District 3		
H	Letter dated November 3, 2006 to Victor Bozic of Landrica Development Company from Mark Rogaczewski, Supervisor, LQD District 3		
I	Letter dated January 18, 2007 to Victor Bozic, Evergreen Energy from David B. Weinert, P.G., Tetra Tech, Inc., re "Subsurface Investigation at Evergreen Energy, Gillette, Wyoming" (Tetra Tech Project No. 7510104) with attached report and appendices		
J	Letter dated January 24, 2007 to Victor Bozic of Evergreen Energy, Inc. from Robert Breuer, Manager, Inspections & Compliance, Solid and Hazardous Waste Division, DEQ (with attached report)		

<u>No.</u>	<u>Description</u>	<u>Offered</u>	<u>Admitted</u>
K	Letter dated March 5, 2007 to Victor Bozic, Evergreen Energy from David B. Weinert, P.G., Tetra Tech, Inc., re "6 Week Sampling Report at Evergreen Energy, Gillette, Wyoming," (Tetra Tech Project No. 7510104) with attached report and appendices		
L	Letter dated May 22, 2007 to Mark Rogaczewski, Wyoming DEQ, LQD from Victor Bozic, Evergreen Energy		
M	Letter dated January 14, 2008 to Mark Taylor, WDEQ-Land Quality from David B. Weinert, P.G., Tetra Tech, Inc., re "Additional Investigation for NOV 100516 at Evergreen Energy, Gillette, Wyoming," (Tetra Tech, Inc. January 18, 2007)" with attached report and appendices		
N	Letter dated February 8, 2008 from Victor Bozic to Mark Rogaczewski re "Drilling Investigation Position Statement-NOV Docket No. 100516 (with attachments including letter dated February 5, 2008 from Mid-Continent Testing Laboratories, Inc. (Robert Miller) to David Weinert re Anderson Coal Sample)		
O	Master Summary of NOV's from April 2, 2001 through July 12, 2007 with Parts: A-Sorted by Exhibit Number B-Sorted by Date C-Sorted by Recommended Penalty D-Sorted by Penalty Collected E-Sorted by Operator/NOV Date [The NOV's and Assessment Memos underlying this report, as provided by DEQ, are available for inspection and confirmation.]		
P	Invoices for the costs of the drilling, Tetra Tech investigations, Mid-Continent Testing Laboratories, etc (partial, not all costs hve been invoiced)		

Respondents Witnesses

WITNESS	SUBJECT MATTER OF TESTIMONY
<p>Victor Bozic Evergreen Energy 3574 Garner Lake Road P.O. Box 516 Gillette, WY 82718</p> <p>(307) 685-9161</p>	<p>(Will Call) Mr Bozic will testify regarding: all aspects of the facts and circumstances surrounding the NOV; the contents of the communications between Landrica Development and DEQ; the remedial steps taken; the Tetra Tech reports and analysis; his review, analysis and conclusions regarding the NOV assessments for the last six years and the inappropriateness of the proposed penalty;</p>
<p>David B. Weinert, P.G. Tetra Tech, Inc.605 North Warehouse Road Casper, WY 82601</p> <p>(307) 234-2126</p>	<p>(Will Call) Mr. Weinert will testify to the work performed by Tetra Tech with respect to this NOV, including the contents and conclusions of the reports made by Tetra Tech:</p> <p>"Report of Subsurface Investigation at Evergreen Energy, Gillette, Wyoming," (Tetra Tech, Inc. January 18, 2007).</p> <p>"6 Week Sampling Report at Evergreen Energy, Gillette, Wyoming," (Tetra Tech, Inc. March 5, 2007).</p> <p>"Additional Investigation for NOV 100516 at Evergreen Energy, Gillette, Wyoming," (Tetra Tech, Inc. January 18, 2007).</p> <p>Letter dated February 5, 2008 to David Weinert from Mid-Continent Testing Laboratories, Inc. (Robert Miller) re Anderson Coal Sample (attachment to Exh. N).</p>
<p>Brent Knottnerus Evergreen Energy 3574 Garner Lake Road P.O. Box 516 Gillette, WY 82718</p> <p>(307) 685-9150</p>	<p>(Will Call) Mr. Knotnerus will testify to the physical conditions in the pit area, the material disposed there and its characterization, the berm and water impoundment resulting from the unusually large rain storms in the area, and the steps taken in response to the NOV.</p>
<p>Mark Rogaczewski Department of Environmental Quality 1866 South Sheridan Avenue Sheridan, WY 82801</p> <p>(307) 673-9337</p>	<p>(May Call) If called, Mr. will testify to the facts and circumstances of the NOV, the subsequent steps taken by Landrica Development, the current status of Landrica Development's disposal into the pit area, and the factors relevant to the amount of the proposed penalty.</p>

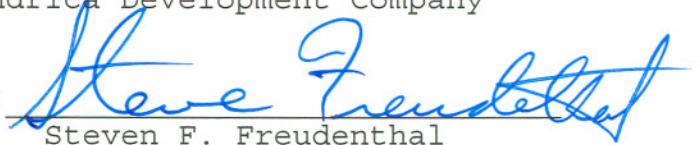
Landrica Development Company reserves the right to call any witness designated by any other party or participant or to

introduce any exhibit listed by any other party. Landrica Development further reserves the right to call any witness necessary or appropriate to provide foundation for any exhibit.

Dated this 29th day of February, 2008.

Landrica Development Company

BY:



Steven F. Freudenthal
Freudenthal & Bonds, P.C.
123 East 17th Street
P. O. Box 387
Cheyenne, WY 82003
(307) 634-2240

CERTIFICATE OF SERVICE

I, Steven F. Freudenthal, do hereby certify that a true and correct copy of the foregoing was served by hand-delivering the same this 29th day of February, 2008, to the following addresses:

John Corra
Director
Wyoming Department of Environmental Quality
Herschler Building
125 West 25th Street
Cheyenne, WY 82002

John S. Burbridge, Esq.
Wyoming Attorney General's Office
123 Capitol Building
Cheyenne, WY 82002
(with one set of copies of the exhibits)

and by hand-delivering the original to:

Chairman
Environmental Quality Council
Herschler Building, Room 1714
Cheyenne, WY 82002
(with three sets of copies of the exhibits)

All before 4:00 p.m. on said day.


Steven F. Freudenthal