

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL  
STATE OF WYOMING

**FILED**

APR 29 2011

In the Matter of the Appeal )  
Of Notice of Violation and Order, )  
dated April 18, 2011 )  
Issued to Envirotank, Inc. )

Docket No. 4824-11  
Jim Ruby, Executive Secretary  
Environmental Quality Council

**APPEAL OF DEPARTMENT OF ENVIRONMENTAL QUALITY NOTICE OF VIOLATION AND ORDER AND REQUEST FOR A HEARING**

Pursuant to Section 701(c)(ii) of the Wyoming Environmental Quality Act, Wyo. Stat. § 35-11-701(c)(ii), Envirotank, Inc. (Envirotank) hereby appeals the Department of Environmental Quality's (Department's) Notice of Violation (NOV) and Order (Order), Docket No. 4824-11, dated April 18, 2011, and further requests that the Environmental Quality Council (Council) hold a hearing in this matter. In support of its appeal of the Order, attached as Exhibit A, Envirotank states as follows:

**A. NAME AND ADDRESS OF APPELLANT AND APPELLANT'S COUNSEL**

1. The name of Appellant is Envirotank, Inc. The company's mailing address is P.O. Box 302, Fort Lupton, Colorado 80621. Legal counsel for Envirotank are Mary A. Throne and Matthias L. Sayer, Throne Law Office, P.C., 211 W. 19<sup>th</sup> St., P.O. Box 828, Cheyenne, WY, 82003.

2. Envirotank is a Wyoming corporation with its principal place of business in Wyoming at 377 Clarkelen Rd. in Campbell County, Wyoming.

**B. DECISION SUBJECT TO APPEAL**

3. On April 18, 2011 the Department issued the Order to Envirotank, requiring the removal of any whole tires placed on the Lange Trust property in Campbell County, Wyoming, within ninety (90) days of the Order. The NOV and Order alleges the whole non-earth filled

tires were placed on the Lange Trust property in violation of relevant regulations of the Wyoming Solid and Hazardous Waste Division (SHWD).

### **C. BASIS FOR APPEAL**

4. Envirotank operates its Clarkelen facility pursuant to Solid Waste Permit No. 51.031(Permit). The Permit was transferred to Envirotank, with Michael Bulger as president, following a change of ownership of Envirotank, in April 2006. The NOV acknowledges that tire tops used to construct windbreaks and other structures on the Lange Trust land are authorized by the permit and are not contrary any SHWD regulations or the Environmental Quality Act. The issues before the Council on this appeal are whether the Department can prove the placement of whole tires for agricultural purposes on the Lange Trust property was in violation of the Act or Solid Waste Regulations (SWR) regulations; whether the current permittee is the sole responsible party for placing the tires; and if a violation is found, whether removal of the whole tires is the appropriate remedy. Envirotank reserves the right to identify other issues as the appeal moves forward.

5. In an enforcement action, the burden of proof rests with the Department. Section 501 of the Act, Wyo. Stat. § 35-11-501, prohibits the location, construction or operation of a solid waste management facility without a permit. Chapter 1 of the SWR provides definitions and general requirements for permits, as well as exemptions from the permit requirements for certain uses of wastes, including an exemption for beneficial reuse of wastes protective of human health and the environment, as approved by the administrator.

6. A solid waste management facility is defined as “any facility for the transfer, treatment, processing, storage or disposal of solid waste....” “Disposal” is defined as “the discharge, deposit, injection, dumping, spilling, leaking, or placing of any waste material into or on any land or water so that such waste material or any constituent thereof may enter the

environment or be emitted into the air or discharged into any waters, including groundwaters.” The NOV and Order alleges the placement of whole tires was not authorized by Envirotank’s permit and therefore, placement of whole tires constitutes a violation. These allegations beg the question of whether a permit was required for the beneficial use of tires in agricultural operations. The Department must first establish the placement of the whole tires was subject to the Act’s permitting requirements. The NOV contains no allegations to this effect and thus is insufficient to support the Order for removal.

7. The placement of the whole tires, if subject to the permit requirement, could have been exempt from the permit requirements under Chapter 1, Section 1(xxi) of the SHWD as a beneficial reuse of wastes. Until the Department issued Solid Waste Guideline No. 21 on July 11, 2008, upon information and belief, it had determined authorization of the use of whole tires for agricultural operations was not a threat to the environment. Since the tires at issue here were placed prior to the issuance of the guideline, the Department could have exempted the use of the whole tires on the Lange property. The Department cannot retroactively apply the 2008 guidance to Envirotank. Although Envirotank concedes it did not seek an exemption from the Administrator, one may have been available and could have been used to authorize the placement of the tires. To now require removal of the tires for an alleged failure to seek an exemption, when other operators have not faced this requirement, is not only an abuse of enforcement authority, but inappropriate selective enforcement and an absurd result.

8. The NOV & Order alleges the permit transfer in 2006, the owner’s or its agent’s role in placement of scrap whole and tire parts on the property, and the placement of tires prior to 2006. If the Department is able to establish the placement of whole tires on the Lange Trust property was not authorized under the Act, the current operators of Envirotank are not the sole




responsible parties. The Department cannot enforce against Envirotank for activities occurring prior to the permit transfer, based on the allegations in the NOV. Moreover, the placement of the tires was done with the approval of the owner's Lessee and the approval of the owner. In any event, Envirotank was entitled to rely on the lessee in placing the tires. Lange Trust benefitted from the placement of the tires as owner of the property and is as responsible for any remediation as Envirotank. The tires were placed for the beneficial use of the owner or their agent and the burden of remediation should not be placed on only one party.

9. The Order fails to justify removal of the whole tires as the appropriated remedy. It alleges no risk justifying the removal of the tires as necessary to protect human health and the environment. The NOV & Order contain no allegations of any threat to human health and the environment posed by the use of whole tires for agricultural purposes. In fact, the NOV suggests if the whole tires were filled with earth or soil, there would not be a violation. In prior informal enforcement discussions with Envirotank, the agency has suggested drilling holes in the tires to allow the drainage of water in order to eliminate any potential public health risk associated with the tires. (See letter from Tim Link, dated October 24, 2008). Consistent with SHWD regulations and past practice, less costly, effective remedies are available. Envirotank requests that the Council reject the Ordered remedy and consider more reasonable and practical alternatives in the event it finds a violation.

10. Envirotank asserts that the NOV & Order is barred by the applicable statute of limitations as well as by estoppel and laches.

11. Envirotank requests a hearing in this matter.

Submitted this 29<sup>th</sup> day of April, 2011

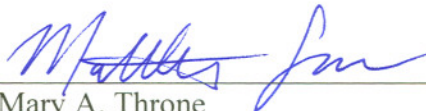
*for*   
\_\_\_\_\_

Mary A. Throne  
Matthias Sayer  
Throne Law Office, P.C.  
211 W. 19<sup>th</sup> St.  
Suite 200  
P.O. Box 828  
Cheyenne, WY 82001  
307-637-2822

**Counsel for Envirotank, Inc.**

### **CERTIFICATE OF SERVICE**

I certify that on April 29<sup>th</sup> 2011, I mailed the foregoing to the Chairman of the Wyoming Environmental Quality Council and a copy of the foregoing to the Director of the Wyoming Department of Environmental Quality, by certified mail, return receipt requested.

*for*   
\_\_\_\_\_

Mary A. Throne  
Matthias Sayer  
Throne Law Office, P.C.  
211 W. 19<sup>th</sup> St.  
Suite 200  
P.O. Box 828  
Cheyenne, WY 82001  
307-637-2822

**Counsel for Envirotank, Inc.**