

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

FILED

FEB 28 2012

Jim Ruby, Executive Secretary
Environmental Quality Council

In the Matter of the Appeal of Notice of)
Violation and Order #4824-11 Issued to:)
Envirotank, Inc. (51.031)) Docket No. 11-5208A
P.O. Box 302)
Ft. Lupton, CO 80621)

DEPARTMENT OF ENVIRONMENTAL QUALITY'S PREHEARING MEMORANDUM

Respondent Wyoming Department of Environmental Quality (DEQ), submits this Prehearing Memorandum pursuant to the Wyoming Environmental Quality Council's (EQC) August 25, 2011 Scheduling Order.

DEQ WITNESSES

Will Call:

1. Tim Link, Natural Resources Program Principal, DEQ / Solid & Hazardous Waste Division (SHWD), Herschler Building, 4th Floor West, 122 W. 25th Street, Cheyenne, WY 82002, (307) 777-7752. Mr. Link will testify regarding specific events relating to issuance of the Letter of Violation (LOV) dated 7/28/2008 and efforts to resolve it and also regarding certain other related events and correspondence between Envirotank, Inc. and DEQ since then.
2. Carl Anderson, Administrator, DEQ / Solid & Hazardous Waste Division (SHWD), Herschler Building, 4th Floor West, 122 W. 25th Street, Cheyenne, WY 82002, (307) 777-7752. Mr. Anderson will testify regarding the matters relating to issuance of the contested Notice of Violation (NOV) & Order (No. 4824-11), dated April 18, 2011. Mr. Anderson will also testify regarding Envirotank, Inc.'s Solid Waste Operating Permit and management of scrap tires under Wyoming Solid Waste Rules.

May Call:

3. Any of the other parties' witnesses for purposes of direct examination.
4. Any other witnesses for purposes of foundation, rebuttal or impeachment.

DEQ EXHIBITS

- DEQ #1 Notice of Violation (NOV) & Order No. 4824-11 (**April 18, 2011**).
- DEQ #2 Printout of Envirotank, Inc. corporate information from the Wyoming Secretary of State's website database.

- DEQ #3 Envirotank, Inc.'s **February 13, 2003** Solid Waste Facility Permit Application documents (including **February 7, 2003** cover letter from Daly Law Assoc.).
- DEQ #4 Envirotank, Inc.'s "Attachment in support of Permit Application" (including "Facility Description" and "Operating Plan"), **Revised July 8, 2003**.
- DEQ #5 Envirotank, Inc.'s **July 15, 2004** Revised Solid Waste Facility Permit Application documents (including **July 20, 2004** cover letter from Daly Law Assoc.).
- DEQ #6 Envirotank, Inc.'s "Attachment in support of Permit Application" (including "Facility Description" and "Operating Plan"), **Revised July 15, 2004**.
- DEQ #7 Letter dated **August 16, 2004** to Tad Daly (Daly Law Assoc.) from Dale Anderson (DEQ).
- DEQ #8 Envirotank, Inc.'s **September 23, 2004** Revised Solid Waste Facility Permit Application documents (including **October 18, 2004** cover letter from Daly Law Assoc.).
- DEQ #9 Operating Permit letter dated **November 15, 2004** to John Hull (Envirotank, Inc.) from Dave Finley (DEQ).
- DEQ #10 Application for Permit Transfer dated **March, 2006**, submitted by John Hull (Transferor) and Michael Bulger (Transferee), requesting transfer of the Envirotank, Inc. Solid Waste Facility operating permit.
- DEQ #11 Approval of Permit Transfer letter dated **April 19, 2006** to Michael Bulger (Envirotank, Inc.) from LeRoy Feusner (DEQ), approving the requested transfer of the Envirotank, Inc. Solid Waste Facility operating permit.
- DEQ #12 Notice to Affected Parties dated **November 25, 2003**, from Dave Finley (DEQ).
- DEQ #13 *The Environmental Assistant*, **January, 2004**, pages 2-3.
- DEQ #14 Solid Waste Guideline #21, dated **July 11, 2008**.
- DEQ #15 Solid Waste Guideline #21, revised **September 12, 2008**.
- DEQ #16 Letter of Violation (LOV) dated **7/28/2008** from DEQ addressed to: Michael Bulger (Envirotank, Inc.), Brian Morgan, and Sandra Lange Trust.
- DEQ #17 Letter dated **September 23, 2008** to from LJ Weatherwax and Michael Bulger (Envirotank, Inc.) to Tim Link (DEQ).
- DEQ #18 Letter dated **10/2/2008** to Michael Bulger (Envirotank, Inc.) from Tim Link (DEQ).

- DEQ #19 Letter dated **October 13, 2008** from Michael Bulger (Envirotank, Inc.) to Tim Link (DEQ).
- DEQ #20 Letter dated **October 21, 2008** from LJ Weatherwax (Envirotank, Inc.) to Heather Jacobson.
- DEQ #21 Letter dated **10/24/2008** to Michael Bulger (Envirotank, Inc.) from Tim Link (DEQ).
- DEQ #22 Letter dated **January 16, 2009** from Heather Jacobson to LeRoy Feusner (DEQ).
- DEQ #23 Letter dated **29 January 2009** to Heather Jacobson from LeRoy Feusner (DEQ).
- DEQ #24 Letter dated **February 5, 2009** from LJ Weatherwax (Envirotank, Inc.) to Heather Jacobson.
- DEQ #25 Letter dated **February 11, 2009** from Heather Jacobson to LJ Weatherwax (Envirotank, Inc.).
- DEQ #26 Letter dated **18 February 2009** to Heather Jacobson from LeRoy Feusner (DEQ).
- DEQ #27 Letter dated **18 February 2009** to LJ Weatherwax (Envirotank, Inc.) from LeRoy Feusner (DEQ).
- DEQ #28 Letter dated **February 20, 2009** from Brian Morgan to Heather Jacobson.
- DEQ #29 Letter dated **February 20, 2009** from Heather Jacobson to LeRoy Feusner (DEQ).
- DEQ #30 Letter dated **April 1, 2009** from Mary Throne to LeRoy Feusner (DEQ).
- DEQ #31 Letter dated **7 May 2009** to Mary Throne and Heather Jacobson from LeRoy Feusner (DEQ).
- DEQ #32 Letter dated **June 9, 2009** from Heather Jacobson to LeRoy Feusner (DEQ).
- DEQ #33 Letter dated **June 9, 2009** to Dave Kyle (Envirotank, Inc. *employee*) from LeRoy Feusner (DEQ).
- DEQ #34 Letter dated **June 9, 2009** to LJ Weatherwax (Envirotank, Inc.) from LeRoy Feusner (DEQ).
- DEQ #35 Letter (re: *Kyle*) dated **July 2, 2009** from Mary Throne to LeRoy Feusner (DEQ).
- DEQ #36 Letter (re: *Lange*) dated **July 2, 2009** from Mary Throne to LeRoy Feusner (DEQ).
- DEQ #37 Letter dated **August 12, 2009** from LJ Weatherwax (Envirotank, Inc.) to Tim Link (DEQ).

- DEQ #38 Letter dated **September 3, 2009** from Heather Jacobson to Mike Barrash (AG Office).
- DEQ #39 Letter dated **September 29, 2009** to Heather Jacobson from Carl Anderson (DEQ).
- DEQ #40 Letter dated **06/28/2010** to Michael Bulger (Envirotank, Inc.) from Tim Link (DEQ).
- DEQ #41 Letter dated **July 12, 2010** from Michael Bulger (Envirotank, Inc.) to Tim Link (DEQ).
- DEQ #42 Notice of Violation (NOV) No. 4771-10 (**November 24, 2010**).
- DEQ #43 Letter dated **January 12, 2011** from Michael Bulger (Envirotank, Inc.) to Tim Link (DEQ).
- DEQ #44 Letter dated **February 2, 2011** from Heather Jacobson to John Corra (DEQ).
- DEQ #45 Envirotank, Inc.'s Responses to DEQ's 1st Discovery Requests.
- DEQ #46 Envirotank, Inc.'s Responses to DEQ's 2nd Discovery Requests.
- DEQ #47 Envirotank, Inc.'s Supplemental Responses to Interrogatories ##3-5 of DEQ's 2nd Discovery Requests.
- DEQ #48 Intervenors' Answers to DEQ's 1st Discovery Requests.
- DEQ #49 Envirotank, Inc.'s Designation of Expert Witness James F. Bowlby, Jr.
- DEQ #50 October 2011 Expert Witness Report of James F. (Jim) Bowlby, Jr.(pp.[i]-29).
- DEQ #51 Bowlby Deposition Exhibit. #7.
- DEQ #52 Bowlby Deposition Exhibit. #9.
- DEQ #53 Bowlby Deposition Exhibit. #10.
- DEQ #54 Bowlby Deposition Exhibit. #11.
- DEQ #55 EQC's Findings of Fact, Conclusions of Law and Order, Doc. No. 1837-87 (October 9, 1987).
- DEQ #56 Any other exhibits used for purposes of foundation, rebuttal or impeachment.

ISSUES

1. Are scrap tires (tires no longer used for their original purpose) a “solid waste” as defined in W.S. 35-11-103(d)(i) and Wyoming Solid Waste Rules Chapter 1?
2. Is placement of whole scrap tires by a permitted scrap tire processing facility at an off-site location for a claimed “beneficial re-use” subject to the terms and conditions of the permit?
3. If not authorized by the permit, is placement of whole scrap tires by a permitted scrap tire processing facility at an off-site location for a claimed “beneficial re-use” subject to the terms and conditions for seeking an exemption from the permit requirement under Wyoming Solid Waste Rules Chapter 1?
4. Should the terms of the contested Order be upheld?

UNCONTESTED FACTS

1. At all times relevant to this case, Petitioner Envirotank, Inc. operated a scrap tire processing facility located on Clarkelen Road approximately 14 miles south of Gillette in Campbell County.
2. Petitioner Envirotank, Inc. is an active Wyoming corporation which initially filed with the Wyoming Secretary of State 12/26/2001 (Filing No. 2001-000428258).
3. Scrap tires are “solid waste,” which is defined in W.S. 35-11-103(d)(i) as including discarded materials resulting from industrial, commercial, agricultural or community activities.
4. Envirotank, Inc.’s scrap tire processing facility is a “solid waste management facility,” which is defined in W.S. 35-11-103(d)(ii) as any facility for the transfer, treatment, processing, storage or disposal of solid waste.
5. W.S. 35-11-502(a) requires a permit from the Wyoming Department of Environmental Quality (DEQ), Solid & Hazardous Waste Division (SHWD) for Envirotank, Inc. to operate a solid waste management facility.
6. By letter addressed to Mr. John Hull, Envirotank, Inc., dated November 15, 2004, the DEQ/SHWD issued Solid Waste Operating Permit #51.031 authorizing Envirotank, Inc. to operate in compliance with the terms of the approved permit application received by DEQ October 20, 2004 and the conditions specified in the DEQ’s November 15, 2004 permit letter.
7. Envirotank, Inc.’s “Operating Plan” (Revised July 15, 2004), which was part of the operating permit application approved by DEQ in 2004, describes the Envirotank facility as a “tire processing facility” and gives the following details:

- up to 30 “raw” tires held in inventory at any one time;
- tires are slit into two pieces on a rotary table;
- the lower pieces are sold to be used for stock watering tanks;
- the upper portion, the sidewall or top, is sold “to be used in stacks” for livestock windbreaks;
- the tops are sold in larger lots (a dozen or more) for windbreaks;
- normally the facility stores up to 75 finished tanks and 200 finished tops.

8. Permit Condition #6 states that “as listed in the [July 15, 2004 final permit] application,” not more than 30 “raw” tires, 75 finished tanks, and 200 tops shall be stored at the facility at any one time.

9. On April 3, 2006, DEQ received an Application for Permit Transfer to transfer the permit for the “Envirotank Inc., SHWD File #51.031 . . . scrap tire processing” facility located at 377 Clarkelen Road, Gillette, from John Hull to Michael Bulger II, signed by both Transferor John D. Hull as “President” and Transferee Michael J.F. Bulger II as “Owner.”

10. By letter dated April 19, 2006, DEQ approved the transfer from John Hull to Michael Bulger of Solid Waste Operating Permit #51.031 for Envirotank, Inc., as initially issued November 15, 2004, and gave notice that the new operator would be responsible for complying with the November 15, 2004 permit and with the terms of the permit application approved in that permit, and also with a new condition requiring the planting of trees to screen the facility.

11. Envirotank, Inc. remains the entity authorized by the April, 2006 permit transfer as requested by the parties to the transfer and as approved by the DEQ.

12. Neither the operating permit DEQ initially issued to Envirotank, Inc. dated November 15, 2004 nor DEQ’s April 19, 2006 approval for the transfer of that permit authorized Envirotank, Inc. to deposit any whole scrap tires or tire parts, other than tire tanks or tire tops as described in Envirotank’s approved application, at any location away from Envirotank’s permitted facility (except at another permitted facility).

13. The Lange Trust owns rural property located at 227 Bell Road south of Gillette in Campbell County (the Lange Trust site).

14. Since approximately November, 2004 (“prior to the first tires being placed on the property”), the Lange Trust has leased the site to Mr. Brian Morgan for ranching operations.

15. At some time after November, 2004, the Lange Trust, through Ms. Sandra Kay Lange, agreed to let the Trust's Lessee, Mr. Brian Morgan, arrange to have two windbreaks built with tires placed on the Lange Trust site.

16. Based on information requested by DEQ/SHWD provided by Envirotank, Inc. and/or the Lange Trust, it appears that Envirotank, Inc. and the Lange Trust's Lessee, Mr. Brian Morgan:

a) agreed to Envirotank, Inc.'s placement of a total of approximately 725 non-earth-filled whole tires of various sizes at the Lange Trust site between November, 2004 and November, 2007, of which approximately 350 whole tires were placed there after April 19, 2006; and

b) agreed to Envirotank, Inc.'s placement of a total of approximately 1,574 half tires to be used to make windbreaks and 50+ 'rings' at the Lange Trust site between November, 2004, and November, 2007, of which approximately 260 tire "tops" were placed there after April 19, 2006.

17. Between November, 2004 and November, 2007, Envirotank, Inc. placed at the Lange Trust site approximately 725 non-earth-filled whole tires of various sizes and scrap tire materials other than the lower halves used for stock water tanks or the upper portions ("tops" or sidewalls) for use in stacks for windbreaks.

DATED this 28th day of February, 2012.



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CERTIFICATE OF SERVICE

This certifies that true and correct copies of the foregoing DEPARTMENT OF ENVIRONMENTAL QUALITY'S PREHEARING MEMORANDUM and copies of the listed DEQ Exhibits (except for DEQ Exhibits ##49-50, which all parties already have) were served this 28th day of February, 2012 by United States first class mail, and/or by Federal Express, and/or by hand delivery, and by e-mail or facsimile transmission, addressed as follows:

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