

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL  
STATE OF WYOMING

**FILED**

**JUN 03 2011**

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 )

WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY'S  
RESPONSE TO ENVIROTANK, INC.'S PETITION

Respondent Wyoming Department of Environmental Quality (DEQ), pursuant to the Wyoming Environmental Quality Council's (EQC) May 3, 2011 Response Order, responds as follows to Petitioner Envirotank, Inc.'s Petition dated and filed April 29, 2011 in the above-captioned matter.

**B. Decision Subject to Appeal**

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

**Admit.**

3(a). 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.

**Admit.**

3(b). 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).

**Admit** that ¶21 of the referenced NOV alleges the actions specified therein were in violation of Solid Waste Permit 51.031 and WYO. STAT. ANN. § 35-11-502(a). **Deny** any other allegations in that sentence of the Petition.

### C. Basis for Appeal

4(a). Envirotank operates its Clarkelen facility pursuant to Solid Waste Permit No. 51.031 (Permit).

**Admit** that DEQ issued Permit 51.031 to Envirotank, Inc. for operation of its scrap tire processing facility on Clarkelen Rd. If by “operates . . . pursuant to” Solid Waste Permit 51.031 Envirotank, Inc. is alleging it is operating in full compliance with the Permit, DEQ **denies** that allegation.

4(b). The Permit was transferred to Envirotank, with Michael Bulger as president, following a change of ownership of Envirotank, in April 2006.

**Admit** that, as alleged in ¶¶14-15 of the NOV, in April, 2006 DEQ approved the transfer of the Envirotank, Inc. operating permit (51.031) from John Hull to Michael Bulger “[a]s operator” of the Envirotank, Inc. facility. DEQ is **without knowledge** or information to form a belief as to the truth of the allegation that the permit transfer followed “a change of ownership of Envirotank [Inc].”

4(c). 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.

**Admit** that the NOV (¶¶10-11) specifically alleges that Permit 51.031 authorizes Envirotank, Inc. to operate in compliance with the terms of the approved permit application, including sale of tire tops to be used in stacks for livestock windbreaks and sale of the bottom halves of tires to be used for stock watering tanks. **Deny** the allegation that the NOV “acknowledges that tire tops used to construct . . . *other structures* on the Lange Trust land are authorized by the permit and are not contrary any SHWD regulations or the Environmental Quality Act.” (*Italics added.*) **Deny** any other allegations in that sentence of the Petition.

4(d). 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.

**Admit** that Petitioner can raise these issues in this appeal. **Deny** factual allegations implied by Petitioner's stated issues, such as that "placement of whole tires . . . on the Lange Trust property" are in fact for "agricultural purposes." **Deny** that issues other than the 3 issues identified by Petitioner are not before the Council in this appeal.

4(e). Envirotank reserves the right to identify other issues as the appeal moves forward.

**Admit** that both parties in this appeal can identify other issues.

5(a). In an enforcement action, the burden of proof rests with the Department.

**Deny** that the burden of proof rests with DEQ for affirmative assertions made by Petitioner regarding "exemptions" (¶5 & ¶7 of the Petition), or for affirmative defenses, such as Petitioner's assertions of statute of limitations, estoppel and laches (¶10 of the Petition).

5(b). 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.

**Admit** that the allegation in this sentence of the Petition pertains to WYO. STAT. ANN. § 35-11-502(a)(i).

5(c). 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 environment, as approved by the administrator.

**Admit** that Chapter 1 provides definitions and general permit *application procedures* and for certain exemptions for beneficial reuse, which are subject to prior approval by the administrator and are not automatic. **Deny** any other allegations in that sentence of the Petition.

6(a). A solid waste management facility is defined as “any facility for the transfer, treatment, processing, storage or disposal of solid waste....”

**Admit** that the definition of “solid waste management facility” in WYO. STAT. ANN. § 35-11-103(d)(ii) includes the language quoted in that sentence of the Petition.

6(b). “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.”

**Admit** that “disposal” is so defined in Chapter 1 of the SWR.

6(c). 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.

**Admit** that ¶21 of the NOV alleges “Envirotank, Inc.’s placement at the Lange Trust site . . . of approximately 725 non-earth-filled whole tires . . . was not authorized by Solid Waste Operating Permit 51.031, and was not exempted from the permit requirement, and therefore was in violation of Solid Waste Operating

Permit 51.031 and W.S. 35-11-502(a).” **Deny** any other allegations in that sentence of the Petition.

6(d). These allegations beg the question of whether a permit was required for the beneficial use of tires in agricultural operations.

**Deny.**

6(e). The Department must first establish the placement of the whole tires was subject to the Act’s permitting requirements.

**Admit** that DEQ will have to establish that Envirotank, Inc.’s placement of whole tires was subject to the permit requirement in WYO. STAT. ANN. § 35-11-502(a)(i).

6(f). The NOV contains no allegations to this effect and thus is insufficient to support the Order for removal.

**Deny.**

7(a). 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.

**Deny.**

7(b). 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.

**Deny.**

7(c). 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.

**Deny.**

7(d). The Department cannot retroactively apply the 2008 guidance to Envirotank.

**Deny** that the DEQ retroactively applied the “2008 guidance” to Envirotank, Inc.

7(e). 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.

**Deny.**

7(f). 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.

**Deny.**

8(a). 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.

**Admit** that the NOV alleges (¶¶14-15) the Envirotank, Inc. permit transfer in 2006 and (¶21) Envirotank, Inc.’s placement of tires at the Lange Trust site prior to 2006. If by “the owner’s or its agent’s role in placement of scrap whole and tire parts on the property” Petitioner is referring to the specific allegations in ¶¶17-20 of the NOV, then DEQ **admits** that the NOV contains those specific

allegations. If Petitioner's allegation is referring to something other than the specific allegations in ¶¶17-20 of the NOV, then DEQ **denies** Petitioner's allegation.

8(b). 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.

**Admit** that (as alleged in NOV ¶21) Envirotank, Inc. is the entity responsible for its unauthorized placement of whole scrap tires at the Lange Trust site. **Deny** that whether or how responsibility should be allocated between past and present Envirotank, Inc. officials has been conclusively determined.

8(c). The Department cannot enforce against Envirotank for activities occurring prior to the permit transfer, based on the allegations in the NOV.

**Deny.**

8(d). Moreover, the placement of the tires was done with the approval of the owner's Lessee and the approval of the owner.

**Admit** that DEQ made specific allegations in ¶¶19-20 of the NOV regarding approval by the Lange Trust and/or its Lessee for Envirotank, Inc.'s placement of certain tires at the Lange Trust site. DEQ is **without knowledge** or information to form a belief as to the truth of any other allegations in that sentence of the Petition that go beyond the specific allegations in ¶¶19-20 of the NOV.

8(e). In any event, Envirotank was entitled to rely on the lessee in placing the tires.

**Deny** that Envirotank, Inc. "was entitled to rely on the lessee" in placing any tires in violation of the terms of Envirotank, Inc.'s permit.



8(f). Lange Trust benefitted from the placement of the tires as owner of the property and is as responsible for any remediation as Envirotank.

DEQ is **without knowledge** or information to form a belief as to the truth of allegations in that sentence of the Petition as to whether the Lange Trust “benefitted from the placement of the tires.” **Deny** that another entity is as responsible as Envirotank, Inc. is for Envirotank, Inc.’s own actions in violation of its permit.

8(g). 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.

DEQ is **without knowledge** or information to form a belief as to the truth of allegations in that sentence of the Petition as to whether the Lange Trust’s Lessee was also its “agent.” **Deny** any other assertions in that sentence of the Petition that alleged benefit to “the owner or their agent” relieves Envirotank, Inc. from full responsibility for complying with the terms of its permit or for taking actions to correct its own noncompliance with the terms of its permit.

9(a). The Order fails to justify removal of the whole tires as the appropriate remedy.

**Deny.** The contested NOV & Order were issued pursuant to WYO. STAT. ANN. § 35-11-701(c)(i), under which the NOV specifies the permit provisions alleged to be violated and the facts which constitute the violation, and the Order requires Envirotank, Inc. to cease and desist from the violation, which in this case involves removing tires Envirotank, Inc. placed at a site in violation of its permit.

9(b). It alleges no risk justifying the removal of the tires as necessary to protect human health and the environment.

**Admit** that the contested Order contains no specific allegation of risk. **Deny** that a specific allegation of risk is a necessary component of the Order.



9(c). 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.

**Deny.** The NOV (¶21) alleges that its placement of non-earth-filled whole tires at the Lange Trust site was in violation of Envirotank, Inc.'s solid waste operating permit and of WYO. STAT. ANN. § 35-11-502(a), which requires authorization under the solid waste permit system to operate. WYO. STAT. ANN. § 35-11-503(a) calls for solid waste permit systems "to protect human health and the environment." **Deny** the factual allegation in this sentence of the Petition implying that "the use of whole tires" at issue here are in fact "for agricultural purposes."

9(d). In fact, the NOV suggests if the whole tires were filled with earth or soil, there would not be a violation.

**Admit** only that while off-site placement of *any* whole tires was not authorized by Envirotank, Inc.'s permit, the NOV (¶21) also notes that livestock windbreaks made from non-earth-filled whole tires would not have been exempt from the permit requirement as a beneficial reuse. **Deny** any other allegations in this sentence of the Petition.

9(e). 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).

**Admit** the referenced letter suggests that Envirotank, Inc.'s proposal to drill holes in tires to drain water could be mosquito control.

9(f). Consistent with SHWD regulations and past practice, less costly, effective remedies are available.

**Deny.**

9(g). Envirotank requests that the Council reject the Ordered remedy and consider more reasonable and practical alternatives in the event it finds a violation.

**Admit** that Petitioner Envirotank, Inc. requests such relief. **Deny** that the Ordered remedy should be rejected.

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

**Deny** Envirotank's assertion "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.

**Admit** that Petitioner Envirotank, Inc. requests a hearing in this matter.

**Generally deny** any other allegations in the Petition.

#### **AFFIRMATIVE DEFENSES**

1. Respondent DEQ asserts that Petitioner Envirotank, Inc. is estopped from now contesting terms of its 2004 permit and 2006 permit transfer that it had the opportunity to timely appeal, but did not.

DATED this 3<sup>rd</sup> day of June, 2011.



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CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the foregoing WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY'S RESPONSE TO ENVIROTANK, INC.'S PETITION was served this 3rd day of June, 2011 by United States mail, first class postage prepaid, and/or by hand delivery or email, addressed as follows:

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