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ATTORNEYS FOR ENVIROTANK, INC.

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

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

FINAL PRE-HEARING MEMORANDUM OF ENVIROTANK, INC.

COMES NOW the Petitioner, Envirotank, Inc. ("Envirotank"), by and through its attorneys, and hereby respectfully submits the following Pre-Hearing Memorandum:

Nature of the Case

BACKGROUND

On November 15, 2004, the Wyoming Department of Environmental Quality ("Department") issued Solid Waste Permit No. 51.031 ("Permit") to John Hull, the original owner of Envirotank, authorizing Envirotank to operate its tire processing facility located at 377 Clarkelen Road Gillette, Wyoming. John Hull

operated Envirotank until Loren J. Weatherwax purchased Envirotank in April of 2006, at which time the Department transferred the Permit to Michal Bulger, Envirotank's new President, on April 19, 2006.

In 2005, prior to the Permit transfer, Brian Morgan leased the property at issue in this case from Sandra Lange, Mildred Rae Broyles and Peggy A. Sullivan, the Intervenors in this matter[1]. The leased property was located at 227 Bell South Road in Campbell County, Wyoming (the "Property"). According to Sandra Lange, there was an agreement between herself and her sisters, Mildred Rae Broyles and Peggy Sullivan, that she would solely manage the Property with regards to grazing leases, and on April 1, 2005, Ms. Lange leased the Property to Brian Morgan. Lange Depo. at 11-12, 33.

At the time he acquired the grazing lease, Mr. Morgan was aware of windbreaks constructed of tires on neighboring lands and determined his cattle could benefit from similar structures. Mr. Morgan also knew that a local company, Envirotank, was willing to construct similar windbreaks for free. Mr. Morgan approached Ms. Lange about the possibility of having windbreaks constructed on the Property. In response, Ms. Lange visited the neighboring

[1] According to the Intervenors' Answer to Envirotank's First Request for Admission, Interrogatories and Request for Production of Documents, the Property is owned by Sandra Kay Lange Trust, a Trust Indenture dated June 28, 1994, Sandra Kay Lange as Trustee, Donald and Peggy Sullivan Trust and Rae Sullivan Trust, as tenants in common. Brian Morgan leased the Property from April 1, 2005 through March 31, 2010.

property with Mr. Morgan to view the tire windbreaks and, after this visit, gave Mr. Morgan verbal permission to construct one windbreak on the Property[2].

In 2005, with Mr. Morgan's permission, Envirotank, under ownership of John Hull, constructed the first windbreak on the Property. After the windbreak was constructed, Mr. Morgan called Ms. Lange and asked for permission to have a second windbreak constructed. Ms. Lange gave her permission and a second windbreak was constructed.

As discussed above, Envirotank was sold to Mr. Weatherwax in April of 2006. After the change of ownership, additional windbreaks were constructed on the Property at the request of Mr. Morgan. Presently, there are four complete windbreaks on the Property and a partially constructed fifth windbreak.[3] According to Mr. Morgan, these windbreaks were only constructed after he received verbal authorization from Ms. Lange, as required by the lease agreement. *See* **Exhibit 4**, attached hereto. Ms. Lange, however, denies giving Mr. Morgan permission for the third and fourth windbreak and the partially constructed fifth windbreak.

According to Ms. Lange, after her visit to the Property to view neighboring windbreaks in 2005 she did not visit the Property again until 2008, after she received the Letter of Violation ("LOV") from the Department. Lange Depo. at

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[2] Under the terms of the Grazing Lease Agreement, Mr. Morgan was only required to obtain verbal permission for capital improvements. *See* **Exhibit 4**, attached hereto.

[3] It is unclear when the second, third, fourth and partially complete fifth windbreaks were constructed in relation to the sale of Envirotank to Mr. Weatherwax. Based on a review of bills of lading, Envirotank, under the ownership of Mr. Weatherwax, estimates it placed approximately 350 whole tires of the approximated 725 whole tires alleged in the Notice of Violation.

36-40. On July 28, 2008, the Department issued a LOV to Michael Bulger, Brian Morgan, and the Sandra Lange Trust in response to a "complaint concerning the unauthorized storage/management of large off-road scrap tires...." *See* **Exhibit 5**, attached hereto. According to the LOV, future continued use of scrap tire tops needed Department approval and the use of whole tires was not authorized under Envirotank's Permit and, to prevent further enforcement action, the whole tires must be removed and the tire tops must either be removed or be approved under Solid Waste Guideline #21 as a management or reuse method. After the LOV was issued, Ms. Lange denied Envirotank access to the Property, which contributed to the incompletion of the fifth windbreak.

In response to the LOV, Envirotank's attorney, Eugene J. Hynes, sent a letter dated September 17, 2008 to the Department proposing to resolve the issue by drilling holes in the tires to drain off any excess water and thereby eliminating the potential for a mosquito breeding habitat. *See* **Exhibit 6**, attached hereto. In a subsequent letter dated September 23, 2008, Mr. Weatherwax and Mr. Bulger, on behalf of Envirotank, again proposed to resolve the issue relating to whole tires by drilling bottom sides for drains and repositioning the tires. *See* **Exhibit** 7, attached hereto. Finally, in a letter dated October 13, 2008, Mr. Bulger addressed concerns regarding the incomplete fifth windbreak. *See* **Exhibit 8**, attached hereto. In the letter, Mr. Bulger acknowledged that Envirotank placed tire tops and whole tires on the Property for "beneficial agricultural use," specifically working cattle pens

and calving/windbreak areas, and he offered to have Envirotank complete the project to the satisfaction of the Department and the landowner/lessee. *Id.*

On October 24, 2008, the Department approved the course of action outlined in Envirotank's September 23, 2008 and October 13, 2008 letters. Specifically, completing the fifth windbreak for a "beneficial agricultural use" and drilling holes in the bottom sides of tires to drain water for mosquito control. *See* **Exhibit 9**, attached hereto. However, on October 29, 2008, Ms. Lange, through her attorney Heather Jacobson, refused to consent to the course of action proposed by Envirotank and approved by the Department. *See* **Exhibit 10**, attached hereto. In her October 29 letter, Ms. Jacobson stated her clients would refuse to "consent to any plan that does not call for the total removal of these materials from her property." *Id.*

After approving at least two of the windbreaks, Ms. Lange requested a meeting with the Department to discuss Envirotank's "dumping" of tires on the Property. *See* **Exhibit 11**, attached hereto. At some point Ms. Lange and Ms. Jacobson met with the Department, then, on April 18, 2011, the Department issued the Notice of Violation and Order ("NOV"), which is the subject of this appeal. *See* **Exhibit 12**, attached hereto. According to the NOV, Envirotank's placement of approximately 725 non-earth-filled whole tires at the Property between November, 2004 and November, 2007, of which approximately 350 whole tires were placed after April 19, 2006, was a violation of Envirotank's Permit and was not exempt from the permit requirements.

SUMMARY OF THE APPLICABLE LAW AND POLICY CONSIDERATIONS

A permit was not required for the construction of windbreaks.

In an enforcement action, the burden of proof rests with the Department. According to the Department, Envirotank's placement of 725 non-earth-filled whole tires at the Property was not authorized by Envirotank's Permit and it was not exempt from the permit requirements of a solid waste management facility. In other words, in order to construct windbreaks for a beneficial use on the Property, Envirotank either needed a permit authorizing the use of whole tires, or an exemption from the permitting requirement, or the landowner, Ms. Lange, needed a permit authorizing the constructed windbreaks, or an exemption.

Permits are required for the regulation of solid waste management facilities. According to the Wyoming Environmental Quality Act (the "Act"), solid waste means "garbage, and other discarded solid materials, including solid waste materials, resulting from industrial, commercial, and agricultural operations, and from community activities, but, unless disposed of at a solid waste management facility, does not include... liquids, solids, sludges or dissolved constitutes which are collected or separated in process units for recycling, recovery or reuse including the recovery of energy, within a continuous or batch manufacturing or refining process." Wyo. Stat. Ann. § 35-11-103(d). The Department must first prove the tires used to construct the windbreaks at the Property are a solid waste.

If the Department can prove the tires are a solid waste, it must prove the Property was a solid waste management facility. Pursuant to Wyoming Statute § 35-11-502, no person, except with authorization under the permit system can "locate, construct, operate or close a solid waste management facility." A solid waste management facility is defined as "any facility for the transfer, treatment, processing, storage, or disposal of solid waste." Wyo. Stat. Ann. § 35-11-103(d). Thus, the Property was required to have a permit only if it meets the definition of a solid waste management facility.

The tires on the Property were not transferred, treated or processed. The tires were not stored or disposed of either; however, this is what the Department will likely argue. Chapter 1 of the Solid Waste Regulations ("SWR") defines "disposal" 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." Chapter 1 defines "storage" as the "holding of solid waste for a temporary period, at the end of which time the solid waste is treated, disposed of, or stored elsewhere." Therefore, the Department must prove that Envirotank, by constructing windbreaks from tires and tire parts, was either disposing of these tires or storing them on the Property, thereby making the Property subject to the permitting requirements of the Act. Envirotank's position is that constructing windbreaks for a beneficial use is neither

a disposal nor storage, and thus no permit was necessary to construct the windbreaks.

If the windbreaks were subject to the permitting requirements of the Act, the windbreaks should have qualified for a beneficial use exemption or be granted a de facto allowance.

If Envirotank's placement of whole tires required a permit, it could have been exempt from the permit requirements under Chapter 1, Section (l)(xxi) of the SWR. Chapter 1, Section (f)(i) of the SWR states a permit is required for the location, construction, operation or closure of any new or existing solid waste management facility. *See also* Wyo. Stat. Ann. § 35-11-502 (noting the same). However, Section (f)(ii) states a permit is not required for the facilities or activities specified in Section (l).

According to Chapter 1, Section (l), the administrator may exempt certain activities from a permit or any requirement to obtain a waste management authorization under the regulations, provided that person supplies requested information to the administrator that demonstrates the act, practice or facility is exempt. Section (l)(xxi) exempts "[t]he reuse of wastes in a manner which is both beneficial and protective of human health and the environment, as approved by the administrator." SWR at Chap. 1, § l(xxi). Thus, the constructed windbreaks could have qualified for a beneficial use exemption because the tires are being reused in a beneficial manner and their current reuse is not harmful to the environment or human health. Because the windbreaks could have qualified for an exemption, the

windbreaks should either be exempt or be given a de facto allowance as the Department has done for other landowners.

In 2003, the Department issued guidance on the use of tire bales. *See* **Exhibit 13**, attached hereto. According to the 2003 Guidance, the Department would no longer exempt the beneficial use of tire bales within the State of Wyoming from solid waste permitting requirements, and any tires bales placed on public or private land, other than at a permitted disposal facility, would be subject to removal at the landowner's expense. *Id.* The Department noted there would be special circumstances where the Department would exempt tire bales as a beneficial use. Specifically, the Department stated it would continue to exempt tire bales when: (1) a landowner, prior to the effective date of the 2003 Guidance, entered into an irrevocable contract for the purchase of tire bales for a legitimate beneficial use; (2) situations when a landowner proposes durable means to shield the tires bales from the accumulation of water; and (3) situations where the landowner agrees to bonding or other forms of financial assurances.

Subsequently, the Department issued Solid Waste Guideline #21 on September 12, 2008. *See* **Exhibit 14**, attached hereto. In the 2008 Guidance, the Department espoused concerns with whole tires and tire bales that are allowed to remain exposed to weather, as they are when used as windbreaks or fencing. According to the Guidance, the Department's concerns stem from the unsightly appearance of tire piles, the potential for a tire fire and the spread of West Nile virus and, therefore, the Department determined it would no longer approve whole

scrap tires, tire shreds, or tire bales for use in windbreaks, fences or other exposed applications.

After the promulgation of the 2003 Guidance, landowners continued to construct windbreaks for agricultural purposes. However, the Department has failed to identify any circumstance, besides the one at issue in this case, when the Department has required a landowner to deconstruct a structure currently being used for a beneficial agricultural purpose. Instead, the Department has granted de facto allowances to other landowners who constructed windbreaks after the promulgation of the 2003 Guidance but before the 2008 Guidance.

The windbreaks on the Property were constructed prior to the issuance of the 2008 Guidance. The Department cannot retroactively apply its Guidance. *See State ex rel. State Department of Revenue v. Union Pac. R.R. Co.,* 2003 WY 54, ¶ 33, 67 P.3d 1176, 1188 (Wyo. 2003) *citing Wyoming Refining Co. v. Bottjen,* 695 P.2d 647 (Wyo.1985); *Johnson v. Safeway Stores, Inc.,* 568 P.2d 908 (Wyo.1977); *State ex rel. Lynch v. Bd. of County Comm'rs,* 75 Wyo. 435, 296 P.2d 986 (1956); *Hercules Powder Co. v. State Bd. of Equalization,* 66 Wyo. 268, 208 P.2d 1096 (1949); and *Mustanen v. Diamond Coal & Coke Co.,* 50 Wyo. 462, 62 P.2d 287 (1936) (standing for the general proposition that retroactive application of either statutes or administrative rules and regulations is disfavored). Moreover, the Department is attempting to enforce its Guidance as a rule without going through the necessary public notice and comment. A legislative rule affects individual rights and obligations and, therefore, is subject to public notice and comment

under the rulemaking provisions of the Wyoming Administrative Procedure Act. *In re Matter of Bessemer Mt.*, 855 P.2d 450, 453 (Wyo. 1993). Here, the "Guidance" prohibiting the use of non-earth filled whole tires should have been subject to public notice and comment before the Department prohibited tires for beneficial agricultural use.

Additionally, requiring Envirotank to retroactively comply with the 2008 Guidance while exempting other landowners is not only an abuse of enforcement authority, but inappropriate selective enforcement. As a policy matter, the Department cannot pick and choose to retroactively apply the 2008 Guidance. Before the issuance of the 2008 Guidance, Envirotank could have applied for a beneficial use exemption under Chapter 1, Section l(xxi) for the placement of the tires. However, because Envirotank did not, it should be granted a de facto allowance because it constructed the windbreaks at issue prior to the issuance of the 2008 Guidance.

If a violation is found, Envirotank is not the sole responsible party.

If the Environmental Quality Council ("Council") does find a violation, Envirotank is not solely responsible. Mr. Weatherwax, the current owner of Envirotank, purchased it in April of 2006. Prior to his purchasing the company, many of the tires had already been placed on the Property. Envirotank should not be responsible for its predecessor's activities and the Department cannot enforce against Envirotank for activities occurring prior to the Permit transfer on April 19, 2006.

Furthermore, Envirotank constructed the windbreaks on the Property only after approval from Mr. Morgan. Mr. Morgan was Envirotank's contact person for the construction of the windbreaks. Ms. Lange acknowledged she gave Mr. Morgan permission to have the first two windbreaks constructed. *See* Lange Depo. at 47. She was therefore aware of Envirotank's activity and also that she never spoke with Envirotank, opting instead to authorize Mr. Morgan to do so. *See* Lange Depo. at 58-59. In Wyoming, "[a]pparent authority exists when a principal (Lange) has intentionally or inadvertently induced a third person (Envirotank) to believe that such a person was his agent: Apparent authority is created with the principal holds the agent (Morgan) out as possessing the authority to bind the principal or when the principal allows the agent to claim such authority." *Velasquez v. Chamberlin,* 2009 WY 80, ¶ 19, 209 P.3d 888, 893 (Wyo. 2009).

Envirotank rightly relied on Mr. Morgan's permission for the construction of each windbreak as the agent of Ms. Lange. Because Ms. Lange never contacted Envirotank, Envirotank had no reason to doubt Mr. Morgan's authority and any dispute regarding whether Ms. Lange gave permission to Mr. Morgan for the construction of the last three windbreaks is not relevant. If a violation is found, responsibility must be apportioned between the responsible parties: John Hull's Envirotank, Envirotank and the landowner.

If a violation is found, removal of all the whole tires is an inappropriate remedy.

If a violation is found, removal of all the whole tires is an inappropriate remedy. The whole tires pose no risk to human health or the environment that justifies the cost of removal. The NOV alleges 725 non-earth-filled whole tires must be removed from the Property. The removal of one load of tires costs approximately three thousand dollars ($3000), with one load consisting of roughly six (6) tires. Therefore, removing 725 whole tires will cost approximately $362,500 (725/6 x 3,000).

The NOV does not order the removal of any tire tops or tire parts, only the whole tires. According to the Department, the risk associated with the whole tires is fire, mosquito habitat, and rodent habitat; however, employees of the Department also acknowledged the fire risk and rodent habitat is no greater for structures composed of whole tires as opposed to tire tops and tire parts, which are allowed by the Department. *See* Anderson Depo. at 23-24 and Link Depo. at 37. Furthermore, the Department has no evidence indicating the windbreaks pose a risk to groundwater. Thus, the only environmental/health risk unique to whole tires is the potential for increased mosquito habitat that could result in incidents of West Nile virus. In 2008, Envirotank proposed, and the Department approved, a plan to reduce the potential for mosquito habitat in whole tires by drilling holes in the bottom sides of the whole tires to drain water for mosquito control. *See* **Exhibits 6-9**.

Envirotank believes its original plan is still a reasonable remedy and is still willing to move forward. Furthermore, in a mark of good faith, Envirotank is willing to remove all the tires in the uncompleted fifth windbreak at its sole expense. Envirotank strongly urges the Council to consider and approve this plan as it significantly reduces any risk exclusive to whole tires in a cost effective manner.

If a violation is found, the Council should consider reasonable alternatives to remedy the situation besides the costly removal of all the whole tires as ordered in the NOV. Furthermore, ordering Envirotank to completely remove all the whole tires is an inappropriate display of selective enforcement in light of the de facto allowance granted to other landowners.

A. Uncontested Issues of Fact

1. On November 15, 2004, the Wyoming Department of Environmental Quality ("Department") issued Solid Waste Permit No. 51.031 ("Permit") to John Hull, the original owner of Envirotank.

2. The Permit authorized Envirotank to conduct approved activities at its facility located at 377 Clarkelen Road Gillette, Wyoming.

3. Brian Morgan leased the property at issue in this case, 227 Bell South Road in Campbell County, Wyoming, (the "Property") from Sandra Kay Lange, as Trustee of the Sandra Kay Lange Trust, a Trust Indenture dated June 28, 1994, and as authorized agent for Mildred Ray Broyles and Peggy A. Sullivan, from April 1, 2005 through March 31, 2007 under an oral agreement, and from

April 1, 2007 through March 31, 2010 under a written agreement entitled Grazing Lease Agreement.

4. From April 1, 2005 until the issuance of the Letter of Violation ("LOV") on July 28, 2008, Sandra Lange made all decisions regarding the leasing of the Property for grazing purposes and the decision to allow Envirotank to construct two windbreaks on the Property.

5. Mr. Morgan showed Ms. Lange windbreaks constructed of tires on neighboring property in 2005, prior to the construction of any windbreaks on the Property.

6. Mr. Morgan sought and was granted verbal permission from Ms. Lange to have the first two windbreaks constructed.

7. Mr. Morgan authorized Envirotank to construct four windbreaks and the partially constructed fifth windbreak

8. The Grazing Lease Agreement, executed in March of 2007, controlled the terms of Mr. Morgan's lease. Under the terms of the lease, Mr. Morgan only had to obtain verbal permission prior to beginning any capital improvements upon the Property.

9. In April of 2006, Loren J. Weatherwax purchased Envirotank from John Hull, and on April 19, 2006, the Department authorized a transfer of the Permit to Michael Bulger, the new President of Envirotank.

10. Ms. Lange never communicated with Envirotank and Mr. Morgan gave Envirotank permission to construct the four windbreaks and partially constructed fifth windbreak.

11. The Department issued a LOV to Michael Bulger, Brian Morgan, and the Sandra Lange Trust on July 28, 2008.

12. After the issuance of the LOV, Ms. Lange denied Envirotank access to the Property.

13. By letters dated September 17, 2008, September 23, 2008 and October 13, 2008, Envirotank proposed a solution besides removal of the whole scrap tires. Envirotank proposed to drill holes in the whole tires to drain off any excess water and to complete the fifth windbreak for "beneficial agricultural use."

14. On October 24, 2008, the Department approved the course of action outlined in Envirotank's October 13, 2008 and September 23, 2008 letters. Specifically, completing the fifth windbreak for a "beneficial agricultural use" and drilling holes in the bottom sides of tires to drain water for mosquito control.

15. On October 29, 2008, Ms. Lange, through her attorney, refused to consent to the plan approved by the Department in its October 24, 2008 letter. In this letter, Ms. Lange stated she would refuse to consent to any plan that did not call for total removal of all the tires.

16. At some point before the Notice of Violation ("NOV") was issued, Ms. Lange and her attorney met with the Department to discuss the LOV and the windbreaks on the Property.

17. On April 18, 2011, the Department issued a NOV to Envirotank ordering it to remove from the Property all whole tires and tire parts that are not either the lower half of a whole tire used for stock watering tanks or the top half/sidewall of a whole tire for use in making livestock windbreaks, as described in Envirotank, Inc.'s approved final permit application dated July 15, 2004.

18. In 2003, the Department issued guidance on the use of tire bales. According to the 2003 Guidance, the Department would no longer exempt the beneficial use of tire bales within the State of Wyoming from solid waste permitting requirements, and any tires bales placed on public or private land, other than at a permitted disposal facility, would be subject to removal at the landowner's expense from the effective date of the Guidance.

19. Subsequently, the Department issued Solid Waste Guideline #21 on September 12, 2008. In the 2008 Guidance, the Department noted its concerns with whole tires and tire bales that are allowed to remain exposed to weather, as they are when used as windbreaks or fencing. According to the Guidance, the Departments concerns stem from the unsightly appearance of tire piles, the potential for a tire fire and the spread of West Nile and, therefore, the Department determined it would no longer approve whole scrap tires, tire shreds, or tire bales for use in windbreaks, fences or other exposed applications.

20. The Department has granted de facto allowances for landowners who have constructed windbreaks from non-earth filled tires bales after 2003 but prior to the issuance of the 2008 Guidance.

21. All the windbreaks constructed by Envirotank were constructed prior to the issuance of the 2008 Guidance.

22. The cost of removal of the 725 non-earth-filled whole tires identified in the NOV is approximately $362,500.

23. The NOV only requires Envirotank to remove all whole tires and tire parts that are not either the lower half of a whole tire used for stock watering tanks or the top half/sidewall of a whole tire for use in making livestock windbreaks, as described in Envirotank's approved final permit application dated July 15, 2004. Envirotank has not been ordered to remove all the tires currently on the Property.

B. Issues on Appeal

1. Whether the Department can prove the placement of whole tries for agricultural purposes on the Property was a violation of the Environmental Quality Act or Solid Waste Regulations. More specifically, whether a permit for the construction of windbreaks on the Property was necessary and, if a permit was necessary, whether the windbreaks could have qualified for a beneficial reuse exemption or, alternatively, if a de facto allowance should be granted.

2. Whether the current permittee is solely responsible for placing the tires on the Property.

3. If a violation is found, whether removal of all the whole tires is the appropriate remedy.

C. Witnesses

The following witness will be called to testify at the hearing in this matter:

1. **James F. Bowlby, Jr.**, Senior Hydrologist, Aquaterra Environmental Solutions, Inc., 4643 S. Ulter Street, Suite 800 Denver, CO 80237. Mr. Bowlby will be called to testify as an expert witness and a fact witness. As an expert witness, Mr. Bowlby will testify about his qualifications, education and work experience and otherwise in accordance with his CV filed in this matter as part of his expert witness designation. He will also testify about his opinions and the bases for those opinions contained in the written report of October 27, 2011, filed in this matter as part of his expert witness designation. He may also testify about those subjects on which he testified in his December 13, 2011 deposition given in this matter. Finally, Mr. Bowlby will testify about his observations of the windbreaks located on the Property during his site reconnaissance on September 30, 2011.

The following witnesses may be called to testify at the hearing in this matter:

2. **Loren J. Weatherwax**, P.O. Box 303, Ft. Lupton, CO 80621. Mr. Weatherwax was the owner of Envirotank from April 19, 2006 until it was Administratively dissolved on February 9, 2012. Mr. Weatherwax may testify about his experience in the used tire industry and the business model of Envirotank and how it worked within the used tire industry. He may also testify about the status of tire structures on the Property when he came to own Envirotank

and Envirotank's relationship with Mr. Morgan and Ms. Lange. Finally, Mr. Weatherwax may also testify about the cost of removing the whole tires.

3. **Brian Morgan**, 227 Bell Road Gillette, Wyoming, Mr. Morgan will be called to testify as a fact witness. Mr. Morgan leased the Property before, during and after the construction of the windbreaks. Mr. Morgan will testify about the Property in general, his relationship with Sandra Lange, and the standard procedure for making improvements on the Property under the Grazing Lease Agreement. He will also testify about how the windbreaks came to exist on the Property. Specifically, he will testify about his dealings with Envirotank and Ms. Lange as they relate to the windbreaks.

Envirotank reserves the right to call any witness listed by any other party to this matter, as well as all witnesses required for rebuttal and to lay foundation for any exhibit. Envirotank reserves the right to supplement this list as identity of additional witnesses may become known or discovered upon reasonable notice to the parties.

D. Exhibits

A copy of Envirotank's Exhibit List is attached hereto as Exhibit 1.

Envirotank reserves the right to use any exhibit for demonstrative purposes. Envirotank may offer any or all of the exhibits designated by any other party, and specifically reserves the right to offer any exhibit required for rebuttal purposes. Envirotank also reserves the right to supplement its list of exhibits upon reasonable notice to the parties hereto.

DATED this 28th day of February, 2012.

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ATTORNEYS FOR ENVIROTANK, INC.

Exhibit 1

- **Envirotank Exhibit #1:** Boards depicting windbreaks
- **Envirotank Exhibit #2:** Expert Report of James F. Bowlby, Jr.
- **Envirotank Exhibit #3**: Cross section of a mine tire with picture depicting source tire
- **Envirotank Exhibit #4:** Grazing Lease Agreement
- **Envirotank Exhibit #5:** Letter of Violation dated July 28, 2008
- **Envirotank Exhibit #6:** September 17, 2008 letter from Eugene J. Hynes
- **Envirotank Exhibit #7:** September 23, 2008 letter from Loren J. Weatherwax and Michael Bulger
- **Envirotank Exhibit #8:** October 13, 2008 letter from Michael Bulger
- **Envirotank Exhibit #9:** October 24, 2008 letter from the Department of Environmental Quality
- **Envirotank Exhibit #10:** October 29, 2008 letter from Heather Jacobson
- **Envirotank Exhibit #11:** February 2, 2011 letter from Heather Jacobson
- **Envirotank Exhibit #12:** Notice of Violation dated April 18, 2011
- **Envirotank Exhibit #13:** 2003 Guidance issued by the Department of Environmental Quality
- **Envirotank Exhibit #14:** Solid Waste Guideline #21
- **Envirotank Exhibit #15:** November 19, 2008 letter from the Department of Environmental Quality to Billy Ward
- **Envirotank Exhibit #16:** June 3, 2009 letter from the Department of Environmental Quality to Jerry Shimic

- **Envirotank Exhibit #17:** Board of key sections of Chapter 1 of the Solid Waste Regulations

- **Envirotank Exhibit #18:** Chapter 1 and Chapter 15 of the Solid Waste Rules and Regulations.

- **Envirotank Exhibit #19**: Bills of Lading

- **Envirotank Exhibit #20**: Invoices for freight loads

- **Envirotank Exhibit #21**: Brian Morgan's letter to Heather Jacobson dated February 20, 2009

- **Envirotank Exhibt #22**: Carl Anderson's notes dated March 11, 2011