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FILED

MAR 06 2012

Jim Ruby, Executive Secretary
Environmental Quality Council

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)) Docket No. 11-5208A
P.O. Box 302)
Ft. Lupton, CO 80621)

**ENVIROTANK, INC.'S RESPONSE TO LANDOWNERS'
MEMORANDUM OF LAW**

COMES NOW the Petitioner, Envirotank, Inc. ("Envirotank"), by and through its attorneys, and hereby respectfully submits its *Response to Landowner's Memorandum of Law*:

The landowner's reliance on *Redco Const. v. Profile Pictures, LLC*, is misplaced. 2012 WY 24 (Wyo. 2012). In *Redco* the Court was interpreting agency in the context of Wyoming's lien laws and found a mechanic's lien was invalid against a landlord's property for improvements made by the tenant because the tenant was not the agent of the landlord. *Id.* at ¶ 39. Regardless, the factors relied

on by the Court in *Redco* in determining there was no agency relationship supports a finding of agency in this case.

An agency relationship is not dependent on the express agreement of the parties, but may be implied from their words or conduct. *Id.* at 43. “The law creates a relationship of principal and agent if the parties, in the conduct of their affairs, actually place themselves in such position as requires the relationship to be inferred by the courts, and if, from the facts and circumstances of the particular case, it appears that there was at least an implied intention to create it, the relation may be held to exist, notwithstanding a denial by the alleged principal, and whether or not the parties understood it to be an agency. *Id.* In determining the existence of implied agency, the most essential test is whether the principal had the right to control the conduct of the agent or the actual exercise of such control. *Id.*

In determining the tenant was not the landlord’s agent in *Redco*, the Court relied on four factors: 1) whether the lease required the lessee to make specific improvements; 2) whether the cost of the improvements was actually borne by the fee owner; 3) whether the fee owner maintains control; and 4) whether the improvements become the property of the fee owners at the end of the lease.

Before applying these factors to this case, it should be noted the facts are in dispute and for purposes of this Memorandum only we are relying on the landowner’s recitation of the fact. With that caveat, application of these factors to this case shows only the first factor is favorable to the landowner, the lease did not

require the lessee to make improvements. Factor two (2) is not applicable because neither the landowner nor lessee paid for the improvements as Envirotank supplied the materials and constructed the windbreaks for free. Factor three (3) supports a finding of agency because the landowner exerted control over the construction of the approved windbreaks. Before making any improvements, the lessee sought and obtained the landowner's verbal permission as required by the lease agreement. *See Lange Depo.* at 31. However, before approving the first two windbreaks, the landowner drove to her property located at 227 Bell Road Gillette, Wyoming (the "Property") to view neighboring windbreaks. *See Id.* After viewing the neighboring windbreaks, the landowner exerted her control over the situation and specified the size of the windbreaks and discussed the location of the first two windbreaks with the lessee. *See Lange Depo.* at 31-32, 35 (testifying the lessee could not construct a windbreak as large as the one viewed and specifying the windbreak could be between fifty (50) and sixty (60) feet long and further testifying about discussions regarding the location of the first and second windbreaks).

The fourth factor also favors a finding of agency. The constructed windbreaks are the property of the landowner and were constructed for her benefit, as acknowledged by the landowner in her deposition. *See Lange Depo.* at 89 (testifying that her vision of the windbreaks would be beneficial). Moreover, the windbreaks are still on the Property and are being put to beneficial use. *See*

Exhibit 1 of *Envirotank Inc.'s Final Pre-Hearing Memorandum*, showing a windbreak in use.

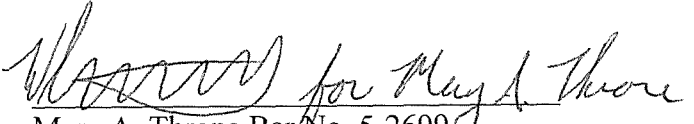
Ms. Lange controlled the construction of the first two windbreaks, which were constructed for her benefit. The fact that Ms. Lange chose to never speak with Envirotank or visit her Property to check on the windbreaks and ensure they were being construed per her specifications is irrelevant. Envirotank could only rely on Mr. Morgan's instructions, who, as her agent, appeared to have the authority to authorize the construction of the windbreaks.

In Wyoming, "[a]pparent authority exists when a principal has intentionally or inadvertently induced third persons to believe that such a person was his agent: 'Apparent authority is created when the principal holds the agent out as possessing the authority to bind the principal or when the principal allows the agent to claim such authority.'" *Velasquez v. Chamberlain*, 2009 WY 80, 209 P. 3d 888, (Wyo. 2009) citing *Ulen v. Kneettle*, 50 Wyo. 94, 103-04, 58 P.2d 446, 449 (Wyo. 1936). To bind the principal under apparent authority, the third party must show (1) the principal was responsible for the agent's appearance of authority while conducting the transaction in question and (2) the third party reasonably relied on the agent's representation.

After Ms. Lange's visit to the Property in 2005 to view the neighboring windbreaks, Ms. Lange did not return to the Property until the Letter of Violation was issued on July 28, 2008. *See Lange Depo.* at 16, 36, 40 and 53 (noting she did

not visit the Property and instead relied on Mr. Morgan to manage the hunters and check on the activities of coal bed methane operators). Ms. Lange's absence from the Property, coupled with her decision to never communicate with Envirotank, led Envirotank to rightly rely on Mr. Morgan's communications regarding the windbreaks. Mr. Morgan was clearly the agent of Ms. Lange who both controlled and benefitted from the construction of the first two windbreaks. Whether Mr. Morgan exceeded this authority is irrelevant to the matter at hand.

DATED this 6th day of March, 2012.



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ATTORNEYS FOR ENVIROTANK, INC.

CERTIFICATE OF SERVICE

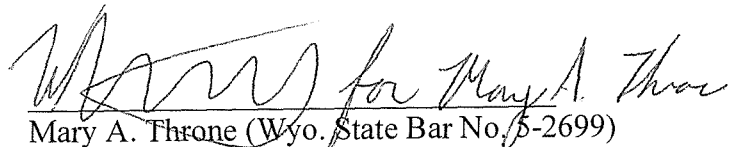
I, Mary A. Throne, of Throne Law Office, P.C., hereby certify that on the 6th day of March 2012, I e-mailed a true and correct copy of the foregoing document, by electronic mail only, to the following:

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A handwritten signature in cursive script, appearing to read "Mary A. Throne for Mary A. Throne".

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