

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL  
STATE OF WYOMING

IN THE MATTER OF THE NOTICES OF )  
VIOLATION AND ORDERS ISSUED TO: )  
 )  
SWECO OILFIELD SERVICES, )  
DOCKET NO. 2368-92 )  
 and )  
PENNANT WELL SERVICE, )  
DOCKET NO. 2369-92 )

**FILED**

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Environmental Quality Council

**CONSOLIDATED BRIEF OF THE DEPARTMENT OF ENVIRONMENTAL  
QUALITY ADDRESSING ISSUES RELATING TO  
INDUSTRIAL DRAINFIELD CASES**

The Department of Environmental Quality (DEQ), through the office of the Attorney General, Keith Burron, Assistant Attorney General, hereby submits this brief pursuant to the Order of the hearing examiner, dated June 3, 1993. The issues addressed and argued herein relate to a series of administrative orders issued to the above-named petitioners ordering them to conduct groundwater monitoring to determine whether the operation of their industrial drainfields has polluted groundwater.<sup>1</sup>

**FORMAT**

Because the issues involved in both of these industrial drainfield cases are practically identical, this brief will address in general the DEQ's legal authority and its rationale for bringing these enforcement actions. In addition, specific questions of the Environmental Quality Council which arose during the hearings of the Sweco and Pennant cases will be answered in the discussion.

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<sup>1</sup> The administrative orders also required the petitioners to cease discharging any pollutants which could cause a groundwater standards violation. This issue is not addressed here, however, since both Sweco and Pennant have disconnected their drainfields,

## **ISSUE**

The DEQ has identified only one principal issue involved in the determination of these cases. Several sub-issues, or more appropriately, related questions, are discussed in argument in support of the DEQ's position. The issue may be stated as follows:

Whether the DEQ may require a permittee to install, use and maintain monitoring equipment where cause exists to believe that the permittee's operations are causing or may be causing a violation of the state's groundwater standards.

## **RELATED QUESTIONS**

- a. What caused the DEQ to issue the Notice of Violation and Order, i.e. what is the violation?
- b. What specifically does the administrative order require the protestants to do?
- c. Does the DEQ have jurisdiction over the type of septic system here or is the system exempted from DEQ regulation by statute?
- d. What legal authority does the state possess to require the protestants to perform the steps required by the administrative orders?
- e. What is the policy behind allowing the DEQ to require the protestants to conduct monitoring which may confirm that they have violated state law? i.e. Requiring the protestants to perform monitoring that may be self-incriminating.

## **ARGUMENT**

Industrial septic systems such as the ones at issue in these proceedings, are designed to collect and dispose of industrial wastes from shop activities. Essentially, the systems are comprised of a shop sump, which drains to a septic tank, which in turn discharges fluid to the ground through a subsurface piping network. At each stage a degree of filtering is achieved, principally through gravity or oil\water separation.

The DEQ permitted approximately 200 industrial septic systems in the early 1980's. In addition to the permitted systems there were approximately 200 more systems operating without

permits. (See Sweco transcript, p. 68).

**a. Why the Department issued the Orders:**

Beginning in 1988 the DEQ became aware that these type of systems were capable of causing significant groundwater contamination problems. (Sweco transcript, p. 20). As a result, the water quality administrator stopped issuing permits to construct industrial drainfield systems. Since that time the DEQ has been attempting to determine how many of these systems have caused groundwater contamination. Where contamination is found, remedial steps are implemented to restore the quality of the groundwater.

To determine whether these systems were impacting groundwater, in 1988 the DEQ began sending letters to operators of industrial drainfield systems requesting them to sample the water in their septic tanks. The purpose of obtaining the samples was to determine whether discharges from their drainfields contained contaminants that threatened groundwater in violation of W.S. 35-11-301(a)(i). In many instances operators complied and submitted sample results to the DEQ. In other instances, the DEQ issued administrative order (not the orders at issue here) requiring operators to take samples. In cases where the sample results showed no harmful levels of contaminants, the matter was concluded and no further action was taken.

**b. What the Orders Require:**

If the sample results submitted by the operators indicated that contaminants were being discharged from the drainfield that threatened to degrade groundwater, the DEQ issued the orders contested here. These orders require the operators to implement a monitoring plan to determine whether groundwater has been affected by discharges from their drainfield systems. Many operators have complied with the orders and performed groundwater monitoring. Of the

monitoring studies that have been conducted, groundwater contamination has been found in approximately fifty percent of the cases. (Sweco transcript, p. 164).

Specifically, the orders require the operators to install four monitor wells to allow for testing of actual groundwater, and to monitor those wells for contamination. The sample results that the DEQ relied upon in issuing the orders measured what was being discharged from the drainfields. Those samples indicate that groundwater is threatened by the discharge, but they cannot confirm or deny the existence of actual groundwater contamination. Hence, the intended purpose of the orders is to require the permittees to investigate whether the operation of their industrial drainfields has polluted the groundwater.

**c. DEQ Jurisdiction over Industrial Drainfields:**

At the Sweco hearing one of the council members questioned whether the DEQ has jurisdiction to regulate the industrial drainfields at issue here, since the samples were taken from the septic tanks rather than from the soil or water beyond the point of discharge. The language alluded to by the council member is found in W.S. 35-11-1104(a)(i), which provides that the Environmental Quality Act does not grant the department any authority over "pollution existing solely within commercial and industrial plants, works or shops." For the reasons discussed below, however, the language in W.S. 35-11-1104(a)(i) does not preclude the DEQ from regulating industrial drainfields.

The first reason why the statute does not apply to industrial drainfield systems is that wastes generated from those systems does not exist "solely within" the shops. The wastes are sent through a treatment works that begins in the shop, but that ultimately discharges to the environment. Consequently, the "solely within" exception does not apply because the pollution

leaves the shop and is discharged to the environment.

The second reason that the language of the statute does not apply to industrial drainfield systems is the nature of the permitting process. To legally construct an industrial drainfield system the operator must obtain a permit to construct from the DEQ. It would be untenable to presume that the DEQ lacks jurisdiction to ensure that a system that it has permitted is meeting applicable water quality standards.

Finally, an industrial drainfield system falls within the definition of a "disposal system" as that term is defined by W.S. 35-11-103(c)(v). Disposal of wastes from disposal systems require a permit under W.S. 35-11-301(a)(iii), and those permits are subject to DEQ regulatory authority.

**d. DEQ Authority to Require the Ordered Activities:**

The Environmental Quality Act grants the DEQ the authority to require the contestants in these cases to perform what is required by the administrative orders. The following statutory and regulatory sections pertain to the exact issues addressed by the orders:

1. W.S. 35-11-109(a)(iv) provides that the director shall **"prepare and require permittees to prepare reports and install, use and maintain any monitoring equipment or methods reasonably necessary for compliance with the provisions of this act..."** In these cases, the operators of the industrial drainfield systems are "permittees," for purposes of the statute, since their drainfields were permitted by the DEQ. The monitor wells and sampling requested in the order are "monitoring equipment or methods reasonably necessary for compliance" with the act.

2. W.S. 35-11-110(a)(vii)(C) and (D) provides that the water quality administrator may

require the owner or operator of any point source to **install, use and maintain monitoring equipment and sample effluents and discharges**. This statute is particularly on point, since it addresses exactly what is being contested in these orders. An industrial drainfield system is a "point source" as that term is defined in 35-11-103(a)(xi). The orders at issue here seek specifically to require the owners or operators of these point sources to install monitoring equipment and sample discharges. W.S. 35-11-110(a)(xi) contemplates and provides for **exactly** what the DEQ is requiring through these orders.

The idea of requiring a permittee to perform monitoring to ensure compliance with environmental laws is not new. The Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901 et seq., which regulates the treatment, storage and disposal of hazardous wastes, contains a provision very similar to the provisions of the Environmental Quality Act cited above. 42 U.S.C. 6934(a), (Section 3013(a) of RCRA), entitled "Authority of Administrator" provides as follows:

If the Administrator [of the EPA] determines, upon receipt of any information, that--

- (1) the presence of any hazardous waste at a facility or site at which hazardous waste is, or has been, stored, treated, or disposed of,
- or
- (2) the release of any such waste from such facility or site may present a substantial hazard to human health or the environment, **he may issue an order requiring the owner or operator of such facility or site to conduct such monitoring, testing, analysis, and reporting with respect to such facility or site as the Administrator deems reasonable to ascertain the nature and extent of such hazard.**

(emphasis added). In cases where the operator's activities are inadequate to satisfy the Administrator's requirements, the EPA may conduct the required monitoring and recover the

costs of monitoring from the operator. (Section 3013(d)). Federal district courts have consistently upheld the EPA Administrator's actions against challenges by owners and operators under these sections. See, e.g. United States v. Seafab Metal Corp., 18 ELR 21024 (W.D. Wash., 1988), E.I. duPont de Nemours & Co. v. Daggett, 610 F. Supp. 260 (D.C.N.Y. 1985), In Re Order Pursuant to Section 3013(d) RCRA, Etc., 550 F. Supp. 1361 (W.D. Wash. 1982).

**e. Rationale for requiring permittees to perform monitoring:**

The DEQ has requested the recipients of the orders at issue here to perform monitoring that may reveal that state water quality standards have been violated. The evidence the permittees collect may tend to be self-incriminating. However, the sections of the Environmental Quality Act cited above, granting the DEQ the authority to require permittees to conduct sampling evidences an intent to place the financial burden of ensuring compliance with environmental laws on owners and operators, not on the taxpayers. Placing the financial burden of reasonable monitoring on the owners and operators instead of the taxpayers makes logical sense in this case. Here, the owners and operators have been the ones benefitting from the use of the industrial drainfield systems. If it is determined, as here, that the operation of those systems poses a threat to groundwater, the burden of confirming the extent of the potential problem should fall on the party responsible for creating the threat. In this case those parties are the owners and operators. It is not unreasonable to require the owners and operators to ensure that their activities do not violate state environmental laws.

It is important to note that enforcement has been narrowly tailored and even-handed. The DEQ has chosen the least intrusive means of resolving the problems associated

with industrial drainfield systems. The DEQ has treated all owners and operators alike. No one has been singled out for enforcement. (Sweco transcript, p. 87).

Enforcement has proceeded in the least intrusive fashion possible. First, permittees were requested to sample their effluents. Operators that had clean samples were weeded out at that stage. Only if the samples revealed potential groundwater contamination were operators required to take further action to determine the extent of the potential problems. Enforcement has been rationally based on the threat to groundwater from the operation of these systems.

The DEQ is aware of the financial burden of complying with the orders. However, Bob Lucht, the DEQ's expert engineer and geologist testified at the SWECO hearing that the simplest and most cost effective way of resolving the groundwater issue is through the steps prescribed by the orders. (Sweco transcript at pp. 41-42).

The fact that the DEQ is sensitive to the issue of the cost of compliance is further borne out by the fact that there was a previous order issued to the contestants that required them to disconnect their drainfield systems. The DEQ vacated those orders and replaced them with the orders at issue here. The reason for vacating the previous orders was that, absent a confirmation that the drainfields are contaminating groundwater, it would be premature to require the permittees to go to the expense of disconnecting the drainfields and securing alternative disposal methods.

## **CONCLUSION**

To summarize the details outlined above, the following facts and legal authority support the action taken by the DEQ and the efficacy of the administrative orders issued:

\* The administrative orders were issued because the sample results taken from the industrial septic tanks indicate that the drainfield systems operated by the



protestants pose a threat to groundwater. The DEQ's expert testified that in about half of the cases where samples showed contamination there was actual groundwater contamination. The orders were not arbitrarily issued.

\* The administrative orders were issued pursuant to statutory authority granted to the DEQ, which provides for the director and administrator to require permittees to install monitoring equipment and conduct sampling.

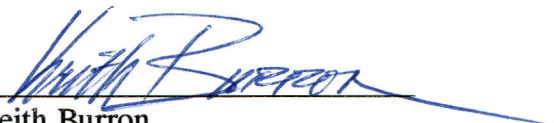
\* Courts have upheld the application of RCRA provisions which are parallel to the statutes granting the DEQ authority to issue these orders.

\* The administrative orders were narrowly tailored and reasonable to meet the objectives of the DEQ, namely to determine whether operation of the drainfields has affected groundwater quality.

\* The DEQ has treated all similarly situated industrial drainfield operators the same. Regulation has been even-handed.

For the foregoing reasons the DEQ requests that the environmental quality council affirm the administrative orders issued by the DEQ in this matter.

Dated this 31<sup>st</sup> day of August, 1993.

  
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CERTIFICATE OF SERVICE

I, Keith Burron, do hereby certify that on the 31<sup>st</sup> day of August, 1993, I served a true full and correct copy of the foregoing Brief upon the following parties by placing the same in the U.S. Mail, postage prepaid, addressed as follows:

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And further certify that I served a copy of the same upon the Environmental Quality Council by hand delivery on the same date.



Keith Burron