

**FILED**

**BEFORE THE ENVIRONMENTAL QUALITY COUNCIL  
STATE OF WYOMING**

JUL 14 2000

**In the Matter of the Lazy B Gas )  
Processing Plant, One-Time )  
Authorization )**

**Docket No. 5601-00**

Terri A. Lorenzon, Director  
Environmental Quality Council

**DEQ'S MOTION TO DISMISS WITH PREJUDICE DUKE  
ENERGY FIELD SERVICES, LLC'S PETITION FOR REVIEW**

Respondent Wyoming Department of Environmental Quality ("DEQ"), Solid & Hazardous Waste Division ("SHWD"), pursuant to Chapter II, §3 of the Wyoming DEQ Rules of Practice & Procedure, moves the Environmental Quality Council ("Council") to dismiss with prejudice the petition for review filed by Duke Energy Field Services, LLC ("Duke") in the above-captioned matter on the following grounds.

1. Petroleum contaminated soils resulting from industrial operations are solid waste. W.S. 35-11-103(d)(i).

2. The Solid & Hazardous Waste Division is the Division of the DEQ responsible for coordinating the activities of all state agencies concerned with solid waste management and disposal and for administering the permit system for management of solid waste. W.S. 35-11-501(a)&(b) and -502(a).

3. Duke has filed a petition dated June 30, 2000, asking the Council to review and reverse the DEQ/SHWD's May 1, 2000 decision regarding the One-Time Authorization which allowed Duke to treat petroleum contaminated soils on site at the Lazy B gas processing plant in Campbell County. Duke petition, ¶6.

4. Duke applied to the DEQ/SHWD for the One-Time Authorization to treat petroleum contaminated soils on site by letter dated April 30, 1998, which proposed that, prior to backfilling, samples of treated soils would be analyzed for Gasoline Range Organics ("GRO") alone, rather than for both GRO and Diesel Range Organics ("DRO"). Duke petition, ¶3.

5. The DEQ/SHWD issued the One-Time Authorization by letter dated May 11, 1998 (**attached hereto as Attachment A**), "contingent upon [Duke's] compliance" with explicit conditions, including (#3) the requirements that soils be treated to meet specified objectives for *both* Gasoline Range Organics (30 mg/kg Total Petroleum Hydrocarbons) *and* Diesel Range Organics (100 mg/kg Total Petroleum Hydrocarbons) and that compliance with the treatment objectives be documented by confirmation sampling.

6. Duke proceeded to excavate, treat and then backfill the treated soils subject to the One-Time Authorization.

7. Although Duke tested the treated soils for Gasoline Range Organics prior to backfilling, Duke did not test the treated soils to demonstrate compliance with the condition #3 objective for Diesel Range Organics. Duke petition, ¶4.

8. Duke backfilled the treated soils without testing them for Diesel Range Organics to demonstrate compliance with condition #3 of the One-Time Authorization *before* requesting or receiving a closure letter from the Water Quality Division (“WQD”). Duke petition, ¶4.

9. The Water Quality Division issued the September 7, <sup>1999</sup>~~2000~~ site closure letter in reliance upon “property conditions represented to the WDEQ by SECOR’ (Duke’s consultant).” Duke petition, ¶4.

10. Duke did not ask the Solid & Hazardous Waste Division for a determination that Duke had fully complied with all conditions of that Division’s One-Time Authorization *before* backfilling the treated soils and requesting a closure letter from the WQD.

11. By letter dated May 1, 2000 (**attached hereto as Attachment B**) the DEQ/SHWD responded to Duke’s assertion that testing for GRO alone was adequate to demonstrate compliance with the treatment objectives specified in condition #3 of the May 11, 1998 One-Time Authorization.

12. The DEQ/SHWD’s May 1, 2000 decision letter, which Duke’s petition for review (¶6) characterizes as “requir[ing] Duke to conduct *additional* testing for TPH/DRO”, does not require additional testing, but only reaffirms that “confirmation sampl[ing]” is required to “document compliance with the treatment objective” for Diesel Range Organics as originally specified in condition #3 of the May 11, 1998 One-Time Authorization.

13. By asserting that testing for GRO alone was adequate to demonstrate compliance with the treatment objectives specified in condition #3 of the May 11, 1998 One-Time Authorization, Duke now actually is contesting the condition #3 requirement that samples of treated soils be tested for compliance with both GRO and DRO standards.

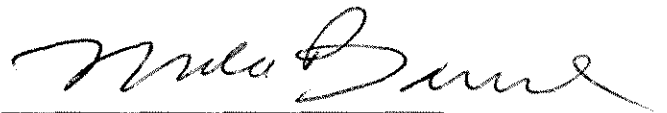
14. Duke failed to appeal to the Council to contest condition #3 of the DEQ/SHWD’s May 11, 1998 One-Time Authorization within the 60 day period provided under **Chapter I, §16(a) of the Wyoming DEQ Rules of Practice & Procedure.**

15 Timely filing of a request for administrative review of an agency decision is mandatory and jurisdictional, and untimely filing deprives the reviewing Board of subject matter jurisdiction over the appeal. *Antelope Valley Improvement v. State Board of Equalization*, 992 P.2d 563, 567 (Wyo. 1999) (case in which the time for filing an appeal was only 30 days).

16 If Duke disagreed with the need to test treated soils for DRO prior to backfilling as required under condition #3 of the DEQ/SHWD's One-Time Authorization issued May 11, 1998, Duke's remedy was to petition for review of that condition within the 60 day period, not to proceed in disregard of the condition and then challenge it after the fact 2 years later.

**WHEREFORE**, Respondent DEQ/SHWD respectfully requests that the Council dismiss Duke's petition for review with prejudice due to lack of subject matter jurisdiction based on the grounds stated above.

DATED this 14 day of July, 2000.



Mike Barrash  
Attorney General's Office  
123 Capitol Building  
Cheyenne, WY 82002  
(307) 777-6946

#### CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing DEQ'S MOTION TO DISMISS WITH PREJUDICE DUKE ENERGY FIELD SERVICES, LLC'S PETITION FOR REVIEW (with Attachments) was served this 14 day of July, 2000 by **hand delivery**, addressed as follows:

Mary A. Throne, Esq .  
Hickey, Mackey, Evans & Walker  
1800 Carey Ave., Suite 700  
Cheyenne, WY 82001



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treatment cell construction, waste placement, discing or tilling, sampling, etc.) shall be maintained and available for inspection by department personnel.

3. These wastes shall be treated to the following objective(s), as defined by EPA Method 8015 Modified:

30 mg/kg Total Petroleum Hydrocarbons / Gasoline Range Organics  
100 mg/kg Total Petroleum Hydrocarbons / Diesel Range Organics

At a minimum, one, 3-point composite confirmation sample must be collected for every 400 cubic yards of contaminated soil in order to document compliance with the treatment objective(s).

This authorization is valid for one (1) year from the date of this letter and applies only to the soils described in the referenced request. Once the soils meet the prescribed treatment objectives they may be backfilled on-site, as proposed. If, after one (1) year from the date of this letter, the treatment activities have not been completed as proposed, treatment activities must be terminated (and the wastes must be removed to an appropriate facility) or a written request for an extension of this authorization must be submitted. A request for an extension of this authorization must demonstrate that reasonable efforts have been made to complete the treatment process and that progress toward the final treatment objectives has been made.

If you have any additional questions please phone Bob Doctor in Casper at (307) 473-3450.

Sincerely,



Ken Schreuder, P.E. & P.G.  
Solid Waste Permit Program Manager  
Solid and Hazardous Waste Division

copy : Bob Doctor, Dennis Lamb >>> Casper SHWD File# 75.015  
: Tim Link >>> Cheyenne SHWD File# 75.015  
: Jim Sullivan, SECOR International, Inc. 2905 Montana Avenue, Billings, MT 59101

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This finding is supported by Duke's analysis of pre-remediation soil showing elevated TPH-Diesel Range Organic values in samples taken in the OTA excavation area.

DEQ believes that excavation and treatment of soils contaminated with petroleum hydrocarbons is generally effective in remediating that contamination. However, heavier petroleum hydrocarbons are more resistant to treatment than Gasoline Range Organics. Soils contaminated with slop oils and waste oils are likely to require a longer period of time for remediation than soils contaminated with natural gas condensate. Testing of soils contaminated with slop oils and waste oils using a GRO test will not demonstrate that those heavier hydrocarbons have been degraded; the GRO test is capable of detecting the presence of C-12 and lower hydrocarbons, while waste oils are generally comprised of C-18 and higher hydrocarbons.

Additionally, the summaries of land treatment projects provided with your February 9 letter confirm that heavier oils require additional time to reach treatment objectives. We note that the East Highlands Ranch project, where contaminants were smudge pot oil and diesel, required 18 months to reach treatment objectives. This is consistent with the Department's prior experience.

We are hopeful that the land treatment activities employed by Duke adequately remediated all the petroleum hydrocarbon contamination to levels compliant with the OTA authorization. However, given DEQ's analysis of the likelihood of the presence of hydrocarbons other than natural gas condensate in the OTA excavation area, DEQ concludes that Duke must sample and test the backfilled soils for Total Petroleum Hydrocarbons-Diesel Range Organics by EPA method 8015 Modified as specified in the May 11, 1998, OTA. In previous correspondence the Department required that samples be collected at a frequency of one sample for every 400 cubic yards of treated soil. Because SECOR's September 2, 1999, letter indicates that 6,500 cubic yards of soil were treated, sixteen (16) samples are necessary. If Duke elects to collect and test sixteen samples, each sample test result must be lower than 100 mg/kg TPH. However, Duke may elect to evaluate compliance with the OTA treatment objective using the statistical procedures described below. In the event Duke elects to use these statistical procedures, the Department has determined that Duke Energy will need to collect at least nineteen (19) samples from several locations and depths throughout the area of backfilled soils. In either event, a report documenting sample locations, sample depths, and analytical results must be submitted to the SHWD within sixty (60) days of the date of this letter. Alternately, Duke Energy may remove the waste PCS and transport them to an appropriate facility for treatment and/or disposal.

To demonstrate statistically that Duke is in compliance with the Department's treatment objective of 100 mg/kg diesel range organics by EPA Method 8015 Modified, Duke may evaluate the data by constructing a 95% confidence/95% coverage tolerance interval and comparing the upper limit of the tolerance interval to the treatment objective. If the data pass this statistical test, the Department will accept the treatment as compliant with the OTA treatment objective. If the data fail the statistical test, Duke Energy may determine the area or areas where the OTA treatment objective has not been met and may retest those soils, or may excavate the soils that exceed the treatment

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objective and haul the inadequately treated soils to a permitted facility for treatment and/or disposal. This confidence/tolerance interval test ensures that we can be 95% sure that no more than 5% of the samples exceed the treatment objective. Prior to any retesting, Duke should consult with the Department to reach agreement on retest frequencies and locations.

In the event of any failure to meet the treatment objective, Duke may also resample and retest soils for the chemical characteristics listed for "unknowns" in Guideline #2 (VOCs, SVOCs, arsenic, barium, cadmium, chromium, lead, mercury, selenium, and silver), and demonstrate that standards protective for unrestricted (residential) land uses have not been exceeded.

Your February 9, 2000 letter raised several other issues that I feel compelled to address.

Duke Energy has suggested that the SHWD mistakenly assumed that soils from the maintenance area would be treated along with soils from the area shown for excavation and treatment in Duke Energy's OTA application and that based on this assumption, DEQ required TPH/DRO testing. This suggestion is not the case. TPH/DRO testing was required because DEQ believed that Duke Energy did not have enough information about historic operations of the plant to be able to conclude that condensate is the only source of contamination in the excavated and treated soils. As it happens, additional information subsequently made available to DEQ strongly suggests that other hydrocarbons were disposed in the area of the OTA excavation.

Treatment of the soils was brought about by Duke Energy's desire to quickly address groundwater contamination at the site in response to WQD requirements and this proactive approach is commendable. The OTA request to the SHWD proposed on-site disposal of treated soils. The SHWD may authorize use of properly treated and characterized petroleum-contaminated soils (PCS) as clean fill if the TPH/GRO level is less than 30 mg/kg, the TPH/DRO level is less than 100 mg/kg, the PCS is not placed in direct contact with seasonally high surface water or groundwater, and the PCS is not placed in an existing or proposed residential, recreational or agricultural area. Because the disposal authorization by the SHWD considered more than just the threat to groundwater, the SHWD required both TPH/GRO and TPH/DRO testing to help ensure that on-site disposal of the treated soils would not pose a significant threat to human health and the environment - not just groundwater. TPH/DRO testing is not used solely to test for the presence of diesel fuel related contamination, but diesel range organics, which could include substances other than just diesel fuel.

Your letter mentions a phone conversation between your consultant and WQD and SHWD personnel on August 22, 1998, and indicates that during this conversation testing for TPH/DRO was not specifically stated to be necessary. In reviewing its phone records, we note that August 22, 1998, is a Saturday and Department offices are not open on Saturday. We could find no written record of a conversation with SECOR or Duke Energy personnel on the preceding or following work days. In addition, the lack of specific reference to a written OTA condition in a telephone conversation would not negate the need to comply with the written conditions of the OTA.

While this letter has been written to provide you with a final determination regarding the

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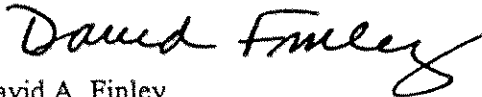
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testing requirements for the backfilled soils at the Lazy B plant to comply with the Division's May 11, 1998, OTA, I should mention that recently passed legislation (original Senate File 15) has established minimum requirements for sites for which a "no further action" letter is desired. If you wish, we would be pleased to discuss these requirements with you or your representative.

If you have any additional questions please contact me in Cheyenne at (307) 777-7752.

Sincerely,



David A. Finley

Administrator

Solid and Hazardous Waste Division

cc: Ken Schreuder >>> Lander SHWD File # 75.015  
Bob Doctor >>> Dale Anderson >>> Casper SHWD File# 75.015  
Dave Finley >>> Tim Link >>> Cheyenne SHWD File# 75.015  
Don Fischer >>> Sheridan WQD  
Jim Sullivan, SECOR International, Inc. 2905 Montana Avenue, Billings, MT 59101  
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