

BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

FILED

JAN 21 2010

Jim Ruby, Executive Secretary
Environmental Quality Council

IN THE MATTER OF A NOTICE OF VIOLATION)
ISSUED TO WESCO)
P.O. Box 40, Wright, Wyoming 82732) DOCKET NO. 09-4601
NOV NO. 100559, Docket # 4494-09)

BRIEF OF RESPONDENT
DEPARTMENT OF ENVIRONMENTAL QUALITY
LAND QUALITY DIVISION

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STATEMENT OF THE ISSUE

- I. **DOES WESCO'S MISREPRESENTATION TO THE DEQ THAT IT CONDUCTED A BLASTERS TRAINING CLASS CONSTITUTE AN ONGOING VIOLATION FOR EVERY DAY THAT WESCO BENEFITTED FROM ITS FALSE REPRESENTATION?**

STATEMENT OF THE CASE

I. Nature of the Case

WESCO was issued a Notice of Violation No. 100559, Docket No. 4494-09 (NOV) on May 20, 2009, for falsifying to the Department of Environmental Quality (DEQ) that it conducted a blaster training class when, in fact, it had not. (A.R. at 41-43). The DEQ assessed a penalty of \$120,000.00 against WESCO which was reduced to \$110,000.00 after an informal conference with the Director of the DEQ (Director). (A.R. at 21-22 and 54). WESCO contests the assessment of the penalty amount claiming that the misrepresentation was a one-time offense. (Br. of Pet. at 7). It is the DEQ's position that the offense continued every day during which WESCO benefitted from its falsification that the blaster training class occurred.

II. Course of Proceedings

On May 20, 2009, WESCO was issued a Notice of Violation (NOV) for falsifying to the DEQ that it had conducted a three day blaster training class when, in fact, it had not. (A.R. at 41-43). WESCO requested an informal conference to discuss the NOV with the Director on May 28, 2009. (A.R. at 28). On June 3, 2009, the Director assessed a penalty of \$120,000.00 against WESCO for the violation identified in the NOV. (A.R. at 21). An informal conference between WESCO and the Director was held on July 13, 2009. (A.R. at 89). On August 18, 2009, the Director issued his Findings of Fact, Conclusions of Law and Decision. (A.R., at 50-54). WESCO timely filed this appeal before the Environmental

Quality Council (EQC) on September 8, 2009, claiming that the penalty imposed by the DEQ was contrary to Wyoming law and the Land Quality Division's (LQD) rules and regulations.

III. Statement of Facts

While there are no issues of contested fact in this case, the following facts are set forth to assist the EQC in its review of the question of law raised herein:

Between February 3 and February 12, 2009, WESCO became aware that one of its blasters allowed his certification to expire and notified the DEQ of the problem. (A.R. at 51 and 93). When a DEQ inspector asked if WESCO's blaster had conducted any blasts while his certification was expired, the answer was no.¹ (A.R. at 51 and 93). The DEQ inspector suggested that the WESCO employee attend a blasters class that was being offered in Sheridan, Wyoming to allow the employee to become recertified. (A.R. at 95 and 100). Rather than having its employee attend the class in Sheridan, WESCO sent a letter to the DEQ claiming that it had completed its own training on February 24 through 26 at its office in Wright, Wyoming. (A.R. at 101). As a result of this letter, the DEQ re-certified two of WESCO's employees as blasters in the State of Wyoming. (A.R. at 44 and 102).

¹ During a routine inspection conducted by the DEQ blasting inspector on April 7 and 8, 2009, it was discovered that the WESCO blaster who allowed his certification to expire did, in fact, sign for six blasts as the blaster in charge in January and early February of 2009. (A.R. at 51 and 92). This investigation led to the issuance of a separate Notice of Violation prior to the NOV at issue in this case on April 23, 2009. (A.R. at 44, 102-104). No fine was assessed by the DEQ for that Notice of Violation. (A.R. at 44).

During a blasters convention held on or about April 21 and 22, 2009, a DEQ blasting inspector overheard that WESCO had “dummied up” a training class. (A.R. at 51 and 104 -106). After hearing this, the inspector conducted an investigation that included checking a mine guard shack log and interviewing several people that WESCO claimed had attended the class. (A.R. at 51 and 105-106). The mine guard shack log revealed that individuals who were listed by WESCO as having attended the class were actually at the mine site on the days the class was represented as being held. (A.R. at 51 and 106). During the interviews, the inspector was told that no class was held by WESCO during February of 2009. (A.R. at 51 and 106).

As a result of the investigation, the DEQ issued NOV No. 100559 to WESCO for violating Land Quality Coal Rule and Regulation (LQCRR), Ch. 6, § 6(h)(i)(D) and assessed WESCO a penalty of \$120,000.00. (A.R. at 21 and 41). After an informal conference, the Director reduced WESCO’s penalty to \$110,000.00. (A.R. at 53).

It is important to note that WESCO made its false representation to the DEQ on February 26, 2009, and the DEQ did not issue its NOV until 83 days later, on May 20, 2009. (A.R. at 41 and 48). At no time during that period did WESCO report the falsification to the DEQ. (A.R. at 52). During that time WESCO was able to continue its blasting operation by benefitting from its uncertified personnel. (A.R. at 139). In addition, the Director determined that

WESCO performed at least 20 blasts during the time that its two employees were not properly certified between January and May 20 of 2009. (A.R. at 53-54).

SUMMARY OF THE ARGUMENT

WESCO contends that the Director incorrectly assessed a penalty of \$110,000.00 for its false representation to the DEQ. WESCO proposes that its false representation only amounts to a one day offense and therefore should be limited under WYO. STAT. ANN. § 35-11-902(b), to a penalty of \$10,000.00.

The DEQ's position is that WYO. STAT. ANN. § 35-11-902(b) allows a penalty of up to \$10,000.00 for each day that a violation continues. In this case, the violation occurred on February 26, 2009 and continued until at least the day the DEQ issued the NOV to WESCO, on May 20, 2009.

STANDARD OF REVIEW

Generally, a court's review of an administrative agency's decision is governed by the Wyoming Administrative Procedure Act (WAPA) which provides in pertinent part:

(c) To the extent necessary to make a decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. In making the following determinations, the court shall review the whole record or those parts of it cited by a party and due account shall be taken of the rule of prejudicial error. The reviewing court shall:

(ii) Hold unlawful and set aside agency action, findings and conclusions found to be:

(A) Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;

(B) Contrary to constitutional right, power, privilege or immunity;

(C) In excess of statutory jurisdiction, authority or limitations or lacking statutory right;

(D) Without observance of procedure required by law; or

(E) Unsupported by substantial evidence in a case reviewed on the record of an agency hearing provided by statute.

WYO. STAT. ANN. § 16-3-114(c)(ii) (West 2008). The court will “affirm an agency’s findings of fact if they are supported by substantial evidence.” *Exxon v. State*, 2009 WY 139, ¶10, 219 P.3d 128, 134 (Wyo. 2009); quoting *Dale v. S & S Builders, LLC*, 2008 WY 84, ¶ 22, 188 P.3d 554, 561 (Wyo. 2008).

In this case, WESCO is not challenging the Director’s findings of fact. Rather, WESCO is asserting that the Director incorrectly applied the facts to the law so that his decision with regard to the penalty assessment was not in accordance with the law. The court reviews an agency's statutory interpretations of law *de novo*, and the agency’s conclusions are afforded no deference. The legal conclusions will be affirmed only if they are in accordance with the law. *Dale*, at ¶ 26; citing *Diamond B Serv's., Inc. v. Rohde*, 2005 WY 130, ¶12, 120 P.3d 1031, 1038 (Wyo. 2005), quoting *DC Prod. Serv. v. Wyoming Dep't of Employment.*, 2002 WY 142, ¶ 7, 54 P.3d 768, 771 (Wyo. 2002). Regarding statutory interpretation, the Wyoming Supreme Court has stated:

When interpreting statutes, we follow an established set of guidelines. First, we determine if the statute is ambiguous or unambiguous. A statute is unambiguous if its wording is such that reasonable persons are able to agree as to its meaning with consistency and predictability. Unless another meaning is clearly intended, words and phrases shall be taken in their ordinary and usual sense. Conversely, a statute is ambiguous only if it is found to be vague or uncertain and subject to varying interpretations. If a statute is clear and unambiguous, we give effect to the plain language of the statute. To determine whether a statute is ambiguous, we are not limited to the words found in that single statutory provision, but may consider all parts of the statutes on the same subject. If a statute is ambiguous, we may resort to principles of statutory construction to determine the intent of the legislature.

Exxon, ¶ 11, 219 P.3d at 134. Citations omitted.

If the Director correctly applied the law in assessing the penalty against WESCO, then the EQC must determine whether the Director reached a well reasoned decision regarding the penalty assessment. The Wyoming Supreme Court has considered the discretion a court has regarding penalty assessments and has stated: “we have often recited the definition of judicial discretion as ‘a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously.’ We must ask ourselves whether the district court could reasonably conclude as it did and whether any facet of its ruling was arbitrary or capricious.” *Bd. of County Comm’rs of Teton County v. Crow*, 2007 WY 177, ¶ 12, 170 P.3d 117, 122 (Wyo. 2007); citing *Thomas v. Thomas*, 983 P.2d 717, 719 (Wyo. 1999).

Logically, it follows that the EQC's review of a decision reached by the Director is no different than a court's review of an agency's decision. Accordingly, the review by the EQC in this case is *de novo*. *Dale*, at ¶ 26, and see *Parker v. Southern Plains Regional Director*, 45 IBIA 310, 318 (2007). In that regard, the EQC has the authority to make its own decision regarding an appropriate penalty to assess WESCO upon its independent review of this case, including an increase of the assessed penalty.

ARGUMENT

I. WESCO'S REPRESENTATION TO THE DEQ THAT IT CONDUCTED A BLASTER TRAINING CLASS, WHEN IT DID NOT, CONSTITUTES AN ONGOING VIOLATION FOR EVERY DAY WESCO BENEFITTED FROM ITS FALSE REPRESENTATION.

WESCO is challenging the DEQ's authority to treat as a multiple day violation, WESCO's submittal to the DEQ falsified documents supporting the recertification of two of its blasters. WESCO does not contest that it submitted a false document to the DEQ or that its conduct constituted a violation of LQCRR. WESCO claims that the violation was a one day event occurring only on the day of the submittal. It is the DEQ's position that WESCO's violation continued daily until corrected and that the penalty calculated by the Director is appropriate.

The question of law presented for the EQC's review in this case pertains to the DEQ's interpretation of WYO. STAT. ANN. § 35-11-902(b), which states as follows:

Any person who violates, or any director, officer or agent of a corporate permittee who willfully and knowingly authorizes, orders or carries out the violation of any provision of article 4 of this act for surface coal mining operations, or any rule, regulation, standard, license, variance or permit issued thereunder, or who violates any determination or order of the council pursuant to article 4 of this act for surface coal mining operations is subject to either a penalty not to exceed ten thousand dollars (\$10,000.00) for each day during which a violation continues, or, for multiple violations, a penalty not to exceed five thousand dollars (\$5,000.00) for each violation for each day during which a violation continues, a temporary or permanent injunction, or both a penalty and an injunction. Penalties and injunctive relief under this subsection may be recovered in a civil action.

(Emphasis added). Article 4 of the Environmental Quality Act (Act) requires “that explosives are used only in accordance with existing state and federal law and the rules and regulations promulgated by the council.” WYO. STAT. ANN. § 35-11-415(a)(xi). LQCRR, Ch. 6, § 1 requires, in pertinent part:

(a) The permittee shall comply with all applicable State, local and Federal laws and regulations and the requirements of this Chapter in the use of explosives.

(c) All persons working with explosive material shall be, or be under the direct supervision of, an experienced, trained, and competent person who understands the hazards involved and who:

(ii) Has obtained a certificate of completion of training and qualification as required by State law.

LQCRR, Ch. 6, § 6(c)(i) requires: “All blasting operations shall be conducted under the direction of a certified blaster having a minimum of two years of blasting experience.” Lastly, the LQCRR provides that a blaster’s certification will be revoked if it is obtained by “[p]roviding false information or a misrepresentation to obtain certification.” LQCRR, Ch.6, § 6(h)(i)(D). WESCO

willfully and knowingly continued its blasting operation under the direction of blasters whose certifications were obtained based on false information provided to the LQD. Every day WESCO continued its operation relying on its falsely certified blasters was a new violation of the LQCRR and the Act allowing the assessment of a cumulative penalty exceeding \$10,000.00.

The statute is clear and unambiguous in allowing the assessment of a penalty, not to exceed \$10,000.00 “**for each day** during which a violation continues.” *Id.* (Emphasis added). When the language of the statute is clear, courts give its words their plain and obvious meaning. *Powder River Basin Res. Council v. Env'tl. Quality Council*, 869 P.2d 435, 438 (Wyo. 1994). “Environmental protection statutes have as their goal public protection; they are entitled to a liberal construction. When faced with claims under the Environmental Quality Act, courts of this state must ‘at all times be ready and willing to afford such remedies as are within the law.’” *People v. Platte Pipe Line Co.*, 649 P.2d 208, 212 (Wyo. 1982); citing *Roberts Constr. Co. v. Vondriska*, 547 P.2d 1171, 1182 (Wyo. 1976). WYO. STAT. ANN. § 35-11-902(b) clearly allows a penalty to be imposed against WESCO for every day its violation continued. Accordingly, the Director’s application of WYO. STAT. ANN. § 35-11-902(b) is entitled to liberal construction by the EQC as the enforcement of the Environmental Quality Act’s policy and purpose is for the protection of the public.

Wyoming case law establishes that if a statute allows, by its terms, an additional penalty for each day that a violation continues, a cumulated penalty is

permissible. See *Teton County*, ¶ 7, 170 P.3d at 119-20; *Petroleum, Inc. v. State Bd. of Equalization*, 983 P.2d 1237, 1241 (Wyo. 1999). In this case, WESCO's violation commenced on the day it submitted the falsified notification of the blasters training class to the DEQ, and continued at least until the NOV was issued on May 20, 2009. The violation is continuous because WESCO benefitted by being able to continue its operations without interruption by using blasters that had been illegally recertified as a result of its misrepresentation submitted to the DEQ. The violation continued for a period of 83 days allowing a potential penalty assessment of \$830,000.00. The Director exercised his discretion and only assessed a penalty of \$110,000.00, rather than the statutorily permissible maximum of up to \$830,000.00 against WESCO for its conduct. (A.R. at 53).

Also, the Wyoming Supreme Court has affirmed a penalty imposed in a situation similar to the one before the EQC in this case. In *Teton County*, the Court was considering WYO. STAT. ANN. §§ 18-5-204 and 18-5-206 which required a mandatory fine for each day that a homeowner violated a habitable space regulation. *Teton County*, ¶ 7, 170 P.3d at 119. In that case, the district court concluded that the homeowner's fine would be \$714,000.00 - an amount less than the total fine mandated by law. *Id.*, ¶ 9, 170 P.3d at 122. The Court concluded that the district court properly exercised a balancing process that resulted in a reasoned decision that was not an abuse of discretion. *Id.* The court concluded that the district court "properly considered the size, character, and use of the house and interest the County [had] in enforcement of its regulations." *Id.*

Lastly, the Court stated that “[g]iven the unique facts with which the district court was presented, the remedy chosen by the district court was not unreasonable and was supported by the record.” *Id.*

Similarly, when the Director determined an appropriate penalty to assess WESCO, he applied LQCRR, Ch. 16, § 3(a); reasoning as follows:

6. WESCO questioned the basis for the penalty calculation. My review of the six factors used by LQD in determining penalty amounts follows:

a. Factor (i) deals with the operator's history of compliance. As noted in the penalty assessment memo from Don McKenzie to me, dated may 20, 2009, WESCO has no prior history of violations. However, based on the fact that training never occurred, a penalty of \$10,000 was assessed. In keeping with the spirit of this factor and that the basis for this assessment is also addressed in factor (ii), I find that the penalty assessment should be reduced to zero.

b. Factor (ii) considers the seriousness of the violation based on the likelihood and extent of the potential or actual impact on the public or environment, both within and outside the permit or exploration area. I wish to stress that falsification of blasting training and records, and the potential for blasting to be undertaken by persons who have been purported to have been trained but have not, is very serious. It is typical of LQD to assess a \$10,000 per day penalty for every day that a violation occurs. Using only the days of training alleged by WESCO and the number of employees involved in those days, a penalty of \$90,000 was assessed. The \$90,000 penalty for this factor is upheld.

c. Factor (iii) addresses the degree of fault by the operator in causing or failing to correct the violation. I find that the degree of fault by WESCO is high. The penalty amount of \$10,000 is upheld.

d. Factor (iv) carried no credit for good faith actions on the part of the WESCO. I agree.

e. Factor (v) allows for credit or penalty if there is good reason to show that there is an inability for WESCO to comply. Not only was WESCO able to comply, they were also able on several occasions to notify LQD of the violation and present evidence of actions taken to prevent recurrence. They did not do this. The \$10,000 penalty for this factor is upheld.

f. Factor (vi) allows for penalty adjustment for any information provided by the operator within 15 days of Notice of order relating to the facts surrounding the violation or the amount of penalty. No information was submitted and no adjustment is made under this factor. The adjusted penalty is \$110,000.

(A.R. at 53). Chapter 16, § 3(a) provides the Director a balancing test to assist him in determining an appropriate penalty to assess against WESCO. The penalty assessed in this case is reasonable because it balances the DEQ's interest of enforcing its rules and regulations, the seriousness of WESCO's violation and the prevention of similar violations. In addition, the Director's decision is correct because it appropriately protects the environment, wildlife and the public in a manner consistent with the policy and purpose of the Act. Most importantly, the Director's interpretation of Wyoming law is correct as WYO. STAT. ANN. § 35-11-902(b) is unambiguous and clearly allows a penalty to be assessed for each and every day that WESCO's violation continued, up to \$830,000.00.

CONCLUSION

For the foregoing reasons, the Department of Environmental Quality Respectfully prays that the Director's Findings of Fact, Conclusions of Law and Decision against WESCO be affirmed in all respects.

DATED this 21st day of January, 2010.



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CERTIFICATE OF SERVICE

I certify that the foregoing document was served by US. Mail, postage prepaid, and addressed correctly, to the following people on the 21st day of January, 2010:

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