

FILED

SEP 08 2009

BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

Jim Ruby, Executive Secretary
Environmental Quality Council

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

DOCKET NO. 09-4/2001

NOTICE OF APPEAL AND REQUEST FOR HEARING

WESCO, through its attorney Loyd E. Smith of Murane & Bostwick, LLC, hereby appeals the Director's Findings of Fact, Conclusions of Law and Decision issued in the above matter on August 18, 2009 and received by WESCO on August 24, 2009. A copy of the Director's Decision is attached.

As grounds for this appeal, WESCO states that the fine imposed by the Director is contrary to Wyoming law and the Land Quality Division Rules and Regulations. The Land Quality Division issued a Notice of Violation (NOV) on May 20, 2009 to WESCO upon the basis that WESCO violated Land Quality Division Rules and Regulations, Chapter 6, Section 6(h)(i)(D), by making a false representation to obtain a blasting certification. The conduct at issue, per the NOV, was that WESCO represented to the LQD that a three-day blaster recertification course had been held and that certain individuals attended the class, but that the class in fact did not occur.

Upon this single incident of misrepresentation, the Director imposed a penalty of \$110,000.00. Wyoming Statute § 35-11-902(b) provides that a violation of surface mining statute, rules or permits is subject to 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. The statute sets forth the maximum allowable penalty. Land Quality Division Rules

and Regulations, Chapter 16, Section 3, sets forth six factors to be considered in assessing a penalty within the statutory maximum. Rather than using the factors as guidance as to the allowable penalty within the statutory maximum, the Director utilized the factors as multipliers of the statutory maximum, thereby increasing the penalty beyond that allowed by statute.

WHEREFORE, WESCO appeals the Director's Decision and seeks a hearing before the Environmental Quality Council.

DATED this 8th day of September, 2009.



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CERTIFICATE OF SERVICE

This is to certify that on this 8 day of September, 2009, a true and correct copy of the foregoing **NOTICE OF APPEAL AND REQUEST FOR HEARING** was served upon the following by **HAND DELIVERY TO:**

Chairman, Environmental Quality Council
122 West 25th Street
Herschler Building, Room 1714
Cheyenne, Wyoming 82002

and by placing a copy of the same in the U.S. Registered Mail, return receipt requested, postage prepaid, and addressed as follows:

John V. Corra, Director
Department of Environmental Quality
122 West 25th Street
Herschler Building 4th Floor West
Cheyenne, Wyoming 82002

And by U.S. Mail to:

John S. Burbridge
Wyoming Attorney General's Office
123 Capitol Building
Cheyenne, Wyoming 82002



**BEFORE THE DIRECTOR OF THE DEPARTMENT OF ENVIRONMENTAL QUALITY
STATE OF WYOMING**

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

**DIRECTOR'S FINDINGS OF FACT, CONCLUSIONS
OF LAW AND DECISION**

This matter came before the Director of the Department of Environmental Quality pursuant to a request by WESCO for an Informal Conference as provided in W.S. 35-11-901(c), W.S. 35-11-437(c)(i) and Chapter VI of the Wyoming Department of Environmental Quality Rules of Practice and Procedure.

At issue is NOV # 100559, issued by Doug Emme on May 20, 2009, for failure to follow the requirements of Chapter 6 of the Land Quality Division (LQD) Rules and Regulations, "Blasting for Surface Coal Mining Operations". In a letter written on February 26, 2009, WESCO represented to the LQD that a WESCO 24 hour training class was held on February 24 – 26, 2009. The letter contained a roster of class attendees and was signed by the instructor. It was later discovered that the class never took place. This violation, along with other false communications by WESCO to LQD was ultimately pieced together sometime in May, 2009 and the NOV was written. A penalty of \$120,000 was assessed in a letter to WESCO dated June 3, 2009.

An Informal Conference was held by the Director on July 13, 2009. WESCO was represented by Jared Fredrick, Tom Fredrick, Tom Fredrick Sr., and Joe Strobbe. The Land Quality Division was represented by Don McKenzie and Doug Emme. Also in attendance were John Burbridge and Becky Brosius.

After reviewing the record and being fully advised of the premises, the Director hereby makes the following Findings of Fact, Conclusions of Law, and Decision.

FINDING OF FACT

1. Mr. Jerry Hugen's blasting certification expired on January 6, 2009. Chapter 6, Section 6 (c)(i) requires that, "All blasting operations be conducted under the direction of a certified blaster..." A number of blasts were conducted by WESCO under Mr. Hugen's direction after the expiration of his certification.
2. Sometime between February 3 and February 12, 2009; Mr. Shawn Seebaum, Mr. Hugen's supervisor, became aware of this matter and called Mr. Doug Emme on February 12, 2009. Mr. Seebaum said that no blasts had been directed by Mr. Hugen during the period of license expiration. Mr. Doug Emme offered that a class in Sheridan in February was available to allow Mr. Hugen to become recertified.
3. A memo written on February 26, 2009 by Mr. Shawn Seebaum stated that Mr. Joe Strobbe of WESCO had conducted training for, among others, Mr. Shawn Seebaum and Mr. Jerry Hugen. This letter was signed by Mr. Seebaum and Mr. Strobbe. LQD recertified those who were listed on the memo.
4. During a mine inspection on April 7 and 8, 2009, another LQD employee conducted a routine audit of blasting records for the North Antelope Rochelle Mine. It was discovered that Mr. Hugen, the blaster in charge, signed six blasts in January and early February, 2009 during the time period when he was not certified.
5. On April 9, 2009 Mr. Strobbe and Mr. Seebaum visited with Mr. Emme's about Mr. Hugen's certification. At that meeting, they requested that we not write an NOV. Mr. Emme informed them that when they spoke with him in February they assured him that no blasts had been certified by Mr. Hugen.
6. Sometime during the period from April 21 to 22, 2009 Mr. Emme overheard that WESCO had "dummied up" a training class.
7. In early May, 2009 Mr. Emme looked at the guard shack log and discovered that individuals who were supposed to have been at the training noted in the February 26, 2009 memo were actually at the mine site on those days. Mr. Emme later interviewed several people whom WESCO claimed had been trained. He was told that there was no class.
8. On May 20, 2009 the NOV was issued to WESCO. Additionally on this day, LQD revoked Wyoming Blaster Certificates for Shawn Seebaum, Joe Strobbe, Marty Davies and Jerry Hugen and

not submitted any documentation of this, despite having knowledge of LQD's policy that training be documented, signed and filed with the division.

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. In concluding the reasonableness of this amount, it has been determined that there were 20 blasts made from January of 2009 until the NOV was

informed WESCO that LQD would not longer accept training classes by WESCO as a basis for certification.

9. Mr. Tom Frederick stated that upon becoming aware of these matters in mid-May, and after discussion with Peabody on June 1, 2009, certain corrective measures were taken. These included termination of Mr. Seebaum; adding a place on their blasting forms to include the certificate expiration dates of the blasters involved; and re-assigning the responsibility for tracking and record keeping from the site manager to their safety manager.

10. At the conference Mr. Strobbe requested that LQD reinstate his certification and was asked to submit a letter of request to Mr. Emme. This was submitted on July 15, 2009.

11. Mr. Emme has recommended that training privileges for WESCO be reinstated.

CONCLUSIONS OF LAW

The Director has jurisdiction over the subject matter and of the parties to this proceeding pursuant to W.S. § 35-11-902(c) and W.S. § 35-11-437(b)(i) of the Wyoming Environmental Quality Act and the Rules of Practice and Procedure, Chapter VI of the Wyoming Department of Environmental Quality.

DECISION

1. WESCO has terminated the employment of the person they hold responsible for the violation. However, a company must be held responsible and accountable for the actions of its employees. At the informal conference, the close relationship between Mr. Strobbe and senior management of WESCO was noted. Mr. Strobbe was aware of this matter throughout the time period under review.
2. WESCO did not contest the NOV at the hearing.
3. On three separate occasions, February 12, February 26, and April 9, 2009, WESCO had the chance to fully explain the problems but did not.
4. Mr. Emme, upon hearing at a public meeting that a false training event had been approved by him, inspected mine visitor records and confirmed that no training event had occurred, as presented by WESCO in their February 26, 2009 memo.
5. Despite WESCO's position that some amount of training takes place many times over the years, the only way to confirm that the statutes and rules are followed is through documentation that not only training takes place but also evidence that employees attended that training. WESCO had

written on May 20, 2009. The adjusted penalty relates to \$5,500 per occurrence. Since the LQD is authorized to calculate penalties up to \$10,000 per day of occurrence of a violation, this amount is reasonable.

7. Mr. Strobe's request to be reinstated is granted pending successful completion of the blasters exam.

The decision is that the NOV stands, and that the penalty be reduced to \$110,000.

ORDERED THIS 18th DAY OF AUGUST, 2009.

WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY



John V. Corra, Director

This decision may be appealed to the Environmental Council for a period of 15 days after the date the parties receive the decision. Appeals shall be directed to:

Chairman
Environmental Quality Council
122 W. 25th Street, Room 1714
Cheyenne, WY 82002