BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

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

REPLY BRIEF OF PETITIONER

Petitioner WESCO, through its attorney Loyd Smith of Murane & Bostwick, LLC, submits the following reply brief in further support of its appeal to the Environmental Quality Council ("EQC") of the Department of Environmental Quality Director's Findings of Fact, Conclusions of Law and Decision issued in the above-captioned matter.

I. Introduction

Petitioner filed its opening brief on December 21, 2009. Respondent the Department of Environmental Quality, Land Quality Division ("DEQ LQD"), filed its brief on January 21, 2010. This reply brief will address matters raised by Respondent's brief. Petitioner notes that the Respondent DEQ LQD does not challenge Petitioner's core argument that the Director improperly applied the factors found at Chapter 16, Section 3(a) of the LQD Rules and Regulations as multipliers of the allowable penalty, rather than as factors to be considered in assessing the penalty allowed within the statutory maximum of $10,000.00 for a single violation.

II. Standard of Review

Respondent DEQ LQD, in its brief, sets forth the standard of review for a court's review of an administrative agency's decision and posits, without authority, that the EQC's review of an agency decision is subject to the same standard. Respondent DEQ LQD cites a Wyoming case concerning court review and, inexplicably, a case from the Interior Board of Indian Appeals.

Respondent DEQ LQD also sets forth the standard of review for findings of fact. Since the parties have stipulated to the facts, there is no reason to address the standard of review applicable to the Director's findings of fact, which are uncontested. In any event, notwithstanding the roundabout argument by Respondent DEQ LQD with respect to the standard of review guiding the EQC in this case, Petitioner agrees with DEQ LQD that the EQC must decide the issue of law in this matter de novo and the EQC should give no deference to the decision of the Director on a question of law. *Olivas v. State ex rel. Wyoming Workers' Safety and Compensation Division*, 130 P.3d 476 (Wyo. 2006).

Respondent DEQ LQD, in its comments on the standard of review, further states that, in deciding this appeal from the Director's decision, the EQC has the authority to make its own decision as to the appropriate penalty and it can increase the penalty assessed against Petitioner. Respondent DEQ LQD cites no authority for this remarkable proposition and fails to note that the appeal in this matter is brought by Petitioner WESCO, not by DEQ LQD. If Respondent DEQ LQD wished to challenge the penalty as insufficient, it would have been obligated to appeal or cross-appeal the Director's decision. As the matter stands, any possible insufficiency of the penalty is not an issue before the EQC. *See Ireland v. State ex rel. Wyoming Workers' Compensation Division*, 998 P.2d 398 (Wyo. 2000) (hearing examiner exceeded authority by considering issues not presented in the notice and pleadings).

III. Argument: Respondent DEQ Misconstrues the Violation at Issue in an Effort to Justify the Excessive Penalty Assessed By the Director

The NOV issued to WESCO, upon which the Director's penalty decision is based, identifies the regulation violated as LQD R&R Regulations Chapter 6, Section 6(h)(i)(D), which provides that, following written notice and opportunity for a hearing, a blasting certification will be revoked or suspended upon finding of providing false information or a misrepresentation to

obtain certification. Thus, the violation upon which the NOV was premised was WESCO's providing false information or misrepresentation to obtain certification. As explained in Petitioner's opening brief, this event occurred one time, via a memo authored by Shawn Seebaum misrepresenting that Joe Strobbe conducted blasting recertification training on February 24, 25, and 26, 2009, and listing persons who attended this non-existent training. See the Director's Findings of Fact, Conclusions of Law and Decision at paragraph 3, Administrative Record, p. 0051 and the memo, Administrative Record, p. 0048.

Wyoming Statute §35-11-902(b) provides, in pertinent part:

> (b) Any person who violates, or any director, officer or agent of a corporate permitee 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.

The violation of article 4 for which WESCO received the subject Notice of Violation was the violation of Chapter 6, Section 6(h)(i)(D) set forth above. Respondent DEQ LQD, however, wants this matter to be about other potential violations of article 4 by WESCO which were not the subject of any NOVs or, in the alternative, DEQ LQD wants the matter to be about the consequences of the violation rather than the violation itself.

Respondent DEQ LQD, in its argument, identifies other potential violations of article 4 by WESCO, including a violation of LQCRR, Chapter 6, Section 1, which requires the permittee to comply with all the rules and regulations and federal, state and local laws and requires persons

working with explosive material to be under the supervision of a person certified in blasting training. The flaw in this argument, of course, is that Respondent DEQ LQD did not issue a Notice of Violation to WESCO for violation of LQCRR, Chapter 6, Section 1. Similarly, in its brief at page 9, Respondent DEQ LQD argues that the penalty against WESCO can further be justified by WESCO arguably being in violation of LQCRR, Chapter 6, Section 6(c)(i) which requires that "All blasting operations shall be conducted under the direction of a certified blaster having a minimum of two years of blasting experience." Again, perhaps DEQ LQD could have issued a Notice of Violation to WESCO for violating Chapter 6, Section 6(c)(i) but it did not do so. As noted in WESCO's opening brief, DEQ did issue such an NOV to Peabody Coal Company. Thus, contrary to the justifications offered by Respondent DEQ LQD, the Director's excessive penalty against WESCO for the NOV of providing false information/misrepresentation cannot be justified by reference to other potential violations which DEQ LQD, in hindsight, now believes might have formed a basis for additional NOVs. Respondent DEQ LQD's effort to justify the Director's excessive penalty against WESCO by thinking up violations that might have been asserted against WESCO, but were not, is misguided and contrary to the regulatory and statutory framework for the DEQ LQD.

Respondent DEQ LQD also makes the remarkable argument that "[e]very 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." (Respondent's Br. at 10) Respondent DEQ LQD offers no authority for this proposition. Again, additional violations might have formed the basis for a greater penalty had DEQ issued a Notice of Violation to WESCO for allowing blasting operations to be conducted under blasters who had

not received the appropriate recertification. But, that is not the basis of the Notice of Violation at issue and the DEQ LQD did not issue any such Notice of Violation to WESCO.

Respondent DEQ LQD further argues, at page 11 of its brief, again without authority, that the violation of providing false information continued because WESCO continued its operations without interruption with uncertified blasters. This is simply another way of stating DEQ LQD's untenable argument that, since DEQ could have issued an NOV for WESCO using uncertified blasters, DEQ can assert a penalty for a violation it never pursued.

Respondent DEQ LQD argues that, even though the misrepresentation occurred in a single event on a single occasion, DEQ is entitled to extract a penalty for every day that consequences flowed from the violation. Respondent DEQ LQD states, at page 11 of its brief "[t]he violation is continuous because WESCO benefited by being able to continue its operations without interruption by using blasters that had been illegally recertified as a result of the misrepresentation to the DEQ." Respondent DEQ LQD then goes on to state, again without authority, that this violation continued for 83 days allowing a potential penalty of $830,000.00. This argument confuses the violation with consequences of a violation. As an analogy, consider a situation where a person or entity discharges pollutants into waters of the state on one occasion on one day. Under such circumstances, the one-time discharger would be subject to a penalty of $10,000 under W.S. §35-11-901(a) or $25,000 if the discharge was willful and knowing under W.S. §35-11-901(j). Under Respondent DEQ's analysis, not only would the discharger be subject to a penalty for the actual day in which the discharge occurred, but would further be subject to cumulative penalties for each succeeding day in which there were consequences of the discharge, such as detriment to the fish or aquatic vegetation in the waters. Since the consequences of the discharge might linger for months or years, that would enable DEQ to assess

penalties in the millions of dollars for a one-time occurrence if one accepts the argument DEQ LQD makes in this case. Obviously, that is not how the penalty provisions in the environmental statutes work. Respondent DEQ LQD's interpretation of Wyoming Statute Section 35-11-902 does violence to the unambiguous language in the statute and the corresponding unambiguous language in the regulation cited by the DEQ in the NOV issued to WESCO.

CONCLUSION

The memo authored by Shawn Seebaum misrepresenting to DEQ LQD that WESCO had conducted a training class constitutes a single event of misrepresentation, a single violation of the DEQ regulations as specifically set forth in the NOV. The strained arguments by Respondent DEQ LQD attempting to incorporate other potential violations, or attempting to base the penalty on the time frame from which consequences from the violation flowed, rather than the violation itself, are contrary to the statutory and regulatory framework. Accordingly, for all the reasons set forth herein and in WESCO's opening brief, WESCO appeals the penalty assessed in this matter and requests that the EQC reduce the penalties of the statutory maximum of $10,000.00.

DATED this 5 day of February, 2010.

WESCO, Petitioner

By: _____

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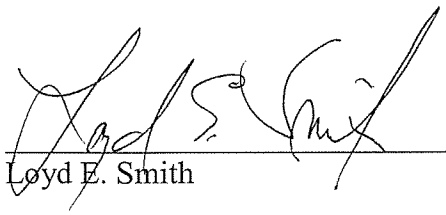
CERTIFICATE OF SERVICE

This is to certify that on this 5 day of February, 2010, a true and correct copy of the foregoing **REPLY BRIEF OF PETITIONER** was served by placing a copy of the same in the U.S. Mail addressed as follows:

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



Loyd E. Smith