

FILED

MAY 25 2010

*Jim Ruby, Executive Secretary
Environmental Quality Council*

**BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
OF THE 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

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter came on for argument before the Environmental Quality Council (EQC) on March 11, 2010, in Cheyenne, Wyoming. Present for the EQC were the Presiding Officer Catherine Guschewsky and Councilmen F. David Searle, Tim Flitner, Dennis M. Boal, John N. Morris, Dr. Fred Ogden. Councilman Thomas Coverdale participated by telephone. The Department of Environmental Quality (DEQ)/Land Quality Division (LQD) was present through its attorney, John S. Burbridge, Senior Assistant Attorney General. WESCO was present through its attorney, Loyd E. Smith.

WESCO timely appealed the DEQ Director's (Director) decision to issue a Notice of Violation (NOV) and assess a penalty pursuant to WYO. STAT. ANN. §§ 35-11-437(b)(i) and 35-11-902(c). The Council has jurisdiction to entertain this appeal pursuant to WYO. STAT. ANN. §§ 35-11-112(a) and 35-11-437(c)(ii).

The Council has considered the record and arguments of the parties, and makes the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. The parties do not contest the facts in this case. WESCO argues that the fine imposed by the Director is contrary to law in that the violation constitutes only a single

incident rather than a continuing violation. (Notice of Appeal, p. 1)

2. Between February 3 and February 12, 2009, WESCO became aware that one of its blasters had allowed his certification to expire and notified the DEQ of the problem. (A.R. at 51 and 93). A DEQ inspector asked if WESCO's blaster conducted any blasts while his certification was expired and WESCO answered no, although it was later learned that six blasts had been conducted during this period. (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).

3. Instead of having its employee attend the class in Sheridan, WESCO sent a letter to the DEQ claiming that it had completed its own training from February 24 through 26, 2009, at its office in Wright, Wyoming. (A.R. at 101). As a result of this letter, DEQ recertified two of WESCO's employees as blasters in the State of Wyoming. (A.R. at 44 and 102).

4. During a blasters' convention held in April, 2009, the DEQ inspector overheard that WESCO had "dummied up" a blaster training class. (A.R. at 51 and 104 - 106).

5. The inspector conducted an investigation in May, 2009 that included checking a coal mine guard shack log and interviewing several people WESCO claimed had attended WESCO's blaster training class. (A.R. at 51 and 105-106).

6. The mine guard shack log revealed that individuals who had been identified by WESCO as having attended the class were actually at the mine site, rather than at

WESCO's Wright office, on the days the class was represented as being held in Wright. (A.R. at 51 and 106).

7. During the interviews, the inspector was told that no blasters' class had been held by WESCO during February, 2009. (A.R. at 51 and 106).

8. As a result of its investigations, DEQ issued NOV No. 100559 to WESCO on May 20, 2009 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).

9. From the time WESCO made its false representation to DEQ on February 26, 2009, until late May, 2009, WESCO remained silent as to its misrepresentation. (A.R. at 48, 53-4 and 118).

10. During that time, WESCO benefitted by being able to continue its blasting operation using personnel certified under false pretenses. (A.R. at 139).

11. The Director held an informal conference with WESCO about the NOV on July 13, 2009. (A.R. at 89). On August 18, 2009, the Director issued his Findings of Fact, Conclusions of Law and Decision, noting that WESCO did not contest the NOV, that WESCO had since terminated the person WESCO held responsible for the violation and that WESCO had had an opportunity to fully explain the problems (to DEQ) in February and April, 2009 but had not done so. The Director found that the NOV should stand but that the proposed penalty should be reduced from \$120,000.00 to \$110,000.00. (A.R. at 50-54).

12. In determining the penalty assessment, the Director utilized the provisions of LQCRR, Ch. 16, § 3(a), and considered the following factors:

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 written on May 20, 2009. The adjusted

penalty relates to \$5,500.00 per occurrence. Since the LQD is authorized to calculate penalties up to \$10,000.00 per day of occurrence of a violation, this amount is reasonable. (A.R. at 50-54).

13. WESCO filed its Notice of Appeal with the EQC on September 8, 2009, claiming that the penalty imposed by the DEQ was contrary to Wyoming law and the DEQ/LQD's rules and regulations. WESCO contested the assessment of the penalty amount, claiming that the misrepresentation was a one-time offense. (Br. of Pet. at 7). WESCO accordingly requested that the EQC reduce the penalty assessed by DEQ to \$10,000.00. (*Id.* at 9).

14. In response, DEQ asserted that the violation continued each and every day during which WESCO benefitted from its false reporting to DEQ that the blaster training class had occurred. (Br. of Resp't. at 2). DEQ requested that the Director's Findings of Fact, Conclusions of Law and Decision be affirmed in all respects. (*Id.* at 14).

15. To the extent that any of the foregoing Findings of Fact constitute Conclusions of Law, they are incorporated as such in this Order.

CONCLUSIONS OF LAW

1. The EQC has jurisdiction over the subject matter and the parties to this proceeding pursuant to WYO. STAT. ANN. §§ 35-11-112(a), 35-11-112(a)(iii), 35-11-112(c)(i) and 35-11-437(c)((ii).

2. The assessment of a penalty for WESCO's violation is authorized by WYO. STAT. ANN. § 35-11-902(b), which provides for the assessment of penalties in the amount of \$10,000.00 for each day during which a violation continues.

3. WESCO's violation was continuous under the provisions of WYO. STAT. ANN. § 35-11-902(b) because WESCO failed to take any action to correct its violation from February 26, 2009, the date it made its misrepresentation to the DEQ, until late May, 2009. (A.R. at 48 and 118).

4. By remaining silent, WESCO effectively reasserted its falsification every day after its submission of its letter to the DEQ claiming that it had held a blaster training course when it had not.

5. LQCRR, Ch. 16, § 3(a) lists factors for consideration to allow the reduction of a penalty from \$10,000.00 for each day of violation, as follows:

In determining the amount of the penalty, if any, to be assessed, consideration shall be given to:

(i) The operator's history of previous violations at the particular surface coal mining operation, regardless of whether any led to a civil penalty assessment. Special consideration shall be given to violations contained in or leading to a cessation order. However, a violation shall not be considered if the notice or order containing the violation:

(A) Is or may become the subject of pending administrative or judicial review; or

(B) Has been vacated.

(ii) 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.

(iii) The degree of fault of the operator in causing or failing to correct the violation, either through act or omission. Such degree shall range from inadvertent action causing an event which was unavoidable by the exercise of reasonable care to reckless, knowing or intentional conduct.

(iv) The operator's demonstrated good faith, by considering whether he took extraordinary measures to abate the violation in the shortest possible time, or merely abated the violation within the time given for abatement. Consideration shall also be given to whether the operator gained any economic benefit as a result of a failure to comply.

(v) Inability to comply, unless caused by lack of diligence.

(vi) Any information submitted to the Director by the operator within 15 days of the service of the notice or order relating to the facts surrounding the violation or the amount of penalty.

LQCRR, Ch. 16, § 3(a).

6. The penalty of \$110,000.00 assessed by the Director as set forth in paragraph 12 of the above Findings of Fact against WESCO for its continuing violation is appropriate and reasonable, is supported by the facts, is authorized by WYO. STAT. ANN. §§ 35-11-437(c) and 35-11-902(b) and is consistent with LQCRR, Ch. 6, § 3(a).

ORDER

Pursuant to the authority vested in the EQC by WYO. STAT. ANN. §§ 35-11-112 and 35-11-437(c), it hereby **DENIES** WESCO's request to reduce the penalty assessed by the DEQ to \$10,000.00 and **AFFIRMS** the Director's decision.

SO ORDERED this 25th day of May, 2010.



Catherine Guschewsky, Presiding Officer
Environmental Quality Council

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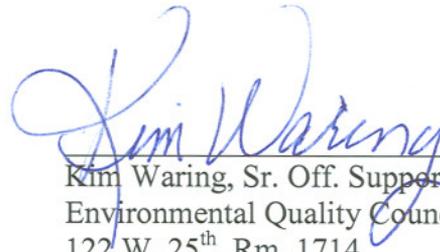
CERTIFICATE OF SERVICE

I, Kim Waring, certify that at Cheyenne, Wyoming, on the 25th day of May, 2010, I served a copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER** by electronic mail to the following:

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