

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

IN RE BENTONITE MINE)	DOCKET 16-4601
No. 624, Good)	
)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
)	AND ORDER

I. APPEARANCES

On June 16, 2016, the parties (Brian Good and the Wyoming Department of Environmental Quality (DEQ)) appeared before the Environmental Quality Council for a contested case hearing in the above entitled matter. Present for the Council were Hearing Officer Rich Fairservis, Chairman Dr. Dave Bagley, Vice-Chairman Meghan Lally, and council members Megan Degenfelder, Tim Flitner, and Aaron Clark. Councilman Nick Agopian was absent and did not participate in this decision.

Present at the hearing for Respondent DEQ was Andrew Kuhlmann, Senior Assistant Attorney General. Petitioner Brian Good was present with his attorney Heather Jacobson from the Jacobson Law Office.

Present and testifying for Petitioner was Brian Good and Shawn Gustafson. Present and testifying on behalf of DEQ was Brian Wood and Alan Edwards. The parties stipulated to the admission into evidence of Good exhibits 1 through 5 and DEQ exhibits 1 through 11.

The Council, having heard and considered all the evidence in this case and being fully advised, pursuant to the Wyoming Administrative Procedure Act, Wyo. Stat. Ann. § 16-3-110, finds and concludes as follows:

II. JURISDICTION

This case arises from a dispute concerning the amount of a renewal reclamation bond under Wyo. Stat. Ann. § 35-11-417(c)(ii). Renewal bond amounts are determined by the DEQ director under Wyo. Stat. Ann. § 35-11-411(d). In this case, Good is appealing from the director's decision setting the renewal bond amount at \$220,000. Good contends that the director's bond amount must be reduced because it is not in accordance with law and is not supported by the preponderance of the evidence.

Under Wyo. Stat. Ann. § 35-11-112(a), the Council "shall act as the hearing examiner for the department and shall hear and determine all cases or issues arising under the laws, rules, regulations, standards or orders issued or administered by the department or its air quality, land quality, solid and hazardous waste management or water quality divisions." Further, the Council is required to "[c]onduct hearings in any case contesting the administration or enforcement of any law, rule, regulation, standard or order issued or administered by the department or any division[.]" Wyo. Stat. Ann. § 35-11-112(a)(iii).

This matter is properly before the Council and is subject to the Council's jurisdiction. This matter fits squarely within the Council's statutory mandate to "hear and determine all cases or issues arising under the laws, . . . or orders issued or administered by the department [or its divisions]" and its requirement to "conduct hearings in any case contesting the administration or enforcement of any law, . . . or order issued or administered by the department or any division[.]"

III. STATEMENT OF THE CASE/ISSUES AND CONTENTIONS

Good is challenging the director's renewal reclamation bond amount under Wyo. Stat. Ann. §§ 35-11-411 and 417. The director set the renewal bond amount at \$220,000. Good

disagrees with that determination and contends that the bond amount should be \$154,000. This dispute centers on whether the director's renewal reclamation bond amount is in accordance with Wyo. Stat. Ann. § 35-11-417(c)(ii) and is supported by the preponderance of the evidence.

IV. FINDINGS OF FACT

A. Testimony of Brian Good

1. Brian Good, Petitioner, resides at 3796 Lane 32 ½, Greybull, Wyoming. *Transcript – Good testimony, p. 31.*

2. Good is the permittee of Permit No. 624 issued by the Land Quality Division of the Wyoming Department of Environmental Quality. *Transcript – Good testimony, p. 32; Good Exh. 1.* The Permit was originally issued June 27, 1989. *Good Exh. 2.*

3. Permit No. 624 covers land generally described as Township 53 North, Range 79 West of the 6th PM the NW1/4 of the SW1/4 of Section 1 and the N1/2 of the S1/2, the E1/2 of the SE1/4 of the NE1/4, the E1/2 of the W1/2 of the SE1/4 of the NE1/4 and the E1/2 of the E1/2 of the W1/2 of the SE1/4 of the NE1/4 of Section 2, located in Big Horn County, Wyoming. *Good Exh. 1.*

4. Good is the owner of the surface estate involved in Permit No. 624. *Transcript – Good testimony, p. 32; Good Exh. 1.*

5. Good mines bentonite on Permit 624. *Transcript – Good testimony, p. 32; Good Exh. 2.*

6. There is approximately 160 acres under Permit 624. *Transcript – Good testimony, p. 34.*

7. Good testified that he submitted a reclamation plan to DEQ in 2013. Good is currently working under that 2013 plan. *Transcript – Good testimony, pp. 36, 55; DEQ Exh. 2.*

8. In creating that 2013 plan, Good testified that he worked with Brian Wood and Mark Moxley at DEQ. *Transcript – Good testimony, p. 37.*

9. Good testified that his current plan for his property is different from his plan outlined in the 2013 plan. Good explained that there is an abundance of water in a pit from Bear Creek and he has expressed an interest in wanting to try to save the water and permit it as dust suppressant for the roads and as an irrigation system. *Transcript – Good testimony, p. 37.* Good testified that he would like to flatten some of his property to where he could put a circle pivot sprinkler and raise a crop. *Transcript – Good testimony, pp. 37-38.*

10. Good admitted that there is nothing currently in the current 2013 reclamation plan that allows for grading the soil and installing a pivot irrigation system and try to farm on that property. *Transcript – Good testimony, p. 56.*

11. Good indicated that he has had some discussions with DEQ about changing the 2013 reclamation plan but DEQ wanted him to stay with the 2013 plan. Good testified that DEQ has not been willing to allow him to put in any kind of an irrigation system. *Transcript – Good testimony, pp. 38-39.*

12. Good testified that he submitted his required annual report for the period of 2015 on August 14, 2015. That report contained a bond estimate in the amount of \$118,165.00 plus a \$35,450 contingency fee for a total bond of \$154,000, rounded up. Good testified that his bond estimate was calculated by Shawn Gustafson, a licensed engineer in the State of Wyoming. *Transcript – Good testimony, pp. 39-41; Good Exh. 2.*

13. Good explained that following the submittal of his annual report, DEQ, through Mr. John Erickson and Mr. Brian Wood, performed an inspection of the land involved in Permit 624. *Transcript – Good testimony, p. 41.*

14. Good stated that in DEQ's inspection report, Wood responded to Good's annual report and disagreed with Good's renewal bond estimate. *Transcript – Good testimony, p. 42; Good Exh. 3.*

15. Good understood Wood's disagreement with his bond estimate to be the topsoil requirement. Good understood DEQ standards to require six inches of topsoil yet Good explained that he believed that Wood was requiring eighteen inches of topsoil. *Transcript – Good testimony, p. 42; Good Exh. 3.*

16. Good testified that his bond estimate included the requirement for six inches of topsoil while Wood's bond estimate required eighteen inches of topsoil. *Transcript – Good testimony, pp. 42-43; Good Exh, 3.*

17. Good explained that his bond calculations for his bond estimate accounts for spreading twelve inches of suitable material and spreading six inches of topsoil. *Transcript – Good testimony, p. 45.*

18. Good testified that all of his reclamation previously done on Permit 624 included twelve inches of suitable material plus six inches of topsoil. *Transcript – Good testimony, pp. 45, 61.*

19. Good explained that he has an overabundance of topsoil on Permit 624 where he dug next to the creek. He didn't want to spoil it, so he stockpiled it for use at a later date. Good testified that if he ever got Permit 533, he wanted to take some of his topsoil and use it there

because he would have to import topsoil for Permit 533 and because it was a short distance from Permit 624. *Transcript – Good testimony, p. 43.*

20. Good admitted that there is nothing in his current 2013 reclamation plan that allows him to use some of the excess topsoil or excess subsoil from Permit 624 on Permit 533. *Transcript – Good testimony, p. 57.*

21. Good stated that six inches of topsoil is required as part of the 2013 reclamation plan. *Transcript – Good testimony, p. 43.*

22. Good explained that he thought DEQ required him to spread more than the six inches of topsoil because he had an overabundance of topsoil. *Transcript – Good testimony, p. 48.*

23. Good testified that he has re-seeded all of the property that he has spread topsoil on. *Transcript – Good testimony, p. 46.*

24. Good explained that some land that has been re-seeded is not growing because of a lack of water and the seed mixture required by DEQ. *Transcript – Good testimony, p. 46.*

25. Good testified that in the inspection report, DEQ also disagreed with him concerning the pond reclamation. *Transcript – Good testimony, p. 44.*

26. Good admitted that his current reclamation plan does not provide for the pond to be a permanent feature. *Transcript – Good testimony, p. 43.*

27. Good admitted that he has not submitted a permit application for the pond with the State Engineer's Office. *Transcript – Good testimony, p. 58.* Good explained that he would like DEQ's blessing before submitting a permit application for the pond to the State Engineer's Office. *Transcript – Good testimony, p. 60.*

28. On December 16, 2015, the director of DEQ issued a final determination setting Good's bond amount at \$220,000, an amount which is a \$55,000 increase over the bond amount currently held by DEQ. *Transcript – Good testimony, p. 45; Good Exh. 4.*

B. Testimony of Shawn Gustafson

29. Mr. Gustafson is employed by ECS Engineers located in Casper. *Transcript – Gustafson testimony, pp. 68-69.*

30. Gustafson has a bachelor of science in civil engineering with a P.E. in civil engineering. *Transcript – Gustafson testimony, p. 68.* He has worked as a civil engineer since 1990. *Transcript – Gustafson testimony, p. 69.*

31. Gustafson testified that since 2013 he has been the engineer of record for the mine on Permit 624. *Transcript – Gustafson testimony, pp. 69-70.* As part of that, Gustafson prepares the annual permit bond estimates. *Transcript – Gustafson testimony, p. 70.* Gustafson testified that he has prepared the annual permit bond estimates for Permit 624 since the 2013-14 bond estimate. *Transcript – Gustafson testimony, pp. 70-71.*

32. Gustafson testified that the 2013-14 renewal bond estimate was \$216,000, rounded. *Transcript – Gustafson testimony, p. 72; DEQ Exh. 7.* The bond renewal estimate for 2012-13 was \$165,000 and for 2011-12 it was \$148,000. *DEQ Exhs. 4, 5.*

33. Gustafson testified that he prepared the 2014-15 bond estimate for Permit 624—that bond estimate was \$154,000. *Transcript – Gustafson testimony, p. 73; DEQ Exh. 7.*

34. Gustafson testified that there are two material differences between the 2013-14 and 2014-15 bond estimates. He explained that the first is that more reclamation has been

accomplished during the past year, and second, was the handling of the topsoil. *Transcript – Gustafson testimony, pp. 73-74; Good Exh. 2.*

35. Gustafson testified that for the 2014-15 bond estimate, the topsoil was calculated to be spread at six inches over the site and the remaining topsoil was to possibly be hauled to the other permit that is short of topsoil. He explained that for the 2013-14 bond estimate, all the topsoil was calculated to be spread over Permit 624. *Transcript – Gustafson testimony, p. 74.*

36. Gustafson explained that his 2014-15 bond estimate included the spreading of twelve inches of subsoil underneath the six inches of topsoil. *Transcript – Gustafson testimony, pp. 74-75; DEQ Exh. 7.*

37. Gustafson testified that because more land on Permit 624 had been reclaimed from the time period when the 2013-14 bond estimate was prepared compared to when the 2014-15 bond estimate, the bond estimates are different. *Transcript – Gustafson testimony, pp. 75-77.* He stated that to be considered reclaimed, the land needed to be backfilled, the subsoil, as part of the backfill, spread over it and the topsoil spread and seeded. *Transcript – Gustafson testimony, p. 76.* He further stated that the subsoil needed to be spread at a minimum of twelve inches and the topsoil needed to be spread at a minimum of six inches. *Transcript – Gustafson testimony, p. 76.*

38. Gustafson explained that the differences between his bond estimate and the DEQ's estimate was a slight difference in acreage and the DEQ required the entire amount of topsoil stockpiled on the site spread over the site; while his bond estimate did not calculate using all the topsoil—some was saved. *Transcript – Gustafson testimony, p. 78.*

39. Gustafson testified that according to his calculations, if Good spread all the topsoil over the entire permit site as required by DEQ, it would total eighteen inches of topsoil throughout the entire site. *Transcript – Gustafson testimony, p. 79.*

40. Gustafson testified that he believes that the DEQ's bond estimate required that the pond be reclaimed. *Transcript – Gustafson testimony, p. 81.*

41. Gustafson explained that he did not include in his bond estimate the site grading to restore the original drainage pass. *Transcript – Gustafson testimony, p. 81*

42. Gustafson testified that the DEQ's estimate also included reclamation of the road on Permit 624 but he explained that other people use that road. *Transcript – Gustafson testimony, p. 82.*

43. Gustafson summed up the differences between his 2013-14 and 2014-15 estimates as the amount of topsoil spread over the permit site (all of it spread out vs. a minimum of six inches spread out) and in the 2013-14 estimate, the pond was reclaimed. *Transcript – Gustafson testimony, p. 94.*

C. Testimony of Brian Wood

44. Brian Wood is employed by DEQ, Land Quality Division, and is the current District 2 assistant supervisor and acts as the permit coordinator for several permits within the District. *Transcript – Wood testimony, p. 97.*

45. Wood received his bachelor's degree in 1982 in watershed science from Colorado State University and in 1994, he received a master's degree in earth resources. *Transcript – Wood testimony, p. 97.*

46. Wood testified that he has worked with the mining industry for roughly twenty-one years from a regulatory standpoint and as a private consultant. *Transcript – Wood testimony, p. 98.*

47. Wood testified that he is familiar with the annual bond renewal process and has gone through the process at least a couple hundred times during the last eight to nine years with DEQ. *Transcript – Wood testimony, p. 99.*

48. Wood explained that a reclamation bond is basically for DEQ in case the operator becomes insolvent and can no longer meet the bonding requirements. It is for DEQ to execute the reclamation plan and restore the property as the plan and permit allows. *Transcript – Wood testimony, p. 99.*

49. Wood is the permit coordinator for Permit 624. *Transcript – Wood testimony, p. 104.*

50. Wood has been the permit coordinator for roughly eight years. *Transcript – Wood testimony, pp. 104-105.*

51. As a permit coordinator, Wood explained that he is involved with the bond review process. *Transcript – Wood testimony, p. 105.*

52. Following the receipt of Good's annual report with the estimated renewal bond amount, Wood performed an inspection of Permit 624 and prepared an inspection report which included his renewal bond estimate. *Transcript – Wood testimony, pp. 106-108; DEQ Exh. 7.*

53. Wood testified that when calculating his bond estimate, he used the majority of the information from Good's annual report. *Transcript – Wood testimony, p. 108; DEQ Exh. 7.*

54. Wood testified that he treated the pond as an impoundment and did not account for the backfilling of that entire impoundment as part of his bond calculation. *Transcript – Wood testimony, p. 110.*

55. Wood explained that he included site grading to restore the drainage on Permit 624 to allow the Tanner pond to function. *Transcript – Wood testimony, p. 112.*

56. Wood admitted that the biggest difference between his and Gustafson’s bond calculations resulted from the differences in the amount of soil respreading. *Transcript – Wood testimony, pp. 112-113.*

57. Wood admitted that his bond calculations assumed replacement of “18 inches of topsoil” over all disturbed areas excluding areas shown to be “prelaw” that have not been reclaimed to date. Wood explained that although his calculation used the term “topsoil” he meant “topsoil and subsoil.” *Transcript – Wood testimony, pp. 113-114; DEQ Exh. 7.*

58. Wood testified that in his calculation, he required Good to respread all of the subsoil that is located in the stockpiles. *Transcript – Wood testimony, p. 114.*

59. Wood testified that Good’s reclamation plan discussed putting down all the subsoil prior to the application of soil, however, he admitted that there is an intermingling of the terms subsoil and topsoil. *Transcript – Wood testimony, p. 114.*

60. Wood admitted that Good has discussed with him the idea of being able to take soil from Permit 624 and hauling it to Permit 533 but Wood testified that doing so is not allowed at this time for Permit 624. *Transcript – Wood testimony, p. 115.*

61. Wood testified that his calculation included a contingency fee of 30% and that comes from Guideline 12. *Transcript – Wood testimony, p. 120; DEQ Exh. 10.*

62. Wood indicated that Guideline 12 required him to use a higher contingency fee, however, he used the lower rate of 30% because that was what was agreed upon by DEQ and Good during previous discussions in January 2015. *Transcript – Wood testimony, pp. 121-122.*

63. Wood ultimately calculated the bond amount at \$220,000. *Transcript – Wood testimony, p. 122; DEQ Exh. 7.* The 30% contingency fee makes up \$50,656.20 of the bond amount—the total cost to reclaim the land minus the contingency fee is \$168,854. *DEQ Exh. 7.*

64. Wood testified that DEQ currently holds a bond in the amount of \$165,000. *Transcript – Wood testimony, pp. 122-123; DEQ Exh. 7.*

65. However, Wood explained that the parties previously agreed on an interim bond amount of \$216,000. *Transcript – Wood testimony, pp. 123, 127.* Wood indicated that it was an interim bond amount because there were still differences between DEQ's estimate and Good's estimate based upon the site mapping effort that was part of the 2014 estimate and because there was no survey of any of the piles located on Permit 624. Wood testified that the bond amount was just an estimate of the material that was on Permit 624 and rather than continue to belabor the conversation, DEQ agreed that it would accept the \$216,000 bond amount and a final adjustment of up or down would be made with the 2105 annual report. *Transcript – Wood testimony, pp. 123-124; DEQ Exh. 7.*

66. Wood testified that Good has not provided the additional \$51,000 which is the difference between the \$165,000 bond estimate and the \$216,000 bond estimate. *Transcript – Wood testimony, p. 124.*

67. Wood explained that the new bond amount is really only a \$4,000 increase from the interim bond amount of \$216,000 which Gustafson calculated. *Transcript – Wood testimony, p. 125; DEQ Exh. 7.*

68. Wood testified that from the time of the setting of the interim bond amount to the most recent bond setting, Good has completed additional reclamation. *Transcript – Wood testimony, p. 125.*

69. Wood admitted that the reclamation plan requires a minimum of 6 inches of topsoil to be respread on Permit 624. *Transcript – Wood testimony, p. 132.* Wood testified that Good has complied with that requirement. *Transcript – Wood testimony, p. 132.*

70. Wood testified that he cannot make changes to the mine reclamation plan without the operator going through the revision process. *Transcript – Wood testimony, p. 133.*

71. Wood testified during the contested case that it is his understanding that Good leases the mineral rights to Permit 624. *Transcript – Wood testimony, p. 136.*

72. Wood admitted that he didn't know whether it was more appropriate to put the subsoil calculation as part of the soil respread or in the backfill. *Transcript – Wood testimony, p. 137.*

73. Wood admitted that there was less reclamation to do in 2015 than in 2014. *Transcript – Wood testimony, p. 139.*

74. Wood testified that the bond amount for 2013 was \$165,000. *Transcript – Wood testimony, p. 141; DEQ Exh. 5.*

75. Wood testified that the contingency fee for the 2013 bond amount was 21% while the contingency for the 2015 bond amount was 30%. *Transcript – Wood testimony, p. 142.*

76. Wood testified that the contingency amount was higher for the 2015 bond because he used Guideline 12 rather than the 21% amount which came from the BLM. *Transcript – Wood testimony, p. 142.*

77. Wood testified that he understood the 2014 bond amount of \$216,000 as an interim amount which would allow Good to then do some additional reclamation which would in turn result in the \$216,000 being correct. However, Wood ultimately accepted the 2014 bond amount at \$216,000. *Transcript – Wood testimony, p. 143; DEQ Exh. 7.*

78. Wood admitted that Good should not be required to do any reclamation in the prelaw area. *Transcript – Wood testimony, p. 145.*

79. Wood testified that the bond amount required that Good reclaim or haul off the topsoil stockpiles located in the prelaw areas and that 18 inches of the topsoil would be left. *Transcript – Wood testimony, pp. 145-46.*

80. Wood admitted that there is a substantial difference in acreage between his map and calculations and Gustafson's map and calculations. He explained that the big difference is that his calculations assume that the existing cover on that area is overburden and not subsoil or not topsoil. *Transcript – Wood testimony, p. 148.*

81. Wood testified that about 20% of the time there is a variance between DEQ's bond amount estimate and the operator's bond amount estimate. *Transcript – Wood testimony, p. 150.*

82. Wood testified that his bond estimate was reviewed and approved by his then supervisor, John Erickson and Alan Edwards prior to it being sent to Good. *Transcript – Wood testimony, p. 154.*

83. On re-direct, Wood testified that in the prelaw area, he calculated that there would be 18 inches of soil left once the topsoil was removed from the area. He explained that the topsoil piles in the prelaw area were not there prior to 1963 or 1969. *Transcript – Wood testimony, p. 155.*

84. Wood explained that he did not add anything into the bond calculation that would have required Good to spread soil onto the footprint of the topsoil piles that were removed in the prelaw areas of the permit. *Transcript – Wood testimony, pp. 155-56.*

85. Wood also explained that during his most recent inspection of the permit area, he felt that the topsoil or, the bentonite piles were on overburden. *Transcript – Wood testimony, p. 156.*

D. Testimony of Alan Edwards

86. Mr. Edwards is employed by DEQ as the deputy director and is the administrator for the Wyoming Abandoned Mine Lands program. *Transcript – Edwards testimony, p. 171.*

87. Edwards testified that he become involved with the renewal bond for Permit 624 in May 2015 because the administrator of the Land Quality Division had a potential conflict. *Transcript – Edwards testimony, p. 171.*

88. Edwards testified that he met with Good and Gustafson in Casper on July 22 to discuss the bond issues. *Transcript – Edwards testimony, p. 172.*

89. Edwards testified that he understood the major issues to be surrounding the actual factual amounts of the stockpiles, volumes, and quantities. Edwards admitted that he sent a letter to Good in August with his thoughts. *Transcript – Edwards testimony, p. 173.*

90. Edwards testified that it was brought to his attention that full and complete surveys had not been done so in 2015 he decided to stay any bond renewal action until such time as the next annual report was done with the understanding that Gustafson would provide, as part of his work, a full and complete, accurate survey. *Transcript – Edwards testimony, p. 173.*

91. Edwards testified that subsequent to the meeting, Good and Gustafson completed the survey and submitted the annual report which was initially reviewed by Wood. *Transcript – Edwards testimony, p. 174.*

92. Edwards testified that after reviewing the survey information, he believed the bond calculation as determined by the Land Quality Division was fair and reasonable. *Transcript – Edwards testimony, p. 175.*

93. Edwards testified that admittedly his experience related to bond calculations is limited and admitted that although he is a civil engineer, he is not licensed in Wyoming. *Transcript – Edwards testimony, p. 175.*

94. All findings of fact set forth in the following conclusions of law section shall be considered a finding of fact and are fully incorporated into this paragraph.

V. CONCLUSIONS OF LAW

A. Principles of Law

95. Paragraphs 1 through 94 of the findings of fact are fully incorporated herein.

96. This matter is properly before the Council upon Good's appeal of the DEQ's bond renewal amount.

97. The Council is the proper agency charged with hearing appeals from DEQ's bond renewal amounts. The Council has the authority to hear this matter and has jurisdiction over this matter and the parties.

98. The Council "shall act as the hearing examiner for the [DEQ] and shall hear and determine all cases or issues arising under the laws, rules, regulations, standards or orders issued or administered by [DEQ] or its . . . divisions." Wyo. Stat. Ann. § 35-11-112(a).

99. The Council is required to "[c]onduct hearings in any case contesting the administration or enforcement of any law, rule, regulation, standard or order issued or administered by [DEQ] or any division thereof[.]" Wyo. Stat. Ann. § 35-11-112(a)(iii).

100. The Council may "[a]pprove, disapprove, repeal, modify or suspend any rule, regulation, standard or order of the director or any division administrator[.]" Wyo. Stat. Ann. § 35-11-112(c)(i).

101. The Wyoming Supreme Court has held that the right to review is presumed and review is precluded only if the legislature provides "clear and convincing evidence of an intent to restrict." *Wyoming Department of Environmental Quality v. Wyoming Outdoor Council*, 2012 WY 135, ¶ 27, 286 P.3d 1045, 1052 (Wyo. 2012). In this case, the right of Good to seek review by the Council is clear, and further, there is not clear and convincing evidence of an intent to restrict review of this matter.

102. Wyoming Statutes § 35-11-417(a) provides that:

(a) The purpose of any bond required to be filed with the administrator by the operator shall be to assure that the operator shall faithfully perform all requirements of this act and comply with all rules and regulations of the board made in accordance with the provisions of this act.

Wyo. Stat. Ann. § 35-11-417(a).

103. Wyoming Statutes § 35-11-417(c)(ii) provides that:

(c) The amount of any bond to be filed with the administrator prior to commencing any mining shall be:

(ii) For renewal bonds the amount equal to the estimated cost of reclaiming the land to be disturbed during that renewal period, and the estimated cost of completing reclamation of unreleased lands and groundwater disturbed during prior periods of time. The estimated cost shall be based on the operator's cost estimate, which shall include any changes in the actual or estimated cost of reclamation of unreleased affected lands, plus the administrator's estimate of the additional cost to the state of bringing in personnel and equipment should the operator fail or the site be abandoned.

Wyo. Stat. Ann. § 33-11-417(c)(ii).

104. Wyoming Statutes § 35-11-411(d) provides that:

(d) Within sixty (60) days after receipt of the annual report, inspection report and other required materials, if the administrator finds the annual report in order and consistent with the reclamation plan as set forth in the permit, or as amended to adjust to conditions encountered during mining and reclamation operations as provided by law, the director shall determine the size of the bond to be posted for the purpose of insuring reclamation of the lands affected during the ensuing year.

Wyo. Stat. Ann. § 35-11-411(d).

105. The general rule in administrative law is that, unless a statute otherwise assigns the burden of proof, the proponent of an order has the burden of proof. *JM v. Department of Family Services*, 922 P.2d 219, 221 (Wyo. 1996).

B. Applications of Principles of Law

106. The Council finds and concludes that it has jurisdiction over this matter under Wyo. Stat. Ann. §§ 35-11-112(a), (a)(iii), (c)(i), and the Wyoming Supreme Court's precedent in *Wyoming Department of Environmental Quality v. Wyoming Outdoor Council*, 2012 WY 135, 286 P.3d 1045 (Wyo. 2012).

107. Under this appeal, the Council was required to determine whether the renewal bond amount estimate set by the director of DEQ was proper and in accordance with law under Wyo. Stat. Ann. § 35-11-417(c)(ii).

108. The Council finds and concludes that the director's renewal bond amount of \$220,000 was not in accordance with law and was not supported by the preponderance of the evidence. However, the Council also finds that Good's bond estimate of \$154,000 was not in accordance with law and not supported by the preponderance of the evidence.

109. The Council finds and concludes that based upon the testimony and exhibits provided during the contested case, the proper total amount (including the contingency fee) for the renewal bond is \$169,000.

110. The Council heard evidence about two bond estimates – Good's estimate of \$154,000 and the DEQ's estimate of \$220,000. It does not surprise the Council that there is a range between these estimates especially since there are differences of opinion in how the bond calculations should be done and differences of opinion in what reclamation needs to be done. Because of the conflicting testimony and opinions, the Council believes that there are inaccuracies in both bond estimates, and as a result, it cannot entirely accept either estimate and

it must set a bond renewal amount that it believes is in accordance with the applicable statutes and is supported by the evidence.

111. The Council finds and concludes that by setting the bond renewal amount at \$169,000, it adequately and properly takes into account the required factors in Wyo. Stat. Ann. 35-11-417(c)(ii). The Council concludes that this amount is equal to the estimated cost of reclaiming the land to be disturbed during the renewal period, and the estimated cost of completing reclamation of unreleased lands and groundwater disturbed during prior periods of time.

112. The Council further concludes that, in part, this amount is based on Good's cost estimate plus the administrator's estimate of the additional cost to the State of bringing in personnel and equipment should Good fail to reclaim the site.

113. In addition, the Council believes that this \$169,000 bond amount takes into account DEQ's contention that Good's renewal bond amount should be higher than Good's estimate. In fact, the Council's amount is equal to DEQ's bond renewal amount prior to any contingency fee being added. The Council believes that \$169,000 not only meets the requirements under the statute but is also based on common sense. Good's renewal bond for 2013 was set at \$165,000, for 2014, it was set at \$216,000 and since that time, both parties agree that Good has conducted reclamation which admittedly means there is less reclamation to do in 2015 than 2014. As a result, the 2015 bond amount should be less than \$216,000, the 2014 bond amount.

114. The Council believes that the \$169,000 total reclamation renewal bond for the next year would allow the State to adequately reclaim the land and protect the State's resources if Good were to have financial difficulties and fail to properly reclaim the site.

115. These findings of fact and conclusions of law constitute a final order of the Council.

VI. ORDER

IT IS HEREBY ORDERED that DEQ's motion to dismiss is denied.

IT IS FURTHER ORDERED that the renewal reclamation bond amount for Permit 624 is reduced from \$220,000 to \$169,000 for one year from the date of this Order.

ENTERED this 28th day of September, 2016.



Rich Fairservis, Hearing Examiner
Environmental Quality Council