

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

In the Matter of the Appeal of the Notice)	
of Violation and Order Issued to Good)	DOCKET 17-4201A
Bentonite Company, LLC,)	
DEQ NOV Docket 5748-17)	
)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
)	AND ORDER

I. APPEARANCES

The final contested case hearing in this matter occurred before the Environmental Quality Council on December 6, 2017, in Cheyenne, Wyoming.

Present for the Council was Council member and Hearing Officer Deborah Baumer, Chairman Meghan Lally, and Council members Tim Flitner and Nick Agopian. Council members Rich Fairservis and Dr. David Bagley were not in attendance, however, following the hearing, they listened to all the testimony and considered all the evidence by watching the video recordings of the hearing. Council member Nick Agopian voluntarily recused himself from this matter on December 13, 2017.

Present at the hearing for Petitioners Good Bentonite Company, LLC and Brian Good was Brian Good. Present at the hearing for the Wyoming Department of Environmental Quality (DEQ) was Andrew J. Kuhlman from the Wyoming Attorney General's Office.

Testifying on behalf of Petitioners was Brian Good. Testifying on behalf of the DEQ was Brian Wood.

The following exhibits were admitted into evidence: DEQ exhibits 1 through 13 and Good exhibits 1 and 2.

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 an appeal from a notice of violation and order (NOV and order) issued to Good Bentonite Company, LLC and Brian Good. Under Wyoming Statute § 35-11-701(c)(ii), the person or persons named in the NOV and order may request a hearing before the Council. In this case, Petitioners timely requested a contested case hearing before the Council.

III. STATEMENT OF THE CASE/ISSUES AND CONTENTIONS

On May 12, 2017, the DEQ issued an NOV and order to Brian Good and Good Bentonite. The NOV and order was issued because Petitioners allegedly violated the Environmental Quality Act by failing to submit to the DEQ the required additional reclamation performance bond in the amount of \$30,600 on permit PT-533. Petitioners disagreed with the NOV and order and requested a contested case before the Council. Petitioners contend that the NOV and order should not be approved because no violation occurred because the bond amount is too high. In fact, Petitioners appear to argue that they are over bonded.

IV. FINDINGS OF FACT

1. On May 12, 2017, the DEQ issued an NOV and order to Brian Good and Good Bentonite. *DEQ Exh. 1*. The NOV and order stated that:

A Director's Bond Letter was sent on March 15, 2017 per W.S. § 35-11-411(d). The Director's Bond Letter provided a \$9,400.00 reduction in the previously-established total bond amount due to a decrease in fuel prices. The Director's Bond Letter set the new total required bond amount for Permit PT-533 at \$43,600.00. As stated in paragraph 3 above, Good Bentonite Company currently maintains \$13,000

in bonding with the Department towards the total required amount. The remaining \$30,600.00 bond shortfall to cover all of the disturbance related to Permit PT-533 was due on or before April 15, 2017 (30 days from the date of the Director's Bond Letter). To date, the Department has not received any additional bonding from Good Bentonite Company to meet the new required bond amount and there has been no communication with regard to its submission. Failure to provide an adequate Reclamation Performance Bond is a violation of W.S. § 35-11-415(a) and W.S. § 35-11-417(a).

....

You are hereby directed to submit the balance of the required Reclamation Performance Bond in the amount of \$30,600.00 within 15 days of receipt of this Notice.

DEQ Exh. 1, pp. 002-003.

2. On May 17, 2017, Petitioners filed a written request for a hearing before the Council. The written request stated "We, Brian and Danae Good of Good Bentonite Company, LLC are appealing this Notice of Violation, Docket #5748-17, on this date of May 12, 2017. We would like the EQC council to review." Subsequently, on July 27, 2017, Petitioners filed a more definite statement and stated that they "believe[] the bond set by the WDEQ for permit #533 is not accurate. It includes lands that the DEQ required GBC to reclaim at the Beaver Creek site. We feel the bond should be much lower."

3. A contested case was held on December 6, 2017.

4. The Council deliberated on December 15, 2017.

5. Following deliberations, a motion to affirm or approve the NOV and order as issued was made and seconded.

6. Three Council members (Baumer, Bagley, and Lally) voted for the motion and two Council members (Flitner and Fairservis) voted against the motion. No other motions were made.

V. CONCLUSIONS OF LAW

A. Principles of Law

7. Paragraphs 1 through 6 of the findings of fact are fully incorporated herein.

8. Wyoming Statute § 35-11-701(c) states, in part:

(ii) Any order is final unless, not later than ten (10) days after the date the notice is served, the person or persons named therein request, in writing, a hearing before the council. Upon the filing of a request the order complained of shall be stayed pending the council's final determination thereon;

(iii) If after a hearing held pursuant to this section, the council finds that a violation has occurred, it shall affirm or modify such order previously issued, or issue an appropriate order or orders for the prevention, abatement or control of the violation involved or for the taking of other corrective action. If, after a hearing on an order contained in a notice, the council finds that no violation has occurred, it shall rescind the order. Any order issued as part of a notice or after hearing may prescribe the date or dates by which the violation shall cease and may prescribe timetables for action. Nothing contained in this subsection shall be construed as preventing any person from applying for a variance as provided in W.S. 35-11-601[.]

9. Wyoming Statute § 35-11-111(d) states that:

(d) The council shall hold at least four (4) regularly scheduled meetings each year. Special meetings may be called by the chairman, and special meetings shall be called by the chairman, upon a written request submitted by three (3) or more members. Four (4) members shall constitute a quorum. **All matters shall be decided by a majority vote of those on the council.** (Emphasis added).

10. When analyzing the language of a statute, the "paramount consideration is the legislature's intent as reflected in the plain and ordinary meaning of the words used in the statute."

Horse Creek Conservation Dist. v. State ex rel. Wyo. Att'y Gen., 2009 WY 143, ¶ 14, 221 P.3d 306, 312 (Wyo. 2009) (citing *Krenning v. Heart Mountain Irrigation Dist.*, 2009 WY 11, ¶ 9, 200 P.3d 774, 778 (Wyo. 2009)). "A statute is clear and unambiguous if its wording is such that

reasonable persons are able to agree on its meaning with consistency and predictability.” *Id.* “When a statute is sufficiently clear and unambiguous, we give effect to the plain and ordinary meaning of the words and do not resort to the rules of statutory construction.” *Cheyenne Newspapers, Inc. v. Building Code Bd. of App. of City of Cheyenne*, 2010 WY 2, ¶ 9, 222 P.3d 158, 162 (Wyo. 2010) (quoting *BP Am. Prod. Co. v. Dep’t of Revenue*, 2005 WY 60, ¶ 15, 112 P.3d 596, 604 (Wyo. 2005)).

11. In this case, the DEQ had the burden of proof and it was required to prove by a preponderance of the evidence that a violation occurred and that the NOV and order was in accordance with law.

B. Applications of Principles of Law

12. The Council finds and concludes that it has jurisdiction over this matter under Wyo. Stat. Ann. § 35-11-701(c).

13. The Council also finds and concludes that the NOV and order is not approved or affirmed because four Council members failed to approve the motion to affirm the NOV and order.

14. Wyoming Statute § 35-11-111(d) states that all matters must be decided by a **majority vote of those on the Council**. At the time of the contested case and the deliberations, the Council had six members.¹ As a result, for a motion or matter to be approved by the Council, four members must vote in favor. It is immaterial that only five members took part in the decision.

15. Section 111(d) is clear and unambiguous—for a matter to be approved, it must be approved by a majority of those on the Council, not simply by a majority of those participating in

¹ Although the Council is statutorily comprised of seven members, during this case and the deliberations, the Council had one vacancy.

the matter or attending the meeting or contested case. If the Legislature had intended for a matter to be decided by a majority of those Council members attending the meeting or taking part in the decision, the Legislature could have used such language.

16. For instance, in Wyo. Stat. Ann. § 33-21-125(c) which governs the board of nursing, the Legislature used language that only requires an act to be approved by the **majority of board members present at a meeting**. In addition, in the Wyoming Administrative Procedure Act, Wyo. Stat. Ann. § 16-4-405(c) states that “[u]nless a different procedure or vote is otherwise specified in law, an executive session may be held only pursuant to a motion that is duly seconded and carried by **majority vote of the members of the governing body in attendance when the motion is made.**”

17. By using the phrase “a majority vote of those on the Council” the Legislature has proven that it understood that it was requiring a majority of those on the Council, regardless of whether all Council members took part in the decision. Omission of words from a statute is considered to be an intentional act by the Legislature and the Council will not read words into a statute when the Legislature has chosen not to include them. *Merrill v. Jansma*, 2004 WY 26, ¶ 29, 86 P.3d 270, 285 (Wyo. 2004).

18. The Council is bound by the language used by the Legislature. For a matter or motion to be approved by the Council, a majority vote of those on the Council is required—that did not happen in this case when only three members voted for the motion to approve the NOV and order.

VI. ORDER AND DECISION

IT IS HEREBY ORDERED that the DEQ's NOV and order is not approved.

ENTERED this 5th day of January, 2018.



Deborah Baumer, Hearing Officer
Environmental Quality Council