

**BEFORE THE OREGON WATER RESOURCES COMMISSION**

In the Matter of Notice of Violation and  
Assessment of Civil Penalty for  
  
Dale L. Wymore, Water Well Constructor,  
License No. 1807,  
*Appellant*

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**DRAFT FINAL ORDER**

**HISTORY OF PROCEEDING**

This proceeding was initiated following a Notice of Violation and Assessment of Civil Penalty dated December 10, 2003, served on Dale L. Wymore. The Notice of Violation proposed to assess civil penalties for material misstatements of fact on well reports during the period October 2002 through August 2003 (ORS 537.747(7)). On December 13, 2003, Mr. Wymore timely filed a request for hearing. On January 12, 2004, the matter was referred to the Office of Administrative Hearings, and a Notice of Hearing and Pre-hearing Conference was served on January 15, 2004.

A Pre-Hearing Conference took place by telephone on April 9, 2004 with Administrative Law Judge (ALJ) Rick Barber presiding. ALJ Barber issued a Pre-Hearing Order on April 13, 2004, identifying the issues for hearing and setting the hearing date for July 15, 2004.

An in-person hearing was held on July 15, 2004 at the offices of the Water Resources Department in Salem, Oregon. Administrative Law Judge Daina Upite of the Office of Administrative Hearings presided. Mr. Wymore was present, represented himself, and testified on his own behalf. Curtis Bilbruck was present and appeared as a witness on behalf of Mr. Wymore. The Department was represented by Juno Pandian, Agency Representative. Department staff Larry Carey and Michael McCord were present and appeared as witnesses on behalf of the Department.

The record remained open after the hearing to receive additional documents from the Department. The Department submitted documents marked as Exhibits 18 and 19, which were used for illustration during the hearing. Exhibit 19 was received immediately after the hearing. The Office of Administrative Hearings received Exhibit 18 on July 22, 2004, whereupon the record closed.

On November 17, 2004, ALJ Upite issued a Proposed Order that proposed to suspend Dale Wymore’s Water Well Constructor’s License #1807 for 660 days and assess civil penalties in the amount of \$11,000.

On December 16, 2004, Mr. Wymore timely filed exceptions to the Proposed Order.

On January 13, 2005, the Oregon Water Resources Commission heard oral argument on the exceptions and now issues this final order.

### **HEARING ISSUES**

1. Whether Mr. Wymore made material misstatements of fact on his well reports during the period October 2002 through August 2003 (ORS 537.747(7)).

2. Whether civil penalties should be assessed, and if so, in what amount (ORS 537.992 and OAR 690-225-0110). Whether Mr. Wymore's license should be suspended, and if so, for how long (ORS 537.747(7) and OAR 690-225-0030).

### **EVIDENTIARY RULINGS**

Exhibits 1-4 and 10-19,<sup>1</sup> submitted by the Department, were admitted into evidence without objection.

### **FINDINGS OF FACT**

1. Dale Wymore is a licensed water well constructor, operating under license No. 1807. Mr. Wymore was licensed during the period 1992-95. He was re-licensed in October 2002. (Test. of Wymore; Ex. 4 at 4.)
2. Between November 7, 2002 and July 18, 2003, Mr. Wymore constructed 22 wells in Deschutes and Klamath Counties, including four wells in Deschutes County for Gary Strecker, one in March 2003 and three in July 2003. On July 11, 2003, Mr. Wymore also abandoned one well for Mr. Strecker. (Ex. 10.<sup>2</sup>)
3. On 21 well reports, Mr. Wymore indicated that he bored a 10-inch diameter hole to a depth of 18 feet and created a seal to a depth of 18 feet using six (6) sacks of bentonite. (Ex. 10 at 3-23.) On one well report for the Strecker well abandonment, Mr. Wymore indicated that he removed 20 feet of six-inch steel casing and filled the cavity with nine (9) sacks of cement grout. (Ex. 10 at 24.)
4. The well seal consists of a two-inch annular space surrounding the well casing that is required to extend 18 feet below land surface. The seal is a very important part of protecting water resources. The seal prevents surface water from seeping down along the well casing. Without the seal, the well casing acts as a wick, drawing surface water down where it can contaminate the ground water resource. Under the Water Resources Commission's administrative rules, the seal must be solid to a depth of 18 feet. To fill the two-inch annular space to a depth of 18 feet requires at least 7.35 50-pound sacks of

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<sup>1</sup> There are no exhibits marked 3-9.

<sup>2</sup> Attachment 1 of Exhibit 10 lists 23 well report numbers, but the Department has not alleged any misstatements of fact regarding well report # DESC 55411 (Cozens).

bentonite, but likely would require more. (Testimony of Carey.) Mr. Wymore used 50-pound sacks of bentonite. (Testimony of Wymore.)

5. The well that Mr. Wymore constructed for Mr. Strecker on July 15, 2003 (DESC 55477, start card #143172) had a Bentonite well seal that extended to only 11 feet below land surface. The Department required Mr. Wymore to bring the well into compliance with minimum well construction standards by September 2, 2003. Mr. Wymore abandoned the well on August 30, 2003. (Ex.12.) Another well that Mr. Wymore constructed for Mr. Strecker on July 12, 2003 (DESC 55476, start card #143171) was sealed to a depth of only 10 feet, four inches below land surface (bls). Mr. Wymore abandoned this well on August 11, 2003 under the Department's supervision. (Ex.14.) A third well that Mr. Wymore constructed for Mr. Strecker on July 15, 2003 (DESC 55480, start card #143173) was sealed to a depth of only seven feet, nine inches bls. Mr. Wymore abandoned this well on August 13, 2003, under the Department's supervision. (Ex. 15.)
6. The well that Mr. Wymore abandoned for Mr. Strecker on July 11, 2003 (DESC 55475, start card #143170) was filled with cement to a depth of only two feet, four inches bls which is not consistent with minimum well construction standards. The Water Resources Commission's well abandonment rules require that if the well casing is removed, the entire hole must be back-filled with cement. On the well report that Mr. Wymore completed and signed July 11, 2003, he indicated that he removed 20 feet of six-inch steel casing and filled the cavity with nine (9) sacks of cement grout. Mr. Wymore re-abandoned the well on August 11, 2003, under the Department's supervision, using eight 94-pound sacks of cement grout. (Ex. 13; testimony of Carey.)
7. On August 4, 2003, the Department issued a "Final Order," requiring Mr. Wymore to re-abandon a well (DESC 55475) and bring two other wells up to well construction standards (DESC 55476 and 55480) by August 15, 2003. Mr. Wymore complied with these requirements. In addition, the Department required Mr. Wymore to substantiate the integrity of the surface seals in the other wells he had constructed since October 2002, and to bring the wells to minimum construction standards if they did not have a minimum 18-foot surface seal. (Ex. 17.) Mr. Wymore did not comply with the latter requirements. (Ex. 16; testimony of Wymore.)
8. On August 12, 2003, Mr. Carey observed Mr. Wymore's work on a particular well. Mr. Wymore's tool had a diameter of only 9-1/4 inches and excavated the well hole to a depth of only 16 feet. Mr. Wymore excavated the hole to at least 18 feet, as directed by Mr. Carey and as required by the Water Resources Commission's rules. To fill the annular space from a depth of 18 feet to eight feet below land surface, Mr. Wymore had to use 10 sacks of bentonite, and he used an additional four sacks to fill the top eight feet of the annular space. Mr. Wymore had only six to eight sacks of bentonite on site, so he had to obtain more. (Testimony of Carey.)
9. On December 10, 2003, the Department issued a Notice of Violation; Assessment of Civil Penalty; and Proposed License Suspension. The Department proposed to assess civil penalties in the amount of \$11,500 for 23 material misstatements of fact on a well

report, being a penalty of \$500 per violation. The Department also proposed to suspend Mr. Wymore's license for 690 days, being 30 days for each material misstatement of fact on a well report. (Ex. 4.) At the hearing, the Department acknowledged that it alleged and presented evidence on only 22 violations. The Department also stated that a 30-day suspension and \$500 per occurrence are the standard penalties proposed for material misstatements of fact on a well report. (Statement of Pandian.)

10. At the hearing, Mr. Wymore acknowledged that six sacks of bentonite would not fill an 18-foot deep annular space. Mr. Wymore stated that he always had at least 12 sacks of bentonite with him, and he always used at least nine sacks, even though he recorded on the well report that he used six sacks. Mr. Wymore acknowledged that he knew that by signing a well report, he certified that "[t]his report is true to the best of my knowledge and belief." (Testimony of Wymore; *see e.g.*, Ex. 10 at 2.) Mr. Wymore signed all the well reports at issue in this case. (Ex. 10 at 3-24.)

## CONCLUSIONS OF LAW

1. The Department provided sufficient evidence to support the claim that Mr. Wymore made material misstatements of fact on 22 well reports during the period October 2002 through August 2003.

2. It is reasonable and appropriate to assess civil penalties in the amount of \$11,000 (\$500 per occurrence) and to suspend Mr. Wymore's license for 660 days (30 days per occurrence).

## OPINION

### **Material Misstatements of Fact**

The Water Resources Commission is authorized to regulate construction and maintenance of wells, pursuant to ORS 537.505 to 537.795. Pursuant to ORS 537.747(1), anyone who enters into a contract to construct or alter a well must possess a water well constructor's license issued by the Water Resources Department. The Department may suspend such license if, after notice and opportunity to be heard, it appears to the satisfaction of the Department that the licensee has failed to comply with, or has established a pattern of conduct that willfully or negligently violates ORS 537.505 to 537.795 or any order or rule adopted under those statutes, applicable to the licensee; or has made a material misstatement of fact on a well report. ORS 537.747(7).

Any person licensed as a water well constructor is required to keep a log of each well constructed, altered, converted, or abandoned. ORS 537.765(1). The well report, which must be in a form prescribed by the Water Resources Commission, must show, among other things, "[t]he depth, diameter and type of the well." ORS 537.765(3)(d).

It is the Department's position that Mr. Wymore made material misstatements of fact on each of 22 well reports. ORS 183.450 states that "the burden of presenting evidence in support of a fact or position in a contested case rests on the proponent of the fact or position." The

Department has the burden of establishing, by a preponderance of the evidence, that Mr. Wymore made material misstatements of fact on the well reports.

In three wells that Mr. Wymore constructed the seals extended to depths of no more than 11 feet, whereas on each well report Mr. Wymore indicated that the seal was filled with bentonite to a depth of 18 feet. This evidence is uncontroverted and clearly establishes that Mr. Wymore made material misstatements of fact with respect to the characteristics of these three well holes, including the seal in each well hole.

With respect to the additional 18 wells that Mr. Wymore constructed, there is no direct evidence that the seals are not 18 feet deep. However, the Department established that at least 7.35 sacks of bentonite would be required to fill a two-inch annular space to a depth of 18 feet, whereas Mr. Wymore stated on each well report that he had used six sacks of Bentonite. Mr. Carey observed Mr. Wymore fill a well seal on August 11, 2003, when Mr. Wymore had to use a total of 14 sacks of bentonite to properly seal an 18-foot deep annular space. Mr. Wymore also testified in the hearing that he did not use six sacks of bentonite each time, despite what he wrote on the well report. In light of the evidence concerning the three wells that were actually examined, evidence that at least seven sacks of bentonite would be required to create a seal to a depth of 18 feet, and that as many as 14 sacks could be required, it is reasonable to infer that the seals on the remaining 18 wells did not extend 18 feet below ground. Alternatively, Mr. Wymore may have misstated the number of sacks of bentonite used, as he testified in the hearing. In either case, Mr. Wymore made material misstatements of fact. Therefore, the Department established, by a preponderance of the evidence, that Mr. Wymore made material misstatements of fact on the well reports for the remaining 18 wells that he constructed during the period October 2002 through August 2003.

The Department also contends that Mr. Wymore made a material misstatement of fact on the well reports for the well that Mr. Wymore abandoned on July 11, 2003 (DESC 55475) by misstating the amount of cement grout used to fill the cavity. Mr. Wymore indicated that he used nine sacks of cement grout, whereas an inspection on August 11, 2003 revealed that the cement extended to only two feet, four inches below land surface. When Mr. Wymore re-abandoned the well under the Department's supervision, he used eight sacks of cement grout to back-fill the 20-foot deep cavity. Thus, the reasonable inference is that Mr. Wymore misrepresented the number of sacks of cement grout he used, and that he used far less than nine sacks because the cement extended to only 28 inches below land surface. Therefore, the Department established that Mr. Wymore made one material misstatement of fact on well report DESC 55475 when he abandoned a well on July 11, 2003.

Accordingly, during the period October 2002 through July 2003, Mr. Wymore made material misstatements of fact on 22 well reports that he completed and signed.

### **Penalties**

As stated above, the Department may suspend a water well constructor's license under ORS 537.747(7) for making material misstatements of fact on a well report. The Department's practice is to propose a 30-day suspension for each material misstatement of fact.

In addition, the Water Resources Commission may assess civil penalties against any person who violates ORS 537.747 to 537.795 in the construction of a well. ORS 537.992 provides in material part:

(1) In addition to any other remedy provided by law, the Water Resources Commission may impose a civil penalty against any person who, in the construction of a well, violates any provision of ORS 537.747 to 537.795 and 537.992, or any rule promulgated pursuant thereto. A civil penalty shall be in an amount determined by the commission in accordance with the rules adopted under subsection (2) of this section. However, the commission shall not impose a civil penalty under this section if the commission, by exercising other authority granted under ORS 537.505 to 537.795 and 537.992, causes the person to comply with the provisions of ORS 537.747 to 537.795 and 537.992 or rules adopted thereunder.

(2) The commission shall adopt by rule a schedule of penalties for violation of ORS 537.747 to 537.795 and 537.992, not to exceed \$1,000 for each occurrence defined in the rules as a major violation, and not to exceed \$250 for each occurrence defined in the rules as a minor violation. Under no circumstances may a penalty for a violation of ORS 537.762 or 537.765 exceed \$250.

OAR 690-225-0110(1)(b) provides that for major violations, the civil penalty shall be not less than \$50 nor more than \$1,000 for each occurrence. A material misstatement of fact on a well report is a major violation. *See* OAR 690-225-0110(3) and Table 225-1. The Department's practice is to propose a civil penalty of \$500 per occurrence.

The Department established that Mr. Wymore made material misstatements of fact on 22 separate well reports. It is a reasonable and appropriate sanction to suspend Mr. Wymore's license for 660 days (30 days x 22 occurrences = 660 days).

It is also reasonable to assess civil penalties in the amount of \$500 per occurrence for the material misstatements of fact. Although Mr. Wymore corrected the problems with three wells by abandoning them, and by re-abandoning a fourth well, these corrections do not erase the material misstatements of fact on the well reports. That is, by bringing the wells into compliance, Mr. Wymore did not and could not correct the misstatements he made on the well reports. Therefore, a civil penalty in the amount of \$11,000 is reasonable and appropriate ( $\$500 \times 22 = \$11,000$ ).

## ORDER

It is HEREBY ORDERED that the November 17, 2004, Proposed Order is affirmed and a civil penalty in the amount of \$11,000 and a 660-day license suspension be assessed against Dale Wymore for 22 violations of ORS 537.747(7), material misstatement of fact on a well report.

It is FURTHER ORDERED that Dale Wymore's suspension shall commence on January 20, 2005 and continue through November 10, 2006.

It is FURTHER ORDERED that the total civil penalties assessed in the amount of \$11,000 are due and payable within 10 days of service of the Final Order in this matter. Failure to pay the civil penalty within 10 days of service of the Final Order may result in referral for collection to the Oregon Department of Revenue or to a private collection agency.

Dated January \_\_\_\_\_, 2005

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Dan Thorndike, Chair  
Oregon Water Resources Commission

### Appeal Rights

You are entitled to judicial review of this order. Judicial review may be obtained by filing a petition for review within 60 days from the date of service of this Order. If this Order was personally delivered to you, the date of service is the day you received the Order. If this Order was mailed to you, the date of service is the date it was *mailed*. Judicial review, pursuant to the provisions of ORS 536.075, is to the Oregon Court of Appeals. If you do not file a petition for judicial review within 60-day time period, you will lose your right to appeal.

## CERTIFICATE OF SERVICE

I certify that on January \_\_\_\_\_, 2005, I mailed by Certified Mail Return Receipt Requested this Final Order to:

Dale L. Wymore  
16034 Strawn Road  
La Pine, OR 97739

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Janet Halladey, Water Resources Department