

MONTANA 59<sup>TH</sup> LEGISLATURE  
HOUSE NATURAL RESOURCES COMMITTEE  
February 2, 2005

TESTIMONY IN SUPPORT OF HB 428

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**Introduction**

Mr. Chairman and members of the committee, my name is John Arrigo and I am administrator of the DEQ Enforcement Division and I am here to testify in support of HB 428. I would first like to thank Rep. Gutsche for sponsoring this bill. HB 428 amends the Strip and Underground Mine Reclamation Act which regulates coal mines, the Metal Mine Reclamation Act which applies to gold mines, copper mines, etc., and the Opencut Mining Act which governs gravel pits.

**Background**

I would first like to explain why the DEQ requested HB 428. Currently, in any district court proceedings, the parties follow the Rules of Civil Procedure. These rules describe how to file complaints and motions, present evidence, examine witnesses, etc. If you appeal a decision of an agency such as a decision not to issue a permit or the decision to assess a penalty, the appeal is considered a contested case. In Montana, contested cases must follow the Montana Administrative Procedures Act or MAPA. The Rules of Civil Procedure and MAPA are in place to ensure that court proceedings and administrative hearings are conducted in a standard manner and to preserve an individual's right to due process.

However, there are no set rules or procedures that govern how the DEQ issues administrative orders. The environmental laws for water, air, and waste, etc. are in Title 75 and were administered by the former Dept. of Health and Environmental Sciences. The reclamation laws for mines are in Title 82 and were administered by the former Dept. of State Lands. The process DEQ must follow to issue an administrative order, is dependent upon the procedures identified in each individual law and because the two agencies operated differently, the administrative enforcement process is different between Title 75 and 82. DEQ believes that its internal administrative procedures for formal enforcement should be consistent and has therefore developed HB 428 to change the enforcement procedures under the reclamation laws to be similar to the procedures under the Title 75 environmental laws.

(Handout orders)

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Under the Title 75 laws, only one step is required to issue an order. As an example I have passed out a copy of a Notice of Violation and Administrative Order that the department issued under the Public Water Supply Law for a failure to conduct monitoring. You will note that this order is only 6 pages long. The department had done all it can to streamline things and operate more efficiently. In the past, these types of orders were typically 20 to 30 pages long and required an attorney to interpret them. The order contains a Findings of Fact, Conclusions of Law, and Order that requires monitoring and payment of a \$900 penalty. The entity either complies with the order or has 30 days to appeal.

In contrast, enforcement under the Title 82 reclamation laws involves a two-step process. I have passed out a penalty order that was issued under the Strip Mine Act for a violation caused by improper grading. To assess a penalty, DEQ must first issue a Notice of Violation and a Statement of Proposed Penalty. The same 30-day appeal period is provided. Depending upon the outcome of an appeal if any, the DEQ must then issue an additional enforcement document called a Findings of Fact, Conclusions of Law and Order. This second document duplicates much of the statement of proposed penalty and is the final order that requires payment of the penalty.

HB 428 modifies the two-step enforcement process by eliminating the statement of proposed penalty and allowing the department to issue only one order. These amendments will go a long way to help standardize DEQ internal administrative enforcement procedures and eliminate some unnecessary paperwork, yet still preserve an individual's right to due process.

Mr. Chairman, after providing this background, I would now like to describe some of the specific amendments in HB 428.

### **Description of Amendments**

Page 2, line 9: These are amendments to the Strip Mine Act insert the new enforcement procedures. The amendments state that to assess a penalty, the department shall issue a notice of violation and penalty order. The order specifies the provision of the law, rule or permit violated; contains a findings of fact; conclusions of law; and a statement of the proposed penalty. The person who is issued the order has 30 days to appeal to the Board of Environmental Review.

Page 4, line 7: Any violation of the Strip Mine Act goes on to a national list of violations maintained by the U.S. Office of Surface Mining. If a company has a violation on the list, it affects their ability to obtain or modify a mining permit throughout the country. The amendment requires that after a company pays the penalty for a violation, the department must issue a "Release of Civil Liability" within 30 days. The release designates that the violation has been resolved.

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Section 3 of the bill on page 4 amends the Metal Mine Reclamation Act. To understand the rationale behind the first amendment I would like to direct your attention existing law on Page 4, line 18. This states that department may assess an administrative penalty. Under existing law the department has discretion to assess a penalty. Generally, the minor violations do not get a penalty and the significant violations do get a penalty. Now I would like to direct your attention to page 5, line 14. This is the existing enforcement procedure that the bill strikes. The first sentence states that the department shall notify the person of the violation. And, the department shall issue a statement of proposed penalty within 30 days of the notice of violation. The law provides discretion in assessing penalties, but a conflict is created because this section requires a notice and statement of proposed penalty for every violation.

The department addresses this consistency with the amendments. To fulfill the requirement that the department send a notice for all violations, the amendment on Page 4, line 11 states that when the department has reason to believe that a violation has occurred, it shall send as violation letter to notify them of the violation and the actions that are required to return to compliance. Page 5, line 27 is the new enforcement procedure that says the department may issue an order if it has credible information that a violation occurred. The order may require corrective action, an administrative penalty, or both.

Over the past 8 years the department has issued 12 administrative orders under the Metal Mine Act with an average penalty of \$5,000. In some instances, when the violations are significant and the violator is uncooperative, the department believes it needs to go to court to compel compliance and to seek a larger penalty. Therefore the amendment on the top of page<sup>5</sup> provides the department with the authority to bring an action in district court to seek a penalty of up to \$5,000 for each day of violation.

Section 3 on page 6 amends the Opencut Mining Act. These amendments mirror the amendments to the Metal Mine Act, which I just described, with one difference.

I would like to draw your attention to page 6, line 23 through 28. The existing language states the department may assess an administrative penalty of not less than \$100 or more than \$1,000 for the violation. I stress "the violation" because this means we can assess a penalty for the violation for one day. We issue the notice of violation and statement of proposed penalty for one day of violation therefore the maximum penalty is \$1,000.

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Item (b) on line 27 states that an additional administrative penalty may be assessed for each day during which the violation continues following the service of a notice of violation. Because the initial notice of violation and statement of proposed penalty is department's action for the violation and the statement of proposed penalty is subject to appeal, it is not practical to issue another statement of proposed penalty for additional days of violation while the first statement of proposed penalty is being settled. The net effect is that the maximum penalty the department may assess for a violation is \$1,000, whether it occurred for more than one day or not.

Over the past 8 years the department has pursued 60 different cases and the average penalty is around \$1,000. The department does not feel that a penalty of this size provides an adequate deterrent nor does it capture the economic benefit that might be realized by the violator as a result of the violation. Therefore the department proposes in this amendment to strike the phrase "following service of the notice of violation." Striking this language in combination with the new enforcement procedures will allow the department to issue one order that assess penalties for multiple days of violations.

And finally, New Section 5 on page 8 line 19 is a contingency voidness section that states if the U.S. Office of Surface Mining does not approve the amendments to the Strip Mine Act, the amendments are void.

Passage of HB 428 will streamline the reclamation law enforcement process by eliminating an unnecessary step. It will also provide the department to go to court to seek larger penalties for the significant violations and uncooperative violators. With all the controversy over gravel pits, it will result in stronger enforcement of the Opencut Mining Act by allowing the assessment of penalties for multiple days of violation.

It is not possible to predict the number of violations and penalties, but the fiscal note assumes that in FY 2006 there will be three cases and four cases in FY 2007 each with an average penalty of \$5,000.

That concludes my testimony in support of HB 428 and I am available for any questions.