



**ENVIRONMENTAL
RISK SOLUTIONS**

COMPLEX RISK
DEMONSTRATED
RESULTS

EXHIBIT 5
DATE 2.7.05
HB 460

www.jchinsurance.com

February 7, 2005

Chairman Peterson and Committee Members
Montana House Natural Resources Committee
Helena, Montana

Subject: Surety Comments Regarding HB 460

Dear Mr. Chairman,

JCH Insurance Brokers (JCH) is a niche insurance and surety broker providing environmental insurance and surety to the mining industry. We have successfully assisted numerous mine owners to acquire mine reclamation surety instruments for large and small scale mining operations over the last three years. We identified the proposed HB460 recently and would like to offer our comments regarding some aspects of the proposed bill from the perspective of the Surety Industry. We provided the proposed bill to a number of surety companies for their review and comment. The following is a summary of the collective comments of those that responded.

The primary concern identified is maintaining the Surety's Right to Perform in the event of a default by the owner/operator. The proposed Statute creates confusion and ambiguity regarding this condition. We will briefly summarize the areas we have identified that create a concern. Paragraph 1.1 is unclear in that it allows for a "bond" to be filed "conditioned upon the faithful performance of the requirements of this part". This brings to question the available remedies to the Surety in the event of a default. Can the surety step in and perform the actual work or is the only remedy to write a check?

Paragraph 8 also provides some concern with respect to performance and the remedy process.

The proposed language references defaults or partial defaults and how it may require the Surety to "forfeit a portion of the bond..." and "the Surety shall pay the forfeiture amount to the Department within 30 days"... This reiterates the question regarding performance versus payment and raises another issue regarding the cure period the owner/operator may have to fix the deficiency noted by the Department prior to the Department making a claim against the bond. Normally certified notification is provided to both the owner/operator and the Surety stating there is a default and the owner/operator has a certain number of days to remedy the default. If such does not occur, claim will be made against the bond and then the Surety has the right to choose its remedy, i.e.: payment or performance. The bill does not address this normal process and provides further ambiguity.

It is very important that the Surety right to perform be maintained within the law. This is consistent with federal law and the bond forms utilized by the federal agencies with authority over mine permitting and operations. This is an important matter because a surety characterizes the risks it underwrites based on how they would be required to respond in the event of a default. Given the right to perform, the surety can underwrite the bond as a "Performance Bond". If this right is not available, then the bond must be considered a "Financial Guarantee". Financial guarantees are not readily available in today's surety marketplace. Eliminating or creating ambiguity regarding the surety's right to perform could effectively remove traditional surety as an available option in the marketplace.

Additional Comments

The proposed statute also addresses recovery to the Surety from the Principal for all amounts paid out. This is not a necessary as the Surety has this remedy both through common law as well as the standard indemnity agreements normally employed in these contractual arrangements.

Section 8 (b), states the Department may make further "demands" on the Surety bond for further defaults. Under common law, a surety may not be held responsible for amounts that exceed the full bond penalty.

Lastly Section 9 on page 4 should clearly define how the surety may issue notice of cancellation. Typically the stipulation is 120 day notice by the Surety with the understanding that if the Principal does not produce alternative financial assurance within 30 days of the NOC date, the full bond penalty may be drawn upon or the bond is put into default.

We appreciate the opportunity to provide comments to the Montana House Natural Resources Committee. We apologize for being unavailable to attend the committee hearing on this matter today. We are willing to offer assistance to the committee to more clearly define the concerns of the surety industry and help assure that traditional surety may continue to be available to the mining industry in Montana. Please call if we can be of assistance. I may be reached at (303) 820-2626.

Sincerely,

JCH INSURANCE BROKERS

Michael E. Herrmann, P.G.
Mining Programs Manager