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TESTIMONY IN SUPPORT OF HB 429

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Introduction

Mr. Chairman and members of the committee, my name is John Arrigo. I am administrator of the DEQ Enforcement Division and I am here to testify in support of HB 429. I would first like to thank Rep. Gutsche for sponsoring this bill and getting it through the House Natural Resources Committee. HB 429 amends the environmental laws administered by the Department of Environmental Quality to establish one standard process for calculating penalties. The bill 26 pages long because it amends 16 different laws, but it does the same thing to each law so it is fairly simple to understand.

Background

(Handout) The environmental statutes authorize the assessment of administrative or judicial penalties for violations of the laws, rules or permits. Many of the laws direct DEQ to consider specific factors when it calculates a penalty. These factors help DEQ calculate a penalty amount that is commensurate with the severity of the violation. The handout lists the factors that are contained in each law. However, the factors are different from law-to-law and some laws do not define any penalty factors. As a result of this variation the Department has a variety of rules and state or federal policies for penalty calculations **(penalty notebooks)**.

To illustrate what this variety means, I would like to give the following example. Under the Water Quality Act, the Clean Air Act and the Hazardous Waste Act the penalty authority is \$10,000 per day per violation. One would think that a significant violation of any of laws would result in similar penalty amounts. However, with the different methods of calculating a penalty, this is not the case.

One of the common penalty factors in existing law is "circumstances" which relates to the violator's negligence. To calculate a penalty under the Water Quality Act we follow rules that contain a penalty point system. Under the WQA penalty rules, the factor for circumstances can increase a penalty up to \$1,500, depending on the degree of negligence. To calculate a penalty under the Clean Air Act, we use an EPA penalty policy which states the penalty may be increased by as much as 100% depending upon the degree of negligence. So under the Clean Air Act, circumstances can increase a penalty by \$10,000. Circumstances are not mentioned as a factor in the Hazardous Waste Act or in the hazardous waste penalty policy so there is no adjustment for circumstances.

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Herein lies the problem. The variety of penalty rules and policies that have been developed over the years assign different levels of importance to each factor. Under the WQA circumstances can mean a \$1,500 increase, a \$10,000 increase under the Air Quality Law and no increase under the Hazardous Waste Law.

Part of our strength in enforcement is consistency. If the DEQ is able to calculate a similar penalty amount for comparable violations, it reduces subjectivity and improves the equitability. If we can be consistent and objective in calculating penalties, we can defend ourselves against complaints that we are biased, unfair or arbitrary.

Because of all the different penalty policies, I have one staff person who calculates air penalties, another for water, etc. If one of those people leave, we lose our consistency in penalty calculations under a particular law. With one standard method of calculating penalties, the factors will be considered equally under each law and a loss of staff would not significantly affect our consistency.

In my budget proposal for the division, I am not asking for more FTEs or a significant increase in funding. But I am looking for ways to streamline our work and become more efficient. If HB 429 passes, the department will write rules that describe one process to calculate penalties under all the laws. It would also be much easier to train staff rather than on the job training.

The other significant changes that HB 429 provides is the authority to accept supplemental projects to mitigate a portion of a cash penalty, and the authority to hire a collection agency to collect unpaid penalties.

Now Mr. Chairman I would like to go through a brief description of the bill.

Description

New Section 1 on page 1, creates a standard set of penalty factors. The factors are:

- (a) the nature, extent, and gravity of the violation;
- (b) the circumstances of the violation;
- (c) the violator's prior history of any violation, which:
 - (i) must be a violation of a requirement under the authority of the same chapter and part as the violation for which the penalty is being assessed;
 - (ii) must be documented in an administrative order or a judicial order or judgment issued within 3 years prior to the date of the occurrence of the violation for which the penalty is being assessed; and
 - (iii) may not, at the time that the penalty is being assessed, be undergoing or subject to administrative appeal or judicial review;
- (d) the economic benefit or savings resulting from the violator's action;
- (e) the violator's good faith and cooperation;

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(f) the amounts voluntarily expended by the violator, beyond what is required by law or order, to address or mitigate the violation or impacts of the violation; and
(g) other matters that justice may require.

Number 2 on page 2, line 3 states that after the amount of a penalty is determined under (1), the department of environmental quality or the district court, as appropriate, may consider the violator's financial ability to pay the penalty and may institute a payment schedule or suspend all or a portion of the penalty.

Number 3 on page 2, line 6 states that the department of environmental quality may accept a supplemental environmental project as mitigation for a portion of the penalty. A "supplemental environmental project" or SEP is an environmentally beneficial project that a violator agrees to undertake in settlement of an enforcement action but which the violator is not otherwise legally required to perform.

In evaluating SEPs the department generally follows EPA's policy to determine what SEPs are acceptable and how much of the penalty may be offset. If HB 429 is passed, the penalty rules will also describe the process for approving SEPs.

Number 4 on page 2, line 10 lists the sections of law in Title 75 and Title 76 that the penalty factors apply to. These are the Clean Air Act of Montana; the Asbestos Control Act; the Water Quality Act; the Public Water Supply Laws; the Underground Storage Tank Act; the Underground Storage Tank Installer Licensing and Permitting Act; the Major Facility Siting Act; the Montana Solid Waste Act; the Hazardous Waste Act; the Motor Vehicle Recycling and Disposal Act; the Septage Pumper Disposal Act; and the Sanitation in Subdivisions Act.

New Section 2 on page 2, is new law that authorizes the DEQ to contract with a collection agency to collect past due penalties, permit fees, late fees and interest. The debt may also be assigned to the Department of Revenue for collection. The department currently has about \$1,3 million in outstanding penalty payments. Most of these judgments are against entities that are out of business and are unable to pay, so the department does not expect it will ever collect some of these penalties. The department also places a lien on properties when it obtains a money judgment from a court to try and obtain payment of penalties when the property is sold. Sometimes, penalties are assessed against people who have money and can pay, but are deadbeats and are unwilling to pay any penalty. In those instances, the department could benefit from the services of a collection agency.

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We have referred collections to the department of revenue, but they are limited to intercepting payments from the state to individuals, such as tax returns. Apparently use of a collection agency has really helped the Dept. of Labor and Industry collect past due workers comp premiums.

Page 2, line 20 states that the reasonable costs of the collection service may be added to the debt for which collection is sought.

Page 2, line 24 states that money collected by a collection service must be paid to the DEQ and deposited in the general fund or special revenue account as specified in statute, except the collection service may retain the costs of collection, or if the total debt is not collected, a portion of the money approved by DEQ. The department does not have money to contract with a collection agency so the cost of collection is added to the debt and to pay the collection service out of the money collected.

New Section 3 on page 2, does the same thing as Section 1 by creating a standard set of penalty factors for the Title 82 reclamation laws. These are the Strip and Underground Mine Siting Act; the Strip and Underground Mine Reclamation Act; the Metal Mine Reclamation Act; and the Opencut Mining Act.

The New Section 4, starting on the bottom of page 3, line 30 does the same thing as Section 2 by authorizing the DEQ to use a collection service to collect past due penalties and fees under the Title 82 reclamation laws.

Section 5 on page 4 and 5 amends the Clean Air Act. Subsection (2)(c) on page 5, line 7 amends the statute of limitations for administrative penalties from 12 months to two years to be consistent with the other laws. Line 10 on page 5 amends the Clean Air Act to insert a reference to the new penalty factors and deletes the existing penalty factors.

Mr. Chairman and members of the committee, the remainder of the bill amends the other 15 environmental laws by inserting a reference to the new standard set of penalty factors and deleting the existing factors. With that explanation, I will not go through the remainder of the bill page-by-page.

I have been asked if the standard factors will increase or decrease penalties. I cannot answer that because the rules that will describe the details of the calculation process have not been written. It is not the department's intent to come up with a penalty system that will intentionally increase or decrease penalties. But it is our intention to develop a fair and consistent process for calculating penalties that is based on the penalty policies and rules we use today.

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Mr. Chairman, members of the committee, Rep. Gutsche has a set of amendments to standardize the venue for penalty actions filed in court. These amendments do not affect the penalty factors and the DEQ supports them. Currently in the DEQ has the option of filing an action in the district court of the county where the violation occurred or in the First Judicial District in Lewis and Clark County.

The amendments modify the venue to require that any court action must be filed in the county where the violation occurred or, if mutually agreed to by the parties, in Lewis and Clark County. The amendment was brought forth to address the concern that it would be a burden for people to travel to Helena to appear in court and to put the discussion in the county where the judge would be familiar with the issues.

Finally, I believe there may be other amendments to the list of penalty factors. The idea behind these amendments is modify the factors to allow for higher penalty calculations. The DEQ will not support these amendments. The enforcement legislation work group worked hard on developing the list of penalty factors proposed in HB 429 and came to an agreement. Interested parties from the environmental community initially participated in the work group but withdrew after their suggestions were not accepted. The House Natural Resources Committee was told that there would be no support for amendments for amendments that make this bill more onerous.

If the penalty factors are amendment, I am confident that support for this bill will vanish. I also firmly believe that with the proposed set of factors, the DEQ will be able to assess penalties that are more than adequate. The combination of bills developed by the work group and proposed by DEQ go a long way to fixing some of the problems with efficient enforcement. If after two years the proposed system for calculating penalties does not work, it can be adjusted during the next session.

This concludes my testimony. I request that you vote in favor of HB 429.

Remaining Section-by Section Review

Section 7 - Amended

Section 7 amends 75-2-514 in the Asbestos Control Act to insert a reference to the standard penalty factors for judicial penalties and clarify the venue for judicial actions.

Section 8 - Amended

Section 8 amends 75-2-515 of the Asbestos Control Act to insert a reference to the standard penalty factors for administrative penalties and to delete the existing factors.

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Section 9 - Amended

Section 9 amends 75-5-611 of the Water Quality Act to insert a reference to the standard penalty factors for administrative penalties.

Section 10 - Amended

Section 10 amends 75-5-631 of the Water Quality Act to insert a reference to the standard penalty factors for judicial penalties, to clarify venue, and to delete the existing factors.

Section 11 - Amended

Section 11 amends 75-6-109 of the Public Water Supply Law to insert a reference to the standard penalty factors for administrative penalties.

Section 12 - Amended

Section 12 amends 75-6-114 of the Public Water Supply Law to insert a reference to the standard penalty factors for judicial penalties, to clarify venue and to delete the existing penalty factors.

Section 13 - Amended

Section 13 amends 75-10-228 of the Solid Waste Management Act to insert a reference to the standard penalty factors for judicial penalties and to clarify venue.

Section 14 - Amended

Section 14 amends 75-10-417 of the Hazardous Waste Act to insert a reference to the standard penalty factors for administrative penalties and to clarify venue.

Section 15 - Amended

Section 15 amends 75-10-424 of the Hazardous Waste Act to insert a reference to the standard penalty factors for judicial penalties, to delete the existing factors and to clarify venue.

Section 16 - Amended

Section 16 amends 75-10- 542 of the Motor Vehicle Recycling and Disposal Act to insert a reference to the standard penalty factors for judicial penalties and to clarify venue.

Section 17 - Amended

Section 17 amends 75-10-1222 of the Septage Pumper Law to insert reference to the standard penalty factors for administrative penalties.

Section 18 - Amended

Section 18 amends 75-10-1223 of the Septage Pumper Law to insert reference to the standard penalty factors for judicial penalties and to clarify venue.

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Section 19 - Amended

Section 19 amends 75-11-223 in the Underground Storage Tank Installer Licensing and Permitting Act to insert a reference to the standard penalty factors for judicial penalties and to clarify venue.

Section 20 - Amended

Section 20 amends 75-11-516 in the Underground Storage Tank Act to insert a reference to the standard penalty factors for judicial penalties and to clarify venue.

Section 21 - Amended

Section 21 amends 75-11-525 in the Underground Storage Tank Act to insert a reference to the standard penalty factors for administrative penalties and to clarify venue.

Section 22 - Amended

Section 22 amends 75-20-408 in the Major Facility Siting Act to insert a reference to the standard penalty factors for judicial penalties and to clarify venue.

Section 23 - Amended

Section 23 amends 76-4-109 in the Sanitation in Subdivisions Act to insert a reference to the standard penalty factors and to clarify venue.

Section 24 - Amended

Section 24 amends 82-4-141 in the Strip and Underground Mine Siting Act to clarify that the DEQ may initiate a judicial action instead of the Attorney General and to insert a reference to the standard penalty factors for judicial penalties.

Section 25 - Amended

Section 25 amends 82-4-254 in the Strip and Underground Mine Reclamation Act to insert a reference to the standard penalty factors for administrative penalties and to clarify that the DEQ may initiate a judicial action instead of the Attorney General.

Section 26 - Amended

Section 26 amends 82-4-361 of the Metal Mine Reclamation Laws to insert a reference to the standard penalty factors for administrative penalties and to delete the existing factors.

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Section 27 - Amended

Section 27 amends 82-4-441 in the Opencut Mining Act to insert a reference to the standard penalty factors for administrative penalties and to delete the existing factors.

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Section 28 - New Section

Section 28 is codification instructions.

Section 29 - New Section

Section 29 is a savings clause to address penalty actions that were begun before the effective date of this act.

Section 30 - New Section

Section 30 is a contingency voidness clause in the event the U.S. Office of Surface Mining does not approve amendments to the Strip and Underground Mine Reclamation Act.

Section 31 - New Section

Section 31 provides a January 1, 2006 effective date. This delayed effective date is necessary to provide the Department and the Board of Environmental Review the opportunity to develop and promulgate rules.