

**MONTANA 59<sup>TH</sup> LEGISLATURE**  
**SENATE NATURAL RESOURCES COMMITTEE**  
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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 and her hard work for getting this bill through the House. HB 428 amends the administrative enforcement procedures described in 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. HB 428 also adds a \$5,000 judicial penalty to Metal Mine Act and the Opencut Act.

During the interim, the DEQ formed a work group of interested parties to help us write legislation that would improve enforcement. HB 428 is one of three pieces of legislation that came out of the group. Although the work group was composed primarily of industry representatives, the legislation, especially HB 428 is not friendly to industry because it makes it easier for DEQ to take enforcement actions and increases our penalty authority. I would like to take this opportunity to publicly thank the members of the work group for their assistance and input.

**Background**

I would first like to explain what is behind the development of HB 428. Currently, in any district court proceedings, the parties have to follow the Rules of Civil Procedure. These rules describe how to file complaints and motions, present evidence, examine witnesses, etc. In contrast to district court actions, most of DEQ's enforcement activities are in the administrative arena. 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.

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However, there are no set rules or procedures that govern how the DEQ issues its administrative orders. The process DEQ must follow to issue an administrative order, is dependent upon the procedures that are identified in each individual law. 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. Because the two agencies operated differently, the administrative enforcement process is significantly different between Title 75 and 82.

DEQ was formed in 1996 and enforcement was centralized under the enforcement division. DEQ believes that its internal administrative procedures for enforcement should be consistent. I have written what rules and policies I can to improve and standardize the process, but we are at the point where legislation is necessary to correct some inconsistencies. Instead of a huge complicated bill to standardize all the enforcement procedures, HB 428 was developed to make Title 82 enforcement procedures to be similar to the procedures under the Title 75 environmental laws.

(Handout)

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. The order contains a Findings of Fact, Conclusions of Law, and Order that requires the public water supply to conduct the required monitoring and to pay a \$900 penalty. This is the standard process for issuing orders under the Title 75 laws.

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 under the reclamation laws, 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 in the Title 82 reclamation laws by combining the notice of violation statement of proposed penalty and the findings of fact and conclusions of law, allowing the department to issue only one order that contains all of these components. 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.

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In testimony provided before the House Natural Resources Committee, incorrect information was provided that implies a violator must pay a penalty when an order issued and that there are no provisions for DEQ to refund the penalty if the agency is wrong. This is not how the laws work. In reality, DEQ issues an order that assesses a penalty. The order becomes final after thirty days. If the violator agrees with the final order, they pay the penalty. However, if the violator does not agree with the order, they have 30 days to submit an appeal to the Board of Environmental Review. If an order is appealed to the Board, it will conduct a contested case hearing and can then decide whether to uphold, modify or reject DEQ's order. A penalty payment is not due until the Board issues a final order.

Normally what happens whether the order is appealed or not is that the DEQ and the parties negotiate a settlement and avoid a contested case hearing. The penalty is not due until after the case is settled.

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.

Section 2 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.

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Section 2 is amendments to the Metal Mine Reclamation Act. The amendment contained on page 4, line 11 states that when the department has reason to believe that a violation has occurred, it shall send a 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 5 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.

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 only enforcement 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.

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And finally, New Section 5 on page 8 lines 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.