

LEGAL MEMO

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TO: CARY HEGREBERG, EXECUTIVE DIRECTOR, MONTANA CONTRACTORS' ASSOCIATION (MCA)
FROM: MICHAEL S. KAKUK, ATTORNEY
RE: HB361 MEMO - AS AMENDED
DATE: MARCH 15, 2005

PURPOSE AND DISCLAIMER

You have asked me to briefly review and summarize HB361, as amended, reflecting DEQ's proposed amendments to the Open Cut Mining Act (Act), §82-4-401 MCA et. seq. This is provided below.

Please keep in mind that this memo is based on the bill as amended in the House and reflects my understanding of the "intent" of the bill. Additional impacts of this legislation may become evident during public testimony in the Senate. Of course, any further amendments to the bill may have serious implications for the accuracy of this memo.

Note. These comments are my own and should not be attributed to any other person or entity. As always, feel free to contact me with any questions, comments, or to further discuss these issues.

BILL

HB361: Open Cut Act Amendments (LC1306). Requested by the Department of Environmental Quality (DEQ) and introduced by Rep. Gallik.

SECTION ANALYSIS

NEW SECTION: SECTION 1, PAGE 1, LINES 13 THROUGH 15.

Requires an annual report regarding all open cut permits (permits).

Comment:

This replaces the currently required "progress report", is already basically required by DEQ rules, and is not intended to be a substantive change.

82-4-402: SECTION 2, PAGE 1, LINE 17 THROUGH PAGE 2, LINE 2:

Changes "open cut materials mining" to "open cut mining operations". These are not intended to be substantive changes.

82-4-403: SECTION 3, PAGE 2, LINE 4 THROUGH PAGE 4, LINE 5:

Clarifies that all activities regarding, related to, or involved with the permitted activity are defined as "open cut operations" and regulated. (Page 2, lines 19 through 25.) This section also makes numerous changes in style and other editorial changes that are not intended to be substantive.

Comment:

The clarification regarding what activities are regulated by DEQ is necessary to ensure that open cut operators (operators) understand and comply with all statutory requirements. This language should help reduce any confusion regarding what activities need to be permitted and when permit amendments are needed. The House amended the bill (page 2, lines 11 through 13) to clarify that existing private roads are not regulated as "affected land" without the consent of the landowner.

82-4-405: SECTION 4, PAGE 4, LINES 7 THROUGH 9:

Requires fees from other government permittees.

Comment:

Since DEQ must spend the same amount of time processing government permits as it must on non-government permits, it is fair and logical to charge the same permit fees for both entities. This change eliminates the subsidy to government permittees currently being paid non-governmental permittees.

82-4-406: SECTION 5, PAGE 4, LINES 11 THROUGH 16:

Makes minor editorial changes. These changes are not intended to be substantive.

82-4-422: SECTION 6, PAGE 4, LINES 18 THROUGH PAGE 5, LINE 19:

Apart from the imposition of a new annual fee, see page 5, lines 6 through 11, this section makes minor editorial changes. These changes are not intended to be substantive.

Comment:

DEQ argues that it needs increased revenue to adequately implement the Act. DEQ told the MCA that the increased funds will be used to put 2 additional FTE's into the field for more efficient response to operators' and citizens' requests for assistance. MCA has agreed to support this new annual fee if HB361 contains some assurance that DEQ will improve its bond release response time. The House made the requested amendments at the request of the DEQ and MCA. See Section 13 of this Memo, page 5.

82-4-424: SECTION 7, PAGE 5, LINE 21 THROUGH PAGE 6, LINE 4:

Brings the existing language into conformance with the rest of the bill and makes other editorial changes. These are not intended to be substantive changes

82-4-425: SECTION 8, PAGE 6, LINES 6 THROUGH 9:

Brings the existing language into conformance with the rest of the bill and makes other editorial changes. These are not intended to be substantive changes

82-4-426: SECTION 9, PAGE 6, LINES 11 THROUGH 15:

Brings the existing language into conformance with the rest of the bill and makes other editorial changes. These are not intended to be substantive changes.

82-4-427: SECTION 10, PAGE 6, LINE 17 THROUGH PAGE 7, LINE 8:

Clarifies that only permitting and permit amendment decisions are subject to appeal under this section. Otherwise, apart from the reference to a "436 hearing" this section brings the existing language into conformance with the rest of the bill and makes other editorial changes. These are not intended to be substantive changes.

Comment:

MCA has always believed that only permit and permit amendment decision were subject to appeal under this section. Also, see section 15 of this Memo, page 5, for information regarding the "436 hearing". The House amended the bill, (page 6, lines 29 and 30) to allow the venue to be moved to Lewis and Clark County if agreed to by all the parties.

82-4-431: SECTION 11, PAGE 7, LINE 10 THROUGH PAGE 8, LINE 20:

Increases the "short form" cubic yard standard from 2,500 to 5,000 and increases the "short form" administrative requirements. This section also brings the existing language into conformance with the rest of the bill and makes other editorial changes. Apart from the "short form" amendments, these are not intended to be substantive changes.

Comment:

MCA members are generally not affected by the "short form" amendments.

82-4-432: SECTION 12, PAGE 8, LINE 22 THROUGH PAGE 10, LINE 10:

Increases the pre-permitting inspection time frame from 15 to 30 days, see page 9, line 17, and brings the existing language into conformance with the rest of the bill and makes other editorial

changes. Apart from the inspection time frame extension, these are not intended to be substantive changes.

Comment:

DEQ argues that it is having difficulty completing the required pre-permitting inspections within the 15-day time frame. MCA has agreed to the 15-day extension again in consideration of the bond release assurances discussed above in Section 6, page 3 of the Memo.

82-4-433: SECTION 13, PAGE 10, LINE 12 THROUGH PAGE 11, LINE 24:

Allows the DEQ to grant a 60-day extension to an operator to secure bond replacement under certain circumstances. This section also brings the existing language into conformance with the rest of the bill and makes other editorial changes. Apart from the 60-day extension authority, these are not intended to be substantive changes.

Comment:

The House amended this section (page 11, lines 18 through 22) at the request of DEQ and the MCA and inserted minimal bond release criteria. See again Section 6, page 3 of this Memo.

82-4-434: SECTION 14, PAGE 11, LINE 26 THROUGH PAGE 14, LINE 24:

Brings the existing language into conformance with the rest of the bill and makes other editorial changes. These are not intended to be substantive changes.

82-4-436: SECTION 15, PAGE 14, LINE 26 THROUGH PAGE 15, LINE 29:

Clarifies that an amendment proposed by the DEQ is not effective until a final decision has been rendered on such proposed amendment or upon the expiration of the 15-day appeal period. This section also repeals the requirement that any appeals under this section must be brought in the county in which the mine is located and repeals various procedural appeal provisions. (See HB361, subsections (6) and (7), page 15, lines 20 through 29.) However, this requirement is still found in HB361 Section 10 and will, through the

cross reference in subsection (4) [page 15, line 15] apply to appeals under this section.

82-4-441: SECTION 16, PAGE 16, LINE 1 THROUGH PAGE 17, LINE 11:

Clarifies that an operator can request an administrative hearing before the Board of Environmental Review (BER) for notices of violation and corrective action orders.

NEW SECTION: SECTION 17, PAGE 17, LINE 13 THROUGH PAGE 18, LINE 16:

Clarifies that the DEQ is authorized to suspend or revoke permits with a BER administrative hearing appeal process.

NEW SECTIONS: SECTIONS 18 THROUGH 21, PAGE 18, LINES 18 THROUGH 28.

Codification, coordination, repealer, and applicability sections.