

LEGAL MEMO

**TO: CARY HEGREBERG, EXECUTIVE DIRECTOR,
MONTANA CONTRACTORS' ASSOCIATION (MCA)**
FROM: MICHAEL S. KAKUK, ATTORNEY
**RE: HB0583 MEMO, DEQ'S PROPOSED OPEN CUT
AMENDMENTS**
DATE: FEBRUARY 20, 2007

PURPOSE AND DISCLAIMER

You have asked me to briefly review and comment on HB0583, DEQ's proposed 2007 amendments to the Open Cut Act. This is provided below. As always, feel free to contact me with any questions, comments, or to further discuss these issues. NOTE: This memo should be treated as a draft memo, as additional issues may become apparent through additional research or committee testimony.

BILL NUMBER: HB0583

NEW SECTION. Section 1. Annual report. For each permitted operation, the operator shall file an annual report on a form furnished by the department. The report must contain the information and be submitted at times provided in rules of the board.

MSK COMMENT: THIS SECTION REPLACES THE PROGRESS REPORT REQUIRED UNDER CURRENT LAW.

Section 2. Section 82-4-402, MCA, is amended to read:

"82-4-402. Intent, findings, and policy. (1) The legislature, mindful of its constitutional obligations under Article II, section 3, and Article IX of the Montana constitution, has enacted The Opencut Mining Act. It is the legislature's intent that the requirements of this part provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

(2) Because the extraction and use of opencut materials is important to the economy of this state, it is the policy of this state to provide for the

reclamation and conservation of land subjected to opencut ~~materials mining~~ operations. Therefore, it is the purpose of this part:

- (a) to preserve natural resources;
- (b) to aid in the protection of wildlife and aquatic resources;
- (c) to safeguard and reclaim through effective means and methods all agricultural, recreational, home, and industrial sites subjected to or that may be affected by opencut ~~materials mining~~ operations;
- (d) to protect and perpetuate the taxable value of property through reclamation;
- (e) to protect scenic, scientific, historic, or other unique areas; and
- (f) to promote the health, safety, and general welfare of the people of this state."

MSK COMMENT: THE CHANGE FROM "MINING" TO "OPEN CUT OPERATIONS" ABOVE AND THROUGHOUT THE ACT, REFLECTS AN UNDERSTANDING THAT THE ACT COVERS MORE THAN JUST "MINING". HOWEVER, SEE SECTION 3(7), PAGE 3, FOR ONE POTENTIAL PROBLEM WITH THIS BROAD SCOPE OF COVERAGE.

Section 3. Section 82-4-403, MCA, is amended to read:

"82-4-403. Definitions. When used in this part, unless a different meaning clearly appears from the context, the following definitions apply:

(1) "Affected land" means the area of land and land covered by water that is disturbed by opencut ~~mining~~ operations, including the area from which overburden or ~~material~~ materials are to be or ~~has~~ have been removed and upon which the overburden is to be or has been deposited, existing private roads that are used and roads constructed to gain access to the material materials, areas of processing facilities on or contiguous to the opencut mine, treatment and sedimentation ponds, soil and material materials stockpile areas on or contiguous to the opencut mine, and any other surface or subsurface disturbance associated with opencut operations.

MSK COMMENT: THESE CHANGES ALSO TOUCH UPON THE NEW DEFINITION TO "OPEN CUT OPERATIONS". (SECTION 3(7), BELOW.) ALSO, WHAT DOES "CONTIGUOUS" MEAN AS USED ABOVE?

For the purposes of this subsection, an existing private road may be included as affected land only with the landowner's consent.

(2) "Amendment" means a change to the approved permit.

(2)(3) "Board" means the board of environmental review provided for in 2-15-3502.

~~(3)~~(4) "Department" means the department of environmental quality provided for in 2-15-3501.

~~(4)~~ "Final cut" means the last pit created in an open-cut mined area.

(5) "Landowner" means the ~~owner of~~ holder of legal title to land subjected to an ~~open-cut mining~~ open-cut operation.

(6) "Materials" means bentonite, clay, scoria, peat, sand, soil materials, ~~or gravel, or mixtures of those substances.~~

(7) "Open-cut ~~mining operation~~" means the ~~mining of materials by following activities, if they are conducted for the primary purpose of sale or utilization of materials:~~

(a) ~~(i) removing the overburden lying upon natural deposits of materials and mining directly from the exposed natural deposits; or~~

~~(b)(ii) mining directly from natural deposits of materials;~~

~~(b) mine site preparation, including access;~~

~~(c) processing of materials within the area that is to be mined or an area immediately adjoining the area that is to be mined;~~

MSK COMMENT: WHAT DOES "PROCESSING" MEAN? ALSO, WHAT DOES "IMMEDIATELY" MEAN? IS ACROSS THE ROAD FROM THE PERMIT AREA "IMMEDIATELY ADJOINING"?

~~(d) transportation of materials within the permit area;~~

~~(e) storing or stockpiling of materials at or immediately adjoining an area included in subsection (7)(c) or (7)(f);~~

MSK COMMENT: AGAIN, WHAT DOES "IMMEDIATELY" MEAN?

~~(f) processing of materials within 1,000 feet of an area on which an activity listed in subsections (7)(a) through (7)(e) occurs;~~

MSK COMMENT: NOTE THE BROAD DEFINITION OF "PROCESSING FACILITIES" IN SECTION 3(12), PAGE 4. ALSO, HOW WILL THE 1000' BE MEASURED:

- ***FROM PERMIT BOUNDARY TO THE EQUIPMENT ITSELF? IF SO, IS THAT TO THE CENTER OF THE EQUIPMENT OR THE EDGE OF THE EQUIPMENT?***
- ***FROM PERMIT BOUNDARY TO THE BOUNDARY OF THE PARCEL ON WHICH THE EQUIPMENT IS LOCATED?***

WHILE DEQ TELLS ME THAT IT IS NOT THEIR INTENT TO BROADEN THE ACT'S APPLICABILITY OR TO COVER ANYTHING OUTSIDE OF THE PERMIT AREA THAT'S EXACTLY WHAT THIS SECTION APPEARS TO DO.

~~(g) reclamation of affected land; and~~

(h) any other associated surface or subsurface activity conducted on an area immediately adjoining the area to be mined.

COMMENT: WHAT DOES "ANY OTHER ACTIVITY" MEAN?

(8) "Operator" means a person engaged in or controlling an ~~open-cut~~ open-cut mining operation. When a permit has been issued for an operation, a person who removes materials from the site under the control of the operator is not considered an operator.

(9) "Overburden" means ~~all of the earth and other materials that lie~~ lies above a natural deposit of materials.

(10) "Person" means:

- (a) a natural person;
- (b) a firm, association, partnership, cooperative, or corporation;
- (c) a department, agency, or instrumentality of the state or any governmental subdivision; or
- (d) any other entity.

(11) "Plan of operation" means a plan that:

- (a) meets the requirements of 82-4-434; and
- (b) contains a description of current land use, topographical data, hydrologic data, soils data, proposed mine areas, proposed mining and processing operations, proposed reclamation, and appropriate maps.

MSK COMMENT: IN RESPONSE TO A QUESTION REGARDING THE LEVEL OF DETAIL NECESSARY TO MEET THE ABOVE REQUIREMENT, DEQ TOLD ME THAT THIS SECTION IS ALREADY FURTHER EXPLAINED AND LIMITED IN RULE. ARE ANY OF YOUR MEMBERS HAVING PROBLEMS WITH THE RULES?

~~(11)~~(12) "Processing facilities" means:

- (a) all crushers, screens, and pug mills; and
- (b) asphalt, wash, or concrete plants; and
- (c) other equipment used in processing open-cut materials.

MSK COMMENT: PLEASE NOTE THAT "PROCESSING" IS INCLUDED AS PART OF THE DEFINITION OF "AFFECTED LAND" AND PROCESSING ON AFFECTED LAND CONTIGUOUS TO A PERMITTED AREA ALSO REQUIRES A PERMIT. I ASK AGAIN, WHAT IS "CONTIGUOUS" LAND UNDER THIS ACT? SEE SECTION 3(1), PAGE 2.

(12) "Progress report" means a report on a form provided by the department, with appropriate maps, that shows:

- ~~(a) any change in ownership or control of the affected land and includes a landowner consent form if a change has occurred;~~

- ~~—(b) any change in personnel who are in charge of the operation or responsible for reclamation;~~
- ~~—(c) any change in any contractors or subcontractors who will be working at the site; and~~
- ~~—(d) all land that has been affected by the operation.~~

MSK COMMENT: "PROGRESS REPORT" IS NOW REPLACED BY "ANNUAL REPORT". SEE SECTION 1, PAGE 1.

(13) "Reclamation" means the reconditioning of the ~~area of land~~ affected ~~land by opencut mining operations~~ to make the area suitable for productive use, including but not limited to forestry, agriculture, grazing, wildlife, recreation, or residential ~~and or industrial sites development~~.

MSK COMMENT: "RECLAMATION PLAN" IS NOW REPLACED BY "PLAN OF OPERATIONS". SEE SECTION 3(11), PAGE 4.

(14) ~~"Reclamation plan" means a plan that:~~

- ~~—(a) meets the requirements of 82-4-434; and~~
 - ~~—(b) contains a description of current land use, topographical data, water data, soils data, leased areas, and intended mine areas and an explanation of proposed reclamation of the land, including appropriate maps.~~
- ~~—(15) "Refuse" means all waste material directly connected with the opencut mining operations.~~

~~(16)~~(14) "Soil materials" are those horizons that contain topsoil or other soils leached free of deleterious salts; "Soil" means the dark or root-bearing surface matter that has been generated through time by the interaction of biological activity, climate, topography, and parent material and that are is capable of sustaining plant growth, and that are is recognized and identified as such by standard authorities and methods.

~~(17) "Spoil" means the overburden that is disturbed from its natural state in the process of opencut mining."~~

Section 4. Section 82-4-405, MCA, is amended to read:

"82-4-405. Inapplicability to government. The provisions of this part relating to fees or bonds do not apply to the federal government or its agencies, the state of Montana, counties, cities, or towns."

MSK COMMENT: DEQ IS AGAIN GOING AFTER LOCAL GOVERNMENTS FOR "FEES".

Section 5. Section 82-4-406, MCA, is amended to read:

"82-4-406. Exemption -- opencut operations on federal and state lands. This part is not applicable to operations on certain federal and state lands as specified by the board, provided it is first determined by the board that federal law laws, or regulations, or rules administered or issued by the federal agency or state agency administering or having jurisdiction over the affected land impose controls for reclamation of opencut operations on those lands equal to or greater than those imposed by this part."

MSK COMMENT: IT IS HOPED THAT THESE TRANSFERS OF AUTHORITY WILL SAVE DEQ MONEY. NOTE THAT THESE TRIBAL AND FEDERAL REGULATORS CAN BE MORE STRICT THAN DEQ.

Section 6. Section 82-4-422, MCA, is amended to read:

"82-4-422. Powers, duties, and functions. (1) The department has the powers, duties, and functions to:

(a) issue permits when, ~~it is found~~ on the basis of the information set forth in the application and an evaluation of the ~~operation~~ proposed opencut operations, by the department finds that the requirements of this part and rules adopted to implement this part will be observed ~~and that the operation and the reclamation of the affected area can be carried out consistently with the purpose of this part;~~

(b) amend permits in accordance with the provisions of 82-4-436;

(c) reclaim any affected land with respect to which a bond has been forfeited; ~~and~~

(d) make investigations or inspections that are considered necessary to ensure compliance with any provision of this part; ~~and~~

(e) enforce and administer the provisions of this part and issue orders necessary to implement the provisions of this part.

(2) The board shall:

(a) adopt rules that pertain to opencut ~~mining~~ operations in order to accomplish the purposes of this part;

(b) adopt rules:

(i) establishing uniform procedures for filing of necessary records;

(ii) providing procedures for the issuance of permits; and for any other matters of administration not specifically enumerated in this part filing of annual reports; and

(iii) providing other administrative requirements that the board considers necessary to implement this part; and

(c) conduct hearings and, for the purposes of conducting those hearings, administer oaths and affirmations, subpoena witnesses, compel attendance of witnesses, hear evidence, and require the production of any books, papers,

correspondence, memoranda, agreements, documents, or other records relevant or material to the inquiry."

MSK COMMENT: CLEAN UP TO MAKE THIS SECTION CONSISTENT WITH THE OTHER AMENDMENTS.

Section 7. Section 82-4-424, MCA, is amended to read:

"82-4-424. Receipt and expenditure of funds -- disposition of fees, fines, penalties, and other money. (1) The department may receive any federal funds, state funds, or any other funds for the reclamation of ~~land~~ affected ~~land~~ by opencut mining. The department may cause the reclamation work to be done by its employees, by employees of other governmental agencies, by soil conservation districts, or through contracts with qualified persons.

(2) All ~~fees, fines, penalties, and other money~~ paid under the provisions of this part must be deposited in the environmental rehabilitation and response account in the state special revenue fund provided for in 75-1-110. Funds held by the department as bond or as a result of bond forfeiture that are no longer needed for reclamation and for which the department is not able to locate a surety or other person who owns the funds after diligent search must be deposited in the environmental rehabilitation and response account in the state special revenue fund."

MSK COMMENT: CLEAN UP TO MAKE THIS SECTION CONSISTENT WITH THE OTHER AMENDMENTS.

Section 8. Section 82-4-425, MCA, is amended to read:

"82-4-425. Inspection of opencut mining operations. The department or its accredited representatives may enter upon lands subjected to opencut mining operations at all reasonable times for the purpose of inspection to determine whether the provisions of this part have been complied with."

MSK COMMENT: CLEAN UP TO MAKE THIS SECTION CONSISTENT WITH THE OTHER AMENDMENTS.

Section 9. Section 82-4-426, MCA, is amended to read:

"82-4-426. Reclamation of land on which bond forfeited. In keeping with the provisions of this part, the department may reclaim any affected ~~lands~~ land with respect to which a bond has been forfeited. ~~If the amount of the forfeited bond exceeds the cost of reclamation, the excess must be deposited in the environmental rehabilitation and response account in the state special revenue fund provided for in 75-1-110."~~

MSK COMMENT: CLEAN UP TO MAKE THIS SECTION CONSISTENT WITH THE OTHER AMENDMENTS.

Section 10. Section 82-4-427, MCA, is amended to read:

"82-4-427. Hearing -- appeal -- venue. (1) A person who is aggrieved whose interests are or may be adversely affected by a final decision of the department to approve or disapprove a permit application and accompanying material or a permit amendment application and accompanying material under this part is entitled to a hearing before the board, if a written request stating the reasons for the appeal is submitted to the board within 30 days of the department's decision.

(2) An operator may request a hearing before the board on:

(a) a final decision of the department director pursuant to 82-4-436(4) by submitting a request for a hearing within 15 days of receipt of notice of the director's decision; and

(b) an order of suspension or revocation issued under [section 17] by filing a request for hearing within 30 days of receipt of the decision.

(3) The operator or the landowner may request a hearing before the board on a decision on a bond release application.

(4) The contested case provisions of the Montana Administrative Procedure Act, Title 2, chapter 4, part 6, apply to a hearing held under this section.

~~(3)~~(5) ~~An action to challenge the issuance of a permit~~ A petition for judicial review of a board decision made pursuant to this section must be brought in the county in which the permitted activity is proposed to occur or, if mutually agreed upon by both parties in the action, in the first judicial district, Lewis and Clark County. If an activity is proposed to occur in more than one county, the action may be brought in any of the counties in which the activity is proposed to occur.

~~(4)~~(6) ~~A judicial challenge to a permit issued pursuant to this part by a party other than the permitholder or applicant~~ The petition for judicial review must include the party to whom the permit was issued or the applicant unless otherwise agreed to by the permitholder or applicant. All judicial challenges of permits for projects with a project cost, as determined by the court, of more than \$1 million must have precedence over any civil cause of a different nature pending in that court. If the court determines that the challenge was without merit or was for an improper purpose, such as to harass, to cause unnecessary delay, or to impose needless or increased cost in litigation, the court may award attorney fees and costs incurred in defending the action."

MSK COMMENT: THIS SECTION HAS BEEN REDRAFTED TO ALLOW AN UNSUCCESSFUL PERMIT "APPLICANT" TO ALSO PETITION FOR JUDICIAL REVIEW.

Section 11. Section 82-4-431, MCA, is amended to read:

"82-4-431. Permit for mining, processing, and reclamation required.

(1) An operator may not conduct ~~open-cut mining operations~~ an open-cut operation that ~~result~~ results in the removal of a total of 10,000 cubic yards or more of materials and overburden until the department has issued a permit to the operator ~~for the reclamation of the land affected.~~ A person ~~A person~~ An operator may not, without a permit, remove materials or overburden from a site from which a total of 10,000 cubic yards or more of materials and overburden in the aggregate has been removed. An operator conducting a number of open-cut operations, each of which results in the removal of less than 10,000 cubic yards of materials and overburden but that result in the removal of 10,000 cubic yards or more of materials and overburden in the aggregate, is subject to the provisions of this part, except as provided in this section.

(2) Except as provided in or conditioned under subsections (3) and (4), an operator who holds a permit ~~for reclamation~~ under this part may ~~operate~~ conduct an ~~open-cut mine~~ open-cut operation without first securing an additional permit or an amendment to ~~the~~ an existing permit ~~or bond~~ if the ~~mine~~ open-cut operation meets the following criteria:

(a) the total amount of materials and overburden removed from the site does not exceed 2,500 5,000 cubic yards and the total area from which the materials and overburden are removed does not exceed 2 acres; and

(b) the operator:

(i) notifies submits information on the site and proposed plan of operation on a form provided by the department prior to beginning operations the open-cut operation; and,

(ii) within 30 180 days of notifying the department, submits a completed site information submitting the form, salvages and stockpiles all root-bearing soil materials from the area to be disturbed, removes the materials, regrades grades the affected area land to 3:1 or flatter slope and slopes, blends the reclaimed area graded land into the adjacent surrounding topography, and during the first appropriate growing season, replaces an appropriate amount of overburden and all topsoil and soil, and reclaims to conditions present prior to mining all access roads used for the operation, unless the landowner requests in writing that specific roads or portions of the roads remain open. Roads left open at the landowner's request must be sized to support the use of the road after open-cut operations.

MSK COMMENT: DEQ STATES THAT THE GOV'S OFFICE OBJECTED TO THIS INCREASE IN "EXEMPT" CUBIC YARDAGE FROM 2,500 TO 10,000 - BUT GOV'S STAFF PROBABLY DID NOT UNDERSTAND ITS INTENT OR EFFECT. THIS PROPOSED CHANGE WOULD ALLOW AN ALREADY PERMITTED OPERATION TO EXTEND ITS PERMIT BOUNDARIES WITHOUT PRIOR APPROVAL FROM DEQ. DEQ STATES THAT THIS IS PROBABLY ONLY RELEVANT IN EASTERN MONTANA AND IS NOT THAT BIG OF A CHANGE.

(iii) reseeds or revegetates as required by the department at the first seasonal opportunity, seeds or plants all affected land to vegetative species that meet the requirements of 82-4-434.

(3) The department may refuse to approve an application for issuance of a permit under subsection (1) or ~~allow~~ may prohibit the operator to ~~operate from conducting an opencut mine operation~~ under ~~subsections (1) and subsection (2)~~ if, at the time of notification by the operator to the department, the operator has a pattern of violations or is in current violation of this part, rules adopted under this part, or provisions of a permit ~~for~~ reclamation.

(4) The department may require an additional bond as a condition for the conduct of an opencut operation ~~of an opencut mine~~ under subsection (2).

(5) Opencut mines operations described in subsection (2) may not be placed occur:

(a) in flowing, ephemeral, or intermittent, or perennial streams;

~~(b) in the bottom or head of a confined drainage;~~

~~(c)~~ (b) in an area where the ~~operation~~ opencut operation will intercept surface water, ground water, or intercept any slope that is ~~naturally~~ steeper than 3:1; or

~~(d)~~ (c) in any area where mining would be restricted by other laws.

(6) Sand and gravel opencut mines operations must meet applicable local zoning regulations adopted under Title 76, chapter 2."

Section 12. Section 82-4-432, MCA, is amended to read:

"82-4-432. Application for permit -- contents -- issuance -- amendment. (1) ~~Applications~~ An application for a permit must be made ~~upon a form using forms~~ furnished by the department. ~~The form and~~ must contain the following:

(a) the name of the ~~operator~~ applicant and, if other than the owner of the land, the name and address of the owner;

(b) the type of operation to be conducted;

(c) the estimated volume of earth overburden and materials to be removed, as accurately as the volume may then be estimated, and the volume that has been previously removed, if any;

(d) the location of the proposed opencut operation by legal subdivision, section, township and range, description and county;

(e) the date when the operation was or will be commenced opencut operation is proposed to commence; and

(f) a statement that the applicant has the legal right and power, by legal estate owned, to mine, by opencut mining, to mine the designated materials in the lands described.

(2) The application must be accompanied by:

(a) a bond or security meeting the requirements as set out in this part;

~~(b) a fee of \$50 for an application to mine bentonite, clay, scoria, sand, or gravel;~~

~~(e)(b)~~ a statement from the local governing body having jurisdiction over the area to be mined certifying that a the proposed sand and gravel opencut mine and its operating and reclamation plans comply operation complies with applicable local zoning regulations adopted under Title 76, chapter 2; and

~~(d)(c)~~ the operator's plan of operation and a complete reclamation plan a plan of operation that meets the requirements of 82-4-434; and

(d) written documentation that the landowner has been consulted about the proposed plan of operation.

(3) If, prior to applying for a permit, a person notifies the department of the intention to submit an application and requests that the department to examine the area to be mined, the department shall cause the area to be examined examine the area and make recommendations to the person regarding reclamation the proposed opencut operation. The person may request a meeting with the department. The department shall hold a meeting if requested.

(4) (a) Except as provided in 75-1-208(4)(b), upon receipt of an application containing all items listed in subsections (1) and (2), the department shall, within ~~15~~ 30 days, review the application, inspect the proposed site, and notify the person whether or not the department believes that the application is complete acceptable. An application is acceptable if it complies with all requirements of subsections (1) and (2). If the department determines that the application is not complete acceptable, the department shall include in the notification a detailed identification of all deficiencies.

MSK COMMENT: THERE DID NOT SEEM TO BE MUCH CONCERN OVER THE ABOVE CHANGE FROM 15 TO 30 DAYS SINCE YOUR MEMBERS DO NOT BELIEVE

DEQ WILL BE ABLE TO MEET THE 30 DAY DEADLINE WITH ANY MORE CONSISTENCY THAN THEY ARE NOW ABLE TO MEET THE 15 DAY DEADLINE.

(b) Within 30 days of receipt of a complete application the applicant's responses to the identified deficiencies, the department shall notify the applicant if it has approved or denied the application is acceptable or not. If the department denies the application is unacceptable, the notice must include a detailed explanation describing why the application was denied of the remaining deficiencies.

(c) The department may for sufficient cause extend its period of review either or both of the 30-day review periods for an additional 30 days if it notifies the person applicant of the extension prior to the end of the respective original 30-day period. The department shall include in the notification of extension the reason for the extension.

(d) ~~Upon approval of~~ If the application is acceptable, the department shall issue a permit to the operator that entitles the operator to ~~continue or engage in the opencut mining operation~~ on the land described in the application.

(5) An operator ~~desiring to have a permit amended to cover additional contiguous or nearby land may file an amended~~ may amend a permit by submitting an amendment application with to the department. Upon receipt of the ~~amended application and any additional bond that may be required and upon agreement to the terms of the amendment by the parties,~~ amendment application, the department shall review it in accordance with the requirements and procedures in subsection (4). If the amendment application is acceptable, the department ~~may~~ shall issue an amendment to the original permit covering the additional land described in the amended application ~~without the payment of any additional fee~~.

~~—(6) An operator may withdraw any land covered by a permit, except affected land, by notifying the department of the withdrawal, in which case the penalty of the bond or security filed by the operator pursuant to the provisions of this part must be reduced proportionately."~~

Section 13. Section 82-4-433, MCA, is amended to read:

"82-4-433. Bond. (1) A bond required to be filed under this part by the operator ~~must be in a form that the department prescribes,~~ Before a permit or permit amendment may be issued, a surety bond made payable to the state of Montana and conditioned upon the operator's full compliance with all requirements of this part, the rules ~~of the board~~ adopted under this part, and the permit must be submitted to and approved by the department. The bond must be signed by the ~~landowner or operator, as appropriate,~~ applicant as

principal; and by a good and sufficient corporate surety licensed to do business in the state of Montana, as surety. ~~The bond must be in an amount not to exceed the costs of restoration required by this part as determined by the department. The amount of the bond may not be less than \$200 or more than \$1,000 an acre unless the department determines, in writing, that the cost of restoration of the land exceeds \$1,000 an acre. Upon the cost determination, the~~ The bond amount must be set determined by the department at the cost of restoring the reclamation of the affected land by the department. The applicant shall submit a bond that is no less than the amount determined by the department.

MSK COMMENT: I HAVE HEARD NO COMPLAINTS FROM YOUR MEMBERS REGARDING REMOVING THE \$1,000 PER ACRE RECLAMATION BOND CAP CURRENTLY IN STATUTE.

(2) (a) For ~~open cut mining~~ open cut operations on federal land within the state, the department may accept a bond payable to the state of Montana and the federal agency administering the land. The bond must provide at least the same amount of financial guarantee as required by this part.

(b) The bond must provide that the department may forfeit the bond without the concurrence of the federal land management agency. The bond may provide that the federal land management agency may forfeit the bond without the concurrence of the department. Upon forfeiture by either agency, the bond must be payable to the department and may also be payable to the federal land management agency. If the bond is payable to the department and the federal land management agency, the department, before accepting the bond, shall enter into an agreement or memorandum of understanding with the federal land management agency providing for administration of the bond funds in a manner that will allow the department to provide for compliance with the requirements of this part, the rules adopted under this part, and the permit.

(3) In lieu of ~~the submitting a surety bond pursuant to subsection (1), the operator may deposit with the department~~ submit cash, government securities, a letter of credit in a form acceptable to the department, or a bond with property sureties in an amount equal to that of the required bond on conditions as prescribed in this part. In the discretion of the department, surety bond requirements may be fulfilled by the operator's posting a bond with land and improvements and facilities located on the land as security, in which event a surety may not be required but the department may require that the amount of the bond be adjusted to reimburse the department for foreclosure costs.

~~(4) The penalty of the bond or amount of cash and securities other security must be increased or reduced from time to time as provided in this part.~~

~~(5) The bond or security remains in effect until the affected land has been reclaimed as provided under the permit and the reclamation has been approved and the bond or security has been released by the department department has approved the reclamation and released the bond or security. The bond or security may cover only actual affected land and may must be increased or reduced to cover only those unreclaimed acreages as remain unreclaimed.~~

~~(4)(6) If the license of a surety upon that has issued a bond filed with the department pursuant to this part is suspended or revoked, the operator, within 30 days after receiving notice of the suspension or revocation from the department, shall substitute for that surety a good and sufficient bond from another surety licensed to do business in the state or shall submit another type of security pursuant to subsection (3). Upon failure of the operator to make the bond substitution of surety within the 30-day time period, the department may shall suspend the permit of the operator to conduct opencut operations upon the land described in the permit until the substitution has been made. If the operator demonstrates in writing that the operator has been pursuing a replacement bond in good faith but additional time is necessary to complete the transaction, the department may grant up to an additional 60 days for the operator to submit a replacement bond before suspending the permit.~~

~~(5) The department shall cause the reclamation of any affected land with respect to which a bond has been forfeited.~~

~~(6)(7) Whenever an operator has completed all of the reclamation requirements under the provisions of this part as to any affected land, the operator shall notify the department of the completed requirements and may request bond release. If the board department releases the operator from further obligation regarding any affected land, the penalty of the bond must be reduced proportionately. The department shall notify the operator and the landowner in writing of the decision on the bond release application."~~

Section 14. Section 82-4-434, MCA, is amended to read:

"82-4-434. Reclamation plan part of permit Plan of operation -- requirements. ~~The reclamation plan must meet the following requirements:~~
—(1) ~~The department shall submit each reclamation plan or operator-proposed amendments to the reclamation plan to the landowner for recommendations and shall consider those recommendations in deciding~~

~~whether to approve or disapprove any plan or operator proposed amendments. The department may seek technical help from any state or federal agency.~~ (1) The department shall immediately submit ~~the a~~ a plan of operation received in a permit or permit amendment application involving expansion of the permit area ~~immediately~~ to the state historic preservation office for evaluation of possible archaeological or historical values in the area to be mined.

(2) The department ~~may approve~~ shall accept a reclamation plan of operation ~~only~~ if the department ~~has found~~ finds that the plan ~~provides for the best possible reclamation under the circumstances at the time, so~~ complies with the requirements of this part and the rules adopted pursuant to this part and that after mining operations are the opencut operation is completed, the affected land will be reclaimed to a productive use. Once the reclamation plan of operation is accepted, in writing, by the department, the plan must become it becomes a part of the permit but is subject to annual review and ~~modification~~ amendment by the department. Any ~~modification~~ amendment by the department must comply with the provisions of 82-4-436(2).

~~(2)(3)~~ (3) The department may not ~~approve a reclamation plan or~~ accept a plan of ~~operations~~ operation unless the ~~plans provide~~ plan provides:

(a) that the affected land will be reclaimed for one or more specified uses, including but not limited to forest, pasture, orchard, cropland, residence, recreation, industry, habitat for wildlife, including food, cover, or water, or other reasonable, practical, and achievable uses;

~~(b)~~ that ~~to the extent reasonable and practicable, the operator will establish vegetative cover commensurate with the proposed land use;~~

~~(e)~~(b) that ~~whenever operations result~~ the opencut operation results in a need to prevent acid drainage or sedimentation on or in adjoining lands or streams, ~~for the construction of earth dams~~ catchments, ponds, or other reasonable devices to control water drainage and sediment will be constructed and maintained, provided the formation of the impoundments or devices will not interfere with other landowners' rights or contribute to water pollution;

~~(d)~~(c) that ~~to accomplish practical utilization of soil and other suitable overburden materials, the material will be salvaged and utilized for placement replaced on affected areas land, if when required by the reclamation plan by the postmining land use, after completion or termination of that particular phase of the opencut operation mining operations, at a depth sufficient for plant growth on slopes of 3:1 or less. The depth of soil~~

and other suitable overburden materials to be placed on the reclaimed area must be specified in the plan.

~~(e)~~(d) that grading will be commensurate with the result in a postmining topography sought and conducive to the designated postmining land use designated;

~~(f)~~(e) that metal and other waste will be removed or buried on site in a manner that protects water quality and is compatible with the postmining land use or will be disposed of off site in accordance with state laws and rules;

~~(g)~~(f) that all access, haul, and other support roads will be located, constructed, and maintained in such a manner as to control and minimize channeling and other that controls and minimizes erosion;

~~(h)~~ that the operator will submit a progress report annually to the department;

~~(i)~~(g) that all operations the opencut operation will be conducted to avoid range and forest fires and spontaneous combustion and that open burning of carbonaceous materials will be conducted in accordance with suitable practices for fire prevention and control; Approval of the plan for fire prevention and control under this part does not relieve the operator of the duty to comply with the air quality permitting and protection requirement of Title 75, chapter 2.

~~(j)~~(h) that archaeological and historical values in areas to be mined on affected lands will be given appropriate protection;

~~(k)~~(i) that except for those ~~postmine~~ postmining land uses that do not require vegetation, each surface area of the mined premises that will be disturbed will be revegetated when its use for extractive purposes the opencut operation is no longer required;

~~(l)~~(j) that seeding and planting will be done in a manner to achieve a permanent vegetative cover that is suitable for the ~~postmine~~ postmining land use and that retards erosion and that all seed will be drilled unless otherwise provided in the plan;

~~(m)~~(k) that reclamation will be as concurrent with mining operations the opencut operation as feasible and will be completed within a specified length of time;

~~(n)~~(l) that surface water and ground water will be given appropriate protection, consistent with state law, from deterioration of water quality and quantity that may arise as a result of the opencut operation;

~~(o)~~(m) that noise and visual impacts on residential areas will be minimized to the degree practicable through berms, vegetation screens, and reasonable limits on hours of operation; and

~~(p)~~(n) that any additional procedures, including monitoring, that are necessary, consistent with the purposes of this part, to prevent significant physical harm to the affected land or adjacent land, structures, improvements, or life forms will be implemented.

~~(3)~~(4) If reclamation according to the plan of operation has not been completed in the time specified, the department, after 30 days' written notice, shall order the operator to cease mining and, if the operator does not cease, may issue an order to reclaim, a notice of violation, or an order of abatement or may institute an action to enjoin further operation and may sue for damages for breach of the conditions of the permit, for payment of the performance bond, or for both.

~~(4)~~(5) (a) At any time during the term of the permit, the operator may for good reason submit to the department a new ~~reclamation~~ plan of operation or amendments to the existing plan, including extensions of time for reclamation.

(b) The department may approve the proposed new ~~reclamation~~ plan of operation or amendments to the existing plan if:

(i) the new plan of operation or amendments comply with the requirements of this section; and

~~(ii) (A) the operator has in good faith carried on reclamation conducted opencut operations according to the existing plan of operation and the proposed new plan or amendments to the existing plan will result in reclamation as or more desirable than the reclamation proposed under the existing plan; or~~

~~(ii) (B) it is highly improbable that reclamation will be successful unless the existing plan of operation is replaced or amended.~~

~~(c) When accepted, the proposed new reclamation plan or the proposed amendments to the existing plan become a part of the permit.~~

~~(5) The operator shall provide a performance bond or an alternative acceptable to the department in an amount commensurate with the estimated cost of reclamation, but in no case may the bond be less than \$200 an acre. The estimated cost of reclamation must be set forth in the reclamation plan.~~

(6) The permit, ~~reclamation~~ plan of operation, and amendments accepted by the department are a public record and are open to inspection.

~~(7) The permit is effective when signed by the department and the operator and remains in force until terminated by mutual consent or by the department upon 6 months' notice."~~

MSK COMMENT: CLEAN UP TO MAKE THIS SECTION CONSISTENT WITH THE OTHER AMENDMENTS.

Section 15. Section 82-4-436, MCA, is amended to read:

"82-4-436. Plan amendments —venue by department. (1) Unless an amendment to a plan of operation, ~~reclamation plan,~~ or other permit is proposed by the operator, the department may ~~modify~~ amend only the terms of a plan or permit in compliance with this section.

(2) If the department believes, based on credible evidence, that a continued opencut operation under the terms of an existing plan of operation or permit would violate a substantive numerical or narrative state standard or regulation or otherwise violate a purpose of this part, it may propose to the operator an amendment to the plan or permit.

(3) The department shall notify the operator of the proposed amendment in writing. The notice must include:

(a) an identification of the existing plan or permit;
(b) the justification for the amendment, including all test results or other credible evidence that the department relied on in proposing the amendment; and

(c) the text, maps, drawings, and other appropriate information that constitute of the proposed amendment.

(4) The operator may, within 15 days of receipt of the department's amendment notice, request a review of the amendment by the department director. The amendment is not effective or enforceable until 15 days following the issuance of the department's amendment notice or, if a review by the director is requested, until 15 days after the department director affirms or modifies the amendment if a review by the director is requested. A decision by the department director is subject to the contested case provisions in 82-4-427 of the Montana Administrative Procedure Act, provided for in Title 2, chapter 4, parts 6 and 7.

(5) If the operator ~~does not appeal~~ requests a hearing on the proposed amendment, the amendment ~~becomes~~ is not effective and enforceable ~~15 days after the operator receives the notification~~ until completion of the contested case process.

~~(6) An action to challenge the issuance of an amendment pursuant to this section must be brought in the county in which the activity is proposed to occur. If an activity is proposed to occur in more than one county, the action may be brought in any of the counties in which the activity is proposed to occur.~~

~~—(7) A judicial challenge to an amendment issued pursuant to this section by a party other than the amendment holder or applicant must include the party to whom the amendment was issued unless otherwise agreed to by the amendment holder or applicant. All judicial challenges of amendments for~~

~~projects with a project cost, as determined by the court, of more than \$1 million must have precedence over any civil cause of a different nature pending in that court. If the court determines that the challenge was without merit or was for an improper purpose, such as to harass, to cause unnecessary delay, or to impose needless or increased cost in litigation, the court may award attorney fees and costs incurred in defending the action."~~

MSK COMMENT: THESE PROVISIONS HAVE BEEN ADDED TO 82-4-427, SECTION 10, BEGINNING ON PAGE 8.

Section 16. Section 82-4-441, MCA, is amended to read:

"82-4-441. Administrative and judicial penalties -- enforcement. (1)

When the department has reason to believe that a person is in violation of this part, a rule adopted or an order issued under this part, or a term or condition of a permit issued under this part, it shall send a violation letter to the person. The violation letter must describe the provision of the statute, rule, order, or permit alleged to be violated and the facts alleged to constitute the violation. The letter must also recommend corrective actions that are necessary to return to compliance. Issuance of a violation letter under this subsection does not limit the authority of the department under this part to bring a judicial action for penalties or injunctive relief or to initiate an administrative enforcement action.

(2) By issuance of an order pursuant to subsection (5), the department may assess against a person who violates any of the provisions of this part, rules adopted or orders issued under this part, or provisions of a ~~reclamation~~ permit:

(a) an administrative penalty of not less than \$100 or more than \$1,000 for the violation; and

(b) an additional administrative penalty of not less than \$100 or more than \$1,000 for each day during which a violation continues.

(3) The department may bring a judicial action seeking a penalty of not more than \$5,000 against a person who violates any of the provisions of this part, rules adopted or orders issued under this part, or provisions of a permit and a penalty of not more than \$5,000 for each day that the violation continues. In determining the amount of the penalty, the district court shall consider the factors in subsection (4).

(4) Penalties assessed under this section must be determined in accordance with the penalty factors in 82-4-1001.

(5) (a) In addition to the violation letter sent pursuant to subsection (1), the department may also issue an order if it has credible information that a violation listed in subsection (2) has occurred. The order must specify the

provision of the part, rule, order, or permit alleged to be violated and the facts alleged to constitute the violation. The order may require necessary corrective action within a reasonable period of time, may assess an administrative penalty determined in accordance with this section, or both. The order must be served personally or by certified mail.

(b) An order issued pursuant to subsection (5)(a) becomes final unless, within 30 days after the order is served, the person to whom the order is issued submits to the board a written request for a hearing stating the reason for the request. Service of an order by mail is complete 3 business days after mailing. If a request for a hearing is filed, a hearing must be held within a reasonable time under the contested case provisions of the Montana Administrative Procedure Act, Title 2, chapter 4, part 6. After a hearing, the board shall affirm, modify, or rescind the order.

(6) The department may bring an action to enjoin an operator or other person violating or threatening to violate this part, rules adopted pursuant to this part, or a permit issued pursuant to this part. Actions for injunctions or penalties must be filed in the district court of the county in which the opencut ~~mine~~ operation is located or, if mutually agreed on by both parties in the action, in the first judicial district, Lewis and Clark County.

(7) The provisions of this section do not limit the authority of the department to bring a judicial action for penalties or injunctive relief prior to or instead of initiating an administrative enforcement action under this part."

MSK COMMENT: CLEAN UP TO MAKE THIS SECTION CONSISTENT WITH THE OTHER AMENDMENTS.

NEW SECTION. Section 17. Suspension and revocation orders. (1)

(a) The department may, after affording the operator an opportunity for an informal conference, order the suspension of a permit if:

(i) the operator fails to comply with a penalty order or a corrective action order issued pursuant to 82-4-441; or

(ii) the operator has violated this part, a rule adopted pursuant to this part, or the permit and the violation could reasonably be expected to create a danger to the health or safety of persons outside the permit area or significant environmental harm to land, air, or water. The order of suspension must be served on the operator personally or by certified mail addressed to the permanent address shown on the most recently filed annual report. The order of suspension must specify the provision of this part, the rules adopted under this part, or the permit violated and the facts alleged to constitute the violation and must, if the violation has not been corrected, order corrective action within a specified time period.

(b) The department may order immediate suspension of a permit whenever it finds that a violation of this part, the rules adopted under this part, or a permit is creating an imminent danger to the health or safety of persons outside the permit area. The order must require immediate corrective action.

(c) The operator upon whom an order is served may file a request for hearing with the board within 30 days of service of the order. The request for hearing must specify the reason for the request. The filing of a request for hearing on an order issued does not stay the suspension or corrective action requirement, but the board may, upon written request of the operator, stay either or both of these requirements.

(2) If the operator has not complied with the requirements set forth in the order of suspension within the time limits set in the order, the permit may be revoked by order of the department and the performance bond forfeited to the department. The operator may request a hearing before the board by submitting a written request stating the reason for the request to the board within 30 days after service of the order. If a hearing is requested within the 30-day period, the permit may not be revoked and the bond may not be forfeited until the board makes a final decision.

(3) If an operator fails to file the report required under [section 1], the department shall serve personally or by certified mail a notice letter informing the operator of the failure. If the operator does not file the report within 30 days of receipt of the letter, the department may issue a penalty order pursuant to 82-4-441 or a suspension order pursuant to this section. If the permit has been suspended, the department shall reinstate the permit upon compliance.

(4) Maintenance, monitoring, reporting, reclamation, and other activities required by statute, rule, or the permit and intended to protect public health or safety or the environment must continue during any period of suspension unless otherwise provided in the order.

MSK COMMENT: THIS SECTION IS TAKEN FROM THE WATER QUALITY ACT AND HAS, APPARENTLY, WORKED FAIRLY WELL IN THAT CONTEXT. THE NEW SECTION REQUIRES AN "INFORMAL" MEETING BEFORE SUSPENDING A PERMIT AND PROVIDES DUE PROCESS PROTECTIONS FOR THE OPERATOR.

NEW SECTION. Section 18. Codification instruction. [Sections 1 and 17] are intended to be codified as an integral part of Title 82, chapter 4, part 4, and the provisions of Title 82, chapter 4, part 4, apply to [sections 1 and 17].

NEW SECTION. Section 1. {standard} Repealer. Sections 82-4-421 and 82-4-423, MCA, are repealed.