

OPENCUT STAKEHOLDERS GROUP - MINUTES
DECEMBER 14, 2011

The meeting opened at 1:00pm by Ed Coleman.

In attendance: Alan Ringlein – AM Welles Inc; Neil Harrington – Citizen; Mike Newton – Fisher Sand & Gravel; Jerry Bowser – Helena Sand & Gravel; Jackie Flikkema – Knife River; Larry Hoffman – Lewis & Clark County Weed District; Cary Hegreberg – Montana Contractors Association; Cale Fisher – Riverside Contracting, Inc.; Rob Koelzer – Schellinger Construction; Jerry Rice – TMC Inc; Kevin DeTienne – Valley Sand and Gravel; Jim Ferch – DNRC; Teresa Kinley - DNRC; Jean Riley – MDT; Moriah Thunstrom – MDT; Kris Brewer - DEQ IEMB OC; Ed Coleman – DEQ IEMB; JJ Conner – DEQ IEMB OC; Chris Cronin - DEQ IEMB OC; Don Jackson – DEQ IEMB OC; John Arrigo – DEQ ENF; Dan Kenney – DEQ ENF.

▪ **Introduction of Participants**

- Everyone in attendance introduced themselves.

▪ **DEQ Update** – Ed Coleman

- **Staffing** – We've been fully staffed since September.
- **Applications and Bond Releases Processed**
 - New Law Applications
 - As of November 30, 2011, we have processed 375 new law applications and have 46 pending.
 - 42 new law applications processed from Sept 1 until Nov 30.
 - 34 new applications were received from Sept 1 until Nov 30.
 - Permit Backlog Progress
 - As of November 30, 2011, we have processed 274 backlog applications and have 24 pending.
 - 9 backlog applications were processed from Sept 1 until Nov 30.
 - Total Processed - In total since the new law was enacted we have processed 649 applications
 - Bond Releases
 - Pending Bond Release Requests - We have processed 57 bond release requests in 2011. 20 were processed from Sept 1 until Nov 30 and we have 137 pending.
 - Of the 137 active bond release sites, we have inspected, but not processed (winter work) approximately 131 of those sites.

▪ **Opencut Topics**

- **DEQ Air Permitting and Compliance Program** – Chuck Homer
 - A discussion of Clean Air Act regulations relating to:
 - Crushers
 - Pavers
 - Concrete/Asphalt Plants
 - Generators
 - Applicable Fees
- **DEQ Enforcement Division** – Dan Kenney
 - Enforcement Update for 2011
 - 24 new cases
 - 10 APR cases
 - 8 unpermitted sites cases
 - 6 “other” cases (includes outside permit boundary, wasting soil, failure to strip, & other violations)
 - 4 ENF actions at the programs' request
 - Discussion regarding location of plants and need for opencut permit or not
 - Discussion of situations where ENF are going after both landowner and operator in certain situations

- There was a discussion about the 10,000cy threshold and “Primary Purpose.” Below are some guidelines that DEQ has come up with. In this instance, it was discussion about a construction of a pond:

If the primary purpose is to dig the pond, then they can dispose of the gravel however they want. If the primary purpose is to get the gravel, it needs a permit. However, it can be sticky if the operator is not the person who wants the pond dug, because the operator’s primary purpose is to get materials to sell while the landowner’s primary purpose is to get a pond. Whose primary purpose do we look at? Where there are two different parties (the landowner who wants the pond and the operator who wants the gravel), we should look to see whose primary purpose, if either, dominates. If neither dominates – e.g., they are co-equal – you should require a permit because the operator, not the landowner, is the one on whom 82-4-431 imposes the permitting requirement, so we would look to the operator’s primary purpose. One thing to consider in deciding whose primary purpose dominates is to look at payments:

- (a) *If the operator is paying the landowner for the gravel, a permit should be required.*
- (b) *If the landowner is paying the operator to dig the hole and haul away the gravel, then I think it would not need a permit.*
- (c) *If no one pays the other at all, but in exchange for the pond, the landowner gives the operator the gravel he digs out, then I would say a permit is needed because the operator’s primary purpose is to get the product, and where the “primary purposes” of each balances out, we look to the operator’s primary purpose because the operator is the one regulated under 82-4-431, MCA.*

- **DNRC New Appropriations Program – Jim Ferch**
- **Opencut Program Resource Prioritization**
 - Has stayed the same – New Law Permits, Backlog Permits, Bond Releases, Response to Complaints and Compliance Inspections.
 - Carey – Wanted to make Opencut aware that Eastern MT legislatures are getting pressure from constituents and oil companies asking how they can expedite the permitting process.
- **MDT Mitigations** - MDT is looking into additional mitigations (left/right turn lanes, additional lanes, stop signs, etc) in Eastern Montana to deal with drastic increase in truck traffic.
- **Electronic Submittals**
 - Making progress - We’ve had initial internal meetings to discuss potential major problems (e.g. electronic date stamps, unreadable documents, electronic amendments to paper permits) and think that we have come up with solutions.
 - We are meeting again in early January and will hopefully be able to do some testing this winter.
 - Part of the solution will be to address issues with electronic submittals in rule.
 - Cale asked if the program will be accepting shape files in lieu of a BCT. JJ stated that we will be looking at this as a solution down the road.
- **Administrative Rules**
 - MCA was the only outside entity to submit comments. We’ve evaluated those comments and are in the process of going through each rule and making proposed changes if necessary.
 - #1 – most likely cannot be addressed in rules.
 - #2 – cannot change via rules – would take a law change
 - #3 – John Arrigo
 - Judicial actions are generally initiated when all reasonable attempts to resolve violations through the administrative enforcement process have been exhausted and the parties cannot come to an agreement.

However, it is important to note that the statutes allow a civil action to be initiated without first pursuing matters through the administrative enforcement process.

- As a rule, the Department will reserve judicial actions for cases where a violator has shown little or no willingness to resolve past violations and/or pay penalties, where a violator is uncooperative or has created unnecessary delays in returning to compliance, where injunctive relief is necessary to ensure timely remedial action or the abatement of a violation, when the sanctions available for judicial actions are needed to deter others from similar violations, or when the administrative penalty calculated for a violation exceeds statutory authority. Judicial actions will be sought to compel compliance and penalize violators who have failed to comply with an administrative order issued by the Department.
- Administrative and judicial actions are the same for all DEQ programs.
- DEQ legal states there are too many variables to develop procedures, but the ENF Division has a manual that they follow.
- The manual is not currently available on line, but a hard copy can be obtained by contacting the ENF Division at 444-0379.
- ENFs strongest tool is consistency in penalties.
- #4 – program agrees that a clarification can be made to the rules along the lines of the clarification currently in the *How To Obtain And Comply With An Opencut Mining Permit* document:
 - *NOTE: If an Operator intends to remove more than 10,000 cubic yards of material, a permit is required before any Opencut operations begin. The Act does not allow an Operator to begin mining toward the 10,000 cubic yard threshold and apply for a permit as that quantity is being exceeded.*
- Before we formally request initiation of rulemaking in front of the Board of Environmental review, DEQ will informally present all proposed substantive changes to stakeholders for discussion.
- **2013 Legislation**
 - DEQ has started the Executive Planning Process and the Opencut Program is not planning on proposing statutory changes to the Opencut Act.
 - The Montana Contractors Association may consider changes regarding access roads. They are happy with the way things are progressing after the last changes.
- **Training**
 - DEQ has been requested to present at the MT Association of County Road Superintendants meeting in March
 - MCA will talk internally to see if there are any needs for additional forms trainings or best practices trainings.
- **Improvements for Stakeholders Meetings** – It was agreed that all in attendance want to continue to improve the meetings.
- **Next Meeting** - Wednesday, March 14, 1-4pm, Metcalf Room 111