

Memo

To: Coal Board Members
From: Amy Barnes, Legal Counsel
cc: Jennifer Olson
Date: September 4, 2018
Re: Statutory Criterion – 90-6-206(1)(b)

This memo is in response to a request for a legal review of the statutory criteria found at section 90-6-206(1)(b), MCA, “degree of severity of impact from an increase or decrease in coal development or in the consumption of coal by a coal-using energy complex.”

The statutory framework for the Coal Board does not specifically define this statutory criterion; however, Coal Board administrative rule, 8.101.301(2)(b), provides “severity of impact: what has been the rapidity of growth or decline and subsequent development of the problem and the number of people affected.”

As the Board reviews that administrative rule mentioned above, it should also consider the purpose and the designation of impact statutory sections 90-6-201 and 90-6-207, MCA. See statutory sections enclosed. Additionally, the legislative history sheds some light as to what was intended when this statutory criterion was written and passed into law.

When the Coal Board and related statutes were created in 1975, the sponsor Senator Thomas Towe stated, “The advantage of this system is flexibility. Application by whatever is affected can be made to the coal board and *they will determine the severity of impact* and need and decide where the money should go. Any town which can show an impact by coal development would be eligible for funds. If not all the money is necessary, it automatically goes to increase the educational trust fund which benefits all Montanans” (emphasis added).

In 1997, the legislature added language to several sections of the statutory framework for the Coal Board including 90-6-206(1)(b). SB 223 amended subsection (1)(b) from “degree of severity of impact from the coal development” to “degree of severity of impact from *an increase or decrease in coal development or in the consumption of coal by a coal-using energy complex.*” This bill also amended the purpose section adding that one of the purposes of this part is to “assist local governmental units that have been required to expand the provision of public services as a consequence of large-scale development of coal mines and coal-using energy complexes *or as a consequence of a major decline in coal mining or in the operation of coal-using energy complexes.*”

When the sponsor Senator Mack Cole received a question about the definition of “impact” and “major decline,” he responded that, “The Coal Board themselves would have to make that decision of what was major.” He went on to say that he was open to an amendment concerning definitions, but no amendments were proposed. Newell Anderson, a Department of Commerce staff member added, “There is an inherent responsibility of the Coal Board to interpret the realities as they are presented and to justify the funds allocated.”

Based on the comments made by both sponsors, it is clear the legislature intended that the Coal Board has the discretion to define the “severity of impact.” The Coal Board has defined the “severity of impact” within its administrative rules and must adhere to that definition. With that said, the statutory framework, particularly sections 90-6-201 and 90-6-207, should not be disregarded as the Board determines how to interpret and apply the “severity of impact” statutory criterion.

90-6-206. Basis for awarding grants. (1) Grants must be awarded on the basis of:

(a) need;

(b) **degree of severity of impact from an increase or decrease in coal development or in the consumption of coal by a coal-using energy complex;**

(c) availability of funds; and

(d) degree of local effort in meeting these needs.

(2) In determining the degree of local effort, the board shall review the millage rates levied for the present fiscal year in relation to the average millage rates levied during the 3 years immediately preceding the year of application for assistance.

(3) Millage rates for the present fiscal year that are lower than the average millage rate levied during the 3 years immediately preceding the year of application for assistance must be considered by the board to indicate the lack of local effort. The application under these circumstances may be rejected.

(4) Further, in determining the degree of local effort, the board shall consider the possibility of requiring that local governmental unit to increase its bonded indebtedness to provide all or part of the governmental service or facility that is needed as a direct consequence of an increase or decrease in coal development or in the consumption of coal by a coal-using energy complex.

(5) To the extent that funds are needed to evaluate and plan for the impact needs caused by the increase or decrease in coal development or in the consumption of coal by a coal-using energy complex, consideration of bond issues and millage levies may be waived.

(6) To the extent that the applicant has no history of mill levies, subsections (2) and (3) do not apply.

History: En. 50-1706 by Sec. 7, Ch. 502, L. 1975; amd. Sec. 3, Ch. 540, L. 1977; R.C.M. 1947, 50-1806(part); amd. Sec. 1, Ch. 619, L. 1979; amd. Sec. 2, Ch. 690, L. 1983; amd. Sec. 3, Ch. 204, L. 1997.

90-6-201. Purpose. The purposes of this part are to assist local governmental units that have been required to expand the provision of public services as a consequence of large-scale development of coal mines and coal-using energy complexes or as a consequence of a major decline in coal mining or in the operation of coal-using energy complexes, to assist in the construction and reconstruction of designated portions of highways that serve the area affected by the large-scale development, to support county land planning, and to support public schools throughout the state.

History: En. 50-1701 by Sec. 1, Ch. 502, L. 1975; R.C.M. 1947, 50-1801; amd. Sec. 76, Ch. 509, L. 1995; amd. Sec. 1, Ch. 204, L. 1997.

90-6-207. Priorities for impact grants. (1) The department of commerce shall biennially designate:

(a) each county, incorporated city and town, school district, and other governmental unit that has had or expects to have as a result of the impact of coal development a net increase or decrease in estimated population of at least 10% over one of the 3-year periods specified in subsection (4);

(b) each county and all local governmental units within each county in which:

(i) a mining permit in accordance with the Montana Strip and Underground Mine Reclamation Act has been granted by the department of environmental quality for a project within the county that will establish a new coal mine to produce at least 300,000 tons a year and that the department of commerce determines will commence production within 2 years;

(ii) the department of commerce has determined that the production of an existing mine will increase or decrease by at least 1 million tons a year and that the new, expanded, or reduced production will commence within 2 years of the designation;

(iii) a newly constructed railroad serves a new, existing, or expanding coal mine; or

(iv) an air quality permit has been issued by the department of environmental quality for a new steam-generating or other new coal-burning facility that will consume at least 1 million tons a year of Montana-mined coal and for which the department of commerce determines the construction or operation will commence within 2 years of the designation;

(c) each local governmental unit located within 100 miles, measured over the shortest all-weather public road, of a mine or facility qualifying under subsection (1)(b)(i), (1)(b)(ii), or (1)(b)(iv); and

(d) each local governmental unit in which:

(i) a mine that has produced 300,000 tons or more of coal a year has ceased all significant mining or is scheduled to cease within 1 year; or

(ii) a steam-generating or other coal-burning facility that has operated under an air quality permit issued by the department of environmental quality and that has consumed at least 1 million tons of Montana-mined coal a year has closed or is scheduled to close within 1 year.

(2) Designation under subsection (1) of:

(a) any local governmental unit extends to and includes as a designated unit the county in which it is located; and

(b) a county extends to and includes as a designated unit any local governmental unit in the county that contains at least 10% of the total population of the county.

(3) Except as provided in **90-6-205(4)(b)**, the board may not award more than 50% of the funds appropriated to it each year for grants to governmental units and state agencies for meeting the needs caused by an increase or decrease in coal development or in the consumption of coal by a coal-using energy complex to local governmental units other than those governmental units designated under subsection (1).

(4) For the purposes of subsection (1), the department of commerce shall use five 3-year periods as follows:

- (a) one consecutive 3-year period ending 2 calendar years prior to the current calendar year;
- (b) one consecutive 3-year period ending 1 calendar year prior to the current calendar year;
- (c) one consecutive 3-year period ending with the current calendar year;
- (d) one consecutive 3-year period ending 1 calendar year after the current calendar year; and
- (e) one consecutive 3-year period ending 2 calendar years after the current calendar year.

(5) Attention should be given by the board to the need for community planning before the full impact is realized. Applicants should be able to show how their request reasonably fits into an overall plan for the orderly management of the existing or contemplated growth or decline problems.

(6) All funds appropriated under this part are for use related to local impact.

(7) All designations based on an increase in coal development or in the consumption of coal by a coal-using energy complex made under subsection (1)(a), (1)(b), or (1)(c) must be for 1 year. A designation may not continue after the department of commerce determines that the mine, railroad, or facility that provided the basis for a designation is contributing sufficient tax revenue to the designated governmental unit to meet the increased costs of providing the services necessitated by the development of the mine, railroad, or facility. However, nondesignated local governmental units continue to be eligible for coal impact grants of not more than 50% of the funds appropriated to the board for grants in circumstances in which an impact exists in a community or area directly affected by:

- (a) the operation of a coal mine or a coal-using energy complex; or
- (b) the cessation or reduction of coal mining activity or of the operation of a coal-using energy complex.

History: En. 50-1707 by Sec. 8, Ch. 502, L. 1975; R.C.M. 1947, 50-1807; amd. Sec. 6, Ch. 274, L. 1981; amd. Sec. 1, Ch. 142, L. 1983; amd. Sec. 1, Ch. 462, L. 1985; amd. Sec. 2, Ch. 619, L. 1985; amd. Sec. 7, Ch. 662, L. 1987; amd. Sec. 1, Ch. 503, L. 1993; amd. Sec. 495, Ch. 418, L. 1995; amd. Sec. 79, Ch. 509, L. 1995; amd. Sec. 4, Ch. 204, L. 1997; amd. Sec. 18, Ch. 217, L. 2003.

8.101.301 POLICY STATEMENT

(1) The Coal Board must prescribe forms for grant applications, receive and consider applications for grants, and award grants to local governmental units, federally-recognized Indian tribes, school districts, and state agencies to assist local governmental units in meeting the local impact of coal development or decline by enabling them to adequately provide governmental services and facilities which are needed as a direct consequence of coal development or decline.

(2) Applications will be judged on the following five main guidelines:

(a) Demonstration of need:

(i) What assistance is required to eliminate or reduce a direct and obvious threat to the public health, safety or welfare that has been caused as a direct result of coal development or decline.

(b) **Severity of impact:**

(i) **What has been the rapidity of growth or decline and subsequent development of the problem and the number of people affected.**

(c) Degree of local effort:

(i) As applicable, what bonding, millage effort, or user charge has been made in the past, those currently being made, and what effort has been made to secure funds from other sources to answer needs.

(d) Availability of funds:

(i) What amount of funds is available in light of the total request submitted.

(e) Planning:

(i) How does the application fit into an overall plan for the orderly management of the existing or contemplated growth or decline problems.

History: 90-6-205, MCA; IMP, 90-6-205, MCA; NEW, Eff. 2/5/76; TRANS, from Dept. of Comm. Affairs, Ch. 274, L. 1981, Eff. 7/1/81; AMD, 1983 MAR p. 1826, Eff. 12/16/83; AMD, 2006 MAR p. 1378, Eff. 6/2/06; AMD, 2009 MAR p. 344, Eff. 3/27/09.