

1 COUNCIL BILL NO. 13-6

2 ORDINANCE NO. 13-6

3 AN ORDINANCE CREATING A NEW CHAPTER IN THE BUTTE-SILVER BOW
4 MUNICIPAL CODE ENTITLED "EXCAVATIONS AND DIRT MOVING",
5 ESTABLISHING REGULATIONS FOR THE CONTROL AND MANAGEMENT OF
6 SOIL; ESTABLISHING AN EXCAVATION CONTROL DISTRICT; ESTABLISHING
7 EXCAVATION AND DIRT-MOVING PROTOCOLS; REGULATING THE
8 EXCAVATION, TRANSPORTATION AND DISPOSAL OF CONTAMINATED SOIL;
9 PROVIDING FOR PERMITS; PROVIDING PENALTIES FOR VIOLATION;
10 PROVIDING FOR SEVERABILITY; AND PROVIDING FOR AN EFFECTIVE DATE
11 HEREIN.

12 NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF COMMISSIONERS
13 OF THE CITY AND COUNTY OF BUTTE-SILVER BOW, STATE OF MONTANA:

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15 8.28.010 Purpose. The purpose of this chapter
16 is to protect human health and the environment
17 by taking the appropriate measures to prevent
18 contaminated soils from migrating to or on a
19 clean site; preventing contaminated soils from
20 being exported to any site other than the Mine

1 Waste Repository; and ensuring contaminated
2 soils are properly capped.

3 8.28.020 Scope. Unless otherwise indicated,
4 this chapter applies to all persons, agencies,
5 institutions, businesses, or government entities
6 living or located within the "Excavation Control
7 District" except for sources exempt from local
8 government regulation under 75-2-301(5), MCA.

9 8.28.030 Definitions: As used in this chapter,
10 unless indicated otherwise, the following
11 definitions apply:

12 Applicant means a property owner or applicant
13 representing a property owner who has filed an
14 application for an "Excavation and Dirt-Moving
15 Permit."

16 Best Management Practices (BMPs) means schedules
17 of activities, prohibitions of practices,
18 general good housekeeping practices, pollution
19 prevention and educational practices,
20 maintenance procedures, and other management

1 practices to prevent or reduce the migration of
2 contamination from a site.

3 Butte Priority Soils Operable Unit or BPSOU
4 means historic mining areas within and near
5 municipalities of Butte and Walkerville, surface
6 water, and alluvial groundwater associated with
7 Silver Bow Creek, as designated on the National
8 Priority List of sites established by the
9 Environmental Protection Agency (EPA) through
10 the Comprehensive Environmental Response
11 Compensation and Liability Act, (CERCLA). A map
12 of this area is on file in the BSB Clerk &
13 Recorder's Office.

14 Butte-Silver Bow (BSB) means the local
15 government of the City-County of Butte-Silver
16 Bow, Montana.

17 Cap or capped means an impervious or soil cover
18 that minimizes the migration of contaminated
19 soil.

1 Contaminant of Concern means Lead, Arsenic or
2 Mercury exceeding EPA standards for clean-up
3 action.

4 Contaminated Soils or contamination means soil
5 containing contaminants of concern exceeding EPA
6 action levels for residential, commercial,
7 industrial, or open space and recreation areas.
8 Action levels are:

9 (a) Residential - Exceeding 1,200 parts per
10 million for Lead; Exceeding 250 parts per
11 million for Arsenic; Exceeding 147 parts
12 per million for Mercury

13 (b) Commercial and Industrial - Exceeding 2,300
14 parts per million for Lead; Exceeding 500
15 parts per million for Arsenic.

16 (c) Recreational and Open Space - Exceeding
17 2,300 parts per million for Lead; Exceeding
18 1,000 parts per million for Arsenic.

19 Department means the Butte-Silver Bow County
20 Planning Department.

1 DEQ means the Montana Department of
2 Environmental Quality.

3 EPA means the United States Environmental
4 Protection Agency.

5 Excavation and Dirt-Moving Activity means any
6 activity which changes the volume of dirt on the
7 land surface. This may include the grading,
8 digging, cutting, scraping, or excavating of
9 soil, placement of fill materials, paving,
10 construction, substantial removal of vegetation,
11 or any activity which exposes soil or rock.

12 Excavation Control District means the entirety
13 of the Silver Bow Creek/Butte Area National
14 Priority List site within Silver-Bow County. A
15 map of the above-described geographical area, as
16 illustrated and approved by Natural Resource
17 Information System, is available and on file in
18 the City-County's Clerk and Recorder's office.

19 Excavation and Dirt-Moving Permit means a Permit
20 issued under this ordinance allowing an

1 Applicant to proceed with an Excavation and
2 Dirt-Moving Activity.

3 Excavation and Dirt-Moving Protocols means those
4 protocols attached as Exhibit "A" and
5 incorporated herein, approved by the EPA and the
6 MDEQ and updated as necessary that set forth the
7 protocols for management of excavated materials
8 (soil, dirt or debris) within the Excavation
9 Control District.

10 Mine Waste Repository means the designated area
11 for disposal of contaminated soil and mine
12 waste.

13 Permit Area means the surface property defined
14 on the set forth in the Excavation and Dirt-
15 Moving Permit.

16 Person means an individual, landowner,
17 partnership, firm, association, municipality,
18 public or private corporation, responsible
19 party, the state or a subdivision or agency of
20 the state, trust, estate, interstate body,

1 federal government or an agency of the federal
2 government or any other legal entity.

3 Remedy means the EPA approved engineering
4 components and remediation requirements,
5 including remedial action objectives,
6 applicable, relevant and appropriate
7 requirements, and clean-up levels.

8 8.28.030 Exemptions. The following activities
9 are exempt from Excavation and Dirt-Moving
10 provisions:

11 (a) Any "Excavation and Dirt-Moving Activity"
12 required by the EPA or MDEQ or Potentially
13 Responsible Party as part of general Operations
14 & Maintenance, a removal or a remedial action in
15 compliance with Superfund law and the permanent
16 remedy, provided that the Butte-Silver Bow
17 County Planning Department is notified prior to
18 the commencement of such EPA / MDEQ / PRP
19 approved work.

20 (b) Any "Excavation and Dirt-Moving Activity"
21 related to Agricultural activities as defined by

1 the Montana Department of Revenue, Property
2 Assessment Division, specifically for the
3 production of plants and/or animal pasturing,
4 crops, and the raising and caring for crops,
5 livestock or poultry and provided that such
6 activities do not take place in an area where a
7 soil cap has been used as a Superfund Remedy by
8 the EPA and/or the MDEQ.

9 (c) Any "Excavation and Dirt-Moving Activity"
10 related to the production, harvesting and
11 logging of timber and timber products and
12 provided that such activities do not take place
13 in an area where a soil cap has been used as a
14 Superfund Remedy by the EPA and/or the MDEQ.

15 (d) Any "Excavation and Dirt-Moving Activity"
16 related to emergency responses including Utility
17 Emergencies such as potable water line breaks,
18 sanitary sewer line breaks, stormwater sewer
19 line breaks, drain blockages, electric power
20 emergencies (transmission and/or distribution),
21 natural gas or propane emergencies (transmission

1 and/or distribution), land management practices
2 posing an immediate danger to life or property,
3 or substantial flood or fire hazards.

4 (e) Any "Excavation and Dirt-Moving Activity"
5 related to Emergency Land Management practices
6 necessitated by fire, flood, windstorm,
7 earthquake, structural failure or other
8 catastrophic events. Within five days after
9 commencement of such activity, the Owner shall
10 notify Butte-Silver Bow Planning Department of
11 the action with an explanation of why emergency
12 action was necessary. No notification is
13 required prior to an Emergency Action.
14 Reasonable care should be taken to minimize soil
15 disturbance and erosion during the conduct of
16 emergency land management practices; and

17 (f) Any "Excavation and Dirt-Moving Activity"
18 removing a volume of soil less than 1 cubic yard
19 in the BPSOU or less than 3 cubic yards in all
20 remaining areas of the Excavation and Dirt-
21 Moving Control District.

1 8.28.040 Permit Requirements. An Applicant shall
2 not commence any "Excavation and Dirt-Moving
3 Activity" nor receive any of the building,
4 grading, or other land development permits
5 within the "Excavation and Dirt-Moving Control
6 District" without first meeting the requirements
7 of this Chapter.

8 A. Application Requirements. Any Applicant
9 desiring a permit for an "Excavation and Dirt-
10 Moving Activity" shall submit to the Department
11 an "Excavation and Dirt-Moving Permit
12 Application" on a form provided for that
13 purpose. The permit application shall meet the
14 "Excavation and Dirt-Moving Protocols".

15 B. Application Procedure.

16 1. Excavation and Dirt-Moving Permit
17 applications shall be filed with the Department
18 on any regular business day.

19 2. The permit shall only be applicable to
20 the Permit Area as defined in the permit
21 application approved by the Department.

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C. Permit Duration. Permits issued under this section shall be valid for six (6) months from the date of issuance unless a written extension is granted by the Department.

8.28.050 Compatibility with other Regulations.

In any case where a provision of these regulations is found to be in conflict with a provision of any zoning, building, fire, safety, or other Butte-Silver Bow code, the provision which establishes the higher standard for the promotion and protection of the health and safety of the people shall prevail.

8.28.060 Liability.

Neither the provisions of this Chapter nor compliance with the provisions of this Chapter shall relieve any Applicant from the responsibility for damage to any person or property otherwise imposed by law, nor shall it impose any liability upon Butte-Silver Bow for damage to any person or property.

8.28.070 Violations, Enforcement, Penalties.

1 A. Violations. It shall be unlawful for
2 any Applicant to violate any of the provisions
3 of this chapter by doing any act forbidden or by
4 failing to perform any duty imposed herein. Any
5 such act or omission shall be deemed a
6 misdemeanor and jurisdiction for prosecution
7 thereof shall be vested in the City Court or
8 Justice Court of Butte-Silver Bow.

9 In the event the violation constitutes an
10 immediate danger to human health and the
11 environment or public safety, Butte-Silver Bow
12 is authorized to enter upon the subject private
13 property, without giving prior notice, to take
14 any and all measures necessary to abate the
15 violation and/or restore the property. Butte-
16 Silver Bow is authorized to seek costs of the
17 abatement as outlined in 8.28.080(7).

18 8.28.080 Enforcement: The provisions of this
19 ordinance shall be enforced as follows:

1 A. The Department and the appropriate law
2 enforcement officials shall be responsible for
3 enforcement of this ordinance.

4 B. Notice of Violation. When the Department
5 determines that an "Excavation and Dirt-Moving
6 Activity" is not being carried out in accordance
7 with the requirements of this Chapter, it shall
8 issue a written notice of violation to the
9 Applicant. The notice of violation shall
10 contain:

11 1. The name and address of the owner and/or
12 applicant;

13 2. The physical address or a description of
14 the building, structure or land upon which the
15 violation is occurring;

16 3. A statement specifying the nature of the
17 violation;

18 4. A description of the remedial measures
19 necessary to bring the "Excavation and Dirt-
20 Moving Activity" into compliance with this

1 Chapter and a time schedule for the completion
2 of such remedial action;

3 Such notice may require without limitation:

4 a. That violating practices or operations
5 shall cease and desist.

6 b. The abatement or remediation of
7 contamination hazards and the restoration of any
8 affected property.

9 c. Payment of a fee to cover
10 administrative and remediation costs.

11 d. The implementation of source control
12 or BMPs.

13 5. A statement of the penalty or penalties
14 that may be assessed against the person to whom
15 the notice of violation is directed.

16 6. A statement that the determination of
17 violation may be appealed as defined in
18 subchapter 8.28.100.

19 7. A statement specifying that, should the
20 violator fail to restore compliance within the
21 established time schedule, the work may be done

1 by the Department, Butte Silver Bow Public Works
2 Department or a designated contractor, and the
3 expense thereof shall be charged to the
4 applicant.

5 C. Suspensions Due to Emergency Situations.

6 The Department may, without prior notice,
7 suspend "Excavation and Dirt-Moving Activity" to
8 stop an actual or threatened violation which
9 presents or may present imminent and substantial
10 danger to human health and the environment, or
11 to the safety and welfare of a member of the
12 public. If the applicant fails to comply with a
13 suspension order issued in an emergency, the
14 authorized enforcement agency may take such
15 steps as deemed necessary to prevent or minimize
16 danger to human health and the environment.

17 D. Stop Work Orders. If issues identified in
18 the notice of violation are not addressed within
19 the required time schedule, the Department will
20 issue to the Applicant a stop work order. An
21 Applicant receiving a stop work order will be

1 required to halt all "Excavation and Dirt-Moving
2 Activity." This stop work order will be in
3 effect until the Department confirms that the
4 "Excavation and Dirt-Moving Activity" is in
5 compliance with the provisions of this chapter
6 and the violation has been satisfactorily
7 resolved. Failure to address a notice of
8 violation in a timely manner can result in
9 civil, criminal or monetary penalties in
10 accordance with the enforcement measures
11 authorized in Section 8.29.090.

12 8.28.090 Penalties: The penalties for violations
13 of this chapter are as follows:

14 A. Civil and Criminal Penalties. In
15 addition to or as an alternative to any penalty
16 provided herein or by law, any Applicant who
17 violates the provisions of this Chapter
18 constitutes a MISDEMEANOR punishable by a fine
19 not to exceed \$500.00 or imprisonment in the
20 county jail for a term not to exceed six (6)
21 months or by both a fine and imprisonment. Such

1 person shall be guilty of a separate offense for
2 each day during which the violation occurs or
3 continues.

4 B. Restoration of Lands. An Applicant
5 may be required to restore land to its
6 undisturbed condition. In the event that
7 restoration is not undertaken within a
8 reasonable time after notice, the Department may
9 take necessary corrective action, the cost of
10 which shall become a lien upon the property
11 until paid.

12 C. Compensatory Action. In lieu of
13 enforcement proceedings, penalties, and remedies
14 authorized by this Chapter, the authorized
15 enforcement agency may impose alternative
16 compensatory actions upon an Applicant.

17 D. Violations Deemed a Public Nuisance.
18 In addition to the enforcement processes and
19 penalties provided, any condition caused or
20 permitted to exist in violation of any of the
21 provisions of this Chapter is a threat to public

1 health, safety, and welfare, and is declared and
2 deemed a nuisance, and may be summarily abated
3 or restored at the Applicant's expense, and/or a
4 civil action to abate, enjoin, or otherwise
5 compel the cessation of such nuisance may be
6 taken.

7 E. Remedies Not Exclusive. The remedies
8 listed in this Chapter are not exclusive of any
9 other remedies available under any applicable
10 federal, state or local law and it is within the
11 discretion of the authorized enforcement agency
12 to seek cumulative remedies.

13 8.28.100 Appeals. Any Applicant aggrieved by a
14 decision of the Department (including any
15 decision with reference to a Notice of
16 Violation, waiver, or variance from the terms of
17 this Chapter) may appeal by filing a written
18 notice of appeal within thirty (30) calendar
19 days of the issuance of said decision to the
20 Second Judicial District Court.

21 8.28.110 Enforcement Measures after Appeal. If

1 a violation has not been corrected pursuant to
2 the requirements set forth in the Notice of
3 Violation, or, in the event of an appeal, within
4 ten (10) days of the decision of the District
5 Court upholding the decision of the Department,
6 then representatives of the Department may enter
7 upon the subject private property and are
8 authorized to take any and all measures
9 necessary to abate the violation and/or restore
10 the property. It shall be unlawful for any
11 Applicant to refuse to allow the Department or a
12 designated contractor to enter upon the premises
13 for the purposes set forth above. Any violation
14 will also be reported to the Enforcement
15 Division of the Montana Department of
16 Environment Quality.

17 8.28.120 Cost of Abatement of the Violation.

18 Within twenty (20) days after abatement of the
19 violation, an Applicant will be notified of the
20 cost of abatement, including administrative
21 costs. The Applicant may file a written protest

1 to the Council of Commissioners objecting to the
2 amount of the assessment within ten (10) days.
3 If the amount due is not paid within forty-five
4 (45) days, the charges shall become a special
5 assessment against the property and shall
6 constitute a lien on the property for the amount
7 of the assessment.

8 Any Applicant violating any of the provisions of
9 this article shall become liable to the City-
10 County by reason of such violation. If the sum
11 to be repaid on or before the date due, the
12 Clerk and Recorder shall certify the amount
13 thereof, with the description of the land to be
14 charged, and shall enter the sum on the
15 assessment list as a special tax on the land,
16 and shall enter the same on the assessment list
17 of Butte-Silver Bow as a special tax on the
18 land. If the land for any reason is exempt from
19 general taxation, the amount of such charge may
20 be recovered by direct claim against the lessee
21 and collected in the same manner as personal

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taxes. When such charges are collected, they shall be returned to the fund from which abatement was paid.

8.28.130 Severability: If any provision of this Ordinance or any section thereof, in any circumstances is held invalid, the validity of the remainder of the Ordinance and of the application of any of the other provisions or sections shall not be affected.

8.28.140 Repealer: All ordinances and resolutions in conflict herewith are repealed.

8.28.150 Effective Date: This Ordinance shall be in full force and effect from and after thirty (30) days after its passage and approval.

PASSED this _____ day of _____, 2013.

CINDI SHAW
CHAIRMAN OF THE COUNCIL OF COMMISSIONERS

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APPROVED this _____ day of _____, 2013.

MATT S. VINCENT
CHIEF EXECUTIVE

ATTEST:

SALLY J. HOLLIS
CLERK AND RECORDER

BY _____
ITS _____

APPROVED AS TO FORM:

EILEEN JOYCE
COUNTY ATTORNEY

WILLIAM O. ANDERSEN
CHAIRMAN, JUDICIARY COMMITTEE