MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 19

The Montana Administrative Register (MAR), a twice-monthly publication, has three sections. The notice section contains state agencies' proposed new, amended or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted. The rule section indicates that the proposed rule action is adopted and lists any changes made since the proposed stage. The interpretation section contains the attorney general's opinions and state declaratory rulings. Special notices and tables are found at the back of each register.

Inquiries regarding the rulemaking process, including material found in the Montana Administrative Register and the Administrative Rules of Montana, may be made by calling the Administrative Rules Bureau at (406) 444-2055.

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**BEFORE THE STATE COMPENSATION INSURANCE FUND
OF THE STATE OF MONTANA**

In the matter of the amendment of ARM 2.55.320 pertaining to classifications of employment and 2.55.327A pertaining to construction industry premium credit program	))))))	NOTICE OF PROPOSED AMENDMENT NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons

1. On December 6, 2002, the Montana State Fund proposes to amend ARM 2.55.320 pertaining to classifications of employment and 2.55.327A pertaining to construction industry premium credit.

2. The Montana State Fund will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, contact the Montana State Fund no later than 5:00 p.m., November 3, 2002, to advise us of the nature of the accommodation that you need. Please contact the Montana State Fund, attn: Nancy Butler, PO Box 4759, Helena, Montana 59604-4759; telephone (406) 444-7725; TDD (406) 444-5971; fax (406) 444-1493.

3. The rules proposed to be amended provide as follows, stricken matter interlined, new matter underlined:

2.55.320 METHOD FOR ASSIGNMENT OF CLASSIFICATIONS OF EMPLOYMENTS (1) and (2) remain the same.

(3) The state fund staff shall assign its insureds to classifications contained in the classifications section of the State Compensation Insurance Fund Policy Services Underwriting Manual issued July 1, ~~2001~~ 2002, and assign new or changed classifications as approved by the board. That section of the manual is hereby incorporated by reference. Copies of the classification section of the manual may be obtained from the Insurance Operations Support Department of the State Fund, 5 South Last Chance Gulch, Helena, Montana 59601.

AUTH: Sec. 39-71-2315 and 39-71-2316, MCA
IMP: Sec. 39-71-2311 and 39-71-2316, MCA

REASONABLE NECESSITY: This amendment to ARM 2.55.320 is reasonably necessary at this time to reflect the updates to the Underwriting manual that are now available up to July 1, 2002.

2.55.327A CONSTRUCTION INDUSTRY PREMIUM CREDIT PROGRAM (1) and (2) remain the same.

(3) The following class codes are the construction codes eligible for the construction industry premium credit program:

3365	5059	5215	5445	5506	5651	6217	6400	9521
3719	5069	5221	5462	5507	5703	6229	7538	9534
3724	5102	5222	5472	5508	5705	6233	7601	9552
3726	5146	5223	5473	5511	6003	6251	7605	
5020	5160	5348	5474	5537	6005	6252	7611	
5022	5183	5402	5478	5538	6017	6306	7612	
5037	5188	5403	5479	5551	6018	6319	7613	
5040	5190	5437	5480	5610	6045	6325	7855	
5057	5213	5443	5491	5645	6204	6365	8227	

(4) through (5)(e)(i) remain the same.

(ii) The manual premium will be calculated for each construction and non-construction class code by multiplying the payroll, divided by 100, times the manual class code rate in effect for the insured during the survey period. ~~If the survey period used is after July 1, 2000, rates in effect for July 1, 1999 through June 30, 2000 shall be used.~~

(iii) through (6) remain the same.

AUTH: Sec. 39-71-2315 and 39-71-2316, MCA
IMP: Sec. 39-71-2211, 39-71-2311, 39-71-2316, and 39-71-2330, MCA

REASONABLE NECESSITY: It is reasonably necessary to amend ARM 2.55.327A(3) at this time to reflect additional classification codes that are eligible for the construction credit program because of action by the classification and review committee pursuant to Section 33-16-1012, MCA. These include 7611 - Telephone or Cable TV Line Installation -- Contractors, Underground & Drivers; 7612 - Telephone or Cable TV Line Installation -- Contractors, Overhead & Drivers; 7613 - Telephone or Cable TV Line Installation -- Contractors, Service Lines, Connection & Drivers. The amendment to ARM 2.55.327A(5)(e)(ii) is for housekeeping purposes and is necessary because this statement demonstrated the application of the rule when it was first adopted in 2000 and is no longer needed.

4. Concerned persons may submit their data, views, or arguments concerning the proposed amendments in writing to Montana State Fund attorney, Nancy Butler, General Counsel, Montana State Fund, 5 South Last Chance Gulch, PO Box 4759, Helena, Montana 59604-4759, or by electronic mail address nbutler@montanastatefund.com. Any comments must be received no later than November 18, 2002.

5. If persons who are directly affected by the proposed amendments wish to express their data, views and arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments they have to Montana State Fund attorney, Nancy

Butler, General Counsel, Montana State Fund, 5 South Last Chance Gulch, PO Box 4759, Helena, Montana 59604-4759, or by electronic mail address nbutler@montanastatefund.com.

6. If the agency receives requests for a public hearing on the proposed actions from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed actions; from the appropriate administrative rule review committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 250 persons based on an estimated 25,000 policyholders.

7. The Montana State Fund maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request, which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding Montana State Fund administrative rules. Such written request may be mailed or delivered to Nancy Butler, Montana State Fund, PO Box 4759, Helena, MT 59601-4759, telephone (406) 444-7725, faxed to the office at (406) 444-1493, or may be made by completing a request form at any rules hearing held by the State Fund.

8. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

/s/ Nancy Butler
Nancy Butler, General Counsel
Rule Reviewer

/s/ Herb Leuprecht
Herb Leuprecht
Chairman of the Board

/s/ Dal Smilie
Dal Smilie, Chief Legal Counsel
Rule Reviewer

Certified to the Secretary of State October 7, 2002.

**BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA**

In the matter of the amendment of ARM 17.30.502, 17.30.619, 17.30.702, 17.30.715, 17.30.1001, 17.30.1006 and 17.30.1007 pertaining to definitions, incorporation by reference, criteria for determining nonsignificant changes in water quality, standards for ground water and sample collection, preservation and analysis methods	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT (WATER QUALITY)

TO: All Concerned Persons

1. On November 19, 2002 at 10:30 a.m., the Board of Environmental Review will hold a public hearing in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Board will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board no later than 5:00 p.m., November 7, 2002, to advise us of the nature of the accommodation that you need. Please contact the Board Secretary at P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2544; fax (406) 444-4386; or email ber@state.mt.us.

3. The rules proposed to be amended provide as follows, stricken matter interlined, new matter underlined:

<u>17.30.502 DEFINITIONS</u> The following definitions, in addition to those in 75-5-103, MCA, and ARM Title 17, chapter 30, subchapters 6 and 7, apply throughout this subchapter:

(1) through (13) remain the same.

(14) The board hereby adopts and incorporates by reference department Circular WQB-7, entitled "Montana Numeric Water Quality Standards" (December ~~2001~~ <u>2002</u> edition), which establishes water quality standards for toxic, carcinogenic, bioconcentrating, nutrient, radioactive, and harmful parameters. Copies of Circular WQB-7 are available from the Department of Environmental Quality, PO Box 200901, Helena, MT 59620-0901.

**AUTH: 75-5-301, MCA
IMP: 75-5-301, MCA**

17.30.619 INCORPORATIONS BY REFERENCE (1) The board hereby adopts and incorporates by reference the following state and federal requirements and procedures as part of Montana's surface water quality standards:

(a) department Circular WQB-7, entitled "Montana Numeric Water Quality Standards" (December ~~2001~~ 2002 edition), which establishes water quality standards for toxic, carcinogenic, bioconcentrating, nutrient, radioactive and harmful parameters;

(b) through (2) remain the same.

AUTH: 75-5-201, 75-5-301, MCA
IMP: 75-5-301, MCA

17.30.702 DEFINITIONS Unless the context clearly states otherwise, the following definitions, in addition to those in 75-5-103, MCA, apply throughout this subchapter (Note: 75-5-103, MCA, includes definitions for "degradation", "existing uses", "high-quality waters", and "parameter."):

(1) through (23) remain the same.

(24) The board hereby adopts and incorporates by reference:

(a) department Circular WQB-7, entitled "Montana Numeric Water Quality Standards" (December ~~2001~~ 2002 edition), which establishes water quality standards for toxic, carcinogenic, bioconcentrating, nutrient, radioactive, and harmful parameters; and

(b) and (c) remain the same.

AUTH: 75-5-301, 75-5-303, MCA
IMP: 75-5-303, MCA

17.30.715 CRITERIA FOR DETERMINING NONSIGNIFICANT CHANGES IN WATER QUALITY (1) through (3) remain the same.

(4) The board hereby adopts and incorporates by reference department Circular WQB-7, entitled "Montana Numeric Water Quality Standards" (December ~~2001~~ 2002 edition), which establishes water quality standards for toxic, carcinogenic, bioconcentrating, nutrient, radioactive, and harmful parameters.

AUTH: 75-5-301, 75-5-303, MCA
IMP: 75-5-303, MCA

17.30.1001 DEFINITIONS For the purpose of this subchapter, the following definitions, in addition to those in 75-5-103, MCA, will apply:

(1) through (14) remain the same.

(15) "WQB-7" means department Circular WQB-7, entitled "Montana Numeric Water Quality Standards" (December ~~2001~~ 2002 edition), which establishes water quality standards for toxic, carcinogenic, radioactive, bioconcentrating, nutrient, and harmful parameters.

(16) The board hereby adopts and incorporates by reference department Circular WQB-7, entitled "Montana Numeric Water Quality Standards" (December ~~2001~~ 2002 edition), which establishes water quality standards for toxic, carcinogenic, bioconcentrating, nutrient, radioactive, and harmful parameters.

AUTH: 75-5-201, 75-5-401, MCA
IMP: 75-5-301, 75-5-401, MCA

17.30.1006 CLASSIFICATIONS, BENEFICIAL USES AND SPECIFIC STANDARDS FOR GROUNDWATERS (1) through (6) remain the same.

(7) The board hereby adopts and incorporates by reference department Circular WQB-7, entitled "Montana Numeric Water Quality Standards" (December ~~2001~~ 2002 edition), which establishes water quality standards for toxic, carcinogenic, bioconcentrating, nutrient, radioactive, and harmful parameters.

AUTH: 75-5-301, 80-15-105, 80-15-201, MCA
IMP: 75-5-301, 80-15-201, MCA

17.30.1007 SAMPLE COLLECTION, PRESERVATION, AND ANALYSIS METHODS (1) through (2) remain the same.

(3) The board hereby adopts and incorporates by reference the following publications:

(a) department Circular WQB-7, entitled "Montana Numeric Water Quality Standards", December ~~2001~~ 2002 edition;

(b) through (4) remain the same.

AUTH: 75-5-301, MCA
IMP: 75-5-301, MCA

REASON: The Board is proposing the amendment of ARM 17.30.502, 17.30.619, 17.30.702, 17.30.715, 17.30.1001, 17.30.1006 and 17.30.1007 to update the incorporations by reference of the Department of Environmental Quality (Department) Circular WQB-7 (WQB-7), which contains Montana's numeric water quality standards. The Board is proposing to amend WQB-7 to add numeric standards criteria for Bromoxynil for the following reasons:

Bromoxynil is an agricultural chemical that has been detected in state waters by the Montana Department of Agriculture. Pursuant to 80-15-201(3) and 80-15-203(2)(a), MCA, the Board is required to adopt a standard for ground water when there is no published standard for an agricultural chemical that has been detected in Montana's ground water. The Department, in conjunction with EPA, has developed a standard for Bromoxynil. Adoption of the standard for Bromoxynil is necessary to comply with Title 80, chapter 15, part 2, MCA, and to protect state waters from pollution resulting from application of the chemical.

The Board is proposing to adopt the standard for Bromoxynil for both surface and ground water. The Board could

choose to adopt only a ground water standard and meet the requirements of state law, but believes that approach is inconsistent with the policy of the state to "protect and maintain" all state waters, both surface and ground water. It is necessary to adopt a standard for surface waters as well as ground water, so that Montana's surface waters will receive the same protection as ground water.

4. Concerned persons may submit their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to the Board of Environmental Review, P.O. Box 200901, Helena, Montana 59620-0901, faxed to (406) 444-4386 or emailed to the Board Secretary at ber@state.mt.us and must be received no later than 5:00 p.m., November 27, 2002. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

5. The Board maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding: air quality; hazardous waste/waste oil; asbestos control; water/wastewater treatment plant operator certification; solid waste; junk vehicles; infectious waste; public water supplies; public sewage systems regulation; hard rock (metal) mine reclamation; major facility siting; opencut mine reclamation; strip mine reclamation; subdivisions; renewable energy grants/loans; wastewater treatment or safe drinking water revolving grants and loans; water quality; CECRA; underground/above ground storage tanks; MEPA; or general procedural rules other than MEPA. Such written request may be mailed or delivered to the Board of Environmental Review, 1520 E. Sixth Ave., P.O. Box 200901, Helena, Montana 59620-0901, faxed to the office at (406) 444-4386, emailed to the Board Secretary at ber@state.mt.us or may be made by completing a request form at any rules hearing held by the Board.

6. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

Reviewed by: **BOARD OF ENVIRONMENTAL REVIEW**

James M. Madden
JAMES M. MADDEN
Rule Reviewer

By: *Joseph W. Russell*
JOSEPH W. RUSSELL, M.P.H.
Chairman

Certified to the Secretary of State, October 7, 2002.

**BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA**

In the matter of the adoption of new rules I through X pertaining to storm water discharges	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION (WATER QUALITY)

TO: All Concerned Persons

1. On November 18, 2002 at 9:00 a.m., in conjunction with the hearing for MAR Notice No. 17-175, the Board of Environmental Review will hold a public hearing in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed adoption of the above-stated rules.

2. The Board will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board no later than 5:00 p.m., November 6, 2002, to advise us of the nature of the accommodation that you need. Please contact the Board Secretary at P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2544; fax (406) 444-4386; or email ber@state.mt.us.

3. The proposed new rules provide as follows:

NEW RULE I PURPOSE AND SCOPE (1) This subchapter is intended to be applied together with ARM Title 17, chapter 30, subchapters 12 and 13 to establish a system for regulating discharges of potential pollutants from point source discharges of storm waters into surface waters. This subchapter and subchapter 13 of ARM Title 17, chapter 30, which regulate storm water discharges through Montana pollutant discharge elimination system (MPDES) general permits, permit authorizations, and notices of intent, are intended to be compatible with the national pollutant discharge elimination system (NPDES) as established by the United States environmental protection agency pursuant to section 402 of the federal Clean Water Act (CWA), 33 USC 1251, et seq. Except as expressly modified in this subchapter, all requirements in ARM Title 17, chapter 30, subchapters 12 and 13 remain effective pertaining to point source discharges of storm water.

(2) The rules in this subchapter pertain to point source discharges of storm water that do not contain routine process wastewater and that do not contain non-storm water discharges except for the potential non-storm water discharges from MS4s that are listed in [NEW RULE VII(6)(c)(iii)]. ARM Title 17, chapter 30, subchapter 13 contains additional requirements pertaining to point source discharges of storm water that routinely contain process wastewater or non-storm water discharges (other than the potential non-storm water discharges for MS4s listed in [NEW RULE VII(6)(c)(iii)]) that are regulated using an individual MPDES permit.

AUTH: 75-5-201, 75-5-401, MCA
IMP: 75-5-401, MCA

REASON: In this rulemaking, the department is codifying in state rules certain federal storm water requirements that have previously been incorporated by reference in state rules at ARM 17.30.1303 and ARM 17.30.1332 ("phase I" rules), as well as some federal phase I rules that were never incorporated into state rules. The department is also promulgating new storm water rules that will conform to recent federal rules applicable to storm water discharges from certain municipalities, small construction activities, and industries with "no exposure" of regulated activities to storm water runoff ("phase II" rules). The federal phase I and II rules have been adopted by the U.S. environmental protection agency (EPA), and are found at 40 CFR 122.26. The department is required by federal law to adopt storm water rules that are not less stringent than the EPA storm water rules.

Promulgating the existing state phase I rules and the new state phase II rules together in a new subchapter of the Montana Administrative Rules, rather than simply incorporating them by reference from the federal rules or amending an existing subchapter of the Montana rules, is necessary to make the rules easier for the regulated community and for the department to locate and to apply.

Storm water runoff from lands modified by human activities can harm surface water resources and can cause or contribute to exceedances of water quality standards. Storm water runoff may contain or mobilize high levels of contaminants, such as sediment, suspended solids, nutrients (phosphorus and nitrogen), heavy metals and other toxic pollutants, pathogens, toxins, oxygen-demanding substances and floatables. As set out in more detail in the rationale statements below, the rules in this rulemaking are necessary to prevent such impacts to surface water.

The storm water requirements in this rulemaking will typically be implemented through general permits issued under the Montana pollutant discharge elimination system (MPDES). The rules also provide for permit coverage for storm water discharges under an individual, as opposed to a general, MPDES permit if necessary. As stated in new rule I, all provisions of Title 17, chapter 30, subchapter 12 (MPDES standards) and subchapter 13 (MPDES permits) apply in this subchapter unless expressly indicated otherwise.

NEW RULE II DEFINITIONS In this subchapter, the following terms have the meanings or interpretations indicated below and shall be used in conjunction with and are supplemental to those definitions contained in 75-5-103, MCA. If not defined in this rule, terms used in this subchapter have the meanings set out in the definitions in ARM Title 17, chapter 30, subchapter 13.

(1) "Best management practices (BMPs)" means schedules of activities, prohibitions of practices, maintenance procedures,

and other management practices to prevent or reduce the pollution of state waters. BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.

(2) "Discharge of a pollutant" and "discharge of pollutants" each means any addition of any pollutant or combination of pollutants to state waters from any point source. This definition includes additions of pollutants into water of the state from surface runoff that is collected or channeled by man and discharges through pipes, sewers, or other conveyances owned by a state, municipality, or other person that do not lead to a treatment works. This term does not include the addition of pollutants by an indirect discharger.

(3) "Discharge monitoring report (DMR)" means the department uniform form for the reporting of self-monitoring results by permittees.

(4) "Facility or activity" means any MPDES point source or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under the MPDES program.

(5) "Final stabilization" means the time at which all soil-disturbing activities at a site have been completed and a vegetative cover has been established with a density of at least 70% of the pre-disturbance levels, or equivalent permanent, physical erosion reduction methods have been employed. Final stabilization using vegetation must be accomplished using seeding mixtures or forbs, grasses, and shrubs that are adapted to the conditions of the site. Establishment of a vegetative cover capable of providing erosion control equivalent to pre-existing conditions at the site will be considered final stabilization.

(6) "General permit" means an MPDES permit issued under ARM 17.30.1341 authorizing a category of discharges under the Act within a geographical area.

(7) "Illicit discharge" means any discharge to a municipal separate storm sewer that is not composed entirely of storm water except discharges pursuant to an MPDES permit (other than the MPDES permit for discharges from the municipal separate storm sewer) and discharges resulting from fire fighting activities.

(8) "Infiltration" means water other than wastewater that enters a sewer system (including sewer service connections and foundation drains) from the ground through such means as defective pipes, pipe joints, connections, or manholes. Infiltration does not include inflow.

(9) "Inflow" means water other than wastewater that enters a sewer system (including sewer service connections) from sources including, but not limited to, roof leaders, cellar drains, yard drains, area drains, drains from springs and swampy areas, manhole covers, cross connections between storm sewers and sanitary sewers, catch basins, cooling towers, storm waters, surface runoff, street wash waters, or drainage. Inflow does not include infiltration.

(10) "Major municipal separate storm sewer outfall" or "major outfall" means a municipal separate storm sewer outfall that discharges from a single pipe with an inside diameter of 36 inches or more or its equivalent (discharge from a single conveyance other than circular pipe which is associated with a drainage area of more than 50 acres); or, for municipal separate storm sewers that receive storm water from lands zoned for industrial activity (based on comprehensive zoning plans or the equivalent), an outfall that discharges from a single pipe with an inside diameter of 12 inches or more or from its equivalent (discharge from other than a circular pipe associated with a drainage area of two acres or more).

(11) "Montana pollutant discharge elimination system (MPDES)" means the system developed by the board and department for issuing permits for the discharge of pollutants from point sources into state waters. The MPDES is specifically designed to be compatible with the federal NPDES program established and administered by the EPA.

(12) "MS4" means a municipal separate storm sewer system.

(13) "Municipal separate storm sewer" means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains) that discharges to surface waters and is:

(a) owned or operated by the state of Montana, a governmental subdivision of the state, a district, association, or other public body created by or pursuant to Montana law, including special districts such as sewer districts, flood control districts, drainage districts and similar entities, and designated and approved management agencies under section 208 of the federal Clean Water Act, which has jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, and is:

(i) designed or used for collecting or conveying storm water;

(ii) not a combined sewer; and

(iii) not part of a publicly owned treatment works (POTW) as defined in ARM Title 17, chapter 30, subchapter 13.

(14) "Outfall" means a point source, as defined in this subchapter, at the point where a municipal separate storm sewer discharges to surface waters. The term does not include open conveyances connecting two municipal separate storm sewers, or pipes, tunnels or other conveyances that connect segments of the same stream or other surface waters and that are used to convey surface waters.

(15) "Overburden" means any material of any nature, consolidated or unconsolidated, that overlies a mineral deposit or economically mineable geologic material (e.g., coal), excluding topsoil or similar naturally occurring surface materials that are not disturbed by mining operations.

(16) "Owner or operator" is defined at 75-5-103, MCA.

(17) "Permit" means an authorization or license issued by EPA or an approved state to implement the requirements of this rule and 40 CFR Parts 123 and 124. The term includes an NPDES

general permit (ARM 17.30.1341). The term does not include any permit that has not yet been the subject of final agency action, such as a "draft permit" or a "proposed permit".

(18) "Point source" means any discernible, confined, or discrete conveyance including, but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft, from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural storm water runoff.

(19) "Pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural wastes discharged into water. The terms "sewage," "industrial waste," and "other wastes" as defined in 75-5-103, MCA, are interpreted as having the same meaning as pollutant.

(20) "Process wastewater" means any water that, during manufacturing or processing, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, byproduct, or waste product.

(21) "Runoff coefficient" means the fraction of total rainfall that will appear at a conveyance as runoff.

(22) "Site" means the land or water area where any facility or activity is physically located or conducted, including adjacent land used in connection with the facility or activity.

(23) "Small municipal separate storm sewer system" means:

(a) small MS4s, and portions of them, that are located in the following urbanized areas in Montana as determined by the latest decennial census by the United States census bureau:

(i) the city of Billings and Yellowstone County;

(ii) the city of Missoula and Missoula County; and

(iii) the city of Great Falls and Cascade County;

(b) the following small MS4s serving a population of at least 10,000 as determined by the latest decennial census by the United States census bureau and that are located outside of an urbanized area:

(i) MS4s located in the city of Bozeman;

(ii) MS4s located in the city of Butte;

(iii) MS4s located in the city of Helena; and

(iv) MS4s located in the city of Kalispell;

(c) MS4s designated by the department pursuant to [NEW RULE V]; and

(d) systems similar to separate storm sewer systems in municipalities, such as systems at military bases, large educational, hospital or prison complexes, and highways and other thoroughfares. The term does not include separate storm sewers in very discrete areas, such as individual buildings.

(24) "Small MS4" means a small municipal separate storm sewer system.

(25) "Source" means any building, structure, facility, or installation from which there is or may be a discharge of pollutants.

(26) "State waters" is defined at 75-5-103, MCA.

(27) "Storm water" means storm water runoff, snow melt runoff, and surface runoff and drainage.

(28) "Storm water discharge associated with construction activity" means a discharge of storm water from construction activities including clearing, grading, and excavation that result in the disturbance of equal to or greater than one acre of total land area. For purposes of these rules, construction activities include clearing, grading, excavation, stockpiling earth materials, and other placement or removal of earth material performed during construction projects. Construction activity includes the disturbance of less than one acre of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb one acre or more.

(a) Regardless of the acreage of disturbance resulting from a construction activity, this definition includes any other discharges from construction activity designated by the department pursuant to [NEW RULE III(1)(f)].

(b) For construction activities that result in disturbance of less than five acres of total land area, the acreage of disturbance does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the facility.

(c) For construction activities that result in disturbance of five acres or more of total land area, this definition includes those requirements and clarifications stated in (29)(a), (b), (d) and (e).

(29) "Storm water discharge associated with industrial activity" means a discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant.

(a) For the categories of industries identified in this definition, the term includes, but is not limited to, storm water discharges from industrial plant yards; immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility; material handling sites; refuse sites; sites used for the application or disposal of process wastewaters (as defined in this subchapter); sites used for the storage and maintenance of material handling equipment; sites used for residual treatment, storage, or disposal; shipping and receiving areas; manufacturing buildings; storage areas (including tank farms) for raw materials, and intermediate and final products; and areas where industrial activity has taken place in the past and significant materials remain and are exposed to storm water.

(b) For the categories of industries identified in (e)(ix) of this definition, the term includes only storm water discharges from all the areas (except access roads and rail

lines) that are listed in the previous sentence where material handling equipment or activities, raw materials, intermediate products, final products, waste materials, by-products, or industrial machinery are exposed to storm water.

(c) For the purposes of this definition, material handling activities include the storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, finished product, by-product, or waste product. The term excludes areas located on plant lands separate from the plant's industrial activities, such as office buildings and accompanying parking lots as long as the drainage from the excluded areas is not mixed with storm water drained from the above described areas.

(d) Industrial facilities (including industrial facilities that are federally, state, or municipally owned or operated that meet the description of the facilities listed in (e)(i) through (ix) and (30)) include those facilities designated under the provisions of [NEW RULE III(1)(f)].

(e) The following categories of facilities are considered to be engaging in "industrial activity" for the purposes of this definition:

(i) facilities subject to storm water effluent limitations guidelines, new source performance standards, or toxic pollutant effluent standards under 40 CFR subchapter N (except facilities with toxic pollutant effluent standards that are exempted under category (e)(ix) of this definition);

(ii) facilities classified as standard industrial classifications 24 (except 2434), 26 (except 265 and 267), 28 (except 283), 29, 311, 32 (except 323), 33, 3441, 373;

(iii) hazardous waste treatment, storage, and disposal facilities, including those that are operating under interim status or a permit under subtitle C of the federal Resource Conservation and Recovery Act (RCRA);

(iv) landfills, land application sites, and open dumps that receive or have received any industrial wastes (waste that is received from any of the facilities described under this definition, or under the definitions of "storm water discharge associated with mining and oil and gas activities," and "storm water discharge associated with construction activity" that will result in construction-related disturbance of five acres or more of total land area) including those that are subject to regulation under subtitle D of RCRA;

(v) facilities involved in the recycling of materials, including metal scrapyards, battery reclaimers, salvage yards, and automobile junkyards including, but not limited to, those classified as standard industrial classification 5015 and 5093;

(vi) steam electric power generating facilities, including coal handling sites;

(vii) transportation facilities classified as standard industrial classifications 40, 41, 42 (except 4221-25), 43, 44, 45, and 5171, which have vehicle maintenance shops, equipment cleaning operations, or airport deicing operations. Only those portions of a facility that are involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting,

fueling, and lubrication), equipment cleaning operations, airport deicing operations, or that are otherwise identified under this definition are associated with industrial activity;

(viii) treatment works treating domestic sewage or any other sewage sludge or wastewater treatment device or system, which is used in the storage, treatment, recycling, or reclamation of municipal or domestic sewage, including land dedicated to the disposal of sewage sludge that is located within the confines of the facility, and which has a design flow of 1.0 mgd or more or is required to have an approved pretreatment program under 40 CFR Part 403. Not included are farm lands, domestic gardens, and lands used for sludge management where sludge is beneficially reused and that are not physically located in the confines of the facility, and areas that are in compliance with section 405 of the federal Clean Water Act; and

(ix) facilities under standard industrial classifications 20, 21, 22, 23, 2434, 25, 265, 267, 27, 283, 285, 30, 31 (except 311), 323, 34 (except 3441), 35, 36, 37 (except 373), 38, 39, and 4221-25, (and which are not otherwise included within (e)(i) through (e)(viii) of this definition).

(30) "Storm water discharge associated with mining and oil and gas activity" means the same as the definition for "storm water discharges associated with industrial activity" except that the term pertains only to discharges from facilities classified as standard industrial classifications 10 through 14 (mineral industry) that discharge storm water contaminated by contact with or that has come into contact with, any overburden, raw material, intermediate products, finished products, byproducts, or waste products located on the site of such operations. Such facilities include active and inactive mining operations (except for areas of coal mining operations no longer meeting the definition of a reclamation area under 40 CFR 434.11(1) because the performance bond issued to the facility by the appropriate SMCRA authority has been released, and except for areas of non-coal mining operations that have been released from applicable state or federal reclamation requirements after December 17, 1990); and oil and gas exploration, production, processing, or treatment operations; and transmission facilities. "Inactive mining operations" are mining sites that are not being actively mined but that have an identifiable owner/operator, but do not include sites where mining claims are being maintained prior to disturbances associated with the extraction, beneficiation, or processing of mined materials, nor sites where minimal activities are undertaken for the sole purpose of maintaining a mining claim.

(31) "Storm water pollution prevention plan (SWPPP)" means a document developed to help identify sources of pollution potentially affecting the quality of storm water discharges associated with a facility or activity, and to ensure implementation of measures to minimize and control pollutants in storm water discharges associated with a facility or activity. The department determines specific requirements and information to be included in a SWPPP based on the type and characteristics

of a facility or activity, and on the respective MPDES permit requirements.

(32) "Surface waters" means any waters on the earth's surface including, but not limited to, streams, lakes, ponds, and reservoirs, and irrigation and drainage systems discharging directly into a stream, lake, pond, reservoir, or other surface water. Water bodies used solely for treating, transporting, or impounding pollutants shall not be considered surface water.

(33) "Total maximum daily load" or "TMDL" is defined at 75-5-103, MCA.

(34) "Uncontrolled sanitary landfill" means a landfill or open dump, whether in operation or closed, that does not meet the requirements for runon or runoff controls established pursuant to subtitle D of the Montana Solid Waste Disposal Act.

(35) "Waste load allocation" means the portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources.

AUTH: 75-5-201, 75-5-401, MCA
IMP: 75-5-401, MCA

REASON: New rule II contains definitions of the major terms used in this subchapter. The definitions are necessary to clarify the meaning of the terms and to specifically identify what discharges are regulated by this subchapter. Several key definitions are discussed below.

Subsection (23) defines "small municipal separate storm sewer systems" (MS4s). The federal phase II rules expanded the scope of the storm water program to include small MS4s, which include all MS4s that are not already designated and regulated as a medium or large MS4 under EPA's phase I rules. However, the federal phase II rules do not require that all MS4s serving populations of less than 100,000 be regulated.

Within "urbanized areas" as defined by the U.S. Census Bureau (areas that have a population over 50,000 and an average population density of 1,000 people per square mile), MS4s must obtain MPDES permit coverage. In Montana, urbanized areas include the City of Billings, portions of Yellowstone County outside the City of Billings, the City of Missoula, portions of Missoula County outside the City of Missoula, the City of Great Falls, and portions of Cascade County located outside the City of Great Falls including Malmstrom AFB.

For areas with a population below 50,000, phase II requires states to establish criteria for use in determining whether MS4s must develop storm water management programs, and the federal rules provide suggested criteria for that purpose. The designation criteria must be applied to cities with a population of at least 10,000. Using the federal designation criteria, the department has determined that municipalities in Montana with a population of 10,000 and greater have the potential to affect water quality as stated above, and are therefore subject to the permit requirements. These municipalities are: the City of Helena, the City of Butte, the City of Bozeman, and the City of Kalispell. These cities typically have a high growth potential.

One city has historical mining-related pollutants that may come into contact with storm water. All seven of the cities over 10,000 population have storm water discharges into waterbodies on the 303(d) impaired list. Designating the municipalities identified in this definition is necessary to control the discharge of pollutants from municipal separate storm sewers.

Subsection (28) defines "storm water discharge associated with construction activity". Included within the scope of the definition are construction activities, regulated under existing rules, that result in the total construction-related disturbance of five acres and above. However, as required by federal phase II rules, the term has also been broadened to include construction activities that result in the total construction-related disturbance of at least one acre. Inclusion of the smaller construction activities is necessary to comply with federal rules and to ensure that pollutants from those sites do not contaminate surface waters. In new rule III(5) there is an exemption procedure for certain construction activities that result in the total construction-related disturbance of from one to five acres. Such activities can be exempted from permit requirements based on a showing that there will be limited erosion through rainfall or that storm water controls are provided through other mechanisms.

The proposed definition in subsection (28) differs from the federal rules in that it provides a separate definition for discharges from construction activity. The federal rules include construction activity within the definition of the term "industrial activity". Providing separate definitions does not have substantive effect, but is necessary in order to make the definitions shorter, easier to apply, and consistent with the department's past permitting procedures for storm water discharges from construction activity.

New Rule II provides the equivalent of the federal definition of "storm water discharge associated with industrial activity", except that the definition has been split into two definitions. Facilities or activities whose storm water discharges are associated with major standard industrial classification groups 10 through 14 (mineral industries) have been broken out into a separate definition for "storm water discharge associated with mining and oil and gas activity". The department regulates storm water discharges from these activities through a separate general permit due to the number of these storm water discharges in Montana, together with certain unique technical features associated with the discharge. There are no other significant changes in the definitions from the federal phase I and II rules.

The following two new definitions were created in order to provide clarity, consistency, and understandability of major components and requirements based on the procedures the department uses in permitting storm water discharges.

One new definition is for "final stabilization" which describes what level of site stabilization must be achieved in order to terminate MPDES permit coverage for a storm water discharge associated with construction activity. Based on

federal requirements and input from other states' storm water requirements, this definition was developed. The definition is necessary to provide guidance to permittees regarding the meaning of the term.

The second new definition is a definition for "storm water pollution prevention plan" (SWPPP). The development and implementation of a SWPPP is among the most fundamental and important requirements pertaining to most permitted storm water discharges. To assist the regulated community in understanding what a SWPPP is, a general definition is proposed based on language in federal documents.

NEW RULE III PERMIT REQUIREMENT (1) Any person who discharges or proposes to discharge storm water from a point source must obtain coverage under an MPDES general permit or another MPDES permit for discharges:

(a) associated with construction activity;

(b) associated with industrial activity;

(c) associated with mining and oil and gas activity;

(d) from small municipal separate storm sewer systems that are identified in [NEW RULE II] or designated pursuant to [NEW RULE V];

(e) for which the department determines that storm water controls are needed based on wasteload allocations that are part of TMDLs that address the pollutants of concern; and

(f) that the department determines are contributing to a violation of a water quality standard or are significant contributors of pollutants to surface waters.

(2) For point source discharges of storm water identified in (1)(a) through (f) that are routinely composed entirely of storm water, authorization under an MPDES general permit must be obtained pursuant to this subchapter, unless the discharge is covered under an individual MPDES permit that is issued pursuant to ARM Title 17, chapter 30, subchapter 13 to the same owner or operator for other point source discharges.

(3) For point source discharges of storm water identified in (1)(a) through (f) that are not routinely composed of storm water, and that routinely discharge pollutants, coverage under an individual MPDES storm water permit or under an MPDES general permit must be obtained pursuant to ARM Title 17, chapter 30, subchapter 13.

(4) Any person who discharges or proposes to discharge storm water combined with municipal sewage from a point source shall obtain MPDES permits in accordance with the procedures set out in ARM Title 17, chapter 30, subchapter 13 and is not subject to the provisions of this subchapter.

(5) The department may waive the permit requirements in this subchapter for a storm water discharge associated with construction activity that disturbs less than five acres of total land area if either of the following two conditions exist:

(a) the value of the rainfall erosivity factor ("R" in the revised universal soil loss equation) is less than five during the period of construction activity. The period of construction activity extends through to final stabilization. The rainfall

erosivity factor must be determined using a state-approved method. The owner or operator must certify to the department that the construction activity will take place only during a period when the value of the rainfall erosivity factor is less than five. If unforeseeable conditions occur that are outside of the control of the waiver applicant, and which will extend the construction activity beyond the dates initially applied for, the owner or operator shall reapply for the waiver or obtain authorization under the general permit for storm water discharges associated with construction activity. The waiver reapplication or notice of intent must be submitted within two business days after the unforeseeable condition becomes known; or

(b) storm water controls are not needed based on a TMDL approved or established by EPA that addresses the pollutants of concern or, for non-impaired waters that do not require TMDLs, an equivalent analysis that determines allocations for construction sites disturbing less than five acres of total land area for the pollutants of concern or that determines that such allocations are not needed to protect water quality based on consideration of existing in-stream concentrations, expected growth in pollutant contributions from all sources, and a margin of safety. For the purposes of this rule, pollutants of concern include sediment, or a parameter that addresses sediment (such as total suspended solids, turbidity or siltation), and any other pollutant that has been identified as a cause of impairment of any water body that will receive a discharge from the construction activity. The operator shall certify to the department that the construction activity will take place, and that storm water discharges will occur, within the drainage area addressed by the TMDL or equivalent analysis.

(6) Prior to October 1, 1994, discharges composed entirely of storm water are not required to obtain an MPDES permit except for:

(a) discharges with respect to which an individual MPDES permit has been issued prior to February 4, 1987; and

(b) discharges listed in (1)(a), (b), (c), and (f), except that, for discharges listed in (1)(a), this requirement applies only to storm water discharges associated with construction activity that will result in construction-related disturbance of five acres or more of total land area.

(7) For storm water discharges designated by the department under (1)(e) and (f), the owner or operator shall apply for a permit within 180 days of receipt of the department's notice of designation, unless the department grants a later date.

(8) Except as provided in (9), if not authorized under a storm water general permit, a permit application or notice of intent must be submitted to the department for stormwater discharges existing as of October 1, 1992 that are associated with:

(a) industrial activity;

(b) mining and oil and gas activity; and

(c) construction activity that will result in construction-related disturbances of five acres or more of total land area and for which storm water discharges are not authorized by a storm water general permit.

(9) For discharges identified in (8)(a) through (c) that are not authorized by a general or individual MPDES permit, and which are from a facility, other than an airport, powerplant, or uncontrolled sanitary landfill, that is owned or operated by a municipality with a population of under 100,000, the permit requirements in this subchapter are effective beginning March 10, 2003.

(10) The eligibility of an owner or operator of a discharge from an MS4 for funding under Title II, Title III, or Title VI of the federal Clean Water Act shall not be affected by the regulation or nonregulation of the MS4 under this subchapter.

(11) A person may petition the department to require an MPDES permit for a discharge that is composed entirely of storm water that contributes to a violation of a water quality standard or is a significant contributor of pollutants to surface waters.

AUTH: 75-5-201, 75-5-401, MCA
IMP: 75-5-401, MCA

REASON: New rule III identifies the types of activities that are required to obtain a storm water discharge permit under this subchapter. The rule also clarifies which storm water discharges must obtain a permit under ARM Title 17, chapter 30, subchapter 13, and provides a procedure for waiving the permit requirements for storm water discharges associated with construction activity.

New (1)(a) through (c) recodify existing requirements for discharges associated with construction activity (five acres of total construction-related disturbance and above), industrial, mining and oil and gas activity. These activities are currently regulated as industrial activities under ARM 17.30.1332. These rules also require permits, in certain circumstances, for storm water discharges from small construction activities, (one or more acres of total construction-related disturbance but less than five acres). This is a new requirement, required by the federal phase II storm water rules. Regulation of storm water discharges from construction, industrial, mining, and oil and gas activities is necessary to protect surface water resources from contaminants associated with those activities.

New (1)(d) requires permits for storm water discharges from small municipal separate storm sewer systems (MS4s). Current phase I rules regulate discharges from large (population 250,000 and up) and medium (population 100,000 and up) MS4s, as determined by the 1990 census. Because there are no municipalities in Montana that were in the large and medium categories as of 1990, those categories are deleted from these rules. Instead, new rule III requires permits for storm water discharges from certain small MS4s, as defined or designated

under these rules. Regulation of small MS4s is required by the recent phase II amendments to the federal rules. The proposed rules require operators of regulated small MS4s to develop, implement, and enforce a storm water management program designed to reduce the discharge of pollutants from their MS4 to protect water quality. Such programs are necessary to control the discharge of pollutants from municipal separate storm sewers. The requirements for MS4s are discussed in more detail in the rationale statements for new rules II and V.

New (1)(e) requires permits for storm water discharges for which the department determines that storm water controls are needed based on wasteload allocations that are part of a total maximum daily load (TMDL). This requirement is based on federal rules, and is necessary to allow the department to require permit coverage for storm water discharges based upon water quality considerations. Designation under this subsection is expected to be rare. Only non-exempt point sources are affected, and most non-exempt point sources with potential water quality effects that are significant enough to result in a TMDL wasteload allocation will either already have an MPDES permit or, if a new source, will be required to obtain a permit under other MPDES rules.

New (1)(f) requires permits for storm water discharges that the department determines are contributing to a violation of a water quality standard or are significant contributors of pollutants to surface waters. This requirement recodifies a provision in existing rules. It is necessary in order to allow the department to require storm water controls in situations outside of the categories listed above, when needed to protect water quality.

New (2), (3), and (4) clarify which storm water discharges must obtain authorizations under general permits under this subchapter, and which discharges must obtain individual MPDES permits under subchapter 13. These subsections are necessary to identify the appropriate procedures that dischargers must follow to obtain MPDES permit coverage.

New (5) sets out new procedures for waiving the permit requirements for what EPA terms "small" construction activities. These procedures follow the federal phase II rules, and are necessary to allow for exemptions for small construction activities in cases where storm water controls are not needed because of low rainfall erosivity or because the activity has been addressed through a TMDL or equivalent process.

New (6) is language directly from the federal rules, which identifies the original effective dates of the original phase I storm water requirements. New (8) is also federal language, which sets out the permit application deadlines for the original phase I requirements. These dates, as set out in the federal CFR, have previously been incorporated by reference in the state rules, and are now proposed to be codified as part of new ARM Title 17, chapter 30, subchapter 11. The effective dates for the phase II requirements are set out elsewhere in the rules (e.g., new rule VII identifies March 2003 as the effective date for the permit requirements for small MS4s).

NEW RULE IV EXCLUSIONS (1) In addition to the exclusions stated in ARM 17.30.1310, the following storm water discharges do not require MPDES permits:

(a) point source discharges of storm water to ground water as provided in 75-5-401(5)(g), MCA;

(b) existing or new discharges composed entirely of storm water from oil or gas exploration, production, processing, or treatment operations, or transmission facilities, unless the operation or facility:

(i) has had, at any time since November 16, 1987, a discharge of storm water resulting in the discharge of a reportable quantity for which notification is or was required pursuant to 40 CFR 110.6, 40 CFR 117.21 or 40 CFR 302.6;

(ii) contributes to a violation of a water quality standard; or

(iii) has a storm water discharge associated with construction activity, as defined in this subchapter;

(c) existing or new discharges composed entirely of storm water from mining operations, unless the discharge has come into contact with any overburden, raw material, intermediate products, finished products, byproducts or waste products located on the site of such operations.

AUTH: 75-5-201, 75-5-401, MCA
IMP: 75-5-401, MCA

REASON: New rule IV lists several types of storm water discharges that do not need a permit under this subchapter. New rule IV excludes discharges to ground water, because such discharges are excluded by the Montana water quality statutes at 75-5-401(5)(g), MCA.

Based on federal requirements, new rule IV also excludes discharges consisting entirely of storm water from oil or gas exploration, production, processing, or treatment operations, and from transmission facilities, unless the operation or facility has had a discharge of a reportable quantity for which notification is or was required pursuant to 40 CFR 110.6, 40 CFR 117.21 or 40 CFR 302.6, contributes to a violation of a water quality standard, or has a discharge associated with construction activity. New rule IV also excludes discharges composed entirely of storm water from mining operations unless there is a potential for the discharge to come into contact with pollutant sources. These exclusions are necessary to avoid requiring nonpolluting activities to obtain MPDES permits except in cases where there is the potential for pollution.

NEW RULE V DESIGNATION PROCEDURES: SMALL MS4S (1) For purposes of this rule, "designation" means a determination by the department that an MS4 is subject to the permit requirements of this subchapter.

(2) The department shall designate an MS4 other than those identified in [NEW RULE II(23)] if a discharge from the MS4 results in, or has the potential to result in, exceedances of water quality standards, including impairment of designated

uses, or has other significant water quality impacts, including habitat and biological impacts. In making a designation under this subsection, the department shall:

(a) consider whether the MS4:

(i) has discharges to a listed impaired waterbody that is on the most recent 303(d) list;

(ii) has high growth or growth potential;

(iii) has high population density;

(iv) is contiguous to an urbanized area; and

(v) is a significant contribution of pollutants to surface waters; and

(b) place a high priority on evaluating small MS4s that have a combined permanent and seasonal population of over 10,000, as determined by the latest decennial census by the United States census bureau plus the number of commercially advertised bedroom accommodations that will allow for an overnight stay, as listed through the chamber of commerce, or any local resort or property management company.

(3) The department shall designate an MS4 other than those identified in [NEW RULE II(23)] if the MS4 contributes substantially to the pollutant loadings of a physically interconnected municipal separate storm sewer that is a regulated small MS4 under these rules.

(4) The department may designate an MS4 other than those identified in [NEW RULE II(23)] pursuant to the criteria in [NEW RULE III(1)(e) or (f)].

(5) The department may designate discharges from municipal separate storm sewers on a system-wide or on a jurisdiction-wide basis. In making its designation the department may consider the following factors:

(i) the location of the discharge with respect to surface waters;

(ii) the size of the discharge;

(iii) the quantity and nature of the pollutants discharged to surface waters; and

(iv) other relevant factors.

(6) Upon petition, the department may designate an MS4 under the appropriate criteria in these rules. The department shall make a final determination on a petition to designate a small MS4 within 180 days after receipt of the petition.

(7) An MS4 may petition the department to reduce the census estimates of the population served by the MS4 to account for storm water discharges to combined sewers, as defined in 40 CFR 35.2005(b)(11), that are treated in a publicly owned treatment works. In municipalities in which combined sewers are operated, the census estimates of population may be reduced in proportion to the fraction, based on estimated lengths, of the length of combined sewers over the sum of the length of combined sewers and municipal separate storm sewers. The MS4 shall submit the MPDES permit number associated with each discharge point and a map indicating areas served by combined sewers and the location of any combined sewer overflow discharge point.

(8) The department may re-evaluate its designation of an MS4 if circumstances change or if new information becomes available.

(9) The department may waive the permit requirements of this subchapter for an MS4 identified in [NEW RULE II(23)] if the MS4 demonstrates to the department that the MS4 has existing storm water quality control programs that are equivalent to the six minimum control measures set out in [NEW RULE VII].

(10) The department may waive the permit requirements of this subchapter for an MS4, which would otherwise be regulated because it is located within an urbanized area, if the MS4 serves a population of under 1,000 and both of the following criteria are met:

(a) discharges from the MS4 are not contributing substantially to the pollutant loadings of a physically interconnected regulated MS4; and

(b) storm water controls are not needed for the MS4 based on wasteload allocations that are part of an EPA-approved or established TMDL that addresses the pollutants of concern.

(11) The department may waive the permit requirements of this subchapter for an MS4, which would otherwise be regulated because it is located within an urbanized area, if the MS4 serves a population of between 1,000 and 10,000 and both of the following criteria are met:

(a) the department has evaluated all surface waters, including small streams, tributaries, lakes, and ponds, that receive a discharge from the MS4 and has determined that storm water controls are not needed based on wasteload allocations that are part of an EPA-approved or established TMDL that addresses the pollutants of concern or, if a TMDL has not been developed or approved, an equivalent analysis that determines sources and allocations for the pollutants of concern;

(i) for purposes of this subsection, pollutants of concern include biochemical oxygen demand (BOD), sediment or a parameter that addresses sediment (such as total suspended solids, turbidity, or siltation), pathogens, oil and grease, and any pollutant that has been identified as a cause of impairment of any water body that will receive a discharge from the MS4; and

(b) the department has determined that current and future discharges from the MS4 do not have the potential to result in exceedances of water quality standards, including impairment of designated uses, or other significant water quality impacts, including habitat and biological impacts.

(12) The department shall at least once every five years review all waivers granted under this rule to determine whether any of the information required for granting the waiver has changed. The department shall consider a petition to review a waiver if the petitioner provides evidence that the information required for granting the waiver has substantially changed.

(13) The department may designate an MS4 for which the permit requirement is waived under this rule if circumstances change or new information becomes available.

AUTH: 75-5-201, 75-5-401, MCA
IMP: 75-5-401, MCA

REASON: As stated in the rationale for new rule II (Definitions), these rules require certain small municipal separate storm sewer systems (MS4s) to obtain MPDES permits, in order to control the discharge of pollutants from municipal storm sewers. Several municipal systems in Montana are designated in new rule II as required to obtain MPDES permits. New rule V contains procedures for deregulating designated MS4s if they show that they already have a storm water control program that meets the minimum requirements set out in the federal phase II rules. This deregulation procedure is necessary to avoid permitting MS4s that do not need additional storm water controls.

New rule V also contains MS4 designation criteria for evaluating MS4s in addition to those listed in new rule II. These criteria would be applicable to unregulated MS4s, which under these rules are those in municipalities with a population under 10,000 people. The criteria are based on federal requirements, and include: the possibility of discharges to listed impaired waterbodies on the most recent 303(d) list, high growth or growth potential, high population density, contiguity to an urbanized area, and significant contribution of pollutants to surface waters. An MS4 may also be designated if it is interconnected with a regulated MS4. These procedures are necessary to allow the department to address municipal storm sewer pollution problems in special circumstances.

New rule V also contains procedures for designation of MS4s in response to petitions, and for changing a determination if circumstances change or if new information becomes available. These procedures are necessary to allow the department to respond to changing circumstances or new information.

Based on federal requirements, new rule V also contains two procedures for waiving the permit requirement for MS4s located within urbanized areas. Separate procedures are set out for jurisdictions with a population under 1,000, and for those with populations over 1,000 but under 10,000. These procedures are necessary to exempt relatively small MS4s from the permit requirement in appropriate circumstances.

NEW RULE VI APPLICATION PROCEDURES: GENERAL (1) This rule does not apply to storm water discharges associated with construction activity. The application procedures for such discharges are set out in [NEW RULE VIII].

(2) When a facility or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit.

(3) Any person proposing a new point source discharge of storm water shall submit a complete application, as provided in (5), at least 30 days before the date on which the discharge is to commence, unless permission for a later date has been granted by the department. Persons proposing a new discharge are

encouraged to submit their applications well in advance of the 30-day requirement to avoid delay.

(4) Permittees of point source discharges of storm water with currently effective authorizations under a general permit shall submit a new application 30 days before the existing permit expires. The department may extend this deadline but may not extend it beyond the permit expiration date.

(5) The department may not issue an authorization under a general permit until it has received a complete application.

(a) An application for authorization under a general permit is complete when the department receives:

(i) a department application form, with the information required in (6), and a completed SWPPP. Both the application and SWPPP must be signed as provided in ARM 17.30.1323; and

(ii) the permit fee required in ARM 17.30.201.

(b) The completeness of any application for a permit must be judged by the department independently of the status of any other permit application or permit for the same facility or activity.

(c) A SWPPP is not required for small MS4s.

(6) Applicants shall provide the following information to the department, using the application form provided by the department:

(a) a description of the nature of the business or activity that requires authorization for a point source discharge of storm water under an MPDES general permit;

(b) the name and mailing address of the owner or operator;

(c) the location of the facility or activity for which the application is submitted;

(d) a facility or activity contact person and telephone number;

(e) for industrial or mining and oil and gas activities, the standard industrial classification (SIC) codes that best reflect the principal products or services provided by the facility;

(f) a description of point source discharges of storm water including an indication of drainage patterns and receiving surface waters;

(g) a listing of all permits and construction approvals received or applied for from state or federal regulatory agencies;

(h) a copy of a USGS topographic quadrangle map extending one mile beyond the property boundaries of the point source discharge of storm water, depicting the facility or activity boundaries and major drainage patterns and receiving surface waters;

(i) the signature of the certifying official under ARM 17.30.1323; and

(j) any other information requested by the department.

(7) Applicants shall submit to the department a copy of the facility or activity SWPPP that provides all information requested under the SWPPP requirements as stated in the respective general permit.

(8) Applicants shall submit to the department a certification that all point source discharges of storm water have been tested or evaluated for the presence of non-storm water discharges (other than the potential non-storm water discharges for MS4s listed in [NEW RULE VII(6)(c)(iii)]) that are not covered by an MPDES permit. If storm water sampling and analytical testing was performed as a basis for this certification, the certification must include a description of any analytical test method used, the date of any testing, and the on-site drainage points that were sampled. If a contract laboratory or consulting firm performed analyses that generated quantitative data upon which conclusions and resultant determinations are based for regulated point source discharges of storm water and potential pollutant concentrations, the identity of each laboratory or firm and the analyses performed must be provided.

(9) In addition to the information reported on the application form, applicants shall provide to the department, at its request, such other information as the department determines is reasonably necessary to assess the discharges of the facility and to determine whether to authorize the discharge under an MPDES individual or general permit.

(10) Applicants shall keep records of all data used to complete permit applications and any supplemental information submitted under this subchapter for a period of at least three years from the date the application is signed.

AUTH: 75-5-201, 75-5-401, MCA
IMP: 75-5-401, MCA

REASON: New rule VI sets out general requirements and procedures for applicants for MPDES storm water discharge permits under this subchapter. Special requirements for particular dischargers are set out in subsequent rules. This rule is necessary in order to inform applicants of the information and procedures that are required to obtain coverage under an MPDES storm water permit.

NEW RULE VII APPLICATION PROCEDURES, PERMIT REQUIREMENTS: SMALL MS4S (1) Owners or operators of small MS4s shall apply for authorization under an MPDES permit as provided in [NEW RULE VI] and this rule.

(a) For small MS4s in existence on [effective date of these rules], the permit requirements in this subchapter are effective beginning March 10, 2003.

(b) The owner or operator of a small MS4 that is designated after [effective date of these rules] by the department under [NEW RULE V] shall apply for authorization within 180 days of notice by the department, unless the department grants a later date.

(2) Small MS4s shall complete an application for authorization in accordance with the requirements in [NEW RULE VI]. The application must also include the following information:

(a) a description of the BMPs that the MS4 will implement for each of the six storm water minimum control measures set out in (6);

(b) identification of the measurable goals for each of the BMPs including, as appropriate, the months and years in which the MS4 will undertake required actions, including interim milestones and the frequency of the action; and

(c) the person or persons responsible for implementing or coordinating the storm water management program.

(3) A small MS4 may file its own application or may jointly submit an application with other municipalities or governmental entities. If a small MS4 intends to share responsibilities for meeting the minimum control measures with other municipalities or governmental entities, the small MS4 shall submit an application that describes which minimum control measures it will implement and identify the entities that will implement the other minimum control measures within the area served by the small MS4.

(4) The general permit may include other steps necessary to obtain permit authorization.

(5) The MPDES permit for small MS4s must require at a minimum that MS4s develop, implement, and enforce a storm water management program designed to reduce the discharge of pollutants from the MS4 to the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriate water quality requirements of the federal Clean Water Act. The storm water management program must include the minimum control measures described in (6).

(a) For purposes of this rule, narrative effluent limitations requiring implementation of BMPs are the most appropriate form of effluent limitations when designed to satisfy technology requirements (including reductions of pollutants to the maximum extent practicable) and to protect water quality. Implementation of BMPs consistent with the provisions of the storm water management program required pursuant to this rule and the provisions of the permit shall constitute compliance with the standard of reducing pollutants to the maximum extent practicable. The department shall specify a time period of up to five years from the date of the permit or permit authorization for the MS4 to develop and implement the program.

(6) Minimum control measures include, but are not limited to:

(a) public education and outreach on storm water impacts. A small MS4 shall implement a public education program to distribute educational materials to the community or conduct equivalent outreach activities about the impacts of storm water discharges on water bodies and the steps that the public can take to reduce pollutants in storm water runoff;

(b) public involvement/participation. A small MS4 shall, at a minimum, comply with state and local public notice requirements when implementing a public involvement/ participation program;

(c) illicit discharge detection and elimination measures that must include the following:

(i) a small MS4 shall develop, implement and enforce a program to detect and eliminate illicit discharges into the small MS4;

(ii) a small MS4 shall:

(A) develop, if not already completed, a storm sewer system map, showing the location of all outfalls and the names and locations of all outfall receiving waters;

(B) to the extent allowable under state or local law, effectively prohibit, through ordinance or other regulatory mechanism, non-storm water discharges (other than the potential non-storm water discharges for MS4s listed in [NEW RULE VII(6)(c)(iii)]) into the MS4 and implement appropriate enforcement procedures and actions;

(C) develop and implement a plan to detect and address non-storm water discharges, including illegal dumping, to the MS4; and

(D) inform public employees, businesses, and the general public of hazards associated with illegal discharges and improper disposal of waste;

(iii) a small MS4 shall address the following categories of non-storm water discharges or flows (i.e., illicit discharges) only if it identifies them as significant contributors of pollutants to the MS4:

(A) water line flushing, landscape irrigation, diverted stream flows, rising ground waters, uncontaminated ground water infiltration (as defined in [NEW RULE II(8)], uncontaminated pumped ground water, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation water, springs, water from crawl space pumps, footing drains, lawn watering, individual residential car washing, flows from riparian habitats and wetlands, dechlorinated swimming pool discharges, and street wash water;

(B) discharges or flows from fire fighting activities are excluded from the effective prohibition against non-storm water and need only be addressed where they are identified as significant sources of pollutants to surface waters;

(d) construction site storm water runoff control measures including:

(i) a small MS4 shall develop, implement, and enforce a program to reduce pollutants in any storm water runoff to the MS4 from construction activities that result in a land disturbance of greater than or equal to one acre. Reduction of storm water discharges from construction activity disturbing less than one acre must be included in the program if that construction activity is part of a larger common plan of development or sale that would disturb one acre or more. If the department waives requirements for a construction site in accordance with [NEW RULE III(5)], the small MS4 is not required to develop, implement, or enforce a program to reduce pollutant discharges from such sites;

(ii) the development and implementation of, at a minimum:

(A) an ordinance or other regulatory mechanism to require erosion and sediment controls, as well as sanctions to ensure compliance, to the extent allowable under state or local law;

(B) requirements for construction site operators to implement appropriate erosion and sediment control BMPs;

(C) requirements for construction site operators to control waste such as discarded building materials, concrete truck washout, chemicals, litter, and sanitary waste at the construction site that may cause adverse impacts to water quality;

(D) procedures for site plan review that incorporate consideration of potential water quality impacts;

(E) procedures for receipt and consideration of information submitted by the public; and

(F) procedures for site inspection and enforcement of control measures;

(e) post-construction storm water management in new development and redevelopment. A small MS4 shall:

(i) develop, implement, and enforce a program to address storm water runoff from new development and redevelopment projects that disturb greater than or equal to one acre, including projects less than one acre that are part of a larger common plan of development or sale, that discharge into the MS4. The program must ensure that controls are in place that would prevent or minimize water quality impacts;

(ii) develop and implement strategies that include a combination of structural and non-structural BMPs appropriate for the community;

(iii) develop and implement an ordinance or other regulatory mechanism to address post-construction runoff from new development and redevelopment projects to the extent allowable under state or local law; and

(iv) ensure adequate long-term operation and maintenance of BMPs;

(f) pollution prevention and good housekeeping measures for municipal operations. A small MS4 shall develop and implement an operation and maintenance program that includes a training component and has the goal of preventing or reducing pollutant runoff from municipal operations. Using training materials that are available from EPA, the state of Montana, or other organizations, the program must include employee training to prevent and reduce storm water pollution from activities such as park and open space maintenance, fleet and building maintenance, new construction and land disturbances, and storm water system maintenance.

(7) A small MS4 may share the responsibility to implement the minimum control measures with another entity in order to satisfy their MPDES permit obligations to implement a minimum control measure.

(a) Shared responsibility is allowed only if:

(i) the other entity implements the control measure;

(ii) the particular control measure, or component thereof, is at least as stringent as the corresponding MPDES permit requirement; and

(iii) the other entity agrees to implement the control measure on behalf of the owners or operators of the regulated small MS4.

(b) In the reports submitted under [NEW RULE VII(14)], the owners or operators must specify that they are relying on another entity to satisfy some of their permit obligations, unless the other entity is responsible to file the reports.

(c) The MS4 remains responsible for compliance with its permit obligations if the other entity fails to implement the control measure (or component thereof). The MS4 should enter into a legally binding agreement with the other entity in order to minimize uncertainty about compliance with the MPDES permit.

(8) The department may specify in an MPDES permit that another governmental entity is responsible for implementing one or more of the minimum control measures for a small MS4. If the department does so, the MS4 is not required to include such minimum control measures in its storm water management program. The department may modify an MPDES permit or permit authorization to require an MS4 to implement a minimum control measure if the other entity fails to implement it.

(9) If a qualifying local program requires a small MS4 to implement one or more of the six minimum control measures of this rule, the department may include conditions in the MPDES permit or permit authorization that direct the MS4 to follow that qualifying program's requirements rather than the minimum control measures requirements of this rule. A "qualifying local program" is a local municipal storm water management program that imposes the relevant minimum control measures stated in (6).

(10) A small MS4 is not required to meet any measurable goals identified in its application in order to demonstrate compliance with the minimum control measures in (6)(c) through (f) if EPA or the department has not provided a menu of BMPs that addresses each such minimum measure. In that event, the MS4 shall comply with other requirements of the general permit, including good faith implementation of BMPs designed to comply with the minimum control measures.

(11) The department may include, in an authorization issued to a small MS4, limitations that are more stringent than those contained in the general permit. Such limitations must be based on a TMDL or equivalent analysis that determines such limitations are needed to protect water quality.

(12) A small MS4 shall evaluate program compliance, the appropriateness of its identified BMPs, and progress towards achieving its identified measurable goals.

(13) A small MS4 shall keep records required by the MPDES permit for at least three years and shall provide its records to the department upon request. Records, including a description of the storm water management program, must be made available to the public at reasonable times during regular business hours. Provisions for the confidentiality of records are stated in ARM 17.30.1321.

(14) Unless a small MS4 relies on another entity to satisfy its MPDES permit obligations under [NEW RULE VII(7)],

the MS4 shall submit annual reports to the department for the first permit term. For subsequent permit terms, the MS4 shall submit reports in years two and four unless the department requires more frequent reports. The annual report must:

(a) describe the status of compliance with permit conditions, the appropriateness of the identified BMPs, and progress towards achieving the identified measurable goals for each of the minimum control measures;

(b) include information collected and analyzed, including monitoring data, if any, during the reporting period;

(c) summarize the storm water activities that the MS4 plans to undertake during the next reporting cycle;

(d) describe changes in any identified BMPs or measurable goals for any of the minimum control measures; and

(e) notify the department if the MS4 is relying on another governmental entity to satisfy some of its permit obligations.

(15) The department may issue permits for small MS4s that are designated under [NEW RULE V] on a system-wide basis, jurisdiction-wide basis, watershed basis, or other appropriate basis, or may issue permits for individual discharges.

(16) An owner or operator of a small municipal separate storm sewer system may petition the department to require a separate MPDES permit for any discharge into the small municipal separate storm sewer system.

(17) When, for the discharges listed in (1), more than one operator discharges storm water through a non-municipal or nonpublicly owned separate storm sewer system, the department may either issue a single permit to all dischargers as co-permittees, or issue separate permits to each discharger on the system. If the department issues a single permit to all dischargers on the system, each co-permittee shall be responsible only for the portion of the discharge under its ownership or control.

(a) This subsection applies to storm water discharges associated with industrial, mining, oil and gas, and construction activity that will result in construction-related disturbance of five acres or more of total land area.

(b) If there is more than one operator of a single system of such non-municipal conveyances, all operators of storm water discharges must submit applications.

(18) Each permit covering more than one operator must identify the effluent limitations, or other permit conditions if any, that apply to each operator.

AUTH: 75-5-201, 75-5-401, MCA
IMP: 75-5-401, MCA

REASON: New rule VII sets out federal requirements and procedures for MS4 applicants for MPDES storm water discharge permits under this subchapter. This rule is necessary in order to inform MS4 applicants of the information and procedures that are required to obtain coverage under an MPDES storm water permit.

NEW RULE VIII NOTICE OF INTENT PROCEDURES: CONSTRUCTION ACTIVITY (1) A person who discharges or proposes to discharge storm water associated with construction activity shall submit to the department a notice of intent (NOI) as provided in this rule.

(a) The NOI must be signed by the owner of the project or by the operator, or by both the owner and the operator if both have responsibility to ensure that daily project activities comply with the SWPPP and other general permit conditions. If more than one operator is responsible for compliance with the SWPPP and general permit each operator shall sign the NOI.

(i) persons signing an NOI shall comply with the permit application signature requirements set out in ARM 17.30.1323.

(b) For storm water discharges associated with construction activity that result in construction-related disturbance of less than five acres of total land area, the permit requirements in this subchapter are effective beginning March 10, 2003.

(2) An NOI must be completed on an NOI form developed by the department. The NOI must be completed in accordance with the requirements stated in the general permit, and must include the legal name and address of the operators, the facility name and address, the type of facility or discharges, and the receiving surface waters.

(a) An NOI must include a narrative description of:

(i) the location (including a map) and the nature of the construction activity;

(ii) the total area of the site and the area within the site that is expected to undergo excavation during the life of the permit;

(iii) proposed measures, including BMPs, to control pollutants in storm water discharges during construction, including a brief description of applicable local erosion and sediment control requirements;

(iv) proposed measures to control pollutants in storm water discharges that will occur after construction operations have been completed, including a brief description of applicable local erosion and sediment control requirements;

(v) for a storm water discharge that will result in construction-related disturbance of five acres or more of total land area, an estimate of the runoff coefficient of the site and the increase in impervious area after the construction addressed in the permit application is completed, the nature of fill material and existing data describing the soil or the quality of the discharge; and

(vi) the name of the receiving surface waters.

(3) An NOI must be accompanied by a SWPPP, which must be completed in accordance with the requirements identified in the general permit including the following:

(a) the SWPPP must be signed by all signatories to the NOI; and

(b) the SWPPP must require the identification and assessment of potential pollutant sources that could be exposed

to storm water runoff, and must contain provisions to implement BMPs, in accordance with the general permit.

(4) Authorization to discharge under the general permit is effective upon receipt by the department of a complete notice of intent and SWPPP, together with the permit fee, by the date on which construction-related disturbance is initiated.

(5) The department may include, in the general permit for storm water discharges associated with construction activity, conditions that incorporate by reference qualifying local erosion and sediment control program requirements. A "qualifying local erosion and sediment control program" is one that includes the elements listed in (6) and all additional requirements necessary to achieve the applicable technology-based standards of best available technology (BAT) and best conventional technology (BCT). If a qualifying local program does not include one or more of the elements in (6), then the department shall include those elements as conditions in the permit.

(6) A qualifying local erosion and sediment control program includes requirements for construction site operators to:

(a) implement appropriate erosion and sediment control BMPs;

(b) control waste such as discarded building materials, concrete truck washout, chemicals, litter, and sanitary waste at the construction site that may cause adverse impacts to water quality;

(c) develop and implement a SWPPP. A SWPPP includes site descriptions, descriptions of appropriate control measures, copies of approved local requirements, maintenance procedures, inspection procedures, and identification of non-storm water discharges; and

(d) submit a site plan for review that incorporates consideration of potential water quality impacts.

(7) Permittees shall keep records of all data used to complete the NOI and SWPPP and any supplemental information submitted under this subchapter for a period of at least three years from the date the NOI is signed.

AUTH: 75-5-201, 75-5-401, MCA
IMP: 75-5-401, MCA

REASON: New rule VIII sets out requirements and procedures for applicants for MPDES permits for storm water discharges associated with construction activity. As required by 75-5-401(1)(c), MCA, discharges associated with construction activity must obtain permit coverage through a notice of intent (NOI) process. The notice must include a signed storm water pollution prevention plan (SWPPP) that requires the applicant to characterize potential pollutant sources at the site and to develop and implement best management practices (BMPs) in accordance with the general permit.

This rule implements the statutory NOI process. The NOI process is necessary to provide a streamlined application

process for construction activity, in which numerous similar sites require permits each season.

NEW RULE IX INDUSTRIAL NO-EXPOSURE CERTIFICATION

(1) Discharges composed entirely of storm water are not regulated as discharges associated with industrial activity or discharges associated with mining and oil and gas activity if there is no exposure of industrial materials and activities to rain, snow, snowmelt, and/or runoff, and the discharger satisfies the conditions in this rule.

(a) For purposes of this rule, "no exposure" means that all industrial materials and activities are protected by a storm-resistant shelter to prevent exposure to rain, snow, snowmelt, and/or runoff. Industrial materials or activities include, but are not limited to, material handling equipment or activities, industrial machinery, raw materials, intermediate products, byproducts, final products, or waste products. Material handling activities include the storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, final product, or waste product.

(2) To qualify for the exclusion in this rule, the owner or operator of the discharge must:

(a) except as provided in (3), provide a storm-resistant shelter to protect industrial materials and activities from exposure to rain, snow, snowmelt, and/or runoff;

(b) complete and sign, in accordance with ARM 17.30.1323, a certification form developed by the department that indicates there are no discharges of storm water contaminated by exposure to industrial materials and activities from the entire facility, except as provided in (3);

(c) submit the signed certification to the department once every five years;

(d) allow the department to inspect the facility to determine compliance with the no exposure conditions;

(e) allow the department to make no-exposure inspection reports available to the public upon request; and

(f) for facilities that discharge through an MS4, submit a copy of the certification of no exposure to the MS4 operator, and allow inspection and public reporting by the MS4 operator.

(3) A storm resistant shelter is not required for:

(a) drums, barrels, tanks and similar containers that are tightly sealed, if the containers are not deteriorated and do not leak. For purposes of this rule, "sealed" means banded or otherwise secured and without operational taps or valves; or

(b) final products, other than products that would be mobilized in storm water discharge (e.g., rock salt).

(4) The exclusion in this rule is subject to the following limitations:

(a) the exclusion is not available for storm water discharges associated with construction activity as defined in this subchapter;

(b) the exclusion is available on a facility-wide basis only, not for individual outfalls. If a facility has some

discharges of storm water that would otherwise be no-exposure discharges, permit requirements should be adjusted accordingly;

(c) if circumstances change and industrial materials or activities become exposed to rain, snow, snowmelt, and/or runoff, the conditions for this exclusion no longer apply. In such cases, the discharge becomes subject to enforcement for unpermitted discharge. Any conditionally exempt discharger who anticipates changes in circumstances should apply for and obtain permit authorization prior to the change of circumstances; and

(d) the department may deny an exclusion under this rule if it determines that the discharge causes, has a reasonable potential to cause, or contributes to a violation of a water quality standard, including designated uses.

(5) A no-exposure certification must contain the following information, at a minimum, to aid the department in determining whether a facility qualifies for the no-exposure exclusion:

(a) the legal name, address and phone number of the discharger;

(b) the facility name and address, the county name, and the township, range, section and 1/4 section where the facility is located;

(c) certification that none of the following materials or activities are, or will be in the foreseeable future, exposed to precipitation:

(i) use, storage or cleaning of industrial machinery or equipment, and areas where residuals from such activities remain and are exposed to storm water;

(ii) materials or residuals on the ground or in storm water inlets from spills/leaks;

(iii) materials or products from past industrial activity;

(iv) material handling equipment, except for adequately maintained vehicles;

(v) materials or products during loading/unloading or transporting activities;

(vi) materials or products stored outdoors, except final products intended for outside use (e.g., new cars), if exposure to storm water does not result in the discharge of pollutants;

(vii) materials contained in open, deteriorated or leaking storage drums, barrels, tanks and similar containers;

(viii) materials or products handled/stored on roads or railways owned or maintained by the discharger;

(ix) waste material, except waste in covered, non-leaking containers (e.g., dumpsters);

(x) application or disposal of process wastewater, unless otherwise permitted; and

(xi) particulate matter or visible deposits of residuals from roof stacks/vents not otherwise regulated, i.e., under an air quality control permit, and evident in the storm water outflow;

(d) the following certification statement, which must be signed in accordance with the signatory requirements of ARM 17.30.1323: "I certify under penalty of law that I have read and understand the eligibility requirements for claiming a condition of "no exposure" and obtaining an exclusion from MPDES

storm water permitting; and that there are no discharges of storm water contaminated by exposure to industrial activities or materials from the industrial facility identified in this document (except as allowed under [NEW RULE IX(3)]). I understand that I am obligated to submit a no-exposure certification form once every five years to the department and, if requested, to the operator of the local MS4 into which this facility discharges (where applicable). I understand that I must allow the department, or MS4 operator where the discharge is into the local MS4, to perform inspections to confirm the condition of no exposure and to make such inspection reports publicly available upon request. I understand that I must obtain coverage under an MPDES permit prior to any point source discharge of storm water from the facility. I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information submitted. Based upon my inquiry of the person or persons who manage the system, or those persons directly involved in gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

AUTH: 75-5-201, 75-5-401, MCA
IMP: 75-5-401, MCA

REASON: Based on federal phase II rules, new rule IX provides a procedure for dischargers of storm water from industrial, mining, and oil and gas operations to certify that there is no potential for storm water runoff from their facility to become contaminated with pollutants. This rule provides a permit "off-ramp" process similar to those provided for MS4s in new rule V and for construction activities that disturb less than five acres in new rule III. This procedure is necessary to avoid permitting facilities that do not need storm water controls.

NEW RULE X TRANSFER OF PERMIT COVERAGE (1) General permit authorizations and NOIs for storm water discharges regulated under this subchapter are not transferable to a new owner or operator, including when the name and/or legal ownership of a party changes, unless the new or revised owner or operator of a facility or activity submits a new application or NOI form, a revised SWPPP if necessary, and other revised documents or information that are necessary to indicate the current conditions or status. Persons requesting transfer of general permit coverage must comply with the application procedures stated in the respective general permit and must pay a fee. If the new permittee develops a new SWPPP, the new permittee shall implement the old SWPPP until the new SWPPP is developed and implemented.

AUTH: 75-5-201, 75-5-401, MCA
IMP: 75-5-401, MCA

REASON: **New rule X provides that general permit authorizations and NOIs are not transferable unless the new permittee submits a new application or NOI form together with all appropriate supporting information. This rule is necessary to inform transferees of required procedures, and to ensure that transferees are qualified for coverage under the general permit.**

4. Concerned persons may submit their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to the Board of Environmental Review, P.O. Box 200901, Helena, Montana 59620-0901, faxed to (406) 444-4386 or emailed to the Board Secretary at ber@state.mt.us and must be received no later than 5:00 p.m., November 27, 2002. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

5. Thomas Bowe, attorney for the Board, has been designated to preside over and conduct the hearing.

6. The Board maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding: air quality; hazardous waste/waste oil; asbestos control; water/wastewater treatment plant operator certification; solid waste; junk vehicles; infectious waste; public water supplies; public sewage systems regulation; hard rock (metal) mine reclamation; major facility siting; opencut mine reclamation; strip mine reclamation; subdivisions; renewable energy grants/loans; wastewater treatment or safe drinking water revolving grants and loans; water quality; CECRA; underground/above ground storage tanks; MEPA; or general procedural rules other than MEPA. Such written request may be mailed or delivered to the Board of Environmental Review, 1520 E. Sixth Ave., P.O. Box 200901, Helena, Montana 59620-0901, faxed to the office at (406) 444-4386, emailed to the Board Secretary at ber@state.mt.us or may be made by completing a request form at any rules hearing held by the Board.

7. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

BOARD OF ENVIRONMENTAL REVIEW

By: *Joseph W. Russell*
JOSEPH W. RUSSELL, M.P.H.,
Chairman

Reviewed by:

James M. Madden
JAMES M. MADDEN, Rule Reviewer

Certified to the Secretary of State, October 7, 2002.

**BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA**

In the matter of the amendment of ARM 17.30.1301, 17.30.1303, 17.30.1304, 17.30.1322, 17.30.1323, 17.30.1341, 17.30.1351, 17.30.1361, and the repeal of ARM 17.30.1332 pertaining to Montana Pollutant Discharge Elimination System Permits	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT AND REPEAL (WATER QUALITY)

TO: All Concerned Persons

1. On November 18, 2002 at 9:00 a.m., in conjunction with the hearing for MAR Notice No. 17-174, the Board of Environmental Review will hold a public hearing in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed amendment and repeal of the above-stated rules.

2. The Board will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board no later than 5:00 p.m., November 6, 2002, to advise us of the nature of the accommodation that you need. Please contact the Board Secretary at P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2544; fax (406) 444-4386; or email ber@state.mt.us.

3. The rules proposed to be amended provide as follows, stricken matter interlined, new matter underlined:

17.30.1301 PURPOSE AND SCOPE (1) The purpose of this subchapter, taken together with ~~subchapter~~ subchapters 11, 12, and 14, is to establish and implement one common system for issuing permits for point sources discharging pollutants into state waters, and is intended to allow the board and department to administer a pollutant discharge permit system which is compatible with the national pollutant discharge elimination system as established by the US environmental protection agency pursuant to section 402 of the federal Clean Water Act, 33 USC 1251, et seq.

AUTH: 75-5-201, 75-5-401, MCA
IMP: 75-5-401, MCA

REASON: In MAR Notice No. 17-174, which the board is issuing in conjunction with this rule notice, the board is proposing to create a new subchapter 11 in ARM Title 17, chapter 30, for the purpose of codifying water quality rules governing discharges of storm water. This rule notice

proposes changes to subchapter 13 to facilitate moving most of the storm water rules to the proposed new subchapter 11.

Current storm water rules are contained in ARM Title 17, chapter 30, subchapter 13, but are not fully spelled out there. Instead, subchapter 13 incorporates by reference federal storm water requirements at ARM 17.30.1303, and codifies other federal storm water requirements in part at ARM 17.30.1332. The current storm water rules are referred to as the "phase I" rules.

Creation of a new storm water subchapter, rather than simply incorporating the federal rules by reference or amending subchapter 13, is necessary to make the rules easier for the regulated community to read and apply.

In MAR Notice No. 17-174, the board is also proposing to promulgate new storm water regulations that will conform to recent federal rules applicable to storm water discharges from certain municipalities and small construction activities. The new storm water rules are referred to as the "phase II" rules. The phase I and II federal rules have been adopted by the U.S. environmental protection agency (EPA), and are found at 40 CFR Part 122. The board is required by federal law to adopt storm water regulations that are not less stringent than the EPA storm water rules. The rules proposed in MAR Notice No. 17-174 and in this rule notice are necessary to prevent impacts to surface water from storm water runoff. Storm water runoff from lands modified by human activities can harm surface water resources and can cause or contribute to exceedances of water quality standards. Storm water runoff may contain or mobilize high levels of contaminants, such as sediment, suspended solids, nutrients (phosphorus and nitrogen), heavy metals and other toxic pollutants, pathogens, toxins, oxygen-demanding substances and floatables.

The storm water requirements in MAR Notice No. 17-174 and in this rule notice would be implemented through permits issued under the Montana pollutant discharge elimination system (MPDES). The proposed amendments to ARM 17.30.1301 clarify that subchapters 11 (storm water discharges), 12 (MPDES standards), 13 (MPDES permits) and 14 (pretreatment) establish a common system for issuing permits for point sources discharging pollutants into state waters. The amendments are necessary to assist the regulated public in locating applicable requirements for discharges.

17.30.1303 INCORPORATIONS BY REFERENCE (1) through (6) remain the same.

(7) The list of incorporations by reference follows:

ARM 17.30...	33 CFR ...	Description of Regulation
(a) 1310	153.101 et seq.	Control of pollution by oil, and hazardous substances, discharge removal.

ARM 17.30...	40 CFR ...	Description of Regulation
(b) 1310	Part 300	The national oil and hazardous substances pollution contingency plan.
(c) 1322	122.26(c)(1)	Requirements for individual permit applications for storm water discharges.

(c) through (as) remain the same, but are renumbered (d) through (at).

AUTH: 75-5-304, MCA
IMP: 75-5-304, 75-5-401, MCA

REASON: The proposed amendments to ARM 17.30.1303 incorporate by reference federal requirements at 40 CFR 122.26(c)(1). The federal requirements pertain to application procedures for MPDES permits for storm water discharges. Individual permits for storm water discharges would continue to be processed under subchapter 13 rather than the new subchapter 11 that is proposed in MAR Notice No. 17-174. The federal application procedures at 40 CFR 122.26(c)(1) are applied in this subchapter in the amendments to ARM 17.30.1322, which are discussed below. Incorporation of the federal requirements in this rule is necessary in order to apply them in ARM 17.30.1322.

17.30.1304 DEFINITIONS In this subchapter, the following terms have the meanings or interpretations indicated below and shall be used in conjunction with and are supplemental to those definitions contained in 75-5-103, MCA.

(1) through (59) remain the same.

~~(60) "Storm water point source" means a conveyance or system of conveyances (including pipes, conduits, ditches, and channels) primarily used for collecting and conveying storm water runoff and which:~~

~~(a) is located at an urbanized area as designated by the Bureau of the Census according to the criteria in 39 Federal Register 15202 (May 1, 1974); or~~

~~(b) discharges from lands or facilities used for industrial or commercial activities; or~~

~~(c) is designated under ARM 17.30.1332(4). Conveyances that discharge storm water runoff combined with municipal~~

~~sewage are point sources that must obtain MPDES permits, but are not storm water point sources.~~

~~(61) "Storm water discharge, Group I" means any storm water point source which is:~~

~~(a) subject to effluent limitations guidelines, new source performance standards, or toxic pollutant effluent standards;~~

~~(b) designated under ARM 17.30.1332(4); or~~

~~(c) located at an industrial plant or in plant associated areas. "Plant associated areas" means industrial plant yards, immediate access roads, drainage ponds, refuse piles, storage piles or areas, and material or products loading and unloading areas. The term excludes areas located on plant lands separate from the plant's industrial activities, such as office buildings and accompanying parking lots.~~

~~(62) "Storm water discharge, Group II" means any storm water point source not included in (61) of this rule. (See ARM 17.30.1322(7)(j)(i) for exemption from certain application requirements.)~~

(63) through (66) remain the same, but are renumbered (60) through (63).

AUTH: 75-5-201, 75-5-401, MCA
IMP: 75-5-401, MCA

REASON: The proposed amendments to ARM 17.30.1304 delete three definitions. The definition for "storm water point source" is proposed to be deleted because it is not used in the federal rules, these rules, or in the new subchapter 11. The definitions for "storm water discharge, Group I" and "storm water discharge, Group II" are proposed to be deleted because the terms are no longer used either in the federal or state storm water rules. Deleting these definitions is necessary to eliminate superfluous rule language, and to be consistent with federal requirements.

17.30.1322 APPLICATION FOR A PERMIT (1) through (5) remain the same.

(6) All applicants for MPDES permits shall provide the following information to the department, using the application form provided by the department (additional information required of applicants is set forth in (7)~~-(12) of this rule~~ through (14)):

(a) through (f)(ix) remain the same.

(g) a topographic map (or other map if a topographic map is unavailable) extending one mile beyond the property boundaries of the source, depicting the facility and each of its intake and discharge structures; each of its hazardous waste treatment, storage, or disposal facilities; each well where fluids from the facility are injected underground; and those wells, springs, other surface water bodies, and drinking water wells listed in public records or otherwise known to the applicant in the map area ~~(group II storm water discharges, as~~

~~defined in ARM 17.30.1304(62), are exempt from the requirements of this subsection)~~;

(h) remains the same.

~~(i) for group II storm water dischargers (as defined in ARM 17.30.1304(62) only, a brief narrative description of:~~

~~(i) the drainage area, including an estimate of the size and nature of the area;~~

~~(ii) the receiving water; and~~

~~(iii) any treatment applied to the discharge.~~

(j) through (m) remain the same, but are renumbered (i) through (l).

(7) Existing manufacturing, commercial, mining, and silvicultural dischargers applying for MPDES permits shall provide the following information to the department, using application forms provided by the department:

(a) through (i) remain the same.

~~(j)(i) an applicant that qualifies as a Group II storm water discharger under ARM 17.30.1304(62) and 17.30.1332 is exempt from the requirements of (6)(g) and (7) of this rule, unless the department requests such information;~~

~~(ii) for the purpose of (7)(c) above, storm water point sources may estimate the average flow of their discharge and must indicate the rainfall event and the method of estimation that the estimate is based on;~~

~~(iii) the department may require additional information under (7)(m) below, and may request any Group II storm water dischargers to comply with this section (7).~~

(k) through (m) remain the same, but are renumbered (j) through (l).

(8) through (10)(h) remain the same.

(11) Dischargers of storm water from facilities or activities that are listed in [NEW RULE III(1)(a) through (f), MAR Notice No. 17-174] must apply for an individual permit, or seek coverage under a storm water general permit as provided for in subchapter 11. Individual permit applications for small municipal separate storm sewer systems are subject to the provisions stated in [NEW RULE VIII(3) through (28), MAR Notice No. 17-174].

(12) Dischargers of storm water associated with industrial, mining, oil and gas, and construction activity, shall apply for an individual permit as stated in 40 CFR 122.26(c)(1) if their discharge is not covered under a general permit provided for in [NEW RULE VI, MAR Notice No. 17-174] or another MPDES permit. Dischargers of storm water associated with construction activity are exempt from the application requirements of ARM 17.30.1322(7) and 40 CFR 122.26(c)(1)(i).

(11) through (11)(b)(iii) remain the same, but are renumbered (13) through (13)(b)(iii).

(c) An extension under federal Clean Water Act section 301(i)(2) of the statutory deadlines in section 301(b)(1)(A) or (b)(1)(C) of the federal Clean Water Act based on delay in completion of a POTW into which the source is to discharge must have been requested on or before June 26, 1978, or 180 days after the relevant POTW requested an extension under ~~(12)~~

(14)(b) of this rule, whichever is later, but in no event may this date have been later than January 30, 1988. The request must explain how the requirements of 40 CFR Part 125, subpart J, have been met.

(d) through (f) remain the same.

(12) through (12)(b) remain the same, but are renumbered (14) through (14)(b).

~~(13)(a)~~(15) Notwithstanding the time requirements in ~~(11)~~ (13) and ~~(12)~~ (14): ~~of this rule,~~

(a) the department may notify a permit applicant before a draft permit is issued under ARM 17.30.1370 that the draft permit will likely contain limitations ~~which are eligible~~ eligibility for variances. In the notice the department may require that the applicant, as a condition of consideration of any ~~potential~~ variance request, ~~to~~ submit ~~a request explaining~~ an explanation of how the requirements of 40 CFR Part 125 applicable to the variance have been met. ~~and~~ The department may require ~~its~~ submission of the explanation within a specified reasonable time after receipt of the notice. The notice may be sent before the permit application has been submitted. The draft or final permit may contain the alternative limitations ~~which~~ that may become effective upon final grant of the variance~~.~~ ; and

(b) ~~A~~ a discharger who cannot file a timely complete request required under ~~(11)~~ (13)(b)(ii) or (iii) of this rule may request an extension. The extension may be granted or denied at the discretion of the department. Extensions ~~shall~~ may not be ~~no~~ more than six months in duration.

(14) through (15)(e) remain the same, but are renumbered (16) through (17)(e).

(f) 40 CFR Part 125, which is a series of federal agency rules setting forth criteria and standards for the national pollutant discharge elimination system (NPDES), specifically including criteria for extending compliance dates for facilities installing innovative technology (Subpart C), criteria for determining the availability of a variance based on fundamentally different factors (FDF) (Subpart D), and criteria for extending compliance dates for achieving effluent limitations; ~~and~~

(g) 40 CFR 403.5(c)(i) (July 1, 1991), which requires POTWs to develop and enforce specific limits to prevent certain discharges~~.~~ ; and

(h) 40 CFR 122.26(c)(1), which states requirements for individual permit applications for storm water discharges.

(h) remains the same, but is renumbered (i).

AUTH: 75-5-201, 75-5-401, MCA
IMP: 75-5-401, MCA

REASON: The proposed amendments to ARM 17.30.1322 delete provisions regarding Group I and Group II storm water discharges. These provisions are proposed to be deleted because the terms are no longer used in either the federal or

state storm water rules. Deleting these provisions is necessary to eliminate superfluous rule language.

The proposed amendments also identify which storm water discharges would be permitted under the new subchapter 11 and which would be subject to permitting under subchapter 13. The amendments require applicants for individual, as opposed to general, permit coverage to follow application procedures set out in federal rules at 40 CFR 122.26(c)(1). These amendments are necessary to inform the regulated community of the applicable procedures for issuing MPDES permits for storm water discharges.

17.30.1323 SIGNATORIES TO PERMIT APPLICATIONS AND REPORTS (1) through (1)(c)(ii) remain the same.

(2) All reports required by permits~~,~~ and other information requested by the department~~, and all permit applications submitted for group II storm water discharges under ARM 17.30.1332~~ must be signed by a person described in (1) ~~of this rule~~ or by a duly authorized representative of that person. A person is a duly authorized representative only if:

(a) through (4) remain the same.

AUTH: 75-5-201, 75-5-401, MCA
IMP: 75-5-401, MCA

REASON: The proposed amendments to ARM 17.30.1323 delete provisions regarding Group II storm water discharges. These provisions are proposed to be deleted because the "Group II" terminology is no longer used in either the federal or state storm water rules. In addition, the federal rules do not allow for a "duly authorized representative" to submit storm water permit applications of notices of intent. Deleting these provisions is necessary to eliminate superfluous rule language and to be consistent with federal regulations.

17.30.1341 GENERAL PERMITS (1) The department may issue MPDES general permits for the following categories of point sources which the board has determined are appropriate for general permitting under the criteria listed in 40 CFR 122.28 as stated in [NEW RULE III, MAR Notice No. 17-174]:

(a) through (i) remain the same.

(j) ~~stormwater~~ point ~~sources~~ source discharges of storm water;

(k) through (s) remain the same.

(2) Although ~~general~~ MPDES general permits may be issued for a category of point sources located throughout the state, they may also be restricted to more limited geographical areas.

(3) Prior to issuing a ~~general~~ MPDES general permit, the department shall prepare a public notice which includes the equivalent of information listed in ARM 17.30.1372(6) and shall publish the same as follows:

(a) through (d) remain the same.

(4) A person owning or proposing to operate a point source who wishes to operate under a ~~general~~ MPDES general

permit shall complete a standard MPDES application or notice of intent form available from the department for the particular general permit. Except for notices of intent submitted for storm water discharges associated with construction activity as stated in [NEW RULE VIII, MAR Notice No. 17-174], ~~The~~ the department shall, within 30 days of receiving a completed application, either issue to the applicant an authorization to operate under the ~~general~~ MPDES general permit, or shall notify the applicant that the source does not qualify for authorization under a ~~general~~ MPDES general permit, citing one or more of the following reasons as the basis for denial:

(a) through (a)(vii) remain the same.

(b) the discharge is different in degree or nature from discharges reasonably expected from sources or activities within the category described in the ~~general~~ MPDES general permit;

(c) remains the same.

(d) the discharge sought to be authorized under a ~~general~~ MPDES general permit is also included within an application or is subject to review under the Major Facility Siting Act, 75-20-101, et seq., MCA;

(e) remains the same.

(5) Where authorization to operate under a ~~general~~ MPDES general permit is denied, or a notice of intent under [NEW RULE VIII, MAR Notice No. 17-174] is not applicable, the department shall proceed, unless the application or notice of intent is withdrawn, to process the application or notice of intent through the ~~as an~~ individual MPDES permit requirements under this subchapter.

(6) Every ~~general~~ MPDES general permit must have a fixed term not to exceed five years. Except as provided in (10) ~~of this rule~~, every authorization to operate under a ~~general~~ MPDES general permit expires at the same time the ~~general~~ MPDES general permit expires.

(7) Where authorization to operate under a ~~general~~ MPDES general permit is issued to, or a notice of intent received from, a point source covered by an individual MPDES permit, the department shall, upon issuance of the authorization to operate or receipt of the notice of intent under the ~~general~~ MPDES general permit, terminate the individual MPDES permit for that point source.

(8) Any person authorized or eligible to operate under a ~~general~~ MPDES general permit may at any time apply for an individual MPDES permit according to the procedures in this subchapter. Upon issuance of the individual MPDES permit, the department shall terminate any ~~general~~ MPDES general permit authorization or notice of intent held by such person.

(9) The department, on its own initiative or upon the petition of any interested person, may modify, suspend, or revoke in whole or in part a ~~general~~ MPDES general permit or an authorization or notice of intent to operate under a ~~general~~ MPDES general permit during its term in accordance with the provisions of ARM 17.30.1361 for any cause listed in ARM 17.30.1361 or for any of the following causes:

(a) the approval of a water quality management plan containing requirements applicable to point sources covered in the ~~general~~ MPDES general permit;

(b) through (d)(iv) remain the same.

(10) The department may reissue an authorization to operate under a ~~general~~ MPDES general permit provided that the requirements for reissuance of MPDES permits specified in ARM 17.30.1322 are met.

(11) The department shall maintain and make available to the public a register of all sources and activities authorized to operate, or with notices of intent to discharge, under each ~~general~~ MPDES general permit including the location of such sources and activities, and shall provide copies of such registers upon request.

(12) through (12)(e) remain the same.

AUTH: 75-5-201, 75-5-401, MCA
IMP: 75-5-401, MCA

REASON: As required by 75-5-401(1)(c), MCA, storm water discharges associated with construction activity must obtain coverage under a general permit through a notice of intent (NOI) process rather than through an application/authorization process. Under the NOI process, coverage under the general permit is effective upon receipt by the department of a complete NOI package, which includes fees and a storm water pollution prevention plan. The NOI process is necessary to provide a streamlined application process for construction activity, in which numerous similar sites require permits each season.

The proposed amendments to ARM 17.30.1341 add provisions to the general permit rule that are necessary to facilitate the NOI process for storm water discharges associated with construction activity.

17.30.1351 REQUIREMENTS FOR RECORDING AND REPORTING OF MONITORING RESULTS (1) All permits must specify:

(1) through (3) remain the same, but are renumbered (a) through (c).

(2) The department may require monitoring of storm water discharges at a facility or activity covered under an MPDES general permit. Such requirements may include storm water sampling, analytical testing, evaluation of monitoring results, recording, and reporting. Monitoring requirements identified by the department must be stated in the MPDES general permit, except that the department may require a discharger to comply with monitoring requirements in addition to those in the general permit.

(3) For storm water discharges that are associated with industrial, mining, oil and gas, and construction activity and that are subject to an effluent limitation guideline, the department shall establish case-by-case requirements to report monitoring results. Such reporting must have a frequency dependent on the nature and effect of the discharge, but the

frequency may in no case be less than once a year.

(4) For storm water discharges that are associated with industrial, mining, oil and gas, and construction activity with construction-related disturbance of five acres or more of total land area and that are not subject to an effluent limitation guideline, the department shall establish case-by-case requirements to report monitoring results.

(a) Such reporting must have a frequency dependent on the nature and effect of the discharge, and the permit for the discharge must, at a minimum, require that the discharger:

(i) conduct an annual inspection of the facility site to identify areas contributing to the regulated storm water discharge and to evaluate whether measures to reduce pollutant loadings identified in a storm water pollution prevention plan are adequate and properly implemented in accordance with the terms of the permit;

(ii) maintain for a period of three years a record summarizing the results of inspections; and

(iii) certify that the facility is in compliance with the plan and the permit, or identify any incidents of non-compliance.

(b) Reports and certifications required under this rule must be signed in accordance with ARM 17.30.1323.

(c) Permits for storm water discharges from inactive mining operations may, if annual inspections are impracticable, require certification once every three years by a registered professional engineer that the facility is in compliance with the permit, or alternative requirements.

(5) Permits that do not require the submittal of monitoring result reports at least annually must require that the permittee report at least annually all instances of noncompliance not reported under ARM 17.30.1342(12).

AUTH: 75-5-201, 75-5-401, MCA
IMP: 75-5-401, MCA

REASON: The proposed amendments to ARM 17.30.1351 set out monitoring and reporting requirements for permittees authorized under storm water discharge permits. These requirements are based on federal law, and are necessary to allow the department to monitor compliance with the terms of the permits and to ensure that storm water discharges do not contribute to pollution of surface water.

17.30.1361 MODIFICATION OR REVOCATION AND REISSUANCE OF PERMITS (1) through (2)(m) remain the same.

(n) for small municipal separate storm sewer systems, to include effluent limitations requiring implementation of minimum control measures as specified in [NEW RULE VII(6), MAR Notice No. 17-174] if:

(i) the permit does not include such measures based upon the determination that another entity was responsible for implementation of the requirements; and

(ii) the other entity fails to implement measures that satisfy the requirements;

(n) and (o) remain the same, but are renumbered (o) and (p).

(3) through (4)(f) remain the same.

AUTH: 75-5-201, 75-5-401, MCA
IMP: 75-5-401, MCA

REASON: The proposed amendments to ARM 17.30.1361 add a new basis for modification of permits, based on federal rules. The new basis applies to small municipal separate storm sewer systems (MS4s), and would allow modification of a permit to require implementation of a minimum control measure when one is lacking because another entity was responsible for the control and failed to implement it. The amendments are necessary to ensure that all MS4s have appropriate control measures to prevent storm water discharges from contributing to pollution of surface water.

4. ARM 17.30.1332 which can be found on page 17-2945 of the Administrative Rules of Montana, is proposed to be repealed.

AUTH: 75-5-201, 75-5-401, MCA
IMP: 75-5-401, MCA

REASON: ARM 17.30.1332 is proposed to be repealed because, pursuant to MAR Notice No. 17-174, the provisions of ARM 17.30.1332 would be moved to the new subchapter 11. Repeal is necessary to avoid duplication of rule language.

5. Concerned persons may submit their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to the Board of Environmental Review, P.O. Box 200901, Helena, Montana 59620-0901, faxed to (406) 444-4386 or emailed to the Board Secretary at ber@state.mt.us and must be received no later than 5:00 p.m., November 27, 2002. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

6. Thomas Bowe, attorney for the Board, has been designated to preside over and conduct the hearing.

7. The Board maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding: air quality; hazardous waste/waste oil; asbestos control; water/wastewater treatment plant operator certification; solid waste; junk vehicles; infectious waste; public water supplies;

public sewage systems regulation; hard rock (metal) mine reclamation; major facility siting; opencut mine reclamation; strip mine reclamation; subdivisions; renewable energy grants/loans; wastewater treatment or safe drinking water revolving grants and loans; water quality; CECRA, underground/above ground storage tanks; MEPA; or general procedural rules other than MEPA. Such written request may be mailed or delivered to the Board of Environmental Review, 1520 E. Sixth Ave., P.O. Box 200901, Helena, Montana 59620-0901, faxed to the office at (406) 444-4386, emailed to the Board Secretary at ber@state.mt.us or may be made by completing a request form at any rules hearing held by the Board.

8. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

BOARD OF ENVIRONMENTAL REVIEW

By: *Joseph W. Russell*
JOSEPH W. RUSSELL, M.P.H., Chairman

Reviewed by:

James M. Madden
JAMES M. MADDEN, Rule Reviewer

Certified to the Secretary of State, October 7, 2002.

**BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA**

In the matter of the adoption of new rules I through IX and the repeal of ARM 17.36.901 through 17.36.903 and 17.36.907 through 17.36.910 pertaining to Subsurface Wastewater Treatment Systems	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION AND REPEAL (WATER QUALITY)

TO: All Interested Persons

1. On November 18, 2002 at 1:30 p.m., in conjunction with the hearing for MAR Notice No. 17-177 and 17-178, the Board of Environmental Review will hold a public hearing in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed adoption and repeal of the above-stated rules.

2. The Board will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board no later than 5:00 p.m., November 6, 2002, to advise us of the nature of the accommodation that you need. Please contact the Board Secretary at P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2544; fax (406) 444-4386; or email ber@state.mt.us.

3. The proposed new rules will read as follows:

NEW RULE I SCOPE (1) These rules are intended to protect the public health, safety, and welfare by setting forth minimum standards for the construction, alteration, repair, extension, and use of wastewater treatment systems within the state.

(2) Under 50-2-116, MCA, local boards of health must adopt regulations no less stringent than this subchapter 9 for wastewater treatment systems for private and public buildings installed after October 1, 1991.

AUTH: 75-5-201, MCA
IMP: 75-5-305, MCA

REASON: In this rule notice, the board is proposing to modify its current rules in ARM Title 17, chapter 36, subchapter 9, which establish minimum standards for counties to follow when regulating wastewater treatment systems. Although these modifications appear as new rules, the actual changes to current rules are not extensive. Because some amendments addressed new subjects, it was necessary initially to create several new rules. However, because of limited codification space in the existing rules, it then became

necessary to recodify all of the current rules under new numbers, in order to allow for a logical rule ordering. Any significant changes to a current rule are discussed in the rationale statements for the respective new rule.

The amendments are based on the recommendations of the department and an advisory stakeholders group. The advisory group and the department have been meeting for over two years to review and update the provisions of the department's subdivision rules, the board's minimum wastewater standards, and the department Circular DEQ-4, "Montana Standards for On-Site Subsurface Sewage Treatment Systems". The amendments proposed in this rule notice would make changes to the current rules and would adopt a revised version of department Circular DEQ-4.

New rule I contains minor changes to the current ARM 17.36.901. The terms "repair" and "use" are added to the first subsection, which is necessary to clarify that the minimum standards in this subchapter apply to repair and use of wastewater systems. The term "onsite" has been stricken because these rules also apply to systems that may not be located at the site where the structure requiring wastewater treatment is located.

NEW RULE II DEFINITIONS (1) "Absorption bed" means an absorption system that consists of excavations greater than three feet in width where the distribution system is laid for the purpose of distributing pretreated waste effluent into the ground.

(2) "Absorption trench" means an absorption system that consists of excavations less than or equal to three feet in width where the distribution system is laid for the purpose of distributing pretreated waste effluent into the ground.

(3) "Bedrock" means material that cannot be readily excavated by hand tools, or material that does not allow water to pass through or that has insufficient quantities of fines to provide for the adequate treatment and disposal of wastewater.

(4) "Cesspool" means a seepage pit without a septic tank to pretreat the wastewater.

(5) "Department" means the Montana department of environmental quality.

(6) "Drainage way" means a course or channel along which stormwater moves in draining an area.

(7) "Dwelling" or "residence" means any structure, building or portion thereof, which is intended or designed for human occupancy and supplied with water by a piped water system.

(8) "Experimental system" means a wastewater treatment system for which specific design standards are not provided in department Circular DEQ-4, 2002 edition, DEQ-2, 1999 edition, or this subchapter.

(9) "Failed system" means a wastewater treatment and/or disposal system that no longer provides the treatment and/or

disposal for which it was intended, or violates any of the requirements of [NEW RULE III].

(10) "Floodplain" means the area adjoining the watercourse or drainway that would be covered by the floodwater of a flood of 100-year frequency except for sheet flood areas that receive less than one foot of water per occurrence and are considered zone b areas by the federal emergency management agency. The floodplain consists of the floodway and the flood fringe, as defined in ARM Title 36, chapter 15.

(11) "Gray water" means wastewater other than toilet wastes or industrial chemicals including, but not limited to, shower and bath wastewater, kitchen wastewater, and laundry wastewater.

(12) "Ground water observation well" means a well installed for the purpose of measuring the depth from the natural ground surface to the seasonally high groundwater.

(13) "Holding tank" means a watertight receptacle that receives wastewater for retention and does not, as part of its normal operation, dispose or treat the wastewater.

(14) "Impervious layer" means any layer of material in the soil profile that has a percolation rate slower than 120 minutes per inch.

(15) "Individual wastewater system" means a wastewater system that serves one living unit or commercial structure. The total number of people served may not exceed 24.

(16) "Limiting layer" means bedrock, an impervious layer, or seasonally high groundwater.

(17) "Living unit" means the area under one roof occupied by a family. For example, a duplex is considered two living units.

(18) "Multiple user wastewater system" means a non-public wastewater system that serves or is intended to serve three through 14 living units or three through 14 commercial structures. The total number of people served may not exceed 24. In estimating the population served, the reviewing authority shall multiply the number of living units times the county average of persons per living unit based on the most recent census data.

(19) "Municipal" means pertaining to an incorporated city or town.

(20) "Package plants" means wastewater treatment systems that are sealed within a watertight container and contain components for the secondary and tertiary treatment of wastewater.

(21) "Percolation test" means a standardized test used to assess the infiltration rate of soils.

(22) "Piped water system" means a plumbing system that conveys water into a structure from any source including, but not limited to, wells, cisterns, springs, or surface water.

(23) "Pit privy" means a pit that receives undiluted, non-water-carried toilet wastes.

(24) "Replacement system" means a wastewater treatment system proposed to replace a failed, failing, or contaminating system.

(25) "Reviewing authority" means a local board of health or local health officer, as those terms are defined in 50-2-101, MCA, or their designees.

(26) "Sealed pit privy" means an enclosed receptacle designed to receive non-water-carried toilet wastes into a watertight vault.

(27) "Seasonally high groundwater" means the depth from the natural ground surface to the upper surface of the zone of saturation, as measured in an unlined hole or perforated monitoring well during the time of the year when the water table is the highest. The term includes the upper surface of a perched water table.

(28) "Seepage pit" means a covered underground receptacle that receives wastewater after primary treatment and allows the wastewater to seep into the surrounding soil.

(29) "Septic tank" means a storage settling tank in which settled sludge is in immediate contact with the wastewater flowing through the tank while the organic solids are decomposed by anaerobic action.

(30) "Shared wastewater system" means a wastewater system that serves or is intended to serve two living units or commercial structures. The total people served may not exceed 24. In estimating the population served, the reviewing authority shall multiply the number of living units times the county average of persons per living unit based on the most recent census data.

(31) "Site evaluation" means an evaluation to determine if a site is suitable for the installation of a subsurface wastewater treatment system.

(32) "Slope" means the rate that a ground surface declines in feet per 100 feet. It is expressed as percent of grade.

(33) "Soil profile" means a description of the soil strata to a depth of eight feet using the USDA soil classification system.

(34) "Subsurface wastewater treatment system" means the process of wastewater treatment in which the effluent is applied below the soil surface or into a mound by an approved distribution system.

(35) "Variance" means the grant, pursuant to [NEW RULE VIII], by the reviewing authority of an exception to the minimum requirements set out in this subchapter or department Circular DEQ-4, 2002 edition.

(36) "Wastewater" means water-carried waste that is discharged from a dwelling, building, or other facility, including:

(a) household, commercial, or industrial wastes;

(b) chemicals;

(c) human excreta; or

(d) animal and vegetable matter in suspension or solution.

(37) "Wastewater treatment system" or "wastewater disposal system" means a system that receives wastewater for purposes of treatment, storage, or disposal. The term includes, but is not limited to, pit privies and experimental systems.

AUTH: 75-5-201, MCA
IMP: 75-5-305, MCA

REASON: New rule II recodifies current definitions and proposes some new definitions. New definitions are proposed for the following terms: "absorption trench", "drainage way", "dwelling or residence", "experimental system", "floodplain", "gray water", "ground water observation well", "individual wastewater system", "living unit", "multiple user wastewater system", "municipal", "package plants", "percolation tests", "piped water system", "pit privy", "reviewing authority", "septic tank", "shared wastewater system", "site evaluation", "slope", "soil profile", "subsurface wastewater treatment system", "variance", and "wastewater treatment system". These definitions are necessary to clarify the meaning of terms used in the current rules and in the new amendments, and to conform the meanings of those terms to their use in department subdivision rules and department Circular DEQ-4.

Minor changes to other definitions were made for clarification of the current meaning, and to conform the language to that used in the definitions of the same terms as set out in department circulars and department rules.

NEW RULE III GENERAL REQUIREMENTS (1) No person may construct, alter, extend, or utilize a wastewater treatment or disposal system that may:

(a) contaminate any actual or potential drinking water supply;

(b) cause a public health hazard as a result of access to insects, rodents, or other possible carriers of disease to humans;

(c) cause a public health hazard by being accessible to persons or animals;

(d) violate any law or regulation governing water pollution or wastewater treatment and disposal, including the rules contained in this subchapter;

(e) pollute or contaminate state waters, in violation of 75-5-605, MCA;

(f) degrade state waters unless authorized pursuant to 75-5-303, MCA; or

(g) cause a nuisance due to odor, unsightly appearance or other aesthetic consideration.

AUTH: 75-5-201, MCA
IMP: 75-5-305, MCA

REASON: New rule III contains a minor modification to the current ARM 17.36.902. The current rule states that "It

is illegal to construct". The amended rule would state that "No person may construct". The amendment is necessary to state the prohibition in terms that are commonly used in administrative rules.

NEW RULE IV WASTEWATER TREATMENT SYSTEMS - TECHNICAL REQUIREMENTS (1) Except as provided in [NEW RULE V], all wastewater treatment systems must be designed and constructed in accordance with the applicable requirements in [NEW RULE III] and in department Circular DEQ-4, 2002 edition.

(2) Department Circular DEQ-4, 2002 edition, which sets forth standards for subsurface sewage treatment systems is adopted and incorporated by reference for purposes of this subchapter. Copies are available from the Department of Environmental Quality, PO Box 200901, Helena, MT 59620-0901.

(3) Wastewater treatment systems must be located to maximize the vertical separation distance from the bottom of the absorption trench to the seasonally high groundwater level, bedrock, or other limiting layer, but under no circumstances may this vertical separation be less than four feet of natural soil.

(4) A replacement area or replacement plan must be provided for each new or expanded wastewater treatment system. Replacement areas and plans must comply with the requirements of this subchapter.

(5) A site evaluation must be performed for each wastewater treatment system. As determined by the reviewing authority, the site evaluation may include the following:

(a) soil descriptions for proposed wastewater treatment systems. Soil descriptions must be based on data obtained from test holes within 25 feet of each wastewater treatment location. Test holes must be at least eight feet in depth unless a limiting layer precludes digging to eight feet;

(b) percolation test results within the boundaries of the proposed wastewater treatment system; and

(c) if the applicant or the reviewing authority has reason to believe that groundwater will be within seven feet of the surface at any time of the year within the boundaries of the system, the applicant must provide data to demonstrate that the minimum separation distance required by (3) between the absorption trench bottom and the seasonally high groundwater level can be maintained. The reviewing authority may require the applicant to install ground water observation wells to a depth of at least eight feet to determine the seasonally high groundwater level. The applicant shall monitor the observation wells through the seasonally high groundwater period. Measurement must occur for a long enough period of time to detect a peak and a sustained decline in the groundwater level.

(6) If a department-approved public collection and treatment system is readily available within a distance of 200 feet of the property line for connection to a new source of wastewater, or as a replacement for a failed system, and the owner or managing entity of the public collection and

treatment system approves the connection, wastewater must be discharged to the public system. For purposes of this rule:

(a) a public system is not "readily available" if there is evidence demonstrating that connection to the system is physically or economically impractical, or that easements cannot be obtained; and

(b) a connection is "economically impractical" if the cost of connection to the public system equals or exceeds three times the cost of installation of an approvable system on the site.

(7) Wastewater treatment systems, except for sealed components that are designed, constructed, and tested as set out in [NEW RULE VI], may not be located in drainage ways.

AUTH: 75-5-201, MCA
IMP: 75-5-305, MCA

REASON: New rule IV recodifies some of the requirements of current ARM 17.36.907. New provisions are proposed in (4) (replacement areas), (5) (site evaluations), and (7) (prohibition against location in drainage ways). The provisions in (4) require that replacement areas be provided for new and expanded wastewater sytems. Replacement areas are necessary to prevent pollution from wastewater systems that fail or reach the end of their service life. The provisions in (5) require site evaluation for proposed wastewater treatment systems, and set out specifications for site evaluation methods. At the discretion of the reviewing authority, a site evaluation may include soil descriptions and/or percolation tests. Site evaluations are necessary to prevent pollution from improperly located wastewater systems, and specifications for site evaluations are necessary to provide guidance to the reviewing authority and the public of proper methodology. The provisions in (7) prohibit location of wastewater treatment systems in drainage ways. This prohibition is necessary in order to prevent pollution caused by flooding of wastewater systems, and to make these rules consistent with department subdivision regulations.

Subsection (6) has been modified to include a 200-foot radius condition for hookups to public systems. This requirement is necessary in order to provide an outside limit within which the reviewing authority can require hookups to public systems. The 200-foot limit is currently used in some county regulations. Subsection (6) has also been modified to clarify the terms "readily available" and "economically impractical". Clarification of these terms is necessary to provide guidance to the reviewing authority and to the regulated community about when hookups to public systems are required.

Setback distances in the current ARM 17.36.907 have been moved to new rule VI.

NEW RULE V ABSORPTION BEDS, HOLDING TANKS, SEEPAGE PITS, PIT PRIVIES, CESSPOOLS - TECHNICAL REQUIREMENTS AND PROHIBITIONS (1) The wastewater treatment systems described in (3) through (7) may be allowed only if the reviewing authority determines that:

(a) site constraints prevent the applicant from constructing any system described in department Circular DEQ-4, 2002 edition;

(b) all off-site treatment alternatives have been considered and are infeasible;

(c) the requirements of [NEW RULE III] are met; and

(d) all other requirements in this subchapter applicable to the proposed system are met.

(2) Applications for permits for wastewater treatment systems described in (3) through (7) must include a demonstration that no other alternatives to wastewater disposal are feasible.

(3) Absorption beds may be used for replacement systems only and may not be constructed in unstabilized fill. Absorption beds must also meet the design and construction requirements in department Circular DEQ-4, 2002 edition.

(4) Seepage pits may be used for replacement systems only, and only when no other means of treatment and disposal is available.

(a) Seepage pits must have a minimum vertical separation of 25 feet between the bottom of the pit and groundwater.

(b) Permit applications for seepage pits must include plans for the proposed pit. Seepage pits must meet the design and construction requirements in department Circular DEQ-4, 2002 edition.

(5) Holding tank systems may be approved only if the facility to be served is for seasonal use.

(a) For purposes of this rule "seasonal use" means use for not more than a total of four months (120 days) during any calendar year. Permit applications for holding tanks must show that the property use conforms to the "seasonal use" limitation or that a variance has been granted.

(b) Holding tanks must meet the design and construction requirements in department Circular DEQ-4, 2002 edition.

(c) Permit applications for holding tanks must include plans for the proposed holding tank system. The plans must include the following information:

(i) the method for monitoring tank levels;

(ii) the method for waterproofing the tank;

(iii) a maintenance plan, which must include annual water tightness testing and periodic pumping by a licensed septic tank pumper; and

(iv) the method for tank stabilization if seasonal high groundwater is expected to be within 12 inches of tank’s base.

(6) Sealed pit privy systems may be approved only if the facility to be served does not have a piped water supply, and the facility is a seasonal-use recreational site.

(a) Permit applications for sealed pit privies must include plans for the proposed sealed pit. Sealed pit privy

systems must meet the design and construction requirements in department Circular DEQ-4, 2002 edition.

(7) Unsealed pit privies may be approved only for seasonal use in remote locations that are not accessible to septic tank pumpers.

(8) New construction or alteration of cesspools is prohibited.

AUTH: 75-5-201, MCA
IMP: 75-5-305, MCA

REASON: New rule V is proposed to replace portions of the current ARM 17.36.907. The new rule clarifies the design standards in the current rules for absorption beds, seepage pits, and holding tanks. The new rule also requires that these systems be designed in accordance with department Circular DEQ-4, which is discussed below. Clarification and expansion of the design requirements for these systems is necessary to identify the proper construction methods to prevent pollution of state waters. The stakeholders advisory group recommended adding design standards for these systems so that they could be used for problem solving on difficult sites or for replacement systems.

Subsection (7) limits the use of unsealed pit privies to seasonal use in remote locations. This limitation is necessary to prevent pollution caused by unsealed pit privies. The new rule makes other minor changes in wording to the current rule.

Adoption of New Edition of Circular DEQ-4

A summary of the differences between the 2000 and 2002 editions of DEQ-4 follows:

Department Circular DEQ-4 was first adopted in December 2000. This design manual for subsurface wastewater treatment systems replaced previous circulars that had not been revised for almost 10 years. When the 2000 version of DEQ-4 was adopted, the department committed to perform periodic review and revision of the Circular to incorporate new technology in wastewater treatment. The review of this manual was recently completed by a stakeholders advisory group. Draft revisions to the Circular were informally circulated to local health departments, environmental consultants, wastewater treatment manufacturers and equipment suppliers, property owner organizations, and other interested parties. The revisions to the Circular are necessary to incorporate the results of this cooperative effort. The advisory group has also incorporated design suggestions in the new EPA Onsite Wastewater Treatment Manual published and distributed in 2002. A copy of the proposed new Circular is available from the department.

Chapter 1, Applicability

The term "sewage" has been replaced with the term "wastewater" to conform to the terminology in the regulations. Several types of systems were added to the Circular to address failing systems and to provide problem-solving techniques for difficult and remote sites. These systems include: absorption beds, seepage pits, holding tanks, and pit privies.

Chapter 2, Definitions

Several definitions were added or revised to provide clarity and to conform to the terminology in the regulations.

Chapter 3, Site Evaluation

The requirement for percolation tests was eliminated based on research that indicates the soil information should provide a better correlation to infiltration rate for domestic wastewater effluent. The percolation test may still be required by rule or, in the case of the county minimum standards, by the reviewing authority to verify soils information or when variable soils are present.

Chapter 4, Site Modifications

Several design changes are proposed for site modifications based on the field experience of the advisory group members.

Chapter 5, Wastewater Flow

Clarification was provided regarding using actual flow data due to confusion with the previous language. The wastewater flow tables were consolidated into two tables and several categories were added using flows from actual data and the advisory group's field experience with these types of systems.

Chapter 6, Design of Sewers

Several sections required further clarifications based on questions received on the previous language.

Chapter 7, Septic Tanks

The sizing of nonresidential septic tanks in the current Circular is problematic and is proposed to be revised to more closely match industry design standards and residential flow volumes. Other language was changed to provide clarity.

Chapter 8, Standard Absorption Trenches

This section was moved to chapter 8 and the section regarding dosed systems was moved to chapter 9 because standard trenches are more frequently used. ASTM F810 HDPE piping was removed as a selection for distribution lines based on the failure of this piping to provide adequate distribution of effluent and structural integrity.

The application rate tables for sizing drainfields were revised based on numerous comments on this section. The tables were developed using a combination of national research, county regulations, previous regulations, comparing other states' standards, and are similar to the example table in the EPA Onsite Wastewater Treatment Systems Manual.

Chapter 9, Dosing System

Minor changes were made to this section to provide further clarification.

Chapter 10, Deep Absorption Trenches

The depth of the distribution pipe was clarified in this section.

Chapter 11, At-Grade Absorption Trenches

The separation distance between the scarified layer and a limiting layer was clarified in this section.

Chapter 12, Sand-Lined Absorption Trenches

The changes to this section are for clarification purposes.

Chapter 13, Gravelless Absorption Trenches

In this section, the advisory group added structural requirements for gravelless chambers. The drainfield sizing was further clarified to prevent confusion in sizing drainfields. The change in sizing the drainfield may result in slightly larger or smaller drainfields in some circumstances. However, the change from a 1.4 increase in application rate to a 25% reduction should result in fewer errors in calculating the reduction.

Chapter 14, Elevated Sand Mounds

This section was updated based on the 2000 version of the Wisconsin Mound Soil Absorption System Siting, Design, and Construction Manual. Other minor editing changes were made to clarify design criteria.

Chapter 15, Intermittent Sand Filters

Several specifications were changed in this section based on the advice of the advisory group members that have built and regulated these systems. A requirement for an operation and maintenance plan was added.

Chapter 16, Recirculating Sand Filters

Several specifications were changed in this section based on the advice of the advisory group members that have built and regulated these systems. The size of the recirculating tank was increased based on the recommendations in the EPA Manual. A requirement for an operation and maintenance plan was added.

Chapter 17, Recirculating Trickling Filters

The drainfield sizing was reduced for this type of system based on research and the recommendations of the advisory group. Maintenance requirements were further clarified in Appendix D.

Chapter 18, Evapotranspiration Absorption Systems

This section was revised to provide more flexibility in design of these systems. A requirement for an operation and maintenance plan was added.

Chapter 19, Evapotranspiration Systems

The changes to this section are clarifications except that a requirement for an operation and maintenance plan was added.

Chapter 20, Aerobic Wastewater Treatment Units

Minor clarifications were made to this section. The requirement for primary treatment was added based on the recommendation of the advisory group. The requirement for an operation and maintenance plan was moved to Appendix D.

Chapter 21, Chemical Nutrient-Reduction Systems

The new EPA Manual was referenced and the operation and maintenance requirements were moved to Appendix D.

Chapter 22, Experimental Systems

The funding requirement was removed because the reviewing authority does not regulate funding for these systems. The monitoring and inspection requirements were clarified.

Chapter 23, Absorption Bed Design

This section was added for design of absorption bed systems. These systems are allowed only in limited situations in accordance with the regulations.

Chapter 24, Holding Tanks

This section was added to address design requirements for holding tanks. These systems are allowed only in limited situations in accordance with the regulations.

Chapter 25, Sealed (Vault) Pit Privy Design

This section was added to address design requirements for sealed pit privies. These systems are allowed only in limited situations in accordance with the regulations.

Chapter 26, Unsealed Pit Privy Design

This section was added to address design requirements for unsealed pit privies. These systems are allowed only in limited situations in accordance with the regulations.

Chapter 27, Seepage Pits

This section was added to address design requirements for seepage pits. These systems are allowed only in limited situations in accordance with the regulations.

Appendix A, Percolation Test Procedure I and II

Minor clarifications were provided in this section. The requirement that the percolation test be completed by an individual approved by the reviewing authority was added for consistency with county regulations and to prevent acceptance of test results that were performed inaccurately. The requirement for a 12-hour soil swell period was eliminated. The advisory group recommended that the 12-hour soil swell period was not necessary and did not significantly change the percolation test results.

Appendix B, Soils and Site Characterization

Minor editing corrections were made in this section.

Appendix C, Ground Water Observation Well Installation and Measuring Procedures

The requirement that ground water observation wells be monitored by an individual approved by the reviewing authority was added for consistency with county regulations and to prevent acceptance of test results that were performed inaccurately. The flagging and identification of wells was

added to help the reviewing authority locate and identify wells during inspections.

Appendix D, Operation and Maintenance Plan

This section was added to clarify operation and maintenance requirements for wastewater treatment systems. EPA has recommended that wastewater treatment systems receive routine maintenance. Certain types of systems, especially those with mechanical or other operating parts, should be periodically inspected and serviced as necessary.

NEW RULE VI HORIZONTAL SETBACKS, FLOODPLAINS

(1) Minimum horizontal setback distances (in feet) are as follows:

TABLE 1
SETBACK DISTANCES

	Sealed components (1) and other components (2)	Absorption systems (3)
Public or multi-user wells/springs	100	100
Other wells	50	100
Suction lines	50	100
Cisterns	25	50
Roadcuts, escarpments	10 (4)	25
Slopes > 25% (5)	10 (4)	25
Property boundaries	10	10
Subsurface drains	10	10
Water lines	10	10
Drainfields/sand mounds (3)	10	-
Foundation walls	10	10
Surface water, Springs	50	100
Floodplains	--(1) 100 (2)	100

(1) Sealed components include sewer lines, sewer mains, septic tanks, grease traps, dosing tanks, pumping chambers, holding tanks and sealed pit privies. Holding tanks and sealed pit privies must be located at least 10 feet outside the floodplain or any openings must be at least two feet above the floodplain elevation.
(2) Other components include intermittent and recirculating sand filters, package plants, and evapotranspiration systems.
(3) Absorption systems include absorption trenches, absorption beds, sand mounds, and other drainfield type

systems that are not lined or sealed. This term also includes seepage pits and unsealed pit privies.
(4) Sewer lines and sewer mains may be located in roadways and on steep slopes if the lines and mains are safeguarded against damage.
(5) Down-gradient of the sealed component, other component, or drainfield/sand mound.

(2) The reviewing authority may require greater horizontal separation distances than those specified in Table 1, if it determines that site conditions or water quality nondegradation requirements indicate a need for the greater distance.
(3) If the floodplain has not been designated and its level relative to a wastewater system is in question, the applicant shall submit evidence adequate to allow the reviewing authority to establish the location of the floodplain.
(4) Sealed components of wastewater treatment systems, if located within a 100-year floodplain, must be designed and constructed to prevent surface water and ground water inundation, and pump lines must be pressure tested prior to use. The minimum test pressure must be five times the operation pressure.

AUTH: 75-5-201, MCA
IMP: 75-5-305, MCA

REASON: New rule VI recodifies the horizontal setback distances from the current ARM 17.36.907. Minor changes to the setbacks are proposed to make them conform to those in the department subdivision regulations. Conformity with subdivision regulations is necessary to avoid having to unnecessarily replace existing systems when an owner wants to subdivide the property.

NEW RULE VII PERMITS (1) The reviewing authority shall administer a permit system for the construction, alteration, repair, and extension of wastewater treatment and disposal systems.
(2) Permit applications must:
(a) identify the owner of the system, location of the system, and type of system to be installed;
(b) provide a justification for the type of system proposed;
(c) include a drawing of the lot layout with legend and scale; and
(d) show separation distances for the features indicated in [NEW RULE VI].
(3) The reviewing authority shall maintain records of all permits.
(4) For permits for new or increased sources, the reviewing authority shall show on the permit the method used

for the non-significance determination made pursuant to ARM Title 17, chapter 30, subchapter 7.

(5) For permits issued for replacement of wastewater treatment systems that do not meet minimum standards for subdivisions as set out in ARM Title 17, chapter 36, subchapter 3, the reviewing authority shall notify the owner that the design may limit the ability of the owner to subdivide the property.

AUTH: 75-5-201, MCA
IMP: 75-5-305, MCA

REASON: The provisions of new rule VII are new. Most counties in Montana have adopted a permitting system to implement these regulations. The permitting procedures set out in this rule are necessary to provide guidelines for implementing a permitting system and to establish consistency among permit programs throughout the state.

NEW RULE VIII LOCAL VARIANCES (1) As provided in this rule, a local board of health, as defined in 50-2-101, MCA, may grant variances from the requirements in this subchapter and in department Circular DEQ-4, 2002 edition.

(2) The local board of health may grant a variance from a requirement only if it finds that all conditions in these rules regarding the variance are met, and that granting the variance will not:

(a) contaminate any actual or potential drinking water supply;

(b) cause a public health hazard as a result of access to insects, rodents, or other possible carriers of disease to humans;

(c) cause a public health hazard by being accessible to persons or animals;

(d) violate any law or regulation governing water pollution or wastewater treatment and disposal, including the rules contained in this subchapter except for the rule that the variance is requested from;

(e) pollute or contaminate state waters, in violation of 75-5-605, MCA;

(f) degrade state waters unless authorized pursuant to 75-5-303, MCA; or

(g) cause a nuisance due to odor, unsightly appearance or other aesthetic consideration.

(3) The local board of health may adopt variance criteria in addition to those set out in (2).

(4) The local board of health's decision regarding a variance of a requirement in this subchapter or in department Circular DEQ-4, 2002 edition, may be appealed to the department pursuant to [NEW RULE IX].

AUTH: 75-5-201, MCA
IMP: 75-5-305, MCA

REASON: New rule VIII codifies the provisions of the current variance rule at ARM 17.36.910, with some proposed changes. Subsection (1) is new, and is necessary to clarify that the local board of health may grant variances both from the rules in this subchapter and from the requirements of department Circular DEQ-4. Subsection (2) modifies the variance conditions in the current rule to be identical with the general requirements set out in new rule III (the current ARM 17.36.902). This modification is necessary to ensure consistency between variance criteria and the general minimum standards set out in new rule III. Subsection (3) is new, and allows local boards of health to adopt variance criteria in addition to those set out in this rule. This provision is necessary to clarify that the variance criteria in this rule are not exclusive.

NEW RULE IX VARIANCE APPEALS TO THE DEPARTMENT

(1) Upon receiving an appeal of a local board of health's variance decision under 75-5-305, MCA, the department shall determine within 30 days whether the appeal meets the requirements of (2) and notify the appellant in writing of its determination.

(2) The appeal to the department must be in writing and must provide the following information:

(a) the name of the appellant;

(b) the local government entity or entities that made the decision on the application for variance at the local level;

(c) a summary explanation of the project or development for which the variance is requested;

(d) a summary explanation of the variance that is sought;

(e) a statement of the law or ordinance at issue in the matter; and

(f) copies of all applications and supporting materials submitted to the local board of health, and of any written decisions issued by the local board of health.

(3) If the appeal does not fulfill the requirements of (2), the department shall state in its notice to the appellant the deficiencies that must be addressed in a resubmittal. The department shall also notify the appellant in writing when its submittal meets the requirements of (2).

(4) If the appeal fulfills the requirements of (2), the department shall conduct a hearing on the appeal.

(5) The hearing must be conducted under the provisions of the Montana Administrative Procedure Act, Title 2, chapter 4, part 6, MCA. Except as provided in (7), the department must conduct the hearing within 90 days of the department's written notice to the appellant that the appeal meets the requirements of (2).

(6) The department shall review each application under ARM Title 17, chapter 4, subchapter 6 to determine if the department's action may result in significant effects to the

quality of the human environment, thereby requiring an environmental impact statement.

(7) If the department's analysis indicates that an environmental impact statement is required, the department shall have 60 days from the date of issuance of the final environmental impact statement to conduct a hearing under this rule.

(8) After conducting the hearing, the department may allow up to 14 days for written comments to be submitted concerning the appeal.

(9) The department shall apply the local government variance requirements at issue in the case, provided the requirements meet the minimum requirements stated in [NEW RULES III and VIII].

(10) The department shall issue a formal decision, including findings of fact and conclusions of law, within 30 days after the hearing.

AUTH: 75-5-201, MCA
IMP: 75-5-305, MCA

REASON: New rule IX recodifies the current ARM 17.36.909 without change except to update the citation to the department's rules implementing the Montana Environmental Policy Act.

4. ARM 17.36.901 through 17.36.903 and 17.36.907 through 17.36.910 are being proposed for repeal and are located at pages 17-3425 through 17-3434 of the Administrative Rules of Montana. The reasons for the proposed repeals are set forth in the reasons for proposed new rules I through IX.

AUTH: 75-5-201, MCA
IMP: 75-5-305, MCA

5. Concerned persons may submit their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to the Board Secretary at Board of Environmental Review, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana 59620-0901; faxed to (406) 444-4386; or emailed to ber@state.mt.us, no later than 5:00 p.m., November 27, 2002. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

6. Thomas Bowe, attorney for the Board, has been designated to preside over and conduct the hearing.

7. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their names added to the list shall make a written request that includes the name and mailing address of the person to receive notices regarding any of the following topics: air quality; hazardous

waste/waste oil; asbestos control; water/wastewater treatment plant operator certification; solid waste; junk vehicles; infectious waste; public water supplies; public sewage systems regulations; hard rock (metal) mine reclamation; major facility siting; open-cut mine reclamation; strip mine reclamation; subdivisions; renewable energy grants/loans; wastewater treatment or safe drinking water revolving grants and loans; water quality; CECRA; underground/above ground storage tanks; MEPA; or general procedural rules other than MEPA. Such written request may be mailed or delivered to the Board of Environmental Review, 1520 East Sixth Avenue, P.O. Box 200901, Helena, Montana 59620-0901, faxed to the office at (406) 444-4386, emailed to the Board Secretary at ber@state.mt.us, or may be made by completing a request form at any rules hearing held by the Board.

8. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

BOARD OF ENVIRONMENTAL REVIEW

BY: *Joseph W. Russell*
JOSEPH W.RUSSELL, M.P.H.
CHAIRMAN

Reviewed by:

James M. Madden
JAMES M. MADDEN, Rule Reviewer

Certified to the Secretary of State October 7, 2002.

**BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA**

In the matter of the amendment of ARM 17.38.101 and 17.38.106 pertaining to public water and sewage system requirements	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT (PUBLIC WATER SUPPLY)

TO: All Interested Persons

1. On November 18, 2002 at 1:30 p.m., in conjunction with the hearing for MAR Notice No. 17-176 and 17-178, the Board of Environmental Review will hold a public hearing in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Board will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board no later than 5:00 p.m., November 6, 2002, to advise us of the nature of the accommodation that you need. Please contact the Board Secretary at P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2544; fax (406) 444-4386; or email ber@state.mt.us.

3. The rules proposed to be amended provide as follows, stricken matter interlined, new matter underlined:

17.38.101 PLANS FOR PUBLIC WATER SUPPLY OR WASTEWATER SYSTEM (1) through (3)(h)(ii) remain the same.

(4) Before commencing the construction, alteration or extension of a public water supply system or wastewater system, the applicant shall submit a design report along with the necessary plans and specifications for the system to the department or a delegated division of local government for its review and written approval. Two sets of plans and specifications are needed for final approval. Approval by the department or a delegated division of local government is contingent upon construction and operation of the public water supply or wastewater system consistent with the approved design report, plans, and specifications. Failure of the system to operate according to the approved plans and specifications or the department's conditions of approval is an alteration that requires resubmittal of a design report, plans, and specifications for department approval.

(a) through (c) remain the same.

(d) The board hereby adopts and incorporates by reference ARM 17.36.320 through 17.36.325, 17.36.327 and 17.36.345. The design report, plans, and specifications for public subsurface sewage treatment systems must be prepared in accordance with ARM 17.36.320 through 17.36.325, 17.36.327 and 17.36.345 and in accordance with the format and criteria set forth in Circular

DEQ-4, "Montana Standards for ~~On-Site~~ Subsurface ~~Sewage~~ Wastewater Treatment Systems, ~~2000~~ 2002 edition.

(e) through (12) remain the same.

(13) The board hereby adopts and incorporates by reference the following publications:

(a) through (c) remain the same.

(d) Department of Environmental Quality Circular DEQ-4 ~~2000~~ 2002 edition, which sets forth standards for ~~on-site~~ subsurface ~~sewage~~ wastewater treatment systems.

(14) remains the same.

AUTH: 75-6-103, MCA
IMP: 75-6-103, 75-6-112, 75-6-121, MCA

REASON: The Board is proposing to amend ARM 17.38.101, which concerns review and approval of plans and specifications for public drinking water supply systems and public wastewater disposal systems. The proposed amendments substitute the 2002 edition of Circular DEQ-4 for the 2000 edition currently adopted in the rules. The reason for this proposed amendment is that the Department of Environmental Quality (Department) is proposing to adopt a new version of DEQ-4, which concerns standards for subsurface wastewater (septic) systems, in a simultaneous rulemaking concerning subdivisions. The 2002 version of DEQ-4 reflects the consensus of a group of engineers, planners, and regulators that meet regularly to help specify standards for subsurface wastewater systems based on technological advances. Adoption of the most recent version of DEQ-4 is necessary in order to allow the Department's Public Water Supply section to use the same standards as the Department's Subdivisions section.

An explanation of the revisions contained in the 2002 version of DEQ-4 is contained in the Board's notice of proposed rulemaking in this administrative register at MAR Notice No. 17-176, in which the Board is proposing to adopt the revised Circular for use by counties in regulating wastewater treatment systems.

17.38.106 FEES (1) remains the same.

(2) Fees for review of plans and specifications are based on (2)(a) ~~- (f)~~ through (e) and (3) ~~below~~. The total fee for the review of a set of plans and specifications is the sum of the fees for the applicable parts or sub-parts listed in these citations. Approval will not be given until fees calculated under this rule have been received by the department.

(a) The fee schedule for designs requiring review for compliance with department Circular ~~WQB-1, 1992~~ DEQ-1, 1999 edition, is set forth in Schedule I, as follows:

Schedule I remains the same.

(b) The fee schedule for designs requiring review for compliance with department Circular ~~WQB-2, 1995~~ DEQ-2, 1999 edition, is set forth in Schedule II, as follows:

Schedule II remains the same.

(c) The fee schedule for designs requiring review for compliance with department Circular ~~WQB-4, 1992~~ DEQ-4, 2002 edition, is as specified in the fee schedule in ARM 17.36.802 for wastewater disposal systems. ~~to be determined under Schedule III, as follows:~~

~~SCHEDULE III~~

~~Chapter 20 Sewers.....$ 50~~
~~Chapter 50 Septic tank.....$ 50~~
~~Chapter 30, 40 & 60 Subsurface treatment~~
~~gravity.....$ 150~~
~~dosed.....$ 250~~

(d) The fee schedule for designs requiring review for compliance with department Circular ~~WQB-3, 1992~~ DEQ-3, 1999 edition, is to be determined under Schedule ~~IV~~ III, as follows:

Schedule IV remains the same, but is renumbered III.

~~(e) The fee for all alternative on-site sewage treatment design requiring review for compliance with department Circular WQB-5, 1992 edition, is $350 per design.~~

~~(f)~~ (e) The fee schedule for the review of plans and specifications not covered by a specific department design standard but within one of the following categories is to be determined under Schedule ~~V~~ IV as follows:

Schedule V remains the same, but is renumbered IV.

(3) Fees for review of plans and specifications not covered under (2) ~~of this rule~~, are established by the department based on a charge of ~~$26~~ $50 per hour multiplied by the time required to review the plans and specifications. The review time applied to each set of plans and specifications will be determined by the review engineer and documented with time sheets. The maximum fee for the review of plans and specifications specified under this section is $500.

(4) and (5) remain the same.

AUTH: 75-6-108, MCA
IMP: 75-6-108, MCA

REASON: The Board is proposing to amend ARM 17.38.106, which concerns fee schedules for plans and specifications review for public drinking water supply systems and public wastewater disposal systems, to substitute "DEQ" for "WQB" in the names of four Department Circulars, and to identify the current version of the circular being cited. Those Circulars specify the standards that public water supply and wastewater systems need to satisfy to obtain Department approval. The names of Circulars WQB-1, WQB-2, and WQB-3 were changed to Circulars DEQ-1, DEQ-2, and DEQ-3 in 1999 through rulemaking that amended ARM 17.38.101, which contains the plans and specifications requirements for public drinking water systems and public wastewater disposal systems. See 1999 Montana Administrative Register, Issue No. 7, p. 578 (proposal) and 1999 Montana Administrative Register, Issue No. 17, p. 1895 (adoption). The name changes were made along with editorial changes that were not intended to change the substance of the Circulars. Several

hearings were held around the state and the public was given an opportunity to review and comment on the amendments. Although the names of the Circulars were changed in ARM 17.38.101 in 1999, ARM 17.38.106, which sets fees for review work performed by the Department of projects submitted under those Circulars, was not amended to reflect the names of the new Circulars. The Board is proposing to correct the rule by changing the names of the Circulars in this rulemaking.

The Board is also proposing to amend ARM 17.38.106(2)(c), (e), and (3), which set the fees that the Department charges for review of plans and specifications for public wastewater disposal systems. The proposed amendment would make the review fees that the Department's public water supply section charges the same as the fees charged by the Department's subdivision section for review of the same type of systems. The existing rule (ARM 17.38.106(2)(c) and (e)) sets fees that the Department charges for work done to review plans submitted under Circulars WQB-4 and WQB-5. Because all subsurface onsite wastewater systems are now covered in Circular DEQ-4, and Circular WQB-5 no longer exists, the proposed rule amendments eliminate the reference to Circular WQB-5 and refer only to the 2002 edition of Circular DEQ-4. The Board is also proposing to delete Schedule III in ARM 17.38.106(2)(c) to delete the fees set forth in that schedule and to adopt the same fees that the Department's subdivision section charges under ARM 17.36.802 for review of wastewater disposal systems. Schedules IV and V are being renumbered III and IV.

The existing fee schedule in ARM 17.38.106 assesses:

1. $50 for review of sewer mains;
2. $50 for review of septic tanks;
3. $150 for review of gravity drainfields;
4. $250 for review of dosed drainfields; and
5. $26 per hour for review of other items.

The schedule in ARM 17.36.802 that is proposed to replace the above fee schedule would assess:

1. $60 for review of gravity drainfields;
2. $150 for review of pressure-dosed systems, elevated sand mound systems, evapotranspiration systems, intermittent sand filter systems, evapotranspiration/absorption systems, recirculating sand filter systems, recirculating trickling filter systems, aerobic treatment systems, and nutrient removal systems (plus $50 per hour for review in excess of 3 hours);
3. $30 for review of pressure-dosed drainfields that serve pressure-dosed systems, elevated sand mound systems, intermittent sand filter systems, and recirculating sand filter systems; and
4. $50 per hour for review of other items.

These revisions are necessary to make the fees the same for the same type of proposed system, regardless of whether the Department, subdivision or public water supply section conducts the review.

The cumulative effect of the fees is as follows: the Department estimates that approximately five applicants per year

would be affected by the change. The average applicant would be charged about $150 in increased fees. Therefore, the cumulative increase would be about $750.

4. Concerned persons may submit their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to the Board Secretary at Board of Environmental Review, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana 59620-0901; faxed to (406) 444-4386, or emailed to ber@state.mt.us, no later than 5:00 p.m., November 26, 2002. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

5. Thomas Bowe, attorney for the Board, has been designated to preside over and conduct the hearing.

6. The board maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their names added to the list shall make a written request that includes the name and mailing address of the person to receive notices regarding any of the following topics: air quality; hazardous waste/waste oil; asbestos control; water/wastewater treatment plant operator certification; solid waste; junk vehicles; infectious waste; public water supplies; public sewage systems regulations; hard rock (metal) mine reclamation; major facility siting; open-cut mine reclamation; strip mine reclamation; subdivisions; renewable energy grants/loans; wastewater treatment or safe drinking water revolving grants and loans; water quality; CECRA; underground/above ground storage tanks; MEPA; or general procedural rules other than MEPA. Such written request may be mailed or delivered to the Board of Environmental Review, 1520 East Sixth Avenue, P.O. Box 200901, Helena, Montana 59620-0901, faxed to the office at (406) 444-4386, emailed to the Board Secretary at ber@state.mt.us, or may be made by completing a request form at any rules hearing held by the Board.

7. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

Reviewed by: **BOARD OF ENVIRONMENTAL REVIEW**

James M. Madden
JAMES M. MADDEN
Rule Reviewer

BY: *Joseph W. Russell*
JOSEPH W.RUSSELL, M.P.H.
Chairman

Certified to the Secretary of State, October 7, 2002.

**BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA**

In the matter of the amendment of ARM 17.36.101, 17.36.310, 17.36.320, 17.36.321, 17.36.325, 17.36.326, 17.36.330, 17.36.332, 17.36.333, 17.36.336, 17.36.340, 17.36.345 pertaining to definitions, storm drainage, sewage systems, water supply systems, non-public water supply systems, alternate water supply systems, lot sizes, and adoption by reference of DEQ-4	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT (SUBDIVISIONS)

TO: All Concerned Persons

1. On November 18, 2002, at 1:30 p.m., in conjunction with the hearing for MAR Notice No. 17-176 and 17-177, a public hearing will be held in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Department will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Department no later than 5:00 p.m., November 7, 2002, to advise us of the nature of the accommodation that you need. Please contact Janet Scaarland, Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-1801; fax (406) 444-1374; or email jskaarland@state.mt.us.

3. The rules proposed to be amended provide as follows, stricken matter interlined, new matter underlined:

17.36.101 DEFINITIONS (1) through (13) remain the same.

(14) "Experimental system" means a wastewater treatment system ~~that is not specifically described~~ for which specific design standards are not provided in department Circular DEQ-4~~, 2000 edition,~~ or ~~in~~ DEQ-2~~, 1999 edition~~.

(15) through (27) remain the same.

(28) "Multiple user water supply system" means a non-public water supply system designed to provide water for human consumption to serve three through 14 living units or three through 14 commercial structures. The total number of people served may not exceed 24. In estimating the population served, the ~~department~~ reviewing authority shall multiply the number of living units times the county average of persons per living unit based on the most recent census data.

(29) through (49) remain the same.

(50) "Soil consistence" means the attributes of soil material as expressed in degree of cohesion and adhesion or in

resistance to deformation or rupture. See appendix B of department Circular DEQ-4~~, edition 2000~~.

(51) "Soil profile" means a description of the soil strata to a depth of eight feet using the USDA soil classification system.

(52) "Soil structure" means the combination or arrangement of primary soil particles into secondary units or peds. See appendix B of department Circular DEQ-4~~, edition 2000~~.

(53) "Soil texture" means the amount of sand, silt or clay measured separately in a soil mixture. See appendix B of department Circular DEQ-4~~, edition 2000~~.

(54) through (63) remain the same.

AUTH: 76-4-104, MCA
IMP: 76-4-104, MCA

REASON: References to the year edition of department Circulars are proposed to be deleted in all rules except ARM 17.36.345. This is necessary to allow the department to incorporate future updates to Circulars without having to change numerous citations throughout the rules. Minor changes are proposed to definitions (28) and (51) to conform the language in these definitions to that used in definitions in department Circulars and in Board rules.

17.36.310 STORM DRAINAGE (1) remains the same.

(2) Except as provided in (3), a storm drainage plan must be designed in accordance with department Circular DEQ-8~~, 2002 edition~~.

(3) through (7) remain the same.

AUTH: 76-4-104, MCA
IMP: 76-4-104, MCA

REASON: See reason for amendment to ARM 17.36.101, above.

17.36.320 SEWAGE SYSTEMS: DESIGN (1) All components of subsurface sewage treatment systems must be designed and installed in accordance with department Circular DEQ-4~~, 2000 edition~~. As indicated on Table 2 of this rule, public systems and multi-user systems with design flows greater than or equal to 2500 gallons per day must be designed by a registered professional engineer.

(2) through Table 2 remain the same.

AUTH: 76-4-104, MCA
IMP: 76-4-104, MCA

REASON: See reason for amendment to ARM 17.36.101, above.

17.36.321 SEWAGE SYSTEMS: ALLOWABLE NEW AND REPLACEMENT SYSTEMS (1) The allowable new sewage treatment systems, together with certain other requirements for such systems, are indicated in Table 2 of ARM 17.36.320. All systems must be

designed and installed in accordance with department Circular DEQ-4~~, 2000 edition~~. The use of sewage systems for replacement systems shall be in accordance with department Circular DEQ-4. Requirements applicable to review of existing sewage treatment systems are set out in ARM 17.36.327.

(2) Systems designed in accordance with department Circular DEQ-2~~, 1999 edition~~, may not be used for individual, shared, or multi-user systems.

(3) The following sewage systems may not be used for new systems:

(a) cut systems~~,~~;

(b) fill systems~~,~~;

(c) artificially drained systems~~,~~;

(d) cesspools~~,~~;

(e) pit privies~~,~~;

(f) seepage pits~~,~~; and

(g) holding tanks.

(i) The department may grant a waiver, pursuant to ARM 17.36.601, to allow holding tanks for recreational vehicle dump stations in facilities owned and operated by a local, state, or federal unit of government, or in facilities licensed by the department of public health and human services and inspected by the local health department. Holding tanks must be designed and maintained in accordance with the requirements in department Circular DEQ-4 and all other requirements imposed by the department and local health department.

(4) and (5) remain the same.

AUTH: 76-4-104, MCA
IMP: 76-4-104, MCA

REASON: References to the year edition of department Circulars are proposed to be deleted in this rule. See reason for amendment to ARM 17.36.101, above.

The department is proposing a new subsection (3)(g)(i) based in part on the recommendation of an advisory group that has been assisting the department in revising and updating the subdivision rules. The proposed amendment would provide a waiver process to allow use of holding tanks in limited situations. The department would consider waivers primarily in situations involving high strength wastewater from RV dump stations. Discharge of high strength wastewater to drainfields can cause failure of the drainfield system. The waiver process and allowance of holding tanks in limited situations is necessary to prevent drainfield failure in those cases.

17.36.325 SEWAGE SYSTEMS: SITE EVALUATION (1) The reviewing authority may require that ~~Percolation~~ percolation tests, conducted in accordance with department Circular DEQ-4, ~~2000 edition, must~~ be performed within the boundary of each proposed subsurface sewage treatment system. Percolation tests must be keyed by a number on the lot layout to the results in the report form.

(2) and (3) remain the same.

AUTH: 76-4-104, MCA
IMP: 76-4-104, MCA

REASON: References to the year edition of department Circulars are proposed to be deleted in this rule. See reason for amendment to ARM 17.36.101, above.

The proposed amendment to this rule also would give the reviewing authority (the department or a delegated local reviewer) discretion as to whether to require percolation tests for proposed drainfield sites. The rule would continue to require that soil descriptions be provided for all proposed drainfields. The rule advisory group has recommended that percolation tests not be mandatory in every case. A guidance manual recently issued by the United States Environmental Protection Agency (EPA) also indicates a trend to rely less on percolation tests and more on soils information for sizing subsurface wastewater treatment systems. Soil texture and structure have been found to correlate better than percolation rates with the infiltration rate of domestic septic tank effluent. The amendment is necessary to avoid an automatic requirement for percolation tests when other information may be more appropriate. However, percolation tests can still be required by the reviewing authority when circumstances at a site indicate that percolation data is needed to characterize site conditions.

17.36.326 SEWAGE SYSTEMS: AGREEMENTS AND EASEMENTS

(1) remains the same.

(2) For public and multiple-user systems, a homeowners' association, county sewer district, or other administrative entity, with the power to charge appropriate fees, must be established as part of the operation and maintenance plan required by department Circular DEQ-4~~, 2000 edition~~.

(3) and (4) remain the same.

AUTH: 76-4-104, MCA
IMP: 76-4-104, MCA

REASON: See reason for amendment to ARM 17.36.101, above.

17.36.330 WATER SUPPLY SYSTEMS--GENERAL (1) The applicant shall demonstrate that water systems provide an adequate supply by showing that the following criteria are met:

(a) remains the same.

(b) the following flows must be provided:

(i) remains the same.

(ii) for multiple family water supply systems, the requirements set out in department Circular DEQ-3~~, 1999 edition~~; and

(iii) for public water supply systems, the requirements set out in department Circular DEQ-1~~, 1999 edition~~;

(c) through (3) remain the same.

AUTH: 76-4-104, MCA
IMP: 76-4-104, MCA

REASON: See reason for amendment to ARM 17.36.101, above.

17.36.332 NON-PUBLIC WATER SUPPLY SYSTEMS: WATER QUANTITY AND DEPENDABILITY (1) and (2) remain the same.

(3) Multiple-user water supply systems must comply with department Circular DEQ-3~~, 1999 edition~~. For individual and shared water supply systems, the reviewing authority may require pumping tests for one or more wells to demonstrate sufficient quantity and dependability. The tests must be conducted pursuant to department Circular DEQ-3~~, 1999 edition~~.

(4) through (7) remain the same.

AUTH: 76-4-104, MCA
IMP: 76-4-104, MCA

REASON: See reason for amendment to ARM 17.36.101, above.

17.36.333 NON-PUBLIC WATER SUPPLY SYSTEMS: DESIGN AND CONSTRUCTION (1) The applicant shall meet the following requirements relating to the design and construction of non-public water supply systems:

(a) remains the same.

(b) multiple-user water supply systems must be designed and constructed in accordance with department Circular DEQ-3~~, 1999 edition~~, and ARM Title 36, chapter 21, subchapter 6, unless the requirements of this subchapter are more stringent;

(i) and (ii) remain the same.

(c) the reviewing authority may require additional well construction and/or testing requirements not required in ARM Title 36, chapter 21, subchapter 6 or in department Circular DEQ-3~~, 1999 edition~~, to ensure that wells within a particular subdivision will provide an adequate water supply.

AUTH: 76-4-104, MCA
IMP: 76-4-104, MCA

REASON: See reason for amendment to ARM 17.36.101, above.

17.36.336 ALTERNATE WATER SUPPLY SYSTEMS (1) and (2) remain the same.

(3) Springs, when developed as an alternate water system, must be constructed in accordance with a plan approved by the reviewing authority and in accordance with department Circular DEQ-11~~, 2001 edition~~. Springs must also meet the requirements for wells regarding quality, quantity and dependability in ARM 17.36.331 and ARM 17.36.332.

(4) remains the same.

(5) Cisterns may be utilized only for individual water supplies. The reviewing authority may authorize such use only if:

(a) and (b) remain the same.

(c) the cistern is constructed and installed in accordance with a plan approved by the reviewing authority and in accordance with department Circular DEQ-17~~, 2002 edition~~.

AUTH: 76-4-104, MCA
IMP: 76-4-104, MCA

REASON: See reason for amendment to ARM 17.36.101, above.

17.36.340 LOT SIZES: EXEMPTIONS (1) This rule sets out, for purposes of the review of proposed subdivisions, the requirements for minimum lot or parcel size and the criteria for varying the minimum size. Proposed subdivisions involving mobile homes, trailer courts, campgrounds, multiple family dwellings, and commercial or industrial development are also subject to this rule.

(a) If an applicant proposes to use subsurface wastewater treatment systems, as described in department Circular DEQ-4~~, 2000 edition~~, the minimum lot size must be one acre for each living unit and one acre for up to 700 gallons per day of design wastewater flow for commercial and other non-residential uses. The department may allow smaller lot sizes pursuant to waiver under ARM 17.36.601 as provided in (1)(b). The reviewing authority may, without a waiver, allow smaller lot sizes in accordance with the criteria set out in (1)(c) and (d). The reviewing authority may require larger lot sizes as provided in (1)(e).

(b) through (e) remain the same.

AUTH: 76-4-104, MCA
IMP: 76-4-104, MCA

REASON: See reason for amendment to ARM 17.36.101, above.

17.36.345 ADOPTION BY REFERENCE (1) For purposes of this chapter, the department hereby adopts and incorporates by reference the following documents. All references to these documents in this chapter refer to the edition set out below:

(a) through (c) remain the same.

(d) Department Circular DEQ-4, "Standards for ~~On-Site~~ Subsurface ~~Sewage~~ Wastewater Treatment Systems", ~~2000~~ 2002 edition;

(e) through (2) remain the same.

AUTH: 76-4-104, MCA
IMP: 76-4-104, MCA

REASON: See reason for amendment to ARM 17.36.101, above.

4. Concerned persons may submit their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to Theresa Blazicevich, Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901, phone (406) 329-1482, fax

(406) 329-1449 or email tblazicevich@state.mt.us and must be received no later than 5:00 p.m., November 26, 2002. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

5. Thomas Bowe, attorney, has been designated to preside over and conduct the hearing.

6. The Department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding: air quality; hazardous waste/waste oil; asbestos control; water/wastewater treatment plant operator certification; solid waste; junk vehicles; infectious waste; public water supplies; public sewage systems regulation; hard rock (metal) mine reclamation; major facility siting; opencut mine reclamation; strip mine reclamation; subdivisions; renewable energy grants/loans; wastewater treatment or safe drinking water revolving grants and loans; water quality; CECRA; underground/above ground storage tanks; MEPA; or general procedural rules other than MEPA. Such written request may be mailed or delivered to Elois Johnson, Paralegal, Legal Unit, 1520 E. Sixth Ave., P.O. Box 200901, Helena, Montana 59620-0901, faxed to the office at (406) 444-4386, emailed to ejohnson@state.mt.us or may be made by completing a request form at any rules hearing held by the Department.

7. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

Reviewed by: **DEPARTMENT OF ENVIRONMENTAL QUALITY**

James M. Madden
JAMES M. MADDEN
Rule Reviewer

BY: *Jan P. Sensibaugh*
JAN P. SENSIBAUGH, Director

Certified to the Secretary of State, October 7, 2002.

**BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA**

In the matter of the amendment of ARM 17.56.502, 17.56.504, 17.56.505, 17.56.602 and 17.56.604 and adoption of new rules pertaining to release reporting, investigation, confirmation and corrective action requirements for tanks containing petroleum or hazardous substances	)))))))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT AND ADOPTION (UNDERGROUND STORAGE TANKS)

TO: All Concerned Persons

1. On November 6, 2002, at 10:00 a.m. a public hearing will be held in the Lewis Room of the Phoenix Building, 2209 Phoenix Avenue, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Department will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Department no later than 5:00 p.m., October 28, 2002, to advise us of the nature of the accommodation that you need. Please contact the Department at P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-1409; fax (406) 444-1901; or email mtalley@state.mt.us.

3. The rules proposed to be amended provide as follows, stricken matter interlined, new matter underlined:

17.56.502 REPORTING OF SUSPECTED RELEASES (1) Owners and operators, any licensed installer, any person who performs subsurface investigations for the presence of regulated substances, and any person who performs a tank tightness or line tightness test pursuant to ARM 17.56.407(3) or 17.56.408(2), must report suspected releases to the department and the implementing agency ~~by telephone~~ within ~~24 hours of the existence of any of the following conditions, and follow the procedures in ARM 17.56.504 for any of these conditions~~ the specified timeframes and in the following manner:

~~(1)~~ (a) ~~The discovery by an owner or operator or other person of a released~~ within 24 hours, report any suspected release of a regulated substance at ~~the~~ a storage tank site or in the surrounding area. ~~(such as~~

(i) Visual or olfactory observations, field monitoring results or other indicators of the presence of regulated substances in soil or nearby surface or ground water, or the presence of free product or vapors in ~~soils,~~ basements, sewer ~~and~~ or utility lines~~, and nearby surface water and groundwater);~~ are an adequate basis for suspecting a release.

(ii) The suspected release must be reported within 24 hours to a person within the remediation division of the department. Messages left on answering machines, received by facsimile, email, voice mail or other messaging device shall not be considered adequate 24-hour notice. Persons within the remediation division may be reached by calling the following telephone number between the hours of 8:00 a.m. and 5:00 p.m. Monday through Friday: (406) 444-1420. Outside the hours of 8:00 a.m. to 5:00 p.m., Monday through Friday, and on state holidays, suspected releases must be reported within 24 hours by telephone to the 24-hour disaster and emergency services duty officer at (406) 841-3911;

(b) within seven days of discovery report the following:

~~(2)~~ (i) ~~U~~unusual operating conditions observed by an owner or operator ~~(such as the erratic behavior of product dispensing equipment, the sudden loss of product from the tank system, or an unexplained presence of water in the tank)~~ or person performing ~~the~~ a tightness test, unless the tank system equipment is found to be defective but not leaking, and is immediately repaired or replaced~~; or~~. Unusual operating conditions include, but are not limited to, the erratic behavior of product dispensing equipment or automatic release detection equipment, the sudden loss of product from the tank system or an unexplained presence of water in the tank.

~~(3)~~ (ii) ~~M~~monitoring results from a release detection method required under ARM 17.56.402 and 17.56.403 that indicate a release may have occurred, or results that cannot rule out the occurrence of a release, unless~~:~~

~~(a)~~ the monitoring device is found to be defective, and is immediately repaired, recalibrated or replaced, and additional monitoring does not confirm the initial result~~; or~~

~~(b) in the case of inventory control, a second month of data does not confirm a suspected release~~. Examples of results that must be reported include, but are not limited to, alarms from automatic release detection equipment, two consecutive months of inconclusive results from a statistical inventory reconciliation method, one month of failing results from a statistical inventory reconciliation method, one month of failed inventory control or manual tank gauging reconciliation, or other instances of failed monthly inventory methods.

AUTH: ~~75-10-405,~~ 75-11-319, 75-11-505, MCA
IMP: ~~75-10-405,~~ 75-11-309, 75-11-505, MCA

REASON: The term "licensed installer" is added to ARM 17.56.502(1), to clarify that persons licensed to install, remove, or repair USTs must report suspected releases. This new language is necessary to more accurately describe the types of persons who, through the course of their work on USTs, are most likely to discover suspected releases.

The term "suspected releases" is added to ARM 17.56.502(1). This amendment is necessary to clarify that this rule regulates only reports of suspected releases and not

confirmed releases or spills, which are addressed by other rules.

The requirement to report a suspected release by telephone has been changed to allow reporting by other means that ensure a person within the remediation division of the department receives notice within the required timeframe. This change reflects the way that releases are actually reported. If a person personally notifies someone in the department of a suspected release, the person will no longer also be required to notify the department by telephone, which was unnecessarily duplicative.

Subsections (1)(a) and (b) split the reporting of suspected releases into two categories: those that must be reported in 24 hours and those that must be reported in seven days. The types of releases requiring 24-hour reporting are those that may present an immediate and growing threat to public health, safety, and the environment. The department needs to be aware of these situations quickly in order to determine whether immediate response is required. Suspected releases that are less likely to pose a significant risk must be reported within seven days. The seven days gives owners and operators time to evaluate whether faulty equipment or false alarms are the cause of the suspected release. Owners and operators will still be required, under ARM 17.56.504, to immediately investigate and confirm all suspected releases.

Erratic behavior of release detection equipment is added to the list of situations, in ARM 17.56.502(1)(b), that are the basis for suspecting a release. This is necessary to address faulty release detection equipment, which may not be detecting an ongoing release. Repeated "inconclusive" results from monthly Statistical Inventory Reconciliation (SIR) release detection methods are also listed in ARM 17.56.502(1)(b) as a basis for suspecting a release. There are occasions when the SIR method cannot determine whether a release is or is not statistically evident. However, when two consecutive months of "inconclusive" results are recorded, the owner or operator essentially does not have a method of release detection. Further, an ongoing release may be overlooked because the owner or operator is not using adequate care when monitoring his/her USTs. These instances must be reported to the department, so that it can evaluate the potential for an ongoing release and take steps to resolve the issue, if necessary.

The proposed amendments to (1)(a) require notification within 24 hours to a person in the department's remediation division or to the Montana Disaster and Emergency Services (DES) duty officer, outside regular business hours, when a person in the department of environmental quality cannot be reached. A DES duty officer is on-duty 24 hours a day. The remediation division personnel and DES duty officers are trained on which emergency response agencies should be contacted to respond to a suspected release. If a message were left on an answering machine, appropriate personnel might not receive the information for several days, which could lead

to inappropriate response actions and undue risks to human health and the environment.

17.56.504 RELEASE INVESTIGATION AND CONFIRMATION STEPS

(1) Unless corrective action is initiated in accordance with subchapter 6, owners and operators must immediately investigate and confirm all suspected releases of regulated substances requiring reporting under ARM 17.56.502, within ~~7~~ seven days of the discovery of the condition identified in ARM 17.56.502, using either of the following steps, unless both are required by the language of this rule:

~~(1)~~ (a) ~~System test.~~ Owners and operators must conduct tests (according to the requirements for tightness testing in ARM 17.56.407(3) and 17.56.408(2)) that determine whether a leak exists in ~~that~~ any portion of the tank that routinely contains product, or the attached delivery piping, or both.

(a) and (b) remain the same, but are renumbered (i) and (ii).

~~(c)~~ (iii) Owners and operators must conduct a site check as described in ~~(2)~~ (1)(b) ~~of this rule~~ if the test results for the system, tank, and delivery piping do not indicate that a leak exists but environmental contamination is the basis for suspecting a release.

~~(2)~~ (b) ~~Site checking.~~ Owners and operators must measure for the presence of a release where contamination is most likely to be present at the PST or UST site. In selecting sample types, sample locations, and measurement methods, owners and operators must consider the nature of the stored substance, the type of initial alarm or cause for suspicion, the type of backfill, the depth of ground water, and other factors appropriate for identifying the presence and source of the release. The department should be consulted to assist in determining sample types, sample locations, and measurement methods. Owners and operators of PST sites and owners and operators of UST sites should refer to the Montana Quality Assurance Plan for Investigation of Underground Storage Tank Releases as a guide in the collection, preservation and analysis of field samples;

(a) remains the same, but is renumbered (i).

~~(b)~~ (ii) If the test results for the excavation zone or the PST or UST site are taken according to ~~ARM 17.56.605(2)~~ (1)(b) and do not indicate that a release has occurred, further investigation is not required if approved by the department; and

~~(c)~~ (iii) The department may reject all or part of the test results, if it has ~~a~~ reasonable doubt as to the quality of data or if the sample or test methods ~~used~~ are scientifically unsound~~,~~. ~~and~~ In such cases, the department may require resampling, reanalysis, or both. The department will provide ~~to~~ the owner or operator with an explanation of its decision to reject any test results.

AUTH: ~~75-10-405,~~ 75-11-319, 75-11-505, MCA
IMP: ~~75-10-405,~~ 75-11-309, 75-11-505, MCA

REASON: The proposed amendments in ARM 17.56.504 are either grammatical or serve to clarify the original intent of the rule, and do not change the substantive effect of the rule. The system test requirement at ARM 17.56.504(1)(a) requires testing to determine whether a leak exists in any portion of the tank that routinely contains product. The word "any" was inserted and the word "that" deleted to clarify this requirement.

In subsection (1)(b)(iii) of the proposed amendment, the department may reject test results if it has reason to question the data. The proposed language states that the department may reject all or part of the test results if it has reasonable doubt as to the quality of data or the scientific soundness of sampling or test methods. This proposed amendment is necessary to identify required methods for sampling and testing.

17.56.505 REPORTING AND CLEANUP OF SPILLS AND OVERFILLS

(1) Owners and operators must contain and immediately clean up a spill or overfill, immediately report the spill or overfill to the department and the implementing agency by telephone, pursuant to (3), or by another method that ensures that a person within the remediation division of the department receives notice within 24 hours of the release, and must begin corrective action in accordance with subchapter 6 in the following cases:

(a) remains the same.

(b) Spill or overfill of a hazardous substance that results in a release to the environment that equals or exceeds its reportable quantity under ~~CERCLA (~~40 CFR Part 302~~)~~.

(2) remains the same.

(3) Telephone notification required in (1) or (2) must be made to a person in the remediation division of the department by calling (406) 444-1420 between the hours of 8:00 a.m. and 5:00 p.m., Monday through Friday, or to the 24-hour disaster and emergency services duty officer at (406) 841-3911 outside the hours of 8:00 a.m. to 5:00 p.m., Monday through Friday, and on state holidays. Messages left on answering machines, received by facsimile, email, voice mail or other messaging device shall not be considered adequate 24-hour notice.

AUTH: ~~75-10-405,~~ 75-11-319, 75-11-505, MCA
IMP: ~~75-10-405,~~ 75-11-309, 75-11-505, MCA

REASON: Amendments to ARM 17.56.505 are necessary to require spill and overfill reporting to a person within the remediation division of the department. The requirement to report spills and overfills by telephone has been changed to allow reporting by other means that ensure a person receives the information. This amendment reflects the way that releases are actually reported. If a person personally notifies someone in the department of a spill or overfill, they will no longer be required to notify the department by

telephone, which was unnecessarily duplicative.

The proposed amendment to (1)(b) is necessary to correct the citation to 40 CFR Part 302. This citation is to federal regulations related to designation, reportable quantities, and notification of hazardous substances under CERCLA, not to the CERCLA statute.

Subsection (3) requires owners and operators to notify a person in the department's remediation division within 24 hours, or the Montana Disaster and Emergency Services (DES) duty officer, who is on duty 24 hours a day, when a person in the department cannot be reached. Spills and overfills may cause an immediate threat to public health, safety, and the environment and need to be addressed quickly. The remediation division personnel and DES duty officers are trained on which emergency response agencies should be contacted under these conditions. If a message were left on an answering machine, appropriate personnel might not receive the information for several days, which could lead to inappropriate response actions and undue risks to human health and the environment.

17.56.602 INITIAL RESPONSE AND ABATEMENT MEASURES

(1) Upon confirmation of a release in accordance with ARM 17.56.504 or after a release from the PST or UST system is identified in any other manner, owners and operators must:

~~(1)~~ (a) perform the following initial response actions ~~within 24 hours of a release~~:

~~(a)~~ (i) report the release to the department ~~and the implementing agency by telephone or electronic mail~~ in accordance with [NEW RULE I];

(b) and (c) remain the same, but are renumbered (ii) and (iii).

(2) remains the same, but is renumbered (b).

(a) through (d) remain the same, but are renumbered (i) through (iv).

~~(e)~~ (v) Determine the extent and magnitude of contamination in soils, ground water, surface water or both, which contamination has resulted from the release at the PST or UST site. In selecting sample types, sample locations, and measurement methods, owners and operators must consider the nature of the stored substance, the type of backfill, depth to ground water and other factors as appropriate for identifying the presence and source of the release. Samples must be collected and analyzed in accordance with ARM 17.56.504~~(2)~~(1)(b); and

(f) remains the same, but is renumbered (vi).

(3) remains the same, but is renumbered (c).

(a) through (c) remain the same, but are renumbered (i) through (iii).

~~(4)~~ (d) Within 30 days after release confirmation, owners and operators must submit a report to the department on a form designated by the department summarizing the initial response and abatement measures taken under (1)(a) through ~~(3)~~ (c) ~~of this rule~~ and any resulting information or data. The report must include data on the nature, estimated quantity and

source of the release. If initial response and abatement measures extend beyond the 30-day time period, owners and operators must also submit an additional follow-up completion report according to a schedule established by the department. If free product is removed, the following information must also be provided in or with the report:

(a) through (g) remain the same, but are renumbered (i) through (iv).

AUTH: ~~75-10-405,~~ 75-11-319, 75-11-505, MCA
IMP: ~~75-10-405,~~ 75-11-309, 75-11-505, MCA

REASON: The requirement to report confirmed releases is being deleted from (1) and moved to subchapter 5 (proposed new rule I). All release reporting requirements will now be contained in Title 17, chapter 56, subchapter 5 of these rules. These amendments are necessary to consolidate release reporting requirements.

17.56.604 REMEDIAL INVESTIGATION (1) In order to determine the full extent and location of soils contaminated by the release and the presence and concentrations of free and dissolved product contamination in the surface water and in ground water, owners and operators must conduct a remedial investigation of the release, the release site, and the surrounding area possibly affected by the release if any of the following conditions exist:

(a) remains the same.

(b) Free product is found to need recovery in compliance with ARM 17.56.602~~(3)~~(1)(c);

(c) through (4) remain the same.

AUTH: 75-10-405, 75-11-319, MCA
IMP: 75-10-405, 75-11-309, MCA

REASON: This proposed amendment is necessary to change the citation of ARM 17.56.602(3) to (1)(c) as that subsection is proposed for amendment as shown above.

4. The proposed new rules provide as follows:

NEW RULE I REPORTING OF CONFIRMED RELEASES (1) Upon confirmation of a release in accordance with ARM 17.56.504, or after a release from the PST or UST system is identified in any other manner, owners and operators, any licensed installer, any person who performs subsurface investigations for the presence of regulated substances, and any person who performs a tank tightness or line tightness test pursuant to ARM 17.56.407(3) or 17.56.408(2), must report releases to the department and the implementing agency within the specified timeframes and in the following manner:

(a) Except as provided in (1)(b), all releases must be reported to the department and the implementing agency within 24 hours of confirming the release. The report must be given

to a person in the remediation division and not a messaging device such as an answering machine, facsimile, email or voice mail. The remediation division may be reached by telephone between the hours of 8:00 a.m. and 5:00 p.m., Monday through Friday, at (406) 444-1420. Outside the hours of 8:00 a.m. to 5:00 p.m., Monday through Friday, and on state holidays, the release must be reported to the 24-hour disaster and emergency services duty officer at telephone number (406) 841-3911 within 24 hours of discovery.

(b) When a release is confirmed from laboratory analysis of samples collected from a site, the release must be reported to the department and implementing agency by a method that ensures the department or implementing agency receives the information within seven days of the confirmation. The time of release confirmation under these circumstances is the time the owner, operator, licensed installer, or person who performs subsurface investigations for the presence of regulated substances received notification of the sample results from the laboratory. Laboratory analytical results that exceed the following values confirm that a release has occurred:

(i) risk-based screening levels (RBSLs) established for petroleum contaminants in surface soil, or 50 micrograms per kilogram, for extractable petroleum hydrocarbon (EPH) compounds at UST sites, published in Montana Tier 1 Risk-Based Corrective Action Guidance for Petroleum Releases (RBCA) for petroleum compounds and mixtures in soil;

(ii) Montana water quality human health standards published in department Circular WQB-7 for contaminants in water that are not listed in RBCA; and

(iii) preliminary remediation goals or soil screening levels published in the United States Environmental Protection Agency, Region 9 Preliminary Remediation Goals for soil analyses of contaminants in soil that are not listed in RBCA.

AUTH: 75-11-319, 75-11-505, MCA
IMP: 75-11-309, 75-11-505, MCA

REASON: New rule I is necessary to include the reporting requirements for confirmed releases originally contained in ARM 17.56.602 (Initial Response and Abatement Measures) and to split release reporting timeframes into two categories: (1) those that must be reported in 24 hours and (2) those that must be reported in seven days. The types of releases requiring 24-hour reporting are those that may present an immediate and growing threat to public health, safety, and the environment. The department needs to evaluate these situations and determine if immediate response is required. Releases that must be reported in seven days are those that are less likely to pose a significant risk to human health or the environment. The seven-day time period is necessary to give owners, operators, and their contractors sufficient time to receive, review, and understand laboratory reports that may confirm a release.

New rule I requires owners and operators to notify a person in the department's remediation division within 24 hours of confirmation of a release or notify the Montana disaster and emergency services (DES) duty officer, on duty 24 hours a day, when a person in the department of environmental quality cannot be reached. Spills and overfills may cause an immediate threat to human health, safety, and the environment and need to be addressed quickly. The remediation division personnel and DES duty officers are trained on which emergency response agencies should be contacted under these conditions. If a message were left on an answering machine, appropriate personnel might not receive the information for several days, which could lead to inappropriate response actions and undue risks to human health and the environment.

New rule I(1)(b) identifies laboratory analytical result concentrations that confirm a release. This amendment is necessary to inform persons receiving laboratory results that those listed analytical concentrations require reporting a confirmed release to the department within seven days of receipt of the results and that further response action will be required.

NEW RULE II NUMBER OF PETROLEUM RELEASES (1) Except as provided in (2), from the date of the first discovery of a suspected or confirmed release of petroleum from a facility, all petroleum contamination that is discovered through any investigation pursuant to subchapter 5 or 6, is considered part of a single release. The department will assign a unique identification number to the release.

(2) Under the following circumstances the department may assign an additional release number:

(a) a new release of petroleum starts after the department has listed all earlier releases on the resolved release list in accordance with [NEW RULE III(4)] or discontinued monitoring in accordance with [NEW RULE III(5)]; or

(b) a new release of petroleum starts from a UST or PST after the date that the earlier release was confirmed.

(3) For the purposes of this rule only, "facility" means petroleum storage tank (PST) systems and their associated distribution piping that are located on contiguous property and are owned and operated as a single business by the same person(s), at the time a release occurs.

(a) A facility may include multiple PST systems located on contiguous property, which are used for storing multiple petroleum products for a single business at the time a release occurred;

(b) A facility does not include PST systems used in different businesses that are connected through permanent or temporary piping used to transfer petroleum products from one business to another.

AUTH: 75-11-319, 75-11-505, MCA
IMP: 75-11-308, 75-11-309, 75-11-505, MCA

REASON: New rule II is necessary to describe the way that the department defines a release and assigns release numbers. The methodology in this rule adopts as rules informal guidelines that the department has operated under since 1989. The department determined that it was necessary to formalize these guidelines in order to ensure their consistent application and to give the regulated community notice of the department's process for determining and identifying releases.

NEW RULE III SITE LISTING (1) The department must maintain three lists that contain information about petroleum releases regulated under this subchapter. The lists are known as the active release list, the residual contamination release list, and the resolved release list. Except as provided in (6), every UST and PST release, spill, and overfill that has been reported to the department under provisions of subchapter 5 of this chapter must be recorded on one of the release lists. The following information must be recorded for each release:

(a) the unique release identification number assigned under [NEW RULE II];

(b) the UST facility identification number;

(c) the address or location of the release;

(d) the petroleum product(s) released and any other information available regarding the nature or extent of the release;

(e) the date the release was confirmed or discovered;

(f) the date the release was transferred to the residual or resolved contamination release list, if applicable;

(g) the date the department sent a letter in accordance with (7), if applicable;

(h) if a release has been transferred to another state or federal program that assumed jurisdiction of the release in accordance with (4)(a), the date the release was transferred; and

(i) other information that the department determines appropriate.

(2) The active release list must contain all UST and PST releases, spills, and overfills that have not been transferred to the residual contamination release list or the resolved release list, or that have not been removed from any of these lists under the provisions of (6).

(3) The department may transfer a release from the active release list to the residual contamination release list if site conditions satisfy all criteria listed under (4)(b) unless water quality parameters exceed standards published in department Circular WQB-7, a standard established as a drinking water maximum contaminant level published in 40 CFR Part 141, or risk-based screening levels published in Montana Tier-1 RBCA Guidance for Petroleum Releases. The department must notify the owner or operator of the department's determination to place the release on the residual contamination release list, and must document all conditions

that preclude the site from being placed on the resolved release list. The department may not place a release on the residual contamination release list unless:

(a) ground water-monitored natural attenuation data collected in accordance with U.S. Environmental Protection Agency Office of Solid Waste and Emergency Response Directive 9200.4-17P indicate that the dissolved contaminant plume has been stable or shrinking for a period of at least two consecutive years or another reasonable time period approved by the department;

(b) all ongoing sources of the release have been eliminated or reduced to the maximum extent practicable;

(c) all free product has been removed to the maximum extent practicable;

(d) documented investigations or site-specific risk analyses demonstrate that taking additional remedial action is not cost effective nor practicable to address the release; and

(e) engineering or institutional controls are in place to ensure that identified risks to human health are reduced to acceptable levels. For the purposes of this rule, engineering or institutional controls must consist of:

(i) deed restrictions or restrictive covenants that run with the land and that have been approved by the department and duly recorded;

(ii) a designated controlled ground water area as provided for in 85-2-506, MCA; or

(iii) another method approved by the department.

(4) The department may transfer a release from the active release list or the residual contamination release list to the resolved release list if:

(a) another state or federal program assumes jurisdiction of the facility and that program addresses all the releases and threatened releases of all hazardous or deleterious substances at the facility; or

(b) the department has determined that all cleanup requirements have been met and that conditions at the site assure present and long-term protection of human health, safety, and welfare and the environment. The following requirements must be met before a release may be moved from the active or residual release list to the resolved release list:

(i) documented investigations conducted in accordance with ARM 17.56.604 identify the extent, or absence of, contamination remaining in the soil, ground water, surface water, and other environmental media relevant to the release;

(ii) risks to human health and the environment from residual contamination at the site have been evaluated and indicate that unacceptable risks do not exist and are not expected to exist in the future. Owners or operators, or other persons, may use any of the following methods to evaluate risk from a release with department approval:

(A) Montana Tier-1 RBCA Guidance for Petroleum Releases for soil and water contamination, except for public health risk from inhalation of contaminant vapors, surface water, or

sediment;

(B) a site-specific risk assessment conducted in accordance with EPA Risk Assessment Guidance for Superfund: Volume I, Parts A through C and EPA Exposure Factors Handbook: Volumes I through III; or

(C) demonstration to the department's satisfaction that current and potential future exposure pathways are incomplete;

(iii) all appropriate remedial actions associated with the release and required by the department, including compliance monitoring and confirmatory sampling, have been completed; and

(iv) all applicable and relevant environmental requirements, criteria or limitations associated with the release have been met.

(5) The department may reduce or discontinue monitoring required for releases listed on the residual contamination release list that do not present a risk to human health or the environment after five years, or another reasonable time period established by the department, of continuous monitoring. In deciding to reduce or discontinue monitoring, the department must consider whether the plume's extent, magnitude, and contaminant concentrations have remained stable or shrunk. Sites on the residual contamination list must be reviewed by the department once every five years, in consultation with the owner or operator, to determine whether monitoring for the purpose of potential site closure should be resumed.

(6) The department may remove a release from all release lists if the department determines that the release should not have been listed based on subsequent investigation that shows that the release did not occur, that contamination did not exceed the standards cited in [NEW RULE I(1)(b)(i) through (iii)], or other comparable circumstances.

(7) The department must send a letter to the owner or operator:

(a) at the time a release is placed on the resolved release list that states the following:

(i) no further corrective action will be required at the time;

(ii) all monitoring wells, piezometers, and other ground water sampling points must either be abandoned in a way that prevents introduction of contamination into the subsurface or be maintained by the property owner in accordance with applicable rules and requirements;

(iii) a description of the amount and location of any residual contamination that remains in the subsurface;

(iv) reasons why the department believes the release does not pose a present or future risk to human health or the environment; and

(v) future conditions that may require additional work; and

(b) at the time a release is placed on the residual contamination list that states the following:

(i) all the information in (7)(a)(i) through (iv); and

(ii) a schedule of monitoring and review. The schedule must comply with (5) and must include a requirement for a groundwater investigation to assess current conditions at the time the owner or operator or department proposes to transfer the site to the resolved list.

(8) The department may transfer a release from the resolved or residual release lists to the active release list if the department receives information regarding the need for further remedial action. This may include changes in land use or site conditions that increase the potential for adverse impacts from residual contamination remaining after previous corrective action. In relisting, the department must comply with the requirements of [NEW RULE II].

AUTH: 75-11-319, 75-11-505, MCA
IMP: 75-11-309, 75-11-505, MCA

REASON: Subsection (1) of proposed new rule III is necessary to require the department to maintain three lists containing information related to petroleum releases. These lists must be known as the active release list, the residual contamination release list and the resolved release list.

Maintaining the three lists will assist the department with workload management and site prioritization. Additionally, assignment of a release to one of the three lists will inform the public about the status of corrective action at a release site and provide notice of future corrective action requirements.

The active release list, at (2), must include all petroleum releases from underground storage tanks (USTs) and petroleum storage tanks (PSTs) that have not been transferred to the residual contamination release list or the resolved release list. The residual contamination release list, at (3), must include all petroleum releases from USTs and PSTs that have met all cleanup requirements and at which site conditions assure present and long-term protection of human health, safety, welfare, and the environment, but water quality standards, drinking water standards or other applicable standards are exceeded. Before a release may be placed on the residual contamination release list, the release must have been monitored for two consecutive years and ground water monitoring data must show that the dissolved contaminant plume is stable or shrinking. Additionally, all sources of contamination must be eliminated or reduced to the maximum extent practicable, all free product must be removed to the maximum extent practicable, it must be demonstrated that additional remedial action is not cost effective or practicable, and engineering or institutional controls must be in place to ensure that risks to human health are reduced to acceptable levels. The resolved release list, at (4), includes all releases for which cleanup requirements have been met, or for which another state or federal program has assumed jurisdiction.

Subsection (5) of proposed new rule III is necessary to

allow the department to reduce or discontinue the monitoring requirements for releases on the residual contamination release list when, after five years or another reasonable period of continuous monitoring, it can be demonstrated that contamination remaining does not pose a risk to human health or the environment.

Subsection (6) is necessary to allow the department to remove a release from all release lists if the department determines, based on new information, that the release should not have been listed because it did not occur, contamination did not exceed standards, or other comparable circumstances.

Subsection (7) is necessary to require the department to send a letter to the owner or operator of the UST or PST with a listed release at the time the release is placed on the resolved or the residual release list. The letter will: 1) state that no further corrective action is required at the time; 2) state that monitoring wells, peizometers and other ground water sampling points must be abandoned or maintained in accordance with applicable rules and regulations; 3) describe any remaining residual contamination; 4) describe the reason the department believes the release does not pose a present risk to human health and the environment; 5) describe any future conditions that may require further work; and 6) for residual contamination, provide a schedule for monitoring and review, that will include a five-year file and document review cycle and a ground water investigation at the time the owner or operator proposes to transfer the release to the resolved release list. The department determined that the five-year review periods for file and document review are reasonable time periods to reassess site development, maintenance of engineering and institutional controls, and other changed circumstances that may change the conclusions of the risk assessment conducted in accordance with (4)(b)(ii) and require further work at the site. A ground water investigation at the time the owner or operator or the department proposes to transfer the release to the resolved release list would provide information about site conditions without requiring the monitoring wells to be left in place. Leaving monitoring wells in place requires ongoing maintenance of the sampling points and may risk cross contamination or provide a conduit for contamination of ground water.

Subsection (8) is necessary to provide a process for transferring a release from the resolved or residual contamination release list back to the active release list when the department receives information regarding the need for further remedial action. This information may include changes in land use that increase the potential for adverse impacts from residual contamination.

Proposed New Rule III at (4) and (5) addresses completion of corrective action and how and when required corrective action, including monitoring, may be ceased or decreased. Current rules address investigation and cleanup of petroleum releases, not how and when to cease or decrease corrective actions. Proposed New Rule III will provide the department

and the regulated community with a regulatory framework for managing three categories of petroleum releases: those that are undergoing active corrective action, those that have residual contamination after completion of required corrective action, and those that are resolved by meeting all clean up requirements.

NEW RULE IV ADOPTION BY REFERENCE (1) For purposes of this subchapter, the department hereby adopts and incorporates by reference:

(a) Department Circular WQB-7, "Montana Numeric Water Quality Standards" (January 2002);

(b) Montana Tier 1 Risk-based Corrective Action Guidance for Petroleum Releases (RBCA) (August 2002);

(c) U.S. Environmental Protection Agency, "Region 9 Preliminary Remediation Goals" (November 22, 2000).

(d) Reportable Quantities for Hazardous Substances under section 102(a) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) published at 40 CFR Part 302 (2001).

(2) All references in this subchapter to the documents incorporated by reference in this rule are to the edition specified in this rule.

(3) Copies of the documents incorporated by reference in this rule may be obtained from the Department of Environmental Quality, P.O. Box 200901, Helena, MT 59620-0901.

AUTH: 75-11-319, 75-11-505, MCA
IMP: 75-11-309, 75-11-505, MCA

REASON: New Rule IV is necessary to incorporate by reference all documents referred to in subchapter 5. Having a separate adoption by reference rule will save the department from having to update numerous references whenever there is a new edition of one of the referenced documents.

NEW RULE V ADOPTION BY REFERENCE (1) For purposes of this subchapter, the department hereby adopts and incorporates by reference:

(a) Department Circular WQB-7, "Montana Numeric Water Quality Standards" (January 2002);

(b) Drinking water maximum contaminant levels published at 40 CFR Part 141 (2001);

(c) Montana Tier 1 Risk-based Corrective Action Guidance for Petroleum Releases (RBCA) (August 2002);

(d) U.S. Environmental Protection Agency Office of Solid Waste and Emergency Response Directive 9200.4-17P, "Use of Monitored Natural Attenuation at Superfund, RCRA Corrective Action, and Underground Storage Tank Sites" (April 1999);

(e) U.S. Environmental Protection Agency Risk Assessment Guidance for Superfund Volume I, Part A, EPA/540/1-89/002 (December 1989), Part B, EPA/540/R-92/004 (December 1991), and Part C, EPA/540/R-92/004 (December 1991); and

(f) U.S. Environmental Protection Agency Exposure

Factors Handbook, Volume I, EPA/600/P-95/002Fa (August 1997), Volume II, EPA/600/P-95/002Fb (August 1997), and Volume III, EPA/600/P-95/002Fc (August 1997).

(2) All references in this subchapter to the documents incorporated by reference in this rule are to the edition specified in this rule.

(3) Copies of the documents incorporated by reference in this rule may be obtained from the Department of Environmental Quality, P.O. Box 200901, Helena, MT 59620-0901.

AUTH: 75-11-319, MCA; 75-11-505, MCA
IMP: 75-11-309, MCA; 75-11-505, MCA

REASON: New Rule V is necessary to incorporate by reference all documents referred to in subchapter 6. Having a separate adoption by reference rule will save the department from having to update numerous references whenever there is a new edition of one of the referenced documents.

5. Concerned persons may submit their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to Kirsten Bowers, Remediation Division, Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901, faxed to (406) 444-1901 or emailed to kbowers@state.mt.us and must be received no later than 5:00 p.m., November 14, 2002. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

6. Kirsten Bowers has been designated to preside over and conduct the hearing.

7. The Department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list must make a written request that includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding: air quality; hazardous waste/waste oil; asbestos control; water/wastewater treatment plant operator certification; solid waste; junk vehicles; infectious waste; public water supplies; public sewage systems regulation; hard rock (metal) mine reclamation; major facility siting; opencut mine reclamation; strip mine reclamation; subdivisions; renewable energy grants/loans; wastewater treatment or safe drinking water revolving grants and loans; water quality; CECRA; underground/above ground storage tanks; MEPA; or general procedural rules other than MEPA. Such written request may be mailed or delivered to Elois Johnson, Paralegal, Legal Unit, 1520 E. Sixth Ave., P.O. Box 200901, Helena, Montana 59620-0901, faxed to the office at (406) 444-4386, emailed to ejohnson@state.mt.us or may be made by completing a request form at any rules hearing held by the Department.

8. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

Reviewed by: **DEPARTMENT OF ENVIRONMENTAL QUALITY**

James M. Madden **BY:** *Jan P. Sensibaugh*
JAMES M. MADDEN **JAN P. SENSIBAUGH, Director**
Rule Reviewer

Certified to the Secretary of State, October 7, 2002.

**BEFORE THE DEPARTMENT OF CORRECTIONS
OF THE STATE OF MONTANA**

In the matter of the proposed adoption of new rules I - IV, amendment of ARM 20.9.315 and 20.9.320, and repeal of ARM 20.9.301, 20.9.305, 20.9.307, and 20.9.310 pertaining to Juvenile Corrections - Parole Agreement Violation, Initial Investigation and Detainer - Scheduling and Notice of Hearing - Procedures - Appeal - Waiver of Right to Hearing - Failure to Appear	)	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION, AMENDMENT, AND REPEAL

TO: All Concerned Persons

1. On November 6, 2002 at 9:00 a.m., a public hearing will be held in the first floor conference room of the Department of Corrections, 1539 11th Ave., Helena, Montana, to consider the proposed adoption, amendment, and repeal of the above-stated rules.

2. The Department of Corrections will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Corrections no later than 5:00 p.m. on October 30, 2002, to advise us of the nature of the accommodation that you need. Please contact Sherri Townsend, Department of Corrections, 1539 11th Ave., PO Box 201301, Helena, Montana 59620-1301; telephone 406-444-3910; fax 406-444-4920; e-mail stownsend@state.mt.us.

3. The proposed adoptions, amendments, and repeals are necessary to bring the rules into compliance with the current law in referencing "parole" agreements rather than "aftercare" agreements; "juvenile parole officers" rather than "counselors"; and "hearings officers" rather than "referees."

Substantively, prior law provided that the "referee" made a recommendation regarding the disposition of the parole violation allegation subject to review and final decision by the department. Chapter 550, L. 1997 amended the law to authorize the "hearings officer" to issue a final decision subject to an intermediate level of appeal to the director of the department prior to appeal to the district court.

These actions are also proposed to address grammar, organization, and eliminate redundancies and unintentional variation of terms.

Portions of 52-5-129, MCA are repeated herein to assist parole officers, hearings officers, and youth offenders who may not have access to the Montana Code Annotated to provide a clear and concise overview of the process.

4. The proposed new rules provide as follows:

NEW RULE I PAROLE AGREEMENT VIOLATION, INITIAL INVESTIGATION AND DETAINER (1) When a parole officer has reason to believe a youth may have violated the youth's written parole agreement in a manner to justify the youth's return to a secure placement facility, the parole officer may issue a written notice to authorize the department or law enforcement officer to detain the youth.

(2) The parole officer must immediately investigate to determine whether the allegations constitute a violation of the written parole agreement. If, on the basis of the investigation, the parole officer concludes that the allegations do not constitute a violation of the written parole agreement or do not warrant return of the youth to a secure placement facility, the officer shall dismiss the allegations and immediately cause the youth to be released from detention.

(a) "Secure placement facility" means a juvenile correctional facility or other placement deemed appropriate by the youth's parole officer.

(3) If the allegations support a violation of the parole agreement, the parole officer must file a report of violation that documents the violation with specific facts, including, but not limited to:

(a) a description of acts or omissions;

(b) dates;

(c) times;

(d) places; and

(e) the names of witnesses and the substance of their testimony.

(4) The parole officer must further:

(a) determine and document whether it is necessary to continue the youth's detention pending the hearing;

(b) ensure the appropriateness of the youth's place of detention; and

(c) institute hearing procedures.

(5) Pending the hearing and decision, the department may detain a youth only to protect the person or property of the youth or others or when the youth may abscond or be removed from the community. The detention of the youth may occur only in the places described in 41-5-348 and 41-5-349, MCA.

AUTH: 52-5-102 and 52-5-129, MCA
IMP: 52-5-102, 52-5-126, 52-5-127, 52-5-128 and 52-5-129, MCA

NEW RULE II SCHEDULING AND NOTICE OF HEARING (1) The parole officer shall schedule a hearing to be held at the site of the alleged violation or in the county where the youth is residing or is found, in a location determined by the hearings officer. The hearing must occur within 10 days after the youth's detention, or 10 days after notice has been served on the youth, whichever is earlier.

(2) As soon as possible after the alleged violation, and at least 72 hours prior to the hearing, the parole officer shall serve the youth with the forms approved by the juvenile corrections division which include written notice of the time, date, location of the hearing and the alleged violation of the parole agreement.

AUTH: 52-5-102 and 52-5-129, MCA
IMP: 52-5-102, 52-5-126, 52-5-127, 52-5-128 and 52-5-129, MCA

NEW RULE III HEARING PROCEDURES (1) The youth may submit a written request to the hearings officer to continue the hearing for a reasonable time period for good cause. The hearings officer must confirm the mutually agreeable rescheduled date in writing to the youth and the youth's attorney.

(2) If a youth has failed to retain counsel, the hearings officer shall appoint an attorney to represent the youth.

(3) On request of either party, the hearings officer shall issue and the parole officer shall serve subpoenas to procure the attendance of witnesses or production of documents at the hearing.

(4) The hearing is a public proceeding. However, upon a finding that an individual right of privacy outweighs the public's right to know, the hearings officer may exclude members of the public from all portions of the hearing pertaining to privacy interests. Witnesses may attend only during their testimony.

(5) The hearing shall be conducted informally. The hearings officer must tape record the hearing and establish for the record the identity of persons present and that the youth received prior written notice of:

(a) the alleged violation of the parole agreement;

(b) the purpose of the hearing;

(c) the evidence against the youth and the facts constituting the alleged violation;

(d) the opportunity to have the hearings officer subpoena witnesses;

(e) the opportunity to be heard in person or by interactive video transmission and to present witnesses and documentary evidence to controvert the evidence against the

youth and to show that there are compelling reasons that justify or mitigate the violation;

(f) the right to confront and cross-examine adverse witnesses in person or by means of interactive video transmission; and

(g) the right to be represented by an attorney.

(6) The hearings officer shall request that the youth enter a plea to the allegations. In the event the youth enters a plea, the hearings officer shall determine whether the youth's plea was made voluntarily and without duress or promise.

(7) The hearings officer must review the evidence submitted by both parties and if, by a preponderance of the evidence, the hearings officer finds that the youth committed the alleged violation, the hearings officer must decide the youth's placement. The hearings officer may consider mitigating or aggravating circumstances in reaching the decision.

(8) The hearings officer must, within 24 hours of the hearing, provide to the parole officer and the youth a record of the hearing and a written statement of the evidence relied upon by the hearings officer in reaching the final decision and the reasons for the final decision.

(9) The hearings officer shall attach to the final decision an appeal form approved by the juvenile corrections division containing information regarding the appeal process of the hearings officer's decision.

AUTH: 52-5-102 and 52-5-129, MCA
IMP: 52-5-102, 52-5-126, 52-5-127, 52-5-128 and 52-5-129, MCA

NEW RULE IV APPEAL (1) The youth may appeal the hearings officer's decision to the department director by submitting a notice of appeal and any additional information within five days of the hearing. Upon request of the youth to the department, the youth may receive a written transcript of the hearing. The director or director's designee shall review the record and grant or deny the appeal within five days of receipt of the appeal.

(2) Within one business day of receipt of request for a transcript, the hearings officer shall cause a transcription of the hearing tape to be made and submitted to the youth and to the department director.

(3) Within five days of receipt of the appeal, the department director shall review the decision of the hearings officer and determine whether the decision is supported by a preponderance of the evidence. The director shall either affirm the decision or vacate the decision.

(4) The statement shall contain notice to the youth of the youth's right to appeal, within 10 days, the director's decision to the district court in the county where the parole revocation hearing was held.

AUTH: 52-5-102 and 52-5-129, MCA
IMP: 52-5-102, 52-5-126, 52-5-127, 52-5-128 and 52-5-129, MCA

5. The rules proposed to be amended provide as follows, stricken matter interlined, and new matter underlined.

20.9.315 WAIVER OF RIGHT TO HEARING (1) At any time prior to the hearing, the youth may, ~~with~~ upon the advice of an attorney ~~counsel~~, waive his right to the hearing on a form provided by the juvenile corrections division for that purpose. ~~In this instance, the waiver of right to hearing form is to be filled out and signed by the youth and his attorney. If the youth has no attorney, the referee may sign the waiver.~~ A waiver of the hearing constitutes an admission by the youth of the alleged violations and authorizes the youth's parole officer to render a decision on the youth's placement. A youth not represented by an attorney may not waive the right to a hearing.

AUTH: ~~2-4-201 and 53-30-203~~ 52-5-102 and 52-5-129, MCA
IMP: ~~53-30-203 and 53-30-229~~ 52-5-102, 52-5-126, 52-5-127, 52-5-128 and 52-5-129, MCA

20.9.320 FAILURE TO APPEAR FOR HEARING (1) If a youth released pending hearing fails to appear for the hearing, the parole officer shall issue a warrant for the youth's ~~his~~ arrest ~~apprehension shall be issued~~. The department shall schedule and hold a hearing ~~apprehended, the youth is to be held in custody and a hearing scheduled~~ within 72 hours of the youth's arrest.

AUTH: ~~2-4-201 and 53-30-203~~ 52-5-102 and 52-5-129, MCA
IMP: ~~53-30-203 and 53-30-229~~ 52-5-102, 52-5-126, 52-5-127, 52-5-128 and 52-5-129, MCA

6. The rules proposed to be repealed are as follows:

20.9.301 ON-SITE HEARING FOR AFTERCARE AGREEMENT VIOLATION, INITIAL INVESTIGATION AND INFORMAL SETTLEMENT
This rule is found on ARM page 20-145.

AUTH: 2-4-201, 52-1-103, 53-30-203 and 52-5-102, MCA
IMP: 53-30-203, 53-30-229, and 52-5-129, MCA

20.9.305 ON-SITE HEARING FOR AFTERCARE AGREEMENT VIOLATION, FORMAL HEARING PROCEDURE
This rule is found on ARM page 20-145.1.

AUTH: 2-4-201, 52-1-103, 53-30-203 and 52-5-102, MCA
IMP: 53-30-203, 53-30-229, and 52-5-129, MCA

20.9.307 AFTERCARE VIOLATION HEARING - DETENTION
This rule is found on ARM page 20-145.2.

AUTH: 52-1-103, 53-30-203 and 52-5-102, MCA
IMP: 53-30-228, 52-5-129 and 41-5-311, MCA

20.9.310 AFTERCARE VIOLATION HEARING - HEARING PROCEDURES
This rule is found on ARM page 20-145.3.

AUTH: 2-4-201, 53-30-203 and 52-5-102, MCA
IMP: 53-30-203, 53-30-229 and 52-5-129, MCA

7. Concerned persons may present their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to the address listed in 9, and must be received no later than November 14, 2002.

8. Colleen White, Rule Reviewer, will preside over and conduct the hearing.

9. The Department of Corrections maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices, and specifies that the person wishes to receive notices regarding community corrections, juvenile corrections, board of pardons and parole, private correctional facilities or general departmental rulemakings. Such written request may be mailed or delivered to Colleen White, Rule Reviewer, Department of Corrections, 1539 11th Ave., PO Box 201301, Helena, Montana 59620-1301, fax to 406-444-4920, e-mail cowhite@state.mt.us or may be made by completing a request form at any rules hearing held by the Department of Corrections.

10. The bill sponsor notice requirements of 2-4-302, MCA, apply and have been fulfilled.

DEPARTMENT OF CORRECTIONS

/s/ Bill Slaughter
Bill Slaughter, Director

/s/ Colleen A. White
Colleen A. White, Rule Reviewer

Certified to the Secretary of State October 7, 2002

BEFORE THE BOARD OF NURSING HOME ADMINISTRATORS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the proposed amendment of ARM 8.34.418, pertaining to fees	)))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On November 12, 2002, at 10:00 a.m., a public hearing will be held in the Business Standards Division, room 438, 301 South Park Avenue, Helena, Montana to consider the proposed amendment of the above-stated rule.

2. The Department of Labor and Industry will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board of Nursing Home Administrators no later than 5:00 p.m., on November 6, 2002 to advise us of the nature of the accommodation that you need. Please contact Linda Grief, Board of Nursing Home Administrators, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2395; Montana Relay 1-800-253-4091; TDD (406) 444-2978; facsimile (406) 841-2305; e-mail dlibsdnha@state.mt.us.

3. The rule proposed to be amended provides as follows, stricken matter interlined, new matter underlined:

8.34.418 FEE SCHEDULE (1) ~~The examination~~ Applicant and licensee fees ~~shall be~~ are as follows:

(a) application fee	~~$60~~	$100
(b) ~~NAB examination and re-examination~~		~~235~~
~~(c)~~ jurisprudence re-examination		$50
~~(d)~~(c) inactive renewal fee	~~45~~	75
~~(e)~~(d) active renewal fee	~~90~~	125
~~(f)~~(e) temporary permit	~~50~~	100
(g)(f) reciprocity	~~100~~	200

(h) through (j) remain the same, but are renumbered (g) through (i).

~~(k)~~(j) late renewal (if paid after December 31)	~~25~~	100
~~(l)~~(k) educational approval fee	~~25~~	40

(2) All fees are non-refundable.

(3) The NAB examination fee and re-examination fee is set by the examination administrator, and is paid by the applicant directly to the examination administrator.

AUTH: Sec. 37-1-131, 37-1-134, ~~37-9-201, 37-9-203,~~ 37-9-304, MCA
IMP: Sec. 37-1-131, 37-1-134, ~~37-9-203,~~ 37-9-304, MCA

REASON: There is reasonable necessity to amend ARM 8.34.418 in order to set the Board's fees at a level commensurate with costs, as required by 37-1-134, MCA. The Board estimates that approximately 284 persons (200 active licensees, 54 inactive status licensees, and 30 new applicants) will be affected by the proposed fee changes. The estimated annual increase in revenue is approximately $18,350. Under the proposed fee schedule, the Board's projected annual revenue is $37,750. The Board's appropriation for fiscal year 2003 is $26,823. A legislative audit of the Business Standards Division required that all boards pay their portion of the conversion to the Oracle database system. The Oracle reallocation for the Board is $946 and is additional to the appropriation for the Board. The reallocation is required to be paid in fiscal year 2003. The Board's recharge will be increased by $16,368 in the 2004 fiscal year and $17,339 in fiscal year 2005. The recharge calculation was based on the Board allocated FTE. The percentage of total board allocated FTE was based on the daily time distribution sheet; personal services charges for the Health Care Licensing Board; personnel allocation without investigator (4 FTE); HCLB Bureau budget; Business Standards Division recharge; and BSD Legal Allocation. The BSD has implemented the alternative pay plan with those increases reflected in the board's recharge. The board last raised its fees in fiscal year 2000.

4. Concerned persons may present their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to the Board of Nursing Home Administrators, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to dlibsdnha@state.mt.us and must be received no later than 5:00 p.m., November 19, 2002.

5. An electronic copy of this Notice of Public Hearing is available through the Department's site on the World Wide Web at http://discoveringmontana.com/dli/nha, in the Rules Notices section. The Department strives to make the electronic copy of this Notice of Public Hearing conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems, and that a person’s technical difficulties in accessing or posting to the e-mail address does not excuse late submission of comments.

6. The Board of Nursing Home Administrators maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this Board. Persons who wish

to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding all Board of Nursing Home Administrators administrative rulemaking proceedings or other administrative proceedings. Such written request may be mailed or delivered to the Board of Nursing Home Administrators, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, faxed to the office at (406) 841-2305, e-mailed to dlibsdnha@state.mt.us or may be made by completing a request form at any rules hearing held by the agency.

7. The Board of Nursing Home Administrators will meet on December 3, 2002, at its regularly scheduled meeting in Helena to consider the comments made by the public, the proposed responses to those comments, and take final action on the proposed amendment. The meeting will be held in conjunction with the Board's regular meeting. Members of the public are welcome to attend the meeting and listen to the Board's deliberations, but the Board cannot accept any comments concerning the proposed amendment beyond the November 19, 2002, deadline.

8. Lon Mitchell, attorney, has been designated to preside over and conduct this hearing.

9. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

BOARD OF NURSING HOME ADMINISTRATORS
JAENA RICHARDS, CHAIRMAN

/s/ WENDY J. KEATING
Wendy J. Keating, Commissioner
DEPARTMENT OF LABOR & INDUSTRY

/s/ KEVIN BRAUN
Kevin Braun
Rule Reviewer

Certified to the Secretary of State October 7, 2002.

BEFORE THE BOARD OF PUBLIC ACCOUNTANTS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the proposed amendment of ARM 8.54.410, pertaining to fees) NOTICE OF PUBLIC HEARING) ON PROPOSED AMENDMENT)

TO: All Concerned Persons

1. On November 15, 2002, at 10:00 a.m., a public hearing will be held at the offices of the Board of Public Accountants, in room 471, 301 South Park Avenue, Helena, Montana, to consider the proposed amendment of the above-stated rule.

2. The Department of Labor and Industry will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board of Public Accountants no later than 5:00 p.m., on November 8, 2002, to advise us of the nature of the accommodation that you need. Please contact Susanne Criswell, Board of Public Accountants, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2389; Montana Relay 1-800-253-4091; TDD (406) 444-2978; facsimile (406) 841-2309; e-mail dlibsdpac@state.mt.us.

3. The rule proposed to be amended provides as follows, stricken matter interlined, new matter underlined:

8.54.410 FEE SCHEDULE (1) The following fees have been established by the board for services or privileges rendered by the board, or for services rendered by contractors of the board:

(1) through (5) remain the same, but are renumbered (a) through (e).

~~(6)~~(f) Initial examination ~~Examination fee~~ ~~225~~

(i) examination application and grading fee 225

(ii) examination administration (seating) fee (paid directly to contractor) 95

~~(7)~~(g) Re-examination ~~fee~~

~~(a) all sections 200~~

~~(b)~~(i) per section application and grading fee ~~75~~ 50

(ii) examination administration (seating) fee (paid directly to contractor) 95

~~(8)~~(h) Examination proctor fee (paid directly to contractor) ~~100~~ 95

(9) remains the same, but is renumbered (i).

(a) and (b) remain the same, but are renumbered (i) and (ii).

(10) and (11) remain the same, but are renumbered (j) and (k).

(12) remains the same, but is renumbered (l).

(a) through (d) remain the same, but are renumbered (i) through (iv).

(13) remains the same, but is renumbered (m).

(2) Fees identified as being "paid directly to contractor" must be paid directly by the candidate to the board's contractor. The candidate will be furnished with explicit directions regarding the name and address of the applicable contractor to whom payment must be sent.

(a) Fees paid directly to a contractor are not refundable by the board.

AUTH: Sec. 37-1-134, 37-50-203, 37-50-204, MCA
IMP: Sec. 37-1-134, 37-50-204, 37-50-308, 37-50-314, 37-50-317, MCA

REASON: There is reasonable necessity to amend ARM 8.54.410 to adjust the fee schedule to make the fees commensurate with the costs incurred by the Board, as required by 37-1-134, MCA. The Board obtains various services from contractors, including examination administration services.

As an example, in February 1998, the examination administration fee, per candidate, was $60.00. That fee has risen to $85.00 for the November 2002 examination, and to $95.00 beginning with the May 2003 examination. The Board has separated the examination administration fee from other examination costs incurred by the Board to help candidates and the profession recognize the component costs for examinations, and to decrease the revenue and expenses flowing through the Board's budget.

Other examination related costs have also increased since the last fee increases. Examination grading services, charged by a contractor, have increased from $22.50 per examination section to $36.00 per examination section. Likewise, other administrative costs, including mailing costs, have increased. The break-out of examination application costs and seating costs also correct cost inequities that exist under the current fee schedule. Currently, the re-examination fee for a single section of the examination is $75.00, which does not even cover the direct expense of the sitting fee of $85 per person, plus an examination grading fee of $36.00 per section.

The decrease in the examination proctor fee is being proposed to match the seating fee charged Montana candidates. With the direct payment by the candidate to the contractor, the Board is able to eliminate the cost of staff processing that candidate's payment and the subsequent re-issuing of payment to the contractor.

Based on the number of initial examination candidates and re-examination candidates applying in the last fiscal year, the Board estimates that 225 individuals will be affected by the proposed rule changes, for a net increase in cost to those individuals. The Board estimates that its revenues will decrease annually by $2,550 as a result of the proposed changes,

and its costs will decrease annually by $21,500.

4. Concerned persons may present their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to the Board of Public Accountants, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2309, or by e-mail to dlibsdpac@state.mt.us and must be received no later than 5:00 p.m., November 15, 2002.

5. An electronic copy of this Notice of Public Hearing is available through the Department's site on the World Wide Web at http://discoveringmontana.com/dli/pac under the Board of Public Accountants rule notice section. The Department strives to make the electronic copy of this Notice conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems, and that a person’s technical difficulties in accessing or posting to the e-mail address does not excuse late submission of comments.

6. Mark Cadwallader, attorney, has been designated to preside over and conduct this hearing.

7. The Board of Public Accountants maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this board. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding all Board of Public Accountants administrative rulemaking proceedings or other administrative proceedings. Such written request may be mailed or delivered to the Board of Public Accountants, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, faxed to the office at (406) 841-2309, e-mailed to dlibsdpac@state.mt.us or may be made by completing a request form at any rules hearing held by the agency.

8. The Board of Public Accountants will meet on November 21, 2002, at 1:30 p.m., via telephone conference call at the Board's offices, 301 South Park Avenue, room 430, Helena, to consider the comments made by the public, the proposed responses to those comments, and take final action on the proposed amendments. Members of the public are welcome to listen to the Board's deliberations, but the Board cannot accept any comments concerning the proposed amendments beyond the November 15, 2002, deadline.

9. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

10. The Board proposes to make the above amendments effective as soon as feasible. The Board notes that the proposed fee changes are applicable beginning with the next examination cycle, which will be conducted in May 2003. The Board reserves the right to adopt only portions of the proposed amendments, or to adopt some or all of the amendments at a later date.

BOARD OF PUBLIC ACCOUNTANTS
BERYL ARGALL STOVER, CPA,
CHAIR

/s/ WENDY J. KEATING
Wendy J. Keating, Commissioner
DEPARTMENT OF LABOR & INDUSTRY

/s/ KEVIN BRAUN
Kevin Braun
Rule Reviewer

Certified to the Secretary of State October 7, 2002

**BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
OF THE STATE OF MONTANA**

In the matter of the amendment of Montana's prevailing wage rates, pursuant to ARM 24.17.127	))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT OF PREVAILING WAGE RATES - HIGHWAY CONSTRUCTION ONLY

TO: All Concerned Persons

1. On November 15, 2002, at 10:00 a.m., a public hearing will be held in Room 104 of the Walt Sullivan Building (Department of Labor and Industry Building), 1327 Lockey, Helena, Montana, to consider a proposed amendment of the standard prevailing rate of wages for four occupational classifications that are set pursuant to the prevailing wage rate rule, ARM 24.17.127 (formerly numbered as ARM 24.16.9007).

2. The Department of Labor and Industry will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Department by not later than 5:00 p.m., November 12, 2002, to advise us of the nature of the accommodation that you need. Please contact the Research and Analysis Bureau, Workforce Services Division, Attn: Bob Schleicher, P.O. Box 1728, Helena, MT 59624-1728; telephone (406) 444-2992; TTY (406) 444-0532; fax (406) 444-2638; or e-mail bschleicher@state.mt.us.

3. The Department of Labor and Industry does not propose to amend the text of ARM 24.17.127, but proposes only to amend certain wage and fringe benefit rates that are to be incorporated by reference in ARM 24.17.127(1)(g), for the 2002 edition of the "The State of Montana Prevailing Wage Rates - Heavy and Highway Construction Services" publication. The occupations and areas (as applicable) in which the rates are proposed to be added are as follows:

Craft/Occupation	Wage rate	Fringe rate
CARPENTER		
Carpenter	$ 19.55	$ 5.15
Piledriverman	19.55	5.15
ELECTRICIAN		
area 1	18.74	2.93 + 3.8%
area 2	20.13	4.76 + 3.8%
area 3	19.98	3.44 + 3.8%
area 4	19.84	3.51 + 3.8%
area 5	20.54	3.54 + 3.8%
area 6	18.02	3.44 + 3.8%

LINE CONSTRUCTION		
Equipment operator	**$ 19.16**	**$ 5.05**
Groundman	**15.40**	**5.05**
PAINTER	**17.60**	**4.40**

AUTH: 18-2-409, 18-2-431 and 39-2-202, MCA
IMP: 18-2-401, 18-2-402, 18-2-403 and 18-2-412, MCA

REASON: There is reasonable necessity to amend ARM 24.17.127 to include wage and fringe benefit rates for the occupations listed. The Department has recently been made aware that the four occupational classifications identified had been inadvertently omitted from the federal Davis-Bacon rates for highway construction in effect when those Davis-Bacon rates were incorporated by reference by the Department earlier this year. The federal government, on or about August 30, 2002, updated the Davis-Bacon rates for highway construction by adding rates for the overlooked occupational classifications. Pursuant to ARM 24.17.127(1)(g), the Department incorporates by reference the federal rates for highway construction services. Without the proposed amendments, the specified occupations would be left with the 2000 wage and fringe rates until the next rate revision sometime in 2003.

4. Interested parties may submit their data, views, or comments, either orally or in writing, at the hearing. Written data, views, or comments may also be submitted to:

Bob Schleicher
Research and Analysis Bureau
Workforce Services Division
Department of Labor and Industry
P.O. Box 1728
Helena, Montana 59624-1728

and must be received no later than 5:00 p.m., November 15, 2002.

5. An electronic copy of this Notice of Public Hearing is available through the Department's site on the World Wide Web at http://dli.state.mt.us/calendar.htm, under the Calendar of Events, Administrative Rule Hearings section. Interested persons may make comments on the proposed rules via the comment forum, http://forums.dli.state.mt.us, linked to the Notice of Public Hearing, but those comments must be posted to the comment forum by 5:00 p.m., November 15, 2002. The Department strives to make the electronic copy of this Notice of Public Hearing conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to

system maintenance or technical problems, and that a person's technical difficulties in accessing or posting to the comment forum does not excuse late submission of comments.

6. The Department maintains a list of interested persons who wish to receive notices of rule-making actions proposed by this agency. Persons who wish to have their name added to the mailing list shall make a written request which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding any specific topic or topics over which the Department has rule-making authority. Such written request may be delivered to Mark Cadwallader, 1327 Lockey St., Room 412, Helena, Montana, mailed to Mark Cadwallader, P.O. Box 1728, Helena, MT 59624-1728, faxed to the office at (406) 444-1394, e-mailed to mcadwallader@state.mt.us or made by completing a request form at any rules hearing held by the Department.

7. The bill sponsor notice provisions of 2-4-302, MCA, do not apply.

8. The Department proposes to make the amendments effective as soon as feasible.

9. The Hearings Bureau of the Centralized Services Division of the Department has been designated to preside over and conduct the hearing.

/s/ KEVIN BRAUN
Kevin Braun
Rule Reviewer

/s/ WENDY J. KEATING
Wendy J. Keating, Commissioner
DEPARTMENT OF LABOR & INDUSTRY

Certified to the Secretary of State: October 7, 2002.

BEFORE THE BOARD OF REAL ESTATE APPRAISERS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the proposed amendment of ARM 24.207.502, 24.207.504, 24.207.506, 24.207.509, and 24.207.2101, and the adoption of NEW RULE I, all pertaining to real estate appraisers	)))))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT AND ADOPTION

TO: All Concerned Persons

1. On November 7, 2002, at 10:00 a.m., a public hearing will be held in room 471, 301 South Park Avenue, Helena, Montana, to consider the proposed amendment and adoption of the above-stated rules.

2. The Department of Labor and Industry will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board of Real Estate Appraisers no later than 5:00 p.m., on November 1, 2002, to advise us of the nature of the accommodation that you need. Please contact Lorri Sandrock, Board of Real Estate Appraisers, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2386; Montana Relay 1-800-253-4091; TDD (406) 444-2978; facsimile (406) 841-2305; e-mail dlibsdrea@state.mt.us.

3. The rules proposed to be amended provide as follows, stricken matter interlined, new matter underlined:

24.207.502 APPLICATION REQUIREMENTS (1) through (3) remain the same.

(4) ~~The board shall require the applicant to submit a recent, passport-type photograph of the applicant.~~ The applicant shall provide three appraisal reports of their choice, with three true and correct copies of each.

(5) The board shall review fully-completed applications for compliance with board law and rules and shall notify the applicant in writing of the results of the evaluation of the application. The board may request such additional information or clarification of information provided in the application as it deems reasonably necessary. Incomplete applications shall be ~~returned to the applicant~~ acknowledged with a statement regarding incomplete portions.

(6) The applicant shall correct any deficiencies and ~~resubmit the application~~ submit required material. Failure to ~~resubmit the application~~ submit the required material within 60 days shall be treated as a voluntary withdrawal of the application. After voluntary withdrawal, an applicant will be required to submit an entirely new application to begin the

process again.

(7) remains the same.

(8) ~~An~~ A completed application file must be received in the board office at least ~~30~~ 45 days in advance of the next scheduled board meeting date.

AUTH: 37-1-131, 37-54-105, MCA
IMP: 37-1-131, 37-54-105, 37-54-202, MCA

REASON: There is reasonable necessity to amend ARM 24.207.502 to provide that applications be submitted an additional 15 days in advance of meetings to allow staff to complete the federally required Standard 3 desk reviews on appraisals for the application process. All other changes, including elimination of the photograph submission, are for procedural clarification and streamlining purposes.

24.207.504 QUALIFYING EDUCATION REQUIREMENTS (1) through (12) remain the same.

(13) Instructors of the uniform standards of professional appraisal practice (USPAP) course must provide proof to the board by submitting a copy of the current certificate demonstrating that the individual has attended the annual ~~of annually attending the~~ update course provided by the appraisal standards board of the appraisal foundation.

(14) Distance education courses may be approved if the board determines that:

(a) the distance education course serves to protect the public by contributing to the maintenance and improvement of the quality of real estate appraisal services provided by real estate appraiser licensees to the public;

(b) an appropriate and complete application has been filed and approved by the board;

(c) the distance education course provider must be certified by the international distance education certification center (IDECC) and provide appropriate documentation that the IDECC certification is in effect. Approval will cease immediately should IDECC certification be discontinued for any reason; and

(d) the distance education course meets all other requirements as prescribed in the statutes and rules that govern the operation of approved courses.

AUTH: 37-1-131, 37-54-105, MCA
IMP: 37-1-131, 37-54-105, 37-54-202, ~~and 37-54-203,~~ MCA

REASON: There is reasonable necessity to amend ARM 24.207.504 to make it consistent with recent changes in federal regulations. The Appraiser Qualification Board (AQB) is in the process of improving the overall quality of USPAP education, and requires that instructors provide proof of specified continuing education. The proposed amendment will be implemented by January 1, 2003, in compliance with federal standard. Integration of technical methods of delivery of education from a

distance necessitates that the Board delineate acceptable standards in delivery methods by requiring IDECC approval. The proposed amendments will better assure the protection of the public welfare.

24.207.506 QUALIFYING EDUCATION REQUIREMENTS FOR RESIDENTIAL CERTIFICATION (1) Applicants for certification as a certified residential real estate appraiser shall provide evidence of completion of 120 classroom hours, 15 hours of which must cover the uniform standards of professional appraisal practice as promulgated by the appraisal foundation and at least 15 hours of which must cover report writing and which may include the ~~75~~ 90 classroom hours required for licensure as a licensed real estate appraiser.

(2) and (3) remain the same.

AUTH: 37-1-131, 37-54-105, MCA
IMP: 37-1-131, 37-54-105, and 37-54-303, MCA

REASON: The Board has determined there is reasonable necessity to correct an oversight from MAR Notice 8-57-8, which failed to specify that education received while working towards the first level of licensure could be included in educational requirements for the Certified Residential level. The oversight was recently brought to the Board's attention.

24.207.509 QUALIFYING EXPERIENCE (1) through (8) remain the same.

(9) The board will use the following hourly credit as a guide toward the crediting of experience hours:

(a) single family residential (one unit dwelling) ~~12~~
(i) complete report 12
(ii) limited report 8
(b) through 10 remain the same.

AUTH: 37-1-131, 37-54-105, MCA
IMP: 37-1-131, 37-54-105, 37-54-202, and 37-54-303, MCA

REASON: There is reasonable necessity to clarify the maximum amount of hourly credit to be granted for a complete appraisal report and a limited appraisal report, in response to apparent confusion among applicants. Typically a limited report is less complex, can include a wider range of options used to complete the assignment, and generally requires less time to complete than a complete report. The Board has determined that limited reports should not receive as much credit. This rule change will make clear to all applicants that the two types of reports will not be given the same amount of credit.

24.207.2101 CONTINUING EDUCATION (1) Continuing education courses shall be approved according to the criteria of ARM 24.207.504, including application for re-approval after three years except that an examination shall not be required.~~, except for the 15 hours of the uniform standards of professional~~

~~appraisal practice which requires an examination.~~

(2) and (3) remain the same.

(4) Beginning with the March 31, 2003 renewal, ~~L~~licensees, upon every ~~third~~ other renewal, shall provide evidence to the board of having completed at least ~~45~~ 31 hours of instruction in courses or seminars approved by the board, at least ~~15~~ seven hours of which must be related to the national uniform standards of professional appraisal practice course.

~~(a) A minimum score of 70% is required for passage of the USPAP examination in order to claim credit for the course. Failing to obtain a score of 70% or better on the examination requires the person to retake the course again before retaking the examination.~~

(5) ~~Up to and including the renewal year ending March 31, 2001, a maximum of 30 continuing education hours in excess of the 45 hours needed, can be carried over to the next renewal cycle. Continuing education hours will not be accepted for carry over for the renewal year ending March 31, 2002 and thereafter. (The uniform standards of professional appraisal practice cannot be carried over.)~~ An education reporting form executed under the penalty of perjury of the laws of Montana attesting to the successful completion of the continuing education requirement must be submitted to the board by March 31 of the licensee's educational reporting cycle.

(6) An incomplete education reporting form will not be accepted and will be returned to the licensee. Any form returned to the licensee must be properly completed and resubmitted before the March 31 deadline.

(7) All continuing education courses must be taken and completed within the licensee's educational cycle.

(8) The board may audit licensees for compliance with continuing education requirements. Audited licensees must provide copies of completion certificates to the board as verification of compliance within 30 days after mailing of the audit request.

(9) Education reporting forms will be mailed to all real estate appraiser licensees at their last address of record. Failure to receive an education reporting form does not eliminate the reporting requirement

AUTH: 37-1-131, 37-1-319, 37-54-105, MCA
IMP: 37-1-131, 37-1-306, 37-54-105, 37-54-210, 37-54-303, and 37-54-310, MCA

REASON: The Board is proposing that the continuing education cycle be changed from a three-year to a two-year reporting cycle. This is necessary because the Appraiser Qualification Board is in the process of improving the overall quality of USPAP education. To comply with the AQB's USPAP education standard, all real estate appraisers must show during the period of January 1, 2003 through December 31, 2005 that they have completed the National USPAP course. For compliance purposes, any licensee whose continuing education is due March 31, 2003, their next reporting date will be March 31, 2005; March 31, 2004

next reporting date will be March 31, 2006; March 31, 2005 next reporting date will be March 31, 2007. Any licensee originally licensed in the calendar year 2002, the first educational reporting cycle will be March 31, 2004. Any failure on the part of the licensee to meet this standard could be interpreted as a violation of Title XI. Failure on the part of the licensee to be in compliance with this requirement could lead to decertification of Montana's real estate appraisal program.

4. The proposed new rule provides as follows:

NEW RULE I CONTINUING EDUCATION NON-COMPLIANCE

(1) Failure to comply with the completion or reporting requirements established by the board is unprofessional conduct and will result in disciplinary action by the board.

AUTH: 37-54-105, 37-54-202, 37-54-210, and 37-54-310, MCA
IMP: 37-1-131 and 37-1-136, MCA

REASON: The Board determined there is reasonable necessity to adopt this rule to put licensees on notice and to emphasize to licensees that any failure to file required educational reporting form(s) could result in disciplinary action being taken against their license(s). The Board has recently become aware that some licensees have claimed they were not aware that failure to comply with continuing education requirements places their license in jeopardy.

5. Concerned persons may present their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to the Board of Real Estate Appraisers, 301 South Park Avenue, P.O. Box 200513 Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to dlibsdrea@state.mt.us and must be received no later than 5:00 p.m., November 15, 2002.

6. An electronic copy of this Notice of Public Hearing is available through the Department's site on the World Wide Web at http://discoveringmontana.com/dli/bsd under the Board of Real Estate Appraisers rule notice section. The Department strives to make the electronic copy of this Notice conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems, and that a person's technical difficulties in accessing or posting to the comment forum does not excuse late submission of comments.

7. The Board of Real Estate Appraisers maintains a list

of interested persons who wish to receive notices of rulemaking actions proposed by this board. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding all Board of Real Estate Appraisers administrative rulemaking proceedings or other administrative proceedings. Such written request may be mailed or delivered to the Board of Real Estate Appraisers, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, faxed to the office at (406) 841-2323, e-mailed to dlibsdrea@state.mt.us or may be made by completing a request form at any rules hearing held by the agency.

8. The Board of Real Estate Appraisers will meet at 1:00 p.m. on December 2, 2002, during the Board's regular meeting in Helena, Montana at the Board's offices, 301 South Park Avenue, Helena, Montana, to consider the comments made by the public, the proposed responses to those comments, and take final action on the proposed amendments. Members of the public are welcome to attend the meeting and listen to the Board's deliberations, but the Board cannot accept any comments concerning the proposed amendments beyond the November 15, 2002, deadline.

9. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

10. Lon Mitchell, attorney, has been designated to preside over and conduct this hearing.

BOARD OF REAL ESTATE APPRAISERS
TIMOTHY MOORE, CHAIR

/s/ WENDY J. KEATING
Wendy J. Keating, Commissioner
DEPARTMENT OF LABOR & INDUSTRY

/s/ Kevin Braun
Kevin Braun,
Rule Reviewer

Certified to the Secretary of State October 7, 2002

BEFORE THE BUILDING CODES BUREAU
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the proposed amendment of ARM 24.301.142, 24.301.401, and 24.301.411, and the proposed repeal of ARM 24.301.215, all pertaining to building codes	))))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT AND REPEAL

TO: All Concerned Persons

1. On November 8, 2002, at 9:00 a.m., a public hearing will be held in Room 471, 301 South Park Avenue, Helena, Montana, to consider the proposed amendment and repeal of the above-stated rules.

2. The Building Codes Bureau of the Department of Labor and Industry (BCB/DOLI) will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Department no later than 5:00 p.m., November 1, 2002, to advise us of the nature of the accommodation that you need. Please contact Bernard A. Jacobs, Department of Labor and Industry, Building Codes Bureau, 301 South Park Avenue, Room 239, P.O. Box 200517, Helena, Montana 59620-0517; telephone (406) 841-2040; Montana Relay 1-800-253-4091; TDD (406) 444-0532; facsimile (406) 841-2050; e-mail bjacobs@state.mt.us.

3. The rules proposed to be amended are as follows, new matter underlined, deleted matter interlined:

24.301.142 MODIFICATIONS TO THE INTERNATIONAL BUILDING CODE APPLICABLE ONLY TO THE DEPARTMENT'S CODE ENFORCEMENT PROGRAM (1) through (7)(a) remain the same.

(b) remains the same but is renumbered (c).

(b) The department will issue certificates of occupancy only when all of the inspections applicable to construction projects have been performed and, based on those inspections, the department reasonably believes the construction has occurred in compliance with applicable state laws and administrative rules.

(i) Where inspections have been performed on various aspects of the same construction project by a combination of state, city, or county inspectors, the department will issue certificates of occupancy based upon written representations from the city or county inspectors that the portions of projects which they inspected caused them to believe those portions of the projects were constructed in compliance with the applicable codes.

(ii) Where certificates of occupancy are sought from certified city or county building code enforcement programs,

but those programs' officials must rely on the department to complete a portion of the requisite inspections, the department inspectors will provide written representations, as described above, to city or county officials concerning those portions of the projects they inspected.

(8) and (9) remain the same.

AUTH: 50-60-201, 50-60-202, 50-60-203, MCA
IMP: 50-60-107, 50-60-211, 50-60-510, 50-60-604, MCA

REASON: There is reasonable necessity to amend ARM 24.301.142 to address issues raised by the Economic Affairs Interim Committee and raised by the public in a recent, related rulemaking project.

On September 27, 2002, the Building Codes Bureau of the Department of Labor and Industry (BCB/DOLI) amended and adopted the International Building Code (IBC) when it adopted ARM 24.301.131. Prior to adoption of the IBC, the Economic Interim Affairs Committee, on November 30, 2001, questioned the way the term "certificate of occupancy" was being used (in former ARM 24.301.107), and if BCB/DOLI's understanding and application of that term was consistent with the meaning set forth in the underlying statute (50-60-107, MCA.) As a result, BCB/DOLI agreed to amend the former rule to make it conform to the meaning most reasonably taken from the underlying statute. However, the need to amend the former rule was eliminated when BCB/DOLI adopted the IBC.

During the process of adopting the IBC, a public comment was received which also expressed concern about BCB/DOLI's understanding and implementation of the reference in ARM 24.301.142 to certificates of occupancy. In response, BCB/DOLI amended ARM 24.301.142 to ensure the new rule's usage and understanding of the term was consistent with the meaning most reasonably taken from section 50-60-107, MCA.

The amendment now proposed to ARM 24.301.142 clarifies how certificates of occupancy may be obtained, based upon the following reasoning:

1. Section 109.1 of the IBC, as adopted in ARM 24.301.142, provides that construction or work for which a permit is required shall be subject to inspection. Section 109.3 of the IBC sets forth all areas and phases of construction subject to inspection, which primarily include installation of electrical, plumbing, and mechanical systems and equipment – in addition to inspection of the buildings where these other areas and phases of construction are occurring as part of the overall construction project.

2. Montana law requires application for and issuance of building permits, electrical permits, plumbing permits, and mechanical permits. In addition, the law requires in-progress and final inspections of each of the areas of construction requiring permits as a way to ensure compliance with all applicable codes (plumbing, electrical, mechanical, and building.)

3. Montana law allows for inspection of construction activities by properly qualified persons who are employed by either BCB/DOLI or a city or county that is certified by BCB/DOLI to conduct such inspections.

4. ARM 24.301.142(7)(a) provides that, after all the inspections required by IBC section 109 have been completed and the inspections have provided a basis for the inspecting official to believe applicable building codes have been complied with during the construction process, certificates of occupancy for the completed construction project shall be issued by the building official.

5. Because city and county inspectors perform inspections in accordance with building code enforcement programs that are certified by BCB/DOLI, BCB/DOLI concludes it is reasonable and cost effective for BCB/DOLI to rely upon inspections performed by these officials to issue certificates of occupancy. BCB/DOLI also concludes it is reasonable and cost effective for city and county building officials to similarly rely upon inspections conducted by BCB/DOLI.

24.301.401 NATIONAL ELECTRICAL CODE (1) The department of labor and industry, by and through the building codes bureau, adopts and incorporates by reference herein the national fire protection association standard NFPA 70, National Electrical Code, ~~1999~~ 2002 Edition referred to as the National Electrical Code unless another edition date is specifically stated. The National Electrical Code is a nationally recognized model code setting forth minimum standards and requirements for electrical installations. A copy of the National Electrical Code may be obtained from the Department of Labor and Industry, Building Codes Bureau, P.O. Box 200517, Helena, Montana~~,~~ 59620-0517 or the National Fire Protection Association, One Batterymarch Park, P.O. Box 9101, Quincy, MA 02269-9101.

AUTH: 50-60-201, 50-60-203, 50-60-603, MCA
IMP: 50-60-203, 50-60-601, 50-60-603, MCA

REASON: There is reasonable necessity to amend ARM 24.301.401 to adopt the 2002 Edition of the National Electrical Code (NEC), which is the most current version of the NEC. Updating this administrative rule by adopting the current NEC will keep the Montana construction industry, especially the electrical portion of that industry, current with changes made in the NEC since 1999, and with related technological changes allowed by the 2002 edition of the NEC.

24.301.411 WIRING STANDARDS (1) and (1)(a) remain the same.

~~(b) NEC Article 210-12(b): This requirement shall not become effective until the department adopts the 2002 edition of the National Electrical Code.~~

~~(c)~~(b) NEC Article 550-~~23~~ 32(a): The allowable distance for service equipment from the exterior wall of a manufactured

or mobile home is increased from 30 ft (9.14 m) to 50 ft (15.24 m).

~~(d)~~(c) NEC Article 550-~~23~~ 32(b)(2): Add the following: It shall be permissible to feed a manufactured (mobile) home~~)~~ with type SER cable when the service equipment is mounted on the exterior of the home. Physical protection of the cable is required by enclosing the cable in an approved raceway where the cable is run on the outside of the home. The cable is to be properly supported and attached per Article 338 where installed under the home.

~~(e) NEC Article 550-23(b): Add the following: "(5) The manufactured (mobile) home is of a construction type that is comparable to conventional frame construction for single family dwellings and is placed on a permanent perimeter foundation wall with the footings placed below frost line or the service entrance equipment is completely installed at the factory by the manufacturer of the structure."~~

~~(f)~~(d) NEC Article 760–1 (SUPPLEMENTARY). Smoke detectors shall be installed in any building or structure as required under the currently adopted International ~~Uniform~~ Building Code or International Residential ~~CABO One and Two Family Dwelling~~ Code, whichever applies, regardless of whether or not the building or structure is exempt by 50-60-102, MCA.

AUTH: 50-60-203, 50-60-603, MCA
IMP: 50-60-203, 50-60-601, 50-60-603, MCA

REASON: There is reasonable necessity to amend ARM 24.301.411 for the following reasons referred to by amended subsection numbers underlined above:

(1)(b) Deletion of the administrative rule coincides with the effective date of the adoption of the 2002 NEC and implementation of the requirement for arc-fault circuit-interrupter protection. Amending NEC Article 550-23(a) to 550-32(a) corrects a clerical error.

(1)(c) Deletion of the administrative rule eliminates redundant publication of service equipment requirements, which now appear in the text of the 2002 NEC. Relocation of the closing parenthesis behind "mobile" instead of "home" corrects a clerical error. Amending NEC Article 550-23(a) to 550-32(a) corrects a clerical error.

(1)(d) Updates the references in the existing administrative rule to the currently adopted International Building Code and International Residential Code.

4. The rule proposed for repeal, ARM 24.301.215, Adoption Of The Uniform Housing Code Or The Uniform Code For The Abatement Of Dangerous Buildings is found at ARM page 24-30693, and cites 50-60-203, MCA, as the authorizing and implementing citations.

REASON: There is reasonable necessity to repeal ARM 24.301.215 because the Department believes the rule to be unnecessary and its repeal eliminates any possible conflict

that was referenced in discussions with the Economic Affairs Interim Committee on November 30, 2001. Despite the recent adoption of the International Building Code and International Residential Code, there is reasonable necessity to repeal the rule due to the one-year period in which either the Uniform Building Code or the International Building Code can be used.

5. Concerned persons may present their data, views, or comments, either orally or in writing, at the hearing. Written data, views, or comments may also be submitted to:

Department of Labor and Industry
Building Codes Bureau
301 South Park Avenue, Room 239
P.O. Box 200517
Helena, Montana 59620-0517

or by facsimile to (406) 841-2050, and must be received by no later than 5:00 p.m., November 15, 2002.

6. An electronic copy of this Notice of Public Hearing is available through the Department's site on the World Wide Web at http://dli.state.mt.us/calendar.htm, under the Calendar of Events, Administrative Rule Hearings section. Interested persons may make comments on the proposed rules via the comment forum, http://forums.dli.state.mt.us, linked to the Notice of Public Hearing, but those comments must be posted to the comment forum or e-mailed to bjacobs@state.mt.us no later than 5:00 p.m., November 15, 2002. The Department strives to make the electronic copy of this Notice of Public Hearing conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems, and that a person's technical difficulties in accessing or posting to the comment forum does not excuse late submission of comments.

7. The Building Codes Bureau maintains a list of interested persons who wish to receive notices of rule-making actions proposed by this Bureau. Persons who wish to have their name added to the mailing list shall make a written request which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding all Building Codes Bureau administrative rule-making proceedings or other administrative proceedings. Such written request may be mailed or delivered to the Building Codes Bureau, 301 South Park Avenue, Room 239, P.O. Box 200517, Helena, Montana 59620-0517, e-mailed to bjacobs@state.mt.us, or may be made by completing a request form at any rules hearing held by the Department.

8. The bill sponsor notice provisions of 2-4-302, MCA, do not apply.

9. Mark Cadwallader has been designated to preside over and conduct the hearing.

/s/ KEVIN BRAUN	**/s/ WENDY J. KEATING**
Kevin Braun	**Wendy J. Keating, Commissioner**
Rule Reviewer	**DEPARTMENT OF LABOR & INDUSTRY**

Certified to the Secretary of State: October 7, 2002.

BEFORE THE DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES OF THE STATE OF MONTANA

In the matter of the adoption of new rules I through XLVI and the repeal of ARM 37.106.2701, 37.106.2702, 37.106.2703, 37.106.2708 through 37.106.2711, 37.106.2715 through 37.106.2719, 37.106.2725 through 37.106.2731, 37.106.2740 through 37.106.2742 and 37.106.2750 pertaining to personal care facilities	)	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION AND REPEAL

TO: All Interested Persons

1. On November 19, 2002, at 2:00 p.m., a public hearing will be held in the auditorium of the Department of Public Health and Human Services Building, 111 N. Sanders, Helena, Montana to consider the proposed adoption and repeal of the above-stated rules.

The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who need an alternative accessible format of this notice or provide reasonable accommodations at the public hearing site. If you need to request an accommodation, contact the department no later than 5:00 p.m. on November 8, 2002, to advise us of the nature of the accommodation that you need. Please contact Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210; telephone (406)444-5622; FAX (406)444-1970; Email dphhslegal@state.mt.us.

2. The rules as proposed to be adopted provide as follows:

RULE I SCOPE (1) The rules in this chapter pertain to facilities which provide personal care services. These rules constitute the basis for the licensure of personal care facilities by the Montana department of public health and human services.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE II PURPOSE (1) The purpose of these rules is to establish standards for personal care A and B facilities as found at 50-5-225, 50-5-226, 50-5-227 and 50-5-228, MCA. Personal care or assisted living facilities are a setting for frail, elderly or disabled persons which provide supportive

health and service coordination to maintain the resident's independence, individuality, privacy and dignity.

(2) A personal care facility offers a suitable living arrangement for persons with a range of capabilities, disabilities, frailties and strengths. In general however, personal care is not appropriate for individuals who are incapable of responding to their environment, expressing volition, interacting or demonstrating any independent activity. For example, individuals in a persistent vegetative state who require long term nursing care should not be placed or cared for in a personal care facility.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE III APPLICATION OF RULES (1) [Rule I through Rule XXXVII] apply to both category A and category B facilities.

(2) Category B facilities must meet the requirements of [Rule XXXVIII through Rule XLVI] in addition to those contained in the rules cited in (1).

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE IV APPLICATION OF OTHER RULES (1) To the extent that other licensure rules in ARM Title 37, chapter 106, subchapter 3 conflict with the terms of ARM Title 37, chapter 106, subchapter 27, the terms of subchapter 27 will apply to personal care facilities.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE V DEFINITIONS The following definitions apply in this subchapter:

(1) "Activities of daily living" means tasks usually performed in the course of a normal day in an individual's life including eating, dressing, bathing, personal hygiene, mobility, transferring and toileting.

(2) "Administrator" means the person designated on the facility application or by written notice to the department as the person responsible for the daily operation of the facility and for the daily resident care provided in the facility.

(3) "Advance directive" means a written instruction, such as a living will, a do not resuscitate (DNR) order or durable power of attorney (POA) for health care, recognized under state law relating to the provision of health care when the individual is incapacitated.

(4) "Ambulatory" means a person is capable of self mobility, either with or without mechanical assistance. If mechanical assistance is necessary, the person is considered ambulatory only if they can, without help from another person, transfer, safely operate and utilize the mechanical assistance, exit and enter the facility and access all common living areas

of the facility.

(5) "Assisted living facility" means personal care facility.

(6) "Change of ownership" means the transfer of ownership of a facility to any person or entity other than the person or entity to whom the facility's license was issued, including the transfer of ownership to an entity which is wholly owned by the person or entity to whom the facility's license was issued.

(7) "Department" means the department of public health and human services.

(8) "Direct care staff" means a person or persons at least 18 years of age, who directly assist residents with personal care services and medication. It does not include housekeeping, maintenance, dietary, laundry, administrative or clerical staff at times when they are not providing any of the above-mentioned assistance. Volunteers can be used for direct care, but may not be considered part of the required staff.

(9) "Health care plan" means a written resident specific plan identifying what ongoing assistance with activities of daily living and health care services is provided on a daily or regular basis by a licensed health care professional to a category B resident under the orders of the resident's practitioner. Health care plans are developed as a result of a resident assessment performed by a licensed health care professional who may consult with a multi-disciplinary team.

(10) "Health care service" means any service provided to a category B resident of a personal care facility that is ordered by a practitioner and required to be provided or delegated by a licensed, registered or certified health care professional. Any other service, whether or not ordered by a physician or practitioner, that is not required to be provided by a licensed, registered, or certified health care professional is not to be considered a health care service.

(11) "Involuntary transfer or discharge" means the involuntary discharge of a resident from the licensed facility or the involuntary transfer of a resident to a bed outside of the licensed facility. The term does not include the transfer of a resident from one bed to another within the same licensed facility, or the temporary transfer or relocation of the resident outside the licensed facility for medical treatment.

(12) "License" means the document issued by the department that authorizes a person or entity to provide personal care or assisted living services.

(13) "Licensed health care professional" means a physician, a physician assistant-certified, a nurse practitioner, or a registered nurse practicing within the scope of their license.

(14) "Medication administration" means an act in which a prescribed drug or biological is given to a resident by an individual who is authorized in accordance with state laws and regulations governing such acts.

(15) "Nursing care" means the practice of nursing as governed by Title 37, chapter 8, MCA and by administrative rules adopted by the board of nursing, found at Title 8, chapter 32,

subchapters 1 through 17.

(16) "Personal care" means the provision, by direct care staff, of assistance with the activities of daily living to the resident.

(17) "Personal care facility" or "facility" means a home, facility or institution that is licensed to provide personal care to either category A or category B residents under 50-5-227, MCA.

(18) "Practitioner" means an individual licensed by the professional and occupational licensing bureau in the department of labor and industry that has assessment, admission and prescriptive authority.

(19) "PRN medication" means an administration scheme, in which a medication is not routine, is taken as needed and requires the licensed health care professional or individual resident's cognitive assessment and judgement for need and effectiveness.

(20) "Resident" means anyone at least 18 years of age accepted for care, through contractual agreement, in a personal care facility.

(21) "Resident agreement" means a signed, dated, written document that lists all charges, services, refunds and move out criteria and complies with [Rule XIV].

(22) "Resident certification" means written certification by a licensed health care professional whose work is unrelated to the daily operation of the facility that the facility can adequately meet the particular needs of a resident. The licensed health care professional making the resident certification must have:

(a) visited the resident on site; and

(b) determined that the resident's health care status does not require services at another level of care.

(23) "Service coordination" means facility or staff assistance provided to the resident to enhance the functioning of the resident. These include, but are not limited to:

(a) beauty or barber shop;

(b) financial assistance or management;

(c) housekeeping;

(d) laundry;

(e) recreation activities;

(f) shopping;

(g) spiritual services; and

(h) transportation.

(24) "Service plan" means a written plan for services developed by the facility with the resident or resident's legal representative or significant other which reflects the resident's capabilities, choices and, if applicable, measurable goals and risk issues. The plan is developed on admission and is reviewed and updated when there is a significant change in the resident's condition. The development of the service plan does not require a licensed health care professional.

(25) "Severe cognitive impairment" means the loss of intellectual functions, such as thinking, remembering and reasoning, of sufficient severity to interfere with a person's

daily functioning. Such a person is incapable of recognizing danger, self evacuating, summoning assistance, expressing need and/or making basic care decisions.

(26) "Therapeutic diet" means a diet ordered by a physician or practitioner as part of treatment for a disease or clinical condition or to eliminate or decrease specific nutrients in the diet, (e.g., sodium) or to increase specific nutrients in the diet (e.g., potassium) or to provide food the resident is able to eat (e.g., mechanically altered diet).

(27) "Third party services" means care and services provided to a resident by individuals having no fiduciary interest in the facility.

(28) "Treatment" means a therapy, modality, product, device or other intervention used to maintain well being or to diagnose, assess, alleviate or prevent a disability, injury, illness, disease or other similar condition.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE VI LICENSE APPLICATION PROCESS (1) Application for a license accompanied by the required fee shall be made to the Department of Public Health and Human Services, Quality Assurance Division, Licensure Bureau, 2401 Colonial Drive, P.O. Box 202953, Helena, MT 59620-2953 upon forms provided by the department and shall include full and complete information as to the identity of:

(a) each officer and director of the corporation, if organized as a corporation;

(b) each general partner if organized as a partnership or limited liability partnership;

(c) name of the administrator and administrator's qualifications;

(d) name, address and phone number of the management company if applicable;

(e) physical location address, mailing address and phone number of the facility;

(f) maximum number of A beds and B beds in the facility;

(g) policies and procedures as outlined in [Rule IX]; and

(h) the resident agreement, as outlined in [Rule XIX], intended to be used.

(2) Every facility shall have distinct identification or name and shall notify the department in writing within 30 days prior to changing such identification or name.

(3) Each personal care facility shall promptly report to the department any plans to relocate the facility at least 30 days prior to effecting such a move.

(4) In the event of a facility change of ownership, the new owners shall provide the department the following:

(a) a completed application with fee;

(b) a copy of the fire inspection conducted within the past year;

(c) policies and procedures as prescribed in [Rule IX] of this chapter;

(i) if applicable, a written statement indicating that the same policies and procedures will be used is required;

(d) a copy of the resident agreement as outlined in [Rule XIV] to be used; and

(e) documentation of compliance with [Rule VIII].

(5) Under a change of ownership, the seller shall return to the department the personal care license under which the facility had been previously operated. This information must be sent to the Department of Public Health and Human Services, Quality Assurance Division, Licensure Bureau, 2401 Colonial Drive, P.O. Box 202953, Helena, MT 59620-2953.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE VII LICENSE RESTRICTIONS (1) A license is not subject to sale, assignment or other transfer, voluntary or involuntary.

(2) A license is valid only for the premises for which the original license was issued.

(3) The license remains the property of the department and shall be returned to the department upon closing or transfer of ownership.

(a) The address for returning the license is Department of Public Health and Human Services, Quality Assurance Division, Licensure Bureau, 2401 Colonial Drive, P.O. Box 202953, Helena, MT 59620-2953.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE VIII ADMINISTRATOR (1) Each personal care facility shall employ an administrator. The administrator is responsible for operation of the personal care facility at all times and shall ensure 24-hour supervision of the residents.

(2) No personal care facility may employ an administrator who does not meet the following minimum requirements:

(a) the administrator must hold a current Montana nursing home administrator license; or

(b) have successfully completed all of the self study modules of "The Management Library for Administrators and Executive Directors," a component of the assisted living training system published by the assisted living federation of America university (ALFA); or

(i) be enrolled in the self study course referenced above, with a six month successful completion; and

(c) the administrator must show evidence of at least 16 contact hours of annual continuing education to include at least three of the following areas:

(i) accounting and budgeting;

(ii) basic principles of supervision;

(iii) basic and advanced emergency first aid;

(iv) characteristics and needs of residents;

(v) community resources;

(vi) pharmacy, medication dispensing, medication security, drug contraindications, interactions, reactions and expected outcomes;

(vii) resident and provider rights and responsibilities, abuse or neglect or confidentiality; or

(viii) skills for working with residents, families and other professional service providers.

(3) The administrator or their designee shall:

(a) ensure that current facility licenses are posted at a place in the facility that is accessible to the public at all times;

(b) oversee the day-to-day operation of the facility including but not limited to:

(i) all personal care services to residents;

(ii) the employment, training and supervision of staff and volunteers;

(iii) maintenance of buildings and grounds; and

(iv) record keeping; and

(c) protect the safety and physical, mental and emotional health of residents.

(4) The facility shall notify the department within five days of an administrator's departure or a new administrator's employment.

(5) In the absence of the administrator, a staff member must be designated to oversee the operation of the facility during the administrator's absence. The administrator or designee shall be in charge, on call and physically available on a daily basis as needed, and shall ensure there are sufficient, qualified staff so that the care, well being, health and safety needs of the residents are met at all times. The administrator or designee may not be a resident of the facility.

(6) The administrator or designee shall initiate transfer of a resident through the resident's practitioner, appropriate agencies or the resident's personal representative or responsible party when the resident's condition is not within the scope of services of the personal care facility.

(7) The administrator or designee shall accept and retain only those residents whose needs can be met by the facility and who meet the acceptance criteria found in 50-5-226, MCA.

(8) The administrator or designee must ensure that a resident who is ambulatory only with mechanical assistance is able to safely self-evacuate the facility without the aid of an elevator or similar mechanical lift, or have the ability to move past a building code approved occupancy barrier or smoke barrier into an adjacent wing or building section, or reach and enter an approved area of refuge.

(9) The administrator or designee shall ensure and document that orientation is provided to all employees at a level appropriate to the employee's job responsibilities.

(10) The administrator or designee shall review every accident or incident causing injury to a resident and document the appropriate corrective action taken to avoid a reoccurrence.

(11) The owner of a personal care facility may serve as administrator, or in any staff capacity, if they meet the

qualifications specified in these rules.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE IX WRITTEN POLICIES AND PROCEDURES (1) A policy and procedure manual for the organization and operation of the personal care facility shall be developed, implemented, kept current and reviewed as necessary. Each review of the manual shall be documented, and the manual shall be available in the facility to staff, residents, residents' legal representatives and representatives of the department at all times.

(2) The manual must include an organizational chart delineating the lines of authority, responsibility and accountability for the administration and resident care services of the facility.

(3) The manual must include a disaster plan that includes a facility evacuation plan in the event of fire and a plan for a backup source of oxygen, if oxygen is in use.

(4) The manual must include resident advance directives, if accepted by the facility, to include:

(a) the circumstances under which an inquiry will be made of individuals regarding the existence of an advance directive;

(b) the location of the resident's advance directive;

(c) documentation requirements in the resident record; and

(d) a precise statement of any limitations if the provider cannot implement a resident's advance directive under [Rule XVI].

(5) The manual must include appropriate emergency telephone numbers, including the poison control center number. Emergency telephone numbers must also be prominently posted near facility telephones.

(6) The manual must include infection control requirements that include, at a minimum, the elements set forth in [Rule XXXI].

(7) The manual must include orientation requirements for staff and volunteers.

(8) The manual must include written policies and procedures for the delivery of personal or direct care to residents which encourage each resident to maintain their independence and personal decision making abilities.

(9) The manual must include written policies and procedures for staffing levels required to ensure the delivery of services and assistance as needed for each resident of the facility during each 24 hour period. Services may be provided directly by staff employed by the facility or in accordance with a written contract.

(10) The manual must include written policies and procedures for provision of emergency first aid and emergency medical and dental care of residents, including notification of the resident's family, legal representative or guardian and the resident's physician or practitioner.

(11) The manual must include written policies and procedures for recording and addressing adverse reactions to

medication, unexpected effects of medications and medication errors.

(12) The manual must include written policies and procedures regarding criteria for the discharge, transfer and readmission of residents, as well as for involuntary termination.

(13) The manual must include written policies and procedures for resident absences from the facility and when the resident's absence from the facility should be investigated.

(14) The manual must include written policies and procedures for maintaining the confidentiality of resident records, including a procedure for examination of the resident records by the resident and/or other authorized persons.

(15) The manual must include written policies and procedures for resident transportation to appointments or events outside of the facility.

(16) The manual must include written policies and procedures for the provision of resident service coordination provided by the facility.

(17) The manual must include written policies and procedures for the control and care of pets, as allowed by the facility.

(18) The manual must include written policies and procedures for resident, visitor and staff smoking in the facility.

(19) The manual must include written policies and procedures for maintaining the security of:

(a) the building and grounds;

(b) facility records;

(c) medications; and

(d) stored resident's personal belongings.

(20) The manual must include written policies and procedures for ongoing and scheduled physical plant maintenance.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE X PERSONAL CARE FACILITY STAFFING (1) The administrator shall develop practices to identify employees that may pose risk or threat to the health, safety or welfare of any resident and provide written documentation of findings in the employee file.

(2) Direct care staff shall receive orientation and training, as specified in the facility's policies and procedures manual. Training shall include:

(a) an overview of the facility's policies and procedures manual;

(b) a review of the employee's job description;

(c) services provided by the facility;

(d) how to perform care directed to a resident's activities of daily living (ADL);

(e) basic techniques in observation or reporting skills of resident's mental, psychosocial and physical health;

(f) changes associated with the aging processes including

dementia;

(g) resident rights, including confidentiality;

(h) assisting resident mobility including transfer;

(i) techniques in lifting;

(j) food and nutrition;

(k) the location of resident records and the implementation of resident service and health care plans;

(l) assistance with medications and resident's medication records;

(m) adverse and desired medication reactions or actions;

(n) responding to behavior issues and redirection;

(o) emergency procedures, such as basic first aid, cardiopulmonary resuscitation (CPR) certification, and procedures used to contact outside agencies, physicians, family members or resident's legal representative or other individuals;

(p) simulated fire prevention, evacuation and disaster drills;

(q) basic techniques of identifying and correcting potential safety hazards in the facility;

(r) standard precautions for infection control;

(s) food preparation, service and storage, if applicable;

(t) Montana Elder and Persons with Developmental Disabilities Abuse Prevention Act found at 52-3-801, MCA; and

(u) Montana Long Term Care Resident Bill of Rights Act found at 50-5-1101, MCA.

(3) Direct care staff shall be trained in the use of the Heimlich maneuver and, if the facility offers CPR, at least one person per shift shall hold a current CPR certificate.

(4) The following rules must be followed in staffing the personal care facility:

(a) direct care staff shall have knowledge of resident's needs and any events about which the employee should notify the administrator or their designated representative;

(b) the facility shall have a sufficient number of qualified staff on duty 24 hours a day to meet the scheduled and unscheduled needs of each resident, to respond in emergency situations, and all related services, including, but not limited to:

(i) maintenance of order, safety and cleanliness;

(ii) assistance with medication regimens;

(iii) preparation and service of meals;

(iv) housekeeping services and assistance with laundry; and

(v) assurance that each resident receives the supervision and care required by the service or health care plan to meet their basic needs;

(c) an individual on each work shift shall have keys to all relevant resident care areas and access to all items needed to provide appropriate resident care;

(d) direct care staff may not perform any service for which they have not received appropriate documented training; and

(e) facility staff may not perform any health care service that has not been appropriately delegated under the Montana

Nurse Practice Act or is restricted to performance by licensed health care professionals.

(5) Employees and volunteers may perform support services, such as cooking, housekeeping, laundering, general maintenance and office work after receiving an orientation of the facility's policy and procedure manual. Any person providing direct care, however, is subject to the orientation and training requirements for direct care staff listed above.

(6) Volunteers may be utilized in the facility, but may not be included in the facility's staffing plan in lieu of facility employees. In addition, the use of volunteers is subject to the following:

(a) volunteers must be supervised and be familiar with resident rights and the facility's policy and procedure manual; and

(b) volunteers shall not assist with medication administration, delegated nursing tasks, bathing, toileting or transferring.

(7) Residents may participate voluntarily in performing household duties and other tasks suited to the individual resident's needs and abilities, but residents may not be used as substitutes for required staff or be required to perform household duties or other facility tasks.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XI EMPLOYEE FILES (1) The facility is responsible for maintaining a file on each employee and substitute personnel, which includes emergency contact information.

(2) Employee files must be made available to the department at all reasonable times, but shall be made available to the department within 24 hours after the department requests to review the files.

(3) The file for each employee shall include:

(a) the employee's name, address, phone number and social security number;

(b) documentation of Heimlich maneuver training;

(c) a copy of current credentials, certifications or professional licenses as required to perform the job description;

(d) an initialed copy of the employee's job description; and

(e) initialed documentation of training and orientation to facility policy and procedures.

(4) The facility shall keep an employee file that meets the requirements set forth in (3) for the administrator of the facility, even when the administrator is the owner.

(5) The employer must have evidence of contact to verify that each certified nursing assistant has no adverse findings entered on the nurse aid registry maintained by the department in the certification bureau.

(a) A facility may not employ or continue employment of any person who has adverse findings on the department nurse aide

registry maintained by the department's certification bureau.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XII RESIDENT APPLICATION AND SCREENING PROCEDURE (1) All facilities must develop a written application procedure for admission to the facility, including an application form requiring the following:

(a) the prospective resident's name and address, sex, date of birth, marital status and religious affiliation (if volunteered);

(b) an emergency contact with phone number; and

(c) the prospective resident's practitioner's name, address, telephone number and whether there are any health care decision making instruments in effect.

(2) The facility shall determine whether a potential resident meets the facility's admission requirements and that the resident is appropriate to the facility's license endorsement as either a category A or B facility.

(3) Prior to admission the facility shall conduct an initial screening to determine the prospective resident's needs.

(4) The department shall collect a screening fee of $100 from a prospective resident, resident or facility appealing a rejection or relocation decision made pursuant to [Rule XII], to cover the cost of the independent nurse assessment.

(5) The initial resident screening must include documentation of the following:

(a) an assessment of the prospective resident's medical, psychiatric or psychological needs, if any;

(b) height and weight;

(c) prescription medications and evaluation of the resident's ability to self administer the medication;

(d) dietary requirements, including any food allergies or restrictions; and

(e) a functional assessment which evaluates how the resident performs activities of daily living.

(6) Based on the initial screening, an initial service plan shall be developed for all category A residents. The initial service plan shall be reviewed or modified within 60 days of admission to assure the service plan accurately reflects the resident's needs and preferences.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XIII RESIDENT SERVICE PLAN: CATEGORY A (1) A service plan shall be developed and followed for each category A resident.

(2) The service plan shall include a written description of:

(a) who will provide the service;

(b) what the service is;

(c) when the service is performed;

(d) where and how often the service is provided;

(e) changes in service and the reasons for those changes; and

(f) if applicable, the desired outcome.

(3) The service plan shall be reviewed and updated as needed.

(4) A copy of the resident service plan shall be given to the resident or resident's legal representative and be made part of the resident file.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XIV RESIDENT AGREEMENT (1) A personal care facility shall enter into a written resident agreement with each prospective resident prior to admission to the personal care facility. The agreement shall be signed and dated by a facility representative and the prospective resident or their legal representative. The facility shall provide the prospective resident or their legal representative a copy of the agreement and shall explain the agreement to them. The agreement shall include at least the following items:

(a) the criteria for requiring transfer or discharge of the resident to another level of care;

(b) a statement explaining the availability of skilled nursing or other professional services from a third party provider to a resident in the facility;

(c) the extent that specific assistance will be provided by the facility to the resident with the activities of daily living.

(d) a statement explaining the resident's responsibilities including but not limited to house rules, the facility grievance policy, facility smoking policy and policies regarding pets;

(e) a listing of specific charges to be incurred for the resident's care, frequency of payment, facility rules relating to nonpayment of services and security deposits, if any are required;

(f) a statement of all charges, fines, penalties or late fees that shall be assessed against the resident;

(g) a statement that the agreed upon facility rate shall not be changed unless 30 day advance written notice is given to the resident and/or their legal representative; and

(h) an explanation of the personal care facility's policy for refunding payment in the event of the resident's absence, discharge or transfer from the facility and the facility's policy for refunding security deposits.

(2) When there are changes in services, financial arrangements, or in requirements governing the resident's conduct and care, a new resident/provider agreement must be executed or the original agreement must be updated by addendum and signed and dated by the resident or their representative and by the facility representative.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA

IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XV INVOLUNTARY DISCHARGE CRITERIA (1) Residents shall be given a written 30 day notice when they are requested to move out. The administrator or designee shall initiate transfer of a resident through the resident's physician or practitioner, appropriate agencies, or the resident, resident's personal representative or responsible party when:

(a) the resident's needs exceed the level of ADL services the facility provides;

(b) the resident exhibits behavior or actions that repeatedly and substantially interferes with the rights, health, safety or well being of other residents and the facility has tried prudent and reasonable interventions;

(i) documentation of the interventions attempted by the facility shall become part of the resident record;

(c) the resident, due to severe cognitive decline, is not able to respond to verbal instructions, recognize danger, make basic care decisions, express needs or summon assistance, except as permitted by [Rule LXI];

(d) the resident has a medical condition that is complex, unstable or unpredictable and treatment cannot be appropriately developed in the personal care environment; or

(e) the resident has had a significant change in condition that requires medical or psychiatric treatment outside the facility and at the time the resident is to be discharged from that setting to move back into the personal care facility, appropriate facility staff have re-evaluated the resident's needs and have determined the resident's needs exceed the facilities level of service. Temporary absence for medical treatment is not considered a move out.

(2) The administrator or designee may initiate transfer of a resident through the resident's physician or practitioner, appropriate agencies, the resident or resident's personal representative or responsible party when:

(a) there is resident nonpayment of charges;

(b) the discharge or transfer is by facility discretion; or

(c) the transfer or discharge is for circumstances not listed in the rule.

(3) The resident 30 day written move out notice shall, at a minimum, include the following:

(a) the reason for transfer or discharge;

(b) the effective date of the transfer or discharge;

(c) the location to which the resident is to be transferred or discharged;

(d) a statement that the resident has the right to appeal the action to the department; and

(e) the name, address and telephone number of the state long term care ombudsman.

(4) A resident may be involuntarily discharged in less than 30 days for the following reasons:

(a) if a resident has a medical emergency;

(b) the resident exhibits behavior that poses an immediate

danger to self or others; or

(c) if the resident has not resided in the facility for 30 days.

(5) A resident has a right to a fair hearing to contest an involuntary transfer or discharge.

(a) "Involuntary transfer or discharge" means the involuntary discharge of a resident from the licensed facility or the involuntary transfer of a resident to a bed outside of the licensed facility. The term does not include the transfer of a resident from one bed to another within the same licensed facility, or the temporary transfer or relocation of the resident outside the licensed facility for medical treatment.

(b) A resident may exercise his or her right to appeal an involuntary transfer or discharge by submitting a written request for fair hearing to the Department of Public Health and Human Services, Office of Fair Hearings, P.O. Box 202953, Helena, MT 59620-2953, within 30 days of notice of transfer or discharge.

(c) The parties to a hearing regarding a contested transfer or discharge are the facility and the resident contesting the transfer or discharge. The department is not a party to such a proceeding, and relief may not be granted to either party against the department in a hearing regarding a contested transfer or discharge.

(d) Hearings regarding a contested transfer or discharge shall be conducted in accordance with ARM 37.5.304, 37.5.305, 37.5.307, 37.5.313, 37.5.322, 37.5.325 and 37.5.334, and a resident shall be considered a claimant for purposes of these sections.

(e) The request for appeal of a transfer or discharge does not automatically stay the decision of the facility to transfer or discharge the resident. The hearing officer may, for good cause shown, grant a resident's request to stay the facility's decision pending a hearing.

(f) The hearing officer's decision following a hearing shall be the final decision for the purposes of judicial review under ARM 37.5.334.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XVI RESIDENT RIGHTS (1) The facility shall comply with the Montana long term care residents' bill of rights, found at 50-5-1101, et seq., MCA. Prior to or upon admission of a resident, the personal care facility shall explain and provide the resident with a copy of the Montana long term care residents' bill of rights.

(2) Residents have the right to execute living wills and other advance health care directives, and to have those advance directives honored by the facility in accordance with law.

(3) Prior to admission of a resident, the personal care facility must inform a potential resident in writing of:

(a) their right (at the individuals option) to make decisions regarding medical care, including the right to accept

or refuse medical treatment, and the right to formulate an advance directive; and

(b) explain and provide a copy of the facility's policies regarding advance directives, including a policy that the facility cannot implement an advance directive, either because of a conscientious objection (under 50-9-203, MCA), or, for some other reason as stated in facility policy (under 50-9-203, MCA).

(4) If the facility policy is not to implement an advanced directive the facility shall:

(a) take all reasonable steps to transfer the resident to a facility which has no prohibition against implementation of advance directives; or

(b) shall inform the resident in writing of any limitations placed upon implementation of the resident's advance directive by the facility.

(5) A personal care facility may not require an execution of an advance directive as a condition for admission.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XVII RESIDENT FILE (1) At the time of admission, a separate file must be established for each category A and B resident. This file must be maintained on site in a safe and secure manner and must preserve the resident's confidentiality.

(2) The file shall include at least the following:

(a) the resident application form;

(b) a completed resident agreement, in accordance with [Rule XIV];

(c) updates of resident/provider agreements, if any;

(d) the service plan for all category A residents;

(e) resident's weight on admission and at least annually thereafter for category A residents or more often as the resident, or the resident's licensed health care professional, determine a weight check is necessary;

(f) reports of significant events and facility contacts with family members or another responsible party;

(g) a record of communication between the facility and the resident or their representative if there has been a change in the resident's status or a need to discharge;

(h) an inventory of personal possessions of significance, as stated by the resident or their representative; and

(i) the date and circumstances of the resident's final transfer, discharge, or death, including notice to responsible parties and disposition of personal possessions.

(3) The resident file must be kept current. The file must be retained for a minimum of three years following the resident's discharge, transfer or death.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XVIII THIRD PARTY SERVICES (1) A resident may purchase third party services provided by an individual or

entity, licensed if applicable, to provide health care services under arrangements made directly with the resident or resident's legal representative.

(2) The resident or resident's legal representative assumes all responsibility for arranging for the resident's care through appropriate third parties.

(3) If a resident of a category A facility receives third party services, the facility is responsible for documenting the resident is receiving third party services.

(4) The third party service shall enter progress notes of the services provided to the resident at the facility for the client record, and will as necessary participate with development, or modification of the resident health care plan to assure continuity of care.

(5) Third party services shall not compromise the personal care facility operation or create a danger to others in the facility.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XIX RESIDENT ACTIVITIES (1) A planned, diversified program of resident activities shall be offered daily for residents, including individual or group activities, on or off site, to meet the individual needs and well being of residents. Resident activities should promote and encourage self care and continuity of normal activities.

(2) The activities program shall be developed based on the activity needs and interest of residents as identified through the service plan.

(3) This program must assist residents with arrangements to participate in social, recreational, religious or other activities within the facility and in the community in accordance with individual interests and capabilities.

(4) The facility shall provide directly, or by arrangement, local transportation for each resident to and from health care services provided outside the facility and to activities of social, religious or community events in which the resident chooses to participate according to facility policy.

(5) The activities program shall develop and post a monthly group activities calendar, which lists social, recreational, and other events available to residents. The facility shall maintain a record of past monthly activities, kept on file on the premises for at least three months.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XX RESIDENT UNITS (1) A resident of a personal care facility who uses a wheelchair or walker must not be required to use a bedroom on a floor other than the first floor of the facility that is entirely above the level of the ground, unless the facility is designed and equipped in such a manner that the resident can move between floors or to an adjacent uniform

building code approved occupancy/fire barrier without assistance.

(2) Each resident bedroom must satisfy the following requirements:

(a) in a previously licensed facility, no more than four residents may reside in a single bedroom;

(b) in new construction and facilities serving residents with severe cognitive impairment, occupancy must be limited to no more than two residents per room;

(c) exclusive of toilet rooms, closets, lockers, wardrobes, alcoves, or vestibules, each single bedroom must contain at least 100 square feet, and each multi-bedroom must contain at least 80 square feet per resident;

(d) each resident must have a wardrobe, locker, or closet with minimum clear dimensions of one foot 10 inches in depth by one foot eight inches in width, with a clothes rod and shelf placed to permit a vertically clear hanging space of 5 feet for full length garments;

(e) a sufficient number of electrical outlets must be provided in each resident bedroom and bathroom to meet staff and resident needs without the use of extension cords;

(f) each resident bedroom must have operable exterior windows which meet the approval of the local fire or building code authority having jurisdiction and may not be below ground level grade;

(g) the resident's room door may be fitted with a lock if approved in the resident service plan, as long as facility staff have access to a key at all times in case of an emergency. Deadbolt locks are prohibited on all resident rooms. Resident room door locks must be operable, on the resident side of the door, with a single motion and may not require special knowledge for the resident to open;

(h) kitchens or kitchenettes in resident rooms are permitted if the resident's service plan permits unrestricted use and the cooking appliance can be removed or disconnected if the service plan indicates the resident is not capable of unrestricted use.

(3) A hallway, stairway, unfinished attic, garage, storage area or shed or other similar area of a personal care facility must not be used as a resident bedroom. Any other room must not be used as a resident bedroom if it:

(a) can only be reached by passing through a bedroom occupied by another resident;

(b) does not have an operable window to the outside; or

(c) is used for any other purpose.

(4) Any provision of this rule may be waived at the discretion of the department if conditions in existence prior to the adoption of this rule or construction factors would make compliance extremely difficult or impossible and if the department determines that the level of safety to residents and staff is not diminished.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XXI FURNISHINGS (1) Each resident in a personal care facility must be provided the following at a minimum by the facility:

(a) unless provided by the resident, a bed with a comfortable and clean mattress at least 36 inches wide and made up with two serviceable clean sheets, a blanket, a pillow and a bedspread. Additional bedding, including rubber or other protective sheets, must be provided as necessary;

(b) individual towel rack;

(c) individual chair in their bedroom;

(d) separate dresser or drawers for each occupant in a bedroom;

(e) reading lamp or equivalent for each bed;

(f) handicap accessible mirror mounted or secured to allow for convenient use by both wheelchair bound residents and ambulatory persons;

(g) clean, flame-resistant or non-combustible window treatments or equivalent, for every bedroom window;

(h) an electric call system comprised of a fixed manual, pendant cordless or two way interactive, UL or FM listed system, must be provided connecting resident rooms to the care staff center or staff pagers; and

(i) for each multiple-bed room, either flame-resistant privacy curtains for each bed or movable flame-resistant screens to provide privacy upon request of a resident.

(2) Upon the request of a resident, a personal care facility shall allow the use of personal furniture and furnishings in lieu of those required by (1)(a) through (g), if in good repair and presenting no observable hazards. The facility may not require the resident to provide these basic requirements as a condition of the resident's admission to the facility.

(3) Following the discharge of a resident, all of the equipment and bedding used by that resident must be cleaned and sanitized.

(4) Any provision of this rule may be waived at the discretion of the department if conditions in existence prior to the adoption of this rule or construction factors would make compliance extremely difficult or impossible and if the department determines that the level of safety to residents and staff is not diminished.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XXII COMMON USE AREAS (1) The facility must provide:

(a) a dining room of sufficient size to accommodate all the residents comfortably with dining room furnishings that are well constructed and tables designed to accommodate the use of wheelchairs;

(b) at least one centrally located common area in which residents may socialize and participate in recreational

activities. A common area may include, without limitation, a living room, dining room, enclosed porch or solarium. The common area must be large enough to accommodate those to be served without overcrowding; and

(c) enough total living or recreational and dining room area to allow at least 30 square feet per resident.

(2) All common areas must be furnished and equipped with comfortable furniture and reading lights in quantities sufficient to accommodate those to be served.

(3) Any provision of this rule may be waived at the discretion of the department if conditions in existence prior to the adoption of this rule or construction factors would make compliance extremely difficult or impossible and if the department determines that the level of safety to residents and staff is not diminished.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XXIII RESIDENT TOILETS AND BATHING (1) The facility shall provide:

(a) at least one toilet for every four residents;

(b) one bathing facility for every 12 residents; and

(c) a toilet and sink in each toilet room.

(2) All resident rooms with toilets or shower/bathing facilities must have an operable window to the outside or must be exhausted to the outside by a mechanical ventilation system.

(3) Each resident room bathroom shall:

(a) be in a separate room with a toilet and sink, a shower or tub is not required if the facility utilizes a central bathing unit or units; and

(b) have at least one towel bar per resident, one toilet paper holder, one accessible mirror and storage for toiletry items.

(4) All doors to resident bathrooms shall open outward or slide into the wall and shall be unlockable from the outside.

(5) In rooms used by severe cognitively impaired or other special needs residents, the bathroom does not have to be in a separate room and does not require a door.

(6) Each resident must have access to a toilet room without entering another resident's room or the kitchen, dining or living areas.

(7) Each resident bathroom or bathing room shall have a fixed emergency call system reporting to the staff location with an audible signal. The devise must be silenced at the location only and shall be accessible to an individual collapsed on the floor.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XXIV ENVIRONMENTAL CONTROL (1) The personal care facility shall provide a clean, comfortable and well maintained home that is safe for residents and employees at all times.

(2) A minimum of 10 foot candles of light must be available in all rooms, with the following exceptions:

(a) all reading lamps must have a capacity to provide a minimum of 30 foot candles of light;

(b) all toilet and bathing areas must be provided with a minimum of 30 foot candles of light;

(c) general lighting in food preparation areas must be a minimum of 30 foot candles of light; and

(d) hallways must be illuminated at all times by at least a minimum of five foot candles of light at the floor.

(3) Temperature in resident rooms, bathrooms, and common areas must be maintained at a minimum of 68EF and the facility must give appropriate consideration to each resident's preferences regarding the temperature.

(4) A resident's ability to smoke safely shall be evaluated and addressed in the resident's service or health care plan. If the facility permits resident smoking:

(a) the rights of non-smoking residents shall be given priority in settling smoking disputes between residents; and

(b) if there is a designated smoking area within the facility, it shall be designed to keep all contiguous, adjacent or common areas smoke free.

(5) A personal care facility may designate itself as non-smoking provided that adequate notice is given to all residents or all applicants in the facility residency agreement.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XXV PERSONAL CARE SERVICES (1) Personal care assistance must be provided to each resident in accordance with their established agreement and needs. Assistance must include, but is not limited to assisting with:

(a) personal grooming such as bathing, hand washing, shaving, shampoo and hair care, nail filing or trimming and dressing;

(b) oral hygiene or denture care;

(c) toileting and toilet hygiene;

(d) eating;

(e) the use of crutches, braces, walkers, wheelchairs or prosthetic devices, including vision and hearing aids; and

(f) self-medication.

(2) Evidence that the facility is meeting each resident's needs for personal care services include the following outcomes for residents:

(a) Physical well being of the resident:

(i) clean and groomed hair, skin, teeth and nails;

(ii) nourished and hydrated;

(iii) free of pressure sores, skin breaks or tears, chaps and chaffing;

(iv) appropriately dressed for the season in clean clothes;

(v) minimizing the risk of accident, injury and infection; and

(vi) receives prompt emergency care for illnesses, injuries and life threatening situations.

(b) Behavioral and emotional well being of the resident:

(i) opportunity to participate in age appropriate activities that are meaningful to the resident if desired;

(ii) sense of security and safety;

(iii) reasonable degree of contentment; and

(iv) feeling of stable and predictable environment.

(c) In agreement that the resident (unless medically contradicted with a physician or other practitioner's written order) is:

(i) free to go to bed at the time desired;

(ii) free to get up in the morning at the time desired;

(iii) free to have visitors;

(iv) granted privacy;

(v) assisted to maintain a level of self care and independence;

(vi) assisted as needed to have good oral hygiene;

(vii) made as comfortable as possible by the facility;

(viii) free to make choices and assumes the risk of those choices;

(ix) fully informed of the services they can be expected to be provided by the facility;

(x) free of abuse, neglect and exploitation;

(xi) is treated with dignity; and

(xii) has the opportunity to participate in activities, if desired.

(3) In the event of accident or injury to a resident requiring emergency medical, dental or nursing care or, in the event of death, the personal care facility shall:

(a) immediately make arrangements for emergency care or transfer to an appropriate place for treatment;

(b) immediately notify the resident's physician and next of kin or responsible party.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XXVI MEDICATIONS: STORAGE AND DISPOSAL (1) With the exception of resident medication organizers as discussed in [Rule XXVII], all medication must be stored in the container dispensed by the pharmacy or in the container in which it was purchased in the case of over-the-counter medication, with the label intact and clearly legible.

(2) Medications that require refrigeration must be segregated from food items and stored within the temperature range specified by the manufacturer.

(3) All medications administered by the facility shall be stored in locked containers in a secured environment such as a medication room or medication cart. Residents who are responsible for their own medication administration must be provided with a secure storage place within their room for their medications. If the resident is in a private room, locking the door when the resident leaves will suffice.

(4) Over-the-counter medications or home remedies requested by the resident shall be reviewed by the resident's practitioner or pharmacist as part of the development of a resident service plan. Residents may keep over-the-counter medications in their room with a written order by the resident's practitioner.

(5) The facility shall develop and implement a policy for lawful disposal of unused, outdated, discontinued or recalled resident medications. The facility shall return a resident's medication to the resident or resident's legal representative upon discharge.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XXVII MEDICATIONS: PRACTITIONER ORDERS

(1) Written, signed practitioner orders shall be documented in all category B resident facility records by a legally authorized person for all medications and treatments which the facility is responsible to administer. Medication or treatment changes shall not be made without a practitioner's order. Order changes obtained by phone must be confirmed by written, signed orders within 21 days.

(2) Medication and treatment orders shall be carried out as prescribed. The resident or the person legally authorized to make health care decisions for the resident has the right to consent to, or refuse medications and treatments. The practitioner shall be notified if a resident refuses consent to an order. Subsequent refusals to consent to an order shall be reported as required by the practitioner.

(3) A prescription medication for which the dose or schedule has been changed by the practitioner must be returned to the pharmacy for relabeling.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XXVIII MEDICATIONS: ADMINISTRATION AND PREPARATION

(1) All category A facility residents must self-administer their medication. Those category B facility residents that are capable of self-administration shall be encouraged by facility staff to do so.

(2) A direct care staff member who is capable of reading medication labels must be made responsible for providing necessary assistance to any resident in taking their medication, including:

(a) removing medication containers from secured storage;

(b) providing verbal suggestions, prompting, reminding, gesturing or providing a written guide for self administrating medications;

(c) handing a prefilled, labeled medication holder, labeled unit dose container, syringe or original marked, labeled container from the pharmacy or a medication organizer as described in [Rule XXVII] to the resident;

(d) opening the lid of the above container for the resident;

(e) guiding the hand of the resident to self-administer the medication;

(f) holding and assisting the resident in drinking fluid to assist in the swallowing of oral medications; and

(g) assisting with removal of a medication from a container for residents with a physical disability which prevents independence in the act.

(3) Only the following individuals may administer medications to residents:

(a) a licensed physician, physician's assistant, certified nurse practitioner, advance practice registered nurse or a registered nurse;

(b) licensed practical nurse working under supervision;

(c) an unlicensed individual who is either employed by the facility or is working under third party contract with a resident or resident's legal representative and has been delegated the task under ARM Title 8, chapter 32, subchapter 17;

(d) a person related to the resident by blood or marriage or who has full guardianship.

(4) Resident medication organizers may be prepared up to four weeks in advance and injectable medications up to seven days in advance by the following individuals:

(a) a resident or a resident's legal representative;

(b) a resident's family care giver, who is a person related to the resident by blood or marriage or who has full guardianship; or

(c) as otherwise provided by law.

(5) The individual referred to in (4) must adhere to the following protocol:

(a) verify that all medications to be set up carry a physician's current order;

(b) set up medications only from prescriptions in labeled containers dispensed by a registered pharmacist or from over-the-counter drug containers with intact, clearly readable labels; and

(c) set up injectable medications up to seven days in advance by drawing medication into syringes identified for content, date and resident.

(6) The facility may require residents to use a facility approved medication dispensing system or to establish medication set up criteria, but shall not require residents to purchase prescriptions from a specific pharmacy.

(7) No resident or staff member may be permitted to use another resident's medication.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XXIX MEDICATIONS: RECORDS AND DOCUMENTATION

(1) An accurate medication record for each resident shall be kept of all medications, including over-the-counter medications, administered by the facility to that resident.

(2) The record shall include:

(a) name of medication, reason for use, dosage, route and date and time given;

(b) name of the primary care or prescribing physician or practitioner and their telephone number;

(c) any adverse reaction, unexpected effects of medication or medication error, which must also be reported to the resident's practitioner;

(d) allergies and sensitivities, if any;

(e) resident specific parameters and instructions for PRN medications;

(f) documentation of treatments with resident specific parameters;

(g) documentation of doses missed or refused by resident and why;

(h) initials of the person administering the medication and treatment at the time of administration; and

(i) review date and name of reviewer.

(3) The facility shall maintain legible signatures of staff who administer medication or treatment, either on the medication administration record or on a separate signature page.

(4) A medication record need not be kept for those residents for whom written authorization has been given by their physician or practitioner to keep their medication in their rooms and to be fully responsible for taking the medication in the correct dosage and at the proper time. The authorization must be renewed on an annual basis.

(5) The facility shall maintain a record of all destroyed or returned medications in the resident's record or closed resident file in the case of resident transfer or discharge.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XXX OXYGEN USE (1) A resident who requires the use of oxygen:

(a) shall be permitted to self-administer the oxygen if the resident is capable of:

(i) determining their need for oxygen; and

(ii) administering the oxygen to themselves or with assistance.

(2) The direct care staff employed by the facility shall monitor the ability of the resident to operate the equipment in accordance with the orders of the practitioner.

(3) The facility shall ensure that all direct care staff who may be required to assist resident's with administration of oxygen have demonstrated the ability to properly operate the equipment.

(4) The following rules must be followed when oxygen is in use:

(a) oxygen tanks, when used, must be secured and properly stored at all times;

(b) no smoking or open flames may be allowed in rooms in

which oxygen is used or stored, and such rooms must be posted with a conspicuous "No Smoking, Oxygen in Use" sign;

(c) a backup portable unit for the administration of oxygen shall be present in the facility at all times when a resident who requires oxygen is present in the facility, this includes when oxygen concentrators are used;

(d) the equipment used to administer oxygen must be in good working condition; and

(e) the equipment used to administer oxygen is removed from the facility when it is no longer needed by the resident.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XXXI INFECTION CONTROL (1) The personal care facility must establish and maintain infection control policies and procedures sufficient to provide a safe environment and to prevent the transmission of disease. Such policies and procedures must include, at a minimum, the following requirements:

(a) any employee contracting a communicable disease that is transmissible to residents through food handling or direct care must not appear at work until the infectious diseases can no longer be transmitted. The decision to return to work must be made by the administrator or designee, in accordance with the policies and procedures instituted by the facility;

(b) if, after admission to the facility, a resident is suspected of having a communicable disease that would endanger the health and welfare of other residents, the administrator or designee, must contact the resident's physician and assure that appropriate safety measures are taken on behalf of that resident and the other residents; and

(c) all staff shall use proper hand washing technique after providing direct care to a resident.

(2) The facility, where applicable, shall comply with applicable statutes and rules regarding the handling and disposal of hazardous waste.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XXXII PETS (1) Unless the facility disallows it, residents in a personal care facility may keep household pets, as permitted by local ordinance, subject to the following provisions:

(a) pets must be clean and disease-free;

(b) the immediate environment of pets must be kept clean;

(c) birds must be kept in appropriate enclosures; and

(d) pets that are kept at the facility shall have documentation of current vaccinations, including rabies, as appropriate.

(2) The administrator or designee shall determine which pets may be brought into the facility. Upon approval, family members may bring pets to visit, if the pets are clean,

disease-free and vaccinated as appropriate.

(3) Facilities that allow birds shall have procedures that protect residents, staff and visitors from psittacosis, ensure minimum handling of droppings and require droppings to be placed in a plastic bag for disposal.

(4) Pets may not be permitted in food preparation, storage or dining areas during meal preparation time or during meal service or in any area where their presence would create a significant health or safety risk to others.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XXXIII FOOD SERVICE (1) The facility must establish and maintain standards relative to food sources, refrigeration, refuse handling, pest control, storage, preparation, procuring, serving and handling food and dish washing procedures that are sufficient to prevent food spoilage and the transmission of infectious disease. These standards must include the following:

(a) food must be obtained from sources that comply with all laws relating to food and food labeling;

(b) the use of home-canned foods is prohibited;

(c) food subject to spoilage removed from its original container, must be kept sealed, labeled, and dated.

(2) Foods must be served in amounts and a variety sufficient to meet the nutritional needs of each resident. The facility must provide therapeutic diets when prescribed by the resident's practitioner. At least three meals must be offered daily and at regular times, with not more than a 14-hour span between an evening meal and breakfast unless a nutritious snack is available in the evening, then up to 16 hours may lapse between a substantial evening meal and breakfast.

(3) Each meal shall include an alternate food or drink item from which the resident may choose.

(4) If a resident is unable to eat a meal or refuses to eat a meal, this must be documented in the resident's record if there is a medical reason or if it is otherwise appropriate.

(5) Menus must be written at least one week in advance to guide cooks in selecting, purchasing, preparing and serving food. Records of menus as served and any substitutions actually served must be filed on the premises for three months after the date of service for review by the department.

(6) A different lunch and dinner menu shall be planned and followed for each day of the week and shall not be repeated for two consecutive weeks. Adding variety to meals and resident preferences shall guide facility menu planning. Either the current day or the current week's menu shall be posted for resident viewing.

(7) The facility shall employ food service personnel suitable to meet the needs of the residents.

(a) Foods must be cut, chopped and ground to meet individual needs or as ordered by the resident's physician or practitioner;

(b) if the cook or other kitchen staff must assist a

resident with direct care outside the food service area, they must properly wash their hands before returning to food service; and

(c) food service shall comply with the Montana administrative rule requirements for compliance with ARM Title 37, chapter 110, subchapter 2, food service establishments administered by the food and consumer safety section of the department of public health and human services.

(8) If the facility admits residents requiring therapeutic or special diets, the facility shall have an approved dietary manual for reference when preparing a meal. Dietitian consultation shall be provided as necessary and documented for residents requiring therapeutic diets.

(9) A minimum of a one-week supply of non-perishable foods and a two-day supply of perishable foods must be available on the premises.

(10) Potentially hazardous food, such as meat and milk products, must be stored at 41ºF or below. Hot food must be kept a 140ºF or above during preparation and serving.

(11) Freezers must be kept at a temperature of 0ºF or below and refrigerators must be kept at a temperature of 41ºF or below. Thermometers must be placed in the warmest area of the refrigerator and freezer to assure proper temperature. Temperatures shall be monitored and recorded at least once a month in a log maintained at the facility for one year.

(12) Employees shall maintain a high degree of personal cleanliness and shall conform to good hygienic practice during all working periods in food service.

(13) A food service employee, while infected with a disease in a communicable form that can be transmitted by foods may not work in the food service area.

(14) Tobacco products may not be used in the food preparation and kitchen areas.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XXXIV LAUNDRY (1) Laundry service must be provided by the facility, either on the premises or off the facility site.

(2) If a personal care facility processes its laundry on the premises it must:

(a) have a separate area used solely as a laundry, including a separate area used for sorting and processing soiled linen and storing clean linen and clothing. No laundry may be sorted or processed in a food preparation or dish washing area;

(b) equip the laundry room with a mechanical washer and a dryer vented to the outside, hand washing facilities, a fresh air supply and a hot water supply system which supplies the washer with water of at least 110ºF during each use;

(c) provide well-maintained covered laundry carts or tied laundry bags that are impervious to moisture to store and transport soiled laundry, keeping those used for soiled laundry separate from those used for clean laundry;

(d) have ventilation in the sorting, holding and processing area that shall be adequate to prevent heat and odor build-up;

(e) dry all bed linen, towels and wash cloths in a dryer;

(f) protect clean laundry from sources of contamination while being transported, processed or stored; and

(g) ensure that facility staff handling laundry wash their hands both after working with soiled laundry and before they handle clean laundry.

(3) Resident's personal clothing must be laundered by the facility unless the resident or the resident's family accepts this responsibility. If the facility launders the resident's personal clothing, the facility is responsible for returning the clothing. Residents capable of laundering their own personal clothing and wishing to do so shall be provided the facilities and necessary assistance by the facility.

(4) The facility shall provide a supply of clean linen in good condition at all times that is sufficient to change beds often enough to keep them clean, dry and free from odors. Facility provided linens must be changed at least once a week and more often if the linens become dirty. In addition, the facility must ensure that each resident is supplied with clean towels and washcloths that are changed at least twice a week, a moisture-proof mattress cover and mattress pad, and enough blankets to maintain warmth and comfort while sleeping.

(5) Residents may use their own linen in the facility if they choose.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XXXV HOUSEKEEPING (1) The following housekeeping rules must be followed:

(a) Supplies and equipment must be properly stored and conveniently located and must be on hand in a quantity sufficient to permit frequent cleaning of floors, walls, woodwork, windows and screens;

(b) Housekeeping personnel must be trained in proper procedures for preparing cleaning solutions, cleaning rooms and equipment and handling clean and soiled linen, trash and trays;

(c) Cleaners used in cleaning bathtubs, showers, lavatories, urinals, toilet bowls, toilet seats and floors must contain fungicides or germicides with current EPA registration for that purpose; and

(d) Garbage and trash must be stored for final disposal in areas separate from those used for preparation and storage of food and must be removed from the facility daily. Garbage containers must be cleaned at least once a week.

(i) Containers used to store garbage in the kitchen and laundry room of the facility must be covered with a lid unless the containers are kept in an enclosed cupboard that is clean and prevents infestation by vermin. These containers shall be emptied daily and sanitized weekly.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XXXVI PHYSICAL PLANT (1) A personal care facility must be constructed and maintained so as to prevent as much as possible the entrance and harborage of rats, mice, insects, flies and other vermin.

(2) The facility and facility grounds shall be kept orderly and free of litter and refuse and secure from hazards.

(3) When required by the building code authority having jurisdiction, at least one primary grade level entrance to the facility shall be arranged to be fully accessible to disabled persons.

(4) All exterior pathways or accesses to the facility's common use areas and entrance and exit ways shall be of hard, smooth material, accessible and be maintained in good repair.

(5) All interior or exterior stairways used by residents shall have sturdy handrails on one side installed in accordance with the uniform building code with strength and anchorage sufficient to sustain a concentrated 250-pound load to provide residents safety with ambulation.

(6) All interior and exterior materials and surfaces (e.g. floors, walls, roofs, ceilings, windows and furniture) and all equipment necessary for the health, safety and comfort of the resident shall be kept clean and in good repair.

(7) Carpeting and other floor materials shall be constructed and installed to minimize resistance for passage of wheelchairs and other ambulation aids. Thresholds and floor junctures shall also be designed and installed for passage of wheelchairs and to prevent a tripping hazard.

(8) The facility shall install grab bars at each toilet, shower, sitz bath and tub with a minimum of one and one half inches clearance between the bar and the wall and strength and anchorage sufficient to sustain a concentrated 250-pound load. If a toilet grab bar assist is used over a toilet, it must be safely stabilized and secured in order to prevent mishap.

(9) Any surface or structure which a resident could use for support while ambulating shall be securely anchored.

(10) The bottoms of tubs and showers must have surfaces that inhibit falling and slipping.

(11) Hand cleansing soap or detergent and single use individual towels must be available at each sink in the commonly shared areas of the facility. A waste receptacle must be located near each sink. Cloth towels and bar soap for common use are not permitted.

(12) Hot water temperature supplied to hand washing, bathing and showering areas may not exceed 120EF.

(13) The facility shall provide locked storage for all poisons, chemicals, rodenticides, herbicides, insecticides and other toxic material. Hazardous material safety sheets and labeling shall be kept available for staff for all such products used and stored in the facility.

(14) Flammable and combustible liquids shall be safely and properly stored in original or approved, properly labeled

containers in areas inaccessible to residents in accordance with the uniform fire code in amounts acceptable to the fire code authority having jurisdiction.

(15) Containers used to store garbage in resident bedrooms and bathrooms are not required to be covered unless they are used for food, bodily waste or medical waste. Resident containers shall be emptied as needed, but at least weekly.

(16) Fish ponds, hot tubs or spas, swimming pools or other bodies of water on the premises of the facility must be fenced, covered, locked or blocked in some other manner at all times when not being used by a resident.

(17) If the facility utilizes a non-municipal water source, the water source is tested at least once every 12 months for total coliform bacteria and fecal coliform or E. coli bacteria and corrective action is taken to assure the water is safe to drink. Documentation of testing is retained on the premises for 24 months from the date of the test.

(18) If a non-municipal sewage system is used, the sewage system must be in working order and maintained according to all applicable state laws and rules.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XXXVII CONSTRUCTION, BUILDING and FIRE CODES

(1) Any construction of or alteration, addition, modification or renovation to a personal care facility must meet the requirements of the building code and fire marshal agencies having jurisdiction and be approved by the officer having jurisdiction to determine if the building and fire codes are met by the facility.

(2) When a change in use and building code occupancy classification occurs, licensure approval shall be contingent on meeting the building code and fire marshal agencies' standards in effect at the time of such a change. Changes in use include adding a category B license endorsement to a previously licensed category A facility.

(3) Changes in the facility location, use or number of facility beds cannot be made without written notice to, and written approval received from, the department.

(4) Exit doors shall not include locks which prevent evacuation, except as approved by the fire marshal and building codes agencies having jurisdiction.

(5) Stairways, halls, doorways, passageways and exits from rooms and from the building shall be kept unobstructed at all times.

(6) All operable windows and outer doors that may be left open, shall be fitted with insect screens.

(7) A personal care facility must have an annual fire inspection conducted by the appropriate local fire authority or the state fire marshal's office and maintain a record of such inspection for at least three years following the date of the inspection.

(8) An employee and resident fire drill is conducted at

least two times annually, no closer than four months apart and includes residents, employees and support staff on duty and other individuals in the facility. A resident fire drill includes making a general announcement throughout the facility that a resident fire drill is being conducted or sounding a fire alarm.

(9) Records of employee and resident fire drills are maintained on the premises for 24 months from the date of the drill and include the date and time of the drill, names of the employees participating in the drill and identification of residents needing assistance for evacuation.

(10) A 2A10BC portable fire extinguisher shall be available on each floor of a greater than 20 resident facility and shall be as required by the fire authority having jurisdiction for facilities of less than 20 residents.

(11) Portable fire extinguishers must be inspected, recharged and tagged at least once a year by a person certified by the state to perform such services.

(12) Smoke detectors installed and maintained per the manufacturer's directions shall be installed in all resident rooms, bedroom hallways, living room, dining room and other open common spaces or as required by the fire authority having jurisdiction. An annual maintenance log of battery changes and other maintenance services performed shall be kept in the facility and made available to the department upon request.

(13) If there is an inside designated smoking area, it shall be separate from other common areas, and provided with adequate mechanical exhaust vented to the outside.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XXXVIII REQUIREMENTS FOR CATEGORY B FACILITIES ONLY

(1) A personal care B endorsement to the license shall be made by the licensing bureau of the department only after:

(a) initial department approval of the facility's B policy and procedures;

(b) evidence of the administrator's and facility staff qualifications; and

(c) written approval from the building and fire code authorities having jurisdiction.

(2) A personal care B facility shall employ or contract with a registered nurse to provide or supervise nursing service to include:

(a) general health monitoring on each category B resident;

(b) performing a nursing assessment on category B residents when and as required;

(c) assistance with the development of the resident health care plan and, as appropriate, the development of the resident service plan; and

(d) routine nursing tasks, including those that may be delegated to unlicenced assistive personnel in accordance with the Montana Nurse Practice Act.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XXXIX ADMINISTRATOR QUALIFICATIONS: CATEGORY B

(1) A personal care B facility must be administered by a person who, in addition to the requirements found in [Rule VIII], either has a nursing home administrator's license or have successfully completed all components of the ALFA self study program "The Management Library for Administrators and Executive Directors" and has not less than one year experience working in the field of geriatrics or caring for disabled residents in a licensed facility.

(2) Providers in existence on the date of the final adoption of this rule will be granted one year to meet the category B administrator requirements found in (1).

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XL DIRECT CARE STAFF QUALIFICATIONS: CATEGORY B

(1) In addition to the requirements found in [Rule X], each non professional staff providing direct care in a personal care B facility shall have successfully completed and show current documentation of one of the following:

(a) a nurse aide training course approved by the Montana department of public health and human services certification bureau and shall have passed the Montana nurse aide competency examination;

(b) successfully challenged and passed the Montana nurse aide competency examination;

(c) be enrolled in an approved nurse aide training course with a completion within six months of hire; or

(d) be enrolled or have successfully completed other equivalent training programs as approved by the department.

(2) At least one person per shift shall hold a current CPR certificate.

(3) Staff members whose job responsibilities will include supervising or preparing special or modified diets, as ordered by the resident's practitioner, shall receive training prior to performing this responsibility.

(4) Prior to providing direct care, direct care staff must:

(a) receive 16 hours of documented training and orientation specific to category B direct care requirements; or

(b) work under direct supervision for any direct care task not yet trained or properly oriented; and

(c) not take the place of the required certified person.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XLI RESIDENT HEALTH CARE PLAN: CATEGORY B

(1) Within 21 days of admission to a category B status, the administrator or designee shall assure that a written

resident health care assessment is performed on each category B resident.

(2) Each initial health care assessment by the licensed health care professional shall include, at a minimum, evaluation of the following:

(a) cognitive status;
(b) communication/hearing patterns;
(c) vision patterns;
(d) physical functioning and structural problems;
(e) continence;
(f) psychosocial well being;
(g) mood and behavior patterns;
(h) activity pursuit patterns;
(i) disease diagnosis;
(j) health conditions;
(k) oral nutritional status;
(l) oral dental status;
(m) skin condition;
(n) medication use; and
(o) special treatment and procedures.

(3) A written resident health care plan shall be developed. The resident health care plan shall include, but not be limited to the following:

(a) a statement which informs the resident and the resident's physician, if applicable, of the requirements of 50-5-226(3) and (4), MCA.

(b) orders for treatment or services, medications and diet, if needed;

(c) the resident's needs and preferences for themselves;

(d) the specific goals of treatment or services, if appropriate;

(e) the time intervals at which the resident's response to treatment will be reviewed; and

(f) the measures to be used to assess the effects of treatment;

(g) if the resident requires care or supervision by a licensed health care professional, the health care plan shall include the tasks for which the professional is responsible.

(4) The category B resident's health care plan shall be reviewed, and if necessary revised upon change of condition.

(5) The health care plan shall be readily available to and followed by all staff.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XLII RESTRAINT USE AND REDUCTION: CATEGORY B

(1) Chemical or physical restraints ordered by the physician are permitted and a licensed health care professional must monitor the resident's response to use of the medication and communicate with the pharmacist and physician to implement a regimen that ensures the least medication and fewest negative consequences.

(2) Protective devices may be used to prevent a resident

from falling from a bed or chair. The least restrictive form of protective device that affords the resident the greatest possible degree of mobility must be used.

(3) Physical restraints ordered by the physician are permitted when needed to manage resident behavior that endangers themselves or others, and only under the following conditions:

(a) there must be a physician's order for the restraint, including the time period for use of physical restraint. A copy of this order must be included in the resident's record;

(b) the restraints must be applied by a licensed health care professional;

(c) a notation must be made in the resident's record showing the date, time and reason restraints were used;

(d) residents so restrained must be checked at least every 30 minutes and released during at least 10 minutes out of every two hours. These checks and releases must be recorded in the resident's record as they are completed; and

(e) if the resident does not respond to the treatment prescribed by the physician, the resident must be re-evaluated by the physician to determine the continued appropriateness of the restraint and whether the facility can continue to provide appropriate care to the resident.

(4) A facility must institute, through policies and procedures, restraint reduction programs and restraint assessments.

(5) Bedside rails for any resident may be used only on the written order of the resident's physician.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XLIII INCONTINENCE CARE: CATEGORY B (1) In order to maintain normal bladder and bowel functions, the facility shall provide individualized attention to each resident that meets the following minimum standards:

(a) the facility shall provide a resident who is incontinent of bowel or bladder adequate personal care services to maintain the person's skin integrity, hygiene and dignity and to prevent urinary tract infections.

(2) Evidence that the facility is meeting each resident's needs for maintaining normal bowel and bladder functions include the following outcomes for residents at risk for incontinence:

(a) the resident is checked during those periods when they are known to be incontinent, including the night;

(b) the resident is kept clean and dry;

(c) clean and dry bed linens are provided as needed; and

(d) if the resident can benefit from scheduled toileting, they are assisted or reminded to go to the bathroom at regular intervals.

(3) Indwelling catheters are permissible, if the catheter care is taught and supervised by a licensed health care professional under a physician's order. Observations and care must be documented.

(4) Facility staff shall not:

(a) withhold fluids from a resident to control incontinence; or

(b) have a resident catheterized to control incontinence for the convenience of staff.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XLIV PREVENTION AND CARE OF PRESSURE SORES: CATEGORY B (1) A resident shall receive skin care that meets the following standards:

(a) the facility shall practice preventive measures to identify those at risk and maintain a resident's skin integrity; and

(b) an area of broken or damaged skin must be reported within 24 hours to the resident's practitioner. Treatment must be as ordered by the resident's practitioner.

(2) A person with an open wound or having a pressure or stasis ulcer requiring treatment by a health care professional may not be admitted or permitted to remain in the facility unless:

(a) the wound is in the process of healing, as determined by a licensed health care professional, and is either:

(i) under the care of a licensed health care professional; or

(ii) can be cared for by the resident without assistance.

(3) The facility shall ensure records of observations, treatments and progress notes are entered in the resident record and that services are in accordance with the resident health care plan.

(4) No over the counter products such as creams, lotions, ointments, soaps, iodine or alcohol shall be put on an open pressure or stasis wound unless ordered by the resident's practitioner after an appropriate evaluation of the wound.

(5) Evidence the facility is meeting those resident's identified as a greater risk for skin care needs include the following outcomes for residents:

(a) the facility has identified those residents who are at greater risk of developing a pressure or stasis ulcer. Primary risk factors include but are not limited to:

(i) continuous urinary incontinence or chronic voiding dysfunction;

(ii) severe peripheral vascular disease (poor circulation to the legs);

(iii) diabetes;

(iv) chronic bowel incontinence;

(v) sepsis;

(vi) terminal cancer;

(vii) decreased mobility or confined to bed or chair;

(viii) edema or swelling of the legs;

(ix) chronic or end stage renal, liver or heart disease;

(x) CVA (stroke);

(xi) recent surgery or hospitalization;

(xii) any resident with skin redness lasting more than 30

minutes after pressure is relieved from a bony prominence, such as hips, heels, elbows or coccyx, is at extremely high risk in that area; and

(xiii) malnutrition/dehydration whether secondary to poor appetite or another disease process.

(b) direct care staff have received training related to maintenance of skin integrity and the prevention and care of pressure sores from a licensed health care professional who is trained to care for that condition;

(c) the resident's practitioner has diagnosed the condition and ordered treatment;

(d) the resident is kept clean and dry;

(e) the resident is provided clean and dry bed linens;

(f) the resident is kept hydrated;

(g) the resident is turned and repositioned;

(h) the wound is getting smaller;

(i) there is no evidence of infection;

(j) wound bed is moist, not dried out or scabbed over;

(k) the resident has less restriction of movement; and

(l) the resident's pain level has diminished.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XLV SEVERE COGNITIVE IMPAIRMENT: CATEGORY B (1) A personal care B facility that provides care to persons with severe cognitive impairment must be administered by a person who meets the conditions of [Rule VIII] and:

(a) has not less than three years experience in caring for residents with severe cognitive impairment in a licensed facility; or

(b) has a documented combination of education and training that the department has determined is equivalent to the experience required in (1)(a).

(2) Each personal care facility that specializes in providing care for persons who have severe cognitive impairment must provide a signed, informed consent form, made part of the resident file that shows, prior to admission, the facility has informed the resident or resident's legal representative of the following:

(a) the facility or unit's overall philosophy and mission which reflects the needs of residents afflicted with severe cognitive impairment or a related disorder and the form of care or treatment provided that distinguishes such care or treatment as being especially applicable to or suited for such persons;

(b) the facility's process and criteria for placement in, transfer to or discharge from the facility or unit;

(c) the facility's limitations regarding resident conduct and resident responsibilities;

(d) the process used for assessment and establishment of the health care plan and its implementation, including the method by which the health care plan evolves and is responsive to changes in resident condition;

(e) staff training and continuing education practices;

(f) the physical environment and design features appropriate to support the functioning of cognitively impaired adult residents;

(g) the frequency and types of resident activities;

(h) the involvement of families and the availability of support programs; and

(i) any additional costs of care or additional fees.

(3) The facility or unit must maintain a sufficient number of direct care staff with the required training and skills necessary to meet the resident population's requirements for assistance or provision of personal care services, health care plans, service plans, supervision and other supportive services. Such staff must remain awake, fully dressed and be available in the facility or on the unit at all times to provide supervision and care to residents.

(4) Direct care staff must be, at a minimum, a certified nurse assistant with additional documented training in:

(a) the facility or unit's philosophy and approaches to providing care and supervision for persons with severe cognitive impairment;

(b) the skills necessary to care for and intervene and direct residents who are unable to perform activities of daily living, personal care, or health care planning and who may exemplify behavior problems or wandering tendencies; and

(c) bowel and bladder care.

(5) In a secured distinct part or locked unit, located within a personal care facility for the exclusive use of residents with severe cognitive impairment, the facility must:

(a) staff the unit with direct care staff at all times there are residents in the unit;

(b) provide a separate dining area, at a ratio of 30 square feet per resident, located on the unit if the main dining room of the facility is not used for the residents on the unit;

(c) provide for a common day or activities area, at a ratio of 30 square feet per resident, on the unit. The dining area listed in (5)(b) may serve this purpose.

(6) The facility must not admit or retain residents that may pose a danger to themselves or to others as determined by a resident's physician, a licensed health care professional or a licensed mental health professional.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XLVI ADMINISTRATION OF MEDICATIONS: CATEGORY B

(1) All medications administered to a B resident shall be administered by a licensed health care professional or by an individual delegated the task under the Nurse Practice Act and ARM Title 8, chapter 32, subchapter 17. Those category B residents, that are capable of self administration shall be given the opportunity and encouraged to do so.

(2) Residents with a standing PRN medication order, that cannot determine their own need for the medication and make a request to self administer the medication shall:

(a) have the medication administered by a licensed health care professional after an assessment and the determination of need has been made; and

(b) be classified as a B resident because a nursing decision to determine the resident's need for the medication was required.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

3. The rules 37.106.2701, 37.106.2703, 37.106.2709, 37.106.2711, 37.106.2718, 37.106.2719, 37.106.2725, 37.106.2726, 37.106.2727, 37.106.2730, 37.106.2731 and 37.106.2742 as proposed to be repealed are on pages 37-26559, 37-26561, 37-26570, 37-26573, 37-26581, 37-26582, 37-26587, 37-26589, 37-26590, 37-26596, 37-26597 and 37-26609 of the Administrative Rules of Montana.

AUTH: Sec. 50-5-103 and 50-5-227, MCA
IMP: Sec. 50-5-227, MCA

The rule 37.106.2702 as proposed to be repealed is on page 37-26560 of the Administrative Rules of Montana.

AUTH: Sec. 50-5-103 and 50-5-227, MCA
IMP: Sec. 50-5-103 and 50-5-227, MCA

The rule 37.106.2708 as proposed to be repealed is on page 37-26567 of the Administrative Rules of Montana.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-227, MCA

The rules 37.106.2710, 37.106.2715, 37.106.2716, 37.106.2717, 37.106.2728, 37.106.2729, 37.106.2740, 37.106.2741 and 37.106.2750 as proposed to be repealed are on pages 37-26571, 37-26577, 37-26578, 37-26580, 37-26592, 37-26595, 37-26605, 37-26607 and 37-26617 of the Administrative Rules of Montana.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-226 and 50-5-227, MCA

4. SB 420, enacted by the 2001 Legislature, directs the department to review all administrative rules adopted pursuant to 50-5-226, MCA, in conjunction with consumers and providers of personal care, to determine any necessary changes that may be needed to the rules or the laws that they implement. The department, in conducting such a review, is directed further to consider the appropriate size of personal care facilities, the necessary extent of regulation of the personal care industry based on the needs of personal care residents and the goal of permitting residents to safely remain in personal care facilities and age in place, and to consider the adequacy of the current administrative rules regarding provider qualifications,

staff training, and physician involvement in the care of residents of personal care facilities.

The Quality Assurance Division has formed a legislative/provider/association-based work group to address the requirements of SB 420. This work group has held 10 day-long meetings and several two day meetings to review the administrative rules adopted pursuant to 50-5-226, MCA, and the statutes implemented by said rules. Although little consensus was reached regarding statutory changes, it has been determined by the work group that it is necessary to repeal the current administrative rules regarding the licensure of personal care facilities, and to adopt in their place the foregoing proposed administrative rules, on the following basis:

a) At the time the current administrative rules were last amended (September 30, 1995), there were 40 personal care facilities operating in Montana. There are currently 149 facilities with 3400 beds operating in Montana, and the current administrative rules are inadequate to address the needs of consumers of personal care given the marked increase in the demand for and availability of personal care beds in Montana.

b) The current administrative rules do not adequately ensure the protection and observance of residents' rights in a personal care/assisted living setting.

c) The current administrative rules do not adequately address the qualifications and training of personal care/assisted living providers and staff.

d) The current administrative rules do not adequately address the provision of dementia care by personal care/assisted living facilities, which is a rapidly growing trend in the personal care/assisted living industry.

e) The current administrative rules do not reflect changes made by the State Fire Marshal to the Administrative Rules of Montana regarding assisted living or personal care facilities, nor do the current administrative rules reflect changes made to the State Building Code regarding assisted living or personal care facilities.

The proposed administrative rules will satisfy the legislative mandate of SB 420 in that said administrative rules will provide for minimum but adequate regulation of the personal care/assisted living industry in Montana, taking into consideration the needs of personal care residents in achieving the goal of permitting said residents to safely remain in a personal care setting and age in place, including provisions to ensure the protection and observance of residents' rights, stating the minimum requirements for qualifications and training of personal care staff, providing guidelines regarding dementia care in a personal care/assisted living setting, and addressing changes in fire and building code requirements. Because of the legislative mandate of SB 420, and because of the inadequacies of the currently existing administrative rules pertaining to the licensure of personal care/assisted living facilities, as addressed above, it is reasonably necessary that the currently

existing administrative rules be repealed, and that the proposed administrative rules be enacted in their place. The alternative is to continue to inadequately address the topics and areas of concern as designated by the Legislature in SB 420.

Although amendment of the current administrative rules was considered as an alternative to the repeal of the current administrative rules and adoption of the proposed administrative rules in their place, the foregoing proposed administrative rules represent such a dramatic and substantial reorganization and modification of the current administrative rules that the proposed rules bear little resemblance to the original rules, and the public would not be well served by the strike out and underlined text format necessitated by the amendment process. Because of the extent of the reorganization and modification of the rules pertaining to the licensure of personal care/assisted living facilities represented by the proposed administrative rules, it is reasonably necessary to repeal the currently existing rules and adopt the proposed rules in their place.

[Rule XII] will authorize the department to charge a $100 fee for the provision of an independent nurse assessment of a potential resident of a personal care facility. The department currently charges the same fee for the same service pursuant to ARM 37.106.2711, which is among the rules the department proposes to repeal. Because the $100 fee provided for at proposed [Rule XII] is the same fee the department currently charges, the fee provided for at proposed [Rule XII] neither constitutes the adoption of a new fee, nor does it constitute the adoption of an increase or decrease in a monetary amount that a person will pay or receive. Furthermore, inclusion of the fee at proposed [Rule XII] will have no effect on the number of persons affected by the fee currently charged pursuant to ARM 37.106.2711, nor will there be any change to the cumulative amount currently collected under the existing rule.

5. Interested persons may submit their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to Kathy Munson, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 202951, Helena, MT 59620-2951, no later than 5:00 p.m. on November 21, 2002. Data, views or arguments may also be submitted by facsimile (406)444-9744 or by electronic mail via the Internet to dphhslegal@state.mt.us. The Department also maintains lists of persons interested in receiving notice of administrative rule changes. These lists are compiled according to subjects or programs of interest. For placement on the mailing list, please write the person at the address above.

6. The Office of Legal Affairs, Department of Public Health and Human Services has been designated to preside over and conduct the hearing.

Dawn Sliva	**/s/ Gail Gray**
Rule Reviewer	**Director, Public Health and Human Services**

Certified to the Secretary of State October 7, 2002.

BEFORE THE DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES OF THE STATE OF MONTANA

In the matter of the amendment of ARM 37.86.2105 pertaining to medicaid eyeglass services	)	NOTICE OF PROPOSED AMENDMENT NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On November 16, 2002, the Department of Public Health and Human Services proposes to amend the above-stated rule.

The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who need an alternative accessible format of this notice. If you need to request an accommodation, contact the department no later than 5:00 p.m. on November 7, 2002, to advise us of the nature of the accommodation that you need. Please contact Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210; telephone (406)444-5622; FAX (406)444-1970; Email dphhslegal@state.mt.us.

2. The rule as proposed to be amended provides as follows. Matter to be added is underlined. Matter to be deleted is interlined.

37.86.2105 EYEGLASSES, REIMBURSEMENT (1) remains the same.

(2) Reimbursement for contact lenses or dispensing fees is as follows:

(a) The department pays the lower of the following:

(i) the provider's usual and customary charge for the service;

(ii) the amount specified for the particular service or item in the department's fee schedule. The department hereby adopts and incorporates by reference the department's fee schedule dated ~~January 1,~~ December 2002 which sets forth the reimbursement rates for eyeglasses, dispensing services and other ~~medicaid~~ related supplies for optometric services. A copy of the department's fee schedule may be obtained from the Department of Public Health and Human Services, Health Policy and Services Division, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

AUTH: Sec. 53-6-113, MCA
IMP: Sec. 53-6-101, 53-6-113 and 53-6-141, MCA

3. The Montana Medicaid program is a joint federal-state program administered by the Department of Public Health and Human Services (the "Department") which pays medical expenses for qualified low-income individuals. One medical expense which

Medicaid pays is the cost of eyeglasses and contact lenses when they are medically necessary, as well as the cost of dispensing eyeglasses and contact lenses and laboratory services.

ARM 37.86.2105 governs reimbursement for eyeglasses. Subsection (1) of the rule provides that the Department pays for eyeglasses through a single volume purchase contract. In regard to reimbursement for contact lenses and dispensing fees, (2) provides that the Department will pay the provider's usual and customary charge for the service or the amount specified in the Department's fee schedule, whichever is lower. Subsection (2)(a)(ii) currently adopts and incorporates by reference the Department's fee schedule effective January 1, 2002.

The amendment of (2)(a)(ii) of ARM 37.86.2105 is now necessary because the Department has developed a new fee schedule which incorporates the fees specified in the new contract. The Department therefore proposes to amend this portion of the rule to adopt and incorporate the new fee schedule effective December 2002.

Because the eyeglass contract was awarded using a competitive process, the rates for several procedures specified in the contract are lower then the rates previously paid by the Department. The Department therefore anticipates savings of $9,600 per year due to the rate reduction for these procedures. This rate reduction will affect only the provider with whom the Department has the contract.

Subsection (2) currently refers to the Department's fee schedule which sets forth the reimbursement rates for eyeglasses and other Medicaid services. This could be misleading, as it suggests that there is one fee schedule which contains reimbursement rates for eyeglasses and all other types of Medicaid services. In reality, the Department has different fee schedules for different categories of Medicaid services. Subsection (2) is therefore being amended to specify that the fee schedule referred to is the fee schedule for eyeglasses, dispensing services and other related supplies for optometric supplies. The Department is not changing the fees for dispensing services and optometric supplies, however.

4. The proposed rule changes will be effective December 1, 2002, because it is easier administratively to have changes in reimbursement rates effective on the first day of the month.

5. Interested persons may submit their data, views or arguments concerning the proposed action in writing to Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210, no later than 5:00 p.m. on November 14, 2002. Data, views or arguments may also be submitted by facsimile (406)444-1970 or by electronic mail via the Internet to dphhslegal@state.mt.us. The Department also maintains lists of persons interested in

receiving notice of administrative rule changes. These lists are compiled according to subjects or programs of interest. For placement on the mailing list, please write the person at the address above.

6. If a person who is directly affected by the proposed action wishes to express data, views and arguments orally or in writing at a public hearing, that person must make a written request for a public hearing and submit such request, along with any written comments to Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210, by facsimile (406)444-1970 or by electronic mail via the Internet to dphhslegal@state.mt.us no later than 5:00 p.m. on November 14, 2002.

7. If the Department of Public Health and Human Services receives requests for a public hearing on the proposed action from either 10% or 25, whichever is less, of those who are directly affected by the proposed action, from the Administrative Rule Review Committee of the legislature, from a governmental agency or subdivision, or from an association having no less than 25 members who are directly affected, a hearing will be held at a later date and a notice of the hearing will be published in the Montana Administrative Register. Ten percent of those directly affected has been determined to be 1 based on the 3 of providers affected by rules covering medicaid eyeglass services.

Dawn Sliva
Rule Reviewer

/s/ Gail Gray
Director, Public Health and Human Services

Certified to the Secretary of State October 7, 2002.

BEFORE THE DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES OF THE STATE OF MONTANA

In the matter of the amendment of ARM 37.85.212 pertaining to medicaid reimbursement for subsequent surgical procedures	)))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Interested Persons

1. On November 16, 2002, at 10:00 a.m., a public hearing will be held in Room 207 of the Department of Public Health and Human Services Building, 111 N. Sanders, Helena, Montana to consider the proposed amendment of the above-stated rule.

The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who need an alternative accessible format of this notice or provide reasonable accommodations at the public hearing site. If you need to request an accommodation, contact the department no later than 5:00 p.m. on October 28, 2002, to advise us of the nature of the accommodation that you need. Please contact Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210; telephone (406)444-5622; FAX (406)444-1970; Email dphhslegal@state.mt.us.

2. The rule as proposed to be amended provides as follows. Matter to be added is underlined. Matter to be deleted is interlined.

37.85.212 RESOURCE BASED RELATIVE VALUE SCALE (RBRVS) REIMBURSEMENT FOR SPECIFIED PROVIDER TYPES (1) For purposes of this rule, the following definitions apply:

(a) through (e) remain the same.

(f) "Resource based relative value scale (RBRVS)" means the most current version of the medicare resource based relative value scale contained in the physicians' medicare fee schedule adopted by the ~~health care financing administration, now known as~~ centers for medicare and medicaid services~~,~~ of the U.S. department of health and human services and published in the Federal Register annually, as amended through November 1, 2001 which is hereby adopted and incorporated by reference. A copy of the medicare fee schedule may be obtained from the Department of Public Health and Human Services, Health Policy and Services Division, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951. The RBRVS reflects RVUs for estimates of the actual effort and expense involved in providing different health care services.

(g) "Subsequent surgical procedure" means any additional surgical procedure or service, except for add-ons and modifier 51 exempt codes, performed after a primary operation in the same operative session.

~~(g)~~ (h) "Usual and customary" means those charges that the

medicaid provider would charge for a particular service in a majority of cases including medicaid and non-medicaid patients.

(2) through (11)(d)(ii) remain the same.

(12) Subject to the provisions of (12)(a), when billed with a modifier, payment for procedures established under the provisions of (7) is a percentage of the rate established for the procedures.

(a) The methodology to determine the specific percent for each modifier is as follows:

(i) through (v) remain the same.

(vi) Notwithstanding any other provision, subsequent surgical procedures shall be reimbursed at 50% of the department's fee schedule.

(13) In applying the RBRVS methodology set forth in this rule, medicaid reimburses in accordance with medicare's policy on the bundling of services, as set forth in the physicians' medicare fee schedule adopted by the ~~health care financing administration~~ centers for medicare and medicaid services of the U.S. department of health and human services and published in the Federal Register annually, whereby payment for certain services constitutes payment for certain other services which are considered to be included in those services.

(14) remains the same.

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-2-201, 53-6-101, 53-6-111 and 53-6-113, MCA

3. The Montana Medicaid Program is a joint federal-state program administered by the Department of Public Health and Human Services (the "Department") to pay medical expenses for qualified low-income individuals. The Montana Medicaid program pays for surgical procedures provided to Medicaid recipients in accordance with the provisions of ARM 37.85.212.

ARM 37.85.212 specifies the methodology used to determine reimbursement for certain types of Medicaid providers, including physicians, known as the Resource Based Relative Value Scale (RBRVS). ARM 37.85.212(12) currently provides that the reimbursement rate paid for certain procedures billed with a modifier will be a percentage of the established rate. A modifier is a provider's means to explain to the payor what circumstances apply to the services rendered which may affect reimbursement.

The Department is now proposing to amend ARM 37.85.212(12) to provide that subsequent surgical procedures will be reimbursed at 50% of the Medicaid reimbursement rate for that procedure. This amendment is being made to bring Medicaid's reimbursement methodology in line with Medicare's methodology, which pays 50% of the established rate for procedures other than primary procedures. The Department believes that it is appropriate to recognize the efficiencies experienced when subsequent surgical procedures are performed on the same date of service by the same provider on the same patient. It is also necessary to amend ARM

37.85.212(1) to include a definition of the term "subsequent surgical procedure" so that providers will know when the 50% rate is applicable.

Although this change in reimbursement is not being made primarily for budgetary reasons, the Department anticipates savings of approximately $109,000 due to the rate reduction for subsequent surgical procedures. This rate reduction will affect approximately 11,600 Medicaid providers.

4. These rule changes will be effective December 1, 2002, because it is easier from an administrative point of view to have a change in reimbursement effective on the first day of a month.

5. Interested persons may submit their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210, no later than 5:00 p.m. on November 14, 2002. Data, views or arguments may also be submitted by facsimile (406)444-1970 or by electronic mail via the Internet to dphhslegal@state.mt.us. The Department also maintains lists of persons interested in receiving notice of administrative rule changes. These lists are compiled according to subjects or programs of interest. For placement on the mailing list, please write the person at the address above.

6. The Office of Legal Affairs, Department of Public Health and Human Services has been designated to preside over

Dawn Sliva
Rule Reviewer

/s/ Gail Gray
Director, Public Health and Human Services

Certified to the Secretary of State October 7, 2002.

BEFORE THE DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES OF THE STATE OF MONTANA

In the matter of the amendment of ARM 37.88.101, 37.89.106, 37.89.114, 37.89.115 and 37.89.125 pertaining to mental health center services and mental health services plan services	))))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Interested Persons

1. On November 8, 2002, at 10:00 a.m., a public hearing will be held in the auditorium of the Department of Public Health and Human Services Building, 111 N. Sanders, Helena, Montana to consider the proposed amendment of the above-stated rules.

The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who need an alternative accessible format of this notice or provide reasonable accommodations at the public hearing site. If you need to request an accommodation, contact the department no later than 5:00 p.m. on November 1, 2002, to advise us of the nature of the accommodation that you need. Please contact Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210; telephone (406)444-5622; FAX (406)444-1970; Email dphhslegal@state.mt.us.

2. The rules as proposed to be amended provide as follows. Matter to be added is underlined. Matter to be deleted is interlined.

37.88.101 MEDICAID MENTAL HEALTH SERVICES, AUTHORIZATION REQUIREMENTS (1) Mental health services may be medically necessary for a medicaid recipient under the Montana medicaid program if the recipient:

(a) is a youth who has been determined to have a serious emotional disturbance as defined in ARM 37.86.3702, or determined by the department on a case-by-case basis that treatment is medically necessary for early intervention and prevention of a more serious emotional disturbance; or

(b) is 18 or more years of age and has been determined to have a severe disabling mental illness as defined in ARM 37.86.3502.

~~(1)~~ (2) For all mental health services provided to a medicaid recipient under the Montana medicaid program for which prior authorization is required, the following exceptions apply:

(a) through (d) remain the same.

(e) under no circumstances may a waiver under ~~(1)~~(2)(c) be granted more than 30 days after the initial date of service.

(2) through (5) remain the same but are renumbered (3)

through (6).

AUTH: Sec. 53-6-113, MCA
IMP: Sec. 53-2-201, 53-6-101, 53-6-111 and 53-6-113, MCA

37.89.106 MENTAL HEALTH SERVICES PLAN, MEMBER ELIGIBILITY

(1) An individual is eligible for covered services under the plan if:

(a) and (b) remain the same.

(c) the individual is under the age of 19 years and the individual ~~is enrolled in or~~ has been denied enrollment in Montana children's health insurance program (CHIP), as established in ARM Title 37, chapter 79;

(d) through (5)(a)(ii) remain the same.

(6) If the department determines that the average per-case cost of mental health services plan expenditures times the number of enrollees will exceed total appropriations, it will suspend enrollment of new recipients.

(a) through (c) remain the same.

(d) notwithstanding the provisions of (6)(a) through (c) of this rule, the department may enroll a qualified applicant if the applicant is:

~~(i) enrolled as a beneficiary of the children's health insurance plan (CHIP);~~

~~(ii)~~ (i) a patient at Montana state hospital (MSH) ready for discharge; or

~~(iii)~~ (ii) in imminent physical danger due to a life-threatening mental health emergency.

AUTH: Sec. 41-3-1103, 52-2-603, 53-2-201, 53-6-113, 53-6-131, 53-6-701, 53-6-706 and 53-21-703, MCA
IMP: Sec. 41-3-1103, 52-2-603, 53-1-601, 53-1-602, 53-2-201, 53-6-101, 53-6-113, 53-6-116, 53-6-117, 53-6-131, 53-6-701, 53-6-705, 53-6-706, 53-21-139, 53-21-202 and 53-21-702, MCA

37.89.114 MENTAL HEALTH SERVICES PLAN, COVERED SERVICES

(1) remains the same.

(2) Covered services include:

(a) evaluation and assessment of psychiatric conditions by licensed and enrolled mental health providers;

~~(b) residential treatment facility services for children and adolescents who are also covered by the children's health insurance program (CHIP);~~

~~(c)~~ (b) primary care providers, as defined in ARM 37.86.5001(18), for screening and identifying psychiatric conditions and for medication management;

~~(d)~~ (c) a psychotropic drug formulary, as specified in (6);

~~(e)~~ (d) medication management, including lab services necessary for management of prescribed medications medically necessary with respect to a covered diagnosis;

~~(f)~~ (e) psychological assessments, treatment planning, individual, group and family therapy, and consultations performed by licensed psychologists, licensed clinical social

workers, and licensed professional counselors for treatment of covered diagnoses in private practice or in mental health centers;

~~(g)~~ (f) case management services for adults with severe disabling mental illness; and

~~(h) the therapeutic component of therapeutic youth group home care and therapeutic family care services for children and adolescents who are also covered by CHIP; and~~

~~(i)~~ (g) mental health center services.

(3) through (5) remain the same.

(6) The plan covers the medically necessary psychotropic medications listed in the department's mental health services plan drug formulary if medically necessary with respect to a covered diagnosis. The department may revise the formulary from time to time. A copy of the current formulary may be obtained from the Department of Public Health and Human Services, Addictive and Mental Disorders Division, ~~1400 Broadway~~ 555 Fuller, P.O. Box ~~202951~~ 202905, Helena, MT ~~59620-2951~~ 59620-2905.

(7) through (11)(a)(ii) remain the same.

AUTH: Sec. 41-3-1103, 52-1-103, 52-2-603, 53-2-201, 53-6-113, 53-6-131, 53-6-706 and 53-21-703, MCA
IMP: Sec. 41-3-1103, 52-1-103, 52-2-603, 53-1-405, 53-1-601, 53-1-602, 53-2-201, 53-6-101, 53-6-113, 53-6-116, 53-6-701, 53-6-705, 53-6-706, 53-21-139, 53-21-202 and 53-21-702, MCA

37.89.115 MENTAL HEALTH SERVICES PLAN, PROVIDER PARTICIPATION (1) through (1)(b) remain the same.

(2) Providers in the following categories may request enrollment in the plan:

~~(a) residential treatment facilities;~~

~~(b) therapeutic youth group homes and therapeutic family care providers;~~

~~(c)~~ (a) mental health centers;

~~(d)~~ (b) psychiatrists;

~~(e)~~ (c) primary care providers, as defined in ARM 37.86.5001(18);

~~(f)~~ (d) licensed psychologists;

~~(g)~~ (e) licensed clinical social workers;

~~(h)~~ (f) licensed professional counselors; and

~~(i)~~ (g) outpatient pharmacies~~; and~~.

~~(j) outpatient psychiatric partial hospitalization providers.~~

(3) The department may, in its discretion, enroll as providers individuals or entities in the categories of providers specified in (2) if they apply for enrollment, if they are appropriately licensed, certified, or otherwise meet the minimum qualifications required by the department for the category of service, and if they agree to the terms of the provider agreement.

(a) through (a)(i)(B) remain the same.

(b) A provider who is denied enrollment has no right to an administrative review or fair hearing as provided in ARM

37.5.304, et seq., ~~46.12.409, 37.5.310, 46.12.1268~~ or any other department rule.

(c) through (4)(b) remain the same.

(c) The department may collect from a provider any overpayment under the plan as provided with respect to medicaid overpayments in ARM 37.85.406(9) through (10)(b). The department may recover overpayments by withholding or offset as provided in ARM 37.85.513(1).

(i) The notice and hearing provisions of ARM 37.85.512 ~~and 46.12.409~~ apply to a department overpayment determination under (4)(c).

(d) through (d)(ii) remain the same.

(iii) The notice and hearing provisions of ARM 37.85.512 ~~and 46.12.409~~ apply to a department sanction determination under (4)(d).

(5) An enrolled provider has no right to an administrative review or fair hearing as provided in ARM 37.5.304, et seq., 37.85.411~~, 46.12.409, 37.5.310, 46.12.1268~~ or any other department rule for:

(a) through (7) remain the same.

AUTH: Sec. 2-4-201, 41-3-1103, 53-2-201, 53-6-113 and 53-21-703, MCA
IMP: Sec. 2-4-201, 41-3-1103, 53-1-601, 53-2-201, 53-6-113, 53-6-116, 53-6-701, 53-6-705, 53-21-202 and 53-21-702, MCA

37.89.125 MENTAL HEALTH SERVICES PLAN, PROVIDER REIMBURSEMENT (1) Reimbursement of enrolled providers for mental health services covered under the plan and provided to plan members is as provided in ARM Title 37, chapters 5, 40, 82, 85, 86 and 88 for the same service or category of service under the Montana medicaid program, except as otherwise provided in this subchapter.

(a) and (a)(i) remain the same.

~~(b) For inpatient psychiatric services provided to a plan member in a residential treatment facility, the reimbursement rate shall be the medicaid rate provided in ARM 37.88.1106, less the amount of the educational component rate as established by the Montana office of public instruction. The educational component rate is available upon requests from the department's addictive and mental disorders division.~~

~~(c) For the room and board component of therapeutic youth group home and therapeutic youth family care, the rate is the lesser of:~~

~~(i) the amount specified in the department's mental health services plan fee schedule; and~~

~~(ii) the provider's usual and customary charges (billed charges).~~

~~(d) If a child or adolescent is in the custody of the state of Montana, the room and board component of therapeutic youth group home and therapeutic youth family care will not be paid by the mental health services plan.~~

~~(e) If a child or adolescent is on a therapeutic home leave, the room and board component of therapeutic youth group~~

~~home and therapeutic youth family care will not be paid by the mental health services plan.~~

(2) through (4) remain the same.

AUTH: Sec. 53-2-201, 53-6-113 and 53-21-703, MCA
IMP: Sec. 53-1-601, 53-2-201, 53-6-101, 53-6-116, 53-6-701, 53-6-705, 53-21-202 and 53-21-702, MCA

3. The Department of Public Health and Human Services is proposing these amendments to make permanent the emergency rules adopted by the Department effective August 16, 2002. The Department is facing imminent and substantial budget shortfalls in the Montana Medicaid Mental Health program and the Mental Health Services Plan. Section 17-8-104, MCA subjects public officials to civil penalties if they fail to keep expenditures, obligations and liabilities within the amount of the legislative appropriation as required by 17-8-103, MCA. Therefore, in addition to other cost saving measures, it is necessary for the Montana Medicaid Mental Health program and the Mental Health Services Plan (MHSP) to reduce expenditures.

The proposed amendments would limit expenditures for children's Medicaid mental health services to youth with serious emotional disturbances, unless treatment is determined on a case-by-case basis to be necessary for early intervention and treatment of a more serious emotional disturbance; to limit expenditures for adult Medicaid mental health services to individuals with severe disabling mental illness; and to eliminate MHSP services for youth who are eligible for Children's Health Insurance Plan (CHIP) benefits. The Department is also taking this opportunity to propose the updating of obsolete references and the correction of clerical mistakes in the effected rules.

ARM 37.88.101

The Department is amending the authorization requirements for Medicaid mental health services provided for in ARM 37.88.101. Recipients under the age of 18 years must be determined to have a serious emotional disturbance as that term is defined in ARM 37.86.3702, or be determined on a case-by-case basis to require early intervention and prevention of a more serious emotional disturbance. Recipients 18 or more years of age must be determined to have a severe disabling mental illness as that term is defined in ARM 37.86.3502 before authorization can be granted.

The serious emotional disturbance determination has been a standard requirement for youth to receive mental health services such as case management services and partial hospitalization services. The severe disabling mental illness determination has been a standard requirement for persons aged 18 or more years to receive mental health services such as case management services and adult day treatment services. The proposed amendment would extend those determinations to all Medicaid mental health

services, except when a recipient under the age of 18 requires the services to prevent development of a more serious emotional disturbance than they currently suffer.

ARM 37.89.106

MHSP eligibility standards would be amended to eliminate eligibility for persons under the age of 19 years who are eligible for CHIP. To be eligible for MHSP, persons under the age of 19 must have applied for and been denied CHIP coverage.

ARM 37.89.114

Consistent with the amendments to ARM 37.89.106, MHSP covered services would be amended to eliminate residential treatment facility services and the therapeutic component of therapeutic youth group home care and therapeutic family care services for children and adolescents covered by CHIP. Those persons would no longer be eligible for MHSP services.

The Department is taking this opportunity to update the address for obtaining a copy of the current psychotropic drug formulary. The address update is for administrative purposes only and is not intended to change any substantive provision of the rule.

ARM 37.89.115

In accordance with the amendments to ARM 37.89.114, the references to residential treatment facilities, outpatient psychiatric partial hospitalization, therapeutic youth group homes and therapeutic family care are deleted from the list of potential MHSP providers.

The Department is taking this opportunity to delete references to repealed ARM 46.12.409, 46.12.1268 or both in (3)(b), (4)(c)(i), (4)(d)(iii) and (5) referring to hearing rights. The Department also deleted redundant references to ARM 37.5.310 in (3)(b), (4)(c)(i) and (5). The Department believes the references to ARM 37.5.310 are unnecessary because that rule would be included in the preceding reference to hearing procedures in ARM 37.5.304, et seq. The deletions are for administrative purposes only and are not intended to change any substantive provisions of the rule.

ARM 37.89.125

The provisions in ARM 37.89.125, the MHSP reimbursement rule for therapeutic youth group homes and therapeutic family care, would be deleted. This amendment would be consistent with the elimination of MHSP coverage of those services in ARM 37.89.114.

Fiscal impact

If adopted, the Department expects these proposed amendments

would reduce total annual state and federal expenditures for Medicaid mental health and Mental Health Services Plan by $3,855,467, including $936,445 annual savings to the state general fund.

If adopted, the Department expects that these amendments would reduce costs to the Medicaid mental health program as follows: the amendment of Medicaid mental health authorization requirements so that only services to youths and adolescents with serious emotional disturbance will be approved is expected to save a total of $1,796,075 annually including $486,198 state general fund dollars for state fiscal year 2003; and the amendment limiting adult services to individuals with severe disabling mental illness is expected to save a total of $738,825 annually including $200,000 state general fund dollars for state fiscal year 2003.

Persons affected

The Department expects these proposed amendments would affect approximately 2,200 beneficiaries enrolled in Montana Medicaid and the Mental Health Services Plan and as many as 500 providers of these services.

4. Interested persons may submit their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210 no later than 5:00 p.m. on November 14, 2002. Data, views or arguments may also be submitted by facsimile (406)444-1970 or by electronic mail via the Internet to dphhslegal@state.mt.us. The Department also maintains lists of persons interested in receiving notice of administrative rule changes. These lists are compiled according to subjects or programs of interest. For placement on the mailing list, please write the person at the address above.

5. The Office of Legal Affairs, Department of Public Health and Human Services has been designated to preside over and conduct the hearing.

Dawn Sliva
Rule Reviewer

/s/ Gail Gray
Director, Public Health and Human Services

Certified to the Secretary of State October 7, 2002.

**BEFORE THE FISH, WILDLIFE AND PARKS COMMISSION
OF THE STATE OF MONTANA**

In the matter of the adoption of a new rule creating a no wake zone on Hebgen Lake	))))	NOTICE OF ADOPTION

TO: All Concerned Persons

1. On April 25, 2002, the Fish, Wildlife and Parks Commission (commission) published notice of the proposed adoption of new rule I (ARM 12.11.2308) creating a no wake zone on Hebgen Lake at page 1156 of the 2002 Montana Administrative Register, Issue Number 8.

2. The commission adopted new rule I (ARM 12.11.2308) with the following changes to the original proposal. Matter to be deleted is interlined. Matter to be added is underlined.

NEW RULE I (ARM 12.11.2308) HEBGEN LAKE (1) Hebgen Lake is located in Gallatin County.

(2) Hebgen Lake is limited to a controlled no wake speed as defined in ARM 12.11.101 in the following areas:

(a) Rainbow Point Bay ~~within 300 feet of the shoreline~~ no wake or as buoyed;

(b) Loneshomehurst ~~Summer Homes and~~ Campground within ~~300~~ 200 feet of the shoreline or as buoyed;

~~(c) Romsett Summer Homes area within 300 feet of the shoreline and moored boats or as buoyed;~~

~~(d)~~(c) Kirkwood Resort Marina and residential area and private marina within 200 feet of the shoreline or as buoyed;

~~(e)~~(d) Happy Hour Marina within 200 feet of the docks or as buoyed;

~~(f)~~(e) Yellowstone Holiday Marina within 200 feet of the docks or as buoyed; and

~~(g)~~(f) Madison Arm Resort within ~~300~~ 200 feet of the docks or as buoyed~~; and~~.

~~(h) Lakeshore Summer Homes within 200 feet of shoreline or as buoyed.~~

AUTH: 23-1-106, 87-1-303, MCA
IMP: 23-1-106, 87-1-303, MCA

3. A summary of the comments received during the rulemaking process appears below with the commission's responses:

Comment 1: Thirteen individuals believed there was a need for the additional no wake zone areas on the lake. These individuals had concerns about excessive speed and reckless behavior endangering other recreational uses, including swimmers, anglers, non-motorized boaters, etc.

Response: The commission recognizes Hebgen Lake as a multi-recreational use area. The commission is also aware of the need to provide a safe, enjoyable recreational experience to all users of the area. Currently, the department and commission are looking into additional measures, including additional enforcement efforts in the area, new rules and regulations governing recreational use of the area, and restricted no wake zones on and near shorelines. The commission places personal safety as a high priority for recreation.

Comment 2: The commission heard two comments relating experiences of witnessing accidents and near-accidents caused by unsafe speeds within the limits of the proposed no wake zone.

Response: While regulations cannot guarantee that no accidents will occur, the commission believes that this rule will promote safety and reduce accidents.

Comment 3: Two individuals expressed a concern that water-skiing activities close to shore are negatively impacting the recreational opportunity and enjoyment of gulper anglers and other users of the area, and other boaters entering and leaving the marina.

Response: Gulper angling generally occurs during the fall of the year after Labor Day, during periods of low motorized recreational activity. Hebgen Lake is a recreational area used by individuals with many different interests, and the commission strives to provide an equitable, enjoyable outdoor recreational experience to all those who utilize the resource.

Comment 4: Twenty-three comments expressed doubt that a need for new rule I (ARM 12.11.2308) exists in light of the absence of a significant number of accidents having occurred in the area. Some individuals stated that accidents can happen either within or outside of a no wake zone, and inconsiderate boating can occur anywhere.

Response: The commission began this process because of complaints received regarding boating conflicts. Many citizens are concerned that current conditions could very well lead to accidents in the future and believe there is a need for protective measures to be put in place. It is the commission's judgment, based on both witnessed accidents and near-misses, that without regulation accidents are more likely to occur in areas regulated under this rule.

Comment 5: One individual suggested regulating the direction of boat traffic in some areas of the lake as a solution to hazardous congestion caused by increased boating traffic.

Response: The proposed regulation is designed to deal with safety issues concerning water recreational conflicts associated with speed. Circular, one-way traffic will not eliminate these problems.

Comment 6: One individual stated that the new rule would be impossible to enforce without buoys, and that the buoys required to delineate no wake zones are visually offensive.

Response: What constitutes a distasteful visual impact is a subjective judgment that varies from one person to another. It is the commission's position that public safety issues override visual aesthetics.

Comment 7: The commission heard four comments suggesting that education on water sports safety, through posting of laws, pamphlets, community involvement, or the development of committees, would be more effective than a no wake zone.

Response: The department has water safety educational and informational materials available. Montana's water safety pamphlets and motorboat home-study courses are available at all department offices. Boating law booklets are available at most county treasurer offices where boats must be registered. Information is also available at the department website fwp.state.mt.us. Additionally, information is available from the local warden, Jim Miller, (406) 646-7968 or boat education coordinator, Liz Lodman, (406) 444-2615. The commission and department encourage community involvement in educating the public about boating laws and water safety. Boaters are responsible for familiarizing themselves with the boating laws.

It is the opinion of the commission that most individuals respond favorably to public education efforts. Unfortunately, even with the best information available, not all individuals choose to behave in a responsible, safe manner. When these individuals choose to conduct themselves in a manner that puts other citizens at risk, regulations need to be in place so that enforcement officials can stop the dangerous conduct and provide consequences to those who choose an irresponsible course of action.

Comment 8: The commission heard two comments suggesting that personal water safety is an individual and family responsibility and should not be imposed by government.

Response: The commission agrees that citizen self regulation on Montana's waters is always preferable to government regulation. However, what is considered safe boating practice by one recreator may be considered dangerous by another. If all recreators were in agreement as to how recreators should use watercraft on Hebgen Lake, rulemaking would not have been initiated. The commission has the authority and duty to

establish regulations on the use of public waters to promote public health, safety and welfare and protect property and public resources.

Comment 9: The commission received 30 comments regarding the need to train young water skiers in shallow water near shore for safety reasons and so that adults can physically attend to them in the water.

Response: After evaluating public comment, the commission changed the original rule proposal to eliminate the no wake zone in the Loneshomehurst, Romsett, and Lakeshore summer homes areas. The commission approved this change in response to members of the public who firmly believe that the no wake areas are not necessary in these areas and that area users are working together to promote safety. If safety concerns increase in these areas, further regulation may be considered.

Comment 10: The commission heard one comment stating that additional regulations should be imposed only after problems with anglers and skiers have arisen.

Response: The rulemaking process began in response to complaints and user conflicts currently occurring in the area. Whenever possible, the commission believes establishing rules to prevent accidents and fatalities is preferable to waiting until they occur to begin rulemaking.

Comment 11: The commission received five comments expressing concern that the suggested rulemaking is intended to penalize those who use personal watercraft (PWC's).

Response: The issue of a no wake zone area is not intended to single out PWC's. The issue is being addressed from a public safety standpoint that includes all motorized and non-motorized watercraft. PWC's already fall under statewide boating laws and are regulated the same as other motorized watercraft.

Comment 12: The commission received 10 comments desiring adequate and additional enforcement of existing regulations, such as those intended to curb reckless driving. Eight of the 10 individuals thought better enforcement of existing regulations would eliminate the need for the new rule.

Response: The commission recognizes the need for enforcement of regulations that exist for the area. The commission does provide enforcement in the area concerned. Unfortunately, not all violations of regulations occur in the presence of our enforcement staff. The duties of our enforcement personnel are varied, and coverage of all our recreational resources is extremely difficult.

While increasing the level of enforcement presence is desirable, enforcement can be done only where regulation exists. The addition of a no wake zone would allow enforcement personnel another tool to effectively deal with dangerous or reckless circumstances when they occur.

Comment 13: The commission heard one comment stating that anglers use areas throughout the lake, rather than only those close to shore, so a no wake zone would not eliminate conflicts between boaters and anglers.

Response: The rule is intended to address and reduce user conflicts in current areas of congestion.

Comment 14: Nine individuals stated that there is no current congestion problem in existence in the area, and that the proposed restrictions would concentrate boating traffic in the middle of the lake, causing a hazardous situation.

Response: This new rule was developed as a result of complaints and concerns over current congestion/conflict areas. The proposed rule affects a small proportion of the overall area of Hebgen Lake. There is currently congestion in the areas regulated by the new rule; eliminating some of this congestion will not significantly create congestion in the center of a lake as large as Hebgen.

The commission's objective in adopting this rule is to slow down the vessels in congested areas and docks and protect the safety of individuals engaging in near-shore activities while not adversely affecting the concentrations in the middle of the lake. Many of the activities that take place near shore are activities like swimming, fishing from shore or dock, and operation of manually powered vessels. Accidents occurring between individuals engaging in these near-shore activities and motorized watercraft traveling at high speeds would have tragic results.

Comment 15: Five individuals expressed concern that the proposed regulations would inhibit the ability of Big Sky Kids, children's athletic groups, and church groups to utilize the area.

Response: The commission does not wish to inhibit any group's ability to recreate on Hebgen Lake. As stated in the response to comment nine, the commission changed the new rule to provide for near-shore motorized activity in the Romsett, Loneshomehurst, and Lakeshore Summer Homes areas. It is the hope of the commission that individuals taking charge of youth or church groups would have safety foremost in mind and would not want to operate motorized watercraft at high rates of speed in the areas regulated under this rule where accidents are more likely to occur. Hebgen Lake offers other areas

where activities that require speed can safely take place. Safety is of paramount importance in dealing with this issue.

Comment 16: The commission heard two comments regarding the taxes and resources that may be spent, should additional staff be required to enforce new regulations.

Response: The commission does not intend to hire additional staff to enforce the new rule. The existing staff will now have an additional enforcement tool which the commission hopes will promote safety on Hebgen Lake.

Comment 17: The commission heard two comments stating that the comment period allowed for this issue was too short, and that the proposal was not communicated to those in the community to a satisfactory degree.

Response: The commission followed, and even exceeded, the process mandated by the Montana Administrative Procedure Act in adopting this rule. An article in the West Yellowstone News described the proposed rule and the opportunity for public comment on the rule. In addition, the rule proposal notice was mailed out to a list of 240 individuals or businesses that region 3 personnel could determine live on or have an interest in the management of Hebgen Lake.

The proposed rule and notice of public hearing was published in the Montana Administrative Register, giving the date, time and location of the public hearing and the address where written comment could be mailed, faxed or emailed. A telephone number was also included in the notice for individuals who wished to express their comments by telephone. A public hearing was held on May 28, 2002, in West Yellowstone. Fifty-one people attended that meeting and many offered comments. The commission also accepted written public comment from the date of the rule proposal notice publication on April 25, 2002, until June 3, 2002.

Comment 18: The commission heard one comment citing the windy nature of Hebgen, and the subsequent difficulty in finding adequately flat water surface in the middle of the lake on which to ski at certain times of day.

Response: The proposed rule is designed to deal with the safety issues, while taking into account and limiting the impact on water recreational activities.

Comment 19: The commission heard one comment suggesting that the time required to drop off and pick up water skiers on shore at no wake speed would be excessive.

Response: The time required to pick up and drop off water skiers on shore would be time well spent if it ensured the safety of recreationists.

Comment 20: The commission heard one comment stating that property rights are at stake within this issue.

Response: The rule is a policy decision of the commission that some citizens may see as a restriction while other citizens may view it as a protection of their interests. These rules are adopted under the authority of the commission to establish regulations on the use of public waters for public health, public safety, public welfare, and protection of property and public resources. The commission has statutory authority to adopt the rules, and the authority is constitutional under the general police powers of the state to reasonably regulate the conduct of its citizens. Therefore, the new rules do not infringe on any of the rights of citizens.

Comment 21: The commission received three written comments expressing a wish to limit or ban the use of PWC's in the area.

Response: The suggested restrictions are outside the scope of this rule issue and rulemaking process. The purpose of this rule is to prevent accidents by slowing watercraft in heavy use areas. While some individuals expressed their dislike for PWC's, the commission believes that most PWC operators are responsible and obey the law. PWC users, along with other users of motorized watercraft, pay motor fuel taxes which build and maintain fishing access sites and other recreation areas.

Comment 22: The commission received eight written comments expressing a concern that recreational activities other than water-skiing have not been given due consideration. Water-skiing activities close to shore are negatively impacting the recreational opportunity and enjoyment of other users of the area.

Response: The commission recognizes that anglers, and other recreators not using motorized watercraft, use Hebgen Lake. However, the commission does not desire to be any more restrictive than absolutely necessary when adopting rules. This rule was proposed in the interest of public safety. The commission believes the new rule will increase public safety on Hebgen Lake.

Comment 23: The commission received three comments on the concern of waves/wakes causing damage to boats and shoreline degradation.

Response: The purpose of this rule is to slow boating traffic in heavily used areas in the interest of safety and protecting property and natural resources.

By: /s/ Dan Walker
Dan Walker, Chairman
Fish, Wildlife and Parks Commission

By: /s/ Rebecca Dockter
Rebecca Dockter
Rule Reviewer

Certified to the Secretary of State October 7, 2002

**BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA**

In the matter of the amendment of ARM 17.8.505, 17.8.510 and 17.8.514 pertaining to air quality operation fees, annual review of air quality permit fees, and open burning fees	NOTICE OF AMENDMENT (AIR QUALITY)

TO: All Concerned Persons

1. On June 27, 2002, the Board of Environmental Review published a notice of public hearing on the proposed amendment of the above-stated rules at page 1692, 2002 Montana Administrative Register, issue number 12.

2. The Board has amended the rules exactly as proposed.

3. The following comment was received and appears with the Board's response:

Comment No. 1: PPL Montana's position is that a cap of $500,000 should be placed on the fees assessed the Colstrip Units. Under any other alternative those units, along with the J.E. Corette plant, would pay almost 50 percent of the total fee assessment for the Department of Environmental Quality. PPL Montana does not receive services from the DEQ in that amount and believes that a cap is more equitable.

Response: The board believes that a fee cap is inequitable because it would apply to a single facility – Pennsylvania Power & Light (PP&L), Colstrip - at the cost of all other facilities in Montana. This result would be inequitable and in effect charge different costs per ton of pollutant based on the size of the source. As program costs rise, fee increases would be borne by all fee payers except PPL MT.

Capping the maximum fee paid by a facility shifts the burden of costs to facilities emitting fewer pollutants. This provides a competitive advantage to larger generating facilities. The board believes that fees based upon the amount of emissions provide an incentive to a facility to reduce emissions in order to reduce its costs. This is consistent with the statute authorizing collection of "an annual fee based on actual emissions." Section 75-2-220(2) (MCA 2001). A fee cap eliminates the incentive for a larger facility to minimize emissions and provides no positive incentive to reduce emissions already in excess of the capped amount.

The board believes that a fee cap cannot be considered because fees assessed under a fee schedule that includes a cap would be substantially higher than the $17.89 rate contained in the notice. Therefore, consideration of a fee cap would be outside of the scope of the notice of proposed rulemaking.

BOARD OF ENVIRONMENTAL REVIEW

By: *Joseph W. Russell*
JOSEPH W. RUSSELL, M.P.H.
Chairman

Reviewed by:

David Rusoff
DAVID RUSOFF, Rule Reviewer

Certified to the Secretary of State, October 7, 2002.

BEFORE THE PETROLEUM TANK RELEASE COMPENSATION BOARD OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.58.326 pertaining to applicable rules governing the operation and management of petroleum storage tanks	NOTICE OF AMENDMENT (PETROLEUM BOARD)

TO: All Concerned Persons

1. On August 15, 2002, the Petroleum Tank Release Compensation Board published a notice of public hearing on the proposed amendment of the above-stated rule at page 2055, 2002 Montana Administrative Register, issue number 15.

2. The Board has amended the rule as proposed, but with the following changes, deleted matter interlined, new matter underlined:

17.58.326 APPLICABLE RULES GOVERNING THE OPERATION AND MANAGEMENT OF PETROLEUM STORAGE TANKS (1) As used in 75-11-308(1)(e), MCA, the term "applicable state rules" means:

(a) through (d)(ii) same as proposed.

3. The following comment was received, and appears with the Board's response:

COMMENT NO. 1: The Department of Environmental Quality (department) commented that ARM 17.58.326(1) must be modified from its original proposal to more specifically cite the statutory provision which includes the term "applicable state rules".

RESPONSE: The amendment has been modified to cite section 75-11-308(1)(e), Montana Code Annotated (MCA), rather than section 75-11-308, MCA, at ARM 17.56.326(1).

Reviewed by: PETROLEUM TANK RELEASE COMPENSATION BOARD

James M. Madden
JAMES M. MADDEN
Rule Reviewer

By: *Tim Hornbacher*
TIM HORNBACHER
Chairman

Certified to the Secretary of State October 7, 2002.

BEFORE THE BOARD OF REALTY REGULATION
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of ARM 8.58.301, 8.58.406A, 8.58.411, 8.58.414, 8.58.415A, 8.58.415B, 8.58.415C, 8.58.419, 8.58.423, 8.58.425, 8.58.426, 8.58.709, 8.58.710, 8.58.711, and 8.58.713, all pertaining to realty regulation matters	)	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On, August 15, 2002, the Board of Realty Regulation published a notice of proposed amendment of the above-stated rules at page 2146, 2002 Montana Administrative Register, Issue Number 15.

2. The Board has amended ARM 8.58.301, 8.58.406A, 8.58.411, 8.58.414, 8.58.415A, 8.58.415B, 8.58.415C, 8.58.419, 8.58.423, 8.58.425, 8.58.426, 8.58.709, 8.58.710, 8.58.711, and 8.58.713 exactly as proposed.

3. No comments or testimony were received.

BOARD OF REALTY REGULATION
JOHN BEAGLE, CHAIRMAN

/s/ WENDY J. KEATING
Wendy J. Keating, Commissioner
DEPARTMENT OF LABOR & INDUSTRY

/s/ KEVIN BRAUN
Kevin Braun,
Rule Reviewer

Certified to the Secretary of State, October 7, 2002.

**BEFORE THE BOARD OF SOCIAL WORK EXAMINERS AND PROFESSIONAL COUNSELORS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA**

In the matter of the amendment of ARM 8.61.1201 pertaining to licensure requirements	))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On May 16, 2002, the Board of Social Work Examiners and Professional Counselors published a notice of the proposed amendment of the above-stated rule at page 1388, 2002 Montana Administrative Register, Issue Number 9.

2. The Board met on September 6, 2002. The Board has amended ARM 8.61.1201 exactly as proposed.

3. The Board received two written comments on the proposed rule amendment. The Board has thoroughly considered the comments received. A summary of the comments received and the Board's responses are as follows:

8.61.1201 LICENSURE REQUIREMENTS:

Comment 1: One commenter supported granting licensure to counselors licensed in another state with a minimum of a 45-semester hour degree and allowing five years to obtain the 60-semester hours required, as an improvement over the current requirement. The commenter also suggested allowing these individuals to obtain the additional hours through workshops and other sources.

Response 1: The Board thanks the commenter and states that the current academic requirement has been in statute since 1985. Therefore, the Board may not license individuals currently licensed in another state unless they meet the academic requirement. A 1995 amendment to the statute allows individuals with a 45-semester hour degree to obtain the credit hours needed to equal the 60-semester hour requirement, and gain licensure in Montana, within a five-year period. As well, because the credit hours are specified in 37-23-202(2), MCA as "additional graduate credit hours", they must be from an institution accredited to offer such courses.

The proposed rule only clarifies the current statutory requirements, as requested by a legislative audit, which found the board did not have a specific rule as needed in 37-23-202(2), MCA. The Board further stated that the proposed rule did not allow for licensure of an individual with a 45-semester hour degree.

Comment 2: Another commenter opposed the amendment if it would lessen the licensure requirements for counselors, and also expressed confusion as to why the proposed amendment was necessary.

Response 2: The Board thanks the commenter and points out that the proposed rule amendment is not a lessening of the current licensure requirements, and stated that the statute requiring academic credit hours has been in place since 1985 [37-23-202(1), MCA]. A 1995 amendment to the statute provides that individuals possessing a minimum of a 45-semester hour degree could apply for licensure and obtain the credit hours needed to equal a 60-semester hour degree. The proposed rule amendment simply clarifies the statute as required by a legislative audit, which found that the Board previously did not have a specific rule as required in 37-23-202(2), MCA.

BOARD OF SOCIAL WORK EXAMINERS
AND PROFESSIONAL COUNSELORS
RICHARD SIMONTON, PRESIDENT

By: /s/ WENDY J. KEATING
Wendy J. Keating, Commissioner
DEPARTMENT OF LABOR & INDUSTRY

By: /s/ KEVIN BRAUN
Kevin Braun
Rule Reviewer

Certified to the Secretary of State, October 7, 2002.

**BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
OF THE STATE OF MONTANA**

**In the matter of the adoption) NOTICE OF ADOPTION
of New Rules I through XVIII)
pertaining to investigating)
complaints of discrimination)**

TO: All Concerned Persons

1. On April 25, 2002, the Department of Labor and Industry published a notice of proposed adoption of the above stated rules at page 1158, 2002 Montana Administrative Register, issue number 8.

2. A public hearing was held in Helena on May 17, 2002. Members of the public attended the hearing and offered oral comments. In addition, a number of written comments were received prior to the closing of the comment period on May 24, 2002.

3. After consideration of the comments, the Department has adopted the following rules as proposed with the following changes, stricken matter interlined, new matter underlined:

NEW RULE I (24.8.101) PURPOSE AND SCOPE OF RULES; EFFECT OF PARTIAL INVALIDITY (1) through (4) same as proposed.

(5) The department may disregard nonprejudicial errors of law or procedure which do not deny a party due process, a fair hearing or fundamental justice. Parties who assign error for the violation of any rule have the burden to demonstrate ~~must demonstrate~~ that a failure to comply with these rules is in fact prejudicial or constitutes prejudice as a matter of law.

(6) and (7) same as proposed.

**AUTH: 49-2-204, MCA
IMP: Title 49, chapter 2, MCA**

NEW RULE II (24.8.103) DEFINITIONS The following definitions apply throughout this chapter:

(1) through (6) same as proposed.

(7) "Notice of dismissal and right to sue" means a document which terminates the jurisdiction of the department over a complaint under the Act or Code and which allows a charging party or aggrieved party to file a discrimination action in district court.

(8) and (9) same as proposed.

**AUTH: 49-2-204, MCA
IMP: Title 49, chapter 2, MCA**

NEW RULE V (24.8.210) CONFIDENTIALITY AND RELEASE OF INFORMATION ~~(1) The department will release a copy of the~~

~~charge of discrimination in a manner consistent with Montana law.~~

~~(2)~~(1) The department finds that there is a compelling state interest in the elimination of illegal discrimination in Montana pursuant to Art. II, sec. 4 of the Montana Constitution (1972). The department also recognizes that the Montana Constitution expressly provides for an individual right of privacy in Art. II, sec. ~~9~~ 10. The department finds that in some cases, the interest of a person in viewing documents related to a complaint or an investigation will compete with individual privacy interests.

(3) through (3)(b) same as proposed, but are renumbered (2) through (2)(b).

(c) The department shall immediately refer a request for review under ~~(3)~~ (2)(b) to the hearings bureau, and the hearings bureau shall promptly provide the parties an opportunity to be heard regarding the internal decision, under hearings bureau procedures.

~~(4)~~(3) After a finding of reasonable cause or no reasonable cause or other agency action terminating the investigation of a case, the complaint, information obtained in the investigation of the complaint, and other information in the department file which does not relate to privacy interests protected by law, becomes public information. If a privacy interest is involved, the procedures as outlined in ~~(3)~~(2) ~~of this rule~~ shall apply.

(5) and (6) same as proposed, but are renumbered (4) and (5).

AUTH: 49-2-204, MCA
IMP: 49-2-501, 49-2-504 through 49-2-510, MCA

NEW RULE VI (24.8.201) FILING OF COMPLAINTS ~~AND AMENDMENT OF COMPLAINTS~~ (1) through (3) same as proposed.

~~(4) During the investigation of a complaint, a charging party may file an amended complaint, including a third party complaint, and a respondent may file a third party complaint, pursuant to Rules 14 and 15, M.R.Civ.P. to cure defects or omissions, or to clarify and amplify allegations, to bring the charge up to date in regard to a continuing pattern of occurrences, or to allege additional facts directly relating to or arising out of the subject matter of the original complaint. The charging party may file an amended complaint to swear or affirm that the charge is true. The charging party must submit a verified complaint before the bureau will require a response from the respondent. If the charging party does not submit a verified complaint, the bureau will not proceed further in investigating the complaint. All amendments shall relate back to the original filing date.~~

~~(a) The department shall accept an amended complaint or third party complaint filed with the department and over which the department has jurisdiction, unless, in its discretion, the department determines that there is insufficient time remaining~~

~~in the statutory period mandated by 49-2-504(4), MCA, to investigate the information alleged in the new filing.~~

~~(b) If the department determines that an amended complaint or third party complaint cannot be investigated in the time remaining pursuant to 49-2-504(4), MCA, it shall give notice to the charging party of its refusal to accept the filing as an amendment and shall accept the filing as a new complaint unless the department does not have jurisdiction over the filing as a new complaint. The department shall follow 49-2-501(4)(c), MCA, in determining whether it has jurisdiction over the filing as a new complaint. In those cases in which an amendment is filed so closely to the 180-day deadline that it cannot be investigated, the allegations of the amendment will be preserved in the final investigative report even though the allegations cannot be investigated.~~

(5) same as proposed, but is renumbered (4).

AUTH: 49-2-204, MCA
IMP: 49-2-210, 49-2-501 and 49-2-504, MCA

NEW RULE VII (24.8.203) FORM OF COMPLAINTS (1) same as proposed.

(2) For the purpose of timely filing, any signed written statement may be deemed a complaint if it sufficiently identifies parties and describes the actions being complained of. Such complaint may be verified by amendment after initial filing. ~~A charging party must submit a verified complaint before the bureau will require a response from the respondent. If the charging party does not submit a verified complaint, the bureau will not proceed further in investigating the complaint. If the charging party does not allege facts sufficient to constitute a claim that unlawful discrimination has occurred, the department will notify the charging party that the department does not have jurisdiction over the complaint, and the case will be dismissed unless the charging party amends the complaint to state a claim of discrimination.~~

(3) A charging party must submit a verified complaint before the bureau will require a response from the respondent. The department will notify the charging party of the obligation to submit a verified complaint. If the charging party does not submit a verified complaint, the bureau will dismiss the complaint.

(4) If the charging party does not allege facts sufficient to constitute a short and plain statement of the claim showing that the charging party is entitled to relief under Title 49, chapters 2 and 3, MCA, the department will notify the charging party that the department does not have jurisdiction over the complaint, and the case will be dismissed unless the charging party amends the complaint to state a valid claim.

(3) same as proposed, but is renumbered (5).

AUTH: 49-2-204, MCA
IMP: 49-2-501, MCA

NEW RULE IX (24.8.207) NOTICE OF FILING OF COMPLAINTS

(1) through (1)(e) same as proposed.

(f) advise the parties of their right to receive a copy of all other information submitted with the complaint and during the investigation and right to review their file; and

(g) same as proposed.

AUTH: 49-2-204, MCA
IMP: 49-2-301, 49-2-303, 49-2-305, 49-2-504 and 49-2-510, MCA

NEW RULE XII (24.8.216) EFFECT OF FAILURE TO COOPERATE WITH INVESTIGATION (1) When a charging party or an aggrieved party refuses to comply with a request by the department for information or evidence reasonably necessary for the investigation, conciliation or litigation of the complaint, or fails to advise the department of a change of address causing the department to be unable to locate them, the department shall dismiss the case and issue a notice of dismissal and right to sue, or shall dismiss so much of the complaint as relates to that charging party or aggrieved party.

(2) same as proposed.

AUTH: 49-2-204, MCA
IMP: 49-2-504, MCA

NEW RULE XIII (24.8.220) FINDING OF REASONABLE CAUSE OR NO REASONABLE CAUSE (1) and (1)(a) same as proposed.

(b) If the allegations of the complaint are not supported by a preponderance of the evidence, or if the department determines that it lacks jurisdiction over the complaint, the department will issue a finding of no reasonable cause. A finding of no reasonable cause will be accompanied by a notice of dismissal and right to sue in accordance with ARM 24.8.403.

AUTH: 49-2-204, MCA
IMP: 49-2-305, 49-2-504, 49-2-505, 49-2-506 and 49-2-507, MCA

NEW RULE XVI (24.8.403) DISMISSAL BY THE DEPARTMENT

(1) The department shall conclude the administrative proceedings and issue a notice of dismissal and right to sue if:

(a) through (d) same as proposed.

(2) A complaint may be dismissed ~~pursuant to (1)(c)~~ prior to investigation if the charging party ~~has not alleged facts sufficient to state a claim of unlawful discrimination~~ does not allege facts which, at a minimum, constitute a short and plain statement of the claim showing that the charging party is entitled to relief under Title 49, chapters 2 and 3, MCA, and has not timely amended the complaint to state ~~such~~ a valid claim.

(3) At any time after a complaint is filed, the department may issue a notice of dismissal and right to sue without prejudice if the parties and issues before the department are also before a court of competent jurisdiction and the court's decision will be determinative of the issues before the

department. If the court later finds that it does not have jurisdiction over a case in which the notice of dismissal and right to sue was issued because of the improper issuance of the notice, the charging party may apply to reopen the complaint before the department.

AUTH: 49-2-204, MCA
IMP: 49-2-509, MCA

NEW RULE XVII (24.8.405) DISMISSAL BY REQUEST OF A PARTY (1) Pursuant to 49-2-509, MCA, the department shall issue a notice of dismissal and right to sue at the request of any party to a case before the department if:

(a) and (b) same as proposed.

(2) The department may deny a party's request under (1) for the issuance of a notice of dismissal and right to sue if:

(a) the party requesting the issuance of the notice of dismissal and right to sue has waived the right to request filing in district court either by specific written waiver or by conduct constituting an implied waiver;

(b) the party requesting the issuance of the notice of dismissal and right to sue has filed the request more than 30 days after service of the notice of a hearing (20 days for complaints filed pursuant to 49-2-305, MCA), scheduled to be held within 90 days of the date of service of the notice of hearing; or

(c) the party requesting the issuance of a notice of dismissal and right to sue has unsuccessfully attempted through court litigation to prevent the department from investigating the complaint.

AUTH: 49-2-204, MCA
IMP: 49-2-305 and 49-2-509, MCA

NEW RULE XVIII (24.8.410) NOTICE OF DISMISSAL AND RIGHT TO SUE; OBJECTIONS TO DISMISSAL (1) The issuance of a notice of dismissal and right to sue completes the administrative process with regard to any complaint of discrimination in which a notice of dismissal and right to sue is issued.

(2) Each notice of dismissal and right to sue issued by the department shall be issued to all parties by certified mail or personal delivery and shall set forth the following information:

(a) through (c) same as proposed.

(d) a statement regarding the effect of the issuance of the notice of dismissal and right to sue as provided in (1); and

(e) a statement that the requirements for issuance of a notice of dismissal and right to sue have been satisfied.

(3) If a court finds that it does not have jurisdiction over a case in which the notice of dismissal and right to sue was issued because of the improper issuance of the notice, the charging party may apply to reopen the complaint before the department.

(4) A party who is dissatisfied with a decision of the department to issue or not issue a notice of dismissal and right to sue may file written objections with the commission as provided in ARM 24.9.1714.

AUTH: 49-2-204, MCA
IMP: 49-2-509, MCA

4. After consideration of the comments, the Department has adopted the following rules, exactly as proposed:

NEW RULE III (24.8.107) RECORD KEEPING REQUIREMENTS FOR EMPLOYERS

NEW RULE IV (24.8.105) APPLICABILITY OF COMMISSION RULES

NEW RULE VIII (24.8.205) INTAKE PROCEDURE

NEW RULE X (24.8.212) INVESTIGATION BY THE DEPARTMENT

NEW RULE XI (24.8.214) INVESTIGATIVE SUBPOENAS

NEW RULE XIV (24.8.301) CONCILIATION AND SETTLEMENT

NEW RULE XV (24.8.401) WITHDRAWAL OF COMPLAINT

5. The Department has thoroughly considered all of the comments made. The comments received, and the Department's responses, are as follows:

Comment 1: A commentor asked the department to clarify which entity has authority and jurisdiction pursuant to Title 49, chapters 1 and 4, MCA, and if it is the intent of the department to have investigators consider these chapters pursuant to NEW RULE I(3).

Response 1: The department's authority is limited to the enforcement of the provisions in Title 49, chapters 2 and 3, MCA. Title 49, chapter one, MCA outlines basic personal rights and is enforceable by parties through civil action. Pursuant to 49-4-102 and -215, MCA, a person who violates the provisions of Title 49, chapter 4, MCA commits a misdemeanor and is also liable in district court for civil damages and attorney fees. Violations of Title 49, chapters 1 and 4, MCA may be considered in other circumstances pursuant to Rule 404(b) of the Montana Rules of Evidence.

Comment 2: A commentor was concerned that NEW RULE I(5), allowing the department to disregard errors of law or procedure, conflicts with NEW RULE I(6) which does not allow the department to waive due process requirements.

Response 2: The department thanks the commentor for their input and has made minor amendments to clarify the language of NEW

RULE I(5). The intention of the department is to have a user-friendly process that does not elevate form over substance. Therefore, NEW RULE I(5) contains standard legal language to allow a complaint or response to go forward where it is technically deficient so long as the errors are not prejudicial.

Comment 3: A commentor asked if the new rules would be retroactive.

Response 3: The new rules will not be retroactively applied to cases currently pending with the department.

Comment 4: A commentor suggested that the department define the Right to Sue letter and refer to it in several locations.

Response 4: The department has amended relevant sections of the new rules to read: "Notice of dismissal and right to sue."

Comment 5: Two commentors were concerned about the confidentiality provisions of NEW RULE V. One commentor was particularly concerned because employers often provide private information regarding non-party employees and made several suggestions for changes.

Response 5: The department acknowledges the commentors' concerns about privacy. The department notes that NEW RULE V was drafted to develop a process to handle requests for information from outside individuals or organizations who are not parties to the complaint, and had made minor modifications to clarify the rule. The department specifically notes one commentor's interest in having the bureau make an initial determination. However, it is incumbent upon the party asserting privacy to be allowed to object and to allow a more formal process to resolve a dispute. The department, through the hearings bureau, can only make a decision after hearing the arguments of both parties in a manner consistent with the law. The department also notes that dissemination of material between the Human Rights Bureau and parties to the complaint is not covered by NEW RULE V; dissemination between parties is already governed by 49-2-504(1), MCA.

Comment 6: A commentor suggested the department's new rules should address those situations where there is a continuing violation.

Response 6: Where there is a continuing violation, per National Railroad Passenger Corporation (AMTRAK) v. Morgan, 356 U.S. ___, 122 S. Ct. 2061 (2002), at least one occurrence giving rise to the complaint must occur within the relevant statute of limitations. Under the Montana Human Rights Act, that period is 180 days. For this reason, the department considers the language of NEW RULE VI(2) adequate.

Comment 7: One commentor suggested that the department utilize the standards set forth in the Montana Rules of Civil Procedure in NEW RULE VI where they relate to the filing of amended complaints, third party claims and joinder of parties. Another commentor suggested that NEW RULE VI(4)(a) and (b) fail to adequately address situations in which additional discriminatory acts are discovered late in the investigative process. The commentor asked the department to insure that new claims are preserved, even if they are not investigated because of time constraints. They also asked the department to clarify that the amendment to the original charge would relate back to the original claim.

Response 7: In light of the comments received on NEW RULE VI(4), the department has decided not to adopt section (4) and has amended the rule title and renumbered the remaining sections of the rule accordingly. The Department will revise the language of section (4) and engage in further rulemaking at a later date. In the interim, the department will look to the Montana Rules of Civil Procedure for guidance on the issue of amended complaints.

Comment 8: One commentor inquired regarding the time and place when the Montana Rules of Civil Procedure (M.R.Civ.P) and the Montana Rules of Evidence (M.R.E.) might be used.

Response 8: The department acknowledges the commentor's question and notes that 49-2-204(2), MCA requires the Human Rights Commission adopt all applicable portions of M.R.Civ.P and M.R.E. However, the department conducts informal investigations pursuant to 49-2-504, MCA. Therefore, most rules of procedure and evidence apply after a final investigative report has been issued, i.e. when and if a case goes to the Human Rights Commission or a contested case hearing.

Comment 9: A commentor suggested that the department advise the charging party of the party's obligation to submit a verified complaint.

Response 9: Although NEW RULE VII(1)(d) states that a verified signature is required, the department acknowledges the commentor's suggestion, recognizes the need for clarification, and has amended NEW RULE VII accordingly.

Comment 10: Several commentors requested clarification in NEW RULE VIII of the procedures by which complaints are drafted. The commentors also expressed concerns about complaints being drafted by bureau staff.

Response 10: The department acknowledges the commentors' input and notes that individuals may file their own complaints pursuant to 49-2-501, MCA and these rules. It is department policy to conduct professional intakes and see complaints are properly drafted. This is also a condition of the department's contract with the EEOC.

Comment 11: A commentor suggested the department advise the parties of their right to review the department's file of their case at any time.

Response 11: The department agrees and has amended NEW RULE IX(1)(f) accordingly.

Comment 12: A commentor requested clarification regarding the charging party's obligation to serve the complaint on the respondent.

Response 12: Pursuant to NEW RULE IX, the department serves notice of the complaint on the respondent.

Comment 13: A commentor asked if NEW RULE IX would make reference to responses, rebuttals, and detailed statements or if a separate rule would govern these pleadings. The commentor also requested clarification regarding whether the parties are responsible for serving these documents on the opposing party or if the Bureau forwards them to the other party.

Response 13: The department declines to make a more specific reference to these documents in the rules at this time and considers them referenced in NEW RULE X as "written information requests," typically gathered during the informal investigation of a discrimination complaint. The department is responsible for forwarding relevant documents to the opposing party. Pursuant to 49-2-504(1)(a), MCA and NEW RULE IX, parties have the right to review the file of their case.

Comment 14: Several commentors requested clarification regarding what constitutes an investigation by the Bureau. They wanted the department to state the minimum standards that constitute an investigation and who would be contacted for an interview by the Bureau staff. One commentor suggested this clarification could be accomplished adopting verbatim ARM 24.9.218 in either NEW RULE I or NEW RULE X.

Response 14: The department acknowledges the comments and concerns about clarification of investigative procedures. However, such extensive amendment is beyond the scope of the proposed rules and would violate the notice and comment procedures of MAPA. The department may entertain a future amendment to the rule.

Comment 15: A commentor requested that the department change the word "may" to "shall" in NEW RULE X(2) and (3) and recommended the addition of language regarding requests for information. The commentor's concern was that permissive language did not provide for uniform investigation and adequate enforcement in all cases.

Response 15: The department acknowledges the commentor's interest in insuring that investigations are conducted in a

uniform manner, and insuring that conciliation agreements and Commission orders be enforced. However, the department believes that it is also important to preserve its flexibility in methods used to achieve compliance and will keep the word "may." There are many instances in which a respondent will voluntarily comply with various requests and orders, making it unnecessary to use investigative powers to enforce the agreement. The department declines to add the commentor's additional language because it would unduly restrict the department when requesting that the commissioner issue subpoenas.

Comment 16: A commentor was opposed to NEW RULE XI. The commentor was concerned that the rule places the onus of obtaining a subpoena onto the parties, instead of on the department which, under 49-2-203(2), MCA, is responsible for obtaining a subpoena to obtain information necessary to complete the investigation.

Response 16: The department agrees that the department is primarily responsible for obtaining subpoenas to gather evidence used in the investigation. However, the department simply proposed this rule to provide parties with additional information on how to request a subpoena. NEW RULE XI specifically incorporates the provisions of 49-2-203(3), MCA, and nothing in NEW RULE XI negates the department's responsibility and authority under 49-2-203(2), MCA.

Comment 17: A commentor inquired if the charging party and respondent are entitled to engage in discovery under the Montana Rules of Civil Procedure during the investigation of a discrimination complaint.

Response 17: No. The department will investigate discrimination claims using an informal process pursuant to 49-2-504(1)(a), MCA. The Montana Rules of Civil Procedure normally engage after the investigation is concluded and the case is certified for a contested case hearing.

Comment 18: A commentor suggested that the department change the first sentence of NEW RULE XII(1) to add the words "...willfully or intentionally refuse to comply...." The concern was that the rule as written has the potential to discriminate against people with cognitive disabilities or poor English proficiency because they may not understand the correspondence sent to them by the Bureau.

Response 18: The department declines to add this language because the word "refuse" already implies willful or intentional behavior. Therefore, NEW RULE XII already provides flexibility for the department to determine if a party has not complied with a request due to lack of understanding or due to a willful or intentional decision.

Comment 19: A commentor proposed that NEW RULE XII(2) incorporate ARM 24.9.221(2). They also encouraged the department to adopt the language of ARM 24.9.223(1) and (2).

Response 19: The department declines to adopt this suggestion because the language recommended by the commentor pertains to evidence admissible at a contested case hearing. The department believes that it is the role of the Hearings Bureau, and not the Human Rights Bureau, to determine what evidence is admissible at a contested case hearing.

Comment 20: A commentor suggested that that the department promulgate a new rule equivalent to ARM 24.9.223 regarding failure to produce evidence.

Response 20: The department declines to adopt this suggestion because NEW RULE XII(2) already outlines the consequences of a failure to produce evidence in an investigation. The rule explains that the department may draw an adverse inference against a party who does not produce the requested evidence. Further, ARM 24.9.223 deals with the rules for a contested case hearing and is thus the responsibility of the Hearings Bureau, not the Human Rights Bureau.

Comment 21: One commentor suggested NEW RULE XIII retain the lesser burden of substantial credible evidence as opposed to the higher burden of preponderance of the evidence.

Response 21: Pursuant to 49-2-504(1)(a), MCA, the department uses the preponderance of evidence standard. This standard was codified into the Montana Human Rights Act by the legislature in 1997. The department does not have the authority to alter a statute.

Comment 22: One commentor asked NEW RULE XIV be amended to allow the department to take a more active role in settlement and conciliation of cases filed with the department and made a number of specific suggestions.

Response 22: The department acknowledges the commentor's thoughtful suggestions and will review the conciliation process to determine if the current practice can be improved. However, the department cannot incorporate these suggestions at this time because they are beyond the scope of the proposed rules.

Comment 23: One commentor considered the first and second sentences of NEW RULE XIV(7) to be redundant.

Response 23: The department believes the sentences are not redundant, and that both sentences are necessary to preserve the ability of the department to take alternative courses of action.

Comment 24: One commentor suggested changing NEW RULE XIV(7) to replace the word "may" with "shall." They expressed concern that

the department had too much flexibility in deciding what happens in cases where a settlement results in the abandonment of third party or systemic claims.

Response 24: The department acknowledges the commentor's concerns but believes that it is important to preserve the department's flexibility in settling claims. The department further notes that 49-2-210(1), MCA authorizes the commissioner to initiate a complaint on behalf of the department and nothing within NEW RULE XIV(7) negates this authority. Third parties with standing are allowed to file their own complaints.

Comment 25: One commentor requested the reason or authority for the requirement of disclosure of private settlement agreements and clarification on what confidentiality rules apply to public disclosure of "private" settlement agreements.

Response 25: Under 2-6-202, MCA, materials made or received by a state agency in connection with the transaction of official business are public records. Article II, sec. 9 of the Montana Constitution provides that the public has a right to examine such documents except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure. Therefore, after the Human Rights Bureau has completed its informal investigation of a case or if it has been resolved, the Department is obligated under 2-6-102, MCA to make available to the public any documents that it has in its possession. However, the department is also obligated to balance the public right to know against the right of privacy. Therefore, the Department will follow the procedure set out in NEW RULE V when a request for a document is made by the public.

Comment 26: A commentor requests clarification on whether a withdrawal of a complaint pursuant to NEW RULE XV is also a withdrawal of an EEOC complaint.

Response 26: A withdrawal of a claim under NEW RULE XV and the Human Rights Act does not constitute a withdrawal of an EEOC claim.

Comment 27: A commentor proposed changing the last sentence of NEW RULE XV(1) to preserve third party claims when a complaint is dismissed.

Response 27: The department declines to make this change because third parties with standing may file their own complaints. The department further notes that 49-2-210(1), MCA authorizes the commissioner to initiate a complaint on behalf of the department and nothing in NEW RULE XV negates this authority.

Comment 28: A commentor asked the department to amend NEW RULE XVI(1)(c) to change the standard from "preponderance of the evidence" to "substantial evidence." The commentor was also concerned that requiring complainants to allege a prima facie

case and support it with a preponderance of evidence, prior to an investigation, places too high a burden on charging parties.

Response 28: The language of NEW RULE XVI(1) is taken verbatim from 49-2-509(3). The department does not have the authority to alter statutory language.

Comment 29: The same commentor proposed that NEW RULE XVI(2) be struck in its entirety or redrafted to clarify that a complaint will not be dismissed prior to an investigation if a charging party meets their initial burden to file with the agency.

Response 29: The department declines to strike section (2) but agrees that complaints will not be dismissed prior to an investigation if the charging party meets their initial burden. To clarify the standard required, the department has amended NEW RULE VII and NEW RULE XVI(2) to conform the initial filing requirements to the same "short and plain statement of the claim showing that the pleader is entitled to relief" standard required for a pleading to survive a motion to dismiss in a civil court per M.R.Civ.P 8(a) and 12(b)(6) and Swierkiewicz v. Sorema, 534 U.S. 506 (2002).

Comment 30: A commentor suggested adding a new subsection to NEW RULE XVII(1) to dismiss a claim when the party requesting the issuance of the notice of dismissal and right to sue letter has failed to comply with the terms of a lawful subpoena during the investigation.

Response 30: The department declines to add this language because it is of the opinion that NEW RULE XII and NEW RULE XVI adequately cover the commentor's concerns.

Comment 31: A commentor suggested that the department adopt a rule that provides that the aggrieved party be able to request a right to sue letter at any time. The commentor believes the aggrieved party should be able to choose their forum.

Response 31: It is the legislative intent that enforcement of Title 49, chapter 2, MCA is the responsibility of the department pursuant to 49-2-501(1), MCA. 49-2-509(3), MCA outlines the circumstances under which the department can dismiss a complaint. There is no provision in the statute that allows the department to dismiss a complaint upon the request of a party until administrative remedies have been exhausted, save for the provisions in 49-2-509(3), MCA.

6. The new rules are effective October 18, 2002.

/s/ KEVIN BRAUN	/s/ WENDY J. KEATING
Kevin Braun,	Wendy J. Keating, Commissioner
Rule Reviewer	DEPARTMENT OF LABOR & INDUSTRY

Certified to the Secretary of State: October 7, 2002.

BEFORE THE DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES OF THE STATE OF MONTANA

In the matter of the amendment of ARM 37.5.316 pertaining to continuation of public assistance benefits	))))	NOTICE OF AMENDMENT

TO: All Interested Persons

1. On August 15, 2002, the Department of Public Health and Human Services published notice of the proposed amendment of the above-stated rule at page 2172 of the 2002 Montana Administrative Register, issue number 15.

2. The Department has adopted ARM 37.5.316 as proposed.

3. No comments or testimony were received.

Dawn Sliva
Rule Reviewer

/s/ Gail Gray
Director, Public Health and Human Services

Certified to the Secretary of State October 7, 2002.

BEFORE THE DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES OF THE STATE OF MONTANA

In the matter of the amendment of ARM 37.80.202 pertaining to parent's copayment for child care services	))))	NOTICE OF AMENDMENT

TO: All Interested Persons

1. On August 15, 2002, the Department of Public Health and Human Services published notice of the proposed amendment of the above-stated rule at page 2175 of the 2002 Montana Administrative Register, issue number 15.

2. The Department has amended ARM 37.80.202 as proposed.

3. The Department has thoroughly considered all commentary received. The comments received and the department's response to each follow:

COMMENT #1: The department has not addressed the real problems with the budget. The department is playing politics with the $5 copayment. To add value to child care, and fund the program at the same time, real, substantial changes must occur. A 300% increase is a little deceiving with a copayment that is ridiculously low to begin with.

Early Childhood Services Bureau should not only consider, but act upon the following proposal: increase all copayments to a minimum of $25 per child, not just per family. A family with two children receiving scholarships that currently pays a $5 a month copayment would now pay $50 per month. All other copayments would also go up by $25. The amounts of funds that this would generate could be used to provide others with child care that might otherwise not qualify due to a lack of funding! Any parent with two children could understand that it would be better to pay $50, rather than $800 or more per month. This would be a hardship to no one, including parents on State assistance. Such an increase would add value to the program, allow more families to be served, and decrease waiting list time.

RESPONSE: Copayments are allocated on a sliding fee scale based on income and family size for families participating in the Best Beginnings Scholarship Program (child care assistance). Approximately 50% of participating families are responsible for copayments based on a percentage of family income, ranging from $29 to $487, or more. This rule changes the minimum copayment from $5 to $10 for families who have incomes below 95.5% of the federal poverty guidelines. Raising the minimum copayment helps fill the gap between $5 and copayments calculated as a percentage of a family's income, spreading some responsibility

for budget shortages to all families while maintaining a reasonable copayment for families with the lowest incomes. A growing percentage of these families participate in the TANF program and have incomes below 40.5% of the federal poverty guidelines. Some families have no income and must barter the value of their copayment. Regarding the rule comment, implementing a $25 per child copayment would be unmanageable for families who have very low incomes.

COMMENT #2: The Department appropriately considered the poor. The amendment should be adopted as proposed.

RESPONSE: The Department appreciates the comment and agrees.

Dawn Sliva
Rule Reviewer

/s/ Gail Gray
Director, Public Health and Human Services

Certified to the Secretary of State October 7, 2002.

**BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA**

In the matter of the adoption of New Rule I (42.4.107); New Rule II (42.4.108); New Rule III (42.4.109); New Rule IV (42.4.119) and New Rule V (42.4.120) relating to exemptions, reduced tax rates, and credits for energy facilities	)))))))	NOTICE OF ADOPTION

TO: All Concerned Persons

1. On August 29, 2002, the department published notice of proposed adoption of the above-stated rules relating to exemptions, reduced tax rates and credits for energy facilities at page 2308 of the 2002 Montana Administrative Register, issue no. 16.

2. No comments were received regarding these rules.

3. The department has adopted the rules as proposed.

4. An electronic copy of this Adoption Notice is available through the Department's site on the World Wide Web at http://www.state.mt.us/revenue/rules_home_page.htm, under the Notice of Rulemaking section. The Department strives to make the electronic copy of this Adoption Notice conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems.

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

/s/ Kurt G. Alme
KURT G. ALME
Director of Revenue

Certified to Secretary of State October 7, 2002

VOLUME NO. 49 OPINION NO. 23

ANNEXATION - Requirement for growth policy;
CITIES AND TOWNS - Authority for annexation and zoning with growth policy;
COUNTIES - Authority for expedited subdivision review and zoning based on adoption of a growth policy;
LAND USE - Requirements for adoption of growth policy;
MUNICIPAL GOVERNMENT - Authority for annexation and zoning with growth policy;
PLANNING - Requirements for adoption of growth policy;
SUBDIVISION AND PLATTING ACT - expedited review--growth policy requirement;
SUBDIVISIONS - expedited review--growth policy requirement;
ZONING - Requirements for adoption of a growth policy;
MONTANA CODE ANNOTATED - Title 7, chapter 2, parts 2, 42, 43, 44, 45, 46; Title 76, chapters 1, 2, parts 2, 3; sections 7-2-4201, -4301, -4401, -4501, -4601, 76-1-103(4), -107, -504, -601, -601(1), -606, 76-2-201, -203, -203(1), -206, -210, -304, -304(1), -306, -308(2), -4734, 76-3-210, -306, -505, -608;
MONTANA LAWS OF 1999 - Chapter 582;
OPINIONS OF THE ATTORNEY GENERAL - 43 Op. Att'y Gen. No. 37 (1990); 46 Op. Att'y Gen. No. 5 (1995).

HELD:

1. **A comprehensive plan adopted prior to October 1, 1999, has no legal effect as the basis for new local zoning or subdivision regulations unless it meets the requirements of a growth policy pursuant to Mont. Code Ann. § 76-1-601.**

2. **Zoning regulations lawfully adopted pursuant to master plans, comprehensive plans and comprehensive development plans prior to October 1, 2001, are valid and enforceable. However, after October 1, 2001, county and municipal zoning regulations authorized by Title 76, chapter 2, parts 2 and 3, may not be adopted or substantively revised unless a growth policy is adopted for the entire area of the planning board having jurisdiction.**

3. **A municipal governing body may not extend municipal boundaries, pursuant to the Planned Community Development Act of 1973, without conforming to a growth policy.**

4. **The expedited review provisions of the Subdivision and Platting Act may not be utilized without a compliant growth policy.**

5. **If a city or county has not developed a growth policy, interim zoning regulations may be implemented only when: there is an exigent**

circumstance related to public health, safety and welfare; the zoning measure reasonably relates to the exigency; and more formal planning processes are underway as required by statute. Failure to adopt a growth policy is not, in and of itself, an exigency that permits adoption of emergency interim zoning.

6. A growth policy must cover the entire planning board jurisdiction for zoning decisions to proceed.

September 26, 2002

Mr. Charles Harball
Kalispell City Attorney
P.O. Box 1997
Kalispell, MT 59903-1997

Mr. Fred Van Valkenburg
Missoula County Attorney
County Courthouse
200 W. Broadway
Missoula, MT 59802-4292

Dear Gentlemen:

You have requested my opinion on questions that I have framed as follows:

1. Does a comprehensive plan adopted prior to October 1, 1999, have any continuing legal effect after October 1, 2001, if it does not meet the current requirements of Mont. Code Ann. § 76-1-601?

2. If a city or county fails to adopt a growth policy, is it prohibited from zoning previously unzoned land, rezoning previously zoned land, and amending or enforcing existing zoning regulations?

3. If a city or county fails to adopt a growth policy, what annexation authority or subdivision review is authorized?

4. If a city or county fails to adopt a growth policy, when may an emergency interim zoning regulation be adopted pursuant to Mont. Code Ann. §§ 76-2-206 and 76-3-306?

5. When a city and county have established a joint planning board, must a growth policy be adopted

for the planning board's entire jurisdiction in order for zoning decisions to proceed?

In 1999 the Montana Legislature passed a bill generally revising laws relating to local planning and subdivision review. Montana Laws of 1999, chapter 582. Senate Bill 97 amended Mont. Code Ann. § 76-1-601, replacing the terms master plan, comprehensive plan, and comprehensive development plan with "growth policy" and specifying requirements that must be fulfilled for a community to adopt a growth policy. SB 97 also required that a growth policy cover the "entire" jurisdictional area and that it be reviewed every five years. Additionally, SB 97 substituted the term growth policy for "plan" throughout the Montana Code Annotated. 1999 Mont. Laws, chapter 582, section 34.

Pursuant to Mont. Code Ann. § 76-1-103(4), a growth policy is now defined as meaning and being "synonymous with, a comprehensive development plan, master plan, or comprehensive plan that meets the requirements of 76-1-601." SB 97 also included a transition clause as follows:

> Transition--applicability. A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001. The requirements for a growth policy in [Section 8], amending 76-1-601, apply to the adoption of zoning regulations pursuant to Title 76, chapter 2, part 2 or 3, after October 1, 2001.

1999 Mont. Laws, chapter 582, section 36.

In addressing the above-stated issues, I must follow the well-accepted principle of statutory construction that "statutory language must be construed according to its plain meaning and, if the language is clear and unambiguous, no further interpretation is required." Dahl v. Uninsured Employers' Fund, 1999 MT 168, ¶ 16, 295 Mont. 173, 178, 983 P.2d 363, 366. If language is ambiguous, however, the legislative history may be sought to derive its intent. 43 Op. Att'y Gen. No. 37 (1990).

I.

To implement the provisions of the act, communities must adopt a growth policy as defined in Mont. Code Ann. § 76-1-601. For example, Mont. Code Ann. § 76-3-210 now enables subdivision review to proceed without an environmental assessment *if* a growth policy is adopted, while Mont. Code Ann. § 76-2-201 authorizes county zoning initiated by the Board of County Commissioners *if* a growth policy exists. In both subdivision

and zoning statutes, SB 97 inserted the term "growth policy" for master plan, comprehensive plan, and comprehensive development plan. SB 97 standardized code language by replacing all references to a "plan" with "growth policy." Pursuant to Mont. Code Ann. § 76-1-103(4), a growth policy means a plan "that meets the requirements of 76-1-601," which was amended to include a list of requirements for the growth policy.

As noted above, the definition of growth policy states that a master plan is synonymous with a growth policy, but only if it meets the requirements of Mont. Code Ann. § 76-1-601. SB 97 explicitly linked the definition of a growth policy to the list of requirements in Mont. Code Ann. § 76-1-601 as amended. I am unconvinced by the argument that this language can be interpreted to mean that a master plan becomes a growth policy if it met the guidelines of Mont. Code Ann. § 76-1-601 before SB 97 amendments. Such a presumption runs contrary to the clear language of the amended statute. If any confusion persists, it is clear that the legislature understood that master plans in existence would not fully comply with the requirements of SB 97. Revising the Laws Relating to Local Planning and Subdivision Review: Hearing on SB 97 Before Senate Comm. On Local Gov., 56th Leg. Sess. 9 (Mont. 1999) (statement that no counties would comply 100 percent with this bill).

Section 36 of SB 97 also references a pre-SB 97 master plan in the bill's transition clause. The transition clearly allows zoning regulations to be adopted pursuant to a master plan until October 1, 2001, so long as the plan was adopted before October 1, 1999. However, after October 1, 2001, the requirements for a growth policy under Mont. Code Ann. § 76-1-601 apply to the adoption of zoning regulations. There is no language indicating that the legislature intended an old master plan to have continuing legal effect after the transition period expired. To the contrary, the transition explicitly requires local governments to conform to the new growth policy requirements when adopting zoning regulations after October 1, 2001.

Based on the totality of the SB 97 statutory amendments, I conclude that a comprehensive plan has no continuing legal effect as the basis for new local regulations after October 1, 2001, if it does not meet the current requirements of Mont. Code Ann. § 76-1-601. After October 1, 2001, the only mention of a master plan, comprehensive plan, or comprehensive development plan provided by SB 97 is in the growth policy definition that requires conformance with Mont. Code Ann. § 76-1-601. There is simply no statutory basis to conclude that the legislature intended a pre-SB 97 plan to have continuing legal effect when it was so thoroughly removed from all corners of the Montana Code Annotated.

II.

The above conclusion does not unravel lawful zoning implemented previous to October 1, 2001, but merely restricts further planning that is dependent upon adoption of a growth policy. As stated above, SB 97 amended Mont. Code Ann. § 76-2-201 to authorize county zoning without citizen petition only if a growth policy has been adopted for the entire jurisdictional area. For municipal zoning, Mont. Code Ann. § 76-2-304 provides in pertinent part: "(1) Zoning regulations must be made in accordance with a growth policy . . . ." Pursuant to this clear language, when read in context with the Section 36 transition clause, after October 1, 2001, no new zoning regulations may be adopted unless an SB 97-compliant growth policy has been adopted.

Similarly, a city or county does not have authority to substantively amend zoning regulations without an SB 97-compliant growth policy. Before SB 97, amendments to zoning regulations had to be made according to a "plan." An absurd result would be reached if zoning regulations were required to be adopted pursuant to a plan, but could be substantively amended without adhering to a similar planning document. See Little v. Board of County Comm'rs, 193 Mont. 334, 353, 631 P.2d 1282, 1293 (1981) (stating that "in reaching zoning decisions, the local governmental unit should at least substantially comply with the comprehensive plan (or master plan)").

As concluded above, a "plan" has no further legal effect unless it meets the requirements of a growth policy. The clear statutory language of Mont. Code Ann. §§ 76-2-203 and -304 requires zoning regulations to be made in accordance with a growth policy. Such a mandate applies to zoning regulations whether they are newly adopted or substantively amended.

A final part to this question concerns the enforcement of zoning regulations adopted under a master or comprehensive plan prior to October 1, 2001. Enforcement of zoning provisions is governed by Mont. Code Ann. §§ 76-2-210 and -308(2), which allow county and municipal authorities to institute proceedings to prevent violation of the zoning regulations. Enforcement of regulations is in no way dependent upon the enactment of a growth policy. Zoning regulations lawfully adopted prior to October 1, 2001, remain in full effect.

Moreover, the statutes do not preclude rezoning. The application of the previously adopted zoning regulations to a parcel of property does not constitute the adoption of zoning regulations. Routine, minor revisions that do not have any impact on growth policy could be made without violating the purpose of the law.

III.

SB 97 made substantive changes in subdivision law. In the Subdivision and Platting Act, SB 97 changed: (1) Mont. Code Ann. § 76-3-210, which exempts subdivisions from required environmental assessments if a growth policy exists; (2) Mont. Code Ann. § 76-3-505, which provides for summary review of minor subdivisions in two forms, one of which requires a growth policy; and (3) Mont. Code Ann. § 76-3-608, which exempts both minor and major subdivisions from some local review if a growth policy and other criteria are established. In each of these sections the statutory language clearly states that the streamlined processes and exemptions will apply only if a growth policy exists.

SB 97 also changed sections in Chapter 1 of Title 76 of the Montana Code Annotated to provide expedited subdivision review if a growth policy is established. For minor subdivisions, Mont. Code. Ann. § 76-1-107 now enables a planning board to delegate advisory responsibilities to staff if a growth policy is adopted. And Mont. Code Ann. § 76-1-606 requires that local subdivision regulations be adopted in accordance with the growth policy.

Additionally, Mont. Code Ann. § 7-2-4734 requires that a growth policy cover an area proposed for municipal annexation before a municipality can extend corporate limits under the Planned Community Development Act (Mont. Code Ann., Title 7, chapter 2, part 47). However, the requirement does not apply to annexations conducted under Title 7, chapter 2, parts 42, 43, 44, 45, or 46.

In summary, SB 97 amendments clearly require a growth policy before certain subdivision review procedures and city powers of annexation are authorized. As concluded above, a growth policy requires conformance with Mont. Code Ann. § 76-1-601 as amended by SB 97. However, the SB 97 amendments to subdivision law nowhere require a growth policy in order to continue subdivision review; the only requirement is that a growth policy exist if a city or county wishes to qualify for the streamlined processes specifically enumerated by SB 97. Additionally, as noted above, SB 97 explicitly amended Mont. Code Ann. § 7-2-4734 to require a growth policy before a municipal governing body can annex new territory. I do note, however, that SB 97 does not require a growth policy for annexations undertaken pursuant to Mont. Code Ann. §§ 7-2-4201, -4301, -4401, -4501, or -4601.

Based on the plain language of these statutes, I conclude that failing to adopt a growth policy does not hamper subdivision review, but merely restricts potential qualification for expedited subdivision review that is provided by the above-stated statutes. However, proposed annexations under

the Planned Community Development Act (supra) must conform to a growth policy.

IV.

Both municipal and county zoning statutes provide authority for interim zoning regulations even if the local governing body has not adopted a growth policy and complied with the statutes enabling permanent county zoning. County interim zoning is authorized by Mont. Code Ann. § 76-2-206, which provides:

> (1) The board of county commissioners may adopt an interim zoning map or regulation as an emergency measure in order to promote the public health, safety, morals, and general welfare if:
> (a) the purpose of the interim zoning map or regulation is to classify and regulate those uses and related matters that constitute the emergency; and
> (b) the county:
> (i) is conducting or in good faith intends to conduct studies within a reasonable time; or
> (ii) has held or is holding a hearing for the purpose of considering any of the following:
> (A) a growth policy;
> (B) zoning regulations; or
> (C) an amendment, extension, or addition to a growth policy or to zoning regulations pursuant to this part.

Similarly, municipal interim zoning is authorized by Mont. Code Ann. § 76-2-306, which provides:

> (1) The city or town council or other legislative body of such municipality, to protect the public safety, health, and welfare and without following the procedures otherwise required preliminary to the adoption of a zoning ordinance, may adopt as an urgency measure an interim ordinance prohibiting any uses which may be in conflict with a contemplated zoning proposal which the legislative body is considering or studying or intends to study within a reasonable time.

Although the statutory language differs between the county and municipal statutes, their commonalities indicate a similar application. Namely, both statutes specify that interim measures may be adopted (1) where proper zoning procedures have not been satisfied, (2) some matter of urgency requires zoning to protect public safety, health, and welfare, (3) the interim measure addresses the urgent matter, (4) so long as more formal planning processes have been initiated, or will be initiated within a reasonable time. While the absence of a

growth policy satisfies step one of the above application, an interim measure cannot be implemented unless the remaining three requirements are fulfilled. The determinative issue of whether interim zoning may be promulgated thus requires analysis of what constitutes an "emergency" or "urgency" measure.

Although not specifically addressing what constitutes a matter of urgency, 46 Op. Att'y Gen. No. 5 (1995), is instructive. In this opinion, Attorney General Mazurek held that Mont. Code Ann. § 76-2-306 imposes various conditions on the use of interim zoning power, including "the existence of an exigency." Further clarifying the issue, Mont. Code Ann. §§ 76-2-203(1) and -304(1) require standard zoning regulations to be designed to:

> lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; and to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements.

In light of Attorney General Mazurek's opinion, when read in context with the entire zoning statute, I conclude that both "emergency" and "urgency" measures exist if there is some exigent circumstance impacting the public health, safety and welfare, and zoning is required to address the exigency pursuant to Mont. Code Ann. §§ 76-2-203(1) and -304(1). See Allen v. Flathead County, 184 Mont. 58, 63, 601 P.2d 399, 402 (1979) (recommending that interim zoning be implemented when zoning regulations were adopted, implemented and relied upon by residents for five years, and then declared invalid by the court). Thus, interim zoning may be adopted when a community has not adopted a growth policy so long as all proper procedures are followed, more formal planning processes are underway and the interim measure is reasonably related to an exigent circumstance as described in this opinion.

The question of what constitutes an "exigency" is necessarily fact-bound, and under the law it is left largely to the discretion of the local governing body. However, in my opinion, the failure to adopt a growth policy cannot, in and of itself, constitute an "exigency" that would allow adoption of emergency interim zoning. If it were otherwise, the transition provision of SB 97 would be a nullity, because local governments would be allowed to continue to adopt zoning without first adopting a growth policy, justified solely by their failure to adopt the growth policy. If the legislature had intended this result, there would have been no need for the transition language they included in the statute.

V.

SB 97 explicitly amended Mont. Code Ann. § 76-1-601(1) by requiring a planning board to prepare a growth policy for the "entire" jurisdictional area. Further, Mont. Code Ann. § 76-2-201 only authorizes county zoning if a growth policy is adopted for the "entire" jurisdictional area. Pursuant to Mont. Code Ann. § 76-1-504, a city and county may adopt a joint planning jurisdiction including areas designated both within and surrounding incorporated city limits. Thus, if a city-county planning board has countywide jurisdiction, I conclude that the plain statutory language requires a growth policy to be adopted for the entire county before zoning can be adopted. This conclusion is in line with present Montana case law. See Allen v. Flathead County, 184 Mont. 58, 62, 601 P.2d 399, 402 (1979) (holding that county zoning authority may only be exercised if a comprehensive plan (now growth policy) covers the entire jurisdictional area of the county planning board).

THEREFORE IT IS MY OPINION:

1. A comprehensive plan adopted prior to October 1, 1999, has no legal effect as the basis for new local zoning or subdivision regulations unless it meets the requirements of a growth policy pursuant to Mont. Code Ann. § 76-1-601.

2. Zoning regulations lawfully adopted pursuant to master plans, comprehensive plans and comprehensive development plans prior to October 1, 2001, are valid and enforceable. However, after October 1, 2001, county and municipal zoning regulations authorized by Title 76, chapter 2, parts 2 and 3, may not be adopted or substantively revised unless a growth policy is adopted for the entire area of the planning board having jurisdiction.

3. A municipal governing body may not extend municipal boundaries, pursuant to the Planned Community Development Act of 1973, without conforming to a growth policy.

4. The expedited review provisions of the Subdivision and Platting Act may not be utilized without a compliant growth policy.

5. If a city or county has not developed a growth policy, interim zoning regulations may be implemented only when: there is an exigent circumstance related to public health, safety and welfare; the zoning measure reasonably relates to the exigency; and more formal planning processes are underway as required by statute. Failure to adopt a

growth policy is not, in and of itself, an exigency that permits adoption of emergency interim zoning.

6. A growth policy must cover the entire planning board jurisdiction for zoning decisions to proceed.

Very truly yours,

/s/ Mike McGrath
MIKE McGRATH
Attorney General

mm/cdt/jym

**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

In the matter of petition no. 41H-104360 to the Department of Natural Resources and Conservation for designation of a controlled groundwater area	))))))	DECLARATORY RULING

BACKGROUND

On July 22, 2002, Roger S. Kirkwood and Sherwood Developers, LLC, (Petitioners) petitioned the Department of Natural Resources and Conservation (Department or DNRC) for a declaratory ruling regarding the definition of "availability" as found in the Department's designation of a controlled groundwater area in In the Matter of Petition No. 41H-104360 to the DNRC for Designation of a Controlled Groundwater Area, Final Order (July 20, 1998)(on file at DNRC). The Petition alleges that because of the high costs now required by the City of Bozeman in order to hook up to the municipal supply, the City of Bozeman's water supply is not "available" under the terms of the Final Order.

The DNRC agrees to issue a declaratory ruling in this matter after considering the Petition and all filed briefs. See Mont. Code Ann. § 2-4-501; Mont. Admin. Rules.§ § 36.12.101; 1.3.226-229.

Pursuant to ¶ 1 (C) of the DNRC's Final Order, a provisional permit for a new appropriation cannot be secured where a "water supply from the City of Bozeman municipal water supply system is presently available or will be available for use by the time the proposed project is to be completed." The Petitioners argue "[n]othing in the Final Order suggests that the City of Bozeman's municipal system is "available" where the City purports to charge the user for the cost of extending the water main to his property, Petition, ¶ 11, or where the "City insists upon charging installation costs and hookup costs and fees well in excess of those charged to other municipal residences of the City of Bozeman." Id. at ¶ 12.

The Petition alleges the following specifics about the expense and requirements before the City will allow its water to be used by the Petitioners:

> The City of Bozeman has extended its main so that Bozeman's municipal water supply system is physically situated to supply the Property. By and through an ordinance adopted by the City Commission (Commission Resolution No. 3519), the municipal water supply system owned by the City of Bozeman is not available to the Property or Mr. Kirk and Sherwood Developers, LLC unless Mr. Kirk and Sherwood Developers, LLC, pay the City of Bozeman $ 0.082 per square foot of the

> Property and otherwise agree to pay various taxes and fees and have their property annexed by the City of Bozeman. At the designated rate per square foot, Bozeman's municipal system will cost Mr. Kirk and Sherwood Developers, LLC $ 39,780, and the municipal system will otherwise be unavailable to them unless they agree to annex their property and pay other fees and taxes set forth in that annexation agreement.

Id. at ¶ 9.

The Petitioners also argue in their briefs that the City of Bozeman did not historically use its water supply on the acreage outside its municipal boundaries that would serve the Petitioners, and since it has not obtained a new permit or changed the place of use, it would be unlawful for the City of Bozeman to supply water to the Petitioners. Therefore, the DNRC could not have "intended to authorize Bozeman to violate the laws the DNRC administers and to commit a crimial [sic] act by the use of the word available in its Final Order." Petitioners' "Reply to Answer Brief to Petition for Declaratory Rulng:"[sic] at 6.

In the "City of Bozeman's Memorandum in Opposition to Petition for Declaratory Ruling" dated August 8, 2002, it is argued by the City of Bozeman that as a local government with self-governing powers it has to the power to set requirements for the use of its municipal water:

> A city has the right to build, construct, and/or extend a water supply and distribution system. Mont. Code Ann. § 7-13-4301. It likewise has a right to charge its customers for this service and likewise a right to annex property which receives the service. Mont. Code Ann. § 7-1-4123(7), 7-13-4304, and 7-13-4314. There is no constitutional or statutory impediment to the City of Bozeman's adoption of the assessment resolution as long as the assessment is "equitable in proportion to the services and benefits rendered." Mont. Code Ann. § 7-12-4304(4). An assessment, based upon a lot's size in proportion to the entire area being benefited, is recognized by statute. Mont. Code Ann. § 7-12-4162.

Id. at 2.

The City of Bozeman argues that should the Petitioners argument be accepted, the DNRC would be effectively voiding the Bozeman City Commission's Resolution and it would be rewriting its Final Order dated July 20, 1998. It is also argued that the City's self-governing powers must be liberally construed and every reasonable doubt as to the existence of the City's power and its authority must be resolved in favor of the existence of the power or authority. Mont. Code Ann. § 7-1-106. Finally, the City of Bozeman argues that availability, by definition alone, is not joined to price or cost, the DNRC did not and could not have so stated, and that indeed the DNRC by its Final Order recognized that the City of

Bozeman, by statute, is the only entity that can set the conditions for the purchase of its municipal water.

The Final Order designating a controlled groundwater area states in part as follows:

> Drilling and installation of water wells within the boundaries of the controlled groundwater are prohibited without first obtaining an interim permit from the Department of Natural Resources and Conservation. Provisional Permits will not be issued where one or more of the following conditions exist:
>
> A. The proposed well is located within the projected limit of "highest contamination" determined from ongoing monitoring activities conducted by the Department of Environmental Quality and Potentially Liable Parties. The zone of highest contamination will be defined on the basis of most recent groundwater monitoring data available, and be contained within the equal to 100 ppb of chlorinated solvents in groundwater.
>
> B. Groundwater pumping from the individual well, or in combination with existing or proposed wells nearby, is likely to induce or redirect contaminated groundwater plume migration.
>
> C. Water supply from the City of Bozeman municipal water supply system is presently available or will be available for use by the time the proposed project is to be completed.
>
> D. The proposed well has a design capacity of equal to or greater than 1,000 gallons per minute.

DISCUSSION

The issue in this case is a very narrow one. The Department is not being asked to reconsider its Final Order. That decision is final and the time for appeal has already passed. See Mont. Code Ann. § 2-4-702. Therefore, the only issue in this declaratory ruling concerns the DNRC's interpretation of the term "available." The Petition requests a declaratory ruling on the following:

> WHEREFORE, your Petitioners request that the DNRC issue a declaratory ruling determining that the City of Bozeman's municipal water supply system is not available within the meaning of ¶ 1(C) of its July 20, Final Order where the City imposes costs in excess of the hook-up fees generally charged to municipal users, or the City otherwise imposes other costs or requirements for access to its municipal water supply system.

From a review of all the pleadings and briefs in this proceeding, there seems to be no disagreement that the City of Bozeman's water mains are physically available to the

Petitioners. The issue then comes down to whether even though they are physically available, they are not legally "available" under the terms of the Department's Final Order in this matter because the Department somehow defines "available" in terms of costs to the Petitioners.

Disputes between cities and water users over hooking up to municipal water systems are longstanding in Montana, City of Polson v. PSC, 155 Mont. 464, 473 508 (1970); Crawford v. City of Billings, 130 Mont. 158, 297 P.2d 292 (1956), and elsewhere, Platt v. Town of Torrey, 949 P.2d 325 (Utah 1997). See also Town of Ennis v. Stewart, 807 P.2d 179, 247 Mont. 355 (1991)(town ordinance requiring residents to connect their residences to town water system was within scope of town's police power). While the City of Polson concerned the authority of the Public Service Commission over the municipal water provider, a function it apparently no longer has[1], the City of Billings held the city could not be compelled to furnish larger mains for installation in a rural special improvement district outside the corporate limits of the city in order to provide adequate service to users within the district. We turn now to the furnishing of services by a municipality to nonresidents. The City of Torrey is a good example of recent cases on this issue:

> We begin by observing that Utah Code Ann. § 10-8-14 (1996) authorizes municipalities to construct and operate "waterworks, sewer collection, sewer treatment systems, gas works, electric light works, telephone lines or public transportation systems" and to "deliver the surplus product or service capacity of any such works, not required by the city or its inhabitants, to others beyond the limits of the city." The statute is silent on whether the charges to nonresidents must be reasonable, as charges to residents are required to be. Nevertheless, upon reflection we find no reason why the requirement of reasonableness that protects municipal residents should not also be extended to nonresidents who subscribe to municipal services. [2] In fact, several reasons dictate that municipalities should act reasonably with their nonresident customers when furnishing necessary services, which many times are not available to them elsewhere.
>
> In County Water System, we held that a municipal utility providing water to nonresidents was not subject to rate regulation by the PSC because the utility was performing a municipal

[1] See Mont. Code Ann. § 69-7-101 et seq.

[2] Footnote 6 from City of Torrey reads: "This is not to say that the rates charged the two classes of customers must be the same for, as we will later discuss in this opinion, there are many potentially legitimate reasons why higher charges to nonresidents may be justified."

> function, the same as when it served residents. That being so, the requirement of reasonableness, which attends all actions by municipalities, should not cease at the city limits. This is especially so because nonresident customers have less political recourse to combat unreasonable rates than do residents. If politically empowered residents have recourse to the courts when their municipal government acts unreasonably, even more so should nonresidents enjoy the protection of the judiciary against similar conduct. Indeed, judicial review for unreasonableness may be the nonresidents' sole remedy.
>
> Requiring that nonresident rates be reasonable strikes the proper balance between competing issues in this area--affording nonresidents protection while allowing a municipality to recoup some return on its investment in the utility and maintain considerable autonomy.

949 P.2d at 330. (emphasis added).

In support of its reasonableness decision the court emphasized how that was the predominant view in other jurisdictions:

> Requiring a reasonable basis for higher nonresident rates accords with the overwhelming majority of cases from other jurisdictions. See Jung v. City of Phoenix, 160 Ariz. 38, 770 P.2d 342 (1989); Delony v. Rucker, 227 Ark. 869, 302 S.W.2d 287 (1957) (interpreting statute requiring reasonable rates); Hansen v. City of San Buenaventura, 42 Cal.3d 1172, 233 Cal.Rptr. 22, 729 P.2d 186 (1986); Barr v. First Taxing Dist., 151 Conn. 53, 192 A.2d 872 (1963); Mohme v. City of Cocoa, 328 So.2d 422 (Fla.1976); Cooper v. Tampa Elec. Co., 154 Fla. 410, 17 So.2d 785 (1944); Inland Real Estate Corp. v. Village of Palatine, 146 Ill.App.3d 92, 99 Ill.Dec. 906, 496 N.E.2d 998 (1986); Usher v. City of Pittsburg, 196 Kan. 86, 410 P.2d 419 (1966); Louisville & Jefferson County Metro. Sewer Dist. v. Joseph E. Seagram & Sons, Inc., 307 Ky. 413, 211 S.W.2d 122 (1948); City of Hagerstown v. Public Serv. Comm'n, 217 Md. 101, 141 A.2d 699 (1958) (based on statute requiring PSC to fix reasonable rate for service to nonresidents); County of Oakland v. City of Detroit, 81 Mich.App. 308, 265 N.W.2d 130 (1978); Borough of Ambridge v. Pennsylvania Pub. Util. Comm'n, 137 Pa.Super. 50, 8 A.2d 429 (1939) (interpreting statute requiring reasonable rates); Town of Terrell Hills v. City of San Antonio, 318 S.W.2d 85 (Tex.Civ.App.1958); Handy v. City of Rutland, 156 Vt. 397, 598 A.2d 114 (1990); Faxe v.

> City of Grandview, 48 Wash.2d 342, 294 P.2d 402 (1956) (holding that state constitution required reasonable nonresident rates); cf. Mayor & Council of Dover v. Delmarva Enterprises, Inc., 301 A.2d 276 (Del.1973); Schroeder v. City of Grayville, 166 Ill.App.3d 814, 117 Ill.Dec. 681, 683, 520 N.E.2d 1032, 1034 (1988) ("[A]lthough not obligated to serve non-residents in the absence of a contractual relationship, a municipality is prohibited from discriminating unreasonably in rates or manner of service when it elects to serve non- residents."); Mayor & City Council of Cumberland v. Powles, 255 Md. 574, 258 A.2d 410 (1969). Commentators in this area are also in agreement with extending the reasonableness requirement to nonresidents. See Charles S. Rhyne, The Law of Local Government Operations § 23.16 (1980); 2 Chester James Antieau, Antieau's Local Government Law § 19.08 (1996) ("Local government utilities can discriminate against nonresidents in rates whenever such differentiated treatment is reasonable."); 12 Eugene McQuillan, The Law of Municipal Corporations § 35.35.45 (3d ed. 1995) ("The duty of a municipality owning a public utility to furnish services and supplies without discrimination and at reasonable rates extends to users outside the city, ... where the city has undertaken to serve the public outside the city.").

Id. at 331. (emphasis added).

The reasonableness standard has also been incorporated into Montana law and can be found at Mont. Code Ann. § 7-13-4311 which reads:

> (1) Subject to the provisions of subsection (2), the city or town council of any city or town within Montana that owns and operates a municipal water system, a municipal sewage system, or both, to furnish water services, sewage services, or both, to the inhabitants of the city or town as a public utility may, in addition to all other powers, furnish water from the water system and sewage services from the sewage system:
>
> (a) to any person, factory, or other industry located within the corporate limits of the city or town; or
>
> (b) to any person, factory, or other industry located outside the corporate limits of the city or town.
>
> (2) (a) The services authorized by subsection (1) must be furnished at reasonable rates.

(emphasis added).

Thus, the DNRC views the issue here as one between the Petitioners and the City of Bozeman as to what is a reasonable rate for furnishing such municipal services, and therefore declines to determine that in the circumstances put forth in the Petition that the City of Bozeman's municipal water supply system is not "available" where the City of Bozeman imposes costs in excess of the hook-up fees generally charged to municipal users, or the City otherwise imposes other costs or requirements for access to its municipal water supply system. The DNRC declines to so further define "available" as requested because Montana law already provides that a municipality can provide municipal water services outside its boundaries, the municipal hook-up is already physically available in this case, and the legislature has already provided a "reasonableness" remedy for the Petitioners if they seek to pursue it. That remedy lies with a declaratory judgment or other action of the Petitioner's choosing in the appropriate district court, not with the DNRC. Case law demonstrates that disputes often arise between nonresidents and municipalities over the cost of municipal water services and hook-ups, and the DNRC is not and will not become the arbiter of what are reasonable rates when the authority to make that decision lies elsewhere.

In regard to the City of Bozeman's water rights, if it is ever established that the City of Bozeman does not in fact have the water rights necessary to extend its municipal services to Petitioners, then by any definition its municipal water supply system would not be available. At this time, however, the DNRC does not conclude that the City of Bozeman does not have the ability to serve the Petitioners with its municipal water rights.

CONCLUSION AND ORDER

Therefore, based on the foregoing, although the DNRC agreed to hear and decide this declaratory ruling matter, the Petitioners' "request that the DNRC issue a declaratory ruling determining that the City of Bozeman's municipal water supply system is not available within the meaning of ¶ 1(C) of its July 20, Final Order where the City imposes costs in excess of the hook-up fees generally charged to municipal users, or the City otherwise imposes other costs or requirements for access to its municipal water supply system," is hereby **DENIED**.

DONE AND DATED THIS 30th DAY OF SEPTEMBER 2002.

/s/ R. Curtis Martin
R. Curtis Martin
DNRC Water Rights Bureau Chief

NOTICE OF FUNCTION OF ADMINISTRATIVE RULE REVIEW COMMITTEE

Interim Committees and the Environmental Quality Council

Administrative rule review is a function of interim committees and the Environmental Quality Council (EQC). These interim committees and the EQC have administrative rule review, program evaluation, and monitoring functions for the following executive branch agencies and the entities attached to agencies for administrative purposes.

Economic Affairs Interim Committee:

- **Department of Agriculture;**
- **Department of Commerce;**
- **Department of Labor and Industry;**
- **Department of Livestock;**
- **Department of Public Service Regulation; and**
- **Office of the State Auditor and Insurance Commissioner.**

Education and Local Government Interim Committee:

- **State Board of Education;**
- **Board of Public Education;**
- **Board of Regents of Higher Education; and**
- **Office of Public Instruction.**

Children, Families, Health, and Human Services Interim Committee:

- **Department of Public Health and Human Services.**

Law and Justice Interim Committee:

- **Department of Corrections; and**
- **Department of Justice.**

Revenue and Transportation Interim Committee:

- **Department of Revenue; and**
- **Department of Transportation.**

State Administration, and Veterans' Affairs Interim Committee:

- **Department of Administration;**
- **Department of Military Affairs; and**
- **Office of the Secretary of State.**

Environmental Quality Council:

- **Department of Environmental Quality;**
- **Department of Fish, Wildlife, and Parks; and**
- **Department of Natural Resources and Conservation.**

These interim committees and the EQC have the authority to make recommendations to an agency regarding the adoption, amendment, or repeal of a rule or to request that the agency prepare a statement of the estimated economic impact of a proposal. They also may poll the members of the Legislature to determine if a proposed rule is consistent with the intent of the Legislature or, during a legislative session, introduce a bill repealing a rule, or directing an agency to adopt or amend a rule, or a Joint Resolution recommending that an agency adopt, amend, or repeal a rule.

The interim committees and the EQC welcome comments and invite members of the public to appear before them or to send written statements in order to bring to their attention any difficulties with the existing or proposed rules. The mailing address is PO Box 201706, Helena, MT 59620-1706.

HOW TO USE THE ADMINISTRATIVE RULES OF MONTANA AND THE MONTANA ADMINISTRATIVE REGISTER

Definitions: **Administrative Rules of Montana (ARM) is a looseleaf compilation by department of all rules of state departments and attached boards presently in effect, except rules adopted up to three months previously.**

Montana Administrative Register (MAR) is a soft back, bound publication, issued twice-monthly, containing notices of rules proposed by agencies, notices of rules adopted by agencies, and interpretations of statutes and rules by the attorney general (Attorney General's Opinions) and agencies (Declaratory Rulings) issued since publication of the preceding register.

Use of the Administrative Rules of Montana (ARM):

Known Subject	**1. Consult ARM topical index. Update the rule by checking the accumulative table and the table of contents in the last Montana Administrative Register issued.**
Statute Number and Department	**2. Go to cross reference table at end of each title which lists MCA section numbers and corresponding ARM rule numbers.**

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies that have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through June 30, 2002. This table includes those rules adopted during the period July 1, 2002 through September 30, 2002 and any proposed rule action that was pending during the past 6-month period. (A notice of adoption must be published within 6 months of the published notice of the proposed rule.) This table does not, however, include the contents of this issue of the Montana Administrative Register (MAR).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through June 30, 2002, this table and the table of contents of this issue of the MAR.

This table indicates the department name, title number, rule numbers in ascending order, catchphrase or the subject matter of the rule and the page number at which the action is published in the 2001 and 2002 Montana Administrative Registers.

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