MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 7

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 The notice section contains state agencies' proposed new, amended or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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 PUBLIC EMPLOYEES' RETIREMENT BOARD
OF THE STATE OF MONTANA**

In the matter of the amendment of ARM 2.43.404 to change the required time for agencies to submit their payroll contribution reports to the Public Employees' Retirement Board	)))))	NOTICE OF PROPOSED AMENDMENT NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons

1. On June 13, 2003, the Public Employees' Retirement Board proposes to amend ARM 2.43.404 to change the required time for agencies to submit payroll contribution reports to the Public Employees' Retirement Board. The change will become effective July 1, 2003.

2. The Public Employees' Retirement Board 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 Public Employees' Retirement Board no later than 5:00 p.m. on April 25, 2003, to advise us of the nature of the accommodation that you need. Please contact Lucie Willson, Public Employees' Retirement Board, 100 North Park Avenue, Suite 100, P.O. Box 200131, Helena, MT 59620-0131; telephone 406-444-7939; TDD 406-444-1421; FAX 406-444-5428; e-mail lwillson@state.mt.us.

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

2.43.404 REQUIRED EMPLOYER REPORTS (1) All reporting agencies shall submit contribution reports no later than five working days after ~~the last~~ each regularly occurring payday ~~of each month~~. Each report must be accompanied by statutorily required employer and employee contributions to the retirement system. Beginning July 1, 2003, reporting agencies shall use the MPERA's online web-based reporting system and shall remit payment via automated clearing house (ACH). If the reporting agency does not have access to the internet, the contribution report may be either hard-copy or electronic, but must be in the format provided by the MPERA, and must be accompanied by the payment.

(2) The report must be in alphabetical order by last name and include for each employee:

(a) social security number;

(b) last and first name;

(c) salary;

(d) regular contributions;

(e) additional contributions if any;

(f) the actual hours for which the employee received compensation; and

(g) each employee who terminated during the ~~month~~ pay period being reported.

(3) Reporting agencies of the Montana university system (MUS) shall report employees in PERS covered positions who elect the MUS optional retirement program (ORP). The MUS ORP report must include all information required in (2). At the same time, reporting agencies of the MUS shall transmit amounts equal to the statutorily required plan choice rate and the education fund rate for those employees.

(4) All PERS and sheriffs' retirement system reporting officials must report, on a ~~monthly~~ pay period basis, all retired PERS and sheriffs' retirement system members employed with their agency. This report must include the retiree's social security number, last and first name, salary and hours worked.

(5) Reporting errors may be corrected on subsequent ~~monthly~~ pay period reports via a letter of explanation that must include all salary and service documentation for the reported error and the affected time period.

(6) The MPERA will notify the reporting agency of the necessary action, including contributions and interest due. Corrections reducing an employee's contributions cannot be accepted if the employee has received a refund.

(7) Reporting errors affecting PERS members who elect the PERS defined contribution retirement plan (DCRP) will be corrected as follows:

(a) Corrections increasing a contribution will be credited to the participant's individual account within the timeframe established in ARM 2.43.1031 and will not be retroactive.

(b) Corrections reducing a contribution will decrease the participant's individual account. Corrections reducing an employee's contribution cannot be accepted if the employee has received a refund. The DCRP recordkeeper will recover the incorrect contribution from the participant's individual account and submit a refund to the MPERA. The MPERA will submit the refund to the reporting agency. It is the reporting agency's responsibility to correct payroll records and submit the refund to the DCRP participant.

AUTH: 19-2-403, 19-3-2104, MCA
IMP: 19-2-506, 19-3-315, 19-3-1106, 19-3-2104, 19-7-1101, MCA

REASON: To facilitate prompt investment of contributions, MPERA proposes to have payroll reports, and accompanying retirement plan contributions, remitted to MPERA within five working days after each pay day, rather than monthly. Timely and accurate transfer of those contributions will insure that the defined benefit retirement plan trust fund, the education trust fund, the long-term disability trust fund, and any other associated trust funds are funded properly, the correct plan choice rate is distributed to the defined benefit retirement plan, and contributions are credited to defined contribution

retirement plan participants' investment options as quickly as administratively possible. The proposed amendment recognizes that electronic advances permit much quicker transfers of funds and information than were previously possible.

4. Concerned persons may submit their data, views, or arguments concerning the proposed amendments in writing to Mike O'Connor, Executive Director, Public Employees' Retirement Board, 100 North Park Avenue, Suite 100, P.O. Box 200131, Helena, MT 59620-0131; FAX 406-444-5428; e-mail moconnor@state.mt.us no later than May 9, 2003.

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 Lucie Willson, P.O. Box 200131, Helena, MT 59620-0131; telephone 406-444-7939; FAX 406-444-5428; e-mail lwillson@state.mt.us. A written request for a hearing must be received no later than May 9, 2003.

6. If the agency receives requests for a public hearing on the proposed amendments from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed action; 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 3,262 persons based on 2002 payroll reports of active members.

7. The Public Employees' Retirement Board maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by the 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 public retirement rulemaking actions. Such written request may be mailed or delivered to Lucie Willson, Public Employees' Retirement Board, 100 North Park Avenue, Suite 100, P.O. Box 200131, Helena, MT 59620-0131; faxed to the office at 406-444-5428; or e-mailed to lwillson@state.mt.us, or may be made by completing a request form at any rules hearing held by the Public Employees' Retirement Board.

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

/s/ Terry Teichrow
Terry Teichrow, Chairman
Public Employees' Retirement Board

/s/ Kelly Jenkins
Kelly Jenkins, General Counsel and
Rule Reviewer

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

Certified to the Secretary of State on March 31, 2003.

**BEFORE THE PUBLIC EMPLOYEES' RETIREMENT BOARD
OF THE STATE OF MONTANA**

In the matter of the amendment of ARM 2.43.801, 2.43.802, 2.43.803, and 2.43.804 pertaining to the Volunteer Firefighters' Compensation Act and reports required to be submitted by fire companies to the Public Employees' Retirement Board	)))))))	NOTICE OF PROPOSED AMENDMENT NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons

1. On June 13, 2003, the Public Employees' Retirement Board proposes to amend ARM 2.43.801, 2.43.802, 2.43.803, and 2.43.804 pertaining to the Volunteer Firefighters' Compensation Act and reports required to be submitted by fire companies to the Public Employees' Retirement Board.

2. The Public Employees' Retirement Board 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 Public Employees' Retirement Board no later than 5:00 p.m. on April 25, 2003, to advise us of the nature of the accommodation that you need. Please contact Lucie Willson, Public Employees' Retirement Board, 100 North Park Avenue, Suite 100, P.O. Box 200131, Helena, MT 59620-0131; telephone 406-444-7939; TDD 406-444-1421; FAX 406-444-5428; e-mail lwillson@state.mt.us.

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

2.43.801 BASIC UNIT OF SERVICE TIME (1) As of July 1, 1965, the basic unit of service time for volunteer firefighters is one fiscal year. Volunteer firefighters not continuously on ~~a roster~~ the active membership list of a single qualifying volunteer fire company for the entire fiscal year shall not be listed on the annual certificate and shall not receive ~~a retirement~~ credit for service under the Volunteer Firefighters' Compensation Act for that fiscal year.

(2) A volunteer ~~fireman will~~ firefighter shall receive one year of ~~retirement~~ credit for service under the Volunteer Firefighters' Compensation Act for each two full fiscal years of service performed prior to July 1, 1965.

**AUTH: ~~19-12-203~~ 19-17-203, MCA
IMP: ~~19-12-401~~ 19-17-201, 19-17-401, MCA**

2.43.802 REQUIRED REPORTS (1) ~~All~~ In order to receive credit for service under the Volunteer Firefighters' Compensation Act, volunteer fire departments must submit an

"annual certificate~~.~~" to the MPERA. ~~This report is on a fiscal year basis and due by September 1st of each year.~~ The ~~report~~ certification is a ~~certification~~ report by the fire chief that the members listed on the certificate were active for the full fiscal year and also had the required 30 hours of training. This report is on a fiscal year basis (July through June) and is due by September 1 of each year. The annual certificate is signed by the fire chief and notarized. Annual certificate forms are provided by the ~~retirement division~~ MPERA.

(2) Annual certificates filed after the September ~~1st~~ 1 due date ~~will be accepted if the chief of the fire department filing the late report will attach a copy of their department's training records showing the required 30 hours of training per member~~ must be appealed to and considered by the board for approval. Information provided by the fire chief to the board must include:

(a) the original, notarized annual certificate;

(b) certified training documents showing the required 30 hours of training per listed member;

(c) a letter from the fire chief explaining why the annual certificate was not submitted timely; and

(d) if requested by the fire chief, oral argument before board.

AUTH: ~~19-12-203~~ 19-17-203, MCA
IMP: ~~19-12-402~~ 19-17-201, 19-17-402, MCA

2.43.803 APPLICATION FOR GROUP INSURANCE PREMIUM PAYMENTS (1) Each volunteer fire company is eligible for payments toward supplemental insurance coverage for their active members provided the company submits by December 31 of each year:

(a) an application form (as provided by the ~~division~~ MPERA); ~~and~~

(b) a ~~certified~~ copy of the department's active membership list certified by the county clerk as required by 7-33-2311, MCA; and

(c) proof of insurance.

AUTH: ~~19-12-203~~ 19-17-203, MCA
IMP: ~~19-12-103~~ 19-17-103, 19-17-201, MCA

2.43.804 PAYMENTS TO SERVICE PROVIDERS FOR MEDICAL EXPENSES RESULTING FROM DUTY-RELATED ~~DISABILITIES~~ INJURIES AND ILLNESSES (1) Payments for ~~disability compensation~~ medical expense claims made pursuant to Title 19, ~~C~~chapter ~~12~~ 17, ~~P~~part 5, MCA shall be ordered paid directly to medical service providers after:

(a) the claim is properly filed as described in ~~19-12-502~~ 19-17-502, MCA; and

(b) all personal and/or group insurance payments for those services first have been deducted from the claim.

(2) Medical expense claims in excess of $1,000 must be approved by the board prior to payment by MPERA.

~~(2)~~ (3) Subsequent insurance settlements in payment of medical expenses which have been previously paid by the board shall be reimbursed to the pension fund within 60 days of receipt by member or service provider.

AUTH: ~~19-12-203~~ 19-17-203, MCA
IMP: ~~19-12-103~~ 19-17-103, 19-17-201, 19-17-506, MCA

REASON: Several Volunteer Fire Departments have recently attempted to become covered, both in the future and retroactively, under the Volunteer Firefighters' Compensation Act (VFCA). The Public Employees' Retirement Board (Board) is concerned about these requests as an influx of members, coupled with the downturn in the stock market, will adversely impact the pension trust fund assets. The Board therefore determined to set standards for reviewing all untimely requests for coverage, rather than summarily permitting late filings that are accompanied by the requisite training reports. This decision, while consistent with statute (19-17-201, MCA), necessitated a change in ARM 2.43.802(2).

The Board's staff, the Montana Public Employees' Retirement Administration (MPERA) is also taking this opportunity to update and clean-up all administrative rules associated with the VFCA. For instance, the "division" has been replaced by MPERA (the Montana Public Employees' Retirement Administration) and the statutes governing the VFCA have been moved from Title 19, Chapter 12 to Title 19, Chapter 17 of the Montana Code Annotated. Other proposed changes distinguish the roll of active members required by Title 7, chapter 33, part 23, MCA, from the list of trained firefighters required to accompany the "annual certificate" filed with MPERA; distinguish medical expenses covered under Title 19, Chapter 17, Part 5 from disability retirement benefits addressed in Part 2 of Title 19, Chapter 17; and incorporate existing board policy regarding the payment of medical expenses greater than $1,000.

4. Concerned persons may submit their data, views, or arguments concerning the proposed amendments in writing to Mike O'Connor, Executive Director, Public Employees' Retirement Board, 100 North Park Avenue, Suite 100, P.O. Box 200131, Helena, MT 59620-0131; FAX 406-444-5428; e-mail moconnor@state.mt.us no later than May 9, 2003.

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 Lucie Willson, P.O. Box 200131, Helena, MT 59620-0131; telephone 406-444-7939; FAX 406-444-5428; e-mail lwillson@state.mt.us. A written request for a hearing must be received no later than May 9, 2003.

6. If the agency receives requests for a public hearing on the proposed amendments from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed action; 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 260 persons based on 2002 reports of active members.

7. The Public Employees' Retirement Board maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by the 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 public retirement rulemaking actions. Such written request may be mailed or delivered to Lucie Willson, Public Employees' Retirement Board, 100 North Park Avenue, Suite 100, P.O. Box 200131, Helena, MT 59620-0131; faxed to the office at 406-444-5428; or e-mailed to lwillson@state.mt.us, or may be made by completing a request form at any rules hearing held by the Public Employees' Retirement Board.

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

/s/ Terry Teichrow
Terry Teichrow, Chairman
Public Employees' Retirement Board

/s/ Kelly Jenkins
Kelly Jenkins, General Counsel and Rule Reviewer

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

Certified to the Secretary of State on March 31, 2003.

BEFORE THE MONTANA PROMOTION DIVISION
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the proposed amendment of ARM 8.119.101 pertaining to the Tourism Advisory Council	NOTICE OF PROPOSED AMENDMENT

NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons

1. On May 10, 2003, the Montana Promotion Division proposes to amend the above-stated rule pertaining to the Tourism Advisory Council.

2. The Department 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 Department no later than 5:00 p.m., April 21, 2003, to advise us of the nature of the accommodation that you need. Please contact Amy Robbins, Montana Promotion Division, 301 S. Park Avenue, PO Box 200533, Helena, Montana 59620-0533; telephone (406) 841-2769; facsimile (406) 841-2871; TDD (406) 444-2978; Montana Relay 1-800-253-4091; e-mail to arobbins@state.mt.us.

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

8.119.101 TOURISM ADVISORY COUNCIL (1) remains as proposed.

(2) The tourism advisory council hereby incorporates by reference the guide entitled "Regulations and Procedures for Regional/CVB Tourism Organizations, February ~~2002~~ 2003," setting forth the regulations and procedures pertaining to the distribution of lodging facility use tax revenue. The guide is available for public inspection during normal business hours at the Montana Promotion Division, Department of Commerce, 301 S. Park Avenue, Helena, Montana 59620. Copies of the guide are available on request.

(3) Distribution of funds to regional nonprofit tourism corporations and to nonprofit convention and visitors' bureaus is contingent upon compliance with the "Regulations and Procedures for Regional/CVB Tourism Organizations, February ~~2002~~ 2003."

AUTH: Sec. 2-15-1816, MCA
IMP: Sec. 2-15-1816, MCA

REASON: It is reasonably necessary to amend this rule to provide clarification because the "2002 Regulations and

Procedures for the Regional/CVB Tourism Organizations" have been revised.

4. Concerned persons may submit their data, views or arguments concerning the proposed amendment in writing to Amy Robbins, Montana Promotion Division, Department of Commerce, 301 S. Park Avenue, PO Box 200533, Helena, Montana 59620-0533, by facsimile to (406) 841-2871, or by email to arobbins@state.mt.us to be received no later than 5:00 p.m., May 8, 2003.

5. If persons who are directly affected by the proposed amendment wish to present their data, views or arguments orally or in writing at a public hearing, they must make a written request for a hearing and submit the request along with any comments they have to Amy Robbins, Montana Promotion Division, Department of Commerce, 301 S. Park Avenue, PO Box 200533, Helena, Montana 59620-0533, by facsimile (406) 841-2871, or by email to arobbins@state.mt.us to be received no later than 5:00 p.m., May 8, 2003.

6. If the Division receives requests for a public hearing on the proposed amendment from either 10 percent or 25, whichever is less, of those persons who are directly affected by the proposed amendment, from the appropriate administrative rule review committee of the legislature, from a governmental agency or subdivision or from an association having no 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 20 based on 10 Convention and Visitor Bureaus, six Tourism Regions and at least 184 potential applicants for grants of accommodations tax funds.

7. The Montana Promotion Division maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this Division. 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 Montana Promotion Division administrative rulemaking proceedings or other administrative proceedings. Such written request may be mailed or delivered to the Montana Promotion Division, 301 S. Park Avenue, PO Box 200533, Helena, Montana 59620-0533 or by phone at (406) 841-2769, or may be made by completing a request form at any rules hearing held by the agency.

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

MONTANA PROMOTION DIVISION
DEPARTMENT OF COMMERCE

By: /s/ MARK A. SIMONICH
MARK A. SIMONICH, DIRECTOR
DEPARTMENT OF COMMERCE

By: /s/ G. MARTIN TUTTLE
G. MARTIN TUTTLE, RULE REVIEWER

Certified to the Secretary of State March 31, 2003.

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

In the matter of the amendment of ARM 17.38.101, 17.38.201A, 17.38.202, 17.38.203, 17.38.206, 17.38.208, 17.38.216, 17.38.229, 17.38.234, 17.38.239, 17.38.249, 17.38.302, and the adoption of new rule I pertaining to ground water under the direct influence of surface water determinations	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT AND ADOPTION (PUBLIC WATER SUPPLY AND WASTEWATER SYSTEM REQUIREMENTS)

TO: All Concerned Persons

1. On April 30, 2003 at 10:00 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 and 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., April 21, 2003, 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 Board is proposing amendments to Administrative Rules of Montana (ARM) Title 17, chapter 38, subchapters 1, 2, and 3 to update existing rules regarding public water supply and wastewater systems by making the rules consistent with the public water supply laws and by incorporating by reference the most recent applicable sections of the Code of Federal Regulations. These proposed amendments are necessary to allow the Board to enforce the public water supply laws and to retain primacy for enforcement of safe drinking water laws. The policy of the Montana legislature has been for state agencies to retain primacy over environmental and public health programs.

New federal regulations that the Board is proposing to adopt by reference include the radiological maximum contaminant levels, the recycle provisions, siting requirements, and prohibition on the use of lead pipes, solder, and flux.

Rule amendments include clarifications and updates to the rules and to definitions for existing rules, a new rule to accommodate new federal requirements, and clarifications of federal requirements.

4. The Board anticipates that it will have to adopt the requirements of many new federal regulations on a regular basis in the coming years. The federal government requires Montana's public water supply rules to be at least as stringent as the federal regulations. Montana statutes, found at 75-6-116, MCA, prohibit the Board from adopting rules that are more stringent than the comparable federal regulations unless certain statutory procedures are followed.

Therefore, the Board is proposing to adopt the rules by reference, as is authorized by 2-4-307, MCA.

5. 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) and (2) remain the same.

(3) As used in this rule, the following definitions apply in addition to those in 75-6-102, MCA.

(a) through (g) remain the same.

(h) "Public water supply system" means a system for the provision of water for human consumption from a community well, water hauler for cisterns, water bottling plant, water dispenser, or other water supply that has at least 15 service connections or that regularly serves at least 25 persons daily for ~~a period of at least~~ any 60 or more days in a calendar year.

(i) and (ii) remain the same.

(4) Before commencing or continuing the construction, alteration, ~~or~~ extension, or operation 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 (8) remain the same.

(9) ~~Prior to commencing~~ A person may not commence or continue the ~~use~~ operation of a public water supply or wastewater system, or any portion of ~~a new public~~ such system, prior to ~~the applicant shall certify~~ certifying by letter to the department or a delegated division of local government that the system, or portion of the system constructed, altered, or extended to that date, was ~~built~~ completed in accordance with ~~approved~~ plans and specifications approved by the department. For a system or any portion of a system designed by a professional engineer, the engineer shall sign and submit the certification letter to the department or a delegated division of local government. ~~As-builts for the new system, or portion~~

~~of the new system constructed to that date, must be submitted to the department within 90 days after the system has been placed into use. For new systems designed by a professional engineer, a professional engineer shall submit the certification letter and as-builts. Within 90 days after construction has been completed upon an existing public water supply system or wastewater system, or upon an extension of or addition to such a system, the applicant shall certify to the department or a delegated division of local government that the construction, alteration, or extension was completed in accordance with the plans and specifications approved by the department. For systems designed by a professional engineer, the applicant shall submit a professional engineer's certification that the construction, alteration or extension was completed in accordance with the plans and specifications approved by the department. This certification shall be accompanied by a complete set of "as built" drawings signed by the applicant or, for systems designed by an engineer, signed by the, professional engineer, and an operation and maintenance manual if applicable.~~

(10) Within 90 days after the completion of construction, alteration, or extension of a public water supply or wastewater system, or any portion of such system, a complete set of certified "as-built" drawings must be signed and submitted to the department or a delegated division of local government. The department may require that the "as-built" submittal be accompanied by an operation and maintenance manual. For a system or any portion of a system designed by a professional engineer, the engineer shall sign and submit the certified "as-built" drawings to the department or a delegated division of local government.

(10) through (12) remain the same, but are renumbered (11) through (13).

~~(13)~~(14) The board hereby adopts and incorporates by reference the following ~~publications~~:

(a) Department of Environmental Quality Circular DEQ-1, 1999 edition, which sets forth the requirements for the design and preparation of plans and specifications for public water supply systems~~.~~;

(b) Department of Environmental Quality Circular DEQ-2, 1999 edition, which sets forth the requirements for the design and preparation of plans and specifications for sewage works~~.~~;

(c) Department of Environmental Quality Circular DEQ-3, 1999 edition, which sets forth minimum design standards for small water systems~~.~~;

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

(e) 40 CFR 141.5, which sets forth siting requirements for public water supply components.

(14) remains the same, but is renumbered (15).

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

REASON: The proposed amendment to (3)(h) is necessary to clarify the definition of a "public water supply." Senate Bill 147 of the 2001 Montana legislature ("Senate Bill 147") modified the statute, and this proposed amendment is necessary to keep the rules parallel with the statutes.

The proposed amendment to (4) is necessary to clarify that each day a public water supply or wastewater system is constructed, altered, extended, or operated without proper department review and approval constitutes a separate day of violation. The statute was modified, as amended by Senate Bill 147, to clarify the same concern, and keeps the rules parallel with the statutes.

The proposed amendment to (9) is necessary to clarify that each day a person operates a public water supply or wastewater system without certifying to the department that the system was completed in accordance with plans and inspections reviewed and approved by the department constitutes a separate day of violation. The statute was modified, as amended by Senate Bill 147, to clarify the same concern, and keeps the rules parallel with the statutes. The proposed amendment is also necessary to clarify who must submit the certified letter to the department.

The proposed addition of new (10) is necessary to clarify when the certified "as-built" drawings must be submitted to the department and by whom. The proposed amendment also simplifies the reading of the rule.

The proposed addition of (14)(e) is necessary to adopt by reference the federal requirement that public water supply or wastewater facilities, other than intakes, not be located within an area of "significant risk." The intent is to protect the integrity and long-term feasibility of public water supply or wastewater systems by avoiding construction in areas that may be susceptible to catastrophic acts of nature. The language is such that the USEPA will not seek to override land use decisions made at the state or local government levels.

17.38.201A INCORPORATION BY REFERENCE--PUBLICATION DATES AND AVAILABILITY OF REFERENCED DOCUMENTS (1) Unless expressly provided otherwise, in this subchapter where the board has:

(a) adopted and incorporated by reference a federal regulation, the reference is to the July 1, ~~1999~~ 2001, edition of the Code of Federal Regulations (CFR); and

(b) referred to a section of the Montana Code Annotated (MCA), the reference is to the ~~1999~~ 2001 edition of the MCA.

(c) through (4) remain the same.

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

REASON: These proposed amendments are necessary to update the rule to adopt by reference the July 1, 2001, edition of the Code of Federal Regulations (CFR) and all the applicable changes made since the 1999 edition. The CFR changes are described below in the rules as specific CFR sections are incorporated.

The proposed amendments are also necessary to allow the department to enforce the public water supply statutes and to retain primacy for enforcement of safe drinking water laws. The policy of the Montana legislature has been for state agencies to retain primacy over environmental and public health programs.

17.38.202 DEFINITIONS In this subchapter, the following terms have the meanings indicated below and must be used in conjunction with and supplemental to those definitions contained in 75-6-102, MCA. In addition, the board hereby adopts and incorporates by reference the definitions in 40 CFR 141.2, except for the following terms: "person~~;~~," "public water supply system~~" or "~~(PWS~~;~~)," "ground water under the direct influence of surface water (GWUDISW)," "special irrigation district~~;~~," and "state." The terms "person," ~~and~~ "public water supply system," "ground water under the direct influence of surface water," and "state," as used in the portions of 40 CFR Parts 141 and 142 adopted by reference in this subchapter, have the meanings ~~of the terms "person" and "public water supply system," respectively, as~~ defined below. ~~The term "state," as used in the portions of 40 CFR Parts 141 and 142 adopted by reference in this subchapter, has the meaning of the term "state" as defined below.~~

(1) and (2) remain the same.

(3) "Ground water under the direct influence of surface water (GWUDISW)" has the same meaning as adopted and incorporated by reference from 40 CFR 141.2, except that GWUDISW determinations for regulatory compliance purposes are made in accordance with the Department of Environmental Quality Circular PWS-5, Ground Water Under the Direct Influence of Surface Water, 2002 edition, as adopted and incorporated by reference in [New Rule I].

~~(3)~~ (4) "Person" means ~~any~~ an individual, ~~corporation, association~~ firm, partnership, ~~municipality, or political subdivision of the state or a federal agency~~ company, association, corporation, city, town, local government entity, federal agency, or any other governmental or private entity, whether organized for profit or not.

~~(4)~~ (5) "Public water supply system (PWS)" means a system for the provision of water for human consumption from a community well, water hauler for cisterns, water bottling plant, water dispenser, or other water supply that has at least 15 service connections or that regularly serves at least 25 persons daily for ~~a period of at least~~ any 60 or more days in a calendar year.

~~(5)~~ (6) "State," as used in the portions of 40 CFR Parts 141 and 142 adopted ~~by reference~~ and incorporated by reference in this subchapter, means the Montana department of environmental quality with respect to regulation of public water supply and wastewater systems for compliance with this subchapter, and the Montana department of public health and human services with respect to certification of laboratories for performing water sample analyses for public water supply systems as required in 40 CFR Part 141.

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

REASON: The proposed amendment to (3) is necessary to clarify the definition of "ground water under the direct influence of surface water" or "GWUDISW." The department is establishing a process under which a final GWUDISW determination is made by the department. That process is adopted in proposed New Rule I, which would adopt by reference Department of Environmental Quality Circular PWS-5, Ground Water Under the Direct Influence of Surface Water, 2002 edition. Although this document was completed in 1999 and is used by the department to make GWUDISW determinations, it was inadvertently not adopted when the department developed the capacity development requirements in 1999.

The proposed amendment to (4) is necessary to clarify the definition of "person." Senate Bill 147 modified the statute and this amendment is necessary to keep the rules parallel with the statute.

The proposed amendment to (5) is necessary to clarify the definition of a "public water supply system" or "PWS." Senate Bill 147 modified the statute, and this amendment is necessary to keep the rules parallel with the statute.

The proposed amendment to (6) is to clarify the definition of "state." This amendment is necessary to retain consistency within the rules.

17.38.203 MAXIMUM INORGANIC CHEMICAL CONTAMINANT LEVELS

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

(a) 40 CFR 141.11~~,~~ and 141.62(b)~~, and 141.65~~, which set forth maximum contaminant levels for inorganic contaminants, except that 40 CFR 141.62(b)(16) is modified to read, "(16) Arsenic ..... 0.010"; ~~and~~

(b) 40 CFR 141.65, which sets forth maximum residual disinfectant levels~~,~~; and

(c) 40 CFR 141.80(c)(1) and 40 CFR 141.80(c)(2), which set forth the action levels for lead and copper.

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

REASON: These proposed amendments are necessary to update the rule to indicate the new arsenic maximum contaminant level (MCL) of 10 parts per billion. Although the new EPA standard will not take effect until January 2006, the PWS rules are being modified to include the standard so that systems can monitor now to determine what steps may be needed in 2006 to come into compliance. The Board wishes to further clarify that requirement by adopting an arsenic MCL of 0.010 mg/L. The USEPA intends to re-publish the arsenic MCL as 0.010 mg/L in order to remove doubt as to the actual compliance standard due to standard scientific rounding procedures. These proposed amendments are also necessary to allow the department to enforce

the public water supply laws and to retain primacy for enforcement of safe drinking water laws. The policy of the Montana legislature has been for state agencies to retain primacy over environmental and public health programs.

17.38.206 MAXIMUM RADIOLOGICAL CONTAMINANT (1) The board hereby adopts and incorporates by reference 40 CFR 141.15, ~~and~~ 141.16, and 141.66(b), (c), (d), (e), and (f), which set forth maximum contaminant levels for radiological contaminants.

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

REASON: This proposed amendment is necessary to update the rule to indicate the new radiological maximum contaminant level requirements. The existing maximum contaminant levels (MCLs) for radiological contaminants were not changed, but monitoring requirements were increased. Also, a new MCL for uranium was established. Uranium was not previously regulated. This proposed amendment is also necessary to allow the department to enforce the public water supply laws and to retain primacy for enforcement of safe drinking water laws. The policy of the Montana legislature has been for state agencies to retain primacy over environmental and public health programs.

17.38.208 TREATMENT REQUIREMENTS (1) through (3) remain the same.

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

(a) 40 CFR 141.43(a) and (d), which set forth prohibition on use of lead pipes, solder, and flux;

(a) through (d) remain the same, but are renumbered (b) through (e).

(f) 40 CFR 141.66(g), which sets forth BATs for radionuclides;

(g) 40 CFR 141.76(a) and (c), which set forth recycle provisions;

(e) through (m) remain the same, but are renumbered (h) through (p).

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

REASON: The proposed amendment to (4)(a) is necessary to adopt by reference the federal requirements for the prohibition on the use of lead pipes, solder, and flux. These requirements are designed to protect the system users from exposure to sources of lead in the distribution system and service connections. Because the public water supply laws and rules do not regulate "service connections", the Board withheld adoption of this rule until the Montana Building Codes Bureau adopted plumbing codes in 2001 that met these requirements. This proposed amendment is also necessary to allow the department to enforce the public water supply laws and to retain primacy for

enforcement of safe drinking water laws. The policy of the Montana legislature has been for state agencies to retain primacy over environmental and public health programs.

The proposed amendment to (4)(f) is necessary to adopt by reference the federal Best Available Treatment (BATs) for radionuclides. EPA established BATs to identify treatment methods that would effectively remove radiological contaminants from drinking water. This proposed amendment is also necessary to allow the department to enforce the public water supply laws and to retain primacy for enforcement of safe drinking water laws. The policy of the Montana legislature has been for state agencies to retain primacy over environmental and public health programs.

The proposed amendment to (4)(g) is necessary to adopt by reference the federal requirements that contain the recycle provisions for treatment. These requirements are designed to protect the system and users from concentrated contaminants being reintroduced into the treatment chain. This proposed amendment is also necessary to allow the department to enforce the public water supply laws and to retain primacy for enforcement of safe drinking water laws. The policy of the Montana legislature has been for state agencies to retain primacy over environmental and public health programs.

17.38.216 CHEMICAL AND RADIOLOGICAL QUALITY SAMPLES

(1) through (2) remain the same.

(3) The board hereby adopts and incorporates by reference the following monitoring and analytical requirements:

(a) 40 CFR 141.23, which sets forth sampling and analytical method requirements for inorganic chemicals except that 141.23(i) is replaced with the following~~,~~:

(i) Compliance with 40 CFR 141.11 or 141.62(b) (as appropriate) shall be determined based on the analytical result(s) obtained at each sampling point.

(A) For systems monitoring more than once per year, compliance with the maximum contaminant levels, as described in 40 CFR 141.11 or 141.62(b), for fluoride, asbestos, barium, cadmium, chromium, mercury, selenium, antimony, beryllium, cyanide, nickel, thallium, or arsenic is determined by a running annual average at any sampling point.

(B) For systems monitoring annually or less frequently for fluoride, asbestos, barium, cadmium, chromium, mercury, selenium, antimony, beryllium, cyanide, nickel, thallium, or arsenic whose sample result(s) exceed(s) a maximum contaminant level, as described in 40 CFR 141.11 or 141.62(b), must begin quarterly sampling. The system will not be considered in violation of the maximum contaminant level until it has completed one year of quarterly sampling.

(C) If any sample result will cause the running annual average to exceed the maximum contaminant level at the sampling point, the system will be considered out of compliance with the maximum contaminant level immediately.

(D) If a system fails to collect the required number of samples, compliance will be based on the total number of samples collected.

(E) If any sample result is less than the detection limit, zero will be used to calculate the annual average.

(3)(b) through (6) remain the same.

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

REASON: The proposed amendment to (3)(a) is necessary to clarify the process by which inorganic maximum contaminant level (MCL) compliance determinations are made pursuant to the standard as described in 40 CFR 141.23(i). The department proposed changes to the language in 40 CFR 141.23(i) will allow the state to adopt the USEPA intended compliance determination process for inorganic contaminants versus the published process. The proposed amendment will base compliance determinations on a running annual average versus a one-time exceedance causing a MCL violation, which will make it easier for the systems to comply with MCLs. Although the process proposed by amendment is less stringent than the published federal requirement, it is the USEPA intended process and is supported by 66 FR 6976, 7032 (January 22, 2001), which clarifies that the MCL determination process for inorganic contaminants is as described in the Board's proposed rule change.

17.38.229 ~~CHLORINATION~~ DISINFECTION (1) Full time ~~chlorination~~ disinfection with chlorine is mandatory where the source of water is from lakes, reservoirs, or streams, or ground water sources under the direct influence of surface water.

(2) Full time ~~chlorination~~ disinfection of the water supply is mandatory whenever the water may be exposed to a potential source of contamination including, but not limited to:

(a) losses of positive pressure within the system~~,~~;

(b) unprotected or poorly protected ground water sources~~,~~;

(c) the introduction of chemicals or gases for treatment~~,~~; or

(d) substandard distribution, pumping or storage facilities.

(3) Full time ~~chlorination~~ disinfection of the water in a ground water supply system ~~must be employed~~ is mandatory whenever the record of bacteriological tests of the system does not indicate a safe water under the criteria listed in ARM 17.38.207 and 17.38.215.

(4) Methods of full time disinfection must be reviewed and approved by the department prior to the installation or use of any form of treatment.

~~(4)~~ (5) The residual disinfectant concentration measured as free chlorine, total chlorine, combined chlorine, ~~or~~ chlorine dioxide, or other department approved disinfectant(s), in the distribution system of a ground water supply system required by the department to use continuous disinfection must not be less than 0.2mg/l using the DPD method or 0.1mg/l using the

amperometric titration method. A heterotrophic bacteria concentration in water in the distribution system less than or equal to 500 per milliliter, measured as heterotrophic plate count (HPC), is an acceptable substitute for disinfectant residual for purposes of determining compliance with this rule.

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

REASON: The proposed amendments to (1), (2) and (3) are necessary to clarify the requirements for "disinfection" as opposed to "chlorination." Where "chlorination" describes one specific disinfection process type, the department wishes to be able to approve alternative disinfection processes when appropriate. Chlorination will still be required for surface water treatment requirements described in (1).

The proposed amendment to (4) is necessary to clarify the need for department review and approval prior to the installation and use of any form of treatment.

The proposed amendment to (5) is necessary to address required residual disinfectant concentration levels for department allowed disinfectants.

17.38.234 TESTING AND SAMPLING RECORDS AND REPORTING REQUIREMENTS (1) and (2) remain the same.

(3) Actual laboratory reports may be kept or data may be transferred to tabular summaries, provided the following information is included:

(a) through (d) remain the same.

(e) 40 CFR 141.76(b) and (d), which set forth reporting and recordkeeping requirements for lead and copper;

(e) through (g) remain the same, but are renumbered (f) through (h).

(4) through (8) remain the same.

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

REASON: The proposed amendment to (6)(e) is necessary to adopt by reference the federal reporting and recordkeeping requirements for the recycle provisions, which are designed to ensure that the operational records for both public water supply and sewage systems are available for inspection during sanitary surveys or other system inspections, and to ensure that the department receives the required information for compliance determination purposes. The proposed amendment is also necessary to allow the department to enforce the public water supply statutes and to retain primacy for enforcement of safe drinking water laws. The policy of the Montana legislature has been for state agencies to retain primacy over environmental and public health programs.

17.38.239 PUBLIC NOTIFICATION FOR COMMUNITY AND NON-COMMUNITY SUPPLIES (1) The board hereby adopts and incorporates

by reference ~~the following~~ 40 CFR Part 141, subpart Q, which sets forth public notification requirements for drinking water violations~~:~~.

~~(a) 40 CFR 141.32, which sets forth public notification requirements;~~

~~(b) 40 CFR 141.35(d), which sets forth public notification requirements for unregulated chemicals; and~~

~~(c) 40 CFR 141.85, which sets forth public education and supplemental monitoring requirements.~~

(2) remains the same.

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

REASON: The proposed amendment to (1) is necessary to update the rule to adopt the public notification requirements under the new 40 CFR Part 141, subpart Q, Public Notification of Drinking Water Violations. The revisions to the public notification requirements place all required public notices under the new 40 CFR Part 141, subpart Q and allow for more state flexibility in implementing requirements for notification of the public regarding violations. This proposed amendment is necessary to allow the department to enforce the public water supply laws and to retain primacy for enforcement of safe drinking water laws. The policy of the Montana legislature has been for state agencies to retain primacy over environmental and public health programs.

17.38.249 DESIGNATED CONTACT PERSON (1) The ~~supplier~~ owner of a community or non-transient non-community public water supply or wastewater treatment system shall retain a certified operator, as defined in Title 37, chapter 42, MCA, to perform monitoring and reporting in accordance with the requirements of this subchapter. The certified operator must be in responsible charge of the public water supply or wastewater treatment system in accordance with Title 37, chapter 42, MCA.

(2) The ~~supplier~~ owner of a public water ~~for community systems~~ supply or wastewater treatment system shall ~~designate~~ provide, no later than 30 days after the ~~effective date of this rule, a~~ issuance of a written request by the department, the name, address, and telephone number of a designated person who shall be responsible for contact and communications with the department in matters relating to system alteration, extension and construction, monitoring and sampling, maintenance, operation, record keeping, notification, and reporting. For a community or a non-transient non-community public water supply or wastewater treatment system, ~~This~~ this person must be certified in accordance with the requirements of Title 37, chapter 42, MCA.

(3) The ~~supplier~~ owner of a public water ~~for non-community water systems shall designate and notify the department of his designee no later than 30 days after the designation~~ supply or wastewater treatment system shall report any change in assigned

responsibilities or designated persons to the department within 30 days after the change.

(4) Any ~~change in assigned responsibilities or designated persons must be promptly reported to~~ communication or notice made by the department to a person designated under (2) is deemed to be adequate communication or notice to the owner of the public water supply or wastewater treatment system.

(5) The department hereby adopts and incorporates by reference Title 37, chapter 42, MCA, which establishes requirements for operators of public water supply systems and wastewater treatment plants. A copy may be obtained from the Department of Environmental Quality, PO Box 200901, Helena, MT 59620-0901.

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

REASON: The proposed amendments to (1), (2), (3), (4) and (5) are necessary to adopt requirements and penalties under the public water supply statutes and rules for certification of wastewater operators. The Public Water Supply program regulates public water supply and wastewater systems; however, only violations for not meeting the certified operator requirements for public water supply systems are regulated under the public water supply statutes and rules. Wastewater systems are required to have certified operators; however, administrative or judicial penalties against wastewater systems are not available in the wastewater operator certification statutes and rules. The addition of wastewater systems to this rule will allow the department to establish requirements and penalties for certified wastewater operator violations in public wastewater systems under the public water supply statutes and rules.

Further proposed amendments in (2), (3) and (4) are necessary to clarify the duties, deadlines, and responsibilities for owners and contact persons of public water supply and wastewater systems. These clarifications are necessary to maintain the integrity of the Certified Operator and Public Water Supply programs.

17.38.302 INCORPORATION BY REFERENCE (1) The board hereby adopts and incorporates by reference the following ~~publications~~:

(a) through (2) remain the same.

(3) Backflow prevention assemblies or devices not identified in the publications listed above may be approved by the department if the person demonstrates to the satisfaction of the department that strict adherence to this rule is not necessary to protect public health and the quality of state waters.

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

REASON: The proposed amendment to (1) is necessary for general housekeeping clarification.

The proposed adoption of (3) is necessary to allow the department to be able to approve alternate type devices or assemblies where appropriate. The existing rule does not allow for other than the specified devices or assemblies.

6. The proposed new rule provides as follows:

NEW RULE I GROUND WATER UNDER THE DIRECT INFLUENCE OF SURFACE WATER DETERMINATIONS (1) The board hereby adopts and incorporates by reference the Department of Environmental Quality Circular PWS-5, Ground Water Under the Direct Influence of Surface Water, 2002 edition, which sets forth the standards for making ground water under the direct influence of surface water determinations.

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

REASON: The new Department of Environmental Quality Circular PWS-5, Ground Water Under the Direct Influence of Surface Water (GWUDISW), 2002 edition (Circular PWS-5), establishes a process under which a final determination is made by the department as to whether a ground water source is directly influenced by surface water. Any system found to be directly influenced by surface water must meet all the applicable treatment requirements of a surface water source as defined by 40 CFR 141.70 and ARM 17.38.201, et seq. In drafting Circular PWS-5, the department used existing GWUDISW Policies dated March 27, 1998, December 23, 1996, April 22, 1996, April 11, 1995, and November 29, 1994. All policies were based on information taken from the United States Environmental Protection Agency (EPA) guidance documents.

Although Circular PWS-5 was originally completed in 1999, it was inadvertently not adopted when the department instituted the capacity development requirements in 1999. The department currently uses Circular PWS-5 to make GWUDISW determinations using ARM 17.38.219, Special Samples, as the authority to require its use.

Section 1.0 Purpose

The purpose of Circular PWS-5 is to protect public health by ensuring that source waters are monitored and treated as required under federal and state public water supply laws and rules. In order to protect the public health and meet the federal requirements under the state's primacy agreement with the EPA, each specific source in the state must undergo a process that determines whether a source is ground water, surface water, or ground water under the direct influence of surface water. Each of these source types has a different monitoring and treatment requirement, with GWUDISW being treated as surface water. Circular PWS-5 outlines the process in which a

final determination will be made. The adoption of Circular PWS-5 is necessary to allow the department to enforce the public water supply laws and to retain primacy for enforcement of safe drinking water laws. The policy of the Montana legislature has been for state agencies to retain primacy over environmental and public health programs.

Sections 2.0 and 2.1 Surface Water and Ground Water Defined

Because Circular PWS-5 outlines the process in which a final GWUDISW determination will be made, it is necessary to define "surface water" and "ground water" as related to this process.

Sections 3.0 - 3.4 Preliminary Assessment

These sections contain information on the GWUDISW Preliminary Assessment (PA). Under federal rules, it is necessary for "every source" to undergo the GWUDISW determination process. Approximately 90% of the public water supply sources in the state of Montana are ground water. The PA allows the department to make initial GWUDISW determinations based on "risk" factors using existing data. Points are given based on particular "risks." The PA allows a vast majority of the sources in the state of Montana to be classified as ground water without expending large amounts of money on increased sampling efforts. These sections include the PA form, as an attachment, which is used as the starting point to evaluate all sources for public water supply systems. Directions for completing and scoring the PA form are also included.

Sections 4.0, 4.1 and 4.2 Hydrogeological Assessment

These sections contain information on the Hydrogeological Assessment (HA), the HA evaluation process, and resources used during an HA. Under federal and state laws and rules, a system that fails the PA process is required to conduct "further assessment," which may include an HA. The HA may be able to determine whether a source is under the direct influence of surface water by evaluating geological and hydrological conditions associated with the source, using a person with specific geological or hydrogeological experience to conduct the investigation. A determination from the HA of "ground water" would be the final determination. Any other result will trigger additional analysis requirements.

Sections 5.0 and 5.1 Water Quality Assessment

These sections contain information on the Water Quality Assessment (WQA) process and how to determine if a hydraulic connection exists between ground water and surface water by monitoring the physical properties of the water in question against the physical properties of the surface water over an extended period of time. A determination from the WQA that a

hydraulic connection does not exist would be the final determination that the source is "ground water." Any other result will trigger additional analysis requirements. Instructions and sample forms are included for conducting a WQA and record keeping.

Sections 6.0 and 6.1 Microscopic Particulate Analysis

These sections contain information on the Microscopic Particulate Analysis (MPA) sampling method for surface water indicators. The MPA is the final determination process for sources that have not been classified as ground water under the above-referenced methods. The MPA sampling method looks for surface water indicators, such as insects, pieces of plants, Giardia Lamblia cysts, etc., to determine whether a source is directly influenced by surface water. The results are given a score based on federal guidelines that assign a "risk factor" to the source. This risk factor is then used to make a final determination whether the source is "ground water" or "surface water." These sections also include general information on risk scoring and sample collection for reference.

7. 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., May 8, 2003. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

8. Kelly O'Sullivan, attorney for the Board, has been designated to preside over and conduct the hearing.

9. 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.

10. The bill sponsor notice requirements of 2-4-302, MCA, apply and have been fulfilled.

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, March 31, 2003.

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 IV and the amendment of ARM 37.86.2201, 37.86.2206 and 37.86.2207 pertaining to early and periodic screening, diagnostic and treatment services (EPSDT)	)))))))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION AND AMENDMENT

TO: All Interested Persons

1. On April 30, 2003, at 10:30 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 adoption and 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 April 21, 2003, 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:

<u>RULE I EARLY AND PERIODIC SCREENING, DIAGNOSTIC AND TREATMENT SERVICES (EPSDT), SCHOOL-BASED HEALTH RELATED SERVICES</u>

(1) School-based services for the purposes of medicaid are defined as medically necessary services provided through a public school district or cooperative. The public school district or cooperative must receive state special education funds through the office of public instruction (OPI).

(2) School-based health related services may include:

(a) physical therapy;

(b) speech-language pathology and audiology;

(c) occupational therapy;

(d) private duty nursing;

(e) personal care paraprofessional services;

(f) licensed psychologist services;

(g) school psychologist services;

(h) licensed clinical social worker services;

(i) licensed professional counselor services; and

(j) comprehensive school and community treatment.

(3) Health-related services provided in the school to a

child with disabilities, as that term is defined in Title 20, chapter 7, part 4, MCA, are eligible for medicaid reimbursement when those services are required by the child's individualized education program (IEP). The IEP is considered the order for health-related services.

(4) Health-related services that are not required by an IEP but are provided by schools and billed to anyone who receives a medical service are covered. Schools cannot bill medicaid for services not required by an IEP that are provided free to other children.

(5) All health-related services billed to medicaid must have PASSPORT approval with the exception of mental health-related services.

AUTH: Sec. 53-6-113, MCA
IMP: Sec. 53-6-101 and 53-6-111, MCA

RULE II SCHOOL-BASED PERSONAL CARE PARAPROFESSIONAL SERVICES (1) Personal care paraprofessional services are medically necessary in-school services provided to medicaid clients whose health conditions cause them to be functionally limited in performing activities of daily living.

(2) Personal care includes assistance with activities of daily living which include:

(a) grooming;
(b) transferring;
(c) mobility;
(d) eating;
(e) dressing;
(f) toileting; and
(g) bus escort for children with functional limitations.

(3) Personal care services do not include:

(a) any skilled services that require professional medical personnel; and
(b) instruction, tutoring or guidance in academics.

(4) Personal care service may not be provided by or reimbursed for an immediate family member as follows:

(a) natural, adoptive or stepparent;
(b) foster parent; or
(c) legal guardian.

AUTH: Sec. 53-6-113, MCA
IMP: Sec. 53-6-101 and 53-6-111, MCA

RULE III SCHOOL PSYCHOLOGIST SERVICES (1) School psychologist services are those services provided by an individual with a class 6 specialist license with a school psychologist endorsement, as required by ARM 10.57.434.

(2) School psychologists may perform medically necessary evaluation and counseling services to individuals or in groups.

(3) Group therapy services provided by a school psychologist must have no more than eight individuals participating in the group.

(4) When an eligible child receives school psychologist

services and the psychologist consults with the parent as part of the child's treatment, time spent with the parent may be billed to medicaid under the child's name. The provider shall indicate on the claim that the child is the patient and state the child's diagnosis.

(5) Services considered educational are not a covered benefit under medicaid.

AUTH: Sec. 53-6-113, MCA
IMP: Sec. 53-6-101 and 53-6-111, MCA

RULE IV ELIGIBILITY AND SCOPE OF HEALTH-RELATED SERVICES

(1) Only public school districts, full-service education cooperatives (established under 20-3-351, MCA) and joint boards are eligible for enrollment and participation in the school-based Montana medicaid program.

(2) To qualify, the district, cooperative or joint board must receive special education funding from the state's general fund for the purpose of providing public education.

(3) School districts include only elementary, high school and K-12 districts organized to provide public educational services under the jurisdiction of a board of trustees as provided in Title 20, MCA.

(4) Full-service education cooperatives and joint boards include only those cooperatives eligible to receive direct state aid payments from the superintendent of public instruction for the purpose of providing special education services consistent with the provisions of Title 20, MCA.

(5) Cooperatives, joint boards and non-public schools that do not receive state general funds for special education do not meet the criteria for medicaid enrollment and cannot participate in the medicaid program as a school-based provider.

AUTH: Sec. 53-6-113, MCA
IMP: Sec. 53-6-101 and 53-6-111, MCA

3. The rules as proposed to be amended provide as follows. Matter to be added is underlined. Matter to be deleted is interlined.

37.86.2201 EARLY AND PERIODIC SCREENING, DIAGNOSTIC AND TREATMENT SERVICES (EPSDT), PURPOSE, ELIGIBILITY AND SCOPE

(1) through (7) remain the same.

(8) School-based health related services may only be provided in public school districts, full-service education cooperatives and joint boards described in [Rule IV].

(8) remains the same but is renumbered (9).

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

37.86.2206 EARLY AND PERIODIC SCREENING, DIAGNOSTIC AND TREATMENT SERVICES (EPSDT), MEDICAL AND OTHER SERVICES (1) remains the same.

(2) In addition to the services generally available to medicaid recipients, the following services are available to EPSDT eligible persons:

(a) through (e) remain the same.

(f) the therapeutic portion of medically necessary therapeutic family care treatment as provided in ARM 37.86.2221~~.~~ ; and

(g) school-based health related services as provided in [Rule I].

(3) Requests for prior authorization must be made in writing to the Department of Public Health and Human Services, Addictive and Mental Disorders Division, Mental Health Program, ~~1400 Broadway, P.O. Box 202951~~ 555 Fuller Avenue, P.O. Box 202905, Helena, MT 59620-~~2951~~2905, or to the department's designee.

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

37.86.2207 EARLY AND PERIODIC SCREENING, DIAGNOSTIC AND TREATMENT SERVICES (EPSDT), REIMBURSEMENT (1) Reimbursement for an EPSDT service, except as otherwise provided in this rule, is the lowest of the following:

(a) the provider's usual and customary charge for the service; ~~or~~

(b) the reimbursement determined in accordance with the methodologies provided in ARM 37.85.212 and 37.86.105 or the department's medicaid mental health fee schedule, except for the by-report method; or

(c) for public agencies, reimbursement determined in accordance with OMB Circular A-87, Cost Principles for State, Local and Indian Tribal Governments as established and approved by the department. The department hereby adopts and incorporates herein by reference the OMB Circular A-87, Cost Principles for State, Local and Indian Tribal Governments, as further amended August 29, 1997. A copy of OMB Circular A-87 may be obtained from the Department of Public Health and Human Services, Health Policy and Services Division, Medicaid Services Bureau, P.O. Box 202951, Helena, MT 59620-2951.

(2) Reimbursement for outpatient chemical dependency treatment, nutrition, and private duty nursing services is specified in the department's EPSDT fee schedule. The department hereby adopts and incorporates herein by reference the department's EPSDT fee schedule dated ~~January 28, 2002~~ January 1, 2003. A copy of the fee schedule may be obtained from the Department of Public Health and Human Services, Health Policy and Services Division, Medicaid Services Bureau, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

(3) Reimbursement for the therapeutic portion of therapeutic youth group home treatment services is the lesser of:

(a) the amount specified in the department's medicaid mental health fee schedule. The department hereby adopts and incorporates herein by reference the department's medicaid

mental health fee schedule dated ~~January 28, 2002~~ January 1, 2003. A copy of the fee schedule may be obtained from the Department of Public Health and Human Services, Addictive and Mental Disorders Division, 555 Fuller, P.O. Box 202905, Helena, MT 59620-2905; or

(b) through (5) remain the same.

~~(6) Reimbursement for comprehensive school and community treatment is the lesser of:~~

~~(a) the amount specified in the department's medicaid mental health fee schedule; or~~

~~(b) the provider's usual and customary charges (billed charges).~~

(7) through (9) remain the same but are renumbered (6) through (8).

(9) School-based health related services are reimbursed at 90% of the fees as specified in (1)(a) through (c), adjusted to reimburse these services at the federal matching assistance percentage (FMAP) rate.

~~(9)~~ (10) The department will not reimburse providers for two services that duplicate one another on the same day. The department hereby adopts and incorporates by reference the matrix of services excluded from simultaneous reimbursement dated ~~January 28, 2002~~ January 1, 2003. A copy of the matrix is posted on the internet at the department's home page at www.dphhs.state.mt.us/divisions/hcs/provider_fee_schedule.htm or may be obtained by writing the Department of Public Health and Human Services, Addictive and Mental Disorders Division, 555 Fuller, P.O. Box 202905, Helena, MT 59620-2905.

(10) remains the same but is renumbered (11).

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

4. The 2001 Legislature authorized additional federal spending authority in HB 2 for medical services provided in public schools. To accomplish this, the Office of Public Instruction (OPI) will certify to the Department of Public Health and Human Services school districts' general fund match for Medicaid expenditures. The Department will draw down and pay school-based Medicaid providers the federal match. The rules also include a description of which schools are eligible to enroll with Medicaid. Schools that do not receive state special education funds through OPI may not enroll in Medicaid as OPI is unable to certify a general fund match for those entities. Rules I through IV implement this program.

The proposed rule changes to ARM 37.86.2201, 37.86.2206 and 37.86.2207 are to include the school-based program in the current early and periodic screening, diagnostic and treatment services (EPSDT) rules.

It is estimated that school-based providers could receive an additional $2 to $3 million annually if schools participate in the program. Because the Department will distribute the federal

portion only on the established fees, there would be no additional monies expended by Medicaid. The Department reviewed the option of not adding services for schools to bill but opted not to adopt this alternative as schools would see a significant decrease in Medicaid revenues. In state fiscal year 2002, Medicaid reimbursed $1.2 million for services provided by 71 providers to 1,837 students.

Rules I through IV are proposed to be applied retroactively to January 1, 2003. There is no adverse impact to a retroactive applicability date. School districts and cooperatives are not compelled to participate as of January 1, 2003. Allowing school-based health related services to be billed as of that date gives districts and cooperatives the opportunity to bill as of January 1, 2003 if they wish to do so. The rule could not be effective prior to January 1, 2003 because the program had to be approved by the Center for Medicaid and Medicare Services (CMS) and coordinated with the Office of Public Instruction.

The Department proposes to make permanent the reinstatement of reimbursement for Comprehensive School and Community Treatment (CSCT) services adopted effective January 15, 2003 in the 2003 Montana Administrative Register (MAR), published January 30, 2003, issue 2 at page 115. The amendments to ARM 37.86.2207 necessary to make the changes permanent are included in this notice of proposed rulemaking. The justification, fiscal impact and other rule amendments necessary to continue the reinstatement of CSCT services were published in issue 2 at page 115, published January 30, 2003. For purposes of simplification and clarity, all the changes to ARM 37.86.2207 are contained in this notice to avoid confusion. The amendment to ARM 37.86.2207(6), which appeared in the January 30, 2003 publication, is not being proposed as a permanent change because the changes proposed in this amendment to ARM 37.86.2207 make that language redundant.

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 May 8, 2003. 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 March 31, 2003.

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

In the matter of the amendment of ARM 17.8.101, 17.8.102, 17.8.103, 17.8.106, 17.8.110, 17.8.302, 17.8.401, 17.8.402, 17.8.801, 17.8.802, 17.8.818, 17.8.819, 17.8.821, 17.8.901, 17.8.902, 17.8.905, 17.8.1002, 17.8.1201, 17.8.1202, 17.8.1204, 17.8.1206, 17.8.1212, 17.8.1213, 17.8.1214, 17.8.1220, 17.8.1224, 17.8.1226, and 17.8.1232, pertaining to definitions and incorporation by reference of current federal regulations and other materials into air quality rules	NOTICE OF AMENDMENT (AIR QUALITY)

TO: All Concerned Persons

1. On December 26, 2002, the Board of Environmental Review published MAR Notice No. 17-186 regarding a notice of public hearing on the proposed amendment of the above-stated rules at page 3468, 2002 Montana Administrative Register, issue number 24.

2. The Board has amended ARM 17.8.101, 17.8.102, 17.8.103, 17.8.106, 17.8.110, 17.8.401, 17.8.402, 17.8.802, 17.8.818, 17.8.819, 17.8.821, 17.8.901, 17.8.902, 17.8.905, 17.8.1002, 17.8.1201, 17.8.1202, 17.8.1204, 17.8.1206, 17.8.1212, 17.8.1213, 17.8.1214, 17.8.1220, 17.8.1224, 17.8.1226, and 17.8.1232 exactly as proposed and has amended ARM 17.8.302 and 17.8.801, as proposed, but with the following changes (stricken matter interlined, new matter underlined):

<u>17.8.302 INCORPORATION BY REFERENCE</u> (1) For the purposes of this subchapter, the board hereby adopts and incorporates by reference the following:

(a) 40 CFR Part 60, pertaining to standards of performance for new stationary sources and modifications~~, including the final rule published at 65 FR 76378 on December 6, 2000, "Emission Guidelines for Existing Small Municipal Waste Combustion Units", to be codified at 40 CFR Part 60, subpart BBBB~~;

(b) through (4) remain as proposed.

<u>17.8.801 DEFINITIONS</u> In this subchapter, the following definitions apply:

(1) "Actual emissions" means the actual rate of emissions of a pollutant from an emissions unit, as determined in accordance with (1)(a) through (c) ~~below~~.

(a) through (29) remain as proposed.

3. The following comments were received and appear with the Board's responses:

COMMENT NO. 1: Regarding the proposed amendments to ARM 17.8.101 to eliminate the duplication of statutory language in definitions by citing the definitions in the statute, the U.S. Environmental Protection Agency (EPA) commented that the Board should reference the existing statutory definitions in effect at the time of adoption of these rule amendments by indicating after each MCA citation the following: "(in effect on [insert date])." EPA commented that the statutory definitions should be referenced by a specific date for two reasons: (1) there will be a common understanding of what the Board is adopting with these current rule amendments; and (2) potentially any revisions to statutory definitions could result in revisions to the federally-approved state implementation plan (SIP) without going through the SIP process. This would be inconsistent with section 110(i) of the Federal Clean Air Act, which prohibits states and EPA, except in certain limited circumstances, from taking any action to modify a requirement of a SIP except by SIP revisions.

RESPONSE: The Board has not made the suggested revision. As updated in this rulemaking, ARM 17.8.102(1)(c) states that "unless expressly provided otherwise, in this chapter where the board has referred to a section of the Montana Code Annotated (MCA), the reference is to the 2001 edition of the MCA." This reference is updated by the Board, as necessary, following each biennial session of the Montana Legislature. The Board believes this is sufficient to clearly identify the edition of the MCA that is referenced.

The rule amendment is consistent with the process the Board has followed for many years of updating incorporations by reference by periodically revising the rules to incorporate the most recent edition of the materials incorporated, including statutes. Also, any revisions to statutory definitions apply regardless of whether they are incorporated into the rules or not. The public and EPA have the opportunity to comment on any proposed legislative revisions to definitions, on any rulemaking before the Board incorporating such revisions, and when any such rule revisions have been submitted to EPA for approval as revisions to the SIP. This is not inconsistent with the SIP revision process.

COMMENT NO. 2: Regarding the deletion of ARM 17.8.101(43), which contains a reference to all definitions contained in 75-2-103, MCA, EPA commented that there are definitions in 75-2-103, MCA, that are not contained in ARM 17.8.101, e.g., advisory council, air contaminant, air pollution, board, department, environmental protection law,

principal, and small business statutory source, and suggested that some or all of these definitions should now be contained in ARM 17.8.101 since the reference to the statute is being deleted.

RESPONSE: The Board has not made the suggested revision. The definitions in the Clean Air Act of Montana apply, as a matter of statute, regardless of what the rules state. It is not necessary to repeat this in the rule, and it is not necessary or appropriate to repeat statutory definitions in administrative rules. Section 2-4-305(2), MCA, of the Montana Administrative Procedure Act, states that "rules may not unnecessarily repeat statutory language...."

COMMENT NO. 3: EPA commented that since the state is revising portions of its stack height rules, EPA reviewed the existing stack height rules in ARM 17.8.401 through 17.8.403 and believes additional changes should be made to make the rules consistent with EPA's stack height rules. EPA suggested seven specific revisions to ARM 17.8.401 and 17.8.402.

RESPONSE: The Board has not made the suggested revisions. The Board's intent in proposing revisions to the rules, including ARM 17.8.401 and 17.8.402, was to update internal references, correct minor typographical and grammatical errors, and conform text to current drafting standards. Substantive revisions to ARM 17.8.401 and 17.8.402 would be outside the scope of this rulemaking.

COMMENT NO. 4: EPA commented that the reference to 65 FR 76378 in ARM 17.8.302 should be deleted from the rule because adoption of the 2002 CFR includes the regulation as codified in the CFR.

RESPONSE: The Board agrees with the comment and has amended the rule as shown above.

COMMENT NO. 5: EPA commented that the word "below" in ARM 17.8.801(1) should be deleted to be consistent with other proposed amendments.

RESPONSE: The Board agrees with the comment and has amended the rule as shown above.

Reviewed by: **BOARD OF ENVIRONMENTAL REVIEW**

David Rusoff
DAVID RUSOFF
Rule Reviewer

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

Certified to the Secretary of State, March 31, 2003.

**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	CORRECTED NOTICE OF AMENDMENT (WATER QUALITY)

TO: All Concerned Persons

1. On October 17, 2002, the Board of Environmental Review published MAR Notice No. 17-175 regarding a public hearing on the proposed amendment and repeal of the above-stated rules at page 2749, 2002 Montana Administrative Register, issue number 19. On February 13, 2003, the Board published the notice of amendment and repeal of the rules at page 220, 2003 Montana Administrative Register, issue number 3.

2. This corrected notice of amendment is being published to reflect amendments to ARM 17.30.1322 that should have been published in the original notice. This notice corrects internal reference cites that should have been amended in the original notice because of renumbering that occurred in the original notice and to delete the word "above" to make the language consistent within the rule.

17.30.1322 APPLICATION FOR A PERMIT (1) through (6)(i) remain as adopted.

(j) In addition to the POTWs listed in ~~(j)~~ (6)(i) ~~above~~, the department may require other POTWs to submit the results of toxicity tests with their permit applications, based on consideration of the following factors:

(i) through (v) remain as adopted.

(k) for POTWs required under ~~(j)~~ (6)(i) or ~~(k)~~ (j) ~~above~~ to conduct toxicity testing, POTWs shall use EPA's methods or other established protocols which are scientifically defensible and sufficiently sensitive to detect aquatic toxicity. This testing must have been conducted since the last MPDES permit reissuance or per modification under ARM 17.30.1361, whichever occurred later;

(l) through (17)(i) remain as adopted.

3. The replacement pages for this corrected notice of amendment were filed with the Secretary of State's office on March 31, 2003.

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, March 31, 2003.

**BEFORE THE OFFICE OF THE WORKERS' COMPENSATION JUDGE
OF THE STATE OF MONTANA**

In the matter of the amendment of ARM 24.5.301, 24.5.310, 24.5.318 and the repeal of 24.5.312 regarding procedural rules of the Court	NOTICE OF AMENDMENT AND REPEAL

TO: All Concerned Persons

1. On February 13, 2003, the Workers' Compensation Judge published MAR Notice No. 24-5-168 regarding the proposed amendment and repeal of the above stated rules at page 170 of the 2003 Montana Administrative Register, Issue No. 3.

2. The Office of the Workers' Compensation Judge has amended ARM 24.5.301, 24.5.310, 24.5.318 and repealed ARM 24.5.312 exactly as proposed.

3. No public hearing was held but interested parties were asked to submit their data, views or arguments to the court in writing by March 13, 2003. The court received no comments.

By: /s/ Mike McCarter
Mike McCarter, Judge
Workers' Compensation Court

/s/ Jay Dufrechou
Jay Dufrechou, Rule Reviewer

Certified to the Secretary of State March 28, 2003.

BEFORE THE BOARD OF REAL ESTATE APPRAISERS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of ARM 24.207.402, regarding adoption of USPAP by reference	))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On January 30, 2003, the Department of Labor and Industry published MAR Notice No. 24-207-19 regarding the public hearing on the proposed amendment of the above-stated rule relating to adoption of USPAP by reference at page 91 of the 2003 Montana Administrative Register, Issue Number 2.

2. On February 19, 2003, a public hearing on the proposed amendment of the above-stated rule was conducted in Helena. No public comments were received.

3. The Board of Real Estate Appraisers has amended the rule exactly as proposed.

BOARD OF REAL ESTATE APPRAISERS
TIMOTHY MOORE, CHAIRMAN

/s/ WENDY J. KEATING
Wendy J. Keating, Commissioner
DEPARTMENT OF LABOR & INDUSTRY

/s/ MARK CADWALLADER
Mark Cadwallader,
Alternate Rule Reviewer

Certified to the Secretary of State March 31, 2003.

BEFORE THE DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES OF THE STATE OF MONTANA

In the matter of the amendment of ARM 37.82.101, 37.82.417 and 37.82.423 and the repeal of ARM 37.82.418 pertaining to medicaid eligibility	))))))	NOTICE OF AMENDMENT AND REPEAL

TO: All Interested Persons

1. On February 13, 2003, the Department of Public Health and Human Services published MAR Notice No. 37-267 regarding the public hearing on the proposed amendment and repeal of the above-stated rules relating to medicaid eligibility, at page 175 of the 2003 Montana Administrative Register, issue number 3.

2. The Department has amended ARM 37.82.101, 37.82.417 and 37.82.423 and repealed ARM 37.82.418 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 March 31, 2003.

BEFORE THE DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES OF THE STATE OF MONTANA

In the matter of the of the amendment of ARM 37.86.3502, 37.89.103, 37.89.114, 37.89.115 and 37.89.118 pertaining to mental health services plan covered services	))))))	CORRECTED NOTICE OF AMENDMENT

TO: All Interested Persons

1. On December 26, 2002, the Department of Public Health and Human Services published notice of the proposed amendment of the above-stated rules at page 3545 of the 2002 Montana Administrative Register, issue number 24, and on March 27, 2003 published notice of the amendment on page 563 of the 2003 Montana Administrative Register, issue number 6.

2. This corrected notice is being filed to correct an error in the adoption notice. A typographical error was made in paragraph 1. The MAR Notice No. should have read MAR Notice No. 37-261 instead of MAR Notice No. 37-257.

3. All other rule changes adopted remain the same.

Dawn Sliva
Rule Reviewer

/s/ Gail Gray
Director, Public Health and Human Services

Certified to the Secretary of State March 31, 2003.

**BEFORE THE DEPARTMENT
OF PUBLIC SERVICE REGULATION
OF THE STATE OF MONTANA**

In the Matter of the Adoption of Rules Pertaining to Default Electricity Supply Procurement Guidelines	))))	NOTICE OF ADOPTION

TO: All Concerned Persons

1. On November 27, 2002, the Department of Public Service Regulation, Public Service Commission (Commission) published MAR Notice No. 38-2-170 regarding the public hearing on the proposed adoption pertaining to default electricity supply procurement guidelines at page 3267 of the 2002 Montana Administrative Register, Issue Number 22.

2. The Commission has adopted new rules III, XV and XVI exactly as proposed:

RULE III (38.5.8203) GOALS
AUTH: 69-8-403, MCA
IMP: 69-8-403, MCA

RULE XV (38.5.8226) DEFAULT SUPPLY RESOURCE PLANNING AND PROCUREMENT FILINGS
AUTH: 69-8-403, MCA
IMP: 69-8-403, MCA

RULE XVI (38.5.8227) REWARD FOR SUCCESSFUL DEFAULT SUPPLY SERVICE
AUTH: 69-8-403, MCA
IMP: 69-8-201, 69-8-210 and 69-8-403, MCA

3. The Commission adopts new rules I (38.5.8201), II (38.5.8202), IV (38.5.8204), V (38.5.8209), VI (38.5.8213), VII (38.5.8210), VIII (38.5.8211), IX (38.5.8212), X (38.5.8218), XI (38.5.8219), XII (38.5.8220), XIII (38.5.8221), and XIV (38.5.8225) with the following changes from the original proposed language (deleted language interlined, new language underlined):

RULE I (38.5.8201) INTRODUCTION AND APPLICABILITY

(1) These guidelines provide policy guidance to default supply utilities (DSU) on long-term default electricity supply resource planning and procurement. The guidelines do not impose on DSUs specific resource procurement processes nor mandate particular resource acquisitions. Instead, the guidelines describe a process framework for considering resource needs and suggest optimal ways of meeting those needs. Electricity default supply resource decisions affect the public interest. A DSU can better fulfill its obligations, mitigate risks and achieve resource procurement goals ~~serve the public interest~~ if

it ~~involves~~ includes the public in the portfolio planning process. An independent advisory committee of respected technical and public policy experts may offer the DSU an excellent source of up-front, substantive input that would help mitigate risk and improve resource procurement outcomes in a manner consistent with these guidelines. Consistent with these guidelines, and after an opportunity for public input, the ~~The~~ DSU must ultimately make electricity resource acquisition decisions based on economics, reliability, management expertise and sound judgment~~, although management should consider these guidelines and public input~~.

(2) through (5) remain as proposed.

AUTH: 69-8-403, MCA
IMP: 69-8-403, MCA

RULE II (38.5.8202) DEFINITIONS For the purpose of this subchapter, the following definitions are applicable:

(1) "Default supply costs" means the actual electricity supply costs of providing default supply service, including but not limited to: capacity costs, energy costs, fuel costs, ancillary service costs, demand-side management and energy efficiency costs, transmission costs (including congestion and losses), billing costs, planning and administrative costs, and any other costs directly related to the purchase of electricity, management of default electricity supply costs and provision of default supply and related services.

(2) and (2)(a) remain as proposed.

(b) a demand-side management activity, including energy efficiency and conservation programs, load control programs and pricing mechanisms; or

(c) a combination of wholesale power transactions and demand-side management activities.

(3) through (5) remain as proposed.

(6) "Long-term" means a time period at least as long as a DSU's default supply planning horizon. Long-term should also be considered that time period in which a DSU can reasonably expect to provide default supply service.

(7) "Planning horizon" means the longer of:

(a) the longest remaining contract term in a DSU's current default supply portfolio; ~~or~~

(b) the longest contract term being considered for a new resource acquisition; or

(c) ~~, but at least~~ 10 years.

(8) and (9) remain as proposed.

AUTH: 69-8-403, MCA
IMP: 69-8-403, MCA

RULE IV (38.5.8204) OBJECTIVES (1) and (1)(a) remain as proposed.

(b) design rates for default supply service that are equitable and promote rational, economically efficient consumption and customer choice decisions;

(c) assemble and maintain a balanced, environmentally responsible portfolio of power supply and demand-side management

resources coordinated with economically efficient cost allocation and rate design that most efficiently supplies ~~the daily, weekly and seasonal capacity and energy requirements of~~ firm, full electricity supply service to default supply customers over the planning horizon;

(d) maintain an optimal mix of demand-side management and power supply sources with respect to underlying fuels, generation technologies and associated environmental impacts, and a diverse mix of long, medium and short duration power supply contracts with staggered start and expiration dates; and

(e) maximize the dissemination of information to default customers regarding the mix of resources and the corresponding level of emissions and other environmental impacts associated with default supply service through itemized labeling and reporting of the default supply portfolio's energy products.

(2) These objectives are listed in order of importance, but no single objective should be pursued such that others are ignored. Simultaneously achieving these multiple objectives will require a balanced approach. A DSU should apply the recommendations in ARM 38.5.8209 through 38.5.8213, 38.5.8218 through 38.5.8221, 38.5.8225, and 38.5.8226, in addition to relevant commission orders, to achieve these goals and objectives.

AUTH: 69-8-403, MCA
IMP: 69-8-403, MCA

RULE V (38.5.8209) DEFAULT SUPPLY UTILITY SERVICE RESPONSIBILITIES (1) A DSU's default service responsibilities are:

(a) to plan and manage its resource portfolio in order to provide adequate, reliable and efficient annual and long-term default electricity supply services at the lowest total cost~~. (During and after the transition period, some customers that participate in retail markets will occasionally rely on default service for countless reasons. Retail customers may subscribe to default service while they study market supply alternatives. Customers may return to default service after their contracts with a licensed electricity supplier expire until they find new suppliers. Or customers may become permanent default service customers if their licensed competitive supplier exits the market.);~~

~~(b) to provide adequate, reliable and efficient long-term default electricity supply services at the lowest total cost. (Some retail customers may subscribe to default supply service for a very long time, perhaps perpetually. Retail markets may never develop for all customer segments, and markets with the potential to benefit customers will take time to mature. Some customers may resist choosing alternative suppliers. Others may have trouble finding market suppliers willing to serve them because of poor payment histories or undesirable consumption characteristics.)~~; and

(c) remains as proposed, but is renumbered (b).

(2) The DSU ~~may~~ should establish an optional retail electricity product composed of or supporting power ~~generated by~~

~~renewable resources~~ from certified environmentally preferred resources that include but are not limited to~~. For purposes of this rule, "renewable resources" means~~ biomass, wind, solar or geothermal resources. The resources used to provide this service should be certified as meeting industry-accepted standards.

AUTH: 69-8-403, MCA
IMP: 69-8-403, MCA

RULE VI (38.5.8213) MODELING AND ANALYSIS (1) and (1)(a) remain as proposed.

(b) evaluate the potential effect of various rate designs and demand-side management methods on future loads and resource needs;

(c) through (e) remain as proposed.

(i) underlying fuel source and associated price volatility and risk, including risks related to future regulatory constraints on environmental ~~emissions~~ impacts such as emissions of carbon dioxide, sulfur dioxide, nitrogen oxides and mercury;

(ii) through (f)(iv) remain as proposed.

(g) help the DSU~~'s managers~~, with input from an advisory committee, inject prudent and informed judgments into the portfolio planning and resource acquisition process;

(h) and (i) remain as proposed.

AUTH: 69-8-403, MCA
IMP: 69-8-403, MCA

RULE VII (38.5.8210) RESOURCE NEEDS ASSESSMENT

(1) Before soliciting new multi-year wholesale power contracts for inclusion in the default supply portfolio, a DSU should evaluate its existing default supply resource portfolio and analyze future resource needs in the context of the goals and objectives of these guidelines. A DSU should use ~~an annual~~ a planning horizon ~~that covers the longer of:~~ as defined in these rules.

~~(a) the longest remaining contract term in its portfolio; or~~

~~(b) the longest contract term the DSU would consider signing, based on the analyses described in these guidelines. (An annual planning horizon of at least 10 years is reasonable.)~~

(2) A DSU's default supply portfolio resource needs assessment should include:

(a) analyses of default customer loads including base load, intermediate load, peak load and ancillary service requirements, seasonal and daily load shapes and variability, the number and type of default customers, load growth, trends in customer choice and retail markets, technology that may lead to substitutes for grid-based electricity service, impacts of demand-side management and price elasticity of demand;

(b) an assessment of the types of resources that are available and could contribute to meeting portfolio needs, including demand-side resources, supply-side resources, distributed resources, and rate design improvements;

(c) an assessment of the types of electricity products that could effectively and efficiently contribute to meeting portfolio needs including base load, heavy load, peak, dispatchable, curtailable, assignable, firm, full requirements, load following, unit contingent, slice of the system (fixed percentage of hourly system load requirements), and others;

(d) remains as proposed.

(e) an assessment of the flexibility of the existing portfolio with respect to generation resources, suppliers, demand-side management resources, electricity products, contract lengths, contract terms and conditions, and market conditions.

~~[The commission proposes to include in these rules either Rule VII(3) and (4) – Alternative A or Rule VIII – Alternative B]~~

~~[ALTERNATIVE A]~~

(3) A DSU's resource needs assessment should include analyses of how cost allocation and rate design decisions might impact future loads and resource needs. A DSU's cost allocation and rate design practices should support and complement the goals and objectives of these guidelines. ~~A DSU should evaluate and consider the following items when assessing its resource needs and developing cost allocation and rate design proposals:~~

~~(a) the ability of opportunity cost-based prices to increase economic efficiency;~~

~~(b) cost allocation among customer segments and services based on cost causation;~~

~~(c) customer desire for long-term rate stability and understandable price structures;~~

~~(d) costs and benefits of implementing various rate types/structures, including:~~

~~(i) time-of-use;~~

~~(ii) seasonal;~~

~~(iii) blocked;~~

~~(iv) tiered;~~

~~(v) commitment-based; and~~

~~(vi) other structures as may be reasonable and consistent with the goals and objectives of these guidelines;~~

~~(e) the potential for retail demand-side-response to cost-effectively enhance economic efficiency and promote the other goals and objectives of these guidelines; and~~

~~(f) the potential for direct load control to cost-effectively contribute to retail demand response.~~

~~(4) A DSU must ensure that all default supply-related costs are recovered through default supply service prices, not in transmission or distribution service prices. An analysis of the sources of default supply costs might support the recovery of some costs through non-bypassable prices.~~

AUTH: 69-8-403, MCA
IMP: 69-8-403, MCA

~~[ALTERNATIVE B]~~

RULE VIII (38.5.8211) COST ALLOCATION AND RATE DESIGN

(1) A DSU's cost allocation and rate design practices and rate case proposals should support and complement the goals and

objectives of these guidelines. Different approaches to allocating costs and designing rates have different advantages and disadvantages. A DSU should consider these advantages and disadvantages in the context of the goals and objectives of these guidelines when proposing particular cost allocations and rate designs. A DSU should evaluate and consider the following items when allocating costs and designing rates:

(a) remains as proposed.

(b) cost allocation among customer segments and services based on cost causation and equity considerations;

(c) remains as proposed.

(d) costs and benefits of implementing various rate types/structures consistent with recognized rate design principles, including:

(d)(i) through (f) remain as proposed.

(2) A DSU must ensure that all allowable default supply-related costs are recovered through default supply service prices, not in transmission or distribution service prices. An analysis of the sources of default supply costs might support the recovery of some costs through non-bypassable default supply prices.

AUTH: 69-8-403, MCA
IMP: 69-8-403, MCA

RULE IX (38.5.8212) RESOURCE ACQUISITION (1) remains as proposed.

(a) obtain and consider upfront input and recommendations from an advisory committee throughout planning and procurement processes, as described in ARM 38.5.8225;

~~(a)~~(b) explore a wide variety of alternative supply and demand-side resources, products and prices;

~~(b)~~(c) collect proposals from various parties offering supply and demand-side resources and products;

~~(c)~~(d) analyze the proposals or offers with respect to price and non-price factors in the context of the goals and objectives of these guidelines;

~~(d)~~(e) select the ~~best~~ most appropriate proposals and develop a short~~/~~list;

~~(e)~~(f) negotiate the ~~best~~ most appropriate contract; and

~~(f)~~(g) anticipate changing circumstances and remain flexible.

(2) remains as proposed.

(a) A DSU should clearly define the resources, products and services it needs~~, including any predetermined price to beat,~~ before issuing a resource solicitation, and clearly communicate these needs to potential bidders in the request(s) for proposals. Multiple solicitations and/or solicitations for multiple resources, products and services may be necessary to obtain information sufficient for prudent analyses and decision-making;

(b) A DSU should establish bid evaluation and bidder qualification standards and criteria it will use to select from among offers before issuing a resource solicitation and clearly communicate these standards and criteria to potential bidders in

the request for proposals. Once bids are received, a DSU should apply its bid evaluation and bidder qualification standards and criteria firmly and consistently~~.~~;

(c) A DSU should develop a systematic rating mechanism that allows it to objectively rank bids with respect to price and nonprice attributes~~;~~. A DSU is not required to reveal to bidders the specific ranking method used to select preferred bids, however a DSU should thoroughly document the development and use of the method for later presentation to the commission;

~~(c)~~(d) A DSU should establish a short~~/~~list of offers from bidders with which the DSU will pursue contract negotiations. A DSU should complete due diligence regarding bid qualifications, bidder credit worthiness and experience and project feasibility before selecting an offer for the short~~/~~list. A DSU should not indicate to a bidder that its offer is being considered for the short~~/~~list while performing initial due diligence;

(d) remains as proposed, but is renumbered (e).

~~(e)~~(f) A DSU should not reassign or "flip" default supply contracts~~. That is, contracts should not be reassigned or secured by an~~ to an additional third party(ies) after the original bid activity and during the evaluation of bids. A DSU must notify the commission before reassigning any fully executed contract;

(f) remains as proposed, but is renumbered (g).

~~(g)~~(h) The DSU should obtain input and recommendations from an advisory committee regarding any procurement process that may involve projects or proposals by an affiliate of the DSU. The DSU should employ an independent third party to develop competitive solicitations if affiliate interests could be involved. An independent third party should review the contract terms and conditions in any power purchase agreement between a DSU and an affiliate before the DSU signs the agreement. A DSU should consult with its advisory committee before selecting the independent third party and should evaluate the third party's findings with the advisory committee. The DSU should be prepared to offer substantially the same form of contract to other bidders for similar products to the extent procuring such products is otherwise justified under the goals, objectives and procedures established in these guidelines; and

(h) remains as proposed, but is renumbered (i).

(3) To the extent a DSU does not use competitive solicitations to acquire default supply resources, it should thoroughly document the exercise of its judgment in evaluating and selecting resource options, including the decision not to use competitive solicitations.

(4) remains as proposed.

AUTH: 69-8-403, MCA
IMP: 69-8-403, MCA

RULE X (38.5.8218) DEMAND-SIDE RESOURCES (1) and (2) remain as proposed.

(3) A non-participant (no-losers) test considers utility-sponsored demand-side management programs cost effective only if rates to customers that do not participate in the program are

not affected by the program. A DSU should not evaluate the cost-effectiveness of demand-side resources using a non-participant test.

~~(3)~~(4) A DSU should develop and strive to achieve targets for steady, sustainable investments in cost-effective, long-term demand-side resources ~~targets~~. A DSU's investment in demand-side resources should be coordinated with and complement its universal system benefits activities.

(5) Except when the entire resource would otherwise be lost, a DSU's demand-side management programs should not be focused on "cream skimming;" the least expensive and most readily obtainable resource potential should be acquired in conjunction with other measures that are cost-effective only if acquired in a package with the least expensive, most readily available resources.

(4) and (5) remain as proposed, but are renumbered (6) and (7).

AUTH: 69-8-403, MCA
IMP: 69-8-403, MCA

RULE XI (38.5.8219) RISK MANAGEMENT AND MITIGATION

(1) Prudent default supply resource planning and procurement includes evaluating, managing and mitigating risks associated with the inherent uncertainty of electricity supply markets and default supply load characteristics. A DSU should identify and analyze sources of risk using its own techniques, market intelligence, risk management policies and judgment. The DSU should apply industry accepted instruments and strategies, document decisions to use various instruments and strategies and monitor the ongoing appropriateness of such instruments and strategies. Sources of risk that should be evaluated may include, but are not limited to:

Underlying Risk Factor	Price Uncertainty Risk	Load Uncertainty Risk
(a) Fuel prices and price volatility	X	X
(b) Environmental regulations & taxes	X	X
(c) Default supply rates	X	
(d) Competitive suppliers' prices	X	
(e) Transmission constraints	X	
(f) Weather	X	X
(g) Supplier capabilities	X	X
(h) Supplier creditworthiness	X	
(i) Contract terms and conditions	X	X

(2) and (3) remain as proposed.

(4) A DSU should use an independent advisory committee of respected technical and public policy experts as a source of upfront, substantive input to mitigate risk and optimize resource procurement outcomes in a manner consistent with these guidelines.

(4) through (4)(e) remain as proposed, but are renumbered (5) through (5)(e).

AUTH: 69-8-403, MCA
IMP: 69-8-403, MCA

RULE XII (38.5.8220) TRANSPARENCY AND DOCUMENTATION

(1) remains as proposed.

(2) A DSU must procure and manage a portfolio of power purchase contracts and demand-side resources to serve the full load requirements of its default supply customers. The commission must allow a DSU to recover through default supply rates all costs it prudently incurs to perform this function. Whether the costs a DSU incurs are prudent is, in part, directly related to whether its resource procurement process was conducted prudently. It is vital that a DSU document its default supply portfolio planning, management and procurement activities to justify the prudence of its resource procurement decisions. The better a DSU documents the steps involved in its resource procurement process and explains how and why decisions were made during procurement and in developing management strategies, the easier it is to satisfy its burden of proof. When a DSU requests cost recovery related to the procurement of new power purchase contracts it should:

(a) through (e) remain as proposed.

(f) document relevant industry practices, instruments and actions to procure resources and manage risk observed in other utilities in the western electricity coordinating council regarding portfolio design, to the extent such practices form the basis for a DSU's decisions;

(g) and (h) remain as proposed.

AUTH: 69-8-403, MCA
IMP: 69-8-403, MCA

RULE XIII (38.5.8221) AFFILIATE TRANSACTIONS (1) through (2)(a) remain as proposed.

(b) The burden of proof is on a DSU to demonstrate that costs it incurs through any affiliate transactions are just and reasonable and in the public interest and, as such, are recoverable through regulated rates. Since, by definition, such transactions cannot be presumed to be conducted on a truly arm's-length basis, inevitably ~~affiliate transactions could be conducted on a less-than-arms-length basis,~~ leaving room for gaming, self dealing and certain subsidies, the commission will subject these transactions to greater scrutiny to reasonably protect ratepayers served under regulated rates from harm. This higher level of protection is referred to as the "no harm to ratepayer" standard. This standard has evolved over time from long standing regulatory practices and policies that require affiliated transactions to be fair, reasonable and in the public interest before the associated costs are recoverable through rates. In keeping with the "no harm to ratepayer" standard, the commission will judge the reasonableness of affiliate transactions-related costs in relation to the lower of cost or market at the time of contract execution. For purposes of this rule, cost, by definition, is the applicable regulated cost of

service structure, including a return on the capital invested, to provide the relevant affiliated services;

(c) through (f) remain as proposed.

AUTH: 69-8-403, MCA
IMP: 69-8-403, MCA

RULE XIV (38.5.8225) STAKEHOLDER INPUT (1) A DSU should maintain a broad-based advisory committee to review, evaluate and make recommendations on technical, economic and policy issues related to a DSU's default supply portfolio planning, management and resource procurement process. An independent advisory committee of respected technical and public policy experts may provide an excellent source of upfront, substantive input to mitigate risk and optimize resource procurement outcomes consistent with these guidelines. Maintaining an effective advisory committee could involve funding certain member participation. A DSU should also facilitate processes that provide opportunities for a broader array of stakeholders to comment. Such processes could include:

(a) through (c) remain as proposed.

AUTH: 69-8-403, MCA
IMP: 69-8-403, MCA

4. The Commission received comments on the proposed rules. The following is a summary of the comments, and Commission responses.

Comments on Rule I: Commissioner Schneider contends Rule I should include stronger language on the importance of public participation, as well as language on the importance and purpose of an independent advisory committee. NorthWestern Energy (NWE) would include the term "long-term" before the words "resource procurement" on the second line of (2). The Montana Environmental Information Center (MEIC) and the Natural Resources Defense Council (NRDC) both argue that these rules should not repeal or replace the Commission's least cost planning rules, ARM 38.5.2001 through 38.5.2016.

Responses: The Commission agrees with Commissioner Schneider and has amended the proposed rule accordingly. The NWE amendment is not adopted. NWE's integration of short-term and long-term resource procurements is a critical aspect of its overall portfolio planning process. As such, documentation of short-term resource procurement in this context is reasonable. MEIC's and NRDC's amendment is not adopted. The commission believes that it will be more administratively efficient to regulate a default supplier's portfolio planning, management and resource procurement processes and activities according to a single set of rules. The least cost planning rules, ARM 38.5.2001 through 38.5.2016, are specifically designed to regulate resource planning and acquisition processes and activities by vertically integrated utilities that are not implementing retail choice. The commission believes it has incorporated all relevant least cost planning principles into

these rules. The rule on demand-side resources is expanded to address specific NRDC comments on non-participant tests and cream-skimming.

Comments on Rule II: MEIC contends the definition of "environmentally responsible," (4), should include a reference to Montana's right to a clean and healthful environment, and to the importance of taking into account external costs in resource acquisition decisions. The Montana Consumer Counsel (MCC) contends the definition of "planning horizon," (7), should be clarified, perhaps to include a specific time period. NWE recommends several changes, without explanation. NWE explains its suggested change to the definition of "long-term," (6), by contending that contracts less than two years "do not lend themselves to the detail of the process provided by these rules."

Responses: All administrative rules and actions required by administrative rules, must be consistent with the Montana Constitution. It is not necessary to emphasize Constitutional requirements in administrative rules. The rules define "Environmentally responsible" and "External costs." The rules establish resource planning and procurement goals and objectives that promote balanced consideration of economic efficiency and environmental responsibility along side other goals and objectives. The Commission believes the rules adequately address the importance of considering external costs in resource decisions. The Commission has clarified (7). NWE's amendment to (6) is not adopted. In combination with its recommendation on proposed Rule VII(1), only resources with a duration of two or more years would appear to involve an integration analysis with respect to the existing portfolio. The Commission believes multi-year (i.e., more than one year) resource acquisitions should be integrated with the existing portfolio according to proposed Rule VII, Resource Needs Assessment and with a DSU's long-term resource procurement strategy. The Commission recognizes that some short term resource acquisitions may not lend themselves to the full application of each of the guidelines contained in these rules.

Comments on Rule III: MEIC comments that "total cost" is not defined in the rules, and that it ought to include "financial and external costs associated with the provision of electricity to default supply customers." District XI Human Resource Council (HRC) recommends editing (1)(e) to read, ". . . where feasible and where it is highly likely to benefit current default customers." HRC criticizes the proposed language because in its view an "environment" necessary to foster retail choice "is likely to require high default supply costs and minimal protection for default supply customers." HRC contends that retail competition should be fostered only when such competition "is expected to actually benefit [default] customers." HRC also suggests that Rule III should include the development of "an efficient and reliable electric wholesale

market" to which choice customers have access. NWE suggested an amendment, without explanation.

Responses: Disputes over how to interpret the term "total costs" may not be avoidable even with additional Commission guidance in these rules. The rules require the default supplier to consider societal costs in making resource procurement decisions. The default supplier must assemble an environmentally responsible portfolio in order to achieve one of the several objectives in the rules. This is different than requiring the default supplier to minimize long-term societal costs, which is what MEIC appears to prefer. This is an area where balancing objectives is important – avoiding the "race to the bottom" with respect to environmental attributes of default resources, while at the same time avoiding creating inefficiency and/or inequity in a retail choice environment. Better product labeling and disclosure might help avoid irrational consumer decisions and enable the default supplier to pursue greater consideration of societal costs, but additional work is needed here. NWE's advisory committee and incremental guidance from the Commission through orders and comments on portfolio planning can best define the proper balance over time.

The Commission believes it addressed HRC's concerns by using the word "meaningful" to modify "retail choice." Retail choice is meaningful to consumers if it adds value: lower cost, better quality, more services. HRC's concern may also be addressed in the term "workable competition." If competition is workable, then, depending on how one specifically defines that term, consumers should benefit from such competition. The economics and regulatory literature is replete with studies on how best to define workable competition; in general it should lead to outcomes that approximate the level of economic efficiency provided by perfect competition. The Commission agrees that an efficient and reliable wholesale market is critical for meaningful or beneficial retail choice and retail competition. Given that the guidelines are focused on default supply planning and procurement, the Commission has not determined how best to address the broader goal in these rules; it may be implicit in that the rules rely on competitive bidding and a diverse resource portfolio. The Commission may explore this issue more in future rulemaking. The NWE amendment is not adopted.

Comments on Rule IV: MEIC makes specific recommendations for modifying (1)(e). MEIC expresses concern "over the absence of comprehensive environmental disclosure, labeling, and certification rules." NWE suggested edits, and substantive changes to the language, without explanation. Commissioner Schneider recommended the following amendments: at (1)(b) insert "equitable," before "economically efficient"; at (1)(c) strike "the daily, weekly and seasonal capacity and energy" after "efficiently supplies" and insert "firm, full requirements electricity supply service to default supply customers over the planning horizon"; at (1)(d) insert "and demand-side" after the

first "power supply."

Responses: The Commission agrees that MEIC's recommended changes to Rule IV(1)(e) address an important issue. However, the Commission incorporates the improved language in Rule V. The Commission agrees with MEIC on the need to return to and conclude previous rulemaking on environmental disclosure and labeling. Other than small edits the Commission does not accept the NWE modifications. The Commission has adopted Commissioner Schneider's recommendations.

Comments on Rule V: MEIC comments that "lowest total cost" should equate with "least cost" as used at 69-3-1201 through 69-3-1206, MCA, and ARM 38.5.2001 through 38.5.2016. Regarding (2) MEIC states that emphasis should not be on "the 'renewable' nature of a resource," or "specific energy sources underlying the electricity," but on the "certification of specific projects and products as environmentally-preferred." Certification should be "in accordance with industry-accepted criteria and procedures." HRC comments that the long parenthetical sections in (1)(a) and (b) could be eliminated if the rule makes clear that the DSU will likely serve different types of customers. HRC comments that the rules should make clear that there should be separate default supply tariffs, reflecting the different costs of serving different types of default supply customers. HRC states that "long run default supply customers" should not have to bear costs associated with other types of default supply customers. NWE recommended certain changes "to recognize the potential legislative changes that may occur to customer choice given the latest discussions on the future default supply service model for small customers." Also, regarding (1)(c), NWE added language to indicate "that such services could be provided by FERC approved tariffs also." Commissioner Schneider recommends deleting the parenthetical language in (1)(a) and (b).

Responses: Regarding MEIC's comments on equating the term "lowest total cost" with "least cost," see the Commission's responses on Rule III. The Commission agrees that MEIC's recommended changes to (2) are an improvement and has modified that rule accordingly. The Commission agrees with the concepts that HRC discusses with respect to (1)(a) and (b). However, the Commission is not convinced, at this time, of the workability and sustainability of disaggregating default supply services to the degree suggested by HRC. The Commission may explore this issue more in future rulemaking or individual default supply rate cases. The Commission agrees with Commissioner Schneider that the parenthetical language in (1)(a) and (b) should be deleted. This change largely renders NWE's recommendations moot. The parenthetical language consists of statements of fact that are not necessary in administrative rules. NWE's recommended change to (1)(c) is not adopted. Emergency service is a retail service provided by the default supply utility according to Commission-approved tariff schedules, although the

method the utility uses to provide the service may involve FERC tariff schedules.

Comments on Rule VI: MEIC makes editing suggestions to (1)(e)(i). HRC comments that the Commission should "explicitly indicate in these Guidelines whether reducing [wholesale] market power is a legitimate consideration for the [DSU] to use in choosing among alternative sources of supply." HRC notes that efforts to increase the competitiveness of the wholesale market could increase DSU costs in the short-term. NWE made certain substantive language changes, without explanation. At (1)(g), Commissioner Schneider recommends striking "managers inject" after "DSU's" and inserting "and its Advisory Committee employ."

Responses: The Commission has made the edits suggested by MEIC. The Commission cannot explicitly state in these rules that it is legitimate for NWE to attempt to reduce the market power to which HRC refers in choosing from among alternative resource options. The Commission questions whether it can determine a priori that the supplier HRC refers to has market power, and if so what is the relevant market, and are there any temporal limitations to such market power. The Commission lacks sufficient information, at this time, regarding what role the current system of transmission grid management may play in any such market power. Until the Commission can answer such questions, it is unable to provide any guidance on what kind of a cost premium, for example, would be reasonable to accept in order to mitigate any market power. While not accepting Commissioner Schneider's language exactly, the Commission has amended (1)(g) to indicate a role for the advisory committee. The Commission has not adopted the changes suggested by NWE.

Comments on Rule VII: MCC comments that the Commission should adopt "Alternative A" as part of this rule, because "[t]hese Guidelines address resource procurement." MCC recommends inserting "allowable" before "default supply-related costs" at (4). MEIC suggests including "demand management" as part of (2)(a). HRC comments that the substance of both Alternative A, (3) and (4), and Alternative B, Rule VIII, "are appropriate." HRC recommends that a "shortened version of (3) should be retained," but that cross-referencing between a shortened (3) and Rule VIII would "avoid the repetition of the long list of rate design and cost allocation considerations now found in both." HRC notes a distinction in (4) between "transmission and distribution service prices" and "non-bypassable prices" for DSU services as "very important," but recommends further explanation of the point in the rule. NWE suggests certain language changes to this rule. Commissioner Schneider recommends the following amendments: at (3)(b) insert "equitable" before "cost causation"; at (3)(d) insert "consistent with recognized rate design principles" after "structures"; at (4) insert "allowable" as also recommended by MCC, and, in the second sentence insert "default supply" before the second "costs."

Responses: Proposed Rules VII and VIII are related. Commission responses to Rule VII will be included with responses to Rule VIII.

Comments on Rule VIII: HRC comments that this rule should refer to the different types of DSU service, identified in a previous rule, and the need to price them separately to avoid imposing costs on "long-term Default Supply customers" that are not "associated with serving them." HRC comments that the rule should recognize the "potential conflict between conveying real-time opportunity costs and shielding customers from market price instability," and should be written so that it cannot be interpreted "as urging spot market pricing on the [DSU]." HRC recommends addressing this concern in the rule "preamble."

Responses: In response to the comments the Commission has substantially revised proposed rules VII and VIII. MCC's recommended language change at proposed Rule VII(4), adopted as VIII(2), has been made. MEIC's recommended addition to Rule VII(2)(a) has been made. Most of HRC's organizational and substantive recommendations have been made and much of proposed Rule VII(3) has been deleted as duplicative of Rule VIII. The substance of Commissioner Schneider's recommendations were made at the appropriate places in the adopted rules. The Commission agrees with MCC that the discussion of cost allocation and rate design occurs in these rules because of the resource procurement context of the rules. The Commission also agrees with HRC that consideration of cost allocation and rate design within default supply portfolio management and resource planning process should translate into proposals submitted in rate filings. Individual rate filings are submitted under the umbrella of an on-going, dynamic process of portfolio planning, management and resource procurement. For these reasons the adopted rules also retain a separate rule on cost allocation and rate design that highlights the interrelationship between planning, resource procurement and rate filings. The Commission made some but not all of NWE's recommended language changes.

Comments on Rule IX: MEIC comments that the use of the term "advisory committee" at (2)(g) may need to be clarified by appropriate reference to another section of the rules. MCC comments that the prohibition on "flipping" at (2)(e) should be amended to give the Commission flexibility, and that (2)(e) could be modified "to restrict bid and resource evaluations to original bid proposals." NWE makes a similar comment regarding "flipping." Commissioner Schneider recommends an additional subsection under (1) to read, "obtain and consider upfront input and recommendations of advisory committee throughout planning and procurement processes." He also recommends language at the beginning of (2)(g) that exhorts the DSU to get input from an advisory committee when contemplating projects or proposals with an affiliate, and to use an independent third party to develop competitive solicitations when an affiliate is involved. NWE

makes editing and substantive recommendations to this rule.

Responses: Proposed Rule IX has been amended to address the comments of MCC, MEIC and Commissioner Schneider. Some of NWE's recommended amendments have been adopted.

Comments on Rule X: MEIC comments that the DSU should be required to develop the "targets" referred to at (3). HRC comments that the Commission should state in (5) that "high monthly fixed charges" will not be considered an "innovative method" of cost recovery for demand-side resource investments and expenses.

Responses: The Commission adopts MEIC's recommended change at (4). The Commission supports the intent of HRC's comments, but does not adopt the recommended amendment. "High monthly fixed charges" is a subjective term; the Commission will decide ratemaking issues regarding fixed charges in contested cases where there is case-specific cost information, record evidence and policy argument.

Comments on Rule XI: NWE recommends substantive changes to (1), without explanation. Commissioner Schneider recommended that a new (4) be added indicating the importance of public process and an independent advisory committee.

Responses: The Commission does not adopt NWE's first suggested change to (1) because it is an unnecessary addition that characterizes the concept of risk. The Commission does not adopt NWE's second and third suggested changes to (1) because they inappropriately weaken the guidance being provided to DSUs. The Commission considers the ideas in NWE's fourth suggested change a reasonable clarification and has incorporated the suggested change. The Commission has substantially adopted Commissioner Schneider's recommended language.

Comments on Rule XII: NWE recommends substantive changes to (2) and (2)(f), without explanation.

Responses: NWE's first recommended change to (2) is a reasonable clarification of intent. The Commission adopts this recommended change. The Commission does not adopt NWE's second recommended change in (2) because it is an unnecessary statement that is misplaced in the context of the rule. NWE's recommended change to (2)(f) is a reasonable clarification. The Commission adopts this change.

Comments on Rule XIII: MCC suggests amending the second sentence of (2)(b) to indicate that affiliate transactions "cannot be presumed" to be conducted on a truly arm's-length basis. NWE comments that the "lower of cost or market" standard at (2)(b) should be applicable "at the time of contract execution."

Responses: The Commission adopts MCC's recommended change to (2)(b) as a more accurate characterization of the regulatory concern with affiliate transactions. NWE questioned whether the lower of cost or market standard may be inconsistent with the public interest if it penalizes the Company for pursuing projects that would enhance competition and reduce customer exposure to exploitation. Affiliate transactions also involve the risk of customer exploitation and there are other means of enhancing competition that do not involve affiliate transactions. The Commission adopts NWE's clarification that the lower of cost or market standard is applied at the time the contract is executed.

Comments on Rule XIV: HRC comments that thus far the timing of NWE decisions has made it difficult for the advisory committee to play a "meaningful role." HRC hopes this problem will be resolved. Commissioner Schneider recommended adding some language related to an advisory committee.

Responses: The Commission considers it very important that the advisory committee play a meaningful role. Commissioner Schneider's recommended language has been adopted.

Miscellaneous Comments: MCC suggested it would be preferable to place some of the rules in a different order. NWE made editing suggestions throughout the rules. NWE made some substantive changes with explanation, and some without explanation.

Responses: The Commission agrees with MCC and the order of the rules will be changed when codified. Regarding NWE's suggested changes without explanation, the Commission has made changes that appear to be matters of simple editing, and substantive changes which have merit based on the Commission's own analysis and guess at NWE's reason for making the change. Where NWE has made substantive, or what appear to be substantive, changes without explanation, and the Commission does not find merit in the changes based on its own analysis, then the Commission has not made the changes.

/s/ Bob Rowe
Bob Rowe, Chairman

/s/ Robin A. McHugh
Reviewed by Robin A. McHugh

CERTIFIED TO THE SECRETARY OF STATE MARCH 31, 2003.

**BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA**

In the matter of the amendment of ARM 42.14.103 relating to diplomatic exemption regarding lodging facilities use tax	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On February 27, 2003, the department published MAR Notice No. 42-2-711 regarding the proposed amendment of ARM 42.14.103 relating to diplomatic exemption regarding lodging facilities use tax at page 295 of the 2003 Montana Administrative Register, issue no. 4.

2. No comments were received regarding this rule.

3. Therefore, the department amends ARM 42.14.103 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 March 31, 2003

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 December 31, 2002. This table includes those rules adopted during the period January 1, 2003 through March 31, 2003 and any proposed rule action that was pending during the past six-month period. (A notice of adoption must be published within six 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 December 31, 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 2002 Montana Administrative Registers.

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