

# MONTANA ADMINISTRATIVE REGISTER

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# MONTANA ADMINISTRATIVE REGISTER

## ISSUE NO. 24

The Montana Administrative Register (MAR or Register), a twice-monthly publication, has three sections. The Proposal Notice Section contains state agencies' proposed new, amended, or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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 Adoption Section contains final rule notices which show any changes made since the proposal stage. All rule actions are effective the day after publication of the adoption notice unless otherwise specified in the final notice. The Interpretation Section contains the Attorney General's opinions and state declaratory rulings. Special notices and tables are found at the end 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 Secretary of State's Office, Administrative Rules Services, at (406) 444-9009.

### Page Number

## TABLE OF CONTENTS

### PROPOSAL NOTICE SECTION

#### COMMERCE, Department of, Title 8

8-111-185 Notice of Public Hearing on Proposed Amendment -  
Definitions - Housing Credit Allocation Procedure. 2287-2289

#### ENVIRONMENTAL QUALITY, Department of, Title 17

17-415 (Water Quality) Notice of Virtual Public Hearing on Proposed  
Amendment - Nutrient Standards Variances. 2290-2295

#### LABOR AND INDUSTRY, Department of, Title 24

24-210-46 (Board of Realty Regulation) Notice of Public Hearing on  
Proposed Amendment and Repeal - Fee Schedule - Unprofessional  
Conduct - Citations and Fines - Prelicensing Education-  
Salespersons and Brokers - Continuing Real Estate Education -  
Continuing Property Management Education - New Licensee  
Mandatory Continuing Education-Salespersons. 2296-2302

24-301-350 Notice of Public Hearing on Proposed Amendment -  
Incorporation by Reference of the International Energy Conservation  
Code. 2303-2308

PUBLIC HEALTH AND HUMAN SERVICES, Department of, Title 37

37-937 Notice of Public Hearing on Proposed Adoption and Amendment - Substance Use Disorder (SUD) State Approval. 2309-2313

37-938 Notice of Public Hearing on Proposed Amendment - Big Sky Rx Benefit. 2314-2316

37-939 Notice of Public Hearing on Proposed Amendment - Newborn Screening. 2317-2319

PUBLIC SERVICE REGULATION, Department of, Title 38

38-2-247 Notice of Public Hearing on Proposed Amendment - Investigation and Discovery. 2320-2323

RULE ADOPTION SECTION

FISH, WILDLIFE AND PARKS, Department of, Title 12

12-531 (Fish and Wildlife Commission) Notice of Amendment and Adoption - Recreational Use on the Madison River. 2324-2334

ENVIRONMENTAL QUALITY, Department of, Title 17

17-413 (Board of Environmental Review) (Air Quality) Notice of Amendment - Air Quality Operation Fees. 2335

17-414 (Board of Environmental Review) (Water Quality) Notice of Amendment and Adoption - Selenium Standards for Lake Koocanusa and the Kootenai River. 2336-2400

CORRECTIONS, Department of, Title 20

20-25-70 (Board of Pardons and Parole) Notice of Adoption and Amendment - Parole Guidelines - Conditional Discharge From Supervision. 2401-2406

JUSTICE, Department of, Title 23

23-18-249 Notice of Adoption and Amendment - Montana 24/7 Sobriety Program Act. 2407-2408

LABOR AND INDUSTRY, Department of, Title 24

24-13-366 Notice of Adoption - HELP-Link. 2409

LABOR AND INDUSTRY, Continued

24-17-363 Notice of Amendment - Prevailing Wage Rates for Public Works Projects.	2410-2418
24-21-362 Notice of Amendment - Apprenticeship and Training Program.	2419
24-22-368 Notice of Adoption - Implementation of the Montana Employment Advancement Right Now Program Act.	2420-2421
24-26-353 (Board of Personnel Appeals) Notice of Amendment, Amendment and Transfer, Adoption, Repeal, and Transfer - Practices of and Procedures Before the Board of Personnel Appeals.	2422-2430
24-29-364 Notice of Amendment - Drug Formulary in the Utilization and Treatment Guidelines for Workers' Compensation and Occupational Disease.	2431
24-29-365 Notice of Adoption - Reimbursement of Workers' Compensation Premiums Due to Providing High-Quality Work-Based Learning Opportunities.	2432-2433

PUBLIC HEALTH AND HUMAN SERVICES, Department of, Title 37

37-932 Notice of Adoption and Amendment - Substantiation of Abuse and Neglect Reports - Disclosure of Information.	2434
37-934 Notice of Adoption and Amendment - Home Support Services (HSS) Program Redesign.	2435-2437
37-935 Notice of Adoption and Amendment - Health and Economic Livelihood Partnership (HELP) Act.	2438-2441

INTERPRETATION SECTION

Before the Gambling Control Division of the Department of Justice of the State of Montana.

Declaratory Ruling.

In the Matter of the Application of Rewards, LLC, for a Declaratory Ruling on the Applicability of 23-5-621(1)(e)(i), MCA and ARM 23.16.2115.	2442-2445
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SPECIAL NOTICE AND TABLE SECTION

Function of Administrative Rule Review Committee.	2446-2447
How to Use ARM and MAR.	2448
Recent Rulemaking by Agency.	2449-2455
Executive Branch Appointees.	2456-2462
Executive Branch Vacancies.	2463-2505

BEFORE THE DEPARTMENT OF COMMERCE  
OF THE STATE OF MONTANA

In the matter of the amendment of ) NOTICE OF PUBLIC HEARING ON  
ARM 8.111.602 definitions and ) PROPOSED AMENDMENT  
8.111.603 housing credit allocation )  
procedure )

TO: All Concerned Persons

1. On January 13, 2021, at 11:00 a.m., the Department of Commerce will hold a public hearing by conference call, 1-877-273-4202, conference room 7865396, to consider the proposed amendment of the above-stated rules.

2. The Department of Commerce will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Commerce no later than 5:00 p.m., January 11, 2021, to advise us of the nature of the accommodation that you need. Please contact Bonnie Martello, Department of Commerce, 301 South Park Avenue, P.O. Box 200501, Helena, Montana 59620-0523; telephone (406) 841-2770; TDD 841-2702; fax (406) 841-2771; or e-mail docadministrativerules@mt.gov.

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

8.111.602 DEFINITIONS (1) and (2) remain the same.

(3) "QAP" means the board's "Housing Credit Program ~~2024~~ 2022 Qualified Allocation Plan," which sets forth the application process and selection criteria used by the board for evaluation and selection of projects to receive awards for allocation of housing credits for calendar year ~~2024~~ 2022. The board adopts and incorporates by reference the Housing Credit Program ~~2024~~ 2022 Qualified Allocation Plan, copies of which may be obtained by contacting the Board of Housing by mail at P.O. Box 200528, Helena, MT 59620-0528, by telephone at (406) 841-2845 or (406) 841-2838, or at the board's web site [www.housing.mt.gov](http://www.housing.mt.gov).

(4) remains the same.

AUTH: 90-6-106, MCA  
IMP: 90-6-104, MCA

REASON: The proposed amendments to ARM 8.111.602 are necessary to adopt and incorporate by reference the board's Housing Credit Program 2022 Qualified Allocation Plan (QAP).

Federal low-income housing tax credits are allocated by the federal government to the states, according to their population, for allocation to particular buildings. Each state's share of federal low-income housing tax credits is allocated to particular

buildings under programs administered by the respective states' housing credit agencies. The Montana Board of Housing is Montana's housing credit agency for purposes of administering the tax credit program and allocating tax credits in the state of Montana. In Montana, the program is known as the Montana Housing Credit Program. Federal law requires that tax credits allocated to the state by the federal government must be allocated by the state pursuant to a "qualified allocation plan" or QAP.

Prior to publication of this notice, the board conducted several public meetings to consider suggestions and comments regarding the provisions of the 2022 QAP. Thereafter, at its September 15, 2020 meeting, the board considered and approved public notice and distribution of the proposed 2022 QAP. After public notice of the proposed 2022 QAP and of the opportunity for public comment was published and distributed, a public hearing on the proposed 2022 QAP was held on October 27, 2020 and written comments were also received. At its November 2, 2020 meeting, after considering all written and oral comments on the proposed 2022 QAP, staff recommendations, additional public comment and various proposed revisions in response to comments, the board approved the 2022 QAP for submission to and approval by the Montana Governor, as required by the federal tax credit statute, 26 U.S.C. § 42. Governor Bullock approved the 2022 QAP on November 13, 2020.

A copy of the 2022 QAP is available on the internet at <http://housing.mt.gov/MFQAP> or by requesting a copy from: Nicole Whyte, Board of Housing, Department of Commerce, 301 South Park Avenue, P.O. Box 200528, Helena, Montana, 59620-0528; telephone (406) 841-2048; fax (406) 841-2841; or e-mail [nicole.whyte@mt.gov](mailto:nicole.whyte@mt.gov).

8.111.603 HOUSING CREDIT ALLOCATION PROCEDURE (1) through (5) remain the same.

(6) Copies of applications and other information submitted to the board in connection with applications are available to other applicants for housing credit projects and members of the public to the extent provided and according to the procedures specified in the board's information request and release policy, available on the ~~board's~~ Department of Commerce web site at <https://commerce.mt.gov/Contact/Legal> ~~www.housing.mt.gov~~.

(7) through (9) remain the same.

AUTH: 90-6-106, MCA

IMP: 90-6-104, MCA

REASON: The proposed amendment to ARM 8.111.603(6) is necessary to update the rule to provide that public record requests will be handled in accordance with the Department of Commerce public information request policy, available on the department's website. Public record requests previously were addressed in a separate Board of Housing policy, but are now handled under a general department policy.

4. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Department of Commerce, 301 South Park Avenue, P.O. Box 200523, Helena, Montana 59620-0523; telephone (406) 841-2770; TDD 841-2702; fax (406) 841-2771; or e-mail docadministrativerules@mt.gov, and must be received no later than 5:00 p.m., January 21, 2021.

5. The Office of Legal Affairs, Department of Commerce, has been designated to preside over and conduct this hearing.

6. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 4 above or may be made by completing a request form at any rules hearing held by the department

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

8. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment of the above-referenced rules will not significantly and directly impact small businesses.

MONTANA BOARD OF HOUSING  
Patrick E. Melby, Chairman

/s/ Amy Barnes  
Amy Barnes  
Rule Reviewer

/s/ Adam Schafer  
Adam Schafer  
Deputy Director  
Department of Commerce

Certified to the Secretary of State December 15, 2020.



BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY  
OF THE STATE OF MONTANA

In the matter of the amendment of ARM )	NOTICE OF VIRTUAL PUBLIC
17.30.660 pertaining to nutrient )	HEARING ON PROPOSED
standards variances )	AMENDMENT
)	
)	(WATER QUALITY)

TO: All Concerned Persons

1. On February 8, 2021, at 1:00 p.m., the Department of Environmental Quality (department) will hold a virtual public hearing via Zoom, to consider the proposed amendment of the above-stated rule.

Due to the guidance issued by the Governor of the State of Montana on March 26, 2020, regarding the COVID-19 public health situation, the public hearing will be held virtually via the Zoom meeting platform and will be recorded. Persons wishing to attend the public hearing need to register in advance with Zoom. Registration with Zoom may be made at the following link: Join Zoom Meeting <https://mt-gov.zoom.us/j/98621930251?pwd=SDE0anVtb21xcGFDeXpqNldPdDBKUT09>

Meeting ID: 986 2193 0251  
Password: 440231

Dial by Telephone  
+1 646 558 8656 or +1 406 444 9999  
Meeting ID: 986 2193 0251  
Password: 440231  
Find your local number: <https://mt-gov.zoom.us/j/98621930251>

Join by SIP  
[98621930251@zoomcrc.com](mailto:98621930251@zoomcrc.com)

Join by H.323 (Polycom)  
162.255.37.11##98621930251

After registering, you will receive a confirmation email containing information about joining the hearing. Please contact Sandy Scherer at the Department of Environmental Quality at (406) 444-2630 or [sscherer@mt.gov](mailto:sscherer@mt.gov) should you encounter any difficulties.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Sandy Scherer no later than 5:00 p.m., February 1, 2021, to advise us of the nature of the accommodation that you need. Please contact Sandy Scherer at the Department of

Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail sscherer@mt.gov.

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

17.30.660 NUTRIENT STANDARDS VARIANCES (1) A person may apply to the department for a nutrient standards variance at any time following the board's adoption of base numeric nutrient standards. In addition to this rule, variances are subject to the procedures and requirements contained in Department Circular DEQ-12B (~~November 2019~~ March 2021 edition).

(2) An application for a general variance must provide information demonstrating that the wastewater treatment facility meets the requirements of Department Circular DEQ-12B (~~November 2019~~ March 2021 edition). The decision to grant the general variance must be reflected in the permit that is made available for public comment.

(3) remains the same.

(4) The department may approve the adoption of an individual variance that specifies interim effluent limits different from those contained in general variance limits contained in Department Circular DEQ-12B (~~November 2019~~ March 2021 edition), if water quality modeling demonstrates that greater emphasis on the reduction of one nutrient may achieve similar water quality and biological improvements as would the equal reduction of both nitrogen and phosphorus. The variance must provide effluent limits that reflect the lowest effluent concentration that is feasible based on achieving the highest attainable condition for the receiving water. A person shall submit the proposed effluent limits and supporting data in an application for an individual nutrient variance under (3). A person who has an individual variance with effluent limits that are based on this section shall, in each subsequent triennial review of those limits conducted pursuant to 75-5-313(7), MCA, collect and submit water quality data to demonstrate whether the biological status of the receiving water continues to justify those effluent limits.

(5) through (7) remain the same.

(8) The department adopts and incorporates by reference Department Circular DEQ-12B, entitled "Nutrient Standards Variances" (~~November 2019~~ March 2021 edition), which provides procedures and requirements for nutrient standards variances. Copies of Department Circular DEQ-12B (March 2021 edition) are available at the Department of Environmental Quality, 1520 East 6th Avenue, P.O. Box 200901, Helena, MT 59620-0901.

(9) If a court of competent jurisdiction determines that the United States Environmental Protection Agency's October 31, 2017 approval of the general variance is valid and lawful, then the incorporations by reference of the ~~November 2019~~ March 2021 edition of Department Circular DEQ-12B contained in this rule shall be void, and the May 2018 edition of Department Circular DEQ-12B shall contain the applicable general variance. If such contingency occurs, all references to the ~~November 2019~~ March 2021 edition of Department Circular DEQ-12B contained in this rule shall be stricken and shall be considered as replaced with the May 2018 edition.

AUTH: 75-5-313, MCA

IMP: 75-5-313, MCA

REASON: The department is proposing to revise Department Circular DEQ-12B in response to the U.S. District Court for the District of Montana's Consolidated Order (October 30, 2020) for cases CV-16-52-GF-BMM and CV-20-27-GF-BMM.

In 2019, the department revised Department Circular DEQ-12B to respond to orders issued by the U.S. District Court in Case No. CV-16-52-GF-BMM. See MAR Notice No. 17-408, pertaining to the amendment of ARM 17.30.660 at page 2100 of the 2019 Montana Administrative Register, Issue No. 22 (November 22, 2019). The revised circular (November 2019 version) was provided to EPA for review; EPA disapproved it on February 24, 2020 as inconsistent with the District Court's 2019 orders. In its disapproval, EPA noted it respectfully disagreed with the District Court's Orders and that it had filed an appeal. The State of Montana has also filed an appeal of certain aspects of the District Court's 2019 Orders. See *Upper Mo. Waterkeeper v. EPA*, No. 20-35135 (9th Cir.) Those appeals are pending.

In 2019, while the District Court found significant portions of the general nutrient standards variance to be lawful and supported by the record, the Court partially vacated and remanded a portion of EPA's October 31, 2017 approval of the general variance found in Department Circular DEQ-12B. The Court then stayed this vacatur and ordered the department to revise the effective variance and adopt a revised general variance timeline. The Court's action allowed the general variance to remain in place, pending EPA's approval of a revised variance. The Court did not vacate EPA's approval of the department's findings concerning widespread economic and social impacts, nor did it vacate approval of the treatment requirements found in Table 12B-1 of Department Circular DEQ-12B.

In its 2020 Consolidated Order, the Court directed that its stay of the partial vacatur of the general variance timelines would remain in place until EPA approves a replacement general variance timeline. The Court directed the department reach general variance timelines that (1) begin with a program that complies with the relaxed criteria of the general variance; (2) work toward ultimate attainment of Montana's stringent base numeric nutrient standards in order to demonstrate progress toward attainment; and (3) adopt a timeline for which attainment of Montana's base numeric nutrient standards would be feasible.

This proposed rulemaking is necessary in order to comply with the Consolidated Order and the 2019 orders issued by the Court. The department was given 120 days from the date of the Consolidated Order to complete the rulemaking and then submit it to EPA for their review (EPA has 90 days to complete its review). This rulemaking is focused only on the requirements of the orders issued by the Court. The rulemaking will allow continued use and application of the general variance for eligible dischargers and will prevent the related economic and social harm that would result from requiring immediate compliance with the base numeric nutrient

standards. Because the Court previously found the justifications and treatment requirements to be reasonable and did not vacate these portions of EPA's approval, the department is not addressing these matters in this rulemaking. Because EPA's approval was limited to only 36 municipal facilities, this proposed rulemaking is also limited to those 36 facilities.

Program that Complies with the Relaxed Criteria of the General Variance: In its July 16, 2019 Remedy Order in Case No. CV-16-52-GF-BMM, the Court reiterated that the adoption of a 17-year timeline to reach the Table 12B-1 values violated the Federal Clean Water Act and that the general variance must, instead, begin with the Table 12B-1 treatment requirements. In doing so, the Court recognized "the reality that discharges throughout the State of Montana currently stand at different levels of attainment." In response, the department proposes that mechanical dischargers ( $\geq 1.0$  million gallons per day and  $< 1.0$  million gallons per day) and lagoon dischargers must attain the Table 12B-1 treatment requirements as soon as possible; the list of 36 facilities eligible for the general variance are in Appendix A of the circular. The general variance is implemented through MPDES permitting, and through permitting the department will be able to ensure facilities are achieving the Table 12B-1 treatment requirements as soon as possible.

Several mechanical facilities are currently achieving the Table 12B-1 treatment requirements and most of the remaining mechanical facilities should be able to attain the treatment requirements well before July 1, 2027. However, the department has identified one mechanical facility, the Town of Manhattan, that may require up to July 1, 2027 to achieve the Table 12B-1 treatment requirements. For the mechanical facilities that are not yet able to attain the Table 12B-1 treatment requirements, i.e., the Cities of Butte, Helena, Kalispell, and Manhattan, this rulemaking clarifies that a compliance schedule may be used to ensure the Table 12B-1 treatment requirements are met as soon as possible.

Because Table 12B-1 already requires that lagoon facilities maintain long-term average effluent concentrations for TP and TN, lagoon facilities—in the short-term—must focus on implementing pollutant minimization programs as soon as possible. In section 2.2.1.2. of the revised Circular DEQ-12B, the department is required to complete its statewide lagoon performance evaluations no later than 2022 (2020 travel restrictions due to the coronavirus pandemic slowed the department's progress and the revised date reflects this).

Work toward Ultimate Attainment of Montana's Stringent Base Numeric Nutrient Standards in Order to Demonstrate Progress Toward Attainment: The department revised Circular DEQ-12B to include section 2.3. This section describes the process for reviewing and amending the Table 12B-1 treatment requirements and how the department and eligible facilities will proceed as the treatment requirements are modified through the triennial review procedure. If Table 12B-1 treatment requirements are not modified during a triennial review, the proposed revisions to Circular DEQ-12B also require the submission and implementation of a revised pollutant minimization program for those facilities currently achieving the Table 12B-

1 treatment requirements. This ensures all facilities will continue to make progress toward attaining the base numeric nutrient standards.

Adopt a Timeline for which Attainment of Montana's Base Numeric Nutrient Standards would be Feasible: Section 2.3 addresses the specific timeline to achieve the base numeric nutrient standards and is consistent with the Court's adoption of Plaintiff's proposed timeline of 2035. Under the terms of 75-5-313(8), MCA, the general variance may be established for a period not to exceed 20 years. Because the original version of the general nutrient standards variance became effective for state law purposes on August 8, 2014, the term of the general variance may not extend beyond August 7, 2034. Section 2.3 also addresses circumstances in which the general variance has ended but base nutrient standards have not been attained. The department may recommend that the board revise designated uses or, if substantial and widespread economic and social impacts are no longer demonstrated, the department may implement a compliance schedule to meet the standards.

To incorporate the amended version of Department Circular DEQ-12B, the amendment of ARM 17.30.660 is also necessary to change references from the November 2019 Edition to the March 2021 Edition of Department Circular DEQ-12B.

4. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Sandy Scherer, Paralegal, Department of Environmental Quality, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana 59620-0901; faxed to (406) 444-4386; or e-mailed to [sscherer@mt.gov](mailto:sscherer@mt.gov), no later than 5:00 p.m., February 8, 2021. To be guaranteed consideration, mailed comments must be postmarked on or before that date. A copy of proposed Department Circular DEQ-12B (March 2021) may be viewed at the department's website: <http://deq.mt.gov/water/drinkingwater/standards>. Copies may also be obtained by contacting Mike Suplee at (406) 444-0831 or [msuplee@mt.gov](mailto:msuplee@mt.gov).

5. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, 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 supply; public sewage systems regulation; hard rock (metal) mine reclamation; major facility siting; opencut mine reclamation; strip mine reclamation; subdivisions; renewable energy grants/loans; wind energy bonding, 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. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to Sandy Scherer, Paralegal, Department of Environmental Quality, 1520 E. Sixth Ave., P.O. Box 200901, Helena, Montana 59620-0901, faxed to the office at

(406) 444-4386, e-mailed to Sandy Scherer at sscherer@mt.gov, or may be made by completing a request form at any rules hearing held by the department.

6. Kurt Moser, attorney for the department, has been designated to preside over and conduct the hearing.

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

8. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment of the above-referenced rule will not significantly and directly impact small businesses.

Reviewed by:

DEPARTMENT OF ENVIRONMENTAL  
QUALITY

/s/ Edward Hayes

EDWARD HAYES

Rule Reviewer

BY: /s/ Shaun McGrath

SHAUN McGRATH

Director

Certified to the Secretary of State December 15, 2020.

BEFORE THE BOARD OF REALTY REGULATION  
DEPARTMENT OF LABOR AND INDUSTRY  
STATE OF MONTANA

In the matter of the amendment of	)	NOTICE OF PUBLIC HEARING ON
ARM 24.210.401 fee schedule,	)	PROPOSED AMENDMENT AND
24.210.641 unprofessional conduct,	)	REPEAL
24.210.643 citations and fines,	)	
24.210.660 prelicensing education –	)	
salespersons and brokers, 24.210.667	)	
continuing real estate education,	)	
24.210.835 continuing property	)	
management education, and the repeal	)	
of 24.210.661 new licensee mandatory	)	
continuing education – salespersons	)	

TO: All Concerned Persons

1. On January 21, 2021, at 9:00 a.m., a public hearing will be held via remote conferencing to consider the proposed amendment and repeal of the above-stated rules. Because there currently exists a state of emergency in Montana due to the public health crisis caused by the coronavirus, there will be no in-person hearing. Interested parties may access the remote conferencing platform in the following ways:

- a. Join Zoom Meeting, <https://mt-gov.zoom.us/j/94151717287>, Meeting ID: 941 5171 7287, Passcode: 365585; or
- b. Dial by telephone, +1 406 444 9999 or +1 646 558 8656, Meeting ID: 941 5171 7287, Passcode: 365585.

The hearing will begin with a brief introduction by department staff to explain the use of the videoconference and telephonic platform. All participants will be muted except when it is their time to speak.

2. The Department of Labor and Industry (department) will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board of Realty Regulation no later than 5:00 p.m., on January 14, 2021, to advise us of the nature of the accommodation that you need. Please contact Rhonda Morgan, Board of Realty Regulation, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2320; Montana Relay 1 (800) 253-4091; TDD (406) 444-2978; facsimile (406) 841-2323; or [dlibsdrre@mt.gov](mailto:dlibsdrre@mt.gov) (board's e-mail).

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

24.210.401 FEE SCHEDULE (1) through (13) remain the same.

(14) Placing active license on inactive status	20
(15) through (17) remain the same but are renumbered (14) through (16).	
(18) Rookie continuing education course registration	175
(19) and (20) remain the same but are renumbered (17) and (18).	
(21) Late fee for individual application for CE course credit (per course)	100

AUTH: 37-1-131, 37-1-134, 37-51-203, 37-51-207, MCA

IMP: 37-1-131, 37-1-134, 37-1-141, 37-51-202, 37-51-204, 37-51-207, 37-51-301, 37-51-302, 37-51-303, 37-51-308, 37-51-309, 37-51-311, 37-51-502, MCA

REASON: A 2016 Legislative Audit Division performance audit determined the board's inactive license fees conflicted with department rules and in 2019 (MAR Notice No. 24-210-45), the board amended this rule to address the audit. Fiscal staff recently discovered the fee to place licenses on inactive status had not been removed. The board is striking (14) to align with the audit and fiscal staff recommendation.

The board is amending and repealing several rules in this notice to move the post-licensure rookie course into pre-licensing course content. See REASON for ARM 24.210.661. The board is striking (18) to eliminate the rookie course registration fee to align with and facilitate the other rule changes.

In 2019, the board amended and repealed rules that ended board preapproval of CE courses, providers, and instructors. Subsequently, staff reviewed the board's fees and noticed a late fee for licensees requesting approval of CE courses. The board concluded that since CE courses are no longer pre-approved, and compliance is ensured through the random audit process, this fee is no longer necessary and is being stricken from (21).

24.210.641 UNPROFESSIONAL CONDUCT (1) ~~A licensee involved in any real estate transaction shall comply with the generally accepted standards of practice. In addition to all other statutes and rules administered by the board, the following are considered unprofessional conduct:~~

~~(2) (a) A licensee shall not act acting as an agent for a party or parties in a real estate transaction where that agency representation conflicts with the obligations owed by the licensee to another party. This does not prohibit dual agency as permitted in 37-51-313, MCA.~~

~~(3) Violation of 37-51-321, MCA, constitutes unprofessional conduct.~~

~~(4) The board may take disciplinary action and impose any penalty found in 37-1-312, MCA, against any licensee who violates any statute or rule administered by the board.~~

~~(5) In addition to all other provisions contained in the statutes and rules administered by the board, the following are considered unprofessional conduct:~~

~~(a) through (j) remain the same but are renumbered (b) through (k).~~

~~(k) failing to make reasonable efforts to perform all obligations arising from any agreement entered into;~~

~~(l) through (q) remain the same.~~



- ~~(r) failing, as a licensee, to repay the recovery account for any amounts paid from the account based on an unsatisfied judgment against the licensee;~~
- ~~(s) through (ac) remain the same but are renumbered (r) through (ab).~~
- ~~(ad) guaranteeing or authorizing a person to guarantee future profits which may result from the resale of real property;~~
- ~~(ae) and (af) remain the same but are renumbered (ac) and (ad).~~
- ~~(ag) failing to disclose in advertising the licensee's name and identifying that the advertisement is made by a real estate licensee or that the advertising is made by a brokerage company;~~
- ~~(ah) through (at) remain the same but are renumbered (ae) through (aq).~~
- ~~(au) indicating on a renewal form that the licensee has completed all required continuing education as of the date of submission of the renewal form when the licensee has not completed the continuing education;~~
- ~~(av) and (aw) remain the same but are renumbered (ar) and (as).~~
- ~~(ax) when applying for a broker license, claiming more credit for transactional experience than actually earned;~~
- ~~(ay) and (az) remain the same but are renumbered (at) and (au).~~
- ~~(6) and (7) remain the same but are renumbered (2) and (3).~~

AUTH: 37-1-131, 37-1-136, 37-1-319, 37-51-203, MCA

IMP: 37-1-131, 37-1-136, 37-1-137, 37-1-307, 37-1-312, 37-1-316, 37-1-319, 37-51-306, 37-51-309, 37-51-313, 37-51-314, 37-51-321, 37-51-324, ~~37-51-503, 37-51-508, 37-51-512, MCA~~

**REASON:** Following an in-depth review, board legal counsel recommended several amendments to this rule to ensure no unnecessary duplication with statutes. The board determined it is reasonably necessary to update this rule to remove duplication with statute, simplify and streamline the rule for ease of use and readability, and more clearly set forth the actions considered by the board as unprofessional conduct, whether located in statute or administrative rule.

The board is striking (1)(k) as too vague to utilize in disciplinary proceedings and the conduct is adequately addressed in 37-51-313 and 37-51-314, MCA.

It is reasonably necessary to remove (1)(ad) and (1)(ag) as the provisions are duplicated in 37-51-321(1)(h) and (1)(a), MCA, respectively.

The 2019 Montana Legislature enacted Chapter 354, Laws of 2019 (House Bill 376), an act repealing the real estate recovery account and providing for the 2021 transfer of remaining money and claim deadline. The board is striking (1)(r) to align with the repeal of the recovery account and further implement the legislation.

The board is striking (1)(au) to align with the standardized department procedures for renewals, random audits, and administrative suspension.

The board is eliminating (1)(ax) as the conduct is adequately addressed by 37-1-316(3) and (4), MCA.

Authority and implementation citations are being amended to accurately reflect all statutes implemented through the rule and provide the complete sources of the board's rulemaking authority.

24.210.643 CITATIONS AND FINES (1) Citations issued by the department may be presented to the ~~broker or property manager licensee~~ responsible for the maintenance of the trust account personally or mailed by certified mail.

(2) A ~~broker or property manager licensee~~ who receives a citation has five business days from the receipt of the citation to either pay the fee or file a written dispute. Failure to either pay the fine or file a written dispute within five business days is unprofessional conduct and subject to board discipline.

~~(3) Significant violations shall be forwarded to the complaint screening panel. Significant violations may include:~~ If a licensee disputes a citation, the citation and dispute will be forwarded to the screening panel for consideration.

~~(a) an excessive number of violations in a single audit;~~

~~(b) repeat violations; or~~

~~(c) a single, severe violation.~~

AUTH: ~~37-1-319~~, 37-51-203, MCA

IMP: 37-51-324, MCA

REASON: In late 2018, department staff noticed that the regularly conducted trust account audits had resulted in increased use of the board's cite and fine authority. Board legal counsel further noted the procedure for licensees to dispute citations was not clear. Following counsel's suggestions, the board is amending this rule to clarify that the screening panel will consider all disputed citations.

Authority citations are being amended to accurately provide the complete sources of the board's rulemaking authority.

24.210.660 PRELICENSING EDUCATION – SALESPERSONS AND BROKERS (1) through (9) remain the same.

(10) ~~Prelicensing course~~ courses to obtain a sales license must consist of at least 70 hours of instruction of and must include theory and practical application of each of the following topics:

~~(a) practices, principles, and essentials of real estate~~ key steps in a real estate transaction, including listings, contracts for sale, inspections and due diligence, financing, and closing;

~~(b) real estate law, including Title 37, chapter 51, MCA, the board's administrative rules, and federal real estate marketing rules;~~

~~(c) real estate taxation;~~

~~(d) property management and leasing, including the Montana Residential Landlord Tenant Act of 1977;~~

~~(e) remains the same.~~

~~(f) estimating closing costs, escrow, and closing, and settlement practices;~~

~~(g) finance~~ real estate financing, including mortgages, trust deeds and indentures, seller financing, commercial financing, mortgage brokers and bankers, and government involvement in real estate financing;

~~(h) hazardous waste or environmental issues;~~

~~(i) agency law;~~

~~(j) contract law and documents, including listings and contracts of sale;~~

~~(k) state rules and regulations;~~

(l) remains the same but is renumbered (k).

~~(m)~~ (l) forms of real estate ownership, including estates, condominiums, and cooperatives;

~~(n)~~ (m) title and transfer of title, including buyer inspection of title, legal aspects of a deed, methods of property conveyance, clouds on the title, and selling mortgaged properties;

(o) remains the same but is renumbered (n).

~~(p)~~ (o) ~~negligence or misrepresentation (risk management)~~ encumbrances and easements;

~~(q)~~ (p) ~~real estate security instruments~~ public and private land use controls, including the police power;

(r) remains the same but is renumbered (q).

~~(s)~~ (r) Regulation Z; and

~~(t)~~ landlord tenant law.

(s) land descriptions;

(t) appraisal and valuation; and

(u) math and financial calculations.

(11) through (14) remain the same.

AUTH: 37-1-131, 37-51-203, MCA

IMP: 37-1-131, 37-51-302, MCA

REASON: The board is amending and repealing several rules in this notice to move the post-licensure rookie course into pre-licensing course content. See REASON for ARM 24.210.661. It is reasonably necessary to amend this rule to increase the hours of instruction and update the content and required topics to align with and facilitate the other rule changes.

24.210.667 CONTINUING REAL ESTATE EDUCATION (1) through (3) remain the same.

~~(4)~~ The required hours shall be in real estate related topics approved by the board.

(5) through (7) remain the same but are renumbered (4) through (6).

AUTH: 37-1-131, 37-1-319, 37-51-203, MCA

IMP: 37-1-131, 37-1-141, 37-1-306, 37-1-319, 37-51-202, 37-51-204, MCA

REASON: Following the elimination of CE pre-approval, staff noticed that the board continued to review and post a list of acceptable CE topics. During a rule review, staff suggested that the practice of real estate is broad enough to allow for CE in many areas beyond any certain list of topics. The board agreed and is amending this rule and ARM 24.210.835 to no longer approve CE topics or produce a topics list. The board does not want to limit licensees' ability to improve their practice and trusts them to select quality CE that fits the profession.

24.210.835 CONTINUING PROPERTY MANAGEMENT EDUCATION

(1) through (3) remain the same.

(4) ~~The required hours shall be in property management related topics approved by the board.~~

(5) and (6) remain the same but are renumbered (4) and (5).

AUTH: 37-1-131, 37-1-319, 37-51-203, MCA

IMP: 37-1-131, 37-1-141, 37-1-306, 37-1-319, 37-51-202, 37-51-204, MCA

REASON: See REASON for ARM 24.210.667.

4. The rule proposed to be repealed is as follows:

24.210.661 NEW LICENSEE MANDATORY CONTINUING EDUCATION – SALESPERSONS

AUTH: 37-1-131, 37-1-319, 37-51-203, MCA

IMP: 37-1-131, 37-1-141, 37-1-306, 37-1-319, 37-51-202, 37-51-204, MCA

REASON: Over the past several years, the board received input regarding the post-licensure rookie course. Specifically, limited numbers of instructors and course hosts could not guarantee a scheduled rookie course within the 120-day completion requirement. Additionally, supervising brokers proposed that it would be ideal for salespersons to know the rookie course subject matter prior to licensure. Instructors and professional association members requested the board eliminate the post-licensure rookie course and instead incorporate its content into the pre-licensing course.

In 2019, the Montana Legislature enacted Chapter 51, Laws of 2019 (Senate Bill 77) to address legislative audit findings and provide recommendations to the department. The bill amended 37-51-302, MCA, thus allowing the board to expand pre-licensing education to salespersons.

Following the bill's passage, the board appointed a rules committee to explore ways to address the concerns about the post-licensure course. On January 16, 2020, the board accepted the committee's recommendations and is now repealing this rule and amending several other rules in this notice to move the post-licensure rookie course into pre-licensing course content. These changes will also streamline the learning process for new applicants, providing the needed education at the time of initial licensure.

5. Concerned persons may present their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Board of Realty Regulation, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2323, or e-mail to [dlibsdrre@mt.gov](mailto:dlibsdrre@mt.gov), and must be received no later than 5:00 p.m., January 21, 2021.

6. An electronic copy of this notice of public hearing is available at [www.realestate.mt.gov](http://www.realestate.mt.gov) (department and board's web site). Although the department strives to keep its web sites accessible at all times, concerned persons should be aware that web sites may be unavailable during some periods, due to system

maintenance or technical problems, and that technical difficulties in accessing a web site do not excuse late submission of comments.

7. The board maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this board. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding all board administrative rulemaking proceedings or other administrative proceedings. The request must indicate whether e-mail or standard mail is preferred. Such written request may be sent or delivered to the Board of Realty Regulation, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; faxed to the office at (406) 841-2323; e-mailed to [dlibsdrre@mt.gov](mailto:dlibsdrre@mt.gov); or made by completing a request form at any rules hearing held by the agency.

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

9. Regarding the requirements of 2-4-111, MCA, the board has determined that the amendment of ARM 24.210.401, 24.210.641, 24.210.643, 24.210.660, 24.210.667, and 24.210.835 will not significantly and directly impact small businesses.

Regarding the requirements of 2-4-111, MCA, the board has determined that the repeal of ARM 24.210.661 will not significantly and directly impact small businesses.

Documentation of the board's above-stated determinations is available upon request to the Board of Realty Regulation, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2320; facsimile (406) 841-2323; or to [dlibsdrre@mt.gov](mailto:dlibsdrre@mt.gov).

10. Rhonda Morgan, Executive Officer, has been designated to preside over and conduct this hearing.

BOARD OF REALTY REGULATION  
RIC SMITH  
PRESIDING OFFICER

/s/ DARCEE L. MOE  
Darcee L. Moe  
Rule Reviewer

/s/ BRENDA NORDLUND  
Brenda Nordlund, Acting Commissioner  
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State December 15, 2020.

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY  
STATE OF MONTANA

In the matter of the amendment of ) NOTICE OF PUBLIC HEARING ON  
ARM 24.301.161 incorporation by ) PROPOSED AMENDMENT  
reference of the International Energy )  
Conservation Code )

TO: All Concerned Persons

1. On January 19, 2021, at 9:30 a.m., a public hearing will be held via remote conferencing to consider the proposed amendment of the above-stated rule. Because there currently exists a state of emergency in Montana due to the public health crisis caused by the coronavirus, there will be no in-person hearing. Interested parties may access the remote conferencing platform in the following ways:

- a. Join Zoom Meeting, <https://mt-gov.zoom.us/j/91065323119>, Meeting ID: 910 6532 3119, Passcode: 551610; or
- b. Dial by telephone, +1 406 444 9999 or +1 646 558 8656, Meeting ID: 910 6532 3119, Passcode: 551610.

The hearing will begin with a brief introduction by department staff to explain the use of the videoconference and telephonic platform. All participants will be muted except when it is their time to speak.

2. The Department of Labor and Industry (department) will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Building Codes Program no later than 5:00 p.m., on January 12, 2021, to advise us of the nature of the accommodation that you need. Please contact Traci Collett, Building Codes Program, 301 South Park Avenue, P.O. Box 200517, Helena, Montana 59620-0517; telephone (406) 841-2016; Montana Relay 1 (800) 253-4091; TDD (406) 444-2978; facsimile (406) 841-2050; or [buildingcodes@mt.gov](mailto:buildingcodes@mt.gov).

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

24.301.161 INCORPORATION BY REFERENCE OF INTERNATIONAL ENERGY CONSERVATION CODE (1) The Department of Labor and Industry adopts and incorporates by reference the International Code Council's International Energy Conservation Code, ~~2012~~ 2018 Edition, referred to as the International Energy Conservation Code, unless another edition is specifically stated, together with the following Appendix and amendments:

(a) and (a)(i) remain the same.

(b) Subsections ~~C104.2~~ C105.2 and ~~R104.2~~ R105.2, Required ~~Approvals~~ Inspections, are deleted in their entirety when the code is used by the Building

Codes Bureau Program of the Department of Labor and Industry. It remains undeleted and available for use for certified local governments using the code.

(c) remains the same.

(d) Table 402.1.4 R402.1.2, INSULATION AND FENESTRATION REQUIREMENTS BY COMPONENT, is amending requirements for climate zone "6" as shown below in the table:

Climate Zone	Fenestration U-Factor(b)	Skylight(b) U-Factor	Glazed Penetration SHGC(b,d)	Ceiling R-Value	Wood Framed Wall R-Value
6	<del>0.32</del> <u>0.30</u>	0.55	NR	49	21 or 13+10(h)

Mass Wall R-Value(i)	Floor R-Value	Basement(c) Wall R-Value	Slab(b) R-Value & Depth	Crawl Space Wall(c) R-Value
15/20	30(g)	15/19	10, 4 ft	15/19

(e) Table ~~R402.1.3~~ R402.1.4, EQUIVALENT U-FACTORS, is amending requirements as shown below in the table:

Climate Zone	Fenestration U-Factor	Sky-light U-Factor	Ceiling U-Factor	Frame Wall U-Factor	Mass Wall U-Factor	Floor U-Factor	Base-ment Wall U-Factor	Crawl Space Wall U-Factor
6	<del>0.32</del> <u>0.30</u>	0.55	0.026	<del>0.054</del> <u>0.045</u>	0.060	0.033	0.050	0.055

(f) Subsection R402.2.2, Ceilings Without Attic Spaces, is deleted and replaced with the following: "Where Section 402.1.4 402.1.2 would require insulation levels above R-30 and the design of the roof/ceiling assembly does not allow sufficient space for the required insulation, the minimum required insulation for such roof/ceiling assemblies shall be R-30. This reduction of insulation from the requirements of Section 402.1.4 402.1.2, shall be limited to 250 square feet or ten percent of the total insulated ceiling area, whichever is less. This reduction shall not apply to the U-factor alternative approach in Section 402.1.3 402.1.4, and the total UA alternative in Section 402.1.4 402.1.5."

(g) Subsection ~~R402.2.9~~ R402.2.11, Crawl Space Walls, is deleted and replaced with the following: "As an alternative to insulating floors over crawl spaces, crawl space walls shall be permitted to be insulated when the crawl space is not vented to the outside. Temporary crawl space vent openings are allowed during construction for crawl spaces that have insulated crawl space walls. These temporary crawl space vent openings shall be closed, sealed, and insulated to the same R-value of the surrounding crawl space wall insulation once construction is complete and prior to the time that the final building inspection would occur. Crawl space wall insulation shall be permanently fastened to the wall and shall extend downward from the floor, the entire height of the crawl space wall. Exposed earth in

unvented crawl space foundations shall be covered with a continuous Class I vapor retarder. All joints of the vapor retarder shall overlap six inches and be sealed or taped. The edges of the vapor retarder shall extend at least six inches up the stem wall and shall be attached and sealed to the stem wall."

(h) Subsection R402.4.1.2, Testing, is deleted and replaced with the following: The building or dwelling unit shall be tested and verified as having an air leakage rate of not exceeding four air changes per hour in Climate Zone 6. Testing shall be conducted with a blower door at a pressure of 0.2 inches w.g. (50 Pascals). Where required by the code official, testing shall be conducted by an approved party. A written report of the results of the test shall be signed by the party conducting the test and provided to the code official. Testing shall be performed at any time after creation of all penetrations of the building thermal envelope. ~~The requirements of testing found in subsection R402.4.1.2 will not be mandatory until one year following the final adoption of this rule. Buildings or dwelling units issued a building permit by a code official prior to this testing becoming required shall not be required to perform testing under subsection R402.4.1.2.~~ During testing:

(i) through (vi) remain the same.

"(vii) HVAC ducts shall not be sealed supply and return registers, where installed at the time of test, shall be fully open.

~~(i) Subsection R403.2.2, Sealing (Mandatory). Delete the existing 2. found beneath, "duct tightness shall be verified by either of the following:" and replace the existing 1. with the following:~~

~~"Postconstruction test: Leakage to the outside of a condition space or total leakage shall be less than or equal to four cfm per 100 square feet of conditioned floor area when tested at a pressure differential of 0.1 inches w.g. across the entire system, including the manufacturer's air handler enclosure. All register boot shall be taped or otherwise sealed during the test.~~

~~Exception: The duct tightness testing is not required for ducts and air handlers located entirely within the building thermal envelope.~~

~~(j) (i) Subsection R403.2.3, R403.3.5, Building Cavities, is deleted in its entirety and replaced with: "Building framing cavities shall not be used as supply ducts." Exception: Building framing cavities may be used for return ducts if there is no atmospherically vented furnace, boiler, or water heater located in the house outside of a sealed and insulated room that is isolated from inside the thermal envelope and if the duct system has been tested as having a maximum total leakage not greater than 4 cfm/SF. The room walls, floor, and ceilings shall be insulated in accordance with the basement wall requirements of Table R402.1.2.~~

(k) remains the same but is renumbered (j).

~~(l) Table R405.5.2(1) SPECIFICATIONS FOR THE STANDARD REFERENCE AND PROPOSED DESIGNS, amend the table as shown below:~~

<del>Building Component</del>	<del>Standard Reference Design</del>	<del>Proposed Design</del>



Thermal distribution systems	<del>Untested distribution systems: DSE = 0.88</del>  <del>Tested Ducts: Leakage rate to outside conditioned space as specified Section R403.2.2(1)</del>  <del>Tested duct Location: Conditioned space</del>  <del>Tested duct Insulation: in accordance with Section R403.2.1</del>	<del>Untested distribution systems: DSE from Table R405.5.2(2)</del>  <del>Tested Ducts: Tested Leakage rate to outside conditioned space</del>  <del>Duct Location: As proposed</del>  <del>Duct Insulation: As proposed</del>
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(k) Appendix RA, Solar-Ready Provisions–Detached One- and Two-Family Dwellings and Townhouses. Appendix RA may be adopted by a certified city, county, or town building code jurisdiction. The department shall not apply or enforce Appendix RA.

(2) remains the same.

(a) The department encourages owners, design professionals, and builders to voluntarily implement greater levels of energy efficiency in building design and construction than those required by the International Energy Conservation Code. Information regarding voluntary building standards for greater levels of energy efficiency can be obtained from the department by contacting the ~~department at the address listed in (3)~~ Department of Labor and Industry, Building Codes Program, P.O. Box 200517, Helena, MT 59620-0517, by telephone at 406-841-2053 406-841-2056, or at the department's web site, [http://bsd.dli.mt.gov/bc/bs\\_index.asp](http://bsd.dli.mt.gov/bc/bs_index.asp) <http://bsd.dli.mt.gov/building-codes-permits>.

(3) The International Energy Conservation Code is a nationally recognized model code for energy efficient construction of buildings. A copy of the International Energy Conservation Code may be obtained from the ~~Department of Labor and Industry, Building Codes Bureau, P.O. Box 200517, Helena, MT 59620-0517, at cost plus postage and handling. A copy may also be obtained by writing to the International Code Council, 4051 West Flossmoor Road, Country Club Hills, IL 60478-5795, or visiting the International Code Council web site at [www.ICCsafe.org](http://www.ICCsafe.org).~~

AUTH: 50-60-203, 50-60-803, MCA

IMP: 50-60-201, 50-60-203, 50-60-803, MCA

REASON: At the end of 2019, the Building and Commercial Measurements Bureau, Business Standards Division, Department of Labor and Industry (department) amended several administrative rules to adopt and incorporate by reference new editions of numerous nationally recognized building codes, with stated exceptions.

The department also amended certain rules to coincide with the adoption and incorporation by reference of these building codes. At that time, the department concluded it was necessary to obtain additional stakeholder input prior to adopting the 2018 Edition of the International Energy Conservation Code (IECC) and is therefore proceeding with those changes now.

The department is amending (1)(a) through (h) to reflect the adoption of and changes in the 2018 Edition of the International Energy Conservation Code (IECC). The rule amendments are reasonably necessary in (1)(i) through (k) to reflect changes instituted by the Building Codes Advisory Council as related to changes made in the 2018 Edition of the IECC.

The department is amending (2)(a) and (3) to reflect the program's current contact information and where to obtain a copy of the IECC from the ICC web site.

4. Concerned persons may present their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Building Codes Program, 301 South Park Avenue, P.O. Box 200517, Helena, Montana 59620-0517, by facsimile to (406) 841-2050, or e-mail to [buildingcodes@mt.gov](mailto:buildingcodes@mt.gov), and must be received no later than 5:00 p.m., January 21, 2021.

5. An electronic copy of this notice of public hearing is available at <http://bsd.dli.mt.gov/building-codes-permits> (department and program's web site). Although the department strives to keep its web sites accessible at all times, concerned persons should be aware that web sites may be unavailable during some periods, due to system maintenance or technical problems, and that technical difficulties in accessing a web site do not excuse late submission of comments.

6. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this program. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding all Building Codes Program administrative rulemaking proceedings or other administrative proceedings. The request must indicate whether e-mail or standard mail is preferred. Such written request may be sent or delivered to the Building Codes Program, 301 South Park Avenue, P.O. Box 200517, Helena, Montana 59620-0517; faxed to the office at (406) 841-2050; e-mailed to [buildingcodes@mt.gov](mailto:buildingcodes@mt.gov); or made by completing a request form at any rules hearing held by the agency.

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

8. Regarding the requirements of 2-4-111, MCA, the department has determined that the amendment of ARM 24.301.161 will not significantly and directly impact small businesses.

Documentation of the department's above-stated determination is available upon request to the Building Codes Program, 301 South Park Avenue, P.O. Box

200517, Helena, Montana 59620-0517; telephone (406) 841-2016; facsimile (406) 841-2050; or to buildingcodes@mt.gov.

9. Traci Collett has been designated to preside over and conduct this hearing.

/s/ DARCEE L. MOE

Darcee L. Moe  
Rule Reviewer

/s/ BRENDA NORDLUND

Brenda Nordlund, Acting Commissioner  
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State December 15, 2020.

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

In the matter of the adoption of New	)	NOTICE OF PUBLIC HEARING ON
Rules I and II and the amendment of	)	PROPOSED ADOPTION AND
ARM 37.27.101 pertaining to	)	AMENDMENT
substance use disorder (SUD) state	)	
approval	)	

TO: All Concerned Persons

1. On January 14, 2021, at 11:00 a.m., the Department of Public Health and Human Services will hold a public hearing via remote conferencing to consider the proposed adoption and amendment of the above-stated rules. Because there currently exists a state of emergency in Montana due to the public health crisis caused by the coronavirus, there will be no in-person hearing. Interested parties may access the remote conferencing platform in the following ways:

(a) Join Zoom Meeting at: <https://mt-gov.zoom.us/j/91826711375>; meeting ID: 918 2671 1375; or

(b) Dial by telephone +1 646 558 8656; meeting ID: 918 2671 1375. Find your local number: <https://mt-gov.zoom.us/u/acLsnxt5OS>.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Public Health and Human Services no later than 5:00 p.m. on January 8, 2021, to advise us of the nature of the accommodation that you need. Please contact Heidi Clark, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-4094; fax (406) 444-9744; or e-mail [dphhslegal@mt.gov](mailto:dphhslegal@mt.gov).

3. The rules as proposed to be adopted provide as follows:

NEW RULE I STATE APPROVED PROGRAMS, PREVENTION PROVIDERS, REQUIREMENTS (1) In order to be reimbursed for prevention services, a prevention provider must be state approved and:

(a) have a contract with the department for substance abuse primary prevention services;

(b) be the Montana Public Health Institute; or

(c) be a county or tribal public health department.

(2) In order to become state approved, a prevention provider must complete and submit to the department the designated application.

(3) If the application and supporting documentation do not meet the application requirements, the department will notify the applicant in writing identifying the incomplete or missing information within 30 days of receipt of the application.

(a) The applicant has 30 days from the date of notification to respond in writing to the content of the notice.

(b) If a response is not received within 30 days, the department will deny approval and will notify the applicant in writing of the denial.

(4) If the application and supporting documentation meet the application requirements, the department shall issue provisional approval. Within 90 days of granting provisional approval, the department shall inspect the provider either on-site or remotely.

(5) The provider must submit the requested documentation to the department or provide access to the provider's premises for inspection.

(6) Within 20 days of the inspection, the department shall issue final approval or deny the application and shall send written notification of full approval or denial to the applicant.

(7) Upon receiving full approval, a provider may provide prevention and early intervention services as described by the Substance Abuse and Mental Health Services Administration of the U.S. Department of Health and Human Services.

(8) The department will annually inspect the provider, on-site or remotely, to ensure the provider continues to meet requirements of this rule.

(9) Approved providers must follow the American Society of Addiction Medicine (ASAM) Criteria in the provision of services and adhere to requirements outlined in the AMDD Medicaid Services Provider Manual for SUD and Adult Mental Health located at: <https://dphhs.mt.gov/amdd/policymanualmedicaid>.

AUTH: 53-2-201, 53-24-204, MCA

IMP: 53-24-204, 53-24-207, MCA

NEW RULE II STATE APPROVED PROGRAMS, OUTPATIENT TREATMENT PROVIDERS (1) In order to be reimbursed for outpatient services, an outpatient treatment provider must be state approved and be a licensed addiction counselor.

(2) In order to become state approved, the outpatient provider must complete and submit the designated application to the department.

(3) If the application and supporting documentation do not meet the application requirements, the department will notify the applicant in writing identifying the incomplete or missing information within 30 days of receipt of the application.

(a) The applicant has 30 days from the date of notification to respond in writing to the content of the notice.

(b) If a response is not received within 30 days, the department will deny approval and will notify the applicant in writing of the denial.

(4) If the application and supporting documentation meet the application requirements, the department shall issue provisional approval. Within 90 days of granting provisional approval, the department shall inspect the provider either on-site or remotely.

(5) The provider must submit the requested documentation to the department or allow the department access to the provider's premises for inspection.

(6) Within 20 days of the inspection, the department shall issue final approval or deny the application and shall send written notification of full approval or denial to the applicant.

(7) The department will reimburse a state approved outpatient treatment provider for American Society of Addiction Medicine (ASAM) level of care 1.0, Outpatient Services, using appropriate Common Procedural Terminology (CPT) codes.

(8) The department will annually inspect the provider, on-site or remotely, to ensure the provider continues to meet requirements of this rule.

(9) Approved providers must follow the ASAM Criteria in the provision of services and adhere to requirements outlined in the AMDD Medicaid Services Provider manual for SUD and Adult Mental Health located at: <https://dphhs.mt.gov/amdd/policymanualmedicaid>.

AUTH: 53-2-201, 53-24-204, MCA

IMP: 53-24-204, 53-24-207, MCA

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

37.27.101 CHEMICAL DEPENDENCY TREATMENT PROGRAMS STATE APPROVED PROGRAMS, PURPOSE (1) Purpose. The purpose of ~~this rule~~ the rules in this subchapter is to establish ~~treatment~~ standards for the approval of programs ~~extending providing prevention, treatment, rehabilitative, and recovery~~ services to alcoholics, intoxicated persons, persons incapacitated by alcohol, drug abusers and family members pursuant to ~~53-24-208, MCA; standards for acceptance of persons into the treatment program and standards by which the administrator may determine which persons may be admitted to an approved public treatment program as an alcoholic, drug abuser or family member pursuant to 53-24-209, MCA~~ individuals with substance use disorders and substance related issues, as provided in Title 53, chapter 24, part 2, MCA.

AUTH: 53-24-207, MCA

IMP: 53-24-207, MCA

#### 5. STATEMENT OF REASONABLE NECESSITY

The Department of Public Health and Human Services (department) is proposing changes to ARM 37.27.101 and proposes to adopt New Rules I and II pertaining to substance use disorder (SUD) state approval.

The department is proposing to make changes to the administrative rules for SUD state approval to include prevention providers and non-facility (outpatient) treatment providers as types of state approved programs and distinguish them from SUD treatment facilities. For prevention services, this is necessary because it allows the department to distribute a portion of allocated alcohol tax funds for prevention services as described in 53-24-108, MCA. In addition, these changes will allow the

department to oversee the state approval process for outpatient treatment providers who currently are required to operate as treatment facilities or be employed by a treatment facility to become state approved. This is necessary to establish equitable requirements for outpatient providers to become state approved.

#### Fiscal Impact

The department anticipates no fiscal impact related to these proposed rule adoptions and amendments.

6. 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: Heidi Clark, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; fax (406) 444-9744; or e-mail [dphhslegal@mt.gov](mailto:dphhslegal@mt.gov), and must be received no later than 5:00 p.m., January 21, 2021.

7. The Office of Legal Affairs, Department of Public Health and Human Services, has been designated to preside over and conduct this hearing.

8. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 6 above or may be made by completing a request form at any rules hearing held by the department.

9. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

10. With regard to the requirements of 2-4-111, MCA, the department has determined that the adoption and amendment of the above-referenced rules will not significantly and directly impact small businesses.

11. Section 53-6-196, MCA, requires that the department, when adopting by rule proposed changes in the delivery of services funded with Medicaid monies, make a determination of whether the principal reasons and rationale for the rule can be assessed by performance-based measures and, if the requirement is applicable, the method of such measurement. The statute provides that the requirement is not applicable if the rule is for the implementation of rate increases or of federal law.

The department has determined that the proposed program changes presented in this notice are not appropriate for performance-based measurement and therefore are not subject to the performance-based measures requirement of 53-6-196, MCA.

/s/ Brenda K. Elias  
Brenda K. Elias  
Rule Reviewer

/s/ Erica Johnston  
Erica Johnston, Interim Director  
Public Health and Human Services

Certified to the Secretary of State December 15, 2020.



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

In the matter of the amendment of        ) NOTICE OF PUBLIC HEARING ON  
ARM 37.81.304 pertaining to the Big       ) PROPOSED AMENDMENT  
Sky Rx benefit                                )

TO: All Concerned Persons

1. On January 14, 2021, at 10:00 a.m., the Department of Public Health and Human Services will hold a public hearing via remote conferencing to consider the proposed amendment of the above-stated rule. Because there currently exists a state of emergency in Montana due to the public health crisis caused by the coronavirus, there will be no in-person hearing. Interested parties may access the remote conferencing platform in the following ways:

(a) Join Zoom Meeting at: <https://mt-gov.zoom.us/j/99704211217>; meeting ID: 997 0421 1217; or

(b) Dial by telephone +1 646 558 8656; meeting ID: 997 0421 1217. Find your local number: <https://mt-gov.zoom.us/j/99704211217>.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Public Health and Human Services no later than 5:00 p.m. on January 8, 2021, to advise us of the nature of the accommodation that you need. Please contact Heidi Clark, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-4094; fax (406) 444-9744; or e-mail [dphhslegal@mt.gov](mailto:dphhslegal@mt.gov).

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

37.81.304 AMOUNT OF THE BIG SKY RX BENEFIT (1) An applicant eligible for the Big Sky Rx PDP premium assistance may receive a benefit not to exceed ~~\$35.40~~ \$38.00 per month. The benefit amount will not exceed ~~\$35.40~~ \$38.00 regardless of the cost of the premium for the PDP the individual chooses.

(a) If a portion of the applicant's PDP premium is paid through the Extra Help Program, the Big Sky Rx Program will pay the applicant's portion of the PDP premium up to ~~\$35.40~~ \$38.00 per month.

(b) remains the same.

(c) All expenditures are contingent on legislative appropriation. The amount of the monthly benefit, ~~\$35.40~~ \$38.00, extends the Social Security Extra Help benefit amount to Montana residents with income up to 200% FPL. The department's total expenditure for the program will be based on appropriation and the number of enrolled applicants.

AUTH: 53-2-201, 53-6-1004, MCA

IMP: 53-2-201, 53-6-1001, 53-6-1004, 53-6-1005, MCA

#### 4. STATEMENT OF REASONABLE NECESSITY

The Department of Public Health and Human Services (department) is proposing an amendment to ARM 37.81.304 pertaining to the Big Sky Rx benefit.

The Big Sky Rx program contributes to the cost of an eligible Montana resident's premium payment in a federally approved Medicare Prescription Drug Plan (PDP). This rule proposal, if adopted, will increase the maximum amount that Big Sky Rx will contribute to pay the eligible enrollee's monthly premium for a PDP program from \$35.40 per month to \$38.00 per month. The department is proposing this change in order to match the federally established Low Income Subsidy (LIS) monthly benefit benchmark. Since the inception of Big Sky Rx, the benefit has mirrored the LIS premium benchmark to ensure a reasonable and prudent monthly benefit for enrolled members.

#### Fiscal Impact

This rule proposal will affect 1,580 Montanans, who will see an increase in the amount of monetary assistance from Big Sky Rx for their monthly PDP premium. This rule proposal will increase state special fund spending by \$4,108 per month or \$49,296 on an annual basis.

The department intends to apply these changes retroactively to January 1, 2021. A retroactive application of this proposed rule amendment does not result in a negative impact to any affected party.

5. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Heidi Clark, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; fax (406) 444-9744; or e-mail [dphhslegal@mt.gov](mailto:dphhslegal@mt.gov), and must be received no later than 5:00 p.m., January 21, 2021.

6. The Office of Legal Affairs, Department of Public Health and Human Services, has been designated to preside over and conduct this hearing.

7. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or

delivered to the contact person in 5 above or may be made by completing a request form at any rules hearing held by the department.

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

9. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment of the above-referenced rule will not significantly and directly impact small businesses.

10. Section 53-6-196, MCA, requires that the department, when adopting by rule proposed changes in the delivery of services funded with Medicaid monies, make a determination of whether the principal reasons and rationale for the rule can be assessed by performance-based measures and, if the requirement is applicable, the method of such measurement. The statute provides that the requirement is not applicable if the rule is for the implementation of rate increases or of federal law.

The department has determined that the proposed program changes presented in this notice are not appropriate for performance-based measurement and therefore are not subject to the performance-based measures requirement of 53-6-196, MCA.

/s/ Brenda K. Elias

Brenda K. Elias  
Rule Reviewer

/s/ Erica Johnston

Erica Johnston, Interim Director  
Public Health and Human Services

Certified to the Secretary of State December 15, 2020.

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

In the matter of the amendment of ) NOTICE OF PUBLIC HEARING ON  
ARM 37.12.401 and 37.57.301 ) PROPOSED AMENDMENT  
pertaining to newborn screening )

TO: All Concerned Persons

1. On January 14, 2021, at 1:00 p.m., the Department of Public Health and Human Services will hold a public hearing via remote conferencing to consider the proposed amendment of the above-stated rule. Because there currently exists a state of emergency in Montana due to the public health crisis caused by the coronavirus, there will be no in-person hearing. Interested parties may access the remote conferencing platform in the following ways:

(a) Join Zoom Meeting at: <https://mt-gov.zoom.us/j/95849495880>; meeting ID: 958 4949 5880; or

(b) Dial by telephone +1 646 558 8656; meeting ID: 958 4949 5880. Find your local number: <https://mt-gov.zoom.us/j/95849495880>.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Public Health and Human Services no later than 5:00 p.m. on January 8, 2021, to advise us of the nature of the accommodation that you need. Please contact Heidi Clark, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-4094; fax (406) 444-9744; or e-mail [dphhslegal@mt.gov](mailto:dphhslegal@mt.gov).

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

37.12.401 LABORATORY FEES FOR ANALYSES (1) remains the same.

(2) The department will maintain a list of all tests available from the lab and the price of each test. The department adopts and incorporates by reference the Laboratory Test Fee List effective ~~April 1, 2018~~ March 1, 2021, which is available on the web site of the Department of Public Health and Human Services at <http://dphhs.mt.gov/publichealth/LaboratoryServices/PublicHealthLabTesting>, and by mail upon request to the lab at the Department of Public Health and Human Services, Public Health and Safety Division, P.O. Box 6489, Helena, MT 59604-6489.

(3) and (4) remain the same.

AUTH: 50-1-202, MCA  
IMP: 50-1-202, MCA

37.57.301 DEFINITIONS As used in this subchapter, the following definitions apply:

(1) and (2) remain the same.

(3) "Newborn screening tests" are screening tests, procedures, or both for the following conditions:

(a) through (i)(vi) remain the same.

(vii) truncus arteriosus; ~~and~~

(j) Severe combined immunodeficiency disease- ; and

(k) Spinal muscular atrophy (SMA).

AUTH: 50-19-202, MCA

IMP: 50-19-203, MCA

#### 4. STATEMENT OF REASONABLE NECESSITY

The Department of Public Health and Human Services (department) is proposing amendments to ARM 37.57.301 and 37.12.401 regarding newborn screening. The proposed rule amendments add spinal muscular atrophy (SMA) to the list of required newborn screening panel tests.

##### ARM 37.57.301

The department is proposing to amend the definition of "newborn screening tests" by adding SMA to the list of required newborn screening panel tests. SMA is one of the primary conditions that the Health Resources and Services Administration (HRSA) of the U.S. Department of Health and Human Services has included in the Recommended Uniform Screening Panel (RUSP) for newborn screening. Essential requirements for inclusion in the RUSP are that the conditions are chosen based on evidence that supports the potential net benefit of screening, the ability of states to screen for the disorder, and the availability of effective treatments. Due to technological and medical advances, newborns with SMA can be screened in a highly effective manner and babies which are identified soon after birth through newborn screening can survive and lead productive lives. The proposed rule change is necessary to conform with HRSA's RUSP for all newborns and to update newborn bloodspot screening to reflect current standards of care for babies born in Montana.

##### ARM 37.12.401

The department is proposing to amend ARM 37.12.401 to adopt and incorporate by reference an updated Laboratory Test Fee List that takes into account the addition of SMA to the newborn screening tests. A copy of the proposed Laboratory Fee Schedule is electronically accessible at:  
<https://dphhs.mt.gov/publichealth/LaboratoryServices/PublicHealthLabTesting>.

The fee for newborn screening panel tests is currently \$134.00. The department is proposing to revise the fee to \$140.00 due to the addition of the SMA test. The proposed rule change is necessary to align with the changes being proposed to ARM 37.57.301.

#### Fiscal Impact

The proposed rule changes affect newborns and their families, birthing hospitals, birthing centers, and small businesses providing direct-entry midwifery services. There are approximately 12,500 babies born in Montana every year. The cost for the addition of the SMA test to the newborn screening panel is \$6.00 per test. Given the modest cost of this test, the department does not anticipate these proposed rule changes will have a significant fiscal impact.

The department intends to adopt these rule amendments effective March 1, 2021.

5. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Heidi Clark, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; fax (406) 444-9744; or e-mail [dphhslegal@mt.gov](mailto:dphhslegal@mt.gov), and must be received no later than 5:00 p.m., January 21, 2021.

6. The Office of Legal Affairs, Department of Public Health and Human Services, has been designated to preside over and conduct this hearing.

7. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 5 above or may be made by completing a request form at any rules hearing held by the department.

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

9. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment of the above-referenced rules will not significantly and directly impact small businesses.

/s/ Robert Lishman

Robert Lishman  
Rule Reviewer

/s/ Erica Johnston

Erica Johnston, Interim Director  
Public Health and Human Services

Certified to the Secretary of State December 15, 2020.

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

In the matter of the amendment of ) NOTICE OF PUBLIC HEARING ON  
ARM 38.2.601 and 38.2.3301 ) PROPOSED AMENDMENT  
pertaining to investigation and )  
discovery )

TO: All Concerned Persons

1. On January 26, 2021, at 1:30 p.m., the Department of Public Service Regulation, Public Service Commission (department) will hold a virtual public hearing to consider the proposed amendment of the above-stated rules. The hearing will be livestreamed at <http://psc.mt.gov/livestream>. Parties seeking to participate in the hearing must contact the department at 1-800-646-6150, by 5 p.m., January 21, 2021, to receive the necessary call-in information for the hearing.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m. on January 19, 2021. Please contact Katy Gordon, Department of Public Service Regulation, 1701 Prospect Avenue, Helena, Montana, 59620-2601; telephone (406) 444-6150; TDD/Montana Relay Service (406) 444-4212; or e-mail [Katy.Gordon@mt.gov](mailto:Katy.Gordon@mt.gov).

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

38.2.601 DEFINITIONS (1) through (1)(m) remain the same.

(n) "Party" means an individual, partnership, corporation, governmental body, or other identifiable group or organization, ~~with the exception of the commission staff, who initiates a commission proceeding by filing a complaint, application, protest or a petition with the commission; or who is named as a defendant or respondent; or who is named or admitted by the commissioners~~ or hearings examiner to a formal proceeding and whose legal rights, duties and privileges will be determined by the commissioners' final decision. ~~The Commission staff shall have the full rights and responsibilities of parties under these rules, but shall not be bound by the rule governing contact between parties and the commission.~~

(o) remains the same

AUTH: 69-1-110~~(3)~~, 69-2-101, 69-2-103, 69-3-103, 69-12-201~~(2)~~, MCA  
IMP: 69-2-101, 69-2-103, MCA

38.2.3301 INVESTIGATION AND DISCOVERY (1) ~~Techniques of prehearing discovery permitted in state civil actions may be employed in commission contested cases, and for this purpose the commission adopts rules 26, 28 through 37 (excepting rule 37(b) (1) and 37(b) (2) (d) of the Montana rules of civil procedure~~

~~in effect on the date of the adoption of this rule, and any subsequent amendments thereto. In applying the rules of civil procedure to commission proceedings, all references to "court" shall be considered to refer to the commission; references to the subpoena power shall be considered references to ARM 38.2.3302 through 38.2.3305; references to "trial" shall be considered references to hearing; references to "plaintiff" shall be considered references to a party; and references to "clerk of court" shall be considered references to the staff member designated to keep the official record in commission contested cases. Data requests and the additional issues process are the primary, though not exclusive, methods of pre-hearing investigation in commission proceedings.~~

~~(2) Nothing in (1) of this rule shall be construed to limit the free use of data requests among the parties. The exchange of information among parties pursuant to data requests is the primary method of discovery in proceedings before the commission. Data requests are a discovery tool, which may contain and combine elements of interrogatories, requests for production, request for admission, and deposition by written question, that provide an efficient means of gathering information where cases are presented primarily through pre-filed testimony with substantial supporting exhibits. Requests—by the commission, hearings examiners, or parties—must be used in good faith, and should avoid repeating previously requested information. Requests must:~~

~~(a) describe the topic and to what witness the request is directed;~~

~~(b) be consecutively numbered (e.g., the commission may issue PSC-001 through 008 to EWM, PSC-009 through 016 to the MCC, and PSC-017 through 019 again to EWM);~~

~~(c) be limited to five sub-parts, denoted with lower case letters (a–e);~~

~~(d) have a separate page for each response; and~~

~~(e) substantially adhere to this format:~~

~~PSC-001 Regarding: Cost of Equity~~

~~Witness: Doe, JBD-4:10-25; As Appropriate~~

~~Request/Response:~~

~~(a) Please explain how the current market conditions impact the utility's cost of equity.~~

~~(b) Please explain why these market conditions are expected to occur in the future, justifying an increased cost of equity.~~

~~(3) When appropriate, the commission or hearing examiner will establish an additional issues deadline to identify issues that the parties have not sufficiently addressed. This deadline will typically occur after the submission of intervenor testimony and before submission of reply testimony. If the commission or hearing examiner identifies any additional issues, it will notify the parties indicating what the issues are, provide direction for how the parties shall address them, and modify the existing procedural schedule as necessary.~~

~~(4) Additional methods of discovery available under Montana Rules of Civil Procedure 26(a) are permitted with commission approval. The commission incorporates by reference Rule 26(b), excepting 26(b)(4)(C), which establishes the scope of discovery, and Rule 37, which governs discovery abuses, motions to compel, and sanctions. Nothing in this rule limits the commission's additional broad statutory investigation powers otherwise found in Title 69, MCA.~~



AUTH: 2-4-602, 2-4-612, 69-1-110(3), 69-2-101, 69-2-102, 69-2-103, 69-3-103, 69-3-106, 69-3-203, 69-3-321, 69-12-201(2), MCA  
IMP: 2-4-602, 69-2-101, 69-2-103, MCA

REASON: These proposed amendments to ARM 38.2.601(1)(n) and ARM 38.2.3301 are reasonably necessary to clarify the department's long-standing, pre-hearing investigation practices. The reasons for these amendments are detailed below.

The final sentence of the definition of "party" in ARM 38.2.601(1)(n) was intended to extend to department staff the investigative tools described in ARM 38.2.3301, which discussed discovery tools available to parties. Some parties appearing before the department have asserted that ARM 38.2.601(1)(n) allows the department's staff to participate as parties without observing rules against ex parte communication with the department. To better reflect department staff's role in investigating facts and issues in contested cases not as a party, but as technical advisors to the department, the department proposes to remove the final sentence of ARM 38.2.601(1)(n) and provide a more detailed description of discovery and investigative procedures in ARM 38.2.3301.

The department proposes to add to ARM 38.2.3301 new sections (2) and (3), regarding data requests and additional issues. These sections are consistently included in the department's procedural orders. To provide greater clarity on the processes involved, the department proposes to incorporate these processes in its rules.

Historically, parties have preferred to use the department's data request procedures rather than the discovery tools available under the Montana Rules of Civil Procedure. To simplify discovery in contested cases, the department proposes to limit its incorporation of the discovery tools available in the Montana Rules of Civil Procedure and allow parties to use those tools only upon department approval.

4. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Katy Gordon, Department of Public Service Regulation, 1701 Prospect Avenue, Helena, Montana, 59620-2601; telephone (406) 444-6150; fax (406) 444-7618; or e-mail [Katy.Gordon@mt.gov](mailto:Katy.Gordon@mt.gov), and must be received no later than 5:00 p.m., February 2, 2021.

5. The Montana Consumer Counsel, 111 North Last Chance Gulch, Suite 1B, Helena, MT 59620-1703, telephone (406) 444-2771, is available and may be contacted to represent consumer interests in this matter.

6. The commission, a commissioner, or a duly appointed presiding officer may preside over and conduct the hearing.

7. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-

mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 4 above or may be made by completing a request form at any rules hearing held by the department.

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

9. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment of the above-referenced rules will not significantly or directly impact small businesses.

/s/ JUSTIN KRASKE

Justin Kraske  
Rule Reviewer

/s/ BOB LAKE

Bob Lake  
Chairman  
Department of Public Service Regulation

Certified to the Secretary of State on December 15, 2020.

BEFORE THE FISH AND WILDLIFE COMMISSION  
OF THE STATE OF MONTANA

In the matter of the amendment of ) NOTICE OF AMENDMENT AND  
ARM 12.11.501 and the adoption of ) ADOPTION  
NEW RULES I through XVI pertaining )  
to recreational use on the Madison )  
River )

TO: All Concerned Persons

1. On September 25, 2020, the Fish and Wildlife Commission (commission) published MAR Notice No. 12-531 pertaining to the public hearing on the proposed amendment and adoption of the above-stated rules at page 1722 of the 2020 Montana Administrative Register, Issue Number 18.

2. The commission has not adopted the following proposed rules:

NEW RULE V MADISON RIVER WALK/WADE SECTIONS

NEW RULE VI MANAGEMENT OF LIMITED COMMERCIAL USERS

NEW RULE VII TRANSFERRED PERMITS

NEW RULE VIII FLEX TRIPS

NEW RULE IX TRANSFER OF GUIDED TRIPS

NEW RULE X MANDATORY GUIDED TRIP REDUCTIONS

NEW RULE XI PERMIT APPLICATION AND FEES

NEW RULE XII REPORTING AND USE FEES

NEW RULE XV MADISON RIVER SPECIAL RECREATIONAL USE PERMIT  
TRIP DISTRIBUTION POOL

NEW RULE XVI MADISON RIVER USE STAMP

REASON: The commission did not approve proposed NEW RULES V through XII and XV and XVI because they are too complex and raised questions of fairness. Instead, the commission opted to create a work group that would consider the complexities and fairness and suggest an allocation system for the commission to consider at a later time. These rules collectively make up the allocation system for guided trips as proposed in the rulemaking petition from the Fishing Outfitters Association of Montana (FOAM). Comments received on the allocation system stated that it was too complicated or that it favored large or existing outfitters at the

expense of small or aspiring outfitters. The commission understands the complexities involved with establishing an allocation system and appreciates concerns raised over fairness. The commission adopted NEW RULE XIV (12.11.6710) establishing the Madison River Work Group to develop an allocation system which would later be brought to the commission for consideration.

The commission did not adopt NEW RULE VII because the rule depended upon the allowance of an individual river use day to be transferred by an outfitter or guide that was allotted those river use days on a limited use river in exchange for money. The transfer of individual river use days by outfitters and guides for pay is currently not allowed by law unless a business is transferred in its entirety pursuant to 47-37-310(4), MCA. Additionally, the Bureau of Land Management, which co-administers the current special recreation permit system on the Madison River, stated that the transfer of river use days is prohibited by their policy.

The commission did not adopt NEW RULE XVI because it created more questions about how to administer it. Instead the commission opted for a better administrative way to address the same intent of the proposed stamp. The commission acknowledges that the stamp proposed in NEW RULE XVI has raised several concerns from the public. The Department of Fish, Wildlife and Parks (department) has also indicated concerns in relation to administration, licensing, and enforcement. The intent of the stamp proposal was to facilitate the collection of information related to use on the river by noncommercial users. This information could later be used to inform any rules related to allocation of noncommercial river use. The commission recognizes that uncontrolled growth of the noncommercial use of the Madison River will increase issues related to crowding, conflict, displacement of river users, and changes in use patterns. Currently, there is a lack of information on the noncommercial use of the river which is necessary to establish a well-informed noncommercial use cap and allocation system. In response to the concerns raised about the stamp the commission did not adopt the proposed rule for the stamp and to instead require mandatory reporting by noncommercial users in a manner prescribed by the department. The department is considering several options on how the intent of gathering the necessary information on noncommercial use can be gathered without the issuance of a stamp. The rule allows for mandatory reporting as prescribed by the department. The department is urged to develop an effective system that is also efficient and minimizes enforceability concerns.

3. The commission has amended ARM 12.11.501 as proposed.

4. The commission has adopted new rule language not proposed in the original proposal.

NEW RULE XVII (12.11.6701) MADISON RIVER REPORTING REQUIREMENTS (1) All persons recreating on the Madison River must provide the required information in the manner prescribed by the department. Each year, information gathered will be reported to the Madison River Work Group and commission.

AUTH: 87-1-303, MCA  
IMP: 87-1-303, MCA

REASON: In response to the concerns raised about NEW RULE XVI but understanding the comments received that expressed the need to collect information regarding the use of noncommercial users, the commission adopted ARM 12.11.6701 requiring mandatory reporting by noncommercial users in a manner prescribed by the department. The department is considering several options on how the intent of gathering the necessary information on noncommercial use and will develop an effective system that is also efficient and minimizes enforceability concerns.

5. The commission has adopted the following rules as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

NEW RULE I (12.11.6705) MADISON RIVER COMMERCIAL USE CAP

~~(1) The number of commercial use trips are limited to 13,909 per year.~~

(1) Fishing outfitters and guides may only operate on the Madison River as long as they have a Madison River Special Recreation Permit and trips allotted them as provided by these rules.

(2) The total number of fishing outfitting and guided trips per individual outfitter and guide is capped at the number of trips reported in 2019 or 2020, whichever is higher.

(3) ARM 12.11.6705 will be implemented January 1, 2022.

(4) The commission will review ARM 12.11.6705 in 2023 as prescribed by ARM 12.11.6711.

AUTH: 87-1-303, MCA  
IMP: 87-1-303, MCA

NEW RULE II (12.11.6706) REST/ROTATION OF MADISON RIVER COMMERCIAL USE (1) Fishing outfitters and guides are prohibited from conducting business ~~Commercial use is prohibited~~ from June 15 to September 30 as follows:

(a) from Lyons Bridge Fishing Access Site to Palisades Day Use Area on Sundays; and

(b) from ~~Varney Bridge~~ Raynolds Pass Fishing Access Site to ~~Ennis Lyons Bridge~~ Fishing Access Site on Saturdays.

(2) ARM 12.11.6706 will be implemented as a trial program January 1, 2022, unless adjusted by the work group as prescribed in ARM 12.11.6710.

(3) The commission will review ARM 12.11.6706 in 2023 as prescribed by ARM 12.11.6711.

AUTH: 87-1-303, MCA  
IMP: 87-1-303, MCA

NEW RULE III (12.11.6702) WALK/WADE SECTIONS OF MADISON RIVER

~~(1) On Fridays, Saturdays, and Sundays from June 15 to September 30 no watercraft or flotation device can be used to access fishing:~~

- ~~(a) from the outlet of Quake Lake to Lyons Bridge Fishing Access Site; and~~
- ~~(b) from Ennis Fishing Access Site to Ennis Reservoir.~~

~~(2) On Mondays, Tuesdays, Wednesdays, and Thursdays from June 15 to September 30 watercraft or flotation device may be used to access fishing but no fishing can occur from watercraft or flotation devices:~~

- ~~(a) from the outlet of Quake Lake to Lyons Bridge Fishing Access Site; and~~
- ~~(b) from Ennis Fishing Access Site to Ennis Reservoir.~~

(1) Fishing from a boat or vessel is prohibited from Ennis Fishing Access Site to Ennis Reservoir.

(2) Fishing from a boat or vessel is prohibited from the outlet of Quake Lake to Reynolds Pass Fishing Access Site.

(3) Fishing from a boat or vessel is prohibited from Reynolds Pass Fishing Access Site to Lyons Bridge Fishing Access Site except on Saturdays and Sunday from June 15 to September 30.

(4) ARM 12.11.6702 will be implemented as a trial program in January 1, 2022 unless adjusted by the work group as prescribed in ARM 12.11.6710.

(5) The commission will review ARM 12.11.6702 in 2023 as prescribed by ARM 12.11.6711.

AUTH: 87-1-303, MCA

IMP: 87-1-303, MCA

NEW RULE IV (12.11.6715) LIMIT DEVELOPMENT ON MADISON RIVER

~~(1) Any department acquisition for a fishing access site New access acquisitions below Greycliff Fishing Access Site made after January 2, 2021, will be designated as carry-in only without boat ramp development will have limited development to maintain the primitive nature by limiting vessel or float tube access to carry-in only.~~

AUTH: 87-1-303, MCA

IMP: 87-1-303, MCA

NEW RULE XIII (12.11.6711) PLAN EVALUATION REVIEW OF RECREATION RULES FOR MADISON RIVER ~~(1) The Madison River Recreation Management Plan will be quantitatively evaluated by section or reach and across time immediately following the first year of implementation.~~

~~(2) Following the first year evaluation, similar quantitative evaluations will be conducted every three years.~~

~~(3) Annual reports will be generated by the department that contain quantitative use data by river section and time as well as financial data.~~

~~(4) The annual reports will evaluate:~~

- ~~(a) river use from Madison River Special Recreational Use Permit holders;~~

~~(b) satisfaction of Madison River Special Recreational Use Permit holders and generate use data annually; and~~

~~(c) the effectiveness of allowing fishing from a boat or vessel for four days per week within this reach.~~

~~(5) The no-cost, no-limit stamp will be evaluated pursuant to [NEW RULE XVI].~~

~~(1) The commission shall review:~~

~~(a) ARM 12.11.6702, 12.11.6705, and 12.11.6706 in 2023; and~~

~~(b) the rules governing recreational use on the Madison River every five years beginning in 2024.~~

AUTH: 87-1-303, MCA

IMP: 87-1-303, MCA

NEW RULE XIV (12.11.6710) COMMERCIAL USE MADISON RIVER WORKING GROUP ~~(1) The Madison River Commercial Use Working Group is under the authority of the Region 3 River Recreation Manager.~~

~~(2) The Commercial Use Working Group will be comprised of the Region 3 Recreation Manager, a member of the Fish and Wildlife Commission, and at least three Madison River outfitters holding a current valid Madison River Special Recreational Use Permit.~~

~~(3) The Commercial Use Working Group will establish an appeal process for conflicts and complaints.~~

~~(4) The Commercial Use Working Group may award guided trips to eligible outfitters from the Madison River Special Recreational Use Permit trip distribution pool via lottery.~~

~~(5) The Commercial Use Working Group will review total use and:~~

~~(a) adjust guided trip allocations as needed if Madison River Special Recreational Use Permit holder use declines;~~

~~(b) review guided trip additions to the Madison River Special Recreational Use Permit trip distribution pool; and~~

~~(c) review the annual number of flex trips eligible for outfitter use. If the total use of guided trips and flex trips exceeds the combined use levels of 2019 and 2020, the annual number of flex trips available to Madison River Special Recreational Use Permit holders may be reduced.~~

~~(6) The Commercial Use Working Group may assign a fixed number of new permits to be issued. New permits will be awarded to qualified licensed Montana outfitters that have applied for a new permit via a lottery.~~

(1) The commission shall develop the membership of and appoint a Madison River Work Group. The work group will consist of:

(a) three commercial outfitters with a current Madison River Special Recreational Use Permit;

(b) three non-commercial Madison River users;

(c) two individuals with a Madison Valley business interest not connected to commercial outfitting;

(d) one member trained in natural resources management and not currently working for the Department of Fish, Wildlife and Parks;

- (e) one representative from the Fish and Wildlife Commission;
- (f) one representative from the Bureau of Land Management; and
- (g) one at-large member whose selected qualities are largely outside the above descriptions for other work group members.
- (2) The members of the working group shall be appointed for three years.
- (3) The work group will be staffed by department employees.
- (4) The work group may develop recommendations to the commission for approval regarding:
  - (a) the allocation of commercial use trips to outfitters;
  - (b) a process to permit new outfitters on the Madison River;
  - (c) rule language to address all recreational use on the Madison River, including walk/wade sections and rest rotation proposals to replace those in ARM 12.11.6702 and 12.11.6706; and
  - (d) consequences of permit violations.

AUTH: 87-1-303, MCA

IMP: 87-1-303, MCA

6. The commission has thoroughly considered the comments and testimony received. A summary of the comments received and the commission's responses are as follows:

COMMENT 1: The commission received comments stating that use of the Madison River needed to be managed and supported the development and adoption of rules.

RESPONSE 1: The commission appreciates the public's involvement in the development and adoption of the rules regarding recreational use of the Madison River.

COMMENT 2: The commission received multiple comments regarding NEW RULES I (12.11.6705) and VI which addressed capping the number of trips. Comments received in support generally stated that commercial growth needed to be controlled because the river was too crowded. Comments received in opposition of the proposal stated concerns that the 2019 and 2020 levels were too high, and others in opposition stated that the cap discriminates against currently operating outfitters whose volume of business was greater in years prior to 2019.

RESPONSE 2: The highest year of commercial activity on the Madison River is 2019. Reducing commercial trip levels to some number below what it was in 2019 would be arbitrary, because there is no consensus on how to equate such reductions to a "carrying capacity" or acceptable limit for the river. The commission chose to adopt the levels specified in NEW RULE VI(1), which allow for either 2019 or 2020 numbers, whichever is higher, after gaining some understanding from department staff that this would amount to no more than 14,500 trips once the 2020 reports are received. Outfitters who have not guided on the Madison River in 2019 or 2020 would have an opportunity for future allocation because one of the issues the Madison River Work Group, established by NEW RULE XIV (12.11.6710), will



address is developing a process to permit new outfitters on the Madison River. This should provide a mechanism for outfitters who have not operated on the Madison River in the past two years to gain entry in the future.

COMMENT 3: The commission received comments both in support and opposition to NEW RULE II (12.11.6706). Comments in opposition stated the rule would lead to more crowding by congregating use in certain stretches of river on certain days and the Madison River will not allow for enough float sections for guided trips because it is not long enough.

RESPONSE 3: The commission adopted NEW RULE II (12.11.6706) with changes to address the comments received. With regard to the concern that this rule will increase crowding in the rested sections, it is important to consider that creel survey data collected in the popular float reach of the Madison River from Lyons Bridge Fishing Access Site to Ennis Bridge Fishing Access Site show that year-round commercial use is on average 50 percent of total use throughout the reach. Approximately 70 percent of total use between Lyons Bridge Fishing Access Site and Windy Point Boat Launch from May through October is commercial and, on some days, it is close to 100 percent of the use. Given these statistics the proposed rest/rotation days would reduce crowding in the reaches on those days. However, if more non-commercial anglers start using the two rest/rotation sections, there may not be a noticeable change in the number of anglers and boats. There is also a chance that population growth in Bozeman and surrounding areas could result in high numbers of noncommercial anglers using these sections in future years.

Those who have concern that this rule will make the river too short for commercial outfitting should consider that the proposed rules were to be limited to only two days per week (Saturday and Sunday) from June 15th through September 30th, with Sundays historically having the lowest commercial traffic. The float reach of the Madison River, which starts at Lyons Bridge Fishing Access Site and ends at the Ennis Fishing Access Site, consists of 37.25 miles of floatable water. The upper rest/rotation section, Lyons Bridge Fishing Access Site to Palisades Day Use Site, represents approximately 8.5 miles of river or 27% of the floatable area on Sunday for the seasonal period. The proposed lower rest rotation section, Varney Bridge Fishing Access Site to Ennis Fishing Access Site, represents approximately 8.7 miles or 23% of the floatable area for Saturdays for the seasonal period. While the proposed rule was not clear with regard to the legality of commercial launches at the lower site for each section, it is the department's assumption that commercial users would be able to launch from Palisades Day Use Area on Sundays and Ennis Fishing Access Site on Saturdays through the seasonal period. Evaluating these restrictions on a weekly basis there are 260.75 miles of floatable river available per week during the seasonal restriction period. The proposed rest rotation sections would account for 3.8% and 3.3% of the weekly available floating opportunities for the upper and lower proposed rest/rotation sections, respectively for the rest/rotation season.

The rest/rotation system adopted by the commission rested the Raynolds Pass Fishing Access Site to Lyons Bridge Fishing Access Site on Saturday and Lyons Bridge Fishing Access Site to Palisades Day Use Area on Sunday. Overall this is similar in length to the miles in the proposed rule; however, the impact of this on commercial outfitters was lessened by NEW RULE III (12.11.6702) by opening up of the Raynolds Pass Fishing Access Site to Lyons Bridge Fishing Access Site to boats on Sundays, essentially giving the outfitters a new, alternative section to float that was previously unavailable. This new section is also of similar mileage to the Lyons Bridge to Palisades section, thereby maintaining the float opportunities.

COMMENT 4: The commission received comments in support and in opposition to the walk/wade sections proposed in NEW RULE III (12.11.6702) and NEW RULE V. Comments in opposition stated the impacts of boats on wade anglers are exaggerated or they are insignificant, restricting boats will favor rich landowners, "privatizes" stretches of the river, the proposed rule language will concentrate boat use on certain sections of the river, and the proposed rule language is inconsistent with the Stream Access Law.

RESPONSE 4: The commission adopted NEW RULE III (12.11.6702) to address the comments received. Regarding the impacts of boats on wade anglers, the department has not cataloged individual complaints, although many have been logged through the various public feedback processes. Scoping results from an online survey conducted in November 2019 showed that there was a high acceptability score among non-commercial users for development of more walk/wade opportunities. The extent to which these impacts may or may not occur can only be known for sure by direct observations of users of the river as reported pursuant to ARM 12.11.6701. Both of the walk/wade sections present obstacles to wade anglers in terms of staying inside of the high-water mark or simply the long distances from access points which limits use of some remote areas. Landowners in these areas may deem this as preferable if they view the anglers in a negative way and would rather anglers stay away from their properties. To some commenters, this situation is unacceptable and can only be remedied by allowing more boat use so that these areas are more fully accessible. What is missing from this perspective is that of wade anglers who enjoy the opportunity to fish without interference from boats or feel it is an acceptable tradeoff. This sentiment was reflected in the 2016 mail survey and 2019 scoping survey. Maintaining a walk/wade section is consistent with the goal to diversify the angling experience. The commission recognizes the limited access, and although some anglers may prefer the remoteness, that is not a sentiment expressed by most wade anglers. For this reason, the department will pursue additional walk-in access in these reaches. The argument that maintaining these stretches prevents boats from spreading out is true, but there are other ways to reduce boat traffic, such as rest/rotation sections or restrictions on overall use. The claim that the rule language is a violation of or inconsistent with the spirit of the Stream Access Law is not true. The law says nothing about the regulation of types of use, which is what occurs in the walk/wade sections. In addition, the commission has specific statutory authority to propose rules such as this. Access is not being prevented but limited and restricted in some areas.

The new rule language reduces the current restrictions on boats in the current upper walk/wade section by allowing fishing from a boat between Raynolds Pass Fishing Access Site and Lyons Bridge Fishing Access Site on weekends from June 15 to September 30. Also significant was the retention of the ban on fishing from a boat for the vast majority of the walk/wade sections. The restriction remained the same year-round from the outlet of Quake Lake to Raynolds Pass Fishing Access Site and in the lower walk/wade section from Ennis Bridge Fishing Access Site to Ennis Reservoir.

COMMENT 5: The commission received comments both in support and in opposition to NEW RULE IV (12.11.6715) which would restrict the development of new access sites downstream of Greycliff Fishing Access Site to carry-in only for boats and vessels. The commission received more comments in support to keep this section of the river as "primitive" in nature, while those in opposition felt this section of river is not used as much and a rule was unnecessary.

RESPONSE 5: Due to the high level of support and concern over future projected recreational increased use of the Madison River, the commission adopted NEW RULE IV (12.11.6715) with changes for clarification.

COMMENT 6: The commission received comments in support of NEW RULE XIII (12.11.6711) with several comments expressing a need for thorough evaluation of any rules that get implemented. The proposed rule was for evaluation after the first year of implementation and then every three years. Some comments indicated a preference for the first evaluation to be after three years of implementation instead of one year.

RESPONSE 6: The commission adopted language to evaluate the rules after one year of implementation and then every five years.

COMMENT 7: The commission received many comments stating NEW RULE XIV (12.11.6710) provided the work group with too much authority or that the commission's authority would be inappropriately delegated to the working group. The Bureau of Land Management (BLM) requested that a representative be added as a member to the working group because they are a partner agency in the management of recreation on the Madison River.

RESPONSE 7: In response to the comments the commission chose to create a work group but did not adopt the work group format as proposed. The commission limited the work group's authority and required any recommendations be presented to the commission for approval with no overall authority being retained by the work group. The commission expanded the membership of the work group by adding a commissioner, a BLM representative, three noncommercial river users, a natural resource professional, and two local business owners.

COMMENT 8: The commission received comments that more needs to be done to protect the fishery of the Madison River against hooking mortality by enacting restrictive fishing regulations and against effects of climate change.

RESPONSE 8: This is outside the scope of this rulemaking authority. Regarding the concerns about hooking mortality, harvest on the Madison River has been shown to be minimal in the most recent creel survey completed by the department. There is no scientific evidence that restricting fishing to barbless hooks or dry flies have any effect on hooking mortality. Also, there is no evidence that year-round fishing causes population level impacts. With respect to concerns regarding climate change, warming water temperatures do have the potential to drastically impact trout population in the Madison River and the recreation it supports. At first, warming temperatures may affect growth and decrease tolerance to stressors such as disease and angling. Continued warming could even ultimately lead to fish kills and changes in fish species assemblages. Any of these changes will impact recreational angling. "Hoot-owl" restrictions, 2:00 pm-midnight closure on fishing, during the hottest weeks of the summer may at first be sufficient to reduce stress on the fishery, but as temperature-induced impacts continue or worsen with increasing temperatures, it may become necessary to move to 24-hour restrictions or find ways to reduce river angling usage. The commission appreciates the comments but at this time is not taking any action. The commission will take action if warranted in the future. For example, if hooking mortality or warming water temperatures are determined to be having substantial impacts on the fishery of the Madison River, the commission can adjust fishing regulations or the administrative rules as appropriate and necessary.

COMMENT 9: The commission received several comments stating that indirect impacts of changing regulations on businesses were not properly evaluated in the environmental assessment.

RESPONSE 9: The commission heard from and accepted that the department would conduct an economic small business analysis in the future when it has more concrete information about how the allocation system would be implemented on the river pursuant to the work group recommendations to the commission as prescribed by NEW RULE XIV (12.11.6710). Until then, the economic impacts are hard to assess because there is no way to analyze the impacts of a system that has yet to be developed without speculation. In addition, the secondary or ripple effect of the management approaches (walk/wade, rest/rotation, commercial allocation and cap) on the entire economic activity of the Madison Valley were not evaluated because no study is available that describes the economic relationships between guides and clients and how their money is spent in the community, nor is it required the commission conduct its own independent study. In addition, the commission cannot predict the long-term behavioral change of anglers in response to these management actions. The department has predicted that some anglers may either quit fishing or be drawn to the Madison River due to various alternative actions in the walk/wade sections or those proposed for rest/rotation. These assumptions may be wrong, and anglers may not quit fishing the Madison River or may not find the new

regulations to be an attraction. The economic consequences of both of those scenarios are very different but truly unknown until the responses occur. Therefore, because there is speculation involved with predicting the immediate impacts of the management actions, the magnitude of uncertainty would increase considerably when trying to predict the secondary impacts to the point that results would be unreliable and misleading. The commission is sensitive to issues raised in relation to economic impacts and added two local business owners to the work group. The commission adopted ARM 12.11.6701 related to reporting requirements which means that persons recreating on the river must provide user information as prescribed by the department. Although not specified in the rule language, this will likely include asking users of access sites to fill out questionnaires or participate in on-site interviews, which will include asking them how they plan to respond to the restrictions and how that might affect their spending in the Madison Valley. Such information will help guide future management restrictions and better understand associated economic activity and impacts.

/s/ Rebecca Docker  
Rebecca Dockter  
Rule Reviewer

/s/ Shane Colton  
Shane Colton  
Chair  
Fish and Wildlife Commission

Certified to the Secretary of State December 15, 2020.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

In the matter of the amendment of ARM )	NOTICE OF AMENDMENT
17.8.501, 17.8.504, 17.8.505, and )	
17.8.510 pertaining to air quality )	(AIR QUALITY)
operation fees )	

TO: All Concerned Persons

1. On August 28, 2020, the Board of Environmental Review (board) published MAR Notice No. 17-413, pertaining to the virtual public hearing on the proposed amendment of the above-stated rules at page 1550 of the 2020 Montana Administrative Register, Issue No. 16.

2. The board has amended ARM 17.8.501, 17.8.504, 17.8.505, and 17.5.510 exactly as proposed.

3. No public comments or testimony were received.

4. The Department of Environmental Quality submitted comments in support of the proposed amendments.

Reviewed by: BOARD OF ENVIRONMENTAL REVIEW

/s/ Angela Colamaria  
ANGELA COLAMARIA  
Rule Reviewer

BY: /s/ Christine Deveny  
CHRISTINE DEVENY  
Chair

Certified to the Secretary of State December 15, 2020.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

In the matter of the amendment of ARM ) NOTICE OF AMENDMENT AND  
17.30.602 and the adoption of NEW ) ADOPTION  
RULE I pertaining to selenium standards )  
for Lake Koocanusa and the Kootenai ) (WATER QUALITY)  
River )

TO: All Concerned Persons

1. On October 9, 2020, the Board of Environmental Review (board) published MAR Notice No. 17-414, pertaining to the virtual public hearing on the proposed amendment and adoption of the above-stated rules at page 1789 of the 2020 Montana Administrative Register, Issue No. 19.

2. The board has amended ARM 17.30.602 exactly as proposed.

3. The board has adopted NEW RULE I (ARM 17.30.632) as proposed but with the following changes, stricken matter interlined, new matter underlined:

NEW RULE I (17.30.632) SELENIUM STANDARDS FOR LAKE KOOCANUSA AND THE KOOTENAI RIVER (1) through (5) remain as proposed.

(6) Fish tissue standards will be instantaneous measurements not to be exceeded. Fish tissue sample results shall be reported as a single value representing an average of individual fish samples or a composite sample, each option requiring a minimum number of five individuals from the same species. Fish tissue standards are applicable to tissues of fish in Lake Koocanusa from the US-Canada international boundary to the Libby Dam and in the mainstem Kootenai River from the outflow below the Libby Dam to the Montana-Idaho border. Egg/ovary tissue standards supersede any muscle or whole-body standards, as well as the water column standards in (7), when fish egg/ovary samples are available and when the aquatic ecosystem is in steady state. When fish egg/ovary samples are unavailable, and the aquatic ecosystem is in steady state, fish muscle or whole-body standards supersede the water column standards in (7).

Fish Tissue	Selenium Concentration
Eggs/Ovaries	15.1 mg/kg dry weight (dw)
Muscle	11.3 mg/kg dw
Whole Body	8.5 mg/kg dw

(7) remains as proposed.

**REASON:** The changes to (6) are necessary to clearly specify the duration and frequency for the fish tissue standards. The fish tissue standard is an instantaneous measurement that is not to be exceeded. The fish tissue standard

may be based on a single value that represents an average of individual fish samples or a composite sample, each option, requiring a minimum of five individuals of the same species.

4. The board has thoroughly considered the comments received. A summary of the comments received and the board's responses are as follows:

#### **List of Acronyms used in Responses to Comments**

BAF – bioaccumulation factor  
BC – British Columbia  
BC-ENV- British Columbia Ministry of Environment  
BER – Board of Environmental Review  
CRT – Columbia River Treaty  
DEQ – Department of Environmental Quality  
dw – dry weight  
EPA or US EPA – United States Environmental Protection Agency  
EQC – Environmental Quality Council  
FWP – Montana Department of Fish, Wildlife and Parks  
Kd – Partitioning coefficient  
KNC -Ktunaxa Nation Council  
LKMRWG – Lake Koocanusa Monitoring and Research Working Group  
MT – Montana  
ppb – parts per billion  
Se – Selenium  
SeTSC – Selenium Technical Subcommittee  
SPM – Suspended particulate matter  
TTF – Trophic Transfer Factor  
USGS – United States Geological Survey  
USFWS – United States Fish and Wildlife Service  
WPCAC – Water Pollution Control Advisory Council  
WPIC – Water Policy Interim Committee

COMMENT NO. 1: Over 180 commenters voiced their support for the proposed limits on selenium pollution in Lake Koocanusa and the Kootenai River. Supporting standards to limit bioaccumulation of selenium in fish and the water will protect not only the aquatic environment, but also the biodiversity of nature, and the endpoint consumer.

RESPONSE: The board acknowledges the comments.

COMMENT NO. 2: We think the recommended standard for the Kootenai River of 0.3 µg/L should protect aquatic life and the sensitive fish species of the lower river.

RESPONSE: The board presumes the commenter meant 3.1 µg/L which is the proposed dissolved selenium standard for the Kootenai River. In that case, the board agrees and thanks you for your comment.



COMMENT NO. 3: Many commenters expressed support for the proposed limits on selenium pollution because they are needed to protect water quality, fish populations, and human health not just in Montana but also in Idaho. Without these limits, endangered populations of sturgeon and burbot in the Kootenai River are at risk. Selenium can also cause harm to people that consume fish with high levels of selenium.

RESPONSE: The board thanks you for your comments. Federal regulation at 40 CFR 131.10(b) requires the state to consider and ensure the attainment and maintenance of downstream (intra-and-interstate) water quality standards. The proposed standards for Lake Koocanusa and the Kootenai River are considered protective of downstream uses including the protection of downstream species listed under the Endangered Species Act. The proposed water quality standards were developed for the protection of aquatic life. Protection of human health was not considered in the development of the proposed standards. The proposed standards are designed to protect aquatic life. More study is necessary to determine whether selenium levels in fish tissue may adversely affect humans.

COMMENT NO. 4: We are confident that the required three-year review period will provide opportunity for adjustment and refinement as additional data gets collected.

RESPONSE: The board agrees with the comment. Consistent with 75-5-301(3), MCA, and 40 CFR 131.20, *Montana reviews water quality standards at least once every 3 years, considers public comments, and may revise classifications of state waters and applicable water quality standards as a result of this review.* Additionally, consistent with 75-5-702, MCA, the department continuously monitors state waters to assess water quality in partnership with state and federal agencies, and other stakeholders, and uses the results of these monitoring efforts to inform future triennial reviews.

COMMENT NO. 5: I think it is a shame the elected leaders in Libby and Eureka have determined there is no crisis while acknowledging they do not understand the study. I would like to thank the scientists who have been comprehensive in this ongoing study, and I would hope we adopt their conclusions as policy.

RESPONSE: The board acknowledges the comment.

COMMENT NO. 6: The coal industry is trying to undermine and delay Montana's effort to adopt protective limits on selenium pollution. The new limits will be enforceable under an international treaty between the United States and Canada.

RESPONSE: The board acknowledges the comment.

COMMENT NO. 7: Some commenters indicated that the EPA nationally recommended criterion of 1.5 µg/L for Lake Koocanusa should be adopted rather than the proposed 0.8 µg/L.

RESPONSE: The department followed the methodology outlined in Appendix K of the EPA 304(a) guidance document (EPA, 2016) for the derivation of site-specific selenium criteria for Lake Koocanusa. The department followed EPA

recommended mechanistic bioaccumulation modeling approach and determined that 1.5 µg/L is not protective of the aquatic life beneficial use for Lake Koocanusa.

COMMENT NO. 8: We recommend MDEQ adopt 1.5 as a performance-based value that is to be developed using site-specific data. The interim water value for lentic waters (1.5 µg/L) would serve as the criteria until such time a site-specific water criterion is derived.

RESPONSE: Following the methodology outlined in Appendix K of the EPA 304(a) guidance document (EPA, 2016), the department determined that 1.5 µg/L is not protective of the aquatic life beneficial use. See also, response to COMMENT NOs. 7, 9, and 177.

COMMENT NO. 9: DeForest (2020) provides evidence that the EPA (2016) lentic value of 1.5 µg/L is protective of Lake Koocanusa aquatic communities and those downstream, including white sturgeon.

RESPONSE: While DeForest (2020) provides an argument for why the EPA (2016) national lentic value is protective in Lake Koocanusa, his opinion differs from the majority of other state, federal, tribal, and academic scientists who believe the DEQ (2020) proposed site-specific criterion of 0.8 µg/L for Lake Koocanusa is protective. In examination of DeForest's (2020) analysis (see DeForest's Table 2), the department noted that 3 of the 8 scenarios with site-specific TTFs and Kds result in a water column criterion that would be appreciably less than the lentic value of 1.5 µg/L recommended by EPA (2016). In this regard, we find that the EPA (2016) lentic water column value is not protective of the aquatic life beneficial uses in Lake Koocanusa and a more stringent standard is required.

COMMENT NO. 10: The proposed standard of 0.8 µg/L is NOT based on the facts and science of the situation, but rather is being driven by anti-coal mining politics.

RESPONSE: The board does not agree with the comment. The department provides detailed analysis of the existing data, modeling methods, and assumptions in the technical support document (DEQ, 2020) housed on their website. Working with a scientifically peer-reviewed and published model and modeling parameters recommended by USGS and the SeTSC, the department identified a narrow range of candidate criteria—most of which were below 1 µg/L—which included the proposed standard of 0.8 µg/L. See also, response to COMMENT NO. 177.

COMMENT NO. 11: If the national lentic criterion (1.5 µg/L) is not considered protective for the lake, then how can the national lotic criterion (3.1 µg/L) be considered protective of the downstream receiving environment, particularly since the goal is aimed at the protection of white sturgeon?

RESPONSE: The national EPA recommended selenium criteria for lentic and lotic waterbodies is based on data at a national scale, and is thus generally applicable but with some waterbodies over or under protected. The rigorous scientific effort for Lake Koocanusa has shown that 1.5 µg/L is not protective of the aquatic life beneficial use. To date, no such analysis has been conducted for the Kootenai River, so the department is proposing adoption of the nationally

recommended criterion for lotic waterbodies because it is considered the best available science at this time for the Kootenai River.

COMMENT NO. 12: We urge the board to also be thoughtful, inclusive, and deliberative. This has been our experience with DEQ in the past and we are puzzled by this rulemaking, which appears to depart from that practice. This is particularly alarming here, where the proposed standard is only a fraction of the existing Montana standard and almost half of the federal guideline.

RESPONSE: The board acknowledges the comment. The department has not departed from the process, and this particular standard setting process has included more public meetings and more stakeholder and external expertise collaboration than any process the department has undertaken. Beginning with data collection and public outreach in 2015, this has included seven large format panel discussion public meetings held in northwest Montana, as well as smaller format meetings with local officials in the area. The forum utilized for this transboundary effort was the LKMRWG, a group that has met twice a year since 2015. Selenium, in particular development of the appropriate water quality standard, was determined to be the first priority. Thus, a Se Technical Subcommittee (SeTSC) was formed comprised of top experts in selenium, meeting nearly 30 times to guide data collection, modeling work, and standard development. See also, response to COMMENT NOs. 19 and 23.

COMMENT NO. 13: The standard unnecessarily deviates from U.S. EPA's current national criteria guidance (2016) and is lower than any other state-wide or site-specific standards in the U.S.

RESPONSE: The board does not agree with the comment. The department followed protocols defined in Appendix K (EPA, 2016) which details the steps required to develop site-specific selenium criteria. The data required to undergo a site-specific derivation effort is extensive. In this case, it took a minimum of four years of data collection. The EPA 304(a) guidance document was finalized in 2016, only four years ago. Many states and tribes do not yet have the extensive data required to develop site-specific criteria required to utilize the Ecosystem-Scale model.

In 2016, the department was participating in a bi-national working group addressing selenium as a result of Ministerial Order (No. M113) under the British Columbia Environmental Management Act to remediate water quality effects of past mining activities and to guide environmental management of future mining activities in the Elk Valley, including the Canadian portion of Lake Koocanusa. The data collection efforts of BC and MT began in 2015 making Montana among the first states or tribes to undertake derivation of site-specific selenium criteria. In the San Francisco Bay Delta, years of selenium data had already been collected, allowing EPA to use the Ecosystem-Scale model (Presser and Luoma, 2010). On November 29, 2018, EPA signed a proposed rule to revise the current federal CWA selenium water quality criterion applicable to certain fresh waters of California. This rule, Establishment of a Numeric Criterion for Selenium for the State of California, is being proposed to ensure that the criterion is set at a level that protects aquatic life and aquatic-dependent wildlife, and includes 0.2 µg/L dissolved selenium for San

Francisco Bay.

COMMENT NO. 14: The selection of a number of 0.8 µg/L has the potential to set precedent in other areas of the region.

RESPONSE: The board does not agree with the comment. The data used to derive the 0.8 µg/L is site-specific and would not be applicable to other waterbodies.

COMMENT NO. 15: The following comment consists of counterpoints to the comment stated during the public hearing (paraphrased) as follows: The standard will set precedents in other regions of the US imposing hardship on other states and mining prospects.

Counterpoint: The proposed criteria is "site-specific," which means: "site-specific." Valid site-specific processes in other parts of the US should result in unique, site-specific standards for those regions.

RESPONSE: The board agrees with the comment.

COMMENT NO. 16: The complex, collaborative process has been thorough and transparent with ample public involvement.

RESPONSE: The board acknowledges the comment. The department worked to facilitate a transparent, collaborative process with numerous opportunities for public involvement. The department co-led the Lake Koocanusa Monitoring and Research Working Group (LKMRWG) which had a broad range of engaged members. The department co-managed a public website housing all materials associated with the selenium work including but not limited to: data, meeting summaries and presentations, sampling and analysis plans, technical reports, and literature. The department held numerous public meetings on the standard development and data collection efforts in Lake Koocanusa beginning in 2015, and this rulemaking effort met all requirements of the Montana Administrative Procedure Act (MAPA), 2-4-301, MCA *et seq.*; the Montana Water Quality Act (WQA), 75-5-307, MCA; and the federal Clean Water Act.

COMMENT NO. 17: We commend the department for collaborating with multiple stakeholders in Montana and British Columbia for over five years to develop a site-specific selenium water column element for Lake Koocanusa with the mechanistic model approach recommended by EPA.

RESPONSE: The board acknowledges the comment. The department worked collaboratively with British Columbia and multiple stakeholders while following EPA 304(a) guidance (EPA, 2016) for developing a site-specific standard for selenium utilizing the EPA recommended mechanistic model approach.

COMMENT NO. 18: We applaud the formation and work of the LKMRWG. Efforts of this multi-agency collaboration have produced datasets that indicate a need for on-going downstream monitoring.

RESPONSE: The board acknowledges the comment.

COMMENT NO. 19: There has been a short stakeholder outreach process. I think some of the department's most successful efforts in the past have taken a long

time because they have had a robust stakeholder participation, which we do not see in this case.

RESPONSE: The board disagrees with the assertion that there has been a short stakeholder process. The department has held public meetings (a total of seven) on the proposed Lake Koocanusa and Kootenai River selenium standards since 2015. Just in the past year these have included two public meetings in Libby and Eureka in 2019, additional meetings with local officials in 2019 and 2020, and two virtual public meetings in 2020. These public meetings were in addition to engaged participation with a multi-stakeholder working group and maintaining an extensive co-managed public website housing all data, meeting summaries, sampling and analysis plans, technical reports, and literature. See response to COMMENT NO. 12.

COMMENT NO. 20: The proposed standards for fish tissue and water quality are derived from an unprecedented and multi-year analysis that involved, among many others, the British Columbia Ministry of Environment and Climate Change Strategy, US Geological Survey, the US Environmental Protection Agency, the Montana Department of Environmental Quality, Montana Fish, Wildlife and Parks, US Fish and Wildlife Service, multiple Tribal and First Nations agencies, and university scientists and researchers. The six-year timeline for this process was agreed to by all parties at the outset, and remains on schedule for completion by close of 2020. Additionally, this robust and transparent scientific analysis conducted by the world's leading selenium experts, the Lake Koocanusa Monitoring and Research Group, and the Selenium Technical Committee (SeTSC) has resulted in sound and peer reviewed findings that at every step have been published and shared in the public domain.

RESPONSE: The board acknowledges the comment.

COMMENT NO. 21: A number of commenters requested the board to not delay in the adoption of the proposed selenium limits. The commenters stated that the water quality and fish cannot afford to wait any longer.

RESPONSE: The board acknowledges the comment.

COMMENT NO. 22: The scientific effort that has resulted in the proposed standards began five years ago, and DEQ proposed then to complete the standard-setting process by the end of 2020. We commend DEQ for reaching that milestone.

RESPONSE: The board acknowledges the comment.

COMMENT NO. 23: A number of commenters expressed the need to stop and slow down this process to do more work.

RESPONSE: The board disagrees with the comment. The LKMRWG has achieved the critical milestones in the scientific process undertaken to establish site-specific selenium standards for Lake Koocanusa. The department has adhered to rulemaking requirements in the Montana Administrative Procedure Act; and to the process for adopting a water quality standard under both the Montana Water Quality Act and the federal Clean Water Act. See response to COMMENT NO. 16.

COMMENT NO. 24: The timing of this rulemaking is particularly bad – the world is in the midst of a pandemic that severely challenges many individual's work performance for a variety of reasons and prevents the face to face meetings that would normally be held by the Committee and Subcommittee to enable consensus building dialogue.

RESPONSE: The board acknowledges the hardship of many during the Covid-19 pandemic. The department agrees that an in-person SeTSC meeting would have been preferable. However, the department viewed the half-day ZOOM teleconference (August 25, 2020) as a major success with 100 percent attendance, robust discussions, and recommendations from all SeTSC members provided. Those positive sentiments were also expressed by participating members.

COMMENT NO. 25: We oppose this rule in the current form. Rather, we ask that you give the experts more time to study the rule and the data, and give the selenium experts, stakeholders, and legislators more time to review options.

RESPONSE: The board acknowledges the comment. See response to COMMENT NO. 23.

COMMENT NO. 26: The majority of WPIC members support a six-month pause in setting this standard to allow for data such as the water treatment data to be investigated and used to set the standard.

RESPONSE: The board notes that WPIC did not lodge either a formal or informal objection to the proposed selenium standards for Lake Koocanusa and the Kootenai River under 2-3-305(9) or 2-4-406(1), MCA. Water treatment information cannot be taken into account in establishing water quality standards under the Clean Water Act. However, treatment technology and economic cost of treatment are considered in the formulation and adoption of standards under the WQA. 75-5-301(2), MCA. In this case, there are no public or private entities discharging to the Kootenai River or Lake Koocanusa with Montana Pollutant Discharge Elimination System (MPDES) permit effluent limits for selenium. Therefore, no permittee will be immediately required to incur additional costs to treat wastewater for selenium. Selenium enters surface water from natural sources. Larger land development activities, such as surface mining and construction are already subject to general discharge permit requirements including implementation and maintenance of best management practices (BMPs). The department foresees no additional treatment requirements associated with these land disturbing activities due to the adoption of site specific selenium criteria. Available treatment technology and economic cost of treatment can play a role in use attainability determinations and in variance development. The department has been and will continue to investigate water treatment data and use it to help guide its work to implement and enforce the selenium standards.

COMMENT NO. 27: The only thing I see is the political rush to set the selenium standards so low, as to force Lake Koocanusa out of compliance of current water quality standards. If there is no "crisis" then setting the standard to the proposed levels will only create an unattainable standard.

RESPONSE: The board disagrees with the comment. Water quality

standards are established based on sound scientific rationale reflecting the latest scientific knowledge on the effects of the concentration and dispersal of pollutants on the aquatic species, or human health. See also, response to COMMENT NO. 149.

COMMENT NO. 28: Why was this proposed very low standard first announced at a virtual meeting in September when there was no reasonable time to question, comment, or petition for change because it immediately went to WPCAC and then immediately to BER?

RESPONSE: Following completion of several milestones in the development of the proposed site-specific selenium standard for Lake Koocanusa (which included five years of data collection, a peer-reviewed modeling report, recommendations from the Selenium Technical Subcommittee (SeTSC), and BC/MT co-developed supplemental model scenarios), the department hosted two public meetings in September 2020 to explain the science and take questions. These meetings were held virtually via ZOOM, due to the Covid-19 pandemic. In parallel, and following the Montana Administrative Procedure Act, the department on September 11, 2020 presented the proposed standard to the Water Pollution Control Advisory Council who unanimously voted to move the rule forward to the Board of Environmental Review (BER) on September 24, 2020. This rulemaking effort met all requirements of MAPA, 2-4-301, MCA *et seq.*; the WQA, 75-5-307, MCA; and the federal Clean Water Act. See response to COMMENT NO. 16.

COMMENT NO. 29: We have always known the department to be very accommodating to the Montana Legislature, but in this case, the Legislature's Water Policy Interim Committee had to request the information from the department. After receiving and considering the information, half of the WPIC members were concerned enough that they voted to object to the rulemaking. The local legislators and county commissioners from Lincoln County have consistently asked for more time in this process. These are clear indications that the rule is too rushed.

RESPONSE: The department is always happy to provide the Montana Legislature with any information they request. The department has briefed the Environmental Quality Council (EQC) about the selenium pollution in Lake Koocanusa in the past. Most recently, the department briefed EQC about this selenium rulemaking process and timeline for public comment and approval at the Council's September 25-26, 2019, meeting. The department is currently following the same timeline it presented to EQC over one year ago. Additionally, the department worked with local stakeholders, state, federal, and Canadian agencies, and selenium experts on the selenium rulemaking process for over six years.

As noted by the commenter, the department briefed the Water Policy Interim Committee (WPIC) on October 13, 2020, providing a summary of the proposed selenium rule and an update on the rulemaking process and schedule. WPIC then discussed the selenium proposal, heard comment from the public, entertained a motion to lodge an informal objection to the proposed rule, held discussion on the motion, and voted not to object to the proposed selenium standards.

COMMENT NO. 30: The following comment consists of counterpoints to the

comment stated during the public hearing (paraphrased) as follows: more time is needed because more data is needed to establish a scientifically rigorous selenium standard.

Counterpoints include: DEQ criteria are based on six years of transboundary collaborative scientific studies, led by agencies in BC and MT, that was preceded by five years of data collection before the collaborative process. MT, BC, FWP, DEQ, Tribes, KNC, EPA, USFWS and USGS agreed that selenium is impacting Lake Koocanusa and needs to be regulated. Only Teck benefits from more time dedicated to this process. Montanans and Idahoans lose as pollution continues to flow and increase in Lake Koocanusa and the Kootenai River below Libby Dam. Only Teck is affected by the standard. Teck has touted its active water treatment and Saturated Rock Fill water treatment. If these technologies are efficacious then Teck should not be concerned with MT setting a Se standard at this time. It is easy to call for more study, but the evidence before us now makes it clear that there is enough data to take action.

RESPONSE: The board acknowledges the comment.

COMMENT NO. 31: The following comment consists of counterpoints to the comment stated during the public hearing (paraphrased) as follows: The process has been rushed and has not given local elected officials enough time to understand the science.

Counterpoints include: On Day 1, November 2014, in Eureka, Montana, the collaborative stakeholders of the Lake Koocanusa Monitoring and Research Subcommittee collectively agreed to set site-specific criteria for selenium by the end of 2020. Montana DEQ has met the timeline agreed by all at the outset. It is understandable that local elected officials may not understand the science. However, it is not necessary for them to understand, as they are not scientists. This is precisely why Montana and other states have departments of environmental quality, in order to conduct the science and recommend the most appropriate standards for controlling pollution. DEQ has provided multiple sessions explaining the six-year process, the data collected, and the methods of deriving the criteria. These sessions have been available for elected officials and the public. If elected officials still do not understand the science, then there is little hope that they ever will. This is not a legitimate reason to delay or halt setting revised criteria for Lake Koocanusa or the Kootenai River below Libby Dam.

RESPONSE: The board acknowledges the comment.

COMMENT NO. 32: Why was the normal Montana legislative process sidestepped until pushed by the conservative legislators of the area that prompted the purview of WPIC and when it was brought to WPIC, a split partisan vote of the members, WPIC can not be considered consensus.

RESPONSE: This rulemaking effort met all requirements of MAPA, 2-4-301, MCA *et seq.*; the WQA, 75-5-307, MCA; and the federal Clean Water Act. See response to COMMENT NOs. 16 and 28.

The department also presented information on the standard setting process and timeline to both the Environmental Quality Council and the Water Policy Interim Committee (WPIC) upon their request. See response to COMMENT NO. 29.



WPIC is the designated administrative rule review committee "where the primary concern is the quality or quantity of water." 5-5-231, MCA. WPIC has authority to lodge an objection to the department-proposed selenium standards. An objection under MAPA must be made by a majority of the WPIC members. 2-4-305(9), MCA. At its October 13, 2020 meeting, WPIC did not have a majority in support of lodging an objection to the proposed selenium standards. See Response to COMMENT NO. 28.

COMMENT NO. 33: I do not see what the immediate crisis is. I do not see why misleading information has been put out there.

RESPONSE: In accordance with 40 CFR §131.11(a)(1), states must adopt water quality criteria that protect the designated use. Such criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use. The proposed selenium water quality standards are intended to protect the aquatic life beneficial use. The current selenium standard for Lake Koocanusa and the Kootenai River is 5 µg/L and is based on 1987 EPA guidance. The results of the bioaccumulation modeling work presented in Presser and Naftz (2020) clearly show 5 µg/L is not protective of the aquatic life beneficial use for Lake Koocanusa. See also, COMMENT NOs. 145 and 149.

COMMENT NO. 34: I have concerns based on incorrect information and misleading suggestions presented in meetings, particularly the WPIC hearing, which may have influenced some members to vote no on the proposal for additional time to understand it. I think some DEQ officials may not fully understand things.

RESPONSE: Thank you for the comment and the opportunity to provide additional information. The board has provided additional information and clarification in response to specific comments. See response to COMMENT NOs. 151 and 153 through 155.

COMMENT NO. 35: As you know, the Water Policy Interim Committee (WPIC) is the designated administrative rule review committee for issues that concern water quality. In this capacity, we appreciate when the Department of Environmental Quality (DEQ) provides timely information to us on upcoming water quality standard rulemaking efforts, such as the updates DEQ provided regarding nutrient and arsenic rulemaking at our July 13-14, 2020 meeting. Curiously absent from those updates was information regarding the above-referenced selenium rulemaking for Lake Koocanusa and the Kootenai River. Additionally, no information on the selenium rulemaking was presented to WPIC during our September 14-15, 2020 meeting even though information had been presented at earlier board meetings and even though the draft rule had been released to the public prior to our meeting.

RESPONSE: See response to COMMENT NO. 29. The board stresses that the department is always willing to provide updates or briefs to WPIC or other Legislative committees on any topic. The department briefed WPIC on five different topics during the July 13-14, 2020, and September 14-15, 2020, committee meetings. Neither selenium nor general water quality standards development were on the agenda for those meetings. The department did answer questions about

selenium rulemaking when they were raised by WPIC committee members during the September 2020 meeting and briefed the Committee on selenium rulemaking when requested by WPIC at the Committee's October 13, 2020 meeting. The Environmental Quality Council (EQC) requested that the department brief the council on selenium standards during their September 25-26, 2019, meeting. The department also answered EQC's questions about selenium rulemaking during their September 9-10, 2020, meeting. The department plans to request time on WPIC agendas in the future to brief the Committee on all water quality standards rulemaking at least once a year.

COMMENT NO. 36: It is unclear how the board will be able to meaningfully consider the testimony from the public hearing as well as the public comments in the limited timeframe – about two weeks – before there is a vote on the proposal.

RESPONSE: The board and department will work within the timelines to thoroughly address all oral and written comments on the proposed rules and meet all requirements under MAPA, the WQA, and the federal Clean Water Act.

COMMENT NO. 37: Nobody at DEQ or any other Montana agency is willing to stand up and say remove Article 13 from CRT because it would be a disaster for ecosystems of both drainages. DEQ and Teck Coal should band together to eliminate Article 13 from CRT because the full diversion would take away 26 percent of the annual Kootenai freshwater flow into Lake Koocanusa, and what would that do to selenium concentration?

RESPONSE: The board acknowledges the comment, but notes that articles within the Columbia River Treaty are outside the scope of this rulemaking.

COMMENT NO. 38: This rulemaking is inconsistent with previous rulemakings. The reason given by DEQ was that they wanted to finish the rulemaking before the change in administration at the end of the year. DEQ's statements indicate that this rulemaking is not aligned with normal, expected and required scientific and technical motivations. Contrary to previous water quality standard rulemakings, this proposed rule was not discussed with the Montana Legislature's Water Policy Interim Committee in a timely fashion. But again, in a significant departure from established procedures, DEQ did not present information to WPIC prior to rulemaking initiation. Instead, WPIC had to request information from DEQ, hold a special meeting, and receive the information after the rule had already been initiated. The WPIC members were concerned enough that half of them voted to invoke statutory rule review authority to ensure that additional time was provided for rulemaking. This indicates that the state's policy makers are hesitant to support this rushed rulemaking.

RESPONSE: See response to COMMENT NOs. 29, 32, and 35.

COMMENT NO. 39: The state of Montana has not updated their selenium standard and still relies on the EPA's 1999 criteria. The state should update their statewide standard to reflect the EPA's updated 2016 criteria before it moves forward to set a substantially lower standard for a single waterbody, particularly one that is not selenium-impaired.

RESPONSE: The department is in the process of gathering data at a state-wide level to determine the implications of state-wide adoption of EPA's 2016 304a selenium criteria. This will be accomplished through the department triennial review of the state's water quality standards. The department's ongoing state-wide work should not preclude adoption of site-specific selenium criterion for Lake Koocanusa where work to develop site-specific criteria has been going on for many years.

COMMENT NO. 40: Given the pre-existing bilateral Selenium Technical Subcommittee (SeSTC) that was underway prior to Montana initiating the rulemaking process, the development of a management approach should fully enable, consider, and address input from the various expert and stakeholder members of the SeSTC. This would likely produce a selenium management strategy for Lake Koocanusa that is technically sound, scientifically defensible, and consistent with good regulatory policy.

RESPONSE: The Selenium Technical Subcommittee was formed to provide information and analysis for the development of selenium criteria/objectives for Lake Koocanusa that are protective of the uses of the lake including, but not limited to, aquatic life, human health, recreation, wildlife, and agriculture, with the specific goal of answering the questions: Is the current Canadian selenium target of 2 µg/L, as set out in the BC Water Quality Guideline, protective of the uses in Lake Koocanusa? If not, what is an appropriate target value for selenium in Lake Koocanusa?

The collaboration and expertise of the SeTSC members was utilized to accomplish these objectives and the department looks forward to continued trans-boundary coordination on future topics pertaining to Lake Koocanusa.

COMMENT NO. 41: The Kootenai River is of immense importance to local communities as a source of pride and an economic driver. Thanks to Montana's efforts to maintain clean waters, the Kootenai River brings out of state tourism. The proposed standards would ensure healthy fish populations. This is important for tourism and recreation associated with fishing on the Kootenai River which plays an important role in Lincoln County's economy and creates direct and indirect jobs for Montana residents.

RESPONSE: The board acknowledges these comments. The proposed standards are established for the protection of aquatic life in Lake Koocanusa and the Kootenai River.

COMMENT NO. 42: I have seen the regions of the west transform. Extractive industries have overall declined, and the major area of growth is in outdoor recreation. Fishing, hunting, boating, hiking, and many other activities are a growing part of the economy in North Idaho. Protecting and supporting a thriving ecosystem benefits all of us, and with the clearly detrimental effects of selenium, it seems clear that we must advocate to limit selenium pollution in our region.

RESPONSE: The board acknowledges the comment.

COMMENT NO. 43: The geology is unique, and the impacts are limited to Canadian mine operators. There are no known selenium deposits in the Montana

geology of this watershed. There are no operating or proposed mines on the Montana side of this watershed. There are no known selenium sources at any existing or proposed mine anywhere in this region of Montana or Idaho. In other words, there is no known potential for negative impact to Montana industries or economies of adopting these proposed standards for selenium contamination. In fact, Montana's only liability lies in not immediately adopting the MDEQ proposed standards.

RESPONSE: The board acknowledges the comments. See also, response to COMMENT NO. 129.

COMMENT NO. 44: The following comment consists of counterpoints to the comment stated during the public hearing (paraphrased) as follows: The proposed criteria will impact the opportunity for Lincoln County to develop mines in its landscape.

Counterpoints include: The geology of NW Montana is not the same as that found in the Elk River Valley, the source of the selenium. The geology in NW Montana will not produce selenium pollution as a by-product of mining. DEQ reviewed all mining potential in the Kootenai watershed and determined that they would not be impacted by the proposed criteria.

RESPONSE: The board acknowledges the comment.

COMMENT NO. 45: We are writing in opposition to the proposed draft rule because of technical and process concerns, as well as concerns about unintended consequences that may negatively affect Montana's economy and communities.

RESPONSE: This rulemaking effort met all requirements of MAPA, 2-4-301, MCA *et seq.*; the WQA, 75-5-307, MCA; and the federal Clean Water Act. The development of the proposed site-specific selenium standard for Lake Koocanusa included five years of data collection, a peer-reviewed modeling report, recommendations from the SeTSC, and development of supplemental modeling scenarios by BC and Montana. Additionally, the department hosted two public meetings in September 2020 to explain the science and take questions. See response to COMMENT NOs. 16 and 28. There are no public or private entities discharging to the Kootenai River or Lake Koocanusa with MPDES permit effluent limits for selenium. Larger land development activities, such as surface mining and construction are subject to general discharge permit requirements including implementation of BMPs and the department foresees no additional treatment requirements for these activities due to the adoption of site-specific selenium criteria. See response to COMMENT NO. 26. There are no known negative economic impacts associated with this rulemaking.

COMMENT NO. 46: We are concerned about the lack of evidence to justify the proposed rule, the process by which the proposed rule was initiated, and the unintended consequences that may negatively affect Montana's economy and communities. Neither the fish tissue or water column data show any evidence that support the dramatic change in water quality standards being proposed.

RESPONSE: The board disagrees with the comment. See response to COMMENT NOs. 45, 145, 160, and 177.

COMMENT NO. 47: DEQ stated, there would be no economic impacts to the surrounding area. If they've done an economic impact study, where is that study? The final rule must include information regarding the costs of the regulated community, yet no such information was provided with the proposed rule so that the regulated community could review and offer comments on the information.

RESPONSE: Following 2-4-111, MCA, prior to the adoption of a proposed rule, an agency must determine if the rule will have significant and direct impacts on small businesses. The department has completed this *Small Business Impact Analysis (October 2020)*. This analysis is included in the rulemaking package and is available upon request. Under 2-4-102(13), MCA, a small business is a business entity, including its affiliates, that is independently owned and operated and that employs fewer than 50 full-time employees.

The department's analysis also looked at the cost of wastewater treatment that may be passed on to small businesses. While there are multiple communities with public wastewater treatment systems in the watershed, none discharge selenium, and so would not be required to treat for selenium.

Regarding large businesses, the only large mine in the watershed on the US side of the border is the Montanore Mine. In the most recent permit renewal application for the mine, Montanore Minerals Corporation stated that they do not believe selenium is present at the mine.

COMMENT NO. 48: Statements were made that there would be no negative economic impact on Lincoln County if the standard of .8 micrograms per liter is adopted. However, if the average amount of selenium concentration in Lake Koocanusa is about 1.0 micrograms per liter, it appears that immediately Lake Koocanusa would be listed as an "impaired water body." First, I have serious concern that "scare headlines" about a polluted lake will be detrimental to real estate, recreational home construction, and recreational businesses in the Tobacco Valley and the Libby area. From my experience, many commercial projects are slowed, delayed, stopped, or made more expensive from lawsuits and/or appeals, based on environmental considerations. I believe that the status of "impaired water body by selenium content" will add another road block for mining, logging, gravel pits, roads and bridges, subdivisions, perhaps others. That means unnecessary negative economic impact.

RESPONSE: Lake Koocanusa was listed as an impaired waterbody due to other causes prior to 2012. The department originally listed selenium as a threat to aquatic life use in Lake Koocanusa in 2012. Lake Koocanusa is currently listed as threatened for selenium (2018 Integrated Report). The source of the selenium is believed to be mining activity in the Elk River Valley. There is no evidence that real estate values have been or will be impacted by threatened or impaired status of Lake Koocanusa. Additionally, there is no evidence that local mining or other land disturbing activities would be negatively impacted by a change in the impairment status. Lake Koocanusa's beneficial use assessment record can be accessed via a search on Montana's Clean Water Act Information Center (<http://svc.mt.gov/deq/dst/#/app/cwaic>). See response to COMMENT NOs. 26, 47, 50, 51, and 131.

COMMENT NO. 49: There is no threat to Montana jobs (the mining company is in Canada), and having an enforceable limit that protects public health would allow for taking action, with the ability to claim compensation, against violators if standards are broken.

RESPONSE: The board acknowledges the comment.

COMMENT NO. 50: We are concerned that if Lake Koocanusa is labeled impaired status, follow-up regulatory actions will only prevent future development and industry within Lincoln County. Projects going forward will most likely have to spend millions of dollars and could even take decades to prove no degradation before being approved to proceed. The hurrying through of this low standard will undoubtedly have a negative effect on the residents and economics of Lincoln County. What regulations will be implemented on future developments and industry in Lincoln County to measure their contribution to selenium in Lake Koocanusa and the Kootenai River? Will future projects and development have to prove they will not contribute selenium to the Kootenai River drainage or Lake Koocanusa?

RESPONSE: If Lake Koocanusa were found to be impaired for selenium as a result of the adoption of the proposed selenium standard (0.8 µg/L), as the comment posits, then new projects would need to discharge at concentrations equal to or less than the proposed standard of 0.8 µg/L. But if the lake is not found to be impaired for selenium, nondegradation rules would apply as follows: a new or increased source of selenium would not be considered significant (and not be subject to further nondegradation review) if the resulting concentration outside of a mixing zone designated by the department does not exceed 15 percent of the standard; see ARM 17.30.715(1)(c). This nonsignificance threshold is equal to 0.12 µg/L for the lake (and 0.47 µg/L for the river, where the proposed standard is 3.1 µg/L). Limited selenium data from tributaries in the watershed using very low detection limits all show concentrations to be ≤0.08 µg/L, concentrations that would not be considered significant per the state's nondegradation regulations. Dozens of other samples in the watershed with detection limits near 1 µg/L are all non-detects as well. The totality of data indicate selenium is at very low concentrations in the watershed; thus, the board has no compelling information indicating that future development and industry in Lincoln County would be subject to the cost and delays described in the comment and as a result of this rulemaking. See also, response to COMMENT NOs. 9, 43, 47, 48, and 53.

COMMENT NO. 51: There has been no consideration of the economics of waste treatment and prevention, as required when adopting water quality standards. 75-5-301(2), MCA.

RESPONSE: Available treatment technology and economic cost of treatment are considered in the formulation and adoption of standards under the WQA. 75-5-301(2), MCA. The department found no public or private entities discharging to the Kootenai River or Lake Koocanusa with Montana Pollutant Discharge Elimination System (MPDES) permit effluent limits for selenium. It is likely that best management practices (BMPs) will be necessary to avoid impact to water quality from land disturbing activities in the local watershed such as mining and

construction. These operations are already subject to BMPs to avoid impacts to surface water and should not incur substantially different treatment costs as a result of this rulemaking. There is no evidence to suggest adoption of the selenium standards will result in increased treatment costs for owners and operators of activities or facilities that discharge to surface water. Data from the Lake Koocanusa/Kootenai River watershed indicates that selenium is very low, below the proposed standards, and all available data indicate watershed concentrations are very likely to be below the nondegradation nonsignificance thresholds as well. See also, response to COMMENT NOs. 26, 43, 50, and 129.

COMMENT NO. 52: We need to stop and see what the effect is going to be on our industries, our communities, our business, and our people. The stakeholders need time to understand the implementation.

RESPONSE: The department carried out, as required by statute, both a takings and a small-business impact analysis. Presently, there are no anticipated effects on Montana industries, communities, or people in the Lake Koocanusa/Kootenai River watershed. Selenium discharge concentrations are regulated via MPDES discharge permits, and there are two communities (Libby and Troy) who have discharges to the Kootenai River where the new Se standard (3.1 µg/L) would apply. Neither of these communities currently has a selenium limit in their discharge permit, and the department's analysis indicates that there is no reason to expect there will be a selenium limit in their permits. See also, response to COMMENT NO. 50.

COMMENT NO. 53: One critical piece that is missing is an assessment method for fish tissue standards. The department is required to assess water and waterbodies for compliance with the standards and for fish tissue standards there is no assessment method in Montana that has been publicly reviewed and vetted and adopted by the department.

RESPONSE: The board agrees that an assessment method specific to fish tissue standards is important. While a publicly reviewed assessment method is not a required component in adoption of a water quality standard, 40 CFR 130.7(b)(6)(i) requires states to submit "a description of the methodology used to develop an impaired waterbody list." The department will undertake this effort beginning in 2021 and will do so in collaboration with the state of Idaho, federal partners, and stakeholders. As a basis for this forthcoming assessment method, the department will utilize our 2016 Standard Operating Procedure (SOP) for fish tissue analysis developed in anticipation of the continuing need for accurate data representing the levels of selenium found in fish species in Montana. The SOP is intended to serve as a guide for and to ensure integrity and consistency in the collection of fish tissue samples from fish populations in Montana waters and has been and will continue to be a reference in development of project planning and design documents. See also, response to COMMENT NOs. 73 and 189.

COMMENT NO. 54: Montana has no publicly reviewed and/or DEQ adopted assessment methodology for assessing waterbodies based on fish tissue data. DEQ has proclaimed that there are issues with aquatic life in the lake, but there is no

assessment method by which DEQ can properly and consistently make the determination. An assessment methodology must be prepared, publicly reviewed, and adopted by DEQ before any conclusion about harm based on fish tissue data can be made and before a rule can be proposed or initiated for fish tissue.

RESPONSE: See response to COMMENT NO. 53.

COMMENT NO. 55: We would strongly recommend that consideration is given to a continuous water quality monitoring regime for the presence of selenium that will provide alerts immediately if there is an increase in selenium levels and inform mitigatory actions before environmental damage is done. Such "canary-in-the mine" technology would be far better than using biosensors (dead fish) to alert stakeholders to a problem.

RESPONSE: The board acknowledges the comment.

COMMENT NO. 56: Training would be needed for compliance. Water quality compliance currently is based on water sampling. Collecting samples for such low-level analyses requires specialized methods. Also, when, where, and how to catch fish for tissue analysis (which should be the matrix upon which a declaration of "impairment" is made) and how to composite fish for analysis will require additional guidance and training. A well-defined assessment method would need to be established as the proposed standard.

RESPONSE: The department works with trained crews for water quality sampling and expects to work with trained fish sampling crews for future fish tissue sampling. See also, response to COMMENT NOs. 53 and 58.

COMMENT NO. 57: The drafting process for the proposed rule has been rushed. A rule this complex, without clear scientific agreement, requires more time for research and collaboration. This specific rule, written in terms of water column requirements and fish tissue criteria, is a brand-new concept in Montana and we do not understand it well enough. For example, the draft rule does not cover how enforcement will occur if fish samples exceed the standard. Is one fish sample enough to support enforcement or regulatory action or will that require multiple fish samples over a period of time? The rule also does not mention how the lake and river will be assessed, or how often. Additionally, the rule does not indicate what fish species will be used, and whether the requirements are the same for all species.

RESPONSE: The board disagrees that the process has been rushed but agrees that a method for the assessment of fish tissue is important. See response to COMMENT NOs. 53 and 73. In addition, clarification for the frequency component of the fish tissue standard will be provided in rule. See response to COMMENT NO. 189.

COMMENT NO. 58: Montana would have a regulatory standard below the ability of most Montana laboratories to actually measure it.

RESPONSE: The department reviewed the method of detection (MDL) and reporting limit (RL) for analytical labs commonly used by the department; a laboratory routinely used by the department can achieve an RL below the proposed standard of 0.8 µg/L. See also, response to COMMENT NO. 59.



COMMENT NO. 59: The standard is less than one tenth the current Practical Quantitation Limit (PQL) of 10 µg/L, determined by EPA (2009) (see Gilron and Downie, 2016) and near the Method Detection Limits (MDLs) of EPA-approved methods for Se; There is increased variability/measurement uncertainty as measurements approach a laboratory's MDL; and establishing a standard near the MDL of available methods will lead to uncertain or inaccurate compliance determinations. To minimize uncertainty in the determined sample concentration and the risks of either false compliance or non-compliance, the achieved quantitation limit should be significantly lower than the regulatory limit (i.e., best practice is typically for the quantitation limit to be no more than one fifth of the regulatory standard). Standard would require a quantitation limit of 0.16 µg/L Se. This will be very difficult for most laboratories to achieve.

RESPONSE: The most common reporting limit over the past 17 years for the dataset from the Lake Koocanusa watershed has been 1 µg/L; this level has been routinely reported by laboratories (state and private) in Montana. (It should be noted that reporting limits are commonly set at a concentration 3-5 times higher than the method detection limit.) In the past two years, the USGS has been collecting samples whose reporting limit is most commonly 0.081 µg/L, a level provided by Brooks Applied Labs in Washington state. Recently, the department received updated selenium reporting limits from commercial laboratories who routinely do work for the state; their reporting limits were 0.5 to 1 µg/L. Current reporting limits from commercial laboratories, therefore, can now be achieved at concentrations below the proposed standards.

COMMENT NO. 60: The following comment consists of counterpoints to the comment stated during the public hearing (paraphrased) as follows: Commercial laboratories cannot measure 0.8 ppb of selenium.

Counterpoints include: Many samples are tested from Lake Koocanusa every year down to a reliable detection limit of 0.05 ppb. Teck tests thousands of these samples annually. Inductively coupled plasma mass spectrometry is commonly used to measure many elements in water, including selenium, and is widely available from commercial environmental laboratories.

RESPONSE: The board agrees with the comment.

COMMENT NO. 61: There is no clear pathway to ensure the lake achieves the proposed standard. The proposed rule is incomplete because it does not consider how compliance will be achieved.

RESPONSE: Water quality standards are established for the protection of the beneficial use. Reductions in the source of the pollutant are determined via the development of a Total Maximum Daily Load (TMDL) which allocates the necessary source reductions to achieve the underlying standard. Compliance is typically achieved through multiple programs that use the water quality standard as the basis for implementing their water quality protection responsibilities such as effluent limits in permits or best management practices. This includes the development of a TMDL that provides a road map for achieving compliance with the standard by allocating the necessary source reductions among the pollutant sources. The department will

work with BC as well as EPA and the State Department to ensure that steps are taken to address an impairment of the proposed standard. This could include the establishment of a waste load allocation at the border which BC would be responsible for meeting or other mechanisms to ensure that the standard is attained.

COMMENT NO. 62: Although the department indicated that the proposed standard may be used in the context of an international treaty with Canada, that seems ill-considered and fraught with complications, particularly when local legislators and county commissioners are expressing serious concerns about the rule. We should not allow Montana water quality standards, which should be scientifically driven and achievable, to be used as leverage for international conflict. In the meantime, Montana will have yet another standard set below the existing levels, and that is likely unachievable and cost prohibitive. Indeed, if Teck has invested millions of dollars in treatment at its operations in the Elk Valley, as noted during the public hearing, and the proposed standard is still not achievable, it is doubtful that the regulated community, especially any start-up industry in Montana, could afford treatment necessary to meet the standard.

RESPONSE: The board notes that water quality standards must be scientifically driven and based upon a demonstration of sound science in the protection of the beneficial use. Available treatment technology and economic cost of treatment are also considered in the formulation and adoption of standards under the WQA. 75-5-301(2), MCA. See response to COMMENT NO. 51. The US and Canada have operated under the Boundary Waters Treaty since 1909, which requires that neither country shall cause water pollution that will cause injury to health or property in the other country. Adoption of the selenium standards for Lake Koocanusa and the Kootenai River will not change this obligation.

COMMENT NO. 63: The 2012 DEQ listing of Lake Koocanusa threatened for selenium was wrong and estimated that the lake would exceed the current water quality standard of 5.0 µg/L by 2015. That never happened. That listing is wrong, and therefore should not serve as the basis for setting a stricter standard. There is no document indicating the lake does or will exceed the standard.

RESPONSE: The threatened listing was not the impetus for the derivation of a site-specific standard. The department began the collaborative work with BC-ENV and the bi-national LKMRWG to develop a protective water column standard to protect aquatic life in Lake Koocanusa, an effort determined necessary based on the local environmental factors affecting selenium bioaccumulation. The 2012 determination that Lake Koocanusa was threatened for selenium was based on the best available information and science. The analysis used knowledge about current and future loading and full mixing within the reservoir. At the time of the initial threatened listing, there were no active treatment plants or other treatment technologies in operation in the Elk Valley, British Columbia, thus, the determination incorporated conservative assumptions (i.e., no treatment). See response to COMMENT NOs. 48 and 66. In re-assessing Lake Koocanusa's impairment status for selenium, the department was waiting upon results of the site-specific standard effort. If adopted, the selenium criteria will be used to reassess the impairment status of Lake Koocanusa.

COMMENT NO. 64: There is no valid basis for this rulemaking. There is no threat to Lake Koocanusa that warrants this rulemaking. Neither the public notice of the proposed rule nor the derivation document clearly or thoroughly demonstrates any reasonable necessity for the proposed rule. DEQ's 2012 assessment of the lake has been proven wrong over time and DEQ presents no water quality data or fish tissue data that warrant the rulemaking.

RESPONSE: See response to COMMENT NOs. 13, 63 and 200.

COMMENT NO. 65: The water quality assessment for the lake has not been updated since 2012. In the 2012 assessment, DEQ estimated that the lake would exceed selenium standards by 2015 – which has NOT happened, even today in 2020. DEQ has told us in public meetings that the lake levels range between 0.04 - 2.29 µg/L selenium, with a current average of 1 µg/L selenium. DEQ has shown us graphs of lake data from 2013 – 2019 showing no increase in selenium in the lake. The data shows that the selenium levels have been and remain well below the standard of 5 µg/L selenium. That is NOT an impairment and it does NOT indicate any threat of an impairment. The water treatment data has been overlooked and ignored. The levels of selenium have even leveled out since the start of selenium and nitrates being removed from the water entering the Elk River.

RESPONSE: See response to COMMENT NOs. 62 and 63.

COMMENT NO. 66: What data and standard will be necessary to deem the lake "unimpaired" once deemed "impaired" under the proposed 0.8 standard?

RESPONSE: The department's metals assessment method (which addresses selenium) is available on its website (*The Montana Department of Environmental Quality Metals Assessment Method*, July 2012). For lakes, at least one data collection point is required; however additional sites can be included (this will likely be the case for Lake Koocanusa since multiple sites are already established). Data must be ≤10 years old. To assess the "once in three years" allowable exceedance rate, at least 8 samples are needed. Multiple samples from a site collected within a 30-day period would first be averaged. If more than 10 percent of the assessed samples exceed the standard, then the attainment decision is to list or to remain listed (i.e., deem the lake impaired). If the exceedance rate is equal to or less than 10 percent, then the attainment decision is not to list or delist (i.e., deem unimpaired).

COMMENT NO. 67: The proposed rule sets up a confusing situation impossible to resolve. Per DEQ's data, the lake already exceeds 0.8 µg/L much of the time. Therefore, the lake may automatically be considered "impaired" because it will not always meet the new water quality standard. An "impairment" listing implies that harm is occurring, yet none has been noted. Further, because DEQ has no permitted sources within Montana to regulate, the lake will apparently remain impaired in perpetuity. Not only is such an automatic "impairment" listing contrary to the data and evidence before the board, it also serves no valid purpose in terms of state laws and rules.

RESPONSE: The board disagrees that the proposed standard sets up a

confusing situation. The proposed selenium standard is established to protect the beneficial use. If through the department's surface water assessment process, selenium concentrations are found to exceed the water quality standard, the water body will be identified as impaired and submitted to EPA in its Integrated Report. The water body will remain designated as impaired until such time that the standard is no longer exceeded.

COMMENT NO. 68: The proposed rule is unworkable. The proposed rule inserts new concepts in the Montana Water Quality Act that are poorly defined and not understood. Fish tissue criteria are a new concept that are problematic because no accompanying assessment methodology has been provided. Additionally, "steady state" is a new concept, poorly understood and poorly defined. The proposed rule is also unworkable because it provides no mechanism from determining how violations will be determined or how enforcement will take place. It states that "fish tissue standards are expressed as instantaneous measurements not to be exceeded," but elsewhere acknowledges that selenium bioaccumulates over time. It is illogical for an "instantaneous measurement" of something that bioaccumulates over time to be used for compliance and enforcement. The proposed rule provides no logical means for determining liability for water quality exceedances. Further, DEQ states that it has no sources in Montana to regulate; therefore, not only does DEQ lack anything to regulate, it has not described how it will regulate anything or control any water quality exceedances.

RESPONSE: The board does not agree with the comment that the proposed rule is unworkable. The water column standards are intended to limit selenium accumulation in fish tissue and the proposed rule clearly states that fish tissue standards are applicable for assessment purposes. See response to COMMENT NOs. 53, 72, 73, 185, and 189.

COMMENT NO. 69: The proposed standard will be difficult to implement. Setting a water-based standard at 0.8 µg/L would result in implementation issues that have not been addressed. These include the inability of the state's commercial testing laboratories to measure concentrations this low without changes to their analytical methods that require substantial time and expense to implement. Sampling fish tissue as a supplement to the water standard also requires implementation guidance that Montana has not yet considered or developed.

RESPONSE: See response to COMMENT NOs. 53 and 59.

COMMENT NO. 70: Considering Lake Koocanusa is not currently at or below the proposed standard, the draft rule will set up a scenario where the lake may be considered impaired. We are concerned that setting the proposed standard below the current selenium level will not have a path to being undone and the science does not support the low standard. We believe that the study of selenium in Lake Koocanusa has produced some great information, but there is still a lot of information that is missing or inconclusive. We do not see a need for immediate action. Immediate action could drastically affect the future of the industry and the economy of Lincoln County.

RESPONSE: The board acknowledges the concern of the commenter but

does not agree with the comment. See response to COMMENT NOs. 47, 61, and 161.

COMMENT NO. 71: Will data taken to enforce the proposed 0.08 µg/L standard be collected only during the runoff season, during non-run off season, or will an average or median number be considered? Will that trigger the specific regulatory actions when the lake is deemed impaired? What are those actions?

RESPONSE: The board presumes the commenter means 0.8 µg/L which is the water column standard for Lake Koocanusa proposed in this rulemaking. As stated in the proposed rule, water column standards are the numeric standards for total dissolved selenium computed as a 30-day average, not to be exceeded more than once in three years. See response to COMMENT NO. 66.

COMMENT NO. 72: The proposed rule would result in the lake likely indefinitely impaired with no way to regulate to bring the lake into compliance. Why rush to do this?

RESPONSE: Water quality standards are established for the protection of the beneficial use. The standard will be the basis for water quality assessments, making impairment determinations, development of Total Maximum Daily Loads, establishment of permit limits and enforcement. Establishing the numeric standard is part of the process that furthers our ability to protect the beneficial use through multiple programs and process steps that build from the setting of a water quality standard. This includes engagement with federal partners to ensure trans-boundary clean water treaty commitments are maintained. The standards adoption process under the Clean Water Act is designed to set protective standards based on existing science, with states required to revisit water quality standards every 3 years, subject to public review, and resubmittal to EPA. A protective water quality standard is the best tool federal agencies have to ensure that water flowing across the boundary from Canada is not polluted on either side to the injury of health or property in the US as required by Article IV of the Boundary Waters Treaty, and to give the US the clarity and certainty to ensure that Canada is accountable for meeting Article IV. See also, response to COMMENT NO. 67.

COMMENT NO. 73: How will enforcement be handled if tissue samples exceed the standard? Is one fish sample enough to support enforcement or regulatory action, or will that require multiple fish samples over some period of time? How will the lake and the river be assessed and how often?

RESPONSE: See response to COMMENT NOs. 53, 66, 74, and 189.

COMMENT NO. 74: What will enforcement of the proposed standards look like?

RESPONSE: Enforcement of the standard may be achieved through development of a TMDL to allocate loads and reduce sources of pollutants to achieve the water quality standard. Compliance with the standard is typically achieved through multiple programs, including incorporation of effluent limitations, and other terms and conditions in discharge permits. See response to COMMENT NOs. 4, 53, 61, 66, 67, and 72.

COMMENT NO. 75: What is the plan of action if selenium in Lake Koocanusa is over the proposed 0.8 µg/L?

RESPONSE: See response to COMMENT NOs. 4, 53, 61, 66, 67, 72, and 74.

COMMENT NO. 76: We see no benefit, only problems and confusion, from this proposed rule. The average selenium level of Lake Koocanusa is 1.0 microgram per liter, which is greater than the proposed standard of 0.8 micrograms per liter. This indicates that most of the time, the lake will exceed the proposed standard, creating a situation where the lake will be perpetually impaired. And to what end? The department does not have anything to regulate to bring the lake into compliance with this low standard, meaning that Lake Koocanusa will forever be impaired. We urge the board to not promulgate this rule, as proposed, because it will create a scenario that is impossible to resolve.

RESPONSE: The board does not agree with the comment. The board recognizes that the lake will probably be considered impaired for selenium if the proposed standard is adopted. The board also acknowledges that, at this time, there are no sources in Montana to regulate. However, there is no reason to believe the lake will be forever on Montana's impaired waters list; it is clear in Table 1-5 of the department's technical support document that selenium loads from Canada have great potential to be reduced if proper actions are taken in the Elk River. Adoption of the standard is the basis for implementation of pollutant reduction plans to achieve the site-specific standard and protect aquatic life in Lake Koocanusa and the Kootenai River. See also, response to COMMENT NO. 66.

COMMENT NO. 77: The following comment consists of counterpoints to the comment stated during the public hearing (paraphrased) as follows: MT will not be able to enforce the selenium standard, so it should not update or set a new, more restrictive standard.

Counterpoints include: If MT does not adopt the proposed, updated standard, the legal level of selenium will remain at 5 ppb, even though the multi-agency six-year effort concluded that it has to be at maximum 0.8 ppb to protect the fish in the reservoir. The proposed standard allows MT to protect its waters by setting a protective limit that can be enforced via international treaty or via legal means within the US (Teck has an American subsidiary, has been found liable in US courts for pollution from the Trail smelter in Canada that flows into Washington State, and does business in Montana so is subject to Montana's "Long-Arm Law"). Given the six years of data demonstrating the need for a protective standard, Montana stands to be liable itself for releasing water into Idaho that does not meet Idaho's standard.

RESPONSE: The board acknowledges the comment.

COMMENT NO. 78: The sudden implementation of an aqueous Se standard of 0.8 µg/L for Lake Koocanusa - which is six times more restrictive than Montana's standard for Se in other surface water and nearly two times more restrictive than the U.S. EPA standard – is untimely, unnecessary, and unachievable.

RESPONSE: The board disagrees with the comment. The proposed

standard was developed over a multi-year collaborative process among many stakeholders. The department has presented data indicating a site-specific selenium standard for Lake Koocanusa is necessary (see response to COMMENT NO. 136). Achievability will depend on the degree of work undertaken in Canada to control the elevated selenium loads coming out of the Elk River.

COMMENT NO. 79: The proposed rule lacks scientific evidence, is incomplete, and is unrealistic.

RESPONSE: The board disagrees with the comment. The development of a site-specific selenium criterion for Lake Koocanusa implements a peer-reviewed and science-based approach, as recommended by EPA (2016), for ascertaining protective tissue and water quality criterion for the reservoir. See also, response to COMMENT NOs. 28, 78, 110, and 159.

COMMENT NO. 80: The following comment consists of counterpoints to the comment stated during the public hearing (paraphrased) as follows: The standard means Lake Koocanusa is already impaired and cannot be remediated.

Counterpoints include: The only way to remediate Lake Koocanusa is to adopt a more protective standard. Without a protective standard, water quality will remain impaired and Montana will not have the legal standard to enforce remediation. If Teck's technology cannot "stabilize and reduce" the selenium contamination, Montana and Lincoln County may be entitled to financial compensation, or other mitigation to offset the loss of "beneficial uses" and other impacts. If we do not adopt a standard now, Montana will not have any leverage over the BC process of permitting mine expansion by Teck or the other proposed mountaintop removal mines currently under consideration by the province. The result will be a continuing increase in selenium loading to Montana waters.

RESPONSE: The board acknowledges the comment.

COMMENT NO. 81: How would these fish tissue concepts be implemented into permits?

RESPONSE: There are no current permits that would be affected by the proposed rule. The proposed rule includes the following language, "Permit conditions and limits developed from water column standards comply with fish tissue standards." Implementation of this rule will be addressed in a forthcoming guidance document. This follows the process defined in the EPA national criteria recommendations. See response to COMMENT NO. 26.

COMMENT NO. 82: Would this standard mean that we will have to have zero degradation, for all projects moving forward? If we propose any kind of subdivision or any kind of new mining development or any kind of industry, do they have to spend millions and decades trying to figure out if they can actually have zero selenium going into the river?

RESPONSE: Some level of change is allowed in high quality waters (high quality waters are those in which water quality is currently better than the standard). For discharges where selenium is a pollutant of concern, if the discharge meets the nonsignificance criteria in ARM 17.30.715, further nondegradation review may not

be required. For toxic compounds like selenium, a change to high quality water is not significant if the resulting concentration outside of a designated mixing zone does not exceed 15 percent of the applicable standard. If the water body is not considered a high-quality water, then a discharge would need to meet the water quality standard at end-of-pipe. See also, response to COMMENT NO. 50.

COMMENT NO. 83: The rule does establish a nondegradation trigger value that is set at a very low method detection. We would like to know if the department has contacted laboratories or can provide some sense of whether or not that can be measured and at what cost before imposing a limit like that. Second, if the nondegradation limit is set at that, what would that mean for future permitted discharges? Does it mean that any measurable amount of selenium will exceed the trigger value and require treatment prior to discharge?

RESPONSE: As stated in the rule notice, the department will include a second selenium trigger value in DEQ-7 at a concentration of 0.02 µg/L. This is the method detection limit (MDL) for very sensitive selenium analysis, and because it is an MDL, it is appropriate to use as a trigger value. Exceeding a trigger value does not necessarily mean treatment will be required prior to discharge; the next test is whether the discharge will result in change to water quality that is significant, requiring nondegradation review and implementation of treatment or other water quality protection practices. See also, response to COMMENT NOs. 58 and 82.

COMMENT NO. 84: Years of data from the Elk River upstream of Lake Koocanusa through the lake and down into the Kootenai River below show unequivocal, steady increases in levels of selenium in the water column and in fish tissue as a result of ongoing and proposed increases in coal mining and processing in the Elk River headwaters of British Columbia.

RESPONSE: The board acknowledges the comment.

COMMENT NO. 85: We cannot expect BC to protect Montana water quality if they are not protecting their own waters or people in the Elk Valley.

RESPONSE: The board acknowledges the concern of the commenters. The mission of the department is to protect, sustain, and improve a clean and healthful environment to benefit present and future generations.

COMMENT NO. 86: Currently there are proposed mine expansions as well as application for new mining permits in the Elk Valley. The selenium problem may only get worse and will not be going away anytime soon. Setting the DEQ's proposed standard is a first, critical step in protecting Montana's aquatic resources.

RESPONSE: The board agrees that a protective standard for Lake Koocanusa and the Kootenai River must be set. The department believes comments related to mining activity, treatment, mitigation, and compliance in the Elk Valley, British Columbia are outside the scope of this rulemaking.

COMMENT NO. 87: Failing to adopt the proposed standards leaves Montana without the necessary legal tools to compel compliance from British Columbia, provide for mitigative relief, and protect the aquatic resources of these waterbodies.



RESPONSE: See response to COMMENT NO. 72.

COMMENT NO. 88: This standard fails to account for Teck's increasing success in source control and water treatment, which is significantly reducing selenium load to the Elk River and Lake Koocanusa. These selenium models used must consider the reduction in selenium and release in setting any standard.

RESPONSE: The board recognizes and commends investment in selenium control by the Canadian coal company operating in the Elk Valley. The department has determined the appropriate data for developing a site-specific standard for Lake Koocanusa is data from the site. In this case, the site is defined as Lake Koocanusa. This follows guidance outlined in the EPA national criteria document (EPA, 2016). The available effluent water treatment data at mining operations in the Elk Valley, British Columbia is considered by U.S. federal agencies such as the U.S. Environmental Protection Agency as they participate in an independent expert review of saturated rock fill (SRF) technology proposed for use by Teck Resources for its coal mining operations in the Elk Valley, British Columbia. Effluent or source pollutant data may also be used for provincial regulatory purposes.

COMMENT NO. 89: The company applying to develop that new mine has admitted repeated violations of Canadian pollution guidelines, and remains under federal investigation through the Canadian Fisheries Act for selenium contamination. Already, British Columbia's waterways immediately downstream of existing mines faced a near collapse (~90 percent) of their fishery, and in US waters trends show selenium concentrations increasing and further increasing downstream into Idaho. The company was recently subject to a Direction under the Fisheries Act that requires them to take certain action that it is hoped will limit selenium and other pollution in the long term, but it is unknown if these actions will be effective. The company has also repeatedly violated provincial pollution limits, even when those limits were suggested by the company themselves at levels far above those considered safe for fish.

RESPONSE: The board acknowledges the comment.

COMMENT NO. 90: The history at this border has proved that the state of Montana cannot rely upon Canada to enforce protection of our interests, and without a selenium standard we cannot enforce protection on our own. Once a standard is set, however, several enforcement options become available, including the Boundary Waters Treaty of 1909 and the International Joint Commission, as well as the Clean Water Act, the Endangered Species Act, CERCLA Superfund law, and other diplomatic avenues.

RESPONSE: The board acknowledges the comment and agrees that adoption of a scientifically sound water quality standard for selenium on Lake Koocanusa, a trans-boundary waterbody, is the critical first step for any subsequent assurances or actions on clean water commitments.

COMMENT NO. 91: Selenium is a difficult pollutant to see the effects of directly and also a pollutant that quickly goes from merely risky to highly dangerous as concentrations increase. Even if pollution is causing reproductive failure for a

certain proportion of a fish population, the effects might not be seen until they reach a tipping point where populations collapse.

RESPONSE: The board agrees that selenium toxicity occurs most often at the reproductive stage, and the proposed standard is being established to prevent harm to the beneficial use. See also, response to COMMENT NO. 145.

COMMENT NO. 92: Regardless of what might happen with water treatment, the biggest challenge is much longer term. Selenium leaching from the Elk Valley waste rock dumps will continue for an unknown length of time. Even waste rock from the 1970s is still leaching at its maximum rate. Selenium will keep flowing from the Elk Valley for centuries, perhaps longer. The company has not made any plans to deal with the pollution problem beyond their short-term treatment facilities—and that leaves our waterways facing a ticking time bomb of water pollution that will go off as soon as water treatments ends. Once BC and Montana adopt a shared standard, crucial discussions to push Teck to develop a plan to meet that standard over the coming centuries can begin.

RESPONSE: The board acknowledges the comment.

COMMENT NO. 93: The proposed rule inappropriately focuses on Teck's British Columbia operations. No other Montana water quality standard rulemaking process has been, nor should be, premised on a single corporation's operation, let alone a corporation that operates on the other side of an international border and is wholly regulated by a foreign government.

RESPONSE: The board agrees that water quality standards should not be premised on a single corporation's operations. Rather, water quality standards, under the Clean Water Act, must be based on sound scientific rationale for the protection of the beneficial use. The department has demonstrated this rationale for selenium standards that protect the aquatic life of Lake Koocanusa.

COMMENT NO. 94: Teck's operations are appropriately regulated by British Columbia. British Columbia is already appropriately regulating selenium issues that may, arguably, impact Lake Koocanusa.

RESPONSE: The board acknowledges the comment. The proposed water quality standards for Lake Koocanusa and the Kootenai River are for protection of the aquatic life in those Montana waterbodies.

COMMENT NO. 95: The following comment consists of counterpoints to the comment stated during the public hearing (paraphrased) as follows: We should just wait for Teck's active water treatment and saturated rock fill (SRF) to work to reduce selenium levels.

Counterpoints include: SRF is an experimental technology, currently in use at one pilot facility in the Elk Valley, and the technology has not been proven at scale. Teck has failed to stabilize and decrease pollutant trends as required under the Elk Valley Water Quality Plan and has failed to meet selenium pollution limits in BC in Lake Koocanusa and upstream in the Elk Valley, despite their pilot SRF and one water treatment plant. Teck has not shared peer-reviewed data from their mitigation technologies verifying that they are actually effective at the scale of the mines. Teck

may have a working technology, but they have publicly stated that it will be many years, decades, before it can be implemented at the scale of the mines. Teck is under investigation by Environment and Climate Change Canada for violations of the federal Fisheries Act. This includes major native trout population declines downstream of their biggest mine, where selenium pollution is at its highest. The US EPA hired independent experts to review the SRF technology and concluded that there was not sufficient evidence that it would be effective at mitigating mining contamination and highlighted that it is unknown if the selenium can be kept in the SRF once it is closed. The regulation should be set based on the scientific conclusions of the level of selenium needed to protect fish, not on what Teck is promising.

RESPONSE: The board acknowledges the comment.

COMMENT NO. 96: Knowing also that the selenium is coming from coal mining in Canada which is beyond Montana's reach places the State of Montana and its citizens at a standstill. I believe that the practical outcome would be to shut down Montana for any development that could take place in our state. Furthermore, Canada and the mining companies are treating the water, successfully, so impacts are not increasing as previously predicted by officials and as more water is treated decreases should occur.

RESPONSE: The development of a site-specific selenium criterion for Lake Koocanusa implements a peer-reviewed and science-based approach, as recommended by EPA (2016), for ascertaining protective tissue and water quality criterion for the reservoir. The process is independent of any other considerations and is guided solely by science. In other words, criteria development is a stand-alone process that informs what levels of selenium in Lake Koocanusa are protective for fish. Existing or proposed water treatment capabilities in Canada as mentioned by the commenter, or existing or proposed permitting or development activities within the State of Montana, are irrelevant to the development of the criteria. See also, response to COMMENT NOs. 47 through 51.

COMMENT NO. 97: Selenium concentration in Lake Koocanusa has averaged about 1.0 µg/L annually for quite a few years. Indications are that in coming years, a high percentage of selenium will be eliminated or reduced from drainages by Teck Coal through a couple different selenium elimination processes. I have visited these facilities and heard the pride of success in the voices of the local folks who are doing the work. A very high percentage of selenium is being cleaned from water before it leaves the mine.

RESPONSE: The board acknowledges the comment. The department commends the research and development efforts Teck Coal is implementing with regards to selenium treatment. The 2019 average selenium concentrations in Lake Koocanusa were about 0.95 µg/L, with limited treatment occurring in Canada. Additional and improved treatment should only result in a reduction in selenium pollution.

COMMENT NO. 98: For the last several years I have seen the signs of selenium poisoning on rainbow trout and westslope cutthroat trout in the Kootenai

River.

RESPONSE: The board acknowledges the comment.

COMMENT NO. 99: Failing to adopt the proposed standards risks possible permanent collapse in the Lake Koocanusa and Kootenai River wild and native coldwater fishery. From a fisheries standpoint this is especially concerning since this system is home to threatened species such as Endangered Species Act-listed bull trout and white sturgeon, as well as Montana identified Species of Special Concern westslope cutthroat trout.

RESPONSE: See response to COMMENT NO. 3.

COMMENT NO. 100: Insect levels have shifted simply due to the significantly reduced nutrient flows caused by the construction of Libby Dam. Increased selenium levels upstream in the Elk River headwaters have added an insidious, destructive element to the most basic life forms in the river.

RESPONSE: The department acknowledges the concern of cumulative impacts to the aquatic ecosystem.

COMMENT NO. 101: The proposed standards are necessary to protect designated beneficial uses in Idaho including protection of endangered populations of sturgeon and burbot in the Kootenai River.

RESPONSE: See response to COMMENT NO. 3.

COMMENT NO. 102: Fish sampling in the Kootenai River in Idaho has found mountain whitefish egg and ovary samples in exceedance of the Idaho standards and the state of Idaho has listed the Kootenai River as impaired for selenium. Idaho must now adopt a TMDL in order to achieve water quality standards and protect designated beneficial uses. Idaho will likely assign a selenium load allocation to the State of Montana.

RESPONSE: The board understands Idaho will be assigning a selenium load allocation to the State of Montana in order to reduce the load of selenium from Montana to Idaho. The board also understands that Idaho DEQ requires reductions in the selenium concentrations in the Kootenai River in Idaho to avoid further violations of Idaho Water Quality Standards. Idaho DEQ has also specified they do not support permitting of additional land-disturbing activities, which result in increased selenium concentrations in the Kootenai River until such time as concentrations are below the criterion in Idaho Water Quality Standards (IDAPA 58.01.02.210).

COMMENT NO. 103: I have watched the Fording River fishery collapse in the five years I have been fishing in the Elk River drainage in neighboring BC. It went from a great fishery, to a fishery with only big fish, to just a few fish. Spawning gravel has been solidified by Teck Coal's operations. Selenium levels only continue to rise. I fish every year in the Kootenai, putting in at Troy and taking out at Twin Rivers in Idaho. Will you let upstream polluters violate existing treaties protecting our rivers downstream from them?

RESPONSE: The board acknowledges the comment and the proposed

standards are for the protection of aquatic life in Lake Koocanusa and the Kootenai River.

COMMENT NO. 104: Both Montana and BC have agreed to adopt a shared standard based on the best available science in 2020. If Montana adopts this standard in 2020, we believe it is reasonably likely that BC will follow suit and adopt the shared "one lake, one number" standard for Lake Koocanusa as planned, likely in early 2021 due to delays brought on by the recent election in our province. If Montana does not adopt this standard now, we fear that BC will use any sign of uncertainty as an excuse to delay or weaken a provincial standard for Lake Koocanusa. BC's current unenforceable guideline for selenium pollution is 2.0 µg/L and BC has already allowed selenium levels to peak at more than 2.5 µg/L in the Canadian portion of the reservoir. If Montana does not move forward to adopt this selenium limit, we fear BC will continue to allow selenium levels to rise over the long term.

RESPONSE: The board acknowledges the comment and agrees the most preferable outcome is an aligned selenium standard for Lake Koocanusa on both sides of the border. Montana will continue to work with BC to achieve this outcome.

COMMENT NO. 105: The proposed standards are based on many years of data collection and sound science.

RESPONSE: The board agrees with the comment.

COMMENT NO. 106: The proposed standards are based on six years of research and represent the best available scientific information.

RESPONSE: The board agrees with the comment.

COMMENT NO. 107: The USGS and US EPA have employed the best selenium scientists in the country to derive these standards as part of the Selenium Technical Committee.

RESPONSE: The board agrees with the comment.

COMMENT NO. 108: A lot of the information that we need still has not been collected.

RESPONSE: The board presumes the commenter is referring to data for Lake Koocanusa and acknowledges the commenter's desire to collect more data. The department believes the multi-year data collection effort produced reliable and appropriate data to support the derivation of the site-specific dissolved selenium standard for Lake Koocanusa following the guidance defined in EPA (2016). A multi-agency data collection effort continues for Lake Koocanusa and that data will be incorporated into the department's future triennial review processes for review of the state's water quality standards.

COMMENT NO. 109: The following comment consists of counterpoints to the comment stated during the public hearing (paraphrased) as follows: the science is not sufficient or is unclear or ambiguous.

Counterpoints include: The science was led by state, federal, provincial, tribal

governments, and Teck Coal Ltd. The process included six years of meetings with these parties to decide what data to collect, why and where. There was complete buy-in on all aspects of the process. The USGS model for calculating the appropriate standard has been peer-reviewed, and all the data and the model itself are publicly available for review. The data clearly show that Koocanusa Reservoir is already impacted by selenium and certain species of fish exceed safe levels of selenium. The science from multiple entities (MT FWP, MT DEQ, USGS, ACoE, Teck Coal) shows that Koocanusa Reservoir is particularly sensitive to selenium pollution and that the national EPA standard will not protect all species of fish in the reservoir. Among the SeTSC there was broad consensus, except for one scientist, a consultant who is paid by Teck, that the limit should be less than 0.9 µg/L. This consensus indicates that the science is clear and conclusive. That Teck's consultant reached a different conclusion is not material to the process at hand as Teck has business interests in keeping pollution limits as high as possible.

RESPONSE: The board acknowledges the comment.

COMMENT NO. 110: The paper applying the selenium model to Lake Koocanusa, upon which the proposed rule relies, was not peer reviewed.

RESPONSE: The work of Jenni et al. (2017) and Presser and Naftz (2020) are both interpretive reports, which in fact undergo a thorough colleague review process whereby a minimum of two individual technical experts in either the USGS or other government agencies provide critical review of the document. The USGS follows the rigorous scientific protocols defined in the USGS Survey Manual 502.3, which includes approval by the center director and a delegated bureau approval officer. Moreover, the global model described in Presser and Luoma (2010) was published in the open scientific literature and therefore was subject to peer-review. The only changes made by Presser and Naftz (2020) were to the model inputs (not the model structure itself). Hence the model has undergone peer-review at a number of levels.

COMMENT NO. 111: The report and model developed by the US Geological Survey was developed by the leading cohort of selenium scientists in North America, with decades of experience researching selenium. This model represents the best available science on the planet with regard to selenium contamination, and was developed with a conservative and protective approach. The standards derived from this effort are uniform across multiple analyses, including federal, state, tribal, and provincial agencies. The only outlier was the analysis by the coal company itself, which perhaps is not unexpected given the company's financial interests in blocking standards that protect downstream waterways and fisheries.

RESPONSE: The board acknowledges the comment.

COMMENT NO. 112: We note that the USGS modelling for Lake Koocanusa is far stronger than the modelling undertaken by Teck and their consultants to set selenium pollution limits in BC as part of the Elk Valley Water Quality Plan. We question Teck's sincerity in their attempts to call into question the USGS modelling on this basis, especially as Teck has been part of the Koocanusa process since it began. It was only after it became clear that the results were not to Teck's liking that

their complaints began.

RESPONSE: The board acknowledges the comment.

COMMENT NO. 113: The USGS report is, to our knowledge, only peer reviewed inside the USGS. So, we request the state take the time to have this modeling work truly peer reviewed.

RESPONSE: It is the department's understanding that the colleague review was undertaken by experts outside of USGS to further strengthen the scientific process. See also, response to COMMENT NO. 110.

COMMENT NO. 114: The derivation document is technically deficient. DEQ has not responded to, nor explained, its deviation from the expert recommendations offered by the Subcommittee members, which is unreasonable, arbitrary and capricious given the high level of expertise recruited for the Subcommittee and the technical acuity of their recommendations. Notably, the Subcommittee could have, but was not requested to review or provide input on either the Proposed Rule or DEQ's Derivation Document. Without review and input from the Subcommittee, the Proposed Rule cannot be said to incorporate the best available science.

RESPONSE: The board does not agree with the comment. The Technical Support Document (TSD) (DEQ, 2020) does not require the review of the SeTSC, nor did the department expect or request review from the SeTSC. The TSD supporting the selenium standards for Lake Koocanusa is based on foundational peer reviewed work, followed protocols defined by EPA (2016), and incorporated guidance by the SeTSC and LKMRWG.

The department's process for responding to recommendations of SeTSC members was outlined during a SeTSC meeting, clearly noting that neither the department nor BC-ENV would be providing individual responses to the recommendations provided. In addition, DEQ (2020) includes outlines of the derivation process by the department in collaboration with the BC-ENV. The SeTSC was involved at every step of the multi-year derivation process, including providing recommendations on model inputs and final criteria. Each of these recommendations was considered and incorporated in subsequent model runs and analysis conducted by the department and BC-ENV. The model produced a range of candidate criteria and a policy decision was made regarding the level of protection of the aquatic life beneficial use. Four members opted to provide final recommendations. Three of those four recommendations were between 0.6-0.85 µg/L. There was a single SeTSC member who recommended 1.5 µg/L (See COMMENT NO. 9). The proposed rule is based on and supported by the best available science. The proposed rule is based on the updated EPA 2016 304(a) guidance, which utilizes the peer reviewed Presser and Luoma (2010) model, tailored to the Lake Koocanusa ecosystem (Presser and Naftz, 2020). Additionally, model input recommendations were solicited from SeTSC members. The department looks forward to continued and further engagement with the SeTSC on subsequent selenium related topics as identified by the LKMRWG Steering Committee.

COMMENT NO. 115: Figure 2-9 of the TSD shows no increasing trend in

selenium concentrations and the bulk of the data is below the federal guideline. According to Figure 1-7, selenium loads increased during a period of time following the run off season. Are all these data points in Figure 2-9 taken during the same season each year? What are the dates of each data point taken in Figure 2-9?

RESPONSE: The data in Figure 2-9 represent in-pool observations from 2012 through 2018, including samples at all depths and locations. Due to the short period of record and spatial variability in the sampling, a trend cannot be characterized directly from those data. An increase in loading trend is unequivocally apparent in Figure 1-6. Data displayed in Figure 2-9 is primarily from the months April through November. All data points are publicly available through the EPA WQX water quality portal.

COMMENT NO. 116: We were impressed that scientists serving on the SeTSC from various agencies and First Nations all recommended a standard less than 1.0 µg/L for Lake Koocanusa. We think that narrow range represents a scientific consensus.

RESPONSE: The board acknowledges the comment.

COMMENT NO. 117: The proposed DEQ selenium standards are appropriate, well-vetted, and agreed upon standards resulting from more than five years of consultation by first the LKMRWG, which formed the Selenium Technical Committee comprised of scientists from the aforementioned agencies and entities.

RESPONSE: The board acknowledges the comment.

COMMENT NO. 118: The scientific process is being rushed. The derivation document was only provided to the public eight days prior to initiating rulemaking. There has been no time for collaboration, revisions, shared understanding or efforts to improve the rule. There has not been consensus among the selenium technical subcommittee.

RESPONSE: The scientific process has not been rushed. In accordance with the Montana Administrative Procedure Act, the proposed NEW RULE I was provided to the Water Pollution Control Advisory Council (WPCAC) in accordance with 75-5-307(1), MCA, to allow WPCAC 30 days to comment on the proposed rule prior to first publication of the notice of the proposed rule. In addition, collaboration and project understanding has been on-going throughout the five-year development of the proposed standard. See also, response to COMMENT NOs. 114 and 119.

COMMENT NO. 119: The rulemaking process employed for this proposed rule has been problematic and unreasonable because it short-circuited and then bypassed the planned, consensus driven, collaborative, science-based process established through the committee and subcommittee. It did not allow time for expert dialogue and consensus. It is inconsistent with previous water quality standard rulemakings, and it disregarded requests from, and concerns raised, by Montana legislators and Lincoln county commissioners.

RESPONSE: The commenter is mistaken to understand that there was an expectation by the LKMRWG Steering Committee, the SeTSC co-chairs, or the broader SeTSC to seek consensus. The SeTSC co-chairs specifically noted during



the LKMRWG meeting held November 2019, that the SeTSC would not be seeking consensus. The co-chairs described to the SeTSC and LKMRWG how recommendations would be considered by the regulatory agencies and LKMRWG Steering Committee (BC-ENV and DEQ), and that final decisions for deriving a protective dissolved selenium standard for Lake Koocanusa were to be made by the regulatory agencies, informed by the science guided by the SeTSC. See also, response to COMMENT NO. 114. This rulemaking effort met all requirements of MAPA, 2-4-301, MCA *et seq.*; the WQA, 75-5-307, MCA; and the federal Clean Water Act. See response to COMMENT NOS. 16 and 28.

COMMENT NO. 120: Experts were never provided the opportunity to review and consider each other's comments. In fact, the Subcommittee comments on the model were not provided until the end of August, after the last Subcommittee and Committee meetings. It was therefore impossible for either the Subcommittee or the Committee to review and discuss the expert recommendations regarding the model inputs and the use of the model. This missed opportunity counsels against any conclusion that the modelling report upon which the proposed rule is based in the best available science. Given the time, effort, and expense already devoted to this project, it does not make sense for DEQ to abandon that process, deny requests for additional time, and abruptly end six years of collaborative work without reaching a final consensus or even a majority decision – indeed without even receiving input from the specially recruited experts.

RESPONSE: The board disagrees with the comment and strongly notes that the department did not abandon a pre-defined process. The assertion of a missed opportunity for further dialogue is solely the opinion of the commenter. On the contrary, the LKMRWG and SeTSC co-chairs informed the LKMRWG and SeTSC of the timeline at every opportunity in addition to publicly posting the BC-MT Workplan which defined the timeline in greater detail. Both the SeTSC and LKMRWG Monitoring and Research Committee (MRC) co-chairs have been in communication with the broader group to provide updates. The specially recruited experts provided significant input which has been considered by the department in development of the selenium standards for Lake Koocanusa. The department looks forward to continued collaboration with the SeTSC on future topics agreed upon by the LKMRWG Steering Committee. See also, response to COMMENT NO. 119.

COMMENT NO. 121: The group of experts that was convened on this topic never reached consensus and did not even reach a majority decision. This raises concern about the scientific basis for the rule. More work should be done with experts to obtain consensus, or at least a majority decision, before the rule is finalized.

RESPONSE: See response to COMMENT NO. 119.

COMMENT NO. 122: The lack of understanding how the SeTSC members' comments were incorporated causes us to question the scientific validity of the draft rule and whether the science has been sufficiently developed to support rulemaking at this time. At a minimum, it seems to require more work among the experts, and in turn, proper consideration of that input in any proposed standard-setting. Here, two

leading national selenium experts provided comments that have not been addressed, nor does there appear to have been any continuing dialogue with those experts that the public and regulated community could consider.

RESPONSE: See response to COMMENT NOs. 23, 110, 119, and 120.

COMMENT NO. 123: The following comment consists of counterpoints to the comment stated during the public hearing (paraphrased) as follows: The proposed standard lacks the consensus of the Selenium Technical Subcommittee members.

Counterpoints include: Every entity on the committee with the exception of Teck agreed that Lake Koocanusa requires a standard that is below 1.0 ppb (all the recommendations were between 0.6-0.9). Only Teck recommended (through their consultant) a criterion above 1.0 ppb, recommending 1.5 ppb. We question the integrity of Teck's position at the scientific table (SeTSC) as they are a self-interested party.

RESPONSE: The board acknowledges the comment.

COMMENT NO. 124: DEQ has not described how the differing views of the SeTSC experts were considered in the proposal.

RESPONSE: The department reviewed all recommendations provided by individuals of the SeTSC. Those recommendations on both final numeric recommendations and model assumptions were reviewed and considered, additional model scenarios were completed, the results of which were analyzed. The recommendations of the entire SeTSC guided the department's decisions.

COMMENT NO. 125: Only data from 2014 forward should be used as that is when Teck improved their treatment and significant changes happened.

RESPONSE: The modeling effort does not utilize pre-2014 data for predicting a protective dissolved selenium concentration for Lake Koocanusa. Presser and Naftz (2020) did include pre-2014 data in the context of defining trends in species composition and density, but these were not included in calculation of Kd values in the modeling.

COMMENT NO. 126: The derivation document wrongly relies on data from the Elk River from the 1980s through 2019 to establish increasing selenium trends.

RESPONSE: The board does not agree with the comment. There is a clear increasing trend in selenium concentrations from 1984 through 2019 detected at the federal Canadian long-term monitoring station located on the Elk River, BC (Figure 2-A; Presser and Naftz, 2020).

COMMENT NO. 127: Why is there no data from water treatment being collected, gathered, and studied?

RESPONSE: There is extensive data collection and analysis occurring in Elk Valley, BC at the site of water treatment plants. See response to COMMENT NO. 88.

COMMENT NO. 128: The following comment consists of counterpoints to the comment stated during the public hearing (paraphrased) as follows: the proposed

standard is not derived from site-specific data.

Counterpoints include: The model took into account six years of site-specific data for Koocanusa Reservoir including paired samples for water, suspended sediment, algae, invertebrates, and fish. The data showed that selenium is being taken up by algae, bugs, and fish in the reservoir. At the beginning of the process in 2014, it appeared likely that the site-specific criteria would come in at the national EPA number of 1.5 µg/L, yet the data collected over the intervening years actually demonstrated that the national criteria would not protect the fish in the reservoir.

RESPONSE: The board acknowledges the comment.

COMMENT NO. 129: What is the contribution of selenium in other streams to Lake Koocanusa and the Kootenai River?

RESPONSE: The department reviewed all selenium data it has collected over the years in surface waters of the Lake Koocanusa/Kootenai River watershed (HUC 17010101). Sampling has occurred for a variety of projects and purposes, e.g., to support Total Maximum Daily Loads, monitor regional lakes, and characterize high-quality (reference) streams. In July 2016 the department collected total and dissolved selenium at or near the mouth of all major (and several minor) tributaries where they join Lake Koocanusa (on the west side Young, Sullivan, Boulder, Big, Parsnip, Ural, Bristow, and Barron creeks, and on the east side the Tobacco River and Pinkham, Sutton, McGuire, Tweed, Sheep, Tenmile, Fivemile, Warland, Cripple Horse, and Canyon creeks). The reporting limit for these samples was 0.9 µg/L (just above the proposed lake standard of 0.8 µg/L) and no selenium was detected in any of the samples from the tributaries.

Between 2004 and 2016, the department also sampled total selenium in several tributaries to the Kootenai River (from the north: Bobtail Cr and the Yaak River; from the south: Dunn, Libby, and Lake creeks). The reporting limit for these samples was ≤1.0 µg/L, below the proposed standard for the river (3.1 µg/L). There were no detections among any of these 22 samples. The USGS also sampled tributaries to the Kootenai River during three seasons (spring, fall, winter) between 2018 and 2019. Tributaries in the sampling effort included the Fisher River, Yaak River, and Moyie River. All samples were reported below detection, with a reporting limit for these samples of 0.081 µg/L.

All of these findings are consistent with dozens of other water samples from numerous streams and lakes (excluding Lake Koocanusa and the Kootenai River) the department has collected in the watershed between 2003 and 2018: no selenium has been detected, with the exception of one stream (North Fork Canyon Cr) where the selenium was <0.1 µg/L. Collectively, these data suggest that the selenium contribution from tributaries to the lake and river are very low and would not contribute to standards exceedances. All data referenced here is publicly available through the EPA WQX water quality portal.

COMMENT NO. 130: The background levels do not appear to have been considered in this proposed rule. DEQ partnered with the University of Montana to document background numbers for many of Lake Koocanusa's tributaries. DEQ studies show there is natural occurrence of selenium coming in from several drainages, and naturally occurring in soils and lake bed.

RESPONSE: Background concentrations were characterized for most of the Lake Koocanusa tributaries in July 2016. Every one of the tributaries came back as below the reporting limit (0.9 µg/L) but the data suggest the concentrations in the tributaries are much lower. See also, response to COMMENT NOs. 129 and 154.

COMMENT NO. 131: Data collected and published by DEQ in 2016 indicate that all Lake Koocanusa tributaries currently exceed the proposed trigger value of 0.02 µg/L. How much selenium do soil-disturbing activities generate? Before a standard is set that will result in such extremely low permit limits, we need to know more about the sources and background levels of selenium and how those will be considered in permits.

RESPONSE: The 2016 Lake Koocanusa tributary sampling showed all tributary samples were found to be below the reporting limit of 0.9 µg/L. The results the commenter is referring to are only estimates. Additional waterbodies in the Kootenai watershed have been sampled for selenium for various projects, which all show samples for selenium below reporting limit, except for one sample detected at 0.08 µg/L. These results are corroborated by the understanding that the underlying geology in the Montana portion of the Kootenai watershed is very unlikely to release elevated levels of selenium to the environment. The geology of Lincoln County differs dramatically from the geology in the Elk Valley. The underlying geology in the Elk Valley is selenium-rich, so the anthropogenic disturbance of these seleniferous soils releases high levels of selenium to the nearby water. As noted in COMMENT NO. 52 there are no current permits affected by the proposed rule. Regarding the trigger value, see also, response to COMMENT NO. 83.

COMMENT NO. 132: Why did DEQ not present to WPIC the 2016 selenium study that indicates selenium exists in the tributaries to the lake, at some level near the proposed standard? Why is the standard being proposed at a level so near the tributary background levels? Where is the data showing non-detect levels and what is that non-detect level?

RESPONSE: The 2016 study along with other selenium data collected since 2003 show there are no detectable contributions of selenium coming from Montana tributaries to Lake Koocanusa. There are also no permitted point sources that will be impacted by the proposed rule in Montana (see COMMENT NO. 52). Moreover, the results of McDonald (2009) showed the Elk River contributed 95 percent of total selenium loading to the reservoir. Given that the results of the 2016 study show every sample was below the reporting limit of 0.9 µg/L (see COMMENT NO. 129), it cannot be concluded that the tributary background concentrations are near the level of the standard.

COMMENT NO. 133: Derivation document fails to account for naturally occurring selenium contributed to the water from band sloughing events along the reservoir.

RESPONSE: To our knowledge, no direct research has been conducted on shoreline erosion contributions of selenium to Lake Koocanusa. However, simple calculations can be made to show this is not an appreciable source. Assuming the entire shoreline of Lake Koocanusa is 980,000 lineal feet (185.6 miles), and all of the

shoreline is eroding at a height of 10 feet and lateral distance of 1 feet each year (which we think is likely a gross overestimate), and assuming a sediment bulk density of 1,500 kg/m<sup>3</sup> and bulk concentration of 0.21 mg Se/kg (the latter measured in DEQ, 2013), the approximate shoreline erosion contribution would be 87.4 kg per year. As a point of reference, the Elk River contribution was approximated at 13,000 kg per year in 2012 (DEQ, 2020). Shoreline erosion is not believed to be an appreciable selenium source in the watershed.

COMMENT NO. 134: The recent Arsenic TSD included estimated loadings by segment of the Yellowstone River from tributary to tributary and the contributions of tributaries. Why is this not done for Lake Koocanusa and the Kootenai River? It is crucial to know the contribution of selenium from the tributaries.

RESPONSE: To develop nonanthropogenic arsenic standards on the Yellowstone River, it was necessary to collect loading data as described in the comment, quantify human-caused arsenic sources, and then compute what the river's concentrations would be in the absence of the human-caused sources. The work ultimately led to the adoption of nonanthropogenic arsenic standards at concentrations higher (less stringent) than the previously adopted human health standard. This process is not necessary in the case of selenium standards for Lake Koocanusa and the Kootenai River. In this instance, the standards are not based on the nonanthropogenic condition, but instead, they represent a level of selenium above which harm will occur to aquatic life. Regarding the selenium contribution from the tributaries, all available data suggest that their concentrations are lower than the proposed standards, and would therefore be a source of dilution to the lake and river where concentrations are elevated due to selenium sources from Canada. See also, response to COMMENT NO. 129.

COMMENT NO. 135: Was an analysis for selenium in the Kootenai River drainage done like the HAWQS analysis for arsenic in the Yellowstone River? If not, why not and how was it determined that the naturally occurring selenium will not negatively influence the proposed standard? If so, where were the samples taken from?

RESPONSE: See response to COMMENT NO. 134.

COMMENT NO. 136: The current water column concentrations are below the EPA guideline. This does not indicate a problem that warrants hurrying a rulemaking process.

RESPONSE: The board recognized that current water column selenium concentrations in Lake Koocanusa are mostly below the EPA lentic guideline of 1.5 µg/L (see Figure 2-9 in the department's TSD). However, the lake's concentrations are mostly above the concentration (0.8 µg Se/L) identified as the protective standard and proposed in this rulemaking. This suggests that emplacing a protective criterion is, contrary to the comment, of the utmost importance, as detrimental impacts may have already begun. The board does not agree that the rulemaking has been hurried.

COMMENT NO. 137: The proposed rule fails to recognize the fact that data

shows that annual average levels of selenium in Lake Koocanusa are not increasing and have been stable since 2014. It also fails to account for Teck's increasing success in source control and water treatment, which is significantly reducing selenium loads to the Elk River and Lake Koocanusa.

RESPONSE: As the department has reiterated, water quality standards are established to protect the beneficial use and not the ambient waterbody concentrations of the pollutant. Moreover, Figure 17 from Presser and Naftz (2020) show the cross-sectional area of the reservoir over 1 µg/L is increasing over the last several years. See also, response to COMMENT NO. 26.

COMMENT NO. 138: The data presented does not support the proposed rule. Water samples collected from 2013-2019 show Se concentrations ranging from 0.23 to 2.3 µg/L with an average 1 µg/L. The data set shows the lake to be in compliance with not only the Montana standard of 5 µg/L but also the more restrictive EPA guideline of 1.5 µg/L and the British Columbia water quality guideline of 2.0 µg/L. Importantly, the data, as graphed by DEQ, does not show an increasing trend in Se levels in the lake. Neither an upward trend in Se levels, nor any harm is shown by DEQ's presentation of fish tissue data.

RESPONSE: Water quality standards are the maximum allowable pollutant level that is protective of a beneficial use, in this case, aquatic life. Site-specific data were used in the bioaccumulation modeling work, accounting for site-specific conditions. Whether or not Lake Koocanusa is in compliance with the current standard (5 µg/L) or the EPA 304(a) criteria (1.5 µg/L) does not determine the protectiveness of the standard. This is particularly important in this case, where the department has determined those standards are not protective of the beneficial uses in Lake Koocanusa. See also, response to COMMENT NOS. 9, 96, and 199.

COMMENT NO. 139: The following comment consists of counterpoints to the comment stated during the public hearing (paraphrased) as follows: Selenium concentrations have not increased since 2014.

Counterpoints include: Considerable variation from year to year in the amount of selenium leaching from waste rock piles due to changes in weather and precipitation. 2014 was a high selenium year and not an appropriate baseline. Using 2014 as a baseline is cherry-picking the data to Teck's advantage. The trend is clear, selenium concentrations are increasing. Data in the Elk and Kootenai River show the same increasing trend. Data from Lake Koocanusa, going back to 2013 is consistent with the trend. The amount of selenium leaching waste rock at the mines is increasing with no sign it is leaching less selenium over time. Teck's treatment plant and SRF do not remove enough selenium to change the overall trend downstream. There is no mechanism that would stabilize the trend over the last 6 years to validate this claim.

RESPONSE: The board acknowledges the comment.

COMMENT NO. 140: We do not see sufficient water quality data or fish tissue data supporting this proposed rule. Without sufficient supporting data, the proposed rule, although labeled "site-specific," is not connected to, and does not reflect, the reality at Lake Koocanusa. Therefore, the rule appears designed to

protect the lake from unrealistic, perceived potential harm not validated by any data. Promulgating rules that protect from unrealistic, perceived harms unnecessarily sets up an unrealistic and likely unachievable regulatory framework, which will create more uncertainty in the future.

RESPONSE: The board does not agree with the comment. See also, response to COMMENT NOs. 10, 136, 160, 161, and 177.

COMMENT NO. 141: DEQ's data on fish tissue is not conclusive. There are only four individual fish that exceed the federal guideline for egg/ovary tissue. We do not see evidence that those fish exceed the standard for whole body tissue, which was the focus of DEQ's model. We heard concerns that the data may not be appropriate, that the eggs/ovaries from those four fish may not have been "ripe" and not appropriate for sampling. Is it true that reidside shiner have a higher tolerance for selenium and may naturally ingest more than other fish would? If so, where is that considered and explained in the draft rule or DEQ's publications?

RESPONSE: We presume the commenter is referencing the unpublished work funded by Teck (EcoTox, 2020) which suggests that for northern pikeminnow, the highest selenium concentrations may not be found at the time of vitellogenesis. While the department recognizes this work, and acknowledges ever-evolving selenium research, the EcoTox (2020) study is not yet peer-reviewed, and draws vastly different conclusions than what is currently understood by the scientific community (presented to the SeTSC in June of 2020). With regards to reidside shiner tolerance, Teck also has a draft report (again not peer reviewed) on the reproductive effects of selenium on reidside shiner. The conclusions suggest the tolerance of reidside shiner may be different than other species, with levels of selenium up to 28 mg/kg dw in eggs. In the future, the department may consider both of these reports following a peer review process.

It is important to note that no egg/ovary sample (or other tissue) exceedances are acceptable to EPA (2016). Moreover, there are many tissue exceedances in cyprinid fish species not referenced in the comment that prompt additional concern (see slide 13 DEQ Presentation to BER, 9/24/20). The department recognizes the science of selenium is ever-evolving. These considerations are important, and we look forward to continued discussions during the development of an assessment methodology. Presser and Naftz (2020) identified several reasons that fish egg/ovary tissue was not appropriate for modeling.

COMMENT NO. 142: Of the more than 1200 individual samples of non-segregated fish in the reservoir, only three measures exceed U.S. egg ovary criteria, and those were for fish species that are not sensitive.

RESPONSE: Three species (not individual fish) have shown egg/ovary selenium tissue concentrations above the proposed 15.1 mg/kg dw, in four different years, including 2013, 2017, 2018, and 2019 (see slide 13 DEQ Presentation to BER, 9/24/20). Between 2008 and 2013, there were significant increases in selenium concentrations in all species. In 2018, concentrations were found at lower concentrations for many species. However, several species that had limited tissue data (longnose suckers, rainbow trout, and westslope cutthroat trout) had been sampled in 2016 and 2017, and showed continued increases in Se concentrations

over 2013 sampling.

COMMENT NO. 143: The current water column concentrations of 1.0 µg/L are not resulting in fish tissue concentrations that are above the threshold, where reproductive effects start to occur.

RESPONSE: The commenter is correct that some species with tissue exceedances are not considered highly sensitive to selenium; however the species in Lake Koocanusa considered to be the most sensitive species to elevated selenium is the native westslope Cutthroat trout. Sampling of egg/ovaries in cutthroat has been difficult as they are tributary spawners, thus it has been a challenge to collect eggs from gravid females. On the US portion of Lake Koocanusa, three cutthroat have been sampled with egg/ovaries and concentrations averaged 11.43 mg/kg dw, approaching the EPA tissue criteria of 15.1 mg/kg dw. There have been no documented reproductive effects on fish in Lake Koocanusa, although MT FWP has determined it would be difficult to detect population level effects with the limited net sampling efforts. This reinforces the importance of adopting the proposed site-specific criteria to protect against any future reproductive effects.

COMMENT NO. 144: Selenium poisoning in fish can be "invisible," because the primary point of impact is the egg, which receives selenium from the female's diet (whether consumed in organic or inorganic forms), and stores it until hatching, whereupon it is metabolized by the developing fish. If concentrations in eggs are great enough (about 10 µg/g or greater) biochemical functions may be disrupted, and teratogenic deformity and death may occur. Adult fish can survive and appear healthy despite the fact that extensive reproductive failure is occurring--19 of the 20 species in Belevs Lake were eliminated as a result of this insidious mode of toxicity. The lessons learned from Belevs Lake provide information useful for protecting other aquatic ecosystems.

RESPONSE: The board acknowledges the comment.

COMMENT NO. 145: I cannot see where there is ANY science that definitely proves that elevated selenium levels in Lake Koocanusa are harmful to fish or other aquatic organisms in that environment.

RESPONSE: The department has made clear that water quality standards are not set once harm occurs, but rather in advance of that, consistent with how ALL water quality standards for the protection of both aquatic life and human health are established. For example, the department does not wait for human populations to show neurological harm to establish lead standards to protect human health. Water quality standards are set to protect the beneficial use of the water body. Sufficient evidence has been presented in Presser and Naftz (2020) and DEQ (2020) to establish a protective standard. It can be challenging to detect the effects of selenium on populations due to the fact that toxic effects of selenium exposure most often occur at the reproductive stage. This means that the point at which harm may be documented could be years later, during fish sampling efforts, where MT FWP may find decreased populations. Or impacts could be fully missed due to survivorship bias because fish sampling techniques employed by MT FWP tend to



capture adult fish. In a reservoir as large as Lake Koocanusa and limited sampling efforts to truly detect population level effects, if the department waited until there was a dramatic decline in fish populations to set a standard, that could create a scenario that would be extremely challenging to recover from.

COMMENT NO. 146: No exceedances of the whole-body Se criterion have been observed or reported. The site-specific field data suggest that current water concentrations do not result in aquatic risk. Based on evaluations of ovary Se concentrations and ovary maturity discussed for cyprinids and mountain whitefish, there is uncertainty in some of the ovary Se data for other fish species (e.g., the potential to overestimate egg Se concentration due to immature ovaries). Most ovary Se concentrations, however, fall well below EPA's egg Se criterion, so this uncertainty is unimportant for most of the cases.

RESPONSE: The commenter is correct that of the four whole body samples collected on the Montana portion of the reservoir, all were below 8.5 mg/kg dw. However, it is debatable that these limited data are appropriate to draw the conclusion that no harmful effects are occurring in Lake Koocanusa. Moreover, existing data in certain species of both cyprinid and non-cyprinid fish exceed the egg/ovary standard, which suggests impacts could already be occurring. The commenter references unpublished work pertaining to selenium concentrations in northern pikeminnow. The conclusions of that study may be considered by the department in the future, once the study has gone through peer review. Importantly, while most ovary concentrations fall below the 15.1 mg/kg dw, some species show elevated levels, increasing over time.

COMMENT NO. 147: As reported in the northern pikeminnow study (EcoTox et al. 2020), the elevated ovary Se concentrations are associated with immature ovaries as samples were not collected at the time of spawning. A similar pattern appears to have been observed in peamouth chub. Recent studies with reidside shiner have yielded more information on Se bioaccumulation in reidside shiner eggs and effects; specifically, the effect level is unbounded, as follows: egg/ovary > 28 mg/kg Se dw, whole body >13.5 mg/kg Se dw. These data on cyprinids in Lake Koocanusa, coupled with EPA's conclusion that cyprinids are not uniquely sensitive, based on evaluations of data from sites in the United States with high Se concentrations, indicate that it is unlikely that cyprinids in the lake are uniquely sensitive to Se and, in fact, may be relatively insensitive. Since the above-mentioned data for reidside shiner are now available, they should be used and incorporated into the model.

RESPONSE: The department may consider these studies in the future, after they have gone through the peer-review process.

COMMENT NO. 148: The results of the fish tissue sampling do not show an impact for that particular species of fish based on EPA's "No Observed Effects Level," which has not been exceeded in Lake Koocanusa. Therefore, the fish tissue data does not clearly indicate adverse impacts, even when measured against the existing federal guidelines.

RESPONSE: See COMMENT NOs. 53 and 145.

COMMENT NO. 149: The data I have seen on fish tissue sampling does not indicate a crisis requiring the toughest regulation in the world. The data on reproductive issues in mature or spawning age fish is not there, or I do not understand it. I see a number of concerns expressed, including downstream for burbot and white sturgeon, but I also know several other conditions have been blamed for the same concerns such as water temperature, fluctuating levels, lack of ideal spawning habitat, lack of spring floods. There seems to be generalized statements that ask for the conservative number, but I still do not see the supporting data.

RESPONSE: The board acknowledges the comment. The department has not indicated that there is a crisis. While the elevated selenium samples in both the water column and the fish tissue are cause for concern, the proposed standards are not being proposed because a crisis may or may not be occurring. Rather, the department has been collaborating with a bi-national working group with the goal of determining a protective water column standard for Lake Kootenai. That work included utilization of the Presser and Luoma (2010) Ecosystem-Scale Model, the state of the science for modeling selenium bioaccumulation. This same model was used by EPA (2016) in the derivation of their nationally recommended selenium criteria. The water quality standard must be protective of the beneficial use. The proposed standard would ensure protection of the aquatic life beneficial use, and ensure there are no additional fish with high levels of selenium detected.

COMMENT NO. 150: The evidence about fish deformities is all anecdotal. The scientific team did not document deformities. I understand that they may not have been looking for deformities, but why not? Before we take this drastic step, we should know whether deformities are real.

RESPONSE: The board understands that the department has clarified and reiterated during many public meetings that Montana Fish, Wildlife and Parks (MT FWP) does not expect to see deformities in adult fish, the age class most commonly captured in their sampling efforts. Moreover, MT FWP has confirmed that if any deformities were observed during their sampling, that information would certainly have been recorded. The commenter should be aware that the proposed standards are not based on whether or not deformities are present. The department has made clear that it intends to protect fish populations from harmful effects at all points during reproduction, including the effect of decreased populations of fish species from reductions in fry survival. See also, COMMENT NO. 145.

COMMENT NO. 151: The WPIC hearing also included testimony on fish deformities. Deformities were reported from fishing guides in tributaries near the coal mines and also from the Kootenai River below Libby Dam. DEQ officials stated that NO deformities were found by FWP biologists studying fish tissue from fish in Lake Kootenai. Then a DEQ official noted that the biologists had not been instructed to look for deformities. Again, it appeared that testimony about deformities may have influenced WPIC voting, at least it came up in questions and comments from the committee. If testimony about deformities is important, why was not this stressed during the studies, or why do we not take time now to gather this

data. Why weren't tests done on deformed fish to verify that selenium is the cause, or not. I am unclear on whether DEQ feels this is important.

RESPONSE: The department is happy to clarify what it meant at the statements made at the October 13, 2020 WPIC meeting. The department's statement was intended to emphasize that it is important that Montana not wait until we see direct impacts of selenium on fish and fish populations in Lake Koocanusa before adopting a protective standard. FWP has been collecting fish tissue data for years in Lake Koocanusa and that data played a critical role in this rulemaking. Additionally, the impact to aquatic life in Lake Koocanusa from increasing selenium levels is more likely to be seen as changes or decreases in fish populations and propagation. See also, response to COMMENT NO. 150.

COMMENT NO. 152: When testifying before the WPIC, DEQ Director McGrath implied that selenium is continuing to build up in the lake to a degree that immediate action is needed. But I have reviewed DEQ's "Analysis of 2013 Lake Koocanusa Sediment Data" and while it does suggest that minor settling is occurring, the rate of selenium deposition is very slow. According to this study on the sediment, there does not appear to be a measurable amount of settling. Where does the urgency come from? Has there been another sediment study since 2013? If so, where is the data?

RESPONSE: The commenter is correct that selenium loadings to Lake Koocanusa have been, and continue to increase to the waterbody. This is evident in Figure 1-6 of the TSD (DEQ, 2020). Elevated selenium concentrations also have been found by Montana Fish, Wildlife and Parks in several fish species in the reservoir, meaning trophic transfer is likely occurring in the waterbody. This could potentially be related to the sediments of the reservoir. The need for immediate action stems from the fact that egg/ovary guidelines for fish tissue samples in Lake Koocanusa are already exceeded, beyond the threshold deemed safe by EPA (2016). Accumulation of selenium in these fish can result in transfer of selenium to offspring and cause reproductive effects or reduced fry survival. Bioaccumulation of selenium therefore should not be misconstrued with reservoir sediment concentrations or the results of the DEQ sediment sampling (DEQ, 2013). The objective of the 2013 analysis was to understand if there were appreciable differences in sediment concentrations in the reservoir. The average selenium concentration in the reservoir bottom was lowest at the international border and increased significantly in the forebay. The DEQ characterization however provides no information on trophic transfer and selenium bioaccumulation in aquatic species of the reservoir. This has subsequently been further investigated by the USGS (Jenni et al. 2017; Presser and Naftz, 2020) and the SeTSC, showing appreciable risk to fish in the reservoir.

COMMENT NO. 153: My understanding is that selenium is carried in the water as a solution with selenium actually bonded to water molecules rather than travelling in a suspension which would drop to the bottom of Lake Koocanusa. This point has been misunderstood by many people. Former County Commissioner Mike Cole and I questioned this issue several years ago, and that led to a USGS study of the sediment on the bottom of Lake Koocanusa. After 45 years of this reservoir, the

USGS study showed no, or negligible, buildup of selenium at the bottom of the lake. This point was described inaccurately by the DEQ director during the WPIC meeting, and I believe that influenced one of the WPIC no votes. The request to WPIC for extended time to allow better understanding was defeated by a tie vote of 5 yes and 5 no. One more yes vote would have changed the outcome, but certainly with the votes of five legislators, half the WPIC membership, that should place reasonable doubt about going forward. Especially if you consider the senator and two representatives from Lincoln County asking for the extension, and all three Lincoln County commissioners signed a letter asking for the extension.

RESPONSE: The commenter is partially correct in their understanding of selenium in the water column. However, the underlying narrative of the comment suggests a description of selenium cycling and bioaccumulation in reservoirs is needed in our response. First, selenium exists in both dissolved and suspended particulate material (SPM) forms in Lake Koocanusa. The former is ionized in water, but not attached to the water molecules (analogous to dissolved table salt dissolved in water or sugar in coffee), while the latter is bound to suspended particles either sorbed to their surface directly or incorporated into phytoplankton or benthic algae tissue. Partitioning between dissolved and particulate selenium in the water column (e.g., how much is dissolved and how much is particulate, an important consideration in selenium transfer to high order organisms) depends on the selenium concentration in the water column and the site-specific waterbody response. Selenium transfer occurs up through the food chain by invertebrates (e.g., macroinvertebrates or zooplankton) that eat the SPM, and ultimately to fish that eat the invertebrates. Elevated selenium in fish tissue is the ultimate problem since it causes issues in fry development or survival. As you will note, the process described above has little to do with direct selenium buildup in bottom sediments, and more to do with the amount of selenium in the water column and how readily it enriches SPM.

Given this understanding, whether or not the bottom of Lake Koocanusa has accumulated selenium over the years is not the primary issue at hand. We are unaware of any study by USGS that characterizes long term concentration changes of selenium in reservoir sediments. The only study to our knowledge was done by the department (DEQ, 2013). Sediments were collected in a single sampling year and showed that reservoir sediments in the forebay (near the dam) are statistically higher than the international border site, and also are statistically higher than shoreline soils. No attempt was made to characterize selenium or sediment buildup in the bottom of the reservoir since samples would be required periodically through time (which was not done). As for whether this influenced WPIC voting, the board understands this is the commenter's opinion. A better understanding of selenium bioaccumulation should hopefully help clarify this issue for the commenter.

COMMENT NO. 154: Sediment studies show no buildup of selenium in sediment at the bottom of Lake Koocanusa after decades of existence, and the coal mine operation has gone on far longer than that. A benthic selenium study conducted in 2013 by DEQ to establish benchmark measurements "was not significantly different than in the native soils." Nothing is settling out to the bottom of Lake Koocanusa, after decades. It is not a settling pond. People do not understand,

and they give inaccurate information to others who repeat incorrect information.

RESPONSE: Similar to COMMENT NO. 153, this suggests the need for a better understanding of selenium cycling in reservoirs, and clarification about the department's past sediment studies. We have described the selenium bioaccumulation process in response to COMMENT NO. 153, and the department's understanding of selenium behavior in the reservoir can be found in the Technical Support Document describing the criterion development process (DEQ, 2020; Figure 4-1). It is the same understanding as published by federal scientists (Presser and Luoma, 2010; Jenni et al. 2017; Presser and Naftz, 2020). Furthermore, the department has not suggested that Lake Koocanusa is a settling pond, nor has the department made any robust analysis of the buildup of selenium in Lake Koocanusa sediments. The reviewer is correct that in 2013 the department did sample metals concentrations, including selenium, which was found to be statistically elevated over native soils in the forebay (near the dam) during a single sampling year; this could potentially be inferred as accumulation over time. However, multi-year sampling would be needed to prove/disprove such a hypothesis, noting the forebay was the only site that exhibited a statistical difference between reservoir sediments and native soils. Additionally, as noted in prior comments, the environmental partitioning of selenium between water and suspended particulate material is more important than accumulation of selenium at the bottom of the reservoir.

COMMENT NO. 155: At the October 13, 2020 WPIC meeting, it was implied that selenium is settling out in Lake Koocanusa and accumulating in the sediment at a rate that will cause problems over the next 20 years. However, we recently became aware of DEQ's "Analysis of 2013 Lake Koocanusa Sediment Data" which seems to conclude otherwise after finding no alarming levels of selenium in the sediment, even after the dam has been in place for 35 years. This echoes concerns raised by local legislators about the need to better understand the operation of Libby Dam and its impact on selenium levels.

RESPONSE: The questions that the department responded to during the October 13, 2020, WPIC meeting, as the department understood it at the time, are: how does Libby Dam impact how selenium affects aquatic life and is that impact greater because selenium concentrations are increasing in the reservoir? The department responded that the retention time of selenium in the reservoir poses a higher risk to aquatic life. That is why there are different standards proposed for Lake Koocanusa versus the mainstem of the Kootenai River. The department also stated that it is concerned that selenium concentrations will increase in the reservoir if the amount of selenium coming from the Elk River Watershed continues unimpeded. See also, responses to COMMENT NOs. 152, 153, and 154.

COMMENT NO. 156: When I asked questions at the last WPIC meeting it was stated that selenium settles to the bottom of the lake and did not remain in suspension. I have since found evidence to the contrary and I would not have voted for the standard recommended by the DEQ if I had known that the information provided was inaccurate.

RESPONSE: See response to COMMENT NOs. 152 through 155.

COMMENT NO. 157: Very little data from the tributaries to Lake Koocanusa and the Kootenai River has been collected. The main focus is on the Elk River. Have any of the Elk River tributaries been studied to see what their contribution of selenium is? If not, why not? If so, where is the data?

RESPONSE: The main focus of the department's work is (and has been) Lake Koocanusa. With respect to the Elk River, extensive publicly available data collected in BC tributaries can be found at the British Columbia Surface Water Quality Monitoring (link below). Additionally, there is no doubt by any state, federal, or provincial agency that the preponderance of the selenium entering Lake Koocanusa is from coal mining operations in the Elk Valley, and thus the focus on the Elk River. The Canadian coal mining company operating in the Elk Valley has acknowledged this too. See also, COMMENT NO. 134. Referenced website: <https://www2.gov.bc.ca/gov/content/environment/research-monitoring-reporting/monitoring/tools-databases/surface-water-monitoring-sites>

COMMENT NO. 158: The model is generic in nature and the model is ten years out of date. It does not use specific data and it is not state of the art modeling. Techniques for setting water quality standards have evolved considerably since 2010.

RESPONSE: The department followed the most recent mechanistic modeling approach defined in the EPA national guidance for developing site-specific selenium criteria which was published just four years ago (EPA, 2016). Moreover, contrary to the reviewer's suggestion, the generalized model of Presser and Luoma (2010) was made site-specific with recent water/particulate partitioning (Kd) data collected directly from Lake Koocanusa and through calibration of bioavailability to observations of selenium in suspended particulate matter (SPM) and invertebrates. The department is unaware of any literature that suggests the ecosystem based modeling approach recommended by EPA or used by DEQ is antiquated, or alternatively that techniques for setting water quality standards for selenium have evolved since 2016. Furthermore, the commenter has not provided any specific evidence that EPA's modeling approach is out of date, or was inappropriately used by the department to develop standards.

COMMENT NO. 159: We have concerns that the model being used is not the most current science and data available, as it is more than a decade old. The model at the time it was made showed selenium content would be far higher by this date in time. However, it does not consider the filtration systems and the changes to current mining practices that Teck Coal has brought online.

RESPONSE: The board understands that the model is state-of-the-art for selenium criteria development (EPA, 2016), and although first published as a global ecosystem model in the scientific literature a decade ago (Presser and Luoma, 2010), model inputs have been updated and made specific to Lake Koocanusa using current data (Presser and Naftz, 2020). The commenter is also incorrect in their assertion that the model would show selenium content to be far higher by this date in time. First, the model is not time-variable, nor does it make predictions of selenium content through time. Second, the model does not consider the influence of water treatment or mining practices because it solely predicts what a protective criterion

will be based on site-specific selenium partitioning and trophic transfer through the food chain.

COMMENT NO. 160: The modeling approach applied is basically a model sensitivity exercise rather than a predictive exercise. The USGS model Presser and Naftz (2020) significantly overpredicts Se concentrations in observed fish tissue. Specifically, many of the model calculations utilize input variables (i.e., TTFs) that are distinctly different from the site data, particularly pertaining to non-cyprinid fish. The argument that the site data are too variable is not valid, particularly when 99.8 percent of the above-mentioned data illustrate that fish species present are below conservative effects thresholds. It should be noted that the data used to generate the Presser and Luoma (2010) model were also site-specific (versus generic) data.

RESPONSE: The department's work in standard setting directly predicts protective water column concentrations based on several different assumptions for whole body guidelines, site-specific model partition coefficients (Kds), calibrated bioavailability factors, and a single set of trophic transfer factors (TTF) from the literature, resulting in very similar levels of protective water column standards across all scenarios. Moreover, criteria are very similar in magnitude to those recommended by several of the SeTSC members using a variety of assumptions, and closely approximating the 20th percentile of model runs done by USGS for sensitive food webs (e.g., the IFM and TFM 100 percent aquatic insects scenarios). The department's approach and resulting criterion, therefore, can hardly be characterized as a sensitivity approach towards criteria development.

Furthermore, with respect to the commenter's assertion that a large percentage of the non-cyprinid fish data are below conservative effects thresholds, it must be questioned whether having any fish samples above the effects threshold is appropriate. Fish tissue sample criteria proposed by EPA (2016) are not to be exceeded, therefore any exceedance is a concern. In fact, multiple species and appreciable percentages of cyprinid fish show elevated tissue concentrations relative to the EPA (2016) tissue standard.

COMMENT NO. 161: The lentic water criterion (national) published by EPA (2016) is 1.5 µg/L. Criteria other than those proposed by EPA (EPA 2016), should be based on site-specific data versus laboratory data. EPA language reads: "The fish egg (or ripe ovary) Se criterion of 15.1 mg/kg dw supersedes (i.e., is given priority over) the Se criteria for muscle or whole-body tissue and for surface water concentrations." EPA's intent is that site-specific adjustments are allowed; however, they should only be based on site-specific data. The data used by USGS in their model Presser and Naftz (2020) did not incorporate site-specific data, with the exception of Kd values. Additionally, assumptions about the bioavailability of Se as inputs to the USGS model Presser and Naftz (2020) were made simply as model-fitting or sensitivity analyses, which were not supported by actual bioavailability measures.

RESPONSE: With respect to EPA guidance and the priority of fish tissue vs. water column concentrations, EPA (2016) indicates that a hierarchy suggested by the commenter should be applied—except under non-steady state loading conditions. Page xvi of the EPA (2016) guidance specifically states (bold added

below for emphasis), "For purposes of this document EPA defines "new inputs" as new activities resulting in the release of selenium into a lentic or lotic aquatic system. New inputs will likely result in a greater concentration of selenium in the food web and a relatively slow increase in the selenium concentration in fish until the new selenium release achieves a quasi- "steady-state" balance in the aquatic system. EPA estimates that the concentration of selenium in fish tissue will not reach steady state for several months in lotic systems and longer time periods (e.g., 2 to 3 years) in lentic systems. Achievement of steady state in an aquatic system also depends on the hydrodynamics of the aquatic system, (particularly reservoirs with multiple riverine inputs), the location of the selenium input and the particular food web. EPA expects the time needed to achieve steady state with new or increased selenium inputs to be site-specific. **Thus, EPA recommends that fish tissue criterion elements not take precedence over the water column criterion elements until the aquatic system achieves steady state.** In the interim, EPA recommends sampling and using site-specific data to determine steady state in the receiving water to gain a better understanding of the selenium bioaccumulation dynamics in a given system." So, in this case, the commenter is misinterpreting EPA (2016) guidance and tissue should not supersede water until the receiving waterbody is in steady state.

As for using site-specific data for criteria determination, EPA (2016) indicates the greatest reduction in uncertainty when translating a selenium fish tissue concentration to a water column concentration is achieved by collecting temporally and spatially coincident site-specific partitioning ( $K_d$ ) data. This was done in model development by USGS (using multiple years of data), and was carried forward into criteria development by the department. There were a wide range of measured  $K_d$ , and consequently the department used both the 50th and 75th percentile in criterion development, assumed a bioavailability calibration fraction of 45 percent and 60 percent, and two different protective tissue endpoints to derive the criterion. Each of these assumptions result in a proposed criterion of 0.8 µg/L.

Site-specific TTFs were not used due to data limitations identified in Presser and Naftz (2020). Moreover, several reviews by SeTSC members provide conflicting thoughts about the use of site-specific TTFs. For example, DeForest (2020) argues that TTFs are overestimated according to site data and, therefore, the USGS model overpredicts fish tissue concentrations. Discussions by the Ktunaxa Nation (2020) citing Thorley (2020) suggest TTFs are temporally variable and use values similar to those selected by the USGS (with assumed bioavailability of 60 percent). Given these contrasting recommendations, along with the department's knowledge that egg/ovary data from fish already exceed EPA (2016) tissue recommendations under current water quality conditions, and knowledge that certain fish species (e.g., burbot and red shiner) have even higher tissue concentrations, the modeling approach and recommended criterion are appropriate and justified.

COMMENT NO. 162: The DeForest (2020) review found through a series of model validation steps, a range of predicted fish tissue concentrations from the model were developed and compared to empirical data for fish tissue. Deforest (2020) found that even when considering site-specific enrichment factors, summary statistics, and site-specific invertebrate TTFs, the USGS model predicts muscle and



whole-body selenium concentrations that, on average, are a factor of 2.9 greater than observed.

RESPONSE: DeForest (2020) completes a quasi-model validation exercise with available fish tissue data oriented at central tendencies (caveats discussed later), but fails to provide a compelling argument that can counter the preponderance of evidence suggesting impacts are already occurring to fish in Lake Koocanusa. As noted in COMMENT NO. 9, he concludes the U.S. Environmental Protection Agency's (US EPA's) surface water quality criterion of 1.5 µg/L for lentic water bodies is fully protective of fish and the aquatic community in Koocanusa Reservoir. However, as indicated in his alternative bioaccumulation model calculations (see Table 2 of his comments), three of the eight scenarios he presents reflecting different diets, food web sensitivities, and assumptions of TTFs and Kds based on his own judgment, suggest the criterion could be as low as 1.1 µg/L. So, the conclusion that the EPA (2016) lentic criterion is fully protective of Lake Koocanusa is not supported by his calculations.

Furthermore, the use of mean measured fish tissue concentrations and standard deviations for developing predicted to observed ratios to make the point that the USGS model is overpredicting fish tissue data is disingenuous (e.g., Figure 19 and Table 4). More realistically, the computations should be compared to maximum fish tissue data, as the EPA (2016) tissue threshold reflects a "not to exceed" criterion and the department is interested in protecting all fish from impacts in the reservoir. Comparison to the mean and standard deviation neglects the most important data in the entire tissue distribution, the upper 15.9 percent of the distribution, and comparisons to data in that region are more appropriate in validation of the model.

Lastly, DeForest (2020) surprisingly chooses to overlook certain fish tissue data altogether. This is despite the fact that several cyprinid species (e.g., reidside shiner, peamouth chub) already have elevated tissue concentrations above EPA (2016) egg/ovary criteria, and in multiple samples. The data were dismissible in his opinion because of collection methods and were further marginalized as species less sensitive to selenium in non-peer-reviewed studies.

COMMENT NO. 163: The proposed standard retains the exact same fish tissue criteria as the federal guidelines, in effect acknowledging the protective nature of one portion of the federal guideline while making a 50 percent reduction in the other portion. This departure from federal guidelines is internally inconsistent and not explained.

RESPONSE: EPA (2016) indicate selenium bioaccumulation potential depends on biogeochemical factors that are unique to a particular aquatic system and uncertainty in the translation of the egg-ovary criterion element to the water column element can be reduced by deriving a site-specific criterion that uses site-specific selenium data and information on food web dynamics and a biological assessment of the aquatic system. It is important to note that the 8.5 mg/kg dw proposed in this standard was also used in modeling that led to the proposed site-specific water column standard.

COMMENT NO. 164: We support the use of the 8.5 mg/kg dw whole-body

fish tissue as appropriately conservative; we do not, however, support the use of generic TTFs used in the model. Site-specific TTFs should be used to decrease uncertainty in the model.

RESPONSE: The board acknowledges the comment. See also, the response to COMMENT NOs. 162, 163, 165, and 169.

COMMENT NO. 165: The modeling that was done is basically a sensitivity analysis rather than a predictive exercise, and this model significantly overpredicts selenium concentrations in the observed fish tissue.

RESPONSE: It is unclear whether this comment pertains to the Monte Carlo ecosystem modeling done by the U.S. Geological Survey in Jenni et al. (2017), which is indeed a combination of a sensitivity and uncertainty analysis, follow-up work by USGS (Presser and Naftz, 2020), or the criteria derivation done by the department (DEQ, 2020). The department's work in standards setting directly predicts protective water column concentrations based on assumed whole body guidelines, model partition coefficient (Kd), bioavailability, and trophic transfer factor (TTF). Each of these requires a user decision/input. The department relied on recommendations from the bi-national SeTSC for each. The department also relied on recommendations from the USGS to consider a single TTF for fish, aquatic insects, and zooplankton for standard setting, reflecting a broader understanding and central tendency from the literature. Three different scenarios were considered by the department for sensitive food web pathways and diets, which is hardly sensitizing input variables. A fourth considered different tissue thresholds [8.5 vs. 5.6 mg/kg dry weight (dw)], bioavailability factors (60 percent vs. 45 percent, each of which increase the criterion over what would typically be computed using 100 percent), and Kd values (75th vs 50th percentile). Very similar levels of protective water column standards are computed in all scenarios. See also, response to COMMENT NOs. 160 and 161.

COMMENT NO. 166: The model is not predicting what is actually being measured in the fish in Lake Koocanusa and not validated to fish tissue.

RESPONSE: The model calibrates a peer reviewed global model to local conditions by modifying the global model parameter values (in this case, the TTFs through the bioavailability factor and then using site-specific Kd data based on repeat field-observations over multiple years). The Lake Koocanusa model overpredicted Se concentrations in zooplankton and invertebrates, relative to the concentrations seen in Lake Koocanusa. Thus, the global model was calibrated to improve predictions on the local level, using a 60 percent bioavailability scenario to address unmeasured local factors causing over prediction. While the current model is not scientifically validated to fish tissue, the 60 percent bioavailability model has been calibrated to be accurate to local conditions informed by the zooplankton and macroinvertebrate tissue concentrations as well as the Kd samples. The USGS determined the fish tissue data was not appropriate to use in the modeling effort. However, there is greater certainty in the TTF used for fish (1.1) than observed variability in Kd. No global average Kd exists in the literature, a wide range was measured in situ, and it is known to be affected by hydrologic factors such as residence time and selenium speciation. In the global dataset fish TTFs vary far less

across ecosystems (0.52 - 1.6) than do Kds (107 - 21,500). Thus, for the Lake Koocanusa model, the USGS applied a modeling approach utilizing all observed pairs of dissolved: particulate Se (Kd) to create scenarios accounting for the full range of the observed dataset (full uncertainty). See also, the responses to COMMENT NOs. 162 and 167.

COMMENT NO. 167: The model consistently overestimated Se concentrations in fish tissue, even in the most conservative model scenario and using site-specific inputs. A generic multi-step modeling approach has too much uncertainty to support, by itself and without validation, recommendations for a site-specific, water-based selenium standard for Lake Koocanusa.

RESPONSE: See response to COMMENT NO.162. The commenter implies that SeTSC comments provided by DeForest (2020), representing Teck, conclude that the USGS model (Presser and Naftz, 2020) overestimates fish tissue concentrations and therefore was not validated. However, there is considerable belief by a cross-section of scientists in both Canada and the U.S. that the approach and recommendations by the department are appropriate and valid (see comments by other SeTSC members). Conservative model scenarios with respect to protecting fishery resources in Lake Koocanusa indicate the proposed criterion could even be lower. At a very basic level, the EPA (2016) tissue standard indicates no sample exceedances are acceptable and currently the reservoir (whose Se concentration is approximately 1 µg/L) has produced egg/ovary samples at levels above the proposed tissue standards. There have also been elevated levels of selenium found in burbot tissue downstream, a species known to be culturally important and, may be among the most selenium sensitive fish species with populations which have been declining since 1990. In this regard, a level of protection slightly under the existing concentration of the lake is recommended and the 0.8 µg/L proposed criterion is an appropriate recommendation in the face of uncertainty.

COMMENT NO. 168: We believe the proposed criteria has been developed using overly conservative assumptions, not supported by site-specific data.

RESPONSE: See response to COMMENT NO. 165.

COMMENT NO. 169: TTF values reported for the original Presser and Luoma (2010) model were based on previous research and were not specific to Lake Koocanusa. Upon reassessment of the model, it was determined that the TTF values assumed in the model were significantly higher than site-specific TTFs (e.g., the site-specific median value for zooplankton was determined to be 0.52, whereas the model assumed a value of 1.5). Validation of the model revealed that even when using site-specific TTF values, the model consistently overestimates Se concentrations in fish tissue. This fact may be due to Kd values that overestimated Se exposure in Lake Koocanusa or perhaps Se exposures by fish were overestimated (e.g., the default whole-body fish TTF is "too high"). Even when using site-specific Kd and TTF values, the model predicted muscle and whole-body Se concentrations that, on average, were a factor of 2.9 greater than what was observed. Checking model predictions of fish tissue Se concentrations against the

reported data from the site in question (in this case, Lake Koocanusa) is critical.

RESPONSE: See responses to COMMENT NOs. 162, 165, and 167. The starting point for the bioaccumulation modeling work is a scientifically robust global model (Presser and Luoma, 2010) and associated global average model coefficients. For reasons provided in Presser and Naftz (2020), there were not sufficient data to develop empirically derived TTFs and we believe the commenter does not accurately represent the limitations of the TTFs and quasi-model validation exercise discussed in DeForest (2020). Nonetheless, we recognize it is common to calibrate a global model to local conditions by modifying the global model parameter values (in this case, the TTFs). Given that the model overpredicted Se concentrations in zooplankton and invertebrates relative to the concentrations seen in Lake Koocanusa, the global model was calibrated by Presser and Naftz (2020) to improve predictions on the local level, using a 60 percent bioavailability scenario to address unmeasured local factors causing over-prediction.

Furthermore, for reasons defined in Presser and Naftz (2020), the calculation of empirically derived TTFs and validation in fish tissue could not be completed. Yet, two SeTSC performed this exercise with TTF results ranging from 1.1 - 1.2 for aquatic insects. These values are very close to the USGS aquatic insect TTF with the 60 percent bioavailability correction (~1.68) and the 45 percent bioavailability correction (~1.26). The same members of the SeTSC calculated zooplankton TTFs which ranged from 0.58-0.85. These are very close to the zooplankton TTF with the 60 percent bioavailability correction (~0.9) and the 45 percent bioavailability correction (0.675). The department took a cautionary approach in the consideration of these site-specific TTFs due to some of the data coming from the Elk River (a lotic system) which would presumably result in a lower TTF as well as the clear reasons defined in Presser and Naftz (2020) for why site-specific TTFs could not be calculated. The TTFs used for the modeling effort are the best available science and representative of local conditions.

COMMENT NO. 170: Site-specific BAFs illustrate lentic water criteria is adequately protective. Using site-specific data for Lake Koocanusa, it is clear that calculated site-specific criteria using a BAF approach can result in a significant proportion of values greater than the MTDEQ (2020) proposed value of 0.8 µg/L.

RESPONSE: We disagree that site-specific BAFs for Lake Koocanusa indicate the national lentic water quality criteria of 1.5 µg/L is fully protective. First, as noted by EPA (2016) when using site-specific BAFs, "Because of uncertainties associated with the BAF approach, EPA does not recommend developing BAFs from data extrapolated from different sites or across large spatial scales." As such, BAFs are to be calculated from specific spatial locations with paired fish and water samples, as was attempted by the commenter in delineating Zones in the reservoir. However, per recommendations of the SeTSC, all regions of the reservoir must be protected, which includes the most sensitive areas. In this instance Zone A delineated by the commenter is clearly the most sensitive (reasons not known), and computations indicate the proposed value by the department of 0.8 µg/L is within an appropriate range. For example, BAF predicted criteria from Table 1 provided by the commenter for both egg/ovary and whole-body samples (which are hierarchically more reliable than muscle criteria) suggest the criterion to protect Zone A of the

reservoir could be as low as 0.56 to 0.65 µg/L. Therefore, in order to maintain the recommendation by the SeTSC, it is noted that the value proposed by the department is not that different from that identified using BAFs for Zone A in the comment.

COMMENT NO. 171: Does the modeling and criteria used for the proposed standard consider that the characteristics of Lake Koocanusa is far different than the characteristics of a natural lake?

RESPONSE: The model is agnostic to whether it is applied to a lake or a reservoir, and relies solely on selection of the Kd coefficient and TTFs. Notably, Kd coefficients in lakes tend to be higher than rivers; however, few comparisons have been made individually between lakes, reservoirs, and ponds (collectively referred to as lentic waterbodies). Anecdotally, EPA (2016) has a Kd compilation in Appendix H of their document and from inspection of those data, it is difficult to parse out a difference between any of the lentic (lakes, reservoirs, and pond) waterbodies. Clearly there is a difference between lentic (non-flowing) and lotic (river-like) Kd. This difference is reflected in EPA (2016) national criterion recommendations. The Kd coefficients for Lake Koocanusa were made site-specific, which is the best possible representation.

COMMENT NO. 172: A different standard exists for the static water of lakes than for a flowing stream. I understand this, but I also know that Lake Koocanusa is not a standard static body of water. Lake Koocanusa was designed for an annual vertical fluctuation of about 100 feet in elevation, with a considerable amount of lake bottom becoming mucky and then dusty dry ground as the reservoir level drops during late summer, autumn, winter and early spring. So, in addition to the normal current of the Kootenai River running downstream through the reservoir all year long, the reservoir is drained and refilled each spring with fresh snowmelt. So, the selenium does not continually build up in, or be added to, the same water.

RESPONSE: Lake Koocanusa by definition is a reservoir and has a mean water residence time of approximately 9 months (Easthouse, 2013). It is no doubt a lentic system and behaves far more like a lake than a river, with bioaccumulation processes characteristic of lentic systems. See also, responses to COMMENT NOs. 153, 171, and 173.

COMMENT NO. 173: Based on the past 10 years of data collection, what does the model predict for the next ten years? Does the model differ if only data from 2014 to the present is used? Does the model differ if only data during spring runoff is used as opposed to data from season of low flow?

RESPONSE: The model does not predict concentrations through time. It is a bioaccumulation or trophic transfer model that considers only a single dissolved and particulate selenium concentration enrichment factor (Kd), along with trophic transfer factors. Based on site-specific Kd data measured by USGS from 2015 through 2019 (including samples by BC-ENV/Teck), selenium enrichment appears to potentially be increasing. Mean Kd factors for samples across all years are trending upward (visual inspection only), noting interannual Kd is variable due to time of year (runoff vs. freshet as suggested by the reviewer) as well as variation in reservoir primary

productivity, hydrodynamics, reservoir operation, and seasonal water temperature variation.

COMMENT NO. 174: Does the modeling consider the large fluctuation of selenium in the Elk River between the runoff season and the season with low flows? (Technical Support Doc -Figure 1-7. Selenium loads from the Kootenay River and Elk River).

RESPONSE: The variability in selenium loadings pointed out by the commenter is reflected in enrichment factors or partitioning coefficients ( $K_d$  values) used in the modeling.  $K_d$ s vary seasonally as a function of runoff and controlling reservoir factors such as biogeochemical processing. Since Lake Koocanusa is a long linear reservoir, with a hydraulic residence time on the order of three quarters of a year, it is believed it partitions selenium uniquely compared to other waterbodies. Therefore, site-specific  $K_d$  values were acquired and used in the model. Those ultimately selected for use in the criteria development were near the middle (50th percentile) and upper quartile (75th percentile) which were used to reflect average and moderate bioaccumulation potentials.

COMMENT NO. 175: The 0.8 µg/L selected for Lake Koocanusa is within the range recommended by selenium experts.

RESPONSE: The board acknowledges the comment.

COMMENT NO. 176: I am opposed to the proposal for a selenium standard of 0.8 µg/L for Lake Koocanusa because I do not believe that the facts and science of the situation warrant a selenium standard more stringent than the national EPA standard of 1.5 µg/L.

RESPONSE: The board does not agree with the commenter's assertion, but acknowledges the comment.

COMMENT NO. 177: The number 0.8 µg/L is not defensible.

RESPONSE: The department followed the procedures in EPA (2016) for developing site-specific selenium criteria. Data were collected under established rigorous scientific protocols. Modeling was based on published, peer-reviewed work—considered the state of the science—and bioaccumulation modeling was completed by the U.S. Geological Survey following their rigorous scientific procedures. The department reviewed and analyzed recommendations from the SeTSC on model inputs. This included a detailed analysis and review of each model input recommendation received. The department ran subsequent model scenarios based upon the SeTSC recommendations.

DEQ (2020) says "As previously stated, the goal of this work was to co-develop a site-specific water column standard for Lake Koocanusa. A challenge of that work has been the differing protection goals between BC-ENV and DEQ." To address this challenge, the department followed two routes: one that worked collaboratively with BC to meet the more stringent regulatory requirements in BC, and a second route that considered the less stringent EPA-recommended whole-body selenium threshold of 8.5 mg/kg. Per the first route, the department considered the SeTSC recommendations (both oral and written) to develop the

scenarios with model inputs displayed in Table 5-1 and Table 5-2 of DEQ (2020). Route one comprised three scenarios developed in collaboration with BC-ENV, and among those the department selected scenario 3 (see Table 5-1; DEQ, 2020) which included a whole-body tissue threshold of 5.6 mg/kg dw, the trophic fish model, 100 percent aquatic insects, 45 percent bioavailability, and the median Kd percentile. This resulted in 0.8 µg/L.

For the second route, the department considered the EPA-recommended whole-body tissue threshold of 8.5 mg/kg with the same trophic fish model at 100 percent aquatic insects, retained the USGS proposed 60 percent bioavailability, and selected 75th percentile of the Kd distribution.

Both of these different approaches arrived at a protective selenium water column criterion of 0.8 µg/L, which meets the protection goals previously defined by the SeTSC, ensures protection of the beneficial use, and strikes a balance between protection of the fish assemblages in Lake Koocanusa, the downstream Kootenai River, and current conditions.

COMMENT NO. 178: The value of 0.8 µg/L makes no scientific sense, as selenium levels in Lake Koocanusa are stable, and the current level of 1.0 µg/L is not causing fish tissue concentrations anywhere close to high enough to impair reproduction.

RESPONSE: Repeat samples and multiple fish species in the reservoir already exceed the EPA (2016) tissue recommendation. Additionally, the department followed a rigorous scientific process in developing the proposed standard for Lake Koocanusa, using EPA recommended protocols. At current concentrations, some fish show selenium levels in their fish tissue above the proposed standard. This is cause of concern and suggests reproductive impairment may already be occurring.

COMMENT NO. 179: I understand this would be the harshest standard for selenium in the world. If 0.8 µg/L is necessary for Lake Koocanusa, why would it not apply to every water body in Montana. Is this site-specific standard business simply a way to divide and conquer? Is this fair to my constituents?

RESPONSE: The proposed site-specific selenium criteria is based on the ecosystem modeling of Lake Koocanusa, and thus would not apply to other lentic or lotic waterbodies in Montana. On November 29, 2018, EPA signed a proposed rule to revise the current federal CWA selenium water quality criterion applicable to certain fresh waters of California. This rule, Establishment of a Numeric Criterion for Selenium for the State of California, is being proposed to ensure that the criterion is set at a level that protects aquatic life and aquatic-dependent wildlife, and includes 0.2 µg/L dissolved selenium for San Francisco Bay. Thus, the proposed site-specific criteria for Lake Koocanusa is not the most restrictive proposed standard in the country and is supported by the procedures in EPA (2016) for developing site-specific selenium criteria, the data were collected under established rigorous scientific protocols, and modeling was based on published, peer-reviewed work. See also, the responses to COMMENT NOs. 13 and 177.

COMMENT NO. 180: I expected the regulation to be reduced from the

Montana standard of 5 micrograms per liter, and I expected it to be reduced to the EPA recommended level of 1.5 micrograms per liter. I was shocked when instead it was proposed at .8 micrograms per liter. What samplings or data make this necessary?

RESPONSE: The board acknowledges the comment. See responses to COMMENT NOs. 9, 161, and 166.

COMMENT NO. 181: Presser and Naftz (2020) provided over 174 different possibilities of potential criteria values, 87 from each model. Despite the conservative assumptions of the models, both yielded median predicted water criteria greater than 0.8 µg/L. It appears the choice to pursue a value of 0.8 µg/L came down to two different scenarios. It appears that the water criterion proposed was a choice not necessarily driven by the outcome of a significant modeling effort.

RESPONSE: As described in COMMENT NO. 177, two scenarios were considered by the department both of which resulted in the 0.8 µg/L. The department selected the upper 25 percent of the distribution, matching the 75th percentile of the Kd distribution for the scenario including 8.5 mg/kg whole body as the tissue guideline. A different set of assumptions with a more conservative tissue guideline and less conservative Kd (50th percentile) and bioavailability fractions were also considered. As noted by the commenter, the cumulative frequency distribution of the USGS modeled water criteria were not considered the criteria development. However, the board notes the median value of that distribution, as suggested by the commenter, would be an incorrect percentile to choose for protectiveness anyway. EPA (2016), in developing their national criteria, selected the 20 percent percentile of the distribution of median water column values as the statistical cut-off to ensure adequate protection. Should a similar approach be used with the USGS models, a very similar criterion to the department value would be arrived at for the two most sensitive food webs (e.g., 0.83 µg/L for the IFM and 0.75 µg/L TFM with 100 percent aquatic insect diet and 60 percent bioavailability). Thus, the approach is similar to the department's recommendations, and meets the protection goals previously defined by the SeTSC, to protect the beneficial use for Lake Koocanusa, and protect downstream water quality.

COMMENT NO. 182: DEQ unexplainably varies the use of model inputs under different scenarios. For example, when DEQ uses the overly conservative fish tissue threshold of 5.6 mg/kg dry weight, they use the Subcommittee recommended enrichment factor and a site-specific bioavailability factor, but when DEQ uses the more appropriate fish tissue threshold of 8.5 mg/kg., the enrichment and bioavailability factors are increased without explanation.

RESPONSE: See response to COMMENT NO. 177.

COMMENT NO. 183: The State of Montana has full legal authority to set these standards. In fact, Montana is required under section 303(c)(2)(B) of the federal Clean Water Act (CWA) to establish water quality criteria for toxic pollutants, including selenium. The CWA authorizes states to adopt numeric values for toxins like selenium that reflect site-specific conditions. Furthermore, 2016 EPA guidance recommends that states adopt site-specific selenium standards based on local



environmental conditions. This is just what DEQ has done.

RESPONSE: The board acknowledges the comment.

COMMENT NO. 184: We recommend using the term "elements" or "criterion elements" in the rule language to clarify that the fish tissue and water column criterion elements are separate elements of the single selenium criterion rather than individual water quality criteria.

RESPONSE: The board does not see a need to change the proposed language of the rule. The rule is plainly written, consistent with other Montana rules, and clearly states in the introductory paragraph that the numeric selenium standard is expressed as both fish tissue and water quality concentrations. It explains which components take precedent over the others and under what circumstances. All of these descriptions are consistent with EPA's national recommendations for selenium.

COMMENT NO. 185: We suggest the state consider whether it would be beneficial to clarify whether under the "steady state" definition that "activities" includes only anthropogenic activities.

RESPONSE: The board considers the definition to be correctly worded as written, and does not consider it appropriate to limit "activities" to only anthropogenic ones. If, for example, a nonanthropogenic selenium increase was documented and Lake Koocanusa was in steady state at the time, the nonanthropogenic change could alter the lake from steady to non-steady state. Regardless of the fact that the change was nonanthropogenic, the effect on the fish tissue standard would be the same as if the source were anthropogenic: fish tissue selenium concentrations would be transient, and the water column and fish tissue standards would all apply simultaneously, as described in the rule.

COMMENT NO. 186: We recommend adopting the intermittent exposure water column criterion element to protect Lake Koocanusa and the Kootenai River if, in the future, intermittent discharges occur into those waters. If Montana chooses to proceed without this element, please provide an explanation for how the state intends to implement the selenium criterion to protect the applicable designated uses without this element.

RESPONSE: The intermittent exposure element is unnecessary because MPDES rules do not differentiate between intermittent and continuous discharges for purposes of developing water quality-based effluent limits. When calculating the reasonable potential for a discharger to cause or contribute to an exceedance of a water quality standard, DEQ methods treat continuous and intermittent dischargers the same.

COMMENT NO. 187: We recommend states/tribes adopt a selenium criterion that clearly indicates the egg-ovary criterion element supersedes any other criterion element because egg and ovarian tissue is the location of selenium toxicity and their selenium concentrations are most strongly correlated with larval deformity and mortality. The egg-ovary criterion element served as the basis for deriving all the other criterion elements.

RESPONSE: The board agrees with the comment, and notes that the department drafted the proposed rule to reflect the importance of the egg-ovary criterion. In NEW RULE I(6), the rule clearly states that the egg-ovary criterion supersedes both the muscle/whole body and water column standards, so long as egg-ovary data are actually available and the aquatic ecosystem is in steady state. No change is made to the proposed language of the rule in response to this comment.

COMMENT NO. 188: We recommend the whole-body/muscle criterion element supersedes the water column criterion elements because whole-body/muscle concentrations provide a more robust and direct indication of potential selenium effects in fish than water concentrations. We suggest adding rule text specifying that muscle or whole-body criterion elements also supersede the water column criterion element when the aquatic ecosystem is in steady state.

RESPONSE: The board agrees that NEW RULE I(6) could be better worded to clarify the hierarchical relationship among different fish tissue standards and the water column standards. Section (6) will have the following sentence added at the end: "When fish egg/ovary samples are unavailable and the aquatic ecosystem is in steady state, fish muscle or whole-body standards supersede the water column standards in (7)."

COMMENT NO. 189: We recommend adding rule text specifying the duration and frequency for the fish tissue elements. For the fish tissue elements, EPA's recommended duration and frequency is an instantaneous measurement, not to be exceeded.

RESPONSE: The board agrees with the comment; therefore, NEW RULE I(6) will be modified as follows: "Fish tissue standards will be instantaneous measurements not to be exceeded." Moreover, language clarifying the number of samples required will be added to the rule: "Fish tissue sample results shall be reported as a single value representing an average of individual fish samples or a composite sample, each option requiring a minimum of five individuals from the same species." Additional details on assessment will be defined in the assessment methodology, see response to COMMENT NO. 53.

COMMENT NO. 190: The statement of reasonable necessity for NEW RULE I indicates a new nondegradation trigger value for selenium of 0.02 µg/L and footnote applying only to NEW RULE I will be incorporated into DEQ-7 as part of the current triennial review (anticipated completion in 2021). Based on this language and confirmation from DEQ, our understanding is that this change is not part of the current public comment period or rulemaking and will be open for public comment as part of the triennial review rulemaking.

RESPONSE: The comment is correct. The department plans to make the described change to Department Circular DEQ-7 during its current, ongoing triennial review, which will subject to public review and comment.

COMMENT NO. 191: Should Montana fail to establish a protective selenium standard at the international border, and should British Columbia's mine waste

continue to pass through Montana and into Idaho, then the State of Montana will be exposed to a claim of Clean Water Act liability by Idaho interests, as well as other community and Tribal interests both in Montana and Idaho.

RESPONSE: The board acknowledges the comment.

COMMENT NO. 192: Failure by the State of Montana to establish a protective selenium standard at the international border exposes the state to a claim of Endangered Species Act liability by downstream interests in Idaho, where Kootenai River white sturgeon remain a listed species. Best available science indicates fish tissue concentrations of selenium already are having deleterious physiological and morphological effects in white sturgeon burbot, mountain whitefish, and freshwater mussels.

RESPONSE: The board acknowledges the comment.

COMMENT NO. 193: The department asserts Montana would or could somehow be financially liable to the state of Idaho, be required to treat water in Lake Koocanusa or the Kootenai River before it reaches Idaho, or otherwise be held accountable for selenium levels coming into Lake Koocanusa from Canada. But DEQ stated that there are no permitted sources of selenium in the watershed to regulate and it does not appear that Idaho considers Montana as the source of selenium. Therefore, it is not clear how this causes liability for Montana. This heightens the concern that the rulemaking is being pursued too quickly, perhaps prompted by fears and assumptions that require further dialogue and better understanding.

RESPONSE: Idaho and EPA can establish a waste load allocation for the selenium in the future. In that situation, Montana's responsibility is to take steps to ensure that the source of selenium that is impairing Idaho's waters is decreased to the point where those waters are not impaired. The source of selenium, as both Idaho and the department have pointed out, is the Elk River watershed in British Columbia, Canada. Additionally, future permitted sources in Montana may be required to incorporate special limits or conditions to avoid impairment to aquatic life downstream in Idaho. See ARM 17.30.1383. See response to COMMENT NO. 61.

COMMENT NO. 194: DEQ has also indicated a need to enact the strict standard, otherwise the State of Montana may be liable to the State of Idaho for selenium pollution. There appears to be no legal basis for the statement.

RESPONSE: See response to COMMENT NO. 193.

COMMENT NO. 195: Neither EPA (2016) or MTDEQ (2020) establish or define what constitutes "steady state." MTDEQ (2020) defers to Presser and Naftz (2020) who state, "This upward trend has created a non-steady state for dissolved selenium in the lake that the ecosystem is responding to throughout this 35-year period." MTDEQ is moving toward site-specific criteria even though the EPA recommends data collection and understanding the problem when the system is in "non-steady state."

RESPONSE: The board disagrees with the comment. In EPA (2016) on page xvi, pages 101-102, and elsewhere, EPA describes the conditions that will

need to be achieved in order to reach selenium steady state in an aquatic ecosystem. In those same paragraphs, EPA essentially describes what non-steady state is. Presser and Naftz (2020) provide a technical explanation why Lake Koocanusa is not in steady state. Regarding the proposed rule, it contains a clear, plainly written definition for steady state corresponding to EPA's description. The rule states the ecosystem is not currently in steady state, and provides for a re-evaluation of that status every three years. See also, response to COMMENT NO. 161.

COMMENT NO. 196: DEQ has portrayed the need for the rule as based on a "concern" that the current standard is not protective and on "uncertainty" of what standard is protective. Neither provides a legal basis for setting a water quality standard.

RESPONSE: Water quality standards are not established based on "concern" or "uncertainty." With designated authority to establish water quality standards under the Clean Water Act and in accordance with 40 CFR §131.11(a)(1), the department adopts water quality criteria that protect the designated use. Such criteria must be based on sound scientific rationale and must contain parameters or constituents to protect the designated use. It is necessary to adopt the proposed numeric selenium standards to incorporate the best available science for selenium toxicity and protect selenium-sensitive aquatic life in Lake Koocanusa and the Kootenai River. The proposed fish tissue and water column standards for the mainstem Kootenai River are based on current EPA 304(a) criteria for lotic (flowing) waters. The proposed fish tissue and water column standards for Lake Koocanusa are based on EPA 304(a) fish tissue criteria, and site-specific water column criteria derived following procedures set forth by EPA in the 304(a) guidance.

COMMENT NO. 197: The proposed rule states the EPA guidance "includes a recommendation that states and tribes develop site-specific selenium standards, whenever possible, due to the local environmental factors affecting selenium bioaccumulation in aquatic ecosystems." This language, specifically "whenever possible" is not found in the EPA guidance.

RESPONSE: The phrase "whenever possible" is in DEQ's Reason Statement for proposed New Rule I and is not in the rule language.

COMMENT NO. 198: There is not a straight line between environmental selenium concentrations and toxicity to fish; it depends on the various conditions of the ecosystem. Therefore, while water concentrations are easier to obtain than fish tissue concentrations, it is fish tissue concentrations that indicate whether a system is selenium-impaired. Here, Montana Department of Environmental Quality (DEQ) appears to be promoting the use of a (very low) water standard for Lake Koocanusa based on the erroneous perception that the system's selenium conditions are not at equilibrium and are worsening. However, the data show that the (1) water, (2) sediment, and (3) fish tissue selenium values are all stable. Therefore, insofar as Montana proceeds with adopting a new selenium management approach for Lake Koocanusa, a more appropriate approach for this non-impaired system is a tissue-based approach, with a water number used only as a trigger for additional fish tissue

sampling, the approach recommended in the EPA's 2016 national water criteria for selenium.

RESPONSE: The department did not derive the proposed standard based on the perception that the system is in steady-state. Rather, the department defined steady state and clarified that at present the system is not considered in steady state, in line with EPA (2016) characterizations. The proposed rule follows guidance from EPA, in that the fish tissue takes precedence over water column only when the system is in steady state. Language from EPA (2016) says, "EPA recommends that fish tissue criterion elements not take precedence over the water column criterion elements until the aquatic system achieves steady state" (see also the response to COMMENT NO. 161). While the data do show that water concentrations are relatively stable, the department cannot ignore the conclusions in Presser and Naftz (2020) that the cross-sectional area of concentrations greater than 1 µg/L has been increasing. Moreover, some fish tissue data (rainbow trout, westslope cutthroat trout, longnose sucker) show a continued increase of selenium found in fish tissue from 2013-2019 (see slide 13 DEQ Presentation to BER 9/24/20). See the responses to COMMENT NOs. 151 through 154.

COMMENT NO. 199: We must show harm to change the status quo, the six years of data to establish a trend. This caused me concern, as I proposed that the current levels are actually traditional levels and we have no evidence of the contrary.

RESPONSE: The department determines whether the state's beneficial uses are harmed through our Monitoring and Assessment programs and development of our Integrated Report. Water quality standards are established not at background levels, but at concentrations to ensure protection of the beneficial use. Water quality criteria are based on data and scientific evaluation regarding the relationship between pollutant concentrations and potential environmental and human health effects. See COMMENT NOs. 129 and 149.

COMMENT NO. 200: The proposed rule is illegal. The proposed rule is more stringent than the federal guideline for the water column concentration portion, but without the required compliance with 75-5-203(2), MCA. There must be evidence in the record that the proposed standard protects public health or the environment.

RESPONSE: The board disagrees that the proposed rule is illegal because it did not comply with 75-5-203(2), MCA. EPA's 2016 selenium criterion document for freshwater contains an appendix, Appendix K. Appendix K describes methods by which site-specific selenium standards may be developed for individual waterbodies. Appendix K is discussed in twelve different locations throughout EPA's 2016 selenium document. EPA is very clear that "states and tribes may choose to adopt the results of site-specific water column translations as site-specific criteria..." Montana chose this approach.

The selenium standards in proposed NEW RULE I are not more stringent than currently recommended federal criteria. The proposed water column standard for the mainstem Kootenai River (3.1 µg/L) corresponds to the current (2016) EPA 304(a) criterion for lotic (flowing) waters. The proposed water column standard for Lake Koocanusa (0.8 µg/L) is based on EPA 304(a) fish tissue criteria and site-specific bioaccumulation modeling, following site-specific procedures set forth by

EPA in its current 304(a) guidance. The fish tissue standards in NEW RULE I include egg/ovary, muscle, and whole body, expressed as mg/kg dry weight, correspond to EPA's currently recommended 304(a) fish tissue criteria. Therefore, the proposed Kootenai River and Lake Koocanusa water column and fish tissue standards are no more stringent than currently recommended EPA 304(a) criteria because they correspond to federal standards or were developed using federally recommended site-specific procedures. Therefore, the board is not required to make written findings required by 75-5-203(2), MCA.

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Reviewed by:

BOARD OF ENVIRONMENTAL REVIEW

/s/ Edward Hayes

EDWARD HAYES

Rule Reviewer

BY: /s/ Christine Deveny

CHRISTINE DEVENY

Chair

Certified to the Secretary of State December 15, 2020.

BEFORE THE BOARD OF PARDONS AND PAROLE  
OF THE STATE OF MONTANA

In the matter of the adoption of New	)	NOTICE OF ADOPTION AND
Rule I pertaining to parole guidelines	)	AMENDMENT
and the amendment of ARM	)	
20.25.704 pertaining to conditional	)	
discharge from supervision	)	

TO: All Concerned Persons

1. On August 28, 2020, the Board of Pardons and Parole (board) published MAR Notice No. 20-25-70 pertaining to the public hearing on the proposed adoption and amendment of the above-stated rules at page 1556 of the 2020 Montana Administrative Register, Issue Number 16. On September 11, 2020, the board published an amended notice pertaining to the public hearing on the proposed adoption and amendment of the above-stated rules at page 1693 of the 2020 Montana Administrative Register, Issue Number 17

2. The board has adopted New Rule I (20.25.507) as proposed.

3. The board has amended ARM 20.25.704 as proposed.

4. The board has thoroughly considered the comments and testimony received. A summary of the comments and the board's responses are as follows:

COMMENT #1: A commenter stated that the Zoom webinar hearing was deliberately confusing making it difficult to comment. The commenter also stated that for some, the parole guidelines set standards that are almost unattainable and set the offender up for failure. The example given was when an offender is granted parole upon completion of a reentry program but no program accepts the offender and so he remains in prison. The commenter also posed general questions and expressed general concerns on various other issues unrelated to the rule proposal notice.

RESPONSE #1: The commenter had a full opportunity to present comments during the hearing. Following the hearing but before expiration of the comment period, the commenter also submitted comments in writing. Respectfully, the board does not agree that the parole guidelines set unattainable standards. In the circumstance described, an offender could, for example, request a reappearance under ARM 20.25.402 to present an alternative parole plan for the board's consideration or to request that the board amend the hearing disposition based on the circumstance described. The board endeavors when necessary and appropriate, to administratively eliminate parole barriers in a manner that both protects the public and positions the offender for successful parole.



The board is unable to respond herein to the commenter's other general comments and concerns that were unrelated to the rule proposal notice and outside the scope of the rule hearing. The commenter is encouraged to submit comments specifically related to the content of any rule proposal notice published by the board.

COMMENT #2: The commenter provided oral and written comments wherein he objected to the board "flopping" an offender due to prison rule infractions (institutional misconduct) even when the offender has completed the sentencing court's recommended conditions for parole. The commenter concluded that such action renders the courts' orders subject to change by the department.

The commenter also commented on various other matters unrelated to the rule proposal notice.

RESPONSE #2: The legislature directed that the board consider four factors, in decreasing order of importance, when making parole decisions. (46-23-218(3)(a), MCA). The four statutory factors are designated (2)(a) through (2)(d) in the proposed rule. Section (2)(c) is the "institutional behavior" factor and it is ranked third in importance. The board cannot adopt a rule that conflicts with statute by, for example, disregarding institutional misconduct. The "order of importance" of the four statutory factors is carried over into the point system established by the board in the proposed parole guidelines of NEW RULE I. Institutional misconduct of a serious nature committed within 6 months of an offender's parole hearing, as described in (2)(c) of NEW RULE I, is one indicator of a lack of readiness on the offender's part to succeed in the community on parole. (46-23-208(4)(c), (e), and (n), MCA). Parole is a privilege and not a right. It must be earned. A prison disciplinary appeal process is available to offenders who maintain that they did not commit a rule infraction for which they were found guilty in an institutional disciplinary proceeding.

The board is unable to respond herein to the matters contained in the comment which are unrelated to the rule proposal notice. The commenter is encouraged to submit comments relating to the specific content of any rule proposal notice published by the board.

COMMENT #3: The commenter submitted oral comments during the rule hearing and written comments after the hearing but before expiration of the comment period. The comments were as follows:

(a) The MORRA and WRNA risk and needs assessment instruments are not validated for Montana. A Council of State Governments (CSG) report was submitted by the commenter in support of the statement. The report recommended that validation not occur until the accuracy of the assessment instruments are confirmed through quality assurance and continuous quality improvement programs with racial and gender breakdowns. The commenter stated that the below-specified cultural biases perceived to be inherent in the MORRA and WRNA assessment instruments operate against Native American offenders in the board's parole decision making. The commenter requested that the board remove risk assessment from the parole guidelines rule and from consideration by the board in making parole decisions. The commenter also addressed an issue pertaining to rates of revocation of parole and

reincarceration. Additional comments pertained to matters unrelated to the rule proposal notice.

(b) The commenter identified unemployment data gathered in the administration of the instruments as a source of cultural bias against Native Americans that formulaically result in minorities' scores on the assessment being elevated. The commenter provided documentation that the unemployment rate on rural Indian reservations is significantly higher than the unemployment rate in majority white communities not on the reservations.

(c) The commenter also cited data pertaining to past incidences of domestic violence in households where offenders lived as another source of cultural bias that is embedded in the assessment instruments and negatively impacts Native American offenders' opportunity to be paroled. Such incidences are matters over which the offenders may not have had any control. For that reason, the commenter stated, such data pertaining to household domestic violence should not operate to disadvantage offenders again, later in life, in a parole decision making process.

(d) Educational experiences were also cited by the commenter as a source of bias against Native American offenders embedded in the risk assessment instruments used by the board. The commenter referred to a 2019 study by the ACLU entitled "Empty Desks" pertaining to indigenous students being disproportionately pushed out of the classroom and into the criminal justice system for adolescent behaviors that are not criminal in nature. The commenter concluded that the risk assessment inquiries into previous expulsions or suspensions from school, coupled with other life experiences referred to herein, negatively impact Native American offenders and elevates their MORRA and WRNA scores.

(e) The commenter objects to the board's consideration of the fourth statutory factor, i.e., risk reduction programming and treatment completion, in making paroling decisions. The commenter noted that an offender on a waiting list for programming can be bumped down the list by the department so that an offender nearer to their discharge date can receive the programming before release. Notwithstanding that the offender has no control over the wait list, two points are assigned by the board under its parole guidelines point system if an offender is on a "wait list" but has not completed the programming.

(f) Treatment interventions that focus on the crime without attempting to heal neurobiological wounds are futile. The commenter posited that the board should not use risk assessment as a tool to determine how soon an offender can be paroled and can gain access to non-punitive counseling, addiction and mental health treatment resources in the community that are not readily available through the Department of Corrections.

(g) There is no mechanism in place for an offender who is "flopped" for multiple years, to reappear before the board sooner than one year from the date of the board action. The commenter stated that an attorney for the legislative services division alerted the board or department of that problem.

(h) The commenter alleged abuse of power by prison staff, retaliatory discipline, denials of medication support to offenders under stress and in need of coping mechanisms, all amounting to an attempt to punish mental health into submission without providing anger management resources.

RESPONSE #3:

(a) The risk and needs assessment tools have long been in use around the country and were developed and validated by the University of Cincinnati. The lengthy process of "norming" the validated instruments for Montana is not complete. The board is an end-user of the risk and needs assessments administered by trained department personnel. As such, the board has no role in the validation process or the norming of the instruments.

The board is required by statute to use risk and needs assessments in making parole decisions. (46-23-218(3)(a)(i), MCA). The board cannot adopt an administrative rule that conflicts with statute by, for example, omitting the risk and needs assessments from consideration in making parole decisions. Removal of that factor from among those that the board must consider would require a legislative amendment.

The board is unable to respond herein to the matters contained in the comment which are unrelated to the rule proposal notice. The commenter is encouraged to submit comments relating to the specific content of any rule proposal notice published by the board.

(b) Any alleged cultural bias against American Indian offenders that is allegedly inherent in risk and needs assessment tools is neutralized or countered by the requirements in 2-15-2305(3)(a), MCA; 46-23-218(1) and (2), MCA; and ARM 20.25.102(1) and (2).

Employment history and stability of an offender's past employment experience are required to be considered by the board in making paroling decisions under 46-23-208(4)(j), MCA. Removal of that consideration would require a legislative amendment to the statute. The board is generally able to address historical employment instability administratively by requiring certain education services be secured as a parole supervision condition, e.g., a requirement that the offender obtain a vocational rehabilitation evaluation and/or undergo job training or counseling while under supervision.

(c) Any alleged cultural bias against American Indian offenders allegedly inherent in risk and needs assessment tools is neutralized or countered by the requirements in 2-15-2305(3)(a), MCA; 46-23-218(1) and (2), MCA; and ARM 20.25.102(1) and (2).

Household domestic violence is not unique to American Indian households. Board members must receive training in American Indian culture *and problems* under 46-23-218(1) and (2), MCA and ARM 20.25.102. The training mitigates any alleged bias borne of a lack of awareness of household domestic violence in American Indian households.

(d) Any alleged cultural bias against American Indian offenders allegedly inherent in risk and needs assessment tools is neutralized or countered by the requirements in 2-15-2305(3)(a), MCA; 46-23-218(1) and (2), MCA; and ARM 20.25.102(1) and (2).

Education is required to be considered by the board in making parole decisions under 46-23-208(4)(h), MCA, and in considering parole release conditions under 46-23-218(3)(c), MCA. Education is one of the domains evaluated in a risk and needs assessment as stated in (5) of NEW RULE I. Removal of education as a factor to be considered by the board would require legislative amendments. The

board is generally able to address education deficits administratively by setting parole supervision conditions related to education in appropriate circumstances.

(e) Wait lists for offenders in need of treatment do exist in the dynamic environment of offender programming. It is not uncommon for a person on a wait list to be bumped further down the list by the department to accommodate the treatment needs of another offender who is nearer to their discharge or release date. The board is required under 46-23-218(3)(a)(iii), MCA, to consider an offender's participation in risk reduction programs and treatment completion. That factor is therefore included as (2)(b) in the parole guidelines rule. The point system established in NEW RULE I is consistent with the "decreasing order of importance" measure in 46-23-218(3), MCA. If an offender has been unable to complete treatment for *any* reason, the risk still exists. The board must take that risk to the public into account when making parole decisions. When appropriate in light of all of the circumstances, the board may be able to administratively address the issue of backlogs and waiting lists by ordering completion of treatment as a condition of parole supervision upon being paroled into the community.

(f) Respectfully, the board disagrees that "non-punitive" counseling, addiction, and mental health treatment resources are not readily available to offenders in prison. All of those resources are readily available. Provision of mental health and addiction related services in a prison setting does not make them "punitive" services.

The board is required by statute to use risk and needs assessments in making parole decisions. (46-23-218(3)(a)(i), MCA). The board cannot adopt an administrative rule that conflicts with statute by, for example, omitting the risk and needs assessments from consideration so that offenders could parole to the community to secure "non-punitive" treatment services.

(g) The board did not receive a comment from an attorney for legislative services division concerning MAR Notice No. 20-25-70 pertaining to NEW RULE I (parole guidelines) or pertaining to ARM 20.25.704 (Conditional Discharge From Supervision). Reappearances before the board sooner than one year after an offender is "flogged" for multiple years is unrelated to MAR Notice No. 20-25-70. Accordingly, the board is unable to respond to the comment herein. The commenter is encouraged to submit comments that are specifically related to any rule proposal notice that the board publishes.

In due course, the board intends to publish notice of proposed amendments to ARM 20.25.402 which rule pertains, in part, to timing of reappearances before the board after being denied parole. When that occurs, the commenter is encouraged to submit comments. In any event, the timing of reappearances is already set by statute (46-23-201(5), MCA) and the board complies with that statute. Rules may not unnecessarily repeat statutory language. (2-4-305(2), MCA)

(h) Respectfully, the board is not involved in and has no control over prison operations. If abuses of power by prison staff, retaliatory discipline, denials of medication support are alleged to have occurred, there are internal institutional procedures and remedies afforded to the offenders. The internal institutional procedures and remedies include grievance procedures, emergency grievance procedures, grievance appeals, disciplinary hearings, and disciplinary appeals. In

addition, offenders have a right of access to the courts for the redress of cognizable legal claims.

COMMENT #4: The commenter referred to the notice of public hearing on the parole guidelines rule, but otherwise the comment was unrelated to the specific content of the rule proposal notice. The commenter stated that he was denied parole in 2020 and that the board was to have begun using the MORRA point system in 2017. The remainder of the commenter's submission pertained to numerous other grievances and legal claims related to the commenter's individual legal circumstances.

RESPONSE #4: As stated in the REASON for the parole guidelines as set out in the rule proposal notice, the statutory factors that the board must consider in making paroling decisions and the framework for the point system and scoring model for weighting those factors in "decreasing order of importance" have been in use by the board since August 2017. The rest of the commenter's comments were unrelated to the rule proposal notice and outside the scope of the rule hearing. Accordingly, the board is unable to respond herein to those comments. The commenter is encouraged to submit comments that are specifically related to the content of any rule proposal notice that is published by the board.

PROPOSED AMENDMENT OF ARM 20.25.704, Conditional Discharge From Supervision.

COMMENT #5: Although no public comments were received pertaining to the proposed amendment of ARM 20.25.704 Conditional Discharge From Supervision, one comment was submitted alleging that the board violated the rule in the commenter's particular circumstances.

RESPONSE #5: Inasmuch as the comment is unrelated to the proposed amendments of ARM 20.25.704 and is outside the scope of the hearing, the board is not able to respond to the comment. The commenter is encouraged to submit comments pertaining to the specific content of any rule proposal notice published by the board.

/s/ Colleen E. Ambrose  
Colleen E. Ambrose  
Rule Reviewer

/s/ Annette Carter  
Annette Carter  
Chair  
Board of Pardons and Parole

Certified to the Secretary of State December 15, 2020.

BEFORE THE DEPARTMENT OF JUSTICE  
OF THE STATE OF MONTANA

In the matter of the adoption of New	)	NOTICE OF ADOPTION AND
Rules I through VII and the	)	AMENDMENT
amendment of ARM 23.3.231,	)	
23.18.301, 23.18.302, 23.18.303,	)	
23.18.304, 23.18.305, 23.18.306,	)	
23.18.308, and 23.18.309 pertaining	)	
to the Montana 24/7 Sobriety	)	
Program Act	)	

TO: All Concerned Persons

1. On October 9, 2020, the Department of Justice published MAR Notice No. 23-18-249 pertaining to the public hearing on the proposed adoption and amendment of the above-stated rules at page 1804 of the 2020 Montana Administrative Register, Issue Number 19.

2. The department has adopted New Rules I (23.18.310), II (23.18.311), III (23.18.312), IV (23.18.313), V (23.18.314), VI (23.18.315), and VII (23.18.316) as proposed.

3. The department has amended ARM 23.3.231, 23.18.301, 23.18.302, 23.18.303, 23.18.304, 23.18.305, 23.18.306, 23.18.308, and 23.18.309 as proposed.

4. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

COMMENT 1: Jake Heard of Intoxalock provided written comment regarding the proposed changes to ARM 23.18.301. Mr. Heard commented that Intoxalock supports the inclusion of ignition interlock devices within the definition of "remote breath testing device."

RESPONSE TO COMMENT 1: The department agrees with the comments made by Intoxalock.

COMMENTS 2-3: Matthew Mitchell of SCRAM Systems Inc. provided written comment regarding the proposed changes to ARM 23.18.301 and 23.18.304. Mr. Mitchell requested that the department rewrite the definition of "24/7 sobriety program" or "program" to clarify whether the definition applies to all court-ordered alcohol and drug testing. Mr. Mitchell also commented that the department should consider eliminating the distinction between a primary testing methodology and a hardship testing methodology.

RESPONSE TO COMMENTS 2-3: The department disagrees. The department concluded that ARM 23.18.301, as amended, sufficiently defines the "24/7 sobriety program" or "program." Further, the department determined that the distinction between the primary testing methodology and the hardship testing methodology as stated in amended ARM 23.18.304 appropriately follows the statutory framework set out in 44-4-1203, MCA.

/s/ Hannah E. Tokerud  
Hannah E. Tokerud  
Rule Reviewer

/s/ Timothy C. Fox  
Timothy C. Fox  
Attorney General

Certified to the Secretary of State December 15, 2020.

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY  
STATE OF MONTANA

In the matter of the adoption of NEW ) NOTICE OF ADOPTION  
RULES I through VII pertaining to )  
HELP-Link )

TO: All Concerned Persons

1. On November 6, 2020, the Department of Labor and Industry (department) published MAR Notice No. 24-13-366 pertaining to the public hearing on the proposed adoption of the above-stated rules at page 1958 of the 2020 Montana Administrative Register, Issue Number 21.

2. The department held a public hearing in Helena on December 4, 2020, over the Zoom videoconference and telephonic platform at which no members of the public commented. No written comments were received during the public comment period.

3. The department has adopted New Rule I (24.13.201), New Rule II (24.13.204), New Rule III (24.13.207), New Rule IV (24.13.210), New Rule V (24.13.213), New Rule VI (24.13.216), and New Rule VII (24.13.219) as proposed.

/s/ QUINLAN L. O'CONNOR  
Quinlan L. O'Connor  
Alternate Rule Reviewer

/s/ BRENDA NORDLUND  
Brenda Nordlund, Acting Commissioner  
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State December 15, 2020.



BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY  
STATE OF MONTANA

In the matter of the amendment of ) NOTICE OF AMENDMENT  
ARM 24.17.127 pertaining to )  
prevailing wage rates for public works )  
projects )

TO: All Concerned Persons

1. On October 23, 2020, the Department of Labor and Industry (department) published MAR Notice No. 24-17-363 regarding the public hearing on the proposed amendment of the above-stated rule on page 1862 of the 2020 Montana Administrative Register, Issue Number 20.

2. On November 13, 2020, a public hearing was held at which time members of the public made oral and written comments and submitted documents. Additional comments were received during the comment period.

3. The department has thoroughly considered the comments and testimony received from the public. The following is a summary of the public comments received and the department's responses to those comments:

COMMENT 1: In an e-mail to the department, Tom Halvorson, civil attorney, Sidney, Montana, submitted a letter on behalf of Richland County Commissioners, Shane Gorder, Loren H. Young, and Chairman Duane Mitchell. The letter points out that district 4 has one dispatch city compared to two for the other districts and the land mass of the districts are not proportionate, which he alleges creates a "systemic bias" against district 4 in the pricing of labor on prevailing wage projects, and "The procedure followed thus far is not really open to public participation when it does not allow consideration of adding dispatch cities to district 4 and yet the designation of dispatch cities is determinant of the resulting prevailing rates." The letter shows a state map graphic of glaziers prevailing wage rates across prevailing wage districts. They also state that while a letter from the Commissioner of Labor in 2019 expressed that Sidney and Miles City do not have a sufficient number of local contractors or the local expertise to complete the designed projects, Richland County has "undertaken multiple substantial construction projects, and they were completed by local contractors and contractors much closer than Billings."

RESPONSE 1: While geographical symmetry is a goal when considering prevailing wage districts and dispatch cities, the initial number and location of dispatch cities were carefully selected by a workgroup of contractors and unions. Reasons for selecting dispatch cities at that time included but were not limited to: population, university locations, industry similarities, and where heavy equipment operators and other specialty workers were typically dispatched. According to 2019 Census Bureau Data current prevailing wage district populations can be computed as follows: district 1--334,160; district 2--193,151; district 3--267,250; and district 4--

274,217. While district 4 has the second highest population, Yellowstone County accounts for 161,300 of the population, which would leave the remainder of district 4 with a population of 112,917, and by far the lowest if it were a district in and of itself.

Robust survey responses were the most important factors in establishing prevailing wage rates that reflected what was being paid in areas at that time. This is why some prevailing wage rates, glaziers for example, that typically have sporadic, low volume survey responses are nonlinear across districts, and crafts that typically have consistent, higher volume responses like carpenters, electricians, ironworkers, operators, and plumbers show more consistency across districts and within districts year to year.

The department surveys contractors that perform commercial, industrial, or public works construction and have employees. The survey data collection period was from April 1, 2019 through March 31, 2020. Survey responses for Billings, Miles City, and Sidney are as follows:

**Billings**

Number of Contractors Surveyed – 403

Number of Those That Performed Work – 37

Number of Those That Did Not Meet Criteria (Residential, Subcontracted Work, etc.) – 8

Number of Those Indicated They Did Not Perform Work During the Survey Data Collection Period – 10

Number That Did Not Respond – 348

**Miles City**

Number of Contractors Surveyed – 41

Number of Those That Performed Work – 1

Number of Those That Did Not Meet Criteria (Residential, Subcontracted Work, etc.) – 1

Number of Those Indicated They Did Not Perform Work During the Survey Data Collection Period – 2

Number That Did Not Respond – 37

**Sidney**

Number of Contractors Surveyed – 34

Number of Those That Performed Work – 0

Number of Those That Did Not Meet Criteria (Residential, Subcontracted Work, etc.) – 0

Number of Those Indicated They Did Not Perform Work During the Survey Data Collection Period – 3

Number That Did Not Respond – 31

In response to, "The procedure...does not allow consideration of adding dispatch cities to district 4," the department has the flexibility to establish up to five districts and to have as many dispatch cities as stakeholders choose at the time.

Administrative Rules of Montana (ARM) 24.17.103 determines the number of prevailing wage districts and their boundaries while ARM 24.17.107 determines the

number and location of dispatch cities. The department appreciates the continued interest in making the prevailing wage process work for contractors, political subdivisions of the state, and workers. The department is always willing to facilitate meetings amongst prevailing wage stakeholders and to use its rulemaking authority to address this issue.

COMMENT 2: Representative Kenneth Holmlund, HD38, Miles City, spoke to the "unfairness" Miles City suffers due to it being void of a prevailing wage dispatch city, and will introduce a bill to add dispatch cities.

RESPONSE 2: The department acknowledges Representative Holmlund's comment.

COMMENT 3: Joel Worth, business representative, Carpenters Local 82, said metal roofing had been under the carpenter classification, was moved to roofer, and should be moved back to carpenter. The department received an e-mail from Mario Martinez, business representative, containing letters from various Local 82 contractors expressing their concern that metal roofing had been removed from the carpenter classification and wanted to have data submitted for the metal roofing, or roofing in general they had performed.

RESPONSE 3: The department has not classified metal roofing on prevailing wage projects as carpenter work. It was previously under sheet metal worker and was moved to roofer in the Montana Prevailing Wage Rates for Building Construction 2019 publication, effective January 26, 2019. The department acknowledges it may be reasonable to consider data from union contractors who are not signatory to the craft in which they are submitting data. However, the department's rate survey has not historically received data from union carpenter contractors to be included into the roofers' wage and hourly benefit calculations. The public comment period offers the opportunity for interested parties to provide views, offer suggestions, point out typos, and submit additional data. However, this recently submitted data would substantially alter the final rates without the opportunity for public comment. Accordingly, the integrity of the prevailing wage rate-setting process prohibits the department from incorporating the data submitted by the carpenter's union into the roofer classification at this time. The department will seek that information during its next survey cycle, with the intention to include that work in the roofer classification. Inclusion of that work as being part of the roofer classification in the next survey will provide other trade classifications the opportunity to object if those other trades claim that work is not properly classified as falling under the roofer classification.

COMMENT 4: Jim Wonnacott, business representative, Ironworkers Local 732, asked if work on solar farms could be added to the prevailing wage.

RESPONSE 4: If the state or any political subdivision of the state were to build a solar farm there are enough classifications in the heavy construction publication to cover the work.

COMMENT 5: Various individuals and entities submitted additional data or documents for inclusion in the rate-setting process during the comment period.

RESPONSE 5: The department has reviewed the information submitted. The department has incorporated the data as appropriate and has revised certain rates in line with the rate-setting standards. Revised rates are identified below in paragraphs 4 through 6.

4. The following rates in the "Montana Prevailing Wage Rates for Building Construction Services 2021" publication, incorporated by reference in the rule, have been amended as follows, stricken matter interlined, new matter underlined:

### **Brick, Block, and Stone Masons**

#### **Duties Include:**

Lays out, lays, cuts, installs, and finishes all brick, structural tile, refractory materials, precast units, concrete, cinder, glass, gypsum, terra cotta block, and all other natural and artificial masonry products to construct or repair walls, partitions, stacks, furnaces, or other structures.

Sets stone to build stone structures such as piers, walls, and abutments, and lays walks, curbstones, or special types of masonry for vats, tanks, and floors. May set, cut, and dress ornamental and structural stone in buildings. This classification is tended by Tender to Masons Trades: Brick and Stonemason, Mortar Mixer, Hod Carrier.

### **Heating and Air Conditioning**

	<b>Wage</b>	<b>Benefit</b>
District 1	<del>\$33.38</del> <u>30.92</u>	<del>\$16.03</del> <u>17.33</u>
District 2	<del>\$30.09</del> <u>30.84</u>	<del>\$18.83</del> <u>19.38</u>
District 3	<del>\$30.09</del> <u>30.84</u>	<del>\$18.83</del> <u>19.38</u>
District 4	<del>\$30.09</del> <u>30.84</u>	<del>\$18.83</del> <u>19.38</u>

### **Insulation Workers – Mechanical (Heat and Frost)**

	<b>Wage</b>	<b>Benefit</b>
District 1	<del>\$33.37</del> <u>35.37</u>	<del>\$21.87</del> <u>19.87</u>
District 2	<del>\$33.37</del> <u>35.37</u>	<del>\$21.87</del> <u>19.87</u>
District 3	<del>\$33.37</del> <u>35.37</u>	<del>\$21.87</del> <u>19.87</u>
District 4	<del>\$33.37</del> <u>35.37</u>	<del>\$21.87</del> <u>19.87</u>

#### **Travel:**

##### **All Districts**

0-30 mi. free zone

>30-40 mi. \$25.00/day

>40-50 mi. \$35.00/day

- >50-60 mi. \$45.00 50.00/day  
>60 mi. \$60.00/day plus
- \$0.56/mi. if transportation is not provided.
  - \$0.20/mi. if in company vehicle.
- >60 mi. ~~\$90.00~~ 95.00/day on jobs requiring an overnight stay plus
- \$0.56/mi. if transportation is not provided.
  - \$0.20/mi. if in company vehicle.

### **Pile Bucks**

#### **Duties Include:**

~~Set up crane; set up hammer; weld tips on piles; set leads; insure piles are driven straight with the use of level or plum bob. Give direction to crane operator as to speed and direction of swing. Cut piles to grade.~~

On all pile driving, bridge, wharf, building, and caisson work, on both land and water, the Pile Driver classification shall apply. General pile driving work shall include all labor employed in the barking, shoeing, splicing, form building, heading, centering, placing, driving, staying, framing, fastening, demo, tooling of the cutter head, lagging, automatic pile threading, pulling, and/or cutting off of all piling, to include all pile of any make and material as well as similar pre-cast structural shapes or units the setting of which is performed with a pile driver, derrick, crane, or similar power equipment. Fabrication, forming, handling, and setting of all such pre-cast, pre-stressed and post-stressed shapes that are an integral part of any heavy structure, rafting, boring, reeving, dogging, or booming of piles or other material. This shall include the unloading of piling of all types together with the wailing and bracing thereof.

### **Sheet Metal Workers**

	<b>Wage</b>	<b>Benefit</b>
District 1	<del>\$30.09</del> <u>30.84</u>	<del>\$18.83</del> <u>19.38</u>
District 2	<del>\$30.09</del> <u>30.84</u>	<del>\$18.83</del> <u>19.38</u>
District 3	<del>\$30.09</del> <u>30.84</u>	<del>\$18.83</del> <u>19.38</u>
District 4	<del>\$30.09</del> <u>30.84</u>	<del>\$18.83</del> <u>19.38</u>

5. The following rates in the "Montana Prevailing Wage Rates for Heavy Construction Services 2021" publication, incorporated by reference in the rule, have been amended as follows, stricken matter interlined, new matter underlined:

### **Brick, Block, and Stone Masons**

#### **Duties Include:**

Lays out, lays, cuts, installs, and finishes all brick, structural tile, refractory materials, precast units, concrete, cinder, glass, gypsum, terra cotta block, and all other natural and artificial masonry products to construct or repair walls, partitions, stacks, furnaces, or other structures.

Sets stone to build stone structures such as piers, walls, and abutments, and lays walks, curbstones, or special types of masonry for vats, tanks, and floors. May set, cut, and dress ornamental and structural stone in buildings. This classification is tended by Tender to Masons Trades: Brick and Stonemason, Mortar Mixer, Hod Carrier.

### **Construction Equipment Operator Group 1**

<b>Wage</b>	<b>Benefit</b>
<del>\$27.91</del> <u>28.21</u>	<del>\$13.67</del> <u>13.65</u>

#### **This group includes but is not limited to:**

Air Compressor; Auto Fine Grader; Belt Finishing; Boring Machine (Small) 12 inch and under; Cement Silo; Crane, A-Frame Truck Crane; Crusher Conveyor; DW-10, 15, and 20 Tractor Roller; Farm Tractor; Forklift; Form Grader; Front-End Loader, under 1 cu. yd; ~~Oiler, Heavy Duty Drills~~; Herman Nelson Heater; Mucking Machine; Oiler, All Except Cranes/Shovels; Pumpman.

### **Construction Equipment Operator Group 2**

<b>Wage</b>	<b>Benefit</b>
\$29.33	<del>\$13.67</del> <u>13.65</u>

### **Construction Equipment Operator Group 3**

<b>Wage</b>	<b>Benefit</b>
<del>\$29.45</del> <u>29.75</u>	<del>\$13.67</del> <u>13.65</u>

#### **This group includes but is not limited to:**

Asphalt Paving Machine; Asphalt Screed; Backhoe\Excavator\Shovel, over 3 cu. yds; Cableway Highline; Concrete Batch Plant; Concrete Curing Machine; Concrete Pump; Cranes, Creter; Cranes, Electric Overhead; Cranes, 24 tons and under; Curb Machine\Slip Form Paver; Finish Dozer; Front-End Loader, over 5 cu. yds; Mechanic\Welder; Pioneer Dozer; Roller Asphalt (Breakdown & Finish); Rotomill, over 6 ft; Scraper, Single, Twin, or Pulling Belly-Dump; YO-YO Cat; Haul Truck, Articulating Truck; Vac Truck.

### **Construction Equipment Operator Group 4**

<b>Wage</b>	<b>Benefit</b>
<del>\$30.45</del> <u>30.75</u>	<del>\$13.67</del> <u>13.65</u>

### Construction Equipment Operator Group 5

Wage	Benefit
<del>\$31.45</del> <u>31.75</u>	<del>\$13.67</del> <u>13.65</u>

### Construction Equipment Operator Group 6

Wage	Benefit
<del>\$32.45</del> <u>32.75</u>	<del>\$13.67</del> <u>13.65</u>

### Construction Equipment Operator Group 7

Wage	Benefit
<del>\$33.45</del> <u>33.75</u>	<del>\$13.67</del> <u>13.65</u>

### Insulation Workers – Mechanical (Heat and Frost)

Wage	Benefit
<del>\$36.87</del> <u>38.87</u>	<del>\$21.87</del> <u>19.87</u>

#### Travel:

##### All Districts

0-30 mi. free zone

>30-40 mi. \$25.00/day

>40-50 mi. \$35.00/day

>50-60 mi. ~~\$45.00~~ 50.00/day

>60 mi. \$60.00/day plus

- \$0.56/mi. if transportation is not provided.
- \$0.20/mi. if in company vehicle.

>60 mi. ~~\$90.00~~ 95.00/day on jobs requiring an overnight stay plus

- \$0.56/mi. if transportation is not provided.
- \$0.20/mi. if in company vehicle.

#### Pile Bucks

#### Duties Include:

~~Set up crane; set up hammer; weld tips on piles; set leads; insure piles are driven straight with the use of level or plum bob. Give direction to crane operator as to speed, and direction of swing. Cut piles to grade.~~

On all pile driving, bridge, wharf, building, and caisson work, on both land and water, the Pile Driver classification shall apply. General pile driving work shall include all labor employed in the barking, shoeing, splicing, form building,

heading, centering, placing, driving, staying, framing, fastening, demo, tooling of the cutter head, lagging, automatic pile threading, pulling, and/or cutting off of all piling, to include all pile of any make and material as well as similar pre-cast structural shapes or units the setting of which is performed with a pile driver, derrick, crane, or similar power equipment. Fabrication, forming, handling, and setting of all such pre-cast, pre-stressed and post-stressed shapes that are an integral part of any heavy structure, rafting, boring, reeving, dogging, or booming of piles or other material. This shall include the unloading of piling of all types together with the wailing and bracing thereof.

6. The following rates in the "Montana Prevailing Wage Rates for Highway Construction Services 2021" publication, incorporated by reference in the rule, have been amended as follows, stricken matter interlined, new matter underlined:

### **Brick, Block, and Stone Masons**

#### **Duties Include:**

Lays out, lays, cuts, installs, and finishes all brick, structural tile, refractory materials, precast units, concrete, cinder, glass, gypsum, terra cotta block, and all other natural and artificial masonry products to construct or repair walls, partitions, stacks, furnaces, or other structures.

Sets stone to build stone structures such as piers, walls, and abutments, and lays walks, curbstones, or special types of masonry for vats, tanks, and floors. May set, cut, and dress ornamental and structural stone in buildings. This classification is tended by Tender to Masons Trades: Brick and Stonemason, Mortar Mixer, Hod Carrier.

### **Pile Bucks**

#### **Duties Include:**

~~Set up crane; set up hammer; weld tips on piles; set leads; insure piles are driven straight with the use of level or plum bob. Give direction to crane operator as to speed, and direction of swing. Cut piles to grade.~~

On all pile driving, bridge, wharf, building, and caisson work, on both land and water, the Pile Driver classification shall apply. General pile driving work shall include all labor employed in the barking, shoeing, splicing, form building, heading, centering, placing, driving, staying, framing, fastening, demo, tooling of the cutter head, lagging, automatic pile threading, pulling, and/or cutting off of all piling, to include all pile of any make and material as well as similar pre-cast structural shapes or units the setting of which is performed with a pile driver, derrick, crane, or similar power equipment. Fabrication, forming, handling, and setting of all such pre-cast, pre-stressed and post-stressed shapes that are an integral part of any heavy structure, rafting, boring,



reeving, dogging, or booming of piles or other material. This shall include the unloading of piling of all types together with the wailing and bracing thereof.

7. The department has amended ARM 24.17.127 as proposed.
8. The effective date for this rule amendment is January 1, 2021.

/s/ QUINLAN L. O'CONNOR  
Quinlan L. O'Connor  
Alternate Rule Reviewer

/s/ BRENDA NORDLUND  
Brenda Nordlund, Acting Commissioner  
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State December 15, 2020.

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY  
STATE OF MONTANA

In the matter of the amendment of ) NOTICE OF AMENDMENT  
ARM 24.21.102, 24.21.202, )  
24.21.302, and 24.21.421 pertaining )  
to the apprenticeship and training )  
program )

TO: All Concerned Persons

1. On November 6, 2020, the Department of Labor and Industry (department) published MAR Notice No. 24-21-362 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 1964 of the 2020 Montana Administrative Register, Issue Number 21.

2. The department held a public hearing in Helena on December 4, 2020, over the Zoom videoconference and telephonic platform at which no members of the public commented. No written comments were received during the public comment period.

3. The department has amended ARM 24.21.102, 24.21.202, 24.21.302, and 24.21.421 as proposed.

/s/ QUINLAN L. O'CONNOR  
Quinlan L. O'Connor  
Alternate Rule Reviewer

/s/ BRENDA NORDLUND  
Brenda Nordlund, Acting Commissioner  
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State December 15, 2020.

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY  
STATE OF MONTANA

In the matter of the adoption of New        ) NOTICE OF ADOPTION  
Rules I through VIII pertaining to the        )  
implementation of the Montana                )  
Employment Advancement Right Now        )  
Program Act                                        )

TO: All Concerned Persons

1. On November 6, 2020, the Department of Labor and Industry published MAR Notice No. 24-22-368 pertaining to the public hearing on the proposed adoption of the above-stated rules at page 1969 of the 2020 Montana Administrative Register, Issue Number 21.

2. The department held a public hearing in Helena on December 2, 2020, over the Zoom videoconference and telephonic platform. Two comments were received by the December 7, 2020, public comment deadline.

3. The department has thoroughly considered the comments received. A summary of the comments and the department's responses are as follows:

COMMENT 1: A commenter spoke in favor of adoption of the new rules.

RESPONSE 1: The department acknowledges the comment.

COMMENT 2: A commenter suggested that the department should amend the rules to allow for grant awards greater than \$5,000. The commenter suggested that the department could use the limited solicitation procedure to allow for grant awards greater than \$5,000, and up to \$25,000 per grant application.

RESPONSE 2: The department acknowledges the comment, and adopts the suggested changes as described above. A larger amount of grant funding per application will allow strategic industry partnerships to implement more effective programs to fulfill the purpose of the EARN Program.

4. The department has adopted the following rules as proposed: New Rules I (24.22.501); II (24.22.504); III (24.22.507); IV (24.22.510); VI (24.22.516); VII (24.22.519); and VIII (24.22.522).

5. The department has adopted New Rule V (24.22.513) with the following changes, stricken matter interlined, new matter underlined:

NEW RULE V (24.22.513) AWARD OF GRANTS AND PAYMENTS  
(1) remains as proposed.

(2) ~~The maximum available for a lead applicant awarded a grant is \$5,000.~~  
The department may award a grant for less than the full amount requested. The amount of a grant that is awarded is the maximum payable for the grant.

(a) The department may award grant funding up to \$5,000 to a lead applicant without use of the limited solicitation procedure outlined in (b).

(b) The department, in its sole discretion, may request grant applications in the form of limited solicitations pursuant to the Montana Procurement Act, Title 18, chapter 4, MCA, for grant applications requesting over \$5,000 and not more than \$25,000.

(3) through (5) remain as proposed.

/s/ QUINLAN L. O'CONNOR  
Quinlan L. O'Connor  
Alternate Rule Reviewer

/s/ BRENDA NORDLUND  
Brenda Nordlund, Acting Commissioner  
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State December 15, 2020.

BEFORE THE BOARD OF PERSONNEL APPEALS  
DEPARTMENT OF LABOR AND INDUSTRY  
STATE OF MONTANA

In the matter of the amendment of	)	NOTICE OF AMENDMENT,
ARM 24.26.102, 24.26.204, 24.26.207,	)	AMENDMENT AND TRANSFER,
24.26.209, 24.26.229, 24.26.518,	)	ADOPTION, REPEAL, AND
24.26.523, 24.26.530, the amendment	)	TRANSFER
and transfer of 24.26.603, 24.26.604,	)	
24.26.651, 24.26.665, 24.26.667,	)	
24.26.695, 24.26.695A, 24.26.697,	)	
24.26.698, 24.26.698A, the adoption of	)	
New Rules I through XLVII, and the	)	
repeal of ARM 24.25.101, 24.25.102,	)	
24.25.103, 24.25.104, 24.25.105,	)	
24.25.107, 24.25.201, 24.25.203,	)	
24.25.204, 24.25.301, 24.25.302,	)	
24.25.303, 24.25.304, 24.25.305,	)	
24.25.306, 24.25.307, 24.25.308,	)	
24.25.401, 24.25.501, 24.25.502,	)	
24.25.503, 24.25.504, 24.25.505,	)	
24.25.601, 24.25.701, 24.25.702,	)	
24.25.703, 24.25.704, 24.25.801,	)	
24.25.802, 24.25.803, 24.25.804,	)	
24.26.101, 24.26.202, 24.26.203,	)	
24.26.205, 24.26.206, 24.26.208,	)	
24.26.210, 24.26.211, 24.26.212,	)	
24.26.215, 24.26.219, 24.26.221,	)	
24.26.222, 24.26.224, 24.26.230,	)	
24.26.501, 24.26.502, 24.26.503,	)	
24.26.508, 24.26.601, 24.26.602,	)	
24.26.610, 24.26.611, 24.26.612,	)	
24.26.614, 24.26.616, 24.26.617,	)	
24.26.618, 24.26.620, 24.26.622,	)	
24.26.630, 24.26.643, 24.26.644,	)	
24.26.645, 24.26.646, 24.26.647,	)	
24.26.648, 24.26.649, 24.26.650,	)	
24.26.655, 24.26.656, 24.26.657,	)	
24.26.658, 24.26.659, 24.26.660,	)	
24.26.661, 24.26.662, 24.26.663,	)	
24.26.664, 24.26.666, 24.26.680,	)	
24.26.680A, 24.26.680B, 24.26.681,	)	
24.26.682, 24.26.683, 24.26.684,	)	
24.26.685, and the transfer of	)	
24.25.206 pertaining to the practices of	)	
and procedures before the Board of	)	
Personnel Appeals	)	

TO: All Concerned Persons

1. On November 6, 2020, the Board of Personnel Appeals (board) published MAR Notice No. 24-26-353 pertaining to the public hearing on the proposed amendment, adoption, repeal, and transfer of the above-stated rules at page 1977 of the 2020 Montana Administrative Register, Issue Number 21.

2. On November 30, 2020, a public hearing was held over the Zoom videoconference and telephonic platform. Many comments were received by the December 7, 2020, public comment deadline.

3. The board has thoroughly considered the comments made. A summary of the comments and the board's responses are as follows:

COMMENT 1: A commenter expressed support of the proposed changes to the rules.

RESPONSE 1: The board acknowledges the comment.

COMMENT 2: A commenter expressed support for combining the rules found in ARM Title 24, ch. 25, regarding Collective Bargaining for Nurses with ARM Title 24, ch. 26, general rules for the Board of Personnel Appeals. The commenter believes that combining the rules will bring consistency and uniformity.

RESPONSE 2: The board acknowledges the comment.

COMMENT 3: A commenter stated support for the changes to the rules regarding Petitions for Elections.

RESPONSE 3: The board acknowledges the comment.

COMMENT 4: A commenter asked the reasons for new rules being proposed at this time in addition to the board's Statements of Reasonable Necessity found in MAR Notice No. 24-26-353.

RESPONSE 4: The board's reasons for adopting new rules are addressed in the board's statements of reasonable necessity in MAR Notice No. 24-26-353, published November 6, 2020.

COMMENT 5: A commenter suggested that the amendments to ARM 24.26.102(6) do not specify that the board is acting in its appellate level. The commenter suggested that parties will engage in ex parte communications by asking individual board members for extensions and procedural question on matters before the board.

RESPONSE 5: The commenter is correct that if a party directly requests a procedural order from an individual board member, when the matter has been set for

a hearing before a hearing officer or the board, then the request is a prohibited ex parte communication under ARM 24.26.229. The board has included instructions for properly filing a request for extension of time under NEW RULE III (24.26.246) FILINGS WITH THE BOARD.

COMMENT 6: A commenter expressed concern that the definition of an excelsior list under ARM 24.26.207(12) includes a telephone number for employees. The commenter asserts that this will cause controversy and telephone numbers should be removed from the definition of excelsior list.

RESPONSE 6: The board asserts that phone numbers for employees on an excelsior list are necessary for speed and efficiency of communication. For example, a board agent may use phone numbers to verify authorization cards pursuant to ARM 24.26.604 (24.26.1002) REQUIREMENTS FOR PROOF OF INTEREST AUTHORIZATION DOCUMENTS – CONFIDENTIALITY filed in support of a unit determination petition, a petition to intervene, or a decertification petition.

COMMENT 7: A commenter expressed concern over NEW RULE XII (24.26.1005) APPROPRIATE UNIT because the new rule combines two prior rules that are being repealed, 24.26.610 COMPOSITION OF UNIT and 24.26.611 APPROPRIATE UNIT. The commenter believes that combining the two rules will cause confusion.

RESPONSE 7: The board has divided NEW RULE XII into two rules, as outlined above, to avoid confusion.

COMMENT 8: A commenter would like the deadline for filing objections to the hearing officer's decision with the board reduced from 20 days to 10 or fewer days under NEW RULE XVII (24.26.1016) EMPLOYER COUNTER PETITION, subsection (4)(a). The commenter asserts that the deadline to file objections with the board should be the same amount of time as the deadline to file an Employer Counter Petition. The commenter argues that the employees do not have the protections of a CBA at this point of the proceedings, and the employees should not have to wait additional time for formation of a bargaining unit.

RESPONSE 8: The board acknowledges the importance of efficient formation of unit determination matters. As outlined above, the board has amended the 20-day deadline to 10 days.

COMMENT 9: A commenter suggested that the board include a definition for consent elections to avoid confusion between consent elections, voluntarily recognition, and other board procedures.

RESPONSE 9: The requirements for a consent election are found in NEW RULE XXXIV (24.26.1072) CONSENT ELECTION.

COMMENT 10: Commenters expressed concern that the amendments to ARM 24.26.229 EX PARTE COMMUNICATIONS would prevent mediators, election

judges, and other board agents from completing their work. The commenters specifically referenced concern over the ability of parties to engage in "side bar" discussions with a mediator or discussions with an investigator.

RESPONSE 10: "At any time that petitions, complaints, exceptions, election challenges, or other contested case matters have been set for hearing before the hearing officer or the board, ex parte communications are prohibited." ARM 24.26.229(1). A communication with a board agent, including a mediator, election judge, or investigator, is not considered an ex parte communication unless "the matter has been referred for a hearing before a hearing officer or the board." ARM 24.26.207(11). A specific matter that is subject to mediation, election, or investigation by a board agent cannot be simultaneously set for hearing before a hearing officer or the board. Therefore, the definition of ex parte communications does not prohibit board agents such as mediators, election judges, or investigators from completing their work and communicating with the parties to a specific matter.

COMMENT 11: Commenters expressed concern that the amendments to ARM 24.26.209 LAY REPRESENTATION BEFORE THE BOARD OR BOARD AGENT will require parties to be represented by an attorney before the board, rather than a lay representative.

RESPONSE 11: The amendments to ARM 24.26.209 preserve the rights of parties before the board or before a board agent to be represented by a lay representative. The amendment to the rule changes the phrase that a lay representative "may be permitted to appear," to "may appear" – in effect, the amendment removes any requirement for a lay representative to seek special permission to appear before the board or a board agent.

COMMENT 12: A commenter expressed concern with the amendments to ARM 24.26.695 (24.26.1401) INTEREST MEDIATION that remove the designation that mediation will be completed by a "board agent" because the commenter believes that the parties will have to wait for the entire board to pick a mediator rather than a single board agent.

RESPONSE 12: The board agrees with the commenter that the rule is unclear as written. As outlined above, the board is further amending the rule to align with current board practice. ARM 24.26.695(3) (24.26.1401(4)) now states that "department staff shall designate a qualified labor mediator" as outlined above. The act of assigning a labor mediator to a dispute is not a matter that is referred for consideration by the entire board; it is a procedural matter that is currently and will continue to be completed by department staff.

COMMENT 13: Commenters expressed concern with the amendments to ARM 24.26.695 (24.26.1401) INTEREST MEDIATION because it removes mediation by "an agent of the board." Commenters expressed concern that the amendments will allow the board to appoint unqualified people for mediation, the board will contract with outside parties or groups to perform mediation, and parties will be charged for



mediation. Commenters stated that department mediators are available and have good relationships with employers and unions.

RESPONSE 13: The amendments to the rule now state that "[u]pon petition for interest mediation, department staff shall designate a qualified ~~labor mediator~~ board agent to mediate the dispute." ARM 24.26.695(4). Regardless of the rule's mandate, the department only appoints qualified mediators to provide these important services to the parties.

COMMENT 14: Commenters expressed concern with the amendments to ARM 24.26.695 (24.26.1401) INTEREST MEDIATION because the amendments will prevent the parties from engaging in mediation before a current contract expires because the rule applies to a "new or expired CBA."

RESPONSE 14: The term "new" CBA includes both a CBA that is being negotiated for a new collective bargaining unit and a CBA that is being negotiated to replace an existing CBA. Nothing in the amendments prevents the parties from requesting mediation before a current CBA expires.

COMMENT 15: Commenters expressed concern with the amendments to ARM 24.26.695 (24.26.1401) INTEREST MEDIATION because of the removal of references to the Federal Mediation and Conciliation Service (FMCS). Commenters note that FMCS is a federal service that is not statutorily mandated to carry out Montana's Collective Bargaining Act for Public Employees, Title 39, ch. 31, MCA. The commenters ask that the rule be restored to the prior language to ensure that FMCS will inform the board if parties subject to Montana's Bargaining Act are requesting mediation from FMCS. The commenters assert that FMCS has similar agreements with other states that have public employees' collective bargaining laws.

RESPONSE 15: The board acknowledges the comment. As outlined above, the board has restored the language regarding FMCS to (4) of ARM 24.26.695 (24.26.1401) INTEREST MEDIATION.

COMMENT 16: Commenters expressed concern that the amendments to ARM 24.26.695 (24.26.1401) INTEREST MEDIATION do not protect the confidentiality of the mediation process. The commenters believe the board should retain the right to control the release of information related to mediation. The commenters noted that confidentiality is essential to an effective mediation process. The commenters expressed concern that the amendments will require mediators to retain records of mediations and mediators will be forced to testify in future legal proceedings about matters discussed at mediation.

RESPONSE 16: The board acknowledges the comments. As outlined above, the board has removed the acknowledgment of the possibility of disclosure of information discussed in the mediation process upon written consent of all parties.

COMMENT 17: A commenter expressed concern for the amendments to ARM 24.26.695 (24.26.1401) INTEREST MEDIATION because the amendments change the board's procedure for closing mediation meetings to the public.

RESPONSE 17: The prior language of the rule, ARM 24.26.695(6), stated that meetings between the parties and the mediator "shall be private and nonpublic, except if otherwise mutually agreed upon by the parties." The amended language now states that "[u]nless otherwise required by the constitution, mediations pursuant to this rule shall be held in private unless both parties agree in writing to waive private meetings." ARM 24.26.695(7). The amendment maintains that mediations are presumed to be private; however, the amendment acknowledges that certain meetings may be required to be open to the public under Montana's Open Meeting Laws, Title 2, ch. 3, pt. 2, MCA, and ultimately Montana's Constitution, including under the Right of Participation, and the Right to Know, Mont. Const. Art. II, §§ 8 and 9. The amendments allow for a case-by-case analysis of the privacy rights at issue in any given meeting.

COMMENT 18: A commenter expressed concern for the amendments to ARM 24.26.697 (24.26.1404) FACT FINDER because the rule does not specifically address the procedure for the invoicing of factfinding services.

RESPONSE 18: Invoicing and payment of fees for factfinding services is a business practice that need not to be specifically addressed by rule. Board agents and department staff may include instructions for paying fees for factfinding on the department's web site or in a relevant communication to the parties. Furthermore, the statute regarding factfinding, 39-31-309(5), MCA, specifies that the costs must be borne equally by the parties, or if factfinding is requested by the board then costs are borne equally by the parties and the board. As outlined above, the board is amending the rule further to clarify the rules and remove duplication with the statute.

COMMENT 19: A commenter expressed concern for the amendments to ARM 24.26.698A (24.26.1408) PANEL OF ARBITRATORS AND FACT FINDERS because the rule no longer requires a specific format for resumes submitted by arbitrators. The commenter also expressed concern with changes to the process for removing arbiters.

RESPONSE 19: The amendments simplify the process for accepting applications from potential arbitrators and for maintaining the current list of arbitrators and factfinders. The board sees no advantage of requiring a specific format for resumes from potential arbiters.

COMMENT 20: A commenter stated that the board should consider a "card check" process for decertification petitions that was previously adopted by the board for unit determination petitions. The commenter asks the board to consider comments previously made to the board regarding the "card check" process.

RESPONSE 20: The comment is outside the scope of the current proposed changes to the rules in MAR Notice No. 24-26-353. The board may consider such an amendment at another time.

COMMENT 21: A commenter noted that the following rules need to be transferred and amended, rather than only amended, for the proper organization of the rules: ARM 24.26.204 INTERVENTION; ARM 24.26.518 FAILURE OF DEPARTMENT HEAD, DESIGNEE, OR STATE HUMAN RESOURCES DIVISION TO ACT WITHIN PRESCRIBED TIME LIMIT; ARM 24.26.523 FILING OF A NEW PETITION FOR HEARING AFTER FINAL ORDER ISSUED; and ARM 24.26.530 FREEDOM FROM INTERFERENCE, RESTRAINT, COERCION, OR RETALIATION.

RESPONSE 21: The board agrees that the above-listed rules should be both amended and transferred to ensure clear and proper organization of the rules.

4. The board has amended the following rules as proposed: ARM 24.26.102, 24.26.207, 24.26.209, and 24.26.229.

5. The board has amended the following rules as proposed but transfers them in response to a comment: ARM 24.26.204 (24.26.240), 24.26.518 (24.26.552), 24.26.523 (24.26.554), and 24.26.530 (24.26.556).

6. The board has amended and transferred the following rules as proposed: ARM 24.26.603 (24.26.1001), 24.26.604 (24.26.1002), 24.26.651 (24.26.1052), 24.26.665 (24.26.1088), 24.26.667 (24.26.1092), 24.26.695A (24.26.1402), 24.26.698 (24.26.1406), and 24.26.698A (24.26.1408).

7. The board has adopted the following rules as proposed: New Rule I (24.26.242), II (24.26.244), III (24.26.246), IV (24.26.248), V (24.26.250), VI (24.26.254), VII (24.26.540), VIII (24.26.542), IX (24.26.544), X (24.26.546), XI (24.26.548), XIII (24.26.1006), XIV (24.26.1008), XV (24.26.1012), XVI (24.26.1014), XVIII (24.26.1018), XIX (24.26.1020), XX (24.26.1022), XXI (24.26.1024), XXII (24.26.1028), XXIII (24.26.1030), XXIV (24.26.1032), XXV (24.26.1034), XXVI (24.26.1036), XXVII (24.26.1038), XXVIII (24.26.1042), XXIX (24.26.1044), XXX (24.26.1046), XXXI (24.26.1048), XXXII (24.26.1050), XXXIII (24.26.1070), XXXIV (24.26.1072), XXXV (24.26.1074), XXXVI (24.26.1076), XXXVII (24.26.1078), XXXVIII (24.26.1080), XXXIX (24.26.1082), XL (24.26.1084), XLI (24.26.1086), XLII (24.26.1090), XLIII (24.26.1201), XLIV (24.26.1202), XLV (24.26.1204), XLVI (24.26.1206), and XLVII (24.26.1208).

8. The board has repealed the following rules as proposed: ARM 24.25.101, 24.25.102, 24.25.103, 24.25.104, 24.25.105, 24.25.107, 24.25.201, 24.25.203, 24.25.204, 24.25.301, 24.25.302, 24.25.303, 24.25.304, 24.25.305, 24.25.306, 24.25.307, 24.25.308, 24.25.401, 24.25.501, 24.25.502, 24.25.503, 24.25.504, 24.25.505, 24.25.601, 24.25.701, 24.25.702, 24.25.703, 24.25.704, 24.25.801, 24.25.802, 24.25.803, 24.25.804, 24.26.101, 24.26.202, 24.26.203, 24.26.205, 24.26.206, 24.26.208, 24.26.210, 24.26.211, 24.26.212, 24.26.215, 24.26.219,

24.26.221, 24.26.222, 24.26.224, 24.26.230, 24.26.501, 24.26.502, 24.26.503, 24.26.508, 24.26.601, 24.26.602, 24.26.610, 24.26.611, 24.26.612, 24.26.614, 24.26.616, 24.26.617, 24.26.618, 24.26.620, 24.26.622, 24.26.630, 24.26.643, 24.26.644, 24.26.645, 24.26.646, 24.26.647, 24.26.648, 24.26.649, 24.26.650, 24.26.655, 24.26.656, 24.26.657, 24.26.658, 24.26.659, 24.26.660, 24.26.661, 24.26.662, 24.26.663, 24.26.664, 24.26.666, 24.26.680, 24.26.680A, 24.26.680B, 24.26.681, 24.26.682, 24.26.683, 24.26.684, and 24.26.685.

9. The board has transferred the following rule as proposed: ARM 24.25.206 (24.26.1210).

10. The board has amended and transferred ARM 24.26.695 (24.26.1401) and 24.26.697 (24.26.1404) as proposed, but with the following changes, stricken matter interlined, new matter underlined:

24.26.695 (24.26.1401) INTEREST MEDIATION (1) through (3) remain as proposed.

(4) Upon petition for interest mediation, ~~the board~~ department staff shall designate a qualified ~~labor mediator~~ board agent to mediate the dispute. Upon the written request of both parties, department staff may instead request a mediator from the federal mediation and conciliation service, if one is available.

(5) All communications, oral or written, from the parties to the mediator and any information and evidence presented to the mediator during the proceeding are confidential. Such matters shall not be disclosed to a non-party to the mediation ~~without the prior written consent of all parties to the mediation.~~

(6) The mediator shall not testify or produce any confidential records or evidence with regard to any mediation to a non-party without written consent of all parties or in any proceeding before any court, board, investigatory body, arbitrator, or fact finder ~~without the written consent of all parties.~~

(7) remains as proposed.

24.26.697 (24.26.1404) FACT FINDER (1) through (6) remain as proposed.

(7) When a party petitions the board to initiate factfinding, ~~the cost of factfinding must be equally borne by the parties.~~ The ~~the~~ parties shall pay directly to the fact finder within ten days.

~~(8) When the board initiates factfinding, the cost of factfinding proceedings must be equally borne by the board and the parties concerned. The~~ the parties shall pay the board within ten days and the board shall forward the total amount to the fact finder.

(9) remains as proposed but is renumbered (8).

11. The board has adopted New Rules XII (24.26.1005) and XVII (24.26.1016) as proposed, but with the following changes, stricken matter interlined, new matter underlined:

NEW RULE XII (24.26.1005) APPROPRIATE UNIT (1) ~~The board may consider a bargaining unit that consists of all the employees in any department, division, bureau, section, or combination thereof.~~

(2) remains as proposed but is renumbered (1).

~~(3)~~ (2) The board shall consider the following factors in addition to those listed in ~~(2)~~ (1) when considering a proposed bargaining unit for nurses working at a health care facility, as defined in 39-32-102, MCA:

(a) through (c) remain as proposed.

NEW RULE XVII (24.26.1016) EMPLOYER COUNTER PETITION

(1) through (4) remain as proposed.

(a) If a party disputes the recommended order of the hearing officer, the party may file exceptions pursuant to [NEW RULE VI (24.26.254) (BOARD REVIEW OF HEARING OFFICER'S RECOMMENDED ORDER)] within ~~20~~ ten days of service of the hearing officer's recommended order.

(b) through (5) remain as proposed.

12. The board has adopted New Rule XLVIII (24.26.1004) in response to a comment.

NEW RULE XLVIII (24.26.1004) COMPOSITION OF UNIT (1) The board may consider a bargaining unit that consists of all the employees in any department, division, bureau, section, or combination thereof.

AUTH: 39-31-104, 39-32-103, MCA

IMP: 39-31-202, 39-32-102, 39-32-106, 39-32-113, MCA

BOARD OF PERSONNEL APPEALS  
ANNE L. MACINTYRE  
PRESIDING OFFICER

/s/ QUINLAN L. O'CONNOR  
Quinlan L. O'Connor  
Alternate Rule Reviewer

/s/ BRENDA NORDLUND  
Brenda Nordlund, Acting Commissioner  
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State December 15, 2020.

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY  
STATE OF MONTANA

In the matter of the amendment of ) NOTICE OF AMENDMENT  
ARM 24.29.1616 pertaining to the )  
drug formulary in the Utilization and )  
Treatment Guidelines for Workers' )  
Compensation and Occupational )  
Disease )

TO: All Concerned Persons

1. On November 6, 2020, the Department of Labor and Industry (department) published MAR Notice No. 24-29-364 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 2030 of the 2020 Montana Administrative Register, Issue Number 21.

2. The department held a public hearing in Helena on November 30, 2020, over the Zoom videoconference and telephonic platform at which members of the public commented. No written comments were received during the public comment period.

3. The department has thoroughly considered the comments made. A summary of the comments and the department's response are as follows:

COMMENT 1: One commenter encouraged adoption of the rule as proposed.

RESPONSE 1: The department acknowledges the comment.

4. The department has amended ARM 24.29.1616 as proposed.

/s/ QUINLAN L. O'CONNOR  
Quinlan L. O'Connor  
Alternate Rule Reviewer

/s/ BRENDA NORDLUND  
Brenda Nordlund, Acting Commissioner  
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State December 15, 2020.

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY  
STATE OF MONTANA

In the matter of the adoption of New        ) NOTICE OF ADOPTION  
Rules I through VII pertaining to        )  
reimbursement of workers'        )  
compensation premiums due to        )  
providing high-quality work-based        )  
learning opportunities        )

TO: All Concerned Persons

1. On November 6, 2020, the Department of Labor and Industry (department) published MAR Notice No. 24-29-365 pertaining to the public hearing on the proposed adoption of the above-stated rules at page 2033 of the 2020 Montana Administrative Register, Issue Number 21.

2. The department held a public hearing in Helena on December 1, 2020, over the Zoom videoconference and telephonic platform at which one member of the public commented. No written comments were received during the public comment period.

3. The department has thoroughly considered the comments made. A summary of the comments and the department's responses are as follows:

COMMENT 1: A commenter stated it applauded the efforts to provide work-based learning opportunities for students.

RESPONSE 1: The department acknowledges the comment.

COMMENT 2: A commenter stated that New Rule V as drafted creates some difficulty for workers' compensation insurance carriers because it requires proof of premiums paid for each student from the carrier. Many insurance carriers in this state do not collect payment data associated with each individual employee. Instead, the payroll reports identify the amount of payment for a particular class code. The new rule seeks an attestation or verification from the insurance carrier which the insurance carrier may not be able to provide. The commenter suggested that the rule be amended to require an affidavit or declaration, the same method for Plan I, self-insured employers.

RESPONSE 2: The department acknowledges the commenter's concern. To address the concern while also receiving the information necessary to meet statutory obligations, New Rule V is amended from the proposal as set forth in paragraph 5 below.

4. The department has adopted New Rule I (24.22.701), New Rule II (24.22.704), New Rule III (24.22.707), New Rule IV (24.22.710), New Rule VI (24.22.716), and New Rule VII (24.22.719) as proposed.

5. The department has adopted New Rule V (24.22.713) with the following changes, stricken matter interlined, new matter underlined:

NEW RULE V (24.22.713) REIMBURSEMENT APPLICATION PROCESS

(1) remains as proposed.

(2) Within 45 days of the date of the department's notice of eligibility, the employer shall complete an application electronically through the department's portal and provide all required documents. The application must include:

(a) ~~proof of payment from the employer's workers' compensation provider of the workers' compensation premiums paid for each student in each qualified high-quality work-based learning opportunity and that each student's payroll was included. If the business entity is self-insured, the employer must submit an affidavit or declaration attesting to the premiums~~ workers' compensation premiums paid per semester for students employed in a high-quality work-based learning opportunity;

(b) through (4) remain as proposed.

/s/ QUINLAN L. O'CONNOR

Quinlan L. O'Connor  
Alternate Rule Reviewer

/s/ BRENDA NORDLUND

Brenda Nordlund, Acting Commissioner  
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State December 15, 2020.



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

In the matter of the adoption of New     ) NOTICE OF ADOPTION AND  
Rules I through IV and the             ) AMENDMENT  
amendment of ARM 37.5.118,             )  
37.47.602, 37.47.610, 37.47.613, and     )  
37.47.614 pertaining to substantiation   )  
of abuse and neglect reports and        )  
disclosure of information                )

TO: All Concerned Persons

1. On November 6, 2020, the Department of Public Health and Human Services published MAR Notice No. 37-932 pertaining to the public hearing on the proposed adoption and amendment of the above-stated rules at page 2040 of the 2020 Montana Administrative Register, Issue Number 21.

2. The department has adopted New Rule I (37.47.611), New Rule II (37.47.612), New Rule III (37.47.616), and New Rule IV (37.47.617).

3. The department has amended the above-stated rules as proposed.

4. No comments or testimony were received.

5. These rule adoptions and rule amendments are effective January 1, 2021.

/s/ Caroline Warne  
Caroline Warne  
Rule Reviewer

/s/ Erica Johnston  
Erica Johnston, Interim Director  
Public Health and Human Services

Certified to the Secretary of State December 15, 2020.

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

In the matter of the adoption of New	)	NOTICE OF ADOPTION AND
Rules I and II and the amendment of	)	AMENDMENT
ARM 37.87.903, 37.87.1401,	)	
37.87.1402, 37.87.1407, 37.87.1408,	)	
and 37.87.1410 pertaining to home	)	
support services (HSS) program	)	
redesign	)	

TO: All Concerned Persons

1. On November 6, 2020, the Department of Public Health and Human Services published MAR Notice No. 37-934 pertaining to the public hearing on the proposed adoption and amendment of the above-stated rules at page 2054 of the 2020 Montana Administrative Register, Issue Number 21.

2. The department has adopted New Rule I (37.87.1414) and New Rule II (37.87.1415) as proposed.

3. The department has amended the following rules as proposed: ARM 37.87.903, 37.87.1402, 37.87.1407, 37.87.1408, and 37.87.1410.

4. The department has amended the following rule as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

37.87.1401 HOME SUPPORT SERVICES AND THERAPEUTIC FOSTER CARE, SERVICES REIMBURSEMENT (1) through (3) remain as proposed.

(4) The HSS provider is reimbursed on a fee per unit of service basis. The two-hour weekly service requirement for HSS services must be met to be eligible for reimbursement. For purposes of this rule, a unit of service is based on a 15-minute unit increment. A unit of service is a period of 15 minutes as follows:

(a) through (h) remain as proposed.

(5) HSS rendered to youth residing in a Montana county with a per capita population of fewer than 6 people per square mile are eligible to receive a frontier community differential of 115% of the current fee schedule, as provided in ARM 37.85.105.

(5) remains as proposed but is renumbered (6).

5. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

COMMENT #1: A commenter offered support for the proposed updated rules and belief that the proposed model will help providers serve youth and families with high intensity needs and prevent children from being moved out of the home.

RESPONSE #1: The department acknowledges this feedback and believes that the updated rules will enhance the quality of services provided to youth and families while managing a fiscally sound home support services (HSS) program.

COMMENT #2: A commenter recommended allowing unlimited HSS concurrently with residential treatment services, or alternatively to allow additional sessions four weeks prior to discharge from a residential facility to community services.

RESPONSE #2: The department's goal is to allow for a warm handoff period when the youth transitions from residential to community services. In response to this comment, the department will update the manual to allow for 96 HSS units to be billed concurrently with Therapeutic Group Home or Psychiatric Residential Treatment Facility services when provided for a warm handoff. The parent or guardian of the youth must be involved in the warm handoff process and weekly contact is required. The two-hour per week requirement will be waived for the warm handoff units. The 96 units will only be available when the youth is transitioning to a home or foster care. The manual is adopted in ARM 37.87.903 and the change in response to this comment is reflected in the manual.

COMMENT #3: A commenter raised concern that the two-hour HSS service requirement cannot be met during times of initiating or discharging from services and asked if the two-hour requirement is not met is the time billable.

RESPONSE #3: The department is not proposing any changes to this requirement for times of initiating or discharging from services, as the department considers the two-hour per week requirement a screening mechanism for families requiring this level of service and that two-hours per week is beneficial to the youth and youth's family during entrance and discharge from services. The two-hour per week service requirement must be met for reimbursement. The department will add clarifying language at ARM 37.87.1401(4) in response to this comment. The department is waiving the two-hour service requirement for the warm handoff period if the service is being provided concurrently while transitioning from residential treatment. The manual is adopted in ARM 37.87.903, and the change in response to this comment is reflected in the manual.

COMMENT #4: A commenter recommended increasing the per unit reimbursement rate from \$18.50 per 15-minute unit to \$22.50 per 15-minute unit to cover provider costs and incentivize providers to implement a new HSS program.

RESPONSE #4: The department has closely evaluated the proposed rates and the commenter's explanation for the requested increase. The department requested feedback from providers on the cost to provide HSS and feedback that was received was considered in rate development. The department believes that the

assumptions, including wages, benefits, and productivity rates, used to develop the proposed rate of \$18.50 per 15-minute unit are reasonable standards for a fiscally sound program. However, the department acknowledges that the service is more costly to provide in frontier areas of the state. To address the increased costs to provide services in frontier communities, the revised fee schedule will include a frontier differential payment of 115% of the proposed rate, resulting in a frontier rate of \$21.28 per 15-minute unit. HSS services rendered to a youth residing in a Montana county with a per capita population of fewer than 6 people per square mile will be eligible to receive the frontier rate. The department has amended ARM 37.87.1401 to include the frontier differential, and the rate will be shown on the final fee schedule posted on the department's website.

COMMENT #5: A commenter inquired about including an ECSII qualification score for HSS.

RESPONSE #5: The department agrees with this recommendation and has included new language in the provider manual stating that a youth under the age of 6 must have an indication of stressors and vulnerabilities within the caregiver environment as indicated by a moderate score within Domain III of the ECSII to qualify for HSS. The manual is adopted in ARM 37.87.903, and the change in response to this comment is reflected in the manual.

6. These rule adoptions and amendments are effective January 1, 2021.

/s/ Brenda K. Elias  
Brenda K. Elias  
Rule Reviewer

/s/ Erica Johnston  
Erica Johnston, Interim Director  
Public Health and Human Services

Certified to the Secretary of State December 15, 2020.

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

In the matter of the adoption of New ) NOTICE OF ADOPTION AND  
Rules I through VIII and the ) AMENDMENT  
amendment of ARM 37.84.101, )  
37.84.102, 37.84.103, 37.84.106, and )  
37.84.107 pertaining to Health and )  
Economic Livelihood Partnership )  
(HELP) Act )

TO: All Concerned Persons

1. On November 6, 2020, the Department of Public Health and Human Services published MAR Notice No. 37-935 pertaining to the public hearing on the proposed adoption and amendment of the above-stated rules at page 2062 of the 2020 Montana Administrative Register, Issue Number 21.

2. The department has adopted the following rules as proposed: New Rules I (37.84.116), II (37.84.117), III (37.84.118), IV (37.84.119), V (37.84.120), VI (37.84.121), and VIII (37.84.123) as proposed.

3. The department has amended ARM 37.84.101, 37.84.103, and 37.84.106 as proposed.

4. The department has adopted the following rule as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

NEW RULE VII (37.84.122) HELP ACT: COMMUNITY ENGAGEMENT  
ACTIVITY PARTICIPATION: COVERAGE SUSPENSION (1) through (4) remain as proposed.

(5) Upon the end of the suspension period, a participant ~~will~~ shall have coverage reinstated so long as the participant continues to be eligible for the HELP program.

(6) and (7) remain as proposed.

AUTH: 53-2-215, 53-6-113, 53-6-1309, 53-6-1318, MCA

IMP: 53-2-215, 53-6-101, 53-6-113, 53-6-1302, 53-6-1303, 53-6-1304, 53-6-1305, 53-6-1308, 53-6-1309, MCA

5. The department has amended the following rules as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

37.84.102 HELP ACT: DEFINITIONS (1) through (10) remain as proposed.

(11) "Participant" means a member with a modified adjusted gross income at or below 138% of the federal poverty level and enrolled in Medicaid under the HELP Act program.

(12) through (14) remain as proposed.

AUTH: 53-2-215, 53-6-113, 53-6-1309, 53-6-1318, MCA

IMP: 53-2-215, 53-6-101, 53-6-113, 53-6-1304, 53-6-1305, 53-6-1306, 53-6-1307, 53-6-1308, 53-6-1309, MCA

37.84.107 HELP ACT: PREMIUMS (1) remains as proposed.

(2) Except as provided in subsection (3), the premiums must:

(a) remains as proposed.

(b) increase by 0.5% in each consecutive subsequent year that a participant receives coverage, up to a maximum of 4% of the participant's income.

(3) through (10) remain as proposed.

AUTH: 53-2-215, 53-6-113, 53-6-1318, MCA

IMP: 53-2-215, 53-6-101, 53-6-1307, MCA

6. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

Comment #1: The department received comments in support of implementing New Rules I through III, VI, and VIII as written.

Response #1: The department appreciates these comments of support.

Comment #2: Commenters expressed support for New Rule IV with requested changes. The commenters asked the department to allow for wage calculations to be done on an annual basis rather than "each reporting" period. They stated the annual basis calculation will better reflect the employment status of seasonal workers.

Response #2: The department appreciates the recommendation but will not be making this change. A six-month reporting period is consistent with the originating legislation, is equitable across all program features, and can be implemented with reasonable costs.

Comment #3: The department received comments requesting modification to New Rule V(1)(e) to require the department to analyze claims data for the purpose of identifying an exemption based on an individual's inability to work due to a mental or physical condition.

Response #3: This recommendation cannot be adopted as claims data does not provide sufficient information to document a physical or mental impairment rendering an individual unable to work.

Comment #4: Commenters asked to revise New Rule V(1)(f) to require the department to review available electronic records on a monthly basis to identify if the applicant is the primary caregiver of a person under the age of 19 who is unable to care for themselves.

Response #4: The department appreciates the recommendation but feels that allowing primary caregiver exemption per child is reasonable and consistent with the originating legislation. The department must receive attestation by the caregiver, as electronic identification is not feasible.

Comment #5: The department received comments requesting the department strike the limitation in New Rule V(1)(f)(ii) stating only one participant may be deemed the primary caregiver of an individual.

Response #5: The department appreciates the recommendation but feels that allowing primary caregiver exemption per child is reasonable and consistent with the originating legislation.

Comment #6: Commenters requested the department strike "in the last 24 months" from New Rule V(1)(l)(i).

Response #6: The department appreciates the comment but will not be implementing the recommendation. The language ensures the exemption condition is current.

Comment #7: A commenter asked the department to modify the language of New Rule VII(5), from "the department will" to "the department shall."

Response #7: The department agrees with this recommendation and will modify the rule language accordingly.

Comment #8: A commenter requested the department modify the proposed definition of "participant" in ARM 37.84.102(11) from "under the HELP ACT" to "under the HELP program."

Response #8: The department agrees with this recommendation and will modify the rule language accordingly.

Comment #9: Commenters requested the department clarify in ARM 37.84.107 that the department will consider consecutive years in coverage when applying the required premium increases.

Response #9: The department agrees with this recommendation and will add the word "consecutive" to the rule language.

7. These rule adoptions and amendments are effective January 1, 2021.

/s/ Brenda K. Elias  
Brenda K. Elias  
Rule Reviewer

/s/ Erica Johnston  
Erica Johnston, Interim Director  
Public Health and Human Services

Certified to the Secretary of State December 15, 2020.



BEFORE THE GAMBLING CONTROL DIVISION  
OF THE DEPARTMENT OF JUSTICE  
OF THE STATE OF MONTANA

In the Matter of the Application of	)	CASE NO. 1-273-424-896
Rewards, LLC, for a Declaratory	)	
Ruling on the Applicability of 23-5-	)	DECLARATORY RULING
621(1)(e)(i), MCA and ARM	)	
23.16.2115	)	

Rewards, LLC, filed this administrative declaratory judgment action on December 19, 2019. Shortly afterward, on January 3, 2020, the Gambling Control Division (GCD) filed a separate proposed department action initiating discipline based on similar facts. *In the Matter of the Proposed Department Action Against Rewards, LLC, d/b/a Platinum Plus Player Rewards System*, Dept. of Justice, Gambling Control Div'n Case No. 0-034-546-688. Since the matters contained common factual and legal issues, the Hearing Examiner on January 26, 2020, consolidated the two cases.

The matters proceeded together until May 2020 when the parties reached a settlement on the disciplinary portion of the consolidated cases and agreed to proceed separately on Rewards' declaratory judgment action. In that settlement, the parties agreed to resolve the remaining declaratory judgment action through briefing on two legal issues based on stipulated facts.

At issue was the legality of Rewards, LLC's, video gambling machine player tracking systems called PlatinumPlus Method 2 and Method 3. The Gambling Code and companion administrative rules restrict player tracking systems. The statute prohibits use of "data made available as a result of an approved automated accounting and reporting system . . . for player tracking purposes." Mont. Code Ann. § 23-5-621(1)(e); Mont. Admin. R. 23.16.2115. The parties briefed whether Method 2 or Method 3, as specifically described, would violate either the statute or the rule promulgated to implement that statute.

On November 5, 2020, Hearing Examiner Chris D. Tweeten issued his *Proposed Declaratory Ruling*. That decision adopted the parties' Statement of Agreed Facts as the Hearing Examiner's findings of fact. The decision included a reasoned memorandum of law supported by authority, which applied the facts to two issues of law the Hearing Examiner captioned this way:

First, do Methods 2 and 3 violate any statute or administrative rule? Second, if Methods 2 or 3 violate an administrative rule, does the rule violate the Montana Administrative Procedure Act because it either exceeds or deviates from the authority provided in statute?

After completing that legal analysis, the Hearing Examiner reached expressed conclusions of law. From those findings of fact, legal memorandum, and

conclusions of law, the Hearing Examiner proffered a proposed declaratory ruling holding, "that Methods 2 and 3 of the PlatinumPlus system violate Admin. R. Mont. 23.16.2115(1)." The Hearing Examiner served a copy of his proposed decision on both parties on November 5, 2020.

On November 12, 2020, the undersigned served notice on the parties of their right under the Montana Administrative Procedure Act to file exceptions to the Hearing Examiner's proposed decision. That notice afforded the parties 20 days in which to file written exceptions with the Attorney General and to request oral argument. The time in which to submit exceptions expired on December 2, 2020, with neither party filing exceptions.

MAPA, Mont. Code Ann. § 2-4-501, requires all agencies to promulgate rules for dispositions of petitions for declaratory rulings. The Attorney General's model rules on declaratory rulings appear at Mont. Admin. R. 1.3.226, *et seq.* This matter has proceeded regularly under MAPA and the model rules.

As required by the Montana Administrative Procedure Act, Mont. Code Ann. § 2-4-623, the Department of Justice, Gambling Control Division, now enters this Final Agency Action.

The Hearing Examiner's *Proposed Declaratory Ruling*, including findings of fact, memorandum, conclusions of law, and declaratory ruling, are adopted and incorporated in their entirety. The complete record, as defined in Mont. Code Ann. § 2-4-614, including the parties' Statement of Agreed Facts and the Hearing Examiner's Proposed Declaratory Ruling, is available for public inspection as required by Mont. Code Ann. § 2-4-623. Interested persons may contact the Gambling Control Division located at 2550 Prospect Avenue, Helena, Montana, (406) 444-1971.

Based on the foregoing, the Department of Justice, Gambling Control Division, enters the following:

### **CONCLUSIONS OF LAW**

1. This is an appropriate case for issuance of a declaratory ruling.
2. Mont. Code Ann. 23-5-621(1)(e)(i) requires the Department of Justice to adopt a rule "specify[ing] that the data made available as a result of an approved automated and reporting system ("AARS") may not be used by licensees for player tracking purposes."
3. To comply with that requirement, the Department of Justice adopted Admin. R. Mont. 23.16.2115, which states: "Data acquired by an automated accounting and reporting system may not be communicated or transferred to any player tracking system by any electronic communications, media, or storage device."

4. The difference between "data acquired by" an AARS and "data made available as a result of an AARS" is immaterial. Gaming machines collect twelve different categories of data for purposes of participation in an AARS. Admin. R. Mont. 23.16.2105(2)(a). Rewards intends to capture this data and divert it to the PlatinumPlus player tracking system. This data is "acquired" pursuant to an AARS, and it is "made available" because of an AARS. Rewards concedes that PlatinumPlus seeks to make use of the same data that the AARS uses.

5. Rewards seeks a ruling on two methods of operating its PlatinumPlus system. Both depend on the electronic transmission of AARS data to PlatinumPlus. Both therefore violate Admin. R. Mont. 23.16.2115(1).

6. Mont. Code Ann. § 23-5-621(1)(e)(1) flatly prohibits the use of AARS data for player tracking. Admin. R. Mont. 23.16.2115(1) covers a different, smaller scope of conduct, facially prohibiting only electronic transmission of such data.

7. Rewards' proposals violate the clear language of the governing rule. Rewards therefore lacks standing to complain that the rule is underinclusive when compared to the scope of the conduct the statute directs the Department of Justice to prohibit.

8. A rule is invalid if it creates new requirements not envisioned by the authorizing statute, or if it adds a requirement that is contrary to statutory language. *Clark Fork Coalition v. Tubbs*, 2016 MT 229, ¶ 25, 384 Mont. 503, 511, 380 P.3d 771, 779. Admin. R. Mont. 23.16.2115(1) does not violate these standards. The conduct prohibited by the rule is subsumed within the conduct described in the authorizing statute.

### **DECLARATORY RULING**

Methods 2 and 3 of the PlatinumPlus system violate Admin. R. Mont. 23.16.2115(1).

As required by Mont. Code Ann. § 2-4-501, a copy of this declaratory ruling shall be filed with the Montana Secretary of State for publication in the Montana Administrative Register.

Dated this 10th day of December 2020.

/s/ Angela Nunn, Administrator  
ANGELA NUNN  
Gambling Control Division  
Montana Department of Justice

**CERTIFICATE OF SERVICE**

I hereby certify that I caused to be mailed a true and accurate copy of the foregoing to the following:

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Date: 12/10/2020

/s/ Jean Saye  
JEAN SAYE  
Administrative Assistant

## **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;
- Office of the State Auditor and Insurance Commissioner; and
- Office of Economic Development.

#### **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.

#### **Energy and Telecommunications Interim Committee:**

- Department of Public Service Regulation.

**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.

**Water Policy Interim Committee (where the primary concern is the quality or quantity of water):**

- 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 P.O. 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 or Register)** is an online 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 recent rulemaking and the table of contents in the last Montana Administrative Register issued.

Statute

2. Go to cross reference table at end of each number and title which lists MCA section numbers and department corresponding ARM rule numbers.

## RECENT RULEMAKING BY AGENCY

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 September 30, 2020. This table includes notices in which those rules adopted during the period June 26, 2020, through December 11, 2020, occurred and any proposed rule action that was pending during the past 6-month period. (A notice of adoption must be published within six months of the published notice of the proposed rule.) This table does not include the contents of this issue of the Montana Administrative Register (MAR or Register).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through September 30, 2020, this table, and the table of contents of this issue of the Register.

This table indicates the department name, title number, notice numbers in ascending order, the subject matter of the notice, and the page number(s) at which the notice is published in the 2020 Montana Administrative Register.

To aid the user, this table includes rulemaking actions of such entities as boards and commissions listed separately under their appropriate title number.

### ADMINISTRATION, Department of, Title 2

2-13-605	Next Generation 9-1-1 Technology Standards and Baseline Principles, p. 1719, 1857, 2237
2-59-596	Banking - Bank Branches - Limitations on Loans - Bank Branch Relocations, p. 1296, 1698
2-59-600	Semiannual Assessment for Banks, p. 1039, 1515
2-59-602	Report Due Dates for Mortgage Servicers - When Initial Mortgage License Applications Are Deemed Abandoned, p. 1247, 1615
2-59-603	Adoption of Model Bylaws and Statutory Reference, p. 1316, 1704
2-59-604	Designated Manager Supervisory Requirements, p. 1544, 1835
2-59-606	Renewal Fees of Mortgage Brokers, Mortgage Lenders, Mortgage Servicers, and Mortgage Loan Originators, p. 1547, 1836
2-59-609	Semiannual Assessment for Banks and Credit Unions, p. 1786

#### (Public Employees' Retirement Board)

2-43-594	Investment Policy Statements for the Defined Contribution Retirement Plan and the 457(b) Deferred Compensation Plan, p. 347, 1117
2-43-601	Adoption by Reference of the State of Montana Public Employee Defined Contribution Plan Document and the Public Employee Deferred Compensation (457) Plan Document, p. 1035, 1614

### AGRICULTURE, Department of, Title 4



- 4-20-268 Violations in Commodity Reporting, p. 1042, 1837
- 4-20-269 Montana Hemp Research and Market Development Program, p. 1319, 2079
- 4-20-270 Hemp, p. 1946

STATE AUDITOR, Office of, Title 6

- 6-250 Securities Regulation - Filings - Securities Exemptions - Fraudulent and Unethical Practices - Broker-Dealers and Investment Advisers - Transactional Exemption, p. 719, 1874
- 6-261 Surety Insurance Producers Who Sell, Solicit, or Negotiate Commercial Bail Bonds, p. 739, 1860

(Classification Review Committee)

- 6-262 Establishment, Deletion, or Revision of Classifications for Various Industries for Supplementing the NCCI Basic Manual for Workers' Compensation and Employers Liability Insurance, p. 1014, 1734

COMMERCE, Department of, Title 8

- 8-94-184 Administration of the 2021 Biennium Federal Community Development Block Grant (CDBG) Program—Planning Grants, p. 1378, 1735

EDUCATION, Title 10

(Board of Public Education)

- 10-53-137 Technology Integration Content Standards, p. 1380
- 10-54-134 K-12 Career and Technical Education Content Standards, p. 1398
- 10-55-135 K-12 Computer Science Content Standards, p. 1416
- 10-55-136 Library Media Content Standards, p. 1428
- 10-55-138 K-12 Social Studies Content Standards, p. 1446

(Office of Public Instruction)

- 10-13-133 Traffic Education, p. 939, 1281

FISH, WILDLIFE AND PARKS, Department of, Title 12

- 12-529 Closing Bird Island on Flathead Lake in Lake County, p. 1616
- 12-530 Closing the Shields River to All Motorized Watercraft, p. 1690
- 12-532 Closing Spring Meadow Lake State Park in Lewis and Clark County, p. 1705
- 12-533 Field Trial Regulations - Game Bird Dog Training - Game Bird Farms, p. 2093
- 12-536 Closing Clark's Lookout State Park in Beaverhead County, p. 1877

(Fish and Wildlife Commission)

- 12-531 Recreational Use on the Madison River, p. 1722

- 12-534 Closing the Boulder River to All Motorized Watercraft, p. 1953
- 12-535 Use of Remote-Controlled Devices and Drones While Fishing, p. 1956
- 12-537 Limiting Tepee Lake to Manually Operated Watercraft, p. 2226

GOVERNOR, Office of, Title 14

- 14-7 Energy Supply Emergency Rules, p. 136, 1322

ENVIRONMENTAL QUALITY, Department of, Title 17

- 17-406 Technologically Enhanced Naturally Occurring Radioactive Material (TENORM) Waste, p. 1239, 159, 1118
- 17-410 Incorporation by Reference - Definitions - Asbestos Project Permits - Training Provider Requirements - Fees - Refunds, p. 354, 525, 633, 1150, 1325

(Board of Environmental Review)

- 17-411 MPDES Program Updates, p. 750, 942, 1879
- 17-412 Natural and Nonanthropogenic Water Quality Standards, p. 765, 944, 1618
- 17-413 Air Quality Operation Fees, p. 1550
- 17-414 Selenium Standards for Lake Koocanusa and the Kootenai River, p. 1789

TRANSPORTATION, Department of, Title 18

- 18-181 MDT Employee Grievance Procedures, p. 840, 1045, 1516
- 18-182 Motor Carrier Services, p. 1251, 1626
- 18-183 Motor Fuels Tax, p. 1795, 2238

CORRECTIONS, Department of, Title 20

(Board of Pardons and Parole)

- 20-25-70 Parole Guidelines - Conditional Discharge From Supervision, p. 1556, 1693

JUSTICE, Department of, Title 23

- 23-18-249 Montana 24/7 Sobriety Program Act, p. 1804

LABOR AND INDUSTRY, Department of, Title 24

Boards under the Business Standards Division are listed in alphabetical order by chapter following the department notices.

- 24-2-361 Commissioner's Active Supervision of the Board of Professional Engineers and Professional Land Surveyors Regarding a Proposed Rule Adding Experience With the Public Land Survey System, p. 1461
- 24-11-360 Unemployment Insurance Benefits Related to the COVID-19 Pandemic, p. 1264, 1628
- 24-11-369 Unemployment Insurance Benefits Related to the COVID-19 Pandemic, p. 2229
- 24-13-366 HELP-Link, p. 1958
- 24-17-363 Prevailing Wage Rates for Public Works Projects, p. 1862
- 24-21-362 Apprenticeship and Training Program, p. 1964
- 24-22-368 Implementation of the Montana Employment Advancement Right Now Program Act, p. 1969
- 24-29-364 Drug Formulary in the Utilization and Treatment Guidelines for Workers' Compensation and Occupational Disease, p. 2030
- 24-29-365 Reimbursement of Workers' Compensation Premiums Due to Providing High-Quality Work-Based Learning Opportunities, p. 2033
- 24-101-308 Registration for Out-of-State Volunteer Professionals, p. 946, 1326
- 24-101-309 Definitions - Applicants With Criminal Convictions, p. 1821
- 24-301-348 Underground Facility Protection Program - Assessment and Collection of Civil Penalties - Collection of Annual Fees - Disputes Regarding Penalties and Fines—Mediation - Training and Educational Grants, p. 1463, 1572, 1840

(Board of Personnel Appeals)

- 24-26-353 Practices of and Procedures Before the Board of Personnel Appeals, p. 1977

(Board of Chiropractors)

- 24-126-37 Continuing Education Requirements - Acceptable Continuing Education - Dry Needling, p. 638, 1737

(Board of Dentistry)

- 24-138-78 Approved Clinical Exam Criteria for Dentists and Dental Hygienists - Specialty Advertising - Dental Hygienists—Temporary Practice Permits, p. 1268, 1631
- 24-138-79 Approved Clinical Exam Criteria for Dentists and Dental Hygienists, p. 2098

(Board of Massage Therapy)

- 24-155-8 Licensure of Out-of-State Applicants - Unprofessional Conduct - Records - Standards of Practice, p. 9, 247, 1327

(Board of Medical Examiners)

- 24-156-87 Definitions - Training of Student Physician Assistants - Application for Physician Assistant License - Physician Assistant Fees - Reporting to the Board - Supervision of Physician Assistant - Patient Rights - Unprofessional Conduct - Management of Infectious Wastes - Physician Assistant License Renewal, p. 1561
- 24-156-89 ECP Scope of Practice, p. 1838
- 24-156-90 ECP Scope of Practice, p. 1866

(Board of Outfitters)

- 24-171-40 Outfitter Records - Safety and First Aid Provisions - Operations Plans and Amendments - Unprofessional Conduct and Misconduct, p. 28, 262, 1157

(Board of Psychologists)

- 24-189-41 Fee Schedule - Psychologist Application Procedures - Examination - Temporary Permit - Behavior Analyst Experience and Supervision, p. 1272, 2081

(Board of Behavioral Health)

- 24-219-35 Application and Licensing Rules for Licensed Clinical Social Workers (LCSW), Licensed Baccalaureate Social Workers (LBSW), Licensed Master's Social Workers (LMSW), Licensed Clinical Professional Counselors (LCPC), Licensed Marriage and Family Therapists (LMFT), Licensed Addiction Counselors (LAC), and Certified Behavioral Health Peer Support Specialists (CBHPSS), p. 278, 1517

(Board of Veterinary Medicine)

- 24-225-41 Definitions - Patient Medical Records and Recordkeeping - Unprofessional Conduct - Continuing Education - Certified Euthanasia Technicians—License Requirements - Board-Approved Training Program Criteria - Certified Euthanasia Technician Examinations—Written and Practical - Application for Certified Euthanasia Agencies - Inspections—Initial and Annual - Continuing Education— Certified Euthanasia Technicians - Certified Euthanasia Agency Operation Standards - Change of Attorney-in-Fact - Closure of a Certified Euthanasia Agency or Loss of DEA Permit - Termination of Certified Euthanasia Technician Employment and Retirement of Certificate, p. 440, 1633

LIVESTOCK, Department of, Title 32

- 32-18-293 Recalls, p. 1468
- 32-20-308 Label Review, p. 1278, 1841
- 32-20-310 Designated Surveillance Area, p. 843, 1282
- 32-20-311 Special Requirements for Poultry - Special Requirements for Alternative Livestock, p. 1472, 1843

32-20-314 Special Requirements for Swine, p. 2104

(Board of Milk Control)

32-20-313 Milk Control Assessments, p. 2101

NATURAL RESOURCES AND CONSERVATION, Department of, Title 36

36-22-203 Management of State Forested Lands, p. 1046, 2239

36-22-210 Rangeland Management, p. 2107

PUBLIC HEALTH AND HUMAN SERVICES, Department of, Title 37

- 37-908 Child Welfare Prevention and Support Services Contract Enrollment and Participation, p. 1087, 1528
- 37-913 Substantiation of Abuse and Neglect Reports - Disclosure of Information, p. 1574, 1739
- 37-916 Updating Medicaid and Non-Medicaid Provider Rates, Fee Schedules, and Effective Dates, p. 846, 1158
- 37-917 Medicaid and Non-Medicaid Manual Updates, p. 856, 1161
- 37-918 Home and Community Based Services for Adults With Severe and Disabling Mental Illness, p. 861, 1173
- 37-919 Nursing Facility Reimbursement, p. 949, 1330
- 37-920 Developmental Disabilities Program Services Manual Updates, p. 1094, 1529
- 37-921 Durable Medical Equipment Order and Record Requirement Update, p. 1098, 1530
- 37-922 Healthy Montana Kids Dental Benefits, p. 1102, 1531
- 37-923 Flavored Electronic Smoking Devices, p. 1105, 1637
- 37-924 Limiting COVID-19 Exposure in Assisted Living Facilities, p. 1333
- 37-925 Medicaid Rates and Services, p. 1476, 1740
- 37-926 Graduate Medical Education Methodology Changes, p. 1481, 1742
- 37-928 Home and Community-Based Services, p. 1486, 1707
- 37-929 Low Income Energy Assistance Program (LIEAP), p. 1582, 1844
- 37-930 Trauma Facility Designation, p. 1591, 1845
- 37-931 Automated External Defibrillators (AED), p. 1826
- 37-932 Substantiation of Abuse and Neglect Reports - Disclosure of Information, p. 2040
- 37-933 Updating Medicaid Provider Rates, Fee Schedules, and Effective Dates, p. 2048, 2111
- 37-934 Home Support Services (HSS) Program Redesign, p. 2054
- 37-935 Health and Economic Livelihood Partnership (HELP) Act, p. 2062
- 37-936 Montana Telecommunications Access Program (MTAP) Financial Eligibility Criteria, p. 2113

PUBLIC SERVICE REGULATION, Department of, Title 38

38-5-246 Pipeline Safety, p. 2232

REVENUE, Department of, Title 42

- 42-1017 Approval of a Licensee Without Premises - Concession Agreements, p. 462, 566, 772, 1177, 1283
- 42-1019 Montana Economic Development Industry Advancement Act (MEDIAA), p. 473, 568, 774, 1638
- 42-1020 Alternative County Business Office Hours, p. 1115, 1648
- 42-1021 Forest Land Classification Requirements and Valuation, p. 1490, 1743
- 42-1022 State Liquor Warehouse Inventory Practices - Amendments to Bailment Limits - Revisions to Product Classification, p. 1506, 1745
- 42-1023 Classification and Valuation of Class Three Property (i.e., Agricultural Land), p. 1594, 1881
- 42-1024 Updates to the Montana Reappraisal Plan and Classification and Valuation Manuals, p. 1832, 2078
- 42-1025 Trended Depreciation Schedules for Valuing Personal Property, p. 1869, 2276
- 42-1026 Montana Achieving a Better Life Experience (ABLE) Program Accounts and Family Education Plan Savings Accounts, p. 2116
- 42-1027 Revisions to Definitions of Oil Stripper Well Bonus - Stripper Well Exemption, p. 2128
- 42-1028 Tax Credits for Contributions to Qualified Education Providers, p. 2235

SECRETARY OF STATE, Office of, Title 44

- 44-2-238 Electronic Notary Stamps, p. 704, 1186
- 44-2-240 Scheduled Dates for the 2021 Montana Administrative Register, p. 1695, 1882

(Commissioner of Political Practices)

- 44-2-241 Payment Threshold--Inflation Adjustment for Lobbyists, p. 2131

## EXECUTIVE BRANCH APPOINTEES AND VACANCIES

Section 2-15-108, MCA, passed by the 1991 Legislature, directed that all appointing authorities of all appointive boards, commissions, committees, and councils of state government take positive action to attain gender balance and proportional representation of minority residents to the greatest extent possible.

One directive of 2-15-108, MCA, is that the Secretary of State publish monthly in the ***Montana Administrative Register*** a list of executive branch appointees and upcoming vacancies on those boards and councils.

In this issue, appointments effective in November 2020 appear. Potential vacancies from January 1, 2021 through March 31, 2021, are also listed.

### IMPORTANT

Membership on boards and commissions changes constantly. The following lists are current as of December 1, 2020.

For the most up-to-date information of the status of membership, or for more detailed information on the qualifications and requirements to serve on a board, contact the appointing authority.

**EXECUTIVE BRANCH APPOINTEES FOR NOVEMBER 2020**

<u>Appointee</u>	<u>Appointed By</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
<b>Board of Architects and Landscape Architects</b>			
Mr. Bayliss Ward Bozeman	Governor	reappointed	11/25/2020 4/1/2023
Qualifications (if required): Licensed Architect			
<b>Board of Radiologic Technologists</b>			
Mrs. Kelli Rae Cummings-Hollow Butte	Governor	Anderson	11/25/2020 7/1/2023
Qualifications (if required): Licensed Radiologic Technologist			
Mr. Nathan David Richardson Kalispell	Governor	reappointed	11/6/2020 7/1/2023
Qualifications (if required): Licensed radiologic technologist			
Dr. Sarah Stilwill Bozeman	Governor	Lindenbaum	11/6/2020 7/1/2023
Qualifications (if required): Licensed Radiologist			
Mr. Darian Sutton Helena	Governor	Johnson	11/6/2020 7/1/2021
Qualifications (if required): Licensed Radiologic Technologist			



**EXECUTIVE BRANCH APPOINTEES FOR NOVEMBER 2020**

<u>Appointee</u>	<u>Appointed By</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
<b>Board of Radiologic Technologists Cont.</b>			
Ms. Lora Wier	Governor	Abramson	11/6/2020
Choteau			7/1/2023
Qualifications (if required): member of public			
<b>Board of Veterans Affairs</b>			
Ms. Jennifer Dalrymple	Governor	Juvik	11/6/2020
Townsend			8/1/2023
Qualifications (if required): Honorably discharged veteran-representative of veterans at large			
Mr. Richard Klose Sr.	Governor	Edelman	11/13/2020
Laurel			8/1/2022
Qualifications (if required): Region 4 Veteran			
Mr. Kurt Nelson	Governor	Olson	11/6/2020
Scobey			8/1/2024
Qualifications (if required): Region 5 Veteran			
<b>Fish and Wildlife Commission</b>			
Mr. Andrew McKean	Governor	Brower	11/25/2020
Glasgow			1/1/2023
Qualifications (if required): District 4			

# **EXECUTIVE BRANCH APPOINTEES FOR NOVEMBER 2020**

<u>Appointee</u>	<u>Appointed By</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
<b>Forest Lands Advisory Council</b>			
Commissioner Andy Hunthausen Helena	Governor	Curtiss	11/6/2020 6/30/2023
Qualifications (if required): County Commissioner			
Mr. Randy Mannix Helmville	Governor	Stokes	11/6/2020 6/30/2023
Qualifications (if required): Forest land owner-non industrial			
Mr. Gordy Sanders Seeley Lake	Governor	Settle	11/6/2020 6/30/2023
Qualifications (if required): Forest landowner-industry			
<b>Interagency Coordinating Council for State Prevention Programs</b>			
Ms. Barbara A. Bessette Great Falls	Governor	reappointed	11/13/2020 7/1/2022
Qualifications (if required): Experiences related to the private nonprofit provision of prevention programs			
Ms. Shantelle Page Gaynor Missoula	Governor	reappointed	11/13/2020 7/1/2022
Qualifications (if required): Experiences related to the private or nonprofit provision of prevention programs			

# **EXECUTIVE BRANCH APPOINTEES FOR NOVEMBER 2020**

<u>Appointee</u>	<u>Appointed By</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
<b>Land Information Advisory Council</b>			
Mr. Alex Dado	Governor	Maynard	11/25/2020
Bozeman			6/30/2021
Qualifications (if required): Employee of U.S. Dept. of Agriculture, Natural Resources Conservation Service			
<b>Montana Public Safety Officer Standards and Training Council</b>			
Mr. Roger Bodine	Governor	Jarrett	11/13/2020
Billings			1/1/2021
Qualifications (if required): Detention Center Administrator or Detention Officer			
<b>Public Employees' Retirement Board</b>			
Mr. Dustin LeRette	Governor	Fowler	11/13/2020
Helena			4/1/2025
Qualifications (if required): Public employee, active member of the public retirement system			
<b>State Workforce Innovation Board</b>			
Mr. Steven Nicholls	Governor	Rose	11/6/2020
Butte			7/1/2022
Qualifications (if required): Business Representative			
<b>State-Tribal Economic Development Commission</b>			
Councilman Martin Charlo	Governor	New	11/13/2020
Pablo			7/1/2023
Qualifications (if required): Alternate for the Confederated Salish and Kootenai Tribes			

**EXECUTIVE BRANCH APPOINTEES FOR NOVEMBER 2020**

<u>Appointee</u>	<u>Appointed By</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
<b>State-Tribal Economic Development Commission Cont.</b>			
Ms. Shelly Fyant	Governor	reappointed	11/13/2020
Pablo			7/1/2023
Qualifications (if required): Representative of the Confederated Salish and Kootenai Tribes			
Chairman Len Twoteeth	Governor	reappointed	11/13/2020
Pablo			7/1/2023
Qualifications (if required): Alternate for the Confederated Salish and Kootenai Tribes			
<b>Trauma Care Committee</b>			
Ms. Lauri Jackson	Governor	reappointed	11/6/2020
Great Falls			11/1/2024
Qualifications (if required): Central Region Trauma Advisory Council			
Dr. Tiffany Kniepkamp	Governor	Newton	11/6/2020
Helena			11/1/2024
Qualifications (if required): Representative of the Montana Medical Assoc.			
Ms. Brenda Koessl	Governor	reappointed	11/6/2020
Glasgow			11/1/2024
Qualifications (if required): Montana Hospital Assoc. Representative			

**EXECUTIVE BRANCH APPOINTEES FOR NOVEMBER 2020**

<u>Appointee</u>	<u>Appointed By</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
<b>Trauma Care Committee Cont.</b>			
Mr. Lanny Orr	Governor	Von Bergan	11/6/2020
Laurel			11/1/2024
Qualifications (if required): Eastern Region Trauma Advisory Council			
Dr. John Bradley Pickhardt	Governor	reappointed	11/6/2020
Missoula			11/1/2024
Qualifications (if required): Western Region Trauma Advisory Council			
<b>Youth Justice Council</b>			
Mr. Isaac Nehring	Governor	McIntosh	11/6/2020
Helena			3/1/2022
Qualifications (if required): Under the age of 28			
Comm. George Real Bird II	Governor	Obert	11/6/2020
Hardin			3/1/2022
Qualifications (if required): Local Government			

**EXECUTIVE BRANCH VACANCIES – JANUARY 1, 2021 THROUGH MARCH 31, 2021**

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
<b>Information Technology Board</b>		
Director Sheila Hogan, Helena Qualifications (if required): Director of a state agency	Governor	1/1/2021
Mr. Sean Higginbotham, Great Falls Qualifications (if required): Member representing local government	Governor	1/1/2021
<b>21st Judicial District</b>		
Ms. Jennifer Boatwright Lint, Victor Qualifications (if required): None Stated	Governor	1/4/2021
<b>9-1-1 Advisory Council</b>		
Director Jason Smith, Helena Qualifications (if required): Director of Indian Affairs	Governor	1/1/2021
<b>Achieving a Better Life Experience Program Oversight Committee</b>		
Director John Lewis, Helena Qualifications (if required): Dept. of Administration Director or Designee	Governor	1/1/2021
Ms. Catherine Murphy, Helena Qualifications (if required): Director of DPHHS	Governor	1/1/2021
<b>Board of Aeronautics</b>		
Mr. Walter LeRoy McNutt, Sidney Qualifications (if required): Member of the Montana Chamber of Commerce	Governor	1/1/2021

**EXECUTIVE BRANCH VACANCIES – JANUARY 1, 2021 THROUGH MARCH 31, 2021**

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
<b>Board of Aeronautics Cont.</b>		
Ms. Tricia McKenna, Bozeman Qualifications (if required): Member of the Montana Pilots' Association	Governor	1/1/2021
Mr. Roger Lincoln, Gildford Qualifications (if required): Member of the Association of Montana Aerial Applicators	Governor	1/1/2021
Mr. Bill Hunt Jr., Shelby Qualifications (if required): Attorney/Member of the MT County Comm. Assoc. or the MT League of Cities & Towns	Governor	1/1/2021
Mr. Jeff Wadekamper, Helena Qualifications (if required): Representative of the Montana Airport Management Association	Governor	1/1/2021
<b>Board of Behavioral Health</b>		
Ms. Kimberly C. Gardner, Helena Qualifications (if required): Licensed Clinical Social Worker	Governor	1/1/2021
Mr. Durand T. Bear Medicine, Browning Qualifications (if required): Licensed Addiction Counselor	Governor	1/1/2021
Dr. Catherine B. Jenni, Missoula Qualifications (if required): Licensed Professional Counselor and Marriage and Family Therapist	Governor	1/1/2021
Ms. Megan N. Bailey, Missoula Qualifications (if required): Licensed Social Worker	Governor	1/1/2021

**EXECUTIVE BRANCH VACANCIES – JANUARY 1, 2021 THROUGH MARCH 31, 2021**

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
<b>Board of Behavioral Health Cont.</b>		
Mr. Adrian Sagan, Helena	Governor	1/1/2021
Qualifications (if required): Licensed Social Worker		
<b>Board of Chiropractors</b>		
Dr. Vincent J. Maddio, Helena	Governor	1/1/2021
Qualifications (if required): Practicing Chiropractor		
Ms. Sheryl Olson, Stevensville	Governor	1/1/2021
Qualifications (if required): Representative of the public		
Dr. Marcus Nynas, Billings	Governor	1/1/2021
Qualifications (if required): Practicing Chiropractor		
<b>Board of Crime Control</b>		
Atty. Gen. Tim Fox, Helena	Governor	1/1/2021
Qualifications (if required): Attorney General		
Sheriff Leo Dutton, Helena	Governor	1/1/2021
Qualifications (if required): Law Enforcement Representative		
Mr. William Dial, Whitefish	Governor	1/1/2021
Qualifications (if required): Law Enforcement Representative		
Commissioner Laura Obert, Townsend	Governor	1/1/2021
Qualifications (if required): Local Government, Youth Justice Council Representative		



**EXECUTIVE BRANCH VACANCIES – JANUARY 1, 2021 THROUGH MARCH 31, 2021**

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
<b>Board of Crime Control Cont.</b>		
Mr. Wyatt Arthur Glade, Miles City Qualifications (if required): Law Enforcement Representative	Governor	1/1/2021
Mr. Tim Brurud, Havre Qualifications (if required): Youth Justice Council Representative	Governor	1/1/2021
Ms. Geri Small, Lame Deer Qualifications (if required): Professional & Community Organizations	Governor	1/1/2021
Mr. Jared Charles Cobell, Great Falls Qualifications (if required): Public Representative	Governor	1/1/2021
Mrs. Jennie Hansen, Huntley Qualifications (if required): Community Corrections	Governor	1/1/2021
Mrs. Katie Patricia Wirtz, Ronan Qualifications (if required): Community Corrections	Governor	1/1/2021
<b>Board of Environmental Review</b>		
Mr. Dexter Busby, Great Falls Qualifications (if required): Experience or background in environmental science	Governor	1/1/2021
Mr. John DeArment, Missoula Qualifications (if required): Experience or background in hydrology	Governor	1/1/2021

**EXECUTIVE BRANCH VACANCIES – JANUARY 1, 2021 THROUGH MARCH 31, 2021**

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
<b>Board of Environmental Review Cont.</b>		
Ms. Christine Deveny, Helena Qualifications (if required): Expertise or background in local government planning	Governor	1/1/2021
Mr. Christian Tweeten, Missoula Qualifications (if required): Attorney	Governor	1/1/2021
<b>Board of Examiners</b>		
Atty. Gen. Tim Fox, Helena Qualifications (if required): Attorney General	Governor	1/1/2021
Sec. of State Corey Stapleton, Helena Qualifications (if required): Secretary of State	Governor	1/1/2021
Governor Steve Bullock, Helena Qualifications (if required): Governor	Governor	1/1/2021
<b>Board of Hail Insurance</b>		
Commissioner Matt Rosendale, Helena Qualifications (if required): State Auditor	Governor	1/1/2021
<b>Board of Horse Racing</b>		
Mr. John Hayes, Great Falls Qualifications (if required): District 3	Governor	1/1/2021

**EXECUTIVE BRANCH VACANCIES – JANUARY 1, 2021 THROUGH MARCH 31, 2021**

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
<b>Board of Horse Racing Cont.</b>		
Mr. Ralph Young, Columbus Qualifications (if required): Horseracing Industry	Governor	1/1/2021
Mr. Barry Stang, Helena Qualifications (if required): District 4	Governor	1/1/2021
Ms. Jody Smith, Miles City Qualifications (if required): District 1	Governor	1/1/2021
<b>Board of Housing</b>		
Mr. Eric L. Schindler, Helena Qualifications (if required): Member informed and experienced in housing, economics, or finance	Governor	1/1/2021
Mr. Patrick Edward Melby, Helena Qualifications (if required): Attorney	Governor	1/1/2021
Mr. John Lewis Raymond McClusky, Billings Qualifications (if required): Member informed and experienced in housing, economics, or finance	Governor	1/1/2021
Ms. Amber Sundsted, Billings Qualifications (if required): Member informed and experienced in housing, economics, or finance	Governor	1/1/2021
<b>Board of Humanities Montana</b>		
Mrs. Carmen McSpadden, Bozeman Qualifications (if required): Public Representative	Governor	1/1/2021

**EXECUTIVE BRANCH VACANCIES – JANUARY 1, 2021 THROUGH MARCH 31, 2021**

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
<b>Board of Humanities Montana Cont.</b>		
Mr. Aaron David Pruitt, Bozeman Qualifications (if required): Public Representative	Governor	1/1/2021
Ms. Mandy L. Smoker Broaddus, Helena Qualifications (if required): Public Representative	Governor	1/1/2021
Mr. David A. Irion, Billings Qualifications (if required): Public Representative	Governor	1/1/2021
<b>Board of Investments</b>		
Mr. Mark E. Noennig, Billings Qualifications (if required): Representative of Small Business	Governor	1/1/2021
Mr. Jack Prothero, Great Falls Qualifications (if required): Representative of the financial community	Governor	1/1/2021
Ms. Maggie Jean Peterson, Anaconda Qualifications (if required): Member of the Public Employees' Retirement Board	Governor	1/1/2021
Mr. Jeffrey A. Greenfield, Shepherd Qualifications (if required): Member of the Teachers' Retirement Board	Governor	1/1/2021
Mr. James Michael Edwards, Helena Qualifications (if required): Representative of small business	Governor	1/1/2021

**EXECUTIVE BRANCH VACANCIES – JANUARY 1, 2021 THROUGH MARCH 31, 2021**

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
<b>Board of Livestock</b>		
Mr. Brett DeBruycker, Dutton Qualifications (if required): cattle producer	Governor	1/1/2021
Representative Lila V. Taylor-Evans, Busby Qualifications (if required): Cattle Producer	Governor	3/1/2021
<b>Board of Milk Control</b>		
Mr. Ralph James Parker, Fairfield Qualifications (if required): Not connected to the industry and not a public officer, Democrat	Governor	1/1/2021
Mr. Erik Somerfeld, Power Qualifications (if required): Not connected to the industry and not a public officer, Democrat	Governor	1/1/2021
Mr. Brian Beerman, Fairfield Qualifications (if required): Not connected to the industry & not a public officer, Republican	Governor	1/1/2021
<b>Board of Nursing Home Administrators</b>		
Director Sheila Hogan, Helena Qualifications (if required): Director of the Department of Public Health and Human Services	Governor	1/1/2021
<b>Board of Oil and Gas Conservation</b>		
Mrs. Peggy Ames Nerud, Circle Qualifications (if required): Public Representative	Governor	1/1/2021

**EXECUTIVE BRANCH VACANCIES – JANUARY 1, 2021 THROUGH MARCH 31, 2021**

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
<b>Board of Oil and Gas Conservation Cont.</b>		
Mr. Mac McDermott, Shelby Qualifications (if required): Member from the oil and gas industry	Governor	1/1/2021
Mr. Dennis Trudell, Fairview Qualifications (if required): Landowner (Special)	Governor	1/1/2021
Mr. Corey Michael Welter, Billings Qualifications (if required): Member from the oil and gas industry	Governor	1/1/2021
Ms. Linda Nelson, Billings Qualifications (if required): Public member	Governor	1/1/2021
<b>Board of Pardons and Parole</b>		
Ms. Annette Carter Farley, Helena Qualifications (if required): Extensive experience in corrections	Governor	1/1/2021
Mr. Edward Foley, Butte Qualifications (if required): Extensive experience in corrections	Governor	1/1/2021
Ms. Renee Bauer, Helena Qualifications (if required): Extensive experience in corrections	Governor	1/1/2021

**EXECUTIVE BRANCH VACANCIES – JANUARY 1, 2021 THROUGH MARCH 31, 2021**

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
<b>Board of Personnel Appeals</b>		
Mr. Quinton Edward Nyman, Helena Qualifications (if required): Full-time employee or elected official of a labor union	Governor	1/1/2021
Mrs. Anzarina Fontana Moore, Great Falls Qualifications (if required): Management employee	Governor	1/1/2021
Mrs. Jenny Lin Stringer, Livingston Qualifications (if required): Management employee in an organization	Governor	1/1/2021
<b>Board of Public Assistance</b>		
Ms. Marianne Roose, Eureka Qualifications (if required): Public Representative	Governor	1/1/2021
Ms. Amy D. Christensen, Helena Qualifications (if required): Attorney	Governor	1/1/2021
<b>Board of Public Education</b>		
Ms. Mary Jo Bremner, Browning Qualifications (if required): District 2, Democrat	Governor	2/1/2021
<b>Board of Regents of Higher Education</b>		
Ms. Martha Sheehy, Billings Qualifications (if required): District 2 and a Democrat	Governor	2/1/2021

**EXECUTIVE BRANCH VACANCIES – JANUARY 1, 2021 THROUGH MARCH 31, 2021**

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
<b>Board of Respiratory Care Practitioners</b>		
Mr. Leonard Bates, Wolf Creek Qualifications (if required): Respiratory Care Practitioner	Governor	1/1/2021
Mr. Rusty James Davies, Billings Qualifications (if required): Respiratory Care Practitioners	Governor	1/1/2021
Mr. Tony Jay Miller, Joplin Qualifications (if required): Respiratory Care Practitioner	Governor	1/1/2021
<b>Board of Review</b>		
Director Sheila Hogan, Helena Qualifications (if required): Director of the Department of Public Health and Human Services	Governor	1/1/2021
Director Mike Kadas, Helena Qualifications (if required): Director of the Department of Revenue, Presiding Officer	Governor	1/1/2021
Atty. Gen. Tim Fox, Helena Qualifications (if required): Attorney General, Director of the Department of Justice	Governor	1/1/2021
Director Tom Livers, Helena Qualifications (if required): Director of the Department of Environmental Quality	Governor	1/1/2021
Commissioner Pam Bucy, Helena Qualifications (if required): Commissioner of the Department of Labor and Industry	Governor	1/1/2021



**EXECUTIVE BRANCH VACANCIES – JANUARY 1, 2021 THROUGH MARCH 31, 2021**

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
<b>Board of Review Cont.</b>		
Ms. Angela Wong, Helena Qualifications (if required): Agency requesting inclusion	Governor	1/1/2021
Director Mike Honeycutt, Helena Qualifications (if required): Director of the Department of Livestock	Governor	1/1/2021
Director Ben Thomas, Helena Qualifications (if required): Director of the Department of Agriculture	Governor	1/1/2021
Mr. Shaun McGrath, Helena Qualifications (if required): Director of the Department of Environmental Quality	Governor	1/1/2021
Commissioner Tom Lopach, Helena Qualifications (if required): Commissioner of Labor and Industry	Governor	1/1/2021
Commissioner Brenda Nordlund, Helena Qualifications (if required): Commissioner of Labor and Industry	Governor	1/1/2021
<b>Board of Veterans Affairs</b>		
Major General Matthew T. Quinn, Fort Harrison Qualifications (if required): Director of the Department of Military Affairs, non-voting member	Governor	1/1/2021
Director Jason Smith, Helena Qualifications (if required): Director of the Office of Indian Affairs, non-voting member	Governor	1/1/2021

**EXECUTIVE BRANCH VACANCIES – JANUARY 1, 2021 THROUGH MARCH 31, 2021**

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
<b>Building Codes Council</b>		
Director Sheila Hogan, Helena Qualifications (if required): Director of the Department of Public Health and Human Services	Governor	1/1/2021
<b>Butte Natural Resource Damage (NRD) Restoration Council</b>		
Representative Ryan Lynch, Butte Qualifications (if required): Public Representative	Governor	1/1/2021
Mr. Roderick David Williams, Butte Qualifications (if required): Public Representative	Governor	1/1/2021
Ms. Helen O'Connor Joyce, Butte Qualifications (if required): Public Representative	Governor	1/1/2021
<b>Capitol Complex Advisory Council</b>		
Mr. Bruce Whittenberg, Helena Qualifications (if required): Director of the Montana Historical Society	Governor	1/1/2021
Mrs. Carol Williams, Missoula Qualifications (if required): Public Member	Governor	1/1/2021
Ms. Molly Kruckenberg, Helena Qualifications (if required): Montana Historical Society Director	Governor	1/1/2021

**EXECUTIVE BRANCH VACANCIES – JANUARY 1, 2021 THROUGH MARCH 31, 2021**

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
<b>Capitol Complex Advisory Council Cont.</b>		
Mrs. Sheena Wilson, Helena Qualifications (if required): Public Member	Governor	1/1/2021
Director John Lewis, Helena Qualifications (if required): Director of the Department of Administration	Governor	1/1/2021
Ms. Tatiana Gant, Helena Qualifications (if required): Director of the Montana Arts Council	Governor	1/1/2021
Ms. Sheryl Olson, Stevensville Qualifications (if required): Public member	Governor	1/1/2021
<b>Coal Board</b>		
Mayor John N. Williams, Colstrip Qualifications (if required): District 2, Impact Area	Governor	1/1/2021
Mr. Sean Smith, Anaconda Qualifications (if required): District 1	Governor	1/1/2021
Commissioner Sidney Fitzpatrick, Hardin Qualifications (if required): District 2, Impact Area	Governor	1/1/2021
Mr. Shawn Fredrickson, Butte Qualifications (if required): District 1	Governor	1/1/2021

**EXECUTIVE BRANCH VACANCIES – JANUARY 1, 2021 THROUGH MARCH 31, 2021**

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
<b>Coal Board Cont.</b>		
Ms. Amber Lynn Henning, Missoula Qualifications (if required): Attorney, District I	Governor	1/1/2021
<b>Commission for Human Rights</b>		
Mr. Christopher Pope, Bozeman Qualifications (if required): Public Representative	Governor	1/1/2021
Ms. Theresa L. Doty, Butte Qualifications (if required): Public Representative	Governor	1/1/2021
Mr. Michael Murray, Helena Qualifications (if required): Public Representative	Governor	1/1/2021
Ms. Sheri Sprigg, Helena Qualifications (if required): Attorney	Governor	1/1/2021
<b>Commissioner of the Montana Department of Labor and Industry</b>		
Commissioner Thomas K. Lopach, Helena Qualifications (if required): Director of the Montana Department of Labor and Industry	Governor	1/1/2021
Mr. Galen John Hollenbaugh, Helena Qualifications (if required): Director of the Montana Department of Labor and Industry	Governor	1/4/2021

**EXECUTIVE BRANCH VACANCIES – JANUARY 1, 2021 THROUGH MARCH 31, 2021**

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
<b>Department of Commerce</b> Director Tara Rice, Helena Qualifications (if required): None Stated	Governor	1/1/2021
<b>Department of Environmental Quality</b> Mr. Shaun McGrath, Helena Qualifications (if required):	Governor	1/1/2021
<b>Department of Fish Wildlife and Parks Director</b> Director Martha Williams, Helena Qualifications (if required): Director of the Department of Fish, Wildlife and Parks	Governor	1/1/2021
<b>Director of the Department of Commerce</b> Director Pam Haxby-Cote, Helena Qualifications (if required): None Stated	Governor	1/1/2021
<b>Director of the Department of Corrections</b> Director Reginald D. Michael, Helena Qualifications (if required): None Stated	Governor	1/1/2021
<b>Director of the Department of Revenue</b> Director Eugene L. Walborn, Helena Qualifications (if required): None Stated	Governor	1/4/2021

**EXECUTIVE BRANCH VACANCIES – JANUARY 1, 2021 THROUGH MARCH 31, 2021**

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
<b>District Court Judge</b> Mr. Howard Frank Recht, Hamilton Qualifications (if required): None Stated	Governor	1/3/2021
<b>District Court Judge District 7 Department 1</b> Ms. Olivia C. Rieger, Glendive Qualifications (if required): none stated	Governor	1/1/2021
<b>Drought and Water Supply Advisory Committee</b> Lt. Governor Mike Cooney, Helena Qualifications (if required): Representative of the Governor	Governor	1/1/2021
Director Tom Livers, Helena Qualifications (if required): Director of the Department of Environmental Quality	Governor	1/1/2021
Major General Matthew T. Quinn, Fort Harrison Qualifications (if required): Director of the Department of Military Affairs	Governor	1/1/2021
Director John Tubbs, Helena Qualifications (if required): Director of the Department of Natural Resources and Conservation	Governor	1/1/2021
Director Pam Haxby-Cote, Helena Qualifications (if required): Director of the Department of Commerce	Governor	1/1/2021
Director Mike Honeycutt, Helena Qualifications (if required): Director of the Department of Livestock	Governor	1/1/2021

**EXECUTIVE BRANCH VACANCIES – JANUARY 1, 2021 THROUGH MARCH 31, 2021**

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
<b>Drought and Water Supply Advisory Committee Cont.</b>		
Director Martha Williams, Helena Qualifications (if required): Director of the Department of Fish, Wildlife and Parks	Governor	1/1/2021
Director Ben Thomas, Helena Qualifications (if required): Director of the Department of Agriculture	Governor	1/1/2021
Mr. Shaun McGrath, Helena Qualifications (if required): None Stated	Governor	1/1/2021
Director Tara Rice, Helena Qualifications (if required): Director of the Department of Commerce	Governor	1/1/2021
<b>Economic Development Advisory Council</b>		
Director Pam Haxby-Cote, Helena Qualifications (if required): Department of Commerce Director	Governor	1/1/2021
Mr. Ken Fichtler, Helena Qualifications (if required): Chief Business Development Officer	Governor	1/1/2021
Director Tara Rice, Helena Qualifications (if required): Director of the Department of Commerce	Governor	1/1/2021
<b>Education Commission of the States</b>		
Governor Steve Bullock, Helena Qualifications (if required): Governor	Governor	1/1/2021

**EXECUTIVE BRANCH VACANCIES – JANUARY 1, 2021 THROUGH MARCH 31, 2021**

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
<b>Education Commission of the States Cont.</b>		
Ms. Elly Driggers, Helena Qualifications (if required): Educator engaged in K-12 Education	Governor	1/1/2021
Ms. Darlene Schottle, Bigfork Qualifications (if required): Educator in K-12 education	Governor	1/1/2021
Ms. Alison Harmon, Bozeman Qualifications (if required): Educator engaged in the field of higher education	Governor	1/1/2021
Superintendent Elsie Arntzen, Helena Qualifications (if required): Superintendent of Public Instruction	Governor	1/1/2021
<b>Family Education Savings Program Oversight Committee</b>		
Commissioner Matt Rosendale, Helena Qualifications (if required): Commissioner of Insurance	Governor	1/1/2021
Director John Lewis, Helena Qualifications (if required): State Treasurer	Governor	1/1/2021
Commissioner Clayton Christian, Helena Qualifications (if required): Presiding officer of the board or designee	Governor	1/1/2021
<b>Fish and Wildlife Commission</b>		
Mr. Gregory M. Tollefson, Missoula Qualifications (if required): District 1	Governor	1/1/2021



**EXECUTIVE BRANCH VACANCIES – JANUARY 1, 2021 THROUGH MARCH 31, 2021**

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
<b>Fish and Wildlife Commission Cont.</b>		
Mr. Richard Louis Stuker, Chinook Qualifications (if required): District 3, Experienced in the breeding and management of domestic livestock	Governor	1/1/2021
Mr. Matthew Tourtlotte, Billings Qualifications (if required): District 5	Governor	1/1/2021
Mr. Shane Colton, Billings Qualifications (if required): District 5	Governor	1/1/2021
Mr. Grover Bennett Aldrich, Missoula Qualifications (if required): District 1	Governor	1/1/2021
<b>Flathead Basin Commission</b>		
Director Tom Livers, Helena Qualifications (if required): Director of the Department of Environmental Quality	Governor	1/1/2021
Director John Tubbs, Helena Qualifications (if required): Director of the Department of Natural Resources and Conservation	Governor	1/1/2021
Director Martha Williams, Helena Qualifications (if required): Director of the Department of Fish, Wildlife and Parks	Governor	1/1/2021
Mr. Patrick Holmes, Helena Qualifications (if required): Governor's Staff	Governor	1/1/2021

**EXECUTIVE BRANCH VACANCIES – JANUARY 1, 2021 THROUGH MARCH 31, 2021**

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
<b>Flathead Basin Commission Cont.</b> Mr. Shaun McGrath, Helena Qualifications (if required): None Stated	Governor	1/1/2021
<b>Flathead Reservation Fish and Wildlife Board</b> Ms. Pelah Niamie Hoyt, Missoula Qualifications (if required): Public Representative	Governor	1/1/2021
Mr. Michael Carl Jamison, Whitefish Qualifications (if required): Public Representative	Governor	1/1/2021
Mr. Rodd Richardson, Saint Ignatius Qualifications (if required): Public Representative	Governor	1/1/2021
<b>Governor's Budget Director</b> Director Tom Livers, Helena Qualifications (if required): None Stated	Governor	1/1/2021
<b>Hard-Rock Mining Impact Board</b> Mr. Joe Michaletz, Helena Qualifications (if required): Representative of the hard-rock mining industry, District 1	Governor	1/1/2021
Ms. Kay Clevidence, Victor Qualifications (if required): Representative of a Major Financial Institution in Montana, District 1	Governor	1/1/2021

**EXECUTIVE BRANCH VACANCIES – JANUARY 1, 2021 THROUGH MARCH 31, 2021**

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
<b>Hard-Rock Mining Impact Board Cont.</b>		
Mr. Tim Warner, Bozeman Qualifications (if required): Public At-Large, District 1	Governor	1/1/2021
Mr. Keith Kelly, Helena Qualifications (if required): Representative of a Major Financial Institution in Montana, District 2	Governor	1/1/2021
Mr. John C. Rogers, Clancy Qualifications (if required): Public At-Large, District 1, Impact Area	Governor	1/1/2021
Mr. Mark S. Thompson, Butte Qualifications (if required): Representative of the Hard-Rock Mining Industry, District 1	Governor	1/1/2021
<b>Human Rights Commission</b>		
Mr. Timothy A. Tatarka, Billings Qualifications (if required): Public Representative	Governor	1/1/2021
Ms. Stephanie Maria Denton Baucus, Billings Qualifications (if required): Public Representative	Governor	1/1/2021
<b>Information Technology Board</b>		
Director John Tubbs, Helena Qualifications (if required): Director of a State Agency	Governor	1/1/2021
Ms. Jennie Stapp, Helena Qualifications (if required): Director of a State Agency	Governor	1/1/2021

**EXECUTIVE BRANCH VACANCIES – JANUARY 1, 2021 THROUGH MARCH 31, 2021**

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
<b>Information Technology Board Cont.</b>		
Mr. Ron Baldwin, Helena Qualifications (if required): Chief Information Officer	Governor	1/1/2021
Director John Lewis, Helena Qualifications (if required): Director of the Department of Administration	Governor	1/1/2021
Ms. Cece Harris, Belgrade Qualifications (if required): Member representing the private sector	Governor	1/1/2021
Representative Mike Milburn, Helena Qualifications (if required): Director of a State Agency	Governor	1/1/2021
Ms. Amy Sassano, Helena Qualifications (if required): Office of Budget and Program Planning	Governor	1/1/2021
Mr. Cody Jones, Boulder Qualifications (if required): Local Government	Governor	1/1/2021
Mr. Timothy Bottenfield, Helena Qualifications (if required): Chief Information Officer	Governor	1/1/2021
Director Martha Williams, Helena Qualifications (if required): State Agency Director	Governor	1/1/2021
Commissioner Tom Lopach, Helena Qualifications (if required): Director of a State Agency	Governor	1/1/2021

**EXECUTIVE BRANCH VACANCIES – JANUARY 1, 2021 THROUGH MARCH 31, 2021**

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
<b>Information Technology Board Cont.</b> Commissioner Brenda Nordlund, Helena Qualifications (if required): Director of a State Agency	Governor	1/1/2021
<b>Interagency Coordinating Council for State Prevention Programs</b> Atty. Gen. Tim Fox, Helena Qualifications (if required): Attorney General	Governor	1/1/2021
Director Jason Smith, Helena Qualifications (if required): Director of the Governor's Office of Indian Affairs	Governor	1/1/2021
Director Mike Tooley, Helena Qualifications (if required): Director of the Department of Transportation	Governor	1/1/2021
Director Reginald D. Michael, Helena Qualifications (if required): Director of the Department of Corrections	Governor	1/1/2021
Major General Matthew Quinn, Helena Qualifications (if required): Adjutant General of the Department of Military Affairs	Governor	1/1/2021
Superintendent Elsie Arntzen, Helena Qualifications (if required): Superintendent of Public Instruction	Governor	1/1/2021
Commissioner Galen Hollenbaugh, Helena Qualifications (if required): Commissioner of Labor and Industry	Governor	1/1/2021

**EXECUTIVE BRANCH VACANCIES – JANUARY 1, 2021 THROUGH MARCH 31, 2021**

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
<b>Interagency Coordinating Council for State Prevention Programs Cont.</b>		
Mr. Leslie Caye, Polson Qualifications (if required): Presiding Officer of the Montana Children's Trust Fund Board	Governor	1/1/2021
Ms. Natalia Bowser, Helena Qualifications (if required): Board of Crime Control Executive Officer	Governor	1/1/2021
Commissioner Clayton Christian, Helena Qualifications (if required): Commissioner of Higher Education	Governor	1/1/2021
Commissioner Brenda Nordlund, Helena Qualifications (if required): Commissioner of Labor and Industry	Governor	1/1/2021
<b>Interstate Commission on Educational Opportunity for Military Children</b>		
Superintendent Elsie Arntzen, Helena Qualifications (if required): Superintendent of Public Instruction	Governor	1/1/2021
<b>Interstate Oil Compact Commission</b>		
Mr. Ron Efta, Wibaux Qualifications (if required): Official Representative	Governor	1/1/2021

**EXECUTIVE BRANCH VACANCIES – JANUARY 1, 2021 THROUGH MARCH 31, 2021**

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
<b>Interstate Oil Compact Commission Cont.</b>		
Mr. Jim Halvorson, Billings	Governor	1/1/2021
Qualifications (if required): Associate Official Representative		
Mr. Steven D. Durrett, Billings	Governor	1/1/2021
Qualifications (if required): Official Representative of Montana		
<b>Judicial Nomination Commission</b>		
Senator Lane Larson, Billings	Governor	1/1/2021
Qualifications (if required): Lay member		
<b>Juvenile Interstate Compact Commissioner</b>		
Ms. Cathy Gordon, Helena	Governor	1/1/2021
Qualifications (if required): None Stated		
<b>Land Information Advisory Council</b>		
Ms. Jennie Stapp, Helena	Governor	1/1/2021
Qualifications (if required): State Librarian		
Mr. Ron Baldwin, Helena	Governor	1/1/2021
Qualifications (if required): Chief Information Officer		
Mr. Timothy Bottenfield, Helena	Governor	1/1/2021
Qualifications (if required): Chief Information Officer		

**EXECUTIVE BRANCH VACANCIES – JANUARY 1, 2021 THROUGH MARCH 31, 2021**

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
<b>Livestock Loss Board</b>		
Mr. Seth M. Wilson, Missoula Qualifications (if required): Member of the general public	Governor	1/1/2021
Mr. Harold James Cross, Kalispell Qualifications (if required): Member of the general public	Governor	1/1/2021
Ms. Doreen Gillespie, Ethridge Qualifications (if required): Member actively involved in the livestock industry	Governor	1/1/2021
<b>Montana Agriculture Development Council</b>		
Director Pam Haxby-Cote, Helena Qualifications (if required): Director of the Department of Commerce	Governor	1/1/2021
Director Ben Thomas, Helena Qualifications (if required): Director of the Department of Agriculture	Governor	1/1/2021
Director Tara Rice, Helena Qualifications (if required): Director of the Department of Commerce	Governor	1/1/2021
<b>Montana Alfalfa Seed Committee</b>		
Director Ben Thomas, Helena Qualifications (if required): Director of the Department of Agriculture	Governor	1/1/2021



**EXECUTIVE BRANCH VACANCIES – JANUARY 1, 2021 THROUGH MARCH 31, 2021**

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
<b>Montana Children's Trust Fund Board</b>		
Mr. Joseph Mathieu Raffiani, Billings Qualifications (if required): Member	Governor	1/1/2021
Mr. Leslie Caye, Polson Qualifications (if required): Member	Governor	1/1/2021
Ms. Brooke Bartholomew, Miles City Qualifications (if required): Public Member	Governor	1/1/2021
<b>Montana Council on Developmental Disabilities</b>		
Ms. Lorrie Merrill, Big Sandy Qualifications (if required): Local nongovernmental entity interested in services	Governor	1/1/2021
Mr. Bob Maffit, Helena Qualifications (if required): local nongovernment entity interested in services	Governor	1/1/2021
Ms. Erin Butts, Helena Qualifications (if required): State Agency Representative	Governor	1/1/2021
Mr. Len Nopen, East Helena Qualifications (if required): Self-Advocate	Governor	1/1/2021
Ms. Kim Evermann, Helena Qualifications (if required): State Agency Representative	Governor	1/1/2021

**EXECUTIVE BRANCH VACANCIES – JANUARY 1, 2021 THROUGH MARCH 31, 2021**

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
<b>Montana Council on Developmental Disabilities Cont.</b>		
Ms. Melissa Clark, Great Falls Qualifications (if required): Self-Advocate	Governor	1/1/2021
Ms. Jan Wenaas, Great Falls Qualifications (if required): Parent/Family Advocate	Governor	1/1/2021
Mr. Don Berryman, Anaconda Qualifications (if required): Parent/Family Advocate	Governor	1/1/2021
Ms. Nanette Whitman-Holmes, Helena Qualifications (if required): Parent/Family Advocate	Governor	1/1/2021
Mr. Isaiah Devereaux, Glasgow Qualifications (if required): Self-Advocate	Governor	1/1/2021
Mr. Jim Marks, Helena Qualifications (if required): State Agency Representative	Governor	1/1/2021
Mr. Martin Blair, Missoula Qualifications (if required): Sister Program	Governor	1/1/2021
Mr. Bob Des Jardin, Dillon Qualifications (if required): Parent/Family Advocate	Governor	1/1/2021
Ms. Virjeana Brown, Belgrade Qualifications (if required): Parent/Family Advocate	Governor	1/1/2021

**EXECUTIVE BRANCH VACANCIES – JANUARY 1, 2021 THROUGH MARCH 31, 2021**

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
<b>Montana Council on Developmental Disabilities Cont.</b>		
Ms. Rebecca DeCamara, Helena Qualifications (if required): State Agency Representative	Governor	1/1/2021
Mrs. Dianna Crawford, Valier Qualifications (if required): Parent/Family Advocate	Governor	1/1/2021
Mr. Trenton Butler, Big Sandy Qualifications (if required): Self-Advocate	Governor	1/1/2021
Representative Susan Webber, Browning Qualifications (if required): State Legislator	Governor	1/1/2021
Ms. Tricia Yvonne Lough, Lewistown Qualifications (if required): Parent/Family Advocate	Governor	1/1/2021
Mr. Terry Stratton, Missoula Qualifications (if required): Parent/Family Advocate	Governor	1/1/2021
Mr. Devin Howard Booth, Kalispell Qualifications (if required): Self-advocate	Governor	1/1/2021
Ms. Ann Buss, Helena Qualifications (if required): DPHHS Title V	Governor	1/1/2021
Mr. David Eaton, Livingston Qualifications (if required): Local, nongovernmental agency	Governor	1/1/2021

**EXECUTIVE BRANCH VACANCIES – JANUARY 1, 2021 THROUGH MARCH 31, 2021**

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
<b>Montana Council on Developmental Disabilities Cont.</b>		
Ms. Chanda Hermanson, Helena Qualifications (if required): DPHHS, Vocational Rehabilitation	Governor	1/1/2021
Ms. Karrie Reidelbach, Helena Qualifications (if required): DPHHS, Older Americans Act	Governor	1/1/2021
Rep. Geraldine Custer, Forsyth Qualifications (if required): State Legislator	Governor	1/1/2021
<b>Montana Facility Finance Authority</b>		
Mr. James W. (Bill) Kearns, Townsend Qualifications (if required): Public Representative	Governor	1/1/2021
Mr. Kent Burgess, Billings Qualifications (if required): Public Representative	Governor	1/1/2021
Mr. Larry Putnam, Helena Qualifications (if required): Public Representative	Governor	1/1/2021
Mr. John Rogers, Helena Qualifications (if required): Public Representative	Governor	1/1/2021
Ms. Janet Bastian, Miles City Qualifications (if required): Public Representative	Governor	1/1/2021

**EXECUTIVE BRANCH VACANCIES – JANUARY 1, 2021 THROUGH MARCH 31, 2021**

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
<b>Montana Grass Conservation Commission</b>		
Mr. William F. Kennedy, Ekalaka Qualifications (if required): Officer of or serves on the board of directors of a state district	Governor	1/1/2021
Ms. Vicki Dunaway, Billings Qualifications (if required): Member of the public who possesses a general understanding of livestock industry	Governor	1/1/2021
<b>Montana Heritage Preservation and Development Commission</b>		
Director Pam Haxby-Cote, Helena Qualifications (if required): Department of Commerce Director	Governor	1/1/2021
Mr. Bruce Whittenberg, Helena Qualifications (if required): Director of the Montana Historical Society	Governor	1/1/2021
Director Tara Rice, Helena Qualifications (if required): Director of the Department of Commerce	Governor	1/1/2021
Ms. Molly Kruckenberg, Helena Qualifications (if required): Montana Historical Society Director	Governor	1/1/2021
Director Martha Williams, Helena Qualifications (if required): Department of Fish, Wildlife and Parks Director	Governor	1/1/2021

**EXECUTIVE BRANCH VACANCIES – JANUARY 1, 2021 THROUGH MARCH 31, 2021**

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
<b>Montana Public Safety Officers Standards and Training (POST) Council</b> Mr. Roger Bodine, Billings Qualifications (if required): Detention Center Administrator or Detention Officer	Governor	1/1/2021
<b>Montana Pulse Crop Committee</b> Director Ben Thomas, Helena Qualifications (if required): Director of the Department of Agriculture	Governor	1/1/2021
<b>Montana Reinsurance Association Board of Directors</b> Mr. Mike Batista, Helena Qualifications (if required): Director appointed by the governor	Governor	1/1/2021
<b>Northwest Electric Power and Conservation Council</b> Mr. Christopher Bo Downen, Helena Qualifications (if required): Member of the Council	Governor	1/1/2021
<b>Pacific Northwest Economic Region</b> Mr. Cliff Larsen, Missoula Qualifications (if required): Designee of the Governor	Governor	1/1/2021
<b>Phillips County Transportation Improvement Authority</b> Ms. Charlene Carley Lefthand-Irvine, Polson Qualifications (if required): Public member	Governor	1/1/2021

**EXECUTIVE BRANCH VACANCIES – JANUARY 1, 2021 THROUGH MARCH 31, 2021**

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
<b>Potato Commodity Advisory Committee</b>		
Mr. Tim Lake, Polson Qualifications (if required): Potato Producer	Director	3/1/2021
 Mr. Jack Meyer, Manhattan Qualifications (if required): Potato Producer	 Director	 3/1/2021
 <b>Public Safety Officers Standards and Training (POST) Council</b>		
Captain Jason R. Jarrett, Bozeman Qualifications (if required): Detention center administrator	Governor	1/1/2021
 Sheriff Tony Harbaugh, Miles City Qualifications (if required): Sheriff	 Governor	 1/1/2021
Mr. John Strandell, Helena Qualifications (if required): State Government Law Enforcement Representative	Governor	1/1/2021
Mrs. Kimberly Burdick, Fort Benton Qualifications (if required): Montana citizen at-large who is informed and experienced in the subject of law enforcement	Governor	1/1/2021

**EXECUTIVE BRANCH VACANCIES – JANUARY 1, 2021 THROUGH MARCH 31, 2021**

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
<b>Public Safety Officers Standards and Training (POST) Council Cont.</b>		
Sheriff Leo Dutton, Helena Qualifications (if required): Board of Crime Control Member	Governor	1/1/2021
Lt. Timothy Owen Neiter, Billings Qualifications (if required): Detention Center Administrator or Detention Officer	Governor	1/1/2021
Mr. James Thomas, Canyon Creek Qualifications (if required): Montana citizen at-large who is informed and experienced in the subject of law enforcement	Governor	1/1/2021
<b>Rail Service Competition Council</b>		
Director Mike Kadas, Helena Qualifications (if required): Director of the Department of Revenue	Governor	1/1/2021
Mr. Todd O'Hair, Helena Qualifications (if required): Substantial knowledge and experience related to transportation for the coal industry	Governor	1/1/2021
Mr. Jerry Dean Jimison, Glendive Qualifications (if required): Substantial knowledge and experience related to Class I railroads	Governor	1/1/2021
Director Mike Tooley, Helena Qualifications (if required): Director of the Department of Transportation	Governor	1/1/2021
Mr. Eric Doheny, Dutton Qualifications (if required): Producer	Governor	1/1/2021



**EXECUTIVE BRANCH VACANCIES – JANUARY 1, 2021 THROUGH MARCH 31, 2021**

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
<b>Rail Service Competition Council Cont.</b>		
Director Ben Thomas, Helena Qualifications (if required): Director of the Department of Agriculture	Governor	1/1/2021
Mr. Ken Fichtler, Helena Qualifications (if required): Chief Business Development Officer of Economic Development	Governor	1/1/2021
Mr. Vu Pham, Billings Qualifications (if required): Knowledge of Mineral Industry Transportation	Governor	1/1/2021
<b>Rangeland Resources Committee</b>		
Mr. John A. Hollenback, Gold Creek Qualifications (if required): Presiding Officer, Rancher	Governor	1/1/2021
Mr. Steve Hedstrom, Raynesford Qualifications (if required): Vice Presiding Officer, Rancher	Governor	1/1/2021
Ms. Diane Ahlgren, Mosby Qualifications (if required): Rancher from the eastern area of the state	Governor	1/1/2021
Mr. Noel Keogh, Nye Qualifications (if required): Rancher from the southern area of the state	Governor	1/1/2021
Mrs. Connie Iversen, Culbertson Qualifications (if required): Rancher from the northern area of the state	Governor	1/1/2021

## EXECUTIVE BRANCH VACANCIES – JANUARY 1, 2021 THROUGH MARCH 31, 2021

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
<b>Rangeland Resources Committee Cont.</b>		
Mr. Sigurd M. Jensen, Elmo	Governor	1/1/2021
Qualifications (if required): Rancher from the area of the state west of the continental divide		
<b>State Historic Preservation Officer</b>		
Mr. Peter Brown, Helena	Governor	1/1/2021
Qualifications (if required): Nominee of the Montana Historical Society		
<b>State Lottery Commission</b>		
Mr. Wilbur Rehmann, Helena	Governor	1/1/2021
Qualifications (if required): Public Representative		
Mrs. Jessica Louise Kynett, Livingston	Governor	1/1/2021
Qualifications (if required): 5 years' experience as a law enforcement officer		

**EXECUTIVE BRANCH VACANCIES – JANUARY 1, 2021 THROUGH MARCH 31, 2021**

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
<b>State Parks and Recreation Board</b>		
Ms. Betty Stone, Glasgow Qualifications (if required): District 4 member	Governor	1/1/2021
Mr. Jeffrey Welch, Livingston Qualifications (if required): District 2 member	Governor	1/1/2021
Ms. Angie Grove, Helena Qualifications (if required): District 1 member	Governor	1/1/2021
Mrs. Erica Jean Lighthiser, Livingston Qualifications (if required): District 2 Member	Governor	1/1/2021
<b>State Tax Appeal Board</b>		
Mr. Steve Doherty, Missoula Qualifications (if required): Public Representative	Governor	1/1/2021
<b>State-Tribal Economic Development Commission</b>		
Director Jason Smith, Helena Qualifications (if required): State Director of Indian Affairs	Governor	1/1/2021
Director Pam Haxby-Cote, Helena Qualifications (if required): Member from the Department of Commerce	Governor	1/1/2021
Mr. Ken Fichtler, Helena Qualifications (if required): Member from the Governor's Office of Economic Development	Governor	1/1/2021

**EXECUTIVE BRANCH VACANCIES – JANUARY 1, 2021 THROUGH MARCH 31, 2021**

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
<b>State-Tribal Economic Development Commission Cont.</b>		
Director Tara Rice, Helena	Governor	1/1/2021
Qualifications (if required): Department of Commerce Representative		
<b>Transportation Commission</b>		
Commissioner Greg Jergeson, Chinook	Governor	1/1/2021
Qualifications (if required): District 3		
Ms. Barb Skelton, Billings	Governor	1/1/2021
Qualifications (if required): District 5		
Commissioner Dave Schulz, Virginia City	Governor	1/1/2021
Qualifications (if required): District 2		
Mr. Michael L. Hope, Bozeman	Governor	1/1/2021
Qualifications (if required): District 2, Republican		

**EXECUTIVE BRANCH VACANCIES – JANUARY 1, 2021 THROUGH MARCH 31, 2021**

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
<b>Traumatic Brain Injury Advisory Council</b>		
Director Sheila Hogan, Helena	Governor	1/1/2021
Qualifications (if required): Director of Public Health and Human Services or designee		
Superintendent Elsie Arntzen, Helena	Governor	1/1/2021
Qualifications (if required): Superintendent of Public Instruction or designee		
Mrs. Teresa McKeon, Malta	Governor	1/1/2021
Qualifications (if required): Survivor of Family Member of a Survivor of Traumatic Brain Injury		
Ms. Carla Hunsley, Fort Peck	Governor	1/1/2021
Qualifications (if required): Survivor or Family of Survivor of Traumatic Brain Injury		
<b>Unemployment Insurance Appeals Board</b>		
Mr. Brian Boland, Great Falls	Governor	1/1/2021
Qualifications (if required): Member of the public who is not an employee of state government		
Mrs. Sara Novak, Anaconda	Governor	1/1/2021
Qualifications (if required): Substitute board member, member of the public, not an employee of state government		
<b>Upper Clark Fork River Basin Remediation and Restoration Advisory Council</b>		
Director Martha Williams, Helena	Governor	1/1/2021
Qualifications (if required): Director of the Dept. of Fish, Wildlife and Parks		
Director John Tubbs, Helena	Governor	1/1/2021
Qualifications (if required): Director of the DNRC		

**EXECUTIVE BRANCH VACANCIES – JANUARY 1, 2021 THROUGH MARCH 31, 2021**

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
<b>Water Pollution Control Advisory Council</b>		
Mr. Earl Salley, Great Falls Qualifications (if required): Representative of industry concerned with the disposal of inorganic waste	Governor	1/1/2021
Ms. Stevie Neuman, Vaughn Qualifications (if required): Supervisor of a soil and water conservation district	Governor	1/1/2021
Mr. Michael Wendland, Rudyard Qualifications (if required): Production agriculture representative	Governor	1/1/2021
Mrs. Mary Ahmann Hibbard, Helena Qualifications (if required): Realtor or developer representative	Governor	1/1/2021
Ms. Karen Bucklin Sanchez, Bozeman Qualifications (if required): Licensed professional engineer	Governor	1/1/2021
Mr. Trevor Selch, Helena Qualifications (if required): Fisheries biologist	Governor	1/1/2021
Mr. William Adam Sigler, Bozeman Qualifications (if required): Member of the public	Governor	1/1/2021
Mr. Craig C. Workman, Whitefish Qualifications (if required): Person serving as a public works director	Governor	1/1/2021
Mr. Bob Zimmer, Bozeman Qualifications (if required): Conservation organization representative	Governor	1/1/2021

**EXECUTIVE BRANCH VACANCIES – JANUARY 1, 2021 THROUGH MARCH 31, 2021**

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
<b>Water Pollution Control Advisory Council Cont.</b>		
Mr. Eric Campbell, Bozeman Qualifications (if required): Representative of industry concerned with the disposal of organic waste	Governor	1/1/2021
Mr. Mark Allen Fix, Miles City Qualifications (if required): Irrigated Agriculture Representative	Governor	1/1/2021
<b>Western Interstate Energy Board</b>		
Mr. Jeff Blend, Helena Qualifications (if required): Board Member	Governor	1/1/2021
Mr. Craig Jones, Helena Qualifications (if required): Board Member	Governor	1/1/2021
Mr. Dan Lloyd, Helena Qualifications (if required): Board member	Governor	1/1/2021

**EXECUTIVE BRANCH VACANCIES – JANUARY 1, 2021 THROUGH MARCH 31, 2021**

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
<b>Western Interstate Nuclear Compact State Nuclear Policy</b>		
Mr. Patrick Holmes, Helena Qualifications (if required): Board member	Governor	1/1/2021
Mr. Christopher Dorrington, Helena Qualifications (if required): Board Alternate Member	Governor	1/1/2021



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**COREY STAPLETON**  
SECRETARY OF STATE

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