

MONTANA ADMINISTRATIVE REGISTER

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MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 9

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 The Proposal Notice Section contains state agencies' proposed new, amended, or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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

LABOR AND INDUSTRY, Department of, Title 24

24-11-372 Notice of Public Hearing on Proposed Repeal - COVID Unemployment Insurance Benefits. 534-535

24-29-371 Notice of Public Hearing on Proposed Amendment - Medical Utilization and Treatment Guidelines for Workers' Compensation Purposes. 536-538

LIVESTOCK, Department of, Title 32

32-21-316 (Board of Milk Control) Notice of Proposed Amendment - Definitions - Regulation of Unfair Trade Practices - Reports and Records - Payments to Pool Producers and Adjustment of Accounts. No Public Hearing Contemplated. 539-544

PUBLIC SERVICE REGULATION, Department of, Title 38

38-2-248 Notice of Public Hearing on Proposed Amendment and Repeal - Commission Procedural Rules. 545-549

SECRETARY OF STATE, Office of, Title 44

44-2-242 Notice of Public Hearing on Proposed Amendment -
Clarification of Business Services Division Filings and Fees. 550-551

RULE ADOPTION SECTION

AGRICULTURE, Department of, Title 4

4-21-272 Notice of Amendment - Plant Health Quarantines. 552-553

COMMERCE, Department of, Title 8

8-94-186 Notice of Amendment - Administration of the Federal
Community Development Block Grant (CDBG) Program–Planning
Grants. 554-555

LABOR AND INDUSTRY, Department of, Title 24

24-101-310 (Alternative Health Care Board, Board of Architects and
Landscape Architects, Board of Athletic Trainers, Board of Barbers
and Cosmetologists, Board of Behavioral Health, Board of
Chiropractors, Board of Clinical Laboratory Science Practitioners,
Board of Dentistry, State Electrical Board, Board of Funeral Service,
Board of Hearing Aid Dispensers, Board of Massage Therapy, Board
of Medical Examiners, Board of Nursing, Board of Nursing Home
Administrators, Board of Occupational Therapy Practice, Board of
Optometry, Board of Outfitters, Board of Pharmacy, Board of
Physical Therapy Examiners, Board of Plumbers, Board of Private
Security, Board of Professional Engineers and Professional Land
Surveyors, Board of Psychologists, Board of Public Accountants,
Board of Radiologic Technologists, Board of Real Estate Appraisers,
Board of Realty Regulation, Board of Respiratory Care Practitioners,
Board of Sanitarians, Board of Speech-Language Pathologists and
Audiologists, Board of Veterinary Medicine, and the Department)
Notice of Amendment and Adoption - Nonroutine Applications and
Criminal Convictions. 556-563

24-118-6 (Board of Athletic Trainers) Notice of Amendment and
Repeal - Definitions - Unprofessional Conduct - Applications -
Supervision - Renewals. 564

LABOR AND INDUSTRY, Continued

24-144-2 Notice of Amendment and Repeal - Fire Protection License Program - Definitions - Duty to Report Changes - Proof of Insurance - Fees - Who Must Obtain an Endorsement - Endorsement Examinations - Fireworks Wholesaler Permit Applications - Continuing Education - Duplicate License or Endorsement - Apprenticeship Programs - Application Procedure - Fireworks Wholesale Permits - Renewals.	565-567
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PUBLIC SERVICE REGULATION, Department of, Title 38

38-2-247 Notice of Amendment - Investigation and Discovery.	568-579
38-5-246 Notice of Amendment - Pipeline Safety.	580

SPECIAL NOTICE AND TABLE SECTION

Function of Administrative Rule Review Committee.	581-582
How to Use ARM and MAR.	583
Recent Rulemaking by Agency.	584-590

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
OF THE STATE OF MONTANA

In the matter of the repeal of ARM) NOTICE OF PUBLIC HEARING ON
24.11.478 pertaining to COVID) PROPOSED REPEAL
unemployment insurance benefits)

TO: All Concerned Persons

1. On June 11, 2021, at 11:00 a.m., the Department of Labor and Industry (department) will hold a public hearing via remote conferencing to consider the proposed repeal of the above-stated rule. 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/88441680485>
Meeting ID: 884 4168 0485

-OR-

b. Dial by telephone, +1 406 444 9999 or +1 646 558 8656
Meeting ID: 884 4168 0485

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 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 Labor and Industry no later than 5:00 p.m. on June 4, 2021, to advise us of the nature of the accommodation that you need. Please contact Boris Karasch, Department of Labor and Industry, P.O. Box 8020, Helena, Montana, 59604-8020; telephone (406) 444-4676; fax (406) 444-2699; Montana Relay 711; or e-mail bkarasch2@mt.gov.

3. The department proposes to repeal the following rule:

24.11.478 COVID-19 CLAIMS FOR UNEMPLOYMENT INSURANCE
BENEFITS FOR WEEKS OF UNEMPLOYMENT BEGINNING ON OR AFTER JULY
12, 2020

AUTH: 39-51-301, 39-51-302, MCA
IMP: 39-51-102, 39-51-301, 39-51-501, MCA

REASON: This rule, enacted amid a once-in-a-century global pandemic, is no longer necessary as Montanans receive the COVID-19 vaccine in greater and greater numbers and as statewide COVID-19 cases continue to decline. The rule reinstates reasonable work-search requirements on individuals receiving unemployment insurance benefits. Repealing this rule and reinstating these

requirements will bring Montanans back into our workforce and expand economic opportunity for Montana families. Repeal of the rule also coincides and is based on the expected enactment of House Bill 230 (2021) which effectuates the ending of the state of emergency in Montana. By the terms of this rule, it is no longer in force or in effect after the state of emergency. Repeal of the rule to coincide with ending the state of emergency therefore keeps the administrative rules up to date.

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: Boris Karasch, Department of Labor and Industry, P.O. Box 8020, Helena, Montana, 59604-8020; telephone (406) 444-4676; fax (406) 444-2699; Montana Relay 711; or e-mail bkarasch2@mt.gov, and must be received no later than 5:00 p.m., June 11, 2021.

5. Department of Labor and Industry staff 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 paragraph 2 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 repeal of the above-referenced rule will significantly and directly impact small businesses by helping them find and hire the workers they need to grow and thrive. Repeal of this rule means a larger, more robust workforce for our small businesses and a stronger economy for all Montanans.

/s/ QUINLAN L. O'CONNOR
Quinlan L. O'Connor
Alternate Rule Reviewer

/s/ LAURIE ESAU
Laurie Esau, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State May 4, 2021.

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of) NOTICE OF PUBLIC HEARING ON
ARM 24.29.1611 and 24.29.1616) PROPOSED AMENDMENT
pertaining to medical utilization and)
treatment guidelines for workers')
compensation purposes)

TO: All Concerned Persons

1. On June 11, 2021, at 10:00 a.m., the Department of Labor and Industry (department) will hold a public hearing via remote conferencing to consider the proposed amendment of the above-stated rules. 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/86418258255>,
Meeting ID: 864 1825 8255

-OR-

b. Dial by telephone, +1 406 444 9999 or +1 646 558 8656,
Meeting ID: 864 1825 8255

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 will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m., on June 4, 2021, to advise us of the nature of the accommodation that you need. Please contact Celeste Ackerman, Employment Relations Division, P.O. Box 8011, Helena, Montana 59604-8011; telephone (406) 444-6604; facsimile (406) 444-4140; Montana TTD (406) 444-5549; or e-mail celeste.ackerman@mt.gov.

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

24.29.1611 UTILIZATION AND TREATMENT GUIDELINES

(1) through (1)(d) remain the same.

(e) for medical services provided January 1, 2018 through June 30, 2019: "Montana Utilization and Treatment Guidelines, 5th edition, 2017"; and

(f) for medical services provided ~~on or after~~ July 1, 2019 through June 30, 2021: "Montana Utilization and Treatment Guidelines, 6th edition, 2019-"; and

(g) for medical services provided on or after July 1, 2021: "Montana Utilization and Treatment Guidelines, 7th edition, 2021."

(2) through (2)(g) remain the same.

- (h) Mild Traumatic Brain Injury;
- (i) ~~Eye Injury~~ Moderate/Severe Traumatic Brain Injury; and
- (j) through (7) remain the same.

AUTH: 39-71-203, 39-71-704, MCA

IMP: 39-71-704, MCA

REASON: There is reasonable necessity to amend ARM 24.29.1611 in order to incorporate updated medical guidelines that appropriately reflect the state of the art for medical treatment and utilization for workers' compensation purposes.

24.29.1616 INCORPORATION BY REFERENCE AND UPDATES TO THE FORMULARY (1) through (2)(a) remain the same.

(b) for prescriptions written between January 1, 2020 through December 31, 2020, the October 2019 edition of the ODG Drug Formulary; ~~and~~

(c) for prescriptions written ~~on or after~~ between January 1, 2021 through June 30, 2021, the October 2020 edition of the ODG Drug Formulary; ~~and~~

(d) for prescriptions written on or after July 1, 2021, the April 2021 edition of the ODG Drug Formulary.

(3) and (4) remain the same.

(a) the department's web site, at ~~http://erd.dli.mt.gov/work-comp-claims/medical-regulations~~ https://erd.dli.mt.gov/work-comp-claims, at no charge;

(b) through (5) remain the same.

AUTH: 39-71-203, 39-71-704, MCA

IMP: 39-71-704, MCA

REASON: There is reasonable necessity to amend this rule to incorporate by reference the updated applicable drug formulary as authorized and required by 39-71-704, MCA.

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 Celeste Ackerman, Employment Relations Division, P.O. Box 8011, Helena, MT 59604-8011; fax (406) 444-4140; or e-mail to celeste.ackerman@mt.gov, and must be received no later than 5:00 p.m., on June 11, 2021.

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, which includes the name and e-mail or mailing address of the person to receive notices, and specifies the particular subject matter or matters regarding which the person wishes to receive notices. Such written request may be mailed or delivered to the Department of Labor and Industry, attention: Laura Ducolon, 1315 E. Lockey Avenue, P.O. Box 1728, Helena, Montana 59624-1728, faxed to the department at (406) 444-4493, or e-mailed to Laura.Ducolon@mt.gov.

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

7. Pursuant to 2-4-111, MCA, the department has determined that the rule changes proposed in this notice will not have a significant and direct impact upon small businesses.

8. Department staff has been designated to preside over and conduct this hearing.

/s/ QUINLAN L. O'CONNOR

Quinlan L. O'Connor
Alternate Rule Reviewer

/s/ LAURIE ESAU

Laurie Esau, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State May 3, 2021.

BEFORE THE BOARD OF MILK CONTROL
OF THE STATE OF MONTANA

In the matter of the amendment of	)	NOTICE OF PROPOSED
ARM 32.24.150 definitions, 32.24.470	)	AMENDMENT
regulation of unfair trade practices,)	
32.24.512 reports and records, and	)	NO PUBLIC HEARING
32.24.515 payments to pool	)	CONTEMPLATED
producers and adjustment of)	
accounts)	

TO: All Concerned Persons

1. The Board of Milk Control (board), which is administratively attached to the Department of Livestock, proposes to amend the above-stated rules.

2. The Department of Livestock will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Livestock no later than 5:00 p.m. on June 4, 2021, to advise us of the nature of the accommodation that you need. Please contact the Department of Livestock, 301 N. Roberts St., Room 308, P.O. Box 202001, Helena, MT 59620-2001; telephone: (406) 444-9321; TTD number: (800) 253-4091; fax: (406) 444-1929; e-mail: MDOLcomments@mt.gov.

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

32.24.150 DEFINITIONS As used in this chapter, unless the context otherwise requires, the following definitions apply:

(1) through (20) remain the same.

(21) "Milk price forward contract" means a voluntary agreement between a distributor and a producer to establish a mechanism to adjust a future producer price on a future delivery of milk at a future date, as a means of hedging the future milk price received by the producer.

(21) through (43) remain the same but are renumbered (22) through (44).

AUTH: 81-23-103, 81-23-104, 81-23-302, 81-23-303, 81-23-402, MCA

IMP: 81-23-101, 81-23-103, 81-23-302, 81-23-303, 81-23-402, MCA

REASON: "Milk price forward contract" is a new term proposed to implement amendments to 81-23-101 and 81-23-303, MCA, resulting from the enactment of 2021 Senate Bill 131, which enables distributors and producers to voluntarily enter into forward price contracts as a means for producers to hedge future milk prices without violating fair trade practices rules. Per ARM 32.24.150(8), "distributor" means a person purchasing milk from any source, either in bulk or in packages, and distributing it for consumption in Montana. The cooperatives operating in Montana

that purchase milk from Montana producers and sell the milk to Class I milk plants in Montana are distributors. These cooperatives and the Class I Montana plants that purchase milk from the cooperatives are also pool handlers, as defined in ARM 32.24.150(29).

The proposed amendment to ARM 32.24.150 would affect approximately 45 businesses licensed by the Milk Control Bureau.

Authorizing and implementing citations are being updated to accurately reflect sources of rulemaking authority and implementation.

32.24.470 REGULATION OF UNFAIR TRADE PRACTICES (1) Under authority delegated by the provisions in 81-23-104, MCA, the following transactions of business among licensees under the Act and among licensees and the general public are declared to be unfair trade practices subject to enforcement sanctions provided by statute:

(a) Except as the result of a milk price forward contract, the ~~The~~ payment of a lesser price than the applicable producer price established by the board pursuant to the Act by any distributor to any producer for milk which is distributed to any person, including agencies of the federal, state or local government.

(b) through (2) remain the same.

AUTH: 81-23-104, 81-23-302, 81-23-303, MCA
IMP: 81-23-103, 81-23-302, 81-23-303, MCA

REASON: The board proposes the amendment to implement the amendment to 81-23-303, MCA, resulting from the enactment of 2021 Senate Bill 131 which enables distributors and producers to voluntarily enter into forward price contracts as a means for producers to hedge future milk prices without violating fair trade practices rules. The current rules prohibit distributors from paying producers a price that is lower than the applicable producer price established by the board. The amendment to 81-23-303, MCA, provides that payment subject to a milk price forward contract that is less than the minimum producer price is not a violation of the minimum producer price provision.

The proposed amendment to ARM 32.24.470 would affect approximately 45 businesses licensed by the Milk Control Bureau.

The proposed amendment would only affect producers and distributors that voluntarily enter into milk price forward contracts. A producer entering into such a contract would be paid less than the applicable producer price established by the board if the forward contract price was lower. It is not possible to estimate the economic impact of the voluntary milk price forward contracts to producers. Economic impact to distributors may be minimal because distributors can hedge the contracts with commodity exchange instruments. Milk price forward contracts will have no financial impact to the Milk Control Bureau.

Authorizing and implementing citations are being updated to accurately reflect sources of rulemaking authority and implementation.

32.24.512 REPORTS AND RECORDS (1) remains the same.

(2) On or before the eighth business day after the end of each month, each pool handler must report for such months, to the bureau with respect to the pool plant(s) operated by such handler, and for all pool milk marketed to nonpool plants, on forms provided by the bureau, the following:

(a) through (i) remain the same.

(j) the weight of milk and the transportation charges for shipments of unprocessed pool milk between plants marketed pursuant to ARM 32.24.524; and

(k) a copy of each milk price forward contract in effect for the month or any other information applicable to the application of a milk price forward contract for the month; and

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

(3) through (6) remain the same.

AUTH: 81-23-104, 81-23-302, 81-23-303, 81-23-402, MCA

IMP: 81-23-302, 81-23-303, 81-23-402, MCA

REASON: The board proposes this amendment so that the bureau, when it audits the payment from a distributor to a producer, has possession of any milk forward price contract that authorizes a deduction from the producer's minimum required payment. By requiring distributors to submit milk price forward contract information on the 8th business day after the end of each month, the bureau will not be delayed when its staff audit producer payments, shortly after the payments are due (not later than the 15th day after the end of the month that producers' milk was received).

The proposed amendment to ARM 32.24.512 would affect approximately two businesses licensed by the Milk Control Bureau.

Authorizing and implementing citations are being updated to accurately reflect sources of rulemaking authority and implementation.

32.24.515 PAYMENTS TO POOL PRODUCERS AND ADJUSTMENT OF ACCOUNTS (1) Each pool producer must be paid twice each month by the appropriate pool handler(s) for the pool milk received or marketed from such pool producer during the month as follows:

(a) and (b) remain the same.

(c) Deductions of any kind (other than assessments that are required under 81-23-105 and 81-23-202, MCA, license fees, mandatory assessments, hauling fees, advance payments made pursuant to this section, adjustments to implement milk price forward contracts, and audit adjustments) from payments due a pool producer may be made only upon written authorization from a pool producer, or, in the case where a pool producer is a member of a cooperative, upon formal resolution of the cooperative directors at a regular business meeting. A copy of the authorization must be retained by the pool handler as part of its permanent records.

(d) Payments provided for in this section must be accompanied by a statement to each pool producer showing each of the following items for the prior month:

- (i) name and address of the pool handler issuing the statement;
- (ii) date of statement;
- (iii) period for which the statement is rendered;
- (iv) name of the pool producer for whom the statement is intended;
- (v) the date, weight, and butterfat test result for each receipt of milk during the month;
- (vi) the total pounds of milk and weighted average butterfat test of milk received from the pool producer for the month for which the statement is rendered;
- (vii) weight of milk, butterfat, and skim received that is within the pool producer's quota;
- (viii) weight of milk, butterfat, and skim received that is in excess of the pool producer's quota;
- (ix) quota butterfat price (to seven decimal places) and quota skim price (to seven decimal places);
- (x) excess butterfat price (to seven decimal places) and excess skim price (to seven decimal places);
- (xi) minimum payment required by the bureau for quota and excess milk received;
- (xii) milk price forward contract adjustment, if applicable;
- (xiii) through (xvi) remain the same but are renumbered (xviii) through (xxi).
- (e) through (2) remain the same.

AUTH: 81-23-104, 81-23-302, 81-23-303, MCA
IMP: 81-23-302, 81-23-303, MCA

REASON: The board proposes these amendments to implement the amendment to 81-23-303, MCA, resulting from the enactment of 2021 Senate Bill 131 which enables distributors and producers to voluntarily enter into forward price contracts as a means for producers to hedge future milk prices without violating fair trade practices rules. The current rules prohibit distributors from paying producers a price that is lower than the applicable producer price established by the board. The amendment to 81-23-303, MCA, provides that payment subject to a milk price forward contract that is less than the minimum producer price is not a violation of the minimum producer price provision.

The proposed amendment to ARM 32.24.515 would affect approximately 45 businesses licensed by the Milk Control Bureau.

The proposed amendment would only affect producers and distributors that voluntarily entered into milk price forward contracts. A producer entering into such a contract would be paid less than the applicable producer price established by the board if the forward contract price was lower. In such instances, the dollar amount specified by (1)(d)(xi) would be a deduction from the minimum required payment. In instances that the milk forward price contract exceeded the minimum required

payment, the dollar amount specified by (1)(d)(xi) would be an addition to the minimum required payment.

It is not possible to estimate the economic impact of the voluntary milk price forward contracts to producers or the extent to which producers will enter into such contracts. Economic impact to distributors is likely small because distributors will likely hedge the contracts with commodity exchange financial instruments. Milk price forward contracts will have no financial impact to the Milk Control Bureau.

Authorizing and implementing citations are being updated to accurately reflect sources of rulemaking authority and implementation.

4. The board intends to adopt these proposed amendments effective July 1, 2021.

5. Concerned persons may submit their data, views, or arguments in writing concerning the proposed action to the Executive Officer, Department of Livestock, 301 N. Roberts St., Room 308, P.O. Box 202001, Helena, MT 59620-2001, by faxing to (406) 444-1929, or by e-mailing to MDOLcomments@mt.gov, to be received no later than 5:00 p.m., June 11, 2021.

6. If persons who are directly affected by the proposed action wish to express their data, views, or arguments orally or in writing at a public hearing, they must make a written request for a hearing and submit this request along with any written comments they have to the same address as in 5 above. The written request for hearing must be received no later than 5:00 p.m., June 11, 2021.

7. If the department receives requests for a public hearing on the proposed action from either 10 percent or 25, whichever is less, of the persons who are directly affected by the proposed action; from the appropriate administrative rule review committee of the Legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a public hearing will be held at a later date. Notice of the public hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 5, based upon there being approximately 45 businesses licensed by the Milk Control Bureau that are producers or are distributors purchasing milk from producers.

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 5 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 apply and have been fulfilled. The primary bill sponsor, Senator Daniel R. Salomon, was contacted by mail sent to 42470 Salomon Road, Ronan, Montana 59864, and by email at dan.salomon@mtleg.gov on April 29, 2021.

10. 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/ Ken Bryan
Ken Bryan
Chair
Board of Milk Control

/s/ Cinda Young-Eichenfels
Cinda Young-Eichenfels
Rule Reviewer
Department of Livestock

Certified to the Secretary of State May 4, 2021.

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 38.2.1203, 38.2.1205,	)	PROPOSED AMENDMENT AND
38.2.1209, 38.2.2403, and 38.2.4204,	)	REPEAL
and the repeal of ARM 38.2.1204,)	
38.2.2103, 38.2.2402, 38.2.2404,)	
38.2.3906, and 38.2.4504, pertaining)	
to Commission procedural rules)	

TO: All Concerned Persons

1. On June 8, 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 and repeal 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., June 7, 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 June 4, 2021, to advise us of the nature of the accommodation that you need. Please contact Loryn Johnson, Department of Public Service Regulation, 1701 Prospect Avenue, Helena, Montana, 59620-2601; telephone (406) 444-6170; TDD/Montana Relay Service (406) 444-4212; or e-mail Loryn.Johnson@mt.gov.

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

38.2.1203 FORM AND SIZE (1) All documents and pleadings shall be typed or printed on paper 8-1/2 inches wide and 11 inches long, and exhibits annexed thereto ordinarily shall be folded to the same size. The impression shall be on one side of the paper only and shall be double spaced. Footnotes and quotations may be single spaced. Documents shall be fastened only on the left side. Reproductions may be by any process providing that all copies are clear and permanently legible. filed electronically in an accessible format. Text documents must be filed in PDF/A format. Spreadsheets must be filed with intact formulas and functions, preferably in Microsoft Excel format. This rule does not apply to documents or exhibits where an accessible format is not reasonably available.

(2) All pleadings shall be formatted for paper 8-1/2 inches wide and 11 inches long with 1-inch margins. All pleadings must be formatted in a proportionally spaced typeface at least 12-point or larger. Whenever reasonably possible, exhibits should be similarly formatted.

(3) The name of the attorney or party responsible for the pleadings, together with the email address, telephone number, and complete mailing address, shall be printed at the top of the first page of each pleading, aligned to the left margin.

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

REASON: The proposed amendment is necessary to transition to electronic filing, economize proceedings, and comply with the accessibility requirements of the ADA.

38.2.1205 SERVICE (1) An initial pleading which begins a proceeding shall be filed electronically with the commission.

(2) All subsequent pleadings must be served either personally, electronically, or by first class mail on all identified parties by the pleading party, and a certificate of service shall be attached to ~~said~~ the pleading.

(3) remains the same.

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

REASON: The proposed amendment is necessary to align with requirements for electronic filing of documents.

38.2.1209 COPIES (1) ~~The filing party shall provide the commission with an original plus ten conformed copies of all pleadings and documents. Each such filing shall include a certificate that a copy of all filed material has been mailed to each party of record. Additional copies may be requested by the staff. Filing parties must provide physical copies of any electronically filed document or pleading upon the request of the commission or commission staff.~~

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

REASON: The proposed amendment is necessary to transition to electronic filing, economize proceedings, and comply with the accessibility requirements of the ADA.

38.2.2403 GENERAL INTERVENTION (1) Any person, other than the original parties to the proceeding, who shall desire to appear and participate in any proceeding before the commission, ~~and who does not desire to broaden the issues of the original proceeding,~~ may petition in writing for leave to intervene in the proceeding. Such a petition shall be filed no later than the intervention deadline established in a procedural order, if one is entered. ~~If no procedural order is entered, the petition shall be filed no later than one week prior to the commencement of hearing by the commission.~~ No such petition or motion shall be filed after these times, except for good cause shown. The petition or motion to intervene must disclose the name and address of the party intervening and ~~; the name and address of his~~ the party's attorney, if any; a clear and concise statement of the ~~direct and~~

substantial interest and position of the petitioner in the proceeding; his position in regard to the matter in controversy; and a statement of the relief desired. The commission may limit the purpose or scope of intervention at the request of a party, or on its own accord.

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

REASON: The commission proposes to revise its intervention rules to mirror current practice and eliminate the distinction between "general" and "special" intervention. The commission intends to allow all intervenors in a proceeding to participate fully as a party, subject to limits on purpose and scope that the commission may set on its own accord, or upon the request of a party.

38.2.4204 PREPARED TESTIMONY (1) At the direction of the presiding officer, the parties shall submit copies of prepared testimony and accompanying exhibits to be presented at any hearing to all other parties within time limits prescribed by the commission. Parties commencing an action should file prepared testimony to establish the facts necessary for the commission to grant the requested relief. If no prepared testimony is filed with an initial pleading, the commission may set a deadline for any party commencing an action to file prepared testimony. The failure to timely file prepared testimony may result in the dismissal of the matter.

(2) In the discretion of the presiding officer, a ~~witness'~~ witness's ~~prefiled~~ prepared testimony may:

- (a) be read into the record on direct examination;
- (b) be copied into the record without reading; or
- (c) be identified and offered as an exhibit.

(3) ~~Before any pre-filed testimony is copied in, unless excused by the presiding officer, the witness shall deliver copies thereof to the presiding officer, the reporter, and counsel for all parties.~~ Prepared testimony must be signed and verified by the witness. The verification must state that the prepared testimony is true and accurate to the best knowledge, information, and belief of the witness. A witness's signature may be electronic and does not need to be notarized.

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

REASON: The commission seeks to update its rule on prepared testimony to mirror existing practice and simplify the presentation of testimony. The proposed revisions to (1) are intended to make the filing of prepared testimony the norm in contested case proceedings before the commission. The proposed revisions to (3) follow the commission's transition to electronic filing for all documents and pleadings. The commission intends to ensure the quality and reliability of prepared testimony by requiring all such testimony to be signed and verified by the witness.

4. The department proposes to repeal the following rules:

38.2.1204 TITLE AND DOCKET NUMBER

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

38.2.2103 COPIES

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

38.2.2402 SERVICE OF PETITIONS

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

38.2.2404 SPECIAL INTERVENTION

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

38.2.3906 NOTICE

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

38.2.4504 FILING AND SERVICE OF BRIEFS

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

REASON: The commission proposes to repeal rules that either conflict with the above-described amendments or are generally duplicative of procedures described elsewhere in the commission's procedural rules. ARM 38.2.1204 duplicates ARM 38.2.309. ARM 38.2.2103 duplicates ARM 38.2.1209. ARM 38.2.2402 and 38.2.4504 duplicate ARM 38.2.1205. ARM 38.2.3906 duplicates ARM 38.2.1801 and 38.2.1205. ARM 38.2.2404 is no longer necessary as a result of the commission's simplified general intervention rule at ARM 38.2.2403.

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: Loryn Johnson, Department of Public Service Regulation, 1701 Prospect Avenue, Helena, Montana, 59620-2601; telephone (406) 444-6170; fax (406) 444-7618; or e-mail Loryn.Johnson@mt.gov, and must be received no later than 5:00 p.m., June 11, 2021.

6. 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.

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

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 amendment and repeal of the above-referenced rules will not significantly or directly impact small businesses.

/s/ LUKE CASEY

Luke Casey
Rule Reviewer

/s/ JAMES BROWN

James Brown
Chairman
Department of Public Service Regulation

Certified to the Secretary of State May 4, 2021.

BEFORE THE SECRETARY OF STATE
OF THE STATE OF MONTANA

In the matter of the amendment of) NOTICE OF PUBLIC HEARING ON
ARM 44.5.114 and 44.5.115) PROPOSED AMENDMENT
pertaining to clarification of Business)
Services Division filings and fees)

TO: All Concerned Persons

1. On June 4, 2021, at 10:30 a.m., the Secretary of State will hold a public hearing in the Secretary of State's Office Conference Room, Room 260, State Capitol Building, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Secretary of State 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 Secretary of State no later than 5:00 p.m. on May 28, 2021, to advise us of the nature of the accommodation that you need. Please contact Angela Nunn, Secretary of State's Office, P.O. Box 202801, Helena, MT 59620-2801; telephone (406) 444-2087; fax (406) 444-4249; TDD/Montana Relay Service (406) 444-9068; or e-mail angela.nunn@mt.gov.

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

44.5.114 CORPORATIONS – PROFIT AND NONPROFIT FEES

(1) Domestic filings:

(a) remains the same.

(b) reinstatement:

(i) for profit corporations, the \$30.00 filing fee, plus an additional fee of ~~\$30.00~~ 35.00 per year for each year of delinquent annual reports

(ii) through (6) remain the same.

AUTH: 2-15-405, 35-1-1307, 35-2-1107, 35-7-103, MCA

IMP: 2-15-405, 35-1-217, 35-1-1206, 35-1-1307, 35-2-119, 35-2-1003, 35-6-201, MCA

44.5.115 LIMITED LIABILITY COMPANY FEES (1) Domestic filings:

(a) through (g) remain the same.

(h) reinstatement of involuntarily dissolved limited liability company 35.00
plus an additional fee of ~~\$30.00~~ 35.00 per year for each year of delinquent annual reports

(2) through (6) remain the same.

AUTH: 2-15-405, MCA

IMP: 2-15-405, 35-8-208, 35-8-211, 35-8-212, MCA

REASON: Currently under ARM 44.5.114(3)(f) and 44.5.115(3)(e), domestic and foreign annual reports filed after the April 15th deadline are charged a \$35.00 fee. These proposed changes simply correct the internal inconsistencies within the rules of fees associated with delinquent annual report filings.

4. Given annual reports filed after April 15th are currently charged a \$35 fee, these proposed changes will not have a fiscal impact.

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 Angela Nunn, Secretary of State's Office, P.O. Box 202801, Helena, Montana 59620-2801, or by e-mailing angela.nunn@mt.gov, and must be received no later than 5:00 p.m., June 11, 2021.

6. Austin Markus James, Chief Legal Counsel, Secretary of State's Office, has been designated to preside over and conduct the hearing.

7. The Secretary of State maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding administrative rules, corporations, elections, notaries, records, uniform commercial code, or combination thereof. Such written request may be mailed or delivered to the Secretary of State's Office, Administrative Rules Services, P.O. Box 202801, Helena, MT 59620-2801, emailed to sosarm@mt.gov, or may be made by completing a request form at any rules hearing held by the Secretary of State's Office.

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 Secretary of State has determined that the amendment of the above-referenced rules will not significantly and directly impact small businesses.

/s/ Austin Markus James
Austin Markus James
Rule Reviewer

/s/ Christi Jacobsen
Christi Jacobsen
Secretary of State

Dated this 4th day of May, 2021.

BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

In the matter of the amendment of) NOTICE OF AMENDMENT
ARM 4.12.1308 pertaining to Plant)
Health Quarantines)

TO: All Concerned Persons

1. On January 29, 2021, the Department of Agriculture published MAR Notice No. 4-21-272 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 100 of the 2021 Montana Administrative Register, Issue Number 2.

2. The department has amended the following rule as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

4.12.1308 PLANT HEALTH QUARANTINES (1) through (3)(d) remain as proposed.

(e) Emerald Ash Borer (*Agrilus planipennis* Fairmaire). See Order MTQ-2021-001A. Exterior Quarantine.

AUTH: 80-7-402, MCA
IMP: 80-7-402, 80-7-404, MCA

3. 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 said that under precautionary principle, the states of Colorado, North Dakota, South Dakota, Mississippi, and Florida should be included in the regulated area.

RESPONSE 1: Mississippi and Florida: the department agrees with adding these states to the regulated area in the order. At least three species of ash, *Fraxinus pennsylvanica*, *F. profunda*, and *F. Americana*, occur in these states and no official control measures are in place for emerald ash borer (EAB) in these states. Colorado and South Dakota: the department has identified the counties where EAB is known to occur in these states. The counties where EAB is known to occur are under official control by the state regulatory officials. The positive counties will be regulated by the Montana EAB quarantine and met by protections of the originating states programs. EAB is under official control in Colorado and South Dakota. North Dakota: EAB is not known to occur in North Dakota, and North Dakota has a state regulation to protect against the introduction. EAB is under official control in North Dakota.

The director reserves the right to change the regulatory status of any state or county based on future EAB detections, continued risk-analysis, or any other information that identifies another area or pathway as likely to introduce live EAB into Montana.

COMMENT 2: A commenter asked if they can still purchase ash seedlings for riparian areas and other restoration plantings in Montana.

RESPONSE 2: Yes, ash seedlings can be purchased and shipped from any area that is not infested with EAB. The area includes all of North Dakota, un-infested counties of South Dakota and Colorado, and other western states including Idaho, Utah, Oregon, Washington, California, Nevada, Arizona, and New Mexico. The shipments must come from licensed and certified nurseries and follow all other requirements of the Montana Nursery Act.

COMMENT 3: A commenter said the department should include all mixed hardwood-softwood species of firewood, all mixed hardwood species of firewood, and any firewood shipment not labeled with species or genus in the regulated items.

RESPONSE 3: The department quarantine order is specific to emerald ash borer, a pest that only impacts ash, genus *Fraxinus*. The quarantine order is not intended to regulate the entirety of the firewood pathway in Montana. The department will clarify in the order (Order MTQ-2021-001A) that ash firewood is a regulated article and firewood shipments into Montana should include documentation that identifies the species that are included with the shipment or sale.

COMMENT 4: A commenter said that the department should add an additional requirement that the origin of each regulated article appear on a label present at the level of the unit of sale.

RESPONSE 4: The department quarantine order is specific to emerald ash borer, a pest that only impacts ash, genus *Fraxinus*. The quarantine order is not intended to regulate the entirety of unregulated products sold in Montana. Wholesalers, vendors, and retailers of regulated items are responsible for providing evidence and documentation that regulated articles imported into Montana meet the requirements of the quarantine order.

/s/ Cort Jensen
Cort Jensen
Rule Reviewer

/s/ Mike Foster
Mike Foster
Director
Agriculture

Certified to the Secretary of State May 4, 2021.

BEFORE THE DEPARTMENT OF COMMERCE
OF THE STATE OF MONTANA

In the matter of the amendment of	)	NOTICE OF AMENDMENT
ARM 8.94.3728 pertaining to the)	
administration of the Federal)	
Community Development Block Grant)	
(CDBG) Program – Planning Grants)	

TO: All Concerned Persons

1. On March 26, 2021, the Department of Commerce published MAR Notice No. 8-94-186 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 288 of the 2021 Montana Administrative Register, Issue Number 6.

2. 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 NO. 1: A commenter said that the department should allow jurisdictions to submit and receive funding for more than one project in the jurisdiction.

RESPONSE NO. 1: In the interest of serving as many communities as possible across the state with limited planning funding, the Department of Commerce limits each eligible county, city, or town to receiving and to having one open CDBG planning grant per funding cycle. The department encourages communities to work with their local governments to prioritize planning needs in deciding which projects to propose for CDBG planning funding each cycle and to work with the Community Development Division staff to ensure that CDBG planning grant applications are complete and as competitive as possible when they are submitted.

COMMENT NO. 2: A commenter said that the department should reduce or eliminate the required completion or percentage of completion on a project prior to requesting funding for another project.

RESPONSE NO. 2: In the interest of serving as many communities as possible across the state with limited planning funding and to ensure the responsible use and equitable distribution of public funding for planning activities, the department limits each eligible county, city, or town to having only one open CDBG planning grant per funding cycle.

3. The department has amended ARM 8.94.3728 as proposed.

/s/ Amy Barnes
Amy Barnes
Rule Reviewer

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

Certified to the Secretary of State May 4, 2021.

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY,
ALTERNATIVE HEALTH CARE BOARD, BOARD OF ARCHITECTS AND
LANDSCAPE ARCHITECTS, BOARD OF ATHLETIC TRAINERS, BOARD OF
BARBERS AND COSMETOLOGISTS, BOARD OF BEHAVIORAL HEALTH,
BOARD OF CHIROPRACTORS, BOARD OF CLINICAL LABORATORY SCIENCE
PRACTITIONERS, BOARD OF DENTISTRY, STATE ELECTRICAL BOARD,
BOARD OF FUNERAL SERVICE, BOARD OF HEARING AID DISPENSERS,
BOARD OF MASSAGE THERAPY, BOARD OF MEDICAL EXAMINERS, BOARD
OF NURSING, BOARD OF NURSING HOME ADMINISTRATORS, BOARD OF
OCCUPATIONAL THERAPY PRACTICE, BOARD OF OPTOMETRY, BOARD OF
OUTFITTERS, BOARD OF PHARMACY, BOARD OF PHYSICAL THERAPY
EXAMINERS, BOARD OF PLUMBERS, BOARD OF PRIVATE SECURITY, BOARD
OF PROFESSIONAL ENGINEERS AND PROFESSIONAL LAND SURVEYORS,
BOARD OF PSYCHOLOGISTS, BOARD OF PUBLIC ACCOUNTANTS, BOARD OF
RADIOLOGIC TECHNOLOGISTS, BOARD OF REAL ESTATE APPRAISERS,
BOARD OF REALTY REGULATION, BOARD OF RESPIRATORY CARE
PRACTITIONERS, BOARD OF SANITARIANS, BOARD OF SPEECH-LANGUAGE
PATHOLOGISTS AND AUDIOLOGISTS, BOARD OF VETERINARY MEDICINE
OF THE STATE OF MONTANA

In the matter of the amendment of	)	NOTICE OF AMENDMENT AND
ARM 24.111.407, 24.118.502,	)	ADOPTION
24.121.406, 24.126.301, 24.129.606,)	
24.138.304, 24.141.509, 24.155.613,)	
24.159.403, 24.162.503, 24.165.302,)	
24.168.407, 24.171.403, 24.180.405,)	
24.182.508, 24.189.613, 24.189.911,)	
24.201.532, 24.210.301, 24.210.418,)	
24.222.405, and 24.225.425, and the)	
adoption of New Rules I through)	
XLVIII pertaining to nonroutine)	
applications and criminal convictions)	

TO: All Concerned Persons

1. On March 26, 2021, the Department of Labor and Industry (department) published MAR Notice No. 24-101-310 regarding the public hearing on the proposed amendment and adoption of the above-stated rules, at page 290 of the 2021 Montana Administrative Register, Issue No. 6.

2. On April 16, 2021, a public hearing was held on the proposed amendment and adoption of the above-stated rules in Helena via the remote conferencing platform. One comment was received by the April 23, 2021 deadline.

3. A summary of the comment and the board response are as follows:

COMMENT: Several commenters supported the Board of Veterinary Medicine's changes and thanked the board for its work on the project.

RESPONSE: The board appreciates all comments received during the rulemaking process.

4. The boards have amended and adopted the following rules exactly as proposed:

ALTERNATIVE HEALTH CARE BOARD

Amended: ARM 24.111.407

Adopted: NEW RULE I (ARM 24.111.408)

ALTERNATIVE HEALTH CARE BOARD
SHEEHAN EDNIE-ROSEN, DEM
PRESIDING OFFICER

BOARD OF ARCHITECTS AND LANDSCAPE ARCHITECTS

Adopted: NEW RULE II (ARM 24.114.506)

NEW RULE III (ARM 24.114.507)

BOARD OF ARCHITECTS AND
LANDSCAPE ARCHITECTS
DALE NELSON
PRESIDENT

BOARD OF ATHLETIC TRAINERS

Amended: ARM 24.118.502

Adopted: NEW RULE IV (ARM 24.118.503)

BOARD OF ATHLETIC TRAINERS
JANET TRETHEWEY
CHAIRPERSON

BOARD OF BARBERS AND COSMETOLOGISTS

Amended: ARM 24.121.406

Adopted: NEW RULE V (ARM 24.121.408)

BOARD OF BARBERS AND
COSMETOLOGISTS
ANGELA PRINTZ
PRESIDENT

BOARD OF BEHAVIORAL HEALTH

Adopted: NEW RULE VI (ARM 24.219.411)
NEW RULE VII (ARM 24.219.412)

BOARD OF BEHAVIORAL HEALTH
ELAINE MARONICK, LCPC, LMFT
CHAIRPERSON

BOARD OF CHIROPRACTORS

Amended: ARM 24.126.301
Adopted: NEW RULE VIII (ARM 24.126.505)
NEW RULE IX (ARM 24.126.506)

BOARD OF CHIROPRACTORS
MARCUS NYNAS, DC
PRESIDENT

BOARD OF CLINICAL LABORATORY SCIENCE PRACTITIONERS

Amended: ARM 24.129.606
Adopted: NEW RULE X (ARM 24.129.608)

BOARD OF CLINICAL LABORATORY
SCIENCE PRACTITIONERS
MATTHEW KALANICK
CHAIRPERSON

BOARD OF DENTISTRY

Amended: ARM 24.138.304
Adopted: NEW RULE XI (ARM 24.138.305)

BOARD OF DENTISTRY
LESLIE HAYES, DDS
PRESIDENT

STATE ELECTRICAL BOARD

Amended: ARM 24.141.509
Adopted: NEW RULE XII (ARM 24.141.511)

STATE ELECTRICAL BOARD
HARRY FREEBOURN
PRESIDENT

BOARD OF FUNERAL SERVICE

Adopted: NEW RULE XIII (ARM 24.147.414)
NEW RULE XIV (ARM 24.147.415)

BOARD OF FUNERAL SERVICE
JOHN TARR
PRESIDING OFFICER

BOARD OF HEARING AID DISPENSERS

Adopted: NEW RULE XV (ARM 24.150.512)
NEW RULE XVI (ARM 24.150.513)

BOARD OF HEARING AID
DISPENSERS
MICHAEL SPINTI
PRESIDING OFFICER

BOARD OF MASSAGE THERAPY

Amended: ARM 24.155.613
Adopted: NEW RULE XVII (ARM 24.155.615)

BOARD OF MASSAGE THERAPY
ELIZABETH CAVIN, ND
CHAIRPERSON

BOARD OF MEDICAL EXAMINERS

Adopted: NEW RULE XVIII (ARM 24.156.418)
NEW RULE XIX (ARM 24.156.419)

BOARD OF MEDICAL EXAMINERS
TAMMY SCOTT, PA-C
PRESIDENT

BOARD OF NURSING

Amended: ARM 24.159.403
Adopted: NEW RULE XX (ARM 24.159.413)
NEW RULE XXI (ARM 24.159.414)

BOARD OF NURSING
SHARON SWEENEY FEE, PHD, RN, CNE
PRESIDENT

BOARD OF NURSING HOME ADMINISTRATORS

Amended: ARM 24.162.503
Adopted: NEW RULE XXII (ARM 24.162.512)

BOARD OF NURSING HOME
ADMINISTRATORS
KATHRYN BEATY
PRESIDING OFFICER

BOARD OF OCCUPATIONAL THERAPY PRACTICE

Amended: ARM 24.165.302
Adopted: NEW RULE XXIII (ARM 24.165.413)
NEW RULE XXIV (ARM 24.165.414)

BOARD OF OCCUPATIONAL
THERAPY PRACTICE
TWYLLA KIRCHEN, OTR/L
PRESIDING OFFICER, ACTING

BOARD OF OPTOMETRY

Amended: ARM 24.168.407
Adopted: NEW RULE XXV (ARM 24.168.409)

BOARD OF OPTOMETRY
DOUG KIMBALL, O.D.
PRESIDENT

BOARD OF OUTFITTERS

Amended: ARM 24.171.403
Adopted: NEW RULE XXVI (ARM 24.171.414)

BOARD OF OUTFITTERS
JOHN WAY
CHAIRPERSON

BOARD OF PHARMACY

Adopted: NEW RULE XXVII (ARM 24.174.508)
NEW RULE XXVIII (ARM 24.174.509)

BOARD OF PHARMACY
TONY KING, RPh
PRESIDENT

BOARD OF PHYSICAL THERAPY EXAMINERS

Adopted: NEW RULE XXIX (ARM 24.177.512)
NEW RULE XXX (ARM 24.177.513)

BOARD OF PHYSICAL THERAPY
EXAMINERS
KELSEY WADSWORTH, PT, DPT, OCS
PRESIDING OFFICER

BOARD OF PLUMBERS

Amended: ARM 24.180.405
Adopted: NEW RULE XXXI (ARM 24.180.406)

BOARD OF PLUMBERS
JEFF GRUIZENG
PRESIDING OFFICER

BOARD OF PRIVATE SECURITY

Amended: ARM 24.182.508
Adopted: NEW RULE XXXII (ARM 24.182.510)

BOARD OF PRIVATE SECURITY
HOLLY DERSHEM-BRUCE
PRESIDENT

BOARD OF PROFESSIONAL ENGINEERS
AND PROFESSIONAL LAND SURVEYORS

Adopted: NEW RULE XXXIII (ARM 24.183.514)
NEW RULE XXXIV (ARM 24.183.515)

BOARD OF PROFESSIONAL ENGINEERS
AND PROFESSIONAL LAND SURVEYORS
RON DRAKE, PROFESSIONAL ENGINEER
PRESIDING OFFICER

BOARD OF PSYCHOLOGISTS

Amended: ARM 24.189.613
ARM 24.189.911
Adopted: NEW RULE XXXV (ARM 24.189.614)
NEW RULE XXXVI (ARM 24.189.912)

BOARD OF PSYCHOLOGISTS
LORETTA BOLYARD, Ph.D.
CHAIRPERSON

BOARD OF PUBLIC ACCOUNTANTS

Amended: ARM 24.201.532
Adopted: NEW RULE XXXVII (ARM 24.201.533)

BOARD OF PUBLIC ACCOUNTANTS
JOHN JACOBSEN, CPA
PRESIDING OFFICER

BOARD OF RADIOLOGIC TECHNOLOGISTS

Adopted: NEW RULE XXXVIII (ARM 24.204.417)
NEW RULE XXXIX (ARM 24.204.418)

BOARD OF RADIOLOGIC
TECHNOLOGISTS
MIKE NIELSEN, RPA
PRESIDING OFFICER

BOARD OF REAL ESTATE APPRAISERS

Adopted: NEW RULE XL (ARM 24.207.411)
NEW RULE XLI (ARM 24.207.412)

BOARD OF REAL ESTATE APPRAISERS
PETER FONTANA
CERTIFIED RESIDENTIAL APPRAISER
PRESIDING OFFICER

BOARD OF REALTY REGULATION

Amended: ARM 24.210.301
ARM 24.210.418
Adopted: NEW RULE XLII (ARM 24.210.420)

BOARD OF REALTY REGULATION
RIC SMITH
PRESIDING OFFICER

BOARD OF RESPIRATORY CARE PRACTITIONERS

Adopted: NEW RULE XLIII (ARM 24.213.406)
NEW RULE XLIV (ARM 24.213.407)

BOARD OF RESPIRATORY CARE
PRACTITIONERS
LEONARD BATES, RCP
PRESIDING OFFICER

BOARD OF SANITARIANS

Adopted: NEW RULE XLV (ARM 24.216.511)
NEW RULE XLVI (ARM 24.216.512)

BOARD OF SANITARIANS
MEGAN BULLOCK, R.S.
PRESIDING OFFICER

BOARD OF SPEECH-LANGUAGE PATHOLOGISTS AND AUDIOLOGISTS

Amended: ARM 24.222.405
Adopted: NEW RULE XLVII (ARM 24.222.407)

BOARD OF SPEECH-LANGUAGE
PATHOLOGISTS AND AUDIOLOGISTS
KELSEY MANN, AuD
PRESIDING OFFICER, ACTING

BOARD OF VETERINARY MEDICINE

Amended: ARM 24.225.425
Adopted: NEW RULE XLVIII (ARM 24.225.427)

BOARD OF VETERINARY MEDICINE
PAUL MCCANN, DVM
PRESIDENT

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

/s/ LAURIE ESAU
Laurie Esau, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State May 4, 2021.

BEFORE THE BOARD OF ATHLETIC TRAINERS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of ARM) NOTICE OF AMENDMENT AND
24.118.301 definitions, 24.118.2301) REPEAL
unprofessional conduct, and the repeal)
of 24.118.501 applications, 24.118.504)
supervision, 24.118.2101 renewals)

TO: All Concerned Persons

1. On January 15, 2021, the Board of Athletic Trainers published MAR Notice No. 24-118-6 regarding the public hearing on the proposed amendment and repeal of the above-stated rules, at page 14 of the 2021 Montana Administrative Register, Issue No. 1.

2. On February 11, 2021, a public hearing was held on the proposed amendment and repeal of the above-stated rules in Helena via the remote conferencing platform. No comments were received by the February 12, 2021 deadline.

3. The board has amended ARM 24.118.301 and 24.118.2301 exactly as proposed.

4. The board has repealed ARM 24.118.501, 24.118.504, and 24.118.2101 exactly as proposed.

BOARD OF ATHLETIC TRAINERS
JANET TRETHEWEY, CHAIRPERSON

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

/s/ LAURIE ESAU
Laurie Esau, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State May 4, 2021.

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of	)	NOTICE OF AMENDMENT AND
ARM 24.144.301 definitions,	)	REPEAL
24.144.402 duty to report changes,)	
24.144.403 proof of insurance,)	
24.144.411 fees, 24.144.501 who must)	
obtain an endorsement, 24.144.502)	
endorsement examinations,)	
24.144.701 fireworks wholesaler permit)	
applications, and 24.144.2101)	
continuing education, and the repeal of)	
24.144.404 duplicate license or)	
endorsement, 24.144.415)	
apprenticeship programs, 24.144.503)	
application procedure, 24.144.702)	
fireworks wholesale permits, and)	
24.144.2102 renewals, all pertaining to)	
the Fire Protection License Program)	

TO: All Concerned Persons

1. On January 15, 2021, the Department of Labor and Industry (department) published MAR Notice No. 24-144-2 regarding the public hearing on the proposed amendment and repeal of the above-stated rules, at page 39 of the 2021 Montana Administrative Register, Issue No. 1.

2. On February 11, 2021, a public hearing was held on the proposed amendment and repeal of the above-stated rules in Helena via the remote conferencing platform. Several comments were received by the February 12, 2021 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: One commenter requested including definitions for "inspection," "maintenance," and "testing" to be in line with the definitions stated in NFPA 25, Standard for the Inspection, Testing, and Maintenance of Water-Based Fire Protection Systems.

RESPONSE 1: The suggested additional definitions are beyond what can be accomplished in a final notice but may be considered in future rulemaking.

COMMENT 2: Several commenters opposed the removal of ARM 24.144.501(6)(c) because other states generally allow homeowners to install their own fire protection

equipment. Commenters stated the exemption is an important option for homeowners seeking greater fire protection for their families and property.

RESPONSE 2: The department is striking this provision because it exceeds the scope of the program's statutes which contain no licensing exceptions for owner/occupants of single-family residences.

COMMENT 3: A commenter proposed amending ARM 24.144.502 to include passage of a NICET test with a conditional certificate as a pathway to licensure.

RESPONSE 3: Pursuant to ARM 24.144.502(1)(b), an endorsement is issued to applicants having letters of certification, specific to the endorsement sought, of NICET Level II or higher, or those candidates for certification from NICET Level II or higher. Therefore, this section allows issuance of an endorsement to individuals who possess a conditional NICET Level II certification to be considered "candidates for certification."

COMMENT 4: Several commenters opposed removing the requirements set forth in ARM 24.144.502(1)(c) because apprenticeships offer an important path to licensure.

RESPONSE 4: The department agrees that the apprenticeship program option should not have been stricken and is retaining the provision.

COMMENT 5: A few commenters suggested the department implement a tiered system to better reflect the duties of those seeking endorsements.

RESPONSE 5: The department did not propose any such amendments to ARM 24.144.502; therefore this request is outside of the scope of the current project but may be considered in future rulemaking.

COMMENT 6: A commenter opposed the reduction of continuing education (CE) hours in ARM 24.144.2101 stating that the four hours is not adequate to maintain current knowledge of state-of-the-art fire protection standards.

RESPONSE 6: The department concluded that reducing the required CE hours from eight to four is reasonable in reducing the burden for endorseees to obtain CE hours while maintaining adequate competency and knowledge.

COMMENT 7: A commenter opposed changes to ARM 24.144.2101(2) stating that the quality of endorseees' training will diminish if they are allowed to choose training unrelated to enhancing knowledge of current standards for fire protection systems.

RESPONSE 7: Pursuant to ARM 24.144.2101(1) and (8), CE must be related to the practice of installing or servicing fire protection equipment. Unrelated CE will not be accepted as meeting the requirements.

COMMENT 8: A commenter requested clarification of what a "candidate for certification" means.

RESPONSE 8: The department defines a "candidate for certification" as an individual who passed the examination for NICET Level II but must meet additional NICET requirements to achieve a NICET II certification.

COMMENT 9: One commenter asked how the proposed amendments would affect currently licensed individuals.

RESPONSE 9: The rule changes will apply to all licensed individuals once effective, and the proposal notice outlined the specific reasons for changes to individual rules.

4. The department has amended ARM 24.144.301, 24.144.402, 24.144.403, 24.144.411, 24.144.501, 24.144.701, and 24.144.2101 exactly as proposed.

5. The department has repealed ARM 24.144.404, 24.144.415, 24.144.503, 24.144.702, and 24.144.2102 exactly as proposed.

6. The department has amended ARM 24.144.502 with the following changes, stricken matter interlined, new matter underlined:

24.144.502 EXAMINATION FOR ENDORSEMENT (1) through (1)(b) remain as proposed.

(c) is currently licensed as an engineer in any jurisdiction (state, territory, federal government, federally-recognized tribe, country or local government), that has licensure standards as stringent as or more stringent than those for licensure as an engineer in the state of Montana; or

(d) has successfully completed an apprenticeship program approved by the department.

(2) remains as proposed.

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

/s/ LAURIE ESAU
Laurie Esau, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State May 4, 2021.

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

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

TO: All Concerned Persons

1. On December 24, 2020, the Department of Public Service Regulation published MAR Notice No. 38-2-247 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 2320 of the 2020 Montana Administrative Register, Issue Number 24.

2. The department has amended ARM 38.2.3301 as proposed.

3. The department has amended ARM 38.2.601 as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

38.2.601 DEFINITIONS (1) through (1)(m) remain as proposed.

(n) "Party" means an individual, partnership, corporation, governmental body, or other identifiable group or organization, 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 commission or hearings examiner to a formal proceeding and whose legal rights, duties and privileges will be determined by the commissioners' final decision.

(o) remains as proposed.

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

4. On January 26, 2021, the department held a virtual public hearing on the proposed amendments and received various oral and written comments. The department has thoroughly considered the comments received. A summary of the comments and the department's responses are as follows:

COMMENT NO. 1: The commenter is generally supportive of the proposed change to ARM 38.2.601, though the commenter "opposed and will continue to oppose attempts by staff to intervene as an actual party in contested case dockets in the future."

The commenter is generally supportive of the proposed changes in ARM 38.5.3301: "While we would request the Commission consider broader adoption of its standard procedures, the proposed amendments are a good start to improving the transparency of the Commission's procedural rules." The commenter states "it is

important for the Commission to formalize its procedures through administrative rule, rather than continuing to rely on case specific procedural orders to govern general procedures." The commenter notes this approach "has the added benefit of increasing the transparency of the Commission's practices and procedural rules to participants who are not familiar with the Commission's practice."

The commenter does "not take a position on the issue of the appropriate role of the Commission or hearing examiners in conducting discovery or offer comment on the specific inclusion of 'the commission, [or] hearing examiner,' in the revised ARM 38.5.3301."

RESPONSE: The proposed rule amendment aligns with the comment above, to improve transparency of the commission's procedural rules. Further, this rule does not contemplate the ability of staff to intervene and appear as an actual party in a contested case docket, whether authorized by existing statutes or other regulations.

COMMENT NO. 2: The commenter opposes both amendments. The commenter "has long stood in opposition to proposed ARM amendments or PSC procedures that would improperly insert either the Commission or Commission staff into Class D contested cases as what could only be described as interested parties." Rather the commenter believes that "the more proper role of the Commission is to sit as a disinterested quasi-judicial body in contested cases, with staff serving in an advisory role." For the commenter, this means refraining from issuing discovery, because doing so "would improperly place the Commission on a particular side in a contested case, create the appearance of bias, and/or open up Class D contested cases to due process challenges."

The commenter makes three additional points. First, motor carrier cases are not utility cases. The commenter notes that protested motor carrier hearings are adversarial proceedings, where applicants and protestants present witnesses and evidence, and the applicant has a burden of proof. In these proceedings "the Commission should maintain its posture as a quasi-judicial, impartial decision maker." This means denying an application where there is insufficient evidence, and granting an application where there is.

Second, the commenter raises a due process concern. "If the Commission intends to discover, develop, and introduce evidence that necessarily supports one adversarial party over another, procedural due process requires providing adversarial parties with the concomitant right to rest the Commission's evidence and engage in discovery with the Commission." The commenter believes that the proposed discovery rule "would violate constitutional due process requirements because the proposed amendments would permit the Commission to act both as an interested party collecting and presenting evidence and as a quasi-judicial body that would then rule upon its own evidence."

Third, the commenter notes that the Constitution "already contains a mechanism for proper supplementation of the record on behalf of the consumer in Class D cases:

the Montana Consumer Counsel." The commenter also notes that the 1972 Montana Constitutional Convention specifically rejected a proposal that would have directed the commission to represent the consumer. Mont. Const. Conv., Verbatim Transcript, 2397–2400 (Mar. 15, 1972). This history raises the question of "which perspective the Commission would represent when it issues discovery or 'data requests' to develop, present, and rule upon its own evidence."

COMMENT NO. 3: The commenter opposes both amendments. The commenter "is concerned that—while this may not be the Commissioners' intent—these most recent proposed amendments will effectively result in the Commission becoming a third party in adjudicative proceedings over which it also effectively serves as the judge." This action "raises obvious and serious due process concerns." Similarly: "Simply put, combining the Commission's two separate powers of quasi-legislative (i.e. rulemaking/policy) and quasi-judicial (i.e. adjudicative) both in an adjudicative proceeding—as the Proposed Amendments purport to do—is contrary to law." The commenter requests the commission withdraw and terminate this proposed rulemaking.

The commenter presents two primary comments: (1) the proposed rulemaking violates party rights to procedural due process, raises *ex parte* communication concerns, and runs contrary to the commission's statutory authority; and (2) if the commission seeks to become an advocate in contested case proceedings "its structure must be reformed by the legislature to include a firewalled advocacy staff."

To avoid these various issues, the commenter recommends the commission withdraw the entire rulemaking or, at minimum, withdraw both proposed amendments.

COMMENT NO. 4: The commenter largely opposes the proposed rulemaking. The commenter questions the commission's intent: "The commissioners need only look at staff's recent attempts to intervene in Montana-Dakota Utilities Co.'s (2020.10.103) and NorthWestern Energy's ("NorthWestern") (2020.08.091) dockets to see that staff's proposed amendments are intended to get the Montana Public Service Commission (commission) to depart from its commitment to the advisory staff model." Accordingly, the commenter opposed the rulemakings, with the exception of striking the last sentence in the definition of "Party" in ARM 38.2.601.

The commenter opposes the amendment to ARM 38.2.601 on several grounds. First, the commission should not strike the language that excludes staff from party. "Since staff is advisory, the language excluding staff from party status must remain. Otherwise, staff may attempt to intervene as a party, as it has done recently." Second, the commenter opposes the addition of "or hearings examiner" because it believes that this permits the commission or hearings examiners from naming or admitting a party to a proceeding without that party filing a motion for intervention, which commenter opposes. Third, the commenter opposes the addition of the word "final," because the purpose of this change was not included in the notice. Fourth, the commenter supports striking the last sentence of the rule.

The commenter provides five comments regarding the amendments to ARM 38.2.3301. The commenter is opposed to striking the reference to the Montana Rules of Civil Procedure, as the commenter notes this is "an ineffective attempt to disguise discovery as an 'investigation,'" but instead proposes a "prehearing investigation" term not contemplated by statute. The commenter notes this amendment is misleading and inaccurate: "Procedural orders have never provided for a 'pre-hearing investigation' in a contested case, and the Commission's authority to conduct investigations is unrelated to the discovery procedures for contested cases."

The commenter opposes changing the rules to allow the commission and hearing examiners to issue discovery: "The change is unnecessary and allows staff to tip the scales to assist a party of its choosing." The commenter opposes an amendment to allow the commission and hearing examiners to raise additional issues: "There is no reason for the Commission to expand its role to create controversy that does not exist between the parties, which is a process the Montana Supreme Court already criticized."

The commenter opposes the amendment which seeks to limit the forms of discovery to data requests, and only allow other forms of discovery, such as depositions, upon commission approval. The commenter believes this is an unnecessary amendment which will complicate the process, which requires more vetting prior to adoption.

The commenter states that the addition of the language "Nothing in this rule limits the Commission's additional broad statutory investigation powers otherwise found in Title 69" is surplusage: "The Commission's authority to conduct investigations is undisputed. But, as the Montana First Judicial District Courts already ruled, the Commission's statutory powers differ from its quasi-judicial powers." Accordingly, "If the Commission wishes to adopt procedural rules to govern its investigations, the Commission must do so separate from its rules for contested cases."

COMMENT NO. 5: The commenter generally opposes the amendments. The commenter suggests that "waiting to consider amendments until after court orders have issued with respect to the pending litigation discussed above would likely lead to a more reasoned rulemaking process that comports with statutory and constitutional constraints placed upon the PSC."

The commenter provides three principal comments regarding the amendments to ARM 38.2.601. The commenter notes that the amendments bring "into question what role the PSC intends to take in future contested case hearings." Whether "framed as a party, or as an investigator, having Commission staff appear at hearing, cross-examine witnesses, introduce evidence, and conduct discovery, does not comport with the parties' due process right to a fair and open hearing before a neutral adjudicator."

The commenter notes that the proposed rulemaking allowing hearing examiners to name parties "should only be allowed if there is a motion for intervention which would allow other parties to the contested case an opportunity to respond to the request, in order to ensure fundamental fairness." The commenter notes that the insertion of the word "final" lacks a reasoning in the proposed rule. Without this reasoning, the commenter opposes the amendment, because it is "concerned that this addition is an attempt to bolster positions the Commission has previously taken, and lessen parties' ability to seek judicial redress."

The commenter provides four comments regarding the amendments to ARM 38.2.3301. The proposed rulemaking "is unnecessary and creates impediments to the timely ability of the parties to proceed in contested cases." Instead these issues should be left to each docket's procedural order, "as Commission contested cases can vary significantly, and are governed by wholly different statutory regimes."

The commenter notes that "it is inappropriate for the Commission or its staff to issue discovery in a contested case." The commenter opposes the amendments for the PSC or staff to issue discovery "while also serving as an adjudicator in the matter, as such action is contrary to contested case parties' due process rights to a fair and open hearing before a neutral adjudicator."

The commenter also notes that it "is inappropriate for the Commission or its staff to raise additional issues in the context of a contested case." The commenter says that this process directly contradicts Montana Supreme Court precedent.

The commenter also notes that references "to investigatory powers are inappropriate in the context of discovery rules." Further "the reference to additional discovery rules is unnecessary if the rulemaking is rejected, as the current version of the rule addresses discovery needs in different matters in a more holistic fashion than this proposed rule. Moreover, the new process is entirely devoid of procedures for requesting and conducting other forms of discovery, and are not practical given statutory timelines." Additionally, "it would be a violation of parties' due process rights to a fair and neutral hearing to combine those investigatory activities with a contested case proceeding."

RESPONSE TO COMMENTS 2 through 5:

1. Whether the commission has statutory authority to investigate issues, either by data request or by the additional issues process.

The commission has several specific grants of rulemaking authority to adopt regulations governing commission proceedings. 69-1-110(3), 69-2-101, 69-2-103(3), 69-3-103(2), 69-3-310, 69-12-201, 69-12-204, MCA. Each provides sufficient rulemaking authority to adopt the rules in question. 2-4-305(3), MCA.

On the merits, a panoply of statutes within Title 69, MCA, and the Montana Rules of Evidence, support the ability of the commission to investigate issues in

proceedings—many of which provide the independent and adequate grounds to do so.

Within Title 69, MCA, 69-2-102 is most squarely on point. In cases that are "actively contested by the consumer counsel," the commission "shall leave representation of the interests of consumers to the consumer counsel." *Id.* However, the statute "does not prohibit the commission or its staff from investigating and interrogating in any hearing to clarify the case or present an issue." *Id.* Similarly: "Evidence may be introduced by the commission on an issue that has not been adequately addressed by any part if the commission firsts request counsel of record to address the issue and counsel fails to introduce sufficient or adequate evidence. *Id.*

Because "the commission or its staff" can investigate and interrogate "in any hearing to clarify the case or present an issue," and can introduce its own evidence, it follows that a regulation which provides the commission the ability to ask data requests (investigate or interrogate), or raise additional issues (investigate, interrogate, and introduce evidence), reasonably effectuates the purpose of 69-2-102, MCA.

If there are any lingering concerns about the commission's ability to issue data requests or raise additional issues, several additional statutes in Title 69, MCA, affirmatively resolve the issue. 69-3-106(1), 69-3-106(2), 69-3-202(5), 69-3-203(2), 69-3-303(2), 69-3-324, 69-3-327, 69-3-328, 69-3-330, 69-3-106(3), 69-12-206(1), 69-12-203(2), 69-12-210, 69-12-407(1), MCA.

In addition to this broad Title 69, MCA authority, the commission adheres to the Montana Rules of Evidence when conducting contested case proceedings. 2-4-612, MCA; see *also* 69-3-303(2), MCA. Rule 614 provides that the court "may, on its own motion or at the suggestion of a party, call witnesses and all parties are entitled to cross-examine witnesses," similarly, the court "may interrogate witnesses, whether called by itself or a party." Importantly, this applies to both evidentiary hearings, and pre-hearing questioning. As permitted by statute, most commission cases involve pre-filed written testimony in advance of evidentiary hearings. 2-4-612(2), MCA. As such, data requests by the commission on pre-filed testimony, or raising additional issues and requiring parties to respond to each, is a reasonable extension of the commission's ability to interrogate witnesses during an evidentiary hearing.

These authorities—several of which provide independent and adequate ground to support the commission's rulemaking—indicate this proposed rulemaking does not engraft additional, contradictory, or consistent requirements not envisioned by the Legislature. Additionally, because the commission's historical practice of issuing data requests and raising additional issues has been questioned, this regulation is reasonably necessary to codify this long-standing practice.

2. Whether the amendments, regardless of their statutory authority, are constitutional.

The commission takes seriously any allegations that its actions have the potential to violate a party's rights to due process under both the United States and Montana Constitutions.

All commission rulemakings must be lawful. The commission must also provide the reasons for overruling opposing comments. Assuming that the commission has the substantive statutory authority to implement this rulemaking, as well as the rulemaking authority to do so, and that the proposed rulemaking falls within the commission's substantive statutory authority, the rulemaking must nonetheless be constitutional.

Due process does not attach in all commission proceedings. Due process requires a legitimate claim of entitlement. *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). For example, developers do not have a vested property interest prior to approval of a subdivision. *Kiely Constr. L.L.C. v. City of Red Lodge*, 2002 MT 241, ¶¶ 34, 47 312 Mont. 52, 57 P.3d 836. Miners do not have a vested property interest prior to gaining a mining permit. *Seven Up Pete Venture v. Mont.*, 2005 MT 146, ¶ 33, 327 Mont. 306, 114 P.3d 1009. And fundamentally important for commission proceedings, motor carriers do not have a vested property interest prior to receiving a license. *Billings Yellow Cab, LLC v. State*, 2014 MT 275, ¶ 14, 376 Mont. 463, 335 P.3d 1223. Reasonably, in certain commission proceedings, parties are not entitled to due process because no vested property interests are at issue.

This is because procedural due process does not apply to legislative acts. *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445–46 (1915). Setting utility rates is a legislative act. *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908). Unlike a judicial inquiry that investigates, declares, and enforces liabilities based "on present or past facts and under laws supposed already to exist," legislative action "looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial, in kind . . ." *Id.*

Montana follows *Prentis*: "The legislature itself has the undoubted authority to regulate public utilities, and by means of a duly constituted commission it operates through its administrative medium. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial, in kind." *Billings Util. Co. v. Public Serv. Comm'n*, 62 Mont. 21, 33, 203 P. 366, 368 (1921) (*citing Prentis*). Montana has adhered to this precedent for close to a century. *Mt. Water Company v. Mont. Dep't of Pub. Serv. Regulation*, 254 Mont. 76, 79-80, 835 P.2d 4, 6 (1992) ("Rate-making is a legislative activity and is therefore prospective only in its effect.") (*citing Billings Util. Co.*).

However, without overruling nor addressing the *Prentis* authorities, the Montana Supreme Court has extended due process rights to certain commission proceedings. *Montana Power Co. v. Public Serv. Comm'n*, 206 Mont. 359, 371, 671 P.2d 604, 611 (1983); *Allied Waste Servs. v. Dep't of Pub. Serv. Regulation*, 2019 MT 199, ¶ 17,

397 Mont. 85, 447 P.3d 463; *Wilson v. Dep't of Pub. Serv. Regulation*, 260 Mont. 167, 172, 858 P.2d 368, 371 (1993).

Accordingly, due process attaches to some property interests, though not all, and only in certain commission proceedings. The question is whether the commission's proposed rulemaking, and related procedural regulations and statutes, provide constitutionally adequate procedures in those circumstances where a constitutionally protected property interest exists.

Due process "requires a fair and impartial tribunal." *In re Best*, 2010 MT 59, ¶ 22, 355 Mont. 365, 229 P.3d 1201. Due process prohibits agencies from combining prosecution and decision powers. *Id.* ¶ 33 ("When investigatory and adjudicatory functions are combined, the risk of unfairness from the combination of those functions may, under certain circumstances, be too high."). However, courts have consistently rejected the public commenters' concerns that mixing investigation and decision-making powers is a *per se* due process violation. Rather, without allegations of bias, due process permits agencies to combine investigation and decision-making powers, even in the same commissioner.

The commission is statutorily precluded from prosecuting actions. 69-3-110(3), MCA. The Montana Supreme Court has found that "proceedings before the commission are investigative on the part of the commission, although they may be conducted in the form of adversary proceedings." *Williamson*, ¶ 31 (*quoting* MAR 38.2.302(1), and MCA 69-3-103(2)(a)). This is because the commission can obtain information from utilities "in any manner necessary to perform its duties." *Qwest Corp. v. Mont. PSC*, 2007 MT 350, ¶ 37, 340 Mont. 309, 174 P.3d 496. This is unique to utility commissions: "Agencies charged with protection of the public interest are not created simply to provide a forum for the private parties to a proceeding." 1 Leonard Saul Goodman, *The Process of Ratemaking* 69 (1998). Rather the commission is legally obligated to ensure, for example upon a "hearing and due investigation," that rates are not "unjust, unreasonable, or unjustly discriminatory . . . or otherwise in violation of the provisions" of Title 69, chapter 3, MCA. 69-3-330(1), MCA. Accordingly, commission proceedings utilize investigative, not prosecutorial, powers.

The combination of investigation and adjudication functions, even in a single commissioner, is not a *per se* due process violation, and a party challenging that combination carries a "difficult burden" of overcoming the "presumption of honesty and integrity in those serving as adjudicators." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *accord Goldstein v. Commission on Practice*, 2000 MT 8, ¶ 24, 297 Mont. 493, 955 P.2d 923 (citing *Withrow*). "That sort of mixing is endemic in agencies, and has been since the beginning of the Republic." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2421–22 (internal quotation omitted). Public commenter's authorities recognize this distinction between an investigative–adjudicative combination and a prosecutorial–adjudicative combination. See *Botsko v. Davenport Civil Rights Comm'n*, 774 N.W.2d 841, 849 (Iowa 2009) ("there is no due process violation based solely upon the overlapping investigatory and adjudicatory roles of agency actors. . . . A more

serious problem, however, is posed where the same person within an agency performs both prosecutorial and adjudicative roles."); *Horne v. Polk*, 394 P.3d 651, 659 (Ariz. 2017) (one person cannot serve as the "accuser, advocate, and final decisionmaker" when prosecuting campaign finance violations); *Dorr v. Wyoming Bd. of CPAs*, 2001 WY 37, ¶ 20, 21 P.3d 735, 745 (declining to reach due process claim, but emphasizing problems associated with one attorney both prosecuting a licensing complaint and advising the decision maker).

Public commenters have concerns about this proposed rulemaking. However, without allegations of unconstitutional decisionmaker bias, those concerns are unfounded. The appropriate resolution of their concerns is to seek judicial review of a specific contested case decision. Unequivocally, Montana has declared these procedures provide constitutionally sufficient due process. *Wiser v. State*, 2006 MT 20, ¶ 30, 331 Mont. 28, 129 P.3d 113 ("where the statutes provide for judicial review of a particular order made or agreed upon by a prejudiced commissioner there is no denial of due process"); *accord Schneeman v. Dep't of Labor & Indus.*, 257 Mont. 254, 259, 848 P.2d 504, 507 (1993), *and Cascade County Consumer's Ass'n v. PSC*, 114 Mont. 169, 394 P.2d 856 (1964), *and State ex rel. Holt v. District Court*, 103 Mont. 438, 63 P.2d 1026 (1936), *and Montana Power Co. v. Public Service Commission*, 12 F.Supp. 946. (D. Mont. 1935), *and State ex rel. Mueller v. District Court*, 87 Mont. 108, 285 P. 928 (1930).

3. Whether the amendments are prohibited by judicial precedent, or other regulations regarding the commission's organizational structure.

The public commenters state that the proposed rulemaking is prohibited by three judicial decisions, which preclude the commission's proposed rulemaking. The commission respectfully disagrees.

First, the *L&L* court denied the petition for a temporary restraining order and immediate review of the commission's action. The court denied the question of whether the petitioner in that case had made a *prima facie* showing that it would suffer actual, irreparable harm prior to final resolution on the merits. Nothing in that order prevented the commission from applying its routine contested case procedures in the case at issue, or in subsequent cases. Further, the proceeding was later voluntarily dismissed, resulting in a lack of final judgment on the merits, which prevented any opportunity to litigate the constitutionality of commission procedures. It is unclear how a district court denial of a temporary restraining order could preclude the commission from proceeding with this rulemaking.

Second, the *Big Foot* decisions were preliminary orders, which cannot be construed as final decisions on the merits. In fact the parties explicitly agreed that the opportunity for briefing on the merits of the constitutionality of the issue would follow after the preliminary injunction hearing. Accordingly, the merits of any due process issue were not fully and fairly litigated. On appeal, the court explicitly declined to reach the constitutionality of the commission's investigative powers, even though amicus parties requested the court to address the issues. *Allied Waste*, ¶ 17, n. 6

("Many of these arguments were not made below and decline to reach them here."). It is unclear how decisions which explicitly declined to reach the constitutionality of the commission's investigative powers, even when requested by the parties, precludes this rulemaking proceeding. To the contrary, this proceeding aligns with the *Big Foot* decisions, because it attempts to clarify the commission's authority to issue data requests as noted in the *Big Foot* decision.

Similarly, *MTSUN* is not on point. *MTSUN* concerned neither the constitutionality of the commission combining investigation and decision-making powers, nor the commission's additional issues process. Rather, *MTSUN* considered the commission's substantive statutory obligations under proceedings where a qualifying small power production facility and an electric utility "are unable to mutually agree to agree to a contract." *MTSUN*, ¶ 73. In those circumstances, the commission's review "must be narrowed to only those controversies and issues that are disputed by the parties, not those issues on which the parties have reached mutual agreement." *Id.* It is unclear how this decision precludes this rulemaking proceeding.

Without precedent to the contrary, it appears that the commission's combination of investigation and decision-making powers as proposed in the rulemaking, without allegations of bias from a specific proceeding, is not a *per se* procedural due process violation.

4. Whether the amendments improperly assume the role of the Montana Consumer Counsel (MCC), insert commission staff as parties in commission proceedings, or raise ex parte concerns.

The amendments do not contemplate the commission assuming the role of the MCC, advocating for the interests of the consumer, or insert commissioners or commission staff as parties in proceedings.

Various statutes support the commissioners or its authorized agents performing agency responsibilities. 2-4-612(7), 69-1-115(2), 69-3-106(2), 69-3-202(5), 69-3-327, 69-3-203(1), 69-3-208(4), 69-12-206(1), 69-12-203(2), 69-12-407(1), MCA. Even in cases where the Montana Consumer Counsel actively contests an issue, this "does not prohibit the commission or its staff from investigating and interrogating in any hearing to clarify the case or present an issue." 69-2-102, MCA. "Evidence may be introduced by the commission on an issue that has not been adequately addressed by any party if the commission first requests counsel of record to address the issue and counsel fails to introduce sufficient or adequate evidence." *Id.*

These statutes underscore the reality of commission proceedings: both individual commissioners and commission staff stand in the shoes of the agency when either performs statutorily authorized commission functions. Neither individual commissioners nor commission staff are parties. The amendment to ARM 38.2.601 codifies that reality.

Because neither the staff nor commissioners are a party to the docket, no *ex parte* concerns are present. These issues only arise when the commission appears as a party in a contested case docket. In those circumstances, it is necessary to separate the necessary staff from commissioners. However, where commission staff do not appear as a party, there are no *ex parte* concerns.

5. Whether the amendments establish improper hearing examiner powers.

The commenters note that hearing examiners in recent dockets have unilaterally appointed commission staff as advocacy staff to the docket. Parties have contested this process, and the authority of a hearing examiner in doing so. Reasonably, the public is concerned whether amending ARM 38.2.601 to empower hearings examiners to name or admit parties in proceedings, is an attempt to codify this recent practice.

These rules are not intending to permit hearing examiners with the authority to unilaterally appoint commission staff as advocacy staff in parties. Rather these rules are intended to permit hearing examiners, in addition to the commission, the ability to name or admit parties to commission dockets. This is a clarifying amendment, because as written the regulation is ambiguous regarding whether only the commission, and not hearings examiners, would have the power to name or admit parties to proceedings. This removes the uncertainty, and explicitly provides hearing examiners the ability to name or admit parties in the same manner as the commission—typically accomplished through the filing of a motion to intervene.

6. The public commented that the deletion of "with the exception of the commission staff" and the addition of "final" in the proposed amendment of ARM 38.2.601, appear to lack an adequate description in the proposal notice.

The deletion of "with the exception of the commission staff" is not adequately described in the proposal notice, but it is reasonably related to the purpose of the proposed rulemaking. The proposal notice indicates that the amendments are an attempt 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 deletion of "with the exception of the commission staff" reasonably aligns with this intent. The commission retains this addition.

The addition of "final" lacks an adequate description, and it is inappropriate for the commission to amend the rule without providing the public with the opportunity to comment. The commission removes this addition.

Reviewed by:

DEPARTMENT OF PUBLIC SERVICE
REGULATION

/s/ LUKE CASEY
Luke Casey
Rule Reviewer

/s/ JAMES BROWN
James Brown
Chairman
Department of Public Service Regulation

Certified to the Secretary of State, May 4, 2021.

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

In the matter of the amendment of) NOTICE OF AMENDMENT
ARM 38.5.2202 and 38.5.2302)
pertaining to pipeline safety)

TO: All Concerned Persons

1. On December 11, 2020, the Department of Public Service Regulation published MAR Notice No. 38-5-246 pertaining to the proposed amendment of the above-stated rules at page 2232 of the 2020 Montana Administrative Register, Issue Number 23.

2. The department has amended the above-stated rules as proposed.

3. No comments or testimony were received.

/s/ LUKE CASEY
Luke Casey
Rule Reviewer

/s/ JAMES BROWN
James Brown
Chairman
Department of Public Service Regulation

Certified to the Secretary of State May 4, 2021.

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 December 31, 2020. This table includes notices in which those rules adopted during the period November 20, 2020, through April 30, 2021, 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 December 31, 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 or 2021 Montana Administrative Registers.

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

2-11-614	Adoption of a State Plan of Operation for Federal Surplus Property, p. 378
2-13-605	Next Generation 9-1-1 Technology Standards and Baseline Principles, p. 1719, 1857, 2237
2-59-607	Activities of Loan Production Offices - Assessments - Dividends - Conversion Applications - Merger Applications - Examination Fees for Trust Companies, p. 152, 328
2-59-609	Semiannual Assessment for Banks and Credit Unions, p. 1786, 2133
2-59-610	Application for Organizing a New Credit Union - Annual Reports, p. 97, 275
2-59-613	Examination Fees - Revocation and Suspension of Mortgage Licenses - Consumer Complaints - Confidentiality Agreements - Sharing Arrangements - Reinstatement of Expired or Suspended Licenses - Mortgage Loan Origination Disclosure Form - Bona Fide Not-For-Profit Certification - Applications for Initial Licenses Near Year End, p. 381

(Public Employees' Retirement Board)

2-43-611	Investment Policy Statements for the Defined Contribution Retirement Plan, the Montana Fixed Fund, and the 457(b) Deferred Compensation Plan, p. 201, 465
----------	---

(State Banking Board)

2-60-608 Closure or Relocation of Bank Branches, p. 1, 228

AGRICULTURE, Department of, Title 4

4-20-270 Hemp, p. 1946, 59

4-21-271 Plant Health Quarantines, p. 114

4-21-272 Plant Health Quarantines, p. 100

STATE AUDITOR, Office of, Title 6

6-261 Surety Insurance Producers Who Sell, Solicit, or Negotiate
Commercial Bail Bonds, p. 739, 1860, 410

(Classification Review Committee)

6-263 Establishment, Deletion, or Revision of Classifications for Various
Industries for Supplementing the NCCI Basic Manual for Workers'
Compensation and Employers Liability Insurance, p. 447

COMMERCE, Department of, Title 8

8-94-186 Administration of the Federal Community Development Block Grant
(CDBG) Program—Planning Grants, p. 288

8-111-185 Definitions - Housing Credit Allocation Procedure, p. 2287, 229

(Board of Investments)

8-97-100 Board of Investments Rules, p. 205, 466

EDUCATION, Title 10

(Board of Public Education)

10-53-137 Technology Integration Content Standards, p. 1380, 2134

10-54-134 K-12 Career and Technical Education Content Standards, p. 1398,
2136

10-55-135 K-12 Computer Science Content Standards, p. 1416, 2138

10-55-136 Library Media Content Standards, p. 1428, 2140

10-55-138 K-12 Social Studies Content Standards, p. 1446, 2142

FISH, WILDLIFE AND PARKS, Department of, Title 12

12-530 Closing the Shields River to All Motorized Watercraft, p. 1690, 62

12-533 Field Trial Regulations - Game Bird Dog Training - Game Bird Farms,
p. 2093, 172

12-538 Closing Giant Springs State Park in Cascade County, p. 116

12-539 Closing Pictograph Cave State Park in Yellowstone County, p. 118

12-540 Closing the Yellowstone River 100 Yards Upstream and Downstream
of the Twin Bridges Road Bridge in Stillwater County, p. 175

- 12-542 Closing the Ennis Fishing Access Site and the Valley Garden Fishing Access Site in Madison County, p. 230
- 12-543 Closing the York's Islands Fishing Access Site in Broadwater County, p. 232
- 12-544 Closing the Springdale Bridge Fishing Access Site in Park County, p. 434

(Fish and Wildlife Commission)

- 12-531 Recreational Use on the Madison River, p. 1722, 2324
- 12-534 Closing the Boulder River to All Motorized Watercraft, p. 1953, 430
- 12-535 Use of Remote-Controlled Devices and Drones While Fishing, p. 1956, 431
- 12-537 Limiting Tepee Lake to Manually Operated Watercraft, p. 2226, 432
- 12-541 Policy Regarding the Management of Black Bear, p. 389
- 12-545 Use of Deer or Elk Urine to Mask Human Odor, p. 391
- 12-546 Implementation of the Commercial Use Cap on the Madison River, p. 395

ENVIRONMENTAL QUALITY, Department of, Title 17

- 17-415 Nutrient Standards Variances, p. 2290

(Board of Environmental Review)

- 17-413 Air Quality Operation Fees, p. 1550, 2335
- 17-414 Selenium Standards for Lake Koocanusa and the Kootenai River, p. 1789, 2336

TRANSPORTATION, Department of, Title 18

- 18-183 Motor Fuels Tax, p. 1795, 2238
- 18-184 Motor Carrier Services Safety Requirements, p. 450

CORRECTIONS, Department of, Title 20

(Board of Pardons and Parole)

- 20-25-70 Parole Guidelines - Conditional Discharge From Supervision, p. 1556, 1693, 2401

JUSTICE, Department of, Title 23

- 23-18-249 Montana 24/7 Sobriety Program Act, p. 1804, 2407
- 23-18-262 Certificates of Public Advantage, p. 453

(Public Safety Officers Standards and Training Council)

- 23-13-260 Certification of Public Safety Officers, p. 4

LABOR AND INDUSTRY, Department of, Title 24

Boards under the Business Standards Division are listed in alphabetical order by chapter following the department notices.

- 24-11-369 Unemployment Insurance Benefits Related to the COVID-19
Pandemic, p. 2229, 120
- 24-13-366 HELP-Link, p. 1958, 2409
- 24-17-363 Prevailing Wage Rates for Public Works Projects, p. 1862, 2410
- 24-21-362 Apprenticeship and Training Program, p. 1964, 2419
- 24-22-368 Implementation of the Montana Employment Advancement Right Now
Program Act, p. 1969, 2420
- 24-29-364 Drug Formulary in the Utilization and Treatment Guidelines for
Workers' Compensation and Occupational Disease, p. 2030, 2431
- 24-29-365 Reimbursement of Workers' Compensation Premiums Due to
Providing High-Quality Work-Based Learning Opportunities, p. 2033,
2432
- 24-29-367 Medical Fee Schedules for Workers' Compensation Purposes, p. 397
- 24-29-370 Use of Signatures When Documents Are Being Electronically
Transmitted, p. 11, 276
- 24-101-309 Definitions - Applicants With Criminal Convictions, p. 1821, 2144
- 24-101-310 Nonroutine Applications and Criminal Convictions, p. 290
- 24-122-1 Boiler Operator Licensing - Fee Schedule for Boiler Operating
Engineers - Approval of Training Courses - Examinations - Renewals,
p. 20, 468
- 24-131-1 Construction Blaster Licensing - Fees - Training Programs - Variances
- Requirements, p. 24, 469
- 24-135-3 License Requirements for Crane and Hoisting Operating Engineers -
Fees - Incorporation by Reference of American National Standards
Institute B30.5, p. 29, 470
- 24-142-2 Elevator Licensing - Fee Schedule - Licensee Responsibilities -
Elevator Mechanic and Limited Mechanic Licensure Qualifications -
Examinations - Licensure by Reciprocity or Endorsement - Apprentice
Registration, p. 34, 475
- 24-144-2 Fire Protection License Program - Definitions - Duty to Report
Changes - Proof of Insurance - Fees - Who Must Obtain an
Endorsement - Endorsement Examinations - Fireworks Wholesaler
Permit Applications - Continuing Education - Duplicate License or
Endorsement - Apprenticeship Programs - Application Procedure -
Fireworks Wholesale Permits - Renewals, p. 39
- 24-301-350 Incorporation by Reference of the International Energy Conservation
Code, p. 2303, 177

(Board of Personnel Appeals)

- 24-26-353 Practices of and Procedures Before the Board of Personnel Appeals,
p. 1977, 2422

(Board of Athletic Trainers)

24-118-6 Definitions - Unprofessional Conduct - Applications - Supervision - Renewals, p. 14

(Board of Dentistry)

24-138-79 Approved Clinical Exam Criteria for Dentists and Dental Hygienists, p. 2098, 121

24-138-80 Denturist Committee - Fees - Dental Hygienist Functions - License Display - Licensure and Certification of Dentists, Dental Hygienists, and Denturists - Continuing Education Requirements - Dentist and Denturist Unprofessional Conduct - Screening Panel - Dental Hygienist Unprofessional Conduct - Justifiable Criticism and Expert Testimony - Infectious Waste - Public Service and Quality of Care - Patient Selection - Patient Records - Emergency Service - Consultation and Referral - Rebate and Split Fees - Volunteer Licensee Scope - Dental and Dental Hygiene Schools - Dentist Specialist License - Licensure After Denial or Revocation - Grounds for Denial - Severability - Multiple-Specialty Announcements, p. 213, 473

(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, 65

24-156-90 ECP Scope of Practice, p. 1866, 277

24-156-91 Audit and Continuing Education Reporting Requirements - Continuing Education Audit, p. 456

(Board of Plumbers)

24-180-50 Fee Schedule - Temporary Exceptions - Renewal of Endorsement - Continuing Education Requirements, p. 102, 329

(Board of Professional Engineers and Professional Land Surveyors)

24-183-44 Definitions - Teaching of Land Surveying Subjects - Continuing Professional Competency—Continuing Education, p. 401

(Board of Real Estate Appraisers)

24-207-44 Approval of Qualifying and Continuing Education Courses, p. 108, 436

(Board of Realty Regulation)

24-210-46 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, p. 2296

LIVESTOCK, Department of, Title 32

- 32-18-293 Recalls, p. 1468, 2145
- 32-20-314 Special Requirements for Swine, p. 2104, 179
- 32-21-315 Diagnostic Laboratory Fees, p. 158

(Board of Milk Control)

- 32-20-313 Milk Control Assessments, p. 2101, 69

NATURAL RESOURCES AND CONSERVATION, Department of, Title 36

- 36-22-200 Oil and Gas Leases on State Lands, p. 459
- 36-22-203 Management of State Forested Lands, p. 1046, 2239
- 36-22-210 Rangeland Management, p. 2107, 330

PUBLIC HEALTH AND HUMAN SERVICES, Department of, Title 37

- 37-931 Automated External Defibrillators (AED), p. 1826, 2146
- 37-932 Substantiation of Abuse and Neglect Reports - Disclosure of Information, p. 2040, 2434
- 37-933 Updating Medicaid Provider Rates, Fee Schedules, and Effective Dates, p. 2048, 2111, 51, 180
- 37-934 Home Support Services (HSS) Program Redesign, p. 2054, 2435
- 37-935 Health and Economic Livelihood Partnership (HELP) Act, p. 2062, 2438
- 37-936 Montana Telecommunications Access Program (MTAP) Financial Eligibility Criteria, p. 2113, 70
- 37-937 Substance Use Disorder (SUD) State Approval, p. 2309, 182
- 37-938 Big Sky Rx Benefit, p. 2314, 183
- 37-939 Newborn Screening, p. 2317, 184
- 37-940 Licensed Marriage and Family Therapists - Policy Changes for Medication Assisted Treatment, p. 52, 164, 331
- 37-941 Update of Effective Dates and Inclusion of Medicaid Manual Changes, p. 168, 334
- 37-942 Low Income Weatherization Assistance Program, p. 405
- 37-943 Hospice Fee Schedule, p. 462

PUBLIC SERVICE REGULATION, Department of, Title 38

- 38-2-247 Investigation and Discovery, p. 2320
- 38-5-245 Small Generator Interconnection Definitions and Procedures, p. 651, 955, 2147
- 38-5-246 Pipeline Safety, p. 2232
- 38-5-248 Advanced Metering Opt-Out, p. 111

REVENUE, Department of, Title 42

- 42-1024 Updates to the Montana Reappraisal Plan and Classification and Valuation Manuals, p. 1832, 2078, 71
- 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, 76
- 42-1027 Revisions to Definitions of Oil Stripper Well Bonus - Stripper Well Exemption, p. 2128, 77
- 42-1028 Tax Credits for Contributions to Qualified Education Providers, p. 2235, 122
- 42-1029 Common Carrier Reporting of Alcoholic Beverage Shipments, p. 56, 234

SECRETARY OF STATE, Office of, Title 44

(Commissioner of Political Practices)

- 44-2-241 Payment Threshold--Inflation Adjustment for Lobbyists, p. 2131, 78

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