**MONTANA ADMINISTRATIVE REGISTER**

**ISSUE NO. 15**

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 The notice section contains state agencies' proposed new, amended or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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

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

**TABLE OF CONTENTS**

**Page Number**

**NOTICE SECTION**


**ADMINISTRATION, Department of, Title 2**

**2-2-318 Notice of Proposed Amendment - State Procurement of Supplies and Services. No Public Hearing Contemplated. 2037-2044**

**2-2-319 Notice of Proposed Transfer and Amendment - Single Audit Act. No Public Hearing Contemplated. 2045-2051**

**2-2-320 (Public Employees' Retirement Board) Notice of Proposed Adoption - Family Law Orders for the Public Employees' Retirement System Defined Contribution Retirement Plan Administered by the Public Employees' Retirement Board. No Public Hearing Contemplated. 2052-2054**

**ENVIRONMENTAL QUALITY, Department of, Title 17**

**17-163 (Petroleum Tank Release Compensation Board) (Petroleum Board) Notice of Public Hearing on Proposed Amendment - Applicable Rules Governing the Operation and Management of Petroleum Storage Tanks. 2055-2058**

**(Board of Environmental Review)**

**17-164 (Metal Mine Reclamation) Notice of Public Hearing on Proposed Amendment - Metal Mine Reclamation Act. 2059-2075**

**Page Number**

**17-165 (Air Quality) Notice of Public Hearing on Proposed Adoption, Amendment and Repeal - Issuance of Montana Air Quality Permits. 2076-2117**

**17-166 (Air Quality) Notice of Public Hearing on Proposed Amendment - Open Burning. 2118-2123**

**17-167 (Air Quality) Notice of Public Hearing on Proposed Amendment - Incorporation by Reference of Hazardous Air Pollutants Emission Standards. 2124-2126**

**17-168 (Air Quality) Notice of Public Hearing on Proposed Amendment, Adoption and Repeal - Protection of Visibility in Mandatory Class I Federal Areas. 2127-2138**

**(Department of Environmental Quality)**

**17-169 (Hazardous Waste) Notice of Public Hearing on Proposed Amendment - Incorporation by Reference of Current Federal Regulations into Hazardous Waste Rules. 2139-2140**

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

**8-54-37 (Board of Public Accountants) Notice of Public Hearing on Proposed Amendment - Basic Requirements and Credit for Formal Study Programs, and Professional Monitoring. 2141-2145**

**8-58-62 (Board of Realty Regulation) Notice of Public Hearing on Proposed Amendment - Realty Regulation Matters. 2146-2158**

**24-174-53 (Board of Pharmacy) Notice of Additional Public Hearing and Extension of Comment Period - Definitions - Foreign Graduates - Preceptor Requirements - Technician Ratio and Pharmacy Security Requirements - Licensing - Personnel - Absence of Pharmacist - Use of Emergency Drug Kits - Drug Distribution - Pharmacist Responsibility - Sterile Products - Return of Medication from Long Term Care Facilities - Pharmacist Meal/Rest Breaks - Health Care Facility Definition - Class I Facility - Class II Facility - Class III Facility. 2159-2161**

**LIVESTOCK, Department of, Title 32**

**32-3-157 Notice of Proposed Repeal - Fees for Environmental Impact Funds. No Public Hearing Contemplated. 2162-2164**

Page Number

PUBLIC HEALTH AND HUMAN SERVICES, Department of, Title 37

37-241 Notice of Public Hearing on Proposed Amendment - Extension of the 2.6% Provider Reimbursement Reductions and the Withholding of the Provider Rate Increase for Resource Based Relative Value Scale (RBRVS) Providers for Fiscal Year 2003. 2165-2171

37-243 Notice of Public Hearing on Proposed Amendment - Continuation of Public Assistance Benefits. 2172-2174

37-244 Notice of Public Hearing on Proposed Amendment - Parent's Copayment for Child Care Services. 2175-2177

REVENUE, Department of, Title 42

42-2-695 Notice of Public Hearing on Proposed Adoption - Changing Land Use for Agricultural (Class Three) and Forest Land (Class Ten) to Class Four. 2178-2181

RULE SECTION

ADMINISTRATION, Department of, Title 2

(Public Employees' Retirement Board)

NEW, AMD Family Law Orders for Retirement Systems and Plans Administered by the Public Employees' Retirement Board. 2182-2184

NEW Qualified Domestic Relations Orders for the Deferred Compensation (457) Plan Administered by the Public Employees' Retirement Board. 2185

AGRICULTURE, Department of, Title 4

NEW Potato Research and Market Development Program. 2186

EDUCATION, Department of, Title 10

(Board of Public Education)

AMD, REP Bus Standards. 2187

AMD Notice of Amendment - GED Fees. 2188

Page Number

ENVIRONMENTAL QUALITY, Department of, Title 17

(Board of Environmental Review)

NEW (Air Quality) Maintenance of Air Pollution Control Equipment for Existing Aluminum Plants. 2189-2194

AMD (Air Quality) Definition of Major Source in the Air Quality Operating Permit Rules. 2195

NEW (Water Quality) Water Use Classifications
AMD and Numeric Nutrient Standards - Definitions and Incorporations by Reference. 2196-2209

NATURAL RESOURCES AND CONSERVATION, Department of, Title 36

AMD (Board of Land Commissioners and the Department of Natural Resources and Conservation) Minimum Easement Charge Under the Jurisdiction of the State Board of Land Commissioners. 2210-2212

AMD Purpose - Definitions and Construction of
NEW Rules - Direct Loans - Types of Bonds; Financial and Other Requirements - Other Types of Bonds - Covenants Regarding Facilities Financed by the Loan - Fees - Evaluation of Financial Matters and Commitment Agreement - Requirements for Disbursing of Loan - Terms of Loan and Bond - Financial and Other Requirements for Loans to Private Persons. 2213-2217

PUBLIC HEALTH AND HUMAN SERVICES, Department of, Title 37

EMERG Medicaid Cost Sharing.
AMD 2218-2224

AMD Mental Health Center Services. 2225-2230

NEW Licensure of Day Care Facilities.
AMD
REP 2231-2242

Page Number

INTERPRETATION SECTION

Opinions of the Attorney General.

20 Fish, Wildlife, and Parks, Department of - Notification Regarding Loss of Hunting, Fishing, and Trapping Privileges is to be Done by the Department of Fish, Wildlife, and Parks - Fishing and Hunting Licenses - The Loss of Hunting, Fishing, and Trapping Privileges that Occurs Upon a Guilty Plea, Conviction, or Forfeiture of Bail of a Fish and Game Violation is a Direct Consequence of that Violation. As a Result, a Judge Must Inform an Individual Accused of a Fish and Game Violation of the Potential Forfeiture of Fishing, Hunting, and Trapping Privileges as a Result of Conviction, Guilty Plea, or Forfeiture of Bond in Order to Assure that a "Knowing" Plea is Entered - Judges - A Judge Must Inform an Individual Accused of a Fish and Game Violation of the Potential Forfeiture of Fishing, Hunting, and Trapping Privileges as a Result of Conviction, Guilty Plea, or Forfeiture of Bond in Order to Assure that a "Knowing" Plea is Entered - Justices of the Peace. 2243-2247

SPECIAL NOTICE AND TABLE SECTION

Function of Administrative Rule Review Committee. 2248-2249

How to Use ARM and MAR. 2250

Accumulative Table. 2251-2261

**BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA**

| | |
|---|---|
| In the matter of the amendment of ARM 2.5.120, 2.5.201, 2.5.402, 2.5.408, 2.5.502 and 2.5.604 concerning state procurement of supplies and services | ) NOTICE OF PROPOSED AMENDMENT<br>)<br>) NO PUBLIC HEARING CONTEMPLATED<br>) |

**TO: All Concerned Persons**

**1. On September 16, 2002, the Department of Administration proposes to amend ARM 2.5.120, 2.5.201, 2.5.402, 2.5.408, 2.5.502 and 2.5.604 concerning state procurement of supplies and services.**

**2. The Department of Administration will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Administration no later than 5:00 p.m. on September 6, 2002, to advise us of the nature of the accommodation that you need. Please contact Sheryl Olson, State Procurement Bureau, P.O. Box 200135, Helena, MT 59620-0135, telephone (406)444-3315; fax (406) 444-2529; email sherylolson@state.mt.us.**

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

**2.5.120 THE STATE EMPLOYEES' CHARITABLE GIVING CAMPAIGN**

**(1) The state employees' charitable giving campaign (SECGC) may procure supplies and services costing ~~$15,000~~ $25,000 or less using a purchase technique that best meets the campaign's needs.**

**AUTH: 18-4-221, MCA
IMP: 18-4-221, MCA**

**REASON: The State Employees' Charitable Giving Campaign is the only employer-authorized solicitation of state employees by non-profit groups. The Department of Administration appoints an advisory council to oversee the campaign. Specific services are required to organize the fund-raising campaign and to collect and disburse employee contributions. All of the funds used to acquire these services come from a portion of employee contributions. This amendment is reasonably necessary to set in rule the higher level of delegated purchasing authority granted to agencies in October of 2001 by ARM 2.5.603. The alternative is to not amend the rule to reflect the higher delegated purchasing authority and**

limit the program's purchasing authority to the lesser amount allowed prior to the rule amendment. Therefore, the amendment of the rule to reflect the higher level seems the most reasonable alternative.

2.5.201 DEFINITIONS In these rules, words and terms defined in Title 18, chapter 4, MCA, shall have the same meaning as in the statutes and, unless the context clearly requires otherwise or a different meaning is prescribed for a particular section, the following definitions apply:

(1) through (8) remain the same.

(9) "Debar or debarment" means an action taken or decision made by the department, other than temporary determinations of nonresponsibility or suspension, that prohibits a vendor from proposing, bidding on, or receiving state contracts for a specific period of time or until certain conditions have been met.

(9) and (10) remain the same, but are renumbered (10) and (11).

(12) "Director" means the director of the department of administration.

(11) through (34) remain the same, but are renumbered (13) through (36).

(37) "Suspension" means an action taken by the division that temporarily prohibits a vendor from proposing, bidding on, or receiving state contracts.

(35) through (39) remain the same, but are renumbered (38) through (42).

AUTH: 18-4-221, MCA
IMP: 18-4-221, MCA

REASON: Three new definitions have been added to assist in understanding the amendments to ARM 2.5.402. The additions are reasonably necessary to clarify terms not defined in statute and explain that the "Director" is the Director of the Department of Administration. The Department has determined that the most reasonable alternative is to provide the new definitions to aid in the interpretation of ARM 2.5.402.

2.5.402 SUSPENSION OR ~~REMOVAL~~ DEBARMENT FROM ~~VENDORS LIST~~ CONTRACT ELIGIBILITY (1) The division has the authority to temporarily suspend ~~or remove~~ a vendor from ~~the vendors list~~ consideration for further contracts with the state if the division ~~determines the vendor:~~ has probable cause to believe that the vendor has engaged in activities that could lead to debarment from contract eligibility. Debarment applies both to a firm or an individual. In the case of a firm, it may be applied against any or all businesses in which a firm has involvement or over which it has ownership or control. In the case of an individual, debarment may be applied to and enforced against any and all businesses in which the individual has any level of interest, ownership or control. The causes for debarment include the following:

(a) ~~has falsely submitted an~~ submission of a false affidavit for Montana residency; ~~or~~

(b) vendor is not ~~a~~ responsible or responsive ~~vendor~~ as defined in 18-4-301, MCA, and ARM 2.5.201 and 2.5.407~~.~~;

(c) deliberate failure, without good cause, to perform in accordance with the specifications or within the time limit provided in a contract;

(d) a recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts;

(e) failure to comply with the provisions of the Unemployment Insurance Law, Title 39, chapter 51, MCA;

(f) failure to comply with the provisions of the Workers' Compensation Act, Title 39, chapter 71, MCA; or

(g) any other cause that the division determines to be so serious and compelling as to affect responsibility as a state contractor, including debarment by another governmental entity.

(2) ~~The division may suspend a vendor from the vendors list upon written determination by the division that probable cause exists for suspension under 18-1-113 and 18-4-241, MCA. A notice of suspension, including a copy of the determination, shall be sent to the affected vendor.~~ If there is probable cause that any of the situations exist as set out in (1), the division shall mail a notice of suspension to the affected vendor or individual. The notice must state that:

(a) the suspension is for the period it takes to complete an investigation into possible ~~removal~~ debarment;

(b) bids or proposals will not be accepted from the suspended vendor or contracts awarded to the suspended vendor during the period of suspension; ~~and~~

~~(c) the suspended vendor may request a redetermination.~~

~~(3)~~(c) the ~~S~~suspension is effective upon the date of issuance of the notice of suspension and, unless the suspension is terminated by the division or a court, it will remain in effect ~~until its expiration date~~ for a period not to exceed 90 calendar days.

(3) If the division's investigation confirms a cause for debarment and the director agrees with the division's determination, a notice will be served upon the vendor by certified mail, return receipt requested. The notice will include:

(a) the pertinent facts supporting the alleged cause for debarment and the division's intent to remove the vendor from eligibility to contract with the state;

(b) notification of the vendor's right to a contested case hearing on the matter in accordance with the procedures set forth in Title 2, chapter 4, part 6, MCA.

(c) the term of the debarment and to what extent affiliates are affected. The debarment will be for a specific period of time or until certain conditions are met, at the discretion of the division.

~~(4) The division may remove a vendor from the vendors list for cause upon written determination by the division that cause exists under 18-1-113 and 18-4-241, MCA.~~

~~(5) The division shall prepare a written decision regarding a removal and send a copy to the affected vendor. The decision shall:~~

~~(a) recite the facts relied upon;~~

~~(b) indicate the term of the removal;~~

~~(c) indicate the reasons for the action; and~~

~~(d) indicate to what extent affiliates are affected.~~

~~(6) Removal is effective upon issuance and remains effective until its expiration date unless otherwise terminated.~~

~~(7) The division may remove a vendor from the vendors list for failure to respond to invitation for bids or proposals on three consecutive solicitations of those items. Prospective bidders and offerors may be reinstated on such lists as described in ARM 2.5.401.~~

(4) A written request for hearing must be received by the director from the vendor within 20 calendar days after the date of the mailing of the notice of debarment. Failure to timely request a hearing will constitute a waiver by the vendor of the opportunity for a contested case hearing and appeal and will result in the director or director's designee entering an order supporting the vendor's debarment from contracting with the state for a specified period of time or until certain conditions are met.

(5) Upon timely receipt of a written request for a contested case hearing, the director shall appoint a hearing examiner in accordance with the procedures set forth in Title 2, chapter 4, part 6, MCA, to hear evidence in the matter and come to a determination as to whether the facts support the decision to debar the vendor from contracting with the state for a specified period of time or until certain conditions are met.

~~(8)~~(6) The ~~department~~ division shall maintain a list of debarred vendors ~~removed or suspended from the vendors list~~ on its website at http://www.discoveringmontana.com/doa/gsd. ~~The list shall be available to all state agencies and the public upon request.~~

AUTH: 18-4-221, MCA
IMP: 18-4-241 and 18-4-308, MCA

REASON: The proposed amendments are reasonably necessary to provide a method of due process for debarment proceedings. The procedures provide due process protections that are lacking in the current version of the rule. The amendments are the Department's response to previous suggestions by vendors that the rule lacked enough due process protections for vendors faced with removal proceedings. By offering the amendments, the Department has provided debarment procedures similar to those currently in place with the departments of Labor and Industry and Transportation. The alternative would

be to not amend the rule and face possible future litigation concerning insufficient due process procedures. Therefore, adoption of the rule amendments seems the most reasonable alternative.

2.5.408 RECIPROCAL PREFERENCE (1) remains the same.

(2) A reciprocal preference is applied only to an invitation for bid for supplies or an invitation for bid for nonconstruction services for public works as defined in 18-2-401(9), MCA, but only in the event that federal funds are not involved in the anticipated purchase. In addition, a reciprocal preference is only applied if it will benefit a Montana resident bidder as defined in 18-1-103, MCA.

(3) through (5) remain the same.

AUTH: 18-1-114 and 18-4-221, MCA
IMP: 18-1-102, MCA

REASON: The amendment is offered as a means of clarifying the application of a reciprocal preference. The current rule does not include a statement extending the preference to an invitation for bid for nonconstruction services for public works as defined in section 18-2-401(9), MCA. Without this statement, the rule is technically incomplete and could lead agencies to not consider the preference in this specific instance. Therefore, the amendment is reasonably necessary to ensure that agencies are in full conformance with the law. The alternative of not adopting the amendment is unacceptable because it could lead to nonconformance with the reciprocal preference law.

2.5.502 BID, PROPOSAL, AND CONTRACT PERFORMANCE SECURITY

(1) and (2) remain the same.

(3) The preferred types of security are bonds as described in 18-4-312(3)(a), MCA, and cash as described in 18-4-312(3)(c) and (d), MCA. The security must be payable to the state of Montana and the contract performance security must remain in effect for the entire contract period. The department will supply bid and proposal security bond and contract performance security bond forms when security is required. These are the only acceptable forms for surety bond or irrevocable letter of credit submission.

(a) If a certificate of deposit, money market certificate, cashier's check, certified check, irrevocable letter of credit, bank money order, or bank draft is determined to be acceptable, it must be issued from a federally chartered or state-chartered bank or savings and loan association that is insured by or for which insurance is administered by the federal deposit insurance corporation or that is drawn and issued by a credit union insured by the national credit union share insurance fund.

(b) Irrevocable letters of credit in excess of $100,000 from a single financial institution will not be accepted as security for contracts.

(c) Facsimile, electronic or photocopy copies of bid or contract security are not acceptable.

(d) Certificates of deposit or money market certificates will not be accepted as security for bid, proposal, or contract security unless the certificates are assigned only to the state. All interest income from these certificates must accrue only to the contractor and not the state.

(4) Factors to consider in requiring bid/proposal security and in determining the amount of the security include:

(a) type of commodity;

(b) past state experience;

(c) labor required to perform contract;

(d) materials required to perform contract.

(5) All negotiable instruments provided as bid security and proposal security~~, except bonds,~~ will be returned to the unsuccessful bidders/offerors within 30 days from date of the award.

(6) and (7) remain the same.

AUTH: 18-4-221, MCA
IMP: 18-1-201 and 18-4-312, MCA

REASON: These amendments are needed to clarify the requirements for acceptance of security instruments. The Department has developed standard forms for vendors submitting surety bonds or irrevocable letters of credit. The amendment of subsection (3) reflects the addition of a standard letter of credit form.

The amendment to subsection (3)(b) clarifies that the State will accept multiple letters of credit from a vendor as long as none of them exceed $100,000 from a single financial institution. This amendment is reasonably necessary to provide clarification of section 18-4-312(2)(b), MCA, which has caused confusion for many years.

The amendment of subsection (3)(c) to add the words "electronic or photocopy" simply clarifies that only an original security document will be accepted. This amendment is reasonably necessary since the question of accepting copies of security documents has frequently arisen.

The amendment of subsection (4) is reasonably necessary to include "proposal" security as a factor to be considered when determining the amount of security required for a certain project. The Department has consistently included language in rules and statutes to distinguish a "bid" from a "proposal." This amendment is just one more instance where the distinction can be made.

The amendment of subsection (5) is necessary to broaden current language and clarify that any accepted form of negotiable security will be returned within 30 days from the

date of contract award. This clarification will notify the business community that their negotiable security instruments will be returned on a timely basis.

Each of the amendments is reasonably necessary to clarify public procurement policy and adopt into rule those agency procedures and policies that are of significant interest to the public. The alternative of continuing to address these issues through non-published policy rather than rule is undesirable.

2.5.604 SOLE SOURCE PROCUREMENT (1) through (5) remain the same.

(6) The following items do not require sole source justification and shall be purchased directly by the agency regardless of delegated authority:

(a) professional licenses;

(b) dues to associations;

(c) renewal of software license agreements; ~~or~~

(d) purchase or renewal of maintenance agreements for software or hardware~~.~~; or

(e) publications available only from a single supplier.

AUTH: 18-4-221, MCA
IMP: 18-4-306, MCA

REASON: This amendment is reasonably necessary to implement a policy that the Department will not require a sole source justification when a state agency needs to purchase publications from a single supplier. The amendment will primarily benefit educational and library facilities by addressing an issue that has arisen over the last several years. The decision is justified because the "sole source" of such purchases is evident. The Department has determined that the rule amendment is the most reasonable alternative in lieu of continuing to require such agencies to submit sole source justifications for these particular types of purchases.

4. Concerned persons may submit their data, views or arguments concerning the proposed amendments in writing to Sheryl Olson, State Procurement Bureau, P.O. Box 200135, Helena, MT 59620-0135, telephone (406)444-3315; fax (406) 444-2529; email sherylolson@state.mt.us. Any comments must be received no later than 5 p.m. on September 13, 2002.

5. If persons who are directly affected by the proposed amendments wish to express their data, views and arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request, along with any written comments they have, to Sheryl Olson, State Procurement Bureau, P.O. Box 200135, Helena, MT 59620-0135, telephone (406)444-3315; fax (406)444-2529; email sherylolson@state.mt.us. A written request for hearing must be received no later than 5 p.m. on September 13, 2002.

**6. If the agency receives requests for a public hearing on the proposed actions from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed actions; from the appropriate administrative rule review committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 250 based on 2,500 possible vendors.**

**7. The State Procurement Bureau of the Department of Administration maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this bureau. Persons who wish to have their name added to this 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 notice regarding state procurement. Such written request may be mailed or delivered to Sheryl Olson, P.O. Box 200135, Helena, MT 59620-0135, faxed to the office at (406) 444-2529, emailed to sherylolson@state.mt.us or may be made by completing a request form at any rules hearing held by the Department of Administration.**

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

**By: /s/ Scott Darkenwald**
**SCOTT DARKENWALD, Director**
**Department of Administration**

**By: /s/ Dal Smilie**
**DAL SMILIE, Rule Reviewer**

**Certified to the Secretary of State July 31, 2002.**

**BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA**

| | | |
|---|---|---|
| In the matter of the proposed transfer and amendment of ARM Title 8, Chapter 94 pertaining to the Single Audit Act | ) ) ) ) ) | NOTICE OF PROPOSED TRANSFER AND AMENDMENT NO PUBLIC HEARING CONTEMPLATED |

TO: All Concerned Persons

1. On September 16, 2002, the Department of Administration proposes to transfer and amend rules pertaining to the Single Audit Act, ARM Title 8, Chapter 94.

2. The Department of Administration will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Administration no later than 5:00 p.m. on September 6, 2002, to advise us of the nature of the accommodation that you need. Please contact Cathy Muri, Administrative Financial Services Division, P.O. Box 200102, Helena, MT 59620-0102, telephone (406) 444-4609; fax (406) 444-2812; email cmuri@state.mt.us.

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

8.94.4104 (2.4.404) PENALTY FOR FAILING TO PAY FILING FEE WITHIN 60 DAYS OF DUE DATE (1) As provided by 2-7-514(2), MCA, local government entities required to submit an annual financial report to the department must pay to the department, at the time the report is submitted, a filing fee as prescribed by ARM ~~8.94.4102~~ 2.4.402.

(2) through (5) remain the same.

AUTH: 2-7-504 and 2-7-517, MCA
IMP: 2-7-504 and 2-7-517, MCA

Reason: The rule transfer action necessitates a change to the internal rule citation.

8.94.4105 (2.4.405) AUDIT AND AUDIT REPORTING STANDARDS

(1) All audits performed under 2-7-503, MCA, must be conducted in accordance with Government Auditing Standards, issued by the comptroller general of the United States (see ARM ~~8.94.4111(3)~~ 2.4.411(3)), that are applicable to financial audits. Those standards incorporate generally accepted auditing standards as adopted by the American institute of certified public accountants.

(2) Audits ~~of periods beginning on or before June 30, 1996, must conform to the requirements of the Federal Single~~

~~Audit Act of 1984 (P.L. 98-502) and the OMB Circular A-128, and audits of periods beginning on or after July 1, 1996,~~ must conform to the requirements of the Federal Single Audit Act of 1984 as amended by the Single Audit Act Amendments of 1996 (P.L. 104-156) and the OMB Circular A-133 (see ARM ~~8.94.4111(4)~~ 2.4.411(4)).

(3) All audit reports shall comply with the reporting standards for financial audits prescribed in Government Auditing Standards as established by the comptroller general of the United States, which incorporate the standards of reporting for financial audits prescribed by the American institute of certified public accountants (see ARM ~~8.94.4111(3)~~ 2.4.411(3)).

(4) For audits conducted under the provisions of the ~~OMB Circular A-128 or the~~ OMB Circular A-133, the audit reports must comply with the reporting requirements of ~~the applicable~~ that circular (see ARM ~~8.94.4111(4)~~ 2.4.411(4)).

AUTH: 2-7-504, 2-7-505 and 2-7-513, MCA
IMP: 2-7-504, 2-7-505 and 2-7-513, MCA

Reason: The rule transfer action necessitates a change to the internal rule citations. In addition, it was reasonably necessary to revise outdated references to the Federal Single Audit Act and Office of Management and Budget (OMB) circulars.

8.94.4106 (2.4.406) ROSTER OF INDEPENDENT AUDITORS AUTHORIZED TO CONDUCT AUDITS OF LOCAL GOVERNMENT ENTITIES

(1) Local government entity audits conducted under the provisions of Title 2, chapter 7, part 5, MCA, must be conducted by an independent auditor as defined by 2-7-501(6), MCA. For purposes of this requirement, an "independent auditor" is a federal, state, or local government auditor who meets the standards specified in Government Auditing Standards as established by the comptroller general of the United States; or a licensed accountant who meets the standards specified in Government Auditing Standards as established by the comptroller general of the United States (see ARM ~~8.94.4111(3)~~ 2.4.411(3)).

(2)through (5)(f) remain the same.

(g) not have been deemed ineligible to conduct local government entity audits by the department:

(i) because of failure to conduct local government entity audits under contract with the department during the previous two years in accordance with the audit standards described in ARM ~~8.95.4105~~ 2.4.405.

(ii) through (13) remain the same.

AUTH: 2-7-504 and 2-7-506, MCA
IMP: 2-7-504 and 2-7-506, MCA

Reason: The rule transfer action necessitates a change to the internal rule citations.

**8.94.4110 (2.4.410) REVIEW OF FINANCIAL STATEMENTS**

(1) remains the same.

(2) A "financial review" is defined as an agreed-upon procedures engagement in which the independent auditor ~~applies agreed-upon procedures to specified elements, accounts or items of a financial statement or statements~~ is engaged to issue a report of findings based on specific procedures performed on subject matter in accordance with standards established by the American institute of certified public accountants [see ARM ~~8.94.4111(5)~~ 2.4.411(5)]. The procedures to be performed during the financial review of a specific type of local government entity are prescribed by the department and are specified in the contract referred to in (4) ~~below~~.

(3) through (6) remain the same.

(7) Reports on financial reviews must be prepared in accordance with reporting standards established by the American institute of certified public accountants for ~~special reports in which agreed-upon procedures are applied to specified elements, accounts or items of a financial statement or statements~~ agreed-upon procedures engagements [see ARM ~~8.94.4111(5)~~ 2.4.411], and in addition must include any schedules specified in the contract referred to in (4) ~~above~~.

(8) through (10) remain the same.

AUTH: 2-7-503 and 2-7-504, MCA
IMP: 2-7-503 and 2-7-504, MCA

Reason: The rule transfer action necessitates a change to the internal rule citations. The other proposed amendments are reasonably necessary to comply with standards changes on agreed-upon procedures engagements made by the American Institute of Certified Public Accountants (AICPA). The standards changes were mandated by the AICPA and the CPAs doing the local government audits are required to follow those professional standards. In addition, the standards currently referenced in the rules do not exist anymore. These changes were incorporated into the standard financial review contract over a year ago without complaints or questions from the CPAs.

**8.94.4111 (2.4.411) INCORPORATION BY REFERENCE OF VARIOUS STANDARDS, ACCOUNTING POLICIES, AND FEDERAL LAWS AND REGULATIONS** (1) The department hereby adopts and incorporates by this reference the accounting and financial reporting standards adopted by the governmental accounting standards board as required standards for counties, cities and towns, as provided by ARM ~~8.94.4101~~ 2.4.401.

(a) and (b) remain the same.

(2) The department hereby adopts and incorporates by reference the chart of accounts prescribed by the department in the Budgetary, Accounting and Reporting System for Montana Cities, Towns and Counties for use by counties, cities, and towns, as provided by ARM ~~8.94.4101~~ 2.4.401.

(a) The chart of accounts incorporated by reference in (2)~~, above,~~ contains the required fund classifications,

balance sheet accounts, revenue accounts, expenditure accounts and objects of expenditure to be used by counties, cities and towns.

(b) The chart of accounts adopted by reference in (2)~~, above,~~ may be obtained from the Montana Department of ~~Commerce~~ Administration, Local Government Services Bureau, ~~Capitol Station~~ 301 South Park Avenue – Room 340, P.O. Box 200547, Helena, MT 59620-0547.

(3) The department hereby adopts and incorporates by this reference the Government Auditing Standards established by the comptroller general of the United States for financial audits as required standards for independent auditors in conducting audits of local government entities, as provided by ARM ~~8.94.4105~~ 2.4.405.

(a) Government Auditing Standards incorporated by reference in (3)~~, above,~~ contain standards to be followed by an independent auditor in conducting financial audits of local government entities, including general standards, field work standards and reporting standards.

(b) Government Auditing Standards established by the comptroller general of the United States adopted by reference in (3)~~, above,~~ may be obtained from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20401. These standards may also be accessed at the following website address: http://www.gao.gov/.

(4) The department hereby adopts and incorporates by this reference the ~~Federal Single Audit Act of 1984 (P.L. 98-502), the~~ Federal Single Audit Act of 1984 as amended by the Single Audit Act Amendments of 1996 (P.L. 104-156)~~, the OMB Circular A-128, "Audits of State and Local Governments,"~~ and the OMB Circular A-133, "Audits of States, Local Governments and Non-Profit Organizations," as requirements to which local government audits must conform, as provided by ARM ~~8.94.4105~~ 2.4.405.

(a) The ~~Federal Single Audit Act, the~~ Federal Single Audit Act of 1984 as amended by the Single Audit Act Amendments of 1996~~, the OMB Circular A-128,~~ and the OMB Circular A-133 incorporated by reference in (4)~~, above,~~ relate to the following:

(i) background and purpose~~,~~;

(ii) applicability of the ~~A~~act and ~~C~~circular~~,~~;

(iii) audit requirements and scope of audits conducted under the ~~A~~act and ~~C~~circular~~s~~,;

(iv) frequency of audits~~,~~;

(v) federal agency and pass-through entity responsibilities~~,~~;

(vi) requirements relating to subrecipients and vendors~~,~~;

(vii) relation to other audit requirements~~,~~;

(viii) auditee responsibilities~~,~~;

(ix) illegal acts or irregularities~~,~~;

(x) audit report requirements~~,~~;

(xi) audit resolution~~,~~;

(xii) audit working papers and reports~~,~~;

(xiii) audit costs and auditor selection~~,~~; and

(xiv) sanctions.

(b) The ~~Federal Single Audit Act of 1984 and the~~ Federal Single Audit Act of 1984 as amended by the Single Audit Act Amendments of 1996 adopted by reference in (4)~~, above, are~~ is codified as chapter 75 of Title 31 of the United States Code. The ~~C~~code is available at many public libraries and at law offices, and can be accessed ~~on~~ at the ~~Internet at~~ following website address: ~~http://law.house.gov/uscsrch.htm~~ http://www.access.gpo.gov/uscode/uscmain.html.

(c) The ~~C~~circular~~s~~ adopted by reference in (4)~~, above, are~~ is available from the federal office of management and budget. A ~~H~~hard ~~copies~~ copy can be obtained by calling (202) 395-~~7332~~ 3080. ~~They~~ It can also be accessed ~~on~~ at the ~~Internet at~~ following website address: ~~http://www.whitehouse.gov/WH/EOP/OMB/html/ombhome.html#docs~~ http://www.whitehouse.gov/omb/circulars/a133/a133.html.

(5) The department hereby adopts and incorporates by this reference the standards established by the American institute of certified public accountants for ~~special reports in which agreed-upon procedures are applied to specified elements, accounts or items of a financial statement as standards~~ agreed-upon procedures engagements under which financial reviews of local government entities must be conducted, as provided by ARM ~~8.94.4110~~ 2.4.410.

(a) The standards adopted by reference in (5)~~, above,~~ contain standards regarding the~~:~~ ~~determination of procedures to be performed, the applicability of other auditing standards, and reporting requirements~~

(i) conditions for engagement performance;

(ii) the subject matter and related assertions;

(iii) the nature, timing, and extent of procedures;

(iv) the presentation of the results of applying agreed-upon procedures to specific subject matter in the form of findings;

(v) reporting requirements; and

(vi) written representations.

(b) The standards for ~~special reports in which agreed-upon procedures are applied to specified elements, accounts or items of a financial statement~~ agreed-upon procedures engagements incorporated by reference in (5)~~, above,~~ are contained in Section ~~622~~ 201 of the Codification of Statements on ~~Auditing~~ Standards for Attestation Engagements, which may be obtained from the American Institute of Certified Public Accountants~~,~~ at the following address: CPA2BIZ, Order Department, P.O. Box 2209, Jersey City, NJ ~~07303-2209~~ 07311-2209.

AUTH: 2-7-503, 2-7-504, 2-7-505 and 2-7-506, MCA
IMP: 2-7-503, 2-7-504, 2-7-505 and 2-7-506, MCA

Reason: The rule transfer action necessitates a change to the internal rule citations. Also, it is reasonably necessary to update the contact information for obtaining the various standards, accounting policies, and federal laws and

regulations incorporated by reference as several mailing addresses and website addresses have changed since the rules were last updated.

4. Pursuant to Chapter 483, Laws of Montana 2001, effective July 1, 2001, the Local Government Services Bureau of the Department of Commerce was transferred from the Department of Commerce to the Department of Administration. The Department of Administration has determined that the transferred rules will be numbered as follows:

| OLD | NEW | |
|---|---|---|
| 8.94.4101 | 2.4.401 | ACCOUNTING AND FINANCIAL REPORTING STANDARDS |
| 8.94.4102 | 2.4.402 | REPORT FILING FEE |
| 8.94.4103 | 2.4.403 | PENALTY FOR FAILING TO FILE ANNUAL FINANCIAL REPORT WITHIN PRESCRIBED TIME WITHOUT APPROVED EXTENSION |
| 8.94.4107 | 2.4.407 | CRITERIA FOR THE SELECTION OF THE INDEPENDENT AUDITOR |
| 8.94.4108 | 2.4.408 | AUDIT CONTRACTS |
| 8.94.4109 | 2.4.409 | ACTIONS BY LOCAL GOVERNMENT ENTITY GOVERNING BODIES TO RESOLVE OR CORRECT AUDIT FINDINGS AND PENALTY FOR FAILURE TO DO SO |

5. Concerned persons may submit their data, views or arguments concerning the proposed amendments in writing to Cathy Muri, Administrative Financial Services Division, P.O. Box 200102, Helena, MT 59620-0102, telephone (406) 444-4609; fax (406) 444-2812; email cmuri@state.mt.us. Any comments must be received no later than 5 p.m. on September 13, 2002.

6. If persons who are directly affected by the proposed amendments wish to express their data, views and arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request, along with any written comments they have, to Cathy Muri, Administrative Financial Services Division, P.O. Box 200102, Helena, MT 59620-0102, telephone (406) 444-4609; fax (406) 444-2812; email cmuri@state.mt.us. A written request for hearing must be received no later than 5 p.m. on September 13, 2002.

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

persons directly affected has been determined to be 6 based on the fact that there are currently 58 certified public accounting firms on the Department of Administration's roster of independent auditors authorized to conduct audits of Montana local government entities for the period beginning July 1, 2002, and ending June 30, 2003, (roster established pursuant to section 2-7-506, MCA, and current ARM 8.94.4106).

8. The Department of Administration 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 this list shall make a written request which includes the name and mailing address of the person to receive notices and specifies the specific areas over which the Department of Administration has rulemaking authority that the person wishes to receive notice regarding. Such written request may be mailed or delivered to Dal Smilie, Chief Counsel, Department of Administration, P.O. Box 200101, Helena, MT 59620-0101, telephone (406) 444-3310, fax (406) 444-2812, email dsmilie@state.mt.us or may be made by completing a request form at any rules hearing held by the Department of Administration.

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

By: /s/ Scott Darkenwald
SCOTT DARKENWALD, Director
Department of Administration

By: /s/ Dal Smilie
DAL SMILIE, Rule Reviewer

Certified to the Secretary of State July 30, 2002.

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

| | | |
|---|---|---|
| In the matter of the adoption of new rule I pertaining to Family Law Orders for the Public Employees' Retirement System Defined Contribution Retirement Plan administered by the Public Employees' Retirement Board | ) ) ) ) ) ) | NOTICE OF PROPOSED ADOPTION<br><br>NO PUBLIC HEARING CONTEMPLATED |

TO: All Concerned Persons

1. On September 26, 2002, the Public Employees' Retirement Board proposes to adopt new rule I pertaining to the Family Law Orders for the Public Employees' Retirement System Defined Contribution Retirement Plan.

2. The Public Employees' Retirement Board will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, contact the Public Employees' Retirement Board no later than 5:00 p.m. on September 3, 2002, to advise us of the nature of the accommodation that you need. Please contact Lucie Willson, Public Employees' Retirement Board, 100 North Park Avenue, Suite 220, P.O. Box 200131, Helena MT 59620-0131; telephone 406-444-7939; TDD number 406-444-1421; FAX 406-444-5428; e-mail lwillson@state.mt.us.

3. The proposed new rule provides as follows:

RULE I FAMILY LAW ORDERS -- APPROVAL AND IMPLEMENTATION FOR THE DEFINED CONTRIBUTION RETIREMENT PLAN (1) This rule applies only to the defined contribution retirement plan.

(2) A participant or alternate payee must submit a certified copy of a family law order (FLO) to the MPERA for board approval. The board has delegated authority for approval to the executive director.

(3) The MPERA will notify the participant and the alternate payee when it receives a certified copy of a FLO. The notice will explain the procedures for determining if the FLO can be approved.

(4) While reviewing the FLO, the board may take steps to safeguard the alternate payee's rights. The steps the board may take include, but are not limited to, the following:

(a) prevent payments from the participant's account, but allow the participant to manage the investments;

(b) segregate the amounts, and earnings thereon, that will be owed to the alternate payee if the FLO is approved;

(c) pay the non-segregated amounts, with any earnings thereon, to the participant if the FLO is not approved within 18 months of the date it was received by MPERA and the participant is entitled to distribution of the account; and

(d) apply the FLO prospectively if approved more than 18 months after the date it was first received by MPERA.

(5) The board will notify the participant and the alternate payee once the FLO is approved.

AUTH: 19-2-403 and 19-2-907, MCA
IMP: 19-2-907, MCA

REASON: Family Law Orders (FLOs) are not effective until a certified copy of the FLO is reviewed and approved by the Public Employees' Retirement Board. Subsections (2), (3) and (5) explain this requirement and provide for notification of participants and alternate payees of the Board's FLO approval process. Participants may become entitled to their Public Employees' Retirement System Defined Contribution Retirement Plan account and request distribution prior to approval of the FLO. Subsection (4) of this rule ensures that both the participant's and the alternate payee's rights in the participant's Defined Contribution Retirement Plan account are protected pending approval of the FLO.

4. Concerned persons may submit their data, views, or arguments concerning the proposed adoption in writing to Mike O'Connor, Executive Director, Public Employees' Retirement Board, 100 North Park Avenue, Suite 220, P.O. Box 200131, Helena, MT 59620-0131; FAX 406-444-5428; e-mail moconnor@state.mt.us no later than September 13, 2002.

5. If persons who are directly affected by the proposed adoption wish to express their data, views, and arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments they have to Lucie Willson, Public Employees' Retirement Board, 100 North Park Avenue, Suite 220, P.O. Box 200131, Helena MT 59620-0131; telephone 406-444-7939; FAX 406-444-5428; e-mail lwillson@state.mt.us. A written request for a hearing must be received no later than September 13, 2002.

6. If the agency receives requests for a public hearing on the proposed adoption from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed adoption; from the appropriate administrative rule review committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 2,964 persons based on 2001 payroll reports of active members.

7. The Public Employees' Retirement Board maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by the agency. Persons who wish to have their name added to the list shall make a written request which

**includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding public retirement rulemaking actions. Such written request may be mailed or delivered to Lucie Willson, Public Employees' Retirement Board, 100 North Park Avenue, Suite 220, P.O. Box 200131, Helena MT 59620-0131, faxed to the office at 406-444-5428, or may be made by completing a request form at any rules hearing held by the Public Employees' Retirement Board.**

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

**/s/ Terry Teichrow**
**Terry Teichrow, President**
**Public Employees' Retirement Board**

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

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

**Certified to the Secretary of State on August 5, 2002.**

**BEFORE THE PETROLEUM TANK RELEASE COMPENSATION BOARD OF THE STATE OF MONTANA**

| | |
|---|---|
| In the matter of the amendment of ARM 17.58.326 pertaining to applicable rules governing the operation and management of petroleum storage tanks | NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT (PETROLEUM BOARD) |

TO: All Concerned Persons

1. On September 4, 2002 at 10:00 a.m., the Petroleum Tank Release Compensation Board proposes to hold a public hearing in the Lewis Room of the Phoenix Building, 2209 Phoenix Avenue, Helena, Montana to consider the proposed amendment of the above-stated rule.

2. The Board will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board no later than 5:00 p.m., August 26, 2002, to advise us of the nature of the accommodation that you need. Please contact the Board at 2209 Phoenix Avenue, P.O. Box 200902, Helena, Montana 59620-0902; phone (406) 444-0925; fax (406) 444-1902.

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

17.58.326 APPLICABLE RULES GOVERNING THE OPERATION AND MANAGEMENT OF PETROLEUM STORAGE TANKS (1) As used in 75-11-308, MCA, the term "applicable state rules" means:

(a) the following provisions of the ~~1994~~ 1997 Uniform Fire Code, Article 79, "Flammable and Combustible Liquids" a copy of which may be obtained from ~~Western Fire Chief's Association,~~ International Fire Chiefs Institute, 5360 ~~South~~ Workman Mill Road, Whittier, CA 90601:

(i) remains the same.

(ii) Section 7901.11.8, which states that aboveground piping joints shall be liquid tight and shall either be welded, flanged or threaded. Threaded or flanged joints shall ~~be made up tight with a suitable thread sealant or lubricant~~ fit tightly by using approved methods and materials for the type of joint;

(iii) remains the same.

(iv) Section 7902.1.~~13~~14.2, which states that tank foundations shall be designed to minimize the possibility of uneven settling of the tank and to minimize corrosion in any part of the tank resting on the foundation; and

(v) remains the same.

(b) The following subsections of Article 53 of the Uniform Fire Code as added and adopted in ARM Title 23, chapter 7, subchapter 3:

(i) remains the same.

(ii) Section 5301.5.2, which states that fuel dispensers shall be secured in an approved manner and shall not be secured to the island using piping or conduit;

(iii) through (v) remain the same.

(c) The following ~~subchapters of~~ requirements in ARM Title 17, chapter 56:

(i) ~~Subchapters 1 and 2, which address the~~ the installation ~~of~~ and design standards for underground storage ~~tanks~~ systems contained in subchapters 1 and 2;

(ii) ~~Subchapter 3, which addresses~~ the spill and overfill prevention and corrosion protection requirements for underground storage tanks contained in subchapter 3;

(iii) ~~Subchapter 4, which addresses~~ the release prevention and detection requirements for underground storage tanks and piping contained in subchapter 4;

(iv) the testing, monitoring and recordkeeping requirements associated with the requirements identified in (1)(c)(ii) and (iii);

(iv) and (v) remain the same, but are renumbered (v) and (vi).

(d) The board may determine that an owner or operator is in compliance with the requirements of (1)(c)(i) through (vi), if:

(i) the facility has a valid operating permit issued by the department under ARM 17.56.308; or

(ii) the board is provided with substantial evidence that the owner or operator has made a reasonable effort to fulfill the terms of a compliance plan issued pursuant to ARM 17.56.309.

AUTH: ~~(This rule is advisory only, but may be a correct interpretation of the law.)~~ 75-11-318, MCA
IMP: 75-11-308, MCA

REASON: The proposed amendments are necessary in order for the Petroleum Tank Release Compensation Board (Board) to update and clarify eligibility requirements under 75-11-308(1)(e), MCA. Under this statutory provision, the Board must determine whether the operation and management of the tank is in compliance with applicable state and federal laws and rules that the Board determines pertain to the prevention and mitigation of petroleum releases. The proposed amendments update and clarify the rules that the Board reviews when making its compliance determination.

The Board proposes to amend subsections (1)(a) and (b) of ARM 17.58.326 to update the applicable fire code provisions from the 1994 edition to the 1997 edition of the Uniform Fire Code. The State Fire Marshal's office is using the 1997 edition of the Uniform Fire Code when it performs compliance inspections at facilities with aboveground petroleum storage tanks. By adopting the same standard used by the State Fire Marshal's office, owners and operators of aboveground storage tanks will not be in danger of being held to two different

standards by the Board and the State Fire Marshal. The proposed amendment also updates specific citations and code provision language from the 1994 to the 1997 edition. The updated code provisions contain clerical changes but do not impose new requirements.

The Board proposes to amend subsection (1)(c) of ARM 17.58.326 to clarify which specific parts of the underground storage tank operation and maintenance requirements will be reviewed by the Board when it determines compliance with petroleum storage tank requirements for eligibility purposes. These changes result in a close parallel between the applicable Board rules for determining compliance for eligibility purposes and the requirements that the Department of Environmental Quality (the department) reviews for determining compliance for purposes of issuing an operating permit to an underground storage tank facility.

The proposed rule adds a new subsection (1)(d) that will allow the board to determine that an owner or operator of an underground storage tank is in compliance with installation and design standards, spill and overfill prevention, corrosion protection, release prevention and detection, and related testing, monitoring and recordkeeping requirements for purposes of fund eligibility if the facility has been issued an operating permit by the department or is subject to a compliance plan issued by the department. This proposal is made in response to the department's new operating permit requirements and the fact that, under that program, a facility must pass a compliance inspection. Under the proposed rule, if an operating permit is issued or the facility is making progress under a compliance plan, no additional inspection will be necessary for determining compliance with the aforementioned requirements for fund eligibility reasons.

Finally, the proposed rule strikes the history provision that was inadvertently left in the rule when it was amended to terminate its interpretative status in 1999.

4. Concerned persons may submit their data, views or arguments concerning the proposed amendment either orally or in writing at the hearing. Written data, views or arguments may also be submitted to the Petroleum Tank Release Compensation Board, P.O. Box 200902, Helena, Montana 59620-0902; faxed to (406) 444-1902; or emailed to Kirsten Bowers at kbowers@state.mt.us no later than September 12, 2002. To be guaranteed consideration, the comments must be postmarked on or before that date.

5. Kirsten Bowers, attorney for the Department, has been designated to preside over and conduct the hearing.

6. The Board maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this Board. Persons who wish to have their name added to the list shall make a written request that includes the name and mailing address of the person to receive rulemaking notices.

**Such written request may be mailed or delivered to the Board at 2209 Phoenix Avenue, P.O. Box 200902, Helena, Montana 59620-0902; faxed to (406) 444-1902, or emailed to Kirsten Bowers at kbowers@state.mt.us or may be made by completing a request form at any rules hearing held by the Board.**

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

**PETROLEUM TANK RELEASE COMPENSATION BOARD**

**BY:** *Tim Hornbacher*
**TIM HORNBACHER, Chairman**

**Reviewed by:**

*James M. Madden*
**JAMES M. MADDEN, Rule Reviewer**

**Certified to the Secretary of State August 5, 2002.**

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

| | |
|---|---|
| In the matter of the amendment of 17.24.101, 17.24.102, 17.24.103, 17.24.104, 17.24.106, 17.24.115, 17.24.116, 17.24.117, 17.24.118, 17.24.119, 17.24.140, 17.24.146, 17.24.167, and 17.24.184, pertaining to the Metal Mine Reclamation Act | NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT<br><br>(Metal Mine Reclamation) |

TO: All Concerned Persons

1. On September 20, 2002, at 10:00 a.m., the Board of Environmental Review will hold a public hearing in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Board will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board no later than 5:00 p.m., September 9, 2002, to advise us of the nature of the accommodation that you need. Please contact the Board Secretary at P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2544; fax (406) 444-4386 or email ber@state.mt.us.

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

17.24.101 GENERAL PROVISIONS (1) through (4) remain the same.

(5) The Act and this subchapter do not apply to a person engaging in a mining activity described in 82-4-310(1) and (2), MCA~~, or to a person who, on land owned or controlled by that person is allowing other persons to engage in mining activities as provided in 82-4-310(3), MCA~~. The Act and this subchapter apply to a person who, on land owned or controlled by that person, is allowing other persons to engage in mining activities whose activities cumulatively exceed the activity described in 82-4-310(1), MCA.

(6) through (8) remain the same.

AUTH: 82-4-321, MCA
IMP: 82-4-305, 82-4-309, 82-4-331, 82-4-332, 82-4-335, 82-4-361, 82-4-362, MCA

17.24.102 DEFINITIONS As used in the Act and this subchapter, the following definitions apply~~:~~:

(1) and (2) remain the same.

~~(3) "Amendment" is defined in 82-4-303(2), MCA, and means, for the purposes of this subchapter, a change in an approved plan of operations that is not a revision.~~

~~(4) "Board" means the board of environmental review, as provided for in 2-15-3502, MCA, or an agency or state employee that may succeed to its powers and duties under the Act.~~

(5) and (6) remain the same, but are renumbered (3) and (4).

~~(7)~~ (5) "Collateral bond" means an indemnity agreement for a fixed amount, payable to the department, executed by the operator and supported by the deposit with the department of cash, negotiable bonds of the United States (not treasury certificates), state or municipalities, negotiable certificates of deposit or an irrevocable letter of credit of any bank organized or authorized to transact business in the United States or other surety acceptable to the department.

~~(8)~~ (6) "Disturbed and unreclaimed surface" means, as used in the definition of "small miner" and ARM 17.24.101(4), land affected by mining activities, including reprocessing of tailing or waste material, that has not been restored to a continuing productive use, with proper grading and ~~revegetative~~ revegetation procedures to assure:

(a) through (d) remain the same.

(9) remains the same, but is renumbered (7).

~~(10)~~ (8) "Exploration" ~~means all activities conducted on or beneath the surface resulting in material disturbance of the surface, for the purpose of determining the presence, location, extent, depth, grade, and economic viability of mineralization in those lands, if any, other than mining for production and economic exploitation, except as noted in 82-4-310, MCA. Included in this definition are roads constructed for the purpose of facilitating exploration and~~ includes pilot ore processing plants or sites and associated facilities constructed for the sole purpose of metallurgical or physical testing of ore materials, not to exceed 10,000 short tons, to aid in determining the development potential of an ore body.

~~(11) "Major amendment", as defined in 82-4-303(2), MCA, means an amendment that may have significant impact on the human environment.~~

~~(12) "Mineral" means any ore, rock or substance, other than oil, gas, bentonite, clay, coal, sand, gravel, peat, soil materials, scoria or uranium, taken from below the surface or from the surface of the earth for the purpose of milling, leaching, concentration, refinement, smelting, manufacturing, or other subsequent use or processing or for stockpiling for future use, refinement or smelting.~~

~~(13) "Mining" commences when the operator first mines ores or minerals in commercial quantities for sale, beneficiation, refining, or other processing or disposition or first takes bulk samples for metallurgical testing in excess of 10,000 short tons.~~

~~(14) "Minor amendment", as defined in 82-4-303(2), MCA, means an amendment that will not significantly affect the human environment.~~

(15) remains the same, but is renumbered (9).

(a) and (b) remain the same.

(c) Work camps are not required to be permitted. (However, they are regulated under ~~the Water Quality Act~~ Title 75, chapter 5, MCA.)

~~(16) "Person" means any person, corporation, firm, association, partnership or other legal entity engaged in exploration or mining of minerals on or below the surface of the earth, reprocessing of tailing or waste materials, or operation of a hard rock mill.~~

~~(17)~~ (10) "Placer or dredge mining" ~~means the mining of minerals from a placer deposit by a person or persons. This definition~~ includes, but is not limited to, mining by hydraulic giant, ground sluice, rocker or sluice box methods, the use of a dry land dredge, trommel or washing plant, and bucket type floating dredges, all as referred to in Mining Methods and Equipment Illustrated, Montana Bureau of Mines and Geology, Bulletin 63, 1967.

~~(18)~~ (11) "Plan of operations" means the plans required under 82-4-335 through 82-4-337, MCA, including the reclamation plan defined in 82-4-303, MCA, plus the approved operating, monitoring and contingency plans required in an application for an operating permit.

(19) remains the same, but is renumbered (12).

~~(20)~~ (13) "Reclamation" means the return of lands disturbed by mining or mining-related activities to an approved postmining land use which has stability and utility comparable to that of the premining landscape except for rock faces and open pits which may not be feasible to reclaim to this standard. Those rock faces and open pits must be reclaimed in accordance with 82-4-336, MCA. The term "reclamation" does not mean restoring the landscape to its premining condition. Reclamation, where appropriate, may include, but is not limited to, neutralizing cyanide or other processing chemicals; closure activities for ore heaps, waste rock dumps, and tailing impoundments; closure activities for surface openings; grading, soiling and revegetating disturbed lands; removal of buildings and other structures; ~~salvage of buildings;~~ other steps necessary to assure long-term compliance with Title 75, chapters 2 and 5, MCA; and other steps necessary to protect public health and safety at closure.

(21) through (24) remain the same, but are renumbered (14) through (17).

~~(25) "Surface mining" means all or any part of the process involved in mining of minerals by removing the overburden and mining directly from the mineral deposits thereby exposed, including, but not limited to, open-pit mining of minerals naturally exposed at the surface of the earth, mining by the auger method, and all similar methods by which earth or minerals exposed at the surface are removed in the course of mining. Surface mining shall not include the extraction of oil, gas, bentonite, clay, coal, sand, gravel, peat, soil materials, scoria or uranium nor excavation or~~

~~grading conducted for on-site farming, on-site road construction, or other on-site building construction.~~

AUTH: 82-4-321, MCA
IMP: 82-4-303, 82-4-305, 82-4-309, 82-4-310, 82-4-331~~(2)~~, MCA

17.24.103 EXPLORATION LICENSE--APPLICATION AND CONDITIONS (1) To secure an exploration license ~~a person~~ an applicant shall:

(a) pay a filing fee of ~~$5~~ $100 to the department;

(b) remains the same.

(c) submit an exploration plan of operations and a map or sketch in sufficient detail to locate the area to be explored as well as the actual proposed disturbances, and to allow the department to adequately determine whether significant environmental problems would be encountered. The ~~applicant shall state in the~~ plan of operations ~~what~~ must state the type of exploration techniques that would be employed in disturbing the land~~. The application shall also~~ and include a reclamation plan in sufficient detail to allow the department to determine whether the specific reclamation and performance requirements of ARM 17.24.104 through 17.24.107 would be satisfied;

(d) and (e) remain the same.

(f) not be in default of any other reclamation obligation mandated by the Act or rules ~~and~~ implementing the Act.

(2) On approval by the department, the applicant will be issued an exploration license renewable annually ~~on application~~ by filing an annual report on a form provided by the department and payment of the renewal fee of $25. ~~The license must not be renewed if the applicant is held by the department to be in any violation of the Act or rules and regulations promulgated by the board.~~

(3) and (4) remain the same.

AUTH: 82-4-321, MCA
IMP: 82-4-332, MCA

17.24.104 EXPLORATION (TEMPORARY) ROADS (1) and (2) remain the same.

(3) No road may be constructed up a stream channel proper or so close that material will spill into the channel. Minor alterations and relocations of streams may be permitted if the stream will not be blocked and if no damage is done to the stream or adjoining landowners. No alteration ~~which~~ that affects more than 100 linear feet of the channel of a flowing stream may be approved by the department without advice from the department of fish, wildlife and parks. ~~The department of environmental quality must also be consulted regarding~~ Any stream channel alterations ~~to ensure compliance~~ must comply with ~~the Montana Water Quality Act (~~Title 75, chapter 5, MCA~~) as amended~~.

(4) through (11) remain the same.

~~(12) When sideslopes are 15% or less, vegetative debris from clearing operations must be completely disposed of or stockpiled at specific areas. On sideslopes steeper than 15% such vegetative debris must be piled neatly parallel to and below the toe of the fill.~~

(13) through (17) remain the same, but are renumbered (12) through (16).

AUTH: 82-4-321, MCA
IMP: 82-4-332, MCA

17.24.106 EXPLORATION DRILL HOLE PLUGGING (1) through (3)(d) remain the same.

(4) All flowing or artesian drill holes must be plugged prior to removing the drill rig from a hole unless removing the drill rig is necessary to the hole plugging operation. If the flow is not completely stopped, after exhaustion of all methods, the operator must:

(a) remains the same.

(b) develop a water well in compliance with the requirements of other applicable local, state and federal statutes, including water rights. In addition, the land owner must concur, the amount and use of flow must be compatible with the approved postmining land use, and the water quality must meet standards set under ~~the Water Quality Act~~ Title 75, chapter 5, MCA.

(5) remains the same.

AUTH: 82-4-321, MCA
IMP: 82-4-302, 82-4-332, 82-4-355~~(2)(b)~~, MCA

17.24.115 OPERATING PERMITS: RECLAMATION PLANS

(1) ~~The definition of reclamation plan (82-4-303(14)(a), MCA) lists 9 considerations which "to the extent practical at the time of application" must be included in the plan. Using the same letter headings as in the above-referenced definition, the~~ The following ~~are the standards for each of the required~~ provisions ~~that~~ must be ~~included~~ addressed in the reclamation plan:

(a) through (b) remain the same.

(c) ~~To the extent reasonable and practicable, the~~ The operator must establish vegetative cover commensurate with the proposed land use specified in the reclamation plan. ~~Should an initial revegetation attempt be unsuccessful, the operator must seek the advice of the department and make another attempt. The second revegation operation, insofar as possible, shall incorporate new methods necessary to reestablish vegetation.~~

(d) Where operations result in a need to prevent acid drainage or sedimentation, on or in adjoining lands or streams, there shall be provisions for the construction of earth dams or other reasonable devices to control water drainage, provided the formation of such impoundments or

devices shall not interfere with other landowner's rights or contribute to water pollution (as defined in ~~the Montana Water Pollution Control Act~~ Title 75, chapter 5, MCA ~~as amended~~).

(e) ~~The plan must provide that all~~ All water, tailings or spoil impounding structures must be equipped with spillways or devices that will protect against washouts during a 100-year flood.

~~(f) All applicants must comply with all applicable county, state and federal laws regarding solid waste disposal. All refuse shall be disposed of in a manner that will prevent water pollution or deleterious effects upon the revegetation efforts.~~

(g) remains the same, but is renumbered (f).

~~(h) All access, haul and other support roads shall be located, constructed and maintained in such a manner as to control and minimize channeling and other erosion.~~

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

~~(j) Archaeological and historical values in area to be developed shall be given appropriate protection.~~

~~(k) Provisions shall be made to avoid accumulation of stagnant water in the development area which may serve as a host or breeding ground for mosquitoes or other disease-bearing or noxious insect life.~~

~~(l) All final grading shall be made with non-noxious, nonflammable, noncombustible solids unless approval has been granted by the department for a supervised sanitary fill.~~

(m) and (n) remain the same, but are renumbered (h) and (i).

~~(o) The plan must describe the location of the surface water diversions as well as the methods of diverting surface water around the disturbed areas. Properly protected culverts, conduits or other artificial channels may carry surface water through the disturbed areas providing such procedures prevent pollution of such waters and unnecessary erosion.~~

(p) through (r) remain the same, but are renumbered (j) through (l).

(m) All facilities constructed as part of the operating permit must be reclaimed for the approved post mine land use. The reclamation plan must provide for removal of buildings and other structures at closure consistent with the post mine land use.

(n) The plan must provide for post mine environmental monitoring programs and contingency plans for the post reclamation permit area.

AUTH: 82-4-321, MCA
IMP: 82-4-303, 82-4-335, 82-4-336, MCA

17.24.116 OPERATING PERMIT: APPLICATION REQUIREMENTS

(1) remains the same.

(2) To obtain an operating permit the applicant shall:

~~(a)~~ pay a ~~$25.00~~ $500 fee~~;~~.

~~(b) indicate proposed date for commencement of mining and minerals to be mined;~~

~~(c) provide a map to scale of the mine area and area to be disturbed (such map will locate and identify streams, and proposed roads, railroads and utility lines in the immediate area);~~

~~(d) submit a plan of mining which will provide, within limits of normal operating procedures of the industry, for completion of mining and associated land disturbances;~~

~~(e) provide a reclamation plan that meets the requirements of 82-4-336, MCA, and this subchapter.~~

(3) In addition to the information required by 82-4-335(4), MCA, an application for an operating permit must describe the following:

(a) the existing environment;

(b) soil salvage and stockpiling activities and measures to protect soil from erosion and contamination;

(c) provisions for the prevention of wind erosion of all disturbed areas;

(d) the design, construction, and operation of the mine, mill, tailings, and waste rock disposal facilities;

(e) the facilities, buildings, and capacity of mill or processing;

(f) the proposed date for commencement of mining, the minerals to be mined, and a proposed conceptual life of mine operations;

(g) the designs of diversions, impoundments, and sediment control structures to be constructed reflecting their safety, utility, and stability;

(h) the location of access, haul, and other support roads and provisions for their construction and maintenance that control and minimize channeling and other erosion;

(i) the source and volume of incoming ore, tailings, or waste rock;

(j) the equipment and chemicals to be used in the operation by location and task;

(k) the general chemical processes and the purpose, amount, and source of water used in the operation and the disposition of any process waste water or solutions;

(l) the ground and surface water monitoring programs to be implemented and a contingency plan addressing accidental discharges to ground or surface water;

(m) a fire protection plan;

(n) a toxic spill contingency plan with certification that notice of the filing of the plan has been provided to the state fire marshal;

(o) the sewage treatment facilities and solid waste disposal sites;

(p) the power needs and source(s), including fuel storage sites;

(q) the anticipated employment including direct and onsite contract employees;

(r) the transportation network to be used during the construction and operation phases, including a list of the type and amount of traffic at mine or mill capacity;

(s) the predicted noise levels by activities during construction and operations;

(t) the protective measures for archaeological and historical values in the areas to be mined;

(u) the protective measures for off-site flora and fauna.

(4) The application must include a map or maps to scale of the mine area and area to be disturbed (such map must locate the proposed mine and facilities and must locate and identify streams, and proposed roads, railroads, and utility lines in the immediate area and residences and wells within one mile of the permit area). All maps provided in the application must have a uniform base, a scale, and a north directional arrow.

(5) The application must include a reclamation plan that meets the requirements of 82-4-336, MCA, and this subchapter.

AUTH: 82-4-321, MCA
IMP: 82-4-336, MCA

17.24.117 OPERATING PERMIT CONDITIONS (1) The following conditions accompany the issuance of each permit:

(a) The permittee shall conduct all operations as described in:

(i) ~~in~~ the plan of operations including the approved operating, reclamation, monitoring, and contingency plans; ~~and~~

(ii) ~~in~~ any express conditions which the department places on the permit to ensure compliance with the Act or this subchapter promulgated pursuant thereto~~.~~;

(iii) written commitments made by the permittee in response to deficiencies identified by the department during the permit application review process;

(iv) mitigation measures mutually developed by the department and permittee pursuant to 75-1-201(5)(b), MCA; and

(v) the most recent reclamation bond calculations.

(b) and (c) remain the same.

AUTH: 82-4-321, MCA
IMP: 82-4-335, 82-4-336, 82-4-351, MCA

17.24.118 OPERATING PERMIT ANNUAL REPORT (1) Each permittee shall file ~~copies of~~ an annual report with the department and pay an annual fee of $100 within a time period specified in 82-4-339, MCA, until such time as full bond is released. No less than 30 days prior to the permit anniversary date for the annual report, the department shall notify the permittee in writing that an annual report and renewal fee is due.

(2) The annual report must include the information outlined under 82-4-339, MCA. In addition, ~~beginning with the~~

~~first full permit year after the effective date of these rules,~~ the annual report must include:

(a) remains the same.

(b) the extent of backfilling and grading performed during the preceding year and cumulatively~~; and~~.

~~(c) maps showing the information required in (a) and (b) above.~~

~~(3) Each annual report must include a status report on revegetation, pursuant to 82-4-339(1)(f)(iv) and (vi), MCA, which includes the extent of reclamation (seeding or planting) performed during the preceding year (in narrative and map form), including:~~

(3)(a) through (e) remain the same, but are renumbered (2)(c) through (g).

~~(f)~~ (h) cumulative acres reseeded to date; ~~and~~

~~(g)~~ (i) cumulative acres of completed reclamation and the date each increment was completed~~.~~; and

(j) maps showing the information required in (2)(a) through (i) above.

(4) through (13) remain the same, but are renumbered (3) through (12).

~~(14)~~ (13) The department shall, by certified mail, notify a permittee, who fails to file an annual report and fee as required by this rule, that~~,~~ the permit will be suspended if the report ~~is~~ and fee are not filed within 30 days of receipt of the notice, ~~the permit must be suspended~~ unless a 30-day extension is granted by the department.

~~(15)~~ (14) If a permittee fails to file an annual report and fee within 30 days of receipt of a notice ~~pursuant to (13) of this rule~~ or within a 30-day extension granted by the department, the department shall suspend the permit.

AUTH: 82-4-321, MCA
IMP: 82-4-335, 82-4-336, 82-4-337, 82-4-338, 82-4-339, 82-4-362, MCA

17.24.119 PERMIT AMENDMENTS (1) An application for a major amendment must:

(a) and (b) remain the same.

~~(c) provide replacement pages in the approved plan of operations necessary to provide adequate cross-referencing to supplemental designs or plans;~~

(d) through (f) remain the same, but are renumbered (c) through (e).

(2) through (4) remain the same.

AUTH: 82-4-321, MCA
IMP: 82-4-337, 82-4-342, MCA

17.24.140 BONDING: DETERMINATION OF BOND AMOUNT

(1) The department shall require submission of bond in the amount of the estimated cost to the department if it had to perform the reclamation, contingency procedures and associated monitoring activities required of an operator

subject to bonding requirements under the Act, the rules adopted thereunder, and the permit, license or exclusion. This amount is based on the estimated cost to the state to ensure compliance with Title 75, chapters 2 and 5, the Act, the rules adopted thereunder, and the approved permit, license or any exclusion and shall include:

(a) through (3) remain the same.

(4) The line items in the bond calculations are estimates only and are not limits on spending of any part of the bond to complete any particular task.

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

AUTH: 82-4-321, MCA
IMP: 82-4-338, MCA

17.24.146 BONDING: LETTERS OF CREDIT (1) The department may accept as a bond a letter of credit subject to the following conditions:

(a) and (b) remain the same.

(c) The letter must be payable to the department in part or in full upon demand and receipt from the department of a notice that the person has failed to comply with a provision of the Act, the rules adopted thereunder, or the permit, license, or exclusion, the failure of which authorizes forfeiture of the bond under the Act. ~~of forfeiture issued pursuant to 82-4-341, MCA.~~

(d) through (2) remain the same.

AUTH: 82-4-321, MCA
IMP: 82-4-338, 82-4-341, 82-4-360, MCA

17.24.167 MILLS: OPERATING PERMIT APPLICATION

(1) remains the same.

(2) Prior to receiving an operating permit, the applicant must:

(a) pay a ~~$25.00~~ $500 filing fee to the department unless the mill application is associated with and submitted concurrently with a new operating permit application submitted under 82-4-335, MCA;

(b) indicate the proposed date for commencement of milling and the minerals to be milled and the conceptual life of the mill;

(c) ~~provide a detailed map using a USGS topographic base to scale of 1" = 400' or less, for the mill area and area to be disturbed. The map must locate and identify streams and proposed roads, railroads, conveyors, and utility lines in the immediate area~~ provide a map or maps to scale of the mill area (such map must locate the proposed mill and must locate and identify streams, and proposed roads, railroads, and utility lines in the immediate area and residences and wells within one mile of the permit area). All maps provided in the application must have a uniform base, a scale, and a north directional arrow;

(d) file a reclamation bond pursuant to 82-4-338, MCA~~.~~;

(e) file ~~an operating~~ a plan of operation including construction, operating, monitoring and contingency plans; and

(f) file a reclamation plan.

(3) remains the same.

AUTH: 82-4-321, MCA
IMP: 82-4-335, MCA

17.24.184 SMALL MINER BOND FORFEITURE AND SMES REVOCATION (1) through (6) remain the same.

(7) A forfeited bond must be used as follows:

(a) remains the same.

(b) Whenever the department documents in a written finding that reclamation cannot be achieved using the amount of the forfeited bond, funds may be deposited in the ~~hard rock mining~~ environmental rehabilitation and response account established by 82-4-311, MCA, and reclamation must be conducted as priorities and additional funding allow. Forfeited funds deposited in the account may not be used for reclamation of other sites.

(c) remains the same.

AUTH: 82-4-321, MCA
IMP: 82-4-305~~(4), (5) and (6)~~, MCA

REASON: The Board is proposing the above rule amendments to conform the rules to two revisions of the Metal Mine Reclamation Act (82-4-301, et seq., MCA, hereinafter referred to as the Act) by the 2001 Montana Legislature. Chapter 488, Laws of 2001, in part, increased application and renewal fees for exploration licenses and operating permits; allows for bond forfeiture in the event that a permittee or licensee causes an imminent danger to public health, safety, or the environment and fails to abate the danger; and requires bonding in an amount not less than the estimated cost to assure compliance with Title 75, chapters 2 and 5, MCA, in addition to the provisions of the Act, rules adopted under the Act, and the approved operating permit. Chapter 338, Laws of 2001, established an environmental rehabilitation and response account in the state special revenue fund for deposit of all fees, fines and penalties paid to the Department under the Act.

Proposed rule amendments specify information that is required to be included in a reclamation plan and an application for an operating permit, implementing 82-4-303(14) and 82-4-335(4), MCA, respectively. In addition, rule amendments provide that commitments made by a permittee during the application, environmental review and bond calculation processes become a condition of the permit. Another proposed rule amendment conforms a bonding provision with statutory language. Finally, proposed rule amendments delete provisions that repeat statutory language or clarify, make consistent, or improve the readability of the rules.

17.24.101: As presently written, (5) provides that the Act does not apply to a person who, on land owned or controlled by that person, is allowing other persons to engage in mining activities as provided in 82-4-310(3), MCA, which is also phrased in the negative. The presence of the double negative makes application of the rule difficult. The proposed amendment to (5) clarifies that the Act does apply to a landowner that allows mining by others whose operations exceed the criteria set forth in 82-4-310(1), MCA.

17.24.102: The proposed amendment deletes the following definitions that are verbatim repetitions of terms defined by statute:

Subsection (3) repeats the definition of "amendment" set forth in 82-4-303(2), MCA;

Subsection (4) repeats the definition of "board" set forth in 82-4-303(3), MCA;

Subsection (10) repeats the definition of "exploration" set forth in 82-4-303(7), MCA;

Subsection (11) repeats the definition of "major amendment" set forth in 82-4-303(2), MCA;

Subsection (12) repeats the definition of "mineral" set forth in 82-4-303(8), MCA;

Subsection (13) repeats the definition of "mining" set forth in 82-4-303(9), MCA;

Subsection (14) repeats the definition of "minor amendment" set forth in 82-4-303(2), MCA;

Subsection (16) repeats the definition of "person" set forth in 82-4-303(11), MCA;

Subsection (17) repeats the definition of "placer or dredge mining" set forth in 82-4-303(13), MCA; and

Subsection (25) repeats the definition of "surface mining" set forth in 82-4-303(17), MCA, and "mineral" set forth in 82-4-303(8), MCA.

Additionally, the proposed amendment to (7) adds the phrase "or other surety acceptable to the department" to make the definition of "collateral bond" consistent with 82-4-338(1), MCA. The proposed amendment to (8) improves grammatical style and the proposed amendment to (15)(c) refers to the Water Quality Act by citation for consistency with other rules and the Act.

The proposed amendment to (18) defines "plan of operations" to include operating, monitoring and contingency plans. An applicant is already required to develop and include in its application operating, monitoring and contingency plans under 82-4-335(4), MCA, and ARM 17.24.116. The express inclusion of operating, monitoring and contingency plans in the definition of "plan of operations" in tandem with the proposed amendment to ARM 17.24.117(1)(a)(i) is meant to emphasize that the operating, monitoring and contingency plans become enforceable components of the permit.

The proposed amendment to (20) adds the adjective "ore" to "heaps" for clarification purposes. It also substitutes "removal of buildings and other structures" for "salvage of buildings." Defining reclamation to include "salvage of

buildings" is too narrow because it pertains only to buildings that have salvage value and does not address buildings with no salvage value and other facilities.

17.24.103: The proposed amendment to (1) changes the phrase "a person" to "an applicant" for consistency. The proposed amendment to (1)(a) reflects the increase in the fee for issuance of an exploration license enacted by Chapter 488, Laws of 2001. The proposed amendment to (1)(c) improves its readability. The proposed amendment to (2) sets forth the amount of the renewal fee as enacted by Chapter 488, Laws of 2001. The proposed amendment also requires submission of an annual report on a form provided by the Department, a codification of long-standing practice. The submission of an annual report enables the Department to maintain contact with the licensee and be apprised of the activity conducted by the licensee in the previous 12-month period. Finally, the proposed amendment to (2) deletes a provision that is redundant to 82-4-331(3), MCA.

Because the increase in exploration license application fees is mandated by statute, the Board does not have discretion to maintain the fees at the present level. The Department receives approximately 10 applications annually. The cumulative amount resulting from the increase ($5 to $100) is approximately $950.

Because the increase in exploration license renewal fees is mandated by statute, the Board does not have discretion to maintain the fees at the present level. Approximately 100 exploration licenses are renewed annually. The cumulative amount resulting from the increase ($5 to $25) is approximately $2000.

17.24.104: The salient requirement of (3) is compliance with the Water Quality Act rather than consultation with the Department. This is reflected in the proposed amendment to (3). Additionally, the proposed amendment to (3) makes the citation to the Water Quality Act consistent with other citations to the Water Quality Act found elsewhere in the rules. The proposed amendment to (12) deletes language that is repetitious to that contained in (9).

17.24.106: The proposed amendment to (4)(b) refers to the Water Quality Act by citation for consistency with other rules and the Act.

17.24.115: The proposed amendment to (1) deletes reference to the structure of 82-4-303(14)(a), MCA, to which the current rule and the proposed amendments do not adhere.

The proposed amendment to (1)(c) clarifies that a reclamation plan must require the establishment of vegetative cover and permanent landscaping pursuant to 82-4-336(8) and (12), MCA. As currently drafted, (1)(c) implies that an operator is required to make only two efforts to establish vegetation, even if the second effort also fails. The proposed amendment to (1)(d) refers to the Water Quality Act by citation for consistency with other rules and the Act. The proposed amendment to (1)(e) removes superfluous language.

The proposed amendments to (1)(f), (h), (j) and (o) delete requirements that are not relevant to a reclamation plan. The provisions, however, are relevant to a plan of operation. As discussed below, proposed amendments incorporate, with some modifications, the provisions of (1)(f), (h), (j), and (o) to ARM 17.24.116, which specifically addresses operating permit application requirements.

The proposed elimination of (1)(k) and (l) delete provisions that are redundant to 82-4-336(5) and (6), MCA, respectively. The proposed amendment adding (m) requires a reclamation plan to provide for reclamation of facilities and removal of structures consistent with the post mine land use, implementing 82-4-303(14)(a) and (b), MCA. The proposed amendment to (1)(n) requires a reclamation plan to provide for post mine environmental monitoring programs, implementing 82-4-336(10), MCA.

17.24.116: The proposed amendment to (2)(a) reflects the increase in the fee for issuance of an operating permit enacted by Chapter 488, Laws of 2001. The proposed amendments also delete (2)(b), (c), (d) and (e). The provisions of these subsections have been transferred, with some modifications, to (3), (4), and (5), respectively, for organizational purposes. Under the proposed amendments to this rule, (2) will address the application fee, (3) will address the substantive information that must be set forth in an application, (4) will address maps required in an application, and (5) will address the reclamation plan required in an application. Because the increase in operating permit application fees is mandated by statute, the Board does not have discretion to maintain the fees at the present level. The Department receives approximately one application annually. The cumulative amount resulting from the increase ($25 to $500) is approximately $475.

The proposed amendments adding (3)(d), (g), (h), (l), and (o) transfer information requirements, with some modification, that previously were inappropriately included in ARM 17.24.115 pertaining to reclamation plans. The proposed rule amendments adding (3)(a), (b), (c), (e), (f), (i), (j), (k), (m), (n), (o), (p), (q), (r), (s), (t), and (u) require additional information that an applicant is required to include in an application for an operating permit, implementing 82-4-335(4), MCA. The additional information is needed to evaluate impacts to air and water quality during operation and following reclamation, to ensure public safety, and for use in the Department's MEPA analysis of the proposed operation. The proposed amendment adding (f) requires information that previously was required in (2)(b), (c), and (d). These proposed rule amendments organize and codify information that historically has been required of applicants for operating permits.

The proposed amendment adding (4) clarifies the mapping requirements in an application for an operating permit that previously was contained in (2)(d). The proposed amendment to

(5) adds language to correct the grammatical style of the provision that previously was contained in (2)(e).

17.24.117: The proposed amendment to (1)(a)(i) reflects the additional information that is included in a plan of operation pursuant to the proposed amendments to ARM 17.24.116(3).

The proposed amendments adding (1)(a)(iii), (iv) and (v) incorporate into the permit written commitments made by the permittee during the application, environmental review and reclamation bond calculation processes and approved by the Department. The proposed amendment would make enforceable the commitments made by the permittee and relied upon by the Department in issuing the permit even if the permit itself has not been updated to reflect the commitments. The amendment is necessary to ensure protection of the environment during operation of the mine and through reclamation.

17.24.118: The proposed amendment to (1) specifies the amount of the annual renewal fee for an operating permit required by Chapter 488, Laws of 2001. The proposed amendment also requires the notice issued by the Department to contain a statement of the annual fees so that the notice covers all annual obligations of the permittee under 82-4-339(1), MCA. Because the increase in operating permit renewal fees is mandated by statute, the Board does not have discretion to maintain the fees at the present level. Approximately 75 operating permits are renewed annually. The cumulative amount resulting from the increase ($25 to $100) is approximately $5625.

The proposed amendments to (2) and (3) consolidate into (2) all information required in an annual report regarding land affected by the operation (either mining or reclamation activities). Specifically, provisions previously set forth in (3)(a) through (e) are now renumbered (2)(c) through (g). Additionally, (2)(c) has been renumbered (2)(j) so that mapping requirements may relate to information required by (2)(a) through (i). Finally, the amendments remove language from (2) that is no longer pertinent as that provision of the rule has been in effect for more than one year and (3) that is redundant to the consolidated provisions.

Finally, the proposed amendments to (14) and (15) clarify that the renewal fee must be filed to avoid suspension of the permit in addition to the annual report and make other changes to improve readability. The amendments also allow the Department to grant a 30-day extension for filing the annual report and renewal fee pursuant to 82-4-339, MCA, which provides that a date for the filing of the annual report may be set by rule that is later than the 30 days specified by statute.

17.24.119: The proposed amendment deletes (1)(c) because its provisions are redundant to (1)(b).

17.24.140: The proposed amendment to (1) conforms the rule provision for determining the amount of the bond to the statutory amendment enacted by Chapter 488, Laws of 2001. The

amendment is necessary to ensure the department of the full bonding authority contemplated by that statute.

The actual cost to complete each component task of reclamation may be more or less than the bond calculation for that task. The proposed amendment to (4) specifies that the total amount of the bond may be spent even if the actual cost of some component tasks are less than that calculated. The amendment assures the Department of the use of the full amount of the bond, if required to complete reclamation. The amendment is necessary to ensure that the Department has adequate bond to complete reclamation.

17.24.146: The proposed amendment to (1)(c) facilitates the forfeiture of a letter of credit whenever any violation is committed that warrants forfeiture under the Act. This amendment ensures that the Department is able to forfeit a letter of credit for a failure to abate an imminent danger as provided by Chapter 488, Laws of 2001, in addition to 82-4-341, MCA.

17.24.167: The proposed amendment to (1)(a) reflects the increase in the fee for issuance of an operating permit enacted by Chapter 488, Laws of 2001.

The proposed amendments to (1)(b), (c), and (e) implement 82-4-335(4), MCA, and require additional information to be set forth in a mill operating permit application. Information regarding the conceptual life of the mill, the location of residences and wells within one mile of the permit boundary, and the construction, operating, monitoring and contingency plan are needed to evaluate the impacts of the mill operation. Additionally, the proposed amendment makes the mapping information required in a mill operating permit application consistent with the mapping requirements for a mine operating permit application.

17.24.184: The proposed amendment to (7)(b) reflects the enactment of Chapter 338, Laws of 2001, establishing the environmental rehabilitation and response account for the placement of all fees, fines and penalties collected under the Act.

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

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

6. The Board maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list

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

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

**BOARD OF ENVIRONMENTAL REVIEW**

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

**Reviewed by:**

*John F. North*
**JOHN F. NORTH, Rule Reviewer**

**Certified to the Secretary of State, August 5, 2002.**

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

| | |
|---|---|
| In the matter of the adoption of NEW RULES I through XVIII, the amendment of 17.8.101, 17.8.110, 17.8.309, 17.8.310, 17.8.316, 17.8.342, 17.8.818, 17.8.825, 17.8.826, 17.8.901, 17.8.904, 17.8.905, 17.8.906, 17.8.1004, 17.8.1005, 17.8.1106, 17.8.1109, 17.8.1201, 17.8.1204, 17.8.1205, 17.8.1220, 17.8.1224, and 17.8.1226, and the repeal of 17.8.701, 17.8.702, 17.8.704 through 17.8.707, 17.8.710, 17.8.715 through 17.8.717, 17.8.720, and 17.8.730 through 17.8.734 pertaining to the issuance of Montana air quality permits | NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION, AMENDMENT AND REPEAL<br><br>(AIR QUALITY) |

TO: All Concerned Persons

1. The Board of Environmental Review previously published a notice of proposed rulemaking in this matter on February 14, 2002 at page 276, 2002 Montana Administrative Register, issue number 3. The Board is reinitiating rulemaking to incorporate suggested revisions received during the prior public comment period. On October 10, 2002, at 10:30 a.m., a public hearing will be held in Room 111, Department of Environmental Quality, Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed adoption, amendment and repeal of the above-stated rules pertaining to the issuance of Montana air quality permits.

2. The Board will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board no later than 5:00 p.m., September 30, 2002, to advise us of the nature of the accommodation that you need. Please contact the Board Secretary at P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2544; fax (406) 444-4386; or email ber@state.mt.us.

3. The proposed new rules provide as follows:

RULE I PURPOSE OF AIR QUALITY PERMITTING (1) This subchapter shall protect public health and the environment by:

(a) clearly identifying regulated air pollution sources and activities;

(b) providing a predictable process whereby air pollution sources can commence construction and operation; and

(c) assuring all applicable state and federal air quality regulations are met.

(2) This program shall be administered so as to provide efficient allocation of resources for the benefit of all parties.

AUTH: 75-2-111, 75-2-204, MCA
IMP: 75-2-211, MCA

RULE II DEFINITIONS For the purposes of this subchapter:

(1) "Best available control technology (BACT)" means an emission limitation (including a visible emission standard), based on the maximum degree of reduction for each pollutant subject to regulation under 42 U.S.C. 7410, et seq. or 75-2-101, et seq., MCA, that would be emitted from any proposed emitting unit or modification which the department, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such emitting unit or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such contaminant. In no event may application of BACT result in emission of any regulated air pollutant that would exceed the emissions allowed by any applicable standard under ARM Title 17, chapter 8, subchapter 3, and this subchapter. If the department determines that technological or economic limitations on the application of measurement methodology to a particular class of emitting units would make the imposition of an emission standard infeasible, it may instead prescribe a design, equipment, work practice, or operational standard or combination thereof, to require the application of BACT. Such standard must, to the degree possible, set forth the emission reduction achievable by implementation of such design, equipment, work practice or operation and must provide for compliance by means that achieve equivalent results.

(2) "Construct" or "construction" includes a reasonable period of time for startup and shakedown and means:

(a) initiation of on-site fabrication, erection, or installation of an emitting unit or control equipment including, but not limited to:

(i) installation of building supports or foundations;

(ii) laying of underground pipework; or

(iii) construction of storage structures; or

(b) the installation of any portable or temporary equipment or facilities.

(3) "Day" means calendar day unless otherwise stated.

(4) "Emitting unit" means:

(a) any equipment that emits or has the potential to emit any regulated air pollutant under the Clean Air Act of Montana through a stack(s) or vent(s); or

(b) any equipment from which emissions consist solely of fugitive emissions of a regulated air pollutant under the Clean Air Act of Montana.

(5) "Existing emitting unit" means an emitting unit that was in existence and operating or was capable of being operated on March 16, 1979, or for which the department had issued a permit by that date.

(6) "Facility" means any real or personal property that is either stationary or portable and is located on one or more contiguous or adjacent properties under the control of the same owner or operator that contributes or would contribute to air pollution, including associated control equipment that affects or would affect the nature, character, composition, amount, or environmental impacts of air pollution and that has the same two-digit standard industrial classification code. A facility may consist of one or more emitting units.

(7) "Install" or "installation" means to set into position and connect or adjust for use.

(8) "Modify" does not include routine maintenance, repair, or replacement but means:

(a) construction or changes in operation at a facility or emitting unit for which the department has issued a Montana air quality permit under this chapter, except when a permit is not required under [NEW RULE IV];

(b) construction or changes in operation at a facility or emitting unit for which a Montana air quality permit has not been issued under this chapter but that subjects the facility or emitting unit to the requirements of [NEW RULE II];

(c) construction or changes in operation at a facility or emitting unit that would violate any condition in the facility's Montana air quality permit, any board or court order, any control plan within the Montana state implementation plan, or any rule in this chapter, except as provided in [NEW RULE IV];

(d) construction or changes in operation at a facility or emitting unit that would qualify as a major modification of a major stationary source under subchapters 8, 9, or 10 of this chapter;

(e) construction or changes in operation at a facility or emitting unit that would affect the plume rise or dispersion characteristics of emissions in a manner that would cause or contribute to a violation of an ambient air quality standard or an ambient air increment, as defined in ARM 17.8.804; or

(f) any change in operation that affects emissions and that was not previously permitted, except that a change in operation that does not result in an increase in emissions because of the change is not a modification.

(9) "Montana air quality permit" means a preconstruction permit issued under this subchapter that may include requirements for the construction and subsequent operation of an emitting unit(s) or facility.

(10) "Negligible risk to the public health, safety, and welfare and to the environment" means an increase in excess lifetime cancer risk of less than $1.0 \times 10^{-6}$, for any individual pollutant, and $1.0 \times 10^{-5}$, for the aggregate of all pollutants, and an increase in the sum of the non-cancer hazard quotients for all pollutants with similar toxic effects of less than 1.0, as determined by a human health risk assessment conducted according to [NEW RULE XVII]. The department shall also consider environmental impacts identified in any environmental analysis conducted pursuant to the Montana Environmental Policy Act, Title 75, chapter 1, parts 1 through 3, MCA, in determining compliance with all applicable rules or other requirements requiring protection of public health, safety, and welfare and the environment.

(11) "New or modified emitting unit" means an emitting unit that was not constructed or upon which construction was not commenced prior to March 16, 1979.

(12) "Owner or operator" means the owner of a facility or other person designated by the owner as responsible for overall operation of the facility.

(13) "Potential to emit" means the maximum capacity of a facility or emitting unit, within physical and operational design, to emit a pollutant. Any physical or operational limitation on the capacity of the facility or emitting unit to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, is treated as part of its design only if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions are not considered in determining potential to emit.

(14) "Routine maintenance, repair, or replacement" means any action taken upon an emitting unit by the owner or operator that is necessary on a periodic basis to assure proper operation of the emitting unit. The term routine does not include activities that:

(a) have associated fixed capital costs in excess of 50% of the fixed capital cost necessary to construct a comparable, entirely new emitting unit;

(b) change the design of the emitting unit, including associated control equipment; or

(c) increase the potential to emit of the emitting unit.

(15) "Secondary emissions" means emissions that would occur as a result of the construction or operation of a facility or emitting unit, but do not come from the facility or emitting unit itself. Secondary emissions must be specific, well defined, quantifiable, and impact the same general area as the facility or emitting unit which causes the secondary emissions. Secondary emissions may include, but are not limited to:

(a) emissions from trains coming to or from the facility or emitting unit;

(b) emissions from any off-site support facility that otherwise would not be constructed or increase its emissions

as a result of the construction or operation of the facility or emitting unit.

AUTH: 75-2-111, 75-2-204, MCA
IMP: 75-2-211, MCA

RULE III MONTANA AIR QUALITY PERMITS--WHEN REQUIRED

(1) Except as provided in [NEW RULE IV and V], a person may not construct, install, modify, or operate any of the following without first obtaining a Montana air quality permit issued by the department:

(a) a new facility or emitting unit with the potential to emit airborne lead in an amount greater than five tons per year or a modification to an existing facility or emitting unit that results in an increase in the facility or emitting unit's potential to emit airborne lead by an amount greater than 0.6 tons per year;

(b) asphalt concrete plants, mineral crushers, and mineral screens that have the potential to emit more than 15 tons per year of any airborne pollutant, other than lead, that is regulated under this chapter;

(c) any incinerator, as defined in 75-2-103(11), MCA, and that is subject to the requirements of 75-2-215, MCA;

(d) any facility or emitting unit upon which construction commenced, or that was installed, before November 23, 1968, when that facility or emitting unit is modified after that date and the modification increases the potential to emit by more than 25 tons per year of any airborne pollutant, other than lead, that is regulated under this chapter; or

(e) any other facility or emitting unit upon which construction was commenced, or that was installed, after November 23, 1968, that is not specifically excluded under [NEW RULE IV], and that has the potential to emit more than 25 tons per year of any airborne pollutant, other than lead, that is regulated under this chapter.

(2) An owner or operator who has submitted an application and received a completeness determination from the department pursuant to [NEW RULE XI] may, prior to receiving a Montana air quality permit, initiate the following seasonal construction activities that, when completed, would have no anticipated increases in emissions of regulated air pollutants associated with them:

(a) installing concrete foundation work;

(b) installing below-ground plumbing;

(c) installing ductwork; or

(d) other infrastructure and/or excavation work involving the same.

(3) Notwithstanding the ability to undertake the construction activities described above, the department may issue a letter instructing the owner or operator to immediately cease such activities pending a final determination on an application if it finds that the proposed project would result in a violation of the state

implementation plan or would interfere with the attainment or maintenance of any federal or state ambient air quality standard.

(4) Nothing in (2) obligates the department to issue a Montana air quality permit. An owner or operator who has received a completeness determination and who elects to engage in initial construction activities accepts the regulatory risks of engaging in such activities. The owner or operator acknowledges that the department may subsequently order cessation of initial construction activities, ultimately decline to issue a Montana air quality permit, or issue a permit that diminishes or renders useless the value of work completed prior to permit issuance. In voluntarily choosing to engage in such activities while knowing of these risks, the owner or operator agrees that, in the event the department seeks injunctive relief to halt or prohibit construction, no irreparable harm has resulted in any way to the owner or operator from these activities.

(5) The provisions of (2) do not supersede any other local, state, or federal requirements associated with the activities set forth therein.

AUTH: 75-2-111, 75-2-204, MCA
IMP: 75-2-211, MCA

RULE IV MONTANA AIR QUALITY PERMITS--GENERAL EXCLUSIONS

(1) A Montana air quality permit is not required under [NEW RULE III] for the following:

(a) residential fireplaces, barbecues, and similar devices for recreational, cooking, or heating use;

(b) mobile emitting units, including motor vehicles, trains, aircraft, and other such self-propelled vehicles;

(c) laboratory equipment used for chemical or physical analysis;

(d) any activity or equipment associated with the use of agricultural land or the planting, production, harvesting or storage of agricultural crops (this exclusion does not apply to the processing of agricultural products by commercial businesses);

(e) emergency equipment installed in hospitals or other public institutions or buildings for use when the usual sources of heat, power or lighting are temporarily unobtainable or unavailable;

(f) emergency equipment installed in industrial or commercial facilities for use when the usual sources of heat, power, or lighting are temporarily unobtainable or unavailable and when the loss of heat, power, or lighting causes, or is likely to cause, an adverse effect on public health or facility safety. Emergency equipment use extends only to those uses that alleviate such adverse effects on public health or facility safety. A permit is not required for emergency equipment as long as the facility was unable to reasonably predict the event that caused the emergency;

(g) any activity or equipment associated with the construction, maintenance, or use of roads except emitting units for which a permit is required under [NEW RULE III];

(h) open burning, which is regulated under ARM Title 17, chapter 8, subchapter 6, and an open burning permit may be required under that subchapter;

(i) drilling rig stationary engines and turbines that do not have the potential to emit more than 100 tons per year of any pollutant regulated under this chapter and that do not operate in any single location for more than 12 months;

(j) temporary process or emission control equipment, replacing malfunctioning process or emission control equipment, and meeting the requirements of ARM 17.8.110(7); or

(k) routine maintenance, repair, or replacement of equipment and equipment used to perform routine maintenance, repair, or replacement.

AUTH: 75-2-111, 75-2-204, MCA
IMP: 75-2-211, MCA

RULE V MONTANA AIR QUALITY PERMITS--EXCLUSION FOR DE MINIMIS CHANGES (1) A Montana air quality permit is not required under [NEW RULE III] for de minimis changes as specified below:

(a) Construction or changed conditions of operation at a facility for which a Montana air quality permit has been issued that do not increase the facility's potential to emit by more than 15 tons per year of any pollutant except:

(i) any construction or changed conditions of operation at a facility that would violate any condition in the facility's existing Montana air quality permit or any applicable rule contained in this chapter is prohibited, except as allowed in (2);

(ii) any construction or changed conditions of operation at a facility that would qualify as a major modification of a major stationary source under subchapters 8, 9, or 10 of this chapter;

(iii) any construction or changed conditions of operation at a facility that would affect the plume rise or dispersion characteristics of the emissions in a manner that would cause or contribute to a violation of an ambient air quality standard or an ambient air increment, as defined in ARM 17.8.804;

(iv) any construction or improvement project with a potential to emit more than 15 tons per year may not be artificially split into smaller projects to avoid permitting under this subchapter; and

(v) emission reductions obtained through offsetting within a facility are not included when determining the potential emission increase from construction or changed conditions of operation, unless such reductions are made federally enforceable.

(b) The owner or operator of any facility making a de minimis change pursuant to (1)(a) shall notify the department

if the change would include addition of a new emissions unit, a change in control equipment, stack height, stack diameter, stack flow, stack gas temperature, source location, or fuel specifications, or would result in an increase in source capacity above its permitted operation.

(c) The following are excluded from the notice requirements of (1)(b):

(i) day-to-day fluctuations of the parameters described in (1)(b), occurring as a result of the design or permitted operations of the facility, including startup and shutdown of emission sources at the facility; and

(ii) addition, modification, or replacement of pumps, valves, flanges and similar emission sources. The department shall develop, maintain, and update a list of emission sources it believes qualify for exclusion from the notice requirements. Upon request, the department shall provide a copy of the list to interested persons.

(d) If notice is required under (1)(b), the owner or operator shall submit the following information to the department in writing at least 10 days prior to startup or use of the proposed de minimis change or as soon as reasonably practicable in the event of an unanticipated circumstance causing the de minimis change:

(i) a description of the proposed de minimis change requiring notice, including the anticipated date of the change;

(ii) sufficient information to calculate the potential emissions resulting from the proposed de minimis change; and

(iii) if applicable, an explanation of the unanticipated circumstance causing the change.

(e) The notice requirements under (1)(d) do not supersede, or otherwise change, any requirements in 40 CFR Parts 60, 61, or 63.

(2) A Montana air quality permit may be amended pursuant to [NEW RULE XV], for changes made under (1)(a)(i) that would otherwise violate an existing condition in the permit. Conditions in the permit concerning control equipment specifications, operational procedures, or testing, monitoring, record keeping, or reporting requirements may be modified if the modification does not violate any statute, rule, or the state implementation plan. Conditions in the permit establishing emission limits, or production limits in lieu of emission limits, may be changed or added under (1)(a), if the owner or operator agrees to such changes or additions.

AUTH: 75-2-111, 75-2-204, MCA
IMP: 75-2-211, MCA

RULE VI NEW OR MODIFIED EMITTING UNITS--PERMIT APPLICATION REQUIREMENTS (1) The owner or operator of a proposed new or modified facility or emitting unit that is subject to [NEW RULE III], shall, no later than 180 days before construction begins, or if construction is not required, no later than 120 days before installation,

modification, or operation begins, submit an application to the department for a Montana air quality permit on an application form provided by the department. The department may, for good cause shown, waive or shorten the time required for filing the application.

(2) The department may provide pre-application consultation and non-binding, advisory opinions regarding any potential issues identified by the owner or operator that may arise regarding the permit application.

(3) A permit application submitted pursuant to this subchapter must contain certification by a responsible official of truth, accuracy, and completeness. This certification must state that, based on information and belief formed after reasonable inquiry, the statements and information in the application are true, accurate, and complete. The following persons are authorized to sign an application on behalf of the owner or operator of a new or modified facility or emitting unit(s):

(a) an application submitted by a corporation or a limited liability company must be signed by an individual specified in the corporate bylaws or the limited liability company operating agreement as having the authority to bind the corporation or limited liability company in contracts, liabilities, and other company obligations;

(b) an application submitted by a partnership or a sole proprietorship must be signed by a general partner or the proprietor respectively;

(c) an application submitted by a municipal, state, federal or other public agency must be signed by a principal executive officer, appropriate elected official, or other duly authorized employee; and

(d) an application submitted by an individual must be signed by the individual or the individual's authorized agent.

(4) An application for a Montana air quality permit must include the following:

(a) a map and diagram showing the location of the proposed new or modified facility or emitting unit(s). The map and diagram must also include the location of each associated stack, the property involved, the height and outline of associated buildings, and the height and outline of each associated stack;

(b) a description of the proposed new or modified facility or emitting unit(s), including data on expected production capacity, raw materials to be processed, and major equipment components;

(c) a description of any control equipment to be installed;

(d) a description of the composition, volume and temperatures of the effluent stream, including the nature and extent of air contaminants emitted, quantities and means of disposal of collected contaminants, and the air quality relationship of these factors to conditions created by existing stacks or emitting units or stacks associated with the proposed new or modified emitting unit(s);

(e) normal and maximum operating schedules;

(f) drawings, blueprints, specifications, or other information adequate to show the design and operation of process and air pollution control equipment involved;

(g) process flow diagrams showing material balances;

(h) a detailed schedule of construction or modification;

(i) a description of shakedown procedures to the extent shakedown is expected to affect emissions, and the anticipated duration of the shakedown period for each new or modified emitting unit;

(j) any other information requested by the department that is necessary for the department to review the application and determine whether the new or modified facility or emitting unit(s) will comply with applicable standards and rules;

(k) information regarding site characteristics necessary to conduct an assessment of impacts under the Montana Environmental Policy Act, 75-1-101, et seq., MCA, as required on the application form; and

(l) the appropriate air quality permit application fee required under ARM 17.8.504.

(5) An applicant is not required to submit information previously filed with the department. If an applicant does not want to submit information that has been submitted previously to the department, the applicant shall specify in the application the information previously submitted, and, wherever possible, shall specify the date upon which the information was submitted. Any information the department determines is in its possession becomes part of the application.

(6) Section 75-2-105, MCA, specifies the procedure for filing a declaratory judgment action to establish the existence, and confidential status of, trade secret information provided in a permit application.

(7) An applicant for a permit shall notify the public of the application by legal publication in a newspaper of general circulation in the area affected by the application. The notice must be published within 10 days before, or after, submittal of the application. The form of the notice must be as provided to the applicant by the department.

AUTH: 75-2-111, 75-2-204, MCA
IMP: 75-2-211, MCA

RULE VII CONDITIONS FOR ISSUANCE OR DENIAL OF PERMIT

(1) When the department issues a Montana air quality permit, the permit must authorize the construction and operation of the facility or emitting unit subject to the conditions in the permit and to the requirements of this subchapter. The permit must contain any conditions necessary to assure compliance with the Federal Clean Air Act, with the Clean Air Act of Montana and rules adopted under those acts.

(2) The permit may contain a schedule for specified permit conditions to become effective, subject to the time limits stated in [NEW RULE XIII]. The department may extend a

deadline specified in the schedule, but an extension may not exceed five years.

(3) A Montana air quality permit may not be issued for a new or modified facility or emitting unit unless the applicant demonstrates that the facility or emitting unit can be expected to operate in compliance with the Clean Air Act of Montana and rules adopted under that Act, the Federal Clean Air Act and rules promulgated under that Act (as incorporated by reference in [NEW RULE XVII]), and any applicable requirement contained in the Montana state implementation plan (as incorporated by reference in [NEW RULE XVII]), and that it will not cause or contribute to a violation of any Montana or national ambient air quality standard.

(4) The department shall issue a Montana air quality permit for the following unless the department demonstrates that the emitting unit does not operate or is not expected to operate in compliance with applicable rules, standards, or other requirements:

(a) emitting units constructed or installed between November 23, 1968, and March 16, 1979; and

(b) emitting units constructed or installed before November 23, 1968, and modified between November 23, 1968, and March 16, 1979.

(5) In a Montana air quality permit, the department shall identify those conditions that are derived from state law, and are not derived from the Federal Clean Air Act, 42 U.S.C. 7401, et seq., the Montana state implementation plan, or other federal air quality requirements. Compliance with these conditions is not required by the state implementation plan, and is not necessary for attainment or maintenance of federal ambient air quality standards. These conditions must be identified in the permit as "state-only," and are not intended by the department to be enforceable under federal law.

(6) Nothing in this subchapter obligates the department to issue a Montana air quality permit. The department may subsequently order cessation of initial construction activities, decide not to issue the permit, or issue a permit that diminishes or renders useless the value of work completed prior to permit issuance.

(7) If the department denies an application for a Montana air quality permit it shall notify the applicant in writing of the reasons for the permit denial and advise the applicant of the right to appeal the department's decision to the board as provided in 75-2-211, MCA. Service of the department's decision to deny a permit must be made as provided in the Montana Rules of Civil Procedure, except that the applicant may agree in writing to service by mail.

(8) If the department denies an application for a Montana air quality permit, it may not accept any further air quality permit application from the owner or operator for that project for which the permit was sought until:

(a) the time for requesting a hearing before the board has expired; or

(b) if a hearing before the board is requested, the board has issued a final decision in the matter; or

(c) the applicant has submitted additional information in writing that adequately addresses the reasons for denial.

AUTH: 75-2-111, 75-2-204, MCA
IMP: 75-2-211, MCA

RULE VIII EMISSION CONTROL REQUIREMENTS (1) The owner or operator of a new or modified facility or emitting unit for which a Montana air quality permit is required by this subchapter shall install on the new or modified facility or emitting unit the maximum air pollution control capability that is technically practicable and economically feasible, except that:

(a) BACT must be utilized.

(i) Existing emitting units and those emitting units constructed or installed after March 16, 1979, that were not previously subject to this subchapter become subject to this rule when any modification to the emitting unit requires a Montana air quality permit; however, only the specific emitting unit that is modified becomes subject to this rule.

(b) The lowest achievable emission rate must be met to the extent required by ARM Title 17, chapter 8, subchapters 9 and 10, for those emitting units subject to those subchapters.

(2) The owner or operator of a new or modified facility or emitting unit for which a permit is required by this subchapter shall operate all equipment to provide the maximum air pollution control for which it was designed.

AUTH: 75-2-111, 75-2-204, MCA
IMP: 75-2-211, MCA

RULE IX INSPECTION OF PERMIT (1) Current Montana air quality permits must be made available for department inspection at the location of the facility or emitting unit for which the permit has been issued, unless the permittee and the department mutually agree on a different location.

AUTH: 75-2-111, 75-2-204, MCA
IMP: 75-2-211, MCA

RULE X COMPLIANCE WITH OTHER REQUIREMENTS (1) This subchapter does not relieve any owner or operator of the responsibility for complying with any applicable federal or Montana statute, rule or board or court order, except as specifically provided in this subchapter.

(2) Issuance of a Montana air quality permit does not affect the responsibility of a permittee to comply with the applicable requirements of any control strategy contained in the Montana state implementation plan.

(3) A permittee may not commence operation of a facility or emitting unit if construction, modification or installation has been completed in such a manner that the facility or

emitting unit cannot operate in compliance with applicable statutes, rules, or requirements specified in the permit.

AUTH: 75-2-111, 75-2-204, MCA
IMP: 75-2-211, MCA

RULE XI REVIEW OF PERMIT APPLICATIONS (1) Except for applications subject to [NEW RULE XII], when an application for a permit does not require an environmental impact statement, the application is not considered filed until the owner or operator has submitted to the department all required fees and all information and completed application forms.

(2) The department shall notify the applicant in writing within 30 days after receiving an application if an application is incomplete. The notice must list the reasons the application is considered incomplete, any additional information required, and the date by which the applicant must submit any additional required information. If the requested additional information is not submitted by the date specified by the department in the notice, the application is considered withdrawn unless the applicant requests in writing an extension of time for submission of the additional information. If the department receives additional application information, whether prior to a determination of completeness or in response to a notice of incompleteness, the 30-day application completeness review period begins again.

(3) Within 40 days after receiving a complete application for a permit, the department shall make a preliminary determination as to whether the permit should be issued, issued with conditions, or denied.

(4) After making a preliminary determination, the department shall notify those members of the public who requested such notification subsequent to the notice required by [NEW RULE VI] and the applicant of the department's preliminary determination. The notice must specify that comments may be submitted on the information submitted by the applicant and on the department's preliminary determination. The notice must also specify the following:

(a) that a complete copy of the application and the department's analysis of the application is available from the department and in the air quality control region where the emitting unit is located;

(b) the date by which all comments on the preliminary determination must be submitted in writing, which must be within 15 days after the notice is mailed; and

(c) that unless the review period is extended pursuant to (5), a final decision must be made within 60 days after a complete application is submitted to the department as required by 75-2-211, MCA. The notice must specify the date upon which the 60-day review period expires, the person from whom a copy of the final decision may be obtained, and the procedure for requesting a hearing before the board concerning the department's final decision.

(5) The time for issuing a final decision may be extended for 30 days by written agreement of the department and the applicant. The department may grant additional 30-day extensions at the request of the applicant.

AUTH: 75-2-111, 75-2-204, MCA
IMP: 75-2-211, MCA

RULE XII ADDITIONAL REVIEW OF PERMIT APPLICATIONS

(1) When an application for a Montana air quality permit requires an environmental impact statement under the Montana Environmental Policy Act, 75-1-101, et seq., MCA, the procedures for public review are those required by the Montana Environmental Policy Act and the rules adopted by the board and department to implement the Act, ARM Title 17, chapter 4, subchapter 6, and 17.4.701 through 17.4.703.

(2) When an application for a Montana air quality permit is also an application for certification under the Major Facility Siting Act, public review is governed by the rules implementing that Act, ARM Title 17, chapter 20.

AUTH: 75-2-111, 75-2-204, 75-20-216, MCA
IMP: 75-2-211, 75-20-216, MCA

RULE XIII DURATION OF PERMIT (1) A Montana air quality permit is in effect until the permit is revoked under [NEW RULE XIV], amended under [NEW RULE XV], or modified under [NEW RULE VI]. Portions of a Montana air quality permit may be revoked, amended, or modified without invalidating the remainder of the permit.

(2) A permit issued prior to construction or installation of a new or modified facility or emitting unit may provide that the permit or a portion of the permit will expire unless construction or installation is commenced within the time specified in the permit, which may not be less than one year or more than three years after the permit is issued.

AUTH: 75-2-111, 75-2-204, MCA
IMP: 75-2-211, MCA

RULE XIV REVOCATION OF PERMIT (1) The department may revoke a Montana air quality permit or any portion of a permit upon written request of the permittee, or for violation of any requirement of the Clean Air Act of Montana, rules adopted under that Act, the Federal Clean Air Act and rules promulgated under that Act (as incorporated by reference in [NEW RULE XVII]), or any applicable requirement contained in the Montana state implementation plan (as incorporated by reference in [NEW RULE XVII]).

(2) The department shall notify the permittee in writing of its intent to revoke a permit or a portion of a permit. The department shall serve the notice as provided in [NEW RULE VII]. The department's decision to revoke a permit or any portion of a permit becomes final when 15 days have elapsed

after service of the notice unless the permittee requests a hearing before the board.

(3) When the department revokes a permit under this rule, the permittee may request a hearing before the board. A hearing request must be in writing and must be filed with the board within 15 days after service of the department's notice of intent to revoke the permit. Filing a request for a hearing postpones the effective date of the department's decision until issuance of a final decision by the board.

(4) A hearing under this rule is governed by the contested case provisions of the Montana Administrative Procedure Act, Title 2, chapter 4, part 6, MCA.

(5) This rule does not apply if the department determines that a permittee's request for the revocation of a portion of its permit is not an administrative amendment in accordance with [NEW RULE XV].

AUTH: 75-2-111, 75-2-204, MCA
IMP: 75-2-211, MCA

RULE XV ADMINISTRATIVE AMENDMENT TO PERMIT (1) The department may amend a Montana air quality permit, or any portion of a permit, for the following reasons:

(a) changes in any applicable rules adopted by the board;

(b) changes in operation that do not result in an increase in emissions. The owner or operator of a facility may not increase the facility's emissions beyond permit limits unless the increase meets the criteria in [NEW RULE V] for a de minimis change not requiring a permit, or unless the owner or operator applies for and receives another permit in accordance with [NEW RULES VI, VII, VIII, IX and X], and with all applicable requirements in ARM Title 17, chapter 8, subchapters 8, 9, and 10;

(c) administrative errors in the permit that do not affect substantive provisions of the permit.

(2) The department shall notify the permittee in writing of any proposed amendments to the permit. The department shall serve the notice as provided for in [NEW RULE VII]. The permit is deemed amended in accordance with the notice when 15 days have elapsed after service of the notice unless the permittee requests a hearing before the board.

(3) When the department amends a permit under this rule, the permittee may request a hearing before the board. A hearing request must be in writing and must be filed with the board within 15 days after service of the department's notice of intent to amend the permit. Filing a request for hearing postpones the effective date of the department's decision until issuance of a final decision by the board.

(4) A hearing under this rule is governed by the contested case provisions of the Montana Administrative Procedure Act, Title 2, chapter 4, part 6, MCA.

AUTH: 75-2-111, 75-2-204, MCA

IMP: 75-2-211, MCA

RULE XVI TRANSFER OF PERMIT (1) A Montana air quality permit may be transferred from one location to another if:

(a) the department receives a complete notice of intent to transfer location, including:

(i) written notice of intent to transfer location on forms provided by the department; and

(ii) documentation that the permittee has published notice of the intended transfer by means of a legal publication in a newspaper of general circulation in the area to which the transfer is to be made. The notice must include a statement that public comment will be accepted by the department for 15 days after the date of publication and that comments should be addressed to: Air Quality Permitting Section, Air and Waste Management Bureau, Department of Environmental Quality, 1520 E. 6th Ave., PO Box 200901, Helena, MT 59620-0901;

(b) the permitted facility will operate in the new location for less than one year;

(c) the permitted facility can be expected to operate in compliance with:

(i) the Federal Clean Air Act, the Clean Air Act of Montana and rules adopted under those acts, including the ambient air quality standards; and

(ii) the Montana state implementation plan.

(d) the owner or operator of the permitted facility complies with ARM Title 17, chapter 8, subchapters 8, 9 and 10, as applicable.

(2) A Montana air quality permit may be transferred from one owner or operator to another if the department receives written notice of intent to transfer, including the names and authorized signatures of the transferor and the transferee.

(3) The department may not approve or conditionally approve a permit transfer if approval would result in a violation of the Clean Air Act of Montana or rules adopted under that Act, including the ambient air quality standards. If the department does not approve, conditionally approve, or deny a permit transfer within 30 days after receipt of a complete notice of intent to transfer, as described in (1)(a) or (2), the transfer is deemed approved.

AUTH: 75-2-111, 75-2-204, MCA
IMP: 75-2-211, MCA

RULE XVII INCORPORATION BY REFERENCE (1) For the purposes of this subchapter, the board hereby adopts and incorporates by reference:

(a) 40 CFR Part 51, subpart I, specifying requirements for state programs for issuing Montana air quality permits;

(b) 40 CFR Part 51, Appendix M, specifying recommended test methods for state implementation plans;

(c) 40 CFR Part 52, subpart BB specifying the Montana state implementation plan for controlling air pollution in Montana;

(d) 40 CFR 52.21, specifying requirements for prevention of significant deterioration of air quality;

(e) 40 CFR Part 60, specifying standards of performance for new stationary sources;

(f) 40 CFR Part 61, specifying emission standards for hazardous air pollutants;

(g) Tables 4-1 and 4-3 of the Department of Environmental Quality Air Quality Health Risk Assessment Procedures/Model, January 1995; and

(h) 42 USC 7412, et seq., listing hazardous air pollutants.

(2) A copy of materials incorporated by reference in this subchapter is available for public inspection and copying at the Air and Waste Management Bureau, Department of Environmental Quality, 1520 E. 6th Ave., PO Box 200901, Helena, MT 59620-0901.

(3) Copies of federal materials also may be obtained from:

(a) the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161, phone: (703)487-4650, fax: (703)321-8547, Internet: orders@ntis.fedworld.gov;

(b) the National Center for Environmental Publications and Information, (800)490-9198;

(c) the US Government Printing Office, Superintendent of Documents, Mail Stop: SSOP, Washington, DC 20402-9328; and

(d) at the libraries of each of the 10 EPA regional offices.

(4) Copies of the CFR may be obtained from the US Government Printing Office, Superintendent of Documents, Mail Stop: SSOP, Washington, DC 20402-9328.

AUTH: 75-2-111, 75-2-204, MCA
IMP: 75-2-211, 75-2-215, MCA

RULE XVIII ADDITIONAL REQUIREMENTS FOR INCINERATORS

(1) An applicant for a Montana air quality permit for an incineration facility subject to 75-2-215, MCA, shall submit a human health risk assessment protocol and a human health risk assessment as part of the application. The human health risk assessment must demonstrate that the ambient concentrations of pollutants resulting from emissions from the incineration facility subject to 75-2-215, MCA, constitute no more than a negligible risk to the public health, safety, and welfare and to the environment. At a minimum, the human health risk assessment must meet the following requirements:

(a) The human health risk assessment must include an emissions inventory listing potential emissions of all pollutants specified in the Federal Clean Air Act Hazardous Air Pollutants List (as defined in section 112(b) of the FCAA);

(b) A characterization of emissions and ambient concentrations of air pollutants, including hazardous air pollutants, from any existing emitting unit at the facility must be submitted as part of the permit application;

(c) The human health risk assessment must address the impacts of all pollutants inventoried in (1)(a), except as provided in (1)(c)(i) and (ii). Pollutants may be excluded from the human health risk assessment if the department determines that exposure from inhalation is the only appropriate pathway to consider in the human health risk assessment and if:

(i) the potential to emit the pollutant is less than $1.28 \times 10^{-13}$ grams per second, if the incineration facility subject to 75-2-215, MCA, has a stack height of at least two meters, a stack velocity of at least 0.645 meters per second, and a stack exit temperature of at least 800° F, and there is a distance of at least five meters from the stack to the property boundary; or

(ii) the ambient concentrations of the pollutants (calculated using the potential to emit; enforceable limits or controls may be considered) are less than the levels specified in Table 1 or Table 2.

(iii) The department shall periodically review accepted toxicity value databases to determine if the de minimis levels in (1)(c)(i) and (ii) should be updated.

(d) The human health risk assessment must address risks from all appropriate exposure pathways. For incineration facilities subject to 75-2-215, MCA, that do not emit or emit only minute amounts of hazardous air pollutants contained in Tables 4-1 or 4-2 of the department's health risk assessment procedures/model the application need address only impact from the inhalation exposure pathway and may use a department supplied screening model to assess human health risk;

(e) The human health risk assessment must address the human health risk impact of all hazardous air pollutants, as described in (1)(a), from the emitting unit or units that constitutes the incineration facility subject to 75-2-215, MCA, from all other existing incineration facilities subject to 75-2-215, MCA, at the facility, and from all other new or existing emitting units solely supporting any incineration facility subject to 75-2-215, MCA, such as fugitive emissions from fuel storage.

(i) Emissions from existing emitting units that partially support the incineration facility, but that do not change the type or amount of emissions allowed under any existing permit in effect at the time of the permit application, need not be considered in the human health risk assessment.

(ii) If an existing emitting unit, wholly or partially supporting the incineration facility, increases the types or amount of its emissions, so that a permit modification is required, that portion of the emissions increase attributable to the support of the incineration facility must be considered in the human health risk assessment;

(f) The health risk assessment must be performed in accordance with accepted human health risk assessment practices, or state or federal guidelines in effect at the time the human health risk assessment is performed, and must address impacts on sensitive populations. The human health risk must be calculated using the emitting unit's potential to emit. Enforceable limits or controls may be considered. The human health risk assessment procedures used may be modified if site-specific conditions warrant use of alternative procedures to appropriately assess human health risk;

(g) As part of the application, the applicant shall submit to the department a human health risk assessment protocol detailing the human health risk assessment procedures. At a minimum, the human health risk assessment protocol must include:

(i) a description of the pollutants considered in the analysis;

(ii) methods used in compiling the emission inventory;

(iii) ambient dispersion models and modeling procedures used;

(iv) toxicity values for each pollutant;

(v) exposure pathways and assumptions;

(vi) any statistical analysis applied; and

(vii) any other information necessary for the department to review the adequacy of the human health risk assessment;

(h) A summary of the human health risk assessment protocol must be included in the permit analysis. The summary must:

(i) clearly define the scope of the risk assessment;

(ii) describe the exposure pathways used;

(iii) specify any pollutants identified in the emission inventory that were not required to be included in the human health risk assessment;

(iv) state whether, and to what extent, the impacts of existing emissions, or the synergistic effect of combined pollutants, were considered in the final human health risk level calculated to determine compliance with the negligible risk standard; and

(v) state that environmental effects unrelated to human health were not considered in determining compliance with the negligible risk standard, but were evaluated as required by the Montana Environmental Policy Act, in determining compliance with all applicable rules or other requirements requiring protection of public health, safety, and welfare and the environment;

(i) The department may impose additional requirements for the human health risk assessment, on a case-by-case basis, if the department reasonably believes that the type or amount of material being incinerated, the proximity to sensitive populations, short-term emissions variations, acute health impact, or the local topographical or ventilation conditions require a more detailed health risk assessment to adequately define the potential public health impact. Additional requirements for the human health risk assessment may include

specific emission inventory procedures for determining emissions from the incineration facility subject to 75-2-215, MCA, use of more sophisticated air dispersion models or modeling procedures and consideration of additional exposure pathways.

TABLE 1

| CAS # | CHEMICAL | CANCER ANNUAL (µg/m$^3$) |
|---|---|---|
| 75070 | Acetaldehyde | 4.5455e-02 |
| 79061 | Acrylamide | 7.6923e-05 |
| 107131 | Acrylonitrile | 1.4706e-03 |
| 1332214 | Asbestos | 5.1546e-04 |
| 71432 | Benzene | 1.2048e-02 |
| 92875 | Benzidine | 1.4925e-06 |
| 117817 | Bis(2-Ethylhexyl) Phthalate (DEHP) | 4.1667e-02 |
| 542881 | Bis(Chloromethyl) Ether | 1.6129e-06 |
| 75252 | Bromoform | 9.0909e-02 |
| 106990 | 1,3-Butadiene | 3.5714e-04 |
| 56235 | Carbon Tetrachloride | 6.6667e-03 |
| 57749 | Chlordane | 2.7027e-04 |
| 67663 | Chloroform | 4.3478e-03 |
| 126998 | Chloroprene | 7.6923e-01 |
| 132649 | Dibenzofurans | 2.6316e-09 |
| 96128 | 1,2-Dibromo-3-Chloropropane | 5.0000e-05 |
| 106467 | 1,4-Dichlorobenzene (p) | 9.0909e-03 |
| 91941 | 3,3-Dichlorobenzidene | 2.9412e-04 |
| 111444 | Dichloroethyl Ether | 3.0303e-04 |
| 123911 | 1,4-Dioxane (1,4-Diethyleneoxide) | 1.2987e-02 |
| 122667 | 1,2-Diphenylhydrazine | 4.5455e-04 |
| 106898 | Epichlorohydrin | 8.3333e-02 |
| 51796 | Ethyl Carbamate (Urethane) | 3.4483e-04 |
| 106934 | Ethylene Dibromide | 4.5455e-04 |
| 107062 | Ethylene Dichloride | 3.8462e-03 |
| 75218 | Ethylene Oxide | 1.1364e-03 |
| 50000 | Formaldehyde | 7.6923e-03 |
| 76448 | Heptachlor | 7.6923e-05 |
| 118741 | Hexachlorobenzene | 2.1739e-04 |
| 87683 | Hexachlorobutadiene | 4.5455e-03 |
| 67721 | Hexachloroethane | 2.5000e-02 |
| 302012 | Hydrazine | 2.0408e-05 |
| 58899 | Lindane (All Isomers) | 9.0909e-05 |
| 75092 | Methylene Chloride | 2.1277e-01 |
| 62759 | N-Nitrosodimethylamine | 7.1429e-06 |
| 87865 | Pentachlorophenol | 2.1739e-02 |
| 1336363 | Polychlorinated Biphenyls | 7.1429e-05 |

| | | |
|---|---|---|
| 75569 | Propylene Oxide | 2.7027e-02 |
| 1746016 | 2,3,7,8-TCDD | 2.6316e-09 |
| 79345 | 1,1,2,2-Tetra-chloroethane | 1.7241e-03 |
| 127184 | Tetrachloro-ethylene (Perch) | 1.6949e-02 |
| 8001352 | Toxaphene | 3.1250e-04 |
| 79005 | 1,1,2-Trichloroethane | 6.2500e-03 |
| 79016 | Trichloroethylene | 5.0000e-02 |
| 88062 | 2,4,6-Tri-chlorophenol | 3.2258e-02 |
| 75014 | Vinyl Chloride | 1.2821e-03 |
| 75354 | Vinylidene Chloride | 2.0000e-03 |
| | Arsenic Compounds | 2.3256e-05 |
| | Beryllium Compounds | 4.1667e-05 |
| | Cadmium Compounds | 5.5556e-05 |
| | Chromium Compounds | 8.3333e-06 |
| | Coke Oven Emissions | 1.6129e-04 |
| | Nickel Compounds | 3.8462e-04 |
| | Polycylic Organic Matter | |
| 56553 | Benz(a)anthracene | 5.8824e-05 |
| 205992 | Benzo(b)fluoranthene | 5.8824e-05 |
| 207089 | Benzo(k)fluoranthene | 5.8824e-05 |
| 50328 | Benzo(a)pyrene | 5.8824e-05 |
| 53703 | Dibenz(a,h)anthracene | 5.8824e-05 |
| 193395 | Indeno(1,2,3-cd) pyrene | 5.8824e-05 |

**TABLE 2**

| CAS # | CHEMICAL | NON-CANCER CHRONIC ANNUAL ($\mu g/m^3$) | NON-CANCER ACUTE ANNUAL ($\mu g/m^3$) |
|---|---|---|---|
| 75070 | Acetaldehyde | 9.0000e-02 | |
| 107028 | Acrolein | 2.2000e-04 | 2.5000e-02 |
| 79061 | Acrylamide | 7.0000e-03 | |
| 79107 | Acrylic Acid | 1.0000e-02 | |
| 107131 | Acrylonitrile | 2.0000e-02 | |
| 107051 | Allyl Chloride | 1.0000e-02 | |
| 62533 | Aniline | 1.0000e-02 | |
| 71432 | Benzene | 7.1000e-01 | |
| 92875 | Benzidine | 1.0000e-01 | |
| 100447 | Benzyl Chloride | 1.2000e-01 | 5.0000e-01 |
| 117817 | Bis(2-Ethylhexyl) Phthalate (DEHP) | 7.0000e-01 | |
| 75150 | Carbon Disulfide | 7.0000e+00 | |
| 56235 | Carbon Tetra-chloride | 2.4000e-02 | 1.9000e+00 |
| 7782505 | Chlorine | 7.1000e-01 | 2.3000e-01 |
| 532274 | 2-Chloroaceto-phenone | 3.0000e-04 | |
| 108907 | Chlorobenzene | 7.0000e-01 | |

| | | | |
|---|---|---|---|
| 67663 | Chloroform | 3.5000e-01 | |
| 126998 | Chloroprene | 1.0000e-02 | |
| 1319773 | Cresols/Cresylic Acid | 1.8000e+00 | |
| 95487 | o-Cresol | 1.8000e+00 | |
| 108394 | m-Cresol | 1.8000e+00 | |
| 106445 | p-Cresol | 1.8000e+00 | |
| 132649 | Dibenzofurans | 3.5000e-08 | |
| 96128 | 1,2-Dibromo-3-Chloropropane | 2.0000e-03 | |
| 106467 | 1,4-Dichloro-benzene (p) | 8.0000e+00 | |
| 542756 | 1,3-Dichloro-propene | 2.0000e-01 | |
| 62737 | Dichlorvos | 5.0000e-03 | |
| 68122 | Dimethyl Formamide | 3.0000e-01 | |
| 123911 | 1,4-Dioxane (1,4-Diethyleneoxide) | 4.0000e-02 | 2.0000e+01 |
| 106898 | Epichlorohydrin | 1.0000e-02 | |
| 106887 | 1,2-Epoxybutane | 2.0000e-01 | |
| 140885 | Ethyl Acrylate | 4.8000e-01 | |
| 100414 | Ethyl Benzene | 1.0000e+01 | |
| 75003 | Ethyl Chloride (Chloroethane) | 1.0000e+02 | |
| 106934 | Ethylene Dibromide | 4.6000e-02 | |
| 107062 | Ethylene Di-chloride | 9.5000e-01 | |
| 75218 | Ethylene Oxide | 6.0000e+00 | |
| 50000 | Formaldehyde | 3.6000e-02 | 3.7000e+00 |
| 118741 | Hexachlorobenzene | 2.8000e-02 | |
| 77474 | Hexachloro-cyclopentadiene | 2.4000e-03 | |
| 822060 | Hexamethylene-1,6-Diisocyanate | 1.0000e-04 | |
| 110543 | Hexane | 2.0000e+00 | |
| 302012 | Hydrazine | 2.4000e-03 | |
| 7647010 | Hydrochloric Acid | 2.0000e-01 | 3.0000e+01 |
| 7664393 | Hydrogen Fluoride (HF Acid) | 5.9000e-02 | 5.8000e+00 |
| 58899 | Lindane (All Isomers) | 1.0000e-02 | |
| 108316 | Maleic Anhydride | 2.4000e-02 | 1.0000e-01 |
| 67561 | Methanol | 6.2000e+00 | |
| 74839 | Methyl Bromide (Bromomethane) | 5.0000e-02 | |
| 71556 | Methyl Chloroform | 3.2000e+00 | 1.9000e+03 |
| 78933 | Methyl Ethyl Ketone (2-Butanone) | 1.0000e+01 | |
| 624839 | Methyl Isocyanate | 3.6000e-03 | |
| 80626 | Methyl Metha-crylate | 9.8000e+00 | |
| 1634044 | Methyl Tert Butyl Ether | 3.0000e+01 | |
| 75092 | Methylene Chloride | 3.0000e+01 | 3.5000e+01 |

| | | | |
|---|---|---|---|
| 101688 | Methylene Diphenyl Diisocyanate | 2.0000e-04 | |
| 101779 | 4,4'-Methylene-dianiline | 1.9000e-02 | |
| 91203 | Naphthalene | 1.4000e-01 | |
| 98953 | Nitrobenzene | 1.7000e-02 | |
| 79469 | 2-Nitropropane | 2.0000e-01 | |
| 87865 | Pentachlorophenol | 2.0000e-03 | |
| 108952 | Phenol | 4.5000e-01 | |
| 75445 | Phosgene | 1.2000e+00 | |
| 7803512 | Phosphine | 3.0000e-03 | |
| 7723140 | Phosphorus | 7.0000e-04 | |
| 85449 | Phthalic Anhydride | 7.0000e+01 | |
| 1336363 | Polychlorinated Biphenyls | 1.2000e-02 | |
| 78875 | Propylene Di-chloride | 4.0000e-02 | |
| 75569 | Propylene Oxide | 3.0000e-01 | 1.0000e+01 |
| 100425 | Styrene | 1.0000e+01 | |
| 1746016 | 2,3,7,8-TCDD | 3.5000e-08 | |
| 127184 | Tetrachloro-ethylene (Perch) | 3.5000e-01 | 6.8000e+01 |
| 108883 | Toluene | 4.0000e+00 | |
| 584849 | 2,4-Toluene Di-isocyanate | 7.0000e-04 | |
| 79016 | Trichloroethylene | 6.4000e+00 | |
| 121448 | Triethylamine | 7.0000e-02 | |
| 108054 | Vinyl Acetate | 2.0000e+00 | |
| 593602 | Vinyl Bromide | 3.0000e-02 | |
| 75014 | Vinyl Chloride | 2.6000e-01 | |
| 75354 | Vinylidene Chloride | 3.2000e-01 | |
| 1330207 | Xylenes (Isomers and Mixture) | 3.0000e+00 | 4.4000e+01 |
| | Antimony Compounds | 2.0000e-03 | |
| | Arsenic Compounds | 5.0000e-03 | |
| | Beryllium Compounds | 4.8000e-05 | |
| | Cadmium Compounds | 3.5000e-02 | |
| | Chromium Compounds | 2.0000e-05 | |
| | Cyanide Compounds | 7.0000e-01 | 3.3000e+01 |
| | Ethyl Glycol But Ether | 2.0000e-01 | |
| | Ethyl Glycol Ethyl Ether | 3.7000e+00 | |
| | Ethyl Gly MonoBut Ether | 1.5000e+01 | |
| | Ethyl Gly Mono-Ethyl Ether | 2.0000e+00 | |
| | Ethyl Gly Ethyl Ether Acetate | 6.4000e-01 | |
| | Ethyl Glycol Methyl Ether | 2.0000e-01 | 3.2000e+00 |
| | Ethyl Gly Methyl | 5.7000e-01 | |

| | | |
|---|---|---|
| Ether Acetate | | |
| Ethyl Gly Mono-Ethyl Ether Acetate | 1.6000e+01 | |
| Lead Compounds | 1.5000e-02 | |
| Manganese Compounds | 5.0000e-04 | |
| Mercury Compounds | 3.0000e-03 | 3.0000e-01 |
| Fine Mineral Fibers | 2.4000e-01 | |
| Nickel Compounds | 2.4000e-03 | 1.0000e-02 |
| Selenium Compounds | 5.0000e-03 | 2.0000e-02 |

AUTH: 75-2-111, 75-2-204, MCA
IMP: 75-2-204, 75-2-211, 75-2-215, MCA

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

17.8.101 DEFINITIONS As used in this chapter, unless indicated otherwise in a specific subchapter, the following definitions apply:

(1) through (3) remain the same.

(4) "~~Air quality preconstruction~~ Montana air quality permit" means a permit issued, altered or modified pursuant to subchapters 7, 8, 9, or 10 of this chapter.

(5) through (43) remain the same.

AUTH: 75-2-111, MCA
IMP: Title 75, Chapter 2, MCA

17.8.110 MALFUNCTIONS (1) through (6) remain the same.

(7)~~(a)~~ Malfunctioning process or emission control equipment may be temporarily replaced without obtaining ~~an~~ a Montana air quality ~~preconstruction~~ permit under the requirements of ARM Title 17, chapter 8, subchapter 7, if:

(a) the department has been notified of the malfunction in compliance with the requirements of (2) ~~of this rule;~~ and

(b) ~~if~~ continued operation or non-operation of the malfunctioning equipment would:

(i) through (iv) remain the same.

~~(b)~~ (8) If construction, installation, or use of temporary replacement equipment under ~~(a)~~ (7)(a) and (b) ~~above~~ constitutes a major modification and subjects a major stationary source to the requirements of ARM Title 17, chapter 8, subchapters 8, 9, or 10, the source must comply with the requirements of the applicable subchapter prior to construction, installation, or use of the temporary replacement equipment.

~~(c)~~ (9) Any source that constructs, installs, or uses temporary replacement equipment under (7)(a) ~~above~~ shall comply with the following conditions:

(i) through (iv) remain the same, but are renumbered (a) through (d).

~~(v)~~ (e) The temporary replacement equipment must be removed or rendered inoperable within 180 days after initial startup of the temporary replacement equipment, or within 30 days after startup of the repaired malfunctioning process or emission control equipment, whichever is earlier, unless the source has submitted to the department an application for a ~~preconstruction~~ Montana air quality permit for the temporary replacement equipment or the department has approved a plan for removing the temporary replacement equipment or rendering the temporary replacement equipment inoperable by a specific date.

AUTH: 75-2-111, 75-2-203, MCA
IMP: 75-2-203, MCA

17.8.309 PARTICULATE MATTER, FUEL BURNING EQUIPMENT

(1) through (4) remain the same.

(5) This rule does not apply to particulate matter emitted from:

(a) remains the same.

(b) sources constructed after March 16, 1979, that have a specific particulate emission limitation contained in ~~an~~ a Montana air quality ~~preconstruction~~ permit obtained under ARM Title 17, chapter 8, subchapter 7, a court order, board order or department order, or a process-specific rule.

AUTH: 75-2-111, 75-2-203, MCA
IMP: 75-2-203, MCA

17.8.310 PARTICULATE MATTER, INDUSTRIAL PROCESSES

(1) through (2)(b) remain the same.

(3) This rule does not apply to particulate matter emitted from:

(a) through (d) remain the same.

(e) sources constructed after March 16, 1979, that have a specific particulate emission limitation contained in ~~an~~ a Montana air quality ~~preconstruction~~ permit obtained under ARM Title 17, chapter 8, subchapter 7, a court order, board order or department order, or a process-specific rule.

AUTH: 75-2-111, 75-2-203, MCA
IMP: 75-2-203, MCA

17.8.316 INCINERATORS (1) through (5) remain the same.

(6) This rule does not apply to incinerators for which ~~an~~ a Montana air quality ~~preconstruction~~ permit has been issued under 75-2-215, MCA, and ~~ARM 17.8.706(5)~~ [NEW RULE XVIII].

AUTH: 75-2-111, 75-2-203, MCA
IMP: 75-2-203, MCA

17.8.342 EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES (1) through (5) remain the same.

(6) As further described below, and except as expressly modified by this rule, the procedural requirements of ARM Title 17, chapter 8, subchapter 7 apply to an application for a notice of MACT approval or 112(g) exemption. For purposes of this rule:

(a) all references in applicable provisions of ARM Title 17, chapter 8, subchapter 7 to "permit" or "Montana air quality ~~preconstruction~~ permit" or "air quality permit" mean "notice of MACT approval" or "112(g) exemption," as appropriate;

(b) all references in applicable provisions of ARM Title 17, chapter 8, subchapter 7 to "new or ~~altered source~~ modified facility" or "new or modified emitting unit" mean "major source of HAP".

(7) The following sections of ARM Title 17, chapter 8, subchapter 7 govern the application, review, and final approval or denial of a notice of MACT approval or 112(g) exemption: ~~ARM 17.8.710(1) through (3), 17.8.710(5), 17.8.710(6), 17.8.716, 17.8.717, 17.8.720, and 17.8.730~~ [NEW RULES VI, VII, IX, X, XI and XII].

(8) through (13) remain the same.

AUTH: 75-2-111, 75-2-203, 75-2-204, MCA
IMP: 75-2-203, 75-2-204, 75-2-211, MCA

17.8.818 REVIEW OF MAJOR STATIONARY SOURCES AND MAJOR MODIFICATIONS--SOURCE APPLICABILITY AND EXEMPTIONS (1) No major stationary source or major modification shall begin actual construction unless, as a minimum, requirements contained in ARM 17.8.819 through 17.8.827 have been met. A major stationary source or major modification exempted from the requirements of subchapter 7 under ~~ARM 17.8.705(1)~~ [NEW RULE IV] shall, if applicable, still be required to obtain ~~an~~ a Montana air quality ~~preconstruction~~ permit and comply with all applicable requirements of this subchapter.

(2) through (7) remain the same.

AUTH: 75-2-111, 75-2-203, MCA
IMP: 75-2-202, 75-2-203, 75-2-204, MCA

17.8.825 SOURCES IMPACTING FEDERAL CLASS I AREAS--ADDITIONAL REQUIREMENTS (1) and (2) remain the same.

(3) Federal land managers with direct responsibility for management of Class I lands may present to the department, after reviewing the department's preliminary determination required under ~~ARM 17.8.720,~~ [NEW RULE XI], a demonstration that the emissions from the proposed source or modification would have an adverse impact on the air quality-related values (including visibility) of any federal mandatory Class I lands, notwithstanding that the change in air quality resulting from emissions from such source or modification would not cause or contribute to concentrations which would exceed the maximum allowable increases for a Class I area. If the department

concurs with such demonstration, the department may not issue the permit.

(4) through (6) remain the same.

AUTH: 75-2-111, 75-2-203, MCA
IMP: 75-2-202, 75-2-203, 75-2-204, MCA

17.8.826 PUBLIC PARTICIPATION (1) The department shall notify all applicants in writing within 30 days of the date of receipt of an application as to the completeness of the application or any deficiency in the application or information submitted as provided in ~~ARM 17.8.720~~ [NEW RULE XI]. In the event of such a deficiency, the date of receipt of the application will be the date on which the department received all required information unless the department notifies the applicant in writing within 30 days thereafter that the application is still incomplete. This, and any subsequent notice of incompleteness shall follow the same form and requirements as the original notice of incompleteness.

(2) In accordance with ~~ARM 17.8.720~~ [NEW RULE XI], the department shall:

(a) through (9) remain the same.

AUTH: 75-2-111, 75-2-203, MCA
IMP: 75-2-202, 75-2-203, 75-2-204, MCA

17.8.901 DEFINITIONS For the purposes of this subchapter:

(1) through (14)(e)(ii) remain the same.

(iii) the department has not relied on it in issuing any Montana air quality ~~preconstruction~~ permit under regulations approved pursuant to 40 CFR Part 51, subpart I (July 1, 1993 ed.), or the state has not relied on it in demonstrating attainment or reasonable further progress; and

(iv) through (20) remain the same.

AUTH: 75-2-111, 75-2-203, MCA
IMP: 75-2-202, 75-2-203, 75-2-204, MCA

17.8.904 WHEN ~~AIR QUALITY PRECONSTRUCTION PERMIT~~ MONTANA AIR QUALITY PERMIT REQUIRED (1) Any new major stationary source or major modification which would locate anywhere in an area designated as non-attainment for a national ambient air quality standard under 40 CFR 81.327 and which is major for the pollutant for which the area is designated nonattainment, shall, prior to construction, obtain from the department ~~an~~ a Montana air quality ~~preconstruction~~ permit in accordance with subchapter 7 and all requirements contained in this subchapter if applicable. A major stationary source or major modification exempted from the requirements of subchapter 7 under ~~ARM 17.8.705(1)~~ [NEW RULES IV and V] which would locate anywhere in an area designated as nonattainment for a national ambient air quality standard under 40 CFR 81.327 and which is major for the pollutant for which the area is designated

nonattainment, shall, prior to construction, still be required to obtain ~~an~~ a Montana air quality ~~preconstruction~~ permit and comply with the requirements of ~~ARM 17.8.706, 17.8.710, and 17.8.720~~ [NEW RULES VI, VII, X, XI and XII], and with all applicable requirements of this subchapter.

(2) Any source or modification located anywhere in an area designated as nonattainment for a national ambient air quality standard under 40 CFR 81.327 which becomes a major stationary source or major modification for the pollutant for which the area is designated nonattainment solely by virtue of a relaxation in any enforceable limitation which was established after August 7, 1980, on the capacity of the source or modification otherwise to emit a pollutant (such as a restriction on hours of operation) shall obtain from the department ~~an~~ a Montana air quality ~~preconstruction~~ permit as though construction had not yet commenced on the source or modification, in accordance with subchapter 7 and all requirements of this subchapter.

AUTH: 75-2-111, 75-2-203, MCA
IMP: 75-2-202, 75-2-203, 75-2-204, MCA

17.8.905 ADDITIONAL CONDITIONS OF ~~AIR QUALITY PRECONSTRUCTION PERMIT~~ MONTANA AIR QUALITY PERMIT (1) The department shall not issue ~~an~~ a Montana air quality ~~preconstruction~~ permit required under ARM 17.8.904, unless the requirements of subchapter 7 and the following additional conditions are met:

(a) through (c) remain the same.

(d) The Montana air quality ~~preconstruction~~ permit contains a condition requiring the source to submit documentation, prior to commencement of operation that the offsets required in the permit have occurred.

(e) through (3) remain the same.

(4) The issuance of ~~an~~ a Montana air quality ~~preconstruction~~ permit shall not relieve any owner or operator of the responsibility to comply fully with applicable provisions of the Montana state implementation plan and any other requirements contained in or pursuant to local, state or federal law.

AUTH: 75-2-111, 75-2-203, MCA
IMP: 75-2-202, 75-2-203, 75-2-204, MCA

17.8.906 BASELINE FOR DETERMINING CREDIT FOR EMISSIONS AND AIR QUALITY OFFSETS (1) and (2) remain the same.

(3) For an existing fuel combustion source, credit shall be based on the actual emissions for the type of fuel being burned at the time the application to construct is filed. If the existing source commits to switch to a cleaner fuel at some future date, emissions offsets credit based on the actual emissions for the fuels involved is not acceptable, unless the Montana air quality ~~preconstruction~~ permit is conditioned to require the use of a specified alternative control measure

which would achieve the same degree of emissions reduction should the source switch back to a dirtier fuel at some later date. The department shall ensure that adequate long-term supplies of the new fuel are available before granting emissions offset credit for fuel switches.

(4) through (9) remain the same.

(10) Credits for an emissions reduction can be claimed to the extent that the department has not relied on it in issuing any Montana air quality ~~preconstruction~~ permit under subchapters 7, 8, 9, and 10, or Montana has not relied on it in a demonstration of attainment or reasonable further progress.

(11) remains the same.

(12) Emission reductions otherwise required by any applicable rule, regulation, Montana air quality ~~preconstruction~~ permit condition or the FCAA are not creditable as emissions reductions for the purposes of the offset requirement in ARM 17.8.905(1)(c). Incidental emission reductions which are not otherwise required by any applicable rule, regulation, Montana air quality ~~preconstruction~~ permit or the FCAA shall be creditable as emission reductions for such purposes if such emission reduction meets the requirements of this rule.

AUTH: 75-2-111, 75-2-203, MCA
IMP: 75-2-202, 75-2-203, 75-2-204, MCA

17.8.1004 WHEN MONTANA AIR QUALITY ~~PRECONSTRUCTION~~ PERMIT REQUIRED (1) Any new major stationary source or major modification which would locate anywhere in an area designated as attainment or unclassified for a national ambient air quality standard under 40 CFR 81.327 and which would cause or contribute to a violation of a national ambient air quality standard for any pollutant at any locality that does not or would not meet the national ambient air quality standard for that pollutant, shall obtain from the department ~~an~~ a Montana air quality ~~preconstruction~~ permit prior to construction in accordance with subchapters 7 and 8 and all requirements contained in this subchapter if applicable. A major stationary source or major modification exempted from the requirements of subchapter 7 under ~~ARM 17.8.705(1)~~ [NEW RULE IV] which would locate anywhere in an area designated as attainment or unclassified for a national ambient air quality standard under 40 CFR 81.327 and which would cause or contribute to a violation of a national ambient air quality standard for any pollutant at any locality that does not or would not meet the national ambient air quality standard for that pollutant, shall, prior to construction, still be required to obtain ~~an~~ a Montana air quality ~~preconstruction~~ permit and comply with the requirements of ~~ARM 17.8.706, 17.8.710, and 17.8.710~~, [NEW RULES VI, VII, X, XI and XII, and ~~all~~ any other applicable requirements of this subchapter.

(2) remains the same.

AUTH: 75-2-111, 75-2-203, MCA
IMP: 75-2-202, 75-2-203, 75-2-204, MCA

17.8.1005 ADDITIONAL CONDITIONS OF ~~AIR QUALITY PRECONSTRUCTION~~ MONTANA AIR QUALITY PERMIT (1) The department will not issue ~~an~~ a Montana air quality ~~preconstruction~~ permit required under ARM 17.8.1004 unless the requirements of subchapters 7 and 8 and the following additional conditions are met:

(a) through (c) remain the same.

(d) the Montana air quality ~~preconstruction~~ permit contains a condition requiring the source to submit documentation, prior to commencement of operation that the offsets required in the Montana air quality permit have occurred.

(2) If the department determines that technological or economic limitations on the application of measurement methodology to a particular class of sources would make the imposition of an enforceable numerical emission standard infeasible, the department may, instead, prescribe a design, operational or equipment standard. In such cases, the department shall make its best estimate as to the emission rate that will be achieved, and must take such steps as are necessary to ensure that this rate is federally enforceable. Any Montana air quality ~~preconstruction~~ permit issued without an enforceable numerical emission standard must contain enforceable conditions which assure that the design characteristics or equipment will be properly maintained (or that the operational conditions will be properly performed) so as to continuously achieve the assumed degree of control. As used in this subchapter, the term "emission limitation" shall also include such design, operational, or equipment standards.

(3) and (4) remain the same.

(5) The issuance of ~~an~~ a Montana air quality ~~preconstruction~~ permit does not relieve any owner or operator of the responsibility to comply fully with applicable provisions of the Montana state implementation plan and any other requirements of local, state or federal law.

(6) remains the same.

AUTH: 75-2-111, 75-2-203, MCA
IMP: 75-2-202, 75-2-203, 75-2-204, MCA

17.8.1106 VISIBILITY IMPACT ANALYSIS (1) remains the same.

(2) The owner or operator of a proposed major stationary source or major modification shall submit all information necessary to support any analysis or demonstration required by these rules pursuant to ~~ARM 17.8.706~~ [NEW RULE VI].

AUTH: 75-2-111, 75-2-203, MCA
IMP: 75-2-203, 75-2-204, 75-2-211, MCA

17.8.1109 ADVERSE IMPACT AND FEDERAL LAND MANAGER (1) Federal land managers may present to the department, after the preliminary determination required under ~~ARM 17.8.720(2)~~ [NEW RULE XI], demonstration that the emissions from the proposed source or modification may cause or contribute to adverse impact on visibility in any federal Class I area, notwithstanding that the air quality change resulting from the emissions from such source or modification would not cause or contribute to concentrations which would exceed the maximum allowable increment defined in ARM 17.8.804 (PSD) for a federal Class I area.

(2) and (3) remain the same.

AUTH: 75-2-111, 75-2-203, MCA
IMP: 75-2-203, 75-2-204, 75-2-211, MCA

17.8.1201 DEFINITIONS (1) through (8) remain the same.

(9) "~~Air quality preconstruction~~ Montana air quality permit" means a permit issued, altered, or modified pursuant to subchapters 7, 8, 9, or 10 of this chapter.

(10) "Applicable requirement" means all of the following as they apply to emissions units in a source requiring an air quality operating permit (including requirements that have been promulgated or approved by the department or the administrator through rulemaking at the time of issuance of the air quality operating permit, but have future-effective compliance dates, provided that such requirements apply to sources covered under the operating permit):

(a) remains the same.

(b) any federally enforceable term, condition or other requirement of any Montana air quality ~~preconstruction~~ permit issued by the department under subchapters 7, 8, 9, and 10 of this chapter, or pursuant to regulations approved or promulgated through rulemaking under Title I of the FCAA, including parts C and D;

(c) through (33) remain the same.

AUTH: 75-2-217, MCA
IMP: 75-2-217, 75-2-218, MCA

17.8.1204 AIR QUALITY OPERATING PERMIT PROGRAM APPLICABILITY (1) through (2)(c) remain the same.

(3) The department may exempt a source listed in (1) ~~above~~ from the requirement to obtain an air quality operating permit by establishing federally enforceable limitations which limit that source's potential to emit, such that the source is no longer a major stationary source, as defined by ARM 17.8.1201(23).

(a) and (b) remain the same.

(c) Federally enforceable limitations that limit a source's potential to emit may be established through conditions contained in ~~an~~ a Montana air quality ~~preconstruction~~ permit or through a judicial order or an administrative order issued by the department or the board,

that has been adopted into the Montana state implementation plan.

(d) In order to exempt a source from the requirement to obtain an air quality operating permit, the department may, at a source's request, issue ~~an~~ a Montana air quality ~~preconstruction~~ permit to establish federally enforceable permit terms, solely to limit a source's potential to emit, even if there is no associated construction at the source, the source has ~~an~~ a Montana air quality ~~preconstruction~~ permit or the source otherwise is not required to obtain a Montana air quality ~~preconstruction~~ permit.

(4) through (7) remain the same.

AUTH: 75-2-217, MCA
IMP: 75-2-217, MCA

17.8.1205 REQUIREMENTS FOR TIMELY AND COMPLETE AIR QUALITY OPERATING PERMIT APPLICATIONS (1) remains the same.

(2) To be considered timely for the purposes of this rule, a source that is required to obtain a permit pursuant to this subchapter must file its application with the department as follows:

(a) One-third of all sources in existence on the date this rule is adopted by the board, or sources that have obtained Montana air quality ~~preconstruction~~ permits prior to the adoption date of this rule but commence operation after such adoption date, shall submit an air quality operating permit application no later than one year after the adoption date or within 30 days of the date the permit program is approved by the administrator (including partial or interim approval), whichever is later. The remainder of these sources shall submit a permit application no later than one year after the date the permit program is approved by the administrator (including partial or interim approval). Within 30 days after the adoption date of this rule, the department shall notify the 1/3 of the above-described sources that are required to submit applications for permits under this subchapter by the first deadline set forth above. The method used by the department to determine which of the above-described sources are included in the initial 1/3 must be fair and equitable and shall to the greatest extent practicable provide for a representative sample of air quality operating permit sources in terms of source size and type.

(b) remains the same.

(c)~~(i)~~ Sources required to obtain an air quality operating permit or permit revision that are also required to obtain ~~an~~ a Montana air quality ~~preconstruction~~ permit under this chapter shall submit an application for an air quality operating permit or permit revision concurrent with the submittal of the Montana air quality ~~preconstruction~~ permit application.

~~(ii)~~ (i) The processing of the Montana air quality ~~preconstruction~~ and operating permits will be coordinated to the greatest extent possible, but each permit will be issued according to the applicable procedures and time frames. Each application for an air quality operating permit, permit renewal, or permit revision and the associated Montana air quality ~~preconstruction~~ permit application will be processed independently of any other pending application under this chapter, including sources with pending air quality operation permit applications who submit an application for a new or altered Montana air quality ~~preconstruction~~ permit during the initial transition period. Submittal of new air quality permit applications shall not impede the issuance of any pending air quality permit application.

~~(iii)~~ (ii) During the initial transition period, sources that receive final Montana air quality ~~preconstruction~~ permits prior to their submittal of an operating permit application shall be required to address any changes to their facility in the operating permit application. The operating permit application shall be submitted per the schedule prescribed in (2)(a) ~~above~~.

(d) through (5) remain the same.

AUTH: 75-2-217, 75-2-218, MCA
IMP: 75-2-217, 75-2-218, MCA

17.8.1220 AIR QUALITY OPERATING PERMIT ISSUANCE, RENEWAL, REOPENING AND MODIFICATION (1) through (4) remain the same.

(5) The department shall ensure priority is given to taking action on Montana air quality ~~preconstruction~~ permit applications for construction or modification submitted pursuant to subchapters 7, 8, 9, and 10 of this chapter.

(6) through (8) remain the same.

(9) The submittal of a complete air quality operating permit application does not affect a requirement that a source obtain ~~an~~ a Montana air quality ~~preconstruction~~ permit prior to commencement of construction under subchapters 7, 8, 9, or 10 of this chapter.

(10) through (13) remain the same.

AUTH: 75-2-217, 75-2-218, MCA
IMP: 75-2-217, 75-2-218, MCA

17.8.1224 ADDITIONAL REQUIREMENTS FOR OPERATIONAL FLEXIBILITY AND AIR QUALITY OPERATING PERMIT CHANGES THAT DO NOT REQUIRE REVISIONS (1) A source holding an air quality operating permit is authorized to make changes within a permitted facility as described in (3) and (4) ~~of this rule~~, providing the following conditions are met:

(a) the proposed changes do not require the source or stack to obtain ~~an~~ a Montana air quality ~~preconstruction~~ permit under subchapter 7 of this chapter;

(b) through (6) remain the same.

(7) Notwithstanding any provisions of this rule, the following changes must be submitted as an air quality operating permit revision:

(a) remains the same.

(b) any change that increases emissions above those allowed in the Montana air quality ~~preconstruction~~ permit;

(c) through (e) remain the same.

AUTH: 75-2-217, MCA
IMP: 75-2-217, 75-2-218, MCA

17.8.1226 ADDITIONAL REQUIREMENTS FOR MINOR AIR QUALITY OPERATING PERMIT MODIFICATIONS (1) Minor air quality operating permit modification procedures may be used only for those permit modifications that:

(a) through (d) remain the same.

(e) do not require ~~an~~ a Montana air quality ~~preconstruction~~ permit;

(f) through (5) remain the same.

(6) Unless the proposed change requires ~~an~~ a Montana air quality ~~preconstruction~~ permit, the source may make the change proposed in its minor modification application immediately after such application is filed with the department. After the source makes the proposed change, and until the department takes any of the actions specified in (5) ~~of this rule~~, the source must comply with both the applicable requirements governing the change and the proposed permit terms and conditions. During this time period, the source need not comply with the existing permit terms and conditions that it seeks to modify. However, if the source fails to comply with its proposed permit terms and conditions during this time period, the existing permit terms and conditions that it seeks to modify may be enforced against it.

(7) through (12) remain the same.

AUTH: 75-2-217, MCA
IMP: 75-2-217, MCA

5. The rules proposed for repeal are as follows:

17.8.701 DEFINITIONS (AUTH: 75-2-111, 75-2-204, MCA; IMP: 75-2-204, 75-2-211, 75-2-215, MCA), located at page 17-421, Administrative Rules of Montana. This rule would be replaced by NEW RULE II, DEFINITIONS.

17.8.702 INCORPORATION BY REFERENCE (AUTH: 75-2-111, 75-2-204, MCA; IMP: 75-2-211, 75-2-215, MCA), located at page 17-424, Administrative Rules of Montana. This rule would be replaced by NEW RULE XVII, INCORPORATION BY REFERENCE.

17.8.704 GENERAL PROCEDURES FOR AIR QUALITY PRECONSTRUCTION PERMITTING (AUTH: 75-2-111, 75-2-204, MCA; IMP: 75-2-204, 75-2-211, MCA), located at page 17-427,

Administrative Rules of Montana. This rule would be replaced by NEW RULE III, MONTANA AIR QUALITY PERMITS--WHEN REQUIRED.

17.8.705 WHEN PERMIT REQUIRED--EXCLUSIONS (AUTH: 75-2-111, 75-2-204, MCA; IMP: 75-2-204, 75-2-211, MCA), located at page 17-429, Administrative Rules of Montana. This rule would be replaced by NEW RULE III, MONTANA AIR QUALITY PERMITS--WHEN REQUIRED; NEW RULE IV, MONTANA AIR QUALITY PERMITS--GENERAL EXCLUSIONS; and NEW RULE V, MONTANA AIR QUALITY PERMITS--EXCLUSION FOR DE MINIMIS CHANGES.

17.8.706 NEW OR ALTERED SOURCES AND STACKS--PERMIT APPLICATION REQUIREMENTS (AUTH: 75-2-111, 75-2-204, MCA; IMP: 75-2-204, 75-2-211, 75-2-215, MCA), located at page 17-431, Administrative Rules of Montana. This rule would be replaced by NEW RULE VI, NEW OR MODIFIED EMITTING UNITS--PERMIT APPLICATION REQUIREMENTS; and NEW RULE XVIII, ADDITIONAL REQUIREMENTS FOR INCINERATORS.

17.8.707 WAIVERS (AUTH: 75-2-111, 75-2-204, MCA; IMP: 75-2-204, 75-2-211, MCA), located at page 17-439, Administrative Rules of Montana. This rule would be replaced by NEW RULE VI, NEW OR MODIFIED EMITTING UNITS--PERMIT APPLICATION REQUIREMENTS.

17.8.710 CONDITIONS FOR ISSUANCE OF PERMIT (AUTH: 75-2-111, 75-2-204, MCA; IMP: 75-2-204, 75-2-211, MCA), located at page 17-441, Administrative Rules of Montana. This rule would be replaced by NEW RULE VII, CONDITIONS FOR ISSUANCE AND DENIAL OF PERMIT; and NEW RULE X, COMPLIANCE WITH OTHER REQUIREMENTS.

17.8.715 EMISSION CONTROL REQUIREMENTS (AUTH: 75-2-111, 75-2-204, MCA; IMP: 75-2-204, 75-2-211, MCA), located at page 17-443, Administrative Rules of Montana. This rule would be replaced by NEW RULE VIII, EMISSION CONTROL REQUIREMENTS.

17.8.716 INSPECTION OF PERMIT (AUTH: 75-2-111, 75-2-204, MCA; IMP: 75-2-204, 75-2-211, MCA), located at page 17-443, Administrative Rules of Montana. This rule would be replaced by NEW RULE IX, INSPECTION OF PERMIT.

17.8.717 COMPLIANCE WITH OTHER STATUTES AND RULES (AUTH: 75-2-111, 75-2-204, MCA; IMP: 75-2-204, 75-2-211, MCA), located at page 17-443, Administrative Rules of Montana. This rule would be replaced by NEW RULE X, COMPLIANCE WITH OTHER REQUIREMENTS.

17.8.720 PUBLIC REVIEW OF PERMIT APPLICATIONS (AUTH: 75-2-111, 75-2-204, 75-20-216(3), MCA; IMP: 75-2-204, 75-2-211, 75-20-216(3), MCA), located at page 17-445, Administrative Rules of Montana. This rule would be replaced by NEW RULE VI, NEW OR MODIFIED EMITTING UNITS--PERMIT APPLICATION REQUIREMENTS; NEW RULE XI, REVIEW OF PERMIT

**APPLICATIONS; and NEW RULE XII, ADDITIONAL REVIEW OF PERMIT APPLICATIONS.**

**17.8.730 DENIAL OF PERMIT (AUTH: 75-2-111, 75-2-204, MCA; IMP: 75-2-204, 75-2-211, MCA), located at page 17-449, Administrative Rules of Montana. This rule would be replaced by NEW RULE VII, CONDITIONS FOR ISSUANCE AND DENIAL OF PERMIT.**

**17.8.731 DURATION OF PERMIT (AUTH: 75-2-111, 75-2-204, MCA; IMP: 75-2-204, 75-2-211, MCA), located at page 17-449, Administrative Rules of Montana. This rule would be replaced by NEW RULE XIII, DURATION OF PERMIT.**

**17.8.732 REVOCATION OF PERMIT (AUTH: 75-2-111, 75-2-204, MCA; IMP: 75-2-204, 75-2-211, MCA), located at page 17-449, Administrative Rules of Montana. This rule would be replaced by NEW RULE XIV, REVOCATION OF PERMIT.**

**17.8.733 MODIFICATION OF PERMIT (AUTH: 75-2-111, 75-2-204, MCA; IMP: 75-2-204, 75-2-211, MCA), located at page 17-450, Administrative Rules of Montana. This rule would be replaced by NEW RULE XV, ADMINISTRATIVE AMENDMENT TO PERMIT.**

**17.8.734 TRANSFER OF PERMIT (AUTH: 75-2-111, 75-2-204, MCA; IMP: 75-2-204, 75-2-211, MCA), located at page 17-451, Administrative Rules of Montana. This rule would be replaced by NEW RULE XVI, TRANSFER OF PERMIT.**

**REASON: The Board is proposing to repeal the existing rules in ARM Title 17, chapter 8, subchapter 7, "Permit, Construction and Operation of Air Contaminant Sources," and adopt new rules because of the extent of the necessary revisions to the rules.**

**In the past, there has been considerable confusion among the regulated community and the public concerning the meaning of the air quality preconstruction permit rules. The proposed new rules would clarify permit requirements and are necessary to make the rules more understandable. The Department of Environmental Quality developed the proposed new rules in conjunction with a working group of representatives of the regulated community and organizations interested in air quality issues.**

**The subcommittee of the Clean Air Act Advisory Committee (CAAAC) drafted New Rule I prior to undertaking the revision of subchapter 7, and it set the ground rules for all subsequent decisions regarding the substantive rules. The scope and intent of the proposed rules cannot be fully understood without reference to New Rule I.**

**New Rule II, "Definitions," would replace existing ARM 17.8.701, "Definitions," and incorporate new terms used in the proposed new rules. For clarity, the phrases "emitting unit" and "facility" would be substituted for the existing term "source." References in the current rules to "stacks" would be eliminated because the Department regulates stacks as part**

of the associated emitting units, so separate references to stacks are not necessary. For clarity, the definition of "construct" or "construction" would be revised to include examples of activities that are considered to constitute initiation of construction. Definitions of "lowest achievable emission rate" or "LAER" and "major emitting facility" would be deleted because the phrase "major emitting facility" no longer would be used in the rules, and the phrase "lowest achievable emission rate" or "LAER" already is defined in ARM 17.8.901(10). The new rule would add necessary definitions for the following terms and phrases used in the proposed new rules: "day"; "emitting unit"; "facility"; "install" or "installation"; "modify"; "Montana air quality permit"; "residential, institutional, or commercial"; and "routine."

New Rule III, "Montana Air Quality Permits--When Required," would replace existing ARM 17.8.704, "General Procedures For Air Quality Preconstruction Permitting," and portions of existing ARM 17.8.705, "When Permit Required--Exclusions." The new rule would specify the sources of air contaminants that are subject to the permit requirements. The new rule also would substitute a new name for the permit, "Montana air quality permit," in place of the current name, "preconstruction permit." The current name has been confusing to the regulated community, and the change is necessary to avoid the incorrect assumption that the permit applies only to construction.

The construction season in Montana is relatively short, and facilities must pour concrete and undertake other construction while weather allows. Current rules prohibit any construction without first securing a permit, and a source has to timely secure that permit in order to meet its construction deadlines. While sources should plan their permit applications accordingly, it is not unusual for issuance of a permit to be delayed beyond their control.

The proposed rule would not allow pre-permit construction if some other permit or rule prohibits the activity. For example, if a source needs a Prevention of Significant Deterioration (PSD) permit, both federal and state regulations require that the applicant secure the permit before undertaking any construction. Nothing in this rule would supersede these existing restrictions in other rules. The applicant would be able to undertake limited pre-permit construction only if the applicant did not need a PSD permit as well. The applicant would need to submit an application and receive a completeness determination from the Department prior to undertaking the construction. In addition, the Department would have the ability to halt construction should it determine that the proposed project would result in a violation of the state implementation plan or would interfere with the attainment or maintenance of any federal or state ambient air quality standard.

New Rule IV, "Montana Air Quality Permits--General Exclusions," would replace portions of existing ARM 17.8.705, "When Permit Required--Exclusions." The new rule would

specify the air contaminant sources that are excluded from the permit requirement. In the existing rules, the exclusions are combined with applicability provisions in ARM 17.8.705. Under the new rule, the following sources would be deleted from the list of excluded sources and would require a Montana air quality permit if the subchapter otherwise applies to the source: food service establishments; sources for which emissions are calculated by BTU heat input; and ventilation systems for animal housing. The Board is proposing to delete these exclusions because it believes that any operation with potential emissions above the general 25 ton per year threshold should be subject to the air quality permit requirements. Most food service establishments still would be excluded under the general 25 ton per year exclusion. New Rule III also would include a provision clarifying when emergency equipment is excluded from the permit requirement. Facilities should preplan for emergency backup and have permits for backup equipment. Predicting the future is not perfect, but it should be encouraged. Companies that do not plan for emergencies would not be absolved of responsibility for obtaining a permit. For clarity, equipment used for routine maintenance, repair, or replacement would be added to the list of exclusions.

New Rule V, "Montana Air Quality Permits--Exclusion for De Minimis Changes," would replace the portions of existing ARM 17.8.705, "When Permit Required--Exclusions," that include the exclusion from the permit requirement for de minimis changes. The exclusion now is included with other exclusions and applicability provisions in ARM 17.8.705. New Rule IV(2), along with New Rule XIV(3), would clarify that the Department may amend a permit to change or add permit conditions, related to a de minimis change, if the owner or operator agrees to the change or addition and would clarify that only the permittee may request a hearing before the Board concerning a permit amendment that is related to a de minimis change, and that is initiated by the Department.

New Rule VI, "New or Modified Emitting Units--Permit Application Requirements," would replace portions of existing ARM 17.8.706, "New or Altered Sources and Stacks--Permit Application Requirements," existing ARM 17.8.707, "Waivers," and portions of existing ARM 17.8.720, "Public Review Of Permit Applications." The new rule would clarify that the Department is not obligated to issue an air quality permit upon receipt of an application, clarify the requirement that permit applications be certified for completeness and accuracy, and clarify the information that must be included in descriptions of shakedown procedures. The existing requirements for submitting "post application" information would be deleted. A new provision would advise readers of the statutory procedures for maintaining the confidentiality of trade secret information that may be included in a permit application.

New Rule VII, "Conditions for Issuance and Denial of Permit," would replace portions of existing ARM 17.8.710,

"Conditions for Issuance of Permit," and existing ARM 17.8.730, "Denial of Permit." The new rule would specify the conditions for issuance or denial of a permit application. Existing ARM 17.8.710(3), which prohibits operation unless the applicant demonstrates that construction has occurred in compliance with the permit, would be moved to New Rule IX. New Rule VI also would include provisions for identifying federally enforceable and state-only conditions in a permit. This is necessary because the state should have exclusive enforcement authority concerning permit conditions that are necessary only to meet state requirements, but not federal requirements. Without this specification in the permit, permit conditions become federally enforceable by virtue of the permit becoming part of the State Implementation Plan.

New Rule VIII, "Emission Control Requirements," would replace existing ARM 17.8.715, "Emission Control Requirements." The new rule would clarify that emission control requirements, including best available control technology (BACT), apply to previously unpermitted, older units that are modified in a manner requiring an air quality permit.

New Rule IX, "Inspection of Permit," would replace existing ARM 17.8.716, "Inspection of Permit." The new rule would add a provision specifying that the owner or operator and the Department may mutually agree on a location other than the permitted facility or emitting unit for making the air quality permit available for inspection. The present rule requires the owner or operator to maintain the permit at the location of the permitted facility. The proposed new provision could be more convenient for owners and operators of multiple facilities, such as natural gas compressor stations, that are subject to separate permits, and would be more convenient for Department inspectors in the field who could review multiple permits issued to an owner or operator without having to travel to each permitted location.

New Rule X, "Compliance With Other Requirements," would replace portions of existing ARM 17.8.710, "Conditions For Issuance Of Permit," and existing ARM 17.8.717, "Compliance With Other Statutes And Rules." The new rule would clarify the Department's authority to prohibit operation of a facility or emitting unit if construction has occurred in a manner such that the facility cannot operate in compliance with applicable statutes, rules or permit requirements.

New Rule XI, "Review of Permit Applications," would replace portions of existing ARM 17.8.720, "Public Review Of Permit Applications." The new rule would clarify the procedure for Department review of air quality permit applications, including clarifying that the time for Department review of a permit application does not begin until the Department receives a complete application.

New Rule XII, "Additional Review of Permit Applications," would, without substantive change, replace portions of existing ARM 17.8.720, "Public Review of Permit Applications."

New Rule XIII, "Duration of Permit," would replace existing ARM 17.8.731, "Duration of Permit." The new rule also would reflect the Department's authority under proposed New Rule XIII to revoke all, or only a portion, of a permit.

New Rule XIV, "Revocation of Permit," would replace existing ARM 17.8.732, "Revocation of Permit." In addition to including the existing procedures for revoking a permit, the new rule would add authority for the Department to revoke only a portion of a permit and would provide procedures for permit revocation upon the request of the owner or operator. Authority to revoke only a portion of a permit is necessary to allow an owner or operator to continue to operate part of a facility when only part of the permit is no longer necessary or valid. Adding authority for the owner or operator to request revocation is necessary to avoid the Department having to initiate revocation proceedings when the owner or operator no longer wishes to operate the facility, or part of a facility, and continue to be subject to air quality permit fees.

Subsection (5) clarifies that the department will not use this provision if a partial revocation of a permit is not an administrative amendment. If a request for a partial revocation is not an administrative amendment, it would be required to go through public review.

New Rule XV, "Administrative Amendment to Permit," would replace existing ARM 17.8.733, "Modification of Permit." For clarity, under the new rule, the term "amend" would be substituted for the term "modify." The new rule also would provide the Department with authority to amend a permit to correct administrative errors made in drafting the permit. This is necessary to provide the Department with authority to correct administrative errors made in permit drafting without having to wait until the permittee applies for a new permit for the facility.

New Rule XVI, "Transfer of Permit," would replace existing ARM 17.8.734, "Transfer of Permit." The new rule would clarify that the Department may deny transfer of a permit only upon determining that the transfer would result in violation of air quality statutes or rules. This revision is necessary to clarify that the Department does not have statutory authority to deny a permit transfer based upon non-air quality factors that the Department is required to consider under the Montana Environmental Policy Act (MEPA).

New Rule XVII, "Incorporation by Reference," would replace existing ARM 17.8.702, "Incorporation By Reference," without substantive change, except for placing the incorporations of federal regulations in numerical order, for easier reference.

New Rule XVIII, "Additional Requirements for Incinerators," would, without substantive change, replace the existing requirements in ARM 17.8.706(5), concerning air quality permits for incinerators.

The Board is proposing to amend references in other air quality rules to the preconstruction permit rules to conform

those references to the proposed new rule numbers and rule terminology. The Board also is proposing minor editorial and numbering revisions to existing rules, to conform those rules to current rule drafting and numbering style. These amendments are not intended to change the meaning of the rules.

6. Concerned persons may submit their data, views or arguments concerning the proposed action either orally or in writing at the hearing. Written data, views or arguments may also be submitted to the Board of Environmental Review, P.O. Box 200901, Helena, Montana 59620-0901, faxed to (406) 444-4386 or emailed to the Board Secretary at ber@state.mt.us, to be received no later than 5:00 p.m. October 17, 2002. To be guaranteed consideration, the comments must be postmarked on or before that date.

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

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

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

BOARD OF ENVIRONMENTAL REVIEW

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

**Reviewed by:**

*David Rusoff*
**DAVID RUSOFF, Rule Reviewer**

**Certified to the Secretary of State, August 5, 2002.**

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

| | |
|---|---|
| In the matter of the amendment of ARM 17.8.601, 17.8.604, 17.8.605, 17.8.606, 17.8.610, 17.8.612 and 17.8.614 pertaining to open burning | NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT (AIR QUALITY) |

TO: All Concerned Persons

1. On September 18, 2002, at 10:30 a.m., the Board of Environmental Review will hold a public hearing in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Board will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board no later than 5:00 p.m., September 9, 2002, to advise us of the nature of the accommodation that you need. Please contact the Board Secretary at P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2544; fax (406) 444-4386 or email ber@state.mt.us.

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

17.8.601 DEFINITIONS (1) "Best available control technology" (BACT) means those techniques and methods of controlling emission of pollutants from an existing or proposed open burning source which limit those emissions to the maximum degree which the department determines, on a case-by-case basis, is achievable for that source, taking into account impacts on energy use, the environment, and the economy, and any other costs, including cost to the source.

(a) Such techniques and methods may include the following:

(i) through (vii) remain the same.

(viii) prioritizing burns as to air quality impact and assigning control techniques accordingly; ~~and~~

(ix) promoting alternative treatments and uses of materials to be burned~~.~~; and

(x) selecting sites that will minimize smoke impacts.

(b) For essential agricultural open burning, ~~or~~ prescribed wildland open burning, conditional air quality open burning, or any other minor open burning during September, October, or November, BACT includes burning only during the time periods specified by the department, which may be determined by calling the department at (800) 225-6779.

(c) For essential agricultural open burning, prescribed wildland open burning, conditional air quality open burning, or any other minor open burning during December, January, or

February, BACT includes burning only during the time periods specified by the department, which may be determined by calling the department at (800) 225-6779.

(2) through (6) remain the same.

(7) "Open burning" means combustion of any material directly in the open air without a receptacle, or in a receptacle other than a furnace, multiple chambered incinerator, or wood waste burner, with the exception of combustion of ordnance, small recreational fires, construction site heating devices used to warm workers, or safety flares used to combust or dispose of hazardous or toxic gases at industrial facilities, such as refineries, gas sweetening plants, oil and gas wells, sulfur recovery plants or elemental phosphorus plants.

(8) through (9) remain the same.

(10) "Trade wastes" means solid, liquid, or gaseous material resulting from construction or operation of any business, trade, industry, or demolition project. Wood product industry wastes such as sawdust, bark, peelings, chips, shavings, and cull wood are considered trade wastes. Trade wastes do not include wastes generally disposed of by essential agricultural open burning, ~~and~~ prescribed wildland open burning, or Christmas tree waste, as defined in this rule.

(11) remains the same.

AUTH: 75-2-111, 75-2-203, MCA
IMP: 75-2-203, MCA

17.8.604 MATERIALS PROHIBITED FROM OPEN BURNING~~--WHEN PERMIT REQUIRED~~ (1) The following material may not be disposed of by open burning:

(a) any waste which is moved from the premises where it was generated, ~~including waste moved to a solid waste disposal site,~~ except as provided in ARM 17.8.611 or 17.8.612(4)(a) or (4)(b), or unless approval is granted by the department on a case-by-case basis;

(b) through (d) remain the same.

(e) wood and wood byproducts ~~other than trade wastes~~ that have been coated, painted, stained, treated, or contaminated by a foreign material, ~~such as papers, cardboard, or painted or stained wood, unless a public or private garbage hauler or rural container system is unavailable, or~~ unless open burning is allowed under ARM 17.8.614 or 17.8.615;

(f) through (v) remain the same.

(w) asbestos or asbestos-containing materials; ~~and~~

(x) standing or demolished structures containing prohibited material, except as provided in ARM 17.8.612, 17.8.614, or 17.8.615; and

(y) paint, except as provided in ARM 17.8.614 or 17.8.615.

(2) remains the same.

AUTH: 75-2-111, 75-2-203, MCA
IMP: 75-2-203, 75-2-211, MCA

17.8.605 SPECIAL BURNING PERIODS (1) The following categories of open burning may be conducted during the entire year:

(a) and (b) remain the same.

(c) open burning authorized under the emergency open burning permit provisions in ARM 17.8.611; ~~and~~

(d) essential agricultural open burning~~.~~;

(e) conditional air quality open burning;

(f) commercial film production open burning;

(g) Christmas tree waste open burning; and

(h) any minor open burning that is not prohibited by ARM 17.8.604.

(2) remains the same.

AUTH: 75-2-111, 75-2-203, MCA
IMP: 75-2-203, MCA

17.8.606 MINOR OPEN BURNING SOURCE REQUIREMENTS

(1) through (2)(c) remain the same.

(3) During September, October, or November, to conduct ~~essential agricultural open burning or prescribed wildland open burning~~ any minor open burning not prohibited by ARM 17.8.604, a minor open burning source must adhere to the ~~time periods set for~~ burning restrictions established by the department that are available by calling the department at (800) 225-6779.

(4) During December, January, or February, to conduct ~~essential agricultural open burning or prescribed wildland open burning~~ any minor open burning that is not prohibited by ARM 17.8.604, a minor open burning source must comply with the following conditions:

(a) Outside the eastern Montana open burning zone, a minor open burning source must:

(i) submit a written request to the department, demonstrating that the essential agricultural open burning, ~~or~~ prescribed wildland open burning, or any minor open burning that is not prohibited by ARM 17.8.604 must be conducted prior to reopening of open burning in March;

(ii) and (iii) remain the same.

(b) Inside the eastern Montana open burning zone, a minor open burning source need only notify the department by telephone of any essential agricultural open burning, prescribed wildland open burning, or any other minor open burning that is not prohibited by ARM 17.8.604 prior to ignition. Burning is allowed when ventilation conditions are good or excellent. Ventilation conditions are determined by the department using a ventilation index, which is defined as the product of the mixing depth in feet at the time of the daily maximum temperature, times the average transport wind in knots through the mixed layer divided by 100. Good or excellent ventilation conditions exist when the ventilation

index is 400 or higher. Forecasts of ventilation conditions may be obtained by calling the department at (800) 225-6779.

(5) and (6) remain the same.

AUTH: 75-2-111, 75-2-203, MCA
IMP: 75-2-203, MCA

17.8.610 MAJOR OPEN BURNING SOURCE RESTRICTIONS

(1) through (3) remain the same.

(4) A major open burning source must:

(a) remains the same.

(b) comply with the conditions in any air quality open burning permit issued to it by the department, which will be in effect for ~~1~~ one year from its date of issuance or another time frame as specified in the permit by the department~~; and~~.

(5) remains the same.

AUTH: 75-2-111, 75-2-203, MCA
IMP: 75-2-203, 75-2-211, MCA

17.8.612 CONDITIONAL AIR QUALITY OPEN BURNING PERMITS

(1) through (3) remain the same.

(4) The department may issue a conditional air quality open burning permit to dispose of:

(a) solid wood and wood byproduct trade wastes by any business, trade, industry, or demolition project; or

(b) untreated wood waste at a licensed landfill site, if the department determines that:

(i) the proposed open burning will occur at an approved burn site, as designated in the solid waste management system license issued by the department pursuant to ARM Title 17, chapter 50, subchapter 5; ~~and~~

(ii) ~~prior to issuance of the air quality open burning permit, the wood waste pile is inspected by the department or its designated representative and no prohibited materials listed in ARM 17.8.604, other than wood waste, are present~~ the material to be burned complies with ARM Title 17, chapter 50, subchapter 5; and

(iii) prior to each burn, the burn pile was inspected by the department or its designated representative and no prohibited materials listed in ARM 17.8.604 were present.

(5) A permit issued under this rule is valid for the following periods:

(a) solid wood and wood byproduct trade wastes--one year; ~~applicants may reapply for a permit annually;~~ and

(b) untreated wood waste at licensed landfill sites--~~single burn~~ one year. ~~A new permit must be obtained for each burn.~~

(6) through (10) remain the same.

AUTH: 75-2-111, 75-2-203, MCA
IMP: 75-2-203, 75-2-211, MCA

**17.8.614 COMMERCIAL FILM PRODUCTION OPEN BURNING PERMITS**

**(1) The department may issue an air quality commercial film production open burning permit for open burning of otherwise prohibited material as part of a commercial, ~~or~~ educational film, or video production for motion pictures or television. Use of pyrotechnic special effects materials, including bulk powder compositions and devices, smoke powder compositions and devices, matches and fuses, squibs and detonators, and fireworks specifically created for use by special effects pyrotechnicians for use in motion picture or video productions is not considered open burning.**

**(2) through (8) remain the same.**

**AUTH: 75-2-111, 75-2-203, MCA**
**IMP: 75-2-203, 75-2-211, MCA**

**REASON: The Department proposes to amend ARM 17.8.601, 17.8.604, 17.8.605, 17.8.606, 17.8.610, 17.8.612, and 17.8.614 to revise conditional, essential agricultural, and minor source open burning rules to allow certain minor open burning in winter, primarily in eastern Montana. The proposed amendments would revise the time periods, materials, and criteria applicable to such open burning. The current rules allow only prescribed wildland open burning, open burning to train firefighters, emergency open burning, and essential agricultural open burning to take place during the winter season (December through February). However, the prescribed wildland and agricultural open burns are generally larger and create greater impacts than other minor open burning sources. The proposed amendments are necessary to allow all types of non-prohibited minor open burning to take place in the Eastern Montana Open Burning Zone during the winter season and allow the Department the flexibility to approve valid burning requests outside that area that will not adversely affect air quality.**

**Burners located outside the Eastern Montana Open Burning Zone would be subject to Department review and would require prior approval from the Department. Burners located in the Eastern Montana Open Burning Zone would still be required to notify the Department prior to burning.**

**Currently, landfill open burning often cannot be completed in a single burn within the 30-day time period that the permit is valid. The proposed amendments would change the time these permits are valid to one year, and would require the Department or its designated representative to inspect burn piles at licensed landfills prior to every burn to ensure that no prohibited materials are in the piles.**

**The current air quality open burning rules may be in conflict with the solid waste rules that regulate open burning conducted at licensed landfills. The proposed amendments to allow burning of discovered ordnance, to prohibit burning of paint and other prohibited material in standing or demolished structures, and to revise conditional open burning permit**

**requirements would make the rules consistent with state and federal solid waste rules that regulate such burning.**

**Minor editorial and grammatical changes are also proposed to make the rules more readable, but are not intended to change the meaning of the rules.**

**4. Concerned persons may submit their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to the Board of Environmental Review, P.O. Box 200901, Helena, Montana 59620-0901, faxed to (406) 444-4386 or emailed to the Board Secretary at ber@state.mt.us and must be received no later than 5:00 p.m., September 25, 2002. To be guaranteed consideration, the comments must be postmarked on or before that date.**

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

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

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

**Reviewed by:** **BOARD OF ENVIRONMENTAL REVIEW**

*David Rusoff*
**DAVID RUSOFF**
**Rule Reviewer**

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

**Certified to the Secretary of State, August 5, 2002.**

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

| | |
|---|---|
| In the matter of the amendment of ARM 17.8.302 pertaining to incorporation by reference of hazardous air pollutants emission standards | NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT<br><br>(AIR QUALITY) |

TO: All Concerned Persons

1. On September 17, 2002 at 10:30 a.m., the Board of Environmental Review will hold a public hearing in Room 35 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed amendment of the above-stated rule.

2. The Board will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board no later than 5:00 p.m., September 9, 2002, to advise us of the nature of the accommodation that you need. Please contact the Board Secretary at P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2544; fax (406) 444-4386 or email ber@state.mt.us.

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

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

(a) through (e) remain the same.

(f) 40 CFR Part 63, specifying emission standards for hazardous air pollutant source categories including the final rules published at ~~66 FR 3179 on January 12, 2001, "National Emission Standards for Hazardous Air Pollutants for Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills", to be codified at 40 CFR 63, subpart MM~~ 67 FR 16581 on April 5, 2002, "National Emissions Standards for Hazardous Air Pollutants for Source Categories: General Provisions; and Requirements for Control Technology Determinations for Major Sources in Accordance With Clean Air Act Sections, Sections 112(g) and 112(j)", to be codified at 40 CFR 63, subparts A and B.

(2) through (4) remain the same.

AUTH: 75-2-111, 75-2-203, MCA
IMP: 75-2-203, MCA

REASON: The proposed amendment would incorporate by reference the new national emission standards for hazardous air pollutants (NESHAP) General Provisions and the new federal maximum achievable control technology (MACT) standards. The

General Provisions to 40 CFR Part 63 establish the framework for emission standards and other requirements developed pursuant to section 112(d) of the FCAA. They eliminate the repetition of general information and requirements in individual NESHAPs by consolidating all generally applicable information in one location. The federal amendments clarify and make the General Provisions more flexible.

The section 112(j) rule establishes requirements and procedures for owners or operators of major sources of hazardous air pollutants (HAP) and permitting authorities to comply with section 112(j) of the FCAA, which establishes equivalent emission limitations by permit. The FCAA required EPA to issue MACT standards over a 10-year schedule. If EPA missed the regulatory deadline by 18 months (May 15, 2002), section 112(j) required affected industrial sources to review their operating permits to contain emission limits equivalent to the limits that EPA should have established.

The federal amendments modify current regulations regarding the timing of permit applications and when and how the MACT standards apply. MACT standards for new sources will apply when a facility's operating permit is issued, rather than by 18 months after the FCAA's regulatory deadline. The amendments create a two-part permit application process. Part 1, which will include basic information such as source type and location, was due by May 15, 2002 from all major sources in source categories for which EPA has failed to issue national emission control standards. Part 2 will include the relevant process, pollutant, and control information to allow permitting authorities to develop MACT standards for the facility equivalent to what EPA would have developed. They would be due to the appropriate permitting authority within 24 months after the Part 1 application. EPA expects to promulgate all remaining MACT standards before any facility would be required to submit Part 2 of its operating permit application.

4. Concerned persons may submit their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to the Board of Environmental Review, P.O. Box 200901, Helena, Montana 59620-0901, faxed to (406) 444-4386 or emailed to the Board Secretary at ber@state.mt.us and must be received no later than 5:00 p.m., September 24, 2002. To be guaranteed consideration, the comments must be postmarked on or before that date.

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

6. The Board maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name and mailing address of the person to receive notices and specifies

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

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

**BOARD OF ENVIRONMENTAL REVIEW**

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

**Reviewed by:**

*David Rusoff*
**DAVID RUSOFF, Rule Reviewer**

**Certified to the Secretary of State, August 5, 2002.**

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

| | |
|---|---|
| In the matter of the amendment of ARM 17.8.1101, 17.8.1102, 17.8.1103 and 17.8.1107, the adoption of new rules I through III and the repeal of 17.8.221 pertaining to the protection of visibility in mandatory Class I federal areas | NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT, ADOPTION AND REPEAL<br><br>(AIR QUALITY) |

TO: All Interested Persons

1. On October 9, 2002 at 9:00 a.m. the Board of Environmental Review will hold a public hearing in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed amendment, adoption, and repeal of the above-stated rules.

2. The Board will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board no later than 5:00 p.m., September 30, 2002, to advise us of the nature of the accommodation that you need. Please contact the Board Secretary at P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2544; fax (406) 444-4386 or email ber@state.mt.us.

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

17.8.1101 DEFINITIONS For the purposes of this subchapter:

~~(1) "Federal Class I area" means those areas listed in ARM 17.8.806(1) and any other federal land that is classified or reclassified as Class 1.~~

~~(2)~~ (1) "Adverse impact on visibility" means~~, for purposes of Title 17, Chapter 8, subchapter 11, ARM,~~ visibility impairment which ~~the department determines does or is likely to~~ interferes with the management, protection, preservation, or enjoyment of the visitor's visual experience of ~~visitors within a~~ the federal Class I area. ~~The~~ This determination must be made on a case-by-case basis taking into account the geographic extent, intensity, duration, frequency, and time of visibility ~~impairment~~ impairments, and how these factors correlate with times of visitor use of the federal Class I area, and the frequency and timing of natural conditions that reduce visibility. This term does not include effects on integral vistas.

(2) "Best available retrofit technology (BART)" means an emission limitation based on the degree of reduction

achievable through the application of the best system of continuous emission reduction for each pollutant which is emitted by an existing stationary facility. The emission limitation must be established, on a case-by-case basis, taking into consideration the following:

(a) technology available;

(b) the costs of compliance;

(c) the energy and non-air quality environmental impacts of compliance;

(d) any pollution control equipment in use or in existence at the source;

(e) the remaining useful life of the source; and

(f) the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology.

(3) "Building, structure, or facility" means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities must be considered as part of the same industrial grouping if they belong to the same major group (i.e., which have the same two-digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101-0066 and 003-005-00176-0 respectively).

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

(5) "Existing stationary facility" means any of the following stationary sources of air pollutants, including any reconstructed source, which was not in operation prior to August 7, 1962, and was in existence on August 7, 1977, and has the potential to emit 250 tons per year or more of any air pollutant. In determining potential to emit, fugitive emissions, to the extent quantifiable, must be counted:

(a) fossil-fuel fired steam electric plants of more than 250 million British thermal units per hour heat input;

(b) coal cleaning plants (thermal dryers);

(c) kraft pulp mills;

(d) Portland cement plants;

(e) primary zinc smelters;

(f) iron and steel mill plants;

(g) primary aluminum ore reduction plants;

(h) primary copper smelters;

(i) municipal incinerators capable of charging more than 250 tons of refuse per day;

(j) hydrofluoric, sulfuric, and nitric acid plants;

(k) petroleum refineries;

(l) lime plants;

(m) phosphate rock processing plants;

(n) coke oven batteries;

(o) sulfur recovery plants;

(p) carbon black plants (furnace process);

(q) primary lead smelters;

(r) fuel conversion plants;
(s) sintering plants;
(t) secondary metal production facilities;
(u) chemical process plants;
(v) fossil-fuel boilers of more than 250 million British thermal units per hour heat input;
(w) petroleum storage and transfer facilities with a capacity exceeding 300,000 barrels;
(x) taconite ore processing facilities;
(y) glass fiber processing plants; and
(z) charcoal production facilities.

(6) "Federal Class I area" means any federal land that is classified or reclassified as Class I.

(7) "Federal land manager" means the secretary of the department with authority over the federal Class I area (or the secretary's designee).

(8) "Federally enforceable" means all limitations and conditions which are enforceable by the EPA administrator under the Federal Clean Air Act including:
(a) requirements developed pursuant to 40 CFR Parts 60 and 61;
(b) requirements within any applicable state implementation plan; and
(c) any permit requirements established pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR Parts 51, 52, or 60.

(9) "Fugitive emissions" means those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.

(10) "Implementation plan" means, for the purposes of this subchapter, any state implementation plan.

(11) "In existence" means that the owner or operator has obtained all necessary preconstruction approvals or permits required by federal, state, or local air pollution emissions and air quality laws or regulations and either has:
(a) begun, or caused to begin, a continuous program of physical on-site construction of the facility; or
(b) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed in a reasonable time.

(12) "In operation" means engaged in activity related to the primary design function of the source.

(13) "Installation" means an identifiable piece of process equipment.

(14) "Integral vista" means a view perceived from within the mandatory Class I federal area of a specific landmark or panorama located outside the boundary of the mandatory Class I federal area.

(15) "Long-term strategy" means a 10- to 15-year plan for making reasonable progress toward the national visibility goal.

(16) "Mandatory Class I federal area" means any area identified in 40 CFR Part 81, subpart D.

(17) "Natural conditions" includes naturally occurring phenomena that reduce visibility as measured in terms of light extinction, visual range, contrast, or coloration.

(18) "Potential to emit" means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source.

(19) "Reasonably attributable" means attributable by visual observation or any other technique the department deems appropriate.

(20) "Reasonably attributable source" means an existing stationary facility that, by itself, or in combination with other sources, emits any air pollutant the department determines may be anticipated to cause or contribute to any impairment of visibility in any mandatory Class I federal area.

(21) "Reasonably attributable visibility impairment" means visibility impairment that is caused by the emission of air pollutants from one, or a small number of sources.

(22) "Secondary emissions" means emissions which occur as a result of the construction or operation of any existing stationary facility, but do not come from the existing stationary facility. Secondary emissions may include, but are not limited to, emissions from ships or trains coming to or from the existing stationary facility.

(23) "Significant impairment" means, for the purposes of [NEW RULE II], visibility impairment which, in the judgment of the department, interferes with the management, protection, preservation, or enjoyment of the visitor's visual experience of the mandatory Class I federal area. This determination must be made on a case-by-case basis taking into account the geographic extent, intensity, duration, frequency and time of the visibility impairment, and how these factors correlate with:

(a) times of visitor use of the mandatory Class I federal area; and

(b) the frequency and timing of natural conditions that reduce visibility.

(24) "State" means "state" as defined at 42 U.S.C. 7602(d).

(25) "Stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant.

~~(3)~~ (26) "Visibility impairment" means any humanly perceptible change in visibility (light extinction, visual range, contrast, ~~or~~ coloration) from that which would have

existed under natural conditions. ~~Natural conditions include fog, clouds, windblown dust from natural sources, rain, naturally ignited wildfires, and natural aerosols.~~

(27) "Visibility in any mandatory Class I federal area" includes any integral vista associated with that area.

AUTH: 75-2-111, 75-2-203, MCA
IMP: 75-2-203, 75-2-204, 75-2-211, MCA

17.8.1102 INCORPORATION BY REFERENCE (1) For the purposes of this subchapter, the board hereby adopts and incorporates by reference the following:

(a) remains the same.

(b) "Workbook for Plume Visual Impact Screening and Analysis" (Revised) (EPA-454/R-92/023), specifying methods for estimating visibility impairment~~.~~;

(c) "Workbook for Plume Visual Impact Screening and Analysis" (EPA-450/4-88-015, 1988), specifying methods for visibility impact analysis; and

(d) "Guidelines for Determining Best Available Retrofit Technology for Coal-fired Power Plants and Other Existing Stationary Facilities" (1980) (EPA-450/3-80-0096), specifying methods for determining BART for fossil-fuel fired generating plants having a total generating capacity in excess of 750 megawatts.

(2) through (4) remain the same.

AUTH: 75-2-111, 75-2-203, MCA
IMP: ~~Title 75, chapter 2~~ 75-2-203, 75-2-204, 75-2-211, MCA

17.8.1103 APPLICABILITY--VISIBILITY REQUIREMENTS

(1) This subchapter is applicable to the owner or operator of:

(a) an existing stationary facility, as defined by ARM 17.8.1101(5);

(b) a proposed major stationary source, as defined by ARM 17.8.801(22)~~.~~; or

(c) ~~of~~ a source proposed for a major modification, as defined by ARM 17.8.801(20) proposing to construct such a source or modification after July 1, 1985, in any area within the state of Montana designated as attainment, unclassified, or nonattainment, in accordance with 40 CFR 81.327, incorporated by reference in ARM 17.8.1102.

(2) The requirements of this subchapter shall be integrated with the requirements of ARM Title 17, chapter 8, subchapters 7 (Permit, Construction and Operation of Air Contaminant Sources) and 8 (Prevention of Significant Deterioration of Air Quality).

AUTH: 75-2-111, 75-2-203, MCA
IMP: 75-2-203, 75-2-204, 75-2-211, MCA

17.8.1107 VISIBILITY MODELS (1) All estimates of visibility impact required under this subchapter shall be based on those models ~~contained in "Workbook for Plume Visual Impact Screening and Analysis" (EPA-450/4-88-015, 1988),~~ incorporated by reference in ARM 17.8.1102(1)(c). Equivalent models may be substituted if approved by the department.

AUTH: 75-2-111, 75-2-203, MCA
IMP: 75-2-203, 75-2-204, 75-2-211, MCA

4. The proposed new rules provide as follows:

NEW RULE I EXISTING IMPAIRMENT (1) The affected federal land manager may certify to the department, at any time, that visibility impairment exists in any mandatory Class I federal area.

(2) The affected federal land manager shall submit an analysis that includes relevant data and demonstrations when certifying that visibility impairment exists in a mandatory Class I federal area.

(3) Upon receipt of the certification and analysis by the federal land manager that visibility impairment exists in a mandatory Class I federal area, the department shall review the analysis and visibility data and determine whether a reasonably attributable source exists.

(4) If a reasonably attributable source does not exist, the department shall review the impairment certification at the time of the next periodic review of the long-term strategy. If a reasonably attributable source exists, the provisions of [NEW RULE III] apply unless the reasonably attributable source is exempted pursuant to [NEW RULE II].

AUTH: 75-2-111, 75-2-203, MCA
IMP: 75-2-203, 75-2-204, 75-2-211, MCA

NEW RULE II EXEMPTION FROM BEST AVAILABLE RETROFIT TECHNOLOGY (BART) (1) If the department determines a reasonably attributable source exists, the owner or operator of the reasonably attributable source may apply to the department for an exemption from the requirement to install, operate, and maintain BART.

(2) An applicant for an exemption from BART shall submit to the department all available documentation relevant to the impact of the existing stationary facility's emissions on visibility in any mandatory Class I federal area. An applicant shall demonstrate the existing stationary facility does not or will not, by itself, or in combination with other sources, emit any air pollutant which may reasonably be anticipated to cause or contribute to a significant impairment of visibility in any mandatory Class I federal area.

(3) Any fossil-fueled power plant with a total generating capacity of 750 megawatts or more may receive an exemption from [NEW RULE III] only if the owner or operator of such power plant demonstrates to the satisfaction of the

department that such power plant is located at such a distance from all mandatory Class I federal areas that such power plant does not or will not, by itself, or in combination with other facilities, emit any air pollutant which may reasonably be anticipated to cause or contribute to significant impairment of visibility in any mandatory Class I federal area.

(4) An applicant for an exemption from BART shall provide written notice to all affected federal land managers prior to submitting an application to the department for exemption. Upon submitting an application for exemption, the applicant shall certify to the department that affected federal land managers were notified of the application.

(5) An affected federal land manager may provide an initial recommendation or comment on an application for exemption within 30 days after the department's receipt of the application. This recommendation or comment is not to be construed as federal land manager concurrence.

(6) The department shall, within 90 days after receipt of an application for exemption, including receipt of any federal land manager recommendation or comment on the application, provide at least 30 days advance notice of public hearing on the application.

(7) Within 60 days following public hearing, the department shall grant or deny an application for exemption on a case-by-case basis using the standard as set forth in (2). The department shall issue an order consistent with its decision to grant or deny an exemption. If the department denies an exemption, the applicant is subject to the requirements of [NEW RULE III].

(8) A person who is jointly or severally adversely affected by the department's order may request a hearing before the board. The request for hearing must be filed within 15 days after the department renders its decision and must include an affidavit setting forth the grounds for the request. The contested case provisions of the Montana Administrative Procedure Act, Title 2, chapter 4, part 6, MCA, apply to a hearing held under this rule.

(9) The department's order is not final unless 15 days have elapsed from the date of the order and no person requests a hearing before the board. The filing of a request for a hearing postpones the effective date of the department's order until the conclusion of the hearing and the issuance of a final decision by the board.

AUTH: 75-2-111, 75-2-203, MCA
IMP: 75-2-203, 75-2-204, 75-2-211, MCA

NEW RULE III BART ANALYSIS (1) Within 60 days after the department issues an order that a reasonably attributable source exists, or within 60 days after the department issues an order denying an exemption under [NEW RULE II], the owner or operator of a reasonably attributable source shall submit to the department a BART analysis of each reasonably attributable source by taking into account the following:

(a) the emission control technology available;
(b) the costs of compliance;
(c) the energy and non-air quality environmental impacts of compliance;
(d) any pollution control equipment in use or in existence at the source;
(e) the remaining useful life of the reasonably attributable source; and
(f) the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology.

(2) Within 60 days following receipt of the BART analysis as required by (1), the department shall review the analysis and issue an order stating the conditions that constitute BART.

(3) Unless granted an exemption pursuant to [NEW RULE II], the owner or operator of each reasonably attributable source shall properly install, operate, and maintain BART as expeditiously as practicable, but in no case later than five years after the department issues an order.

(4) For fossil-fuel fired generating plants having a total generating capacity in excess of 750 megawatts, BART shall be determined pursuant to the guidelines incorporated by reference in ARM 17.8.1102(1)(d).

(5) If the department determines that technological or economic limitations on the applicability of measurement methodology to a particular existing stationary facility would make the imposition of an emission standard infeasible, the department may instead prescribe a design, equipment, work practice, or other operational standard, or combination thereof, to require the application of BART. Such standard, to the degree possible, must set forth the emission reduction to be achieved by implementation of such design, equipment, work practice or operation, and must provide for compliance by means which achieve equivalent results.

(6) A person who is jointly or severally adversely affected by the department's order may request a hearing before the board. The request for hearing must be filed within 15 days after the department renders its decision and must include an affidavit setting forth the grounds for the request. The contested case provisions of the Montana Administrative Procedure Act, Title 2, chapter 4, part 6, apply to a hearing held under this rule.

(7) The department's order is not final unless 15 days have elapsed from the date of the order and no person requests a hearing before the board. The filing of a request for a hearing postpones the effective date of the department's order until the conclusion of the hearing and the issuance of a final decision by the board.

AUTH: 75-2-111, 75-2-203, MCA
IMP: 75-2-203, 75-2-204, 75-2-211, MCA

5. ARM 17.8.221 is being proposed for repeal and is on page 17-279 of the Administrative Rules of Montana.

AUTH: 75-2-111, 75-2-202, MCA
IMP: 75-2-202, MCA

REASON: Congress declared a national goal for visibility that includes the prevention of any future, and the remedying of any existing, impairment of visibility in mandatory Class I federal areas, which impairment results from manmade air pollution. 42 USC §7491 of the federal Clean Air Act (CAA) requires all states with mandatory Class I federal areas to adopt visibility protection programs that meet the requirements of federal regulations.

As a demonstration of visibility protection, states are required to submit regulatory elements of a state visibility program to the U.S. Environmental Protection Agency (EPA) for approval as a revision to the State Implementation Plan (SIP). Under the CAA, failure to adopt a visibility protection program may result in an EPA finding of SIP inadequacy and the imposition of federal economic sanctions.

The federal regulations implementing 42 USC §7491 require the state to establish goals and emission reduction strategies for improving visibility in all 12 mandatory Class I federal areas, i.e., the national parks in Montana and the wilderness areas in Montana of 5,000 acres or more established on or before August 7, 1977. To implement 42 USC §7491, and the federal regulations promulgated under that statute, the Board has adopted ARM 17.8.1101 through 17.8.1111, which provide requirements concerning visibility protection applicable to new major stationary sources and major modifications.

On November 24, 1987, EPA issued a determination disapproving the SIPs of 29 states, including Montana, for failure to comply with the provisions of EPA's regulations concerning visibility impairment that can be reasonably attributed to existing major sources. 52 Federal Register 45132 (November 24, 1987). EPA directed the states with disapproved SIPs to address the general visibility plan and long-term strategy requirements of 40 CFR 51.302 and 51.306.

The proposed amendments and new rules would include requirements concerning visibility impairment that may be reasonably attributed to an existing major source or a small number of existing major sources. These federal provisions require Best Available Retrofit Technology (BART) for existing major stationary facilities that, by themselves, or in combination with other sources, may be anticipated to cause or contribute to impairment of visibility in a mandatory Class I federal area. Although EPA also determined that the state had not addressed Integral Vista Protection, no federal land managers identified any integral vistas in Montana on or before December 31, 1985, the date required for doing so under 40 CFR 51.304. Therefore, the Board is not proposing rules regarding Integral Vista Protection. If adopted by the Board,

the Department intends to submit the rule amendments and new rules to EPA for incorporation into the Montana SIP.

At this time, no reasonably attributable sources exist in Montana because that designation would be made only following certification by a federal land manager of the existence of visibility impairment in a mandatory Class I federal area, followed by determination by the Department that the impairment is caused by one or more existing stationary facilities.

The Board is proposing to amend the current definitions in ARM 17.8.1101 to conform to the definitions of those phrases in 40 CFR 51.301. The Board is proposing additional amendments to ARM 17.8.1101 to add definitions of terms and phrases used in proposed New Rules I through III. All of the proposed new definitions are taken almost verbatim from 40 CFR 51.301, except for the proposed definitions of "long-term strategy" and "reasonably attributable source," which are not defined in federal regulations. The provisions of the federal regulations that refer to "long-term strategy" refer to a period of 10 to 15 years, so the Board is proposing to define the phrase using that period of time. The phrase "reasonably attributable source" is not used in the federal statutes and regulations, but is necessary for purposes of proposed New Rules I through III. The Board is proposing a definition of "reasonably attributable source" that conforms to 42 USC §7491 and federal regulations.

The Board is proposing to amend ARM 17.8.1102 to incorporate by reference EPA's "Workbook for Plume Visual Impact Screening and Analysis," which the Department is required to follow under ARM 17.8.1107 in estimating visibility impacts, but which previously has been omitted from the incorporations by reference in ARM 17.8.1102. The Board is proposing to amend ARM 17.8.1102 to incorporate by reference "Guidelines for Determining Best Available Retrofit Technology for Coal-fired Power Plants and Other Existing Stationary Facilities," which, under 40 CFR 51.302(c)(4)(iii), the Department must follow in determining BART for fossil-fuel fired generating plants having total generating capacity of more than 750 megawatts. In the authorizing section for ARM 17.8.1102, to conform to the current format prescribed by the Secretary of State's office, the Board also is proposing to substitute citations to the specific statutes implemented in place of the current reference to "Title 75, chapter 2, MCA."

The Board is proposing to amend ARM 17.8.1103 to note that the subchapter would now also apply to existing stationary facilities, as defined in the proposed amendments, in addition to applying to proposed major stationary sources and major modifications.

The Board is proposing to amend ARM 17.8.1107 by deleting the specific citation to the Workbook for Plume Visual Impact Screening and Analysis, which would be adopted and incorporated by reference in ARM 17.8.1102. This is not intended to change the meaning of the rules but is intended only to avoid having to amend the references to the workbook

in both rules whenever the workbook is updated or the name of the workbook is changed.

New Rule I would provide a process for federal land managers to provide an analysis to the Department demonstrating that visibility impairment exists in a mandatory federal Class I area and for the Department to review the analysis and determine whether a reasonably attributable source exists.

New Rule II would allow owners or operators to apply for an exemption from BART by demonstrating that their facility does not, or will not, cause or contribute to significant impairment of visibility in a mandatory Class I federal area. Under New Rule II, the Department would conduct a public hearing on an application for an exemption from BART and a person adversely affected by the Department's decision on the application could request a contested case hearing before the Board concerning the decision.

New Rule III would provide a process for the Department to determine and require BART for reasonably attributable sources that are not granted an exemption under proposed New Rule II. The rule would require installation and operation of BART as expeditiously as practicable, but no later than five years after the Department or the Board determines that BART is required. New Rule III would provide a process for an adversely affected person to request a contested case hearing before the Board concerning a Department order stating the conditions that constitute BART for a particular facility.

The Board is proposing to repeal ARM 17.8.221 because the rule sets forth a redundant and incomplete method of measuring visibility impairment. The current method of measuring the extinction and scattering of light that results in visibility impairment is the Interagency Monitoring of Protected Visual Environments (IMPROVE). IMPROVE monitoring sites measure visibility at all of Montana's mandatory Class I federal areas. Confirming compliance with a standard such as that set forth at ARM 17.8.221 is an inferior method of mitigating visibility impairment. The Department expects federal land managers certifying impairment of visibility will rely on data from IMPROVE monitors. The Department's determinations will likewise rely on IMPROVE data.

6. Concerned persons may submit their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to the Board Secretary at Board of Environmental Review, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana 59620-0901; faxed to (406) 444-4386, or emailed to ber@state.mt.us, no later than 5:00 p.m., October 16, 2002. To be guaranteed consideration, written comments must be postmarked on or before that date.

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

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

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

**BOARD OF ENVIRONMENTAL REVIEW**

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

**Reviewed by:**

*David Rusoff*
**David Rusoff, Rule Reviewer**

**Certified to the Secretary of State, August 5, 2002.**

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

| | |
|---|---|
| In the matter of the amendment of ARM 17.53.105 pertaining to incorporation by reference of current federal regulations into hazardous waste rules | NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT (HAZARDOUS WASTE) |

TO: All Concerned Persons

1. On September 12, 2002, at 10:30 a.m. a public hearing will be held in Room 35 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed amendment of the above-stated rule.

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., September 5, 2002, to advise us of the nature of the accommodation you need. Please contact the Department at P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2544; fax (406) 444-4386; or email rmartin@state.mt.us.

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

17.53.105 INCORPORATION BY REFERENCE (1) and (2) remain the same.

(3) When incorporated by reference in this chapter, references to 40 CFR 124 and 40 CFR 260 through 270, 273, or 279 refer to the version of that publication revised as of July 1, ~~2001~~ 2002. References in this chapter to 40 CFR 124 and 40 CFR 260 through 270, 273, or 279 that incorporate publications refer to the version of the publication as specified at 40 CFR 260.11. 40 CFR 60, Appendix A, methods 1-5, are also incorporated by reference.

(4) through (7) remain the same.

AUTH: 75-10-405, MCA
IMP: 75-10-405, MCA

REASON: The proposed amendment to ARM 17.53.105(3) would update the incorporations by reference by adopting the most recent edition of the Code of Federal Regulations. The amendment is necessary to allow the Department to follow the most recent edition of federal regulations, and thus maintain comity with the U.S. Environmental Protection Agency, to preserve program authorization.

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 Keith

**Christie, Legal Unit, Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901, no later than September 20, 2002. To be guaranteed consideration, the comments must be postmarked on or before that date. Written data, views or arguments may also be submitted electronically via e-mail addressed to kchristie@state.mt.us, no later than 5:00, p.m., September 20, 2002.**

**5. Keith Christie has been designated to preside over and conduct the hearing.**

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

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

**Reviewed by:** **DEPARTMENT OF ENVIRONMENTAL QUALITY**

*David Rusoff* **BY:** *Jan P. Sensibaugh*

**DAVID RUSOFF** **JAN P. SENSIBAUGH, Director**

**Rule Reviewer**

**Certified to the Secretary of State, August 5, 2002.**

**BEFORE THE BOARD OF PUBLIC ACCOUNTANTS**
**DEPARTMENT OF LABOR AND INDUSTRY**
**STATE OF MONTANA**

| | |
|---|---|
| In the matter of the proposed amendment of ARM 8.54.802, 8.54.815, 8.54.816, and 8.54.901, pertaining to basic requirements and credit for formal study programs, and professional monitoring | ) NOTICE OF PUBLIC HEARING ) ON PROPOSED AMENDMENT ) ) ) ) ) |

TO: All Concerned Persons

1. On September 12, 2002, at 10:00 a.m., a public hearing will be held at the offices of the Business Standards Division, in room 471, 301 South Park Avenue, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Department of Labor and Industry will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board of Public Accountants no later than 5:00 p.m., on September 6, 2002, to advise us of the nature of the accommodation that you need. Please contact Susanne Criswell, Board of Public Accountants, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2389; Montana Relay 1-800-253-4091; TDD (406) 444-2978; facsimile (406) 841-2309; e-mail dlibsdpac@state.mt.us.

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

8.54.802 BASIC REQUIREMENT (1) During the three-year period, ending the June 30th immediately preceding the permit year of January 1 through December 31, applicants for a permit to practice must complete 120 hours of acceptable continuing education credit, except as otherwise provided under 37-50-314~~(3) and (4)~~, MCA, and as explained in ARM 8.54.806 and 8.54.807~~, of these rules~~.

(2) At least 24 hours of the 120 hours of acceptable continuing education credit must consist of subjects related to the reporting on financial statements as defined in ARM 8.54.204~~(1)(c) and (i)~~.

(3) Beginning July 1, 1998, at least two hours of the 120 hours of acceptable continuing education credit must consist of knowledge and the application of ~~board rules and how board professional conduct rules may compare and contrast with~~ ethics or the codes of professional conduct of certified public accountants and licensed public accountants ~~primary professional organizations~~. These hours ~~are not~~ may be considered subjects related to the reporting on financial statements required in (2) ~~above~~.

(4) and (5) remain the same.

AUTH: Sec. 37-1-319, 37-50-201, 37-50-203, MCA
IMP: Sec. 37-1-306, 37-50-203, MCA

REASON: There is reasonable necessity to amend ARM 8.54.802 to broaden the continuing education requirements with respect to ethical issues and the codes of professional conduct for accountants. The existing language has for several years focused on distinctions between Montana requirements and provisions that have been adopted by the various national professional organizations. The Board believes that most Montana accountants no longer need to have their attention directed at the various differences between Montana and other states, and that the public and the profession would be better served by allowing a broader range of ethical matters to be studied. The Board notes that the proposed amendments specifically will now allow ethics courses to count as part of the credits required for audit and attest matters. There is reasonable necessity for such changes in light of the general ethical issues concerning the practice of accounting. In addition, there is reasonable necessity to make technical changes to delete references to statutory or rule subparts that have been repealed or may be re-numbered, as recommended by the Secretary of State's Administrative Rule Bureau, at the same time the rule is otherwise being amended. Finally, there is reasonable necessity to amend the authorizing and implementing citations to more appropriately cite the applicable statutes.

8.54.815 CREDIT HOURS GRANTED - GENERAL (1) Continuing education credit will be given ~~for whole hours only,~~ with a minimum of 50 minutes constituting one hour. ~~As in example, 100 minutes of continuous instruction would count for two hours. However, more than 50 minutes but less than 100 minutes of continuous instruction would count only for one hour~~. One-half continuing education credit increments (equal to a minimum of 25 minutes) are permitted after the first credit has been earned in a given learning activity. ~~Only contact hours are allowed.~~ For university or college courses, each semester unit of credit shall equal 15 hours toward the requirement. A quarter unit of credit shall equal 10 hours.

AUTH: Sec. 37-1-319, 37-50-201, 37-50-203, MCA
IMP: Sec. 37-1-306, 37-50-203, ~~37-50-314~~, MCA

REASON: There is reasonable necessity to amend ARM 8.54.815 in the context of the other rule changes regarding continuing education requirements. The Board believes that the allowance of half credits for each 25 minutes in a learning activity after the first credit is earned is more equitable than the prior version of the rule. Various members of the accounting profession have requested the change to allow half-credits. The Board notes that a number of other professions allow half-credit increments for continuing education purposes. Finally, there is

reasonable necessity to amend the authorizing and implementing citations to more appropriately cite the applicable statutes.

8.54.816 CREDIT FOR FORMAL INDIVIDUAL STUDY PROGRAMS

(1) remains the same.

(a) Interactive self-study programs shall receive continuing education credit equal to the average completion time, if the sponsor is recognized and approved by NASBA's CPE quality assurance service. An interactive self-study program is designed to use interactive learning methodologies that simulate a classroom learning process ~~by employing software, other courseware, or technology-based systems~~ that ~~provide~~ provides significant ongoing, interactive feedback to the participant regarding his or her learning progress.

(b) Non-interactive self-study programs ~~should~~ receive continuing education credit equal to one-half of the average completion time.

(2) Individuals claiming credit for such correspondence or formal individual study courses are required to obtain evidence of satisfactory completion of the course from the program sponsor. Credit ~~will be~~ is allowed in the period in which the course is completed, except as allowed in ARM 8.54.802~~(4)~~.

AUTH: Sec. 37-1-319, 37-50-201, 37-50-203, MCA
IMP: Sec. 37-1-306, 37-50-203, ~~37-50-314~~, MCA

REASON: There is reasonable necessity to amend ARM 8.54.816 because NASBA's CPE quality assurance service has recently changed the criteria upon which a self-study program is determined to be "interactive", and clarification is needed to place members of the profession on notice of what must be done to obtain required continuing education credits. The proposed amendments also make minor technical changes to clarify the rule, and are reasonably necessary to make while the rule is otherwise being amended. Finally, there is reasonable necessity to amend the authorizing and implementing citations to more appropriately cite the applicable statutes.

8.54.901 INTRODUCTION (1) Pursuant to 37-50-203~~(2)(h)~~, MCA, the purpose of these rules shall be to provide for the monitoring of the profession of public accounting.

AUTH: Sec. 37-50-203, MCA
IMP: Sec. 37-50-203, MCA

REASON: There is reasonable necessity to amend ARM 8.54.901 to delete the reference to subsection (2)(h) in the cited statute. Subsection (h) is no longer part of section 37-50-203(2), MCA. Pursuant to the recommendations of the Secretary of State's Administrative Rules Bureau, the Board is deleting the cross-reference to the specific subsection, so that future legislative changes to the numbering of sub-parts of the statute do not necessarily require the amendment of the rule.

4. Concerned persons may present their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to the Board of Public Accountants, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2309, or by e-mail to dlibsdpac@state.mt.us and must be received no later than 5:00 p.m., September 19, 2002.

5. An electronic copy of this Notice of Public Hearing is available through the Department's site on the World Wide Web at http://discoveringmontana.com/dli/pac under the Board of Public Accountants rule notice section. The Department strives to make the electronic copy of this Notice conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered.

6. Mark Cadwallader, attorney, has been designated to preside over and conduct this hearing.

7. The Board of Public Accountants maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this board. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding all Board of Public Accountants administrative rulemaking proceedings or other administrative proceedings. Such written request may be mailed or delivered to the Board of Public Accountants, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, faxed to the office at (406) 841-2309, e-mailed to dlibsdpac@state.mt.us or may be made by completing a request form at any rules hearing held by the agency.

8. The Board of Public Accountants will meet on November 4, 2002, during the Board's regular meeting at 301 South Park Avenue, Helena, to consider the comments made by the public, the proposed responses to those comments, and take final action on the proposed amendments and new rules. Members of the public are welcome to attend the meeting and listen to the Board's deliberations, but the Board cannot accept any comments concerning the proposed amendments and new rules beyond the September 19, 2002, deadline.

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

**10. The Board proposes to make the above amendments effective November 28, 2002, and applicable to continuing education requirements for the report year beginning July 1, 2002. The Board reserves the right to adopt only portions of the proposed amendments, or to adopt some or all of the amendments at a later date.**

**BOARD OF PUBLIC ACCOUNTANTS**
**BERYL ARGALL STOVER, CPA,**
**CHAIR**

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

**/s/ KEVIN BRAUN**
**Kevin Braun**
**Rule Reviewer**

**Certified to the Secretary of State August 5, 2002**

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

| | | |
|---|---|---|
| In the matter of the proposed amendment of ARM 8.58.301, 8.58.406A, 8.58.411, 8.58.414, 8.58.415A, 8.58.415B, 8.58.415C, 8.58.419, 8.58.423, 8.58.425, 8.58.426, 8.58.709, 8.58.710, 8.58.711, and 8.58.713, all pertaining to realty regulation matters | ) ) ) ) ) ) ) ) ) ) ) | NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT |

**TO: All Concerned Persons**

**1. On September 10, 2002, at 9:00 a.m., a public hearing will be held at the offices of the Business Standards Division, in conference room #489, on the 4th floor of the Old Federal Building, 301 South Park Avenue, Helena, Montana, to consider the proposed amendment of the above-stated rules.**

**2. The Department of Labor and Industry will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board of Realty Regulation no later than 5:00 p.m., on September 3, 2002, to advise us of the nature of the accommodation that you need. Please contact Grace Berger, Board of Realty Regulation, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2322; Montana Relay 1-800-253-4091; TDD (406) 444-2978; facsimile (406) 841-2323; e-mail dlibsdrre@state.mt.us.**

**3. The Board of Realty Regulation believes that the following amendments are reasonably necessary to amend current rules to clarify and update current rules to meet practice. The 2001 Legislature eliminated the two types of broker licenses. The rules must now eliminate those references. These amendments will separate the definitions of supervising broker and managing broker as a result of the legislative change. On-line filing of education requires the elimination of an affidavit of education. The affidavit is being replaced by an education reporting form and all reference to the affidavit is being changed to "education reporting form for real estate". This system is currently used for property managers. Currently, the Board has no requirement that pre-licensing education be reviewed to ensure they are maintained and teaching material is updated. This review and renewal process is similar to the one currently in place for continuing education. These amendments also establish minimum requirements for instructors that are currently used but not adopted by rule. The broker pre-licensing education course is being amended to structure the education to better prepare broker candidates for the job of**

being a supervising or independent broker since a broker associate level no longer exists. Education credit carry over for property managers will increase from 3 to 6 hours. Their annual requirement has increased from 6 to 12 hours annually and the Board determined that those licensees should be allowed to carry over more hours.

In addition, there is reasonable necessity to make technical changes to delete references to statutory or rule subparts that have been repealed or may be re-numbered, as recommended by the Secretary of State's Administrative Rules Bureau, at the same time the rule is otherwise being amended.

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

8.58.301 DEFINITIONS The terms used in this chapter shall have their common meaning as used in the real estate industry, and, unless the context otherwise requires, the following meanings shall also apply:

(1) through (5) remain the same.

~~(6) "associate" shall include broker associate and salesperson;~~

(7) through (13) remain the same, but are renumbered (6) through (12).

~~(17)~~ (13) "~~supervising broker/m~~ Managing broker" is a broker ~~owner or broker associate~~ who has been designated by other brokers ~~owners~~ of a real estate brokerage company to be the ~~designated~~ broker ~~responsible~~ with the authority for the maintenance of a trust account, if any~~, supervision of all licensed salespersons associated with the office and the appropriate administration of all regulations and laws pertaining to the licensed functions of the individual real estate licensees associated with the office;~~.

(14) through (16) remain the same.

(17) "Supervising broker" is a broker who is responsible for supervision and training of one or more licensed salespersons, pursuant to 37-51-302, MCA.

(18) and (19) remain the same.

AUTH: Sec. 37-1-131, 37-51-203, MCA
IMP: Sec. 37-51-202, MCA

REASON: There is reasonable necessity to amend ARM 8.58.301 in order to conform the Rule to recent legislative amendments. Chapter 492, Laws of 2001 (HB 120) eliminated broker owner/broker associate licensing types. Under current law there is only a broker license. A managing broker is to be the person designed by a group of brokers to be responsible for the daily operations of a brokerage company and trust account. A supervising broker is the broker responsible for supervising salespeople licensed under their broker license and is responsible for all of the salespersons licensed activity. The rules must now reflect that amendment. Any reference to broker

owner or broker associate has been eliminated. This also requires distinct definitions for managing broker and supervising broker. Those definitions were once combined and referred to broker owner and broker associate responsibilities. The trust account maintenance also is more clearly defined now that all brokers are of equal status and no one broker is a broker owner.

In addition, there is reasonable necessity to make technical changes to delete references to statutory or rule subparts that have been repealed or may be re-numbered, as recommended by the Secretary of State's Administrative Rule Bureau, at the same time the rule is otherwise being amended.

8.58.406A APPLICATION FOR LICENSE--SALESPERSON AND BROKER (1) through (3) remain the same.

(4) All applicants for licensure as a salesperson must submit 60 hours of approved pre-licensing education obtained within a period of 24 months immediately preceding the date of the submission of the application.

(5) All applicants for licensure as a broker must submit 60 hours of approved pre-licensing education obtained within a period of 18 months immediately preceding the date of the submission of the application.

(5) through (9) remain the same, but are renumbered (6) through (10).

AUTH: Sec. 37-1-131, 37-51-203, MCA
IMP: Sec. 37-1-135, 37-51-202, 37-51-302, MCA

REASON: There is reasonable necessity to amend ARM 8.58.406A in order to conform the rule to recent Board activities. The Board created a taskforce comprised of board members and licensees. One of the recommendations of this taskforce was that the pre-licensing education for brokers be revamped to address the demands placed on brokers. It was determined that education received two years prior to applying for a real estate license was outdated at best. Eighteen months was determined to be a reasonable time to allow a broker applicant sufficient time to complete all required modules. It was recommended that education offered in module format was more pertinent, resulted in better retention of the material, and was more effectively presented in addition to being more convenient for the broker applicant.

8.58.411 FEE SCHEDULE (1) through (17) remain the same.

(18) ~~Continuing education~~ Education course instructor application for approval and renewal 50

(19) through (25) remain the same.

(26) Pre-licensing course application for approval and renewal 150

AUTH: Sec. 37-1-131, 37-1-134, 37-51-203, 37-51-204, MCA
IMP: Sec. 37-1-134, 37-51-202, 37-51-204, 37-51-207, 37-

51-303, 37-51-310, 37-51-311, MCA

REASON: There is reasonable necessity to amend ARM 8.58.411 in order to conform the rule to recent recommendations made to the Board. Fees are created to cover costs associated with review and approval of pre-licensing education courses and instructors. This application fee is similar to that charged to continuing education courses and instructors for approval. It was the recommendation of the Education Committee to initiate an approval and periodic review of pre-licensing education courses to ensure accurate, timely information is being presented to all licensee candidates. This would affect 6 pre-licensing programs. The instructor fees would affect 7 instructors. The Board estimates that the fee increase would generate an additional $1,200 over three years. Currently the pre-licensing education arena is seeing more activity and more providers entering the field, thus needing more closely supervised administration in order to ensure compliance with requirements.

8.58.414 TRUST ACCOUNT REQUIREMENTS (1) Each broker shall maintain a separate bank account which shall be designated a trust account wherein all down-payments, earnest money deposits, rent payments, security deposits or other trust funds received by the broker or his salesperson on behalf of a principal, third party or any other person shall be deposited. However, ~~any~~ a broker~~, broker owner or managing broker~~ does not need to maintain a trust account if:

(a) The broker~~, broker owner or managing broker~~ does not receive down payments, earnest money deposits, rent payment, security deposits or other trust funds on behalf of a principal, third party or any other person; ~~or~~

(b) The broker~~, broker owner or managing broker~~ elects to use a title company to hold all down payments, earnest money deposits, rent payments, security deposits or other trust funds received from principals, third parties or other persons~~.~~; or

(c) The broker has delegated the authority for maintenance of a trust account to a managing broker with whom the broker is employed or associated as an independent contractor. However, such delegation shall not relieve the delegating broker from responsibility for failure to comply with these trust account requirements.

(2) Broker trust accounts may be maintained in interest-bearing accounts with the interest payable to the broker, principal, third party or any other person, as may be designated by agreement. Interest payable to the broker shall be identified by agreement as consideration for services performed. Offices or firms having more than one broker~~, whether broker owner or broker associate,~~ may utilize a single trust account.

(3) through (3)(n) remain the same.

(o) A salesperson, or broker who has delegated the broker's obligation to maintain a trust account to a managing broker pursuant to (1)(c), shall place all deposits in the custody of the supervising or managing broker in adequate time for the supervising or managing broker to comply with all trust

account requirements.

(4) through (6) remain the same.

(7) Each broker~~, broker owner or managing broker~~ shall ensure that all real estate money received by the broker, ~~broker owner or managing broker or his or her~~ the broker's salesperson, or another broker who has delegated the broker's obligation to maintain a trust account to the broker pursuant to (1)(c) is deposited in the broker or title company's trust account within three business days of the broker's or salesperson's (whichever is earlier) receipt of the money, unless otherwise provided in the buy/sell agreement, lease agreement or rental agreement.

(8) ~~When a salesperson or broker associate is licensed with a broker owner, the responsibility for maintaining the trust account shall be that of the broker owner or the brokerage's managing broker.~~

~~(9)~~ The broker ~~owner or the designated managing broker~~ is responsible at all times for the proper handling of earnest money, security deposits or other funds received by the broker, ~~owner or the designated managing broker or the broker owner's or designated managing broker's salespersons.~~ the broker's salesperson or funds received by the broker as a managing broker pursuant to (1)(c) on behalf of customers or clients.

AUTH: Sec. 37-1-131, 37-1-316, 37-51-203, MCA
IMP: Sec. 37-1-316, 37-1-319, 37-51-202, 37-51-203, 37-51-321, MCA

REASON: See the statement of reasonable necessity for ARM 8.58.301.

8.58.415A CONTINUING REAL ESTATE EDUCATION (1) through (11) remain the same.

(12) ~~A sworn affidavit~~ An education reporting form attesting to the successful completion of the continuing education requirement must be submitted to the board by December 31 of each year. Filing of an ~~affidavit~~ education reporting form after December 31, but on or before February 15 will result in a late filing fee.

(13) An incomplete ~~affidavit of~~ education reporting form will not be accepted and will be returned to the licensee. Any form returned to the licensee must be properly completed and resubmitted before the December 31 deadline, or late filing fees will be required.

(14) through (16) remain the same.

(17) ~~Affidavits~~ Education reporting forms will be mailed to all real estate licensees at their last address of record. Failure to receive an ~~affidavit~~ education reporting form does not eliminate the reporting requirement. Each licensee is required to annually report continuing education.

AUTH: Sec. 37-1-131, 37-1-306, 37-51-203, 37-51-204, MCA
IMP: Sec. 37-1-319, 37-51-202, 37-51-203, 37-51-204, MCA

REASON: There is reasonable necessity to amend ARM 8.58.415A in

order to accommodate on-line filing of continuing education reporting. Reporting of continuing education is being amended for real estate licensees to accommodate on-line filing and mirror the process established for property managers. An affidavit is not practical in the on-line process. The Board is implementing a reporting mechanism using an education reporting form rather than an affidavit.

8.58.415B CONTINUING REAL ESTATE EDUCATION - COURSE APPROVAL (1) Requests for approval of a continuing real estate education course must be made on forms approved by the board and submitted ~~45~~ at least 30 days prior to the date of the intended course, with payment of the required fee.

(2) through (7) remain the same.

AUTH: Sec. 37-1-131, 37-51-202, 37-51-203, 37-51-204, MCA
IMP: Sec. 37-1-319, 37-51-202, 37-51-204, MCA

REASON: There is reasonable necessity to amend ARM 8.58.415B in order to expedite the process of course and instructor approval. Continuing education courses are now being approved in an expedited manner. It is not necessary to have the course and instructor applications submitted 45 days prior to their intended offering date. 30 days is sufficient time to complete the review and approval process for both real estate and property management.

8.58.415C CONTINUING REAL ESTATE EDUCATION - INSTRUCTOR

(1) Request for approval of a continuing education instructor must be made on forms approved by the board and submitted ~~45~~ at least 30 days prior to the date of the intended instruction with payment of the required fee.

(2) through (4) remain the same.

AUTH: Sec. 37-1-131, 37-51-203, 37-51-204, MCA
IMP: Sec. 37-1-319, 37-51-202, 37-51-204, MCA

REASON: There is reasonable necessity to amend ARM 8.58.415C in order to expedite the process of course and instructor approval. Continuing education courses are now being approved in an expedited manner. It is not necessary to have the course and instructor applications submitted 45 days prior to their intended offering date. 30 days is sufficient time to complete the review and approval process for both real estate and property management.

8.58.419 GROUNDS FOR LICENSE DISCIPLINE - GENERAL PROVISIONS - UNPROFESSIONAL CONDUCT (1) through (3)(m) remain the same.

(n) Licensees shall disclose to ~~the~~ their managing broker, supervising broker ~~owner, responsible broker~~, business partner or any other responsible business associate any and all additional wages, tips, bonuses or gifts which have been or are to be recovered by the licensee which are not considered to be

real estate commission(s);

(o) through (4) remain the same.

AUTH: Sec. 37-1-131, 37-1-136, 37-1-306, ~~37-51-102,~~ 37-51-202, 37-51-203, 37-51-321, MCA
IMP: Sec. 37-51-102, 37-51-201, 37-51-202, 37-51-321, 37-51-512, MCA

REASON: See statement of reasonable necessity for ARM 8.58.301.

8.58.423 GENERAL LICENSE ADMINISTRATION REQUIREMENTS

(1) At any time that a salesperson's ~~or broker associate's~~ association with ~~a~~ the supervising broker ~~owner~~ is terminated, the license of the salesperson ~~or broker associate~~ shall be immediately mailed, by the broker ~~owner~~, to the board office with a letter noting the termination.

(2) No dispute between a salesperson ~~or broker associate~~ and ~~a~~ the supervising broker shall be cause for failing to immediately mail the license of the salesperson ~~or broker associate~~ to the board office.

(3) When required in writing to do so by a salesperson formerly associated with a supervising broker ~~owner~~, the supervising broker ~~owner or managing broker of the brokerage company~~ shall promptly provide the former salesperson ~~associate~~ with a certified statement on the form prescribed by the board identifying all real estate transactions in which the salesperson ~~associate~~ was involved in connection with the salesperson's ~~associate's~~ association with the supervising broker ~~owner or brokerage company~~ within the preceding three years.

(4) Upon termination of a salesperson's association with ~~a~~ his or her supervising broker, the supervising broker ~~owner or managing broker, the broker owner or managing broker~~ shall immediately notify all principals as to the listings or pending transactions in which the salesperson was involved, that the salesperson is no longer affiliated or associated with the supervising broker ~~owner or brokerage company~~.

(5) Listings and pending transactions of a salesperson are the responsibility of the supervising broker upon termination of an association.

(6) The supervising broker ~~owner or managing broker~~ is responsible for the salespersons under his or her supervision for the salespersons'~~s~~ performance as ~~a~~ real estate licensees. For any complaints submitted to the board of realty regulation alleging improper conduct on the part of a ~~real estate~~ salesperson ~~licensee~~, a screening panel shall notify the salesperson's supervising broker ~~owner or managing broker~~ that a complaint has been filed by providing a copy of the complaint to the supervising broker ~~owner or managing broker~~.

(7) The supervising broker ~~or managing broker~~ must provide on-going training in the area of real estate activity to all salespersons under his/her supervision. ~~Broker owners~~ Managing brokers are not responsible to provide training or ongoing supervision of brokers ~~associates~~ whom they employ or are

associated as independent contractors.

(8) All listings obtained by a salesperson must be reviewed, signed and dated by the supervising broker ~~or managing broker~~ before the listing is effective.

(9) The supervising broker ~~or managing broker~~ has the responsibility to exercise adequate supervision to assure that all documents for a real estate transaction prepared by a salesperson under his/her supervision are appropriately prepared and executed.

(10) A broker ~~owner~~ shall not sign the application of a salesperson unless the broker ~~owner~~ and salesperson will be in lawful association, through employment contract or otherwise.

(11) ~~The broker owner may designate another broker to be the managing broker of the office.~~ A broker shall notify the board office upon any changes of the broker's business address.

AUTH: Sec. 37-1-131, 37-51-203, MCA
IMP: Sec. 37-51-202, 37-51-203, 37-51-308, 37-51-309, MCA

REASON: See statement of reasonable necessity for ARM 8.58.301.

8.58.425 PRE-LICENSING EDUCATION - SALES AND BROKERS

(1) Request for approval of a pre-licensing education course and instructor approval must be made on forms approved by the board and submitted 60 days prior to the initial course offering date.

(2) Expiration of course approval or instructor approval is three years from the date of approval, but may be revoked for cause.

(3) Distance education courses shall be approved if the board determines that:

(a) an appropriate and complete application has been filed and approved by the board;

(b) the distance education course meets the content requirements as established under ARM 8.58.425;

(c) the distance education course provider must be certified by the association of real estate license law officials (ARELLO) and provide appropriate documentation that the ARELLO certification is in effect. Approval will cease immediately should ARELLO certification be discontinued for any reason; and

(d) the distance education course meets all other requirements as prescribed in the statutes and rules that govern the operation of approved courses.

(4) Advanced nationally recognized designation courses may be submitted and approved in part to fulfill specific topics of the broker pre-licensing education requirement.

(5) Instructors teaching more than 25% of a pre-licensing course must be approved by the board as pre-licensing instructors.

(6) The course provider is responsible for the actions and representations of all instructors who aid or assist in the instruction of the pre-licensing education course.

(1) and (2) remain the same, but are renumbered (7) and (8).

(9) Approved instructors must have:

(a) a bachelor's degree in a field traditionally associated with the subject matter being taught;

(b) advanced training on instruction methods and adult learning; and

(c) one year's experience in real estate education.

(3) remains the same, but is renumbered (10).

~~(4)~~(11) ~~Pre-licensing course to obtain a broker license must consist of the following topics:~~ Effective January 1, 2003, the 60 hours of board approved broker pre-licensing education will consist of the following modules:

~~(a) a review of:~~

~~(i) real estate law;~~

~~(ii) taxation;~~

~~(iii) property management and leasing;~~

~~(iv) construction and land development;~~

~~(v) ethics and standards of practice;~~

~~(vi) escrow closing/settlement practices;~~

~~(vii) hazardous waste/environmental issues;~~

~~(viii) agency;~~

~~(ix) contract law and documents;~~

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

~~(xi) negligence/misrepresentation (risk management);~~

~~(xii) fair housing;~~

~~(xiii) landlord/tenant law.~~

(a) business management;

(b) ~~real estate brokerage management~~ contracts;

(c) ~~trust account procedures~~ financial management;

(d) ~~planning and organizing a real estate office~~ liability pertaining to real estate practice;

(e) ~~in-house training~~ ethics; and

(f) ~~agent supervising and broker responsibilities~~ property management.

(12) In order to receive credit for attendance, 90% of each hour of the approved course time must be attended.

(13) A board representative may audit all board-approved courses at no charge for rule compliance.

AUTH: Sec. 37-1-131, 37-51-202, 37-51-203, MCA
IMP: Sec. 37-51-203, 37-51-302, ~~37-51-308,~~ MCA

REASON: There is reasonable necessity to amend ARM 8.58.425 in order to allow periodic review of pre-licensing courses. Currently, pre-licensing courses are not required to renew or complete any review process. Once a course is approved, it is approved forever. It is reasonable to require a periodic review of course material and instructors to ensure timely updating of instructional material, accurate information and appropriate qualifications of instructors.

With the elimination of the two levels of broker licensing, the pre-licensing education required to obtain a broker license

is being amended to include topics to prepare a broker to open their own office, their responsibilities for a trust account, for supervision of sales staff and their unique type of liability as a broker. The broker associate level of licensing was used to provide a transition from a salesperson to a broker supervising salespeople and running an office. That transition is no longer available. The education needed to obtain a broker license should better prepare candidates to fulfill their responsibilities as supervisors of sales staff and be a more advanced level of education in the areas of trust accounts, contracts, property management, liability, ethics and financial management, the areas of licensing specific to brokers.

Those broker applicants who complete the old broker curriculum of pre-licensing education prior to January 1, 2003, have 18 months to make application for their broker license before their education will expire. The old curriculum will be accepted for 18 months after completion. Those broker applicants who complete their education after January 1, 2003, must complete the new pre-licensing education curriculum requirements within 18 months immediately preceding the date of the submission of the broker license application.

8.58.426 RENEWAL (1) and (2) remain the same.

(3) Licensees cannot renew their license without also completing and submitting the ~~affidavit of~~ education reporting form at the time of renewal.

(4) remains the same.

AUTH: Sec. 37-51-203, MCA
IMP: Sec. 37-51-310, MCA

REASON: See statement of reasonable necessity for ARM 8.58.415A.

8.58.709 CONTINUING PROPERTY MANAGEMENT EDUCATION

(1) remains the same.

(2) No more than ~~three~~ six hours of elective topics may be carried over. No mandatory hours may be carried over to any other year.

(3) through (5) remain the same.

(6) ~~The effective date of the amendments to this rule will be January 1, 2002.~~ The board may audit licensees for compliance with continuing education requirements. Audited licensees must provide copies of completion certificates to the board as verification of compliance within 30 days after mailing the audit request.

(7) An education reporting form attesting to the successful completion of the continuing education requirement must be submitted to the board by December 31 of each year. Filing of an education reporting form after December 31, but on or before February 15 of the next year, will result in a late filing fee.

AUTH: Sec. 37-1-131, 37-51-202, 37-51-203, MCA
IMP: Sec. ~~37-1-101,~~ 37-1-306, 37-1-319, ~~37-51-604,~~ MCA

REASON: There is reasonable necessity to amend ARM 8.58.709. The carry-over allowed for property managers is being increased to 6 hours to mirror the real estate requirement due to the increase in overall hours now required of property managers. Amendment will also allow the Board to audit a number of licensees to ensure compliance with the continuing education requirement. It also reiterates the deadline established for filing this information.

8.58.710 CONTINUING PROPERTY MANAGEMENT EDUCATION - COURSE APPROVAL (1) Requests for approval of a continuing real estate education course must be made on forms approved by the board and submitted ~~45~~ at least 30 days prior to the date of the intended course, with payment of the required fee.

(2) through (8) remain the same.

AUTH: Sec. 37-1-131, 37-51-202, 37-51-203, MCA
IMP: Sec. ~~37-1-101,~~ 37-1-306, 37-1-319, ~~37-51-604,~~ MCA

REASON: There is reasonable necessity to amend ARM 8.58.710 because continuing education courses are now being approved in an expedited manner. It is not necessary to have the course and instructor applications submitted 45 days prior to their intended offering date. Thirty days is sufficient time to complete the review and approval process for both real estate and property management.

8.58.711 CONTINUING PROPERTY MANAGEMENT EDUCATION - INSTRUCTOR APPROVAL (1) Request for approval of a continuing education instructor must be made on forms approved by the board and submitted ~~45~~ at least 30 days prior to the intended instruction with payment of the required fee.

(2) through (4) remain the same.

AUTH: Sec. 37-1-131, 37-51-202, 37-51-203, MCA
IMP: Sec. ~~37-1-101,~~ 37-1-306, 37-1-319, ~~37-51-604,~~ MCA

REASON: See statement of reasonable necessity for ARM 8.58.710.

8.58.713 FEE SCHEDULE (1) and (2) remain the same.

(3) Examination fees are payable to the national testing service under contract with the board.~~:~~

~~(a) for initial examination $50~~

~~(b) for each subsequent or rescheduling of examination $50~~

(4) through (18) remain the same.

AUTH: Sec. 37-1-134, 37-51-202, 37-51-203, MCA
IMP: Sec. 37-1-134, 37-51-207, MCA

REASON: There is reasonable necessity to amend ARM 8.58.713.

The Board of Realty Regulation contracts with a national testing service to deliver licensing examinations on their behalf. Fees are negotiated by the board, department and test vendor and paid directly to the testing service. This language mirrors that found in the real estate fee schedule. Based on the fiscal year 2002 examinations taken by Montana property manager applicants, the Board estimates that its revenue and expenses will decrease by approximately $5,600. The Board is preparing a request for proposal to make the property manager test computer-based. The Board expects, based upon the cost for broker tests that are computer-based, that the test administration fee will be approximately $100 per examination, a $50 increase per applicant. None of that fee will be paid to the Board.

5. Concerned persons may present their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to the Board of Realty Regulation, 301 South Park Avenue, PO Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2323, or by e-mail to dlibsdrre@state.mt.us and must be received no later than 5:00 p.m., September 12, 2002.

6. An electronic copy of this Notice of Public Hearing is available through the Department's site on the World Wide Web at http://discoveringmontana.com/dli/bsd under the Board of Realty Regulation rule notice section. The Department strives to make the electronic copy of this Notice conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered.

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

8. The Board of Realty Regulation will meet at 1:00 p.m. on September 18, 2002, during the Board's regular meeting at the Grouse Mountain Lodge, 2 Fairway Drive, Whitefish, Montana, to consider the comments made by the public, the proposed responses to those comments, and take final action on the proposed amendments and new rules. Members of the public are welcome to

attend the meeting and listen to the Board's deliberations, but the Board cannot accept any comments concerning the proposed amendments and new rules beyond the September 12, 2002, deadline.

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

10. The Board proposes to make the above amendments, except ARM 8.58.425, effective on the day after publication of the notice of final agency action. The Board proposes to make the amendments to ARM 8.58.425 effective January 1, 2003, and applicable to continuing education requirements for the reporting year starting January 1, 2003. The Board reserves the right to adopt only portions of the proposed amendments, or to adopt some or all of the amendments at a later date.

11. Jack Atkins, attorney, has been designated to preside over and conduct this hearing.

BOARD OF REALTY REGULATION
JOHN BEAGLE, CHAIR

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

/s/ Kevin Braun
Kevin Braun,
Rule Reviewer

Certified to the Secretary of State August 5, 2002

**BEFORE THE BOARD OF PHARMACY**
**DEPARTMENT OF LABOR AND INDUSTRY**
**STATE OF MONTANA**

| | |
|---|---|
| In the matter of the proposed amendment of ARM 24.174.301, 24.174.501, 24.174.604, 24.174.711, 24.174.1411, and 24.174.2106, pertaining to definitions, foreign graduates, preceptor requirements, technician ratio and pharmacy security requirements, the proposed adoption of new rule I, licensing, new rule II, personnel, new rule III, absence of pharmacist, new new rule IV, use of emergency drug kits, new rule IV, drug distribution, new rule V, pharmacist responsibility, new rule VI, sterile products, new rule VII, return of medication from long term care facilities, and new rule VIII, pharmacist meal/rest breaks, and the proposed repeal of ARM 24.174.302, health care facility definition, 24.174.810, class I facility, 24.174.811, class II facility and 24.174.812, class III facility | NOTICE OF ADDITIONAL PUBLIC HEARING AND EXTENSION OF COMMENT PERIOD |

TO: All Concerned Persons

1. On July 11, 2002, the Board of Pharmacy published a notice of the proposed amendment, adoption and repeal of the above-stated rules at page 1868, 2002 Montana Administrative Register, Issue Number 13. That notice provided for a public hearing to be held in Helena, which was held on August 2, 2002, as scheduled. However, because a copy of the notice was not mailed to all pharmacy licensees, the Board has decided to schedule a second public hearing and extend the comment period as described below.

2. On September 12, 2002, at 10:00 a.m., a public hearing will be held in the Business Standards Division's basement conference room, room B-07, 301 South Park Avenue, Helena, Montana to consider the proposed amendments, adoption and repeal of the above-stated rules.

3. The Department of Labor and Industry will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board of Pharmacy no later than 5:00 p.m., on September 6, 2002, to advise us of the nature of the accommodation that you need. Please contact Becky Deschamps, Board of Pharmacy, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2355; Montana Relay 1-800-253-4091; TDD (406) 444-2978; facsimile (406) 841-2343; e-mail dlibsdpha@state.mt.us.

4. Concerned persons may present their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to the Board of Pharmacy, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2343, or by e-mail to dlibbsdpha@state.mt.us and must be received no later than 5:00 p.m., September 19, 2002.

5. A copy of the original Notice of Public Hearing, as described in paragraph 1, above, is available upon request from Becky Deschamps, Board of Pharmacy, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2355; Montana Relay 1-800-253-4091; TDD (406) 444-2978; facsimile (406) 841-2343; e-mail dlibsdpha@state.mt.us.

6. An electronic copy of this Notice of Additional Public Hearing and the Notice of Public Hearing are available through the Department’s site on the World Wide Web at http://discoveringmontana.com/dli/bsd under the rule notice section for the Board of Pharmacy. The Department strives to make the electronic copy of this Notice conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered.

7. The Board of Pharmacy maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this Board. Persons who wish to have their name added to the list shall make a written request to the board which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding all Board of Pharmacy administrative rulemaking or other administrative proceedings. Such written request may be mailed or delivered to the Board of Pharmacy, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, faxed to the office at (406) 841-2343, e-mailed to dlibsdpha@state.mt.us or may be made by completing a request form at any rules hearing held by the agency.

**8. The Board of Pharmacy will meet on October 3-4, 2002, to consider the comments made by the public, the proposed responses to those comments, and take final action on the proposed amendments, new rules and repeals. The meeting will be held at Fairmont, Montana, the site of the meeting of the Montana Pharmacy Association. Members of the public are welcome to come to the Board's meeting and listen to the Board's deliberations, but the Board cannot accept any comments concerning the proposed amendments, new rules and repeals beyond the September 19, 2002, deadline.**

**9. Jack Atkins, attorney, has been designated to preside over and conduct the hearing.**

**BOARD OF PHARMACY**
**ALBERT A.FISHER, R.Ph.,**
**PRESIDENT**

**By: /s/ KEVIN BRAUN**
**Kevin Braun**
**Rule Reviewer**

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

**Certified to the Secretary of State August 5, 2002.**

**BEFORE THE BOARD OF LIVESTOCK
OF THE STATE OF MONTANA**

| | | |
|---|---|---|
| In the matter of the proposed repeal of ARM Title 32, Chapter 2, Sub-Chapter 3 as it relates to fees for environmental impact funds | ) ) ) ) ) | NOTICE OF PROPOSED REPEAL NO PUBLIC HEARING CONTEMPLATED |

TO: All Concerned Persons

1. On September 14, 2002, the board of livestock proposes to repeal ARM Title 32, Chapter 2, Sub-Chapter 3 as it relates to fees for environmental impact funds.

2. The board of livestock will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, contact the department of livestock no later than 5:00 p.m. on September 5, 2002, to advise us of the nature of the accommodation that you need. Please contact Marc Bridges, 301 N. Roberts Street - Room 308, PO Box 202001, Helena, MT 59620-2001; phone: (406)444-7323; TTD number: 1-800-253-4091; fax:(406)444-1929; e-mail: mbridges@state.mt.us.

3. The rules proposed to be repealed are as follows:

32.2.301 found on ARM page 32-27
32.2.302 found on ARM page 32-27
32.2.303 found on ARM pages 32-27 through 32-29
32.2.304 found on ARM page 32-29
32.2.305 found on ARM page 32-29
32.2.306 found on ARM pages 32-29 and 32-30
32.2.307 found on ARM page 32-30

AUTH: Sec. 2-4-302, 2-4-305, MCA
IMP: Sec. 2-4-302, 2-4-305, MCA

4. REASON: The rules proposed for repeal concern determination of fees to pay for costs associated with development of environmental assessments and environmental impact statements that must be preformed in conjunction with applications submitted to the department in accordance with the Montana Environmental Policy Act (MEPA). These rules were adopted in July, 1980, and existed as part of the department's rules which implemented and explained its authority under MEPA prior to December, 2000. However, in December, 2000, the department repealed the 1980 rules and adopted new rules which more accurately and succinctly accomplished the same purpose. During the process of repealing the former rules and adopting the present ones in 2000, the rules now proposed for repeal were inadvertently overlooked. ARM 32.2.244 and 32.2.245, which were adopted in December, 2000, cover the same material

and were intended to replace the rules now proposed for repeal. By repealing the 1980 rules, any confusion resulting from having both the 1980 and 2000 rules published will be eliminated.

5. Concerned persons may submit their data, views or arguments concerning the proposed repeals in writing to Marc Bridges, 301 N. Roberts Street - Room 308A, PO Box 202001, Helena, MT 59620-2001, or emailed to mbridges@state.mt.us to be received no later than September 12, 2002.

6. If persons who are directly affected by the proposed repeals wish to express their data, views and 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 above. The request for hearing and comments must be received no later than September 12, 2002.

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

8. An electronic copy of this Notice of Proposed Repeal is available through the Department's site on the World Wide Web at http://www.liv.state.mt.us/recentupdates/Recent.HTM. Interested persons may make comments on the proposed repeals via the comment forum linked to the notices posted, but those comments must be posted to the comment forum by 5:00 p.m., September 12, 2002. The Department strives to make the electronic copy of rulemaking activities conform to the official version of all Notices printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of notices and the electronic versions of notices only the official printed text will be considered. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems, and that a person's technical difficulties in accessing or posting to the comment forum do not excuse late submission of comments.

9. The divisions of the Montana department of livestock maintain a list of interested persons who wish to receive notices of rulemaking actions proposed by this board. Persons

who wish to have their name added to a list shall make a written request that includes the name and mailing address of the person to receive notices and specifies the particular subject area of interest that the person wishes to receive notices regarding particular subject or subjects. Such written request may be mailed or delivered to Marc Bridges, 301 N. Roberts Street – Room 308A, PO Box 202001, Helena, MT 59620-2001 or may be made by completing a request form at any rules hearing held by the board.

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

DEPARTMENT OF LIVESTOCK

By: /s/ Marc Bridges
Marc Bridges, Exec. Officer,
Board of Livestock
Department of Livestock

By: /s/ Bernard A. Jacobs
Bernard A. Jacobs, Rule Reviewer
Livestock Chief Legal Counsel

Certified to the Secretary of State August 5, 2002.

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

| | | |
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| In the matter of the proposed amendment of ARM 37.85.212, 37.86.1004, 37.86.1406, 37.86.1807, 37.86.2405, 37.86.2505, 37.86.2605, 37.86.2905, 37.86.3009, 37.86.3011 and 37.86.3020 pertaining to the extension of the 2.6% provider reimbursement reductions and the withholding of the provider rate increase for resource based relative value scale (RBRVS) providers for fiscal year 2003 | ) | NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT |

TO: All Interested Persons

1. On September 4, 2002, at 1:30 p.m., a public hearing will be held in the auditorium of the Department of Public Health and Human Services Building, 111 N. Sanders, Helena, Montana to consider the proposed amendment of the above-stated rules.

The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who need an alternative accessible format of this notice or provide reasonable accommodations at the public hearing site. If you need to request an accommodation, contact the department no later than 5:00 p.m. on August 28, 2002, to advise us of the nature of the accommodation that you need. Please contact Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210; telephone (406)444-5622; FAX (406)444-1970; Email dphhslegal@state.mt.us.

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

<u>37.85.212 RESOURCE BASED RELATIVE VALUE SCALE (RBRVS) REIMBURSEMENT FOR SPECIFIED PROVIDER TYPES</u> (1) remains the same.

(2) Services provided by the following health care professionals will be reimbursed in accordance with the RBRVS methodology set forth in (3):

(a) through (o) remain the same.

(p) providers of oral surgery services; ~~and~~

(q) providers of pathology and laboratory services<u>; and</u>

<u>(r) independent diagnostic testing facilities (IDTF)</u>.

(3) Except as set forth in (8), (9), (10) and (11) the fee

for a covered service provided by any of the provider types specified in (2) is determined by multiplying the relative value units determined in accordance with (7) by the conversion factor specified in (4), and then multiplying the product by a factor of one plus or minus the applicable policy adjustor as provided in (5), if any; provided, however, that rates for procedure codes included in the conversion to the RBRVS reimbursement methodology are:

(a) through (e)(ii) remain the same.

(f) for state fiscal year 2003:

(i) those codes paid at 80% of the level of state fiscal year 1997 reimbursement in state fiscal year 2001 shall be frozen at that level less 2.6%;

(ii) those codes restricted to 145% of the medicaid fee of the level of state reimbursement in state fiscal year 1997 which were at the lowest percentage of medicare reimbursement in state fiscal year 2002 shall ~~receive a 2.3% increase in provider fees~~ be frozen at their state fiscal year (SFY) 2002 levels, less 2.6%.

(4) The conversion factor used to determine the medicaid payment amount for the services covered by this rule for state fiscal year 2003 is:

(a) ~~$32.93~~ 31.90 for medical and surgical services, as specified in (2); and

(b) ~~$26.93~~ 26.25 for anesthesia services.

(5) through (14) remain the same.

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-2-201, 53-6-101, 53-6-111 and 53-6-113, MCA

37.86.1004 REIMBURSEMENT METHODOLOGY FOR SOURCE BASED RELATIVE VALUE FOR DENTISTS (1) For procedures listed in the relative values for dentists scale, reimbursement rates shall be determined using the following methodology:

(a) remains the same.

(b) The conversion factor used to determine the medicaid payment amount for services provided to eligible individuals age 18 and above is ~~$20.40~~ 19.87.

(c) The conversion factor used to determine the medicaid payment amount for services provided to eligible individuals age 17 and under is ~~$26.52~~ 25.83.

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

37.86.1406 CLINIC SERVICES, REIMBURSEMENT (1) Ambulatory surgical center (ASC) services as defined in ARM 37.86.1401(2) provided by an ASC will be reimbursed on a fee basis as follows:

(a) and (i) remain the same.

(ii) For state fiscal year 2003, fees determined in accordance with this rule shall be reduced by 2.6%.

(b) through (3) remain the same.

AUTH: Sec. 53-2-201 and 53-6-113, MCA

IMP: Sec. 53-6-101 and 53-6-141, MCA

37.86.1807 PROSTHETIC DEVICES, DURABLE MEDICAL EQUIPMENT, AND MEDICAL SUPPLIES, FEE SCHEDULE (1) remains the same.

(2) Prosthetic devices, durable medical equipment and medical supplies shall be reimbursed in accordance with the department's fee schedule ~~dated January 1,~~ effective July 2002, which is hereby adopted and incorporated by reference. A copy of the department's fee schedule may be obtained from the Department of Public Health and Human Services, Health Policy Services Division, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

(3) through (5) remain the same.

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-2-201, 53-6-101, 53-6-111, 53-6-113 and 53-6-141, MCA

37.86.2405 TRANSPORTATION AND PER DIEM, REIMBURSEMENT

(1) remains the same.

(2) The department hereby adopts and incorporates by reference the department's fee schedule effective July ~~2001~~ 2002 which sets forth the reimbursement rates for transportation, per diem and other medicaid services. A copy of the department's fee schedule may be obtained from the Department of Public Health and Human Services, Health Policy and Services Division, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

(3) through (5) remain the same.

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-6-101, 53-6-113 and 53-6-141, MCA

37.86.2505 SPECIALIZED NONEMERGENCY MEDICAL TRANSPORTATION, REIMBURSEMENT (1) remains the same.

(2) The department hereby adopts and incorporates by reference the department's fee schedule effective July ~~2001~~ 2002 which sets forth the reimbursement rates for specialized nonemergency medical transportation services and other medicaid services. A copy of the department's fee schedule may be obtained from the Department of Public Health and Human Services, Health Policy and Services Division, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-6-101, 53-6-113 and 53-6-141, MCA

37.86.2605 AMBULANCE SERVICES, REIMBURSEMENT (1) remains the same.

(2) The department hereby adopts and incorporates by reference the department's fee schedule effective July ~~2001~~ 2002 which sets forth the reimbursement rates for ambulance services and other medicaid services. A copy of the department's fee schedule may be obtained from the Department of Public Health and Human Services, Health Policy and Services Division, 1400

Broadway, P.O. Box 202951, Helena, MT 59620-2951.

(3) through (5) remain the same.

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-6-101, 53-6-113 and 53-6-141, MCA

37.86.2905 INPATIENT HOSPITAL SERVICES, REIMBURSEMENT

(1) remains the same.

(2) The department's DRG prospective payment rate for inpatient hospital services is based on the classification of inpatient hospital discharges to DRGs. The procedure for determining the DRG prospective payment rate is as follows:

(a) through (b) remain the same.

(c) The department computes a Montana average base price per case. This average base price per case is ~~$2125~~ 2070 excluding capital expenses, effective for services provided on or after July 1, ~~2001~~ 2002.

(d) through (18) remain the same.

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-2-201, 53-6-101, 53-6-111, 53-6-113 and 53-6-141, MCA

37.86.3009 OUTPATIENT HOSPITAL SERVICES, PROSPECTIVE PAYMENT METHODOLOGY, EMERGENCY ROOM AND CLINICAL SERVICES

(1) Emergency room and clinic services provided by hospitals that are not isolated hospitals or critical access hospitals as defined in ARM 37.86.2902(17) and (18) will be reimbursed on a fee basis for each visit as follows:

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

(b) Fees for emergency room and clinic service groups described in (1)(a)(i) through (iii) above for sole community hospitals and non-sole community hospitals are specified in the department's outpatient hospital emergency room fee schedule. The department hereby adopts and incorporates herein by reference the outpatient hospital emergency room fee schedule (June ~~1998~~ 2002). A copy of the emergency room fee schedule may be obtained from the Department of Public Health and Human Services, Health Policy and Services Division, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

(c) through (e) remain the same.

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-2-201, 53-6-101, 53-6-111 and 53-6-113, MCA

37.86.3011 OUTPATIENT HOSPITAL SERVICES, PROSPECTIVE PAYMENT METHODOLOGY, NON-EMERGENT EMERGENCY ROOM SERVICES

(1) Emergency room services provided to a passport recipient, when the passport provider has not authorized the services, will be reimbursed a prospective fee for evaluations and stabilization of ~~$20.60~~ 20.06 per emergency room visit plus ancillary reimbursement for laboratory, imaging and other diagnostic services. The fee is a bundled payment per visit for all outpatient services provided to the patient including, but

not limited to, nursing, pharmacy, supplies and equipment and other outpatient hospital services. Physician services are separately billable according to the applicable rules governing billing for physician services.

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-2-201, 53-6-101, 53-6-111 and 53-6-113, MCA

37.86.3020 OUTPATIENT HOSPITAL SERVICES, PROSPECTIVE PAYMENT METHODOLOGY, AMBULATORY SURGERY SERVICES (1) and (1)(a) remain the same.

(b) The department determines a fee for each day procedure group which reflects the estimated cost of hospital resources used to treat cases in that group relative to the statewide average cost of all medicaid cases. Fees for day procedure groups for sole community hospitals and non-sole community hospitals are specified in the department's outpatient hospital fee schedule. The department hereby adopts and incorporates by reference the outpatient hospital ambulatory surgery fee schedule (June ~~1998~~ 2002). A copy of the fee schedule may be obtained from the Department of Public Health and Human Services, Health Policy and Services Division, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

(c) through (f) remain the same.

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-2-201, 53-6-101, 53-6-111 and 53-6-113, MCA

3. The Department is facing imminent and substantial budget reductions in the Montana Medicaid program due to anticipated state surplus funds falling below the amount specified in 17-7-140, MCA. The Governor has ordered an immediate 3.5% cost reduction to prevent the State of Montana from depleting its funds. As a result, it is necessary for the Montana Medicaid program to immediately reduce expenditures. Should the State of Montana deplete its funds, a lack of available resources would result in the wholesale elimination or substantial curtailment of Medicaid services and would immediately imperil the public health, safety and welfare.

Consequently, the Department is adopting these rules to prevent the imminent peril to the public health, safety and welfare that would result from the elimination or substantial curtailment of Medicaid services.

Emergency rules which: (1) extended the 2.6% reduction in provider reimbursement and (2) withheld the provider rate increases scheduled to take effect for resource based relative value scale (RBRVS) providers on July 1, 2002 have been adopted. The amendments to ARM 37.85.212, 37.86.1004, 37.86.1406, 37.86.1807, 37.86.2405, 37.86.2505, 37.86.2605, 37.86.2905, 37.86.3009, 37.86.3011 and 37.86.3020 are proposed in order to adopt the emergency amendments on a permanent basis. Emergency rules are valid only for 120 days following the date of

adoption. Because the effective period of the changes to reimbursement is longer than 120 days, the amendments must be made through the ordinary rulemaking process, in addition to the emergency adoption that was necessary to ensure immediate implementation.

The expected effect of these proposed rules would be to reduce total state and federal expenditures for Medicaid services in Montana by $5,080,850, including $1,371,830 of savings to the state general fund.

In order to implement these reimbursement rate reductions, the Department is amending ARM 37.85.212 (pertaining to resource based relative value scale (RBRVS) reimbursement for specified provider types); ARM 37.86.1004 (pertaining to reimbursement methodology for source based relative value for dentists); ARM 37.86.1406 (pertaining to clinic services reimbursement); ARM 37.86.1807 (pertaining to prosthetic devices, durable medical equipment, and medical supplies, fee schedule); ARM 37.86.2405 (pertaining to transportation and per diem reimbursement); ARM 37.86.2505 (pertaining to specialized nonemergency medical transportation reimbursement); ARM 37.86.2605 (pertaining to ambulance services reimbursement); ARM 37.86.2905 (pertaining to inpatient hospital services reimbursement); ARM 37.86.3009 (pertaining to outpatient hospital services, prospective payment methodology, emergency room and clinical services); ARM 37.86.3011 (pertaining to outpatient hospital services, prospective payment methodology, and nonemergent emergency room services) and 37.86.3020 (pertaining to ambulatory surgery services). The amendments are necessary to withdraw the 2.3% provider rate increase for RBRVS providers which was previously provided in ARM 37.85.212. The amendments are also necessary to extend the 2.6% reimbursement rate reduction that was scheduled to end on June 30, 2002. The methodology which reduced net pay reimbursement by 2.6% according to ARM 37.85.406 ended June 30, 2002. Individual fees will be reduced by 2.6% effective July 1, 2002, as provided in this amendment.

The Department anticipates that withholding the 2.3% provider rate increase will reduce the costs of the Medicaid program by approximately $938,888. Furthermore, the Department anticipates that extension of the 2.6% reimbursement rate reduction will impact the specified provider types in the following manner:

- RBRVS providers: physicians, mid-level practitioners, podiatrists, physical therapists, occupational therapists, speech therapists, audiologists, optometrists, opticians, providers of clinic services, providers of EPSDT services, independent diagnostic testing facilities, imaging, dentists providing medical services, providers of oral surgery services. Estimated savings $1,135,843 for state fiscal year 2003.
- Ambulatory surgical centers. Estimated savings $43,590 for state fiscal year 2003.
- Inpatient hospitals. Estimated savings $1,821,724 for

state fiscal year 2003.

- Outpatient hospitals. Estimated savings $689,851 for state fiscal year 2003.
- Dental providers. Estimated savings $156,909 for state fiscal year 2003.
- Durable medical equipment providers. Estimated savings $225,251 for state fiscal year 2003.
- Transportation/per diem and specialized non-emergency transportation providers. Estimated savings $18,102 for state fiscal year 2003.
- Ambulance providers. Estimated savings $50,692 for state fiscal year 2003.

The Department expects that these amendments will affect approximately 11,600 providers enrolled in Montana Medicaid. The Department does not anticipate an adverse impact on recipients.

4. Interested persons may submit their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to Kathy Munson, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 202951, Helena, MT 59620-2951, no later than 5:00 p.m. on September 12, 2002. Data, views or arguments may also be submitted by facsimile (406)444-1970 or by electronic mail via the Internet to dphhslegal@state.mt.us. The Department also maintains lists of persons interested in receiving notice of administrative rule changes. These lists are compiled according to subjects or programs of interest. For placement on the mailing list, please write the person at the address above.

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

Dawn Sliva
Rule Reviewer

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

Certified to the Secretary of State August 5, 2002.

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

| | | |
|---|---|---|
| In the matter of the proposed amendment of ARM 37.5.316 pertaining to continuation of public assistance benefits | ) ) ) ) | NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT |

TO: All Interested Persons

1. On September 4, 2002, at 3:00 p.m., a public hearing will be held in the auditorium of the Department of Public Health and Human Services Building, 111 N. Sanders, Helena, Montana to consider the proposed amendment of the above-stated rule.

The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who need an alternative accessible format of this notice or provide reasonable accommodations at the public hearing site. If you need to request an accommodation, contact the department no later than 5:00 p.m. on August 28, 2002, to advise us of the nature of the accommodation that you need. Please contact Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210; telephone (406)444-5622; FAX (406)444-1970; Email dphhslegal@state.mt.us.

2. The rule as proposed to be amended provides as follows. Matter to be added is underlined. Matter to be deleted is interlined.

37.5.316 CONTINUATION OF PUBLIC ASSISTANCE BENEFITS

(1) This rule regarding continuation of benefits applies only to benefits under the following programs:

(a) ~~FAIM~~ TANF cash assistance;

(b) food stamps; and

(c) medicaid, subject to (2).

(2) through (5) remain the same.

(6) A claimant is not entitled to continued benefits if, after a hearing, the hearing officer makes a determination in writing that the sole issue is one of state or federal law or policy and no valid issue of improper benefit calculation, or misapplication or misinterpretation of state or federal law or policy exists. ~~Benefits to a claimant may continue if the only issue is the appropriateness, terms or requirements of a family investment agreement (FIA), so long as all other eligibility requirements are met.~~

(7) through (9) remain the same.

(10) A claimant is not entitled to continuation of benefits when the issue is the lack of a negotiated FIA as specified at ARM 37.78.216(2).

(11) A claimant is not entitled to continuation of benefits for any month that TANF cash assistance benefits have

been issued for a required filing unit member in another case or state.

(10) through (13) remain the same but are renumbered (12) through (15).

AUTH: Sec. 53-2-201, 52-2-111, 53-2-606, 53-2-803, 53-3-102, 53-4-111, 53-4-212, 53-6-111, 53-6-113 and 53-7-102, MCA
IMP: Sec. 52-2-112, 53-2-201, 53-2-306, 53-2-606, 53-2-801, 53-3-107, 53-4-112 and 53-6-111, MCA

3. ARM 37.5.316 is the rule that establishes when continuation of benefits is allowed pending a fair hearing. The proposed amendments to ARM 37.5.316 are necessary to establish that continuation of benefits is not allowed when the issue is the failure or refusal to negotiate a Family Investment Agreement (FIA). This change is necessary because the negotiation of a FIA is a basic eligibility requirement pursuant to 2001 Laws of Montana, Chapter 465, as codified in the amendment to 53-4-231, MCA. A household is not eligible if any household member fails or refuses to negotiate a FIA.

The Department considered two options. The first was to not allow continued benefits when the issue is the failure or refusal to negotiate a FIA. The second option was to allow continued benefits and establish overpayments in those cases where the individual lost the fair hearing. The Department rejected the second option because the penalty to the household often created financial difficulties for the family and used time limited benefits for months the recipient may ultimately be obligated to repay. When a household receives TANF assistance, their TANF time clock ticks. When an overpayment is established for a month the household was not eligible, the time clock is not adjusted. This is a harsh penalty on the household. The eligibility case managers have been trained to contact the household when a fair hearing is requested due to a lack of a FIA so that a FIA can be negotiated. A case does not have to be closed if the recipient will negotiate a FIA. The issue can be handled administratively rather than at a fair hearing, saving the time, delay and expense associated with the exhaustion of legal administrative remedies.

ARM 37.5.316 is also being amended to reflect that a household is not entitled to continued benefits for any month that a required filing unit member receives TANF cash assistance in another case or state. This change is necessary to ensure that individuals do not receive duplicative TANF cash assistance benefits.

The only alternative to the proposed amendment is to issue duplicate TANF cash assistance benefits to individuals. The Department did not select this option because individuals should only receive TANF cash assistance in one case or state.

There are approximately 16,473 individuals participating in the TANF cash assistance program all of whom may be impacted by these rules. The Department does not anticipate any increase or decrease in the costs of the program because of the proposed amendments to ARM 37.5.316. Furthermore, benefits, fees, and costs assessed against participants will not be increased, decreased or changed because of this amendment.

4. Interested persons may submit their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to Kathy Munson, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 202951, Helena, MT 59620-2951, no later than 5:00 p.m. on September 12, 2002. Data, views or arguments may also be submitted by facsimile (406)444-9744 or by electronic mail via the Internet to dphhslegal@state.mt.us. The Department also maintains lists of persons interested in receiving notice of administrative rule changes. These lists are compiled according to subjects or programs of interest. For placement on the mailing list, please write the person at the address above.

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

Dawn Sliva
Rule Reviewer

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

Certified to the Secretary of State August 5, 2002.

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

| | | |
|---|---|---|
| In the matter of the proposed amendment of ARM 37.80.202 pertaining to parent's copayment for child care services | ) ) ) ) ) | NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT |

TO: All Interested Persons

1. On September 4, 2002, at 10:00 a.m., a public hearing will be held in the auditorium of the Department of Public Health and Human Services Building, 111 N. Sanders, Helena, Montana to consider the proposed amendment of the above-stated rule.

The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who need an alternative accessible format of this notice or provide reasonable accommodations at the public hearing site. If you need to request an accommodation, contact the department no later than 5:00 p.m. on August 28, 2002, to advise us of the nature of the accommodation that you need. Please contact Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210; telephone (406)444-5622; FAX (406)444-1970; Email dphhslegal@state.mt.us.

2. The rule as proposed to be amended provides as follows. Matter to be added is underlined. Matter to be deleted is interlined.

<u>37.80.202 FINANCIAL REQUIREMENTS FOR ELIGIBILITY; PAYMENT FOR CHILD CARE SERVICES; PARENT'S COPAYMENT</u> (1) and (2) remain the same.

(3) Parents eligible for assistance are responsible for paying a monthly copayment in the amount specified in the sliding fee scale table incorporated in (14).

(a) In general, the household's copayment is a percentage of the household's gross monthly income, based on the household's gross monthly income as compared to the FPG for a household of that size. Generally, households with income which is a higher percentage of the FPG are required to pay a higher percentage of their gross monthly income as a copayment than households whose income is a smaller percentage of the FPG. All parents receiving TANF-funded cash assistance shall pay the $~~5~~ <u>10</u> minimum copayment amount as specified in the sliding fee scale, regardless of household size or income.

(b) through (13) remain the same.

(14) The household's monthly copayment shall be the amount specified in the department's child care assistance sliding fee scale as amended ~~June 30, 2001~~ <u>July 1, 2002</u>. The sliding fee scale is hereby adopted and incorporated by reference and shall

be in effect until ~~June 30, 2002~~ October 31, 2002. A copy of the sliding fee scale is available upon request from the Department of Public Health and Human Services, Human and Community Services Division, Early Childhood Services Bureau, Cogswell Building, 1400 Broadway, P.O. Box 202952, Helena, MT 59620-2952. The household's size and income are taken into consideration in determining the copayment amount each household must pay.

(15) For the period beginning ~~July~~ November 1, 2002, the household's monthly copayment shall be the amount specified in the department's child care assistance sliding fee scale as amended ~~July~~ November 1, 2002. The sliding fee scale is hereby adopted and incorporated by reference and shall be in effect beginning ~~July~~ November 1, 2002. A copy of the sliding fee scale is available upon request from the Department of Public Health and Human Services, Human and Community Services Division, Early Childhood Services Bureau, Cogswell Building, 1400 Broadway, P.O. Box 202952, Helena, MT 59620-2952. The household's size and income are taken into consideration in determining the copayment amount each household must pay.

AUTH: Sec. 52-2-704 and 53-4-212, MCA
IMP: Sec. 52-2-704, 52-2-713, 52-2-721, 52-2-722, 52-2-723, 52-2-731, 53-2-201, 53-4-211, 53-4-212, 53-4-601 and 53-4-611, MCA

3. The State of Montana Department of Public Health & Human Services, through the Early Childhood Services Bureau, administers a child care assistance program to assist eligible low income families with child care expenses. The State of Montana is experiencing a significant budget deficit and the Department has been ordered by the Governor to reduce expenditures. In order to reduce expenditures, the proposed amendment is necessary to increase the minimum copayment amount for child care assistance from $5 per month to $10 per month. This increase is anticipated to save the State $11,940 per month ($143,280 per year). The increase is expected to impact approximately 2,400 families (an estimated 61.5% of the families receiving child care assistance).

Early Childhood Services Bureau considered the possibility of raising the minimum copayment to $15 per month, rather than $10. However, the Bureau determined that a 300% increase would likely create a hardship for families benefitting from child care assistance. Consequently, the Department chose to increase the copayment to $10.

4. Interested persons may submit their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to Kathy Munson, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 202951, Helena, MT 59620-2951, no later than 5:00 p.m. on September 12, 2002. Data, views or arguments may also be submitted by facsimile (406)444-9744 or by electronic

mail via the Internet to dphhslegal@state.mt.us. The Department also maintains lists of persons interested in receiving notice of administrative rule changes. These lists are compiled according to subjects or programs of interest. For placement on the mailing list, please write the person at the address above.

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

Dawn Sliva
Rule Reviewer

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

Certified to the Secretary of State August 5, 2002.

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

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|---|---|
| In the matter of the proposed adoption of New Rule I relating to changing land use for agricultural (class three)) and forest land (class ten) to class four | NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION |

**TO: All Concerned Persons**

**1. On September 4, 2002, at 1:00 p.m., a public hearing will be held in the Director's Office Fourth Floor Conference Room of the Sam W. Mitchell Building, at Helena, Montana, to consider the adoption of New Rule I relating to when land will be changed from agricultural (class three) and forest land (class ten) to class four.**

**Individuals planning to attend the hearing shall enter the building through the east doors of the Sam W. Mitchell Building, 125 North Roberts, Helena, Montana.**

**2. The Department of Revenue will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Revenue not later than 5:00 p.m., August 23, 2002, to advise us of the nature of the accommodation that you need. Please contact Cleo Anderson, Department of Revenue, Director's Office, P.O. Box 5805, Helena, Montana 59604-5805; telephone (406) 444-2855; fax (406) 444-3696; or e-mail canderson@state.mt.us.**

**3. The proposed new rule does not replace or modify any section currently found in the Administrative Rules of Montana. The proposed new rule provides as follows:**

**NEW RULE I AGRICULTURAL AND FOREST LAND USE CHANGE CRITERIA (1) The department shall change the classification and valuation of land from class three, as defined in 15-6-133, MCA, or class ten, as defined in 15-6-143, MCA, to class four, as defined in 15-6-134, MCA, when any of the following criteria are met:**

**(a) the land contains covenants or other restrictions that prohibit agricultural use or the cutting of timber, other than that required as part of a timber management plan or a conservation easement;**

**(b) the agricultural land does not meet the eligibility requirements in 15-7-202, MCA;**

**(c) the forest land does not meet the eligibility requirements in 15-44-102, MCA, and subsequently does not meet the requirements of 15-7-202, MCA;**

(d) the land is part of a platted and filed subdivision, and the land contains three or more of the following physical site improvements:

(i) a city or community sewer system;

(ii) a city or community water system;

(iii) street curbs and gutters;

(iv) a paved or all-weather gravel road that meets county standards;

(v) a storm sewer system;

(vi) underground or aboveground utilities that may include gas, electricity, telephone, or cable television;

(vii) streetlights;

(viii) a fire hydrant;

(ix) landscaping developed for the aesthetic benefit or security of all the landowners; or

(e) the land contains a commercial or industrial structure or is used in direct support of commercial or industrial activities.

(i) Examples of a commercial or industrial structure include, but are not limited to:

(A) an apartment building;

(B) an office building;

(C) a mobile home park;

(D) a warehouse;

(E) a lumber mill;

(F) a sugar beet processing plant;

(G) a refinery;

(H) a power generation facility;

(I) a greenhouse where the product is sold to the public;

(J) a storage tank; and

(K) a cellular communication tower.

(ii) Examples of land being used for commercial or industrial activity include, but are not limited to:

(A) a parking lot;

(B) a lumber company log yard;

(C) land used as a buffer for an industrial facility from adjoining land uses;

(D) land used to store sugar beets, potatoes, or other cash crops until those crops can be transported to a manufacturing facility; and

(E) land that is used to store horticultural crops for sale where the roots of the crop are placed in a container or other material and that container is either placed in the ground or on a platform.

(2) Examples of what would not be considered a change in land classification based on this rule are:

(a) utility lines that run across the property but are provided for the benefit of a third party and not for access or the benefit of the property owner;

(b) easement access roads that are provided for the benefit of a third party and not for access or the benefit of the property owner.

(3) The land will be valued at market value under class four instead of its productivity value when any of the criteria

in (1) are met.

AUTH: Sec. 15-1-201, 15-7-111, and 15-44-105, MCA
IMP: Sec. 15-1-101, 15-6-133, 15-7-103, 15-7-111, 15-7-202, 15-7-206, 15-7-207, 15-7-210, 15-44-102, and 15-44-103, MCA

REASONABLE NECESSITY: The department is proposing to adopt new rule I to clarify when the classification of land will change from class three or class ten to class four. The department invited representatives from agriculture, forest lands, realtors, developers, local governments and taxpayer organizations to participate in developing rules to address when agricultural (class three) or forest land (class ten) should be changed to class four. The rule contained in this notice is the result of that meeting and a formal recommendation to the Director.

Clarification of this issue is necessary because it is difficult for both the agency and the taxpayer to determine when property that has had certain improvements beyond platting and sub-dividing should change to a different classification for tax purposes. The department has had two cases appealed to the State Tax Appeal Board (STAB) and district court regarding this issue. In both cases, the STAB ruled in the department's favor and the Nineteenth Judicial District Court upheld that decision in the Mariners Haven case. The second case, Bottrell Family Investments, LLC, has been appealed to the Thirteenth Judicial District Court and is pending a final decision.

The issue of when land changes from agricultural or forest land to residential has not been addressed by the legislature. Class three applies to agricultural land as provided in 15-6-133 and 15-7-202, MCA, and class ten refers to forest land as provided in 15-6-143 and 15-44-102, MCA. None of these statutes address when the land converts to class four, but 15-7-202(4), MCA, states in part: "Land may not be classified or valued as agricultural if it is subdivided land with stated restrictions effectively prohibiting its use for agricultural purposes." This presumes that with a change in use there is a change in tax status. The same appears to be true for forest land. The department has adopted other rules in an attempt to clarify the requirements to qualify for class three and class ten tax classification, but none of those rules address the criteria to be considered when the land changes use.

STAB has concluded that more than just platting and sub-dividing class three or class ten land is necessary to cause a change to class four. This rule establishes for both the department and landowners what level of development causes a change from class three or class ten to class four.

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:

Cleo Anderson
Department of Revenue
Director's Office
P.O. Box 5805
Helena, Montana 59604-5805

and must be received no later than September 13, 2002.

5. Cleo Anderson, Department of Revenue, Director's Office, has been designated to preside over and conduct the hearing.

6. An electronic copy of this Notice of Public Hearing is available through the Department's site on the World Wide Web at http://www.state.mt.us/revenue/rules_home_page.htm, under the Notice of Rulemaking section. The Department strives to make the electronic copy of this Notice of Public Hearing conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems.

7. The Department of Revenue 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 particular subject matter or matters. Such written request may be mailed or delivered to the person in 4 above or faxed to the office at (406) 444-3696, or may be made by completing a request form at any rules hearing held by the Department of Revenue.

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

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

/s/ Kurt G. Alme
KURT G. ALME
Director of Revenue

Certified to Secretary of State August 5, 2002

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

| | | |
|---|---|---|
| In the matter of the adoption of new rules I and II and the amendment of ARM 2.43.615 and 2.43.616 pertaining to the Family Law Orders for retirement systems and plans administered by the Public Employees' Retirement Board | ) ) ) ) ) ) ) | NOTICE OF ADOPTION AND AMENDMENT |

TO: All Concerned Persons

1. On June 13, 2002, the Public Employees' Retirement Board published notice of proposed adoption and amendment of rules pertaining to the Family Law Orders for the Public Employees' Defined Benefit Retirement Plan and the Defined Contribution Retirement Plan and the Judges', Sheriffs', Game Wardens' and Peace Officers', Highway Patrol Officers', Municipal Police Officers', and the Firefighters' Unified Retirement Systems at page 1603 of the 2002 Montana Administrative Register, Issue Number 11.

2. The Board has adopted new RULE I (ARM 2.43.1701) and new RULE II (ARM 2.43.1702) exactly as proposed.

3. The Board has amended ARM 2.43.615 and 2.43.616 with the following changes, stricken matter interlined, new matter underlined:

2.43.615 FAMILY LAW ORDERS -- CONTENTS AND DURATION FOR DEFINED BENEFIT PLANS (1) through (3)(a) same as proposed.

(b) if the participant is a ~~retiree~~ benefit recipient, the first monthly benefit payment that may be divided is the first benefit payment following the month MPERA receives the FLO; and

(c) a FLO may not provide for payments to an alternate payee prior to the date on which the participant first receives a payment from the retirement system or plan~~; or~~.

~~(d) the MPERA must receive the FLO in the month before the affected payment or payments are made.~~

(4) through (5)(b) same as proposed.

AUTH: 19-2-403 and 19-2-907, MCA
IMP: 19-2-907, MCA

2.43.616 FAMILY LAW ORDERS -- APPROVAL AND IMPLEMENTATION FOR DEFINED BENEFIT PLANS (1) same as proposed.

(2) All FLOs must be applied prospectively and may only allocate future payments. However, a FLO may include procedures for collecting retroactive amounts from future payments.

(3) For purposes of allocating a lump sum payment, the FLO must be received before the payment is mailed or otherwise conveyed to the participant.

(4) If a member requests a refund, the MPERA will notify the alternate payee. The alternate payee may request a direct payment or may roll the payment over to another eligible plan. Within 60 days of the date of notification, the ~~The~~ alternate payee must inform MPERA of his or her choice and if necessary, provide any information for a rollover to MPERA ~~within 60 days of the date of notification~~. Otherwise a direct payment will be made to the alternate payee after 60 days.

(3) remains the same, but is renumbered (5).

~~(4)~~(6) The board's decision to approve or not approve a ~~proposed~~ FLO is final unless the participant or alternate payee files a request for an administrative contested case hearing within 10 days from the date the MPERA sends notice of the decision. If an administrative hearing is properly requested, the board must make the final administrative decision after receiving the hearing examiner's proposed decision.

AUTH: 19-2-403 and 19-2-907, MCA
IMP: 19-2-907, MCA

4. The following comments were received and appear with the Board's response:

COMMENT 1: A comment was received from internal staff suggesting that ARM 2.43.615(3)(b) refer to the "benefit" recipient" rather than the "retiree" as the "benefit recipient" is not always a "retiree".

RESPONSE: The Board agrees. The language has been amended.

COMMENT 2: A comment was received from internal staff suggesting that "monthly benefit" be inserted in ARM 2.43.615(3)(b) and that ARM 2.43.615(3)(d) be deleted. A FLO affecting a "monthly" benefit payment must be received in the month prior to the first payment to the alternate payee. However, a lump sum payment may be paid to an alternate payee in the same month the FLO is received, if the FLO is approved in a timely manner and coincides with the MPERA refund payment cycle.

RESPONSE: The Board agrees. The language has been amended and deleted.

COMMENT 3: A comment was received from internal staff suggesting that the next to the last sentence of ARM 2.43.616(2) be reworded for clarity purposes.

RESPONSE: The Board agrees. The language has been amended and (2) has been restructured for ease of understanding.

COMMENT 4: A comment was received from internal staff suggesting the word "proposed" be stricken from ARM 2.43.616(4) because the Board approves only Family Law Orders that have been signed by a judge.

**RESPONSE**: The Board agrees. The word "proposed" has been deleted.

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

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

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

Certified to the Secretary of State on August 5, 2002.

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

| | | |
|---|---|---|
| In the matter of the adoption of new rules I through III pertaining to Qualified Domestic Relations Orders for the Deferred Compensation (457) Plan Administered by the Public Employees' Retirement Board | ) ) ) ) ) ) | NOTICE OF ADOPTION |

TO: All Concerned Persons

1. On June 13, 2002, the Public Employees' Retirement Board published notice of proposed adoption of new rules I through III pertaining to Qualified Domestic Relations Orders for the Deferred Compensation (457) Plan administered by the Public Employees' Retirement Board at page 1612 of the 2002 Montana Administrative Register, Issue Number 11.

2. The Board has adopted new RULE I (ARM 2.43.1810), new RULE II (ARM 2.43.1811), and new RULE III (2.43.1812) exactly as proposed.

3. No comments or testimony were received.

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

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

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

Certified to the Secretary of State on August 5, 2002.

**BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA**

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|---|---|
| In the matter of the adoption of new rules relating to potato research and market development program | NOTICE OF ADOPTION |

TO: All Concerned Persons

1. On June 27, 2002, the Department of Agriculture published notice of the proposed adoption of new rules I through III relating to potato research and market development program at page 1682 of the 2002 Montana Administrative Register, Issue Number 12.

2. The agency has adopted New Rule I, ARM 4.6.103; New Rule II, ARM 4.6.104; and New Rule III, ARM 4.6.105 exactly as proposed.

3. No comments or testimony were received.

DEPARTMENT OF AGRICULTURE

/s/ W. Ralph Peck
Ralph Peck
Director

/s/ Tim Meloy
Tim Meloy, Attorney
Rule Reviewer

Certified to the Secretary of State August 5, 2002.

**BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA**

| | | |
|---|---|---|
| In the matter of the amendment of ARM 10.64.301 and the repeal of ARM 10.64.101, 10.64.341, 10.64.354, 10.64.355, 10.64.356 and 10.64.358 relating to bus standards | ) ) ) ) ) ) ) | NOTICE OF AMENDMENT AND REPEAL |

**TO: All Concerned Persons**

**1. On May 30, 2002, the Board of Public Education published notice of the proposed amendment and repeal of rules concerning bus standards at page 1530 of the 2002 Montana Administrative Register, Issue Number 10.**

**2. The Board of Public Education has amended ARM 10.64.301 SCHOOL BUS REQUIREMENTS exactly as proposed.**

**3. The Board of Public Education has repealed the following rules as proposed:**

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| ARM | 10.64.101 | PENALTY FOR NONCOMPLIANCE |
| | 10.64.341 | INTERPRETATIONS |
| | 10.64.354 | BUS CHASSIS |
| | 10.64.355 | BUS BODY |
| | 10.64.356 | SPECIALLY EQUIPPED SCHOOL BUS STANDARDS |
| | 10.64.358 | ALTERNATIVE FUEL POWERED SCHOOL BUSES |

**4. The following comment was received and appears with the Board of Public Education's response:**

**COMMENT 1: The Administrative Rules Bureau of the Secretary of State's office suggested that the Board amend the rule to explain what is contained in the Standards for School Buses in Montana.**

**RESPONSE 1: The Board considered the comment and felt that the persons and entities affected by this rule are well aware of what is contained in the document.**

**/s/ Dr. Kirk Miller**
**Dr. Kirk Miller, Chair**
**Board of Public Education**

**/s/ Steve Meloy**
**Steve Meloy, Executive Secretary**
**Rule Reviewer**
**Board of Public Education**

**Certified to the Secretary of State August 5, 2002.**

**BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA**

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| In the matter of the amendment of ARM 10.66.104 relating to GED fees | ) ) ) | NOTICE OF AMENDMENT |

**TO: All Concerned Persons**

**1. On May 30, 2002, the Board of Public Education published notice of the proposed amendment of ARM 10.66.104 concerning GED fees at page 1534 of the 2002 Montana Administrative Register, Issue Number 10.**

**2. The Board of Public Education has amended ARM 10.66.104 exactly as proposed.**

**3. No comments or testimony were received.**

**/s/ Dr. Kirk Miller**
**Dr. Kirk Miller, Chair**
**Board of Public Education**

**/s/ Steve Meloy**
**Steve Meloy, Executive Secretary**
**Rule Reviewer**
**Board of Public Education**

**Certified to the Secretary of State August 5, 2002.**

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

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| In the matter of the adoption of New Rule I pertaining to maintenance of air pollution control equipment for existing aluminum plants | NOTICE OF ADOPTION<br><br>(AIR QUALITY) |

TO: All Concerned Persons

1. On April 11, 2002, the Board of Environmental Review published a notice of public hearing on the proposed adoption of the above-stated rule at page 1033, 2002 Montana Administrative Register, issue number 7.

2. The Board has adopted New Rule I (17.8.335) exactly as proposed.

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

The U.S. Environmental Protection Agency (EPA), Region VIII, submitted the following comments:

Comment No. 1: The draft rule provides an exemption to meeting emission limits for a specified source category during scheduled maintenance. Generally, since state implementation plans (SIPs) must provide for attainment and maintenance of the national ambient air quality standards (NAAQS) and the achievement of the prevention of significant deterioration of air quality (PSD) increments, all periods of excess emissions must be considered violations. Accordingly, any provision that allows for an automatic exemption for excess emissions is prohibited. The appropriate mechanism for excusing excess emissions in this situation is through the exercise of enforcement discretion.

Response: The new rule states that the Department may not initiate an enforcement action for excess emissions during maintenance of air pollution control equipment that results in a violation of ARM 17.8.111, ARM 17.8.334(2), or any emission standard. The rule does not, however, contain an exemption from enforcement for maintenance activities that violate a federal or state ambient air quality standard, which would include ambient air quality standards for PSD increments. In addition, (11) of the rule specifically states that the rule does not allow an owner or operator to cause or contribute to violations of any federal or state ambient air quality standard.

Comment No. 2: In guidance documents issued by EPA, we have indicated that scheduled maintenance is a predictable event which can be scheduled at the discretion of the

operator, and which can therefore be made to coincide with maintenance on production equipment, or other source shutdowns. Consequently, excess emissions during periods of scheduled maintenance should be treated as a violation unless a source can demonstrate that such emissions could not have been avoided through better scheduling for maintenance or through better operation and maintenance practices.

Response: As described in the background information provided in the notice of proposed rulemaking as well as in Department testimony, the Columbia Falls Aluminum Company (CFAC) operates a primary aluminum reduction plant. The aluminum process is unique in that the process does not include periodic shutdowns. The shutdown and startup process is expensive and lengthy. It often takes 4-6 months after startup before processes within the aluminum reduction cells stabilize and aluminum is reliably produced. During shutdown and startup, plant emissions are greater than emissions during normal operations. Maintenance of the control equipment requires the plant to bypass some of the dry scrubbers during the maintenance event. If the plant continues to operate during bypass of the dry scrubbers, emissions from the plant may exceed limits allowed by rule, but would be substantially less than the emissions that would result from failure of the control equipment.

Also, CFAC has been maintaining its air pollution control equipment during the time it has been shut down. During 2001, CFAC focused efforts on the East Plant primary air pollution control system since that plant would be restarted first. The work included inspecting all fan tower and courtyard ducting, replacing dampers and duct work on fan towers, replacing worn steel plate in dry scrubbers, installing new inlet dampers on six dry scrubbers, replacing several ductwork expansion joints, and performing a leak check of the entire system. CFAC intends to refurbish the West Plant primary air pollution control system this year.

Comment No. 3: We believe we would not be able to approve New Rule I as a SIP revision if submitted by the Governor. The new rule is inconsistent with the Clean Air Act (e.g., sections 110(a)(2)(E) and 110(i)) and our guidance.

Response: The new rule allows flexibility in response to needed repair and maintenance of control equipment and does not apply to process equipment at the facility. This flexibility may be granted by the Department as an alternative to a complete shutdown of the facility for maintenance activities. Use of the new rule will actually minimize emissions when compared to emissions during startup if the facility is forced to shut down to perform the maintenance activities, and minimizing emissions is consistent with the Clean Air Act.

Comment No. 4: The draft rule could be interpreted to excuse CFAC from meeting the National Emission Standards for Primary Aluminum Reduction Plants, Subpart LL of 40 CFR Part

63, or the General Provisions, Subpart A of 40 CFR Part 63. Sources may not exceed emission limits set by the applicable National Emission Standards during maintenance, and State rules cannot be less stringent than the national standards.

Response: The new rule would apply to very limited times defined by the rule, for the specific purpose of maintaining control equipment, and would not apply to process equipment. If aluminum plants are forced to shut down to conduct this maintenance, overall emissions will increase. No exemption is granted for exceedance of federal or state ambient air quality standards or PSD increments. Therefore, the Board does not believe that this rule is less stringent than the federal regulations.

Comment No. 5: We have reviewed the Department of Environmental Quality's review (i.e., Angelia Haller's February 1, 2002 memorandum entitled "CFAC Plant Maintenance Modeling Analysis for Rule Revision") of modeling to support the New Rule. Based on the DEQ's review, we have several concerns with the modeling. The February 1, 2002 review indicates that only 700 lbs. of PM-10 per 24-hour period were modeled. The draft rule appears to allow emissions to exceed normal operation emissions by up to 700 lbs. of PM-10 per 24-hour period (New Rule I(1)(a)(ii)). By only modeling the 700 lbs. per 24-hour period, in lieu of 700 + normal operating emissions (or the allowable emission limit), the impact of the maintenance procedure has not been adequately evaluated. In addition, EPA's modeling guideline requires that any nearby point sources that cause a significant concentration gradient should also be included in the modeling. Other emission points at CFAC and other sources in the airshed should also be included in the modeling.

Response: Emissions that were modeled included both normal operations plus 700 lbs. of PM-10 per 24-hour period. Therefore, the normal operating emissions were considered along with the maximum allowable increase (700 lbs. of PM-10 per 24-hour period) from the proposed maintenance procedure. Only emissions from the CFAC facility were considered in this analysis because the Department determined that adding the background concentration of PM-10 emissions measured at the onsite PM-10 monitor adequately represented the emissions from other sources in the area.

Each modeling scenario demonstrated compliance with the Montana Ambient Air Quality Standards (MAAQS) and the National Ambient Air Quality Standards (NAAQS). The modeled concentrations were reported as high-first-high values (highest concentration modeled), and then a PM-10 background concentration of 17 $\mu g/m^3$ was added to the result.

Comment No. 6: Modeling only the month of September for three years is also problematic because it is extremely unlikely that one would capture worst-case conditions that may occur in future September periods. Three months of data is not enough to find even slightly adverse conditions.

Response: Maintenance allowed under the new rule may occur only during the month of September. Therefore, the Department determined that three years of onsite meteorological data for September should adequately represent the types of meteorological conditions that would be encountered during the maintenance procedures. Also, CFAC would not be allowed to perform any maintenance procedures during any adverse conditions. Subsection (10) of the rule states that maintenance conducted under the rule may not occur during any period in which an air pollution alert, air pollution warning, or air pollution emergency has been declared pursuant to the Montana emergency episode plan or any applicable county air pollution control program.

Comment No. 7: It does not appear that the impact of the "maintenance" emissions on the Columbia Falls nonattainment area has been analyzed. In the July 1997 draft of the maintenance plan we received for Columbia Falls, the DEQ projected the 2009 maintenance year concentrations to be 146.2 $\mu g/m^3$, 24-hour average. The 146.2 $\mu g/m^3$ value did not include impacts from CFAC. Any additional emissions added to this airshed, as predicted by this modeling, could jeopardize attainment and maintenance of the PM-10 NAAQS in Columbia Falls. Additionally, the modeling assumed a background concentration of 17 $\mu g/m^3$. We believe this value is too low. Maximum ambient concentrations measured in Columbia Falls over the past several years in the August to October time frame have been on the order of 16 to 48 $\mu g/m^3$. Because of the impact in the Columbia Falls nonattainment area, we believe the draft rule may not be consistent with section 110(1) of the CAA.

Response: Section 110 of the federal Clean Air Act relates to adoption of SIPs for implementation, maintenance, and enforcement of the NAAQS. The CFAC plant is located north of Columbia Falls, is situated over a substantial hill from town, and is not in the same airshed as the town. Therefore, emissions from the CFAC plant have never been considered to have a significant impact on the Columbia Falls PM-10 nonattainment plan. Ambient monitoring results from a PM-10 sampler located between the plant and Columbia Falls confirm this conclusion. The Department believes that the background values used for the SIP adequately account for any impacts from the aluminum plant in the Columbia Falls airshed. The 17 $\mu g/m^3$ background values used in the Department's modeling for the CFAC plant were taken from the monitor near the plant, not from the sampler in the Columbia Falls nonattainment area, and were not intended to represent maximum ambient concentrations in the Columbia Falls airshed.

Comment No. 8: We note that the State has adopted, and EPA has approved into the SIP, ARM 17.8.334, Emission Standards for Existing Aluminum Plants-Startup and Shutdown. This rule provides that emissions in excess of the emission limits will not be considered a violation during startup and shutdown. We believe this rule is not consistent with the CAA

requirements and our guidance for the same reasons stated above. We believe the State should revise the rule to eliminate the automatic exemption from meeting the emission limits.

Recent case law supports our position that this rule is inconsistent with the CAA. In Michigan Department of Environmental Quality, et al. v. EPA, 230 F.3d 181 (6th Cir. 2000), EPA disapproved Michigan's SIP submittal because it provided for an automatic exemption from SIP limits during periods of startup, shutdown, and malfunction. The petitioners in the case claimed that EPA wrongfully interpreted section 110 of the CAA as requiring that all excess emissions due to startup, shutdown, and malfunction be considered violations of the CAA. They also claimed that section 110 specifies no requirements for startup, shutdown, and malfunction and that EPA's disapproval intruded on the State's authority to set emission limits.

The Court rejected these arguments and upheld our longstanding interpretation of section 110 (reflected in the Bennett memoranda of 1982 and 1983, reiterated in EPA's September 1999 policy memo) that SIPs cannot provide automatic exemptions from SIP limits during periods of startup, shutdown, and malfunction. The Court noted that the CAA requires EPA to determine whether a SIP meets the requirements of the CAA and concluded that EPA had reasonably determined that Michigan's SIP revision did not meet such requirements.

We are concerned that ARM 17.8.334 does not ensure protection of the NAAQS and compliance with other CAA requirements, and believe that the regulation should be changed to make it consistent with our interpretation of CAA section 110, as reflected in our September 20, 1999 memorandum entitled "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown."

Response: As discussed above in the response to Comment No. 1, the new rule does not exempt violations of the federal or state ambient air quality standards. Also, action to address this EPA concern with an existing, EPA-approved rule is outside of the scope of the current rulemaking.

Another commentor submitted the following comment:

Comment No. 9: We believe that an additional criterion should be added to New Rule I(4) that gives the agency the ability to consider past opportunities to maintain the air pollution control equipment when the facility was shut down. This type of criteria would give the company an incentive to do necessary maintenance work on those rare occasions when the equipment is shut down, instead of trying to eke a few more years out of the equipment and then relying on this rule for permission to have uncontrolled emissions.

Response: The Board does not agree that this addition is necessary. Pursuant to New Rule I(1)(b), the owner or operator of the plant must submit a maintenance plan to the Department for approval, and New Rule I(2)(a) requires that

**the plan include an explanation of the need for maintenance. The rule, as proposed, grants the Department adequate authority to disapprove a submitted maintenance plan. Grounds for disapproval could include the Department's belief that the requested maintenance should have been conducted during a prior shutdown period.**

**BOARD OF ENVIRONMENTAL REVIEW**

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

**Reviewed by:**

*David Rusoff*
**DAVID RUSOFF, Rule Reviewer**

**Certified to the Secretary of State, August 5, 2002.**

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

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| **In the matter of the amendment of ARM 17.8.1201 pertaining to the definition of major source in the air quality operating permit rules** | **NOTICE OF AMENDMENT**<br><br>**(AIR QUALITY)** |

**TO: All Concerned Persons**

**1. On April 11, 2002, the Board of Environmental Review published a notice of public hearing on the proposed amendment of the above-stated rule at page 1030, 2002 Montana Administrative Register, issue number 7.**

**2. The Board has amended the rule exactly as proposed.**

**3. No comments or testimony were received.**

**BOARD OF ENVIRONMENTAL REVIEW**

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

**Reviewed by:**

*David Rusoff*
**DAVID RUSOFF, Rule Reviewer**

**Certified to the Secretary of State, August 5, 2002.**

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

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| In the matter of the adoption of new rules I through X pertaining to water use classifications and numeric nutrient standards, and the amendment of ARM 17.30.602 and 17.30.619 pertaining to definitions and incorporations by reference | NOTICE OF ADOPTION AND AMENDMENT<br><br>(WATER QUALITY) |

TO: All Concerned Persons

1. On April 11, 2002, the Board of Environmental Review published a notice of public hearing on the proposed adoption and amendment of the above-stated rules at page 1019, 2002 Montana Administrative Register, issue number 7.

2. The Board has amended ARM 17.30.602 and 17.30.619 exactly as proposed. The Board has adopted new rules I (17.30.615), II through IX (17.30.650 through 17.30.657) and X (17.30.631) as proposed, but with the following changes, stricken matter interlined, new matter underlined:

RULE I (17.30.615) WATER-USE CLASSIFICATIONS AND DESCRIPTIONS - CONSTRUCTED DITCHES, SEASONAL AND SEMI-PERMANENT LAKES AND EPHEMERAL STREAMS (1) The water-use classifications for waters in constructed irrigation ditches and drain ditches that ~~have return flows to~~ are state waters as defined in 75-5-103, MCA, and the water-use classification for waters in ephemeral streams and seasonal and semi-permanent lakes and ponds are as follows:

(a) same as proposed.

(b) waters in constructed irrigation and drain ditches that contain controlled flows of surface water mixed with ground water ~~and are periodically de-watered~~. . D-2

(c) through (2) same as proposed.

RULE II (17.30.650) D-1 CLASSIFICATION STANDARDS FOR CONSTRUCTED DITCHES, SEASONAL AND SEMI-PERMANENT LAKES AND EPHEMERAL STREAMS (1) same as proposed.

(2) No person may violate the following specific water quality standards for waters classified D-1:

~~(a) the standards in WQB-7 for carcinogens and parameters with a bioconcentration factor greater than 300 apply;~~

~~(b)~~ (a) ~~the water quality shall be maintained of sufficient quality that all designated uses of any downstream receiving waters will~~ the designated uses of a receiving water body under a different classification must be fully maintained;

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

(3) same as proposed.

RULE III (17.30.651) D-2 CLASSIFICATION STANDARDS

(1) same as proposed.

(2) No person may violate the following specific water quality standards for waters classified D-2:

(a) same as proposed.

~~(b) the standards in WQB-7 for carcinogens and parameters with a bioconcentration factor greater than 300 apply;~~

~~(c)~~ (b) ~~the water quality shall be maintained of sufficient quality that all designated uses of any downstream receiving waters will~~ the designated uses of a receiving water body under a different classification must be fully maintained;

(d) same as proposed, but is renumbered (c).

(3) same as proposed.

RULE IV (17.30.652) E-1 CLASSIFICATION STANDARDS

(1) same as proposed.

(2) No person may violate the following specific water quality standards for waters classified E-1:

~~(a) the standards in WQB-7 for carcinogens and parameters with a bioconcentration factor greater than 300 apply;~~

~~(b) when the natural water quality exceeds the standards in WQB-7 identified in (2)(a), the natural water quality may not be made worse;~~

~~(c)~~ (a) ~~the water quality shall be maintained of sufficient quality that all designated uses of any downstream receiving waters will~~ the designated uses of a receiving water body under a different classification must be fully maintained;

(d) same as proposed, but is renumbered (b).

(3) same as proposed.

RULE V (17.30.653) E-2 CLASSIFICATION STANDARDS

(1) same as proposed.

(2) No person may violate the following specific water quality standards for waters classified E-2:

(a) same as proposed.

~~(b) the standards in WQB-7 for carcinogens and parameters with a bioconcentration factor greater than 300 apply;~~

~~(c) when the natural water quality exceeds the standards in WQB-7 identified in (2)(a) and (b), the natural water quality may not be made worse;~~

~~(d)~~ (b) ~~the water quality shall be maintained of sufficient quality that all designated uses of any downstream receiving waters will~~ the designated uses of a receiving water body under a different classification must be fully maintained;

(e) same as proposed, but is renumbered (c).

(3) same as proposed.

RULE VI (17.30.654) E-3 CLASSIFICATION STANDARDS

(1) same as proposed.

(2) No person may violate the following specific water quality standards for waters classified E-3:

~~(a) the standards in WQB-7 for carcinogens and parameters with a bioconcentration factor greater than 300 apply;~~

~~(b) when the natural water quality exceeds the standards in WQB-7 identified in (2)(a), the natural water quality may not be made worse;~~

(c) same as proposed, but is renumbered (a).

~~(d)~~ (b) ~~the water quality shall be maintained of sufficient quality that all designated uses of any downstream receiving waters will~~ the designated uses of a receiving water body under a different classification must be fully maintained.

(3) same as proposed.

RULE VII (17.30.655) E-4 CLASSIFICATION STANDARDS

(1) same as proposed.

(2) No person may violate the following specific water quality standards for waters classified E-4:

(a) same as proposed.

~~(b) the standards in WQB-7 for carcinogens and parameters with a bioconcentration factor greater than 300 apply;~~

~~(c) when the natural water quality exceeds the standards in WQB-7 identified in (2)(a) and (b), the natural water quality may not be made worse;~~

~~(d)~~ (b) ~~the water quality shall be maintained of sufficient quality that all designated uses of any downstream receiving waters will~~ the designated uses of a receiving water body under a different classification must be fully maintained;

(e) same as proposed, but is renumbered (c).

RULE VIII (17.30.656) E-5 CLASSIFICATION STANDARDS

(1) same as proposed.

(2) No person may violate the following specific water quality standards for waters classified E-5:

~~(a) the standards in WQB-7 for carcinogens and parameters with a bioconcentration factor greater than 300 apply;~~

~~(b) when the natural water quality exceeds the standards in WQB-7 identified in (2)(a), the natural water quality may not be made worse;~~

~~(c)~~ (a) ~~the water quality shall be maintained of sufficient quality that all designated uses of any downstream receiving waters will~~ the designated uses of a receiving water body under a different classification must be fully maintained;

(d) same as proposed, but is renumbered (b).

(3) same as proposed.

RULE IX (17.30.657) F-1 CLASSIFICATIONS STANDARDS

(1) same as proposed.

(2) No person may violate the following specific water quality standards for waters classified F-1:

(a) same as proposed.

~~(b) the standards in WQB-7 for carcinogens and parameters with a bioconcentration factor greater than 300 apply;~~

~~(c) when the natural water quality exceeds the standards in WQB-7 identified in (2)(a) and (b), the natural water quality may not be made worse;~~

~~(d)~~ (b) ~~the water quality shall be maintained of sufficient quality that all designated uses of any downstream receiving waters will~~ the designated uses of a receiving water body under a different classification must be fully maintained;

(e) same as proposed, but is renumbered (c).

(3) same as proposed.

RULE X (17.30.631) NUMERIC ALGAL BIOMASS AND NUTRIENT STANDARDS (1) same as proposed.

(2) The numeric nutrient and standing crop of benthic algae water quality standards for the mainstem Clark Fork River from below the Warm Springs Creek confluence (N46° 11' 17", W112° 46’ 03") to the confluence with the Flathead River (N47° 21' 45", W114° 46' 43") are as follows:

(a) In the mainstem Clark Fork River from below the Warm Springs Creek confluence (N46° 11' 17", W112° 46' 03") to the ~~Reserve Street Bridge in Missoula, MT (N46° 52' 52", W114° 02' 21")~~ confluence with the Blackfoot River (N46° 52' 19", W113° 53' 35") the numeric water quality standards for Total Nitrogen, Total Phosphorus, and benthic algal chlorophyll a, applicable from June 21 to September 21, are as follows:

(i) and (ii) same as proposed.

(b) In the mainstem Clark Fork River from the ~~Reserve Street Bridge in Missoula, MT (N46° 52' 52", W114° 02' 21")~~ confluence with the Blackfoot River (N46° 52' 19", W113° 53' 35") to the confluence with the Flathead River (N47° 21' 45", W114° 46' 43") the numeric water quality standards for Total Nitrogen, Total Phosphorus, and benthic algal chlorophyll a, applicable from June 21 to September 21, are as follows:

(i) and (ii) same as proposed.

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

COMMENT NO. 1: Several commentors recommended that the language in New Rules II through IX stating that "the standards in WQB-7 for carcinogens and parameters with a bioconcentration factor greater than 300 apply" should be removed. These commentors pointed out that the Department's statement in support of the rules made it clear that streams that are periodically de-watered and not suitable for drinking supplies should not be subject to the human health-based

standards developed by the U.S. Environmental Protection Agency.

One commentor pointed out that the numeric standards for carcinogens and bioconcentrating parameters listed in WQB-7 have not applied to ephemeral drainages and lakes in the past. This commentor also stated that applying WQB-7 standards to ephemeral drainages and lakes is problematic due to naturally occurring carcinogens in soils or waters within these drainages and due to the use of pesticides and insecticides next to these drainages.

RESPONSE: The Board agrees with the comments and has deleted the language from the rules.

COMMENT NO. 2: The requirement in New Rules IV through IX stating that "when the natural water quality exceeds the standards in WQB-7 identified in (2)(a), the natural water quality may not be made worse" should be removed because it is not clear how the requirement will be implemented and "natural water quality" is not defined. One commentor asked whether naturally occurring ground waters pumped to the surface would be considered "naturally occurring"?

RESPONSE: The Board agrees that the language referring to "natural water quality" is confusing. Moreover, since the Board is deleting the language requiring compliance with the standards in WQB-7 for carcinogens and bioconcentrating parameters identified in (2)(a), the prohibition against making water quality worse when natural water quality exceeds the standards in (2)(a) will also be removed from the rules.

COMMENT NO. 3: Proposed New Rule I states that the new water-use classification system will apply to waters in constructed ditches and drain ditches that have "return flows to state waters." Accordingly, the proposed new rules for ditch classification expands the water-use classifications to every ditch in Montana, not only those which are designated "state waters" under § 75-5-103(29), MCA.

RESPONSE: The Board agrees that the term "return flows" may cause some confusion since it is not specifically included in the definition of "state waters" and may have the appearance of broadening the statutory definition. For this reason, the term will be deleted from the rules.

COMMENT NO. 4: The requirement for a "use attainability analysis" (UAA) prior to re-classifying a particular stream is problematic for three reasons: (1) the Department does not have the resources to conduct a UAA for every ditch, pond, and coulee in Montana; (2) EPA's oversight of the UAA process will likely result in standards intended to protect a variety of uses of a ditch or pond never intended by the farmer or rancher, such as recreational use, fish, wildlife, and other uses; and (3) eliminating uses will create more controversy when preparing new lists of impaired waters.

RESPONSE: The Board acknowledges that EPA's requirement for a UAA prior to re-classifying a water body in order to

eliminate a designated use may, in certain instances, be difficult, resource intensive, and controversial. Simply eliminating reference to the UAA requirement in the new rules, however, will not eliminate this federal requirement. Since the CWA requires EPA's approval of any revised water quality standard, including the elimination of use designations, the federal requirement for a UAA prior to eliminating a use will remain regardless of its inclusion or exclusion from the rules. Moreover, the alternative not to adopt the new rules conflicts with the Board's duty to adopt "an appropriate classification for streams that, due to sporadic flow, do not support an aquatic ecosystem that includes salmonid or nonsalmonid fish." See § 75-5-301(2)(a), MCA. For this reason, the Board is adopting the new classification system even though a UAA will be required prior to any particular stream, ditch, or pond being included under the classification system.

In order to address the problems identified by the comment, the Department intends to conduct UAAs only as needed to address a particular discharge permit. If a number of UAAs are needed, the Department intends to schedule and prioritize development of the UAAs giving consideration to its other responsibilities and the availability of resources.

COMMENT NO. 5: The reference to "dewatered" conditions in the proposed D-1 and D-2 classifications under New Rule I indicates that both ditches will be periodically dewatered during the year. Ditches that receive municipal discharges may never be completely dewatered during a given year. As such, the rules fail to provide a classification that will provide relief to municipal discharges on ditches that will always contain water but still do not support aquatic life. To resolve this problem, several commentors recommended that New Rule I be modified by removing the words "periodically dewatered" from the D-2 classification.

RESPONSE: The Board agrees and will delete the term from the D-2 classification. The results of the UAA will determine whether or not a particular ditch that is not periodically dewatered conforms to the limited uses under the D-2 classification. The UAA will also ensure that existing uses will be maintained.

COMMENT NO. 6: The requirement in New Rules II-IX that the water quality "shall be maintained of sufficient quality that all designated uses of any downstream receiving water will be fully maintained" is not clear. The language implies that the standards of the downstream water body will be applied to the water in the ditch.

RESPONSE: The quoted language was intended to ensure that the designated uses of a downstream water body are not impaired by discharges to a newly classified ditch or stream with standards that are less stringent than those downstream. In order to clarify the language, the Board will replace the quoted language with the following: "the designated uses of a

receiving water body under a different classification will be fully maintained."

COMMENT NO. 7: Non-point source activities should not be regulated in an effort to address a point source discharge permitting concern.

RESPONSE: The proposed rules do not contain or imply any increased regulatory authority over non-point or point source discharges. The proposed rules only refine the existing use classification system to better reflect the actual uses (and standards to protect those uses) of ephemeral streams and ditches.

COMMENT NO. 8: How or would existing Montana Pollutant Discharge Elimination System (MPDES) permits be affected by the proposed new classifications?

RESPONSE: The adoption of the proposed new classifications will not automatically change the permit limits of any Montana Pollutant Discharge Elimination System permit. The new rule classifications only establish a "place holder" for a water body to be listed after a UAA is conducted and after the Board adopts a rule that places the water body under the new classification. Once a particular water body is placed under a new classification through future rule adoption, then an MPDES permit holder on that stream will be subject to less stringent standards than currently used to establish permit limits.

COMMENT NO. 9: Modify the proposed rules to allow the specific water quality standards to be set based on the results of the use attainability analysis and site-specific conditions of each water body or by the discharger. To provide for site-specific standards, the following language was recommended for New Rules II through IX: "(4) Notwithstanding the water quality requirements of (2), acute aquatic life standards specific to a water body may be adopted that are consistent with the use attainability of the water body, the requirement that the water quality be maintained of sufficient quality that all designated uses of any downsteam receiving water will be fully maintained, and water body-specific aquatic life."

RESPONSE: The Board disagrees that site-specific standards may be developed based upon the results of a UAA. The UAA is a scientific study demonstrating a water body's natural ability to support certain uses and not support other uses. It is not a method to develop site-specific standards or criteria to protect those uses. The mechanism to establish site-specific standards for aquatic life is provided in § 75-5-310, MCA. Under the statute, any water quality standard for aquatic life that is different than recommended by EPA must be developed in accordance with federal regulations and guidelines applicable to developing site-specific criteria. In contrast, the proposed rules establish new classifications with fewer designated uses than currently apply and set the

standards necessary to protect those uses based upon criteria recommended by the EPA.

COMMENT NO. 10: The designated use for secondary contact recreation for the proposed ditch classifications should be removed because recreation in a ditch may be dangerous or prohibited by the owners or operators of the ditch.

RESPONSE: Recreation in a ditch may be hazardous and prohibited by the owner of the ditch, but that does not prevent persons, such as children, from actually using the ditch for such purposes. As such, rules implementing the federal Clean Water Act require states to designate the basic "fishable and swimmable" uses for all waters and adopt criteria to protect those uses, unless through the UAA process it is found that the use has not occurred and cannot be attained.

Under Montana's existing classification system, all ditches that meet the definition of "state waters" are designated suitable for primary contact recreation, such as swimming and bathing, and are protected by fecal coliform bacteria standards recommended by EPA. Under the new rules, a ditch may be re-classified as suitable for limited recreation (i.e., "secondary contact recreation"), such as wading and boating, and the fecal coliform limits will be less stringent than those currently used for primary contact recreation.

COMMENT NO. 11: The proposed classifications are not clear and are overly broad.

RESPONSE: The Board disagrees. The rules clearly describe each type of stream, ditch, or pond that may be re-classified and establishes specific sub-classifications for those waters. In addition, the new classifications are limited in their application since they can only be used when a specific water body is found to be originally "misclassified" under the current system (See § 75-5-302, MCA) and a UAA has been performed.

COMMENT NO. 12: The problem of lagoon wastewater treatment systems meeting ammonia standards could be addressed by other means similar to proposed New Rule X.

RESPONSE: The Board disagrees. Regardless of other means available to assist municipal systems, the Board is required by law to adopt classifications for low or sporadic flow water bodies, pursuant to § 75-5-301, MCA. New Rules I through IX fulfill this statutory obligation.

COMMENT NO. 13: The proposed New Rules should include intermittent streams and other water bodies.

RESPONSE: Intermittent streams and other water bodies are included in the New Rules under the F-1 classification, provided that those water bodies are "streams with low or sporadic flow that because of natural hydro-geomorphic and hydrologic conditions, are not able to support fish." See New Rule I(1)(h).

**COMMENT NO. 14:** There are many unanswered questions about the use attainability analysis. How will it be implemented? How will UAAs be funded? What is meant by potential uses?

**RESPONSE:** Implementation of the UAA will be conducted on an "as needed" basis. For example, if a permittee on a dewatered ditch wishes to re-classify the ditch in order to obtain relief from certain permit requirements, a UAA will be conducted for that ditch. At this time, the Department does not know what the specific source of funding for UAAs will be.

The word "potential" in the definition of UAA refers to the level or degree that a use is supported or could support. For example, a publicly accessible stream with an established swimming beach has an established recreational use (primary contact) as opposed to an ephemeral stream that has a few pools that might be used for wading for a few days of the year (secondary contact).

**COMMENT NO. 15:** Rule III uses the term "aquatic life" which is subject to interpretation.

**RESPONSE:** "Aquatic life" refers to all of the animals and plants that live in the water including algae, insects, such as mayflies or caddis flies, and fish, such as trout or minnows. The term has been used in the state's water quality standards for over two decades.

**COMMENT NO. 16:** Rules III, IV, and others appear to raise the fecal coliform standard from 200 per 100 ml to 1000 per 100 ml.

**RESPONSE:** The proposed rules relax the fecal coliform standard typically used to protect primary contact recreation uses, such as bathing and swimming, by substituting EPA's recommended fecal coliform standard for secondary contact recreation use, such as boating and wading. The new standards adopted for the protection of secondary contact recreation are 1000 organisms of the fecal coliform group per 100 ml.

**COMMENT NO. 17:** Rule IV and others refer to standards in WQB-7 with a bioconcentration factor greater than 300. Bio-accumulation is a concern, especially with carcinogens, and the factor of 300 needs to be reduced.

**RESPONSE:** The language referring to parameters with a bioconcentration factor greater than 300 has been removed from the rules, because the assumptions used by EPA in developing those standards do not apply to water bodies under the new classifications. See Response to Comment No. 1.

**COMMENT NO. 18:** What does the phrase, "When the natural water quality exceeds the standards in WQB-7" mean? Does "exceeds" mean "better than the standards" or "worse than the standards"?

**RESPONSE:** The Board agrees that the language is ambiguous and has removed the language from the rules. See Response to Comment No. 2.

**COMMENT NO. 19:** Will children playing in the water be protected?

**RESPONSE:** Yes. The water quality standards under the new classifications protect any use of the water for secondary recreational purposes.

**COMMENT NO. 20:** What is meant by "physical conditions"?

**RESPONSE:** The term "physical conditions" refers to the depth, width and sinuosity of a ditch or stream. These factors, in addition to substrate size, can limit the type of aquatic life community present in a ditch or stream.

**COMMENT NO. 21:** Rule VIII refers to wildlife. Many dead deer have been found downstream of the Missoula wastewater treatment plant. DEQ should interface with the Department of Agriculture and Fish, Wildlife, and Parks. The rule should refer more specifically to wildlife.

**RESPONSE:** The term "wildlife," similar to the terms used to describe other designated uses, is simply a short-hand way of describing the designated use of a water body. In this case, the term "wildlife" indicates that any water body placed under the new rule classifications will be protected for use by wildlife. The department does coordinate with Fish, Wildlife and Parks on water quality issues.

**COMMENT NO. 22:** The classification of ditches as D-1 and D-2 is arbitrary and should be based on agricultural uses only, not recreation which is actually prohibited by § 23-2-302, MCA

**RESPONSE:** The Board disagrees that § 23-2-302, MCA, prohibits the recreational use of water in all instances. Rather, the statute prohibits the recreational use of certain ditch waters enumerated under § 23-2-302(2), MCA, unless the landowner gives permission for such use. As such, the new classifications require that the water quality for all ditches classified under D-1 and D-2 is suitable for secondary contact recreation, so that human health is protected should permission be granted for access under the statute.

**COMMENT NO. 23:** Several commentors indicated that they support the adoption of New Rule X as proposed.

**RESPONSE:** Comment noted.

**COMMENT NO. 24:** Several commentors support the adoption of the nutrient standards in New Rule X provided certain language is added to the rule. Specifically, they want language expressly stating that the signatories to the Voluntary Nutrient Reduction Program (VNRP) will have 10 years (beginning in August 1998) to comply with the nutrient values specified in the voluntary agreement even though New Rule X establishes nutrient standards that will be effective upon publication.

**RESPONSE:** The Board disagrees that such language is necessary. The nutrient values specified in the VNRP have been

approved by EPA as a Total Maximum Daily Load (TMDL) for the Clark Fork and apply only to the signatories to the VNRP. When EPA approved the VNRP/TMDL for these sources, EPA also approved the 10-year schedule provided in the VNRP for implementing the nutrient targets as part of the TMDL. For this reason, the Department and EPA consider the 10-year schedule for implementing the TMDL as a valid and appropriate regulatory basis that will be relied upon when reissuing permits for the four signatories to the VNRP. Since the Department intends to rely upon the 10-year schedule approved by EPA as part of the VNRP/TMDL (until August 2008), there is no need to adopt the suggested language in these rules.

COMMENT NO. 25: The rule contains two proposed total Phosphorus (P) standards, 20 µg total P/L above the Reserve Street Bridge and 39 µg total P/L below the bridge. The bridge as a separation point is arbitrary and, in addition, the total P standard should be uniform throughout the river.

RESPONSE: The Board disagrees that the total P standard should be uniform throughout the river.

The values of 20 and 39 µg total P/L for the Upper and Middle Clark Fork, respectively, were developed based on studies in the Clark Fork River and other rivers. The value of 39 µg total P/L was drawn from the substantial study of Dodds and Smith (1995), later published as Dodds et al. (1997). They used a probabilistic approach and suggested that an appropriate instream total Phosphorus (P) concentration could be derived as a function of the instream total Nitrogen (N) concentration. Their work indicated that 317 µg total N/L would limit the summer algae standing crop to a mean of 100 mg Chl a/$m^2$ and a maximum of 150 mg Chl a/$m^2$, the same algae levels that are being proposed in New Rule X. In order to maintain the N:P ratio of 7:1 (by weight) that is typically found in algae, total P should be kept to 13% of the total N value. The proposed standard for total N in New Rule X is 300 µg/L (slightly more conservative than that suggested by Dodds and Smith), and therefore the appropriate total P concentration would be 0.13 * 300 = 39 µg/L, the same as in New Rule X. It should be pointed out, however, that when using other approaches to determine the appropriate total P value, Dodds and Smith (1995) concluded that 30 µg total P/L might be more appropriate, given the variability in values generated from different methods.

The lower value of 20 µg/L TP in the Upper Clark Fork River is intended to maintain a high (N:P) ratio of 15:1, given that the total N standard is 300 µg/L. Data suggest that a high N:P ratio in the Upper Clark Fork will help control the nuisance filamentous algae Cladophora, which dominates the upper river but which is less common in the Middle Clark Fork.

Even though there are uncertainties in the algae-nutrient relationship used to establish these standards, the new standards will be re-evaluated at least once every three years, as required by state law and the federal Clean Water

Act. During the next triennial review (scheduled for 2004), the Department will review the appropriateness of these numeric nutrient standards along with the rest of its standards. Given the information cited above justifying different standards for total P, the Board is adopting the values for nutrient standards in the Upper and Middle Clark Fork River as proposed.

The Board agrees, however, that the location of the separation point for the two total P values (at the Reserve Street Bridge) is inappropriate. As such, the Board is amending the proposed rule to move the separation point further upstream to the confluence with the Blackfoot River for the following reasons:

1. There is a substantial decrease in the Clark Fork River's hardness (concentration of Calcium and Magnesium) due to inflows from Rock Creek and the Blackfoot River. The filamentous algae Cladophora prefers hard to very-hard water (Whitton 1970), whereas downstream of the Blackfoot River confluence the Clark Fork's water is typically moderately-hard or soft. This condition should in general discourage the growth of Cladophora.

2. A long-term study of the Upper Clark Fork's biota has been ongoing since 1989. The study has found that a station just downstream of the Blackfoot confluence and Milltown dam is something of a transition zone between the aquatic flora of the Upper Clark Fork and the aquatic flora of the Middle Clark Fork (Weber 2000, 2001).

3. It is more in keeping with the other hydrologic boundaries of the proposed rule (i.e., the upper and lowermost boundaries of the rule extend from the Clark Fork's Warm Springs Creek confluence downstream to the Flathead River confluence).

**COMMENT NO. 26:** The applicable time period of the proposed standard in New Rule X, June 21st to September 21st, is arbitrary and capricious and should be set for the entire year.

**RESPONSE:** The Board disagrees that the time period in Rule X is inappropriate. The new standards in Rule X are designed to control nuisance algae, which usually grow during the summer months after spring runoff. By late September much of the river algae has begun to die and move downstream. Although algal growth occurs outside the summer period, its growth does not appear to be fast enough to pose a water-quality impairment during non-summer months. Further, early spring algal growth is frequently scoured off during spring runoff. Since the nutrient standards are intended to maintain algae below nuisance levels during the summer period, then the only remaining question might be is: What is the effect of

year-round nutrient loads on downstream waterbodies? Lake Pend Oreille in Idaho is the waterbody downstream of the Clark Fork River, and receives most of its water from the Clark Fork. Fortunately, studies have already been completed to determine acceptable nutrient loads to the lake. As a result, maximum allowable N and P loads from the Clark Fork River have already been allocated to Montana in a signed Montana-Idaho border agreement. Under current conditions, Montana usually meets its load restriction requirements.

Because the numeric nutrient criteria will be implemented during the critical time period when nuisance algae proliferate and, just as importantly, the effects of nutrient loads on the downstream waterbody have been addressed, the Board is adopting the June 21st to September 21st time frame as proposed in New Rule X.

COMMENT NO. 27: An Environmental Impact Statement (EIS) was not undertaken prior to the proposal of New Rule X.

RESPONSE: An EIS is not required prior to adopting New Rule X, because establishing numeric water quality standards for nutrients is not a major state action significantly affecting the human environment. Specifically, adopting a numeric standard to replace the existing narrative standards currently used to regulate algal growth in surface water will not change the environment. Rather, the numeric standards will serve the same purpose as the existing narrative standards, which is to prevent undesirable aquatic life. Consequently, there will be no significant change to the environment resulting from the adoption of these rules.

COMMENT NO. 28: The title of New Rule X should be changed to "Numeric Algae Chlorophyll Standards" to reflect that the issue is impairment of the river by nuisance algae growth. Since the nutrient standards are included as a method of attaining the algal standards, the standards should be rearranged in the rule so that the algal standard is listed first and the nutrient standard is listed second.

RESPONSE: The Board agrees that the title should reflect that the standards being adopted limit algae growth. The term "algae chlorophyll" suggested by the commentor, however, is not broad enough to include other nutrient and algal standards that may be adopted in the future. Future standards that might be adopted could apply to the water column or be based on another measure of algae standing crop (Ash Free Dry Weight, for example). In order to keep the rule title as general as needed, the Board is amending the title to read: "Rule X Numeric Algal Biomass and Nutrient Standards."

Although the Board agrees that the nutrient standards assist attaining the algal standards, the nutrient standards are as important as the biomass standards because both are necessary to control algae growth. Therefore, the Board declines to list the standards in any particular order since each numeric standard adopted now or in the future under New Rule X will be equally necessary to control algae growth.

**COMMENT NO. 29:** One commentor asked that a note be added to New Rule X stating that: "The nutrient standards listed herein are designed to result in compliance with the underlying algal standards. Further monitoring of algae and nutrients and development of better correlation between nutrients and algal levels may result in needed refinement of the nutrient standards to ensure compliance with the algal standard."

**RESPONSE:** The Board disagrees that an explanatory note in New Rule X discussing what the standards are designed to achieve in terms of restricting algal growth is necessary. The explanation for why numeric water quality standards are being adopted to restrict undesirable aquatic life was given in the notice of hearing for these rules. Upon adoption, the standards will be used as a regulatory basis for establishing limits in MPDES permits without further need of their underlying purpose.

The Board also disagrees that language should be added to ensure that further monitoring and review of the nutrient and algal standards will occur. The state is already required under both state and federal law to review its water quality standards every three years and to revise those standards as necessary. Consequently, no similar requirement need be adopted in these rules.

**COMMENT NO. 30:** Adoption of New Rule X would bring about takings and damages to the citizens of Montana.

**RESPONSE:** The Department's legal staff has completed a "takings" review and concluded that the proposed rulemaking does not have taking or damage implications. The Board agrees with that conclusion.

**Reviewed by:** **BOARD OF ENVIRONMENTAL REVIEW**

*James M. Madden*
**JAMES M. MADDEN**
**Rule Reviewer**

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

**Certified to the Secretary of State August 5, 2002.**

**BEFORE THE BOARD OF LAND COMMISSIONERS AND THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA**

| | | |
|---|---|---|
| In the matter of amendment of ARM 36.2.1005 amending the minimum easement charge under the jurisdiction of the State Board of Land Commissioners | ) ) ) ) ) | NOTICE OF AMENDMENT |

**TO: All Concerned Persons**

**1. On May 30, 2002, the Board of Land Commissioners and the Department of Natural Resources and Conservation published a notice of the proposed amendment of ARM 36.2.1005 concerning minimum easement charges at page 1540 of the 2002 Montana Administrative Register, Issue Number 10.**

**2. The board and department have amended ARM 36.2.1005 exactly as proposed.**

**3. The following comments were received and appear with the board and department's responses:**

**COMMENT 1: Montana's electric cooperatives association commented that the proposed rule change and the new policy for historic utilities and roads will encourage utility companies to research the existence of utility lines on state trust land that are in trespass and perfect easement under the historic right of way policy.**

**RESPONSE 1: The department agrees.**

**COMMENT 2: Montana telecommunications association (MTA) has no objection to imposing a $100 minimum easement charge. In fact, MTA contends that the minimum charge is consistent with important policy criteria that the department and state board of land commissioners should consider in implementing any easement policies. Those criteria are simplicity, predictability, and cost-effectiveness, with minimal effect on rates or the deployment of telecommunications infrastructure.**

**RESPONSE 2: The department agrees.**

**COMMENT 3: Market valuation should be predictable and easy to administer. The department should adopt uniform rules consistent with other state, federal or local agencies. If the state continues to implement a market value approach to easement assessment, MTA opposes any effort to value land for purposes of determining easement charges based on the "economic value" of the land to the company.**

**RESPONSE 3:** The department agrees that the compensation for the easement should not be based on the economic value of the land to the company. The department coordinates with other state, local and federal agencies where their laws and rules allow.

**COMMENT 4:** The area encumbered by an easement should be no more than one foot for buried cable. Determining the area encumbered should be based on a "least burdensome effect" policy, which focuses on establishing the minimal easement footprint necessary to deploy an asset. Access to and from an easement should be granted by a construction permit, which is approved quickly and cost-effectively, without requiring a lengthy, costly application process.

**RESPONSE 4:** The area encumbered by an easement is addressed under department policy and procedures for historic and new construction utility easements. The department has streamlined the application process to provide applicants the ability to acquire an easement within sixty to ninety days.

**COMMENT 5:** Routine cable deployment and area restoration do not qualify as damages. Only negligence or malicious intent should trigger an inquiry into potential damages. MTA is concerned that definition of what constitutes damages can fall victim to subjective criteria. MTA recommends a standard definition of "damages," based on application of uniform rules across all state or federal agencies.

**RESPONSE 5:** Damages to the environment associated with construction and maintenance are typically addressed under the terms and conditions of the easement or reclamation. Damages referred to in the rule are associated with the damages realized to the remainder of the parcel as a result of the presence of the easement. Generally, the difference between the value of the whole property before the taking and the value of the remainder after the taking. This is the measure of the value of the part taken and the damages to the remainder. Three types of damages are recognized: consequential, direct or severance.

**COMMENT 6:** As noted above, infrastructure deployment today is subject to a variety of rules, procedures, permits, and ultimately, costly delays. MTA recommends an efficient, user-friendly, statewide, uniform easement procedure that satisfies the state’s need to manage state land, while concurrently facilitating the deployment of advanced infrastructure and services to Montana’s consumers. In this regard, MTA notes that other state and local entities already institute processes by which easements are granted in less than 30 days. Obtaining an easement from the state board of land commissioners, on the other hand, often takes as much as 12 months, or more. MTA finds such delays unacceptable to both infrastructure providers, and more importantly, to Montana’s business and residential consumers. By recommending a statewide, uniform easement

process, MTA assumes that rules ultimately adopted by the state not only would be cost-effective, simple and predictable, but that easements under the vast majority of circumstances could be granted within a reasonable period of time (i.e., 30 days or less).

RESPONSE 6: The department believes the proposed rule facilitates the deployment of infrastructure in Montana by eliminating the criteria for the minimum compensation. The amendment allows utilities to perfect their route prior to determining such things as kilowatts, number of poles, etc. The state board of land commissioners has authority over all easements across state school trust lands. Easements must be approved by the land board. The board meets every third Monday of each month. Scheduling environmental reviews and land board review eliminates the possibility of granting easements in less than thirty days. Easement applications are typically processed in sixty to ninety days.

COMMENT 7: MTA's recommendations assume initiating a rulemaking process whereby parties can reach consensus definitions by which uniform statewide easement rules will be determined after full public participation recognizing the due process rights of all parties.

RESPONSE 7: The department does not intend to broaden the scope of the ARM 36.2.1005 minimum easement charge.

4. An electronic copy of this Notice of Amendment is available through the department's site on the World Wide Web at http://www.dnrc.state.mt.us. The department strives to make the electronic copy of this Notice of Amendment conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered.

BOARD OF LAND COMMISSIONERS

By: /s/ Judy Martz
JUDY MARTZ
Chair

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

By: /s/ Arthur R. Clinch
ARTHUR R. CLINCH
Director

By: /s/ Donald D. MacIntyre
DONALD D. MACINTYRE
Rule Reviewer

Certified to the Secretary of State August 5, 2002.

**DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA**

| | | |
|---|---|---|
| In the matter of the amendment of ARM 36.24.101 purpose, 36.24.102 definitions and construction of rules, 36.24.103 direct loans, 36.24.104 types of bonds; financial and other requirements, 36.24.105 other types of bonds, 36.24.106 covenants regarding facilities financed by the loan, 36.24.107 fees, 36.24.108 evaluation of financial matters and commitment agreement, 36.24.109 requirements for disbursing of loan, 36.24.110 terms of loan and bond; adoption of new rule I (36.24.111) relating to financial and other requirements for loans to private persons | ) | NOTICE OF AMENDMENT AND ADOPTION |

TO: All Concerned Persons

1. On June 27, 2002, the Department of Natural Resources and Conservation published notice of the public hearing on proposed amendment of existing rules and the adoption of a new rule all related to implementation of the Water Pollution Control State Revolving Fund Act, at page 1708, of the 2002 Montana Administrative Register, Issue Number 12.

2. The department has amended ARM 36.24.101, 36.24.105, 36.24.108 and 36.24.110 exactly as proposed.

3. The department has amended the following rules as proposed with the following changes from the original proposal. Matter to be added is underlined. Matter to be deleted is interlined.

The following comments were received and appear with the agency's responses:

COMMENT 1: Dorsey & Whitney submitted written comments concerning editorial changes, which will not affect the intent of the rules.

RESPONSE 1: The agency agrees, and has made the suggested changes.

**36.24.102 DEFINITIONS AND CONSTRUCTION OF RULES**

**(1) through (15) same as proposed.**

**(16) "Eligible water pollution control project" means projects that meet the requirements of the federal act and that are approved by the department of environmental quality, including, without limitation, certain wastewater collection and treatment system projects, sewage system projects, storm sewer or storm drainage projects, and solid waste management projects and other nonpoint source projects.**

**(17) through (21) same as proposed.**

**(22) "Gross revenues" means with respect to revenue bonds, all revenues derived from ~~their~~ the operation of a sewage, wastewater, storm sewer or storm drainage system, or from a nonpoint source project, including but not limited to rates, fees, charges, and rentals imposed for connections with and for the availability, benefit, and use of the water, sewage, wastewater, storm sewer or storm drainage system, or nonpoint source project as now constituted and of all replacements and improvements thereof and additions thereto, and from penalties and interest thereon, and from any sales of property acquired for the system or for or in connection with the nonpoint source project and all income received from the investment of all moneys on deposit in system accounts.**

**(23) through (31) same as proposed.**

**(32) "Nonpoint source project" means a project that has been approved in the source management plan and that is eligible and has qualified for financing under the program pursuant to the ~~deferral~~ federal act, the act, these rules, and applicable department of environmental quality rules.**

**(33) through (54) same as proposed.**

**AUTH: 75-5-1103, MCA**
**IMP: 75-5-1102, MCA**

**36.24.103 DIRECT LOANS (1) and (2) same as proposed.**

**(3) Anytime after receipt of notice that the proposed project has been placed on the priority list and the engineering report for the proposed project, including compliance with the Montana Environmental Protection Act has been approved, a municipality or private person may file an application for financing from the state revolving fund. The borrower shall indicate on the application the type of bond it proposes to issue to secure the requested loan. The borrower shall submit with its application the financial information necessary to enable the department to determine compliance with the provisions of these rules and sufficient information to determine whether the project proposed to be financed is an eligible water pollution control project.**

**AUTH: 75-5-1105, MCA**
**IMP: 75-5-1113, MCA**

**36.24.104 TYPES OF BONDS; FINANCIAL AND OTHER REQUIREMENTS**

**(1) through (1)(c)(iv) same as proposed.**

(v) the district shall covenant to collect and maintain rates, charges, and rentals such that the revenue for each fiscal year the bonds are outstanding will be at least sufficient to pay the current expenses of operation and maintenance of the system, to maintain the operating reserve and to produce net revenues during each fiscal year not less than 120% of the maximum amount of principal and interest due on all outstanding bonds payable from the revenues of the system in any future fiscal year, or, if the ~~municipality~~ district calculates debt service on such outstanding bonds on a calendar year basis, then in any future calendar year;

(vi) remains the same.

(vii) the district shall agree not to incur any additional debt payable from the revenues of the system without the written consent of the department, unless the net revenues of the system for the last complete fiscal year preceding the issuance of such additional bonds have equaled at least 120% of the maximum amount of principal and interest payable from the revenue bond account in any subsequent fiscal year during the term of the then outstanding bonds and the additional bonds proposed to be issued, or, if the ~~municipality~~ district calculates debt service on such outstanding bonds on a calendar year basis, then in any future calendar year.

(A) through (d)(vi) remain as proposed.

AUTH: 75-5-1105, MCA
IMP: 75-5-1113, MCA

36.24.106 COVENANTS REGARDING FACILITIES FINANCED BY THE LOAN (1) Specific requirements and covenants with respect to the system or improvements to the system being financed from the proceeds of the loan must be contained in the bond resolution of the municipality, forms of which are available from the department, and may include the requirements and covenants set forth herein. The ~~forms~~ form of bond resolution of the municipality should be consulted for more specific detail as to each of these covenants. Given that a loan agreement cannot be reduced to a general form, no such general form exists, and would need to be developed for each proposed loan to or for the benefit of each private person and the particular nonpoint source project.

(2) through (13) same as proposed.

AUTH: 75-5-1105, MCA
IMP: 75-5-1113, MCA

36.24.107 FEES (1) through (1)(d) same as proposed.

(e) All borrowers unless excepted from the requirement by the department shall pay a loan loss reserve surcharge equal to 1% per annum on the outstanding principal amount of the loan, payable on the same dates that payments of principal and interest on the loan are due. The loan loss reserve surcharge must be deposited in the loan loss reserve account established in the indenture of trust until the loan loss reserve

requirement as defined in the bond resolution or loan agreement is satisfied. At this point it can be deposited in the state allocation account or to such other fund or account in the state treasury authorized by state law as a department of environmental quality or department representative shall designate, or segregated in a separate sub-account in the loan loss reserve account and applied to any costs of activities under the program authorized by state law as a department of environmental quality or department representative shall designate. The department and department of environmental quality may determine and establish from time to time, the precise amount of the loan loss reserve surcharge to be charged, based on the loan loss reserve requirement and the amounts in the match account. The borrower shall repay the loan at an interest rate determined in accordance with ARM ~~36.24.111~~ 36.24.110, plus the loan loss reserve surcharge plus the administrative expense surcharge. The borrower shall propose rates and charges for all wastewater services necessary to repay the above items. The department and the department of environmental quality shall rank all applications. Based on a consideration of social economic factors and measures of financial condition, and in accordance with the provisions of the intended use plan, the department may agree not to impose the loan loss reserve surcharge on the borrower. Any excess fees on revenues generated within or by the program shall be used exclusively for purposes authorized by the federal act.

AUTH: 75-5-1105, MCA
IMP: 75-5-1113, MCA

36.24.109 REQUIREMENTS FOR DISBURSING OF LOAN (1) through (1)(c) same as proposed.

(d) an opinion of bond counsel acceptable to the department that the bond is a valid and binding obligation of the municipality payable in accordance with its terms and that the interest in a form acceptable to the department thereon is exempt from state and federal income taxation in a form acceptable to the department, and, with respect to a loan to a private person, such legal opinions as the department deems necessary or appropriate, including that the note and loan agreement are the valid and bonding obligations of the private person payable in accordance with their terms and that the making of the loan will ~~now~~ not cause any bonds issued as tax-exempt bonds by the state to finance the program to become taxable;

(e) through (n) same as proposed.

AUTH: 75-5-1105, MCA
IMP: 75-5-1113, MCA

NEW RULE I (36.24.111) FINANCIAL AND OTHER REQUIREMENTS FOR LOANS TO PRIVATE PERSONS (1) through (5)(h) same as proposed.

(i) any information that the department may require in order to determine the effect of making the loan on the tax-exempt status

of the state's bonds; and

~~(i)~~(j) any other information that the department or the department of environmental quality may require to determine the feasibility of a project and the applicant's ability to repay the loan, including but not limited to:

(i) through (v) same as proposed.

AUTH: 75-5-1105, MCA
IMP: 75-5-1112, MCA

COMMENT 2: Dorsey & Whitney suggested clarifying the new rule to provide that the department may require any information in order to determine the effect of making the loan on the tax exempt status of the state's bonds.

RESPONSE 2: The agency agrees. The change would clarify that the agency can ask for additional information to make the program more credit worthy and the state program more viable.

4. An electronic copy of this Notice of Amendment and Adoption is available through the department's site on the World Wide Web at http://www.dnrc.state.mt.us. The department strives to make the electronic copy of this Notice of Amendment and Adoption conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered.

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

By: /s/ Arthur R. Clinch
Arthur R. Clinch
Director

By: /s/ Donald D. MacIntyre
Donald D. MacIntyre
Rule Reviewer

Certified to the Secretary of State August 5, 2002.

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

| | | |
|---|---|---|
| In the matter of the adoption of temporary emergency amendment of ARM 37.85.204 pertaining to medicaid cost sharing | ) ) ) ) ) | NOTICE OF ADOPTION OF TEMPORARY EMERGENCY RULE |

**TO: All Interested Persons**

**1. The Department of Public Health and Human Services is adopting the following temporary emergency rule amendment of ARM 37.85.204 pertaining to medicaid cost sharing.**

**The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who need an alternative accessible format of this notice. If you need to request an accommodation, contact the department no later than 5:00 p.m. on August 30, 2002, to advise us of the nature of the accommodation that you need. Please contact Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210; telephone (406)444-5622; FAX (406)444-1970; Email dphhslegal@state.mt.us.**

**2. The rule as amended provides as follows. Matter to be added is underlined. Matter to be deleted is interlined.**

**37.85.204 RECIPIENT REQUIREMENTS, COST SHARING**

**(1) Except as provided in ~~(3)~~ (4) through ~~(5)~~ (6) each recipient must pay to the provider a copayment of ~~$200~~ $100 per discharge for inpatient hospital services, not to exceed the cost of the services.**

**(2) Except as provided in (4) through (6) each recipient must pay to the provider a cost sharing payment for outpatient drugs not to exceed the cost of the service. The rate of cost sharing payment is a minimum of $1 per prescription up to a maximum of $5 per prescription based on 5% of the medicaid allowed amount. The maximum total cost sharing payment per recipient for outpatient drugs shall not exceed $25 per month.**

**~~(2)~~ (3) Except as provided in ~~(3)~~ (4) through ~~(5)~~ (6) each recipient must pay to the provider ~~coinsurance~~ a cost sharing payment not to exceed the cost of the service. For the following service providers, the rate of ~~coinsurance is~~ cost sharing is a minimum of $1 per visit up to a maximum of the lesser of $5 per visit or 5% of the average medicaid allowed amount for that provider type, rounded to the nearest dollar:**

**(a) outpatient hospital services;**
**(b) podiatry services;**
**(c) physical therapy services;**
**(d) speech therapy services;**
**(e) audiology services;**
**(f) hearing aid services;**

(g) occupational therapy services;
(h) home health services;
(i) ambulatory surgical center services;
(j) public health clinic services;
(k) dental services;
(l) denturist services;
~~(m) outpatient drugs, minimum coinsurance payment $1 per prescription;~~
~~(n)~~ (m) durable medical equipment, orthotics, prosthetics, and medical supplies;
~~(o)~~ (n) optometric and optician services;
~~(p)~~ (o) physician services;
~~(q)~~ (p) mid-level practitioner services;
~~(r)~~ (q) federally qualified health center services;
~~(s)~~ (r) rural health clinic services;
~~(t)~~ (s) freestanding dialysis clinic services;
~~(u) services to qualified medicare beneficiaries including chiropractic services;~~
~~(v)~~ (t) licensed psychiatrist services;
~~(w)~~ (u) licensed psychologist services;
~~(x)~~ (v) licensed clinical social worker services;
~~(y)~~ (w) licensed professional counselor services;
~~(z)~~ (x) adult day treatment services provided by a mental health center under ARM 37.88.901 and 37.88.905 through 37.88.907;
~~(aa)~~ (y) community-based psychiatric rehabilitation and support services provided by a mental health center under ARM 37.88.901 and 37.88.905 through 37.88.907;
~~(ab)~~ (z) independent diagnostic testing facility services; and
~~(ac)~~ (aa) home infusion therapy services.
~~(3)~~ (4) For purposes of this rule, "medicaid allowed amount" means the amount allowed in accordance with the reimbursement methodology for the particular service, before third party~~,~~ liability, incurment~~,~~ and other such payments are applied.
~~(4)~~ (5) The following individuals are exempt from cost sharing:
(a) individuals under ~~18~~ (21) years of age; ~~and~~
(b) pregnant women; and
(c) institutionalized individuals for services furnished to any individual who is an inpatient in a hospital, skilled nursing facility, intermediate care facility or other medical institution if such individual is required to spend for the cost of care all but their personal needs allowance, as defined in ARM 37.82.1320.
~~(5)~~ (6) Cost sharing may not be charged for services provided for the following purposes:
(a) emergencies;
(b) family planning;
(c) hospice;
(d) personal assistance services;
(e) home dialysis attendant services;
(f) home and community based waiver services;

(g) non-emergency medical transportation services;

(h) eyeglasses purchased by the medicaid program under a volume purchasing arrangement;

(i) early and periodic screening, diagnostic and treatment (EPSDT) services; ~~and~~

(j) independent laboratory and x-ray services~~.~~; ;

(k) services for medicare crossover claims where medicaid is the secondary payor under ARM 37.85.406(18). If a service is not covered by medicare but is covered by medicaid, cost sharing will be applied; and

(l) services for third party liability (TPL) claims where medicaid is the secondary payor under ARM 37.85.407. If a service is not covered by TPL but is covered by medicaid, cost sharing will be applied.

~~(6) The total cost sharing for each medicaid recipient shall not exceed $500 per state fiscal year. The existing $200 cap is replaced by the $500 cap on March 1, 2002.~~

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-6-101, 53-6-113 and 53-6-141, MCA

3. The Department of Public Health and Human Services is adopting this emergency rule to prevent imminent peril to the public health, safety and welfare. Effective April 1, 2002 the Department amended ARM 37.85.204 to change the cost sharing requirements for Medicaid recipients by increasing the cost sharing amounts charged to each recipient of Medicaid inpatient hospital services from $100 to $200 per discharge; setting cost sharing charges for certain other Medicaid services at 5% of the Medicaid allowed amount and setting a minimum cost sharing charge for outpatient drugs at $1 for each prescription. The April 1, 2002 amendments also increased the cost sharing cap for each Medicaid recipient from $200 to $500 for each state fiscal year, July 1 through June 30. Finally, the age of individuals exempted from cost sharing was decreased from under 21 to under 18 years of age.

The Department received comments and correspondence from providers and recipients of Medicaid services criticizing the changes to ARM 37.85.204 implemented April 1, 2002. State legislators contacted the Department to express their concerns about the effects of the April 1, 2002 changes on health, safety and welfare of their constituents. The Department has determined that the changes to cost sharing methodology have created severe problems for health care providers and Medicaid recipients and unless immediate steps are taken to address those problems, severe peril to the public health, safety and welfare is imminent.

Health care providers objected to the 5% cost sharing charge because it is extremely difficult to administer and collect. It required the providers to calculate the charge based upon a Department fee schedule of allowed charges. The Department intended the cost sharing charges to be similar to coinsurance

methodologies used by private health care insurers, in that providers would bill and collect the cost sharing amounts. It was impractical for providers to bill Medicaid recipients for the cost sharing charges because the amounts were not sufficient to warrant preparation of a statement. Health care providers preferred to collect cost sharing charges at the time of service, due to the financial and economic situation of the Medicaid population. They stated they were more likely to collect the cost sharing charge at the time of service than if they billed for the recipient's obligation.

Health care providers also complained that the cost sharing requirement made them look petty when trying to collect the amount owing, especially when cost sharing amounts were less than $1. Most health care providers did not have change on hand and could not make change for a recipient like a retail business would. Therefore, most providers did not bother collecting the cost sharing obligation.

Some services under the cost sharing policy resulted in an unduly large obligation for the Medicaid recipient. Due to the high cost of health care, some services could have resulted in cost sharing obligations of well over $50 per visit. Providers argued that a Medicaid recipient would be unable to pay such large obligations, especially when the recipient is receiving services frequently. Therefore, the providers argued, the policy represented a hidden shift of costs to the health care provider and in effect reduces their payment for the service. Many health care providers indicated they are considering withdrawing their participation from the Medicaid program because they cannot afford to provide services below cost.

Some pharmacy services also resulted in excessive cost sharing charges and some recipients did not receive prescriptions needed to treat their conditions. The Department estimated that 10% of prescriptions would result in cost sharing charge obligations greater than $5. While this was true, some very expensive prescriptions resulted in cost sharing obligations of $100 or more per prescription, placing an undue burden on Medicaid recipients. Therefore, Medicaid recipients used other resources to pay their cost sharing obligations and in some instances, costs shifted to other department programs that paid the 5% cost sharing charge. In other instances, recipients did not obtain their prescriptions. This aggravated their conditions. Consequently, recipients sought other high cost services such as hospital emergency rooms and the State Hospital.

Medicare crossover claims typically represent 20% or less of the amount allowed by Medicare. Under the previous methodology in which the cost sharing obligation was calculated at 5% of the Medicaid allowed amount, crossover claim cost sharing obligations were frequently less than $1. The small amount of the crossover claim cost sharing obligations made it difficult or impossible for health care providers to calculate them at the

time of service.

42 CFR 447.20 prevents the Department from imposing cost sharing obligations on recipients with third party liability (TPL) coverage that would result in payments equal to or greater than the amount payable under the state plan. Again, it was administratively difficult or impossible for providers to calculate the cost sharing charge for a recipient with TPL insurance.

When the Department decreased the age of individuals exempted from cost sharing charges to 18, the eligibility limit for EPSDT remained at 20. The different ages for cost sharing and EPSDT services created an unnecessary conflict that resulted in individuals between 18 and 20 arguing that they should be exempt from cost sharing based on the provisions of the rule exempting EPSDT services from cost sharing. While the Department intended the exemption apply only to nutrition, respiratory therapy, school based services and chiropractic services, recipients sought to apply it to all services for the age group. The increased difficulty of operating and administering Medicaid programs and explaining the policy resulted in the Department authorizing cost sharing overrides for persons between the ages of 18 through 20. Therefore, the Department is realigning the age limits by restoring the cost sharing age limit to under 21.

The Department found that excessive cost sharing charges caused some Medicaid recipients to avoid or delay treatment of medical conditions. This will lead to an aggravation of some medical conditions and a crisis in public health is imminent. Utilization of more intensive high-cost services will increase expenditures, further adding to the need to cut Medicaid services. Overburdened providers may withdraw their participation in the Medicaid program. This would lead to shortages of some services and will make medical services inaccessible in some rural areas of the state of Montana. This will further contribute to a public health crisis.

The Department's experience with an annual cap on cost sharing charges indicated that few Medicaid recipients met the $200 cap. The Department believes that the $100 cost sharing for inpatient hospital discharges, the $25 monthly cap on outpatient drugs and the $5 cap on cost sharing charges for each service or prescription adopted in this rule will make an annual cap unnecessary.

Therefore, the Department is adopting the following changes to ARM 37.85.204:

(1) a maximum cap of $5 per prescription is added for Medicaid outpatient drugs with a $25 monthly cap on outpatient drug cost sharing amounts per recipient;

(2) a minimum cap on other outpatient Medicaid services is

set at $1 and a maximum cap of the lesser of $5 per service or an amount equal to 5% of the average per visit Medicaid allowed amount for each provider type rounded to the nearest dollar is added;

(3) the cost sharing charge for inpatient hospital services is reduced to $100 per discharge;

(4) the age limit for individuals exempt from cost sharing charges is restored to under 21 years of age;

(5) services covered by Medicare for crossover claims are exempted from cost sharing when Medicaid is the secondary payor;

(6) services covered by TPL are exempted from cost sharing when Medicaid is the secondary payor;

(7) the annual limitation on cost sharing by a Medicaid recipient is removed; and

(8) the department corrected a clerical mistake in the list of services subject to cost sharing charges. The term "independent" was inadvertently omitted from laboratory and x-ray services in the previous rule revision.

The Department projects no adverse effect on Medicaid recipients or providers. Under the methodology adopted, all cost sharing amounts will be limited to a maximum of $5 per visit or prescription. Therefore, recipient cost sharing will be reduced for any Medicaid service greater than $100 based on the Medicaid allowed amount. The administrative burden of computing and collecting cost sharing amounts will be significantly reduced. The Department expects these amendments to benefit both recipients and providers.

4. The temporary emergency amendments setting minimum and maximum cost sharing charges for outpatient drugs are effective August 1, 2002. All other temporary emergency amendments addressed in this notice will be effective September 1, 2002.

5. A standard rulemaking procedure will be undertaken by the Department prior to the expiration of the temporary emergency rule changes.

6. Interested persons may submit their data, views or arguments during the standard rulemaking process. The Department also maintains lists of persons interested in receiving notice of administrative rule changes. These lists are compiled according to subjects or programs of interest. For placement on the mailing list, please write to Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210, submit by facsimile (406)444-1970 or by electronic mail via the Internet to dphhslegal@state.mt.us.

Dawn Sliva
Rule Reviewer

/s/ John Chappuis
for Gail Gray
Director, Public Health and Human Services

Certified to the Secretary of State August 1, 2002.

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

| | | |
|---|---|---|
| In the matter of the amendment of ARM 37.88.901, 37.88.905 and 37.88.906 pertaining to mental health center services | ) ) ) ) ) | NOTICE OF AMENDMENT |

**TO: All Interested Persons**

**1. On May 16, 2002, the Department of Public Health and Human Services published notice of the proposed amendment of the above-stated rules at page 1424 of the 2002 Montana Administrative Register, issue number 9.**

**2. The Department has amended ARM 37.88.901, 37.88.905 and 37.88.906 as proposed.**

**3. The Department has thoroughly considered all commentary received. The comments received and the Department's response to each follow:**

**The Department received many comments in support of the Comprehensive School and Community Treatment (CSCT) program and adult day treatment services. Since many of the comments were duplicative, they have been summarized and combined for purposes of response. Some of the comments were general, and did not address the proposed changes in CSCT and adult day treatment rules. Those comments are not summarized here, but were forwarded to the appropriate division for further review and consideration. The Department understands that the proposed rule changes are controversial. It sympathizes with Medicaid recipients, their families, educators and therapists who will experience changes in service as a result of these rules. However, the proposed rule amendments are being adopted as proposed because the Department believes they are the most effective and least disruptive means of preserving the most important services for children and adults with serious mental illness.**

**COMMENT #1: CSCT is a popular and effective program. Unbundling CSCT services will reduce the effectiveness of mental health services provided in the schools. The Department should cut other services and continue CSCT in its present form.**

**RESPONSE: The Department agrees that CSCT is a beneficial program for children and adolescents. However, the Department has not realized lower expenditures for out-of-home placements and is unable to continue funding for the bundled services. The Department will continue to reimburse medically necessary services provided to youth with serious emotional disturbances within the school setting. Reimbursable services include**

**outpatient therapy, community based psychiatric rehabilitation and support services, and case management services. The Department will also continue to support refinancing CSCT through local school districts.**

**COMMENT #2: Adult day treatment services are effective for consumers whose symptoms are not severe enough to justify inpatient treatment. Full day treatment should remain an option for adults who would suffer an aggravation of their condition in a half-day setting or who would be a danger to themselves or others outside a structured environment.**

**RESPONSE: The Department recognizes the need for adult consumers to have effective mental health treatment and rehabilitation services in the community. ARM 37.88.905 and 37.88.906, as amended, allow reimbursement for up to four hours of adult day treatment each day. Outpatient therapy, case management, and community based psychiatric rehabilitation and support services will continue to be available to adult consumers in addition to four hours of day treatment.**

**COMMENT #3: Reduction of community based treatment services, such as adult day treatment, will increase utilization of more costly and restrictive residential treatment options. Has the Department considered these effects in its proposals for cost savings?**

**RESPONSE: While a reduction of community based treatment services could result in increased utilization of more costly and restrictive residential treatment options, the Department believes that the array of services that remain available to adult consumers are adequate to meet their mental health treatment needs. In calculating projected savings from the proposed amendments, the Department allowed for increased costs due to greater utilization of other mental health services.**

**COMMENT #4: CSCT should be continued as a bundled service until it is refinanced under the Office of Public Instruction (OPI).**

**RESPONSE: If the Department were to continue reimbursing for CSCT until the service is refinanced under OPI, it would be forced to eliminate other services or make other reductions in public mental health programs in order to ensure that expenditures do not exceed the legislative appropriation. The Department has delayed the effective date of the rule amendments until August 16, 2002. At that time it is anticipated that the feasibility of alternative funding will be known.**

**COMMENT #5: The Department has a legislative mandate, 2001 Laws of Montana, Chapter 416, that created a multiagency children's services initiative requiring the Department to work with the most difficult kids. The unbundling of CSCT services is contrary to that mandate.**

**RESPONSE**: The Department will continue to reimburse for medically necessary services provided both within the school setting and in other community settings that will continue to allow providers to treat seriously emotionally disturbed youth. The legislation creating the multiagency children's services initiative does not mandate the provision of specific services.

**COMMENT #6**: Unbundling CSCT creates a hardship for rural schools that have no other mental health services in the community. Did the Department's calculation of cost savings take into account the likelihood that some children and youths served by CSCT will require more expensive residential treatment outside their homes and communities?

**RESPONSE**: The Department understands the challenges of providing mental health services in the rural counties of the state. The Department has encouraged mental health centers to provide outpatient mental health services to youth within the school setting when there are an insufficient number of students to justify the staffing requirements of CSCT. This has proven effective in many rural locations across the state. In calculating projected savings from the unbundling of CSCT services, the Department allowed for increased costs of other mental health services. The savings projected in the notice of proposed rulemaking was a net amount.

**COMMENT #7**: The cap on outpatient sessions is a barrier to providing the children's mental health services in an unbundled manner.

**RESPONSE**: The Department does not agree that the provisions of ARM 37.88.101 exempting the first 24 outpatient mental health counseling visits from the prior authorization requirements is a barrier to providing medically necessary mental health services to children. Outpatient services may be provided beyond the 24-session maximum if it can be demonstrated that the additional sessions are medically necessary. The prior authorization procedure for additional outpatient sessions is very similar to that previously required for CSCT.

**COMMENT #8**: The fear of having treatment reduced causes great anxiety to consumers and threatens their stability. If there is only half-day day treatment, there will be no lunch. This is the only meal of the day for some consumers. The Department should not close our day treatment center.

**RESPONSE**: The Department is aware that changes in the service system are difficult for some consumers. It is important for consumers to have stability, as well as effective services. The Department has not required that day treatment centers close or that lunch be eliminated. The provider agency will determine the nature of day treatment and what services are available within that schedule.

**COMMENT #9**: We question the state's commitment to serving adults with mental illness.

**RESPONSE**: The Department has a strong commitment to adults with severe disabling mental illness. In addressing the need to manage the funding appropriated by the Legislature, the Department has had to propose amendments and make decisions that are necessary to preserve many important services for individuals with serious mental illness. The Department will continue to reimburse providers for a variety of services for mentally ill adults, including medication management and pharmacy, Program of Assertive Community Treatment (PACT), intensive case management, outpatient therapy, and community based psychiatric rehabilitation and support.

**COMMENT #10**: The changes and cuts are inconsistent with the intent stated in Olmstead v. L.C., 527 U.S. 581, 144 L. Ed. 2d 540, 119 S. Ct. 2176 (1999) that persons with mental disabilities be treated in the community whenever possible. Community based services should be expanded, not cut.

**RESPONSE**: The Department disagrees that the elimination of full-day day treatment is inconsistent with the intent of the United States Supreme Court as enunciated in Olmstead. The Department continues to encourage day treatment providers to use the time available to provide rehabilitation services, to help consumers integrate into the community, and to continue supportive employment efforts that will serve to reduce the isolation of consumers with mental illness.

**COMMENT #11**: The Department should use PACT or Assertive Community Treatment (ACT) teams in cooperation with the National Alliance for the Mentally Ill (NAMI) to solve budget problems.

**RESPONSE**: The commentor submitted extensive analysis of the benefits of ACT teams in the treatment of mental illness. The Department supports the development of additional ACT teams and acknowledges that the existing teams in Billings and Helena are a valuable component of the adult mental health system. The development of additional ACT teams would require a commitment by community mental health centers and a determination that there is a sufficient need for the service in each community. The Department has not discouraged any community from developing this service. However, since its implementation in 1999, no requests for new programs or expansion of existing programs have been received.

**COMMENT #12**: The Department should take money from the Department of Corrections and spend it on community based mental health services.

**RESPONSE**: The budget for the Department of Public Health and Human Services is appropriated by the Montana legislature and is separate from the appropriation for the Department of

Corrections. The Legislature reconsiders its appropriations during each biennial session and makes adjustments as necessary. The Department of Public Health and Human Services has no authority to spend the budget of another agency.

COMMENT #13: The proposed amendments are a short-sighted approach to the budget shortfall within Medicaid mental health and the Mental Health Services Plan.

RESPONSE: The Department's response to the budget shortfall has been to identify those services and program costs that can be adjusted or eliminated to achieve the fiscal savings required for a balanced budget while simultaneously minimizing the adverse effect on mental health services overall. Although the Department projected some growth in Medicaid costs in the budget approved by the 2001 Legislature, the Department has experienced a substantially larger increase than anticipated. For example, there has been a 30% to 40% increase in the number of children seeking mental health services. Additionally, the cost per person for adult Medicaid mental health services has increased by at least 25%. The Department will respond to the budget crisis by eliminating some programs, by reducing the hours of other programs, and by increasing the cost-sharing responsibility of recipients. All of these actions have been necessary to meet the requirement for a balanced budget.

COMMENT #14: The Department should tighten the requirements for higher cost services. The Department should cut funding to programs that serve children outside of the home.

RESPONSE: The Department proposed and adopted stricter criteria for out-of-home placements in January, 2002 and will continue to review the medical necessity of treatment at higher levels of care.

COMMENT #15: The budget could be balanced by provider rate cuts.

RESPONSE: The Department implemented a temporary provider rate reduction of 2.6% for practitioner services in January, 2002. The rate reduction for mental health services was discontinued on July 1, 2002. The Department believes it is preferable to eliminate some services rather than to reimburse providers at a rate below the cost of providing services.

COMMENT #16: The Department should ignore the cost of services and think about the kids.

RESPONSE: The Department does not have the authority to adopt this strategy for addressing the budget for mental health services. 17-8-103, MCA requires the Department to keep all expenditures within the amount of legislative appropriations, 17-8-104, MCA makes public officers and employees personally liable for expenditures in excess of appropriations and subjects

them to other civil penalties for misfeasance.

COMMENT #17: The Department should restructure CSCT to provide a less intensive level of service while maintaining the cost-effective nature of a bundled service. The Department should not eliminate CSCT.

RESPONSE: The Department reviewed the alternative proposed by this commentor and forwarded it to OPI. The Department believes that the commentor's proposal may have merit in the refinanced service model. The Department is concerned that the proposal may not be universally accepted by all providers of CSCT and the projected savings would not be fully realized. If the Department were to unilaterally make the suggested adjustments to CSCT, savings would need to be found in other programs to avoid expending amounts in excess of legislative appropriations. The Department believes that it has reduced the expenditures for mental health programs and services to the optimum level by unbundling CSCT services.

4. The rule changes will be effective August 16, 2002.

Dawn Sliva
Rule Reviewer

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

Certified to the Secretary of State August 5, 2002.

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

| | | |
|---|---|---|
| In the matter of the adoption of New Rules I and II, the amendment of ARM 37.95.102, 37.95.106, 37.95.108, 37.95.109, 37.95.115, 37.95.117, 37.95.121, 37.95.127, 37.95.132, 37.95.139, 37.95.207, 37.95.210, 37.95.227, 37.95.610, 37.95.620, 37.95.640, 37.95.701, 37.95.705, 37.95.706 and 37.95.718 and the repeal of ARM 37.95.1010 pertaining to the licensure of day care facilities | ) | NOTICE OF ADOPTION, AMENDMENT, AND REPEAL |

TO: All Interested Persons

1. On February 28, 2002, the Department of Public Health and Human Services published notice of the proposed adoption, amendment, and repeal of the above-stated rules at page 483 of the 2002 Montana Administrative Register, issue number 4.

2. The Department has adopted rules I [37.95.104] and II [37.95.105] as proposed.

3. The Department has amended ARM 37.95.106, 37.95.117, 37.95.139, 37.95.620, 37.95.640, 37.95.705 and 37.95.718 and repealed ARM 37.95.1010 as proposed.

4. The Department has amended the following rules as proposed with the following changes from the original proposal. Matter to be added is underlined. Matter to be deleted is interlined.

37.95.102 DEFINITIONS (1) through (20) remain as proposed.

(21) "Portable wading pool" means a structure which contains water and is used for aquatic activities and is less than 24 inches high.

(21) through (28) remain as proposed but are renumbered (22) through (29).

~~(29)~~ (30) "Regular basis" means providing day care to children of separate families for any daily periods of less than 24 hours and within three or more consecutive weeks. In addition to the previous definitional language found at 52-2-703, MCA, the term also means the child must be in attendance four or more days a week for six hours a day or more.

(30) through (32) remain as proposed but are renumbered

(31) through (33).

~~(33)~~ (34) "Supervision" means the provider and all caregivers shall be able to see ~~and~~ or hear the children at all times.

(34) through (36) remain as proposed but are renumbered (35) through (37).

(38) "Volunteer" means any person who enters into service voluntarily, but who when in service is subject to discipline and regulations like any other employee.

AUTH: Sec. 52-2-704, 53-4-212 and 53-4-503, MCA
IMP: Sec. 52-2-702, 52-2-703, 52-2-713, 52-2-731, 53-2-201, 53-4-211, 53-4-501, 53-4-504, 53-4-601, 53-4-611 and 53-4-612, MCA

37.95.108 DAY CARE FACILITIES, REGISTRATION AND LICENSING PROCEDURES (1) The department may investigate and inspect the conditions and qualifications of any day care ~~center~~ facility or any person seeking or holding a license or registration.

(2) through (13) remain as proposed.

AUTH: Sec. 52-2-704, MCA
IMP: Sec. 52-2-723, 52-2-731, 52-2-732 and 52-2-733, MCA

37.95.109 CAREGIVER QUALIFICATIONS FOR ALL DAY CARE FACILITIES (1) and (2) remain as proposed.

(3) No director, caregiver or adult in residence shall be currently diagnosed or receiving therapy or medication for a mental illness or emotional disturbance which might create a risk to children in care. Mental illness which might create a risk to children in care shall be determined by a licensed psychologist or psychiatrist.

(a) The department may request that a person obtain a psychological or psychiatric evaluation at the ~~provider's own~~ individual's expense if there is reasonable cause to believe such a mental illness or emotional disturbance exists.

(4) through (9) remain as proposed.

(10) Caregivers must supervise ~~child~~ children at all times.

(a) remains as proposed.

AUTH: Sec. 52-2-704, MCA
IMP: Sec. 52-2-723, 52-2-731 and 52-2-735, MCA

37.95.115 DAY CARE PARENT INFORMATION (1) through (2) remain as proposed.

(3) The licensee or registrant shall allow custodial and non-custodial parental access as well as access by legal guardians to the facility at any time during which child day care services are provided, unless there is a current court order preventing parent-child contact.

AUTH: Sec. 52-2-704, MCA
IMP: Sec. 52-2-723, 52-2-731 and 52-2-735, MCA

37.95.121 SAFETY REQUIREMENTS (1) through (13) remain as proposed.

(14) In an emergency, all occupants must be able to escape from the facility, whether a home or building, in a safe and timely manner.

(a) All facilities must have two accessible ~~exit means~~ exits on each level that are unlocked when children are in care and are easily operable from the inside with a single action. ~~If the facility utilizes~~ The two ~~exit doors as the means of egress, then the doors~~ exits must be far enough apart from one another to avoid having them both blocked by fire and smoke. Aisle ways and corridors leading to ~~exit doors~~ the exits must be kept clear of obstructions. Deadbolt locks that can be opened from the inside only with a key are prohibited.

(b) remains the same.

AUTH: Sec. 52-2-704 and 52-2-731, MCA
IMP: Sec. 52-2-704 and 52-2-734, MCA

37.95.127 DAY CARE FACILITIES SWIMMING (1) remains the same.

(2) Portable wading pools, ~~are prohibited in child care facilities and can not be erected on day care facility property during the hours of operation~~ as defined in ARM 37.95.102, are permitted in day care facilities.

(a) When children are utilizing a portable wading pool, an approved caregiver shall always be present and actively supervising.

(b) If the portable wading pool is filled with water and will sit unused for any period of time prior to use by day care children, the caregiver shall equip the wading pool with a barrier to prevent a young child's unsupervised access.

(i) A barrier refers to a fence, a wall, or gate or screen that locks.

(c) Portable wading pools must be emptied after the day's use and sanitized.

(3) through (8) remain as proposed.

AUTH: Sec. 52-2-704, MCA
IMP: Sec. 52-2-731 and 52-2-735, MCA

37.95.132 TRANSPORTATION (1) through (6) remain as proposed.

(7) Facilities providing transportation for children under four years of age or 40 pounds shall comply with the following requirements:

(a) all vehicles shall be equipped with children's car seats or booster seats that meet federal department of transportation standards for the age and weight of the child being transported;

(b) car seats or booster seats shall be fastened securely to the seat or to the floor of the vehicle. Children shall be secured with safety belts ~~anchored to the floor~~ which are secured within the vehicle according to factory assembly;

(c) remains as proposed.

(d) there shall be one adult in addition to the driver for each four infants being transported~~. No child shall be left unattended in a vehicle~~; and

(e) remains as proposed.

(8) No child shall be left unattended in a vehicle.

AUTH: Sec. 52-2-704, MCA
IMP: Sec. 52-2-731, MCA

37.95.207 GENERAL HOUSEKEEPING (1) As general housekeeping measures, a day care center must ensure that:

(a) through (e) remain the same.

(f) at the end of each week of use, or more frequently as needed, toys are cleaned and sanitized in a solution containing ~~100 ppm available chlorine (~~1/4 cup ~~ounce~~ household bleach to ~~1~~ one gallon of water~~)~~ or a comparable sanitizing solution, air dried after sanitizing, rinsed with clean water ~~after the first air drying step,~~ and air dried ~~again~~;

(g) through (k) remain the same.

AUTH: Sec. 52-2-735 and 53-4-506, MCA
IMP: Sec. 52-2-735 and 53-4-506, MCA

37.95.210 SPECIAL REQUIREMENTS FOR CHILDREN REQUIRING CRIBS OR DIAPERS (1) If a day care center cares for children requiring cribs or diapers, it must:

(a) ensure that cribs, playpens, and toys used by those children are made of washable, nontoxic materials and are kept clean and sanitized with a solution containing ~~at least 100 ppm chlorine (~~1/4 cup ~~ounce~~ household bleach to ~~1~~ one gallon water~~)~~ or equivalent sanitizing solution, air dried, rinsed with clean water ~~after the first air drying step,~~ and air dried ~~again~~. This must be done daily;

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

(ii) after each diapering, thoroughly clean and sanitize the diapering area, using a solution of ~~at least 100 ppm chlorine (~~1/4 cup ~~ounce~~ household bleach to ~~1~~ one gallon water~~)~~ or an equivalent sanitizing solution, air dry, rinse with clean water ~~after the first air drying step,~~ and air dry ~~the area again~~;

(iii) through (f)(iv) remain the same.

AUTH: Sec. 52-2-735, MCA
IMP: Sec. 52-2-735, MCA

37.95.227 SWIMMING POOLS ~~(1) The department hereby adopts and incorporates by reference ARM Title 37, chapter 111, subchapter 11, setting construction and operation standards for swimming pools. A copy of ARM Title 37, chapter 111, subchapter 11 may be obtained from the Department of Public Health and Human Services, Health Policy and Services Division, Food and Consumer Safety Section, P.O. Box 202951, Helena, MT 59620-2951.~~

~~(2)~~ (1) In regard to swimming, a day care center must:

(a) allow children to use only a swimming pool which is constructed and operated in accordance with ARM Title 37, chapter 111, subchapter 11 and in accordance with ARM 37.95.127~~.~~;

(b) provide and utilize each day the pool is used a chlorine test kit to ensure that the required chlorine residual is present in the pool at all times~~.~~ ; or

(c) in the event that a portable wading pool, as defined in ARM 37.95.102, is used, add one tablespoon household bleach to 100 gallons of water to the pool on the day of use; drain, clean, and refill it with fresh water daily, and refill it with fresh water when needed. Bleach must be added any time the pool is refilled and drained.

AUTH: Sec. 52-2-735 and 53-4-506, MCA
IMP: Sec. 52-2-735 and 53-4-506, MCA

37.95.610 DAY CARE CENTERS, SPACE (1) through (2)(b) remain the same.

(3) Outdoor play areas at the facility must be surrounded by a fence that is at least four feet high and in good repair without any holes or spaces greater ~~that~~ than four inches in diameter. Outdoor areas must be designed so that all parts are always visible to allow for direct supervision by child care staff.

(4) remains the same.

AUTH: Sec. 52-2-704 and 53-4-503, MCA
IMP: Sec. 52-2-723, 52-2-731, 53-4-504 and 53-4-508, MCA

37.95.701 GROUP AND FAMILY DAY CARE HOMES, PROVIDER RESPONSIBILITIES AND QUALIFICATIONS (1) through (10) remain as proposed.

(11) The provider must hold current course completion cards in ~~cardio-pulmonary resuscitation~~ infant, child and adult CPR and infant choking response and standard first aid.

AUTH: Sec. 52-2-704 and 53-4-503, MCA
IMP: Sec. 52-2-702, 52-2-704, 52-2-723, 52-2-731, 52-2-735 and 53-4-504, MCA

37.95.706 GROUP AND FAMILY DAY CARE HOMES, FIRE SAFETY REQUIREMENTS (1) In an emergency, all occupants of the day care facility must be able to escape from the home or building in a safe and timely manner.

(a) the ground or main level must have two accessible ~~exit doors~~ exits easily opened from the inside with a single action. Deadbolt locks that can be opened from the inside only with a key are prohibited. ~~If the facility utilizes~~ The two ~~exit doors, as the means of egress, then these doors~~ exits must be far enough apart from one another to avoid having them both blocked by fire and smoke. Aisle ways and corridors leading to ~~exit doors~~ the exits must be kept clear of obstructions.

(2) through (7) remain the same.

AUTH: Sec. 52-2-704 and 53-4-503, MCA
IMP: Sec. 52-2-731, 52-2-734 and 53-4-504, MCA

5. The Department has thoroughly considered all commentary received. The comments received and the department's response to each follow:

COMMENT #1: The word "shall" should be changed to "should be" or "is required" in ARM 37.95.102.

RESPONSE: The Department feels the wording as proposed is appropriate. To change the wording from "shall" to "should be" infers permissiveness. This rule is not designed to be permissive, rather the rule is outlining when a person must become registered or licensed. Subsection (3) in particular is designed to outline this. The Department could change the wording to "is required" but feels that the change to "is required" vs. "shall" is not substantial.

COMMENT #2: The Department's use of the word licensor in ARM 37.95.102(2) should be changed to "licensure".

RESPONSE: The Department disagrees. To change the wording as suggested by the commentors would not be grammatically correct.

COMMENT #3: The Department should omit the new text of ARM 37.95.102(2) because the added language makes it seem as if the only reason for licensure or registration is for payment purposes.

RESPONSE: The Department disagrees. The change is necessary to allow the Early Childhood Services Bureau to refer to the definition of "child care" in their rules. The addition also includes the possibility that some relative caregivers may need to become licensed or registered to qualify for the various child care assistance programs.

COMMENT #4: In ARM 37.95.102(9) the Department should define a group day care home as having "up to 12 children" and should allow a group day care home to care for no more than four infants.

RESPONSE: The Department cannot change the definition of a "group day care home" as it is statutorily defined at 52-2-703(7), MCA.

COMMENT #5: Comments suggested that the change to ARM 37.95.102(29) would result in a "too broad" interpretation and would force those programs such as the Boys and Girls Clubs and other "activity programs" to be licensed.

RESPONSE: The Department agrees and will reinstate the language

to assist in the clarity of the definition of "regular basis".

COMMENT #6: Comments were received regarding ARM 37.95.102(33) concerning the Department's use of the words "see and hear" as too restrictive, especially in family day care homes. The concerns were that the use of the words "see and hear" would not allow the solo provider to attend to personal hygiene while providing care and may exclude caregivers with visual or hearing impairments.

It was suggested the Department use "see and/or hear".

RESPONSE: The Department concurs and will change the rule to read "see or hear".

COMMENT #7: Comments suggested ARM 37.95.106(3) and (3)(i) be changed to allow documentation of the required eight fire drills be maintained on site at the facility and viewed as appropriate by the licensing program instead of annually submitted.

RESPONSE: This subsection was not proposed for change; therefore, the Department chooses not to change it at this time. The Department will consider amendment with the next rule proposal on these rules.

COMMENT #8: The Department should use the word "facility" instead of "center" in ARM 37.95.108(1).

RESPONSE: The Department concurs with this change and will amend the rule accordingly.

COMMENT #9: In the addition to ARM 37.95.108(9)(e), it was questioned whether day care licensing staff are qualified to make determinations of "harm to a child".

RESPONSE: The addition of ARM 37.95.108(9)(e) is to allow the Department to take licensing action once "harm to a child" as defined at 41-3-102, MCA has occurred due to a violation of licensing regulation. The Department provides thorough training to child care licensing investigators including techniques to determine "harm to a child".

COMMENT #10: Comment was received wanting the Department to define volunteer pertaining to ARM 37.95.109(2).

RESPONSE: The Department agrees and will amend ARM 37.95.102 to include a definition of "volunteer".

COMMENT #11: Will the review of criminal records for crimes listed in ARM 37.95.109(2)(a) delay the process of issuance of license?

RESPONSE: The Department does not believe the process for issuance or renewal will be delayed as the process for reviewing

**criminal background checks and making a fitness determination is not changed. The new language allows the Department and potential caregivers to identify disqualifiers.**

**COMMENT #12: In ARM 37.95.109(2)(a)(ii) why not move the spousal abuse crime to the crimes which would be aged out after five years?**

**RESPONSE: The Department disagrees with this proposal as convictions of spousal abuse are of a serious enough nature to warrant total disqualification as a caregiver.**

**COMMENT #13: In ARM 37.95.109(3)(a) change the wording of this rule from "at the providers own expense" to "person's or individual's expense". The proposed language, as written, could be perceived to mean that in cases where an employee is subject to psychiatric evaluation, the owner/director/employer is responsible to pay that cost.**

**RESPONSE: The Department concurs and will make the appropriate wording changes.**

**COMMENT #14: The use of the word "habitual" in ARM 37.95.109(4) will preclude the habitual use of legal drugs and medications.**

**RESPONSE: The Department disagrees that this language will preclude the use of legal medications which are used habitually. The current reading of the proposed language states: "in a habitual and inappropriate manner...". The Department's concern is when legal drugs and medications are inappropriately used.**

**COMMENT #15: In ARM 37.95.109(10) a suggestion was made that the word "child" be changed to "children".**

**RESPONSE: The Department concurs and will make the appropriate change.**

**COMMENT #16: Comment was made concerning the reluctance to allow unfamiliar persons into a provider's home. Licensees or registrants should be allowed to take the past history of a non-custodial parent into consideration before allowing entry.**

**RESPONSE: The Department understands the reluctance to allow unfamiliar persons entry into the facility and acknowledges the right to require proof of identity; however, the law requires that the provider allow the custodial and non-custodial parent access unless there is a court order barring access.**

**COMMENT #17: The language in ARM 37.95.115 should include the wording to allow access by "legal guardians" as well as parents.**

**RESPONSE: The Department concurs. We will amend the proposed language accordingly.**

**COMMENT #18**: The Department should reword the caption to read "Other Safety Hazards" instead of "Safety Requirements" in ARM 37.95.121.

**RESPONSE**: The Department does not feel this is a significant enough change to warrant amending the current rule title.

**COMMENT #19**: The wording in ARM 37.95.121(7)(a) is problematic in that it does not allow for various configurations of the outdoor play space when multiple staff are present.

**RESPONSE**: The Department disagrees. The rule states that outdoor play areas shall be designed so that all parts are always visible and easily supervised by staff, regardless of the number of staff.

**COMMENT #20**: ARM 37.95.121(14)(a) should address the need for sufficient space to exist between the escape door and the egress window using the same rationale as that which exists if a facility utilizes two doors for escape.

**RESPONSE**: The Department agrees and will amend this language accordingly.

**COMMENT #21**: Many comments were received in opposition to the elimination of wading pools and requested that the Department reconsider the prohibition. Many of the comments concerned the fact that wading pools are a viable form of summer fun for children and that with the new definition of supervision, the risks of drowning would be lessened. Others commented that their city no longer has wading pools in parks, or at the local swimming pool. Still others commented that they supported additional regulation in regard to wading pools, such as height restrictions, water level restrictions and increased supervision; however, they felt a total ban was inappropriate.

**RESPONSE**: The Department concurs. ARM 37.95.127 and 37.95.227 shall be amended as they pertain to the use and maintenance of wading pools.

In addition, the Department will amend ARM 37.95.102 to include a definition of portable wading pools.

**COMMENT #22**: In regard to ARM 37.95.132(4) the Department must be consistent with insurance coverage weight and age requirements.

**RESPONSE**: The Department has based the weight and age requirements upon the national transportation safety recommendations.

**COMMENT #23**: In ARM 37.95.132(7)(a) the words "or booster seat" should be included after car seats.

**RESPONSE**: The Department concurs and agrees to add the wording "or booster seat" accordingly.

**COMMENT #24**: Many safety belts are no longer anchored to the floor of vehicles, but are part of the seat mechanisms. ARM 37.95.132(7)(b) should be reworded to acknowledge this.

**RESPONSE**: The Department concurs and the subsection will be reworded accordingly.

**COMMENT #25**: Comments were made in regard to ARM 37.95.132(7)(d) stating that the wording is awkward and will make the feasibility of transporting infants very difficult, especially for the family day care home provider.

**RESPONSE**: The Department disagrees. The rule as proposed allows the family day care home provider to transport three infants without a second person present as previously required.

**COMMENT #26**: The last sentence of ARM 37.95.132(7)(d) needs to be separated into its own subsection.

**RESPONSE**: The Department concurs. The rule has been changed accordingly.

**COMMENT #27**: The Department received several comments regarding ARM 37.95.207 and 37.95.210 concerned that the changes in the bleach solution were not correct based upon Center for Disease Control (CDC) recommendations. Additionally, there was concern about the repetitive process of air drying and wiping the surfaces prior to and following the use of the bleach solution.

**RESPONSE**: The Department concurs. The appropriate bleach solution should consist of 1/4 cup of household bleach to one gallon of water. This solution will allow providers to adequately sanitize toys by spraying vs. immersing the toys in the solution. Additionally, the CDC does not require air drying before rinsing. Therefore, the following language regarding air drying: "...rinsed with clean water and air dried" will be used.

The rules will be amended accordingly.

**COMMENT #28**: The Department received comments regarding ARM 37.95.610(3) asking that height restriction on fencing be lessened especially for infant only programs.

**RESPONSE**: The fencing height was not proposed for change during this rule proposal process; therefore, the Department chooses not to change it at this time. The Department will consider amending it in future rulemaking.

**COMMENT #29**: The language in ARM 37.95.610(3) regarding the design of the outdoor play areas does not reflect centers with multiple staff.

**RESPONSE**: The Department disagrees. This rule requires the play area to be designed so all areas are visible at all times, regardless of the number of staff.

**COMMENT #30**: Does the language in ARM 37.95.620(2)(b) through (4) in regards to staffing requirements apply only to centers?

**RESPONSE**: Yes, these subsections are applicable to center facilities only.

**COMMENT #31**: Is a person who works less than the 160 hours subject to CPR and first aid requirements?

**RESPONSE**: Yes. All persons who will be responsible for providing direct care to children must hold a current course completion in CPR and first aid.

**COMMENT #32**: Could the Department assign a higher number of hours per caregiver before the eight hour training became mandatory? Additionally, could the rule state or be enforced only after the mandatory probationary period specified by the employer?

**RESPONSE**: The Department does not feel there is a compelling reason to increase this number at this time, but agrees to examine the issue as we implement the rule. Mandatory probation periods as specified by employers vary and would make enforcement difficult.

**COMMENT #33**: Does the 160 hour requirement apply to the person, or the number of hours worked per facility?

**RESPONSE**: The 160 hours requirement pertains to the person. It does not matter whether the person works in one facility or many facilities.

**COMMENT #34**: In ARM 37.95.620(8), the term "through" is too vague when referring to a child's age.

**RESPONSE**: The Department disagrees. The proposed rule amendment is necessary as it clarifies when the child's age change requires staffing ratio changes.

**COMMENT #35**: In ARM 37.95.701(11) the phrase, "cardio-pulmonary resuscitation, infant, child, and adult CPR..." is redundant and is not consistent with the language contained in ARM 37.95.620(2)(b).

**RESPONSE**: The Department agrees. The words, "cardio-pulmonary resuscitation" are redundant. The Department will amend this subsection to be consistent with ARM 37.95.620(2)(b).

**COMMENT #36**: The need for sufficient space to exist between the escape door and the egress window should be addressed using the

same rationale as that which exists if a facility utilizes two doors for escape.

RESPONSE: The Department agrees and will amend the language in ARM 37.95.706 as appropriate.

COMMENT #37: Concerns were expressed with the general nature of the wording, "...for a short period of time..." in ARM 37.95.718(4). It was requested that the Department define this phrase.

RESPONSE: ARM 37.95.718(4) was not proposed for change. However, subsection (4)(b) of the rule states: "overlap care shall not exceed three hours in any day care day".

Dawn Sliva
Rule Reviewer

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

Certified to the Secretary of State August 5, 2002.

**VOLUME NO. 49** **OPINION NO. 20**

**FISH, WILDLIFE, AND PARKS, DEPARTMENT OF - Notification regarding loss of hunting, fishing, and trapping privileges is to be done by the Department of Fish, Wildlife, and Parks;**
**FISHING AND HUNTING LICENSES – The loss of hunting, fishing, and trapping privileges that occurs upon a guilty plea, conviction, or forfeiture of bail of a fish and game violation is a direct consequence of that violation. As a result, a Judge must inform an individual accused of a fish and game violation of the potential forfeiture of fishing, hunting, and trapping privileges as a result of conviction, guilty plea, or forfeiture of bond in order to assure that a "knowing" plea is entered;**
**JUDGES – A Judge must inform an individual accused of a fish and game violation of the potential forfeiture of fishing, hunting, and trapping privileges as a result of conviction, guilty plea, or forfeiture of bond in order to assure that a "knowing" plea is entered;**
**JUSTICES OF THE PEACE – A Judge must inform an individual accused of a fish and game violation of the potential forfeiture of fishing, hunting, and trapping privileges as a result of conviction, guilty plea, or forfeiture of bond in order to assure that a "knowing" plea is entered;**
**MONTANA CODE ANNOTATED - Sections 46-7-102 (1999), 46-8-101, 46-12-210, (1999), 87-1-101, -102(1), (2), (2)(a), (b), (d), (f), (3), (4), (6)(b), (7)(b), (11), -201(1), (2);**
**UNITED STATES CODE - Title 18, sections 922, (g)(9).**

**HELD:**

1. **The loss of hunting, fishing, and trapping privileges that occurs upon a guilty plea, conviction, or forfeiture of bail of a fish and game violation is a direct consequence of that violation. A Judge must inform an individual accused of a fish and game violation of the potential forfeiture of fishing, hunting, and trapping privileges as a result of conviction, guilty plea, or forfeiture of bond in order to assure that a "knowing" plea is entered.**

2. **Notification regarding loss of hunting, fishing, and trapping privileges is, by statute, to be done by the Department of Fish, Wildlife, and Parks.**

**July 24, 2002**

**Mr. David G. Rice**
**Hill County Attorney**
**County Courthouse**
**315 Fourth Street**
**Havre, MT 59501-3923**

Dear Mr. Rice:

You have requested my opinion concerning the following questions:

1. Does a judge have a duty to advise persons accused of fish and game violations of the potential forfeiture of hunting, fishing and trapping privileges as a result of a conviction, plea, or forfeiture of bond in order to assure a "knowing" plea; and,

2. Should a judge or the Department of Fish, Wildlife, and Parks (FWP) enforce the forfeiture of hunting, fishing, and trapping privileges?

I.

The statutes governing the notification duties of the courts provide a list of information that must be provided to a criminal defendant. The statutes do not specifically require judges to inform persons accused of fish and game violations about the potential loss of hunting, fishing, or trapping privileges as a result of a conviction, plea or forfeiture of bond.

At the initial appearance, a judge is required to inform the criminal defendant:

> (a) of the charge or charges against the defendant;
> (b) of the defendant's right to counsel;
> (c) of the defendant's right to have counsel assigned by a court of record in accordance with the provisions of 46-8-101;
> (d) of the general circumstances under which the defendant may obtain pretrial release;
> (e) of the defendant's right to refuse to make a statement and the fact that any statement made by the defendant may be offered in evidence at the defendant's trial; and
> (f) of the defendant's right to a judicial determination of whether probable cause exists if the charge is made by complaint alleging the commission of a felony.

Mont. Code Ann. § 46-7-102.

Before accepting a plea of guilty or nolo contendere, the court shall determine that the defendant understands the following:

> (a)(i) the nature of the charge for which the plea is offered;

(ii) the mandatory minimum penalty provided by law, if any;

(iii) the maximum penalty provided by law, including the effect of any penalty enhancement provision or special parole restriction; and

(iv) when applicable, the requirement that the court may also order the defendant to make restitution of the costs and assessments provided by law;

. . . .

Mont. Code Ann. § 46-12-210.

In addition to the requirements contained in the above statutes, the Supreme Court has explicitly ruled that under Mont. Code Ann. § 46-12-210 and related statutes, courts must inform defendants of the direct, but not the collateral, consequences of a guilty plea. State v. Liefert, 2002 MT 48, 309 Mont. 19, 43 P.3d 329. Thus, the question presented turns on whether the forfeiture of hunting, trapping, and fishing privileges is a direct or collateral consequence of a fish and game violation.

A consequence is direct if it has a "definite, immediate, and largely automatic effect" on the defendant. Liefert, at ¶ 22 (citing United States v. Bouthot, 878 F.2d 1506, 1511 (1st Cir., 1989)). In contrast, a consequence is collateral if a defendant has control over whether or not the consequence occurs. In addition, a consequence is collateral if it is not under the control of the sentencing judge or it is a procedure under the control of a different sovereign or different agency. Id., (citing United States v. Long, 852 F.2d 975 (7th Cir. 1988)).

In the Liefert case, David Liefert was charged under federal law with unlawfully possessing a firearm, 18 U.S.C. § 922(g)(9), after pleading guilty under state law to partner/family member assault, Mont. Code Ann. § 45-5-206. Liefert, ¶ 1. After the federal violation was charged, Liefert moved in Justice Court to withdraw his guilty plea to the partner assault, arguing good cause to withdraw his plea because the Justice Court did not inform him of the federal prohibition on possessing a firearm as a result of his plea under state law. Id.

The Court held that a potential federal firearms prosecution under 18 U.S.C. § 922 was a collateral consequence because it is not an automatic, definite, or immediate consequence of a state guilty plea and because the later prosecution is under the control of the federal government. Liefert, ¶ 25. The Court found that Liefert had discretionary control over whether or not he would be in violation of federal law upon entry of his guilty plea. If he chose to possess a weapon after pleading guilty, he would be in violation of federal law; if he chose not to possess a weapon, he would not be in violation. Id. Finally, Liefert's federal prosecution was under the control of a different sovereign entity. Id. Accordingly, the trial court was not

required to inform Liefert of this collateral consequence. Liefert, 2002 MT 48, ¶ 25. See also Saadiq v. Iowa, 387 N.W. 2d 315, 325 (Iowa, 1986) (holding that restriction on firearms under a different section of Iowa law was a collateral consequence); Reponte v. State, 566 P.2d 577, 584 (1974) (restriction on holding a gun is a collateral consquence).

The loss of hunting, fishing, and trapping privileges that occurs upon a guilty plea, conviction, or forfeiture of bond of a fish and game violation is different. The majority of the fish and game statutes make forfeiture of hunting, fishing, and trapping privileges a mandatory consequence of a violation. See Mont. Code Ann. § 87-1-102(2), (a), (b), (d), (f), (3), (4), (6)(b), (7)(b). Some allow discretion on the part of the judge. See Mont. Code Ann. § 87-1-102(1). Regardless, the loss of privileges is a direct and immediate consequence of a conviction. It is a consequence that is completely outside the control of the defendant. The consequence is either completely automatic or entirely dependent upon the discretion of the sentencing judge. It is my opinion that the loss of hunting, fishing, and trapping privileges that occurs upon guilty plea, conviction, or forfeiture of bail of a fish and game violation is a direct consequence of the violation. Therefore, a Judge must inform a defendant of the potential forfeiture of privileges as a result of conviction, guilty plea, or forfeiture of bond in order to assure that a "knowing" plea is obtained.

Though not directly on point, the recent decision in State v. Kempin, 2002 MT 313, 308 Mont. 17, 38 P.2d 859, supports this opinion. In that case, the Justice of the Peace advised defendant's counsel of the possible loss of privileges as a consequence of the forfeiture of bond. Kempin, ¶ 5. The Montana Supreme Court noted that fact in determining that a court may forfeit privileges upon the forfeiture of bond. Id., ¶ 18. The Court also noted that the Notices to Appear issued to the defendant contained notices regarding the possibility of loss of privileges. Id. The Court specifically referred to these notifications in determining that Kempin's due process rights were not violated. Kempin, ¶ 18.

II.

The statutes governing the powers and duties of FWP clearly authorize that department to enforce the forfeitures. Mont. Code Ann. § 87-1-201(1) provides that FWP "possesses all powers necessary to fulfill the duties prescribed by law and to bring actions in the proper courts of this state for the enforcement of the fish and game laws and the rules adopted by the department." Mont. Code Ann. § 87-1-201(2) further provides that FWP "shall enforce all the laws of the state respecting the protection, preservation, and propagation of fish, game, fur-bearing animals, and game and nongame birds within the state." FWP performs these functions primarily by control of licenses and permits to hunt, fish, and trap. The statutes governing the

forfeiture of privileges specifically direct FWP to notify the defendant of the loss of privileges. See Mont. Code Ann. §§ 87-1-102(1) and (2).

The principle function of FWP in regards to forfeiture of privileges is that of notifying the individual that his/her privileges have been forfeited as a result of a conviction, plea, forfeiture of bond, or an administrative hearing. See Mont. Code Ann. §§ 87-1-101(1) and (2). See also § 87-1-102(11). This notification by FWP is premised upon either a conviction, plea, forfeiture of bond, or an administrative ruling. Id. Due process requires an opportunity to be heard at a meaningful time. Montana State University v. Ransier, 167 Mont. 149, 154, 536 P.2d 187 (1975). As the forfeiture of privileges is either mandatory or at the discretion of the sentencing judge, any due process issues that a defendant may have would be as a result of the conviction, plea, forfeiture of bond, or administrative ruling, not the notification provided by FWP. Assuming adequate notice to the defendant of the possibility of forfeiture, as discussed in Part I above, the defendant's due process right to a hearing would clearly be satisfied by his ability to raise and argue any objections to the forfeiture at that time. The law also provides adequate opportunities to raise issues after sentencing, through a motion to withdraw a guilty plea, appeal from the conviction, or through a postconviction petition. Thus, the notification action itself required by the statutes provides sufficient due process to a recipient.

THEREFORE, IT IS MY OPINION:

1. The loss of hunting, fishing, and trapping privileges that occurs upon guilty plea, conviction, or forfeiture of bail of a fish and game violation is a direct consequence of that violation. A Judge must inform an individual accused of a fish and game violation of the potential forfeiture of fishing, hunting, and trapping privileges as a result of conviction, guilty plea, or forfeiture of bond in order to assure that a "knowing" plea is entered.

2. Notification regarding loss of hunting, fishing, and trapping privileges is, by statute, to be done by the Department of Fish, Wildlife, and Parks.

Very truly yours,

/s/ Mike McGrath
MIKE McGRATH
Attorney General

mm/pdb/jym

**NOTICE OF FUNCTION OF ADMINISTRATIVE RULE REVIEW COMMITTEE**

**Interim Committees and the Environmental Quality Council**

**Administrative rule review is a function of interim committees and the Environmental Quality Council (EQC). These interim committees and the EQC have administrative rule review, program evaluation, and monitoring functions for the following executive branch agencies and the entities attached to agencies for administrative purposes.**

**Economic Affairs Interim Committee:**

- **Department of Agriculture;**
- **Department of Commerce;**
- **Department of Labor and Industry;**
- **Department of Livestock;**
- **Department of Public Service Regulation; and**
- **Office of the State Auditor and Insurance Commissioner.**

**Education and Local Government Interim Committee:**

- **State Board of Education;**
- **Board of Public Education;**
- **Board of Regents of Higher Education; and**
- **Office of Public Instruction.**

**Children, Families, Health, and Human Services Interim Committee:**

- **Department of Public Health and Human Services.**

**Law and Justice Interim Committee:**

- **Department of Corrections; and**
- **Department of Justice.**

**Revenue and Transportation Interim Committee:**

- **Department of Revenue; and**
- **Department of Transportation.**

**State Administration, and Veterans' Affairs Interim Committee:**

- **Department of Administration;**
- **Department of Military Affairs; and**
- **Office of the Secretary of State.**

**Environmental Quality Council:**

- **Department of Environmental Quality;**
- **Department of Fish, Wildlife, and Parks; and**
- **Department of Natural Resources and Conservation.**

**These interim committees and the EQC have the authority to make recommendations to an agency regarding the adoption, amendment, or repeal of a rule or to request that the agency prepare a statement of the estimated economic impact of a proposal. They also may poll the members of the Legislature to determine if a proposed rule is consistent with the intent of the Legislature or, during a legislative session, introduce a bill repealing a rule, or directing an agency to adopt or amend a rule, or a Joint Resolution recommending that an agency adopt, amend, or repeal a rule.**

**The interim committees and the EQC welcome comments and invite members of the public to appear before them or to send written statements in order to bring to their attention any difficulties with the existing or proposed rules. The mailing address is PO Box 201706, Helena, MT 59620-1706.**

# HOW TO USE THE ADMINISTRATIVE RULES OF MONTANA AND THE MONTANA ADMINISTRATIVE REGISTER

**Definitions:** Administrative Rules of Montana (ARM) is a looseleaf compilation by department of all rules of state departments and attached boards presently in effect, except rules adopted up to three months previously.

Montana Administrative Register (MAR) is a soft back, bound publication, issued twice-monthly, containing notices of rules proposed by agencies, notices of rules adopted by agencies, and interpretations of statutes and rules by the attorney general (Attorney General's Opinions) and agencies (Declaratory Rulings) issued since publication of the preceding register.

## Use of the Administrative Rules of Montana (ARM):

| | |
|---|---|
| Known Subject | 1. Consult ARM topical index. Update the rule by checking the accumulative table and the table of contents in the last Montana Administrative Register issued. |
| Statute Number and Department | 2. Go to cross reference table at end of each title which lists MCA section numbers and corresponding ARM rule numbers. |

## ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies that have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through March 31, 2002. This table includes those rules adopted during the period April 1, 2002 through June 30, 2002 and any proposed rule action that was pending during the past 6-month period. (A notice of adoption must be published within 6 months of the published notice of the proposed rule.) This table does not, however, include the contents of this issue of the Montana Administrative Register (MAR).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through March 31, 2002, this table and the table of contents of this issue of the MAR.

This table indicates the department name, title number, rule numbers in ascending order, catchphrase or the subject matter of the rule and the page number at which the action is published in the 2001 and 2002 Montana Administrative Registers.

To aid the user, the Accumulative Table includes rulemaking actions of such entities as boards and commissions listed separately under their appropriate title number.


ADMINISTRATION, Department of, Title 2

| | |
|---|---|
| I | Montana's Volume Cap Allocation, p. 2196, 2456 |
| 2.4.101 | and other rules - Regulation of Travel Expenses, p. 2198, 2455 |

(Public Employees' Retirement Board)

| | |
|---|---|
| I | Purchase of Service Credit through Direct Trustee-to-Trustee Transfers, p. 1154, 1889 |
| I-III | Qualified Domestic Relations Orders for the Deferred Compensation (457) Plan Administered by the Public Employees' Retirement Board, p. 1612 |
| I-III | Deferred Compensation Plan Administered by the Public Employees' Retirement Board, p. 1150, 1893 |
| I-X | Deferred Retirement Option Plan (DROP) for Members of the Municipal Police Officers' Retirement System, p. 1118, 1891 |
| 2.43.404 | and other rules - Defined Contribution Retirement Plan for Members of the Public Employees' Retirement System, p. 1126, 1884 |
| 2.43.606 | Retirement Systems Administered by the Public Employees' Retirement Board, p. 1114, 1890 |
| 2.43.615 | and other rules - Family Law Orders for Retirement Systems and Plans Administered by the Public Employees' Retirement Board, p. 1603 |

(State Fund)
2.55.319 and other rules - Multiple Rating Tiers - Premium Modifiers - Individual Loss Sensitive Dividend Distribution Plan - Premium Rates, p. 2073, 164, 1065

(Banking and Financial Institutions)
2.59.107 Investments of Financial Institutions, p. 136, 901
2.59.112 and other rules - Approved Investments for Montana Banks - Investment Policies, p. 2066, 166

AGRICULTURE, Department of, Title 4

I-III Potato Research and Market Development Program, p. 1682
4.12.402 and other rules - Feed Penalties, p. 1, 778
4.12.3104 and other rules - Seeds - Labeling - Analysis Fees, p. 2278, 70
4.13.1001A State Grain Laboratory Fees, p. 1008, 1548
4.14.301 and other rule - Loan Qualifications, p. 1231, 1723, 71

STATE AUDITOR, Title 6

I-IV Insurance Information and Privacy Protection, p. 1686
I-XX Formation and Regulation of Captive Insurance Companies, p. 2351, 171
6.6.4202 and other rules - Continuing Education Program for Insurance Producers and Consultants, p. 1161, 1511, 1702, 2134, 2457
6.10.121 Registration and Examination of Securities Salespersons, Investment Adviser Representatives, Broker-Dealers, and Investment Advisers, p. 2283, 73

COMMERCE, Department of, Title 8

(Community Development Division)
I Administration of the 2002 Federal Community Development Block Grant Program, p. 2449, 1656, 1976
I Application to the Treasure State Endowment Program (TSEP), p. 2447, 524

(Board of Research and Commercialization Technology)
8.100.104 and other rule - Definitions - Application Procedures, p. 2203, 74

(Hard-Rock Mining Impact Board)
8.104.101 and other rules - Organizational Rule - Rules Governing Awarding of Grants, p. 425, 1660

(Board of Housing)
I-XV Affordable Housing Revolving Loan Fund - TANF Housing Assistance Funds, p. 1513, 75

8.111.513 Terms and Conditions of Loans Made from TANF Housing Assistance Funds, p. 1832

(Montana Promotion Division)
8.119.101 Tourism Advisory Council, p. 1013, 1661

EDUCATION, Title 10

(Office of Public Instruction)
10.7.106A and other rules - Students Placed in Private Education Programs - Tuition, p. 855, 1662
10.7.112 and other rules - Establishment of Investment Accounts - Spending Accounts - Agreement with the County Treasurer - Payments into an Investment Account - Controls and Accounting Records - Closure of a School District Fund - Cash and Budget Transfers Between School District Funds - School Flexibility Payment - Basic Equalization Levy Shortfall, p. 825, 1740
10.13.307 and other rules - Traffic Education, p. 6, 1067
10.41.101 and other rules - Vocational Education, p. 1784, 2206, 780, 1304

(Board of Public Education)
I Substantial and Material Non-performance of a Contract of Employment, p. 1016, 1549
10.55.601 Accreditation Standards and Procedures, p. 2359, 172
10.57.211 and other rules - Model Rules - Teacher Certification - Testing for Certification and Minimum Scores, p. 867, 1463
10.64.301 and other rules - Bus Standards, p. 1530
10.66.104 GED Fees, p. 1534

FISH, WILDLIFE, AND PARKS, Department of, Title 12

12.9.802 and other rules - Issuance of Supplemental Game Damage Licenses to Hunters in Lieu of Kill Permits, p. 20, 1306

(Fish, Wildlife, and Parks Commission)
I Creating a No Wake Zone on Hebgen Lake, p. 1156
I Regulating the Use of Snowmobiles on Open Public Water, p. 27, 1084
12.3.135 and other rule – Allowing Successful Moose, Sheep or Goat Applicants to Annul and Return the License if Military or Emergency Duty Does Not Allow Use of the License – Bonus Point Exemption for Military or Emergency Personnel in Combat or Emergency Situations, p. 1835
12.3.402 Refunding of the Two-day Resident Fishing License, p. 17, 1072
12.7.801 and other rules - Fishing Contest Regulations, p. 29, 1073, 1894

(Department of Fish, Wildlife, and Parks and the Fish, Wildlife, and Parks Commission)

I-V Contractual Public Elk Hunting Access Agreements, p. 1536, 1977

12.2.501 Declaring Black-tailed and White-tailed Prairie Dogs to be Nongame Wildlife in Need of Management, p. 1806, 526

ENVIRONMENTAL QUALITY, Department of, Title 17

I Air Quality - Air Quality Fee Credit for Use of Postconsumer Glass in Recycled Material, p. 1950, 529

17.36.101 and other rules - Subdivisions - Subdivision Review Under the Sanitation and Subdivisions Act, p. 568, 1465, 1981

17.40.201 and other rules – Wastewater Operators – Wastewater Treatment Operators, p. 1839

17.53.102 and other rules - Hazardous Wastes - Management of Hazardous Wastes, p. 35, 789, 1315

17.56.105 and other rule - Underground Storage Tanks - Variances - Issuance of Compliance Tags and Certificates, p. 51, 1477

17.56.121 and other rules - Underground Storage Tanks - Operating Permits - Operating Tags - Scope of Compliance Inspections - Compliance Plans, p. 2080, 2459

17.56.308 and other rule - Underground Storage Tanks - Operating Permits or Compliance Plans - Compliance Inspections, p. 2452, 139, 1091

(Board of Environmental Review)

I Air Quality - Maintenance of Air Pollution Control Equipment for Existing Aluminum Plants, p. 1033

17.8.101 and other rules - Air Quality - Definitions - Incorporation by Reference of Current Federal Regulations - Additional Conditions of Air Quality Preconstruction Permit, p. 268, 1747

17.8.505 and other rules - Air Quality - Air Quality Operation Fees - Annual Review of Air Quality Permit Fees - Open Burning Fees, p. 1692

17.8.701 and other rules - Air Quality - Issuance of Montana Air Quality Permits, p. 276

17.8.1201 Air Quality - Definition of Major Source in the Air Quality Operating Permit Rules, p. 1030

17.30.201 Water Quality - Water Quality Permit and Authorization Fees, p. 2361, 382

17.30.502 and other rules - Water Quality - Surface Water Quality, p. 1920, 387, 1089, 1314

17.30.602 and other rules - Water Quality - Water Use Classifications and Numeric Nutrient Standards - Definitions - Incorporations by Reference, p. 1019

17.30.2003 Water Quality - Enforcement Actions for Administrative Penalties, p. 263, 1749

**TRANSPORTATION, Department of, Title 18**

(Transportation Commission)
18.6.211 Collection of Permit Fees for Outdoor Advertising Signs, p. 2208, 2465

**CORRECTIONS, Department of, Title 20**

20.9.101 and other rules - Youth Placement Committees, p. 618, 1039

**JUSTICE, Department of, Title 23**

23.3.127 and other rules - Driver Licensing and Identification Cards, p. 428, 1316, 1896
23.4.201 and other rules - Field Certification of Associated Equipment, p. 871, 1482
23.4.501 and other rules - Definitions - Requirements for Collection and Storage of DNA, p. 1617, 1983
23.15.101 and other rules - Creating the Office of Victims Services and Restorative Justice, p. 1382, 1753
23.16.102 and other rules - Forms Used by the Department in Regulating Gambling - Gambling Applications and Licenses - Loans - Letters of Withdrawal - Machine Specifications - Bill Acceptors - Promotional Games of Chance, p. 1947
23.16.102 and other rules - Forms Used by the Department in Regulating Gambling - Gambling Applications - Video Gambling Machine Testing Fees, p. 308, 902
23.17.311 Montana Law Enforcement Academy Student Academic Performance Requirements for the Basic Course, p. 1386, 1754

(Board of Crime Control)
I Authorizing Reimbursement to Counties for Detention of Indian Youth, p. 142, 305, 1484
23.14.401 and other rule - Membership on the Peace Officers Standards and Training Council - POST Training Hours Awarded for College Credits, p. 1697

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

(Board of Architects)
8.6.101 and other rules - Transfer from the Department of Commerce - Board of Architects Rules, p. 173
8.6.405 and other rules - Licensure of Applicants Who are Registered in Another State - Examinations - Renewals - Fees, p. 1408, 175

(Board of Barbers)
8.10.101 and other rules - Transfer from the Department of Commerce - Board of Barbers Rules, p. 393

8.10.414 and other rule - Prohibition of Animals in Barbershops - Certain Records of Barber Schools, p. 1953, 176

(Board of Clinical Laboratory Science Practitioners)
8.13.101 and other rules - Transfer from the Department of Commerce - Board of Clinical Laboratory Science Practitioners, p. 1485
8.13.301 and other rules - Application - Fees - Minimum Standards for Licensure - Continuing Education - Inactive Status - Reactivation of License - Notification of Denial or Disciplinary Action - Supervision, p. 636, 1486

(Board of Cosmetologists)
8.14.402 and other rules - Elimination of the Required Practical Examination for Cosmetologists, p. 465, 1318

(Board of Dentistry)
8.16.402 and other rules - Licensure of Dentists and Dental Hygienists - Application Requirements for Dentists and Dental Hygienists, p. 439, 1488

(State Electrical Board)
8.18.101 and other rules - Transfer from the Department of Commerce - State Electrical Board Rules, p. 1755

(Board of Hearing Aid Dispensers)
8.20.101 and other rules - Transfer from the Department of Commerce - Board of Hearing Aid Dispensers Rules, p. 349
8.20.402 and other rules - Fees - Examination - Pass/Fail Point - Minimum Testing and Recording Procedures, p. 819, 1412, 2422, 82

(Board of Landscape Architects)
8.24.101 and other rules - Transfer from the Department of Commerce - Board of Landscape Architects Rules, p. 1498

(Board of Funeral Service)
8.30.101 and other rules - Transfer from the Department of Commerce - Board of Funeral Service Rules, p. 790
8.30.406 and other rules - Examination - Continuing Education - Sponsors - Renewal, p. 1297, 84, 793

(Board of Nursing)
8.32.301 and other rules - Probationary Licenses - Standards of Practice for Advanced Practice Registered Nurses - Standards Related to the Advanced Practice of Registered Nurses - Standards Related to Nurses as Members of the Nursing Profession - Method of Referral, p. 1952

8.32.303 and other rules - Nursing Licensure, p. 1621

(Board of Optometry)
8.36.601 Continuing Education, p. 632, 1550
8.36.801 Therapeutic Pharmaceutical Agents, p. 884, 1551

(Board of Pharmacy)
8.40.101 and other rules - Transfer from the Department of Commerce - Board of Pharmacy Rules, p. 904
8.40.401 and other rules - Substantive Pharmacy Rules - Automated Data Processing - Certified Pharmacies - Internship Regulations - Continuing Education for Pharmacists - Dangerous Drug Act - Collaborative Practice Agreement Requirements - Security of Certified Pharmacy - Administration of Vaccines by Pharmacists - Explosive Chemicals - Prescription Copies for Legend Drugs, p. 1422, 178, 794
8.40.1301 and other rules - Pharmacy Technicians - Registration of Pharmacy Technicians - Renewal, p. 1447, 86, 796
24.174.301 and other rules – Definitions – Foreign Graduates – Preceptor Requirements – Technician Ratio – Pharmacy Security Requirements – Licensing – Personnel – Absence of Pharmacist – Use of Emergency Drug Kits – Drug Distribution – Pharmacist Responsibility – Sterile Products – Return of Medication from Long Term Care Facilities – Pharmacist Meal/Rest Breaks – Health Care Facility Definition – Class I Facility – Class II Facility – Class II Facility, p. 1868

(Board of Professional Engineers and Land Surveyors)
I Fire Protection System Shop Drawings, p. 1968
8.48.101 and other rules - Transfer from the Department of Commerce - Board of Professional Engineers and Land Surveyors Rules, p. 1756
8.48.401 and other rules - Board Organization - Board Meetings - Screening Panel - Applications - Reclassification of Engineers and Land Surveyors - Classification of Experience of Land Surveying Applicants, p. 450, 1326

(Board of Real Estate Appraisers)
24.207.401 and other rules - Fees - Adoption of USPAP by Reference - Qualifying Experience - Inactive License/Certification, p. 144, 911

(Board of Sanitarians)
8.60.101 and other rules - Transfer from the Department of Commerce - Board of Sanitarians Rules, p. 1499

(Board of Social Work Examiners and Professional Counselors)
8.61.1201 Licensure Requirements, p. 1388

(Board of Veterinary Medicine)
8.64.509 Licensure of Out-of-State Applicants (Endorsement), p. 1041, 1984

I Unemployment Insurance Matters - Voluntary Layoff, p. 2090, 2466
I-VIII Building Codes, p. 1631
I-XVIII Investigating Complaints on Discrimination, p. 1158
24.11.204 and other rules - Unemployment Insurance Benefits Matters, p. 1044, 1665
24.11.442 Initial Monetary Determination Matters, p. 1863
24.16.9001 and other rules - Prevailing Wage Matters, p. 1172
24.16.9001 and other rules - Prevailing Wage Matters, p. 313
24.16.9003 and other rule - Prevailing Wage Rates, p. 1391, 1985
24.21.411 and other rules - Apprenticeship, p. 1701
24.21.414 Adoption of Wage Rates for Certain Apprenticeship Programs, p. 1400
24.29.1504 and other rules - Chiropractic, Occupational Therapy and Physical Therapy Services and Fees in Workers' Compensation Matters, p. 1403, 1758
24.29.2803 and other rules - Uninsured Employers' Fund, p. 1420, 1766
24.29.2814 Emergency Amendment - Uninsured Employers' Fund Administrative Costs Balance, p. 907
24.30.102 Occupational Safety and Health Standards for Public Sector Employment, p. 887, 1552
24.301.107 and other rules - Building Codes - Modifications to the Uniform Building Code Applicable Only to the Department's Code Enforcement Program - Adoption of the Uniform Housing Code or the Uniform Code for the Abatement of Dangerous Buildings, p. 345

(Workers' Compensation Judge)
24.5.303 and other rules - Procedural Rules of the Court, p. 2211, 93

LIVESTOCK, Department of, Title 32

(Board of Horse Racing)
8.22.301 and other rules - Transfer from the Department of Commerce - Board of Horse Racing Rules, p. 642, 1500, 1897

(Board of Livestock)
32.2.401 Various Fees Charged by the Department of Livestock for Inspecting Livestock, p. 724, 1510

NATURAL RESOURCES AND CONSERVATION, Department of, Title 36

36.24.101 and other rules - Water Pollution Control State Revolving Fund Act - Purpose - Definitions and Construction of Rules - Direct Loans - Types of Bonds; Financial and Other Requirements - Other

Types of Bonds - Covenants Regarding Facilities Financed by the Loan - Fees - Evaluation of Financial Matters and Commitment Agreements - Requirements for Disbursing of Loan - Terms of Loan and Bond - Financial and Other Requirements for Loans to Private Persons, p. 1708

(Board of Land Commissioners and Department of Natural Resources and Conservation)
36.2.1005 Minimum Easement Charge under the Jurisdiction of the State Board of Land Commissioners, p. 1540

PUBLIC HEALTH AND HUMAN SERVICES, Department of, Title 37

I Licensure of Minimum Standards for Critical Access Hospital (CAH), p. 1956, 205
16.28.101 and other rules - Transfer from the Department of Health and Environmental Sciences - Communicable Disease Control, p. 913
16.32.101 and other rules - Transfer from the Department of Health and Environmental Sciences - Licensure of Health Care Facilities, p. 185
16.32.302 Health Care Licensure, p. 1959, 192
16.32.601 and other rules - Minimum Standards for Mental Health Centers, p. 1962, 916
37.5.304 and other rules - Child Care Assistance and Hearing Appeal Rights, p. 727, 1553, 1989
37.8.101 and other rules - Vital Statistics, p. 2373, 397
37.40.301 and other rules - Nursing Facilities, p. 1262, 1767
37.50.315 Foster Care Classification Model, p. 774, 1557
37.76.101 and other rules - Temporary Assistance for Needy Families (TANF), p. 149, 952
37.78.102 and other rules - Families Achieving Independence in Montana (FAIM) and Temporary Assistance for Needy Families (TANF), p. 1207, 1771
37.82.701 and other rules - Medically Needy Family Medicaid Coverage, p. 1279, 1773
37.85.204 and other rules - Independent Diagnostic Testing Facilities - Medicaid Reimbursement, p. 56, 797
37.85.212 and other rules – Emergency Amendment – Extension of the 2.6% Provider Reimbursement Reductions – Withholding Provider Rate Increase for Resource Based Relative Value Scale (RBRVS) Providers for Fiscal Year 2003, p. 1899
37.85.212 and other rule - Resource Based Relative Value Scale (RBRVS), p. 1247, 1775
37.85.212 and other rules - Emergency Amendment - Medicaid Reimbursement, p. 94
37.86.805 and other rules - Medicaid Reimbursement for Primary Care Services, p. 1251, 1779
37.86.1004 and other rule - Reimbursement Methodology for Source Based Relative Value on Dental Services, p. 1243, 1780

37.86.1101 and other rule - Medicaid Outpatient Drug Reimbursement, p. 1257, 1788
37.86.2207 and other rules - Mental Health Services, p. 503, 1328
37.86.2207 and other rules - Emergency Adoption and Amendment - Mental Health Services, p. 193
37.86.2801 and other rules - Inpatient and Outpatient Hospitals, p. 1289, 1543, 1725, 1991
37.88.901 and other rules - Mental Health Center Services, p. 1424
37.95.102 and other rules - Licensure of Day Care Facilities, p. 483
37.108.507 Components of Managed Care Plan Quality Assessment Activities, p. 349, 954
37.114.799 Communicable Disease Control, p. 891, 1511

PUBLIC SERVICE REGULATION, Department of, Title 38

I Electronic Filings, p. 1582, 398
38.2.5007 and other rule - Protective Orders - Protection of Confidential Information, p. 1972
38.5.1107 Accrual of Interest on Customer Deposits with Utilities, p. 893, 1995
38.5.2202 and other rule - Pipeline Safety, p. 2093, 2467
38.5.8001 General Requirement to Obtain License to Supply Electricity, p. 521, 1512

REVENUE, Department of, Title 42

I Production Threshold for Beer Taxes, p. 379, 955
I-III Exemptions, Reduced Tax Rates, and Credits for Energy Facilities, p. 1060
42.2.501 Partial Payments for Debts Collected by the Department, p. 1545, 1998
42.2.613 and other rules - Taxpayer Appeals, p. 1430
42.5.213 Filing and Remittance Requirements for Electronic Fund Transfers, p. 1438, 1906
42.13.101 and other rules - Liquor Licensing, p. 1727
42.15.315 and other rules - Penalties and Interest Charges for Late Filed and Late Paid Taxes, p. 352, 1094
42.18.106 and other rules - Montana Appraisal Plan Rules, p. 356, 1097
42.19.1102 and other rule - Treatment of Gasohol Production Facilities, p. 65, 811
42.22.104 Motor Vehicles and Special Mobile Equipment, p. 2403, 99
42.22.1311 and other rules - Exemptions - Reduced Tax Rates - Credits for Energy Facilities, p. 369, 1092
42.23.413 Carryovers of Net Operating Losses for Corporation License Taxes, p. 2127, 2468, 207
42.26.101 and other rules - Corporation Taxes, p. 2096, 2469, 403
42.29.101 and other rules - Universal System Benefits Credits, p. 2216, 209

42.31.501 and other rules - Retail Communications Excise Tax, p. 2399, 68, 956

(Board of Review)
I-V One-Stop Licensing Program Administered by the Department of Revenue on Behalf of the Board of Review, p. 1056, 1559

SECRETARY OF STATE, Title 44

44.3.1101 Schedule of Fees for the Centralized Voter File, p. 896, 1667
44.5.101 and other rules - Filing and Copy Fees for Corporations, p. 2000, 2472, 960
44.6.201 and other rule - Uniform Commercial Code Filings (UCC), p. 898, 1668

(Commissioner of Political Practices)
44.12.101 and other rules - Lobbying - Regulation of Lobbying, p. 1440