ISSUE NO. 3

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 The Proposal Notice Section contains state agencies' proposed new, amended, or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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

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

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BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the repeal of ARM 2.21.5005, 2.21.5006, 2.21.5007, 2.21.5008, and 2.21.5011 pertaining to reduction in work force	))))	NOTICE OF PUBLIC HEARING ON PROPOSED REPEAL

TO: All Concerned Persons

1. On March 11, 2010, at 11:30 a.m., the Department of Administration will hold a public hearing in Room 136 of the Mitchell Building, at 125 N. Roberts, Helena, Montana, to consider the proposed repeal of the above-stated rules.

2. The Department of Administration will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Administration no later than 5:00 p.m. on March 1, 2010, to advise us of the nature of the accommodation needed. Please contact Marjorie Thomas, Department of Administration, P.O. Box 200127, 125 N. Roberts, Helena, Montana 59620; telephone (406) 444-3982; fax (406) 444-0703; Montana Relay Service/TDD 711; or e-mail mthomas2@mt.gov.

3. The department proposes to repeal the following rules:

2.21.5005 SHORT TITLE found at page 2-1275 of the Administrative Rules of Montana (ARM).

AUTH: 2-18-102, MCA
IMP: 2-18-102, MCA

2.21.5006 DEFINITIONS found at ARM page 2-1275.

AUTH: 2-18-102, MCA
IMP: 2-18-102, MCA

2.21.5007 POLICY found at ARM page 2-1276.

AUTH: 2-18-102, MCA
IMP: 2-18-102, 2-18-1201, MCA

2.21.5008 VETERAN'S PREFERENCE IN RETENTION found at ARM page 2-1279.

AUTH: 2-18-102, 39-29-112, MCA
IMP: 39-29-111, MCA

2.21.5011 CLOSING found at ARM page 2-1279.

AUTH: 2-18-102, MCA
IMP: 2-18-102, MCA

STATEMENT OF REASONABLE NECESSITY: The rules proposed to be repealed concern only the internal management of state government and do not affect the public. Therefore, the rules are not appropriately included in ARM, according to the definition of "rule" in 2-4-102(11)(b)(i), MCA. A revised "Implementing a Reduction in Force" policy for state employees will be included instead in the Montana Operations Manual, a document that addresses the internal management of state government.

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 Marjorie Thomas, Department of Administration, P.O. Box 200127, 125 N. Roberts, Helena, Montana 59620; telephone (406) 444-3982; fax (406) 444-0703; or e-mail mthomas2@mt.gov, and must be received no later than 5:00 p.m., March 22, 2010.

5. Marjorie Thomas, an attorney with the Department of Administration, has been designated to preside over and conduct this hearing.

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

7. An electronic copy of this proposal notice is available through the department's web site at http://doa.mt.gov/administrativerules.mcpx. The department strives to make the electronic copy of the notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that if a discrepancy exists 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 works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

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

By: /s/ Janet R. Kelly
Janet R. Kelly, Director
Department of Administration

By: /s/ Michael P. Manion
Michael P. Manion, Rule Reviewer
Department of Administration

Certified to the Secretary of State February 1, 2010.

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the adoption of New Rules I through V, the amendment of ARM 2.21.6606, 2.21.6608, 2.21.6622, and the amendment and transfer of ARM 2.21.6611 pertaining to employee records management	)))))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION, AMENDMENT, AND AMENDMENT AND TRANSFER

TO: All Concerned Persons

1. On March 11, 2010, at 11:00 a.m., the Department of Administration will hold a public hearing in Room 136 of the Mitchell Building, at 125 N. Roberts, Helena, Montana, to consider the proposed adoption, amendment, and amendment and transfer of the above-stated rules.

2. The Department of Administration will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Administration no later than 5:00 p.m. on March 1, 2010, to advise us of the nature of the accommodation needed. Please contact Lisa Coligan, Department of Administration, P.O. Box 200127, 125 N Roberts Street, Helena, Montana 59620; telephone (406) 444-3854; fax (406) 444-0703; Montana Relay Service 711; or e-mail lcoligan@mt.gov.

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

NEW RULE I RECORDS THAT CONSITUTE EMPLOYEE PERSONNEL RECORDS (1) Employee personnel records, both electronic and paper, include:

(a) preemployment information (resumes, references, interview questions, etc.);

(b) compensation, job history, and timekeeping records;

(c) employee accident reports and worker's compensation claims;

(d) I-9 forms;

(e) W-4 forms;

(f) benefit plans and employee medical records (including disability accommodation requests and supporting documents, and any record that contains genetic information);

(g) performance appraisals;

(h) disciplinary action records;

(i) background check information;

(j) office policies/documents signed by the employee; and

(k) awards and acknowledgements.

(2) Employee personnel records do not include documents, information, or other evidence developed as part of an investigation. If an investigation results in disciplinary action, the disciplinary action record is an employee personnel record.

Investigations include, but are not limited to, grievances, violations of agency rules, policies, and procedures, or matters that may result in civil or criminal liability.

AUTH: 2-18-102, MCA
IMP: 2-18-102, MCA

STATEMENT OF REASONABLE NECESSITY: The Department of Administration proposes to adopt New Rule I to add content that is missing from the current Employee Records Management policy. The current policy describes access restrictions for employee personnel records, but does not describe what types of records constitute employee personnel records. Section (2) above is included under Access to Employee Personnel Records in the current policy. The Department of Administration proposes moving it to New Rule I for clarity and organization.

NEW RULE II RECORDS THAT CONTAIN GENETIC INFORMATION

(1) The federal Genetic Information Nondiscrimination Act (GINA) provides that the following records contain genetic information:

(a) an individual's genetic tests, including genetic tests done as part of a research study;

(b) genetic tests of an individual's family members;

(c) genetic tests of any fetus of an individual or family member who is a pregnant woman, and genetic tests of any embryo legally held by an individual or family member utilizing assisted reproductive technology;

(d) an individual's family medical history; and

(e) any request for, or receipt of, genetic services or participation in clinical research that includes genetic services (genetic testing, counseling, or education).

(2) Examples of frequently used employee personnel records that may contain genetic information include Family and Medical Leave Act (FMLA) request forms, reasonable accommodation requests, medical certification tests, medically fit for duty forms, and records relating to worker's compensation claims.

AUTH: 2-18-102, MCA
IMP: 2-18-102, MCA

STATEMENT OF REASONABLE NECESSITY: The Department of Administration proposes New Rule II to define which types of records contain and may contain genetic information. GINA is a new federal act establishing storage and access requirements for employee personnel and other records that contain genetic information.

NEW RULE III EMPLOYEE PERSONNEL RECORDS STORAGE

(1) Agencies shall store employee personnel records as follows:

(a) I-9 forms for all employees may be stored together, but must be kept separate from other records in a secured area such as a locked cabinet or drawer;

(b) employee background check information must also be maintained separate from other records in a secure location such as a locked cabinet or drawer;

(c) an employee's medical and genetic information may be kept in the same folder, but these folders must be stored and secured in separate locked cabinets or drawers from other personnel records as required by the Americans with Disabilities Act (ADA) and GINA;

(d) all other employee personnel records, such as performance appraisals and preemployment information, must be stored in the employee's personnel file. These files must be stored in a secure location, such as locked cabinet or drawer separate from other records; and

(e) electronic employee personnel records must be stored in secure electronic folders and must be separated in electronic folders as outlined in this rule.

AUTH: 2-18-102, MCA
IMP: 2-18-102, MCA

STATEMENT OF REASONABLE NECESSITY: The Department of Administration proposes New Rule III to add content that is missing from the current Employee Records Management policy. The current policy states that access to employee personnel records must be restricted, but the policy does not include federal requirements describing how these records must be stored to ensure that access to them is restricted.

NEW RULE IV EMPLOYEE PERSONNEL RECORDS USE (1) Nothing in this subchapter prohibits authorized users from relying on the content of employee personnel records as provided in this policy or in agency procedures when responding to requests for employment information from employers to which employees have applied for employment.

(2) Agencies may set and charge fees for copies of employee personnel records.

AUTH: 2-18-102, MCA
IMP: 2-18-102, MCA

STATEMENT OF REASONABLE NECESSITY: The Department of Administration proposes New Rule IV for organization and clarity. The above rule is in the Access to Employee Personnel Records section of the current policy. The above rule deals with employee personnel records use, not employee personnel records access. Thus, the Department of Administration proposes moving this portion of the rule to a new rule that outlines employee personnel records use.

NEW RULE V EMPLOYEE PERSONNEL RECORDS RETENTION (1) The Montana Secretary of State's Records and Information Management Division maintains a records retention schedule for payroll and personnel records. Most employee personnel records must be kept in the employer's office for three years after an employee terminates employment, and then transferred to the state records center for seven additional years. Some personnel records have different retention requirements, which are listed in the schedule.

(2) The GS5 payroll and personnel records schedule may be accessed via the Secretary of State's web site.

AUTH: 2-18-102, MCA
IMP: 2-18-102, MCA

STATEMENT OF REASONABLE NECESSITY: The Department of Administration proposes New Rule V to add content that is missing from the current Employee Records Management policy. The current policy addresses records access, but does not inform agencies how long employee personnel records must be retained and where the records are stored.

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

2.21.6606 POLICY AND OBJECTIVES (1) ~~It is the policy of the state of Montana to:~~ This policy:

(a) defines which records constitute employee records and establishes procedures for collecting and maintaining employee personnel records while protecting an employee's right of privacy ~~pursuant to~~ under Article II, section 10 of ~~the constitution of the State of Montana; and~~ Montana's constitution;

(b) ensures employee awareness of records held, provides employees access to their personnel records, and ~~allow agencies to correct~~ describes how employee personnel records~~.~~ may be corrected;

~~(2)~~ (c) ~~It is the objective of this policy to~~ provides minimum standards for employee records management and allows agencies to adopt supplemental employee records management procedures~~.~~; and

(d) covers all positions in Montana's executive branch except elected officials, the personal staff of elected officials, those employed by the Montana University System and the Montana State Fund, and any other position specifically excluded under 2-18-103 and 2-18-104, MCA.

AUTH: 2-18-102, MCA
IMP: 2-18-102, MCA

2.21.6608 DEFINITIONS As used in this subchapter the following definitions apply:

(1) remains the same.

~~(2) "Agency" has the same meaning as defined in 2-18-101(1), MCA.~~

(3) remains the same, but is renumbered (2).

~~(4) "Document" means an object upon which information is written, transcribed or recorded.~~

~~(5)~~ (3) "Employee personnel record" means information relating to an employee's employment with the state of Montana that is appropriate for preservation as an official record of employment policies, practices, and decisions. An employee personnel record may be a paper document or it may be information maintained in an information system such as the Statewide Accounting Budgeting

and Human Resource System (SABHRS). Employee personnel records include the documents listed in [New Rule I]. ~~Other programs including, but not limited to, Montana Public Employee Retirement Administration (MPERA), workers' compensation, or unemployment insurance, develop records relating to an employee which are not an employee personnel record as defined in this policy.~~

~~(6) "Statewide Accounting Budgeting and Human Resource System (SABHRS)" means the automated system established by the state of Montana to maintain some types of personnel records for state employees.~~

(4) "Genetic information" means information about applicants' or employees' genetic tests, the genetic tests of their family members, and the manifestation of a disease or disorder in their family members. Genetic information does not include information about an individual's sex or age. Records containing genetic information are listed in [New Rule II].

(5) "Genetic test" means an analysis of human DNA, RNA, chromosomes, proteins, or metabolites that detects genotypes, mutations, or chromosomal changes.

(7) remains the same, but is renumbered (6).

AUTH: 2-18-102, MCA
IMP: 2-18-102, MCA

2.21.6622 CLOSING (1) This subchapter shall be followed unless it conflicts with negotiated labor ~~contracts~~ agreements or specific statutes, which shall ~~take precedence~~ govern to the extent applicable.

AUTH: 2-18-102, MCA
IMP: 2-18-102, MCA

STATEMENT OF REASONABLE NECESSITY: The Department of Administration proposes to amend ARM 2.21.6606, 2.21.6608, and 2.21.6622 to improve writing style and clarity and to remove definitions that are not pertinent to or mentioned in the Employee Records Management policy. The Department of Administration also proposes amendments to ARM 2.21.6608 to add and explain new definitions relating to GINA.

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

2.21.6611 (2.21.6615) ACCESS TO EMPLOYEE PERSONNEL RECORDS

(1) All employee personnel records are confidential and access is restricted to protect individual employee privacy, except the following employee information which is considered public and must be released upon request:

(a) an employee's name;

(b) position title~~,~~;

(c) dates and duration of employment~~,~~;

(d) salary~~,~~; and

(e) claims for vacation, holiday, or sick leave pay, except that the reason for taking leave is confidential and may not be disclosed ~~which are public information and must be released on request~~.

(2) ~~An agency~~ Agencies may require that ~~the~~ a request for information be in writing. ~~An agency~~ Agencies may not require justification for ~~the~~ a request.

~~(2) An agency must restrict access to confidential records to protect individual employee privacy.~~

~~(3) In addition to access provided in this subchapter and an agency procedure, the following provisions apply to employee personnel records:~~

~~(a)~~ (3) ~~The~~ An employee has access to all of his or her employee personnel records. An employee may file a written response to information contained in the employee's personnel records ~~which becomes a permanent part of the record~~. The employee's response must be filed within ten working days of the date on which ~~an~~ the employee is made aware of the information by the agency. The written response becomes a permanent part of the employee's personnel record.

~~(b)~~ (4) ~~Information collected regarding medical examinations or inquiries must be treated as confidential medical records in compliance with the Americans with Disabilities Act (ADA) and collected and maintained on separate forms in separate files from employee personnel records.~~ As provided in the ADA and FMLA, access ~~is restricted~~ to medical information may not be disclosed except to:

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

~~(ii)~~ (b) first aid and safety personnel, when appropriate, if the disability might require emergency treatment; ~~and~~

~~(iii)~~ (c) ~~on request from~~ government officials investigating compliance with the ADA or FMLA; and~~.~~

(d) support an employee's compliance with the certification provisions of the FMLA.

~~(c) Nothing in this rule prohibits those having authorized access to employee personnel records as provided in this rule or in any agency procedures from relying on the content of those records when responding to a request for employment information from organizations to which the employee has applied for employment.~~

(5) As provided in GINA, genetic information may not be disclosed except:

(a) to an occupational or other health researcher if the research is conducted in compliance with the federal regulations and protections provided for under the Protection of Human Subjects, 45 CFR, Part 46;

(b) in response to a court order, but only the genetic information expressly authorized by the court order may be disclosed and the employee must be informed before the disclosure;

(c) to government officials investigating compliance with GINA;

(d) to support an employee's compliance with the certification provisions of the FMLA; and

(e) to a federal, state, or local public health agency only regarding information about the manifestation of a contagious disease that presents an imminent hazard of death or life-threatening illness, and the employee must be notified before the disclosure.

~~(d)~~ (6) The ~~Office of the~~ Legislative Auditor's Division has access to employee personnel records ~~pursuant to~~ under 5-13-309, MCA, for the purposes of auditing state agencies.

~~(e)~~ (7) The Human Rights ~~Commission~~ Bureau, Department of Labor and Industry, has access to employee personnel records directly related to discrimination complaints ~~of discrimination~~.

~~(f)~~ (8) The professional staff of the State ~~Personnel~~ Human Resources Division has access to confidential records when gathering summary data on personnel programs or systems or ~~to provide~~ when providing technical assistance ~~at the request of~~ to an agency.

~~(g) Employee personnel records, as defined in this policy, do not include documents, information, or other evidence developed as part of an investigation. Investigations may include, but are not limited to, grievance investigations, violation of agency rules, policies, and procedures, or matters which may result in civil or criminal prosecution. Access to such documents will be determined on a case-by-case basis, balancing the constitutional guarantees of The Right to Privacy, Article II, section 10, and The Public's Right to Know, Article II, section 9.~~

~~(h)~~ (9) Certain governmental entities have authority ~~pursuant to~~ under state or federal law to access an employee's personnel record.

~~(i)~~ (10) Other persons may access an employee's personnel record only if there is a job-related purpose, the employee has granted written permission, or ~~pursuant to~~ if a valid court order grants access. An agency ~~will~~ shall inform ~~an~~ the employee when a valid court order has been received directing access ~~be provided~~ to an employee's personnel record.

~~(j) Fees may be charged to copy employee personnel records.~~

AUTH: 2-18-102, MCA
IMP: 2-18-102, MCA

STATEMENT OF REASONABLE NECESSITY: The Department of Administration proposes to amend ARM 2.21.6611 to comply with the new federal requirements of GINA. This federal act requires specific treatment of confidential medical records that contain genetic information. The Department of Administration proposes transferring ARM 2.21.6611 to 2.21.6615 for clarity and organization. Transferring this rule allows the types of records that constitute employee personnel records to be defined before the access requirements are outlined. The Department of Administration recommends, organizationally, that the rule that describes what these records are should be listed before the rule that defines how these records are accessed. Other changes are being proposed improve the clarity of the rule.

6. Concerned persons may submit their data, views, or arguments concerning the proposed action in writing to Lisa Coligan, Department of Administration, P.O. Box 200127, Helena, Montana 59620; telephone (406) 444-3854; fax (406) 444-0703; or e-mail lcoligan@mt.gov, and must be received no later than 5:00 p.m., March 12, 2010.

7. Lisa Coligan, Department of Administration, has been designated to preside over and conduct this hearing.

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

9. An electronic copy of this Proposal Notice is available through the department's web site at http://doa.mt.gov/administrativerules.mcpx. The department strives to make the electronic copy of the notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that if a discrepancy exists 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 works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

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

By: /s/ Janet R. Kelly
Janet R. Kelly, Director
Department of Administration

By: /s/ Michael P. Manion
Michael P. Manion, Rule Reviewer
Department of Administration

Certified to the Secretary of State February 1, 2010.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.30.617 and 17.30.638 pertaining to outstanding resource water designation for the Gallatin River	)))))	NOTICE OF EXTENSION OF COMMENT PERIOD ON PROPOSED AMENDMENT (WATER QUALITY)

TO: All Concerned Persons

1. On October 5, 2006, the Board of Environmental Review published MAR Notice No. 17-254 regarding a notice of public hearing on the proposed amendment of the above-stated rules at page 2294, 2006 Montana Administrative Register, issue number 19. On March 22, 2007, the board published MAR Notice No. 17-257 regarding a notice of extension of comment period on the proposed amendment of the above-stated rules at page 328, 2007 Montana Administrative Register, issue number 6. On September 20, 2007, the board published MAR Notice No. 17-263 regarding a notice of extension of comment period on the proposed amendment of the above-stated rules at page 1398, 2007 Montana Administrative Register, issue number 18. On March 13, 2008, the board published MAR Notice No. 17-268 extending the comment period on the proposed amendment of the above-stated rules at page 438, 2008 Montana Administrative Register, issue number 5. On September 11, 2008, the board published MAR Notice No. 17-276 extending the comment period on the proposed amendment of the above-stated rules at page 1953, 2008 Montana Administrative Register, issue number 17. On February 26, 2009, the board published MAR Notice No. 17-276 extending the comment period on the proposed amendment of the above-stated rules at page 162, 2009 Montana Administrative Register, issue number 4. On August 13, 2009, the board published MAR Notice No. 17-276 extending the comment period on the proposed amendment of the above-stated rules at page 1324, 2009 Montana Administrative Register, issue number 15.

2. During the initial comment period, the board received a number of comments opposing adoption of the proposed rule amendments on grounds that the amended rules would render a number of properties in the Big Sky area undevelopable. The draft environmental impact statement on the proposed rule amendments indicates that the rule amendments would not preclude full development in the Big Sky area if certain mechanisms, such as central sewers and advanced treatment, are implemented. However, the record did not indicate whether regulatory or other means to require or facilitate implementation of these mechanisms are feasible. At the close of the initial comment period, the board was notified that the original petitioners for this rulemaking and developers were discussing means of accomplishing this goal. For that reason, the board extended the comment period to July 2, 2007. During the second comment period, the board received comments indicating that the discussions had been continuing, that progress was being made, and that an engineering feasibility study was underway.

The commentors requested further extension of the comment period. The board granted their request and extended the comment period to January 4, 2008. On January 4, 2008, the board received a comment indicating that the feasibility study will be completed in May of 2008 and requesting that the comment period be further extended. The board has granted this request and extended the comment period to July 18, 2008. On July 2, 2008, the board received a comment indicating that the feasibility study would be completed in July and requesting a further extension of the comment period. The board granted this request.

On December 29, 2008, the board received a comment indicating that the feasibility study indicates that extending wastewater hookups for the Big Sky Water and Sewer district wastewater treatment plant along the Gallatin River would be more effective in protecting the Gallatin River than adoption of the proposed rules. The commentor requested that the comment period be extended during a public participation process and a search for funding. The board granted that request and extended the comment period to July 15, 2009.

On July 2, 2009, the board received a comment indicating that efforts to secure funding were ongoing and requested that the board further extend the comment period. The board granted this request.

On November 16, 2009, the board received a comment indicating that the economic downturn had hindered efforts to secure funding and requesting that the board further extend the comment period while efforts to secure funding continue. The board has granted this request.

3. Written data, views, or arguments may be submitted to Elois Johnson, Paralegal, Department of Environmental Quality, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana, 59620-0901; faxed to (406) 444-4386; or e-mailed to ejohnson@mt.gov, no later than April 23, 2010. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

4. The board will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking action or need an alternative accessible format of this notice. If you require an accommodation, contact the board no later than 5:00 p.m., February 22, 2010, 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 e-mail ber@mt.gov.

Reviewed by: BOARD OF ENVIRONMENTAL REVIEW

/s/ John F. North BY: */s/ Joseph W. Russell*
JOHN F. NORTH JOSEPH W. RUSSELL, M.P.H.
Rule Reviewer Chairman

Certified to the Secretary of State, February 1, 2010.

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.40.206 pertaining to examinations	)))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT (PUBLIC WATER AND SEWAGE SYSTEM REQUIREMENTS)

TO: All Concerned Persons

1. On March 10, 2010, at 1:30 p.m., the Department of Environmental Quality will hold a public hearing in Room 136/137, 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, please contact Elois Johnson, Paralegal, no later than 5:00 p.m., February 22, 2010, to advise us of the nature of the accommodation that you need. Please contact Elois Johnson at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail ejohnson@mt.gov.

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

17.40.206 EXAMINATIONS (1) A person desiring to take the examination for certification as a water supply or wastewater treatment system operator must complete the department's application form and return it to the department at least ~~15~~ 30 days before the date of the ~~next~~ examination. The proper fee, as determined under ARM 17.40.212, must accompany the application. Upon department approval, the applicant may take the examination.

(2) through (9) remain the same.

AUTH: 37-42-202, MCA
IMP: 37-42-201, 37-42-301, 37-42-305, 37-42-306, MCA

REASON: The proposed amendment would require that applications to take an operator certification examination be submitted to the department at least 30 days before the examination. The current rule requires that applications be submitted at least 15 days in advance. The proposed amendment is necessary to allow the department adequate time to process applications and to provide a sufficient interval between repeat examinations.

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 Elois Johnson, Paralegal, Department of Environmental Quality, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana 59620-0901; faxed to (406) 444-4386; or e-mailed to ejohnson@mt.gov, no later than March 11, 2010. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

5. Carol Schmidt, attorney, has been designated to preside over and conduct the hearing.

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

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

Reviewed by:

DEPARTMENT OF ENVIRONMENTAL QUALITY

/s/ James M. Madden
JAMES M. MADDEN
Rule Reviewer

BY: */s/ Richard H. Opper*
RICHARD H. OPPER, Director

Certified to the Secretary of State, February 1, 2010.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.8.745 pertaining to Montana air quality permits--exclusion for de minimis changes	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT (AIR QUALITY)

TO: All Concerned Persons

1. On March 11, 2010, at 1:30 p.m., the Board of Environmental Review will hold a public hearing in Room 35, 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 Elois Johnson, Paralegal, no later than 5:00 p.m., February 22, 2010, to advise us of the nature of the accommodation that you need. Please contact Elois Johnson at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail ejohnson@mt.gov.

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

17.8.745 MONTANA AIR QUALITY PERMITS--EXCLUSION FOR DE MINIMIS CHANGES (1) A Montana air quality permit is not required under ARM 17.8.743 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~~ 5 tons per year of any pollutant except:

(i) through (iii) remain the same.

(iv) any construction or improvement project with a potential to emit more than ~~15~~ 5 tons per year may not be artificially split into smaller projects to avoid permitting under this subchapter; and

(v) through (2) remain the same.

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

REASON: On August 9, 1996, the board adopted the initial de minimis rules, ARM 16.8.1102, 16.8.1113, and 16.8.1121 as part of Montana's state air quality preconstruction permit program rules. These rules created an exemption from the requirement to obtain an air quality permit modification for certain changes at a permitted facility that did not increase the facility's potential emissions of a pollutant by more than 15 tons per year, when conditions specified in the rules were met. On December 9, 1996, the board recodified its rules, including the following

recodification of the de minimis rules: ARM 16.8.1102 became 17.8.705; 16.8.1113 became 17.8.733; and 16.8.1121 became 17.8.708. On May 14, 1999, the board revised ARM 17.8.705 and 17.8.733 and repealed 17.8.708. The Governor submitted the board's August 9, 1996, and May 14, 1999, rulemaking actions to the Environmental Protection Agency ("EPA") on August 26, 1999, for inclusion in the state implementation plan ("SIP"). On December 6, 2002, the board repealed ARM 17.8.705 and 17.8.733, which the board incorporated into a new rule, ARM 17.8.745, the current de minimis rule. On May 28, 2003, the Governor submitted the new rule to EPA for inclusion in the SIP and rescinded the previous submissions of ARM 17.8.705 and 17.8.733. EPA has not acted on this SIP submittal.

When the board adopts a rule necessary to attain, or maintain compliance with, national ambient air quality standards ("NAAQS"), the Governor submits the rule to EPA for inclusion in the SIP. EPA then has a limited amount of time to approve or disapprove the submission. However, EPA has not taken action on many such submissions, and this failure to take timely action on Montana's SIP submissions over many years has left the department and Montana's permitted industries in the difficult position that Montana's permitted industry is subject to different sets of rules: the current Administrative Rules of Montana (ARM); and the rules that have been formally approved by EPA into the SIP.

The state's original air quality permitting rules did not include provisions for de minimis actions. The intent of the de minimis rule was to avoid expenditure of the resources required for both the department and the regulated community to process relatively inconsequential changes that otherwise would be handled as resource-intensive permit modifications. The de minimis rule allows the department and the regulated community to redirect resources to more significant air pollution impacts having much greater potential effects on public health and welfare.

EPA has indicated to the state that it intends to disapprove ARM 17.8.745 as a revision to the SIP. Through the various rule revisions, the department has implemented the de minimis rule since 1996. The department has received and approved countless de minimis requests, from a wide spectrum of industry types, based on conformity with the requirements in ARM 17.8.745. Most of these requests have been for changes that did not increase the facility's potential emissions by more than 5 tons per year. Implementation of the de minimis rule over the past 13 years, with a threshold of 15 tons per year, has not resulted in a violation of the NAAQS, which are set by EPA at levels intended to protect public health and welfare. Therefore, the more stringent threshold of 5 tons proposed by the board in this rulemaking should not cause a NAAQS violation and should not pose a risk to public health and welfare.

The board believes that a de minimis exemption from permit modification requirements is reasonably necessary in order to avoid expenditure of resources on facility changes that do not pose a risk to public health and welfare. Based on the department's experience in implementing the de minimis rule that a threshold greater than five tons is not necessary, the indication from EPA that it intends to disapprove the current ARM 17.8.745, and the need for consistency between the state rules implemented by the department and the rules enforceable under the SIP, the board proposes to decrease the existing 15-ton per year de minimis rule threshold to 5 tons per year. This would increase the stringency of the threshold

and overall implementation of the de minimis rule, would not compromise control measures designed to maintain, or achieve compliance with, the NAAQS, and would continue to allow the department and the regulated community the opportunity to utilize their resources for more pressing air quality concerns than permitting minor modifications.

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 Elois Johnson, Paralegal, Department of Environmental Quality, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana 59620-0901; faxed to (406) 444-4386; or e-mailed to ejohnson@mt.gov, no later than 5:00 p.m., March 18, 2010. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

5. Katherine Orr, attorney for the board, or another attorney for the Agency Legal Services Bureau, 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, e-mail, and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding: air quality; hazardous waste/waste oil; asbestos control; water/wastewater treatment plant operator certification; solid waste; junk vehicles; infectious waste; public water supply; public sewage systems regulation; hard rock (metal) mine reclamation; major facility siting; opencut mine reclamation; strip mine reclamation; subdivisions; renewable energy grants/loans; wastewater treatment or safe drinking water revolving grants and loans; water quality; CECRA; underground/above ground storage tanks; MEPA; or general procedural rules other than MEPA. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to Elois Johnson, Paralegal, Department of Environmental Quality, 1520 E. Sixth Ave., P.O. Box 200901, Helena, Montana 59620-0901, faxed to the office at (406) 444-4386, e-mailed to Elois Johnson at ejohnson@mt.gov, or may be made by completing a request form at any rules hearing held by the board.

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

Reviewed by: BOARD OF ENVIRONMENTAL REVIEW

/s/ David Rusoff BY: */s/ Joseph W. Russell*
DAVID RUSOFF JOSEPH W. RUSSELL, M.P.H.,
Rule Reviewer Chairman

Certified to the Secretary of State, February 1, 2010.

BEFORE THE BOARD OF BARBERS AND COSMETOLOGISTS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of ARM 24.121.301 definitions, 24.121.603 out-of-state applicants, 24.121.801 inspections, 24.121.803 school requirements, 24.121.805 school standards, 24.121.807 curricula, 24.121.1509 implements and equipment, 24.121.1511 sanitizing equipment, 24.121.1517 salon preparation, and 24.121.2301 unprofessional conduct	)))))))))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On March 8, 2010, at 10:00 a.m., a public hearing will be held in room 430 301 South Park Avenue, Helena, Montana to consider the proposed amendment of the above-stated rules.

2. The Department of Labor and Industry (department) will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board of Barbers and Cosmetologists (board) no later than 5:00 p.m., on March 4, 2010, to advise us of the nature of the accommodation that you need. Please contact Shane Younger, Board of Barbers and Cosmetologists, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2335; Montana Relay 1 (800) 253-4091; TDD (406) 444-2978; facsimile (406) 841-2309; e-mail dlibsdcos@mt.gov.

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

24.121.301 DEFINITIONS ~~The following definitions shall apply as used in this chapter:~~

(1) through (6) remain the same.

(7) "Clipper cuts" for barbering education are haircuts performed using the free-hand method with a universal electro-magnetic clipper.

(7) through (15) remain the same but are renumbered (8) through (16).

(17) "Facial shaving" means utilizing a disposable injector straight edge designed for barbering. Standard shaving positions and strokes are:

(a) free-hand;

(b) reverse free-hand;

(c) back-hand; and

(d) reverse back-hand.

(18) "Free-hand methods" for clipper cuts are:
(a) toe, middle, heel;
(b) arching;
(c) clipper over comb, to:
(i) blend;
(ii) remove bulk; and
(iii) remove cut lines; and
(d) blending with shear over comb.

(16) through (19) remain the same but are renumbered (19) through (22).

(23) "Needles" mean single-use, presterilized, and disposable needles of various sizes, which are stored in a manner that will maintain the sterile conditions of contents, away from wetness or extreme humidity. Needles may not be recapped, bent, or otherwise manipulated by hand prior to disposal, to avoid accidental puncture injury. Needles must be placed in a puncture-resistant sharps container immediately after use, when damaged, when contaminated before use, or when not used before the preprinted expiration date.

(20) through (24) remain the same but are renumbered (24) through (28).

~~(25)~~ (29) "Supplemental barbering course" means a course of study in a licensed school, ~~consisting~~ which consists of at least 125 hours in clipper cuts and 25 hours in facial, neck, and outline shaving to licensed cosmetologists only, in order to meet the required educational needs for a barber license prior to taking a national written exam.

(26) and (27) remain the same but are renumbered (30) and (31).

AUTH: 37-1-131, 37-1-319, 37-31-203, 37-31-204, MCA
IMP: ~~37-1-306,~~ 37-31-101, 37-31-203, 37-31-204, 37-31-303, 37-31-305, 37-31-309, 37-31-311, MCA

REASON: The board is amending this rule to set forth several definitions regarding the supplemental barbering course for cosmetologists. In 2008, the board amended its rules to clarify that cosmetology schools could offer a supplemental course to licensed cosmetologists to qualify for barber licensure. Following a recent review of the rules, the board determined it is necessary to define several terms to further clarify the supplemental barbering course requirements.

The board is adding a definition of "needles" following a recommendation from the board's electrology rules committee. The committee reviewed the electrology practice rules and recommended the board clarify the types of needles allowed and their appropriate use and disposal. The board is proposing the definition in response to current national electrology infection control standards that prohibit sterilization and reuse of electrolysis needles.

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

24.121.603 OUT-OF-STATE APPLICANTS (1) through (2)(b) remain the same.

(c) ~~proof of high school graduation or equivalency~~ an original state board transcript or verification from each state in which the applicant holds or has held a license; and

(d) ~~an original state board transcript or verification from each state in which the applicant holds or has held a license~~ proof of high school graduation or equivalency; or~~.~~

(e) in lieu of a high school diploma or equivalency, applicants may petition the board for an exception by submitting the following information:

(i) certified copies of applicant's high school transcripts; or

(ii) lists of courses completed including:

(A) adult education courses;

(B) postsecondary education courses; and

(C) other experiences providing evidence of equivalency to a high school diploma.

(3) through (b) remain the same.

(c) ~~proof of high school graduation or equivalency~~ a certified state board transcript or verification from each state in which the applicant holds or has held a license; and

(d) ~~a certified state board transcript or verification from each state in which the applicant holds or has held a license~~ proof of high school graduation or equivalency; or~~.~~

(e) in lieu of a high school diploma or equivalency, applicants may petition the board for an exception by submitting the following information:

(i) certified copies of applicant's high school transcripts; or

(ii) lists of courses completed including:

(A) adult education courses;

(B) postsecondary education courses; and

(C) other experiences providing evidence of equivalency to a high school diploma.

(4) through (b) remain the same.

(c) ~~proof of high school graduation or equivalency~~ an original state board transcript or verification from each state in which the applicant holds or has held a license; and

(d) ~~an original state board transcript or verification from each state in which the applicant holds or has held a license~~ proof of high school graduation or equivalency; or~~.~~

(e) in lieu of a high school diploma or equivalency, applicants may petition the board for an exception by submitting the following information:

(i) certified copies of applicant's high school transcripts; or

(ii) lists of courses completed including:

(A) adult education courses;

(B) postsecondary education courses; and

(C) other experiences providing evidence of equivalency to a high school diploma.

(5) through (b) remain the same.

(c) ~~proof of high school graduation or equivalency~~ an original state board transcript or verification from each state in which the applicant holds or has held a

license; and

(d) ~~an original state board transcript or verification from each state in which the applicant holds or has held a license~~ proof of high school graduation or equivalency; or~~.~~

(e) in lieu of a high school diploma or equivalency, applicants may petition the board for an exception by submitting the following information:

(i) certified copies of applicant's high school transcripts; or

(ii) lists of courses completed including:

(A) adult education courses;

(B) postsecondary education courses; and

(C) other experiences providing evidence of equivalency to a high school diploma.

(6) through (b) remain the same.

(c) ~~proof of high school graduation or equivalency~~ an original state board transcript or verification from each state in which the applicant holds or has held a license; and

(d) ~~an original state board transcript or verification from each state in which the applicant holds or has held a license~~ proof of high school graduation or equivalency; or~~.~~

(e) in lieu of a high school diploma or equivalency, applicants may petition the board for an exception by submitting the following information:

(i) certified copies of applicant's high school transcripts; or

(ii) lists of courses completed including:

(A) adult education courses;

(B) postsecondary education courses; and

(C) other experiences providing evidence of equivalency to a high school diploma.

(7) through (b) remain the same.

(c) ~~proof of high school graduation or equivalency~~ an original state board transcript or verification from each state in which the applicant holds or has held a license; and

(d) ~~an original state board transcript or verification from each state in which the applicant holds or has held a license~~ proof of high school graduation or equivalency; or~~.~~

(e) in lieu of a high school diploma or equivalency, applicants may petition the board for an exception by submitting the following information:

(i) certified copies of applicant's high school transcripts; or

(ii) lists of courses completed including:

(A) adult education courses;

(B) postsecondary education courses; and

(C) other experiences providing evidence of equivalency to a high school diploma.

(8) and (9) remain the same.

AUTH: 37-1-131, 37-31-203, MCA
IMP: ~~37-1-141,~~ 37-1-304, 37-31-303, 37-31-304, 37-31-305, 37-31-308, MCA

REASON: The board determined it is reasonably necessary to amend this rule to provide an exception to the high school diploma requirement for out-of-state applicants. The board previously amended ARM 24.121.601 to allow applicants for initial Montana licensure to petition the board for an exception to the high school diploma or equivalency requirement. The board is amending and reorganizing this rule to allow the same exception for out-of-state licensees seeking Montana licensure and to specify the required application documentation.

Implementation cites are being amended to accurately reflect all statutes implemented through the rule.

24.121.801 INSPECTION - SCHOOL LAYOUT (1) and (2)(a) remain the same.

(b) Electrology schools shall have floor space of at least 1000 square feet for the first ten students and ~~60~~ 80 square feet for each additional student, including locker room, office space and reception area.

(c) through (5) remain the same.

AUTH: 37-1-131, 37-31-203, 37-31-311, MCA
IMP: 37-31-311, 37-31-312, MCA

REASON: The board determined it is reasonably necessary to amend this rule to align with proposed changes to school requirements also in this notice. The proposed amendments to ARM 24.121.803 increase both the electrology workstation size and the equipment required for the workstations. The board is amending this rule to increase the minimum additional floor space required per student when schools enroll more than ten students from 60 to 80 square feet.

24.121.803 SCHOOL REQUIREMENTS (1) through (6) remain the same.

(7) Barbering schools or cosmetology schools offering a separate barbering course or supplemental barbering course, regardless of the number of students enrolled, shall provide ~~the following~~ certain equipment as follows:

(a) and (b) remain the same.

(c) a fire extinguisher; ~~and~~

~~(h)~~ (d) one locker per two students;

~~(i)~~ (e) one protective covering per student; ~~and~~

~~(j)~~ (f) one current board law and rule book per student~~.~~; and

~~(d)~~ (g) ~~the following equipment shall be provided for~~ schools enrolling one to 15 students shall provide the following equipment, which~~. The equipment~~ shall be doubled for 16 to 30 students and tripled for 31 to 45 students:

(i) and (ii) remain the same.

(iii) one hot lather machine; ~~and~~

(iv) two covered wet sanitizers~~.~~;

~~(e)~~ (v) one closed cabinet for clean linens;

~~(f)~~ (vi) one covered soiled linen container; and

~~(g)~~ (vii) two covered garbage containers~~;~~.

(8) Cosmetology schools, regardless of the number of students enrolled, shall provide ~~the following~~ certain equipment as follows:

(a) and (b) remain the same.

(c) a fire extinguisher; ~~and~~

~~(i)~~ (d) one locker per two students;

~~(j)~~ (e) one protective covering per student; ~~and~~

~~(k)~~ (f) one current board law and rule book per student~~.~~; and

~~(d)~~ (g) ~~the following equipment shall be provided for~~ schools enrolling one to 15 students shall provide the following equipment, which~~. The equipment~~ shall be doubled for 16 to 30 students and tripled for 31 to 45 students:

(i) and (ii) remain the same.

(iii) two manicure tables; ~~and~~

(iv) two covered wet sanitizers~~.~~;

~~(e)~~ (v) one closed cabinet for clean linens;

~~(f)~~ (vi) one facial chair;

~~(g)~~ (vii) one covered soiled linen container; and

~~(h)~~ (viii) two covered garbage containers~~;~~.

(9) Electrology schools, regardless of the number of students enrolled, shall provide ~~the following~~ certain equipment as follows:

(a) ~~a practice workroom including:~~ one serviceable school first aid kit;

~~(i) one bead sterilizer; and~~

~~(ii)~~ (b) one sink, with hot and cold running water for hand washing~~.~~ , not used for restroom facilities;

~~(b) a minimum of two stations for the first three students enrolled, with one station added for each additional two students;~~

~~(c) needles of various sizes per student upon completion of 50 hours of basic training; and~~

~~(d)~~ (c) one locker per two students~~.~~;

(d) an autoclave or dry heat sterilizer;

(e) stainless steel and gold needles of various sizes per student; and

(f) one current board law and rule book per student.

(10) Electrology schools shall provide a clinical area divided into a minimum of two workstations for the first three students enrolled, with one station added for each additional two students, which shall be enclosed by partitions or curtains, and measure at least ten feet by eight feet in area. Each workstation must include the following:

(a) one treatment table or chair;

(b) one magnifying lamp;

(c) an epilator or epilators offering either thermolysis, electrolysis, and the blend;

(d) one puncture-resistant sharps container;

(e) schools enrolling one to 15 students shall provide the following equipment, which shall be doubled for 16 to 30 students and tripled for 31 to 45 students:

(i) two covered wet sanitizers;

(ii) one covered soiled linen container; and

(iii) one covered garbage container.

(f) the number of sinks, treatment tables or chairs, and lamps must be increased by one for each additional five students (e.g. six to ten, 11 to 15, etc.); and

~~(10)~~ (g) ~~Only~~ only presterilized, disposable needles may be used for electrolysis services on any individual in a licensed school, unless a properly installed, serviced, and ~~operated~~ operational autoclave is utilized for sterilization of reusable needles.

~~(11) The clinical area of an electrology school must be divided into workstations that are enclosed by partitions or curtains. Each workstation must measure at least ten feet by six feet in area.~~

~~(12)~~ (11) Esthetics schools or cosmetology schools offering a separate esthetics course, regardless of the number of students enrolled, shall provide ~~the following~~ certain equipment as follows:

(a) through (h) remain the same.

(i) the number of sinks, facial beds or chairs, and lamps must be increased by one for each additional five students (e.g., six to ten, 11 to 15, etc.); and

(j) ~~the following equipment shall be provided for~~ schools enrolling one to 15 students shall provide the following equipment, which~~. The equipment~~ shall be doubled for 16 to 30 students and tripled for 31 to 45 students:

(i) through (iii) remain the same.

~~(13)~~ (12) Manicuring schools or cosmetology schools offering a separate manicure course, regardless of the number of students enrolled, shall provide ~~the following~~ certain equipment as follows:

(a) through (e) remain the same.

(f) ~~the following equipment shall be provided for~~ schools enrolling one to 15 students~~. The equipment~~ shall provide the following equipment, which shall be doubled for 16 to 30 students and tripled for 31 to 45 students:

(i) through (j) remain the same.

AUTH: 37-1-131, 37-31-203, 37-31-311, MCA
IMP: 37-31-311, MCA

REASON: The board is amending this rule throughout to reorganize and correct grammatical errors for clarity and ease of use. The board's electrology rules committee concluded that current requirements do not ensure the adequate and safe education and training of electrology students. The board is amending this rule to require that all electrology schools provide certain mandatory equipment including a first aid kit and an autoclave or dry heat sterilizer. The board is also amending this rule to set forth the equipment that electrology schools must provide in each clinical workstation and to require that schools double or triple certain items when enrolling more than 15 students.

The board is increasing the minimum workstation size from ten by six feet to ten by eight feet because extra room will be needed for the additional required equipment. The board is deleting the requirement for a bead sterilizer as this item has not been approved for marketing by the United States Food and Drug Administration. The board is also specifying the types of allowable needles and deleting the requirement that students complete 50 hours of basic training before handling needles in response to current national electrology infection control standards and for consistency among other U.S. electrology schools.

24.121.805 SCHOOL OPERATING STANDARDS (1) through (12)(b) remain the same.

(c) electrology students - ~~200~~ 150 hours for facial services and 50 hours for other services;

(d) through (15) remain the same.

AUTH: 37-1-131, 37-31-203, 37-31-311, MCA
IMP: 37-31-311, MCA

REASON: The board determined it is reasonably necessary to amend this rule following a recommendation by the board's electrology rules committee that 200 total hours of basic training is adequate prior to allowing electrology students to practice on the public. Compared to students in barbering, cosmetology, manicuring, and esthetics, electrology students currently must complete a higher percentage of hours before practicing on the public and there is no justification for such an elevated requirement. The board concluded that reducing the hours would more closely align the electrology training hours with those of these other professions.

24.121.807 SCHOOL CURRICULA (1) Barbering, cosmetology, electrology, esthetics, manicuring, and instructor students shall complete the course of study within three years of the student's original enrollment date. Students enrolled in a supplemental barbering course shall complete the course within three months of the student's original enrollment date.

(2) through (4) remain the same.

(a) 600 hours of training, of which at least ~~200~~ 120 hours is ~~of technical instruction (demonstration, lecture, classroom participation, or examination); and~~ in theory, distributed as follows:

(i) electrolysis five hours;

(ii) thermolysis 150 hours;

(iii) the blend 150 hours;

(iv) bacteriology, sanitation, sterilization, safety, anatomy, physiology, blood spill procedures, diseases and disorders of the skin, electricity, chemistry, and light therapy 70 hours;

(v) waxing (face, neck, hands, and superfluous hair anywhere on the body, including tweezing), 10 hours; and

(vi) salon management, business methods, appointment book, customer service, professional ethics, and current state board laws and rules, 65 hours.

~~(b) 400 hours of practical operations (the actual performance by the student of a complete service on another person) to include:~~

~~(i) a minimum of 90 hours of practical operations obtained in the following subjects:~~

~~(A) electrolysis;~~

~~(B) thermolysis; and~~

~~(C) the blend.~~

~~(ii) 310 hours of practical operations shall be at the discretion of the school, provided they are within the applicable curriculum.~~

~~(c) Technical instruction and practical operations shall be obtained within the following topics:~~

~~(i) causes of hair problems;~~

~~(ii) structure and dynamics of hair and skin;~~

~~(iii) practical analysis of hair and skin;~~

~~(iv) neurology and angiology;~~

~~(v) bacteriology and disinfection;~~

~~(vi) dermatology;~~

~~(vii) principles of electricity and equipment;~~

~~(viii) electrolysis;~~

~~(ix) thermolysis;~~

~~(x) the blend;~~

~~(xi) the needle;~~

~~(xii) general treatment procedure;~~

~~(xiii) treatment of specific areas;~~

~~(xiv) current state board laws and rules; and~~

~~(xv) development of a practice.~~

(b) 150 hours of instruction shall be at the discretion of the school provided that the hours are within the applicable curriculum.

(5) through (8) remain the same.

AUTH: 37-1-131, 37-31-203, 37-31-311, MCA
IMP: 37-31-304, 37-31-305, 37-31-311, MCA

REASON: In 2008, the board amended its rules to clarify that cosmetology schools could offer a supplemental course to licensed cosmetologists to qualify for barber licensure. Although the board intended to include the requirement for students to complete the supplemental barbering course in three months, the board recently discovered the change had been inadvertently overlooked and is adding it now.

Following requests by the electrology schools, the board's electrology rules committee recommended several changes to the curricula of electrology schools, including the courses, required subject matter, and individual course hours. The board is therefore amending this rule to reduce the required training in theory from 200 to 120 as the board agreed with the committee that requiring a third of the total hours in theory is excessive and unnecessary. The board is amending the rule to require schools include a course on waxing because waxing is necessary to be able to effectively carry out the practice of electrology. The board is not changing the total required hours per course of study.

The board is further amending this rule to broaden the course content required for electrology curricula. Following this amendment, electrology schools will no longer need to micromanage students' required hours in specific subcategories of instruction, only in broader overall categories. As part of these changes, the board is deleting the practical operations requirement from electrology curricula. The board previously removed the practical experience from the cosmetology, barbering, esthetics, and manicuring curricula requirements but unintentionally left the requirement in for electrology. These changes will allow instructors more discretion

in tailoring instruction for individual students in specific areas when needed to ensure each student has adequate overall training for safe practice.

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

24.121.1509 IMPLEMENTS, INSTRUMENTS, SUPPLIES, AND EQUIPMENT (1) and (2) remain the same.

(3) Salons, shops, and schools must maintain copies of the manufacturers'/owners' manuals on-site for all equipment in service.

(3) through (10) remain the same, but are renumbered (4) through (11).

AUTH: 37-1-131, 37-31-203, 37-31-204, MCA
IMP: 37-31-204, 37-31-312, MCA

REASON: The board concluded it is reasonably necessary for the public's protection to amend this rule and require that licensed salons, shops, and schools keep equipment manuals on-site. Board inspectors request these manuals during inspections to verify that machines are being used and cleaned properly, but often the owners cannot produce them. The board determined that this amendment will help ensure that licensees are able to more safely and correctly operate their equipment and able to quickly consult a manual if problems arise.

Implementation cites are being amended to accurately reflect all statutes implemented through the rule.

24.121.1511 SANITIZING AND DISINFECTING IMPLEMENTS AND EQUIPMENT (1) through (4) remain the same.

(5) Electrical equipment, whether professional or consumer designed, which provides circulating, whirlpool, or vacuum effects (for example, all pedicure stations, microdermabrasion machines, facial machines, nail drills, and body treatment equipment) shall be cleaned and disinfected after each use. Such equipment shall also be flushed, cleaned, and disinfected on a regular basis. A record of such cleaning shall be kept on forms provided by the board and available upon client request or any salon inspection.

~~(5)~~ (6) In addition to the above requirements, the following rules apply to the practice of electrology:

(a) ~~Chair~~ chair and table headrests must be covered with a single use ~~towel for each patron~~ protective covering;~~.~~

(b) ~~Before~~ before each use, ~~each~~ electrolysis ~~needle or~~ tweezers and other nondisposable implements must ~~be first~~ first be cleansed with warm water and soap, rinsed thoroughly and placed into an ultrasonic cleanser or chemical sterilant presoak, and then sterilized by one of the following methods:

(i) and (ii) remain the same.

(c) ~~Equipment~~ equipment for steam~~,~~ or dry heat~~, and glass bead sterilization~~ methods must be checked weekly for determining equipment to be in proper working order and reaching required temperature~~.~~;

d) each month a monthly log must be maintained consisting of date and sterile packet strip; and

(e) outside biological monitors shall be used to ensure proper mechanical function of sterilizers on no less than a quarterly basis. Results shall be maintained in a log.

(6) through (11) remain the same, but are renumbered (7) through (12).

AUTH: 37-1-131, 37-31-203, 37-31-204, MCA
IMP: 37-31-204, 37-31-312, MCA

REASON: The board is amending this rule to specify cleaning, disinfecting, and record keeping requirements for electrical equipment. Noting that violations regarding electrical equipment consistently appear on inspection reports, the board concluded it is reasonably necessary to delineate for licensees specific requirements for disinfecting and cleaning electrical equipment and to require that salons and schools maintain records of this cleaning for use during inspections.

The board is amending this rule to address coverings used on electrology headrests. The board concluded that specifying the use of towels is unnecessarily restrictive and that requiring single use protective coverings ensures the public's adequate protection.

The board is amending the requirements for cleaning electrology implements before use to align with the new definition of "needles" proposed in this notice. The new definition is broader and includes needles and other nondisposable implements. The board is striking reference to glass bead sterilization throughout the electrology rules as the method is not FDA approved for marketing.

The board is also amending this rule to require salons and shops to keep sterilization packet strips with their monthly equipment logs. The board determined that this will help ensure that sterilization requirements are being met and assist the board inspectors when conducting inspections.

The board is adding the requirement for the use of outside biological monitors and their documentation in logs in response to current national electrology infection control standards and to assist salons, schools, and board inspectors in determining whether sterilizers are working properly.

Implementation cites are being amended to accurately reflect all statutes implemented through the rule.

24.121.1517 SALON PREPARATION STORAGE AND HANDLING (1) All salon, ~~and~~ shop, and school preparations must be:

(a) and (b) remain the same.

(2) Material Safety Data Sheets (MSDS) relative to product ingredients, proper use, storage, disposal, and hazards for products in use at salons, shops, and schools, shall be kept on the premises and available upon need or request by the public, the board, or the board inspector.

(2) through (6) remain the same, but are renumbered (3) through (7).

(8) Board inspectors may take a sample of a product used or sold in a salon, shop, or school for the purpose of examining or testing the sample on-site to determine whether this subchapter has been violated.

(9) If the board inspector obtains evidence that a product or item prohibited by this rule is being used in a salon, shop, or school, the inspector may seize the product or item and remove it from the facility immediately.

AUTH: 37-1-131, 37-31-203, 37-31-204, MCA
IMP: 37-31-204, 37-31-312, MCA

REASON: The board is amending this rule to address licensee questions by clarifying that schools are also required to ensure the proper handling and dispensing of products. The board is adding (2) to require that licensees maintain MSDS sheets and present them upon request. The board concluded this amendment will help product users and board inspectors to identify products that contain hazardous substances.

The board is amending this rule to clarify the authority of inspectors to take product samples and remove prohibited items from salons, shops, or schools. The board has noticed a recent increase in inspection report violations regarding nail products containing methyl methacrylate monomers (MMA), even though the FDA chose to remove products containing 100% MMA from the market through court proceedings. Further, MMA use is prohibited under board rule at ARM 24.121.1517. Additionally, board inspectors have discovered that some hazardous chemicals can be either disguised as something else or not even included on a product's label. The board determined that allowing inspectors to sample and remove questionable or prohibited products will assist in determining chemical content of products and enhance public protection.

Implementation cites are being amended to accurately reflect all statutes implemented through the rule.

24.121.2301 UNPROFESSIONAL CONDUCT (1) through (1)(u) remain the same.

(v) aiding or abetting unlicensed practice by intentionally or unintentionally encouraging, assisting, or failing to prevent the commission of unlicensed practice; ~~or~~

(w) failing to provide verification of completed continuing education when requested by the board~~.~~; or

(x) engaging in or teaching the practice of barbering, cosmetology, electrology, esthetics, or manicuring when the license has expired or terminated, has been suspended or revoked, or is on inactive status, except as allowed in ARM 24.121.805.

(2) remains the same.

AUTH: 37-1-131, 37-1-136, 37-1-319, 37-31-203, MCA
IMP: 37-1-136, 37-1-137, 37-1-141, 37-1-316, 37-31-301, 37-31-331, MCA

REASON: It is unlawful to practice or teach any of the professions regulated by the board without holding a current, valid license. The board is amending this rule to add such prohibited conduct to those actions the board considers unprofessional

conduct. Implementation cites are being amended to accurately reflect all statutes implemented through 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 Barbers and Cosmetologists, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2309, or by e-mail to dlibsdcos@mt.gov, and must be received no later than 5:00 p.m., March 16, 2010.

5. An electronic copy of this Notice of Public Hearing is available through the department and board's site on the World Wide Web at www.cosmetology.mt.gov. The department strives to make the electronic copy of this Notice conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems, and that technical difficulties in accessing or posting to the e-mail address do not excuse late submission of comments.

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, e-mail, and mailing address of the person to receive notices and specifies the person wishes to receive notices regarding all board administrative rulemaking proceedings or other administrative proceedings. The request must indicate whether e-mail or standard mail is preferred. Such written request may be sent or delivered to the Board of Barbers and Cosmetologists, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, faxed to the office at (406) 841-2309, e-mailed to dlibsdcos@mt.gov, or made by completing a request form at any rules hearing held by the agency.

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

8. Anjeanette Lindle, attorney, has been designated to preside over and conduct this hearing.

BOARD OF BARBERS AND
COSMETOLOGISTS
WENDELL PETERSEN, CHAIRPERSON

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

/s/ KEITH KELLY
Keith Kelly, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State February 1, 2010

BEFORE THE BOARD OF HEARING AID DISPENSERS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of ARM 24.150.301 definitions, 24.150.401 fees, 24.150.402 record retention, 24.150.501, 24.150.503, and 24.150.505 regarding licensure, 24.150.2101 renewals, 24.150.2201, 24.150.2203, and 24.150.2204 regarding continuing education, 24.150.2301 unprofessional conduct, the amendment and transfer of ARM 24.150.502 minimum testing, and 25.150.510 transactional document requirements, and the repeal of ARM 24.150.403 notification, 24.150.504 licensees from other states, and 24.150.2202 exceptions	))))))))))))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT, AMENDMENT AND TRANSFER, AND REPEAL

TO: All Concerned Persons

1. On March 8, 2010, at 10:00 a.m., a public hearing will be held in room B-07, 301 South Park Avenue, Helena, Montana to consider the proposed amendment, amendment and transfer, and repeal of the above-stated rules.

2. The Department of Labor and Industry (department) will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board of Hearing Aid Dispensers (board) no later than 5:00 p.m., on March 4, 2010, to advise us of the nature of the accommodation that you need. Please contact Linda Grief, Board of Hearing Aid Dispensers, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2395; Montana Relay 1 (800) 253-4091; TDD (406) 444-2978; facsimile (406) 841-2305; e-mail dlibsdhad@mt.gov.

3. GENERAL STATEMENT OF REASONABLE NECESSITY: The 2009 Montana Legislature enacted Chapter 34, Laws of 2009 (Senate Bill 53), an act extending the trial period for hearing aids purchased from traveling vendors. The bill was signed by the Governor on March 20, 2009, became effective on October 1, 2009. Additionally, the 2009 Montana Legislature enacted Chapter 109, Laws of 2009 (House Bill 80), an act revising professional and occupational licensing laws. The bill was signed by the Governor on April 1, 2009, became effective on October 1, 2009. In conjunction with and in response to the 2009 legislation, the board is proposing revisions throughout the board rules.

The board is also proposing general amendments throughout. Some amendments are technical in nature, such as renumbering or amending punctuation within certain rules following amendment and to comply with ARM formatting requirements. Other changes replace out-of-date terminology for current language and processes, delete unnecessary or redundant sections, and amend rules and catchphrases for accuracy, consistency, simplicity, better organization, and ease of use. The board is generally amending the rules to align with and implement the legislative changes, and avoid unnecessary repetition of statutes within board rules. Accordingly, the board has determined that reasonable necessity exists to generally amend certain rules at this time. Where additional specific bases for a proposed action exist, the board will identify those reasons immediately following that rule.

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

24.150.301 DEFINITIONS ~~(1)~~ (4) "Related devices" means those parts, attachments, or accessories ~~that are~~ typically sold with ~~a hearing aid by a licensed hearing aid dispenser or trainee, and~~ hearing aids. The term includes assistive devices ~~of all types if sold by a licensee~~, but does not include general merchandise ~~items,~~ such as cleaners, cords, or batteries that are commonly available at most retail stores.

~~(5)~~ (1) "Dispensing fee" means ~~costs associated with fitting, delivery and counseling.~~ a fee chargeable by the hearing aid dispenser, subject to ARM 24.150.602, for the initial hearing evaluation, consultation, fitting, and follow up visit.

~~(2) "Permanent place of business" means the headquarters or home office of the company, corporation or franchise offices which are considered to be permanent by the person or persons in charge of the company, corporation or franchise office, and who also have authority concerning hiring and firing of employees, as well as financial responsibility for the company, and employee liabilities.~~

(2) "Person in charge" means the one licensed hearing aid dispenser at a permanent place of business having the responsibilities imposed by 37-16-301, MCA.

~~(3) "Designated licensee in charge" means the licensed dispenser in charge of the permanent place of business.~~

~~(6)~~ (3) "Prominently ~~display~~ displayed" means ~~that the statement required pursuant to 37-16-303, MCA, be conspicuous and noticeable at once on the purchase agreement. To this end, the statement shall be as set forth in the example in ARM 24.150.510(5). The statement must appear in bold face type uppercase letters, extending the width of the page, two points larger than any other type face appearing on the document, but no smaller than 12-point type face, and quoted verbatim from the statute.~~ boldface type, uppercase letters that extend the width of an 8 1/2 by 11 inch page, excluding margins, and are at least as large as any other type face in the body of the document, but not smaller than 12-point type face.

~~(4) "Thirty day cancellation period" means a total of 30 days of actual possession of the hearing aid(s) by the purchaser. If the aid is returned during the 30-day time frame for service, repair or remake, the time period the aid is out of the purchaser's possession will not count against his 30-day total.~~

~~(7)~~ (5) "Substantially equivalent," for purposes of 37-1-304, MCA, means ~~the applicant has successfully completed a written and practical examination administered by or authorized by a state other than Montana. The examination shall measure basic knowledge of the fitting and dispensing of hearing aids. In addition, the applicant shall have successfully completed a training period of direct supervision for no less than 90 days. To satisfy the substantial equivalency requirement, the board shall accept formal training, in its discretion, in lieu of the traineeship.~~ the following standards which must be met by the applicant to the satisfaction of the board:

(a) the written International Hearing Society examination and a practical examination through the International Institute for Hearing Instrument Studies, verifying the minimum competencies to fit and dispense hearing aids and related devices, with a passing score of 75 percent or greater on each examination; and

(b) a training period under the direct supervision of a licensed hearing aid dispenser of not less than 1000 hours, or a board-approved formal hearing aid dispenser education and training program, or working 180 days as a licensed hearing aid dispenser in another state.

AUTH: 37-1-131, 37-16-202, ~~37-16-303,~~ MCA
IMP: 37-1-131, 37-1-304, 37-16-301, 37-16-303, 37-16-304, ~~37-16-414,~~ MCA

REASON: To address confusion and questions among applicants, the board is amending the definition of "related devices" in this rule to clarify that such devices are not solely those items sold by licensees. The board is deleting the definition of "permanent place of business" because following SB 53, the term is now defined in statute. The board is replacing former (3) with new (2) to define "person in charge" and align with specific language used in the statutes.

The board is amending the definition of "prominently displayed" as it is used in renumbered ARM 24.150.602. Following amendment, the definition will more clearly and simply set forth the requirements for the appearance of sales contracts for hearing aids and related devices. The board is deleting (4) to align with and further implement SB 53.

The board is amending the definition of "substantially equivalent" to clearly and adequately set forth examination, passing score, and experience requirements for applicants coming to Montana from other states.

Authority and implementation cites are being amended to accurately reflect all statutes implemented through the rule, provide the complete sources of the board's rulemaking authority, and delete reference to a repealed statute.

24.150.401 FEES (1) remains the same.

(a) Application fee (includes initial written and practical examination)	$500
(b) Application fee for hearing aid trainee (includes initial written and practical examination)	600

(b) and (c) remain the same but are renumbered (c) and (d).

~~(d)~~ (e) Reexamination -- practical ~~(includes renewal of trainee~~

~~license)~~ 550

(e) remains the same but is renumbered (f).

~~(f)~~ (g) Renewal active license: ~~350~~

(i) for the 2010 renewal cycle 650

(ii) for 2011 and subsequent years 450

(g) and (h) remain the same but are renumbered (h) and (i).

(2) and (3) remain the same.

AUTH: 37-1-131, 37-1-134, ~~37-1-141,~~ 37-16-202, MCA
IMP: 37-1-131, 37-1-134, 37-1-141, ~~37-16-202,~~ 37-16-402, 37-16-405, 37-16-406, MCA

REASON: As of March 31, 2009, the board had a negative cash balance of approximately $14,000. The department, in providing administrative services to the board, has determined that a one-time $300 increase and a $100 increase thereafter for hearing aid dispenser (HAD) renewals is necessary to achieve a positive cash balance by the end of fiscal year 2010.

Currently, hearing aid trainee (HAT) applicants pay the same application fee as HADs. The board has determined that processing HAT applications requires more time and staff involvement to monitor and update trainee records, to order, schedule, and administer the HAT practical exam, and to track expiration of HAT licenses. The board concluded that it is reasonably necessary to set the HAT application fee at $600 and amend the renewal fees as proposed to comply with the provisions of 37-1-134, MCA, and maintain the board's fees commensurate with program costs. The board estimates that the proposed fee changes will affect approximately 93 persons and will increase annual board revenue by $32,200.

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

24.150.402 RECORD RETENTION (1) through (1)(h) remain the same.

(i) a record of hearing tests or evaluations performed on the patient, in accordance with ARM ~~24.150.502; and~~ 24.150.601. Reports of audiometric test results on the patient's audiogram for the purpose of fitting and dispensing hearing aids shall include the following information:

(i) name and age of the patient;

(ii) date of the test;

(iii) name and license number of the person performing the test; and

(iv) whether the test was calibrated in SPL or HTL; and

(j) a copy of the physician's statement regarding the patient's candidacy for a hearing aid or the medical waiver in accordance with 21 CFR 801.421 (April~~,~~ 1995).

(2) ~~Failure to keep patient~~ Patient records shall be retained by dispensers for a minimum of seven years from the last recorded date of service~~, date constitutes unprofessional conduct subject to discipline pursuant to 37-1-312, MCA. Records for~~ except records relating to deceased patients ~~must~~ may be ~~kept for a minimum of~~ discarded one year after the date of death.

(3) remains the same.

(4) Upon the board's request, and in a form or manner as may reasonably be required by the board, a licensee shall timely provide the board a copy of an electronic audiometer calibration made within the 12 months preceding the date of the board's request.

AUTH: 37-1-131, 37-16-202, MCA
IMP: 37-16-301, 37-16-303, 37-16-304, 37-16-411, MCA

REASON: The board determined it is reasonably necessary to amend this rule to incorporate requirements for the retention of audiometric test results and calibration records that were previously set forth in ARM 24.150.502. Authority cites are being amended to provide the complete sources of the board's rulemaking authority.

24.150.501 EXAMINATION - PASS/FAIL POINTS (1) ~~All applications for examination must be received in the board office 15 days prior to the examination date.~~ All exam candidates must have current applications for licensure pending with the board and have been approved by the board to take the examination.

(2) Except as provided in 37-16-406, MCA, all applicants for a Montana hearing aid dispenser license must pass:

(a) a written examination consisting of two parts:

(i) the International Hearing Society written examination; and

(ii) the Montana hearing aid dispenser jurisprudence examination; and

(b) the International Institute for Hearing Instrument Studies practical examination administered by the board.

~~(2)~~ (3) ~~The passing score on the written examination shall be 75 percent. The written examination shall include a Montana jurisprudence section.~~ The minimum passing score on each part of the written examination is 75 percent, and the minimum passing score on the practical examination is 75 percent.

~~(3) Each section of the oral and practical examination must be passed by a minimum grade of 75 percent. An applicant who fails any section only has to retake section(s) failed.~~

~~(4) All applicants, original or licensed in other states, shall be required to pass a jurisprudence examination on Montana laws and rules, administered by the board.~~

(4) An applicant who fails either part of the written examination or who fails the practical examination need only retake and pass the examination that was failed.

AUTH: 37-1-131, 37-16-202, MCA
IMP: 37-1-131, 37-16-405, 37-16-406, MCA

REASON: The board is amending this rule to clarify for applicants the required examination types and names and corresponding passing scores. While the tests and scoring requirements are those currently in place, the board determined it is reasonably necessary to more clearly set forth the requirements. Implementation cites are being amended to accurately reflect all statutes implemented through the rule.

24.150.503 TRAINEESHIP REQUIREMENTS AND STANDARDS (1) For the purposes of 37-16-405, MCA, a "qualified licensed hearing aid dispenser," who will serve as ~~a sponsor~~ the supervisor of a trainee~~,~~ shall meet the following criteria:

(a) ~~have been~~ be currently licensed and ~~active~~ have been actively engaged in the business of selling, dispensing, and the fitting of hearing aids in the state of Montana for at least one year; and

(b) have ~~not~~ had ~~a~~ no final order of disciplinary action entered against the hearing aid dispenser's license or a related professional or occupational license such as audiologist, in this or any state, in the two years preceding the request to ~~sponsor~~ supervise a trainee.

(2) and (3) remain the same.

(4) Credit toward the ~~180-day~~ 1000 hour training period will be given only during the period of time during which a trainee is on record as having a ~~sponsor~~ supervisor. All breaks in the training period will toll the running of the ~~180-day~~ 1000 hour training period.

(5) A daily log, on a form provided by the department, must be kept by the trainee, showing the date, description of job tasks, and duties. Both the trainee and the supervisor must sign the log. The log must be submitted to the board office ~~at the end of~~ every 90 days and again, upon conclusion of the 1000 training hours. The log ~~at the end of 180 days and~~ must be approved by the board or its designee prior to the trainee being allowed to take the practical examination.

(6) All written materials distributed by the trainee shall include the trainee's ~~name and title, "trainee"~~ and the supervisor's respective ~~name~~ names, license numbers, titles ("trainee" and "supervisor"), and business phone ~~number,~~ numbers. ~~and title "supervisor."~~

AUTH: 37-1-131, 37-16-202, MCA
IMP: 37-1-101, 37-1-131, 37-16-301, 37-16-405, MCA

REASON: The board is amending this rule to specify the requirement that trainee sponsors have no discipline against even a related professional or occupational license within two years of application to sponsor. In light of the recent statutory changes and the overall amendments to the rules, the board determined this requirement will enhance the board's ability to monitor the supervision of trainees and the accountability of both trainees and sponsors.

24.150.505 INACTIVE STATUS (1) A ~~licensed dispenser~~ licensee requesting inactive status shall certify ~~his~~ this intention to the board on the ~~annual~~ renewal form.

(2) ~~Inactive~~ Except as provided in (5), inactive licensees shall not be required to meet the continuing education requirements.

(3) Inactive licensees shall regularly renew their license on inactive status and pay the appropriate renewal fee.

(3) remains the same but is renumbered (4).

~~(4)~~ (5) Inactive licensees reactivating their license shall submit for board review and prior approval, proof of completion of a minimum of ten hours of

additional formal training or continuing education ~~to be approved by the board~~, which shall not include on-the-job experience.

AUTH: 37-1-319, 37-16-202, MCA
IMP: 37-1-131, 37-1-319, 37-1-306, MCA

REASON: The board is amending this rule to clarify that inactive licensees must continue to renew while on inactive status. The board hopes that this amendment will address confusion and alleviate questions from licensees. Implementation cites are being amended to accurately reflect all statutes implemented through the rule.

24.150.2101 RENEWALS (1) ~~Renewal notices will be sent as specified in ARM 24.101.414 prior to the renewal date set by ARM 24.101.413.~~ For rules regarding renewals, refer to:

(a) ARM 24.101.413 for renewal date;

(b) ARM 24.101.414 for renewal notification information;

(c) ARM 24.150.401 for renewal fees; and

(d) ARM 24.101.408 for information regarding late penalties and lapsed, expired, and terminated licenses.

~~(2) Licensees shall present documentation of the appropriate continuing education requirements with the renewal application.~~

~~(3) The provisions of ARM 24.101.408 apply.~~

AUTH: 37-1-131, ~~37-1-141, 37-1-319,~~ 37-16-202, MCA
IMP: 37-1-131, 37-1-141, ~~37-1-306,~~ MCA

REASON: The board is amending this rule to better address licensee questions by providing references to the specific rules on licensure renewals. Authority and implementation cites are being amended to accurately reflect all statutes implemented through the rule and provide the complete sources of the board's rulemaking authority.

24.150.2201 CONTINUING ~~EDUCATIONAL~~ EDUCATION REQUIREMENTS

(1) ~~The licensee must submit an affidavit, subscribed and sworn, stating that the licensee completed at least~~ Except as provided in (2) and (3), licensees are required to complete ten clock hours of continuing education~~. Such evidence must be presented by the date set in ARM 24.101.413~~ each renewal period and must attest to their compliance on renewal applications.

(2) ~~The board will conduct an audit of licensee's continuing education affidavits on an annual basis. Each year, the board will choose, at random, 30 percent of licensees to audit. Those licensees shall submit evidence of completion of continuing education courses as set forth in the affidavit. Requested evidence shall be received in the board's office within ten days of receipt of the notice to submit.~~ A licensee may request an exception or extension of time to complete the continuing education requirements for good cause shown. The request must be received prior to the renewal date. The board may extend the time for completion of the continuing education to a certain date. The licensee must submit documentary

proof of continuing education compliance by that date, if it is after the date the license would have expired, had no extension been granted.

~~(3)~~ (4) Continuing education courses ~~recognized by the board pertaining to~~ on fitting and dispensing hearing aids ~~include those~~ sponsored by the Montana Hearing Aid Society, the National Institute for Hearing Instruments Studies, the American Speech Language Hearing Association, the American Conference of Audioprosthology, the Montana Speech and Hearing Association, the Academy of Dispensing Audiologists, and the American Academy of Audiology~~,~~ are preapproved. College courses and ~~other such programs~~ continuing education courses offered in related disciplines will be reviewed and approved by the board on a case-by-case basis.

~~(4)~~ (3) A ~~dispenser~~ licensee whose initial Montana license was issued within the six months immediately preceding the annual renewal date ~~will not be required to meet~~ is exempt from the continuing education requirements during that six month period.

(5) through (7) remain the same.

(8) ~~Clock hours cannot be accumulated and transferred to another fiscal year.~~ Clock hours of continuing education in excess of the ten required hours per renewal period may not be accumulated and carried forward to another renewal period.

AUTH: 37-1-319, 37-16-202, MCA
IMP: 37-1-131, 37-1-306, MCA

REASON: The board is amending this rule to more clearly set forth the continuing education (CE) requirements. The board is changing the method by which licensees document their completion of CE requirements. Changing from a sworn affidavit to an attestation on renewal applications will help facilitate the online renewal system and still requires an affirmative statement by the licensees.

The board is deleting from (2) the specific board procedure to audit 30% of renewed licensees for CE compliance. Following amendment, the board will conduct random audits of up to 50% of renewed licenses as allowed by 37-1-131, MCA. The board is adding to (2) the provisions for licensees to obtain CE exceptions or extensions. These provisions are currently set out in ARM 24.150.2202 which is proposed for repeal in this notice.

24.150.2203 PROOF OF ATTENDANCE (1) ~~Licensee~~ Each licensee who is audited pursuant to 37-1-131, MCA must timely provide satisfactory written proof of attendance and completion of approved ~~course for renewal of license~~ continuing education. Proof must include, among any other requirements demanded by the board, a statement giving the sponsoring organization~~;~~, location and dates~~;~~, course name~~;~~, instructor~~;~~, name of licensee~~;~~, and number of clock hours completed.

(2) Forms must be properly signed by the course instructor~~, monitor~~ and licensee, verifying attendance at the particular course.

(3) Forms ~~are available from the board office.~~ for the following purposes are provided by the department and shall be used by licensees, when complying with the board's continuing education requirements:

(a) application for course approval;
(b) verification of continuing education attendance; and
(c) remains the same.

AUTH: 37-1-319, 37-16-202, MCA
IMP: 37-1-131, 37-1-306, ~~37-16-407,~~ MCA

REASON: Authority and implementation cites are being amended to accurately reflect all statutes implemented through the rule, provide the complete sources of the board's rulemaking authority, and delete reference to a repealed statute.

24.150.2204 STANDARDS FOR APPROVAL (1) through (3) remain the same.

(4) Each course or program shall clearly state the educational objective ~~that can be realistically accomplished within the course~~ and the number of clock hours which may be obtained by completion of a specified course.

(5) Instructors shall be qualified to teach the specified course content by virtue of their prior education, training, and experience. A resume of each instructor's qualifications shall be ~~forwarded with~~ submitted to the ~~application~~ board.

(6) and (7) remain the same.

AUTH: 37-1-319, 37-16-202, MCA
IMP: 37-1-131, 37-1-306, ~~37-16-407,~~ MCA

REASON: Authority and implementation cites are being amended to accurately reflect all statutes implemented through the rule, provide the complete sources of the board's rulemaking authority, and delete reference to a repealed statute.

24.150.2301 UNPROFESSIONAL CONDUCT (1) For the purpose of implementing the provisions of Title 37, ~~chapter~~ chapters 1 and 16, MCA, and in addition to the unprofessional conduct provisions set forth ~~at 37-1-316 MCA,~~ in statute, the board defines unprofessional conduct as follows:

~~(1) the use in advertising or otherwise, of the words "prescribe" or "prescription" or any abbreviation, variation or derivative thereof or symbol therefore in referring to or in describing any industry product unless such product was made pursuant to a prescription given by a physician; provided, however, that the word "prescription" or words of similar meaning may be used to refer to or describe an industry product which was specifically made to compensate for the hearing loss of a particular purchaser patient, in accordance with the directions furnished by a qualified person other than a physician when such words are accompanied by a clear and conspicuous disclosure that the "prescription" was not based on a medical examination and that the person issuing it was not a physician;~~

(a) the use in advertising or otherwise of the words "prescribe" or "prescription" or any abbreviation, variation or derivative thereof or symbol therefore, in referring to or in describing any industry product, unless the industry product was made pursuant to a prescription given by a physician, or unless:

(i) the industry product was specifically made to compensate for the hearing loss of a particular patient, in accordance with the directions furnished by a qualified person other than a physician; and

(ii) the prohibited words, abbreviations, variations, derivatives or symbols are accompanied by a clear and conspicuous disclosure that:

(A) the "prescription" was not based on a medical examination, and

(B) the person issuing it was not a physician;

~~(2)~~ (b) initiating contact by telephone, without ~~the dispenser~~ first identifying ~~himself~~ the dispenser by name and company ~~he represents~~ represented, or making more than one such contact, unless further contact is specifically requested by the patient;

(3) and (4) remain the same, but are renumbered (c) and (d).

~~(5) engaging in a home solicitation sale without complying with the statutory requirements of the Door to Door Sales Act as set out in 30-14-501, et seq., MCA;~~

~~(6)~~ (e) failing to comply with ~~the provisions~~ any provision of Title 37, ~~chapter~~ chapters 1 or 16, MCA, or any rule promulgated thereunder;

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

~~(8)~~ (g) failing to follow FDA recommendation as set forth in the warning statement in 21 CFR 801.420~~(c)(2)~~;

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

~~(10)~~ (i) violating any state, federal, provincial or tribal statute, or administrative rule governing or affecting the professional conduct of any licensee;

(11) remains the same, but is renumbered (j).

~~(12)~~ (k) acting in such a manner as to present a danger to public health or safety, or to any patient including, but not limited to, incompetence, negligence, or malpractice;

~~(13)~~ (l) performing services outside of the licensee's area of training, expertise, competence, or scope of practice or licensure, including but not limited to:

~~(a)~~ (i) the purposeful removal of cerumen from a patient's ear is unprofessional conduct~~;~~.

~~(14)~~ (m) failing to obtain an appropriate consultation or make an appropriate referral when the problem of the patient is beyond the licensee's training, experience, or competence;

~~(15)~~ (n) promoting for personal gain any drug, device, treatment, procedure, product, or service which is unnecessary, ineffective, or unsafe;

(16) remains the same, but is renumbered (o).

~~(17)~~ (p) discontinuing professional services, unless services have been completed, the patient requests the discontinuation, alternative, or replacement services are arranged or the patient is given reasonable opportunity to arrange alternative or replacement services;

~~(18)~~ (q) delegating a professional responsibility to a person when the licensee knows, or has reason to know, that the person is not qualified by training, experience, license, or certification to perform the delegated task;

(19) and (20) remain the same, but are renumbered (r) and (s).

~~(21)~~ (t) physical or verbal abuse of a ~~client~~ patient, or sexual contact with a patient;

(22) remains the same, but is renumbered (u).

~~(23)~~ (v) failing to supply continuing education documentation as requested by the audit procedure set forth in ARM 24.150.2201 or supplying misleading, incomplete, or false information relative to continuing education taken by the licensee~~.~~;

(w) practicing the profession of hearing aid dispensing on an expired or inactive license;

(x) failing to comply with records retention requirements; or

(y) failing to comply with the Personal Solicitations Act set forth in 30-14-501 et seq., MCA.

AUTH: 37-1-131, 37-1-319, 37-16-202, MCA
IMP: 37-1-131, 37-1-141, 37-1-316, ~~37-16-202,~~ 37-16-411, MCA

REASON: It is reasonably necessary to reorganize and renumber this rule for clarity and ease of use. The board is adding to unprofessional conduct the practice of hearing aid dispensing on an expired or inactive license since this is unlawful pursuant to 37-1-141, MCA. The board is adding failure to comply with record retention requirements to enable the board to adequately address violations of ARM 24.150.402. The provisions of (5) are being relocated to (1)(y) to correct an inaccurate statutory reference.

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

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

24.150.502 (24.150.601) MINIMUM TESTING ~~AND RECORDING PROCEDURES~~

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

~~(d)~~ (2) ~~at~~ At the time of fitting or during the course of the trial period, the dispenser will verify and~~/or~~ validate the hearing aid fitting and document the results.

~~(i) verification~~ Verification refers to generally accepted ~~and appropriate established~~ standards of practice to objectively analyze aided performance~~.~~, while

~~(ii)~~ validation establishes the patient's perceived improvement.

~~(2) Reports of audiometric test results on the patient's audiogram for the purpose of fitting and dispensing hearing aids shall include the following information:~~

~~(a) name and age of the patient;~~

~~(b) date of the test;~~

~~(c) name and license number of the person performing the test; and~~

~~(d) whether the test was calibrated in SPL or HTL.~~

(3) All audiometers shall be calibrated to ANSI standards once a year. ~~A copy of an electronic audiometer calibration made within the past 12 months shall be made available by the licensee upon the board's request.~~

AUTH: 37-16-202, MCA
IMP: 37-16-202, 37-16-411, MCA

REASON: ARM 24.150.502 and 24.150.510 address transactional and client documents, whereas the rest of subchapter 5 deals with licensure issues. The board is transferring these two rules to subchapter 6 to improve the organization of the rules. The board is deleting from this rule reporting requirements that are being shifted to ARM 24.150.402 in this notice.

24.150.510 (24.150.602) TRANSACTIONAL DOCUMENT REQUIREMENTS - FORM AND CONTENT (1) In addition to the requirements of 37-16-303, MCA, all written memorialization of the sale, including but not limited to bills of sale, ~~including a three-day~~ cancellation ~~notice, where applicable~~ notices, contracts and purchase agreements, ~~or other written memorialization of the sale,~~ shall be ~~on a form~~ no smaller than 12-point type face and appear on forms no smaller than 8 1/2 x 11 inches ~~and conform to the terms set forth in this rule~~.

(2) The terms of the right to cancel found at 37-16-304, MCA, must be set off from surrounding text in a bold-lined box and include the statement required by 37-16-303, MCA. The text within the box must include the heading "Right to Cancel Provided by Montana Law" and ~~appear in bold-face type, in no less than 10-point size font. The box shall be positioned immediately above the signature line of the purchaser and seller~~ be prominently displayed.

(3) ~~A delivery verification form stating the date of delivery and signed by the purchaser shall be obtained at the time of delivery by the dispenser. The delivery verification form shall also restate the terms of the 30-day refund or cancellation period. Dispensers have the option to use contracts with the required information, signed at delivery, in lieu of the separate delivery verification requirement.~~ On the date and at the time of delivery, the dispenser shall obtain the dated signature of the patient verifying delivery. The written notice of the 30-day right to cancel and refund, meeting the standards specified in (2), shall be positioned immediately above the signature line of the patient and seller verifying delivery.

(4) remains the same.

(5) ~~Notice of cancellation must be given to the seller in writing within 30 days of the date of delivery of the hearing aid or related device. The notice of cancellation may be delivered by mail or in person, and must indicate the purchaser's intent not to be bound by the sale. The purchaser shall return the hearing aid or related device in substantially the same condition as it was received. Under this provision, the hearing aid dispenser shall refund to the purchaser the amount paid, minus a dispensing fee, within ten days of receipt of the written notice of cancellation. The dispensing fee per hearing aid or related device may not exceed 15 percent of the purchase price or $250, whichever is less. All fees to be retained by the dispenser, in the event the hearing aid(s) is returned, shall be prominently displayed in a dollar amount on all transactional documents.~~ A patient who has given written notice of the patient's election to cancel the purchase agreement in accordance with 37-16-304, MCA, shall return the hearing aid or related device in substantially the same condition as it was received. The hearing aid dispenser may deduct from the purchase price a dispensing fee not to exceed 15 percent of the purchase price or $250, whichever is less, per hearing aid or related device and shall refund the balance within ten days of receipt of the patient's written notice of cancellation. The

dispensing fee that may be deducted from the refund in the event of cancellation must be prominently displayed in a dollar amount on all transactional documents.

AUTH: 37-16-202, MCA
IMP: 37-16-202, 37-16-303, 37-16-304, MCA

REASON: Because this current rule is poorly organized and confusing, the board determined it is reasonably necessary to rework the rule and clearly delineate the requirements for transactional documents. The board is also amending this rule to require that all sales related documents are printed in the larger 12-point type face to enhance readability and lessen buyer misunderstanding. Implementation cites are being amended to accurately reflect all statutes implemented through the rule.

6. The rules proposed to be repealed are as follows:

24.150.403 NOTIFICATION found at ARM page 24-14026.

AUTH: 37-16-202, MCA
IMP: 37-16-202, MCA

REASON: The board is repealing this rule as unnecessary because the department has standardized processes that provide public notice of board and department rulemaking projects.

24.150.504 LICENSEES FROM OTHER STATES found at ARM page 24-14050.

AUTH: 37-1-304, 37-16-202, MCA
IMP: 37-16-406, MCA

REASON: Because the procedure for licensing applicants from other states is adequately addressed in statute at 37-16-406, MCA, the board is repealing this rule as unnecessary and redundant.

24.150.2202 EXCEPTIONS found at ARM page 24-14348.

AUTH: 37-1-131, 37-1-319, 37-16-202, MCA
IMP: 37-1-141, 37-1-306, MCA

REASON: The board is repealing this rule because the provisions for CE exceptions are being incorporated into ARM 24.150.2201 in this notice.

7. Concerned persons may present their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Board of Hearing Aid Dispensers, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-

mail to dlibsdhad@mt.gov, and must be received no later than 5:00 p.m., March 16, 2010.

8. An electronic copy of this Notice of Public Hearing is available through the department and board's site on the World Wide Web at www.hearingaid.mt.gov. The department strives to make the electronic copy of this Notice conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems, and that technical difficulties in accessing or posting to the e-mail address do not excuse late submission of comments.

9. The board maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this board. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies the person wishes to receive notices regarding all board administrative rulemaking proceedings or other administrative proceedings. The request must indicate whether e-mail or standard mail is preferred. Such written request may be sent or delivered to the Board of Hearing Aid Dispensers, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, faxed to the office at (406) 841-2305, e-mailed to dlibsdhad@mt.gov, or made by completing a request form at any rules hearing held by the agency.

10. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was contacted on July 23, 2009, by telephone.

11. Tyler Moss, attorney, has been designated to preside over and conduct this hearing.

BOARD OF HEARING AID DISPENSERS
LEE OINES, CHAIRMAN

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

/s/ KEITH KELLY
Keith Kelly, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State February 1, 2010

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

In the matter of the amendment of ARM 24.168.401 fee schedule, 24.168.402 licensure requirements, 24.168.2101 continuing education, and the repeal of ARM 24.168.408 licensure by endorsement	))))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT AND REPEAL

TO: All Concerned Persons

1. On March 4, 2010, at 1:00 p.m., a public hearing will be held in room 430, 301 South Park Avenue, Helena, Montana to consider the proposed amendment and repeal of the above-stated rules.

2. The Department of Labor and Industry (department) will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board of Optometry (board) no later than 5:00 p.m., on February 26, 2010, to advise us of the nature of the accommodation that you need. Please contact Linda Grief, Board of Optometry, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2395; Montana Relay 1 (800) 253-4091; TDD (406) 444-2978; facsimile (406) 841-2305; e-mail dlibsdopt@mt.gov.

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

24.168.401 FEE SCHEDULE

(1) Application ~~by examination~~ fee $175

(2) remains the same.

(3) Endorsement ~~application~~ fee ~~300~~ 125

(4) and (5) remain the same.

AUTH: 37-1-131, 37-1-134, 37-10-202, MCA
IMP: 37-1-134, 37-1-141, 37-1-304, 37-10-302, MCA

REASON: The board determined it is reasonably necessary to amend this rule to align with other changes elsewhere in this notice. The board is combining all examination and endorsement requirements into a single rule at ARM 24.168.402. Although endorsement applicants currently pay a $300 application fee, the board is amending this rule to clarify that all applicants pay a $175 application fee and endorsement applicants pay an additional $125 endorsement fee to still total $300. The proposed amendments result in no fee changes.

24.168.402 LICENSURE REQUIREMENTS ~~BY EXAMINATION~~ (1) All applicants for licensure ~~by examination~~ shall submit a completed application.

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

(f) three affidavits from individuals not related to the applicant attesting to the good moral character of the applicant; ~~and~~

(g) the appropriate fee~~.~~; and

(h) any other information the board may require.

~~(3) Applicants shall read and understand the statutes and rules of the board for compliance with their profession.~~

~~(a) Proof of an applicant's familiarity with the board statutes and rules is evidenced by attestation on the application.~~

(3) Applicants actively licensed in another state, but not meeting the qualifications of (2)(a), (b), or (c), must pay an endorsement fee and shall be reviewed by the board on a case-by-case basis.

(4) If an applicant was licensed prior to the inclusion of TMOD in the NBEO examination (1993), the applicant shall:

(a) provide proof of successful completion of a qualifying examination, or examinations, as defined in 37-10-304, MCA, administered by the licensing authority of the state or jurisdiction granting the license; and

(b) meet all qualifications to be TPA and DPA certified.

(5) Applicants shall read and understand the statutes and rules of the board for compliance with their profession.

(6) Proof of an applicant's familiarity with the board statutes and rules is evidenced by attestation on the application.

(7) Applications not completed within one year will expire and the applicant will be required to reapply.

AUTH: 37-1-131, 37-10-202, 37-10-302, MCA
IMP: 37-1-131, 37-1-304, 37-10-301, 37-10-302, 37-10-304, MCA

REASON: The board is amending this rule by incorporating the requirements for endorsement licensure from ARM 24.168.408, which is proposed for repeal in this notice. Because many of the requirements are the same for both types of application, many out of state applicants qualify for licensure by examination. The board concluded that it is not necessary to have two separate licensure rules and is amending the rules accordingly. Authority and implementation cites are being amended to provide the complete sources of the board's rulemaking authority and accurately reflect all statutes implemented through the rule.

24.168.2101 CONTINUING EDUCATION REQUIREMENTS (1) through (4)(a) remain the same.

(b) A three month extension will be provided for all licensees who fail to meet the continuing education requirements as a result of an audit. Failure to meet this extension may result in disciplinary action.

AUTH: ~~37-1-141,~~ 37-1-319, 37-10-202, MCA
IMP: 37-1-141, 37-1-306, MCA

REASON: The board has determined it is reasonably necessary to amend this rule and allow a three-month extension for licensees who fail to meet the continuing education (CE) requirements and are selected in a random audit. The board consistently receives licensee requests to extend the audit response time, but the requests must be scheduled for review at the next board meeting. This amendment will allow board staff to respond to these requests promptly and consistently, and requests will not have to wait until the next board meeting for consideration.

The board is deleting an erroneous authority cite to accurately reflect the sources of the board's rulemaking authority.

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

24.168.408 LICENSURE BY ENDORSEMENT found at ARM page 24-18033.

AUTH: 37-1-131, 37-10-202, MCA
IMP: 37-1-304, MCA

REASON: The board is repealing this rule as the endorsement licensure requirements are being incorporated into ARM 24.168.402 in this notice.

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 Optometry, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to dlibsdopt@mt.gov, and must be received no later than 5:00 p.m., March 12, 2010.

6. An electronic copy of this Notice of Public Hearing is available through the department and board's site on the World Wide Web at www.optometry.mt.gov. The department strives to make the electronic copy of this Notice conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems, and that technical difficulties in accessing or posting to the e-mail address do not excuse late submission of comments.

7. The board maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this board. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies the person wishes to receive notices regarding all board administrative rulemaking proceedings or other administrative proceedings. The request must indicate whether e-mail or standard mail is preferred. Such written request may be sent or delivered to the

Board of Optometry, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, faxed to the office at (406) 841-2305, e-mailed to dlibsdopt@mt.gov, or made by completing a request form at any rules hearing held by the agency.

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

9. Darcee Moe, attorney, has been designated to preside over and conduct this hearing.

BOARD OF OPTOMETRY
ROCK SVENNUNGSEN, O.D., PRESIDENT

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

/s/ KEITH KELLY
Keith Kelly, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State February 1, 2010

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

In the matter of the amendment of ARM 24.189.301 definitions, 24.189.607 supervisory experience, and 24.189.2104 and 24.189.2107 pertaining to continuing education	)))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On March 4, 2010, at 9:30 a.m., a public hearing will be held in room 430, 301 South Park Avenue, Helena, Montana to consider the proposed amendment of the above-stated rules.

2. The Department of Labor and Industry (department) will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board of Psychologists (board) no later than 5:00 p.m., on February 26, 2010, to advise us of the nature of the accommodation that you need. Please contact Cheryl Brandt, Board of Psychologists, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2394; Montana Relay 1 (800) 253-4091; TDD (406) 444-2978; facsimile (406) 841-2305; e-mail dlibsdpsy@mt.gov.

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

24.189.301 DEFINITIONS ~~As used in this chapter, the following definitions apply:~~

(1) remains the same.

(2) "One year's academic residency" means ~~18 semester hours or 27 quarter hours earned on a full-time or part-time basis~~ continuous, full time, active engagement by the student in the elements of the training program while the student is physically present during one academic year at the educational institution granting the doctoral degree.

(a) Critical components of the residency must include:

(i) adequate opportunity for the resident to:

(A) concentrate on required coursework;

(B) obtain professional training and scholarship;

(C) work closely with professors, supervisors, and other students; and

(D) acquire the habits, skills, knowledge, and insights necessary for attaining a doctoral degree in psychology; and

(ii) adequate time for faculty, training staff, supervisors, and administrators to adequately assess all elements of the student's competence including, at a minimum:

(A) emotional stability and well-being;
(B) interpersonal competence;
(C) professional development; and
(D) personal fitness to practice psychology.

(b) The year of residency that uses face-to-face contact for shorter durations throughout the year or that uses video teleconferencing or other electronic means is not acceptable.

(c) The year of acceptable academic residency experience shall consist of two semesters or three quarters with continuous experience on campus, in no less than three month increments, and be accrued in no more than 18 months.

(d) Full-time experience shall consist of at least 30 hours on campus per week, but no more than 45 hours per week each contiguous week of the semester or quarter. The board will consider situations that are not full-time on a case-by-case basis.

~~(a)~~ (e) ~~The residency must be accumulated in not less than nine months and not more than 18 months and must include student-to-faculty contact involving face-to-face (personal) group courses.~~ Active engagement in the elements of the training program shall be fully documented by a log of residency activities on a form prescribed by the board and signed by the student's academic advisor. Such ~~educational meetings~~ residency activities must:

(i) include both faculty-to-student and student-to-student face-to-face (personal) interaction;

(ii) through (iv) remain the same.

(b) remains the same but is renumbered (f).

(g) Video conferencing will not be allowed to satisfy the requirements of the academic residency.

(c) remains the same but is renumbered (h).

(3) remains the same.

AUTH: 37-1-131, 37-17-202, MCA
IMP: 37-1-131, 37-17-101, 37-17-302, MCA

REASON: The board is amending this rule to clarify the definition of one year's academic residency as part of an applicant's minimum standards in ARM 24.189.604. The board is required under 37-17-302, MCA, to set minimum educational standards for psychology applicants with doctoral degrees from graduate programs that are not approved by the American Psychological Association. The board determined it is reasonably necessary to amend the current definition to more thoroughly and completely delineate the specific components of the residency requirement. This amendment will benefit the board and applicants throughout the application review process. Implementation cites are being amended to accurately reflect all statutes implemented through the rule.

24.189.607 REQUIRED SUPERVISED EXPERIENCE (1) through (4)(a) remain the same.

(b) be obtained over a period of no more than five calendar years. The board may review and approve written requests for additional time in which to complete the

postdoctoral supervision in situations where personal or professional matters may necessitate an extension;

(c) through (13) remain the same.

AUTH: 37-1-131, 37-17-202, MCA
IMP: 37-17-302, MCA

REASON: The board is amending this rule to address applicants' postdoctoral supervision when it occurs beyond the five-year time limit. A few applicants have requested the board grant additional time for the completion of their postdoctoral supervision. The board concluded that there may be situations where an extension is warranted and is amending this rule to allow additional time following board review.

24.189.2104 CONTINUING EDUCATION PROGRAM OPTIONS

(1) Acceptable continuing education may be chosen from (a), (b), ~~or~~ (c), or (d) below. No more than 20 of the total continuing education units required can be met by (b) and up to 15 continuing education units can be met by (c).

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

(d) Psychologist board members may receive continuing education credit of up to eight hours per calendar year for their attendance of board meetings.

AUTH: ~~37-1-306,~~ 37-1-319, 37-17-202, MCA
IMP: 37-1-306, 37-17-202, MCA

REASON: The board is amending this rule to allow psychologist board members to receive some continuing education (CE) credit for attendance at board meetings. Noting the amount of necessary research and the steep learning curve required to become current on many board issues for these meetings, the board concluded it is reasonably necessary to allow limited CE credits for participation in these meetings. The board is striking an erroneous authority cite to accurately reflect the statutory sources of the board's rulemaking authority.

24.189.2107 CONTINUING EDUCATION IMPLEMENTATION (1) through (2)(e) remain the same,

(f) The board will randomly audit ~~50~~ 25 percent of the licensees attesting to continuing education in addition to all licensees requiring a plan. Certificates of completion or programs for continuing education credits reported must be submitted upon request of the board. Any continuing education noncompliance determined by the audit may be handled by the board as a disciplinary matter.

AUTH: 37-1-319, 37-17-202, MCA
IMP: 37-1-131, 37-1-141, 37-1-306, 37-17-202, MCA

REASON: In 2005, the board initially set random continuing education (CE) audits at 50 percent of all renewed licensees. The board has determined that decreasing the audit percentage to 25 percent will provide an adequate measure of overall

licensee compliance with CE requirements, while alleviating the workload of the board.

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 Psychologists, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to dlibsdpsy@mt.gov, and must be received no later than 5:00 p.m., March 12, 2010.

5. An electronic copy of this Notice of Public Hearing is available through the department and board's site on the World Wide Web at www.psy.mt.gov. The department strives to make the electronic copy of this Notice conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems, and that technical difficulties in accessing or posting to the e-mail address do not excuse late submission of comments.

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, e-mail, and mailing address of the person to receive notices and specifies the person wishes to receive notices regarding all board administrative rulemaking proceedings or other administrative proceedings. The request must indicate whether e-mail or standard mail is preferred. Such written request may be sent or delivered to the Board of Psychologists, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, faxed to the office at (406) 841-2305, e-mailed to dlibsdpsy@mt.gov, or made by completing a request form at any rules hearing held by the agency.

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

8. Darcee Moe, attorney, has been designated to preside over and conduct this hearing.

BOARD OF PSYCHOLOGISTS
GEORGE WATSON, PhD., CHAIRPERSON

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

/s/ KEITH KELLY
Keith Kelly, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State February 1, 2010

BEFORE THE STATE COMPENSATION INSURANCE FUND
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 2.55.320 pertaining to classifications of employments and ARM 2.55.408 pertaining to retrospective rating plans	)))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On November 25, 2009, the Montana State Fund published MAR Notice No. 2-55-39 pertaining to the proposed amendment of the above-stated rules at page 2179 of the 2009 Montana Administrative Register, Issue Number 22.

2. The Montana State Fund has amended the above-stated rules as proposed.

3. No comments or testimony were received.

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

/s/ Joe Dwyer
Joe Dwyer
Chairman of the Board

/s/ Michael P. Manion
Michael P. Manion, Chief Legal Counsel
and Rule Reviewer

Certified to the Secretary of State February 1, 2010

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 2.59.1701, 2.59.1703, 2.59.1705, 2.59.1706, 2.59.1707, 2.59.1709, and 2.59.1710 pertaining to the licensing and regulation of mortgage brokers, mortgage lenders, and mortgage loan originators; the repeal of ARM 2.59.1704, 2.59.1711, 2.59.1712, 2.59.1713, and 2.59.1715; and the adoption of NEW RULES I through VIII regarding license renewals for mortgage lenders as of July 1, 2009; new applicants for a mortgage loan originator license – temporary licenses; new applicants for a mortgage broker or mortgage lender license – temporary licenses; net worth requirement for mortgage brokers; unacceptable assets; proof of net worth; records to be maintained by mortgage lenders and financial responsibility	)	NOTICE OF AMENDMENT, REPEAL, AND ADOPTION

TO: All Concerned Persons

1. On August 13, 2009, the Department of Administration published MAR Notice No. 2-59-414 pertaining to the public hearing on the proposed amendment, repeal, and adoption, of the above-stated rules at page 1292 of the 2009 Montana Administrative Register, Issue Number 15.

2. The department has amended ARM 2.59.1701, 2.59.1703, 2.59.1705, 2.59.1706, 2.59.1707, 2.59.1709, and 2.59.1710 exactly as proposed.

3. The department has repealed ARM 2.59.1704, 2.59.1711, 2.59.1712, 2.59.1713, and 2.59.1715 exactly as proposed.

4. The department has adopted New Rules I (2.59.1718), II (2.59.1719), III (2.59.1720), IV (2.59.1721), V (2.59.1722), VI (2.59.1723), and VII (2.59.1724) exactly as proposed.

5. The department has thoroughly reviewed and considered the comments and testimony received on proposed New Rule VIII. In light of those comments, and the concerns expressed by the mortgage broker industry, the department has redrafted the proposed New Rule VIII in a manner that the department hopes will address the concerns of the mortgage broker industry relative to the use of financial criteria in licensing. The proposed New Rule VIII will be noticed separately for a new

comment period and public hearing separate from this adoption notice, and is not being adopted at this time.

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

Comment 1: Three people commented on ARM 2.59.1701(2) that it is unfair to require a mortgage loan originator to work for one entity.

Response 1: The concept that a mortgage loan originator may work only for a single entity is not new. The 2003 version of the Montana Mortgage Broker and Loan Originator Licensing Act stated, "[a] loan originator may transact business only for an employing mortgage broker licensed in accordance with the provisions of this part." That language existed from 2003 until July 1, 2009 in 32-9-119(1), MCA.

On July 1, 2009, the Montana Mortgage Broker, Mortgage Lender, and Mortgage Loan Originator Licensing Act (Montana Act) took effect. Under 32-9-116, MCA, the Montana Act provides: "[a] mortgage loan originator may transact business only for an employing mortgage broker or one employing mortgage lender licensed in accordance with this provisions of this part."

Since 2003, Montana law has consistently required a mortgage loan originator to work for one employing entity. The Montana Act carries that concept forward.

One person commented that she is an independent contractor who works for several mortgage loan originators. It should be noted that an independent contractor who is a sole proprietor, and is licensed as such, can continue to act as mortgage broker and mortgage loan originator for multiple companies. See the response to comment 8.

Comment 2: One person commented that the net worth requirements of New Rule IV will effectively eliminate her ability to originate mortgage loans. She also commented that mortgage loan originators should not be financially responsible for loans.

Response 2: The net worth option is available only to a mortgage broker entity, not an individual mortgage loan originator. A mortgage broker may elect to carry a surety bond or, in lieu of the surety bond, the mortgage broker entity may elect the net worth option. The election is at the mortgage broker's discretion.

Mortgage loan originators are not financially responsible for loans. They are required to be bonded in order to ensure their compliance with state and federal laws related to the origination of residential mortgage loans. The surety bond is intended to be used to reimburse borrowers, or bona fide third parties, who demonstrate a financial loss due to the acts of a mortgage loan originator, mortgage broker, or mortgage lender. A surety bond or minimum net worth is required by the

Secure and Fair Enforcement for Mortgage Licensing Act of 2008 found in Title V of the Housing and Economic Recovery Act of 2008 (Pub. L. 110-289, 1501-1517, 122 Stat. 2654, 2810-2824 [July 30, 2008]) (federal SAFE Act). It is specifically required in 12 USC 5107(d)(6) and 32-9-123, MCA.

Comment 3: One person commented that the regulations do not affect the banking industry at all.

Response 3: It is true that the rules proposed by the Division of Banking and Financial Institutions do not affect the banking industry. The federal SAFE Act requires that federal regulators that regulate state and national banks and credit unions promulgate regulations to implement the federal SAFE Act. The federal regulators have done so. The rules proposed by the federal regulators will apply to all state and national banks and credit unions. The federal rules as proposed will require the registration of financial institutions and individuals employed by financial institutions who engage in mortgage loan origination activities. The proposed rules can be found at Federal Register, Vol. 74, No. 109, June 9, 2009. It is unknown when the final rules affecting banks and credit unions will be adopted.

Comment 4: One person commented that the Home Valuation Code of Conduct (HVCC) has affected their industry greatly and they were highly offended that the Division of Banking and Financial Institutions has taken no action whatsoever on the HVCC ruling.

Response 4: The HVCC was the result of an agreement made in March 2008 between the Federal Housing Finance Agency (FHFA), the New York State Attorney General, the Federal Home Loan Mortgage Corporation (Freddie Mac), and the Federal National Mortgage Association (Fannie Mae). The FHFA is the federal regulatory authority over Freddie Mac and Fannie Mae.

The New York Attorney General's office conducted an industry-wide investigation into mortgage fraud. On November 7, 2007, Attorney General Cuomo announced he had issued subpoenas to Fannie Mae and Freddie Mac seeking information on the mortgage loans the companies purchased from banks, including Washington Mutual, the nation's largest savings and loan. The subpoenas sought information on the due diligence practices of Fannie Mae and Freddie Mac as well as their valuations of appraisals.

As a result of that investigation, Fannie Mae and Freddie Mac entered into an agreement with Attorney General Cuomo. The agreement established the HVCC, created the "Independent Valuation Protection Institute," a new organization to implement and monitor the HVCC, and required all lenders, including banks, to represent and warrant that appraisals related to mortgage loans originated on or after January 1, 2009, conform to the HVCC. Any mortgage loan based on an appraisal that does not conform to the HVCC will not be purchased by Fannie Mae or Freddie Mac.

Fannie Mae and Freddie Mac held an open comment period from March 14 through April 30, 2008. As a result of the comments received, the HVCC was revised and a new effective date of May 1, 2009, for the revised code. As of May 1, 2009, Fannie Mae and Freddie Mac will not purchase a loan that was not made in conformance with the HVCC.

The HVCC prohibits a mortgage broker from ordering an appraisal, or selecting, retaining, or providing payment to an appraiser. Any questions or concerns regarding the HVCC should be directed to Fannie Mae, Freddie Mac, or the FHFA who are responsible for implementing the HVCC.

The Montana Division of Banking and Financial Institutions has no jurisdiction over any of the parties involved in the HVCC, was not involved in any way in the HVCC, and has no authority to take any action on the HVCC.

Comment 5: The Montana Association of Mortgage Brokers and their attorney commented that the federal SAFE Act only addressed independent contractors in reference to loan processors or underwriters, not mortgage loan originators. So, the matter should be left to the Department of Labor and Industry, not the banking division, to determine whether a mortgage loan originator should be considered an independent contractor or an employee.

Response 5: The federal SAFE Act states, "[a]n independent contractor may not engage in residential mortgage loan origination activities as a loan processor or underwriter unless such independent contractor is a State-licensed loan originator." 12 USC 5103(b)(2). This section applies to independent contractors who engage in residential mortgage loan origination activities.

That language is also found in 32-9-129(2), MCA. It requires an independent contractor who engages in mortgage loan origination activities to be licensed as a mortgage loan originator. The section makes no mention of "employee."

For the analysis of Montana law in relation to an employee, see response 6.

Comment 6: Three people commented on ARM 2.59.1701(2) that it is unfair and unreasonable to require independent contractors to be employees. Independent contractors are able to set their own hours, pay, and benefits. One person commented that she "employs" loan originators as independent contractors, which allows her to give a job to people without the expense of a salary, benefits, and a bookkeeper.

Response 6: The Montana Act was passed by the 2009 legislature in order to implement the provisions of the federal SAFE Act. The federal SAFE Act requires each mortgage loan originator to carry a surety bond that is scaled to their loan production volume. The federal SAFE Act applies only to individuals and it requires each individual licensed to carry a surety bond.

In Montana, mortgage broker entities, in addition to individuals, have always been licensed. The Model State Law, which was developed by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators, and approved by the U.S. Department of Housing and Urban Development (HUD), provides:

> [e]ach mortgage loan originator shall be covered by a surety bond in accordance with this section. In the event that the mortgage loan originator is an employee or exclusive agent of a person subject to this Act, the surety bond of such person subject to this Act can be used in lieu of the mortgage loan originator's surety bond requirement.

That language is repeated nearly verbatim in 32-9-123(1)(a), MCA.

So, despite the fact that federal SAFE Act requires each individual to carry a surety bond, the Model Law and Montana law allow the surety bond to be maintained by the entity, but only if the mortgage loan originator is the employee or exclusive agent of the entity. HUD approved the Model Law. HUD has ultimate authority to issue rules to interpret the federal SAFE Act and to determine whether each state's laws and rules are in compliance with the federal SAFE Act.

HUD has proposed rules to implement the federal SAFE Act. The rules were proposed on December 15, 2009. The comment period on the HUD proposed rules runs until February 16, 2010. HUD has proposed to define "employee" under the federal SAFE Act as follows:

> (1) Subject to paragraph (2) of this definition, [employee] means:
> (i) An individual:
> (A) Whose manner and means of performance of work are subject to the right of control of, or are controlled by, a person, and
> (B) Whose compensation for Federal income tax purposes is reported, or required to be reported, on a W–2 form.
> (2) Has such binding definition as may be issued by the Federal banking agencies in connection with their implementation of their responsibilities under the SAFE Act.

Montana's proposed definition of "employee" is consistent with HUD's proposed definition of "employee."

In order for an individual mortgage loan originator to be covered under the entity's bond, the entity must be responsible for the acts of the individual employee. If the individual is an independent contractor, they are not, by definition, subject to control and supervision by the entity. An independent contractor is not an employee.

In Montana, an independent contractor must obtain an independent contractor certification under 39-71-417, MCA. In order to obtain that certification, the applicant for an independent contractor certification must swear to and acknowledge that the

applicant: "has been and will continue to be free from control and direction over the performance of the person's own services, both under contract and in fact; and that the applicant is engaged in an independently established trade, occupation, profession, or business and will provide sufficient documentation of that fact to the department [of labor]." This is required in 39-71-417, MCA.

Therefore, in order to use the surety bond of the entity, the mortgage loan originator must be the employee of the entity, meaning a W-2 employee, not an independent contractor.

However, 32-9-123(1)(a), MCA, also states a mortgage loan originator may be the exclusive agent of a licensed mortgage broker or lender entity. The department interprets 32-9-123(1)(a), MCA, to mean that if an individual must be licensed under 32-9-113(1), (2), or (3), MCA, that individual is an exclusive agent of the entity and is covered under the entity's surety bond.

It should be noted that due to a drafting error, 32-9-113, MCA, states that individuals who are ultimate equity owners, control persons, or principals of an entity must independently meet the requirements of 32-9-120(1)(a) through (1)(d), MCA. (Emphasis added.) Section 32-9-120(1)(d), MCA, requires the individuals to carry a surety bond. It does not make sense for ultimate equity owners, control persons, or principals to carry a surety bond because they do not originate loans on the entity's behalf. The section that was intended to be referenced was 32-9-120(1)(g), MCA, which prohibits an individual from being licensed if they make a material misstatement of fact or a material omission of fact. Due to a drafting error in the legislative process, the wrong subsection of 32-9-120, MCA, was referenced. The department will introduce legislation in the next legislative session to correct this error.

Comment 7: One person commented that existing rules already subject exclusive independent contractors to sufficient control and supervision by the mortgage broker. This person proposed that the definition of employing in ARM 2.59.1701(2) be amended to read:

(3) "Employing" means the entity for whom the individual works is:

(a) liable for withholding taxes pursuant to Title 26 of the United States Code; or

(b) accountable for the regulated mortgage loan activities of its independent contractors as evidenced by

(1) an executed undertaking of accountability; and

(2) an exclusive written agreement between the sponsoring broker and its independent contractors, such that the independent contractors may broker loans only through the sponsoring mortgage broker or lender.

Response 7: Existing rules are being amended by this notice due to the changes in the law arising from the federal SAFE Act and the Montana Act. The former rule text in ARM 2.59.1701, provided:

(3) "Employed by" means:

(a) an individual performing a service for a mortgage broker liable for withholding taxes pursuant to Title 26 of the United States Code; or

(b) any individual acting as an independent contractor for a mortgage broker if that individual is under exclusive written agreement to broker loans only through their sponsoring mortgage broker or if the sponsoring mortgage broker undertakes accountability for the regulated mortgage loan activities of the independent contractor.

The former rule text is no longer consistent with statute or HUD's proposed rules. That is why the rule is being amended. Given that the Montana Act requires a mortgage loan originator to be an employee or an exclusive agent for a licensed mortgage broker or lender and requires the mortgage broker or lender to be responsible for the conduct of its designated manager and mortgage loan originators, the concept of an independent contractor is no longer consistent with the Montana Act.

The language suggested is not consistent with the Montana Act. The Montana Act requires a mortgage lender or mortgage broker to apply for a branch office license at each location where business is conducted and to designate a separate designated manager for each location. The designated manager is responsible for the operation of the business at the location under the designated manager's full charge, supervision, and control. The mortgage broker or lender is responsible for the conduct of its designated managers and mortgage loan originators.

In order to be an independent contractor, the independent contractor must certify that he or she is free from control and direction over the performance of the person's own services, both under contract and in fact. A person employed by a mortgage broker or lender cannot make this certification and comply with the Montana Act.

Comment 8: One person commented that since mortgage brokers are entities and independent contractors cannot be licensed as individuals, then independent contractors cannot work in the business at all.

Response 8: This is not a correct interpretation of Montana law. A mortgage broker is indeed an entity. A mortgage lender is also an entity. However, "entity" is defined to include a sole proprietorship as provided in 32-9-103(11), MCA. Therefore, a sole proprietor who is independently engaged in business can and should be licensed as a mortgage broker or mortgage lender and as a mortgage loan originator working for their sole proprietorship. This enables the individual to act as an independent contractor for other mortgage broker or lender entities.

Comment 9: One person commented that it should be made clear in rule that the intent of 32-9-123, MCA, was to provide net worth as an option to a surety bond. He feels it should be made clear in New Rule IV that the net worth is an alternative to a

surety bond and the net worth can be met by being FHA approved or as provided by rule if the applicant is not FHA approved.

Response 9: Section 32-9-123, MCA provides, in relevant part:

> (2) (a) A mortgage broker or mortgage lender is required to maintain one surety bond for each entity license.
> (b) The amount of the required surety bond must be calculated by combining the annual loan production amounts for all persons originating residential mortgage loans and for all business locations of the mortgage broker or mortgage lender and must be in the following amount:
> (i) $25,000 for a combined annual loan production that does not exceed $50 million a year;
> (ii) $50,000 for annual loan production of $50 million but not exceeding $100 million a year; or
> (iii) $100,000 for annual loan production of more than $100 million a year.
> (3) (a) In lieu of a surety bond, a mortgage broker may meet a minimum net worth requirement.
> (b) Minimum net worth must be maintained in an amount determined by the department that reflects the dollar amount of loans originated.
> (c) The department shall adopt rules with respect to the requirements for minimum net worth as are necessary to accomplish the purposes of this part.
> (4) Evidence that a mortgage broker is approved by the department of housing and urban development to originate loans insured by the federal housing administration must be considered as satisfying the net worth requirement provided that the actual net worth determined in the department of housing and urban development's approval is equivalent to the bond amount set forth for the corresponding dollar amount range set forth in subsections (2)(b)(i) through (2)(b)(iii).

The text of the statute makes it clear that a mortgage broker may meet a minimum net worth requirement in lieu of a surety bond. The statute also makes clear that evidence of a HUD certification must be considered as satisfying the net worth requirement provided that the HUD approval is equivalent to the bond amount set forth in 32-9-123(2)(b)(i) through (iii), MCA. Rules may not unnecessarily repeat the statutory language as provided in 2-4-305(2), MCA. Therefore, the department cannot repeat the language of the statute in rule.

By: /s/ Janet R. Kelly
Janet R. Kelly, Director
Department of Administration

By: /s/ Michael P. Manion
Michael P. Manion, Rule Reviewer
Department of Administration

Certified to the Secretary of State February 1, 2010.

BEFORE THE STATE AUDITOR AND COMMISSIONER OF INSURANCE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 6.6.3501, 6.6.3502, 6.6.3503, 6.6.3504, 6.6.3505, 6.6.3506, 6.6.3507, 6.6.3508. 6.6.3509, 6.6.3510, 6.6.3511, and 6.6.3512, the amendment and transfer of ARM 6.6.3513 and 6.6.3514, and the adoption of NEW RULES I through III (ARM 6.6.3515, 6.6.3516, and 6.6.3517), pertaining to Annual Audited Reports and Establishing Accounting Practices and Procedures to be Used in Annual Statements	)))))))))))))	NOTICE OF AMENDMENT, AMENDMENT AND TRANSFER, AND ADOPTION

TO: All Concerned Persons

1. On December 24, 2009, the State Auditor and Commissioner of Insurance published MAR Notice No. 6-186 regarding the public hearing on the proposed amendment, amendment and transfer, and adoption of the above-stated rules at page 2394 of the 2009 Montana Administrative Register, issue number 24.

2. On January 21, 2010, at 10:00 a.m., the State Auditor and Commissioner of Insurance held a public hearing to consider the proposed amendment, amendment and transfer, and adoption of the above-stated rules. There were no public attendees at the hearing.

3. The department has amended ARM 6.6.3501, 6.6.3502, 6.6.3503, 6.6.3504, 6.6.3505, 6.6.3506, 6.6.3507, 6.6.3508, 6.6.3509, 6.6.3510, 6.6.3511, and 6.6.3512, amended and transferred ARM 6.6.3513 (6.6.3520) and 6.6.3514 (6.6.3521), and adopted NEW RULES I (6.6.3515), II (6.6.3516), and III (6.6.3517) exactly as proposed.

4. The department has thoroughly considered the written comments from one commenter. A summary of the comments received and the agency's responses are as follows:

COMMENT: The American Council of Life Insurers [ACLI] commented that the compliance dates for subsections (2), (3), and (4) in ARM 6.6.3513 (6.6.3520) be revised to December 31, 2010, in light that calendar year 2009 was concluded prior to the adoption of the amended and new rules.

RESPONSE: The commissioner does not accept the suggested changes to certain effective dates in ARM 6.6.3513 (6.6.3520). Insurers have been required since 1993

to file audited financial reports on June 1 of every year. The definition of audited financial report has not changed.

With regard to ARM 6.6.3513(2), although the requirements for independence of the certified public accountants preparing the audited financial report will be amended in ARM 6.6.3506 to prohibit potential conflicts of interest and to otherwise ensure the reliability of the audited financial report, insurers may request an exemption from the commissioner for the year ending 2009.

With regard to ARM 6.6.3513(3), domestic insurers not retaining certified public accountants who qualify as independent under the amended rules may request an exemption from the commissioner for the year ending 2009.

With regard to ARM 6.6.3513(4), foreign insurers may request an exemption from the commissioner for the year ending 2009.

Accordingly, if compliance with the amendments and new rules regarding audited financial statements will be a hardship for any insurer, that insurer may request an exemption from the commissioner which will not be unreasonably withheld.

/s/ Christina L. Goe
Christina L. Goe
Rule Reviewer

/s/ Robert W. Moon
Robert W. Moon
Deputy Insurance Commissioner

Certified to the Secretary of State February 1, 2010.

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.50.403, 17.50.410, 17.50.501 through 17.50.503, 17.50.508, 17.50.509, and 17.50.513; the adoption of New Rules I through LI; and the repeal of ARM 17.50.505, 17.50.506, 17.50.510, 17.50.511, 17.50.526, 17.50.530, 17.50.531, 17.50.542, 17.50.701, 17.50.702, 17.50.705 through 17.50.710, 17.50.715, 17.50.716, and 17.50.720 through 17.50.726 pertaining to the licensing and operation of solid waste landfill facilities	NOTICE OF AMENDMENT, ADOPTION, AND REPEAL (SOLID WASTE)

TO: All Concerned Persons

1. On February 26, 2009, the Department of Environmental Quality published MAR Notice No. 17-284 regarding a notice of public hearing on the proposed amendment, adoption, and repeal of the above-stated rules at page 164, 2009 Montana Administrative Register, issue number 4. On August 13, 2009, the Department of Environmental Quality published MAR Notice No. 17-284 regarding an amended notice of public hearing and extension of comment period on proposed amendment, adoption, and repeal of the above-stated rules at page 1326, 2009 Montana Administrative Register, issue number 15.

2. The department has amended ARM 17.50.501, 17.50.503, 17.50.509, and 17.50.513, adopted New Rules II (17.50.1001), XII (17.50.1101), XIV (17.50.1103), XV (17.50.1104), XVI (17.50.1105), XVII (17.50.1106), XVIII (17.50.1107), XIX (17.50.1108), XX (17.50.1109), XXI (17.50.1110), XXIII (17.50.1112), XXV (17.50.1114), XXVI (17.50.1115), XXX (17.50.1201), XXXV (17.50.1301), XLVI (17.50.1312), and XLVII (17.50.1401), and repealed ARM 17.50.505, 17.50.506, 17.50.510, 17.50.511, 17.50.526, 17.50.530, 17.50.531, 17.50.542, 17.50.701, 17.50.702, 17.50.705 through 17.50.710, 17.50.715, 17.50.716, and 17.50.720 through 17.50.726 exactly as proposed. The department is not adopting the proposed amendments to ARM 17.50.403, 17.50.410, and New Rule X in this rulemaking. The department has adopted ARM 17.50.502, 17.50.508, New Rules I (17.50.507), III (17.50.1002), IV (17.50.1003), V (17.50.1004), VI (17.50.1005), VII (17.50.1006), VIII (17.50.1007), IX (17.50.1008), XI (17.50.1009), XIII (17.50.1102), XXII (17.50.1111), XXIV (17.50.1113), XXVII (17.50.1116), XXVIII (17.50.1117), XXIX (17.50.1118), XXXI (17.50.1202), XXXII (17.50.1203), XXXIII (17.50.1204), XXXIV (17.50.1205), XXXVI (17.50.1302), XXXVII (17.50.1303), XXXVIII (17.50.1304), XXXIX (17.50.1305), XL (17.50.1306), XLI (17.50.1307), XLII (17.50.1308), XLIII (17.50.1309), XLIV (17.50.1310), XLV (17.50.1311), XLVIII (17.50.1402), XLIX (17.50.1403), L (17.50.1404), and LI (17.50.1405) as proposed,

but with the following changes (stricken matter interlined, new matter underlined). In some rules commas have been added or stricken without changing the substantive meaning of the rules. The department has made findings concerning rules that have been determined to be more stringent than comparable federal regulations or guidelines addressing the same circumstances in a document dated January 29, 2010, and entitled Montana Department of Environmental Quality's Written Findings, Pursuant to Section 75-10-107, MCA, (House Bill 521), for Amendment and Adoption of Rules Proposed in MAR Notice No. 17-284 at Page 164, 2009 Montana Administrative Register, Issue Number 4 on February 26, 2009 and Page 1326, 2009 Montana Administrative Register, Issue Number 15 on August 13, 2009, Pertaining to the Licensing and Operation of Solid Waste Landfill Facilities. This document will be referred to in this notice as "Stringency Findings." It may be obtained by viewing or downloading it from the department's web site at http://deq.mt.gov/SolidWaste/LawsRules.mcpx, or by contacting the Department's Solid Waste Section Supervisor as follows: Ricknold Thompson, Solid Waste Section Supervisor, Department of Environmental Quality, PO Box 200901, Helena MT 59620-0901; Tel: 406-444-5345; Fax: 406-444-1374; Email: rithompson@mt.gov.

17.50.502 DEFINITIONS In addition to the definitions in 75-10-203, MCA, the following definitions apply to this subchapter:

(1) through (3) remain as proposed.

(4) "Clean fill" means soil, dirt, sand, gravel, rocks, and rebar-free concrete, emplaced free of charge to the ~~property owner~~ person placing the fill, in order to adjust or create topographic irregularities for agricultural or construction purposes.

(5) through (9) remain as proposed.

(10) ~~"Existing disposal unit" means a unit within the licensed waste boundary of a solid waste management facility.~~ "Existing," when used in conjunction with "unit" or a type of unit, means a unit that was licensed as a solid waste management system and was receiving solid waste as of October 9, 1993.

(11) "Facility" means property where solid waste management is occurring or has occurred. It includes all contiguous land and structures, other appurtenances, and improvements on the land ~~ever~~ used for management of solid waste.

(12) through (25) remain as proposed.

(26) "New," when used in conjunction with "unit" or a type of unit, means a unit that is not an existing unit.

(26) through (40) remain as proposed, but are renumbered (27) through (41).

~~(41) "Waste boundary" means the perimeter of the area approved by the department for disposal of solid waste that is located within the licensed boundary of a solid waste management facility.~~

(42) remains as proposed.

17.50.508 APPLICATION FOR SOLID WASTE MANAGEMENT SYSTEM LICENSE (1) Prior to disposing of solid waste or operating a solid waste management system or expanding a licensed boundary, a person shall submit to the department for approval an application for a license to construct and operate a solid waste management system. The applicant shall use the application form provided

by the department. The applicant shall provide at least the following information:

(a) through (x) remain as proposed.

(y) a copy of a proposed deed notation that meets the requirements in subchapter 11; and

(z) a demonstration required in ARM 17.50.1003 through 17.50.1008, if applicable~~; and~~

~~(aa) any other information determined by the department to be necessary to protect human health or the environment, and requested by the department~~.

(2) remains as proposed.

NEW RULE I (17.50.507) CLASS II LANDFILL UNIT RESEARCH, DEVELOPMENT, AND DEMONSTRATION PLANS (1) Except as provided in (6), the department may approve a research, development, and demonstration plan included as a condition in the license for a new Class II landfill unit, existing Class II landfill unit, or lateral expansion of ~~that~~ an existing Class II landfill unit, for which the licensee proposes to utilize innovative and new methods that vary from either or both of the following criteria if the Class II landfill unit has a leachate collection system designed and constructed to maintain less than a 30-centimeter depth of leachate on the liner:

(a) and (b) remain as proposed.

(2) The department may approve a research, development, or demonstration plan for a new Class II landfill unit, existing Class II landfill unit, or lateral expansion of ~~that~~ an existing Class II landfill unit, for which the licensee proposes to utilize innovative and new methods which vary from the final cover criteria of ARM 17.50.1403(1)(a), (1)(b), and (2)(a), provided the licensee demonstrates that the infiltration of liquid through the alternative cover system will not cause contamination of ground water or surface water, or cause leachate depth on the liner to exceed 30 centimeters.

(3) through (9) remain as proposed.

NEW RULE III (17.50.1002) DEFINITIONS In this subchapter, the following definitions apply:

(1) through (14) remain as proposed.

(15) "Existing ~~disposal unit~~," when used in conjunction with "unit" or a type of unit, has the meaning given in ARM 17.50.502.

(16) through (27) remain as proposed.

(28) "New," when used in conjunction with "unit" or a type of unit, has the meaning given in ARM 17.50.502.

(28) through (41) remain as proposed, but are renumbered (29) through (42).

NEW RULE IV (17.50.1003) AIRPORT SAFETY (1) The owner or operator of a new or existing Class II landfill unit, or a lateral expansion of ~~that~~ an existing Class II landfill unit, that is located within 10,000 feet (3,048 meters) of any airport runway end used by turbojet aircraft or within 5,000 feet (1,524 meters) of any airport runway end used by only piston-type aircraft shall submit for department approval a demonstration that the unit is designed and operated so that the landfill unit does not pose a bird hazard to aircraft. For a new Class II landfill unit, or a

lateral expansion of ~~that~~ an existing Class II landfill unit, the demonstration must be submitted with the application for license. For an existing Class II landfill unit for which the demonstration has not been submitted and approved, the owner or operator shall submit the demonstration to the department for approval within 60 days after being requested to do so by the department.

(2) remains as proposed.

(3) An owner or operator proposing to site a new Class II landfill unit, or lateral expansion of ~~that~~ an existing Class II landfill unit, within a five-mile radius of any airport runway end used by turbojet or piston-type aircraft shall notify the manager of the affected airport and the Federal Aviation Administration (FAA) of the proposal.

NEW RULE V (17.50.1004) FLOODPLAINS (1) The owner or operator of a new or existing Class II or ~~lined~~ Class IV landfill unit, or a lateral expansion of ~~that~~ an existing Class II or Class IV landfill unit, located in a 100-year floodplain shall submit for department approval a demonstration that the unit will not restrict the flow of the 100-year flood, reduce the temporary water storage capacity of the floodplain, or result in washout of solid waste so as to pose a hazard to human health and the environment. The owner or operator shall place the approved demonstration in the operating record and notify the department that it has been placed in the operating record.

(2) For a new Class II or ~~lined~~ Class IV landfill unit, or a lateral expansion of ~~that~~ an existing Class II or Class IV landfill unit, the demonstration in (1) must be submitted with the application for a license. ~~For an existing Class II or lined Class IV landfill unit for which the demonstration has not been submitted and approved, the owner or operator shall submit the demonstration to the department for approval within 45 days after being requested to do so by the department.~~

NEW RULE VI (17.50.1005) WETLANDS (1) A new Class II or ~~lined~~ Class IV landfill unit, or a lateral expansion of ~~that~~ an existing Class II or Class IV landfill unit, may not be located in wetlands, unless the owner or operator submits to the department for approval the following demonstrations:

(a) remains as proposed.

(b) the construction and operation of a Class II or ~~lined~~ Class IV landfill unit will not:

(i) through (iv) remains as proposed.

(c) the Class II or ~~lined~~ Class IV landfill unit will not cause or contribute to significant degradation of wetlands. The owner or operator shall demonstrate the integrity of the Class II or ~~lined~~ Class IV landfill unit and its ability to protect ecological resources, by addressing the following factors:

(i) erosion, stability, and migration potential of native wetland soils, muds, and deposits used to support the Class II or ~~lined~~ Class IV landfill unit;

(ii) erosion, stability, and migration potential of dredged and fill materials used to support the Class II or ~~lined~~ Class IV landfill unit;

(iii) the volume and chemical nature of the waste managed in the Class II or ~~lined~~ Class IV landfill unit;

(iv) through (e) remain as proposed.

NEW RULE VII (17.50.1006) FAULT AREAS (1) A new Class II ~~or lined Class IV~~ landfill unit, or a lateral expansion of ~~that~~ an existing Class II landfill unit, may not be located within 200 feet (60 meters) of a fault that has had displacement in Holocene time unless the owner or operator submits to the department for approval a demonstration that an alternative setback distance of less than 200 feet (60 meters) will prevent damage to the structural integrity of the Class II ~~or lined Class IV~~ landfill unit~~s~~ and will be protective of human health and the environment.

NEW RULE VIII (17.50.1007) SEISMIC AREAS (1) A new Class II ~~or lined Class IV~~ landfill unit, or a lateral expansion of ~~that~~ an existing Class II landfill unit, may not be located in a seismic impact zone, unless the owner or operator submits to the department for approval a report prepared by a Montana licensed professional engineer demonstrating that all landfill containment structures including, but not limited to, the landfill liner, leachate collection and removal system, ~~gas control system, landfill final cover,~~ and surface water control system~~,~~ are designed to resist the maximum horizontal acceleration in lithified earth material for the site. ~~An owner or operator of an existing Class II or lined Class IV landfill unit shall, within 45 days after being requested by the department to do so, submit to the department for approval the report required in the previous sentence.~~ The owner or operator shall place the approved report in the operating record and notify the department that it has been placed in the operating record.

NEW RULE IX (17.50.1008) UNSTABLE AREAS (1) An applicant for a license for a new Class II ~~or lined Class IV~~ landfill unit, or a lateral expansion of ~~that~~ an existing Class II landfill unit, located in an unstable area shall submit to the department for approval, with the application, a report prepared by a Montana licensed professional engineer demonstrating that the unit is designed to ensure that the integrity of the structural components of the unit will not be disrupted. ~~An owner or operator of an existing Class II or lined Class IV landfill unit shall, within 45 days after being requested by the department to do so, submit to the department for approval the report required in the previous sentence.~~ The owner or operator shall place the approved report in the operating record and notify the department that it has been placed in the operating record. When determining whether an area is unstable, the owner or operator shall consider the following factors, and any other factor determined by the department to be necessary to protect human health or the environment:

(a) through (c) remain as proposed.

NEW RULE XI (17.50.1009) LOCATION RESTRICTIONS (1) The owner or operator of a landfill facility shall comply with the following general locational requirements:

(a) through (g) remain as proposed.

(h) a Class III landfill may not ~~be located on the banks of or in a perennial, intermittent, or ephemeral stream, water saturated area, such as a marsh or deep gravel pit that contain exposed ground water, or wetland, unless the owner or operator submits to the department for approval the demonstrations required in~~

~~ARM 17.50.1005 to the same extent as required for a Class II or Class IV landfill unit~~ restrict the flow of the 100-year flood, reduce the temporary water storage capacity of the floodplain, or result in washout of solid waste so as to pose a hazard to human health, wildlife, or land or water resources; and

(i) the facility or solid waste management activity may not result in the destruction or adverse modification of the critical habitat of endangered or threatened species, as identified in 50 CFR Part 17~~; and~~

~~(j) any other locational requirement determined by the department to be necessary to protect human health or the environment~~.

NEW RULE XIII (17.50.1102) DEFINITIONS In this subchapter, the following definitions apply:

(1) through (10) remain as proposed.

(11) "Existing ~~disposal unit~~," when used in conjunction with "unit" or a type of unit, has the meaning given in ARM 17.50.502.

(12) through (21) remain as proposed.

(22) "New," when used in conjunction with "unit" or a type of unit, has the meaning given in ARM 17.50.502.

(22) through (28) remain as proposed, but are renumbered (23) through (29).

(30) "Special waste" has the meaning given in ARM 17.50.502.

(29) through (32) remain as proposed, but are renumbered (31) through (34).

NEW RULE XXII (17.50.1111) LIQUIDS RESTRICTIONS (1) Bulk or noncontainerized liquid waste may not be placed in a Class II landfill unit unless ~~approved in advance by the department, and~~:

(a) remains as proposed.

(b) the waste is leachate or gas condensate derived from the Class II landfill unit and the Class II landfill unit, whether it is a new or existing Class II landfill unit, or lateral expansion of ~~that~~ an existing Class II landfill unit, is designed with a composite liner and leachate collection and removal system as described in ARM 17.50.1204(1)(b). The owner or operator shall submit a demonstration to the department that the waste would meet the requirements of this rule, place the demonstration in the facility operating record, and notify the department that it has been placed in the operating record.

(2) through (2)(c) remain as proposed.

NEW RULE XXIV (17.50.1113) DEED NOTATION (1) The following requirements concerning deed notations apply to a solid waste landfill facility:

(a) Before the initial receipt of waste at the facility or, if the facility is licensed and accepting waste on [THE EFFECTIVE DATE OF THIS RULE], by [60 DAYS AFTER THE EFFECTIVE DATE OF THIS RULE], the owner of the land where a facility is located shall submit for department approval a notation to the deed to that land, or to some other instrument that is normally examined during title search. The notation must be submitted to the department on a form provided by the department and, if the notation covers less than all of the land in the deed, must be accompanied by a certified exhibit of the waste boundary that references the certificate of survey for the tract that encloses the facility. If the notation covers all of the land in the deed, then the notation must reference the certificate of survey for

that land. The notation must, in perpetuity, notify any potential purchaser of the land that:

(i) through (e) remain as proposed.

(2) For the purpose of this rule, "waste boundary" means the perimeter of the area approved by the department for disposal of solid waste that is located within the licensed boundary of a solid waste landfill facility.

NEW RULE XXVII (17.50.1116) OPERATING CRITERIA (1) remains as proposed.

(2) In addition to the requirements of ARM 17.50.509, the owner or operator of a solid waste management facility shall satisfy the following general operating requirements:

(a) through (c) remain as proposed.

(d) a resource recovery, recycling, or solid waste treatment facility and components must be designed, constructed, maintained, and operated to control litter, insects, rodents, odor, ~~aesthetics,~~ residues, wastewater, and air pollutants;

(e) and (f) remain as proposed.

NEW RULE XXVIII (17.50.1117) OPERATING CRITERIA FOR CLASS III LANDFILL UNITS (1) The owner or operator of a Class III landfill unit:

(a) through (c) remain as proposed.

(d) shall comply, to the same extent required of a Class II landfill unit, with:

(i) and (ii) remain as proposed.

(iii) ARM 17.50.1109, pertaining to run-on ~~and run-off~~ control systems;

(e) and (f) remain as proposed.

NEW RULE XXIX (17.50.1118) OPERATING CRITERIA FOR CLASS IV LANDFILL UNITS (1) The owner or operator of a Class IV landfill unit:

(a) shall control litter, odor, ~~aesthetics,~~ wastewater, and leachate;

(b) remain as proposed.

(c) may not accept liquid paints, solvents, glues, resins, dyes, oils, pesticides, putrescible organic materials, or any other household hazardous wastes. If these wastes have not been removed from buildings prior to demolition, the owner or operator of a Class IV landfill unit may not accept the wastes as demolition waste;

(d) and (e) remain as proposed.

(2) The owner or operator of a Class IV landfill unit shall comply, to the same extent required for a Class II landfill unit, with the:

(a) and (b) remain as proposed.

(c) ~~methane~~ explosive gas control requirements in ARM 17.50.1116(1);

(d) through (j) remain as proposed.

NEW RULE XXXI (17.50.1202) DEFINITIONS In this subchapter, the following definitions apply:

(1) through (6) remain as proposed.

(7) "Existing ~~disposal unit~~," when used in conjunction with "unit" or a type of unit, has the meaning given in ARM 17.50.502.

(8) through (14) remain as proposed.

(15) "New," when used in conjunction with "unit" or a type of unit, has the meaning given in ARM 17.50.502.

(15) through (17) remain as proposed, but are renumbered (16) through (18).

(19) "Underground drinking water source" means:

(a) an aquifer supplying drinking water for human consumption; or

(b) an aquifer in which the ground water contains less than 10,000 mg/L total dissolved solids.

(18) remains as proposed, but is renumbered (20).

NEW RULE XXXII (17.50.1203) SMALL COMMUNITY EXEMPTION

(1) The owner or operator of a new Class II or Class IV landfill unit, existing Class II or Class IV landfill unit, or lateral expansion of ~~that~~ an existing Class II or Class IV landfill unit, that disposes of less than 20 tons of municipal solid waste daily, based on an annual average, is exempt from ARM Title 17, chapter 50, subchapters 12 and 13, if there is no evidence of ground water contamination from that unit, or lateral expansion of ~~that~~ an existing Class II or Class IV landfill unit, and the unit, or lateral expansion of ~~that~~ an existing Class II or Class IV landfill unit, serves:

(a) through (b)(ii) remain as proposed.

(2) The owner or operator of a new Class II or Class IV landfill unit, existing Class II or Class IV landfill unit, or lateral expansion of ~~that~~ an existing Class II or Class IV landfill unit, that meets the criteria in (1)(a) or (b) shall place in the operating record information demonstrating this.

(3) Within 14 days after obtaining knowledge of ground water contamination resulting from the unit for which the exemption in (1)(a) or (b) has been claimed, the owner or operator of a new Class II or Class IV landfill unit, existing Class II or Class IV landfill unit, or lateral expansion of ~~that~~ an existing Class II or Class IV landfill unit, shall notify the department of such contamination and, thereafter, comply with ARM Title 17, chapter 50, subchapters 12 and 13.

(4) remains as proposed.

NEW RULE XXXIII (17.50.1204) DESIGN CRITERIA - CLASS II AND CLASS IV LANDFILL UNITS (1) An owner or operator of a new Class II or Class IV landfill unit, or a lateral expansion of ~~that~~ an existing Class II or Class IV landfill unit, may construct it only if the owner or operator has obtained department approval of a design that ~~meets applicable Montana ground water quality standards and that~~ either:

(a) ensures that the concentration values listed in Table 1 of this rule will not be exceeded ~~in the uppermost aquifer~~ at the relevant point of compliance, as specified by the department~~; or~~:

(i) for a Class II landfill unit, in the uppermost aquifer; or

(ii) for a Class IV landfill unit, in an underground drinking water source; or

(b) remains as proposed.

(2) When determining whether a design complies with (1)(a), the department shall consider at least the following factors:

(a) remains as proposed.

(b) the climatic factors of the area; and

(c) the volume and physical and chemical characteristics of the leachate~~; and~~

~~(d) any other matter determined by the department to be necessary to protect human health or the environment~~.

(3) The relevant point of compliance (RPOC) specified by the department pursuant to (1)(a) may not be ~~no~~ more than 150 meters from the ~~vertical surface located at the hydraulically downgradient limit of the unit~~ waste management unit boundary and must be on land owned by the owner of the Class II or Class IV landfill unit. ~~This vertical surface extends down into the uppermost aquifer. The RPOC must be located within the facility's licensed boundary.~~ In determining the RPOC, the department shall consider at least the following factors:

(a) through (f) remain as proposed.

(g) public health, safety, and welfare effects; and

(h) practicable capability of the owner or operator~~; and~~

~~(i) any other matter determined by the department to be necessary to protect human health or the environment~~.

~~(4) A liner design submitted under (1)(a) must provide ground water protection equivalent to the liner prescribed in (1)(b).~~

Table 1 remains as proposed.

NEW RULE XXXIV (17.50.1205) ADDITIONAL DESIGN CRITERIA - CLASS II AND CLASS IV LANDFILL UNITS (1) The owner or operator of a new Class II or Class IV landfill unit, or lateral expansion of ~~that~~ an existing Class II or Class IV landfill unit, also shall comply with the following design criteria and exceptions:

(a) a leachate collection system is not required for a landfill unit that has obtained department approval of a demonstration, pursuant to ARM 17.50.1303(2), that there is no potential for migration of a constituent in Appendix I or II to 40 CFR Part 258 (July 1, 2008) pursuant to ARM Title 17, chapter 50, subchapter 13; and

~~(b) a liner component consisting of compacted soil or compacted "in situ" subsoil must provide a hydraulic conductivity of no more than 1 x 10^{-7} cm/sec;~~

~~(c)~~ (b) a liner is not required for a Class IV landfill unit located within the approved ground water monitoring network of a licensed Class II landfill facility~~; and~~

~~(d) any other design standard determined by the department to be necessary to meet the requirements of [NEW RULE XXXIII(1)]~~.

(2) An owner or operator of a new Class II or Class IV landfill facility shall submit to the department for approval each landfill unit design plan, including any design specifications or applicable plans or documents developed pursuant to this chapter. The design plan must demonstrate compliance with the standards of ARM 17.50.1204(1) and (4).

(3) The owner or operator of a new Class II or Class IV landfill unit, or lateral expansion of ~~that~~ an existing Class II or Class IV landfill unit, shall design and construct a landfill unit leachate collection and leachate removal system required under this subchapter to:

(a) provide for accurate monitoring of the leachate level, measured to within one centimeter, on the liner or base of the unit, and the leachate volume removed from the unit; and

(b) provide a minimum slope at the base of the overlying leachate collection layer equal to at least two percent~~, and a maximum side slope on the liner less than~~

~~or equal to 33 percent, whenever soil or "in situ" subsoil is compacted for use as a liner component;~~

~~(c) provide for secondary containment, monitoring of leachate and removal system components, and monitoring of leachate in collection sumps within alternative liners;~~

~~(d) provide account for increased hydraulic head in the leachate removal system; and~~

~~(e) meet any other requirements determined by the department to be necessary to protect human health or the environment~~.

(4) An owner or operator of a Class II landfill unit may, if it obtains department approval, recirculate leachate to that unit ~~only~~ if ~~it:~~ the unit

~~(a)~~ is constructed with a composite liner, leachate collection, and leachate removal system~~; and~~

~~(b) meets any other requirements determined by the department to be necessary to meet the requirements of (1), and the department notifies the owner or operator of the other requirements by mail~~.

(5) At the time the owner or operator submits a design plan required in (2), the owner or operator of a Class II or Class IV landfill facility shall submit to the department for approval a construction quality control (CQC) and construction quality assurance (CQA) ~~manual~~ plan describing procedures that provide for conformance with the department-approved design plans required by (2).

(6) Within 60 days after construction of a Class II or Class IV landfill unit is completed, the owner or operator shall submit to the department for approval a final CQC and CQA report that describes, at a minimum, construction activities and deviations, and conformance with the ~~manual~~ plan required in (5).

(7) Within 60 days after construction of a Class II or Class IV landfill unit is completed, the owner or operator shall submit a certification, by an independent Montana licensed professional engineer, that the project was constructed according to the plans ~~and manual~~ required in (2) and (5).

NEW RULE XXXVI (17.50.1302) DEFINITIONS In this subchapter, the following definitions apply:

(1) through (8) remain as proposed.

(9) "Existing ~~disposal unit~~," when used in conjunction with "unit" or a type of unit, has the meaning given in ARM 17.50.502.

(10) through (13) remain as proposed.

(14) "New," when used in conjunction with "unit" or a type of unit, has the meaning given in ARM 17.50.502.

(14) through (19) remain as proposed, but are renumbered (15) through (20).

(21) "Underground drinking water source" means:

(a) an aquifer supplying drinking water for human consumption; or

(b) an aquifer in which the ground water contains less than 10,000 mg/1 total dissolved solids.

(20) and (21) remain as proposed, but are renumbered (22) and (23).

NEW RULE XXXVII (17.50.1303) APPLICABILITY OF LANDFILL GROUND WATER MONITORING AND CORRECTIVE ACTION (1) remains as proposed.

(2) Ground water monitoring requirements under ARM 17.50.1304 through 17.50.1307 for a Class II or Class IV landfill unit may be suspended by the department if the owner or operator submits, and obtains department approval for, a demonstration that there is no potential for migration of a constituent in Appendix I or II to 40 CFR Part 258 (July 1, 2008) from that Class II or Class IV landfill unit to the uppermost aquifer or underground drinking water source, as required in ARM 17.50.1204, during the active life of the unit and the post-closure care period. This demonstration must be certified by a qualified ground water scientist, and must be based upon:

(a) and (b) remain as proposed.

(3) The owner or operator of an existing Class II or Class IV landfill unit, or a lateral expansion of ~~that~~ an existing Class II or Class IV landfill unit, except one meeting the conditions of ARM 17.50.1203, shall comply with the ground water monitoring requirements of ARM Title 17, chapter 50, subchapters 5 through 14.

(4) through (6) remain as proposed.

NEW RULE XXXVIII (17.50.1304) GROUND WATER MONITORING SYSTEMS (1) An owner or operator required to monitor under this subchapter shall install a ground water monitoring system that consists of a sufficient number of wells, installed at appropriate locations and depths, to yield ground water samples from the uppermost aquifer, or underground drinking water source, as required in ARM 17.50.1204, that:

(a) through (a)(ii) remain as proposed.

(b) represent the quality of ground water passing the relevant point of compliance specified by the department under ARM 17.50.1204(3). The downgradient monitoring system must be installed at the relevant point of compliance specified by the department under ARM 17.50.1204(3) that ensures detection of ground water contamination in the uppermost aquifer, or underground drinking water source, as required in ARM 17.50.1204. When physical obstacles preclude installation of ground water monitoring wells at the relevant point of compliance at existing ~~disposal~~ units, the downgradient monitoring system may be installed at the closest practicable distance hydraulically downgradient from the relevant point of compliance specified by the department under ARM 17.50.1204(3) that ensures detection of ground water contamination in the uppermost aquifer, or underground drinking water source, as required in ARM 17.50.1204.

(2) through (3) remain as proposed.

(4) The owner or operator of a Class II or Class IV landfill unit required to monitor under this subchapter shall:

(a) submit a ground water monitoring plan to the department for approval that includes:

(i) remain as proposed.

(ii) plans for the design, installation, development, and decommission of piezometers or other measurement, sampling, and analytical devices; and

(iii) discussions of the anticipated ground water monitoring system and schedule of sampling for closed portions of the facility, if applicable; ~~and~~

~~(iv) any other information determined by the department to be necessary to protect human health or the environment;~~

(b) update the ground water monitoring plan at least once every five years, except that a ground water monitoring plan for a closed facility must be updated at least every ten years; and

(c) notify the department that the approved ground water monitoring systems plan has been placed in the operating record~~; and~~

~~(d) provide any other information determined by the department to be necessary to protect human health or the environment~~.

(5) remains as proposed.

(6) The number, spacing, and depths of monitoring wells must be:

(a) determined based upon site-specific technical information that must include thorough characterization of:

(i) remains as proposed.

(ii) saturated and unsaturated geologic units and fill materials overlying the uppermost aquifer or underground drinking water source, as required in ARM 17.50.1204, materials comprising the uppermost aquifer or underground drinking water source, as required in ARM 17.50.1204, and materials comprising the confining unit defining the lower boundary of the uppermost aquifer or underground drinking water source, as required in ARM 17.50.1204 including, but not limited to, thicknesses, stratigraphy, lithology, hydraulic conductivities, porosities, and effective porosities; and

(b) remains as proposed.

(7) The drilling and construction of a ground water monitoring well at a solid waste management system may be subject to the requirements of Title 36, chapter 21, subchapters 4, 7, and 8.

NEW RULE XXXIX (17.50.1305) GROUND WATER SAMPLING AND ANALYSIS REQUIREMENTS (1) An owner or operator required to monitor ground water under this subchapter shall implement a ground water monitoring program that includes consistent sampling and analysis procedures that are designed to ensure monitoring results that provide an accurate representation of ground water quality at the background and downgradient wells installed in compliance with 17.50.1304(1). The owner or operator shall submit to the department for approval a sampling and analysis plan that documents sampling and analysis procedures and techniques for:

(a) through (c) remains as proposed.

(d) chain of custody control; and

(e) quality assurance and quality control~~; and~~

~~(f) any other matter determined by the department to be necessary to protect human health or the environment~~.

(2) remains as proposed.

(3) The ground water monitoring program required in (1) must include sampling and analytical methods that are appropriate for ground water sampling and that accurately measure constituents and parameters that are required to be monitored in ground water samples. ~~Ground water samples may not be field-filtered prior to laboratory analysis.~~ Any requirement in this subchapter for analysis of the concentration in ground water of a metal listed in Appendix I or II to 40 CFR Part 258 (July 1, 2008) is for analysis of the dissolved metal concentration, unless

another alternative for analysis is approved in writing by the department on an individual facility basis.

(4) through (11)(b) remain as proposed.

NEW RULE XL (17.50.1306) DETECTION MONITORING PROGRAM

(1) through (~~4~~)(e) remain as proposed.

(5) If the owner or operator of a Class II or Class IV landfill unit, or the department, determines, pursuant to ARM 17.50.1304(8), that there is a statistically significant increase over the background level for a constituent or parameter other than pH required to be monitored in this rule, at any monitoring well at the boundary specified under ARM 17.50.1304(1)(b), the owner or operator shall:

(a) and (b) remain as proposed.

(6) If pH is a parameter of an alternative list established under (3), and if the department determines that there has been a statistically significant ~~change on an alternative list established under (3)~~ decrease from background in pH, at a monitoring well at the boundary specified under ARM 17.50.1304(1)(b), and that assessment monitoring is necessary to protect human health or the environment, the department shall notify the owner or operator of the Class II or Class IV landfill unit of the determination, and the owner or operator shall give notice and establish assessment monitoring as required in (5).

(7) remains as proposed.

Appendix I to 40 CFR Part 258 (July 1, 2008)
Constituents for Detection Monitoring

Common name[1]	CAS RN[2]
Inorganic Constituents:	
(1) Antimony	~~(Total)~~
(2) Arsenic	~~(Total)~~
(3) Barium	~~(Total)~~
(4) Beryllium	~~(Total)~~
(5) Cadmium	~~(Total)~~
(6) Chromium	~~(Total)~~
(7) Cobalt	~~(Total)~~
(8) Copper	~~(Total)~~
(9) Lead	~~(Total)~~
(10) Nickel	~~(Total)~~
(11) Selenium	~~(Total)~~
(12) Silver	~~(Total)~~
(13) Thallium	~~(Total)~~
(14) Vanadium	~~(Total)~~
(15) Zinc	~~(Total)~~
Organic Constituents:	
(16) Acetone	67-64-1
(17) Acrylonitrile	107-13-1

(18)	Benzene	71-43-2
(19)	Bromochloromethane	74-97-5
(20)	Bromodichloromethane	75-27-4
(21)	Bromoform; Tribromomethane	75-25-2
(22)	Carbon disulfide	75-15-0
(23)	Carbon tetrachloride	56-23-5
(24)	Chlorobenzene	108-90-7
(25)	Chloroethane; Ethyl chloride	75-00-3
(26)	Chloroform; Trichloromethane	67-66-3
(27)	Dibromochloromethane; Chlorodibromomethane	124-48-1
(28)	1,2-Dibromo-3-chloropropane; DBCP	96-12-8
(29)	1,2-Dibromoethane; Ethylene dibromide; EDB	106-93-4
(30)	o-Dichlorobenzene; 1,2-Dichlorobenzene	95-50-1
(31)	p-Dichlorobenzene; 1,4-Dichlorobenzene	106-46-7
(32)	trans-1, 4-Dichloro-2-butene	110-57-6
(33)	1,1-Dichlorethane; Ethylidene chloride	75-34-3
(34)	1,2-Dichlorethane; Ethylene dichloride	107-06-2
(35)	1,1-Dichloroethylene; 1,1-Dichloroethene; Vinylidene chloride	75-35-4
(36)	cis-1,2-Dichloroethylene; cis-1,2-Dichloroethene	156-59-2
(37)	trans-1, 2-Dichloroethylene; trans-1,2-Dichloroethene	156-60-5
(38)	1,2-Dichloropropane; Propylene dichloride	78-87-5
(39)	cis-1,3-Dichloropropene	10061-01-5
(40)	trans-1,3-Dichloropropene	10061-02-6
(41)	Ethylbenzene	100-41-4
(42)	2-Hexanone; Methyl butyl ketone	591-78-6
(43)	Methyl bromide; Bromomethane	74-83-9
(44)	Methyl chloride; Chloromethane	74-87-3
(45)	Methylene bromide; Dibromomethane	74-95-3
(46)	Methylene chloride; Dichloromethane	75-09-2
(47)	Methyl ethyl ketone; MEK; 2-Butanone	78-93-3
(48)	Methyl iodide; Idomethane	74-88-4
(49)	4-Methyl-2-pentanone; Methyl isobutyl ketone	108-10-1
(50)	Styrene	100-42-5
(51)	1,1,1,2-Tetrachloroethane	630-20-6
(52)	1,1,2,2-Tetrachloroethane	79-34-5
(53)	Tetrachloroethylene; Tetrachloroethene; Perchloroethylene	127-18-4
(54)	Toluene	108-88-3
(55)	1,1,1-Trichloroethane; Methylchloroform	71-55-6
(56)	1,1,2-Trichloroethane	79-00-5
(57)	Trichloroethylene; Trichloroethene	79-01-6
(58)	Trichlorofluoromethane; CFC-11	75-69-4
(59)	1,2,3-Trichloropropane	96-18-4
(60)	Vinyl acetate	108-05-4
(61)	Vinyl chloride	75-01-4
(62)	Xylenes	1330-20-7

Footnote 1 remains as proposed.

[2]Chemical Abstract Service registry number. ~~Where "Total" is entered, all species in the ground water that contain this element are included~~

NEW RULE XLI (17.50.1307) ASSESSMENT MONITORING PROGRAM

(1) and (2) remain as proposed.

(3) The department may specify, and an owner or operator shall comply with, an appropriate alternate frequency for repeated sampling and analysis of the constituents in Appendix II to 40 CFR Part 258 (July 1, 2008) required by (2), during the active life ~~of the unit, including~~ and closure and post-closure care periods of the unit, considering the following factors:

(a) through (f) remain as proposed.

(4) After obtaining the results from the initial or subsequent sampling events required in (2), the owner or operator shall:

(a) remains as proposed.

(b) within 90 days, and on at least a semiannual basis thereafter, resample all wells described in ARM 17.50.1304(1), conduct analyses for all constituents in Appendix I to 40 CFR Part 258 (July 1, 2008) or in the alternative list of parameters established in accordance with ARM 17.50.1306(3), and for those constituents in Appendix II to 40 CFR Part 258 (July 1, 2008) that are detected by monitoring required by (2), and record their concentrations in the facility operating record. At least one sample from each background and downgradient well must be collected and analyzed during these sampling events. If specified by the department, the owner or operator shall conduct sampling and analyses under this subsection at an alternative frequency during the active life ~~of the unit, including~~ and closure and the post-closure care periods of the unit. The alternative frequency may be no less frequent than annual during the active life of the unit, including closure. The alternative frequency must be based on consideration of the factors specified in (3);

(c) through (9)(d) remain as proposed.

(10) In proposing a ground water quality standard under (9), the department shall consider the following:

(a) and (b) remain as proposed.

(c) other site-specific exposure or potential exposure to ground water.

Appendix II to 40 CFR Part 258 (July 1, 2008)
List of Hazardous Inorganic and Organic Constituents

Common name[1]	CAS RN[2]	Chemical abstracts service index name[3]
Acenaphthene	83-32-9	Acenaphthylene, 1,2-dihydro-
Acenaphthylene	208-96-8	Acenaphthylene
Acetone	67-64-1	2-Propanone
Acetonitrile; Methyl cyanide	75-05-8	Acetonitrile
Acetophenone	98-86-2	Ethanone, 1-phenyl-
2-Acetylaminofluorene; 2-AAF	53-96-3	Acetamide, N-9H-fluoren-2-yl-

Acrolein	107-02-8	2-Propenal
Acrylonitrile	107-13-1	2-Propenenitrile
Aldrin	309-00-2	1,4:5,8-Dimethanonaphthalene, 1,2,3,4,10,10-hexachloro-1,4,4a,5,8,8a-hexahydro-(1,4,4a,5,8,8a)-
Allyl chloride	107-05-1	1-Propene, 3-chloro-
4-Aminobiphenyl	92-67-1	[1,1′-Biphenyl]-4-amine
Anthracene	120-12-7	Anthracene
Antimony	~~(Total)~~	Antimony
Arsenic	~~(Total)~~	Arsenic
Barium	~~(Total)~~	Barium
Benzene	71-43-2	Benzene
Benzo[a]anthracene; Benzanthracene	56-55-3	Benz[a]anthracene
Benzo[b]fluoranthene	205-99-2	Benz[e]acephenanthrylene
Benzo[k]fluoranthene	207-08-9	Benzo[k]fluoranthene
Benzo[ghi]perylene	191-24-2	Benzo[ghi]perylene
Benzo[a]pyrene	50-32-8	Benzo[a]pyrene
Benzyl alcohol	100-51-6	Benzenemethanol
Beryllium	~~(Total)~~	Beryllium
alpha-BHC	319-84-6	Cyclohexane, 1,2,3,4,5,6-hexachloro-,(1α,2α,3β,4α,5β,6β)-
beta-BHC	319-85-7	Cyclohexane, 1,2,3,4,5,6-hexachloro-,(1α,2β,3α,4β,5α,6β)-
delta-BHC	319-86-8	Cyclohexane, 1,2,3,4,5,6-hexachloro-,(1α,2α,3α,4β,5α,6β)-
gamma-BHC; Lindane	58-89-9	Cyclohexane, 1,2,3,4,5,6- hexachloro-,(1α,2α, 3β, 4α,5α,6β)-
Bis(2-chloroethoxy)methane	111-91-1	Ethane, 1,1′-[methylenebis (oxy)]bis [2-chloro-
Bis(2-chloroethyl)ether; Dichloroethyl ether	111-44-4	Ethane, 1,1′-oxybis[2-chloro-
Bis(2-chloro-1-methylethyl) ether; 2,2′-Dichlorodiisopropyl	108-60-1	Propane, 2,2′-oxybis[1-chloro-

ether; DCIP, See footnote 4		
Bis(2-ethylhexyl) phthalate	117-81-7	1,2-Benzenedicarboxylic acid, bis(2-ethylhexyl)ester
Bromochloromethane; Chlorobromethane	74-97-5	Methane, bromochloro-
Bromodichloromethane; Dibromochloromethane	75-27-4	Methane, bromodichloro-
Bromoform; Tribromomethane	75-25-2	Methane, tribromo-
4-Bromophenyl phenyl ether	101-55-3	Benzene, 1-bromo-4-phenoxy-
Butyl benzyl phthalate; Benzyl butyl phthalate	85-68-7	1,2-Benzenedicarboxylic acid, butyl phenylmethyl ester
Cadmium	~~(Total)~~	Cadmium
Carbon disulfide	75-15-0	Carbon disulfide
Carbon tetrachloride	56-23-5	Methane, tetrachloro-
Chlordane	See footnote 5	4,7-Methano-1H-indene, 1,2,4,5,6,7,8,8-octachloro-2,3,3a,4,7,7a-hexahydro-
p-Chloroaniline	106-47-8	Benzenamine, 4-chloro-
Chlorobenzene	108-90-7	Benzene, chloro-
Chlorobenzilate	510-15-6	Benzeneacetic acid, 4-chloro--(4-chlorophenyl)--hydroxy-, ethyl ester.
p-Chloro-m-cresol; 4-Chloro-3-methylphenol	59-50-7	Phenol, 4-chloro-3-methyl-
Chloroethane; Ethyl chloride	75-00-3	Ethane, chloro-
Chloroform; Trichloromethane	67-66-3	Methane, trichloro-
2-Chloronaphthalene	91-58-7	Naphthalene, 2-chloro-
2-Chlorophenol	95-57-8	Phenol, 2-chloro-
4-Chlorophenyl phenyl ether	7005-72-3	Benzene, 1-chloro-4-phenoxy-
Chloroprene	126-99-8	1,3-Butadiene, 2-chloro-
Chromium	~~(Total)~~	Chromium
Chrysene	218-01-9	Chrysene
Cobalt	~~(Total)~~	Cobalt
Copper	~~(Total)~~	Copper

m-Cresol; 3-Methylphenol	108-39-4	Phenol, 3-methyl-
o-Cresol; 2-Methylphenol	95-48-7	Phenol, 2-methyl-
p-Cresol; 4-Methylphenol	106-44-5	Phenol, 4-methyl-
Cyanide	57-12-5	Cyanide
2,4-D; 2,4-Dichlorophenoxyacetic acid	94-75-7	Acetic acid, (2,4-dichlorophenoxy)-
4,4′-DDD	72-54-8	Benzene 1,1′-(2,2-dichloroethylidene) bis[4-chloro-
4,4′-DDE	72-55-9	Benzene, 1,1′-(dichloroethenylidene) bis[4-chloro-
4,4′-DDT	50-29-3	Benzene, 1,1′-(2,2,2-trichloroethylidene) bis[4-chloro-
Diallate	2303-16-4	Carbamothioic acid, bis(1-methylethyl)-, S- (2,3-dichloro-2-propenyl) ester.
Dibenz[a,h]anthracene	53-70-3	Dibenz[a,h]anthracene
Dibenzofuran	132-64-9	Dibenzofuran
Dibromochloromethane; Chlorodibromomethane	124-48-1	Methane, dibromochloro-
1,2-Dibromo-3-chloropropane; DBCP	96-12-8	Propane, 1,2-dibromo-3-chloro-
1,2-Dibromoethane; Ethylene dibromide; EDB	106-93-4	Ethane, 1,2-dibromo-
Di-n-butyl phthalate	84-74-2	1,2-Benzenedicarboxylic acid, dibutyl ester
o-Dichlorobenzene; 1,2-Dichlorobenzene	95-50-1	Benzene, 1,2-dichloro-
m-Dichlorobenzene; 1,3-Dichlorobenzene	541-73-1	Benzene, 1,3-dichloro-
p-Dichlorobenzene; 1,4-Dichlorobenzene	106-46-7	Benzene, 1,4-dichloro-
3,3′-Dichlorobenzidine	91-94-1	[1,1′-Biphenyl]-4,4′-diamine, 3,3′-dichloro-
trans-1,4-Dichloro-2-butene	110-57-6	2-Butene, 1,4-dichloro-, (E)-
Dichlorodifluoromethane; CFC 12	75-71-8	Methane, dichlorodifluoro-
1,1-Dichloroethane;	75-34-3	Ethane, 1,1-dichloro-

Ethyldidene chloride		
1,2-Dichloroethane; Ethylene dichloride	107-06-2	Ethane, 1,2-dichloro-
1,1-Dichloroethylene; 1,1-Dichloroethene;	75-35-4	Ethene, 1,1-dichloro-
Vinylidene chloride cis-1,2-Dichloroethylene; cis-1,2-Dichloroethene	156-59-2	Ethene, 1,2-dichloro-(Z)-
trans-1,2-Dichloroethylene; trans-1,2-Dichloroethene	156-60-5	Ethene, 1,2-dichloro-, (E)-
2,4-Dichlorophenol	120-83-2	Phenol, 2,4-dichloro-
2,6-Dichlorophenol	87-65-0	Phenol, 2,6-dichloro-
1,2-Dichloropropane	78-87-5	Propane, 1,2-dichloro-
1,3-Dichloropropane; Trimethylene dichloride	142-28-9	Propane, 1,3-dichloro-
2,2-Dichloropropane; Isopropylidene chloride	594-20-7	Propane, 2,2-dichloro-
1,1-Dichloropropene	563-58-6	1-Propene, 1,1-dichloro-
cis-1,3-Dichloropropene	10061-01-5	1-Propene, 1,3-dichloro-, (Z)-
trans-1,3-Dichloropropene	10061-02-6	1-Propene, 1,3-dichloro-, (E)-
Dieldrin	60-57-1	2,7:3,6-Dimethanonaphth [2,3-b]oxirene, 3,4,5,6,9,9-hexachloro-1a,2,2a,3,6,6a,7,7a-octahydro-, (1aα,2β,2aα,3β,6β,6aα,7β,7aα)-
Diethyl phthalate	84-66-2	1,2-Benzenedicarboxylic acid, diethyl ester
O,O-Diethyl O-2-pyrazinyl phosphorothioate; Thionazin	297-97-2	Phosphorothioic acid, O,O-diethyl O-pyrazinyl ester.
Dimethoate	60-51-5	Phosphorodithioic acid, O,O-dimethyl S-[2-(methylamino)-2-oxoethyl] ester
p-(Dimethylamino)azobenzene	60-11-7	Benzenamine, N,N-dimethyl-4-(phenylazo)-
7,12-Dimethylbenz[a]anthracene	57-97-6	Benz[a]anthracene, 7,12-dimethyl-
3,3′-Dimethylbenzidine	119-93-7	[1,1′-Biphenyl]-4,4′-diamine, 3,3′-dimethyl-

alpha, alpha-Dimethylphenethylamine	122-09-8	Benzeneethanamine, α,α-dimethyl-
2,4-Dimethylphenol; m-Xylenol	105-67-9	Phenol, 2,4-dimethyl-
Dimethyl phthalate	131-11-3	1,2-Benzenedicarboxylic acid, dimethyl ester
m-Dinitrobenzene	99-65-0	Benzene, 1,3-dinitro-
4,6-Dinitro-o-cresol; 4,6-Dinitro-2-methylphenol	534-52-1	Phenol, 2-methyl-4,6-dinitro-
2,4-Dinitrophenol	51-28-5	Phenol, 2,4-dinitro-
2,4-Dinitrotoluene	121-14-2	Benzene, 1-methyl-2,4-dinitro-
2,6-Dinitrotoluene	606-20-2	Benzene, 2-methyl-1,3-dinitro-
Dinoseb; DNBP; 2-sec-Butyl-4,6-dinitrophenol	88-85-7	Phenol, 2-(1-methylpropyl)-4,6-dinitro-
Di-n-octyl phthalate	117-84-0	1,2-Benzenedicarboxylic acid, dioctyl ester
Diphenylamine	122-39-4	Benzenamine, N-phenyl-
Disulfoton	298-04-4	Phosphorodithioic acid, O,O-diethyl S-[2- (ethylthio)ethyl] ester
Endosulfan I	959-98-8	6,9-Methano-2,4,3-benzodiox-athiepin, 6,7,8,9,10,10-hexachloro-1,5,5a,6,9,9a-hexahydro-, 3-oxide,
Endosulfan II	33213-65-9	6,9-Methano-2,4,3-benzodioxathiepin, 6,7,8,9,10,10-hexachloro-1,5,5a,6,9,9a-hexahydro-, 3-oxide, (3α,5aα,6β,9β, 9aα)-
Endosulfan sulfate	1031-07-8	6,9-Methano-2,4,3-benzodioxathiepin, 6,7,8,9,10,10-hexachloro-1,5,5a,6,9,9a-hexahydro-, 3,3-dioxide
Endrin	72-20-8	2,7:3,6-Dimethanonaphth[2,3-b]oxirene, 3,4,5,6,9,9-hexachloro-1a,2,2a,3,6,6a,7,7a-octahydro-, (1aα, 2β,2aβ, 3α,6α,6aβ,7β,7aα)-
Endrin aldehyde	7421-93-4	1,2,4-Methenocyclo-penta[cd]pentalene-5-carboxaldehyde,2,2a,3,3,4,7-hexachlorodecahydro-(1α,2β,2aβ,4β,4aβ,5β,6aβ,6bβ,7R*)-
Ethylbenzene	100-41-4	Benzene, ethyl-

Ethyl methacrylate	97-63-2	2-Propenoic acid, 2-methyl-, ethyl ester
Ethyl methanesulfonate	62-50-0	Methanesulfonic acid, ethyl ester
Famphur	52-85-7	Phosphorothioic acid, O-[4-[(dimethylamino)sulfonyl]phenyl]-O,O-dimethyl ester
Fluoranthene	206-44-0	Fluoranthene
Fluorene	86-73-7	9H-Fluorene
Heptachlor	76-44-8	4,7-Methano-1H-indene,1,4,5,6,7,8,8-heptachloro-3a,4,7,7a-tetrahydro-
Heptachlor epoxide	1024-57-3	2,5-Methano-2H-indeno[1,2-b]oxirene, 2,3,4,5,6,7,7-heptachloro-1a,1b,5,5a,6,6a,-hexahydro-,(1aα,1bβ,2α,5α,5aβ,6β,6aα)
Hexachlorobenzene	118-74-1	Benzene, hexachloro-
Hexachlorobutadiene	87-68-3	1,3-Butadiene, 1,1,2,3,4,4-hexachloro-
Hexachlorocyclopentadiene	77-47-4	1,3-Cyclopentadiene, 1,2,3,4,5,5-hexachloro-
Hexachloroethane	67-72-1	Ethane, hexachloro-
Hexachloropropene	1888-71-7	1-Propene, 1,1,2,3,3,3-hexachloro-
2-Hexanone; Methyl butyl ketone	591-78-6	2-Hexanone
Indeno(1,2,3-cd)pyrene	193-39-5	Indeno[1,2,3-cd]pyrene
Isobutyl alcohol	78-83-1	1-Propanol, 2-methyl-
Isodrin	465-73-6	1,4,5,8-Dimethanonaphthalene,1,2,3,4,1 0,10-hexachloro-1,4,4a,5,8,8a hexahydro-(1α, 4α, 4aβ,5β,8β,8aβ)-
Isophorone	78-59-1	2-Cyclohexen-1-one, 3,5,5-trimethyl-
Isosafrole	120-58-1	1,3-Benzodioxole, 5-(1-propenyl)-
Kepone	143-50-0	1,3,4-Metheno-2H-cyclobuta-[cd]pentalen-2-one, 1,1a,3,3a,4,5,5,5a,5b,6-decachlorooctahydro-
Lead	~~(Total)~~	Lead
Mercury	~~(Total)~~	Mercury
Methacrylonitrile	126-98-7	2-Propenenitrile, 2-methyl-

Methapyrilene	91-80-5	1,2,Ethanediamine, N,N-dimethyl-N′-2-pyridinyl-N′-(2-thienylmethyl)-
Methoxychlor	72-43-5	Benzene, 1,1′-(2,2,2,trichloroethylidene)bis [4-methoxy-
Methyl bromide; Bromomethane	74-83-9	Methane, bromo-
Methyl chloride; Chloromethane	74-87-3	Methane, chloro-
3-Methylcholanthrene	56-49-5	Benz[j]aceanthrylene, 1,2-dihydro-3-methyl-
Methyl ethyl ketone; MEK; 2-Butanone	78-93-3	2-Butanone
Methyl iodide; Iodomethane	74-88-4	Methane, iodo-
Methyl methacrylate	80-62-6	2-Propenoic acid, 2-methyl-, methyl ester
Methyl methanesulfonate	66-27-3	Methanesulfonic acid, methyl ester
2-Methylnaphthalene	91-57-6	Naphthalene, 2-methyl-
Methyl parathion; Parathion methyl	298-00-0	Phosphorothioic acid, O,O-dimethyl
4-Methyl-2-pentanone; Methyl isobutyl ketone	108-10-1	2-Pentanone, 4-methyl-
Methylene bromide; Dibromomethane	74-95-3	Methane, dibromo-
Methylene chloride; Dichloromethane	75-09-2	Methane, dichloro-
Naphthalene	91-20-3	Naphthalene
1,4-Naphthoquinone	130-15-4	1,4-Naphthalenedione
1-Naphthylamine	134-32-7	1-Naphthalenamine
2-Naphthylamine	91-59-8	2-Naphthalenamine
Nickel	~~(Total)~~	Nickel
o-Nitroaniline; 2-Nitroaniline	88-74-4	Benzenamine, 2-nitro-
m-Nitroaniline; 3-Nitroaniline	99-09-2	Benzenamine, 3-nitro-
p-Nitroaniline; 4-Nitroaniline	100-01-6	Benzenamine, 4-nitro-
Nitrobenzene	98-95-3	Benzene, nitro-

o-Nitrophenol; 2-Nitrophenol	88-75-5	Phenol, 2-nitro-
p-Nitrophenol; 4-Nitrophenol	100-02-7	Phenol, 4-nitro-
N-Nitrosodi-n-butylamine	924-16-3	1-Butanamine, N-butyl-N-nitroso-
N-Nitrosodiethylamine	55-18-5	Ethanamine, N-ethyl-N-nitroso-
N-Nitrosodimethylamine	62-75-9	Methanamine, N-methyl-N-nitroso-
N-Nitrosodiphenylamine	86-30-6	Benzenamine, N-nitroso-N-phenyl-
N-Nitrosodipropylamine; N-Nitroso-N-dipropylamine; Di-n-propylnitrosamine	621-64-7	1-Propanamine, N-nitroso-N-propyl-
N-Nitrosomethylethalamine	10595-95-6	Ethanamine, N-methyl-N-nitroso-
N-Nitrosopiperidine	100-75-4	Piperidine, 1-nitroso-
N-Nitrosopyrrolidine	930-55-2	Pyrrolidine, 1-nitroso-
5-Nitro-o-toluidine	99-55-8	Benzenamine, 2-methyl-5-nitro-
Parathion	56-38-2	Phosphorothioic acid, O,O-diethyl-O-(4-nitrophenyl) ester
Pentachlorobenzene	608-93-5	Benzene, pentachloro-
Pentachloronitrobenzene	82-68-8	Benzene, pentachloronitro-
Pentachlorophenol	87-86-5	Phenol, pentachloro-
Phenacetin	62-44-2	Acetamide, N-(4-ethoxyphenyl)
Phenanthrene	85-01-8	Phenanthrene
Phenol	108-95-2	Phenol
p-Phenylenediamine	106-50-3	1,4-Benzenediamine
Phorate	298-02-2	Phosphorodithioic acid, O,O-diethyl S-[(ethylthio)methyl] ester
Polychlorinated biphenyls; PCBs	See footnote 6	1,1′-Biphenyl, chloro derivatives
Pronamide	23950-58-5	Benzamide, 3,5-dichloro-N-(1,1-dimethyl-2-propynyl)-
Propionitrile; Ethyl cyanide	107-12-0	Propanenitrile
Pyrene	129-00-0	Pyrene
Safrole	94-59-7	1,3-Benzodioxole, 5-(2- propenyl)-
Selenium	~~(Total)~~	Selenium
Silver	~~(Total)~~	Silver

Silvex; 2,4,5-TP	93-72-1	Propanoic acid, 2-(2,4,5-trichlorophenoxy)-
Styrene	100-42-5	Benzene, ethenyl-
Sulfide	18496-25-8	Sulfide
2,4,5-T; 2,4,5-Trichlorophenoxyacetic acid	93-76-5	Acetic acid, (2,4,5- trichlorophenoxy)-
2,3,7,8-TCDD; 2,3,7,8-Tetrachlorodibenzo- p-dioxin	1746-01-6	Dibenzo[b,e][1,4]dioxin, 2,3,7,8-tetrachloro-
1,2,4,5-Tetrachlorobenzene	95-94-3	Benzene, 1,2,4,5-tetrachloro-
1,1,1,2-Tetrachloroethane	630-20-6	Ethane, 1,1,1,2-tetrachloro-
1,1,2,2-Tetrachloroethane	79-34-5	Ethane, 1,1,2,2-tetrachloro-
Tetrachloroethylene; Tetrachloroethene; Perchloroethylene	127-18-4	Ethene, tetrachloro-
2,3,4,6-Tetrachlorophenol	58-90-2	Phenol, 2,3,4,6-tetrachloro-
Thallium	~~(Total)~~	Thallium
Tin	~~(Total)~~	Tin
Toluene	108-88-3	Benzene, methyl-
o-Toluidine	95-53-4	Benzenamine, 2-methyl-
Toxaphene	See footnote 7	Toxaphene
1,2,4-Trichlorobenzene	120-82-1	Benzene, 1,2,4-trichloro-
1,1,1-Trichloroethane; Methylchloroform	71-55-6	Ethane, 1,1,1-trichloro-
1,1,2-Trichloroethane	79-00-5	Ethane, 1,1,2-trichloro-
Trichloroethylene; Trichloroethene	79-01-6	Ethene, trichloro-
Trichlorofluoromethane; CFC-11	75-69-4	Methane, trichlorofluoro-
2,4,5-Trichlorophenol	95-95-4	Phenol, 2,4,5-trichloro-
2,4,6-Trichlorophenol	88-06-2	Phenol, 2,4,6-trichloro-
1,2,3-Trichloropropane	96-18-4	Propane, 1,2,3-trichloro-
O,O,O-Triethyl phosphorothioate	126-68-1	Phosphorothioic acid, O,O,O-triethyl ester
sym-Trinitrobenzene	99-35-4	Benzene, 1,3,5-trinitro-

Vanadium	~~(Total)~~	Vanadium
Vinyl acetate	108-05-4	Acetic acid, ethenyl ester
Vinyl chloride; Chloroethene	75-01-4	Ethene, chloro-
Xylene (total)	See footnote 8	Benzene, dimethyl-
Zinc	~~(Total)~~	Zinc

Footnote 1 remains as proposed.

[2]Chemical Abstracts Service registry number. ~~Where "Total" is entered, all species in the ground water that contain this element are included.~~

Footnotes (3) through (8) remain as proposed.

NEW RULE XLII (17.50.1308) ASSESSMENT OF CORRECTIVE MEASURES (1) Within 90 days after a determination is made pursuant to ARM 17.50.1307 that a constituent listed in Appendix II to 40 CFR Part 258 (July 1, 2008) has been detected at a statistically significant level exceeding the ground water protection standards defined under ARM 17.50.1307(8), ~~or applicable Montana ground water quality standards,~~ the owner or operator of a facility shall:

(a) remains as proposed.

(b) submit to the department for approval an assessment of corrective measures that addresses the criteria listed in (3) ~~and any other criteria determined by the department to be necessary to protect human health or the environment~~.

(2) through (4) remain as proposed.

NEW RULE XLIII (17.50.1309) SELECTION OF REMEDY (1) Based on the results of a corrective measures assessment conducted under ARM 17.50.1308, the owner or operator of a facility shall:

(a) remains as proposed.

(b) submit to the department for approval, within 90 days after the date of the department's approval of the assessment of corrective measures ~~plan~~ required in ARM 17.50.1308, a selected remedy report describing how the selected remedy would meet the standards in (2) through (4), and how it would be implemented;

(c) through (3)(e) remain as proposed.

(4) An owner or operator required by (1) to select a remedy shall specify as part of the selected remedy a schedule(s) for initiating and completing remedial activities. Such a schedule must require the initiation of remedial activities within a reasonable period of time, taking into consideration the factors in (4)(a) through ~~(h)~~ (f). The owner or operator shall consider the following factors in determining the schedule of remedial activities:

(a) through (d) remain as proposed.

(e) potential risks to human health and the environment from exposure to contamination prior to completion of the remedy; and

(f) resource value of the aquifer, including:

(i) through (vii) remain as proposed.

(viii) the practicable capability of the owner or operator~~; and~~

~~(g) any other factor determined by the department to be necessary to protect human health or the environment~~.

(5) through (6) remain as proposed.

NEW RULE XLIV (17.50.1310) IMPLEMENTATION OF THE CORRECTIVE ACTION PROGRAM (1) Based on the schedule established under ARM 17.50.1309(4) for initiation and completion of remedial activities, an owner or operator required by ARM 17.50.1309 to select a remedy shall:

(a) through (a)(iii) remain as proposed.

(b) implement the corrective action remedy selected under ARM 17.50.1309; and

(c) submit for department approval, and if approved, take any interim measures necessary to ensure the protection of human health and the environment. Interim measures must, to the greatest extent practicable, be consistent with the objectives of, and contribute to the performance of, any remedy that may be required pursuant to ARM 17.50.1309. The following factors must be considered by an owner or operator and the department in determining whether interim measures are necessary:

(i) through (vi) remain as proposed.

(vii) other situations that may pose threats to human health and the environment~~; and~~

~~(d) submit to the department, by April 1 of each year, an annual corrective measures progress report. The progress report must cover the preceding 12-month period. The progress report must include the following information:~~

~~(i) a description of all corrective action work completed;~~

~~(ii) all relevant sampling and analysis data;~~

~~(iii) summaries of all deviations from the selected remedy;~~

~~(iv) summaries of all problems or potential problems encountered and any actions taken to rectify the problems;~~

~~(v) an updated schedule for achieving compliance with all applicable standards; and~~

~~(vi) any other information determined by the department to be necessary to protect human health or the environment~~.

(2) through (8) remain as proposed.

NEW RULE XLV (17.50.1311) HYDROGEOLOGIC AND SOILS CHARACTERIZATION (1) through (1)(b)(iii) remain as proposed.

(2) A hydrogeologic and soils report required in (1) must include the following:

(a) through (b) remain as proposed.

(c) a description of the hydrogeologic units that overlie the uppermost aquifer or underground drinking water source, as required in ARM 17.50.1204, or that may be part of the leachate migration pathways at the facility, including saturated and unsaturated units;

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

(g) any other information determined by the department to be necessary to

~~protect human health or the environment~~ adequately characterize the hydrogeologic characteristics of the solid waste landfill facility.

(3) through (3)(e) remain as proposed.

NEW RULE XLVIII (17.50.1402) DEFINITIONS In this subchapter, the following definitions apply:

(1) through (6) remain as proposed.

(7) "Existing ~~disposal unit~~," when used in conjunction with "unit" or a type of unit, has the meaning given in ARM 17.50.502.

(8) through (16) remain as proposed.

NEW RULE XLIX (17.50.1403) CLOSURE CRITERIA (1) through (3)(c) remain as proposed.

(4) The owner or operator of a Class II or Class IV landfill unit, or a lateral expansion of ~~that~~ an existing Class II or Class IV landfill unit, shall submit a closure plan to the department for approval that describes the steps necessary to close all Class II and Class IV landfill units and lateral expansions at the facility at any point during their active life in accordance with the cover design requirements in (1) or (2), as applicable. The closure plan must include, at a minimum, the following information ~~and any other information determined by the department to be necessary to protect human health or the environment~~:

(a) through (11) remain as proposed.

NEW RULE L (17.50.1404) POST-CLOSURE CARE REQUIREMENTS

(1) Following closure of a Class II or Class IV landfill unit, the owner or operator shall conduct post-closure care. Post-closure care must be conducted for 30 years, except as provided under (2), and consist of at least the following:

(a) and (b) remain as proposed.

(c) monitoring the ground water in accordance with the requirements of ARM Title 17, chapter 50, subchapter 13, and maintaining the ground water monitoring system, if applicable; and

(d) maintaining and operating the gas monitoring system in accordance with the requirements of ARM 17.50.1106~~; and~~

~~(e) any other measure determined by the department to be necessary to protect human health or the environment~~.

(2) through (2)(b) remain as proposed.

(3) The owner or operator of a Class II or Class IV landfill unit shall submit a post-closure plan to the department for approval that includes, at a minimum, the following information ~~and any other information determined by the department to be necessary to protect human health or the environment~~:

(a) through (8)(d) remain as proposed.

NEW RULE LI (17.50.1405) CLOSURE AND POST-CLOSURE CARE REQUIREMENTS FOR CLASS III LANDFILL UNITS (1) A Class III landfill unit closure plan required under ARM 17.50.508 must include, at a minimum:

(a) remains as proposed.

(b) procedures for grading and seeding to prevent erosion; and

(c) the deed notation specified in ARM 17.50.1103, unless all wastes are removed from the landfill unit and the owner or operator of a facility receives approval from the department to remove the notation from the deed~~; and~~

~~(d) any other information determined by the department to be necessary to protect human health or the environment~~.

(2) A Class III landfill unit post-closure plan required under ARM 17.50.508 must include, at a minimum, descriptions of procedures for:

(a) remains as proposed.

(b) maintaining adequate vegetative cover; and

(c) erosion control~~; and~~

~~(d) any other procedures determined by the department to be necessary to protect human health or the environment~~.

(3) and (4) remain as proposed.

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

ARM 17.50.403 and 17.50.410

COMMENT NO. 1: Based on his understanding that Title 17, chapter 50, subchapter 4, pertaining to fees, was adopted by the Board of Environmental Review (BER) pursuant to the authority granted to the board in 75-10-115, MCA, a commentor questioned the department's authority to revise the rule.

RESPONSE: The department is not adopting the proposed amendments to ARM 17.50.403 and 17.50.410 in this rulemaking. The department will address the proposed amendments to ARM 17.50.403 and 17.50.410 in a BER rulemaking at a future date.

ARM 17.50.501

COMMENT NO. 2: A commentor asked where the new rules provide for an exemption of a pre-1993 footprint from liner requirements, which exemption was found in the previous rules and in the solid waste regulations adopted by the federal Environmental Protection Agency (EPA), and the commentor asked that this be clarified.

RESPONSE: The adoption, amendment, and repeal of the rules in this rulemaking would not change the regulatory status of any pre-1993 solid waste landfill unit footprinted areas subject to these rules. A landfill unit with a pre-1993 footprint is an "existing" unit, and is not subject to the liner design requirements in New Rules XXXIII and XXXIV. A "new" unit or lateral expansion was not licensed or accepting waste by the effective date of the 1993 deadline for having the new rules for solid waste management take effect, and is subject to only the design requirements in effect at the time the unit was approved. The department has amended the definitions of "existing" and "new" in ARM 17.50.502 and in the definition rule in each new subchapter where necessary to reflect the distinction between "existing" and "new."

However, the department wishes to make it clear how it is using the terms

"existing" unit, "new" unit, and "unit," or any of those terms in connection with a qualifying phrase such as Class II, Class III, or Class IV. Federal solid waste regulations adopted to give effect to the federal Resource Conservation and Recovery Act of 1976 and subsequent amendments, codified at 42 USC 6901 through 6992k (RCRA), took effect on October 9, 1993. Montana's solid waste rules use the same effective date as the federal RCRA rules. As noted by the commentor, a unit that was receiving waste on October 9, 1993, was defined as "existing." The area where waste had been placed before October 9, 1993, is called the "pre-RCRA footprint," and was often unlined. The pre-RCRA footprint of an existing unit was not subject to the design and construction criteria for "new" units in the federal regulations and Montana rules that took effect on October 9, 1993. An existing landfill unit was and is entitled to continue to place solid waste in the "air space" over its pre-RCRA footprint without redesigning that unit to meet post-1993 design standards.

If the existing unit expanded laterally outside its pre-RCRA footprint, that was and is a "lateral expansion," and was and is subject to the design requirements in effect at the time of the expansion.

The design criteria in this rulemaking, found in New Subchapter III (New Subchapter 12), refer to "new" units. The rules in that subchapter are generally equivalent to the rules that have been in place since 1993. Therefore, all new units, or lateral expansions of existing units, have been required to be designed and constructed in conformance with the post-1993 requirements. However, design and construction requirements under New Subchapter III (New Subchapter 12) are not intended to be retroactive. The department does not intend that a unit at a licensed solid waste management system that has had the design and construction of its liner and associated components approved by the department will be subject to being redesigned or reconstructed according to requirements in this rulemaking. Once a landfill unit is designed and constructed, it is usually covered with many feet of solid waste. It would be prohibitively expensive, impractical, and potentially harmful to human health or the environment to require a unit to be excavated, redesigned, and reconstructed when rules change.

So, existing units, that is, those licensed and accepting waste on October 9, 1993, are exempt from complying with design criteria that took effect on that date. They may continue to accept waste in the airspace above their pre-RCRA footprint without redesigning or reconstructing. Lateral expansions of existing units were and are required to meet the design and construction requirements in effect at the time of the proposed expansion. New units that have been designed and constructed since October 9, 1993, were subject to the design and construction requirements in effect when the design was approved, but are not subject to any different design requirements adopted later. New units that are proposed in the future are subject to the design and construction requirements in effect when they are approved.

In light of this, the department has added definitions of "existing" and "new" to the definitions rules in the new subchapters, where necessary, to provide the needed definitions. In addition, the department has added "new" to the first sentence in New Rule XXXIV, because it was inadvertently omitted, and the design rules apply only to new units or lateral expansions.

COMMENT NO. 3: A commentor stated that (1) and (2) should be copied to the general provisions of each subchapter. In (4), the proposed rule also should provide for emergency actions that facilities may need to take without receiving prior written department approval. An example of this would be immediate changes to the operation of a facility required as the result of an inspection. The language proposed for ARM 17.50.501(4) is found in the General Provisions rule of every new proposed subchapter and should be changed in each instance to allow for emergencies. The language of the proposed amendment appears to preclude any excavation prior to receipt of full department approval, however, there is no provision in the solid waste laws requiring preconstruction approval. If the owner or operator of a facility wants to begin excavating a new cell prior to receiving full approval in order to take advantage of good weather, it should be able to proceed at its own risk, during inevitable department paperwork delays.

RESPONSE: The department believes that it is not necessary to have a purpose statement in each of the newly proposed subchapters. A purpose statement may be informative, but would not change or enhance any regulatory requirement.

The existing rules do not address emergency situations, and the department did not propose rules concerning emergency situations in this rulemaking. Deficiencies noted in an inspection likely would be based on failures to follow an operations and maintenance plan or a rule, and actions to bring the facility into compliance with a plan or rule likely would not require review and approval of a submission other than one already required. However, if an action necessary to respond to an inspection were to require a submission to comply with the applicable rule, then a submission would be necessary. Emergency rules are beyond the scope of this rulemaking, and the department declines to amend the language as requested in the comment. The department's solid waste program is committed to swift review in the case of a genuine threat to human health or the environment.

The department agrees that ARM 17.50.501(4) precludes taking an action without prior department approval if a rule requires submittal and approval of a document concerning the proposed action. The department disagrees that the solid waste laws do not require preconstruction approval. Section 75-10-204(3), MCA, requires the department to adopt rules concerning the procedures to be followed in the disposal of solid waste. The design rule, New Rule XXXIII, implements that law by prohibiting construction of a Class II or Class IV landfill unit, unless a design that is protective of ground water has been approved. This same requirement for an alternative design is found in the EPA regulation in 40 CFR 258.40(a)(1). The department agrees that a landfill unit owner or operator may excavate a hole for a new cell without submittal and approval of a document. However, a landfill unit owner or operator who excavates without first obtaining approval risks a determination by the department that the location violates a rule and that waste may not be disposed of there. In addition, other work may constitute the construction of a unit, and may need approval before it can be commenced.

ARM 17.50.502

COMMENT NO. 4: A commentor suggested that the definition of "clean fill"

should be rewritten to represent the actual intent, which is to provide an exemption for an unregulated material. The commentor suggested the following language: "'Clean fill' means soil, dirt, sand, gravel, rocks, and rebar-free concrete, emplaced free of charge by the property owner to the person placing the fill." If the rule remains as proposed, gravel pit operators will not be able to charge for fill material. Conversely, the property owner possibly could charge for material meeting the physical description when placed on the property. Landfills charge for waste placement. Clean fill might be paid for by the property owner, or it may be placed free of charge to the property owner receiving the material. The hauling contractor may charge the generator of the materials for removal, but there is no charge to the contractor for placement of "clean fill."

RESPONSE: The department agrees with the comment and will not amend the definition of "clean fill" as proposed, but will retain the existing definition, which comports with the definition suggested by the commentor.

COMMENT NO. 5: Concerning the definition of "contaminated soils" in ARM 17.50.502(8), a commentor questioned whether the concentrations of organic compounds in soil that cause it to be considered contaminated should be specified. The commentor stated that maximum concentrations should be established, if they have not already been established. The commentor also stated that landfills currently are allowed to use contaminated soil as daily cover after it has been treated. The commentor stated that he didn't see any reference in the new rules to using treated soils for this purpose, and he would like for the department to consider this, because the department has been allowing this for some time.

RESPONSE: The concentration of organic compounds in soils necessary to be considered contaminated is the minimum detectable amount for the particular organic compound. The proposed addition of the definition of "contaminated soil" would not affect the accepted practice for the use of treated soils for daily cover. The department currently has guidelines that allow the use as daily cover of soils contaminated with certain levels of petroleum. See "General Guidelines for Operation of Soil Treatment Facility to Bioremediate Petroleum Contaminated Soils," pp. 13-14, Montana DEQ revised 7/2002. These guidelines are included in rules currently being developed by the department for a future rulemaking concerning landfarms.

COMMENT NO. 6: A commentor stated that the amendments to the definition of "existing unit" should not be adopted as proposed. The commentor stated that the phrase "existing unit" has profound implications in the federal regulatory scheme and that the phrase provides a date certain after which specific regulations, primarily design standards, apply.

RESPONSE: The department agrees with the comment and will not adopt the definition of "existing unit" as proposed. The department has stricken the term "existing disposal unit" in ARM 17.50.502, and has amended the definition rule in each new subchapter where necessary to clarify that "existing" when used in conjunction with "unit" or a type of unit and "new," when used in conjunction with "unit" or a type of unit, determine regulatory requirements for pre-1993 and post-1993 landfill units.

See also Response to Comment No. 2.

COMMENT NO. 7: A commentor stated that, if the reason given for changing the term "facility" is correct, the changes should not be made until the department proposes rules regulating recycling and waste recovery facilities.

A definition that is more consistent with 40 CFR 258.2 would be: "'Facility' means property licensed by the department as a solid waste management system. It includes all contiguous land and structures, other appurtenances, and improvements on the land used for the management of solid waste."

This simple definition would allow for licensing of solid waste management systems that are recycling or waste recovery facilities. The "ever used" retroactive language proposed is troubling.

RESPONSE: The department agrees with the comment and will remove "ever" from the definition of "facility." The department believes it is appropriate to have the definition of "facility" be broad enough to include all of the different types of solid waste management systems. This will also simplify future rulemakings so that this definition will not have to be modified when the department proposes rules pertaining to recycling and resource recovery systems.

COMMENT NO. 8: Based on the commentor's general comments on the stringency provisions of 75-10-107, MCA, a commentor suggested amending the definition of "lateral expansion" as follows: "'Lateral expansion' means a horizontal expansion of the waste boundaries of an existing ~~disposal~~ MSWLF unit." The use of "MSWLF" would be more consistent with the definition of "lateral expansion" found in 40 CFR 258.2 and would properly restrict use of the phrase to the definition prescribed by the EPA.

RESPONSE: The definition of "lateral expansion" is not proposed to be amended in this rulemaking. "Lateral expansion" in the proposed amendments and adoptions sometimes refers to units that are not MSWLF or Class II units. Therefore, the department declines to amend the language as requested in the comment.

COMMENT NO. 9: A commentor stated that the phrase "municipal solid waste landfill unit" should not be deleted, because this phrase defines what is regulated under 40 CFR Part 258. The "other types of RCRA subtitle D wastes" mentioned in the definition are regulated under 40 CFR Part 257 when they are not co-mingled with municipal solid waste. The phrase "new unit" should not be repealed because it is used to provide a date certain for landfill design requirements and it is used in the proposed new rules, specifically, in New Rule XXXIII.

RESPONSE: The terms "municipal solid waste landfill unit" and "new unit" were proposed to be deleted because the terms were not used in ARM Title 17, chapter 50, subchapter 5. The department plans to analyze, with stakeholders and other interested members of the public, possible revisions to ARM 17.50.502 concerning the distinction between municipal solid waste and non-municipal solid waste that may affect the regulation of Class II landfill units and may initiate rulemaking to address the concerns raised. The department has added a definition of "new" to be used in conjunction with "unit" or a type of unit. This clarifies which

units are not existing units, that is, that have come into existence since October 9, 1993. The proposed definition of "new" (to be used in conjunction with "unit" or a type of unit) is being added to ARM Title 17, chapter 50, subchapter 5, and subchapters 10 through 14.

COMMENT NO. 10: A commentor stated that the phrase "solid waste management system," found in (48) and proposed to be renumbered (36), should be repealed because the term is defined in 75-10-203(12), MCA.

RESPONSE: The definition of "solid waste management system" is not proposed to be revised in this rulemaking. The Montana Administrative Procedure Act states, at 2-4-305(2), MCA, that rules may not unnecessarily repeat statutory language. The department believes that it is necessary to leave the definition in the rules for the convenience of the regulated community. Therefore, the department declines to amend the language as requested in the comment.

COMMENT NO. 11: A commentor stated that a better, more grammatically correct, definition of "waste boundary" would be "the perimeter of the ~~area~~ unit approved by the department for the disposal of solid waste." Because all units must be at licensed solid waste management systems, the rest of the definition is superfluous. Once a solid waste management system is licensed, each unit has its own boundary. It may be proposed, placed, and approved wherever it is within the licensed area. Designs change so much over the life of a landfill that attempting to fix an arbitrary boundary for waste placement at a facility that may have a life of fifty to one hundred years is ridiculous. That is why EPA regulates on the unit basis, and the department should do likewise.

RESPONSE: The term "waste boundary" is used only in the deed notation rule (New Rule XXIV). The use of "area" is appropriate in the context of that rule. The definition of "waste boundary" is being deleted in ARM 17.50.502 and moved to New Rule XXIV because the term is used only in that rule.

ARM 17.50.503

COMMENT NO. 12: A commentor stated that this rule initially was adopted in 1992, and has been amended several times since then, with the last time being in 1997. It is time for the rule to be amended again to truly reflect what EPA requires to be regulated, and how it is regulated by EPA. The following amendments are suggested:

"(1) ... Solid wastes that are not regulated hazardous wastes, are categorized into five groups:

(a) Group II wastes include ~~decomposable~~ household waste and mixed solid waste with household waste containing decomposable material but exclude regulated hazardous waste. Examples include, but are not limited to, the following:

(i) municipal and household solid wastes such as garbage and putrescible organic materials, paper, cardboard, cloth, glass, metal, plastics, street sweepings, yard and garden wastes, digested sewage treatment sludges, water treatment sludges, household solid waste incinerator ashes, dead animals, offal, discarded appliances, abandoned automobiles, and hospital and medical facility wastes,

provided that infectious wastes have been rendered noninfectious to prevent the danger of disease~~; and~~.

~~(ii)~~ deleted because they are reclassified below.

(b) Group III wastes include wood wastes and non-water soluble solids. These wastes are characterized by their general inert nature and low potential for adverse environmental impacts. Examples include, but are not limited to, the following:

(i) inert solid waste such as unpainted brick, dirt, rock and concrete;

(ii) clean, untreated, unglued wood materials, brush, unpainted or untreated lumber, and vehicle tires; ~~and~~

(iii) industrial mineral wastes which are essentially inert and non-water soluble and do not contain hazardous waste constituents; and

(iv) ashes from burning of clean, untreated, unglued wood waste or brush.

(c) remains as proposed.

(d) Group V wastes include: commercial waste; and

(e) Group VI wastes include: industrial solid waste including contaminated soils."

RESPONSE: The department recognizes the concerns in the comment. It did not want to add proposed amendments to ARM 17.50.503 to an already long and complicated rulemaking. The department plans to analyze possible revisions to ARM 17.50.503 with stakeholders and other interested members of the public and may initiate rulemaking to address the concerns raised.

Because Group II solid waste can be disposed of only in a Class II landfill unit, and because the rules governing disposal at a Class II unit impose similar requirements to the EPA's regulation of an MSWLF unit, the regulation of a Class II landfill unit that does not receive MSW is more stringent than the regulation of a similar unit under federal regulations in 40 CFR Part 257. However, it is not clear that applying, to non-MSW units, requirements similar to EPA's requirements for MSWLF units, constitutes a comparable regulatory scheme addressing the same circumstances. Also, this requirement was contained in the existing rules and had been in those rules for a number of years, and the department did not propose to change this regulatory scheme in this rulemaking process. Therefore, the department is carrying the existing scheme forward in these rules. Nevertheless, the department recognizes the concerns raised by the commentors and will address the stringency concerns, in communication with its solid waste stakeholders, in a future process. This response also applies to this comment as it pertains to all other rules that regulate Class II landfill units.

ARM 17.50.504

COMMENT NO. 13: A commentor stated that this rule was not proposed for amendment, but should be amended in order for the rest of the rules to make sense. If the department opens the rule and accepts proposed changes to ARM 17.50.504, the phrase Class II unit could remain as proposed in the remainder of the proposed rules. Class II units could accept all waste groups, Class III and IV would remain the same, and two new classes for commercial and industrial wastes would be created. The department then could propose rules for managing these kinds of

wastes based on their environmental threat and EPA requirements.

RESPONSE: The department recognizes the concerns in the comment. It did not want to add proposed amendments to ARM 17.50.504 to an already long and complicated rulemaking. The department plans to analyze possible revisions to ARM 17.50.504 with stakeholders and other interested members of the public and may initiate rulemaking to address the concerns raised.

For issues concerning the regulation of MSW and non-MSW at a Class II unit, see the response to Comment No. 12.

ARM 17.50.508

COMMENT NO. 14: A commentor stated that, under Title 75, chapter 10, part 2, the department is authorized to license only "solid waste management systems," and this phrase should be used consistently in the proposed rules.

A commentor stated that use of the phrase "any other information determined by the department to be necessary to protect human health or the environment, and requested by the department," in (1)(aa) gives the department too much discretion and allows the department to be arbitrary.

RESPONSE: The amendments to ARM 17.50.508(1) provide that: "Prior to disposing of solid waste or operating a solid waste management system or expanding a licensed boundary, a person shall submit to the department for approval an application for a license to construct and operate a solid waste management system." The department is licensing only solid waste management systems. The department believes that the phrase "solid waste management systems" is used consistently and appropriately throughout the rules.

Concerning the phrase "any other information determined by the department to be necessary to protect human health or the environment, and requested by the department," in (1)(aa), the department needs flexibility to determine if a license application is adequate. It is, therefore, striking that phrase and is reverting to the language in existing ARM 17.50.508 of "at least." This retains the department's flexibility to require additional information if necessary, while removing the language objected to.

COMMENT NO. 15: A commentor asked how many copies of the application referenced in ARM 17.50.508(1) need to be submitted to the department. The commentor stated that ARM 17.50.508(1)(g) and (h) should be repealed because the same information is required in (1)(o), (p), and (q).

The commentor requested that the term "pertinent water quality information" be defined in existing (9) or repealed, as it is negated by the requirements in new (1)(j), if correctly written. The commentor also stated that a comma should be added to (1)(j).

The commentor stated that the phrase "if required" should be added to (1)(w).

The commentor asked which statute provides the department authority to require insurance at solid waste management systems and to set the minimum amount needed. The commentor questioned whether 75-10-204(8), MCA, which requires the department to adopt rules governing other factors related to the sanitary

disposal or management of solid waste, authorizes the department to adopt a rule requiring liability insurance. The commentor stated that the rationale for this rule cites the fact that a facility could be unable to properly manage wastes if it is uninsured and someone is injured at the facility, but that the financial health of a facility is not a proper concern of the department, which has regulatory authority over environmental concerns, not business dealings. Facilities that pose a possible significant threat to the environment, Class II landfills, are required to have financial assurance to cover the costs of closure and post closure care. EPA has no comparable insurance requirement for facilities, nor did it think one was necessary except for the financial assurance needed at MSWLF units. The commentor stated that this proposed rule should be deleted.

RESPONSE: One copy of an application for a license is required. If the department needs more copies, it will ask for them.

ARM 17.50.508 requires, as part of a license application, the submission of the location, for (1)(g), of water bodies within two miles of the facility boundary, and for (1)(h), the facility location in relation to the base floodplain of nearby drainages, and (1)(o), (p), and (q) detail the type of maps required. There may be some minor duplication in the requested information, but the department does not believe such duplication would hinder the licensing process.

ARM 17.50.508(1)(i), which contains the phrase "pertinent water quality information," was not proposed to be revised. However the phrase will be interpreted consistent with past practice.

ARM 17.50.508(1)(w) was not proposed for amendment in this rulemaking. However, if a closure or post-closure plan were not required as part of a license application, the department would notify the applicant that the plan was not required. The department will study the suggested revision and may revise (1)(w) in a future rulemaking.

Section 75-10-204(8), MCA, provides the authority to require liability insurance. The reason for this provision was provided in the statement of reasonable necessity for New Rule XXV in MAR Notice No. 17-284.

ARM 17.50.509

COMMENT NO. 16: A commentor stated that ARM 17.50.509(2)(k)(vi) should be revised to read: "any other special waste, as defined in ARM 17.50.502(37), determined by the department," to prevent the rule from being overly broad and subject to misinterpretation.

RESPONSE: Because "special waste" is defined in the definition rule (ARM 17.50.502) for subchapter 5, it does not have to be defined in any other rule in subchapter 5.

ARM 17.50.513

COMMENT NO. 17: A commentor stated that it is the commentor's understanding that, pursuant to the authority granted to the board in 75-10-115, MCA, only the Board of Environmental Review has the authority to adopt rules related to solid waste fees.

RESPONSE: The application fee referenced in ARM 17.50.513(2) is provided in ARM 17.50.410, and was adopted under the authority of 75-10-115, MCA. The revisions in (2) do not adopt a new fee, but require a new application to be submitted with the appropriate application fee as provided in ARM 17.50.410. See Response to Comment No. 19.

COMMENT NO. 18: A commentor stated that the department was being arbitrary in ARM 17.50.513(2) by requiring a license applicant to pay a new application fee if it failed to respond to a department request for more information to complete an application within 90 days, and asked whether it is possible to gather requested information within that timeframe. For example, archaeological surveys are nearly impossible to conduct in the wintertime due to snow cover, and, during a snowy winter, it might not be possible to complete a field survey requested in November, within 90 days. The department may make demands that are impossible for an applicant to complete without large amounts of additional funding or without benefit of another budget cycle. The sentence requiring the 90-day deadline and additional fee should be removed from the proposed rule.

RESPONSE: The 90-day deadline in ARM 17.50.513(2) was not proposed to be revised. However, the department believes the 90-day time limit for receiving additional requested information is more than enough time to compile and submit the requested information.

COMMENT NO. 19: A commentor questioned the justification for the department requiring a new application fee if the applicant fails to provide additional information within 90 days after being requested to do so.

RESPONSE: Existing ARM 17.50.513(1) requires an applicant, that has not responded to a department notice that a license application is incomplete, to submit a new application. Existing ARM 17.50.410(1)(a) requires an application fee with a license application, and provides that the department shall send the applicant an invoice for the fee and begin processing the application upon receipt of that fee. Therefore, the requirement of a new application fee, when a new application is submitted, is not new. The department believes that submittal of a new application fee for a new application, when requested additional information is not received within 90 days after the applicant has been notified, is necessary to cover the department's costs for processing the application. It can take significant time for the department's staff to re-review the application, become familiar with it, and prepare to analyze it after 90 days have passed. This is time that cannot be used on other projects and constitutes a drain on the department's resources.

NEW RULE I

COMMENT NO: 20: A commentor questioned use of the word "that" in the phrase "a new Class II landfill unit, existing Class II landfill unit, or lateral expansion of that unit" in New Rule I(1) and (2), and in similar phrases, such as "a new or existing Class II or Class IV landfill unit, or a lateral expansion of that unit," in New Rule V(1) and (2) and in other rules. The commentor stated that use of "that" was

confusing, and that it was unclear whether the department intended to refer to a new unit or an existing unit, or both.

RESPONSE: The department was using "that" as an abbreviated way to refer to lateral expansions of multiple classes of units. Because the use of "that" was confusing and inexact, the department has amended the rules with that phrase to state explicitly that lateral expansions of existing units are subject to the requirements of the rule. Other rules where this amendment has been made for the same reason are New Rules IV(1) and (3), V(1) and (2), VI(1), VII(1), IX(1), XXII(1)(b), XXXII(1), (2), and (3), XXXIII(1), XXXIV(1) and (3), XXXVII(3), and XLIX(4).

NEW RULE III

COMMENT NO. 21: A commentor stated that, in the definition of "maximum horizontal acceleration in lithified earth materials," the last portion of the definition should be deleted because it conflicts with, and, potentially, is either more or less restrictive than, the requirements in 40 CFR 258.14.

RESPONSE: The definition of "maximum horizontal acceleration in lithified earth materials" is identical to the definition of the same term in 40 CFR 258.14. Therefore, the department declines to strike the language as requested in the comment.

NEW RULE V

COMMENT NO. 22: A commentor stated that, according to EPA regulations, all Class IV landfills, not just lined ones, should be subject to these provisions relating to floodplains. In New Rules V, VIII, and IX, the 45-day limit for response is arbitrary and does not take into account the realities of budgets and hiring times for the necessary experts.

RESPONSE: As a practical matter, a liner would be required under this rule for all Class IV landfill units to be located in a floodplain. The location of unlined Class IV landfill units would not be approved in floodplains due to shallow ground water. No existing unlined Class IV landfill units are located in floodplains. However, to be as stringent as EPA's regulations in 40 CFR 257.8, the department is striking "lined" from "lined Class IV."

The department has determined that all existing facilities meet the requirement. Therefore, the department has stricken the requirement, from New Rules V, VIII, and IX, that the owners and operators of existing units must make the demonstration within 45 days after being requested to do so by the department.

NEW RULE VI

COMMENT NO. 23: A commentor stated that, to be consistent with EPA's regulatory requirements, all Class IV landfills, not just lined ones, should be subject to the provisions concerning wetlands.

RESPONSE: The department agrees with the commentor. The requirements were taken from 40 CFR 258.12. The same requirements are found in

40 CFR 257.9, which applies to all Class IV landfill units. The department is striking "lined" from the phrase "lined Class IV."

NEW RULE VII

COMMENT NO. 24: A commentor stated that the phrase "lined Class IV unit" should be deleted from New Rule VII(1), concerning setbacks from fault areas, because the phrase made the rule more stringent than EPA requirements.

RESPONSE: The department agrees that EPA regulations for Class IV landfill units do not require a setback from fault areas. In response to comments, the department is eliminating many of the prescriptive requirements for a Class IV landfill unit, including the setback from fault areas that was the subject of this comment. Instead, the department is basing design requirements on a showing that a Class IV landfill unit will not contaminate an underground drinking water source, which is the standard required by EPA in 40 CFR 257.3-4 for all solid waste landfill units that do not receive municipal solid waste, including a Class IV landfill unit. If an owner or operator of a Class IV landfill unit does not include, as part of its application for a solid waste license, a liner as part of its design to avoid contaminating an underground drinking water source, and the department approves the design, then no liner will be required, and no setback from fault areas to protect a liner from being torn by fault displacement will be needed. However, if an owner or operator includes a liner as part of a design of a Class IV landfill unit, then the department will not be likely to approve the design unless it includes a setback from a fault area to protect the liner from being torn by displacement.

NEW RULE VIII

COMMENT NO. 25: A commentor stated that the phrases "gas control system" and "landfill final cover" should be removed from the proposed rule, because they are not included as "containment structures" in EPA requirements, in 40 CFR 258.14, for a unit located in a seismic impact zone, and they make the rule more stringent than that regulation.

RESPONSE: In response to the comment, the department has stricken the language as requested.

COMMENT NO. 26: A commentor stated that reference to lined Class IV units should be deleted from New Rule VIII(1), concerning design of a unit in a seismic impact zone, because the reference made the rule more stringent than EPA requirements.

RESPONSE: In response to the comment, the department has stricken the language as requested. If a liner is submitted as part of a design to meet ground water standards, design requirements to protect a liner from seismic activity could be required. See Response to Comment No. 24.

NEW RULE IX

COMMENT NO. 27: A commentor stated that applying unstable area

restrictions to lined Class IV units makes the rules more stringent than EPA requirements.

RESPONSE: The department recognizes that there are additional unstable area location requirements in New Rule IX for Class IV landfill units that are not provided in 40 CFR 257. In response to the comment, the department has stricken the language as requested. If a liner is submitted as part of a design to meet ground water standards, design requirements to protect a liner from movement in unstable areas could be required. See Response to Comment No. 24.

NEW RULE X

COMMENT NO. 28: A commentor stated that the rule is redundant. The location restrictions were evaluated by EPA as part of the State Program Approval process and have been in place since 1993. Facilities for which the appropriate demonstrations could not be made have been closed, most for over 15 years, and new ones need not be licensed by the department.

RESPONSE: The department has determined that all existing facilities meet the requirements of the locational rules. Therefore, the department has stricken New Rule X.

NEW RULE XI

COMMENT NO. 29: A commentor stated that the rule mixes operational requirements with location requirements and that operational requirements should be moved to New Rule XXVII. Specifically, (1)(d) and (f) are operational requirements, not location requirements. Subsection (1)(h) should be replaced with the requirements of 40 CFR 257.3-1. The commentor stated that proposed (1)(j), which would authorize the department to require any other locational requirement determined to be necessary, should not be adopted because it is vague and overly broad and grants the department nearly unlimited powers.

RESPONSE: The department agrees that New Rule XI includes a mix of operational and locational requirements. Because most of these requirements are from one rule, ARM 17.50.505, the department placed them all in New Rule XI. ARM 17.50.505 is being repealed. The department does not believe that the substance of the requirements in the rule is affected by having locational and operational requirements in the same rule. It may initiate a future rulemaking to consider rearranging the locational and operating criteria now in this rule.

Concerning subsection (1)(h), in response to the comment, the department has substituted the language concerning floodplains from 40 CFR 257.3-1.

Based on the comment, the department has stricken (1)(j).

COMMENT NO. 30: A commentor stated that (1)(h), which addresses the location of a new Class III landfill, should include a grandfather clause for existing landfills established under previous rules.

RESPONSE: The department has amended New Rule XI(1)(h) in response to Comment No. 29. A grandfather clause is not necessary because the adoption of New Rule XI(1)(h) would not affect an existing Class III landfill unit.

NEW RULE XIII

COMMENT NO. 31: A commentor stated that a definition of "special waste" should be added to this rule because it is needed for purposes of New Rule XXV.

RESPONSE: The department agrees with the comment, and has added a definition of "special waste."

NEW RULE XV

COMMENT NO. 32: A commentor stated that, in New Rule XV(2)(c), the proposed requirement that the owner or operator of a Class II landfill, for which some portion will not receive additional waste within 90 days, must place on that portion an intermediate cover of at least one foot of approved cover soil is more stringent than the comparable federal requirement in 40 CFR 258.21.

RESPONSE: This standard is not provided in 40 CFR 258.21, and there is no comparable federal regulation or guideline addressing the same circumstances, so the findings requirements of 75-10-107, MCA, do not apply. This rule is necessary to keep birds and other scavenger species out of the waste, and to protect waste from precipitation that could mix with it and form leachate. Prior to the implementation of this rule in 1995, the same requirement was contained in Solid Waste Program policy. Portions of landfills not slated to receive waste for long periods became a source of litter as well as a source of food for birds and other scavenger species. The areas of landfills that had not received waste for a long period, but that had not received final cover, often were covered with the bare minimum of cover soils (i.e. six inches). The insufficient amount of cover soils over the wastes did little to prevent animals or birds from getting into the waste mass. The lack of sufficient cover soil also resulted in precipitation entering the wastes and generating leachate.

An example of this was noted at a landfill in the state several years ago when a portion of the waste unit was filled to the maximum capacity and had to sit idle until the other cells in the unit were filled to the same elevation to effect a uniform closure of the unit. During a routine facility inspection, department inspectors noted waste from the idle portion of the facility was scattered around the facility and birds and other small animals were seen in the waste mass. The six inch daily cover left on the cell was eroded and did not present a deterrent to precipitation or animals from entering the waste. The solution was long-term intermediate cover over the unused portion of the landfill. This policy has been in place since 1995 and has worked well to prevent these problems.

The estimated costs to the regulated community for each of 50 facilities that are directly attributable to the proposed requirement would be $2,018/acre based on the $2.50/cubic yard cost of the placement of 807 cubic yards of additional six-inch soil cover per acre of open area. The on-site soil would already be available for placement after excavation to build each landfill unit and provide daily cover as designed. The site-specific magnitude of these additional costs would vary depending on the open area chosen by each facility operator.

NEW RULE XVII

COMMENT NO. 33: A commentor stated that the requirements of New Rule XVII(1)(a) and (b) apply to all facilities, but that the rest of the rule should not apply to Class III and Class IV facilities, or at any Class II landfill units except MSWLF units.

RESPONSE: New Rule XVII, which concerns explosive gases control, applies only to Class II landfill units. However, the requirements of this rule are adopted for Class IV landfill units in New Rule XXIX(2)(c). The requirement cited by the commentor, that (1)(a) and (b) are applicable to Class IV landfill units, is contained in 40 CFR 257.3-8(a)(1) and (2).

The department has amended New Rule XXIX(2)(c) to state that only XVII(1) applies to a Class IV landfill unit. For issues concerning the regulation of MSW and non-MSW at a Class II unit in New Rules XVII and XXIX, see the response to Comment No. 12.

The department has prepared findings, pursuant to 75-10-107, MCA, concerning the stringency of the requirement in (4)(c) for department approval of a methane remediation plan. See Stringency Findings for this rule.

NEW RULE XVIII

COMMENT NO. 34: A commentor stated that (2) states that burning is prohibited, except for the infrequent burning of agricultural wastes, forest product wastes, land-clearing debris, diseased trees, and emergency cleanups, but that other wastes, such as untreated wood waste, are being burned in burn pits at landfills. The commentor stated that the department should re-evaluate the list in New Rule XVIII(2) and modify it to reflect actual practice.

RESPONSE: New Rule XVIII(2) contains the same list as 40 CFR 258.24 concerning materials that are permitted for open burning. A condition of approval of the department's solid waste program by EPA is that the rules be at least as stringent as EPA's regulations. Therefore, it is necessary for the department to adopt the language as proposed. The department's air quality rule concerning the issuance of a conditional air quality open burning permit, ARM 17.8.612, addresses the burning of untreated wood waste at a licensed landfill, as follows:

"(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, …."

ARM 17.8.612 is inconsistent with New Rule XVIII and 40 CFR 258.24 concerning the list of materials that may be burned at a licensed landfill. The department believes it would be prudent to conform the list of materials that may be burned at a licensed landfill in ARM 17.8.612 to those materials listed in New Rule XVIII, but that cannot be accomplished in this rulemaking.

NEW RULE XXII

COMMENT NO. 35: A commentor stated that New Rule XXII(1), concerning exclusion of bulk or noncontainerized liquids unless approved, is more stringent than the comparable federal requirement in 40 CFR 258.28(a).

RESPONSE: In response to the comment, the department has stricken the language requiring approval.

NEW RULE XXIV

COMMENT NO. 36: A commentor stated that this rule, requiring recording of a deed notation before the first acceptance of solid waste, or within 60 days after the effective date of the rule, should apply only to new applications. Existing landfill owners should be grandfathered under the existing rules. Current owners of landfills will be denied the choice of not permitting a landfill and avoiding the requirement for a deed encumbrance.

Under the new rule, the owners or operators of existing Class III landfills will be required to obtain a certificate of survey for the deed notation. This imposes a legal obligation and cost upon the holder of the existing license that is retroactive and non-negotiable. Commentors were concerned that the cost of providing an exhibit to a certificate of survey for the waste boundary to be covered by a deed notation at a Class III landfill would be excessive.

New Rule XXIV states that the notation on the deed must be approved by the department, however, the rule does not provide suggested language. This means that the language required is not defined in the standards and might impose an encumbrance on the deed that would make the property unmarketable. The language that must appear on the deed should appear within the new rule.

The new rules do not provide for a means of removing a deed notation.

RESPONSE: The department believes a deed notation as a license condition for new and existing landfill units is necessary to inform future owners of the property that the property was used as a landfill. The department has prepared findings, pursuant to 75-10-107, MCA, concerning the stringency of the requirement in (1)(a) for the submission and recording of a deed notation before the acceptance of solid waste for a unit that is not yet accepting waste, or within 60 days after the effective date of the rule for a facility that is accepting waste, and for the requirement in (1) for department approval of that notation. See Stringency Findings for this rule.

For a Class III or Class IV landfill unit, there is no comparable federal regulation addressing the same circumstances, so the stringency findings of 75-10-107, MCA, do not apply. However, the facts underlying the findings made for Class II landfill units also are applicable to Class III and IV landfill units. The department believes that it is important to have a deed notation for Class III landfill units, for the reasons listed in the statement of reasonable necessity to the proposed new rule, but recognizes that an exhibit to a certificate of survey is not necessary if the deed notation is to cover the entire land area referred to in the deed for the property. The department has therefore amended (1)(a) to provide that an exhibit to a certificate of survey is not necessary if the landowner wishes it to cover the entire parcel in the deed. The notation must reference only the certificate of survey for the entire

parcel. However, if the landowner wishes to narrow the land area subject to the deed notation, it must provide an exhibit to the certificate of survey. This may be done, for example, at closure, and the surveys that were done to obtain approval for lateral expansions or new units may be used to create the exhibit used for the waste boundary in the deed notation.

The department believes that 60 days is enough time for a land owner to obtain an exhibit to a certificate of survey or to refer to the parcel's existing certificate of survey, and to submit the deed notation to the department for approval. An exhibit to a certificate of survey is a standard form used by surveyors and should be readily available. A deed notation form is available from the department.

Under New Rule XLIX(11), which concerns closure, if all the wastes have been removed from a landfill unit, the "owner or operator may request permission from the department to remove the notation from the deed." This is the same process that EPA provided in its regulations at 40 CFR 258.60(j).

COMMENT NO. 37: A commentor stated that the department is proposing a radical change in deed notation requirements that exceeds EPA requirements, found in 40 CFR 258.60(i), which apply only to MSWLF units.

RESPONSE: The department does not agree that a deed notation requirement for Class III landfill units (before the initial receipt of waste or within 60 days for a licensed landfill) is a radical change. Existing ARM 17.50.530(2)(c) requires deed notations for Class III landfill units. The department recognizes that 40 CFR 258.60(i) does not require a deed notation as a license condition for Class III or Class IV landfill units. The department stated the necessity for this rule in the statement of reasonable necessity for the proposed rules and in the Response to Comment No. 36. The department also addressed the matter of stringency in its Response to Comment No. 36.

For issues concerning the regulation of MSW and non-MSW at a Class II unit in New Rule XXIV, see the response to Comment No. 12.

NEW RULE XXV

COMMENT NO. 38: A commentor questioned the department's authority to require insurance at solid waste management systems and to set the minimum amount needed.

RESPONSE: Section 75-10-204(8), MCA, provides the authority to require liability insurance. There is no comparable federal regulation or guideline addressing the same circumstances, and, therefore, stringency findings under 75-10-107, MCA, are not required.

The department determined that a minimum amount of $1 million per occurrence with a minimum annual aggregate of $2 million was necessary. The standard waste management industry practice is to have this amount of insurance.

NEW RULE XXVII

As discussed in the Response to Comment No. 39, the department has stricken "aesthetics" from the list of items in (2)(d) that a resource recovery,

recycling, or solid waste treatment facility must control through design, construction, maintenance, and operation.

NEW RULE XXVIII

COMMENT NO. 39: A commentor stated the requirements proposed for Class III facilities clearly are more stringent in certain areas than the comparable EPA requirements, and that it appears that many of the proposed rules violate the stringency requirements of 75-10-107(1), MCA, which is a serious concern to the regulated community. The location restrictions in 40 CFR Part 257, Subpart A, include restrictions related to floodplains, endangered species, surface water, ground water, application to food-chain crops, disease, air, and safety. There are no design requirements and, therefore, no fault area, seismic zone, or unstable area restrictions in 40 CFR Part 257 for Class III landfill units as are found in 40 CFR Part 258 for MSW landfill units. EPA regulations in 40 CFR Part 257, for Class III landfill units, include no closure/post closure care requirements, beyond those found in the disease and safety sections, and those sections do not establish design requirements, but establish only a performance standard.

RESPONSE: The department agrees that some of the proposed requirements for Class III landfill units are not found in the requirements in 40 CFR Part 257. The department is not proposing any design requirements for Class III landfills for fault areas, seismic zones, or unstable areas.

The department has received several comments concerning whether certain rule adoptions and amendments would make the rules more stringent than comparable federal regulations or guidelines addressing the same circumstances, and whether they can be adopted or amended without the department making the written findings referred to in 75-10-107, MCA. New Rule XXVIII does not set closure or post-closure care requirements. Closure requirements for Class III landfill units are found in New Rule LI, not in New Rule XXVIII. There is no comparable federal regulation or guideline addressing the same circumstances, so the findings requirements of 75-10-107, MCA, do not apply.

Deed notation recording requirements in New Rule XXVIII(1)(f) have been addressed in the Responses to Comment Nos. 34 and 35.

Concerning bulk liquids restrictions in New Rule XXVIII(1)(c) for a Class III landfill unit, there is no comparable federal regulation or guideline addressing the same circumstances, so the findings requirements of 75-10-107, MCA, are not applicable. The requirement is consistent with EPA's discussion, in its proposal notice for adoption of its solid waste regulations in 40 CFR Part 257, of one of the purposes of cover being to reduce infiltration of rainwater and to increase runoff and decrease leachate formation. 43 FR 4950 (2/6/78). A Class III landfill unit will not have a liner, leachate collection or removal system, or a ground water monitoring network or plan, and it is not appropriate to dispose of liquid waste in such a unit, when the liquid waste could move unimpeded to ground water, causing contamination that would not be detected. In addition, although the wastes allowed to be disposed of in a Class III landfill unit are relatively inert, the addition of bulk liquids to those wastes could result in the leaching of tannins and lignins from wood

waste, which could result in odor and taste problems in drinking water. Water in wood waste could also result in accelerated decomposition and settling, which could harm the cover and render it ineffective to protect the public from sharp objects or habitat for disease vectors.

Concerning New Rule XXVIII(1)(b), requiring placement of six inches of cover at least every three months, EPA regulations provide that, for protection from fires or disease vectors, the "periodic application of cover material" may be required. 40 CFR 257.3-8(b). "Periodic application of cover material" is defined as the "application and compaction of soil or other suitable material over disposed solid waste at the end of each operating day or at such frequencies and in such a manner as to reduce the risk of fire and to impede disease vectors' access to the waste." 40 CFR 257.3-8(e)(6). Therefore, this requirement for the application of six inches of an approved cover is equivalent to the federal requirement in 40 CFR 257.3-8, and the finding requirements of 75-10-107, MCA, are not triggered.

However, based on the experience of the department's solid waste section supervisor in managing the program and inspecting solid waste landfill facilities over 17 years, six inches of cover placed at least every three months is necessary to reduce the risk of fire and to impair the disease vectors' access to the waste. In at least two Class III landfill units where at least six inches of cover have not been placed at least every three months, fires have occurred and large numbers of mosquitoes have been observed. This requirement has been shown to be achievable because it has been followed under the existing rules and has been shown to be good management practice for many years, and there are no technological barriers to meeting this requirement.

Because this requirement is equivalent to the EPA's regulation, there is no additional cost. However, the estimated costs to the regulated community, for each of 33 Class III landfill facilities, would be $2,018/acre based on the $2.50/cubic yard cost of the placement of 807 cubic yards of additional six-inch soil cover per acre of open area. There would be four applications of cover per year for a total cost of $8,072/acre.

Concerning New Rule XXVIII(1)(d)(ii), pertaining to access, EPA prohibits uncontrolled public access that would subject people to health and safety hazards. 40 CFR 257.3-8(d). Therefore, the restriction for this purpose is not more stringent than a comparable federal regulation. The new rule limits and controls access and prevents unauthorized vehicular traffic and illegal dumping of wastes by requiring artificial or natural barriers. There is no comparable federal regulation for Class III landfill units, so the findings requirements of 75-10-107, MCA, are not applicable. It is necessary to limit access by unauthorized people to prevent illegal dumping of waste and to protect them from injury from heavy equipment and sharp objects.

See Response to Comment No. 72 concerning stringency.

COMMENT NO. 40: A commentor stated that, in (1)(b), provision should be made concerning cover requirements for Class III landfills, such as the one owned by the commentor, that contain significant amounts of clean dirt, soil and earthen materials, and no tires. The commentor suggested that a situation like this could be handled in the O & M plan on file with the landfill license, and that quarterly cover of at least six inches is not necessary.

RESPONSE: Proposed New Rule XXVIII(1)(b) is substantively the same as existing ARM 17.50.511(2). Existing ARM 17.50.511 is being repealed. See Response to Comment No. 72 concerning stringency. There is no comparable federal regulation for Class III landfill units, so the findings requirements of 75-10-107, MCA, are not applicable. The department believes that a minimum quarterly cover of six inches is necessary to prevent fires and to protect against disease vectors such as mosquitoes. See Response to Comment No. 39.

NEW RULE XXIX

COMMENT NO. 41: A commentor disagreed with the requirements of New Rule XXIX for methane control, financial assurance, runoff controls, ground water monitoring, and liners at Class IV landfill units. The commentor stated that the department was requiring Class II and Class IV units to be operated in the same way, and that this made it prohibitively expensive for a Class IV landfill to be developed and operated. The commentor stated that the only difference between a Class II and a Class IV landfill in the rules is that cover is required every 90 days for a Class IV landfill versus the requirement of daily cover for a Class II landfill, but the design standards are about the same. The commentor stated that he has asked the department numerous times how many stand-alone Class IV landfills are found in Montana and how many have been licensed in the last ten years or so, and that he believes the answer is none.

The commentor stated that the stand-alone Class IV landfill rules should be deleted and that the department should rethink regulation of Class IV landfills. The commentor also questioned the department's authority, under the federal Subtitle D regulations, to pass these Class IV rules, because they are more stringent than the federal regulations.

RESPONSE: The department agrees that New Rule XXIX is equivalent to the existing Class IV landfill unit requirements in ARM 17.50.511(3)(c), 17.50.530, 17.50.531, and 17.50.542. The only new requirement for Class IV landfill units is the deed notation requirement in New Rule XXIV. See Responses to Comment Nos. 34 and 35.

The authority for the adoption of rules regulating Class IV landfill units is provided in 75-10-204, MCA. In response to this and other comments, the department is modifying the rules concerning a Class IV landfill unit to eliminate many prescriptive requirements and to instead adopt the performance standard in EPA's regulations at 40 CFR 257.3-4, that a landfill unit may not cause contamination in excess of the standards in Table 1 of New Rule XXXIII in an underground drinking water source. The reason for the deed notation requirement was stated in the statements of reasonable necessity for ARM 17.50.508 and New Rules XXIX and XXVIII(1)(f). See Response to Comment No. 72 concerning stringency.

In response to the comment, the department has amended New Rule XXIX(2)(c) to provide that only the requirements in New Rule XVII, concerning explosive gases control, that are contained in EPA's regulation concerning Class IV landfill units are imposed on Class IV landfill units in Montana. Because the term "explosive gases" is used in New Rule XVII, and in 40 CFR 257.3-8, to set the basic

requirements for control of explosive gases, including methane the department has substituted "explosive gases" for "methane gas" in New Rule XXIX(2)(c).

COMMENT NO. 42: A commentor stated that the proposed rules regulate construction and demolition wastes, also known as Group IV wastes, in a manner that is much more stringent than comparable federal regulations. Federal rules found in 40 CFR Part 257, which regulates this type of waste, do not require financial assurance, deed notation, or elaborate closure and post-closure plans. Inclusion of the Class IV unit at the Billings Landfill in the landfill's financial assurance results in significant unnecessary costs to rate payers.

RESPONSE: New Rule XXIX is equivalent to the existing Class IV landfill unit requirements in ARM 17.50.511(3)(c), 17.50.530, 17.50.531, and 17.50.542. The only new requirement for Class IV landfill units is the deed notation requirement in New Rule XXIV. See Responses to Comment Nos. 34 and 35.

The authority for the adoption of rules regulating Class IV landfills is provided in 75-10-204, MCA. Because there are no comparable federal regulations or guidelines for financial assurance, deed notation, and closure and post-closure plans for Class IV landfill units, stringency findings under 75-10-107, MCA, are not required. Also, see the Responses to Comment Nos. 39 and 42 concerning stringency. The department has addressed specific rules containing requirements for Class IV landfill units in the response to specific comments on those rules.

COMMENT NO. 43: A commentor stated that the term "aesthetics" is used in (1)(a), but the term is not found in 40 CFR Parts 257 or 258, and beauty is not a concern of environmental protection.

RESPONSE: The department believes that aesthetics are a legitimate subject of regulation. EPA's rulemakings identify the protection of aesthetics as one legitimate purpose of cover, for example. See 43 FR 4950 (February 6, 1978). However, because it has the tools to protect those aspects of aesthetics identified by EPA, by use of cover and control of litter, the department is eliminating the word "aesthetics."

COMMENT NO. 44: A commentor stated that, in (1)(c), the wastes listed are precisely the materials that EPA designated 40 CFR 257, Subpart B, facilities to accept, and the commentor stated that putrescible waste must be removed from a building prior to demolition, because it is municipal solid waste.

Subsection (1)(d), concerning financial assurance, should be deleted because it is more stringent than EPA requirements for 40 CFR Part 257, Subpart B, facilities.

Subsection (1)(e), requiring a deed notation, should be deleted because EPA has no requirement for deed notation for Part 257, Subpart B, facilities. There is no need to cloud the title of a property that poses such low risk. An examination of most major cities of the world would reveal that they are built on the remains of older cities. Most of civilization is built on top of what the department considers to be Class III and Class IV facilities.

There is no waste screening requirement, like the requirement in (2)(a), in comparable EPA regulations; this requirement is more stringent than the federal

regulations and should be deleted.

In (2)(b), the requirement for MSWLF units to place daily cover for vector control conflicts with New Rule XXIX(1)(b).

Subsection (2)(c), concerning methane gas control, is much more stringent than EPA requirements. This is a 40 CFR Part 258 requirement; the owners and operators of Class IV landfill units are not required to monitor for methane because of the extremely low generation rate, and the rule should be limited to the requirements in 40 CFR 257.3-8(a).

Subsection (2)(f) is more stringent than the requirements found in 40 CFR 257.3-3. The proposed requirement is from 40 CFR 258.26 and should be deleted. The applicable EPA requirements are found in New Rule XXI.

Concerning (2)(h), restricting bulk liquids, EPA has no restrictions on bulk liquids at 40 CFR Part 257 landfills.

Concerning (2)(i), recordkeeping requirements are found in 40 CFR 258.29. EPA does not have the same requirements in 40 CFR Part 257, so the proposed rule is more restrictive than EPA regulations. The only recordkeeping requirements for construction and demolition waste landfills concern ground water monitoring and related items.

RESPONSE: The department agrees with the comment concerning (1)(c), and has added "putrescible organic materials."

The requirement for financial assurance in New Rule XXIX(1)(d) is not new. Existing ARM 17.50.542, which is being repealed, requires financial assurance for Class IV landfills. There is no comparable federal regulation addressing the same circumstances, so the stringency findings of 75-10-107, MCA, do not apply. However, financial assurance ensures that money is available to complete closure and post-closure care at a landfill unit. If this money was not available, closure might not be completed, post-closure care might not be conducted, and increased leachate could form and threaten an underground drinking water source. The requirement could prevent this from occurring, and Class IV landfill units have been providing financial assurance for many years. Therefore, the department declines to remove the language as requested in the comment.

The department declines to remove the deed notation as an operating requirement as requested in the comment. See Responses to Comment Nos. 34 and 35.

Subsection (2)(a) requires a Class IV landfill unit owner or operator to screen waste as required at a Class II landfill unit. This is carried forward from existing ARM 17.50.511(3). Section 75-10-204(2), MCA, requires the department to adopt "rules governing ... the classification of disposal sites according to the physical capabilities of the site to contain the type of solid waste to be disposed of." There is no comparable federal regulation addressing the same circumstances. Therefore, it is not necessary to make findings under 75-10-107, MCA. Waste screening is an inherent function of all solid waste management systems, to ensure that only the correct waste stream enters the appropriate facility. All hazardous wastes and municipal solid wastes are prohibited from disposal at Class IV solid waste management systems, and a waste screening program must be implemented to ensure protection of human health and the environment from the release of hazardous contaminants to ground water that could be used as a drinking water

source. If hazardous wastes, or municipal solid waste, were not screened from a Class IV landfill unit, the public could be exposed to contamination that is harmful to human health. All solid waste management systems currently screen as part of their plans of operation. Therefore, the department declines to remove the language as requested in the comment.

The department does not agree that (2)(b), concerning disease vector control, conflicts with (1)(b), concerning the requirement to apply cover at least quarterly. New Rule XVI, Disease Vector Control, provides that the owner or operator of a Class II landfill unit shall prevent or control on-site populations of disease vectors using techniques appropriate for the protection of human health and the environment. The requirement to use appropriate techniques to control disease vectors implies that the application of approved cover would be considered in the selection of the appropriate technique to control disease vectors. It does not mean that the daily cover requirement for a Class II landfill unit applies to a Class IV landfill unit.

Concerning the requirements for control of explosive gases at a Class IV landfill unit, see the Response to Comment No. 41.

Subsection (2)(f), concerning run-on and run-off control systems, is equivalent to existing ARM 17.50.511(3). ARM 17.50.511(3) provides: "Class IV solid waste units and components thereof must be designed, constructed, maintained, and operated so as to control … residues, waste water, leachate …." Control of residues, waste water, and leachate includes the run-on and run-off control systems described in New Rule XX. This is necessary to ensure that a Class IV landfill unit does not pollute state waters, as provided in New Rule XI(1)(c).

Subsection (2)(h), concerning bulk liquids, is equivalent to existing ARM 17.50.511(2)(c)(vi). The commentor noted that bulk liquids may not be received at a Class IV landfill unit. It is therefore necessary to require that they be screened out of the waste allowed to be disposed of there. For Class IV landfill units, which can accept painted wood waste, drywall, and other construction waste, the conditions created by bulk liquids could result in the same harms described in the Response to Comment No. 39 for Class III landfill units, plus the environment created by the presence of liquids can create leachate that can contaminate an underground drinking water source in excess of the applicable ground water quality standard. The exclusion of bulk liquids from Class IV landfill units is necessary to protect public health because it will prevent the harms described above. This requirement has been followed under the existing rules and has been shown to be good management practice for many years.

See also Response to Comment No. 72 concerning stringency.

Subsection (2)(i), concerning recordkeeping, is equivalent to existing ARM 17.50.511(2)(c)(vii). See Response to Comment No. 72 concerning stringency. Where by rule the department has provided that documents are to be placed in the operating record at a Class IV landfill unit, it is necessary to require that information to be kept by the owner or operator.

<u>NEW RULE XXXI</u>

As discussed below, in the Response to Comment No. 45, the department

has revised New Rule XXXIII to use the phrase "underground drinking water source." New Rule XXXIII is in New Subchapter III. Because that phrase was not defined in this rule, which includes definitions for use in New Subchapter III, it is necessary to revise this rule to include a definition of that term. Therefore, the department has revised New Rule XXXI to include the definition of "underground drinking water source."

NEW RULE XXXIII

COMMENT NO. 45: The design standards proposed by the department for Class IV facilities are more stringent than comparable EPA requirements, therefore, findings under 75-10-107, MCA, are required.

RESPONSE: The design requirements for Class IV landfills are substantively the same as the existing requirements in ARM 17.50.506 and 17.50.511. Existing ARM 17.50.506 and 17.50.511 are being repealed. In response to comments, the department has stricken many of the prescriptive requirements in New Rule XXXIII for a Class IV landfill unit, such as requirements for a liner or leachate collection system. Instead, the department is basing design requirements on a showing that a Class IV landfill unit will not contaminate an underground drinking water source, which is the standard required by EPA in 40 CFR 257.3-4. The department has amended (1)(a) to refer to an underground drinking water source and has added a definition of underground drinking water source to New Rule XXXI.

In reviewing the proposed new rules while responding to comments, the department identified a potential problem in New Rule XXXIII(1). That section would have required an owner or operator to design a Class II or IV landfill unit to meet Montana ground water quality standards. The department did not provide a statement of reasonable necessity for the proposed adoption, and has stricken the reference to Montana ground water quality standards in that rule. However, Montana ground water quality standards are applicable to a discharge from a solid waste management system. See 75-5-605(1)(a), MCA, of the Montana Water Quality Act, which makes it illegal to cause pollution as defined in 75-5-103, MCA. Section 75-5-103(25)(a), MCA, defines pollution as exceeding a Montana water quality standard. These standards are contained in Department Circular DEQ-7, which was adopted by the Montana Board of Environmental Review pursuant to section 75-5-301, MCA. Although Montana ground water quality standards are not being adopted in this rulemaking, they are already applicable to solid waste management systems through 75-5-605(1)(a), MCA.

COMMENT NO. 46: A commentor stated that, in (2)(d), the phrase "any other matter determined by the department to be necessary to protect human health or the environment" is more stringent than comparable EPA regulations and is vague, arbitrary, capricious, and easily abused and should be deleted.

RESPONSE: The department needs flexibility to determine if a design submission is adequate. EPA's comparable regulations provide that an agency such as the department, when approving an alternative design, "shall consider at least the following factors:". In response to the comment, the department is eliminating (2)(d) and is modifying (2) to state "at least." This retains the

department's flexibility to require additional information if necessary, while removing the language objected to and replacing it with the comparable EPA language.

COMMENT NO. 47: A commentor stated, concerning (3), that EPA does not require that the relevant point of compliance be inside a permitted facility, rather, EPA requires only that the RPOC be on land owned by the owner of the unit. The owner or operator of a facility might be compelled to license additional land simply to place an additional well on property it already owns, which would be unnecessary and could be expensive. The department should change the language of the rule to mirror the requirements of 40 CFR 258.40(d).

New Rule XXXIII(4) is more stringent than EPA requirements. In 40 CFR 258.40(a)(1) and (2), EPA allows an owner or operator to submit a design meeting the requirements of New Rule XXXIII(1)(a) to a state for approval, or to use the default prescriptive design in New Rule XXXIII(1)(b). A (1)(a) design does not have to equal a (1)(b) design, but must simply provide the protection required in (1)(a). This proposed rule should not be adopted.

RESPONSE: The department agrees with the comment concerning (3), and has amended New Rule XXXIII(3) to require only that the monitoring well at the relevant point of compliance be on land owned by the owner of the landfill unit. The department is concerned that, if the owner were to transfer the land on which the well was located, access to and protection of the monitoring well could become a problem. The department may address this matter further in a future rulemaking.

Subsection (3)(i) was stricken, and "at least" placed in (3), for the same reason as in the Response to Comment No. 46.

The department agrees with the comment concerning (4), and has stricken the proposed language.

NEW RULE XXXIV

COMMENT NO. 48: A commentor stated that the department should not amend or delete the definitions of "existing unit" or "new unit" because this would affect "grandfathered" units that were not required to retroactively comply with design requirements that took effect on October 9, 1993.

RESPONSE: The department determined to amend the definitions of "existing" and "new" when used in conjunction with "unit" or a type of unit in each subchapter of the rules subject to this rulemaking. The amendments of those definitions are not intended to affect existing units, that is, those units that were accepting waste on October 9, 1993. The department also noticed, in analyzing the comment, that New Rule XXXIV, as a design rule, could address only new units or lateral expansions of existing units. The proposed rule had not specified that it concerned only those types of units, so the department has modified New Rule XXXIV(1) through (3) to provide that the design requirements in those sections apply only to new units or lateral expansions.

COMMENT NO. 49: A commentor suggested that New Rule XXXIV(1)(a), which states that a leachate collection system is not required for a unit for which a no-migration demonstration has been approved, should refer to New Rule

XXXVII(2), which contains the no-migration rule.

Subsection (1)(b) is more stringent than EPA requirements. EPA has permeability requirements for the standard composite liner only. For alternate designs, even designs using natural materials, the owner or operator needs to demonstrate only that they will prevent migration of contaminants to the uppermost aquifer over the life of the unit and the post-closure care period, and (1)(b) should be deleted.

There are no federal recordkeeping requirements for leachate measurement or removal volumes as are found in (3)(a). Facilities in the United States use the English System of units and have measuring devices that read in feet, inches, and tenths of a foot. If this proposal is retained, the department should at least provide an appropriate standard in English units.

There are no slope requirements in 40 CFR Part 258 as are arbitrarily required in (3)(b). EPA specifies only the performance standard found in New Rule XXXIII(1)(a), or the standard design found in New Rule XXXIII(1)(b), and engineers are free to choose any design that meets those requirements.

Subsection (3)(c) goes far beyond the EPA design requirements for MSWLF units. "Secondary containment" is not defined, but double liners are not required by 40 CFR 258.40 for leachate collection sumps. In addition, (3)(c) is grammatically incorrect, as well as being more stringent than federal regulations.

A commentor questioned the meaning of (3)(d), which states that an owner or operator of a Class II or Class IV landfill unit shall design a required leachate collection and removal system to provide for increased hydraulic head in the leachate removal system. The commentor stated that a design for a prescriptive liner could not allow for an increased head of more than 30 cm of leachate over the liner, and that there was no such requirement for an alternative liner.

Concerning (6), CQA and CQC reports are the engineer's assurance to the department that the unit was constructed as designed, and they should be placed in the operating record and submitted to the department. Department approval is not needed or desired, unless the department is signing and sealing the document and taking responsibility for the design and construction. Department approval may expose the department to liability for failure of the unit.

In (7), the commentor suggested striking the word "independent" in front of "Montana licensed professional engineer". Any engineer licensed to practice in Montana is capable of supplying the required certification, regardless of their employer. "A professional engineer licensed to practice in Montana" is a better phrase.

RESPONSE: In response to the comment regarding (1)(a), the department agrees that the rule would be clarified by inserting a reference to New Rule XXXVII(2). However, the department believes that it would be helpful to the reader to retain the narrative describing the no-migration demonstration. Therefore, the department is adding the reference, but retaining the narrative.

Subsection (1)(b), concerning the hydraulic conductivity of soil in a liner, is equivalent to existing ARM 17.50.506(4)(f). See Response to Comment No. 44. In response to comments, the department is eliminating many prescriptive requirements in New Rule XXXIII for a Class II landfill unit with an alternative design to the prescriptive liner and leachate removal system. Instead, the department is

basing design requirements on a showing that a Class II landfill unit will not contaminate the uppermost aquifer, which is the standard required by EPA in 40 CFR 258.40(a)(1). Therefore, the department has eliminated (1)(b).

Both existing ARM 17.50.506(2)(c) and 40 CFR 258.40(c)(3) require consideration of the volume of leachate as a component for design approval.

The requirement in (3)(a), for accurate monitoring of leachate, measured to within one centimeter, is necessary for proper evaluation of the effectiveness of an approved liner. Metric units are commonly used in state rules and federal regulations, and are appropriate here.

Subsection (3)(b), concerning minimum slope of a liner with a leachate collection system, is equivalent to existing rule ARM 17.50.506(6)(b). See Response to Comment No. 44. A 2% minimum slope for a leachate collection system is necessary to cause leachate to flow to the collection point. This requirement is contained in a comparable EPA guideline, Municipal Solid Waste Disposal Facility Criteria Technical Manual, Subpart D Design Criteria, EPA 530-R-93-017, page 152; and Sanitary Landfill Design and Operation, SW-65ts, page 9-35. Therefore no findings are required by 75-10-107, MCA.

In response to the comment on (3)(b) concerning maximum slope for a liner, the department has stricken the requirement that the maximum slope be limited to 33%. The maximum slope allowed will be determined by engineering submission and review.

In response to the comment concerning (3)(c), the department has removed (3)(c) because an owner or operator is required by New Rules XXXIII and XXXIV to design a unit with an alternative liner to meet the ground water standards in Table 1 of New Rule XXXIII, and to obtain department approval of that design. The department has determined that it is not appropriate to prescribe the elements of that design; rather, it will review a design to determine whether it will meet the standards. See Response to Comment No. 50.

The purpose of (3)(d) was to require that the design of a leachate removal system, which could create a column of leachate in a pipe above a liner greater than 30 cm as it was being pumped away, had to take this increased head into account to protect against leachate contamination of ground water due to stress caused by the increased head on the liner. This is a necessary element of protecting ground water at a landfill, and should be addressed in a design. This requirement is contained in existing ARM 17.50.506(8)(c). However, in response to the comment, the department is eliminating the specific requirement as unnecessary, because it must be addressed as part of the design of the unit to show that ground water will not be contaminated at the RPOC.

Concerning (6), CQA and CQC plans are necessary to ensure a landfill was correctly constructed, and it is necessary for the department to review them to determine whether they are adequate. Use of CQA and CQC plans is contained in comparable EPA guidelines and the scientific literature. See, Quality Assurance and Quality Control for Waste Containment Facilities, EPA/600/R-93/182, page 11, which was expanded into a book by D.E. Daniel, Ph.D, P.E., and R.M. Koerner Ph.D, P.E., entitled Waste Containment Facilities- Guidance for CQA and CQC of Liner and Cover Systems (American Society of Civil Engineers 2d ed. 2007). Research conducted by the Solid Waste Association of North America (SWANA)

Applied Research Foundation Disposal Group indicated that long-term environmental risks from Subtitle 'D' landfills are reduced by CQC\CQA of the liners and covers. As provided in the September 2009 edition of the MSW Management Magazine at p. 12, "Recent studies of Subtitle 'D' landfills have yielded important findings about their design, construction and operation. These studies have found that good design and appropriate CQC testing and CQA oversight during construction are important to provide bottom-liner and final cover systems that function."

Because EPA recommends the use of CQC and CQA plans in the above-listed guideline, the requirement is not more stringent than a comparable federal guideline. Also, CQC and CQA plans are a component of a design plan. See New Rule XXXIV(5) and stringency discussion, above, for that rule and for New Rule XXXIV(6). The design plan is required as part of a license application. See discussion of New Rule XXXIII(1), above. See also, EPA guideline Quality Assurance and Quality Control for Waste Containment Facilities, EPA/600/R-93/182, page 11: "Most state and federal regulatory agencies require that a MQA/CQA plan be submitted by the owner/operator and be approved by that agency prior to construction. The MQA/CQA plan is usually part of the permit application." See also D.E. Daniel, Ph.D, P.E., and R.M. Koerner Ph.D, P.E., Waste Containment Facilities- Guidance for CQA and CQC of Liner and Cover Systems, page 26 (American Society of Civil Engineers 2d ed. 2007): "The permitting agency reviews the owner/operator's permit application, including plans, specifications, and the site-specific MQA/CQA document, for compliance with the agency's regulations and to make a decision to issue or deny a permit based on this review." Licensing is a duty imposed on the department by the Legislature under 75-10-221 and 75-10-224, MCA. A rule adopted to implement a direct requirement of Montana state law is not subject to stringency review under 75-10-107, MCA. In addition, EPA requires, in its 40 CFR Part 239 regulations for approval of state solid waste management programs, that a state have a permitting (or licensing) program that ensures compliance with the requirements in 40 CFR Part 258. See 40 CFR 239.4 and 239.6. Because the requirements of 40 CFR Part 258 include design, and the department is required by statute to review design as part of a license application, there is no stringency issue. Therefore, the requirements that an owner or operator submit CQC and CQA plans, and that they be reviewed for approval by the department, do not trigger the findings requirements of 75-10-107, MCA. See Response to Comment No. 44.

The comment concerning (6) does not address a specific rule requirement, but addresses the department's CQA and CQC report review and approval procedures. It is prudent to require the submission of the CQA and CQC reports to ensure that the construction has been completed according to the approved design. This is suggested in the EPA guideline, Quality Assurance and Quality Control for Waste Containment Facilities, EPA/600/R-93/182, page 14, and D.E. Daniel, Ph.D, P.E., and R.M. Koerner Ph.D, P.E., Waste Containment Facilities- Guidance for CQA and CQC of Liner and Cover Systems, page 37 (American Society of Civil Engineers 2d ed. 2007). "The permitting agency also has the responsibility to review all MQA/CQA documentation during or after construction of a facility, possibly including visits to the manufacturing facility and construction site to observe the

MQC/CQC and MQA/CQA practices and to confirm that the approved MQA/CQA plan was followed and that the facility was constructed as specified in the design." Quality Assurance and Quality Control for Waste Containment Facilities, EPA/600/R-93/182, page 3, and D.E. Daniel, Ph.D, P.E., and R.M. Koerner Ph.D, P.E., Waste Containment Facilities- Guidance for CQA and CQC of Liner and Cover Systems, page 27 (American Society of Civil Engineers 2d ed. 2007). Because the submission of CQA and CQC reports, and their approval by the department, is contained in comparable EPA guidelines, and because the department is charged by law to review and approve design as part of the licensing process, findings under 75-10-107, MCA, are not required.

Concerning the comment on (7), because of the potential for a conflict of interest, it is not appropriate for a licensed professional engineer to certify the proper construction of a landfill that is owned by the engineer's employer. To avoid a conflict of interest, the certification must be conducted by a third party. See Quality Assurance and Quality Control for Waste Containment Facilities, EPA/600/R-93/182, page 8: "The MQA/CQA engineer is normally hired by the owner/operator and functions separately of the contractors and owner/operator." Because this requirement is contained in comparable EPA guidelines, stringency findings under 75-10-107, MCA, are not required. Therefore, the department declines to remove the language as requested in the comment.

In New Rule XLIII, in referring to CQC and CQA, the department used the word "plan," but, in New Rule XXXIV, the department used the word "manual," to refer to the same document. Both terms are used in the solid waste field, but, for consistency, the department has amended New Rule XXXIV to use "plan" exclusively.

COMMENT NO. 50: A commentor stated that (1)(d) allows the department to ask for any other design standards determined by the department to be necessary to meet the requirements of New Rule XXXIII(1) and that this type of requirement is too open-ended and vague. The department could ask for anything that could drive away the applicant because of the cost, and there is no provision in the rules for a landfill owner or operator to disagree that the department needs this additional information. If it is unreasonable or too expensive, an owner or operator could be forced to drop an application after spending tens of thousands of dollars to get to that point, and this rule should be revised or deleted.

RESPONSE: The requirements of New Rule XXXIII(1), which are referenced in New Rule XXXIV(1)(d), are the same as those in 40 CFR 258.40(a) and existing rule ARM 17.50.506(1). An owner or operator is required to obtain department approval of a design, and in considering whether to approve the design, the department is required to consider "at least" the factors listed in New Rule XXXIII(2)(a) through (c), which is the same language used by EPA in 40 CFR 258.40(c)(1) through (3). The use of "at least" indicates that the EPA intended the department to have flexibility in determining if other information should be considered. By adopting "at least," the department retains the flexibility intended by EPA. Because that flexibility is available in New Rule XXXIII(2), and New Rule XXXIV(1)(d) refers to that provision, New Rule XXXIV(1)(d) is redundant and is being stricken.

COMMENT NO. 51: A commentor noted that (3)(c) requires secondary containment, monitoring of leachate and removal systems, and monitoring of leachate in collection sumps within an alternatively lined cell. The commentor asked whether this all needs to be completed within a lined cell, and the commentor questioned the justification and cost versus benefits for this requirement. The commentor also questioned the legality, due to the proposed rule being more stringent than the Subtitle D federal regulations, found at 40 CFR Parts 257 and 258. The commentor stated that this rule provision is unnecessary, unwarranted, and very expensive and should be deleted because the applicant already would have demonstrated that the alternative liner system meets the Subtitle D ground water protection standards, or the alternative liner wouldn't have been approved.

RESPONSE: The department agrees that the phrase "monitoring of leachate in collection sumps within alternative liners" is not justified in New Rule XXXIV. Alternative liners may be approved under New Rule XXXIII(1)(a) or New Rule I. The requirements for an alternative liner would be determined based on engineering submissions and reviews pursuant to those rules. The department agrees that "secondary containment" is not defined. Therefore, the department has stricken New Rule XXXIV(3)(c).

Subsection (3)(e) was stricken for the same reasons as in the Response to Comment No. 46.

COMMENT NO. 52: A commentor stated that the conjunction at the end of (4)(a), and the entire (4)(b) should be changed to read:

"…; or

(b) is approved by the department under the requirements of [NEW RULE I]."

Proposed (4)(b) needs to be deleted.

RESPONSE: Because New Rule XXXIV(1)(d), which required an owner of a Class II or IV landfill to meet any other design standard determined by the department to be necessary to meet the requirements of New Rule XXXIII(1), has been stricken, and the only requirement being referred to in New Rule XXXIV(4)(b) is in New Rule XXXIV(1)(d), New Rule XXXIV(4)(b) has also been stricken.

Regarding the commentor's suggestion that New Rule XXXIV(4) should be amended to state that a unit approved under New Rule I may recirculate leachate, New Rule I authorizes leachate to be circulated at a landfill unit approved under that rule if recirculation of leachate is part of the approved design and operation of the unit; therefore, it is unnecessary to insert a reference to New Rule I in New Rule XXXIV.

NEW RULE XXXVI

For the same reason discussed in the Response to Comment No. 45, the department is revising New Rules XXXVII and XXXVIII to use the phrase "underground drinking water source." New Rules XXXVII and XXXVIII are in New Subchapter IV. Because that phrase was not defined in this rule, which includes definitions for use in New Subchapter IV, it is necessary to revise this rule to include a definition of that phrase. The department has revised New Rule XXXVI to include

a definition of "underground drinking water source."

NEW RULE XXXVII

For the same reason discussed in the Response to Comment No. 45, the department has revised New Rule XXXVII(2) to refer to "the uppermost aquifer, or underground drinking water source," as required in New Rule XXXIII. For the same reason, similar revisions have been made to New Rule XXXVIII and New Rule XLV.

NEW RULE XXXVIII

COMMENT NO. 53: A commentor suggested adding the following language as (1)(c), to coordinate this rule with the requirements of other agencies and Montana laws: "Ground water monitoring wells must be drilled by a driller licensed according to the requirements of ARM Title 36, chapter 21, subchapter 4. Ground water monitoring wells at solid waste management facilities must be installed by a person licensed under ARM Title 36, chapter 21, subchapter 7."

A commentor stated that (3) should be replaced with: "Ground water monitoring wells must be constructed according to the standards found in ARM Title 36, chapter 21, subchapter 6." The rules from the Board of Water Well Contractors provide necessary construction requirements and provide a single, uniform source of regulation.

A commentor stated that (4)(a) should be revised to read: "submit a ground water monitoring plan, prepared by a qualified ground water scientist,". The necessity for department approval should be removed from this rule because state approval is not required by EPA. The plans simply need to be prepared by a competent person and placed in the operating record and submitted to the department. To do more, would place an undue regulatory burden on the facilities.

The commentor stated that (4)(a)(iv) and (d), which authorize the department to require any other information determined to be necessary, should not be adopted because they are vague and overly broad.

Commentors stated that they disagreed with the requirement in (4)(b) of updating ground water monitoring plans at least every five years. A commentor stated that monitoring networks need to be updated only if new units are added that are outside the monitoring network approved in (2). A commentor requested that the requirement be revised to read: "to be reviewed and updated if necessary every five years," and that an update not be automatically required every five years. A commentor stated that it costs up to several thousand dollars to update a network, that, especially at smaller landfills, it takes 10 to 15 years to fill a cell, and there isn't really anything that changes at these landfills. A commentor stated that, while ground water monitoring plan updates may be needed every five years at other facilities, they were not needed at the 16 facilities where the commentor worked.

A commentor stated that (4)(c) is duplicative of (6)(b) and should be deleted.

A commentor stated that (6)(b) should read: "be certified by a qualified ground water scientist or approved by the department," which would conform to the requirements of 40 CFR 258.51(d)(2).

RESPONSE: In (1)(b) the word "disposal" has been stricken in response to

Comment No. 6.

The department agrees that it is worthwhile to inform persons regulated under these rules that the drilling and construction of ground water monitoring wells at solid waste management systems is governed by laws and rules of the Department of Natural Resources and Conservation (DNRC). However, the adoption of the DNRC's ground water monitoring well rules in ARM Title 36, chapter 21, subchapters 4 and 7, may be beyond the scope of the current rulemaking because it would impose additional enforcement consequences on an owner, operator, or licensee--the $1,000 per day penalty provision of 75-10-228, MCA, and the injunction provision of 75-10-231, MCA. In addition, it could make the Department of Environmental Quality responsible for determining compliance with the DNRC rules. Existing ARM 17.50.707(1) required compliance with ARM Title 36, chapter 21, subchapter 8, and it was adopted by reference in existing ARM 17.50.707(13). Because it may be beyond the scope of this rulemaking to adopt subchapters 4 and 7 of the DNRC rules, the department has determined not to adopt subchapter 8 either. Rather, New Rule XXXVII(7) refers to that subchapter so that landfill unit owners and operators will be aware that it applies to construction of monitoring wells.

Therefore, the department is adding a new (7), instead of a new (1)(c) as the commentor suggested, that does not adopt the DNRC rules, but rather gives notice that the drilling and construction of ground water monitoring wells at solid waste management systems is governed by the DNRC's rules at ARM Title 36, chapter 21, subchapters 4, 7, and 8.

In (4)(a), concerning department approval of ground water monitoring plans, submission and department approval of a ground water monitoring plan is required under 75-10-207(4), MCA. The number, spacing, and depth of ground water monitoring wells are necessary components of a ground water monitoring plan. These are required elements of a multiunit ground water monitoring system, which is subject to review and approval by the state, in EPA's regulations at 40 CFR 258.51(b). Because approval of a ground water monitoring plan is required by state law, the findings requirements of 75-10-107, MCA, are not triggered. Therefore, the department declines to revise the language as requested in the comment.

In response to the comment, the department has stricken (4)(a)(iv) and (d).

Subsection (4)(b), concerning updating of a ground water monitoring plan, is equivalent to existing ARM 17.50.709(1)(b)(iii). Existing ARM 17.50.709 is being repealed. It is necessary to require an update to a ground water monitoring plan every five years because of the dynamic nature of a landfill. Because waste units can expand, or new units can be located in a different part of a property in relation to the area covered by monitoring wells, it is important to have the ground water monitoring plan updated every five years to capture those changes. If the owner or operator believes that nothing has changed at the landfill that would affect the ground water monitoring plan, the update should provide the basis for that position, and no further submission would be necessary. A ground water monitoring plan and plan updates are not addressed in the federal solid waste regulations (40 CFR Parts 257 and 258). Therefore, the requirement to submit a plan update for approval does not trigger the findings requirements of 75-10-107, MCA, because EPA has no comparable regulations that address the same circumstances.

Subsection (4)(c) requires that the ground water monitoring plan be placed in the operating record, and (6)(b) requires that a certification of the number, spacing, and depths of monitoring wells by a qualified ground water monitoring scientist be placed in the operating record. The department does not agree that the sections are redundant and duplicative. If the owner or operator wished to provide the certification as part of the ground water monitoring plan that is placed in the operating record, only one such placement would be necessary. Therefore, the department declines to delete the language as requested in the comment.

In (6)(b), it is necessary for the department to review certification by a qualified ground water monitoring scientist to ensure the number, spacing, and depths of the monitoring wells are appropriate. Because this information is an integral part of a ground water monitoring plan, and the department is required to review and approve such plans under 75-10-207(4), MCA, its review of the certification is required by law and does not require findings under 75-10-107, MCA. Therefore, the department declines to revise the language as requested in the comment.

For the same reason discussed above, in the Response to Comment No. 45, the department has revised New Rule XXXVIII(1) to refer to "the uppermost aquifer, or underground drinking water source," as required in New Rule XXXIII.

NEW RULE XXXIX

COMMENT NO. 54: A commentor expressed concern for the requirements in (3) that inorganic metal constituents must be monitored for "total" metals and that samples may not be field-filtered. The commentor stated that monitoring should be conducted for "dissolved" metals rather than for "total" metals.

RESPONSE: The department agrees with the comment and has amended New Rule XXXIX to require monitoring for dissolved metal concentrations. Existing ARM 17.50.708(9) provides that: "Laboratory analysis must be for the dissolved metals concentration in the ground water, unless another alternative for analysis is approved in writing by the department on an individual facility basis." Existing ARM 17.50.708 is being repealed. Similar language to that quoted from ARM 17.50.708(9) has been added to New Rule XXXIX with a reference to Appendix I or II to 40 CFR Part 258 (July 1, 2008), because these appendices contain the lists of metals that must be analyzed. In addition, those Appendices, which were in the proposed rulemaking at the end of New Rules XL and XLI, respectively, are being amended to eliminate references to monitoring for "total" metals as opposed to "dissolved" metals.

COMMENT NO. 55: A commentor stated that 40 CFR 258.53(a) and 40 CFR 257.23(a), concerning sampling and analysis plans for ground water monitoring, are self-implementing and any additional requirements beyond the requirements of the federal regulations must be justified under the requirements of 75-10-107, MCA. The commentor stated that EPA regulations do not require department approval as in New Rule XXXIX(1).

The commentor stated that (1)(f), which requires an owner or operator to submit a sampling and analysis plan along with any other information determined by

the department to be necessary, should not be adopted because it is vague and overly broad.

RESPONSE: Ground water sampling and associated analysis are fundamental aspects of the ground water monitoring plan required by 75-10-207, MCA. Without a sampling and analysis plan, a ground water monitoring plan would be meaningless. The EPA, in 40 CFR 258.53(a) and 258.23(a), requires sampling and analysis procedures in a ground water monitoring program. The ground water monitoring plan required in ARM 17.50.508 and New Rule XXXVII is the method used by the department to implement the ground water monitoring program required by EPA, and the elements of the sampling and analysis plan in the rule are taken from the EPA regulation. Therefore, New Rule XXXIX(1) is not more stringent than a comparable federal regulation. Because a ground water monitoring plan is required by state law, and because a sampling and analysis program is required under the EPA regulations, 75-10-107, MCA, does not apply.

Subsection (1)(f) was stricken in response to the comment.

NEW RULE XL

COMMENT NO. 56: A commentor stated that, as it applies to Class IV landfills, (3) should be revised because it is more stringent than EPA requirements found in 40 CFR 257.24(a)(1), and the department has broader authority to require removal of constituents under Part 257 than under Part 258.

Sections (5) and (6) are more stringent than EPA requirements found in 40 CFR 257.24(c) and 40 CFR 258.54(c). The director of an approved state, i.e., the department, is given no intervention authority by EPA. The determination of any statistically significant increase that would trigger assessment monitoring resides with the owner or operator alone. The department has no authority to second guess the results of the statistical tests, or to conduct different statistical testing on its own initiative, and the language in (5), (5)(a), and (5)(b) should be revised to reflect this. Detection begins a mandatory regulatory sequence that requires no department approval as is found in (5)(b); the department must only be notified. Section (6) should be deleted entirely.

Section (7) is more stringent than EPA requirements in 40 CFR 257.24(c)(3) and 40 CFR 258.54(c)(3). The department has no authority to nullify a certification by a qualified ground water scientist. Section (7) should be changed to reflect the language of 40 CFR 257.24(c)(3) and 40 CFR 258.54(c)(3).

RESPONSE: New Rule XL(3), concerning an alternative list of inorganic indicator parameters, is substantially identical to the comparable EPA regulations at 40 CFR 257.24(a)(2) and 258.54(a)(2). In addition, it is equivalent to existing ARM 17.50.708(4)(b). Existing ARM 17.50.708 is being repealed. Because New Rule XL(3) is not more stringent than comparable federal regulations, no findings are required by 75-10-107, MCA. The department declines to make the requested change.

The requirements in (5)(b) and (6) for department review and approval of the assessment monitoring program and the statistically significant change in an alternative list parameter are not subject to the stringency requirements of 75-10-107, MCA. Section 75-10-207(4), MCA, requires the submittal of a ground water

monitoring plan for department review and approval. Ground water sampling and the associated analyses and determinations are all fundamental aspects of the ground water monitoring required by 75-10-207(4), MCA. The assessment monitoring program in New Rule XL(5)(b) contains the elements of a ground water assessment monitoring plan. Because department review and approval of a ground water monitoring plan is required by Montana law, the findings requirements of 75-10-107, MCA, do not apply. It is necessary for the department to review the assessment monitoring program developed pursuant to (5)(b), and the statistically significant change in an alternative list parameter pursuant to (6), to ensure the ground water monitoring program meets the requirements of New Rule XLI.

Concerning a statistically significant change in an alternative list parameter triggering assessment monitoring, in 40 CFR 258.54(a)(2), EPA allows the department to use an alternative list of inorganic indicator parameters in place of some or all of the metals in Appendix I. One of those parameters is pH. pH is a measure of acidity. An increase in acidity is demonstrated by a decrease in pH. Therefore, for pH, a statistically significant increase in acidity will be indicated by a statistically significant decrease in pH. Because acids are highly reactive solvents, heavy metals that are potentially harmful to human health are stripped off by higher acidity and made more available to come into contact with people.

For pH, then, a statistically significant decrease is the appropriate measure for determining whether assessment monitoring should be triggered. However, EPA designated only a statistically significant increase in a constituent or parameter as triggering assessment monitoring. Yet, as noted above, pH is an inorganic indicator parameter that could be required to be monitored for on an alternative list. It would be unreasonable for EPA to allow the department to use pH as an alternative list indicator parameter for detection monitoring, and then not to have a consequence for a statistically significant decrease. The omission of decreased pH from triggering a consequence, while allowing it to be used as an alternative parameter, means that EPA's regulation is not comparable and does not address the same circumstances as New Rule XL(6). Therefore, New Rule XL(6) is not more stringent than the comparable EPA regulation. Because the department did not wish to subject a unit owner or operator to the increased cost of assessment monitoring, when decreased pH was detected, unless the department had determined that it was necessary, the department proposed to require assessment monitoring only when it was necessary to protect health or the environment. Therefore, the department declines to revise the language as requested in the comment.

Concerning department review of a demonstration of a statistically significant change revealed by detection monitoring, it is necessary for the department to review the demonstration, developed pursuant to (7) concerning a statistically significant decrease from background levels for a pH, to determine whether assessment monitoring is required. The department has prepared findings, pursuant to 75-10-107, MCA, concerning the stringency of the requirement in (7) for department approval. See Stringency Findings for this rule. Therefore, the department declines to revise the language as requested in the comment.

The department notes that the word "total" in Appendix I, and a reference to the word "total" in footnote 2, were stricken in response to Comment No. 54.

NEW RULE XLI

COMMENT NO. 57: A commentor stated that the next to the last sentence in (2) should read: "The department may specify an appropriate subset of wells to be sampled and analyzed for Appendix II constituents during assessment monitoring." This language would be more consistent with the language in 40 CFR 258.55(b).

Subsection (4)(d) should include: "The groundwater protection standard must be established in accordance with (8) or (9)."

Section (5) should be revised to be no more stringent than federal regulations, and department approval should not be required. Return to detection monitoring is the choice of the owner or operator of the facility after two consecutive sampling events.

Subsection (7)(b) is more stringent than the comparable requirements of 40 CFR 258.55(g)(2) and 40 CFR 257.25(g)(2). The department has no approval authority over the certification of a qualified ground water scientist. 40 CFR 258.55(g)(2) reads "... certified by a qualified groundwater scientist or approved by the Director ..." 40 CFR 257.25(g)(2) uses identical language. If the owner or operator of a facility cannot make a positive determination, then the requirements of (7) are automatic.

RESPONSE: The proposed language in the second-to-the-last sentence of New Rule XLI(2), and the suggested language in the comment are the same in substance. The language chosen by the department in the proposed rule uses the active voice and makes it clear that the regulated entity has the duty to monitor as specified by the department. Therefore, the department declines to revise the language as requested in the comment.

Subsection (4)(d) references the establishment of a ground water protection standard pursuant to (8). Subsection (8)(d) references the establishment of a ground water protection standard pursuant to (9). A citation to (9) in (4)(d) is not necessary. Therefore, the department declines to revise the language as requested in the comment.

Concerning New Rule XLI(5), which provides for department review of a determination that assessment monitoring has shown that constituent concentrations are at or below background, it is necessary for the department to review the determination, developed pursuant to (5) concerning whether concentrations of all Appendix II constituents are at or below background levels, to ensure that a return to detection monitoring is appropriate. The department has prepared findings, pursuant to 75-10-107, MCA, concerning the stringency of the requirement in (5) for department approval. See Stringency Findings for this rule. Therefore, the department declines to revise the language as requested in the comment.

Concerning the requirement in (7)(b), for department approval of a demonstration that a statistically significant increase of a contaminant over background levels was caused by a source other than a landfill, it is necessary for the department to review that demonstration to determine whether it is appropriate for assessment monitoring to continue. The department has prepared findings, pursuant to 75-10-107, MCA, concerning the stringency of the requirement in (7)(b) for department approval. See Stringency Findings for this rule. Therefore, the

department declines to revise the language as requested in the comment.

New Rule XLI(3) and (4), concerning alternate frequencies for monitoring, included, through the use of improper punctuation, the post-closure care period in the active life of a facility. The post-closure care period is not part of the active life and the department has corrected the punctuation to correct that mistake.

The word "total" in Appendix II, and a reference to the word "total" in footnote 2, were stricken in response to Comment No. 54.

NEW RULE XLII

COMMENT NO. 58: A commentor stated that (1)(b), which requires an owner or operator to submit to the department for approval an assessment of corrective measures that addresses any other criteria determined by the department to be necessary to protect human health and the environment, should not be adopted because it is more stringent than EPA requirements and is vague and overly broad.

RESPONSE: New Rule XLII(1)(b) concerns the department's review and approval of an assessment of corrective measures. It is necessary for the department to review these determinations to ensure that the facility has made a reasonable assessment of the monitoring data. The department has prepared findings, pursuant to 75-10-107, MCA, concerning the stringency of the requirement in (1)(b) for department approval. See Stringency Findings for this rule. The department declines to remove the requirement as requested in the comment.

In response to the comment, the phrase in (1)(b) concerning "necessary to protect human health or the environment" was stricken.

Because the department did not provide a statement of reasonable necessity for the adoption of the phrase "applicable Montana ground water quality standards" in (1), the department has stricken the phrase.

NEW RULE XLIII

COMMENT NO. 59: A commentor stated that, in the 1988 EPA rulemaking proposal, 40 CFR 258.57(a) contained the following language: "Based on the results of the corrective measure study conducted under § 258.56, the State must select a remedy ...." In the final rule adopted in 1991, the responsibility was on the owner/operator, and New Rule XLIII should reflect this significant change.

Concerning (1)(b), there is no "corrective measures plan" required in New Rule XLII(1); only an assessment is required.

New Rule XLIII(1)(b) imposes a numeric performance standard, a 90-day period for submitting a selected remedy report after department approval of the corrective measures assessment, on the owner or operator that is more stringent than EPA requirements. 40 CFR 258.57(a) and 40 CFR 257.27(a) include no deadline, but include only a requirement to send the state director, within 14 days after a remedy is selected, a report, placed in the operating record, describing how the requirements of 40 CFR 258.57(b) and 40 CFR 257.27(b) are met. 40 CFR 258.56(a) simply states: "Such assessment must be completed within a reasonable period of time," and 40 CFR 257.26(a) uses identical language.

In 40 CFR 258.57 and 40 CFR 257.27, there are no requirements for the items required in (1)(c). Department approval would delay implementation, and the selection of remedy is the sole responsibility of the owner/operator.

Section (4) includes the phrase: "the factors in (4)(a) through (h)," however, there is no (4)(h) in the rule.

A commentor stated that (4)(g), which requires an owner or operator to consider certain factors in determining the schedule of remedial activities, including any other factor determined by the department to be necessary to protect human health and the environment, should not be adopted because it is more stringent than EPA requirements and is vague and overly broad.

RESPONSE: New Rule XLIII(1)(b), concerning department approval of an owner or operator's selection of a remedy, is equivalent to existing ARM 17.50.710(7)(b)(v), which is being repealed, and 40 CFR 258.57(a). It is necessary to retain approval over selection of a remedy because it is critical to its regulatory role in protecting human health and the environment. The department has prepared findings, pursuant to 75-10-107, MCA, concerning the stringency of the requirement in (1)(b) for department approval. See Stringency Findings for this rule. Therefore, the department declines to revise the language as requested in the comment.

The department agrees with the comment on (2)(b) that New Rule XLII(1)(b) does not use the word "plan" in association with the corrective measure assessment, and the department has stricken the word "plan" from New Rule XLIII(1)(b).

The department agrees with the comment on (1)(b) that 40 CFR 258.57(a) does not establish a 90-day period for submitting a selected remedy report. The reasons for the requirement for approval of the report, and the stringency findings for it, were discussed immediately above. Because EPA regulations do not set a deadline for such a report, there is no comparable federal regulation or guideline addressing the same circumstances. It is necessary for the department's rules to set a deadline for the report, which is a critical aspect of corrective action.

Concerning department approval of the design plans for the selected remedy and associated CQC and CQA plans in (1)(c), it is necessary for the department to review the design, CQC, and CQA plans, developed pursuant to (1), to ensure the selected remedy meets the requirements of New Rule XLIII. It entails designs that could affect the integrity of the systems that isolate solid waste and leachate from the environment, and should be subject to the same quality control review as other designs. As discussed above, the department determined that similar provisions in new Rule XXXIV(5) and (6) were not more stringent than a comparable federal guideline, and that findings under 75-10-107, MCA, were not required. In addition, design, CQC, and CQA plans are basic to determining whether a project has been built according to requirements. The same rationale applies to the requirement in New Rule XLIII(1)(c). Department review and approval of the design, CQC, and CQA plans is necessary to ensure compliance with corrective action requirements. Because 40 CFR 239.6 requires the department to adopt a regulatory program that ensures compliance with EPA's corrective action requirements, and approval of the selected remedy design, CQC, and CQA plans is necessary to ensure compliance, the requirements are not more stringent than a comparable federal regulation or guideline.

Therefore, the department declines to revise the language as requested in the comment.

In response to the comment, the department has stricken (4)(g).

The department agrees with the comment concerning (4)(h), and has amended the rule to delete the reference to (4)(h).

NEW RULE XLIV

COMMENT NO. 60: A commentor stated that (1)(a) is more stringent than EPA regulations because department approval of a corrective action ground water monitoring plan is not required in 40 CFR 258.58(a)(1) or in 40 CFR 257.28(a)(1).

A commentor stated that (1)(c) is more stringent than the comparable EPA regulation at 40 CFR 258.57 because the federal regulation does not give the department authority to approve interim measures, and that the department is prohibited by 75-10-107, MCA, from adopting an approval rule. The commentor also stated that a delay in the department's consideration of interim measures submitted by a landfill owner or operator could cause delay in implementing the measures and could cause harm to health or the environment.

Concerning (3), the owner or operator should be solely responsible for making a determination of technical impracticability. In the 1988 proposed version of 40 CFR 258.58(b), the state was to make this determination, but, in the final regulation, EPA placed the responsibility on the owner or operator. EPA has published at least one guidance document on technical impracticability to assist in implementation of this rule.

Section (7) is more stringent than the comparable requirements of 40 CFR 258.58(f) and 40 CFR 257.28(f).

RESPONSE: The department's review and approval of a ground water monitoring plan is required in 75-10-207(4), MCA. A corrective action ground water monitoring plan is such a plan. Therefore, review and approval of a corrective action ground water monitoring program required by New Rule XLIV(1)(a) would also be required by 75-10-207(4), MCA. Because the corrective action ground water monitoring plan is required by state law, 75-10-107, MCA, does not apply.

Concerning (1)(c), interim measures review and approval by the department, department review and approval is necessary and appropriate to determine if they are protective of human health and the environment. The department's solid waste program is committed to swift review in the case of a genuine threat to human health or the environment. See Response to Comment No. 3.

The department has prepared findings, pursuant to 75-10-107, MCA, concerning the stringency of the requirement in (1)(c) for department approval. See Stringency Findings for this rule.

The department has determined to strike the requirement in (1)(d) for an annual corrective measures progress report. During department discussions with the Solid Waste Advisory Committee, an informal group representing landfill owners and operators that meets regularly with the department, the issue of stringency was discussed, and pursuant to those discussions, the department determined to eliminate this provision.

It is necessary for the department to review the determination, developed

pursuant to (3), that compliance with remedy requirements cannot be practically achieved, before the implementation of alternative control measures. The department does not believe this approval would cause unacceptable delay or risk. The department has prepared findings, pursuant to 75-10-107, MCA, concerning the stringency of the requirements in (3)(a) and (d) for department approval. See Stringency Findings for this rule. Therefore, the department declines to revise the language as requested in the comment.

Section (7) concerns certification of completion of the selected remedy by a qualified ground water scientist and approval by the department. Department review of the certification of completion is necessary to protect public health. In addition, completion of a corrective action remedy triggers release of financial assurance, which is critical to funding the remedy. Corrective action financial assurance should not be released until the department has determined that the remedy is complete. The department has prepared findings, pursuant to 75-10-107, MCA, concerning the stringency of the requirement in (7) for department approval. See Stringency Findings for this rule.

Therefore, the department declines to revise the language as requested in the comment.

NEW RULE XLV

COMMENT NO. 61: A commentor stated that the department noted in its testimony at the November 4, 2009, hearing on stringency that, in response to comments, it has conducted an analysis of the phrase "necessary to protect human health and the environment," found in (2)(g).

RESPONSE: Concerning (2)(g), in response to a comment that the use of the phrase "necessary to protect human health or the environment" is vague and overly broad, the department substituted the phrase "necessary to adequately characterize the hydrogeologic characteristics of the solid waste landfill facility."

For the same reason discussed above, in the response to Comment No. 45, the department has revised New Rule XLV(2)(c) to require a description of the hydrogeologic units that overlie "the uppermost aquifer, or underground drinking water source," as required in New Rule XXXIII.

NEW RULE XLIX

COMMENT NO. 62: A commentor stated that the department may not impose closure requirements on facilities other than MSWLF landfill units, because those requirements would be more stringent than comparable federal regulations.

A commentor criticized the department's use, in (4), of the phrase "any other information determined by the department to be necessary to protect human health or the environment" as being more stringent than comparable EPA regulations and vague, arbitrary, capricious, and easily abused, and the commentor asked that this phrase be deleted.

RESPONSE: Section 75-10-204, MCA, provides the authority for closure requirements for Class II and Class IV landfill units. There are no comparable federal requirements for closure or post-closure care for a Class IV landfill unit.

Therefore, the closure and post-closure requirements for a Class IV landfill unit do not trigger the findings requirements of 75-10-107, MCA. For issues concerning the regulation of MSW and non-MSW at a Class II unit in New Rules XVII and XXIX, see the response to Comment No. 12. Also, closure and post-closure plans are required as part of a license application. They are part of the design required in New Rules XXXIII and XXXIV to ensure that the waste in a unit will not contaminate ground water. If the planned cover and vegetation are not properly installed and maintained, water from precipitation can enter the waste and form leachate, which can then migrate to a ground water drinking water source.

The department needs flexibility to require more information in a closure plan if necessary. EPA's comparable regulations provide that an owner or operator must provide a closure plan that "at a minimum, must include the following information ...." In response to the comment, the department is modifying (4) to state "at a minimum." This retains the department's flexibility to require additional information if necessary, while removing the language objected to and replacing it with the comparable EPA language.

COMMENT NO. 63: A commentor stated that most landfill owners and operators will seek approval of an alternative final cover that meets the requirements of New Rule XLIX(2)(a) and that the department needs to set fixed standards, based on scientific research, so the regulated community has an attainable goal. In 1998, EPA funded research to study alternative covers, under the Alternative Cover Assessment program, or ACAP.

For the two ACAP test sites in Montana, infiltration of 3 mm/year or less was determined to be equivalent to a standard Subtitle D cover, as required in 40 CFR 258.60(a)(2) and ARM 17.50.530(1)(b)(i), which use identical language. New Rule XLIX(2)(a) should explicitly state 3 mm or less per year infiltration through the cover, in accordance with the EPA ACAP study.

The full deed notation requirements should be placed in this rule because they are closure requirements for MSWLF units.

RESPONSE: New Rule XLIX(2)(a) uses the same standard for alternative final cover as provided in ARM 17.50.530(1)(b) and 40 CFR 258.60(a)(2). Therefore, the department declines to use the ACAP standard as requested in the comment.

It is not necessary to include the deed notation requirement in the closure criteria rule, because the deed notation already would be completed under New Rule XXIV. New Rule XXIV provides: "… before the initial receipt of waste at the facility or, if the facility is licensed and accepting waste on [THE EFFECTIVE DATE OF THIS RULE], by [60 DAYS AFTER THE EFFECTIVE DATE OF THIS RULE], the owner of the land where a facility is located shall submit for department approval a notation to the deed …."

NEW RULE L

In response to other comments, the department has conducted an analysis of the use of the phrase "necessary to protect human health and the environment." The phrase "necessary to protect human health or the environment" in (1)(e) and (3) was

stricken, and the phrases used by EPA in 40 CFR 258.61(a) and (c) to address the same subject, "at least" and "at a minimum," respectively, were added. This language gives the department the flexibility to exercise its discretion to require different post-closure care practices and to request more information in a post-closure care plan if necessary to fulfill the purposes of the subchapter.

NEW RULE LI

COMMENT NO. 64: A commentor stated that EPA regulates Class III facilities under 40 CFR Part 257, Subpart A, which deliberately include no closure or post-closure care requirements. The requirements in the state rule, found in 40 CFR Part 258, apply only to MSWLF units. This rule is more stringent than comparable EPA requirements and should not be adopted.

RESPONSE: There are no federal requirements comparable to New Rule LI concerning closure or post-closure care requirements for a Class III landfill unit that address the same circumstances. Therefore, the closure and post-closure requirements do not trigger the findings requirements of 75-10-107, MCA. Under 40 CFR 257.3-4(a), a Class III landfill unit must not contaminate an underground drinking water source. In addition, the public should be protected from exposed waste that could pose a danger from sharp objects or that could collect water or harbor disease vectors such as insects and rodents, and that could cause litter. In addition, if construction of cover at a Class III landfill unit is not properly engineered, subsidence of the cover can occur. Therefore, the department believes that closure and post-closure care and plans at Class III landfill units are appropriate measures to provide for the sanitary disposal of solid waste there. The department is, therefore, not making the changes requested by the commentor.

COMMENT NO. 65: A commentor stated that the most objectionable provisions in the rulemaking proposal are the various permutations of the phrase, "and any other information determined by the department to be necessary for the protection of human health and the environment," which normally follows after a list of items that duplicate EPA requirements and that are sufficient for the department to evaluate an application or a plan.

RESPONSE: EPA's regulations concerning closure and post-closure plans for MSW landfill units state that a plan must contain, "at a minimum," the elements specified in the regulation. In response to the comment, the department has deleted (1)(d) and (2)(d) and has amended (1) and (2) to state "at a minimum." This retains the department's flexibility to require additional information if necessary, while removing the language objected to and replacing it with the language EPA used in similar circumstances for MSW units.

COMMENT NO. 66: A commentor asked how the department will address disposal of coal combustion waste, because it is difficult for consultants and landfill operators to know how to address it given that there is no rule.

RESPONSE: The department has drafted rules for the management of coal combustion wastes that will be proposed in a future rulemaking.

COMMENT NO. 67: A commentor that operates a landfill stated that it has sought approval of an alternative final cover that meets the requirements of New Rule XLIX(2)(a) but that, after four years, it is still waiting for final approval.

RESPONSE: This comment is outside the scope of this rulemaking. However, the department is actively working with the commentor on the review and approval of the requested alternative final cover.

COMMENT NO. 68: A commentor stated that EPA regulations concerning the topics covered by New Rule I are found in 40 CFR 258.4 but that the EPA regulations specifically refer to MSWLF units. Class II wastes in Montana are broader than municipal solid waste, therefore, the state rules apply the requirements at more units than under the EPA regulations. The term "Class II landfill" should be replaced with MSWLF, for consistency with the EPA.

RESPONSE: For issues concerning the regulation of MSW and non-MSW at a Class II unit in New Rule I, see Response to Comment No. 12.

Public Hearing Comments (November 4, 2009):

COMMENT NO. 69: A commentor stated that he and his clients are disappointed in the process that the department has followed in this rulemaking. He understands that the Solid Waste Program will be proposing additional rules in the near future, and he hopes that the new rules will be better reviewed by the regulated public before they are submitted to the Secretary of State and before the public and the department become embroiled in long, legal, letter-writing discussions.

RESPONSE: The department has fully complied with the Montana Administrative Procedure Act (MAPA) in this rulemaking. In addition, the department held many meetings with the regulated community concerning the rulemaking both before and after the proposed changes were published, and has made several informational mailings. The department will follow MAPA and fully involve all interested parties in the future solid waste program rulemakings.

COMMENT NO. 70: A commentor stated that the department has grossly failed to meet the requirements of 75-10-107, MCA, for adopting a rule more stringent than comparable federal regulations. The department presented no peer-reviewed scientific studies as required by 75-10-107(3), MCA.

RESPONSE: Section 75-10-107(3), MCA, provides that the written finding that is a prerequisite to adoption of a rule that is more stringent than a comparable federal rule or guideline "must reference information and peer-reviewed scientific studies contained in the record that forms [sic] the basis for the department's conclusion." Procedural requirements are not commonly the subject of peer-reviewed scientific studies. Furthermore, had the Legislature intended to require peer-reviewed studies in all instances in which HB 521 is applicable, it could have provided that an agency cannot adopt a more stringent rule unless there is a peer-reviewed study to support it. It did not do so.

The Senate Natural Resources Committee took executive action on HB 521 on March 28, 1995. Sen. Loren Grosfield proposed an amendment that would have inserted the words "if any" after the requirement to reference peer-reviewed

scientific studies. Sen. Keating opposed the motion on the ground that "this bill doesn't say you have to have a peer-reviewed study, it only says you review any studies contained in the record that form the basis for the board's conclusion [sic] and 'if any' doesn't add anything." Sen. Grosfield then indicated that he thought that the bill could be interpreted that way, but "if it is clear to the committee that the bill will not require peer-reviewed studies," it was okay with him and he would withdraw the pertinent amendments. He then withdrew the amendments.

In addition, the preamble to HB 521 provides that the written finding "must include but is not limited to a discussion of the policy reasons and an analysis that supports the board's or the department's decision that the proposed state standards or requirements protect public health or the environment of the state and that the state standards or requirements protect public health and are achievable under current technology." The preamble contains no reference to peer-reviewed scientific studies.

Given the statements from the legislative history and the language of the preamble, it is the department's opinion that citation to peer-reviewed scientific studies in the record is not a prerequisite to adoption of a rule that is more stringent than a comparable federal regulation or guideline. Rather, a written finding required by HB 521 must reference peer-reviewed scientific studies if the rulemaking record contains them.

In addition, the department introduced into the record language from EPA rulemakings concerning the regulations that the commentor alleges are less stringent. It is clear that EPA contemplated that states would have flexibility in implementing the licensing and oversight of regulation of solid waste landfills.

COMMENT NO. 71: A commentor stated that the department's analysis of the actual breadth of the requirements of the federal regulations found in 40 CFR Parts 257 and 258 misrepresents the flexibility granted to states by EPA and is fatally flawed. EPA allows states flexibility only to have programs that are more stringent than minimum EPA requirements. Because 40 CFR Part 258 is designed to be self-implementing, most of the flexibility offered to states concerns items that facilities would desire, such as approval to use multi-unit groundwater monitoring arrays rather than monitoring each unit individually and such as approval to locate a landfill in a seismically active area.

RESPONSE: Because the commentor did not identify a specific rule where the department had misrepresented the flexibility granted to states by EPA, the department will provide a general response. The department believes the stringency analysis and findings were capably prepared and adequately address the applicable elements of 75-10-107, MCA. In addition, the department believes that the commentor has misstated EPA's regulatory approach in creating the federal regulations and in approving state programs. The regulations proposed in 1988 were, to some degree, based on state implementation. Concerns raised by regulated entities and state governments in comments on the proposed regulations led EPA to adopt regulations in 1991 that emphasized a self-implementing approach, so as not to delay the effect of regulatory requirements such as a landfill owner's duty to respond to ground water contamination by taking action when a state might not yet have the capacity to review the contamination and require action.

However, in that adoption, EPA made it clear that it intended to preserve the traditional primary role of the state in implementing compliance, and that an upcoming state implementation rulemaking would carry that traditional role forward. When EPA adopted the state implementation regulations in 1999, it required states to adopt a permit or licensing program that ensured compliance with the requirements in 40 CFR Part 258, the comparable federal regulations. EPA did not require merely that a state adopt a licensing program with the elements in the federal regulations, but rather EPA required that a licensing program ensure compliance with those elements. See 40 CFR 239.6. The department believes that this requirement, that its regulatory program must ensure compliance with the EPA's solid waste regulations, means that that department has the flexibility to require submission and approval of important solid waste management determinations and actions.

COMMENT NO. 72: A commentor stated that 75-10-107(3), MCA, clearly states that, in order to adopt a more stringent rule, the department must have scientific proof that the rule is necessary to "mitigate harm to public health and the environment" and that this is made clear by the requirements in 75-10-107(3), MCA, that "[t]he written finding must reference information and peer-reviewed scientific studies contained in the record that forms the basis for the department's conclusion." Both elements are needed, "information and peer-reviewed scientific studies," not just one or the other.

In its testimony, the department clearly stated that its evidence was merely "anecdotal" and was based on what "the department believes," rather than proffering any scientific papers on the matters challenged as being "more stringent than the comparable federal regulations." (For example, see Mr. Thompson's testimony on New Rules XVII(4)(c) and XVIV(1)(a) for use of the term "anecdotal," and see the rest of the New Rules analyzed on pages 1 and 2 of his testimony for the constant use of the term "believes.") Anecdotal comments were supplied without any analysis of the actual number of potential problems versus the number of facilities affected by the proposed rules. Information was scant and science was absent. The commentor stated that only two instances of problems with lack of a deed notation before closure did not justify requiring recording of a deed notation before accepting waste, as proposed by the department, compared with at the end of the closure process, as is required by EPA.

RESPONSE: Section 75-10-107(3), MCA, does not contain the phrase "scientific proof." See Response to Comment No. 2. The department produced evidence in the record of problem areas that proposed rules and amendments were reasonably designed to correct. The department has experienced problems with the recording of deed notations at four landfills out of the six landfills (two Class II and four Class III) that have recently closed under the existing deed notation requirements.

COMMENT NO. 73: A commentor stated that the department contends that, because a license application or O & M plan is required in solid waste statutes at 75-10-204(1) and 221, MCA, the department has broad authority to adopt rules regarding applications and O & M plans. This is inconsistent with the limitation

found in the first paragraph of 75-10-204, MCA, that "[t]he department shall, subject to the provisions of 75-10-107, adopt rules governing solid waste management systems ...." The department is not given *carte blanche* when specifying what must be in a license application or in an O & M plan.

RESPONSE: The department believes its interpretation of 75-10-204 and 75-10-221, MCA, with respect to the components of license applications and O & M plans that would be required by ARM 17.50.508, is correct. The department must require a license application to include all information necessary for the department to determine whether to issue or deny the license. The commentor did not identify a requirement in the licensing rule, ARM 17.50.508, that he believes to be inappropriate as more stringent than a comparable federal regulation or guideline. The department responded to comments on ARM 17.50.508 under the responses to comments for that rule. Under 75-10-221(3), MCA, an applicant is required to provide "the name and business address of the applicant, the location of the proposed solid waste management system, a plan of operation and maintenance, and other information that the department may by rule require." There is no federal regulation listing the information that is required in a license application. ARM 17.50.508 implements 75-10-221(3), MCA. An application must contain the information necessary for the department to determine whether the requirements of the solid waste laws and rules are being met by the applicant for the proposed system. The department has analyzed substantive requirements, such as for an insurance policy or a deed notation, which are required in a license application, under the responses to comments on the operating rules containing those requirements. Where the department has determined that the substantive provisions are appropriate, either through the required stringency findings or because there is no comparable federal requirement addressing the same circumstances, it is necessary to require them in an application.

A proposed O & M plan is one of the items that is required by law to be submitted as part of an application. See 75-10-204(1) and 221(3), MCA. The substantive requirements of an O & M plan have been addressed in the response to comments for each O & M rule. If the proposed substantive requirement is not more stringent than a comparable federal regulation or guideline, or if there is no comparable federal regulation or guideline, the requirement that the department review the submission to determine whether the requirement has been met does not trigger stringency findings, because the department is required by law to review and approve license applications and O & M plans. The commentor has not identified any items listed in the application rule, ARM 17.50.508, or in the O & M rule, cite that are not needed for that determination. Regarding the requirements for an O & M plan, many of the department's requirements are taken directly from the EPA regulations covering O & M in 40 CFR 258.20 through 28. The following table shows the federal regulation and the state rule covering the same topic:

Excluding hazardous waste:	40 CFR 258.20	New Rule XIV
Cover materials:	40 CFR 258.21	New Rule XV
Disease vector control:	40 CFR 258.22	New Rule XVI
Explosive gases control:	40 CFR 258.23	New Rule XVII
Air criteria:	40 CFR 258.24	New Rule XVIII

Access:	40 CFR 258.25	New Rule XIX
Run-on/run-off controls:	40 CFR 258.26	New Rule XX
Surface water:	40 CFR 258.27	New Rule XXI
Liquids restrictions:	40 CFR 258.28	New Rule XXII
Recordkeeping:	40 CFR 258.29	New Rule XXIII

Requirements that are not based on a federal regulation, such as requirements for liability insurance in New Rule XXV, management of special wastes, in New Rule XXVI, and salvaging, confining waste to appropriate areas, controlling litter, and designing, constructing, operating, and maintaining a system to protect against threats to environmental and health concerns, in New Rule XXVII, are not more stringent because there are no comparable federal regulations or guidelines addressing the same circumstances. Therefore, no stringency findings are required.

COMMENT NO. 74: A commentor stated that the department's cost evaluations are simplistic and grossly underestimate the cost of submitting plans of all types to the department and obtaining department approval. While the cost of mailing is negligible, the department has failed to evaluate the additional cost of obtaining approval of plans submitted by licensed engineers and qualified ground water scientists and the cost to the facility of waiting for department approval.

RESPONSE: The cost evaluations that contained only a mailing cost were for the submittal of plans that are required by other rules to be placed in the operating record. Because these plans would have to be prepared anyway, the only additional cost would be the cost of submitting the plan to the department. If the department determines that a submittal is inadequate, then the department has done its job in ensuring compliance with the rules, and the cost to correct the deficiency would not have been caused by the review, but by the fact that the original submission was deficient.

COMMENT NO. 75: A commentor stated that, in ARM 17.50.513(3), the department arbitrarily proposed requiring updates to plans of operation and other plans every five years, based on the regulatory authority in 75-10-221(5), MCA. This portion of the solid waste statute states: "The department may require submission of a new application if the department determines that the plan of operation, the management of the solid waste system, or the geological or ground water conditions have changed since the license was initially approved." The requirement that a new application or operation and management plan be submitted requires an affirmative declaration from the department that something at the facility has changed. Absent an inspection by the department, and an affirmative declaration that something has changed, the five-year requirement is arbitrary, capricious, and presumptuous, and proposed rule changes based on this reasoning are without merit or legal basis. The cost to upgrade an O & M plan at most facilities is at least $2,000, with the cost for major landfills being between $7,000 and $10,000.

RESPONSE: ARM 17.50.513(3) does not require an update of the O & M plan every five years. ARM 17.50.513(3) requires that an owner, operator, or

licensee "review the operation and maintenance plan every five years after the date of the issuance of the solid waste management system license to determine if significant changes in conditions or requirements have occurred. If the review indicates that significant changes have occurred, the owner, operator, or licensee shall update the operation and maintenance plan to reflect changed conditions and requirements, and submit the update to the department for approval." If the owner, operator, or licensee determines that significant changes have not occurred then an update of the plan is not necessary.

COMMENT NO. 76: A commentor stated that the department's assertion that there are no comparable federal requirements for Class III and IV facilities is not correct. Comparable federal requirements for Class III and IV facilities are found in 40 CFR Part 257, and the federal government deliberately limited the regulations based on the threats from different types of facilities to human health and the environment. The department cannot adopt rules for Class III or Class IV facilities that are more stringent or that cover additional areas without presenting full scientific evidence of the threats to the environment, as required in 75-10-107, MCA.

RESPONSE: The department conducted a stringency analysis of the proposed requirements for Class III and Class IV landfill facilities. The department introduced testimony on the stringency factors at the November 4, 2009, public hearing. Each rule for which specific comments were received has been addressed in the responses to comments in this notice, and, where the department determined that findings were required under 75-10-107, MCA, the factors specified in that statute have been addressed in the findings. For those rules on which a specific comment was received, the following discussion cites to the number of the response to comments for that rule. For those rules for which no specific comment was received, an analysis follows.

(a) the prohibition in New Rule XI(1)(h) against locating a Class III landfill unit in wetlands unless a demonstration has been made. See Response to Comment No. 29.

(b) the locational restriction in New Rule VII for a Class IV landfill unit in a fault area unless a demonstration has been made. See Response to Comment No. 24.

(c) the locational restriction in New Rule VIII for a Class IV landfill unit in a seismic area unless a demonstration has been made. See Response to Comment No. 26.

(d) the locational restriction in New Rule IX for a Class IV landfill unit in an unstable area unless a demonstration has been made. See Response to Comment No. 27.

(e) liability insurance requirements in proposed ARM 17.50.508(2) and New Rule XXV. See Response to Comment No. 38.

(f) requirements concerning updates to operating and maintenance plans in proposed new ARM 17.50.509(4). Operation and maintenance plan and plan updates are not addressed in the federal solid waste regulations in 40 CFR Parts 257 and 258. Therefore, the requirement to submit a plan update for approval does not trigger the findings requirements of 75-10-107, MCA, because EPA has no comparable regulations that address the same circumstances. The reason for the

requirement was provided in the statement of necessity for the rule.

(g) requirements concerning deed notations in New Rule XXVIII(1)(f) for a Class III landfill unit and in New Rule XXIX(1)(e) for a Class IV landfill unit. See Response to Comment No. 36.

(h) bulk liquids restrictions in New Rule XXVIII(1)(c) for a Class III landfill unit and in New Rule XXIX(2)(h) for a Class IV landfill unit. See Responses to Comment Nos. 39 and 44 for Class III and Class IV units, respectively.

(i) the requirement in New Rule XXVIII(1)(b) for placement of six inches of cover at a Class III landfill unit at least every three months. See Response to Comment No. 39.

(j) restrictions concerning access at a Class III landfill unit in New Rule XXVIII(1)(d)(ii). See Response to Comment No. 39.

(k) requirements in New Rule XXIX(1)(a), concerning control for aesthetics at a Class IV landfill unit. See Response to Comment No. 43.

(l) requirements in New Rule XXIX(1)(c), for Class IV landfill units, concerning excluding liquids, and other materials, that may be conditionally exempt small quantity generator (CESQG) wastes that may be disposed of at a 40 CFR Part 257, subpart B, landfill unit. Exclusion of bulk liquids has been addressed in the Response to Comment No. 44. Concerning the prohibition on accepting containerized liquids at a Class IV landfill unit, there is no comparable federal regulation addressing the same circumstances. Therefore, it is not necessary to make findings under 75-10-107, MCA;

(m) waste screening requirements at a Class IV landfill unit in New Rule XXIX(2)(a). See Response to Comment No. 44.

(n) requirements in New Rule XXIX(1)(d) for financial assurance for a Class IV unit. See Response to Comment No. 44.

(o) requirements in New Rule LI for closure and post-closure care for a Class III landfill unit. See Response to Comment No. 65.

(p) requirements in New Rules XLIX and L for closure and post-closure care for a Class IV landfill unit. See Response to Comment No. 62.

COMMENT NO. 77: A commentor stated that, in the department's analysis of the deed notation requirements in New Rule XXIV(1)(a), there is no evaluation of the number of problem facilities versus the number of existing facilities of the same type. Two cases in 16 years is not a significant burden on the legal assets of the department. There are only a few, perhaps two, small private landfills of the type involved left in Montana. To adopt a rule that applies to all facilities in Montana, based on two occurrences in 16 years, seems extreme.

RESPONSE: The department believes two cases in 16 years demonstrate recording a deed notation, before the initial receipt of waste, is necessary to protect public health or the environment of the state, and can mitigate harm to the public health or environment. See Responses to Comment Nos. 34 and 35. Only a few facilities have closed, but the department has experienced problems with deed notations not being recorded at a high percentage of those that have closed.

COMMENT NO. 78: A commentor stated that any ground water quality protection standard established at a landfill may not exceed the requirements of 40

CFR 258.55(h) and (i) without a full scientific analysis under 75-10-107, MCA.

RESPONSE: The department believes that the commentor is referring to the process in New Rule XLI(9) for adopting a ground water protection standard for a contaminant for which no maximum contaminant level exists. The process is identical to the process EPA established in 40 CFR 258.55(h), except that the department has provided that it will request the Montana Board of Environmental Review (BER), to which the Legislature has delegated the authority to adopt water quality standards, adopt any such standards it believes to be necessary. EPA's regulation gives that authority to the department. The department is not adopting a rule that is more stringent than a comparable federal regulation that addresses the same circumstances. In addition, the rule provides very stringent criteria for the adoption of a standard, which include some of the same elements required for stringency findings under 75-10-107, MCA. Also, the appropriate time for the consideration of stringency matters, and the making of any required findings for the adoption of a standard under New Rule XLI(9), would be when the BER considers the adoption of a standard under that rule. Therefore, the stringency requirements of 75-10-107, MCA, do not apply at this time.

COMMENT NO. 79: A commentor stated that the assertion that EPA's use of the term "at least the following" means that the department can require anything it wants, even if it is more than the minimum required by EPA regulations, without the analysis required in 75-10-107, MCA, is illogical. Allowing the department to request "any other information ..." is not narrower than the EPA regulations that specify minimum requirements. When EPA regulations specify minimum required items, anything beyond that minimum is more stringent, and a full scientific justification is required by 75-10-107, MCA, in order for the department to add to the list. The phrase "or any other matter determined by the department ..." makes the rule requirements, in virtually all cases, subject to the whim of anyone in the department who would assert that, correctly or not, something was necessary for the "protection of human health and the environment," and this language should be deleted. The regulated community needs clear regulations, not a moving target. A letter from a mid-level EPA Region VIII employee stating that the proposed rules are equivalent to federal requirements should not be given too much credence. To EPA, use of the word "equivalent," means "at least as stringent as" and does not constitute an evaluation as to whether the rules are more stringent than comparable federal regulations.

RESPONSE: See the Response to Comment No. 46 and other responses concerning "any other matter," above.

COMMENT NO. 80: A commentor stated that the department's comments to the effect that EPA not having a rule is equal to allowing requirements that are more stringent is ludicrous, at best. If the department wants to have rules that are more stringent or require additional items, it should state what those items are and prove the validity of its claim through a true stringency test and analysis. If the requirements were reasonable, the commentor would have no trouble supporting them.

RESPONSE: The department believes that its analysis of the requirements

of 75-10-107, MCA, is appropriate. The department has addressed the requirements of each rule where stringency appeared to be an issue, and has provided a discussion of stringency for each such rule. The department has also provided the findings required in that statute for each rule provision it found to be more stringent than a comparable federal regulation or guideline, or has deleted the rule provision.

Reviewed by: DEPARTMENT OF ENVIRONMENTAL QUALITY

/s/ David Rusoff By: */s/ Richard H. Opper*
DAVID RUSOFF RICHARD H. OPPER, DIRECTOR
Rule Reviewer

Certified to the Secretary of State, February 1, 2010.

BEFORE THE DEPARTMENT OF JUSTICE
OF THE STATE OF MONTANA

In the matter of the repeal of ARM 23.12.602, 23.12.604, and 23.12.606, concerning the Uniform Fire Code; the amendment of ARM 23.12.401 through 23.12.405, 23.12.407, 23.12.408, and 23.12.430, concerning fire safety; 23.12.501, 23.12.502, and 23.12.504, concerning fireworks; and 23.12.601, 23.12.603, and 23.12.605, concerning the Uniform Fire Code	))))))))))	NOTICE OF REPEAL AND AMENDMENT

TO: All Concerned Persons

1. On September 10, 2009, the Department of Justice published MAR Notice No. 23-12-212, pertaining to the public hearing on the proposed repeal and amendment of the above-stated rules at page 1535 of the 2009 Montana Administrative Register, Issue Number 17. On September 24, 2009, the Department of Justice published an amended MAR Notice No. 23-12-212, at page 1608 of the 2009 Montana Administrative Register, Issue Number 18.

2. The department has repealed the following rules as proposed: ARM 23.12.602, 23.12.604, and 23.12.606.

3. The department has amended the following rules as proposed: ARM 23.12.402, 23.12.403, 23.12.404, 23.12.408, 23.12.501, 23.12.502, 23.12.504, and 23.12.603.

4. The department has amended the following rules as proposed, but with changes from the original proposals, new matter underlined, deleted matter interlined:

23.12.401 DEFINITIONS (1) through (7) remain as proposed.

(8) "Explosive" means a chemical compound, mixture, or device, the primary or common purpose of which is to function by explosion. The term includes, but is not limited to, dynamite, black powder, pellet powder, initiating explosives, detonators, safety fuses, squibs, detonating cord, igniter cord, igniters, and display fireworks. See 1.3G (Class B, Special), International Fire Code, 2009 Edition.

~~(8)~~ (9) "Fire alarm system" means a system or portion of a combination system consisting of components and circuits arranged to monitor and annunciate the status of a fire alarm or supervisory signal-initiating devices and to initiate the appropriate response to those signals. This definition does not include single- and multiple-station smoke or heat ~~detectors~~ alarms.

(9) through (26) remain as proposed, but are renumbered (10) through (27).

23.12.405 APPOINTMENT OF SPECIAL FIRE INSPECTORS (1) through (3) remain as proposed.

(a) Any person appointed special deputy state fire marshal, except for a qualified inspector employed by another state agency, must have a degree in fire protection engineering or related field from a recognized institution of higher education, two years' experience in fire protection, or be ~~IFC~~ ICC Fire Inspector I or Fire Inspector II certified.

(b) and (4) remain as proposed.

23.12.407 CERTIFICATE OF APPROVAL FOR DAY CARE CENTERS FOR 13 OR MORE CHILDREN (1) through (5)(g) remain as proposed.

(h) Every day care center shall provide operational smoke alarms or smoke detectors in locations designated by the FPIS or chief fire official. Smoke ~~detectors~~ alarms shall be tested at least every 30 days and a log of such tests maintained on the premises. Smoke detectors connected to a fire alarm system shall be tested in accordance with the IFC.

(i) through (8) remain as proposed.

23.12.430 SERVICE TAGS (1) through (5) remain as proposed.

(6) Stored pressure extinguisher tags must follow the guidelines listed in the National Fire Protection Association (NFPA) 10, 2007 Edition, and include the information listed in (3).

(7) remains as proposed.

23.12.601 ADOPTION OF THE INTERNATIONAL FIRE CODE (2009 EDITION) (1) through (3) remain as proposed.

(4) ~~The design and construction requirements in NFPA 1/UFC IFC that apply to public buildings or places of employment are not included in this adoption.~~ The building code adopted by the Building Codes Bureau of the Department of Labor and Industry controls design and construction in Montana. If there is any conflict between the construction standards in the IFC and construction standards set forth in the building code, the provisions of the building code control. ~~NFPA 1/UFC IFC construction standards only apply if no comparable building code construction standard exists.~~

(a) and (5) remain as proposed.

~~(a) 102.5 Application of residential code is not adopted.~~

(b) through (f) remain as proposed, but are renumbered (a) through (e).

~~(g)~~ (f) 202 General Definitions. ~~Insert~~ GOVERNMENTAL FIRE AGENCIES. Any fire department organized under Montana law under the jurisdiction of a city, county, state, fire district, or fire service area.

(h) through (k) remain as proposed, but are renumbered (g) through (j).

(k) 903.6 Existing buildings - is not adopted.

(l) 906.1 Portable fire extinguishes - (1) Exception - is not adopted.

(l) through (q) remain as proposed, but are renumbered (m) through (r).

~~(r)~~ (s) ~~Insert "~~3306.6. The maximum quantities, storage conditions, and fire-protection requirements for gunpowder and ammunition stored in a building shall be as follows: Smokeless powder and small arms primers or percussion caps shall be

in accordance with 50-61-120 and 50-61-121, MCA."

(s) and (t) remain as proposed, but are renumbered (t) and (u).

~~(u)~~ (v) 3406.2 Delete "farms and" from the heading, and "~~private use~~ on farms and rural areas and" from the paragraph.

(v) remains as proposed, but is renumbered (w).

~~(w)~~ (x) ~~Appendix A - Board of Appeals - is not adopted.~~ Appendix B - Fire Flows - is adopted.

~~(x)~~ (y) ~~Appendix D - Fire Apparatus Access Roads - is adopted, but Sections D106, D107, and D108 are not adopted.~~ Appendix C - Hydrants - is adopted.

~~(y)~~ (z) ~~Appendix E - Hazard Categories - is not adopted.~~ Appendix D - Access Roads: Sections 101-105.3 - is adopted.

~~(z)~~ (aa) ~~Appendix F - Hazard Ranking - is not adopted.~~ Appendix I - Fire Protection Systems Non-Compliant Conditions - is adopted.

~~(aa) Appendix G - Cryogenic Fluids - Weight and Volume Equivalents - is not adopted.~~

~~(ab) Appendix J - Fire Protection Systems - Noncompliant Conditions - is not adopted.~~

23.12.605 PROCESSES (1) remains as proposed.

(a) ~~Insert~~ 2204.5 Fuel Dispensing in Rural Areas. For public automotive motor vehicle fuel-dispensing stations located in rural areas:

(b) and (c) remain as proposed.

(d) 2204.5.3. Rural Bulk Plants. Bulk plants located inside the districts defined as "rural" are permitted to incorporate motor vehicle fuel-dispensing stations. The motor vehicle fuel-dispensing stations shall be separated by a fence or similar barrier from the area in which bulk operations are conducted.

(e) ~~Insert~~ 2204.6 Rural Motor Vehicle Fuel-Dispensing Stations.

(f) ~~Insert~~ 2204.6.1 Plans submittal. Plans shall be submitted in accordance with these rules for public automotive motor vehicle fuel-dispensing stations located in rural areas.

(g) ~~Insert~~ 2204.6.2 Plans and specifications submittal. Plans and specifications shall be submitted for review and approval prior to the installation or construction of a public automotive motor vehicle fuel-dispensing station located in a rural area. A site plan shall be submitted which illustrates the location of flammable liquid, LP-gas, or CNG storage vessels, and their spatial relation to each other, property lines, and building openings. Both aboveground and underground storage vessels shall be shown on plans. For each type of station, plans and specifications shall include, but not be limited to, the following:

1. remains as proposed.

(h) 2204.6.3 Plan Approval. Prior to the proposed renovation or construction of a public automotive motor vehicle fuel-dispensing station located in a rural area, an applicant shall obtain a letter of approval from the local fire official responsible for fire protection. This letter and two sets of plans, blueprints, or drawings shall be submitted to the FPIS for examination and approval.

(i) ~~Insert~~ 2204.7 Locations of aboveground tanks. Aboveground storage tanks are not prohibited for private use on farms and ranches. EXCEPTION: Pursuant to 50-3-103(6), MCA, there are no requirements regarding diked areas or

heat-actuated or other shut-off devices for storage tanks containing Class I or Class II liquids ~~intended only for private use~~.

(j) ~~Insert~~ 2204.7.1 Disposal of Tanks. Tanks shall be disposed of in accordance with the following:

1. through (k) remain as proposed.

(l) ~~Insert~~ 3306.6 Hazardous Materials. The maximum quantities, storage conditions, and fire-protection requirements for gunpowder and ammunition stored in a building shall be as follows:

1. and 2. remain as proposed.

5. The department has thoroughly considered the comments and testimony received. A summary of the comments received (other than those that were withdrawn) and the department's responses are as follows:

COMMENT 1: The Lake County Attorney requested a definition for "explosives," since 50-3-102(3), MCA, refers to the department adopting "nationally recognized standards," and the fire codes are not readily accessible to all interested persons.

RESPONSE 1: The department has adopted the suggested language.

COMMENT 2: The Building Codes Bureau of the Department of Labor and Industry requested the deletion of the first and last sentence of the amendment to 23.12.601(4).

RESPONSE 2: The department made these changes.

COMMENT 3: The Billings Fire Department pointed out editing errors in citing from the International Fire Code.

RESPONSE 3: The suggested corrections have been made.

COMMENT 4: The Billings Fire Department requested the adoption of at least one sentence of 102.5 - Application of Residential Code of the IFC.

RESPONSE 4: After discussion with several interested groups, it was decided that all of 102.5 would be adopted.

By: /s/ Steve Bullock
STEVE BULLOCK
Attorney General
Department of Justice

/s/ J. Stuart Segrest
J. STUART SEGREST
Rule Reviewer

Certified to the Secretary of State February 1, 2010.

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of ARM 24.17.127 related to prevailing wage rates for public works projects - building construction services, heavy construction services, highway construction services, and nonconstruction services	)))))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On October 29, 2009, the Department of Labor and Industry published MAR Notice No. 24-17-238 regarding the public hearing on the amendment of the above-stated rule on page 1840 of the 2009 Montana Administrative Register, issue no. 20.

2. On November 23, 2009 a public hearing was held at which time members of the public made oral and written comments and submitted documents. Additional comments were received during the comment period.

3. The department has thoroughly considered the comments and testimony received from the public. The following is a summary of the public comments received and the department's response to those comments:

Comment 1: Keith Allen, IBEW Local 233, stated that in the Heavy Construction rates Toole County should be set at the same rates as specified in the federal Davis-Bacon Act ruling ELEC0233-001 06/01/2009, because Toole County had been inadvertently omitted from inclusion in that ruling.

Response 1: The department acknowledges that there appears to be a clear oversight in the federal rate that the department had relied upon, and that Toole County should be included as suggested. The department has corrected the rate as requested.

Comment 2: Keith Allen, IBEW Local 233, stated that the data for work done on wind towers should be included in setting the building construction rates. The commenter stated that in ARM 24.17.501(2)(a) power plants are included in the definition of building construction. The commenter believes the department is confusing the statute that specifies wage rates to be paid for an alternative energy project so it can be classified as Class 14 property taxes with the administrative rule that defines what type of work that should be used to set rates for building construction classifications.

Response 2: Heavy rates reported on building construction projects are included in the rate setting process. The fact that a project is classified as a Class 14 property

tax, and that the wage rates paid on that project are heavy does not alone exclude the data from being used by the department.

Data must be from a commercial, governmental, or industrial building construction project to be considered for use in setting the building construction rates. ARM 24.17.501(2)(a) lists a "power plant" as an example of building construction. A power plant is considered to be an industrial facility that generates electricity. These include steam electric stations (nuclear boiling water reactors), hydroelectric dams, CHP plants, coal plants and wind farms. A hydroelectric dam is considered to be a power plant. However, the dam itself is a heavy construction project. Buildings built incidental to the dam, i.e., control buildings, visitor centers, etc., would meet the building construction criteria.

Data for buildings constructed on wind farms, i.e., maintenance or administrative buildings, meet the criteria to be included in the building construction rates. The wind turbines' structures themselves do not. ARM 24.17.501(2) states: "Building construction projects generally are the constructions of sheltered enclosures with walk-in access for housing persons, machinery, equipment, or supplies." A wind turbine is not built with the purpose to house any of the above. It is built to produce wind energy. The door on the side of the wind turbine is for mechanics to enter when the turbine needs repair.

The department concludes that it corrected excluded data on the construction of wind turbines for building construction.

Comment 3: Keith Allen, IBEW Local 233, submitted letters by employers giving the department permission to use the data submitted by the IBEW in place of the employer's data.

Response 3: The data has been incorporated into the rate setting process as provided for in ARM 24.17.121. Revised rates are listed in paragraph 5.

Comment 4: Randy Sobeck, IUOE Local 400, requested review of the rates for several Groups of Construction Equipment Operators. The commenter requested review of the wage and benefit for Group 2 in district 5 in the Building Construction publication. In the Heavy Construction publication, the commenter stated the benefit of $5.76 and $2.50 in districts 5 and 6 respectively for Group 3 were incorrect.

Response 4: The department has reviewed the rates requested. The wage and benefit set in the building construction rates for Group 2 were set correctly in accordance with ARM 24.17.121. The commenter stated the benefit of $5.76 and $2.50 in districts 5 and 6 respectively for Group 3 were in the Heavy Construction publication and incorrect. Those rates were actually in the Building Construction publication and were set in accordance with ARM 24.17.121.

Comment 5: Jim Ryan, SMACNA Local 103, provided data and requested review of the wages for Heating and Air Conditioning in district 8, the benefits for Sheet Metal

Worker in districts 1 and 3, and the wages and benefits for Sheet Metal Worker in districts 6 and 8.

Response 5: In reviewing the rates requested, the department found that the collective bargaining agreement submitted to the department was not in place during the reference period in which the department was gathering data. The department incorporated the correct CBA and the revised rates for Heat and Air Conditioning and Sheet Metal Worker are noted in paragraph 5.

Comment 6: Mary Alice-McMurray, PNWRCC, requested the wage in district 8 for Carpenters be reviewed. The commenter believes some of the data that was not included met the criteria of building construction, and should be included.

Response 6: The original data submitted to the department for district 8 did not meet the criteria of building construction. In an e-mail sent to the department, Bob Bloom, PNWRCC Local #1172, submitted additional data for Carpenters in district 8. The department has reviewed and incorporated the data submitted. The corrections are noted in paragraph 5.

Comment 7: Carey Hegreberg, Montana Contractors Association, voiced concern over the consistency of how prevailing wages are handled, in particular with regards to fringe benefits, across trades and districts. Commenter presented testimony that the MCA has 75 employers that contribute to a healthcare and retirement trust. These companies pay exactly the same premium to the healthcare and retirement trust for every worker regardless of classification or where work is done.
The commenter states any contractor that is in a position to bid sizeable state and local projects, provide health insurance and retirement to all of their employees, and that this package costs a minimum of $6.00. Specific examples of large disparities in benefits were Glaziers and Groups 3 Operators. The benefit for Glaziers is $0.70 in district 5 and $8.20 in district 3. The benefit for Group 3 Operators in district 6 is $2.50 and $9.05 everywhere else. Additionally, the commenter is concerned that benefit rates in district 6 are too low across the board, and that contractors working on public facilities would be bidding on a benefit package significantly less than what they are actually paying, and would have to eat that cost if they wanted to compete.

Response 7: The survey is driven by the number of responses received and the value of those responses. Although persons having information regarding wages and related information have a duty (imposed by rule) to provide that information to the department, the survey is voluntary, in that there is no penalty for not responding to the survey. As such, the responses are skewed in that they reflect information about wages paid by employers who see a value in responding to the survey. The department acknowledges the voluntary nature of the survey and the bias inherent with this type of survey, coupled with the fact that there is no penalty for reporting skewed, incomplete, or untrue data presents a barrier to accuracy that the department is committed to improving. The department's intention is to get a snap shot of the wages, benefits, and travel/per diem a contractor pays during the month the contractor employs the most workers. The department asks for "all commercial,

industrial, or government work performed in Montana during your peak month of employment…" on the form. A contractor wanting the benefits to be low would pick a month when they only had commercial work. The department believes this represents a minority of the response but realizes the effect it has on the survey. The department stresses the importance of participation and the positive effect it has on the accuracy and integrity of the results. The department also notes that organizations such as the MCA may submit data on behalf of its member contractors.

Comment 8: Aaron Golik, Century Companies Inc., requested that the dispatch points in Lewistown, Havre, and Miles City be added to the Heavy and Highway Construction publications. Commenter states that record keeping becomes cumbersome when one worker receives two different amounts for zone pay for two different jobs.

Response 8: The department sets the rates for heavy and highway construction pursuant to 18-2-414, MCA, and currently incorporates federal rates by reference. The department notes that the prevailing wage rates to be paid on a project are only a minimum (a floor amount) and recognizes that contractors may pick the higher of two rates to avoid any confusion staying in compliance paying prevailing wages.

Comment 9: Janet Cook, aBCc Erectors, Inc., stated that they did not receive a survey form and would like to have their data be considered in the rate setting process.

Response 9: The department incorporated the data provided by the commenter, in line with rate-setting procedures. Revised rates for Ironworker are identified below in paragraph 5.

Comment 10: Robert Papin, UA Local # 30, submitted additional data and requested review of the per diem rate for Plumbers in districts 7, 8, 9, and 10.

Response 10: The department has reviewed the information submitted. Revised per diem rates for Plumbers in districts 7, 8, 9, and 10 are identified below in paragraph 5.

Comment 11: Steven Carey, UA Local # 459, submitted data and requested review of wages and benefits in districts 1and 2 for Plumbers.

Response 11: The department has reviewed the information submitted. The prevailing wage rate for district 1 is correct. In district 2 the wage will be $26.31 and the benefit will be $10.82. The revised rates are also identified in paragraph 5.

Comment 12: Steven Carey, UA Local # 459, inquired as to how a union wage could prevail, but not the union benefit in the same district.

Response 12: The department notes that wage rates and benefit rates are set separately, as provided by ARM 24.17.121. As an example, survey data for a given district may include information showing that more than 50 percent of the workers receive a given wage and a given benefit amount. The wage amount might be higher than the collectively bargained rate, but benefits amount might be lower than the collectively bargained rate. The wages from the survey would be subject to the provisions of law that restrict the wage rate from being higher than the collectively bargained rate, and thus the prevailing rate established would be capped at the "union rate." The surveyed benefit rate, being lower than the union rate, would prevail.

Comment 13: Larry Mayo, PNWRCC Local #112, submitted additional data for Carpenters in district 3.

Response 13: The department has incorporated the data in line with the rate-setting procedures. The revised rates are identified below in paragraph 5.

Comment 14: Roger Johanson, PNWRCC, provided notice to the department that the wage rate for Carpenters in district 10 is higher than the CBA submitted to the department.

Response 14: The department has reviewed the information submitted. The wage rate of $29.00 was set in error. The correct wage rate will be $19.00. The correction is noted in paragraph 5.

4. The rule has been amended exactly as proposed.

5. The following rates in "The State of Montana Prevailing Wage Rates – Building Construction Services" publication incorporated by reference in the rule have been amended as follows, stricken matter interlined, new matter underlined:

Electricians

District	Wage		Benefit	
1	~~$27.10~~	$27.02	~~$ 8.83~~	$9.89
3	~~$25.46~~	$26.27	$10.92	
6	~~$26.11~~	$26.29	$ 9.72	

Carpenters

District	Wage		Benefit	
1	~~$18.49~~	$18.96	~~$6.48~~	$6.67
3	~~$22.28~~	$22.50	~~$7.25~~	$8.10
8	~~$17.13~~	$18.00	~~$7.67~~	$8.12
10	~~$29.00~~	$19.00	$8.40	

Heating and Air Conditioning

District	Wage		Benefit	
1	~~$26.24~~	$25.09	~~$13.24~~	$13.07
2	~~$26.24~~	$25.09	~~$13.24~~	$13.07
3	~~$26.24~~	$25.09	~~$13.24~~	$13.07
4	~~$26.24~~	$25.09	~~$13.24~~	$13.07
5	~~$26.24~~	$25.09	~~$10.75~~	$13.07
6	~~$26.24~~	$25.09	$13.00	
7	~~$26.24~~	$25.09	~~$13.24~~	$13.07
8	~~$22.42~~	$25.09	~~$13.24~~	$13.07
9	~~$26.24~~	$25.09	~~$13.24~~	$13.07
10	~~$26.24~~	$25.09	~~$13.24~~	$13.07

Sheet Metal Worker

District	Wage		Benefit	
1	~~$26.24~~	$25.09	~~$11.04~~	$10.02
2	~~$18.59~~	$25.09	~~$ 4.39~~	$13.07
4	~~$26.24~~	$25.09	~~$13.24~~	$13.07
5	~~$26.24~~	$25.09	~~$13.24~~	$13.07
6	~~$22.19~~	$23.27	~~$ 4.53~~	$ 6.85
7	~~$26.24~~	$25.09	~~$13.24~~	$13.07
8	~~$19.76~~	$25.09	~~$ 7.66~~	$13.07
9	~~$26.24~~	$25.09	~~$13.24~~	$13.07
10	~~$26.24~~	$25.09	~~$13.24~~	$13.07

Ironworker-Structural Steel and Rebar Placer

District	Wage		Benefit	
8	~~$24.75~~	$21.85	~~$13.80~~	$ 7.68

Plumbers

District	Wage		Benefit	
2	~~$24.70~~	$26.31	~~$ 8.39~~	$10.82

Travel [for plumbers]

District	Per Diem	
7	~~$60/day~~	$70/day
8	~~$60/day~~	$70/day
9	~~$60/day~~	$70/day
10	~~$60/day~~	$70/day

6. The "The State of Montana Prevailing Wage Rates – Heavy Construction Services" publication is amended to include work performed in Toole County as being subject to the rate for classification ELEC0233-001 06/01/2009.

/s/ MARK CADWALLADER
Mark Cadwallader
Alternate Rule Reviewer

/s/ KEITH KELLY
Keith Kelly, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State February 1, 2010

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

In the matter of the amendment of ARM 24.138.508 dental anesthetic certification, 24.138.509 dental permits, and 24.138.2106 exemptions - continuing education	)))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On July 16, 2009, the Board of Dentistry (board) published MAR Notice No. 24-138-66 regarding the public hearing on the proposed amendment of the above-stated rules, at page 1068 of the 2009 Montana Administrative Register, issue no. 13.

2. On November 12, 2009, the board published a notice extending the comment period at page 2091 of the 2009 Montana Administrative Register, Issue no. 21.

3. On August 11, 2009, a public hearing was held on the proposed amendment of the above-stated rules in Helena. Several comments were received by the extended November 16, 2009, deadline.

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

Comments 1 and 2 pertain to ARM 24.138.508:

COMMENT 1: One commenter stated that requiring written verification of an applicant's experience in administering local anesthetic agents could create unforeseen problems in certification and suggested the board allow the verification be done by the applicants themselves.

RESPONSE 1: Following discussion, the board agreed with the commenter and is amending the rule accordingly.

COMMENT 2: A commenter stated that an applicant should not be required to reapply for exceeding the six-month application period and should be allowed a reasonable time to respond to board requests.

RESPONSE 2: The board notes that the six-month application period is consistent with current application processes and is not an absolute deadline for applicants. Staff will continue to work with any applicant trying to complete an application but nearing the end of the six-month period.

Comments 3 through 16 pertain to ARM 24.138.509:

COMMENT 3: Several commenters opposed adding the Paris Gibson Education Center (center) as a board-accepted additional public health facility for limited access permit (LAP) practice. The commenters asserted that dental offices are within walking distance of the center and in a safe neighborhood. The commenters stated that there is no issue with access to dental care for the center and offering LAP services may confuse students and their families into thinking they will receive a full diagnosis and complete dental care. A commenter opined that ten dentists practice within a half-mile of the center, six of them are Medicaid providers, and three of those are accepting new Medicaid patients.

RESPONSE 3: The board notes that 37-4-405(5)(c), MCA, allows limited access permit holders to provide dental hygiene services to patients who are unable to receive regular dental care due to age, infirmity, disability, or financial constraints. The board concluded that the statute does not limit LAP services based upon access to dental care or location of or patient proximity to a dental office.

COMMENT 4: One commenter asserted that because LAP services may only be provided to patients or residents of facilities or programs who, due to age, infirmity, disability, or financial constraints, are unable to receive regular dental care, the board lacks the statutory authority to allow LAP services at the center. The commenter stated there has been no proof that the student population at the center has difficulty gaining access to dental care and believes that the center's students are not "unable to receive regular dental care." The commenter also stated that the local Community Health Care Center (CHCC) provides dental care for low income and uninsured patients.

RESPONSE 4: The board received additional documentation during the extended comment period and since this comment was submitted. Following consideration of the additional information, the board concluded that at a minimum, there exists a financial constraint on the young mothers and their children who are the population of the center. The board notes that documentation indicates the population may also be limited in getting regular dental care by age and infirmity. The board also notes that the CHCC does not offer or provide any regular preventative dental hygiene services.

COMMENT 5: A commenter stated that the major national pediatric health organizations advise that children have a "dental home" so that dental care is provided or supervised by qualified child dental health specialists.

RESPONSE 5: The board acknowledges the need for a dental home, but concluded that a LAP holder is an important part of this setting. Further, the LAP dental hygienist may only provide the limited dental hygiene services as outlined in 37-4-405(4), MCA.

COMMENT 6: One commenter stated that there has been no need shown for dental services by the students at the center. The commenter also questioned whether the center's students have been screened and how the dental hygienist proposing LAP services at the center gained access to the public schools.

RESPONSE 6: The board determined that both the documentation from the center's principal and the letter from a Great Falls pediatrician showed a need for LAP services at the center. The board cannot respond to questions regarding the screening of students or access to the public schools as they are beyond the board's knowledge.

COMMENT 7: A commenter stated that schools were intentionally left out of the enacting legislation for LAP services and that the center is a school.

RESPONSE 7: The board notes that 37-4-405, MCA, only lists programs and facilities at which LAP services may be performed, but does not specifically prohibit or exclude any type of location. The board is authorized under the statute to identify by rule other acceptable facilities and programs.

COMMENT 8: Three commenters stated that 38% of the students at Paris Gibson Education Center qualify for free lunch and are in a household at or below 130% of the poverty level. In comparison, 14% of the students at C.M. Russell High School and 20% at Great Falls High School qualify for free lunch.

RESPONSE 8: The board appreciates all comments made during the board's rulemaking projects.

COMMENT 9: One commenter supported the amendment stating that it would support the goals of the 2006 State of Oral Health in Montana report for the prevention of oral disease.

RESPONSE 9: The board appreciates all comments made during the board's rulemaking projects.

COMMENT 10: A commenter supported adding the center as a LAP site to offer dental hygiene preventative services to the highest risk families in the community. The commenter noted that these families have parents who are age 15 through 24 with children from infants through age three.

RESPONSE 10: The board appreciates all comments made during the board's rulemaking projects.

COMMENT 11: Two commenters supported LAP services at the center because such services would help educate the at-risk families who do not usually seek dental care except in emergency situations for pain relief.

RESPONSE 11: The board appreciates all comments made during the board's rulemaking projects.

COMMENT 12: Two commenters pointed out that the City County Health Department does not currently offer routine prophylactic dental cleaning, so center students cannot obtain preventative dental hygiene services there. One commenter stated that CCHD staff members do not routinely see new patients due to the overwhelming patient load.

RESPONSE 12: The board appreciates all comments made during the board's rulemaking projects.

COMMENT 13: Three commenters noted that, even though the center's students qualify for Healthy Montana Kids Plus (Medicaid), only six or seven Great Falls dentists are shown on the DPHHS web site as accepting new Medicaid patients. One commenter further stated that only three actually will accept new patients (two on the list take only hospital cases and two are the same entity).

RESPONSE 13: The board appreciates all comments made during the board's rulemaking projects.

COMMENT 14: One commenter suggested that allowing LAP services at the center would help reduce tax payer costs associated with having to send children to the nearest pediatric dentist in Helena.

RESPONSE 14: The board appreciates all comments made during the board's rulemaking projects.

COMMENT 15: A commenter stated that 59% of children between 100-199% of the federal poverty level have not seen a dentist in the past year. The commenter also noted that the current State of Oral Health in Montana report shows that 40.8% of all pregnant women did not receive dental care during their pregnancies.

RESPONSE 15: The board appreciates all comments made during the board's rulemaking projects.

COMMENT 16: A commenter asked if the board had canvassed the current LAP facilities to determine what services have been provided, where, when, and by whom.

RESPONSE 16: The board has not surveyed current LAP facilities or programs but acknowledges that such information could be beneficial.

5. The board has amended ARM 24.138.509 and 24.138.2106 exactly as proposed.

6. The board has amended ARM 24.138.508 with the following changes, stricken matter interlined, new matter underlined:

24.138.508 DENTAL HYGIENE LOCAL ANESTHETIC AGENT CERTIFICATION (1) through (3)(e) remain as proposed.

(f) written verification ~~from a supervising dentist~~ that the applicant has practiced administering local anesthetic agents within the last five years.

(4) and (5) remain as proposed.

BOARD OF DENTISTRY
PAUL SIMS, DDS, PRESIDENT

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

/s/ KEITH KELLY
Keith Kelly, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State February 1, 2010

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

In the matter of the amendment of ARM 24.138.402 fee schedule, 24.138.406 dental auxiliaries, 24.138.2104 requirements and restrictions, 24.138.3207 continuing education, and the adoption of NEW RULES I through III pertaining to restricted volunteer licensure	)))))))	NOTICE OF AMENDMENT AND ADOPTION

TO: All Concerned Persons

1. On October 15, 2009, the Board of Dentistry (board) published MAR Notice No. 24-138-67 regarding the public hearing on the proposed amendment and adoption of the above-stated rules, at page 1743 of the 2009 Montana Administrative Register, issue no. 19.

2. On November 5, 2009, a public hearing was held on the proposed amendment and adoption of the above-stated rules in Helena. Two comments were received by the November 13, 2009, deadline.

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

COMMENT 1: One commenter supported the amendment and new rules regarding the temporary volunteer licensure of nonresident dentists and dental hygienists and the clarification of teeth whitening as the practice of dentistry.

RESPONSE 1: The board appreciates all comments received during the board's rulemaking projects.

COMMENT 2: A commenter suggested that ARM 24.138.406(10) should be amended to include (8)(a) through (d), instead of (a) through (c).

RESPONSE 2: The board intended to accept documentation of (8)(a) through (d) and acknowledges the unintentional misprint in the original notice. The board is amending the rule accordingly.

4. The board has amended ARM 24.138.402, 24.138.2104, and 24.138.3207 exactly as proposed.

5. The board has adopted NEW RULE I (24.138.601), NEW RULE II (24.138.603), and NEW RULE III (24.138.306) exactly as proposed.

6. The board has amended ARM 24.138.406 with the following changes, stricken matter interlined, new matter underlined:

24.138.406 FUNCTIONS FOR DENTAL AUXILIARIES (1) through (9) remain as proposed.

(10) The board will accept documentation of (8)(a) through ~~(c)~~ (d) as certification for radiographic exposure.

BOARD OF DENTISTRY
PAUL SIMS, DDS, PRESIDENT

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

/s/ KEITH KELLY
Keith Kelly, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State February 1, 2010

BEFORE THE DEPARTMENT OF LIVESTOCK
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 32.3.104, 32.3.106, 32.3.212, 32.3.501 through 32.3.506, and adoption of NEW RULE I (32.3.507) and NEW RULE II (32.3.508) pertaining to Trichomoniasis and NEW RULE III (32.3.138), NEW RULE IV (32.3.139), NEW RULE V (32.3.140), and NEW RULE VI (32.3.141) pertaining to Deputy State Veterinarians	))))))))))	NOTICE OF AMENDMENT AND ADOPTION

TO: All Concerned Persons

1. On October 29, 2009 the Department of Livestock published MAR Notice No. 32-9-198 pertaining to the proposed amendment and adoption of the above-stated rules at page 1852 of the 2009 Montana Administrative Register, Issue Number 20.

2. On November 12, 2009 the Department of Livestock published an amended MAR Notice No. 32-9-198 pertaining to the proposed amendment and adoption of the above-stated rules at page 2092 of the 2009 Montana Administrative Register, Issue Number 21.

3. The department has amended and adopted the following rules as proposed: ARM 32.3.104, 32.3.106, 32.3.212, 32.3.503, 32.3.504, 32.3.506, NEW RULE II (32.3.508), NEW RULE III (32.3.138), NEW RULE IV (32.3.139), and NEW RULE VI (32.3.141).

4. The department has amended and adopted the following rules as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

32.3.501 DEFINITIONS in this subchapter:

(1) through (15) remain as proposed.

(16) "Negative T. foetus bull" is a bull that T. foetus has not been detected in a ~~prepucial~~ preputial scraping, which has not commingled with female cattle since that test, and which qualifies by one of the following:

(a) through (d) remain as proposed.

(17) "Official Trichomoniasis test" means the sampling procedure conducted by a deputy state Trichomoniasis certified veterinarian of the preputial content of a sexually intact male bovine and submitted to an approved laboratory to identify Tritrichomonas foetus by ~~in vitro cultivation~~ three weekly cultures, an individual PCR test, or other test approved by the state veterinarian.

(18) through (31) remain as proposed.

AUTH: 81-2-102, 81-2-103, MCA
IMP: 81-2-102, MCA

32.3.502 OFFICIAL TRICHOMONIASIS TESTING AND CERTIFICATION REQUIREMENTS (1) remains as proposed.

(a) Nonvirgin male cattle must be negative to one Trichomoniasis test by PCR and originate from a herd not known to be infected with T. foetus, or to three official Trichomoniasis culture tests. Bulls must be sexually rested for at least two weeks prior to the first test. For the culture tests:

(i) through (c) remain as proposed.

(d) Test eligible bulls sold, loaned, leased, or otherwise acquired without a negative test are in violation of ARM 32.3.502 ~~considered positive and must be disposed of per ARM 32.3.505. If the bull has been identified as being sold, loaned, leased, or otherwise acquired without a negative Trichomoniasis test he~~ and must be quarantined away from females and tested ~~as in ARM 32.3.502(1)~~. The owner is liable for any fine, expenses, and/or misdemeanor ticket as stated in new penalty rule.

AUTH: 81-2-102, 81-2-103, 81-2-707, MCA
IMP: 81-2-102, 81-2-703, MCA

32.3.505 DISPOSITION OF TEST POSITIVE ANIMALS (1) through (4)(a) remain as proposed.

(b) all requirements ~~conditions~~ in (3)(e)(i) through (iii) have been met as applicable.

(5) and (6) remain as proposed.

AUTH: 81-2-102, 81-2-103, MCA
IMP: 81-2-102, 81-2-108, MCA

NEW RULE I (32.3.507) PUBLIC GRAZING AND GRAZING ASSOCIATIONS (1) All bulls from multiple sources commingling in common pasture(s) that include male and female cattle ~~grazing associations and/or public lands or multiple user permits~~ shall have the official Trichomoniasis foetus test as in ARM 32.3.502(1)(a) conducted after the last breeding season and within ten months prior to next season's turn out. This test is valid for the next year's breeding season unless bulls are commingled with female cattle. Virgin bulls added to a herd are exempt from testing requirements during their first breeding season.

(a) through (c) remain as proposed.

AUTH: 81-2-102, 81-2-103, MCA
IMP: 81-2-102, 81-2-108, MCA

NEW RULE V (32.3.140) DUTIES OF DEPUTY STATE VETERINARIAN

(1) through (1)(e) remain as proposed.

(f) file a monthly form regarding other ~~important~~ reportable diseases;
(g) remains as proposed.

AUTH: 81-2-102, 81-2-103, MCA
IMP: 81-2-102, 81-2-108, MCA

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

COMMENT #1: Virgin statement should be enough; too expensive to test bull three times.

RESPONSE #1: Virgin statement affidavit is accepted for bulls 12-24 months of age; older virgin bulls may be tested with one PCR rather than three weekly cultures.

COMMENT #2: Would like to see imported bison to be Trichomoniasis tested negative as bison are prone to wandering far from their home range and would be a serious problem if they transmitted the disease to cattle herds.

RESPONSE #2: There is little or no evidence at this time to suggest that bison transmit Tritrichomonas foetus.

COMMENT #3: Who put the educational material together that is to be provided to owners in ARM 32.3.506? Can I get a sample of it? Were any boarded theriogenologists consulted on this material?

RESPONSE #3: Educational information is available on our web site, and also from the web sites of Colorado and Washington Departments of Agriculture. Most of their material has been provided by Animal Scientists and Cooperative Extension. Proposed changes to ARM 32.3.501 through the New Rules were sent to three bovine reproductive specialists (theriogenologists) and to one laboratory director outside the Department of Livestock. Auburn University, Colorado State University, and the Great Plains Research Center in Clay Center, Nebraska were solicited for comments regarding the proposed rule.

COMMENT #4: Does this ARM apply on reservations?

RESPONSE #4: No, Montana Animal Health law does not apply to sovereign Tribal Nations, only to those cattle that are moving within the state system, such as county movements or to a livestock market or to slaughter movements. However, it does apply when animals are moved into Montana from reservations.

COMMENT #5: On page 1861- These prices do not include the InPouch or the sampling procedure.

RESPONSE #5: The economic analysis has not changed from existing rule to the proposed changes regarding supplies used for sampling. One pouch would be used for PCR, three pouches for three cultures. Veterinary fees are individualized and are not able to be estimated or averaged.

COMMENT #6: The local brand inspector is becoming overwhelmed by animal health issues from Brucellosis to Trichomoniasis and some of these rules are overkill.

RESPONSE #6: The local brand inspector is a critical component to a functioning Department of Livestock in tracking animal movements and preventing the spread of livestock diseases. The department is dedicated to increasing education and providing support for these inspectors through the district brand investigators and by providing more public information about livestock diseases.

COMMENT #7: ARM 32.3.502(d) says bulls sold, loaned, leased, or otherwise acquired found to be without test must be treated as positive and sent to slaughter. This is too aggressive to force the sale of these bulls since there is now a fine and a misdemeanor ticket.

RESPONSE #7: The department agrees and has changed the language to be: (d) Test eligible bulls sold, loaned, leased, or otherwise acquired without a negative test are in violation of ARM 32.3.502 and must be quarantined away from females and tested. The owner is liable for any fine, expenses, and/or misdemeanor ticket as stated in new penalty rule.

COMMENT #8: How are these proposals to be enforced? Numerous times the state office has told me there is not enough manpower to enforce the equine shipped semen regulations; therefore, how will the manpower be present to enforce new Trich proposals?

RESPONSE #8: Administrative staff handles import permits, including shipped equine semen, while three regional animal health/brand investigators plus 16 district brand inspectors perform local investigations, quarantine, and movement controls.

COMMENT #9: I was told brand inspectors would be in charge of manpower and enforcement. How will grazing association testing be enforced if the cattle are not crossing county lines?

RESPONSE #9: Like any management program, the key critical component is education and voluntary testing by participants for the benefit of the state's livestock industry. Peer pressure helps, but unless the violations are passed on to brand inspectors there will be minimal enforcement on animal movement within the county.

COMMENT #10: On page 1858 New Rule I(1)(c) how is this to be collected?

RESPONSE #10: At the time of the testing, the veterinarian is due the cost of testing and it will be enforced by the department.

COMMENT #11: If positive animals that are ordered to be quarantined get out, who is responsible? The state for ordering quarantine or rancher?

RESPONSE #11: An owner of any livestock is responsible for their animals straying or moving off land owned or controlled by them, according to statute. The Trichomoniasis rule does not affect current law. The goal of this rule is to balance disease detection, prevention, eradication, at the same time allowing the cattle industry to continue to thrive without interfering unnecessarily with commerce.

COMMENT #12: What determines if exposed herds may be quarantined as in ARM 32.3.506(3)?

RESPONSE #12: Epidemiological investigation of positive animals commingling with other herds determines exposure and quarantine.

COMMENT #13: On page 1856 ARM 32.3 503(1) if the lab reports positives, why does the practitioner also need to repeat?

RESPONSE #13: ARM 32.3.201 requires veterinarian reporting of many diseases. In this day and age of electronic laboratory notification it can happen that faxes or e-mails don't get delivered. There are also out of state labs that may not report to the Department of Livestock as well as some in clinic culture screening tests that are being performed. Most often with Trichomoniasis, the department is calling the veterinarian to inform them of the result so no further reporting is required.

COMMENT #14: Is there any deadline for the state veterinarian or epidemiologist to respond to owner of positive Trich animals?

RESPONSE #14: The goal of the department is to notify the veterinarian first and then the owner within two working days of receiving the results. This is a seasonally detected disease, and we do get inundated during certain times and rely on the veterinarian to provide information to the producer regarding the Montana Trich program, including restriction of movement of the positive animal and the requirement for slaughter unless a retest is requested.

COMMENT #15: ARM 32.3.503(2) what is the need to report negative Trich animals?

RESPONSE #15: Negative test results are important to gather statistics to determine incidence of disease per tested cattle per county or state. If a county does not have any Trich reported, is it because they truly don't have the disease or is it because they are not testing bulls? This is a question that is asked repeatedly by producers all over the state - they want to know where testing is going on and if they have Trich in their county.

COMMENT #16: For ARM 32.3.505(2) is self slaughter appropriate for disposal? What if the ranch sells all bulls?

RESPONSE #16: Self slaughter has been allowed as long as a third party documents the death. Usually a district brand inspector performs this task on farm or at a custom slaughter house, although, a veterinarian may also confirm the death. The owner at any time may sell all of his bulls to slaughter from a positive herd, including any that are negative. He is not required to continue to retest them, but they may only move as described in ARM 32.3.505(3)(a).

COMMENT #17: The Epidemiological Investigation appears to consist of only phone calls to producers; it is not a true epidemiological investigation.

RESPONSE #17: The department's epidemiological investigation consists of veterinarian and owner notification, mandatory neighbor notification by phone or a district brand inspector visit, notifications to local and county veterinarians, maintaining data on bull movements and possible exposure sources, and education. In response to this comment the department has requested an epidemiologist to review the standard operating procedure for investigating a positive Trich animal.

COMMENT #18: Why does a contract veterinarian call practitioners to report when a Trich bull is diagnosed in a county? In my opinion, this is running up the bill for the state. This money would be more wisely spent on Trich education or reservation testing.

RESPONSE #18: Prior to hiring the private veterinarian, many veterinarians had called to complain that they did not know that Trich was in their area and have requested this information be made available to them as soon after initial contact is made with the primary veterinarian and the owner.

COMMENT #19: On page 1860 what is the breakdown of the 118 positive bulls between ranch surveillance and sale of nonvirgin bulls? Is the Trich rule diagnosing these animals or is ranch management?

RESPONSE #19: The majority of these bulls have been found due to an increase in testing requirements on grazing associations as well as reproductive management of the herd by the veterinarian.

COMMENT #20: We are against the testing requirement for common grazing associations.

RESPONSE #20: Bulls running in common pastures from multiple sources are at the highest risk for transmitting Trichomoniasis. The department encourages grazing associations to reduce risk by good management practices including: using all virgin bulls, using only cows with calves at their sides or virgin heifers, and testing all returning bulls prior to breeding season. This additional ruling allows the

producer flexibility to test the bulls after being separated from the cows for a minimum of two weeks, and using that negative test for the next breeding season (up to ten months) providing he is kept separate from all female cattle.

COMMENT #21: The new grazing section is ambiguous and maybe misconstrued by private, state, or federal land owners to require Trich testing on single source herds going onto leased lands.

RESPONSE #21: The department agrees and is proposing new language for New Rule I. "All bulls from multiple sources commingling in common pasture(s) that includes male and female cattle shall have the official Trichomoniasis foetus test conducted within ten months prior to next season's turn out."

COMMENT #22: On page 1858 New Rule I Public Grazing: Why is the Trich test good for ten months and on page 1856 import bulls Trich test expires in 90 days? No consistency on times.

RESPONSE #22: Time of test expiration is different because of different environments and bull usage. The 90-day test with no commingling is for sale, loan, lease, or import, whereas the ten-month requirement is for no ownership changes and to allow for maximum management flexibility. Scientists tell us that the best time to test is after being pulled away from the cows at least two weeks and that means testing in the fall for most Montana herds. If these bulls are going back into the same managed grazing association with no comingling with females until the next breeding season and all bulls going into that grazing association will be tested, the science tells us that we have a pretty good idea about the incidence of Trich in a higher risk activity. If any bulls are positive, all the remaining bulls would have to test negative three times.

COMMENT #23: How is the identity of the positive animals specified?

RESPONSE #23: Positive bulls must be identified at time of test as described in ARM 32.3.501(14) "Individual Trichomoniasis Identification."

COMMENT #24: On page 1855 ARM 32.3.501(20) how is the identity of these quarantined cattle made? By silver tags? Do all open cows in Trich positive herds need to be silver tagged?

RESPONSE #24: Identification of positive bulls will be with the Montana Trich tag which was placed at testing unless alternative approved ID was placed, as described in ARM 32.3.501(14)(a), (b), or (c). Exposed animals in a positive herd are identified by brands and description which is consistent with official quarantine documents already in use by the Department of Livestock. If open cows are moving to slaughter or to a Trich approved feedlot then they must be identified individually, but if remaining on the ranch during the quarantine period only the brand and description are required.

COMMENT #25: What about open cows going to market? All dry cows from a positive herd should go to slaughter and not be allowed to "clear up" over time. We need to require imported open cows to only be allowed to be sold to slaughter unless coming from a Trich free herd or are virgin heifers. Open cows must go to slaughter even if bulls are not tested. Open cows imported must be from Trich free herds or not exposed to bulls.

RESPONSE #25: While recognizing the risk of importing open cows, the current proposal does not include any requirements except for cows from positive herds. The department is interested in receiving additional comments regarding the movement restrictions on open cows. These rules would address the imported cows as well as the open cows sold at livestock markets. South Dakota has an existing rule that restricts import of open cows as well as open cows sold at a market. SD12:68:27:04.

COMMENT #26: Why must all T. Foetus positive animals be kept for minimum of 30 days before being sold directly to slaughter?

RESPONSE #26: Positive bulls may go immediately to slaughter through a market or enter a Trichomoniasis approved feedlot. The 30 day requirement is specific to a licensed Trich approved feedlot and allows the legitimate feeder to fatten the bull up for slaughter before being sold directly to slaughter or going to market and then to slaughter.

COMMENT #27: ARM 32.3.505(3)(e) does this mean heifer calves at cows' side with no bulls on cows? I have done numerous C-sections on 11 and 12 month old heifers.

RESPONSE #27: This section provides that quarantine exemption to heifer calves (virgin). Although it does occur, heifer calves getting bred during their first season of life is not where the vast majority of this disease shows up. We have not seen any data to restrict heifer calf movement from a positive herd, although it could be incorporated into the rule if the data was presented.

COMMENT #28: How do we determine 120 day pregnancy? The fetus is too old to ultrasound at that time and there are inaccuracies with rectal palpation. No veterinarian can determine a 120 day pregnancy.

RESPONSE #28: Numerous veterinarians have been queried over the course of the last two years and this is the first time that this statement has occurred. Rectal palpation is an artful science that combines specific anatomical facts with practitioners' experience. The goal for this estimation of pregnancy is to ensure that a minimum of 90 days and preferable 120 days has passed for exposure to a positive bull for the majority of exposed cows to clear the infection. Market veterinarians and dairy practitioners are quite excellent at rectal palpation, but the vast majority of bovine practitioners questioned in Montana felt that they could determine the difference between a 90 day and a 120 day pregnancy.

COMMENT #29: What is an acceptable specimen in ARM 32.3.501(1)?

RESPONSE #29: The accredited laboratory determines if the sample is unacceptable because of a multitude of reasons that are too exhaustive to include here. Many of these are common sense from inappropriate culture media, excess contaminated material present, improper handling or shipping. This sample determination is no different for Trichomoniasis than it is for other diseases that require laboratory testing.

COMMENT #30: The public grazing section (New Rule I) says that the bulls shall have the Official Trichomoniasis Test but the definition doesn't say whether or not that means three negative cultures or one negative PCR? Or in a positive herd does that mean three negative cultures or three negative PCRs? Is there ever a situation where multiple negative PCRs are required?

RESPONSE # 30: In New Rule I after "the Official Trichomoniasis foetus test" language has been added as in "ARM 32.3.502(1)(a)" to clarify which test(s) are required. In a positive herd New Rule I or in 32.3.505(3)(c), the remaining bulls must be tested three times with negative, weekly results using either three cultures or three individual PCR tests or any combination thereof.

COMMENT #31: ARM 32.3.503(2) Labs now report bulls as not detected instead of negative.

RESPONSE #31: Laboratory language changes from lab to lab and from time to time. A positive bull is one that Trich foetus has been detected. Conversely, a negative bull is one that T. foetus has not been detected.

COMMENT #32: Montana diagnostic lab has disclaimer for one PCR test on lab report.

RESPONSE #32: The purpose of the disclaimer was to protect both the practitioner and the laboratory. Science does not have a 100% method to identify Trich with one or more tests of the animal, and the possibility still exists that the animal could be positive even with a negative test. Disclaimers are simply to inform the practitioners of the limitations of the test.

COMMENT #33: If nonvirgin sale bulls (assumed to be positive) require only one PCR test, then why do positive herds need three PCR tests? The correct procedure, according to the theriogenologist with whom I consult, is three PCR tests. No consistency to these proposals.

RESPONSE #33: The department has received and agreed with several comments about the "assumed to be positive" in ARM 32.3.502(1)(d) and has changed the wording. The goal of this rule is to balance disease detection, prevention,

eradication, and at the same time allowing the cattle industry to continue to thrive without interfering unnecessarily with commerce.

COMMENT #34: In New Rule V(1)(a) what does this mean "quarantine on suspicion of diagnosis"?

RESPONSE #34: Veterinarians are trained to determine a disease diagnosis based on a multitude of facts presented by the clinical examination and history of the case; treatment and diagnosis are often prescribed prior to confirmatory laboratory testing. This is what is meant by "suspicion of diagnosis".

COMMENT #35: In New Rule V(1)(f) what distinguishes important reported disease from unimportant?

RESPONSE #35: "Other important reportable diseases" are those reportable within 30 days versus immediately. The department has removed the word "important" to now read: "(f) file a monthly form regarding other reportable diseases." Producers and veterinarians have the duty to report infectious and contagious disease per 81-2-107, MCA and ARM 32.3.104. Every veterinarian was provided with a list of diseases that are immediately reportable to either or both the Montana State Veterinarian or the federal APHIS Area Veterinarian in Charge. This list also contains diseases that are reportable within 30 days.

COMMENT #36: How are these proposals accepted or rejected?

RESPONSE #36: After the public comment period has closed then the agency has up to six months from the filing date to organize the comments into groups and write the agency response to public comment, which will be filed. Depending upon comments received agencies may change the proposal and refile. It will be presented to the Board of Livestock for final approval before going back to Secretary of State's office for filing as law.

/s/ George H. Harris
George H. Harris
Rule Reviewer

/s/ Christian Mackay
Christian Mackay
Executive Officer
Department of Livestock

Certified to the Secretary of State February 1, 2010

BEFORE THE DEPARTMENT OF MILITARY AFFAIRS
OF THE STATE OF MONTANA

In the matter of the repeal of ARM 34.6.101 through 34.6.106 pertaining to the Education Benefit Program	)))	NOTICE OF REPEAL

TO: All Concerned Persons

1. On December 10, 2009 the Department of Military Affairs published MAR Notice No. 34-10 pertaining to the proposed repeal of the above-stated rules at page 2357 of the 2009 Montana Administrative Register, Issue Number 23.

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

3. No comments or testimony were received.

/s/ John C. Melcher
John C. Melcher
Assistant Attorney General
Rule Reviewer

/s/ John F. Walsh
John F. Walsh
The Adjutant General

Certified to the Secretary of State February 1, 2010.

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

In the matter of the adoption of New Rule I and the amendment of ARM 37.86.3501, 37.86.3505, 37.86.3506, and 37.86.3515 pertaining to case management services for adults with severe disabling mental illness	))))))	NOTICE OF ADOPTION AND AMENDMENT

TO: All Concerned Persons

1. On August 13, 2009, the Department of Public Health and Human Services published MAR Notice No. 37-481 pertaining to the public hearing on the proposed adoption and amendment of the above-stated rules at page 1378 of the 2009 Montana Administrative Register, Issue Number 15.

2. The department has adopted the following rule as proposed with the following changes from the original proposal. Matter to be added is underlined. Matter to be deleted is interlined.

RULE I (37.86.3503) CASE MANAGEMENT SERVICES FOR ADULTS WITH SEVERE DISABLING MENTAL ILLNESS, SEVERE DISABLING MENTAL ILLNESS (1) "Severe disabling mental illness" means with respect to a person who is 18 or more years of age that the person meets the requirements of (1)(a), (b), (c), or (d). The person must also meet the requirements of (1)(e). The person:

(a) and (b) remain as proposed.

(c) has a DSM-IV-TR diagnosis of:

(i) through (ii) remain as proposed.

(iii) mood disorder (293.83, 296.22, 296.23, 296.24, 296.32, 296.33, 296.34, 296.40, 296.42, 296.43, 296.44, 296.52, 296.53, 296.54, 296.62, 296.63, 296.64, 296.7, 296.80, 296.89);

(iv) remains as proposed

(v) disorder due to a general medical condition (293.0~~1~~, 310.1);

(vi) through (e)(v) remain as proposed.

AUTH: 53-2-201, 53-6-113, MCA
IMP: 53-2-201, 53-6-101, MCA

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

37.86.3501 CASE MANAGEMENT SERVICES FOR ADULTS WITH SEVERE DISABLING MENTAL ILLNESS, DEFINITIONS (1) "Case management" services means services furnished to assist Medicaid and mental health services

plan eligible individuals who reside in a community setting, or are transitioning to a community setting, in gaining access to needed medical, social, educational, and other services.

(2) through (4) remain as proposed.

AUTH: 53-2-201, 53-6-113, MCA
IMP: 53-2-201, 53-6-101, MCA

37.86.3505 CASE MANAGEMENT SERVICES FOR ADULTS WITH SEVERE DISABLING MENTAL ILLNESS, SERVICE COVERAGE (1) Case management services for adults with severe and disabling mental illness include:

(a) comprehensive assessment and ~~periodic~~ reassessment at least once every 90 days of an eligible individual to determine service needs, including activities that focus on needs identification for any medical, educational, social, or other services. These assessment activities include the following:

(i) through (iii) remain as proposed.

(b) development (and periodic revision) of a specific care plan based on the information collected through the assessment that:

(i) and (ii) remain as proposed.

(iii) identifies a course of action to respond to the assessed needs of the eligible individual and to avert crisis.

(c) remains as proposed.

(d) monitoring and follow-up activities, including activities and contacts to ensure that the care plan is effectively implemented and ~~adequately~~ addresses the needs of the eligible individual. Activity may be with the individual, family members, service providers, or other entities or individuals and conducted as frequently as necessary, ~~including~~ and at least ~~one annual monitoring~~ once every 90 days, to help determine whether the following conditions are met:

(i) through (2) remain as proposed.

(3) Case management may include contacts with noneligible individuals that are directly related to the identification of the eligible individual's needs and care, for the purpose of helping the eligible individual access services, identifying needs and supports to assist the eligible individual in obtaining services, providing case managers with useful feedback, ~~and~~ alerting case managers to changes in the eligible individual's needs, and averting crisis.

(4) "Case management" does not include the:

(a) direct delivery of a medical, educational, social, or other service to which an eligible individual has been referred; and

(b) transportation~~; and~~.

~~(c) Medicaid determination and redetermination.~~

(5) remains as proposed.

(6) Case management reimbursement requirements include those described in (1) through (5) and the following:

(a) case managers must inform eligible individuals they have the right to refuse case management at the time of eligibility determination and annually thereafter at the time of reassessment; and

(b) providers must document in the case record that the individual has been informed and if the individual has refused services.

AUTH: 53-2-201, 53-6-113, MCA
IMP: 53-2-201, 53-6-101, 53-6-113, MCA

37.86.3506 CASE MANAGEMENT SERVICES FOR ADULTS WITH SEVERE DISABLING MENTAL ILLNESS, SERVICE REQUIREMENTS

(1) through (8) remain as proposed.

(9) Case management services must be provided on a one-to-one basis, to an individual by one case ~~manager~~ management provider.

(10) through (12) remain as proposed.

AUTH: 53-2-201, 53-6-113, MCA
IMP: 53-2-201, 53-6-101, MCA

37.86.3515 CASE MANAGEMENT SERVICES FOR ADULTS WITH SEVERE DISABLING MENTAL ILLNESS, REIMBURSEMENT (1) Case management services for adults with severe disabling mental illness will be reimbursed on a fee per unit of service basis as follows~~:~~. For purposes of this rule, a unit of service is a period of 15 minutes.

(a) ~~the~~ The department will pay the lower of the following for case management services:

(i) the provider's actual submitted charge for services; or

(ii) the amount specified in the department's Medicaid fee schedule.

~~(b) a unit of service is a period of 15 minutes as follows:~~

~~(i) one unit of service is from 9 through 23 minutes;~~

~~(ii) two units of service are from 24 through 38 minutes;~~

~~(iii) three units of service are from 39 through 53 minutes;~~

~~(iv) four units of service are from 54 through 68 minutes;~~

~~(v) five units of service are from 69 through 83 minutes;~~

~~(vi) six units of service are from 84 through 98 minutes;~~

~~(vii) seven units of service are from 99 through 113 minutes; and~~

~~(viii) eight units of service are from 114 through 128 minutes.~~

~~(c) if a provider sees an eligible individual more than one time in a day, the entire time spent with the individual that day should be totaled and billed once with the correct number of units described in (b), which must be supported by documentation requirements described in ARM 37.86.3305;~~

~~(d) providers are discouraged from consistently billing one unit of service for an eight minute service, because one unit of service is meant to be a period of 15 minutes;~~

~~(e) reimbursement cannot be made to providers for time spent traveling to provide a service or travel on behalf of an eligible individual for the following:~~

~~(i) direct delivery of a medical, educational, social, or other service to which an eligible individual has been referred;~~

~~(ii) transportation for an eligible individual;~~

~~(iii) Medicaid eligibility determination and redetermination activities.~~

(2) remains as proposed.

AUTH: 53-2-201, 53-6-113, MCA
IMP: 53-2-201, 53-6-101, 53-6-113, MCA

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

COMMENT #1: Case management services should include advocacy.

RESPONSE #1: Although it is not specifically listed, the department recognizes advocacy as a part of referral and related activities, depending upon the needs identified in the individual's care plan.

COMMENT #2: Under the proposed changes in ARM 37.86.3505(1)(d), would it be necessary to write advocacy into an individual's care plan? Who decides to include advocacy as a follow-up activity? Who decides whether services are adequate to meet the needs of the individual?

RESPONSE #2: As indicated above in response #1, advocacy can be part of an individual's care plan. It is best to list all the activities and services that will be provided in an individual's care plan. The individual and their treatment team will determine which services are included in the care plan and whether they are adequate.

COMMENT #3: Case management services should include crisis response.

RESPONSE #3: The case management functions of monitoring and follow-up may include crisis response when a case manager is monitoring the implementation of an individual's care and crisis plans. Face-to-face crisis response that does not require intervention by a mental health professional may be billed as community-based psychiatric rehabilitation and support (CBPRS).

COMMENT #4: We are concerned that, under the proposed changes, case management services would no longer include direct contact with the client.

RESPONSE #4: All of the identified case management functions (comprehensive assessment and reassessment; development of a plan; referral and related activities; and monitoring and follow-up activities) may include face-to-face contact with the client. Direct contact that does not involve one of these functions may not be billed as case management.

COMMENT #5: We disagree with the department's finding that recipients will not be affected by changes in targeted case management rules.

RESPONSE #5: The department acknowledges that these rules may affect a recipient's choice of who provides activities of daily living and other direct services, but the amount and quality of services should not change.

COMMENT #6: Transportation and daily living assistance should remain a part of case management services.

RESPONSE #6: Federal regulations clearly permit transportation and assistance with activities of daily living to be billed as CBPRS activities.

COMMENT #7: We are concerned that the reimbursement rate for CBPRS is not adequate.

RESPONSE #7: The department acknowledges the commentor's concerns. However, reimbursement rates are outside the scope of the proposed amendments.

COMMENT #8: Do the proposed changes prohibit billing CBPRS for transportation, education, training, and the other services mentioned?

RESPONSE #8: No. Please see ARM 37.88.901(5). Community-based psychiatric rehabilitation and support services are provided on a face-to-face basis with the recipient, family members, teachers, employers, or other key individuals in the recipient's life when such contacts are clearly necessary to meet goals established in the recipient's individual treatment plan.

COMMENT #9: Why did the department choose to use the 15 minute billing increment when the Centers for Medicare and Medicaid Services (CMS) have withdrawn regulations requiring its use?

RESPONSE #9: The use of a 15 minute unit for case management is not a change in Montana. The department agrees that the detailed delineation of time proposed in ARM 37.86.3515(b) is unnecessary and this language has been deleted. The department will continue to require that all Montana Medicaid targeted case management providers bill in 15 minute increments.

COMMENT #10: We recommend the entire section of ARM 37.86.3515 pertaining to reimbursement be deleted.

RESPONSE #10: The department agrees and has deleted ARM 37.86.3515(c), (d), and (e) from the final rule.

COMMENT #11: It is not practical to require that each recipient have only one case manager. Services are sometimes necessary when a case manager is away for training, sick leave, or vacation. Another case manager should be permitted to provide services temporarily.

RESPONSE #11: The department agrees and has amended ARM 37.86.3506(9) to use the term "case management provider" in accordance with federal regulations. This means that an individual will have one case manager but the individual can access another case manager from the provider agency if necessary.

COMMENT #12: Please clarify Rule I(1)(a) (37.86.3503), pertaining to severe disabling mental illness (SDMI) that would recognize hospitalization only at Montana State Hospital (MSH). It is our understanding that Montana has moved to voluntary admission for short term treatment in local hospitals.

RESPONSE #12: Recent legislation is permissive of short term care in local hospitals in lieu of involuntary admission to MSH. However, this legislation does not affect the proposed changes to the definition of SDMI.

COMMENT #13: We support adding post traumatic stress disorder (PTSD) and suicidal ideation and behavior to the SDMI definition.

RESPONSE #13: The department agrees that these are needed additions to the definition and appreciates the commenter's support of the change.

COMMENT #14: Please clarify what is meant by self-harm.

RESPONSE #14: Self-harm means intentional self-injury. This can include a number of different behaviors such as cutting or burning, intentionally taking an overdose of pills, or head banging. It does not include such things as smoking, drinking, or anorexia which may also be harmful.

COMMENT #15: We are concerned that the definition of suicidality may not be adequate.

RESPONSE #15: The department believes the definition is adequate for the determination of SDMI. If an individual does not meet the criteria for SDMI, the individual may still receive outpatient psychotherapy, medication management, and services under the 72-Hour Presumptive Eligibility Program for Crisis Stabilization.

COMMENT #16: We recommend several changes to the list of covered diagnoses. Please check 293.01, 296.32, and 296.24 for typographical errors. Please add 206.90. Please eliminate 294.0 and 204.8.

RESPONSE #16: Several diagnostic codes were omitted in error and have been added to the final rule. An examination of billing records for the past year does not support the suggestion that 206.90 be added to the list, as it was never billed, nor that 294.0 and 204.8 be removed, as they were billed a number of times.

COMMENT #17: Case managers should be allowed to bill for assisting clients with Medicaid, SSI applications, and social security hearings. We are concerned that

under the proposed changes, clients would not be able to get help with forms and applications.

RESPONSE #17: The department agrees and has deleted proposed ARM 37.86.3505(4)(c) that would have excluded Medicaid determination and redetermination from the definition of case management.

COMMENT #18: Under the proposed changes to ARM 37.86.3506(3), will the department disallow billing if a case manager accompanies a client to a medical appointment to provide information to the doctor?

RESPONSE #18: No. The department will allow billing for this activity because the recipient is receiving a case management service (assessment or care plan development with the doctor, therapist, etc.) and a medical service.

COMMENT #19: We have concerns about the brokerage model for delivery of case management services in rural settings and about the restriction of direct service delivery to this population. Please clarify the case manager's role and the billing of other services by persons employed as case managers.

RESPONSE #19: The department agrees that the service array in rural settings must meet the needs of consumers. The adult mental health services program is working with licensing program managers to address these concerns.

COMMENT #20: We propose the addition of language defining core areas of case management.

RESPONSE #20: The department appreciates the suggested additions, but the details contained in the proposal are too specific for administrative rule.

COMMENT #21: We propose language changes related to free choice of providers.

RESPONSE #21: The department appreciates the suggested changes, but the suggested language is less detailed than is required for administrative rule.

COMMENT #22: The medical necessity rule does not need to be duplicated in the rules pertaining to case management services for adults with SDMI and should be deleted.

RESPONSE #22: Many people who are new to the mental health system have experienced difficulty finding the rule for medically necessary service in the general Medicaid chapter (ARM Title 37, chapter 82). Therefore, the department has chosen to repeat the standards for the convenience of the public.

COMMENT #23: Consumers value the trusting relationships they have with their case managers, especially when they have little to no family support. We are concerned people will end up in crisis or in institutions without case management.

RESPONSE #23: The department understands and appreciates that consumers value the services they receive from their case managers. Case management is not being eliminated by these changes. These rules pertain to activities that may be billed as case management services. Some activities that case managers previously provided in the course of case management must now be billed as other activities.

COMMENT #24: We are concerned that the department may choose to limit the number of qualified case management services providers or contract exclusively with one case management services provider.

RESPONSE #24: It is the department's intent to encourage freedom of choice, not to limit choice of a case management provider for adults with SDMI. ARM 37.86.3515(2) is not new language or an addition to the rule.

COMMENT #25: Under the proposed change to ARM 37.86.3515(2), pertaining to designation of a single case management services provider, would a provider have to serve a larger or smaller area?

RESPONSE #25: Not necessarily. It is the department's intent to encourage freedom of choice, not to limit the choice of adults with SDMI. ARM 37.86.3515(2) is not new language or an addition to this rule.

COMMENT #26: Please clarify the proposed changes pertaining to the frequency with which reassessment and case plan review must be completed.

RESPONSE #26: In order to be consistent with other rules of the department, the final rule has been amended to say that reassessment and review of a specific care plan as provided at ARM 37.86.3505(1)(a) and (b) must occur at least once every 90 days.

COMMENT #27: Please explain why the term "intensive case management" was changed to "case management" in the proposed rules.

RESPONSE #27: The term "intensive case management" was changed to provide consistency in language among all targeted case management services provided under Montana Medicaid.

COMMENT #28: If rules are applied retroactively, how will it affect the way providers are audited?

RESPONSE #28: The definition of case management services has been available to providers since 2006 and the department believes that providers have been working toward meeting the standards adopted in this notice. The policy of the department is to audit based on the date rules are in place, so providers can expect to be audited based on the date the changes were retroactively effective.

COMMENT #29: How will First Health Services of Montana, the department's utilization review contractor, address a noncovered diagnosis when suicidal thoughts or behavior, or involuntary hospitalization at MSH are met?

RESPONSE #29: First Health Services of Montana has been advised of the updated definition of SDMI and will contact the provider if prior authorization for services is requested for an individual with a noncovered diagnosis.

COMMENT #30: Does this set of rules apply to the mental health services plan (MHSP)?

RESPONSE #30: As amended, ARM 37.86.3501, 37.86.3505, and 37.86.3506 include the mental health services plan, Montana's Mental Health Services Program for low income adults with SDMI who do not qualify for Medicaid benefits. The other rules affected by this notice apply to Medicaid only.

COMMENT #31: Please clarify the department's policy pertaining to billing case management services for the last 60 days transitioning from an institution. Change this to require involvement by a case manager from admission and travel to the facility.

RESPONSE #31: The department concluded that the proposed policy was not feasible under current eligibility rules and withdraws it.

COMMENT #32: Does 72-hour presumptive eligibility apply to case management services?

RESPONSE #32: Case management is not billable when an individual is covered by 72-hour presumptive eligibility.

5. The department intends for the adoption and amendment of these rules to be applied retroactively to July 1, 2009. A retroactive application of the proposed rules does not result in a negative impact on providers or consumers.

/s/ John Koch
Rule Reviewer

/s/ Anna Whiting Sorrell
Anna Whiting Sorrell, Director
Public Health and Human Services

Certified to the Secretary of State February 1, 2010.

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

In the matter of the adoption of New Rule I and the amendment of ARM 37.86.105, 37.86.1101, and 37.86.1105 pertaining to Medicaid physician administered drug reimbursement and pharmacy outpatient drug reimbursement	)))))))	NOTICE OF ADOPTION AND AMENDMENT

TO: All Concerned Persons

1. On November 12, 2009, the Department of Public Health and Human Services published MAR Notice No. 37-495 pertaining to the public hearing on the proposed adoption and amendment of the above-stated rules at page 2120 of the 2009 Montana Administrative Register, Issue Number 21.

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

3. The department has adopted the following rule as proposed with the following changes from the original proposal. Matter to be added is underlined. Matter to be deleted is interlined.

RULE I (37.86.1106) CALCULATION OF THE STATE MAXIMUM ALLOWABLE ~~COST~~ CHARGE, THE ESTIMATED ACQUISITION CHARGE, AND PROVIDER'S USUAL AND CUSTOMARY CHARGE (1) through (3) remain as proposed.

AUTH: 53-6-101, 53-6-113, MCA
IMP: 53-6-101, 53-6-113, MCA

4. The department noticed there is a grammatical error in the catchphrase of Rule I (37.86.1106). It should read ". . . STATE MAXIMUM ALLOWABLE CHARGE. . ." not ". . .STATE MAXIMUM ALLOWABLE COST. . . ". The department is changing the word "cost" to "charge".

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

COMMENT #1: It was stated that adequate reimbursement to pharmacies for dispensing generic drugs is important to maintain reasonable access and contain costs. The department should increase the dispensing fees for generic drugs. It would be cost effective for the department to increase generic utilization instead of implementing a state maximum allowable cost (SMAC.)

RESPONSE #1: The department agrees it is important to maintain adequate reimbursement for dispensing generic drugs to maintain Montana Medicaid recipient's access to pharmaceuticals and to contain costs. The department disagrees that increasing the dispensing fee is necessary to adequately reimburse pharmacies for dispensing generic drugs. Montana Medicaid's utilization rate for generics is 72.61% and its generic substitution rate is 95.52%. Montana Medicaid's current maximum dispensing fee of $5.04 is one of the highest in the state for third party payors and one of the highest in the nation for state Medicaid programs. Implementing the SMAC stated in these rules is consistent with the federal requirements to reimburse pharmacies at estimated acquisition costs and eliminate overpayments allowed by the current reimbursement methodology.

COMMENT #2: It was suggested that the definition of multisource drug be a drug that has three or more "A" rated therapeutically equivalent drug products sold by different manufacturers that are readily available for purchase nationally and in Montana. Any other definition risks basing drug product reimbursement on an unstable pricing structure, which could reduce access to generic drugs for Medicaid recipients.

RESPONSE #2: The department disagrees that the definition of multisource drugs should be changed. The existing definition does not result in an unstable pricing structure. The department has addressed generic availability in its mandatory generic policy. Generic mandatory logic typically does not engage until there are two or more "A" rated therapeutically equivalent drug products in addition to the trademarked product in the marketplace. The first generics may be available at a significantly discounted rate to pharmacies. The rule allows the department to actively monitor the Montana marketplace to calculate the Medicaid reimbursement that approximates actual acquisition cost as required by federal law.

COMMENT #3: It was proposed that SMAC be calculated using drug price information obtained from multiple nationally recognized data sources because pharmacies are not appropriate sources of information for determining actual acquisition cost for setting a price based on SMAC. The commentor suggests that the department use nationally recognized data sources.

RESPONSE #3: The department plans to use a variety of sources to arrive at an equitable price for generics but the actual cost of a drug to a Montana pharmacy is the best source of data. Pharmacy level data is a more appropriate source for determining acquisition costs to set a price based on SMAC than national data sources. The survey of in-state pharmacy providers is the most accurate means of determining a Montana pharmacy's actual acquisition cost and the availability of a product across Montana.

The department's survey process is designed to be minimally disruptive to pharmacy operations. The commentor's proposal to use only nationally available pricing information would not provide Montana-specific acquisition cost or availability.

COMMENT #4: It was requested that pharmacies be given the right to comment on, contest, or appeal the SMAC rates set by the department.

RESPONSE #4: Any party has the right to comment on SMAC rates set by the department. The right to a hearing is based on statute and case law. Hearing rights are described in ARM Title 37, chapter 5 and are not changed in these rules.

COMMENT #5: A commentor suggested that the department amend the definition of average manufacture price (AMP) to include language that has also been proposed in federal legislation.

RESPONSE #5: The department does not agree that the definition of AMP should be amended. Amendment was not proposed in this rule change notice. The department is not basing any pricing off of AMP. AMP is federally defined term that is currently subject to litigation and proposed amendment.

COMMENT #6: It was proposed that a contract amendment to the Medicaid provider contract with pharmacists address changes in average wholesale price (AWP.)

RESPONSE #6: The department disagrees that the provider contract should be amended regarding AWP at this time. AWP and the Medicaid provider contract are not the subject of this rulemaking.

COMMENT #7: It was proposed that the department change its reimbursement methodology to wholesale acquisition cost (WAC) multiplied by 110% plus a dispensing fee of $5.25 for branded products, and 200% of the federal upper limit plus a dispensing fee of $9.50 for generic drugs.

RESPONSE #7: The department does not agree that 110% of WAC plus a dispensing fee is the appropriate reimbursement methodology for Montana Medicaid. The reimbursement method would exceed the amount the Montana Legislature appropriated. The commentor's proposal for the department to pay 200% of the federal upper limit as reimbursement for generic drugs is prohibited by federal law 42 CFR, parts 447.331-333.

COMMENT # 8: A commentor proposed that the department pay an undetermined fee for any other professional services rendered by a pharmacy, adjusted annually for inflation.

RESPONSE #8: Professional service fees in addition to the dispensing fee are outside the scope of the rule proposed, and no funds have been allocated to allow for payment.

COMMENT #9: A commenter stated that the department could collect data on actual acquisition cost for a drug from sources other than Montana pharmacies and

that Montana pharmacies should be compensated for compiling and providing this information.

RESPONSE #9: The department disagrees with the commentor. See response #3.

COMMENT # 10: It was stated that the department was a party to the AWP settlement and is required by the terms of the settlement to offset the judicially mandated adjustment to AWP by increasing dispensing fee.

RESPONSE #10: The department disagrees. Montana Medicaid was not a party to the AWP settlement (First DataBank lawsuit settlement). The AWP settlement does not impose a legal obligation to offset the downward adjustment to AWP.

COMMENT #11: A commentor generally supports the rule changes. The federal upper limit should be eliminated. The commentor supports the new SMAC methodology but wants the dispensing fee carefully monitored to cover actual costs. The commentor supports a higher dispensing fee that should cover the actual costs associated with filing a prescription. For example, some patients require weekly packaging of some medications. This may reduce costs and is good treatment but it is an overhead cost to the pharmacy that should be reimbursed.

RESPONSE #11: The department appreciates the comment and agrees that the dispensing fee and pricing structure must be monitored to promote the equitable reimbursement of pharmacies for quality patient care and cost containment.

6. The department intends to apply these rules effective March 1, 2010.

/s/ Geralyn Driscoll
Rule Reviewer

/s/ Anna Whiting Sorrell
Anna Whiting Sorrell, Director
Public Health and Human Services

Certified to the Secretary of State February 1, 2010.

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

In the matter of the amendment of ARM 37.108.507 pertaining to components of quality assessment activities	))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On December 24, 2009, the Department of Public Health and Human Services published MAR Notice No. 37-497 pertaining to the proposed amendment of the above-stated rule at page 2455 of the 2009 Montana Administrative Register, Issue Number 24.

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

3. No comments or testimony were received.

4. The department intends to apply this rule retroactively to January 1, 2010. There is no negative impact to the affected health insurance companies by applying the rule amendment retroactively.

/s/ Lisa Swanson
Rule Reviewer

/s/ Anna Whiting Sorrell
Anna Whiting Sorrell, Director
Public Health and Human Services

Certified to the Secretary of State February 1, 2010.

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

IN THE MATTER of the Petition by NorthWestern Energy for a Declaratory Ruling Certifying Turnbull Project as a Community Renewable Energy Project	)))))	UTILITY DIVISION DOCKET NO. D2009.11.151 DECLARATORY RULING

INTRODUCTION

1. On November 27, 2009, NorthWestern Corporation d/b/a NorthWestern Energy (NWE) filed a Petition for Declaratory Ruling certifying Turnbull Project as a Community Renewable Project (Petition). On December 9, 2009, the Public Service Commission (Commission) issued a Notice of Petition and Opportunity to Comment (Notice). In the Notice, the Commission stated, "NWE's Petition requires the PSC to construe the term 'local owners.' The PSC requests comments on the Petition, particularly the meaning of [§] 69-3-2003(11), MCA (2009)."

2. Greenfield Irrigation District, Marcie Shaw, Selway Corporation, Fairfield Chamber of Commerce, Heberly and Associates, and First Interstate Bank (collectively Commenters) filed comments supporting the Petition. None of the Commenters provided any analysis of or reference to § 69-3-2003(11), MCA (2009).

3. Section 2-4-501, MCA (2009), provides, in part, "Each agency shall provide for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency." The Public Service Commission (Commission) has adopted ARM 38.2.101 which, in part, adopts ARM 1.3.226 – 1.3.229. ARM 1.3.226 – 1.3.229 govern the Commission's consideration of and action on requests for declaratory rulings.

4. A petition for declaratory ruling must include: (a) the name and address of the petitioner; (b) a detailed statement of the facts upon which the petitioner requests the agency to base its declaratory ruling; (c) sufficient facts to show that the petitioner will be affected by the requested ruling; (d) the rule or statute for which the petitioner seeks a declaratory ruling; (e) the questions presented; (f) propositions of law asserted by the petitioner; (g) the specific relief requested; and (h) the name and address of any person known by petitioners to be interested in the requested declaratory ruling. ARM 1.3.227(2).

ANALYSIS

5. The Petition clearly contains all of the required items.

6. NWE stated the question presented as follows:

Does the Turnbull Project as described [in the Petition] qualify as a 'community renewable energy project' as that term is defined by Mont. Code Ann. §69-3-2003(4) (2009)?

7. NWE presented the following facts on which it requested the Commission to base its declaratory ruling:

(a) NWE has executed a power purchase agreement with Turnbull Hydro, LLC. (Turnbull Hydro);

(b) Turnbull Hydro is a limited liability company organized under the laws of Montana and is owned by Sorenson Montana, LLC (45%), Josten Montana, LLC (22.5%), Wade Jacobsen (22.5%), and Greenfields Irrigation District (10%);

(c) Sorenson Montana, LLC is a limited liability company organized under the laws of Montana and is owned by Ted Sorenson (100%) who is an Idaho resident;

(d) Josten Montana, LLC is a limited liability company organized under the laws of Montana and is owned by Nick Josten (100%) who is an Idaho resident;

(e) Wade Jacobsen is a Montana resident;

(f) Greenfields Irrigation District is an irrigation district created under § 85-7-101, MCA (2009);

(g) Turnbull Hydro's sole purpose is the development of small hydroelectric projects in Montana;

(h) Turnbull Hydro is constructing the Turnbull Project; and

(i) The Turnbull Project will consist of two hydroelectric facilities connected to the electric grid on the NWE side of the meter, with a combined nameplate capacity of 13 megawatts (MWs), and located on an existing irrigation canal west of Fairfield, Montana.

8. The Commission restates the propositions of law asserted by NWE as follows:

(a) Turnbull Hydro is a local owner as defined in § 69-3-2003(11), MCA, because it is a Montana resident or because it is a Montana small business;

(b) A limited liability company domesticated in Montana is a Montana resident;

(c) An entity that develops projects solely in Montana is located in or principally based within Montana and, therefore, a Montana business;

(d) An entity that is engaged in the generation of electric energy for sale is a small business if its total output for the preceding year did not exceed 4 million megawatt hours;

(e) An entity that has a net worth of less than $6 million, an annual net income of less than $2 million for the preceding two years, and less than 200 employees working in Montana is a small business;

(f) The Turnbull Project qualifies as an eligible renewable resource as defined by § 69-3-2003(10), MCA (2009); and

(g) The Turnbull Project qualifies as a community renewable energy project because it is an eligible renewable resource that is interconnected on the utility side of the meter, locally owned, and has a total nameplate capacity of less than 25 MWs.

9. First, the Commission must determine if the Turnbull Project will be an eligible renewable resource. "Eligible renewable resource means . . . a facility located in Montana . . . that commences commercial operation after January 1, 2005, and that produces electricity from . . . (d) water power, in the case of a hydroelectric project that: . . . (ii) is installed at an existing reservoir or on an existing irrigation system that does not have hydroelectric generation as of April 16, 2009, and has a nameplate capacity of 15 megawatts or less." §69-3-2003(10), MCA (2009).

10. The Turnbull Project is located in Montana. It will commence commercial operation after July 1, 2005. It is being installed on an existing irrigation system. It has a nameplate capacity of less than 15 MWs.

11. NWE did not present a factual representation that the existing irrigation system did not have hydroelectric generation as of April 16, 2009.

12. The Commission concludes that the Turnbull Project will be an eligible renewable resource if it is constructed as described, and if there was no hydroelectric generation on the existing irrigation canal on April 16, 2009.

13. Second the Commission must determine if the Turnbull Project is one in which local owners have a controlling interest. "Local owners means (a) Montana residents or entities composed of Montana residents; (b) Montana small businesses; (c) Montana nonprofit organizations, (d) Montana-based tribal councils; (e) Montana political subdivisions or local governments; (f) Montana-based cooperative other than cooperative utilities; or (g) any combination of the individuals or entities listed in subsections (11)(a) through (11)(f)." § 69-3-2003(11), MCA (2009).

14. Wade Jacobsen is a Montana resident and a local owner.

15. Greenfields Irrigation District is a public corporation for the promotion of the public welfare. § 85-7-109, MCA (2009). A public corporation is a political subdivision. § 2-9-101(5), MCA (2009). Greenfields Irrigation District is a local owner.

16. NWE asserts: [S]ince Turnbull Hydro is a Montana limited liability company and its four members are all either Montana limited liability companies, individuals living and residing in Montana, or irrigation districts created pursuant to Montana law, then it logically follows that Turnbull Hydro as a corporate entity, should qualify as a "Montana resident for purposes of Mont. Code Ann. § 69-3-2003(11)(a)."

17. The Commission has not found any reported Montana case that establishes an artificial entity can be a resident of a state. Such a conclusion seems contrary to the definition contained in § 69-3-2003(11)(a), MCA (2009), which references Montana residents and entities composed of Montana residents. If an entity could be a Montana resident, there would have been no need for the Legislature to add "entities composed of Montana residents." The Commission finds that Turnbull Hydro; Sorenson Montana, LLC; and Josten Montana, LLC are not Montana residents.

18. Section 69-3-2003(11)(b), MCA (2009), references Montana small businesses. The Legislature has not defined Montana small business in any statute. However, by inclusion of the term, the Legislature must have meant something other than entities composed of Montana residents. Otherwise, there would have been no need for the Legislature to include Montana small businesses as a local owner. Although the Legislature has not provided any guidance, the Commission is persuaded that an entity organized in Montana, developing hydroelectric projects solely in Montana, and with a maximum theoretical electric output of less than 115,000 megawatt hours annually is a Montana small business. The Commission determines that Turnbull Hydro is a Montana small business and local owner.

19. Local owners have a controlling interest in the Turnbull Project.

20. Third, the Commission must determine if the Turnbull Project is interconnected on the utility side of the meter and is less than or equal to 25 MWs in total nameplate capacity. NWE has presented factual representations that the Turnbull Project will be interconnected on NWE's side of the meter and has a total nameplate capacity of 13 MWs. The Commission determines that the Turnbull Project if constructed and owned as represented by a company of the size represented will be a community renewable energy project.

21. The Commission cautions NWE that the Turnbull Project must be registered with and have renewable energy credits produced by it tracked by WREGIS for NWE to use them to meet the standards established by § 69-3-2004, MCA (2009). ARM 38.5.8301(2).

DECLARATORY RULING

On the Petition of NorthWestern Corporation d/b/a/ NorthWestern Energy for a declaratory ruling, the Commission rules that the Turnbull Project, if built and owned as described in the Petition, and if there was no hydroelectric generation as of April 16, 2009, on the canal on which the project will be built, will be a community renewable energy project as defined by § 69-3-2003(4), MCA (2009).

DATED this 21st day of January 2010 by a vote of 5 to 0

MONTANA PUBLIC SERVICE COMMISSION

s/ Greg Jergeson
GREG JERGESON
Chairman

s/ Ken Toole
KEN TOOLE
Vice-Chairman

s/ Gail Gutsche
GAIL GUTSCHE
Commissioner

s/ Brad Molnar
BRAD MOLNAR
Commissioner

s/ John Vincent
JOHN VINCENT
Commissioner

NOTICE: Petitioner has the right to appeal the decision of this agency by filing a petition for judicial review in district court within 30 days after service of this decision. Judicial review is conducted pursuant to § 16-4-411, MCA.

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 28th day of January 2010, a true and correct copy of the foregoing has been serviced by placing same in the United States Mail. Postage prepaid, addressed as follows:

Jason Williams
Northwestern Energy
40 E. Broadway
Butte, Montana 59701

/s/ Verna Stewart
PSC Commission Secretary

NOTICE OF FUNCTION OF ADMINISTRATIVE RULE REVIEW COMMITTEE

Interim Committees and the Environmental Quality Council

Administrative rule review is a function of interim committees and the Environmental Quality Council (EQC). These interim committees and the EQC have administrative rule review, program evaluation, and monitoring functions for the following executive branch agencies and the entities attached to agencies for administrative purposes.

Economic Affairs Interim Committee:

- Department of Agriculture;
- Department of Commerce;
- Department of Labor and Industry;
- Department of Livestock;
- Office of the State Auditor and Insurance Commissioner; and
- Office of Economic Development.

Education and Local Government Interim Committee:

- State Board of Education;
- Board of Public Education;
- Board of Regents of Higher Education; and
- Office of Public Instruction.

Children, Families, Health, and Human Services Interim Committee:

- Department of Public Health and Human Services.

Law and Justice Interim Committee:

- Department of Corrections; and
- Department of Justice.

Energy and Telecommunications Interim Committee:

- Department of Public Service Regulation.

Revenue and Transportation Interim Committee:

- Department of Revenue; and
- Department of Transportation.

State Administration and Veterans' Affairs Interim Committee:

- Department of Administration;
- Department of Military Affairs; and
- Office of the Secretary of State.

Environmental Quality Council:

- Department of Environmental Quality;
- Department of Fish, Wildlife, and Parks; and
- Department of Natural Resources and Conservation.

These interim committees and the EQC have the authority to make recommendations to an agency regarding the adoption, amendment, or repeal of a rule or to request that the agency prepare a statement of the estimated economic impact of a proposal. They also may poll the members of the Legislature to determine if a proposed rule is consistent with the intent of the Legislature or, during a legislative session, introduce a bill repealing a rule, or directing an agency to adopt or amend a rule, or a Joint Resolution recommending that an agency adopt, amend, or repeal a rule.

The interim committees and the EQC welcome comments and invite members of the public to appear before them or to send written statements in order to bring to their attention any difficulties with the existing or proposed rules. The mailing address is P.O. Box 201706, Helena, MT 59620-1706.

HOW TO USE THE ADMINISTRATIVE RULES OF MONTANA AND THE MONTANA ADMINISTRATIVE REGISTER

Definitions:

Administrative Rules of Montana (ARM) is a looseleaf compilation by department of all rules of state departments and attached boards presently in effect, except rules adopted up to three months previously.

Montana Administrative Register (MAR or Register) is 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

2. Go to cross reference table at end of each number and title which lists MCA section numbers and department 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 September 30, 2009. This table includes those rules adopted during the period October 1, 2009, through December 31, 2009, and any proposed rule action that was pending during the past six-month period. (A notice of adoption must be published within six months of the published notice of the proposed rule.) This table does not include the contents of this issue of the Montana Administrative Register (MAR or Register).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through September 30, 2009, 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 2009 and 2010 Montana Administrative Register.

To aid the user, the Accumulative Table includes rulemaking actions of such entities as boards and commissions listed separately under their appropriate title number.

GENERAL PROVISIONS, Title 1

1.2.104	and other rules - Administrative Rules, p. 1465, 1809
1.2.419	Scheduled Dates for the 2010 Montana Administrative Register, p. 1586, 2031

ADMINISTRATION, Department of, Title 2

2.2.101	Department of Administration's Procedural Rules, p. 1180, 1777
2.21.617	and other rules - Holidays - Holiday Pay, p. 1
2.59.302	and other rules - Schedule of Charges - Change of Location - Application Procedure for Approval to Merge Affiliated Banks - Satellite Terminals, p. 2067, 213
2.59.308	and other rule - Examination Fees - Dollar Amounts To Which Consumer Loan Rates Are To Be Applied, p. 1826, 63
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