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MONTANA ADMINISTRATIVE REGISTER

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BEFORE THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES
OF THE STATE OF MONTANA

In the matter of the amendment of Rule 16-2.18(10)-S18050, setting standards for school immunization programs.	)))	NOTICE OF PROPOSED AMENDMENT OF RULE 16-2.18(10)-S18050 School District Immunization Program NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On September 5, 1978, the Department of Health and Environmental Sciences proposes to amend rule 16-2.18(10)-S18050 which sets immunization standards for school districts requiring immunization as a condition of attendance.

2. The rule as proposed to be amended provides as follows:

~~(1)--Powers of trustees.--School district trustees may require that all children at the time they are first enrolled in school, or within a reasonable time thereafter, be successfully immunized against those communicable diseases as recommended by the Department of Health and Environmental Sciences.~~

~~(2)--Immunizing agents.--The department does not prescribe the details of the immunizing agents used, however, the department has the information and recommendations to be available to the school district trustees, upon request, to assist the school district in the implementation of its program.~~

~~(3)--Recommendations of the department.--The department adopts as a rule the following required immunizations and manner and frequency of their administration which conforms to recognized standards of medical practice when immunization is required as a prerequisite for school entrance:~~

~~(a)--Diptheria---Pertussis---Tetanus-(DPT.--Diptheria, Whooping Cough and Hockjaw).--The primary series is to be administered in the following manner:--Three doses given sequentially in the first six months and a fourth dose approximately one year later.--A booster is required upon school entry.--If primary immunization is not complete at the time of school entrance, additional doses should be administered according to the above schedule.~~

~~(b)--Poliomyelitis.--The primary series is to be administered in the following manner.--Three doses with two given in the first six months of life and a third given approximately one year later.--A booster is required upon school entry.--If primary immunization is not complete at the time of school entrance, additional doses should be administered according to the above schedule.~~

~~(c)--Rubeola-(red measles).--The immunization vaccine is to be administered after twelve months of age.~~

~~(d)--Rubella-(German measles)---The immunization vaccine is to be administered after twelve months of age.--The immuniza-~~

~~tion-vaccine-shall-not-be-routinely-administered-to-females over-the-age-of-twelve-years-but-rather-shall-be-left-to-the discretion-of-the-individual-child's-personal-physician.~~

(1) All children shall be minimally immunized against Diphtheria, Pertussis, Tetanus, Poliomyelitis, Measles (Rubeola), Rubella (German Measles), except for certified medical or religious exemptions, if the trustees of the school district have officially adopted the immunization requirement.

(2) Minimum requirements. A child shall be considered to be minimally immunized if he or she has received:

(a) 3 or more doses of Polio vaccine, with at least one (booster) dose given after the fourth birthday.

(b) 4 or more doses of DTP (or Td) (or DT) vaccine, with at least one (booster) dose given after the fourth birthday.

(c) 1 dose live attenuated Measles vaccine, at 12 months of age or older;

(d) 1 dose Rubella vaccine, at 12 months of age or older.

(3) If a child has not received the requisite number of poliomyelitis or DTP vaccine doses, the following chart indicates the number of doses to be administered at 1-2 month intervals to satisfy the requirement.

Number of doses child has received DTP or Polio	Child needs: DTP*	Poliomyelitis
0	3	3
1	3	2
2	2	1
3	1	0
4	0	0

*Td vaccine should be given if child has passed the seventh birthday.

(4) Mumps immunization is desirable, but not required.

(5) Girls 13 years of age and older should not be given Rubella vaccine, except under personal medical supervision by a health department or private physician.

(6) Children older than the seventh birthday should not be given Pertussis vaccine.

(7) The optimal immunization schedule as recommended by the American Academy of Pediatrics and by the Advisory Committee on Immunization Practices (USPHS) is as follows: The minimal criteria indicated above are consistent with these recommendations, but are simplified for use by school and public health personnel.

(see chart on next page)

RECOMMENDED IMMUNIZATION SCHEDULE FOR
NORMAL INFANTS AND CHILDREN

2 mos	DTP[1] TOPV[1]
4 mos	DTP TOPV
6 mos	DTP (Some physicians also recommend an additional dose of TOPV)
15 mos	Measles[2] Rubella[2] Mumps[2]
12-18 mos	DTP TOPV
4-6 yrs (school entry) . .	DTP Booster dose, TOPV Booster dose
14-16 yrs	Td[3] (and thereafter every 20 years)

[1]DTP - diphtheria and tetanus toxoids combined with pertussis vaccine; TOPV - trivalent oral poliovirus vaccine. Having intervals longer than those recommended between doses does not generally jeopardize final antibody levels. Therefore, it is not necessary to restart an interrupted series of vaccinations or to add extra doses. Pertussis immunization should not be repeated if any central nervous system disorder develops after a DTP injection. DT (pediatric type) should then be used instead.

[2]May be given individually or as combination vaccines (MR, MMR). Routine vaccination with measles vaccine is not recommended for children younger than 15 months. However, whenever there is a likely exposure to natural measles at an earlier age, children as young as 6 months should be vaccinated. In such cases, it should be recognized that since the rate of seroconversion declines with diminishing age, revaccination at about 15 months is necessary to assure full and continued protection. A history of rubella illness (unless serologically diagnosed) is usually not reliable, thus all children should receive vaccination for rubella.

[3]Td - tetanus and diphtheria toxoids (adult type). A booster dose of Td toxoid is recommended every 10 years after completion of the primary DTP series. More frequent booster doses are not indicated and may be associated with increased incidence and severity of reactions. A tetanus booster dose should be given at time of injury if more than five years have elapsed since the last dose.

NOTE: These recommendations represent an optimal schedule to provide the maximum possible protection to any normal infant. Lack of conformity with the recommended age intervals will not necessarily result in inadequate protection or unsatisfactory immunologic response.

(8) Certification of record — exemptions. The immunization record must be certified by a physician or health department

Certification of a medical exemption must be signed by a physician licensed to practice in Montana. Certification of a religious exemption must be signed by a parent or guardian. The forms used for certification of exemptions must either be approved or provided by the state or local health department.

3. The purpose of the above amendment is to update and make more specific immunization requirements in accord with current medical practice.

4. Interested parties may submit their data, views or arguments concerning the proposed amendment orally or in writing to Dr. Martin Skinner, Preventive Health Services Bureau, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana, 59601 (phone: 449-2645) no later than September 1, 1978.

5. If a person who is directly affected by the proposed amendment wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to Dr. Martin Skinner, Preventive Health Services Bureau, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana, 59601, no later than August 14, 1978.

6. If the department receives requests for a public hearing on the proposed amendment from more than 10% or 25 or more persons who are directly affected by the proposed amendment, or from the Administrative Code Committee of the legislature, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be substantially larger than 25, rendering 25 persons the minimum number necessary to request a hearing.

7. The authority of the department to make the proposed amendment is based on Section 75-5933, R.C.M. 1947.

for R. A. Hanna

A. C. KNIGHT, M.D., F.C.C.P., Director

Certified to the Secretary of State July 18, 1978

BEFORE THE BOARD OF HEALTH AND ENVIRONMENTAL SCIENCES
OF THE STATE OF MONTANA

In the matter of the adoption of a rule setting standards for haulers of water for human consumption	))))	NOTICE OF PROPOSED ADOPTION OF A RULE Water Haulers for Cisterns NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On September 8, 1978, the Board of Health and Environmental Sciences proposes to adopt a rule setting sanitation standards for haulers of water for human consumption.

2. The proposed rule provides as follows:

Water Hauler for Cisterns

(1) Purpose. The purpose of this rule is to assure the safety and purity of water hauled from a public water supply source to fill cisterns or other reservoirs to provide water for human consumption.

(2) Definitions.

(a) Water Hauler is a person engaged in the business of transporting water to be used for human consumption from a water source to a cistern or other reservoir by ten or more families or 25 or more persons for at least sixty days of the calendar year.

(b) Department means the Department of Health and Environmental Sciences.

(3) Equipment, Specifications and Operation.

(a) Equipment used for the conveying and hauling of water must have water contact surfaces that are made of non-corrodable and non-toxic materials. All interior coatings, platings, or paints shall be free of toxic materials.

(b) Water-contact surfaces must be smooth for easy cleaning and sanitizing.

(c) Inlets, outlets, piping, hose, and tank openings must be constructed to prevent entrance of foreign materials that may contaminate the water.

(d) The tanks or containers shall be free of deep pits, excessive scale, dents, or crimps which may tend to hold contaminating matter.

(e) All water contact surfaces including tanks must never have been used to transport or handle toxic or noxious substances.

(f) All inlet openings must be kept closed except when filling or cleaning.

(g) Flexible delivery piping, connectors, and ends are to be protected at all times. During delivery, cistern or reservoir must be protected from contamination.

(h) Tanks used for hauling water for human consumption shall not be used for any other purpose.

(i) Each piece of equipment used to haul water may be inspected periodically by representatives of the department.

(4) Sanitizing equipment.

(a) Hauling equipment must be cleaned and sanitized:

(i) Before being used the first time and after a period of non-use.

(ii) After any portion of equipment has been dismantled or repaired.

(iii) After known errors in sanitary procedures by the operators have occurred.

(iv) At least weekly.

(b) Equipment shall be cleaned by scrubbing with normal cleaning aids, being careful to flush away all foreign materials.

(c) The equipment shall be sanitized by exposing it to:

(i) Steam at 170° F. for 15 minutes, or

(ii) Steam at 200° F. for 5 minutes, or

(iii) Chlorine, Iodine, or other approved sanitizers at recommended strength and contact time. Application of chemical sanitizers can be done by fogging, spraying, jet-blowing, or any other procedure approved by the department.

(5) Supply. Water to be hauled must be taken from a supply approved by the department. Periodical bacteriological samples will be collected from the water hauling equipment by the department or its authorized representatives.

(6) Filling Points. Filling points must be constructed in order to protect against contamination of the filling pipe or hose when not in use. They must also be protected during the tank filling operation to prevent contamination of either the water being piped into the tank or water in the public water supply system.

There must be no direct connection between the hose or pipe on the public water supply and the hauling tank itself. An airgap must be provided or an adequate back flow prevention device must be installed on the filler pipe.

(7) Chemical Treatment of Water. Each load of water shall be dosed with enough chlorine to provide a free chlorine residual of 0.4 parts per million. The water hauler shall have DPD test kits to check the chlorine residual. Sufficient chlorine must be added when delivering water into the cistern to have a chlorine residual of 0.4 parts per million detected when the cistern is filled.

3. The rule is proposed to provide sanitary standards ensuring the purity and safety of water provided for human consumption by water haulers.

4. Interested parties may submit their data, views or arguments concerning the proposed rule orally or in writing to Art Clarkson, Water Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana 59601 (phone: 449-2406) no later than September 7, 1978.

5. If a person who is directly affected by the proposed rule wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to Art Clarkson, at the address above, no later than August 15, 1978.

6. If the agency receives requests for a public hearing on the proposed rule from more than 10% or 25 or more persons who are directly affected by the proposed rule, or from the Administrative Code Committee of the legislature, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be tenpersons based on a rough estimate of approximately 100 water haulers in the state.

7. The authority of the agency to adopt the proposed rule is based on Section 69-4903, R.C.M. 1947.

JOHN W. BARTLETT, Chairman

Certified to the Secretary of State July 18, 1978

BEFORE THE DEPARTMENT OF HIGHWAYS
OF THE STATE OF MONTANA

In the matter of the repeal of Rule 18-2.10(2)-S1010, Gas Tax Regulations, and the repeal of Rule 18-3.14(1)-01400, Board of Highway Appeals Organizational Rule.	NOTICE OF PROPOSED REPEAL OF RULE 18-2.10(2)-S1010, Gas Tax Regulations, and RULE 18-3.14(1)-01400, Board of Highway Appeals Organizational Rule.

NO PUBLIC HEARING CONTEMPLATED.

To: All Interested Persons:

1. On August 28, 1978, the Department of Highways will repeal Rule 18-2.10(2)-S1010, Gas Tax Regulations.

2. The rule to be repealed is on pages 18-111 and 18-112 of the Administrative Rules of Montana and comprises the entire Sub-Chapter 2 entitled "Importer's Gasoline Tax" of Chapter 10, "Gross Vehicle Weight Division".

3. The Department is repealing this rule because Sections 84-6301 through 84-6308, R.C.M. 1947, "Importers Tax on Gasoline Purchased outside State and Used in State" were repealed by the Legislature in Section 1, Chapter 375, of the Laws of 1977 and this gasoline tax was thereby abolished.

4. Also, on August 28, 1978, the Department of Highways will repeal Rule 18-3.14(1)-01400, Board of Highway Appeals Organizational rule.

5. This rule being repealed is on page 18-209 of the Administrative Rules of Montana and comprises the entire Sub-Title 3, Chapter 14, entitled "Board of Highway Appeals", of Title 18, Highways.

6. The Department is repealing this rule because the Board of Highway Appeals was abolished by the Legislature by Section 3, Chapter 28, of the Laws of 1974.

Ronald P. Richards
Director of Highways

Certified to the Secretary of State, July 18, 1978.

BEFORE THE DEPARTMENT OF INSTITUTIONS
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 20-2.2(1)-P200 relating to model rules of administrative procedure	))))	NOTICE OF PROPOSED AMENDMENT OF ARM 20-2.2(1)-P200 NO PUBLIC HEARING CONTEMPLATED

TO: ALL INTERESTED PERSONS

1. On August 30, 1978, the Department of Institutions proposes to amend rule no. 20-2.2(1)-P200.

2. The rule as proposed to be amended would provide as follows (Material to be deleted is interlined, material to be added is underlined):

20-2.2(1)-P200 MODEL PROCEDURAL RULES (1) The Department of Institutions has herein adopted and incorporated the Attorney General's model procedural rules ~~MAC-1-1.6(2)-P650 through MAC-1-1.6(2)-P6060 and MAC-1-1.6(2)-P6220 through MAC 1-1.6(2)-P6280~~ as published in ARM Title 1, chapter 6. As the Department of Institutions is exempt from the Montana Administrative Procedures Act in the areas of the supervision and administration of any penal ~~mental, medical or eleemosynary~~ institution with regard to the ~~admission, release~~ institutional supervision, custody, control, care and treatment of ~~inmates~~ youths or prisoners ~~or patients~~, none of the above cited model rules shall apply to the above listed institutional functions. Modications to the model rules for contested cases are set forth in sub-chapter 2 of this chapter.

3. The reasons for taking this action are to restate the rule's description of departmental functions excluded from MAPA in terms of the 1977 MAPA amendment which narrowed those exclusions, and to re-incorporate the Attorney General's model rules which were revised and renumbered last December.

4. Interested parties may submit data, views or arguments concerning the proposed amendment in writing to Nick Rotering, Legal Counsel, Department of Institutions, 1539 Eleventh Avenue, Helena, Montana 59601 not later than August 28, 1978.

5. The authority of the department to make the proposed amendment is based on 82-4203, R.C.M. 1947.

Director of Institutions

Certified to the Secretary of State July __, 1978.

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
DIVISION OF WORKERS' COMPENSATION

In the Matter of the Amendment of Fired Pressure Vessels Rules and Regulations.	NOTICE OF PROPOSED AMENDMENT OF RULE 24-3.18AI(1)-S1800 RELATING TO FIRED PRESSURE VESSELS NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On August 28, 1978, the Division of Workers' Compensation proposes to amend rule 24-3.18AI(1)-S1800 in its entirety relating to fired pressure vessels.

2. The rule changes would replace the current rules concerning fired pressure vessels that have been adopted under rule ARM 24-3.18AI(1)-S1800.

3. The Division proposes to replace the current rules concerning fired pressure vessels in order to update the rules on this subject. The rules relate to matters concerning the inspection, repairing, safety valve control, and other matters related to the safe operation of fired pressure vessels. A copy of the proposed rules may be obtained from the Division of Workers' Compensation by contacting Mrs. Norma Brodersen, Division of Workers' Compensation, 815 Front Street, Helena, Montana 59601.

4. Interested parties may submit their data, views or arguments concerning the proposed amendment in writing to the Division of Workers' Compensation, 815 Front Street, Helena, Montana 59601, no later than August 23, 1978.

5. The authority of the Division to adopt the proposed amendment is based on Sections 69-1501 and 41-1727, Revised Codes of Montana, 1947.

6. If a person who is directly affected by the proposed amendment wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to the Division of Workers' Compensation, 815 Front Street, Helena, Montana 59601, no later than August 18, 1978.

7. If the Division receives requests for a public hearing on the proposed amendment from 25 or more persons who are directly affected by the proposed amendment, or from the Administrative Code Committee of the Legislature, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register.

8. Rationale: The reason the Division is proposing to completely redo the rules concerning fired pressure vessels is that changes in technology have taken place which should be addressed through new rules, and it is believed a more modern and clearly understood set of rules is required for the safe operation of fired pressure vessels in this state.

Dated this 14th day of July, 1978

DIVISION OF WORKERS' COMPENSATION

By Norman H. Grosfield
Norman H. Grosfield, Administrator

Certified to the Secretary of State July 14, 1978.

BEFORE THE DEPARTMENT OF SOCIAL
AND REHABILITATION SERVICES OF THE
STATE OF MONTANA

In the matter of the adoption of a rule pertaining to AFDC assistance standards and the repeal of ARM Rule 46-2.10(14)-S11120	)))))))	NOTICE OF PROPOSED ADOPTION OF A RULE PERTAINING TO AFDC ASSISTANCE STANDARDS AND THE REPEAL OF ARM RULE 46-2.10(14)-S11120 NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On August 28, 1978, the State Department of Social and Rehabilitation Services proposes to adopt a rule pertaining to AFDC assistance standards and repeal ARM Rule 46-2.10(14)-S11120.

2. The rules proposed to be repealed can be found on pages 46-66 through 46-69.1 of the Administrative Rules of Montana.

3. The proposed rule provides as follows:

RULE I TABLE OF ASSISTANCE STANDARDS (1) The table of assistance standards contains the requirements of individuals or families according to the number of persons and the type of living arrangements.

(a) Basic Requirements:

BUDGET TO BE USED WHEN NO *RENT IS PAID

No. of Children	Family with one adult per month	Family with one adult per day	Family with two adults per month	Family with two adults per day
0	$104.00	$ 3.47	$166.00	$ 5.53
1	125.00	4.17	194.00	6.47
2	191.00	6.37	248.00	8.27
3	248.00	8.27	286.00	9.53
4	280.00	9.33	305.00	10.17
5	291.00	9.70	339.00	11.30
6	320.00	10.67	373.00	12.43
7	348.00	11.60	407.00	13.57
8	377.00	12.57	440.00	14.67
9	405.00	13.50	474.00	15.80
10	434.00	14.47	508.00	16.93
11	462.00	15.40	542.00	18.07
12	491.00	16.37	575.00	19.17
13	519.00	17.30	609.00	20.30
14	548.00	18.27	643.00	21.43
15	576.00	19.20	677.00	22.57
16	605.00	20.17	710.00	23.67

BUDGET TO BE USED WHEN *RENT IS PAID

No. of Children	Family with one adult per month	Family with one adult per day	Family with two adults per month	Family with two adults per day
0	$139.00	$ 4.63	$215.00	$ 7.17
1	167.00	5.57	259.00	8.63
2	255.00	8.50	331.00	11.03
3	331.00	11.03	381.00	12.70
4	373.00	12.43	407.00	13.57
5	388.00	12.93	452.00	15.07
6	426.00	14.20	497.00	16.57
7	464.00	15.47	542.00	18.07
8	502.00	16.73	587.00	19.57
9	540.00	18.00	632.00	21.07
10	578.00	19.27	677.00	22.57
11	616.00	20.53	722.00	24.07
12	654.00	21.80	767.00	25.57
13	692.00	23.07	812.00	27.07
14	730.00	24.33	857.00	28.57
15	768.00	25.60	902.00	30.07
16	806.00	26.87	947.00	31.57

*Rent cost includes house payments, rent, mortgage payments, home repairs, taxes, home insurance, and other costs related to maintaining a home.

The Per Day Column is to be used to compute General Assistance for the particular size family. Example A family of four (two children and two adults) paying rent-15-day GA - 13.57 x 15 = $203.55 or ($204.00). The total is rounded off to the nearest dollar.

SPECIAL ALLOWANCE

Children in Boarding School----------$16.00
Children in Boarding School
Home on Weekends----------$31.00

In Boarding School situations where children are in the boarding school on a full time or part time basis, the children are to be budgeted according to the special allowance table. In situations where all the children are in boarding school, the needy caretaker relative is to be budgeted on the basis of a single person paying rent.

(b) Basic Requirements:

BUDGET TO BE USED CHILDREN ONLY

No. of Children	Monthly Rate	Daily Rate
1	$ 42.00	$ 1.40
2	116.00	3.87
3	192.00	6.40
4	234.00	7.80
5	249.00	8.30
6	287.00	9.57
7	325.00	10.83
8	363.00	12.10
9	401.00	13.37
10	439.00	14.63
11	477.00	15.90
12	515.00	17.17

Each Additional Child add $38.00 per month

BUDGET TO BE USED CHILDREN ONLY
WHEN NO SHELTER IS ALLOWED

No. of Children	Monthly Rate	Daily Rate
1	$ 32.00	$ 1.07
2	87.00	2.90
3	144.00	4.80
4	176.00	5.87
5	187.00	6.23
6	215.00	7.17
7	244.00	8.13
8	272.00	9.07
9	301.00	10.03
10	329.00	10.97
11	358.00	11.93
12	386.00	12.87

Each Additional Child add $28.00 per month

4. This rule replaces and simplifies an earlier rule by consolidating the former winter and summer budgets into a single budget. The rule also conforms the assistance level with federal requirements, in particular to reflect the benefit levels already approved and currently being paid for fiscal year 1979.

5. Interested parties may submit their data, views, arguments, or requests for an oral hearing concerning the proposed adoption and repeal in writing to the Office of Legal

Affairs, P. O. Box 4210, Helena, MT 59601, no later than August 28, 1978. A Public Hearing will be scheduled if requested by 10% or 25 of the persons directly affected by the rules.

6. The authority of the department to make the proposed rule is based on section 71-503, R.C.M. 1947.

Director, Social and Rehabilitation Services

Certified to the Secretary of State July 18, 1978

BEFORE THE DEPARTMENT OF SOCIAL
AND REHABILITATION SERVICES OF THE
STATE OF MONTANA

In the matter of the adoption of Rule ARM 46-2.10(14)-S11091 pertaining to AFDC assistance after return of absent parent and the repeal of Rule ARM 46-2.10(14)-S11090 pertaining to AFDC assistance during adjustment period.	NOTICE OF PROPOSED ADOPTION OF RULE 46-2.10(14)-S11091 pertaining to AFDC assistance after return of absent parent and the REPEAL OF RULE 46-2.10(14)-S11090. NO PUBLIC HEARING CONTEMPLATED.

TO: All Interested Persons:

1. On August 28, 1978, the Department of Social and Rehabilitation Services proposes to adopt Rule ARM 46-2.10(14)-S11091 which pertains to AFDC assistance after return of absent parent and repeal Rule ARM 46-2.10(14)-S11090 which pertains to AFDC assistance during adjustment period.

2. The rule proposed to be adopted provides as follows:
46-2.10(14)-S11091 AFDC: ASSISTANCE AFTER RETURN OF ABSENT PARENT Aid to Families with Dependent Children assistance payments may continue for 90 days after the date of return of an absent parent if the family is otherwise eligible for such payments during that time.

3. The rule proposed to be repealed is on page 65.1 and 66 of the Administrative Rules of Montana.

4. This rule is intended to encourage family reconciliation by allowing AFDC assistance payments to continue for 90 days after an absent parent returns to the family, to give the family time to develop a means of self-support. This rule will replace an earlier rule which specified the circumstances of return of the parent which would qualify the family for such continued assistance, and which allowed up to 180 days of assistance. The rule changes are intended to conform the Montana rule to federal requirements.

5. Interested persons may present their data, views, or arguments, either orally or in writing, at the hearing.

6. The Office of Legal Affairs has been designated to preside over and conduct the hearing.

7. The authority of the agency to make the proposed rule is based on section 71-503, R.C.M. 1947.

Director, Social and Rehabilitation Services

Certified to the Secretary of State July 18, 1978.

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

In the matter of the adoption of a rule establishing training requirements for school bus drivers	NOTICE OF PUBLIC HEARING FOR ADOPTION OF A RULE establishing training requirements for school bus drivers

1. On September 6, 1978, at 10:00 a.m., a public hearing will be held in the Regents' Conference Room at 33 South Last Chance Gulch, Helena, Montana, to consider the adoption of a rule establishing training requirements for school bus drivers.

2. The proposed rule does not replace or modify any section currently found in the Montana Administrative Code.

3. The proposed rule provides as follows:

(1) The Board of Public Education in accordance to Sections 75-5604(4), 75-7003(6) and 75-7004(3), R.C.M. 1947, hereby establishes the policy that school bus drivers (to meet certification requirements) shall participate in 30 hours of inservice training. Such training shall include eight hours of first-aid training which will also qualify a driver for a first-aid certificate. All drivers currently certified shall complete this inservice training requirement by September 1, 1980. Any new driver employed after September 1, 1979, shall have one calendar year to meet this requirement.

(2) Each school district shall have on file a plan describing the type of program the district will provide employed bus drivers. The name of the coordinator responsible for such training shall be included in this file. Local district officials shall be responsible for notifying the Superintendent of Public Instruction the names of the drivers who complete this training and the date of completion.

(3) Bus drivers who complete this training will be certified for three years. Certification may be renewed if a driver completes 18 additional inservice training hours. A new certificate will be issued when the local district official attests that a driver has met the recertification requirement.

(4) The Superintendent of Public Instruction shall be responsible for approving and monitoring programs according to established criteria for instruction as provided in Section 75-7005, R.C.M. 1947.

4. The Board is proposing this rule to help Montana meet federal guidelines established by the National Highway Traffic Safety Administration, U.S. Department of Transportation guidelines, and to promote safer school bus transportation for the children of Montana.

5. Interested persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views or arguments may be submitted to Earl J. Barlow, Chairman of the Board of Public Education, 33 South Last Chance Gulch, Helena, Montana, 59601, at any time prior to September 15, 1978. Written data, views, or arguments received by the Board after September 15, 1978, or post mark dated after September 15, 1978, may not be considered in the adoption of the rule.

6. Mr. Rick Reese, Assistant to the Board of Public Education, has been designated to preside over and conduct the hearing.

7. The authority of the agency to make the proposed rule is based on sections 75-5607(4), 75-7003(6) and 75-7004(3), R.C.M. 1947.

Earl D. Barlow

CHAIRMAN
BOARD OF PUBLIC EDUCATION

Certified to the Secretary of State July 18, 1978.

In the matter of the amendment of Rule 48-2.10(1)-S1010 regarding Class 2 standard teaching certificates	)))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT OF RULE 48-2.10(1)-S1010 regarding secondary endorsement of teaching certificates.

1. On September 6, 1978, at 1:00 p.m., a public hearing will be held in the Regents' Conference Room at 33 South Last Chance Gulch, Helena, Montana, to consider the amendment of rule 48-2.10(1)-S1010.

2. The proposed amendment will make it possible by 1983 for teachers with a secondary certificate to teach in grades 5 through 12 rather than 7 through 12 if they are endorsed in the subject matter area.

3. The rule as proposed to be amended provides as follows:

(1) Remains the same.
(2) Remains the same.
(3) Remains the same.
(4) Remains the same.
(5) Remains the same.
(6) Remains the same.
(7) Remains the same.
(8) Remains the same.
(9) Remains the same.
(10) Secondary Endorsement ~~"Secondary endorsement" of the Class 1, Class 2 or Class 5 certificate means the holder is authorized to teach in grades seven through twelve or in post-secondary vocational-technical programs if so specified. "Secondary endorsement" is accompanied by specification of the appropriate area(s) in which the holder is authorized to teach.~~ Issuance of the Class 2 certificate at secondary level requires a teaching major of at least 45 quarter (30 semester) credits and a teaching minor of at least 30 quarter (20 semester) credits; or at least 60 quarter (40 semester) credits in a single field of specialization, provided these fields are sub-

jects commonly offered for credit in the high school curriculum and provided that the pattern of preparation constitutes the approved secondary teacher education program of an accredited college or university. At least 24 quarter (16 semester) credits of professional preparation for teaching, to include student teaching, are also required. Within the total preparation, emphasis must be placed on Student Growth and Development, Behavior, Reading and Writing Skills. The student teaching experience, if taken at grade levels 7-12, must also have an observation period at grade 5 or 6. If the student teaching experience is at grades 5 or 6, an observation period must be taken at grade 7-12.

Secondary endorsement of the Class 1, 2 or 5 certificate means the holder is authorized to teach in grades seven through twelve until 1983. After that time, secondary programs will cover 5-12. Secondary endorsement is accompanied by endorsement as to the appropriate area(s) in which the holder is authorized to teach.

4. The Board is proposing this amendment so that small schools will have more flexibility in assigning teachers in that they will be able to assign both elementary and secondary endorsed teachers at the fifth and sixth grade levels.

5. Interested persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may be submitted to Earl J. Barlow, Chairman of the Board of Public Education, 33 South Last Chance Gulch, Helena, Montana, 59601, at any time prior to September 15, 1978. Written data, views, or arguments received by the Board after September 15, 1978, or post mark dated after September 15, 1978, may not be considered in the adoption of the rule.

6. Mr. Rick Reese, Assistant to the Board of Public Education, has been designated to preside over and conduct the hearing.

7. The authority of the agency to amend the rule is based on sections 75-6002, 75-6006, R.C.M. 1947.

Earl J. Barlow

CHAIRMAN
BOARD OF PUBLIC EDUCATION

Certified to the Secretary of State July 18, 1978.

In the matter of the amendment of Rule 48-2.10(1)-S1070 regarding substitute teaching	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT OF RULE 48-2.10 (1)-S1070 regarding substitute teaching.

1. On September 6, 1978, at 1:00 p.m., a public hearing will be held in the Regents' Conference Room at 33 South Last Chance Gulch, Helena, Montana, to consider the amendment of Rule 48-2.10(1)-S1070.

2. The proposed amendment will clarify the Board's rule on substitute teaching.

3. The rule as proposed to be amended provides as follows:

(1) Remains the same.

(2) ~~If the absence of the regular teacher continues for more than (30) teaching days, the substitute shall be placed under contract (if certifiable) or replaced with a certified teacher under contract.~~ If the absence of the regular teacher continues for more than (30) teaching days, the substitute may be placed under contract if certifiable; or the board of trustees shall replace the substitute with a certified teacher under contract.

~~(3) A school district shall not replace one substitute with another.~~

4. The Board is proposing this amendment to clarify the use of substitute teachers by local school boards.

5. Interested persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may be submitted to Earl J. Barlow, Chairman of the Board of Public Education, 33 South Last Chance Gulch, Helena, Montana, 59601, at any time prior to September 15, 1978. Written data, views, or arguments received by the Board after September 15, 1978, or post mark dated after September 15, 1978, may not be considered in the adoption of the rule.

6. Mr. Rick Reese, Assistant to the Board of Public Education, has been designated to preside over and conduct the hearing.

7. The authority of the agency to amend the rule is based on section 75-6002, R.C.M. 1947.

Earl J. Barlow

CHAIRMAN
BOARD OF PUBLIC EDUCATION

Certified to the Secretary of State July 18, 1978.

In the matter of the amendment of Rule 48-2.6(2)-S680 regarding the philosophy of boards of trustees	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT OF RULE 48-2.6 (2)-S680 regarding the philosophy of boards of trustees.

1. On September 6, 1978, at 1:00 p.m., a public hearing will be held in the Regents' Conference Room at 33 South Last Chance Gulch, Helena, Montana, to consider the amendment of Rule 48-2.6(2)-S680.

2. The proposed amendment will require that each school district formulate a statement of specific subject areas as objectives to meet the educational needs of students in accordance with the district's philosophy of education.

3. The rule as proposed to be amended provides as follows:

(1) Remains the same.

(2) Philosophy and Objectives

(a) Remains the same.

(b) ~~Each school district shall also formulate a statement of specific objectives which describes how its schools will meet educational needs in accordance with the district's particular philosophy. The school district shall publicize the availability of the statement of objectives so that persons so wishing may secure a copy.~~ Each school district shall also formulate a statement of specific subject area objectives which indicates how its schools through the subject areas will meet the educational needs of students in accordance with the district's particular philosophy. The school district shall publicize the availability of the statement of objectives so that persons so wishing may secure a copy.

(c&d) Remain the same.

(3-7) Remain the same.

4. The Board is proposing this amendment so that Montana schools can address the competency issue through accreditation standards at the local school district level.

5. Interested persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may be submitted to Earl J. Barlow, Chairman of the Board of Public Education, 33 South Last Chance Gulch, Helena, Montana, 59601, at any time prior to September 15, 1978. Written data, views, or arguments received by the Board after September 15, 1978, or post mark dated after September 15, 1978, may not be considered in the adoption of the rule.

6. Mr. Rick Reese, Assistant to the Board of Public Education, has been designated to preside over and conduct the hearing.

7. The authority of the agency to amend the rule is based on sections 75-7501, 75-7402, and 75-7404, R.C.M. 1947.

Earl J. Barlow

CHAIRMAN
BOARD OF PUBLIC EDUCATION

Certified to the Secretary of State July 18, 1978.

In the matter of the amendment of Rule 48-2.6(2)-S6000 regarding administrative assistants	)))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT OF RULE 48-2.6(2)-S6000 regarding administrative assistants.

1. On September 6, 1978, at 1:00 p.m., a public hearing will be held in the Regent's Conference Room at 33 South Last Chance Gulch, Helena, Montana, to consider the amendment of Rule 48-2.6(2)-S6000.

2. The proposed amendment will allow an administrative assistant to relieve district superintendents of minor administrative duties, freeing the superintendents for more supervisory time; it will also allow persons working toward administrative certificates to gain on-the-job training.

3. The rule as proposed to be amended provides as follows:

(1) Remains the same.

(2) (a-c) Remain the same.

(d) ~~In any school district where the combined elementary and secondary enrollment exceeds 150 but is less than 300, the superintendent may serve as half-time elementary or high school principal. The district must employ a half-time elementary or high school principal for the other unit in the district. The superintendent shall devote half-time as principal of the assigned school.~~ In any school district where the combined elementary and secondary enrollment exceeds 150 but is less than 300, and where the superintendent serves as both elementary and secondary principal, the district must employ a half-time administrative assistant.

The administrative assistant shall be defined as a person who holds a Bachelors degree and presents evidence of working toward the Administrators Certificate on a planned program to be completed within 5 years of first assignment. The administrative assistant shall not supervise or evaluate staff or curriculum.

(e-k) Remain the same.

4. The Board is proposing this amendment because there is evidence that in schools of this size, many administrative duties can be accomplished by an administrative assistant.

5. Interested persons may present their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may be submitted to Earl J. Barlow, Chairman of the Board of Public Education, 33 South Last Chance Gulch, Helena, Montana 59601, at any time prior to September 15, 1978. Written data, views or arguments received by the Board after September 15, 1978, or post mark dated after September 15, 1978, may not be considered in the adoption of the rule.

6. Mr. Rick Reese, Assistant to the Board of Public Education, has been designated to preside over and conduct the hearing.

7. The authority of the agency to amend the rule is based on sections 75-7501, 75-6114, R.C.M. 1947.

Earl J. Barlow

CHAIRMAN
BOARD OF PUBLIC EDUCATION

Certified to the Secretary of State July 18, 1978.

In the matter of the amendment of Rule 48-2.6(2)-S6030 regarding student records	)))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT OF RULE 48-2.6(2)-S6030 regarding student records.

1. On September 6, 1978, at 1:00 p.m., a public hearing will be held in the Regents' Conference Room at 33 South Last Chance Gulch, Helena, Montana, to consider the amendment of Rule 48-2.6(2)-S6030.

2. The proposed amendment will allow early diagnosis and prescription in order to provide programs and instruction that will accomodate mastery level competency.

3. The rule as proposed to be amended provides as follows:

(1) ~~Each school shall keep a permanent file of student records which shall include the name and address of the student, parent or guardian, birth date, academic work completed, level of achievement (grades, standardized achievement tests) and attendance data of the student.~~ Each school shall keep a permanent file of student records which shall include the name and address of the student, parent or guardian, birth date, academic work completed, level of achievement (grades, achievement of subject area objectives, standardized and/or criterion referenced achievement tests) and attendance data of the students. Student records shall be kept in a fireproof file or vault in the school building or, for rural schools, in the county superintendent's office. All new or remodeled buildings shall be equipped with at least a Class "C" fireproof vault. Each school district shall establish policies and procedures for the use of information stored in the permanent file which is in compliance with state and federal laws that assure an individual's privacy is respected.

(2) Remains the same.

4. The Board is proposing this amendment so that Montana schools can address the competency issue through accreditation standards at the local school district level.

5. Interested persons may present their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may be submitted to Earl J. Barlow, Chairman of the Board of Public Education, 33 South Last Chance Gulch, Helena, Montana 59601, at any time prior to September 15, 1978. Written data, views or arguments received by the Board after September 15, 1978, or post mark dated after September 15, 1978, may not be considered in the adoption of the rule.

6. Mr. Rick Reese, Assistant to the Board of Public Education, has been designated to preside over and conduct the hearing.

7. The authority of the agency to amend the rule is based on section 75-7501, R.C.M. 1947.

Earl J. Barlow

CHAIRMAN
BOARD OF PUBLIC EDUCATION

Certified to the Secretary of State July 18, 1978.

In the matter of the amendment of Rule 48-2.6(6)-S6090 regarding teaching assignments	))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT OF RULE 48-2.6(6)-S609 regarding teaching assignments.

1. On September 6, 1978, at 1:00 p.m., a public hearing will be held in the Regents' Conference Room at 33 South Last Chance Gulch, Helena, Montana, to consider the amendment of rule 48-2.6(6)-S6090.

2. The proposed amendment to 48-2.6(6)-S6090(1) attaches to the rule an exception which will be in effect for five years. The proposed amendment to 48-2.6(6)-S6090(3) adds a provision whereby school districts not meeting this portion of the rule must submit a written report to the Superintendent of Public Instruction delineating plans for compliance.

3. The rule as proposed to be amended provides as follows:

(1) Teachers shall be assigned at the levels and in the subjects for which their certificates are endorsed. Exception: A teacher assigned in grades seven or eight who holds a secondary certificate may teach in subject areas for which they hold

no endorsement if they have 15 quarter hour credits (10 semester hours) of preparation in the assigned subject area. The 15 credits shall include a methods course in the teaching of that subject area appropriate to the grade levels. The exception shall expire July 1, 1983. See "Questions & Answers on Certification of Montana Teachers and School Administrators", Office of the Superintendent of Public Instruction, Seventh Edition, October 1975.

(2) Remains the same.

(3) Teachers in state-approved junior high schools shall hold valid Montana teaching certificates endorsed for appropriate levels and subjects. Certification at the elementary level based on a bachelor's degree entitles the holder to teach in grades kindergarten through nine. Teachers with such certification shall have a minimum of 30 quarter (20 semseter) credits in all subjects which they teach at the ninth grade level. The proportion of teachers certified at the elementary or secondary levels shall not be less than one-fourth at either level. (NOTE: The last provision concerning proportion of teachers is to be fully implemented by the 1980-81 school year.) Schools not meeting this provision must submit a written report to the Superintendent of Public Instruction delineating plans for compliance.

(4-6) Remain the same.

4. The Board is proposing the amendment to 48.2-6(6)-S6090(1) because it recognizes that in order to comply with the present standard, new teachers with different qualifications would have to be hired in some cases; that in order to avoid the necessity of terminating currently employed teachers, the Board would grant a five-year period during which positions created by attrition could be filled with new teachers with the requisite clarifications. The Board is proposing the amendment to 48-2.6(6)-S6090(3) to allow schools additional time to meet the provisions of the rule with the stipulation that they have a plan for complying as soon as possible.

5. Interested persons may present their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may be submitted to Earl J. Barlow, Chairman of the Board of Public Education, 33 South Last Chance Gulch, Helena, Montana 59601, at any time prior to September 15, 1978. Written data, views or arguments received after September 15, 1978, may not be considered in the adoption of the rule.

6. Mr. Rick Reese, Assistant to the Board of Public Education, has been designated to preside over and conduct the hearing.

7. The authority of the agency to amend the rule is based on sections 75-4701, 75-6001, R.C.M. 1947.

Earl J. Barlow

CHAIRMAN
BOARD OF PUBLIC EDUCATION

Certified to the Secretary of State July 18, 1978.

In the matter of the amendment of rule 48-2.6(10)-S6120 regarding high school and junior high school curriculum	NOTICE OF PUBLIC HEARING FOR AMENDMENT OF RULE 48-2.6(10)-S6120 regarding high school and junior high school curriculum.

1. On September 6, 1978, at 1:00 p.m., a public hearing will be held in the Regents' Conference Room at 33 South Last Chance Gulch, Helena, Montana, to consider the amendment of rule 48-2.6(10)-S6120.

2. The proposed amendment will allow early diagnosis and prescription in order to provide programs and instruction that will accomodate mastery level competency.

3. The rule as proposed to be amended provides as follows:

(1) Remains the same.

(2) (a-c) Remain the same.

(d)(i-vii) Remain the same.

(viii) Each course in the curriculum has specified mastery level competencies (student performance) that reflect local goals for education (expectations). Implementation: administrators, teachers and school boards in cooperation with parents (advisory committee) shall establish mastery level competencies for each course in the curriculum and shall certify the attainment of those competencies for each student. (NOTE: Progress toward implementation shall be reported each year, beginning with the 1979 Fall Report. The provisions of this section are to be fully implemented by the 1983-84 school year.)

(2) (e-h) Remain the same.

(3) Remains the same.

4. The Board is proposing this amendment so that Montana schools can address the competency issue through accreditation standards at the local school district level.

5. Interested persons may present their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may be submitted to Earl J. Barlow, Chairman of the Board of Public Education, 33 South Last Chance Gulch, Helena, Montana 59601, at any time prior to September 15, 1978. Written data, views or arguments received by the Board after September 15, 1978, or post mark dated after September 15, 1978, may not be considered in the adoption of the rule.

6. Mr. Rick Reese, Assistant to the Board of Public Education, has been designated to preside over and conduct the hearing.

7. The authority of the agency to amend the rule is based on sections 75-7501 and 75-7503.1, R.C.M. 1947.

Earl J. Barlow

CHAIRMAN
BOARD OF PUBLIC EDUCATION

Certified to the Secretary of State July 18, 1978.

In the matter of the amendment of rule 48.2-6(10)-S6130 regarding elementary curriculum	)))	NOTICE OF PUBLIC HEARING FOR AMENDMENT OF RULE 48.2-6(10)-S6130 regarding elementary curriculum.

1. On September 6, 1978, at 1:00 p.m., a public hearing will be held in the Regents' Conference Room at 33 South Last Chance Gulch, Helena, Montana, to consider the amendment of rule 48-2.6(10)-S6130.

2. The proposed amendment will allow early diagnosis and prescription in order to provide programs and instruction that will accomodate mastery level competency.

3. The rule as proposed to be amended provides as follows:

(1) (a-1) Remain the same.

(m) The board of trustees shall require the development and implementation of processes to assist staff in assessing the educational needs of each student. Each subject area in the elementary curriculum has specified mastery level competencies (student performance) that reflect local goals for education (expectations). Implementation: administrators, teachers and school boards in cooperation with parents (advisory committee) shall establish mastery level competencies for each course in the curriculum and shall certify the attainment of those competencies for each student. NOTE: Progress towards implementation shall be reported each year, beginning with the 1979 Fall Report. The provisions of this section are to be fully implemented by the 1983-84 school year.

4. The Board is proposing this amendment so that Montana schools can address the competency issue through accreditation standards at the local school district level.

5. Interested persons may present their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may be submitted to Earl J. Barlow, Chairman of the Board of Public Education, 33 South Last Chance Gulch, Helena, Montana 59601, at any time prior to September 15, 1978. Written data, views or arguments received by the Board after September 15, 1978, or post mark dated after September 15, 1978, may not be considered in the adoption of the rules.

6. Mr. Rick Reese, Assistant to the Board of Public Education, has been designated to preside over and conduct the hearing.

7. The authority of the agency to amend the rule is based on sections 75-7501 and 75-7503.1, R.C.M. 1947.

Earl J. Barlow

CHAIRMAN
BOARD OF PUBLIC EDUCATION

Certified to the Secretary of State July 18, 1978.

BEFORE THE DEPARTMENT OF INSTITUTIONS
OF THE STATE OF MONTANA

In the matter of the Amendment of Rules 20.7.005 through 20.7.040 and the adoption of a new rule 20.7.045.	)))))	ADOPTION OF RULES

TO: ALL INTERESTED PERSONS

1. On May 25, 1978 the Department of Institutions gave notice (Notice No. 20-2-7) that amendments and changes to the work and educational furlough rules would be implemented.

2. No adverse comments were received by the Department by the public. All comments received were favorable.

3. These rules are hereby adopted by the Department of Institutions with only the following changes. Grammatical changes, typographical errors and misspellings will appear corrected in the published version of the rules at a later date.

Rule 20.7.005 (2)(f) the word "connected" is amended to read committed. Further "Prisoner" is any adult person committed to a Montana State correctional facility.

Rule 20.7.010 (2) is to be deleted.

Rule 20.7.025 (7) should read: Type of facility in which the furloughee shall reside.

Rule 20.7.030 line 12 should read small "r" on reports.

Rule 20.7.035 interline the words in the last part of the second paragraph: ~~"if so state in writing~~". In the third, the paragraph should read: "the prisoner shall be granted an interview with the furlough committee and he may bring up to two persons to act as his advocates to this interview".

Rule 20.7.040 paragraph 2 interline the words: "~~its own statement to the applicant~~".

4. These rules have been adopted as proposed with no other language changes and became effective July 28, 1978.

LAWRENCE M. ZANTO, Director
Department of Institutions

Certified to the Secretary of State July 18, 1978.

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

In the matter of the adoption of Rules providing for discovery) NOTICE OF ADOPTION OF RULES

TO: All Interested Persons

1. On May 15, 1978, the Department of Labor and Industry published notice of the proposed adoption of rules concerning discovery procedures at pages 673-674 of the 1978 Montana Administrative Register, issue No. 5.

2. The agency has adopted the rule as proposed, and will number the Rule ARM 24-2.2(1)-P201.

3. No comments or testimony were received. The Department has adopted the Rule to facilitate the conduct of hearings.

Dated this 12 day of July, 1978.

David E. Fuller
Commissioner
Department of Labor and Industry

Certified to the Secretary of State July 12, 1978.

BEFORE THE DEPARTMENT OF STATE LANDS
AND THE BOARD OF LAND COMMISSIONERS
OF THE STATE OF MONTANA

In the matter of the adoption of New Rule I through VIII, pertaining to reclamation of strip and underground mined lands	))))	NOTICE OF ADOPTION OF RULES

TO: All Interested Persons:

1. On May 25, 1978, the Department of State Lands and Board of Land Commissioners published notice of adoption of rules pertaining to reclamation of strip and underground mined lands at page 677 of the 1978 Montana Administrative Register, issue no. 5. A public hearing at which written and oral testimony was taken, was held on June 15, 1978. Written testimony was accepted until June 22, 1978.

2. The Board has adopted the rules with the following changes:

~~Rule I~~ 26-2.10(10)-S10261 - APPLICABILITY (1) No person shall engage in strip and underground mining operations which result in a condition or constitute a practice that creates an imminent danger to the health or safety of the public or which results in a condition or constitutes a practice that causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

(2) For operations conducted pursuant to permits initially issued before February 3, 1978, the regulations of Rules ~~I through VIII~~ S10261, S10291, S10301, S10302, S10303, S10311, S10312, and S10313 and Amended Rules S10310, S10320, S10330, S10340 and S10350 of this subchapter shall apply to lands from which coal ~~has~~ had not yet been removed on May 3, 1978, and to any other lands used, disturbed, or redisturbed in connection with or to facilitate mining or comply with the requirements of ~~new Rules I through VIII or Amended Rules S10310, S10320, S10330, S10340, and S10350 of this subchapter.~~ those rules. For operations conducted pursuant to permits issued after February 3, 1978, these rules apply to all disturbances.

~~(c)~~ (3) Any preexisting, nonconforming structure or facility which is used in connection with or to facilitate mining shall comply with the requirements of these regulations, unless--

(a) it is physically impossible to bring the structure or facility into compliance by the effective date;

(b) the operator has submitted to the Department a plan designed by a professional engineer for the reconstruction of the structure or facility;

(c) the Department has approved the plan; and

(d) reconstruction is completed by November 4, 1978~~.~~ or

(e) the preexisting, nonconforming structure meets the performance standards of this subchapter.

(4) Notwithstanding paragraph ~~(2)~~ (3)(c) of this section, any sedimentation pond, or related preexisting, nonconforming structure or facility which is used in connection with or to facilitate mining after the effective date of these regulations shall comply with the requirements of this subchapter unless--

(a) the permittee has submitted to the Department and to the Director of the Office of Surface Mining by May 3, 1978, a statement in writing demonstrating that it is physically impossible to bring the structure or facility into compliance by May 3, 1978. The statement shall include the steps to be taken to reconstruct the structure or facility in conformance with applicable performance standards and a schedule for reconstruction including the estimated date of completion;

(b) the Department has found in writing that it is physically impossible to bring the structure or facility into compliance by May 3, 1978;

(c) the construction work is to be performed in accordance with plans designed by a professional engineer;

(d) the construction work started no later than June 3, 1978 and is completed no later than November 4, 1978; and

(e) the Director of the Office of Surface Mining approves of any schedules which contain an estimated date of completion beyond October 3, 1978.

~~RULE II~~ 26-2.10(10)-S10291 DEFINITIONS As used throughout this subchapter the following terms have the specified meanings unless otherwise indicated:

(1) "Acid drainage" means water with a pH of less than 6.0 discharged from active or abandoned mines and from areas affected by mining operations.

(2) "Acid-forming" materials means earth materials that contain sulfide mineral or other materials which, if exposed to air, water, or weathering processes, will cause acids that may create acid drainage.

(3) "Alluvial valley floors" means unconsolidated stream-laid deposits holding streams where water availability is sufficient for subirrigation or flood irrigation agricultural activities but does not include upland areas which are generally

overlain by a thin veneer of colluvial deposits composed chiefly of debris from sheet erosion, deposits by unconcentrated runoff or slope wash, together with talus, other mass movement accumulation and windblown deposits.

(4) "Approximate original contour" means that surface configuration achieved by backfilling and grading of the mined area so that the reclaimed area, including any terracing or access roads, closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain, with all highwalls and spoil piles eliminated; water impoundments may be permitted where the Department determines that they are in compliance with Rule S10330 of this subchapter.

(5) "Aquifer" means a zone, stratum, or group of strata that can store and transmit water in sufficient quantities for a specific use.

(6) "Combustible material" means organic material that is capable of burning either by fire or through a chemical process (oxidation) accompanied by the evolution of heat and a significant temperature rise.

(7) "Compaction" means the reduction of pore spaces among the particles of soil or rock, generally done by running heavy equipment over the earth materials.

(8) "Diversion" means a channel, embankment, or other man-made structure constructed for the purpose of diverting water from one area to another.

(9) "Downslope" means the land surface between a valley floor and the projected outcrop of the lowest mineral bed being mined along each highwall.

(10) "Embankment" means an artificial deposit of material that is raised above the natural surface of the land and used to contain, divert, or store water, support roads or railways, or other similar purposes.

(11) "Essential hydrologic functions" means, with respect to alluvial valley floors, the role of the valley floor in collecting, storing, and regulating the natural flow of surface water and groundwater, and in providing a place for irrigated and subirrigated farming, by reason of its position in the landscape and the characteristics of its underlying material.

(12) "Flood irrigation" means irrigation through natural overflow or the temporary diversion of high flows in which the entire surface of the soil is covered by a sheet of water.

(13) "Groundwater" means ~~subsurface water that fills available openings in rock or soil materials such that they may be considered water saturated.~~ the tension free (i.e., hydrostatic pressure is equal to or greater than atmospheric pressure) continuous mass of water that saturates an aquifer below the land surface.

(14) "Highwall" means the face of exposed overburden and mineral in an open cut of a surface or for entry to an underground mine.

(15) "Hydrologic balance" means the relationship between the quality and quantity of inflow to, outflow from, and storage in a hydrologic unit such as a drainage basin, aquifer, soil zone, lake, or reservoir. It encompasses the quantity and quality relationships between precipitation, runoff, evaporation, and the change in ground and surface water storage.

(16) "Hydrologic regime" means the entire state of water movement in a given area. It is a function of the climate, and includes the phenomena by which water first occurs as atmospheric water vapor, passes into a liquid or solid form and falls as precipitation, moves thence along or into the ground surface, and returns to the atmosphere as vapor by means of evaporation and transpiration.

(17) "Imminent danger to the health and safety to the public" means the existence of any condition, or practice, or any violation of a permit or other requirement of these rules in a surface mining and reclamation operation, which condition, practice, or violation could reasonably be expected to cause substantial physical harm to persons outside the permit area before such condition, practice, or violation can be abated. A reasonable expectation of death or serious injury before abatement exists if a rational person, subjected to the same condition or practice giving rise to the peril, would not expose himself or herself to the danger during the time necessary for abatement.

(18) "Impoundment" means a closed basin formed naturally or artificially built, which is dammed or excavated for the retention of water, sediment, or waste.

(19) "Intermittent or perennial stream" means a stream or part of a stream that flows continuously during all (perennial) or for at least ~~one month~~ 30 continuous days (intermittent) of the calendar year as a result of groundwater discharge or surface runoff. The term does not include an ephemeral stream which is one that flows for less than one month of a calendar year and only in direct response to precipitation in the immediate watershed and whose channel bottom is always above the local water table.

(20) "Leachate" means a liquid that has percolated through soil, rock, or waste and has extracted dissolved ~~or suspended~~ materials.

(21) "Noxious plants" means species that have been included on official State lists of noxious plants for the State in which the operation occurs.

(22) "Operator" means any person engaged in mining who removes or intends to remove more than 250 tons of minerals from the earth by mining within 12 consecutive calendar months in any one location, or any person engaged in strip mining or underground mining who removes or intends to remove more than 10,000 cubic yards of minerals or overburden during any period of time:

(23) "Outslope" means the exposed area sloping away from a bench or terrace being constructed as a part of a surface mining and reclamation operation.

(24) "Productivity" means the vegetative yield produced by a unit area for a unit of time.

(25) "Recharge capacity" means the ability of the soils and underlying materials to allow precipitation and runoff to infiltrate and reach the zone of saturation.

(26) "Roads" means access and haul roads constructed, used, reconstructed, improved, or maintained for use in surface mining and reclamation operations, including use by haul vehicles leading to transfer, processing, or storage areas. The term includes any such road used and not graded to approximate original contour within 45 days of construction other than temporary roads used for topsoil removal and haulage roads within the pit area. Roads maintained with public funds such as all Federal, State, county, or local roads are excluded.

(27) "Recurrence interval" means the precipitation event expected to occur, on the average, once in a specified interval. For example, the 10-year, 24-hour precipitation event would be that 24-hour precipitation event expected to be exceeded on the average once in 10 years. Magnitude of such events are as defined by the National Weather Service Technical Paper No. 40, "Rainfall Frequency Atlas of the U.S.," May 1961, and subsequent amendments or equivalent regional or rainfall probability information developed therefrom.

(28) "Runoff" means precipitation that flows overland before entering a defined stream channel and becoming streamflow.

(29) "Safety factor" means the ratio of the available shear strength to the developed shear stress on a potential surface of sliding determined by accepted engineering practice.

(30) "Sediment" means undissolved organic and inorganic material transported or deposited by water.

(31) "Sedimentation pond" means any natural or artificial structure or depression used to remove sediment from water and store sediment or other debris.

(32) "Significant, imminent environmental harm to land, air or water resources" is determined as follows:

(a) An environmental harm is any adverse impact on land, air, or water resources, including but not limited to plant and animal life.

(b) An environmental harm is imminent if a condition, practice or violation exists which (i) is causing such harm or (ii) may reasonably be expected to cause such harm at any time before the end of the reasonable abatement time.

(c) An environmental harm is significant if that harm is appreciable and not immediately reparable.

(33) "Slope" means average inclination of a surface, measured from the horizontal, normally expressed as a unit of vertical distance to a given number of units of horizontal distance (e.g., 1v to 5h=20 percent=11.3 degrees).

(34) "Soil horizons" means contrasting layers of soil lying one below the other, parallel or nearly parallel to the land surface. Soil horizons are differentiated on the basis of field characteristics and laboratory data. The three major soil horizons are--

(a) A horizon. The uppermost layer in the soil profile often called the surface soil. It is the part of the soil in which organic matter is most abundant, and where leaching of soluble or suspended particles is the greatest.

(b) B horizon. The layer immediately beneath the A horizon and often called the subsoil. This middle layer commonly contains more clay, iron, or aluminum than the A or C horizons.

(c) C horizon. The deepest layer of the soil profile. It consists of loose material or weathered rock that is relatively unaffected by biologic activity.

(35) "Spoil" means overburden that has been removed during surface mining.

(36) "Stabilize" means any method used to control movement of soil, spoil piles, or areas of disturbed earth and includes increasing bearing capacity, increasing shear strength, draining, compacting, or revegetating.

(37) "Strip and underground mining", as defined in Chapter 10 of Title 50, R.C.M. 1947, includes excavation for the purpose of obtaining minerals including such common methods as contour, strip, auger, mountain removal, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, and loading of minerals at or near the mine site.

(38) "Subirrigation" means irrigation of plants with water delivered to the roots from underneath.

(39) "Surface water" means water, either flowing or standing, on the surface of the earth.

(40) "Suspended solids" means organic or inorganic materials carried or held in suspension in water that will remain on a 0.45 micron filter.

(41) "Ton" means 2,000 pounds avoirdupois (.90718 metric ton).

(42) "Toxic-forming materials" means earth materials or wastes which, if acted upon by air, water, weathering, or microbiological processes, are likely to produce chemical or physical conditions in soils or water that are detrimental to biota or uses of water.

(43) "Toxic-mine drainage" means water that is discharged from active or abandoned mines and other areas affected by mining operations and which contains a substance which through chemical action or physical effects is likely to kill, injure, or impair biota commonly present in the area that might be exposed to it.

(44) "Valley fill and head-of-hollow fill" means a structure consisting of any materials other than waste placed so as to encroach upon or obstruct to any degree any natural stream channel other than those minor channels located on highland areas where overland flow in natural rills and gullies is the predominant form of runoff. Such fills are normally constructed in the uppermost portion of a V-shaped valley in order to reduce the upstream drainage area (head-of-hollow fills). Fills located farther downstream (valley fills) must have larger diversion structures to minimize infiltration. Both fills are characterized by rock underdrains and are constructed in compacted lifts from the toe to the upper surface in a manner to promote stability.

(45) "Waste" means earth materials, which are combustible, physically unstable, or acid-forming or toxic-forming, wasted or otherwise separated from the mineral product and are slurried or otherwise transported from processing facilities or preparation plants after physical or chemical processing, cleaning, or concentrating of the mineral.

(46) "Water table" means upper surface of a zone of saturation, where the body of groundwater is not confined by an overlying impermeable zone.

~~RULE-III~~ 26-2.10(10)-S10301 POSTING A copy of all current permits, licenses, approved plans, or other authorizations to operate the mine shall be available for inspection at or near the mine site.

~~RULE-IV~~ 26-2.10(10)-S10311 POSTMINING USES (1) General. All disturbed areas shall be restored in a timely manner (a) to conditions that are capable of supporting the uses which they were capable of supporting before any mining, or (b) to higher or better uses achievable under criteria and procedures of subsection (4) of this section, except that use as cropland or hayland or pasture is not allowed as a postmining land use and is not allowed as part of a combined use as set forth in paragraph (3)(i) below.

(2) Determining premining use of land. The premining uses of land to which the postmining land use is compared shall be those uses which the land previously supported if the land had not been previously mined and had been properly managed.

(a) The postmining land use for land that has been previously mined and not reclaimed shall be judged on the basis of the highest and best use that can be achieved and is compatible with surrounding areas.

(b) The postmining land use for land that has received improper management shall be judged on the basis of the premining use of surrounding lands that have received proper management.

(c) If the premining use of the land was changed within five years of the beginning of mining, the comparison of postmining use to premining use shall include a comparison with the historic use of the land as well as its use immediately preceding mining.

(3) Land-use categories. Land use is categorized in the following groups. Change from one to another land-use category in premining to postmining constitutes an alternate land-use, and the permittee shall meet the requirements of subsection (4) of this section and all other applicable environmental protection performance standards of this subchapter.

(a) Heavy industry. Manufacturing facilities, power-plants, airports or similar facilities.

(b) Light industry and commercial services. Office buildings, stores, parking facilities, apartment houses, motels, hotels, or similar facilities.

(c) Public services. Schools, hospitals, churches, libraries, water-treatment facilities, solid-waste disposal facilities, public parks and recreation facilities, major transmission lines, major pipelines, highways, underground and surface utilities, and other servicing structures and appurtenances.

(d) Residential. Single- and multiple-family housing (other than apartment houses) with necessary support facilities.

(e) Rangeland. Includes rangelands and forest lands which support a cover of herbaceous or scrubby vegetation suitable for grazing or browsing use.

(f) Forest land. Land with at least a 25 percent tree canopy or land at least ten percent stocked by forest trees of any size, including land formerly having had such tree cover and that will be naturally or artificially reforested.

(g) Impoundments of water. Land used for storing water for beneficial uses such as stock ponds, irrigation, fire protection, recreation, or water supply.

(h) Fish and wildlife habitat and recreation lands. Wetlands, fish and wildlife habitat, and areas managed primarily for fish and wildlife or recreation.

(i) Cropland. Land used primarily for the production of cultivated and closegrowing crops for harvest alone in association with sod crops. Land used for facilities in support of farming operations are included.

(j) Hayland or pasture. Land used primarily for the long-term production of adapted, domesticated forage plants to be grazed by livestock or cut and cured for livestock feed.

(k) Combined uses. Any appropriate combination of land uses where one land use is designated as the primary land use and one or more other land uses are designated as secondary land uses.

(4) Criteria for approving alternative postmining use of land. **An** Pursuant to Section 50-1044(6), an alternative postmining land use may be approved by the Department, after consultation with the landowner or the land-management agency having jurisdiction over State or Federal lands, if the following criteria are met (except that use as rangeland is exempted from these requirements):

(a) The proposed land use is compatible with adjacent land use and, where applicable, with existing local, State or Federal land use policies and plans. A written statement of the views of the authorities with statutory responsibilities for land-use policies and plans shall accompany the request for approval. The permittee shall obtain any required approval of local, State or Federal land management agencies, including any necessary zoning or other changes necessarily required for the final land use.

(b) Specific plans have been prepared which show the feasibility of the proposed land use as related to needs, projected land-use trends, and markets and that include a schedule showing how the proposed use will be developed and achieved within a reasonable time after mining and be sustained. The Department may require appropriate demonstrations to show that the planned procedures are feasible, reasonable, integrated with mining and reclamation, and that the plans will result in successful reclamation.

(c) Provision of any necessary public facilities is assured as evidenced by letters of commitment from parties other than the permittee, as appropriate, to provide them in a manner compatible with the permittee's plans.

(d) Specific and feasible plans for financing attainment and maintenance of the postmining land use including letters of commitment from parties other than the permittee as appropriate, if the postmining land is to be developed by such parties.

(e) The plans are designed under the general supervision of a registered professional engineer, or other appropriate professional, who will ensure that the plans conform to applicable accepted standards for adequate land stability, drainage, and vegetative cover, and aesthetic design appropriate for the postmining use of the site.

(f) The proposed use or uses will neither present actual or probable hazard to public health or safety nor will they pose any actual or probable threat of water flow diminution or pollution.

(g) The use or uses will not involve unreasonable delays in reclamation.

(h) When required by law, approval of measures to prevent or mitigate adverse effects on fish and wildlife has been obtained from the Department and appropriate State and Federal fish and wildlife management agencies.

(i) The Department has provided by public notice not less than 45 days nor more than 60 days for interested citizens and

local, State and Federal agencies to review and comment on the proposed land use.

(j) The operator demonstrates to the satisfaction of the Department that the use is a viable, long-term use which will not in the future create a condition that violates the purposes and standards of Chapter 10 of Title 50.

~~RULE V~~ 26-2.10(10)-S10312 DISPOSAL OF SPOIL Disposal of spoil in other than valley or head-of-hollow fills. Spoil not required to achieve the approximate original contour shall be transported to and placed in a controlled (engineered) manner in disposal areas other than the mine workings or excavations only if all the following conditions, in addition to the other requirements of the Act and this subchapter, are met:

(1) The disposal areas shall be within the permit area, and they must be approved by the Department as suitable for construction of fills in accordance with the requirements of this paragraph.

(2) The disposal areas shall be located on the most moderate sloping and naturally stable areas available as approved by the Department. Where possible, fill materials suitable for disposal shall be placed upon or above a natural terrace, bench, or berm if such placement provides additional stability and prevents mass movement.

(3) The fill shall be designed using recognized professional standards, certified by a registered professional engineer, and approved by the Department.

(4) The disposal area does not contain springs, natural water courses, or wet weather seeps unless lateral drains are constructed from the wet areas to the underdrains in such a manner that infiltration of the water into the spoil pile will be prevented.

(5) All organic material shall be removed from the disposal area, and the topsoil must be removed and segregated before the material is placed in the disposal area. However, if approved by the Department, organic material may be used as mulch or may be included in the topsoil.

(6) The spoil shall be transported and placed in a controlled manner, concurrently compacted as necessary to ensure mass stability and prevent mass movement, covered, and graded to allow surface and subsurface drainage to be compatible with the natural surroundings, and to ensure long-term stability. The final configuration of the fill must be suitable for postmining land uses. Terraces shall not be constructed unless approved by the Department.

(7) The fill shall be inspected for stability by a registered engineer or other qualified professional specialist during critical construction periods to assure removal of all organic material and topsoil, placement of underdrainage systems, and proper construction of terraces according to the approved plan. The registered engineer or other qualified professional specialist shall provide a certified report after each inspection that the fill has been constructed as specified in the design approved by the Department.

~~RULE VI~~ 26-2.10(10)-S10313 PRIME FARMLAND (1) Applicability. (a) Permittees of surface mining and reclamation operations conducted on prime farmland shall comply with the general performance standards of this subchapter in addition to the special requirements of this section. Prime farmlands are those lands defined in paragraph (2) of this section that have been used for the production of cultivated crops, including nurseries, orchards, and other specialty crops, and small grains for at least five years out of the 20 years preceding the date of the permit application.

(b) The requirements of this section are applicable to any permit issued on or after August 3, 1977. Permits issued before that date and revisions or renewals of those permits need not conform to the provisions of this section regarding actions to be taken before a permit is issued. Permit renewals or revisions shall include only those areas that--

(i) were in the original permit area or in a mining plan approved prior to August 3, 1977; or

(ii) are contiguous and under State regulation or practice would have normally been considered as a renewal or revision of a previously approved plan.

(2) Definition. Prime farmland means those lands that meet the applicability requirements in paragraph (1) of this section and the specific technical criteria prescribed by the Secretary of Agriculture as published in the Federal Register on August 23, 1977. These criteria are included here for convenience. Terms used in this section are defined in U.S. Department of Agriculture publications: Soil Taxonomy, Agriculture Handbook 436; Soil Survey Manual, Agriculture Handbook 18; Rainfall-Erosion Losses From Cropland, Agriculture Handbook 282; and Saline and Alkali Soils, Agriculture Handbook 60. To be considered prime farmland, soils must meet all of the following criteria:

(a) The soils have--

(i) aquic, udic, ustic, or xeric moisture regimes and sufficient available water capacity within a depth of 40 inches or in the root zone, if the root zone is less than 40 inches deep, to produce the commonly grown crops in seven or more years out of ten; or

(ii) xeric or ustic moisture regimes in which the available water capacity is limited but the area has a developed irrigation water supply that is dependable and of adequate quality (a dependable water supply is one in which enough water is available for irrigation in eight out of ten years for the crops commonly grown); or

(iii) aridic or torric moisture regimes and the area has a developed irrigation water supply that is dependable and of adequate quality.

(b) The soils have a temperature regime that is frigid, mesic, thermic, or hyperthermic (pergelic and cryic regimes are excluded). These are soils that at a depth of 20 inches have a mean annual temperature higher than 32 degrees F. In addition, the mean summer temperature at this depth in soils with an O horizon is higher than 47 degrees F.; in soils that have no O horizon, the mean summer temperature is higher than 59 degrees F.

(c) The soils have a pH between 4.5 and 8.4 in all horizons within a depth of 40 inches or in the root zone, if the root zone is less than 40 inches deep.

(d) The soils either have no water table or have a water table that is maintained at a sufficient depth during the cropping season to allow food, feed, fiber, forage, and oilseed crops common to the area to be grown.

(e) The soils can be managed so that, in all horizons within a depth of 40 inches or in the root zone if the root zone is less than 40 inches deep, during part of each year the conductivity of the saturation extract is less than 4 mmhos/cm and the exchangeable sodium percentage (ESP) is less than 15.

(f) The soils are not flooded frequently during the growing season (less often than once in two years).

(g) The soils have a product of K (erodibility factor) times percent slope of less than 2.0 and a product of I (soil erodibility) times C (climatic factor) not exceeding 60.

(h) The soils have a permeability rate of at least 0.06 inch per hour in the upper 20 inches, and the mean annual soil temperature at a depth of 20 inches is less than 59 degrees F.; the permeability rate is not a limiting factor if the mean annual soil temperature is 59 degrees F. or higher.

(i) Less than ten percent of the surface layer (upper six inches) in these soils consists of rock fragments coarser than three inches.

(3) Identification of prime farmland. Prime farmland shall be identified on the basis of soil surveys submitted by the applicant. The Department also may require data on irrigation, drainage, flood control, and subsurface water management. Soil surveys shall be conducted according to standards of the National Cooperative Soil Survey, which include the procedures set forth in U.S. Department of Agriculture Handbooks 436 (Soil Taxonomy) and 18 (Soil Survey Manual), and shall include--

(a) data on moisture availability, temperature regime, flooding, water table, erosion characteristics, permeability, or other information that is needed to determine prime farmland in accordance with subsection (2);

(b) a map designating the exact location and extent of the prime farmland; and

(c) a description of each soil mapping unit.

(4) Negative determination of prime farmland. The land shall not be considered as prime farmland where the applicant can demonstrate one or more of the following situations--

(a) Lands within the proposed permit boundaries have been used for the production of cultivated crops for less than five years out of 20 years preceding the date of the permit application.

(b) The slope of all land within the permit area is ten percent or greater.

(c) Land within the permit area is not irrigated or naturally subirrigated, has no developed water supply that is dependable and of adequate quality, and the average annual precipitation is 14 inches or less.

(d) Other factors exist, such as a very rocky surface, or the land is frequently flooded, which clearly place all land within the area outside the purview of prime farmland.

(e) A written notification, based on scientific findings and soil surveys, that land within the proposed mining area does not meet the applicability requirements in paragraph (1) of this section is submitted to the Department by a qualified person other than the applicant, and is approved by the Department.

(5) Plan for restoration of prime farmland. The applicant shall submit to the Department a plan for the mining and restoration of any prime farmland within the proposed permit boundaries. This plan shall be used by the Department in judging the technological capability of the applicant to restore prime farmlands. The plan shall include--

(a) a description of the original undisturbed soil profile, as determined from a soil survey, showing the depth and thickness of each of the soil horizons that collectively constitute the root zone of the locally adapted crops and are to be removed, stored, and replaced;

(b) the proposed method and type of equipment to be used for removal, storage, and replacement of the soil in accordance with paragraph (7) of this section;

(c) the location of areas to be used for the separate stockpiling of the soil and plans for soil stabilization before redistribution;

(d) if applicable, documentation such as agricultural school studies or other scientific data from comparable areas that supports the use of other suitable material, instead of the A, B or C soil horizon, to obtain on the restored area equivalent or higher levels of yield as nonmined prime farmlands in the surrounding area under equivalent levels of management; and

(e) plans for seeding the final graded mine land and the conservation practices to control erosion and sedimentation during the first 12 months after regrading is completed. Proper adjustments for seasons must be made so that final graded land is not exposed to erosion during seasons when vegetation or conservation practices cannot be established due to weather conditions; and

(f) available agricultural school studies, company data, or other scientific data for comparable areas that demonstrate that the applicant using his proposed method of reclamation could achieve, within a reasonable time, equivalent or higher levels of yield after mining as existed before mining; and

(g) plans that demonstrate that the proposed method of reclamation will achieve vegetation to satisfactorily comply with section 50-1047.

(6) Consultation with Secretary of Agriculture and issuance of permit.

(a) The Department may grant a permit which shall incorporate the plan submitted under subsection (5) of this section if it finds in writing that the applicant--

(i) has the technological capability to restore the prime farmland within the proposed permit area, within a reasonable time, to equivalent or higher levels of yield as nonmined prime farmland in the surrounding area under equivalent levels of management; and

(ii) will achieve compliance with the standards of paragraph (7) of this section.

(b) Before any permit is issued for areas that include prime farmlands, the Department shall consult with the Secretary of Agriculture. The Secretary of Agriculture will provide a review of the proposed method of soil reconstruction and comment on possible revisions that will result in a more complete and adequate restoration. The Secretary of Agriculture has assigned his responsibilities under this paragraph to the Administrator of the U.S. Soil Conservation Service, and the U.S. Soil Conservation Service will carry out the consultation and review through its State Conservationist, located in each State.

(7) Special requirements. For all prime farmlands to be mined and reclaimed, the applicant shall meet the following special requirements:

(a) All soil horizons to be used in the reconstruction of the soil shall be removed before drilling, blasting, or mining to prevent contaminating the soil horizons with undesirable materials. Where removal of soil horizons results in erosion that may cause air and water pollution, the Department shall specify methods of treatment to control erosion of exposed overburden. The permittee shall--

(i) remove separately the entire A horizon or other suitable soil materials which will create a final soil having an equal or greater productive capacity than that which existed prior to mining in a manner that prevents mixing or contamination with other material before replacement;

(ii) remove separately the B horizon of the natural soil or a combination of B horizon and underlying C horizon or other suitable soil material that will create a reconstructed root zone of equal or greater productivity capacity than that which existed prior to mining in a manner that prevents mixing or contamination with other material; and

(iii) Remove separately the underlying C horizons or other strata, or a combination of such horizons or other strata, to be used instead of the B horizon that are of equal or greater thickness and that can be shown to be equal or more favorable for plant growth than the B horizon, and that when replaced will create in the reconstructed soil a final root zone of comparable depth and quality to that which existed in the natural soil.

(b) If stockpiling of soil horizons is allowed by the Department in lieu of immediate replacement, the A horizon and B horizon must be stored separately from each other. The stockpiles must be placed within the permit area and where they will not be disturbed or exposed to excessive erosion by water or wind before the stockpiled horizons can be redistributed on terrain graded to final contour. Stockpiles in place for more than 30 days must meet the requirements of S10340 of this subchapter.

(c) Scarify the final graded land before the soil horizons are replaced.

(d) Replace the material from the B horizon, or other suitable material specified in subparagraph (7)(a)(ii) or (7)(a) (iii) of this section in such a manner as to avoid excessive compaction of overburden and to a thickness comparable to the root zone that existed in the soil before mining.

(e) Replace the A horizon or other suitable soil materials, which will create a final soil having an equal or greater productive capacity than existed prior to mining, as the final surface soil layer to the thickness of the original soil as determined in subparagraph (7)(a)(i) of this section in a manner that--

(i) prevents excess compaction of both the surface layer and underlying material and reduction of permeability to less than 0.06 inch per hour in the upper 20 inches of the reconstructed soil profile; and

(ii) protects the surface layer from wind and water erosion before it is seeded or planted.

(f) Apply nutrients and soil amendments as needed to establish quick vegetative growth.

~~RULE VII~~ 26-2.10(10)-S10302 SIGNS AND MARKERS (1) Specifications. All signs required to be posted shall be of a standard design that can be seen and read easily and shall be made of durable material. The signs and other markers shall be maintained during all operations to which they pertain and shall conform to local ordinances and codes.

(2) Mine and permit identification signs. Signs identifying the mine area shall be displayed at all points of access to the permit area from public roads and highways. Signs shall show the name, business address, and telephone number of the permittee and identification numbers of current mining and reclamation permits or other authorizations to operate. Such signs shall not be removed until after release of all bonds.

(3) Perimeter markers. The perimeter of the permit area shall be clearly marked by durable and easily recognized markers or by other means approved by the Department.

(4) Buffer zone markers. Buffer zones shall be marked in a manner consistent with the perimeter markers along the interior boundary of the buffer zone.

(5) Blasting signs. If blasting is necessary to conduct surface coal mining operations, signs reading "Blasting Area" shall be displayed conspicuously at the edge of blasting areas along access and haul roads within the mine property. Signs reading "Blasting Area" and explaining the blasting warning and all clear signals shall be posted at all entrances to the permit area.

(6) Topsoil markers. Where topsoil or other vegetation-supporting material is segregated and stockpiled, the stockpiled material shall be marked. Markers shall remain in place until the material is removed.

~~RULE V~~ 26-2.10(10)-S10303 UNDERGROUND MINING (1) Compliance. All underground mining and associated reclamation operations shall comply with the applicable performance standards of these rules. Those performance standards which the Department has deemed to be inapplicable to underground mining and associated reclamation operations are as follows: Rule ~~V~~ 26-2.10(10)-S10302(5) and Rule 26-2.10(10)-S10310(1)(l), (l)(m)(i) through (iii), and (4)(b)(i) and (ii).

(a) For the purpose of these rules, "underground mining and associated reclamation operations" mean a combination of surface operations and underground operations. Surface operations include construction, use, and reclamation of new and existing access and haul roads, above ground repair areas, storage areas, processing areas, shipping areas, and areas upon which are sited support facilities, including hoist and ventilating ducts, and on which materials incident to underground mining operations are placed. Lands overlying any tunnels, shafts or other excavations are included. Underground operations include underground construction, operation, and reclamation of shafts, adits, underground support facilities, underground mining, hauling, storage, and blasting.

(b) For the purpose of this part, "disturbed areas" means surface work areas and lands affected by surface operations facilities and other operating facilities, waste work and spoil disposal areas, and mine waste impoundments or embankments.

(2) Authorizations to operate. A copy of all current permits, licenses, approved plans or other authorizations to operate the mine shall be available for inspection at or near the mine site. Each application for an underground mining permit shall be accompanied by cross-sections and maps showing the proposed underground locations of all shafts, entries, and haulageways or other excavations to be excavated during the permit period.

3. The following are summaries of the comments received and the Department's response to those comments:

RULE 26-2.10(10)-S10261 APPLICABILITY

(1) COMMENT: Subsection (2) is unclear as to the affective date of the rules.

RESPONSE: The Department agrees and has modified the rules to provide an effective date and provide that reclamation for areas mined before May 3, 1978, must comply with the reclamation requirements in affect before that date.

(2) COMMENT: Subsection "(c)" should be subsection "(3)".

RESPONSE: The Department agrees and has modified the rule accordingly, also modifying the citation in subsection (4).

(3) COMMENT: Add to subsection (3) language which provides that preexisting, nonconforming structures need not meet design criteria if they meet performance standards.

RESPONSE: This change was mandated on the federal level by Judge Flannery's decision. The Department agrees with the proposed change and it has been incorporated into proposed subsection (3).

(4) COMMENT: Subsection (4)(a) should not require the operator to have submitted his statement of physical impossibility to the Director of the Office of Surface Mining.

RESPONSE: Thirty C.F.R. 710.11 makes this a requirement for a state interim program. The suggestion is therefore rejected.

(5) COMMENT: Subsection (4)(d) requires "construction" to have been commenced by June 3, 1978. "Construction" should be defined to monetary and physical considerations such as sodding, scarification, and dredging.

RESPONSE: The term "construction", as is commonly used, does not include a monetary commitment and does include the suggested physical considerations. The suggestion is therefore rejected.

(6) COMMENT: Subsection (4)(e) does not adequately define "Director" and should be changed to "Department".

RESPONSE: The term refers to the "Director of the Office of Surface Mining". The rule has been modified to reflect this meaning.

RULE 26-2.10(10)-S10291 DEFINITIONS

(1) COMMENT: Change the definition of "acid-forming" (subsection (2)) by eliminating the word "may" thus excluding those materials that neutralizing agents.

RESPONSE: The Department's language is taken from the federal regulations, which has not been changed. The definition as proposed by the Department can be interpreted to apply to those situations where there is not adequate buffering to neutralize acids produced. The proposed change is rejected.

(2) COMMENT: Change the definition of "aquifer" (subsection (5)) to a "group or formation or a part of a formation that contains sufficient saturated permeable materials to yield significant quantities of water to wells, or springs."

RESPONSE: The language proposed by the Department is taken from the federal regulations. In addition, a water right is based upon beneficial use and not a "significant" quantity of water yielded only to wells and springs. Although the proponents have raised the possibility that the present definition could apply to aquitards and aquicludes, that possibility is remote because those formations would probably not yield water in sufficient quantities for a specified use. The proposed change is therefore rejected.

(3) COMMENT: Modify the definition of "flood irrigation" (subsection (12)) by excluding on alluvial valley floors, areas 2.5 meters or higher in elevation above the streambed and excluding waters pumped in.

RESPONSE: The language proposed by the Department is taken from the federal regulations. The proposed addition would significantly modify the alluvial valley floors provisions. The proposed change is therefore rejected.

(4) COMMENT: Redefine "groundwater" (subsection (13)) as "The tension free (i.e., hydrostatic pressure is equal to or greater than atmospheric pressure) continuous mass of water below the soil surface."

RESPONSE: The Department agrees. Although the Department's proposed definition is taken from the federal regulations. The proposed definition would not make the Department's regulations less strict. The proposed change is adopted.

(5) COMMENT: In the definition of "intermittent or perennial stream" (subsection (19)), replace "for at least one month" with "for at least 30 continuous days."

RESPONSE: The Department agrees. Change adopted.

(6) COMMENT: Modify the definition of "leachate" (subsection (20)) by excluding therefrom suspended materials.

RESPONSE: The Department agrees. Change adopted.

(7) COMMENT: Modify the definition of "productivity" to include only "above ground" yield during a "growing season" instead of "for a unit of time."

RESPONSE: Although above ground yield is the commonly used measure of productivity, the possibility exists that root growth may be used in the future. For certain vegetation more than one growing season may be needed to determine productivity. The proposed modifications are therefore rejected.

(8) COMMENT: Replace the definition of "subirrigation" (subsection (38)) with a definition which applies only to areas where the groundwater level is with 1.5 meters of ground level and which eliminates irrigation by pumping.

RESPONSE: Subirrigation should not be restricted to groundwater within 1.5 meters of the surface. Capillary rise can supply subirrigation to plants above the saturated zone and some agricultural crops root deeper than that depth. The suggested change is therefore rejected.

(9) COMMENT: Modify the definition of "Toxic-forming materials" (subsection 42)) by including only those materials that will produce toxic pollutants as defined in the Federal Water Pollution Control Act, rather than materials that will produce chemical or physical conditions that may be detrimental to biota or uses of water.

RESPONSE: This definition is taken from the federal regulations. It is designed to avoid potential problems by defining as toxic-forming those materials that will create conditions that are likely to have detrimental effect. The suggested change is therefore rejected.

(10) COMMENT: Modify the definition of "Toxic-mine drainage" by defining it as water which contains toxic pollutants or defined by the Federal Water Pollution Control Act instead of water which contains a substance which is likely to damage biota.

RESPONSE: For the same basic reasons comment #8 was rejected, this proposed modification is rejected.

RULE 2.10(10)-S10301 POSTING

No comments received.

RULE 26-2.10(10)-S10311 POSTMINING USES

(1) COMMENT: The Department does not have authority to adopt this rule and it therefore should be eliminated.

RESPONSE: The authority is contained in Section 50-1044. The proposed deletion is rejected. A statement of authority upon which the rule is based has been included in subsection (4).

(2) COMMENT: Eliminate paragraph (2)(b) which requires the postmining use of land that has received improper management shall be judged on the basis of premining use of surrounding lands that have received proper management because topsoil loss may have occurred, making reclamation to that standard impossible.

RESPONSE: This is a requirement of the federal regulations. The intent is to require abused lands to be replaced in a better condition after mining. The suggestion is therefore rejected.

(3) COMMENT: Allow use as cropland, hayland, or pasture as a postmining use where it corresponds with the premining use.

RESPONSE: This is prohibited by Section 50-1045. The proposal is therefore rejected.

(4) COMMENT: The Department should not allow under subsection (4) alternative land uses which require less land reclamation than the previous use.

RESPONSE: The proposed rules as presently drafted provide this protection whenever vegetation is the proposed postmining use by requiring revegetation to rangeland, which is the most stringent requirement. Thus, it is only when non-vegetative alternative uses are applied for that the comment is relevant. The major problem is ensuring that alternative land uses do not in the future lead to conditions which would not be acceptable at the time of bond release. To prevent this, paragraph 4(j) has been added.

RULE 26-2.10(10)-S10312 DISPOSAL OF SPOIL

No comments received.

RULE 26-2.10(10)-S10313 PRIME FARMLAND

COMMENT: The Department does not have the authority to adopt this rule and it should therefore be eliminated.

RESPONSE: The authority although not specifically set forth in the Montana Act as it is in the federal act, is contained in Sections 50-1042, 1035, 1043, and 1044.

RULE 26-2.10(10)-S10302 SIGNS AND MARKERS

COMMENT: In subsection (4), require buffer zone markers only where the buffer zone boundary is other than the permit boundary. Also, define "buffer zone" because the term is used differently in the Montana regulations than it is used in the federal regulations.

RESPONSE: Operators need only look to the state regulations. Therefore, there is no need to clarify the term "buffer zone", and the suggestion that this be done is rejected. As to the first suggestion, the Department agrees and language so modifying the rule has been incorporated.

RULE 26-2.10(10)-S10303 UNDERGROUND MINING

No comments received.

COMMENTS APPLICABLE TO ALL RULES

(1) COMMENT: Reword the rules so that they do not apply to uranium mining.

RESPONSE: The uranium mining industry had no objections to the application of these rules to their industry and one commenter favored it. The rules provide regulating procedure for uranium mining which can be modified to more particularly apply to that process in certain areas or uranium mining becomes more prevalent in Montana. The suggestion is therefore rejected.

(2) COMMENT: The Department should adopt a program whereby state coal leases on lands upon which mining is precluded pursuant to these rules can be exchanged for other leases.

RESPONSE: These rules are being adopted pursuant to the authority granted to the Board and Department by Chapter 10 of Title 50. That chapter does not provide authority for such an exchange program. The proposal is therefore rejected.

(3) COMMENT: The proposed rules should define the term "reclamation".

RESPONSE: The term is defined in section 50-1036(14). Definition in the rules is therefore unnecessary. The proposal is therefore rejected.

(4) COMMENT: The proposed rules should define the term "reasonable time".

RESPONSE: The term represents a standard that must be applied on a case by case basis. The proposal is +herefore rejected.

Ted Schwinden, Acting Governor &
Acting Chairman of the Board of
Land Commissioners

Certified to the Secretary of State July 18, 1978.

BEFORE THE DEPARTMENT OF STATE LANDS
AND THE BOARD OF LAND COMMISIONERS
OF THE STATE OF MONTANA

In the matter of the amend-) ment of Rules 26-2.10(10)-) S10310, S10320, S10330,) S10340, and S10350)	NOTICE OF AMENDMENT OF RULES 26-2.10(10)- S10310, S10320, S10330, S10340, and S10350

TO: All Interested Persons:

1. On May 25, 1975, the Department of State Lands and Board of Land Commissioners published notice of proposed amendments to Rules 26-2.10(10)-S10310, S10320, S10330, S10340, and S10350 concerning strip and underground mine reclamation at page 675 of the 1978 Montana Administrative Register, issue no. 5. A public hearing, at which written and oral testimony was taken, was held on June 15, 1978. Written testimony was accepted until June 22, 1978.

2. The Board has adopted the proposed rules with the following changes:

26-2.10(10)-S10310 MINING AND RECLAMATION PLANS (1) Backfilling and grading.

(a) Backfilling and grading of the disturbed area shall be completed prior to removal of necessary reclamation equipment from the area of operation. If the operator for good cause shown cannot complete backfilling and grading requirements within the time limits set for current backfilling and grading, the Department may approve a revised time table. Additional bonding may be required.

(b) All final grading on the area of land affected shall be to the approximate original contour of the land. The final surface of the restored area need not necessarily have the exact elevations of the original ground surface. Where a flat surface or a surface with less slope than the original ground surface is desired, such surface shall be deemed to comply with backfilling and grading to the approximate original contour. With the exception of highwalls, railroad loops and access road cuts and fills through unmined lands, no final graded slopes shall be steeper than five horizontal to one vertical (5:1) unless otherwise approved in writing by the Department.

(c) In order to achieve the approximate original contour, the permittee shall transport, backfill, compact (where advisable to ensure stability or to prevent leaching of toxic materials), and grade all spoil material to climinate all highwalls, spoil piles, and depressions. Cut-and-fill terraces may be used only in those situations expressly identified in this section. The postmining graded slopes must approximate the premining natural slopes in the area as defined in paragraph (i).

(i) Slope measurements. (A) To determine the natural slopes of the area before mining, sufficient slopes to adequately represent the land surface configuration, and as approved by the Department in accordance with site conditions, must be accurately measured and recorded. Each measurement shall consist of an angle of inclination along the prevailing slope extending 100 linear feet above and below or beyond the mineral outcrop or the area to be disturbed, or, where this is impractical, at locations specified by the Department. Where the area has been previously mined, the measurements shall extend at least 100 feet beyond the limits of mining disturbances as determined by the Department to be representative of the premining configuration of the land. Slope measurements shall take into account natural variations in slope so as to provide accurate representation of the range of natural slopes and shall reflect geomorphic differences of the area to be disturbed. Slope measurements may be made from topographic maps showing contour lines, having sufficient detail and accuracy consistent with the submitted mining and reclamation plan.

(B) After the disturbed area has been graded, the final graded slopes shall be measured at the beginning and end of lines established on the prevailing slope at locations representative of premining slope conditions and approved by the Department. ~~These measurements~~ This grading must not be ~~made~~ done so as to allow unacceptably steep slopes to be constructed.

(ii) Final graded slopes. The final graded slopes shall not exceed either the approximate premining slopes as determined according to paragraph (i)(A) and approved by the Department or any lesser slope specified by the Department based on consideration of soil, climate, or other characteristics of the surrounding area. Postmining final graded slopes need not be uniform.

(d) On approval by the Department, cut-and-fill terraces may be allowed if the terraces are compatible with the approved postmining land use. Terraces shall be installed in such a way so as not to prohibit vehicular access or revegetation procedures. Terraces shall be installed at varying intervals as determined by climatic conditions, spoil and topsoil composition and texture, slope steepness, and slope length. Suggested terrace installation intervals shall be submitted in the reclamation plan. Additional surface manipulation procedures shall be installed as required by the Department. Culverts and underground rock drains shall be used on the terrace only when approved by the Department.

(e) Small depressions. The requirement of this section to achieve approximate original contour does not prohibit construction of small depressions if they are approved by the Department. These depressions shall be compatible with the approved postmining land use and shall not be inappropriate substitutes for construction of lower grades on the reclaimed lands. Depressions approved under this section shall have a holding capacity of less than 1 cubic yard of water or, if it is necessary that they be larger, shall not restrict normal access throughout the area or constitute a hazard. Large, permanent impoundments shall be governed by paragraph (f) of this section and by S10330 of this subchapter.

(f) Permanent impoundments. Permanent impoundments may be retained in mined and reclaimed areas, provided all highwalls are eliminated by grading to appropriate contour and the provisions for postmining land use and protection of the hydrologic balance are met. No impoundments shall be constructed on top of areas in which excess materials are deposited pursuant to Rule ¥ S10312 of this subchapter.

(g) All exposed mineral seams remaining after mining shall be covered with a minimum of four feet of nontoxic and noncombustible material, and acid-forming, toxic-forming, combustible materials, or any other waste materials identified by the Department that are exposed, used, or produced during mining shall be covered with a minimum of eight feet of nontoxic and noncombustible material; or, if necessary, treated to neutralize toxicity in order to prevent water pollution and sustained combustion, and to minimize adverse effects on plant growth and land uses. Where necessary to protect against upward migration of salts, exposure by erosion, to provide an adequate depth for plant growth or to otherwise meet local conditions, the Department shall specify thicker amounts of cover using nontoxic material. Acid-forming or toxic-forming material shall not be buried or stored in proximity to a drainage course so as to cause or pose a threat of water pollution.

(h) An operator shall show where the overburden and parting strata materials are to be placed in the backfill. Materials which are not conducive to revegetation techniques, establishment, and growth shall not be left on the top or within eight feet of the top of regraded spoils or at the surface of any other affected areas. The Department may require that problem materials be placed at a greater depth.

(i) The operator shall bury under adequate fill all materials set forth in section 50-1043 only after approval of the method and site by the Department. In the event that the operator

plans to use fly-ash for fill material, it must be shown by adequate testing and analysis that the fly-ash material will not have any adverse or detrimental effect. Plans for placement of fly-ash or any other foreign matter or processes in the backfill must be approved by the Department.

(j) Backfilled materials shall be selectively placed and compacted wherever necessary to prevent leaching of toxic-forming materials into surface or subsurface waters in accordance with Rule S10330 of this subchapter and wherever necessary to ensure the stability of the backfilled materials. The method of compacting material and the design specifications must be approved by the Department before the toxic materials are covered.

(k) Before waste materials from a coal preparation or conversion facility or from other activities conducted outside the permit area such as municipal wastes are used for fill material, it must be demonstrated to the Department by hydrogeological means and chemical and physical analyses that use of these materials will not adversely affect water public health and safety; and will not cause instability in the backfilled area. Where thick overburden is encountered, all highwalls and depressions will be eliminated by backfilling with soil and suitable waste materials. The thick overburden provisions of this section may apply only where the final thickness is the sum of the overburden thickness and mineral thickness. Final thickness is the product of the overburden thickness times the bulking factor to be determined for each mine area.

(l) Box cut spoils or portions thereof, shall be hauled to the final cut if:

(i) Excessively large areas of the mine perimeter will be disturbed by proposed methods for highwall reduction or regrading of box cut spoils; or

(ii) material shortages in the area of the final highwall or spoil excesses in the area of the box cut are likely to preclude effective recontouring.

(m) Final grading shall be kept current with mining operations. In order to be considered current, grading and backfilling shall meet the following requirements unless exceptions are granted by the Department.

(i) on lands affected by area strip mining, the grading and backfilling shall not be more than two spoil ridges behind the pit being worked; the spoil from that pit being considered the first ridge. The Department may allow delay grading of box cut spoils if better recontouring will result.

(ii) if the operation involves stripping and augering, the augering shall follow the stripping by not more than sixty (60) days and final grading and backfilling shall follow the augering by not more than fifteen (15) days, but in no instance shall an area be left ungraded more than 1,500 feet behind the augering.

(iii) all backfilling and grading shall be completed within ninety (90) days after the department has determined that the operation is completed or that a prolonged suspension of work in the area will occur. Final pit reclamation shall proceed as close behind the coal loading operation as the frequency and location of ramp roads, the use of overburden stripping equipment in highwall reclamation, and other factors may allow.

(iv) grading and backfilling of other types of subject excavations shall be kept current as departmental directives dictate for each set of field circumstances.

(n) Reclamation equipment to be used in grading and highwall reduction shall be listed in the application for a permit.

(2) Highwall reduction.

(a) All highwalls shall be reduced and the steepest slope of the reduced highwall shall be no greater than 20 degrees from the horizontal. Highwall reduction shall be commenced at or beyond the top of the highwall and sloped to the graded spoil bank.

(b) The company shall show by a narrative and cross-sections the plan of highwall reduction, including the limits of buffer zone.

(c) Grading along the contour. All final grading, preparation of overburden before replacement of topsoil, and placement of topsoil shall be done along the contour to minimize subsequent erosion and instability. If such grading preparation or placement along the contour would be hazardous to equipment operators, then grading, preparation or placement in a direction other than generally parallel to the contour may be used. In all cases, grading, preparation, or placement shall be conducted in a manner which minimizes erosion and provides a surface for replacement of topsoil which will minimize slippage.

(d) Regrading or stabilizing rills and gullies. When rills or gullies deeper than nine inches form in areas that have been regraded and the topsoil replaced but vegetation

has not yet been established the permittee shall fill, grade, or otherwise stabilize the rills and gullies and reseed or replant the areas. The Department shall specify that rills or gullies of lesser size be stabilized if the rills or gullies will be disruptive to the approved postmining land use or may result in additional erosion and sedimentation.

(3) Buffer zones.

(a) All mining activities, including highwall reduction and related reclamation, shall cease at least 100 feet from a property line, permanent structure, unmineable steep or precipitous terrain, or any area determined by the Department to be of unique scenic, historical, cultural, or other unique value. If special values or problems are encountered, the Department may modify buffer zone requirements.

(b) The transition from undisturbed ground shall be blended with cut or fill to provide a smooth transition in topography.

(4) Roads and railroad loops.

(a) Haulageway roads through permitted areas shall be allowed providing that their presence does not delay or prevent recontouring and revegetation on immediately adjacent spoils.

(b) Ramp roads will be allowed under the following criteria:

(i) No more than two ramp roads per mile of active pit being mined shall be allowed. Fractional portions of ramp roads resulting from active pit lengths of uneven mileage will be counted as an additional ramp road allowable. (Example: 2.1 (active pit mile length) x 2 (ramp roads/mile) = 4.2 (ramp roads) or 5 ramp roads allowable). The Department may authorize an additional ramp road.

(ii) Ramp roads, beginning from the spoil edge of the pit being worked, shall be engineered so as to exhibit an overall seven percent grade, or steeper, until topping on graded spoils. As each new pit is excavated, the ramp roads shall be regraded, as soon as possible, so as to remain at an overall seven percent or steeper grade from the spoil side of the new pit. In all cases, ramp road renovation grading shall allow for topsoiling and revegetative activities to proceed during prime revegetative seasons. Lesser slopes may be allowed if the Department makes a written determination that seven percent slopes would cause safety problems or hamper successful reclamation.

(c) The Department may require that access roads constructed after the effective date of the Act be graded, constructed, and maintained in accordance with the following requirements:

(i) No sustained grade shall exceed eight percent.

(ii) The maximum pitch grade shall not exceed 12 percent for 300 feet.

(iii) There shall not be more than 300 feet of maximum pitch grade for each 1000 feet.

(iv) The grade on switchback curves shall be reduced to less than the approach grade and shall not be greater than ten percent.

(v) Cut slopes shall not be more than 2:1 in soils or 1/2:1 in rock.

(vi) All grades referred to shall be subject to a tolerance of two percent of measurement. Linear measurements shall be subject to a tolerance of ten percent of measurement.

(vii) Additional requirements may be imposed by the Department if special drainage or steep terrain problems are likely to be encountered.

(d) The location of a proposed road or railroad loop shall be identified on the site by visible markings at the time the reclamation and mining plan is preinspected and prior to the commencement of construction. No such construction shall proceed along dry coulees and intermittent drainageways unless the operator assures that no offsite sedimentation will result.

(e) Drainage ditches shall be constructed on both sides of the through-cut, and the inside shoulder of a cut-fill section, with ditch relief cross-drains being spaced according to grade. Water shall be intercepted before reaching a switchback or large fill and shall be drained off or released below the fill. Drainage structures shall be constructed in order to cross a stream channel and shall not affect the flow or sediment load of the stream.

(f) All cut and fill slopes resulting from construction of access road, railroad loop or haulageway road outside of the area to be mined shall be stabilized and revegetated the first seasonal opportunity.

(g) No roads or railroad loops shall be surfaced with refuse coal, acid-producing or toxic materials or with any material which will produce a concentration of suspended solids in surface drainage.

(h) All appropriate methods shall be employed by the operator to prevent loss of haulage or access road surface material in the form of dust.

(i) Upon abandonment of any road or railroad loop, the area shall be conditioned and seeded and adequate measures taken to prevent erosion by means of culverts, water bars, or other devices. Such areas shall be abandoned in accordance with all provisions of Chapter 10, Title 50, R.C.M. 1947 and of the Rules and Regulations adopted pursuant thereto. Upon completion of mining and reclamation activities, all roads shall be closed and reclaimed unless the landowner requests in writing and the Department concurs that certain roads of specified portions thereof are to be left open for further use.

(5) Hydrologic impact of roads.

(a) General. Access and haul roads and associated bridges, culverts, ditches, and road rights-of-way shall be constructed, maintained, and reclaimed to prevent additional contributions of suspended solids to streamflow, or to runoff outside the permit area to the extent possible, using the best technology currently available. In no event shall the contributions be in excess of requirements set by applicable State or Federal law. All access and haul roads shall be removed and the land affected regraded and revegetated consistent with the requirements of sections S10310 and S10350 of this subchapter, unless retention of a road is approved as part of a postmining land use under Rule IV of this subchapter as being necessary to support the postmining land use or necessary to adequately control erosion and the necessary maintenance is assured.

(b) Construction.

(i) All roads, insofar as possible, shall be located on ridges or on the available flatter and more stable slopes to minimize erosion. Stream fords are prohibited unless they are specifically approved by the Department as temporary routes across dry streams that will not adversely affect sedimentation and that will not be used for coal haulage. Other stream crossings shall be made using bridges, culverts or other structures designed and constructed to meet the requirements of this paragraph. Roads shall not be located in active stream

channels nor shall they be constructed or maintained in a manner that increases erosion or causes significant sedimentation or flooding. However, nothing in this paragraph will be construed to prohibit relocation of stream channels in accordance with subparagraph (5)(b) of this section.

(ii) In order to minimize erosion and subsequent disturbances of the hydrologic balance, roads shall be constructed in compliance with the following grade restrictions or other grades determined by the Department to be necessary to control erosion:

(A) The overall sustained grade shall not exceed eight percent.

(B) The maximum grade greater than ten percent shall not exceed 12 percent for more than 300 feet.

(C) There shall not be more than 300 feet of grade exceeding eight percent within each 1,000 feet.

(iii) All access and haul roads shall be adequately drained using structures such as, but not limited to, ditches, water barriers, crossdrains, and ditch-relief drains. For access and haul roads that are to be maintained for more than one year, water-control structures shall be designed with a discharge capacity capable of passing the peak runoff from a ten-year, 24-hour precipitation event. Drainage pipes and culverts shall be constructed to avoid plugging or collapse and erosion at inlets and outlets. Drainage ditches shall be provided at the toe of all cut slopes formed by construction of roads. Trash racks and debris basins shall be installed in the drainage ditches wherever debris from the drainage area could impair the functions of drainage and sediment control structures. Ditch relief and cross-drains shall be spaced according to grade. Effluent limitations of paragraph (3)(b) of this section shall not apply to drainage from access and haul roads located outside the disturbed area as defined in this section unless otherwise specified by the Department.

(iv) Access and haul roads shall be surfaced with durable material. Toxic- and acid-forming substances shall not be used. Vegetation may be cleared only for the essential width necessary for road and associated ditch construction and to serve traffic needs.

(c) Maintenance. (i) Access and haul roads shall be routinely maintained by means such as, but not limited to wetting, scraping or surfacing.

(ii) Ditches, culverts, drains, trash racks, debris basins and other structures serving to drain access and haul roads shall not be restricted or blocked in any manner that impedes drainage or adversely affects the intended purpose of the structure.

(6) Hydrologic impacts of other transport facilities. Railroad loops, spurs, sidings and other transport facilities shall be constructed, maintained and reclaimed to control diminution or degradation of water quality and quantity and to prevent additional contributions of suspended solids to streamflow, or to runoff outside the permit area to the extent possible, using the best technology currently available. In no event shall contributions be in excess of requirements set by applicable State or Federal law.

26-2.10(10)-S10320 BLASTING (1) General. (a) The permittee shall comply with all applicable local, State, and Federal laws and regulations and the requirements of this section in the storage, handling, preparation, and use of explosives.

(b) Blasting operations that use more than the equivalent of five pounds of TNT shall be conducted according to a time schedule approved by the Department.

(c) All blasting operations shall be conducted by experienced, trained, and competent persons who understand the hazards involved. Persons working with explosive materials shall--

(i) have demonstrated a knowledge of, and a willingness to comply with, safety and security requirements;

(ii) be capable of using mature judgment in all situations;

(iii) be in good physical condition and not addicted to intoxicants, narcotics, or other similar types of drugs;

(iv) possess current knowledge of the local, State and Federal laws and regulations applicable to his work; and

(v) have obtained a certificate of completion of training and qualification as required by State law or the Department.

(2) Preblasting survey. (a) On the request to the Department of a resident or owner of a man-made dwelling or structure that is located within one-half mile of any part of the permit area, the permittee shall conduct a preblasting survey of the dwelling or structure and submit a report of the survey to the Department.

(b) Personnel approved by the Department shall conduct the survey to determine the condition of the dwelling or structure and to document any preblasting damage and other physical factors that could reasonably be affected by the blasting. Assessments of structures such as pipes, cables, transmission lines, and wells and other water systems shall be limited to surface condition and other readily available data. Special attention shall be given to the preblasting condition of wells and other water systems used for human, animal, or agricultural purposes and to the quantity and quality of the water.

(c) A written report of the survey shall be prepared and signed by the person or persons who conducted the survey and prepared the written report. The report shall include recommendations of any special conditions or proposed adjustments to the blasting procedures outlined in subsection (5) which should be incorporated into the blasting plan to prevent damage. Copies of the report shall be provided to the person requesting the survey and to the Department.

(3) Public notice of blasting schedule. At least ten days, but not more than 20 days before beginning a blasting program in which explosives that use more than the equivalent of five pounds of TNT are detonated, the permittee shall publish a blasting schedule in a newspaper of general circulation in the locality of the proposed site. Copies of the schedule shall be distributed by mail to local governments and public utilities and to each residence within one mile of the blasting sites described in the schedule. The permittee shall republish and redistribute the schedule by mail at least every three months. Blasting schedules shall not be so general as to cover all working hours but shall identify as accurately as possible the location of the blasting sites and the time periods when blasting will occur. The blasting schedule shall contain at a minimum--

(a) identification of the specific areas in which blasting will take place. The specific blasting areas described shall not be larger than 300 acres with a generally contiguous border;

(b) dates and times when explosives are to be detonated expressed in not more than four-hour increments;

(c) methods to be used to control access to the blasting area;

(d) types of audible warnings and all clear signals to be used before and after blasting; and

(e) a description of possible emergency situations (defined in subparagraph (5)(a)(ii) of this section), which have been approved by the Department when it may be necessary to blast at times other than those described in the schedule.

(4) Public notice of changes to blasting schedules. Before blasting in areas not covered by previous schedule or whenever the proposed frequency of individual detonations are materially changed, the permittee shall prepare a revised blasting schedule in accordance with the procedures in subsection (3) of this section. If the change involves only a temporary adjustment of the frequency of blasts, the permittee may use alternate methods to notify the governmental bodies and individuals to whom the original schedule was sent.

(5) Blasting procedures. (a) General. (i) All blasting shall be conducted only during the daytime hours, defined as sunrise until sunset. Based on public requests or other considerations, including the proximity to residential areas, the Department may specify more restrictive time periods.

(ii) Blasting may not be conducted at times different from those announced in the blasting schedule except in emergency situations where rain, lightning, other atmospheric conditions, or operator or public safety requires unscheduled detonation.

(iii) Warning and all-clear signals of different character that are audible within a range of one-half mile from the point of the blast shall be given. All persons within the permit area shall be notified of the meaning of the signals through appropriate instructions and signs posted as required by Rule VII of this subchapter.

(iv) Access to the blasting area shall be regulated to protect the public and livestock from the effects of blasting. Access to the blasting area shall be controlled to prevent unauthorized entry at least 10 minutes before each blast and until the permittee's authorized representative has determined that no unusual circumstances such as imminent slides or undetonated charges exist and access to and travel in or through the area can safely resume.

(v) Areas in which charged holes are awaiting firing shall be guarded, barricaded and posted, or flagged against unauthorized entry.

(vi) Airblast shall be controlled such that it does not exceed 128 decibel linear-peak at any man-made dwelling or structure located within one-half mile of the permit area.

(vii) Except where lesser distances are approved by the Department (based upon a preblasting survey or other appropriate investigations), blasting shall not be conducted within--

(A) 1,000 feet of any building used as a dwelling, school, church, hospital, or nursing facility;

(B) 500 feet of facilities including, but not limited to, disposal wells, petroleum or gas-storage facilities, municipal water-storage facilities, fluid-transmission pipelines, gas or oil-collection lines, or water and sewage lines; and

(C) 500 feet of an underground mine not totally abandoned except with the concurrence of the Mining Enforcement and Safety Administration.

(viii) All holes primed shall be blasted within 72 hours.

(b) Blasting standards. (i) Blasting shall be conducted to prevent injury to persons, damage to public or private property outside the permit area, adverse impacts on any underground mine, and change in the course, channel, or availability of ground or surface waters outside the permit area.

(ii) In all blasting operations, except as otherwise stated, the maximum peak particle velocity of the ground motion in any direction shall not exceed one inch per second at the immediate location of any dwelling, public building, school, church, or commercial or institutional building. The Department may reduce the maximum peak particle velocity allowed if it determines that a lower standard is required because of density of population or land use, age or type of structure, geology or hydrology of the area, frequency of blasts or other factors.

(iii) The maximum peak particle velocity of ground motion does not apply to property inside the permit area that is owned or leased by the permittee.

(iv) An equation for determining the maximum weight of explosives that can be detonated within any eight-millisecond period is given in subparagraph (v). If the blasting is conducted in accordance with this equation, the Department will consider the vibrations to be within the 1 inch per second limit.

(v) The maximum weight of explosives to be detonated within any eight millisecond period shall be determined by the formula

$$W = \left(\frac{D}{60}\right)^2$$

where W=the maximum weight of explosives, in pounds, that can be detonated in any 8 millisecond period, and D=the distance, in feet, to the nearest dwelling, school, church, or commercial or institutional building.

For distances between 350 and 5,000 feet, solution of the equation results in the following maximum weight:

Distance, in feet (D):	Maximum weight, in pounds (W)
350	34
400	44
500	69
600	100
700	136
800	178
900	225
1,000	278
1,100	336
1,200	400
1,300	469
1,400	544
1,500	625
1,600	711
1,700	803
1,800	900
1,900	1,002
2,000	1,111
2,500	1,736
3,000	2,500
3,500	3,402
4,000	4,444
4,500	5,625
5,000	6,944

(vi) If on a particular site the peak particle velocity continuously exceeds one-half inch per second after a period of one second following the maximum ground particle velocity, the Department shall require the blasting procedures to be revised to limit the ground motion.

(c) Seismograph measurements. (i) Where a seismograph is used to monitor the velocity of ground motion and the peak particle velocity limit of one inch per second is not exceeded, the equation in subparagraph (v) need not be used. However, if the equation is not being used, a seismograph record shall be obtained for every shot.

(ii) The use of a modified equation to determine maximum weight of explosives for blasting operations at a particular site may be approved by the Department on receipt of a petition accompanied by reports including seismograph records of test blasting on the site. However, in no case shall the Department authority approve the use of a modified equation where the peak particle velocity limit of one inch per second required in subparagraph (5)(b)(ii) of this section would be exceeded.

(iii) The Department may require a seismograph recording of any or all blasts.

(4) Records of blasting operations. A record of each blast, including seismograph reports, shall be retained for at least three years and shall be available for inspection by the Department and the public on request. The record shall contain the following data:

(i) Name of permittee, operator, or other person conducting the blast;

(ii) Location, date, and time of blast;

(iii) Name, signature, and license number of blaster-in-charge;

(iv) Direction and distance, in feet, to nearest dwelling, school, church, or commercial or institutional building neither owned or leased by the permittee;

(v) Weather conditions;

(vi) Type of material blasted;

(vii) Number of holes, burden, and spacing;

(viii) Diameter and depth of holes;

(ix) Types of explosives used;

(x) Total weight of explosives used;

(xi) Maximum weight of explosives detonated within any eight millisecond period;

(xii) Maximum number of holes detonated within any eight millisecond period;

(xiii) Methods of firing and type of circuit;

(xiv) Type and length of stemming;

(xv) If mats or other protections were used;

(xvi) Type of delay detonator used, and delay periods used;

(xvii) Seismograph records, where required, including--

(A) seismograph reading, including exact location of seismograph and its distance from the blast;

(B) name of person taking the seismograph reading; and

(C) name of person and firm analyzing the seismograph record.

26-2.10(10)-S10330 WATER QUALITY: Impoundment, Drainage, and Treatment (1) General provisions. The permittee shall plan and conduct mining and reclamation operations to minimize disturbance to the prevailing hydrologic balance in order to prevent long-term adverse changes in the hydrologic balance that could result from surface mining and reclamation operations, both on-and off-site. Changes in water quality and quantity, in the depth to groundwater, and in the location of surface water drainage channels shall be minimized such that the postmining land use of the disturbed land is not adversely affected, and applicable Federal and State statutes and regulations are not violated. Waters within the public domain of the State that possess a higher quality than that established on the effective date of established standards shall be maintained at their present high quality consistent with the powers granted to the board. Such high quality waters shall not be lowered in quality unless and until it is affirmatively demonstrated to the board through public hearing, that such a change is justifiable as a result of necessary economic or social development and that the change will not adversely affect the present and future uses of such waters. In implementing this policy as it relates to interstate streams, the Administrator of the Environmental Protection Agency shall be provided with such information as will enable the Administrator to discharge his reponsibilities under the Federal Water Pollution Control Act. The permittee shall conduct operations so as to minimize water pollution and shall, where necessary, use treatment methods to control water pollution. The permittee shall emphasize surface mining and reclamation practices that will prevent or minimize water pollution and changes in flows in preference to the use of water treatment facilities. Practices to control and minimize pollution include, but are not limited to, stabilizing disturbed areas through grading, diverting runoff, achieving quick growing stands of temporary vegetation, lining drainage channels with vegetation, mulching, sealing acid-forming and toxic-forming materials, and selectively placing waste materials in backfill areas. If pollution can be controlled only by treatment, the

permittee shall operate and maintain the necessary water-treatment facilities for as long as treatment is required.

(2) Impoundment and treatment. Treatment facilities in sufficient size and number consisting of but not limited to collection basins, water retarding structures and siltation dams shall be constructed with prior approval of the Department. All such facilities shall be constructed at or above the points of discharge into receiving streams for the purpose of treating acid or toxic water and for the settling of sediment prior to discharge into the receiving stream. As part of an application for permit, an operator shall submit the design specifications, drawings, method of operation and control, and quality of discharge of the treatment facilities. The operator shall indicate on the maps submitted as part of an application for permit the proposed location of all treatment facilities. Proposed reclamation of treatment facilities shall be included in the reclamation plan. No water quality treatment of approved lakes or ponds shall be permitted without Department approval. Under no circumstances shall water be discharged into highly erodible soil or spoil banks. Additional treatment facilities may be required by the Department after commencement of the operation if conditions arise that could not be anticipated at the time of the permit application.

(3) Drainage. (a) All surface drainage from the disturbed area, including disturbed areas that have been graded, seeded, or planted shall be passed through a sedimentation pond, a series of sedimentation ponds or treatment facilities before leaving the permit area. Sedimentation ponds shall be retained until drainage from the disturbed area has met the water quality requirements of this section and the revegetation requirements of section S10350 of this subchapter have been met. The Department may grant exemptions from this requirement only when the disturbed drainage area within the total disturbed area is small and if the permittee shows that sedimentation ponds are not necessary to meet the effluent limitations of this paragraph and to maintain water quality in downstream receiving waters. For purpose of this section only, disturbed area shall not include those areas in which only diversion ditches, sedimentation ponds, or roads are installed in accordance with this section and the upstream area is not otherwise disturbed by the permittee. Sedimentation ponds required by this paragraph shall be constructed in accordance with subsection (6) in appropriate locations prior to any mining in the affected drainage area in order to control sedimentation or otherwise treat water in accordance with this paragraph.

(b) Discharges from areas disturbed by surface mining and reclamation operations must meet all applicable Federal and

State laws and regulations, including the Total Suspended Solids provision of 30 CFR, Part 715, and, at a minimum, the following numerical effluent limitations:

EFFLUENT LIMITATIONS, IN MILLIGRAMS PER LITER, mg/l, EXCEPT FOR pH

Effluent characteristics	Maximum allowable[1]	Average of daily values for 30 consecutive discharge days[1]
Iron, total	7.0	3.5
Manganese, total[3]	4.0	2.0
~~Total suspended solids[1]~~	~~45.0~~	~~30.0~~
pH[2]	Within the range 6.0 to 9.0.	

[1]Based on representative sampling.

[2]Where the application of neutralization and sedimentation treatment technology results in inability to comply with the manganese limitations set forth, the Department may allow the pH level in the discharge to exceed to a small extent the upper limit of 9.0 in order that the manganese limitations will be achieved.

[3]Applicable only under acid drainage conditions.

The discharge must register positive net alkalinity (total alkalinity must exceed the total acidity) and the turbidity shall not exceed 100 J.C.U. The Department may modify above requirements if special problems occur.

The maximum total allowable increase to naturally occurring stream turbidity is ten Jackson Candle Units except that four hours following a major precipitation event, the discharge shall not contain suspended sediments in excess of 500 Jackson Candle Units above normal and not over 100 Jackson Candle Units above normal 24 hours thereafter. All analyses are to be defined and performed according to the Standard Methods for the Examination of Water and Wastewater, unless otherwise specified in writing by the Department.

(c) Any overflow or other discharge of surface water from the disturbed area within the permit area demonstrated by the permittee to result from a precipitation event larger than a 10-year, 24-hour frequency event will not be subject to the effluent limitations of paragraph (3)(b).

(d) The permittee shall install, operate, and maintain adequate facilities to treat any water discharged from the disturbed area that violates applicable Federal or State laws or regulations or the limitations of paragraph (3)(b). If the pH of waters to be discharged from the disturbed area is normally less than 6.0, an automatic lime feeder or other neutralization process approved by the Department shall be installed, operated, and maintained. If the Department finds--

(i) that small and infrequent treatment requirements to meet applicable standards do not necessitate use of an automatic neutralization process; and

(ii) that the mine normally produces less than 500 tons of minerals per day, then the Department may approve the use of a manual system if the permittee ensures consistent and timely treatment.

(e) No surface mine drainage shall be discharged through or permitted to infiltrate into existing deep mine workings. Location of all known existing deep mines within the permit area and plans for remedial measures shall be included in the application for a permit.

(4) Monitoring. (a) Surface water monitoring. The permittee shall submit for approval by the Department a surface water monitoring program which:

(i) provides adequate monitoring of all discharge from the disturbed area.

(ii) provides adequate data to describe the likely daily and seasonal variation in discharges from the disturbed area in terms of water flow, pH, total iron, total manganese, and total suspended solids and, if requested by the Department any other parameter characteristic of the discharge.

(iii) provides monitoring at appropriate frequencies to measure normal and abnormal variations in concentrations.

(iv) provides an analytical quality control system including standard methods of analysis such as those specified in 40 CFR 136.

(v) provides a regular report of all measurements to the Department within 60 days of sample collection, unless violations of permit conditions occur, in which case the Department shall be notified immediately after receipt of analytical results by the permittee.

(b) Reporting. Monthly monitoring reports, where applicable, shall be submitted to the Department including the number of operating days, the gallons of drainage treated, a log of the tests made in accordance with these rules, and a description of any operating problems and the corrective action taken.

(i) If the discharge is subject to regulation by a Federal or State permit issued in compliance with the Federal Water Pollution Control Act Amendment of 1972 (33 U.S.C. §§ 1251-1373), a copy of the completed reporting form supplied to meet the permit requirements may be submitted to the Department to satisfy the reporting requirements if the data meet the sampling frequency and other requirements of this paragraph.

(ii) After disturbed areas have been regraded and stabilized in accordance with this part, the permittee shall monitor surface water flow and quality. Data from this monitoring shall be used to demonstrate that the quality and quantity of runoff without treatment will be consistent with the requirement of this section to minimize disturbance to the prevailing hydrologic balance and with the requirements of this part to attain the approved postmining land use. These data shall provide a basis for approval by the Department for removal of water quality or flow control systems and for determining when the requirements of this section are met. The Department shall determine the nature of data, frequency of collection, and reporting requirements.

(iii) Equipment, structures, and other measures necessary to accurately measure and sample the quality and quantity of surface water discharges from the disturbed area of the permit area shall be properly installed, maintained, and operated and shall be removed when no longer required.

(5) Diversions. (a) Away from disturbed areas. All surface water which might damage regraded slopes, or drain into the stripping pit shall be intercepted on the uphill side of the highwall or other mine perimeters by diversion ditches and conveyed by stable channels or other means to natural or prepared watercourses outside the operation, unless it is determined by the Department that such ditches and channels are unnecessary or would create a more serious pollution problem. Such conveyances shall be of sufficient size and grade to prevent overflow into the mine area. If the ditches are likely to carry surface water only intermittently, they will be retopsoiled and revegetated with grasses, forbs and/or legumes. All constructed diversion ditches shall be included in the permit acreage and shown on the map. The following requirements shall be met:

(i) Temporary diversion structures are those used during mining and reclamation. When no longer needed, these structures shall be removed and the area reclaimed. Temporary diversion structures shall be constructed to safely pass the peak runoff from a precipitation event with a one-year recurrence interval or a larger event as specified by the Department.

(ii) Permanent diversion structures are those remaining after mining and reclamation and approved for retention by the Department and other appropriate State and Federal agencies. To protect fills and property and to avoid danger to public health and safety, permanent diversion structures shall be constructed to safely pass the peak runoff from a precipitation event with a 100-year recurrence interval or a larger event as specified by the Department. Permanent diversion structures shall be constructed with gently sloping banks that are stabilized by vegetation. Asphalt, concrete, or other similar linings shall not be used unless specifically required to prevent seepage or to provide stability and are approved by the Department.

(iii) Diversions shall be designed, constructed, and maintained in a manner to prevent additional contributions of suspended solids to streamflow or to runoff outside the permit area to the extent possible, using the best technology currently available. In no event shall such contributions be in excess of requirements set by applicable State or Federal law. Appropriate sediment control measures for these diversions shall include, but not be limited to, maintenances of appropriate gradients, channel lining, revegetation, roughness structures, and detention basins.

(b) Stream channel diversions.

(i) Flow from perennial and intermittent streams within the permit area may be diverted only when the diversions are approved by the Department and they are in compliance with local, State, and Federal statutes and regulations. When streamflow is allowed to be diverted, the new stream channel shall be designed and constructed to meet the following requirements:

(A) The average stream gradient shall be maintained and the channel designed, constructed, and maintained to remain stable and to prevent additional contributions of suspended solids to streamflow, or to runoff outside the permit area to the extent possible, using the best technology currently available. In no event shall such contributions be in excess of requirements set by applicable State or Federal law. Erosion control structures such as channel lining structures, retention basins, and artificial channel roughness structures shall be used only when approved by the Department for temporary diversions where necessary or for permanent diversions where they are stable.

An additional sediment storage volume must be provided equal to the sediment yield that can be expected from the disturbed land within the upstream drainage area. If sediment yield values representative of the area are not available from prior studies, the Department may authorize the calculation of a conservative sediment yield value from empirical data for runoff characteristics. If the empirical approach is used, the permittee may be required to conduct yearly bathymetric studies of representative sediment ponds in order to arrive at a measured sediment yield value to be used in future pond design. All ponds must be accurately surveyed immediately after construction to provide a baseline for later bathymetric surveys. If representative sediment yield values are not available and if the operator does not wish to use the empirical approach, he may, in the alternative, provide sediment storage volume equal to 0.2 acre-feet for such acre of disturbed area within the upstream drainage area. Upon approval of the Department, the sediment storage volume may be reduced in amount, as demonstrated by the permittee, equal to the sediment removed by other appropriate sediment control measures such as those identified in paragraph (6)(a) of this rule. In no event shall sediment cleaning occur less frequently than when the sediment storage is equal to or less than .80 of the sediment storage capacity.

(d) Ponds may be of the permanent pool or self-dewatering type. Dewatering-type ponds shall use siphon or other dewatering methods approved by the Department to prevent discharges of pollutants within the design flow.

(e) Spillway systems shall be properly located to maximize the distances from the point of inflow into the pond to maximize detention times. Spillway systems shall be provided to safely discharge the peak runoff from a precipitation event with a 25-year recurrence interval or larger event as specified by the Department.

(f) Sediment shall be removed from sedimentation ponds so as to assure maximum sediment removal efficiency and attainment and maintenance of effluent limitations. Sediment removal shall be done in a manner that minimizes adverse effects on surface waters due to its chemical and physical characteristics, on infiltration, on vegetation, and on surface and groundwater quality. Sediment that has been removed from sedimentation ponds and that meets the requirements for topsoil may be redistributed over graded areas in accordance with section S10340.

(g) If a sedimentation pond has an embankment that is more than 20 feet in height, as measured from the upstream toe of the embankment to the crest of the emergency spillway, or

has a storage volume of 20 acre-feet or more, the following additional requirements shall be met:

(i) An appropriate combination of principal and emergency spillways shall be provided to safely discharge the runoff resulting from a 100-year, six-hour precipitation event or larger event as specified by the Department.

(ii) Ponds shall be designed and constructed with an acceptable static safety factor of at least 1.5 of maximum design flood elevation of the pool to ensure embankment slope stability.

(iii) The minimum top width of the embankment shall not be less than the quotient of (H+35)/5, where H is the height of the embankment as measured from the upstream toe of the top of the embankment.

(iv) Ponds shall have appropriate barriers to control seepage along conduits that extend through the embankment.

(h) All ponds shall be designed and inspected under the supervision of and certified after construction by a registered professional engineer.

(i) All ponds shall be examined for structural weakness, erosion, and other hazardous conditions.

(j) All ponds shall be removed and the affected land regraded and revegetated consistent with the requirements of section S10310 and S10350 of this subchapter, unless the Department approves retention of the ponds pursuant to subsection (12) of this section.

(7) Discharge structures. Discharges from sedimentation ponds and diversions shall be controlled, where necessary, using energy dissipators, surge ponds, and other devices to reduce erosion and prevent deepening or enlargement of stream channels and to minimize disturbances to the hydrologic balance.

(8) Acid and toxic materials. Drainage from acid-forming and toxic-forming mine waste materials and soils into ground and surface water shall be avoided by--

(a) identifying, burying, and treating, where necessary, spoil or other materials that, in the judgment of the Department will be toxic to vegetation or that will adversely affect water quality if not treated or buried. Such material shall be disposed of in accordance with the provision of subparagraph S10310 (1)(g) of this subchapter;

(b) preventing or removing water from contact with toxic-producing deposits;

(c) burying or otherwise treating all toxic or harmful materials within 30 days, if such materials are subject to wind and water erosion, or within a lesser period designated by the Department. If storage of such materials is approved, the materials shall be placed on impermeable material and protected from erosion and contact with surface water. Waste ponds and other waste materials shall be maintained according to paragraph (d) below;

(d) burying or otherwise treating waste materials from preparation plants no later than 90 days after the cessation of the filling of the disposal area. Burial or treatment shall be in accordance with paragraph S103i0 (l)(g) of this subchapter;

(e) casing, sealing or otherwise managing boreholes, shafts, wells, and auger holes or other more or less horizontal holes to prevent pollution of surface or groundwater and to prevent mixing of groundwaters of significantly different quality. All boreholes that are within the permit area but are outside the surface or underground mining area or which extend beneath the mineral to be mined and into water bearing strata shall be plugged permanently in a manner approved by the Department, unless the boreholes have been approved for use in monitoring.

(f) taking such other actions as required by the Department.

(9) Groundwater.

(a) Recharge capacity of reclaimed lands. The disturbed area shall be reclaimed to restore approximate premining recharge capacity through restoration of the capability of the reclaimed areas as a whole to transmit water to the groundwater system. The recharge capacity should be restored to support the approved postmining land use and minimize disturbances to the prevailing hydrologic balance at the mined area and in associated offsite areas. The permittee shall be responsible for monitoring according to paragraph (9)(c) of this section to ensure operations conform to this requirement.

(b) Groundwater systems. Backfilled materials shall be placed to minimize adverse effects on groundwater flow and quality, to minimize offsite effects, and to support the approved postmining land use. The permittee shall be responsible for performing monitoring according to paragraph (9)(c) of this section to ensure operations conform to this requirement.

(c) Monitoring. Groundwater levels, infiltration rates, subsurface flow and storage characteristics, and the quality of groundwater shall be monitored in a manner approved by the Department to determine the effects of surface or underground mining and reclamation operations on the recharge capacity of reclaimed lands and on the quantity and quality of water in groundwater systems at the mine area and in associated offsite areas. When operations are conducted in such a manner that may affect the groundwater system, groundwater levels and groundwater quality shall be periodically monitored using wells that can adequately reflect changes in groundwater quantity and quality resulting from such operations. Sufficient water wells must be used by the permittee. The Department may require drilling and development of additional wells if needed to adequately monitor the groundwater system. As specified and approved by the Department, additional hydrologic tests, such as infiltration tests and aquifer tests, must be undertaken by the permittee to demonstrate compliance with paragraphs (a) and (b) of this subsection.

(10) Water rights and replacement. The permittee shall replace the water supply of an owner of interest in real property who obtains all or part of his supply of water for domestic, agricultural, industrial, or other legitimate use from an underground or surface source where such supply has been affected by contamination, diminution, or interruption proximately resulting from surface coal mine operation by the permittee.

(11) Alluvial valley floors west of the 100th meridian west longitude.

(a) Surface mining operations conducted in or adjacent to alluvial valley floors shall be planned and conducted so as to preserve the essential hydrologic functions of these alluvial valley floors throughout the mining and reclamation process. These functions shall be preserved by maintaining or reestablishing those hydrologic and biologic characteristics of the alluvial valley floor that are necessary to support the functions. The permittee shall provide information to the Department as required in paragraph (11)(c) of this section to allow identification of essential hydrologic functions and demonstrate that the functions will be preserved. The characteristics of an alluvial valley floor to be considered include, but are not limited to--

(i) the longitudinal profile (gradient), cross-sectional shape, and other channel characteristics of streams that have formed within the alluvial valley floor and that provide for maintenance of the prevailing conditions of surface flow;

(ii) aquifers (including capillary zones and perched water zones) and confining beds within the mined area which provide for storage, transmission, and regulation of natural groundwater and surface water that supply the alluvial valley floors;

(iii) quantity and quality of surface and groundwater that supply alluvial valley floors;

(iv) depth to and seasonal fluctuations of groundwater beneath alluvial valley floors;

(v) configuration and stability of the land surface in the flood plain and adjacent low terraces in alluvial valley floors as they allow or facilitate irrigation with flood waters or subirrigation and maintain erosional equilibrium; and

(vi) moisture-holding capacity of soils (or plant growth medium) within the alluvial valley floors, and physical and chemical characteristics of the subsoil which provide for sustained vegetation growth or cover through dry months.

(b) Surface mining operations located west of the 100th meridian west longitude shall not interrupt, discontinue, or preclude farming on alluvial valley floors, unless the premining land use has been undeveloped rangeland which is not significant to farming on the alluvial valley floors, or unless the area of affected alluvial valley floor is small and provides negligible support for the production from one or more farms. This subparagraph (b) does not apply to those surface mining operations that--

(i) were in production in the year preceding August 3, 1977, were located in or adjacent to an alluvial valley floor, and produced minerals in commercial quantities during the year preceding August 3, 1977; or

(ii) had specific permit approval by the Department before August 3, 1977, to conduct surface mining operations for an area within an alluvial valley floor.

(c) (i) Before surface mining and reclamation operations authorized under paragraph (11)(b) of this section may be issued a new, revised or amended permit, the permittee shall submit, for Department approval, detailed surveys and baseline data to establish standards against which the requirements of paragraph (11)(a) of this section may be measured and from which the degree of material damage to the quantity and quality of surface and groundwater that supply the alluvial valley floors may be assessed. The surveys and data shall include--

(A) a map, at a scale determined by the Department, showing the location and configuration of the alluvial valley floor;

(B) baseline data covering a full water year for each of the hydrologic functions identified in paragraph (11)(a) of this section;

(C) plans showing how the operation will avoid, during mining and reclamation, interruption, discontinuance, or preclusion of farming on the alluvial valley floors and will not materially damage the quantity or quality of water in surface and groundwater system that supply such valley floors;

(D) historic land use data for the proposed permit area and for farms to be affected; and

(E) such other data as the Department may require.

(ii) Surface mining operations which qualify for the exceptions in paragraph (11)(b) of this section are not required to submit the plans prescribed in (i)(C) of this paragraph.

(12) Permanent impoundments. Permanent water impoundments shall not be allowed unless approved by the Department. If the Department determines at any time that a permanent impoundment area will not fill to expected levels, meet acceptable water quality standards or any other relevant criteria, the impoundment area shall be regraded and surface drainage facilitated. Any permanent water impoundment authorized by the Department must be demonstrated to be in compliance with Rule S10311 and S10310 of this subchapter in addition to the following requirements:

(a) The size of the impoundment is adequate for its intended purposes.

(b) The impoundment dam construction is designed to achieve necessary stability with an adequate margin of safety compatible with that of structures constructed under Pub. L. 83-566 (16 U.S.C. 1006).

(c) The quality of the impounded water will be suitable on a permanent basis for its intended use, and discharges from the impoundment will not degrade the quality of receiving waters below the water quality standards established pursuant to applicable Federal and State law.

(d) The level of water will be reasonably stable; and evaluated based on the impoundment intended use.

(e) Final grading will comply with the provisions of section S10310 of this subchapter and will provide adequate safety and access for proposed water users.

(f) Water impoundments will not result in the diminution of the quality or quantity of water used by adjacent or surrounding landowners for agricultural, industrial, recreational, or domestic uses.

(13) ~~Hydrologic impact of roads.~~

~~(a) General. Access and haul roads and associated bridges, culverts, ditches, and road rights-of-way shall be constructed, maintained, and reclaimed to prevent additional contributions of suspended solids to streamflow, or to runoff outside the permit area to the extent possible, using the best technology currently available. In no event shall the contributions be in excess of requirements set by applicable State or Federal law. All access and haul roads shall be removed and the land affected regraded and revegetated consistent with the requirements of sections S10310 and S10350 of this subchapter, unless retention of a road is approved as part of a postmining land use under Rule IV of this subchapter as being necessary to support the postmining land use or necessary to adequately control erosion and the necessary maintenance is assured.~~

~~(b) Construction.~~

~~(i) All roads, insofar as possible, shall be located on ridges or on the available flatter and more stable slopes to minimize erosion. Stream fords are prohibited unless they are specifically approved by the Department as temporary routes across dry streams that will not adversely affect sedimentation and that will not be used for coal haulage. Other stream crossings shall be made using bridges, culverts or other structures designed and constructed to meet the requirements of this paragraph. Roads shall not be located in active stream channels nor shall they be constructed or maintained in a manner that increases erosion or causes significant sedimentation or flooding. However, nothing in this paragraph will be construed to prohibit relocation of stream channels in accordance with subparagraph (5)(b) of this section.~~

~~(ii) In order to minimize erosion and subsequent disturbances of the hydrologic balance, roads shall be constructed in compliance with the following grade restrictions or other grades determined by the Department to be necessary to control erosion:~~

~~(A) The overall sustained grade shall not exceed eight percent.~~

~~(B) The maximum grade greater than ten percent shall not exceed 12 percent for more than 300 feet.~~

~~(C) There shall not be more than 300 feet of grade exceeding eight percent within each 1,000 feet.~~

~~(iii) All access and haul roads shall be adequately drained using structures such as, but not limited to, ditches, water barriers, crossdrains, and ditch relief drains. For access and haul roads that are to be maintained for more than one year, water control structures shall be designed with a discharge capacity capable of passing the peak runoff from a ten year, 24 hour precipitation event. Drainage pipes and culverts shall be constructed to avoid plugging or collapse and erosion at inlets and outlets. Drainage ditches shall be provided at the toe of all cut slopes formed by construction of roads. Trash racks and debris basins shall be installed in the drainage ditches wherever debris from the drainage area could impair the functions of drainage and sediment control structures. Ditch relief and cross drains shall be spaced according to grade. Effluent limitations of paragraph (3)(b) of this section shall not apply to drainage from access and haul roads located outside the disturbed area as defined in this section unless otherwise specified by the Department.~~

~~(iv) Access and haul roads shall be surfaced with durable material. Toxic or acid forming substances shall not be used. Vegetation may be cleared only for the essential width necessary for road and associated ditch construction and to serve traffic needs.~~

~~(c) Maintenance. (i) Access and haul roads shall be routinely maintained by means such as, but not limited to, wetting, scraping or surfacing.~~

~~(ii) Ditches, culverts, drains, trash racks, debris basins and other structures serving to drain access and haul roads shall not be restricted or blocked in any manner that impedes drainage or adversely affects the intended purpose of the structure.~~

~~(14) Hydrologic impacts of other transport facilities. Railroad loops, spurs, sidings and other transport facilities shall be constructed, maintained and reclaimed to control diminution or degradation of water quality and quantity and to~~

~~prevent-additional-contributions-of-suspended-solids-to-stream-flow,-or-to-runoff-outside-the-permit-area-to-the-extent-possible, using-the-best-technology-currently-available.--In-no-event shall-contributions-be-in-excess-of-requirements-set-by-applicable-State-or-Federal-law.~~

~~(15)~~ Discharge of waters into underground mines. Surface and groundwaters shall not be discharged or diverted into underground mine workings.

26-2.10(10)-S10340 TOPSOILING (1) All available topsoil shall be removed from the area of land affected before further disturbance occurs. ~~The-operator-shall-segregate-the-A,-B, C-horizons,-or-such-appropriate-combinations-thereof-as-the and-the-Department-shall-require,-unless-the-operator-demonstrates-to-the-satisfaction-of-the-Department-that-such-segregation-will-not-significantly-enhance-the-post-mining-productivity-of-salvaged-topsoils.~~ The operator shall segregate surface soil material (A and possibly portions of underlying B and C horizons) from subsurface soil material (B and C horizons) in the salvage, stockpiling, and redistribution of topsoil. By means of a site-specific evaluation of the soil types present the operator shall recommend to the Department the depths to which he feels each of the two soil lifts for each soil type should be conducted. The operator shall then proceed in accordance with the Department's recommendation. If the operator demonstrates to the satisfaction of the Department that such segregation with regard to a specific soil type(s) is immaterial to the postmining productivity of this soil type(s), segregation will not be required. Topsoil removal shall precede each step of the mining operation. Topsoil shall be immediately redistributed according to the requirements of paragraphs (4), (5), and (7) of this section on areas graded to the approved postmining configuration.

(2) The topsoil shall be stockpiled if sufficient graded areas are not immediately available for redistribution. Stockpiles of salvaged topsoil shall be located in an area where they will not be disturbed by ongoing mining operations and will not be lost to wind erosion or surface runoff. All unnecessary compaction and contamination of the stockpiles shall be eliminated; and, once stockpiled, the topsoil shall not be rehandled until replaced on regraded disturbances. The operator shall ~~immediately~~ during the first appropriate season plant an annual and/or perennial crop or use other methods demonstrated to provide equal protection, such as snow fences, chemical binders, and mulching on topsoil stockpiles for the purposes of stabilization. Proposed stockpile locations shall be indicated on the map submitted as part of an application for a permit.

(3) Where the removal of topsoil results in erosion that may cause air or water pollution, the Department shall limit the size of the area from which topsoil may be removed at any one time and specify methods of treatment to control erosion of exposed overburden.

(4) Topsoil shall be redistributed in a manner that--

(a) achieves an approximate uniform thickness consistent with the postmining land uses;

(b) prevents excess compaction of the spoil and topsoil.

(5) Stockpiled topsoil shall be replaced on all areas to be seeded within a 90-day period prior to revegetative seeding or planting. Extreme care shall be exercised to guard against erosion during application and thereafter. In the case of abandoned roads, the roadbeds shall be ripped, disced, or otherwise conditioned before topsoil is replaced. The Department may prescribe additional alternate conditioning methods for the reclamation of abandoned roadbeds.

(6) If necessary redistributed topsoil shall be reconditioned by discing, ripping or other appropriate methods. Gypsum, lime, fertilizer, or other amendments may be added in accordance with section S10350 and/or as stated in the approved reclamation plan.

(7) Spoil surfaces shall be left roughened in final contour grading to eliminate slippage zones that may develop between deposited topsoil and heavy textured spoil surfaces. The operator shall take all measures necessary to assure the stability of topsoil on graded spoil slopes.

(8) Any application for permit or accompanying reclamation plan which for any reason proposes to use materials other than or along with topsoil for final surfacing of spoil or other disturbances shall document problems of topsoil quantity or quality. The following requirements must be met before use of material other than topsoil will be allowed:

(a) The permittee demonstrates that the selected overburden materials or an overburden-topsoil mixture is more suitable for restoring land capability and productivity by the results of chemical and physical analyses. These analyses shall include determinations of pH, percent organic material, nitrogen, phosphorus, potassium, texture class, water-holding capacity, and such other analyses as required by the Department. The Department also may require that results of field-site trials or greenhouse tests be used to demonstrate the feasibility of using such overburden materials.

(b) The chemical and physical analyses and the results of field-site trials and greenhouse tests are accompanied by a certification from a qualified soil scientist or agronomist.

(c) The alternative material is removed, segregated, and replaced in conformance with this section.

The application or plan must also show that the topsoil substitute(s) proposed:

(d) The alternative material will not contribute to or cause pollution of surface or underground waters;

(e) The alternative material will support a diverse cover of predominantly native perennial species consistent with section S10350.

26-2.10(10)-S10350 PLANTING AND REVEGETATION (1) A suitable permanent, effective, and diverse vegetative cover of species native to the area of disturbed land or species that will be capable of meeting the criteria set forth in Section 50-1045 shall be established on all areas of land affected except traveled portions of railroad loops and roadways or areas of authorized water confinement. Areas shall be planted or seeded during the first appropriate season following completion of grading, topsoil redistribution and remedial soil treatments.

(2) For areas qualifying as prime farmland, test plots shall be established and cropped until restoration of the premining productivity has been shown to the satisfaction of the Department. When restoration of the premining productivity has been demonstrated, the operator shall revegetate the test plots consistent with section 50-1045.

(3) All disturbed lands, except authorized water confinements and traveled portions of railroad loops and roads that are approved as a part of the postmining land use, shall be seeded or planted to achieve a vegetative cover of the same seasonal variety native to the area of disturbed land. Vegetative cover will be considered of the same seasonal variety when it consists of a mixture of species of equal or superior utility for the land use when compared with the naturally occurring vegetation during each season of the year.

(4) Introduced species may be substituted for native species only if appropriate field trials have demonstrated that the introduced species are of equal or superior utility for the approved postmining land use or are necessary to achieve a quick, temporary, and stabilizing cover. Such species substitution shall be approved by the Department. Except for mixtures designed to provide a quick, temporary, and stabilizing cover, the operator shall establish a permanent diverse vegetative cover of predominantly native species. Introduced

species shall meet applicable State and Federal seed or introduced species statutes and shall not include poisonous or potentially toxic species.

(5) The species of grasses, legumes, browse, trees, or forbs for seeding or planting and their pattern of distribution shall be selected by the permittee to provide a diverse, effective, and permanent vegetative cover with the seasonal variety, succession, distribution, and regenerative capabilities native to the area.

(6) The permittee shall consult with appropriate State and Federal wildlife and land management agencies and shall select those species that will fulfill the needs of wildlife, including food, water, cover, and space. Plant groupings and water resources shall be spaced and distributed to fulfill the requirements of wildlife.

(7) Where forest is necessary to comply with 50-1045, the permittee shall plant trees adapted for local site conditions and climate. Trees shall be planted in combination with an herbaceous cover of grains, grasses, legumes, forbs, or woody plants to provide a diverse, effective, and permanent vegetation cover with the seasonal variety, succession, and regeneration capabilities native to the area.

(8) Seeding and planting of disturbed areas shall be conducted during the first normal period for favorable planting conditions after final preparation. The normal period for favorable planting shall be that planting time generally accepted locally for the type of plant materials selected to meet specific site conditions and climate. Any disturbed areas, except water areas and surface areas of roads that are approved as part of the postmining land use, which have been graded shall be seeded with a temporary cover of small grains, grasses, or legumes to control erosion until an adequate permanent cover is established. When rills or gullies that would preclude the successful establishment of vegetation or the achievement of the postmining land use form in regraded topsoil and overburden materials, additional regrading or other stabilization practices will be required before seeding and planting as specified in section S10310 of this subchapter.

(9) The permittee shall use technical publications or the results of laboratory and field tests approved by the Department to determine the varieties, species, seeding rates, and soil amendment practices essential for establishment and self-regeneration of vegetation. The Department shall approve species selection and planting plans.

(10) An operator shall establish a permanent diverse vegetative cover of predominantly native species by drill seeding or planting, by seedling transplants, by establishing sod plugs, and/or by other methods. All methods must have prior approval of the Department.

(11) The operator shall utilize locally grown genotypical seed and seedlings when available in sufficient quality and quantity.

(12) An operator shall plant seed of a pure and viable nature. Unless otherwise approved by the Department, seed shall be at least 90% pure. Seeding rates shall reflect germination percentages.

(13) The operator shall consider soil, climate, and other relevant factors when planting and/or seeding to provide for the best seed germination and plant survival.

(14) All drill seeding shall be done on the contour. When grasses, shrubs and/or forbs are seeded as a mixture, they may be drill seeded in separate rows at intervals specified in the standard Soil Conservation Service (SCS) planting guidelines. Such mixed seedings shall be done in this manner wherever necessary to avoid deleterious competition of different vegetal types or to avoid seed distribution problems due to different seed sizes.

(15) Soil amendments shall be used as necessary to supplement the soil and to aid in the establishment of a permanent vegetative cover as specified in the approved reclamation plan or as later deemed necessary by the Department.

(16) Mulch shall be used on all regraded and topsoiled areas to control erosion, to promote germination of seeds, and to increase the moisture retention of the soil. Mulch shall be anchored to the soil surface where appropriate, to ensure effective protection of the soil and vegetation. Mulch means vegetation residues or other suitable materials that aid in soil stabilization and soil moisture conservation, thus providing micro-climatic conditions suitable for germination and growth, and do not interfere with the postmining use of the land. Annual grains such as oats, rye and wheat may be used instead of mulch when it is shown to the satisfaction of the Department that the substituted grains will provide adequate stability and that they will later be replaced by species approved for the post-mining use.

(17) Livestock grazing will not be allowed on reclaimed land until the seedlings are established and can sustain managed grazing. The Department, in consultation with the permittee and the landowner or in concurrence with the governmental agency having jurisdiction over the surface, shall determine when the revegetated area is ready for livestock grazing.

(18) An operator shall use any other means necessary to insure the establishment of a diverse and permanent vegetative cover, including but not limited to irrigation, and fencing, or other protective measures.

(19) The Department will annually inspect seeded areas at the end of the growing season to determine species diversity, germination, and seedling take. If the Department determines that seedings are unsuccessful in terms of good germination and/or seedling take, immediate investigative action shall be taken by the operator at the request of the Department to determine the cause so that alternatives can be employed to establish the desired permanent vegetative cover at the very next seasonal opportunity. The investigative report shall be submitted along with prescribed course of corrective action prior to the next growing season.

(20) If the area affected is to be primarily utilized by domestic stock, the Department may require incorporation of a grazing system after vegetative establishment to gauge stand tolerance to grazing pressure.

(21) Topsoil stockpiled in compliance with section S10340 of this subchapter must be seeded or planted with an effective cover of nonnoxious, quick growing annual and perennial plants during the first normal period for favorable planting conditions or protected by other approved measures as specified in section S10340.

(22) Success of revegetation shall be measured on the basis of control areas approved by the Department. Control areas mean land units of varying size and shape and maintained under the absence of livestock grazing for the purpose of measuring ground cover, productivity, and species diversity that are produced naturally. The control areas must be representative of geology, soils, slope, aspect, and vegetation in the permit area. Control areas shall be fenced to exclude grazing by domestic livestock. The Department shall approve the estimating techniques that will be used to determine the degree of success in the revegetated area. At least one control area will be established for each native ~~vegetation~~ community type found on the mine area. More than one control area will be established for types with significant variation due to edaphic factors, past management or other factors. Two or more community types may be included in one exclosure if the examples of each type are typical of that community type.

(23) The ground cover of living plants on the revegetated area shall be equal to the ground cover of living plants of the approved reference area for a minimum of two growing seasons. The ground cover shall not be considered equal if it is less than 90 percent of the ground cover of the reference area for any significant portion of the mined area.

3. The following are summaries of the comments received and the Department's response to those comments:

RULE 26-2.10(10)-S10310 MINING AND RECLAMATION PLANS

(1) COMMENT: In subsection (1), replace the eight foot burial rule with a four foot rule.

RESPONSE: The eight foot burial rule is a carry-over from the Department's previous rules. Comments were divided as to whether the rule should be retained. The proposed amendment is therefore rejected.

(2) COMMENT: In the second sentence in (1)(c)(i)(B), clarify to indicate that grading, and not measuring, must be done so as not to allow unacceptably steep slopes.

RESPONSE: The Department agrees. The proposed rule has been so modified.

(3) COMMENT: In (1)(c)(ii), place the word "Department" after "specified by the".

RESPONSE: The Department agrees. The proposed rule has been so modified.

(4) COMMENT: Modify the box cut spoils rule, (1)(l), by allowing box cut spoils to be hauled to the area of the final cut initially or when the final cut is made, or allowing the operator to move the spoils as the operation progresses; and allow the operator to choose which option will be used.

RESPONSE: This provision is part of the Department's original rules. In addition, all three options are possible under the present rule. The Department should retain authority on a case by case basis to determine which option should be used. The proposed modifications are therefore rejected.

(5) COMMENT: Add to subsection (1) paragraphs similar to those in the federal rules (715.14) relating to thick and thin overburden to fully comply with the federal program.

RESPONSE: The Department is required to adopt only those portions of the federal program which are more stringent than the Department's program. The thick and thin overburden provision represent exceptions to the approximate original contour requirement which would make the Department's program less strict. The proposed additions are therefore rejected.

(6) COMMENT: The Department has no authority to adopt paragraph 4(h) which requires all operators to employ all appropriate methods to prevent dust from escaping from access roads and railroads.

RESPONSE: This provision was contained in previous Departmental rules. Authority comes from 50-1043. The proposal is therefore rejected.

RULE 26-2.10(10)-S10320 BLASTING

(1) COMMENT: Amend subsection (3) to provide that blasting schedules may be hand delivered to residence within one mile of blasting sites because residents within these areas sometimes do not receive mail in these areas because they reside there only during the work week.

RESPONSE: The rule requires ten days advance notice. These residents should therefore receive notice in time. The proposed amendment is therefore rejected.

RULE 26-2.10(10)-S10330 WATER QUALITY

(1) COMMENT: Subsection (1) provides that the Department and Board shall ensure that waters are maintained at their present high standard unless a variance is granted pursuant to a public hearing. Enforcement of this standard is properly in the Department of Health and Environmental Sciences and not the Department of State Lands.

RESPONSE: This provision makes no change from the former hydrology rule. Authority is contained in sections 50-1043 and 1055. The proposal is therefore rejected.

(2) COMMENT: The requirement of subsection (1) referred to in comment #1 above should not contain a variance provision.

RESPONSE: The language referred to makes no change from the former rule. It has the same provisions as the water quality requirements for other discharges from other types of projects. The proposed is therefore rejected.

(3) COMMENT: Delete sentence in subsection (2) which prohibits discharge of water into highly erodable soil because the permittee is already required to treat all surface drainage from disturbed areas.

RESPONSE: The treatment requirement and the proposed requirement are not identical. The regulation implements the law and the comment is therefore rejected.

(4) COMMENT: Paragraph (3)(b) should be eliminated because the Department does not have the authority to impose effluent limitations.

RESPONSE: Sections 50-1043 and 1055 give the Department this authority. The suggestion is therefore rejected.

(5) COMMENT: In paragraph (3)(b), change "Average of daily value for 30 consecutive discharge days to "daily averages".

RESPONSE: The language as proposed by the Department comes from the EPA regulations. In the interest of uniformity, the proposal is rejected.

(6) COMMENT: The manganese effluent limitation requirements should be changed to comply with EPA guidelines by requiring monitoring only under acid conditions.

RESPONSE: The Department agrees and has modified the proposed rule accordingly.

(7) COMMENT: The maximum allowable total suspended solids standard contained in paragraph (3)(b) should be rejected in favor of a case by case approach.

RESPONSE: Judge Flannery's decision suspended enforcement of the 45 mg/l standard in favor of the C.F.R. 40 434.32 and 434.42 case by case approach. The 45 mg/l standard required by 30 C.F.R. Part 715 has been adopted. This will insure Montana's compliance should O.S.M.'s requirement change.

(8) COMMENT: The J.C.U. effluent limitations of paragraph (3)(b) are not technically justified and should be eliminated.

RESPONSE: These limitations are taken from the former rules. They are based on the Department of Health and Environmental Science's standard. The proposal is rejected.

(9) COMMENT: Delete from paragraph (4)(a) subparagraphs (ii), (iii), and (iv), and delete paragraph (4)(6) for the reason that effluent limitation monitoring should be done by the Department of Health and Environmental Sciences.

RESPONSE: Because section 50-1043(3)(c) requires permittees to impound, drain, or treat runoff waters so as to reduce water pollution, and because section 50-1038 requires the Department to enforce the Act, the suggestion is rejected.

(10) COMMENT: Subparagraph (5)(b)(iii) should be amended to allow non-mining level disturbance within the 100' stream buffer zone.

RESPONSE: This is a federal requirement mandated by Section 715.17(d)(3). The suggestion is therefore rejected.

(11) COMMENT: Subparagraph (6)(A)(vi) should be redesignated (6)(b).

RESPONSE: Sedimentation ponds are properly included herein as a sediment control measure. The proposed modification is therefore rejected.

(12) COMMENT: The .2 acre feet requirement of subparagraph (6)(b)(iii) should be eliminated in favor of standard requiring less storage area or a more flexible standard.

RESPONSE: The Department agrees. The proposed rule has been modified to require sediment storage equal to the sediment yield of each acre of disturbed land. The .2 acre feet rule has been retained as an option.

(13) COMMENT: The figure "H+35/5" in subparagraph (6)(g)(iii) should read "(H+35)/5".

RESPONSE: The Department agreed and the proposed change has been incorporated.

(14) COMMENT: Add to subsection (6) a paragraph which recognizes that sedimentation ponds may not be appropriate sediment control measures and which allows installation of other types of sediment control measures.

RESPONSE: Section 715.17(a) of the federal regulations and paragraph (3)(a) require sedimentation ponds where there is surface drainage. Also, sedimentation ponds have worked well with negligible environmental impacts. The permittee still has the option of reducing the size of his sedimentation pond by utilizing other sediment control measures. The proposed is therefore rejected.

(15) COMMENT: In subsection (8), change "acid forming and toxic forming mine waste" to "waste materials" because the latter term is comprehensive, and "avoided" to "minimized".

RESPONSE: The phrases "acid-forming" and "toxic-forming" modify the term "mine waste", which has a broader definition. To protect surface waters from acid or toxic mine drainage, it is necessary only to avoid contact with those wastes and spoils that are acid- or toxic-producing. Section 515(b)(10)(A) of the Federal Act and Section 715.17(g) requires avoidance of drainage from acid- and toxic-forming materials. The suggestions are therefore rejected.

(16) COMMENT: In paragraph (8)(a), changing "spoil or other" to "waste" and "in the judgement of" to "when technically justified by".

RESPONSE: The effect of the first change would be to require burial of waste but not spoil. Burial of waste is required elsewhere in these rules. The Federal Act, Section 515(b)(10) requires burial of spoil. The present language allowed the Department to use its judgment and implies a technical judgment. The only effect of the proposed amendment would be to shift the burden of proof from the permittee to the Department. The proposed changes are therefore rejected.

(17) COMMENT: In paragraph (8)(b), change the words "Preventing or removing" to "minimize or remove" and the phrase "toxic producing deposits" to "waste material".

RESPONSE: The Federal Act and regulations require the permittee to prevent water from contacting toxic-producing deposits. The proposed changes, while expanding the scope of the rule, would also weaken the requirement with regard to toxic-producing spoils. The proposed changes are therefore rejected.

(18) COMMENT: In paragraph (8)(c), replace the phrases "toxic or harmful materials within 30 days" with all toxic or harmful materials other than waste that are susceptible of erosion. The proposed change is therefore rejected.

(19) COMMENT: In paragraph (9)(i), eliminate the words "specified and" so that the Department does not specify monitoring methods.

RESPONSE: The proposed deletion would eliminate authority to require additional hydrologic tests. Even with the deletion, the Department would control which monitoring method is used through its approval power. The proposed change is therefore rejected.

(20) COMMENT: Subsection (10) should be amended by deleting the provision that the Department may order replacement of a water supply and adding a provision that the Department of Natural Resources and Conservation may request replacement.

RESPONSE: The proposed change contravenes section 50-1055(3)(b) and is therefore rejected.

(21) COMMENT: The Department does not have authority to adopt subsection (11), the alluvial valley floors provision and it should therefore be eliminated.

RESPONSE: The authority, although not granted specifically as it is contained in the Federal Act, is granted by sections 50-1042, 1035, 1043, and 1055. The proposed is therefore rejected.

(22) COMMENT: Include in subsection (11) paragraphs identical to the federal regulations which authorizes the Secretary of Interior to exchange Federal coal leases or Federal coal for Federal or fee coal located within alluvial valley floors.

RESPONSE: The Department may not enact a regulation which is binding on the Secretary of Interior. The proposed change is therefore rejected.

(23) COMMENT: In subsection 12, substitute language stating that a permanent impoundment must be regraded if, "at the time of bond release", instead of "at any time", it appears that the impoundment will not "satisfy land use objectives" instead of "fill to expected levels, meet acceptable water quality standards or any other relevant criteria".

RESPONSE: Because the Department does not retain jurisdiction past the time of bond release, and termination of permit, the effect of the first proposed amendment would be to prohibit the Department from requiring regrading at any time other than the time of bond release. This is unacceptable. The second language change would make water quality standards only a secondary consideration. Both are therefore rejected.

(24) COMMENT: Replace language in paragraph (12)(c) requiring water to be suitable on a permanent basis for its intended use and prohibiting discharges from violating water quality standards or degrading receiving waters with the following language: "The quality of the impounded water will be suitable for the intended use of the time of bond release".

RESPONSE: The proposed change represents a much weaker standard. The justification by the proponents of the change indicates that the proponents are of the opinion that the permittee may be held liable past the time of permit termination and bond release. This is not the case. The proposed amendment is therefore rejected.

(25) Paragraph (12)(d) requires the water level of a permanent impoundment to be "reasonably stable". Add the following language: "and evaluated based on the impoundment intended use."

RESPONSE. Water impoundments in Eastern Montana may fluctuate greatly but still may be useful. The proposed addition is therefore accepted.

(26) COMMENT: Delete the words "or quantity" in paragraph 12(f) to eliminate the requirement that permanent water impoundment may not diminish water quantity for adjacent or surrounding landowners because this standard should be administered by the Department of Natural Resources.

RESPONSE: The proposed changes contravenes section 50-1055 (3)(b) and is therefore rejected.

(27) COMMENT: Subsection (13) provides standards for the hydrologic impact of roads. This subsection should be incorporated into the other subsection of the rules dealing with roads.

RESPONSE: The Department agrees. This subsection is incorporated into 26-2.10(10)-S10310(4).

RULE 26-2.10(10)-S10340 TOPSOILING

(1) COMMENT: The segregation of A, B, and C horizons, which can be required under subsection (1), is not justified.

RESPONSE: The Department agrees. Language providing for a two-lift procedure has been substituted.

(2) COMMENT: The requirement of subsection (2) that the operator plant (immediately" should be changed to "during the first appropriate season" to allow for seasonal considerations.

RESPONSE: The Department agrees. The phrase "at the first seasonal opportunity" has been substituted.

RULE 26-2.10(10-S10350 PLANTING AND REVEGETATION

(1) COMMENT: In subsection (2) eliminate the requirement that test plots be revegetated consistent with 50-1045.

RESPONSE: Section 50-1046 requires revegetation to rangeland. The proposed deletion is rejected.

(2) COMMENT: In subsection (2), eliminate the test plot requirement for prime farmlands.

RESPONSE: Montana law prohibits reclamation of an area to farmland. Test plots are therefore necessary to demonstrate compliance with the federal act. The proposal is therefore rejected.

(3) COMMENT: In subsection (10), add language allowing broadcast seeder.

RESPONSE: The language of the subsection proposed by the Department already allows broadcast seeding by allowing "other methods". The proposal is therefore rejected.

(4) COMMENT: Replace the phrase "control area" with "reference area". To be consistent with the federal regulations.

RESPONSE: There are differences - such as management control standards - between "control area" as used in the proposed regulations and "reference areas" as used in the federal regulations. The different terminology emphasizes those differences. The proposed modification is rejected.

(5) COMMENT: Modify the control areas provision (subsection (22)) by providing that control areas must be representative of major plant community types that are important to the management of the area.

RESPONSE: The language as proposed by the Department is taken from the federal rules. Also, vegetative types that are not major may be very important for wildlife. The proposed modification is therefore rejected.

(6) COMMENT: Add to subsection (22) a provision allowing more than one vegetative type in a control area.

RESPONSE: The Department agrees and the suggestion is incorporated into the new rules.

(7) COMMENT: Rule S10350 does not meet federal requirements in that a subsection corresponding to 715.20(f)(2) relating to the measure of success of revegetation has not been included.

RESPONSE: The Department agrees and the proposed rules have been amended accordingly.

COMMENTS APPLICABLE TO ALL RULES

(1) COMMENT: Reword the rules so that they do not apply to uranium mining.

RESPONSE: The uranium mining industry had no objections to the application of these rules to their industry and one commenter favored it. The rules provide regulating procedure for uranium mining which can be modified to more particularly apply to that process in certain areas as uranium mining becomes more prevalent in Montana. The suggestion is therefore rejected.

(2) COMMENT: The Department should adopt a program whereby state coal leases on lands upon which mining is precluded pursuant to these rules can be exchanged for other leases.

RESPONSE: These rules are being adopted pursuant to the authority granted to the Board and Department by Chapter 10 of Title 50. That chapter does not provide authority for such an exchange program. The proposal is therefore rejected.

(3) COMMENT: The proposed rules should define the term "reclamation".

RESPONSE: The term is defined in section 50-1036(14). Definition in the rules is therefore unnecessary. The proposal is therefore rejected.

(4) COMMENT: The proposed rules should define the term "reasonable time".

RESPONSE: The term represents a standard that must be applied on a case by case basis. The proposal is therefore rejected.

Ted Schwinden, Acting Governor &
Acting Chairman of the Board of
Land Commissioners

Certified to the Secretary of State July 18, 1978.

BEFORE THE SUPERINTENDENT OF PUBLIC
INSTRUCTION OF THE STATE OF MONTANA

In the matter of the adoption of rules on hearing procedures and appellate procedures for special education controversies.	) NOTICE OF THE ADOPTION OF) RULES 48-2.18(42)-P18750,) 48-2.18(42)-P18760, AND) 48-2.18(42)-P18770 CON-) CERNING HEARING PROCEDURES) AND APPELLATE PROCEDURES) FOR SPECIAL EDUCATION) CONTROVERSIES.

TO: All Interested Persons:

1. On May 25, 1978, the Office of Public Instruction published notice of a public hearing on June 14, 1978, in the conference room at 1300 Eleventh Avenue, Helena, Montana, on a proposed adoption of Rules 48-2.18(42)-P18750, 48-2.18 (42)-P18760, and 48-2.18(42)-P18770 concerning hearing procedures and appellate procedures for special education controversies at pages 709-715 of the 1978 Montana Administrative Register, Issue No. 5.

2. The Office of Public Instruction has adopted the Rules with the following changes:

48-2.18(42)-P18750 HEARING. (1) Scope. A parent, guardian or board of trustees may initiate a hearing:

(a) On a refusal of a parent or guardian to consent to a preplacement evaluation by the school district which is providing educational services to the child or by the school district in which the child's parent or guardian resides;

(b) On a controversy about the initial placement of a handicapped child in a program providing special education and related services;

(c) On a proposal or a refusal to initiate or change the identification, evaluation, or educational placement of a handicapped child;

(d) On a proposal or refusal to initiate or change the provision of a free appropriate public education to a handicapped child; or

(e) On a written request for an extension of a temporary placement of a handicapped child.

(2) Requests for Hearing. A parent, guardian, the board of trustees of the district in which a child's parent or guardian resides, or the board of trustees providing educational services to the child may initiate a hearing by filing a written request for a hearing, together with a statement of the reasons therefor and the names and addresses of the parties, with the ~~county superintendent of schools of the county in which~~ chairman of the board of trustees of the school district in which the handicapped child's parent or

guardian resides.

(3) Notification of Access to Information and Assistance. (a) Upon receipt of a request for a hearing the ~~county superintendent~~ chairman of the board of trustees shall notify the parent or guardian in writing:

(i) That the parent, guardian or ~~his~~ a representative designated in writing shall have access to school reports, files and records pertaining to the child and shall be given copies at the actual cost of copying;

(ii) Of any free or low-cost legal and other relevant services available in the area.

(b) Upon request, a parent or guardian shall be informed by the county superintendent and the school districts of any free or low-cost legal and other relevant services available in the area.

(4) Conference and Informal Disposition. Upon receipt of a request for hearing, the ~~county superintendent~~ chairman of the board of trustees shall direct the appropriate special education personnel to schedule a conference with the parent or guardian within 5 days for the purpose of settling the controversy without hearing.

(5) Notice of Hearing. (a) If the parent or guardian cannot attend a conference within the 5 days or the controversy is not settled, the ~~county superintendent~~ chairman of the board of trustees shall schedule a hearing at a time and place which is reasonably convenient to the parent or guardian and child. ~~In no event shall the hearing take place later than 20 days after receipt of the request for hearing.~~

(b) Written notice of the date, time and place shall be sent to all parties by ~~certified~~ mail or shall be personally served. Notice to the parent or guardian shall be written in language understandable to the general public and in the native language of the parent or guardian or other mode of communication used by the parent or guardian, unless it is clearly not feasible to do so. If the native language or other mode of communication is not a written language, the ~~county superintendent~~ chairman of the board of trustees shall direct the notice to be translated orally or by other means to the parent or guardian in his native language or other means of communication.

~~(6) Witnesses. At the request of the parent, the board of trustees of any district which is a party to the hearing shall require the attendance at the hearing of any officer or employee of the district who may have evidence or testimony relevant to the needs, abilities, proposed programs or status of the child.~~

(6) Witnesses. Neither the trustees nor any employee of a school district shall prevent or attempt to prevent any employee of the district from attending the hearing and giving evidence and testimony relevant to the issues. Neither the trustees nor any employee of a school district shall take any action against an employee for appearing and giving evidence and testimony.

(7) Evidence. Evidence which a party intends to introduce at the hearing must be disclosed to the other parties at least 5 days before the hearing.

(8) Conduct of Hearing. (a) At the hearing, ~~an impartial hearing officer shall hear witnesses and take evidence~~ witnesses shall be heard and evidence taken according to the provisions of this rule and according to the common law and statutory rules of evidence which are not in conflict with the provisions of this rule.

(i) Objections to offers of evidence may be made and ~~the hearing officer will note them~~ will be ruled on and noted in the record.

(ii) To expedite the hearing, if the interests of the parties are not prejudiced, any part of the evidence may be received in written form.

(iii) ~~The hearing officer may take notice~~ Notice of judicially cognizable facts may be taken. Parties shall be notified of materials noticed and shall be given an opportunity to contest materials noticed.

(iv) Where the original of documentary evidence is not readily available the best evidence rule is hereby modified to allow copies of excerpts.

(v) All testimony shall be given under oath or affirmation.

(vi) Special education controversy hearings will be conducted in accordance with the provisions of the Montana Administrative Procedure Act and the rules promulgated pursuant thereto for the conduct of hearing contested cases which are not in conflict with the provisions of this rule.

(b) Any party to a hearing has the right to:

(i) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children;

(ii) Present evidence and confront, cross-examine, and compel the attendance of witnesses;

(iii) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least 5 days before the hearing;

(iv) Obtain a written or electronic verbatim record of the hearing;

(v) Obtain written findings of fact and decision.

(c) The parent or guardian shall have the right to

have the child who is the subject of the hearing present.

(d) The hearing shall be closed to the public unless the parent or guardian requests an open hearing.

(e) A written or electronic verbatim record of the hearing shall be made.

(f) When necessary, interpreters in the native language or other mode of communication of a parent or guardian shall be provided throughout the hearing at public expense.

~~(g)--The-burden-of-proof-shall-be-upon-the-board-of trustees-proposing-or-refusing-a-course-of-action.--In-the case-of-a-placement-question,-the-personnel-must-demonstrate-why-placement-is-being-recommended-or-denied-and-why less-restrictive-placement-alternatives-would-not-adequately and-appropriately-serve-the-child's-educational-needs.~~

(g) The party holding the affirmative of the issue must produce the evidence to prove it; therefore, the burden of proof lies on the party who would be defeated if no evidence were given on either side.

(h) The expense of the hearing shall be borne in the same manner as the expense of a hearing is borne in other school controversies.

(i) If the county superintendent is disqualified from presiding over the hearing, the hearing officer will submit proposed findings of fact, conclusions of law, decision and notice of opportunity for administrative appeal in accordance with the provisions of section 82-4212, R.C.M. 1947 and the rules promulgated pursuant thereto.

(9) Timeliness. Not later than 45 days after the request for hearing is filed, ~~with-the-county-superintendent,~~ plus specific time extensions granted at the request of a party, and any delays attributable to the parties, the ~~hearing-officer~~ county superintendent shall:

(a) Reach a final decision in the hearing which is written in language understandable to the general public; and

(b) Insure that a copy of the findings of fact, conclusions of law, decision and notice of opportunity for administrative appeal is sent by ~~certified~~ mail to or is personally served on each party. ~~and-the-county-superintendent~~ The parent or guardian shall receive a copy of the decision in the native language of the parent or guardian or other mode of communication used by the parent or guardian unless it is clearly not feasible to do so. If the native language or other mode of communication is not a written language, the hearing officer shall direct the decision to be translated orally to the parent or guardian in his native language or other means of communication.

(c) Delays attributable to the parties include time during which the parties are submitting proposed findings of fact, conclusions of law and decisions and while the

parties are reviewing and making exceptions to the hearing officer's proposed findings, conclusions and decision.

(10) Placement. The child shall remain in his current educational placement until the ~~hearing-officer~~ county superintendent enters a decision following the hearing,' except in an emergency situation when the health and safety of the child or other children would be endangered or when the child's presence substantially disrupts the educational programs for other children as provided in Rule 48-2.18(14)-S18120(1)(c)(vi).

(11) Appeal to the Superintendent of Public Instruction. (a) The decision of the ~~hearing-officer~~ county superintendent is final unless a party to the hearing appeals~~,~~ to the Superintendent of Public Instruction.

(b) Within 15 days after receipt of the findings of fact, conclusions of law, decision, and notice of opportunity for administrative appeal, a party may appeal the decision of the ~~hearing-officer~~ county superintendent to the Superintendent of Public Instruction by filing a notice of appeal with the county superintendent. The party appealing shall mail a copy of the notice of appeal to all other parties and the Superintendent of Public Instruction.

(c) The notice of appeal shall ~~state~~ include:

(i) The name of the party appealing;

(ii) The name(s) and address(es) of the other parties to the hearing;

~~(iii) A copy of the findings of fact, conclusions of law and decision being appealed;~~

~~(iv)~~ (iii) A brief statement of the reasons for the appeal; and

~~(v)~~ (iv) The signature and address of the party appealing or representatives.

(d) Upon receipt of the notice of appeal, the county superintendent will cause the record to be compiled and forwarded to the Superintendent of Public Instruction within 40 days. The record shall contain:

(i) A verbatim, typewritten record of the hearing;

(ii) All exhibits offered into evidence;

(iii) Proposed findings of fact, conclusions of law, and decision;

(iv) Findings of fact, conclusions of law, decision, and notice of opportunity for administrative appeal;

(v) Notice of appeal; and

(vi) All other notices, motions, memoranda and orders.

(History: Sec. 75-7802, R.C.M. 1947; IMP Sec. 75-7802, R.C.M. 1947.)

48-2.18(42)-P18760. ADMINISTRATIVE APPEAL. (1) Scope. An impartial hearing officer shall conduct an impartial review of hearings on appeal from decision in special

education controversies heard pursuant to the provisions of Rule 48-2.18(42)-P18750.

(2) Impartial Review. The hearing officer conducting the review of the hearing shall:

(a) Examine the entire hearing record;

(b) Insure that the procedures at the hearing were consistent with the requirements of due process;

(c) Seek additional evidence if necessary, and if by hearing, the hearing shall be conducted in accordance with Rule 48-2.18(42)-P18750(6), (7) and (8)(a)-(h), at a time and place which is reasonably convenient to the parent or guardian and child and the trustees;

(d) Afford the parties an opportunity for oral or written argument, or both, at the discretion of the hearing officer; and

(e) On completion of the review, ~~make an independent decision written in language understandable to the general public and in the native language of the parent or other mode of communication used by the parent unless it is clearly not feasible to do so; and~~ submit a proposed decision to the Superintendent of Public Instruction in accordance with the provisions of section 82-4212, R.C.M. 1947, and the rules promulgated pursuant thereto.

~~(f) Not later than 30 days after the Superintendent of Public Instruction receives the notice of appeal, plus specific time extensions granted at the request of a party, a copy of the decision is sent by certified mail to each party and the county superintendent. If the native language or other mode of communication is not a written language, the hearing officer shall direct the notice to be translated orally or by other means to the parent in his native language or other means of communication.~~

(3) Timeliness. Not later than 30 days after the Superintendent of Public Instruction receives the notice of appeal, plus specific time extensions granted at the request of a party and delays attributable to the parties,

(a) The Superintendent of Public Instruction shall make a decision written in language understandable to the general public and in the native language of the parent or guardian or other mode of communication used by the parent or guardian, unless it is clearly not feasible to do so, whereupon the decision will be translated orally to the parent or guardian in his native language or other means of communication; and

(b) Personally serve or mail a copy of the decision on the parties and the county superintendent. Delays attributable to the parties includes the time for compiling and forwarding the record and the time during which the provisions of rule 48-2.18(42)-P18760(2)(c) and (d) are in

effect and while the parties are reviewing and making exceptions to the hearing officer's proposed decision.

~~(3)~~ (4) Court Action. The decision of the hearing officer is final unless a party seeks judicial review pursuant to section 82-4216, R.C.M. 1947 or brings a civil action pursuant to 20 U.S.C. 1415.

~~(4)~~ (5) Placement. The child shall remain in his current educational placement until the hearing officer enters a decision, except in an emergency situation when the health and safety of the child or other children would be endangered or when the child's presence substantially disrupts the educational programs for other children as provided in Rule 48-2.18(14)-S18120(1)(c)(vi). (History: Section 75-7802, R.C.M. 1947; IMP Sec. 75-7802, R.C.M. 1947.)

48-2.18(42)-P18770. IMPARTIAL HEARING OFFICER. (1) Lists. Each county superintendent and the Superintendent of Public Instruction shall keep a list of persons who serve as hearing officers. The list must include a statement of qualifications of each person to hear and decide special education controversies.

~~(2) Selection for a Hearing. (a) Upon filing of the request for a hearing, the county superintendent shall mail to each party a list of 5 or more proposed hearing officers together with their qualifications.~~

~~(b) A party shall have 7 days to study the list, cross off any names objected to, number the remaining names in order of preference, and return the list to the county superintendent. Requests for more information about proposed hearing officers must be directed to the county superintendent. As few names as possible should be crossed off.~~

~~(c) If, despite all efforts to arrive at a mutual choice, the parties cannot agree upon a hearing officer, the county superintendent will make an appointment, but in no case will a hearing officer whose name was crossed out by any party be so appointed.~~

(2) Selection for a Hearing. The county superintendent shall preside over the hearing, unless disqualified on the grounds set forth in subsection (5). If grounds for disqualification exist the county superintendent shall appoint a hearing officer after following the procedures in subsections (3) and (4).

(3) Selection for Administrative Appeal. (a) Upon receiving a copy of the notice of appeal the Superintendent of Public Instruction shall mail to each party a list of 5 or more proposed hearing officers together with their qualifications.

(b) A party shall have 7 days to study the list, cross off any names objected to, number the remaining names in order of preference, and return the list to the Superintendent of Public Instruction. Requests for more information about proposed hearing officers must be directed to the Superintendent of Public Instruction. As few names as possible should be crossed off.

(c) If, despite all efforts to arrive at a mutually agreeable choice, the parties cannot agree upon a hearing officer, the Superintendent of Public Instruction will make an appointment, but in no case will a hearing officer whose name was crossed out by any party be so appointed.

(4) Notwithstanding the foregoing provisions, the parties can mutually select the hearing officer.

(5) (a) A hearing may not be conducted or reviewed by a person who is an employee of a school district or other public agency which is involved in the education or care of the child, or who has a personal or professional interest or reason which would conflict with his or her objectivity in the conduct or review of the hearing.

(b) A person who otherwise qualifies to conduct or review a hearing under paragraph (a) of this subsection is not an employee solely because he or she is paid by the school district or other public agency to serve as a hearing officer. (History: Sec. 75-7802, R.C.M 1947; IMP Sec. 75-7802, R.C.M. 1947.)

3. The public hearing was conducted as scheduled. Comments and testimony were received. Interested persons were given an additional 10 days after the hearing to submit written comments. Written comments have been received.

(a)(1) Comment: Several persons wondered whether the word "parent" as used in the proposed rules includes a guardian.

(2) Response: The word "parent" was intended to include guardians and surrogate parents. To avoid misunderstanding, the word "guardian" has been expressly included in the rules where appropriate. For sake of brevity, "surrogate parent" has not been expressly listed as a person who may initiate a hearing, however, the word "parent" as used in the rule is intended to include a surrogate or natural parent.

(b)(1) Comment: John Albrecht suggested that a handicapped child should be given standing to initiate hearings. He argues that 20 U.S.C. section 1415(a) so requires, but that, even if federal law did not so require, Montana should because a child should be able to question the education

being provided.

(2) Response: The suggestion is overruled. Congress did not intend, through 20 U.S.C. §1415(a), to give handicapped children any greater authority than other children in questioning the education being provided. Provisions for the appointment of surrogate parents together with other statutory provisions for the protection of children, e.g., §§ 10-1301, et. seq. R.C.M. 1947, concerning abused, neglected and dependent youth, give handicapped children procedures which adequately guarantee procedural safeguards with respect to the provision of a free, appropriate education.

(c)(1) Comment: Considerable comment has been submitted about who should conduct, preside over and decide special education controversies and about how those persons should be selected.

(i) Roberta Snively, president of the Montana Association of County School Superintendents, Richard J. Llewellyn, County Attorney of Jefferson County, Glennadene Ferrell, Lake County Superintendent of Schools, Patrick M. Springer, County Attorney of Flathead County, Rhoda Jamruszka, Havre Public Schools, and Robert L. Laumeyer, Superintendent of the Boulder Public Schools, recommended that the county superintendents should preside over and decide special education controversies in their respective counties because it is their duty under section 75-5811, R.C.M. 1947, and the costs of the hearing will be less.

(ii) Carroll C. Blend, Deputy County Attorney for Cascade County submitted that 45 C.F.R. 121a.506(b) requires a hearing to be conducted by the Superintendent of Public Instruction or a board of trustees, but not the county superintendents.

(iii) At the public hearing, John Albrecht argued that county superintendents should not serve as hearings officers because they cannot be impartial hearings officers within the meaning of 45 C.F.R. 121a.507.

(iv) Patrick M. Springer suggested that the prohibition against employees serving as hearings officers be limited to employees involved with the education or care of the child.

(2) Response: 45 C.F.R. 121a.506(b) provides that the hearing must be conducted by the Superintendent of Public Instruction or the board of trustees of the district directly responsible for the education of the handicapped child as determined under state statute, regulation or policy.

The Montana Constitution makes the boards of trustees responsible for the control and supervision of education in their districts. That the boards of trustees are primarily responsible for special education of handicapped

children in their districts is apparent from sections 75-7801, et seq., R.C.M. 1947. The Superintendent of Public Instruction has the duty to approve board recommendations and many proposed activities due to funding provisions. Therefore, in keeping with the constitutional and statutory provisions for local control and supervision of education, hearings of special education controversies must be conducted by the school district directly responsible for the education of the child, i.e., the district in which the child's parent or guardian resides.

County superintendents have the duty to hear and decide all matters of controversy arising in their respective counties as a result of decisions of the trustees of a district. Furthermore, 45 C.F.R. 121a.507 prohibits employees of the school district from serving as hearings officers. Persons having a personal or professional interest which would conflict with their objectivity in the hearing cannot serve as the hearing officer either. Taking expenses and statutory duties into consideration, the county superintendents should decide all special education controversies arising in their respective counties, and should be the hearing officer subject to disqualification. There has been no showing that a county superintendent cannot be impartial in any special education controversy, however it could be argued that one would not be impartial, i.e., when the issue is the appropriateness of the special education services being for the grandson of a superintendent. For the possibility of disqualification, each county superintendent must keep a list of persons who serve as hearing officers to comply with 45 C.F.R. 121a.507.

The prohibition against employees serving as hearings officers was drafted to comply with 45 C.F.R. 121a.507.

The rules have been changed to reflect that the school district, instead of the county superintendent, is responsible for conducting the hearing, that the county superintendent will decide all special education controversies, and provisions have been made for the selection of alternate hearing officers.

(d)(1) Comment: Richard J. Llewellyn, County Attorney of Jefferson County, and Patrick M. Springer, County Attorney of Flathead County, objected to requiring school officials to advise a parent or guardian of the availability of free or low-cost legal and other relevant services available in the area.

(2) Response: The objection is overruled because such notice is required by 45 C.F.R. 121a.506(c).

(e)(1) Comment: Richard J. Llewellyn, County Attorney of Jefferson County, questioned whether the county superintendents have the authority to direct special education

personnel to schedule conferences.

(2) Response: Changes in the rules concerning responsibility for conducting the hearing makes this comment moot. See the response in paragraph 3(c)(2).

(f)(1) Comment: Patrick M. Springer, County Attorney of Flathead County and Rhoda Jamruszka, Havre Public Schools, objected to requiring documents to be served by certified mail. The objection was made because of the cost of certified mail.

(2) Response: The certified mail requirement was made for the purpose of insuring evidence of service. Cost being a significant consideration, the requirement is striken. The oversight of not expressly providing for personal service has been corrected.

(g)(1) Comment: Richard J. Llewellyn, County Attorney of Jefferson County, Patrick M. Springer, County Attorney of Flathead County, Glennadene Ferrell, Lake County Superintendent of Schools, and Rhoda Jamruszka, Havre Public Schools, objected to a 20 day time limitation within which the hearing must be held.

(2) Response: The 20 day limitation is stricken to allow as much flexibility as possible.

(h)(1) Comment: Richard J. Llewellyn, County Attorney of Jefferson County, Patrick M. Springer, County Attorney of Flathead County, and Glennadene Ferrell, Lake County Superintendent of Schools, questioned the provision for compelling the attendance of district employees. The latter two suggested restricting the time when hearings can be held.

(2) Response: Restricting the time when hearings can be held may seriously affect the well being of a handicapped child and therefore the suggestion is overruled.

The provision for compelling the attendance of employees was inserted so trustees would not deny a child and his parent a fair hearing by preventing district employees from testifying on behalf of the parent and child. Rule 48-2.18 (42)-P18750(6) has been amended to better state the intent.

(i)(1) Comment: Richard J. Llewellyn, County Attorney of Jefferson County, inquired about the method and detail required in disclosing evidence to other parties.

(2) Response: The purpose of the rules is for everyone to have a fair hearing. The surprise at the hearing of springing undisclosed evidence upon unsuspecting parties denies them an opportunity to rebut the evidence, does nothing to promote fairness, and most importantly, does absolutely nothing for the best interests and welfare of the child. Therefore, the evidence should be disclosed in as much detail and by a means sufficient to fairly and ade-

quately apprise the other parties of the nature and content of the evidence. The means, including costs, and detail of disclosure should first be left to the good judgment of the parties. That failing, the means and detail is left to the person presiding over the hearing. Where doubt exists, the means and detail of disclosure must maximize, not minimize, knowledge.

(j)(1) Comment: Rhoda Jamruszka, Havre Public Schools, suggested that in addition to the evidence being disclosed at least 5 days before the hearing, the parties should submit a summary of facts and desired decision. She also suggested submitting the evidence and summary to the hearing officer.

(2) Response: Submitting summaries is encouraged, but the decision to do so is left to the person presiding over the hearing. The evidence should not be presented to the hearing officer before the hearing unless agreed upon by the parties. To do otherwise would neutralize a party's right to object to evidence and could deny a fair hearing.

(k)(1) Comment: Patrick M. Springer, County Attorney of Flathead County, suggested that the presentation of evidence should not be governed by the rules of evidence.

(2) Response: This suggestion is overruled. The rules of evidence have been developed to assist parties in the orderly presentation of their cases and to prevent the introduction of inflamatory, prejudicial, impertinent, frivolous, irrelevant, immaterial, incompetent or otherwise suspect evidence. Arriving at a correct determination of the appropriate education for the handicapped child will be severely hindered if the rules of evidence are abandoned.

(l)(1) Comment: Patrick M. Springer, County Attorney of Flathead County, and Richard J. Llewellyn, County Attorney of Jefferson County wondered whether objections to evidence should be ruled upon as well as noted in the record. Mr. Llewellyn also asks if the controverted evidence must be heard.

(2) Response: An express provision has been made for ruling on objections. A party has the right and duty to perfect the record at any hearing where the decision is subject to review. It is left to the discretion of the person presiding over the hearing as to how parties can make offers of proof and otherwise perfect the record.

(m)(1) Comment: Patrick M. Springer, County Attorney of Flathead County, suggested steering away from the best evidence rule without changing the impact of the subsection.

(2) Response: This suggestion is as to form and style rather than substance, and therefore the suggestion is

overruled.

(n)(1) Comment: Richard J. Llewellyn, County Attorney of Jefferson County, suggested that hearsay will become the rule of the day if evidence may be received in written form.

(2) Response: The rule allows evidence to be received in written form if the parties are not prejudiced. If a party believes he is so prejudiced, he should enter his objections.

(o)(1) Comments: John Albrecht suggested the addition of a subsection prohibiting ex parte consultations.

(2) Response: The suggestion is approved and is incorporated in the subsection adopting the provisions of the Administrative Procedure Act, and the Model Rule promulgated thereunder, for the hearing of contested cases insofar as such Act and Model Rules are not in conflict with 48-2.18(42)-P18750.

(p)(1) Comment: Many persons objected to placing the initial burden of proof on the school district. Only John Albrecht argued for the burden of proof being on the district.

(2) Response: So the burden of proof in special education controversies is consistent with state law, section 93-1501(1), R.C.M. 1947, is restated in the rules verbatim.

(q)(1) Comment: Considerable comment has been submitted about the costs of special education hearings.

(i) Inquiry was made at the public hearing about whether the Superintendent of Public Instruction would pay for the hearings.

(ii) Glennadene Ferrell, Lake County Superintendent of Schools, advised that Lake County is opposed to being obligated for any hearing costs if the county superintendent is not the hearing officer. Two costs specifically identified are the cost of a hearing officer other than the county superintendent and the cost of a transcript.

(iii) Richard Llewellyn, County Attorney of Jefferson County asked "who is going to pay for the proceeding and for the preparation of the 'verbatim record' of the hearing?" and suggested that not many county superintendents have sufficient funds to pay for the transcripts. He also inquired about who pays for the hearing officer.

(iv) Robert L. Laumeyer, Superintendent of the Boulder Public Schools, recommended that, if parents of special education children can have a hearing at no cost to themselves, the rules must provide for a just cause hearing, with provisions for review, to determine whether the parent can have a hearing on the merits of the controversy. The

recommendation was silent about whether the trustees would be bound to the same procedure.

(v) Carroll C. Blend, Deputy County Attorney of Cascade County, visualizes the fiscal implications of appointing hearing officers as being horrendous. He also recommends that the parties, appellants and respondents, pay the cost of their copy of the transcript unless an affidavit of poverty is found.

(2) Response: The Superintendent of Public Instruction does not have funds for paying the costs of special education hearings nor does she have the authority to spend special education funds for the expense of the hearings.

The rules have been changed to allow the county superintendents to decide all special education controversies and preside over all but those in which they are disqualified. The parties are entitled to a fair hearing and the agencies responsible for providing a fair hearing must also bear the cost of providing it.

Insofar as the cost of transcribing the hearing is concerned, section 75-5811 requires the county superintendents to prepare a written transcript of the hearing proceedings. No one has advanced a compelling reason why transcripts of special education hearings should be treated any differently than any other school controversy.

Furthermore, there does not seem to be any compelling reason why the expenses of a special education hearing should not be borne in the same way the expenses of any other school controversy is borne. A provision has been added to so provide.

(r)(1) Comment: Rhoda Jamruszka, Havre Public Schools, suggested that a decision should be made within 45 working days instead of 45 days plus limiting extensions of time to 10 days.

(2) Response: 45 C.F.R. 121a.512 requires a decision to be made within 45 days without being modified as working days. To be in compliance with the federal rule, the Montana rule must remain 45 calendar days.

(s)(1) Comment: Patrick M. Springer, County Attorney of Flathead County, suggested eliminating the need to attach a copy of the findings of fact, conclusions of law, decision and notice of opportunity for administrative appeal because all interested persons will have a copy.

(2) Response: The rule has been changed to so provide.

(t)(1) Comment: Patrick M. Springer, County Attorney of Flathead County, recommended giving parties 15 days after receipt of the decision in which to appeal to the Superintendent of Public Instruction.

(2) Response: The rule has been changed to so provide.

(u)(1) Comment: Carroll Blend, Deputy County Attorney of Cascade County, recommended that the transcript be sent to the Superintendent of Public Instruction within 40 days with extensions for good cause shown.

(2) Response: Setting a time limit for forwarding the entire record including the transcript has merit. Enforcement is on the parties.

(v)(1) Comment: Patrick M. Springer, County Attorney of Flathead County, proposed amending rule 48-2.18(42)-P18750(11)(d)(i) to allow an electronic record.

(2) Response: The proposal is overruled because the hearing officer reviewing the appeal would have too much difficulty keeping the speakers property identified.

(w)(1) Comment: Richard J. Llewellyn, County Attorney of Jefferson County, and Robert L. Laumeyer, Superintendent of Boulder Public Schools, requested a definition of what is an appropriate education.

(2) Response: An attempt to provide an all-encompassing definition of "appropriate education" would be outside the scope of these rules, which are procedural in nature. What is an "appropriate education" in the context of the particular needs of one child may not be appropriate for another child. The purpose of these rules is to provide a framework so that the meaning of "appropriate education" may be determined as it applies to each individual case.

(x)(1) Comment: John Albrecht suggested that the rules provide for situations arising under title 75, chapter 78, R.C.M. 1947, in which the approval of the Superintendent of Public Instruction is required for certain programs. He expresses concern regarding appeal procedures in such instances and also suggests that local school districts be allowed to challenge a decision of the Superintendent of Public Instruction on an application for assistance.

(2) Response: Rule 48-2.18(42)-P18780, adopted simultaneously with these rules, accommodates these suggestions. Such rule provides for the opportunity for a hearing before an impartial hearing officer whose decision is final unless a party seeks judicial review pursuant to section 82-4216, R.C.M. 1947, or brings a civil action pursuant to 20 U.S.C. §1415.

(y)(1) Comment: John Albrecht suggested that the rules follow the decision of the United States District Court in Stuart v. Nappi, No. B-77-381 (D. Conn. 1/4/78), regarding prohibitions against expulsion of a student while a special education complaint is pending.

(2) Response: This suggestion is overruled. This decision construes the federal Education for the Handicapped

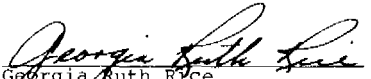
Act, 20 U.S.C. §1401, et seq. Written statutes and regulations always must be considered in light of interpretive decisions, but these rules do not attempt to duplicate or follow all court decisions.

(z)(1) Comment: John Albrecht comments that provisions for hearing and similar procedural safeguards should be adopted by the Office of Public Instruction for children in the Boulder River School and Hospital.

(2) Response. The Department of Institutions is the agency responsible for the operation of the Boulder River School and Hospital. It is necessary for the Office of Public Instruction to insure that the Department of Institutions adopts rules which substantially provide these procedural safeguards, but not to adopt such rules for the Department of Institutions.

(aa)(1) John Albrecht suggests that provision be made for a pleading similar to an answer in civil actions, for the purpose of clarifying the issues.

(2) Response: Every effort has been made in drafting these rules to keep the procedures as informal as possible without jeopardizing the rights of any of the parties. Section 82-4211, R.C.M. 1947, relating to the authority of hearing examiners, provides that a hearing examiner may order a pre-hearing conference for the purpose of formulating and simplifying the issues. Such procedure, within the discretion of the hearing examiner would provide adequate protection of the rights of the parties without the added burden of formal pleadings.



Georgia Ruth Rice
Superintendent of Public
Instruction

Certified to the Secretary of State July 18, 1978.

VOLUME 37 OPINION NO. 149

BOARD OF NATURAL RESOURCES AND CONSERVATION - Members - Right to compensation for time spent on Board related matters other than at Board meetings;
SECTION 82A-112(7), R.C.M. 1947.

HELD: Members of the Board of Natural Resources and Conservation are entitled to be compensated under Section 82A-112(7), R.C.M. 1947, for the time spent on necessary Board related matters other than Board meetings.

11 July, 1978

Donald MacIntyre
Chief Legal Counsel
Department of Natural Resources
and Conservation
32 South Ewing
Helena, Montana 59601

Dear Mr. MacIntyre:

You have requested my opinion concerning the following question:

> Are members of the Board of Natural Resources and Conservation entitled to compensation under Section 82A-112(7), R.C.M. 1947, for the time spent on Board related matters other than at Board meetings?

The law concerning payment to Board members is codified at Section 82A-112(7), R.C.M. 1947. In pertinent part it states:

> Unless he is a full-time salaried officer or employee of this state, each member is entitled to be paid $25.00 for each day in which he is actually and necessarily engaged in the performance of board duties, and he is also entitled to be reimbursed for travel expenses, as provided for in 59-538, 59-539, and 59-801, incurred while in the performance of board duties.

The Montana Supreme Court has not interpreted this statutory language. However, other jurisdictions have addressed similar statutory forms of compensation.

In State ex rel Greb v. Hurn, 102 Wash. 328, 172 P. 1147, 1148 (1918), the Washington Supreme Court held that "where a statute fixes an officer's compensation at a certain sum per day, such officer performing any substantial service on a particular day, has a right to the per diem for that day."

The Colorado Supreme Court in Smith v. Board of County Commissioners of Jefferson County, 10 Colo. 17, 13 P. 917 (1887) construed a statute regarding the compensation of the superintendent of schools which provided: "For the time necessarily spent in the discharge of his duty he shall receive five dollars per day...". Section 3020, Gen. St. Colo. 1885. The Colorado Court held that when the law provides a per diem compensation for the time necessarily devoted to the duties of an office, "the officer is entitled to this daily compensation for each day on which it becomes necessary for him to perform any substantial official service ...regardless of the time occupied in its performance." Id. at 13 P. 920.

In construing Section 82A-112(7), R.C.M. 1947, the controlling words of the statute are "necessarily and actually engaged in the performance of Board duties". The statute does not limit the right to compensation only to actual Board meetings. In light of the reasoning of the decisions of other jurisdictions, any time members engage in services necessary to the performance of their Board duties, they are entitled to compensation. For example, a member of the Board must take certain actions to adequately prepare for regularly scheduled meetings or to render decisions required of the Board. While engaged in such activity the Board member is "actually and necessarily engaged in the performance of Board duties".

THEREFORE IT IS MY OPINION:

> A member of the Board of Natural Resources and Conservation is entitled to be compensated under Section 82A-112(7), R.C.M. 1947, for the time spent on necessary Board related matters other than Board meetings.

Very truly yours,

MIKE GREELY
Attorney General

MG/RA/kr

VOLUME NO. 37 OPINION NO. 150

HOLIDAYS - Public employees;
HOLIDAYS - "School holidays" and "legal holidays";
HOLIDAYS - Non-teaching school employees as public employees;
SECTIONS - 19-107, 19-108, 59-1007, 59-1009, 75-7406 and 75-7407, R.C.M. 1947;
37 OP. ATT'Y GEN. NO. 96.

HELD: School district employees, non-teaching and teaching alike, throughout the State of Montana, are entitled to days off on those holidays enumerated in §75-7406, R.C.M. 1947, rather than the holidays of §19-107. School district employees are therefore entitled only to days off on New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, Christmas Day, and state and national election days when the school building is a polling place and school functions will interfere with the election process at the polling place.

11 July 1978

Ron Smith
County Attorney
Hill County
Havre, Montana 59501

Dear Mr. Smith:

You have requested my opinion concerning the effect of a recent district court decision holding that non-teaching school district employees are entitled to days off on the school holidays enumerated in §75-7406, R.C.M. 1947, rather than those holidays of §19-107, R.C.M. 1947. The decision was rendered by the District Court of the Twelfth Judicial District in School Distict No. 16, Hill County, Montana v. Department of Labor and Industry, Docket No. 16040. It expressly overruled an Attorney General opinion, 37 OP. ATT'Y GEN. NO. 96, which had declared that non-teaching school district employees are entitled to days off on the legal holidays enumerated in §19-107.

The legal effect of an Attorney General opinion is prescribed by §82-401(6), R.C.M. 1947, which provides in relevant part:

* * *

> If an opinion issued by the attorney general conflicts with an opinion issued by a city attorney, county attorney, or an attorney employed or retained by any state officer, board, commission, or department, the attorney general opinion shall be controlling unless overruled by a state district

No appeal has or will be taken from the district court decision in School District No. 16, and since that decision overrules Opinion No. 96, it must be followed by all Montana school districts.

The decision not to appeal the district court ruling was made only after a comprehensive review of the prior Attorney General opinion, the arguments made by the plaintiff school district, and the district court's conclusions of law. That review was undertaken by the Attorney General's office after consultation with the Department of Labor and Industry and merits further comment in the present opinion.

The origin of the school holiday issue is §59-1009, R.C.M. 1947, since it is in that section that public employees are entitled to receive an additional day off when their scheduled day off falls on a holiday. Section 59-1009 provides:

> Any employee of the state of Montana, or any county or city thereof, who is scheduled for a day off on a day which is observed as a legal holiday, except Sundays, shall be entitled to receive a day off either the day preceding or the day following the holiday, whichever allows a day off in addition to the employee's regularly scheduled days off.

The provision must be interpreted "with a view to giving vitality to and making operative all provisions of the law and accomplishing the intention of the Legislature ***." Burritt and Safeway v. City of Butte, 161 Mont. 530, 534, 508 P.2d 563 (1973). The purpose of §59-1009 is to ensure public employees do not lose regularly scheduled days off because those regularly scheduled days off happen to fall on holidays. The section expressly provides that public employees receive their regular days off in addition to holidays off. This was not at issue in School District No. 16, supra.

Similarly, there is no dispute that school district employees are state employees within the meaning of §59-1009. This conclusion is based on the Montana Supreme Court case of Teamsters v. Cascade County School District No. 1, 162 Mont. 277, 511 P.2d 339 (1973), which held that school district employees are state employees within the meaning of public employee vacation provisions of §59-1001, et. seq., R.C.M. 1947. The court in Teamsters, 162 Mont. at 280, said:

> In the instant case, we hold that school district employees other than teachers are entitled to vacation benefits under section 59-1001, R.C.M. 1947. In doing so, this Court has given effect to a long line of this Court's decisions holding that a school district is a political subdivision and instrumentality of the State. (Citations omitted.)
>
> The legislature used the term "employees" in its generic sense to include all employees of the state or employees of state agencies of which a school district is included.

The rationale of Teamsters applies with equal force to holiday and day off provisions of §59-1009 which describes public employees in identical terms as the vacation provision.

Thus, the sole issue presented in School District No. 16 was, to what "legal holidays" are non-teaching school district employees entitled? Section 59-1009, although it refers to legal holidays, does not define or enumerate specific holidays. However, at the time §59-1009 was enacted in 1971, other provisions of the Montana Revised Codes defined legal holidays. It is presumed that the legislature was aware of these existing provisions, and it is further presumed, in absence of some other clear indication to the contrary, that the legislature was referring to those holidays defined under existing statutory provisions. See Fletcher v. Paige, 124 Mont. 114, 119, 220 P.2d 484 (1950). The principle provision for legal holidays was, and is, §19-107, R.C.M. 1947, which enumerates twelve legal holdays, including Sundays. Since §19-107 is a general provision, Opinion No. 96 looked to it and concluded that public employees are entitled to those holidays enumerated therein. However, Opinion No. 96 did not consider other, more specific holiday provisions which are applicable to school

districts. Those provisions are §§19-108, 75-7406, and 75-7407, R.C.M. 1947. Section 19-108 provides:

> Nothing contained in section 19-107 defining legal holidays shall be deemed to amend or change the provisions of sections 75-7406 and 75-7407 said sections being hereby expressly declared to define legal holidays for school purposes only. (Emphasis added.)

Thus, the legislature expressly provided that the general holidays of §19-107 shall not interfere with or change statutorily defined "school holidays" for "school purposes." Section 19-108 is controlling. "***[W]here a specific statute conflicts with a general statute the specific controls to the extent of any repugnancy." Huber v. Groff, ___ Mont. ___, 558 P.2d 1124, 1134 (1976).

The district court in School District No. 16 found that reference in §19-108 to holidays for "school purposes" encompasses school holidays for all school district employees, teaching and non-teaching alike. I agree with the district court conclusion.

There is little question that schools must be in session on at least four of the holidays listed as legal holidays under §19-107, R.C.M. 1947. Section 75-7406, R.C.M. 1947 provides:

> School holidays. Pupil instruction and pupil-instruction-related days shall not be conducted on the following holidays:
>
> (1) New Year's day (January 1),
> (2) Memorial day (last Monday in May),
> (3) Independence day (July 4),
> (4) Labor day (first Monday in September),
> (5) Thanksgiving day (fourth Thursday in November),
> (6) Christmas day (December 25),
> (7) State and national election days when the school building is used as a polling place and the conduct of school would interfere with the election process at the polling place. When these holidays fall on Saturday or Sunday, the preceding Friday or the succeeding Monday shall not be a school holiday.

The section omits four of the holidays enumerated in §19-107, to-wit: Lincoln's Birthday (February 12); Washington's Birthday (the third Monday in February); Columbus Day (the second Monday in October); and Veteran's Day (November 11). Further, §75-7407, R.C.M. 1947, requires schools to conduct commemorative exercises on Lincoln's Birthday, Washington's Birthday and Columbus Day. Statutes must be construed reasonably, State ex rel Ronish v. School District No. 1 of Fergus County, 136 Mont. 453, 460, 348 P.2d 797 (1960), and, as a practical matter, schools cannot operate effectively without the assistance of non-teaching personnel. School bus routes cannot be run without school bus drivers, cafeterias can't serve without cafeteria personnel, and administrative functions go unattended without school secretaries and clerks. There are other examples of non-teaching personnel whose help is essential to operating schools on a day-to-day basis. Thus, the conclusion that school holidays are intended to pertain not only to teachers and pupils but to non-teaching school district staff is a reasonable and compelling one.

Unfortunately, holiday statutes as presently written treat full time, year-around non-teaching school district employees differently than either teachers or other full-time public employees. As already noted, other public employees are generally entitled to four holidays unavailable to non-teaching school district employees. Additionally, other public employees are entitled under §19-107 to the following Monday off when a holiday falls on a Sunday, whereas §75-7406 expressly precludes substitution of Mondays or Fridays off when the holiday occurs on a weekend. Teachers, on the other hand, are not entitled to more holidays than non-teaching school staff members, but are typically employed on a ten month basis, receiving two month summer vacations. I therefore intend to recommend new legislation which will put full-time, year-around school district employees on equal basis with other public employees by providing such school employees with additional, compensating vacation time during non-school periods. I also urge school districts to consider providing such compensatory time on a contractual basis with their full-time, year-around non-teaching employees.

THEREFORE, IT IS MY OPINION:

> School district employees, non-teaching and teaching alike, throughout the State of Montana, are entitled to days off on those holidays enumerated in §75-7406,

R.C.M. 1947, rather than the holidays of §19-107. School district employees are therefore entitled only to days off on New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, Christmas Day, and state and national election days when the school building is a polling place and school functions will interfere with the election process at the polling place.

Very truly yours,

MIKE GREELY
Attorney General

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