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MONTANA ADMINISTRATIVE REGISTER

1980 ISSUE NO. 22
PAGES 2950-2982

RESERVE



NOTICE OF FUNCTIONS OF ADMINISTRATIVE CODE COMMITTEE

The Administrative Code Committee reviews all proposals for adoption of new rules or amendment or repeal of existing rules filed with the Secretary of State. Proposals of the Department of Revenue are reviewed only in regard to the procedural requirements of the Montana Administrative Procedure Act. The Committee has the authority to make recommendations to an agency regarding the adoption, amendment, or repeal of a rule or to request that the agency prepare a statement of the estimated economic impact of a proposal. In addition the Committee may poll the members of the Legislature to determine if a proposed rule is consistent with the intent of the Legislature or, during a legislative session, introduce a Joint Resolution directing an agency to adopt, amend or repeal a rule.

The Committee welcomes comments from the public and invites members of the public to appear before it or to send it written statements in order to bring to the Committee's attention any difficulties with existing or proposed rules. The address is Room 138, State Capitol, Helena, Montana 59601.

NOTICE: The July 1977 through June 1980 Montana Administrative Registers have been placed on microfiche. For information, please contact the Secretary of State, Room 202, Capitol Building, Helena, Montana, 59601.

MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 22

TABLE OF CONTENTS

NOTICE SECTION

	Page Number
<u>HEALTH AND ENVIRONMENTAL SCIENCES, Department of, Title 16</u>	
16-2-161 Notice of Public Hearing on Proposed Amendment of Rule - Sulfur Oxide Emissions -- Lead Smelters.	2950
16-2-161 Notice of Public Hearing for Adoption of a Rule - Sulfur Oxide Emissions--Lead Smelters.	2953
16-2-162 Notice of Public Hearing on Proposed Amendment of Rule - Public Water or Wastewater Systems.	2955-2959
<u>LIVESTOCK, Department of, Title 32</u>	
32-2-84 Notice of Public Hearing on Proposed Amendment of Rule - Duties of State Appointed Market Veterinarians.	2960-2961
<u>PROFESSIONAL AND OCCUPATIONAL LICENSING, Department of, Title 40</u>	
40-32-16 (Board of Nursing Home Administrators) Notice of Proposed Amendment - Examinations. No Public Hearing Contemplated.	2962-2963
<u>REVENUE, Department of, Title 42</u>	
42-2-170 Notice of Proposed Amendment of Rule - Relating to Application Deadlines for Property Tax Relief. No Public Hearing Contemplated.	2964-2965
-i-	22-11/28/80

RULE SECTION

	<u>Page Number</u>
<u>ADMINISTRATION, Department of, Title 2</u>	
AMD (Workers' Compensation Court) Procedural Rules	2966
<u>HEALTH AND ENVIRONMENTAL SCIENCES, Department of, Title 16</u>	
AMD Rules Relating to the Collection and Disposition of Fees for the Review of Subdivisions.	2967-2968
<u>PUBLIC SERVICE REGULATION, Department of, Title 38</u>	
NEW Rules Prohibiting Use of Automatic Adjustment Clauses in Utility Rate Schedules.	2969
<u>PROFESSIONAL AND OCCUPATIONAL LICENSING, Department of, Title 40</u>	
AMD (Board of Nursing) Rules Relating to Reexamination of Registered Nurses; Reexamination of Practical Nurses; Standards for Montana Schools of Practical Nursing	2970
NEW (Board of Public Accountants) Rules Relating to Examinations; Qualification; Education; Experience Requirements; License to Practice; Registration; Professional Conduct; Committees; Reciprocity; Fee Schedule	2971-2975
<u>SOCIAL AND REHABILITATION SERVICES, Department of, Title 46</u>	
AMD Rule Relating to Title IV-A Day Care	2976-2977
AMD Rule Pertaining to AFDC Unearned Income	2978
AMD Rules Relating to Medical Assistance	2978
REP	
NEW	
AMD Rules Relating to Personal Care Services in a Recipient's Home	2979

INTERPRETATION SECTION

Attorney General's Opinions

113 Courts, City - Judges - Justices of the Peace - Municipal Corporations	2980-2982
22-11/28/80	-ii-

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

In the matter of the amendment) NOTICE OF PUBLIC HEARING
of ARM rule 16.8.1412, Sulfur) ON PROPOSED AMENDMENT OF
Oxide Emissions -- Primary) RULE 16.8.1412
Non-Ferrous Smelters) (Sulfur Oxide Emissions--
Lead Smelters)

TO: All Interested Persons

1. On January 9, 1981, at 9:00 o'clock a.m., or as soon thereafter as the matter may be heard, a public hearing will be held in the auditorium of the Montana Department of Highways Building, 2701 Prospect Avenue, Helena, Montana, to consider the amendment of ARM 16.8.1412.

2. The proposed amendment replaces present rule 16.8.1412 found in the Administrative Rules of Montana. The proposed amendment would delete all reference to lead or zinc smelting operations and would continue to regulate sulfur oxide emissions from copper smelters in the same manner as the existing rule.

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

16.8.1412 SULFUR OXIDE EMISSIONS--PRIMARY NON-FERROUS COPPER SMELTERS (1) ~~No person or persons shall cause, suffer, allow or permit to be discharged into the outdoor atmosphere from any copper, zinc or lead smelting operation or any slag treatment plant~~ may cause an emission of reduced sulfur from any copper smelting operation in excess of the amount shown in the following table:

Total Feed of Sulfur, lb/hr	Allowable Sulfur Emission, lb/hr		
	Cu	Zn	Pb
1,000	100	100	100
5,000	500	394	348
10,000	1,000	704	593
20,000	2,000	1,270	1,000
40,000	4,000	2,310	1,000
60,000	6,000	3,210	1,000
80,000	8,000	4,120	1,000
100,000	10,000	5,000	1,000
Over 100,000	10,000	5,000	1,000

(2) For a total sulfur feed input between any two consecutive total sulfur feed inputs stated in the preceding table, maximum allowable emissions are shown in Figure 1 which follows this rule and by reference is made a part of this rule. For the purposes ~~hereof~~ of this rule, total sulfur input ~~shall~~ must be calculated as the aggregate sulfur

content of all fuels and other feed materials whose products of combustion and gaseous by-products pass through the stack or chimney.

(a) When two or more furnaces, ~~sinter-machines, sinter boxes,~~ roasters, converters or other similar devices for converting copper, ~~zinc-or-lead~~ ores, concentrates, residues or slag to the metal or the oxide of the metal either wholly or in part are connected to a single stack, the combined sulfur input of all units connected to the stack ~~shall~~ must be used to determine the allowable emission from the stack.

(b) When a single furnace, ~~sinter-machine, sinter-box,~~ roaster, converter or other similar device for converting copper, ~~zinc-or-lead~~ ores, concentrates, residues, or slag to the metal or the oxide of the metal either wholly or in part is connected to two or more stacks, the allowable emission from all the stacks combined ~~shall~~ may not exceed that allowable from the same unit connected to a single stack.

(3) The effective date of this rule for existing operations ~~shall-be~~ is June 30, 1973. For new operations, the effective date ~~shall-be~~ is June 30, 1970.

NOTE: "Figure 1" referred to in subsection (2) of rule 16.8.1412 is also proposed to be amended to eliminate all references to lead and zinc, as shown in Exhibit "A", attached.

4. The Board is proposing this amendment to its rule because it has determined that an equal or better degree of protection to public health and safety may be obtained regulating sulfur oxide emissions from lead and zinc smelters by proposing a new rule setting forth a different standard for limiting SO₂ emissions than that retained for such emissions from copper smelters. The new rule, also being proposed at this time by the board, will set emission limitations for lead and zinc smelters which will conform to requirements of Montana's air quality control state implementation plan and assure compliance with Montana and federal ambient air quality standards.

5. Interested persons may present their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to C.W. Leaphart, Jr., hearing examiner for the board, 1 North Last Chance Gulch, Helena, Montana, 59601, no later than January 2, 1981.

6. C. W. Leaphart, JR., 1 North Last Chance Gulch, Helena, Montana, has been designated to preside over and conduct the hearing.

7. The authority of the board to make the proposed amendment is based on section 75-2-111, MCA, and the rule implements section 75-2-203, MCA.

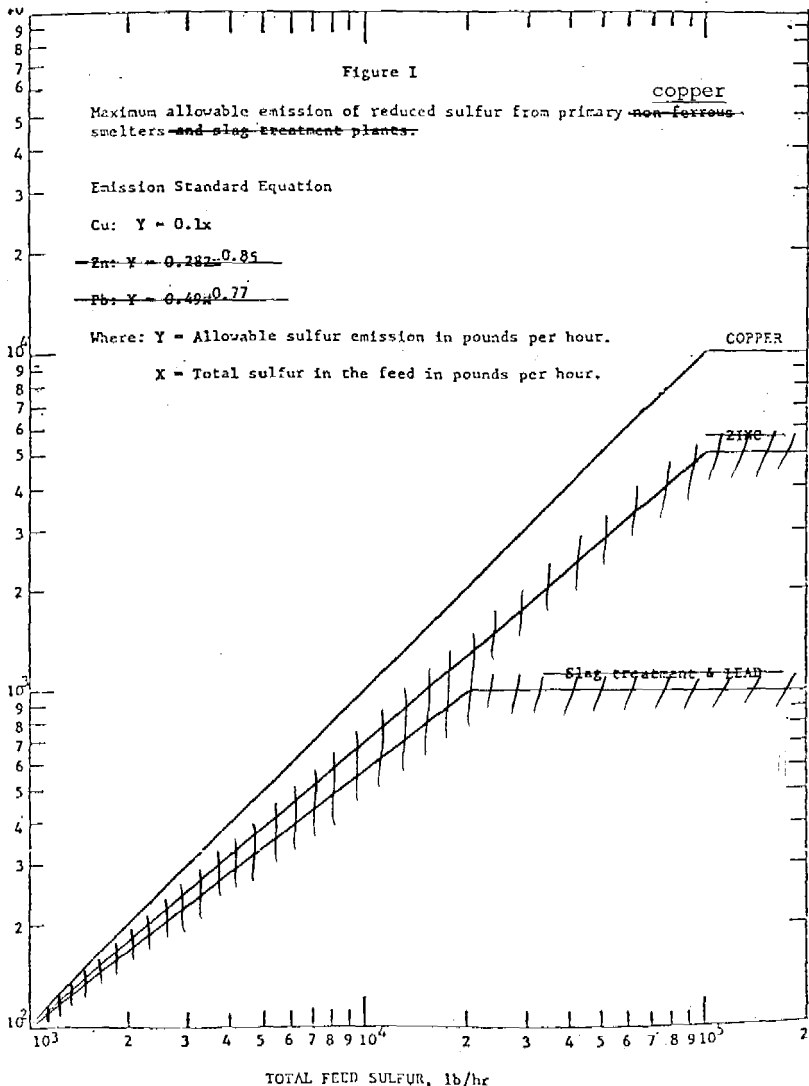


EXHIBIT "A" ----- to MAR NOTICE NO. 16-2-161

In the matter of the adoption) NOTICE OF PUBLIC HEARING
of a rule setting sulfur oxide) FOR ADOPTION OF A RULE
emission limitations for) (Sulfur Oxide Emissions--
existing lead or lead-zinc) Lead Smelters)

TO: All Interested Persons

1. On January 9, 1981, at 9:00 o'clock a.m., or as soon thereafter as the matter may be heard, a public hearing will be held in the auditorium of the Montana Department of Highways Building, 2701 Prospect Avenue, Helena, Montana, to consider the adoption of a rule which sets sulfur dioxide emission standards for existing lead or lead-zinc smelting facilities.

2. The proposed rule results from splitting ARM 16.8.1412 to remove all reference in that rule to lead-zinc smelting operations and placing emission standards for lead-zinc smelting in the proposed rule.

3. The proposed rule provides as follows:

RULE I SULFUR OXIDE EMISSIONS--LEAD OR LEAD-ZINC SMELTING FACILITIES (1) No person may cause an emission of sulfur dioxide from a lead or lead-zinc smelter stack, as described below, existing on January 1, 1980, in excess of the amount set forth below:

<u>Lead or Lead-Zinc Smelter Source</u>	<u>Emission Limitation</u>
Main (Sinter Machine) Stack	80 tons/day 20 tons/6 hours
Blast Furnace Baghouse Stack	23 tons/day 5.75 tons/6 hours

(2) Compliance with subsection (1) of this rule shall be determined by source testing as specified by 40 CFR, Part 60, Appendix A -- Reference Methods, "Method 6 -- Determination of Sulfur Dioxide Emissions from Stationary Sources" (as modified to the satisfaction of the department) or "Method 8 -- Determination of Sulfuric Acid Mist and Sulfur Dioxide Emissions from Stationary Sources," and the source testing shall consist of averaging 3 separate 1-hour tests using the applicable testing methods.

(3) The department hereby adopts and incorporates by reference 40 CFR, Part 60, Appendix A -- Reference Methods, Method 6 -- Determination of Sulfur Dioxide Emissions from Stationary Sources and Method 8 -- Determination of Sulfuric Acid Mist and Sulfur Dioxide Emissions from Stationary Sources. 40 CFR, Part 60, Appendix A, Methods 6 and 8 are federal

rules setting forth procedures for extracting gas samples from the emitting source and performing tests thereon to determine amounts of contaminants contained in such gases. A copy of 40 CFR, Part 60, Appendix A, Methods 6 and 8, may be obtained from the Air Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana, 59601.


4. The board is proposing this rule in order to make the department's sulfur oxide emission regulations regarding lead and zinc smelting facilities consistent with the emission limitations already adopted in Montana's air quality control state implementation plan (SIP). The proposed rule will eliminate the need for existing lead-zinc smelting operations to annually seek a variance from emission regulations contained in the present rule, and the proposed rule will require existing lead-zinc smelters to meet fixed SO₂ emission limitations which assure compliance with Montana and federal ambient air quality standards. At the same time, the board is separately proposing rule amendments to delete reference to sulfur oxide standards for lead-zinc smelters in ARM 16.8.1412.

5. Interested persons may present their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to Mr. C. W. Leaphart, Jr., 1 North Last Chance Gulch, Helena, Montana, 59601, no later than January 2, 1981.

6. C. W. Leaphart, Jr., 1 North Last Chance Gulch, Helena, Montana, 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 75-2-111, MCA, and the rule implements section 75-2-203.


JOHN F. MCGREGOR, M.D., Chairman

By 
RITA ANN SHEEHY

Certified to the Secretary of State November 17, 1980

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

In the matter of the amendment) NOTICE OF PUBLIC HEARING
of rule ARM 16.20.401, Plans) ON PROPOSED AMENDMENT
for Public Water or Sewer) OF ARM 16.20.401
Systems) (Public Water or
Wastewater Systems)

TO: All Interested Persons

1. On January 9, 1981, at 9:30 a.m., or as soon thereafter as the matter can be heard, a public hearing will be held in the auditorium of the Montana Department of Highways Building, 2701 Prospect Avenue, Helena, Montana to consider the amendment of rule 16.20.401.

2. The proposed amendment replaces present rule 16.20.401 found in the Administrative Rules of Montana. The proposed amendment would generally revise the existing rule in its entirety, updating it and allowing deviations from general engineering standards of the rule under limited circumstances.

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

~~16.20.401 - PLANS FOR PUBLIC WATER OR SEWER SYSTEM~~

~~(1) - Before a person commences construction of a new public water or sewer system, or major alteration or extension of an existing public water or sewer system, an engineering report along with necessary plans and specifications for the public water or sewer system shall be submitted to the department for review and approval. For sewer lines, detailed plans and profiles shall be provided.~~

~~(2) - Upon receipt of plans and specifications, the department shall notify the person within 60 days if the material is satisfactory, and if not, what additional information is required.~~

~~(3) - If additional information is needed, no further processing will be made until all requested information is received.~~

~~(4) - The comprehensive engineering report on proposed water or sewer systems shall be typewritten on letter-sized paper and the sheets firmly bound together. If the plans are solely for the extension of the existing system, only such information as is necessary for the comprehension of the plans shall be required in the report.~~

~~(a) - The comprehensive report and plans and specifications for a proposed water system shall be prepared in accordance with the format and criteria set forth in the Recommended Standards for Water Works prepared by the Great~~

Lakes-Upper-Mississippi-River-Board-of-State-Sanitary-Engineers-in-1974-or-subsequent-editions:

(b)--The-comprehensive-report-and-plans-and-specifications-for-sewage-systems-shall-be-prepared-in-accordance-with-the-format-and-criteria-set-forth-in-the-1971-Revised-Version-of-the-Recommended-Standards-for-Sewage-Works-or-subsequent-editions:

(5)--Small-water-systems-for-domestic-supply-without-provisions-for-fire-fighting-or-irrigation-flows-may-use-an-alternate-design-for-small-water-systems-as-set-forth-in "The-Design-of-Small-Water-Systems"-by-Joseph-A-Salvato, Jr., P.E., produced-by-the-Health-Education-Service-of-the-State-of-New-York-in-1958.

(6)--To-the-extent-practicable, a-person-shall-avoid-locating-part-or-all-of-the-new-or-expanded-facility-at-a-site-which:

(a)--is-subject-to-a-significant-risk-from-earthquakes, floods, fires, or other disasters which could cause a breakdown of the public water system or a portion thereof, or

(b)--except-for-intake-structures-and-source-wells, is-within-the-flood-plain-of-a-100-year-flood;--Water-wells-located-in-the-100-year-flood-plain-shall-have-the-casing-extended-at-least-four-feet-above-the-maximum-highest-flood-elevation:

16.20.401 PLANS FOR PUBLIC WATER SUPPLY OR WASTEWATER SYSTEM

(1) The purpose of this rule is to assure the protection of public health and the quality of state waters by requiring Department review and approval of plans and specifications for siting, construction, operation and modification of public water supply systems and waste water systems prior to the beginning of construction.

(2) As used in this rule, the following definitions apply in addition to those in section 75-6-102, MCA.

(a) "Applicant" means a person who submits plans and specifications for approval pursuant to this rule.

(b) "Public sewage system" means a system for collection, transportation, treatment or disposal of sewage that is designed to serve or serves ten or more families or 25 or more persons for a period of at least 60 days out of the calendar year.

(c) "Sewage system" means a device for collecting or conducting sewage, industrial wastes, or other wastes to an ultimate disposal point.

(d) "Subsurface sewage treatment system" means the method of sewage treatment in which the effluent is applied to the soil or subsoil.

(e) "Wastewater" means either any combination of sewage, industrial waste, or other wastes.

(f) "Wastewater system" means a public sewage system or other system that collects, transports, treats or disposes of industrial wastes.

(3) Before the applicant commences the construction, alteration or extension of a public water supply system or wastewater system, he shall submit an engineering report along with the necessary plans and specifications for the system to the department for its review and written approval.

(a) The engineering report, plans and specifications for a public water supply system shall be prepared and designed by a professional engineer in accordance with the format and criteria set forth in the Great Lakes-Upper Mississippi River Board of State Sanitary Engineers Recommended Standards for Water Works, also known as the Ten State Standards, 1976 edition, published by the Health Education Service, Inc., P. O. Box 7126, Albany, New York, 12224.

(i) The board hereby adopts and incorporates herein by reference the Great Lakes-Upper Mississippi River Board of State Sanitary Engineers, Recommended Standards for Waterworks, 1976 edition, also known as the "Ten State Standards", published by the Health Education Service, Inc. "Ten State Standards" is a like publication setting forth the requirements for the design and preparation of plans and specifications for public water supply systems. A copy of the 1976 "Ten State Standards" may be obtained from the Water Quality Bureau, Department of Health and Environmental Sciences, Helena, MT.

(b) The engineering report, plans and specifications for a wastewater system shall be prepared and designed by a professional engineer in accordance with the format and criteria set forth in the Great Lakes-Upper Mississippi River Board of State Sanitary Engineers Recommended Standards for Sewage Works, also known as the Ten State Standards, 1978 edition, published by the Health Education Service, Inc., P. O. Box 7126, Albany, New York, 12224. The engineering report plans and specifications for a wastewater system shall also be designed to ensure the safety of the public health and compliance with the Montana Water Quality Act, sections 75-5-101 et seq., MCA, and rules adopted pursuant thereto.

(i) The board hereby adopts and incorporates herein by reference the Great Lakes-Upper Mississippi River Board of State Sanitary Engineers, Recommended Standards for Sewage Works, 1978 edition, also known as the "Ten State Standards", published by the Health Education Service, Inc. "Ten State Standards" is a like publication setting forth the requirements for the design and preparation of plans and specifications for sewage works. A copy of the 1978 "Ten State Standards" may be obtained from the Water Quality Bureau, Department of Health and Environmental Sciences, Helena, MT.

(c) A subsurface sewage treatment system may be designed in accordance with publications such as, "Manual of Septic Tank Practice" by U.S. Department of Health, Education and Welfare,

"Treatment and Disposal of Wastewater from Homes by Soil Infiltration and Evapotranspiration" by Alfred P. Bernhart, "Wastewater Treatment Systems for Rural Communities" by Goldstein and Moberg, or Bulletin 332 "Septic Tanks" by Cooperative Extension Service, Montana State University.

(d) The department may grant a deviation from the standards referenced in subsections (3)(a) and (b) of this rule when the design engineer for the system has demonstrated to the satisfaction of the department that strict adherence to the standards of this rule is not necessary to protect public health and the quality of state waters.

(e) The applicant must identify to the department's satisfaction that a legal entity exists which is responsible for the ownership, maintenance, operation and perpetuation of the public water supply system or wastewater system.

(4) The department may issue a written approval for a public water supply system or wastewater system if it determines that the engineering report, plans and specifications are complete and the applicant has complied with all provisions of this rule.

(a) The department's approval of a public water supply system may set forth conditions of approval which may include but shall not be limited to those specifying limits on quantities available for irrigation and fire flows, limited storage, standby power sources, and peak flows.

(b) The department's approval of a wastewater system may set forth conditions of approval which may include but shall not be limited to expected performance characteristics and performance limitations such as operations, staffing, financing, wastewater loads, standby power and access.

(5) Unless the applicant has commenced the construction, alteration, or extension of a public water supply or wastewater system within 2 years after the department has issued its written approval, the approval shall be deemed void and an engineering report, plans and specifications shall be re-submitted as required by subsection (3) of this rule.

(6) Within 90 days after the construction, extension or addition of a public water supply system or wastewater system has been completed, the project engineer shall certify to the department that the construction, alteration, or extension was completed in accordance with the plans and specifications approved by the department. This certification shall be accompanied by a complete set of "as built" drawings signed by the project engineer and an operation and maintenance manual if applicable.

(a) The department may require that chemical analyses, microbiological examinations, flow tests, pressure tests, treatment plant performance records or other measures of performance for a public water supply or wastewater system

be conducted by the applicant to substantiate that the system complies with the criteria set forth in the engineering report, plans and specifications.


4. The board is proposing the amendments to this rule in order to generally revise the rule. The revision would in part update the standards and allow deviations from the standards under limited circumstances.

5. Interested persons may present their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to C. W. Leaphart, Jr., 1 North Last Chance Gulch, #6, Helena, Montana, 59601, no later than January 3, 1981.

6. C. W. Leaphart, Jr., has been designated to preside over and conduct the hearing.

7. The authority of the board to make the proposed amendments is based on section 75-6-103, MCA, implementing sections 75-6-103, 75-6-104, and 75-6-112, MCA.


JOHN F. MCGREGOR, M.D. Chairman

By 
RITA ANN SHEEHY

Certified to the Secretary of State November 17, 1980

BEFORE THE BOARD OF LIVESTOCK
OF THE STATE OF MONTANA

In the matter of the amendment) NOTICE OF PUBLIC HEARING ON
of Rule 32.15.208 (concerning) PROPOSED AMENDMENT OF RULE
the duties of and compensation) 32.15.208 DUTIES OF STATE
for State Market Veterinarians) APPOINTED MARKET VETER-
) INARIANS.

TO: All Interested Persons.

1. On December 19, 1980 at 1:00 p.m. a public hearing will be held in room 319 of the Department of Livestock, at Helena, Montana, to consider the amendment of rule 32.15.208.

2. The proposed amendment replaces present rule 32.15.208 found in the Administrative Rules of Montana. The proposed amendment would eliminate payments by the Department of Livestock to State Market Veterinarians for inspection serviced at livestock markets. The requirement for; duties of; and, state authorization of State Market Veterinarians will continue as mandated but the expense of the State Market Veterinarian will be an obligation of the livestock market.

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

32.15.208 DUTIES OF STATE APPOINTED AUTHORIZED MARKET VETERINARIANS A veterinarian, provided at the expense of the livestock market, but authorized and paid by the Montana department of livestock, animal health division must inspect all livestock coming into livestock markets, make and keep records of the proper disposition of any animal showing evidence of disease or any animal condemned by the Montana department of livestock or the United States department of agriculture and determine the brucellosis status of all female cattle and bulls. He is responsible for providing that all livestock sold and moved from the market have complied with the disease control regulations of the Montana department of livestock, animal health division. He is also responsible for the enforcement of the rules contained in this sub-chapter. (History: Secs. 81-2-102, 81-8-231 MCA; IMP, Secs. 81-2-102, 81-8-231 MCA; Eff. 12/31/72; EMERG AMD, Eff. 8/15/75; AMD, Eff. 11/4/75.)

4. The department is proposing this amendment to its rule mainly because of budget deficits. However, to maintain the necessary quality inspection services now being provided, all present service mandated by law and administrative rule will remain in effect.

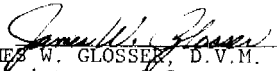
5. Interested persons may present their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to James W. Glosser, D.V.M., Administrator & State Veterinarian, Department of Livestock, Capitol Station, Helena, Montana

59601, no later than December 28, 1980.

6. One member of the Board of Livestock, the department Administrator, or the department's attorney will preside over and conduct the hearing.

7. The authority of the agency to make the proposed amendment is based on section 81-2-102, 81-8-231, MCA, and the rule implements section(s) 81-2-102, 81-8-231, MCA.


ROBERT G. BARTHELMESS
Chairman, Board of Livestock

By: 
JAMES W. GLOSSET, D.V.M.
Administrator & State
Veterinarian

Certified to the Secretary of State November 18, 1980.

STATE OF MONTANA
DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL LICENSING
BEFORE THE BOARD OF NURSING HOME ADMINISTRATORS

IN THE MATTER of the proposed) NOTICE OF PROPOSED AMENDMENT
amendment of ARM 40.32.414) OF ARM 40.32.414 (3)(4)
subsections (3) and (4) con-) EXAMINATIONS
cerning examinations.)

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On December 29, 1980, the Board of Nursing Home Adminis-
trators proposes to amend subsections (3) and (4) of ARM 40.32.
414 concerning examinations.

2. The proposed amendment will delete subsection (3)
in its entirety and will amend subsection (4)(a), (b) and (c).
The complete text of the rule is located at page 40-584 of
the Administrative Rules of Montana. The proposed amendments
will read as follows: (deleted matter interlined, new matter
underlined)

"40.32.414 EXAMINATIONS

~~(3) Applicant must provide a recent photograph approxi-
mately 2-1/2 x 2-1/2" in size of head and shoulders only.~~

~~(4) Any one or a combination of~~ The following will
establish eligibility for admission to the examination:

(a) ~~at least an Associate Degree or its equivalent,
in hospital or nursing home administration, subject to
board approval 2 years of college in business administra-
tion; and~~

~~(b) presenting evidence satisfactory to the board of
sufficient education, training or experience in the fore-
going fields to administer, supervise and manage a long
term care facility, and 2 years of experience under a
licensed nursing home administrator or hospital
administrator.~~

~~(c) four of the last six years as an administrator or
assistant in a licensed health care facility
....."~~

3. The board is proposing the amendment to clearly define
requirements for admission to the nursing home administrators
examination with regard to education and experience.

4. Interested parties may submit their data, views or
arguments concerning the proposed amendment in writing to the
Board of Nursing Home Administrators, Lalonde Building, Helena,
Montana 59601 no later than December 26, 1980.


5. If a person who is directly affected by the proposed
amendment wishes to express his data, views or 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 Board of Nursing Home Administrators,
Lalonde Building, Helena, Montana 59601 no later than December
26, 1980.

6. If the board receives requests for a public hearing

on the proposed amendment from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed amendment; from the Administrative Code Committee of the legislature; from a governmental agency or subdivision; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register.

7. The authority of the board to make the proposed amendment is based on section 37-9-201 (1), MCA and implements sections 37-9-203 (1), 301 and 304, MCA.

BOARD OF NURSING HOME
ADMINISTRATORS
MRS. H.E. GERKE, CHAIRMAN

BY: 
ED CARNEY, DIRECTOR
DEPARTMENT OF PROFESSIONAL
AND OCCUPATIONAL LICENSING

Certified to the Secretary of State, November 18, 1980.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE	)	NOTICE OF PROPOSED AMENDMENT
AMENDMENT OF RULE 42.19.202,	)	OF RULE 42.19.202, relating to
relating to application	)	application deadlines for
deadlines for property	)	property tax relief.
tax relief.)	

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On December 29, 1980, the Department of Revenue proposes to amend Rule 42.19.202, relating to application deadlines for property tax relief.

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

42.19.202 APPLICATION DEADLINE (1)(a) Except as provided in subsection (2), all completed applications for relief under Chapter 698, Laws of 1979, must be returned not later than the second Friday in December of the year for which relief is sought to the county assessor of the county wherein the property to which the relief is granted is located.

(b) Applications that are mailed to the county assessor must be postmarked not later than the second Friday in December.

(2)(a) In those cases where tax notices are released later than November 15, the department may extend the deadline for applications for up to 30 days after the date of release if the department determines that an extension is needed to provide a reasonable opportunity for taxpayers to apply for relief.

(b) The director may accept applications after the deadline provided for in subsection (1) upon a showing by the applicant of good cause for failure to comply with the deadline.

3. In order to permit the acceptance of late applications for tax relief when there exists good cause for failure to comply with the filing deadlines, the proposed amendment grants authority to the director to accept late applications upon a satisfactory showing of good cause.

4. Interested persons may submit their data, views, or arguments concerning the proposed amendment in writing no later than December 26, 1980, to:

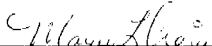
Laurence Weinberg
Legal Division
Department of Revenue
Mitchell Building
Helena, Montana 59601

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 that request along with any written comments he has to Laurence Weinberg at the address given in paragraph 4 above no later than December 26, 1980.

6. If the department receives request for a public hearing on the proposed amendment from either 10% or 25, whichever is less, of the persons directly affected; from the Revenue Oversight Committee of the Legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who are directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been estimated to be at least 25 based upon the number of persons receiving property tax relief.

7. The authority of the department to make the proposed amendment is based on 15-1-201, MCA. The rule and its amendment implement Chapter 698, Laws of 1979.



MARY E. CRAIG, Director
Department of Revenue

Certified to the Secretary of State 11-18-80

BEFORE THE WORKERS' COMPENSATION COURT
OF THE STATE OF MONTANA

In the matter of the	)	NOTICE OF ADOPTION OF AMENDMENTS
adoption of amendments	)	TO ARM 2.52.201, 2.52.202, 2.52.204,
ARM 2.52.201, 2.52.202	)	2.52.206, 2.52.207, 2.52.208
2.52.204, 2.52.206,	)	2.52.209, 2.52.210, 2.52.212,
2.52.207, 2.52.208,	)	2.52.213, 2.52.214, 2.52.215,
2.52.209, 2.52.210,	)	2.52.219, 2.52.222 and 2.52.225.
2.52.212, 2.52.213,)	
2.52.214, 2.52.215,)	
2.52.219, 2.52.222 and)	
2.52.225.)	

TO: All Interested Persons

1. On October 16, 1980 the Workers' Compensation Court published a Notice of Proposed Amendments of ARM 2.52.201, 2.52.202, 2.52.204, 2.52.206, 2.52.207, 2.52.208, 2.52.209, 2.52.210, 2.52.212, 2.52.213, 2.52.214, 2.52.215, 2.52.219, 2.52.222 and 2.52.225 of the existing procedural rules of the Workers' Compensation Court at page 2684 of the 1980 Montana Administrative Register, Issue No. 19.

2. The Workers' Compensation Court has adopted the amendments to ARM rules as proposed with the following change:

2.52.208 TIME AND PLACE OF TRIAL GENERALLY

Sections (1) through (5) as previously noticed on October 16, 1980.

(6) Upon receipt of a petition meeting the requirements of these rules, the Court will set a trial ~~for the area where the accident occurred~~ date at the time and in the place designated in subsections (3) and (4) of this rule and at a time that will allow 30 days notice to be given of the trial. ~~However,~~ The Court may, for good cause, hold a trial over to the next regular trial date in or for the area.

3. No public hearing was held but interested parties were asked to submit their data, views or arguments to the Court in writing by November 15, 1980. No comments were received.


JUDGE

CERTIFIED TO SECRETARY OF STATE November 13, 1980

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

In the matter of the amendment)	NOTICE OF AMENDMENT
of rules 16.16.802, 16.16.803,)	OF RULES
16.16.804 pertaining to the)	16.16.802, 16.16.803,
collection and disposition of)	and 16.16.804
fees for the review of)	
subdivisions)	

TO: All Interested Persons

1. On August 23, 1980, the Department of Health and Environmental Sciences published notice of a proposed amendment to rules 16.16.802, 16.16.803 and 16.16.804 concerning the collection and disposition of fees for the review of subdivisions at pages 2442 through 2445 of the 1980 Montana Administrative Register, issue number 16, and hearing was held on September 30, 1980.

2. The Department has amended the rules as proposed except for the following changes:

- 16.16.802 Same as proposed
- 16.16.803 Same as proposed
- 16.16.804(1)(a)--(f) Same as proposed
 - (2) Same as proposed
 - (2)(a) Two dollars (\$2) per parcel for subdivisions containing over 5 or fewer parcels with individual sewage treatment systems.
 - (b) Same as proposed
 - (3), (4), (5) Same as proposed.

3. Comments and testimony were received from a few persons. Summaries of comments received in addition to the Department's responses are set forth below.

Comment: The Lewis and Clark City-County Board of Health stated that all of the amendments as proposed will produce only a negligible increase in the reimbursement for subdivision review to local health departments, including the increased reimbursement to local health departments for their review of mobile homes or trailer parcels.

Response: The Department has not changed any of the amounts to be reimbursed to local health departments in response to the Lewis and Clark City-County Board of Health's general comment. Increased reimbursement to the local health departments would severely impact the Department's ability to perform its statutory duties and would create an undue impact upon the Department's Subdivision Bureau's budget.

Comment: The Cascade County City-County Board of Health stated that they were in general agreement with the Depart-

ment's proposed amendments and also proposed that "local health departments be reimbursed \$10 for their review of subdivisions with over 5 parcels with public water and sewer not included within master plan areas.

Response: An increased reimbursement in this category to the local health departments would severely impact the Department's ability to perform its statutory duties and would create an undue impact upon the Department's Subdivision Bureau's budget.

Comment: Mr. Thomas J. Wing of the Resource Engineers and Associates commented that 16.16.804(2)(a) should address five or more parcels and not five or fewer parcels.

Response: The Department acknowledges this error and has made the necessary correction.

A. C. Knight

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

Certified to the Secretary of State November 17, 1980

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

IN THE MATTER of Adoption of) NOTICE OF ADOPTION OF RULES
Rules Prohibiting the Use of) PROHIBITING USE OF AUTOMATIC
Automatic Adjustment Clauses) ADJUSTMENT CLAUSES IN
in Utility Rate Schedules.) UTILITY RATE SCHEDULES.

TO: All Interested Persons

1. On September 11, 1980, the Department of Public Service Regulation published notice of a proposed adoption of new rules which would prohibit the use of automatic adjustment clauses in utility rate schedules at page 2551 of the 1980 Montana Administrative Register, issue number 17.

2. The Commission has adopted the rules as proposed.

Rule I. 38.5.1701 DEFINITION (No change).

Rule II. 38.5.1702 AUTOMATIC ADJUSTMENT CLAUSES
PROHIBITED (No change).

3. The Department received one comment endorsing the rules as proposed.


GORDON E. BOLLINGER, Chairman

CERTIFIED TO THE SECRETARY OF STATE November 18, 1980.


STATE OF MONTANA
DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL LICENSING
BEFORE THE BOARD OF NURSING

In the matter of the Amendments)	NOTICE OF AMENDMENTS OF ARM
of ARM 40.30.403 concerning re-	40.30.403 RE-EXAMINATION -
examination for registered)	REGISTERED NURSE; 40.30.404
nurses; 40.30.404 concerning)	RE-EXAMINATION - PRACTICAL
re-examination for practical)	NURSE; 40.30.1002 through
nurses; and 40.30.1002 through)	40.30.1009 STANDARDS FOR
40.30.1009 concerning standards)	MONTANA SCHOOLS OF NURSING
for Montana schools of practi-	and ADOPTION OF 40.30.1010
cal nursing; and adoption of a)	EVALUATION (concerns the
new rule concerning these)	standards for schools)
standards.)	

TO: All Interested Persons:

1. On October 16, 1980 the Board of Nursing published a notice of proposed amendment and adoption of the above stated rules at pages 2731 through 2737, 1980 Montana Administrative Register, issue number 19.
2. The board has amended and adopted the rules exactly as proposed.
3. No comments or testimony were received.

BOARD OF NURSING
JANIE CROMWELL, R.N., PRESIDENT

BY: 
ED CARNEY, DIRECTOR
DEPARTMENT OF PROFESSIONAL
AND OCCUPATIONAL LICENSING

Certified to the Secretary of State, November 18, 1980.

STATE OF MONTANA
DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL LICENSING
BEFORE THE BOARD OF PUBLIC ACCOUNTANTS

IN THE MATTER of the Proposed) NOTICE OF AMENDMENT OF ARM
amendment of rules 40.52.402) 40.52.402 EXAMINATIONS; 40.
concerning examinations; 40.52.) 52.403 OUT-OF-STATE CANDI-
403 concerning out-of-state) DATES FOR EXAMINATION; 40.52.
candidates for examination;) 404 EXAMINATION CREDITS -
40.52.404 concerning examina-) OUT-OF-STATE CANDIDATES; 40.
tion credit for out-of-state) 52.405 CONSECUTIVE EXAMINA-
candidates; 40.52.405 concern-) TION REQUIREMENTS; 40.52.407
ing consecutive examination re-) QUALIFICATIONS FOR REGISTRA-
quirements; 40.52.407 concern-) TION AS LICENSED PUBLIC
ing qualifications for registra-) ACCOUNTANT; 40.52.408 EQUIVA-
tion as licensed public account-) LENT EDUCATION; 40.52.409
ants; 40.52.408 concerning) ACCOUNTING EXPERIENCE RE-
equivalent education; 40.52.409) QUIREMENTS; 40.52.410 FEE
concerning accounting experience) SCHEDULE; 40.52.411 ANNUAL
requirements; 40.52.410 fee) LICENSES TO PRACTICE; PRO-
schedule; 40.52.411 concerning) POSED REPEAL OF 40.52.412
annual licenses to practice;) REGISTRATION OF OFFICE/PART-
proposed repeal of ARM 40.52.) NERSHIPS AND PROFESSIONAL
412 concerning registration of) CORPORATIONS; 40.52.413 RULES
office/partnerships and profes-) OF PROFESSIONAL CONDUCT; and
sional corporations and 40.52.) ADOPTION OF RULES 40.52.203
413 rules of professional con-) COMMITTEES; 40.52.415 RECIPRO-
duct; and adoption of new rules) CITY -- OTHER STATES; 40.52.416
concerning committees; reciproc-) PREVIOUS APPLICATIONS IN
ity; previous applications in) EFFECT; 40.52.601 through
effect; rules of professional) 40.52.616 RULES OF PROFESSIONAL
conduct; and rules for continu-) CONDUCT; and 40.52.801 through
ing education.) 40.52.827 RULES FOR CONTINUING
EDUCATION

TO: All Interested Persons:

1. On September 11, 1980, the Board of Public Accountants published a notice of public hearing on the proposed amendments of most of its present rules ARM 40.52.402 through 40.52.413 and for the adoption of new rules at pages 2553 through 2582, Montana Administrative Register, issue No. 18 of 1980. This notice was amended on September 25, 1980, at page 2627 of the Register.

2. Approximately 20 individuals appeared at the hearing and another 9 mailed written comments to the Board. Of those appearing at the hearing, all but 3 either made no comment or spoke generally in favor of the proposed action. One of the letters was also in favor of the proposed action. The comments which could be characterized as adverse are

summarized with the Board's response as follows:

Comment: Some certified public accountants employed full-time in state government questioned whether such employment should necessitate meeting the full c.p.e. requirement.

Response: As other state employees countered, the ability to append the initials C.P.A. to one's name is a privilege which is of value to the user and which affects the public perception of his or her opinions. This is sufficient reason to require c.p.e. requirements of such persons. However, licensees not working at accounting functions at all may seek exceptions from the requirement under proposed rule VI (Hardship Exceptions). (40.52.806)

Comment: A prospective candidate for re-examination questioned the wording of rule 40.52.405 as proposed to be amended in subsection (3)(b). His concern was that he might be required to participate in a continuing education program to which he could not gain admission.

Response: The Board's intent is that candidates for re-examination demonstrate in one of three possible ways that they have undertaken additional study since failing the exam: either by enrolling in more college courses in accounting, or by enrolling in a correspondence course tailored for examination candidates, or by enrolling in continuing education programs. To clarify that not all three requirements are simultaneously imposed, the rule is amended to insert the disjunctive "or" between (ii) and (iii).

Comment: The status of retired, inactive licensees who neither complete c.p.e. requirements nor pay renewal fees was raised.

Response: It is the Board's policy not to request the surrender of a certificate from licensees who submit affidavits that they are wholly retired from the practice, and to grant inactive status to such licenses.

Comment: The renewal fee of \$50 a year is more than is needed for administering the continuing education requirement.

Response: If we find the revenue is excessive, the Board will reduce the fee. However, it must be remembered that the renewal fee covers the increased costs of the positive enforcement program, and the traditional areas of board administration, renewal paperwork, etc.

Comment: The committee of board members who administer the C.P.A. exam should all be C.P.A.'s.

Response: Such a committee is customarily appointed now. In any event, the grading is done in New York City and the only functions performed locally are those of a proctor.

Comment: Proposed rule XXIII, "Statement on Standards for Formal Continuing Education Programs" should be phrased as guidelines rather than standards. These standards would limit available c.p.e. to NAA or AICPA programs and would eliminate access to programs offered by other organizations or firms. (Rule XXIII adopted as 40.52.823)

Response: "Guidelines" are not enforceable but "standards" are. It is the Board's firm intent to construe these standards liberally so as to qualify relevant programs offered by bar organizations, computer companies, real estate and insurance societies, and even programs sponsored within a firm. However, the Board feels that standards should be stated now as goals to which c.p.e. programs will meet by 1984 or 1985.

Comment: Several persons urged the adoption of carry-back and carryforward provisions for the 3-year periods for continuing professional education requirements. As phrased in one letter, no one should "be required to take more than 40 hours in any one year to qualify if he has met the qualifications the previous year."

Response: The intent is that licensees take 40 hours per year; the rule has been drafted to allow fulfillment of the requirement with 120 hours every three years to allow flexibility for special circumstances. This education is intended to be continuing, however, and a licensee who lets one or two years go by without getting his annual 40 hours puts himself at risk.

Comment: A C.P.A. living and working in California comments that c.p.e. reporting periods in his state fall in a different time period.

Response: See proposed rule V, first sentence: "The Board has authority to make a written exception from the continuing education requirements for those persons who certify they do not intend to practice public accounting in Montana". (Adopted as 40.52.805)

Comment: A C.P.A. living and working in Texas objects to exempting out-of-state licensees altogether and urges that such persons be required to meet one-half the hourly c.p.e. requirements for other licensees.

Response: The Board intends its rule to protect Montanans and sees no need to extend regulation to those

licensees who have no practice in this state.

Comment: One national firm urged adoption of a calendar year reporting requirement for c.p.e. Since the Securities Exchange Commission, and various other state boards, use the calendar year.

Response: The reason for reporting c.p.e. on a fiscal year while the licensing year is a calendar year, is that the Board wishes the five months (July 31 to December 31) to tabulate and determine that education requirements have been met.

Comment: A mother staying home to raise her two young children wrote objecting to the c.p.e. requirements as they would apply to her tax return work of a few dozen hours a year.

Response: The Board has authority to grant hardship exceptions under proposed rule VI (adopted and numbered 40.52.806). The examples of hardship set forth in the rule are set forth by way of illustration and not limitation.

Comment: The rules are unclear as to how one gets credit for self-study work.

Response: As noted in proposed rule XXIII (3)(a) and (b), it is necessary to provide evidence of satisfactory completion, such as a completed workbook or examination. (40.52.823)

3. No other comments or testimony were received. The Board therefore adopts the rules as proposed with the exception of rule 40.52.405 subsection (3)(b) which is amended to read as follows:

"(3)(b) Any applicant who has been rejected by the board for re-examination may reapply for the next regularly scheduled examination by submitting with his application for re-examination evidence of further educational preparation for the uniform certified public accountants examination. The evidence considered by the board shall consist of:

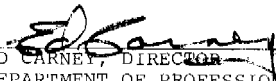
(i) enrollment in courses of an accredited college or university.

(ii) enrollment in a specified correspondence course specifically designed to aid an applicant in passage of the examination, or

(iii) participation in a continuing education program sanctioned by the board."

-2975-

BOARD OF PUBLIC ACCOUNTANTS
SHERMAN VELTKAMP, CHAIRMAN

BY: 
ED CARNEY, DIRECTOR
DEPARTMENT OF PROFESSIONAL
AND OCCUPATIONAL LICENSING

Certified to the Secretary of State, November 18, 1980.

22-11/28/80

Montana Administrative Register

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

In the matter of the amendment of) NOTICE OF THE AMEND-
Rule ARM 46.10.404 pertaining to) MENT OF ARM 46.10.404
Special Needs, Title IV-A Day Care) PERTAINING TO TITLE
for Recipients in Training) IV-A DAY CARE.

TO: All Interested Persons

1. On September 11, 1980, the Department of Social and Rehabilitation Services published notice of a proposed amendment of Rule 46.10.404, pertaining to special needs, Title IV-A Day Care for Recipients in training at page 2583 of the 1980 Montana Administrative Register, Issue number 17.

2. The agency has amended the proposed rule with the following changes:

46.10.404 SPECIAL NEEDS, TITLE IV-A DAY CARE FOR RECIPIENTS IN TRAINING Unless otherwise provided; in addition to the basic AFDC grant, day care payment will be included for children of recipients who are attending employment-related training. AFDC recipients who attend WIN training shall be referred for WIN-related day care. AFDC recipients who are employed shall be referred to Title XX for payment of day care services.

(1) Limitations to special needs day care:

(a) Title IV-A day care payments are made for children of parents who are AFDC recipients in training on a full- or part-time basis. Training is, but not limited to: vocational-technical schools, business colleges, junior colleges, university students, or special classes which may be classified as "employment-related training." Students who are working to support their education are included under this rule.

(b) Day care needs will be taken into consideration for eligibility determination of an applicant. If an applicant requires special need day care, this need will be considered in addition to the AFDC grant amount to determine eligibility.

(c) Day care payment shall be added to the AFDC grant amount, and in no cases will Title IV-A day care be paid in the form of vendor payment.

(d) Day care payment will be paid upon evidence of need. Evidence of need includes verification from the provider of day care services. Verification includes the signature of the individual provider or his designee, the month of service, and names of children served.

(e) Day care ~~payment~~ PAYMENTS shall not exceed ~~\$143 \$154~~ per month, ~~or \$7 per day or \$3-50 per half day per child for children in licensed day care centers meeting federal-guide lines, and \$121 \$132~~ per month, ~~or \$6 per day, or \$3 per half day per child for children in licensed day care centers, \$121~~

per month per child for children in licensed day care homes meeting federal guidelines and \$99 per month, per child for in-home day care or in day care homes. The recipient shall choose his day care provider.


(f) Day care ~~payment~~ PAYMENTS shall not exceed \$132 per month ~~or \$6 per day or \$3 per half day per child for children in licensed day care homes meeting federal guidelines and \$110 per month, or \$5 per day or \$2.50 per half day per child for in-home day care or in day care homes.~~

(g) These rate increases shall be paid retroactive to August 1, 1980.

(h) The recipient shall choose his day care provider.

3. The Department is amending the rule as proposed except it is deleting the references to payments for facilities meeting federal guidelines because the federal government has not adopted any guidelines. Furthermore, this reference is redundant because Section 53-4-514 MCA requires the Department to pay an additional \$1.00 per day per child for those day care facilities which meet federal guidelines.

4. No comments or testimony were received.


Director, Social and Rehabilitation Services

Certified to the Secretary of State November 18, 1980.

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

In the matter of the amendment of) NOTICE OF THE AMENDMENT
Rule 46.10.508 pertaining to AFDC) OF RULE 46.10.508
Unearned income) PERTAINING TO AFDC UNEARNED
) INCOME

TO: All Interested Persons

1. On October 16, 1980, the Department of Social and Rehabilitation Services published notice of a proposed amendment of Rule 46.10.508 pertaining to AFDC Unearned Income at page 2771 of the 1980 Montana Administrative Register, issue number 19.

2. The agency has amended the rule as proposed.

3. No comments or testimony were received.

In the matter of the amendment of) NOTICE OF THE AMENDMENT OF
Rule 46.12.102, the repeal of 46.) RULE 46.12.102, THE REPEAL
12.701 and the adoption of Rules) OF 46.12.701 AND THE
46.12.702 and 46.12.703 all per-) ADOPTION OF RULES 46.12.
taining to medical assistance,) 702 AND 46.12.703 ALL PER-
outpatient drugs) TAINING TO MEDICAL
) ASSISTANCE

TO: All Interested Persons

1. On October 16, 1980, the Department of Social and Rehabilitation Services published notice of a proposed amendment of Rule 46.12.102, the repeal of Rule 46.12.701 and the adoption of Rules 46.12.702, OUTPATIENT DRUGS, REQUIREMENTS and 46.12.703, OUTPATIENT DRUGS, REIMBURSEMENT all pertaining to medical assistance, outpatient drugs at page 2773 of the 1980 Montana Administrative Register, issue number 19.

2. The agency has adopted Rules 46.12.702, OUTPATIENT DRUGS, REQUIREMENTS and 46.12.703, OUTPATIENT DRUGS, REIMBURSEMENT and repealed 46.12.701 as proposed.

3. The agency has amended 46.12.102 as proposed with the following changes:

(23) Estimated acquisition cost is the cost for drugs

for which no MAC price has been determined. The estimated acquisition cost is established FOR ALL DRUGS and adjusted monthly by the department upon notification of drug prices by pharmacies or legitimate pharmacy supplies.

4. No comments or testimony were received.

In the matter of the amendment of	)	NOTICE OF THE AMENDMENT
Rules 46.12.556 and 46.12.557	)	OF RULES 46.12.556 AND
pertaining to personal care ser-	)	46.12.557 PERTAINING TO
vices in a recipient's home	)	PERSONAL CARE SERVICES
	)	IN A RECIPIENT'S HOME

TO: All Interested Persons

1. On October 16, 1980, the Department of Social and Rehabilitation Services published notice of a proposed amendment of Rules 46.12.556 and 46.12.557 pertaining to personal care services in a recipient's home at page 2769 of the 1980 Montana Administrative Register, issue number 19.

2. The agency has amended the rules as proposed.

3. No comments or testimony were received.



Director, Social and Rehabilitation Services

Certified to the Secretary of State November 18, 1980.

VOLUME NO. 38

OPINION NO. 113

COURTS, CITY - Calling in another judge because of work load;
JUDGES - Calling in another city judge because of work load;
JUSTICES OF THE PEACE - Calling in a city judge for a town because of work load;
MUNICIPAL CORPORATIONS - Calling in a city judge for a town because of work load;
MONTANA CODE ANNOTATED - Section 3-11-203(1)(d).

HELD: Section 3-11-203(1)(d) MCA, authorizes a city judge for a town who has determined that he or she is unable to act for any reason to call in a justice of the peace or a qualified resident of the town to act in his or her place. However, that provision does not authorize the city judge to appoint a regular deputy or substitute city judge.

14 November 1980

Wayne L. Vick, Esq.
Bridger City Attorney
P.O. Box 471
Bridger, Montana 59014

Dear Mr. Vick:

You have asked for my opinion on the following question:

May a justice of the peace who has been designated to act as a city judge for a town call another person in to act as judge under section 3-11-203(1)(d), MCA, because of the work load?

Section 3-11-203(1)(d), MCA, states:

The city judge or mayor may call in a justice of the peace or some qualified resident of the city or town to act in the judge's place whenever the judge is:...sick, absent, or unable to act.

(Emphasis added.) My research has revealed no Montana interpretations of this provision. Therefore, my opinion is based on cases from other jurisdictions interpreting similar laws.

In Titan Oil & Gas, Inc. v. Shipley, 257 Ark. 278, 517 S.W.2d 210, 217 (1974), the Supreme Court of Arkansas held that a judge need not be physically disabled in order to come under such a provision. If that were the case, the court reasoned, the other words--"sick" or "absent" in the Montana statute--would have sufficed. The court did not, however, provide any guidance as to what sorts of non-physical disabilities would constitute an inability to act. Rather, the court deferred to the judge's own determination of inability, stating:

The judge's determination of the necessity for his being absent from court on a day fixed for its being in session is conclusive and the record showing his absence and the election of a special judge in accordance with the requirements of the constitution is impervious to attack, not only collaterally, but on appeal, unless the facts which would defeat the election are recited in the record. (Citation omitted.)

517 S.W.2d at 217. Thus, in the situation you have described, the determination whether the city judge is unable to act must be made by the city judge herself.

Another case revealed by my research does establish a limit on a judge's use of a statute such as section 3-11-203, MCA. In Cox v. Allen, 188 Ky. 598, 222 S.W. 932 (1920), the Kentucky Supreme Court held that a regular deputy or substitute judge appointed under the supposed authority of such a provision had no more judicial power "than would any loafer who might have been in the office of the...judge at the time." The court stated:


Manifestly no such authority was ever intended to be conferred by the Legislature in enacting the statute. ...To construe the section as the county judge did in this case would result in having two or more county judges in the same county at the same time, but only one of whom was chosen by the people as provided by law. They might perchance be making contradictory orders concerning the same matter at the same time, and thus not only obstruct the orderly administration of the office, but create endless confusion.

222 S.W. at 934. By analogy, section 3-11-203(1)(d), MCA, does not confer on a city judge the authority to appoint a regular deputy or substitute city judge, with power and authority to act in all matters the same as the regular city judge. The city judge may call in a substitute only when and for as long as the emergency situations listed in the statute exist.

THEREFORE, IT IS MY OPINION:

Section 3-11-203(1)(d), MCA, authorizes a city judge for a town who has determined that he or she is unable to act for any reason to call in a justice of the peace or a qualified resident of the town to act in his or her place. However, that provision does not authorize the city judge to appoint a regular deputy or substitute city judge.

Very truly yours,


MIKE GREELY
Attorney General