RESERVE

MONTANA ADMINISTRATIVE REGISTER

1981 ISSUE NO. 9
PAGES 430-479

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, 59620.

HOW TO USE THE ADMINISTRATIVE RULES OF MONTANA AND THE MONTANA ADMINISTRATIVE REGISTER

Definitions: Administrative Rules of Montana (ARM) is a loose-leaf compilation by department of all rules of state departments and attached boards presently in effect, except rules adopted up to three months previously.

Montana Administrative Register (MAR) is a soft back, bound publication, issued twice-monthly, containing notices of rules proposed by agencies, notices of rules adopted by agencies, and interpretations of statute and rules by the attorney general (Attorney General's Opinions) and agencies (Declaratory Rulings) issued since publication of the preceding register.

Use of the Administrative Rules of Montana (ARM):

Known Subject Matter	1.	Consult General Index, Montana Code Annotated to determine department or board associated with subject matter or statute number.
Department	2.	Refer to Chapter Table of Contents, Title 1 through 46, page i, Volume 1, ARM, to determine title number of department's or board's rules.
	3.	Locate volume and title.
Subject Matter and Title	4.	Refer to topical index, end of title, to locate rule number and catchphrase.
Title Number and Department	5.	Refer to table of contents, page 1 of title. Locate page number of chapter.
Title Number and Chapter	6.	Go to table of contents of chapter, locate rule number by reading catchphrase (short phrase describing rule.)
Statute Number and Department	7.	Go to cross reference table at end of each title which lists each MCA section number and corresponding rules.
Rule in ARM	8.	Go to rule. Update by checking the accumulative table and the table of contents for the last register issued.

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies which have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through March 31, 1981. With the exception of this issue of the Montana Administrative Register (MAR), this accumulative table includes all rulemaking action published in each register since March 31, 1981.

To be current on rulemaking, it is necessary to check the ARM updated through March 31, 1981, this table and the table of contents of this issue of the MAR.

This table indicates the department name, title number, rule number in ascending order, catchphrase or the subject matter of the rule and the page number at which the action is published.

ACCUMULATIVE TABLE

MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 9

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NOTICE SECTION

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

In the matter of the Repeal of ARM 16.16.699 MISCELLANEOUS	))	NOTICE OF PROPOSED REPEAL

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On June 15, 1981 the department proposes to repeal rule ARM 16.16.699, which requires that plans and specifications for water and sewer facilities in a subdivision excluded from the provisions of the subdivision rules must be reviewed by the department before construction of structures may commence.

2. The rule proposed to be repealed can be found on page 16-835 of the Administrative Rules of Montana.

3. The Department proposes the repeal of this rule because it has become superfluous as a result of recodification. The situations covered by this rule are adequately addressed by existing Rule ARM 16.16.606, which specifies that excluded subdivisions must still comply with the provisions of the Public Water Supply Act.

4. Interested persons may submit their data, views, or arguments concerning the proposed repeal in writing to Robert Solomon, Hearings Officer, Department of Health and Environmental Sciences, Cogswell Building, Capitol Complex, Helena, Montana 59620 no later than June 11, 1981.

5. If a person who is directly affected by the proposed action 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 Robert Solomon, Hearings Officer, Department of Health and Environmental Sciences, Cogswell Building, Capitol Complex, Helena, Montana 59620, no later than June 11, 1981.

6. If the agency receives requests for a public hearing on the proposed action from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed action, from the Administrative Code Committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be greater than 25, based on the number of developers, county officials and other persons involved in subdivision planning and review in the state.

7. The authority of the department to repeal the rule, is based on section 76-4-104, MCA, and implements section 76-4-125 and 76-4-131, MCA.

JOHN J. DRYNAN, M.D., Director

Certified to the Secretary of State May 4, 1981

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

In the matter of the repeal of rules 16.28.709, providing for an administrative exemption from immunization requirements, and 16.28.710, setting a time limit for complying with immunization requirements	NOTICE OF PUBLIC HEARING ON REPEAL OF RULE 16.28.709 (Administrative Exemption) AND RULE 16.28.710 (Time Limit)

To: All Interested Persons

1. On June 5, 1981, at 1:30 p.m., a public hearing will be held in the auditorium of the Highway Department Building located at 2701 Prospect, Helena, MT, to consider the repeal of rules 16.28.709 and 16.28.710.

2. The rules proposed to be repealed can be found on pages 16-1231 and 16-1232 of the Administrative Rules of Montana.

3. The rules are proposed to be repealed because amendments made by the 1981 Legislature eliminating the "administrative exemption" also eliminate the need and authority for both rules.

4. 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 Robert L. Solomon, Cogswell Building, Capitol Complex, Helena, MT., no later than June 12, 1981.

5. Robert L. Solomon, Cogswell Building, Capitol Complex, Helena, MT, has been designated to preside over and conduct the hearing.

6. The authority of the Department to repeal the rule is based on section 20-5-407, MCA.

In the matter of the adoption of a rule requiring schools to report when students fail to meet immunization requirements	NOTICE OF PUBLIC HEARING FOR ADOPTION OF A RULE REQUIRING REPORT OF NON-COMPLIANCE WITH SCHOOL IMMUNIZATION REQUIREMENTS

To: All Interested Persons

1. On June 5, 1981, at 1:30 p.m., a public hearing will be held in the auditorium of the Highway Department Building located at 2701 Prospect, Helena, MT, to consider the adoption of a rule which sets requirements for reporting whenever a child is excluded from school for failing to complete immunization, qualify for conditional enrollment, or claim an exemption.

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

3. The proposed rule provides as follows:

RULE I REPORT OF NON-COMPLIANCE (1) If a person is excluded from school due to the failure to complete immunization, claim an exemption, or qualify for conditional enrollment, the school must immediately notify the following, by telephone, that such an exclusion has occurred:

(a) the local health department; and

(b) the Preventive Health Services Bureau of the department (phone: 449-2645).

(2) The notification must include the name of the excluded person; his or her address; the name of his or her parent(s), guardian or responsible adult; and the date of exclusion.

(3) Within 24 hours after the above phone notification, written documentation of that notification must be placed in the school file, if any, of the person excluded, or in a special file established for such documentation, if the person has no school file. Such documentation must include the information noted in (2) above, time and date of the phone notification, and name of the individual giving the notification.

4. The Department is proposing this rule because, since the 1981 legislature eliminated the automatic exemption for children whose parents, guardians, or other responsible parties failed to take one of several specified alternative actions related to their immunization, children must now be excluded from school for such failure, and the state and local departments of health need to be notified, as this rule requires, so that they may bring enforcement action against the delinquent parties.

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 Robert L. Solomon, Cogswell Building, Capitol Complex, Helena, MT, no later than June 12, 1981.

6. Robert L. Solomon, Cogswell Building, Capitol Complex, Helena, MT, has been designated to preside over and conduct the hearing.

7. The authority of the Department to make the proposed rule is based on section 20-5-407, MCA, and the rule implements section 20-5-408(2), MCA.

In the matter of the amendment of rules 16.28.701, definitions; 16.28.702, requirements for unconditional enrollment in school; 16.28.705, documentation of immunization status of first-time enrollees after July 31, 1981; 16.28.706, conditional enrollment requirements; 16.28.711, exempted pupil report; and 16.28.712, immunization status summary report	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT OF RULES 16.28.701, 16.28.702, 16.28.705, 16.28.706, 16.28.711 AND 16.28.712 (SCHOOL IMMUNIZATION REQUIREMENTS)

TO: All Interested Persons

1. On June 5, 1981, at 1:30 p.m., a public hearing will be held in the auditorium of the Highway Department Building, located at 2701 Propsect, Helena, MT, to consider the amendment of rules 16.28.701, 16.28.702, 16.28.705, 16.28.706, 16.28.711, and 16.28.712.

2. The proposed amendments replace present rules 16.28.701, 16.28.702, 16.28.705, 16.28.706, 16.28.711, and 16.28.712 found in the Administrative Rules of Montana. The proposed amendments would do the following:

a. 16.28.701 -- provide a definition of "transfer";

b. 16.28.702 -- provide a 30-day grace period for transfer students to meet the rule's requirements for unconditional enrollment;

c. 16.28.705 -- allow a school 45 days after a transfer student commences attendance to transfer immunization data on that student to a certificate of immunization form from other types of acceptable documentation;

d. 16.28.706 -- clarify and correct conditional enrollment immunization requirements, eliminate the administrative exemption if those requirements are not fulfilled, and state the statutory result of such failure, which would be exclusion from school unless an exemption were claimed;

e. 16.28.711 -- clarify that if no students claim exemptions, the exempted pupil report must note that fact; eliminate reference to "administrative exemption"; amend the requirement that exemptions be separately reported if claimed by transfer students transferring after the report is submitted, so that separate reporting is required whenever the transfer student claims the exemption after the initial report is filed; and recognize the fact the report may need to be reported to a local board of health if no local health department exists;

f. 16.28.712 -- eliminate obsolete references to the 1980-1981 school year; allow schools the option to report on the immunization status of all students, rather than first-time enterers and transfer students alone; and eliminate the requirement to report changes in immunization status and the status of late transfers.

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

16.28.701 DEFINITIONS The following definitions apply throughout this sub-chapter:

(1) "Adequate documentation" means that documentation required by ARM 16.28.703, 16.28.704 or 16.28.705, depending upon the school year in question.

(2) "Department" means the department of health and environmental sciences.

(3) "Enrolling for the first time" means the first occasion a student is entered upon the rolls of any Montana school, and does not include transfers from one Montana school to another.

(4) "Montana immunization initiative" means the actions taken by state and local public health officers between October 1, 1977, and October 1, 1979, to attempt to assess the immunization status of all Montana school children and to fully immunize up to 90% of children under age 15 against the immunizable childhood diseases, in conjunction with the nationwide immunization project stating those goals and initiated by the federal department of health, education and welfare in April, 1977.

(5) "Official parent-maintained immunization record" means a standard document distributed by a state's principal health or education agency to record the immunization status of a child as part of that state's immunization maintenance system and designed to be retained and maintained by the parents of that child.

(6) "Physician" is a person licensed to practice medicine in any jurisdiction in the United States or Canada.

(7) "School" means an institution for the teaching of individuals, the curriculum of which is comprised of the work of any combination of kindergarten through grade 12.

(8) "Transfer" means to change school attendance, at any time, from one public school district to another, between private schools, or between public and private schools, and includes a change which occurs between the end of one school year and commencement of the next.

~~(8)~~ (9) "Vaccine" means in immunizing agent approved by the Bureau of Biologics, Food and Drug Administration, U.S. Public Health Service.

16.28.702 REQUIREMENTS FOR UNCONDITIONAL ENROLLMENT

(1) In order to unconditionally enroll a person as a pupil, a school must receive adequate documentation that immunizations were performed on the schedule and with the agents noted below:

(a) DTP, DT, or Td vaccine must be administered as follows:

(i) For a child aged less than 7 years, four or more doses of diphtheria and tetanus toxoids and pertussis vaccine (DTP) and/or diphtheria/tetanus (DT) toxoids must be administered, at least one dose of which must be given after the fourth birthday unless (iii) below applies;

(ii) For a person 7 years old or older who has not completed the above requirement, any combination of three doses of either DTP, DT, or Td is acceptable, at least one dose of which must be given after the fourth birthday unless (iii) below applies;

(iii) A person enrolled for the first time prior to August 1, 1980, need not have received a dose after his fourth birthday;

(iv) Pertussis vaccine is not required for a person seven years of age or older.

(b) Polio vaccine must be administered as three or more doses of live, oral, trivalent poliomyelitis vaccine, at least one dose of which must be given after the fourth birthday unless the person receiving the vaccine was enrolled for the first time prior to August 1, 1980.

(c) Measles vaccine must be administered as one dose of live, attenuated measles (rubeola) vaccine, given after the first birthday, with the exception that a person certified by a physician as having had measles disease is not required to receive measles vaccine. A person receiving measles vaccine prior to one year of age or prior to 1968 must be revaccinated, unless, in the latter case, it can be documented that the vaccine, if administered between 1966 and 1968, was a live virus vaccine.

(d) Rubella vaccine must be administered as one dose of live rubella vaccine given after the first birthday, with the exception that a female who has reached age 12 is exempted from the rubella vaccine requirement.

(2) In order to unconditionally enroll a person as a pupil, a school must receive adequate documentation of the following dates for each disease noted:

(a) For DTP, DT, Td, and polio, -- the month and year the last dose was administered, unless the person was enrolled prior to August 1, 1980, in which case only the year is necessary.

(b) For rubella -- the month and year administered, unless the person was enrolled prior to August 1, 1980, in which case only the year is necessary.

(c) For measles (rubeola), -- the month, day, and year the vaccination was administered, or if measles disease was contracted, the month, day, and year of diagnosis, except if the person was enrolled prior to August 1, 1980, only the month and year are necessary.

(3) A person who transfers to a Montana school has 30 calendar days after commencement of attendance at the school to which he or she transfers to produce the documentation of immunization status required by this rule.

~~(3)~~ (4) If a person transfers into a Montana school from out-of-state, he or she must provide the same documentation as required above for a person who enrolled prior to August 1, 1980.

16.28.705 DOCUMENTATION OF IMMUNIZATION STATUS OF PERSONS ENROLLING IN SCHOOL FOR THE FIRST TIME AFTER JULY 31, 1981 (1) Immunization data may be accepted by a school only if submitted on the department's certificate of immunization form and signed by a physician, physician's designee, local health officer, or that officer's designee, except:

(a) if immunization was performed outside of Montana, the school may accept the following documentation:

(i) an official school medical record from any school;

(ii) a record from any public health department, signed by a public health officer or nurse;

(iii) a certificate signed by a physician;

(iv) the international certificates of vaccination approved by the World Health Organization;

(v) for measles (rubeola) only, a letter or statement signed by a physician indicating that the person had measles (rubeola) disease, with the date of diagnosis indicated;

(b) data from the official parent-maintained immunization record of Montana or any other state may be accepted if signed by a physician, physician's designee, local health officer, or that officer's designee.

(c) if documentation of immunization comes from either (a) or (b) above, the data must be transferred to a certificate of immunization form and signed by the person performing the transfer by November 15 of the year the documentation is submitted, or, if ~~enrollment~~ commencement of attendance occurs later than ~~that date,~~ October 1, within ~~15~~ 45 days after the person ~~is enrolled in school~~ commences attendance.

16.28.706 REQUIREMENTS FOR CONDITIONAL ENROLLMENT (1) A person may be admitted to school on a conditional basis if a physician or local health department indicates on the department's conditional enrollment form that immunization of the person has already been initiated by receiving, at a minimum, one DTP, (or DT or Td), one polio, one measles, and one rubella vaccination (unless rubella is not required because the person

is a female 12 years of age or older). If a person is exempt from any of the foregoing vaccinations, the requirements of this rule apply to the remaining immunizations for which no exemption exists.

(2) Conditional enrollment must be for a reasonable length of time consistent with the immunization schedule in subsection (4) below, in order to allow for completion of all immunization requirements, but in any case must not exceed 90 days from the date of enrollment.

(3) The conditional enrollment form provided by the department must be used to document conditional enrollment status and must be retained in the person's school record.

(4) A person who is conditionally enrolled qualifies for unconditional enrollment when he receives the following number of doses of each vaccine, and at intervals of no less than four weeks:

Number of Polio Doses Person Has Received:	Person Needs
~~0~~	~~3~~
1	2
2	1
3	0
4	0
3 or more, but none after 4th birthday (If enrolled for first time after July 31, 1980)	1

Number of DTP, DT, or Td Doses Person Has Received:	~~Person Before 7th Birthday Needs DTP or DT:~~ Under 7 years of age -- additional DTP or DT doses needed:	~~Person After 7th Birthday Needs Td:~~ 7 years of age or older -- additional Td doses needed:
~~0~~	~~3*~~	~~3*~~
1	2*	2*
2	2	~~2~~ 1
3	1	~~1~~ 0
4	0	0
3 or more, but none since 4th birthday (If enrolled for first time after July 31, 1980)	1	1

*A booster dose 8-14 months following the third dose is recommended. Td boosters are also recommended every 10 years.

(5) If the person who is conditionally enrolled fails to complete immunization within the time period indicated in subsection (2) above, he ~~is exempt from the immunization requirements that remain unfulfilled and a statement that he is administratively exempt from these requirements, naming the particular diseases for which immunization remains incomplete, must be filed in his school record on a form provided by the department.~~ must either claim an exemption from the immunizations not received and documented, or be excluded from school.

16.28.711 REPORT OF EXEMPTED PUPILS (1) On or before October 15 of each year, a school shall submit to the department and the local health department a report ~~of~~ listing those students who are exempt from the immunization requirements of section 20-5-403, MCA, or, if no students are exempt, noting that fact.

(2) The report must be filed on a form provided by the department and shall indicate the disease in each case for which immunization is incomplete.

(3) If a ~~person transferring into a school~~ transfer student claims an exemption after ~~October 15 is exempt,~~ the report is submitted, or ~~one~~ a person who is conditionally enrolled fails to complete immunization within the time period indicated in ARM 16.28.706, and ~~is therefore administratively exempt,~~ then claims an exemption, notice of that fact must be sent immediately to the department and either the local health department or local board of health, if there is no local health department, on the form provided by the department for reporting exemptions.

16.28.712 SUMMARY REPORT OF IMMUNIZATION STATUS (1) A report of the immunization status of the pupils in every school must be sent each year to the department by the principal or other person in charge of a school on a form provided by the department.

(2) During the ~~1980-1981 and~~ 1981-1982 school ~~years,~~ year, the report of immunization status must include the status of all pupils through January 15, ~~of 1981 and~~ 1982, ~~respectively,~~ and must be submitted by February 1, 1982. ~~of the respective academic year.~~

(3) For the 1982-1983 school year and each year thereafter, the report ~~must be limited~~ may either be limited in coverage to the immunization status of pupils enrolling in school for the first time and transfer students ~~through November 15~~ who commence attendance at that school by October 15 of each school year, or include the immunization status of all pupils. ~~and~~ The report must be submitted by December 1 of each school year.

(4) A copy of the report must be sent concurrently from the school to the local health department, or, if there is no local health department, to the local board of health.

~~(5)--If, after the annual report of immunization status has been submitted to the department and the appropriate local health authority, the immunization status of any person included in that report changes, the~~ The school must keep a record ~~of the change in status, available upon request by the department or the local health authority. The information on change of status must be reported along with the summary report for the following school year.~~ of any change in immunization status of a pupil from that stated on the summary report, plus the immunization status of any transfer pupil commencing attendance after October 15 of the pertinent school year. Such records must be available upon request to the department or local health authority.

4. The Department is proposing these amendments to the rules primarily in order to conform the rules to statutory amendments made by the 1981 legislature eliminating the automatic exemption from the act whenever a parent, guardian, etc. fails to act to comply with it, and providing a grace period for compliance by transfer students. In addition, minor changes were made to clarify rule language, eliminate obsolete references, and correct minor errors.

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 Robert L. Solomon, Cogswell Building, Capitol Complex, Helena, MT., no later than June 12, 1981.

6. Robert L. Solomon, Cogswell Building, Capitol Complex, Helena, MT, has been designated to preside over and conduct the hearing.

7. The authority of the Department to make the proposed amendments is based on section 20-5-407, MCA, and the rules implement sections 20-5-403, 20-5-404, 20-5-406, and 20-5-408, MCA.

JOHN J. DRYNAN, M.D., Director

Certified to the Secretary of State 5/4/81

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

IN THE MATTER of the Proposed) amendments of ARM 40.38.404) subsection (5) concerning) examination fee; 40.38.1215) subsection (5)(a),(b), (c),) and (d), dangerous drugs; and) adoption of a new rule re-) garding suspension or revoca-) tion for gross immorality)	NOTICE OF PROPOSED AMENDMENTS OF ARM 40.38.404 (5) FEE SCHEDULE; 40.38.1215 (5) ADDITIONS, DELETIONS, & RE-SCHEDULING OF DANGEROUS DRUGS; PROPOSED ADOPTION OF A NEW RULE REGARDING SUSPENSION OR REVOCATION - GROSS IMMORALITY

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On June 13, 1981, the Board of Pharmacists proposes to amend ARM 40.38.404 subsection (5) concerning examination fees; 40.38.1215 subsection (5) (a),(b), (c), and (d), dangerous drugs; and adopt a new rule concerning suspension or revocation for gross immorality.

2. The proposed amendment of 40.38.404, subsection (5) will read as follows: (new matter underlined, deleted matter interlined)

"40.38.404 FEE SCHEDULE...

(5) Examination fee ~~45.00~~ 55.00

..."

3. The board is raising the examination fee because the cost to the board for the NABPLEX examination has been raised $10.00 by the Educational Testing Service/National Association of Boards of Pharmacy, thereby making it necessary to raise the examination fee $10.00. The authority of the board to make the proposed change is based on section 37-7-201, MCA and implements section 37-7-302 (2), MCA.

4. The proposed amendment of subsection (5) of ARM 40.38.1215 will read as follows: (new matter underlined, deleted matter interlined)

"40.38.1215 ADDITIONS, DELETIONS, & RESCHEDULING OF DANGEROUS DRUGS...

(5) In addition to the controlled substances identified and referred to above, the board has adopted, pursuant to the authorization in section 50-32-103, MCA. the following substances to be added thereto:

(a) Schedule I: Difenoxin; Propiram; Drotebanol; 4-bromo-2,5-dimethoxyamphetamine; 4-methoxyamphetamine; thiopene analog of phencyclidine; Mecloqualone; N-ethyl-1-phenylcyclohexylamine; 1-(1-phenylcyclohexyl) pyrrolidien; Sufentanil; Tilidine.

(b) Schedule II: Amobarbital; Pentobarbital; Secobarbital; Methaqualone; Etorphine Hydrochloride; Diprenorphine; Apomorphine; Codeine; Ethylmorphine; Hydrocodone; Hydromorphone; Metopon; Morphine;

Oxycodone$_7$; Oxymorphone$_7$; Thebaine$_7$; Cocaine$_7$; Methylphenidate$_7$; Norpethidine$_7$; Phencyclidine$_7$; Phenylacetone, also known as phenyl-2-propanone, benzyl methyl ketone, methyl benzyl ketone, and P2P; Bulk Dextropropoxyphene (non-dosage forms) as an opiate.

...

(c) Schedule III: Benzphetamine$_7$; Chlorphentermine$_7$; Chlortermine$_7$; Phendimetrazine$_7$; Maxindol.

...

(d) Schedule IV: Diethyl propion$_7$; Fenfluramine$_7$; Phentermine$_7$; Clordiazepoxide$_7$; Diazapam$_7$; Clonazepam$_7$; Clorazepate$_7$; Flurazepam$_7$; Oxazepam$_7$; Pemoline$_7$; Mebutamate$_7$; Prazepam$_7$; Pipradrol; SPA [(-)-1-dimethylamino-1, 2-diphenylethane]; Dextropropoxyphene as a narcotic. Propoxyphene, its optical isomers and salts of all optical isomers,; Preparations of not more than 1 mg of difenoxin with not less than 0.025 mg of atropine sulfate per dosage unit. Any material, compound, mixture or preparation which contains any quantity of pentazocine, including its salts.

..."

5. The additions result from these products being placed in the respective schedules by the U.S. Department of Justice, Drug Enforcement Administration.

Sufentanil and Tilidine were scheduled December 1, 1980. These drugs have no currently accepted medical use and it has been determined that they should be placed in Schedule I in order for the United States to discharge its obligations under the Single Convention on Narcotic Drugs, 1961.

Bulk Dextropropoxyphene (non-dosage forms) as an opiate was scheduled on September 22, 1980. This form of the drug was placed in Schedule II by the Drug Enforcement Administration at the recommendation of the United Nations Commission on Narcotic Drugs.

Pipradrol and SPA[(-)-1-dimethylamino-1, 2-diphenylethane] were scheduled on December 1, 1980. They were placed in Schedule IV by the Drug Enforcement Administration in order for the United States to discharge its obligations under the Convention on Psychotropic Substances, 1971.

Dextropropoxyphene as a narcotic was scheduled in Schedule IV on July 24, 1980. Based upon the Assistant Secretary for Health's medical and scientific evaluation of dextropropoxyphene as a narcotic the Drug Enforcement Administration found that it is an opiate and therefore a narcotic drug.

The authority of the board to make the proposed amendment is based on sections 50-32-103, 203, MCA and implements sections 50-32-203, 222, 224, and 229, MCA.

6. The proposed new rule on suspension or revocation for gross immorality will read as follows:

"I. SUSPENSION OR REVOCATION - GROSS IMMORALITY

(1) For the purpose of interpreting 'gross immorality' as it applies to Section 37-7-311 (5), MCA, the board has determined that it includes, but is not limited to:

(a) knowingly engaging in any activity which violates state and federal statutes and rules governing the practice of pharmacy;

(b) knowingly dispensing an outdated or questionable product;

(c) knowingly dispensing a cheaper product and charging third party vendors for a more expensive product;

(d) knowingly charging for more dosage units than is actually dispensed;

(e) knowingly altering prescriptions or other records which the law requires pharmacies and pharmacists to maintain;

(f) knowingly dispensing medication without proper authorization;

(g) knowingly defrauding any persons or government agency receiving pharmacy services;

(h) placing a signature on any affidavit pertaining to any phase of the practice of pharmacy which the pharmacist knows to contain false information; and

(i) any act or practice hostile to the public health that is knowingly committed or engaged in by the holder of a license."

7. The new rule is being proposed because the board decided that the term "gross immorality" should be defined in order that registrants be aware of what the term includes and involves. The authority of the board to make the adoption is based on section 37-7-201, MCA and implements section 37-7-311 (5), MCA.

8. Interested parties may submit their data, views or arguments concerning the proposed amendments and adoption in writing to the Board of Pharmacists, Lalonde Building, Helena, Montana 59620 no later than June 11, 1981.

9. If a person who is directly affected by the proposed amendments and adoption 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 Pharmacists, Lalonde Building, Helena, Montana 59620 no later than June 11, 1981.

10. If the board receives requests for a public hearing on the proposed amendments and adoption from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed amendments and adoption; 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.

11. The authority and implementing sections are listed after each proposed change.

BOARD OF PHARMACISTS
JAMES R. CARLSON, R.Ph.,
PRESIDENT

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

Certified to the Secretary of State, May 4, 1981.

BEFORE THE DEPARTMENT OF REVENUE

OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT OF RULE 42.31.2141, relating to personal property tax credits for public contractors.	NOTICE OF PROPOSED AMENDMENT OF RULE 42.31.2141, relating to personal property tax credits for public contractors NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On June 15, 1981, the Department of Revenue proposes to amend rule 42.31.2141, relating to personal property tax credits for public contractors.

2. The proposed amendment replaces present rule 42.31.2141 found in the Administrative Rules of Montana. The proposed amendment would provide the deadline for filing applications for refunds based on payment of certain personal property taxes by public contractors.

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

42.31.2141 PERSONAL PROPERTY TAX CREDIT (1) Public contractors, who have had 1% of the gross amount due to them under their respective contracts withheld by the respective contracting governmental agencies or prime contractors, shall be allowed, as a refund from his gross receipts tax account, those personal property taxes paid between January 1 and December 31, on any personal property of the contractor which is used in the business of the contractor.

(2) These refunds shall be allowed upon delivery to the department of revenue of copies of the applicable personal property tax paid receipts, provided such application is mailed or delivered on or before ~~March~~ July 1 of the year following the year in which the personal property tax liability is incurred and paid.

4. The March 1 application deadline has caused some problems for public contractors because it occurs during the period when income tax returns are being prepared. This has caused numerous cases of persons missing the deadline. In order to alleviate this situation, the Department of Revenue proposes to make July 1 the deadline for application for refunds.

5. Interested persons may submit their data, views, or arguments concerning the proposed amendment in writing no later than June 12, 1981, to:

Laurence Weinberg
Legal Division
Department of Revenue
Mitchell Building
Helena, Montana 59620

6. 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 that request along with any written comments he has to Laurence Weinberg at the address given in paragraph 5 above no later than June 12, 1981.

7. If the Department receives requests 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 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 public contractors.

8. The authority of the Department to make the proposed amendment is based upon Section 15-50-103, MCA. The proposed amendment implements Section 15-50-207, MCA.

Ellen Feaver

ELLEN FEAVER, Director
Department of Revenue

Certified to the Secretary of State May 4, 1981

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

In the matter of the amendment of Rule 46.8.102 and the adoption of a rule pertaining to the developmental disabilities program, minimum standards	)))))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT OF RULE 46.8.102 AND THE ADOPTION OF A RULE PERTAINING TO THE DEVELOPMENTAL DISABILITIES PROGRAM

To: All Interested Persons:

1. On June 4, 1981, at 9:00 a.m., a public hearing will be held in the auditorium of the Social and Rehabilitation Services Building, 111 Sanders, Helena, Montana, to consider the amendment of Rule 46.8.102 and the adoption of a rule pertaining to the Developmental Disabilities programs, minimum standards.

2. Rule 46.8.102 as proposed to be amended provides as follows:

46.8.102 DEFINITIONS For purposes of this chapter, the following definitions apply:

(1) "Division" means the developmental disabilities division of the department of social and rehabilitation services.

(2) "Client" means a person with a developmental disability who is enrolled in a provider service program.

(3) "Provider" means any person or entity furnishing services to persons with developmental disabilities under a contractual agreement with the department through the developmental disabilities division.

(4) "Interdisciplinary team" means a group of persons that is drawn from or represents those professions, disciplines, or service areas that are relevant to identifying an individual's needs and designing a program to meet them, and that is responsible for evaluating the individual's needs, developing an individual habilitation plan to meet them, periodically reviewing the individual's response to the plan, and revising the plan accordingly.

(5) "Applicant" means a person who applies for services, but is not yet accepted into a service program.

(6) "Service standards" mean the Standards for Services for Developmentally Disabled Individuals, Accreditation Council for Services for Mentally Retarded and Other Developmentally Disabled Persons (ACMRDD) which is a manual published by Accreditation Council for Services for Mentally Retarded and Other Developmentally Disabled Persons, 1980.

(7) "Standard" means each statement preceded by a section number present in the service standards that is estab-

lished as a rule or a basis of comparison in measuring quality.

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

RULE I MINIMUM STANDARDS (1) The department of social and rehabilitation services hereby adopts and incorporates herein by reference as minimum standards to assure quality community-based services to developmentally disabled persons the Standards for Services for Developmentally Disabled Individuals, Accreditation Council for Services for Mentally Retarded and Other Developmentally Disabled Persons (ACMRDD) which is a manual published by the Accreditation Council for Services for Mentally Retarded and Other Developmentally Disabled Persons, 1980. A copy of the service standards may be obtained at cost or on temporary loan from the Department of Social and Rehabilitation Services, P.O. Box 4210, 111 Sanders, Helena, Montana 59601.

(2) It is the intention of the department that providers shall comply with all aspects of standards applicable to each provider's operation by June 1, 1986. Providers shall adhere to the sets of standards as adopted by the department in stages during the process of development as provided for in this rule. These sets of standards as adopted by rule shall constitute the standards for compliance.

(3) The selection of the standards for the first stage of rule adoption for state fiscal year 1982 is called Set I. Set I standards are selected from the service standards incorporated by reference in this rule. (See ARM Rule I(1)). Set I service standards include the following items:

Section 1 - Individual Program Planning And Implementation

1.3 The Individual Program Plan
Standards 1.3.1 through 1.3.8.5.4

1.4 Individual Program Implementation
Standards 1.4.0.1 through 1.4.0.6

1.4.2 Mobility
Standards 1.4.2.1 through 1.4.2.2.1 and standards 1.4.2.4 through 1.4.2.7.6

1.4.3 Habilitation, Education and Training
Standards 1.4.3.1 through 1.4.3.4.9

1.4.4 Work and Employment
Standards 1.4.4.1 through 1.4.4.9.9

1.6 Programming Records
Standards 1.6.1 through 1.6.7

Section 2 - Alternative Living Arrangements
- 2.1 Attention to Normalization and Use of Least Restrictive Alternatives Standards 2.1.4 through 2.1.20
- 2.3 Temporary Assistance Living Arrangements Standards 2.3.1 through 2.3.3.1
- 2.5 Congregate Living
  - 2.5.1 The Congregate Living Environment Standards 2.5.1.1 through 2.5.1.3.13.1
  - 2.5.2 Staffing and Staff Responsibilities Standards 2.5.2.1 through 2.5.2.13

Section 3 - Achieving And Protecting Rights
- 3.1 Attention to Individual Rights and Responsibilities Standards 3.1.1 through 3.1.4.7 and standards 3.1.13 through 3.1.18.1
- 3.2 Advocacy
  - 3.2.1 Self Representation Standards 3.2.1.1 through 3.2.1.4
  - 3.2.2 Personal Advocacy Standards 3.2.2.1 through 3.2.2.8

Section 4 - Individual Program Support
- 4.4 Follow Along Standards 4.4.1 through 4.4.10
- 4.5 Family Related Services
  - 4.5.1 Home Training Services Standards 4.5.1.1 through 4.5.1.2
  - 4.5.2 Family Education Services Standards 4.5.2.1 through 4.5.2.8.1
- 4.6 Professional Services Standards 4.6.7 through 4.6.7.5.1

Section 5 - Safety and Sanitation
Standards 5.5.2 through 5.5.2.10.1

Section 7 - The Agency In The Service Delivery System
- 7.4 Prevention Standards 7.4.1. through 7.4.2.3

(4) A provider who has a contractual agreement with the division at the time of adoption of this rule shall be in full compliance with 85% of Set I standards by June 1, 1982. The provider shall select standards from Set I which meet 85% compliance criteria.

(5) Upon the failure of a provider to comply with 85% of Set I service standards applicable to each provider's operation as stated in this chapter, the following shall occur:

(a) The provider shall provide by June 1, a written justification for the failure of a provider to comply with the applicable standards as stated.

(b) The department shall assist the provider in the preparation of a compliance plan with reasonable timelines. The plan must be approved by the department by June 30.

(6) The department may, upon the failure of a provider to comply with 5(a) and (b), terminate the provider's contract for default of agreements .

(7) Any provider not contracting with the division at the time of adoption of this rule will prepare an implementation plan within 60 days after the effective date of the contract for the approval of the department.

(8) The department may grant a waiver to all providers on a specific service standard item if it is determined by the department that funds are not generally available to the providers to meet the requirement for that specific service standard item.

(9) Providers shall provide the following documents to the department:

(a) a written assessment by June 1, 1982, of compliance with Set I standards established in this chapter;

(b) a complete written assessment by September 30, 1981, of provider's ability to meet the requirements of all standards applicable to each provider's operation. This assessment is to be based upon an assessment tool provided by the department;

(c) an estimate by September 30, 1981 of the cost of meeting the requirements of all service standards applicable to each provider's operation;

(d) other information as requested upon a 30-day notification.

(10) The department shall:

(a) provide to each provider by July 1, 1981, one manual titled, Standards For Services For Developmentally Disabled Individuals, developed by the Accreditation Council for Services for Mentally Retarded and Other Developmentally Disabled Persons (ACMRDD), published by the Accreditation Council For Services For Mentally Retarded and Other Developmentally Disabled Persons, 1980;

(b) provide an assessment tool, other materials and instruction for the complete written assessment of all service standards applicable to each provider's operation at least 90 days preceding the date the assessment is due;

(c) provide an assessment tool, other materials, and instruction for the written assessment of compliance to Set I standards at least 90 days preceding the date the assessment is due;

(d) provide technical assistance to providers on service standard compliance.

(11) The department shall monitor provider compliance of Set I service standards and review status with each provider board of directors and report standard status of each provider to regional councils and to the state planning and advisory council by July 30 of each year.

(12) An adverse decision regarding service standard compliance under this part may be appealed to the department director in writing no later than June 20 of each fiscal year.

(a) The director will select a committee of three persons which shall include:

(i) division administrator,

(ii) regional council chairperson, and

(iii) provider of a like service.

(b) The selected committees upon review of verbal and written testimony concerning standard compliance will send their recommendations to the department director within 30 days following notice of the committee selection.

(c) Upon consideration of the committees testimony and recommendation the department director will make a final decision within a reasonable time period.

4. The department is proposing this amendment and the adoption in order to establish guidelines and requirements pertinent for the administration of the service standards to improve the quality of the developmental disabilities service program. The service standards are mandated by Section 53-20-205, MCA, which states that the department shall set minimum standards for programs for developmental disabilities services.

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 the Office of Legal Affairs, Department of Social and Rehabilitation Services, P.O. Box 4210, Helena, MT 59604, no later than June 12, 1981.

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

7. The authority of the agency to amend and adopt the rules is based on Section 53-20-204, MCA, and the rules implement Sections 53-20-204 and 53-20-205, MCA.

John La Faver

Director, Social and Rehabilitation Services

Certified to the Secretary of State May 4, 1981.

BEFORE THE DEPARTMENT OF AGRICULTURE

OF THE STATE OF MONTANA

IN THE MATTER of the adoption of a temporary emergency rules on the sale and use of Chlorpyrifos - Lorsban 4E	NOTICE OF ADOPTION OF TEMPORARY EMERGENCY RULES ALLOWING CERTAIN USES OF THE PESTICIDE LORSBAN 4E. NO PUBLIC HEARING CONTEMPLATED

TO ALL INTERESTED PARTIES:

(1) Statement of reasons for emergency:

a. The department has documented that an army cutworm, Euxoa auxilaris infestation in small grains has reached economic outbreak proportions in central and eastern Montana. The department is beginning to document that the pale western cutworm, Agrotis orthogonia, is infesting small grains in Montana. The department finds that this outbreak is of such economic stature, that coupled with the detrimental effects posed by large scale use of endrin, that an imminent peril to public welfare requires the immediate adoption of this rule.

b. The Department has received from EPA, a Section 18 specific exemption, providing for the emergency use of Lorsban 4E on small grains. This exemption was issued under Section 18 of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, Public Laws 92-516, 94-140, and 95-296. The exemption allows the use of Lorsban 4E, only under specific conditions of sale and use, which necessitates immediate implementation of this rule.

c. The emergency use of Lorsban 4E will provide immediate relief to agricultural producers needing to control cutworms in wheat, barley, and oats. Lorsban 4E is an environmentally acceptable pesticide replacement for the acutely toxic pesticide endrin.

d. In order to protect the public health and the environment from the toxic effects of endrin, the department hereby declares an emergency which allows the use of Lorsban 4E, and allows the promulgation of this emergency rule under authority of 80-8-105(3) (a)(b) and (4) MCA, section 2-4-303 MCA. IMP - same.

RULE 1 PROVIDING FOR EMERGENCY SALE AND USE OF LORSBAN 4E

(1) The Department is hereby adopting this emergency rule, allowing the emergency sale and use of Lorsban 4E for the control of army and pale western cutworms on wheat, barley, and oats, and a buffer zone of 150 feet, around the field margins of small grain fields. The total usage shall not exceed 37,500 gallons or 150,000 acres.

RULE II DEALERS INFORMATION TO BE PROVIDED

(1) Dealers selling Lorsban 4E shall require each person purchasing this pesticide to provide the following information:

a. Name and address of purchaser;
b. Date of purchase;
c. Specific area and location to be treated;
d. Crop to be treated;
e. Pest to be controlled;
f. Number of acres to be treated;

A dealer must record this information and data and provide such information and data to the department or its authorized representative upon request at the time of inspection or upon order of the director. Each pesticide dealer or distributor shall maintain a list of sales of Lorsban 4E to other dealers or distributors by name and volume sold. These lists shall be subject to review by the department.

RULE III DIRECTIONS AS TO APPLICATION

(1) All pesticide applicators shall use and apply Lorsban 4E in accordance with all federal label directions, precautions, restrictions, and the following use directions and precautions:

a. The rate of application of Lorsban 4E shall be for:
army cutworms - 1 to 1½ pints per acre;
and for
pale western cutworms - 1 - 2 pints per acre
b. Aerial application will require a minimum of 2 gallons of water carrier.
c. Ground application will require a minimum of 10 gallons of water carrier.
d. Applicators may apply Lorsban 4E to noncrop areas surrounding treated fields. The buffer zone is not to exceed 150 feet from the field. The rates of application shall be identical to those established for wheat, barley, and oats.
e. Do no apply within 28 days of harvest.
f. Do not allow livestock to graze straw and crop residues in treated fields until 28 days after crop harvest.
g. Do not apply directly to any body of water.

(2) This emergency authorization, for the sale and use of Lorsban 4E on wheat, barley and oats, expires June 15, 1981.

W. Gordon McOmber

W. Gordon McOmber, Director
MONTANA DEPARTMENT OF AGRICULTURE

Certified to the Secretary of State May 1st, 1981.

BEFORE THE DEPARTMENT OF AGRICULTURE

OF THE STATE OF MONTANA

IN THE MATTER of the adoption of a temporary emergency rule temporarily suspending certain sales and uses of Endrin, and imposing other restrictions thereon.	NOTICE OF ADOPTION OF EMERGENCY RULE TEMPORARILY SUSPENDING USE OF ENDRIN FOR GRASSHOPPER CONTROL, AND IMPOSING MORE STRINGENT CONTROL OVER ENDRIN USES STILL ALLOWED.

TO ALL INTERESTED PERSONS:

(1) Statement of reason for declaring an emergency:

a) The department has documented that an outbreak of army cutworms, Euxoa auxilaris, and the pale western cutworms, Agrotis orthogonia, exists in small grains within the State of Montana on a scale sufficient to pose a threat of significant economic proportions.

b) The restricted use insecticide, Endrin, has been used extensively within this state to control this outbreak.

c) The department has documentation showing that Endrin is very toxic; is very resistant to degradation; and has a potential for bioaccumulation in fatty tissues.

d) Because of the extensive usage of Endrin, and of its adverse characteristics as set forth above, the department hereby finds that an imminent emergency exists which threatens public health, safety and welfare and which requires the adoption and implementation of this rule immediately, without prior notice.

RULE I ENDRIN - SUSPENDING CERTAIN USE; IMPOSING CERTAIN CONTROLS

(1) The department hereby suspends the use or application of Endrin, for grasshopper control on any lands within this state, effective immediately. This suspension is to continue in effect until June 30, 1981.

(2) Effective immediately Endrin may only be sold, used or applied under the following terms and conditions:

a) Pesticide dealers shall not sell Endrin to private applicators. However, private applicators may apply present stock on hand, in strict accordance with the label directions and precautions, for cutworm control on wheat, barley and oats on land not previously subjected to Endrin this year.

b) Pesticide dealers may sell Endrin only to currently licensed certified commercial applicators qualified to use restricted use insecticides in the agricultural plant pest control licensing category.

(3) Pesticide dealers selling Endrin shall require the following from each applicator, prior to each sale:

a) Name and address of purchaser;
b) Date of purchase;
c) Certification number of applicator;
d) Quantity of Endrin purchased;
e) Signature of applicator.

(4) Certified commercial applicators shall maintain the records required by ARM rule 4.10.207, and in addition a copy of all records of Endrin use shall be submitted to the department, at the address shown below, no later than 48 hours following each application. The said reports should be addressed to: Montana Department of Agriculture, Environmental Management Division, Capitol Station, Helena, MT 59620.

(5) Applicators shall use and apply Endrin in strict accordance with all federal and state label directions and in accordance with the following additional precautions and recommendations.

a) Applicators shall not use or apply Endrin in combination with any other pesticide.

b) Applicators shall not use or apply Endrin except when there is no reasonable alternative.

c) When any of the following conditions are present, the use of Endrin should be the last resort:

i) If the area to be sprayed is near running or standing water;

ii) If the small grain fields to be sprayed are to be used for grazing after harvest.

iii) If sensitive wildlife populations frequent the area;

iv) If people frequent the area to be sprayed.

(2) These emergency rules shall expire June 30, 1981.

(3) These rules are authorized and promulgated under sections 80-8-105 (3)(a) and (b) and (4) MCA, Section 2-4-303 MCA. IMP-same.

Dated this 1st day of May, 1981.

W. Gordon McOmber

W. Gordon McOmber, Director
MONTANA DEPARTMENT OF AGRICULTURE

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

In the matter of the amendment of rule 16.24.405, concerning health care requirements in day care centers	NOTICE OF THE AMENDMENT OF RULE 16.24.405 (Health Care Requirements)

TO: All Interested Persons

1. On March 26, 1981, the department published notice of a proposed amendment of rule 16.24.405, concerning health care requirements for day care centers at page 235 of the 1981 Montana Administrative Register, issue number 6.

2. The department has amended the rule as proposed.

3. No comments or testimony were received.

JOHN J. DRYNAN, M.D., Director

Certified to the Secretary of State April 28, 1981

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

In the matter of the repeal of ARM Rule 24.30.101, regarding logging, oil and gas well drilling safety standards.	))))	NOTICE OF PROPOSED REPEAL OF ARM RULE 24.30.101

TO: All Interested Persons.

1. On March 26, 1981, the division of workers' compensation published a notice of a proposed repeal of rule 24.30.101 LOGGING, OIL AND GAS regarding minimum safety standards for the logging, oil and gas well drilling industries, at page 240 of the 1981 Montana Administrative Register, issue number 6.

2. The division has repealed rule 24.30.101 found on page 24-2405 of the Administrative Rules of Montana.

3. No comments or testimony were received.

David L. Hunter
DAVID L. HUNTER, Commissioner
Department of Labor and Industry

Certified to the Secretary of State April 27, 1981

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

IN THE MATTER of Proposed Adoption of rules eliminating the nonessential use of Natural Gas for Outdoor Lighting.	))))	NOTICE OF ADOPTION OF NEW RULES ELIMINATING USE OF NATURAL GAS FOR OUTDOOR LIGHTING.

TO: All Interested Persons

1. On December 26, 1980, the Department of Public Service Regulation published notice of proposed adoption of new rules concerning the elimination of nonessential use of natural gas for outdoor lighting at pages 3064-3069 of the 1980 Montana Administrative Register, issue number 24.

2. The agency has adopted the rules as proposed.

Rule I. 38.5.1801 PURPOSE AND OBJECT OF RULES.

Rule II. 38.5.1802 DEFINITIONS.

Rule III. 38.5.1803 PROHIBITIONS.

Rule IV. 38.5.1804 EXEMPTIONS.

Rule V. 38.5.1805 EXEMPTIONS BASED ON HISTORICAL SIGNIFICANCE.

Rule VI. 38.5.1806 EXEMPTIONS BASED ON MEMORIAL LIGHTING

Rule VII. 38.5.1807 EXEMPTIONS BASED ON COMMERCIAL LIGHTING OF TRADITIONAL SIGNIFICANCE.

Rule VIII. 38.5.1808 EXEMPTION BASED ON SAFETY OF PERSONS AND PROPERTY

Rule IX. 38.5.1809 TEMPORARY EXEMPTION BASED ON TIME NEEDED TO INSTALL SUBSTITUTE LIGHTING

Rule X. 38.5.1810 EXEMPTION BASED ON SUBSTANTIAL EXPENSE

Rule XI. 38.5.1811 EXEMPTION BASED ON THE PUBLIC INTEREST

3. Several written statements were received. However, almost all of these comments sought exemptions to the prohibition of outdoor gas lighting under procedures established in the rules, rather than commented on the proposed adoption of the rules themselves. Those that did comment on the proposed rules uniformly approved.

GORDON E. BOLLINGER, Chairman

CERTIFIED TO THE SECRETARY OF STATE MAY 4, 1981.

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

IN THE MATTER of Proposed Adoption of New Rules Governing Purchases and Sales Between Public Utilities and Qualifying Cogeneration and Small Power Production Facilities.	))))))	NOTICE OF ADOPTION OF COGENERATION AND SMALL POWER PRODUCTION RULES

TO: All Interested Persons

1. On March 26, 1981, the Department of Public Service Regulation published notice of a proposed adoption of new rules which would implement Sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978 at pages 242-250 of the 1981 Montana Administrative Register, issue number 6.

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

Rule I. 38.5.1901 DEFINITIONS (1) The Commission hereby adopts and incorporates by reference 18 CFR, Part 292, which sets forth general requirements and criteria for cogeneration and small power production facilities which are eligible for consideration under Sections 201 and 210 of the federal Public Utility Regulatory Policies Act of 1978, Pub. L. 95-617. A copy of this incorporated material may be obtained from the Commission, 1227 11th Avenue, Helena, Montana 59620.

(2) For purposes of these rules, the following definitions apply:

(a) "Avoided costs" means the incremental costs as determined by the Commission to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source.

~~(b) "Back-up power" means electric energy or capacity supplied by an electric utility to replace energy ordinarily generated by a facility's own generation equipment during an unscheduled outage of the facility.~~

(b) ~~(c)~~ "Cogeneration facility" means equipment used to produce electric energy and forms of useful thermal energy such as heat or steam, used for industrial, commercial, heating or cooling purposes, through the sequential use of energy.

(c) ~~(d)~~ "Commission" means the Montana Public Service Commission.

(d) ~~(e)~~ "Interconnection costs" means the reasonable costs of connection, switching, metering, transmission, distribution, safety provisions, and administrative costs incurred by the utility directly related to the installation and maintenance of the physical facilities necessary to permit interconnected operations with a qualifying facility, to the extent such costs are in excess of the corresponding interconnection costs which the electric utility would have incurred if it had not engaged in interconnected operations, but instead generated

an equivalent amount of electric energy itself or purchased an equivalent amount of electric energy or capacity from other sources. Interconnection costs do not include any costs included in the calculation of avoided costs.

~~(f) "Interruptible power" means electric energy or capacity supplied by an electric utility subject to interruption by the electric utility under specified conditions.~~

~~(g) "Maintenance power" means electric energy or capacity supplied by an electric utility during scheduled outages of the qualifying facility.~~

(e) ~~(h)~~ "Purchase" means the purchase of electric energy or capacity or both from a qualifying facility by an electric utility.

(f) ~~(i)~~ "Qualifying facility" or "facility" means:

(i) A cogeneration facility which meets the operating, efficiency, and ownership standards established by FERC regulations, 18 CFR, Part 292, as incorporated in ARM 38.5.1901(1); or

(ii) A small power production facility which meets the production capacity, energy source, and ownership criteria established by FERC regulations, 18 CFR, Part 292, as incorporated in ARM 38.5.1901(1).

(g) ~~(j)~~ "Rate" means any price, rate, charge, or classification made, demanded, observed or received with respect to the sale or purchase of electric energy or capacity, or any rule, regulation, or practice respecting any such rate, charge, or classification and any contract pertaining to the sale or purchase of electric energy or capacity.

(h) ~~(k)~~ "Sale" means the sale of electric energy or capacity or both by an electric utility to a qualifying facility.

(i) ~~(l)~~ "Small power production facility" means a facility with a power production capacity which, together with any other facilities located at the same site, does not exceed ~~80~~ 50 megawatts of electricity, and which depends upon biomass, waste, or renewable resources for its primary source of energy. At least 50 percent of the equity interest in a small power production facility must be owned by a person not primarily engaged in the generation or sale of electric energy. The provisions of FERC regulations, 18 CFR, Part 292, as incorporated in ARM 38.5.1901(1), respecting site location and primary energy sources are incorporated by reference in this definition.

(j) ~~(m)~~ "Standard rates" means those rates calculated by a means approved by the Commission which:

(i) In the case of purchases, are based on avoided costs to the utility, are computed annually by the utility and made available to the public, are reviewed by the Commission, and are applicable to all contracts with qualifying facilities which do not choose to negotiate a different rate; or

(ii) In the case of sales by a utility to a qualifying facility, are the utility's tariff schedules in effect for members of the same class as the qualifying facility.

~~(n) "Supplementary power" means electric energy or capacity supplied by an electric utility and regularly used by a qualifying facility in addition to that which the facility generates itself.~~

(k) ~~(o)~~ "System emergency" means a condition on a utility's system which is likely to result in imminent significant disruption of service to customers or is imminently likely to endanger life or property.

(l) ~~(p)~~ "Utility" means any public utility, as defined in 69-3-101, MCA, which provides electric service subject to the jurisdiction of the Montana Public Service Commission.

Rule II. 38.5.1902 GENERAL PROVISIONS (1) The Commission hereby adopts and incorporates by reference 18 CFR, Part 292, which sets forth general requirements and criteria for cogeneration and small power production facilities which are eligible for consideration under Sections 201 and 210 of the federal Public Utility Regulatory Policies Act of 1978, Pub. L. 95-617. A copy of this incorporated material may be obtained from the Commission, 1227 11th Avenue, Helena, Montana 59620.

(2) Any cogeneration or small power production facility in Montana, which is a qualifying facility under the criteria for size, fuel-use, and ownership established by FERC regulations, 18 CFR, Part 292, as incorporated in ARM 38.5.1901(1), is a qualifying facility eligible to participate, under these rules, in arrangements for purchases and sales of electric power with electric utilities regulated by the Commission.

(3) Any qualifying facility in Montana which produces electric energy or capacity, or both, available for purchase by any public utility regulated by the Commission, shall not be considered a public utility within the meaning of 69-3-101, MCA, and shall be exempt from regulation by the Commission as a public utility, except insofar as these rules or any other Commission order, tariff, requirement, or rule governing the activities of public utilities may affect the facility in its dealings with such regulated utilities. Nothing in these rules is to be construed to limit the full powers of regulation, supervision, and control of public utilities vested by law in the Commission.

(4) Nothing in these rules shall exempt any qualifying facility from the applicable licensing or permit requirements which may be imposed on facilities by Montana laws and regulations governing water use, land use, community development and planning, zoning, air quality, environmental protection, or any other existing pertinent law or regulation administered by state agencies other than the Commission.

(5) All purchases and sales of electric power between a utility and a qualifying facility ~~may~~ shall be accomplished according to the terms of a written contract between the parties or in accordance with the standard tariff provisions as approved by the Commission. The contract shall specify:

(a) The nature of the purchases and sales;

(b) The applicable rate schedule or negotiated rates for the purchases and sales;

(c) The amount and manner of payment of interconnection costs;

(d) The means for measurement of the energy or capacity purchased or sold by the utility;

(e) The method of payment by the utility for purchases, and the method of payment by the facility for utility sales;

(f) Any installation and performance incentives to be provided by the utility to the qualifying facility;

(g) The services to be provided or discontinued by either party during system emergencies;

(h) The term of the contract;

(i) Applicable operating safety and reliability standards with which the qualifying facility must comply;

(j) Appropriate insurance indemnity and liability provisions.

Rule III. 38.5.1903 OBLIGATIONS OF UTILITIES TO QUALIFYING FACILITIES (1) Each utility shall purchase any energy and capacity made available by a qualifying facility, except that a utility is not obligated to make purchases from an interconnected qualifying facility:

(i) during system emergencies if such purchase would contribute to the emergency;

(ii) as stipulated in the contract between the utility and the qualifying facility;

(iii) if, due to operational circumstances, purchases from a qualifying facility will result in costs greater than those which the utility would incur if it did not make such purchases. This provision is only applicable in the case of light loading periods in which the utility must cut back base load generation in order to purchase the qualifying facility's production followed by an immediate need to utilize less efficient generating capacity to meet a sudden high peak. Any utility seeking to invoke this exception must notify each affected qualifying facility and the Commission one month prior to the time it intends to invoke this provision. Failure to properly notify the qualifying facilities and/~~or~~ the Commission or incorrect identification of such a period will result in reimbursement to the qualifying facility by the utility in an amount equal to that amount due had the qualifying facility's production been purchased.

(2) Except as provided in ARM 38.5.1903(1), each utility shall purchase any energy and capacity made available by a qualifying facility:

(a) At a standard rate for such purchases which is based on avoided costs to the utility as determined by the Commission; or

(b) If the qualifying facility agrees, at a rate which is a negotiated term of the contract between the utility and the facility and not to exceed avoided cost to the utility. However, **~~avoided costs may be averaged over the life of the~~**

~~contract~~ the utility shall offer long-term contracts with qualifying facilities which permit a rate higher than avoided costs in the early years of the contract and a lower rate in the latter years.

(3) Each utility shall sell to any qualifying facility all electricity requested by the facility.

(4) Each utility shall make such interconnections with a qualifying facility in accordance with the provisions of ARM 38.5.1904.

(5) Each utility shall offer each qualifying facility the option of:

(a) ~~to operate~~ operating in parallel with ~~a qualifying facility,~~ the utility grid, with a single meter monitoring only the net amount of electricity purchased or sold, or

(b) operating in a simultaneous purchase and sale arrangement with separate meters whereby all power produced by the qualifying facility is sold to the utility at the standard or negotiated purchase rate and all power used by the facility is sold to the facility by the utility at the tariff rate; provided that the requirements of ARM 38.5.1907 are met by the qualifying facility.

(6) Any utility which is otherwise obligated to purchase energy or capacity from a qualifying facility may, if the affected qualifying facility agrees, transmit energy or capacity purchased from the facility to any other electric utility. Any electric utility subject to the Commission's jurisdiction that receives this energy or capacity shall be subject to the pricing provisions contained in these rules. The cost of transmission ~~shall~~ may be assigned to the qualifying facility.

(7) Each utility shall, if required by the Commission, include installation and performance incentive provisions in any contract with a qualifying facility. Such provisions shall offer a maximum dollar amount per kw per month for any month in which the facility's energy output meets or exceeds specified levels of performance.

(8) Each utility shall, upon initial contact with a potential qualifying facility, provide the potential qualifying facility with one (1) copy of:

(a) these rules,

(b) the Commission's approved standard provisions tariff, and

(c) the Commission's standard complaint procedure.

Rule IV. 38.5.1904 OBLIGATIONS OF QUALIFYING FACILITIES TO UTILITIES (1) A qualifying facility shall specify in its contract with a utility the nature of the purchases undertaken in the contract, including:

(a) The technology used in the production of energy or capacity by the qualifying facility;

(b) The qualifying facility's best estimate of the facility's energy and/or capacity supply characteristics, including its availability during utility system daily and

seasonal peak periods and during system emergencies.

~~(2) A qualifying facility shall specify in its contract with any utility the nature of the sales undertaken in the contract. Such sales may include sales of back-up, maintenance, or interruptible power.~~

(2) ~~(3)~~ A qualifying facility shall be fully responsible for interconnection costs and shall:

(a) Submit, for written approval prior to actual installation equipment specifications and detailed plans to the utility for the installation of its interconnection facilities, control and protective devices, and facilities to accommodate utility meter(s).

(b) Provide and install necessary meter socket and enclosure equipment at or near the point of interconnection, unless the utility has agreed to install the equipment and the facility has agreed to pay for this service;

(c) Reimburse the utility for special or additional interconnection facilities, including control or protective devices, time of delivery metering, and reinforcement of the utility's system to receive or continue to receive the power delivered under the contract. Such reimbursement may be accomplished by means of amortization over a reasonable period of time within the term of the contract and such costs must be reasonable according to industry standards.

(3) ~~(4) Any~~ Interconnection costs undertaken by the utility shall be reimbursed by the qualifying facility on a nondiscriminatory basis with respect to other customers with similar load characteristics.

(4) ~~(5)~~ A qualifying facility shall be required to provide power to a utility during a system emergency only to the extent specified in the contract between the facility and the utility, unless the qualifying facility is able to supply additional power and agrees to do so.

Rule V. 38.5.1905 RATES FOR PURCHASES (1) ~~At least annually, each~~ Each utility shall submit to the Commission by November 1, ~~1980~~ 1981, and on June 1st every year thereafter, the following cost data for use by the Commission in determining avoided costs and standard rates therefrom.

(a) The estimated avoided cost on the electric utility's system, solely with respect to the energy component, for various levels of purchases from qualifying facilities. Such levels of purchases shall be stated in blocks of ~~not more than~~ 10 megawatts and in blocks of 100 megawatts for systems with peak demand of 1000 megawatts or more, and in blocks of 10 megawatts and in blocks equivalent to ~~not more than~~ 10 percent of the system peak demand for systems of less than 1000 megawatts. The avoided costs shall be stated on a cents per kilowatt-hour basis, during daily and seasonal peak and off-peak periods, by year, for the current calendar year and each of the next five years;

(b) The electric utility's plan for the addition of capacity by amount and type, for purchases of firm energy and

capacity, and for capacity retirements for each year during the succeeding ten years; and

(c) The estimated capacity costs at completion of the planned capacity additions and planned capacity firm purchases, on the basis of dollars per kilowatt, and the associated energy costs of each unit, expressed in cents per kilowatt hour. These costs shall be expressed in terms of individual generating units and of individual planned firm purchases.

(2) Each utility shall purchase available power from any qualifying facility at either the standard rate determined by the Commission to be appropriate for the utility, or at a rate which is a negotiated term of the contract between the utility and the qualifying facility.

(3) The rate paid by the utility for any purchase shall not exceed the avoided costs to the utility, calculated:

(i) At the time of delivery of the facility's energy or capacity, for "as available" purchases; or

(ii) At either the time of delivery or the time the obligation is incurred, at the facility's option, for purchases of firm power over the term of the contract.

(4) The standard rate for purchases from a qualifying facility shall be that rate calculated on the basis of avoided costs to the utility which is determined by the Commission to be appropriate for the particular utility after consideration, to the extent practicable, of the avoided cost data submitted to the Commission by the utility and other interested persons.

(5) Assignment of a particular qualifying facility to the appropriate standard rate schedule for purchases by the utility should consider:

(a) The availability of capacity and energy from the qualifying facility during system daily and seasonal peak periods;

(b) The expected or demonstrated reliability of the qualifying facility;

(c) The relationship of the availability of energy or capacity from the qualifying facility to the ability of the utility to avoid cost;

(d) The contractual obligations the owner or operator of the qualifying facility is willing to undertake.

(6) If a qualifying facility has provided in its contract with a utility that measurement of facility energy input to the utility system and measurement of facility load will be accomplished with one meter, the qualifying facility shall be subject to a net billing system, whereby the utility shall pay the standard rate or the negotiated rate for purchases only for the facility's input to the system which is in excess of the facility's load.

(7) If the qualifying facility has agreed in its contract with a utility that measurement of facility input to the utility system shall be accomplished by metering separate from that measuring the facility load, the qualifying facility may receive payment for all of the energy it supplies to the

utility according to the applicable schedule of standard rates for purchases. Unless the qualifying facility has contracted for a different rate, the standard rate is applicable regardless of whether the qualifying facility is simultaneously served by the utility for the facility's load, and regardless of the rate charged by the utility for such simultaneous sales.

Rule VI. 38.5.1906 RATES FOR SALES (1) Each utility shall sell power delivered to a qualifying facility under the terms of the contract at the same rate applicable to the utility's non-generating customers belonging to the same class as the qualifying facility or having similar load or other cost-related characteristics~~, except that rates for the sale of back-up, maintenance, or interruptible power to a qualifying facility may be adjusted to correspond to savings to the utility or demonstrable additional burden to the utility resulting from such sales~~.

(2) The standard rates for sales of power to interconnected qualifying facilities shall be each utility's current applicable tariff schedules approved by the Commission.

Rule VII. 38.5.1907 OPERATING SAFETY PROVISIONS (1) The Commission hereby adopts and incorporates by reference the national electric safety code approved by the American National Standards Institute as published by the Institute of Electrical and Electronic Engineers which sets forth generally accepted safety standards for electric facilities. A copy of this incorporated material may be obtained from the Commission, 1227 11th Avenue, Helena, Montana 59620 or from the Institute of Electrical and Electronics Engineers, Inc., 345 East 47th Street, New York, NY 10017.

(2) Each qualifying facility shall, in the design, installation, interconnection, maintenance, and operation of the facility, comply with the requirements of the national electrical safety code.

(3) Each qualifying facility seeking parallel operation with any utility shall provide such control and protective devices as required by the utility for such operation.

(4) Each utility shall have the right:

(a) To enter the premises of the qualifying facility at reasonable times and with reasonable notice for inspection of the facility's protective devices, and

(b) To disconnect without notice if a hazardous condition exists in the generation or other equipment of the qualifying facility, and such immediate action is necessary to protect persons, utility facilities or other customers' facilities from damage or interference imminently likely to result from the hazardous condition.

(5) The Commission shall have the same power to investigate accidents occuring in the operation of any qualifying facility which result in death or serious injury to any person as it has under Section 69-3-107, MCA, with respect to public utilities.

Rule VIII. 38.5.1908 INFORMATION TO BE PROVIDED TO THE COMMISSION (1) Pursuant to initial contact with a potential qualifying facility, each utility shall provide the Commission with one (1) copy of the utility's initial written response.

3. Comments Accepted by the Commission.

Rule I(b), (f), (g), (n), Rule IV(2), and Rule VI(1). The Commission eliminated the distinction of back-up, interruptible, maintenance, and supplemental electricity purchased by the qualifying facility from that electricity purchased by the utilities nongenerating customers. The distinction, as proposed, violated the premise of nondiscriminatory purchase rates for qualifying facilities. The change was suggested by the Montana Power Company (MPC) and the Alternative Energy Resources Organization (AERO).

Rule I(1).

The revision redefines a small power production facility as a facility whose power production capacity does not exceed 50 megawatts, rather than 80 megawatts as proposed. This revision is commensurate with both the Montana Major Facilities Siting Act and the Northwest Electric Power and Planning and Conservation Act, which define as major those facilities with greater than 50 megawatts. The change was suggested by AERO.

Rule II(5).

This revision clarifies the contract options available to the qualifying facility.

Rule III(1)(iii).

The revised provision requires notification of both the qualifying facility and the Commission one month prior to, due to operational circumstances, the refusal to purchase the production of any qualifying facility.

Rule III(2)(b).

Whereas the proposed rule merely allowed for purchase rates to be averaged over the life of the contract, the final rule requires the utilities to offer "front-loading" contract terms where the purchase rates exceed avoided costs in the early years of the contract and are lower than avoided costs in the latter years. It is anticipated that this provision will aid a qualifying facility by covering debt service in the early years and benefit the utility by providing power below avoided cost in the latter years. This change was proposed by the Energy Law Institute (ELI).

Rule III(5).

The revision merely clarifies the interconnection options available to the qualifying facility, as suggested by AERO.

Rule III(6).

The proposed rule read that in the case of wheeling through the franchise utility to a second utility, that the cost of transmission "shall" be assigned to the qualifying facility. The Commission feels the proposed rule imposed an unnecessary restriction on the negotiations between the

qualifying facility, the franchise utility, and the receiving utility.

Rule III(8).

Pursuant to suggestions by several commentors, the Commission included provisions which will ensure that qualifying facilities are aware of existing rules and tariffs that govern the purchase of power by public electric utilities from cogenerators and small power producers. The final rule will also ensure that the qualifying facility is fully aware of the Commission's complaint procedure, including opportunity for public hearing.

Rule IV(3)(c).

The revised rules qualifies the interconnection costs in that the costs must be consistent with industry standards. This qualification was the result of proposals by several commentors.

Rule IV(4).

The reference to interconnection costs is made more specific per definitions provided elsewhere in the rules. Rather than "any" interconnection costs, the final rule references "the" interconnection costs subject to other provisions of the rule.

Rule V(1).

This rule was revised to reflect altered avoided cost data reporting dates. Commensurate with Federal reporting requirements, the November 1st filing was revised to reflect a June 1st filing. However, the Commission maintains the annual reporting requirements, whereas the Federal requirements dictate biannual filings.

Rule V(1)(a).

Whereas the proposed rules required reporting of avoided cost increments of up to 100 megawatts, the final rule requires reporting for both 10 megawatts and 100 megawatts. It is anticipated that the 10 megawatt increments would be more reflective of potential cogeneration and small power production in Montana. AERO provided the proposal to reduce the incremental blocks.

Rule VII(4)(a).

The proposed rule was altered to reflect the requirement for both reasonable time and reasonable notice for the entering of qualifying facilities premises by utilities, as suggested by AERO.

Rule VIII.

This new rule provides the Commission with a method to continually monitor the potential and actual cogeneration and small power production in the state of Montana.

Comments Rejected by the Commission.

Suggested changes to the proposed rules that were rejected by the Commission include:

Rule I(2)(m)(i) and Rule V(1).

Both MPC and Pacific Power and Light Company (PP&L) suggested that the avoided cost data reporting requirements be

revised to reflect biannual filings. The Commission believes that the current volatile energy situation requires at least annual filing of avoided cost data.

Rule IV(3)(c).

The Commission rejected PP&L's suggested mandatory "up-front" payment of interconnection costs as being contrary to the general objective of promoting cogeneration and small power production.

Rule I(2)(c) and Rule IV(4).

In several places MPC objected to the reference to some uniform amount of interconnection costs, in the belief that those costs will be unique to each and every qualifying facility. Although the Commission agrees that the detailed interconnection costs are likely to vary from one qualifying facility to another, it finds that reference to a standard amount of costs both necessary and desirable for purposes of preventing discriminatory interconnection costs.

Rule II(5).

MPC requested a change in the rules which would require all qualifying facilities to negotiate a contractual agreement with the utility. The Commission rejects this, however, has clarified in the rules that the contract options are limited to: a) a negotiated contractual agreement with the utility or b) the standard non-negotiated contract dictated by the tariff provisions approved by the Commission.

Rule III(1)(iii).

MPC suggested that the reporting and reimbursement provisions be eliminated. The Commission rejected this suggestion. Although the Commission intends to assure that there will be no subsidization of qualifying facilities by either ratepayers or stockholders, it also intends to provide the qualifying facility with a consistent market for its production, unless operational circumstances are proven to dictate otherwise.

Rule V(1)(c).

AERO inquired as to the role of planned capacity cost overruns in the determination of avoided costs. Although the Commission finds merit, and a disturbing amount of reality, in the idea of quantified estimates of cost overruns, it rejects the idea as unworkable and contrary to the utility's obligations to provide accurate cost estimates.

GORDON E. BOLLINGER, Chairman

CERTIFIED TO THE SECRETARY OF STATE MAY 4, 1981.

VOLUME NO. 39 OPINION NO. 13

COUNTIES -- Recovery of cost of noxious weed control;
WEED CONTROL DISTRICTS -- Cost allocation between county and landowners;
REVISED CODES OF MONTANA 1947 -- Sections 16-1715, 16-1720;
MONTANA CODE ANNOTATED -- Sections 7-22-2124, 7-22-2146, 7-22-2147, 7-22-2148(1).

HELD: In counties in which the full financial responsibility for a weed control program lies with the landowners, the county may recover the full amount of the cost incurred in noxious weed control when the weed board must institute weed control measures pursuant to section 7-22-2124, MCA, without the consent of the owner.

22 April 1981

Loren Tucker
Madison County Attorney
P.O. Box 36
Virginia City, Montana 59755

Dear Mr. Tucker:

You have requested my opinion on the following question:

> Whether a county may recover all or only two-thirds of the cost incurred in noxious weed control when the county, through its county weed board, controls noxious weeds without the consent of the landowner.

According to the information you have provided, the financial burden of weed control in Madison County generally rests on the landowners within the weed control district. When existing weeds are not adequately controlled by the landowners, however, the county weed board institutes control measures without the consent of the landowners.

As pointed out in your inquiry, the statutes applicable to recoupment of costs by a county for its extermination of weeds on land within a weed control district are ambiguous. Section 7-22-2147, MCA, states that when the district supervisors perform the weed control, one-third of the cost is

paid from the noxious weed fund and two-thirds is chargeable against the land on which the work is undertaken. Section 7-22-2148(1), on the other hand, provides that when the county incurs expenses in exterminating weeds which the landowner refuses to control himself, the "sum to be repaid by the owner or occupant" may be assessed against the land as a special tax. There is no specific reference to whether that "sum" is to include all expenses incurred by the county or merely the two thirds mentioned in section 7-22-2147.

The legislative history of sections 7-22-2147 and 7-22-2148(1) provides a reasonable means of erasing any ambiguity in the two provisions. Section 7-22-2148(1) was originally enacted as section 11, chapter 195, of the Laws of 1939 and was codified at section 16-1715, R.C.M. 1947. The section encompassed the entire process by which a county could undertake the extermination of weeds and collect the costs of its work when the landowner failed to assume his responsibility for weed control. Neither the original legislation nor section 16-1715, R.C.M. 1947, mentioned any division of expenses between the county and the landowner.

Moreover, the punctuation of the original act differs from that now codified in section 7-22-2148(1), MCA, and supports a finding that the full amount of expenses incurred by the county is generally recoverable. Section 7-22-2148(1) states that the county's expenses are to be paid from the noxious weed fund and that "the sum to be repaid by the owner or occupant" may become a lien on his land. Arguably, the "sum to be repaid" could be interpreted as referring back to section 7-22-2147, which allocates the cost between the weed fund and the owner. However, as originally enacted the provision stated that the expenses were to be paid by the county out of the noxious weed fund, and that "the sum, to be repaid by the owner or occupant," could be certified as an assessment on the land. The original insertion of the comma in the quoted phrase indicates a legislative intent that the appropriate "sum" to be assessed is the full amount of the expenses paid out of the noxious weed fund.

The legislative history of section 7-22-2147 is also helpful in answering the question you have posed. When read alone, section 7-22-2147 appears to allow a charge of only two-thirds of weed control costs in all cases in which the supervisors perform the work themselves, regardless of whether there was an agreement to that effect and regardless of whether the landowner has failed to meet his responsibility for weed control. However, the history of section 7-22-2147 belies such an interpretation.

Sections 7-22-2143, 7-22-2146, and 7-22-2147, MCA, were all originally enacted together in section 16, chapter 195, Laws of 1939. That enactment provided that one-third of the costs of weed control would be paid from the noxious weed fund, whether the control measures were undertaken by the landowners themselves or by the county. In 1947, the provision was amended. Immediately before the provisions calling for allocation of costs between the weed fund and the landowners, the legislature inserted the following language:

> If in the judgment of the commissioners and supervisors it seems advisable they may agree to assist the landowners in said district with a part of the cost of weed control on their land.

§ 16, chapter 228, L.Mont. 1947 (originally codified in § 16-1720, R.C.M. 1947; now codified in § 7-22-2716, MCA).

From the language of this amendment, it is apparent that the legislature intended to make discretionary the previously-mandatory assumption of some expenses by the county. There is no indication in the amending language that the grant of discretion was meant to apply only to situations in which the landowners themselves performed the weed control or that one-third payments from the noxious weed fund would continue to be required in all cases in which weed board undertook the work. Although the provisions on cost allocation have now been recodified in separate sections (§§ 7-22-2146 and 7-22-2147), their separation does not affect the intent of the 1947 legislature that financial assistance from the noxious weed fund is discretionary regardless of who is responsible for the control of weeds.

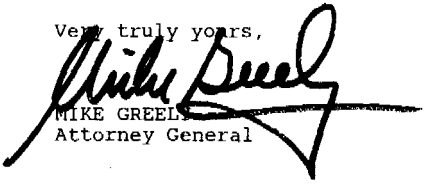
Interpreting sections 7-22-2147 and 7-22-2148(1) as allowing recovery of the entire amount of county expense in cases in which the landowner is fully responsible for weed control and the weed board is forced to control weeds without his consent accords not only with legislative history but also with reason. For instance, under section 7-22-2146 county commissioners and weed control supervisors are clearly not required to have an agreement to assist landowners with weed control. Therefore, the landowners in counties without such agreements are obliged to carry the entire financial burden of the weed program. If section 7-22-2147 were then interpreted to allow recovery by the county of only two-thirds of the costs incurred in destroying weeds on the property of

noncomplying landowners, it would be economically advantageous for the landowners to refuse to cooperate in the program. Complying landowners would bear their total cost of weed control, while recalcitrant landowners would be liable for only two-thirds of the expenses.

THEREFORE, IT IS MY OPINION:

In counties in which the full financial responsibility for a weed control program lies with the landowners, the county may recover the full amount of the cost incurred in noxious weed control when the weed board must institute weed control measures pursuant to section 7-22-2124, MCA, without the consent of the owner.

Very truly yours,



MIKE GREELY
Attorney General

VOLUME NO. 39 OPINION NO. 14

SUBDIVISIONS - State campground, local review;
LOCAL GOVERNMENT - Subdivisions, authority to review state activities;
RECREATION - State campgrounds, subdivisions, local review;
MONTANA CODE ANNOTATED - Section 76-3-101, et seq.

HELD: The Department of Fish, Wildlife, and Parks is subject to local subdivision review under 76-3-101 et seq., MCA, to the extent that it is creating an area which provides or will provide multiple spaces for recreational camping vehicles.

27 April 1981

Morris Brusett, Director
Department of Administration
Mitchell Building
Helena, Montana 59601

Dear Mr. Brusett:

You have requested my opinion on the following question:

> Is the proposed extension of the facilities at the Lambeth State Recreation Area subject to local review under the Subdivision and Platting Act?

The Department of Fish, Wildlife and Parks (DFWP) has proposed several improvements to the Lambeth State Recreation Area on the shores of Lake Mary Ronan in Lake County. In addition to a new well and caretaker facilities, DFWP proposes to construct several new campsites at Lambeth. Lake County asserts that this activity falls under the Subdivision and Platting Act, 76-3-101 et seq., MCA, and DFWP, under a variety of theories, argues to the contrary.

The Subdivision and Platting Act generally requires local review and approval of all subdivisions (76-3-601, MCA). All local governments are required to adopt and enforce subdivision regulations (76-3-501, MCA). Some subdivisions may be reviewed in an abbreviated procedure (76-3-505, MCA), and some subdivision activities are wholly exempt from regu-

lations (76-3-201 et seq., MCA). DFWP, on the other hand, has express authority, with the consent of the Fish and Game Commission, to acquire and develop areas for state parks and recreation areas (87-1-209, MCA).

The present issue is to what extent, if any, the DFWP'S activities in expanding Lambeth are subject to regulation as a subdivision by Lake County. While the statutes are not a model of clarity, a coherent construction of legislative intent can be derived. Section 76-3-103(15) defines the term "subdivision" as follows:

> "Subdivision" means a division of land or land so divided which creates one or more parcels containing less than 20 acres, exclusive of public roadways, in order that the title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed and shall include any resubdivision and shall further include any condominium or area, regardless of its size, which provides or will provide multiple space for recreational camping vehicles, or mobile homes.

On its face this section provides that the following activities are deemed to be subdivisions:

1. A division of land or land so divided which creates one or more parcels containing less than 20 acres, exclusive of public roadways, in order that title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed.

2. Any resubdivision.

3. Any condominium.

4. Any area, regardless of size, which provides or will provide multiple space for recreational camping vehicles.

5. Any area, regardless of size, which provides or will provide multiple space for mobile homes.

It is instructive that the original statute (Section 3, chapter 500, L. 1973) listed condominiums, camping spaces and mobile home sites in a separate sentence, clearly in-

dicating an intent to create a separate class of subdivision activity not necessarily requiring a "division of land." The fact that the language is now all in one sentence does nothing to change the original intent that there are activities deemed to be subdivisions which do not require a division of land.

Section 76-3-104, MCA, immediately following, provides that a subdivision "shall comprise only those parcels less than 20 acres which have been segregated from the original tract..." While this limitation is somewhat confusing, it is clear that it does not apply to categories 4 and 5 of the "subdivision" definition listed above. Those categories of activities or land uses are subdivision "regardless of ... size." Thus, it is clear that if a private individual wished to construct a recreational vehicle camping area on the banks of Lake Mary Ronan, local subdivision review would be required. The question, then, is whether under the statute or the law DFWP is exempted from local review when doing the same thing. I conclude that there is no exemption.

Activities by the State are mentioned twice in the Act. Section 76-3-205, MCA, provides:

> The provisions of this chapter shall not apply to the division of state-owned land unless the division creates a second or subsequent parcel from a single tract for sale, rent, or lease for residential purposes after July 1, 1974.

This section provides an exemption for certain State activities and an express inclusion of others. It exempts an initial division of state-owned land. A "division of land" is defined in 76-3-103(3), MCA, and requires segregation of one or more parcels from a larger tract by transferring title or possession. This clearly refers to activities in the first category of covered subdivision activities. The effect of 76-3-205, MCA, is to allow the state to subdivide and sell one tract from a parcel without local regulation, but to require local review of any subsequent divisions from the same parcel. Similary, 76-3-209, MCA, exempts from the survey and platting requirements, lands acquired for state highways.

These two sections, especially 76-3-205, are a persuasive indication that the Legislature intended state activities to be covered by the Act. If state activities were intended to

be exempt as a blanket matter, there would have been no reason to adopt 76-3-205, MCA, granting an exemption for certain state activities. While 76-3-209, MCA, is an exemption not so much for the state as for the person transferring the land, it is a specific and narrow exemption. Thus, since the legislature chose to mention the state in the Act, and chose to grant exemptions in its favor only in two specific instances, the clear implication is a legislative intent that the state stands in the same footing as a private person in all other matters under the Act.

Section 76-3-201, MCA, creates one additional exemption which should be discussed. That section exempts from review any "division of land" which "in the absence of agreement between the parties to the sale, could be created by an order of any court in this state pursuant to the law of eminent domain..." It has been suggested that since DFWP could have acquired this property on Lake Mary Ronan by eminent domain (87-1-209, MCA), this exemption applies. This is incorrect for two reasons. First, 76-3-201, MCA, applies expressly to "division of land." As noted above, the instant situation does not involve a division of land, even though it does involve "subdivision" activity. Second, exemptions of this type operate primarily upon the seller of land. That is, if DFWP were acquiring a piece of property on the lake, 76-3-201, MCA, would probably allow the seller to complete the transaction without local subdivision review and would not directly affect DFWP. That, however, is not the current situation. The land is already owned by DFWP and it wants to engage in a subsequent land use which triggers local subdivision review. Section 76-3-201, MCA, would apply to the original acquisition, but not subsequent uses.

Therefore, the statutes contemplate coverage of state activities, and no applicable statutory exemptions can be found. There remains, however, the question of whether there are general principles of law which would exempt DFWP from local regulation. While no cases could be found dealing with state-local conflicts under subdivision statutes, there is a considerable body of law dealing with state-local conflicts under zoning ordinances. The "traditional view" is that activities of the state may be exercised free of local control or regulation on the theory that the state is the superior sovereign. The analysis and language is much like that found in cases dealing with federal supremacy over state law. See, e.g., Board of Regents v. Tempe, 356 P.2d 399, 406 (Ariz. 1960); Anderson, American Law of Zoning, §12.06 et seq.

The more recently decided cases show a clear trend toward abandoning the traditional view. In Dearden v. Detroit, 269 N.W.2d 139, 140 (Mich 1978), the court analyzed and rejected all the traditional mechanical theories for finding state freedom from local control. To the same effect see City of Pittsburg v. Commonwealth, 360 A.2d 607 (Pa. 1976); City of Temple Terrace v. Hillsborough Ass'n, 322 So.2d 571 (Fla. App.1975), aff'd. 332 So.2d 610 (Fla. 1976); Brown v. Kansas Forestry, Fish & Game Comm., 576 P.2d 230 (Kan. 1978). As the court persuasively argued in City of Pittsburg v. Commonwealth, supra, viewing the conflict as a state-local one is unrealistic since both the local government and the state agency are exercising powers that come from the legislature.

Thus, the first task is simply to determine legislative intent from the applicable statutes. Where there is a discernable intent as to whether the state agency should be subject to local control, that is the end of the matter. See, e.g., Dearden v. City of Detroit, supra. As discussed above, the statutes in the instant case indicate a legislative intent that the state not be immune from local regulation.

In situations in which the legislature is silent, the courts have adopted a balancing of interests test. See City of Temple Terrace v. Hillsborough Ass'n., supra; Rutgers v. Piluso, 286 A.2d 697 (N.J. 1972); Brown v. Kansas Forestry, supra. Even though legislative intent is discernable in the present case, the balancing test as applied in these cases also leans toward the applicability of local regulation. The test announced in Rutgers, and followed in Brown, looks at the following factors:

1. The nature and scope of the instrumentality seeking immunity;

2. The kind of function or land use involved;

3. The extent of public interest to be served thereby;

4. The effect local land use regulation would have upon the enterprise; and

5. The impact upon legitimate local interests.

In the present case the agency seeking immunity is a state agency empowered to acquire and develop land for recreational uses. This function is obviously in the public interest, but, as the court in Brown observed, does not rise to the level of public education or corrections. In the latter areas the courts have been much more willing to find that important state goals would be frustrated by local regulation. See, e.g., Dearden v. City of Detroit, supra. Third, there is an obvious public interest in outdoor recreation facilities. There is, however, an existing facility at the site in question and even if the local review process resulted in a rejection of the new camping spaces the existing facility and the remainder of the proposed improvements would be unaffected. Fourth, the effect the local land use regulation would have on this project is unknown. In most of the zoning cases the state agency's project is directly prohibited by the local regulations. This is not the case here; we are not dealing with an all or nothing situation. The question is not whether or not the project is prohibited but rather whether or not it must be subjected to local review. Lastly, the impact upon legitimate local interests is great. As noted above, the state has mandated that local governments adopt subdivision regulations to further the comprehensive purposes listed in 76-3-102, MCA. These purposes are all related directly to local impacts, and the legislature has determined that the local governments are best able to regulate those impacts.

It should be clear that the balancing of interests test weighs heavily in favor of local regulations. As noted in the cases, however, susceptability to local regulation cannot be construed as a green light for local efforts to stop state developments. The state, just as a private developer has every right to expect and demand fair and impartial treatment. There is no indication in this case that the local government will do any more than fulfill its statutory responsibilities.

THEREFORE IT IS MY OPINION:

The Department of Fish, Wildlife, and Parks is subject to local subdivision review under 76-3-101 et seq., MCA, to the extent that it is creating an area which provides or will provide multiple spaces for recreational camping vehicles.

Very truly yours,

MIKE GREELY
Attorney General