MONTANA ADMINISTRATIVE REGISTER

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MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 22

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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing and where written comments may be submitted.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

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NOTICE SECTION

BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

In the matter of the proposed adoption of a rule relating to the inspection fee for commercial feeds	))))	NOTICE OF PROPOSED ADOPTION OF A RULE RELATING TO THE INSPECTION FEE FOR COMMERCIAL FEEDS

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On December 23, 1988, the Department of Agriculture proposes to adopt a rule relating to the inspection fee for commercial feeds.

2. The proposed rule provides as follows:

RULE I INSPECTION FEE

The manufacturer or registrant of a commercial feed, except pet foods and specialty pet foods, shall pay to the department an inspection fee of 15 cents per ton on all commercial feeds, including custom mixed feeds, except pet foods and specialty pet foods distributed in this state. AUTH: 80-9-206, MCA IMP: 80-9-206, MCA.

3. REASON: Sec 80-9-206, MCA, enacted in 1973 established the fee and authorized the department to raise it as necessary, through the rule making process. After some 13 years, the costs have risen to levels which are surpassing the funding provided, and it has become necessary to raise the fee to adequately fund the administration of the chapter.

4. Interested persons may submit their data, views, or arguments concerning the proposed adoption in writing to the Department of Agriculture, Agriculture/Livestock Building, 6th and Roberts, Helena, MT 59620-0201, no later than December 21, 1988.

5. If a person who is directly affected by the proposed 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 comments he has to the Department of Agriculture, Agriculture/Livestock Building, 6th and Roberts Helena, MT . 59620-0201 no later than December 21, 1988.

6. If the department receives requests for a public hearing on the proposed rule from either 10% or 25 whichever is less, of those persons who are directly affected by the proposed rule, from the Administrative Code Committee of the legislature, from a governmental agency or subdivision or from an association having no less than twenty-five 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 and mailed to all interested persons.

Keith Kelly
Director

Certified to the secretary of state November 14, 1988

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF SOCIAL WORK EXAMINERS
AND PROFESSIONAL COUNSELORS

In the matter of the proposed amendment of a rule pertaining to hours, credits and carry over	NOTICE OF PROPOSED AMENDMENT OF 8.61.1601 HOURS, CREDITS AND CARRY OVER

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On December 23, 1988, the Board of Social Work Examiners and Professional Counselors proposes to amend the above-stated rule.

2. The proposed amendment will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at page 8-1677, Administrative Rules of Montana)

"8.61.1601 HOURS, CREDITS AND CARRY OVER (1) will remain the same.

(2) If a licensee completes more than 20 hours of continuing education after 1986, excess hours in an amount not to exceed ~~10~~ 20 hours may be carried forward to the next year.

(3) and (4) will remain the same."

Auth: 37-23-103, MCA Imp: 37-23-101, 37-23-103, 37-23-201, 37-23-205, 37-23-211, MCA

REASON: The amendment is consistent with the rule for social workers, who are also regulated by this Board.

3. Interested persons may submit their data, views or arguments concerning the proposed amendment in writing to the Board of Social Work Examiners and Professional Counselors, 1424 - 9th Avenue, Helena, Montana 59620-0407, no later than December 21, 1988.

4. If a person who is directly affected by the proposed amendment wishes to express his data, views or arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any comments he has to the Board of Social Work Examiners and Professional Counselors, 1424 - 9th Avenue, Helena, Montana 59620-0407, no later than December 21, 1988.

5. If the board receives requests for a public hearing on the proposed amendment from either 10% or 25, whichever is less, of those persons who are directly affected by the proposed amendment, from the Administrative Code Committee of the legislature, from a governmental agency or subdivision or from an association having no 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 24 based on the 240 licensees in Montana.

BOARD OF SOCIAL WORK EXAMINERS
AND PROFESSIONAL COUNSELORS
PAT KELLY, CHAIRMAN

BY: Keith L. Colbo
KEITH L. COLBO, DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, November 10, 1988.

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

In the matter of the amendment of rules 16.8.1407, 16.8.1501, and 16.8.1503 regarding combustion in wood-waste burners, definitions for emission standards for existing aluminum plants and standards for visible emissions in aluminum plants	NOTICE OF PUBLIC HEARING FOR AMENDMENT OF RULES (Air Quality)

To: All Interested Persons

1. On January 6, 1989, at 9:00 a.m., the board will hold a public hearing in Room C209 of the Cogswell Building, 1400 Broadway, Helena, Montana, to consider the amendment of the above-captioned rules which amendments will effect the following changes. As to the wood-waste burners changes are made which relax the grain loading standard for wood-waste burner particulate matter and which require combustion at a certain temperature to insure cleaner burning. The changes in the rules pertaining to aluminum plants clarify the application of the standard for visible emissions from potrooms within the aluminum plants.

2. The proposed amendments would adopt changes proposed to the department through rule-making petitions, one petition from the Montana Wood Products Association (WPA) and one petition for a small clarification from the Columbia Falls Aluminum Company. The WPA asserts that rule changes should be made so that methods of disposal of wood-waste other than tepee burners should be used and that the existing grain loading standards is unreasonable because it does not reflect continual operation of wood-waste burners.

3. The rules, as proposed to be amended, appear as follows (new material is underlined; material to be deleted is interlined):

16.8.1407 WOOD-WASTE BURNERS (1) It is hereby declared to be the policy of the department to encourage the complete utilization of wood-waste residues and to restrict, wherever reasonably practical, all disposal of wood-waste residues by incineration. Recent technological and economic developments have enhanced the degree to which wood-waste residues currently being disposed of in wood-waste burners may be utilized or otherwise disposed of in ways not damaging the environment. While recognizing that complete utilization of wood-waste is not presently possible in all instances this policy applies to the extent practical and consistent with economic and geographical conditions in Montana.

~~(1)~~(2) Construction, reconstruction, or substantial alteration of wood-waste burners is prohibited unless the re-

quirements of subchapter 11 of this chapter have been met.

~~(2)~~(3) No person shall cause or authorize to be discharged into the outdoor atmosphere from any wood-waste burner any emissions which exhibit an opacity of twenty percent (20%) or greater averaged over six (6) consecutive minutes.

~~(3)~~(4) No person shall cause or authorize to be discharged into the outdoor atmosphere from any wood-waste burner particulate matter in excess of ~~0.1~~ 0.25 grains per standard cubic foot corrected to twelve percent ~~(12%)~~ CO_2.

~~(4)~~(5) A thermocouple and a recording pyrometer or other temperature measurement and recording device approved by the department shall be installed and maintained on each wood-waste burner. The thermocouple shall be installed at a location ~~six (6) inches above and near the center of the horizontal screen~~ near the center of the opening for the exit gases, or at another location approved by the department.

(6) A minimum temperature of 700° F shall be maintained during normal operation of all wood-waste burners. A normal start-up period of one (1) hour is allowed during which the 700° F minimum temperature does not apply. The burner shall maintain 700° F operating temperature until the fuel feed is stopped for the day.

(7) Existing wood-waste burners which cannot maintain 700° F during normal operation will be exempt from section (4) and section (6) of this rule for a period of five (5) years from the adoption date of this rule. After that time, all wood-waste burners must comply with this requirement, except existing wood-waste burners in Group III areas or burners that contribute to Group I or II areas as defined in 52 FR 24680, July 1, 1987 which will be exempt from section (6) of this rule.

~~(5)~~(8) ~~A daily written log of the wood-waste burner's operation shall be~~ The department may require a daily written log of the wood-waste burner's operation to be maintained by the owner or operator to determine optimum patterns of operations for various fuel and atmospheric conditions. The log shall include, but not be limited to, the time of day, draft settings, exit gas temperature, type of fuel, and atmospheric conditions. The log or a copy of it shall be submitted to the department within ten (10) days after it is requested.

~~(6)~~(9) No person shall use a wood-waste burner for the burning of other than production process wood-waste transported to the burner by continuous flow conveying methods.

~~(7)~~(10) Rubber products, asphaltic materials, or other prohibited materials ~~which cause dense smoke discharge~~ specified in ARM 16.8.1302 shall not be burned or disposed of in wood-waste burners.

~~(8)~~(11) Exception: For building of fires in wood-waste burners, the provisions of sections ~~(2)~~(3) and ~~(3)~~(4) of this rule may be exceeded for not more than sixty (60) minutes in eight (8) hours.

(12) If an existing wood-waste burner does not combust wood-waste for a period of two continuous years or more a new air quality permit must be obtained as applicable from the

department prior to reactivation of the burner in accordance with the provisions of subchapter 11 and subchapter 9.

(13) The board hereby adopts and incorporates by reference herein 52 FR 24680, July, 1987 which pertains to the definition of Group I, II, and III areas. 52 FR 24680, July 1, 1987 is available for public inspection and copying at the Air Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, 1400 Broadway, Helena, Montana 59620; at EPA's Public Information Reference Unit, 401 M Street SW, Washington DC 20460; and at the libraries of each of the ten EPA Regional Offices.

AUTHORITY: 75-2-111, 75-2-203, MCA
IMPLEMENTING: 75-2-203, MCA

16.8.1501 DEFINITIONS For the purposes of this rule, the following definitions apply:

(1)-(5) Same as existing rule.

(6) "Potroom" means a building unit which houses a group of electrolytic cells in which aluminum is produced.

(7) "Potroom group" means an uncontrolled potroom, a potroom which is controlled individually as a group of potrooms or potroom segments ducted to a common control system.

~~(6)~~(8) "Total fluorides" means all fluoride compounds as measured by methods approved by the department.

AUTHORITY: 75-2-111, 75-2-203, MCA
IMPLEMENTING: 75-2-203, MCA

16.8.1503 STANDARD FOR VISIBLE EMISSIONS ~~(1)~~(2) For the purposes of this rule, the board hereby adopts and incorporates herein by reference Method 9 of Appendix A of 40 CFR Part 60 (July 1, 1987 edition). Method 9 is included in the appendix to a federal agency rule and sets forth the method for visual determination of the opacity of emissions from stationary sources including the determination of plume opacity by qualified observers. The method also includes procedures for the training and certification of observers and procedures to be used in the field for determination of plume opacity. A copy of Test Method 9 may be obtained from the Air Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana, 59620.

~~(2)~~(1) No owner or operator subject to the provisions of this rule may cause the emission into the atmosphere from any potroom group of any gasses or particles which exhibit 10% opacity or greater as determined by EPA Reference Method 9 in Appendix A of Title 40, Part 60, (July 1, 1987 edition) of the Code of Federal Regulations.

AUTHORITY: 75-2-111, 75-2-203, MCA
IMPLEMENTING: 75-2-203, MCA

4. The board is proposing these amendments to the rules in order to comply with the request of the petitioners to ef-

fect rule changes pursuant to ARM 1.3.205 (Model Rules) and the Montana Administrative Procedure Act.

5. Interested persons may submit their data, views, or arguments concerning the proposed amendments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Robert L. Solomon, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620, no later than January 5, 1989.

6. Robert L. Solomon, at the above address, has been designated to preside over and conduct the hearing.

JOHN J. DRYNAN, M.D., Director

Certified to the Secretary of State November 14, 1988.

STATE OF MONTANA
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
BEFORE THE BOARD OF WATER WELL CONTRACTORS

In the matter of the proposed amendments of ARM 36.21.650 concerning casing perforations and intermixing of aquifers and ARM 36.21.654 concerning sealing of casing - general	NOTICE OF PROPOSED AMENDMENT OF ARM 36.21.650 CASING PERFORATIONS and ARM 36.21.654 SEALING OF CASING - GENERAL NO PUBLIC HEARING CONTEMPLATED

TO: ALL INTERESTED PERSONS:

1. On December 23, 1988, the Board of Water Well Contractors proposes to amend the above-stated rules.

2. The proposed amendment of ARM 36.21.650 will add a new subsection (2) and will read as follows: (new matter underlined) (Full text of the rule is located at pages 36-393.45 and 36-393.46, Administrative Rules of Montana)

"36.21.650 CASING PERFORATIONS (1) ...

(2) Casing perforations that allow the well casing to act as a conduit for deleterious interflow between aquifers shall not be permitted. (That is, waters of different heads, different temperatures, and different quality.)

(3) Dual completions of unconsolidated and bedrock aquifers shall be permitted only with prior board approval.

(4) Perforations shall not be placed to allow cascading water within the well casing during static conditions.

(5) Perforations shall not be placed to allow upward artesian flow from one aquifer to another."

Auth: 37-43-202, MCA Auth. Extension: Sec. 11, Ch. 728, L. 1985, Eff. 7/1/85 Auth. Extension: Sec. 19, Ch. 538, L. 1987, Eff. 7/1/87 Imp: 37-43-202, MCA

3. The proposed amendment is to clarify that waters of different pressures, temperatures and quality should not be mixing. By perforating casing into several different aquifers, it is possible to contaminate a good aquifer with water of a different quality.

4. The proposed amendment of ARM 36.21.654 will read as follows: (new matter underlined) (Full text of the rule is located at pages 36-393.46 and 36-393.47, Administrative Rules of Montana)

"36.21.654 SEALING OF CASING - GENERAL (1) In constructing, developing, redeveloping or conditioning a well, care shall be taken to preserve the natural barriers to groundwater movement between aquifers and to seal aquifers or strata penetrated during drilling operations which might impair water quality or result in cascading water. All sealing shall be permanent and prevent possible downward movement of waters in the annular space around the well casing. Sealing shall be

accomplished to prevent the upward movement of artesian waters within the annular space around the well casing that could result in the waste of ground water. The sealing shall restrict the movement of ground water either upward or downward from zones that have been cased out of the well because of poor quality. When cement grout is used in sealing, it shall be set in place 72 hours before additional drilling takes place, unless special additives are mixed with the grout that will cause it to adequately set in a shorter period of time. All grouting shall be performed by adding the mixture from the bottom of the space to be grouted toward the surface in one continuous operation. The minimum grout thickness shall be 3 inches.

(a) ..."

Auth: 37-43-202, MCA Auth. Extension: Sec. 11, Ch. 728, L. 1985, Eff. 7/1/85 Auth. Extension: Sec. 19, Ch. 538, L. 1987, Eff. 7/1/87 Imp: 37-43-202, MCA

5. The proposed amendment adds the word "constructing" to clarify that the rule also applies to new wells.

6. Interested persons may submit their data, views, or arguments concerning the proposed amendments in writing to the Board of Water Well Contractors, Department of Natural Resources and Conservation, 1520 East Sixth Avenue, Helena, Montana 59620, no later than December 21, 1988.

7. If a person who is directly affected by the proposed amendments 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 written comments he has to the Board of Water Well Contractors, Department of Natural Resources and Conservation, 1520 east Sixth Avenue, Helena, Montana 59620, no later than December 21, 1988.

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

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION
BOARD OF WATER WELL CONTRACTORS

BY: Wesley Lindsay
WESLEY LINDSAY, CHAIRMAN

Certified to the Secretary of State, November 14, 1988.

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

In the matter of the amendment of Rule 46.11.131 pertaining to the Food Stamp Employment Program	))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF RULE 46.11.131 PERTAINING TO THE FOOD STAMP EMPLOYMENT PROGRAM

TO: All Interested Persons

1. On December 13, 1988, 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 proposed amendment of Rule 46.11.131 pertaining to the Food Stamp Employment Program.

2. The rules as proposed to be amended provide as follows:

46.11.131 FOOD STAMP EMPLOYMENT AND TRAINING PROGRAM

~~(1) The department of social and rehabilitation services hereby adopts and incorporates by reference 7 CFR 271, 7 CFR 272 and 7 CFR 273, as amended through June 1, 1988, which are the food stamp employment and training program regulations as adopted by the food and nutrition services, United States department of agriculture. These federal regulations set forth the food stamp employment and training program components, participation requirements, and penalties for non-compliance. A copy of 7 CFR 271, 7 CFR 272 and 7 CFR 273, as amended through June 1, 1988, may be obtained from the Department of Social and Rehabilitation Services, 111 Sanders, Box 4210, Helena, Montana 59604.~~

(1) Participants in the food stamp employment and training program shall be reimbursed for costs of transportation or other costs that are reasonably necessary and directly related to participation in the program. The following reimbursement shall be provided to participants:

(a) Project work program:

(i) rates and types of reimbursement as found at ARM 46.25.731(6).

(b) Job search project:

(i) transportation utilizing the least expensive means and not to exceed $10 per day at the rate of $.185 per mile when using a private automobile;

(ii) work clothing;

(iii) other costs not exceeding $15 per month may be spent to obtain necessary employment and training items such as school transcripts, birth certificates, driver's license and application fees;

(iv) reimbursements provided shall not exceed $25 per month per participant.

AUTH: Sec. 53-2-201 MCA
IMP: Sec. 53-2-306 MCA

3. This proposed amendment is necessary to implement the federal Hunger Prevention Act of 1988. The repealed language formerly found in Section 1 was unnecessary because 7 CFR 271 through 273 were previously incorporated by reference in ARM 46.11.101.

4. Interested parties may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Office of Legal Affairs, Department of Social and Rehabilitation Services, P.O. Box 4210, Helena, Montana 59604, no later than December 21, 1988.

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

Director, Social and Rehabilitation Services

Certified to the Secretary of State November 10, 1988.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF COSMETOLOGISTS

In the matter of the amendment of a rule pertaining to requirements	)))	NOTICE OF AMENDMENT OF 8.14.603 SCHOOL REQUIREMENTS

TO: All Interested Persons:

1. On September 8, 1988, the Board of Cosmetologists published a notice of proposed amendment of the above-stated rule at page 1943, 1988 Montana Administrative Register, issue number 17.

2. The Board amended the rule exactly as proposed.

3. No comments or testimony were received.

BOARD OF COSMETOLOGISTS
DAVID BLANCO, PRESIDENT

BY: Keith L. Colbo
KEITH L. COLBO, DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, November 14, 1988.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF PRIVATE SECURITY
PATROLMEN AND INVESTIGATORS

In the matter of the amendment of a rule pertaining to fees) NOTICE OF AMENDMENT OF 8.50.437 FEE SCHEDULE

TO: All Interested Persons:

1. On October 13, 1988, the Board of Private Security Patrolmen and Investigators published a notice of proposed amendment of the above-stated rule at page 2073, 1988 Montana Administrative Register, issue number 19.

2. The Board amended the rule exactly as proposed.

3. No comments or testimony were received.

BOARD OF PRIVATE SECURITY
PATROLMEN AND INVESTIGATORS
CLAYTON BAIN, CHAIRMAN

BY: Keith L. Colbo
KEITH L. COLBO, DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, November 14, 1988.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE MONTANA AGRICULTURE DEVELOPMENT COUNCIL

In the matter of the adoption of new rules pertaining to the "Growth Through Agriculture Program"	)))))))	NOTICE OF ADOPTION OF NEW RULES I. (8.121.101), II. (8.121.102), III. (8.121.103), IV. (8.121.201), V. (8.121.301) and VI. (8.121.401) PERTAINING TO IMPLEMENTATION OF THE "GROWTH THROUGH AGRICULTURE PROGRAM"

TO: All Interested Persons:

1. On September 22, 1988, the Montana Agriculture Development Council published a "Notice of Public Hearing on Proposed Rules Pertaining to the Growth Through Agriculture Program" on page 2026 of the Montana Administrative Register, issue number 18.

2. The Council has adopted rules I. (8.121.101), II. (8.121.102), III. (8.121.103) and IV. (8.121.201) exactly as proposed and has adopted rules V. (8.121.301) and VI. (8.121.401) as proposed but with some changes. The changes will appear as follows: (new matter underlined, deleted matter interlined)

"8.121.301 AGRICULTURAL BUSINESS INCUBATOR PROGRAM - PURPOSE-INVESTMENTS-CRITERIA AND LIMITATIONS (1) through (3) will remain as proposed.

(4) In order for an agricultural business incubator to qualify for a council investment, the applicant must:

(a) will remain as proposed.

(b) demonstrate, through supporting documentation, the ability of the incubator to ~~be financially self-sufficient~~ operate independent of council investment within 5 years of receiving a council investment;

(c) through (6) will remain as proposed."

"8.121.401 AGRICULTURAL MARKETING DEVELOPMENT PROGRAM-PURPOSE-GOALS-CRITERIA (1) In addition to the purposes of the "Montana Growth Through Agriculture Act" as set forth in section 90-9-102, MCA, a ~~The~~ purpose of the marketing program is to find new or expanded markets for the products, processes, and technologies of Montana agricultural businesses.

(2) and (3) will remain as proposed.

(4) The goals of the marketing development program are to:

(a) through (d) will remain as proposed.

(e) encourage the expansion of value-added production, processes, and technologies in Montana.

(5) The council will biannually identify, ~~on a biannual basis,~~ at regularly scheduled meetings at which public

comment will be invited, the markets, products, processes, and technologies it seeks to study, expand, or otherwise develop.

~~(a)--the-council-shall-publish-requests-for-proposals,-in-compliance-with-Montana-law,-which-seek-persons-to-further-identify,-study,-and-expand-such-markets,-products,-processes,-and-technologies.--Contracts-for-market-development-activities-will-be-awarded-consistent-with-the-criteria-contained-in-the-requests-for-proposals-and-other-applicable-provisions-of-Montana-law.~~

(a) The council shall advertise requests for proposals in compliance with applicable Montana law and shall consider the comments received at its meetings when determining which types of proposals should be requested.

(b) At a minimum, requests for proposals will include the following:

(i) specific criteria by which proposals will be selected;

(ii) the establishment of milestones for evaluating the progress and success of the proposals;

(iii) a schedule for the submission of periodic progress reports."

3. Comments received at the public hearing held on October 20, 1988, and in writing, and the Council's action on the comments are set forth below:

COMMENT: Representative Chuck Swysgood proposed that the Council provide language in ARM 8.121.301(4)(b) clarifying the time frame in which incubators must be financially self-sufficient.
RESPONSE: The Council believes that this proposal has merit and has modified the rule to establish a five year time frame in which the incubator must demonstrate its abiity to operate independent of Council investment.

COMMENT: Mr. Hugh Spencer of Spencer's Hackles proposed that the Council include marketing education as one of the purposes of the "Agricultural Marketing Development Program."
RESPONSE: Although the Council belives that marketing education programs would assist persons involved in agriculture, the "Montana Growth Through Agriculture Act" ("Act") does not specifically authorize the expenditure of funds for such a purpose.

COMMENT: Mr. Bill Chumrau, Director of the Missoula Community Business Incubator, proposed that the location of incubators be in communities with populations of any size.
RESPONSE: The Council declines to incorporate this proposal into its rule since the Act, specifically Section 90-9-302(3), states that incubators may not be located "in a municipality with a population in excess of 1.,000 people."

COMMENT: Mr. John Marchi proposed that "eligible agricultural businesses" be defined in the rule; that the concept of

"value-added" be added to the rule; and that the rules provide a mechanism by which to involve the public in the identification of markets, etc., for funding.
RESPONSE: The Council believes that the last two proposals of Mr. Marchi have merit and have modified the rules accordingly. First, the Council has made encouragement of the expansion of value-added production, processes, and technologies as one of the goals of the marketing program. Second, 8.121.401(5) has also been modified to clarify that public comment will be invited at meetings in which the Council identifies markets, etc., it seeks to study, expand or develop. Since agricultural business is already defined in Section 90-9-103 of the Act, however, the Council declines, in accordance with Section 2-4-305 of the Montana Administrative Act to repeat the definition in the rules.

COMMENT: Ms. Nancy Matheson, on behalf of the Alternative Energy Resources Organization (AERO) requested that 8.121.401(1) of the proposed rules be expanded to include language extremely similar to that contained in Section 90-9-102 of the Act; that the rules provide a mechanism by which to involve the public in the identification of markets, etc. for council funding; that the rules specify the criteria by which the council will select projects; that the beneficiaries be identified; and that milestones for progress and success be specified.
RESPONSE: Except for the identification of project beneficiaries, which the Council believes will be known when the Council enters into contracts with funding recipients, it has modified 8.121.401 so that requests for proposals advertised by the Council will include, at a minimum, the criteria by which proposals will be selected, and the establishment of milestones for evaluating the progress and success of the proposal funded. 8.121.401(5) has also been modified to clarify that public comment will be invited at meetings in which the Council identifies markets, etc., it seeks to study, expand or develop. Also, rather than repeat the language contained in Section 90-9-102 of the Act, Section 8.121.401(1) of the rule has been modified by referencing Section 90-9-102.

4. No other comments or testimony were received.

5. The rulemaking authority for all of the proposed rules and the sections being implemented are the same as cited in the "Notice of Public Hearing".

MONTANA AGRICULTURE DEVELOPMENT COUNCIL
JIM JENKS, CHAIRMAN

BY: Keith S. Colbo
KEITH COLBO, DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, November 14, 1988.

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

In the matter of the amendment of rule 16.32.110 concerning criteria for granting certificates of need for health care facilities and services	NOTICE OF AMENDMENT OF RULE (Certificate of Need)

To: All Interested Persons

1. On September 22, 1988, the department published notice of a proposed amendment of rule 16.32.110 relating to criteria for granting certificates of need for health care facilities and services at pages 2030 and 2031 of the 1988 Montana Administrative Register, issue number 18.

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 November 14, 1988.

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

In the matter of the amendment of rules 16.44.202, 16.44.302, 16.44.303, 16.44.304, 16.44.306, 16.44.325, 16.44.327, 16.44.334, and 16.44.609, regarding definition of waste, definition of hazardous waste, requirements for samples collected for treatability studies, requirements for recyclable materials, reclassification to a material other than a waste, reclassification as a boiler, regulation of certain recycling activities and applicability of interim status requirements.	NOTICE OF THE ADOPTION AND AMENDMENT OF RULES
* * * * * * * * * * * *	
In the matter of an information statement pertaining to ARM Title 16, Chapter 44, subchapter 10, regarding the availability of information.	(Hazardous Wastes)

To: All Interested Persons

1. On October 13, 1988 at pages 2153-2161, issue number 19 of the 1988 Montana Administrative Register, the department published notice of proposed adoption and amendment of the above-captioned rules implementing changes consisting of a minor clarification of citations and phraseology; definitional changes; clarification in the disposition of samples collected for treatability studies, and, applicability of interim status requirements.

2. The department has amended all the rules as noticed with the following changes (new material since the last notice is capitalized and double underlined):

16.44.609 STANDARDS FOR EXISTING FACILITIES WITH TEMPORARY PERMITS (INTERIM STATUS) (1) Same as existing rule.

(2) Interim status standards apply to owners and operators of facilities that treat, store or dispose of hazardous waste who have fully complied with the requirements for interim status and until either a hazardous waste management permit is issued or until applicable closure and post-closure requirements under 40 CFR Part 265, SUBPART G are fulfilled, and, to those owners of facilities in existence on November 19, 1980 who have failed to file a Part A permit application as required by ARM 16.44.605 and ARM 16.44.119. These standards apply to all treatment, storage and disposal of hazardous waste at treatment, storage and disposal facilities except as specifically exempted in ARM Title 16, chapter 44.

(3) Same as existing rule.

(Note of clarification: In the public information statement pertaining to the provision of information by the department, all references to 16.44.1009 should be 16.44.1012.)

3. No hearing was requested in the above-captioned matter and no comments were received from the public.

JOHN J. DRYNAN, M.D., Director

Certified to the Secretary of State November 14, 1988.

BEFORE THE DEPARTMENT OF HIGHWAYS
OF THE STATE OF MONTANA

In the matter of the amendment of Rules 18.8.514 and 18.8.515 regarding special permits for length	)))	NOTICE OF THE AMENDMENT OF RULES 18.8.514 AND 18.8.515 ON LENGTH

TO: All Interested Persons:

1. On September 8, 1988, the Department of Highways published notice of proposed amendments of rules 18.8.514 and 18.8.515 concerning the conditions for special permits for length at page 1964 of the 1988 Montana Administrative Register, issue number 17.

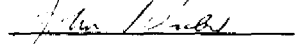
2. The agency has amended the rules as proposed.

3. The Department received two comments regarding the proposed amendments. A written comment was received from Rudolf L. Bertolino of Billings who originally requested the rule change. He stated that his new equipment with a tractor trailer and a set of Rocky Mountain doubles has an overall length of 99 feet and that he operates from Billings to Bismark, North Dakota, Worland, Wyoming, Missoula, Glendive and Great Falls. He wants to be able to operate his equipment on Montana highways and interstates. Under present rules he can only obtain a special permit for length up to 95 feet. The Department considered his request and acknowledged that triple trailer combinations up to 110 feet are allowed on the interstate system under section 61-10-124(6), MCA. The Department believes that Rocky Mountain doubles up to 100 feet can be safely operated on the interstate system and is therefore amending the length rules to allow such combinations. The Department is rejecting his proposal to operate such combinations on other state highways as well because of safety reasons including a potential of greater off tracking in longer combinations and the increased hazards of longer combinations for passing.

A second comment was received from Roger Tippy, Attorney for the Montana Manufactured Housing and RV Association. He proposed the amendment of Rule 18.8.515 to delete the rear flag car requirement in subsections (1)(b) and (c), and (3)(b). He stated that the rear flag vehicle serves no useful purpose. The Department has rejected the proposed amendments because the rear flag car alerts the driver of a vehicle to the rear that an unusually long load

is ahead and that the driver will have to use caution in passing. The Department believes that the flag car requirement enhances the safety of long moves.

Gary J. Wicks
Director of Highways

By: 

Certified to the Secretary of State November 14, 1988.

BEFORE THE DEPARTMENT OF NATURAL
RESOURCES AND CONSERVATION
STATE OF MONTANA

In the Matter of the Adoption of Rules	)))	NOTICE OF THE ADOPTION OF RULES FOR THE ADMINISTRATION OF THE SAFETY OF DAMS PROGRAM

TO: ALL INTERESTED PERSONS

1. On June 9, 1988, the department of natural resources and conservation published a notice of the proposed adoption of rule I (36.14.101) through rule XLV (36.14.803) relating to administration of the safety of dams program at page 1137 of the 1988 Montana Administrative Register, issue no. 11.

2. The Department has adopted the following rules as proposed in the notice:

Rule I	36.14.101	DEFINITIONS
Rule II	36.14.102	DUTIES AND AUTHORITY
Rule III	36.14.103	EXEMPTIONS
Rule IV	36.14.104	CANCELLATION OF PERMITS
Rule VI	36.14.201	WHO HAS TO APPLY FOR HAZARD DETERMINATION
Rule VIII	36.14.203	MULTIPLE DAMS
Rule IX	36.14.204	APPLICATION
Rule X	36.14.205	APPLICATION PROCESSING PROCEDURES
Rule XII	36.14.207	CHANGE IN CLASSIFICATION
Rule XIV	36.14.301	CONSTRUCTION PERMIT APPLICATION - GENERAL REQUIREMENTS
Rule XV	36.14.302	DEPARTMENT INSPECTION COSTS DURING CONSTRUCTION
Rule XVIII	36.14.305	NEW CONSTRUCTION - CONSTRUCTION AND MATERIAL SPECIFICATIONS
Rule XXI	36.14.308	REMOVAL - ENGINEERING REPORT, PLANS, AND SPECIFICATIONS
Rule XXIII	36.14.310	FINAL INSPECTION - NOTICE OF COMPLETION
Rule XXV	36.14.312	NOTICE, ORDER, AND REVOCATION FOR NONCOMPLIANCE
Rule XXVI	36.14.401	OPERATION PERMIT REQUIREMENTS
Rule XXVII	36.14.402	OPERATION PERMIT APPLICATION - GENERAL REQUIREMENTS
Rule XXVIII	36.14.403	APPLICATION CONTENT - RESERVOIR OPERATION PLAN
Rule XXX	36.14.405	OPERATION PLAN - MAINTENANCE

		PROCEDURES
Rule XXXIII	36.14.501	HIGH-HAZARD DAM DESIGN CRITERIA
Rule XXXIV	36.14.502	HYDROLOGIC STANDARD FOR EMERGENCY AND PRINCIPAL SPILLWAYS
Rule XXXVI	36.14.504	BREACH OR REMOVAL OF AN EARTH DAM
Rule XXXVII	36.14.601	PERIODIC OWNER INSPECTIONS - GENERAL REQUIREMENTS
Rule XXXVIII	36.14.602	PERIODIC OWNER INSPECTIONS - INSPECTION ITEMS
Rule XXXIX	36.14.603	ENGINEER'S REPORT OF PERIODIC INSPECTION
Rule XLI	36.14.702	EMERGENCY ACTIONS - OWNER
Rule XLIII	36.14.801	JURISDICTIONAL SIZE OF THE DAM OR RESERVOIR
Rule XLIV	36.14.802	AFFIDAVIT OF COMPLAINT
Rule XLV	36.14.803	INVESTIGATION AND INSPECTION

3. The Department has adopted the following rules as proposed with the following changes:

RULE V (36.14.105) LIABILITY (1) Same as proposed rules.

~~(2) After October 1, 1985, owners of high-hazard dams without an operation permit are strictly liable, regardless of negligence, for any damages resulting from leakage or overflow of water or floods caused by the failure or rupture of the dam or reservoir.~~

~~(3) After July 1, 1990, owners of corps inspected high-hazard dams without an operation permit are strictly liable, regardless of negligence, for any damages resulting from leakage or overflow of water or floods caused by the failure or rupture of the dam or reservoir.~~

RULE VII (36.14.202) HAZARD DETERMINATION BY THE CORPS (1) The department will automatically adopt the determination of high-hazard only for those dams classified high-hazard by the corps pursuant to P.L. 92-367. A copy of the letter or document of such determination or reference to a report by the corps must accompany any application for construction permit or operation permit. The owner may request a determination by making an application for hazard determination.

RULE XI (36.14.206) CRITERIA FOR DETERMINATION (1) Same as proposed rules.

(2) The breach flooded area, for the purpose of this classification only, is the flooded area caused by a breach of the dam with the reservoir full to the crest of the emergency spillway ~~and excludes the flooded area created by a 100-year flood without the dam.~~

RULE XIII (36.14.208) DAMS IN SERIES (1) The worst case scenario shall govern for determining the hazard classification of dams in series where more than one mode of failure is possible among the dams. Classification shall be based on potential for failure under combined and, if applicable, individual dam breach scenarios ~~based on a reasonable likelihood of occurrence~~.

(2) and (3) Same as proposed rules.

RULE XVI (36.14.303) NEW CONSTRUCTION - ENGINEERING DESIGN REPORT (1) An engineering design report for construction of a new dam must include:

(a) a summary describing:

(i) through (viii) Same as proposed rules.

(ix) an outlet discharge capacity rating table(s) referenced to reservoir elevations ~~for each foot of head above the inlet or control section~~ indicating the discharge that can be safely released;

(x) a rating table(s) indicating spillway discharge capacity referenced to reservoir elevations ~~in cubic feet per second for each foot of head above the control section, including the crest elevation referenced from mean sea level (include the equations for determining the discharge capacity rating)~~;

(xi) and (xii) Same as proposed rules.

~~(b) construction plans reduced to 11 x 17 inches;~~

~~(c) construction and material specifications;~~

(d) and (e) Same as proposed rules except renumbered to (b) and (c).

~~(f)~~ (d) a hydrologic and hydraulic report that gives ~~giving the hydrologic/hydraulic~~ design procedure(s), ~~or method(s)~~ calculations, and data for the reservoir and appurtenances ~~used, including the reservoir inflow hydrographs, the reservoir outflow hydrographs, the spillway discharge capacity, flow characteristics of the spillway throughout its entire length at design discharge, the area of the drainage basin, hydrologic and hydraulic characteristics, the pertinent rainfall and stream flow records and flood flow records and estimates and, if done, the incremental analysis for loss of life for the spillway design~~;

(g) through (j) Same as proposed rules except renumbered as (e) through (h).

RULE XVII (36.14.304) NEW CONSTRUCTION - CONSTRUCTION PLANS

(1) Same as proposed rules.

(2) The plans must be detailed illustrations ~~engineering designs that consist of drawings and specifications~~ that include as a minimum the following:

(a) through (h) Same as proposed rules.

(i) foundation plan showing limits of excavation, ~~with proposed grout drain holes, elevations and size of core trench, cutoff walls, or other foundation treatments;~~ construction keying the dam to the foundation and the abutments, and construction to control seepage.

(j) and (k) Same as proposed rules.

(1) other drawings, schedules, and notes required for construction and technical review of appurtenant structures.

RULE XIX (36.14.306) REPAIR, ALTERATION, OR ENLARGEMENT - ENGINEERING DESIGN REPORT, PLANS, AND SPECIFICATIONS (1) Same as proposed rules.

(a) Same as proposed rules.

(i) a summary, including those items in Rule XVIII(1), and a general description of the proposed work, and for repair must include the specific measures to be taken to reasonably ensure the problem will not recur or the solution is the most reasonable and will not impact the safety of the dam;

(ii) through (v) Same as proposed rules.

(b) Same as proposed rules.

(i) through (iv) Same as proposed rules.

RULE XX (36.14.307) GENERAL MAINTENANCE AND ORDINARY REPAIRS THAT DO NOT REQUIRE A CONSTRUCTION PERMIT (1) General maintenance and ordinary repairs that do not require a construction permit are those activities that do not impair the safety of the dam if done properly. These activities include:

(a) through (d) Same as proposed rules.

RULE XXII (36.14.309) CONSTRUCTION PERMIT - STANDARD TERMS

(1) Same as proposed rules.

(a) Same as proposed rules.

(b) the owner shall provide the department evidence that ~~he has required~~ a performance bond has been obtained by ~~from~~ the contractor for the completion of construction of the dam in the amount of at least ~~50%~~100% of the estimated cost of the project;

(c) Same as proposed rules.

(i) through (iii) Same as proposed rules.

(iv) The construction reports must summarize the detailed daily log of all construction operations, including written and photographic records, documenting:

(A) through (C) Same as proposed rules.

(iv) through (vi) Same as proposed rules except renumbered as (v) through (vii).

(d) through (i) Same as proposed rules.

RULE XXIV (36.14.311) RELEASE OF THE PERFORMANCE BOND (1) Same as proposed rules.

(2) If the owner or the surety decides to abandon the project, the owner or the surety shall immediately notify the department in writing and, if during construction, submit suitable plans ~~to~~ and render the dam safe.

RULE XXIX (36.14.404) OPERATION PLAN - RESERVOIR OPERATION PROCEDURES (1) Same as proposed rules.

(a) through (e) Same as proposed rules.

(f) a plan including the method and frequency for routine inspections conducted by an engineer, ~~as well as the~~ or owners or

[36.14.102(3)] where the height is not used when more detailed information is available.

COMMENT: The reference to the water resources division should be changed to just refer to the department and would save making a change in Rule II(1) [36.14.102(1)] if there is an organizational change.
RESPONSE: The purpose of the rule is to give direction to those utilizing the rules of the appropriate unit within the department that administers the program.

COMMENT: The law does not allow exceptions included in Rule III(3) [36.14.103(3)]. In general, they are not reasonable exemptions.
RESPONSE: The statute enumerates certain exemptions in MCA section 85-15-107 (1987). The law does not prohibit the exemptions listed in this rule. The exemptions are necessary to clarify the specific instances where it is questionable as to the intent to regulate such structures.

COMMENT: Rule V, parts 2 and 3 [36.14.105(2) and (3)] describe a specific case and assign a liability in the event of these cases actually happening. The liability is probably an issue for the court to decide and should not be included in the rules, but if they are left in the rules, other cases should also be described.
RESPONSE: Agree; the parts have been deleted.

COMMENT: Is there a need for a hazard determination for removal of a dam.
RESPONSE: Rule VI (36.14.201) specifically includes a hazard determination for removal of a dam. Inappropriate techniques for removal of a dam may cause a failure or rupture of a dam that would likely cause a loss of life. The statute clearly includes that removal of a high-hazard dam is to be regulated. MCA section 85-15-106(3) (1987) defines construction to include removal of a dam.

COMMENT: All dams classified by the Corps should not be classified as high-hazard.
RESPONSE: Agreed; the rule has been modified accordingly.

COMMENT: The automatic adoption of the high-hazard classification by the Corps by the State is onerous and objectionable.
RESPONSE: Rule VII (36.14.202) provides the automatic adoption of high-hazard for Corps-inspected dams that the Corps classified as high-hazard. The rule also provides that if there is disagreement that an application for hazard classification can be submitted to the department.

COMMENT: The inspection fee is not commensurate with the cost of inspection as required in the law. The actual cost of hazard

determination is probably 10 to 100 times the amount suggested in the rules.
RESPONSE: The cost of the inspection necessary for a hazard classification is, on the average, estimated to cost approximately $125. An inspection is only part of the overall analysis in making a hazard classification.

COMMENT: The criteria for determination of hazard in Rule XI (36.14.206) must be changed. Loss of life can certainly occur outside the flooded area in part 2 of the proposed rule. There is no justification for assuming the reservoir is full only to the crest of the emergency spillway or that loss of life occur within the 100-year floodplain if the dam were to fail.
RESPONSE: It is agreed that loss of life can occur outside the flooded area in part 2. The statute, however, defines a high-hazard dam as one that is likely to cause loss of life. The judgment then is the degree of the likelihood of such loss of life. Consideration has included the reasonableness of the event occurring, the probability of a storm that would fail the dam, the failure occurring on the rising limb, peak, or lowering limb of the storm hydrograph. The amount and cost of data to engineer the spillway and the amount and cost of the effort to make a hazard determination. It becomes impractical for the dam owner or the department to develop the information and data necessary to identify all high-hazard dams. A substantial increase in work and staff time is required to make the criteria more inclusive. The present criteria is a reasonable limit for the dam owner and the department to develop the information and data necessary for a hazard classification. The present criteria will include most dams that are high-hazard in the state.

COMMENT: Part 3 of Rule XI [36.14.206(3)] seems to add confusion to the limitation of liability that now exists in the Dam Safety Act. The owner is not relieved of liability damages within the 100-year floodplain. Therefore, the owner may be liable for damages well beyond the downstream limit of the hazard evaluation.
RESPONSE: The rule attempts to put a practical limit on the area of consideration where there is likely a loss of life. It is reasonable to establish such limitations. Several interpretations of liability can be made, but this probably is best left to the court or legislature to clarify.

COMMENT: Part 4 of Rule XI [36.14.206(4)], methods used by the department to determine the downstream routing of streamflows and the breach flow hydrograph, should not be limited to the two methods in the section. Other techniques may be appropriate as well.
RESPONSE: The rule describes methods that are already broad in nature.

COMMENT: Part 5 of Rule XI [36.14.206(5)] suggests that loss of life is not likely on all private roads. This is not a reasonable exclusion. Also, the paving of roads does not always indicate the amount of traffic on that road. Some leeway may be appropriate in both directions on this issue.
RESPONSE: The distinction is a reasonable one and has been generally adopted by other states. Paved roads generally indicate a greater likelihood for loss of life.

COMMENT: The last few words of part 1, Rule XIII [36.14.208(1)], "based on a reasonable likelihood of an occurrence," should be eliminated.
RESPONSE: Agreed.

COMMENT: In parts 2 and 3 of Rule XIII (36.14.208), the failure floodwave of the upstream dam should be combined with the inflow design flood of the downstream dam in making the classifications.
RESPONSE: The rule allows a worst-case scenario to be considered, and it may include the scenario suggested. The rule requires no change.

COMMENT: Part 1 of Rule XV [36.14.302(1)] conflicts with the law in excluding salary and travel expenses. The law says that if fees are charged, they have to be commensurate with costs. The main costs are salary and travel expenses.
RESPONSE: The law is permissive and allows the department discretion in the amount of cost to be collected through fees.

COMMENT: In part 1, a, ix, of Rule XVI (36.14.303), the rating table would be much more useful if capacity were related to reservoir elevations above MSL or above the spillway crest. The control section may move around on the spillway depending on the flow. It may be convenient to have the rating table reflect the position of any gates or other control devices that may be on the spillway.
RESPONSE: Agreed; proposed rule modified.

COMMENT: In part 1, a, xii, b, of Rule XVI (36.14.303), full-size plans would be easier to review and less costly for many applicants.
RESPONSE: Agreed; proposed rule modified.

COMMENT: Part 1, a, xii, c, of Rule XVI (36.14.303); already required in Rule XVII (36.14.304).
RESPONSE: Agreed; deleted from this part.

COMMENT: In Part 1, e, of Rule XVI (36.14.303), the geotechnical report does not require drill logs, drill hole locations, test pit logs, or test pit locations.
RESPONSE: The requirements of the rule have been generally stated to require such information, if applicable.

COMMENT: In Part 1, f, of Rule XVI (36.14.303), what is meant by the "incremental analysis for loss of life for the spillway design?" How will it be used? Some careful wording is needed for this.
RESPONSE: Agreed; the rule is reworded since the analysis is clear in the text of Rule XXXIV [36.14502(2)].

COMMENT: Part 1, g, of Rule XVI (36.14.303); report should be included in the geotechnical report. The drainage design report should provide more important details than those suggested in this section.
RESPONSE: The rule does not prohibit the consolidation of such reports. The wording has been modified to delete references to specific examples. The requirements of the rule as modified is sufficient to cover most cases and does not prohibit the owner to supply details that the dam owner or engineer think are important.

COMMENT: In Rule XVII (36.14.304), the limits on plan sheet sizes seem unreasonable. Some of the items listed are often found on odd-sized sheets.
RESPONSE: Disagree.

COMMENT: In part 2 of Rule XVII (36.14.304), specifications are typically provided on letter-sized sheets rather than the 21" by 30" required as a minimum size by these rules. Plans are not designs but rather a result of or a description of the design.
RESPONSE: Construction specifications also appear on drawings as schedules and notes, so parts 2 and 2(e) have been modified.

COMMENT: In part 2, i, of Rule XVII (36.14.304), provisions other than those listed are likely to be needed in specifications.
RESPONSE: Agree; reworded to a more general description.

COMMENT: Rule XIX (36.14.306) requires a large amount of paperwork for many relative minor repairs. On the average, it would more than double the cost of a typical repair to one of our projects. It seems to go far beyond what the law requires.
RESPONSE: Disagree; the rule has been written in general form to cover the entire range of repairs that might be needed. Minor repairs are exempt as outlined in Rule XX (36.14.307).

COMMENT: Part 1, a, 1, of Rule XIX (36.14.306), requires that measures are to be taken to reasonably ensure that the problem will not recur. This is an unreasonable requirement. We fully expect the problem to recur after a repair is made in most cases.
RESPONSE: It is agreed that repairs may be needed more than once, but the repair should have a reasonable life. The rule is therefore modified accordingly.

COMMENT: In part 1 of Rule XX (36.14.307), most repairs, maintenance, and even major construction do not impair the safety of the dam. Therefore, there would almost never be a repair that would require a permit. Rule XIX could probably be eliminated if Rule XX remains as it is.
RESPONSE: Disagree; there are repairs that if done improperly would impair the safety of the dam, and there are others that do not. Clarification has been added to judge the application of this rule.

COMMENT: There seems to be no legal basis for Rule XXI (36.14.308).
RESPONSE: Disagree; construction as defined in the statute includes removal of a dam.

COMMENT: In Rule XXII (36.14.309), the necessity of a performance bond should be evaluated on a case-by-case basis. If a performance bond is actually needed, a 50% bond is not adequate. Bonds are expensive, however, and if one is not needed, it should not be required by these rules.
RESPONSE: The cost of a 50% performance bond and a 100% performance bond is the same, generally 1 to 1.5% of the construction cost. Construction on a high-hazard dam is important, and there needs to be some guarantee that the job is finished properly. The rule has been modified to require a 100% performance bond.

COMMENT: In Section 1, c, i, of Rule XXII (36.14.309), the requirement for assurance that construction is carried out in substantial compliance with "the approval plans and specifications" is not enough. Assurance is also needed that the design is appropriate for actual conditions encountered during construction.
RESPONSE: The rule already includes this.

COMMENT: Part 2 of Rule XXIV (36.14.311) should not suggest that the surety be allowed to decide to abandon the project. The rules should require that the incomplete project be made safe, not simply that suitable plans be submitted to make the dam safe.
RESPONSE: Disagree; the surety may decide that the project be abandoned and construction be stopped. The rule has been modified to specify that the surety must render the dam safe.

COMMENT: Part 6 of Rule XXV (36.14.312) should describe what happens after the department cancels the permit.
RESPONSE: This is clearly spelled out in the statute in MCA sections 85-15-216, 501 MCA (1987).

COMMENT: The requirement in Rule XXVI (36.14.401) for an operating permit for an existing dam does not seem to agree with the requirements in the law. The law requires the owner of a

high-hazard dam to have an approved operating plan as described in the law. The operating permit cannot be issued until construction is complete and the dam or reservoir conforms to the construction permit and an operation plan has been approved. Perhaps a procedure for obtaining department approval of an operating plan is needed.
RESPONSE: Disagree with the commentor's interpretation of the law.

COMMENT: The law does not require an inspection report for the first operation permit application, nor that the investigation be conducted within 90 days of submitting the application as required in Rule XXVII (36.14.402).
RESPONSE: Disagree. MCA section 85-15-213(2) MCA (1988) provides that the Department issue or re-issue an operation permit. This implies that an inspection report is intended where there was no previous operation permit. The 90 days is a reasonable period to ensure that the inspection report is a reasonable representation of field conditions when the permit is issued.

COMMENT: Rule XXIX (36.14.404), part I, (c) and (d), requires a description of the authority granted and direction given to the dam tender. What if there is no dam tender?
RESPONSE: The rule, of course, doesn't require a dam tender. If there is no dam tender, the operation plan simply says so.

COMMENT: The plan required in Rule XXIX (36.14.404), part 1(e), will be difficult and time-consuming. It will be of little value.
RESPONSE: The plan is necessary to ensure safe operation of the dam. The plan might include the authority and means for removal of flashboards, limits on gate operations during flood events, and removal of excessive debris during spillway and outlet use. The plan should not be difficult or time-consuming.

COMMENT: As required by Rule XXIX (36.14.404), part 1(F), sending an engineer to a dam after each event listed will cost a lot of money, significantly more than we spend now for dam inspections.
RESPONSE: Inspections after critical events listed as modified in this rule are necessary to ensure a safe dam. The critical events now listed do not happen often. The department concedes, however, that a yearly inspection by an engineer may be expensive and excessive if the dam tender or owner performs an inspection following the planned inspection items. If conditions warrant inspections on such a frequent basis, the department may modify the operation permit pursuant to Rule XXXII(2) (36.14.407).

COMMENT: Rule XXIX (36.14.404), part 1(g), requires a study of each dam in the $50,000 range, plus the cost of instrumentation, which is likely to be in the $100,000 range.

dam tender, at least once per year as well as inspections after critical events identified in the plan, for example, during and after heavy runoff, a severe rainstorm, or a severe wind storm, or after an earthquake, and during periods of high storage. The plan must identify an inspection checklist and other directions to complete the required inspections. ~~These~~ Inspections following critical events must be performed by an engineer, who may also be the owner or the dam tender, experienced in dam inspection. The completed inspection checklist and any other report must be maintained in the owner's records;

(g) through (h) Same as proposed rules.

RULE XXXI (36.14.406) OPERATION PLAN - EMERGENCY PROCEDURES AND WARNING PLANS (1) through (3) Same as proposed rules.

(4) Same as proposed rules.

(a) Same as proposed rules.

~~(b)--a-description-of:~~

~~(i)--wind-direction-and-speed-and-duration-that-would-exceed the-allowable-freeboard-during-flood-and-full-pool,-non-flood conditions;~~

~~(ii)--the-basin-wide-precipitation-over-a-12-,-24-,-and-72-hour-period-that-would-exceed-the-emergency-spillway-capacity-and cause-failure;-and~~

~~(iii)--the-earthquake-magnitude-at-known-faults-that-would cause-the-dam-to-fail;~~

~~(c)~~ (b) an up-to-date notification directory with phone numbers of key county or municipal and emergency management officials, an engineer familiar with the dam's characteristics, downstream residents requiring immediate notification within the inundation area (listed in order by those affected first), and the department;

~~(d)~~ (c) Same as proposed rule.

~~(e)~~ (d) the general sites and availability of ~~suitable~~ materials for emergency repairs such as filling ~~of~~ erosion gullies and ~~controlling control of~~ seepage; and

~~(f)~~ (e) Same as proposed rule.

(5) Same as proposed rules.

RULE XXXII (36.14.407) OPERATING PERMIT - CONDITIONS AND TERMS (1) through (4) Same as proposed rules.

~~(5)--The-department-may-amend-the-terms-and-conditions-of-an existing-operating-permit-whenever-the-department,-as-a-result-of an-inspection-or-construction,-finds-that-the-dam-does-not conform-to-current-safety-standards;~~

RULE XXXV (36.14.503) INSTRUMENTATION (1) Same as proposed rules.

(2) Any dam that exceeds 50 feet in height must have a sufficient number of piezometers to adequately monitoring the piezometric surface within the dam to identify unusual changes in seepage characteristics of the dam.

RULE XL (36.14.701) EMERGENCY CONDITIONS (1) Same as proposed rules.

(a) and (b) Same as proposed rules.

(i) excessive and unusual seepage on the outer slope or downstream from the toe of the dam or near or around a conduit through the dam as indicated by unusual damp areas, boils, cones, and deltas;

(ii) through (v) Same as proposed rules.

RULE XLII (36.14.703) EMERGENCY ACTIONS - DEPARTMENT (1) The department shall immediately notify the ~~Montana disaster and emergency services in Helena~~county sheriff, and employ any or additional remedial measures, or enter into and immediately take such actions, necessary to protect human life or property if, in the department's opinion:

(a) and (b) Same as proposed rules.

(2) through (5) Same as proposed rules.

4. Public hearings were conducted in Missoula, Helena, and Billings on July 11, 12, and 13, 1988, respectively.

COMMENT: It is unconstitutional to require actions by city and counties as owners of dams within jurisdiction of the Dam Safety Act without specific authority of the legislature.
RESPONSE: The statute does give authority to regulate high-hazard dams owned by cities and counties.

COMMENT: It will be expensive to comply with the requirements as set out in the rules.
RESPONSE: Every effort has been made in drafting the rules to balance the cost as a result of the requirements with the risk of danger to those living below the high-hazard dams that are to be regulated.

COMMENT: The inflow design flood should be defined.
RESPONSE: The purpose of the definitions is to define the terms used in the rules that are to mean something other than the normal sense of the word. The term "inflow design flood" does not meet this criteria.

COMMENT: Acronyms and equations should be defined.
RESPONSE: Acronyms are defined in the text of the rules. Specific equations are not defined since the engineer's selection of an equation if used in design is an engineering judgment and should not be specified in a regulation.

COMMENT: The definition of height of dam should consider that the measurement to the downstream toe would yield a storage volume in excess of the actual volume of water stored in the reservoir in some cases.
RESPONSE: A provision for such cases is provided in Rule II(3)

RESPONSE: Disagree; the rule does not require any specific level of instrumentation. The amount and cost of the plan, as well as the instrumentation, depends on the dam's construction, the site conditions, degree of maintenance, etc.

COMMENT: Rule XXIX (36.14.404), part 1(h) requires an expensive plan of limited value. The interaction is important, but the plan would probably never be used.
RESPONSE: The plan is necessary to ensure a dam is operated safely and to determine the effect of operation on other dams.

COMMENT: Writing a plan as required in Rule XXX (36.14.405) for maintenance procedures is unnecessary and an unneeded expense. Some of the items seem to belong in the inspection section.
RESPONSE: Disagree; maintenance should be an ongoing process and should be determined, scheduled, and completed on a regular basis. The plan is to ensure that this is done.

COMMENT: Part 4(b) of Rule XXXI (36.14.406) requires a very detailed and expensive engineering analysis in the operating plan. Is it really necessary?
RESPONSE: Agree; the requirements may be expensive and of limited value. The data and engineering techniques may be refined in the future so that there are representative indicators of a possible evacuation.

COMMENT: The up-to-date notification directory is another expensive requirement in Rule XXXI (36.14.406), part 4(c).
RESPONSE: The list is necessary to have an effective evacuation.

COMMENT: Part 4(e) of Rule XXXI (36.14.406) requires expensive engineering studies that will provide useful information for very rare events.
RESPONSE: This rule does not require a detailed analysis; however, language has been added to the rule to clarify this.

COMMENT: Suggest adopting the FERC requirements for emergency procedures and warning plans that are current when the plan is written. This would be cheaper for the owner and provide more value for the amount of money spent in developing the plan.
RESPONSE: The FERC guidelines have been examined. The guidelines are written to apply to all hydropower dams in the U.S. Portions of the guidelines would apply while others would not. The core requirements of the guidelines and the Department requirements in these rules are similar. Adopting the FERC guidelines and specifying the appropriate requirements that do not apply would be cumbersome and confusing to dam owners. The procedure would be cumbersome to the department as well, especially as updates and revisions occur that may or may not be useful and beneficial to dam owner and the department.

COMMENT: Part 2 of Rule XXXII (36.14.407) needs revision. The department has a blank check to revoke any operating permit.
RESPONSE: The statute gives the department the authority to cancel or modify a permit. This rule simply identifies the administrative measures to carry out the authority to safeguard life.

COMMENT: There are too many classes of dams created in Rule XXXIV (36.14.502). Spillway classifications should be based on the potential number of lives that may be lost downstream.
RESPONSE: There are probably a lot of different ways to set requirements for spillway sizes. Other schemes examined during the development of this rule had their own advantages and disadvantages. The classes set by other states are almost all based on a capacity and/or dam height for high-hazard dams. The idea suggested merits a further analysis in the future. However, the rule will remain as proposed.

COMMENT: The purpose of monitoring the piezometric surface on the dam should be defined in Rule XXXV (36.14.503).
RESPONSE: Agree; the purpose of the measurement of the piezometric surface within the dam needs to be defined.

COMMENT: Rule XXXVI (36.14.504) does not provide for adequate removal.
RESPONSE: Disagree; the minimum as proposed does not present a danger that would cause a catastrophic failure of the remaining dam.

COMMENT: Rule XL (36.14.701), part 1(b)(i), implies that a damp area on the outer slope or downstream from the toe may be an indication of excessive and unusual seepage. I do not consider a damp area a major concern.
RESPONSE: Agree; the rule will be modified to consider the damp areas that are newly developed or unusual.

COMMENT: The sheriff in the county where the failure is taking place should be notified before the Montana Disaster and Emergency Services Office in Helena.
RESPONSE: Agree.

COMMENT: Who pays for the cost of inspection envisioned in Rule XLV (36.14.803)? Someone (the department) is to provide the owner and complainer with an estimate of the cost of inspection, but there is no provision to collect the cost.
RESPONSE: The statute clearly provides a provision for collection of the cost in Section 85-15-214 MCA (1988). No change is necessary in the proposed rule.

BY: Larry Fasbender
Larry Fasbender, Director
Dept. Natural Resources & Conservation

CERTIFIED TO THE SECRETARY OF STATE 11/10/88

STATE OF MONTANA
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
BEFORE THE BOARD OF WATER WELL CONTRACTORS

In the matter of the adoption of monitoring well construction standards, under subchapter 8.	NOTICE OF ADOPTION OF MONITORING WELL CONSTRUCTION STANDARDS, ARM 36.21.801 DEFINITIONS, 36.21.802 EXCLUSIONS, 36.21.803 MONITORING WELL CONVERSION, 36.21.804 MONITOR WELL CONSTRUCTION MATERIALS, 36.21.805 SEAL/ MATERIALS, 36.21.806 INSTALLATION OF SEALS, 36.21.807 PREVENTION OF CONTAMINATION BY EQUIPMENT, 36.21.808 SITE PROTECTION AND SECURITY, 36.21.809 MONITORING WELL REPORTS

TO: ALL INTERESTED PERSONS:

1. On August 25, 1988, the Board of Water Well Contractors published a notice of public hearing on the proposed adoption of the above-stated rules at pages 1868 through 1876, 1988 Montana Administrative Register, Issue number 16.

2. On September 30, 1988 at 9:00 a.m., the public hearing was held in the Director's Conference Room of the Department of Natural Resources and Conservation Building, 1520 East Sixth Avenue, Helena, Montana. Jim Madden, Board Attorney, presided over and conducted the hearing. Present were board members Wesley Lindsay, Ron Guse, Dan Fraser, and Wayne Van Voast; Diana Cutler, Program Specialist for the Board; Tonya Mazzucola, Recording Secretary; Dennis Johnson, San Geffen, and Ron Peterson, N.L. Baroid; David Potts, Potts Drilling and Development; Herb Jacobson, Jacobson Drilling; Sara Weinstock, EPA; and Bruce Thorson, Braun Engineering. Dennis Johnson with N. L. Baroid, Wesley Lindsay, board chairman, and Sara Weinstock had suggested changes or questions on the proposed rules.

Marvin Cross, with the Havre Department of Natural Resources and Conservation Water Rights Bureau Field Office submitted written comments. A telephone call from the Legislative Council office was received making note that a typographical error exists throughout the notice of proposed adoption. Under the authority extension citation, a reference is made to Chapter 278, which should cite Chapter 728, Laws of 1985.

3. Based on comments which will be addressed at the end of this notice, and the reasons stated in the notice of proposed adoption, the board has adopted the rules as proposed with the following exceptions: (new matter underlined, deleted matter interlined)

"<u>36.21.801 DEFINITIONS</u> The following definitions shall apply for monitoring well construction:

(1) ...
(5) 'Bentonite' means a highly plastic, highly absorbent colloidal clay composed largely of ~~the mineral~~ swelling sodium montmorillonite, meeting API bentonite specification (API specification 13^{A} - Section 4).
(6) ...
(31) 'Non-biodegradable fluidizing admixtures' means grout additives that provide temporary reduction of gel strength by dispersing the clay particles. Non-biodegradable limits the use to only those additives not subject to biological decomposition. ~~Natural and synthetically produced~~ Natural polymers are biodegradable and may not be used. Totally synthetic polymers must be used with care, and only after determining that they are chemically acceptable can they be introduced into fresh water systems.
(32) ..."

"36.21.806 INSTALLATION OF SEALS (1) ...
(4) A minimum of at least two feet of seal material shall be placed. Seal material shall extend down to within five feet of the zone being monitored. In sand and gravel formations, a minimum of 10 feet of surface seal shall be used, except when the zone of monitoring is higher.
(5) ..."

COMMENT: Dennis Johnson, N. L. Baroid, suggested the definition of bentonite (subsection (5), under 36.21.710) should read as follows: " 'Bentonite' means a highly plastic, highly absorbent colloidal clay composed largely of non-treated swelling sodium montmorillonite, meeting API bentonite specifications (API specification 13^{A} - Sec. 4). The change would assure that no foreign matter would be added to the bentonite. Current wording could allow the bentonite to be peptized with a bacteria forming polymer. He also addressed subsection (31) of the same rule by suggesting the "Natural and synthetically produced" be deleted from the beginning of the third sentence as it was addressed by the remainder of the sentence and the sentence immediately following. Therefore, it is redundant wording.

RESPONSE: The board agreed to amend a portion of subsection (5) of ARM 36.21.801, but did feel "non-treated" was too restrictive and might eliminate products of other mud companies. The amendment of subsection (31) was accepted.

COMMENT: Wesley Lindsay, Chairman of the Board of Water Well Contractors commented that he felt the two feet of seal material required by subsection (4) of proposed rule VI, now 36.21.806, was not sufficient.

RESPONSE: It was pointed out to Mr. Lindsay that the two feet was a minimum requirement for shallow wells. The second sentence of the subsection states the seal shall extend to within five feet of the zone being monitored. It was decided that the first sentence was unnecessary and therefore deleted.

COMMENT: Mr. Lindsay also objected to subsection (2) (b) of proposed rule VIII, now 36.21.808. He felt two feet of metal protective casing was not sufficient protection for a monitoring

well.

RESPONSE: It was pointed out to Mr. Lindsay that this was only one of several suggested methods of providing protection to the monitoring well. Mr. Lindsay withdrew his objections to this portion.

COMMENT: Sara Weinstock with the EPA had a question with regard to the exclusions, which was clarified by Jim Madden.

COMMENT: Marvin Cross, Havre DNRC Water Rights Bureau Field Office, sent in a written comment with regard to abandonment of monitoring wells, under proposed rule I, now 36.21.801. Mr. Cross felt that Abandoned well under subsection (1) should specifically state " 'monitoring' well whose use has been permanently discontinued..." He also suggested in the same definition on line five between the words "year" and "shall" that "or which have been declared abandoned in writing by the monitoring party" be inserted. Mr. Cross also suggested that since abandonment rules are not being fully addressed at this time, that the board delete the definition of abandoned well completely.

RESPONSE: The board felt that the definition clearly applies to abandoned monitoring wells and the additional word was unnecessary in the first sentence. The board felt the additional wording in line 5 was unnecessary as the definition clearly states what is to be considered an abandoned well. It is easier to include the definition now, than to go back and renumber all definitions when adding it later.

No other comments or testimony were received.

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION
BOARD OF WATER WELL CONTRACTORS

BY: Wesley Lindsay
WESLEY LINDSAY, CHAIRMAN

Certified to the Secretary of State, November 14, 1988.

**BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA**

IN THE MATTER OF THE ADOPTION of Rule I (42.25.103) and Rule II (42.25.104) relating to Metalifferous Mines License Tax.	CORRECTED NOTICE OF ADOPTION Rule I (42.25.103) and Rule II (42.25.104 relating to Metalifferous Mines License Tax.

TO: All Interested Persons:

1. On August 11, 1988, the Department published notice of the proposed adoption of Rules I (42.25.103) and II (42.25.104) relating to Metalifferous Mines License Tax at page 1786 of the 1988 Montana Administrative Register, issue no. 15.

2. On October 13, 1988, the Department noticed these rules for adoption on page 2224 of the 1988 Montana Administrative Register, issue no. 19. The numbers (42.25.102 and 42.25.103) assigned to these rules are incorrect and we are correcting the numbers through this notice.

3. Therefore, the Department has adopted rules I (42.25.103), Market Value; and II (42.25.104), Taxable Quantity as proposed.

JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 11/14/88.

**BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA**

IN THE MATTER OF THE AMENDMENT of ARM 42.25.1113 and 42.25.1117 and the ADOPTION of Rule I (42.25.1105) relating to Mine Net Proceeds	NOTICE OF THE AMENDMENT of ARM 42.25.1113 and 42.25.1117 and the ADOPTION of Rule I (42.25.1105) relating to Mines Net Proceeds

TO: All Interested Persons:

1. On September 8, 1988, the Department of Revenue published notice of the proposed amendment of ARM 42.25.1113 and 42.25.1117 and the adoption of Rule I (42.25.1105) relating to Mines Net Proceeds at page 1973 of the 1988 Montana Administrative Register, issue no. 17.

2. A public hearing was held on October 20, 1988 where written and oral comments were received.

3. As a result of the comments received the Department has amended ARM 42.25.1113 and 42.25.1117 and adopted rule I (42.25.1105) as proposed with the following clarification changes to rule I (42.25.1105).

RULE I (42.25.1105) COMPUTATION OF GROSS VALUE (1) through (2)(b) remain as originally proposed.

(c) If the information required by (a) and (b) is not available, the proportionate profits method may be used to compute a value in the absence of adequate market data. The general formula for this computation is stated below.

$$\text{Taxable value/unit} = \frac{\text{Direct costs through valuation point}}{\text{Total direct costs}} \times \text{Sales price/unit}$$

~~(d)~~(i) Direct costs through the valuation point will include overburden removal, drilling, blasting, loading, hauling, crushing, sorting, drying, mine reclamation, production taxes and royalties and any other direct costs incurred through the valuation point.

~~(e)~~(ii) Total direct costs will include, in addition to those noted above, all direct costs applied to the mineral products up to the point of production of the first marketable product or group of products which have not been manufactured or fabricated. These costs will typically include grinding, burning or calcining, blending with other materials and treatment effecting a chemical change.

~~(f)~~(iii) The sales price per unit will be the weighted average price of the first marketable product or group of substantially similar products sold in significant quantities by the producer. ~~The first marketable product or group of products will not include manufactured products. For example, a cement~~

~~producer must use the sales price of bulk cement not the price of concrete blocks he may manufacture from the cement.~~

~~(g)~~(iv) Only direct costs may be used in computing the cost ratio for the formula. No costs that benefit the operation as a whole or are not directly related to a specific phrase of the mining or processing of the mineral product will be included in the ratio.

~~(h)~~(d) The department may use an alternative valuation method if warranted by an unusual situation. AUTH, 15-23-108 MCA; IMP, 15-23-502 and 15-23-503 MCA.

4. Oral and written comments received during and subsequent to the hearing are summarized as follows along with the response of the Department:

RULE I

COMMENT: The requirement that at least 30% of total production must be sold in crude form in order to establish a value for crude mineral product using sales prices is being adopted "without any substantiation in fact".

RESPONSE: This restriction is included in the rule to provide both the taxpayer and the Department some assurance that minerals will not be valued on incidental sales that may not reflect market value. The rule also provides relief from the 30% provision in the instance a producer sells less than 30% of the crude mineral product but can establish through the use of corroborating market data that those sales were transacted at market value.

COMMENT: When using comparative sales data there should be no requirement that at least three producers sales data must be used to establish a value. There are few producers with similar mineral products and producers may be forced to consider production outside Montana to obtain all the necessary data.

RESPONSE: This requirement provides a certain degree of statistical reliability in the sales data accumulated through the use of averaging. It also provides, as above, some assurance for both taxpayers and the Department that the data used reflects market value. A taxpayer may have to obtain data from outside Montana to use this method, but that is certainly permissible according to this rule.

COMMENT: The proportionate profits computation as described by the Department in this rule ignores costs and incorrectly includes production taxes and royalties as direct costs.

RESPONSE: Indirect costs by definition are not physically traceable to or observable as being identified with a specific mining or processing step in the production of minerals. Direct costs, however, can be related to the various production

processes and therefore are a better measure of mineral value at an intermediate processing stage. The direct cost ratio used in this rule is the same as that used in the Kaiser stipulation dating back to the 1960's. The IRS, in its depletion regulations, recognizes that indirect costs can be allocated using the direct cost ratio. Doing this does not change the ratio, but merely increases both numerator and denominator proportionally. Consequently, there is no need to consider indirect costs.

Production taxes and royalty expenses are incurred as a result of mineral production. They do not relate to the processing or manufacturing of minerals. They are a direct cost of mining and have been treated as such in the computation formula proposed by this rule.

COMMENT: The phrase in the rule "the first marketable group of products will not include manufactured products" renders the proposed rule meaningless. The proportionate profits method can be used to work backwards from any point in the process and as to any product, whether manufactured or not.

RESPONSE: The problem here is one of semantics. What is meant by the term manufactured product? The rule provides an explanatory example distinguishing between a cement block (manufactured product) and bulk cement (non manufactured product). The comment calls to our attention that bulk cement could also be considered a manufactured product. The intent of this language in the rule was to emphasize that the starting point to work back from should be as near to the valuation point as possible. The phrase "first marketable product" probably covers that intent sufficiently. In response to this comment, we will delete the following language from paragraph (c)(iii) "The first marketable product or group of products will not include manufactured products. For example, a cement producer must use the sales price of bulk cement not the price of concrete blocks he may manufacture from the cement."

COMMENT: The proportionate profits method as described by the Department fails to take into account value added by research and development, product development, sales and market research, customer analysis and customer relations. The result is substantial distortion.

RESPONSE: The indirect costs mentioned in the comment are typical of the general costs of doing business and creating goodwill as opposed to those costs directly affecting product value. Also the very nature of these costs make it virtually impossible to categorize them as totally prevaluaton or post valuation costs. They are costs that benefit the total operation of the business.

COMMENT: For what tax years is this rule effective?

RESPONSE: This rule codifies the existing law, policy, practices and decisions of the courts and tax appeals board.

ARM 42.25.1113

COMMENT: Marketing and transportation costs should not be limited to those costs incurred that are directly applicable to the crude mineral products being taxed. To say the Pfizer vs. Madison County court decision supports this interpretation is incorrect.

RESPONSE: Section 15-23-503 Montana Code Annotated does allow deductions for marketing and transportation costs. The Pfizer decision does say that there is no question that where value is determined deductions end. A literal interpretation of that case on this issue would yield the conclusion that no marketing and no transportation costs to the point of sale are deductible because these costs, while relating to the crude product, are incurred beyond the valuation point. In order to reconcile both the Pfizer decision and the statutory deductions, we have concluded that these costs are deductible, but Pfizer limits those costs to those directly related to the crude product subject to tax. Allowing marketing costs for manufactured goods to be deducted against the value of a crude mineral product would be unreasonable and contrary to Pfizer and the Cyprus Mines court case.

COMMENT: Transportation costs should be allowed for the cost of shipping mineral products to the purchaser.

RESPONSE: The deduction for transportation costs to the point of sale includes only those costs incurred to transport the mineral product to the point of sale F.O.B. the mine. Deductions are obviously not allowed for shipping and freight to the final customer. These costs are often four times the value of the mineral being shipped. Construing the statute to allow these costs results in no net proceeds in almost all instances. Statute interpretations must result in reasonable conclusions. The Legislature intended the counties to be able to tax the value of minerals extracted.

COMMENT: The term "marketing" is broader than the term "sale" or "selling". The Department of Revenue cannot arbitrarily decide what constitutes marketing and what does not.

RESPONSE: Taxpayers have expanded the meaning of the term marketing to include all types of administrative costs such as accounting, scientific testing, research and development, etc. This has prompted the Department to add language emphasizing the direct marketing costs that will be deductible. The Cyprus Mines vs. Madison County court decision supports the interpretation limiting these costs.

COMMENT: For what tax years is this rule effective?

RESPONSE: This rule codifies the existing law, policy, practices and decisions of the courts and tax appeals board.

ARM 42.25.1117

COMMENT: The rule as amended disallows amounts paid to independent contractors.

RESPONSE: The rule does not specifically address independent contractors. However, to the extent they are engaged in a deductible function, their labor costs are also deductible.

COMMENT: Labor costs incurred for personnel engaged in the functions of accounting, bookkeeping, legal, management above the superintendent level and other such functions should be deductible if they relate to the mining process.

RESPONSE: Section 15-23-503(4) Montana Code Annotated limits these costs and several court decisions have upheld the interpretation expressed in this rule. The Somont Oil and Ed Vanderpas court decisions upheld the disallowance of administrative and clerical costs as did the WR Grace district court decision (now on appeal to Montana Supreme Court).

COMMENT: For what tax years is this rule effective?

RESPONSE: This rule codifies the existing law, policy, practices and decisions of the courts and tax appeals board.

JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 11/14/88.

VOLUME NO. 42 OPINION NO. 120

CITIES AND TOWNS - Authority of cities to issue municipal revenue bonds to be retired by gasoline tax revenues;
CITIES AND TOWNS - Whether debt incurred by city which is to be paid exclusively from gasoline tax revenue is considered part of city's general debt and subject to the limitation of section 7-7-4201, MCA;
MUNICIPAL CORPORATIONS - Authority of cities to issue municipal revenue bonds to be retired by gasoline tax revenues;
REVENUE BONDS - Authority of cities to issue municipal revenue bonds to be retired by gasoline tax revenues;
TAXATION AND REVENUE - Authority of cities to issue municipal revenue bonds to be retired by gasoline tax revenues;
TAXATION AND REVENUE - Whether debt incurred by city which is to be paid exclusively from gasoline tax revenues is considered part of city's general debt and is subject to the limitation of section 7-7-4201, MCA;
MONTANA CODE ANNOTATED - Sections 7-1-114(1)(g), 7-6-4466, 7-7-2203(2), 7-7-4101, 7-7-4101(5), 7-7-4201 to 7-7-4275, 7-7-4401 to 7-7-4435, 7-12-4102(2)(c), 15-70-101, 15-70-101(2);
MONTANA CONSTITUTION - Article XI, section 6;
OPINIONS OF THE ATTORNEY GENERAL - 38 Op. Att'y Gen. No. 14 (1979).

HELD: 1. A city may not issue municipal revenue bonds which are to be retired by gasoline tax revenues received annually from the state pursuant to sections 7-7-4401 to 4435, MCA.

2. If a city contracts for street construction work to be paid exclusively from gasoline tax revenues to be received from the state, such indebtedness is considered part of the city's general debt limitation under section 7-7-4201, MCA, unless the conditions of some specific exception are otherwise met.

3 November 1988

William A. Schreiber
Belgrade City Attorney
P.O. Box 268
Belgrade MT 59714

Dear Mr. Schreiber:

You have requested my opinion concerning these two questions:

1. May a city issue municipal revenue bonds which are to be retired by gasoline tax revenues received annually from the state?

2. If a city contracts for street construction work to be paid exclusively from gasoline tax revenues to be received from the state, is such indebtedness considered part of the city's general debt limitation under section 7-7-4201, MCA?

The City of Belgrade has self-government powers, pursuant to article XI, section 6 of the Montana Constitution and the city's recently-adopted charter. However, section 7-1-114(1)(g), MCA, subjects local governments with self-government powers to state statutes "regulating the budget, finance, or borrowing procedures and powers of local governments." Thus, with respect to the issuance of revenue bonds, local governments with self-government powers have no more powers than local governments with general government powers. 38 Op. Att'y Gen. No. 14 (1979) at 50. Therefore, the City of Belgrade is governed by the Municipal Revenue Bond Act, Tit. 7, ch. 7, pt. 44, MCA.

Municipalities in Montana may sell two types of bonds to finance authorized general projects: general obligation bonds and revenue bonds. §§ 7-7-4101, 7-7-4201 to 4275, 7-7-4401 to 4435, MCA. Cities and towns may finance the construction or improvement of streets through the sale of general obligation bonds. § 7-7-4101(5), MCA. On the other hand, municipal revenue bonds may only finance the construction or maintenance of certain revenue-producing "undertakings" (§§ 7-7-4402(3), 7-7-4404, MCA), and neither street construction nor maintenance is among the authorized undertakings. There is an exception for "other revenue-producing facilities," but the connection between street paving and gasoline tax revenues is not direct enough to render this exception applicable. Cf. Taylor v. Land Clearance for Redevelopment Authority of Kansas City, 586 S.W.2d 331 (Mo. 1979); Kennecot Copper Corp. v. Town of Hurley, 84 N.M. 743, 507 P.2d 1074 (1973); Fickes v. Missoula County, 155 Mont. 258, 470 P.2d 287 (1970). I therefore conclude that cities and towns are prohibited from issuing revenue bonds to finance street construction projects.

VOLUME NO. 42 OPINION NO. 121

DEEDS - Use by grantor of quitclaim deed to transfer property not owned by grantor;
PROPERTY, REAL - Use by grantor of quitclaim deed to transfer property not owned by grantor;
PROPERTY, REAL - Conditions requiring survey of property under section 76-3-401, MCA;
SURVEYORS - Conditions requiring survey of property under section 76-3-401, MCA;
MONTANA CODE ANNOTATED - Sections 76-3-103(3), 76-3-401.

HELD: Section 76-3-401, MCA, requires a survey only when the transfer of title involves division of a tract of property. Further, a grantor is not barred from using a quitclaim deed to transfer property whose title he does not own, but such action is inadvisable and subject to potential liability.

4 November 1988

David G. Rice
Hill County Attorney
Hill County Courthouse
Havre MT 59501

Dear Mr. Rice:

Thank you for your letter requesting my opinion on two issues which I have rephrased as follows:

1. Is a survey required under section 76-3-401, MCA, for a transfer of a parcel of land which includes, within its boundaries, two smaller parcels of property not owned by the grantor, but which have been surveyed and recorded as a result of earlier transfers?

2. Can a grantor transfer by quitclaim deed a parcel of land which includes, within its boundaries, two smaller parcels of property which the grantor does not own?

It is my understanding that you are presented with a situation where the grantor owns a quarter-section block of property (160 acres) which has within its boundaries two smaller parcels (10 and 15 acres in size) that the grantor does not own. You explain that the grantor intends to transfer, by quitclaim deed, the entire

160-acre tract, making no attempt to specifically exclude the two smaller tracts because he believes that a survey would be required if he were to do so.

A survey is not required under the described circumstances. Roughly paraphrased, section 76-3-401, MCA, requires that all "divisions of land for sale" into parcels smaller than 20 acres be surveyed. While the two parcels at issue here are smaller than 20 acres, the transaction, as it affects them, is not a "division of land." A "division of land" is defined in section 76-3-103(3), MCA, as

> the segregation of one or more parcels of land from a larger tract held in single or undivided ownership by transferring or contracting to transfer title to or possession of a portion of the tract or properly filing a certificate of survey or subdivision plat establishing the identity of the segregated parcels pursuant to this chapter.

The two smaller parcels of property not owned by the grantor which are within the grantor's property lines were segregated from the larger tract before the transaction at issue here, as evidenced by the certificate of survey filed for the one parcel and the recording date for the second. Hence, the two smaller tracts were already created and, as such, are not a "division of land" requiring a survey under section 76-3-401, MCA. In other words, a survey is only required when a single tract of land is divided, creating several tracts. No division occurs as a result of the transaction contemplated in your request, therefore no survey is required.

Your second question is whether the grantor may transfer by quitclaim deed the entire parcel of property, even though it includes two smaller parcels within its boundaries which the grantor does not own. A quitclaim deed passes to the buyer all those rights or as much of a title as the seller actually has. A quitclaim deed does not warrant that the seller actually has full title of the land to pass on. See 23 Am. Jur. 2d § 338. In sum, the distinguishing characteristic of a quitclaim deed is that it conveys the interest or title of the grantor in and to the property described, rather than the property itself. See 23 Am. Jur. 2d § 259.

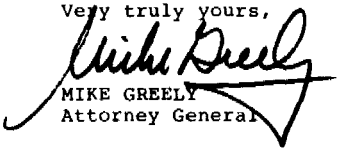
While the grantor in this case is not precluded from using a quitclaim deed to transfer his block of property, expansively including the two tracts he does not own in his description of the property, such action

would be inadvisable and subject to potential liability. Obviously, rather than create unnecessary difficulties for the buyers of his tract and the owners of the two smaller parcels, the grantor should merely describe the property in a manner which excludes the two smaller parcels from his deed.

THEREFORE, IT IS MY OPINION:

> Section 76-3-401, MCA, requires a survey only when the transfer of title involves division of a tract of property. Further, a grantor is not barred from using a quitclaim deed to transfer property whose title he does not own, but such action is inadvisable and subject to potential liability.

Very truly yours,



MIKE GREELY
Attorney General

VOLUME NO. 42 OPINION NO. 122

LIENS - Duration of tax lien;
PROPERTY, PERSONAL - Duration of tax lien against;
PROPERTY, REAL - Duration of tax lien against;
TAXATION AND REVENUE - Duration of tax lien;
MONTANA CODE ANNOTATED - Sections 15-16-401, 15-16-402(1), 15-16-403;
OPINIONS OF THE ATTORNEY GENERAL - 36 Op. Att'y Gen. No. 69 (1976).

HELD: Under section 15-16-401, MCA, a tax lien created under Title 15, MCA, is valid and enforceable until the taxes are paid or the property sold for the payment of the delinquent tax, regardless of whether that lien is upon real property or personal property.

9 November 1988

J. Allen Bradshaw
Granite County Attorney
P.O. Box 490
Philipsburg MT 59858

Dear Mr. Bradshaw:

You have requested my opinion concerning the following questions:

1. Since a tax lien is given the effect of a judgment lien under section 15-16-401, MCA, is that lien valid for only six years, the same as a judgment lien under section 25-9-301, MCA?

2. Is your conclusion affected by whether the lien in question is a personal property tax lien or a lien against real property?

Section 15-16-401, MCA, provides in pertinent part:

> Every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied against all personal property in the possession of the person assessed .... The judgment is not satisfied nor the lien

> removed until the taxes are paid or the property sold for the payment thereof.

The threshold rule of statutory construction is that where statutory language is clear and unambiguous, the statute speaks for itself and there is no need to engage in further construction. Matter of Blake v. State, 44 St. Rptr. 580, 584, 735 P.2d 262, 265 (1987); Yearout v. Rainbow Painting, ___ Mont. ___, 719 P.2d 1258, 1259 (1987).

The plain and unambiguous language of section 15-16-401, MCA, indicates that a lien created by Title 15, MCA, endures either until "the taxes are paid or the property is sold at a tax sale." 36 Op. Att'y Gen. No. 69 at 457 (1976). This interpretation comports with the general rule that:

> [T]he continued existence and duration of the lien are fixed by statute, which, of course, governs and controls. Under some statutes, the lien for taxes is made perpetual ... until the taxes are paid or the property of the delinquent taxpayer is sold for the payment ....

84 C.J.S. Taxation § 595 (1954), citing State ex rel. Tillman v. District Court, 101 Mont. 176, 53 P.2d 107 (1936), and Swingley v. Riechoff, 112 Mont. 59, 112 P.2d 1075 (1941).

In Tillman, the Montana Supreme Court construed the language of the predecessor to section 15-16-401, MCA, as follows:

> It is therefore clear that [Fergus County's] lien, akin to a judgment, will hold until the taxes are paid or a deed to the property is secured ....

Tillman, 101 Mont. at 183, 53 P.2d at 110.

The Court amplified this holding in Swingley, stating that:

> The government's lien for taxes is based upon express statutory provision, and is a perpetual lien against which no statute of limitations can successfully be interposed. (Secs. 2152 and 2154, Rev. Codes.) Section 2152 provides: "Every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect

> of an execution duly levied against all personal property of the delinquent. The judgment is not satisfied nor the lien removed until the taxes are paid or the property sold for the payment thereof." A perpetual lien, of course, presupposes a continuance of the obligation of a property owner to pay the tax or otherwise satisfy the lien without reference to the lapse of time.

Swingley, 112 Mont. at 68, 112 P.2d at 1079.

It is therefore my conclusion that under section 15-16-401, MCA, a tax lien created pursuant to Title 15, MCA, is valid and enforceable until the delinquent taxes are paid or until the property is sold for the payment of the delinquent taxes, regardless of lapse of time.

With regard to your second question, tax liens can be created against both personal property, by operation of section 15-16-402(1), MCA, and real property, by operation of section 15-16-403, MCA. Section 15-16-402(1), MCA, also provides that tax liens upon personal property may have effect as liens on the real property "of the owner thereof." Because tax liens against both real and personal property are created under Title 15, MCA, section 15-16-401, MCA, applies equally to both kinds of liens, since that statute provides that "every lien created by this title has the force and effect of an execution duly levied against all personal property in the possession of the person assessed." (Emphasis added.) See State ex rel. Tillman v. District Court, 101 Mont. at 182, 53 P.2d at 110.

THEREFORE, IT IS MY OPINION:

> **Under section 15-16-401, MCA, a tax lien created under Title 15, MCA, is valid and enforceable until the taxes are paid or the property sold for the payment of the delinquent tax, regardless of whether that lien is upon real property or personal property.**

Very truly yours,

MIKE GREELY
Attorney General

Looking to the statute mandating the distribution of gasoline tax revenues (§ 15-70-101, MCA), it is clear that these funds may be used by municipalities only for the construction and/or maintenance of streets. § 15-70-101(2), MCA. Although these funds are earmarked for construction and maintenance of city streets, a street project would still not qualify under the Municipal Revenue Bond Act because the streets are not "revenue-producing facilities" within the contemplation of the Act.

Your second question concerns the possibility of a city avoiding the general debt limitation contained in section 7-7-4201, MCA, by dedicating gasoline tax revenues to pay for contracted construction work. Section 7-7-4201, MCA, limits the indebtedness that cities and towns may incur to 28 percent of the taxable value of property subject to taxation. That statute allows for exceptions "as otherwise provided," and such exceptions are found in such statutes as section 7-7-4202, MCA, providing for construction of water and sewer systems, or section 7-7-4403, MCA, providing for construction of revenue-producing facilities financed by the sale of revenue bonds. In addition, special improvement district bonds are not subject to this limitation as Montana courts have long held that special improvement district bonds are not obligations of the city or town. See Stanley v. Jeffries, 86 Mont. 114, 133, 284 P. 134, 139, 70 A.L.R. 166 (1929); Lumberman's Trust Co. v. Town of Ryegate, 61 F.2d 14, 19 (9th Cir. 1932). However, my review of the statutes does not reveal any exception to the general debt limitation for municipal street construction projects, unless such construction is undertaken by a special improvement district. See § 7-12-4102(2)(c), MCA.

You suggest that the date of passage of the general debt limitation (in 1939) may be significant in light of the fact that the gasoline tax distribution legislation was not passed until 1955. However, amendments by implication are not favored in Montana, State of Montana ex rel. Malott v. Board of County Commissioners, 89 Mont. 37, 76, 296 P. 1 (1930), and for at least three reasons amendment by implication is untenable in this case. First, there is no indication that the Legislature intended to modify the general municipal debt limit when it passed the gasoline tax distribution bill. Second, any amendment of the general municipal debt limitation would be a complex procedure which could not be accomplished by implication. Cf. §§ 7-7-4402, 7-7-2203(2), MCA. Finally, the Legislature has demonstrated its belief that the general municipal debt limitation must be explicitly amended, by its treatment

of the resort community tax. See § 7-6-4466, MCA, where such an explicit amendment was made.

I conclude that in order to come within an exception to the general municipal debt limitation of section 7-7-4201, MCA, the conditions of some specific exception (SIDs, sewer and water systems, revenue-producing facilities) must be met. Since the city's proposed dedication of gasoline tax revenues for the street construction project does not fall within any such exception, the debt incurred by the city is subject to the debt limitation in section 7-7-4201, MCA.

THEREFORE, IT IS MY OPINION:

1. A city may not issue municipal revenue bonds which are to be retired by gasoline tax revenues received annually from the state pursuant to sections 7-7-4401 to 4435, MCA.

2. If a city contracts for street construction work to be paid exclusively from gasoline tax revenues to be received from the state, such indebtedness is considered part of the city's general debt limitation under section 7-7-4201, MCA, unless the conditions of some specific exception are otherwise met.

Very truly yours,

MIKE GREELY
Attorney General

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 bill repealing a rule, or directing an agency to adopt or amend a rule, or a Joint Resolution recommending that an agency adopt or amend 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 the existing or proposed rules. The address is Room 138, Montana 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 looseleaf compilation by department of all rules of state departments and attached boards presently in effect, except rules adopted up to three months previously.

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

Use of the Administrative Rules of Montana (ARM):

Known Subject Matter

1. Consult ARM topical index. Update the rule by checking the accumulative table and the table of contents in the last Montana Administrative Register issued.

Statute Number and Department

2. Go to cross reference table at end of each title which list MCA section numbers and corresponding ARM rule numbers.

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies which have been designated by the Montana Procedure Act for inclusion in the ARM. The ARM is updated through June 30, 1988. This table includes those rules adopted during the period June 30, 1988 through September 30, 1988 and any proposed rule action that is pending during the past 6 month period. (A notice of adoption must be published within 6 months of the published notice of the proposed rule.) This table does not, however, include the contents of this issue of the Montana Administrative Register (MAR).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through June 30, 1988, this table and the table of contents of this issue of the MAR.

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