OF MONTANA

MONTANA ADMINISTRATIVE REGISTER

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MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 1

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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing and where written comments may be submitted.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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SPECIAL NOTICE AND TABLE SECTION

STATE OF MONTANA
DEPARTMENT OF COMMERCE
POLYGRAPH EXAMINERS

In the matter of the proposed amendment of a rule pertaining to license renewal - date - continuing education.	NOTICE OF PROPOSED AMENDMENT OF 8.47.404 LICENSE RENEWAL - DATE - CONTINUING EDUCATION

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On February 11, 1989, the Department of Commerce proposes to amend the above-stated rule.

2. The proposed amendment of 8.47.404 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at page 8-1276, Administrative Rules of Montana)

"8.47.404 LICENSE RENEWAL - DATE - CONTINUING EDUCATION

(1) and (2) will remain the same.

(3) Each licensee shall present evidence~~,~~ of attending ~~20~~ 12 hours of education in an approved polygraph course within 2 years of renewal. Failure for a licensee to comply with this rule will constitute reason for denial of license renewal.

(4) The ~~20~~ 12 hours of continuing education requirement must be met with the following exception:

(a) Sickness, family emergency, or such other circumstances that the department may determine consistent with this act.

(5) will remain the same."

Auth: 37-62-104, MCA Imp: 37-62-207, MCA

REASON: The proposed amendment is at the request of the Montana Association of Polygraph Examiners for economic reasons. The majority of Montana licensees are employed in the field of law enforcement. Law enforcement budgets have been drastically reduced, thus curtailing the available time off for licensees and funding for attendance at CE courses. Also, the Montana Law Enforcement Academy is trying to structure some polygraph courses, but they will not meet the 20 hours currently required.

3. Interested persons may submit their data, views or arguments concerning the proposed amendment in writing to Mary Lou Garrett, Polygraph Examiners, Department of Commerce, 1424 - 9th Avenue, Helena, Montana 59620-0407, no later than February 9, 1989.

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 Mary Lou Garrett, Polygraph Examiners,

Department of Commerce, 1424 - 9th Avenue, Helena, Montana 59620-0407, no later than February 9, 1989.

5. If the Department 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 2 based on the 28 licensees in Montana.

POLYGRAPH EXAMINERS
DEPARTMENT OF COMMERCE

BY: Geoffrey L. Brazier
GEOFFREY L. BRAZIER, ATTORNEY
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, December 30, 1988.

BEFORE THE SECRETARY OF STATE
OF THE STATE OF MONTANA

In the matter of the amendment of fee rules.	)	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT OF RULE 44.6.104 - Fees for Filing Federal Tax Liens; RULE 44.6.105 - Fees for Filing Documents; and RULE 44.6.107 - Fees for Filing Notice of Agricultural Lien.

TO: All Interested Persons:

1. On February 2, 1989 at 10:00 a.m. a public hearing will be held in the Conference Room in Room 225 of the Secretary of State's office, State Capitol Building, Helena, MT 59620, to consider the amendment of rules pertaining to fees.

2. The proposed rules do not replace or modify any rules currently found in the Administrative Rules of Montana.

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

44.6.104 FEES FOR FILING FEDERAL TAX LIEN (1) Effective ~~May 1, 1988~~, March 1, 1989 the secretary of state and the county clerk and recorder shall charge and collect for:

(a) filing a notice of federal tax lien, ~~$7.00~~; 10.00

(b) filing any amendment, ~~$7.00~~; 10.00

(c) filing a certificate of release/termination statement, no fee; and

(d) issuing a certificate of federal tax lien from the filing officer, ~~$7.00~~. 10.00

Auth: Sec. 71-3-206, MCA; IMP, Sec. 30-9-403, MCA

44.6.105 FEES FOR FILING DOCUMENTS -- UNIFORM COMMERCIAL CODE (1) The secretary of state and the county clerk and recorder shall charge and collect for:

(a) filing a financing statement, ~~$7.00~~; 10.00

(b) filing a termination statement, no fee;

(c) filing a continuation statement, ~~$5.00~~; 8.00

(d) filing a financing statement indicating an assignment, ~~$5.00~~; 8.00

(e) filing a statement of partial release of collateral, ~~$5.00~~; 8.00

(f) filing a statement adding to or changing collateral, ~~$5.00~~; 8.00

(g) filing any amendment changing debtor name, secured party name, and/or addresses, ~~$5.00~~; 8.00

(h) filing any other amendment, ~~$5.00~~; 8.00

(i) issuing a certificate from the filing officer, ~~$7.00~~; 10.00

(j) certificate of information obtained by public access, ~~$2.00~~; 4.00

(k) computer printout of collateral description, no fee;

(l) any of the filing and indexing in subsections (a), (b), or (e) where the collateral is equipment or rolling stock of railroads or street railways, $15.00.

Auth: Sec. 30-9-403, MCA; IMP, Sec. 30-9-403, MCA

44.6.107 FEES FOR FILING NOTICE OF AGRICULTURAL LIEN

(1) Effective ~~December 1, 1987~~, March 1, 1989 the secretary of state shall charge and collect for:

(a) filing a notice of agricultural lien, ~~$7.00~~; 10.00 and

(b) filing a termination statement, no fee.

Auth: Sec. 30-9-403, MCA; IMP, Sec. 71-3-125, MCA

4. The rules are being amended to make fees commensurate with program costs.

5. Interested persons may present their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to Secretary of State, Room 225, State Capitol, Helena, Montana, 59620, no later than February 10, 1989.

6. A representative of the Secretary of State will preside over and conduct the hearing.

Dated this 30th day of December, 1988.

Verner L. Bertelson

VERNER L. BERTELSON
Secretary of State

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

In the matter of the adoption of Rules I through X pertaining to the AFDC work supplementation program	)))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED ADOPTION OF RULES I through X PERTAINING TO THE AFDC WORK SUPPLEMENTATION PROGRAM

TO: All Interested Persons

1. On February 2, 1989, at 1:30 p.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 adoption of Rules I through X pertaining to the AFDC work supplementation program.

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

RULE I AFDC WORK SUPPLEMENTATION PROGRAM, GENERAL (1) The department may operate an employment training and experience program in which long-term AFDC recipients may volunteer to participate. The program will provide, as set forth in this sub-chapter, a subsidized employment opportunity for participants in those counties designated by the department.

AUTH: Sec. 53-4-212 MCA; AUTH Extension, Sec. 113, Ch. 609, L. 1987, Eff. 10/1/87.
IMP: Sec. 53-2-201, 53-4-211 and 53-4-215.

RULE II AFDC WORK SUPPLEMENTATION PROGRAM, DEFINITIONS Unless the context requires otherwise, the following definitions shall apply in this sub-chapter:

(1) "Base grant" means the amount of AFDC assistance which the participant's assistance unit would receive in the month of the participant's placement in a work supplementation program (WSP) job if no member of the assistance unit were placed in a WSP job and if no income were received by the assistance unit.

(2) "Completion" means completion by the participant of the maximum period of employment under the program.

(3) "Department" means the department of social and rehabilitation services.

(4) "Diverted grant" means the amount of the AFDC grant that remains after subtracting the amount of the residual grant, if any, from the amount of the base grant.

(5) "Employability assessment and training" means a battery of evaluations, tests and/or interviews directed at ascertaining the interests, attitudes, aptitudes, skills and knowledge of participants related to obtaining and holding a job, and training determined by the department or its agent to

be necessary and appropriate to prepare the participant for subsidized employment.

(6) "Grant diversion" means a procedure whereby all or part of an AFDC recipient's grant is diverted into a central pool from which funds can be drawn to reimburse employers for a portion of the wage paid to a participant to provide an incentive to the employer.

(7) "Gross monthly income (GMI) standard" means the levels of gross income for each size assistance unit as specified in ARM 46.10.403, which cannot be exceeded if the unit is to remain eligible for a residual grant.

(8) "Long-term AFDC recipient" means an individual who at the time of application for WSP is receiving AFDC and has been receiving AFDC benefits for at least six (6) out of the previous twelve (12) months.

(9) "Net earned income" means the portion of the assistance unit's earnings remaining after allowable deductions and disregards.

(10) "Net monthly income (NMI) standard" means levels of net monthly income for each size assistance unit as specified in ARM 46.10.403 which cannot be exceeded if the unit is to remain eligible for a residual grant.

(11) "Residual grant" means the portion of a recipient's base grant amount that is provided directly to the recipient when participating in WSP, as specified in Rule VI(3).

(12) "Subsidized employment" means an employment position for which a monetary incentive is paid to the employer over a specified period of time as reimbursement for anticipated training costs.

(13) "Termination" refers to the termination of employment under WSP for any reason, whether voluntary or involuntary, prior to completion of the program.

(14) "Volunteer" means an AFDC recipient who makes the decision to participate in WSP.

(15) "Work supplementation program" (WSP) means a grant diversion project in which all or part of a recipient's grant amount is paid to an employer as a subsidy to cover training costs and to induce the employer to employ the recipient and thereby prepare the recipient for the unsubsidized job market.

(16) "WSP job" means a job subsidized by the WSP program that is full-time for at least 32 hours per week or in which the participant earns a gross monthly wage equivalent to the federal minimum wage multiplied by 138 hours, and where the work is not related to any labor dispute and is not a job from which a regular employee has been displaced.

(17) "WSP participant" means an AFDC recipient employed in a WSP job.

(18) "WSP placement" means placement in a WSP job.

(19) "WSP service" means counseling, training, educational, assessment or other supportive services available to a

volunteer as provided in these rules and in the discretion of the department or its agent.

AUTH: Sec. 53-4-212 MCA; AUTH Extension, Sec. 113, Ch. 609, L. 1987, Eff. 10/1/87.
IMP: Sec. 53-2-201, 53-4-211 and 53-4-215.

RULE III AFDC WORK SUPPLEMENTATION PROGRAM, PARTICIPANT ELIGIBILITY (1) To be eligible to participate in the WSP program, the volunteer must:

(a) be receiving an AFDC grant of at least $150 per month during the month immediately prior to placement in a WSP job;

(b) at the time of application, have received AFDC in six (6) of the previous twelve (12) months;

(c) at the time of application, have completed at least a 4-week structured job search program or a program determined by the department or its agent to be equivalent;

(d) agree to the terms and conditions of the WSP program; and

(e) during the volunteer's period of participation in the WSP program, not be a member of a household with another member participating in the WSP program.

(2) Participants with gross wages, excluding WSP wages, projected to exceed 185% of the NMI standard specified in ARM 46.10.403 shall not be eligible for continued participation in WSP.

AUTH: Sec. 53-4-212 MCA; AUTH Extension, Sec. 113, Ch. 609, L. 1987, Eff. 10/1/87.
IMP: Sec. 53-2-201, 53-4-211 and 53-4-215.

RULE IV AFDC WORK SUPPLEMENTATION PROGRAM, APPLICATION AND PLACEMENT, EMPLOYER REQUIREMENTS (1) A volunteer must submit a WSP application on the form and in the manner prescribed by the department or its agent.

(2) Following application and a preliminary determination of eligibility, the participant shall cooperate and participate in:

(a) an employability assessment prescribed and administered by the department or its designated agent; and

(b) any training determined by the department or its agent to be appropriate and necessary to prepare the participant for subsidized employment.

(3) Following application and preliminary determination of eligibility, or, in the discretion of the department or its agent, following completion of an employability assessment and any appropriate and necessary training, the department or its agent shall commence a job search to locate an employer who agrees to provide a WSP job to the participant under written contract with the department.

(a) The participant may locate an employer, but the department or its agent shall have no obligation to place the participant with an employer unless the employer enters into a written contract with the department and all other WSP requirements are met.

(b) The department and its agent shall have no obligation to provide a WSP placement to a participant unless an employer agrees to provide a WSP job to the participant in compliance with all applicable rules, regulations, laws and contract requirements.

(4) The department may contract with another department, agency or organization to conduct employability assessments, provide employment training, conduct job searches or provide WSP services for participants. Such contractor may be referred to as the "job developer".

(5) The department shall pay a monetary incentive to an employer who enters into a written contract with the department and complies with the terms of the contract and all applicable rules, regulations and laws. The amount of the incentive shall be specified in the contract and shall be paid each month for a maximum of six (6) months during the participant's WSP placement, except as otherwise specified in Rule V.

AUTH: Sec. 53-4-212 MCA; AUTH Extension, Sec. 113, Ch. 609, L. 1987, Eff. 10/1/87.
IMP: Sec. 53-2-201, 53-4-211 and 53-4-215.

RULE V AFDC WORK SUPPLEMENTATION PROGRAM, TERMINATION AND REASSIGNMENT (1) If the participant's WSP job is terminated voluntarily or involuntary, the recipient may be placed in another WSP job only if the county director and job developer concur that:

(a) termination was beyond the recipient's control or for good cause, and

(b) the reassignment is likely to lead to future unsubsidized employment.

(2) A participant who either terminates WSP employment without good cause, as defined in ARM 46.10.311, or reduces earned income within 30 days preceding the benefit month, shall be subject to the following penalties and sanctions:

(a) the earned income disregards provided in ARM 46.10.512 shall not be allowed; and

(b) if the participant is a nonexempt WIN participant, the participant may be deregistered from the WIN program as specified in ARM 46.10.310.

AUTH: Sec. 53-4-212 MCA; AUTH Extension, Sec. 113, Ch. 609, L. 1987, Eff. 10/1/87.
IMP: Sec. 53-2-201, 53-4-211 and 53-4-215.

RULE VI AFDC WORK SUPPLEMENTATION PROGRAM, AFDC ELIGIBILITY; RESIDUAL GRANT (1) The need for and amount of AFDC assistance for WSP participants shall be determined according to the provisions of ARM 46.10.101 through 608, except as specifically stated otherwise in this sub-chapter. WSP participants must continue to meet non-financial eligibility criteria as specified in ARM Title 46, Chapter 10 to continue participation in WSP.

(2) AFDC eligibility for WSP participants shall be determined by prospective budgeting, as described in ARM 46.10.505, excluding WSP wages. The amount of the participant's residual grant shall be determined by retrospective budgeting, as described in ARM 46.10.505, including WSP wages as earned income.

(3) Subject to the limitations stated in this sub-chapter, a participant shall be eligible for a residual grant in a particular month in an amount calculated as follows:

(a) The residual grant shall be the amount of the benefit standard for an assistance unit of that size, as provided in ARM 46.10.403, less that household's net earned income for the month, as determined by retrospective budgeting including WSP wages as earned income and subject to the provisions of Rule VIII(4).

(b) The participant and his household shall be ineligible for a residual grant if household income, determined prospectively and retrospectively excluding WSP wages, exceeds either:

(i) the applicable gross monthly income standard specified in ARM 46.10.403; or

(ii) the applicable net monthly income standard specified in ARM 46.10.403.

(c) Participants with gross wages, including WSP wages, retrospectively determined to exceed 185% of the NMI standard specified in ARM 46.10.403 shall not be eligible for a residual grant.

(d) A household shall not be eligible for a residual grant if the participant is the principal wage earner in an AFDC unemployed parent household.

(4) Participants and their households shall not be entitled to the day care disregard provided in ARM 46.10.512.

AUTH: Sec. 53-4-212 MCA; AUTH Extension, Sec. 113, Ch. 609, L. 1987, Eff. 10/1/87.
IMP: Sec. 53-2-201, 53-4-211 and 53-4-215.

RULE VII AFDC WORK SUPPLEMENTATION PROGRAM, MEDICAL ASSISTANCE BENEFITS (1) An AFDC assistance unit of a participant which continues to meet non-financial eligibility criteria, shall be deemed to be receiving AFDC and assistance unit members shall remain eligible for medical assistance and

child care during the period of any WSP placement and any reassignment under Rule V. This rule shall apply regardless of whether assistance unit income exceeds the GMI or NMI standards for an assistance unit of that size and regardless of whether the assistance unit receives a residual grant.

(2) Beginning the month following the end of grant diversion, the participant and assistance unit members shall be eligible for extended medical assistance for nine (9) months if:

(a) the fourth month of the $30 and one-third disregard provided in ARM 46.10.512 is used in the last month of WSP placement; and

(b) the grant is closed in the following month solely because of the loss of the $30 and one-third disregard.

(3) Beginning the month following the end of grant diversion, the participant and assistance members shall be eligible for extended medical assistance for four (4) months if the grant is closed the month following the end of grant diversion solely because of:

(a) increased earned income;

(b) increased child support; or

(c) increased hours of work.

AUTH: Sec. 53-4-212 MCA; AUTH Extension, Sec. 113, Ch. 609, L. 1987, Eff. 10/1/87.
IMP: Sec. 53-2-201, 53-4-211 and 53-4-215.

RULE VIII AFDC WORK SUPPLEMENTATION PROGRAM, CHILD SUPPORT ASSIGNMENT AND EXCLUSION (1) WSP participants must assign child support rights and cooperate in establishing paternity as required by ARM 46.10.314.

(2) WSP participants are entitled to the $50 unearned income exclusion of child support payments provided in ARM 46.10.506(1)(r). Such $50 child support payment shall not be considered income for WSP program purposes.

(3) The child support amount collected by the child support enforcement agency from the absent parent shall include the amount of the residual grant paid directly to the family and any amount paid to the employer on the participant's behalf.

(4) Child support retained by the participant, excluding the $50 exclusion described in subsection (2) of this rule shall be treated as unearned income in determining eligibility for any residual payment to the participant. Once the recipient is determined eligible to participate in WSP, receipt of increased child support payments shall be considered in determining eligibility for and the amount of the residual grant, but shall not affect further participation in WSP.

AUTH: Sec. 53-4-212 MCA; AUTH Extension, Sec. 113, Ch. 609, L. 1987, Eff. 10/1/87.

IMP: Sec. 53-2-201, 53-4-211 and 53-4-215.

RULE IX AFDC WORK SUPPLEMENTATION PROGRAM, WIN AND TITLE IV-A WORK REQUIREMENTS (1) Participation in WSP shall satisfy the recipient's obligation to participate in WIN and all other Title IV-A work requirements.

AUTH: Sec. 53-4-212 MCA; AUTH Extension, Sec. 113, Ch. 609, L. 1987, Eff. 10/1/87.
IMP: Sec. 53-2-201, 53-4-211 and 53-4-215.

RULE X AFDC WORK SUPPLEMENTATION PROGRAM, ADMINISTRATIVE REVIEW AND FAIR HEARING WSP applicants and participants shall be entitled to administrative review and fair hearings as provided in ARM 46.10.104. Participants shall not be entitled to administrative review or fair hearing under Title 46 of the administrative rules of Montana with respect to disputes or grievances with the employer, but shall be entitled to pursue such remedies and procedures provided by any applicable collective bargaining agreement, employer policy or law.

AUTH: Sec. 53-4-212 MCA; AUTH Extension, Sec. 113, Ch. 609, L. 1987, Eff. 10/1/87.
IMP: Sec. 53-2-201, 53-4-211 and 53-4-215.

3. These rules are being proposed to allow implementation of work supplementation as a component of the AFDC Model Work Programs. This option was informally requested by four Human Resource Development Councils (HRDC) prior to funding of the AFDC Model proposals. Each of these agencies were subsequently funded by the Department of Labor for a pilot project and the agencies incorporated work supplementation into their formal pilot proposals. The Kalispell HRDC was not funded but will also provide the work supplementation option to participants in a program they have funded from other sources.

Work Supplementation is an allowable work program option provided at 45 CFR 239. Participation must be voluntary on the part of the recipient. Work supplementation provides a $150 monthly monetary incentive for six months to an employer for hiring a hard-to-place AFDC recipient.

The Montana AFDC State Plan has been amended to allow work supplementation. Work supplementation has not been offered previously in Montana. It is being piloted now to determine whether the program offers enough incentives to motivate AFDC recipients to seek and retain employment. Work supplementation may be expanded to more geographical areas when the Family Support Act of 1988 is implemented.

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 February 9, 1989.

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

Interim Director, Social and Rehabilitation Services

Certified to the Secretary of State January 3, 1989.

BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

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

TO: All Interested Persons

1. On November 23, 1988, the Department of Agriculture published notice of the proposed adoption of Rule I, Inspection Fee at p.2467 of the Montana Administrative Register, issue no. 22.

2. The department received two written comments. Jerry Meidinger of Miles City stated that a fee increase is inappropriate due to the status of the local economy. The department responds that the increase is necessary to cover administrative costs and it is not unreasonable to raise a fee which has not been increased for 13 years.

A second comment was received from Steve Chambers of Great Falls who expressed concern over inspection fees for both feed ingredients and final feed products. The department responds that the legislative intent was that ingredients as well as final products be inspected and the fee set is not unreasonable.

3. The department has adopted the rule as proposed, and has assigned 4.12.218 ARM as its rule number.

MONTANA DEPARTMENT OF AGRICULTURE

By: W. Ralph Peck
W. Ralph Peck
Deputy Director

Certified to the Secretary of State January 3, 1989.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF NURSING HOME ADMINISTRATORS

In the matter of the amendment) CORRECTED NOTICE OF 8.34.
of 8.34.418 pertaining to fees) 418 FEE SCHEDULE

TO: All Interested Persons:

1. On October 27, 1988, the Board of Nursing Home Administrators published a notice of proposed amendment of the above-stated rule at page 2269, 1988 Montana Administrative Register, issue number 20. The amendment was adopted as proposed at page 2567, 1988 Montana Administrative Register, issue number 23.

2. There were amendments to subsection (2) that were not shown in the original proposal and were not shown in the adoption notice. The amendment to subsection (2) should have read as shown below:

"8.34.418 FEE SCHEDULE (1) . . .

(2) ~~Each person granted a license as a nursing home administrator shall pay an original license fee of $65 if granted after the May exam and $100 if granted after the November exam.~~ Each applicant shall pay an examination and license fee of $100 for the May examination, and $120 for the November examination. The licenses granted at the May exam expire as of December 31 unless renewed. The licenses granted at the November exam remain in effect until December 31 of the following year and then must be renewed.

(3) through (12) will remain the same."

Auth: 37-1-134, 37-9-203, MCA Imp: 37-9-203, 37-9-304, MCA

3. The replacement pages have been completed and show the amendment as it should have been proposed and adopted.

BOARD OF NURSING HOME
ADMINISTRATORS
CAROL ANN ANDREWS, CHAIRPERSON

BY: Geoffrey L. Brazier
GEOFFREY L. BRAZIER, ATTORNEY
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, December 30, 1988.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF MILK CONTROL

In the matter of proposed amendment of rule 8.86.301 (6)(b), (g), and (h) as it relates to class I pricing formulas	))))))	NOTICE OF AMENDMENT OF RULE 8.86.301 PRICING RULES DOCKET #89-88

TO: ALL LICENSEES UNDER THE MONTANA MILK CONTROL ACT (SECTION 81-23-101, MCA, AND FOLLOWING), AND ALL INTERESTED PERSONS:

1. On August 29, 1988, the Montana Board of Milk Control published notice of a proposed amendment of rule 8.86.301(6)(a),(b) and (g) as it relates to class I pricing formulas. The notice was published at page 1949 of the 1988 Montana Administrative Register, issue No. 17, as MAR NOTICE No. 8-86-29.

2. On October 31, 1988, the Montana Board of Milk Control published notice of a proposed amendment of rule 8.86.301(6)(b),(g) and (h) as it relates to class I pricing formulas. The notice was published at page 2333 of the 1988 Montana Administrative Register, issue No. 21, as MAR NOTICE No. 8-86-30.

3. The hearing was held on September 29, 1988, at 9:00 a.m. in the banquet room, Jorgenson's Restaurant, 1720 11th Avenue, Helena, Montana and continued to 9:00 a.m., December 9, 1988 in the SRS auditorium, 111 Sanders Street, Helena, Montana.

A total of forty-six (46) different persons attended the hearings. Twelve (12) persons offered testimony on proposed amendments. Of those offering testimony on September 29, 1988, one person spoke in favor of the proposal and four against.

On December 9, 1988, an alternate proposal was offered by Mr. Ed McHugh. Seven participants spoke in favor of the alternate proposal with one objecting to lowering the minimum volume of sales qualifying for the plant dock price from 500 gallons to 240 gallons. Three additional written comments were received, one favoring the proposal as contained in the notices and two in opposition.

4. After considering all of the testimony and comments received, the board is denying all the proposed rule changes except for the following (text of rule with matter stricken is interlined and new matter added, then underlined):

"8.86.301 PRICING RULES Subsections (1) through (6)(a) remain the same as before proposed.

(b) The flexible economic formula which shall be used in calculating minimum on-the-farm wholesale and retail, jobber, wholesale, institutional and retail prices of class I milk in the state of Montana utilizes a November, 1969 base equalling 100, an interval of 5.3 and consists of five (5) economic factors. It is used to calculate incremental deviations from the price which was calculated for the first quarter of 1974. The factors and their assigned weights are as follows:

	FACTOR	WEIGHT	CONVERSION FACTOR
(i)	Weekly wages - total private revised	50%	.4035187
(ii)	Wholesale price index (US)	28%	.260707
(iii)	Pulp, paper and allied products (US)	12%	.1142857
(iv)	Industrial machinery (US)	6%	.0556586
(v)	Motor vehicle and equipment (US)	4%	.0376294
		100%	

NOTE: The reported revised weekly wages - total private is seasonally adjusted by dividing each months revised figures by the factors listed above in paragraph (6)(a).

The following table will be used in computing distributor prices.

TABLE II

Handler incremental deviation from last official reading of present formula. (December 1973 - 122.10; Formula Base = November 1969; Interval = 5.3.)

FORMULA INDEX		HANDLER INCREMENTAL DEVIATION	
~~101.30-105.54~~	143.70-147.94	-$ 0.02	
~~106.60-110.84~~	149.00-153.24	- 0.01	
~~111.90-116.14~~	154.30-158.54	0.00	
~~117.20-121.44~~	159.60-163.84	0.01	
~~122.50-126.74~~	164.90-169.14	0.02	~~(NOTE: This~~
~~127.80-132.04~~	170.20-174.44	0.03	~~chart is amended~~
~~133.10-137.34~~	175.50-179.74	0.04	~~to reflect a two~~
~~138.40-142.64~~	180.80-185.04	0.05	~~cent ($0.02)~~
~~143.70-147.94~~	186.10-190.34	0.06	~~reduction in the~~
~~149.00-153.24~~	191.40-195.64	0.07	~~distributor's~~
~~154.30-158.54~~	196.70-200.94	0.08	~~margin based on~~
~~159.60-163.84~~	202.00-206.24	0.09	~~a half ($1/2)~~
~~164.90-169.14~~	207.30-211.34	0.10	~~gallon of whole~~
~~170.20-174.44~~	212.60-216.84	0.11	~~milk, as ordered~~
~~175.50-179.74~~	217.90-222.14	0.12	~~by the board of~~
~~180.80-185.04~~	223.20-227.44	0.13	~~milk control on~~
~~186.10-190.34~~	228.50-232.74	0.14	~~Sept. 15, 1979.)~~
~~191.40-195.64~~	233.80-238.04	0.15	
~~196.70-200.94~~	239.10-243.34	0.16	
~~202.00-206.24~~	244.40-248.64	0.17	
~~207.30-211.54~~	249.70-253.94	0.18	
~~212.60-216.84~~	255.00-259.24	0.19	
~~217.90-222.14~~	260.30-264.54	0.20	
~~223.20-227.44~~	265.60-269.84	0.21	
~~228.50-232.74~~	270.90-275.14	0.22	
~~233.80-238.04~~	276.20-280.44	0.23	
~~239.10-243.34~~	281.50-285.74	0.24	
~~244.40-248.64~~	286.80-291.04	0.25	

(c) . . ." remains the same as before proposed.

AUTH: 81-23-302, MCA IMP: 81-23-302, MCA

5. Principal reasons given for the adoption of the amendment to the rule were as follows:

(a) An adjustment in wholesale and retail prices is necessary to reflect adjustments that the industry had already made in the marketplace.

(b) There are cost savings occasioned by changes in the form of distribution of milk in this state that ought to be passed on to the consumer in the form of lower retail prices.

(c) The evidence received indicated current distribution costs justify and support a lower price structure than the one that results from the present formula.

(d) The reduced price level herein ordered is a compromise which reflects the best intentions and efforts of the board to arrive at a solution that addresses all concerns and permits the local dairy industry to survive in the marketplace in as near the present form as possible.

(e) Lower prices are necessary to stabilize the marketing of milk in this state in order to remain competitive with milk that is available in areas adjacent to and surrounding Montana.

6. Principal reasons given against the adoption of the amendment to the rule were as follows:

(a) It would reduce jobber margins and make it difficult for jobbers to remain in business.

(b) It would result in prices being set which are below some distributor's costs of doing business and be contrary to law.

7. The board's reasons for rejecting the arguments against the rule amendment were as follows:

(a) Montana's milk prices are based on cost and, since the only cost evidence of record did not indicate that resulting prices would be below cost, and since the cost study procedures were not challenged, the preponderance of evidence proved that resulting prices would be above most distributor's costs of doing business.

(b) The board has heard numerous persons testify about the chaos in the marketplace caused by current prices and practices. It felt that lowering of prices would make it easier, not more difficult, for jobbers to survive in business.

MONTANA BOARD OF MILK CONTROL
CURTIS C. COOK, CHAIRMAN

BY: William E. Ross
WILLIAM E. ROSS, Bureau Chief

Certified to the Secretary of State January 3, 1989.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE MONTANA STATE LOTTERY COMMISSION

In the matter of the repeal of rules pertaining to licenses and license renewal and the amendment of rules pertaining to electronic funds transfer and prizes	)))))	NOTICE OF REPEAL OF 8.127.605 EXPIRATION OF LICENSE, 8.127.610 LICENSE RENEWAL and AMENDMENT OF 8.127.801 ELECTRONIC FUNDS TRANSFER AND 8.127.1201 PRIZES

TO: All Interested Persons:

1. On November 10, 1988, the Montana State Lottery Commission published a notice of proposed repeal and amendment of the above-stated rules at page 2342, 1988 Montana Administrative Register, issue number 21.

2. The Commission repealed and amended the rules exactly as proposed.

3. No comments of testimony were received.

MONTANA STATE LOTTERY
COMMISSION
SPENCER HEGSTAD, CHAIRMAN

BY: Geoffrey L. Brazier
GEOFFREY L. BRAZIER, ATTORNEY
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, December 30, 1988.

BEFORE THE DEPARTMENT OF
FAMILY SERVICES OF THE
STATE OF MONTANA

In the matter of the repeal of Rules 11.12.211 and 11.12.420 and the adoption of rules pertaining to payment rates for residential foster care providers	NOTICE OF THE REPEAL OF RULES 11.12.211 AND 11.12.420 AND THE ADOPTION OF RULES PERTAINING TO PAYMENT RATES FOR RESIDENTIAL FOSTER CARE PROVIDERS

TO: All Interested Persons

1. On November 10, 1988, the Department of Family Services published notice of the proposed repeal of Rules 11.12.211 and 11.12.420 and the adoption of rules pertaining to the payment rates for residential foster care providers at pages 2344-2348 of the 1988 Montana Administrative Register, issue number 21.

2. The Department has repealed Rules 11.12.211 and 11.12.420 as proposed.

3. The Department has adopted Rule I (11.7.310 DEFINITIONS), Rule II (11.7.311 PAYMENTS TO FACILITIES), Rule V (11.7.319 FACILITY CONTRACTS) as proposed.

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

11.7.313 CLASSIFICATION MODEL (1) Each facility shall be classified according to the department's classification model. The model identifies ~~four~~five levels of supervision and three levels of treatment. A model rate has been assigned to each level of supervision and treatment.

Subsections (2) has been adopted as proposed.

(3) There are ~~four~~five levels of supervision in the classification model:

(a) In Level I the facility provides the basic living needs of the child, including shelter, food, transportation and clothing by placing the youth in community family therapeutic foster homes. Trained foster home parents provide a skilled role model to carry out the implementation of the community based treatment plan for the youth. The facility provides supervision based upon an assessment of the child's needs and a specific written case plan that is monitored to determine its effectiveness in reducing the need for this level of supervision.

(~~a~~b) In Level II the facility provides the basic living needs of the child, including shelter, food, transportation and clothing. In addition to the provision of these basic needs, the facility employs paid caretakers who provide day-to-day supervision of the youth in a family-like setting. This level of

supervision does not require individual assessment of the youth and/or the development of treatment plans to determine structured activities or provide the day-to-day care and guidance of the youth.

(~~b~~c) In Level III the facility provides the basic living needs of the child, employs caretakers who provide the day-to-day supervision of the youth in a family-like setting, and a paid director to coordinate the facility's operations.

(~~c~~d) In Level ~~III~~IV the facility provides the basic living needs of the youth and employs shift staff who provide 24 hour structured supervision of the youth and administrative personnel. This level of supervision utilizes planned structured supervision by trained staff. The facility provides activities and supervision based upon an assessment of the child's needs and a specific written case plan that is monitored to determine its effectiveness in reducing the need for structured supervision.

(~~d~~e) In Level ~~IV~~ the facility provides the basic living needs of the youth, and employs shift staff who provide twenty-four hour intensive supervision with backup staff available. The facility also employs administrative personnel. The facility provides constant control of the youth by highly trained staff in a planned treatment environment. This level of supervision requires individual assessment of the youth and the development, implementation and monitoring of an individual written treatment plan by professional staff.

(4) There are three levels of treatment in the classification model:

(a) In Basic Treatment professional staff employed by the facility provide structured individual and group therapeutic services designed to address the youth's mild delinquent, emotional, social and/or behavior problems. Staff implements skill-building techniques to assist the youth in progressing toward an acceptable adjustment to his family, school and/or community. This level of treatment requires more than the day-to-day supervision by caretakers.

Subsections (4)(a) through (6) have been adopted as proposed.

AUTH: Sec. 41-3-1103 and 52-1-103, MCA; AUTH Extension, Sec. 113. Ch. 609, L. 1987, Eff. 10/1/87.
IMP: Sec. 41-3-1103, 41-3-1122 and 52-1-103, MCA

11.7.316 CLASSIFICATION PROCEDURES (1) Effective January ~~10~~5, 1989, all facilities providing foster care under contract to the department shall be classified according to the level of treatment and supervision provided. Any facility that does not have a contract with the department may request classification at any time.

Subsections (2) through (7) have been adopted as proposed.

AUTH: Sec. 41-3-1103 and 52-1-103, MCA; AUTH Extension,

Sec. 113. Ch. 609, L. 1987, Eff. 10/1/87.
IMP: Sec. 41-3-1103, 41-3-1122 and 52-1-103, MCA

5. Rationale Appropriations for rate increases for residential foster care providers were contingent upon the development of a revised reimbursement system. The system provides for an equitable disbursement of funds.

6. The Department has thoroughly considered all commentary received:

COMMENT: An Attorney for the Administrative Code Committee submitted comments regarding errors in the authority sections of the rules which are intended to be repealed.

RESPONSE: The Department agrees and has corrected the citations. Repeal of Rule 11.12.211 incorrectly cited authority as Sec. 41-3-1142 and 53-4-111. These have been corrected to read Sec. 41-3-1103 and 52-1-103. IMP was cited incorrectly as 41-3-1142, 53-2-201 and 53-4-113. These have been changed to 41-3-1103, 41-3-1122 and 52-1-103. Repeal of Rule 11.12.420 incorrectly cited Sec. 53-4-111 as an authority. This has been changed to 52-1-103. IMP Sections 41-3-1131, 41-3-1132, 53-2-201 and 53-4-113 were changed to 41-3-1103, 41-3-1122 and 52-1-103.

COMMENT: The model rate system does not adequately address the therapeutic foster care programs. A better definition reflecting evaluation costs and actual payments to foster parents is needed.

RESPONSE: The Department agrees in part and has modified the definition of Level I Supervision. However, the definition was not expanded to include set amounts for specific costs. The model rate is set up to compensate for costs at a level of service. How this level of service is provided is up to the individual facility. The definition of therapeutic foster care is more appropriately addressed in licensing requirements and the specific program requirements. This rule merely describes the level of supervision and level of treatment.

COMMENT: Specific costs, such as assessment, evaluation and screening of therapeutic foster parents, individual case plan management, staff training, adequate pay for qualified staff, respite care, and in-house management and therapy are not adequately reflected or compensated for by the model rates.

RESPONSE: When developing the model rates, the Department did consider and provide for these costs in the rates. Individual facilities may break down and categorize their costs differently than the rate matrix reflects, but the above-mentioned costs were considered in the Department's calculations of the model rates. Also, some facilities included treatment costs under what the Department would consider to be an aspect of supervision, or visa

versa. This would cause the Department's figures to appear to be low for some costs and higher for other costs. However, the total rate provides compensation for such services.

COMMENT: $600/month is not an adequate amount to compensate (treatment) foster parents. Screening parents and conducting evaluations are very costly. Other states pay considerably more.

RESPONSE: The Department has agreed to modify the monthly rate to $613.24, the amount quoted during testimony as the low median payment paid to therapeutic foster homes nationally. Montana has an average cost of living which is below the national average. The Department considered evaluations and screening and reflected these costs in the treatment component, not the supervision component. The rate of $600/month was calculated by the Department as an appropriate amount, but each program is free to pay any amount to its treatment foster parents.

COMMENT: In the Treatment matrix, the basic level includes group, but not individual therapeutic services. It is recommended that group therapeutic services be lowered to $2.06 and that individual therapeutic services be included at the rate of $6.18 to realistically reflect the cost of having a professional staff person in addition to the direct care staff to handle the treatment component.

RESPONSE: The Department agrees and has changed the Model Rate Matrix to reflect individual therapeutic services at the rates suggested.

COMMENT: The model rates do not adequately reflect actual costs of the supervision and treatment services provided by the residential facilities.

RESPONSE: The model rate is the rate calculated by the department to cover the costs of providing services established in the model. The proposed rate system establishes a rate matrix which reflects the typical costs of providing for the essential services for children placed in the variously classified facilities.

COMMENT: Although the proposed rates system does a fairly good job of addressing foster care reimbursement, the system does not realistically cover the cost of intensive treatment provided by some of the facilities.

RESPONSE: The rates are intended to compensate for foster care services. The system is not based upon a medical model, nor does the Department impose the same requirements on providers which are imposed by medical reimbursement systems. The classifications are based on the levels of treatment set forth. Intensive medical treatment is not contemplated by the rate system. The Department reiterates its position that the proposed rate system provides

adequate coverage for the services which the Department expects from providers. If providers provide additional services, the Department will not participate in paying for these costs.

COMMENT: The whole residential care system is underfinanced.

RESPONSE: It should be noted that the model rates rules pertain only to the model rates and the classification of facilities according to the services provided. The daily rate which will be paid to each facility will not be determined until after the 1989 Legislative Session. The Department believes, and supportive testimony was given, that the proposed model rates provide adequate compensation for services. The Department has historically paid a portion of each facility's total costs, with third party contributions providing the balance. The percentage of the model rate which will be paid by the department will depend on the amount of funding provided by the legislature for such services.

In the interim, the Department is paying a rate based upon historic experience. With the approval of MRCCA, the Department has used the amount received in the last legislative session to increase the rates paid to those providers whose rates show the greatest discrepancy from the model rates.

COMMENT: Any facility that is classified under the new rules at a higher rate should be reimbursed the difference between the current interim rate and the rate based upon reclassification retroactively from July 1, 1988.

RESPONSE: The Department agrees, with the exception of the date of retroactive reimbursement. If a facility is classified under the new rules at a higher rate, the difference between the interim rate implemented October 1, 1988, and the reclassification rate will be reimbursed to that facility retroactive to October 1, 1988.

COMMENT: "Model" rates is a misnomer. "Model" means ideal. "Determined" rates is a more accurate reflection of what the rules do.

RESPONSE: The word "model" has several meanings. As used in the rules, it is intended to indicate a rate for the service model identified. Therefore, the rates established are not intended to be "ideal", but are intended to fund the service model described.

COMMENT: Present rates paid to residential care facilities should not be lowered, even to bring up the rates paid to those facilities which are presently paid a disproportionately low amount.

RESPONSE: The rate rules are intended to be implemented in two phases. Phase I deals with the classification of facilities and

which model rates are applicable. Phase II will deal with actual implementation of the rates paid. These rules pertain only to classification. When the Department receives its appropriation for these services, new rules addressing implementation will be drafted and submitted for comments. When implementing Phase II, the Department will consider the comments of Montana Residential Child Care Association requesting that the implementation plan should not result in the lowering of any facility's rate.

Director, Department of Family Services

Certified to the Secretary of State December 30, 1988.

BEFORE THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS
OF THE STATE OF MONTANA

In the matter of the adoption of ARM 12.5.301 regarding crayfish	)))	NOTICE OF ADOPTION OF THE AMENDMENT OF ARM 12.5.301 REGARDING THE LISTING OF CRAYFISH AS NONGAME WILDLIFE IN NEED OF MANAGEMENT.

TO: All interested persons

1. On July 15, 1988 the Department of Fish, Wildlife, and Parks published notice of a proposed amendment of Rule 12.5.301 listing crayfish as nongame wildlife in need of management at page 1310 of the 1988 Montana Administrative Register, issue number 13.

2. Oral comment was taken at the public hearings scheduled in the rulemaking notice and written comments were received through August 16, 1988.

3. The department has considered the comment recieved and responds as follows:

COMMENTS: The comments were overwhelmingly in favor of adopting the amendment. Commercial crayfishermen and sportsmen alike were in favor of regulating the harvest of crayfish. The only disagreement at the hearings was in the manner of regulation as sportsmen tended to favor an outright ban which the crayfishermen did not favor. Only one commentator opposed the listing. This commentator trapped crayfish as food for his family and for recreation. He commented that the taking of crayfish should not be regulated because only nonreproductive crayfish that are too big for fish forage are taken. He was also concerned that if crayfish taking was regulated, only the large commercial operators would be allowed to continue and small noncommercial activities like his would be banned.

RESPONSE: Listing crayfish as in need of management is a preliminary step to regulating the taking of crayfish. Actual regulations can only be implemented after the in need of management designation. Therefore, if the desire of both sportsmen and commercial crayfishermen that crayfish harvest be regulated is to be met, the amendment must be adopted. Regulations applicable to commercial operations will be implemented later. The department does not intend to regulate recreational takings of crayfish at this time and does not anticipate circumstances that would require regulating recreational use in the future. However, the designation would provide the department with the flexibility to regulate recreational use if the need arises.

4. The department has the rulemaking authority for the amendment of ARM 12.5.301 and therefore adopts the rule as proposed.

Richard L. Johnson
Deputy Director
Montana Department of Fish,
Wildlife, and Parks

Certified to the Secretary of State January 3, 1989.

BEFORE THE BOARD OF LAND COMMISSIONERS
AND DEPARTMENT OF STATE LANDS

In the matter of the repeal of A.R.M. 26.2.601 Through 633 and the adoption of New Rules I through XXVI providing standards and procedures for implementation of the Montana Environmental Policy Act	))))))	NOTICE OF REPEAL OF A.R.M. 26.2.601 THROUGH 633 AND ADOPTION OF RULES I THROUGH XXVI

To: All Interested Persons

1. On July 28, 1988, the Board of Land Commissioners and Department of State Lands, along with the Department of Agriculture, Department of Commerce, Department of Fish, Wildlife and Parks, Department and Board of Health and Environmental Sciences, Department of Highways, Department and Board of Natural Resources and Conservation, and Fish and Game Commission published notice of public hearings on the proposed repeal of existing rules and adoption of new rules concerning implementation of the Montana Environmental Policy Act at page 1606 of the 1988 Montana Administrative Register, issue number 14.

2. All of the above-referenced agencies, boards, and commissions except the Board of Land Commissioners, Department of State Lands, and Board and Department of Health and Environmental Sciences published notice of repeal of existing rules and adoption of new rules at page 2692 of the Montana Administrative Register, issue number 24. The Department and Board of Health and Environmental Sciences intend to take action on the proposed repeal and new rules in January 1989. The Board of Land Commissioners has repealed A.R.M. 26.2.601 through 633 as proposed. The Board of Land Commissioners and Department of State Lands have adopted the proposed rules in the same form as adopted by the other agencies, boards, and commissions, or as set forth on pages 2692 through 2700 of the 1988 Montana Administrative Register, issue number 24, and the portions of those pages containing the rules as amended are hereby incorporated by reference.

3. At the hearings and during the comment period, the Board of Land Commissioners and Department of State Lands received written, oral, or both written and oral comments from 31 persons. Those persons are listed on pages 2700 and 2701 of the 1988 Montana Administrative register, issue number 24. Summaries of the comments received and agency responses to those comments are found at pages 2702 through 2717 of the 1988 Montana Administrative Register, issue number 24. The Board of Land Commissioners and Department of State Lands have adopted those summaries and responses and hereby incorporate them into this notice by reference.

4. The Board of Land Commissioners and Department of State Lands have assigned the following numbers to the rules; Rule I, 26.2.641; Rule II, 26.2.642; Rule III, 26.2.643; Rule IV; 26.2.644; Rule V, 26.2.645; Rule VI, 26.2.646; Rule VII, 26.2.647; Rule VIII, 26.2.648; Rule IX, 26.2.649; Rule X, 26.2.650; Rule XI, 26.2.651; Rule XII, 26.2.652; Rule XIII, 26.2.653; Rule XIV, 26.2.654; Rule XV, 26.2.655; Rule XVI, 26.2.656; Rule XVII, 26.2.657; Rule XVIII, 26.2.658; Rule XIX, 26.2.659; Rule XX, 26.2.660; Rule XXI, 26.2.661; Rule XXII, 26.2.662; Rule XXIII, 26.2.663; Rule XXIV, 26.2.628; Rule XXV, 26.2.629, Rule XXVI, 26.2.630.

5. The authority of the Board of Land Commissioners and Department of State Lands to repeal A.R.M. 26.2.601 through 619 is contained in 2-3-103, MCA. The repeal of A.R.M. 26.2.601 through 619 implements 75-1-201, MCA. The repeal of A.R.M. 26.2.618 also implements 2-2-121, MCA. The repeal of A.R.M. 26.2.619 also implements 2-3-103, M.C.A. The authority to repeal 26.2.631 through 633 is based on 75-1-202, MCA. The authority of the Board of Land Commissioners and Department of State Lands to adopt Rules I through XXVI is contained in 2-3-103, 2-4-201, and 75-1-202, MCA. The rules implement sections 2-3-104 and 75-1-201, 202, 203, 205, 206, and 207, MCA.

Dennis Hemmer, Commissioner
Department of State Lands

Certified to the Secretary of State December 30, 1988

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

In the Matter of the Amendment of ARM 26.4.301 through 26.4.306, 26.4.308, 26.4.310 through 26.4.327, 26.4.401 through 26.4.413, 26.4.501 through 26.4.505, 26.4.507, 26.4.510, 26.4.514 through 26.4.518, 26.4.520 through 26.4.524, 26.4.601 through 26.4.609, 26.4.621 through 26.4.626, 26.4.631 through 26.4.652, 26.4.701 through 26.4.703, 26.4.711, 26.4.713 through 26.4.714, 26.4.716 through 26.4.721, 26.4.723 through 26.4.726, 26.4.728, 26.4.730 through 26.4.733, 26.4.751, 26.4.761 through 26.4.763, 26.4.801 through 26.4.802, 26.4.804 through 26.4.806, 26.4.811, 26.4.815, 26.4.821, 26.4.823 through 26.4.825, 26.4.831 through 26.4.833, 26.4.901 through 26.4.904, 26.4.907, 26.4.911 through 26.4.912, 26.4.1001 through 26.4.1014, 26.4.1101 through 26.4.1119, 26.4.1121, 26.4.1125, 26.4.1129, 26.4.1131 through 26.4.1137, 26.4.1141 through 26.4.1148, 26.4.1201 through 26.4.1210, 26.4.1212 through 26.4.1215, 26.4.1221 through 26.4.1228, 26.4.1231 through 26.4.1232, 26.4.1234 through 26.4.1242, 26.4.1246 through 26.4.1254, 26.4.1260 through 26.4.1263, 26.4.1302, 26.4.1303, and 26.4.1309; the repeal of ARM 26.4.307, 26.4.309, 26.4.506, 26.4.508, 26.4.509, 26.4.511, 26.4.512, 26.4.513, 26.4.712, 26.4.715, 26.4.722, 26.4.727, 26.4.729, 26.4.734, 26.4.735, 26.4.803, 26.4.807, 26.4.812, 26.4.813,)	NOTICE OF AMENDMENT, REPEAL, AND ADOPTION OF STRIP MINE RULES

26.4.814, 26.4.816, 26.4.822,)
and 26.4.1015;)
and the adoption of NEW)
RULES I through XIII,)
concerning the regulation of)
strip and underground coal)
and uranium mining.)

TO: All Interested Persons:

1. On July 14, 1988, the Department of State Lands and the Board of Land Commissioners published notice of public hearing on the proposed amendment, repeal, and adoption of strip mine rules at page 1316 of the 1988 Montana Administrative Register, issue number 13.

2. The Department and Board have repealed the rules proposed for repeal, except for 26.4.727, 26.4.729, 26.4.734, and 26.4.735, which remain in effect. The Department and Board have adopted and amended the rules with the following changes:

26.4.301 DEFINITIONS

Subsections (1) through (20)(a) remain the same as the proposed rule.

(b) minimize, to the extent possible, disturbances and adverse impacts on fish, wildlife and related environmental values, and achieve enhancement of those resources where practicable. The term includes equipment, devices, systems, methods, or techniques ~~which~~ that are currently available anywhere as determined by the department, even if they are not in routine use. The term includes, but is not limited to, construction practices, siting requirements, vegetative selection and planting requirements, animal stocking requirements, scheduling of activities and design of sedimentation STRUCTURES. ~~ponds in accordance with all applicable rules pursuant to the Act 26.4.639 and 26.4.642.~~

Subsections (20)(c) through ~~(15)~~ remain the same as the proposed rule.

~~(27) "Contamination" means, with respect to soils, the addition to, deposition or spillage on, or mixing with soil of any substance or material that by its chemical nature adversely affects the quality of the soil or impairs its properties to support plant establishment and growth.~~

Subsections (28) "Contour Strip Mining" through (32) "Cumulative hydrologic impact area" remain the same as the proposed rule, but are renumbered to (27) through (31).

~~(33) "Degradation" means, in reference to soils, to decrease the physical quality of soil materials by adversely affecting the tilth, texture, structure, porosity, hydraulic conductivity, available water capacity, and other relevant physical properties as a result of compaction by heavy equipment, introducing other materials to or mixing them with soil, or other factors.~~

Subsections (34) through (40)(b) remain the same as the proposed rule, but are renumbered to (32) through (38).

~~(21)~~ ~~(40)~~ (38)(c)(i) The role of the alluvial valley floor in regulating the natural flow of surface water results from the ~~characteristic~~ VALLEY GEOMORPHIC CHARACTERISTICS AND PHYSICAL configuration of the channel flood plain and adjacent low terraces.

Subsections (40)(d) through (49) remain the same as the proposed rule, but are renumbered to (38)(d) through (46).

~~(27)~~ ~~(49)~~ (47) "Head-of-hollow fill" means a fill structure consisting of any material, other than coal processing waste and organic material, placed in the uppermost reaches of a hollow or a naturally occurring drainage where side slopes of the existing hollow or drainage measured at the steepest point are greater than 20% or the average slope of the profile of the hollow or drainage from the toe of the fill to the top of the fill is greater than 10%. ~~In fills with less than 250,000 cubic yards of material, associated with contour mining, the top surface of the fill will be at the elevation of the coal seam.~~ --In ~~all other~~ head-of-hollow fills, the top surface of the fill, when completed, is at approximately the same elevation as the adjacent ridge line, and no significant area of natural drainage occurs above the fill draining into the fill area. (See 26.4.520(14).)

Subsections (50) through (54) remain the same as the proposed rule, but are renumbered to (48) through (52).

Subsection (55) is modified and has been moved to (85).

Subsections (56) through (84) remain the same as the proposed rule, but are renumbered to (53) through (81).

~~(85)~~ (82) "Previously mined area" means land on which coal mining operations were previously conducted, except those lands upon which ~~such~~ AN operations OR ~~were conducted pursuant to and in~~ HAD SECURED ~~compliance with~~ a permit issued under the Montana Strip and Underground Mine Reclamation Act.

Subsections (86) through (87) remain the same as the proposed rule, but are renumbered to (83) through (84).

~~(55)~~ (85) "PROBABLE Hhydrologic consequences" means the projected results of proposed strip or underground mining operations that may reasonably be expected to alter, interrupt, or otherwise affect the hydrologic balance. The consequences may include, but are not limited to, effects on stream channel conditions and the aquatic habitat on the permit area and adjacent areas.

Subsections (51) through (110) remain the same as the proposed rule, but are renumbered to (86) through (107).

~~(72)~~ ~~(110)~~ (108) "Subirrigation" means, with respect to alluvial valley floors, the supplying of water to plants from ~~underneath or from a semi-saturated or saturated~~ a subsurface zone where water is available AND SUITABLE for use by vegetation. Subirrigation may be identified by:

(a) through (e) Remains the same.

Subsections (111) through (103) remain the same as the proposed rule, but are renumbered to (109) through (128).

~~(85)~~ ~~(131)~~ (129) "Waste" means, earth materials, ~~which that are combustible, physically unstable, or acid forming or toxic forming, wasted or otherwise separated from the mineral product have been~~ ARE generated as a result of MINERAL PREPARATION OR,

IN SOME CASES, mining and are not marketed by the operator. ~~and are~~ The term includes earth materials RESULTING FROM ~~that are slurried or otherwise transported from processing facilities or preparation plants after~~ phvsical or chemical processing, cleaning, or concentrating of the mineral. IT ALSO INCLUDES "UNDERGROUND DEVELOPMENT WASTE" AS DEFINED IN THIS RULE AND MATERIALS THAT CONTAIN REJECT MINERAL RESULTING FROM SELECTIVE EXTRACTION OF THE MINERAL. "WASTE" DOES NOT INCLUDE "SPOIL, OVERBURDEN, OR SOIL" AS THOSE TERMS ARE DEFINED IN THIS RULE.

Subsections (132) through (133) remain the same as the proposed rule, but are renumbered to (130) through (131).

26.4.302 FORMAT AND SUPPLEMENTAL INFORMATION

This rule is adopted as proposed. (AUTH: Sec. 82-4-204, 205 MCA; AUTH Extension, Sec. 4, Ch. 70, L. 1987, Eff. 10/1/87; IMP, Sec. 82-4-222.)

26.4.303 LEGAL, FINANCIAL, COMPLIANCE, AND RELATED INFORMATION

Subsections (1) through (15) remain the same as the proposed rule.

(15)(a) Whenever the private mineral estate to be STRIP mined has been severed from the private surface estate, an applicant shall also submit:

(i) a copy of the written consent of the surface owner for the extraction of mineral by ~~the~~STRIP mining methods ~~proposed by the applicant~~;

(ii) a copy of the conveyance that expressly grants or reserves the right to extract mineral by those methods; or

(iii) if the conveyance does not expressly grant the right to extract the mineral by ~~the~~STRIP mining methods ~~proposed by the applicant~~, documentation that under Montana law the applicant has the legal right to extract the mineral by ~~the proposed mining~~ THOSE methods;

(b) Nothing in this section may be construed to authorize the department to adjudicate property rights disputes;

Subsections (16) through (23) remain the same as the proposed rule.

26.4.304 BASELINE INFORMATION: ~~ON~~ ENVIRONMENTAL RESOURCES

Subsections (1) through (4) remain the same as the proposed rule.

(5) all hydrologic and geologic data necessary to evaluate baseline conditions, ~~probable~~ hydrologic consequences and cumulative hydrologic impacts of mining, and to develop a plan to monitor water quality and quantity pursuant to 26.4.314(3) and 82-4-222. GROUNDWATER QUALITY MONITORING SHALL AT A MINIMUM, BE CONDUCTED QUARTERLY AND INCLUDE TOTAL DISSOLVED SOLIDS, FIELD SPECIFIC CONDUCTANCE CORRECTED TO 25°C, pH, TOTAL IRON, TOTAL MANGANESE, MAJOR CATIONS (Ca, Mg, Na, K), MAJOR ANIONS (SO_4, HCO_3, CO_3, C_1) AND WATER LEVELS. Such data must be generated in accordance with 26.4.645 (2) and (3) and 26.4.646 (1), (1)(a), (3), (5), and (6). Existing baseline data, with departmental approval, may supplement data collected by the

applicant. If the information necessary to provide the description is not available from the appropriate state and federal agencies, the applicant may gather and submit this information to the department as part of the permit application. The application must not be deemed complete until this information is made available in the application;

Subsections (6) through (8) remain the same as the proposed rule.

~~(11)~~(9) vegetative surveys as described in 82-4-222(2)(k) of the ~~a~~Act, which ~~shall~~ must include:

(a) a vegetative map ~~(1:400)~~ at a scale of 1 inch equals 400 feet, acceptable to the department, which delineates community types based on two ~~(2)~~ or more dominant species, which ~~are species which,~~ by their structure, number, or coverage, have the greatest functional influence on the type. OTHER METHODS FOR DELINEATING COMMUNITY TYPES MAY BE USED WITH PRIOR APPROVAL BY THE DEPARTMENT;

(b) a narrative describing the community types within the proposed permit area and within any proposed reference areas, ~~by~~ and listing associated species and discussing environmental factors controlling or limiting the distribution of species. Current condition and trend ~~shall~~ must be discussed for each community type or portion thereof if significant differences exist within a type; and

(c) a range site map; and

~~(d) a description of field and laboratory methods to be used during vegetative surveys that must be derived in consultation with the department, must be approved prior to initiation, and must comply with 26.4.726;~~

Subsections (10) through (12) remain the same as the proposed rule.

26.4.305 MAPS

Subsections (1)(a) through (1)(t) remain the same as the proposed rule.

(1) ~~(v)~~(u) the date on which each map was prepared and the north point; a legend indicating the items shown on the map, the scale, and the contour interval; the township, range, and section numbers;

(v) grid coordinates based upon the 1000-meter universal transverse mercator system FOR MAPS, AS DETERMINED BY THE DEPARTMENT, THAT ARE NECESSARY TO DO CUMULATIVE HYDROLOGIC IMPACT ASSESSMENTS AND ALLUVIAL VALLEY FLOOR DETERMINATIONS;

Subsections (1)(v) through (1)(y) remain the same as the proposed rule, but are renumbered to (1)(w) through (1)(z).

26.4.306 BASELINE INFORMATION: PRIME FARMLAND INVESTIGATION

This rule is adopted as proposed.

26.4.307 GEOLOGIC AND HYDROLOGIC INVESTIGATION

This rule is repealed as proposed.

26.4.308 ~~RECLAMATION AND~~ OPERATIONS PLAN

Subsections (1) through (2) remain the same as the

proposed rule.

(3)(a) a description of measures to be employed to ensure that all debris, acid, toxic, acid-forming, and toxic-forming materials, materials constituting a fire hazard, and otherwise undesirable materials, are properly disposed of;

(b) a description of the contingency plans which have been developed to ~~preclude~~ EXTINGUISH A FIRE OR sustained combustion of materials constituting a fire hazard;

Subsections (4) through (5) remain the same as the proposed rule.

26.4.309 PLAN FOR EXISTING STRUCTURES

This rule is repealed as proposed.

26.4.310 BLASTING PLAN

Subsection (1) remains the same as the proposed rule.

(2) For underground mines the department may, on a case-by-case basis, waive ANY OF THE ~~those~~ requirements ~~of (1)(a) through~~ IN (1)~~(g)~~ above that ~~cannot be applied.~~ DO NOT APPLY TO UNDERGROUND BLASTING OPERATIONS. (AUTH: Sec. 82-4-204, 205 MCA; IMP, Sec. 82-4-222.)

26.4.311 AIR POLLUTION CONTROL PLAN

This rule is adopted as proposed.

26.4.312 FISH AND WILDLIFE PLAN

This rule is adopted as proposed.

26.4.313 ~~PERMIT AREA INFORMATION~~ RECLAMATION PLAN

Each reclamation plan ~~shall~~ must contain a description of the reclamation operations proposed, including the following information ~~for the proposed permit area~~:

(1) a ~~detailed~~ timetable for the ESTIMATED completion of each major step in the reclamation plan;

Subsections (2) through (3)(a) remain the same as the proposed rule.

(3)(b) a narrative and cross-sections showing the plan of highwall reduction, including the limits of buffer zone consistent with the performance standards of 26.4.501 and 26.4.5145. An operator may propose alternate plans other than highwall reduction if the restoration will be consistent with the purposes of 82-4-232(7) and 26.4.821 through 825;

Subsections (3)(c) through (5)(a) remain the same as the proposed rule.

(5)(b) Species and amounts per acres of seeds and seedlings to be used, ~~including purity and germination,~~ calculated as pure live seed.

Subsections (5)(c) through (5)(i) remain the same as the proposed rule.

~~(f)~~(j) ~~a~~ plans for determining quality, fertility, and thickness of REDISTRIBUTED soil and for determining quality of regraded spoil. ~~testing plan for~~ The purpose of THESE PLANS IS TO ~~evaluation of~~ evaluat~~e~~ing the results of ~~topsoil~~ the handling of soils, overburden, wastes, and other materials and

~~for~~ TO evaluat~~E~~ing reclamation procedures related to reveqetation;and

Subsections (5)(k) through (7) remain the same as the proposed rule.

26.4.314 PLAN FOR PROTECTION OF THE HYDROLOGIC BALANCE

Subsections (1) through (3) remain the same as the proposed rule.

(4) Whenever this determination in section (3) indicates that adverse impacts to the hydrologic balance on or off the permit area may occur, the department ~~may~~ SHALL require submission of supplemental information to evaluate such impacts and to evaluate plans for remedial and long-term reclamation activities.

Subsection (5) remain the same as the proposed rule.

26.4.315 PLAN FOR PONDS AND EMBANKMENTS

This rule is adopted as proposed.

26.4.316 STRIP OR UNDERGROUND MINING NEAR UNDERGROUND MINING

This rule is adopted as proposed.

26.4.317 DIVERSIONS

This rule is adopted as proposed.

26.4.318 PROTECTION OF PUBLIC PARKS AND HISTORIC PLACES

This rule is adopted as proposed.

26.4.319 RELOCATION OR USE OF PUBLIC ROADS

This rule is adopted as proposed.

26.4.320 PLANS FOR DISPOSAL OF EXCESS SPOIL

This rule is adopted as proposed.

26.4.321 TRANSPORTATION FACILITIES PLAN

This rule is adopted as proposed.

26.4.322 COAL CONSERVATION PLAN

This rule is adopted as proposed.

26.4.323 GRAZING PLAN

(1) Unless alternate reclamation that does not involve grazing is proposed, an outline of the grazing management plan proposed for reclaimed areas must be submitted with the application. ~~detailed range and grazing management plans shall be submitted with the application.~~ Prior to livestock grazing, the applicant shall submit a detailed range and grazing management plan that describes how the reclaimed area will be managed, taking into consideration the premine utilization of the area. The plan must be approved by the department prior to initiating grazing pursuant to 26.4.71~~0~~9. (AUTH: Sec. 82-4-204, 205 MCA; IMP, Sec. 82-4-222.)

26.4.324 PRIME FARMLANDS: SPECIAL APPLICATION REQUIREMENTS

Subsections (1) through (3)(a) remain the same as the proposed rule.

(3)(b) the applicant has the technological capability to restore the prime farmland, within a reasonable time, to equivalent or higher levels of yield as comparable non-mined prime farmland ~~in the surrounding area~~ under equivalent levels of management; ~~and~~

(c) THE POSTMINING LAND USE OF THE AFFECTED PRIME FARMLAND MUST BE CROPLAND, SPECIAL USE PASTURE, GRAZING LAND, OR WILDLIFE HABITAT THAT IS CONSISTENT WITH THE RESTORATION OF THE REAL OR POTENTIAL PRODUCTIVITY OF THE PRIME FARMLAND; AND

~~(c)~~ (d) the proposed operations will be conducted in compliance with the applicable requirements of ~~Rules~~ 26.4.811 through ~~26.4.816 or~~ 26.4.825. (AUTH: Sec. 82-4-204, 205 MCA; IMP, Sec. 82-4-222.)

26.4.325 COAL MINING OPERATIONS ON AREAS OR ADJACENT TO AREAS INCLUDING ALLUVIAL VALLEY FLOORS: SPECIAL APPLICATION REQUIREMENTS

Subsections (1) through (2) remain the same as the proposed rule.

(3)(a)(i) ~~If land within the proposed permit area or adjacent area is identified as~~ Whenever an alluvial valley floor is identified pursuant to (2)(b) above, and the proposed coal mining operation may affect ~~an~~ this alluvial valley floor or waters that supply the alluvial valley floors, the applicant ~~shall submit a complete application for the proposed mining and reclamation operations, to be used by the department, together with other relevant information, including the information required by sub-section (2) of this rule, as a basis for approval or denial of the permit~~ may request the department, as a preliminary step in the permit application process, to separately determine the applicability of the statutory exclusions set forth in paragraph (3)(a)(ii) ~~above~~ BELOW. The department may make such a determination based on the available data, may require additional data collection and analyses in order to make the determination, or may require the applicant to submit a complete permit application and not make the determination until after the complete application is evaluated.

(ii) An applicant need not submit the information required in subparagraphs (3)(c)(ii)(B) and (C) of this section and the department is not required to make the findings of subparagraphs (3)(f)(ii)(A) and (B) of this section when the department determines that one of the following circumstances, heretofore called statutory exclusions, exist:

Subsections (3)(a)(ii)(A) through (3)(a)(iii) remain the same as the proposed rule.

(3)(b) If the department determines that the statutory exclusions are not applicable and that any of the required findings of paragraph (3)(f)(ii) of this section cannot be made, the department may, at the request of the applicant:

Subsections (3)(b)(i) through (3)(d)(ii) remain the same as the proposed rule.

(d)(iii) FOR surveys and data required under ~~subsection~~ section (3) for areas designated as alluvial valley floors because of their flood irrigation characteristics ~~shall also include~~, at a minimum, surface hydrologic data, including streamflow, runoff, sediment yield, and water quality analyses describing seasonal variations over at least 1 full year, field geomorphic surveys and other geomorphic studies;

(iv) FOR surveys and data required under ~~subsection~~ section (3) for areas designated as alluvial valley floors because of their subirrigation characteristics, ~~shall also include,~~ at a minimum, geohydrologic data including observation well establishment for purposes of water level measurements, groundwater contour maps, testing to determine aquifer characteristics that affect waters supplying the alluvial valley floors, well and spring inventories, and water quality analyses describing seasonal variations over at least 1 full year, and physical and chemical analysis of overburden to determine the effect of the proposed mining operations on water quality and quantity;

Subsections (3)(d)(v) through (3)(f)(i) remain the same as the proposed rule.

(f)(ii) No permit or permit revision application for coal mining and reclamation operations may be approved by the department unless the application demonstrates IN COMPLIANCE WITH 26.4.801-806 AND ALL OTHER APPLICABLE REQUIREMENTS OF THE ACT AND RULES and the department finds, in writing, on the basis of information set forth in the application, that:

(A) the proposed operations will not interrupt, discontinue, or preclude farming on an alluvial valley floor; AND

(B) the proposed operations will not materially damage the quantity or quality of water in surface and underground water systems that supply alluvial valley floors.~~; and~~

~~(C) the proposed operations will comply with 26.4.801 through 26.4.806 and the other applicable requirements of the Act and the regulatory program.~~ (AUTH: Sec. 82-4-204, 205 MCA; IMP, Sec. 82-4-222.)

26.4.326 AUGER MINING: SPECIAL APPLICATION REQUIREMENTS

This rule is adopted as proposed.

26.4.327 COAL PROCESSING PLANTS AND SUPPORT FACILITIES NOT LOCATED ~~AT OR NEAR THE MINESITE NOR~~ WITHIN ~~THE MINE~~ A MINE PERMIT AREA: SPECIAL APPLICATION REQUIREMENTS

This rule is adopted as proposed.

26.4.401 ~~NOTICE AND~~ FILING OF APPLICATION AND NOTICE

This rule is adopted as proposed. (AUTH: Sec. 82-4-204, 205 MCA; AUTH Extension, Sec. 2, Ch. 289, L. 1985, Eff. 10/1/85; IMP, Sec. 82-4-222, 226, 231(4), 232, 233 MCA.

26.4.402 SUBMISSION OF COMMENTS AND WRITTEN OBJECTIONS

This rule is adopted as proposed. (AUTH: Sec. 82-4-204, 205 MCA; AUTH Extension, Sec. 2, Ch. 289, L. 1985, Eff. 10/1/85; IMP, Sec. 82-4-226, 231 MCA.

26.4.403 INFORMAL CONFERENCE
This rule is adopted as proposed. (AUTH: Sec. 82-4-204, 205 MCA; AUTH Extension, Sec. 2, Ch. 289, L. 1985, Eff. 10/1/85; IMP, Sec. 82-4-226, 231 MCA.

26.4.404 REVIEW OF APPLICATION
This rule is adopted as proposed. (AUTH: Sec. 82-4-204, 205 MCA; AUTH Extension, Sec. 2, Ch. 289, L. 1985, Eff. 10/1/85; IMP, Sec. 82-4-226, 231 MCA.

26.4.405 FINDINGS AND NOTICE OF DECISION
This rule is adopted as proposed. (AUTH: Sec. 82-4-204, 205 MCA; AUTH Extension, Sec. 2, Ch. 289, L. 1985, Eff. 10/1/85; AUTH Extension, Sec. 4, Ch. 70, L. 1987, Eff. 10/1/87; IMP, Sec. 82-4-226, 231 MCA.)

26.4.406 ~~NOTICE OF~~ EXTENSION OF TIME TO COMMENCE MINING
This rule is adopted as proposed.

26.4.407 CONDITIONS OF PERMIT
This rule is adopted as proposed.

26.4.408 REVIEW OF EXISTING PERMITS
This rule is adopted as proposed.

26.4.409 PERMIT REVISIONS
Subsections (1) through (3)(b) remain the same as the proposed rule.
(3)(c) must include submittal of a new or updated probable hydrologic consequence determination, if determined necessary by the department for adequate permit review~~.~~.
Subsection (4) remains the same as the proposed rule.

26.4.410 PERMIT RENEWAL
This rule is adopted as proposed.

26.4.411 PERMIT AMENDMENT
This rule is adopted as proposed.

26.4.412 TRANSFER OF PERMITS
This rule is adopted as proposed.

26.4.413 ADMINISTRATIVE REVIEW
This rule is adopted as proposed.

26.4.414 RECORDS RETENTION
This rule is adopted as proposed.

26.4.415 CHANGE OF CONTRACTOR
This rule is adopted as proposed.

26.4.501 GENERAL BACKFILLING AND GRADING CESSATION OF OPERATIONS AND MISCELLANEOUS REQUIREMENTS
This rule is adopted as proposed.

26.4.501A FINAL GRADING REQUIREMENTS

(1)(a) All final grading on the area of land affected must be to the approximate original contour of the land. The final surface of the restored area need not necessarily have the exact elevations of the original ground surface. No final graded slopes may be steeper than five horizontal to one vertical (5h:1v) unless otherwise approved in writing by the department in which case steeper slopes must achieve a minimum long-term static safety factor of 1.3, not to exceed the angle of repose. See also 26.4.513~~4~~.

Subsections (1)(b) through (3)(a) remain the same as the proposed rule.

(3)(b) Grading and backfilling of other types of subject excavations must be kept current as departmental directives dictate for each set of field circumstances. (AUTH: Sec. 82-4-204 MCA; IMP, Sec. 82-4-231, 232, 234 MCA.)

26.4.502 CUT-AND-FILL TERRACES

This rule is adopted as proposed.

26.4.503 SMALL DEPRESSIONS

This rule is adopted as proposed.

26.4.504 PERMANENT IMPOUNDMENTS

This rule is adopted as proposed.

26.4.505 BURIAL AND TREATMENT OF WASTE MATERIALS

(1) All exposed mineral seams remaining after mining ~~shall~~ must be covered with a minimum of 4 four feet of the best available non-toxic and non-combustible material.

(2) Acid, toxic, ~~A~~acid-forming, toxic-forming, combustible, or any other undesirable waste materials OR FLY ASH identified by the department that are exposed, used, or produced during mining OR MINERAL PREPARATION ~~shall~~ must be covered in accordance with 26.4.501(2) with ~~a minimum of 8 feet of~~ the best available ~~non-toxic~~ nontoxic and ~~non-combustible~~ noncombustible material. The method and site of final disposal must be approved by the department. If necessary, these materials ~~shall~~ must be tested to determine necessary mitigations to neutralize acidity, to nullify toxicity, ~~in order~~ to prevent water pollution and sustained combustion, ~~and~~ or to minimize adverse effects on plant growth and land uses. ~~Where~~ If necessary to protect against upward migration of salts or exposure by erosion, to provide an adequate depth for plant growth or to otherwise meet local conditions, the department may specify thicker amounts of cover using ~~non-toxic~~ noncombustible and nontoxic material, or, the use of special compaction and isolation techniques to prevent contact of these materials with groundwater. Acid, ~~A~~acid-forming, toxic, ~~or~~ toxic-forming or other deleterious materials ~~shall~~ must not be buried or stored in proximity to a drainage course so as to cause or pose a threat of water pollution.

~~(3) Whenever wastes are proposed for use as fill material, 26.4.510 is applicable.~~

(3) Wastes must not be ~~disposed of in surface deposits or~~ used in the construction of EMBANKMENTS FOR impoundments.

(4) WHENEVER WASTE IS TEMPORARILY IMPOUNDED:

(a) THE IMPOUNDMENT MUST BE DESIGNED AND CERTIFIED, CONSTRUCTED, AND MAINTAINED IN ACCORDANCE WITH 26.4.603, 26.4.639, AND 26.4.642 USING CURRENT PRUDENT-DESIGN STANDARDS; ~~AND~~

(b) THE IMPOUNDMENT MUST BE DESIGNED SO THAT AT LEAST 90 PERCENT OF THE WATER STORED DURING THE DESIGN PRECIPITATION EVENT CAN BE REMOVED WITHIN A 10-DAY PERIOD; AND

(c) SPILLWAYS FOR COAL IMPOUNDING STRUCTURES MUST BE DESIGNED TO PROTECT AGAINST CORROSION.

~~(4)~~(5) STRUCTURES IMPOUNDING COAL WASTE MUST NOT BE RETAINED AS A PART OF THE APPROVED POSTMINING LAND USE. (AUTH: SEC. 82-4-204, 205 MCA; IMP, SEC. 82-4-231 MCA.)

26.4.506 REPLACEMENT AND DISPOSAL OF OVERBURDEN

This rule is repealed as proposed.

26.4.507 STORAGE AND FINAL DISPOSAL OF GARBAGE ~~NON-COAL WASTES~~ AND OTHER DEBRIS

This rule is adopted as proposed.

26.4.508 DEPARTMENTAL APPROVAL OF FINAL WASTE DISPOSAL PLANS

This rule is repealed as proposed.

26.4.509 PREVENTION OF LEACHING

This rule is repealed as proposed.

26.4.508 and 509 are reserved.

26.4.510--~~USE~~ DISPOSAL OF OFFSITE-GENERATED WASTE AND FLY ASH ~~FOR FILL~~

(1) Before waste materials or fly ash from a coal preparation or conversion facility or from other activities conducted outside the permit area such as municipal wastes ~~are~~ may be used for fill material, the permittee ~~must~~ shall demonstrate to the department by hydrogeological means, ~~and~~ chemical and physical analyses, AND THE DISPOSAL PROCEDURES that DISPOSAL ~~use~~ of these materials ~~these materials are not acid, toxic, acid-forming, or toxic-forming and~~ WILL BE CONDUCTED IN ACCORDANCE WITH 26.4.505, will not adversely affect ~~public~~ water quality, public health, or safety, or other environmental resources, and will not cause instability in the backfilled area. The operator may not use SUCH waste or fly ash for fill without prior approval by the department.

(2) Notwithstanding any provision of this subchapter, any waste materials meeting the definition of "hazardous" as found in section 3001 of P.L. 94-580, as amended, must be handled in accordance with that act and regulations adopted thereunder.

~~(3) Whenever waste is temporarily impounded:~~

~~(a) the impoundment must be designed and certified, constructed, and maintained in accordance with 26.4.506,~~

~~26.4.603, and 26.4.639 using current prudent design standards; and~~

~~(b) the impoundment must be designed so that at least 90 percent of the water stored during the design precipitation event can be removed within a 10 day period.~~

~~(4) Structures impounding coal waste must not be retained as a part of the approved postmining land use.~~ (AUTH: Sec. 82-4-204, 205 MCA; IMP, Sec. 82-4-231 MCA.

26.4.511 THICK OVERBURDEN
This rule is repealed as proposed.

26.4.512 BOX CUT SPOILS
This rule is repealed as proposed.

26.4.513 FINAL GRADING
This rule is repealed as proposed.

26.4.514 CONTOURING
This rule is adopted as proposed.

26.4.515 HIGHWALL REDUCTION
This rule is adopted as proposed.

26.4.516 ADJACENT STRIP AND UNDERGROUND MINING OPERATIONS
This rule is adopted as proposed.

26.4.517 SLIDES AND OTHER DAMAGE
This rule is adopted as proposed.

26.4.518 BUFFER ZONES
This rule is adopted as proposed.

26.4.519 THICK OVERBURDEN AND EXCESS SPOIL
This rule is adopted as proposed.

26.4.520 DISPOSAL OF EXCESS SPOIL
This rule is adopted as proposed.

26.4.521 TEMPORARY CESSATION OF OPERATIONS
Subsection (1) remains the same as the proposed rule.

(2) Before temporary cessation of mining and reclamation operations extends for a period of 30 days or more, or as soon as it is known that a temporary cessation will extend beyond 30 days, an ~~persons who conducts strip or underground mining operations~~ operator shall submit to the department a notice of intention to temporarily cease ~~or abandon~~ mining and reclamation operations. This notice ~~shall~~ must include a statement of the exact number of acres ~~which~~ that will have been affected in the permit area, prior to such temporary cessation; the extent and kind of reclamation of those areas ~~which~~ that will have been accomplished; and identification of the backfilling,

regrading, revegetation, environmental monitoring, and water treatment activities that will continue during the temporary cessation. (AUTH: Sec. 82-4-204, 205 MCA; IMP, Sec. 82-4-231, 232 MCA.)

26.4.522 PERMANENT CESSATION OF OPERATIONS

Subsections (1) through (2) remain the same as the proposed rule.

(3) All backfilling and grading ~~shall~~ must be completed within ~~ninety~~ (90) days after the department has determined that the operation is completed ~~or that a prolonged suspension of work in the area will occur~~. Final pit reclamation ~~shall~~ must proceed as close behind the coal loading operation as the frequency and location of ramp roads, the use of overburden stripping equipment in highwall reclamation, and other factors ~~may~~ allow. Equipment needed for reclamation may not be removed from the ~~site~~ MINE until reclamation is complete. (AUTH: Sec. 82-4-204, 205 MCA; IMP, Sec. 82-4-231 MCA.)

26.4.523 COAL ~~PROCESSING WASTE~~ FIRES

This rule is adopted as proposed.

26.4.524 SIGNS AND MARKERS

This rule is adopted as proposed.

26.4.601 GENERAL REQUIREMENTS FOR ROAD AND RAILROAD LOOP CONSTRUCTION

This rule is adopted as proposed.

26.4.602 LOCATION OF ROADS AND RAILROAD LOOPS

This rule is adopted as proposed.

26.4.603 EMBANKMENTS

This rule is adopted as proposed.

26.4.604 ~~TOP~~SOIL REMOVAL

This rule is adopted as proposed.

26.4.605 HYDROLOGIC IMPACT OF ROADS AND RAILROAD LOOPS

This rule is adopted as proposed.

26.4.606 SURFACING OF ROADS

This rule is adopted as proposed.

26.4.607 MAINTENANCE OF ROADS

This rule is adopted as proposed.

26.4.608 IMPACTS OF OTHER TRANSPORT FACILITIES

This rule is adopted as proposed.

26.4.609 OTHER SUPPORT FACILITIES

This rule is adopted as proposed.

26.4.610 PERMANENT ROADS

This rule is adopted as proposed.

26.4.621 GENERAL REQUIREMENTS FOR USE OF EXPLOSIVES
This rule is adopted as proposed.

26.4.622 ~~PRE-BLASTING~~ PREBLASTING SURVEY
This rule is adopted as proposed.

26.4.623 BLASTING SCHEDULE
This rule is adopted as proposed.

26.4.624 SURFACE BLASTING REQUIREMENTS
This rule is adopted as proposed.

26.4.625 SEISMOGRAPH MEASUREMENTS
This rule is adopted as proposed.

26.4.626 RECORDS OF BLASTING OPERATIONS
This rule is adopted as proposed.

26.4.631 GENERAL HYDROLOGY REQUIREMENTS
This rule is adopted as proposed.

26.4.632 PERMANENT SEALING OF DRILLED HOLES
This rule is adopted as proposed.

26.4.633 WATER QUALITY PERFORMANCE STANDARDS ~~AND EFFLUENT~~
Subsections (1) through (3) remain the same as the proposed rule.

~~(6)~~(4) Wherever ~~the~~ a sedimentation pond or series of sedimentation ponds ~~is used so as to~~ results in the mixing of drainage from the disturbed areas with drainage from other areas not disturbed by current strip or underground mining operations, the permittee shall achieve the following ~~effluent limitations~~ CRITERIA: ~~set forth below for all of the mixed drainage when it leaves the permit area:~~

Subsections (4)(a) through (4)(b) remain the same as the proposed rule.

~~(7)~~(5) In accordance with 40 CFR 434, for certain constituents AS DEFINED IN THE OPERATOR'S MPDES PERMIT, ~~A~~ discharge from the disturbed areas is not subject to the effluent limitations ~~of this rule~~ or BTCA standards of 26.4.638 if:

(a) the discharge is demonstrated by the permittee to have resulted from a precipitation event equal to or larger than a 10-year, 24-hour precipitation event, or snowmelt runoff of equivalent volume; and

(b) the discharge is from ~~facilities~~ BTCA practices designed, constructed, and maintained in accordance with ~~this applicable rule implementing the act.~~ sections (1) through (4) and 26.4.639.

~~(c) In the event that a discharge from the disturbed area is so large that effluent limitations can not be reasonably met using BTCA, the department may use exceedence of~~

~~historical background levels as a basis for determining the need for an enforcement action.~~

Subsection (6) remains the same as the proposed rule.

26.4.634 RECLAMATION OF DRAINAGES

Subsection (1) remains the same as the proposed rule.

(2) At least 120 days prior to reclamation of a SIGNIFICANT drainage AS DETERMINED IN CONSULTATION WITH AND REQUIRING APPROVAL BY THE DEPARTMENT, the operator shall submit to the department detailed designs for the drainage or any modifications from the approved design based on sound geomorphic and engineering principles. These designs must be certified by a qualified registered professional engineer meeting the performance standards and ~~any~~ APPLICABLE design criteria set by the~~SE department~~ RULES. These designs must represent the state-of-the-art in reconstruction of geomorphically stable channels and must be approved by the department before construction begins. The operator shall notify the department when construction begins. The regraded drainage must not be resoiled or seeded until it is inspected and approved by the department.

Subsections (3) through (4) remain the same as the proposed rule.

26.4.635 GENERAL REQUIREMENTS FOR TEMPORARY AND PERMANENT DIVERSION OF OVERLAND FLOW, THROUGH FLOW, SHALLOW GROUND WATER FLOW, AND EPHEMERAL, INTERMITTENT, AND PERENNIAL STREAMS

This rule is adopted as proposed.

26.4.636 SPECIAL REQUIREMENTS FOR TEMPORARY DIVERSIONS

This rule is adopted as proposed.

26.4.637 SPECIAL REQUIREMENTS FOR PERMANENT DIVERSIONS

This rule is adopted as proposed.

26.4.638 SEDIMENT CONTROL MEASURES

(1) Appropriate sediment control measures ~~shall~~ must be designed, constructed, and maintained using the best technology currently available to:

(a) prevent, to the extent possible, additional contributions of sediment to streamflow or to runoff outside the permit area;

(b) meet the more stringent of applicable state or federal effluent limitations; and

(c) minimize erosion to the extent possible.~~; and~~

~~(d) prevent, to the extent possible, the degradation and contamination of soil by spoil or other materials.~~

(2) Sediment control measures include practices carried out within ~~and~~ or adjacent to the disturbed area. The sedimentation storage capacity of practices in and downstream from the disturbed area ~~shall~~ must reflect the degree to which successful mining and reclamation techniques are applied to reduce erosion and control sediment. Sediment control measures consist of the utilization of proper mining and reclamation methods and sediment control practices, singly or in

combination. Sediment control methods include but are not limited to:

(a) disturbing the smallest practicable area at any one time during the mining operation through progressive backfilling, grading, and prompt revegetation as required in ~~Rules~~ 26.4.711 through 26.4.735~~26.4.733~~;

(b) through (d) Remains the same.

(e) diverting runoff by using protected channels or pipes through disturbed areas ~~so as not~~ to ~~cause~~ eliminate additional erosion;

(f) through (g) Remains the same. (AUTH: Sec. 82-4-202, 204, MCA; IMP, Sec. 82-4-231, 232, 233, 234 MCA.)

26.4.639 SEDIMENTATION PONDS AND OTHER TREATMENT FACILITIES

Subsections (1) through (24) remain the same as the proposed rule.

(25) (a) Excavations WHICH ARE PRIMARY SEDIMENT CONTROL STRUCTURES ~~that will impound water~~ during or after the mining operation must have perimeter slopes that are stable and must not be steeper than 3h:1v or lesser slope determined by the department to ensure stability. Where surface runoff enters the impoundment area, the sideslope must be protected against erosion.

(b) Excavations WHICH ARE PRIMARY SEDIMENT CONTROL STRUCTURES must be certified initially by a qualified registered professional engineer. The department shall perform subsequent inspections. If any modifications are necessary, the department shall promptly notify the operator. (AUTH: Sec. 82-4-204 MCA; IMP, Sec. 82-4-231 MCA.)

26.4.640 DISCHARGE STRUCTURES

This rule is adopted as proposed.

26.4.641 ACID- AND TOXIC-FORMING SPOILS

This rule is adopted as proposed.

26.4.642 PERMANENT AND TEMPORARY IMPOUNDMENTS

This rule is adopted as proposed.

26.4.643 GROUNDWATER PROTECTION

This rule is adopted as proposed.

26.4.644 PROTECTION OF GROUNDWATER RECHARGE

This rule is adopted as proposed.

26.4.645 GROUNDWATER MONITORING

(1) Groundwater levels, infiltration rates, subsurface flow and storage characteristics, and the quality of groundwater ~~shall~~ must be monitored BASED ON INFORMATION GATHERED PURSUANT TO 26.4.304 AND in a manner approved by the department to determine the effects of strip or underground mining operations on the recharge capacity of reclaimed lands and on the quantity and quality of water in groundwater systems in the mine plan and adjacent areas. When operations ~~are conducted in~~

~~such a manner that~~ may affect the groundwater system, groundwater levels and groundwater quality ~~shall~~ must be periodically monitored using wells that can adequately reflect changes in groundwater quantity and quality resulting from such operations.

(2) Monitoring ~~shall~~ must:

(a) include ~~measurements from a sufficient number of wells and physical and chemical analyses of aquifer, overburden, and spoil characteristics and~~ the measurement of the quantity and quality of water in all disturbed or potentially affected geologic strata within and adjacent to the permit area. Affected strata are all those adjacent to or physically disturbed by mining disturbance and any aquifers below the base of the spoils that could receive water from or discharge water to the spoils. ~~Aquifers that must be monitored include those where water level data indicate the potential for interaquifer comingling of groundwater between the aquifers and the spoil through the geologic units, unplugged drillholes, or fractures that connect the spoils with the underlying aquifers.~~ Monitoring must be of sufficient frequency and extent to adequately identify ~~, land, the strata beneath the lowest coal seam to be mined if water level data indicate a potential for the leakage of water through these strata) that are adequate to reflect~~ changes in groundwater quantity and quality resulting from ~~those activities.~~ mining operations; and ~~Monitoring shall~~

Subsections (2)(b) through (4) remain the same as the proposed rule.

(5) Groundwater monitoring must proceed through mining and continue until PHASE IV bond release. The department may allow modification of the monitoring requirements, except those required by the Montana pollutant discharge elimination system permit, including the parameters covered and sampling frequency, if the operator or the department demonstrates, using the monitoring data obtained under this paragraph, that:

Subsections (5)(a) through (8) remain the same as the proposed rule.

26.4.646 SURFACE WATER MONITORING

(1) Surface water monitoring ~~shall~~ must be conducted in accordance with the monitoring program submitted under ~~Rule~~ 26.4.314 and approved by the department. ~~The department shall determine the nature of data, frequency of collection, and reporting requirements.~~ Monitoring ~~shall~~ must:

(a) Remains the same.

(b) in all cases in which analytical results of the sample collections indicate noncompliance with a permit condition or ~~when~~ an applicable standard ~~has occurred~~, result in the ~~person who conducts the strip or underground mining operations~~ operator IMMEDIATELY TAKING APPROPRIATE REMEDIAL MEASURES. WITHIN 5 DAYS OF THE DISCOVERY OF THE NONCOMPLIANCE, THE OPERATOR SHALL notify~~ing~~ the department ~~within 5 days~~ of the noncompliance and of the remedial measures taken and SHALL comply~~ing~~ with section (6) below. These remedial measures include, but are not limited to, accelerated or additional monitoring, abatement, and warning of all persons whose health

and safety is in imminent danger. ~~Where~~ Whenever a violation of a Montana pollutant discharge elimination system (MPDES) permit ~~effluent limitation noncompliance has occurred~~ occurs, the ~~person who conducts strip or underground mining operations~~ operator shall forward the analytic results concurrently with the written notice of noncompliance;

~~(c)~~ (2) ~~result in quarterly~~ The operator shall submit semi-annual reports ~~to the department, to include~~ including analytical results from each sample taken during the ~~quarter~~ semester to the department. IN ADDITION, ALL MONITORING DATA MUST BE MAINTAINED ON A CURRENT BASIS FOR REVIEW AT THE MINESITE. Any sample results ~~which~~ that indicate a permit violation ~~will~~ must be reported immediately to the department. ~~In those cases where~~ However, whenever the discharge for which water monitoring reports are required is also subject to regulation by a MPDES permit and ~~where such~~ that permit ~~includes provisions for equivalent reporting requirements and~~ requires filing of the water monitoring reports within 90 days or less of sample collection, ~~the following alternative procedure shall be used. The person who conducts the strip or underground mining operations~~ the operator shall submit to the department on the ~~same~~ time schedule ~~as~~ required by the MPDES permit or within 90 days following sample collection, whichever is earlier, a copy of the completed reporting form filed to meet MPDES permit requirements.

Subsections (3) through (6) remain the same as the proposed rule.

26.4.647 TRANSFER OF WELLS

This rule is adopted as proposed.

26.4.648 WATER RIGHTS AND REPLACEMENT

This rule is adopted as proposed.

26.4.649 DISCHARGE OF WATER INTO UNDERGROUND MINES

This rule is adopted as proposed.

26.4.650 POSTMINING REHABILITATION OF SEDIMENTATION PONDS, DIVERSIONS, IMPOUNDMENTS, AND TREATMENT FACILITIES

This rule is adopted as proposed.

26.4.651 STREAM CHANNEL DISTURBANCES AND BUFFER ZONES

Subsections (1) through (2) remain the same as the proposed rule.

(3) A stream with a biological community ~~shall be~~ is determined by the existence in the stream ~~at any time~~ of an assemblage of two or more species of fish, amphibians, arthropods or ~~molluscan~~ MOLLUSCANS ~~animals which~~ that are:

(a) through (c) Remains the same.

(d) These species must be longer than 2 millimeters at some stage ~~of the part~~ of their life cycle spent in the flowing water habitat. (AUTH: Sec. 82-4-204 MCA; IMP, Sec. 82-4-231, 232 MCA.)

26.4.652 WELLS AND UNDERGROUND OPENINGS: SAFETY
This rule is adopted as proposed.

26.4.701 REMOVAL OF ~~TOP~~SOIL
(1) ~~All trees and large shrubs that would interfere with the use of topsoil must be cleared before topsoil removal. All available topsoil shall be removed from the area of land affected before further disturbance occurs. The operator shall segregate surface soil material (A and possibly portions of underlying B and C horizons) from subsurface soil material (B and C horizons) in the salvage, stockpiling and redistribution of topsoil. Using the soil survey information required in Sub-Chapter 3, the operator shall recommend to the department the depths to which it feels each of the two soil lifts for each soil phase and mapping unit should be conducted. The operator shall then proceed in accordance with the department's recommendation, if the operator demonstrates to the satisfaction of the department that such segregation with regard to a specific soil phase or mapping unit is immaterial to the postmining productivity and stability of such soil, segregation shall not be required.~~
Prior to any surface disturbance by the mining operation, and after the removal of vegetation that would interfere with soil removal and use, all soil suitable for reclamation use must be removed. Exceptions may be granted if the operator demonstrates to the satisfaction of the department that a site-specific disturbance would be insignificant and that soil loss, degradation, AND contamination~~, or impairment of quality~~ would ~~not occur~~ BE MINIMIZED.
(2) ~~Topsoil removal shall precede each step of the mining operation. Topsoil~~ The operator shall use a multiple-lift soil handling method consisting of the separate handling of surface soil (A, E, and possibly upper B or C horizons) and subsurface soil (underlying B and C horizons) during salvage, stockpiling, and redistribution, unless, for any particular soil component, the operator affirmatively demonstrates, and the department finds, that multiple lifts are not necessary to achieve reclamation consistent with the Act, rules and reclamation plan.
(3) The operator shall limit the area from which soil is removed at any one time to minimize wind and water erosion. The operator shall take other measures, as necessary and with departmental approval, to control erosion.
(4) Undisturbed soils must be protected TO THE EXTENT POSSIBLE from contamination and degradation and soil salvage operations ~~will~~ must be conducted in a manner and at a time that minimizes erosion, contamination, degradation, compaction, and deterioration of the biological~~, chemical, and physical~~ properties of the ~~top~~soil. (AUTH: Sec. 82-4-204 MCA; IMP, 82-4-232 MCA.)

26.4.702 REDISTRIBUTION AND STOCKPILING OF ~~TOP~~SOIL
Subsections (1) through (3) remain the same as the proposed rule.

(4) ~~In final grading, spoil surfaces~~ Prior to soil redistribution, regraded areas ~~shall~~ must be deep-tilled, subsoiled, ~~scarified~~ or otherwise treated as required by the department to eliminate ANY POSSIBLE slippage ~~zones that may develop between deposited topsoil and heavy textured spoil surfaces~~ potential at the soil/spoil interface, to relieve compaction, and to promote root ~~and water~~ penetration and permeability of spoils. This preparation must be done on the contour whenever possible and to a minimum depth of 12 inches. ~~The operator shall take all measures necessary to assure the stability of topsoil on graded spoil slopes.~~

(5) ~~Extreme~~ The operator shall, ~~care shall be exercised~~ during and after redistribution, prevent, to the extent possible, ~~to guard against~~ spoil and soil compaction, protect against soil erosion, contamination, and degradation, and minimize the deterioration of the biological, ~~chemical, and physical~~ properties of the soil. ~~during redistribution and thereafter.~~

Subsections (6) through (7) remain the same as the proposed rule.

26.4.703 SUBSTITUTION OF OTHER MATERIALS FOR ~~TO~~PSOIL

This rule is adopted as proposed.

26.4.711 ESTABLISHMENT OF VEGETATION

(1) A diverse, effective, and permanent vegetative cover of the same seasonal variety and utility as the vegetation native to the area of land to be affected must be established. This vegetative cover must also be ~~and~~ capable of meeting the criteria set forth in 82-4-233 ~~shall~~ and must be established on all areas of land affected except on ~~water areas and surface area of~~ roads surfaces and below the low-water line of permanent impoundments that are approved as a part of the postmining land use. Vegetative cover ~~will be~~ is considered of the same seasonal variety ~~when~~if it consists of a mixture of species of equal or superior utility when compared with the natural vegetation during each season of the year. Reestablished vegetation must meet the requirements of applicable state and federal ~~seed, poisonous and~~ noxious plant, ~~and introduced species~~ laws and regulations. For areas designated prime farmland that are to be revegetated to a vegetative cover as previously described in this rule, the requirements of ~~Rules~~ 26.4.811 ~~through~~ and 26.4.815 ~~shall~~ must also be met. (AUTH: Sec. 82-4-204 MCA; IMP, 82-4-233, 235 MCA.)

26.4.712 USE OF INTRODUCED SPECIES IN REVEGETATION

This rule is repealed as proposed.

26.4.713 TIMING OF SEEDING AND PLANTING

(1) Seeding and planting of disturbed areas ~~shall~~ must be conducted during the first ~~normal~~ appropriate period for favorable planting after final seedbed preparation but ~~shall~~ may not ~~in no case~~ be more than 90 days after ~~top~~soil has been replaced, unless a variance is approved by the department. The ~~normal~~ appropriate period for favorable planting ~~shall be~~ is

that planting time generally accepted locally for the type of plant materials selected to meet specific site conditions and climate. (AUTH: Sec. 82-4-204 MCA; IMP, 82-4-233, 234, 235 MCA.)

26.4.714 COVER CROPS AND MULCHING
This rule is adopted as proposed.

26.4.715 SELECTION OF SPECIES FOR WILDLIFE
This rule is repealed as proposed.

26.4.716 METHOD OF REVEGETATION
This rule is adopted as proposed.

26.4.717 PLANTING OF TREES
This rule is adopted as proposed.

26.4.718 SOIL AMENDMENTS AND OTHER MANAGEMENT TECHNIQUES
This rule is adopted as proposed.

26.4.719 LIVESTOCK GRAZING
(1) Livestock grazing may not take place on reclaimed land until the seedlings are established sufficiently for the reclaimed area to ~~and can~~ sustain managed grazing. The department, in consultation with the permittee and the landowner or in concurrence with the governmental agency having jurisdiction over the surface, shall determine when the revegetated area is ready for livestock grazing in compliance with 26.4.323 ~~and 26.4.724~~. (AUTH: Sec. 82-4-204 MCA; IMP, 82-4-233, 235 MCA.)

26.4.720 ANNUAL INSPECTIONS FOR REVEGETATED AREAS
This rule is adopted as proposed.

26.4.721 ERADICATION OF RILLS AND GULLIES
(1) When rills or gullies deeper than 9 inches form in areas that have been regraded and ~~to~~resoiled, the rills and gullies ~~shall~~ must be filled, graded, or otherwise stabilized and the area reseeded or replanted. The department shall specify that rills or gullies of lesser size be stabilized and the area reseeded or replanted if the rills or gullies are disruptive to the approved postmining land use or may result in additional erosion and sedimentation. The department shall also specify time frames for completion of repair work. ~~and shall determine if the~~ rRepair work will result in restarting the period of responsibility for reestablishing vegetation, UNLESS IT CAN BE DEMONSTRATED THAT SUCH WORK IS A NORMAL CONSERVATION PRACTICE. (AUTH: Sec. 82-4-204 MCA; IMP, 82-4-233, 235 MCA.)

26.4.722 PROTECTION OF TOPSOIL STOCKPILES
This rule is repealed as proposed.

26.4.723 MONITORING
This rule is adopted as proposed.

26.4.724 through 26.4.735 The department has elected not to adopt changes to these rules. Due to the extent of comments on these rules, the department has elected to retain all existing language. However, the department will begin a separate rule-writing effort to readdress these rules in coordination with industry and other interested parties. References to these rules have been corrected throughout the proposed and final rules.

26.4.751 PROTECTION AND ENHANCEMENT OF FISH, WILDLIFE, AND RELATED ENVIRONMENTAL VALUES

Subsections (1) through (2)(b) remain the same as the proposed rule.

(2)(~~4~~c) fence roadways where specified by the department to guide locally important wildlife to roadway underpasses. No ~~N~~new barrier ~~shall to wildlife movements~~ may be created in known and important wildlife migration routes unless otherwise approved by the department;

Subsections (2)(d) through (2)(i) remain the same as the proposed rule.

26.4.761 AIR RESOURCES PROTECTION

This rule is adopted as proposed.

26.4.762 POSTMINING LAND USE

This rule is adopted as proposed.

26.4.763 COAL CONSERVATION

This rule is adopted as proposed.

26.4.801 ALLUVIAL VALLEY FLOORS: PRESERVATION OF ESSENTIAL HYDROLOGIC FUNCTIONS AND PROTECTION OF FARMING

This rule is adopted as proposed.

26.4.802 ALLUVIAL VALLEY FLOOR: PROTECTION OF FARMING AND PREVENTION OF MATERIAL DAMAGE

This rule is adopted as proposed.

26.4.803 ALLUVIAL VALLEY FLOORS: RESTORATION OF AGRICULTURAL CAPABILITIES

This rule is repealed as proposed.

26.4.804 ALLUVIAL VALLEY FLOORS: MONITORING

This rule is adopted as proposed.

26.4.805 ALLUVIAL VALLEY FLOORS: SIGNIFICANCE DETERMINATION

(1) The significance of the impact of the proposed operations on farming ~~shall be~~ is based on the relative importance of the vegetation and water of the grazed or hayed alluvial valley floor area to the farm's production, or any more stringent criteria established by the department as suitable for site-specific protection of agricultural activities in alluvial valley floors. The effect of the proposed operations on farming ~~shall be concluded to be~~ is "significant" if ~~they~~ the operations would remove from production, over the life of the mine, MORE THAN A NEGLIGIBLE IMPACT ON ~~a proportion of~~ the farm's AGRICULTURAL production that

would decrease the expected annual PRODUCTION ~~income~~ from agricultural activities normally conducted at the farm. (AUTH: Sec. 82-4-204, 205 MCA; IMP, Sec. 82-4-227, 231 MCA.)

26.4.806 ALLUVIAL VALLEY FLOORS: MATERIAL DAMAGE DETERMINATION

This rule is adopted as proposed.

26.4.807 ALLUVIAL VALLEY FLOORS: DEFINITION OF "FARM"

This rule is repealed as proposed.

26.4.811 PRIME FARMLAND: ~~GENERAL REQUIREMENTS~~ SOIL HANDLING

This rule is adopted as proposed.

26.4.812 PRIME FARMLANDS: TOPSOIL REMOVAL

This rule is repealed as proposed.

26.4.813 PRIME FARMLANDS: TOPSOIL STOCKPILING

This rule is repealed as proposed.

26.4.814 PRIME FARMLANDS: TOPSOIL REPLACEMENT

This rule is repealed as proposed.

26.4.815 PRIME FARMLANDS: REVEGETATION

(1) Each ~~person~~ operator who conducts strip or underground mining operations on prime farmlands shall, within the area identified as prime farmland before disturbance:

(a) randomly establish test plots ~~which~~ that will be cropped until restoration of the premining productivity has met the requirements of this rule. The remainder of the area not used for test plots ~~shall~~ must be ~~reclaimed~~ revegetated consistent with the standards of ~~Rules~~ 26.4.711 through 26.4.7335. When restoration of the premining productivity has been demonstrated, the operator shall revegetate the test plots consistent with the standards of ~~Rule~~ 26.4.711, through 26.4.735; or ~~The operator may apply to reclaim the area as cropland subject to the requirements of Rule 26.4.825. The test plots or the reclaimed area if reclaimed in accordance with Rule 26.4.825 shall meet the following revegetation requirements during reclamation:~~

(b) crop the entire area of disturbed prime farmland until restoration of the premining productivity is demonstrated. The operator shall then:

(i) revegetate the entire area consistently with 26.4.711 through 26.4.7335; or

(ii) permanently reclaim the area to cropland if application is made and approval is granted under the provisions of 26.4.821 through 26.4.825.

Subsections (2)(a) through (2)(e) remain the same as the proposed rule.

~~(a)~~ (f) ~~average annual c~~Crop production on disturbed prime farmland ~~disturbed by mining shall~~ must be determined based upon a minimum of ~~5~~ 3 consecutive crop years of data;

(i) for permanent cropland, these 3 years of data must include the last year of a minimum 10-year period of responsibility preceding the application for phase ~~II~~ bond release;

Subsections (f)(ii) through (h) remain the same as the proposed rule.

26.4.816 PRIME FARMLANDS: ISSUANCE OF PERMIT

This rule is repealed as proposed.

26.4.821 ALTERNATE RECLAMATION: SUBMISSION OF PLAN

This rule is adopted as proposed.

26.4.822 ALTERNATE RECLAMATION: PUBLIC NOTICE OF PLAN

This rule is repealed as proposed.

26.4.823 ALTERNATE RECLAMATION: APPROVAL OF PLAN AND REVIEW OF OPERATION

This rule is adopted as proposed.

26.4.824 ALTERNATE RECLAMATION: ALTERNATE POSTMINING LAND USES

This rule is adopted as proposed.

26.4.825 ALTERNATE RECLAMATION: ALTERNATE REVEGETATION

Subsections (1) through (4) remain the same as the proposed rule.

~~(3)~~ (5) If the department determines that the operator's ~~alternative~~ alternate revegetation ~~operation~~ has not produced, under viable agricultural practices, adequate crop or forage ~~production~~ yields based on the production standards required in ~~paragraph (1)(d)~~ section (3) and subsection ~~(5)(b)~~ (4)(c) of this rule, or if the use of land for the production of crops or forage is causing accelerated or unacceptable levels of soil erosion or other deleterious effects as determined by the department, the operator shall reclaim the land to the standards provided for in ~~section~~ 82-4-233~~(1)~~.

~~(4)~~ (6) Where cropland, special use pasture, or hayland is proposed to be the alternate postmining land use ~~on lands diverted from a fish and wildlife premining land use~~, ~~and~~ the following is required:

(a) Wwhere ~~Whenever~~ appropriate for wildlife, IN ACCORDANCE WITH 26.4.312 AND 26.4.751, and crop management practices, the fields ~~shall~~ must be interspersed with trees, hedges, or fence rows ~~throughout the harvested area~~ to break up large blocks of monoculture and to diversify habitat types for birds and other animals.

(b) Wetlands ~~shall~~ must be preserved, restored, or created consistent with 26.4.751 rather than drained or otherwise permanently abolished.

~~(5) Where the primary land use is to be residential, public service, or industrial land use, primary use lands shall be interspersed with greenbelts trees useful as food and cover for birds and small animals, unless such greenbelts are inconsistent with the approved postmining land use.~~ (AUTH: Sec. 82-4-204, 205 MCA; IMP, Sec. 82-4-232 MCA.)

26.4.831 AUGER MINING: GENERAL REQUIREMENTS
This rule is adopted as proposed.

26.4.832 AUGER MINING: SPECIFIC PERFORMANCE STANDARDS
This rule is adopted as proposed.

26.4.833 AUGER MINING: REQUIREMENTS FOR PERMIT
This rule is adopted as proposed.

26.4.834 REMINING: APPLICABILITY
(1) This rule and rules 26.4.835, 26.4.836, and 26.4.837 apply only to operations which process coal mine waste materials resulting from "previously mined areas" as that term is defined in 26.4.301. (AUTH: Sec. 82-4-204, 205 MCA; AUTH Extension, Sec. 4, Ch. 70, L. 1987, Eff. 10/1/87; IMP, Sec. 82-4-203 MCA.)

26.4.835 REMINING: APPLICABILITY AND OPERATING REQUIREMENTS
This rule is adopted as proposed.

26.4.836 REMINING: ELIGIBILITY FOR ABANDONED MINE LAND STATUS
This rule is adopted as proposed.

26.4.837 REMINING: BONDING
This rule is adopted as proposed.

26.4.901 GENERAL APPLICATION AND REVIEW REQUIREMENTS
This rule is adopted as proposed.

26.4.902 APPLICATION REQUIREMENTS FOR ~~IN-SITU~~ IN SITU COAL PROCESSING OPERATIONS
This rule is adopted as proposed.

26.4.903 GENERAL PERFORMANCE STANDARDS
This rule is adopted as proposed.

26.4.904 IN SITU COAL PROCESSING OPERATION PERFORMANCE STANDARDS
This rule is adopted as proposed.

26.4.907 IN SITU URANIUM PROCESSING OPERATION PERFORMANCE STANDARDS
This rule is adopted as proposed.

26.4.911 SUBSIDENCE CONTROL
This rule is adopted as proposed.

26.4.912 BUFFER ZONES
This rule is adopted as proposed.

26.4.1001 APPLICATION REQUIREMENTS
This rule is adopted as proposed.

26.4.1002 INFORMATION AND MONTHLY REPORTS
This rule is adopted as proposed.

26.4.1003 RENEWAL OF PERMITS
This rule is adopted as proposed.

26.4.1004 ENVIRONMENTAL MONITORING
This rule is adopted as proposed.

26.4.1005 DRILL HOLES
This rule is adopted as proposed.

26.4.1006 ROADS
This rule is adopted as proposed.

26.4.1007 ~~TOP~~SOIL~~ING~~ SALVAGE, STORAGE AND REDISTRIBUTION
This rule is adopted as proposed.

26.4.1008 REVEGETATION
This rule is adopted as proposed.

26.4.1009 DIVERSIONS
This rule is adopted as proposed.

26.4.1010 REMOVAL OF EQUIPMENT
This rule is adopted as proposed.

26.4.1011 HYDROLOGIC BALANCE
This rule is adopted as proposed.

26.4.1012 TOXIC- OR ACID-FORMING MATERIALS
This rule is adopted as proposed.

26.4.1013 DRILLING
This rule is adopted as proposed.

26.4.1014 TEST PITS: APPLICATION REQUIREMENTS, REVIEW PROCEDURES, BONDING, AND ADDITIONAL PERFORMANCE STANDARDS
This rule is adopted as proposed.

26.4.1015 TEST PITS: PUBLIC NOTICE OPPORTUNITY TO COMMENT, AND DECISION
This rule is repealed as proposed.

26.4.1016 BOND REQUIREMENTS FOR DRILLING OPERATIONS
This rule is adopted as proposed.

26.4.1017 BOND RELEASE PROCEDURES FOR DRILLING OPERATIONS
This rule is adopted as proposed. (AUTH: Sec. 82-4-204, 205 MCA; AUTH Extension, Sec. 2, Chap. 288, L. 1985, Eff. 10/1/85; IMP, Sec. 82-4-226, 232, 235, MCA.)

26.4.1101 BONDING: DEFINITIONS
This rule is adopted as proposed.

26.4.1102 BONDING: DETERMINATION OF BOND AMOUNT
This rule is adopted as proposed.

26.4.1103 BONDING: PERIOD OF ~~LIABILITY~~ RESPONSIBILITY FOR ALTERNATE REVEGETATION

This rule is adopted as proposed.

26.4.1104 BONDING: ADJUSTMENT OF AMOUNT OF BOND

This rule is adopted as proposed. (AUTH: Sec. 82-4-204, 20' MCA; AUTH Extension, Sec. 2, Chap. 288, L. 1985, Eff. 10/1/85; IM Sec. 82-4-223, 232, 235 MCA.)

26.4.1105 BONDING: FORM OF BOND

This rule is adopted as proposed.

26.4.1106 BONDING: TERMS AND CONDITIONS OF BOND

This rule is adopted as proposed.

26.4.1107 BONDING: INCAPACITY OF SURETY

This rule is adopted as proposed.

26.4.1108 BONDING: CERTIFICATES OF DEPOSIT

This rule is adopted as proposed.

26.4.1109 BONDING: LETTERS OF CREDIT

This rule is adopted as proposed.

26.4.1110 BONDING: REPLACEMENT OF BOND

This rule is adopted as proposed.

26.4.1111 BONDING: BOND RELEASE APPLICATION CONTENTS

This rule is adopted as proposed. (AUTH: Sec. 82-4-204, 20' MCA; AUTH Extension, Sec. 2, Chap. 288, L. 1985, Eff. 10/1/85; IM Sec. 82-4-223, 232, 235 MCA.)

26.4.1112 BONDING: ADVERTISEMENT OF RELEASE APPLICATIONS A RECEIPT OF OBJECTIONS

This rule is adopted as proposed. (AUTH: Sec. 82-4-204, 20' MCA; AUTH Extension, Sec. 2, Chap. 288, L. 1985, Eff. 10/1/85; IM Sec. 82-4-223, 232, 235 MCA.)

26.4.1113 BONDING: INSPECTION OF SITE AND PUBLIC HEARING OR INFORMAL CONFERENCE

This rule is adopted as proposed. (AUTH: Sec. 82-4-204, 20' MCA; AUTH Extension, Sec. 2, Chap. 288, L. 1985, Eff. 10/1/85; IM Sec. 82-4-223, 232, 235 MCA.)

26.4.1114 BONDING: DEPARTMENTAL REVIEW AND DECISION ON BOND RELEASE APPLICATION

This rule is adopted as proposed. (AUTH: Sec. 82-4-204, 20' MCA; AUTH Extension, Sec. 2, Chap. 288, L. 1985, Eff. 10/1/85; IM Sec. 82-4-223, 232, 235 MCA.)

26.4.1115 BONDING: ~~PUBLIC~~ HEARING ON BOND RELEASE DECISION

This rule is adopted as proposed. (AUTH: Sec. 82-4-204, 20' MCA; AUTH Extension, Sec. 2, Chap. 288, L. 1985, Eff. 10/1/85; IM Sec. 82-4-223, 232, 235 MCA.)

26.4.1116 BONDING: CRITERIA AND SCHEDULE FOR RELEASE OF BOND

Subsections (1) through (7)(b)(iii) remain the same as the proposed rule.

(iv) ~~the provisions of a plan approved by the department for the sound future management of any permanent impoundment by the permittee or landowner have been implemented to the satisfaction of the department; and~~ noxious weeds are controlled; AND

~~(v) the reestablishment of essential hydrologic functions and agricultural productivity on alluvial valley floors has been achieved;~~

~~(vi)~~ (v) with respect to prime farmlands, production has been returned to the level required by 26.4.815.

(c) ~~r~~Reclamation phase III ~~shall be~~ is deemed to have been completed when: ~~the permittee has successfully completed all strip or underground mining operations in accordance with the approved reclamation plan, including the implementation of any alternative land use plan approved pursuant to Rules 26.4.821 through 26.4.825 and achieved compliance with the requirements of the act, the rules adopted pursuant thereto, the permit, and the applicable liability period under the act and rules adopted pursuant thereto.~~

(i) the applicable responsibility period (which commences with the completion of any reclamation treatments as defined in 26.4.725) has expired and the revegetation criteria in 26.4.711, 26.4.719, 26.4.724, 26.4.726 through 26.4.73~~3~~5, 26.4.815 and 26.4.825 are met;

(ii) a stable landscape has been established;

(iii) the lands are not contributing suspended solids to stream flow or runoff outside the permit area in excess of the requirements of the Act, 26.4.633, or the permit; ~~and~~

(iv) the provisions of a plan approved by the department for the sound future management of any permanent impoundment by the permittee or landowner have been implemented to the satisfaction of the department, AND

(d) Reclamation phase IV is deemed to have been completed when:

(i) all lands within a DISCRETE drainage basin have been reclaimed in accordance with the phase I, II, and III requirements;

(ii) fish and wildlife ~~and their~~ habitats and related environmental values have been restored, reclaimed, or protected in accordance with the Act, the rules, and the approved permit;

(iii) with respect to the hydrologic balance, disturbance has been minimized and OFFSITE material damage has been prevented in accordance with the Act, the rules, and the approved permit;

(iv) alternative water sources to replace water supplies that have been adversely affected by mining and reclamation operations have been developed and are functional in accordance with the Act, the rules, and the approved permit;

(v) the reestablishment of essential hydrologic functions and agricultural productivity on alluvial valley floors has been achieved; and

(vi) implementation of any alternate land use plan approved pursuant to 26.4.821-26.4.825 has been successfully achieved; and

(vii) all other reclamation requirements of the Act, rules, and the permit have been met. (AUTH: Sec. 82-4-204, 205 MCA; AU Extension, Sec. 2, Chap. 288, L. 1985, Eff. 10/1/85; IMP, Sec. 82-4-223, 232, 235 MCA.)

26.4.1117 BONDING: PROCEDURE FOR FORFEITURE
This rule is adopted as proposed.

26.4.1118 BONDING: EFFECT OF FORFEITURE
This rule is adopted as proposed.

26.4.1119 BONDING: CRITERIA FOR FORFEITURE
This rule is adopted as proposed.

26.4.1121 BONDING: ~~EXEMPTION FOR~~ STATE AGENCIES AND POLITICAL SUBDIVISIONS
This rule is adopted as proposed.

26.4.1122 NOTICE OF ACTION ON COLLATERAL BOND
This rule is adopted as proposed.

26.4.1125 LIABILITY INSURANCE
This rule is adopted as proposed.

26.4.1129 ANNUAL REPORT
Subsections (1) through (2)(f) remain the same as the propos rule.

(2)(g) an inspection map depicting all approved surface features, AS REQUIRED BY THE DEPARTMENT, in or associated with th permit area, reproduced at a scale applicable for field use;

Subsection (2)(h) through (3) remain the same as the propose rule.

26.4.1131 PROTECTION OF PARKS AND HISTORIC SITES
This rule is adopted as proposed.

26.4.1132 AREAS UPON WHICH COAL MINING IS PROHIBITED: DEFINITIONS AND STANDARD FOR MEASUREMENT OF DISTANCES
This rule is adopted as proposed.

26.4.1133 AREAS UPON WHICH COAL MINING IS PROHIBITED: PROCEDURES FOR DETERMINATION
This rule is adopted as proposed.

26.4.1134 AREAS UPON WHICH COAL MINING IS PROHIBITED: PERMISSION TO MINE NEAR PUBLIC ROAD
This rule is adopted as proposed.

26.4.1135 AREAS UPON WHICH COAL MINING IS PROHIBITED: RELOCATION OR CLOSURE OF PUBLIC ROAD
This rule is adopted as proposed.

26.4.1136 AREAS UPON WHICH COAL MINING IS PROHIBITED: WAIVE TO MINE NEAR DWELLING
This rule is adopted as proposed.

26.4.1137 AREAS UPON WHICH COAL MINING IS PROHIBITED: CONSULTATION WITH OTHER AGENCIES
This rule is adopted as proposed.

26.4.1141 DESIGNATION OF LANDS UNSUITABLE: DEFINITIONS
This rule is adopted as proposed.

26.4.1142 DESIGNATION OF LANDS UNSUITABLE: ~~EXCEPTIONS~~ EXEMPTIONS
This rule is adopted as proposed.

26.4.1143 DESIGNATION OF LANDS UNSUITABLE: ~~EXPLORATION~~ PROSPECTING ON DESIGNATED LANDS
This rule is adopted as proposed.

26.4.1144 DESIGNATION OF LANDS UNSUITABLE: PETITION FOR DESIGNATION OR TERMINATION OF DESIGNATION
This rule is adopted as proposed.

26.4.1145 DESIGNATION OF LANDS UNSUITABLE: NOTICE AND ACTION ON PETITION
This rule is adopted as proposed.

26.4.1146 DESIGNATION OF LANDS UNSUITABLE: HEARINGS ON PETITION
This rule is adopted as proposed.

26.4.1147 DESIGNATION OF LANDS UNSUITABLE: DECISION ON PETITION
This rule is adopted as proposed.

26.4.1148 DESIGNATION OF LANDS UNSUITABLE: DATA BASE AND INVENTORY SYSTEM
This rule is adopted as proposed.

26.4.1201 FREQUENCY OF INSPECTIONS
This rule is adopted as proposed.

26.4.1202 METHOD OF INSPECTIONS
(1) Inspections ~~shall~~ must occur without prior notice to the permittee, except for necessary on-site meetings, be conducted on an irregular basis, and be scheduled to detect violations on nights, weekends, and holidays. Inspectors shall collect evidence of violations and promptly file with the department inspection reports adequate to determine whether violations exist.

~~(2) All regrading must be approved by the department for compliance with the approved postmining topography plan before ripping or other tillage of this regraded surface and soil replacement activities can begin on affected areas.~~

~~(a) The operator shall provide the department with as-built contour maps, cross sections, drainage profiles, and other materials as appropriate of the regraded areas and shall notify the department when such areas are deemed ready by the operator for regraded surface tillage and soil replacement.~~

~~(b) The department shall review the written information required in subsection (a) above and shall perform an inspection the affected regraded area within 30 days of notification by the operator.~~

~~(3)~~ (2) In addition to the requirements of 26.4.1201, the department shall inspect revegetation as required by 26.4.720. (AUTH: Sec. 82-4-205 MCA; IMP, Sec. 82-4-235, 237, 251 MCA.)

26.4.1203 AVAILABILITY OF INSPECTION REPORTS
This rule is adopted as proposed.

26.4.1204 INSPECTIONS IN RESPONSE TO CITIZEN COMPLAINTS
This rule is adopted as proposed.

26.4.1205 INSPECTIONS IN RESPONSE TO NOTIFICATION BY THE ~~OFFICE OF SURFACE MINING~~ FEDERAL COAL REGULATORY AUTHORITY
This rule is adopted as proposed.

26.4.1206 NOTICES, ORDERS OF ABATEMENT AND CESSATION ORDERS: ISSUANCE AND SERVICE
Subsections (1) through (5)(c) remain the same as the propos rule.

(d) Whenever any of the conditions in subsection (5)(b) above exist, the permittee may request extension of the abatement period beyond 90 days. The department may not grant an extension for more time than is necessary for abatement. The permittee has the burden of establishing by clear and convincing proof that he entitled to an extension. In determining whether or not to grant an abatement period exceeding 90 days, the department may conside any relevant written or oral information from the permittee or an other source. The department shall promptly and fully document i the file its reasons for granting or denying the request. The department's decision on an application for extension beyond 90 days is subject to hearing if a hearing is requested by a person with an interest that is or may be adversely affected; SUCH A REQUEST MUST BE SUBMITTED in writing within 30 days of notice of the department's decision on the application. The hearing must b a contested case hearing.

(e) An extension granted under this paragraph must not exceed 90 days in length. Where the condition or circumstance which prevented abatement within 90 days exists at the expiration of any such extension, the permittee may request a further extension.

~~(6) Each notice of violation and statement of proposed penalty must include a review for pattern of violations.~~ (AUTH: Sec. 82-4-204, 205 MCA; IMP, Sec. 82-4-251 MCA.)

26.4.1207 NOTICES OF NONCOMPLIANCE AND CESSATION ORDERS: INFORMAL HEARINGS
This rule is adopted as proposed.

26.4.1208 NOTICES OF NONCOMPLIANCE AND CESSATION ORDERS: EFFECT OF INABILITY TO COMPLY
This rule is adopted as proposed.

26.4.1209 NOTICES OF NONCOMPLIANCE AND CESSATION ORDERS: CONTINUATION OF HEALTH AND SAFETY RELATED ACTIVITIES

This rule is adopted as proposed.

26.4.1210 CESSATION ORDERS: ADDITIONAL AFFIRMATIVE OBLIGATIONS

This rule is adopted as proposed.

26.4.1212 POINT SYSTEM FOR CIVIL PENALTIES AND WAIVERS:

Susections (1) through (3) remain the same as the proposed rule.

(4) If an administrative order issued after hearing increases the amount of penalty due, the person to whom the order is issued shall pay the difference within 15 days of receipt of the order. IF THE ADMINISTRATIVE ORDER DECREASES OR ELIMINATES THE PENALTY DUE, THE DEPARTMENT SHALL REFUND WITHIN 30 DAYS.

Subsection (5) remains the same as the proposed rule.

26.4.1213 SUSPENSION AND REVOCATION OF PERMITS: DETERMINATION OF PATTERN OF VIOLATIONS

(1) In implementing section 82-4-251(3), the department:

~~(1)~~ (a) may determine that a pattern of violations exists or has existed, based on two or more inspections of the permit area within any 12-month period, after considering the circumstances, which circumstances shall include:

~~(a)~~ (i) the number of violations, cited on more than one occasion, of the same ~~of~~ or related requirements of the aAct, ~~this~~ the rules adopted pursuant thereto, or the permit;

(b) through (c) Remains the same-, EXCEPT RENUMBERED (ii) AND (iii);

~~(d)~~ (iv) the number of violations caused by unwarranted failure of the permittee to comply or willfully caused by the permittee; and

~~(2)~~ (b) shall determine that a pattern of violations exists if it finds that there were violations of the same or related requirements during ~~3~~ three or more inspections of the permit area within any 12-month period.

(2) WHENEVER A PERMITTEE FAILS TO ABATE A VIOLATION CONTAINED IN A NOTICE OF NONCOMPLIANCE OR CESSATION ORDER WITHIN THE ABATEMENT PERIOD SET IN THE NOTICE OR ORDER OR AS SUBSEQUENTLY EXTENDED, THE DEPARTMENT SHALL REVIEW THE PERMITTEE'S HISTORY OF VIOLATIONS TO DETERMINE WHETHER A PATTERN OF VIOLATIONS EXISTS.

(3) If the department determines that a pattern exists, it shall issue an order to show cause why the permit should not be suspended or revoked. (AUTH: Sec. 82-4-204, 205 MCA; IMP, Sec. 82-4-251 MCA.)

26.4.1214 SUSPENSION AND REVOCATION OF PERMITS: PUBLIC NOTICE OF SHOW CAUSE ORDER

This rule is adopted as proposed.

26.4.1215 SUSPENSION AND REVOCATION OF PERMITS: SERVICE OF PROCESS

This rule is adopted as proposed.

26.4.1221 SMALL ~~MINER~~ OPERATOR ASSISTANCE PROGRAM: PROGRAM SERVICES
This rule is adopted as proposed.

26.4.1222 SMALL ~~MINER~~ OPERATOR ASSISTANCE PROGRAM: ELIGIBILITY FOR ASSISTANCE
This rule is adopted as proposed.

26.4.1223 SMALL ~~MINER~~ OPERATOR ASSISTANCE PROGRAM: FILING F ASSISTANCE
This rule is adopted as proposed.

26.4.1224 SMALL ~~MINER~~ OPERATOR ASSISTANCE PROGRAM: APPLICATION APPROVAL AND NOTICE
This rule is adopted as proposed.

26.4.1225 SMALL ~~MINER~~ OPERATOR ASSISTANCE PROGRAM: DATA REQUIREMENTS
This rule is adopted as proposed.

26.4.1226 SMALL ~~MINER~~ OPERATOR ASSISTANCE PROGRAM: QUALIFICATION OF LABORATORIES
This rule is adopted as proposed.

26.4.1227 SMALL ~~MINER~~ OPERATOR ASSISTANCE PROGRAM: ASSISTANCE FUNDING
This rule is adopted as proposed.

26.4.1228 SMALL ~~MINER~~ OPERATOR ASSISTANCE PROGRAM: APPLICAN LIABILITY
This rule is adopted as proposed.

26.4.1231 ABANDONED MINE LAND RECLAMATION: DEFINITIONS
This rule is adopted as proposed.

26.4.1232 ABANDONED MINE LAND RECLAMATION: FUND
This rule is adopted as proposed.

26.4.1234 ABANDONED MINE LAND RECLAMATION: RECLAMATION OBJECTIVES AND PRIORITIES
This rule is adopted as proposed.

26.4.1235 ABANDONED MINE LAND RECLAMATION: RECLAMATION PROJECT EVALUATION
This rule is adopted as proposed.

26.4.1236 ABANDONED MINE LAND RECLAMATION: CONSENT TO ENTER LANDS
This rule is adopted as proposed.

26.4.1237 ABANDONED MINE LAND RECLAMATION: LAND ELIGIBLE FOR ACQUISITION
This rule is adopted as proposed.

26.4.1238 ABANDONED MINE LAND RECLAMATION: PROCEDURES FOR ACQUISITION

This rule is adopted as proposed.

26.4.1239 ABANDONED MINE LAND RECLAMATION: ACCEPTANCE OF GIFTS OF LAND

This rule is adopted as proposed.

26.4.1240 ABANDONED MINE LAND RECLAMATION: MANAGEMENT OF ACQUIRED LANDS

This rule is adopted as proposed.

26.4.1241 ABANDONED MINE LAND RECLAMATION: DISPOSITION OF RECLAIMED LANDS

This rule is adopted as proposed.

26.4.1242 ABANDONED MINE LAND RECLAMATION: RECLAMATION ON PRIVATE LAND

This rule is adopted as proposed.

26.4.1246 RESTRICTIONS ON EMPLOYEE FINANCIAL INTERESTS: RESPONSIBILITIES OF THE COMMISSIONER

This rule is adopted as proposed.

26.4.1247 RESTRICTIONS ON EMPLOYEE FINANCIAL INTERESTS: RESPONSIBILITIES OF EMPLOYEES

This rule is adopted as proposed.

26.4.1248 RESTRICTIONS ON EMPLOYEE FINANCIAL INTERESTS: DEFINITIONS

This rule is adopted as proposed.

26.4.1249 RESTRICTIONS ON EMPLOYEE FINANCIAL INTERESTS: FILING OF STATEMENT

This rule is adopted as proposed.

26.4.1250 RESTRICTIONS ON EMPLOYEE FINANCIAL INTERESTS: CONTENTS OF STATEMENT

(1) Each employee who performs any function or duty under the Act shall report all information required on the statement of employment and financial interests of the employee, his or her spouse, minor children, or other relatives who are full-time residents of the employee's home. The report ~~shall~~ must be on ~~OSM Form 705-1~~ OSM FORM 705-1 ~~the form currently in use by the federal coal regulatory authority, if that form meets the requirements of this rule~~.

(2) through (4)(b) Remains the same as the proposed rule.

26.4.1251 RESTRICTIONS ON EMPLOYEE FINANCIAL INTERESTS: EFFECT OF FAILURE TO FILE STATEMENT

This rule is adopted as proposed.

26.4.1252 RESTRICTIONS ON EMPLOYEE FINANCIAL INTERESTS: GIFTS AND GRATUITIES

This rule is adopted as proposed.

26.4.1253 RESTRICTIONS ON EMPLOYEE FINANCIAL INTERESTS: RESOLUTION OF PROHIBITED INTERESTS OF EMPLOYEES
This rule is adopted as proposed.

26.4.1254 RESTRICTIONS ON EMPLOYEE FINANCIAL INTERESTS: RESOLUTION OF PROHIBITED FINANCIAL INTERESTS OF THE COMMISSIONER
This rule is adopted as proposed.

26.4.1260 REQUIREMENTS FOR THE CONDUCT OF BLASTING OPERATIO
This rule is adopted as proposed. (AUTH: Sec. 82-4-204(4), 82-4-205(7), and 82-4-231(10)(e) MCA; IMP, Sec. 82-4-231(3)(e) MCA.)

26.4.1261 CERTIFICATION OF BLASTERS
This rule is adopted as proposed. (AUTH: Sec. 82-4-204(4), 82-4-205(7), and 82-4-231(10)(e) MCA; IMP, Sec. 82-4-231(10)(e) MCA.)

26.4.1262 BLASTER TRAINING COURSES
This rule is adopted as proposed. (AUTH: Sec. 82-4-204(4), 82-4-205(7), and 82-4-231(10)(e) MCA; IMP, Sec. 82-4-231(10)(e) MCA.)

26.4.1263 SUSPENSION OR REVOCATION OF BLASTER CERTIFICATION
This rule is adopted as proposed. (AUTH: Sec. 82-4-204(4), 82-4-205(7), and 82-4-231(10)(e) MCA; IMP, Sec. 82-4-231(10)(e) MCA.)

26.4.1301A MODIFICATION OF EXISTING PERMITS: ISSUANCE OF REVISIONS AND PERMITS (1) By [the date that is 2 years after th effective date of this rule] each operator and each test pit prospector shall submit to the department:

(a) an index to the existing permit cross-referencing each section of the permit to sub-chapters 3 through 12, as they read [the day before the effective date of this rule] and as they read on [the effective date of this rule];

(b) a modified table of contents for the existing permit;

(c) maps showing each portion of the permit area on which each of the following had been completed as of 11:59 p.m. on [the day before the effective date of this rule]:

(i) removal of overburden only;

(ii) removal of overburden and coal only;

(iii) removal of overburden and coal and backfilling and grading only;

(iv) removal of overburden and coal, backfilling and gradin and soiling only; and

(v) removal of overburden and coal, backfilling and grading, soiling and seeding and planting;

(d) an application for all permit revisions necessary to bring the permit and operations conducted thereunder into compliance with [this rule] and Rules I through XII.

(2) A permit revision application submitted solely for purposes of subsection (1)(d) above is a minor revision for purposes of sub-chapter 4. The department shall issue written

findings granting or denying the application within 5 months of its receipt.

(3) No permittee may continue to mine under an operating permit after [the date that is 30 months after the effective date of this rule] unless the permit has been revised to comply with sub-chapters 3 through 12, as amended [effective date of this rule].

(4) As of the date that a permit is revised to comply with sub-chapters 3 through 12, as amended on [the effective date of this rule], the permittee shall conduct all operations in compliance with the permit and sub-chapters 3 through 12, as amended, except that:

(a) any area in which backfilling and grading operations had been completed on [the day before the effective date of this rule] is subject to the backfilling and grading requirements as they read on that date;

(b) any area in which soiling operations had been completed on [the day before the effective date of this rule] is subject to the soiling requirements as they read on that date; and

(c) any area for which the final minimum period of responsibility for establishing vegetation, as provided in ARM 26.4.725(1), had commenced on or before [the day before the effective date of this rule] is subject to the seeding and planting and related requirements as they read on that date.

(5) Each new permit and each amendment to an existing permit APPLIED FOR AND issued ON OR after [~~the day before~~ the effective date of this rule] must be in compliance with sub-chapters 3 through 12 as they read on [the effective date of this rule]. (AUTH: Sec. 82-4-205 MCA; AUTH Extension, Sec. 4, Ch. 70, L. 1987, Eff. 10/1/87; AUTH Extension, Sec. 2, Chap. 288, L. 1985, Eff. 10/1/85; AUTH Extension, Sec. 2, Ch. 289, L. 1985, Eff. 10/1/85; IMP, Sec. 82-4-221, 222 MCA.)

26.4.1302 NONCONFORMING STRUCTURE

This rule is adopted as proposed.

26.4.1303 RULES APPLICABLE TO COAL OPERATIONS ONLY

This rule is adopted as proposed.

26.4.1309 LITIGATION EXPENSES: CONTENTS OF PETITION AND ANSWER

This rule is adopted as proposed.

3. At the hearing and during the comment period, the Department and Board received written, oral, or both written and oral comments from the following persons: Bruce Nelson, Dave Simpson, Jim Mockler, Fran Amendola, Michele Mitchell, Bill Harbrecht, Lanny Icenogle, David M. Murja, Ed Bartlett, Sam Scott, and Bob Carroll.

A summary of the comments received and the responses to those comments are as follows:

COMMENTS AND RESPONSES

Miscellaneous changes to the rules have been made to correct typographical errors, citations and grammar. Additionally, the word "probable" was added in front of "hydrologic consequences" in the definitions. This change made it necessary to adjust the listing in alphabetical order.

26.4.301 DEFINITIONS

COMMENT: Unless the meaning of the following terms used within the Montana rules is made explicit by adding substantive rule language, Montana needs to define the terms in a manner no less effective than the Federal rules: gravity discharge, permittee, and support facility.

RESPONSE: The Department will not consider adding these terms at this time, because this would involve substantive changes. Such changes should be considered under a new rule making exercise. These terms will be interpreted by this agency consistent with federal definitions.

(20) COMMENT: The use of the term structure allows for use of sediment controls other than ponds and is consistent with 26.4.633. Change "best technology currently available" to read: . . . scheduling of activities and design of sedimentation structures. ~~ponds in accordance with 26.4.639 and 26.4.642.~~

RESPONSE: Changes to (20) cannot be considered at this point in the revision process because no changes had been proposed by the Department previously. However, the definition already allows for sediment controls other than ponds with the phrase ". . . includes, but is not limited to, . . .".

(27) COMMENT: The suggested language clarifies the intent of rules related to this definition which are to prevent contamination that will result in soil being incapable of supporting the vegetation necessary to achieve the approved post-mining land use. Change "contamination" to read: . . . or impairs its properties to support ~~plant establishment and growth~~ the approved post-mining land use.

RESPONSE: In terms of contamination of soil materials, the primary concern is with handling soils or other materials in a manner which will minimize any adverse impact on soil quality in order to promote "plant establishment and growth". While post-mining land use is of ultimate concern, the immediate focus of attention must be plants.

With respect to the definition the comment is rejected because the Department has elected not to adopt the definition, but to interpret the term as policy. However, the use of this term in 26.4.701(1) and (4) has been modified to protect

against the possibility that it would be used in an unduly restrictive or unrealistic manner.

(31) COMMENT: The proposed definition of anticipated mining is less effective than the Federal definition because it does not include a statement that the period of consideration is the entire projected lives of operations through bond release. To be no less effective, Montana must amend its rule to include this statement in their definition.

RESPONSE: The Department believes that the existing language includes the entire projected lives of all operations through and beyond bond release and is, therefore, more stringent than Federal requirements. For example - hydrologic impacts, particularly to groundwater quality, may persist well beyond bond release periods which implies that these still need to be considered in the cumulative impact analyses of existing or proposed mines.

(33) COMMENT: The process of handling soil for reclamation purposes will cause an affect on the physical properties of soil particularly when heavy equipment is used. This affect, however, is temporary and does not result in permanent damage to the soil so that it is impossible for vegetation to become established. The true measure of soil degradation should be whether or not it is capable of supporting the post-mining land use. Change "degradation" to read: . . . and other relevant physical properties ~~as a result of compaction by heavy equipment, introducing other materials to or mixing them with soil, or other factors.~~ so it cannot support the approved post-mine land use.

RESPONSE: In terms of soil degradation, the major concern involves the reduction in quality of the soil resource prior to or during salvage and following soil lay down. The degradation of the soil's physical properties may have a detrimental effect on the establishment of vegetation as a result of excessive compaction or introduction/mixing of materials which inhibit plant growth. Soil degradation in any form must be minimized, regardless of post-mining land use. The Department has elected not to adopt this definition, but to interpret the term as policy. However, the use of this term in 26.4.701(1) has been revised to protect against the possibility that it would be used in an unduly restrictive or unrealistic manner.

(40) COMMENT: The proposed changes clarify the functions of alluvial valley floors and more clearly emphasize the need for delineation between significant and insignificant effect of AVF functions, with respect to water quality and agricultural production beyond dry land farming. Change "essential hydrologic functions" to read . . . (a) The function ~~role~~ of the valley floor . . . (b) The function ~~role~~ of the alluvial valley floor in storing . . . (c)(i) The function ~~role~~ of the alluvial

valley floor in regulating the natural flow of surface water results from the ~~characteristic~~ valley geomorphic characteristics and physical configuration of the channel flood plain and adjacent low terraces. (ii) The function ~~role~~ of the alluvial valley floor in regulating . . . (d) The function ~~role~~ of the alluvial valley floor in making water usefully available for agricultural activities results from the existence of flood plains and terraces where surface and ground water can be provided in sufficient quantities and quality to support the economically significant growth of agriculturally useful plants, to a degree which is notably more productive or more agriculturally useful when compared to dry land areas. ~~from the~~ Inclusive are the presence of earth materials suitable for the growth of agriculturally useful plants, ~~from~~ the temporal and physical distribution of water of sufficient quantity and quality ~~making it~~ accessible to plants throughout . . . .

RESPONSE: The definition of 'essential hydrologic functions' is not clarified when part of the phrase being defined (e.g. function) is used as part of the definition. The Department agrees that the additional proposed language for (40)(c)(i) addresses the geomorphic aspects more clearly, and has made the change. Changes to (40)(a), (b) and (d) are not being made at this point in the revision process because no changes had been proposed by the Department previously. Additionally, the proposed language is less effective than both State and Federal language.

(49) COMMENT: By deleting the final two sentences which provide some description of the structure, adding a seemingly all inclusive term like "natural drainage" and retaining confounding language like "measured at the steepest point", the Department is apparently redefining "head-of-hollow-fill" as placing material other than coal processing waste and organic material virtually anywhere natural drainage occurs. The proposed definition is so ambiguous that it could be interpreted to include fills on side hills as well as fills which cross hollows from side-to-side. Even without this expansive redefinition, the prohibition of head-of-hollow fills stated in Rule 26.4.520(14) presents an obstacle to coal and uranium mine development in mountainous areas where sufficient areas of level ground are seldom available. This prohibition is inconsistent with the Federal rule which only mandates special drainage considerations. Moreover, Montana's own hard rock rules have no comparable prohibition.

If such a prohibition must remain, the definition of head-of-hollow-fill must specifically outline the objectionable characteristics inherent to hollows or drainages which the Department has determined design features cannot adequately mitigate; give some definition of how the steepest point is to be measured; define the design characteristics of the prohibited fill structure and its orientation in the hollow; and

provide guidance concerning the size and significance of drainages which must not be utilized.

RESPONSE: Head-of-hollow fills and contour mining have never been allowed in Montana. This will not change. Montana never intended to allow such features. The addition of the words, "drainage" and "naturally occurring drainage," does not significantly alter the definition. Thus, these terms will remain. There is no mandate for the State of Montana to be consistent with the Federal Government regarding this rule, only to be as effective.

The Department cannot make substantive changes of the kind being suggested at this time under this rule making. This would have to be the subject of a future rule making exercise.

(87) COMMENT: The proposed language clarifies the role of the probable cumulative impacts as those impacts due to cumulative effects of more than one mining operation. Change "probable cumulative impacts" to read: . . . direct and indirect effect of a mining and reclamation operation and adjacent mining and reclamation operations on the hydrologic balance.

RESPONSE: The revised definition uses the plural, operations, to clarify that the impacts of more than one mining operation are to be considered. The comment is rejected.

(96) COMMENT: Change "Recurrence Interval" to read: . . . means the interval of time in which a precipitation event or runoff event are expected to occur once on the average. The proposed language is to clarify that runoff events have magnitudes and recurrence intervals also. This is necessary in order to assess the magnitude of a snowmelt runoff event, as opposed to precipitation events alone.

RESPONSE: The most recent revision reflects your suggestion that a generic definition be used.

(110) COMMENT: The term reflects the need for adequate water quality for plant utilization. Change "subirrigation" to read: . . . where water is available and suitable for use by vegetation.

RESPONSE: The definition of alluvial valley floors in 82-4-203, MCA, requires that "water availability is sufficient for subirrigation." The word sufficient means the water must be adequate for the purpose; to incorporate this concept into the definition of subirrigation although not needed serves to clarify the concept of subirrigation in the context in which it is being defined for use in 82-4-203, MCA, and relevant rules. The change is made.

(131) COMMENT: The redefinition of the term "waste" now appears to include all non-marketed earth materials generated during mining, i.e. topsoil, overburden, parting, coal cleaning, etc. and all mineral processing wastes, i.e. coal refuse, uranium tailings, etc. If this is the case, Rule 26.4.505(4) would prohibit reclamation and the use of any material generated during the course of mining in the construction of an impoundment. Either a redefinition of waste or the elimination of 26.4.505(4) is clearly required. However, the most desirable choice is to change 26.4.505 while also modifying the proposed definition.

RESPONSE: The definition of "waste" has been revised to make it clear that topsoil, soil, overburden and spoil are not considered as "waste" materials and to clarify the kinds of materials that are to be defined as "waste". Also please note that topsoil, soil, overburden and spoils are defined elsewhere in the Act or rules.

26.4.303 LEGAL, FINANCIAL, COMPLIANCE, AND RELATED INFORMATION

(14) COMMENT: The Department has proposed to let this rule remain unchanged. Clearly this rule should also apply to all proposed mining operations not just strip mining.

RESPONSE: The word "strip" has been deleted from this rule.

(15) (a)(i), (ii) and (iii) COMMENT: The commentor suggests that the language should be changed to "Right-of-entry information", which is the same as the Federal section 778.15. Add Section 778.15(a). The added section will further clarify the intent of the section which is not to preclude the mining of severed minerals when the surface owner refused to give permission to mine. This was stated in the Supreme Court decision of last year.

RESPONSE: Under the State rule format, rule subsections do not contain titles. Therefore, (15)(a) cannot be given the suggested title. The language of 30 C.F.R. 778.15(a) is already contained in 303(14).

(15) (a)(i), (ii) and (iii) COMMENT: Use of the terms "mining method proposed by the applicant" and "the proposed mining method" extends the revised Montana rule far beyond the intended scope of the Federal regulation which attempts to only make a distinction between surface mining methods. With this particular choice of language, the Department has further complicated the problem which it was attempting to solve. This section is simply not applicable to underground mining unless there are associated surface mining operations; therefore, any

revised rule should recognize this distinction as does the Federal rule.

RESPONSE: The rule has been amended to apply only to stripmining methods.

26.4.304 BASELINE INFORMATION: ENVIRONMENTAL RESOURCES

(5) COMMENTS: Add a sentence clearly stating that the information on the cumulative impact area must be provided by the regulatory authority. It is not the operator's responsibility to provide this information. This is consistent with the Act.

RESPONSE: Section 82-4-222(m), MCA, states that the appropriate Federal or State agency will supply information on the general area for the purpose of assessing cumulative hydrologic impacts. The agencies will supply hydrologic information contained in the public record about conditions surrounding the proposed mine site. The applicant must gather required baseline information specific to the proposed mine site. The comment is rejected.

(9)(a) COMMENT: Delineating community types based on two or more dominant species is difficult. Determining which have the greatest functional influence on the type may be impossible and may change relative to climatic variations. Other methods, such as basing communities on soil types and/or range sites may be appropriate and should be allowed. Change (9)(a) to read: . . . which delineates community types based on two or more dominant species which by their structure, number, or coverage, have the greatest function influence on the type. Other methods for delineating community types may be used with prior approval by the Department.

RESPONSE: The Department agrees with the proposed change, and has included this language.

(10)(a) COMMENT: It is important to note which species use the proposed permit areas, however, it is extremely difficult to provide population densities for small mammals, birds, and reptiles. In addition, the usefulness of this information is questionable for all but locally important, threatened, or endangered species. This rule change also tracks with proposed Federal rules to change the intensity of wildlife survey work. Change to read: Population density estimates of locally important ~~each~~ species on the threatened and endangered species list, insofar as practicable; . . . .

RESPONSE: Population density estimates are necessary to provide a basis for evaluating the impact of mining on all species, not just those which are on the threatened and endangered species list.

26.4.305 MAPS

(u) COMMENT: Other methods for delineating grids are currently being used and should to be allowed for continued consistency. Coal companies use coordinates based on the Montana Principal Meridian, and all surveys to date have utilized this system. A change would therefore be very time consuming and costly. Delete the proposed insert: . . . ~~based upon the one thousand meter universal transverse mercator system.~~

RESPONSE: The requirement to include universal transverse mercator (UTM) system grid coordinates was included to provide a standard reference system for all maps from all operators. The coordinates are on all U.S.G.S. topographic maps. One reason for this is to allow data from all mines to be incorporated by digitization into the Geographical Information System, a computerized database being developed by State and Federal agencies. This database will be extremely useful for many purposes, including cumulative hydrologic impact assessments. Operators may continue to include other grid coordinates in addition to the UTM on maps if they desire to maintain consistency with older maps. Industry's cooperation in this standardization effort would be appreciated. The Department has revised the language to indicate that the UTM system will apply, as determined by the Department, to maps necessary to do cumulative hydrologic impact assessments and alluvial valley floor determinations.

26.4.308 OPERATIONS PLAN

(3)(b) COMMENT: The proposed rule is unnecessary. Rule 26.4.308(3)(a) requires a plan or description of measures that the permit applicant will use for materials constituting a fire hazard. Change (3)(b) to delete: ~~A description of the contingency plans which have been developed to preclude sustained combustion materials constituting a fire hazard;~~ . . . .

RESPONSE: Parts (3)(a) and (3)(b) are not redundant, because the former addresses disposal of combustible materials, while the latter addresses measures to "preclude sustained combustion" of such materials in the event they start burning (emphasis added). Language has been added, however, to clarify that fires are to be extinguished.

26.4.310 BLASTING PLAN

(2) COMMENT: The Montana regulations for the blasting plan are written somewhat differently than the Federal requirements but all the critical information required by the Federal rule such as drilling patterns, delay periods, and decking is included in the Montana rule. The State of Montana has added a caveat to the rule that makes it unacceptable. Rule 26.4.310

(2) allows for the requirements to be waived for underground mining. The Act and the regulations do not make a distinction between the surface blasting at underground mines and surface blasting at surface mines. State Rule 26.4.310(2) must be reworded to indicate that the requirements cannot be waived for surface blasting at underground mines in order for the regulation to be as stringent as SMCRA and no less effective than the Federal regulations.

RESPONSE: The Department has made changes to clarify its intentions concerning the OSMRE comment. The Department added the proposed language to 26.4.310(2) because the present form of this rule does not dictate any regulations for underground mining operations. Please refer to 26.4.901 where an exception is provided to this blasting requirement. The intention of this proposed language is to provide the Department with the flexibility to dictate to the operator when it will regulate blasting for underground mining operations. Blasting will be regulated at the surface, but at some point, the Department can discontinue its monitoring due to the size and nature of the patterns and the techniques used in an underground blasting situation. Essentially any safety concerns would fall under the MSHA regulations and would be regulated by a different authority. The Department also reserves the right to resume its authority upon encroachment of areas that may result in a surface effect. Therefore, it is reasonable to grant the Department the flexibility to discontinue or resume regulating of the blasting operation on an as-needed basis. The language has been modified to clarify these points.

26.4.311 AIR POLLUTION CONTROL PLAN

COMMENT: The commentor suggested deleting the following: (1) for all strip mining operations with projected production rates exceeding one million tons of mineral per year, the application must contain an air pollution control plan that includes the following: (a) through (b); (2) For all other strip mining operations, the application must contain: (a) through (b). Section 515(b)(4) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) states that a coal operator must: ". . . stabilize and protect all surface areas including spoil piles affected by the surface coal mining and reclamation operation to effectively control erosion and attendant air and water pollution."

The corresponding Montana Act at 82-4-231(10)(m) states that the operator must: ". . . stabilize and protect all surface areas, including spoil piles, to effectively control air pollution . . ."

The Office of Surface Mining, in its original regulatory program, promulgated, at 30 CFR 780.15, the requirement for an air pollution control plan that would include:

"(1) An air quality monitoring program to provide data to evaluate the effectiveness of the fugitive dust control

practices to comply with Federal and State air quality standards proposed under (a)(2) of this section to comply with Federal and State quality standards; and (2) a plan for fugitive dust control practices as required under 30 CFR 816.95."

As with the Federal regulations, rule 26.4.311 requires an air pollution control plan which includes: (a) an air quality monitoring program to provide sufficient data to evaluate the effectiveness of the fugitive dust control practices proposed under (b) below to comply with Federal and State air quality standards; and (b) a plan for fugitive dust control practices as required by 26.4.761.

Along with others, the Office of Surface Mining's air quality regulations were appealed to the United States District court for the District of Columbia. The objections were based on the grounds that: (1) the Secretary lacks statutory authority for these regulations; and (2) the Act only requires compliance with air quality laws. The court subsequently found that: "The legislative history implies that Section 515(b)(4) directs the Secretary to protect against erosion and those air and water pollution problems attendant to erosion. Moreover, if Congress wanted the Secretary to develop regulations protecting air quality, it could have done so in a straightforward manner. Congress certainly explicated with clear intent its desire to protect the hydrologic balance. The passing reference to air and water pollution with respect to protection of surface areas is an ambiguous statement; however, the legislative history indicates that Congress only intended to regulate air pollution related to erosion. The Court, therefore, remands 30 CFR Sections 816.95 and 817.95."

The Office of Surface Mining subsequently deleted the "plan for fugitive dust control practices" at Section 816.95 (Montana rule 26.4.761) and replaced it with: "Section 816.95 - Stabilization of Surface Areas. (a) All exposed surface areas shall be protected and stabilized to effectively control erosion and air pollution attendant to erosion."

This revision, consistent with the Act(s) deletes all reference to a "plan for fugitive dust control practices." The air pollution control plan called for at 30 CFR 780.15 and 26.4.311 requiring a monitoring program for the fugitive dust control plan is, therefore, superfluous.

A potential source of air pollutants, before commencement of construction or operation, must obtain an air quality permit from the Air Quality Bureau. That permit may require air quality monitoring by a source to show compliance with State and Federal air quality laws and regulations. The most that the Department can require is that the operator obtain and comply with the provisions of an air quality permit.

RESPONSE: The Department feels that the present wording of the rules applying to air quality (26.4.311 and 26.4.761, ARM) is more clear than the Federal language although 26.4.311 matches federal language at 30 C.F.R. 780.15. The vagueness of the Federal language can cause confusion as, to what is or may

be required. An example of this is found in the comment on 26.4.311, ARM, which states that the air monitoring requirement of 30 CFR 780.15 is superfluous. The Department disagrees with this interpretation and would consider air monitoring requirements even if the Federal language were adopted for the Montana rules. Another example would be the determination of specific sources for which the terminology "All exposed surface areas shall be protected and stabilized to effectively control erosion and air pollution attendant to erosion" (30 CFR 816.95 and 817.95). The Department's interpretation of this would include haul road activity while others might limit the meaning to strictly wind erosion. This is particularly important because haul road emissions are typically the most significant air pollutant source at surface coal mines.

The Department recognizes the Department of Health and Environmental Sciences - Air Quality Bureau as the primary air quality regulatory agency in the state, and does not consider the present rules to be inconsistent with, or contrary to Federal and State law. The cooperative implementation of both Departments' responsibilities pertaining to coal mining eliminates any additional compliance burden placed on applicants or operators by the small amount of duplication in the regulation. This type of coordination may not be practical at the Federal level between OSM and EPA (the Federal air quality regulatory authority); however, given the relatively small number of mines in Montana, it works efficiently here, and, in fact, accelerates approval by both agencies.

Deletion of 26.4.311, ARM, would cause the Montana regulations to be less stringent than the Federal regulations since it is essentially identical to 30 CFR 780.15. The language of 26.4.761, ARM is broader in scope than 30 CFR 816.95 and 817.95 and might therefore be considered more stringent; however, the Department feels that this is justified and advantageous to the Montana program for the reasons noted above. The comment is rejected.

26.4.312 FISH AND WILDLIFE PLAN

(1)(c) COMMENT: Monitoring methods will not protect or enhance, but will merely document the effectiveness of control measures, management techniques or mitigation methods. Monitoring is called for under rule 26.4.721.

In some cases, mining related impacts will be unavoidable. However, these impacts may be offset through the use of various mitigation techniques included in the reclamation plan or through special undisturbed areas set aside for the use of wildlife.

Change to read: A statement explaining how the applicant will utilize impact control measures, management techniques, and ~~annual monitoring methods~~ mitigation methods to protect or . . .

RESPONSE: While monitoring data does document the effectiveness of impact control measures, management techniques, or mitigation methods, it also may indicate additional mitigation methods needed to protect wildlife species and habitat. As such monitoring serves "to protect or enchance . . . ". Monitoring data may be used to refine the Fish and Wildlife Plan, if necessary. "Impact control measures" and "mitigation methods" can be used interchangeably. This rule revision is consistent with language in 30 CFR 780.16(2)(b). The comment is rejected.

26.4.313 RECLAMATION PLAN

(1) COMMENT: Reclamation operations are concurrent with mining operations which are highly dependent on production requirements and market fluctuations. A timetable for the estimated completion dates is the best that can be expected. Change to read: A timetable for the estimated completion of each major step in the reclamation plan; . . . .

RESPONSE: The Department agrees with the reasonableness of the comment. The change has been made.

(3)(b) COMMENT: The State regulation cites sections 501 through 514 as performance standards applying to highwall reduction. It appears section 515 should be included in this citation.

RESPONSE: The Department agrees and has changed 514 to 515.

(3)(e) COMMENT: Minor discrepancies in the final graded topography with the approved post-mining contour plan are to be expected. Major discrepancies such as a change in drainage patterns will occur only if a major change in the mining plan is made. Changes of this nature require a revision to the permit so a plan for early detection is not needed. The commentor suggests that the Department delete the following: ~~Plan for the early detection of grading problems that would result in a final graded topography not consistent with the approved post mining contour plan. Upon detection of such a grading problem, the permittee must notify the Department, in writing, within ten working days. The notification must contain at a minimum a preliminary proposal for measures to remedy the problem;~~ . . . .

RESPONSE: This rule is language moved from old rule 308(1)(d) and does not have a history of noncompliance. It is designed to anticipate problems and to correct situations before the problem gets out-of-hand. Therefore, no change has been made to this rule.

(5)(b) COMMENT: Purity and germination vary with individual seed lots, therefore this information is not known at

the time of permit application. Species and amounts calculated as pure live seed will give the department sufficient information with which to evaluate the proposed seed mixes. Change to read: Species and amounts per acre of seeds and seedlings to be used ~~including purity and germination~~ calculated as pure live seed; . . . .

RESPONSE: The Department agrees with this proposal and has made the change.

(5)(j) COMMENT: This language is confusing as to its intent, clarification is necessary.

RESPONSE: This subpart has been revised to clarify the language.

26.4.314 PLAN FOR PROTECTION OF THE HYDROLOGIC BALANCE

(2)(d) COMMENT: Montana proposes in 26.4.314(2)(d) and in 26.4.645 and .646 that hydrologic monitoring reports be submitted to the Department semiannually rather than quarterly. Quarterly reporting is required at 30 CFR 780.21(i) and (j). OSMRE has found that semiannual hydrologic reporting is no less effective if monitoring reports are available at the minesite for quarterly inspection. To be no less effective than the Federal regulations Montana must amend its regulations to require that in addition to semiannual reporting, both surface and groundwater monitoring reports be available for review at the minesite.

RESPONSE: The Department has amended the language of 26.4.646 to require that in addition to semiannual reporting, both surface and groundwater monitoring reports be available at the minesite. This language is already found in 26.4.645. Monitoring requirements in 26.4.314 are referenced to 26.4.645 and 646.

(2)(d) COMMENT: Proposed Language: Strike "semiannual". Semiannual reporting of ground and surface water quality and quantity data is an unnecessary burden for both the mining company and the regulatory agency. Should a hydrologic system be found to be extremely variable or "active", it would seem logical that the regulatory agency may require the operation to report on a more frequent basis, if necessary. However, it does not seem prudent that a semiannual monitoring period be required of all operations, since in most instances this would be unnecessary and would not provide any additional useful information. In addition, the results of monitoring of water quality and quantity are available at the mine sites and can be viewed by inspectors during the periodic inspections conducted by MDSL.

RESPONSE: The revised wording is consistent with Federal oversight requirements. The comment is rejected.

(4) COMMENT: Montana's baseline supplemental hydrologic information is less stringent than the Federal program because the regulation at 26.4.314(4) states that the Department may require that the information be submitted when adverse impacts to the hydrologic balance are indicated by the PHC determination. Montana must amend its rule to be no less effective than the Federal rule.

RESPONSE: The Department of State Lands has changed the MAY to SHALL.

26.4.315 PLAN FOR PONDS AND EMBANKMENTS

(1)(a)(i) COMMENT: A qualified engineer is already specified. This language is redundant. Change to read: Be prepared by . . . a qualified registered professional engineer. ~~experienced in designing impoundments.~~

RESPONSE: The language has been added to be as effective as the Federal language provided 30 CFR 816.49. Therefore, no change can be made.

(b)(i) COMMENT: See comment (1)(a)(i).

RESPONSE: See response to comment (1)(a)(i).

(c)(i) COMMENT: See comment (1)(a)(i).

RESPONSE: See response to comment (1)(a)(i).

26.4.322 COAL CONSERVATION PLAN

(2)(x) COMMENT: We understand that areas of spoil, waste, disposal, dams, embankments and other impoundments may affect coal conservation because they may affect recovery, however, water treatment and air pollution control facilities have nothing to do with coal conservation and should not be included in this rule. The location of these facilities is required in other rules. Change to read: Location and dimensions of existing areas of spoil, waste, and garbage and other debris disposal, dams, embankments, and other impoundments, ~~and water treatment and air pollution control facilities within the proposed permit area;~~ . . . .

RESPONSE: The Department did not make any additional changes to this rule as a result of this comment. No changes were made because the Department believes that this information may be useful to ensure maximum recovery, when reviewing plans for waste disposal associated with water treatment and air pollution control facilities, e.g., sludge and fly ash ponds.

(3)(d) COMMENT: Detailed cost and revenue analysis is proprietary information that an operator would not want available to the general public or its competitors. A mechanism for confidentiality must be included as it is in Federal programs. Change to add: Confidentiality of this information will be assured by the Department if requested by the applicant.

RESPONSE: The Department sees merit in this comment, but the proposed change would require legislation.

26.4.323 GRAZING PLAN

COMMENT: The State rule incorrectly cites section 26.4.718. This should be changed to reference section 26.4.719, livestock grazing.

RESPONSE: The citation has been changed to 719.

26.4.324 PRIME FARMLANDS: SPECIAL APPLICATION REQUIREMENTS

(1)(a)(iii) COMMENT: At the Federal level, a court decision removed a requirement for using a bulk density test for determining whether compaction of replaced soil horizons on prime farmlands is excessive. If such a test has been ruled unjustified for reconstruction of prime farmlands, surely the same is true of reclamation in general in Montana. A bulk density standard between actual and disturbed lands is an unfair measure of reclamation success. Change to delete: ~~The bulk densities of each soil horizon for each prime farmland soil;~~ . . . .

RESPONSE: The language in this rule is compatible with Federal language requiring a range of densities. However, there is no utility or purpose in requiring pre-mine bulk density determinations unless post-mining bulk density determinations are also required in order to evaluate compatibility of replaced soil horizons.

The commentor is apparently under the impression that this rule applies to all reclamation (re: ". . . surely the same is true of reclamation in general in Montana."). This is certainly not the case because 26.4.324 clearly applies only to prime farmland.

(3)(b) COMMENT: To be no less effective than the Federal rule, Montana needs to revise its rules to require that, before approving any mining on prime farmland, the Department must find in writing that the approved post-mining land use will be cropland.

RESPONSE: The rule indicates that prime farmland must be restored to premine productivity. Productivity is assessed by comparison of yields between reconstructed prime farmland and

undisturbed prime farmland. Yield comparisons must be made using row crops, small grain crops, or hay crops. Nevertheless, the Department of State Lands does not have the authority to require that cropland or special use pasture be the final post-mining land use of prime farmland. Indeed, there is nothing intrinsically better about cropland than grazing land or wildlife habitat. This appears to be the crux of OSMRE's argument that the Montana rule is "less effective than the Federal rule". This appears to be based upon a value judgment of OSMRE, nothing else.

To make it clear that the post-mining land use must be consistent with the restoration of prime farmland productivity, the Department has added language to require that the post-mining land use of prime farmland must be consistent with the restoration of prime farmland productivity. The Department has added language to require that the post-mining land use of prime farmland must be cropland, special use pasture, grazing land, or wildlife habitat consistent with that restoration.

26.4.325 COAL MINING OPERATIONS ON AREAS OR ADJACENT TO AREAS INCLUDING ALLUVIAL VALLEY FLOORS: SPECIAL APPLICATION REQUIREMENTS

COMMENT: We recommend that the Federal language regarding alluvial valley floors (785.19 and 822) be adopted for clarification.

RESPONSE: The current language is consistent with Federal language.

(2)(b)(ii) COMMENT: Change to read: There is sufficient water of good quality to support economically significant agricultural activities beyond dry land farming, as evidenced by: . . . . The proposed language clarifies that the water availability must enhance production over and above surrounding dry land farming and must be large enough in aerial extent to be significant to the farming operation. Also, water quality should be addressed.

RESPONSE: The quality and use of water are already addressed in this rule. The other phrases suggested would go beyond the language of the Federal rules. No changes are made.

(3)(f)(C) COMMENT: This section could be deleted, it seems redundant.

RESPONSE: The Department agrees that there is some redundancy, but the reference to Rules 26.4.801 through 806, and other requirements is important. A revision to eliminate unnecessary repetition, but retain the appropriate references, has been made.

26.4.401 FILING OF APPLICATION AND NOTICE

(6) COMMENT: Minor revisions should not be subject to public notice and review because they are minor. Submitting minor revisions to the Clerk and Recorder is an unnecessary expense of time and energy. Furthermore, the Clerk and Recorder's office would probably prefer not to have extra, unnecessary paper to handle. Change to read: Upon receipt of the Department's determination of administrative completeness, the applicant shall make a full copy of the complete application available for the public to inspect and copy . . . The applicant shall file any subsequent major revision of the application with the Clerk and Recorder . . . .

RESPONSE: The terms "major revision" and "minor revision" refer to revisions to an approved permit. The term "revision in 26.4.401(6) refers to a permit application. To allow the public to make informed comments on the application it is necessary to require that all application revisions be filed with the Clerk and Recorder.

26.4.405 FINDINGS AND NOTICE OF DECISION

(6) COMMENT: It appears that the following rule is redundant. We question the Department on its inclusion. The Department may not approve an application submitted pursuant to 26.4.401(1) unless the application affirmatively demonstrates . . . or information otherwise available that is compiled by the Department, that: (a) (b) (c) (d) (e) (f) (g) (h) (i) (j) (k) (l).

RESPONSE: Although 405(c) reiterates requirements from other laws and rules, the Department has included it to provide applicants and the public with a comprehensive summary of the requirements of the act and rules.

26.4.501 GENERAL BACKFILLING AND GRADING REQUIREMENTS

(2) COMMENT: This section requires that eight feet of suitable cover be placed over non-conducive material. This rule assumes first that there is eight feet of suitable cover for deleterious material, and second that this much cover is necessary for good plant performance. This requirement is, in our opinion, excessive, unnecessary, not consistent with recent studies, and in many cases cost-prohibitive. Additionally, the Federal requirements stated under Rule 715.14(j) specifically require that said material be covered by four feet of suitable cover. Wyoming and even North Dakota which has high levels of expanding clays have a similar four feet requirement in their rule package.

Recent studies completed at many mines in Montana as well as other states show that successful reclamation can be achieved with approximately 3.5-4.0' of suitable material which will suffice for species found in eastern Montana. We

recommend the current specific requirement be amended to read, "Unsuitable material shall be covered adequately with nontoxic, noncombustible suitable material required to meet the post-mining land use." This enables the Department to address suitable cover on-site specific conditions, including the particular reclamation objectives for a given area. Even though lesser amounts are allowed under the rules, eight feet is still the standard unless otherwise demonstrated. Coal companies have already demonstrated that lesser amounts are adequate. Our studies deserve an objective review. We urge you to use the results of our studies to defend the rule change.

RESPONSE: This particular rule allows for use of less than eight feet of cover material above potentially acid and/or toxic spoil material, if the applicant can demonstrate "that a lesser depth will provide for reclamation consistent with the act". The Department of State Lands feels that this provision allows for sufficient flexibility and gives the operator the opportunity to propose alternate measures for mitigating suspect spoil material. The comment is rejected.

(2) COMMENT: Delete "nor within eight feet" and insert nor within four feet. This will provide consistency with Federal rules.

RESPONSE: This issue may warrant discussion; however, this change was not proposed previously and would constitute a significant change in the rules requiring public notice and comment. To consider this issue further interested parties must petition for rulemaking.

(3) COMMENT: See comment to .638.

RESPONSE: See responses to comment to .638.

26.4.503 SMALL DEPRESSIONS

(1) COMMENT: The use of small depressions should be based on their value in the post-mining landscape and their importance to the post-mining land use not just on an arbitrary size limitation. The Federal rules have no size limitations on small depressions. Change to read: . . . Depressions approved under this section must ~~have a holding capacity of less than one cubic yard of water or, if it is necessary that they be larger, may~~ not restrict normal access throughout the area or constitute a hazard.

RESPONSE: The rule as written does not limit small depressions to an arbitrary size, but does provide a general guideline for what is meant. The rule very clearly states that appropriately sized, small depressions for the approved

post-mining land use may be larger than one cubic yard, subject to Departmental approval.

26.4.505 BURIAL AND TREATMENT OF WASTE MATERIALS

COMMENT: We believe that this section along with the provision in 26.4.510 of the proposed rule changes constitute a virtual prohibition on the construction of coal refuse piles. This would adversely affect the development of Montana coals which could economically benefit from cleaning, particularly if these coals must be exploited through underground mining methods. The Bull Mountain coals located between Roundup and Billings are a prime example. The mines which once prospered in this area have virtually all been displaced by low cost surface mines in other areas. While it is impossible to compete on a cost per ton basis, there is still a possibility that underground mines can compete on a cost per delivered BTU basis. Because the most attractive seams exhibit a high ash content, this requires an economical means of beneficiating the coal and disposing of the refuse.

Consequently 26.4.505, the section dealing with the burial and treatment of waste materials must be revised and expanded to include the coal processing waste provisions contained in the Code of Federal Regulations. Our specific recommendations for the revision of this rule are as follows: (1) Subpart (1) - No change required; (2) Subpart (2) - Make this part specific to surface mines. Burial and grading requirements for surface and underground mines may involve different considerations. For example, an underground mine will be required to engage in a separate surface operation to specificly mine suitable cover material. In addition, the volume of suitable material will decrease the useful storage capacity of any disposal site; thereby, increasing the total disturbance area; (3) - Delete the current language because if 26.4.510 is not changed it will prohibit coal refuse piles; otherwise it is redundant. Replace with 26.4.510(3) and 26.4.510(4); (4) Subpart (4) - Delete the current language because the requirements are covered in rules to be added from the Federal regulations; (5) Add 30 CFR 816.81 making requirements specific to coal processing wastes associated with underground mines; (6) Add 30 CFR 816.83, making requirements specific to coal processing wastes associated with underground mines; and (7) Add 30 CFR 816.84, making requirements specific to coal processing wastes associated with underground mines.

RESPONSE: This comment would be appropriately addressed as a subject of discussion between the Department and applicant regarding the application of the rules to coal refuse piles.

(1) Subpart (1) - No response necessary.

(2) Subpart (2) - Regardless of the type of mine, consistent requirements for burial or treatment of toxic or deleterious materials must be promulgated. Section (2) allows various options for properly disposing of such materials. We

cannot allow different standards of environmental protection for underground mines as compared to strip mines. No changes will be made to Section (2).

(3) Subpart (3) - The Department agrees that Section (3) is redundant; it will be deleted.

(4) Subpart (4) - We will not delete (4) but will revise the language to clarify its intent to apply to impoundment embankments.

(5) We cannot revise the rules in accordance with comment (5), (6) and (7) at this time, because it would involve substantive changes which were not proposed in the draft of revisions circulated for public comment. These would have to be considered under a new rule making exercise.

(2) COMMENT: See comments to 26.4.501(2).

RESPONSE: See responses to comments to 26.4.501(2).

26.4.510 DISPOSAL OF WASTE AND FLY ASH

COMMENT: To be no less effective than the Federal rule Montana must include a provision that spillways and outlet works for coal impounding structures be designed to protect against corrosion. OSMRE recommends including a reference to 26.4.642 in section 510(a) to incorporate the requirements for impoundments. Also section 510 references section 506. However, section 506 has been eliminated. The proper section should be inserted or the reference eliminated.

RESPONSE: The Department has provided such language as requested and included the appropriate reference to 26.4.642. The proper reference is to Rule 505. This has been corrected.

COMMENT: The intent and application of this section was clearer before the amendments were added and important phrases deleted. With the insertion of additional provisions into 26.4.510, its application with respect to 26.4.505 becomes confused. Rule 26.4.510 should be restricted to wastes generated outside the permit area which are proposed to be disposed of inside the area covered by the mine disposal of acid, toxic, acid-forming, or toxic-forming material within the permitted area. Consequently, we believe the rules should be revised as follows: 26.4.510 Disposal of Waste and Fly Ash from Sources outside the permitted Area - (1) Before waste material or fly ash from any activity outside the permit area may be used for fill material, the permittee shall demonstrate to the Department by hydrogeological means and chemical and physical analyses that the use of these materials will not adversely affect water quality, public health or safety, or other environmental resources; and will not cause instability in the backfilled area. The operator may not use waste or fly ash for fill with-out prior approval by the Department. (2) Retain as

proposed. (3) Omit with similar provision added to 26.4.505. (4) Omit with similar provision added to 26.4.505.

RESPONSE: The Department agrees that the language of 26.4.510 as written is confusing in comparison with 26.4.505. As a result 26.4.510 has been revised to provisions that approximate the language in the current rules, but will retain some of the other presently proposed revisions as well as adding a requirement that 26.4.505 must be complied with regarding disposal of materials covered by this rule. The title of 26.4.510 has also been revised to clarify the subject matter of this rule. Because of these changes, the Department also agrees that Section (3) and (4) belong in 26.4.505 and has transferred these requirements, accordingly.

26.4.522 PERMANENT CESSATION OF OPERATIONS

(3) COMMENT: Items (1) and (2) are in conformance with Federal language and are reasonable requirements of the operator. Item (3) is unnecessary if (1) and (2) are complied with and are in excess of Federal requirements. Further, the Department has no authority to determine the use of reclamation equipment in a normal cessation. Delete: ~~All backfilling and grading must be completed within ninety days after the Department has determined that the operation is completed. Final pit reclamation must proceed as close behind the coal loading operation as the frequency and location of ramp roads, the use of overburden stripping equipment in highwall reclamations, and other factors allow. Equipment needed for reclamation may not be removed from the site until reclamation is complete.~~

RESPONSE: The Department cannot consider this entire proposed substantive change at this time. These requirements have been part of the rules since adoption in 1980. Regarding the last sentence in (3), this is consistent with and constitutes a logical extension of a similar requirement in 501(1), which covers only backfilling and grading. However, to make this requirement somewhat less restrictive, the word, "site," will be changed to "mine" in 522(3).

COMMENT: It seems that 26.4.521 an .522 should be included in Subchapter 4 instead of here.

RESPONSE: These rules are not consistent with the general subject matter of Subchapter 4. However, the Department has revised the title of Subchapter 5 to be more inclusive of these miscellaneous rules.

26.4.524 SIGNS AND MARKERS

(3) COMMENT: It is not necessary that each marker be visible from each adjacent marker if the perimeter of the permit area is clearly marked. In rough or forest terrain this

may be difficult to do without using a large number of markers. Change to read: The perimeter of the permit area must be clearly marked by durable and easily recognized markers or by other means approved by the Department. Delete: ~~Each marker must be visible from each adjacent marker, or markers must be joined by fencing or other durable means approved by the Department. Such markers must be designed so that their visibility will not be reduced in general by operation of equipment, weather effects, and other normally occuring effects. The markers must be in place before the start of any mining activities.~~

RESPONSE: The language in this rule is necessary for the Department to properly identify the location of the permit boundary and to determine if all activities are being conducted within the permit area. This will also provide additional protection for the operator by allowing clearer identification of the permit boundary. The Department would also point out that the materials that could be used to mark the boundary in heavily timbered areas do not need to be confined to steel posts, fences, or other elaborate system.

COMMENT: It seems that 26.4.523 and .524 belong in different subchapters other than in Backfilling and Regrading.

RESPONSE: The title of Subchapter 5 has been revised to include miscellaneous rules such as these.

26.4.623 BLASTING SCHEDULE

(2)(b)(iii) COMMENT: Because of schedules and market demand, companies need flexibility to shoot explosives any time during the normal work day. The people in Colstrip don't seem to care when the shots go off during the day. Federal regs., 816.64, do not require a limit of hours. The commentor suggests that the language be changed from four hours to eight hours.

RESPONSES: The Department sees merit in this comment and will consider this change in future rule making efforts.

26.4.624 SURFACE BLASTING REQUIREMENTS

(5)(d) COMMENT: Airblast monitoring provides no useful purpose unless there are occupied structures within one thousand feet of the blasting operation. By specifying a one thousand foot distance the regulation is as effective as the Federal regulation 816.67(b)(2) in protecting such facilities while not burdening the operator with unwarranted monitoring, especially when the mining operation is located in remote areas. Change to read: The operator shall conduct periodic monitoring of air blast at any occupied public, or private building, including any dwelling, school, church, hospital, or

nursing facility at or within one thousand feet of the blasting operation to ensure compliance with the airblast standards.

RESPONSE: There is no language in the Federal rule to allow the Department to incorporate the additional language proposed. The Department would be less stringent than the Federal rule if this comment is accepted. Periodic monitoring is defined as once a year by OSMRE. This is based upon a comment given to the Department which first instituted this requirement to periodically monitor air blasts. The language that the Department has presently is as effective as 816.67. Therefore, no change has been made in regard to this comment.

26.4.633 WATER QUALITY PERFORMANCE STANDARDS

(4) COMMENT: Subsection 4 refers to the "following effluent limitations". No limitations have been included in this section.

RESPONSE: The language has been changed to ". . . the following criteria . . ." to correct the error; thanks for your comment. Please note that the commentor referenced 26.4.631, the correct reference is 26.4.633.

(5) COMMENT: OSMRE recommends two changes to this section for the purpose of clarification. First the State should reword "for certain constituents" to identify the constituents. Second, the State should define "so large" to avoid confusion between the State and operators.

RESPONSE: The Department has reworded part (5) to more clearly identify the constituents not subject to effluent limitations under the provisions of part (5a). The new wording reflects that these constituents are defined in the MPDES permits, the constituents may vary between permits depending on particular circumstances of the operation and other factors affecting local water quality.

The Department has decided to delete the proposed language of part (5c) as it appears to be unnecessary since the previous language already provided for exemption from effluent limitations for certain constituents for discharges greater than or equal to the ten year, twenty-four hour storm runoff. In addition, there appears to be a conflict with parts (5a) and (b).

(5)(a) COMMENT: Change to read: (a) . . . than a ten year/twenty-four hour precipitation event or snowmelt runoff of equivalent volume or equivalent peak discharge from snowmelt runoff; and . . . . The peak discharge of a run-off event may have greater indication of erosive force and sediment carrying capacity than the total volume of the runoff during a twenty-four hour period. For snowmelt runoff, exemption should be allowed not only for unusual (ten year) total volumes of

discharge, but also the occurrence of an unusual (ten year) peak discharge during the twenty-four hour period.

RESPONSE: In order for the Department's regulations to be as effective as Federal regulations, we cannot add the language allowing effluent limitation exemptions for "equivalent peak discharge from snowmelt runoff", particularly without regard to equivalent volume. The comment is rejected.

26.4.634 RECLAMATION OF DRAINAGES

COMMENT: This portion of the regulation is filled with contradictory requirements. For instance, Section 1 requires that channel and flood plain dimensions be approximate to the pre-mining configuration. Subpart C of this section requires improvement upon unstable conditions. Subpart E requires long-term stability of the landscape. In many instances in the semi-arid west, we are dealing with an erosional environment. Replacing the pre-mining flood channel dimension and configuration more than likely will not be consistent with the requirement to provide for long-term stability and improve upon unstable conditions in the drainage. Stream channel morphologic processes are a dynamic system. In the west, erosion and subsequent deposition of material are normal processes found in nature. The elimination of a formerly native erosive reach as required by Part C may result in the presence of cut banks and head cuts which serve as sediment sources and as energy dissipation features. The elimination of these features may result in erosive clear water and excessively high energies, resulting in dissipation of these energies downstream of the channel improvement. The ultimate result of this then is degradation of the stream channel downstream perhaps in a previously undisturbed reach. In addition, Section 1 requires that a concave longitudinal profile be maintained. The concept of a longitudinal profile is inconsistent with the concept of riffles and pools required under (1)(f) of 634.

RESPONSE: Alternative drainage reclamation techniques may be proposed in place of those listed in 26.4.634 (1a) and (1c), therefore this part does not contradict the other required portions of 634 (1b, d, e, f, or g). In addition, more flexibility is included in part (1c) with the wording ". . . where practicable in consultation with and upon approval of the Department; . . . ." Rule 634 states that the average stream gradient must be maintained with a concave longitudinal profile. This is not inconsistent with the presence of geomorphically appropriate features, such as riffles and pools, on a reach scale. A stream channel is adjusted to conditions present in the drainage basin and is generally in a state of dynamic equilibrium. A disturbed drainage basin and reach must be reclaimed to approximate this pre-mining configuration and blend with the undisturbed reached above and below or the reclaimed reach will upset the state of equilibrium the basin

has obtained; the expected result would be accelerated erosion above, below and within the reclaimed reach. No changes are being made.

(1) COMMENT: Pre-mining conditions can be undesirable and unstable such as gullies, etc. The concept of concave longitudinal profile is inconsistent with the concept of "riffles and pools" required under (1)(f) of 634. Change to read: . . . that will blend with the undisturbed drainage above and below the area to be reclaimed. ~~The average stream gradient must be maintained with a concave.~~ The longitudinal profile and the channel and floodplain must be designed and constructed to: . . . .

RESPONSE: See above responses.

(1)(d) COMMENT: Since spillways are addressed with pond design in 26.4.639, 540 and 642, it does not seem proper to address their "sizing" in Reclamation of Drainages. Change to read: Provide separation of flow . . . as specified by the Department. ~~, including emergency spillways of permanent impoundments~~

RESPONSE: In its current form, this rule does not specifically state that in-stream structures must be designed and constructed to pass the same precipitation event as the reclaimed drainage channel. Since there were questions raised regarding this issue, the Department incorporated this addition to clarify what is required. Therefore, there is no change made.

(1e) COMMENT: Section 3, Rule 634 allows for alternate reclamation techniques for parts(1)(a) and (1)(c). However, it specifically disallows any variance from Parts B, D, E, F or G. Language should be added to Rule 634 which requires reclaiming the drainages in such a manner that the hydrologic balance is not affected and provide for variance from all parts of Section 3. Since MDSL has the authority to approve/disapprove all such plans on a case-by-case basis, the performance of adequate reclamation is not compromised. This would allow the operator to return the stream channel to a state where it is in dynamic equilibrium with native reaches upstream and downstream thereby providing maintenance of hydrologic balance.

RESPONSE: The Department feels that it provides a reasonable degree of flexibility in drainage reclamation within the context of the severely disturbed structure of the post-mine landscape. The intent of drainage reclamation is to avoid accelerated erosion due to mining activities since the operator is reclaiming drainages usually without the benefit of bedrock controls. Under these circumstances, it is especially critical that designs are planned for the long-term stability of the landscape. It has long been recognized by the Department that

there remains the potential for additional geomorphic adjustments within a reclaimed fluvial system (e.g. previous EIS analyses) particularly immediately following reclamation and removal of temporary ponds, but also further into the future. No changes to the rule are made in response to this comment.

(2) COMMENT: We request that the word "significant" be inserted to describe which drainages are covered by Section 2 of Rule 634. Also, we request that the phrase "and any design criteria set by the Department" be deleted and add "where necessary" these designs must . . . . The position of prior notification for drainage reconstruction is well taken, but this requirement should be limited to only significant drainages, not minor swales or drainages that would convey insignificant quantities of water. Additionally, the requirements for design criteria set by the Department seem superfluous based upon the fact that the designs must be certified by a qualified registered professional engineer or registered land surveyor and the performance standards for drainage reconstruction are already in place. The emphasis on performance standards rather than design criteria is consistent with the Flannery decision on SMCRA litigation.

RESPONSE: The Department understands the operators' concern that requiring notification for drainage reconstruction is not specified as to minimum size, the addition of "significant" is acceptable. The Department will determine significance on a case by case basis. The Department does not agree that it is necessary to delete the language; however, we have replaced "any design criteria set by the Department" with "design criteria set by these rules" to clarify the intent. The Department will not incorporate the other suggested language change "where necessary" as reconstruction of all significant drainages as determined by the Department must incorporate the best technology currently available.

26.4.638 SEDIMENT CONTROL MEASURES

(1)(a) COMMENT: Change to read: Prevent, to the extent possible, additional contributions of sediment above native background or pre-mining concentrations to stream flow or to runoff outside the permit area; . . . . To clarify the approach of maintaining hydrologic balance through a non-degradation approach rather than an arbitrary effluent limitation approach to maintaining water quality. This allows for undisturbed area runoff to enter the mine area and exit with essentially the same sediment concentration or load as pre-mining, thus maintaining the sedimentological balance of the stream.

RESPONSE: This language cannot be modified as proposed and still be as effective as the corresponding Federal rule. Changes to part (1) cannot be considered at this point in the

revision process because no changes had been proposed by the Department previously.

(1)(b) COMMENT: Change to read: If discharged from a point source, meet the more stringent of applicable State or Federal effluent limitations; . . . . The proposed language clarifies the fact that effluent limitations apply only to point source discharges and to prevent the application of effluent limitations to non-point controls, such as check dams, vegetative buffers, and other means of sediment control. This is consistent with the change which allows alternate sediment control.

RESPONSE: See (1)(a) above.

(1)(d) COMMENT: The proposed language exceeds statutory authority, and is inconsistent with the purposes of this rule. Statutory language with respect to sediment control focuses entirely on confining sediment within the permitted and bonded area. Pertinent citations include 82-4-231, MCA, (10) and (11). This emphasis is restated in 26.4.638(a) and (b). The clear purpose of this rule as stated in 26.4.638(2) is to encourage management practices designed to confine sediment to disturbed areas, thereby allowing a corresponding reduction in the sediment storage capacity of downstream facilities. A rule addressing soil contamination is clearly out of place. Change to delete: ~~Prevent to the extent possible, the degradation and contamination of soil by spoil or other materials.~~

RESPONSE: This subpart has been deleted as soil contamination and degradation are addressed under Rules 26.4.701 and 702.

26.4.639 SEDIMENTATION PONDS AND OTHER TREATMENT FACILITIES

COMMENT: The proposed State rule 26.4.639(22)(a)(i) allows an exemption from the provision that siltation structures must not be removed sooner than two years after the last augmented seeding. Federal rule 816.46(b)(5) does not provide such an exemption. Montana must amend its rules to be no less effective than the Federal rule.

The proposed State regulation specifies a twenty-four hour duration design storm in every case whereas comparable Federal regulations specify six hour duration design storms. Rationale for the change in duration in the Federal regulations is provided at 48 FR 43982. The principle reason cited for adopting the six hour storm duration is to make SMCRA regulations consistent with MSHA impoundment design criteria. Further, for most mining situations the higher intensity six hour duration storm will produce a larger peak discharge than the twenty-four hour duration storm. OSMRE will accept the State's use of a twenty-four hour duration design storm if the

State can demonstrate that the peak discharge for a typical twenty-four hour duration storm will be as large as for a six hour duration storm.

RESPONSE: The intent of the provision in part (i) is to allow for alternate sediment control measures after a positive demonstration that effluent standards would be met. Due to the positive demonstration and the need for alternate sediment control where no pond exists, the Montana rule is as effective as the Federal rule.

The NOAA Precipitation-Frequency Atlas of the Western United States, Volume 1 Montana, consistently demonstrates for all areas having coal mining operations that the twenty-five year, twenty-four hour precipitation event has more runoff, in tenths of an inch, than the one hundred year, six hour. Also, the Department has previously compared the two storm events on occasion and determined that the twenty-five year, twenty-four hour was in fact the greater of the two events in terms of capacity and peak discharge. Therefore, no change has been made regarding this comment. The Department believes that this requirement in its present form is more stringent than the Federal regulations.

(19) and (21) COMMENT: The proposed rules do not require that non-MSHA sized structures be certified to have been constructed and maintained as designed and in accordance with the approved plan. Federal rule 816.49(a)(10)(ii) requires the above. Montana must amend its rule to be no less effective than the Federal rule.

RESPONSE: The Department believes that the OSMRE language would provide unnecessary language to the rules referenced. The operator is already required to follow the approved plan under the conditions of the permit referenced in 26.4.407. Any deviations from the approved plan must be in the form of a revision request. The qualified professional engineer would document the design standards of the approved plan, or submit new design standards based upon an in-field analysis in the form of a revision as per 26.4.407. In either case, the procedures used are acceptable to the Department. Therefore, no change has been made as per this comment.

(25)(a) COMMENT: Temporary, undesigned traps, generally excavated with a scraper or a backhoe should not be subject to this requirement. Change to read: Designed excavations that will impound water during or after mining operations . . . .

RESPONSE: This rules applies to impoundments (sediment ponds) which are primary structures. All ditches and traps are designed in the permit application package prior to permit issuance and construction. All runoff and sediment flow is contained in a designed structure throughout the permit area. Typically ditches and traps are secondary in nature and not

primary structures, however, this rule would apply to traps constructed along a perimeter boundary where it becomes a primary structure. Therefore, language has been added to clarify this rule.

(25)(b) COMMENT: Temporary, undesigned traps, generally excavated with a scraper or a backhoe should not be subject to this requirement. Change to read: Designed excavations must be certified initially by a certified registered professional engineer . . . .

RESPONSE: See comment for 26.4.639(25)(a).

26.4.642 PERMANENT AND TEMPORARY IMPOUNDMENTS

(1)(a) COMMENT: The additional language is not necessary if the impounded water is suitable for its intended use. Change to read: The quality of the impounded water will be suitable on a permanent basis for its intended use. ~~and, after reclamation, must meet applicable State and Federal water quality standards.~~

RESPONSE: The existing language is consistent with Federal regulations, to modify the language as suggested would make Montana rules less effective than Federal rules.

(1)(g) COMMENT: The reference to 26.4.634(1)(d) should be changed to 26.4.639 to be consistent with our comments on 26.4.634(1)(d).

RESPONSE: Cross-reference to 26.4.634(1)(d) is appropriate. Therefore, no change has been made.

(3) COMMENT: Change to read: Designed excavations that will impound water must meet the requirements of 26.4.639(25).

RESPONSE: See comment to 26.4.639(25)(a).

COMMENT: All dams and embankments that meet or exceed the size or other criteria of 30 CFR 77.216(a) must be inspected and certified annually by a qualified registered professional engineer as having been constructed and maintained to comply with the requirements of this section. All dams and embankments that do not meet the size or other criteria of 30 CFR 77.216(a) must also be inspected and certified annually until bond release by either a qualified registered professional engineer or a qualified registered land surveyor. These reports must be submitted to the Department annually, and the operator shall retain a copy of each report at or near the mine site. Certification reports must include statements on: Existing rule 26.4.639(18) [proposed 26.4.639(19)] requires that all ponds, regardless of size must be inspected during construction and certified after construction by a registered

professional engineer. There is no need to restate that in 642(8).

Existing Rule 26.4.639(20) [proposed 26.4.639(21)] states that all ponds regardless of size must be inspected in accordance with 30 CFR 77.216.3. Rule 77.216.3 discusses items to be covered in inspections by a qualified person designated by the owner. The annual report certified by a professional engineer, for ponds meeting the criteria of 77.216(a), if found in 30 CFR 77.216-4. MSHA and OSM have stated that the Federal requirement for certification by a professional engineer does not apply to ponds not meeting the criteria of 77.216(a).

The Montana Registration Act, 37-67-101(7)(d) defines the practice of land surveying as including "location of natural and manmade features in the air, on the surface of the earth, within underground workings, and on the beds of bodies of water, including such work for the determination of areas and volumes;". Rule 26.4.642(8) requests that the annual report include statements on monitoring procedures; depth and elevation of waters; and capacity (volume). These items are included in the definition of land surveying. Montana Reclamation Law 82-4-231(10)(ii)(B) states "constructing any siltation structures pursuant to (ii)(A) . . . certified by a qualified registered engineer to be constructed as designed and as approved in the reclamation plan;". The law appears to address the design and construction certification, and does not cover the annual reports.

Allowing a registered surveyor to perform the annual report does not appear to conflict with the Montana Registration or Reclamation Acts, Montana regulations, or any Federal regulations. Since the rules state "qualified registered" for the certifying engineer or surveyor, your Department has the authority to request verification of qualifications of the individual.

If the Department of State Lands proposal is adopted without allowing the surveyor to certify the annual report on smaller ponds, then industry would be required to engage the services of a professional engineer rather than those of a land surveyor. The result would be a loss of employment and/or income for members of the surveying profession. In a number of instances, acquiring the services of an engineer would be a major expense for industry in those remote areas where an engineer does not currently live. For some industry, the additional expense of an engineer would be sufficient cause to close down their operation due to economics, and thus increase unemployment of other individuals. This seems unnecessary since a number of companies have their ponds regularly inspected and certified annually by a surveyor based on the Department of State Lands rules dated April 1, 1980.

RESPONSE: The Department believes that Montana statute 82-4-231 does not allow the flexibility to include qualified registered land surveyors in this rule. This is primarily because the annual certification report includes checking the

structural integrity of the pond embankment as indicated in 26.4.642(8)(d). Therefore, there has not been any change to this rule based upon this comment.

Please note that the Department finds it acceptable for registered land surveyors to survey impoundments having no embankments (excavations). Here, there is no embankment stability concern and is acceptable practice on an annual basis in completing pond certification reports.

26.4.645 GROUNDWATER MONITORING

COMMENT: Federal rules require that groundwater monitoring be conducted quarterly at a minimum and that, at a minimum, total dissolved solids or specific conductance corrected to twenty-five degrees Centigrade, pH, total iron, total manganese and water levels be monitored. Montana's 26.4.645 lacks these provisions. Montana must amend its rule to be no less effective than the Federal rule.

Also in this submission Montana has eliminated the requirement that the groundwater monitoring plan be based on the findings of the probable hydrologic consequences determination required under 26.4.314(3). In the last submittal this was included in 26.4.645(1). To be no less effective than Federal rule 780.21(i)(1), the State must amend its rule to include this requirement.

RESPONSE: The suggestion to omit the first phrase in (2)(a) was incorporated by referencing Section 26.4.304(5) and (6) which requires this information.

Federal rules require that hydrologic monitoring be conducted quarterly at a minimum. The required semi-annual hydrologic reporting with all monitoring data available at the minesite for quarterly inspections has been agreed by OSMRE to be consistent with Federal oversight requirements.

The requirement to base the monitoring plan on the findings of the probable hydrologic consequences determination has not been deleted, but has been moved to 26.4.304. The reason for this move is that a monitoring plan is part of the application requirements and therefore belongs in Subchapter 3 which deals with permit application requirements. Subchapter 6 deals with the hands on, how-to-do operational rules. A major part of this rule rewrite has been an effort to clarify application and operational requirements. To require a plan in both sections would be redundant and not increase effectiveness of the rule. Montana's requirements are no less effective than the Federal rule.

(2)(a) COMMENT: Analyses of spoil and overburden characteristics are covered elsewhere and are not properly part of the groundwater monitoring requirements. Change to read: Monitoring must: ~~include physical and chemical analyses of aquifer, overburden, and spoil characteristics and the measurement of~~ be adequate to assess the quantity and quality

of water in all disturbed or potentially affected geologic strata within and adjacent to the permit area. Affected strata are all those adjacent to or physically disturbed by mining disturbance and any aquifers below the base of the spoils that could receive water from or discharge water to the spoils. ~~Aquifers that must be monitored include those where water level data indicate the potential for interaquifer comingling of groundwater between the aquifers and the spoil though the geologic units, unplugged drillholes, or fractures that connect the spoils with the underlying aquifers. Monitoring must be of sufficient frequency and extent to adequately identify changes in groundwater quantity and quality resulting from mining operations; and~~

RESPONSE: The suggestion to omit the first phrase in (2)(a) was incorporated by referencing Section 26.4.304(5) and (6) which requires this information.

The second sentence in (2)(a) was struck as per your comment as it adds unnecessary clarification and was redundant with the previous sentence.

(8) COMMENT: Strike semiannual. Semiannual reporting is an unnecessary burden to the mining company and to the regulatory agency. Should more frequent reporting be required due to unusual circumstances, regulatory agency has the authority to require such reporting. A semiannual reporting interval specified by regulation is unnecessary.

RESPONSE: Federal rules require that hydrologic monitoring be conducted quarterly at a minimum. The required semiannual hydrologic reporting with all monitoring data available at the minesite for quarterly inspections has been agreed by OSMRE to be consistent with Federal oversight requirements.

26.4.646 SURFACE WATER MONITORING

COMMENT: The proposed State rule, while requiring notification of the Department of remedial actions taken by the operator upon evidence of non-compliance from sample analyses, does not specifically require implementation of the remedial actions listed in paragraph (1)(b) as does the Federal regulation in paragraph 816.41(e)(2). Therefore, the proposed State rule is less effective than the Federal regulation in this respect and must be amended.

RESPONSE: The Department has reworded part (1b) to include the Federal recommendation.

COMMENT: The proposed State rule does not list the minimum parameters to be monitored including total dissolved solids or specific conductance, total suspended solids, pH, total iron, total manganese, and flow, nor that upstream and downstream locations must be monitored. In these respects,

the proposed State rule is less effective than the Federal regulation and must be amended.

RESPONSE: See last paragraph of comment to 26.4.645.

COMMENT: The proposed State rule does not require that, prior to Departmental approval of a reduction or discontinuance of monitoring, the operator demonstrates that the operation had prevented material damage outside the permit area and has protected the water rights of other users. This regulation is less effective than the Federal regulation. Montana must amend its rule to be no less effective than the above referenced Federal rules.

RESPONSE: The Department has added the words "Phase IV" to the language in part (7). The Department would look at changes in monitoring on a case by case basis, but any changes would have to be in compliance with 646(1a).

COMMENT: Again in this submission, the State has eliminated a requirement that the surface water monitoring plan be based on the findings of the probable hydrologic consequences determination required under 26.4.313(3). In the last submission this was included in 26.4.646(1). To be no less effective than Federal rule 780.21(j) the State must amend its rule to include this requirement.

RESPONSE: See last paragraph of comment to 26.4.645.

(2) COMMENT: Strike semiannual. Semiannual reporting is an unnecessary burden to the mining company and to the regulatory agency. Should more frequent reporting be required due to unusual circumstances, the regulatory agency has the authority to require such reporting. A semiannual reporting interval specified by regulation is unnecessary.

RESPONSE: The requirement to base the monitoring plan on the findings of the probable hydrologic consequences determination has not been deleted, but has been moved to 26.4.304. The reason for this move is that a monitoring plan is part of the application requirements and therefore belongs in Subchapter 3 which deals with permit application requirements. Subchapter 6 deals with the hands on, how-to-do operational rules. A major part of this rule rewrite has been an effort to clarify application and operational requirements. To require a plan in both sections would be redundant and not increase effectiveness of the rule. Montana's requirements are no less effective than the Federal rule.

(7) COMMENT: The language in 26.4.645(5) should be added here to allow the operator to discontinue or modify monitoring programs for good cause.

RESPONSE: The Department has added language to 646(7) (by reference to 645(5)) to allow for modification of monitoring programs for good cause.

26.4.648 WATER RIGHTS AND REPLACEMENT

(1) COMMENT: Replacement of water supplies should be limited to those adjudicated. Change to read: The permittee shall replace the adjudicated water supply of any owner of interest in real property who obtains all or part of his supply of water for domestic, agricultural, industrial, or other legitimate use . . . .

RESPONSE: Water Rights in Montana are separated into two broad categories; pre-1973 and post-1973. Only pre-1973 water rights are being adjudicated. Post-1973 rights are granted by a permit or certificate. Withdrawals for a beneficial use at a rate less than 100 gpm do not require a permit, but are still considered a valid claim. A backlog currently exists in both types of claims. In any case, in order for a person to legally use a water supply, they need a water right. Rather than confuse the rule by trying to describe all possible types of water rights, it is preferable to refer to "his supply" which implies that the owner has the appropriate water right.

26.4.701 REMOVAL OF SOIL

(1) COMMENT: Under the strict definitions of contamination and degradation in 26.4.301, it would be impossible to create any surface disturbance without causing these effects. What is more important is whether these effects are significant enough to render the soil incapable of supporting the post-mining land use. The phrase "or impairment of quality" is redundant with the definitions of contamination and degradation. Change to read: Prior to any surface disturbance by the mining operation, . . . if the operator demonstrates to the satisfaction of the Department that a site-specific disturbance would be insignificant and that soil loss, degradation, and contamination, to the extent that the post-mining land use can not be achieved, ~~or impairment of quality~~ would not occur.

RESPONSE: Post-mining land use should not be the focus of attention in this particular rule, as the major emphasis is being placed on limiting any potential adverse impact on soil quality which may result in a reduction in its (soil) usefulness as a plant root medium. Thus, the suggested language regarding post-mining land use will not be inserted. However, to be consistent with similar language elsewhere in Rules 26.4.701 and 702, and to eliminate the term "impairment of quality" which we agree is redundant, the following revisions to the end of Rule 26.4.701(1) are made: " . . . and that soil loss, degradation, and contamination would be minimized." The

latter change will also protect against the possibility of an unduly restrictive or unrealistic application of these standards to soil salvage operations.

(4) COMMENT: Change to read: Undisturbed soils must be protected from contamination and degradation and soil salvage operations must be conducted in a manner and at a time that minimizes erosion, contamination, degradation, and compaction ~~and deterioration of the biological, chemical, and physical properties~~ of the soil.

RESPONSE: The comment is accepted as the language in question is redundant, except that the phrase "deterioration of the biological properties" will be retained because it is not covered by any of the other terms.

26.4.702 REDISTRIBUTION AND STOCKPILING OF SOIL

(4) COMMENT: Slippage is not a problem on gentle slopes in our semi-arid climate and compaction may improve the water holding capacity of coarser spoils. Our proposal better recognized site specificity. A minimum depth of twelve inches is arbitrary and unnecessary to achieve the objectives. The common practice for the last ten years has been to scarify at a depth of six to twelve inches, and there have been no problems of slippage. Root action and freeze/thaw cycles will do more to lessen compaction than ripping the spoil surface, especially considering that the majority of this work is negated by rubber-tired scrapers when redistributing topsoil. Change to read: Prior to soil redistribution, regraded areas must be deep-tilled, subsoiled scarified or otherwise treated as required by the Department if necessary to eliminate slippage potential at the soil/spoil interface, to relieve compaction, and to promote root penetration permeability of spoils. This preparation must be done on the contour whenever possible. ~~and to a minimum depth of twelve inches.~~

RESPONSE: The words "any possible" will be added as follows: "to eliminate any possible slippage potential . . . ." This will be done in recognition of the possibility that slippage potential may be insignificant in various situations.

While compaction may improve some water-holding capacities, determination of the capacities would require that the operator undertake routine measurements of bulk density and various tests of water holding capacity of regraded spoils.

Scarifying the regraded spoil surface prior to soil laydown to a twelve inch depth is considered reasonable. Use of heavy machinery in regrading spoils can result in an impervious layer to a rather extensive depth. The twelve inch or greater scarification depth will aid in reducing resistance to root penetration at the soil-spoil interface by shattering the compacted regraded spoil surface. There is no evidence that "root action and freeze/thaw cycles will do more to lessen

compaction than ripping the spoil surface. No other changes to this rule are to be made.

(5) COMMENT: Compaction is not necessarily deleterious to plant growth. Certain critical limits (e.g. with respect to root growth) must be exceeded before damage can be assumed. The language to be deleted is redundant with the definitions of contamination and degradation. It is not possible to prevent all soil erosion, contamination, compaction and degradation. There must be a distinction between significant (i.e. that will affect the post-mining land use) and insignificant effects. Change to read: The operator shall, during and after redistribution, prevent, to the extent possible, excessive spoil and soil compaction, protect against soil erosion, contamination, and degradation ~~and minimize the deterioration of the biological, chemical, and physical properties of the soil~~ that will render the soil incapable of supporting the post-mining land use.

RESPONSE: The comment regarding the redundant language in this rule is accepted, except that the phrase "deterioration of the biological properties" will be retained because it is not covered by any other term. However, all other language will remain unchanged. Considering there is no means of defining excessive compaction without taking bulk density measurements in the field, the additional verbage is unacceptable. Here once again, we are concerned with the protection of the soil resource prior to establishment of vegetation. Post-mining land use is not the focus of attention; soil quality must be maintained regardless of the post-mining land use.

The Department of State Lands agrees that it is not possible to prevent all erosion, compaction, contamination, and degradation, and the rule does not require that.

26.4.703 SUBSTITUTION OF OTHER MATERIALS FOR SOIL

(1)(b) COMMENT: This requirement is unnecessary. If the operator has already demonstrated that the medium is at least as capable of supporting the approved post-mining land use as in (b) above, then he has met his responsibility. Change to delete: ~~The medium must be the best available in the permit area to support vegetation.~~

RESPONSE: This language must be retained in the rule in order to be as effective as the corresponding Federal rule.

26.4.711 ESTABLISHMENT OF VEGETATION

(1) COMMENT: This requirement does not apply to reestablished vegetation, it applies to the seed that is used to reclaim mined lands. This requirement is appropriately addressed in Rule 26.4.716(4). Change to read: A diverse, effective, and permanent vegetative cover of the same seasonal

variety and utility as the vegetation native to the area of land to be affected must be established. This vegetative cover must also be capable of meeting the criteria set forth in 82-4-233, MCA, and must be established on all areas of land affected except . . . during each season of the year. ~~Reestablished vegetation must meet the requirements of applicable State and Federal seed, poisonous and noxious plant, and introduced species laws and regulations. For areas designated prime farmland that are to be revegetated to a vegetative cover as previously described in this rule, the . . .~~

RESPONSE: The Department disagrees with this comment, because 2-4-307, MCA, gives administrative agencies the authority to adopt standards by referring to other rules or codes. The Noxious Weed Management Act requires that noxious weeds be controlled on all areas. The Department agrees with a portion of the comment and has changed the language accordingly.

26.4.716 METHOD OF REVEGETATION

(2) COMMENT: Change to read: "An operator shall establish a permanent diverse vegetative cover ~~of predominantly native species~~ of the same seasonal variety and utility found on the pre-mine area by drill . . .

RESPONSE: The Department disagrees with this comment, because to meet the revegetation requirement of the Montana Act and of SMCRA, especially those for permanence, diversity, and utility, the Department believes this requirement is necessary.

26.4.720 ANNUAL INSPECTIONS FOR REVEGETATED AREAS

COMMENT: Montana has added language to the effect that repair of rills and gullies may restart the period of responsibility. However, Judge Flannery's decision requires that the repair of rills and gullies restart the period of responsibility unless it can be demonstrated that such action is a normal conservation practice. Therefore, the State should either demonstrate that such repair is a normal conservation practice or amend their program to state that such repair does restart the period of responsibility.

RESPONSE: The proper rule reference is 26.4.721, not 720. The rule has been revised to incorporate appropriate language per the comment.

26.4.721 ERADICATION OF RILLS AND GULLIES

(1) COMMENT: The requirement to eradicate rills and gullies nine inches or more in depth is arbitrary, and is no longer included in the Federal rules. The department should conform to the Federal rule changes and adopt the language of 30 CFR 816.95(b) which requires repair of rills and gullies

which would adversely affect the post-mining land use. Change to read: ~~When rills or gullies deeper than nine inches form in areas that have been regraded and resoiled, the rills and gullies must be filled, graded, or otherwise stabilized and the area reseeded or replanted. The Department shall specify that rills or gullies of lesser size be stabilized and the area reseeded or replanted if the rills or gullies are disruptive to the approved post-mining land use or may result in additional erosion and sedimentation.~~ Rills and gullies which form in areas that have been regraded and topsoiled and which either disrupt the approved post-mining land use or the reestablishment of the vegetative cover, or cause or contribute to a violation of water quality standards for receiving streams shall be filled, regraded, or otherwise stabilized; topsoil shall be replaced; and the areas shall be reseeded or replanted. The Department shall also specify time frames for completion of repair work and shall determine if the repair work will result in restarting the period of responsibility for reestablishing vegetation . . . .

RESPONSE: The Department cannot consider this comment at this time, because it involves a substantive change to language that was not proposed for change. Consideration of such a change would have to be made under a new rule making exercise.

26.4.722 PROTECTION OF TOPSOIL STOCKPILES

COMMENT: The Federal rules require that the regulatory authority select all acceptable standards for success and sampling techniques and include them in an approved regulatory program. The preamble to the Federal rules further explains that this provision is intended to provide for public comment on and review of specific standards and techniques. Accordingly, Montana needs to require that any alternative success standards be approved by both the Department and the Federal coal regulatory authority. All technical guides must be either excepted or referenced with sufficient specificity to provide clear guidance to the operator and to allow a complete review by OSMRE and the public. Similarly, Montana needs to submit, perhaps in the form of an appendix or guidelines referenced in the rules, the comparative methods and sampling techniques which it will allow operators or other parties to use in evaluating the success of revegetation with respect to ground cover, production and stocking. Montana must amend its rule to be no less effective than the Federal rule.

RESPONSE: The subject of these comments is properly referenced to 26.4.726, not 722. The Department believes that the revised rules delineate acceptable success standards to the extent required by Federal rules. Sampling techniques used must be approved by the Department and must comply with Rule 26.4.726. Guidelines regarding acceptable sampling and assess-

ment methodologies are available from the Department and will be revised to best insure consistency with revised rules. The Department believes that although guidelines are available, other methods not necessarily delineated by guideline are acceptable if these methods are proven to be valid to meet an intended purpose. These other methods must be accepted by the Department, and validity will be established by consultation with academic, government agencies, and by pertinent literature.

26.4.724 USE OF REVEGETATION COMPARISON STANDARDS

COMMENT: The need to establish reference areas even if not used to compare reclamation against, is not justifiable. It is very unlikely that these same communities can be reestablished on reclaimed lands regardless of the extensive effort made to do so. These native stands represent several decades of management and the results of variable climatic regimes. These communities cannot be reestablished within the responsibility period even if extravagant seed mixes and sound management techniques are utilized. Besides, why establish them if you don't plan to use them? Eliminate this requirement.

RESPONSE: The proposals to Rules 26.4.724 through 26.4.735 are not being adopted. Due to the extent of comments on these rules, the Department has elected to retain all existing language. However, the Department will begin a separate rule-writing effort to readdress these rules in coordination with industry and other interested parties.

(1) COMMENT: It will not be necessary to establish reference areas if technical standards based on historical data or other methods for determining vegetation success are approved in accordance with Rule 26.4.724(2) and (7). Change to read: Reference areas must be established for each native plant community type or group of similar native community types found in the area to be disturbed by mining if the method for determining revegetation success will be based on comparisons with a reference area.

RESPONSE: See Response to 26.4.724 above.

(2) COMMENT: Other methods for determining revegetation success should be allowed as per the Federal rules. If more than one method is required, the Department should have a good reason for adding the extra burden on the operator. Presumably, if the operator has shown to the Department's satisfaction that technical standards based on historical data or some other method will work, reference areas will not be necessary. Change to read: Success of revegetation must be measured on the basis of comparison with unmined reference areas or by comparison with technical standards derived from historical

data or by other methods as described in (7) of this rule. These areas, standards, and methods of comparison must be approved by the Department. The Department for good cause shown, may require that reference areas be used in conjunction with historical data technical standards or other approved methods to assess success of revegetation.

RESPONSE: See Response to 26.4.724 above.

(3)(a) COMMENT: "Good" condition rangeland is very rare in eastern Montana. The reference area should be representative of lands to be mined. Change to read: The range condition of reference areas must reflect the condition of the lands to be affected as determined by pre-mine baseline studies. ~~Reference areas must be managed such that they are in at least a "good" range condition, as defined by the Soil Conservation Service. When this required range condition has been achieved, the reference area must be grazed at an approved level.~~

RESPONSE: See Response to 26.4.724 above.

(4)(b) COMMENT: This phrase and the parentheses are not necessary in the sentence. Change to read: Vegetation measurements (exclusive of grazing) must be conducted on ~~the reference areas and~~ reclaimed areas ~~(~~ and on reference areas when appropriate ~~)~~ for at least the last two years of this period of responsibility.

RESPONSE: See Response to 26.4.724 above.

(7) COMMENT: Flexibility for using other methods for determining revegetation success is given on the Federal level and should be given here too. Change to read: The applicant may propose and the Department may approve alternate standards for measuring success of revegetation if it is affirmatively demonstrated that such standards are at least as effective as those derived from reference areas or historical data.

RESPONSE: See Response to 26.4.724 above.

26.4.725 PERIOD OF RESPONSIBILITY

COMMENT: Rule 718, which addresses management techniques, directs the operator to use "any means necessary to insure the establishment of a diverse and permanent vegetative cover, including irrigation, management fencing or other measures as approved by the Department". The specific requirements of this rule are consistent with sound range management practices common to the area. In contrast, Rule 725 resets the period of responsibility time clock if fertilization or irrigation is utilized as a management tool on reclaimed lands. This contradiction basically ties our hands and prevents us from using sound practices dictated by environmental factors. I

fail to understand why the rancher across the fence can irrigate during extremely dry periods, or fertilize when nutrient deficiency symptoms are expressed, while operators have to sit back and hope for rain or risk losing eight or nine years of progress on reclaimed lands. Give us the flexibility to correct problems as they occur. We share the common goal of reclamation success. However, the rigid structure of the rules inhibits realization of this goal. Perhaps a more sensible approach would be to prohibit these activities during the last year or two of the responsibility period. But to extend this requirement over the full ten year period makes our job even more difficult, and reduces our chances for success. We need to manage our land without being penalized.

RESPONSE: See Response to 26.4.724 above.

COMMENT: The Federal language of 816.116(5)(c)(1) should be adopted to allow the operator to implement husbandry practices that would be a benefit to reclaimed lands without being penalized by restarting the bond clock. Change to read: The minimum period of responsibility for reestablishing for vegetation begins after the last seeding, planting, fertilizing, irrigating, or other work, excluding husbandry practices that are approved by the regulatory authority. ~~activity related to final reclamation as determined by the Department.~~

RESPONSE: See Response to 26.4.724 above.

26.4.726 VEGETATION PRODUCTION, COVER, DIVERSITY, DENSITY, AND UTILITY REQUIREMENTS

(1) COMMENT: Other methods for determining revegetation success should be allowed as per the Federal program. Sample adequacy is nearly impossible to demonstrate for some parameters without resulting in extremely large sample sizes. In order for sample adequacy to be demonstrated, all data collection must be carried out in a controlled and scientifically designed manner. For some parameters such as utility, morphological class segregation and diversity this is not necessary or relevant. Sample adequacy may be demonstrated for total production and total cover but for all other vegetation parameters it proves unwieldly and is not important for showing revegetation success. Change to read: Standard and consistent field and laboratory methods must be used to obtain vegetation production, cover, diversity, density, and utility data, and to compare revegetated area data with reference area data and/or with historical record technical standards or with other approved standards. Specific field and laboratory methods used, and schedules of assessments must be detailed in the application and must be approved by the Department. Sample adequacy must be addressed. ~~demonstrated.~~ In addition to these and other requirements described in this rule, the

Department shall supply guidelines regarding acceptable field and laboratory methods.

RESPONSE: See Response to 26.4.724 above.

(2) COMMENT: Delete (2) and substitute: the current vegetative production of graminoids, forbs and shrubs must be measured by clipping and weighing on the revegetated area and the reference areas. Vegetative cover must be documentated for each species present on revegetated areas and on all other areas where a vegetation data base is required. The justification is that 26.4.726(3)(a) calls for production data to be a composite of morphological classes. There is no point in clipping and weighing by morphological classes when the data are to be lumped.

RESPONSE: See Response to 26.4.724 above.

(2) COMMENT: Federal rules required only total cover and total production. Changes were made in 26.4.726(3)(a) which eliminated the requirement to compare production by morphological class, therefore clipping morphological class should not be required.

Language regarding native species is not appropriate here. It is addressed in 26.4.728. See also comments regarding native species in 26.4.728.

Change to read: The current vegetative production must be measured by clipping and weighing. ~~each morphological class on the revegetated area and the reference areas (morphological classes must be composited by native and introduced, annual grasses, perennial cool season and warm season grasses, annual, biennial, and perennial forbs, shrubs and half shrubs). Vegetative must be documented for each species present on revegetative areas and on all other areas where a vegetation data base is required. At least fifty one percent of the species present on the revegetated areas must be native species genotypically adapted to the area. A countable species must be contributing at least one percent of the cover for the area.~~

RESPONSE: See Response to 26.4.724 above.

(3) COMMENT: Without being able to achieve sample adequacy for parameters other than total cover and total production as discussed in (1) above, ninety percent confidence intervals would be invalid. Change to read: The sampling techniques for measuring success must use a ninety percent statistical confidence interval when comparing total vegetative cover and total production. ~~The following vegetation parameters for revegetated are data must be at least ninety percent of identically composited reference area data and/or technical standards derived from historical data: (a) total vegetative production (totals derived from summation of morphological classes described in section (2) above; (b) vegetative cover~~

~~(in the following categories: --annual grass, perennial cool season and warm season grasses, annual, biennial and perennial forbs); --(c) density (native and introduced species of trees, shrubs, and half shrubs; and (d) diversity of vegetation (calculated using all species).~~

RESPONSE: See Response to 26.4.724 above.

(4) COMMENT: Only total cover and total production should be required as per the Federal rules, therefore this rule is unnecessary. Delete: ~~If one morphological class is composed of undesirable species for both wildlife and livestock, a lesser cover and production in that class may be accepted by the Department if it is offset by a more desirable cover and production in another class.~~

RESPONSE: See Response to 26.4.724 above.

(5) COMMENT: Other methods for determining revegetation success should be allowed as per the Federal program.

Grazing trials and especially weight gain studies are not required by the Federal rules and are not the only method for demonstrating utility. Further, these studies would require a carefully controlled scientific design, including livestock with identical characteristics, such that sample adequacy and a ninety percent confidence interval could be achieved. If demonstration grazing is used to show utility, trials should utilize grazing plans and livestock typical of the area. The Department should incorporate flexibility by allowing the operator to propose methods for demonstrating utility. Change to read: The post-mine vegetative communities ~~cover and production and species composition~~ must be of equal utility compared to those of the applicable reference area and/or historical record standard or other approved standards. The method used for demonstrating utility must be approved by the Department. ~~Livestock performance must also be used to asses reclaimed areas as approved or prescribed by the Department in compliance with 26.4.724 and as follows: --(a) Utility of revegetated areas with regard to livestock must be assessed by grazing of revegetated areas and results must be comparable to those on reference areas or to historic data. --Grazing trial s must be documented during the periods described in 26.4.724(a); --(b) Methods used to assess post mine utility of revegetated areas must include a comparison of weight gains by livestock. --Livestock weight gains on revegetated areas must be at least ninety percent of reference area of historical data weight gains. --(c) Utility data must be derived from groupings of vegetation communities that are determined by the Department to be similar to the revegetated areas being grazed. --~~

RESPONSE: See Response to 26.4.724 above.

(5)(a)(b) COMMENT: The commentor suggests that the Department eliminate the need for weight gain comparisons and studies. Coal companies are not in the cattle business. We do not have any control over a rancher's herd, and therefore, would not be able to generate any useful data. In addition, there are many variables which would impact such a study, not the least would be genetics. The Department already has the capability to determine if reclamation has been successful.

RESPONSE: See Response to 26.4.724 above.

(5)(b) COMMENT: Delete (b) entirely. The justification is that far too many non-comparable, uncontrollable and unrepeatable factors would be involved. Climatic conditions, breed of livestock, and age of livestock are just a few of the factors. In practical terms, uniformity of and repeatability of factors would be impossible. If the vegetative productivity is acceptable, there is no need to go an additional step in the food chain.

RESPONSE: See Response to 26.4.724 above.

(5)(d) COMMENT: (d) Utility data must be generated in a manner and at a time approved the Department, as well as in compliance with 26.4.323 and 26.4.724.

RESPONSE: See Response to 26.4.724 above.

(6) COMMENT: We feel that this requirement is unreasonable and excessive. The distribution of plant communities is shown on the post-mine revegetation map which must be approved by the Department. Requiring morphological classes to have the same distribution as pre-mine areas is overkill. It appears that the Department is trying to do nothing more than to thwart the industry by establishing a standard that is impossible to attain. Change to delete: ~~Distribution of plant species and morphological classes on reclaimed areas must provide for the approved post-mine land use to the same or greater extent provided for pre-mine and as compared to approved revegetation plans and reference areas or historical record standards, or both.~~

RESPONSE: See Response to 26.4.724 above.

(7) COMMENT: The Department has no authority to require that the performance standards be met the last two years of the Phase III bond period. If the operator shows that the standards have been met when the ten year period is up then bond should be released. Change to read: ~~The revegetated areas must meet the performance standards in section (1) through (6) above for at least the last two years of the Phase III bond period.~~

RESPONSE: See Response to 26.4.724 above.

(8) COMMENT: This rule seems superfluous. If revegetated areas meet the performance standards, they will not be full of noxious weeds. We must already comply with the noxious weed laws when developing our seed mixes. Change to read: ~~The reestablished vegetation must meet the requirements of the Noxious Weed Management Act (7-22-2101 through 7-22-2153, as amended).~~

RESPONSE: See Response to 26.4.724 above.

(9) COMMENT: These plant community characteristics required by Montana statute and Federal regulation are largely qualitative, and hence, do not lend themselves to statistical evaluation. Using vegetation data in combination with climatic and grazing history during the responsibility period, a qualified range scientist or plant ecologist can infer the vitality of the reclaimed plant community, and address these requirements in a narrative with supporting data. Use of such a "technical evaluation" is preferable to total reliance on statistics. Federal rules do not require statistical examination of these criteria. Change to read: In order to demonstrate successful revegetation, the permittee must use vegetation sampling data and any other relevant information to demonstrate affirmatively that reestablished vegetation is diverse, effective and permanent and that the species present are compatible with the post-mining land use, have the same seasonal characteristics of growth as the original vegetation, are capable of self-regeneration and plant succession, and are compatible with plant and animal species of the area.

RESPONSE: See Response to 26.4.724 above.

26.4.728 COMPOSITION OF VEGETATION

(1) COMMENT: This rule should be deleted. The Department has no authority to require that fifty-one percent of the species present must be native. This number is arbitrary and has no basis scientifically or legally. The act reads: "species native to the area" not "native species". Most species at one time or another were introduced. We feel that "species native to the area" includes all species identified during baseline studies whether or not they are technically considered introduced, naturalized, etc. Change to delete: ~~Prior to Phase III bond release the revegetated area must meet the following criteria: (1) It must be composed of at least fifty-one percent native species base on richness and cover data derived in accordance with 26.4.726 and 26.4.733, (2) Introduced species may be present in a minority (less than fifty percent based on the richness and cover data) if it has been documented to the Department's satisfaction that they have the ability to survive in the area through adverse climatic~~

~~conditions, particularly drought. Introduced species must be as capable as native species of meeting the requirements of 26.4.711, 26.4.730, 26.4.751, and 82-4-233.~~

RESPONSE: See Response to 26.4.724 above.

26.4.730 SEASON OF USE

(1) COMMENT: Other methods for measuring revegetation success should be allowed as in the Federal rules. Change to read: The revegetated area must furnish palatable forage in comparable quantity and quality during the same grazing period as the reference area or technical standard derived from historic records or other approved standards. Palatability must be based on the literature and proven by references.

RESPONSE: See Response to 26.4.724 above.

26.4.733 MEASUREMENT STANDARDS FOR TREES, SHRUBS, AND HALF-SHRUBS

COMMENT: The Federal rule requires a ninety percent statistical confidence interval for all comparisons including trees, shrubs and half shrubs. In addition, the Federal rule states that cover, production or stocking shall be equal to the approved success standard when they are not less than ninety percent of the success standard. The Montana rule lacks an equivalent success standard for trees, shrubs, and half shrubs. Montana must amend its rule to be no less effective than the Federal rule.

RESPONSE: See Response to 26.4.724 above.

(1) COMMENT: Other methods for determining revegetation success should be allowed as per the Federal program. Change to read: The species composition and stocking of trees, shrubs, and half-shrubs, and half-shrubs on the revegetated area must be comparable to the composition and density on the reference area or with other approved standards in accordance with 26.4.726 and .728.

RESPONSE: See Response to 26.4.724 above.

(2) COMMENT: Other methods for measuring revegetation success should be allowed as per the Federal program. Change to read: Only trees and shrubs that are greater than one foot in height, . . . may be counted when comparing the stocking rates of the revegetated area with the reference areas or historical record standard or other approved standard. Whenever multiple stems occur . . . .

RESPONSE: See Response to 26.4.724 above.

(3)(a) COMMENT: Other methods for determining revegetation success should be allowed as per the Federal program. Change to read: Each operator shall provide documentation that: (a) density of woody plants established in the revegetated area is comparable to the density of live woody plants of the same life forms of the approved reference areas or the approved historical record standard or other approved standards, with ninety percent statistical confidence, unless stocking at a lesser rate that better achieves the approved post-mining land use is approved by the Department; . . . .

RESPONSE: See Response to 26.4.724 above.

(3)(b) COMMENT: Density of trees, shrubs and half-shrubs is the only meaningful measurement. Cover of trees, especially, is not relevant. Change to read: ~~The cover of trees, shrubs and half-shrubs on the revegetated area meets the requirements of 82-4-233; and~~ . . . .

RESPONSE: See Response to 26.4.724 above.

(3)(c) COMMENT: This rule is unnecessary. It is redundant with the cited rules. Change to read: ~~The species diversity, seasonal variety and the regenerative capacity of the vegetation of the revegetated area meet the requirements of 26.4.711, 26.4.717, 26.4.724, 26.4.726, and 26.4.751.~~

RESPONSE: See Response to 26.4.724 above.

26.4.751 PROTECTION OF FISH, WILDLIFE, AND RELATED ENVIRONMENTAL VALUES

(1) COMMENT: This rule appears to be too broad. There is concern that liabilities could be incurred by forces outside the operator's control.

RESPONSE: This rule revision is consistent with language in 82-4-227(2)(a), MCA, and 30 CFR 816.97(b)(c).

(2)(c) COMMENT: This rule should be limited to known and important wildlife migration routes as in the original language. "Wildlife movements" is too vague. The Department does not have the authority to be so restrictive. Change to read: Fence roadways where specified by the Department to guide locally important wildlife to roadway underpasses. No new barrier ~~to wildlife movements~~ may be created in known and important wildlife migration routes unless otherwise approved the Department; . . . .

RESPONSE: The Department believes that the proposal to return to original language is reasonable because the language has sufficient flexibility to allow case-by-case evaluation. The original language is retained.

26.4.761 AIR RESOURCES PROTECTION

(1) COMMENT: Rule 26.4.761 should be amended to be consistent with the Office of Surface Mining Regulations at Section 816.95. To retain the present rule, as proposed, is not required by OSM and is contrary to both Federal and State law. The Department and Board of Land Commissioners of the State of Montana lack the statutory authority under the Act to require a plan for monitoring a fugitive dust control practices plan. Further, the rule, as proposed, duplicates in several instances the rules promulgated by the Department of Health and Environmental Sciences (Rule 16.8.101 - 16.8.1602) under authority of the Clean Air Act of Montana (MCA 75-2-101 et. seq.). See also comments under 26.4.311. Change to read: ~~Each operator shall plan and employ Department approved fugitive dust control measures as an integral part of site preparation, coal mining and reclamation operations.--The Department shall approve the control measures appropriate for use in planning, according to applicable Federal and State air quality standards, climate, existing air quality in the area affected by mining, and the available control technology.--~~ (1) All exposed surface areas shall be protected and stabilized to effectively control erosion and air pollution attendant to erosion. (2) ~~The fugitive dust control measures to be used, depending on applicable Federal and State air quality standards, climate, existing air quality, size of the operation, and type of operation, must include, as necessary, but not limited to:--(a) through (t).--~~(3) Whenever it determines that application of fugitive dust control measures listed in section (2) is inadequate, the Department may require additional measures and practices as necessary. (4) ~~Air monitoring equipment must be installed and monitoring must be conducted in accordance with the air monitoring plan required under 26.4.311 and approved by the Department.~~

RESPONSE: See response to Rule 26.4.311.

26.4.801 ALLUVIAL VALLEY FLOORS: PRESERVATION OF ESSENTIAL HYDROLOGIC FUNCTIONS AND PROTECTION OF FARMING

COMMENT: As discussed in OSMRE's December 24, 1986, review, Montana 26.4.801 needs to also contain a section that is counterpart to 1979 Federal program 822.11(c) which pertains to the lengthy list of characteristics that support the essential functions of alluvial valley floors that were listed in the 1979 program 785.19(d)(3). This addition to 26.4.801 is necessary because of the January 29, 1988, appellate court ruling that the Secretary had abandoned the detailed specification of AVF characteristics without adequate explanation, and the court directed the Secretary to provide appropriate official guidance to operators and RAs. Montana must amend its rules to be no less effective than the Federal rules. In

addition this section should include a reference to section 26.4.325(3)(c).

RESPONSE: Subchapter 3 deals with application requirements and Subchapter 8 addresses permitted activities. The Department has endeavored to clarify this distinction in the rule rewrite. For this reason it is inappropriate to discuss application requirements in Subchapter 8.

26.4.805 ALLUVIAL VALLEY FLOORS: SIGNIFICANCE DETERMINATION

(1) COMMENT: As written, any decrease in the farm's expected annual income from agricultural activities would constitute a significant impact to the operation thereby prohibiting all mining on AVF's. Practically, there can be "insignificant" impact to farming and still allow for mining. Section 82-4-227(3)(i) specifically states that if the land "is of such small acreage as to be of negligible impact on the farm's agricultural production", mining may be permitted. The Federal rules also use the term "negligible impact" as well. This is a critical distinction, and we believe that the rules should incorporate the directive of the statute. Change to delete: ~~The significance of the impact of the proposed operations on farming is based on the relative importance of the vegetation and water of the grazed or hayed alluvial valley floor area to the farm's production, i.e., the expected annual income from agricultural activities normally conducted at the farm.~~

RESPONSE: The wording of this rule has been revised to clarify that the intent of the rule is not to totally preclude mining on any alluvial valley floor and to be consistent with Federal regulations.

26.4.825 ALTERNATE RECLAMATION: ALTERNATE REVEGETATION

(1)(i) COMMENT: Eliminate the need to plant a grass-legume mixture. It is always required. In some fields it may be necessary to plant a small cereal grain.

RESPONSE: The rule as stated indicates that a grass-legume stand must be established, only if necessary as determined by the DSL. This is by no means a mandatory practice and will be evaluated on a case basis. Therefore, the existing language is retained.

(1)(c)(i) COMMENT: It is not necessary to restrict texture in this manner. Aspect and slope are more important. If soils meet the capability class requirements, an additional limitation on texture is not necessary. Restricting texture to loamy may be prohibitive. The commentors suggest that this section be eliminated. Delete: ~~Loamy texture as defined by~~

~~the U.S. Soil Conservation Service in the Soil Survey Manual, Chapter 4 as revised May, 1981.~~ .

RESPONSE: Soil texture is an important soil property in determining soil tilth, infiltration, permeability, water holding capacity, and erosivity. Specifically, loamy textured soils (ranging from coarse sandy loams to silty clay loams) are the most viable soils in relation to crop production and are recommended by the SCS for agricultural uses. Thus, it is obvious that the range of loamy textured materials is very wide with the limits being the extremes at both ends of the spectrum. In addition, 26.4.825(1)(b)(ii) would allow soils or materials other than class IV cropland soils to be used. Therefore, the DSL will retain the soil texture criterion in order to better define soils which may be used for row crop and cereal grain crop production.

(1)(e) COMMENT: Slopes such as those in capability unit IVe-4 (Soil Survey of Richland County, MT) which range up to fifteen percent are suited to cropping according to the Soil Conservation Service. Change to read: Slope gradients must not exceed ~~eight~~ fifteen percent; . . . .

RESPONSE: The Department disagrees with this suggestion, because allowing highly disturbed lands proposed to be reclaimed to cropland to have slopes reaching the upper limit for Class 4 lands (i.e., fifteen percent) is not deemed prudent reclamation practice. A margin of safety for stability appears warranted. Thus, in accordance with other soil reconstruction standards in (1) of this rule, the Department has chosen the upper limit for slopes of Class 3 land (i.e., eight percent) for this purpose.

(4)(c) COMMENT: See comments in .723 to .732.

RESPONSE: See responses to applicable comments on .723 to .732.

(5) COMMENT: Subsection (5)(b) of this rule does not exist.

RESPONSE: This is true. The proper citation is (4)(c).

(6) COMMENT: The reclamation plan already allows for wildlife habitat needs. Whether or not the operator wants to also include additional habitat along with croplands should be at the discretion of the operator. The Department of State Land's original language was more appropriate. Change to read: Where cropland, special use pasture, or hayland is proposed to be the alternate post-mining land use on lands diverted from fish and wildlife pre-mining land use, ~~the following is required:~~ (a) where ~~Whenever~~ appropriate for wildlife and crop

management practices, the fields may be interspersed with trees, hedges, or fence rows . . . (b) . . . .

RESPONSE: The suggested insertion "on lands diverted . . . " cannot be made, because such a change in land use is not allowed by 82-4-233, MCA, and would be in conflict with Rule 26.4.825(4)(a).

Regarding the comment on (a), the Department will insert a reference to Rules 26.4.312 and .751 to indicate that this requirement is to be considered as part of the reclamation plan for wildlife. Also, the Department agrees that "where" should replace "whenever".

26.4.912 BUFFER ZONE

(3) COMMENT: It seems unlawful to prohibit mining under these structures. Also, these potential problems are covered by 26.4.912(4).

RESPONSE: The Federal language in 30 CFR 817.121 is similar to the Montana rule. Also, the Department can allow mining under these structures if the operator demonstrates that subsidence would not cause material damage. Therefore, there is no change made to this rule.

26.4.1103 BONDING: PERIOD OF RESPONSIBILITY FOR ALTERNATE REVEGETATION

COMMENT: The proposed State regulation is not as effective as the Federal counterpart regulations. The State's period of bond liability is limited to a period which "begins after the last seeding, planting, fertilizing, irrigating, or other activity related to final reclamation". Whereas the Federal counterpart regulations require bond liability for the duration of the mining and reclamation operation, and for a period which is coincident with the extended responsibility for successful revegetation. Montana must amend its rules to be no less effective than the Federal rule.

RESPONSE: OSMRE has misread Rules 26.4.1103 and 725. The phrase, "period of bond liability," is not used in either rule. These rules use the term, "period of responsibility," for reestablishing vegetation. Please refer to 26.4.407(5) and other rules as well as the Act regarding the requirements for obtaining and maintaining bonds. No change is necessary.

26.4.1116 BONDING: CRITERIA AND SCHEDULE FOR RELEASE OF BOND

(7)(b)(v) COMMENT We believe that this section more properly belongs in Phase IV bond release. It would be very difficult to know so early in the "game" whether hydrologic functions have been reestablished. Change to read: ~~The~~

~~reestablishment of essential hydrologic functions and agricultural productivity on alluvial valley floors has been achieved; and .....~~

RESPONSE: The Department will move this requirement to Phase IV.

(7)(b)(vi) COMMENT: We believe that this section more properly belongs in Phase III bond release. It appears to be related to a vegetation parameter rather than a soils characteristic. Delete: ~~With respect to prime farmlands, production has been returned to the level required by 26.4.815.~~

RESPONSE: While the Department agrees that this is a vegetation related parameter, the State Act as well as SMCRA and the Federal rules indicate that this requirement must be met at Phase II. This requirement for prime farmland appears in 82-4-232(6)(c)(ii), MCA, which is equivalent to Phase II in the new proposed rules. This paragraph (ii) in the act allows for release of additional bond when revegetation has been established in accordance with the approved plan, which means when the area has been seeded and/or planted and some evidence of establishment is apparent. The actual evaluation of revegetation relative to the standards of success under the responsibility period is to be done under paragraph (iii); this appears to be further supported by the language in (ii) that sufficient bond be retained, after release under (ii), that would be necessary for a third party to cover the cost of reestablishing vegetation. This latter portion of the bond is retained until the criteria in (iii) are met. The exception to all of this is prime farmland productivity which must be met in (ii) as stated.

(7)(c)(iv) COMMENT: There is no way the operator can guarantee future management of impoundments after final bond release and the lands are sold or turned back to the orginal landowner. Furthermore, the Department has no authority for such a request. Change to read: The provisions of a plan approved by the Department for the sound ~~future~~ management until final bond release is granted of any permanent impoundment by the permittee or landowner have been implemented to the satisfaction of the Department.

RESPONSE: The language proposed by the Department appears to be a reasonable interpretation of similar language in 82-4-232(6)(c)(ii), MCA. No changes are made.

(7)(d)(i) COMMENT: The criterion to have all lands within a drainage basin reclaimed in accordance with Phases I-III, is not well conceived. If an operation borders a major drainage, there will be no final bond release on any of the permit until the operation is abandoned. There is no reason to deny Phase IV bond release on an entire drainage basin if there are

parcels of land within it that are not reclaimed. This is a particularly troublesome requirement for operators that are mining on private surface where the landowners would like the return of their land as promptly as possible. Mining from outcrop inward will cause the bottom of the drainage to be reclaimed first. The highwall area (top of drainage) may not be reclaimed for many years, due to market demand and the mining plan. It is possible that the great majority of the drainage basin could be ready for bond release, but because the upper reaches of the basin are not yet ready, the whole area would have to wait. System would be in place to ensure that sediment does not reach previously vegetated areas.

RESPONSE: While the Department appreciates your concern regarding this requirement, the Department has concluded that this requirement is still important to allow an examination of how well an entire basin functions following reclamation, primarily, from the stand point of surface water hydrology. It is important to be able to observe this after all portions of the main channel in a basin are completely reconnected. Since problems of erosion or stability arising in the main channel(s) may affect tributary channels and hill slopes, this concept should include the whole basin.

(7)(d)(ii) COMMENT: Restoring fish and wildlife habitats is an important objective of reclamation. If suitable habitat is restored in the post-mining landscape, it is reasonable to assume that fish and wildlife will use it. Many variables affect wildlife habitat use and movements, and we cannot control what wildlife will do. The focus of this bond release criteria should be on the restoration of habitat rather than on the fish and wildlife per se. Change to read: Fish and wildlife ~~and their~~ habitats and related environmental values have been restored . . . .

RESPONSE: The Department agrees with the comment and has made the change as proposed.

(7)(d)(iii) COMMENT: The operator is responsible to minimize impacts to the prevailing hydrologic balance applies to off site areas only. Change to read: With respect to the hydrologic balance, disturbance has been minimized and material damage off site has been vented in accordance with the Act, the rule, and the approved permit.

RESPONSE: This language is a paraphrasing of 82-4-231(k) and cannot be altered.

26.4.1129 ANNUAL REPORT

(2)(g) COMMENT: A map of this type would contain so much information that it would be illegible, especially at a scale small enough for field use. All necessary information is

already submitted to the Department. Change to read: ~~An inspection map ... applicable for field use.~~

RESPONSE: The Department has made a change in response to your comment to clarify its intentions. It is the operator's responsibility to consult with the Department to determine what features are necessary for depiction upon the inspection map.

26.4.1202 METHOD OF INSPECTIONS

(2)(a)(b) COMMENT: We agree that a procedure for signoff on contours prior to topsoiling is desirable, however, this should be a departmental procedure during inspections rather than a regulation. We understand the intent of this rule, but if the operator wished to take the risk in topsoiling without prior contour approval, that should be their decision because it is their bond. We believe strongly that thirty days for inspection is entirely too long, and we are very disturbed that there is not time limit on when the Department must make a decision. Past experience has shown that within the Department heavy workloads, vacation schedules or other outside work assignments many times affect the ability of the Department to render a timely decision.

In multiple pit operations stripping and lay down decisions are made according to customer demands. The sequencing of mining and reclamation procedures is dependant on the market and the fluctuations can be extreme causing the operation to move at a very slow pace or very fast. If operation are moving at a fast pace the operator may not have the time to wait thirty days for the Department to inspect and an indefinite time for the Department to make a decision. If this were to occur the operator's only options are to stockpile topsoil or to risk a NOV for not getting prior approval of the contours. With this rule the operator will get a NOV even if the contours are exactly according to the post-mine contour map if prior approval was not obtained. We do not believe that this is the Department's intent in writing this rule. However, by making this a rule rather than a Departmental procedure, the Department is putting the monkey on our back rather than taking the responsibility of enforcing the Act.

The industry is willing to work with the Department in developing a workable system for contour approval, but we are strongly opposed to a rule addressing this issue. The commentors suggest elimination of both sections.

RESPONSE: The Department agrees to delete all of section (2). We shall attempt to develop a workable policy that will be conducive to systematic review of post-mining contours. After some experience with this policy, new rule making in this area may be reconsidered.

26.4.1206 NOTICES, ORDERS OF ABATEMENT AND CESSATION ORDERS: ISSUANCE AND SERVICE

(3) COMMENT: It is not always necessary to make a field inspection to terminate an abatement order. There are instances where a NOV was issued for a paperwork violation. In this case abatements and terminations can be handled through the mail rather than onsite. Change to read: Whenever an abatement order has been complied with, the Department may ~~shall~~ inspect the abatement, and, if the abatement is satisfactorily completed, may ~~shall~~ terminate the order of abatement. The termination may ~~must~~ be issued onsite at the time of the inspection.

RESPONSE: The Department agrees with the intent of this comment, but will revise it differently than suggested.

Whenever an abatement order has been complied with, the Department shall inspect or review the abatement, as appropriate, and, if the abatement is satisfactorily completed, shall terminate the order at the time of the inspection, if an inspection is necessary to determine compliance with the abatement order.

(6) COMMENT: Montana has included a rule requiring review of each notice of violation and statement of proposed penalty for a pattern of violations. The comparable Federal rule includes cessation orders. Montana must clarify that this rule applies to imminent harm cessation orders to be no less effective than the Federal rule.

RESPONSE: The language of the Federal rule (30 C.F.R. 843.11(d) has been added to 26.4.1213. Proposed 26.4.1206(6) has been deleted.

26.4.1212 POINT SYSTEM FOR CIVIL PENALTIES AND WAIVERS

COMMENT: Section needs to be rewritten so that maximum points are not assigned each time a violation has deemed to have occurred. The Department has interpreted this rule to mean that maximum points are assigned each time a violation is issued. A sliding scale is provided, but no where in the rules does it say the maximum must be assigned. Each violation should be looked at on a case-by-case basis.

RESPONSE: Subsection (1) of the rule provides for assignment of points on a sliding scale. The Department assigns points within (a) through (d) based on the factors indicated in those paragraphs with violation of less than maximum severity within a particular category receiving fewer points.

(4) COMMENT: The Federal rule requires the return of escrow money within thirty days if the administrative or judicial review reduces or eliminates the proposed penalty. The

State rule lacks a counterpart. Montana must amend its rule to be no less effective than the Federal rule.

RESPONSE: A requirement for payment within 30 days has been added.

26.4.1250 RESTRICTIONS ON EMPLOYEE FINANCIAL INTERESTS: CONTENTS OF STATEMENT

(1) COMMENT: The CFR specifically states that the "report shall be on OSM Form 705-1 as provided by the office." The proposed change allows for "the form currently in use by the Federal coal regulatory authority, if that form meets the requirements of this rule." The State's change allows for updates in OSMRE's forms directives system and adds a qualifier -- "if that form meets the requirements of this rule." It is uncertain who determines if the form meets the requirements of this rule, i.e., can the SRA determine the adequacy of OSMRE's form? Because this form is used to report information to OSMRE, there should be no reason for the State to review it. To be no less effective than the Federal rule Montana should eliminate this statement.

RESPONSE: The proposed amendment has been deleted and the original language, which requires reporting on OSM Form 705-1 has been reinserted.

RULE XIII MODIFICATION OF EXISTING PERMITS: ISSUANCE OF REVISIONS AND PERMITS

(4)(c) COMMENT: The operator should have a choice as to which standards to apply to revegetated areas. For instance if under the new rules the operator develops a technical standard for measuring revegetation success, he will not be able to apply it to revegetated areas completed prior to enactment of the new rules, he will still have to use the reference area method. One reason for revising the revegetation performance standards is that there are many technical problems with the formulas used, etc. to which the Department agrees. "Grandfathering" in this instance is counterproductive.

RESPONSE: The proposed amendments in Sub-Chapter 7 regarding seeding and planting that give rise to the comment have been deleted. The suggested amendment to (4)(c) has therefore not been made.

(5) COMMENT: Permit applications or amendments currently pending should not be delayed for compliance to the new rules. This would be an unfair burden on the applicant. Approvals to currently pending permit applications and amendments should be made with the time frame for cross-referencing etc., specified in this rule as applicable. Change to read: Each new permit

and each amendment to an existing permit applied for ~~issued~~ after [the day before . . . .

RESPONSE: The Department agrees with this comment, but will also retain the word "issued."

4. The authority of the Board and Department to repeal the following rules and the sections implemented are as follows:

Rule	AUTH	IMP
26.4.307	82-4-204, 205, MCA	82-4-222, MCA
26.4.309	82-4-204, 205, MCA	82-4-222, MCA
26.4.506	82-4-204, MCA	82-4-231, MCA
26.4.508	82-4-204, MCA	82-4-231, MCA
26.4.509	82-4-204, 205, MCA	82-4-231, MCA
26.4.511	82-4-204, MCA	82-4-231, 232, MCA
26.4.512	82-4-204, MCA	82-4-231, 232, MCA
26.4.513	82-4-204, MCA	82-4-232, 234, MCA
26.4.712	82-4-204, MCA	82-4-232, 235, MCA
26.4.715	82-4-204, MCA	82-4-233, 235, MCA
26.4.722	82-4-204, MCA	82-4-233, 235, MCA
26.4.803	82-4-204, MCA	82-4-227, 231, MCA
26.4.807	82-4-204, MCA	82-4-227, 231, MCA
26.4.812	82-4-204, MCA	82-4-227, 232, MCA
26.4.813	82-4-204, MCA	82-4-227, 232, MCA
26.4.814	82-4-204, MCA	82-4-227, 232, MCA
26.4.816	82-4-204, 205, MCA	82-4-227, 231, MCA
26.4.822	82-4-204, 205, MCA	82-4-233, MCA
26.4.1015	82-4-204, 205, MCA	82-4-226, MCA

The authority of the Board and Department to adopt the amendments and new rules is based on 82-4-204 and 205, MCA; Section 4, Chapter 70, Laws of 1987; Section 2, Chapter 288, Laws of 1985; and Section 2, Chapter 289, Laws of 1985. The amendments and new rules implement Title 82, Chapter 4, Part 2, MCA.

Dennis Hemmer, Commissioner
Department of State Lands

Certified to the Secretary of State December 30, 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 THE AMENDMENT OF RULE 46.11.131 PERTAINING TO THE FOOD STAMP EMPLOYMENT PROGRAM

TO: All Interested Persons

1. On November 23, 1988, the Department of Social and Rehabilitation Services published notice of the proposed amendment of Rule 46.11.131 pertaining to the Food Stamp Employment Program at page 2477 of the 1988 Montana Administrative Register, issue number 22.

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

46.11.131 FOOD STAMP EMPLOYMENT AND TRAINING PROGRAM
Subsections (1) through (1)(b)(iv) remain as proposed.

AUTH: Sec. 53-2-201 MCA; AUTH Extension, Sec. 113, Ch. 609, L. 1987, Eff. 10/1/87.
IMP: Sec. 53-2-306 MCA

4. The Department has thoroughly considered all commentary received:

COMMENT: A legislative council staff person noted an authority extension was improperly omitted from the authorities citation.

RESPONSE: The department has inserted the relevant authority extension.

Interim Director, Social and
Rehabilitation Services

Certified to the Secretary of State January 3, 1989.

VOLUME NO. 42 OPINION NO. 127

AGRICULTURE - Grazing districts;
GRAZING DISTRICTS - Membership;
NATURAL RESOURCES AND CONSERVATION, DEPARTMENT OF - Grazing districts;
SOIL AND WATER CONSERVATION - Grazing districts;
MONTANA CODE ANNOTATED - Sections 76-16-103, 76-16-201 to 76-16-204, 76-16-207 to 76-16-209, 76-16-302, 76-16-304, 76-16-320, 76-16-322, 76-16-323, 76-16-411.

HELD: 1. A member of a grazing district is no longer eligible and must withdraw from membership in the district if he ceases to be engaged in the livestock business or no longer owns or leases forage-producing land. The rights and interest involved should be determined by the directors of the state district with the approval of the Department of Natural Resources and Conservation.

2. A member of a grazing district may withdraw from membership in the district if the district's articles of incorporation or by-laws provide conditions and procedures for voluntary withdrawal.

3. If a member of a district continues to be engaged in the livestock business and owns or leases forage-producing land, and the district's articles of incorporation and by-laws do not provide for voluntary withdrawal, a member may not unilaterally withdraw from the district.

13 December 1988

Larry Fasbender, Director
Department of Natural Resources
and Conservation
1520 East Sixth Avenue
Helena MT 59620

Dear Mr. Fasbender:

You have requested my opinion regarding the following questions:

1. May an individual withdraw from a grazing district?

2. If an individual may withdraw, what is the proper procedure for doing so?

3. If a permittee member may withdraw, would that be considered a loss of preference entitling the ex-member to his proportionate share of excess reserves and assets of the district pursuant to section 76-16-414(2), MCA?

4. If a permittee member may withdraw, do the leases of private and public land revert to the district that has handled the leases and in whose name they are held, or would they revert to the individual who owns the dependent property?

Grazing districts are governed by the Grass Conservation Act (Act), Tit. 76, ch. 16, pts. 1 to 4, MCA. Establishment of the districts is provided for in sections 76-16-201 to 208, MCA.

Three or more persons may propose creation of a state district by submitting a written statement and plat showing the proposed boundaries of the district to the Department of Natural Resources and Conservation (Department). § 76-16-201(1), MCA. Those persons making the proposal must own or control commensurate property, i.e., property which is not "range" as defined in the Act, and they must be livestock operators within the area proposed to be created into a district. §§ 76-16-103(4), 76-16-201(1), MCA. After receiving the statement and plat and any additional information, the Department conducts a hearing concerning creation of the grazing district. §§ 76-16-201(3), 76-16-202, MCA. The record of the hearing and a report prepared by the Department are then submitted to the Board of Natural Resources and Conservation (Board). § 76-16-202(2), MCA. If those who own or control over 50 percent of the lands to be included in the district approve formation of the district, the Board may issue a certificate of approval. § 76-16-203, MCA.

Upon issuance of that certificate, three or more qualified persons may prepare and file articles of incorporation, along with the certificate of approval, with the office of the Secretary of State. § 76-16-204(1), MCA. The articles of incorporation must include, among other things, the membership fee to be charged for each member, and the names and residences of the persons who subscribe, together with a statement that each owns or controls commensurate property and is

a livestock operator within the proposed district. § 76-16-204(2)(c), (e), MCA.

When organized, a district must file with the county clerk and recorder of each county in which its lands lie a map or plat of the external boundaries of the district and a copy of its articles of incorporation. § 76-16-207, MCA. Within 60 days after its incorporation, the district must adopt by-laws approved by the Department. § 76-16-208, MCA.

The articles of incorporation, by-laws, and boundaries of a grazing district may be amended. §§ 76-16-206(1), 76-16-208, 76-16-209, MCA.

Nothing in the statutes requires all eligible persons to join when a grazing district is established. In fact, the statutes recognize that nonmembers may own or control land within the external boundaries of the district. See §§ 76-16-320, 76-16-322, 76-16-323, 76-16-411, MCA. See also McKee v. Clark, 115 Mont. 438, 144 P.2d 1000 (1944) (plaintiff owned land within external boundaries of state grazing district but was neither a member nor a permittee of district).

However, pursuant to section 76-16-108(2), MCA, "any person who chooses to become a member of any state district is bound by all the provisions of [chapter 16] and is limited to the statutory remedies therein contained." (Emphasis added.) The statutes, by-laws and articles of incorporation, and the application to be a member constitute a contract between the member and the corporation. Appeal of Two Crow Ranch, 159 Mont. 16, 23, 494 P.2d 915, 919 (1972). Likewise, the right of a member to withdraw from an agricultural cooperative is generally regulated by statutory or charter provisions, the by-laws of the cooperative, and the contracts with members. 3 C.J.S. Agriculture § 154 at 720 (1973). Thus, a member may withdraw only in circumstances contemplated by the statutes, the articles of incorporation, or the by-laws of the grazing district.

Membership in a state grazing district is statutorily limited to persons, or agents of persons, who meet two conditions: (1) they are engaged in the livestock business, and (2) they own or lease forage-producing lands within or near the district. § 76-16-302, MCA. Conversely, if a person ceases to be engaged in the livestock business or no longer owns or leases forage-producing land, he is no longer eligible to be a member. The rules of statutory construction dictate that legislation be read as a whole to ascertain legislative

intent. State v. Magnuson, 210 Mont. 401, 408, 682 P.2d 1365, 1369 (1984). Pursuant to section 76-16-304, MCA, when a member disposes of a part of the lands or leases owned by him so that another person becomes the owner of the lands or leases and acquires the right to membership, then the rights and interests involved are determined by the directors of the state district with the approval of the Department. It follows that the same type of determination of the rights and interests involved should be made by the directors and the Department if a member becomes ineligible for membership by ceasing business or transferring his land or leases. I conclude that an individual must withdraw from a grazing district if he is no longer eligible for membership. The directors of the district should then determine the rights and interests involved with the Department's approval.

As I noted above, a member may generally withdraw from a grazing district in circumstances contemplated by the statutes, the articles of incorporation, or the by-laws. The Act gives the districts broad authority to adopt and amend their articles of incorporation and by-laws with the Department's approval. I conclude that a withdrawal procedure may be provided for in the articles of incorporation or the by-laws of the district.

Therefore, it is my opinion that a member may withdraw from a grazing district if the articles of incorporation or by-laws or amendments thereto allow such a withdrawal. Absent a circumstance where a member becomes ineligible for membership, or the articles of incorporation or by-laws provide for withdrawal, a member may not unilaterally withdraw from a district.

It is inappropriate for me to answer your remaining questions concerning the specific procedure and ramifications of a member's withdrawal because they would depend on the circumstances of the withdrawal, the provisions of the articles of incorporation and the by-laws, the terms of the leases at issue, and the discretion exercised by the Department.

THEREFORE, IT IS MY OPINION:

1. A member of a grazing district is no longer eligible and must withdraw from membership in the district if he ceases to be engaged in the livestock business or no longer owns or leases forage-producing land. The rights and interest involved should be determined by the directors of the state district with the

approval of the Department of Natural Resources and Conservation.

2. A member of a grazing district may withdraw from membership in the district if the district's articles of incorporation or by-laws provide conditions and procedures for voluntary withdrawal.

3. If a member of a district continues to be engaged in the livestock business and owns or leases forage-producing land, and the district's articles of incorporation and by-laws do not provide for voluntary withdrawal, a member may not unilaterally withdraw from the district.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 42 OPINION NO. 128

ADMINISTRATIVE LAW AND PROCEDURE - Whether rule specifying necessary experience for outfitter's license conflicts with statutory minimum age requirement;
FISH AND WILDLIFE - Licensing of outfitters;
LICENSES, PROFESSIONAL AND OCCUPATIONAL - Licensing of outfitters;
ADMINISTRATIVE RULES OF MONTANA - Sections 8.39.409 (superseded), 8.39.502;
MONTANA CODE ANNOTATED - Sections 2-4-305(6), 2-15-1883, 37-47-101 to 37-47-404, 37-47-201, 37-47-302, 37-47-303, 37-47-305;
MONTANA LAWS OF 1903 - Chapter 11, section 10;
MONTANA LAWS OF 1941 - Chapter 103;
MONTANA LAWS OF 1949 - Chapter 173;
MONTANA LAWS OF 1951 - Chapter 184;
MONTANA LAWS OF 1955 - Chapter 223, section 1;
MONTANA LAWS OF 1971 - Chapter 221;
MONTANA LAWS OF 1975 - Chapter 541, section 3;
MONTANA LAWS OF 1987 - Chapter 528.

HELD: Section 8.39.502(1)(a), ARM, which requires certain experience as a condition to outfitter licensure and which may not be satisfied by an applicant based on experience in Montana prior to his 18th birthday, is not inconsistent with section 37-47-302(1), MCA, which conditions licensure on an applicant's being at least 18 years of age.

29 December 1988

Ron Curtiss, Chairman
Board of Outfitters
Department of Commerce
1424 Ninth Avenue
Helena MT 59620-0407

Dear Mr. Curtiss:

You have requested my opinion concerning the following question:

> May the Montana Board of Outfitters require, as a condition of licensure as an outfitter, that an applicant have three seasons of experience in Montana or bordering states as a licensed outfitter or licensed professional guide working for a licensed outfitter if such requirement makes it impossible for the

applicant to have satisfied the experience requirement prior to his 18th birthday?

I conclude that the Board of Outfitters does have authority to issue reasonable rules requiring specified experience as a condition to licensure as an outfitter and that section 8.39.502(1)(a), ARM, is not inconsistent with section 37-47-302(1), MCA, merely because its requirements cannot be satisfied by all applicants prior to their 18th birthdays. It is inappropriate to resolve the other question raised in your letter, concerning whether the experience requirement in section 8.39.502(1)(a), ARM, is reasonable.

The Legislature first required licensure of individuals in the "guiding" business under 1903 Montana Laws, chapter 11, section 10. The 1903 statute permitted such licensure upon submission of an affidavit by "[a]ny competent person, who is a bona fide citizen of the State of Montana ... stating that the applicant is of good moral character and responsible, and signed by three tax payers of the county in which the applicant lives" and payment of a $10 annual fee. Aside from the addition of a reciprocity provision in 1941 Montana Laws, chapter 103, the 1903 statute's substantive requirements remained unchanged until 1949 Montana Laws, chapter 173.

The 1949 law established separate licensure requirements for "outfitters" and "guides." The word "outfitter" was defined as "any person or persons who shall engage in the business of outfitting for hunting or fishing parties, as the term is commonly understood, or any person, persons, or agent of a domestic corporation who is operating in this state from a temporary or permanent camp, private or public lodge, private or incorporated home, who shall for pay provide any saddle or pack animal or animals, vehicles, boats, or other conveyance for any person or persons to hunt, trap, capture, take or kill any of the game animals or to catch any of the game fish of the State of Montana." 1949 Mont. Laws, ch. 173, § 4. Section 1 of this statute not only specified the requisite elements of the application for an outfitter's license but also vested in the state fish and game warden discretion to determine whether the applicant possessed "the necessary ability, experience and equipment" for the protection and convenience of his guests. The Legislature consolidated the outfitter and guide licensure requirements in 1951 Montana Laws, chapter 184, leaving unaltered the state warden's authority to make the ability, experience, and equipment determination. In 1955 the warden's licensure

responsibility was assumed by the director of the Montana Fish and Game Department who, in turn, was required to make the outfitter ability, experience, and equipment determination with reference "to such standards that have been adopted by the [Montana Fish and Game] commission." 1955 Mont. Laws, ch. 223, § 1.

The Legislature substantially revised the regulation of outfitters in 1971 Montana Laws, chapter 221. Most importantly, the 1971 statute created an advisory council, known as the Montana Outfitter's Council, and transferred the Fish and Game Commission's rulemaking powers to the director of the Fish and Game Department. Section 5(2) of this statute further required the director, after considering the Council's recommendations, to issue "[o]utfitter standards" and "[r]egulations prescribing all requisite qualifications for license, including training, experience, knowledge of rules and regulations of governmental bodies pertaining to outfitting and condition and type of gear and equipment." Section 8(2)(c) also imposed, for the first time, a requirement that license applicants "[b]e at least twenty-one (21) years of age." The age requirement was reduced to 18 years in 1975 Montana Laws, chapter 541, section 3.

The basic structure of outfitter regulation contained in the 1971 act remained in effect until adoption of 1987 Montana Laws, chapter 528 (codified in §§ 37-47-101 to 404, MCA). The 1987 statute made two significant changes in such regulation. First, it created the Board of Outfitters which assumed the Department of Fish, Wildlife, and Parks' responsibility with respect to licensing and promulgation of rules

> to administer and enforce this chapter, including but not limited to rules prescribing all requisite qualifications for licensure. These qualifications must include training, experience, knowledge of rules of governmental bodies pertaining to outfitting, and condition and type of gear and equipment[.]

§ 37-47-201(5)(b), MCA (temporary). Second, the Board is scheduled to terminate as of July 1, 1991, and be replaced by an advisory entity known as the Outfitters' Council, with the former's current licensing responsibilities transferred to the Department of Commerce. §§ 2-15-1883, 37-47-201, MCA (effective July 1, 1991). In discharging its responsibilities, the Department of Commerce is directed, inter alia, to "consult with the outfitters' council to develop policy concerning the administration of outfitting"

(§ 37-47-201(4), MCA (effective July 1, 1991)), but, unlike the Board, is given no rulemaking power.

The description of statutory changes with respect to outfitter licensure is important because it shows not only increasingly more complex regulation but also, since 1955, a shift from specifying statutorily all licensure requirements to a process which relies heavily on administratively imposed standards. Promulgation of those standards has been the responsibility of the Fish and Game Commission, the Department of Fish, Wildlife, and Parks and, under the 1987 act, the Board of Outfitters. The 1971 act, moreover, mandated adoption of rules specifying experience requirements. The rules in effect immediately prior to implementation of the Board's regulations at issue here were contained in section 8.39.409, ARM, and stated:

> (1) A general outfitter is required to meet the following experience standards:
>
> (a) a minimum of 5 years' hunting, fishing, packing and camping, handling livestock and equipment experience or previous experience as a professional guide with a general outfitter or previous experience as a licensed special class I and II outfitter; and the director, when deemed necessary, may require a practical field examination to determine the applicant's ability to use all equipment required to provide service.
>
> (2) A special outfitter is required to meet the following experience standards:
>
> (a) a minimum of 5 years' hunting[,] fishing, floating and boating or previous experience as a professional guide with a general outfitter or as a professional guide for a special outfitter in category of license requested.

The Board's rules differ somewhat from the Department's in various respects and, as to experience, require an applicant to "have three seasons of experience in Montana or bordering states as a licensed outfitter or a licensed professional guide working for a licensed outfitter" and permits "one season of experience [to] be waived by the board for an applicant who has completed training at an outfitter or guide school licensed by a state and approved by the board." § 8.39.502(1)(a) and (3)(b), ARM.

The longstanding nature of administratively imposed conditions of outfitter licensure and the express legislative direction in section 37-47-201(5)(b), MCA (temporary), mandating the Board to adopt rules governing experience qualifications negative any contention that section 37-47-302, MCA, which sets forth certain qualifications required to apply for or possess an outfitter's license, is intended to identify the only qualifications, aside from satisfactory completion of the examination provided under section 37-47-305, MCA, upon which licensure may be conditioned; i.e., the statutorily established qualifications are not to be exclusive. Cf. McPhail v. Montana Board of Psychologists, 196 Mont. 514, 640 P.2d 906 (1982) (finding statutory requirements to be exclusive and invalidating rule which conditioned licensure upon satisfying additional requirement); Bell v. Department of Licensing, 182 Mont. 21, 594 P.2d 331 (1979) (same). It has nonetheless been suggested that section 8.39.502(1)(a), ARM, is inconsistent with section 37-47-302(1), MCA, which states in part that an applicant for outfitter licensure must be at least 18 years of age, because it is impossible for an applicant to have satisfied by age 18 the experience requirements through work in this state. See also § 37-47-303(1)(a), MCA (requiring applicants for professional guide licensure to be at least 18 years of age). The issue is therefore whether section 37-47-302(1), MCA, requires the Board to adopt experience standards which, at least theoretically, can be satisfied by an 18-year-old.

Nothing in section 37-47-302(1), MCA, evinces an attempt to so limit the Board's standard-setting authority. Literally read, it merely specifies one of several minimum conditions to licensure and does not prevent the Board from fashioning experience requirements which themselves require one or more years of licensure obtainable only by a person who has reached the age of 18 years. The Legislature clearly contemplated through its express grant of rulemaking authority in section 37-47-201(5)(b), MCA, that the Board would adopt licensure standards pertaining to experience and that those standards, unless otherwise independently unreasonable or in direct conflict with a specific statutory provision, should be given effect. § 2-4-305(6), MCA. Since the age requirement in section 37-47-302(1), MCA, represents a minimum licensure condition, the Board cannot be faulted for adopting a rule which may have the practical effect of limiting outfitter licensure to persons who are no less than 19 or 20 years of age. See Bick v. State, 43 St. Rptr. 2331, 2334, 730 P.2d 418, 421 (1986) ("A valid rule must meet both prongs of a two-prong test to determine

whether or not it harmonizes with its enabling legislation. It must not engraft additional and contradictory requirements on the statute, and it must not engraft additional noncontradictory requirements on the statute which were not contemplated by the Legislature"). Simply put, section 37-47-302(1), MCA, may not be metamorphosed into a legislative directive that the Board adopt experience requirements which, at least in theory, can be satisfied by age 18.

You also inquire concerning whether the experience standard in section 8.39.502(1)(a), ARM, is reasonable. The reasonableness of this standard likely presents significant factual questions inappropriate for resolution in an Attorney General's Opinion. Thus, that issue cannot be addressed in this opinion.

THEREFORE, IT IS MY OPINION:

> Section 8.39.502(1)(a), ARM, which requires certain experience as a condition to outfitter licensure and which may not be satisfied by an applicant based on experience in Montana prior to his 18th birthday, is not inconsistent with section 37-47-302(1), MCA, which conditions licensure on an applicant's being at least 18 years of age.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 42 OPINION NO. 129

CITIES AND TOWNS - Authority to adopt budget which provides for different millage rates within a particular taxing unit;
TAXATION AND REVENUE - Authority of city council to adopt budget which provides for different millage rates within a particular taxing unit;
MONTANA CODE ANNOTATED - Sections 15-10-401, 15-10-402, 15-10-412;
MONTANA LAWS OF 1987 - Chapter 654;
OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 21 (1987).

HELD: Chapter 654, 1987 Montana Laws, prohibits use of different millage rates within a taxing unit to increase the tax liability attendant to a particular piece of property over the 1986 tax year level or to impose tax liability equal to that in the 1986 tax year as to property whose valuation has decreased.

29 December 1988

David V. Gliko
City Attorney
P.O. Box 5021
Great Falls MT 59403-5021

Ken Nordtvedt, Director
Department of Revenue
Room 455, Mitchell Building
Helena MT 59620

Dear Messrs. Gliko and Nordtvedt:

You have submitted separate opinion requests which present the following question:

> Is a taxing unit prohibited from adopting a mill levy rate which cannot be uniformly imposed upon all property within the unit because of the tax limitation in section 15-10-412(7), MCA?

I conclude that chapter 654, 1987 Montana Laws (codified in §§ 15-10-411, 15-10-412, MCA), prohibits a taxing unit from using nonuniform, or varying, millage rates in a particular tax year either to increase a taxpayer's liability over 1986 for property whose taxable valuation has increased pursuant to section 15-10-412(4), MCA, or

to impose tax liability equal to that in 1986 for property whose valuation has decreased.

In August 1988 the city of Great Falls adopted Resolution No. 8203 which established an aggregate levy of 103.37 mills for all taxing units included within its fiscal year 1989 budget, excluding a 1.12 mill levy to finance bonded indebtedness. The 103.37 mill levy was 8.30 mills higher than that imposed for tax year 1986--the base year for determining compliance with the property tax limitations in Initiative No. 105 (codified in §§ 15-10-401, 15-10-402, MCA) and chapter 654. The total taxable valuation in none of the involved taxing units had decreased by 5 percent or more from the previous year, and the higher mill levy thus could not be applied to all property within a particular taxing unit since, if so applied, the tax liability of some taxpayers would increase over tax year 1986 in contravention of section 15-10-412(7), MCA. Nonetheless, the resolution contemplated full application to certain valuation which, under chapter 654, is excluded from the general property tax limitation and thus anticipated that some property valuation would be effectively taxed at 95.07 mills and other property valuation taxed at 103.37 mills. It further contemplated that property whose valuation had decreased from 1986 levels would be taxed at the millage rate, not to exceed 103.37 mills, necessary to produce the same monetary liability as in 1986 for the involved property. Prior to actual implementation of the higher mill levy, the city council passed Resolution No. 8216 which restored the 1986 levy of 95.07 mills, but the council remains interested in the validity of the earlier resolution for future budgetary purposes.

I first address Resolution No. 8203's validity with respect to application of the 103.37 mill levy rate to additional valuation of the kind specified in section 15-10-412(4), MCA. Initiative No. 105 limited, with certain exceptions not relevant here, the maximum amount of taxes which could be levied on property in statutory classes 3, 4, 6, 9, 12, and 14 to that levied in tax year 1986. § 15-10-402(1), MCA. It defined the terms "amount of taxes levied" and "amount levied" to "mean the actual dollar amount of taxes imposed on an individual piece of property, notwithstanding ... changes in the number of mills levied, or increase or decrease in the value of a mill." § 15-10-402(4), MCA. Chapter 654, whose provisions terminate on December 31, 1989, modified the initiative's effect in various respects but generally limits property taxes to 1986 levels in section 15-10-412(7), MCA. Like that in Initiative No. 105, chapter 654's property tax

limitation was established with reference to actual taxes paid under 1986 assessments and not to mill levy rates. § 15-10-412(2) and (7), MCA. Chapter 654 accordingly does not nominally restrict mill levy rates although, by limiting tax amounts, it may, and virtually always does, affect in practice permissive millage rates. See 42 Op. Att'y Gen. No. 21 (1987).

Unlike Initiative No. 105, chapter 654 does allow increases

> in the actual tax liability on individual property in each [statutory] class as a result of:
>
> (a) construction, expansion, replacement, or remodeling of improvements that adds value to the property;
>
> (b) transfer of property into a taxing unit;
>
> (c) reclassification of property;
>
> (d) increases in the amount of production or the value of production for property described in 15-6-131 or 15-6-132;
>
> (e) annexation of the individual property into a new taxing unit; or
>
> (f) conversion of the individual property from tax-exempt to taxable status.

§ 15-10-412(4), MCA. The bases for these exemptions are either an increase in the property's valuation, other than from cyclical reappraisal, or a change in the legal status of the property accompanied by differing tax consequences. Section 15-10-412(4), MCA, clearly does not create an exception to the general property tax limitation in section 15-10-412(7), MCA, for tax amounts which do not result from new or increased taxable valuation or change in legal status.

Consequently, while chapter 654 does not specifically restrict mill levy rates for property subject to the tax limitation in section 15-10-412(7), MCA, it does prohibit any increase in actual tax liability over 1986 tax year levels unless otherwise authorized. The exceptions to this limitation in section 15-10-412(4), MCA, must be construed in light of this prohibition and, when so read, do not permit increases over 1986 tax amounts premised on differentiated millage rates within a taxing unit. Increases over 1986 tax levels

authorized under section 15-10-412(4), MCA, may instead derive only from the additional valuation or change in a property's legal status of the nature described in that subsection. My conclusion in this regard is further supported by the analysis below with respect to the effect of the last sentence of section 15-10-412(7), MCA.

Chapter 654 also prohibits application of Resolution No. 8203 insofar as it would have imposed differing millage rates, not to exceed 103.37 mills, on property whose valuation decreased since 1986 in order to reach that year's level of tax liability for the particular property. The final two sentences of section 15-10-412(7), MCA, read:

> In fixing tax levies, the taxing units of local government may anticipate the deficiency in revenues resulting from the tax limitations in 15-10-401 and 15-10-402, while understanding that regardless of the amount of mills levied, a taxpayer's liability may not exceed the dollar amount due in each taxing unit for the 1986 tax year unless the taxing unit's taxable valuation decreases by 5% or more from the previous tax year. If a taxing unit's taxable valuation decreases by 5% or more from the previous tax year, it may levy additional mills to compensate for the decreased taxable valuation, but in no case may the mills levied exceed a number calculated to equal the revenue from property taxes for the 1986 tax year in that taxing unit.

The first sentence reflects the basic property tax restriction embodied in Initiative No. 105, while the second allows additional mills to be imposed to compensate for overall property devaluation of 5 percent or more from one year to the next within a taxing unit without reference to that restriction--as long as total property tax revenue for the taxing unit does not exceed the 1986 amount. The second sentence expressly authorizes levies of additional mills because the Legislature recognized that, except in the extraordinary situation where all property within a taxing unit has decreased in valuation, application of increased millage will raise at least some taxpayers' tax liability over 1986 amounts. This sentence, moreover, would have no discernible purpose if nonuniform millage rates were permissible, since in that case a taxing unit could always levy at whatever rates would produce total property tax liability at least equal to that in 1986.

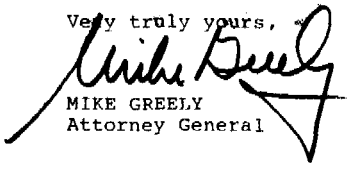
Because it presumably does not enact meaningless provisions, I draw from the last sentence of section 15-10-412(7), MCA, the conclusion that the Legislature intended property taxes subject to Initiative No. 105 and chapter 654 to be levied on the basis of a uniform millage rate within a particular taxing unit--a conclusion inconsistent with Resolution No. 8203.

I note that determination of your question on statutory grounds avoids the need to address a significant issue under the United States and Montana Constitutions' equal protection provisions presented by Resolution No. 8203's proposed use of varying millage rates.

THEREFORE, IT IS MY OPINION:

> Chapter 654, 1987 Montana Laws, prohibits use of different millage rates within a taxing unit to increase the tax liability attendant to a particular piece of property over the 1986 tax year level or to impose tax liability equal to that in the 1986 tax year as to property whose valuation has decreased.

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 September 30, 1988. This table includes those rules adopted during the period September 30, 1988 through December 31, 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 September 30, 1988, this table and the table of contents of this issue of the MAR.

This table indicates the department name, title number, rule numbers in ascending order, catchphrase or the subject matter of the rule and the page number at which the action is published in the 1988 Montana Administrative Register.

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