RESERVE

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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing and where written comments may be submitted.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

Page Number

TABLE OF CONTENTS

NOTICE SECTION

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF PUBLIC ACCOUNTANTS

In the matter of the proposed amendment of rules pertaining to credit for service as report reviewer, definitions, filing of reports, alternatives and exemptions, and reviews and enforcement	))))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF RULES PERTAINING TO THE PROFESSIONAL MONITORING PROGRAM OF THE BOARD OF PUBLIC ACCOUNTANTS

TO: All Interested Persons:

1. On December 14, 1989, at 1:00 p.m., a public hearing will be held in the Scott Hart Building Auditorium, 303 Roberts, Helena, Montana, to consider the amendment of ARM 8.54.817, 8.54.902, and 8.54.904 through 8.54.906 pertaining to the professional monitoring program of the board of public accountants.

2. The proposed amendments will read as follows: (new matter underlined, deleted matter interlined)

"8.54.817 CREDIT FOR SERVICE AS LECTURER, DISCUSSION LEADER, SPEAKER, OR REPORT REVIEWERS (1) will remain the same.

(2) Continuing education credit may be claimed for serving as a report reviewer under the board's positive enforcement program set out in ARM 8.54.703 or under other structured report review programs approved by the board. One hour of credit shall be granted for every two hours spent reviewing reports. The maximum credit for such reviews shall not exceed 24 hours of the full basic period requirement. These credits shall qualify towards the requirement related to reporting on financial statements as set out in ARM 8.54.802 (2)."

Auth: Sec. 37-50-201, 37-50-203, MCA; IMP, Sec. 37-50-203, 37-50-314, MCA

REASON: The Board, after undergoing three years of report reviews, recognizes the knowledge that is acquired by report reviewers under a structured program. Most participants in the Profession Monitoring Program have stated that the knowledge gained is very beneficial and comparable to the education gained by attending professional continuing education programs. It is felt appropriate to recognize these benefits of participation in the program.

"8.54.902 DEFINITIONS As used in this section:

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

(3) "Quality review" means a review under a formal quality review program sponsored by the American institute of certified public accountants or such other formal quality review program approved by the board."

Auth: Sec. 37-50-203, MCA; IMP, Sec. 37-50-203, MCA

REASON: The Board is proposing to add the definition of "quality review" because quality reviews are being proposed as exceptions to report filing requirements under the Board's Profession Monitoring Program.

"8.54.904 FILING OF REPORTS (1) Every permit holder who is required to file a report under ARM 8.54.903 shall file with the board a copy of the highest level of public accounting work performed by the holder, ~~which may be any of the following~~ Levels of reporting from the highest to lowest level are:

(a) through (c) will remain the same.

(d) if reports mentioned in (a), (b), or (c) above have not been issued, any other report (complete with the information reported on) that indicates the permit holder has expert knowledge of accounting or auditing.

(2) The report submitted must have been issued within the ~~past calendar year~~ period of time specified by the board and must have the client's or employer's name and similar identifying information deleted.

(3) will remain the same."

Auth: Sec. 37-50-203, MCA; IMP, Sec. 37-50-203, MCA

REASON: The Board is proposing the amendments to clarify the levels of reports, from highest to lowest, that must be submitted and to reserve some latitude in specifying the time frames for reports under review.

"8.54.905 ALTERNATIVES AND EXEMPTIONS (1) A practice unit which has undergone an AICPA or board-sanctioned peer or quality review within 3 calendar years may satisfy the requirements of ARM 8.54.904 by filing a complete copy of the peer or quality review report including all findings and recommendations and the practice unit's responses to such findings and recommendations.

(2) The board reserves the authority to exempt permit holders who would otherwise be required to file a report under ARM 8.54.904 for good cause, ~~based upon facts and circumstances.~~"

Auth: Sec. 37-50-203, MCA; IMP, Sec. 37-50-203, MCA

REASON: The board is proposing to amend this rule to provide for an exemption under the Profession Monitoring Program for practice units that have undergone a quality review program conducted by the AICPA. The AICPA has implemented a quality review program which will be more inclusive than the Board's positive enforcement program. It is felt that satisfaction of either the Board's requirement or the AICPA requirements will indicate a satisfactory quality of report.

"8.54.906 REVIEWS AND ENFORCEMENT (1) Reports submitted shall be classified as either acceptable, acceptable with comments, marginal or deficient. Definitions of these terms are as follows:

(a) "Acceptable" means in compliance with professional standards (no significant departures from professional standards noted).

(b) "Acceptable with comments" means in compliance with professional standards (no significant departures from professional standards noted), but reviewers did have minor comment(s).

(c) "Marginal" means noticeable departures from professional standards, and the report is generally not in compliance.

(d) "Deficient" means serious departures from, or omissions of, compliance with professional standards noted, so that the reviewer believes the report is basically not in compliance with professional standards and is materially inaccurate or misleading.

(2) Responses are required from those practice units whose reports are classified as deficient.

(3) The board may require responses from practice units which have consecutive reports classified as marginal or a combination of marginal and deficient.

(4) For those practice units which are required to submit responses under (2) or (3) above, the board may require one or more of the following actions:

(a) completion of specific CPE courses;

(b) third-party review of workpapers;

(c) third-party review of other reports and workpapers;

(d) pre-issuance reviews of reports by permit holders approved by the board;

(e) inspection of quality controls by a third-party;

(f) participation in an approved peer or quality review program;

(g) certain restrictions on the permit to practice;

(h) suspension of the permit to practice; or

(i) revocation of the permit to practice.

(5) For those practice units whose reports are classified as deficient for more than one year, the board may require:

(a) the practice unit to submit a written comprehensive statement of future procedures to be followed that will insure an improvement in the quality of future reports.

(6) The reports submitted to the board under this subchapter shall be subject to review, investigation and enforcement under subchapter 7."

Auth: Sec. 37-50-203, MCA; IMP, Sec. 37-50-203, MCA

REASON: The proposed changes will supply a mechanism to enforce steps thought necessary to improve or enhance the work product and services of practice units identified by the review process as substandard.

3. Interested persons 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 Board of Public Accountants, 1424 - 9th Avenue, Helena, Montana 59620-0407, no later than December 21, 1989.

4. Geoffrey L. Brazier, Helena, Montana, has been designated to preside over and conduct the hearing.

BOARD OF PUBLIC ACCOUNTANTS
DARRELL E. EHRLICK, CPA
CHAIRMAN

BY: _____
ANDY POOLE, DEPUTY DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, November 13, 1989.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF PUBLIC ACCOUNTANTS

In the matter of the proposed amendment, repeal and adoption of rules pertaining to the licensing of public accountants	))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT, REPEAL AND ADOPTION OF RULES PERTAINING TO PUBLIC ACCOUNTANTS

TO: All Interested Persons:

1. On December 14, 1989, at 1:00, p.m., a public hearing will be held in the Scott Hart Building Auditorium, 303 Roberts, Helena, Montana, to consider the amendment of ARM 8.54.204, 8.54.401, 8.54.402, 8.54.409 through 411, 8.54.415, 8.54.416, 8.54.702, 8.54.704, 8.54.802, 8.54.804, 8.54.809, 8.54.810, 8.54.821, repeal of 8.54.406, 8.54.601, 8.54.607, 8.54.618, 8.54.701, 8.54.801, 8.54.805, and adoption of new rule I, all pertaining to public accountants.

2. The proposed amendments will read as follows: (new matter underlined, deleted matter interlined)

"8.54.204 DEFINITIONS (1) For purposes of these rules the following terms have the meanings indicated:

~~(a) "Practice of (or practice) public accounting" means the performance or the offering to perform, by a certificate or license holder, for a client or potential client, one or more kinds of services involving the use of accounting or auditing skills, including the issuance of reports on financial statements on which third parties may rely, or of one or more kinds of management advisory or consulting services, or the preparation of tax returns or the furnishing of advice on tax matters.~~

~~(b) "Non-practice of public accounting" - a certificate or license holder not in the practice of public accounting but providing financial or consulting services to the public must have a permit to practice, if they hold themselves out to the public as a CPA or PA in any manner.~~

~~CPA's or PA's working for a non-public accounting employer shall not use their CPA or PA designation when presenting employer reports to outside parties unless they maintain a permit to practice.~~

(c) through (h) will remain the same but will be renumbered (a) through (f).

(g) "Licensee" - A certificate, license, or permit holder.

(i) will remain the same but will be renumbered (h).

~~(j)~~ (i) "Financial statement" - A presentation of financial data, derived from accounting records and intended to communicate an entity's economic resources or obligations at a point in time, or the changes therein for a period of time. ~~Financial forecasts, projection and similar presentations, and f~~Financial presentations included in tax returns are not financial statements for purposes of this

definition. ~~The following~~ [Financial statements include, but are not limited to, the following] ~~presentations are examples of financial statements~~:

(i) balance sheet,

(ii) statement of income,

(iii) statement of retained earnings,

(iv) statement of ~~changes in financial position~~ cash flows,

(v) statement of changes in owners equity,

(vi) financial forecasts, projections and similar presentations,

(vii) statement of assets and liabilities (with or without owner's equity accounts),

(viii) statement of revenue and expenses,

(ix) summary of operations,

(x) statement of operations by product lines,

(xi) statement of cash receipts and disbursements."

Auth: Sec. 37-50-203, MCA; IMP, Sec. 37-50-203, MCA

REASON: The Board is proposing to delete subsection (a) because the practice of public accounting is now defined by statute, with the enactment of Chapter No. 382 of the Laws of 1989.

The Board is proposing to delete subsection (b) from this rule and transferring it to a separate new rule entitled "Use of CPA/LPA Designation." It is being reassigned for the purposes of clarification.

The Board is proposing to add the definition of "licensees" to clarify that the terminology refers to all certified public accountants, licensed public accountants and holders of annual permits to practice.

The Board is proposing to change "changes in financial position" to "cash flows" for the reason that this is now the correct terminology used in the profession.

The Board is proposing to add financial forecasts, projections and similar presentations to the definition of "financial statements" for the reason that these are now areas of reporting on financial statements generally recognized by the profession.

"8.54.401 BOARD MEETINGS (1) The chairman shall preside at all meetings and shall perform such duties as the board may direct. At any meeting at which the chairman is absent, the members present will, by a majority vote, select a temporary chairman for the meeting.

~~(2) The department shall keep accurate minutes of the meetings of the board and complete records of all applications for examination and registration, certificates granted, and persons registered as licensed public accountants, and all necessary information in regard thereto.~~

~~(3) The department shall collect all fees and deposit same to the credit of the state treasurer in a special fund as provided in section 37-50-315, MCA. The department shall prepare and (after approval of the board) file the annual operating budget with the budget director of the state of~~

~~Montana.--After-the-close-of-the-state-fiscal-year-(June 30)-the-department-shall-prepare-and-submit-to-the-board-a statement-showing,-in-reasonable-detail,-the-amount-of-monies received-and-disbursed-during-that-year-and-a-comparison-with the-related-budget-allotments.~~

(4) and (4)(a) will remain the same but will be renumbered (2) and (3)."

Auth: Sec. 37-50-201, MCA; IMP, Sec. 37-50-201, MCA

REASON: The Board is proposing to delete subsections (2) and (3) because they repeat language in Sections 37-1-101, 37-50-205, and 37-50-315, MCA.

"8.54.402 EXAMINATIONS (1) and (2) will remain the same.

(3) The board hereby adopts the use and grading services of the American institute of certified public accountants (AICPA) and its examination schedule. Applications for the examination must be postmarked or received by the 15th day of the second month prior to each scheduled examination. Where the 15th day of the month falls on a Saturday, Sunday, or holiday, the postmark of the next business day will be accepted.

(a) will remain the same.

(4) The passing score on each section of the examination is 75 or better, subject to the conditioning requirements of ARM 8.54.405."

Auth: Sec. 37-1-131, 37-50-201, 37-50-308, MCA; IMP, Sec. 37-50-308, MCA

REASON: It is being proposed to parenthetically include the acronym for the American Institute of Certified Public Accountants in the earliest possible point of the rules to shorten text of later rules referring to the Institute.

The proposed addition of subsection (4) will make clear to license applicants what the pass/fail point on the licensing exam is. The passing grade set forth in the proposed rule conforms to the uniform passing grade established and used by the American Institute of Certified Public Accountants and other state boards of accountancy which enforce similar licensing qualifications.

"8.54.409 ACCOUNTING AND AUDITING EXPERIENCE REQUIREMENTS (1) To be issued an initial permit to practice under section 37-50-203 (2) (g), MCA, an applicant must provide evidence of "adequate" accounting and auditing experience.

(1) will remain the same but will be renumbered (2).

(a) through (c)(ii) will remain the same."

Auth: Sec. 37-50-201, MCA; IMP, Sec. 37-50-201, MCA

REASON: The Board is proposing to amend the rule to clarify that experience requirements must be met for the purpose of qualifying for the initial annual permit under Section 37-50-203 (2) (g), MCA.

"8.54.410 FEE SCHEDULE
(1) through (4) will remain the same.
(5) Annual fee for non-permit holder.....~~35.00~~ 25.00
(6) Annual fee for permit to practice.....~~60.00~~ 50.00
(7) through (8) will remain the same.
~~(9) Registration of professional corporation pursuant to 35-4-208, MCA.....10.00 plus 5.00 per shareholder.~~
(9) Late fees for renewals postmarked after the deadline date:
(a) Permit to practice.....50.00
(b) Non-permit holder.....25.00
(10) Late fee for failure to comply with CPE requirements in accordance with 8.54.802.....100.00
(11) Late fee for failure to submit CPE reporting form by July 31st of each year.....25.00."
Auth: Sec. 37-1-134, 37-50-203, MCA; IMP, Sec. 37-1-134, 37-50-204, 37-50-314, 37-50-317, MCA

REASON: The Board is proposing to lower the annual renewal fees because of a surplus in its special revenue account fund balance. It has been the recommendation of the Office of the Legislative Auditor's to keep the cash balance at a level equal to one years' operating budget. The reduction in annual fees should reduce the cash balance accumulated each year by approximately $22,000.

The Board is proposing to remove the fee charged for the registration of professional corporations because it places an unfair expense on PC's. Partnerships are also required to be registered, but a fee for this registration is expressly prohibited by statute.

Considerable costs have been incurred in enforcing payment of renewal fees. The proposed fee will reflect costs in this program area.

The Board is proposing to impose a late fee for licensees who fail to file the CPE reporting form on time and for those who fail to comply with the CPE requirements in the prescribed period of time. This is because considerable costs have been incurred in enforcing the CPE requirements. Those licensees who fail to comply should bear the costs of enforcing this program. The Board is also of the opinion that a late filing fee will provide an incentive to comply with the CPE requirements on a timely basis.

"8.54.411 EXPIRATION - RENEWAL ~~--GRACE PERIOD~~
(1) through (2) will remain the same.
~~(3) After the expiration of the annual permit to practice, certificate, and license on December 31 of each year and after January 31 following the year, the board shall, in writing, request the surrender of the license or certificate and permit to practice of all persons failing to renew the same.~~
~~(4) Annual permits to practice shall be subject to the continuing education requirements set forth in these rules.~~
(5) will remain the same but will be renumbered (3)."

Auth: 37-1-131, 37-50-201, 37-50-203, MCA; IMP, Sec. 37-50-203, 37-50-314, 37-50-317, MCA

REASON: The Board is proposing to delete subsection (3), because it is in conflict with a statute. Section 37-50-317, MCA establishes an expiration date of December 31. There is no provision for a grace period.

The Board is proposing to delete subsection (4) because it unnecessarily repeats Section 37-50-314, MCA.

"8.54.415 RECIPROCITY - OTHER STATES (1) and (1)(a) will remain the same.

(b) meeting the requirements established under section 37-50-203(2)~~(f)~~(g), MCA, and the regulations established thereunder.

(c) and (2) will remain the same."

Auth: Sec. 37-50-311, 37-50-312, 37-50-313, 37-50-317, MCA; IMP, Sec. 37-50-311, 37-50-312, 37-50-313, 37-50-317, MCA

REASON: The reason for the change is the result of an incorrect reference to the statutes when the rule was amended in 1984.

"8.54.416 RECIPROCITY - ~~OTHER COUNTRIES~~ FOREIGN APPLICANTS (1) The AICPA has no program or facilities to evaluate the education of a foreign applicant so that the education can be proved comparable to that required under section 37-50-305, MCA, or for evaluating the licensing examinations of foreign countries or to compare them to the Uniform CPA examination. Therefore, reciprocity with holders of certificates or licenses from foreign countries will not be recognized."

Auth: Sec. 37-1-131, 37-50-203, MCA; IMP, Sec. 37-50-311, 37-50-312, MCA

REASON: The Board is proposing to amend the title of this rule to more appropriately reflect its content.

"8.54.702 ENFORCEMENT AGAINST ~~PERMIT-HOLDERS~~ LICENSEES (1) (a) through (j) remain the same

(k) failure to respond to correspondence from, or comply with, orders of the board.

(2) In lieu of or in addition to any disciplinary actions specifically provided in subsection (1) of this section, the board may require of a ~~permit-holder~~ licensee:

(a) through (c) will remain the same.

(3) The board may publish the enforcements implemented against ~~permit-holders~~ licensees under subsections (1) and (2) of this section whenever the board determines that the public's right to know outweighs the ~~permit-holder's~~ licensee's right of privacy."

Auth: Sec. 37-1-131, 37-50-203, MCA; IMP, Sec. 37-1-136, 37-50-203, 37-50-321, MCA

REASON: The Board is proposing to change the title of the rule to more appropriately reflect its content in that enforcement pertains to all licenses, and not just permit holders.

The Board is proposing to amend subsection (1) to provide that failure to comply with orders or to respond to correspondence from the Board is grounds for disciplinary action. The Board has experienced problems with licensees who fail to respond to correspondence and orders from the Board. This has been particularly true in regard to attempts to enforce the Board's Profession Monitoring Program under Section 37-50-203 (2) (h), MCA.

The Board is proposing to change all references to "permit holders" to "licensees" to clarify that disciplinary actions may be instituted against all licensees and not just permit holders.

"8.54.704 ENFORCEMENT PROCEDURES - HEARING BY THE BOARD

(1) In any case where reasonable cause has been determined with respect to a violation by a licensee ~~permit holder~~, or where the board has received a written complaint by any person furnishing grounds for a determination of such reasonable cause, or where the board of accountancy of another state furnishes such grounds, the board may cause a notice setting forth appropriate charges to be issued. ~~The board shall, not less than 30 days prior to the date of the hearing, serve a copy of said notice upon the permit holder, by civil service according to the Montana Rules of Civil Procedure.~~

(2) Any ~~permit holder~~ licensee against whom a notice of proposed board action has been issued under this section shall have the right, reasonably in advance of the hearing, to all discovery available to parties in accordance with the Montana Rules of Civil Procedure, as limited by Model Rule 13.

(3) In a hearing under this section, the respondent ~~permit holder~~ licensee may appear in person or, in the case of a firm, through a partner, officer, director or shareholder or by counsel, examine witnesses and evidence presented in support of the board's action, and present evidence and witnesses on his own behalf. The ~~permit holder~~ licensee shall be entitled, on application to the board, to the issuance of subpoenas to compel the attendance of witnesses and the production of documentary evidence.

(4) and (5) will remain the same.

(6) If, after service of notice, the ~~permit holder~~ licensee fails to appear at the hearing, the board may enter such order as it deems warranted by the evidence, which order shall be final unless the ~~permit holder~~ licensee petitions for review thereof pursuant to subsection (7) of this section; provided, however, that within 30 days from the date of any such order, upon showing of good cause for the ~~permit holder's~~ licensee's failure to appear and defend, the board may set aside the order and schedule a new hearing on the complaint, to be conducted in accordance with applicable subsections of this rule.

(7) will remain the same."

Auth: Sec. 37-1-136, 37-50-203, MCA; IMP, Sec. 37-1-136, 37-50-203, MCA

REASON: The Board is proposing to delete the last sentence in the first subsection of the rule because it is repetitious and restrictive. In actual practice, the Board has not followed this rule in recent years, because it is time-consuming and costly.

The Board is proposing to change all references to "permit holders" to "licensees" to clarify that disciplinary actions may be instituted against all licensees and not just permit holders.

"8.54.802 BASIC REQUIREMENT (1) will remain the same.

(2) At least 24 hours of the aforementioned 120 hours of acceptable continuing education credit must consist of subjects related to the reporting on financial statements as defined in ARM 8.54.204 (1) (e) and (j) in these regulations. ~~The purpose of this requirement is to have permit holders participate in a minimum amount of continuing education in the area of reporting on financial statements which is an area of responsibility specifically given to permit holders in section 37-50-301 (6), MCA.~~

~~(3) Applicants who have not completed their full basic requirement by the end of the continuing education reporting period (June 30) as described in (4) below, or because of hardship as described in ARM 8.54.806, or because their reported continuing education was not acceptable to the board, may use the period of time between the end of the continuing education reporting period (June 30) and the start of the next permit year (January 1) to complete their full basic requirement. This time is limited to the last day of August for those applicants described in (4) below. The purpose of this exception is to allow the applicants described in (4) below, or those with a hardship, or those with a disagreement with the board as to whether continuing education submitted is acceptable, the opportunity to properly complete the full basic requirement in time for the next permit year. It is not the intent of the board to change the basic requirement reporting period from the three year period ending the June 30th immediately preceding the permit year to the three and one half years immediately preceding the permit year except in the unusual situations designated above.~~

~~(4)~~ (3) ~~The board realizes that an applicant, because of distance to travel, course selection, or for other reasons, may wish to apply continuing education hours taken near each June 30 to either the preceding or subsequent continuing education reporting period. Accordingly, if the a~~Applicants who have has already met the full basic requirement by the end of any June 30th reporting period, ~~the applicant~~ may elect to have excess ~~qualified~~ continuing education hours, taken during the immediately preceding months of May and June, apply to the subsequent reporting period.

(4) ~~Conversely, a~~Applicants who have not completed their full basic requirements by the end of any June 30th

reporting period may elect to have qualified continuing education hours taken during the immediately following months of July and August apply to the previous reporting period. ~~The election and reporting will be made on forms provided by the board.~~"

Auth: Sec. 37-50-201, 37-50-203, MCA; IMP, Sec. 37-50-203, 37-50-314, MCA

REASON: The Board is proposing amendments to this rule to delete unnecessary wording and to make the rule more understandable. In subsection (2), the last sentence is proposed for deletion because it is considered unnecessary to include the purpose of this rule with the rule.

Subsection (3) is being proposed for repeal because it is in conflict with other rules and because the Board has the authority to grant hardship exceptions under Section 37-50-314, MCA.

In Subsection (4), unnecessary wording is being proposed for repeal, with the balance of the rule rephrased for clarification.

"8.54.804 NON-RESIDENT HOLDERS OF A PERMIT TO PRACTICE COMPLIANCE (1) Holders of a permits to practice who are out-of-state residents are required to comply with the continuing education requirements if they wish to maintain their ~~right~~ permits to practice public accounting in Montana."

Auth: Sec. 37-50-201, 37-50-203, MCA; IMP, Sec. 37-50-203, 37-50-314, MCA

REASON: The Board is proposing the amendment because the correct terminology is "permit." This amendment was identified during a recent review of the Board's rules pursuant to Section 2-4-314, MCA.

"8.54.809 APPLICATION BY RECIPROCITY ~~EFFECTIVE DATE~~

(1) will remain the same.

(2) ~~Except that~~ If the individual holds a valid and unrevoked permit to practice public accounting if one is issued by such other jurisdiction, or was otherwise allowed to practice public accounting in such other jurisdiction, and cannot meet the full basic requirement at the time of application for a permit to practice, the individual must request that the public accounting regulatory entity of such other jurisdiction submit in writing, directly to the board, verification that the individual was allowed to practice public accounting in that other jurisdiction. Upon acceptance of the verification by the board, the individual will be issued a permit to practice until the permit year following the June 30 following the individual's application. The individual must complete the full basic requirement by the June 30 following their application.

(3) will remain the same."

Auth: Sec. 37-50-201, 37-50-203, MCA; IMP, Sec. 37-50-203, 37-50-314, MCA

REASON: The Board is proposing to amend the title of the rule to reflect the content of the rule more closely. The changes to the rule are being proposed to remove archaic and unnecessary phraseology.

"8.54.810 REENTRY (1) An individual formerly the holder of a ~~certificate, or license, or~~ permit ~~and no longer the holder because of inactive status, revocation, suspension, or refusal to renew certificate, license, or permit as described in section 37-50-211, MCA, or because of failure to properly pay the annual renewal fee as described in section 37-50-314, MCA, or because of failure for a permit holder to meet the continuing education requirement shall otherwise apply to the board for reinstatement of certificate, license, or permit as described in section 37-50-322, MCA and, if wishing a permit to practice, must comply with the continuing education full basic requirement upon their reentry at which time, they will receive a permit to practice~~ who wishes to apply for reinstatement of the permit must first satisfy the provisions of ARM 8.54.802."

Auth: Sec. 37-50-201, 37-50-203, MCA; IMP, Sec. 37-50-203, 37-50-314, MCA

REASON: The Board is proposing the changes for clarification. This rule can be shortened considerably without changing its meaning. In its present form, it is archaic and redundant.

"8.54.821 ~~RENEWAL OF CERTIFICATE OR LICENSE TO PRACTICE~~ REPORTING REQUIREMENTS (1) ~~To renew a permit to practice after June 30, 1984, the applicant shall~~ On or before the July 31 ~~prior to the time at which the permit to practice would otherwise expire, (December 31) permit holders shall~~ give evidence to the board that their continuing education ~~provisions~~ requirements have been met for the reporting period ending the June 30 prior thereto ~~to the permit to practice renewal date. Except that persons described in 8.54.802 (4) will have until the August 31 following the end of the reporting period. The intent of the board is for all other persons to report by July 31 so that the board has adequate administrative time to process reports prior to the time permits to practice are issued.~~

(2) Persons who use the two-month carry-back provision of ARM. 8.54.802 (4) shall file their reporting forms by July 31, listing the course(s) they are planning to attend or complete. If the course(s) listed are not completed, they must notify the board office in writing immediately, but not later than August 31st. Such notification(s) shall explain why the course(s) were not completed and provide a plan to meet the continuing education requirements."

Auth: Sec. 37-50-201, 37-50-203, MCA; IMP, Sec. 37-50-203, 37-50-314, MCA

REASON: The Board is proposing the rule change to clarify the reporting period and delete unnecessary

phraseology. Also, the proposed changes will clarify when all reporting forms are due in the office with no exceptions. The amendments will also provide that any licensee using a "carry-back" provision must file a statement, if the courses taken were not completed, and showing what additional course work will be completed. Experience has shown that not all licensees are complying with the present rule. The changes, as proposed, should clarify and simplify the reporting requirements and stimulate compliance.

3. The following rules are being proposed for repeal:

8.54.406 REQUIREMENTS FOR CERTIFIED PUBLIC ACCOUNTANT CERTIFICATE AND LICENSED PUBLIC ACCOUNTANT LICENSE Full text of the rule is located at page 8-1480, Administrative Rules of Montana. The board is proposing to repeal this rule because it repeats sections 37-50-302, 303, and 304, MCA, and adds confusion to interpretation of the statutes.

Auth: Sec. 37-50-201, 37-50-203, MCA; IMP, Sec. 37-50-302, 37-50-303, 37-50-304, MCA

8.54.601 PREAMBLE Full text of the rule is located at pages 8-1493 and 8-1494, Administrative Rules of Montana. The board is proposing to repeal this rule because it is not enforceable and does not serve any purpose.

Auth: Sec. 37-1-131, 37-50-203, MCA; IMP, Sec. 37-50-203, 37-50-314, 37-50-321, MCA

8.54.607 INCOMPATIBLE OCCUPATIONS Full text of the rule is located at page 8-1496, Administrative Rules of Montana. The board is proposing to repeal this rule because it is felt the rule is no longer applicable to the profession.

Auth: Sec. 37-1-131, 37-50-203, MCA; IMP, 37-50-203, 37-50-321, MCA

8.54.618 FORM OF PRACTICE AND NAME Full text of the rule is located at page 8-1501, Administrative Rules of Montana. The board is proposing to repeal this rule because attempted enforcement of these prohibitions is vulnerable to a successful challenge or defense under the First Amendment to the U.S. Constitution, dependent upon the fictitious name used or specialization indicated.

Auth: Sec. 37-1-131, 37-50-203, MCA; IMP, Sec. 37-50-203, MCA

8.54.701 DEFINITIONS Full text of the rule is located at page 8-1503, Administrative Rules of Montana. The board is proposing to repeal this rule because the definition of permit holder is already contained in ARM 8.54.204.

Auth: Sec. 37-1-136, 37-50-203, MCA; IMP, Sec. 37-1-136, 37-50-321, MCA

8.54.801 INTRODUCTION Full text of the rule is located at page 8-1509, Administrative Rules of Montana. The board is proposing to repeal this rule because it does not serve any

purpose. It was identified as archaic and unnecessary during a recent review of the board's rules pursuant to section 2-4-314, MCA.

Auth: Sec. 37-50-201, 37-50-203, MCA; IMP, Sec. 37-50-203, 37-50-314, MCA

8.54.805 EXCEPTIONS - NOT PRACTICING PUBLIC ACCOUNTING Full text of the rule is located at page 8-1510, Administrative Rules of Montana. The board is proposing to repeal this rule because it is unnecessary and confusing.

Auth: Sec. 37-50-201, 37-50-203, MCA; IMP, Sec. 37-50-203, 37-50-314, MCA

4. The proposed new rule will read as follows:

"I. 8.54.205 USE OF CPA/LPA DESIGNATION

(1) Certificate or license holders not otherwise in the practice of public accounting, but providing financial or consulting services to the public, must have permits to practice, if they hold themselves out to the public in any manner as a CPA or LPA.

(2) Certificate or license holders working for non-public accounting employers shall not use their CPA or LPA designations when presenting employer reports to outside parties unless they maintain a permit to practice."

Auth: Sec. 37-1-131, 37-50-203, MCA; IMP, Sec. 37-50-203, MCA

REASON: In order to maintain a permit, certificate and license holders are required by statute to meet continuing professional education requirements. This is a method for assuring that licensees maintain professional competence. This proposed rule will require that licensees meet CPE requirements before using professional designations in certain circumstances.

5. Interested persons 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 Board of Public Accountants, 1424 - 9th Avenue, Helena, Montana 59620-0407, no later than December 21, 1989.

6. Geoffrey L. Brazier, Helena, Montana, has been designated to preside over and conduct the hearing.

BOARD OF PUBLIC ACCOUNTANTS
DARRELL E. EHRLICK, CPA
CHAIRMAN

BY: _____
ANDY POOLE, DEPUTY DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, November 13, 1989.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF INVESTMENTS

In the matter of the proposed amendment of rules pertaining to the Montana Capital Company Act and investments by the Montana Board of Investments	))))	NOTICE OF PROPOSED AMENDMENT OF 8.97.802, 8.97.803, 8.97.807, 8.97.1404 and 8.97.1502

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On December 23, 1989, the Board of Investments proposes to amend the above-stated rules.

2. The proposed amendments will read as follows: (new matter underlined, deleted matter interlined)

"8.97.802 DEFINITIONS (1) As used in this subchapter and unless the context clearly requires another meaning:

(a) The "act" means the Montana capital companies act, Title 90, chapter 8, MCA;

(b) "administrator" means the ~~administrative officer of the Office of Development Finance of the Board of Investments~~ chief investment officer or his designee;

(c) "affiliate" or "affiliated group" means:

(i) any corporation that directly or indirectly owns, controls, or holds with power to vote, 50 percent or more of the outstanding voting securities of such specified corporation;

(ii) any corporation, 50 percent or more of whose outstanding voting securities are owned, controlled, or held with power to vote, directly or indirectly, by such specified corporation;

(iii) any corporation that is directly or indirectly under common control with such specified corporation through the ownership, control or holding with power to vote, directly or indirectly, of 50 percent or more of such corporation's and such specified corporation's outstanding voting securities;

(c) through (e) will remain the same but will be renumbered (d) through (f).

(g) "corporate taxpayer" means a corporation other than a small business corporation;

~~(f)~~ (h) "small business" means a business that has a net worth less than $6 million; has an average net income, after federal income taxes, for the preceding two years of less than $2 million (average net income to be computed without benefit of any carryover loss); and has less than 200 employees working in Montana;

(i) "small business corporation" means a "small business corporation" or an "electing small business corporation" as those terms are defined in 15-31-201(1) and (2), respectively;

(j) "wholly owned subsidiary" of another corporation means a subsidiary, 100 percent of whose outstanding voting

securities are owned, controlled or held with power to vote, directly or indirectly, by such other corporation.

(2) will remain the same."

Auth: Sec. 90-8-105, MCA; IMP, Sec. 90-8-101, 90-8-104, 90-8-201, 90-8-202, MCA

REASON: Definitions (1)(c), (g), (i) and (j) are being proposed to implement Chapter 707, Laws of 1989. Definition (1)(b) is needed because the Board has changed titles of its administrative staff.

"8.97.803 APPLICATION PROCEDURE TO BECOME A 'CERTIFIED' MONTANA CAPITAL COMPANY (1)(a) through (o) will remain the same.

(p) the amount of equity capitalization up to $1,500,000 raised between April 18, ~~1987~~ 1983 and June 30, 1987 and the amount of equity capitalization up to $3,000,000 raised after June 30, 1987 that the company expects to qualify for the tax credits provided for in section 90-8-202, MCA.

(2) through (8) will remain the same.

(9) Certification automatically expires if the company fails to become qualified pursuant to ARM 8.97.804, within ~~one year~~ eighteen months of the date it was certified ~~or within one year of the effective date of this subsection, whichever is longer.~~

Auth: Sec. 90-8-105, MCA; IMP, Sec. 90-8-202, 90-8-204, MCA

REASON: The amendment to subsection (9) is being proposed because experience has shown that the one year time period does not allow sufficient time to raise the necessary capital to become qualified. This amendment should eliminate requests for extension of time.

"8.97.807 ALLOCATION OF TAX CREDITS (1) Each "qualified" Montana capital company shall report to the board on a quarterly basis beginning April 1, 1984 on forms provided by the board.

(a) the name of each new investor in the qualified Montana capital company; and:

(i) whether the investor is a partner in a partnership which expects to obtain or has received any tax credit pursuant to the Act, and if so, explain in detail;

(ii) whether the investor is a shareholder in a small business corporation that has obtained or is expected to obtain any tax credit pursuant to the Act, and if so, explain in detail;

(iii) if the investor is a partnership or a small business corporation, whether any of its partners or shareholders have or are expected to obtain tax credits pursuant to the Act, and if so, explain in detail;

(iv) if the investor is a corporate taxpayer, whether it is a member of an affiliated group as defined in 8.97.802(c) and whether any wholly owned subsidiary or affiliate within the group has obtained or is expected to

obtain any tax credits pursuant to the Act, and if so, explain in detail.

(1)(b) through (5) will remain the same."

Auth: Sec. 90-8-105, MCA; IMP, Sec. 90-8-202, MCA

REASON: These amendments are being proposed to implement Chapter 707, Laws of 1989.

"8.97.1404 CONVENTIONAL LOAN PROGRAM - PURPOSE AND LOAN RESTRICTIONS (1) through (4) will remain the same.

(5) A mortgage offering for refinance purposes ~~must be for the borrower's primary residence. The maximum loan-to value ratio for uninsured loans will be 70 percent up to FHLMC maximum and then the graduated scale in 8.97.1403(1)(a) will be used.~~ will be considered as follows:

(a) For a borrower's primary residence, the maximum loan-to-value ratio for uninsured loans will be 70 percent up to the FHLMC maximum and then the graduated scale in 8.97.1403(1)(a) will be used.

(b) For a property which is not a borrower's primary residence, the maximum loan-to-value ratio for uninsured loans will be 65 percent up to the FHLMC maximum and then the graduated scale in 8.97.1403(1)(a) will be used, less five percent. Use of refinance proceeds must be limited to paying off the existing first mortgage, to paying off junior liens against the property at least one year old as of the origination date of the refinance mortgage, or to paying related closing costs associated with the refinance loan. Cash out to be disbursed to the borrower or any other payee will not be permitted.

(6) through (8) will remain the same."

Auth: Sec. 90-8-105, MCA; IMPLIED, Sec. 17-6-201, 17-6-324, MCA; IMP, Sec. 17-6-201, 17-6-211, MCA

REASON: This amendment is being proposed in response to requests from several lenders requesting that the Board purchase refinances of properties which are not primary residences of borrowers. FHLMC underwriting guidelines permit such refinances.

"8.97.1502 INTEREST RATE REDUCTION FOR LOANS FUNDED FROM THE COAL TAX TRUST (1) The board will provide an interest rate reduction based on the number of jobs the loan generates over a two year period. The date of the formal written interim or permanent loan application to the seller/servicer will be used as a beginning date for counting jobs created. The interest rate reduction shall be limited to a maximum loan size of four percent of the portion of the permanent trust fund which has been designated for Montana investments by the board at each fiscal year end and calculated as follows:

(a) through (f) will remain the same."

Auth: Sec. 17-6-324, MCA; IMP, Sec. 17-6-304, MCA

REASON: There have been a number of applications in the $10 million plus range, causing the board to set a policy limiting

a portion of the loan allocation to the Permanent Trust fund, with the balance of the loan being allocated to other funds managed by the board. This rule will limit the interest rate reduction to that portion funded by the Permanent Trust.

3. Interested persons may submit their data, views or arguments concerning the proposed amendments in writing to the Board of Investments, Department of Commerce, 555 Fuller Avenue, Helena, Montana 59620, no later than December 23, 1989.

4. If a person who is directly affected by the proposed amendments wishes to express his data, views or arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any comments he has to the Board of Investments, Department of Commerce, 555 Fuller Avenue, Helena, Montana 59620, no later than December 23, 1989.

5. If the Board receives requests for a public hearing on the proposed amendments from either 10% or 25, whichever is less, of those persons who are directly affected by the proposed amendments, from the Administrative Code Committee of the legislature, from a governmental agency or subdivision or from an association having 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.

BOARD OF INVESTMENTS
W. E. SCHREIBER, CHAIRMAN

BY: _____
ANDY POOLE, DEPUTY DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, November 13, 1989.

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

In the Matter of the Amendment of ARM 26.4.724 through 26.4.726, 26.4.728, 26.4.730 through 26.4.733, and 26.4.1301A and repeal of ARM 26.4.727, 26.4.729, 26.4.734 and 26.4.735, all pertaining to revegetation of land disturbed by coal and uranium mining operations.)	NOTICE OF PUBLIC HEARING ON PROPOSED REPEAL AND AMENDMENT OF STRIP AND UNDERGROUND COAL AND URANIUM MINING AND RECLAMATION RULES

TO: All Interested Persons

1. On December 18, 1989, at 7:00 p.m., a public hearing will be held in the Lewis and Clark room, Student Union Building, Eastern Montana College, Billings, Montana, to consider the amendment of 26.4.724 through 26.4.726, 26.4.728, 26.4.730 through 26.4.733, and 26.4.1301A and repeal of 26.4.727, 26.4.729, 26.4.734, and 26.4.735, which provide revegetation success standards relating to canopy cover, diversity, commercial forests, and other woody plants.

2. The rules proposed to be repealed can be found on pages 26-600 through 26-603. The proposed amendments replace present ARM 26.4.724 through 26.4.726, 26.4.728, and 26.4.730 through 26.4.733. The proposed amendments would clarify and modify standards and procedures for determining success of revegetation and eligibility for bond release.

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

26.4.724 USE OF ~~REFERENCE AREAS~~ REVEGETATION COMPARISON STANDARDS (1) 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.

(2) Success of revegetation ~~shall~~ must be measured on the basis of comparison with unmined reference areas or by comparison with technical standards derived from historical data. These areas, standards, and methods of comparison must be approved by the department. The department may require that reference areas be used in conjunction with historical data technical standards to assess success of revegetation for phase III bond release whenever historical data technical standards are not adequate to determine premine conditions for comparison. ~~The department shall approve the estimating techniques that will be used to determine the degree of success in the revegetated area. At least one reference area shall be established for each native community type found in the mine area. Two or more community types may be included~~

~~in one reference area if examples of each type are typical of that community type~~ More than one reference area or historical record ~~shall~~ must be established for vegetation types with significant variation due to edaphic factors, past management, size of the permit area, or other factors. Each reference area or area from which historical records are derived ~~shall~~ must be mapped at a scale of 1 inch:400 feet. ~~permanently marked, including reference points for all sampling transects and plots.~~ Locations of all sample points must be noted on 1 inch:400 feet scale maps submitted to the department. The applicant shall designate which reference areas or historical data records will be used for comparison to specific post-mine vegetation communities.

~~(2) The success of revegetation on operations of less than 100 acres may be based on approved USDA or USDI technical guides, provided that this acreage is not a segment of a larger area proposed for mining.~~

(3)(a) Reference areas ~~shall~~ must be managed such that they are in at least a "good" ~~or better~~ range condition, as defined by the SCS. When ~~a good or better~~ this required range condition has been achieved, the reference area ~~will~~ must be grazed at ~~a proper~~ an approved level ~~(50% or less utilization)~~.

(b) Where the operator has an approved enclosed reference area, prior to February 3, 1978, grazing is not necessary on that reference area. In this case the success of revegetation ~~will~~ must be based on the ungrazed reference area. These operators shall initiate a study approved by the department ~~which~~ that will demonstrate that the revegetated areas are capable of withstanding grazing pressure.

(c) If past management of the reference area has resulted in a disclimax such that ~~a good or better~~ the required range condition cannot be attained, the department may approve use of ~~the~~ this area ~~in poorer condition~~, may require designation of a different reference area, or may approve or require use of technical standards derived from historical data for determining success of revegetation.

(4) (a) ~~The reference area and the r~~Revegetated areas and reference areas, when appropriate, ~~will~~ must be grazed at ~~a proper~~ an approved level ~~(50% or less utilization)~~ for at least ~~the last two~~ 2 years ~~of the liability~~ during the last 5 years of responsibility for vegetative establishment.

(b) Vegetation measurements (exclusive of grazing) must be conducted on the reclaimed areas and on reference areas when appropriate for at least the last 2 years of this period of responsibility.

(c) Grazing must be conducted in a manner and at a time that does not preclude acquisition of appropriate vegetation production, cover and diversity data. ~~Vegetation measurements these last two years will be on areas enclosed from grazing by agronomy cages or other systems approved by the department.~~

(5) Technical standards derived from historical data may be used as standards of comparison with revegetated areas

with the following conditions:

(a) vegetative cover, production, diversity, density, and utility data (see 26.4.726) must be obtained from the premine area or from an area approved by the department that exhibits comparable vegetative cover, production, diversity, density, and utility, as well as comparable management, soil type, topographic setting (slope, aspect, etc.), and climate, in comparison to those of the premine area;

(b) data must be generated for a sufficient time period to encompass the range in climatic variations typical of the premine or other appropriate area, or data generated from revegetated areas must be compared to historical data generated only during climatic conditions comparable to those conditions existing at the time revegetated areas are sampled; and

(c) historical records must be established for each native plant community or group of native communities that will be compared to specific reclaimed area plant communities.

(6) The success of revegetation on operations of less than 100 acres disturbance may be based on USDA or USDI technical guides whenever this acreage is not a segment of a larger area proposed for disturbance by mining. The applicant shall submit a detailed description of how the USDA or USDI technical guides will be applied to determine the success of revegetation. (AUTH: Sec. 82-4-204, 205 MCA; IMP, Sec. 82-4-233, 235 MCA.)

26.4.725 PERIODS OF RESPONSIBILITY ~~AND EVALUATION~~

(1) The minimum period of responsibility for reestablishing vegetation ~~under the performance bond~~ begins ~~when the canopy cover of seeded species is comparable to the approved standard~~ after the last ~~year of~~ seeding, planting, fertilizing, irrigating, or other ~~work~~ activity related to final reclamation as determined by the department unless it can be demonstrated that such work is a normal husbandry practice that can be expected to continue as part of the postmining land use or if discontinuance of the practices after the liability period expires will not reduce the probability of permanent revegetation success. ~~"Comparable to the approved standard" is defined as not significantly less than the approved standard with 90 percent statistical confidence for herbaceous vegetation or 80 percent statistical confidence for trees, shrubs or half shrubs. In no case will an area be considered comparable if it is less than 90% of the approved standard.~~

(2) ~~The revegetated areas and their respective reference areas will be evaluated for at least two consecutive years prior to application for bond release and shall include the last two consecutive years of the bonding period.~~ Application for ~~final~~ phase III bond release may not be submitted prior to the end of the tenth growing season. (AUTH: Sec. 82-4-204, 205 MCA; IMP, Sec. 82-4-233, 235 MCA.)

26.4.726 VEGETATION PRODUCTION, COVER, DIVERSITY, DENSITY, AND UTILITY REQUIREMENTS (1) 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. 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 demonstrated. In addition to these and other requirements described in this rule, the department shall supply guidelines regarding acceptable field and laboratory methods.

(2) The current vegetative ~~annual~~ production ~~shall~~ must be measured by clipping and weighing each morphological class on the revegetated area and the reference areas (morphological classes must be segregated by native and introduced: annual grasses, perennial cool-season grasses, perennial warm-season grasses, annual forbs, biennial forbs, perennial forbs, shrubs and half-shrubs). Vegetative cover must be documented for each species present on revegetated areas and on all other areas where a vegetation data base is required. At least 51% 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 1% of the cover for the area. ~~Weighted productivity shall be established for the reference areas for comparison to the revegetated area. Weighted productivity shall be determined for each of the following morphological classes: annual grasses; perennial grasses; annual, biennial, and perennial forbs; and shrubs. The production of each class on the revegetated area shall be comparable to the weighted production for that morphological class (except that if one class if composed of undesirable species for both wildlife and livestock, a lesser production in that class will be accepted if it is offset by production above the weighted productivity in another class). Weighted productivity is derived from the following formula:~~

~~WP=~~

~~(P-type 1xA-type 1)+(P-type 2xA-type2)+...+(P-type nxA-type n)~~

~~Total area for all types~~

~~Where:~~

~~WP = Weighted production of that morphological class~~

~~P = Production of that morphological class on the reference area for that type~~

~~A = Prorate area of that type within the permit boundary~~

(3) The sampling techniques for measuring success must use a 90% statistical confidence interval for total production and total cover and for other parameters as required by the department using a one-sided test with a 0.1 alpha error. The following vegetation parameters for revegetated area data must be at least 90% 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) total non-stratified vegetative cover; and

(c) density (of native and introduced: trees, shrubs, and half-shrubs).

(4) The diversity of the revegetated area, that is, richness and evenness, must be comparable to the reference area or historical data technical standard in terms of species and morphological class composition and the importance of those species and morphological classes within the vegetative community.

(5) 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.

(6) Postmine vegetative cover and production and species composition must be of equal utility compared to those of the applicable reference area and/or historical record standard. The method used for demonstrating utility must be approved by the department. Utility data must be generated in a manner and at a time approved by the department, as well as in compliance with 26.4.323, 26.4.724, and 26.4.751.

(7) Plant species and morphological classes must be distributed on reclaimed areas in a manner which is at least as effective for the postmine land use as the premine condition. The means of achieving species and morphological class distribution must be addressed in the approved revegetation plan, and success must be determined through comparison with the appropriate reference area, historical record standard, or both.

(8) The revegetated areas must meet the performance standards in sections (1) through (7) above for at least the last 2 years of the phase III bond period.

(9) The reestablished vegetation must meet the requirements of the Noxious Weed Management Act (7-22-2101 through 7-22-2153, MCA, as amended). (AUTH: Sec. 82-4-204 MCA; IMP, Sec. 82-4-233, 235 MCA.)

26.4.728 ~~PERMANENCE~~ COMPOSITION OF VEGETATION ~~During the last two years p~~Prior to phase III bond release ~~the vegetation on~~ the revegetated area must meet the following criteria:

(1) ~~I~~It must be composed of at least 51% ~~percent~~ native species ~~(~~based on ~~production and canopy~~ stratified cover data derived ~~by~~ in accordance with 26.4.726 and 26.4.733~~)~~.

(2) ~~I~~Introduced species may be present in a minority (less than 50% based on the stratified cover data) if it has been documented to the department's satisfaction that they have ~~exhibited~~ the ability to survive in the area through adverse climatic conditions, particularly drought. Intro-

duced 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. (AUTH: Sec. 82-4-204 MCA; IMP, Sec. 82-4-233, 235 MCA.)

26.4.730 SEASON OF USE (1) The ~~vegetation~~ revegetated area must furnish palatable forage in comparable quantity and quality during the same grazing period as the reference areas or as compared to a technical standard derived from historic records. Palatability ~~will~~ must be based on the literature and proven by references. Quantity ~~will~~ must be based on production measurements described in 26.4.726. Methods used for evaluation must be consistent with those approved in relation to 26.4.726. (AUTH: Sec. 82-4-204 MCA; IMP, Sec. 82-4-233, 235 MCA.)

26.4.731 ANALYSIS FOR TOXICITY (1) Where toxicity to plants or animals ~~consumers~~ is suspected due to the effects of ~~mining~~ disturbance, the department may require comparative chemical analyses of the ~~vegetation~~ plants or animals, or both, on the revegetated areas and the reference areas. Alternatively, the department may require or approve a comparison of chemical analyses of plants or animals, or both, from the revegetated area with suitable standards. (AUTH: Sec. 82-4-204, 205 MCA; IMP, Sec. 82-4-233, 235 MCA.)

26.4.732 VEGETATION REQUIREMENTS FOR PREVIOUSLY CROPPED AREAS (1) Where the premining vegetation was cropland and it cannot be adequately determined what the precropping vegetation community was, the cropping acreage ~~will~~ must be considered to have the same potential to support the same native vegetation as other noncropped areas with the same edaphic and topographic characteristics. In consultation with the department, these edaphic and topographic characteristics must be used to insure compliance with 26.4.724. (AUTH: Sec. 82-4-204 MCA; IMP, Sec. 82-4-233, 235 MCA.)

26.4.733 ~~ADDITIONAL~~ MEASUREMENT STANDARDS FOR TREES, SHRUBS, AND HALF-SHRUBS (1) The species composition and s~~S~~tocking~~, i.e., the number of stems per unit area,~~ of trees, shrubs, and half-shrubs on the revegetated area ~~shall~~ must be ~~used to determine the degree to which space is occupied by well distributed, countable trees, or shrubs~~ comparable to the composition and density on the reference areas or to technical standards derived from historic records in accordance with 26.4.726 and 26.4.728.

~~(1)~~(2) When comparing the stocking rates of the revegetated area with the reference areas or historical record standard, only healthy, living plants may be counted. ~~Root crown or root sprouts over 1 foot in height shall count as one toward meeting the stocking requirements for trees and shrubs;~~

(a) Trees, shrubs, and half-shrubs counted for revegetation success must be at least 2 years old and at least 80% of these plants must have been in place for 60% of

the applicable period of responsibility; and ~~Where~~

(b) whenever multiple stems occur, only the tallest stem ~~shall be~~ may be counted.

~~(2) (4) A "countable" tree or shrub means a tree or shrub that can be used in calculating the degree of stocking under the following criteria:~~

~~(a) the tree or shrub must have been in place at least 2 growing seasons;~~

~~(b) the tree or shrub must be alive and healthy; and~~

~~(c) the tree or shrub must have at least one-third of its length in live crown.~~

(3) 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 form of the approved reference areas or the approved historical record standard, with 90% statistical confidence, unless stocking at a lesser rate that better achieves the approved post mining land use is approved by the department;

(b) the cover of trees, shrubs and half-shrubs on the revegetated area meets the requirements of 82-4-233; and

(c) 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.

~~(3)~~ (4) ~~Rock areas, p~~Permanent roads ~~and surface water drainage ways~~ on the revegetated area ~~shall~~ do not require stocking. (AUTH: Sec. 82-4-204, 205 MCA; IMP, Sec. 82-4-233, 235 MCA.)

Sub-Chapter 13

Strip and Underground Mine Reclamation Act: Miscellaneous Provisions

26.4.1301A MODIFICATION OF EXISTING PERMITS: ISSUANCE OF REVISIONS AND PERMITS (1) By January 13, 1991 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 on January 12, 1989 and as they read on January 13, 1989;

(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 January 12, 1989:

(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 grading, 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 ARM 26.4.414 through 26.4.1122.

(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 July 13, 1991 unless the permit has been revised to comply with sub-chapters 3 through 12, as amended January 13, 1989.

(4) As of the date that a permit is revised to comply with sub-chapters 3 through 12, as amended on January 13, 1989, 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 January 12, 1989 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 January 12, 1989 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 ~~January 12, 1989~~ [the day before the effective date] of 26.4.724 through 26.4.735, as amended is subject to:

(i) the seeding and planting and related requirements as they read on that date; or

(ii) the seeding and planting requirements on or after [the effective date] of 26.4.724 through 26.4.735, as amended.

(5) Each new permit and each amendment to an existing permit applied for and issued on or after January 13, 1989 must be in compliance with sub-chapters 3 through 12 as they read on January 13, 1989. [AUTH: Sec. 82-4-205, MCA; IMP, Sec. 82-4-221, 222, MCA.)

4. The repealers and existing rule amendments are necessary for a number of reasons. The Office of Surface Mining, U. S. Department of the Interior (OSM) is authorized to promulgate rules with which each state must comply in order to continue regulating strip and underground coal mining. OSM approved the existing Montana rules in 1980. Since that time, OSM has changed the federal rules and is now requiring Montana to change its rules. Much of the proposed rulemaking is in response to these federal requirements.

Additional changes are necessary to keep pace with technology, which has advanced during the nine years since these rules were adopted. Other changes are being made to eliminate requirements and procedures that experience in administering the program has demonstrated are unnecessary. These changes clarify revegetation standards and provide alternative methods for measuring vegetation success and meeting the performance standards.

A number of changes are necessary to reorganize, consolidate, and eliminate duplication in rules dealing with similar subject matters in order to make the rules better organized and more easily understood.

Finally, changes are necessary to correct grammatical, cross-referencing, and typographical errors in the original rules.

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 Bonnie Lovelace, Chief, Coal and Uranium Bureau, Department of State Lands, Capitol Station, Helena, Montana 59620, no later than January 5, 1990. Mailed comments must be postmarked no later than that date.

6. Gary Amestoy, Administrator of the Reclamation Division, has been designated to conduct the hearing.

7. The authority of the department and board to amend and repeal these rules is based on sections 82-4-204 and 82-4-205, MCA, and the rules implement sections 82-4-233 and 82-4-235, MCA.

Dennis D. Casey, Commissioner

Certified to the Secretary of State November 13, 1989.

BEFORE THE DEPARTMENT OF LIVESTOCK
OF THE STATE OF MONTANA

In the matter of the proposed amendments of rules regulating sheep	)))))	NOTICE OF PROPOSED ADOPTION OF AMENDMENTS TO ARM 32.18.205 AND 32.2.401 requiring a sheep permit before removal of sheep from County or State and establishing fees.

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On December 26, 1989, the Board of Livestock acting through the department of livestock proposes amending ARM 32.18.205 requiring a sheep permit for removal from County or State and amending ARM 32.2.401 establishing fees for such sheep permit.

2. The amendments of rules, as proposed provide as follows: 32.2.401 DEPARTMENT OF LIVESTOCK LICENSE FEES, PERMIT FEES, AND MISCELLANEOUS FEES The department of livestock shall charge:

Subsections (1) through (14) remain the same.

(15) for a sheep removal permit as required by ~~81-5-202~~ 81-5-112 MCA, a fee of ~~50~~ $1.00 ~~cents~~;

(a) an annual sheep permit for show purposes only with the State of Montana of $1.00.

Subsections (16) through (37) remain the same.

AUTH: 81-5-112, MCA IMP: 81-5-112, MCA

32.18.205 SHEEP PERMIT BEFORE REMOVAL FROM COUNTY OR STATE In any county of the state of Montana where the ~~sheep raisers have petitioned and requested the department of livestock, brands enforcement division to issue permits for sheep before removal from that county, as provided for in section 81-5-201 MCA, any person removing or causing to be removed from the county any sheep or lambs must first obtain from a state stock inspector or deputy state stock inspector a permit for removal. The permit must be issued on department of livestock, brands enforcement division form 35B. The owner or his agent must sign the permit and certify as to approximate number and the description and brands. Department of livestock, brands enforcement division form 35B shall, when used for a sheep permit, show destination in or out of the state of Montana. Destination on a sheep permit is not limited to Montana only.~~ department of livestock, must issue permits for sheep before removal from that county or state, as provided for in section 81-5-112 MCA, any person removing or causing to be removed from the county or state any sheep or lambs must first obtain from a state stock inspector or deputy state stock

inspector, a permit for removal. The permit must be issued on an approved department of livestock, brands-enforcement division form. The owner or his agent must sign the permit and certify as to approximate number and the description and brands or marks, breed and color. Department of livestock, brands-enforcement division form shall, when used for a sheep permit, show destination in or out of the state of Montana. Destination on a sheep permit is not limited to Montana only.

(a) an owner's account of sale purchase sheet shall constitute a sheep permit for those sheep leaving an auction market.

(b) an annual sheep permit for show purposes only within the state of Montana is required.

AUTH: 81-5-112, MCA IMP: 81-5-112, MCA

3. The Board of Livestock proposes to adopt these amendments of rules pursuant to the mandate of 81-5-112, MCA which requires that the department shall adopt rules imposing a permit system and requiring commensurate fees.

4. Interested parties may submit their data, views or arguments concerning the proposed amendments of rules in writing to Les Graham, Executive Secretary to the Board of Livestock, Capitol Station, Helena, Montana 59620 no later than December 25, 1989.

5. If a person who is directly affected by the proposed amendments of rules wishes to express his data, views and arguments orally or in writing at a public hearing he must make written request for a hearing and submit this request along with any written comments he has to Les Graham, Executive Secretary to the Board of Livestock, no later than December 25, 1989.

6. If the Board receives requests for a public hearing on the proposed rules from either 10% or 25, whichever is less, of those persons who are directly affected by the proposed amendments of rules, 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 public hearing will be held at a later date. Notice of Hearing will be published in the Montana Administrative Register.

Nancy Espy
NANCY ESPY, Chairman
Board of Livestock

BY: Lon Mitchell
LON MITCHELL, Staff Attorney
Department of Livestock

Certified to the Secretary of State November 13, 1989.

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

In the matter of the repeal of Rule 46.10.407 pertaining to transfer of resources rule for the AFDC Program	)))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED REPEAL OF RULE 46.10.407 PERTAINING TO TRANSFER OF RESOURCES RULE FOR THE AFDC PROGRAM

TO: All Interested Persons

1. On December 15, 1989, at 10:00 a.m., a public hearing will be held in the auditorium of the Social and Rehabilitation Services Building, 111 Sanders, Helena, Montana to consider the proposed repeal of Rule 46.10.407 pertaining to repeal of transfer of resources rule for the AFDC Program.

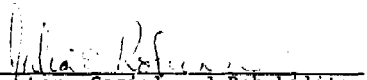
2. Rule 46.10.407, TRANSFER OF PROPERTY, as proposed to be repealed is on page 46-803 of the Administrative Rules of Montana.

AUTH: Sec. 53-2-601 and 53-4-212 MCA
IMP: Sec. 53-2-601 and 53-4-211 MCA

3. The department proposes to repeal the transfer of property rule for the AFDC financial assistance program. Current rule requires the department to presume that any uncompensated property transfer made within 24 months prior to application was made to qualify for assistance, and to impose a period of ineligibility. This rule was identical to the medicaid transfer of property rule. The Medicare Catastrophic Coverage Act of 1988 (MCCA) significantly limited the circumstances under which the medicaid transfer of property rule may apply. Repeal of the AFDC transfer rule will make consistent the regulations for the AFDC financial assistance program and AFDC related medicaid program. This will also allow for more efficient administration of the AFDC financial assistance program and will reduce potential quality control errors. The department anticipates that this change will affect very few AFDC recipients.

4. Interested parties may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Office of Legal Affairs, Department of Social and Rehabilitation Services, P.O. Box 4210, Helena, Montana 59604, no later than December 20, 1989.

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



Director, Social and Rehabilitation Services

Certified to the Secretary of State November 13, 1989.

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

In the matter of the amendment of Rule 46.12.3207 pertaining to ineligibility for certain medicaid benefits following certain transfers of resources	)))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF RULE 46.12.3207 PERTAINING TO INELIGIBILITY FOR CERTAIN MEDICAID BENEFITS FOLLOWING CERTAIN TRANSFERS OF RESOURCES

TO: All Interested Persons

1. On December 15, 1989, at 9:00 a.m., a public hearing will be held in the auditorium of the Social and Rehabilitation Services Building, 111 Sanders, Helena, Montana to consider the proposed amendment of Rule 46.12.3207 pertaining to ineligibility for certain medicaid benefits following certain transfers of resources.

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

46.12.3207 TRANSFER OF RESOURCES (1) The following ~~D~~definitions apply to this section:

(a) "Non-excluded resource" means any ~~asset~~ property which would have counted in whole or in part toward the resource limit at the time of transfer.

~~(i) In instances where the property transferred is the individual's home, the individual, his spouse or a dependent relative must have actually been living in the home at the time of the transfer in order for the home to be considered his principal residence and, therefore, an excluded resource. For example, if an unmarried individual was living in a nursing home at the time his home was transferred and there was no intent to return, the home would count as a non-excluded resource for eligibility.~~

(b) "Fair market value" means ~~an~~ the amount ~~equal to the resource's actual value at the time of transfer~~ of compensation at which property would change hands between a willing buyer and an unrelated seller, neither being under compulsion to buy or sell and both having reasonable knowledge of the relevant facts.

(c) "Compensation" means money, ~~real or personal property,~~ food, shelter, support, maintenance, ~~or~~ services or other valuable real or personal property, as further specified in subsection (5), ~~which are~~ received by an individual in exchange for the ~~resource~~ transferred property.

(d) "Uncompensated value" means the fair market value of ~~a resource~~ property at the time of the transfer minus the fair market value ~~amount~~ of compensation received by the individual in exchange for the ~~resource~~ property.

(e) "Transfer of ~~real or personal~~ property" means any transfer or renunciation of an ~~individual's~~ client's ~~proportionate right or title to~~ property. Transfers to joint tenancy or to tenancy in common are included in this definition. Transfers of or restrictions upon a client's right of access to or legal ability to dispose of property are also included in this definition, except as provided in subsection (7)(b)(iv).

(f) "Incurred medical expenses" are those actually incurred medical expenses which are not subject to payment by a third party.

(g) "Undue hardship" means any one of the conditions specified in subsection (7)(b)(i) through (7)(b)(v).

(h) "Client" means applicant for or recipient of Medicaid services and, where the context allows, includes any person whose resources are considered by the department in determining eligibility of the applicant or recipient.

(i) "Property" means any full or proportionate right, title or interest in or to any real or personal property or property right.

(j) "Institutionalization" means admission to a nursing facility, admission to a medical institution at a level of care equivalent to nursing facility services, or commencement of services to the applicant or recipient under the home and community based waiver program.

(2) Property transfers made on or after July 1, 1988, are evaluated for only those clients applying for or receiving nursing facility services, services in a medical institution at a level of care equivalent to nursing facility services, or services under the home and community based waiver program.

(3) For transfers made on or after July 1, 1988:

(a) When a client disposes of non-excluded resources for less than fair market value within thirty (30) months before institutionalization, it is presumed that the transfer was made to establish eligibility unless the client presents clear and convincing evidence that the disposal was exclusively for some other purpose.

(b) Subsection (3)(a) does not apply where:

(i) the property was transferred to a spouse or a blind or permanently and totally disabled child of the applicant or recipient;

(ii) the transferred property was the applicant's or recipient's home and was transferred to:

(A) the applicant's or recipient's spouse;

(B) a child of the applicant or recipient who is under age twenty-one;

(C) a blind or permanently or totally disabled adult child of the applicant or recipient;

(D) a child of the applicant or recipient who resided in the home for at least two years prior to the client's

institutionalization and who provided care which permitted the client to reside at home; or

(E) a sibling of the applicant or recipient who has equity interest in the home and resided in the home for at least one continuous year immediately preceding the client's institutionalization.

(iii) the property was transferred exclusively for a purpose other than to qualify for medical assistance; or

(iv) denial of eligibility would cause an undue hardship as defined in subsection (1)(g).

(c) When a client transfers non-excluded resources for less than fair market value, a period of ineligibility will be imposed. The period of ineligibility will begin with the month in which the resources were transferred. The number of months in such period is equal to the lesser of:

(i) thirty months; or

(ii) the uncompensated value divided by Montana's statewide average private pay cost of nursing home services as determined by the department as of July 1 of the state fiscal year in which the transfer occurs.

(d) The department may recover from the client all medicaid benefits paid on the client's behalf within the ineligibility period.

~~(2) General rule:~~

(4) For transfers made before July 1, 1988:

(a) An individual's home will be considered an individual's principal residence and therefore an excluded resource for purposes of subsection (4)(a) through (e) only if the individual, his spouse, or a dependent relative was actually residing in the home at the time of the transfer.

(ab) When an individual or his spouse disposeds of non-excluded ~~real or personal property~~ resources for less than ~~its~~ fair market value within 24 months before the month of application or redetermination for medicaid, it is presumed that the transfer was made to establish eligibility unless the individual presents convincing evidence that the disposal was exclusively for some other purpose.

(bc) The uncompensated value of the transferred non-excluded ~~property~~ resources shall be counted toward the ~~general~~ resource limitation for medicaid eligibility until it is reduced by one or more of the following:

(i) all or part of the transferred property is returned;

(ii) ~~the uncompensated amount is reduced by~~ documented further consideration so that the individual's total non-excluded resources are less than the general resource limit;

(iii) ~~the uncompensated amount is reduced by~~ documented household medical expenses incurred beginning with the month of transfer.

(cd) If the reductions referred to in subsection ~~(2)~~(bc) are less than $500 in any month beginning with the month

of transfer, the uncompensated value of the transferred non-excluded property shall be reduced by a total of $500 for each of those months.

(de) When the uncompensated value of the transferred property is less than $500, it shall be counted as a resource for one month.

~~(3)--Determining--compensation--for--transferred--real--or personal-property:~~

(a5) The value of compensation received for transferred property is determined based ~~on~~ upon the agreement and expectations of the parties at the time of the transfer. Compensation may be in the form of:

(~~i~~a) cash, in the total amount paid or agreed to be paid in exchange for the resource, excluding interest;

(~~ii~~b) any valuable real or personal property which is valued according to its fair market value and which is exchanged for the ~~real-or-personal~~ property transferred;

(~~iii~~c) support and/or maintenance provided in accordance with ~~which-are-provided-in-the-case-of-the-transfer-of-real property,-pursuant-to-the-consideration-section-of-a-deed-and in-the-case-of-the-transfer-of-personal-property,-pursuant-to~~ a valid written contract entered into ~~prior-to-the-rendering of~~ before the support ~~of~~ and/or maintenance was rendered. The support and/or maintenance ~~provided-for-the-transfer-of--real or-personal-property~~ are valued at ~~the~~ fair market value ~~of the-support-and/or-maintenance~~ based upon the support and/or maintenance provided and the length of time ~~it-can-reasonably be--expected--to~~ for which the contract requires that it be provided;

(~~iv~~d) services ~~which--are--provided--in--the--case--of--the transfer-of-real-property,-pursuant-to-the-consideration-section-of-a-deed-and-in-the-case-of-the-transfer-of-personal property,--pursuant--to~~ provided in accordance with a valid written contract entered into ~~prior-to-the-rendering-of-the service~~ before services were rendered. The services provided ~~for-the-transfer-of-real-or-personal-property~~ are valued at ~~the~~ fair market value, ~~of-the-service-and~~ considering the frequency and the duration of the services required by the contract; ~~over-a-reasonable-period-of-time:~~

(e) food valued at retail price; or

(f) shelter valued at fair market value.

~~(4)--Notification-of-individual-of-the-department's-determination-that-property-has-been-transferred-to-qualify-for assistance:~~

(a6) In all cases in which ~~an-amount-of-uncompensated value-is-established,-the-individual-must-be-advised-of-the fact-before-eligibility-is-approved-or-denied.~~ the department determines that an applicant or recipient has transferred non-excluded resources to establish or maintain eligibility, the department must send a written

~~(i)~~ Nnotice ~~will be sent~~ to the individual, prior to a determination of eligibility or ineligibility, informing him that an uncompensated transfer of non-excluded ~~property~~ resources has been identified ~~in his case~~, stating the value of the property so transferred, and explaining the individual's right to rebut the presumption that the transfer was made to qualify for assistance.

~~(ii) If the individual does not respond to the letter within 15 days, the department will assume that he does not want to rebut the presumption that the transfer was made to qualify for assistance.~~

~~(5) Rebuttal of the presumption that real or personal property was transferred to establish medicaid eligibility.~~

(a7) ~~If the individual wishes to rebut t~~The presumption that ~~real or personal~~ property was transferred ~~for the purpose of~~ to establish~~ing~~ medicaid eligibility shall apply unless ~~for medicaid, it is~~ the individual ~~is responsibility to~~ presents to the department, within 15 days of the department's mailing of notice, a rebuttal statement containing clear and convincing evidence that the ~~real or personal~~ property was transferred exclusively for some other reason. If the individual does not present a rebuttal statement as provided herein, the department shall deny or terminate eligibility.

(~~i~~a) The individual's rebuttal statement ~~of rebuttal shall~~ must include, if applicable:

(A~~i~~) the individual's reason for transferring the ~~real or personal~~ property;

(B~~ii~~) the individual's attempts to transfer the ~~real or personal~~ property at fair market value.

(C~~iii~~) the individual's representation and documentation that he did receive fair market value, if that is his belief and contention, or the individual's reasons for accepting less than fair market value for the ~~real or personal~~ property;

(D~~iv~~) the individual's means of or plans for supporting himself after the transfer;

(E~~v~~) the individual's relationship, if any, to the persons to whom the ~~real or personal~~ property was transferred; and

(F~~vi~~) any ~~pertinent~~ relevant documentary evidence ~~(such as~~ of the transfer or consideration received for the transfer including but not limited to legal documents, ~~realtor~~ agreements, appraisals and ~~relevant~~ correspondence regarding the transfer of property~~)~~.

(~~ii~~b) The determination of whether a transfer covered by this section has occurred will be based upon consideration of all facts and circumstances. The presence of one or more of the following or other factors, while not necessarily conclusive, may indicate that ~~real or personal~~ the property was transferred exclusively for some purpose other than establishing eligibility. ~~This list is not all inclusive:~~

(Ai) The occurrence or onset after transfer ~~of the real or personal property~~ of ~~the~~ an unexpected event or condition which necessitates application for medicaid benefits. ~~traumatic onset of disability.~~

(Bii) The occurrence after transfer ~~of the real or personal property~~ of the an unexpected loss of:

(IA) other resources which would have precluded medicaid eligibility; or

(IIB) income which would have precluded medicaid eligibility.

~~(C) The individual's total countable resources would have been below the general resource limit during each of the preceding 24 months if the real or personal property had been retained.~~

(iii) If the property had been retained, the individual's total countable resources would have been below the general resource limit during each of the preceding:

(A) thirty months if the property transfer was made on or after July 1, 1988; or

(B) twenty-four months if the property transfer was made prior to July 1, 1988.

(Biv) The property transfer or restrictions upon the availability of the property to its owner were ~~was approved by~~ or ordered by a court of law based upon an applicable statute, regulation, bona fide condition of settlement or other legal requirement and not at the request or suggestion of the client or the client's parent, child, guardian, attorney or other legal representative.

(Cv) The individual was the victim of fraud, misrepresentation or coercion and the transfer was based upon such fraud, misrepresentation or coercion, provided that the individual has taken any and all possible steps, including legal action, to recover such property or the equivalent thereof in damages.

~~(6) Determination if transfer of real or personal property was completely for reasons other than to qualify.~~

(a8) If the individual had some other purpose for transferring the ~~real or personal~~ property but establishing eligibility for public assistance was also a factor or foreseeable ~~likely~~ result of his decision to transfer, the presumption is not ~~successfully~~ rebutted.

AUTH: Sec. 53-2-201 and 53-2-601 MCA
IMP: Sec. 53-2-601, 53-6-113 and 53-6-143 MCA

3. This amendment to the medicaid transfer of property rule incorporates changes required by the Medicare Catastrophic Coverage Act of 1988 (MCCA). MCCA requires a period of medicaid ineligibility for uncompensated transfers within 30 months prior to institutionalization, rather than within 24 months prior to application as under the current rule. MCCA

allows application of the rule only to individuals becoming institutionalized as defined in MCCA, rather than to all medicaid applicants or recipients for all medicaid services as under the current rule. MCCA also creates new exemptions for certain transfers. The changes required by MCCA apply only to transfers made on or after July 1, 1988. For earlier transfers, the current rule remains in effect, with some revisions intended to clarify the rule and to enhance the department's ability to enforce the existing rule.

4. Interested parties may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Office of Legal Affairs, Department of Social and Rehabilitation Services, P.O. Box 4210, Helena, Montana 59604, no later than December 20, 1989.

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

Director, Social and Rehabilitation Services

Certified to the Secretary of State November 13, 1989.

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

In the matter of the adoption of Rule I and the amendment of Rule 46.25.726 pertaining to transfer of resources for general relief eligibility purposes	)))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED ADOPTION OF RULE I AND THE AMENDMENT OF RULE 46.25.726 PERTAINING TO TRANSFER OF RESOURCES FOR GENERAL RELIEF ELIGIBILITY PURPOSES

TO: All Interested Persons

1. On December 15, 1989, at 11:00 a.m., a public hearing will be held in the auditorium of the Social and Rehabilitation Services Building, 111 Sanders, Helena, Montana to consider the proposed adoption of Rule I and the amendment of Rule 46.25.726 pertaining to transfer of resources for general relief eligibility purposes.

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

RULE I GENERAL RELIEF, TRANSFER OF RESOURCES (1) The following definitions apply to this section:

(a) "Client" means an applicant for or recipient of general relief and any other person whose resources are required to be considered for general relief eligibility purposes.

(b) "Compensation" means money, food, shelter, support, maintenance, services, or other valuable real or personal property, as further specified in subsection (4), received by an individual in exchange for the transferred property.

(c) "Fair market value" means the amount of compensation at which property would change hands between a willing buyer and an unrelated seller, neither being under compulsion to buy or sell and both having reasonable knowledge of the relevant facts.

(d) "Non-excluded resource" means any property which would have counted in whole or in part against the monthly income standard at the time of transfer.

(i) In instances where the property transferred is the individual's home, the individual, his spouse or a dependent relative must have actually been living in the home at the time of the transfer in order for the home to be considered his principal residence and, therefore, an excluded resource.

(e) "Transfer of property" means any transfer or renunciation of a client's full or proportionate right, title or interest in or to any real or personal property or property right. This definition includes transfers to joint tenancy or to tenancy in common, and transfers of or restrictions upon a client's right of access to or legal ability to dispose of property, except as provided in subsection (6)(c).

(f) "Uncompensated value" means the fair market value of property at the time of the transfer minus the fair market value of compensation received by the individual in exchange for the property.

(2) An applicant for or recipient of general relief is ineligible for general relief as provided in this section when the department determines that the client has divested himself directly or indirectly of any property for the purpose of qualifying for general relief. When a client transfers non-excluded resources for less than fair market value within 30 months before application for or redetermination of eligibility for general relief, it is presumed that the transfer was made to establish eligibility unless the applicant or recipient presents clear and convincing evidence that the transfer was exclusively for some other purpose.

(3) The uncompensated value of the transferred non-excluded resources shall be considered available for general relief eligibility purposes for the number of months determined by dividing the uncompensated value by the applicable monthly income standard, and applying any remainder against the applicable monthly income standard for the last month, or until it is reduced by one or both of the following:

(a) all or part of the transferred property is returned at which time the uncompensated value shall be reduced by the fair market value of the returned property as of the date of transfer; or

(b) the uncompensated amount is reduced by documented further compensation, at which time the uncompensated value shall be reduced by the fair market value of the further compensation.

(4) The value of compensation received for transferred property is determined based upon the agreement and expectations of the parties at the time of the transfer. Compensation may be in the form of:

(a) cash, in the total amount paid or agreed to be paid in exchange for the property, excluding interest;

(b) any valuable real or personal property which is valued according to its fair market value and which is exchanged for the property transferred;

(c) support and/or maintenance provided in accordance with a valid written contract entered into before the support and/or maintenance was rendered. The support and/or maintenance will be valued at fair market value based upon the support and/or maintenance provided and the length of time over which the support and/or maintenance must be provided under the contract;

(d) services provided in accordance with a valid written contract entered into before the services were rendered. The services will be valued at fair market value based upon the services provided and the length of time over which the services must be provided under the contract;

(e) food valued at retail price; or
(f) shelter valued at fair market value.
(5) In the event the department determines that an applicant or recipient transferred resources for the purpose of qualifying for general relief, the department must send to the applicant or recipient a written notice of determination explaining the reason for and the length of the disqualification, and explaining the applicant or recipient's right to a fair hearing.
(6) The determination whether a prohibited transfer has occurred shall be based upon consideration of all facts and circumstances known to and presented to the department. If the applicant or recipient had some other purpose for transferring the property, but establishing or maintaining eligibility for general relief was also a factor or foreseeable result of the decision to transfer, the presumption is not rebutted.
(7) The presence of one or more of the following or other factors, while not necessarily conclusive, may indicate that the property was transferred exclusively for some purpose other than qualifying for general relief:
(a) the occurrence or onset after transfer of an unexpected event or condition which necessitates application for general relief;
(b) the client's total countable income and resources would have been below the applicable monthly income standard during each of the 30 months immediately preceding application or during the period of eligibility even if he had retained the property;
(c) the property transfer or restrictions upon the availability of the property to its owner were ordered by a court of law based upon an applicable statute, regulation, bona fide condition of settlement or other legal requirement and not at the request or suggestion of the client or the client's parent, child, guardian, attorney or other legal representative; or
(d) the client was the victim of fraud, misrepresentation or coercion and the transfer was based upon such fraud, misrepresentation or coercion, provided that the client has taken any and all possible steps, including legal action, to recover such property or compensation for the loss of such property.

AUTH: Sec. 53-2-201 and 53-2-601 MCA
IMP: Sec. 53-2-601 MCA

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

46.25.726 RESOURCES, Subsections (1) and (2) remain the same.

~~(3)--Resources-transferred-without-adequate-consideration within-two-years-prior-to-application-will-be-treated-as-described-in-ARM-46.12.3207.~~

Subsections (4) through (4)(d) remain the same in text but will be renumbered as subsections (3) through (3)(d).

AUTH: Sec. 53-2-201 and 53-2-601 MCA
IMP: Sec. 53-2-601 MCA

4. The current general relief property rule is identical to the medicaid rule. However, the Medicare Catastrophic Coverage Act of 1988 significantly limits the circumstances under which the medicaid transfer rule may be applied. This proposed rule creates a separate rule for the general relief program. Further, House Bill 242 of the 1989 Montana Legislature amended section 53-2-601, MCA to require the department to adopt rules establishing a presumption that transfers for less than fair market value within 30 months, rather than 24 months as under the current statute, were made to establish general relief eligibility. This proposal also implements that statutory amendment.

5. Interested parties may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Office of Legal Affairs, Department of Social and Rehabilitation Services, P.O. Box 4210, Helena, Montana 59604, no later than December 20, 1989.

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

Director, Social and Rehabilitation Services

Certified to the Secretary of State November 13, 1989.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BUILDING CODES BUREAU

In the matter of the amendment of a rule pertaining to the model energy code	)	NOTICE OF AMENDMENT OF 8.70.104 INCORPORATION BY REFERENCE OF THE MODEL ENERGY CODE

TO: All Interested Persons:

1. On August 17, 1989, the Building Codes Bureau published a notice of proposed amendment of the above-stated rule at page 1070, 1989 Montana Administrative Register, issue number 15.

2. The Bureau has amended the rule exactly as proposed.

3. No comments or testimony were received.

BUILDING CODES BUREAU
JAMES BROWN, BUREAU CHIEF

BY: _____
ANDY POOLE, DEPUTY DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, November 13, 1989.

BEFORE THE FISH AND GAME COMMISSION
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 12.6.901 pertaining to Water Safety Regulations	)))	NOTICE OF AMENDMENT OF ARM 12.6.901 Toston Dam-Closure of the Missouri

TO: All interested persons

1. On August 31, 1989, the Montana Fish and Game Commission published notice of the proposed amendment of ARM 12.6.901 relating to Helena Valley Equalizing Regulations at page 1257 of the 1989 Montana Administrative Register, issue number 16.

2. Written and oral comments were received at a public hearing on September 20, 1989. Other written comments were received through September 28, 1989.

3. A report summarizing the public comment was prepared and submitted to the Commission and Department.

4. The Department recommended to the Commission that the proposed amendment be adopted.

5. After considering the public comment and the Department's recommendation the rule has been amended as proposed.

7. The Commission responds to the comments opposing the adoption as follows:

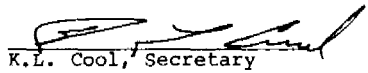
COMMENT: We have used canoes and drift boats in the areas proposed for closure and observed no significant hazard.

RESPONSE: Based on testimony and documentation by DNRC's technical staff the Commission believes operation of the new hydro-electric facility has created hazardous conditions above and below Toston Dam, and that the risk to human life is substantial. Power plant trip-outs are of particular concern to the Commission. When there is a trip-out the flow of water is suddenly diverted over the dam causing extremely dangerous backflows and undercurrents below the dam. The drastic flow diversion occurs almost instantaneously, and trip-outs might occur at any time. Consequently, the Commission believes the closure is necessary to prevent loss of life.

COMMENT: An outfitter submitted written comment that "[t]he stretch of water below the dam that you are proposing for closure is of vital importance to us for fishing."

RESPONSE: Fishing is not being closed below the dam by this amendment, but the Commission recognizes that the boating closure will effectively prevent fishing in a large portion of the water. Unfortunately, the hazards presented by the hydo-electric

generation require that the areas be closed to prevent loss of life.



K.L. Cool, Secretary
Montana Fish and Game
Commission

Certified to the Secretary of State November 13, 1989.

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

In the matter of the proposed repeal of ARM 16.45.101 and 16.45.102 and the adoption of new rules I through LXIII relating to underground storage tanks and reimbursement for petroleum storage tank release cleanups. ARM 16.45.101A through 16.45.1103	NOTICE OF REPEAL OF ARM 16.45.101 AND THE ADOPTION OF NEW RULES I THROUGH LXIII RELATING TO UNDERGROUND STORAGE TANKS AND REIMBURSEMENT FOR PETROLEUM STORAGE TANK RELEASE CLEANUPS (Underground Storage Tanks)

To: All Interested Persons

1. On August 17, 1989, the Department of Health and Environmental Sciences published a notice of public hearing on the proposed repeal and adoption of rules governing underground storage tanks, at page 1075, issue no. 15 and page 1308, issue no. 17, of the 1989 Montana Administrative Register.

2. The hearing was held on September 7, 1989, at 9:30 a.m. in room C-209, Cogswell Building, in Helena, Montana.

3. The department has repealed ARM 16.45.101. ARM 16.45.102 has not been repealed, as violations of that rule still need to be investigated by the department. ARM 16.45.102 has been transferred and renumbered 16.45.901.

4. As a result of the oral comments received at the hearing, the written comments received on the public record and the department's review of the comments and the proposed rules, the department has adopted all of the proposed new rules as proposed and has adopted the following rules as proposed with the following changes:

Sub-Chapter 1
General Provisions

RULE I (16.45.101A) DEFINITIONS (1) - (12) Same as proposed.

(13) "Corrective action" means investigation, monitoring, cleanup, restoration, abatement, removal, and other actions necessary to respond to a release.

(13) - (31) Will remain as proposed but will be numbered (14) - (32).

~~(32)~~(33) "Local governmental unit" means a city, town, ~~or~~ county, or fire district.

(33) - (57) Will remain as proposed but will be numbered (34) - (58).

(59) "State Fire Marshal" means the state fire marshal as provided for in 2-15-2005, MCA.

(58) - (62) Will remain as proposed but will be numbered (60) - (64).

(65) "Uniform Fire Code" or "U.F.C." means the edition of the Uniform Fire Code adopted by the state fire marshal in ARM 23.7.111.

(63) - (65) Will remain as proposed but will be numbered (66) - (68).

RULE II (16.45.102A) APPLICABILITY (1) Except as otherwise provided in subsections (2), (3), (4), (5) and (6) of this rule, this chapter applies to all owners and operators of UST systems; and to all owners and operators of petroleum storage tanks who seek or intend to seek reimbursement from the Montana Petroleum ~~Storage~~ Tank Release Cleanup Fund. An UST system listed in subsection (4) or (5) of this rule must comply with Rule III (ARM 16.45.104).

(2) - (3) Same as proposed.

(4) Exemptions. Sub-chapters 2, 3, 4, 5, ~~6,~~ 7, 8, 9, 10 and 11 do not apply to any of the following types of UST systems:

(a) - (c) Same as proposed.

(5) Same as proposed.

RULE III (16.45.104) TANK STANDARDS FOR EXEMPTED UST SYSTEMS Same as proposed.

RULE IV (16.45.105) VARIANCES (1) - (2)(b) Same as proposed.

(c) The time period for which the variance is sought;

~~(c)~~(d) The ~~basis for~~ reason why the variance is requested;

(d) - (e) Will remain as proposed but will be numbered (e) - (f).

(3) Same as proposed.

Sub-Chapter 2
UST Systems:
Design, Construction & Installation

RULE V (16.45.201) PERFORMANCE STANDARDS FOR NEW UST SYSTEMS (1) Same as proposed.

(a) The tank is constructed of fiberglass-reinforced plastic in accordance with any one of the standards adopted by reference in subsection ~~(9)~~(7); or

(b) The tank is constructed of steel and cathodically protected in the following manner and in accordance with any one of the standards adopted by reference in subsection ~~(10)~~(8):

(i) - (iv) Same as proposed.

(c) Same as proposed.

~~(2) Tanks in environmentally sensitive areas. Tanks installed within one quarter mile of the water source for a public water supply system, a surface water body, or in an area determined by the administrator of the U.S. Environmental Protection Agency, pursuant to the Safe Drinking Water Act, to be a sole source aquifer must use secondary barriers and interstitial monitoring, both as specified in Rule XV(7).~~

~~(3)~~(2) Piping. The piping that may contain regulated substances, including vent lines and fill lines, and is in contact with the ground, must be properly designed, constructed, and protected from corrosion in accordance with any one of

the codes of practice developed by a nationally recognized association or independent testing laboratory adopted by reference in ~~(3)~~(2)(a) and (b) below:

(a) The piping is constructed of fiberglass-reinforced plastic in accordance with all of the standards adopted by reference in subsection ~~(12)~~(10); or

(b) The piping is constructed of steel and cathodically protected in the following manner and in accordance with all of the standards adopted by reference in subsection ~~(13)~~(11):

(i) - (iv) Same as proposed.

~~(4) Piping installed within one quarter mile of a public water supply well, a surface water body, or in an area determined by the administrator of the U.S. Environmental Protection Agency, pursuant to the Safe Drinking Water Act, to be a sole source aquifer must use secondary barriers and interstitial monitoring, both as specified in Rule XV(7).~~

~~(5)~~(3) Spill and overfill prevention equipment. To prevent spilling and overfilling associated with product transfer to the UST system, owners and operators must use the following spill and overfill prevention equipment:

(a) - (b) Same as proposed.

~~(6)~~(4) Installation. All tanks and piping must be properly installed in accordance with the manufacturer's instructions and in accordance with any one of the standards adopted by reference in subsection ~~(14)~~(12).

~~(7)~~(5) Certification of Installation. All owners and operators must ensure that one or more of the following methods of certification, testing, or inspection is used to demonstrate compliance with subsection ~~(6)~~(4) of this rule by providing a certification of compliance on the UST notification form in accordance with Rule LVI.

(a) - (e) Same as proposed.

~~(8)~~(6) Subsections ~~(7)~~(5)(a), (c), and (e) may be used to demonstrate compliance with subsections ~~(6)~~(4) and ~~(7)~~(5) until April 1, 1990. On and after that date only paragraphs ~~(7)~~(5)(b) and (d) may be used to demonstrate compliance with subsections (6) and (7).

~~(9)~~(7) The department hereby adopts and incorporates by reference:

(a) - (c) Same as proposed.

~~(10)~~(8) The department hereby adopts and incorporates by reference:

(a) - (d) Same as proposed.

~~(11)~~(9) The department hereby adopts and incorporates by reference:

(a) - (b) Same as proposed.

~~(12)~~(10) The department hereby adopts and incorporates by reference:

(a) - (d) Same as proposed.

~~(13)~~(11) The department hereby adopts and incorporates by reference:

~~(a) National Fire Protection Association Standard 30, "Flammable and Combustible Liquids Code" which sets forth fire protection standards for flammable and combustible liquid stor-~~

~~age and a copy of which may be obtained from National Fire Protection Association, Batterymarch Park, Quincy, MA 02269, (800) 344-3555,~~ "Uniform Fire Code", article 79, "Flammable and Combustible Liquids" which sets forth the fire protection requirements where flammable and combustible liquids are stored or dispensed, and a copy of which may be obtained from Western Fire Chief's Association, 5360 South Workman Road, Whittier, California 90601;

(b) - (d) Same as proposed.

~~(14)~~(12) The department hereby adopts and incorporates by reference:

(a) - (c) Same as proposed.

RULE VI (16.45.202) UPGRADING OF EXISTING UST SYSTEMS

(1) - (2) Same as proposed.

(3) Piping upgrading requirements. Metal piping that may contain regulated substances, including vent lines and fill lines, and is in contact with the ground, must be cathodically protected in accordance with all of the standards adopted by reference in Rule V~~(13)~~(11) and must meet the requirements of Rule V~~(3)~~(2)(b)(ii), (iii), and (iv).

(4) Spill and overfill prevention equipment. To prevent spilling and overfilling associated with product transfer to the UST system, all existing UST systems must comply with new UST system spill and overfill prevention equipment requirements specified in Rule V~~(5)~~(3).

(5) Same as proposed.

Sub-Chapter 3
General Operating Requirements

RULE VII (16.45.301) SPILL AND OVERFILL CONTROL

(1) Owners and operators must ensure that releases due to spilling or overfilling do not occur. The owner and operator must ensure that the volume available in the tank is greater than the volume of product to be transferred to the tank before the transfer is made and that the transfer operation is monitored constantly to prevent overfilling and spilling. The transfer procedures described in ~~National Fire Protection Association Publication 385~~ Article 79, Division XII of the Uniform Fire Code adopted by reference in subsection (3) shall be used to comply with this subsection. Further guidance on spill and overfill prevention appears in American Petroleum Institute Publication 1621, "Recommended Practice for Bulk Liquid Stock Control at Retail Outlets," and National Fire Protection Association Standard 30, "Flammable and Combustible Liquids Code."

(2) Same as proposed.

(3) The department hereby adopts and incorporates by reference: ~~National Fire Protection Association Publication 385~~ Uniform Fire Code, Article 79, "Flammable and Combustible Liquids". Further guidance on spill and overfill prevention appears in American Petroleum Institute Publication 1621, "Recommended Practice for Bulk Liquid Stock Control at Retail

Outlets," and National Fire Protection Association Standard 30, "Flammable and Combustible Liquids Code" which sets forth transferring and dispensing flammable and combustible liquids and a copy of which may be obtained from API Publications Department, 1220 L Street, NW, Washington, DC 20005, (202) 682-8375 or National Fire Protection Association, Batterymarch Park, Quincy, MA 02269, (800) 344-3555.

RULE VIII (16.45.302) OPERATION AND MAINTENANCE OF CORROSION PROTECTION Same as proposed.

RULE IX (16.45.303) COMPATIBILITY Same as proposed.

RULE X (16.45.304) REPAIRS ALLOWED (1) Same as proposed.

(a) Repairs to UST systems must be properly conducted in accordance with one of the following codes of practice adopted by reference in subsection (2), developed by a nationally recognized association or an independent testing laboratory: ~~National Fire Protection Association Standard 30~~ Uniform Fire Code, Article 79, "Flammable and Combustible Liquids Codes"; American Petroleum Institute Publication 2200, "Repairing Crude Oil, Liquified Petroleum Gas, and Product Pipelines"; American Petroleum Institute Publication 1631, "Recommended Practice for the Interior Lining of Existing Steel Underground Storage Tanks"; and National Leak Prevention Association Standard 631, "Spill Prevention, Minimum 10 Year Life Extension of Existing Steel Underground Tanks by Lining Without the Addition of Cathodic Protection."

(b) Repairs to fiberglass-reinforced plastic tanks and steel-fiberglass-reinforced-plastic composite must be made by the manufacturer's authorized representatives ~~and~~ or the tank manufacturer and the manufacturer's authorized representative or the manufacturer must certify that the repaired tank meet the manufacturer's design standards.

(c) - (f) Same as proposed.

(2) The department hereby adopts and incorporates by reference:

(a) ~~National Fire Protection Association Standard 30, "Flammable and Combustible Liquids Codes" which sets forth fire protection where flammable and combustible liquids are stored or dispensed and a copy of which may be obtained from National Fire Protection Association, Batterymarch Park, Quincy, MA 02269, (800) 344-3555,~~ Uniform Fire Code, Article 79, "Flammable and Combustible Liquids" which sets forth the fire protection requirements where flammable and combustible liquids are stored or dispensed, and a copy of which may be obtained from Western Fire Chief's Association, 5360 South Workman Mill Road, Whittier, California 90601;

(b) - (d) Same as proposed.

RULE XI (16.45.305) REPORTING AND RECORDKEEPING

(1) through (b) Same as proposed.

(c) Corrective actions planned or taken including initial

abatement measures, initial site ~~characterization~~ history, free product removal, ~~investigation of soil and groundwater cleanup~~ the result of remedial investigations, and ~~corrective action~~ cleanup plan; and

(d) Same as proposed.

(2) through (3) Same as proposed.

Sub-Chapter 4
Release Detection

RULE XII (16.45.401) GENERAL REQUIREMENTS FOR ALL UST SYSTEMS (1) Same as proposed.

~~(2) Owners and operators of an existing UST system within one quarter mile of the public water supply well, a surface water body, or in an area determined by the administrator of the U.S. Environmental Protection Agency, pursuant to the Safe Drinking Water Act, to be a sole source aquifer, must use automatic tank gauging as specified in Rule XV(4) (16.45.404) and one other method of release detection provided in that rule.~~

~~(3)~~(2) When a release detection method operated in accordance with the performance standards in Rule XV (16.45.404) and XVI (16.45.405) indicates a release may have occurred, owners and operators must notify the department and the implementing agency in accordance with sub-chapter 5.

~~(4)~~(3) Owners and operators of all UST systems must comply with the release detection requirements of this sub-chapter by December 22 of the year listed in the following table below:

SCHEDULE FOR PHASE-IN OF RELEASE DETECTION

Year system was installed	Year when release detection is required (by December 22 of the year indicated)				
	1989	1990	1991	1992	1993
Before 1965 or date unknown	RD	P			
1965-69		P/RD			
1970-74		P	RD		
1975-79		P		RD	
1980-88		P			RD

New tanks (after Dec. 22, 1988) immediately upon installation.

P = Must begin release detection for all pressurized piping in accordance with Rule XIII(2)(a) and XIV(2)(d).

RD = Must begin release detection for tanks and suction piping in accordance with Rule XIII(1), XIII(2)(b), and Rule XIV.

(4) Farm or residential tanks of 1,100 gallons or less capacity used for storing motor fuel for non-commercial purposes, heating oil tanks, and emergency power generator tanks which were installed before 1965 or for which the date of installation is unknown, must comply with release detection requirements by December 22, 1990. Any of these types of tanks installed on or after January 1, 1965 must follow the schedule set forth in Rule XII(3).

(5) Same as proposed.

RULE XIII (16.45.402) REQUIREMENTS FOR PETROLEUM UST SYSTEMS (1)(a) - (c) Same as proposed.

(d) Farm or residential tank of 1,100 gallons or less capacity used for storing motor fuel for non-commercial purposes, ~~and~~ a tank of 1,100 gallons or less capacity used for storing heating oil for consumptive use on the premises where stored, and emergency power generator tanks with capacities of 1,100 gallons or less capacity may use yearly tank gauging (conducted in accordance with Rule XV(2)).

(2) Same as proposed.

RULE XIV (16.45.403) REQUIREMENTS FOR HAZARDOUS SUBSTANCE UST SYSTEMS Same as proposed.

RULE XV (16.45.404) METHODS OF RELEASE DETECTION FOR TANKS (1) - (5) Same as proposed.

(6)(a) - (b) Same as proposed.

(c) The slotted portion of the monitoring well casing must be designed to prevent migration of natural soils or filter pack into the well and to allow entry of regulated substance on the water table into the well under both high and low groundwater conditions, as well as all conditions between the high and low groundwater conditions;

(d) - (i) Same as proposed.

(7) - (8) Same as proposed.

RULE XVI (16.45.405) METHODS OF RELEASE DETECTION FOR PIPING Same as proposed.

RULE XVII (16.45.406) RELEASE DETECTION RECORDKEEPING Same as proposed.

Sub-Chapter 5
Release Reporting, Investigation, and Confirmation

RULE XVIII (16.45.501) GENERAL (1) Except as otherwise provided in this sub-chapter, owners and operators of UST systems must comply with the requirements of this sub-chapter.~~, and owners~~ Owners and operators of PSTs seeking reimbursement from the Montana Petroleum Tank Release Cleanup Fund must comply with the requirements of this sub-chapter.

RULE XIX (16.45.502) REPORTING OF SUSPECTED RELEASES Same as proposed.

RULE XX (16.45.503) INVESTIGATION DUE TO OFF-SITE IMPACTS Same as proposed.

RULE XXI (16.45.504) RELEASE INVESTIGATION AND CONFIRMATION STEPS (1) Same as proposed.

(2) Site checking. Owners and operators must measure for the presence of a release where contamination is most likely to

be present at the PST or UST site. In selecting sample types, sample locations, and measurement methods, owners and operators must consider the nature of the stored substance, the type of initial alarm or cause for suspicion, the type of backfill, the depth of groundwater, and other factors appropriate for identifying the presence and source of the release. ~~(a) Owners and operators must analyze samples of soil and water for at least BTEX (benzene, toluene, ethylbenzene, xylene) using EPA method 602/8020, and TPH (total petroleum hydrocarbons) using EPA method 418.1, or other equivalent methods approved by the department, and submit the analytical results to the department. Site-specific conditions may warrant analysis of additional constituents, especially when waste oils or solvents or hazardous substances are the known or suspected source of contamination.~~ The department should be consulted to assist in determining sample types, sample locations, and measurement methods. Owners and operators of PST sites and owners and operators of UST sites ~~must comply with~~ should refer to the Montana Quality Assurance Plan for Investigation of Underground Storage Tank Releases as a guide in the collection, preservation and analysis of field samples;

~~(b)~~(a) If the test results for the excavation zone or the PST or UST site indicate that a release has occurred, owners and operators must begin corrective action in accordance with sub-chapter 6;

~~(c)~~(b) If the test results for the excavation zone or the PST or UST site are taken according to Rule XXI(2)~~(a)~~ (16.45.504) and do not indicate that a release has occurred, further investigation is not required if approved by the department; and

~~(d)~~(c) The department may reject all or part of the test results, if it has a reasonable doubt as to the quality of data or the methods used are scientifically unsound, and require resampling, reanalysis, or both. The department will provide to the owner or operator an explanation of its decision to reject any test results.

RULE XXII (16.45.505) REPORTING AND CLEANUP OF SPILLS AND OVERFILLS (1) Owners and operators must contain and immediately clean up a spill or overfill, immediately report the spill or overfill to the department and the implementing agency by telephone ~~within 24 hours~~, and begin corrective action in accordance with sub-chapter 6 in the following cases:

(a) through (b) Same as proposed.

(2) Same as proposed.

Sub-Chapter 6
Release Response and Corrective Action for Tanks Containing Petroleum or Hazardous Substances

RULE XXIII (16.45.601) GENERAL (1) Except as otherwise provided in this rule, owners and operators of UST systems must, in response to a confirmed release from a tank or system, comply with the requirements of this sub-chapter. ~~, and owners~~

Owners or operators of PSTs seeking reimbursement from the Montana Petroleum Tank Release Cleanup Fund, must, in response to a confirmed release from a tank or system, comply with the requirements of this sub-chapter. This sub-chapter does not apply to USTs excluded under Rule II(2) and (4) (16.45.102A) and UST systems subject to RCRA Subtitle C corrective action requirements under section 3004(u) of the Resource Conservation and Recovery Act, as amended.

(2) If corrective action, initial response and abatement, initial site ~~characterization~~ history, remedial investigation, preparation of ~~a corrective action plan~~ remedial investigation and cleanup plans, or ~~corrective action~~ cleanup or any of them are conducted by:

(a) - (b) Same as proposed.

RULE XXIV (16.45.602) INITIAL RESPONSE AND ABATEMENT MEASURES (1) - (2)(b) Same as proposed.

(c) Continue to monitor and mitigate any additional fire and safety hazards posed by vapors or free product that have migrated from the UST excavation zone or the PST and entered into subsurface structures (such as sewers or basements). ~~and~~ ~~v~~Vapor concentrations measured as gasoline in surface or subsurface structures (basements, buildings, utility conduits) must be reduced to a level below the ~~following~~ action levels~~,~~ established by the department. A combustible gas indicator should be used to determine explosive levels measured from the lowest point in a structure. To determine health-based vapor levels, air samples should be collected from the breathing space approximately four feet above the floor. The Montana Quality Assurance Plan for Investigation of Underground Storage Tank Releases should be consulted for appropriate sampling and analytical methods for collection of air samples. The following action levels for gasoline vapors are established by the department:

(i) - (iii) Same as proposed.

(d) Remedy hazards posed by contaminated soils that are excavated or exposed as a result of release confirmation, site investigation, abatement, or ~~corrective action~~ cleanup activities. If these remedies include treatment or disposal of soils, owners and operators must comply with applicable state and local requirements. Soils heavily contaminated with leaded gasoline, waste oil, solvents, or hazardous substances must be tested for the presence of hazardous wastes. Treatment or disposal of all soils containing hazardous wastes must be approved by the department.

(e) Determine the extent and magnitude of contamination in soils, groundwater, surface water or both, which contamination has resulted from the release at the PST or UST site. In selecting sample types, sample locations, and measurement methods, owners and operators must consider the nature of the stored substance, the type of backfill, depth to groundwater and other factors as appropriate for identifying the presence and source of the release. Samples must be collected and analyzed in accordance with Rule XXI(2)~~(a)~~ (16.45.504); and

(f) Same as proposed.

(3) Same as proposed.

(4) Within 30 days after release confirmation, owners and operators must submit a report to the department on a form designated by the department summarizing the initial response and abatement measures taken under subsections (1), (2), and (3) of this rule and any resulting information or data. The report must include data on the nature, estimated quantity and source of the release. If initial response and abatement measures extend beyond the 30-day time period, owners and operators must also submit an additional follow-up completion report according to a schedule established by the department. If free product is removed, the following information must also be provided in or with the report:

(a) - (g) Same as proposed.

RULE XXV (16.45.603) INITIAL SITE ~~CHARACTERIZATION~~ HISTORY (1) - (b)(ii) Same as proposed.

(iii) the years of ~~their~~ current and past ownership and/or operation;

(iv) a description of the activities conducted at the site by each current and past owner/operator; and

(v) Same as proposed.

(c) - (h) Same as proposed.

(2) Within ~~45~~ 30 days of release confirmation, owners and operators must submit the information collected in compliance with subsection (1) of this rule to the department in a manner that demonstrates its applicability and technical adequacy. Owners and operators must provide an explanation to the department regarding any information requested in subsection (1) of this rule that cannot be obtained.

RULE XXVI (16.45.604) REMEDIAL INVESTIGATION (1) - (2) Same as proposed.

(3) A remedial investigation generally is an expanded site assessment more detailed in scope than the initial response and abatement measures under Rule XXIV (16.45.602), which must define the nature, extent, and magnitude of contamination and identify threats to public health, welfare and to the environment. A remedial investigation work plan must be submitted to ~~and approved by~~ the department prior to implementation by the owners and operators. The department shall submit a copy of a work plan from any owner or operator who is or may be seeking reimbursement to the appropriate local government office with jurisdiction over corrective action of the release. The office shall respond with any comments within 15 days of receipt of the plan and the department shall approve or disapprove the plan within 15 days of receipt from the local government. The following information is required to complete the remedial investigation:

(a) - (h) Same as proposed.

(4) If a remedial investigation has been conducted, owners and operators must submit a report containing the information collected under subsection (3) of this rule within 120

days of release confirmation. If investigation extends beyond the time for submission of the report, owners and operators must also submit an additional follow-up completion report according to a schedule established by the department.

RULE XXVII (16.45.605) ~~CORRECTIVE ACTION~~ CLEANUP PLAN

(1) At any time after reviewing the information submitted ~~in compliance with~~ pursuant to Rule XXIV (16.45.602) ~~through~~ , XXV (16.45.603), and/or XXVI (16.45.604), the department may require owners and operators to submit additional information or to develop and submit a ~~corrective action~~ cleanup plan for responding to contaminated soils and groundwater. If a plan is required, owners and operators must submit the plan according to a schedule and format established by the department. Alternatively, owners and operators may, after fulfilling the requirements of Rule XXIV (16.45.602) through XXVI (16.45.604), choose to submit a ~~corrective action~~ cleanup plan for responding to contaminated soil and groundwater. In either case, owners and operators are responsible for submitting a plan that provides for adequate protection of human health, safety, and the environment as determined by the department, and must modify their plan as necessary to meet this standard.

(2) In order to prepare the ~~corrective action~~ cleanup plan, owners and operators must properly evaluate and interpret the field and analytical results of the site or remedial investigation to define the extent and magnitude of free product, adsorbed phase product, dissolved phase plume and vapor phase product.

(3) The owners and operators must screen and select ~~corrective action~~ cleanup alternatives to develop a matrix evaluation of ~~corrective action~~ cleanup alternatives which considers cost, performance, reliability, implementation, safety and effects on public health, ~~welfare~~ and the environment. Information on all ~~corrective action~~ cleanup alternatives, with an explanation of why any alternative was selected, must be included in the ~~corrective action~~ cleanup plan. ~~Corrective action~~ cleanup alternatives may include, but ~~is~~ are not limited to the following types of action:

(a) - (j) Same as proposed.

(4) Upon receipt of a cleanup plan from any owner or operator who is or may be seeking reimbursement, the department shall submit a copy of the plan to the appropriate local government office with jurisdiction over corrective action of the release. The office shall respond with any comments within 15 days of receipt of the plan and the department shall approve or disapprove the plan within 15 days of receipt from the local government.

~~(4)~~(5) The department will approve the ~~corrective action~~ cleanup plan only after ensuring that implementation of the plan will adequately protect human health, safety, and the environment. In making this determination, the department must consider the following factors as appropriate:

(a) - (f) Same as proposed.

~~(5)~~(6) Within thirty (30) days of department approval of the ~~corrective action~~ cleanup plan or as directed by the department, owners and operators must implement the plan, including any modifications made by the department to the plan. Owners and operators must monitor, evaluate, and report the results of implementing the plan in accordance with a schedule and in a format established by the department. During implementation of the ~~corrective action~~ cleanup plan, a status letter shall be submitted quarterly to the department and to the implementing agency. The ~~corrective action~~ cleanup plan must contain a plan and schedule for compliance monitoring to evaluate the effectiveness of ~~corrective action~~ cleanup activities. Compliance monitoring must continue for a period of at least two years after completion of ~~corrective action~~ cleanup activities specified in the cleanup plan, or another reasonable time period approved by the department. Results of compliance monitoring will be evaluated by the department on a site-specific basis and compared to cleanup goals that should be outlined in the cleanup plan. Final completion of cleanup activities and compliance monitoring must be approved by the department.

~~(6)~~(7) Owners and operators may, in the interest of minimizing environmental contamination and promoting more effective cleanup, begin cleanup of soil and groundwater before the ~~corrective action~~ cleanup plan is approved provided that they:

(a) - (b) Same as proposed.

(c) Incorporate these self-initiated cleanup measures in the ~~corrective action~~ cleanup plan that is submitted to the department for approval.

~~(7)~~(8) As part of corrective action, owners and operators must conduct restoration activities as soon as the completion of any part of the ~~corrective action~~ cleanup plan will allow. Restoration activities must include:

(a) - (b) Same as proposed.

RULE XXVIII (16.45.606) PUBLIC PARTICIPATION (1) For each confirmed release that requires a ~~corrective action~~ cleanup plan under Rule XXVII, the department must provide notice to the public by means designed to reach those members of the public directly affected by the release and the planned ~~corrective action~~ cleanup activities. This notice may include, but is not limited to, public notice in local newspapers, block advertisements, public service announcements, letters to individual households, or personal contacts by field staff.

(2) The department must ensure that site release information and decisions concerning the ~~corrective action~~ cleanup plan are made available to the public for inspection upon request.

(3) Before approving a ~~corrective action~~ cleanup plan, the department may hold a public meeting to consider comments on the proposed ~~corrective action~~ cleanup plan if there is sufficient public interest, or for any other reason.

(4) The department must give public notice that complies

with subsection (1) of this rule if implementation of an approved ~~corrective action~~ cleanup plan does not achieve the established cleanup levels in the plan and termination of that plan is under consideration by the department.

Sub-Chapter 7
Out-of-Service UST Systems and Closure

RULE XXIX (16.45.701) TEMPORARY CLOSURE Same as proposed.

RULE XXX (16.45.702) PERMANENT CLOSURE AND CHANGES-IN-SERVICE Same as proposed.

RULE XXXI (16.45.703) ASSESSING THE SITE AT CLOSURE OR CHANGE-IN-SERVICE (1)(a) - (b) Same as proposed.

(c) ~~To confirm the presence or absence of contamination, soil and water samples should be analyzed for TPH using EPA method 418.1 or other equivalent method approved by the department. Site-specific conditions may warrant analysis of additional constituents, especially when waste oils, solvents or hazardous substances are the known or suspected source of contamination.~~ In selecting sample types, sample locations, and measurement methods, owners and operators must consider the method of closure, the nature of the stored substance, type of backfill, depth to groundwater, and other factors appropriate for identifying the presence of a release. The department and the implementing agency should be consulted to assist in determining sample types, sample locations, and measurement methods. The Montana Quality Assurance Plan for Investigation of Underground Storage Tank Releases ~~must~~ should be used as a guide for the collection, preservation and analysis of field samples.

(d) Same as proposed.

(2) Same as proposed.

RULE XXXII (16.45.704) APPLICABILITY TO PREVIOUSLY CLOSED UST SYSTEMS (1) When directed by the department, the owner and operator of a permanently closed UST system must access the excavation zone and close the UST system in accordance with this sub-chapter if releases from the UST may, in the judgment of the department, pose a current or potential threat to human health and the environment ~~or if the UST system was not closed in accordance with Rules XXX through XXXI~~.

RULE XXXIII (16.45.705) CLOSURE RECORDS Same as proposed.

Sub-Chapter 8
Financial Responsibility

RULE XXXIV (16.45.801) APPLICABILITY Same as proposed.

RULE XXXV (16.45.802) COMPLIANCE DATES Owners of petroleum underground storage tanks are required to comply with the

requirements of this sub-chapter by the following dates:

(1) All petroleum marketing firms owning 1,000 or more USTs and all other UST owners that report a tangible net worth of $20 million or more to the U.S. Securities and Exchange Commission (SEC), Dun and Bradstreet, the Energy Information Administration, or the Rural Electrification Administration; ~~October 1, 1989~~ effective date of this rule.

(2) All petroleum marketing firms owning 100-999 USTs; ~~October 26, 1989~~ effective date of this rule.

(3) - (4) Same as proposed.

RULE XXXVI (16.45.803) DEFINITION OF TERMS Same as proposed.

RULE XXXVII (16.45.804) AMOUNT AND SCOPE OF REQUIRED FINANCIAL RESPONSIBILITY Same as proposed.

RULE XXXVIII (16.45.805) ALLOWABLE MECHANISMS AND COMBINATIONS OF MECHANISMS Same as proposed.

RULE XXXIX (16.45.806) FINANCIAL TEST OF SELF-INSURANCE Same as proposed.

RULE XL (16.45.807) GUARANTEE Same as proposed.

RULE XLI (16.45.808) INSURANCE AND RISK RETENTION GROUP COVERAGE Same as proposed.

RULE XLII (16.45.809) SURETY BOND Same as proposed.

RULE XLIII (16.45.810) LETTER OF CREDIT Same as proposed.

RULE XLIV (16.45.811) MONTANA PETROLEUM TANK RELEASE CLEANUP FUND Same as proposed.

RULE XLV (16.45.812) TRUST FUND Same as proposed.

RULE XLVI (16.45.813) STANDBY TRUST FUND Same as proposed.

RULE XLVII (16.45.814) SUBSTITUTION OF FINANCIAL ASSURANCE MECHANISMS BY OWNER OR OPERATOR Same as proposed.

RULE XLVIII (16.45.815) CANCELLATION OR NONRENEWAL BY A PROVIDER OF FINANCIAL ASSURANCE Same as proposed.

RULE XLIX (16.45.816) REPORTING BY OWNER OR OPERATOR Same as proposed.

RULE L (16.45.817) RECORDKEEPING Same as proposed.

RULE LI (16.45.818) DRAWING ON FINANCIAL ASSURANCE MECHANISMS Same as proposed.

RULE LII (16.45.819) RELEASE FROM THE REQUIREMENTS Same as proposed.

RULE LIII (16.45.820) BANKRUPTCY OR OTHER INCAPACITY OF OWNER OR OPERATOR OR PROVIDER OF FINANCIAL ASSURANCE Same as proposed.

RULE LIV (16.45.821) REPLENISHMENT OF GUARANTEES, LETTERS OF CREDIT, OR SURETY BONDS Same as proposed.

Sub-Chapter 9
Notification

RULE LV (16.45.902) NOTIFICATION REQUIREMENTS

(1) - (3) Same as proposed.

(4) Owners and operators of new UST systems must certify in the notification form that they have complied with the following requirements:

(a) Installation of tanks and piping under Rule V~~(7)~~(5) (16.45.201);

(b) Cathodic protection of steel tanks and piping under Rule V(1) and ~~(3)~~(2) (16.45.201);

(c) - (d) Same as proposed.

(5) Owners and operators of new UST systems must ensure that the installer certifies in the notification form that the methods used to install the tanks and piping comply with the requirements in Rule V~~(6)~~(4) (16.45.201).

(6) - (7) Same as proposed.

Sub-Chapter 10
Tank Fees and Delegation to Local Governments

RULE LVI (16.45.1001) TANK FEE SCHEDULE (1) - (2)(b) Same as proposed.

~~(c) underground storage tanks owned or operated by the State of Montana, the applicable tank fee under section (2)(a) or (2)(b) of this rule, with the total annual fee for all tanks not to exceed $5,000.00 per agency.~~

(3) - (6) Same as proposed.

RULE LVII (16.45.1002) GRANTS TO LOCAL GOVERNMENTAL UNITS

(1) Local governmental units may apply for grants from the department for the purposes of designation under Rule LVIII (16.45.1003). Grant money received from the department may be used only for the purchase of equipment or basic training of personnel or both necessary for designation under Rule LVIII (16.45.1003) and specified by the department. Grant money received from the department may not be used for equipment or training not required for designation under Rule LVIII (16.45.1003) and not specified by the department. Grants are generally limited to the amounts of $2,000.00 per ~~year~~ local governmental unit for equipment or personnel training, or both, or to such other amount specified in the written notice of

grant award made by the department. No grant may be made or used for any equipment, training or period of time following designation under Rule LVIII (16.45.1003), unless approved by the department. Grantees shall comply with all conditions and requirements contained in the written notice of grant award.

(2) - (6) Same as proposed.

RULE LVIII (16.45.1003) DESIGNATION OF LOCAL UST PROGRAMS Same as proposed.

RULE LIX (16.45.1004) IMPLEMENTING AGENCY PROGRAM SERVICES AND REIMBURSEMENT Same as proposed.

RULE LX (16.45.1005) REVOCATION AND SURRENDER OF DESIGNATION Same as proposed.

Sub-Chapter 11
Petroleum Storage Tank Release Compensation

RULE LXI (16.45.1101) DEFINITIONS (1) - (3) Same as proposed.

(4) "Corrective action plan" means a written or verbal proposal for implementing actions necessary to respond to a release, including investigation, monitoring, cleanup, restoration, abatement, removal, and final completion of all corrective action activities.

(4) - (13) Will remain as proposed but will be numbered (5) - (14).

RULE LXII (16.45.1102) REVIEW OF REIMBURSEMENT CLAIMS Same as proposed.

RULE LXIII (16.45.1103) PROVISION OF CORRECTIVE ACTION PLANS TO LOCAL GOVERNMENT Same as proposed.

5. The following comments were received on the proposed rules and the department makes the following responses:

RULE I (16.45.101A) Definitions

(13) DEPARTMENT CHANGE: A definition for "corrective action" has been added to Rule I because this term is frequently used in the rules and needed clarification to match the definition given in sub-chapter 11.

(23) COMMENT: One commenter proposed that the groundwater definition should be changed to "all subsurface water as distinct from surface water."

RESPONSE: The proposed definition parallels existing language in rules and is similar to that in DHES groundwater rules adopted pursuant to the Water Quality Act (Title 75, Chapter 5, MCA). While the comment may have some merit in rare and unusual cases where subsurface water above the zone of saturation may become contaminated from UST releases, the department believes that the language of the rule as proposed

is sufficient to address these problems and that it will be more important in general to remain consistent with existing definitions in other rules or laws. No change is made in the proposed rule in response to this comment.

(32) COMMENT: A government commenter suggested the definition of local governmental unit should include the words "or fire district." Fire districts are similar in governmental structure to school districts and are not directly responsible to city or county government units.

RESPONSE: The department agrees that this definition appears necessary for proper implementation of sub-chapters 10 and 11. DHES is proposing delegation of duties, responsibilities, and funding to units of local government designated by DHES. Fire districts are an important part of that plan and process. It was not clear that they were free standing governmental units responsible to elected Boards of Trustees. It is still not certain that they are totally autonomous and not subject to review or management by city or county governments. In order to clarify the issue in these rules, the comment is adopted and the definition is changed in the final rule to include fire districts as units of local government eligible for program designation.

(40) COMMENT: Another commenter believed that the proposed term "operator" is confusing and might allow the person deriving economic benefit from the tank to shift liability burdens to agents or employees since they might be considered persons in control of or having responsibility for the daily operation of the tank. The term operator should be defined as the person who economically benefits from the tank.

RESPONSE: The definition of "operator" in the proposed rule is taken verbatim from the analogous federal regulation. As explained in paragraph (5) of the notice of proposed rulemaking (MAR Notice No. 16-2-349, 15 MAR 1989 1161, the rules are proposed to seek approval of a state underground storage tank program by the United States Environmental Protection Agency (USEPA). Upon approval, the state program will operate in lieu of the federal program. Under the standards established by the Resource Conservation and Recovery Act section 9004(b), 42 USC Section 6991c(b), the state program will be approved only if the state rules are "no less stringent than the corresponding requirements standards promulgated by the [USEPA] administrator." Because of this requirement, the department is reluctant to change the language of the proposed rule. Further, in the interests of national and interstate consistency with regard to the definition of such a key term as "operator", DHES sees no advantage to unilaterally adopting a different definition at this time. It could be equally argued that an employee of the operator is at least indirectly deriving some economic benefit from the operation of the tank. No change is made in the rule in response to this comment.

(59) DEPARTMENT CHANGE: The department has added a

definition of "State Fire Marshal" because identification is made necessary as the result of subsequent references added in the rules to this state official.

(65) COMMENT: A commenter suggested this definition should also include wastewater treatment plant equalization tanks which are flow stabilization tanks receiving effluent, merely add capacity to the system and stabilize the flow into the treatment process. These tanks do not provide treatment.

RESPONSE: For the reason expressed in the response to the comment on Rule I(40), The proposed definition is taken verbatim from the analogous federal regulation. Further, wastewater treatment tank systems regulated under Section 402 or 307b of the Clean Water Act are excluded from regulation in the federal and proposed state rules. Other wastewater treatment tank systems are subject only to corrosion resistant tank designs and corrective action.If these equalization tanks can be considered as an integral part of the system, they will be regulated similarly. DHES sees no overriding reason to depart from the existing federal language for this definition. No change is made in the rule in response to this comment.

RULE II (16.45.102A) Applicability

(1) COMMENT: One commenter suggested the following language be added to subsection (1) of the rule. "This chapter does not apply to petroleum storage tanks contained within a petroleum refinery or bulk marketing terminal whose purpose is to manufacture and/or distribute petroleum products or those tanks located at oil and gas production facilities." The commenter suggested that this language will specifically exclude those tanks that are within a refinery or bulk marketing terminal as the law intended.

RESPONSE: Under Section 75-11-302, MCA, these types of tanks are excluded from seeking reimbursement from the Montana Petroleum Tank Cleanup Fund and therefore would not need to comply with the requirements of this chapter for the purposes of reimbursement. Also, under 75-10-405, MCA, the type of tanks referred to in the comment are not USTs. Therefore, no change is made to the rule in response to this comment.

(4) DEPARTMENT CHANGE: DHES has found a typographic error in subsection (4) of this rule. In order to be equivalent to EPA rules, the department must add sub-chapter 7 to and delete sub-chapter 6 from the list of sub-chapters that do not apply to some types of UST systems.

RULE IV (16.45.105) Variances

COMMENT: One commenter suggested that the variance procedure should include as a grounds for a variance, the inability, either financially or factually, to comply, and provision for a temporary variance in that event. The commenter suggested that some provision should be made to allow a variance in this regard on a case-by-case basis, and that "2e" should be eliminated because it is vague or it is unclear what constitutes a

"demonstration". The commenter suggested that if it is a first time use, this requirement cannot be met, and if the process is technically and environmentally sound, one should not need a demonstration.

RESPONSE: Under the proposed language, variances would be granted on a site-by-site basis, and may be granted only for a specified time frame. DHES may, for example, allow a site a variance from the closure requirement for a period of time, because the tank cannot be removed because of location or weather. The proposed rule does not purport to limit the reason for a variance and one might therefore be granted because of financial impossibility if the other terms of the variance rule are complied with. However, to allow variances from any rule only because of financial difficulty and to not require equivalent effectiveness would have the effect of weakening the proposed rules below the standard provided by federal law in 42 U.S.C. Section 6991 c(b)(1) for approval of the state program. For this reason and as further explained in the response to the comment on Rule I(40), DHES is reluctant to change the rule. DHES feels that factual impossibility of compliance has been adequately addressed by the United States in the adoption of the minimum federal requirements (42 CFC part 280). DHES feels that the "demonstration" required by the proposed language should remain broad, to allow the satisfaction of these requirements to come from literature or technical documents showing how the system is designed to work or to come from other sources. Therefore, the department has made no change to this part of the rule in response to this comment. However, the department has added language requiring the time in which the variance would operate to be provided in the application, and clarifying "the basis" for the variance, which was unclear.

RULE V (16.45.201) Performance Standards for New UST System

(1) COMMENT: A commenter suggested that the meaning of "properly designed and constructed" is unclear, since the phrase is undefined. The commenter questioned whether the code of practice of a nationally recognized association was meant to define the design and construction requirements. The commenter was also concerned that (1)(a) and (b) were unclear.

RESPONSE: For the reason expressed in the response to the comment on Rule I(40), DHES has used the same criteria and much of the same language as the corresponding federal rule. The nationally recognized associations have design standards for tanks and piping. Montana has adopted these by reference. Included in the Montana rule are the addresses where these standards may be obtained. DHES does not feel the rule is unclear. For these reasons, no change is made to the rule in response to this comment.

(2), (4): The Department of Health received many comments for and against proposed Rule V(2) and (4), requiring secondary containment and interstitial monitoring. Because of the importance of this proposal to the issue of groundwater protection, DHES has chosen not to summarize the comments in total, but has

set forth a summary of each comment below.

COMMENT: One commenter believed the requirement for secondary containment on all new USTs within 1/4 mile of a public water supply is insufficient. Hydraulic conductivity can exceed 80 feet per day east of Kalispell. Monthly monitoring of single wall tanks could theoretically result in downgradient contamination of greater than 1/4 mile before discovery. The department should require secondary containment on all new UST installations regardless of site conditions. Site specific design standards are less effective and difficult to administer.

COMMENT: Another commenter believed the 1/4 mile limit is arbitrary and does not consider variations between hydraulic conductivity. Secondary containment should be required for all new installations statewide.

COMMENT: Another commenter wrote a general comment in support of rules to protect all aquifers, not just those deemed "environmentally sensitive".

COMMENT: Another commenter gave a general comment of support for the proposed rule regarding secondary containment tank and piping design in environmentally sensitive areas, citing high potential for environmental damage and high cost of corrective action. The commenter acknowledgment that this proposed standard is more restrictive than existing federal rules and is a past and future trend for new tank design in other states.

COMMENT: Another commenter wrote a general comment of support of the proposed rule requiring special design standards in environmentally sensitive areas. The comment stated that the proposed state rule is a partial attempt to redress this major inadequacy in the federal rule.

COMMENT: A commenter suggested DHES should include an additional criterion to the definition of environmentally sensitive areas and suggested that proposed new tank installation sites where groundwater is within 10 feet of the surface and the soil permeability is greater then 6.0 inches/hour should also be considered to be environmentally sensitive. Secondary containment should also be required in areas which meet this criteria.

COMMENT: A government commenter opined that sole source aquifer areas are divided into three subcategories: stream source areas, designated areas, and project review areas. DHES should limit the secondary containment requirement only to those areas within the designated area of a sole source aquifer.

COMMENT: Another commenter stated DHES should require secondary containment and dual leak detection requirements for all new installations state wide. This should be standard for new installations, and would also be the upgrading standard that all existing tanks must meet by December 1998 according to the proposed rules. The comment acknowledges EPA's initial consideration of the secondary containment standard which was ultimately deleted from the final federal rules. The comment states correctly that the Montana Legislature authorized the

state UST rules to be more inclusive and comprehensive than the federal regulations. Copies of two supporting documents were provided with the comment, one from the Environmental Defense Fund and one from the Ohio Environmental Council. Both documents are critical of EPA's final rules which do not require secondary containment for new tank installations. The comment, in general, urges DHES to adopt the best available technology for new tank standards as the best eventual leak prevention methodology.

COMMENT: A general comment was received, without recommendation, that the proposed rule was more stringent than in other states (i.e. Oregon) in that DHES was proposing additional design standards for new tanks and additional release detection requirements for tanks in environmentally sensitive areas.

COMMENT: A comment was made that the proposed secondary containment design standard for new tanks in environmentally sensitive areas was gratuitous and unnecessary in light of the other stringent provisions of the proposal and would only serve to complicate the requirements.

COMMENT: A commenter suggested DHES should strike proposed Rules V(2) and (4) and Rule XII (2) which require more restrictive design and release detection requirements in areas defined as environmentally sensitive. It would be difficult to categorize such areas statewide and clearly identify in a fair manner those sites within one quarter mile of wells or surface waters.

COMMENT: A commenter said DHES should not go beyond EPA regulations on new tank design and release detection as DHES has proposed to do in areas defined as environmentally sensitive. The proposed rule is unfair, hard to enforce, hard to administer, and will delay the upgrading of existing tank systems as concluded by EPA on page 37102 of the preamble of 40 CFR 280, published September 23, 1988.

COMMENT: A comment was given that DHES rules should not go beyond federal requirements. With time, more stringent requirements may be needed, but, for now, the proposed rules should follow the federal rules to the letter.

COMMENT: An industry commenter suggested that dual release detection requirements for tanks in environmentally sensitive areas applies to a limited number of tanks and is a reasonable option.

RESPONSE: If regulated substances must be stored in containers underground, DHES believes that, inevitably, these containers will fail and releases to the environment will occur. Failures will occur over time for a variety of reasons including container material properties, design and manufacturing methods, site conditions, installation methods, operator error, and environmental conditions. The USEPA approach to minimizing the environmental and safety hazards of these releases is to require the use of corrosion resistant single wall containers and to require periodic operation of leak detection devices or methods. If properly managed, EPA concludes that leak detection methods should identify subsurface

releases to the environment prior to the release causing serious environmental damage.

DHES believes that the best available technology for tank design which minimizes releases to the environment requires the use of either secondary containment or double wall constructed containers. In the first type of containment, damage is truly limited to an area between the primary and secondary container or liner, and with the second type, releases should only rarely escape to the environment at all. In either instance, corrective action costs should be minimized and typically quite localized. Leak detection should be more reliable and verifiable.

Secondary containment designs used in this country are not leak proof. They are still subject to the same causes for release as those mentioned earlier for single wall containers. But the added benefit from an environmental protection standpoint is that releases should be more positively identified and the impact should be far less. For these reasons, DHES proposed that secondary containment be required for all new tank and piping systems in areas of environmental sensitivity. Existing tanks in these special areas would have until December 1998 to upgrade to this standard. Meanwhile, existing tanks in environmentally sensitive areas would be required to conduct two types of release detection on a schedule set forth in state and federal rules.

As noted by several commenters, this proposal is more restrictive than the requirements of the analogous federal regulations. The Montana legislature has statutorily authorized DHES to develop rules that go beyond those of the United States Environmental Protection Agency. States which have already implemented an approach similar to Montana's proposal include Florida, California, Massachusetts, Virginia, New Hampshire, Vermont, New York, and Texas. These states either require secondary containment on new tanks statewide or only in areas defined by the state as environmentally sensitive.

USEPA declined to implement a national policy requiring secondary containment for several reasons: site specific differences between states and within state boundaries, additional capital costs did not appear to result in a commensurate cost savings in terms of environmental damage when compared to the anticipated leak rate reduction from use of improved single wall systems combined with leak detection, perceived cost of compliance would delay needed upgrading of existing tank systems by owners, and difficulty of administering a site specific approach on a national basis.

DHES believes that the most administratively simple approach would be to require secondary containment statewide. Several commenters urged DHES to do so. The department agrees that this would be the most environmentally protective approach and be the easiest to administer. Tank owners, also, would have clear guidance on what would be required. However, there are areas in the state where it would be extremely difficult to justify the use of secondary containment systems on both an economic and environmental basis. The variance procedure set

forth in proposed Rule IV would likely be used or requested liberally in these instances, resulting in a considerable drain on limited staff time and resources. In making the original rule proposals, DHES did not agree with commenters that a statewide requirement for secondary containment was required or necessary at this time. Areas with universally sensitive aquifers like Florida or with high population densities may have need for these requirements statewide. Montana may later discover that the current EPA approach is not sufficient to prevent leaks or detect them in time to prevent serious damage. Until then, DHES did not feel justified in requiring secondary containment on a statewide basis.

Instead, DHES proposed a site classification approach where new tanks proposed for installation in areas within a designated sole source aquifer and within one quarter mile of a public water supply well or a surface water body would be required to have secondary containment or be double walled. DHES agrees with the comment that sole source aquifer areas should be limited and defined as only that portion which is the "designated area" and not include the stream source or project area language found in Federal law. DHES also agrees with commenters who pointed out that the one quarter mile distance language between tank and water source is occasionally insufficient due to rapid groundwater flow rates. Also, DHES agrees that in soils with high permeabilities (well drained soils), a tank release can quickly reach and contaminate near surface aquifers.

In fact, DHES experience indicates that the most environmentally sensitive areas in Montana are those where the bottom of the tank is placed in very permeable soils several feet above a near surface aquifer accessed for potable water by shallow wells. In this setting, a leak is often not detected until serious groundwater damage occurs and public water supplies have been fouled.

Leaks in tanks which are located directly in groundwater are often detected rapidly by the owner when groundwater enters the tank and fouls the fuel. In these cases, quick response can minimize the spread of fuel in all but the most permeable aquifers. Further, most wells will be completed below the depth of these shallow aquifers, minimizing public exposure to the contaminant, depending again on aquifer characteristics (drawdown, hydraulic conductivity, recharge rates, etc.)

After carefully considering all of the comments received on this subject, DHES has concluded that the proposed approach is unworkable at the state level. It would require, for example, secondary containment for an installation within one quarter mile of a public supply well completed at a depth of 500 feet through extremely tight bentonitic clay formations. The proposed rule would also permit single wall installations at sites located three eighths of a mile from a shallow public supply well in Livingston, Missoula, or Kalispell where groundwater flow rates can exceed tens of feet per day.

Moreover, there is no central groundwater aquifer characteristic database available to make administrative decisions

based on a level of detail necessary to establish site specific tank design standards. To obtain this information for each site would, at this time, not be practical with the available program resources. For these reasons, DHES has deleted proposed Rules V (2) and (4) and Rule XII (2) which would have required secondary or double wall containment designs for new tank systems and dual release detection requirements for existing tank systems in environmentally sensitive areas. The final rule in both instances will read identically to that adopted by EPA.

This issue was researched considerably by EPA from an environmental and economic standpoint. Its conclusion that the corrosion resistant single wall design combined with leak detection provides sufficient protection for groundwater and subsurface soil will be tested in Montana and most other states. DHES will review the results both in Montana and nationally to determine whether or not the conclusion is valid. Adoption of the rules in this amended form in no way limits or prohibits units of local government from adopting more restrictive requirements through permits or ordinances in order to protect vulnerable groundwater resources that are vital to their existence. Local governments are in the best position to make the determination as to which areas of their communities are truly "environmentally sensitive" and exposed to excessive risk from tank leaks.

DHES also believes it is inevitable that, for a variety of reasons, tank owners who are economically capable and environmentally concerned will install double wall systems on their own. With a double wall system, leak detection over the long term life expectancy of a tank system is less expensive and more conclusive, pollution insurance rates will likely be less and policies more available, resale value of the business and property will likely be greater, corrective action costs should be minimized, property transfer site assessments should be less costly and more conclusive, and closure can be simplified. Dual wall systems are being installed in Montana occasionally and with an increasing frequency. They are required by both the EPA and the proposed and final state rules for new tanks storing hazardous substances (chemicals, pesticides, etc.) As the economics and results of release detection become more familiar to petroleum tank owners, and the availability and price competitiveness of dual wall systems improve, DHES believes that the petroleum industry itself will voluntarily abandon the current EPA approach now chosen by DHES in preference of a dual wall system. Meanwhile, or until the approach is clearly proven inadequate to protect Montana's groundwater resources, DHES has adopted the federal design standards for new tanks and piping in the final rules.

(5) COMMENT: A commenter suggested that if any national standard exists which details proper spill and overfill equipment, these standards should be referenced and incorporated.

RESPONSE: At the time of publication of the proposed Montana rules, no such national standards were available. If

standards do become available later, they will be incorporated into the rule. No change is made in the rule in response to this comment.

(6), (7) COMMENT: A commenter stated that if an owner does his own tank installation, it is not clear whether the crews must be licensed and their work certified.

RESPONSE: For the reason expressed in the response to the comment on Rule I(40), DHES has used the same criteria and much of the same language as the corresponding federal rule. Because of the requirements of Section 75-11-210, MCA, the options provided in subsection (7) will be reduced to licensed installers and inspected installations effective April 1, 1990. Whether a person needs to be licensed under the provision of Section 75-11-210, MCA depends upon the definition of "installer" in Section 75-11-203, MCA. Rules implementing these statutes are being drafted at this time and should be effective by April 1, 1990. No change is made in the rule in response to this comment.

(7)(b) COMMENT: One commenter asked how an installer becomes licensed by the department and stated that this information should be available to owners and contractors.

RESPONSE: The requirement for licensure is contained in Title 75, Chapter 11, Part 2, MCA. DHES is in the process of writing proposed rules for the licensing of installers. DHES hopes to have the rules effective by April 1, 1990. No change is made in the rule in response to this comment.

COMMENT: One commenter asked whether the proposed rules contain a provision for certification of tank testers and whether one is needed?

RESPONSE: Title 75, Chapter 11, Part 2, MCA, requires installers to be licensed, but neither the statutes nor DHES require that tank testers be certified. The reason for this is first, that tank testers use many different types of equipment and that occupation would therefore be more difficult to regulate, and secondly, there is no statuary authority for licensure or certification of tank testers. DHES strongly urges owners or operators to be sure that any tank tester they use has been certified by the company whose testing equipment is being used. No change is made in the rule in response to this comment.

(7)(d) COMMENT: A commenter suggested that the representative from the department or implementing agency should be certified and be able to show proof of certification at the site for liability reasons to the owner.

RESPONSE: Title 75, Chapter 11, Part 2 MCA requires DHES to license inspectors. DHES has not finished writing the rules concerning this program, but hopes to have the rules effective by April 1, 1990. DHES inspectors will receive inspector training in the areas regulated by these rules but the department has not determined whether they will actually be "licensed". No change is made in the rule in response to this

comment.

RULE VI (16.45.202) Upgrading of Existing UST Systems

COMMENT: A commenter stated that the methodologies for upgrading the existing tanks are outdated and very costly to Montana. An interior inspection should not be conducted for tanks 10 years old. A site assessment for corrosion should be sufficient. These methods of inspection/determination are included in the National Association of Corrosion Engineers' paper number 417.

RESPONSE: DHES has taken this suggestion under review but has reached the same findings as EPA: there is not enough data available to make the determination that tanks can be found to be structurally sound by doing a site assessment for soil resistivity alone. Interior inspections can determine the structural stability of the tank. The references which the commenter included state that some 60 year old tanks may be sound while some tanks less than 10 years old may be very corroded. DHES agrees with this statement and believes that to do proper corrosion protection to a system the soil resistivity also needs to be known. Therefore DHES has followed the EPA guidance for upgrading of existing UST systems. No change is made to the rule in response to the comment.

RULE VII (16.45.301) Spill and Overfill Control

COMMENT: A commenter stated that the broad language of Rule VII appears to impose on owners and operators strict liability for any spilling or overfilling that occurs. This over-broad language should be narrowed to provide owner/operator liability only in the event of a violation of the proposed rules.

RESPONSE: For the reason expressed in response to the comment on Rule I(40), DHES has used verbatim the language in the analogous federal rule. Further, to the extent that the proposed language applies a strict liability standard, it is because that is the standard imposed by federal law (see, e.g., 42 USC 6991b(h)(6)). No change is made to the rule in response to this comment.

RULE X (16.45.304) Repairs Allowed

(1)(b) COMMENT: One commenter noted that repair by the manufacturer is not always possible. The manufacturer may have gone out of business or may not be available. The manufacturer may not provide inspections as part of his operations.

RESPONSE: For the reason expressed in the response to the comment on Rule I(40), DHES has followed much of the federal language concerning the manufacturer recertifying tanks before they were reinstalled. Discussions with the manufacturers of the types of reinforced-fiberglass or steel clad with reinforced-fiberglass tanks most widely distributed in Montana indicate that these tanks are presently being recertified by the manufacturer in Montana for re-installation. No change is made to the rule in response to the comment.

RULE XI (16.45.305) Reporting and Recordkeeping

COMMENT: One commenter suggested that the Montana rule requiring reporting of underground releases within 24 hours be made similar to the federal rule. The commenter noted that EPA required only that confirmed underground release be reported only within 7 days from when they are originally suspected.

RESPONSE: Proposed Rule XI is a summary of reports required elsewhere. The specific federal rule (40 CFR Section 280.50) and the proposed Montana rule XIX both require that a release or suspect release be reported within 24 hours. No change is made to the rule in response to the comment.

COMMENT: A commenter stated that the proposed rule contains overly broad language in the initial paragraph in that it refers to the applicability of other state laws or rules, which reference, the commenter believed, made the duty of the owner or operator unclear. The commenter also questioned whether the first paragraph meant that the department would be conducting monitoring and testing and, if so, said that the authority for those actions should be cited.

RESPONSE: The reference to other state laws or rules should not make an owner or operator's duty unclear as that duty will be defined by the scope of those other laws and those other rules. Whether or not they are referred to in the proposed rule will not alter the applicability of those other state laws and rules to the owner or operator. For the reason expressed in the response to the comment on Rule I(40), the language of the first paragraph is taken verbatim from the analogous federal rule and the department is therefore reluctant to change it. The DHES may conduct monitoring or testing as authorized by other statutes but the proposed rule implements only the statute cited as being implemented. No change is made to the rule in response to the comment.

(1)(c) COMMENT: One commenter believed this rule to be unclear, pointing out that a "cleanup" is the result of an investigation as to the amount of contamination to the soil and/or groundwater that is found during the investigation and that if the phrase "soil and groundwater cleanup" seeks to require the submission of information gathered in an investigation for a soil and groundwater cleanup, that should be made clear.

RESPONSE: For the reasons expressed in the response to the comment on Rule I(40), DHES has used verbatim the language in the analogous federal rule. Further, this rule does not require the owner or operator to perform any "cleanup" but only requires that the results of an investigation required by other rules, and any "cleanup" already accomplished by the owner or operator, be reported to the department. However, to be responsive to the comment DHES has slightly altered the wording of the rule, using the title of the proposed state rules referred to, to help clarify what is being requested.

RULE XII (16.45.401) General Requirements for All UST Systems

(2) COMMENT: See comments to Rule V(2) and (4).

RULE XIII (16.45.402) Requirements for Petroleum Systems

(2)(a)(ii) COMMENT: One commenter expressed the opinion that if a line is equipped with an automatic leak detector that meets the qualifications as stated in the proposed rule then there should be no need for annual line testing and monthly monitoring.

RESPONSE: For the reason expressed in the response to the comment on proposed Rule I(40), DHES has used verbatim the language in the analogous federal rule. Further, the current technology of automatic line leak detectors can find leaks at or greater than 3 gallons per hour at 10 pounds per square inch line pressure within 1 hour. These types of line leak detectors are used for the immediate detection of large leaks. Because piping has been found to be the major source of leaks from UST systems, EPA deemed it necessary to detect the leaks beyond the capability of automatic line leak detectors. An owner or operator may use either annual line testing or monthly monitoring along with the automatic line leak detector on pressurized piping. No change is made to the rule in response to the comment.

RULE XV (16.45.404) Methods of Release Detection for Tanks

(5)(f) COMMENT: Another commenter observed that monitoring wells and vapor monitoring are utilized for different purposes and should not be used as a substitute for each other. If monitoring wells are to be installed, vapor monitoring is not always accurate for placement. The commenter noted that vapor monitoring is just an approximate tool that is highly variable on soil conditions. If the soil conditions are right, then vapor monitoring will assist in an assessment.

RESPONSE: For the reason expressed in the response to the comment on proposed Rule I(40), DHES has used verbatim the language in the analogous federal rule. Further, DHES notes that there is a difference between vapor monitoring wells and groundwater monitoring wells. The rule does not propose that these two types of wells be interchangeable. No change is made to the rule in response to this comment.

(6)(b) COMMENT: One commenter pointed out that the word "course" should be changed to "coarse".

RESPONSE: DHES agrees with the comment and has corrected this typographical error.

(6)(c) COMMENT: One commenter expressed the opinion that most of the language in this part of the proposed rule refers to "water table" aquifers. Strictly speaking, the commenter said, confined aquifer systems may be excluded by language that refers to water table aquifers.

RESPONSE: For the reason expressed in the response to the comment on proposed Rule I(40), DHES has used verbatim the language in the analogous federal rule. Further, if the groundwater was in a confined aquifer it is very unlikely that soils between the UST system and the monitoring well or devices would

not have a hydraulic conductivity of less than 0.01 cm/sec. and therefore the groundwater would not meet the stated requirements for groundwater monitoring. In order to meet the requirements for groundwater monitoring, soils between the tank and the water table should consist of gravels, coarse to medium sands, coarse silts or other permeable materials. If the soils are permeable then the aquifer would not be confined. No change is made to the rule in response to the comment.

COMMENT: A commenter suggested that monitoring wells should be screened to allow entry of regulated materials on the water table for all water table levels, high, low and everything in-between.

RESPONSE: DHES agrees with the commenter and has changed the rule to require screening for all water table levels at and between the low and high water table conditions in the groundwater monitoring wells.

RULE XVI (16.45.405) Methods of Release Detection for Piping

COMMENT: A commenter asked whether all sections of this rule apply or whether compliance with one of the sections was sufficient. The commenter said this should be clarified because the rule does not state that compliance with only one of the methods is required.

RESPONSE: For the reasons expressed in the response to the comment on proposed Rule I(40), DHES has used verbatim the language in the analogous federal rule. Further, the owner or operator determines the type of release response to the detection needed for the type of piping at the facility. All this rule states are the requirements which any type of detection method must meet. No change is made to the rule in response to the comment.

RULE XVII (16.45.406) Release Detection Recordkeeping

(1) COMMENT: One commenter asked what type of performance claims and what is defined as a "performance claim"? The commenter suggested that this should be clarified and made specific.

RESPONSE: For the reason expressed in the response to the comment on proposed Rule I(40), DHES has used verbatim the language in the analogous federal rule. The manufacturers of release detection equipment usually supply performance documentation to the owner or operator. The documentation of how the equipment is designed to work and what release detection standards it meets must be kept with the tank. No change is made to the rule in response to the comment.

RULES XVIII (16.45.501) General AND XXIII (16.45.601) General

COMMENT: Two comments were made questioning language in Rule XVIII and Rule XXIII, which language was interpreted by the commenters to mean that the requirements of sub-chapters 5 and 6 are only applicable to those owners/operators who are seeking reimbursement from the Petroleum Tank Release Cleanup Fund.

RESPONSE: As stated in Rule XVIII and Rule XXIII, all

owners and operators of UST systems must comply with the requirements of sub-chapters 5 and 6. Owners and operators of PST systems that do not meet the definition of an UST system do not have to comply with sub-chapters 5 and 6, unless they are seeking reimbursement from the cleanup fund. An example of a PST that is not an UST is an above-ground storage tank holding less than 30,000 gallons. Releases from PSTs for which reimbursement is not requested could fall under the application of other state or federal laws and regulations, such as the Montana Water Quality Act or the Comprehensive Environmental Cleanup and Responsibility Act. The language of Rule XVIII and Rule XXIII(1) has been modified to clarify the applicability of these rules.

RULE XIX (16.45.502) Reporting of Suspected Releases

COMMENT: One commenter suggested that only confirmed releases should have to be reported to the department because having to report a malfunctioning pump or alarm brings unnecessary attention to a not yet verifiable problem.

RESPONSE: For the reasons expressed in the comment on proposed Rule I(40), DHES has used verbatim the language in the analogous federal rule. Further, this rule does allow an owner or operator to avoid reporting a defective tank system or monitoring equipment if a leak did not occur and the defective equipment is immediately repaired or replaced. No change has been made to the rule in response to this comment.

COMMENT: A commenter requested that the following language in Rule XIX should be deleted: "any person who performs subsurface investigations for the presence of regulated substances, and any person who performs a tank tightness test or line tightness test pursuant to Rule XV(3) or Rule XVI(2)". The commenter felt that this language requiring persons other than the owner/operator to report a suspected release interferes with client confidentiality and that the financial responsibility requirements under Rule XXXVII will cover any problems that may arise from the operation and ownership of petroleum USTs.

RESPONSE: The department understands the need for maintaining confidentiality between a contractor and its client. However, the purpose of the language referred to above in Rule XIX is to protect public health, safety and the environment. Therefore, it is necessary that all suspected releases be reported to the department as quickly as possible by whomever is aware of them. Maintenance of confidentiality is acceptable when no danger to the public or environment is occurring. At the time most suspected releases are discovered, the potential for impacts to public health and the environment are not completely known and the department must be notified to assure that the response and abatement measures are initiated. Therefore, no change is made to the rule in response to this comment.

RULE XX (16.45.503) Investigation Due to Off-site Impacts

COMMENT: One commenter suggested clarifying Rule XX so

that an owner or operator not be required to investigate a suspected release due to off-site impacts unless sufficient evidence exists to connect the off-site impact to a specific UST or PST.

RESPONSE: For the reason expressed in the response to the comment on proposed Rule I(40), DHES has used verbatim the language in the analogous federal rule. Further, the proposed language allows the department to make the decision of when to require an owner or operator to investigate a suspected release due to off-site impacts. The department will not use the Rule XX requirement unless it feels that sufficient evidence does exist to warrant making the request of an owner/operator. No change is made to the rule in response to this comment.

RULE XXI (16.45.504) Release Investigation and Confirmation Steps

COMMENT: One commenter suggested the department extend the seven-day time period provided in Rule XXI for investigation and confirmation of all suspected releases.

RESPONSE: The department believes that seven days is a reasonable time period to conduct a system test and/or site check for all suspected releases. If a tank/line test cannot be arranged within seven days, a site check can be conducted within seven days to investigate and confirm a suspected release. All suspected releases need immediate response so that potential environmental and human health impacts can be minimized and promptly mitigated. No change is made to the rule in response to this comment.

(1)(c) COMMENT: One commenter recommended that no site check be required under Rule XXI(1)(c) if the contamination source was known and already under investigation.

RESPONSE: The commenters concern is already affirmatively addressed at the beginning of Rule XXI where it states, "Unless corrective action is initiated in accordance with sub-chapter 6 ... ". No change is made to the rule in response to this comment.

(1)(c) and (2)(a) COMMENT: Several commenters suggested that the sampling and analytical requirements provided in Rule XXI(2)(a) and Rule XXI(1)(c) be modified or eliminated.

RESPONSE: The department has decided that the specific analytical methods previously contained in the proposed rule will be eliminated and more general wording similar to the federal regulations will be substituted. This language will allow more flexibility for the department and the owner/operator to determine the appropriate analytical method(s) based on site-specific conditions and the type(s) of contamination. Guidelines for appropriate analytical methods can be obtained from the department and will be included in the Montana Quality Assurance Plan for Investigation of Underground Storage Tank Releases.

(2)(d) COMMENT: One comment was received stating that the

language in Rule XXI(2)(d) provides an unreasonable and unclear standard by which the department may reject all or part of the test results.

RESPONSE: The language in Rule XXI(2)(d) has been changed to provide that the department may reject results that are based on methods of data gathering that are "scientifically unsound". The department will provide an explanation of its decision to reject any test results at the time of the decision.

COMMENT: One commenter felt that where test results indicate a release has not occurred, the department should not have to approve the discontinuation of further investigation.

RESPONSE: The department feels that it must maintain the requirement for approval because some site checks performed under Rule XXI(2) may not adequately assess the site for the presence of a release. Therefore, the department has to make the final decision about whether further testing should be conducted to confirm the presence or absence of a release. No change is made to the rule in response to this comment.

RULES XXI (16.45.504) Release Investigation and Confirmation Steps AND XXXI (16.45.703) Assessing the Site at Closure or Change-in-service

COMMENT: Several commenters asked to review the Montana Quality Assurance Plan for Investigation of Underground Storage Tank Releases referenced in Rule XXI(2)(a) and Rule XXXI(1)(d).

RESPONSE: The Quality Assurance Plan is now available from the department in final form. However, subsequent revisions may be prepared based on new information and changes in accepted practices. The Quality Assurance Plan is a guidance document and includes proper methods for collection and analysis of samples, construction of monitoring wells, chain-of-custody procedures, decontamination, analytical methods, and general quality assurance and quality control procedures. Wording in Rule XXI and XXXI has been modified to clarify that the Quality Assurance Plan is to be used as a guidance document and that its use is not mandatory.

RULE XXII (16.45.505) Reporting and Cleanup of Spills and Overfills

(1) COMMENT: Two commenters suggested that the reporting requirement of "within 24 hours" for spills and overfills in Rule XXII(1) be changed to "immediate" notification so that the state can respond in a more timely manner if necessary.

RESPONSE: The department agrees that spills and overfills have the potential for causing significant damage within a short time period; therefore, Rule XXII(1) has been modified to change the 24-hour notification requirement to an "immediate" notification requirement. This is consistent with other state and federal regulations that require notification due to a release.

RULE XXIII (16.45.601) General

COMMENT: One commenter found Rule XXIII confusing, saying

that it could not discern which standard an owner/operator must adhere to in responding to a release and taking corrective action.

RESPONSE: The language in Rule XXIII has been modified in an attempt to clarify owner and operator responsibilities for release response and corrective action under sub-chapter 6.

RULE XXIV (16.45.602) Initial Response and Abatement Measures

(2)(c) COMMENT: Several commenters raised questions about the air vapor action levels specified in Rule XXIV(2)(c). One commenter asked for clarification as to what was meant by an "action level". Another asked to which medium 7 ppm applied and suggested that because 7 ppm TPH in soil can be naturally occurring, a more realistic figure be used.

RESPONSE: Rule XXIV(2)(c) has been modified to clarify methods of vapor measurement and what is meant by an "action level". The action levels specified to protect the health of individuals are based on the Permissible Exposure Limit (PEL) established by the federal Occupational Safety and Health Administration in 29 CFR 1910.1000. The PEL for gasoline vapor inhalation is 300 ppm, which is an 8-hour ceiling concentration above which workers may not be exposed during a 40-hour week. The department has added a safety factor of 10X, which sets an action level of 30 ppm for individuals exposed in affected structures 8 hours per day, 5 days per week. For individuals in affected structures with full-time occupancy, the department action level is 7 ppm which takes into account the additional time that gasoline vapors are inhaled beyond a 40-hour work week. Corrective action is required by the department in structures where the applicable action level is exceeded; corrective action being that the gasoline vapor concentrations must be reduced to below that action level. Action levels do exist for other chemical compounds. However, only gasoline vapors are identified in this rule because gasoline is the most common and volatile product released from underground storage tanks. The appropriate methods of air sampling measurement are included in the Montana Quality Assurance Plan for Investigation of Underground Storage Tank Releases. Appropriate air sampling methods include use of charcoal tubes, dosimeter badges, and air space containers. Analysis of air samples should be conducted using gas chromatography or infrared.

(4) DEPARTMENT CHANGE: Language has been added to the 30-day reporting requirement for initial response and abatement to allow initial response and abatement activities to extend beyond 30 days if necessary.

RULE XXV (16.45.603) Initial Site Characterization

(1) COMMENT: Several commenters suggested changing or eliminating some of the informational requirements in this rule. Some commenters felt that too much information is being requested. It was also suggested that the language be changed to eliminate the mandatory nature of the requirement to collect all information requested because it may not be avail-

able or appropriate to collect. One commenter suggested that some of the information already available on department records not be requested again under this rule. Another commenter was concerned that the information requested by this rule not be required for a site where a release is not confirmed.

RESPONSE: The title of Rule XXV has been changed from "Initial Site Characterization" to "Initial Site History" to avoid the confusion that this rule may be requiring field activities to investigate the contamination problem; this rule only requires that existing data on the site where a release has been confirmed be gathered for the department. This rule describes all information that must be submitted to the department by an owner/operator to provide a comprehensive description of the site and requires the owner/operator to appraise all possible sources of the release, based upon known facts, in order to help determine potential impacts to receptors in the area. Several pronouns in subsection (1) have been clarified and a statement has been added to Rule XXV(2) that allows the owner/operator to explain to the department why some of the required information cannot be obtained. The department generally has only limited information about a site in its tank notification form on file with the department. Some of this information is repeated in Rule XXV so that it can be verified for a site where a release has occurred. Some of the information required by the rule applies to all tanks on a site regardless of whether they are known to be leaking or not. This requirement is made because in some cases not all potential sources of the release have been assessed and a description of the entire UST or PST system on the property will help in the investigation.

(2) COMMENT: One commenter stated that the 45 days allowed by subsection (2) may not be enough time to submit a report to the department with all the information requested because all laboratory data may not be available.

RESPONSE: The report required at the end of 45 days by Rule XXV does not include any new laboratory data, but is only a report of existing site information. Additionally, the department is changing the 45-day reporting requirement to a 30-day requirement to be consistent with the 30-day requirement for reporting initial response and abatement measures conducted under Rule XXIV. Making these two dates consistent will simplify the schedule for reporting the required information to the department. Additional language has been added to Rule XXIV(4) to allow an owner/operator to submit a second, or follow-up report to the department if activities extend beyond the 30-day time period required for the first report. If the contamination problem is significant, the owner/operator may be required by the department to begin a remedial investigation under Rule XXVI, which requires a work plan to be approved by the department.

(2) DEPARTMENT CHANGE: The 45-day reporting requirement for initial site history has been changed to a 30-day reporting

requirement to match the reporting requirement for initial response and abatement measures conducted under Rule XXIV. The department feels that 30 days is sufficient for owners and operators to collect the information required by Rule XXV.

RULES XXV (16.45.603) Initial Site Characterization AND XXXI (16.45.703) Assessing the Site at Closure or Change-in-service

(1)(g) COMMENT: One person commented on the "independent observer" referred to in Rule XXV(1)(g)(v) and wanted to know what the observer is required to look for and recommended that only state approved independent observers be utilized.

RESPONSE: This rule does not require the presence of an independent observer, it only asks the owner/operator whether or not one was present and to provide identifying information if one was present. Moreover, the department does not believe it can either require a state approved independent observer or prohibit the use of "nonapproved" observers. Part of House Bill 552, now codified as 75-11-209, MCA, requires that beginning April 1, 1990, closures either be inspected by a department or local inspector, or that a licensed installer conduct the closure. Rules implementing HB 552 are yet to be drafted but will address the issue of the duties of inspectors. No change is made in the rule in response to the comments on this rule.

RULE XXVI (16.45.604) Remedial Investigation

(3)(b)(i) COMMENT: A comment was received recommending that Rule XXVI(3)(b)(i) require that soil material be classified using a standard classification system.

RESPONSE: The department understands that specifying a standard soil classification system would provide consistency in data collection. However, this level of detail will not be included in the Rule, but will be incorporated into the guidance document, "Montana Quality Assurance Plan for Investigation of Underground Storage Tank Releases". No change has been made in the rule in response to this comment.

(4) COMMENT: Several commenters stated that 120 days is insufficient time to complete a remedial investigation and submit a report to the department.

RESPONSE: The department understands that sites will vary considerably in extent and magnitude of contamination resulting from a release, and that the time necessary to complete a remedial investigation and report may be more than 120 days. Therefore, the department is changing the language in Rule XXVI(4) to provide for a second, or follow-up report if more than 120 days are needed.

RULES XXVI (16.45.604) Remedial Investigation AND XXVII (16.45.605) Corrective Action Plan

COMMENT: One commenter proposed that the department specify in Rules XXVI and XXVII a time-frame for department review of the remedial investigation and corrective action (cleanup) work plans, including submission of comments or

approval to the owner/operator. The commenter suggested a time-frame of five business days.

RESPONSE: The department agrees that deadlines for approval of the work plan and approval of the corrective action plan are necessary. However, because the plans must, under 75-11-309(1)(c)(i), MCA, be submitted to any local government with jurisdiction over the release, the five day deadline proposed by the commenter is unworkable. The department has adopted language requiring 15 days for action by the local government and 15 days for department action.

RULE XXVII (16.45.605) Corrective Action Plan

(1) COMMENT: One commenter stated that there was no explanation as to when a corrective action plan would be required of an owner/operator.

RESPONSE: The title of Rule XXVII has been changed from "Corrective Action Plan" to "Cleanup Plan" to avoid the confusion with the definition of "corrective action" under subchapter 11 - Petroleum Storage Tank Release Compensation. As stated under Rule XXVII(1), the department may require a corrective action plan (now "cleanup plan") at any time after the department reviews information submitted under Rules XXIV through XXVI. This allows the department the flexibility of assessing each site independently to determine whether a written cleanup plan is needed. For example, a minor release may be adequately corrected during the initial response and abatement phase, with no further cleanup action or plan required. In this case, an owner or operator can verbally propose the cleanup plan to the department for approval during the Initial Response and Abatement process. Additionally, owners and operators may submit a cleanup plan to the department at any time after fulfilling the requirements of Rules XXIV, XXV and/or XXVI for responding to contaminated soil and water.

COMMENT: One commenter wanted an explanation of how the department will determine that a cleanup plan meets the standard of providing "adequate protection of human health and the environment.".

RESPONSE: The standard of adequate protection will be evaluated by the department based on several factors given in Rule XXVII(4) which is excerpted from the analogous federal regulations.

(4) COMMENT: One commenter noted that Rule XXVII(4) adds the word "safety" to the standard "adequate protection of human health and the environment".

RESPONSE: These factors will be evaluated on a site-specific basis. The word "safety" has been added to Rule XXVII(1) to be consistent with Rule XXVII(4).

(5) COMMENT: A comment was received suggesting that compliance monitoring rates under Rule XXVII(5) should be agreed upon by the tank owner and the department.

RESPONSE: Rule XXVII(5) does state that a compliance monitoring schedule is to be included in the corrective action plan prepared by the owner and approved by the department. No change is made to the rule in response to this comment.

COMMENT: One commenter requested that the department define the terms "compliance monitoring" and "completion of corrective action" as contained in Rule XXVII(5). The commenter had some general questions regarding these terms such as "how will the results of compliance monitoring be evaluated?" and "is completion of corrective action determined by the department?".

RESPONSE: Under Rule XXVII(5), the term "corrective action" has been changed to "cleanup" in order to avoid confusion with the use of corrective action under sub-chapter 11. "Corrective action" is defined in Rule I. Rule XXVII(5) states that owners and operators will submit a cleanup plan to the department for approval which will include a plan and schedule for compliance monitoring to evaluate the effectiveness of cleanup activities. The department will review each proposed compliance monitoring plan and schedule on a site-specific basis to determine whether it is sufficient to monitor the effectiveness of cleanup based on the factors given in Rule XXVII(4). The rule states that compliance monitoring must continue for a period of at least two years after completion of cleanup activities specified in the cleanup plan, or continue for another reasonable time period approved by the department. This minimum two year period is intended to allow confirmation that cleanup goals have been attained and not affected by seasonal or temporal variations. Results of compliance monitoring will be evaluated by the department on a site-specific basis and compared to cleanup goals that should be outlined in the cleanup plan. Cleanup goals may include numerical standards or background levels for analytical sample results established for a particular site by the department. Final completion of cleanup activities and compliance monitoring ultimately is approved by the department. Some language has been added to Rule XXVII(5) to clarify compliance monitoring and completion of cleanup.

DEPARTMENT CHANGE: The department has changed the term "corrective action" to "cleanup" to avoid confusion with the definition of corrective action used in sub-chapter 11 - Petroleum Storage Tank Release Compensation.

RULE XXVIII (16.45.606) Public Participation

DEPARTMENT CHANGE: The department has changed the term "corrective action" to "cleanup" to avoid confusion with the definition of corrective action used in sub-chapter 11.

RULE XXIX (16.45.701) Temporary Closure

COMMENT: One commenter suggested adding a line that would provide for an owner or operator to apply for a variance.

RESPONSE: Proposed Rule IV ("Variances") applies to the entire chapter. This rule therefore already allows the owner

or operator to request a variance to Rule XXIX(3). No change is made to the rule in response to this comment.

RULE XXXI (16.45.703) Assessing the Site at Closure or Change-In-Service

COMMENT: A commenter expressed the opinion that the detailed requirements of this rule would only serve to restrict the flexibility of the department when assessing site condition at closure, and possibly require owners to collect data with questionable utility. Additionally, the commenter stated that the rule indicates that specific procedures are already provided in the Montana Quality Assurance Plan for Investigation of Underground Storage Tank Releases. The commenter stated that federal rule 280.71 [sic] provides sufficient detail without restricting flexibility for proper data collection and therefore incorporation of the federal verbiage was recommended.

RESPONSE: DHES has changed the requirement for using the Montana Quality Assurance Plan for collecting samples to allow the owner or operator the flexibility of using the plan for guidance. A copy of the Plan may be obtained from the UST program. The reason for requiring a site assessment is because the department has followed the federal guidance on this matter, which was published after publication of the federal rule.

COMMENT: A commenter also suggested the department allow the use of hydrocarbon vapor analyzers in tank excavations to determine contamination.

RESPONSE: Different types of vapor analyzers may result in showing different concentrations of contamination, therefore DHES feels that lab analysis will allow the department to make clearer and faster judgments on whether or not remediation needs to be done. No change is made in the rule in response to this comment.

(1)(d) COMMENT: One commenter recommended that the department include a listing of department-approved field hydrocarbon vapor analyzers and describe a standard "headspace" test method for hydrocarbon vapor analysis.

RESPONSE: Rule XXXI(1)(d) is the only place in the rules that discusses the use of field hydrocarbon vapor analyzers. This rule states that such instruments can only be used as screening tools to assist the investigator in locating the presence of a release. Only laboratory analysis of samples will be accepted by the department to confirm the absence of soil or water contamination. If a release is discovered, then the owner/operator must begin corrective action in accordance with sub-chapter 6, which includes a more detailed investigation with additional laboratory samples required. Therefore, since field hydrocarbon vapor analyzers are not recognized by the department as a quantitative instrument, it is not appropriate for the department to develop a list of the instruments. A standard "headspace" test method for hydrocarbon vapor analysis is included in the Montana Quality Assurance Plan for Investigation of Underground Storage Tank Releases.

No change is made to the rule in response to this comment.

(2) COMMENT: One commenter asked the department to define the word "contamination" as used in Rule XXXI(2) and in other rules, and to specify the level of contamination the department will allow to remain at a site. The commenter proposed that environmental sample results be compared to background sample results to determine what is "contaminated".

RESPONSE: The department considers the word "contamination" to be related to the word "release" which is defined in the Rules. "Release" as defined in Rule I(51) means any spilling, leaking, emitting, discharging, escaping, leaching or disposing from a tank system into groundwater, surface water or subsurface soils. This definition is identical to the definition in the analogous federal regulation. The word "contamination", therefore, results from a release from an UST system or from a PST, as measured in surface water, groundwater, or subsurface soils. The Montana Quality Assurance Plan for Investigation of Underground Storage Tank Releases can be consulted for common analytical methods and detection limits. The UST rules currently contain no numerical standards for determining the level of contamination allowed to remain at a site. Federal drinking water standards and the Montana Water Quality Rules include some standards applicable to petroleum products, such as 5 micrograms/liter for benzene, and the application of "nondegradation" with respect to water resources. The decision of "how clean is clean" is made by the department based on site-specific information and utilizing the standard of adequate protection to human health, safety and the environment. In most cases, environmental samples should be compared to background sample results to assist the department in determining what is contaminated and the level of cleanup required. The establishment of numerical clean-up standards is very difficult given the variety of site conditions and types of contaminant sources. No change is made to the rule in response to this comment.

RULE XXXII (16.45.704) Applicability to Previously Closed UST Systems

COMMENT: One commenter expressed the opinion that the proposed rule is interesting in that it gives the department the authority to revisit previously closed site to the extent of requiring excavation of the tank. The commenter correctly noted that tank sites closed over the last several years are not free from liability or reopening and expressed the belief that this is a fairly unique requirement.

RESPONSE: For the reasons expressed in the response to the comment on proposed Rule I(40), DHES has substantially followed the language in the analogous federal rule. Further, DHES knows that not all systems are closed properly and that not all owners report releases found during closures. This rule allows the department to investigate a site if the department feels that it is justified. Examples of sites which may be required to be excavated are sites in areas where contamina-

tion problems have or are occurring. No change is made in the rule in response to this comment.

COMMENT: A commenter asked whether the last line of the proposed rule meant that previously closed UST systems must be accessed because the system was not closed in accordance with rules which had not even been written at the time of closure, or whether the rule referred only to systems to be closed after the rule is effective. The commenter suggested it would be less ambiguous to strike all the proposed language after the word "environment".

RESPONSE: DHES feels that this comment has merit and has made the change as suggested for the reasons stated.

RULE XXXV (16.45.802) Compliance Dates for Financial Responsibility

COMMENT: One commenter expressed concern that the requirements for obtaining financial responsibility by the dates specified in the rule were unduly burdensome and suggested that later compliance dates be substituted for some of the earlier required dates.

RESPONSE: For the reasons expressed in the response to the comment on proposed Rule I(40), the department has used nearly verbatim the language of the analogous federal rule. The main difference between the dates in the federal and state rules is that some owners covered by the federal rules have already obtained coverage before the effective date of the Montana Rule. Thus, under the state rule, those owners must have coverage only upon the effective date of the Montana Rule. The language in the final rule will reflect this.

RULE LVI (16.45.1001) Tank Fee Schedule

COMMENT: One city-county health department commented, saying that the proposed fee structure is supported by that city-county health department.

A Department of Defense facility stated that DHES is discriminating against private tank owners and federal agencies by capping the maximum annual tank fee payment per state government agency at $5000. The facility estimates that it has 400 USTs subject to the fees which would total an annual tank fee cost of approximately $16,000. The comment does not ask for a similar total fee cap for private or federal agencies. The commenter believed that DHES is proposing to illegally subject a federal entity to a state environmental tax and doing so in a discriminatory manner. Department of the Air Force.

An industry spokesman stated that DHES should delete Rule LVI (2)c which proposes capping the maximum annual tank fee cost to state agencies at $5000 per year, saying that the proposed rule is discriminatory in favor of state agencies.

RESPONSE: DHES has proposed this rule in accordance with legislative direction and within financial limits which would generate revenue from underground tanks to supplement other state and federal funds necessary to implement the requirements of this program. A large portion of the projected revenue has been budgeted by DHES and the state Legislature to reimburse

local governments for their inspection work on behalf of the program. DHES is aware that the proposed fees to a few owners of large numbers of tanks (e.g. State of Montana Department of Highways, U.S. Department of Defense/Air Force at Malmstrom Air Force Base, Town Pump Incorporated, and perhaps the U.S. Postal Service, Burlington Northern Railroad, Mini-Mart Corp., Circle K, and Super America Inc.) will exceed the proposed $5000 cap set for state agencies.

DHES agrees that the $5000 annual ceiling in the proposed rule is blatantly discriminatory, but points out that the limit was designed to minimize the fiscal impact of the rule on state taxpayers. It is interesting to note that the Western Petroleum Marketers Association which represents the private fuel distribution and retail sector did not object to the imposition of fees on its members, but did object to the cap for state agencies. The State Highway Department owns a similar number of tanks as the Air Force and will be subject to a similar annual fee if the ceiling is deleted from the final rule. Following discussions with the State Department of Highways, DHES has concluded that to discriminate in favor of this one agency is counter-productive to the program needs and objectives. The total annual fee limitation in Rule LVI (2)c has therefore been deleted from the final rule.

In regards to the Department of Defense facility comment alleging the illegality of the imposition of the tank fees on federal entities, DHES refers federal agencies to 42 U.S.C. Section 6991(f)a and b, which provide in part:

> Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government having jurisdiction over any underground storage tank shall be subject to and comply with all Federal, State, interstate, and local requirements, applicable to such tank, both substantive and procedural in the same manner, and to the same extent, as any other person is subject to such requirements, including payment of reasonable service charges.

No change is made to the rule in response to this comment.

RULE LVII (16.45.1002) Grants to Local Governmental Units

COMMENT: One commenter supported the grant concept in the proposed rule, but stated that the proposed limit of $2000 per year is insufficient to purchase necessary equipment. Training and equipment grants should be greater in the early years of the program. Revenue generated from the more populous counties justify a larger grant amount.

RESPONSE: DHES agrees that startup costs to local governments may require additional funding. The proposed rule limit is conservative for two reasons; first, because the total revenue to be generated from the tank fee process is uncertain, and secondly because of the unknown number of local governmental units (LGUs) that may seek grants and state designation. The Legislature has authorized approximately $200,000 each year of the biennium for grants and reimbursements to LGUs. These funds must not only cover the cost of equipment and training,

but also be available to reimburse the actual inspection work performed by local governmental units. If 50 LGUs expend $2000 each year in grants for equipment and training, only $100,000 will be available for reimbursement. At $25 per hour, 4000 man-hours of work can be reimbursed statewide or less than the equivalent of two man-years.

DHES does not agree that $2000 is totally insufficient for basic program equipment purchases. For example, an explosimeter can be purchased for approximately $800, or a combination field instrument which measures combustible gas, oxygen levels and hydrocarbon vapors in parts per million can be purchased for approximately $1300. The more exotic photo or flame ionization instruments cost around $4500 to $6000, and portable gas chromatographs cost even more. Typically, these instruments do not offer much additional information to the average tank closure inspection or initial leak investigation.

There are two parts of the proposed rules which could be construed to permit grants in excess of the $2000 limit. These parts are the variance procedure in Rule IV, and the language found in Rule LVII(1), authorizing grants in "such other amount specified in the written notice of grant award made by the department." Additionally, DHES is concerned about the language which, at first glance, seems to authorize or require providing grants to local governments on an annual basis in perpetuity. This is not the intent. Subsections (4) and (5) of the proposed rule make it clear that DHES has unilateral approval authority over grant awards, in whole or in part, in an attempt to be fiscally responsible for the limited funds and still manage to meet the objectives of funding LGU's for their part in implementing these rules. To clarify that annual grant awards are not to be considered as a local government expectation and a mandatory state obligation, the final rule replaces the words "per year" with the phrase "local government unit". Until reimbursement costs expend a majority of available funding, equipment and training grants should be available for several years. DHES expects to distribute grants for training and equipment as widely as possible and not concentrate the funding in a few jurisdictions.

The state funding mechanism for LGU's is not expected to be a 100% subsidy for local government efforts. In the early years of the effort, this may be the case. But as more LGU's apply for the same limited funds, less work can be reimbursed in any one jurisdiction. This is counter-productive to program goals, and may require a Legislative adjustment to the tank fee schedule or LGU's will have to obtain additional local funding, or local efforts may need to be consolidated or curtailed. Obviously, less funding will be made available for equipment and training grants in later years as more of the available funds are used for inspection reimbursements.

To address the concern that the proposed rule may be too inflexible, DHES has added language which provides for the possibility of larger startup grants for an amount to be negotiated between the LGU and DHES. The awarding of such grants will still be accomplished at the discretion of DHES

under the conditions set forth in subsections (4) and (5) and be largely controlled by the availability of funds, the goals of the state and local program in the particular jurisdiction, and the details of the grant application submitted to DHES.

RULE LVIII (16.45.1003) Designation of Local UST Programs AND RULE LIX (16.45.1004) Implementing Agency Program Services and Reimbursement

COMMENT: One commenter opposed the idea of implementation by local governmental units (LGUs), saying DHES should not designate or authorize LGUs to implement the rules in their local jurisdictions. California has followed this approach. It places an additional burden on tank owners to have to deal with local and state agencies, particularly if the state and local rules are different or if the state rules are interpreted differently in various localities. The two government level approach can result in higher costs and delay to the tank owner.

Another commenter suggested it would be easier for LGUs to budget for program work on a total annual basis rather than to submit claims for reimbursement of effort. Annual contracts specifying total reimbursement would be preferable. If hourly billing for reimbursement is used, there should be an inflation clause written into the rule to cover increased costs beyond the proposed $25 per hour figure. It currently costs $18 per hour for personnel costs alone and does not include mileage or other operational costs.

RESPONSE: The underground storage tank program regulates at least 18,000 underground tanks located at over 9000 separate facilities in Montana. Under federal and state tank management rules, tank owners will be required to conduct leak detection on their tanks, upgrade or replace tanks over time, test corrosion protection systems, investigate releases and conduct necessary corrective action, and properly install new and close existing tanks. It is simply not possible for one state agency's staff to provide the on-site advice and inspection services that the number of regulated tanks will require. Full implementation of these rules will require even more effort if tank leak prevention is to be more than just a goal. DHES feels strongly that with state guidance and training to establish regulatory consistency, the best service to the public and the tank owner will be provided locally. The federal government has always maintained that the states can do a better job than it due to the vast numbers of tanks and the differences between states. For similar reasons, the state believes that the environment and the regulated public can be better served in this program through local efforts.

For several years, local fire jurisdictions in the larger cities or in smaller communities where a sufficient local concern exists have regulated tanks which store flammable and combustible liquids. Many of the proposed rules are based upon existing good practices set forth in fire codes. Local health and fire agencies are routinely drawn into tank issues when a release is discovered. DHES is convinced that the only way to

improve the current situation is to spend less time reacting to problems and place more effort on implementing leak prevention rules. This can be done most efficiently with assistance from local governments. For these reasons, no change is made in the rule in response to these comments.

DHES anticipates entering into contracts with LGUs as set forth in Rule LVIII. Application will be made, competing applications will be consolidated or selected based on criteria in the rule, and a contract between the state and the LGU will be made. In the interest of accountability and proper allocation of limited funds, DHES prefers to reimburse on an hourly or fee for service basis. This should help control costs until a more accurate revenue summary is available and result in less administrative review of costs. Claims for reimbursement of costs must be accompanied by proof that the service was performed. Increases or adjustments in the hourly reimbursement schedule can be made by future rule amendments as the program is implemented and future budgeting decisions can be based on then available data and revenue. For these reasons, no change is made in the rule in response to these comments.

RULE LXI (16.45.1101) Definitions

DEPARTMENT CHANGE: A definition for "corrective action plan" has been added to Rule LXI to clarify what the department requires of an owner and operator when submitting a claim for reimbursement of costs for preparing or implementing a corrective action plan approved by the department.

Comments effecting multiple rules

COMMENT, Replace NFPA 30 with the Uniform Fire Code: One commenter recommended replacing the references to NFPA Standard 30 with references to the Uniform Fire Code, because that is the standard used by the Montana State Fire Marshal.

RESPONSE: DHES has conferred with the State Fire Marshal and has changed the references in several rules from NFPA Standard 30 to the Uniform Fire Code, Article 79.

COMMENT, Suggested Citations to UFC: The State Fire Marshal suggested numerous wording changes to make the proposed rules consistent with the rules administered by the State Fire Marshal.

RESPONSE: DHES has incorporated many of the suggested changes concerning references to NFPA, to make the proposed rules consistent with the Uniform Fire Code.

COMMENT, Emergency standby power generator tanks: Two federal agency commenters expressed concern over the requirement of release detection for emergency standby generator tanks. These types of tanks have been deferred from release detection by the final EPA rules. The commenter asked that these types of tanks also be deferred from the Montana requirements for release detection.

RESPONSE: Notwithstanding the burden the proposed rules

will place on some owners and operators, there is evidence that emergency standby generator tanks do leak and can cause environmental damage. Typically, standby generator tanks are not closely monitored, if they are monitored at all. A release from this type of tank may go undetected for a long period of time. DHES has allowed annual monitoring of these types of tanks if the tank is 1100 gallons or less capacity. Tanks greater than 1100 gallons capacity will need to be monitored in a different manner. However, to lessen the burden on some owners and operators, DHES has determined to delay the requirement of release detection for tanks installed prior to 1965 until December 22, 1990. All tanks installed in 1965 or later will need to follow the federal schedule for release detection that is adopted by the Montana rules. The proposed rule has been changed to reflect this time schedule.

6. The authority of the Department of Health and Environmental Sciences to repeal ARM 16.45.101 is contained in 75-10-405, MCA. The repeal of ARM 16.45.101 implements 75-10-405 and 75-11-301, MCA. The authority of the Department of Health and Environmental Sciences to adopt Rules I through LXIII is contained in 75-10-405, MCA. The rules implement sections 75-10-405, 75-11-302 and 75-11-309, MCA.

for DONALD E. FIZZINI, Director

Certified to the Secretary of State November 13, 1989.

VOLUME NO. 43 OPINION NO. 41

CITIES AND TOWNS - Authority of city with self-government powers to enact ordinance superseding state law;
CITIES AND TOWNS - Sale of city lands;
LOCAL GOVERNMENT - Authority of city with self-government powers to enact ordinance superseding state law;
LOCAL GOVERNMENT - Sale of city lands;
MUNICIPAL GOVERNMENT - Authority of city with self-government powers to enact ordinance superseding state law;
MUNICIPAL GOVERNMENT - Sale of city lands;
PROPERTY, PUBLIC - Sale of city lands;
PROPERTY, REAL - Sale of city lands;
MONTANA CODE ANNOTATED - Sections 7-1-105, 7-1-111, 7-1-113, 7-1-114, 7-8-4201;
MONTANA CONSTITUTION - Article XI, sections 5, 6;
OPINIONS OF THE ATTORNEY GENERAL - 41 Op. Att'y Gen. No. 42 (1986), 37 Op. Att'y Gen. No. 68 (1977).

HELD: Although section 7-8-4201(2)(a), MCA, requires a two-thirds vote of the city commission to sell city land, a city having self-government powers may enact a superseding ordinance allowing the sale of such land by simple majority vote.

November 1, 1989

David V. Gliko
Great Falls City Attorney
P.O. Box 5021
Great Falls MT 59403-5021

Dear Mr. Gliko:

You have requested my opinion on the following questions:

1. Does state law require a four-fifths vote of the city commission to sell city land?

2. If so, may the commission adopt an ordinance authorizing the sale of city property by simple majority vote?

Your request states that the Great Falls City Commission recently adopted a resolution vacating the park dedication of Park Island, a Missouri River island adjacent to the city of Great Falls. It has been proposed that the island, which never has been developed for use as a public park, be sold to a private developer; the sale, however, failed for lack of a two-thirds majority vote, which translates into four votes of a five-member governing body.

The city of Great Falls has adopted a charter form of government with self-governing powers, effective July 1, 1986. Under its charter, the commission has proposed an ordinance allowing the sale of city property by a simple majority (3/5) vote of the city commission. The proposed ordinance would conflict with section 7-8-4201(2)(a), which requires a two-thirds vote of all members of a city council to sell city land.

As a general rule, local governments must possess specific statutory authority to dispose of their governmental properties. 2A C. Antieau, Municipal Corporation Law § 20.32 at 20-106 (1987). See also 41 Op. Att'y Gen. No. 42 at 167 (1986). Statutory conditions governing the sale of such properties are respected and strictly applied by the courts. 2A C. Antieau, Municipal Corporation Law § 20.35 at 20-114; Prezeau v. City of Whitefish, 198 Mont. 416, 646 P.2d 1186 (1982). Section 7-8-4201, MCA, contains the legislative grant of power enabling municipalities to sell their properties, and also provides the procedures by which such sales may be had. By its unambiguous terms, section 7-8-4201(2)(a), MCA, requires four votes of a five-member city council in order to sell city land.

The answer to your second question thus turns on the power of the city commission to supersede section 7-8-4201(2)(a), MCA, by ordinance.

My analysis begins with the 1972 Montana Constitution. Prior to its enactment, cities were considered subordinate political subdivisions of the state, and had only those powers expressly given them by the Legislature. D & F Sanitation Service v. City of Billings, 219 Mont. 437, 444, 713 P.2d 977, 981 (1986). The new Constitution empowered local government units to adopt self-government charters with the approval of a voter majority. Mont. Const. Art. XI, § 5 (1972). Further, the Constitution grants to such entities the exercise of "any power not prohibited by this constitution, law, or charter." Mont. Const. Art. XI,

§ 6 (1972). Under the "shared powers" concept embodied in the Constitution, "'the assumption is that local government possesses the power, unless it has been specifically denied.'" D & F Sanitation, 219 Mont. at 445, 713 P.2d at 982 (quoting II Mont. Const. Conv. 796-97 (1972)) (emphasis in original). Every reasonable doubt as to the existence of a local government's authority is to be resolved in favor of the existence of that authority. § 7-1-106, MCA.

Keeping in mind that units of local government with self-government powers are constitutionally granted the exercise of any power not prohibited by the Constitution, law or charter, it is clear that the statutory scheme governing such units is designed as a limitation upon, rather than as a grant of, such powers. §§ 7-1-101 to 114, MCA. Section 7-1-111, MCA, enumerates those specific powers denied to units with self-government powers, and section 7-1-114, MCA, sets forth those provisions of state law with which such local government units are obligated to comply. Finally, section 7-1-113, MCA, prohibits such local governments from exercising any powers "in a manner inconsistent with state law or administrative regulation in any area affirmatively subjected by law to state regulation or control."

> Consequently, in determining whether a self-government power is authorized, it is necessary to: 1) consult the charter and consider constitutional ramifications; 2) determine whether the exercise is prohibited under the various provisions of [Title 7, chapter 1, part 1, MCA] or other statute specifically applicable to self-government units; and 3) decide whether it is inconsistent with state provisions in an area affirmatively subjected to state control as defined by section [7-1-113].

37 Op. Att'y Gen. No. 68 at 272, 274 (1977).

Considering the first factor, the city of Great Falls has by its charter reserved the full spectrum of self-government powers permitted by law, and has vested in its city commission the authority to enact such ordinances as are necessary for the proper execution of governmental functions and responsibilities. The charter contains no provision which would tend to limit the commission's authority to enact an ordinance such as the one in question. I see no constitutional

ramifications of the proposed ordinance, other than the general limitation that a city may not exercise any power prohibited by law.

This leads to the second factor, which requires an examination of sections 7-1-111 and 7-1-114, MCA, to determine if enactment of the proposed ordinance is prohibited by law. The powers denied to a self-governing local government by section 7-1-111, MCA, consist largely of matters committed to a state agency or affecting statewide concerns. The sale of city properties is not included among those powers the city is prohibited from exercising.

Likewise, there is no provision of state law enumerated in section 7-1-114, MCA, which encompasses the sale of city land. Although that section requires the city to abide by all state laws which "require or regulate planning or zoning," § 7-1-114(1)(e), MCA, the planning and zoning laws do not concern disposition of city-owned property. See generally Tit. 76, ch. 2, pt. 3, MCA. Similarly, section 7-1-114(1)(c), MCA, by which the city is subject to laws establishing legislative procedures or requirements for units of local government, is not controlling. Section 7-8-4201, MCA, does not by its terms establish legislative procedures since it does not address the process of enacting laws or, in this instance, ordinances. A legislative act is one which prescribes what the law shall be in future cases arising under it. See Black's Law Dictionary at 810 (5th ed. 1979). The process of enacting the proposed ordinance obviously is a legislative act which is required by section 7-1-114(1)(c), MCA, to be performed in conformity with state law. However, the sale of property pursuant to section 7-8-4201, MCA, is not a legislative act. The decision to sell a parcel of city property pertains to a specific set of circumstances and does not prescribe a permanent rule for future situations. Thus it is more akin to an executive or proprietary function and does not fit within the rubric of section 7-1-114(1)(c), MCA.

Accordingly, resolution of your inquiry turns on the third factor of the analysis. It is important to recognize that the proposed ordinance is not necessarily prohibited simply because it conflicts with a state statute. See § 7-1-105, MCA (state law applicable until superseded by ordinance). It is a fundamental principle of home rule that "state legislative acts are invalid when they deal with basically local concerns and are in conflict with laws of the municipality." O. Reynolds, Handbook of Local Government Law at 102 (1982). Thus,

in most states, the gravamen of a home rule dispute is whether it concerns local matters or state matters. Id. at 96. In those states, while "[c]harter cities [with self-government powers] have certain rights and privileges in local matters to legislate free from interference by the legislature[,] ... [w]hen the subject of legislation is a matter of statewide concern the [l]egislature has the power to bind all throughout the state including charter cities." City of Scottsdale v. Scottsdale Associated Merchants, 583 P.2d 891, 892 (Ariz. 1978). See also Envirosafe Services of Idaho v. County of Owyhee, 785 P.2d 998, 1000 (Idaho 1987); Village of Tully v. Harris, 504 N.Y.S.2d 591, 593 (App. Div. 1986); State Personnel Board of Review v. City of Bay Village, 503 N.E.2d 518, 520-21 (Ohio 1986); City and County of Denver v. Colorado River Water Conservation Dist., 696 P.2d 730, 740-41 (Colo. 1985).

Many of these states also acknowledge the ability of the state legislature to preempt local regulation implicitly by occupying the field of regulation or activity. See, e.g., Envirosafe Services, 735 P.2d at 1001; Handbook of Local Government Law at 119-20. Consistent with the shared powers presumption, Montana has expressly rejected the doctrine of implied preemption as applied to local governments with self-government powers. D & F Sanitation, 219 Mont. at 445, 713 P.2d at 982.

Indeed, by its enactment of section 7-1-113, MCA, the Montana Legislature apparently sought to avoid the nebulous distinction between matters of "statewide" and "local" concern. Essentially section 7-1-113(1), MCA, allows a local government with self-government powers to enact any ordinance unless the ordinance (1) is inconsistent with state law or regulation and (2) concerns an area affirmatively subjected by law to state control. See 37 Op. Att'y Gen. No. 68 at 274 (1977). The statute allows little room for interpretation; it provides further that:

> (2) The exercise of power is inconsistent with state law or regulation if it establishes standards or requirements which are lower or less stringent than those imposed by state law or regulation.
>
> (3) An area is affirmatively subjected to state control if a state agency or officer is directed to establish administrative rules governing the matter or if enforcement of standards or requirements established by

statute is vested in a state officer or agency.

The ordinance proposed by the city of Great Falls satisfies the first prong of the above test. Clearly, by allowing a sale of property upon a simple majority vote, the ordinance is inconsistent with state law in that it establishes requirements which are less stringent than the two-thirds majority required by section 7-8-4201, MCA.

As to the element of state control, the disposition of city lands does not appear to come within the statutory definition. Although section 7-8-4201, MCA, has been the subject of a number of cases and of an Attorney General's Opinion, each involved subsection (2)(b) thereof and none considered the effect of self-governing powers on the procedural requirements. See Prezeau v. City of Whitefish, 198 Mont. 416, 646 P.2d 1186 (1982); 41 Op. Att'y Gen. No. 42 at 164 (1986). Further, my research has revealed no Montana case law interpreting section 7-1-113(3), MCA. Although the Montana Supreme Court has ruled in one case that a city with self-government powers could not supersede state statutory provisions pertaining to a service that is mandated by state law, that decision was based upon sections 7-1-113(2) and 7-1-114(1)(f), MCA. Billings Firefighters Local 521 v. City of Billings, 214 Mont. 481, 694 P.2d 1335 (1985). The Court did not consider subsection (3) of section 7-1-113, MCA, in its opinion. Given the subject matter there involved, and the fact that it was included within section 7-1-114's mandatory provisions, Billings Firefighters offers little guidance under the circumstances here presented.

Section 7-8-4201, MCA, is contained within the chapter of the local government title governing acquisition, transfer, and management of property and buildings. As noted above, it is not a mandatory provision under section 7-1-114, MCA, and is not committed by law to the jurisdiction of any state agency or officer. City lands are not included in any other provision of the code enforced by or under the control of a state officer or agency. As such, the disposition of city property cannot be said to be affirmatively subjected to state control.

I have assumed that the property in question was not held in trust for a specific purpose, and accordingly this opinion does not address section 7-8-4201(2)(b),

MCA. See Prezeau, 646 P.2d 1186; 41 Op. Att'y Gen. No. 42 at 164 (1986).

THEREFORE, IT IS MY OPINION:

> Although section 7-8-4201(2)(a), MCA, requires a two-thirds vote of the city commission to sell city land, a city having self-government powers may enact a superseding ordinance allowing the sale of such land by simple majority vote.

Sincerely,

Marc Racicot

MARC RACICOT
Attorney General

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

* * * * *

IN THE MATTER of the Petition of Northern Tank Line, Inc. and Keller Transport, Inc. for an Interpretation of Operating Authority, PSC No. 2255.	))))	TRANSPORTATION DIVISION DOCKET NO. T-9065

DECLARATORY RULING

BACKGROUND

1. On or about March 24, 1987 the Montana Public Service Commission (Commission) received a Petition for Declaratory Ruling from Northern Tank Lines (Northern) and Keller Transport, Inc. (Keller), collectively "Petitioners."

2. The Petitioner Northern alleges that it is the holder of Montana Intrastate Certificate No. 1927 which authorizes the transportation, as a Class B Carrier, of bulk commodities, liquid, in tank vehicles and petroleum and petroleum products, in bulk, in tank vehicles between all points and places within the State of Montana, subject to certain limitations.

3. The Petitioner Keller alleges that it is the owner and holder of Montana Intrastate Certificate No. 1060 which authorizes the transportation of petroleum and petroleum products, between all points and places in the State of Montana.

4. Both Petitioners contend that they operate daily under these certificates and maintain terminals and equipment in the conduct of their business. The Petitioners transport, and have transported, varying types of petroleum and petroleum products, between points in the State of Montana. The Petition also alleges that these Petitioners transport these products on road building and construction projects throughout all of Montana, and that these latter shipments comprise a substantial volume of the Petitioners' traffic and revenue annually. Further, these shipments included asphalt saturated aggregate, liquid asphalt and various types of road oils.

5. The Petition also states that L.L. Smith Trucking, Inc. (Smith), is the owner and holder of Montana Intrastate Certificate No. 2255, which authorizes the transportation, as a Class B Carrier, between all points and places in the State of Montana, of the following:

> Heavy equipment of unusual size and weight requiring special equipment; including dredge, mining, milling, road building and logging machinery, equipment and supplies; machinery, equipment and supplies used in construction, operation and maintenance of electrical power plants and transmission systems; machinery, equipment and supplies used in construction, operation and mainte-

nance of natural gas and petroleum transmission systems; including compressor and pumping stations; machinery, equipment and supplies used in construction, operation and maintenance of telephone and telegraph lines and systems; machinery, equipment, and supplies used in refining and processing ore and rock, or in manufacturing finished products; tanks; equipment, materials and supplies used and useful in control of forest fires, construction of forest service improvements, or fire, or pest control; equipment, materials and supplies used and useful in transporting or retrieving air craft or other mobile equipment. Subject to the following limitation: the transportation of property between points served by rail carriers, or between points served by Class A motor carrier, is prohibited.

6. The Petition indicates that in 1986, Willard R. and Leta F. Drinkwalter, dba W.R. Drinkwalter and Sons Trucking (Drinkwalter) leased the above-described Smith certificate and commenced hauling petroleum and petroleum products, between points in the State of Montana. These hauls included asphalt saturated aggregate, liquid asphalt, and various road oils. The Petition alleges that these transportation movements by Drinkwalter were conducted under that portion of the Smith certificate which authorizes the transportation of "road building ... supplies." The Petition also states that on December 31, 1986, Drinkwalter renewed the lease of the Smith certificate and was a participating carrier under Intermountain Tariff Bureau Tariff-29A, which establishes rates and charges for common carriers transporting petroleum products in intrastate traffic in Montana.

7. The Petitioners indicate that the Smith certificate is the subject of a transfer proceeding currently pending before the Commission, Docket No. T-8945, in which Drinkwalter is attempting to purchase the Smith authority. According to the Petition, that proceeding is presently in abeyance and is not being actively processed. The Petitioners are protestants in the transfer proceeding.

8. The Petitioners allege that PSC No. 2255, is not an intrastate certificate that permits the transportation of any petroleum or petroleum products between points in the State of Montana. The following question is presented to the Commission for a Declaratory Ruling:

> Whether certificate PSC No. 2255 can be construed as authorizing the transportation of petroleum or petroleum products, including asphalt saturated aggregate, liquid asphalt, or road oils, or in the alternative, construed as a heavy machinery and

equipment certificate including machinery and equipment for road building purposes and such "supplies" directly affiliated to the operation of the road building machinery and equipment, but not including petroleum or petroleum products.

9. On April 7, 1987 the Commission issued a Notice of Petition for Declaratory Ruling in this docket. The notice indicated that the Commission had received a Petition for a Declaratory Ruling as described above and stated that the Commission did not intend to hold a hearing on this petition unless good cause was shown. Interested persons were required to inform the Commission and/or request a hearing in writing on or before May 7, 1987.

10. On or about May 7, 1987 the Commission received a Response to the Petition for Declaratory Ruling filed by L.L. Smith Trucking, Inc., and Willard R. and Leta F. Drinkwalter, collectively Respondents. The Respondents requested that the Commission deny the request of Petitioners for further proceedings.

11. Intervention in this proceeding was also sought by Dixon Brothers, Inc. (Dixon), H.F. Johnson, Inc. (Johnson), and Hornoi Transport, Inc. (Hornoi), collectively Intervenors. The Intervenors sought to participate in this proceeding in support of the Petition for Declaratory Ruling.

12. On May 20, 1987 the Commission received a request from the Respondents pursuant to ARM 38.2.2701 for a prehearing conference in this proceeding, for the purpose of the orderly dispensation of this matter. A prehearing conference was held in this matter on July 15, 1987, and was attended by counsel for all of the respective parties. At this conference, it was determined that there were potential deficiencies in the notice which had been issued in this proceeding. Accordingly, the Commission issued an amended notice of the petition for declaratory ruling on August 5, 1987. The parties to this proceeding agreed at the prehearing conference that this amended notice was adequate. In the amended notice, a new intervention deadline of August 25, 1987 was established, and another prehearing conference in this proceeding was set for September 2, 1987. There were no additional intervenors.

13. A second prehearing conference was held in this matter on September 2, 1987. At this conference a procedural schedule was drafted which would govern this proceeding. It was determined that the Respondents' request for denial of the Petition for Declaratory Ruling should be briefed by the parties. On September 9, 1987 the Commission issued a procedural order which embodied the drafted procedural schedule. During the briefing of Respondents' request for denial of the Petition for Declaratory Ruling, this procedural order was amended by agreement of the parties.

14. On January 29, 1988 the Commission issued a Preliminary Order Limiting Scope of Hearing on Petition for Declara-

tory Ruling. In that Order, the Commission disposed of the Respondents' request that the Commission refuse to hold further proceedings in this matter. The Commission limited the factual question to be further addressed in the proceeding as follows:

> Whether those certain "petroleum and petroleum products" which have been transported by Drinkwalter under the Smith certificate, namely, asphalt saturated aggregate, liquid asphalt, and various road oils, are supplies intended for use in road building.

15. On July 6, 1988, and pursuant to proper notice, a hearing was held in this proceeding to address the factual question described above. At the close of the hearing, the various parties agreed to submit simultaneous "post-hearing" opening and reply briefs.

TESTIMONY

Testimony of Petitioners

16. Mr. E.G. Balsam, Miles City, Montana, appeared and testified on behalf of Northern Tank Line, Inc. (Northern), Petitioner. Mr. Balsam is the president, and principal stockholder of Northern. He described his background in the trucking industry. He started driving trucks in 1932 and occasionally drove during the summer while attending school. In 1943 he purchased a trucking business, including interstate authority and equipment. The authority consisted of hauling from Laurel and Billings, Montana to the southwest corner of North Dakota. The authority purchased was a petroleum products authority, and Mr. Balsam's firm moved such products as gasolines, kerosene, diesel fuels and burner fuels (TR 20, 21).

17. Mr. Balsam made several applications to this Commission for petroleum products authority in 1945 and 1946, but these applications were denied. In 1945, Mr. Balsam purchased a certificate for crude oil, road oil, asphalt and fuel oil, not refined petroleum products. At that time, Mr. Balsam traded part of the acquired authority to Bice Truck Lines for the right to use their intrastate petroleum and petroleum products authority for five years (TR 22).

18. Subsequently, Mr. Balsam applied for and received interstate authorities into North Dakota, and purchased a certificate for the only intrastate authority for North Dakota, the entire state from any point to any place. Prior to that time, and for about four or five years, Mr. Balsam's company was hauling products from Laurel to all of Western North Dakota. They had truck stations in Fargo and Grand Forks. All of the products moved were petroleum and petroleum products, primarily gasoline and diesel fuel. Mr. Balsam also obtained a small intrastate petroleum and petroleum products authority around Roundup, Montana (TR 23).

19. Mr. Balsam described proceedings before this Commission in 1954. The Yellowstone Pipeline was built, opening terminals at Bozeman, Helena, Missoula and Great Falls. At about the same time the Cenex Pipeline went to Minot with terminals

at Glendive and Sidney. Many applications for authority were filed with the Commission. Thirteen people received intrastate authority out of the Yellowstone Pipeline terminals for petroleum products. From 1954 to the 1960's those carriers, including Mr. Balsam, operated in Montana intrastate traffic. Mr. Balsam expanded his business, and acquired virtually all of the Farmers Union business in eastern Montana (TR 24). At this point his authority was almost statewide in nature.

20. Mr. Balsam also described proceedings before this Commission in 1961. According to Mr. Balsam, the Commission attempted to "straighten out the mess that the petroleum hauling had gotten into." The Commission called in six people who were actively engaged in hauling petroleum products in Montana. The meeting was noticed in the newspapers and all interested parties were invited to participate. According to Mr. Balsam, six carriers were granted statewide authority for petroleum and petroleum products. These carriers included Greenup, Rice, Consolidated Freightways, H.F. Johnson, Mr. Al Houck and Bice (TR 25, 26). According to Mr. Balsam, the Commission eliminated Class C petroleum and petroleum products authorities (TR 26).

21. Mr. Balsam testified that subsequent to this proceeding, the six carriers were required to participate in a Montana intrastate tariff. This particular tariff still exists today, and Northern has operated under this tariff and the intrastate certificate since 1961. According to Mr. Balsam, he has never encountered anyone in the Montana trucking industry transporting petroleum or petroleum products under the term "supplies," other than the Respondents. He testified that he believed that it was not appropriate to do so, and added that he has never participated in a hearing that involved petroleum or petroleum products which was an application seeking authority for "supplies." Mr. Balsam stated that in the 1940's and 1950's he was trying to obtain a statewide authority for refined petroleum products (TR 28). He stated that in discussions with the Commission staff members, a "supplies" authority would not allow such movements, but that a petroleum and petroleum products authority was required.

22. Mr. Balsam testified that it was his custom, as well as the custom of those carriers with whom he was associated, to move petroleum and petroleum products under the petroleum or petroleum products authorities in Montana intrastate traffic. Mr. Balsam noted that there are carriers who have authority to transport crude oil, residual fuels, and aviation fuels, which are also petroleum and petroleum products (TR 30).

23. According to Mr. Balsam, asphalt is a tar that comes out of some crude oil, but not all crude oils. If it is cooler than about 200 degrees it is solid, so it has to be transported hot. It is usually loaded at a temperature of 350 to 375 degrees and unloaded at about 250 degrees. Liquid asphalt is hauled in an insulated tank truck, either under heat, or hot to start with. Road oils are derivatives of asphalt and can be made to any desired specifications, by the addition of

gasoline or burner fuel. These specifications include using such oils for mixing, or applying seal coats (TR 32). The various classes of road oils differ by specific gravity, and include 100-150 penetrating (pen) asphalt, and 150-200 pen asphalt (TR 33). Liquid asphalt is also used on flat roofs to seal tar paper (TR 34).

24. Mr. Balsam stated that Northern has suffered a change in its financial picture in regard to the transportation of petroleum and petroleum products during the last several years. He stated that they have been losing money for the last five or six years, and their revenues have been cut in half. In 1980 Northern received two million dollars for asphalt hauling, and this year they will be fortunate to receive a million dollars (TR 35). In 1980 Northern was operating 85 petroleum and petroleum product units. This year Northern has licensed 45 similar units. According to Mr. Balsam, the loss of revenue and volumes is due to a great deal of competition in the asphalt business. In both Montana and interstate, there has been a lot of rate cutting. There are minority carriers who are receiving preference, which is adversely affecting Northern's operations (TR 36). Further, the Respondents have been transporting petroleum and petroleum products under the term "supplies," which has also adversely affected Petitioner's operations. Mr. Balsam stated that there were several other carriers with authority similar to that of Respondents. If the Commission were to decide in favor of Respondents, several new carriers would enter the petroleum and petroleum products market. All of these additional operations have hurt the ability of Northern to function as a common carrier (TR 37).

25. On cross, Mr. Balsam testified that asphalt saturated aggregate, liquid asphalt, and road oils are part of the end product in a finished road. These commodities form the permanent road structure that results from the road building process. Mr. Balsam also elaborated upon Northern's participation in the Intermountain Tariff Bureau. The tariffs were applicable to the intrastate movement of petroleum and petroleum products, and were established as a result of meetings between the participating carriers and their members (TR 40). According to Mr. Balsam, neither the respondents nor their predecessors in interest were participants in this tariff, or hauled petroleum or petroleum products (TR 41). According to Mr. Balsam, participation in this tariff bureau was restricted to only those carriers possessing authority to haul petroleum.

26. Mr. Balsam also described an earlier Commission proceeding involving the authority at issue in this docket, when that authority was owned by Mr. Burleson. According to Mr. Balsam, Northern did not participate in that hearing. Mr. Balsam testified that the Commission's notice procedure at that time involved notifying each certificate holder whom they thought would be interested in a proceeding. Mr. Balsam stated that Northern did not receive any notice of the Burleson proceeding (TR 42, 43).

27. On cross, Mr. Balsam also testified that, in his opinion, there is actually more road building involving asphalt now than during the early 1980's, as completed surfaces are being repaved and oiled. Northern has cut its rates since 1980 to meet the changed market (TR 46, 47).

28. Mr. Harold Ankrum, Billings, Montana appeared and testified on behalf of Keller Transport. Mr. Ankrum is the president of Keller. Mr. Ankrum offered a description of his background in the motor carrier industry. He has been involved in the transportation industry for approximately 40 years, during which time he has served as a driver, dispatcher, mechanic, supervisor and manager. Mr. Ankrum has worked for Keller for 16 years, and has been the president of that corporation for 5 years. Keller is primarily engaged in the transportation of petroleum and petroleum products, both on an interstate and intrastate basis. The products moved by Keller under this authority include liquid asphalt. Mr. Ankrum generally agreed with the descriptions of asphalt saturated aggregate, liquid asphalt, and road oils which were offered by Mr. Balsam in his testimony (TR 48, 49).

29. Mr. Ankrum also testified that Keller had been adversely affected by the diversion of traffic for liquid asphalt to other carriers. He attributed this diversion to minority preference, rate cutting, and the proliferation of private carriers. Keller has had unutilized equipment because of these diversions of traffic. This equipment has in the past been used for the movement of refined products including road oil, liquid asphalt, and other petroleum and petroleum products (TR 50-52).

30. Mr. Ankrum also agreed with Mr. Balsam that he did not believe that the term "supplies" in an authority encompassed the commodities at issue in this proceeding. To his knowledge, he was unaware of any carrier moving these commodities pursuant to a "supplies" authority. Mr. Ankrum stated that Keller is a successor in interest to Greenup trucking, one of the six carriers that was certificated in the 1961 proceeding described by Mr. Balsam (TR 52). Mr. Ankrum stated that the loss of traffic and revenue has hurt Keller, and has not contributed to that carrier's well-being (TR 52-53).

Testimony of Respondents

31. Mr. Richard Blossom, Great Falls, Montana, appeared and testified. Mr. Blossom is the vice-president and equipment manager of Hilde Construction Company. Up to last year, Mr. Blossom served as the grading superintendent and was extensively involved in the road building process. Mr. Blossom had served in this capacity for 35 years (TR 56).

32. Mr. Blossom described in detail the process that is entailed in building a road. After the plans are provided, the road site must be cleared, and appropriate drainage structures must be installed. The necessary grade must be established and the aggregate, gravel, asphalt, cement, or a mixture is applied. First, a layer of base gravel is applied,

which consists of gravel from three inches to one and one-half inches in size. Then a cushion is put down, consisting of three-quarter inch gravel. This layer is primed with oil or asphalt, to bind the top layer together. The next layer to be applied is called the primary mix, which differs between interstate or primary secondary roads. For interstate roads, a plant mix seal is applied. This consists of aggregate which is mixed with oil and put on hot. With a secondary road, an emulsion is applied and chipped with rock chips (TR 58).

33. Mr. Blossom stated that in road building terminology, asphalt and road oil are the same item, and are used as a binding agent. Emulsion is asphalt mixed with water. A plant mix is heavy grade asphalt which is mixed with aggregate at a plant and heated. A road mix is aggregate and road oil which is mixed as applied to the roadway (TR 59).

34. Mr. Blossom testified that gravel is used in building a road, and is either applied separately or in combination with asphalt. Similarly, asphalt cement, or lime cement, is also used and may be added to the aggregate (TR 60). The aggregate and gravel is obtained from nearby gravel pits, while the asphalt is obtained from refineries. The aggregate is moved in belly dump trucks and the asphalt and road oils are transported in tankers from the refinery to the job site, where it is often placed in temperature-controlled storage tanks (for plant mix) (TR 61). On other occasions, the asphalt product is applied directly by the carrier to the roadway, such as for priming or chip sealing.

35. Mr. Blossom stated that the prime application on top of the gravel serves to bind the cushion together. The next application is usually of plant mix, which is applied and spread out with a paver (TR 63). Road oil is also used for dust control when it is applied as a prime. There are also several other petroleum products besides asphalt and road oils which are used in road building, including: diesel fuels and lubricants, which are used for the various pieces of equipment, and; propane, which is used for heating the asphalt storage containers (TR 63-64).

36. According to Mr. Blossom, plant mix is approximately 93 percent aggregate, 6 percent asphalt, and 1 percent lime. The asphalt may be cutback with a thinner to soften the tar (TR 64-65). Emulsion is approximately 60 percent asphalt and 40 percent water. Usually, the same mixtures are used for new road construction, or overlays on existing roads (TR 65-66). There are usually heating requirements for the asphalts and road oils in both transportation and application. For emulsion, it usually must be heated to the 145 to 150 degree range. For other asphalt products, the temperature range is approximately 350 degrees (TR 66-67). Mr. Blossom stated that the asphalt product is transported to the job site (or hot mix plant) from the refinery by a common carrier, and added that the Respondent Drinkwalter has provided that service for Hilde Construction (TR 68).

37. On cross, Mr. Blossom further described the road building process. The base gravel is compacted with rollers and equipment, and is then watered down to make a more compact surface (TR 68). Each separate layer, involving the aggregates, plant mix, and asphalt concrete is rolled with a vibratory roller to remove all air spaces and voids (TR 69). Water is used throughout this process, to achieve the optimum moisture content required by the plans. Tests are conducted by the State to insure compliance with these requirements. The moisture content remains at that level after the road is built, for the life span of the road (TR 69-70, 72).

38. Mr. Willard Drinkwalter, Billings, Montana, appeared and testified. Mr. Drinkwalter is the operator of Respondent W.R. Drinkwalter and Sons Trucking, and the applicant for the transfer of the certificate at issue in this proceeding. Mr. Drinkwalter described his background in the motor carrier industry. He started driving a truck in 1947, and bought his first truck and worked for a firm in Denver, Colorado from 1954 through 1957, hauling road oils, gasolines and propane. In 1957 he went to work for another firm in Cheyenne, Wyoming, which transported all petroleum products. In 1961 he went to work for H.F. Johnson, Inc., of Billings, hauling road oil and gasolines. In 1976 he went to work for Hornoi Transport and worked for that company through 1986. In 1986 Mr. Drinkwalter purchased the authority at issue in this proceeding (Smith certificate) to haul road oil and asphalt products (TR 73).

39. Mr. Drinkwalter stated that under the Smith certificate he has hauled road oils, asphalts and emulsified asphalts, but no saturated aggregate. Specifically, they have hauled AE-150 (emulsified), CSS-1 (emulsified), CRS-2 (emulsified), HF-100 (emulsified), 85-100 (asphalt), 120-150 (asphalt), MC-70 (road oil), MC-250 (road oil), MC-800 (road oil), MC-3000 (road oil), and dust oil for dust control (TR 74). Mr. Drinkwalter stated that the emulsified asphalts are used for chipping and sealing, the pen asphalts are from the hot plant and are laid on the road, and the road oils are used for a prime coat. MC-250, MC-800 and MC-3000 are all primarily used for patch repair (TR 75).

40. Mr. Drinkwalter testified that each of these products are to be transported at different temperature requirements, which are noted at the refinery. Mr. Drinkwalter stated that his company operates the equipment necessary to meet these specific requirements, including two spreader trucks or distributors. The asphalt products are usually obtained from the refinery which has contracted to supply the project (TR 76). These refineries are located in Great Falls, Billings and Laurel. Mr. Drinkwalter testified that when he purchased the Smith certificate, it was his intent to haul road oil. In purchasing the Smith certificate, Mr. Drinkwalter stated that he believed that road oils could be hauled because of a decision of this Commission in 1973 (TR 77). Specifically, he stated that he was shown a copy of a 1973 letter from the Commission to Richard Carlson indicating that the authority at is-

sue authorized the transportation of asphalt, asphalt saturated aggregate, and road oil (TR 78). The witness sponsored the following exhibit:

Respondent's Exhibit A: Mr. Drinkwalter's handwritten notes, listing commodities transported by Drinkwalter and Sons Trucking. This list was prepared from freight bills which were prepared and maintained in the regular course of business.

41. Mr. Roger Smith, Riverton, Wyoming, appeared and testified. Mr. Smith is employed by Respondent L.L. Smith Trucking, and serves as the president of that company. Mr. Smith has been associated with that Company for 29 years, serving as a truck driver and manager. Mr. Smith stated that the company acquired the certificate at issue in 1982 (TR 83). Mr. Smith testified that prior to acquiring this authority, they discussed the scope of the authority with Mr. Carlson, who referred to the 1973 letter from the Commission. Mr. Carlson also showed Mr. Smith the order of the Commission concerning activities by Mr. Frank Burleson under the certificate (Burleson order). Based on this information, Mr. Smith and his company purchased the authority.

42. Mr. Howard C. Anderson, Billings, Montana, appeared and testified. Mr. Anderson is a chemist who recently retired from Conoco (TR 86). He sponsored the following exhibit:

Respondent's Exhibit B: A resume synopsis of Mr. Anderson, showing his educational and employment experience. The admission of this exhibit was objected to as irrelevant, and the document was admitted over that objection. This document establishes Mr. Anderson's credentials as an expert in the field of chemistry (TR 89).

Mr. Anderson testified that he worked for Conoco for 40 years, and since 1967 had been involved in asphalt chemistry at the Billings refinery. Mr. Anderson also defined SC and MC asphalt products (TR 89). An SC is a slow cure asphalt cement that is cut back with a heavy diesel fuel to cure slowly when used in the field. An MC is a medium cure which is asphalt cement cut back with a kerosene, and the kerosene evaporates at a moderate rate as compared to the diesel. There are also rapid cures, or RCs, where a naphtha or a narrow range gasoline fraction is blended with the asphalt cement, and quickly evaporates. Following the development of cutback asphalts, Mr. Anderson was involved with making the full range of asphalt cements at the refinery, both by vacuum tower distillation, and propane deasphalting, where the gas oils are removed by a solvent or propane from the heavy bottom of the crude oil. These processes concentrate the asphalt and remove the valuable gas oils which are used for cracking into gasoline. From that point it is a matter of refining or blending these to the point that they meet an acceptable specification as established by the State of Montana (TR 90).

43. Mr. Anderson also described the various refining steps that crude oil passes through to obtain asphalt. First, the light oils are removed as a flash, then the bottom oils

are separated by topping. The crude topping is further refined by a high temperature distillation. There is no particular chemical formula for asphalt. It is a large conglomerate of a myriad of molecules. Asphalt is a bituminous product which by definition, is all hydrocarbon, completely soluble in carbon disulfide (TR 91).

44. Mr. Anderson described the transportation of asphalt products. He stated that in his experience, 99 percent of all asphalt either went by tank car or tank truck. Asphalt has to be hot enough to be loaded, but not too hot to be dangerous (TR 92). Asphalt needs to be moved in an insulated vehicle to prevent heat loss, because the asphalt itself is a semisolid. At high temperatures of 300 to 350 degrees, asphalt becomes fluid enough to handle and pump. At low temperatures, such as room temperatures, it will be firm. Since it is a semisolid, it is necessary to preserve the heat. According to Mr. Anderson, heat in asphalt cement is money because energy is spent to raise it to the necessary temperature (TR 93).

45. Mr. Anderson also explained various tests applied to asphalt, and their importance to the asphalt industry. A viscosity test is the standard method for grading. The basic definition of viscosity is resistance to flow. The hotter the temperature, the lower the viscosity because there is resistance to flowing. The asphalts and the cutback asphalts are graded primarily by viscosity, to meet the required specifications. All grades are the same regardless of the source of the asphalt. Penetration grading is also used in Montana (TR 93, 94). Flash point and conductivity tests are also performed. Flash point tests are important from a safety standpoint, to insure that the asphalt is safe to transport and use. Conductivity tests measure the ability of the asphalt to resist shock (TR 95).

46. Mr. Anderson explained the cutback classes of road oils. A cutback is an asphalt that is cut with a hydrocarbon solvent. These are the SCs, MCs and RCs described earlier (TR 96). The evaporation of the solvent occurs after the road oil has been applied to the road. Eventually all of the solvent evaporates, at a rate which is dependent upon the type of solvent used (TR 98). One of the purposes of cutbacks is to be able to transport the product and handle it at a much lower temperature than asphalt cement. Asphalt cement would need to be at 300 to 350 degrees, while the cutbacks can be handled at 130 to 150 degrees (TR 98).

47. Mr. Anderson also provided a brief description of water emulsified asphalts. The water comprises approximately one-half of the product, and the water breaks out and spreads into the concrete after it is applied. The water eventually evaporates leaving the asphalt (TR 98, 99). Dust control oils are often used in road building. Most of these oils are not asphalt products, but are still petroleum products (TR 99).

48. Mr. Anderson also described laboratory tests which simulate the aging of asphalt in the road, which shows what happens to the asphalt over time after application. The as-

phalt tends to evaporate or oxidize. After the water or cutback solvent dissipates, all that is left is the asphalt cement (TR 100, 101).

49. Mr. Thomas J. Schneider, Helena, Montana, appeared and testified. Mr. Schneider is the president and owner of Thomas Schneider and Associates, a consulting firm. He is a professional engineer by background (TR 104, 105), and received a bachelor of Science Degree in petroleum engineering from Montana Tech. Mr. Schneider was employed in the petroleum industry for over six years (TR 106), where his duties ranged from being a roustabout to a full-time petroleum engineer. He was involved with supervising drilling operations, production operations and completion operations (TR 107). Part of this responsibility included constructing and maintaining the access roads into the field sites (TR 109). The roads were actually built by another company under contract with Mr. Schneider's employer (TR 111). The contract work was supervised by Mr. Schneider to ensure that the roads were adequately constructed (TR 111). Over objection by Petitioners and Intervenors, Mr. Schneider was allowed to testify concerning his knowledge of road building requirements (TR 113).

50. Mr. Schneider described the typical requirements for roads constructed on an oil exploration site. There were various stages of materials to be applied, starting with a heavy, coarse base material followed by a medium grade material, such as gravel. Each of these stages was compacted with a roller, and was watered to allow for greater compaction. This was followed by a finer topping for the finished surface. These roads were designed to provide all-weather access (TR 114). The roads must also be able to support very heavy equipment, which moves in and off the site (TR 115). Water or oil is often used around the sites for dust control (TR 117).

51. Mr. Schneider also described other uses for water in the oil fields. Water is the primary constituent of drilling mud, which is used in drilling the well. The mud is pumped down into the well, and it resurfaces, removing the fresh cuttings (TR 118). The water is then directed into a mud pit, where some of it may be recirculated, and some of it becomes waste product (TR 122). Water is also used as the base of the oil field drilling cementing process. The purpose of the cementing process is to place cement around the casing and bond to the formation to provide a seal to prevent contamination of the hole (TR 122). Both the mud and the cement column remain in the hole (TR 123). Water is also used during well stimulation to improve the flow of oil or gas into the well bore (TR 123-124). Again, the majority of this water would tend to remain in the hole after injection (TR 123-125). Mr. Schneider sponsored the following exhibit:

Respondent's Exhibit C: A document consisting of several pages, including a description of Mr. Schneider's professional background, a schematic drawing of an oil field site, schematic drawings of a down hole drilling operation, and the vertical cross-section of a well and a plan

view, both illustrating fracture stimulation. That portion of the exhibit referring to Mr. Schneider's qualifications was admitted over relevancy objections. Similar objections to the remainder of the exhibit were taken under advisement. (TR 127)

52. On cross, Mr. Schneider agreed that the end product in a road construction project is the road itself (TR 127). With an oil well, the end product to be produced is oil to be sold, and the only way to get this end product is to drill a well (TR 128).

53. Mr. David Carlson, Clancy, Montana, appeared and testified. Mr. Carlson is a professional engineer and land surveyor for Morrison-Maierle Consulting Engineers. Morrison-Maierle is basically engaged in consulting for civil engineering. Mr. Carlson studied at Montana State and has a degree in construction technology. Construction technology is the construction aspect of civil engineering, including construction surveying, design, strength of materials, pavement designs, concrete design, structural design and thermodynamics. Since receiving his degree, most of his experience has been with street improvement projects, water and sewer collection and distribution, and airport engineering. According to Mr. Carlson, airport engineering and highway engineering are similar disciplines, particularly in the area of pavements, pavement design and pavement construction (TR 130). Presently Mr. Carlson is the chief civil engineer for Morrison-Maierle, concerning the disciplines of airport and highway engineering. During the last 22 years Mr. Carlson has been involved with all of the pavement construction at four of the air carrier airports in Montana, including Helena, Bozeman, Kalispell and Butte. During the last 12 years he has been involved with the pavement construction at Billings Logan International Airport. He has also worked on various street projects, including several in Conrad, Chester, Helena, Bozeman and Billings (TR 131-132). Mr. Carlson sponsored the following exhibit:

Respondent's Exhibit D: Mr. Carlson's resume and qualifications. The exhibit was admitted.

54. Mr. Carlson also described the various stages involved in the construction of a road:

Respondent's Exhibit E: An enlarged view of a typical highway cross section. This exhibit was objected to as irrelevant, and the objections were taken under advisement (TR 155).

Assuming that the road is designed and the course is set, the compacted subgrade is developed. That is the finished profile that has been set for the street, highway, or road. This is reached through cutting and filling operations (TR 134). Creating the compacted subgrade involves the use of various pieces of compaction equipment and the introduction of water. In some cases it may even involve the removal of water if the material that is on site is excessively wet. There is always some form of water conditioning to reach an optimum moisture. Optimum

moisture is the moisture content of the soil or aggregate at which point the material is easily compacted (TR 134-135). This is usually determined in a laboratory for the specific materials being used. In the compaction process, water serves as a lubricant, as the particles undergo a reorientation. There are various courses in an aggregate base course, starting with a fairly inexpensive and readily available uncrushed material. This is followed by a two-inch minus crushed base with more granular and angular particles, and eventually, a paving surface is placed on top. Through surface tension in the water a cohesive force develops which holds the material together, and the water functions as a lubricant so the particles can be reoriented (TR 135, 136). Granular material is rolled with a vibratory roller, and the particles are reoriented so that the gradation fills the voids. Therein lies the strength, and the cohesiveness of the mass will remain after the section is constructed. The moisture remains in the compacted material for many years after the section is constructed. Tests have been conducted beneath pavement sections on a number of airports, including Helena, and found that in the range of 10 to 15 years after those pavement sections were constructed, perhaps 50 percent of the moisture that was introduced in the construction process still remained in the compacted base course. If the moisture was completely lost and the base course was not protected by the surface, compaction would be lost, and the road would not be able to carry the designed load (TR 136).

55. Mr. Carlson also described the importance of aggregate size and shape in the compaction process. The strength of the base course, and the increasing strength of the overlying courses is derived by the aggregate interlock, which results from highly fractured or crushed faces that are angular and develop a lot of frictional force between them when they are compacted. The strength of these courses is based on that aggregate interlock (TR 137). The lubrication feature of water is essential to the compaction of the base courses. When the load is imposed, the density of the material has to be such that it is not densified or compacted further. That has already been achieved in the process of construction (TR 138).

56. Mr. Carlson described the purpose for using a pavement surface instead of gravel. Pavement is stronger per inch of depth. An inch of asphalt concrete is as strong structurally as an inch and a half of the crushed base (TR 138-139). Pavement provides a wearing surface that protects the underlying base courses. The base courses develop the same structural strength and the same load carrying capability as the surfacing. The underlying courses are really the structural load bearing capability of the section (TR 139).

57. Mr. Carlson also described the process of constructing the asphalt concrete. A common application is of a cutback asphalt on the top of the three-quarter inch crushed base, with a penetration of about a half an inch. Then there is an application of three inches of asphalt concrete, which is a mixture of aggregate and penetration grade asphalt. This

normally is done in a hot plant and applied through a process of lay down and compaction (TR 139).

58. According to Mr. Carlson, the asphalt provides a lubrication feature similar to the water in the under courses. In the case of a hot mix asphalt, virtually all of the water is driven out of that mixture before it is laid, through a heating process. The asphalt is introduced at approximately 400 degrees and the rock is heated to 300 degrees. Those two are mixed together, and in that process of heating the rock, most of the moisture is removed. In the case of an asphalt concrete surface, water does not act as a lubricant to facilitate compaction or densification. That is one of the purposes asphalt serves in that process, as a lubricant (TR 140).

59. According to Mr. Carlson, there are three basic forms of asphalt, the penetration grades, the cutbacks, and the emulsified asphalts (TR 140). Asphalt is a product of the refining of crude, and what remains in all cases is a residual asphalt. With a cutback, the cutter stock is volatile and evaporates. In the case of an emulsion, after it is applied it breaks, and the water separates from the asphalt and evaporates (TR 141). In the case of the application of asphalt in an asphalt concrete mix, it is in a very fluid state. Once the heat dissipates from an asphalt concrete, it very quickly achieves a stable state which is desired as the ultimate surface. For example, with an emulsion on a 70 degree day, the separation or break occurs in perhaps 20 to 30 minutes (TR 142).

60. Mr. Carlson stated that the strength of asphalt concrete is derived from a crushed base, and the aggregate interlock, or friction of those particles against each other. Stability is specified and achieved in construction, and is a function of the asphalt content. Stability is the resistance to the load, and a lack of stability is characterized in an asphalt surface by rutting, or displacement under high daytime temperatures. The major source of strength is aggregate interlock and the degree of crushed faces or the fracture in the rock itself (TR 143). The aggregate interlock is obtained by the lubrication of the asphalt.

61. Mr. Carlson described the results of research conducted at the Helena airport, concerning compaction and moisture with paved surfaces. Approximately ten years after the paved sections were constructed, there was still on average about half of the amount of water that would have been considered optimum moisture in the base courses. There was more moisture in the subgrade. The base courses and the subgrade essentially still had the same density as when they were constructed. The purpose of the study was to design an overlay of asphalt concrete for a change in aircraft, and this depended upon the moisture content and the density of the pavement courses (TR 145).

62. Mr. Carlson stated that in his opinion, asphalt is both a supply and a material, in that it both becomes a permanent part of the road project (material), and is used or consumed in the project (supply) (TR 147, 149-150). His opinion

was admitted over the objection that Mr. Carlson was not an expert qualified to draw such a conclusion (TR 147-149).

63. On cross, Mr. Carlson stated that asphalt becomes a permanent part of the road structure, and acts as a lubricant, which is essential to the compaction of the materials used. Ultimately, asphalt is applied to the road, and becomes a part of the permanent road structure. This is the case whether the asphalt is used in asphalt concrete, or aggregate in a mixing process at a hot plant (TR 151). From the hot plant, the mix is transported to the highway project and laid down at a uniform depth. At this point, the process of compaction and the action as a lubricant begins immediately. The mix then cools and ultimately remains as a permanent part of the road structure (TR 152). Mr. Carlson also stated that there was no way to be sure that water found under pavement after several years was the original water used during the compaction process. There were other possible sources of such water (TR 154).

ANALYSIS

64. The Petitioners and Intervenors continue to assert that the Smith certificate is a heavy equipment authority only, including the transportation of equipment and machinery. In making this argument, the Petitioners cite to the ICC descriptions cases as authority for the proposition that transported products are classified by Class or Generic headings. Similarly, the Petitioners and Intervenors continue to assert that the custom of the industry supports their narrow reading of the Smith certificate. Petitioners allege it is "incumbent" on Smith and Drinkwalter to establish their authority to move petroleum and petroleum products in Montana intrastate traffic.

65. For several reasons, the Commission finds these arguments to be without merit. First, and as previously described, the Commission has already considered these arguments in this proceeding, resulting in the Preliminary Order Limiting Scope of Hearing, dated January 29, 1988. As the Commission noted in that order, any ambiguities which may exist in the Smith certificate concerning the movement of "road building ... supplies" were resolved in Matter of Burleson. There the Commission specifically considered the relationship between the language authorizing the movement of heavy equipment and that concerning "road building ... supplies." This includes any arguments concerning the positioning of punctuation on the face of the Smith certificate. Clearly, by that decision the holder of the Smith certificate is authorized to transport those commodities which are intended for use as road building supplies, apart from any restriction relating to the movement of heavy equipment. See Preliminary Order Limiting Scope of Hearing, Docket No. T-9065, Order No. 5826 (January 29, 1988).

66. Similarly, the reliance upon the prior activities of the predecessors of the Smith certificate is not of any value to the Commission in its deliberations in this matter. In its

preliminary order in this hearing, the Commission found these activities irrelevant: Dormancy does not exist in Montana. The Commission also rejected similar arguments relating to the characterization of this proceeding as revolving around a determination of PC&N: class or generic headings are not the only standards used in the interpretation of certificates. Even the ICC has recognized that its own Descriptions cases do not result in a completely inflexible categorization of commodities. This matter, of course, was also put to rest in Matter of Burleson. See Preliminary Order Limiting Scope of Hearing.

67. In the Preliminary Order, the Commission found that several of the issues raised in this proceeding, had already been determined in a previous Commission Order in Matter of Burleson, which dealt specifically with the certificate at issue in this proceeding. Thus, the Commission chose to adhere to its precedent, which was plainly applicable. In raising these issues again, the Petitioners and Intervenors have not presented any arguments which would persuade the Commission to overrule Burleson as it applies to the Smith certificate. This is so even though it is not clear that this Commission would reach the same result today looking at the Smith certificate. By the very nature of a declaratory proceeding such as this one, the ruling itself is limited only to the facts presented, and has no application beyond this scope. Along these lines, the Petitioners incorrectly contend that it is somehow incumbent upon Smith and Drinkwalter to make any showing in this proceeding. As previously determined in the Preliminary Order in this proceeding, the nature of a proceeding for declaratory ruling really precludes that anyone bears a burden of proof. If this were the case, then the Commission would be forced to serve as a trier of contested fact, which is not appropriate in these proceedings. A determination by the Commission in this proceeding that the Smith certificate authorizes the movement of asphalt, for example, does not preclude the Commission from later citing Drinkwalter for illegally moving asphalt, if the facts at that time differ from the facts presented in this proceeding. See Preliminary Order Limiting Scope of Hearing, Docket No. T-9065, Order No. 5826 (January 29, 1988).

68. Intervenor Dixon also contends that the Class A and rail carrier limitations found in the Smith certificate would have a limiting effect upon any operations under the Smith certificate. Smith counters that the restrictions are largely inapplicable, as through time and due to the changing nature of the services provided by Class A carriers and railroads, this restriction has become meaningless. Smith argues for removal of this restriction for lack of definiteness. These arguments are echoed by Drinkwalter. The Commission does not see any need to resolve this question in this proceeding. To do so would likely be beyond the appropriate scope of this proceeding.

69. Intervenor Dixon also argues that the Smith certificate was originally issued as a Class C Contract Carrier Authority, and was changed to a Class B authority without notice "to anyone of the proposed expansion of authority." Dixon

adds that no formal application was ever filed to request such expansion, and that, therefore, no competing motor carriers were ever given the opportunity to object. In summary, Dixon concludes that "Certainly there was no statutory or regulatory justification for such a blatant disregard of the required statutory and regulatory process." Smith points out that the classification change was in fact noticed to the public, and that the Commission was applying § 69-12-302(1), MCA, in changing the certificate from Class C to Class B. At best, the records of the Commission are unclear on this point. The 1970 minutes of the Commission refer to the Smith certificate as a Class B authority. In any event, Dixon does not elaborate upon the value of these facts, if they are accurate, to the Commission in its deliberations in this proceeding. Even Dixon notes that looking at these facts only leads to conjecture. The Commission chooses not to rely upon conjecture during its deliberations in this proceeding and will disregard this discussion by the Intervenor Dixon.

70. Intervenor Dixon also describes as "pertinent" the activity of Hughes Hauling while it held the Smith authority from October, 1963 to May, 1970. Dixon contends that cement destined for highway construction projects falls within the same commodity classification as "asphalts and road oils." Dixon further argues that in 1968, Hughes Hauling applied to the Commission for separate cement authority, which it received. Dixon contends that this is evidence of the Commission's belief (in 1968) that the term "supplies," as used in the Smith certificate, did not include those materials which make up the permanent end result of a road building construction project (presumably like asphalt and road oils). Smith counters that Dixon's contentions are based upon unproven assumptions, such as the intentions of Hughes Hauling to haul cement for road building projects. Further, Smith challenges Dixon's claim that cement is a "building" material, but instead contends that cement is rather a "construction" material. Finally, Smith points out that it would appear to be unlikely that cement in bags or sacks (which was the authority granted to Hughes Hauling) would be used by a road contractor.

71. First, that Hughes sought separate "cement (in bags or sacks)" authority in 1968 is not indicative of anything. Smith is correct: Dixon's argument, as presented, rests upon too many unproven assumptions. Further, and as elaborated upon the preliminary order in this docket, that Hughes felt compelled to seek separate authority for cement does not mean that cement could not be a road building supply. See Preliminary Order Limiting Scope of Hearing, Docket No. T-9065, Order No. 5826, para. 45; see also In the Matter of Dixon Bros., Docket No. T-8842 (Declaratory Ruling, July 28, 1986). Finally, the Commission will not determine in this proceeding whether or not cement destined for highway construction projects falls within the same commodity classification as "asphalts and road oil" (Smith claims cement is a construction material,

not a building material). This issue is clearly beyond the proper scope of this proceeding.

72. The Intervenor Dixon also addresses the existence of an "escape clause" in the sale agreement between Smith and Drinkwalter, which allows Drinkwalter to "escape" the agreement in the event of an adverse Commission ruling. Dixon argues that the ultimate disposition of the agreement should not control the Commission's decision in this proceeding. Smith responds that the existence of an escape clause in the purchase and sale agreement is totally irrelevant to this proceeding. The Commission agrees, and accordingly, disregards this evidence in its deliberations in this matter.

73. Respondents continue to place reliance and weight upon the May, 1973 letter from the Commission staff, concerning the scope of the authority at issue. The Respondents note that the "opinion" letter contains no warnings about its "informal" nature, and that it is issued on Commission letterhead, under the names (but not signatures) of the then current Commissioners. The letter, Respondent notes, "states there was a meeting about the matter, and it states Carlson was authorized."

74. In the preliminary order in this proceeding, the Commission found that the letter, as an "informal and advisory ruling," could not be dispositive of the issues in this proceeding. The Commission continues to take this position. Again, reliance upon such informal rulings is taken at risk of a subsequent, and different "formal" determination. See Preliminary Order Limiting Scope of Hearing.

75. The Commission finds that as a matter of both law and sound policy, such informal opinions cannot be dispositive. The request for this opinion was filed by Carlson on May 31, 1973. Despite the existence of appropriate and legal administrative procedures governing the issuance of "formal" rulings, an "opinion" letter was issued on the same day by Commission counsel. Although the letter does not clearly state its "informal" nature, it clearly does not either reflect the substance of a formal determination. As a final order from an administrative proceeding, determinative of Carlson's substantive rights as well as those of other interested parties, the May, 1973 letter would be woefully inadequate, and far short of the appropriate standards maintained by law and this Commission as a matter of policy.

76. The final matter to be considered by the Commission in this proceeding primarily concerns the interpretation to be given by the Commission to the term "supplies" as it appears in the Smith certificate. The Petitioner and Intervenors contend that the term "supplies" is distinct from the term "materials," that the commodities at issue in this proceeding, predominately asphalts, are in fact "materials" used in road building, and that the Smith certificate thus does not authorize the transportation of those commodities.

77. Respondents assert that the commodities at issue serve both a "supply" and "material" function, that the distinction between the terms "supplies" and "materials" is large-

ly nonexistent, and that the Smith certificate authorizes the transportation of these commodities.

78. The Commission finds that there is an important distinction between the terms "supplies" and "materials" which relates to the issues in this proceeding, and adopts the general distinction drawn by the Interstate Commerce Commission in several pertinent proceedings, including Builders Express, Inc., Interpretation of Certificate, 51 M.C.C. 103 (November 22, 1949), and P.B. Mutrie Motor Transportation, Inc. v. Blue Line Express, Inc., 53 M.C.C. 530 (November 7, 1951). More specifically, the Commission finds the following language from Builders Express to be pertinent:

> In its generally accepted meaning, the term "contractor's material" means materials used by a building or construction contractor, which are to become a permanent part of a building or other construction project. In contrast contractor's "supplies" are those things used or consumed in a contractor's work other than those which become a part of the structure such as forms, hoists, and gasoline for construction power.

51 M.C.C. 106-7. The Commission believes that many of the cases cited by Respondents in this proceeding miss the mark, as they relate to the distinction, if any, between materials and supplies under circumstances which are substantially different from those before the Commission, which involve the regulated transportation industry.

79. The distinction between "materials" and "supplies" was also drawn in P.B. Mutrie Motor Transportation, Inc. v. Blue Line Express, Inc., 53 M.C.C. 530, wherein the ICC stated:

> The term "supplies" has a very broad meaning and should not be confused with "materials" or "ingredients." It embraces those things furnished for the purpose of operation, as distinguished from "materials," which are furnished for original construction.

53 M.C.C. 530. The Respondents attempt to blur this distinction by pointing to various ICC decisions which, they claim, acknowledge that the distinction between materials or supplies may be nonexistent in other contexts. For various reasons, the Commission rejects these arguments.

80. First, at no point in these proceeding have the Respondents claimed that the original grant of authority was also intended to include "materials" as well as "supplies." Thus, their reliance on George Grifall Common Carrier Application, 62 M.C.C. 763 (1954), is misplaced. Further, that decision involved a general imperfection in terminology which had been corrected by the time of that proceeding. No such imperfection is claimed here. Second, Respondents have not introduced any evidence that removing the distinction between "mate-

rials" and "supplies" is necessary to enable established carriers to continue in their traditional field of service. The ICC decision in H. Messick, Inc., Extension-Explosives, 102 M.C.C. 492 (1966) is thus of little help, and is clearly distinguishable factually.

81. The recognition of the distinction between "materials" and "supplies" by this Commission, however, does not end this inquiry. The Respondents also argue that the commodities at issue in this proceeding are both "materials" and "supplies." This contention appears to exist independent of any Commission determination regarding the necessity for a distinction between "materials" and "supplies."

82. Respondents contend that asphalt is both a material and a supply, since the asphalt also serves certain functions when it is put upon the road surface. Respondents point out that asphalt must be mixed with other components prior to application, must be kept hot in order to be used, and must be compacted in order to perform its lubricating and sealing functions. According to Respondents, the asphalt mix acts as a "supply" in that it lubricates the aggregate to allow compaction, and as a "material" in that it provides a seal or a bonding element.

83. The Commission rejects these narrow contentions. Although it may be true that asphalt, in its various forms, serves these different functions, it is obvious to the Commission from the record that, from a broad view, the whole purpose of asphalt in any road construction project is to build a permanent highway surface. This is the case whether that purpose is accomplished through either the lubricating or sealing function, or both. The asphalt base is an essential permanent component of the resulting roadway, and asphalt itself, although it may deteriorate with time is not a consumable in road building, but rather remains as the resulting surface of the road. This is the ultimate result of the road building process.

84. As a policy matter, to accept the Respondent's contentions herein would be to promote the eventual blurring of the clear distinction between materials and supplies recognized and affirmed by the Commission in this order. This decision is reinforced by the absence of the term "materials" in the contested portion of the Smith certificate, and the presence of that term (along with "supplies") at other places in the certificate. The Commission also notes that the arguments advanced by Respondents bear no similarity to previous Commission determinations regarding the overlapping nature of various types of commodity descriptions (ie, generic class and intended use).

85. Respondents place great weight upon this Commission's determination in Green Oil Field Services Docket No. T-8854 (May 19, 1986), wherein the Commission determined that the term oil field supplies includes water and waste oil in bulk in tank vehicles. However, a review of that decision reveals that it did not address any of the concerns raised and discussed in this proceeding. Similarly, many of the other de-

cisions relied upon by Respondents are factually or legally distinguishable.

86. During the hearing on this matter, the parties agreed that the consideration of "asphalt saturated aggregate" should be stricken. Further, it was testified that in road building terminology, asphalt and road oil are the same.

87. Based on the foregoing discussion and analysis, the Commission finds and declares as follows:

Asphalt is not a supply intended for use in road building.

Done and Dated this 30th day of October, 1989 by a vote of 3-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

HOWARD L. ELLIS, Vice Chairman

JOHN B. DRISCOLL, Commissioner

DANNY OBERG, Commissioner

ATTEST:

Ann Purcell
Acting Commission Secretary

(SEAL)

NOTE: Any interested party may request that the Commission reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.

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, 1989. This table includes those rules adopted during the period October 1, 1989 through December 31, 1989 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, 1989, 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 1989 Montana Administrative Register.

ADMINISTRATION, Department of, Title 2

I-XIII and other rules - Veteran's Employment Preference - Veteran's and Handicapped Person's Employment Preference, p. 1361

(Teachers' Retirement Board)

I-VII and other rules - Crediting Military Service - Payment of Benefits at Death - Payment of Child's Benefit - Bonuses as Compensation - Correcting Errors on Wages Not Reported, p. 800, 1276

AGRICULTURE, Department of, Title 4

I-V Production of Mint, p. 1374, 1839

(Montana Agriculture Development Council)

I-XIII and other rules - Growth Through Agriculture Program, p. 810, 1190, 1338

4.5.203 Designation of Noxious Weeds, p. 628, 899

4.12.2618 Bond Schedule for Itinerant Merchants, p. 1037, 1482

4.15.101 and other rule - Fees - Agriculture Debt Mediation Scheduling and Agreement Procedures, p. 807, 1278

STATE AUDITOR, Title 6

6.6.505 Policy Definitions and Terms, p. 1252

6.6.506 and other rules - Medicare Supplement Insurance Minimum Standards, p. 1039, 1230, 1301

COMMERCE, Department of, Title 8

(Board of Athletics)
8.8.2803 and other rules - Prohibitions - Boxing Contestants - Physician Requirements - Weights and Classes - Scoring - Down - Equipment - Judges - Inspectors - Appeals - Appeal of Decisions of Officials, p. 630, 967, 1483
8.8.2901 and other rules - Boxing Contestants - Down - Fouls - Appeals, p. 1254
(Board of Cosmetologists)
8.14.814 and other rules - Fees, Initial, Renewal, Penalty and Refund - Salons - Cosmetological/Manicuring, p. 1062, 1663
(Board of Dentistry)
I Prior Referral for Partial Dentures, p. 1065
8.16.101 and other rules - Board Organization - Examinations - Allowable Functions - Minimum Qualifying Standards - Minimum Monitoring Standards - Facility Standards - Reporting Adverse Occurrences - Fees - Oral Interview - Applications - Mandatory CPR, p. 942
8.16.402 and other rules - Examination - Permit Required for Administration or Facility, p. 1066
(Board of Hearing Aid Dispensers)
8.20.401 and other rules - Traineeship Requirements and Standards - Fees - Notification of Address Change - Record Retention - Code of Ethics - Disciplinary Actions - Fines - Hearings - Minimum Testing and Recording Procedures, p. 694, 1069, 1840
(Board of Horse Racing)
I-VI Superfecta Sweepstakes - Tri-superfecta Wagering, p. 1693
8.22.301 and other rules - Simulcast Horse Racing - Simulcast Race Meets Under the Parimutuel System for Wagering, p. 1683
8.22.501 and other rules - Definitions - Parimutuel Exercise Persons - Jockeys - Pony Persons - Trainers - Veterinarians - General Requirements - Medication, p. 635, 968
(Board of Landscape Architects)
8.24.403 and other rules - Applications - Seals - Examinations - Reciprocity - Suspensions and Revocations - Complaint Process - Disciplinary Actions - Fines, p. 698, 1279
(Board of Morticians)
8.30.406 and other rules - Examinations - Fee Schedule - Itemization, p. 1624
(Board of Nursing)
8.32.411 Renewals, p. 1627
(Board of Occupational Therapists)
8.35.402 and other rules - Definitions - Applications for Limited Permit - Pass-Fail Criteria - Fees - Unprofessional Conduct - Limited Permits -

Reciprocity, p. 819, 1191
(Board of Outfitters)
8.39.504 and other rules - Licensure -- Approved Operations Plan - Conduct -- Standards of Outfitter and Professional Guide - Conduct -- Additional Required Outfitter Procedures - Outfitter Records, p. 460, 1192
(Board of Pharmacy)
8.40.415 and other rule - Suspension or Revocation - Gross Immorality and Dangerous Drugs, p. 703, 1193
(Board of Physical Therapy Examiners)
8.42.601 and other rules - Unprofessional Conduct - Disciplinary Actions, p. 174, 833
8.42.702 and other rules - Reported Violations, p. 463, 833
(Polygraph Examiners)
8.47.404 License Renewal - Date, p. 465, 972
(Board of Radiologic Technologists)
8.56.409 Fees Schedule, p. 430, 753
8.56.602 and other rules - Permit Applications - Course Requirements - Permit Examinations - Temporary Permits - Permit Restrictions, p. 949
(Board of Realty Regulation)
8.58.411 Fee Schedule, p. 432, 754
8.58.412 Inactive Licenses - Reactivation of Licenses - Continuing Education, p. 467, 1339
(Board of Sanitarians)
8.60.408 Minimum Standards for Registration Certificate, p. 1629
(Board of Social Work Examiners and Professional Counselors)
8.61.1601 and other rules - Hours, Credits and Carry Over - Fee Schedule - Ethical Standards, p. 434, 755
(Board of Speech/Language Pathologists and Audiologists)
8.62.404 and other rules - Speech/Language Pathology and Audiology, p. 1699
8.62.504 Nonallowable Functions of Aides, p. 645, 1566
(Board of Veterinary Medicine)
I Advisory Committee, p. 952, 1341
8.64.504 and other rules - Annual Renewal of Certificate of Registration - Continuing Education - Conduct - Unprofessional Conduct, p. 823, 1195
(Building Codes Bureau)
8.70.104 Incorporation by Reference of the Model Energy Code, p. 1070
(Milk Control Bureau)
8.79.201 Regulation of Unfair Trade Practices, p. 708, 1196
(Financial Division)
I Investment Securities, p. 1377
8.80.102 Banks - Direct Leasing of Personal Property, p. 470, 1280
(Board of Milk Control)
8.86.301 Formula for Fixing Class I Wholesale, Retail, Jobber and Institutional Prices, p. 1546
8.86.301 Class I Resale Pricing Formula, p. 710

FISH, WILDLIFE AND PARKS, Department of, Title 12

HEALTH AND ENVIRONMENTAL SCIENCES, Department of, Title 16

HIGHWAYS, Department of, Title 18

INSTITUTIONS, Department of, Title 20

JUSTICE, Department of, Title 23

SOCIAL AND REHABILITATION SERVICES, Department of, Title 46