MONTANA ADMINISTRATIVE REGISTER

1991 ISSUE NO. 5
MARCH 14, 1991
PAGES 288-340

MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 5

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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing and where written comments may be submitted.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

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BEFORE THE FISH AND GAME COMMISSION
OF THE STATE OF MONTANA

In the matter of the proposed)
adoption of hunting license) NOTICE OF PUBLIC HEARING
and damage hunt rules)

TO: All interested persons

1. On April 4, 1991 at 7:30 o'clock p.m., a public hearing will be held at Montana Department of Fish, Wildlife and Parks 1420 East Sixth Avenue, Helena, Montana 59601 in the Commission Conference Room to establish policies and procedures for issuing special hunting licenses and permits and for conducting big game damage hunts and game management seasons.

2. The proposed rules were previously published on January 17, 1991, Montana Administrative Register, Issue No. 1, Pages 4 through 18.

3. These rules are necessary to allow the department to establish the many detailed procedures required to implement laws for special hunting seasons and permits.

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 James Herman, License Bureau Chief, Field Services Division, Department of Fish, Wildlife and Parks, 1420 East Sixth, Helena, Montana, 59620, no later than April 11, 1991.

5. Jerry Wells has been designated to preside over and conduct the hearing.

6. The authority of the department to make the proposel is based on section 87-1-301, MCA, and the rule implements section 87-1-301, MCA.

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

Certified to the Secretary of State March 4, 1991.

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

In the matter of the amendment of rules 16.45.1220, 16.45.1221, 16.45.1232	)))	NOTICE OF PUBLIC HEARING FOR AMENDMENT OF RULES (Underground Storage Tanks)

To: All Interested Persons

1. On April 12, 1990, at 9:00 a.m., the department will hold a public hearing in Room C209 of the Cogswell Building, 1400 Broadway, Helena, Montana, to consider the amendment of the above-captioned rules.

2. The proposed amendments would modify the inspection requirement for farm and residential tanks with a capacity of 1,100 gallons or less that are used for storing heating oil or motor fuel. The proposed amendment would give the department the discretion to waive the inspection in appropriate circumstances. Owners of these tanks would not be required to pay an inspection fee. In addition, the proposed amendment would provide alternate methods for funding the inspection of these smaller farm and residential tanks.

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

16.45.1220 INSPECTION FEES

(1) - (4) Remain the same.

(5) Notwithstanding subsections (1) through (4), no inspection fee is required to be paid to the department for the inspection of the installation or closure of a farm or residential tank with a capacity of 1,100 gallons or less that is used for storing motor fuel for non commercial purposes or a tank with a capacity of 1,100 gallons or less used for storing heating oil for consumptive use on the premises where stored.

AUTH: 75-11-204, MCA; IMP: 75-11-204, MCA

16.45.1221 REQUIREMENTS FOR INSPECTION GENERALLY (1) Except as provided in subsection (2), ~~A~~an owner or operator intending to install or close an underground storage tank without the services of a licensed installer in accordance with section 75-11-213 and 75-11-217, MCA, must have the installation or closure inspected by a department inspector or a local inspector licensed by the department.

(2) The owner or operator of a farm or residential tank with a capacity of 1,100 gallons or less that is used for storing motor fuel for non commercial purposes or a tank with a capacity of 1,100 gallons or less used for storing heating oil for consumptive use on the premises where stored is not required to use the services of a licensed installer but must have the

installation or closure inspected by a department inspector or a local inspector licensed by the department unless the department determines otherwise.
AUTH: 75-11-204, MCA; IMP: 75-11-204, MCA

16.45.1232 INSPECTION REIMBURSEMENT
(1) Remains the same.
(2) Notwithstanding subsection (1), reimbursement for the inspection of tanks exempt under ARM 16.45.1220(5) from the payment of an inspection fee shall be paid from a maximum of 80% of the fee assessed under ARM 16.45.1001 or 16.45.1219 or both, at the rate provided in ARM 16.45.1004(3).
~~(2)~~(3) The statement for services and claims by an implementing agency shall be prepared and submitted to the department in accordance with ARM 16.45.1004.
~~(3)~~(4) Claims for reimbursement not in accordance with this rule shall be and are denied. Claims shall be paid only within the limitations of departmental budgets and legislative appropriations.
AUTH: 75-11-204, MCA; IMP: 75-11-204, 75-11-213, MCA

4. The department is proposing the amendments to the rules in order to reduce the actual out-of-pocket expense for an individual or business installing or closing a small underground farm or residential heating oil tank with a capacity of 1,100 gallons or less by changing the frequency of inspections and not requiring the department to assess an inspection fee.

5. Interested persons may submit their data, views, or arguments concerning the proposed amendments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to John Geach, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620, no later than April 12, 1991.

6. Claudia Massman, at the above address, has been designated to preside over and conduct the hearing.

DENNIS IVERSON, Director

Certified to the Secretary of State March 4, 1991.

BEFORE THE FIRE MARSHAL BUREAU
OF THE DEPARTMENT OF JUSTICE
OF THE STATE OF MONTANA

In the matter of the adoption of Rules pertaining to the the sale, packaging, and display of fireworks.	)))))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION OF RULES PERTAINING TO THE REGULATION OF FIREWORKS

TO: All Interested Persons:

1. On April 11, 1991, at 9:30 a.m. a public hearing will be held in the auditorium of the Social and Rehabilitation Services Building, at 111 Sanders, Helena, Montana, to further consider the adoption of proposed rules V, VI, and VII, pertaining to the regulation of fireworks. Proposed rules V, VI and VII were previously published in the Montana Administrative Register, Issue No. 22, pp. 2078-2079. However, interested parties may request copies of the rules from the State Fire Marshal, Room 371, Scott Hart Building, 303 North Roberts, Helena, Montana.

2. Proposed rule V concerns the regulation of the sale of retail fireworks. Proposed rule VI concerns the regulation of the packaging, storage and shipping of fireworks. Proposed rule VII concerns the regulation of the display of fireworks.

3. Interested parties 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 Ray E. Blehm, Jr., State Fire Marshal, Room 371, Scott Hart Building, 303 North Roberts, Helena, Montana, no later than April 19, 1991.

4. Elizabeth L. Griffing, Office of the Attorney General, 215 N. Sanders, Helena, Montana 59634 has been designated to preside over and conduct the hearing.

By: Ray E. Blehm
Ray E. Blehm, Jr.
State Fire Marshal

Certified to the Secretary of State March 1, 1991

BEFORE THE FINANCIAL DIVISION
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the proposed amendment of rules pertaining to credit unions	)	NOTICE OF AMENDMENT OF 8.80.401 CREDIT UNIONS - SUPERVISORY AND EXAMINATION FEES AND 8.80.402 CREDIT UNIONS - LIMITED INCOME PERSONS, DEFINITION

TO: All Interested Persons:

1. On October 11, 1990, the Financial Division published a notice of public hearing on the proposed amendment of the above-stated rules at page 1872, 1990 Montana Administrative Register, issue number 19. The hearing was held on October 31, 1990, in Helena, Montana.

2. The Department amended rule 8.80.402 exactly as proposed and amended 8.80.401 with the following changes:

"8.80.401 CREDIT UNIONS - SUPERVISORY AND EXAMINATION FEES (1) Supervisory fees (annual):

Total Assets	Fee
$500,000 or less	~~30 cents per $1,000 (10 min.)~~ 0.00026 x total assets
Over $500,000 ~~and~~ but not over $1,000,000	~~150 plus 26 cents per $1,000 in excess of $500,000~~ $130 plus 0.000221 x total assets in excess of $500,000
Over $1,000,000 ~~and~~ but not over $2,000,000	~~280 plus 21 cents per $1,000 in excess of $1,000,000~~ $240.50 plus 0.000182 x total assets in excess of $1,000,000
Over $2,000,000 ~~and~~ but not over $5,000,000	~~490 plus 15 cents per $1,000 in excess of $2,000,000~~ $422.50 plus 0.00013 x total assets in excess of $2,000,000
Over $5,000,000	~~940 plus 10 cents per $1,000 in excess of $5,000,000~~ $812.50 plus 0.000091 x total assets in excess of $5,000,000

The above fees will be assessed upon the December 31 total assets of each year and become due and payable on or before February 15 of the next succeeding year.

(2) Examination fees ~~will be billed upon completion of each examination and based on the following~~*:

(a) ~~Examiner time spent at credit union site and in office will be billed based on total examiner hours times~~

~~examiner-hour-compensation.~~ The fee for the regular, annual examination will be calculated according to the following schedule:

~~(b) --Office staff and supervisory review will be based on staff hours used times hourly compensation of staff involved in review and analysis.~~

~~(c) --Examiners in training will not be included in hourly billing until such time as supervisors are assured of the individual's capability.~~

Total Assets	Fee
~~$25,000 or less~~	~~$37.50 (minimum fee).~~
~~Over $25,000 and not over $500,000~~	~~$37.50 plus 9 cents per $100 in assets over $25,000~~
~~Over $500,000 and not over $5,000,000~~	~~$670 plus 3 cents per $100 in assets over $1,000,000~~
~~Over $5,000,000~~	~~1,870 plus 1.10 per $100 in assets over $5,000,000~~
$500,000 or less	0.00078 x total assets
Over $500,000 but not over $1,000,000	$390 plus 0.0003575 x total assets in excess of $500,000
Over $1,000,000 but not over $5,000,000	$568.75 plus 0.00026 x total assets in excess of $1,000,000
Over 5,000,000	$1,608.75 plus 0.0000975 x total assets in excess of $5,000,000

(b) A charge of ~~$10.50~~ $10.00 per hour per examiner engaged in the examination will be made in addition to the above charges. The number of hours charged for examiners in training will be adjusted to exclude time devoted to training.

~~(*)~~ (c) Newly chartered credit unions will receive ~~an~~ one examination at no cost during the first year ~~at no cost~~ of operation. A newly chartered credit union is defined as a credit union which began operation within the past twelve months.

(d) If a credit union is examined by the Department more than once during a calendar year, subsequent examination(s) will be based on examiner(s) time spent at the credit union site and in department offices preparing the examination report. The fee will equal actual working hours, net of any training time, multiplied by the hourly rate of compensation for the personnel involved."

Auth: Sec. 32-3-201, MCA; IMP, Sec. 32-3-201, MCA

3. The Department has thoroughly considered all comments received. Those comments and the Department's responses thereto are as follows:

COMMENT: The proposed increase in fees is too high. Seven letters and oral testimony addressed the adverse effect the proposed increase would have on the financial strength of credit unions.

RESPONSE: The Department recognizes the effects a sudden change in expenses can have. However, revenue for the current fiscal year is estimated at only 60% of expenses; budgeted expenses are $70,428 while revenue is projected to be $42,024. Fees would have to be increased over 67% to make up the deficiency. Expenses exceed revenue by 30% in the last fiscal year, and in fact, have exceeded revenue for the past four completed fiscal years. The proposed amendment was developed with the intent of increasing total fee revenue by approximately 50%. Further review of the program's finances, and events occurring subsequent to the proposed amendment indicate a 50% increase is not necessary at this time. Revisions to the proposed amendment will result in a potential revenue increase of approximately 30%.

COMMENT: The proposed increase should be phased in over time to allow credit unions to plan and budget for the increased expense and reduce the financial impact. Six letters and oral testimony proposed a phase in period.

RESPONSE: The current balance allocated to the credit union fund does not allow for such phase-in unless services were also reduced. Section 32-3-203, MCA, mandates that an annual examination be performed by either the Financial Division or by an independent accounting firm approved by the Division with the possibility of a state examination as a result of the findings of the examination performed by the accounting firm. Credit unions rated CAMEL 3 or less, those which appear to be deteriorating in condition, and those which appear to have a higher than normal risk structure are not eligible for examination by an accountant. Credit union expenses could be reduced to the extent that they (1) are eligible for the program and, (2) the accountant or accounting firm charges a lesser examination fee.

COMMENT: The proposed amendment is poorly written, unclear, confusing and appears to result in unreasonable charges. Two letters and oral testimony commented on this issue.

RESPONSE: The Department agrees that the proposed amendment contained typographical errors. These errors will be corrected and text will clearly set forth the method for assessing fees.

COMMENT: The proposed fees are much higher than federal credit unions pay; proposed fees may promote conversions from state to federal credit unions. One letter stated the adoption of the proposed fee increase may force the credit union to convert to a federal charter; one oral witness compared the proposed fees to current charges to federal credit unions.

RESPONSE: The costs of federal credit union examinations are subsidized 50% by transfers from the National Credit Union Share Insurance Fund. The state supervisory program must stand on its own, and has no other source of funding to defray costs involved.

COMMENT: The proposed fees will result in a proportionately higher fee for smaller credit unions than for larger credit unions. One letter stated the fee should be equitable.

RESPONSE: The Department believes the fee schedule is equitable. Smaller credit unions quite often have less skilled management and problems with accounting systems which result in inaccurate financial reports. The financial division staff spends proportionately more time with smaller credit unions than with larger credit unions.

COMMENT: Hourly charges for examiners are not accounted for on the examination fee billing; charges do not appear to be consistent with credit union size.

RESPONSE: The Department agrees that the number of examiner hours is not currently stated on the billing and agrees to detail examiner hours on bills. However, differences in the number of hours are attributable to the length of time between examinations, problems encountered during the examination, and the financial condition of the credit union. Adjustment is made to the hourly charge for examiner training time.

4. The Department agreed to extend the time for written data, views and arguments to be submitted to the Financial Division, 1520 East Sixth Avenue, Lee Metcalf Building, Room 50, Helena, Montana 59620-0542 until November 15, 1990.

5. No other comments or testimony were received.

FINANCIAL DIVISION

BY: _____
ANDY POOLE, DEPUTY DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, March 4, 1991.

BEFORE THE BOARD OF MILK CONTROL
OF THE STATE OF MONTANA

In the matter of amendment of Rule 8.86.301 as it relates to class I wholesale prices	)	NOTICE OF AMENDMENT OF RULE 8.86.301
	)	PRICING RULES
	)	DOCKET #4-90

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

1. On January 17, 1991, the Montana Board of Milk Control published notice of proposed amendments of rule 8.86.301(6)(h)(ii) and (iii) as it relates to class I wholesale prices. Notice was published at page 1 of the 1991 Montana Administrative Register, issue no. 1 as MAR NOTICE 8-86-40.

2. The board has amended the rule exactly as originally proposed.

3. No comments or testimony were received concerning the proposed amendments.

4. The authority for the board to amend the rule is contained in section 81-23-302, MCA, and implements section 81-23-302, MCA.

MONTANA BOARD OF MILK CONTROL
MILTON J. OLSEN, Chairman

BY: _____
Andy J. Poole, Deputy Director
Department of Commerce

Certified to the Secretary of State March 4, 1991.

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

In the matter of the amendment of Reinstatement, and Class 1 Professional Teaching Certificate, and Class 3 Administrative Certificate	) NOTICE OF ADOPTION OF ARM 10.57.208, REINSTATEMENT) AND ARM 10.57.401, CLASS) 1 PROFESSIONAL TEACHING) CERTIFICATE, AND ARM 10.57.403,) CLASS 3 ADMINISTRATIVE) CERTIFICATE

TO: All Interested Persons

1. On December 27, 1990, the Board of Public Education published notice of proposed amendments concerning ARM 10.57.208, Reinstatement and ARM 10.57.401, Class 1 Professional Teaching Certificate, and ARM 10.57.403, Class 3 Administrative Certificate on pages 2232-2234 of the 1990 Montana Administrative Register, issue number 24.

2. The Board has amended the rules as proposed.

3. At the public hearing which was held January 17, 1991, no persons testified and no written comments were received prior to January 24, 1991, the date on which the Board closed the hearing record.

Bill Thomas
BILL THOMAS, CHAIRPERSON
BOARD OF PUBLIC EDUCATION

BY: Wayne Buchanan

Certified to the Secretary of State March 1, 1991.

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

In the matter of the amendment) NOTICE OF ADOPTION OF ARM
of Test for Certification) 10.57.211, TEST FOR
) CERTIFICATION

TO: All Interested Persons

1. On December 27, 1990, the Board of Public Education published notice of a proposed amendment concerning ARM 10.57.211, Test for Certification on page 2231 of the 1990 Montana Administrative Register, issue number 24.

2. The Board has amended the rule as proposed.

3. At the public hearing which was held January 17, 1991, one person testified as a proponent and no written comments were received prior to January 24, 1991, the date on which the Board closed the hearing record.

Bill Thomas
BILL THOMAS, CHAIRPERSON
BOARD OF PUBLIC EDUCATION

BY: Wayne Buchanan

Certified to the Secretary of State March 1, 1991.

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

In the matter of the amendment of Endorsement Information and Foreign Languages	NOTICE OF ADOPTION OF ARM 10.57.301, ENDORSEMENT INFORMATION, AND ARM 10.58.511, FOREIGN LANGUAGES

TO: All Interested Persons

1. On December 27, 1990, the Board of Public Education published notice of proposed amendments concerning ARM 10.57.301, and ARM 10.58.511, Foreign Languages on pages 2229-2230 of the 1990 Montana Administrative Register, issue number 24.

2. The Board has amended the rules as proposed.

3. At the public hearing which was held January 17, 1991, no persons testified and two written comments as proponents were received prior to January 24, 1991, the date on which the Board closed the hearing record.

Bill Thomas
BILL THOMAS, CHAIRPERSON
BOARD OF PUBLIC EDUCATION

BY: Wayne Buchanan

Certified to the Secretary of State March 1, 1991.

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

In the matter of the amendment of Endorsement Information, Computer Endorsement Review Committee, and Endorsement of Computer Science Teachers	NOTICE OF AMENDMENT OF ARM 10.57.301, ENDORSEMENT INFORMATION AND ADOPTION OF ARM 10.57.302, COMPUTER ENDORSEMENT REVIEW COMMITTEE, AND ARM 10.58.528, ENDORSEMENT OF COMPUTER SCIENCE TEACHERS

TO: All Interested Persons

1. On December 27, 1990, the Board of Public Education published notice of proposed amendments concerning ARM 10.57.301, Endorsement Information and ARM 10.57.302, Computer Endorsement Review Committee, and ARM 10.58.528, Endorsement of Computer Science Teachers on pages 2235-2238 of the 1990 Montana Administrative Register, Issue number 24.

2. The Board has amended the rules as proposed.

3. At the public hearing which was held January 17, 1991, two persons testified as proponents and one written comment with concerns, but not disagreement with the proposal, was received prior to January 24, 1991, the date on which the Board closed the hearing record.

Bill Thomas
BILL THOMAS, CHAIRPERSON
BOARD OF PUBLIC EDUCATION

BY: Wayne Buchanan

Certified to the Secretary of State March 1, 1991.

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

In the matter of the amendment) NOTICE OF ADOPTION OF ARM
of Student Transportation) 10.61.207, STUDENT
) TRANSPORTATION

TO: All Interested Persons

1. On December 27, 1990, the Board of Public Education published notice of a proposed amendment concerning ARM 10.61.207, Student Transportation on pages 2227-2228 of the 1990 Montana Administrative Register, issue number 24.

2. The Board has amended the rule as proposed.

3. At the public hearing which was held January 17, 1991, one person testified as a proponent and no written comments were received prior to January 24, 1991, the date on which the Board closed the hearing record.

Bill Thomas
BILL THOMAS, CHAIRPERSON
BOARD OF PUBLIC EDUCATION

BY: Wayne Buchanan

Certified to the Secretary of State March 1, 1991.

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

In the matter of the amendment of rules 16.44.101-102, 16.44.107, 16.44.116, 16.44.120, 16.44.124 16.44.202, 16.44.302-304, 16.44.333, 16.44.351, 16.44.402, 16.44.404, 16.44.415, 16.44.418, 16.44.528, 16.44.609-610, 16.44.613, 16.44.702-703, 16.44.802, 16.44.804-805, 16.44.813, 16.44.817-819, 16.44.823)	NOTICE OF AMENDMENT OF RULES (Solid & Hazardous Waste)

To: All Interested Persons

1. On January 17, 1991, the Department published notice at page 23 of the Montana Administrative Register, issue No. 1, to amend rules which are intended to adopt changes in order to achieve parity with federal regulations. Passage of these amendments is necessary for authorization from the Environmental Protection Agency (EPA) to the State of Montana to independently operate a hazardous waste program.

2. After consideration of the comments received on the proposed rules, the department has adopted the rules as proposed, with the following changes (new material is underlined; material to be deleted is interlined):

16.44.101 PURPOSE OF RULES Same as proposed.

16.44.102 INCORPORATIONS BY REFERENCE (1)-(4) Remain the same.

(5) As of ~~July 14, 1986~~ March 15, 1991, all of the incorporations by reference of federal agency rules listed below within the specific state agency rules listed below shall refer to federal agency rules as they have been codified in the July 1, 1989 edition of Title 40 of the Code of Federal Regulations (CFR). References in the state rules to federal rules contained in Titles 49 and 33 are updated to the extent that they have been updated by the federal rules which also incorporate these rules by reference. For the proper edition of these rules in Titles 49 and 33, see the reference in Title 40 of the CFR (1989 edition), provided in parenthesis. A short description of the amendments to incorporated federal rules which have occurred since the last incorporation by reference is contained in the column to the right. This rule supersedes any specific references to editions of the CFR contained in other rules in this chapter.

The chart, which will be earmarked (a), which lists the rules that were incorporated by reference, remain the same as proposed.

16.44.107 VALIDITY OF FEDERAL HWM PERMITS Same as proposed.

16.44.116 MODIFICATION OR REVOCATION AND REISSUANCE Same as proposed.

16.44.120 CONTENTS OF PART B Same as proposed.

16.44.124 PERMITS FOR LAND TREATMENT DEMONSTRATIONS Same as proposed.

16.44.202 DEFINITIONS Same as proposed.

16.44.302 DEFINITION OF WASTE Same as proposed.

16.44.303 DEFINITION OF HAZARDOUS WASTE Same as proposed.

16.44.304 EXCLUSIONS Same as proposed.

16.44.333 DISCARDED COMMERCIAL CHEMICAL PRODUCTS, OFF-SPECIFICATION SPECIES, CONTAINER RESIDUES, AND SPILL RESIDUES THEREOF Same as proposed.

16.44.351 REPRESENTATIVE SAMPLING METHODS; EP TOXICITY TEST PROCEDURES; CHEMICAL ANALYSIS TEST METHODS; AND TESTING METHODS Same as proposed.

16.44.402 HAZARDOUS WASTE DETERMINATION; APPLICABILITY OF RULES TO GENERATOR CATEGORIES; SPECIAL REQUIREMENTS FOR CONDITIONALLY EXEMPT SMALL QUANTITY GENERATORS (1)-(4) Same as proposed.

(5) The following special requirements apply to a conditionally exempt small quantity generator:

(a)-(d) Same as proposed.

(e) The hazardous waste of a conditionally exempt generator ~~(except for wastes identified as hazardous solely on the basis of ignitability)~~ may not be used for dust suppression or road treatment. If these hazardous wastes (except for wastes identified as hazardous solely on the basis of ignitability) are mixed with used oil or with other materials, the resultant mixture is likewise prohibited from use in dust suppression or road treatment.

16.44.404 MAINTENANCE OF REGISTRATION AND REGISTRATION FEES Same as proposed.

16.44.415 REQUIREMENTS FOR ACCUMULATION OF WASTES AND ACCUMULATION IN SATELLITE LOCATIONS Same as proposed.

16.44.418 EXCEPTION REPORTING Same as proposed.

16.44.528 COMMERCIAL TRANSFER FACILITY ANNUAL REPORT Same as proposed.

16.44.609 STANDARDS FOR EXISTING FACILITIES WITH TEMPORARY PERMITS (INTERIM STATUS) Same as proposed.

16.44.610 CHANGES DURING TEMPORARY PERMITTING (INTERIM STATUS) Same as proposed.

16.44.613 ANNUAL REPORT Same as proposed.

16.44.702 STANDARDS AND REQUIREMENTS FOR PERMITTED FACILITIES Same as proposed.

16.44.703 ANNUAL REPORT Same as proposed.

16.44.802 APPLICABILITY OF FINANCIAL REQUIREMENTS Same as proposed.

16,44.804 COST ESTIMATE FOR FACILITY CLOSURE Same as proposed.

16.44.805 COST ESTIMATE FOR POST-CLOSURE CARE Same as proposed.

16.44.813 USE OF A FINANCIAL MECHANISM FOR MULTIPLE FACILITIES (1) An owner or operator may use a financial assurance mechanism specified in ARM 16.44.806 through 16.44.811 of this subchapter to meet the requirements of this subchapter for more than one facility. Evidence of financial assurance submitted to the department must include a list showing, for each facility, the EPA identification number, name, address, and the amount of funds for closure and/or post-closure care assured by the mechanism. The amount of funds available through the mechanism must be no less than the sum of funds that would be available if a separate mechanism had been established and maintained for each facility. In directing funds available through the mechanism for closure and/or post-closure of any of the facilities covered by the mechanism, the department may direct only the amount of funds designated for that facility, unless the owner or operator agrees to the use of additional funds available under the mechanism.

16.44.817 FINANCIAL TEST AND CORPORATE GUARANTEE FOR LIABILITY COVERAGE Same as proposed.

16.44.818 REQUIREMENTS FOR LIABILITY COVERAGE: SUDDEN OCCURRENCES Same as proposed.

16.44.819 REQUIREMENTS FOR LIABILITY COVERAGE: NON-SUDDEN ACCIDENTAL OCCURRENCES (1) An owner or operator of hazardous waste management facility which includes one or more a surface impoundments, landfills, ~~or~~ land treatment units, or disposal miscellaneous units, or a group of such hazardous waste management facilities, must demonstrate financial responsibility for bodily injury and property damage to third parties caused by non-sudden accidental occurrences arising from operations of its facility or group of facilities. The owner or operator must have and maintain liability coverage for non-sudden accidental occurrences in the amount of at least $3 million per occurrence with

an annual aggregate of at least $6 million, exclusive of legal defense costs. This liability coverage may be demonstrated in one of three ways, as specified in sections (2), (3), and (4) of this rule:

(2)-(5) Same as proposed.

16.44.823 WORDING OF THE INSTRUMENTS Same as proposed.

3. Comments on the proposed amendments were received and considered by the department. The following is a summary of the comments received from the public and the department's responses:

COMMENT -- 16.44.322: One commentator urged the state, through written comment, to reconsider and reject the listing of KO65 as a hazardous waste. The Federal District Court for the District of Washington, D.C. has remanded the listing of that waste under the federal rules. Because of the questions regarding the effectiveness of the federal regulation at this time, the commentator asked for the rejection of the listing of that specific waste.

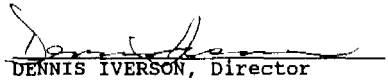
RESPONSE: The action by the District Court for the District of Washington, D.C. is not binding on any district of the United States except the Washington, D.C. district. The EPA has not altered its particular rule listing KO65 as hazardous but is in the process of articulating a rational connection between the data reviewed in its rule making mechanism and the decision to list the waste. The Department recognizes that EPA's listing of certain mineral processing wastes as hazardous wastes was held invalid and remanded to the agency for further consideration. Should legal action against EPA be successful in forcing a change of the federal rule in question, the department then would consider amending its regulations to reflect those changes. The proper forum for the arguments set out in these comments is either an EPA proceeding or judicial review of EPA's proceedings.

COMMENT -- 16.44.415(9): By written comment, one commentator outlined concern with the proposed 16.44.415 which requires maintenance of log books by generators. The comment indicated the belief that the amendment was both duplicative of current rules and burdensome to the regulated community.

RESPONSE: With respect to the comment that this section is duplicative of existing rules, the department acknowledges that a close relationship exists between this new rule section and current requirements in ARM 16.44.416, 16.44.405, and 16.44.417. ARM 16.44.416 requires generators to maintain manifest copies, annual report copies, and records of the testing data used to determine that a waste is a hazardous waste. ARM 16.44.405 requires that generators use the Uniform Hazardous Waste Manifest when shipping hazardous wastes to off-site locations. ARM 16.44.417 requires the filing of annual reports summarizing waste generation and waste disposition information. The log book requirements of ARM 16.44.415(9) mandate a brief information

summary for each of the hazardous wastes which are brought into and then removed from the generator's designated waste accumulation area(s).

The department disagrees that this new rule section is unnecessarily burdensome. The one key bit of information required in the log book which is not required or implied elsewhere in the rules is the association of the wastes generated with their actual dates of generation. Realistically, no generator can correctly determine his generator category under ARM 16.44.401 and his generator responsibilities under ARM 16.44.402 unless he in some form develops the information specified in ARM 16.44.415(9). The requirement that this information must be recorded in a log book or some similar form of documentation is a very minor workload burden in relationship to its important information value. Furthermore, the information required to be entered in a log book should directly translate to the manifesting and annual report requirements referenced above.



DENNIS IVERSON, Director

Certified to the Secretary of State March 4, 1991

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

In the matter of the amendment of rules 16.44.401, 16.44.402, and 16.44.415	NOTICE OF AMENDMENT OF RULES (Solid & Hazardous Waste)

To: All Interested Persons

1. On January 17, 1991, the Department published notice at page 19 of the Montana Administrative Register, Issue No. 1, to amend rules which would define the terms large generator, small generator and conditionally exempt small generator of hazardous waste.

2. After consideration of the comments received on the proposed rules, the Department has adopted the rules as proposed.

3. The Department has thoroughly considered the comments received on the proposed rules. The following is a summary of the comments received from the public and the department's response:

COMMENT: One commentator submitted written comment in opposition to the proposed amendment of 16.44.415 which limits the time of accumulation of hazardous waste to a ninety (90) day period. The commentator urged the Department to disapprove the amendment and "retain the current disposal time frames."

RESPONSE: In amending ARM rules 16.44.401, 16.44.402 and 16.44.415 to address EPA concerns regarding equivalency, the department developed this rule section to deal with the regulatory variables associated with episodic generators -- those whose generator category may change from month to month because of varying waste generation rates. This section is deemed necessary by the department to assist it in determining individual generator compliance with applicable waste accumulation requirements.

DENNIS IVERSON, Director

Certified to the Secretary of State March 4, 1991.

BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

In the matter of the adoption of 24.9.265 (RULE I) Document format, filing, service and time; and the amendment of rules 24.9.314 Document format, filing and service and 24.9.315 Time	))))))	NOTICE OF THE ADOPTION OF 24.9.265 (RULE I) DOCUMENT FORMAT, FILING, SERVICE AND TIME AND THE AMENDMENT OF RULES 24.9.314 DOCUMENT FORMAT, FILING, AND SERVICE AND 24.9.315 TIME

TO: All Interested Persons

1. On December 13, 1990, at page 2145 of the 1990 Montana Administrative Register, Issue No. 23, the Human Rights Commission published notice of the proposed adoption of 24.9.265 (Rule I) and the proposed amendment of Rules 24.9.314 and 24.9.315, A.R.M. 24.9.265 (Rule I) relates to the format, filing and service of documents filed with the Commission during investigation and conciliation. Rule 24.9.314 relates to the format, filing and service of documents filed with the commission during contested case proceedings. ARM 24.9.315 relates to calculating the time limits for acts, such as filing documents, required under the contested case rules.

2. The authority of the commission to make these amendments is based upon Sections 49-2-204 and 49-3-106, MCA.

3. The rules as adopted and amended implement Sections 49-2-504, 49-2-505, 49-2-509, 49-3-307, 49-3-308 and 49-3-312, MCA.

4. The Commission did not receive any public comments regarding the proposed rulemaking.

5. The Commission has adopted the rules listed above as proposed with the following changes:

24.9.265 (RULE I) DOCUMENT FORMAT, FILING, SERVICE AND TIME Adopted as proposed.

24.9.314 DOCUMENT FORMAT, FILING AND SERVICE Adopted as proposed.

24.9.315 TIME (1) In computing any period of time for acts required by any of the commission's ~~these~~ rules, the day of the act, event or default after which the designated period of time begins to run is not included. The last day of the period so computed is included unless it is a Saturday, Sunday, legal holiday, or the commission offices are closed on such day. In that event, the period runs until the end of the next day when the commission offices are open ~~OR MAIL DELIVERY IS AVAILABLE~~ WHICH IS NOT ONE OF THE AFOREMENTIONED DAYS. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and holidays are excluded in computation. A half holiday will be considered as other days and not as a holiday.

(2) - (3) Adopted as proposed.

6. The commission adopted 24.9.265 (Rule I) to make it clear that the rules for document format, filing and service in contested cases apply also to other proceedings in which a party makes a motion before the commission or requests commission review of an action of the commission staff. The commission amended ARM 24.9.314 to make it clear that a party filing a document with the commission must serve a copy of the document on opposing parties in accordance with the Montana Rules of Civil Procedure. The commission amended ARM 24.9.315 to make it clear that the rule for computing time for acts required by the commission's rules applies to acts required by all commission rules and not just the rules concerning contested cases. The commission also amended ARM 24.9.315 to make it clear that service by mail is complete upon mailing and to provide that the hearing examiner or the commission may enlarge the time for a party to perform an act prior to the expiration of the time in which the act is to be performed with or without a motion or notice but only for cause shown.

MONTANA HUMAN RIGHTS COMMISSION
JOHN B. KUHR, CHAIRPERSON

By: Anne L. MacIntyre
ANNE L. MacINTYRE
ADMINISTRATOR
HUMAN RIGHTS COMMISSION STAFF

Certified to the Secretary of State March 4, 1991.

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

In the matter of the amendment of Rules 46.12.503 and 46.12.505 pertaining to inpatient hospital services and medical assistance facilities	)))))	NOTICE OF THE AMENDMENT OF RULES 46.12.503 AND 46.12.505 PERTAINING TO INPATIENT HOSPITAL SERVICES AND MEDICAL ASSISTANCE FACILITIES

TO: All Interested Persons

1. On January 31, 1991, the Department of Social and Rehabilitation Services published notice of the proposed amendment of Rules 46.12.503 and 46.12.505 pertaining to inpatient hospital services and medical assistance facilities at page 117 of the 1991 Montana Administrative Register, issue number 2.

2. The Department has amended Rules 46.12.503 and 46.12.505 as proposed.

3. No written comments or testimony were received.

Director, Social and Rehabilitation Services

Certified to the Secretary of State February 28, 1991.

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 46.14.401 pertaining to eligibility of group homes for weatherization assistance	)))))	NOTICE OF THE ADOPTION OF RULE I AND THE AMENDMENT OF RULE 46.14.401 PERTAINING TO ELIGIBILITY OF GROUP HOMES FOR WEATHERIZATION ASSISTANCE

TO: All Interested Persons

1. On January 17, 1991, the Department of Social and Rehabilitation Services published notice of the proposed amendment of Rule 46.14.401 pertaining to eligibility of group homes for weatherization assistance at page 47 of the 1991 Montana Administrative Register, issue number 1.

2. A new rule is adopted to clarify that community residential facilities will be processed differently from individual applicants for purposes of application and eligibility.

[RULE I] 46.14.208 APPLICATION/ELIGIBILITY (1) ELDERLY OR HANDICAPPED PERSONS RESIDING IN A COMMUNITY RESIDENTIAL FACILITY AS DEFINED AT 76-2-411, MCA NEED NOT APPLY FOR WEATHERIZATION ASSISTANCE AS PROVIDED FOR IN THIS SUB-CHAPTER. THE DEPARTMENT WILL DETERMINE THEIR ELIGIBILITY BASED ON THEIR LIVING ARRANGEMENT AND THE INDIVIDUAL RECORDS AVAILABLE TO THE DEPARTMENT. THE DEPARTMENT WILL PROVIDE A LIST OF THE ELIGIBLE FACILITIES TO THE DESIGNATED LOCAL CONTRACTORS.

AUTH: Sec. 53-2-201 MCA
IMP: Sec. 90-4-201 and 90-4-202 MCA

3. The Department has amended the following rule as proposed with the following changes:

46.14.401 PRIORITIZATION FOR SERVICE Subsections (1) through (2) remain as proposed.

(3) ~~The department may determine licensed group homes occupied by~~ COMMUNITY RESIDENTIAL FACILITIES AS DEFINED AT 76-2-411, MCA WHICH ARE THE RESIDENCE FOR low-income elderly or handicapped individuals ARE ~~to be~~ eligible for weatherization ~~and designate these homes a high priority. To be so designated, it shall be the responsibility of the department to document eligibility and provide names and addresses of households to local contractors.~~

Subsections (4) through (7) remain as proposed.

AUTH: Sec. 53-2-201 MCA
IMP: Sec. 90-4-201 and 90-4-202 MCA

4. No written comments or testimony were received.

5. This new rule on second notice is necessary to provide consideration of group homes as a whole in the application and eligibility process. Because group homes are communal settings and the financial information on the residents is already available, it is not appropriate or necessary that each resident apply individually for weatherization. This new rule provides that application and eligibility for weatherization for group homes will be done on a facility basis rather than an individual basis.

Russell E. Cobia acting
Director, Social and Rehabilitation Services

Certified to the Secretary of State March 4, 1991.

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

In the matter of the adoption of Rule I pertaining to state medical reimbursement	))))	NOTICE OF THE ADOPTION OF RULE I PERTAINING TO STATE MEDICAL REIMBURSEMENT

TO: All Interested Persons

1. On December 27, 1990, the Department of Social and Rehabilitation Services published notice of the proposed adoption of Rule I pertaining to state medical reimbursement at page 2242 of the 1990 Montana Administrative Register, issue number 24.

2. The Department has adopted [Rule I] 46.25.756, REIMBURSEMENT FOR GENERAL RELIEF MEDICAL ASSISTANCE SERVICES as proposed.

3. The Department has thoroughly considered all commentary received:

COMMENT: SRS should clarify when and how this rule will be made effective. Consideration should be given to retroactive application to previous years settlements.

RESPONSE: The effective date of this rule will be March 15, 1991. Settlements for cost reporting periods beginning after this date will be subject to this rule. In order to implement this rule in a consistent manner SRS will not apply the rule retroactively. Retroactive application would adversely impact some providers. Retroactive application of this rule to only those providers requesting an adjustment would be arbitrary.

COMMENT: Claims for state medical are not distinguishable from medicaid on the statements of remittance. Annual claims summaries are generated only for medicaid payments. SRS should identify persons covered by state medical on the statement of remittance, explain how information for settlement will be generated and explain whether hospitals will be required to submit additional cost report information.

RESPONSE: Currently SRS does not distinguish state medical from medicaid on the statement of remittance. For cost reports beginning after this rule, SRS will make state medical detail available and summarize information in a manner consistent with medicaid. The requirements for state medical will be the same as for medicaid.

Because of the similarities of the state medical and medicaid programs, many state medical recipients will become retroactively eligible for medicaid after the statement of remittance is generated. Providers can identify clients at the time of service by examining their identification card. Supplying information on the statement of remittance would not increase the accuracy of the information significantly. In order to supply correct information to providers in a cost effective manner, SRS will provide a breakdown at the time of settlement.

COMMENT: Will settlement procedures apply to state medical payments to hospitals located outside of state assumed counties and outside of Montana?

RESPONSE: Any hospital or unit subject to medicaid settlement now will be subject to state medical settlement if state medical clients are served. Facilities outside Montana currently are not subject to medicaid settlement and will not be subject to settlement for state medical under this rule.

Russell E. Cater
Director, Social and Rehabilitation Services

Certified to the Secretary of State February 28, 1991.

VOLUME NO. 44 OPINION NO. 6

ELECTIONS - Amending official canvass of election returns after certification of results;
ELECTIONS - Procedure for conducting recount;
PUBLIC OFFICERS - Powers of boards of canvassers;
MONTANA CODE ANNOTATED - Title 13, chapter 15; sections 13-16-201, 13-16-418, 13-16-419.

HELD: The State Board of Canvassers has no authority to amend the official state canvass except when amended election results are certified by a county recount board after compliance with the procedures set forth in Title 13, chapter 16, MCA.

February 22, 1991

Hon. Mike Cooney
Secretary of State
State Capitol
Helena MT 59620

Dear Mr. Cooney:

You have requested an Attorney General's Opinion on the following question:

> Can the State Board of Canvassers accept an amended certified county canvass after the Board has certified the official state canvass?

Your request arises out of certain events that occurred following the general election held on November 6, 1990. After receiving election returns from the counties, and in accordance with sections 13-15-501 and 13-15-502, MCA, the State Board of Canvassers convened to determine the vote for those offices and ballot issues subject to its review. On November 26, 1990, acting in your capacity as secretary of the State Board of Canvassers, you certified the report of the official canvass, which was approved by the members of the board.

Thereafter, the office of the Secretary of State received amended election returns for Lewis and Clark County following a recount. In her letter of transmittal, the Lewis and Clark County Clerk and Recorder indicated that the county board of canvassers had been unable to reconcile the number of ballots that should have been counted with the number of ballots actually tabulated on election night. After consultation with the county attorney and with the county board of canvassers, the clerk and recorder further investigated the problem and determined that the tabulator had in fact failed to count one

ballot in each of six precincts. A recount was then held on November 28, 1990.

Subsequently, another "correction" was brought to the Secretary of State's attention by Missoula County, upon the Missoula County Clerk and Recorder's discovery of a typographical error in one vote total. The error in Missoula County was not discovered or transmitted to the Secretary of State until mid-December 1990.

The issue presented by your request is whether the State Board of Canvassers may amend the report of the official canvass to include the corrected figures supplied by the counties after the canvass had been certified.

The canvass of votes and certification of results for all elections are governed by Title 13, chapter 15, MCA. Pursuant to section 13-15-401, MCA, the governing body of the county must convene ex officio as a board of county canvassers within three days after each election to canvass the election returns. The board then proceeds by "opening the returns, auditing the tally books or other records of votes cast, determining the vote for each individual and for and against each ballot issue from each precinct, compiling totals, and declaring or certifying the results." § 13-15-403(1), MCA. The board is authorized to petition for a recount of the votes "immediately" if, during the canvass, it finds an error in a precinct or precincts affecting the accuracy of vote totals. § 13-15-403(4), MCA.

Upon completion of the canvass, the county board must declare the election of those individuals having the highest number of votes cast for each county and precinct office, proclaim the adoption or rejection of a county ballot issue, and certify the results of the canvass of political subdivision offices and ballot issues to the governing body of each political subdivision participating in the election. § 13-15-405, MCA. The canvass for state and congressional offices is transmitted to the state board of canvassers, which must convene within 20 days after the election or sooner if all returns are received. § 13-15-502, MCA. Upon completion of its canvass, the state board declares elected the individual having the highest number of votes cast for each office, proclaims the adoption or rejection of ballot issues, and files a report of the canvass. §§ 13-15-506, 13-15-507, MCA.

The county governing body, or three members thereof if the body is larger, also meets as the county recount board when a recount is required. § 13-16-101, MCA. Section 13-16-201, MCA, prescribes those conditions under which a recount must be made, generally limited to circumstances in which the margin of votes for a particular office or ballot issue does not exceed one-quarter of one percent of the total votes cast. The only other circumstance prescribed for a required recount is if the board of county canvassers finds an error during its canvass of

election returns and "immediately ... file[s] a petition with the election administrator." § 13-16-201(7), MCA. All petitions for recount other than those filed "immediately" by the board of county canvassers under section 13-16-201(7), MCA, must be filed within five days after the official canvass. § 13-16-201, MCA.

The election administrator must notify the members of the county recount board "[i]mmediately upon receiving a petition for a recount or a notice from the secretary of state that a petition has been filed with him," and the board must convene no later than five days after receiving such notice. § 13-16-204, MCA. "Immediately after the recount," the results must be certified by the county recount board and, if congressional, legislative, or other multi-county office or issue is involved, a copy of the certificate must be transmitted "immediately" to the secretary of state. § 13-16-418, MCA. The secretary of state then must reconvene the board of state canvassers, which must recanvass the official returns and make a new and corrected abstract of the votes cast. § 13-16-419, MCA.

Being creatures of statute, the county and state boards of canvassers have only those powers and duties authorized by the statutes creating them. State ex rel. Wilson v. County Court of Barbour County, 145 W. Va. 435, 114 S.E.2d 904, 909 (1960); 29 C.J.S. Elections § 237(1), at 654 (1965). A board of canvassers, though vested with some discretionary powers, is a ministerial body. State ex rel. Ainsworth v. District Court of Fourth Judicial District in and for Sanders County, 107 Mont. 370, 86 P. 5, 8 (1938). Its members are "merely ministerial officers, and it is their duty to canvass the returns as they find them, and to declare the result of such canvass." State ex rel. Riley v. District Court of Ninth Judicial District in and for Glacier County, 103 Mont. 515, 63 P.2d 147, 149 (1936).

"'When a board of canvassers has fully performed its duty, proclaimed the result of the count according to law, and adjourned sine die, it is functus officio; the persons who compose it have no power voluntarily to reassemble and recanvass the returns.'" Henderson v. Young, 179 Ga. 540, 176 S.E. 388, 391 (1934) (citations omitted). Accord People ex rel. Holdom v. Sweitzer, 280 Ill. 436, 117 N.E. 625, 633 (1917); State ex rel. Wilson, 114 S.E.2d at 911; State ex rel. Robinson v. Hutcheson, 180 Tenn. 46, 171 S.W.2d 282 (1943); Hall v. Stuart, 198 Va. 315, 94 S.E.2d 284, 289 (1956); 29 C.J.S. Elections § 239, at 668-69 (1965). Once having examined all the returns filed, reached a conclusion thereon, and made a report, the canvassing board has fulfilled its duties, whether or not its conclusion is accurate, and it cannot voluntarily recanvass the same returns and announce a different conclusion. Hutcheson, 171 S.W.2d at 285.

This rule of law is based on a solid foundation. As stated in Henderson:

> "[The members of the Canvassing] Board can act but once. And having once met and fully completed their duty, their powers are exhausted, and they cannot again meet and recanvass the votes or reverse their prior decision and announce a different result." And this rule seems to be the logical result of our elective system. If canvassing boards can meet and change the results which they have once declared, they can also meet and change the results any number of times. Serious and injurious results might follow if such powers were held to exist in canvassing boards.

Id., 176 S.E. at 391-92 (citation omitted). This concern also was expressed by the court in Hutcheson, noting that a contrary holding would "open wide the door and provide the opportunity for the perpetration of every conceivable fraud." 171 S.W.2d at 284. Thus, it has been held that after a board of county canvassers has forwarded an abstract of votes for certain offices to the secretary of state to be canvassed by the state canvassing board, a change made thereafter by the county board in such abstract is a nullity. Sweitzer, 117 N.E. at 633. See also Henderson, 176 S.E. at 391; 29 C.J.S. Elections § 239, at 669 (1965).

Where state law provides no procedure for a recount, a board of canvassers may not, voluntarily or by writ of mandamus, conduct a recount of the ballots cast. Hutcheson, 171 S.W.2d at 284; 29 C.J.S. Elections § 289, at 760-62 (1965). Where the right to a recount is established by statute, it may be exercised only upon compliance with the conditions prescribed. Coe v. State Election Board, 203 Okla. 356, 221 P.2d 774, 776 (1950); Cowling v. City of Foreman, 238 Ark. 677, 384 S.W.2d 251, 254 (1964). "It is well settled that recounts are wholly a matter of statute, and that they are of no validity unless the foundation required by statute is laid." Berardi v. Registrars of Voters of Milford, 318 Mass. 748, 64 N.E.2d 100, 102 (1945).

Courts have held that the right of a candidate to demand a recount must be exercised between the completion of the canvass and the declaration of the official result. Beacom v. Board of Canvassers of Cabell County, 122 W. Va. 463, 10 S.E.2d 793, 795 (1940); State ex rel. Wilson v. County Court of Barbour County, supra, 114 S.E.2d at 911. Montana law, as noted, prescribes in most instances a specific time within which to petition for recount. That five-day period commences to run from the conclusion of the canvass. § 13-16-201, MCA. See also State ex rel. Riley v. District Court of Second Judicial District in and for Silver Bow County, 103 Mont. 576, 64 P.2d 115, 120 (1937) (time begins to run from conclusion of the canvass by the county board of canvassers).

Where the recount is sought by the county board of canvassers itself, however, petition to the election administrator must be

made "immediately." §§ 13-15-403(4), 13-16-201(7), MCA. Though the statutes do not place a specific limit on when the recount must be completed, the recount board is required to meet within five days after the petition is filed and, where the statutes refer to a recount, the word "immediately" is used often. §§ 13-15-403(1), 13-16-201(7), 13-16-204(1), 13-16-418(4), (5), MCA.

In the instant case, with respect to Lewis and Clark County, while it appears that the recount was done at the instance of the county board of canvassers, there is no indication that the board discovered an error during the canvass and immediately petitioned the election administrator for a recount, or in fact that it ever submitted such a petition, as is required by section 13-16-201(7), MCA. Further, there is no evidence that the recount board convened within five days after the petition was received by the election administrator, as required by section 13-16-204, MCA. Absent a court order as provided in section 13-16-301, MCA, or a petition from one of the persons listed in section 13-16-201(1) to (5) or 13-16-211, MCA, the only circumstance under which a recount may be conducted is upon petition of the board of county canvassers immediately upon discovery of the error during the canvass. §§ 13-15-403(4), 13-16-201(7), MCA. None of these procedures appears to have been followed in Lewis and Clark County.

With respect to Missoula County, there was no recount at all, but simply the belated correction of a keystroke error by the clerk and recorder after the canvass had been certified.

The state board of canvassers is authorized by law to reconvene and recanvass the official returns under only one circumstance -- that prescribed in section 13-16-419, MCA, when certificates have been filed by county recount boards. Absent compliance with the statutes governing recounts, a recount is of no validity, and the board is without authority to certify a new abstract of the votes cast. Likewise, there is no statutory provision for the correction of a canvass due to mathematical or typographical errors after the canvass has been certified, and there is thus no authority by which the board may accept the revisions submitted by Missoula County.

THEREFORE, IT IS MY OPINION:

The State Board of Canvassers has no authority to amend the official state canvass except when amended election results are certified by a county recount board after compliance with the procedures set forth in Title 13, chapter 16, MCA.

Sincerely,

Marc Racicot

MARC RACICOT
Attorney General

VOLUME NO. 44 OPINION NO. 7

HEALTH - Mandatory immunization of students and religious exemption;
RELIGION - Mandatory immunization of students and religious exemption;
SCHOOL DISTRICTS - Mandatory immunization of students and religious exemption;
MONTANA CODE ANNOTATED - Sections 20-5-405(1), 49-2-307;
MONTANA CONSTITUTION - Article II, section 5; Article X, section 7;
MONTANA LAWS OF 1989 - Chapter 644, section 4;
OPINIONS OF THE ATTORNEY GENERAL - 39 Op. Att'y Gen. No. 68 (1982);
UNITED STATES CONSTITUTION - Amendments I, XIV.

HELD: 1. The religious exemption to mandatory immunization of students in section 20-5-405(1), MCA, encompasses sincerely held personal religious beliefs and not only religious beliefs or tenets of an "established or recognized" religion.

2. Absent the use of established, uniform standards or procedures, a school district should refrain from challenging an affidavit claiming a religious exemption from mandatory immunization.

February 27, 1991

Wm. Nels Swandal
Park County Attorney
414 East Callender
Livingston MT 59047

Dear Mr. Swandal:

You have requested an opinion on two questions involving the mandatory immunization of students under section 20-5-405, MCA, and the sufficiency of an affidavit claiming a religious exemption from immunization filed pursuant to these sections. In particular, you have asked the following questions:

1. May a school district require that an affidavit filed pursuant to section 20-5-405, MCA, claiming a religious exemption from mandatory immunization of students, be based on the tenets and practices of an established religion and not on personal religious practices of the signer?

2. What authority or duty does a school district have to challenge an affidavit presented pursuant to section 20-5-405, MCA, stating that

immunization is contrary to the religious tenets and practices of the signer?

Section 20-5-405, MCA, provides in pertinent part:

> (1) When a parent, guardian or adult who has the responsibility for the care and custody of a minor seeking to attend school or the person seeking to attend school, if an adult, signs and files with the governing authority, prior to the commencement of attendance each school year, a notarized affidavit on a form prescribed by the department stating that immunization is contrary to the religious tenets and practices of the signer, immunization of the person seeking to attend the school may not be required prior to attendance at the school. The statement must be maintained as part of the person's immunization records. A person who falsely claims a religious exemption is subject to the penalty for false swearing provided in 45-7-202.

Your concerns arose from a situation in which a husband and wife claimed a religious exemption for their six-year-old daughter. The couple stated that they practiced a particular faith although they apparently do not subscribe to every tenet of that faith. Their personal religious belief, which is not held by others of the same faith, is that their child should not be immunized before she attends school. You suggest that the notarized affidavit must be based on religious tenets and beliefs of an organized religion. To support that suggestion you balance the state's interest in protecting school children with the First Amendment rights of individuals. See U.S. Const. Amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof") and Mont Const. Art. II, § 5 ("The state shall make no law respecting an establishment of religion or prohibiting the free exercise thereof"). In performing this balancing test, you conclude that the state's interest must be paramount and that immunizations are required in all cases except when the religious exemption is based upon a tenet of an established religion. You also believe that a school district has not only the right but the duty to challenge all religious exemptions to guarantee compliance with the statute.

In 1989, the Montana Legislature amended section 20-5-405(1), MCA, substituting "religious tenets and practices of the signer" for "personal and religious tenets and practices of the signer." 1989 Mont. Laws, ch. 644, § 4 (House Bill 364). While the legislative history reveals that the bill's sponsor believed that the religious exemption would apply only to those holding beliefs of an organized religion, there is no mention in the plain language of the statute that the religious practices which serve as a basis for the exemption must be derived from an organized or established religion. See Hearing on House Bill

364, Minutes of Senate Education Committee, March 10, 1989, at 4 (Representative Nelson, the bill's sponsor, stated that the exemption would apply only to "well recognized religion[s] which includes spiritual healing").

When construing a statute, the words should be given their plain and ordinary meaning. Rierson v. State, 188 Mont. 522, 614 P.2d 1020, 1023, on reh'g, 622 P.2d 195 (1980). If language of a statute is clear and unambiguous, the statute speaks for itself and there is nothing left to construe. Yearout v. Rainbow Painting, 222 Mont. 65, 719 P.2d 1258 (1986); 39 Op. Att'y Gen. No. 68 (1982). The plain language of section 20-5-405(1), MCA, indicates that the affidavit need only be based on the "religious tenets and practices of the signer." There is no requirement that such tenets and practices must be based on a recognized or established religion. Compare section 39-31-204, MCA, and the right of nonassociation with a labor organization based upon religious grounds.

It is also a fundamental mandate of statutory construction not to insert what has been omitted or omit what has been inserted. § 1-2-101, MCA. To read the phrase "religious tenets and practices of the signer" as only including religious beliefs from a recognized or established religion would require inserting a qualification that is simply not contained in the plain language of the statute.

I am compelled to construe a state statute such that it will withstand constitutional scrutiny. If the exemption in section 20-5-405(1), MCA, were construed to apply only to religious beliefs from a recognized or established religion, under case law from other states such a construction might place the statute in conflict with the Fourteenth Amendment or the Free Establishment Clause in the First Amendment. LaFountaine v. State Farm Mutual Automobile Insurance Co., 215 Mont. 402, 698 P.2d 410 (1985). Three significant cases from Mississippi, Massachusetts, and Maryland have found a statutory religious exemption to mandatory immunization which requires belief in a "recognized" religion to be unconstitutional. Brown v. Stone, 378 So. 2d 218 (Miss. 1980) (religious exemption requiring certificate from officer of a church of a "recognized denomination" violates equal protection clause); Dalli v. Board of Education, 267 N.E.2d 219 (Mass. 1971) (religious exemption limited to the "tenets and practice of a recognized church or religious denomination" unconstitutional because it grants preferred treatment of one group and discriminate[s] against another); Davis v. State, 451 A.2d 107 (Md. 1982) (statutory religious exemption for members of "recognized church or religious denomination" violates Establishment Clause of First Amendment because the exemption shows preference of one religion over another). See also Bonjour v. Bonjour, 592 P.2d 1233 (Alaska 1979) (in custody suit, district court could not give preference to father because he was member of an "organized" religion); Kemp v. Workers' Compensation Department, 65 Or. App.

659, 672 P.2d 1343 (1983), adhered to as modified, 677 P.2d 725 (1984) (statute granting right to refuse medical treatment by members who held beliefs based on "well-recognized" church violates establishment clause).

More important, perhaps, is the consideration of the numerous court decisions involving questions other than immunization, which recognize that the term "religious beliefs" does not necessarily include only those beliefs held by a "recognized religion." An overwhelming body of case law clearly holds that the First Amendment right to the free exercise of religion protects all sincerely held religious beliefs, not just those held because of membership in an established or recognized religion. Most recently, the United States Supreme Court clearly stated: "[B]ut we reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization." Frazee v. Illinois Department of Employment Security, ___ U.S. ___, 109 S. Ct. 1514, 1517 (1989). The Court in Frazee was deciding whether Frazee qualified for unemployment insurance benefits because he had refused suitable work for good cause. Frazee claimed that his personal religious beliefs as a Christian forbade him from working on Sunday and therefore he had good cause for refusing otherwise suitable work that required working on Sunday. The Court in Frazee reasoned:

> Frazee asserted that he was a Christian, but did not claim to be a member of a particular Christian sect. It is also true that there are assorted Christian denominations that do not profess to be compelled by their religion to refuse Sunday work, but this does not diminish Frazee's protection flowing from the Free Exercise Clause. Thomas [Thomas v. Review Bd. of Indiana Employment Security Div. 450 U.S. 398, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981)] settled that much. Undoubtedly, membership in an organized religious denomination, especially one with a specific tenet forbidding members to work on Sunday, would simplify the problem of identifying sincerely held religious beliefs, but we reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization. Here, Frazee's refusal was based on a sincerely held religious belief. Under our cases, he was entitled to invoke First Amendment protection.

109 S. Ct. at 1517-18. See also United States v. Seeger, 38 U.S. 163, 178, 85 S. Ct. 850, 860, 13 L. Ed. 2d 733 (1965) (term "religious training and belief" not limited to those believing in a traditional God); International Society for Krishna Consciousness v. Barber, 650 F.2d 430, 440 (2d Cir. 1981) (individual's most sincere beliefs do not necessarily fall within traditional religious categories"); Mason v. General Brown Central School District, 851 F.2d 47, 51 (2d Cir. 1988)

("There is no doubt that 'religious belief' encompasses more than the traditional Judeo-Christian, Moslem or Buddhist forms of worship"); Toward a Constitutional Definition of Religion, 91 Harv. L. Rev. 1056-78 (1978). It is therefore clear that First Amendment protection of the free exercise of religion is not limited to traditional religious beliefs.

Applying the principles pronounced in these court decisions, I conclude that the religious exemption in section 20-5-405, MCA, is not limited to tenets and practices held by an established or recognized religion.

Your next question is, in fact, more difficult to answer. You ask what authority or duty a school board has to challenge the affidavit submitted for a religious exemption. The following statement from the United States Supreme Court is relevant because it acknowledges that a state does have authority to assure itself that a religious belief is sincerely held when a state statute is challenged as an unconstitutional violation of the free exercise of religion. In Frazee, the Supreme Court stated:

> Nor do we underestimate the difficulty of distinguishing between religious and secular convictions and in determining whether a professed belief is sincerely held. States are clearly entitled to assure themselves that there is an ample predicate for invoking the Free Exercise Clause.

109 S. Ct. at 1517. In Wisconsin v. Yoder, 406 U.S. 105, 115, 92 S. Ct. 1526, 1533-34, 32 L. Ed. 2d 15 (1972), the Supreme Court recognized that certain tests or considerations may be used in distinguishing a sincerely held religious belief from a secular or philosophical belief. The Supreme Court cautioned, however, that such a determination involves "the most delicate matter" and deserves the most careful consideration. Yoder, 406 U.S. at 115, 92 S. Ct. at 1533.

In Yoder, the Supreme Court, in balancing the state's interest in compulsory education with the free exercise of the tenets of the Amish religion, distinguished a secular belief from a sincerely held personal religious belief and stated:

> A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a "religious" belief or practice entitled to constitutional protection may present a most delicate question, [footnote omitted] the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which

> society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.

Yoder, 406 U.S. 215-16, 92 S. Ct. at 1533. See also Callahan v. Woods, 658 F.2d 679, 683 (9th Cir. 1981) (plaintiff's claim "must be rooted in religious belief, not in 'purely secular' philosophical concerns"); Fiedler v. Marumsco Christian School, 631 F.2d 1144, 1151 (4th Cir. 1980) (if belief asserted is "philosophical and personal rather than religious," or is "merely a matter of personal preference," it is not entitled to protection); Mason v. General Brown Central School District, 851 F.2d 47, 51 (2d Cir. 1988) (plaintiffs' objection to mandatory vaccination was simply embodiment of secular chiropractic ethics, and not sincerely held personal religious belief); International Society for Krishna Consciousness v. Barber, 650 F.2d 430, 433 ("threshold inquiry into 'religious' aspect of particular beliefs and practices cannot be avoided").

While recognizing the state's authority to distinguish a religious belief from a secular one, the courts have not given much guidance concerning what procedure a state may use to determine sincerity of belief. Early case law on mandatory vaccination statutes suggested that the state's authority is extensive because of the compelling state interest of protecting the health and welfare of school children. Jacobsen v. Massachusetts, 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643 (1905), Zucht v. King, 260 U.S. 174, 43 S. Ct. 24, 67 L. Ed. 194 (1922). In Zucht, the Court suggested that the extreme importance of protecting the health and welfare of children in a community vests the local authority with broad discretion in enforcing mandatory vaccination laws. But how broad is the discretion of local authorities in the face of an assertion of First Amendment rights?

In Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944), the Court balanced the state's interest in the protection of its children with the parents' free exercise of religion. The Court in Prince stated:

> But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. [Citations omitted.] And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school

> attendance, regulating or prohibiting the child's labor, and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death. [Footnotes omitted, emphasis added.]

321 U.S. at 166, 64 S. Ct. at 442. Prince therefore suggests that the state's interest in protecting the health and welfare of children may outweigh the freedom to exercise a religious belief that would endanger the child's health and welfare, but Prince does not address the extent of discretion in the local authorities when there is a constitutional challenge based on the Free Exercise Clause.

In Cantwell v. Connecticut, 310 U.S. 296, 306, 60 S. Ct. 900, 84 L. Ed. 1049 (1941), the Court recognized that unbridled discretion in a local authority in determining what is religious may be unconstitutional. While Cantwell dealt with a state's regulation of solicitation, which does not necessarily involve regulation of an interest as compelling as protection of the health of children, one federal district court has applied the Cantwell standard to mandatory immunization laws. In Avard v. Dupuis, 376 F. Supp. 479, 481 (D.N.H. 1974), the Court examined a statute that read, "[A] child may be excused from immunization for religious reasons at the discretion of the local school board." Relying upon Cantwell and its progeny, the Court in Avard held that the religious exemption vested too much discretion in the school board. The Court stated that

> the fact that the State has a right to regulate, and arguably completely prohibit, the conduct in question here does not relieve it of its duty to regulate fairly.

376 F. Supp. at 482. The Court reasoned that the statute was too vague and without standards, and therefore in contravention of the due process clause of the Fourteenth Amendment. In addition to the due process infirmities, the Court noted the possibility of equal protection problems lurking in the background. "Standardless statutes may result in different applications to similarly situated persons, not to mention the possibility that unarticulated underlying reasons may in themselves be constitutionally impermissible." 376 F. Supp. at 482. See also Niemotko v. Maryland, 340 U.S. 268, 71 S. Ct. 325, 95 L. Ed. 267 (1951) (practice of allowing local official discretionary control over public parks unconstitutional on basis of freedom of religion); Espinoza v. Rusk, 634 F.2d 477 (9th Cir. 1980) (administrative determination without

established guidelines and procedures as to what is religion or what is religious may be unconstitutional); Swearson v. Meyers, 455 F. Supp. 90 (D. Kan. 1978) (local committee's authority to grant, deny, or revoke permits based on determination of religious nature of solicitation found unconstitutional). Caution must therefore be exercised by the school board because unbridled discretion by the board could give rise to a challenge based on a violation of the due process clause of the Fourteenth Amendment.

Caution is also indicated because of the more recent holding in Lewis v. Sobel, 710 F. Supp. 506 (S.D.N.Y. 1989), in which a local school district rejected an affidavit from parents claiming a religious exemption from mandatory immunization based on personal religious beliefs. The Court recognized that sincerely held, personal religious beliefs are protected by the First Amendment, analyzed the sincerity of the plaintiffs' religious beliefs, and found that the school board's rejection of the affidavit was a violation of the plaintiffs' right to free exercise of their religion. The court in Sobel awarded $1,000 in damages to the plaintiffs for emotional distress.

While a school district clearly has a compelling interest in distinguishing a sincerely held religious belief from a secular or philosophical belief, the case law leaves a district in a difficult position. In order to avoid violating the Fourteenth Amendment and due process, established guidelines and standards should be developed and followed when an affidavit is challenged. Such standards could be adopted by statute, by administrative rule, or by the local school board. However, if guidelines and standards are established that could be construed to favor one religious belief over another, numerous constitutional challenges are possible. As discussed above, religious exemptions have been stricken because of possible violations of equal protection, the Free Exercise Clause, or the Establishment Clause. See also Mont Const. Art. X, § 7 ("no person shall be refused admission to any public educational institution on account of sex, race, creed, religion, political beliefs, or national origin"); § 49-2-307, MCA (it is an unlawful discriminatory practice for an educational institution to announce or follow a policy of denial or limitation of educational opportunities of a group or its member, through a quota or otherwise, because of race, color, sex, marital status, age, creed, religion, physical or mental handicap, or national origin). One way to limit, but not eradicate, the possibility of a constitutional violation would be for the state or local authority to develop uniformly applicable procedures to challenge affidavits which are submitted under the religious exemption but which are considered not to be based upon sincerely held religious beliefs. Guidelines for conducting such a "sincerity analysis" are suggested in International Society for Krishna Consciousness v. Barker, 560 F.2d 430, 440 (2d Cir. 1981), and may include consideration of questions such as whether the affiant acts in a manner inconsistent with the

claimed religious belief, or whether there is evidence that the affiant materially gains by fraudulently hiding secular interests behind a veil of religious doctrine. Id. at 441.

Although the school district undeniably has a compelling interest to protect students from communicable diseases, it does not have unlimited discretion to determine the legitimacy or sincerity of the religious tenets and practices of one seeking an exemption pursuant to section 20-5-405, MCA. The school district should therefore refrain from challenging an affidavit under section 20-5-405(1), MCA, and attempting to distinguish between a religious belief and a secular one and between a sincerely held belief and one that is insincerely held until established standards are in place.

THEREFORE, IT IS MY OPINION:

1. The religious exemption to mandatory immunization of students in section 20-5-405(1), MCA, encompasses sincerely held personal religious beliefs and not only religious beliefs or tenets of an "established or recognized" religion.

2. Absent the use of established, uniform standards or procedures, a school district should refrain from challenging an affidavit claiming a religious exemption from mandatory immunization.

Sincerely,

Marc Racicot

MARC RACICOT
Attorney General

NOTICE OF FUNCTIONS OF ADMINISTRATIVE CODE COMMITTEE

The Administrative Code Committee reviews all proposals for adoption of new rules, amendment or repeal of existing rules filed with the Secretary of State, except rules proposed by the Department of Revenue. Proposals of the Department of Revenue are reviewed by the Revenue Oversight Committee.

The Administrative Code 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 lists 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 Administrative Procedure Act for inclusion in the ARM. The ARM is updated through December 31, 1990. This table includes those rules adopted during the period January 1, 1991 through March 31, 1991 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 December 31, 1990, this table and the table of contents of this issue of the MAR.

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