RESERVE

MONTANA ADMINISTRATIVE REGISTER

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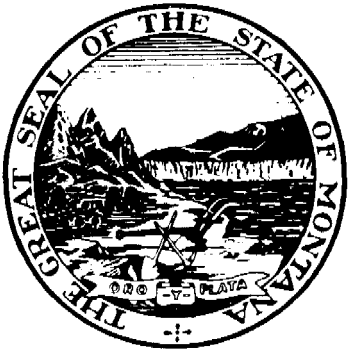

MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 1

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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing and where written comments may be submitted.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

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NOTICE SECTION

BEFORE THE BOARD OF ALTERNATIVE HEALTH CARE
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the proposed amendment of a rule pertaining to fees and the proposed adoption of new rules pertaining to direct entry midwifery apprenticeship	)))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF 8.4.301 FEES AND THE PROPOSED ADOPTION OF NEW RULES PERTAINING TO DIRECT ENTRY MIDWIFERY APPRENTICESHIP

TO: All Interested Persons:

1. On October 27, 1992, at 9 o'clock a.m., in the downstairs conference room, Department of Commerce Building, 1424 - 9th Avenue Helena, Montana, a public hearing will be held to consider the proposed amendment of ARM 8.4.301 and adoption of new rules pertaining to the practice of direct entry midwifery.

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

"8.4.301 FEES (1) through (2) (k) will remain the same.
(l) midwife apprentice renewal $ 200.00
(m) midwife exam proctor only fee 150.00
(l) will remain the same but be renumbered (n)."
Auth: Sec. 37-26-201, 37-27-105, MCA; IMP, Sec. 37-26-201, 37-27-205, 37-27-210, MCA

REASON: The amendment is necessary to set a fee for renewal of the apprentice license required by section 37-27-205, MCA, and the fee for proctoring the direct entry midwife exam only, which fees are commensurate with costs.

3. The proposed new rules will read as follows:

"I DEFINITIONS (1) "Indirect supervision" means the physical presence of the licensed supervisor is not always required. Indirect supervision may only be implemented during level III of the direct entry midwife apprenticeship, and at the discretion of the licensed supervisor.

(2) "Morbidity" means all transfers of care to a physician, transports to a hospital, emergency measures, or client refusal to refer or transfer care, which shall be reported to the board within 72 hours, on a form prescribed by the board.

(3) "Personal supervision" means the physical presence of the licensed supervisor.

Auth: Sec. 37-27-105, MCA; IMP, Sec. 37-27-205, 37-27-320, MCA

"II DIRECT ENTRY MIDWIFE APPRENTICESHIP REQUIREMENTS (1) The direct entry midwife apprenticeship license program shall be that instructional period composed of

practical experience time obtained under the personal supervision of a supervisor approved by the board. A direct entry midwife apprentice shall not work alone, except at the discretion of the licensed supervisor under level III as defined below.

(2) Applicants for a direct entry midwife apprenticeship license shall submit a completed application with the proper fee, a current CPR card indicating certification to perform adult and infant cardiopulmonary resuscitation, a supervision agreement, and a curriculum outline or method of academic learning that meets the board's educational rule requirements for licensure. A direct entry midwife apprentice license is valid for one year after issuance, and shall then expire the following December 31, and each December 31 annually, with a limit of four renewals. A supervision agreement shall include:

(a) name of supervisor who shall be a licensed direct entry midwife, a certified nurse midwife, or a physician licensed under Title 37, chapter 3;

(b) agreement of parties that supervisor will provide personal supervision of the direct entry midwife apprentice during levels I and II, and may, at the supervisor's discretion, allow the direct entry midwife apprentice to work under indirect supervision during level III only;

(c) agreement of supervisor to supervise no more than two direct entry midwife apprentices at the same time.

(i) A waiver will allow an individual supervisor to supervise up to four direct entry midwife apprentices at the same time from the date of adoption of these rules until September 1, 1993.

(3) A level I direct entry midwife apprenticeship is served under the personal supervision of the licensed supervisor, with a focus on prenatal care. To complete level I, the direct entry midwife apprentice shall:

(a) observe 40 births;

(b) provide 20 prenatal examinations;

(c) complete level I skills checklist;

(d) submit evaluation of skills and educational progress form, with written verification by supervisor of completion of level I.

(4) A level II direct entry midwife apprenticeship is served under the personal supervision of the licensed supervisor, with a focus on birth, post-partum, and newborn care. To complete level II, the direct entry midwife apprentice shall:

(a) attend 10 births as primary birth attendant, which births are verified by signed birth certificates, or affidavit from supervisor;

(b) provide 40 prenatal examinations;

(c) submit prenatal protocols;

(d) complete level II skills checklist;

(e) submit evaluation of skills and educational progress form, with written verification by supervisor of completion of level II.

(5) A level III direct entry midwife apprenticeship is served under the personal supervision of the licensed

supervisor or under indirect supervision, as defined by board rules, at the discretion of the supervisor. A formal outline of indirect supervision communication shall be submitted in writing to the board for approval, prior to implementation, which shall include supervisor chart review, and may include telephone contact supervision. The focus of level III shall be continuous prenatal, perinatal and postnatal care. To complete level III, the direct entry midwife apprentice shall:

(a) complete 15 continuous care births as the primary attendant, which are verified by signed birth certificates, or affidavit from supervisor;

(b) provide 40 prenatal examinations;

(c) submit protocols for birth, post-partum, and newborn care;

(d) complete level III skills checklist;

(e) submit evaluation of skills and educational progress form, with written verification by supervisor of completion of level III.

(6) Direct entry midwife apprenticeship applicants who have, at the time of application, through an apprenticeship or other supervisory setting, participated as the primary birth attendant at 25 births, 15 of which included continuous care, may enter directly into direct entry midwife apprenticeship license level III. The 25 births and 15 continuous care births shall be evidenced by the signed birth certificate as primary birth attendant, an affidavit from the birth mother, or documented records from the applicant, as shown on the birth experience form prescribed by the board.

(7) To be approved by the board as a supervisor of a direct entry midwife apprentice, each supervisor shall:

(a) be currently licensed in good standing as a direct entry midwife, a certified nurse midwife, or a physician licensed under Title 37, chapter 3, MCA. A licensed direct entry midwife supervisor shall have been licensed for two years before becoming a supervisor, except for those licensees who have successfully passed the first licensing exam administered by the board;

(b) review and sign all documents required by the board under the direct entry midwife apprenticeship program;

(c) supervise no more than two direct entry midwife apprentices at the same time, except as allowed by waiver in subsection (2), above;

(d) notify the board in writing of any change in the supervisory relationship, including advancement from personal to indirect supervision, termination of the supervisory relationship, or any other relevant changes;

(e) be directly responsible for all activities undertaken by the apprentice(s) under their supervision agreement. Violation of the board statutes or rules may result in license discipline action against the direct entry midwife apprentice, or supervisor, or both."

Auth: Sec. 37-27-105, MCA; IMP, Sec. 37-27-201, 37-27-205, 37-27-210, 37-27-213, 37-27-321, MCA.

REASON: These rules are being proposed to implement the direct entry midwife apprentice license mandated by the 1991 Legislature in Section 37-27-205, MCA.

5. Interested persons may present their data, views or arguments, either orally or in writing at the hearing. Written data, views or arguments may also be submitted to the Board of Alternative Health Care, Lower Level, Arcade Building, 111 North Jackson, Helena, Montana, 59620-0407, to be received no later than 5:00 p.m., October 22, 1992.

6. Carol Grell, attorney, has been designated to preside over and conduct the hearing.

BOARD OF ALTERNATIVE HEALTH CARE
DR. MICHAEL BERGKAMP, CHAIRMAN

Annie M. Bartos

ANNIE M. BARTOS, CHIEF COUNSEL
DEPARTMENT OF COMMERCE

Annie M. Bartos

ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, September 14, 1992.

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION
OF THE STATE OF MONTANA

In the matter of the proposed amendment and repeal of rules relating to school controversy contested cases rules of procedure	NOTICE OF THE PROPOSED AMENDMENT AND REPEAL OF RULES RELATING TO SCHOOL CONTROVERSY CONTESTED CASES RULES OF PROCEDURE

NO PUBLIC HEARING CONTEMPLATED

To: All interested persons

1. On October 26, 1992, the Superintendent of Public Instruction proposes to amend and repeal rules pertaining to the rules of procedure for all school controversy contested cases before the county superintendents of the state of Montana.

2. The rules, as proposed to be amended, new material underlined, deleted material interlined, provide as follows. Full text of the rules is found at pages 10-51 through 10-63, ARM.

10.6.101 SCOPE OF RULES (1) These rules govern the procedure for conducting all hearings on school controversy cases arising under the provisions of Title 20 before ~~appealed to~~ the county superintendent, ~~state superintendent and~~ or the county transportation committee, and all appeals to the state superintendent of public instruction. These rules shall be construed to secure the just, speedy and inexpensive determination of every action. All rules promulgated by former state superintendents with regard to school controversies are hereby repealed.

(a) Remains the same.

~~(b) All references made to appropriate federal or state statutes or state plans for school controversies arising from postsecondary vocational technical centers, or postsecondary vocational technical education and secondary vocational courses and programs which are a part or portion of secondary school offerings shall be governed by these rules.~~

(c) - (d) Remains the same, renumbered (b) - (c).

(AUTH: 20-3-107, MCA; IMP: 20-3-107, MCA)

10.6.102 SCHOOL CONTROVERSY MEANS CONTESTED CASE (1) Contested case means any proceeding in which a determination of legal rights, duties or privileges of a party is required by law to be made after an opportunity for hearing. (AUTH: 20-3-107, MCA; IMP: 20-3-107, MCA)

10.6.103 INITIATING SCHOOL CONTROVERSY PROCEDURE PROCESS (1) Remains the same.

(2) A school controversy contested case shall be commenced by filing a notice of appeal with the county superintendent and the parties within 30 days after the final decision of the governing authority of the school district is made. Notice of

appeal shall be served by certified mail. Respondent shall file a written reply to the notice of appeal within 10 days of receipt.

(3) A party to a controversy may make and file with the county superintendent an affidavit disqualifying the county superintendent pursuant to section 20-3-211, MCA. The affidavit must be filed not less than 10 days before the original date set for the hearing.

(AUTH: 20-3-107, MCA; IMP: 20-3-107, MCA)

10.6.104 JURISDICTION (1) - (1)(b) Remains the same.

(2) The county superintendent shall, at all times, have jurisdiction to determine the jurisdiction over any particular contested case. In such situations, the rules of procedure shall apply, and questions of jurisdiction may be resolved by rulings and orders based upon the pleadings or after a hearing, as necessary to suit the circumstances of the case.

(2) Remains the same, renumbered (3).

(4) A determination by the county superintendent as to jurisdiction may be immediately appealed to the state superintendent.

(AUTH: 20-3-107, MCA; IMP: 20-3-107)

10.6.105 COMMENCEMENT OF ACTION/REQUIREMENTS OF THE NOTICE OF APPEAL (1) Remains the same.

(2) When a party appeals to the county superintendent, ~~a~~ the notice of appeal ~~shall~~ must include:

(a) - (c) Remains the same.

(d) a statement ~~indicating that the petitioner has a~~ setting forth the basis for the contested case ~~and~~ that the county superintendent has proper jurisdiction;

(e) references to the particular sections of the statute and rules involved~~;~~.

(~~f~~3) ~~that t~~The notice of appeal shall be signed by petitioner and/or his representative.

(4) Failure of any party to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal but is grounds for such action as the county superintendent deems appropriate, which may include dismissal of the appeal.

(AUTH: 20-3-107, MCA; IMP: 20-3-107, MCA)

10.6.107 CONFERENCE AND INFORMAL DISPOSITION (1) The county superintendent may informally confer with the parties ~~to an appeal~~ for the purpose of attempting informal disposition of any contested case.

(2) Remains the same.

~~(3) If it is appropriate, the county superintendent may draft findings of fact, conclusions of law and order and shall promptly send such to each party in the contested case.~~

(AUTH: 20-3-107, MCA; IMP: 20-3-107, MCA)

10.6.108 COUNTY SUPERINTENDENT'S PREHEARING PROCEDURE - FORMULATING ISSUES (1) In any action, the county superintendent

within 10 working days of receipt of the reply to the appeal shall ~~may, at his/her discretion, direct the parties to appear before him/her for a conference~~ order a prehearing conference, which may be held by telephone conference call, to consider:

(a) - (d) Remains the same.

(e) the date for hearing;

(~~e~~f) such other matters as may aid in the disposition of the action.

(2) In addition to the matters to be considered, the prehearing conference notice shall include a provision advising the parties of their right to be represented by counsel at their own expense.

(~~2~~3) The county superintendent ~~may make~~ shall issue an order which recites the action taken at the conference, the amendments to the notice of appeal and the agreements made by the parties as to any of the matters considered, and which limits the issues for the hearing to those not disposed of by admissions or agreements of ~~counsel~~ the parties. Such order when entered will control the subsequent course of action, unless modified at the hearing to prevent manifest injustice. ~~The county superintendent, in his/her discretion, may establish by rule a prehearing calendar on which actions may be placed for consideration as provided above.~~

(~~3~~4) Individual privacy. County superintendents shall ~~provide for provision to~~ insure the privacy of matters before them as is required by law. Parents maintain the right to waive their right of confidentiality and privacy in the hearing and may request that the hearing be open to the public. The county superintendent shall also provide or allow an opportunity for the minor to be present at the hearing upon request of the parent or guardian ~~or non-minor pupil~~.

(~~4~~5) Location of hearing. The county superintendent shall conduct the hearing ~~in the county courthouse unless stipulated~~ in a location stipulated to by all parties and the county superintendent. In the event of disagreement, the county superintendent will make the final determination.

(AUTH: 20-3-107, MCA; IMP: 20-3-107, MCA)

10.6.109 DISCOVERY (1) The county superintendent may compel~~,~~ or limit ~~or conduct~~ discovery prior to the hearing and/or prehearing conference pursuant to ARM 10.6.110 through 10.6.113.

(AUTH: 20-3-107, MCA; IMP: 20-3-107, MCA)

10.6.113 SEQUENCE AND TIMING OF DISCOVERY (1) The county superintendent shall provide reasonable discovery on the relevant issues for the hearing and shall establish a calendar so as not to allow discovery to delay a hearing. A request for discovery directed to the party must be made within 30 days of filing of respondent's reply to the notice of appeal.

(AUTH: 20-3-107, MCA; IMP: 20-3-107, MCA)

10.6.114 EX-PARTE CONSULTATIONS (1) The county superintendent, after ~~the issuance of the notice of hearing,~~

receipt of a notice of appeal, shall not communicate with any party in connection with any issue of fact or law in such case except upon notice and opportunity for all parties to participate.
(AUTH: 20-3-107, MCA; IMP: 20-3-107, MCA)

10.6.115 POWERS OF THE COUNTY SUPERINTENDENT
(1) - (1)(c) Remains the same.
(d) set the time and place of the hearing and direct parties to appear and confer to consider simplifications of the issues ~~by consent of the parties involved~~;
(e) - (2)(b) Remains the same.
(AUTH: 20-3-107, MCA; IMP: 20-3-107, MCA)

10.6.116 HEARING (1) The hearing will be conducted before the county superintendent in the ~~following~~ order set at the prehearing conference and will include:
(a) - (c) Remains the same.
(d) closing arguments ~~beginning with petitioner ending with respondent~~.
~~(2) The order of procedure may be changed by order of the county superintendent upon a showing of good cause.~~
(3) Remains the same, renumbered (2).
(AUTH: 20-3-107, MCA; IMP: 20-3-107, MCA)

10.6.118 RECORD (1) - (1)(a) Remains the same.
(b) all evidence received plus a stenographic or tape-recorded record of oral proceeding;
(c) - (f) Remains the same.
~~(2) A transcript of the hearing shall be taken by a certified court reporter and transcribed upon by request of the county superintendent.~~
(AUTH: 20-3-107, MCA; IMP: 20-3-107, MCA)

10.6.119 FINAL ORDER (1) The final order by the county superintendent shall be in writing and shall include findings of fact and conclusions of law separately stated and a memorandum opinion as appropriate. Findings of fact, as set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings.
(a) - (b) Remains the same.
(c) The ~~F~~final order shall inform the parties of their right to appeal the order to the state superintendent of public instruction, and when appropriate, ~~by attaching~~ shall include a copy of the Uniform Rules of Administrative Appellate Procedure for the State Superintendent of Public Instruction with the final order, ARM 10.6.120 through 10.6.130.
(2) The county superintendent shall insure for all cases that not later than 90 days after the receipt of the reply to notice of appeal a final order is reached and a copy of the findings of fact, conclusions of law and order is mailed to each party. The time limitation provided here may be waived upon request of the county superintendent or a party of the school

controversy contested case, upon stipulation of all parties.

(3) County transportation committee. In the case of an appeal to the county transportation committee, after hearing the committee shall meet and vote in open session whether to grant or deny the appeal or request for consideration. The members of the majority shall appoint one member to prepare findings of fact, conclusions of law and order which shall then be adopted at an open meeting of the transportation committee and signed by all members of the majority. Any member of the minority may put the reasons for his/her vote in writing, and this shall be made part of the record.

(AUTH: 20-3-107, MCA; IMP: 20-3-107, MCA)

10.6.121 APPELLATE PROCEDURE - SCOPE OF RULES

(1) Remains the same.

(2) All references made to the county superintendent ~~as to the procedure on these rules~~ shall also include the county transportation committee where appropriate.

~~(3) All references made in these rules shall maintain consistency with the Uniform Rules of Procedure for all School Controversy Contested Cases before the county superintendents of the state of Montana.~~

(4) Remains the same, renumbered (3).

(AUTH: 20-3-107, MCA; IMP: 20-3-107, MCA)

10.6.122 APPELLATE PROCEDURE - NOTICE OF APPEAL - FILING

(1) An appeal shall be taken by filing a notice of appeal with the state superintendent of public instruction and a copy of such notice of appeal with the parties and the county superintendent. Failure of any party to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal but is grounds for such action as the state superintendent deems appropriate, which may include dismissal of the appeal.

(AUTH: 20-3-107, MCA; IMP: 20-3-107, MCA)

10.6.123 APPELLATE PROCEDURE - CONTENTS OF THE NOTICE OF APPEAL (1) The appealing party shall be known as appellant, and the responding party shall be known as respondent. When a party appeals to the state superintendent of public instruction, a the notice of appeal ~~shall~~ must include:

(a) - (e) Remains the same.

(f) the signature of the petitioner and/or his/her ~~attorney~~ representative;

(g) Remains the same.

(AUTH: 20-3-107, MCA; IMP: 20-3-107, MCA)

10.6.124 APPELLATE PROCEDURE - TRANSMISSION OF RECORD

(1) Upon receipt of the notice of appeal to the state superintendent of public instruction, the county superintendent shall transmit the record along with a certified docket listing the contents of the record ~~from his/her order~~. The record shall contain all items identified in ARM 10.6.118, ~~of the Uniform Rules of School Controversy~~ including a transcribed transcript

of the proceedings. Such records shall be transmitted to the state superintendent within ~~30~~ 20 days upon receipt of the notice of appeal to the state superintendent unless otherwise ordered by the state superintendent.
(AUTH: 20-3-107, MCA; IMP: 20-3-107, 20-3-210, MCA)

10.6.125 APPELLATE PROCEDURE - STANDARD OF REVIEW (1) The state superintendent of public instruction ~~may use~~ shall be subject to the standard of review as set forth below and shall be confined to the record established at the factfinding hearing ~~unless otherwise decided~~.

(2) Remains the same.

(3) ~~Upon request, t~~ The state superintendent, at his/her discretion or upon request, may ~~shall~~ hear oral arguments and receive written briefs.

(4) The state superintendent may not substitute his/her judgment for that of the county superintendent as to the weight of the evidence on questions of fact. The state superintendent may affirm the decision of the county superintendent or remand the case for further proceedings or refuse to accept the appeal on the grounds that the state superintendent fails to retain proper jurisdiction on the matter. The state superintendent may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the findings of fact, conclusions of law and order are:

(a) Remains the same.

(b) in excess of the statutory authority ~~of the agency~~;

(c) - (f) Remains the same.

(g) affected because findings of fact upon issues essential to the decision were not made although requested.
(AUTH: 20-3-107, MCA; IMP: 20-3-107, MCA)

3. The proposed rules for repeal follow.

10.6.106 NOTICE OF HEARING (IS HEREBY REPEALED)
(AUTH: 20-3-107, MCA; IMP: 20-3-107, MCA)

10.6.117 ABILITY OF CROSS-EXAMINATION OR PARTICIPATION IN THE HEARING (IS HEREBY REPEALED)
(AUTH: 20-3-107, MCA; IMP: 20-3-107, MCA)

10.6.120 COUNTY ATTORNEY RULE (IS HEREBY REPEALED)
(AUTH: 20-3-107, MCA; IMP: 20-3-107, MCA)

10.6.126 APPELLATE PROCEDURE - COMMENCEMENT OF ACTION (IS HEREBY REPEALED)
(AUTH: 20-3-107, MCA; IMP: 20-3-107, MCA)

4. These rules are being amended and repealed to clarify procedure and facilitate the hearing process.

5. Interested persons may submit their data, views or arguments concerning the proposed rule changes in writing to the Office of Public Instruction, Room 106, State Capitol, Helena, Montana 59620, no later than 5:00 p.m. on October 22, 1992.

6. If a person who is directly affected by the proposed changes wishes to express his/her data, views and arguments orally or in writing at a public hearing, s/he must make written request for a hearing and submit this request along with any written comments s/he may have to the Office of Public Instruction, Room 106, State Capitol, Helena, Montana 59620, no later than 5:00 p.m. on October 22, 1992.

7. If OPI receives requests for a public hearing on the proposed changes from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed changes from the Administrative Code Committee of the Legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register.

Beda J. Dwight
Rule Reviewer
Office of Public Instruction

Nancy Keenan
Superintendent
Office of Public Instruction

Certified to the Secretary of State September 14, 1992.

BEFORE THE DEPARTMENT OF
FAMILY SERVICES OF THE
STATE OF MONTANA

In the matter of the amendment of rules pertaining to youth detention facilities.	))))	AMENDED NOTICE OF PROPOSED AMENDMENT OF RULES PERTAINING TO YOUTH DETENTION FACILITIES

NO PUBLIC HEARING
CONTEMPLATED

1. On August 27, 1992, on page 1813 of the 1992 Montana Administrative Register, issue no. 16, the Department of Family Services published notice of its intention to amend ARM 11.17.101, 11.17.102, 11.17.110, 11.17.111, 11.17.113, 11.17.115, 11.17.117, 11.17.118, 11.17.120, 11.17.124, 11.17.125, 11.17.127, 11.17.129, 11.17.131, 11.17.138, and 11.17.146, pertaining to youth detention facilities. The notice stated that the department intended to amend the rules on October 15, 1992.

2. The notice of amendment lacked provisions on notice and comment which are required by the Montana Administrative Procedure Act. The department is publishing this amended notice and plans to adopt the rules on November 12, 1992.

3. The rules as proposed to be amended in the notice of August 27, 1992, remain the same, except that the paragraphs following this paragraph should be considered as applying to the proposed amendments.

4. Interested persons may submit their data, views or arguments to the proposed amendments in writing to the Office of Legal Affairs, Department of Family Services, 48 North Last Chance Gulch, P.O. Box 8005, Helena, Montana 59604, no later than October 23, 1992.

5. If a person who is directly affected by the proposed amendment wishes to express data, views and arguments orally or in writing at a public hearing, that person must make a written request for a public hearing and submit such request, along with any written comments, to the Office of Legal Affairs, Department of Family Services, 48 North Last Chance Gulch, P.O. Box 8005, Helena, Montana 59604, no later than October 23, 1992.

6. If the Department of Family Services receives requests for a public hearing on the proposed amendment from either 10% or 25, whichever is less, of those persons who are directly affected by the proposed amendment, from the Administrative Code Committee of the legislature, from a governmental agency or subdivision, or from an association having no less than 25

members who are directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register.

DEPARTMENT OF FAMILY SERVICES

Tom Olsen, Director

John Melcher, Rule Reviewer

Certified to the Secretary of State, September 16, 1992.

BEFORE THE DEPARTMENT OF JUSTICE
OF THE STATE OF MONTANA

In the matter of the proposed adoption of Procedural Rules I through V pertaining to investigative protocol by the department of justice in the performance of its investigative responsibilities	NOTICE OF PROPOSED ADOPTION OF RULES I THROUGH V REGARDING DEPARTMENT OF JUSTICE INVESTIGATIVE PROTOCOL NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On October 26, 1992, the Department of Justice and the Law Enforcement Advisory Council proposes to adopt the following rules concerning investigative protocol regarding its investigative responsibilities.

2. The proposed rules will read as follows:

RULE I. DEFINITIONS Unless the context requires otherwise, the following definitions apply to [rules I through V]:

(1) "Active investigation" means an investigation when officers are physically collecting data in another jurisdiction, conducting surveillance or interviews, executing search warrants, or any related activities. Active investigation does not include the collection, analysis or dissemination of criminal intelligence information or unconfirmed information secured prior to the initiation of an active investigation.

(2) "Investigative protocol" means the procedure used by department of justice law enforcement agencies to notify other law enforcement agencies and coordinate investigative activities to ensure the maximum effective use of personnel, respect for jurisdictional boundaries, and safety of officers involved in an investigation.

(3) "Liaison officer" means an officer in a police department, sheriff's office, state or federal agency designated by the agency head to serve as the contact between local or federal law enforcement agencies and state investigative agencies within the Montana department of justice.

(4) "State agency" means a criminal investigative agency within the Montana department of justice including those agencies that investigate narcotics, organized crime, gambling, general criminal investigations, motor vehicle investigations, worker's compensation (state fund) fraud, and other areas of responsibility as defined in section 44-2-115, MCA.

AUTH: 2-15-112, MCA; IMP: 44-2-115, MCA

RULE II. PROTOCOL (1) A state agency shall not undertake an active criminal investigation except as provided in section 44-2-115, MCA. When a state agency begins an active investigation pursuant to section 44-2-115, MCA, within the

jurisdiction of a local law enforcement agency, the administrator of the division or a designated liaison officer shall provide advance notification to the chief law enforcement officer or designated liaison officer of that jurisdiction.

(2) This notification is required in all instances unless one of the following special exceptions exist:

(a) An investigation has been properly initiated within one jurisdiction and during the immediate course of the investigation exigent circumstances require investigation in another jurisdiction. In this event, the state liaison officer shall notify the affected jurisdiction as soon as the safety and security of investigative personnel is assured.

(b) When an investigation is performed by a state agency at the request and under the direction of a federal agency, the federal agent in charge of the investigation shall notify the affected jurisdiction. When joint federal and state investigations are conducted, the liaison officer for the state agency will request in writing that the federal agency notify local law enforcement officials that the investigation is in progress, and document the response to this notification.

(c) When the subject of the investigation is the chief law enforcement officer of the agency or public official and a request for investigative assistance has been received pursuant to section 44-2-115(1), MCA, the notification procedure described in rule III will apply.

AUTH: 2-15-112, MCA; IMP: 44-2-115, MCA

RULE III. INTERNAL INVESTIGATION (1) To initiate an internal investigation of another law enforcement agency or public official pursuant to section 44-2-115, MCA, the following procedures must be followed:

(a) A written request must be received and approved by the attorney general or a designated representative. The request must be from a law enforcement official in a position of authority within the jurisdiction where the alleged offense(s) occurred.

(b) The request must describe the reasonable facts that led the official to believe a criminal offense has been or is being committed.

(c) The request must name a local representative to serve as the liaison officer.

(2) The agent shall contact only the liaison officer designated in the request from the law enforcement official.

(3) If the investigation concerns the supervisor of a law enforcement agency or the county attorney, it will be the responsibility of the attorney general or his designated representative to contact the affected officer when the investigation is completed, and summarize the action the state agency intends to take based on the investigation.

AUTH: 2-15-112, MCA; IMP: 44-2-115, MCA

RULE IV. COORDINATION (1) Local, state, and federal law enforcement agencies will make every good faith effort to notify the appropriate law enforcement agencies concerning active investigations.

(2) Notification to the appropriate law enforcement agencies is intended to avoid duplication of effort and to ensure maximum coordination among various law enforcement agencies in the state of Montana.

AUTH: 2-15-112, MCA; IMP: 44-2-115, MCA

RULE V. COMPLAINT REVIEW (1) Whenever a law enforcement agency concludes that a state agency has actively conducted an investigation within their jurisdiction without proper notification, a written complaint may be forwarded to the attorney general for referral to the law enforcement advisory council. Whenever a complaint is received, the attorney general or a designated representative will request a written response from the agency involved in the complaint. The law enforcement advisory council will review the response, determine if the action constituted a violation of investigative protocol, and advise the attorney general.

(2) If the advisory council determines there has been a violation of investigative protocol, the attorney general or a designated representative shall act to ensure future compliance with the administrative rules.

AUTH: 2-15-122, MCA; IMP: 44-2-115, MCA

3. The 1991 Montana legislature passed Senate Bill 257, now codified in section 44-2-115, MCA that clarified the criminal investigative authority of the department of justice. Pursuant to section 44-2-115, MCA to ensure the effective cooperation of Montana law enforcement and respect for jurisdictional limits, the department of justice and the law enforcement advisory council intends to adopt rules to define the investigative protocol by the department of justice in the performance of its investigative responsibilities.

4. Interested parties may submit their data, views, or arguments concerning the proposed adoption of rules in writing to Rick Day, Administrator Law Enforcement Services Division, 303 North Roberts, Helena, Montana 59620-1413, no later than October 23, 1992.

5. If a person who is directly affected by the proposed adoption wishes to submit data, or express views and arguments orally or in writing at a public hearing, the person must make a written request for a hearing and submit this request, along with any written comments to Rick Day, Administrator Law Enforcement Services Division, 303 North Roberts, Helena, Montana 59620-1413, no later than October 23, 1992.

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

the proposed adoption; from the Administrative Code Committee of the Legislature; from a governmental subdivision, or agency; 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.

By: Marc Racicot
MARC RACICOT, Attorney General

Judy Browning
Rule Reviewer

Certified to the Secretary of State 9-14-92

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

In the Matter of Proposed Adoption of New Rules Pertaining to Fuel Cost Surcharge and Temporary Rate Reductions and the Proposed Amendment of an Existing Rule to Define "miles," all Regarding Motor Carriers.	NOTICE OF PUBLIC HEARING ON THE PROPOSED ADOPTION OF NEW RULES I AND II AND PROPOSED AMENDMENT OF EXISTING RULE 38.3.103

TO: All Interested Persons

1. On Thursday, October 22, 1992, at 9:00 a.m., in the Public Service Commission office building, 1701 Prospect Avenue, Helena, Montana 59620, a hearing will be held to consider the proposals identified in the above titles and described in the following paragraphs, all related to the proposed adoption and amendment of rules pertaining to motor carriers.

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

RULE I. FUEL COST SURCHARGE (1) All intrastate motor carriers operating under commission approved tariffed rates or commission approved maximum rates may charge, in addition to such rates, a fuel cost surcharge as provided by this rule.

(2) The commission may grant approval for a surcharge upon written request by a qualifying carrier:

(a) establishing that the carrier's fuel costs (for like fuel purchases) have increased by more than 6 percent from the lowest average fuel cost in any seven consecutive day period within the preceding three months;

(b) identifying the percentage increase in fuel costs and the percentage increase in rates necessary to offset the increased fuel costs; and

(c) establishing that the increase is likely to be of duration more than two months but less than six months.

(3) The commission may grant approval for decrease or increase to an existing surcharge upon written request by a qualifying carrier establishing that fuel costs have decreased or increased by more than 3 percent since the surcharge was approved.

(4) The surcharge or amendment to the surcharge becomes effective on the date approved by the commission and applies to all transportation after that date until expiring or being terminated by the commission.

(5) The surcharge shall be effective for 90 days from the date of approval by the commission, but may be extended for an additional 90 days. Amendments do not extend the effective period. After the expiration of the times permitted by this rule, if the carrier determines that fuel cost increases are likely to remain permanent, an application for a permanent rate increase may be made.

(6) Fuel costs must be monitored by the motor carrier throughout the duration of the surcharge. If, at any time, it appears that fuel costs have decreased by more than 3 percent within a seven consecutive day period, the carrier shall then apply for a decrease in the surcharge.

(7) Upon complaint by any interested person or upon the commission's own motion a surcharge may be reviewed for accuracy and compliance with this rule in both application and implementation. If the surcharge is found to be excessive, in addition to all other remedies provided by law, the carrier must provide each affected shipper with a rebate of the excessive charge.

(8) As a condition to granting approval for a surcharge, the commission may impose any lawful terms it deems necessary restricting the application of this rule.

(9) The provisions of this rule are not applicable to rates charged by contract carriers unless the contract for carriage so allows.

(10) Nothing in this rule prohibits a motor carrier from filing an application for authority to increase rates on a permanent basis.

(11) The person or entity, whether agent or contractor or other, actually incurring the cost of the fuel shall receive the benefit of any fuel surcharge approved by the commission, subject to all other provisions of this rule.

(12) The commission determines that fuel cost increases and the surcharge relief provided herein are good cause for rate changes to be effective on less than 45 day's notice, pursuant to section 69-12-504, MCA. AUTH: Sec. 69-12-201, MCA; IMP, Secs. 69-12-501 through 69-12-511, MCA

Rationale: This rule is necessary to provide a procedure and means to permit a carrier operating under tariffed rates or maximum rates to offset or recover costs caused by temporary increases in fuel prices. The standard procedure and means of obtaining rate relief, that of permanent rate increase, is unduly complex and costly for this purpose and, more significantly, is likely not to be allowed in the case that fuel cost increases are not known to be permanent. The rebate provision adequately protects the consuming public from abuses of this procedure.

RULE II. TEMPORARY RATE REDUCTIONS (1) All intrastate motor carriers operating under commission approved tariffed rates may apply for temporary rate reductions under the provisions of this rule.

(2) The commission may grant approval for a temporary rate reduction upon written request by a qualifying carrier:

(a) establishing that seasonal demands or special circumstances appear to justify the rate reduction; and

(b) establishing that the rate should be allowed on an experimental basis to verify these appearances.

(3) No temporary rate shall be approved if found to be noncompensatory.

(4) The temporary rate becomes effective on the date approved by the commission and applies to all transportation after that date until expiring or being terminated by the commission.

(5) The temporary rate shall be effective for 90 days from the date of approval by the commission. After the expiration of the time permitted by this rule, if the carrier determines that temporary rates have verified the appearance that seasonal demands or special circumstances justify the reduction as being permanent, an application for a permanent rate reduction may be made.

(6) Temporary rates must be monitored by the motor carrier throughout their duration.

(7) Upon complaint by any interested person or upon the commission's own motion a temporary rate may be reviewed for accuracy and compliance with this rule in both application and implementation.

(8) As a condition to granting approval for a temporary rate, the commission may impose any lawful terms it deems necessary restricting the application of this rule.

(9) The provisions of this rule are not applicable to rates charged by contract carriers unless the contract for carriage so allows.

(10) Nothing in this rule prohibits a motor carrier from filing an application for authority to decrease rates on a permanent basis.

(11) The commission determines that temporary rates as provided herein are good cause for rate changes to be effective on less than 45 days notice, pursuant to section 69-12-504, MCA. AUTH: Sec. 69-12-201, MCA; IMP, Secs. 69-12-501 through 69-12-511, MCA

Rationale: This rule is necessary to provide a means whereby a carrier may, in the interests of the public, implement reduced rates for seasonal demands or on an experimental basis on short notice on a temporary basis and avoid the sometimes costly and time consuming formal permanent rate change procedures which might otherwise dissuade such action in the face of uncertainties as to its actual effect.

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

38.3.103 VICINITY, TRIBUTARY, RADIUS, BETWEEN (1) (a) and (b) remain the same.

(c) The word "miles" means road miles and not straight line or "air miles," including when used in conjunction with "radius."

((c) through (e) remains the same but will be renumbered (d) through (f). AUTH: Sec. 69-12-201, MCA; IMP, Secs. 69-12-201 and 69-12-323, MCA

Rationale: This amendment is necessary to prevent a potential problem in enforcement which could be caused by a strict reading of the existing rule which, although generally referencing "distance" as meaning "road miles," does not specifically reference "miles" as being "road miles."

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 Public Service Commission, Transportation Division, 1701 Prospect Avenue, Helena, Montana 59620-2601 no later than October 22, 1992.

5. The Public Service Commission, a commissioner, or a duly appointed presiding officer may preside over and conduct the hearing.

6. The authority of the agency to make rules as proposed and the statutes being implemented are set forth following each rule above.

7. The Montana Consumer Counsel, 34 West Sixth Avenue, Helena, Montana, (406) 444-2771, is available and may be contacted to represent consumer interests in this matter.

Danny Oberg, Chairman

Rule Reviewer

CERTIFIED TO THE SECRETARY OF STATE SEPTEMBER 14, 1992.

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

In the matter of the amendment of rule 46.10.404 pertaining to Title IV-A day care for children	))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF RULE 46.10.404 PERTAINING TO TITLE IV-A DAY CARE FOR CHILDREN

TO: All Interested Persons

1. On October 14, 1992, at 1:30 p.m., a public hearing will be held in the auditorium of the Social and Rehabilitation Services Building, 111 Sanders, Helena, Montana to consider the proposed amendment of rule 46.10.404 pertaining to Title IV-A day care for children.

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

46.10.404 TITLE IV-A DAY CARE FOR CHILDREN OF RECIPIENTS IN TRAINING OR IN NEED OF PROTECTIVE SERVICES

Subsections (1) through (3)(d) remain the same.

(e) The maximum rate for full-day care in day care homes is ~~$10.50~~11.25 per day per child for children 24 months of age or older and $12.00 per day per child for infants under 24 months of age. The maximum rate for full-day care in group day care homes is ~~$11.00~~11.25 per child per day for children 24 months of age or older and $12.00 per child per day for infants under 24 months of age. The maximum rate for full-day care in day care centers is $11.00 per child per day for children 24 months of age or older and $13.00 per child per day for infants under 24 months of age.

(f) The maximum rate for part-time care in day care homes is ~~$1.35~~1.50 per hour per child. The maximum rate for part-time care in group day care homes is ~~$1.35~~1.50 per hour per child. The maximum rate for part-time care in day care centers is ~~$1.65~~2.00 per hour per child. Part-time care payments may not exceed the full-day or night care rate.

Subsections (3)(g) and (3)(g)(i) remain the same.

(ii) exceptional child care, as defined in ARM 11.14.101 (6)(d), at a maximum of $12.00 per day per child for full-time care or ~~$1.65~~1.75 per hour per child for part-time care in day care homes or group day care homes and $12.15 per day per child for full-time care and ~~$1.75~~2.00 per hour per child for part-time care in day care centers.

Subsections (3)(h) and (3)(i) remain the same.

AUTH: Sec. 53-4-212 and 53-4-503 MCA
IMP: Sec. 53-4-211, 53-4-514 and 53-4-716 MCA

3. ARM 46.10.404 requires the department to pay day care costs for children of Aid to Families with Dependent Children (AFDC) recipients who are attending employment-related training and for children in need of protective services. The rule sets forth the rates at which providers of day care to these children will be reimbursed.

The appropriations bill of the 52nd Montana Legislature, regular session, House Bill 2, provided for an increase in rates to such day care providers to bring the rates to 75% of market rate by 1993. The legislature directed that the change be made in two increments. The first increment, increasing rates for family and group day care providers $1.00 per day and for day care centers $.50 per day, was implemented effective October 1, 1991.

This rule amendment is necessary to implement the additional increases to bring rates to 75% of the market rate. The proposed rates will provide an increase over the current rates of $.75 per day for family and group day care providers and $.25 per day for day care centers.

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 Russell E. Cater, Chief Legal Counsel, Office of Legal Affairs, Department of Social and Rehabilitation Services, P.O. Box 4210, Helena, MT 59604-4210, no later than October 22, 1992.

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

Rule Reviewer

Director, Social and Rehabilitation Services

Certified to the Secretary of State September 14, 1992.

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

In the matter of the amendment of rules 46.12.565, 46.12.566 and 46.12.567 pertaining to private duty nursing	))))	**NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF RULES 46.12.565, 46.12.566 AND 46.12.567 PERTAINING TO PRIVATE DUTY NURSING**

TO: All Interested Persons

1. On October 15, 1992, 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 amendment of rules 46.12.565, 46.12.566 and 46.12.567 pertaining to private duty nursing.

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

46.12.565 PRIVATE DUTY NURSING SERVICE, DEFINITION

(1) Private duty nursing services are nursing services provided by a registered nurse or a licensed practical nurse to ~~a hospitalized patient when the patient requires individual and continuous skilled nursing care beyond that routinely provided by the hospital nursing staff.~~ a non-institutionalized patient under the age of 21 requiring care for conditions of such medical severity or complexity that skilled nursing care is necessary.

(2) Private duty nursing services include:

(a) skilled nursing services provided directly to a recipient by a registered or licensed practical nurse; and

(b) patient-specific training provided to a registered nurse or licensed practical nurse when a patient is new to the nursing agency, when a change in the condition of a patient requires additional training for the current nurse, or when a change in nursing personnel requires a new nurse to be trained to care for a patient.

(3) Private duty nursing services do not include:

(a) psychological or mental health counseling; or

(b) nurse supervision services including chart review, case discussion or scheduling by a registered nurse.

(4) For purposes of this section, "skilled nursing services" and "skilled nursing care" mean nursing services provided by a registered nurse or a licensed practical nurse. Skilled nursing services and skilled nursing care may not be provided by a nurse aide or a personal care attendant.

AUTH: Sec. 53-6-113 MCA
IMP: Sec. 53-6-101 and 53-6-113 MCA

46.12.566 PRIVATE DUTY NURSING SERVICE, REQUIREMENTS

(1) These requirements are in addition to those contained in ARM 46.12.301 through 46.12.3089.

(2) Authorization of private duty nursing services by the department for a recipient is based on approval of a plan of care by the department or the department's designated review agent.

(~~1~~a) Private duty nursing service must be ordered in writing by ~~the patient's~~ a physician.

(~~2~~3) Private duty nursing service must be authorized by the department prior to payment.

(a) Prior authorization must be requested at the time of initial submission of the plan of care and at any time the plan of care is amended and must be renewed with the department or the department's designated review agent every 90 days during the first six months of services, and every six months thereafter.

(b) Initial requests for and requests for renewal of prior authorization must be submitted to the Medical Support Section, Medicaid Services Division, Department of Social and Rehabilitation Services, P.O. Box 4210, Helena, MT 59604-4210, (406) 444-4540 on the form required by the department. Forms may be obtained from the medicaid services division.

(c) The provider of the private duty nursing service is responsible for requesting prior authorization and for obtaining renewal of prior authorization.

~~(3) Payment for private duty nursing service will not be made to the hospital.~~

(4) A provider of private duty nursing services must be an incorporated entity meeting the legal criteria for independent contractor status that either employs or contracts with nurses for the provision of nursing services. The department does not contract with or reimburse individual nurses as providers of private duty nursing services.

AUTH: Sec. 53-6-113 MCA
IMP: Sec. 53-6-101, 53-6-111 and 53-6-113 MCA

46.12.567 PRIVATE DUTY NURSING SERVICE, REIMBURSEMENT

~~(1) The department will pay the lowest of the following for private duty nursing services not also covered by medicare: the provider's actual (submitted) charge for the service or $48.40 per eight (8) hour shift.~~

~~(2) The department will pay the lowest of the following for private duty nursing services which are also covered by medicare: the provider's actual (submitted) charge for the service; the amount allowable for the same service under medicare; or $48.40 per eight (8) hour shift.~~

(1) Medicaid reimbursement for private duty nursing services is the lowest of the following:

(a) the provider's actual submitted charge for the service;

(b) the amount allowable for the service by medicare if the service is covered by medicare; or

(c) the amount provided for the service in the department's fee schedule.

(2) The current fee schedule for private duty nursing services is published by the department in a pricing manual. Copies of the pricing manual may be obtained from the Medical Support Section, Medicaid Services Division, Department of Social and Rehabilitation Services, P.O. Box 4210, Helena, MT 59604-4210, (406) 444-4540.

AUTH: Sec. 53-6-113 MCA
IMP: Sec. 53-6-101, 53-6-111 and 53-6-113 MCA

3. The department is required by section 53-6-101, MCA to determine the amount, scope and duration of services in accordance with federal law and by section 53-6-113, MCA to adopt rules to further define the items and components constituting the services provided.

The department's rules currently allow for medicaid coverage of private duty nursing services only for hospitalized patients, although federal law allows states to provide medicaid coverage of the service to individuals regardless of whether they are hospitalized or otherwise residing in any particular setting. The Omnibus Budget Reconciliation Act of 1989 (OBRA 1989) requires that any service which a state could elect to cover under the medicaid program must be provided for children under age 21, regardless of whether the service currently is covered for any group. OBRA 1989 does not require the state to extend the broader coverage to individuals 21 years of age and older. The proposed amendments are necessary to implement this federal coverage requirement.

The proposed amendments to ARM 46.12.565 are necessary to define the scope of the implemented coverage.

The proposed elimination by amendment in ARM 46.12.565 of private duty nursing services for hospitalized patients is necessary because the department's current hospital reimbursement scheme encompasses all inpatient nursing services. Inpatient nursing services are appropriately paid through the hospital reimbursement scheme.

The proposed amendment to ARM 46.12.565, listing RN supervision as an excluded service component, is necessary to clarify that nursing functions which are a part of administrative overhead cannot be billed as a direct care service. An on-site visit by an RN may be billed as an RN direct care service.

Section 53-6-101, MCA requires the department to pay only for services that are medically necessary and which are the most efficient and cost effective. The department is authorized by section 53-6-111, MCA to administer and supervise a vendor

payment program of medical assistance. The proposed amendments to ARM 46.12.566, requiring providers to obtain department authorization prior to delivery of services and to obtain renewal of prior authorization at certain specified regular intervals, are necessary to assure that the services provided are medically necessary, efficient and cost effective.

The proposed amendment to ARM 46.12.566 adding a reference to ARM 46.12.309 is necessary to incorporate the new rule, ARM 46.12.309.

The department is authorized by section 53-6-113, MCA to designate professionals who may deliver or supervise delivery of a particular service. As a third party payer for health care services, the department's relationship to providers is similar to that of a private insurer to medical providers who treat patients and bill the insurer for the service. The department's role is to provide payments for services, not to employ service providers. The proposed amendment to ARM 46.12.566, specifying that services only be delivered by incorporated providers who are established independent contractors, is necessary to protect the medicaid program from potential employment claims by service providers.

Sections 53-6-101 and 53-6-113, MCA require the department to set by rule the reimbursement for medical services. The proposed amendments to ARM 46.12.567 are necessary to specify the reimbursement methodology for private duty nursing services.

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 Russell E. Cater, Chief Legal Counsel, Office of Legal Affairs, Department of Social and Rehabilitation Services, P.O. Box 4210, Helena, MT 59604-4210, no later than October 22, 1992.

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

Rule Reviewer

Director, Social and Rehabilitation Services

Certified to the Secretary of State September 14, 1992.

BEFORE THE BOARD OF CHIROPRACTORS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment of rules pertaining to applications, examination, unprofessional conduct and definitions	NOTICE OF AMENDMENT OF RULES PERTAINING TO THE PRACTICE OF CHIROPRACTIC

TO: All Interested Persons:

1. On July 30, 1992, the Board of Chiropractors published a notice of proposed amendment of rules pertaining to the practice of chiropractic at page 1542, 1992 Montana Administrative Register, issue number 14.

2. The Board adopted ARM 8.12.601, 8.12.603, 8.12.605 and 8.12.614 exactly as proposed.

3. No comments or testimony were received.

BOARD OF CHIROPRACTORS
DWAYNE BORGSTRAND, D.C.,
PRESIDENT

BY: Annie M. Bartos
ANNIE M. BARTOS, CHIEF COUNSEL
DEPARTMENT OF COMMERCE

Annie M. Bartos
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, September 14, 1992.

BEFORE THE BOARD OF DENTISTRY
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment of rules pertaining to dentures	)	NOTICE OF AMENDMENT OF 8.17.808 PRIOR REFERRAL FOR PARTIAL DENTURES AND 8.17.809 INSERT IMMEDIATE DENTURES

TO: All Interested Persons:

1. On April 16, 1992, the Board of Dentistry published a notice of proposed amendment of the above-stated rules at page 723, 1992 Montana Administrative Register, issue number 7. That notice was published with no public hearing being contemplated. On May 18, 1992, the Board received a written request from the Denturists Association of Montana requesting that a public hearing be held. Thus, on June 11, 1992, the Board of Dentistry published an Amended Notice of Public Hearing on the proposed amendments at page 1177, 1992 Montana Administrative Register, issue number 11, noting that a public hearing would be held at 10:00 a.m. on July 9, 1992, in Helena, Montana.

2. The Board has amended the rules exactly as proposed.

3. The Board has thoroughly considered all comments and testimony received. Those comments and the Board's responses thereto follow:

COMMENT: Various commentors stated that the Board of Dentistry should not be forcing certain type of care upon patients and that patients should be the ultimate arbiters in deciding what care they would receive.

RESPONSE: The Board noted that patients do have a certain degree of autonomy and right to choose the type of care they will receive in the placement of dentures including partial dentures. Such care, however, must be administered as required by statute. The current statute, section 37-29-403, MCA, requires that a partial denture patient be referred to a dentist before a partial denture is fitted or constructed. This view that the Board holds has recently been buttressed by an Attorney General's Opinion No. 36, regarding that particular statute. The Board further determined that the advisory language in the rule regarding a prohibition on placement or insertion of immediate dentures within four weeks of the last extraction of the tooth was not proper since the statutes themselves absolutely prohibit a denturist from placing or inserting immediate dentures. That prohibition is found in section 37-29-402, MCA. The purpose of these amendments is to rid the regulations of any advisory language that may be viewed as conflicting with the requirements of the statutes.

COMMENT: It was stated that the Board cannot force patients of a denturist to comply with the denturist's recommendation that they see a dentist prior to the placement of a partial denture and there was concern as to how a

denturist would be able to force a patient to see a dentist if it was against the patient's wishes.

RESPONSE: The Board stated that it is the law for partial denture patients to be seen by a dentist prior to construction or fitting of a partial denture and it is the law for immediate dentures to be inserted by the dentist. Thus, if the patient is reluctant to see the dentist, the denturist under the law has no choice but to refuse service. Ultimately the right of choice belongs to the patient, however, in that he or she still may choose to go forth with denturist services but must do so in compliance with the statutes.

COMMENT: It was stated that the denturist should have the option to explain to the patient his or her alternatives and then allow the patient to choose.

RESPONSE: The patient cannot choose outside the scope of the statute. Statutes require prior referrals for partial dentures and statutes require that a dentist insert the immediate denture. It also was stated that a full explanation of the alternatives available to the patient in order to yield informed consent by the patient, requires a diagnosis by a professional trained and licensed to do diagnosis, which is the function of the dentist, not of the denturist. In fact, the denturist is specifically prohibited by section 37-29-402, MCA, from making a diagnosis.

COMMENT: At least one commentor stated that the proposed rule amendments constituted an attempt at restraint of trade.

RESPONSE: It was stated that the commentor should take his concern to the Legislature to attempt amendment of the statutes, for it is the statutes which require that denturists make referrals of partial denture patients and prohibit them from inserting immediate dentures.

COMMENT: It was stated that the government cannot prescribe for the individual the level of health care to be received.

RESPONSE: The legislative enactments as interpreted by the Attorney General state that, while a patient does indeed have a right to choose who will perform certain denture services, such choice must be made in compliance with the statutes. This requires that partial denture patients be seen by dentists and that immediate dentures be inserted by dentists.

COMMENT: Questions were received as to what constitutes a referral and why were concerns regarding referrals not addressed when the Denturist Act was originally passed.

RESPONSE: As regards what constitutes a referral, the Board decided that the patient belongs to the original care giver and should be returned to him or her unless the patient chooses otherwise, but the requirement of a referral of a partial denture patient as set forth by the Attorney General's opinion on the meaning of section 37-29-403, MCA, requires that such a patient be seen by a dentist along with x-rays and

study models, prior to the time a partial is constructed or fitted so that the dentist can provide diagnosis and treatment of any other underlying problems that may be occurring. As regards the question why these concerns were not addressed at the time the licensed practice of denturitry was enacted, the Board stated that the concerns were addressed and that they continue to be addressed in statutory sections enacted by the Legislature and now found and codified at sections 37-29-402 and 37-29-403, MCA.

COMMENT: A written comment was received from Dr. John McGregor, a physician in Great Falls, who stated that the rule amendment proposals were not aimed so as to provide the optimum care of the patient and that it was not right for a patient to wait twenty-eight days after the extraction of one tooth to add to an existing partial.

RESPONSE: The commentor misunderstands the purpose of the rule amendments. The requirement to wait twenty-eight days after the extraction of teeth to construct a denture applies to an immediate denture. No patient will have to wait twenty-eight days to add to an existing partial denture or to have a partial denture constructed and fit. All that is required is that the patient be seen by a dentist prior to the time the partial is done along with x-rays and study models so that the dentist can treat any underlying problems or provide any tooth cleaning that is necessary, and insure that there will be no complications with the addition of that particular tooth to the partial denture.

BOARD OF DENTISTRY
ROBERT RECTOR, D.M.D., PRESIDENT

BY: Annie M. Bartos
ANNIE M. BARTOS, CHIEF COUNSEL
DEPARTMENT OF COMMERCE

Annie M. Bartos
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, September 14, 1992.

BEFORE THE BOARD OF PHARMACY
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the adoption of new rules pertaining to wholesale drug distributors licensing	))))	CORRECTED NOTICE

TO: All Interested Persons:

1. On June 11, 1992, the Board of Pharmacy published a notice of proposed adoption of rules pertaining to wholesale drug distributors licensing at page 1178, 1992 Montana Administrative Register, issue number 11. Those new rules were adopted exactly as proposed at page 1754, 1992 Montana Administrative Register, issue number 15.

2. The new rules were numbered 8.40.1301 through 8.40.1306. Those numbers were already assigned to new rules pertaining to pharmacy technicians in a previous register. These new rules should have been numbered 8.40.1401 through 8.40.1406. Replacement pages for these rules are being prepared for the 9/30/92 date.

BOARD OF PHARMACY
ROBERT KELLEY, CHAIRMAN

BY: Annie M. Bartos
ANNIE M. BARTOS, CHIEF COUNSEL
DEPARTMENT OF COMMERCE

Annie M. Bartos
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, September 14, 1992.

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

In the matter of the amendment of rules pertaining to examinations, education requirements and fees	))))	NOTICE OF AMENDMENT OF RULES PERTAINING TO THE PRACTICE OF PUBLIC ACCOUNTING

TO: All Interested Persons:

1. On June 11, 1992, the Board of Public Accountants published a notice of public hearing to consider the proposed amendments of rules pertaining to the practice of public accounting, at page 1184, 1992 Montana Administrative Register, issue number 11. The hearing was held on August 3, 1992, at 1:00 p.m., at the Park Plaza, Helena, Montana.

2. The Board has amended ARM 8.54.402, 8.54.403, 8.54.405 and 8.54.410 exactly as proposed. The Board has amended ARM 8.54.408 as proposed but with the following changes:

"8.54.408 EDUCATION REQUIREMENTS (1) will remain the same as proposed.

(a) A candidate for ~~certification~~ EXAMINATION TO BE CERTIFIED OR LICENSED as a ~~certified~~ public accountant ~~or licensing as a licensed public accountant~~ who submits an application for an examination administered prior to July 1, 1997, or a candidate whose approved application for examination is still current under the provisions of ARM 8.54.405, or a candidate who applies by transfer of grades PRIOR TO JULY 1, 1997, must, PRIOR TO CERTIFICATION OR LICENSURE, have graduated from a college or university accredited to offer a baccalaureate degree, with a concentration in accounting, or

(i) through (c) will remain the same as proposed.

(2) A candidate submitting an application for an examination administered after July 1, 1997, or a candidate whose approved application for examination has expired and is making reapplication for an examination administered after July 1, 1997, or a candidate who applies by transfer of grades after July 1, 1997, for certification ~~as a certified public accountant~~ or ~~licensing~~ LICENSURE as a ~~licensed~~ public accountant must, PRIOR TO CERTIFICATION OR LICENSURE:

(a) through (5) will remain the same as proposed."

Auth: Sec. 37-50-203, MCA; IMP, Sec. 37-50-203, 37-50-302, 37-50-303, 37-50-305, MCA

3. The Board has thoroughly considered all comments and testimony received. Those comments and the Board's responses thereto follow:

COMMENT: Clinton J. Frazee, a professor of accounting at Montana State University, presented a letter signed by him and five other professors at the Montana State University College of Business in opposition to 8.54.408 as proposed for amendment. Their concern was that the rule as it was proposed

to be amended seemed to require that candidates for examination had to have completed their college education and could not take the examination before they had graduated.

RESPONSE: The Board accepted the comment and addressed the comment by amending language to state that the individual needed only to have completed his or her college education before he or she could receive the license or certificate. It was the Board's feeling that this amendment would allow the individual to sit for the examination but would not be eligible for licensure or certification until all requirements were met.

BOARD OF PUBLIC ACCOUNTANTS
SHIRLEY WAREHIME, C.P.A.,
CHAIRMAN

BY: Annie M. Bartos
ANNIE M. BARTOS, CHIEF COUNSEL
DEPARTMENT OF COMMERCE

Annie M. Bartos
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, September 14, 1992.

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

In the matter of the amendment of rules pertaining to reports, alternatives and exemptions and reviews and enforcement	)))	NOTICE OF AMENDMENT OF RULES PERTAINING TO THE PRACTICE OF PUBLIC ACCOUNTING

TO: All Interested Persons:

1. On June 11, 1992, the Board of Public Accountants published a notice of public hearing on the proposed amendment of rules pertaining to the practice of public accounting at page 1191, 1992 Montana Administrative Register, issue number 11. The hearing was held on August 3, 1992, at 2:00 p.m., at the Park Plaza, Helena, Montana.

2. The Board has amended ARM 8.54.905 and 8.54.906 exactly as proposed. The Board has amended ARM 8.54.904 as proposed but with the following changes:

"8.54.904 FILING OF REPORTS AND/OR WORKPAPERS (1) through (1)(d) will remain the same as proposed.

(2) The board may require a permit holder to submit workpapers prepared in support of the reports issued in (1)(a) above.

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

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

3. The Board has thoroughly considered all comments and testimony received. Those comments and the Board's responses thereto follow:

COMMENTS REGARDING AMENDMENT TO 8.54.904

COMMENT: Ron Foltz, CPA, a practitioner in Missoula, Montana, stated that he had chaired a committee that drafted these rules originally six years ago. At the time the rules were first drafted, the committee received advice that in addition to reviewing audits, reviews and compilations, the Board should have access to the accountant's work papers to determine if there was sufficient grounds for the opinions offered on the audits or reviews. Mr. Foltz stated that with changes in federal regulations there are now fewer individuals that are not subject to some sort of peer or quality review. He stated that in order to place individuals on a level playing field, those not receiving a quality or peer review would be subject to work-paper review. He stated that the basic issue was one of fairness and objectivity.

RESPONSE: The Board noted his comment and thanked him for presenting his viewpoint.

COMMENT: Dan Fenno, a CPA practicing in Helena, Montana, stated that it is possible, in his experience as a reviewer in the Profession Monitoring Program for an individual to provide

an audit report that is nicely displayed and has what appears to be a competent opinion published on it but without work papers to substantiate it, it is impossible to know whether that opinion is justified. He also stated that if practitioners realized that work papers were going to be included in profession monitoring reviews, they would insure that the work papers substantiated the opinions provided and that the work papers were competently prepared. Written comments expressing the same support were received.

RESPONSE: The Board thanked Mr. Fenno for his comment and noted it for its consideration and acknowledged receipt of the written comments.

COMMENT: Robert Wolfe, an LPA from Conrad, set forth the concerns of various individuals in regard to the proposed amendment to ARM 8.54.904. He asked for what sort of accounting work would the Board require that work papers be submitted, for audits, for reviews, or for compilations.

RESPONSE: The Board addressed this concern by changing the proposed amendment of the rule to insert reference to subsection (1)(a), which refers specifically to audits. It is the Board's intention that the rule apply strictly to audits, not to reviews or compilations.

COMMENT: Mr. Wolfe and various persons presenting written comment asked how the client's right of privacy would be protected if work papers were required to be submitted.

RESPONSE: The Board believes that the fact that the profession monitoring reviews are done in confidence will provide sufficient protection for the confidentiality of the work product.

COMMENT: Mr. Wolfe and various persons presenting written comment asked who would pay for the cost of these work papers if it was going to apply even to compilations and reviews.

RESPONSE: Those concerns were addressed by the Board's changes to the rule which now mandate inclusion of work papers for audit reports only. With the reduction in number of reports that would be reviewed because of peer or quality reviews, the cost of conducting a work-paper review would be absorbed by the current budget allocation for the Profession Monitoring Program.

COMMENT: Written comments were received from individuals stating that the cost of copying work papers and whiting them out to protect client's names and information would bear unreasonably upon small practice units and could work against the effect of these proposed rules since it might force certain individuals not to employ the services of a public accountant.

RESPONSE: The Board believes that by the amendment of the rule to apply only to audit reports the burden upon any practitioner will be relieved. The rule no longer would apply to compilations or reviews.

COMMENT: Various individuals submitted written comments stating that Continuing Professional Education (CPE) should be sufficient to attest to continuing competency so that review of work papers would not be required.

RESPONSE: A review of work papers under the Profession Monitoring Program would demonstrate if CPE courses have been absorbed and are being used.

COMMENT: A further concern was raised by Wayne Hoffman, a licensed public accountant from Billings, who asked what provisions there would be for the fact that the protection afforded by this Board of Public Accountants would be continued by future Boards of Public Accountants as regards confidentiality of documents and the requirement that work papers need be required only for audit reports.

RESPONSE: The purpose of the administrative hearing is to provide a record for future boards to use. The promulgation of this adoption notice will provide a record for future boards to use. The selection of persons to submit work papers would be done pursuant to the existing procedures used for the Profession Monitoring Program.

COMMENTS REGARDING AMENDMENT TO 8.54.905

COMMENT: Ron Foltz, CPA from Missoula, chairman of the committee that drafted the proposed amendment to ARM 8.54.905 stated that it was intended to include an acceptance copy of the oversight organization that monitors the quality reviews so that the quality reviewers' qualifications could be easily verified. The other portion of the rule provided that if it was an adverse or qualified quality review of the practitioner, the Board should have some authority to take disciplinary action against the practitioner.

RESPONSE: The Board noted Mr. Foltz's comments and thanked him for clarifying the rule proposal.

COMMENT: Paul Sepp, a certified public accountant in Missoula, suggested that individuals who are not members of the American Institute of Certified Public Accountants will not be able to receive quality reviews from the Montana Society of Certified Public Accountants. He suggested that the Board be willing to act as an oversight agency for such individuals.

RESPONSE: The Board acknowledged Mr. Sepp's comment but believes it is not the function of the Board to serve as an oversight agency. Rather, the appropriate body would be the Profession Monitoring Program.

COMMENTS REGARDING AMENDMENT TO 8.54.906

COMMENT: Dan Fenno, CPA from Helena, explained the proposed amendment to ARM 8.54.906, by stating that it has become unworkable to grade profession monitoring reports on four scales - everything from acceptable to acceptable with comment to marginal to deficient. In reality, he stated that there is no such thing as a marginal or acceptable with

comment report. The report is either acceptable or it is not. Similar statements were made by individuals submitting written comments.

RESPONSE: The Board acknowledged receipt of the comments.

COMMENT: Wayne Hoffman, LPA from Billings, stated that, in his opinion, nothing is perfect and that there should be a provision for marginal reporting or reports that are acceptable but that need to be commented upon. Similar comments were made by individuals submitting written comments.

RESPONSE: The Board stated that it would be possible to note that a report was acceptable and yet address concerns to the individual preparing it.

BOARD OF PUBLIC ACCOUNTANTS
SHIRLEY WAREHIME, C.P.A.
CHAIRMAN

BY: Annie M. Bartos
ANNIE M. BARTOS, CHIEF COUNSEL
DEPARTMENT OF COMMERCE

Annie M. Bartos
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, September 14, 1992.

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION
OF THE STATE OF MONTANA

In the matter of the amendment of rule relating to foundation payments	)))	NOTICE OF AMENDMENT OF ARM 10.20.202

To: All Interested Persons

1. On July 16, 1992, the Superintendent of Public Instruction published notice of proposed amendment of the rule referenced above at page 1447 of the 1992 Montana Administrative Register, issue number 13.

2. No public hearing was held nor was one requested. The Superintendent has received no written or oral comments concerning this rule.

3. Based on the foregoing, the Superintendent of Public Instruction hereby amends the rule as proposed.

Beda J. Lovitt
Rule Reviewer
Office of Public Instruction

Nancy Keenan
Superintendent
Office of Public Instruction

Certified to the Secretary of State September 14, 1992

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION
OF THE STATE OF MONTANA

In the matter of the amendment of rule relating to spending and reserve limits	NOTICE OF AMENDMENT OF ARM 10.22.104

To: All Interested Persons

1. On July 16, 1992, the Superintendent of Public Instruction published notice of proposed amendment of the rule referenced above at page 1449 of the 1992 Montana Administrative Register, issue number 13.

2. No public hearing was held nor was one requested. The Superintendent has received no written or oral comments concerning this rule.

3. Based on the foregoing, the Superintendent of Public Instruction hereby amends the rule as proposed.

Beda J. Lovitt
Rule Reviewer
Office of Public Instruction

Nancy Keenan
Superintendent
Office of Public Instruction

Certified to the Secretary of State September 14, 1992

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION
OF THE STATE OF MONTANA

In the matter of the repeal and adoption of rules pertaining to secondary vo-ed program requirements	))))	NOTICE OF REPEAL OF 10.44.201 THROUGH 10.44.210 RELATING TO SECONDARY VO-ED PROGRAM REQUIREMENTS

To: All interested persons

1. On August 13, 1992, the Superintendent of Public Instruction published notice of proposed repeal of the rules referenced above at page 1725 of the 1992 Montana Administrative Register, issue number 15.

2. No public hearing was held nor was one requested. The Superintendent has received written comments concerning these rules from Legislative Counsel staff. No other written or oral comments were received.

COMMENT:

. . . . Since OPI has published the "Standards and Guidelines for Secondary Vocational Education," staff suggests that the Superintendent adopt and incorporate them by reference in a rule.

RESPONSE:

The Superintendent of Public Instruction adopts the rule as follows:

10.44.211 STANDARDS AND GUIDELINES FOR SECONDARY VOCATIONAL EDUCATION (1) The superintendent of public instruction hereby adopts and incorporates by reference "Standards and Guidelines for Secondary Vocational Education," which sets forth standards for K-12 vocational education courses and programs. A copy of the Standards may be obtained from the State Director of Vocational Education Services, Office of Public Instruction, Room 106, State Capitol, Helena, Montana 59620.
(AUTH: 20-7-301, MCA; IMP: 20-7-303, MCA)

3. Based on the foregoing, the Superintendent of Public Instruction hereby repeals the rules as proposed and incorporates the above rule by reference.

Beda J. Lovitt
Rule Reviewer
Office of Public Instruction

Nancy Keenan
Superintendent
Office of Public Instruction

Certified to the Secretary of State September 14, 1992.

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

In the matter of the amendment of 16.16.101-104, 16.16.106, 16.16.111, 16.16.116, 16.16.301-305, 16.16.312, 16.16.601, 16.16.603, 16.16.605, 16.16.803-804 dealing with fee requirements for subdivision applications.	)	NOTICE OF AMENDMENT OF RULES (Subdivision Review & Fees)

To: All Interested Persons

1. On July 30, 1992, the department published notice at page 1556 of the Montana Administrative Register, Issue No. 14, to consider amendments to existing rules that implement the Sanitation in Subdivisions Act, Title 76, Chapter 4, MCA.

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 stricken is interlined):

16.16.101 DEFINITIONS (1)-(5) Same as proposed.

(6) "Floodplain" means the area adjoining the watercourse or drainway which would be covered by the floodwater of a flood of 100-year frequency except for sheetflood areas that receive less than one foot of water per occurrence and are considered zone b areas by the federal emergency management agency. The floodplain consists of the floodway and the floodfringe, as defined in ARM 36.15.101.

(6)-(27) Same as proposed.

16.16.102 APPLICATION -- GENERAL Same as proposed.

16.16.103 APPLICATION FORMS Same as proposed.

16.16.104 INFORMATION SUBMITTED WITH APPLICATION Same as proposed.

16.16.106 REVIEW PROCEDURES Same as proposed.

16.16.111 MOBILE HOMES AND RECREATIONAL CAMPING VEHICLES Same as proposed.

16.16.116 CERTIFICATION OF LOCAL DEPARTMENT OR BOARD OF HEALTH Same as proposed.

16.16.301 LOT SIZES Same as proposed.

16.16.302 PUBLIC WATER AND SEWER Same as proposed.

16.16.303 INDIVIDUAL WATER SUPPLY SYSTEMS Same as proposed.

16.16.304 INDIVIDUAL SEWAGE TREATMENT SYSTEMS Same as proposed.

16.16.305 MULTIPLE FAMILY SYSTEMS Same as proposed.

16.16.312 SUBDIVISIONS ADJACENT TO STATE WATERS Same as proposed.

16.16.601 WAIVERS -- DEVIATIONS (1) Same as proposed.

(2) The department may grant a deviation from the requirements of Department Circulars WQB-3, WQB-4, WQB-5, and WQB-6 if the applicant demonstrates to the department that strict adherence to the requirements is not necessary to protect public health and the quality of state waters.

(3) Department Circulars WQB-3 and WQB-4 are adopted by reference in ARM 16.16.101 and 16.16.305; WQB-5 in ARM 16.16.116 and 16.16.304; and WQB-6 in ARM 16.16.101 and 16.16.304.

16.16.603 SUBDIVISIONS IN MASTER PLANNED AREA Same as proposed.

16.16.605 EXCLUSIONS Same as proposed.

16.16.803 FEE SCHEDULES Same as proposed.

16.16.804 DISPOSITION OF FEES Same as proposed.

3. The department has thoroughly considered the comments received on the proposed rules. The following is a summary of the comments received, along with department responses to these comments.

COMMENT 1: The rules should allow DHES staff to authorize deviations from the requirements of Circulars WQB-3, WQB-4, and WQB-6.

RESPONSE: The department agreed and added appropriate language to the rule.

COMMENT 2: The definition of floodplain should be the same as that found in the Department of Natural Resources and Conservation (DNRC) regulations.

RESPONSE: The proposed definition almost matches that found in the DNRC regulations. DHES staff proposed an addition to the rule at the hearing to make the definition even more closely match DNRC's rule. That amendment is adopted as part of these rules.

COMMENT 3: Fill should be defined and the rules should be amended to disallow any septic systems in fill within floodplain areas.

RESPONSE: The department feels that the lay definition of fill is sufficient. Also, ARM 16.16.304(15) and Department Circular WQB-4 disallow any non-public sewage treatment system within 100 feet of the floodplain unless the bottom of the system is four feet above the floodplain elevation. The department feels that this requirement adequately protects water quality. In addition, DNRC regulations disallow any sewage treatment system within the floodway.

DENNIS IVERSON, Director

Certified to the Secretary of State September 14, 1992.

Reviewed by:

Eleanor Parker, DHES Attorney

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

In the matter of the adoption of rules I through VI dealing with minimum standards for on-site subsurface wastewater treatment	))))	NOTICE OF ADOPTION OF NEW RULES I THROUGH VI (Water Quality Bureau)

To: All Interested Persons

1. On March 26, 1992, the board published a notice at page 513 of the 1992 Montana Administrative Register, Issue No. 6, of the proposed adoption of the above-captioned rules.

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

RULE I (16.17.101) SCOPE Same as proposed.

RULE II (16.17.102) GENERAL REQUIREMENTS (1) Same as proposed.

(2) If a department-approved public collection and treatment system is readily available for connection to ~~the~~ a new source of wastewater or as a replacement for a failed treatment system, and the owner of the public collection and treatment system approves the connection, wastewater must be discharged to the system.

(3) Same as proposed.

RULE III (16.17.103) DEFINITIONS (1)-(10) Same as proposed.

(11) "Innovative alternative system" means a new device, not discussed in department rules or circulars, that provides primary and secondary treatment and ultimate disposal of the wastewater. Innovative alternative systems include corrugated chamber systems~~,~~ and gravel-less corrugated pipe systems~~, and package plant systems~~.

(12)-(20) Same as proposed.

RULE IV (16.17.104) TECHNICAL REQUIREMENTS (1) Same as proposed.

(2) Other on-site wastewater treatment systems may only be allowed if site constraints prevent the applicant from constructing a system that meets the requirements of section (1), and all off-site treatment alternatives have been considered and determined to be infeasible. ~~These systems must be authorized under a variance procedure that ensures~~ The following on-site wastewater treatment systems must be designed so that the requirements of section (3) are met, and that the following specific requirements, as applicable, are fulfilled:

(a) Innovative alternative systems may be used for replacement systems only and must provide primary treatment

(removal of settleable solids) and secondary treatment (stabilization of effluent from primary treatment).

(b) Absorption beds may be used for replacement systems only and may not be constructed in unstabilized fill.

(c) Seepage pits may be used for replacement systems only, may only be constructed in situations where groundwater is shown to be a minimum of 25 feet below the proposed bottom of the seepage pit, and may not be used in environmentally vulnerable areas or areas of ~~high permeability~~ highly permeable soils.

(d)-(e) Same as proposed.

(3) Same as proposed.

RULE V (16.17.105) VARIANCE APPEALS TO THE DEPARTMENT Same as proposed.

RULE VI (16.17.106) LOCAL VARIANCES Same as proposed.

4. The Board has thoroughly considered the comments received on the proposed rules. The following is a summary of comments received, along with responses to these comments.

COMMENT: The county authorities should be allowed to permit drainfields within 100 feet of the 100 year floodplain if site conditions do not allow for a 100-foot separation.

RESPONSE: The rules as written allow such variances at the county level if approved by the local board of health. The local board of health's approval is necessary because the 100-foot separation requirement is an important public health criterion.

COMMENT: County staff should be allowed to vary from standards without going through a variance procedure if a system has failed and site conditions cannot accommodate all standard requirements.

RESPONSE: The proposed rules were revised to allow county sanitarians to permit the construction of certain less restrictive systems as replacements for failed systems if certain strict criteria are met. These criteria include a prerequisite that all off-site treatment alternatives have been evaluated and determined to be infeasible. If these criteria cannot be met, the rules then require that the local Board of Health authorize a variance prior to local approval.

COMMENT: Buildings with existing on-site systems that are functioning properly should not be required to connect to municipal systems that are nearby and readily available.

RESPONSE: This section was not clearly worded. The wording has been amended to require connection only for new buildings or as a replacement for a failed system.

COMMENT: Inspections of on-site wastewater treatment system installations should be mandatory for all counties.

RESPONSE: Some counties argued that this requirement would be infeasible and unnecessary for larger areas with low population density. If a county decides that such a requirement is necessary, its individual regulations can require such an inspection.

COMMENT: Package plant systems should not be considered as innovative alternative systems.

RESPONSE: A package plant system is too complex for the homeowner to maintain, and therefore is withdrawn as a permissible innovative alternative system.

COMMENT: Sand filter systems should not be considered experimental and should be allowed in areas with separation to groundwater of less than 4 feet. Other comments stated that the 4-foot requirement should not be altered.

RESPONSE: Sand filter systems are listed in the experimental category because of the complexity of their design. The minimum separation conforms with existing Department subdivision regulations which were based on evidence of the separation necessary to prevent contamination of groundwater. If a county desires to allow less separation in some circumstances, its Board of Health may do so consistent with these rules by allowing a variance.

COMMENT: State variances should be based on minimum standards only, and not the county's more stringent regulations.

RESPONSE: If state actions on variance appeals were based on state requirements only, any more stringent county regulations would be continuously appealed to the state, rendering them useless. Thus, the legislation is interpreted to require the Department to apply county requirements to variance appeals.

COMMENT: Some septic tank dimensions were contested, and other technical issues were raised in regard to various wastewater systems.

RESPONSE: Changes are made to accommodate most comments. However, the length-to-width ratio was not changed because proper sedimentation is best achieved by the proposed ratio. The 2-inch vertical separation between the inlet and outlet inverts in a septic tank was not deleted because the requirement conforms with regional (i.e., Ten States) guidelines.

RAYMOND W. GUSTAFSON, Chairman
BOARD OF HEALTH AND
ENVIRONMENTAL SCIENCES

by _____
DENNIS IVERSON, Director

Certified to the Secretary of State September 14, 1992 .

Reviewed by:

_____
Eleanor Parker, DHES Attorney

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

In the matter of the amendment of rules 16.20.401 and 16.20.402 and adoption of new Rules I and II dealing with plan and specification review for small water and sewer systems and review fees, and repeal of 16.20.405, concerning drilling of water wells	NOTICE OF AMENDMENT OF RULES, ADOPTION OF NEW RULES AND REPEAL OF 16.20.405 (Water Quality Bureau)

To: All Interested Persons

1. On March 26, 1992, the board published notice at page 505 of the 1992 Montana Administrative Register, Issue No. 6, to consider the amendment of rules 16.20.401 and 16.20.402, the adoption of new rules I and II, and the repeal of rule 16.20.405.

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

16.20.401 PLANS FOR PUBLIC WATER SUPPLY OR WASTEWATER SYSTEM (1)-(3) Same as proposed.

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

(c) The design report, plans and specifications for all wastewater systems, except non-community sewage systems and other public subsurface sewage treatment systems, must be prepared and designed by a professional engineer in accordance with the format and criteria set forth in the Great Lakes-Upper Mississippi River Board of State Sanitary Engineers Recommended Standards for Sewage Works, also known as the Ten State Standards, ~~1988~~ 1978 edition, published by the Health Education Service, Inc., P. O. Box 7126, Albany, New York, 12224. The design report, plans and specifications for a wastewater system must also be designed to protect public health and ensure compliance with the Montana Water Quality Act, Title 75, Chapter 5, MCA, and rules adopted under the act, including ARM Title 16, chapter 20, subchapter 7.

(d)-(g) Same as proposed.

(5) Upon receipt of a submittal or resubmittal under section (4), the department shall provide a written response to the applicant within 60 days that either approves the submittal, approves the submittal with conditions, describes additional information that must be submitted to the department, or denies the proposal.

(5)-(6) Same as proposed but are renumbered (6)-(7).

~~(7)~~(8) The applicant shall not deviate from the approved plans and specifications without first receiving ~~department~~ approval from the governmental entity that approved the plans and specifications.

(8)-(10) Same as proposed but are renumbered (9)-(11).

(11)(a) Same as proposed but is renumbered (12)(a).

(i) Same as proposed.

(ii) The Great Lakes-Upper Mississippi River Board of State Sanitary Engineers, Recommended Standards for Sewage Works, ~~1980~~ 1978 edition, also known as the "Ten States Standards", published by the Health Education Service, Inc., P. O. Box 7283, Albany, New York, 12224, which sets forth the requirements for the design and preparation of plans and specifications for sewage works.

(iii)-(v) Same as proposed.

(b) Same as proposed.

16.20.402 CROSS CONNECTIONS Same as proposed.

RULE I (16.20.406) DELEGATION OF REVIEW OF SMALL PUBLIC WATER AND SEWER SYSTEM PLANS AND SPECIFICATIONS Same as proposed.

RULE II (16.20.407) FEES (1) Same as proposed.

(2) Fees for review of plans and specifications are based on subsections (a)-(f) and section (3). The total fee for the review of a set of plans and specifications is the sum of the fees for the applicable parts or sub-parts listed in these citations. ~~Review~~ Approval will not ~~commence~~ be given until fees calculated under this rule have been received by the department.

(a) The fee schedule for designs requiring review for compliance with department Circular WQB-1, 1992 edition, is set forth in Schedule I, as follows:

SCHEDULE I

~~Part~~ Section 3.1 Surface water quality and quantity	$ 100
structures	$ 50
~~Part~~ Section 3.2 Groundwater	$ 275
~~Part~~ Section 4.1 Clarification standard clarification	$ 250
solid contact units	$ 500
~~Part~~ Section 4.2 Filtration rapid rate	$ 625
pressure filtration	$ 475
diatomaceous earth	$ 475
slow sand	$ 475
~~Part~~ Section 4.3 Disinfection	$ 100
~~Part~~ Section 4.4 Cation exchange softening	$ 150
~~Part~~ Section 4.5 Aeration natural draft	$ 100
forced draft	$ 100
~~Part~~ Section 4.6 Iron and manganese control-sequestering	$ 100
~~Part~~ Section 4.8 Stabilization CO_2 addition	$ 150
~~Part~~ Section 4.9 Taste and odor control	

powdered activated carbon.....$ 100
~~Part~~ Section 4.11 Waste disposal
alum sludge.....$ 125
lime softening sludge.....$ 125
red water waste.....$ 125
~~Part~~ Chapter ~~5.0~~ Chemical application.....$ 250
~~Part~~ Chapter ~~6.0~~ Pumping facilities.....$ ~~300~~ 200
~~Part~~ Section 7.1 Plant storage.....$ 175
~~Part~~ Section 7.2 Hydropneumatic tanks.....$ 50
~~Part~~ Section 7.3 Distribution storage.....$ 175
~~Part~~ Chapter ~~8.0~~ Distribution system
< 1320 lineal feet with standard specs.....$ ~~100~~ 50
< 1320 lineal feet without standard specs...$ 225
> 1320 lineal feet with standard specs.....$ ~~150~~ 100
> 1320 Lineal feet without standard specs...$ 275
Main extension certified checklist.....$ 25

(b) The fee schedule for designs requiring review for compliance with Recommended Standards for Sewage Works, ~~1988~~ 1978 edition, is set forth in Schedule II, as follows:

SCHEDULE II

~~Part~~ Chapter 20 Sewer collection system
< 1320 lineal feet with standard spec.....$ ~~100~~ 50
< 1320 lineal feet without standard spec....$ 225
> 1320 lineal feet with standard spec.....$ ~~150~~ 100
> 1320 lineal feet without standard spec....$ 275
Sewer extension certified checklist.....$ 25
~~Part~~ Chapter 30 Sewage pumping station
100 gpm or less.....$ ~~450~~ 250
greater than 100 gpm.....$ ~~625~~ 500
~~Part~~ Chapter 50 Screening grit removal.....$ 500
~~Part~~ Chapter 60 Settling.....$ 400
~~Part~~ Chapter 70 Sludge handling.....$ 800
~~Part~~ Chapter 80 Biological treatment.....$1200
~~Part~~ Chapter 90 Disinfection.....$ 250
~~Part~~ Chapter 100 Wastewater treatment ponds (lagoons)
non-aerated.....$ 400
aerated.....$ 700

(c) The fee schedule for designs requiring review for compliance with department Circular WQB-4, 1992 edition, is to be determined under Schedule III, as follows:

SCHEDULE III

~~Part~~ Chapter 20 Sewers.....$ 50
~~Part~~ Chapter 50 Septic tank.....$ ~~100~~ 50
~~Part~~ Chapter 30,40 & 60 Subsurface treatment
gravity.....$ ~~200~~ 150
dosed.....$ 250

(d) The fee schedule for designs requiring review for compliance with department Circular WQB-3, 1992 edition, is to be determined under Schedule IV, as follows:

SCHEDULE IV

~~Part~~ Section 3.2 Groundwater.....$ 250
~~Part~~ Chapter ~~6.0~~ Pump facilities.....$ 100
~~Part~~ Chapter ~~8.0~~ Distribution system.....$ 100

(e)-(f) Same as proposed.

(3)-(4) Same as proposed.

(5) When a resubmitted set of plans and specifications contains substantial changes in the design that require the plans and specifications to be reviewed again, the department may require an additional review fee. The additional fee will be calculated in the same manner as the original fee and based on those parts of the standard that must be reviewed again due to the change in design. The department shall give notice and provide for appeal as specified under 75-6-108(5), MCA.

3. The department has repealed 16.20.405 as proposed.

4. 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 responses.

COMMENT 1: Concern was expressed about the use of fees to finance plan review.

RESPONSE: Both the 1991 Legislature and the Public Water Supply Task Force determined that fees are the most viable funding mechanism for plan review. The legislature required the assessment of fees for plan review, as stated in Section 75-6-108(3), MCA.

COMMENT 2: How do services funded by the plan review fees interface with other program functions funded by the service connection fees?

RESPONSE: The service connection fees are intended to allow the state to maintain primacy over current federal regulations and maintain certain state preventive functions such as training and technical assistance. The plan review fees fund only plan review activities. These fees allow the review function to be self sufficient and ensure that it is funded by those that require such services.

COMMENT 3: How does staff time supported by the proposed plan review fees interface with those supported by the service connection fee?

RESPONSE: Four staff engineers spend approximately one third to one half of their time on plan review. Two other engineers conduct plan review as other responsibilities allow. Other job responsibilities for staff engineers are primarily funded with Resource Indemnity Trust interest proceeds and federal funds,

and to some extent from the service connection fee.

COMMENT 4: More efficient plan review was used to justify the service connection fees. Why are plan review fees now being proposed?

RESPONSE: The department, public water supply task force, and legislature have consistently reported the need for both plan review fees and service connection fees to completely implement the program.

COMMENT 5: How much revenue will be generated from the proposed fees?

RESPONSE: The estimated total income will be $72,000, which will support 1.3 FTEs. Based on department estimates, between $93,000 and $110,000 per year is devoted to plan review. The program must review over 250 projects each year, maintain design standards for a variety of public infrastructures, provide technical assistance, maintain records, and develop review policy. Establishing fees to recover sufficient funds for only 1.3 FTEs is reasonable and efficient.

COMMENT 6: The department based its fee on an engineering cost of $26 per hour. Dividing the fees proposed in the schedule by $26 per hour results in review times for certain projects that appear excessive. It's hard to believe these fees are commensurate with the cost of reviewing a particular project unless unqualified individuals are conducting the review.

RESPONSE: Dividing the fee for a particular project by the engineering cost per hour ($26/hr) does not represent the review time for a typical project. The fees must be based on the average review time which includes significant time associated with reviewing poor project submittals, difficult site conditions and those applicants that do not want to satisfy the standards. Further, the fees are adjusted to account for the time associated with standards development, deviations, and program administration necessary for an effective plan review program. With regard to staff qualifications, most of the staff engineers have P.E. licenses and master's degrees. Further, the staff's engineering experience on average exceeds ten years.

COMMENT 7: Do the fees reflect the true cost to the department for plan review?

RESPONSE: As explained in the response to comment 5, the proposed fees are the department's best estimate as to the average costs of review. Some amendments are made for certain systems based on the department's reevaluation of average costs of review for those systems.

COMMENT 8: Previous department correspondence indicated that

the fees would be assessed at 50% of cost. Now, the fees are proposed at 75% of cost. Does this represent a 25% increase in revenue above what EPA is already providing for plan review?

RESPONSE: No. EPA does not provide the department with any special funds for plan review. The department has simply decided to use some EPA funds to support plan review because EPA considers plan review when granting primacy and use of EPA money would reduce the impact of the fees. Section 75-6-108, MCA, authorizes the department to recover all of the costs associated with plan review.

COMMENT 9: The fees are primarily aimed at generating funds to match EPA grants and are not tied to particular water quality or public health issues.

RESPONSE: EPA grant money is matched with other revenue, and will not rely on a match from the proposed fees. Minimum design standards and the enforcement of those standards through plan review encourages the construction of quality infrastructure, which positively impact the quality of state waters and public health.

COMMENT 10: The plan review fee should be based on the size of the community or the value (construction cost) of the project.

RESPONSE: The cost to the department is primarily a function of the complexity of the project and the quality of the submitted plans rather than the size of the community, the size of the project, or the value of the project. Basing the fees on community size or project value would not reflect the true cost to the department.

COMMENT 11: The following language should be added to the fee schedule: "The department shall notify the owner of a public water supply system in writing of the amount of the fee to be assessed and the basis of the assessment. The owner may appeal the fee assessment in writing to the board within 20 days after receipt of the written notice".

RESPONSE: The department amended Rule II to reference the appeal requirement, as set out in Section 75-6-108, MCA.

COMMENT 12: The rules should not allow fee assessment for resubmitted projects.

RESPONSE: The proposed rule language only authorizes the department to assess additional fees for those parts of a project resubmittal that contains design changes.

COMMENT 13: The fee for a 1000 ft. water main extension with standard specifications might be as high as $500.00.

RESPONSE: No. The fee for a water main as described above will be $50.00.

COMMENT 14: Will local governments with review authority delegated to them have to pay state fees if they review their own plans?

RESPONSE: No, because the department will not bear any review costs.

COMMENT 15: Projects may be reviewed under several circulars, which will make fee assessment confusing and potentially conflicting.

RESPONSE: This will not be a problem for circulars governing community public water systems and most community wastewater systems. However, the circulars governing non-community water and wastewater and a few community systems using drainfields reference other department circulars. Where these references are made, they are very clear, making it relatively easy to assess fees. Also, projects subject to subdivision fees will not be assessed plan review fees.

COMMENT 16: The department should respond to plan submittals within a specified timeframe.

RESPONSE: The department revised ARM 16.20.401 to require an initial response within 60 days of receipt of the plans by the department. This is equivalent to the time period required in subdivision review.

COMMENT 17: The design standards may be more stringent than necessary.

RESPONSE: The design standards are nationally accepted and have been used by the department for many years. The standards are used by many states as minimum design standards and are based on science and sanitary practice. They are widely accepted by public health professionals as the minimum required to ensure protection of public health, pollution prevention and protection of the public's investment in infrastructure. In addition, applicants through their engineers can justify and obtain a deviation from the standards where such standards are not necessary for the protection of public health.

COMMENT 18: Plan review turnaround time may be more of a problem with the system rather than resource limitations. Why can't projects be reviewed within 30 days and what is the average turnaround?

RESPONSE: The department's log book indicates that the average initial response is 35 days. The majority of the projects are approved within 20 to 30 days after initial response; many are approved upon first review. About 25% of the projects get

bogged down in the system. Generally, this is because insufficient information was provided, difficult site conditions exist, or an applicant is unwilling to satisfy the standards. The department acknowledges that excessive staff workloads because of the expansive requirements of new federal drinking water regulations have increased turnaround for plan review. Steps are being taken to correct this problem by streamlining the review process in certain areas and delegating plan review responsibilities to qualified local governments.

COMMENT 19: The department should certify professional engineers to conduct water and sewer design and eliminate plan review.

RESPONSE: Public water supply law requires the department to review and approve plans. To accommodate this desire, the law would have to be amended.

COMMENT 20: Is it necessary to locate potential sources of contamination within a 2500 ft. radius of the well?

RESPONSE: Several wells in the state are currently contaminated because they were located close to potential sources of contamination such as underground storage tanks, drainfields, grease pits, etc. In many cases, the source of contamination was a half a mile or greater away from the contaminated well. The cost to properly locate a well to avoid such contamination is much less expensive than having to abandon the well and drill a new one at a later date.

COMMENT 21: An inconsistency exists between sections 3.2.3.1 and 3.2.3.2 of Circular WQB-3. Section 3.2.3.1. allows sewage systems within 50 ft. of a public well, yet 3.2.3.2 requires continued protection through ownership, leasing, etc. within 100 ft.

RESPONSE: The 100 ft. radius is intended to provide control so adjacent property owners cannot undertake activities or projects on their property that will result in contamination of the public water well. However, the 100 ft. radius does not preclude locating a new well closer to an existing sewer, if no other options are available. Practical considerations may force locating a new well as close as 50 ft. to an existing sewer, but it is not encouraged.

COMMENT 22: Will fees be charged for the review of design reports?

RESPONSE: Costs of this review are included in the Schedules set forth in Rule II.

COMMENT 23: Will direct filtration and pressure filters be allowed?

RESPONSE: Yes. Direct filtration was removed from the fee schedule because it is a process, not a specific filtration method. Pressure filters are generally rapid sand filters.

COMMENT 24: Continuous disinfection of shallow wells less than 25 ft. deep should not be mandatory. Such a determination should be based on aquifer characteristics and coliform tests.

RESPONSE: The current standard is based on aquifer characteristics. In most cases, wells less than 25 ft. in depth are drilled in an unconfined (water table) aquifer which is very vulnerable to surface water contamination. In those unique cases where a shallow well is protected with a confining layer, a deviation from the standards can be requested to avoid disinfection.

COMMENT 25: Section 3.2.5.6.c. of Circular WQB-3 requires the top of the well to be above the 100-year flood elevation. The 25-year flood elevation is recommended.

RESPONSE: If the 100-year elevation is too conservative in a particular situation, the applicant can request a deviation.

COMMENT 26: Although the City of Great Falls generally supports Rule I, it objects to section 1(b), which limits delegation to local governments to projects serving 50 or fewer service connections. The City would like to see this authority extended to 150 service connections.

RESPONSE: Section 75-6-121, MCA, only allows the department to delegate review to local government of projects of 50 or fewer service connections. Any expansion of this authority would require a change in the law.

COMMENT 27: A conflict between section (2) of Rule II and section (3) exists, relating to fee collection as a prerequisite for department review.

RESPONSE: The department has removed this apparent conflict by adding language that allows review to commence before receipt of fees, but approvals will not be issued until the fees are received.

COMMENT 28: The rules should allow the use of purchase orders and warrants to pay plan review fees.

RESPONSE: Specific language is not necessary to allow the use of purchase orders. Warrant transfers between state agencies is also an option that does not require specific language in the rule.

COMMENT 29: Change Section 7.1.2.a of Circular WQB-3 to provide that the design must ensure that the capacity of the wells, pump outputs and hydropneumatic storage meets the peak

instantaneous demand.

RESPONSE: The existing language will eliminate deficient systems that are currently based on common design misconceptions.

COMMENT 30: ARM 16.20.401(8) should be amended to allow the governmental entity that reviews a public wastewater or water supply system to authorize a deviation. Under the present rule only the department could authorize a deviation.

RESPONSE: ARM 16.20.401(8) is amended to accommodate the comment.

COMMENT 31: Rule 16.20.401 should retain the 1978 Ten State Standards for now, since a new circular will be adopted in a few months that will provide a current (1992) update for technical standards.

RESPONSE: The amendment is made accordingly.

COMMENT 32: In Rule II, change "Part" to "Section" or "Chapter" to be consistent with national Ten States Standards.

RESPONSE: The amendments are made accordingly.

RAYMOND W. GUSTAFSON, Chairman
BOARD OF HEALTH AND
ENVIRONMENTAL SCIENCES

by _____
DENNIS IVERSON, Director

Certified to the Secretary of State September 14, 1992.

Reviewed by:

_____
Eleanor Parker, DHES Attorney

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

In the matter of the proposed amendment of rules 16.44.102, 16.44.120, 16.44.202, 16.44.304, 16.44.415, 16.44.609, and new Rule I dealing with wood preserving operations.	NOTICE OF AMENDMENT OF RULES AND ADOPTION OF NEW RULE I (16.44.350) (Solid & Hazardous Waste)

To: All Interested Persons

1. On July 30, 1992, the department published a notice at page 1547 of the 1992 Montana Administrative Register, Issue No. 14, of the proposed amendment of the above-captioned rules and the adoption of new rule I.

2. After consideration of the comments received on the proposed rules, the department has adopted the rules as proposed with no changes.

3. The Department received no written comments. A public hearing was held on August 26, 1992. Two people provided oral testimony at the hearing. One comment was in support of the rules and one spoke in opposition to the rules. The following is a summary of comments received, along with responses to those comments.

COMMENT: Fred Menzik, an operator of a wood treatment facility from Thompson Falls, spoke in opposition to the proposed amendments and rule. He stated that, in his opinion, pentachlorophenol, the chemical used for wood treating, has not been shown by the EPA to be carcinogenic and harmful to human health. He stated his belief that research performed by the EPA was outdated and inconclusive.

RESPONSE: The Department does not have the staff to establish health based risk assessments independently of federal agencies, specifically the EPA. Wood treating rules addressing the hazardous nature of the waste generated by the treatment process are reasonable in light of federal findings, and the state has no data with which to contradict EPA research and practice. The Department will continue to monitor federal EPA rulemaking and will make appropriate changes should industry practices and federal rules change.

COMMENT: Harold Bouma, a wood treater from Choteau, spoke generally in favor of the proposed rules. He expressed his dissatisfaction at his profession being regulated by federal agencies, and, while he may disagree with some of the results of the rulemaking process, he was in agreement with the State of Montana maintaining primacy with its hazardous waste program.

RESPONSE: The Department agrees with Bouma's opinion. No rule changes need be made in response to his comments.

DENNIS IVERSON, Director

Certified to the Secretary of State September 14, 1992 .

Reviewed by:

Eleanor Parker, DHES Attorney

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

In the matter of the amendment of rules 16.44.202, 16.44.303, 16.44.305, and 16.44.911 dealing with definitions related to hazardous waste regulation, requirements for counting hazardous wastes, and the issuance and effective date of permits.	NOTICE OF AMENDMENT OF RULES (Hazardous Waste)

To: All Interested Persons

1. On August 13, 1992, the department published a notice at page 1736 of the 1992 Montana Administrative Register, Issue No. 15, of the proposed amendment of the above-referenced rules.

2. The department has amended the rules as proposed with no changes.

3. No comments were received.

DENNIS IVERSON, Director

Certified to the Secretary of State September 14, 1992.

Reviewed by:

Eleanor Parker, DHES Attorney

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
OF THE STATE OF MONTANA

In the matter of the Amendment of Montana's Prevailing Wage Rates, pursuant to Rule 24.16.9007	))))	NOTICE OF ADOPTION BY REFERENCE OF PREVAILING WAGE RATES

TO: All Interested persons:

1. On April 30, 1992, the Department of Labor and Industry published Notice of Public Hearing on proposed amendments to the prevailing wage rates. The notice can be found on page 873 of the 1992 Montana Administrative Register, Issue No. 8.

2. On May 22, 1992, a public hearing was held at the Department of Transportation Building in Helena, Montana, to consider proposed amendments to the prevailing wage rates.

3. Thirteen persons attended the hearing. Eleven persons registered with name and affiliation listed. Oral testimony was presented by six opponents. The Presiding Officer received written comments from persons present at the hearing and advised the participants that they were allowed to submit additional comments or questions through May 29, 1992 to the Research and Analysis Bureau, Research, Safety and Training Division, Department of Labor and Industry, P.O. Box 1728, Helena, Montana 59624.

COMMENT: Mr. Ron D. Crawford, representing the Boilermakers Union, asked why the department had not calculated the vacation benefit on hours paid instead of hours worked.

RESPONSE: The wording of this part of the prevailing wage rule has been in effect for many years and appears in all the prevailing rate publications since 1986. It probably originated from the many union contracts that include this wording. Mr. Crawford is correct that the boilermaker's collectively bargained contract specifies that vacation is paid at hours paid, not hours worked. The Department received no other data other than that provided by Mr. Crawford, so it does appear that collectively bargained rates paid during the survey period prevail. The department concurs that, in the case of Boilermakers, vacation and the annuity can be included in overtime calculations. For ease of calculation, both will be included under vacation in the publication.

COMMENT: Mr. Ken Dunham, Manager of the Montana Contractors Association presented letters from Doden Construction, A-1 Paving and Portable Pavers, Inc., all Montana contractors, objecting to the proposed rates in general and the methodology used to derive them. Mr. Dunham also introduced information for benefit rates paid by non-collective bargaining employers into the Montana Contractors

Association Trust. Mr. Dunham continued with the Montana Contractors Association's concerns alluding to a large segment of the construction industry in Montana that did not receive survey forms, asking for information on how many firms were contacted and how firms were selected.

RESPONSE: The department concurs that the health and welfare and pension data submitted from the Montana Contractor's Trust should be weighted into the benefits rates calculations. This was done for those occupations covered under the trust. Mr. Dunham was contacted and asked to submit any additional data, though none was forthcoming. The survey form to determine prevailing wage rates was mailed to 2250 Montana contractors whose Standard Industrial Classification for Unemployment Insurance purposes was either SIC 15, General Contractors and Operative Builders, or SIC 17, Special Trade Contractors. Major group SIC 16, Heavy-Highway Contractors, were not contacted since the department accepts Federal Davis-Bacon rates for public works Heavy-Highway construction. The department feels that surveying these employers would be an unnecessary duplication of effort and an additional burden on employers. 1248 Montana contractors responded and 556 submitted usable data. In addition, many contractors elected to have collective bargaining units submit data from pension reports. All of the data, covering both private and public construction, weighted by hours worked, was computer compiled to produce the proposed rates.

COMMENT: Mr. Eugene Fenderson, representing the Montana Council of Laborers, expressed concerns regarding the wage rates for Laborers in all districts and the handling of vacation pay in published rates.

RESPONSE: Mr. Fenderson submitted additional data for laborers and that information was weighted into the calculation of the laborer's rate.

COMMENT: Mr. Ron James, representing Ironworkers Local #841 and #598 asked the scope of the sample period, outlined the jurisdiction of both collective bargaining units, and their collective bargaining rates.

RESPONSE: When the department originally set up the prevailing wage districts, as mandated by law, it was obvious that no matter how the state was divided, there would be some overlapping of collective bargaining units. For the purposes of prevailing wage, the department weights the information from all employers to determine the prevailing rate. The pension rate for districts covered by Local #598 and the pension rate for Local #841 were corrected to include the annuity trust funds specific to each local and the mileage rate for Local #841 was increased to $28.00 based on information provided by Mr. James. While data for ironworkers indicates that a very large proportion of this type of work is done by collective bargaining unit workers, both non-union and union employers submitted data. Therefore, the prevailing rate may not equal collectively bargained rates in all districts.

COMMENT: Mr. Walt Morris, representing Bricklayers Local #10, opposed the rates in his area as too low and proposed combining the occupations of Tile Setter, Stone Mason, and Bricklayer, into a single bricklayer classification. Both the union and employers tend to lump all under a single rate of pay. Mr. Morris also indicated that benefits for bricklayers are for hours paid not hours worked and submitted additional data.

RESPONSE: The department concurs that bricklayers should be a single classification since the rate is same. Bricklayer rates in districts 7, 8, 9, and 10 were adjusted based on data submitted by Mr. Morris. Bricklayer benefits, like those of Boilermakers, will be based on hours paid.

COMMENT: Mr. Ron Senger, Representing Sheet Metal Workers Local #103 objected to the proposed rates as different from his collectively bargained rates. He promised to submit additional data to substantiate his claim.

RESPONSE: Mr. Senger's contention that the proposed rates differ from his collectively bargained rates is correct because of a low response rate from sheet metal employers in several districts. Mr. Senger did submit additional data that was weighted into the calculation of sheet metal worker's rates. However, because of a mix of employers, both union and non-union, the prevailing wage rate in some districts may not equal the collectively bargained rate.

THE FOLLOWING COMMENTS WERE RECEIVED IN WRITING BY THE RESEARCH AND ANALYSIS BUREAU.

COMMENT: The Department of Administration, Purchasing Bureau, requested an interim rate for Elevator Constructors and that a permanent rate be established.

RESPONSE: The department concurs with this request and established rates for Elevator Constructor/Repairer under the general classification of Electricians for all districts.

COMMENT: Mr. Don Halverson, representing Plumbers Local #459 submitted data for plumber work in Districts 1 & 2.

RESPONSE: Data submitted by Mr. Halverson was weighted into the rate calculation for these districts.

COMMENT: Mr. Arnold A. Mohl, A-1 Paving, wrote expressing his concerns about the prevailing wage process and included rates for laborers, operators and teamsters.

RESPONSE: While the department appreciates the information submitted by this employer, part was for city and county workers and none included hours worked. Since wage data must include hours worked, the department was unable to weight this data into the wage calculation for these occupations.

COMMENT: Mr. John Hirshfelder, representing Northern Sound & Communications, submitted data for Communications Technicians in districts 1 & 2.

RESPONSE: Data submitted by Mr. Hirshfelder was weighted into the calculation for this occupation.

COMMENT: Mr. Lars Erickson, representing the Montana State Council of Carpenters, submitted additional data for District 5.

RESPONSE: The department weighted the data submitted by Mr. Erickson into the calculation of carpenter rates in District 5.

COMMENT: Mr. Paddy Dennehy, representing the Carpenters Local #112, submitted additional data for District 3.

RESPONSE: The data submitted by Mr. Dennehy was weighted into the calculation of carpenter rates in District 3.

COMMENT: Mr. G. Bruce Morris, representing Carpenters Local #28, submitted additional data for District 2.

RESPONSE: The data submitted by Mr. Morris was weighted into the calculation of carpenter rates for District 2.

COMMENT: Mr. Michael Mizenko, representing Plumbers Local #139, submitted additional data for District 4.

RESPONSE: The data submitted by Mr. Mizenko was weighted into the calculation of plumbers rates for District 4.

COMMENT: Mr. Kent Pellegrino, representing the National Electrical Contractors Association, submitted hours worked and a schedule of collectively bargained rates for electricians by district.

RESPONSE: The department was unable to weight the data submitted by Mr. Pellegrino into the calculation of electrician rates in any district as the hours were not by contractor. Without this information, we could not check for duplicate submissions. We could, however confirm data submitted by collective bargaining units.

COMMENT: Mr. Bob Murphy, representing IBEW #185, submitted additional data for District 5.

RESPONSE: The data submitted by Mr. Murphy was weighted into the calculation of electrician data for District 5.

COMMENT: Mr. L. Don Rogers, representing Operating Engineers Local #400, submitted a list of contractors who have verbally agreed to sign the Pattern Agreement and Operator's Addendum as well as an agreement signed by R. H. Grover, Inc.

RESPONSE: These agreements will be kept on file and used as substantiating information for the development of rates for operating engineers.

COMMENT: Mr. Lloyd C. Lockrem, representing the Montana Contractors Association Trust, submitted health and welfare and pension data totalling in excess of 1.2 million hours for operating engineers, carpenters, teamsters, and laborers statewide and a list of the participating contractors.

RESPONSE: After checking for duplication, the department weighted this information into the benefits rates for these occupations.

COMMENT: Mr. Kenneth C. Barnhardt, President, Montana Roofing Contractors Association, proposed the inclusion of a "roofer helper" classification consistent with the U.S. Department of Labor's January 29, 1992 decision that regulations governing the use of semi-skilled "helpers" on federal and federally assisted construction contracts subject

to the Davis Bacon and Related Acts are now in effect. It is Mr. Barnhardt's contention that it is common in the roofing industry for helpers to "perform a variety of duties to assist the journeyman such as preparing, carrying and furnishing materials, tools, equipment, and supplies and maintaining them in order; cleaning and preparing work areas; lifting, positioning, and holding materials or tools; and other related semi-skilled tasks as directed by the journeyman. A helper may use tools of the trade at and under the direction and supervision of the journeyman. The particular duties performed by a helper vary according to area practice." Mr. Barnhardt made essentially the same comment under his position as owner of Quality Roofing and Sheet Metal, Inc.

RESPONSE: The department has been asked in the past to consider the issue of helpers and has refused to consider this classification because the request did not meet the criteria found in ARM 24.16.9004. The department is aware that the U.S. Department of Labor has, on specific Montana projects, recognized the use of helpers, specifically, roofer helpers. These USDL determinations cover a single employer on a single project and are initiated at the request of the employer. No other employer group or special trade contractor association, other than those involved in the roofing trade, has asked the Montana Department of Labor and Industry for a "helper" classification. The use of this classification appears limited to roofing contractors and "varies according to area practice." The department's position is that we will continue to consider requests that a special job classification and commensurate rate of wages be established for a particular project, if, the department has not previously determined a prevailing rate of wages for that craft, classification or type of worker. These requests, however, must meet the criteria outlined in ARM 24.16.9004.

COMMENT: Mr. Perry Maddox, representing Maddox Roofing & Construction, expressed essentially the same proposal as the Montana Roofing Contractors Association above.

RESPONSE: Same as for the Montana Roofing Contractors Association above.

4. Several of the proposed rates have been amended. The worker classification and rationale for the changes are as follows:

1. Asbestos Removal Worker - additional data supplied by Laborers collective bargaining unit.
2. Asbestos Removal Foreperson - additional data supplied by Laborers collective bargaining unit.
3. Boilermakers - new collective bargaining agreement.
4. Bricklayers - classifications combined as suggested by collective bargaining unit. Rates in District 8 updated based on additional data supplied by Local # 28.
5. Carpenters - additional data supplied by collective bargaining units in Districts 2, 3, 5, 6, and 8.
6. Electricians - all districts updated with additional data

supplied by collective bargaining units. Added Elevator Constructor classification in all districts at the request of the Department of Administration. Rates based on data supplied by collective bargaining unit.

7. Laborers - additional data supplied by collective bargaining units in Districts 3, 4, 5, 6, and 8.
8. Plumbers - additional data supplied by collective bargaining units in all districts.
9. Sheet Metal Workers - additional data supplied by collective bargaining unit all districts.
10. Carpenters, Laborers, Operating Engineers, Teamsters benefits rate updated based on data supplied by the Montana Contractors Association Trust.

5. The Department of Labor and Industry adopts and incorporates by reference, effective August 15, 1992, the prevailing wage rates entitled "State of Montana Prevailing Wage Rates - Building Construction and Heavy Highway" and dated August 15, 1992. This publication was originally scheduled for August 13, 1992, Montana Administrative Register. Processing problems prohibited publication on that date. Retroactive adoption is required because public contracts have been bid incorporating these rates.

6. AUTH: 18-2-431 and 2-4-307 MCA;

IMP: 18-2-401 through 18-2-432 MCA.

David A. Scott
Rule Reviewer

Mario A. Micone, Commissioner
Department of Labor & Industry

Certified to the Secretary of State: September 14, 1992

BEFORE THE BOARD OF OIL
AND GAS CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION OF NEW RULES FOR THE IMPLEMENTATION OF THE UNDERGROUND INJECTION CONTROL PROGRAM FOR CLASS II INJECTION WELLS UNDER THE FEDERAL SAFE DRINKING WATER ACT (SDWA).	))))))	NOTICE OF ADOPTION OF NEW RULES I THROUGH XVII.

TO: All Interested Persons:

1. On March 26, 1992, the board published notice at page 521 of the Montana Administrative Register, Issue No. 6, of the proposed adoption of new rules I through XVII.

2. The board held a public hearing on the proposed new rules at 9:00 a.m. on May 7, 1992, in the Frontier Room of the Radisson Northern Hotel, Broadway and 1st Avenue North, Billings, Montana. No written or oral comments were presented on Rules I(2), I(3), I(5), I(6), I(8) through (12), and I(14), VII (36.22.1409), IX (36.22.1411), or XVI (36.22.1422), and these rules are adopted as proposed. After consideration of the comments received on the remaining proposed rules, the board has adopted these rules as proposed with the following changes (new material is underlined, deleted material is interlined):

RULE I (36.22.1401) DEFINITIONS For the purposes of this chapter the following are defined:

(1) through (15) same as proposed.

AUTH: 82-11-111, MCA IMP: 82-11-111, 82-11-121, 82-11-123, 82-11-124, 82-11-127, and 82-11-137, MCA

Comment: Exxon Company, U.S.A (Exxon), recommends that definition (1), "Area of review," be amended to allow the operator to calculate a "zone of endangering influence" as an exception to the 1/4 mile radius requirement. Exxon states that "it is important to allow this option so that the permittee can minimize the costs of performing an AOR where the zone of endangering influence is significantly less than one quarter mile and well density is high."

Response: A significant amount of data from years of UIC program implementation in this state and other states would suggest that 1/4 mile is a sufficient minimum distance on which to base the AOR. Exxon does not present any technical criteria under which a "zone of endangering influence" might be calculated. The potential cost of a 1/4 mile area of review is justified in light of the potential risk to USDW's. The board does not adopt Exxon's suggested amendment.

Comment: Exxon recommends that definition (4), "Class II injection well," be amended to include a well which is used to inject "waste waters from gas plants or other E & P operations unless those waters are classified as an EPA RCRA hazardous waste at the time of injection." Shell Western E & P, Inc.

(Shell) also recommends that this definition be broadened to include wells which are used to inject waste water from gas plants.

Response: Many waste waters and other solid wastes generated in E & P primary field operations are presently exempt from hazardous waste management requirements under Subtitle C of Resource Conservation and Recovery Act (RCRA). Many states allow such RCRA exempt wastes to be injected in permitted UIC wells. Some of these RCRA exempt E & P solid wastes might display hazardous waste characteristics. Injection of such wastes down a permitted class II injection well can be the most environmentally safe method of disposal.

Montana does not presently have a commercial or municipal disposal facility which will take RCRA exempt E & P solid wastes. Underground injection of RCRA exempt E & P wastes is an option which should be considered on a case-by-case basis. The board also believes that subsection (4)(a), of the "class II injection well" definition, and definition (13) for "Produced water" are broad enough to allow such disposal practices on a case-by-case basis under the proposed Montana UIC program.

E & P solid wastes (other than typical produced formation water) will likely exhibit widely varying chemical and physical properties depending on the type of waste, the source, additives, concentrations, and other factors. The class II UIC well operator will be required to submit a board form 2 sundry notice prior to each instance such fluids are proposed to be injected. The sundry must state the results of an analytical test and other information. The board will determine the suitability of injecting the RCRA exempt solid wastes on a case-by-case basis. The injection of produced formation water will continue to be allowed under the terms of the UIC permit without subsequent analysis unless the properties of the typical injection water change. The board does not adopt Exxon and Shell's recommended amendments.

Comment: The Montana Department of Health and Environmental Sciences, Water Quality Bureau (WQB), recommends that definitions (7), "injection well, new," and (8), "injection well, existing" be tied into a specific date rather than "the effective date of the UIC program."

Response: The effective date of the UIC program will be a date certain. These rules will not be effective until Montana receives primacy of the UIC program from the U.S. EPA. The primacy application process is lengthy and the board cannot determine in advance if, or when, primacy will be delegated. If primacy is delegated, there will be a specific date for purposes of definitions (7) and (8), but the board is unable to determine what that date will be. The board does not adopt the WQB's recommended amendment.

Comment: Exxon recommends that definition (13), "produced water," be changed to mean "the aqueous phase of fluids brought to the surface in conjunction with conventional oil and gas production." Exxon also suggests that a new term, "authorized injection fluid," be defined.

Response: Exxon's comments on definition (13) are related to

its comments on the definition of "class II injection well." The board believes that the existing definitions are sufficiently drafted to address the types of material which might be injected under a valid injection permit. The board does not adopt Exxon's proposed amendments.

Comment: Exxon recommends that definition (15), "underground source of drinking water," be amended to reduce the TDS content to 3,000 mg/l, and that wording be added to characterize USDW's as those aquifers "with sufficient quantity to supply a public water system."

Response: Exxon's suggested amendments overlook uses of Montana aquifers for other than "public" drinking water systems. Many rural Montana residents rely on USDW's, as defined in this rule, to provide drinking water for human consumption. The board believes that the definition of USDW is necessary to protect those aquifers. The board does not adopt Exxon's proposed amendment.

RULE II (36.22.1402) UNDERGROUND INJECTION

(1) same as proposed.

(2) Existing injection wells operating under valid EPA-issued or rule authorized class II injection permits will be governed under the terms and conditions of such permits until permit expiration or plugging, whichever occurs first; provided, however, that no existing injection well may be operated in a manner inconsistent with the laws and rules of the board.

AUTH: 82-11-111, MCA IMP: 82-11-111, 82-11-121, 82-11-123, 82-11-124, 82-11-127, and 82-11-137, MCA

Comment: Exxon recommends that Rule II be revised to "state that rule authorized and EPA permitted wells are deemed permitted and the terms and conditions of existing permits are taken over by Montana for administrative and any enforcement action, regardless of whether or not the injection has been implemented."

Response: The board agrees with Exxon to the extent that previously permitted injection wells should be grandfathered if injection began on or before the effective date of these rules. To allow all previously permitted injection wells to be grandfathered, including those yet to be injected, would encourage operators to "forum shop." The board amends Rule II to grandfather previously permitted existing injection wells which began injection on or before the effective date of these rules. Such wells must be operated in a manner consistent with board laws and rules. The board adopts Exxon's proposed amendment in part.

RULE III (36.22.1403) APPLICATION CONTENTS AND REQUIREMENTS

(1)(a) and (1)(b) same as proposed.

(c) the location ~~and--mechanical--condition,~~ of all pipelines which will be used to transport fluids to the input well for storage and injection;

(d) the formations from which wells are producing or have produced, the formations, depth, and estimated water quality of

any the deepest potential underground sources of drinking water, and the location and depth of any water wells in the area of review;

(e) the name, description, and depth of the injection zone(s) including a water analysis or other water quality information acceptable to the board, estimated formation pressure, and reservoir characteristics of the zone, and the name, lithologic characteristics, depth, and estimated fracture gradient of the confining zone;

(1)(f) through (1)(i) same as proposed.

~~(j) the names and addresses of the pool operators in an enhanced recovery project;~~

~~(k)~~ (j) the names and addresses of the leasehold owners, including unleased mineral owners, and the surface owners within the area of review of the input well(s)~~;~~ .

~~(l) such other information, including proposed contingency plans for well failure, as the board may require to determine whether the injection project may be made safely and legally.~~

(2) One application may be made for multiple class II injection wells in a geographic area if all wells within that geographic area have substantially the same mechanical and geologic characteristics and are operating in the same field, unit, or lease. Where appropriate, an application for underground injection of fluids on an area basis may include the information required in subsection (1) of this rule for a typical class II injection well in lieu of submitting such information on all class II injection wells in the application provided such class II injection wells have substantially the same characteristics. The area of review for such an area application is the project area plus a circumscribing area the width of which is one quarter (1/4) mile.

(3) same as proposed.

AUTH: 82-11-111, MCA IMP: 82-11-111, 82-11-121, 82-11-123, 82-11-124, 82-11-127, and 82-11-137, MCA

Comment: Exxon recommends that the first sentence of Rule III be amended to incorporate a new term that it suggested be added to the definitions in Rule I.

Response: The board declined to add Exxon's new term to the definitions (see previously stated response) and declines to refer to the term in this rule. The board does not adopt Exxon's recommended amendment to the first sentence of Rule III.

Comment: Exxon recommends that subsection (1)(b) be amended to improve readability.

Response: The board believes that (1)(b) reads well as written. Exxon's recommended wording changes are not adopted.

Comment: Shell recommends that the permittees not be required to show the mechanical condition of pipelines as referred to in subsection (1)(c) of Rule III. Shell reasons that "mechanical condition" has no definition and will be difficult to measure or define. Exxon comments that pipeline operations should not be addressed in UIC regulations.

Response: The board agrees with Shell that the term "mechanical condition" is relative and impossible to define. The board has

other rules which set forth criteria for reporting spills or leaks. The board also requires control and clean-up measures in the event of such a spill or leak. The operator faces fines and other sanctions if any of its production facilities endanger human health or the environment. The mechanical condition of pipelines within the board's jurisdiction will be monitored without the need for this information in the UIC permit application. The board adopts Shell's recommendation and deletes the requirement that the mechanical condition of pipelines be shown on the UIC permit.

The board knows of no reason why pipeline operations should not be addressed in UIC rules as Exxon alleges. In some instances, the pipeline facilities generate more work for board inspectors and present more potential risk to human health and the environment than do the injection wells. It is important to know where these pipelines are to respond to reports of leaks, and to monitor the pipeline condition. Exxon's suggestion that the location of pipelines not be shown on the UIC permit is not adopted.

Comment: Exxon recommends that subsection (1)(d) of Rule III be amended to require that the permittee only estimate the quality of the deepest USDW currently in use. Exxon believes that it is reasonable to assume that all shallower USDW's will be of similar or better quality. To test for all potential USDW's, in Exxon's opinion, would be "overly restrictive without commensurate environmental benefits."

Response: The board agrees in part with Exxon. It is overly restrictive with no commensurate environmental benefit to require that the quality of all potential USDW's be estimated. It is not overly restrictive to require that the quality of the deepest potential USDW be estimated, and that all shallower aquifers be treated as USDW's of equal or better quality. As modified, Exxon's proposed amendment will have no adverse affect on how USDW's are identified or protected under the UIC program. The amendment could, however, make the UIC application process less burdensome. The board adopts Exxon's proposed amendment to subsection (1)(d) of Rule III as modified.

Comment: Exxon comments that the water analysis in subsection (1)(e) should include PH, total dissolved solids, and chlorides. Exxon also recommends that a water analysis only be required "where the permittee is concerned about the compatibility between the injection and formation water." Finally, Exxon believes that "it should be sufficient for the operator to demonstrate, via electric logs, if available, that the salinity of the injection zone exceeds 10,000 mg/l, or the aquifer is exempted based on other criteria."

Response: The board must know the water quality of the injection zone in order to properly protect all potential USDW's. The board agrees that a minimum water analysis will usually include tests for PH, TDS, and chlorides. Other tests might be required on a case-by-case basis.

Logs are not always accurate and are usually many years old. The water quality of the injection zone will likely change over time. Once an exempt aquifer does not mean always an

exempt aquifer if new data would suggest that exempt status should be reconsidered. The board will usually require current data on the injection zone, and a water analysis is the cheapest and most accurate method to obtain that data. However, the board does recognize that other sources of water quality data might be sufficient. The board does not adopt Exxon's proposed amendments, but does include an amendment to allow the permittee to substitute other water quality data for the water analysis. The board will consider the substitute water quality information on a case-by-case basis. A water analysis might still be required if the substitute water quality data is insufficient.

Comment: Exxon recommends that subsection (1)(j) be deleted because it believes that the board already has the names and addresses of all pool operators in the enhanced recovery project.

Response: The board should have this information in its files, if the files are properly updated by the operators. The board adopts Exxon's recommended amendment. The board may require the permittee to submit this information if the operators have not kept the board's files complete and updated.

Comment: WQB recommends that subsection (1)(k) be amended to require the operator to submit information on existing water uses within the area of review.

Response: New UIC injection wells will be permitted much like oil or gas wells - an application for permit to drill (APD) must be submitted by the operator, and the board must prepare an environmental assessment before approval of the permit to drill. The APD form requires the operator to submit information on existing water wells, and a topographic map showing water courses within a one mile radius of the proposed well. The board staff reviews existing water uses in the area in the course of preparing the environmental assessment. Subsection (1)(d) of Rule III also requires all UIC well permittees to submit information with regard to "the formations, depth, and estimated water quality of the potential underground sources of drinking water, and the location and depth of any water wells in the area of review . . ." WQB's proposed amendment is not adopted.

Comment: Exxon recommends that subsection (1) of Rule III be amended to delete ". . . including proposed contingency plans for well failure . . ." Exxon reasons that injection well failures are rarely catastrophic, and that the board already has a detailed notice and reporting requirement for undesirable events.

Response: Exxon is correct, injection well failures do not prove to be catastrophic and the board does have a sufficient reporting requirement for undesirable events (e.g., spills, leaks, blowouts, fires, etc.) under ARM 36.22.1103. The board also has stringent requirements ARM 36.22.1104, and ARM 36.22.1105 for spill control, clean-up, and disposal. Subsection (1) of Rule III is unnecessary. The board adopts Exxon's proposed amendment.

Comment: The U.S. Environmental Protection Agency (EPA) recommends that section (2) of Rule III be amended to further

define "geographic area" as the same field or lease. EPA also recommends that the area of review for a project area be clarified in this section.
Response: The board agrees with both of EPA's recommendations and has made the requisite amendments to section (2) of Rule III.

RULE IV (36.22.1406) CORRECTIVE ACTION (1) same as proposed.
(2) The board may require that corrective action be taken if, after notice and hearing, it is shown that USDW's outside the area of review are threatened by an injection well or wells.
AUTH: 82-11-111, MCA IMP: 82-11-111, 82-11-121, 82-11-123, 82-11-124, 82-11-127, and 82-11-137, MCA

Comment: EPA recommends that the board add language to allow it to require corrective action in the event a threat from an injection well to a USDW outside of the area of review.
Response: The board agrees with EPA's suggested amendment and has added such a provision to Rule IV.

RULE V (36.22.1407) SIGNING THE APPLICATION (1) Applications must be signed (for a corporation) by a principal executive officer of at least the level of vice-president, or by an agent and attorney-in-fact; or, (for a sole proprietorship) by the sole proprietor; or, (for a partnership) by a general partner. If the application is submitted on behalf of a federal, state, or other public agency, or by a municipality, signature must be of a principal executive or a ranking elected official. The application may be signed by a duly authorized representative if the authorization is made in writing by one of the above described persons, and if the authorization either names an individual or specifies a position having responsibility for the operation of the project. The written authorization will be submitted to the board, and must be promptly replaced if the authorization no longer accurately describes the responsible position or person. Application for enhanced recovery projects must be signed by all operators who will participate in the proposed project, or by the unit operator if the request is part of a plan for unitized operation under sections 82-11-201, et seq., MCA. Applications for disposal wells must be signed by the well operator.
AUTH: 82-11-111, MCA IMP: 82-11-111, 82-11-121, 82-11-123, 82-11-124, 82-11-127, and 82-11-137, MCA

Comment: Exxon recommends that Rule V be amended to allow UIC permits to be signed by an agent and attorney-in-fact, or by individuals which the EPA has previously allowed to sign such applications. Shell recommends that a "general manager" be allowed to sign UIC applications.
Response: The board agrees that an agent and attorney-in-fact should be authorized to sign UIC applications for a corporation. The board does not agree that it should include all persons the

EPA found authorized, especially in light of the fact that there is no showing as to who those persons might be. Finally, in response to Shell's comment, the board believes that a corporation can designate a general manager as an agent and attorney-in-fact for purposes of signing a UIC application. The board adopts Exxon's proposed amendment in part and, in so doing, enables Shell to designate a general manager as an agent and attorney-in-fact.

Comment: Exxon recommends that Rule V be amended to "require that applications for enhanced recovery projects be signed by the operator of the well."

Response: The board cannot assume that all operators who will participate in a non-unitized enhanced recovery project support the UIC application unless all such operators sign the application. Conceivably, if all operators are participating in the project, all operators are readily identifiable and willing to sign the UIC permit application. The board does not adopt Exxon's proposed amendment.

RULE VI (36.22.1408) FINANCIAL RESPONSIBILITY

Adopted as proposed.

AUTH: 82-11-111, MCA IMP: 82-11-111, 82-11-121, 82-11-123, 82-11-124, 82-11-127, and 82-11-137, MCA

Comment: EPA expresses concerns over the bonding limits set forth in ARM 36.22.1308. EPA wishes the board to consider raising the bond amount and limiting the number of wells under blanket bonds. The EPA also recommends that the board add a provision to the rules to allow a periodic re-evaluation of the adequacy of existing bonds based on inflation.

Response: The board is in the process of proposing amendments to the bonding rules, ARM 36.22.1308, which address the EPA's concerns. The board does not make any changes to this rule at this time in light of the proposed amendments to ARM 36.22.1308.

RULE VIII (36.22.1410) NOTICE OF APPLICATION (1) New wells or projects. Notice of application for underground injection permit must be ~~given by the applicant by mailing a copy of the application~~ mailed to each current operator ~~of drilling or producing wells or of wells which have produced within the area of review and to the lease owners, mineral owners, and surface owners within the area of review of the proposed input well or wells~~, lease owner of non-operated lease, and mineral owner of non-operated and un-leased tracts within the area of review, and the surface owner of each well site. A copy of the notice must also be mailed to the Region VIII office of the EPA, the Water Quality Bureau of Montana Department of Health and Environmental Sciences, and to the Montana Department of Natural Resources and Conservation. ~~A copy of the application must be mailed,~~ and to the Clerk and Recorder of the county in which the project is located. Such notices must be mailed on or before the date the application is mailed to or filed with the board.

(2) New wells in existing projects. ~~Applications~~ Applicants for an additional new well or wells, or for

recompletion of an existing well or wells to injection service, within an approved area or enhanced recovery project must ~~give~~ mail notice to ~~the leasehold owners~~ each current operator, lease owner of non-operated lease, mineral owner of non-operated lease ~~and surface owners~~ within the area of review, and the surface owner of each new well site, ~~of the well or wells by mailing a copy of the application to each party~~ on or before the date the application is mailed to the board.

(3) The applicant must advise each party to which notice is given that the application is eligible for administrative approval by the program director, unless objections are received within twenty (20) days of receipt of the application by the program director. Notices must be in a board-approved format. AUTH: 82-11-111, MCA IMP: 82-11-111, 82-11-121, 82-11-123, 82-11-124, 82-11-127, and 82-11-137, MCA

Comment: Exxon recommends that the first sentence of Rule VIII be amended to read as follows: "(1) New wells or projects. Notice of application for underground injection permit must be given by the applicant by mailing a copy of the application to each current operator, lease owner of non-operated lease, mineral owner of non-operated and un-leased tracts within the area of review as well as the surface of each well site . . . ."

Exxon also recommends that section (2) be amended to read as follows: "(2) New wells in existing projects. The applicant must notify the surface owner of the well site by copy of the application which must include a statement that the application is eligible for administrative approval unless objections are received within 20 days of receipt of the application by the program director . . . ."

Exxon gives no rationale for the suggested amendments.

Response: The proposed rule would require that notice be given to many individuals whose properties are farmed-out or leased to current operators. These operators are charged with the legal responsibility under the lease or farm-out agreement to protect against drainage or other adverse actions against the oil or gas reservoir. Exxon's proposed amendment correctly assumes that notice to the operator of a lease will serve to protect the interests of the mineral owner(s) or owner(s) of the lease.

Exxon's proposed amendment also recognizes that the only surface owner requiring notice is the owner of the surface on which the UIC well is, or will be, located. The rule as proposed would require the permittee to give notice to every surface owner within a 1/4 mile radius of the well or project, regardless of whether there will be any activity on that owner's land. In essence, the permittee would have to undertake multiple title examinations to ascertain the names and addresses of these surface owners. This requirement serves no useful purpose. The board adopts Exxon's proposed amendments with minor changes for clarity. The board also makes an amendment to the last sentence of section (1) to clarify that all notices must be mailed "on or before the date the application is mailed or filed with the board."

Comment: Beartooth Oil Company (Beartooth) comments that it

would be unduly burdensome to require the operator to send copies of the entire injection permit application as required under subsections (1) and (2) of this rule. Beartooth suggests that a one-page notice containing information about the application be sent in lieu of the entire application.
Response: It is not necessary that the entire injection permit application be mailed. A one-page notice containing the name and address of the applicant, the location of the well, the board's address, and other information concerning the proposed operations will be sufficient. The board will prepare a notice format for applicants to use. Those receiving notice can obtain a copy of the entire application from the board. The board adopts Beartooth's suggested amendment.

RULE X (36.22.1414) NOTICE OF COMMENCEMENT OR DISCONTINUANCE - PLUGGING OF ABANDONED WELLS (1) Within ~~ten (10)~~ thirty(30) days of the commencement of underground injection operations, the applicant must notify the board of the same and the date of commencement in conjunction with the filing of form 4 for well completions and recompletions.

(2) Within thirty (30) days after the discontinuance of an enhanced recovery or liquid hydrocarbon storage project, the ~~applicant or the one in charge thereof~~ operator of the project must notify the board of the date of such discontinuance and the reasons therefor.

(3) same as proposed.

(4) Injection wells which fail a mechanical integrity test (MIT), or which otherwise have lost mechanical integrity, will be immediately removed from service and promptly repaired or plugged for abandonment within 180 days of the failed test or discovery of lost mechanical integrity unless otherwise ordered by the board; provided, however, that the operator of an injection well that has failed the MIT or has lost mechanical integrity may apply to the program director, or other authorized representative of the board, to defer repair or plugging. Any deferment granted will be under such conditions of physical isolation of the injection zone, or monitoring and reporting requirements deemed necessary under the circumstances to protect any USDW's penetrated by the wellbore. Up to a two (2) year deferment may be granted administratively from the date of the failed test, but will not be extended without consent of the board. The board may order further deferment for up to two (2) years, after notice and hearing, upon a showing that all USDW's are protected.

(5) same as proposed.

AUTH: 82-11-111, MCA IMP: 82-11-111, 82-11-121, 82-11-123, 82-11-124, 82-11-127, and 82-11-137, MCA

Comment: Exxon recommends that the 10 day notice requirement of section (1) be changed to 30 days and that the notice be given in conjunction with the form 4 completion report.
Response: Under existing board policies, Form 4 would be used

to report the completion of a newly drilled injection well or a well never before completed, or to report the recompletion of a well to an injection well. Form 4 must be filed within 30 days of completion or recompletion (ARM 36.22.1011, ARM 36.22.1013), except in cases of wildcat or exploratory wells. An extra report is not necessary if the commencement of injection operations is noted on the form 4 when filed with the board within the 30 day period. The board adopts Exxon's proposed amendment.

Comment: Exxon recommends that section (2) be amended to require the "operator" to report the discontinuance of an enhanced recovery or hydrocarbon storage project.

Response: The board adopts Exxon's proposed amendment with the changes shown above.

Comment: Exxon recommends that section (3) be amended to delete the requirement that the abandonment plan include isolation of injection zone and isolation of all USDW's. Exxon reasons that such a requirement is better addressed in the abandonment requirements of all wells rather than for just injection wells.

Response: Though unstated in board rules, the board's policy is to require that underground drinking water sources be protected when any well is plugged. The board does not feel that stating such a policy in the UIC rules is unnecessary or burdensome. The board does not adopt Exxon's proposed amendment.

Comment: EPA recommends that section (4) of Rule X be amended to cover wells which are discovered to have lost mechanical integrity by other than the results of a mechanical integrity test. EPA reasons that any well which loses mechanical integrity should be shut-in and repaired or plugged.

Response: The board agrees with the EPA and has amended section (4) of Rule X to cover wells which are discovered to have lost mechanical integrity.

Comment: The EPA recommends that section (4) be amended to clarify what time limits will be placed on board ordered extensions to the administratively-approved two-year plugging deferment. The EPA also wishes to know whether an additional demonstration of need must be shown to the board.

Response: The board amends section (4) to clarify what board-ordered time limits will apply and what showing will be required.

Comment: Exxon recommends that the second sentence of section (5) be deleted because the board already requires a monthly injection report.

Response: The monthly injection report referred to by Exxon provides the board with monthly injection information but does not give the board any notice of the operator's plans to shut-in or temporarily abandon a well or wells. Under Exxon's proposed amendment, the monthly injection report, if filed during a shut-in or TA'd period, would simply note that no injection occurred. After six months of no-injection reports, the board could probably assume that the operator planned on six months of shut-in or TA'd status. By then, the information is too late and is of little use to the board's planning and well monitoring program. The board wishes to be informed in advance of the

operator's plans for extended shut-in or TA'd well status. The monthly injection form alone does not supply such information. However, the operator may satisfy the notice requirement by conspicuously noting its plans for extended shut-in or TA'd status on the monthly injection report. No new or separate form need be filed. The board does not adopt Exxon's proposed amendment.

RULE XI (36.22.1415) RECORDS REQUIRED

(1)(a) through (1)(c) same as proposed.

(d) the pressure in the casing - tubing annulus if monitoring of such pressure is required as part of a mechanical integrity test~~.~~ ;

(e) the results of any chemical or physical analyses performed on injection zone fluids and injected fluids.

(2) The information required in subsections (1)(a) through (d) of this rule must be observed at least weekly and a representative observation recorded at least monthly and filed with the board on board form 5.

(3) The owner or operator of any class II injection well permitted after the effective date of this rule must conduct a chemical analysis of the typical injected fluids ~~on the 360th operational day~~ during the 12th month of injection. ~~For purposes of this rule, an operational day of injection shall mean any day on which fluids are injected for two (2) or more hours.~~ Samples of typical injected fluids must be taken at the injection wellhead, or, where more than one well is receiving fluid from a common facility, the sample may be taken from the discharge line of such facility. The chemical analysis of the typical injected fluids must include tests for total dissolved solids (TDS), specific conductivity, pH, and percent oil and grease. The results of such analysis must be submitted in writing to the board within ~~thirty (30)~~ forty-five (45) days after the sample is taken.

AUTH: 82-11-111, MCA IMP: 82-11-111, 82-11-121, 82-11-123, 82-11-124, 82-11-127, and 82-11-137, MCA

Comment: The EPA recommends that Rule XI be amended to require the owner or operator to retain "records relating to the analysis of reservoir fluid and injected fluid quality."

Response: The board adopts the EPA's proposed amendment.

Comment: Exxon recommends that section (2) be amended to require monthly observations and yearly reporting for the parameters listed in section (1). Exxon reasons that it is too burdensome to require weekly observations and monthly reporting.

Response: The purpose of the weekly observation requirement is to have the operator check its wells on a regular and timely basis. A mechanical failure, pressure drop, spill or other undesirable event cannot go undetected for a month or unreported for a year. The board must have this information on a timely basis to ensure compliance and to protect USDW's. Monthly observations and yearly reports are simply not timely enough. The board does not adopt Exxon's proposed amendment.

Comment: Shell recommends that section (3) be amended to

require the operator to perform the chemical analysis of injected fluids in the "first year of injection." Shell also recommends that section (3) be amended to allow for samples to be taken from the discharge line of a common facility rather than from each injection wellhead. Finally, Shell recommends that the sample analysis be submitted 30 days after the operator receives the results from the lab. Exxon also recommends that the sample be taken "during the 12th month of injection," and that a common facility exception be recognized.

Response: The board agrees in principle with the comments made by Shell and Exxon, and adopts the amendments with modifications.

RULE XII (36.22.1416) MECHANICAL INTEGRITY (1) From and after the effective date of these regulations, all new wells drilled for, and all existing wells converted to, water injection or disposal must demonstrate mechanical integrity before being placed into service. A mechanical integrity test must be designed to determine whether there is a significant leak in the tubing, casing, or packer of the well, and whether there is a significant movement of injected fluid into any USDW or between any USDW's through vertical channels adjacent to the wellbore. The owner or operator of an injection well regulated under this chapter must maintain the mechanical integrity of such well until the well is plugged.

(2) through (8) same as proposed.

AUTH: 82-11-111, MCA IMP: 82-11-111, 82-11-121, 82-11-123, 82-11-124, 82-11-127, and 82-11-137, MCA

Comment: The EPA recommends that section (1) be amended to add language to require that mechanical integrity be maintained.

Response: The board recognizes that one of the underlying premises of a successful mechanical integrity program is that well mechanical integrity be maintained at all times. The board adopts the EPA's proposed amendment to section (1) of Rule XII.

Comment: Shell recommends that the cement bond log requirement of section (3) be required only "prior to initial injection." Exxon recommends that the cement bond log requirement be deleted. Exxon recommends that cementing records be allowed in lieu of a cement bond log if the cementing records "demonstrate adequate external mechanical integrity."

Response: The board believes a cement bond log is an important and integral part of any mechanical integrity test. Cementing records are not an adequate indicator of the success of the cementing program. The board does not adopt Shell or Exxon's proposed amendments.

Comment: Exxon recommends that section (4) be amended to apply only to internal mechanical integrity tests and not to external mechanical integrity tests. Exxon further recommends that section (5) be amended to reflect the changes it proposes be made to section (4).

Response: The board must have the option to require the type of mechanical integrity test necessary to demonstrate that USDW's are protected. The board does not adopt Exxon's proposed

amendments.

Comment: Shell recommends that a section be added to Rule XII to "grandfather" mechanical integrity programs approved by the EPA prior to the board's UIC program. Shell confesses that many of its EPA-approved injection wells in the Cedar Creek anticline have "small volume leaks or pressure build-ups." According to Shell, the EPA approved a special testing/monitoring program for these wells. Shell requests that it be granted relief "from a rule that requires an applied pressure to be held for 15 minutes with no more than 5% pressure loss."

Response: The board cannot provide for a one-operator exception in the body of this rule. Section (2) of Rule II allows the operator to continue to operate EPA-approved injection wells under the terms and conditions of the EPA permit "provided, however, that no existing injection well may be operated in a manner inconsistent with the laws and rules of the board." Shell may submit its agreement with the EPA for the board's consideration. A field or area-wide exception to Rule XII may be granted, after notice and hearing, upon a showing that all USDW's are adequately protected. The board does not adopt Shell's proposed amendment.

RULE XIII (36.22.1417) NOTIFICATION OF TESTS - REPORTING RESULTS (1) To the extent practicable, the board's field representative will schedule routine mechanical integrity tests required under RULE XII. The owner or operator of a class II injection well must give the board at least forty-eight (48) hour advance written, telephone, or facsimile notice of any mechanical integrity test not originally scheduled by a board representative. Notification of tests not included in the board's routine test schedule must specify the name and telephone number of the person responsible for scheduling the test, the name and address of the owner or operator of the injection well, the name and location of the well, and the time and date the mechanical integrity test will be performed.

(2) and (3) same as proposed.

(4) Two (2) copies of any well logs, surveys, fluid analyses or any other reports of a technical nature run or made during the test or as part of any reworking or repair efforts must be submitted with the subsequent report.

AUTH: 82-11-111, MCA IMP: 82-11-111, 82-11-121, 82-11-123, 82-11-124, 82-11-127, and 82-11-137, MCA

Comment: Shell and Exxon recommend that section (1) be amended to allow something other than written notice. Each company reasons that it is impractical to require written notice in such a short time frame with operators located hundreds of miles from the nearest board office.

Response: The board modifies and adopts the amendment proposed by Shell and Exxon.

Comment: Shell recommends that section (4) be amended to specify that only reports of a "technical" nature be filed with the board. Exxon recommends that the board not require the filing of reports made during reworking or repair efforts.

Response: Common sense would dictate that the board not concern itself with reports other than of a "technical" nature. Shell's proposed amendment is adopted. The board is concerned with logs, surveys, fluid analyses, and other "technical" reports made during reworking and repair operations. Such information completes the board's files on the current status of the well. The board does not adopt Exxon's proposed amendment.

RULE XIV (36.22.1418) EXEMPT AQUIFERS

Same as proposed.

AUTH: 82-11-111, MCA IMP: 82-11-111, 82-11-121, 82-11-123, 82-11-124, 82-11-127, and 82-11-137, MCA

Comment: Exxon recommends that section (1)(b)(iii) of Rule XIV be amended to read as follows: "The aquifer is of a quality that it would be economically or technologically impractical to render the water fit for human consumption . . . ."

Response: The language existing in this section of Rule XIV is an EPA standard used in UIC programs throughout the United States. The language might be clarified, but the board hesitates to depart from EPA standards in this case. The board does not adopt Exxon's proposed amendment.

Comment: The WQB comments that it is "responsible for protection of state water under authority granted by the Water Quality Act (Section 75-5-201, MCA)." The WQB then asks "how does the (board) authority to exempt an aquifer from classification as an underground source of drinking water fit the ground water classification system established in ARM 16.20.1002 (as administered by the WQB)?"

The WQB comments: "The nondegradation policy defined in ARM 16.20.1011 applies to all ground water. Even poor quality water with a TDS > 10,000 mg/l cannot be degraded. If the (board) exempts an aquifer from classification as an USDW and then allows fluid injection into that exempted aquifer, degradation may occur. Limited degradation may only be granted by the Board of Health and Environmental Sciences after an applicant has followed the petition process described in ARM 16.20.704. How does the overall injection well permitting process assure compliance with the nondegradation policy of the Water Quality Act?"

Response: In essence, the WQB questions whether the board has the authority to administer the UIC program in light of an apparent conflict between the Montana Oil and Gas Conservation Act, Sections 82-11-101 et seq., MCA, and the Water Quality Act. The board is specifically empowered and directed to adopt and administer the UIC program under Sections 82-11-111(5), 82-11-121, 82-11-123(7) and (8), 82-11-124, 82-11-127(2), and 82-11-137, MCA. Sections 82-11-121 and 82-11-124 prohibit waste of the oil and gas resources, and require the board to take steps to ensure that these resources are conserved. A viable UIC program with injection permits, exempt aquifers, and, admittedly, some "degradation" of hydrocarbon-bearing non-potable aquifers is essential to the conservation of oil and gas and the prevention of waste. If a conflict exists between the

Water Quality Act and the board's laws or rules, the board believes that it is up to the legislature to find a resolution. However, the board is not convinced that a conflict exists.

RULE XV (36.22.1419) TUBINGLESS COMPLETIONS

Same as proposed.

AUTH: 82-11-111, MCA IMP: 82-11-111, 82-11-121, 82-11-123, 82-11-124, 82-11-127, and 82-11-137, MCA

Comment: Exxon requests that an another exception be added to section (2) of Rule XV to allow "existing tubingless completions disposal wells as long as USDW's are sufficiently protected via increased testing and monitoring."

Response: Any operator may request an exception to Rule XV. The board will consider such a request after notice and hearing. Exceptions may be allowed if the applicant can demonstrate that it is not feasible to equip the well with tubing and packer, and, that all USDW's will be protected. The board does not adopt Exxon's proposed amendment.

RULE XVII (36.22.1423) INJECTION FEE - WELL CLASSIFICATION

Same as proposed.

AUTH: 82-11-111, MCA IMP: 82-11-111, 82-11-121, 82-11-123, 82-11-124, 82-11-127, and 82-11-137, MCA

Comment: Exxon recommends that amendments be made to Rule XVII to institute a one-time injection permit fee in lieu of the annual fee. Exxon believes that annual fees to hold a valid injection permit are not appropriate.

Response: The annual fee system is codified in Section 82-11-137, MCA. The board cannot, without legislative authority, change the permit fee system. The board does not adopt Exxon's proposed amendments.

Comment: The Montana Petroleum Association (MPA) comments that the amount of the annual fee should be lowered.

Response: The board has placed the initial annual fee at an amount which should adequately fund the UIC program. If revenues from the annual fee prove to be more than UIC program expenses, the fee will be lowered by future rulemaking.

3. These rules are effective on the day after primacy of the UIC program is delegated to the State of Montana by the U.S. Environmental Protection Agency.

Donald D. MacIntyre
Chief Legal Counsel

Dee Rickman, Executive Secretary
Board of Oil and Gas Conservation

Certified to the Secretary of State, September 14, 1992.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT of ARM 42.12.122 and the REPEAL of ARM 42.13.501 AND 42.13.502 relating to Suitability of a Premises for Liquor Licenses	NOTICE OF THE AMENDMENT of ARM 42.12.122 and the REPEAL of ARM 42.13.501 and ARM 42.13.502 relating to Suitability of a Premises for Liquor Licenses

TO: All Interested Persons:

1. On March 26, 1992, the Department published notice of a public hearing on the proposed amendment of ARM 42.12.122 and the repeal of ARM 42.13.501 and 42.13.502 relating to liquor licenses at pages 544 of the 1992 Montana Administrative Register, issue no. 6.

2. A Public Hearing was held on April 16, 1992, to consider the proposed action. Public comments were received both orally at the hearing and subsequent to the hearing date. The Revenue Oversight Committee also reviewed the proposed rules at two of their meetings.

3. As a result of the comments received the Department has repealed ARM 42.13.501 and 42.13.502 as proposed and amended ARM 42.12.122 as follows:

42.12.122 DETERMINATION OF SUITABILITY OF PREMISES (1) through (2)(a) remain as proposed.

(b) The investigator can easily ascertain the type of alcoholic beverages business that is being conducted on the premises due to indoor and outdoor advertising, signage and/OR the general layout and atmosphere of the premises to be licensed. The two circumstances to be ascertained are:

(i) A beer and/or table wine license issued for off-premises consumption operates at a premises recognizable as a grocery store or a pharmacy; and

(ii) A license issued for on-premises consumption operates at a premises recognizable as a restaurant, bar, ~~or~~ tavern OR OTHER BUSINESS DIRECTLY RELATED TO THE ON-PREMISES CONSUMPTION OF ALCOHOLIC BEVERAGES SUCH AS A BOWLING ALLEY, HOTEL, OR GAMBLING CASINO, having a bar preparation area and sufficient seating, not less than 12 seats at the bar, tables, ~~or~~ booths OR GAMING AREAS OR A COMBINATION OF THE ABOVE, to encourage patrons to remain on the premises and consume the alcoholic beverages sold by the drink.

(c) ~~A variety of a~~ Alcoholic beverages are advertised and displayed as being available for purchase.

(d) The premises is open for business on a regular basis so not to be considered a license on nonuse status.

(e) The layout of the premises allows for licensee and/or employee only control over the preparation, sale, service and

distribution of alcoholic beverages.

(f) The investigator can verify to the department that the dimensions shown on the floor plan accurately represents the physical layout of the premises.

(g) The applicant has demonstrated adequate safeguards are in place to prevent the sale of alcoholic beverages to minors and intoxicated persons.

(h) The premises to be used for the on-premises consumption of alcoholic beverages, is physically separated by four permanent walls and is without inside access from any other business conducted in the building, except businesses which are directly related to the on-premises consumption of alcoholic beverages, such as a hotel, BOWLING ALLEY, GAMBLING CASINOS, or restaurant.

(i) The premises is not within a fifty foot radius of gasoline pumps.

(j) The provisions of subsection (3) are not violated.

(3) remains as proposed.

(4) Premises currently licensed that do not meet the suitability standards would be required to meet the above standards when requesting the department to approve an application ~~for a transfer of ownership, and/or location, or a request~~ to remodel the existing licensed premises. ~~But in no case, may premises that do not meet the suitability standard continue to operate after January 1, 1995~~ EXCEPT FOR THE REQUIREMENT THAT PREMISES NOT BE WITHIN A FIFTY FOOT RADIUS OF GASOLINE PUMPS. THE RESTRICTION ON PREMISES BEING BEYOND A FIFTY FOOD RADIUS OF GASOLINE PUMPS APPLIES ONLY TO TRANSFERS OF LICENSES TO NEW LOCATIONS OR TO NEW ORIGINAL LICENSES.

AUTH: Sec. 16-1-303 MCA; IMP, Sec. 16-4-402 MCA; 16-4-404, 16-4-405, MCA.

4. Oral and written comments received during and subsequent to the hearing from the following: Mark Staples, attorney representing the Montana Tavern Association (MTA), Larry Akey, Executive Director, Gaming Industry Association (GIA), J. Grant Lincoln and Jack D. Lincoln (G&JL), Ronna Alexander, State Executive, Montana Petroleum Marketers Association (MPMA), Jeffrey H. Langton, attorney representing Jack and Corol Lister (J&CL), Marc Racicot, Montana Attorney General (AG), Nancy Wall (NW), Ellen Engstedt (EE), Erma Dias and Rheba Simpson (D&S), Susan Miller (SM), Earl and Robin Norcutt (E&RN), Judy Smith (JS), Argyle and Doris Bishop (A&DB), Pastor Michael Borge (MB), Ruth Bishop (RB), Edna Hostetler (EH), Pondera County Farmer's Union (PCFU), Carolyn Ennis (CE), Virginia and Gordon Dyrud (V&GD), Margorie Matheson (MM), David Hillard (DH), Rob Uithof of Golden State Oil Co. (GSO), Tom Richardson, attorney representing Town Pump (TP), Mark Olson of Ole's County Stores (OCS), Harley Warner, representing the Montana Association of Churches (MAC), Bill Stephens, representing the Montana Food Association (MFA).

Comments attributed to one or more of the above are

referenced by the initials in parentheses behind each party's name. Parties that globally supported MTA recommendations are (G&JL) (WPMA) (TP) (OCS) (MFA).

COMMENTS: Recommend that the department not adopt any changes but stay with current rules and procedures, which allows us to exercise broad discretion on a case by case basis when an application is protested by the public. Furthermore, the rule is inconsistent with the code, exceeds the department's rule-making authority, and there's no evidence that there's a problem that needs to be solved through rule. While preferring that the rule not be adopted, would support MTA amendments in the alternative. (GIA)

RESPONSE: The department is proceeding to adopt these rules with many of the amendments that were recommended. The new rule is needed to identify the basics of what a suitable premises is up front instead of waiting for debate after an application is submitted.

COMMENTS: Recommend that the rule be modified to allow a grandfather clause for currently approved licenses who can continue as they are until they make application to remodel at which time they would be required to meet the standards of the rule. (MTA) (J&CL)

RESPONSE: The department has adopted this recommendation. In addition an exception is made concerning proximity to gasoline pumps, noted below.

COMMENTS: Recommend that the separation between businesses not traditionally associated with on-premises consumption of alcoholic beverages be reduced to five-foot walls that allow inside access. (MTA) (J&CL)

RESPONSE: The department has not accepted this recommendation since the adoption of the grandfathering clause provides for existing licenses to remain as they are until the licensee decides to remodel.

COMMENTS: Recommend that the department delete the requirement that on-premises operations be at a distance of more than 50 feet from gasoline pumps since it would be an economic hardship on the many locations that are currently closer to gasoline pumps. (MTA) (J&CL)

RESPONSE: We modified the rule to exempt all existing premises affected by this provision. This provision will only affect new original licenses and existing licenses that transfer to a new location.

COMMENTS: Recommend that the department delete the requirement that drive-up windows be eliminated since they serve as a convenience to customers and have not presented a problem. (MTA)

RESPONSE: The department has not accepted this recommendation since the law is clear that licensees and their employees are prohibited from serving to minors and obviously intoxicated individuals. Drive-up windows significantly increases the chance of a failure to identify minors or intoxicated individuals. Customers should be required to walk

on the premises to make a purchase.

COMMENTS: Recommend that the department more clearly specify what are considered businesses that are directly related to the on-premises consumption of alcoholic beverages and that the following be included in addition to hotels and restaurants: bowling alleys and gambling casinos. (MTA)

RESPONSE: The department has adopted this recommendation.

COMMENTS: Recommend that the department delete "a variety of" from subsection (2)(c) since some establishments do not want to be held to a standard of variety that they may not wish to or have the demand to maintain. (MTA)

RESPONSE: The department has adopted this recommendation.

COMMENTS: Recommend that in subsection (2)(b) the department insert "or" after "signage and" to allow either "appropriate advertising" or "signage" or "general layout and atmosphere" as appropriate criteria for rendering the premises "recognizable". (MTA)

RESPONSE: The department has adopted this recommendation.

COMMENTS: Recommend that in subsection (2)(b)(ii) after "booths" insert "or gaming areas or combination of the above" as stools affixed to or sitting near the gaming apparatus should be considered as patron seating. (MTA)

RESPONSE: The department has adopted this recommendation.

COMMENTS: Recommend that the department adopt the proposed rule as proposed by the department since legislators in 1989 were concerned about the proliferation of video gambling machines in convenience stores and therefore, the department should do everything it can to carry out the legislative intent with regard to gambling in convenience stores. (AG)(EH)(RB)(MB)(A&DB)(PCFU)(MM)(MAC)

RESPONSE: Gambling is an issue related to licensing for the sale of alcoholic beverages only because an on-premises license is a condition precedent for certain gambling licenses. However, the department cannot make decisions about the suitability of premises based on the effect those decisions would have on the proliferation of gambling licenses. The department must limit our evaluation to the effects the proposed rule would have on and as a result of the sale of alcoholic beverages. The department has adopted some modification to our proposed rule with only this in mind.

COMMENTS: Recommend the department exclude gambling machines from convenience stores because they are frequented by children and the youth should not be subjected to the atmosphere of a bar or the availability of alcohol. (EE)(NW)(E&RN)(MM)(DH)

RESPONSE: Alcoholic beverage law does not prohibit children from being on an alcoholic beverage licensed premises. Legislation to attempt this has been proposed in the past but never adopted. Therefore, the proposed rule cannot prohibit children's presence. Likewise, the law specifically permits gambling machines in premises licensed for on-premises consumption. Therefore the department cannot prohibit them.

COMMENTS: Recommend the department prohibit the sale of

alcohol at locations that sell gas as it would reduce the incidence of drunk driving. (NW)(E&RN)(MM)

RESPONSE: The department took the approach of providing separation between gas pumps and the premises licensed for on-premises consumption rather than complete prohibition where gas is sold. The department has modified the rule to grandfather existing on-premises locations because we recognize the financial hardship this requirement would create. Furthermore, the law explicitly prohibits the sale of alcoholic beverages to obviously intoxicated individuals.

COMMENTS: Support the requirement that any area used for alcohol consumption to be separated by permanent walls with a separate outside entrance. (MB)(E&RN)(EH)(V&GD)

RESPONSE: The department has maintained the separation requirement as proposed. However, the department accepted the suggestion others made to allow for a grandfathering of existing arrangements until the licensee proposes to remodel the premises.

COMMENTS: Recommend the department prohibit mini-bars in convenient stores. (D&S)(E&RN)(RB)(PCFU)(CE)(DH)(GSO)(JS)

RESPONSE: The department has maintained the separation between alcohol consumption areas and grocery stores which are typically included in convenient stores. The department does not believe it is appropriate to prohibit alcoholic consumption areas from a building housing a convenient store.

5. Therefore, the Department repeals ARM 42.13.501 and 42.13.502, and adopts the amendments as proposed and listed above to ARM 42.12.122.

CLEO ANDERSON
Rule Reviewer

DENIS ADAMS
Director of Revenue

Certified to Secretary of State September 14, 1992.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION of NEW RULE I (42.12.132) and NEW RULE II (42.13.108) relating to Liquor Licenses	NOTICE OF THE ADOPTION of NEW RULE I (42.12.132) and NEW RULE II (42.13.108) relating to Liquor Licenses

TO: All Interested Persons:

1. On April 16, 1992, the Department published notice of the proposed adoption of New Rule I and II relating to liquor licenses at pages 778 of the 1992 Montana Administrative Register, issue no. 7.

2. A Public Hearing was held on May 14, 1992, to consider the proposed adoption. Public comments were received both orally at the hearing and subsequent to the hearing date. The Revenue Oversight Committee also reviewed the proposed rules at two of their meetings.

3. As a result of the comments received the Department has adopted Rule II (ARM 42.13.108) as proposed and amended Rule I (ARM 42.12.132) as follows:

NEW RULE I (ARM 42.12.132) MANAGEMENT AGREEMENTS (1) and (2) remain the same.

(3) The division will review the agreement for compliance with the following standards:

(a) the licensee must retain the possessory interest in the premises through ownership, lease, rent or other agreement with the owner of the premises;

(b) while the agreement may delegate duties to the manager, the licensee must retain ultimate control, liability, responsibility, and accountability for the retail liquor operation. ~~This control may include, but is not limited to the following~~ THE AGREEMENT MAY NOT ASSIGN OR LIMIT ANY OF THE RIGHTS OR RESPONSIBILITIES OF OWNERSHIP. IN PARTICULAR, THE AGREEMENT MAY NOT GRANT OR ASSIGN TO THE MANAGER:

(i) CONTROL OF business hours, types of alcoholic beverage products sold, selling price, level of inventory maintained, and overall business atmosphere ~~as established by licensee~~;

(ii) ~~licensee has signatory~~ EXCLUSIVE authority over ~~the bank accounts of the~~ business ACCOUNTS, and ~~unrestricted access to the funds of the~~ operation FUNDS ~~, whether in the form of initial capitalization or those generated by the business operations~~;

(iii) ~~licensee maintains an active participation in the business operations sufficient to insure the proper and lawful conduct of the business and executes all reports required by governmental agencies that attest to licensee's ownership and certify compliance with applicable statutes and regulations;~~

~~(iv) licensee has unrestricted access to the business~~

~~premises and its books and records, and retains full and independent~~ authority to make adjustments, alterations, or changes in the business operations ~~at any time~~;

(~~v~~ IV) ~~licensee retains the~~ authority to lawfully discipline or discharge employees ~~for just cause, including the manager, (the authority to discipline employees may be shared with the manager)~~;

~~(vi) licensee may personally work in the establishment at any time;~~

(~~vii~~ V) ~~licensee is liable~~ LIABILITY for all business expenses and losses, ~~and the manager is not liable for those expenses or losses,~~ either directly or through an indemnification agreement with the licensee. The licensee may require the manager to do the ministerial act of paying the expenses, but this must be accomplished by using the licensee's funds; and

(~~viii~~ VI) ~~the licensee owns~~ OWNERSHIP OF the inventory ~~and retains~~ OR the right to use or dispose of it at will.

(c) THE LICENSEE MUST MAINTAIN AN ACTIVE PARTICIPATION IN THE BUSINESS OPERATION SUFFICIENT TO INSURE THE PROPER AND LAWFUL CONDUCT OF THE BUSINESS AND EXECUTE ALL REPORTS REQUIRED BY GOVERNMENTAL AGENCIES THAT ATTEST TO THE LICENSEE'S OWNERSHIP AND CERTIFY COMPLIANCE WITH APPLICABLE STATUTES AND REGULATIONS. THE LICENSEE MAY WORK IN THE ESTABLISHMENT AT ANY TIME.

(D) the agreement may not be assignable by the manager to a successor manager without the written consent of the licensee;

(~~d~~ E) the agreement may not place any restrictions on the licensee's right to transfer, mortgage, hypothecate, or alienate the license or change the location of the operation ~~of the license without the consent of the manager~~;

(~~e~~ F) the agreement must be terminable upon the licensee transferring the license, selling the business or otherwise ceasing business operations at the licensee's option;

(~~f~~ G) the agreement must provide for compensation ~~by one of the following:~~ EITHER AS A FIXED AMOUNT, A PERCENTAGE OF GROSS SALES OR A COMBINATION OF FIXED AMOUNT AND PERCENTAGE OF GROSS SALES;

(~~i~~ H) the compensation of the manager~~, which may be set as a fixed amount or by a percentage formula,~~ must be commensurate with the duties performed, ~~and~~ cannot consist of all net profits from the business~~.~~ AND ~~if a percentage formula is used, the compensation~~ cannot be less than the federal wage and hour standards for an individual; ~~or~~

(~~ii~~ I) if the licensee's net ~~operating~~ profit, after payment of all sums due to the manager, whether for services as a manager or for other compensation due to the manager under a security agreement, lease, or other purposes, constitutes at least ~~an economic rate of return,~~ A PERCENTAGE OF CAPITAL INVESTMENT EQUAL TO THE INTEREST RATE EARNED BY THE STATE BOARD OF INVESTMENTS FOR MONTANA COMMERCIAL LOANS FROM THE PERMANENT COAL TAX FUND AS PUBLISHED IN ITS MOST RECENT ANNUAL REPORT, the financial arrangement between the manager and the licensee will

not be considered to create an economic interest of the manager in the license; AND

(g J) the management agreement must establish a principal agent, master-servant, employer-employee or other type of agency relationship, making the manager responsible to the licensee for the performance of assigned duties, while the licensee is responsible for the proper performance of the manager.

(4) Management agreements failing to meet any of the standards set forth in subsections (1), (2) and (3) of this rule will be marked as rejected and returned to the licensee together with a written explanation of the reasons for the rejection. If the deficiencies are not corrected within a period of time set by the liquor division, the tendered management agreement will be deemed to be void. Failure of the licensee to terminate operations under a void management agreement constitutes a violation of Montana law and the departmental rules.

AUTH: 16-1-303, MCA; IMP: 16-4-404, MCA

4. Oral and written comments received during and subsequent to the hearing pertained to Rule I Management Agreements and they are summarized as follows along with the response of the Department:

COMMENT: The Department of Justice, Gambling Control Division requested that the Department preapprove management agreements 30 days in advance of the effective date of the management agreement.

RESPONSE: The Department did not change the rule because preapproval would place a processing burden on licensing staff that could not be met with consistency.

COMMENT: The Department of Justice, Gambling Control Division requested that the Department more clearly specify the scope of decision-making retained by the licensee and prohibited to the manager.

RESPONSE: The Department modified the rule to incorporate the language clarification recommended. No substantive change resulted from this amendment.

COMMENT: The Department of Justice, Gambling Control Division requested that any percentage payments of management services be on gross sales only and never on net sales.

RESPONSE: The Department modified the rule to limit percentage payments for management services to percentages of gross sales only.

COMMENT: The Department of Justice, Gambling Control Division requested that the Department more clearly specify what constitutes an economic rate of return to a licensee.

RESPONSE: The Department modified the rule to replace the term "economic rate of return" with a specific source for a percentage of capital investment.

COMMENT: The Department of Justice, Gambling Control Division requested that the rule limit the contractual agreements involving the same parties to the management agreement alone.

RESPONSE: The Department did not modify the rule in this regard because we believe the Department does not have the authority to prohibit parties to the management agreement from entering into other agreements with each other. We believe that the way the rule is written takes into account possible financial interests that might result from other agreements affecting the independence of the parties to the management agreement. Furthermore, the safe harbor that the proposed subsection (3)(g) provides the manager in the agreement is limited to the economic interest in the license. Other relationships between the manager and the licensee that might affect the licensee's commitment to maintaining all the responsibilities associated with the Department's issuing the license could cause the Department to take action against the licensee or the manager as appropriate notwithstanding the safe harbor subsection.

5. Therefore, the Department adopts New Rule I (ARM 42.12.132) with the amendments listed above.

CLEO ANDERSON
Rule Reviewer

DENIS ADAMS
Director of Revenue

Certified to Secretary of State September 14, 1992.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION of RULE I (42.15.416), RULE II (42.15.507), RULE III (42.15.508), RULE IV (42.15.509) relating to Recycled Material as it Applies to Income Tax	NOTICE OF THE ADOPTION of RULE I (42.15.416), RULE II (42.15.507), RULE III (42.15.508), RULE IV (42.15.509) relating to Recycled Material as it Applies to Income Tax

TO: All Interested Persons:

1. On April 16, 1992, the Department published notice of the proposed adoption of Rule I (42.15.416), Rule II (42.15.507), Rule III (42.15.508), and Rule IV (42.15.509) relating to recycled material as it applies to income tax at page 783 of the 1992 Montana Administrative Register, issue no. 7.

2. A public hearing was held on May 11, 1992, where oral comments were received. Written comments were also received.

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

COMMENT: Walt J. Kero, CPA, with the CPA firm of Junkermier, Clark, Campanella & Stevens, PC, asked if the credit is computed on the adjusted basis after the trade-in or is it based on the full purchase of the new item being acquired.

RESPONSE: The credit is computed on the cost of the equipment, before any trade-in, including any transportation and installation costs. Language has been added to state that the cost is before any trade-in of equipment.

COMMENT: Walt J. Kero asked if there is any provision for recapture of the credit.

RESPONSE: No, there is no provision for recapture of the credit. Since there is no provision for this in the law, the proposed rule cannot go any further.

COMMENT: Walt J. Kero asked if there is any anti-churning rule so that related parties do not buy and sell equipment between each other solely to generate a tax credit.

RESPONSE: The proposed rule allows a credit only once a year per piece of qualifying equipment no matter how many times it is sold during the year. If a piece of equipment was acquired and sold during the year, the person who has ownership at the end of the year is the only one allowed the credit.

COMMENT: Christine Kaufmann from the Waste Reduction & Recycling division of the Department of Health & Environmental Sciences asked if the definitions apply for both the credit and deduction sections.

RESPONSE: Yes, the definitions apply to both the credit and the deduction sections. To make this more clear, the language "for 25% credit" will be dropped in the title of the definition section.

COMMENT: Christine Kaufmann asked if "machinery or equipment" should be defined broader than "a mechanical unit or system." She stated that it should be clear that containers, receptacles, and other non-mechanical units and systems are included for the tax credit.

RESPONSE: The statute provides that in order to be eligible for the credit, a piece of property must be "depreciable" and used "primarily" for the reclamation and recycling of materials. However, to provide a broader reading of the proposed rule, "mechanical" will be dropped and replaced with the word "property."

COMMENT: Christine Kaufmann asked what is the definition of "reclaimable."

RESPONSE: The definition of "reclaimable" is not covered in the proposed rule since there is a definition of this in the statute. Under the statute, "reclaimable material" means material that has useful physical or chemical properties after serving a specific purpose and that would normally be disposed of as solid waste, as defined in 75-10-203, MCA, by a consumer, processor, or manufacturer.

COMMENT: Christine Kaufmann asked if the following sentence is necessary: "Recycling machinery and/or equipment must be located and operating in Montana on the last day of the taxable year for which the credit is claimed."

RESPONSE: Yes, the sentence is necessary. The intent of the law is to allow a credit for property used in Montana only once a year no matter how many times it was bought and sold. This wording also limits a company who does business in more than one state from taking a credit for qualifying property that was bought by the company but not used in Montana. The intent of the Department is that a piece of equipment that is not operational on the last day of the taxable year due to mechanical breakdowns, closure of the plant, etc will be eligible for the credit.

COMMENT: Charles Walk, Executive Director of the Montana Newspaper Association, testified at the hearing that the requirement for recycled products to be made from at least 90% of reclaimed material in order to take the additional 5% deduction is too restrictive. For example, paper that is recycled in the newspaper industry is made up of no more than 40% recycled material.

RESPONSE: The requirement that a recycled product must be made up of 90% recycled material is by statute. Under the law, "recycled material" means a substance that is produced from at least 90% reclaimed material. The Department does not have any authority to change the statute.

4. As a result of the comments received the Department has adopted Rules I (42.15.416) and IV (42.15.509) as proposed and amended Rules II (42.15.507) and III (42.15.508). The Department has amended Rules II and III as follows:

NEW RULE II (42.15.507) DEFINITIONS ~~FOR 25% CREDIT~~ (1) through (3) remain the same.

(4) "Machinery or equipment" is ~~a mechanical unit or system~~ PROPERTY having a depreciable life of more than one year, ~~which~~ WHOSE PRIMARY PURPOSE IS TO collect~~s~~ or process~~es~~ reclaimable material or is DEPRECIABLE PROPERTY used in the manufacturing of a product from reclaimed material.

(5) through (7) remain the same.

AUTH: 15-32-611, MCA; IMP: 15-32-601 through 610, MCA.

NEW RULE III (42.15.508) CREDIT FOR INVESTMENTS IN DEPRECIABLE EQUIPMENT OR MACHINERY TO COLLECT, PROCESS OR MANUFACTURE A PRODUCT FROM RECLAIMED MATERIAL (1) remains the same.

(2) The basis for the credit is GENERALLY the ~~adjusted basis for tax depreciation purposes~~ COST OF THE PROPERTY BEFORE CONSIDERATION OF TRADE-IN EQUIPMENT. AN EXCEPTION TO THIS IS THAT THE BASIS SHALL BE REDUCED BY ANY TRADE-IN WHICH HAS HAD THIS CREDIT PREVIOUSLY TAKEN ON IT. This includes the purchase price, transportation cost (if paid by the purchaser) and the installation cost before depreciation or other reductions. This credit does not increase or decrease the basis for tax purposes. Leased equipment is restricted to capital leases and the credit is calculated on the amount capitalized for balance sheet purposes under generally accepted accounting ~~purposes~~ PRINCIPLES.

(3) Recycling machinery and/or equipment must be located and operating in Montana on the last day of the taxable year for which the credit is claimed. The machinery or equipment must be used to collect, process, separate, modify, convert or treat solid waste into a product that can be used in place of a raw material for productive use. Examples may include BUT ARE NOT LIMITED TO: balers, bob cats, briquetters, compactors,

containers, conveyors, conveyor systems, cranes with grapple hooks or magnets, crushers, end loaders, exhaust fans, fork lifts, granulators, lift-gates, magnetic separators, pallet jacks, perforators, pumps, scales, screeners, shears, shredders, two-wheel carts, and vacuum systems. This does not include transportation equipment unless it is specialized to the point that it can only be used to collect and process reclaimable material.

(4) through (8) remain the same.

AUTH: 15-32-611, MCA; IMP: 15-32-601 through 610, MCA.

4. Therefore, the Department adopts the rules with the amendments listed above.

CLEO ANDERSON
Rule Reviewer

DENIS ADAMS
Director of Revenue

Certified to Secretary of State September 14, 1992.

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

In the matter of the amendment of rule 46.10.409 pertaining to transitional child care	))))	NOTICE OF THE AMENDMENT OF RULE 46.10.409 PERTAINING TO TRANSITIONAL CHILD CARE

TO: All Interested Persons

1. On August 13, 1992, the Department of Social and Rehabilitation Services published notice of the proposed amendment of rule 46.10.409 pertaining to transitional child care at page 1750 of the 1992 Montana Administrative Register, issue number 15.

2. The Department has amended rule 46.10.409 as proposed.

3. No written comments or testimony were received.

Rule Reviewer

Director, Social and Rehabilitation Services

Certified to the Secretary of State September 14, 1992.

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

In the matter of the amendment of rules 46.13.201, 46.13.301 through 46.13.304 and 46.13.401 pertaining to low income energy assistance program	))))	NOTICE OF THE AMENDMENT OF RULES 46.13.201, 46.13.301 THROUGH 46.13.304 AND 46.13.401 PERTAINING TO LOW INCOME ENERGY ASSISTANCE PROGRAM

TO: All Interested Persons

1. On July 30, 1992, the Department of Social and Rehabilitation Services published notice of the proposed amendment of 46.13.201, 46.13.301 through 46.13.304 and 46.13.401 pertaining to low income energy assistance program at page 1580 of the 1992 Montana Administrative Register, issue number 14.

2. The Department has amended rules 46.13.201, 46.13.301, through 46.13.304 and 46.13.401 as proposed.

3. The Department has thoroughly considered all commentary received:

COMMENT: Provision of full benefit awards to categorically eligible households draws distinctions in the amount of benefits received without regard to need. The incomes of categorically eligible households should, like other LIEAP households, be examined to determine whether income levels justify reducing benefit levels by 25 percent.

RESPONSE: The Department believes the provision of full benefit awards to categorically eligible households is a fair and administratively efficient method of matching benefit awards to household need. The focus of comparison made in the above comment is "household income." Household need is a function of both income and resources. Households which are categorically eligible for LIEAP are subject (through GA, SSI or AFDC eligibility rules) to much more restrictive resource limits than other eligible LIEAP households. AFDC rules for example, allow only $1,000 in resources, excluding one vehicle with an equity value of up to $1,500. The LIEAP rules allow liquid resources between $5,000 and $10,000 depending on household size and do not limit the amount of non-liquid resources such as vehicles and other personal property which a household may have.

The Department also received several comments supporting full benefits for all categorically eligible households.

COMMENT: The proposed rule is not justified by administrative efficiency. Administrative systems in place, fully computerized, are adequate to track all information necessary to ensure

benefits provided to categorically eligible households are based upon income.

RESPONSE: The Department believes the proposed rule is justified by administrative efficiency. Income data for AFDC, GA and SSI households, although computerized (through TEAMS) is inaccessible to the majority of agencies administering LIEAP.

Basing benefits on income, prior to provision of regular or emergency LIEAP benefits, would require that the majority of approximately 7,000 categorically eligible households be referred to county welfare offices for verification of income. In addition to placing a heavy burden on county workers (over half of all LIEAP applications are received during the month of October), provision of regular and emergency assistance to needy households would frequently be delayed.

Requiring 12 month income verification would also eliminate increased efficiency achieved by SRS and LIEAP administering agencies through annual recertification of categorically eligible households. Each program year a significant portion of categorically eligible households receive benefits without reapplying for them. Because their AFDC, GA or SSI status has not changed from the year of original application, the current rule does not require that a new application be submitted and processed. Adding a provision to the rule requiring that income be used in determining the benefit awards of categorically eligible households would remove these households from the recertification pool and add significantly to the number of applications received, reviewed and processed each year.

Russell E. Cater
Rule Reviewer

Henry M. Hudson for
Director, Social and Rehabilitation Services

Certified to the Secretary of State September 14, 1992.

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 June 30, 1992. This table includes those rules adopted during the period July 1, 1992 through September 30, 1992 and any proposed rule action that is pending during the past 6 month period. (A notice of adoption must be published within 6 months of the published notice of the proposed rule.) This table does not, however, include the contents of this issue of the Montana Administrative Register (MAR).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through June 30, 1992, 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 1992 Montana Administrative Register.

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BOARD APPOINTEES AND VACANCIES

House Bill 424, passed by the 1991 Legislature, directed that all appointing authorities of all appointive boards, commissions, committees and councils of state government take positive action to attain gender balance and proportional representation of minority residents to the greatest extent possible.

One directive of HB 424 was that the Secretary of State publish monthly in the *Montana Administrative Register* a list of appointees and upcoming or current vacancies on those boards and councils.

In this issue, appointments made in August, 1992, are published. Vacancies scheduled to appear from October 1, 1992, through December 31, 1992, are also listed, as are current recent vacancies due to resignations or other reasons.

Individuals interested in serving on a new board should refer to the bill that created the board for details about the number of members to be appointed and qualifications necessary.

Each month, the previous month's appointees are printed, and current and upcoming vacancies for the next three months are published.

IMPORTANT

Membership on boards and commissions changes constantly. The following lists are current as of September 4, 1992.

For the most up-to-date information of the status of membership, or for more detailed information on the qualifications and requirements to serve on a board, contact the appointing authority.

BOARD AND COUNCIL APPOINTEES: AUGUST, 1992

Appointee	Appointed by	Succeeds	Appointment/End Date
Board of Pardons (Institutions)			
Rep. David Hoffman	Governor	Bosch	8/1/1992
Sheridan			1/1/1995
Qualifications (if required): attorney			
Board of Private Security Patrolmen and Investigators (Commerce)			
Mr. Gary Gray	Governor	reappointed	8/1/1992
Great Falls			8/1/1995
Qualifications (if required): contract security member			
Ms. Mary'l G. Luntsford	Governor	reappointed	8/1/1992
Kalispell			8/1/1995
Qualifications (if required): represents a proprietary security company			
Council for Montana's Future (Governor)			
Mr. John Bailey	Governor	not listed	8/27/1992
Livingston			12/15/1992
Qualifications (if required): none specified			
Mr. Kurt Baltrusch	Governor	not listed	8/27/1992
Glendive			12/15/1992
Qualifications (if required): none specified			
Mr. Jerry Black	Governor	not listed	8/27/1992
Shelby			12/15/1992
Qualifications (if required): none specified			
Ms. Anne Boothe	Governor	not listed	8/27/1992
Malta			12/15/1992
Qualifications (if required): none specified			

BOARD AND COUNCIL APPOINTEES: AUGUST, 1992

Appointee	Appointed by	Succeeds	Appointment/End Date
Council for Montana's Future	(Governor) cont.		
Mr. Tony Colter Deer Lodge Qualifications (if required): none specified	Governor	not listed	8/27/1992 12/15/1992
Mr. Jim Crane Helena Qualifications (if required): none specified	Governor	not listed	8/27/1992 12/15/1992
Mr. Michael Grove White Sulphur Springs Qualifications (if required): none specified	Governor	not listed	8/27/1992 12/15/1992
Ms. Constance Jones Sheridan Qualifications (if required): none specified	Governor	not listed	8/27/1992 12/15/1992
Ms. Alyce Kuehn Sidney Qualifications (if required): none specified	Governor	not listed	8/27/1992 12/15/1992
Ms. Debbie Leeds Havre Qualifications (if required): none specified	Governor	not listed	8/27/1992 12/15/1992
Ms. Jane Lopp Kalispell Qualifications (if required): none specified	Governor	not listed	8/27/1992 12/15/1992
Mr. Rich Pavlonnis Great Falls Qualifications (if required): none specified	Governor	not listed	8/27/1992 12/15/1992

BOARD AND COUNCIL APPOINTEES: AUGUST, 1992

Appointee	Appointed by	Succeeds	Appointment/End Date
Council for Montana's Future	(Governor) cont.		
Mr. Russ Ritter Helena Qualifications (if required): none specified	Governor	not listed	8/27/1992 12/15/1992
Ms. Lynn Robson Bozeman Qualifications (if required): none specified	Governor	not listed	8/27/1992 12/15/1992
Mr. Craig Smith Wolf Point Qualifications (if required): none specified	Governor	not listed	8/27/1992 12/15/1992
Mr. Daniel Smith Missoula Qualifications (if required): none specified	Governor	not listed	8/27/1992 12/15/1992
Mr. Alan Solum Kalispell Qualifications (if required): none specified	Governor	not listed	8/27/1992 12/15/1992
Mr. David Spencer Willow Creek Qualifications (if required): none specified	Governor	not listed	8/27/1992 12/15/1992
Mr. Herman Wessell Billings Qualifications (if required): none specified	Governor	not listed	8/27/1992 12/15/1992
Mr. Craig Wilson Billings Qualifications (if required): none specified	Governor	not listed	8/27/1992 12/15/1992

BOARD AND COUNCIL APPOINTEES: AUGUST, 1992

Appointee	Appointed by	Succeeds	Appointment/End Date
Council for Montana's Future (Governor) cont.			
Mr. Robert Wuttke, Jr. Missoula Qualifications (if required): none specified	Governor	not listed	8/27/1992 12/15/1992
Department of Commerce Director (Commerce)			
Mr. Alan G. Elliott Billings Qualifications (if required): none specified	Governor	Brooke	8/1/1992 0/0/0
Peace Officers Standards and Training Advisory Council (Justice)			
Mr. Lee Edmisten Sheridan Qualifications (if required): sheriff	Governor	Later	8/6/1992 12/31/1993
Mr. Erwin J. Kent Helena Qualifications (if required): represents Fish, Wildlife and Parks	Governor	Bird	8/6/1992 12/31/1993
Science and Technology Development Board (Commerce)			
Mr. James A. Stevenson Billings Qualifications (if required): represents private sector	Governor	Allen	8/27/1992 1/1/1995
Wheat and Barley Committee (Agriculture)			
Mr. Fred L. Elling Rudyard Qualifications (if required): Republican represents District II	Governor	Simonson	8/20/1992 8/20/1995
Ms. Judy Vermulm Cut Bank Qualifications (if required): Democrat represents District III	Governor	Mattson	8/20/1992 8/20/1995

VACANCIES ON BOARDS AND COUNCILS -- October 1, 1992 through December 31, 1992

Board/current position holder	Appointed by	Term end
Alfalfa Seed Committee (Agriculture)		
Mr. Durl Heiken, Billings Qualifications (if required): public member	Governor	12/21/1992
Mr. Keith Reynolds, Winnett Qualifications (if required): public member	Governor	12/21/1992
Board of Outfitters (Commerce)		
Mr. Jack Billingsley, Glasgow Qualifications (if required): licensed outfitter from District 2	Governor	10/1/1992
Mr. Raymond Craig Madsen, Great Falls Qualifications (if required): licensed outfitter from District 2	Governor	10/1/1992
Council for Montana's Future (Governor)		
Mr. John Bailey, Livingston Qualifications (if required): none specified	Governor	12/15/1992
Mr. Kurt Baltrusch, Glendive Qualifications (if required): none specified	Governor	12/15/1992
Mr. Jerry Black, Shelby Qualifications (if required): none specified	Governor	12/15/1992
Ms. Anne Boothe, Malta Qualifications (if required): none specified	Governor	12/15/1992
Mr. Tony Colter, Deer Lodge Qualifications (if required): none specified	Governor	12/15/1992
Mr. Jim Crane, Helena Qualifications (if required): none specified	Governor	12/15/1992

VACANCIES ON BOARDS AND COUNCILS -- October 1, 1992 through December 31, 1992

Board/current position holder	Appointed by	Term end
Council for Montana's Future (Governor) cont.		
Mr. Michael Grove, White Sulphur Springs Qualifications (if required): none specified	Governor	12/15/1992
Ms. Constance Jones, Sheridan Qualifications (if required): none specified	Governor	12/15/1992
Ms. Alyce Kuehn, Sidney Qualifications (if required): none specified	Governor	12/15/1992
Ms. Debbie Leeds, Havre Qualifications (if required): none specified	Governor	12/15/1992
Ms. Jane Lopp, Kalispell Qualifications (if required): none specified	Governor	12/15/1992
Mr. Rich Pavlonnis, Great Falls Qualifications (if required): none specified	Governor	12/15/1992
Mr. Russ Ritter, Helena Qualifications (if required): none specified	Governor	12/15/1992
Ms. Lynn Robson, Bozeman Qualifications (if required): none specified	Governor	12/15/1992
Mr. Craig Smith, Wolf Point Qualifications (if required): none specified	Governor	12/15/1992
Mr. Daniel Smith, Missoula Qualifications (if required): none specified	Governor	12/15/1992
Mr. Alan Solum, Kalispell Qualifications (if required): none specified	Governor	12/15/1992

VACANCIES ON BOARDS AND COUNCILS -- October 1, 1992 through December 31, 1992

Board/current position holder	Appointed by	Term end
Council for Montana's Future (Governor) cont.		
Mr. David Spencer, Willow Creek Qualifications (if required): none specified	Governor	12/15/1992
Mr. Herman Wessell, Billings Qualifications (if required): none specified	Governor	12/15/1992
Mr. Craig Wilson, Billings Qualifications (if required): none specified	Governor	12/15/1992
Mr. Robert Wuttke, Jr., Missoula Qualifications (if required): none specified	Governor	12/15/1992
Historic Preservation Review Board (Commerce) Mr. Paul H. Gleye, Bozeman Qualifications (if required): architectural historian	Governor	10/1/1992
Mr. James R. McDonald, Missoula Qualifications (if required): none specified	Governor	10/1/1992
Natural Resources Advisory Council (Natural Resources and Conservation) Mr. John Anderson, Alder Qualifications (if required): Western Montana	Director	11/30/1992
Resource Conservation Advisory Council (Department of Natural Resources) Mr. Sever Enkerud, Glasgow Qualifications (if required): grazing districts	Director	11/30/1992
Mr. Ellis Hagen, Westby Qualifications (if required): Eastern Montana	Director	11/30/1992
Mr. Herb Karst, Sunburst Qualifications (if required): North Central Montana	Director	11/30/1992

VACANCIES ON BOARDS AND COUNCILS -- October 1, 1992 through December 31, 1992

Board/current position holder	Appointed by	Term end
Resource Conservation Advisory Council (Department of Natural Resources) cont.		
Mr. Arville Lammers, Shawmut Qualifications (if required): General Public	Director	11/30/1992
Mr. Ken Minnie, Roundup Qualifications (if required): South Central Montana	Director	11/30/1992
Mr. Bob Schroeder, Missoula Qualifications (if required): Conservation Districts	Director	11/30/1992
Science and Technology Advisory Council (Commerce)		
Dr. William Wiley, Richland Qualifications (if required): none specified	Governor	10/22/1992
Mr. Bud Wonsiewicz, Englewood Qualifications (if required): none specified	Governor	10/22/1992
Water and Waste Water Operators Advisory Council (Health and Environmental Sciences)		
Mr. Gary M. Smith, Cut Bank Qualifications (if required): none specified	Governor	10/16/1992