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MONTANA ADMINISTRATIVE REGISTER

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JAN 15 1993

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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing and where written comments may be submitted.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

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BEFORE THE STATE COMPENSATION MUTUAL INSURANCE FUND
OF THE STATE OF MONTANA

In the matter of the proposed) NOTICE OF PUBLIC HEARING FOR
amendments of rules 2.55.324,) PROPOSED AMENDMENTS OF RULES
2.55.327, and 2.55.402) 2.55.324, 2.55.327, AND
pertaining to the) 2.55.402
establishment of premium)
rates.)

TO: All Interested Persons:

1. On February 3, 1993, the State Compensation Mutual Insurance Fund will hold a public hearing at 2:00 p.m., in Room 303 of the State Compensation Mutual Insurance Fund Building, 5 South Last Chance Gulch, Helena, Montana, to consider the amendments to rules 2.55.324, 2.55.327, and 2.55.402 pertaining to the State Compensation Mutual Insurance Fund and premium rate setting.

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

2.55.324 PREMIUM RATESETTING (1) The board shall approve the overall rate adjustment that provides an amount sufficient to meet the aggregate revenue projections. Except as provided in subsections (2) through ~~(6)~~(7), to establish a premium rate for a classification for the following fiscal year, the state fund staff in consultation with the actuary and with approval of the board shall apply the overall rate adjustment factor to each credibility weighted rate in an amount sufficient to ensure that the aggregate of the premium for all classifications provides an amount sufficient to meet the actuarially determined aggregate revenue projections.

(2)(a) The state fund staff in consultation with the actuary and with approval of the board shall evaluate an individual classification to determine whether the process for setting the premium rate results in an equitable rate based on an analysis of the losses and the premium amount and, if the rate is not equitable, may adjust it so that it is equitable.

(b) Payrolls have been determined not to be sufficiently verifiable for the horse racing industry and a fee basis shall be used. The fee shall be based on the aggregate revenue requirements of this classification and allocated among the projected number of industry participants. The policy period and premium rates for this industry may be placed on a calendar year basis.

(3) The state fund staff in consultation with the actuary and with approval of the board may set a classification's rate for all or a portion of the fiscal year at a percentage of the National Council on Compensation Insurance (NCCI) rate based on a factor recommended by the state fund actuary of not more than 150% of the NCCI rate or not less than 75% 50% of the NCCI rate or substitute rate or at the rate of an equivalent class code recommended by NCCI or

the state fund actuary. These situations include, but are not limited to:

(a) an industry or occupation new to Montana or the state fund;

(b) an industry or occupation without state fund experience;

(c) an industry or occupation which has changed to the extent that a new classification code is applicable;

(d) an industry or occupation with significant changes in class code definition or application such that a portion of the experience of that classification code would be moved into two or more classification codes. A significant change may be determined by the impact on the experience of the class codes by review of the percent of payroll and liabilities affected, numbers of policyholders, the similarities or differences in experience and premium of those moving into or out of a class code and the feasibility of developing experience-based rates.

(4) - (5) remain the same.

(6) For each construction class code defined in rule 2.55.327, the state fund staff in consultation with the actuary and with approval of the board will calculate and apply an additional factor to offset the anticipated credits in rule 2.55.327. These factors will be applied to each construction class code after the credibility weighted rate and before the overall rate adjustment, however, the limits in (4) do not apply.

(7). The board may approve for each class code a premium rate which is a percentage of or more than the NCCI rate or substitute rate. The board may use these percentages based upon the credibility factor of each code, with all codes which have the same credibility factor treated alike. However, no rate generated by this percentage and applied to a class code shall be less than the state fund's experience-based rate for that class code and shall also be subject to the limitations in (4).

AUTH: Sec. 39-71-2315 and 2316 MCA; IMP: Sec. 39-71-2211, 39-71-2311 and 39-71-2316 MCA.

Rationale: (2)(b): Premium ratesetting for the horse racing industry is an exception to the usual ratemaking process as it is fee based. This amendment combines all of the features of the horse racing premium ratesetting in one subpart for clarification. The policy has a calendar year basis to coincide with the horse racing season and the licensing process used by the board of horse racing.

Subpart (3) sets out the process for a new or changed code and it is currently an exception to the usual ratemaking process, but as new and changed industries arise year around, the state fund wants to clarify within the language in (3) that it is a process for ratemaking as well as the process used at other times during the year for new or changed industries.

Amending this subsection to insert "substitute rate" reflects consistency with 2.55.322 and allows the use of a substitute rate in conjunction with a new or changed industry.

Currently for a new changed industry, the state fund uses not less than 50% of the NCCI rate. A percentage of not less than 75% more closely approximates the average at which the state fund rates are a percentage of the NCCI rates.

(6): Clarify that the construction industry premium credit program is a specific program mandated by the Legislature and therefore the limits in (4) do not apply. This change makes the rules consistent with the statutory requirements of the plan to be revenue neutral.

(7): This amendment is an additional exception to the regular ratemaking process and allows for use of an NCCI rate to be used in the ratemaking process, particularly when state fund experience is limited, but this subsection is also subject to the limitations in (4).

2.55.327 CONSTRUCTION INDUSTRY PREMIUM CREDIT PROGRAM

(1) - (2) remain the same.

(3) The following class codes are the construction codes eligible for the construction industry premium credit program:

3365	5040	5146	5215	5403	<u>5473</u>	5507	5703	6204	6260	7536
3724	5057	5160	5221	5437	5474	5508	6003	6217	6306	7538
3726	5059	5183	5222	5443	5479	5538	6005	6229	6319	7601
5020	5069	5188	5223	5445	5480	5551	6017	6233	6325	7605
5022	5086	5190	5348	5462	5491	5645	6018	6251	6365	7855
5037	5102	5213	5402	<u>5472</u>	5506	5651	6045	6252	6400	9521
										9522

(4)(a) The following credit percentages, filed by the National Council on Compensation Insurance (NCCI) with the Montana insurance commissioner, are to be applied to the manual premium of the insured's construction class codes during the survey period to determine the premium credit factor for the fiscal year beginning July 1, 1992:

Average Hourly Wage Credit Percentage

\$ 8.39 or less	None
\$ 8.40-\$ 9.39	.25%
\$ 9.40-\$10.39	.50%
\$10.40-\$11.39	.75%
\$11.40-\$12.59	1.00%
\$12.60-\$13.59	6.00%
\$13.60-\$14.59	7.00%
\$14.60-\$15.59	8.00%
\$15.60-\$16.59	9.00%
\$16.60-\$17.59	10.00%
\$17.60-\$18.59	11.00%
\$18.60-\$19.59	12.00%
\$19.60-\$20.59	13.00%
\$20.60 and above	14.00%

(b) The following credit percentages in lieu of the table in (1) will be used for the fiscal year beginning July 1, 1993.

Average Hourly Wage Credit Percentage

<u>\$ 8.72 or less</u>	<u>None</u>
<u>\$ 8.73-\$ 9.72</u>	<u>.25%</u>
<u>\$ 9.73-\$10.72</u>	<u>.50%</u>
<u>\$10.73-\$11.72</u>	<u>.75%</u>
<u>\$11.73-\$13.09</u>	<u>1.00%</u>
<u>\$13.10-\$14.09</u>	<u>6.00%</u>
<u>\$14.10-\$15.09</u>	<u>7.00%</u>
<u>\$15.10-\$16.09</u>	<u>8.00%</u>
<u>\$16.10-\$17.09</u>	<u>9.00%</u>
<u>\$17.10-\$18.09</u>	<u>10.00%</u>
<u>\$18.10-\$19.09</u>	<u>11.00%</u>
<u>\$19.10-\$20.09</u>	<u>12.00%</u>
<u>\$20.10-\$21.09</u>	<u>13.00%</u>
<u>\$21.10 and above</u>	<u>14.00%</u>

(5) - (6) remain the same.

AUTH: Sec. 39-71-2315 and 2316, MCA; IMP: Sec. 39-71-2211, 39-71-2311 and 39-71-2316 MCA.

Rationale: There are two new class codes to be added to the construction class codes to which the construction credit can be applied. In addition, as the state's average weekly wage changes at the beginning of each fiscal year, the table in (b) reflects the average hourly rate credit percentage which will be used for the fiscal year beginning July 1, 1993 to take into consideration the increase in the state's average weekly wage effective July 1, 1992.

2.55.402 MEDICAL DEDUCTIBLE (1) The state fund offers an annual (fiscal year July 1 through June 30) medical deductible plan in increments of \$500, \$1,000, \$1,500, \$2,000 and \$2,500 per claim. This plan allows qualified employers to reimburse the state fund for a selected deductible amount of the medical costs of each claim in exchange for a premium discount.

(2) To qualify for the plan for the next fiscal year, an employer must:

(a) file an endorsement form, provided by the state fund prior to the beginning of the next fiscal year; and

(b) have annual premium which equals or exceeds the chosen deductible amount; and

(c) demonstrate the ability to promptly pay the deductible amounts by not having a poor premium payment history with the state fund.

(d) have a most recent policy effective date prior to the beginning of the most recent complete fiscal year.

(3) remains the same.


AUTH: Sec. 39-71-2315 and 2316, MCA; IMP: Sec. 39-71-434, 39-71-2311, and 39-71-2316, MCA.

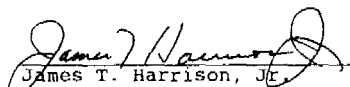
Rationale: Amendments in (2) and (2)(a) are to clarify that the medical deductible is a fiscal year plan, not a calendar year.

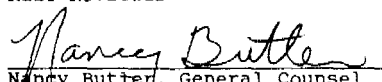
The amendment in (d) is necessary to properly review the requirements in (b) and (c) as the information for an entire complete fiscal year must be evaluated to determine qualification for the annual premium and ability to pay requirements.

3. Interested persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written testimony may be submitted to state fund attorney Nancy Butler, Legal Department, State Compensation Mutual Insurance Fund, 5 South Last Chance Gulch, Helena, Montana 59604-4759, no later than February 11, 1993.

4. The State Fund Legal and Underwriting Departments have been designated to preside over and conduct the hearing.


Dal Smilie, Chief Legal Counsel
Rule Reviewer


James T. Harrison, Jr.
Chairman of the Board


Nancy Butler, General Counsel
Rule Reviewer

Certified to the Secretary of State January 4, 1993.

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

In the Matter of Proposed	)	NOTICE OF PROPOSED ADOPTION
Adoption of a Rule Requiring	)	OF A RULE REQUIRING A PRE-
a Prefiling Notification of	)	FILING NOTIFICATION OF
Certain Utility Rate Case	)	CERTAIN UTILITY RATE CASE
Filings before the Public	)	FILINGS BEFORE THE PSC
Service Commission.	)	NO PUBLIC HEARING
	)	CONTEMPLATED

TO: All Interested Persons

1. On February 17, 1993 the Department of Public Service Regulation proposes to adopt the rule identified in the above title and described in the following paragraphs, all related to prefiling notification of utility rate case filings.

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

RULE 1. NOTIFICATION OF CERTAIN UTILITY RATE CASE FILINGS (1) A utility which anticipates the filing of a general rate case subject to commission established minimum filing requirements shall file with the commission, at least 30 days prior to the intended rate case filing date, a notification of that intent.

(2) The notification shall be mailed to all parties and interested persons named in the last service list of the previous rate case filed by that utility.

(3) The notification shall include, by an informative, concise, narrative statement, individual paragraphs, and accompanying tables:

(a) the date of the intended rate case filing;

(b) a summary of the approximate change in the utility's revenue requirements, approximate changes to rates by class, both being described by dollar amount and percentage; and

(c) a summary of the major elements of the requested changes.

(4) This rule does not apply to commission approved single or limited issue filings or filings made on a regular schedule established by rule or order.

(5) The filing of notification does not bind the utility to the filing of a rate case. AUTH: Sec. 69-3-103; IMP, Secs. 69-3-102, 69-3-106, 69-3-301, 69-3-302 and 69-3-303, MCA

3. Rationale: The Commission has recently completed a critical analysis of its decision making process (PSC Docket No. 90.7.44) resulting in changes virtually abolishing the liberal amount of time previously dedicated to preliminary review, analysis, and preparation by the Commission and intervenors. This rule is necessary to permit both the Commission and potential intervenors sufficient time to complete required preliminary preparation for the filing of a utility rate case. The Commission finds that in order to properly conduct

and complete a utility rate case within the nine month period prescribed by Section 69-3-302, MCA, public notices, procedural orders, and schedules must be now issued within the first seven days following filing. Additionally, intervention must be completed within the first 14 days thereafter and intervenor discovery must be prepared for service within the following 14 days. Many intervenors are institutions or organizations requiring board meetings for review of the filing, approval of intervention, and the hiring of expert witnesses and attorneys. The Commission estimates that approximately 30 days is required for an adequate preview of an anticipated rate case filing to permit both the Commission and potential intervenors to reach preliminary organizational decisions concerning the filing.

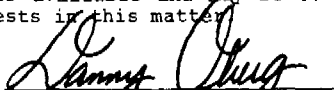
4. Interested parties may submit their data, views or arguments concerning the proposed adoption in writing to Martin Jacobson, Public Service Commission, 1701 Prospect Avenue, P.O. Box 202601, Helena, Montana 59620-2601 no later than February 17, 1993.

5. If a person who is directly affected by the proposed adoption wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a public hearing and submit this request along with any written comments he has to Martin Jacobson, Public Service Commission, 1701 Prospect Avenue, Helena, Montana 59620-2601, no later than February 17, 1993.

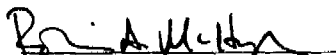
6. If the agency receives requests for a public hearing on the proposed adoption from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed adoption; from the Administrative Code Committee of the legislature; from a governmental subdivision or agency; or from an association having 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. Ten percent of those persons directly affected has been determined to be 2 based upon a minimum of 20 public utilities that might be reasonably expected to be affected by this rule.

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

8. 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

CERTIFIED TO THE SECRETARY OF STATE JANUARY 4, 1993.


Reviewed By

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

In the matter of the	)	NOTICE OF PUBLIC HEARING ON
amendment of rules	)	THE PROPOSED AMENDMENT OF
46.12.1226 and 46.12.1229	)	RULES 46.12.1226 AND
pertaining to nursing	)	46.12.1229 PERTAINING TO
facility reimbursement	)	NURSING FACILITY
	)	REIMBURSEMENT

TO: All Interested Persons

1. On February 3, 1993, at 1:15 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 rules 46.12.1226 and 46.12.1229 pertaining to nursing facility reimbursement.

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

46.12.1226 NURSING FACILITY REIMBURSEMENT Subsections (1) through (3) remain the same.

(a) A provider's per diem rate for rate year 1993 shall not exceed the provider's average per diem rate, including the OBRA increment, in effect for rate year 1992 plus \$6-009.00 per diem.

Subsections (4) through (13) remain the same.

AUTH: Sec. 54-6-113 MCA

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

46.12.1229 OPERATING COST COMPONENT Subsections (1) through (2)(c) remain the same.

(i) For purposes of setting rates for rate years beginning on or after July 1, 1992, the DRI-HC shall not be applied to reported nursing facility utilization fees paid or incurred pursuant to section 15-60-102, MCA or to nursing facility utilization fees projected to be paid or incurred during the rate year.

Subsections (2)(d) through (2)(d)(ii) remain the same.

(iii) In determining median operating costs for purposes of setting rates for rate years beginning on or after July 1, 1992, the inflated per diem base period operating cost shall be the inflated base period operating costs, not including reported nursing facility utilization fees paid or incurred pursuant to section 15-60-102, MCA, plus the amount of the nursing facility utilization fee required by law to be paid for each bed day during the rate year.

Subsection (2)(e) remains the same.

(i) For purposes of setting rates for rate years beginning on or after July 1, 1992, operating costs shall not include

nursing facility utilization fees paid or incurred pursuant to section 15-60-102, MCA.

Subsections (2)(f) and (3) remain the same.

(a) In determining the provider's operating cost component for purposes of setting rates for rate years beginning on or after July 1, 1992, the inflated base period per diem operating cost shall be the inflated base period operating costs, not including reported nursing facility utilization fees paid or incurred pursuant to section 15-60-102, MCA, plus the amount of the nursing facility utilization fee required by law to be paid for each bed day during the rate year.

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

(a) In determining the amount of any incentive allowance to which the provider may be entitled under subsection (5) for purposes of setting rates for rate years beginning on or after July 1, 1992, the inflated base period per diem operating cost shall be the inflated base period operating costs, not including reported nursing facility utilization fees paid or incurred pursuant to section 15-60-102, MCA, plus the amount of the nursing facility utilization fee required by law to be paid for each bed day during the rate year.

AUTH: Sec. 53-6-113 MCA

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

3. The proposed amendments are necessary to implement the provisions of sections 53-6-101 and 53-6-113, MCA, which require and authorize the department to set rates for medicaid services. These changes are necessary to revise the methodology by which rate year 1993 reimbursement rates for medicaid nursing facility services will be determined.

The proposed amendments to the medicaid nursing facility reimbursement rule are necessary to raise the \$6.00 per diem rate increase cap to \$9.00 and to revise the rate setting methodology to account differently for the costs incurred by facilities to pay nursing facility utilization fees.

Current ARM 46.12.1226(3)(a) provides that a provider's per diem rate for rate year 1993 shall not exceed the provider's average per diem rate, including the OBRA increment, in effect for rate year 1992, plus \$6.00 per diem. This provision places a limit of \$6.00 per diem on the amount by which any provider's rate may increase from the 1992 to the 1993 rate year.

The 1991 legislature enacted a nursing facility utilization fee, known as the "bed fee," which required nursing facilities to pay a fee of \$1.00 per patient day in state fiscal year 1992 and \$2.00 per patient day in state fiscal year 1993, for all patient days except private pay. The bed fee is a cost which must be incurred by all facilities.

Under current ARM 46.12.1229, the department uses facilities' 1991 cost reports to determine base period costs for setting

rate year 1993 rates. The 1991 cost reporting year is a different period for each facility, because it matches the facility's fiscal year used for tax purposes. For some facilities, the 1991 base period fell partly within state fiscal year 1992, when the \$1.00 per diem bed fee was in effect. For some facilities, the 1991 base period included none of the state fiscal year 1992 period during which the \$1.00 bed fee was in effect. For the other facilities, the 1991 base period included some but not all of the state fiscal year 1992 period during which the \$1.00 bed fee was in effect. None of the facilities incurred or reported bed fees at the \$2.00 per diem amount which will be incurred for the entire 1993 rate year.

Accordingly, for rate year 1993, rates are based upon cost projections which assume that only some facilities incurred a \$1.00 fee for only some of the year and that other facilities incurred no bed fees for any portion of the year. Yet, all facilities will in fact be required to pay the \$2.00 per diem fee for the entire 1993 rate year.

The proposed amendments to ARM 45.12.1229 would revise the methodology for determining 1993 rates to project costs based upon the assumption that all facilities will in fact pay a \$2.00 bed fee for the entire rate year. The methodology would be revised to provide that actual reported bed fees would be removed from 1991 base year operating costs, all other base year operating costs would be inflated by the DRI-HC inflation index, and that the projected \$2.00 bed fee required to be paid would be added to the per diem operating cost for each facility. Once an inflated base period per diem operating cost is calculated for each facility in this manner, the median operating costs would be calculated. This median operating cost would be used to calculate the incentive allowance, if any, for each facility. These amendments to ARM 46.12.1229 are necessary to accurately project bed fee costs for purposes of rate year 1993 rates.

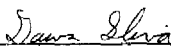
The proposed amendment to ARM 46.12.1226(3)(a) would increase the rate increase cap from \$6.00 to \$9.00 to allow more of facilities' increased costs from 1992 to 1993 to be reflected in medicaid nursing facility reimbursement rates. This change is necessary to allow the increased projected operating costs resulting from the amendments to ARM 46.12.1229, and other increased costs, to affect the actual per diem rate of all facilities.

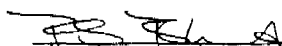
The department estimates that the proposed amendments will have a fiscal impact of approximately \$3.5 million in total state and federal funds over the amount estimated to be expended under the current rule. The medical care advisory committee will be notified of these proposed changes on January 21, 1993. A copy of this notice may be reviewed in the county office of public welfare in each county of the state of Montana.

The proposed amendments will apply retroactively to medicaid nursing facility services provided on or after July 1, 1992. The amendments will not adversely impact any nursing facility. All nursing facilities participating in the medicaid program will receive a per diem rate either equal to or greater than the per diem rate it is receiving under the current rule. Under the current rule, some provider's received decreased per diem rates effective August 1, 1992. In the event the proposed amendments would result in a rate for such facilities for the period July 1, 1992 through July 31, 1992 which is less than the rate in effect on June 30, 1992, then the proposed amendments would apply for such facilities for nursing facility services provided on or after August 1, 1992. The department believes retroactive application of these amendments is necessary to correct an alleged flaw in the reimbursement methodology which affects the entire 1993 rate year.

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 February 11, 1993.

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 January 4, 1993.

BEFORE THE BOARD OF CRIME CONTROL
DEPARTMENT OF JUSTICE
STATE OF MONTANA

In the Matter of the)
Adoption of Rule 23.14.307) NOTICE OF ADOPTION
regarding the DARE Trust Fund) OF RULE 23.14.307 REGARDING THE
) DRUG ABUSE RESISTANCE EDUCATION
) (DARE) TRUST FUND

TO: All Interested Persons:

1. On November 12, 1992, the Board of Crime Control published notice to adopt the following rule concerning contributions received under the drug abuse resistance education (DARE) trust fund checkoff, at page 2452 of the 1992 Montana Administrative Register, issue number 21.

2. The agency has adopted the rule with the following change:

RULE 23.14.307 DRUG ABUSE RESISTANCE EDUCATION (DARE) TRUST FUND (1) Public contributions received under the drug abuse resistance education trust fund tax checkoff shall be used to develop, enhance and expand Drug Abuse Resistance Education (DARE) programs only.

(2) The Board may assess an administrative fee not to exceed 5% of the total tax checkoff contributions, ~~gifts, and grants~~ received each tax year under this act.

(3) Funds will be administered according to established policies and procedures of the Board.

(4) Funds collected for a given tax year will be allocated within three months after the Board is notified by the Department of Revenue of the total amount received through the checkoff.

(5) Existing DARE projects will receive up to 100% of the contributions which originate from their service area as defined by the zip code from which the contribution was received.

(6) All remaining contributions, gifts, and grants received from zip code areas not served by DARE projects or from outside of Montana will be distributed when the amount in this category reaches a minimum of \$2,000.

(7) Communities not served by a DARE project will be afforded the opportunity to apply for subgrant funds according to established Board subgrant guidelines.

3. The change to the rule was made in response to comment received from the Legislative Council. No other comments were received.

July 7 Browning
Rule Reviewer

By: Edwin L. Hall
EDWIN L. HALL, Administrator
BOARD OF CRIME CONTROL
DEPARTMENT OF JUSTICE

Certified to the Secretary of State, January 4 1993

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment)
of rules and a new rule regarding) CORRECTED
what is classified as wages for) NOTICE OF AMENDMENT OF
purposes of Workers' Compensation) ARM 24.11.813 AND 24.11.814
and Unemployment Insurance.) AND ADOPTION OF NEW RULE I

TO ALL INTERESTED PERSONS:

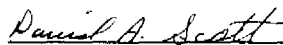
1. On October 29, 1992, the Department published notice at page 2344 of the Montana Administrative Register, Issue No. 20, to consider the amendment of the above-captioned rules and the adoption of new rule I. On December 24, 1992, the Department published notice of adoption of those rules, with certain changes made in response to comments, at page 2753 of the Montana Administrative Register, Issue No. 24.

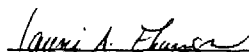
2. In adopting the rules, a change was made in RULE I (2)(e) [24.29.720 (2)(e)] from the phrase "related equipment" to "timber falling" in the last line of the subsection, in response to a comment from the State Fund. A similar change should have been made in the parallel language in 24.11.813 (3), but it was inadvertently not included in the notice of adoption. The proper language has been included in the December 31, 1992, replacement pages, however.

3. The correct text of 24.11.813 (3) is as follows:

(3) ~~With respect to light equipment, such as chain saws, the reasonable rental value may not be greater than 25% of the employee's gross remuneration.~~ equipment other than vehicles, the employer may pay an allowance not greater than the reasonable rental value for that equipment, which for individuals involved in timber falling may not exceed \$22.50 per working day for chain saw and related equipment. TIMBER FALLING expense.

The rest of the rules remain the same as published in the notice of adoption.


David A. Scott
Rule Reviewer


Laurie A. Ekanger, Commissioner
DEPARTMENT OF LABOR & INDUSTRY

Certified to the Secretary of State: January 4, 1993

BEFORE THE DEPARTMENT OF STATE LANDS
AND BOARD OF LAND COMMISSIONERS

In the matter of the adoption,)	NOTICE OF ADOPTION OF
of new Rules I through XI)	STREAMSIDE MANAGEMENT
implementing regulations for)	ZONE RULES
forest practices in the)	
streamside management zone.)	

TO: All Interested Persons

1. On October 15, 1992, the Board of Land Commissioners and Department of State Lands published notice of proposed adoption of rules concerning forest practices in the streamside management zone at page 2252 of the 1992 Montana Administrative Register, Issue Number 19.
2. The agency has adopted the new rules with the following changes:

RULE 1 (26.6.601) APPLICABILITY - DEFINITIONS - EFFECTIVE DATE

- (1) [Rules I through XIX] apply to forest practices conducted within a timber sale in the streamside management zone. Such practices, as defined at 77-5-302(3), MCA, include the following activities when conducted within a "timber sale" as that term is defined below:
 - (a) the harvesting of trees;
 - (b) road construction or reconstruction associated with harvesting and accessing trees;
 - (c) site preparation for regeneration of a timber stand;
 - (d) reforestation;
 - (e) management of logging slash.
- (2) Wherever used in [these rules], unless a different meaning clearly appears from the context:
 - (a) "Alternative practices" means forest practices conducted in the SMZ that are different from the practices required by the standards provided in 77-5-303, MCA, and are approved by the department either by adoption of [these rules] or on a site-specific basis upon application of the operator.
 - (b) "Broadcast burning" means spreading fire through a continuous fuel cover. The fuels consist of slash resulting from forest practices, surface litter, and duff. Fuels are left in place, fairly uniform, and ignited under certain conditions with the intent to meet planned management objectives in the desired area.
 - (c) "Class 1 stream segment" means a portion of stream that supports fish; ~~or that contributes water during most years to a stream, lake, or other body of water that supports fish; or that has continuous surface flow during most of the year, or a portion of stream that normally has surface flow during 6 months of the year or more; and that contributes surface flow to another stream, lake, or other body of water.~~
 - (d) "Class 2 stream segment" means a portion of stream ~~which does not carry surface flow to a class 1 stream segment.~~

lake, or other body of water during most years that is not a class 1 or class 3 stream segment. Two common examples of class 2 stream segments are:

(i) A portion of stream which does not support fish; normally has surface flow during less than six months of the year; and contributes surface flow to another stream, lake, or other body of water; or

(ii) A portion of stream that does not support fish; normally has surface flow during 6 months of the year or more; and does not contribute surface flow to another stream lake, or other body of water.

(e) "Class 3 stream segment" means a portion of a stream that does not support fish; normally has surface flow during less than six months of the year; and rarely contributes surface flow to another stream, lake, or other body of water.

(f) (f) "Clearcutting" means removal of virtually all the trees, large and small, in a stand in one cutting operation. Virtually all woody vegetation is removed from the site preparatory to establishment of new trees.

(g) (g) "Construction" means cutting and filling of earthen material that results in a travel-way for wheeled vehicles.

(h) (h) "Diameter at breast height" (abbreviated "dbh") means the diameter of a tree measured 4½ feet from the ground level. Ground level is the highest point of the ground touching the stem.

(i) "Eastern Zone" means the counties of Big Horn, Blaine, Carter, Chouteau, Custer, Daniels, Dawson, Fallon, Fergus, Garfield, Golden Valley, Hill, Liberty, McCone, Musselshell, Petroleum, Phillips, Powder River, Prairie, Richland, Roosevelt, Rosebud, Sheridan, Toole, Treasure, Valley, Wibaux, and Yellowstone.

(j) (j) "Established road" means an existing access or haul route for highway vehicles- that it is passable with clearing of small woody vegetation and minor earthwork under one or more of the following circumstances:

(i) without any work;

(ii) with clearing of windfall or small woody vegetation;

(iii) with surface blading;

(iv) with replacement of stream crossing structures and drainage structures that were removed to restrict access; or

(v) with removal of constructed access barriers.

(k) (k) "Hazardous or toxic material" means substances which by their nature are dangerous to handle or dispose of, or a potential environmental contaminant, and includes petroleum products, pesticides, herbicides, chemicals, and biological wastes.

(l) (l) "Lake" means a body of water where the surface water is retained by either natural or artificial means, where the natural flow of water is substantially impeded, and which supports fish.

(m) (m) "Ordinary high water mark" means the stage regularly reached by a body of water at the peak of fluctuation in its water level. The ordinary high water mark is often generally observable as a clear, natural line impressed on the bank. It may be indicated by such characteristics as terracing,

changes in soil characteristics, destruction of vegetation, presence or absence of litter or debris, or other similar characteristics.

(l) (n) "Other body of water" means ponds and reservoirs greater than 1/10th acre that do not support fish; and irrigation and drainage systems discharging directly into a stream, lake, pond, reservoir or other surface water. Water bodies used solely for treating, transporting, or impounding pollutants shall not be considered surface water.

(m) (o) "Road" means a travel-way suitable for highway vehicles.

(n) (p) "Salvage" means harvesting trees that have been killed or damaged or are in imminent danger of being killed or damaged by injurious agents other than competition between trees.

(o) (q) "Sidecasting" means the act of moving excess earthen material over the side of a road during road maintenance operations.

(p) (r) "Slash" means the woody debris that is dropped to the forest floor during forest practices. Timber slash consists of stems, branches, and twigs left behind after forest practices.

(q) (s) "Slope distance" means the length of a line between two points on the land surface.

(r) (t) "Stream," as defined at 77-5-302(7), MCA, means "a natural watercourse of perceptible extent that has a generally sandy or rocky bottom or definite banks and that confines and conducts continuously or intermittently flowing water."

(s) (u) "Streamside management zone" or "zone" (abbreviated "SMZ"), as defined at 77-5-302(8), MCA, means "the stream, lake, or other body of water and an adjacent area of varying width where management practices that might affect wildlife habitat or water quality, fish, or other aquatic resources need to be modified. The streamside management zone encompasses a strip at least 50 feet wide on each side of a stream, lake, or other body of water, measured from the ordinary high-water mark, and extends beyond the high-water mark to include wetlands and areas that provide additional protection in zones with steep slopes or erosive soils."

(t) (v) "Timber sale", as defined at 77-5-302(9), MCA, means "a series of forest practices designed to access, harvest, and regenerate trees on a defined land area for commercial purposes."

(u) (w) "Wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands include marshes, swamps, bogs, and similar areas.

(3) [Rules I through XIX] shall become effective March 15, 1993. (AUTH: 77-5-307, MCA; IMP: 77-5-307, MCA.)

RULE II (26.6.602) WIDTH OF STREAMSIDE MANAGEMENT ZONE - MARKING BOUNDARY (1) The slope of the SMZ is measured perpendicular to the stream or lake from the ordinary high water mark to a point 50 feet slope distance from the ordinary high water mark.

(2) The minimum SMZ width is 50 feet slope distance on each side of streams, and lakes, and other bodies of water measured from the ordinary high water mark, in all cases except:

~~(a) Where wetlands exist adjacent to the stream, lake, or other body of water, the SMZ extends to include the wetlands;~~

~~(a) (b) On class 1 and 2 stream segments and lakes where the slope of the SMZ is greater than 30% 35%, and the soil profile is mostly sand or silt, the minimum SMZ width is 100 feet; or except:~~

~~(b) On class 1 stream segments and lakes where the slope of the SMZ is greater than 40% and the timber harvest is to be conducted with ground skidding by wheeled or tracked equipment, the minimum SMZ width is 100 feet, regardless of soil type.~~

~~(c) Under the conditions described in (a) or (b) above, when (i) where an established road exists between 50 and 100 feet from the ordinary high water mark, the SMZ boundary is located at the toe of the road fill; or~~

~~(d) Under the conditions described in (a) or (b) above, when (ii) where the slope of the extended-SMZ decreases to 15% or less at a location at least 50 feet slope distance to form a bench that is 50 to 100 feet from the ordinary high water mark and at least 30 feet wide, and does not exceed 15% for at least an additional 30 feet slope distance from the ordinary high water mark, the SMZ boundary is located at the edge of the slope change bench nearest the stream.~~

(3) Where forest practices that are prohibited in the SMZ will be conducted adjacent to the SMZ boundary on a class 1 or class 2 stream segment, the SMZ boundary must be clearly marked prior to conducting such practices. (AUTH: 77-5-307, MCA; IMP: 77-5-301, 302(8), MCA.)

RULE III (26.6.603) BROADCAST BURNING (1) Broadcast burning in the SMZ is prohibited unless approved by the department under a site-specific alternative practice.

~~(2) The department may approve broadcast burning as a site-specific alternative practice when the use of a broadcast burn will conserve the integrity of the SMZ. In most cases this will require burning under conditions that produce low fire intensity in the SMZ. (AUTH: 77-5-307, MCA; IMP: 77-5-303, MCA.)~~

RULE IV (26.6.604) EQUIPMENT OPERATION IN THE SMZ (1) Operation of wheeled or tracked equipment in the SMZ except on established roads is prohibited except as provided in this rule.

~~(2) As an alternative practice not requiring site-specific approval, an operator may operate wheeled or tracked equipment in the SMZ above the ordinary high water mark only under the following conditions:~~

~~(a) the ground must be covered with snow at least 24 inches deep or the ground must be frozen to a depth of more than 2 inches; and~~

~~(b) the residual stand of shrubs and trees must be protected and all stumps left in place; and~~

~~(c) such operations must not cause rutting of the soil and must otherwise conserve the integrity of the SMZ.~~

(2) In order to permit timber harvest on wetlands under conditions that protect the integrity of the SMZ, an operator may, as an alternative practice without site-specific approval, operate wheeled or tracked equipment from the outside edge of an SMZ to within 50 feet of the ordinary high water mark wherever:

(a) the SMZ extends beyond 50 feet from the ordinary high water mark to include adjacent wetlands;

(b) there exist winter conditions with adequate snow or frozen ground, and

(c) operation of the wheeled or tracked equipment:

(i) does not cause rutting or displacement of the soil;

(ii) protects and retains shrubs and submerchantable trees to the fullest extent possible;

(iii) does not remove stumps; and

(iv) otherwise conserves the integrity of the SMZ.

(3) In order to minimize road construction and skid trails necessary for timber harvest on lands adjacent to the SMZ, an operator may, as an alternative practice without site-specific approval, cross the SMZ and the stream or other body of water with wheeled or tracked equipment on a class 3 stream segment or other body of water at locations spaced approximately 200 feet apart or more provided that:

(a) crossings are located in areas where the stream or other body of water is dry and the banks and bottoms are stable;

(b) excavation is minimized;

(c) the capacity of the stream channel or other body of water is maintained; and

(d) the distance travelled through the SMZ is minimized.

(4) In order to minimize road construction necessary for timber harvest on lands adjacent to the SMZ, an operator may, as an alternative practice without site-specific approval, operate wheeled or tracked equipment inside the SMZ off of established roads on the side of the road away from the stream wherever:

(a) an established road exists inside the SMZ or construction of a road inside the SMZ is authorized under (Rule VI);

(b) the toe of the road fill nearest the stream is at least 25 feet from the ordinary high water mark; and

(c) operations are conducted in such a manner that:

(i) wheeled or tracked equipment stays out of wetlands except under winter conditions as provided in (2) above;

(ii) all skidding of logs takes place on designated skid trails located approximately 200 feet apart or more;

(iii) all skid trails in such areas are reclaimed by installing erosion control measures and reestablishing vegetative cover;

(iv) drainage features are established or reestablished on all roads used under this section;

(v) logs are not decked on the side of the road toward the stream; and

(vi) no landings are constructed in the SMZ.

(5) When logs are being winched or cable yarded across a class 1 or 2 stream segment by equipment located outside the SMZ, logs must be fully suspended unless otherwise authorized pursuant to the Natural Streambed and Land Preservation Act of 1975, 75-7-101 et seq., MCA.

(3) (6) The department may also approve operation of wheeled or tracked equipment in the SMZ as a site-specific alternative practice only under conditions that:

- (a) conserve the integrity of the SMZ; and
- (b) do not cause rutting of the soil; and
- (c) protect the residual stand of shrubs and trees. (AUTH: 77-5-307, MCA; IMP: 77-5-301, 303, MCA.)

RULE V (26.6.605) RETENTION OF TREES IN THE SMZ - CLEARCUTTING

(1) The forest practice of clearcutting is prohibited in the SMZ unless approved by the department under a site-specific alternative practice.

(2) Further, in order to provide large woody debris, stream shading, water filtering effects, and to protect stream channels and banks, merchantable and submerchantable trees must be retained in the first 50 feet of the SMZ beyond the ordinary high water mark and in the entire SMZ where the SMZ is extended for wetlands under [Rule II(2)(a)], on each side of streams, and along lakes and other bodies of water as follows:

(a) On each side of class 1 stream segments and lakes+ retain

~~(i) No more than 50% of the trees greater than or equal to 8 inches dbh may be removed in any one timber sale; and, or~~

~~(ii) A minimum of 10 trees greater than or equal to 8 inches dbh must be retained in each 100 lineal feet of the SMZ, whichever is greater.~~

~~(i)(iii) If less than 10 trees greater than or equal to 8 inches dbh are present in any 100 lineal foot segment of the SMZ, then a minimum of 10 trees of the largest diameter available must be retained in that segment.~~

~~(i)(iv) Trees retained must be representative of the species and size of trees in the pre-harvest stand.~~

~~(iii) Shrubs and submerchantable trees must be protected and retained in the entire SMZ to the fullest extent possible when conducting forest practices in the SMZ.~~

(b) On each side of class 2 stream segments retain and other bodies of water, 10 trees of any size must be retained in each 100 lineal feet of the SMZ, 50% of the trees greater than or equal to 8 inches dbh, or 5 trees greater than or equal to 8 inches dbh in each 100 lineal feet of the SMZ, whichever is greater.

(i) If less than 5 trees greater than or equal to 8 inches dbh are present in any 100 lineal foot segment of the SMZ, then a minimum of 5 trees of the largest diameter available must be retained in that segment.

(ii) Trees retained must be representative of the species and size of trees in the pre-harvest stand.

(iii) Shrubs and submerchantable trees must be protected and retained in the entire SMZ to the fullest extent possible when conducting forest practices in the SMZ.

(c) On each side of class 3 stream segments and other bodies of water, shrubs and submerchantable trees must be protected and retained in entire SMZ to the fullest extent possible when

conducting forest practices in the SMZ.

~~(Former Section (3) has been moved to (5))~~

~~(4) (3)~~ Hardwood trees and snags meeting diameter standards of (2) above may be counted toward retention tree requirements in the same approximate proportion as their occurrence in the stand prior to commencement of forest practices.

~~(5) Shrubs and submerchantable trees must be protected and retained to the fullest extent possible when conducting forest practices in the SMZ.~~

~~(6) (4)~~ Trees retained pursuant to this rule must be distributed within the SMZ as guided by the following criteria:

(a) favor bank-edge trees;

(b) favor trees leaning toward the stream and those that cannot be felled without falling into the stream;

(c) where the SMZ is greater than 50 feet wide and harvesting will result in the minimum stocking of trees required to be retained under section (2)(a) and (b), concentrate retained trees within 50 feet of the stream where the SMZ is greater than 50 feet wide.

~~(3) (5)~~ Trees retained pursuant to this rule may ~~not~~ be salvaged ~~exceptionally~~ under the following conditions:

(a) ~~All standing live trees not requiring salvage, as defined in [Rule I(2)(n)], must be retained. Trees to be harvested meet the definition of salvage at [Rule I(2)(p)]; and~~

(b) ~~If the minimum tree retention requirements of this rule of section (2) are not met by standing live trees, then additional trees which are or by dead or fallen trees where sufficient standing live trees are not available; and which meet the size requirements of this rule must be retained to meet the minimum tree retention requirements in each 100 lineal feet of the SMZ.~~

(c) All trees that have fallen across or in the stream must be retained, unless salvage of such trees is approved as a site-specific alternative practice subject to other federal and state laws and regulations.

~~(7) (6)~~ All practices which deviate from the tree-distribution criteria provided in (2) and ~~(6) (4)~~ above require approval as site-specific alternative practices. (AUTH: 77-5-307, MCA; IMP: 77-5-301, 303, MCA.)

RULE VI (26.6.606) ROAD CONSTRUCTION IN THE SMZ (1) The construction of roads in the SMZ is prohibited except when necessary to cross a stream or wetland unless approved by the department under a site-specific alternative practice or as provided in this rule. The construction of roads across streams, wetlands or other bodies of water is not regulated by these rules but may be subject to other state and federal laws and regulations.

(2) Road fill material must not be deposited into the SMZ except as needed to construct crossings.

(3) In order to minimize excavation for road construction on erosive soils characteristic of Eastern Montana, an operator may, as an alternative practice without site-specific approval, construct or locate a road inside the SMZ on class 3 stream segments in the eastern zone only wherever:

(a) the slope of the SMZ immediately adjacent to the stream is 10% or less for a distance of at least 25 feet from the ordinary high water mark;

(b) there exists in the outer portion of the SMZ a hillside with slopes in excess of 35%; and

(c) the road is constructed or located on the gentler slopes in such a manner that:

(i) cutting and filling of earthen material is minimized;

(ii) the toe of the road fill is located at least 15 feet from the ordinary high water mark;

(iii) the road is located as far away from the ordinary high water mark as is practical; and

(iv) road drainage features are installed as needed to minimize sediment delivery to streams. (AUTH: 77-5-307, MCA; IMP: 77-5-303, MCA.)

RULE VII (26.6.607) HAZARDOUS OR TOXIC MATERIALS (1) The handling, storage, application, or disposal of hazardous or toxic materials in the SMZ in a manner that pollutes streams, lakes, or wetlands or that may cause damage or injury to humans, land, animals, or plants is prohibited.

(2) Any application of herbicides or pesticides must be done in a manner that such materials are not introduced to streams, lakes, wetlands, or other bodies of water through surface runoff or sub-surface flow.

(3) Any application of herbicides or pesticides must be done in a manner which does not destroy vegetation in the SMZ to an extent which significantly impairs the capacity of the SMZ to provide shade or to act as an effective sediment filter.

(4) Any application of herbicides or pesticides in the SMZ must be in accordance with all label directions and in compliance with all applicable laws and regulations regarding the use of such material.

(5) Dust abatement agents which do not contain waste oil may be applied on roads in the SMZ provided that such material is not directly introduced into a stream, lake, or other body of water. (AUTH: 77-5-307, MCA; IMP: 77-5-303, MCA.)

RULE VIII (26.6.608) SIDE-CASTING OF ROAD MATERIAL (1) The side-casting of road material into a stream, lake, wetland, or other body of water during road maintenance operations is prohibited in the SMZ. (AUTH: 77-5-307, MCA; IMP: 77-5-303, MCA.)

RULE IX (26.6.609) DEPOSITING SLASH (1) Depositing slash in streams, lakes, or other bodies of water is prohibited unless approved by the department under a site-specific alternative practice subject to other state and federal laws and regulations. (AUTH: 77-5-307, MCA; IMP: 77-5-303, MCA.)

RULE X SKIDDING (1) ~~Logs which are not fully suspended must not be skidded or yarded over or through streams unless approved by the department under a site-specific alternative practice.~~ (AUTH: 77-5-307, MCA; IMP: 77-5-303, MCA.)

RULE XIX (26.6.610) SITE-SPECIFIC ALTERNATIVE PRACTICES

(1) The owner or operator shall comply with the management standards stated in 77-5-303(1), MCA, and [these rules], unless approval has been obtained from the department for alternative practices designed for site-specific conditions encountered during a timber sale prior to conducting such practices.

(2) The department may approve a proposed alternative practice only if such practice would be otherwise lawful and the department determines with reasonable certainty that the proposed alternative practice would conserve the integrity of the stream-side management zone and would not significantly diminish the function of the zone as stated in 77-5-301, MCA:

(a) to act as an effective sediment filter to maintain water quality;

(b) to provide shade to regulate stream temperature;

(c) to support diverse and productive aquatic and terrestrial riparian habitats;

(d) to protect stream channel and banks;

(e) to provide large, woody debris that is eventually recruited into a stream to maintain riffles, pools, and other elements of channel structure; and

(f) to promote floodplain stability.

(3) In order to obtain department approval of alternative practices, the owner or operator shall submit to the department an application describing the proposed practices and location. Applications must provide all data specified by the department and must be submitted on forms provided or approved by the department.

(4) Within 10 working days of receipt of the application for approval of alternative practices the department shall determine if the application is approved, approved with modification, disapproved, incomplete, requires additional information or environmental analysis, or requires a field review. The department shall notify the owner and the applicant of its decision in writing.

(5) If the department determines a field review is necessary, the field review must be made at a mutually agreeable time. The owner or his designee must be present at the field review.

(6) Within 10 working days after all necessary field review is complete, the department shall determine whether the application is approved, approved with modification, disapproved, incomplete, or requires additional information or environmental analysis. The department shall notify the owner and the applicant of its decision in writing.

(7) The department may notify the applicant in writing that it declines to conduct further environmental analysis of an application if it determines that the proposed alternative practices are complex, or affect an environmentally sensitive area, or involve a high degree of uncertainty that the proposed alternative practices will have a significant impact on the quality of the human environment. The notice must briefly describe the department's reasons for declining to conduct further analysis. In this case, the applicant may conduct further environmental analysis and submit documentation to the department. The depart-

ment shall independently review any further environmental analysis and documentation of the proposed alternative practices provided by the applicant and may adopt such documentation if it is adequate under the Montana Environmental Policy Act (75-1-101 et seq., MCA) and rules adopted thereunder (ARM 26.2.628-663). If so adopted, the department may utilize such environmental documentation in further consideration of the application for alternative practices.

(8) In the event the department determines that an application for alternative practices may be of significant interest to the public, the time provided in this rule for considering such application may be extended ~~an additional 45 days~~ in order to allow time for the public to be notified and participate in the department's decision pursuant to 2-3-101 et seq. MCA and ARM 26.2.701-707.

(9) Persons applying for approval of alternative practices shall agree in writing that approved alternative practices, including any additional conditions imposed by the department, shall have the same force and authority as the standards contained in 77-5-303, MCA, and shall be enforceable by the department under 77-5-305, MCA, to the same extent as such standards. Persons responsible for conducting alternative practices shall comply with all conditions of such practices. In determining whether to approve applications for alternative practices, the department may consider past violations of such standards or of the requirements of previously approved alternative practices by the applicant.

(10) Authorization to conduct alternative practices is valid for 2 years from the date of approval or for such ~~lesser~~ period as may be specified by the department. (AUTH: 77-5-307, MCA; IMP: 77-5-302, 307, MCA.)

3. Approximately 176 persons presented oral or written comments on the rules. A summary of the comments and the agency's responses to those comments are as follows:

GENERAL COMMENTS

1. **COMMENT:** The rules give no concern to wildlife needs such as hiding and thermal cover in these corridors. Because the SMZ law clearly includes wildlife, wildlife rules must be incorporated in the SMZ rules.

RESPONSE: The Department is not authorized to adopt mandatory rules for management of terrestrial wildlife habitat. Section 77-5-301(5)(b), MCA, indicates specifically that the purpose of the SMZ law with respect to wildlife is to provide "guidelines" for the management of wildlife habitat in streamside zones. The statement of intent of HB 731 (1991) indicates that the Legislature intended for the Department to develop "voluntary, nonenforceable guidelines concerning the selection of retention trees and vegetation, including snags, for wildlife habitat within the streamside management zone." The legislative history further indicates that mandatory standards for terrestrial wildlife were eliminated from the bill during the legislative

process. The Department is currently developing voluntary guidelines for wildlife habitat management in the SMZ.

2. **COMMENT:** a. All class 1 streams should be protected statewide.

b. Intermittent streams should be fully protected because they are the source of a healthy watershed.

c. The current coverage of the rules, including ephemeral streams, should be maintained.

d. The law was written to only apply to perennial streams; the rules go beyond the intent of the law.

RESPONSE: Section 77-5-302(7), MCA, defines "stream" as including those watercourses which have "continuously or intermittently flowing water". The rules have been amended to regulate forest practices on all streams, whether ephemeral, intermittent, or perennial, to varying degrees depending on the duration of surface flow and the degree of connection downstream in the drainage system for each stream segment.

3. **COMMENT:** a. The rules are too loosely defined and too vague.

b. The rules are too complex; use general guidelines instead. Simplify the rules.

c. Language in rules is too technical and should be simplified to improve public understanding.

RESPONSE: The Department has generally reviewed and revised the language in the rules to simplify the language where possible without sacrificing precision or clarity.

4. **COMMENT:** Make the rules more flexible, less oriented toward penalties, like the BMPs. Forest stewardship is largely a matter of motivation, not regulation.

RESPONSE: The Department has drafted and revised the rules to strike a balance between flexibility for varying conditions and implementing specific, enforceable standards as required by the statute. Additional flexibility is provided through provisions for alternative practices.

5. **COMMENT:** Post all operations with clear identifying information so that the public can police violations.

RESPONSE: The statute does not authorize the Department to impose such a requirement.

6. **COMMENT:** One commenter suggested that the rules should clarify whether they apply to Indian Tribal lands. Another commenter said that the regulation should be made clear that Indian Tribes are exempt.

RESPONSE: The Department is not expressly authorized to adopt a rule codifying its interpretation of the applicability of the SMZ law or rules to Indian Tribes or Tribal lands and such a rule would lack the force and effect of law and serve little purpose.

7. **COMMENT:** Distinguish between East and West of Continental Divide in regulating and defining intermittent streams. The rules should take into account that differing conditions exist in Southeastern Montana. Relax regulation at intermittent streams. The stream classification system should fit Eastern as well as Western Montana.

RESPONSE: The rules have been modified to reflect these

concerns. The stream segment classes described in Rule I(2)(c), (d) and (e) are appropriate for both Eastern and Western Montana.

8. **COMMENT:** The rules should also protect the landowner from SMZ destruction by the public and natural events.

RESPONSE: Under the SMZ law and the rules, a landowner is not responsible for conditions beyond his or her control.

9. **COMMENT:** Responsibility between owner/operator should be clarified.

RESPONSE: Section 77-5-305, MCA, makes clear that it is the responsibility of the owner to ensure compliance with the SMZ law and rules unless a written contract between the owner and the operator specifies that the operator is responsible.

10. **COMMENT:** Some wording should be incorporated to allow for the managed perpetuation of some economically viable timber types, i.e. scarification/broadcast burning.

RESPONSE: DSL is of the opinion the rules allow perpetuation of economically viable timber types.

11. **COMMENT:** Rules invade constitutional property rights by requiring double entry to effect harvest, loss of trees, and disruption of optimum stand management. The rules should provide that every effort should be made to protect the SMZ but at the same time respect private property rights.

RESPONSE: The Department believes that the proposed rules are within the State's power to regulate the use of private property in order to substantially advance and protect legitimate public interests in the quality and quantity of forest waters and in the integrity of the streamside zone as described in 77-5-301, MCA. The rules attempt to utilize the least restrictive means necessary to achieve this end so as not to deny any owner an economically viable use of his or her land.

12. **COMMENT:** The rules should protect waterways even if that means no logging within the SMZ.

RESPONSE: The Department believes that the revised rules are adequate to protect the integrity of the SMZ.

13. **COMMENT:** Consider implementing the rules in several stages to give people time to get conditioned to our changing environment.

RESPONSE: HB 731 went into effect on October 1, 1991. These rules have been under development since prior to that time pursuant to 77-5-307, MCA. The Department feels it is necessary to adopt rules to implement the law without further delay in order to carry out the intent of the Legislature.

14. **COMMENT:** a. Many commenters stated that since the rules were developed as a consensus process of the technical committee, they should not be changed or only be changed through a consensus process of the technical committee.

b. One commenter stated that the role of the technical committee is advisory only and it is expected that it is the responsibility of DSL to develop workable rules.

RESPONSE: The statement of intent to HB 731 states that it was the intent of the Legislature that the Department establish a technical committee "to assist the Department in adopting rules". The recommendations of the technical committee were, for the most part, incorporated into the proposed rules. The public has been

given an opportunity to comment on these proposed rules. The Department has considered these comments and made changes in the rules in response as it deemed necessary. The Department has obtained and considered the comments of the members of the technical committee upon their review of the revised rules.

15. **COMMENT:** Is irrigation water, once diverted, defined as state water? The leave tree situation for irrigation ditches needs to be clarified, probably by the Water Quality Bureau, and whether the water is subject to state water quality standards.

RESPONSE: If water is within an irrigation system which discharges directly into a stream, lake, pond, reservoir or other surface water, it is subject to state water quality standards. 75-5-103(9), MCA. Because irrigation ditches are within the definition of "other body of water" in Rule I(1), tree retention requirements for class 3 streams apply.

16. **COMMENT:** Rules should "grandfather" those timber harvest contracts in existence prior to October 1, 1991.

RESPONSE: The SMZ law makes no provision to exempt timber sale contracts in existence prior to the law's effective date and the Department is not authorized to make such provision by rule.

17. **COMMENT:** The seven forest practice standards are unnecessary absolutes.

RESPONSE: The seven standards for forest practices in the SMZ are provided in the statute at 77-5-303, MCA. The Legislature recognized the need for flexibility by providing for alternative practices to be approved by the Department.

18. **COMMENT:** The draft rules do not represent a consensus. They are rigid, cumbersome, expensive to implement.

RESPONSE: This comment makes no specific suggestion and does not assist the Department in adopting rules. Where this commenter makes specific recommendations, they have been considered.

19. **COMMENT:** Rules should be more stringent because of decline in bull trout population and because the timber industry receives heavy government subsidies and is only a small part of the state's economy.

RESPONSE: This comment makes no specific suggestion as to how the rules should be made more effective. The Department believes that the rules will help reduce the amount of sediment deposited in streams and protect habitat.

20. **COMMENT:** There needs to be clarification between the jurisdiction of the Montana Conservation Districts and DSL for enforcement of land management activities occurring within beds and banks of perennial streams.

RESPONSE: The rules have been modified to clarify this matter.

21. **COMMENT:** a. Have a committee to review violations before fines are levied.

b. Criminal charges should be available against persons who violate the rules.

c. The names of persons reporting an owner or operator for an SMZ violation should be open to public review.

RESPONSE: Section 77-5-305, MCA, provides for civil penalties, site rehabilitation orders, and for administrative hearings

before the Department on such orders if requested. The statute makes no provision for criminal charges and does not direct the Department to adopt rules with regard to enforcement matters. All Department records with regard to enforcement of the SMZ law are open to public inspection including any written reports of SMZ violations after the investigative phase, subject to considerations of personal privacy. No rule change is needed.

COMMENTS ON RULE I APPLICABILITY - DEFINITIONS - EFFECTIVE DATE

RULE I, Section (1)

1. **COMMENT:** a. These rules should not be limited to commercial timber operations, but rather should apply to all operations; except as permitted by local conservation districts.

b. The law defines "timber sale" to include "practices designed to access, harvest, and regenerate trees." What if timber harvest is not followed by regeneration? The rules should also apply in this situation.

c. We support protection of Montana's water quality. Because HB 731 only applies to the timber industry, the bill misses the real target of who causes water degradation in Montana.

d. These rules should not apply only to forest practices. Other spray programs can affect waterways.

e. Please clarify the degree to which these regulations, indeed the law, applies to firewooding, sanitary thinning, pre-commercial thinning, and commercial thinning in the SMZ.

f. The proposed rules would not permit the maintenance or creation of riparian openings dominated by riparian vegetation other than trees as is found in a naturally diverse riparian landscape without approval of an alternative practice. The rules ignore the natural diversity of landscape along streams.

RESPONSE: The SMZ law and these rules apply only to forest practices conducted within a "timber sale" as that term is defined at 77-5-302(9), MCA. The law does not apply to practices which are not designed to regenerate trees. Under the Montana Administrative Procedure Act, the jurisdiction cannot be expanded by rulemaking.

RULE I, Section (2)

Subsection (b): Definition of "Broadcast burning"

1. **COMMENT:** (b) Broadcast burning should be specific as to cause of ignition to prevent owner from being blamed for accidental fires.

RESPONSE: The definition states "... ignited under certain conditions with the intent to meet planned management objectives..." If the SMZ burns due to wildfire, the landowner will not be responsible under these rules.

2. **COMMENT:** Definition of "broadcast burning" is ambiguous as to meaning and intent and, together with Rule IV, expose owner to liability for events beyond his control.

RESPONSE: It is the landowner's responsibility to ensure that amount and location of slash and disposal methods do not result in a broadcast burn which compromises the integrity of the SMZ.

Subsections (c) and (d): Definitions of "class 1 stream segment, class 2 stream segment"

3. COMMENT: a. The definitions of "class 1 stream segment" and "class 2 stream segment" are critical. Even intermittent streams can be used for spawning and support insect and other small wildlife populations.
- b. Include "or provides domestic water for humans" in definition of class 1 stream.
- c. The definition of "class 2 stream segment" in (2)(d) is too vague. It is difficult to distinguish between a class 2 stream and an ephemeral stream. Stream classification is ambiguous.
- d. Revise the stream classification to provide more detail and greater class distinctions - e.g. California's classification.
- e. Provide a new stream classification with fewer restrictions for dry creek beds in Eastern Montana that rarely flow water.
- f. There are other stream classifications on the books; do we need another one?
- g. We need simpler rules for determining what is a class 2 stream and what isn't.
- h. Define class 1 stream segment as: "a stream that supports fish yearly, or has continuous surface flow." The proposed definition is not definable on the ground, and is subject to wide variation in interpretation.
- i. Define class 2 stream segment as "a natural watercourse of perceptible extent that has a generally sandy or rocky bottom or definite banks that confines and conducts intermittently flowing water." The proposed verbiage is an unwarranted extension of the law that causes increased loss of timber harvest.
- j. Rule needs to deal with segments that show stream characteristics in one segment, but do not in adjoining segments.
- k. Use 3 stream classes.
- l. Classify streams according to the 1989 BMPs including ephemeral areas, intermittent streams, and perennial streams.
- m. Add the following definitions: "continuously flowing stream segment" means continually or constantly flowing; "intermittently flowing stream segment" means a stream segment which is not continuously flowing.

RESPONSE: The number of stream segment classes has been expanded to three, with revised definitions to better describe conditions encountered in the field and provide a basis to apply the requirements of the rules to those conditions. The potential for sediment delivery is the primary criterion for differentiation of stream classes. Criteria used for describing perennial, intermittent, and ephemeral streams are not primary considerations for classifying streams under the SMZ laws and the revised rules. Many intermittent streams are included as class 1. Streams are classified by segments, to allow for variable conditions within a stream. All watercourses that meet the stream definition, as stated in the law, have been classified as class 1, 2, or 3 stream segments. Because stream segments that do not provide surface flow for at least six months out of the

year would, in many instances, not provide a reliable domestic water supply, comment b has not been accepted.

Subsection (e): Definition of "Clearcutting"

4. COMMENT: a. The definition of clearcutting is completely inadequate.

b. Differentiate between clearcutting and group selection, e.g. based on size as in SAF or AFC definitions. Don't preclude group selection in the SMZ.

c. The clearcutting definition should include seed tree cuts and shelterwood cuts and define clearcut in terms of how many trees per acre are considered a clearcut.

RESPONSE: The definition included in the rules is a common silvicultural definition. The retention tree requirements in Rule V set standards for the number and distribution of retention trees. If an owner wishes to deviate from the requirements of Rule V, and for example, use a group selection silvicultural prescription, the practice will be subject to alternative practice approval.

Subsection (g): Definition of "Diameter breast height (dbh)"

5. COMMENT: Indicate that dbh is taken when standing on the uphill side of the tree.

RESPONSE: The definition in the proposed rule does indicate that dbh is measured at the highest point of ground touching the stem of the tree. No change in the rule is necessary.

Subsections (h) and (m): Definitions of "Established road" and "Road"

6. COMMENT: a. The term "minor earth work" should be defined to avoid confusion in interpreting the term "established road."

b. Substitute "wheeled or tracked vehicles" for "highway vehicles" so as to make clear that road standards are not for 18 wheelers, for example.

c. Delete either the definition of "established road" or of "road" as unnecessary since context refers only to established roads.

RESPONSE: a. The definition has been modified by eliminating the term "minor earth work" and substituting more clearly understandable terminology.

b. This proposed change would designate all skid roads as established roads. This is not consistent with the intent of the law.

c. The "established road" definition is necessary to clarify the requirements of Rule IV. The definition of "road" is necessary to clarify the requirements of Rule VI.

Subsection (k): Definition of "Ordinary high water mark"

7. COMMENT: Change "often" to "generally".

RESPONSE: The proposed change has been made.

Subsection (l): Definition of "Other body of water"

8. COMMENT: a. Define "other body of water" as "ponds and reservoirs with surface water greater than 1/10 acre throughout the year that do not support fish, and continuously flowing irrigation and drainage systems discharging directly into a class 1 stream, or lake. Water bodies used solely for treating, transporting, or impounding pollutants shall not be considered surface

water." In Eastern Montana there are many ponds and reservoirs which dry up every year and are not then bodies of water.

b. Do not regulate irrigation ditches except under certain specified conditions.

c. Do not include irrigation ditches at all. To do so potentially precludes effective management practices in the utilization of such facilities for the efficient use of irrigation water and is beyond the intent of the statute.

RESPONSE: a. The rules stipulate that irrigation ditches, as included in the "other bodies of water" definition, receive the minimum level of protection as a class 3 stream. Because ditches and ponds that dry up can contribute water to other waters, the proposed revision has not been made.

b. and c. Irrigation ditches that discharge directly to streams have potential to impact water quality and are "state waters" under 75-5-103(9), MCA. The SMZ law applies only to forest practices associated with a timber sale and not to irrigation ditch maintenance.

Subsection (p): Definition of "Slash"

9. **COMMENT:** Define size of slash to be removed from the stream and managed as 1 inch in diameter and at least 3 feet long. The definition should include length and diameter criteria.

RESPONSE: This recommendation conflicts with the standards of the Montana Water Quality Act and therefore will not be incorporated.

Subsection (r): Definition of "Stream"

10. **COMMENT:** a. In (r), the SMZ should include class 2 streams and irrigation ditches.

b. To meet the definition of "stream," a groundwater component should not be required. Streams without a groundwater component can contribute to sedimentation.

c. Class 2 streams should not be considered in SMZ as they do not contribute to the concern of the act. Dry water courses created by nature's extremes should not be considered in the SMZ. Irrigation ditches should not be considered in SMZ.

d. Define intermittently flowing water as "surface running water in a natural watercourse which flows directly into a class 1 stream and causes a natural watercourse to have a generally sandy or rocky bottom or definite banks." This definition is identifiable on the ground as near as the law allows.

e. Define stream according to 310 law.

f. Stream definition is too broad and therefore restrictive of management, discourages small operators.

g. Please define "intermittent" as carrying water once every 3 years.

h. Definition of rule should (per Aug. 4 draft) drop ephemeral streams from regulation to be consistent with historic uses and understandings.

i. Add the following definition: "perceptible extent: means visually obvious in width and length as far as the eye can see from the ordinary highwater mark."

j. The definition of "stream" in (2)(r) should be changed to "drainage." Streams have running water; drainages are some-

times dry.

k. Dry draws of eastern Montana should not be defined as streams and should be excluded from the streamside management classification in the proposed rules.

1. Several key words in the definition of "stream" need to be defined, i.e. "watercourse" and/or "perceptible extent". It is suggested that "watercourse" be defined as follows: "all continuously flowing channels and easily recognizable water channels caused by intermittently flowing water that provides a conduit of sediment delivery connecting completely and identifiable through connecting channels to any continuously flowing stream, lake, or other body of water that supports fish."

RESPONSE: The term "stream" is defined in the law and cannot be modified through the rule making process. Streams are separated into three classes to allow for varying levels of protection. Further definition of terms used in the definition of "stream" would be interpretive only and would not have force of law. Interpretation of these terms is best done in the context of a specific factual situation.

Subsection (s): Definition of "streamside management zone"

11. COMMENT: a. The SMZ should be no more than 25 feet either side of irrigation ditches and extend no farther than 300 feet above discharge point.

b. Do not change current definition of SMZ.

c. SMZ should be 100 feet wide at a minimum.

RESPONSE: a. The minimum SMZ width of 50 feet is specified in the law and cannot be modified through the rule making process. The entire length of irrigation ditches meeting the "other body of water" definition will be protected as class 3 stream segments.

b. The definition has not been changed.

c. A 100 foot SMZ is not necessary to meet the purposes of the law for all streams, lakes and other bodies of water. The SMZ has been expanded in those instances in which additional protection is clearly necessary.

Subsection (u): Definition of "wetlands"

12. COMMENTS: a. In defining the SMZ in (s), DSL should use the mandatory technical criteria for riparian identification in the January, 1989, Federal Manual for Identifying and Delineating Jurisdictional Wetlands and the definitions from 40 CFR 230.3 and 33 CFR 328.3, and the criteria to define "naturally associated hydrophytic vegetation" and hydric soil criteria.

b. Since the SMZ law may create new wetlands by requiring large trees to be retained and eventually incorporated into the stream channel, there must be a positive wetland description.

c. The definition of "wetlands" should be modified to include riparian plant community indicators.

d. We need an objective definition of "wetlands," not subjective one subject to regulatory discretion.

e. Keep pending federal wetlands regulations in mind when developing a wetlands definition for these rules.

RESPONSE: Indicator species are not consistent state-wide and therefore, have not been incorporated into the rules. They will be used in the program as appropriate. The Federal wetlands

definition is the subject of national controversy and debate. To inject these issues into this rule making process would not clarify the definition.

COMMENTS ON RULE II WIDTH OF STREAMSIDE MANAGEMENT ZONE - MARKING BOUNDARY

RULE II, Section (1)

1. **COMMENT:** The side slope or slope of SMZ should be the average of adjacent terrain to preclude limited topographic features from expanding the slope distance.

RESPONSE: The SMZ width needs to be checked at intervals where there are extremes in the side slope. Where there are both steep and near level slopes adjacent to each other along an SMZ there may be different SMZ width requirements. Operationally, it is envisioned that there would be a gradual transition between these different SMZ widths. The comment has not been accepted in order to provide adequate SMZ protection.

RULE II, Section (2)

1. **COMMENT:** Section (2) and (3) are not protective enough of class 2 streams, because it also applies to ephemeral, which doesn't need protection. The remedy is to modify the definition.

RESPONSE: Rule I has been amended to provide a revised classification system.

2. **COMMENT:** Either specify a "maximum" SMZ, or eliminate the adjective "minimum" in describing SMZ, in order to close the open-ended definition.

RESPONSE: The term "minimum" has been deleted.

3. **COMMENT:** Several persons commented on subsection (2)(d):

- a. Change the word "when" on line 2 to "where" to be consistent with other rule language.
- b. Add the word "inside" before "edge."
- c. (2)(d) is poorly written and confusing.
- d. (2)(d) should be stricken.

RESPONSE: a. Subsection (2)(d) has been retained as part of (2)(b) and the suggested change has been made.

- b. The phrase "nearest the stream" has been added.
- c. The rule has been re-written for clarification.
- d. Subsection (2)(d) has been retained in order to allow operating flexibility while protecting the integrity of the SMZ.

4. **COMMENT:** Several persons commented that the width of the SMZ in the proposed rule was generally not adequate to protect either water quality or wildlife. Some suggested specific provisions as follows:

a. No disturbance should be allowed within 100' of a stream without DSL's permission within 200' of the stream. Some persons suggested that the minimum SMZ width should be 100' on both sides of the stream or greater.

b. There should be wildlife corridors to 600' and SMZ width should be variable as to sediment regulation, up to 700' on 60° slopes.

c. The SMZ should be defined as three 100-foot zones. Corridors should be 600 feet and an elk should not be visible at 200 feet.

d. Are the 50'/100' requirements based on scientific data?

Biologists recommend 200' for wildlife corridors.

e. The minimum SMZ width should be much greater than 50' to protect migratory corridors for wildlife.

f. The minimum width for all SMZs should be 100' and in (a) and (b) the width should be 200'.

g. 50 feet width is BMP.

RESPONSE: The 50' minimum SMZ width is the distance set by 77-5-302(8), MCA. That statute also provides that the zone extends beyond the 50' minimum boundary to include wetlands and areas with steep slopes or erosive soils. Under 77-5-307(2), the Department may further define this extension. Extension of the zone outside areas with steep slopes or erosive soils is not permissible. In addition, as indicated on the response to Comment 1 of the General Comments, extension of the zone for wildlife corridors is beyond the Department's authority.

5. **COMMENT:** No reduction in the 50' minimum zone can be allowed.

RESPONSE: By law the minimum SMZ width is 50'.

6. **COMMENT:** The section specifies a minimum width only for streams and lakes. It should also specify width for "other bodies of water."

RESPONSE: The recommended change has been made.

7. **COMMENT:** The SMZ should include existing roads, not stop at the toe of the fill. Subsection (2)(c) should therefore be eliminated.

RESPONSE: The Department believes that an established road forms a logical boundary for the SMZ where the SMZ extends beyond 50 feet due to steep slopes. The SMZ law expressly allows the use of established roads within an SMZ and does not authorize DSL to regulate or condition that use. Regulation of a narrow strip on the far side of an established road would provide little benefit to the SMZ in the form of sediment filtering, stream shading, recruitment of woody debris, or slope stability. The Department believes that the rule as proposed will provide sufficient protection to the SMZ.

8. **COMMENT:** Subsection (c) should mention wetlands or other bodies of water on the other side of established roads.

RESPONSE: Section (2)(c) applies only when the SMZ is extended due to steep slopes. It is unlikely that there would be a wetland or other body of water on the other side of the road under those circumstances.

9. **COMMENT:** The rules should establish a wetland buffer zone.

RESPONSE: Section 77-5-302(8), MCA provides that, when a wetland is located adjacent to a stream, lake, or other body of water, the SMZ width is expanded to include the wetland. The law does not include a buffer zone for the wetland.

COMMENTS ON RULE III BROADCAST BURNING

1. **COMMENT:** Fire is needed as management tool for encouraging shade-intolerant species like willow, aspen, and dogwood.

RESPONSE: These rules apply only to forest practices associated with a commercial timber sale. Agricultural operations are not affected by them. Under many conditions, these species will respond simply to the increased sunlight resulting from

removing the overstory trees during timber harvesting, and fire is not necessarily required. If fire is the best management tool and will maintain the integrity of the SMZ, it can be used if the Department approves an alternative practice for it.

2. **COMMENT:** The rule must be specific as to cause of fuel ignition to protect owner from liability for accidental fires.

RESPONSE: These rules apply only to forest practices associated with a commercial timber harvest. If the fire is started by a source other than a person conducting a broadcast burn within the SMZ, these rules (and the fines associated with them) do not apply.

3. **COMMENT:** Regulated broadcast burning should be permitted. It should require site-specific approval.

RESPONSE: Broadcast burning is permitted if an alternative practice is approved. Approval will be site-specific.

4. **COMMENT:** Delete (2). It is excess language which is clear in the law and not necessary in rules.

RESPONSE: This section has been deleted.

COMMENTS ON RULE IV EQUIPMENT OPERATION IN THE SMZ

1. **COMMENT:** Does this rule, when read in conjunction with the definition of "established road," prohibit use of equipment to construct a crossing that will become part of an established road?

RESPONSE: No. Rule VI allows this.

2. **COMMENT:** Skidders should be allowed to cross the creek every 200 feet unless there is standing or running water.

RESPONSE: A third stream classification has been added which would account for the majority of streams in Eastern Montana, where the commenter operates. Under the proposed class 3 streams in Eastern Montana counties, crossings are permitted at 200 foot intervals as a preapproved alternative practice. This language has been added in Rule IV(3).

3. **COMMENT:** This rule should be expanded to include other conditions in which wheeled or tracked equipment could be allowed on a temporary basis without a formal alternative practice. The comment suggests requirements for these uses.

RESPONSE: The intent of this rule is to minimize the amount of unimproved crossings of the SMZ. The reason for requiring alternative practices for temporary crossings is to provide adequate review to ensure that all other alternatives have been explored.

The mitigation measures recommended by the commenter would be quite adequate for certain situations, but may be unrealistic to require under all situations under a preapproved alternative practice. Whatever the case, this level of mitigation would require an amount of DSL involvement equal to an alternative practice simply to enforce these mitigation efforts for each crossing.

4. **COMMENT:** Equipment operations should only be allowed in the outer zone of three 100 foot SMZ zones.

RESPONSE: DSL believes that a 50' SMZ is sufficient to filter sediment caused by equipment operation on slopes less than 35% outside the SMZ. Slopes above 35% require an SMZ width of 100'.

5. **COMMENT:** Grandfather old skid trails.

RESPONSE: During enforcement of these rules, it will be impossible to distinguish between old and new skid trails once they have been used. The effects on water quality from reopening and using an existing skid trail within the SMZ and constructing a new one would be essentially the same.

RULE IV, Section (1)

1. **COMMENT:** In (1), after the word "rule", add "or unless approved by the Department under a site-specific alternative practice."

RESPONSE: This is addressed under Rule IV (3), which mentions alternative practices. The conditions are included here to reinforce the need for special situations which would allow an alternative practice to be granted.

RULE IV, Section (2)

1. **COMMENT:** a. Steeper slopes must be harvested when ground conditions are dry instead of your recommended two (2) feet of snow or in frozen streams.

b. Exclusion for winter operations is good.

c. Use 6" of snow in Eastern Montana.

d. Eliminate 2(a) for Eastern Montana. Snow and/or frozen requirement not practical for Eastern Montana.

e. There is no indication that 24 inches of snow or 2 inches of frost depth is adequate to protect the SMZ. Sometimes the frost does not go deep enough during an entire winter to protect the SMZ from equipment. Operations within the SMZ should be limited to cable skidding from outside the SMZ or should be prohibited altogether.

f. Drop the frozen ground portion of this section because harm to vegetation can occur even though the ground is frozen.

RESPONSE: This rule has been changed to allow skidding under winter conditions, but only in wetlands because they are not accessible during any other season. This change was made due to the inability to prescribe snow or soil conditions under which an operator would be certain to meet the mitigation conditions required in this rule. Although 6" of snow under certain conditions may be adequate to prevent soil displacement and compaction in Eastern Montana, this condition is not sufficiently common to include it in the rule as a preapproved alternative practice not requiring site-specific approval.

RULE IV, Section (3)

1. **COMMENT:** Delete (3)(a),(b) and (c). This is excess language which is clear in law and is not necessary in the rules.

RESPONSE: These conditions are not specifically mentioned in the law, and therefore have been included to provide further explanation of situations in which alternative practices would be granted.

2. **COMMENT:** Add: "An alternative practice is not required for stream crossings approved by securing a 310 permit. This may or may not include improved road crossings or unimproved primitive trails and log crossings".

RESPONSE: In order to minimize disturbance resulting from equipment operation in the SMZ, the operator will be required to obtain alternative practice approval for equipment operation in

the SMZ even though a 310 permit has been obtained.

COMMENTS ON RULE V RETENTION OF TREES IN THE SMZ - CLEARCUTTING

General Comments

1. **COMMENT:** There should be a snag retention requirement.

RESPONSE: Within the "statement of intent" for the SMZ law, legislature directed DSL to "develop voluntary, nonenforceable guidelines concerning the selection and retention of trees and vegetation, including snags, for wildlife habitat within the streamside management zone." It is DSL's intent to develop these guidelines using a panel of wildlife professionals formed by the Department. See response to Comment no. 1 under General Comments. Snags may be counted toward tree retention requirements in proportion to their representation in the pre-harvest stand. The Department anticipates that some snags will be retained because it will be economically advantageous to the landowner to do so.

2. **COMMENT:** Before any harvest within the SMZ is acceptable, DSL should do a cumulative analysis of the condition of the stream.

RESPONSE: The SMZ law does not give DSL the authority to prohibit harvesting within the SMZ and does not provide that harvesting within the SMZ is contingent upon a favorable cumulative effects analysis of the stream.

3. **COMMENT:** Rule V, as written, could encourage landowners to highgrade SMZ's and leave only inferior trees to meet the retention requirements.

RESPONSE: Rule V (2) provides that, for class 1 and 2 stream segments "Trees retained must be representative of the species and size of trees in the pre-harvest stand." Although not entirely discouraging the landowner from taking the most genetically desirable trees in the SMZ, this requires them to leave some representation of the larger trees of each species present before harvest. These large trees will meet the purposes of the SMZ law.

4. **COMMENT:** With the exception of sub-part(2), this whole section is nonsense. These should be guidelines.

RESPONSE: Within the "Statement of Intent" in the SMZ law, the Legislature states that DSL will adopt rules "to ensure the retention of merchantable and submerchantable timber necessary to maintain the integrity of the streamside management zone." Subsection (2)(a)&(b) establish the minimum number and type of trees which must be retained. The remainder of this rule provides standards for the landowner as to how to choose and manage these leave trees to "maintain the integrity of the streamside management zone."

5. **COMMENT:** The rule is confusing for operators to implement. The type of logging that can be done in each class of stream should be clearly stated.

RESPONSE: The revised rules eliminate as much confusing language as possible. In its educational effort following adoption of these rules, the Department will comply with the second comment.

6. **COMMENTS:** This complex and rigid retention rule is unrealistic in light of varied habitats, and may be unachievable as well. It is better to talk in terms of percentages, or trends, or averages.

RESPONSE: There is the need to establish the absolute minimum activities and requirements which are necessary to achieve the intent of the legislation. The rule has been modified to allow more flexibility for site-specific conditions by adopting three stream classifications. A percentage approach would, through multiple entries, allow the number of trees to be reduced below the level necessary to protect the SMZ.

7. **COMMENT:** Rule V is an unconstitutional taking of private property without just compensation. Compensation should be provided.

RESPONSE: See response to General Comments, Comment #11.

8. **COMMENT:** Rule V, as written, tries to respond to the law's clearcutting ban but would also preclude group selection, overstory removal, and possibly shelterwood.

RESPONSE: Although components of each method mentioned in this comment must be modified when conducted within the SMZ, it is still possible to use them.

9. **COMMENT:** The proposed tree retention scheme was not the intent of the law and is not in the best interest of the land.

RESPONSE: The retention tree requirements in Rule V are the minimum specifications necessary to maintain the integrity of the SMZ. The "statement of intent" for the SMZ law indicates that DSL should adopt rules which "ensure the retention of merchantable and submerchantable timber necessary to maintain the integrity of the streamside management zone."

10. **COMMENT:** The harvest of old growth timber should be prohibited.

RESPONSE: The rules written to implement the SMZ law must be directly related to either the intent or letter of the legislation. The law does not allow the Department to prohibit timber harvest within the SMZ. Under this rule, the retention trees will be representative of the pre-harvest stand in terms of both size and species.

RULE V, Section (1)

1. **COMMENT:** Clearcutting should not be uniformly prohibited. There should be flexibility to adopt the best practices for each particular site. Guidelines would be better than rules.

RESPONSE: Clearcutting is one of the seven prohibited acts within 77-5-303, MCA. These rules are being written to implement the law. If clearcutting in the SMZ is the best practice for a particular site, it is still possible with an approved site-specific alternative practice.

2. **COMMENT:** Prohibit harvest of any trees within 35 feet of a creek in order to preserve the filtering capacity of the SMZ.

RESPONSE: In the statement of intent prefacing the SMZ law, the Legislature states that "the streamside management zone be an area of closely managed activity, but not a zone where timber harvest is excluded." Prohibiting timber harvest within 35 feet of a stream would in effect exclude timber harvest from a portion

of the SMZ, which is contrary to the intent of the law. DSL believes that a 35-foot strip of non-harvested timber is not necessary to maintain the integrity and functioning capacity of the SMZ.

RULE V, Section (2): comments that section is too stringent

1. COMMENT: a. This rule leaves too many large shade-producing, water consuming leave trees and discourages the small logging operator.

b. Retaining trees representative of species and size in the preharvest stand is too restrictive.

c. V(2)(a)(iv) rule requiring species retention serves no purpose and should be deleted.

d. The requirement in Rule V(2) to retain trees representative of the species and size of the preharvest stand ignores the results of past human activity which may have left residual trees and conditions which are not silviculturally desirable. Dealing with such issues would require a cumbersome application for an alternative practice.

RESPONSE: The retention tree requirements have been modified to provide the minimum standards necessary to maintain the integrity of the SMZ and to ensure the long-term function of the SMZ to protect water quality and fisheries. One of the desirable effects of trees within the SMZ is to produce shade which cools water temperature and supports cold water fisheries. The requirement that trees retained be representative of the size and species of the preharvest stand ensures that larger trees and diverse species will be retained when present in the preharvest stand to provide for diversity in the size and species of large woody debris incorporated into the stream channel in the future. Larger woody debris retains sediment more effectively, forms larger pools and riffles important for fish habitat and is less easily dislodged during high flow events. Where larger trees and woody debris are present in the SMZ, the 8 inch dbh minimum standard may not be adequate to maintain the channel structure. Similarly, woody debris from different tree species decay at different rates when incorporated into the stream channel. Maintaining the existing tree species diversity is necessary to maintain long term stream channel stability and the overall integrity of the SMZ.

2. COMMENT: Ten trees per 100 feet retention requirement can't be met in Eastern Montana and would be counterproductive to management.

RESPONSE: The rules have, based upon public comment, been revised to include a third stream class which includes many streams in Eastern Montana. Retention tree requirements in class 3 streams do not have size or number restrictions, but do require that understory shrubs and submerchantable trees be protected.

3. COMMENT: The effect of the proposed rules on tree retention is to prohibit tree removal if a landowner has appropriately managed leave trees to an "ideal" spacing of 20 feet recommended by foresters to maximize timber growth and vigor. Thus a landowner practicing good stewardship is penalized.

RESPONSE: The purpose of the SMZ law is to manage the SMZ to protect the quality and quantity of forest waters while allow-

ing timber harvest in the SMZ consistent with this purpose. The Department believes that the SMZ rules strike an appropriate balance between management of the SMZ for stream protection and management for timber production.

RULE V, Section (2): comments that section is adequate

4. COMMENT: The present retention tree requirements are the minimum that is acceptable to protect water quality and cannot be compromised further. Weakening of tree retention standards along intermittent streams should be resisted because many fisheries problems begin farther up the watershed. Do not dilute the tree retention requirement. The ten 8" tree/100' rule should be left as is.

RESPONSE: The stream classes and corresponding retention tree requirements have been changed in response to comments pointing out the need to adapt the rules to variable conditions throughout the state. The revised rules provide protection more appropriate to these conditions and meets the requirements of the SMZ law.

RULE V, Section (2): comments that section is not stringent enough

5. COMMENT: No logging should be allowed within the SMZ as a standard practice.

RESPONSE: This would contradict the intent of the legislature, which stated that the SMZ is "an area of closely managed activity, but not a zone where timber harvest is excluded." Statement of Intent, Ch. 608, Laws of Montana 1991.

6. COMMENT: a. The 10 tree retention requirement is arbitrary and weak.

b. The proposed amount of standing trees is inadequate to provide thermal cover for fish and stream and bank protection.

c. Paragraph (a)(ii) is insufficient to provide temperature control of streams and the life forms they support in some cases.

d. Paragraphs (a)(ii) and (iii) do not provide adequate watershed protection. The standard is the equivalent of a clearcut and does not result in sustainable yield or implement best management practices.

e. In paragraph (a)(i), 50% of the trees 8" dbh is not adequate to provide large diameter log recruitment necessary for stream stabilization.

RESPONSE: DSL believes that the number and diameter specifications within the retention tree requirements are adequate to provide large diameter log recruitment. Subsections 2(a)(ii) and 2(b)(ii) also requires that "trees retained must be representative of the species and size of trees in the pre-harvest stand." This will ensure that when they are present within the SMZ, trees larger than 8" dbh will be retained as well.

7. COMMENT: There is no need for two classes of streams. All streams should be afforded full protection. Even the timbered draws of Eastern Montana should be protected to protect wildlife. Secondary streams should be protected.

RESPONSE: See General Response to Comments on Rule V(2) below.

RULE V, Section (2): comments suggesting changes other than in classifications or numerical standards

8. **COMMENT:** Retention standards for ephemeral, or class 2, SMZs should not permit seedlings or seedlings and saplings to be counted toward retention requirements.

RESPONSE: The rules have been revised to apply to class 3 streams only. See portion of General Response to Comments on Rule V(2) below relating to class 3 streams.

9. **COMMENT:** Clarify in (ii) that the 10 trees/lineal foot means on each side of the stream, for a total of 20. Paragraphs (a)(i)-(iv) and (6) should clearly state that the retention tree requirements apply to each side of the stream.

RESPONSE: The rule has been so revised.

10. **COMMENT:** Two sided riparian harvest should not be allowed.

RESPONSE: This proposal would create zone of exclusion within the SMZ. This is contrary to intent of legislature as expressed in its statement of intent in the SMZ law. Ch. 608, Laws of Montana 1991.

11. **COMMENT:** Non-merchantable trees and snags should count toward retention requirements. Hardwood trees should be counted for retention tree requirements without specifically retaining the conifer species.

RESPONSE: Retention of snags and hardwood trees is allowed up to their relative representation in the stand before harvest. Diversity of tree species is important to maintain the integrity of the SMZ.

12. **COMMENT:** The SMZ is inadequate to protect steep slopes in class 1 streams. Make it mandatory to obtain approval to clearcut in a class 1 drainage.

RESPONSE: There is no authority given in the SMZ law for DSL to restrict clearcutting outside the designated SMZ.

13. **COMMENT:** This section should be made clearer so that loggers can understand its requirements.

RESPONSE: The rules have been clarified where possible, and future educational materials and efforts by DSL will assist loggers in understanding specifics of the rules.

14. **COMMENT:** Paragraph (a)(i) provides no real protection because multiple cuts would reduce tree density to the minimum allowed by law [i.e. (a)(ii) and (iii)]. There should be a minimum time limit for the next sale.

- Paragraph (a)(i) is a farce because it applies only to the first entry.

- A clause prohibiting reentry for 25 years needs to be added. This, combined with Cabinet Resource Group's proposed thermal cover standard, would provide 100-year rotation in SMZs.

RESPONSE: DSL recognizes that multiple entries are possible. The minimum retention standards are designed to ensure that sufficient trees are left to meet the intent of the SMZ law.

RULE V, Section (2): comments suggesting different standards
Response in General Response to Comments on Rule V (2)

15. **COMMENT:** In (a)(i), prohibit removal of more than 25% of the basal area in a riparian area during any one entry.

16. **COMMENT:** The amount of canopy cover, not the number of trees, is critical to maintaining low water temperatures. The rule should therefore be amended to require a minimum canopy

cover and hiding cover. Accepted standards are 70% crown closure of trees 21 inches or greater breast height. Thermal cover is 40' trees with 70% canopy cover. Hiding cover for deer and elk is that cover which will hide 90% of a standing adult at 200'.

17. **COMMENT:** Paragraph (a)(ii) should be strengthened to provide a minimum canopy cover equal to the canopy cover of the SMZ.

18. **COMMENT:** In order to provide large organic debris (LOD) recruitment to protect fisheries, the rules should contain a requirement for class 1 streams of 10 trees/100' of 12" in diameter or better that will fall into the stream. Ten inch trees rot too rapidly to adequately protect fisheries.

19. **COMMENT:** A number of commenters suggested different numerical retention standards: 75% retention especially in 50' SMZs, of trees at least 8" dbh, 75% of the basal area, and a minimum of 10 trees/100 lineal feet segment would help keep cows out, trap sediment delivery and provide canopy closure and thermal cover; 75% retention; 50% of the basal area; 75% of the basal area; 75% for thermal cover, wildlife and habitat protection.

20. **COMMENT:** Paragraph (a)(iii) should require retention of all trees greater than or equal to 8 inches dbh if there are not 100 of these/100 lineal feet.

21. **COMMENT:** Trees larger than 8' should be required if they are available within the SMZ.

22. **COMMENT:** In (b), the requirements for class 2 streams should be 50% of those for class 1 streams.

23. **COMMENT:** A minimum of 10 trees at least 5" dbh should be required in the timbered draws of Eastern Montana.

24. **COMMENT:** On class 1 streams east of divide retention rule should be 50% of 8" dbh, no minimum number of trees per 100'. On class 2 streams leave the rule unchanged. West of divide retention should be 50% of 8" dbh, minimum 5 trees per 100'.

25. **COMMENT:** In Eastern Montana retention tree rule should require 50% \geq 8" dbh/100' and not 5 trees \geq 8" dbh/100'.

26. **COMMENT:** Westside tree retention should be a maximum of 5 trees equal to or greater than 8 inches per 100 feet on continuous flowing streams and on intermittent flowing streams 3 trees equal or greater than 8 inches per 100 feet. On the east side, 1/3 of trees equal or greater than 8 inches per 100 feet.

27. **COMMENT:** Delete for dry water courses and class 2 streams. Recognize importance of stream shrubbery to superior cover, shade, and attraction of beneficial insects. Moderate 10 trees rule for intermittent streams.

28. **COMMENT:** Stick to the basic rule which everybody can understand and follow, and you have developed two choices. (1) Leave 30% to 50% of the trees in the SMZ, regardless of size. It is up to the discretion of the landowner to maintain the appropriate size class. (2) Leave 10 trees per 100 lineal feet of SMZ. Pick one or the other and leave the size classes alone for better management and silvicultural purposes.

29. **COMMENT:** Item (2)(a)(ii), (2)(a)(iii) and 2(a)(iv) should be deleted for all areas east of the continental divide Change (2)(b) to read "retain 50% of the trees".

30. **COMMENT:** The leave tree requirement should be 50% of

trees available rather than the complex formula that is in the proposed rule.

31. **COMMENT:** The 10 tree retention level will prevent most timber harvest, on West side intermittent streams because median tree count on those streams are 14 trees of 8" dbh per 100'. It will prevent all timber harvest on East side intermittent streams because the median tree counts are 6 trees per 100'. The rules should be changed to 5 trees on West side intermittent streams and 50% on East side intermittent streams.

32. **COMMENT:** Clearcutting in SMZ should be prohibited but there's no reason why just limiting a selective harvest to 50% of the timber by species wouldn't suffice.

33. **COMMENT:** In Eastern Montana, retention should be 50% of 6 inch diameter trees.

34. **COMMENT:** East of divide, class 1 retention should be 50% of 6" dbh, class 2=50% without size or species requirement.

35. **COMMENT:** Retention requirement should be 50% of the vegetative cover.

36. **COMMENT:** East of the divide, leave 50% of trees greater than or equal to 8 inches on class 1 streams.

37. **COMMENT:** The retention standard should be 50% of the trees including submerchantable trees.

RULE V, Section (2): comments suggesting different classifications and standards Response in General Response to comments on Rule V(2)

38. **COMMENT:** Include an intermittent stream category. Retention requirements for this category should be less than for class 1 streams: preserve all hardwoods, unmarketable or cull trees, large snags, and submarketable trees, as well as 5 trees 8 inches and greater per 100 feet of stream length. All other protection requirements should remain the same.

39. **COMMENT:** Change to include two kinds of class/stream segments: continuously flowing and intermittently flowing. Also include a minimum of 5 trees to be retained on class 1 intermittently flowing stream segments.

40. **COMMENT:** In a 3 class system, retain 5 trees per 100 feet of intermittent stream.

41. **COMMENT:** A number of commenters suggested that three (3) stream classifications be implemented and suggested various tree retention schemes for those classifications.

A. Class 1 - Same as proposed rule, except deleting (iv);
Class 2 - Same as above, except 5 trees instead of 10;
Class 3 - Same as proposed rule for class 2.

B. Class 1 (Continuous flow most of year) - 50% of trees greater than 8", 10 tree minimum, and all submarketable timber.

Class 2 (During most years contribute surface flow to lake or other body of water) - 5 trees greater than 8"/100' and all submarketable trees

Class 3 (Defined bed or bank, but rarely carries flow to higher class stream) 10 trees of any size.

C. For the West side:

Perennial - 10 trees minimum/100' (83 trees/acre)

Intermittent - 5 tree minimum/100'

Ephemeral - Leave all hardwoods, culls and submarketable timber

For the East side:

Another set of standards should be developed by professionals with East side expertise

- D. Perennial - same as proposed rule for class 1 stream
Intermittent - five 8" trees/100'

Ephemeral - same as proposed rules for class 2 stream.

42. **COMMENT:** You don't need zones where harvesting is excluded. Consider selective harvesting or no more than one third to one half of the trees are cut.

43. **COMMENT:** The tree retention standards should be more flexible. Timber types, conditions, land forms, and watershed conditions and needs require professional judgment rather than rigid standards. The standards should be:

West Side: - Continuous flowing streams; 5 to 10 trees 8" or greater/100 feet

- Intermittent streams: 3 to 5 trees 8" or greater

East Side: - 50% of trees 8" or greater/100 feet

44. **COMMENT:** The SMZ should be defined as three 100-foot zones with 75% retention in the inner zone and 50% retention in the 2 outer zones.

45. **COMMENT:** In (a)(ii), all trees should be retained within 10' of the highwater mark. The 10 trees standard should apply to the remaining 40' for 50' SMZs and the outer 50' for 100' SMZs. This is necessary to provide sediment filtration, shade, habitat, and woody debris and to protect stream channel and bank and promote flood plain stability.

46. **COMMENT:** No timber harvest should be allowed within 200' of a stream with steep slopes, loose soils, or a resident bull trout population.

47. **COMMENT:** Corridors should be 600 feet and you should not be able to see an elk at 200 feet.

48. **COMMENT:** A minimum tree retention standard, designed to provide adequate thermal cover, is Idaho's - 75' on both sides of the stream where no more than 25% of the canopy cover can be removed. This is necessary to prevent blowdown due to bug infestations. A better standard would be 400' (200' from the high water mark) with a 200' cover managed for 75% canopy retention and the outside of the zone managed for adequate sediment filtration or wildlife hiding cover.

49. **COMMENT:** The rules should provide for wildlife protection. This would include a 400' SMZ with 75% canopy maintenance for the inner 200' core, hiding cover in the outside 100'; and 50% snag retention standard throughout.

50. **COMMENT:** Retention requirements ignore the capacity of other riparian vegetation, and especially tall shrubs, to shade the stream, filter sediment, protect stream channel and banks, promote floodplain stability, and contribute woody debris to maintain stream structure. Where other riparian factors are in good condition, tree retention under the proposed rule may be excessive.

General Response to Comments on Rule V, Section (2)

The Department has reviewed each comment summarized above

and has chosen to modify Rule V by adopting a three category tree retention system. The system allows the Department to more closely tailor retention tree requirements to the on-the-ground situations statewide.

The highest level of protection (class 1) is afforded to streams that contain fish or to streams that flow during most of the year and contribute surface flow to other streams or bodies of water during seasons when the sun may heat the water to an extent that adversely affects fish unless the stream is adequately shaded. These streams also have the greatest potential for delivering sediment to another stream or body of water.

The lowest level of protection (class 3) is afforded to streams that contain no fish, rarely contribute surface flow to other streams or bodies of water, and normally do not have surface flow during most of the year. These streams have very little potential for contributing sediment to another stream or body of water downstream and do not usually incorporate large woody debris as an important element of channel structure.

An intermediate level of protection (class 2) is afforded to all other streams which are not class 1 or class 3 stream segments. Class 2 includes streams which do not contain fish, do not flow during most of the year, and normally contribute surface flow to another stream or other body of water only during cooler seasons when stream temperature is not a concern for fish habitat. Class 2 also includes streams that, while not supporting fish, do have surface flow during most of the year but do not contribute surface flow to another stream or body of water.

Several commenters suggested that the retention tree standard based on a number of trees/stream distance is inappropriate. They suggested alternate systems such as canopy cover, basal area, both basal area and canopy cover, percentage limitation on trees cut, a percentage limitation on cuts contained within a minimum time limit for succeeding cuts.

The Department has chosen to reject these approaches. The canopy cover is difficult to measure and may not, alone, result in a sufficient number of large trees. Basal area standards are complex and difficult for owners and operators to measure. The percentage/reharvest limits have been rejected because it would be difficult to administer over time.

The Department is of the opinion that the trees/stream distance standard should be used because it is easier to comply with, easier to enforce, better suited than other suggested standards to achieve the purpose of tree retention in a practical manner. The trees/stream distance standard is better suited than the simple percentage limitation to avoid overcutting, and, if standards are adequate, effective in protecting water quality and aquatic habitat.

A number of commenters suggested changes in the retention standards. The Department determined to leave the standard for class 1 streams at 10 trees 8" dbh or larger per 100' of stream or 50% of trees 8" dbh or larger, whichever results in more trees retained. The stocking rate of 10 trees 8" or larger per 100' of stream equals 110 trees per acre, which designates a timber stand as an "open forest" under generally accepted silvicultural stan-

dards. Although a wider SMZ would result in a lower stocking rate, Rule V(6) requires the operator to favor bank edge trees and to concentrate retained trees within 50 feet of the stream.

It is the opinion of the Department's foresters and hydrologist, after review of all comments and relevant information, including inventory information, and after conferring with a technical committee composed of scientists and foresters from government agencies, the university system, industry, and the conservation community, that retention of 10 trees 8" or larger per 100' of stream, together with the other requirements of Rule V, will protect stream channels and banks, provide woody debris to maintain channel structure, promote flood plain stability, and provide adequate shade for class 1 streams, while using the least restrictive means necessary to achieve these ends and allowing timber harvest consistent with the objectives of the SMZ law.

Tree retention is also necessary for class 2 streams to protect the stream channel and banks and promote flood plain stability. However, because these streams tend to be smaller, and are not fisheries streams, not as many trees are necessary for woody debris and shading. In addition, class 2 streams that provide surface flow to streams that do have fish generally provide that surface flow at times of the year when shading is not important. Given these considerations, and after review of the public comment and relevant data, and after conferring with the above-referenced technical committee, it is the opinion of the Department's hydrologist that a retention standard of 5 trees of 8" or greater dbh/100' will adequately protect the channel by providing for woody debris to maintain channel structure and trap sediment while using the least restrictive means necessary to achieve these ends and allowing timber harvest consistent with the purpose of the SMZ law.

The 50% harvest limitation has been retained for class 1 and 2 streams to allow a higher level of protection for more densely stocked stands. This will help protect against blowdown that often results from a more intensive harvest in a dense stand. Also, the 50% retention results in less disturbance in the SMZ, more shading, and more potential for recruitment of woody debris.

Rule V(2) has been amended to require that 50% of trees 8 inches or larger be retained only in the first 50 feet of the SMZ beyond the high water mark and in the entire SMZ in areas where the SMZ is extended for wetlands under Rule II(2)(a), but not in areas where the SMZ is extended for steep slopes under Rule II(2)(b). Trees beyond the first 50 feet of the SMZ are less likely than those nearer the stream to provide large woody debris, stream shading, and protection of stream channels and banks. However, in wetlands, removal of all merchantable timber may cause a rise in the water table due to reduced evaporation and transpiration through large trees and thereby reduce the opportunity for regeneration of trees. Large trees are important to maintaining the overall integrity of the wetland and the SMZ.

Given these considerations, and after review of the public comment and relevant data, and after consultation with members of the above referenced technical committee, the Board of Land Com-

missioners believes that the 50% harvest limitation is the least restrictive means necessary in more densely stocked stands to achieve these ends while allowing timber harvest consistent with the purpose of the SMZ law.

Retention of only shrubs and submerchantable timber is required for class 3 streams. These minimum requirements are adequate because these streams contain no fish and rarely contribute surface flow to a fishery; because woody debris is usually not a component of these streams; and because there is a very low risk of off-site impact from these areas. Retention of shrub and submerchantable timber will help maintain the integrity of streambanks and protect against erosion.

Species and non-numerical size requirements will ensure that larger trees and diverse species will be retained when present to provide for diversity in the size and species of woody debris incorporated into the stream channel in the future. See also responses to comments under "Comments That Section is Too Stringent."

RULE V, Section (3)

1. **COMMENT:** This section should be deleted because it conflicts with 310 law.

RESPONSE: Subsection (3)(c) has been changed accordingly.

2. **COMMENT:** In (a), the term "not requiring salvage" should be deleted because there are no tree salvage requirements.

RESPONSE: The rule has been changed to correct this.

3. **COMMENT:** Amend (c) to allow salvage of trees fallen into stream provided that 10 trees/100' are retained.

RESPONSE: Removal of a tree fallen into a stream may damage the banks of the stream. Approval of a site-specific alternative practice is considered necessary.

4. **COMMENT:** Subsection (c) should be amended to allow a landowner to remove hazard trees from his property.

RESPONSE: If an identifiable hazard exists, an application for an alternative practice can be submitted.

RULE V, Section (4)

1. **COMMENT:** We have concerns about substituting snags or dead or fallen trees for live trees to meet retention requirements. This section should be stricken. This section should only apply to class 1 streams in Eastern Montana.

RESPONSE: Snags and hardwood trees can only be counted in the approximate proportion as in the preharvest stand. This will help retain diversity within the SMZ.

2. **COMMENT:** This section should be amended to read: "Hardwood trees and snags may be counted towards retention tree requirements,".

RESPONSE: This suggestion would circumvent the minimum retention requirements in Rule V (2)(a), (b), and (c), which DSL considers critical to maintaining the integrity of the SMZ.

RULE V, Section (5)

1. **COMMENT:** Does this provision mean that alder and other shrubs/trees cannot be removed along established roads?

RESPONSE: These rules do not apply to the brushing of roads to improve visibility (see Rule I (2)(t)). See responses to comments on Rules I(1).

RULE V, Section (6)

1. **COMMENT:** Delete this section because it contains unenforceable guidelines.

RESPONSE: This section is both enforceable and critical to provide standards for spatial distribution of retention trees within the SMZ.

2. **COMMENT:** This section would allow clumping within a given 100' of the SMZ. If this was not the intention, the section should be amended to require even distribution.

RESPONSE: DSL feels this section is sufficient to provide adequate distribution throughout the SMZ, and maintain flexibility for the operator. In most instances, compliance with these standards will result in adequate distribution of retention trees.

3. **COMMENT:** a. In subsection (c), the term "50 feet" should be "100 feet."

b. Subsection (c) should be amended to provide that retention trees should be concentrated within 100' of the stream where the SMZ is greater than 100'.

RESPONSE: Trees closest to the stream provide better shading and log recruitment opportunities. The 50' requirement is therefore necessary.

4. **COMMENT:** Retention guidelines should be different for irrigation ditches.

RESPONSE: This has been addressed in the revised rule. Irrigation ditches are treated the same as class 3 streams for which there are no retention requirements for merchantable trees.

COMMENTS ON RULE VI ROAD CONSTRUCTION IN THE SMZ

1. **COMMENT:** a. Rule VI does not take 310 law into account: various activities, including skidding, are permissible and subject to 310 permits.

b. Intermittent streams could be severely impacted by crossing without any state regulation.

c. The rule should exempt 310 permit holders from regulation.

d. People should be reminded in the rules of the need for 310 permits.

e. What is the skid trail/crossing interface?

RESPONSE: 310 permits administered by Conservation Districts (pursuant to 75-7-101 et seq., MCA) are required for all practices that may impact the bed or banks of perennial streams. Road building and equipment operation adjacent to a stream is regulated by the Department of State Lands pursuant to the SMZ law and these rules. To build a road across a perennial stream, an operator would need only a 310 permit. To skid timber across a perennial stream the operator would need a 310 permit to cross the stream and, approval of an alternative practice to operate equipment in the SMZ. To operate equipment in an SMZ or cross a stream that is not covered under the 310 law, the operation must be conducted pursuant to a pre-approved alternative practice or a site-specific alternative practice. The 310 law would not apply.

2. **COMMENT:** This rule should allow improvement of substandard existing roads without invoking Rule XI under certain

specified limited conditions.

RESPONSE: Rule VI applies to construction of new road. Rule IV permits use of established roads. The definition of established roads at Rule I(2)(j) has been amended to allow the use of existing roads that may be used without upgrading or with only minor upgrading. Rule VI(3) has been added to permit construction of roads in SMZ's on class 3 streams in Eastern Montana under certain conditions. Rule VIII and I(2)(q) have been modified to clarify that sidecasting into adjacent waters is prohibited during road maintenance operations. Otherwise, the Department believes that site specific approval of alternative practices is necessary.

3. **COMMENT:** In many cases a road cut up on a sidehill away from the bottom of a draw will cause more erosion than if the road were in the bottom.

RESPONSE: The Department recognizes that the impact to the SMZ of some roads built on hillsides may have greater erosion potential than roads in bottoms. The revised rules for class 3 streams in the Eastern zone (see Rule I(2)(i) for definition of the term) would allow for this practice with specified limited conditions. On class 1 and 2 streams, road construction along streams in the SMZ would require a site-specific alternative practice.

4. **COMMENT:** Use and improvement of existing roads up the drainage, weaving across the draw, would have less environmental damage than roads on both sides of the draw.

RESPONSE: Use of existing roads is permissible if the road meets the definition of "established road".

5. **COMMENT:** a. An operator locating a road should have the flexibility to weave in and out of the 50 foot SMZ to reach flat landing areas.

b. Rather than prohibiting road construction in the SMZ your direction should be to minimize it.

c. In many drainages only access is through a bottom of a canyon along side a stream. Rule VI should be expanded to provide general standards and guidelines for roads that have to be built in SMZ to expand flexibility.

RESPONSE: The rules have been amended to allow this practice as a preapproved alternative practice on class 3 streams in Eastern Montana. The operator may request a site-specific alternative practice on other streams where this practice is desired.

6. **COMMENT:** This rule allows road building within wetlands, which is inappropriate and violates federal law.

RESPONSE: Section 77-5-303(1)(d), MCA, allows construction of roads to cross wetlands "as necessary". This cannot be changed by rule. However, such crossings may be regulated by other state and federal laws and regulations.

7. **COMMENT:** When crossing the stream, you should not do anything other than a single-lane roadway and single-lane bridge with no turn-outs in order to avoid harm to plant communities in adjacent SMZs.

RESPONSE: The proposed rules do not address road building standards, except that road material must not be deposited into the SMZ except as needed to construct crossings. Road standards

vary greatly depending on the intended traffic and safety requirements of the road. See response to comment 8 below.

8. **COMMENT:** Don't allow crossing of ephemeral or intermittent streams within 100 feet of their entry into class 1 streams.

RESPONSE: Section 77-5-303(1)(d) prohibits the construction of roads in the SMZ except when necessary to cross a stream or wetland. The Department therefore does not have authority to make the suggested revision.

COMMENTS ON RULE VII HAZARDOUS OR TOXIC MATERIALS

1. **COMMENT:** a. No hazardous or toxic chemicals should be allowed in the SMZ because it is likely they would reach the stream through runoff, subsurface flow, or wind drift.

b. Pesticide and herbicide labels are commonly violated across the state.

RESPONSE: a. & b. Rule VII restricts the use of hazardous or toxic materials if such use results in pollution of streams, lakes, and wetlands, regardless of the transport mechanism. b. Application in violation of the label is prohibited by section (4) and is subject to the civil penalty provision of 77-5-305(2).

2. **COMMENT:** What herbicides are being referred to?

RESPONSE: All herbicides, which are substances used to destroy plants.

3. **COMMENT:** a. The phrase "to an extent which significantly impairs the capacity" in (3) is too vague to ensure compliance with the SMZ law.

b. Section (3) contains subjective language which is not measurable or enforceable.

c. No pesticide should be used if it would alter vegetation in any way: kill it, suppress it, or otherwise affect it.

RESPONSE: a. and b. The word "significantly" has been deleted.

c. The standards for use of pesticides is set by 77-5-303(1)(e). The comment would exceed that standard and therefore cannot be adopted in the rule.

4. **COMMENT:** a. Does Rule VII(5) allow the use of dust suppressants that do not contain waste oil but do contain petroleum products, such as DO-4 (Clarified Dust Oil) in the SMZ?

b. Dust abatement agents contain oil.

c. Allow dust abatement materials.

RESPONSE: a. Yes, if not introduced directly to the stream.

b. Some do, but only those that contain waste oil, which contains certain pollutants, are prohibited.

c. Yes, if they do not contain waste oil. Rule VII(5) states "Dust abatement agents which do not contain waste oil may be applied on roads in the SMZ provided that such material is not directly introduced into a stream, lake, or other body of water."

5. **COMMENT:** What is the penalty for violation of this rule? The regulating agencies have not enforced water quality and pesticide laws in the past.

RESPONSE: The penalty as set out in section 77-5-305, is a civil penalty of up to \$1,000/day of violation.

6. **COMMENT:** Is the landowner responsible for the public's dumping of refuse into the SMZ from a county road?

RESPONSE: No, this law pertains only to forest practices conducted within a timber sale.

COMMENTS ON RULE IX DEPOSITING SLASH

1. **COMMENT:** Deposition of slash in the stream violates the Water Quality Act. The rule should therefore be amended by removing the authority to allow this.

RESPONSE: The phrase "subject to other state and federal laws and regulations" has been added to the end of the Rule IX(1).

2. **COMMENT:** It is useful and most productive to deposit unburned slash into V-shaped dry gullies. This practice should not be prohibited.

RESPONSE: If the V-shaped dry gully is not a "stream," as defined in the SMZ law, then neither the law or these rules apply. If it is a stream, then site-specific alternative practice request may be considered by the Department if it is clear that it does not violate any other state or federal law.

COMMENTS ON RULE X SKIDDING

1. **COMMENT:** This rule does not take 310 law into account: various activities including skidding are permissible under these rules but are subject to 310 permits.

RESPONSE: Rule X has been incorporated into Rule IV. The suggested language has been incorporated into Rule IV(5).

2. **COMMENT:** This rule should distinguish between ephemeral draws and intermittent streams because winter skidding across the former is harmless

RESPONSE: The rule as amended (and transferred) does not distinguish between ephemeral and intermittent streams. However, it does allow skidding across class 3 streams if certain conditions are met.

3. **COMMENT:** The rule should provide a contingency for accidental falling into the stream.

RESPONSE: Section 77-5-305(4) allows the department to issue warnings. Section 77-5-305(2) allows DSL to take the accidental nature of a violation into account in making a civil penalty assessment. No additional rule language is necessary.

4. **COMMENT:** a. Allow salvage of wind-thrown timber in or on the stream, provided the stream banks are not damaged.

b. One should be able to consider the specific site and develop alternatives instead of saying that logs can't be skidded through streams.

RESPONSE: This may be allowed with a site-specific alternative practice if tree retention requirements are met and adequate stream protection measures are used. A 310 permit may also be required on perennial streams.

COMMENTS ON RULE XI SITE SPECIFIC ALTERNATIVE PRACTICES

General Comments

1. **COMMENT:** The rule should provide for stringent certification to assure DSL personnel are qualified to judge alternative practices.

RESPONSE: DSL intends to implement an ongoing training program to ensure that its personnel are qualified to enforce the rules.

2. **COMMENT:** Allowance of alternative practices should not

be routine, should be reviewed against a checklist of environmental priorities by a panel made up of DFWP, DHES, and other agency personnel, and the records should be open to public inspection. A large exemption should be subject to an EIS.

RESPONSE: Rule XI(2) provides that before any site-specific alternative practice is approved, DSL must determine that the practice would adequately protect the functions of the SMZ listed in that section and that the proposed practice would not violate any other law. The statute directs DSL to make determinations as to proposed alternative practices, but DSL will consult other agencies as necessary. DSL's decision on a proposed alternative practice is subject to the Montana Environmental Policy Act (MEPA) and DSL must follow its rules implementing MEPA. All DSL records regarding alternative practice requests will be open to the public.

3. **COMMENT:** The rule will not cause a flood of applications if DSL sparingly authorizes site specific alternative practices.

RESPONSE: Section 77-5-301(5)(d), MCA, states that one of the purposes of the law is "to allow operators necessary flexibility to use practices appropriate to site-specific conditions" in the SMZ. DSL has attempted to make alternative practices reasonably available where the integrity of the SMZ can be adequately protected by other means.

4. **COMMENT:** a. State will not have time, personnel or money to process alternative practice requests adequately.

b. Administration will be very costly to landowner and state with very little benefit to the land.

c. Alternative practices should be streamlined. Manpower, time, and environmental reviews are a concern.

d. Rule XI is complex and threatening to the livelihood of the small operator.

e. The approval process is cumbersome and should be expedited, especially for those who have developed certified forest management plans which address riparian zone issues.

RESPONSE: Rule XI is intended to provide for efficient processing of alternative practice requests while at the same time preserving integrity of the SMZ and while meeting all legal requirements. The comments make no specific suggestion as to how to make the process more efficient.

5. **COMMENT:** DSL must have qualified field staff and authority to make on-site decisions.

RESPONSE: DSL will train its field staff. The SMZ law would allow on-site approvals. However, DSL must comply with the environmental review requirements of MEPA and public participation requirements. Therefore, on-site decisions will not be made in many cases.

6. **COMMENT:** Include requirement for DSL inspection within 2 weeks after completion of the alternative practice. Also include a provision for monitoring alternative practices as they

are occurring.

RESPONSE: DSL intends to monitor alternative practices as time and personnel constraints allow. Because these factors are not foreseeable, no language requiring a certain level of inspection has been inserted.

7. **COMMENT:** Have a checklist for approval process.

RESPONSE: DSL will develop information necessary for operators to comply with these rules. No such requirement is necessary in the rules.

8. **COMMENT:** Rule XI is too awkward and wordy; it only reiterates the laws.

RESPONSE: The statute does not provide detailed standards or procedures for implementing alternative practices, but rather directs DSL to provide for alternative practices by rule. Therefore, it is necessary to spell out standards and procedures in some detail. DSL has attempted to make Rule XI as clear and simple as possible.

9. **COMMENT:** a. Do the proposed rules fall under the Montana Environmental Policy Act, 75-1-101 et seq., MCA, (MEPA) or the National Environmental Policy Act (NEPA)? Can they be enforced on private land? These rules could open up every operation to MEPA and public review.

b. Any application for alternative practice should trigger MEPA so that there are environmental reviews, including cumulative effects, and public notice and comment.

RESPONSE: The approval of a proposed site-specific alternative practice by DSL is an action subject to the Montana Environmental Policy Act (MEPA) and must undergo environmental review in accordance with DSL's administrative rules implementing MEPA (ARM 26.2.628-663). Environmental review documents are public documents and are available for inspection. DSL must provide additional opportunities for public review consistent with the seriousness and complexity of environmental issues and the level of public interest. The National Environmental Policy Act (NEPA) does not apply to DSL actions and decisions.

10. **COMMENT:** Add "intent" language specifying that MEPA analysis will be triggered only in certain defined situations.

RESPONSE: MEPA and the MEPA rules which are contained in ARM 26.2.628-663, specify when environmental review is required. Those rules apply to all "actions" of the Department as defined in the MEPA rules, including approval of alternative practices.

11. **COMMENT:** Alternative practices should only be available to small landowners and non-commercial timber owners.

RESPONSE: Under section (2), an alternative practice may be granted only if the integrity of the SMZ would be preserved and the alternative practice would not significantly diminish the function of the zone. Therefore, there is no rational basis to discriminate against large landowners and commercial timber owners.

12. **COMMENT:** "Department" should be defined to distinguish

between one person or a review board.

RESPONSE: It is not necessary to specify by rule which DSL employees will carry out its functions under the rules. This is a matter of internal operating policy. The Board of Land Commissioners, as head of the Department of State Lands, is ultimately responsible but may delegate its authority to the Department.

RULE XI, Section (2)

1. **COMMENT:** The sole decision should not rest with the state. There should be a panel of diverse interests and back-grounds including conservation districts. Rule XI lodges too much discretion in DSL.

RESPONSE: Considerable discretion is necessary to provide flexibility for varying site-specific conditions. Section 77-5-302, MCA, provides that alternative practices are subject to the approval of the Department of State Lands. This approval function cannot be delegated to another person or body.

2. **COMMENT:** I am concerned that alternative practices could be used to circumvent the standards.

RESPONSE: The definition of alternative practices at 77-5-302(1), MCA, indicates that alternative practices are exceptions from the standards and 77-5-301(5)(d), MCA, indicates that alternative practices are intended to allow operators flexibility where the standards of 77-5-303, MCA, are not appropriate to site-specific conditions. The criteria set out in section (2) of Rule XI require the Department to determine with reasonable certainty that the integrity of the SMZ will be protected under the proposed alternative practice prior to approving such practice. A sentence has been added to Section (a) to clarify that compliance with the terms of an alternative practice is mandatory.

3. **COMMENT:** DSL is notorious for development activities and therefore will grant alternative practices, negating the standards of the rules in the process.

RESPONSE: Under section (2), alternative practice requests may not be granted in situations that would compromise the integrity or significantly diminish the functioning of the SMZ.

RULE XI, Sections (3), (4), (5), and (6)

1. **COMMENT:** a. There should be no time limit for DSL review.

b. Impose time limits to avoid delay.

c. The time limit should be extended.

d. The time limit should be 15 working days and should include notice to and receipt of comments from interested citizens who have demonstrated a willingness to monitor forest practices.

RESPONSE: Rule XI(3),(4),(5) and (6) provide time limits within which DSL must respond to an application for alternative practices. That response may range from denial, to notification of the need for more information or field review, to approval. This will allow DSL to evaluate an application adequately prior to acting but will require DSL to respond in a timely fashion.

See response to Comment # 1 in Rule XI(8) regarding receipt of public comments.

2. **COMMENT:** Operators should be required to photograph the site before and after alternative practices.

RESPONSE: Photographs are an unreliable method of documenting the success of an alternative practice.

3. **COMMENT:** Variances should not be allowed on a verbal basis. Specify that approval must be in writing.

RESPONSE: Sections (3) through (6) provide that applications and approvals must be in writing. A sentence has been added to section (9) to clarify that compliance with the terms of an alternative practice is mandatory.

RULE XI, Section (7)

1. **COMMENT:** Who is required to conduct the environmental analysis and how much will it cost the landowner. EIS requirement at owner expense is unwarranted burden of time and money.

RESPONSE: DSL will conduct routine environmental review of alternative practice applications at public expense. However, DSL's current budget and personnel do not permit it to engage in more detailed environmental review which may be required by law in some cases before approving an alternative practice application. In these instances, the applicant may submit environmental analysis at the applicant's expense for the Department's use in preparing the environmental review under MEPA.

2. **COMMENT:** Department must give specific reasons to decline further review.

RESPONSE: Language implementing this comment has been added.

RULE XI, Section (8)

1. **COMMENT:** a. Any site-specific alternative practices should be subject to the widely publicized hearings and should be allowed only if the public approves.

b. Provide timely public notification of all alternative practices being considered.

c. There's no method defined for notifying the public interested in alternative practices that get permitted. This is probably a violation of MEPA unless it is tightened up.

d. To minimize pressure on the Department, this rule should provide a process to make public all requests for alternative practices by maintaining a list of all interested persons and organizations and mailing a copy of all requests to those on the list in time to allow comment.

e. The rule should provide that DSL will publish notice of all alternative practice applications on the legal notice section of the local newspaper and develop a notice list.

f. Because these are public lands, lack of public notice and involvement are unacceptable.

RESPONSE: Under ARM 26.2.643(3), an EA will be prepared on an application for an alternative practice. ARM 26.2.646 provides that all EAs are available for public inspection and that

DSL must provide additional opportunities for public review consistent with the seriousness and complexity of the environmental issues associated with the proposed action and the level of public interest. For alternative practices that are potentially more serious, complex, or controversial, the public review must include public notice and an opportunity to comment. Thus, the MEPA rule provides a process that is adequate to ensure public participation. No additional process is necessary. Section (8) has been amended allow DSL to extend the time for considering an alternative practice request to allow for public notice and comment as appropriate under ARM 26.2.646. The decision to grant or deny an application for alternative practices is by law DSL's responsibility. It cannot be delegated to private individuals or groups.

2. **COMMENT:** Public review is gross infringement on private property rights.


RESPONSE: Appropriate notice and opportunity for public comment is required pursuant to DSL's MEPA rules cited above and 2-3-101 et seq., MCA, requiring state agencies to develop procedures permitting and encouraging the public to participate in agency decisions that are of significant interest to the public.

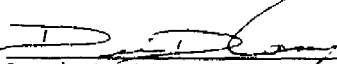
RULE XI, Section (10)

1. **COMMENT:** The authorization should be effective for 3 years or until new laws or rules take effect or longer if reasonable.

RESPONSE: Section (10) has been modified to allow DSL to provide that an alternative practice is valid for a period longer than two years.

Reviewed by:


John F. North
Chief Legal Counsel


Dennis D. Casey
Commissioner

Certified to the Secretary of State January 4, 1993.

VOLUME NO. 44

OPINION NO. 45

ARCHITECTS AND ENGINEERS - Consideration of proposed fees as part of selection criteria for architectural, engineering and land surveying services;

CONTRACTS - Consideration by state agency of proposed fees in procurement of architectural, engineering or land surveying services;

FEES - Consideration of proposed fees as part of selection criteria for architectural, engineering and land surveying services;

PROPERTY, PUBLIC - Selection criteria by state agency for architectural, engineering or land surveying services;

PROPERTY, STATE - Selection criteria by state agency for architectural, engineering or land surveying services;

PUBLIC FUNDS - Consideration of proposed fees as part of selection criteria for architectural, engineering and land surveying services;

STATE AGENCIES - Selection criteria by state agency for architectural, engineering or land surveying services;

SURVEYORS - Proposed fees;

SURVEYORS - Selection criteria for architectural, engineering and land surveying services;

MONTANA CODE ANNOTATED - Sections 18-8-201 to 18-8-212;

UNITED STATES CODE - 40 U.S.C. §§ 541-544.

HELD: State agencies may not consider a proposed fee when selecting architectural, engineering or land surveying services, but may negotiate a fair and reasonable fee after the most qualified firm has been selected.

December 31, 1992

Hal Harper, Speaker
Montana House of Representatives
State Capitol
Helena MT 59620

Dear Mr. Speaker:

You have asked my opinion on the following question:

May a state agency request that a proposed fee be included in an architect, engineer, or land surveyor's response to a Request for Proposal, and should the submitted figure be part of the evaluation criteria in selecting the design firm that would be awarded the state contract?

Sections 18-8-201 to 212, MCA, describe the procedures by which a state agency may obtain the services of an architect, engineer or land surveyor. Section 18-8-201, MCA, sets forth the policy

of the State for the procurement of such architectural, engineering or land surveying services:

The legislature hereby establishes a state policy that governmental agencies publicly announce requirements for architectural, engineering, and land surveying services and negotiate contracts for such professional services on the basis of demonstrated competence and qualifications for the type of professional services required and at fair and reasonable prices.

Section 18-8-204, MCA, provides the specific procedure for selection of the firm to provide architectural, engineering and land surveying services. Each agency may encourage firms engaged in the lawful practice of their profession to submit annually a statement of qualifications and performance data. The agency may then review that data and conduct discussions with one or more firms regarding anticipated concepts and the relative utility of alternative methods of approach to the project. § 18-8-204(1), MCA. After such review and discussions, the agency "shall then select, based on criteria established under agency procedures and guidelines and the law, the firm considered most qualified to provide the services required for the proposed project." § 18-8-204(2)(a), MCA.

The minimum criteria for the agency procedures and the guidelines are listed in section 18-8-204(2)(b), MCA. It is notable that nowhere in this section is the proposed fee listed as a criterion for selection of the most qualified firm. Moreover, section 18-8-205, MCA, provides:

(1) The agency shall negotiate a contract with the most qualified firm for architectural, engineering, and land surveying services at a price which the agency determines to be fair and reasonable. In making its determination, the agency shall take into account the estimated value of the services to be rendered, as well as the scope, complexity, and professional nature thereof.

(2) If the agency is unable to negotiate a satisfactory contract with the firm selected at a price the agency determines to be fair and reasonable, negotiations with that firm must be formally terminated and the agency shall select other firms in accordance with 18-8-204 and continue as directed in this section until an agreement is reached or the process is terminated. [Emphasis added.]

The plain language of this section indicates that only after the State has selected the most qualified firm is the fee negotiated. If a reasonable price cannot be negotiated, then the negotiations are formally terminated and a new firm is selected in accordance with the provisions of section 18-8-204,

MCA. This interpretation is supported by the rule of statutory construction that statutes involving the same subject matter must be read together, see State ex rel. McHale v. Ayers, 111 Mont. 1, 105 P.2d 686 (1940), and is further supported by their legislative history. The legislative history of sections 18-8-201 to 212, MCA, discloses that the Legislature intended to create a process for the selection of architects, engineers, and land surveyors by state agencies that conforms to requirements of federal law, 40 U.S.C. §§ 541-544. See 1987 Mont. Laws, ch. 51, introduced as House Bill 310; Minutes, House Business and Labor Committee, Hearings on H.B. 310, January 29, 1987 (comments by Rep. Les Kitselman, Billings).

40 U.S.C. §§ 541-544, popularly known as the "Brooks Architect-Engineers Act," sets forth a qualification-based selection procedure for the procurement of such professional services by the federal government. Under the federal procedure, firms are ranked based upon demonstrated competence and qualifications. Negotiations are then conducted with the top-ranking firm to arrive at a fair and reasonable fee for the project. See S. Rep. No. 92-1219, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News 4767, 4767-75.

The legislative history of sections 18-8-201 to 212, MCA, also reveals that the statutes were modeled upon the American Bar Association's Model Procurement Code for State and Local Governments (ABA Model Code). See Minutes, House Business and Labor Committee, Hearings on H.B. 310, January 29, 1987; Minutes, Senate Business and Industry Committee, Hearings on H.B. 310, February 10, 1987 (statements and exhibits of James Carpita, P.E., on behalf of the Consulting Engineers Council of Montana). Both the federal law and the ABA Model Code are substantially similar to Montana's law. The federal law and the ABA Model Code provide procedures for the procurement of architectural, engineering and land surveying services which are clearly distinct from the procurement of other goods and services.

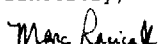
The comments to the ABA Model Code reveal that using the qualification-based selection procedure for the selection of architectural, engineering and land surveying services is preferred because of the importance of selecting the best qualified firm, and because the architect, engineer or land surveyor is engaged to represent the interests of the state and thus stands in a different relationship with the state than under the usual buyer-seller arrangement. The ABA Model Code also makes it clear that the principal difference between the procurement of architect, engineer and land surveyor services and the procedures used for most other types of goods and services is the point at which price is considered. Thus, while the proposed fee is highly relevant, the ABA Model Code provides that it is best to discuss the proposed fee only after the best firms are selected. See Model Procurement Code for State and Local Governments § 5-501, comment.

It is apparent from the language of the statutes and the legislative history that the Legislature intended the State adopt and utilize a process for the selection and procurement of architectural, engineering and land surveying services which is based upon a firm's demonstrated competence and qualifications and that price be a factor only at the fee negotiation stage after the most qualified firm has been selected.

THEREFORE, IT IS MY OPINION:

State agencies may not consider a proposed fee when selecting architectural, engineering or land surveying services, but may negotiate a fair and reasonable fee after the most qualified firm has been selected.

Sincerely,



MARC RACICOT
Attorney General

NOTICE OF FUNCTIONS OF ADMINISTRATIVE CODE COMMITTEE

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

The Administrative Code Committee has the authority to make recommendations to an agency regarding the adoption, amendment, or repeal of a rule or to request that the agency prepare a statement of the estimated economic impact of a proposal. In addition, the Committee may poll the members of the Legislature to determine if a proposed rule is consistent with the intent of the Legislature or, during a legislative session, introduce a bill repealing a rule, or directing an agency to adopt or amend a rule, or a Joint Resolution recommending that an agency adopt or amend a rule.

The Committee welcomes comments from the public and invites members of the public to appear before it or to send it written statements in order to bring to the Committee's attention any difficulties with the existing or proposed rules. The address is Room 138, Montana State Capitol, Helena, Montana 59620.

HOW TO USE THE ADMINISTRATIVE RULES OF MONTANA AND THE
MONTANA ADMINISTRATIVE REGISTER

Definitions: Administrative Rules of Montana (ARM) is a looseleaf compilation by department of all rules of state departments and attached boards presently in effect, except rules adopted up to three months previously.

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

Use of the Administrative Rules of Montana (ARM):

- | | |
|------------|-----------------------------------------------|
| Known | 1. Consult ARM topical index. |
| Subject | Update the rule by checking the accumulative |
| Matter | table and the table of contents in the last |
| | Montana Administrative Register issued. |
| Statute | 2. Go to cross reference table at end of each |
| Number and | title which lists MCA section numbers and |
| Department | 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 September 30, 1992. This table includes those rules adopted during the period September 1, 1992 through December 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 September 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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