RESERVE

MONTANA ADMINISTRATIVE REGISTER

1993 ISSUE NO. 12
JUNE 24, 1993
PAGES 1247-1446

ISSUE NO. 12

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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing and where written comments may be submitted.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

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NOTICE SECTION

BEFORE THE BOARD OF INVESTMENTS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the proposed amendment of rules pertaining to definitions and seller/ servicer approval procedures; and the repeal of a rule pertaining to the loan loss reserve account	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT OF 8.97.1301 AND 8.97.1302; AND REPEAL OF 8.97.1602

TO: All Interested Persons:

1. On August 13, 1993, from 10:00 a.m. to 12:00 p.m., a public hearing will be held in the conference room of the Board of Investments, at 555 Fuller Avenue, Helena, Montana, to consider the proposed amendment of rules pertaining to the seller/servicer approval procedures under the mortgage and loan program; and the proposed repeal of a rule pertaining to the loan loss reserve account.

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

"8.97.1301 DEFINITIONS In addition to the definitions set forth in 17-5-1503, and 17-6-302, MCA, the following definitions apply in all sub-chapters contained in Title 8, chapter 97, of these rules:

(1) through (28) will remain the same.

(29)(a) "Regulatory agency" means only the following:

(i) department of commerce financial institutions division;

(ii) office of comptroller of currency (OCC);

(iii) federal reserve board (FRB);

(iv) federal deposit insurance corporation (FDIC);

(v) national credit union administration (NCUA);

(vi) office of thrift supervision (OTS);

(vii) securities and exchange commission (SEC).

(b) Any reference in these regulations to "regulatory agency" shall refer only to the agencies listed herein or their successors.

(c) Any requirements in these regulations that an entity may meet conditions imposed by this act by supplying submissions previously provided to regulatory agencies, shall only apply if the submission is to one of the agencies defined in this rule.

(30) "Regulated financial institution" means any financial institution which is governed by one or more of the regulatory agencies defined herein.

(29) through (37) will remain the same but will be renumbered (31) through (39).

(40) "USPAP" means uniform standards of professional appraisal practice adopted by the appraisal standards board of appraisal foundation.

(38) will remain the same but will be renumbered (41)."
Auth: Sec. 17-5-1503, 17-6-324, MCA; IMP, Sec. 17-5-1503, 17-6-201, 37-6-211, 37-6-302, MCA

REASON: ARM 8.97.1301 is being amended to provide additional definitions for purposes of further clarifying the program and to provide language further distinguishing regulated lenders from non-regulated lenders for purposes of Board approval.

"8.97.1302 SELLER/SERVICER APPROVAL PROCEDURES - GENERAL REQUIREMENTS (1) will remain the same.

~~(2) Any financial institution interested in becoming a seller/servicer must submit a written request for such approval. If the financial institution is a federally or state regulated institution it must submit its most recent quarterly consolidated report of condition and income or its most recent quarter-end balance sheet and income statement, plus, if available, copies of its previous three years' consolidated reports of condition and income or audited financial statements, including both balance sheets and income statements. If the financial institution is not regulated by a federal or state agency, it must have been in business a minimum of three years and must submit copies of its last three years' audited financial statements, including both balance sheets and income statements plus its most recent quarter-end balance sheet and income statement. If approved as a seller/servicer, the financial institution must sign a sale and servicing agreement and show proof of financial responsibility which may include errors and omissions insurance coverage.~~

~~(3) Participation agreements must be signed to sell loans on a participation basis and a participation certificate must be signed for each participation commitment delivered.~~

~~(4) Annually, and within 90 days after the seller/servicer's year-end, the seller/servicer if a commercial bank, must submit to the board a complete copy of the consolidated report of condition and income. Other financial institutions must submit audited financial statements, including both a balance sheet and income statement. Proof of financial responsibility which may include errors and omissions insurance coverage may also be required. Failure to provide such proof, if requested, will result in termination of the sale and servicing agreement.~~

~~(5) The board may suspend approval of a seller/servicer and discontinue purchasing loans or otherwise participating with the seller/servicer in purchasing and servicing loans if any of the following situations occur:~~

~~(a) any fees due the board by the seller/servicer remain unpaid for more than 30 calendar days;~~

~~(b) the board determines that more than seven percent of loan payments have been delinquent for more than 90 calendar days; and~~

~~(c) the board determines that the seller/servicer has violated the servicing or participation agreement, or rules adopted by the board.~~

(2) All requests must include:

(a) a listing of the applicant's principal officers and officer(s) authorized to execute contracts, agreements, and other documents, plus a copy of the authorized officer's statement;

(b) a listing of the personnel and their qualifications principally involved in making and servicing commercial loans and mortgage loans;

(c) an indication of the programs under which the applicant seeks designation as an approved seller/servicer;

(d) a certificate of errors and omissions insurance coverage in an amount to be determined by the Board at the time of approval;

(e) an applicant that is governed by one or more regulatory agencies must submit its most recent quarterly consolidated report of condition and income or its most recent quarter-end balance sheet and income statement, plus, if available, copies of its previous three years' consolidated reports of condition and income or audited financial statements, including both balance sheets and income statements which must indicate a positive return on average assets, and, based on generally accepted accounting principles (GAAP), indicate a total capital as a percentage of average assets of at least 6 percent or meet all applicable capital requirements of the regulatory agency.

(f) an applicant that is not governed by a regulatory agency defined herein, must submit copies of its last three years' audited financial statements, including both balance sheets and income statements plus its most recent quarter-end balance sheet and income statement which have been prepared within 60 days of submission. Current financial statements must indicate a positive return on average assets, and must indicate total capital as a percentage of average assets of at least 6 percent with a minimum GAAP net worth of $1,000,000. Evidence of current corporate and ownership structure demonstrating more than three years of existence.

(3) The board will determine approval of each applicant at its regularly scheduled meeting following receipt of application.

(4) If approved as a seller/servicer, the financial institution must sign the appropriate sale and servicing agreement(s).

(5) Participation agreements must be signed to sell loans on a participation basis and a participation certificate must be signed for each participation commitment delivered.

(6) Annually, and within 90 days after the seller/servicer's year end, the seller/servicer shall file audited financial statements including income statements or equivalent regulatory reports. The financial statements shall exhibit total capital as a percentage of average assets of at least 6 percent and in the case of non-regulated seller/servicers approved after January 1, 1993, a minimum GAAP net worth of $1,000,000. If the seller/servicer's capital to average assets ratio is below 6 percent, the institution must meet the capital requirements of its regulatory agency or demonstrate, with current financial statements, an increasing ratio of capital to average assets.

(7) The board may suspend approval of a seller/servicer and discontinue purchasing loans or otherwise participating with the seller/servicer in purchasing and servicing loans if any of the following situations occur:

(a) any fees due the board by the seller/servicer remain unpaid for more than 30 calendar days;

(b) the board determines that more than seven percent of loan payments have been delinquent for more than 90 calendar days; and

(c) the board determines that the seller/servicer has violated the servicing or participation agreement, or rules adopted by the board."

Auth: Sec. 17-5-1521, 17-6-324, MCA; IMP, Sec. 17-5-1521, 17-6-211, MCA

REASON: The Board is proposing to amend this rule in order to better describe the procedures that it will follow when reviewing applications from regulated and non-regulated lenders to become approved financial institutions under the Board's mortgage and loan program.

3. The Board is proposing to repeal ARM 8.97.1602 located at page 8-3585, Administrative Rules of Montana. The rule is being repealed because the loan loss reserve account no longer exists. The authority section is 17-6-324, MCA, and the implementing section is 17-6-315, MCA.

4. Interested persons may present their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to Ms. Sherry Bach, Board of Investments, 555 Fuller Avenue, Helena, Montana, 59620, to later than August 16, 1993.

5. Sherry Bach has been designated to preside over and conduct the hearing.

BOARD OF INVESTMENTS
WARREN VAUGHAN, CHAIRMAN

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

Annie M. Bartos
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, June 14, 1993.

BEFORE THE DEPARTMENT OF
FAMILY SERVICES OF THE
STATE OF MONTANA

In the matter of the adoption of Rule I pertaining to qualifications of respite care providers.	))))	NOTICE OF PROPOSED ADOPTION OF RULE I PERTAINING TO QUALIFICATIONS OF RESPITE CARE PROVIDERS

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On August 12, 1993, the Department of Family Services proposes to adopt Rule I pertaining to qualifications of respite care providers.

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

I. FOSTER CARE SUPPORT SERVICES, RESPITE CARE SELECTION AND TRAINING (1) For children eligible for respite care under ARM 11.7.609, foster parents may arrange for respite care services. The arrangement shall provide for respite care services from a qualified individual. The respite care services should be provided only on a casual basis, as casual basis is defined under 29 CFR §§ 552.5 and 552.104.

(2) Foster parents using respite care providers may be considered employers of respite care providers for purposes of meeting obligations imposed by applicable laws covering rights and duties of employment relationships. Reimbursement for respite care services to foster parents shall not be deemed to create a joint-employer relationship between foster parents and the department. Foster parents must agree to assume all employer-related obligations which may arise as a result of provision of respite care services.

(3) The selection of the person to provide respite care is made by the foster parent. The foster parent should consider the ability of the respite care provider to:

(a) meet the special needs of the foster child; and

(b) provide safe, developmentally appropriate care to the child.

(4) The foster parent provides any specific training which may be necessary to care for a particular child.

(5) A request for reimbursement for respite care services which includes information on the name and qualifications of the respite care provider must be made prior to the care being given.

(6) The department representative may deny the request for reimbursement if the foster parent fails to document that the respite care provider selected by the foster parent possesses the qualifications and ability to provide care for the foster child.

AUTH: Sec. 41-3-1103, 41-3-1142 and 52-2-111, MCA.
IMP: Sec. 41-3-1103, 41-3-1142 and 52-2-111, MCA.

3. The 1991 Legislature mandated that the department develop qualifications for respite care providers and incorporate the requirements into rules. Since the 1991 Legislative Session, the department has up-dated its policy to include qualifications for respite care providers. This rule-making proposes to incorporate the substance of the policy into rules as required by the Legislature.

The proposed rules are designed to require that foster parents select respite care providers based on the particular needs of each child. The qualifications needed for care of the child must be a determination made on a case-by-case basis.

Under Montana law, the number of state workers' positions for each agency is determined by the state budget director. Section 2-18-204, MCA. There has been no determination of state positions for respite care providers. Therefore, respite care workers cannot be considered to be employed by the State of Montana, and foster parents must agree to assume responsibility for any employer-related benefits or obligations associated with obtaining respite care services.

The proposed rule states that foster parents should use respite care providers on a casual basis only, as casual is defined in the Code of Federal Regulations. Respite care should be an occasional break from caring for a child, rather than a regular event. This policy is already recognized by the annual-hour limitation already in effect in regard to respite care. In addition, regular use of respite care providers may subject foster parents to greater risk of responsibility for obligations imposed on employers.

However, where circumstances demand use of respite care providers on a regular basis, foster parents must make arrangements for fulfilling any applicable employer-related obligations. Foster parents who need to familiarize themselves with such obligations should contact the Montana Department of Labor & Industry, the United States Internal Revenue Service, the Montana Department of Revenue, and the United States Department of Health and Human Services, Social Security Administration, where information on employment obligations is readily available.

This rule-making is reasonably necessary to comply with the mandate of the 1991 Legislature that respite care provider qualifications be incorporated into department rules. The department is authorized to implement through rules: child welfare services, the administration of foster care, and regulation of facilities providing care. Rules covering qualifications and employment status of respite care providers are reasonably necessary to implement administration of foster

care, child welfare services and regulation of family foster care.

4. Interested persons may submit their data, views or arguments to the proposed adoption in writing to the Office of Legal Affairs, Department of Family Services, 48 North Last Chance Gulch, P.O. Box 8005, Helena, Montana 59604, no later than July 22, 1993.

5. If a person who is directly affected by the proposed adoption wishes to express data, views and arguments orally or in writing at a public hearing, that person must make a written request for a public hearing and submit such request, along with any written comments, to the Office of Legal Affairs, Department of Family Services, 48 North Last Chance Gulch, P.O. Box 8005, Helena, Montana 59604, no later than July 22, 1993.

6. If the Department of Family Services receives requests for a public hearing on the proposed adoption from either 10% or 25, whichever is less, of those persons who are directly affected by the proposed adoption, from the Administrative Code Committee of the legislature, from a governmental agency or subdivision, or from an association having no less than 25 members who are directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register.

DEPARTMENT OF FAMILY SERVICES

Hank Hudson, Director

John Melcher, Rule Reviewer

Certified to the Secretary of State, June 14, 1993.

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

In the matter of the amendment of ARM 16.44.125, 202, 302, 303, 306, 326-328, 330, 333-335, 602, 605, 802, dealing with facility permit fees and hazardous waste management, and the repeal of 16.44.1018, dealing with attorney's fees in court action concerning release of records.	NOTICE OF PUBLIC HEARING FOR PROPOSED AMENDMENT OF RULES AND REPEAL OF 16.44.1018 (Hazardous Waste)

To: All Interested Persons

1. On July 20, 1993, at 9:00 a.m., the department will hold a public hearing in Room C209 of the Cogswell Building, 1400 Broadway, Helena, Montana, to consider the amendment of the above-captioned rules and the repeal of ARM 16.44.1018.

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

16.44.125 FACILITY PERMIT FEES: APPLICATION, ~~RENEWAL~~, MODIFICATION AND ~~MAINTENANCE~~ MANAGEMENT FEES (1) ~~Each applicant for a permit under this subchapter must pay, at the time of application or 180 days after a Part B permit application is requested by the department, whichever comes first, a fee in the amount to be determined by the department as follows:~~

~~(a) $4,000 for the first hazardous waste disposal process (those processes requiring ground water monitoring under subchapters 6 and 7) employed at the facility;~~

~~(b) $2,500 for each additional hazardous waste disposal process employed at the facility;~~

~~(c) $2,500 for the first non-disposal hazardous waste management process employed at the facility; and~~

~~(d) $1,500 for each additional non-disposal hazardous waste management process employed at the facility.~~ As used in (2) and (3), the following definitions apply:

(a) "Class I facility" means a hazardous waste management facility that:

(i) contains one or more regulated landfill units, surface impoundments, land treatment units, incinerators, boilers, or industrial furnaces; and

(ii) primarily receives hazardous waste generated by offsite sources not owned, controlled, or operated by the facility owner or operator.

(b) "Class II facility" means a hazardous waste management facility that is neither a class I facility nor a class III facility.

(c) "Class III facility" means a hazardous waste management

facility that:

(i) does not contain a regulated landfill unit, surface impoundment, land treatment unit, incinerator, boiler, or industrial furnace; and

(ii) primarily receives hazardous waste generated either onsite or by offsite sources that are owned, controlled, or operated by the facility owner or operator.

(2) The department shall assess to the applicant for a hazardous waste management permit under this subchapter a filing and review fee based upon the following schedule:

(a) For class I facilities, a maximum fee of $150,000, payable as follows:

(i) a nonrefundable payment of $50,000 due when an applicant files for a permit;

(ii) a payment of $50,000 due when the department notifies the applicant that the application is complete; and

(iii) an additional payment of up to $50,000 for the portion of the department's actual costs of review that exceed 100,000. This payment is due 30 days after the department's final decision on the application.

(b) For class II facilities, a maximum fee of $90,000, payable as follows:

(i) a nonrefundable payment of $40,000 due when an applicant files for a permit; and

(ii) an additional payment of up to $50,000 for the portion of the department's actual costs of review that exceed $40,000. This payment is due 30 days after the department's final decision on the application.

(c) For class III facilities, a maximum fee of $25,000, payable as follows:

(i) a nonrefundable payment of $10,000 due when an applicant files for a permit; and

(ii) an additional payment of up to $15,000 for the portion of the department's actual costs of review that exceed $10,000. This payment is due 30 days after the department's final decision on the application.

(d) If, after receipt of the payment required in (2)(a)(ii), the applicant notifies the department in writing of its intent to withdraw the application, the department shall return to the applicant any portion of the payment received pursuant to (1)(a)(ii) in excess of the department's actual costs of permit review.

~~(2)~~(3)(a) At the time the permit ~~renewal~~ reissuance process is initiated, the department shall assess a ~~permit renewal~~ fee for reissuance of the permit in the amount to be determined by the department as follows:

~~(a)~~(i) ~~$2,000~~ $10,000 for ~~the first hazardous waste management process employed at the~~ a class I facility; ~~and~~

~~(b)~~(ii) ~~$1,500~~ $5,000 for ~~each additional hazardous waste management process~~ a class II facility; and

(iii) $2,000 for a class III facility.

(b) If payment for the permit reissuance is not received by the department within ten days of initial billing, the department may suspend all work on the permit reissuance until such time as

the permit reissuance fee has been received.

~~(3)~~ (4)(a) The department shall assess a permit modification fee, at the time the modification process is initiated, for all permit modifications, regardless of whether the modification is requested by the permittee or initiated by the department. The fee amount shall be as follows:

~~(a)~~ (i) $1,500 for major modifications under ARM 16.44.116, except that, if a major modification is so significant as to constitute reissuance of a permit, the fee schedule set forth in ~~(2)~~ (3) of this rule shall apply in lieu of the $1,500 amount; and

~~(b)~~ (ii) ~~from $100 to $500 for~~ For minor modifications under ARM 16.44.118; ~~, the specific amount to be based upon the complexity of the modification, except that if the modification is of a very minor nature (e.g., changing only a name or an address on the permit documents), the department may waive the fee.~~

(A) $100 for those minor modifications listed in items A-E of Table I under ARM 16.44.118.

(B) $500 for those minor modifications listed in items F-L of Table I under ARM 16.44.118.

(b) If the modification is of a very minor nature (e.g., changing only a name or an address on the permit documents), the department may waive the fee.

(c) If payment for the permit modification is not received by the department within ten days of initial billing, the department may suspend all work on the permit modification until such time as the permit modification fee has been received.

~~(4)~~ (5) ~~The department shall assess annual permit maintenance fees based upon the amount of hazardous waste received each year at a facility.~~ A hazardous waste management facility that primarily receives wastes generated by offsite sources that are not owned or operated by the facility owner or operator or site owner shall remit to the department hazardous waste management fees based upon the amount of wastes received. The schedule of fees shall be as follows:

(a) ~~The amount of fee assessed shall be determined from Table 1 in ARM 16.44.404 except that the fee shall be assessed upon the amount of waste received at the facility in a base year rather than upon the amount of hazardous waste generated at the facility.~~ $8 per ton on all hazardous waste received at the facility or site for management in regulated landfill units, surface impoundments, land treatment units, incinerators, boilers or industrial furnaces; or

(b) ~~Where a person pays an annual registration fee as a generator under ARM 16.44.404, and the hazardous waste he generates is treated, stored, or disposed of at a facility in Montana which the generator owns or operates, the payment of the generator registration fee shall be in lieu of any permit maintenance fee under this rule.~~ $4 per ton on all hazardous wastes received at the facility or site for management in any regulated unit or units other than those described in (5)(a).

(c) The fees established in (5)(a) and (b) may be prorated for amounts of hazardous waste received that are less than 1 ton in weight.

(d) Payment of the fees established in (5)(a) and (b) shall be submitted to the department quarterly, with payments due on March 31, June 30, September 30 and December 31 of each year. AUTH: 75-10-404, 75-10-405, 75-10-406, MCA; IMP: 75-10-405, 75-10-406, MCA

16.44.202 DEFINITIONS In this chapter, the following terms shall have the meanings or interpretations shown below:

(1)-(8) Remain the same.

(9) "Boiler" means an enclosed device using controlled flame combustion and having the following characteristics:

(a) Remains the same.

(b) The unit is one which the department has determined, on a case-by-case basis, to be a boiler, after considering the standards in ARM 16.44.~~325~~ 327.

(10)-(37) Remain the same.

(38) "Existing tank system" or "existing component" means a tank system or component that is used for the storage or treatment of hazardous waste and that was in operation, or for which installation had commenced on or prior to ~~January~~ July 14, 1986. Installation will be considered to have commenced if the owner or operator had obtained all federal, state, and local approvals or permits necessary to begin physical construction of the site or installation of the tank system and if either:

(a)-(b) Remain the same.

(39)-(135) Remain the same.

AUTH: 75-10-405, MCA; IMP: 75-10-405, 75-10-406, MCA

16.44.302 DEFINITION OF WASTE (1)-(3) Remain the same.

(4) The following ~~materials are~~ inherently waste-like materials are "wastes" when they are recycled in any manner:

(a)-(b) Remain the same.

(c) wastes which may be added to this list by the department ~~such as~~ because they are materials:

(i)(A) ~~those materials~~ which are ordinarily disposed of, burned, or incinerated; or

(B) ~~those materials~~ which contain the toxic constituents listed in ARM 16.44.352 and that are not ordinarily found in raw materials or products for which the materials substitute (or are found in raw materials or products in smaller concentrations) and which are not used or reused during the recycling process; and

(ii) ~~those materials~~ which may pose a substantial hazard to human health and the environment when recycled.

(5)-(6) Remain the same.

AUTH: 75-10-404, 75-10-405, MCA; IMP: 75-10-405, MCA

16.44.303 DEFINITION OF HAZARDOUS WASTE (1)-(2) Remain the same.

(3)(a) Remains the same.

(b) The following wastes are not hazardous even though they are generated from the treatment, storage, or disposal of a hazardous waste, unless they exhibit one or more of the characteristics of hazardous waste:

(i) waste pickle liquor sludge generated by lime stabili-

zation of spent pickle liquor from the iron and steel industry (SIC Codes 331 and 332); and

(ii) Remains the same.

(4) Remains the same.

AUTH: 75-10-404, 75-10-405, MCA; IMP: 75-10-403, 75-10-405, MCA

16.44.306 REQUIREMENTS FOR RECYCLABLE MATERIALS (1)(a) Hazardous wastes that are recycled will be known as "recyclable materials".

(b) The following recyclable materials are not subject to the requirements of this rule but are regulated under subparts C through ~~H~~ G of 40 CFR Part 266, and all applicable provisions in subchapters 1, 8, 9 and 11 of this chapter:

(i)-(v) Remain the same.

(c) Remains the same.

(2)-(4) Remain the same.

AUTH: 75-10-405, MCA; IMP: 75-10-405, MCA

16.44.326 STANDARDS AND CRITERIA FOR RECLASSIFICATION TO A MATERIAL OTHER THAN A WASTE (1)(a)-(c) Remain the same.

(d) the extent to which the material is handled to minimize loss; ~~or~~ and

(e) other relevant factors.

(2)-(3) Remain the same.

AUTH: 75-10-404, 75-10-405, MCA; IMP: 75-10-405, MCA

16.44.327 RECLASSIFICATION AS A BOILER (1)(a)-(d) Remain the same.

(e) the extent to which the device is in common and customary use as a "boiler" functioning primarily to produce steam, heated fluids, or heated gases; ~~or~~ and

(f) Remains the same.

AUTH: 75-10-404, 75-10-405, MCA; IMP: 75-10-405, MCA

16.44.328 PROCEDURES FOR RECLASSIFICATION (1) The department will use the following procedures in evaluating applications for reclassification from classification as a waste or applications to classify particular enclosed flame combustion devices as boilers (as described in ARM 16.44.327):

(a) Remains the same.

(b) The department will evaluate the application and issue a draft notice ~~provisionally~~ tentatively granting or denying the application. A notification of this ~~provisional~~ tentative decision with notice of the opportunity to comment to the department within 30 days of the notification ~~shall~~ must be provided by the applicant to a newspaper of general circulation within the area to be affected by a decision to reclassify. A radio broadcast, in the locality where the recycler is located, about the ~~provisional notification~~ tentative decision and opportunity to comment ~~shall~~ must also be made by the applicant. The department will accept comment on the ~~provisional~~ tentative decision for 30 days, and may also hold a public hearing upon request or at its discretion. The department will issue a final decision on the application after receipt of comments and after the hearing (if any).

AUTH: 75-10-404, 75-10-405, MCA; IMP: 75-10-405, MCA

16.44.330 LISTS OF HAZARDOUS WASTES -- GENERAL

(1) Remains the same.

(2) The basis for listing the classes or types of wastes listed in ARM 16.44.331 through 16.44.333 will be indicated by employing one or more of the following hazard codes:

(a) Remains the same.

(b) ARM 16.44.352 identifies the constituent which caused the waste to be listed as ~~an EP toxic waste~~ a toxicity characteristic (E) or toxic waste (T) in ARM 16.44.331 and 16.44.332.

(3)-(4) Remain the same.

AUTH: 75-10-405, MCA; IMP: 75-10-405, MCA

16.44.333 DISCARDED COMMERCIAL CHEMICAL PRODUCTS, OFF-SPECIFICATION SPECIES, CONTAINER RESIDUES, AND SPILL RESIDUES THEREOF (1) The following materials or items are hazardous wastes if and when they are discarded or intended to be discarded, as described in ARM 16.44.302(1)(b)(i), when they are mixed with waste oil or used oil or other material and applied to the land for dust suppression or road treatment, when they are otherwise applied to the land in lieu of their original intended use, or when they are contained in products that are applied to the land in lieu of their original intended use, or when, in lieu of their original intended use, they are produced for use as (or as a component of) a fuel, distributed for use as a fuel, or burned as a fuel:

(a)-(c) Remain the same.

(d) Any residue or contaminated soil, water or other debris resulting from the discharge, into or on any land or water, of any commercial chemical product or manufacturing chemical intermediate having the generic name listed in (1)(e) or (f) of this rule, or any residue or contaminated soil, water or other debris resulting from the discharge, into or on any land or water, of any off-specification chemical product and manufacturing chemical intermediate which, if it met specifications, would have the generic name listed in (1)(e) or (f) of this rule. [The phrase "commercial chemical product or manufacturing chemical intermediate having the generic name listed in ..." refers to a chemical substance which is manufactured or formulated for commercial or manufacturing use which consists of the commercially pure grade of the chemical, any technical grades of the chemical that are produced or marketed, and all formulations in which the chemical is the sole active ingredient. It does not refer to a material, such as a manufacturing process waste, that contains any of the substances listed in (1)(e) or (f). Where a manufacturing process waste is deemed to be a hazardous waste because it contains a substance listed in (1)(e) or (f), such waste will be listed in either ARM 16.44.~~301~~ 331 or 16.44.~~302~~ 332, or will be identified as a hazardous waste by the characteristics set forth in ARM 16.44.320-16.44.324.]

(e)-(g) Remains the same.

AUTH: 75-10-405, MCA; IMP: 75-10-405, MCA

16.44.334 ADDITIONAL REGULATION OF CERTAIN HAZARDOUS WASTE RECYCLING ACTIVITIES ON A CASE-BY-CASE BASIS (1)(a)-(c) Remain the same.

(d) whether any contaminants are being released into the environment, or are likely to be so released; ~~or~~ and

(e) Remains the same.

(2)-(3) Remain the same.

AUTH: 75-10-405, MCA; IMP: 75-10-405, MCA

16.44.335 PROCEDURES FOR CASE-BY-CASE REGULATION OF HAZARDOUS WASTE RECYCLING ACTIVITIES (1) The department will use the following procedures when determining whether to regulate hazardous waste recycling activities described in ARM 16.44.306(1)(b)(iv) under the provisions of ARM 16.44.306(2) and (3):

(a) If a generator is accumulating the waste, the department will issue a notice setting forth the factual basis for the decision and stating that the person must comply with the applicable requirements of subchapter 4. The notice will become final within 30 days, unless the person served requests a public hearing to challenge the decision. Upon receiving such a request, the department will hold a public hearing. The department will provide notice of the hearing to the public in the newspapers of general circulation serving the affected areas and will allow public participation at the hearing. The department will issue a final order after the hearing stating whether or not compliance with subchapter 4 is required. The order becomes effective 30 days after issuance of the decision unless the department specifies a later date or unless review by the board is requested. The order may be appealed to the board by any ~~interested and affected~~ person who participated in the public hearing. Final agency action occurs when a final order is issued by the board.

(b) Remains the same.

AUTH: 75-10-404, 75-10-405, MCA; IMP: 75-10-405, MCA

16.44.602 PROHIBITIONS (1) No person may operate ~~an existing~~ a facility which treats, stores or disposes of hazardous waste without obtaining a permit under ARM 16.44.605, or 16.44.104.

(2) Remains the same.

AUTH: 75-10-404, 75-10-405, MCA; IMP: 75-10-405, 75-10-406, MCA

16.44.605 TEMPORARY PERMITS (INTERIM STATUS)

(1)-(3) Remain the same.

(4) Form 8700-12 and forms for submitting the information required in ~~(2)~~ (1)(b) and (2)(b) of this rule may be obtained from the department.

AUTH: 75-10-404, 75-10-405, MCA; IMP: 75-10-405, 75-10-406, MCA

16.44.802 APPLICABILITY OF FINANCIAL REQUIREMENTS

(1)-(2) Remain the same.

(3) Except as provided in (1), the requirements of this subchapter, with respect to post-closure care, apply to owners and operators of:

(a)-(c) Remain the same.
(4)-(5) Remain the same.
AUTH: 75-10-405, MCA; IMP: 75-10-405, MCA

3. The department is proposing the amendment of 16.44.125 in order to implement the department's authority to assess permit fees under 75-10-405, MCA, as amended by the Montana fifty-third legislature. The proposed amendments to subchapters 2, 3, 6 and 8, are needed to make technical corrections and to bring current rules in line with U.S. Environmental Protection Agency regulations so that the Montana Hazardous Waste Management Program may continue to enforce EPA authorized portions of the state program in place of EPA's program.

4. ARM 16.44.1018, which can be found on page 16-4155 of the Administrative Rules of Montana, is proposed to be repealed because, like the amendments proposed above, the action is needed to conform state rules to those promulgated by the U.S. Environmental Protection Agency, thereby allowing the department to enforce EPA-authorized portions of the Montana Hazardous Waste Management Program in place of EPA's.
AUTH: 75-10-405, MCA; IMP: 75-10-405, MCA

5. Interested persons may submit their data, views, or arguments concerning the proposed amendments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to J. Mark Stahly, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620, no later than July 23, 1993.

6. J. Mark Stahly has been designated to preside over and conduct the hearing.

/s/ William J. Opitz
for ROBERT J. ROBINSON, Director

Certified to the Secretary of State June 14, 1993.

Reviewed by:

/s/ Eleanor J. Parker
Eleanor Parker, DHES Attorney

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

In the matter of the amendment of ARM 16.24.104 concerning eligibility requirements for the children's special health services program	NOTICE OF PROPOSED AMENDMENT OF ARM 16.24.104 NO PUBLIC HEARING CONTEMPLATED (Children's Special Health Services)

To: All Interested Persons

1. On July 26, 1993, the department proposes to amend the above-captioned rule, which sets eligibility standards for the children's special health services program.

2. The rule, as proposed to be amended, appears as follows (new material is underlined; material to be deleted is interlined):

16.24.104 APPLICANT ELIGIBILITY (1)-(7) Remain the same.

(8) Effective ~~May 1, 1992~~ [effective date of amendment], the department hereby adopts and incorporates by reference the ~~1992~~ 1993 federal poverty income guidelines published by the U.S. department of health and human services in the ~~February 14, 1992~~ February 12, 1993, federal register [~~57 FR 5455~~ 58 FR 8287]. Copies of the federal poverty income guidelines may be obtained from the Family/Maternal and Child Health Services Bureau, CSHS Program, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620 [phone: (406)444-3617].

AUTH: 50-1-202, MCA; IMP: 50-1-202, MCA

3. The department is proposing this amendment because it is necessary in order to provide handicapped children's services to all those children who should be eligible under the federal poverty guidelines.

4. Interested persons may submit their data, views, or arguments concerning the proposed amendment to Ellie Parker, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana 59620, no later than July 22, 1993.

5. If a party who is directly affected by the proposed amendment wishes to express his data, views, and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comment he has to Ellie Parker, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana 59620, no later than July 22, 1993.

6. If the department receives requests for a public

hearing under 2-4-315, MCA, on the proposed amendment, from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed amendment; from the Administrative Code Committee of the legislature; from a governmental subdivision or agency, or from an association having no fewer 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 in excess of 25, based on the current numbers of children receiving handicapped children's services.

ROBERT J. ROBINSON, Director

Certified to the Secretary of State June 14, 1993.

Reviewed by:

Eleanor Parker, DHES Attorney

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

In the matter of the amendment of ARM 16.8.701, 1401, 1407, 1414, 1423-1425, 1427-1428, and new rules I-XXXIV dealing with air quality permitting, prevention of significant deterioration, permitting in nonattainment areas, source testing protocol and procedure, and wood waste burners.	)	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT OF RULES; ADOPTION OF NEW RULES I-XXXIV AND REPEAL OF ARM 16.8.921 through 16.8.943

(Air Quality Bureau)

To: All Interested Persons

1. On July 16, 1993, at 10:00 a.m., the board will hold a public hearing in Room C209 of the Cogswell Building, 1400 Broadway, Helena, Montana, to consider the amendment of the above-captioned rules and the repeal of ARM 16.8.921 through 16.8.943.

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

16.8.701 DEFINITIONS As used in this ~~and subsequent subchapters~~ chapter, unless indicated otherwise in a specific subchapter, the following definitions apply:

(1) "Administrator" means the administrator of the U.S. environmental protection agency or his designee.

(2) "Air pollutants" means one or more air contaminants that are present in the outdoor atmosphere.

(3) "Air quality operating permit" means any permit or group of permits issued, renewed, revised, amended, or modified pursuant to subchapter 20 of this chapter.

(4) "Air quality preconstruction permit" means a permit issued, altered or modified pursuant to subchapters 9, 11, 17, or 18 of this chapter.

(5) "Allowable emissions" means the emissions rate of a stationary source calculated using the maximum rated capacity of the source (unless the source is subject to federally enforceable limits which restrict the operating rate or hours of operation, or both) and the most stringent of the following:

(a) The applicable standards as set forth in ARM 16.8.1423 or 1424;

(b) The applicable emissions limitation contained in the Montana state implementation plan, including those with a future compliance date; or

(c) The emissions rate specified as a federally enforceable permit condition.

~~(1)~~(6) "Ambient air" means that portion of the atmosphere, external to buildings, to which the general public has access.

~~(2)~~(7) "Ambient air monitoring" means measurement of any air ~~contaminant~~ pollutant, odor, meteorological or atmospheric characteristic, or any physical or biological condition resulting from the effects of air ~~contaminants~~ pollutants or meteorological atmospheric conditions provided the measurement is performed in an area constituting ambient air.

~~(3) "Animal matter" means any product or derivative of animal life.~~

(8) "Boiler or industrial furnace" means any source or emitting unit that is subject to the provisions of 75-10-405(2)(f) and 75-10-406, MCA, and rules promulgated thereunder defining the class of activities subject to regulation under those sections, found at ARM 16.44.1101.

(9) "Commercial hazardous waste incinerator" means an incinerator that burns hazardous waste, or a boiler or industrial furnace. The term "commercial hazardous waste incinerator" does not include a research and development facility that receives federal or state research funds and that burns hazardous waste primarily to test and evaluate waste treatment remediation technologies.

(10) "Commercial medical waste incinerator" means any incinerator that incinerates medical waste, except that "commercial medical waste incinerator" does not include hospital or medical facility incinerators that primarily incinerate medical waste generated onsite.

~~(4)~~(11) "Control equipment" means any device or contrivance which prevents, removes, controls or ~~reduces~~ abates emissions.

~~(5) "Control officer" means the director or the administrator, or any employee of the department designated by the administrator, or any local health officer or employee designated by the administrator.~~

~~(6) "Food service establishment" means any fixed or mobile restaurant; coffee shop; cafeteria; short-order cafe; luncheonette; grill; tea room; sandwich shop; soda fountain; tavern; bar; cocktail lounge; night club; roadside stand; private, public or nonprofit organization or institution routinely serving food; catering kitchen, commissary, or similar place in which food or drink is placed for sale or for service on the premises or elsewhere; and any other eating or drinking establishment or operation where food is served or provided for the public with or without charge.~~

(12) "Emission" means release of air contaminants into the ambient air.

(13) "Emission standard" means an allowable rate of emissions or level of opacity, or a requirement that certain equipment, work practices or operating conditions be employed to assure continuous emission control. An emission standard may be contained in a rule or regulation, consent decree, judicial or administrative order, or permit condition.

(14) "EPA" means the U.S. environmental protection agency.

(15) "FCAA" means the Federal Clean Air Act, 42 U.S.C. 7401, et seq.

(16) "Federally enforceable" means all limitations and conditions which are enforceable by the administrator, including those requirements developed pursuant to 40 CFR Parts 60 and 61, requirements within the Montana state implementation plan, and any permit

requirement established pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR Part 51, subpart I, including operating permits issued under an EPA-approved program that is incorporated into the Montana state implementation plan and expressly requires adherence to any permit issued under such program.

~~(7)~~(17) "Fuel burning equipment" means any furnace, boiler, apparatus, stack, or appurtenances thereto used in the process of burning fuel or other combustible material for the primary purpose of producing heat or power by indirect heat transfer.

(18) "Fugitive emissions" means those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.

(19) "Hazardous air pollutant" means any air pollutant listed as a hazardous air pollutant pursuant to section 7412(b)(1) of the FCAA.

(20) "Hazardous waste" means a substance defined as hazardous waste under either 75-10-403, MCA, or administrative rules found at ARM Title 16, chapter 44, subchapter 3, or a waste containing two parts or more per million of polychlorinated biphenyl.

(21) "Hazardous waste incinerator" means any incinerator that incinerates hazardous waste.

~~(8) "Incinerator" means any equipment, device or contrivance used for the destruction of garbage, rubbish or other wastes by burning, but not wood wastes burned in devices commonly called tepee burners, silos, truncated cones, wigwam burners or other such burners used commonly by the wood products industries and not including barrels, baskets or other contrivances commonly termed backyard trash burners, trash barrels or ash pits.~~

(22) "Incinerator" means any single or multiple chambered combustion device which burns combustible material, alone or with a supplemental fuel or catalytic combustion assistance, primarily for the purpose of removal, destruction, disposal, or volume reduction of all or any portion of the input material.

(a) Incinerators do not include:

(i) safety flares used for combustion or disposal of hazardous or toxic gases at industrial facilities such as refineries, gas sweetening plants, oil and gas wells, sulfur recovery plants, or elemental phosphorus plants;

(ii) space heaters burning used oil;

(iii) wood-fired boilers; or

(iv) wood waste burners such as tepee, wigwam, truncated cone or silo burners.

~~(9) "Installation" means any property, real or personal, including, but not limited to, processing equipment, manufacturing equipment, or construction, capable of creating or causing emissions.~~

(23) "Medical waste" means any waste that is generated in the diagnosis, treatment, or immunization of human beings or animals, in medical research on humans or animals, or in the production or testing of biologicals. The term includes:

(a) cultures and stocks of infectious agents;

(b) human pathological wastes;

(c) waste human blood or products of human blood;

(d) sharps;

(e) contaminated animal carcasses, body parts, and bedding that were known to have been exposed to infectious agents during research;

(f) laboratory wastes and wastes from autopsy or surgery that were in contact with infectious agents; and

(g) biological waste and discarded material contaminated with blood, excretion, exudates, or secretions from humans or animals.

(24) "Montana state implementation plan" means the state implementation plan adopted by EPA for the state of Montana pursuant to the FCAA, found at 40 CFR Part 52, subpart BB.

~~(10)~~(25) "Multiple chamber incinerator" means any ~~article, machine, equipment, contrivance, structure or part of a structure used to dispose of combustible refuse by burning,~~ incinerator consisting of three or more refractory lined combustion furnaces in series physically separated by refractory walls, interconnected by gas passage ports or ducts and employing adequate parameters necessary for maximum combustion of the material to be burned.

~~(11)~~(26) "Odor" means that property of an emission which stimulates the sense of smell.

~~(12)~~(27) "Opacity" means the degree, expressed in percent, to which emissions reduce the transmission of light and obscure the view of an object in the background. Where the presence of uncombined water is the only reason for failure of an emission to meet an applicable opacity limitation contained in this chapter, that limitation shall not apply. For the purpose of this chapter, opacity determination shall follow all requirements, procedures, specifications, and guidelines contained in 40 CFR Part 60, Appendix A, method 9 ~~(July 1, 1987 ed.)~~, or by an in-stack transmissometer which complies with all requirements, procedures, specifications and guidelines contained in 40 CFR Part 60, Appendix B, performance specification 1 ~~(July 1, 1987 ed.)~~.

(28) "Owner or operator" means any person who owns, leases, operates, controls, or supervises a source or alteration, or the authorized agent of the owner, or the person who is legally responsible for the overall operation of the source or alteration.

~~(13)~~(29) "Particulate matter" means any material, except water in uncombined form, that is or has been airborne, and exists as a liquid or a solid at standard conditions. For the purposes of this definition, standard conditions are defined in the applicable test method.

~~(14)~~(30) "Person" means any individual, partnership, firm, association, municipality, public or private corporation, the state or a subdivision or agency of the state, trust, estate, interstate body, federal government or an agency of the federal government, or any other legal entity.

~~(15)~~(31) "PM-10" means particulate matter with an aerodynamic diameter of less than or equal to a nominal 10 micrometers as measured by a reference method based on 40 CFR Part 50, Appendix J, ~~(52 FR 24664, July 1, 1987)~~ and designated in accordance with 40 CFR Part 53 ~~(52 FR 24727, July 1, 1987)~~, or by an equivalent method designated in accordance with 40 CFR Part 53 ~~(52 FR 24727, July 1, 1987)~~.

~~(16)~~(32) "PM-10 emissions" means finely divided solid or liquid material, with an aerodynamic diameter less than or equal to a

nominal 10 micrometers emitted to the ambient air as measured by an applicable reference method ~~or alternative method~~ as specified in 40 CFR Part 51 Appendix ~~C of the PM-10 SIP development guideline manual entitled, "Guidelines for Source Testing for Size Specific Particulate Emissions"~~ M and condensible emissions measured by an impinger method, or by ~~a~~ an alternative equivalent test method approved by the department. If the use of an alternative test method requires approval by the administrator, that approval must also be obtained.

(33) "Potential to emit" means the maximum capacity of a stationary source, or source or alteration to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source or alteration to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design only if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source. When used in subchapter 20, this definition does not alter the use of the term "capacity factor" as used in Title IV of the FCAA or rules promulgated thereunder.

~~(17)~~(34) "Premises" means any property, piece of land or real estate or building.

~~(18) "Process weight" means the total weight of all materials introduced into any specific process which may cause emissions. Solid fuels charged will be considered as part of the process weight, but liquid and gaseous fuels and combustion air will not.~~

~~(19) "Process weight rate" means the rate established as follows:~~

~~(a) For continuous or long-run steady-state operations, the total process weight for the entire period of continuous operation or for a typical portion thereof, divided by the number of hours of such period or portion thereof.~~

~~(b) For cyclical or batch operations, the total process weight for a period that covers a complete operation or an integral number of cycles, divided by the hours of actual process operation during such a period. Where the nature of any process or operation or the design of any equipment is such as to permit more than one interpretation of this definition, the interpretation that results in the minimum value for allowable emission shall apply.~~

~~(20)~~(35) "Public nuisance" means any condition of the atmosphere beyond the property line of the offending person which:

(a)-(b) Remains the same.

~~(21) "Reduction" means any heated process, including rendering, cooking, drying, dehydrating, digesting, evaporating, and protein concentrating.~~

~~(22) "Salvage operation" means any operation conducted in whole or in part for the salvaging or reclaiming of any product or material.~~

(36) "Secondary emissions" means emissions which would occur as a result of the construction or operation of a major stationary source or major modification, but do not come from the major stationary source or major modification itself. For the purpose of

this chapter, secondary emissions must be specific, well defined, quantifiable, and impact the same general area as the stationary source or modification which causes the secondary emissions. Secondary emissions include emissions from any offsite support facility which would not be constructed or increase its emissions except as a result of the construction or operation of the major stationary source or major modification. Secondary emissions do not include any emissions which come directly from a mobile source such as emissions from the tailpipe of a motor vehicle, from a train, or from a vessel.

(37)(a) "Solid waste" means all putrescible and nonputrescible solid, semi-solid, liquid, or gaseous wastes, including but not limited to garbage; rubbish; refuse; ashes; swill; food wastes; commercial or industrial wastes; medical waste; sludge from sewage treatment plants, water supply treatment plants, or air pollution control facilities; construction, demolition or salvage wastes; dead animals, dead animal parts, offal, animal droppings, or litter; discarded home and industrial appliances; automobile bodies, tires, interiors, or parts thereof; wood products or wood byproducts and inert materials; styrofoam and other plastics; rubber materials; asphalt shingles; tarpaper; electrical equipment, transformers, insulated wire; oil or petroleum products, or oil or petroleum products and inert materials; treated lumber and timbers; and pathogenic or infectious waste.

(b) "Solid waste" does not mean municipal sewage, industrial wastewater effluent, mining wastes regulated under the mining and reclamation laws administered by the department of state lands, or slash and forest debris regulated under laws administered by the department of state lands.

(c) This definition of "solid waste" is only applicable to the regulation of incinerators under the Montana Clean Air Act, Title 75, Chapter 2, MCA, and regulations adopted pursuant thereto.

(38) "Solid waste incinerator" means any incinerator that incinerates solid waste.

~~(23)~~(39) "Source" means any ~~property, real or personal, or person contributing to air pollution~~ person, real property or personal property located on one or more contiguous or adjacent properties under the control of the same owner or operator which contributes or would contribute to air pollution, including associated control equipment that affects or would affect the nature, character, composition, amount or environmental impacts of air pollution.

~~(24)~~(40) "Stack ~~or chimney~~ , vent, or roof monitor" means any flue, conduit, chimney, vent, or duct arranged to conduct emissions.

~~(25) "Standard conditions" means a temperature of 70° fahrenheit and pressure reduced to 29.92 inches of mercury at sea level.~~

~~(26)~~(41) "Total suspended particulate" means particulate matter as measured by the method described in 40 CFR Part 50, Appendix B ~~(July 1, 1987 ed.)~~.

(42)(a) "Volatile organic compounds (VOC)" means any compound of carbon, excluding carbon monoxide, carbon dioxide, carbonic acid, metallic carbides or carbonates, and ammonium carbonate, which participates in atmospheric photochemical reactions, and including any such organic compound other than the following, which

have been determined to have negligible photochemical reactivity: methane; ethane; methylene chloride (dichloromethane); 1,1,1- trichloroethane (methyl chloroform); 1,1,1-trichloro-2,2,2-trifluoroethane (CFC-113); trichlorofluoromethane (CFC-11); dichlorodifluoromethane (CFC-12); chlorodifluoromethane (CFC-22); trifluoromethane (FC-23); 1,2-dichloro-1,1,2,2-tetrafluoroethane (CFC-114); chloropentafluoroethane (CFC-115); 1,1,1-trifluoro-2,2-dichloroethane (HCFC-123); 1,1,1,2-tetrafluoroethane (HFC-134a); 1,1-dichloro-1-fluoroethane (HCFC-141b); 1-chloro-1,1-difluoroethane (HCFC-142b); 2-chloro-1,1,1,2-tetrafluoroethane (HCFC-124); pentafluoroethane (HFC-125); 1,1,2,2-tetrafluoroethane (HFC-134); 1,1,1-trifluoroethane (HFC-143a); 1,1-difluoroethane (HFC-152a); and perfluorocarbon compounds which fall into these classes:

(i) Cyclic, branched, or linear completely fluorinated alkanes;

(ii) Cyclic, branched, or linear completely fluorinated ethers with no unsaturations;

(iii) Cyclic, branched, or linear completely fluorinated tertiary amines with no unsaturations; and

(iv) Sulfur-containing perfluorocarbons with no unsaturations and with sulfur bonds only to carbon and fluorine.

(b) For purposes of determining compliance with emissions limits, VOC will be measured by the test methods in 40 CFR Part 60, Appendix A, as applicable. Where such a method also measures compounds with negligible photochemical reactivity, these negligibly-reactive compounds may be excluded as VOC if the amount of such compounds is accurately quantified, and such exclusion is approved by the department. As a precondition to excluding these compounds as VOC or at any time thereafter, the department may require an owner or operator to provide monitoring or testing methods and results demonstrating, to the satisfaction of the department, the amount of negligibly-reactive compounds in the source's emissions.

~~(27)~~(43) "Wood waste burner" means a device commonly called a tepee burner, silo, truncated cone, wigwam burner, or other similar burner commonly used by the wood products industry for the disposal of wood.

~~(28)~~(44) The definitions contained in 75-2-103, MCA, ~~shall be~~ are applicable where appropriate.

~~(29) The department hereby adopts and incorporates herein by reference the following sections of the federal regulations:~~

~~(a) 40 CFR Part 60, Appendix A, Test Method 9 (July 1, 1987 ed.), which sets forth a method for visual determination of the opacity of emissions from stationary sources;~~

~~(b) 40 CFR Part 50, Appendix J (52 FR 24664, July 1, 1987), which contains reference methods for the determination of particulate matter as PM-10 in the atmosphere;~~

~~(c) 40 CFR Part 53 (52 FR 24727, July 1, 1987), which pertains to ambient air monitoring reference methods and equivalent methods;~~

~~(d) Appendix C of the PM-10 SIP development guideline manual entitled, "Guidelines for Source Testing for Size Specific Particulate Emissions", which pertains to alternative methods for testing PM-10 emissions; and~~

~~(e) 40 CFR Part 50, Appendix B (July 1, 1987 ed.), which con-~~

~~tains the reference method for the determination of suspended particulate matter in the atmosphere (high-volume method).~~

~~(f) A copy of the above sections is available for public inspection and copying at the Air Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, 1400 Broadway, Helena, Montana 59620; or from EPA's Public Information Reference Unit, 401 M Street SW, Washington, DC 20460.~~

AUTH: 75-2-111, MCA; IMP: Title 75, chapter 2, MCA

RULE I INCORPORATIONS BY REFERENCE (1) In this subchapter, and unless expressly provided otherwise, the following is applicable:

(a) Where the board has adopted a federal regulation by reference, the reference in the board rule shall refer to the federal agency regulations as they have been codified in the July 1, 1992, edition of Title 40 of the Code of Federal Regulations (CFR);

(b) Where the board has adopted a section of the United States Code (U.S.C.) by reference, the reference in the board rule shall refer to the section of the U.S.C. as found in the 1988 edition and Supplement II (1990);

(c) Where the board has adopted a section of the Montana Code Annotated (MCA) by reference, the reference in the board rule shall refer to the section of the MCA as found in the 1991 edition.

(d) Where the board has adopted another rule of the department or another agency of the state of Montana that appears in a different title or chapter of the Administrative Rules of Montana (ARM), the reference in this subchapter shall refer to the other rule in the ARM as such rule existed on June 24, 1993.

(2) For the purposes of this subchapter, the board hereby adopts and incorporates herein by reference the following:

(a) 40 CFR Part 50, Appendix B, which contains the reference method for the determination of suspended particulate matter in the atmosphere (high-volume method).

(b) 40 CFR Part 50, Appendix J, which contains reference methods for the determination of particulate matter as PM-10 in the atmosphere;

(c) 40 CFR, Part 51, Appendix M, which sets forth EPA reference emission source test methods for state programs to use in developing and implementing state implementation plans, including alternative methods for testing PM-10 emissions;

(d) 40 CFR, Part 51, Appendix P, which sets forth EPA minimum emission monitoring requirements;

(e) 40 CFR Part 52, subpart BB, which sets forth the implementation plan for control of air pollution in Montana;

(f) 40 CFR Part 53, which pertains to ambient air monitoring reference methods and equivalent methods;

(g) 40 CFR, Part 60, Appendix A, which sets forth EPA reference emission source test methods for stationary sources, including test method 9, which sets forth a method for visual determination of the opacity of emissions from stationary sources;

(h) 40 CFR, Part 60, Appendix B, which sets forth EPA performance specification and test procedures for continuous emission monitoring systems, including performance specification 1, which sets forth specifications and test procedures for opacity continu-

ous emission monitoring systems in stationary sources;

(i) 40 CFR, Part 61, Appendix B, which sets forth EPA reference emission source test methods for sources subject to national emission standards for hazardous air pollutants;

(j) 40 CFR, Part 63 (56 FR 27369, June 13, 1991), which sets forth the protocol for field validation of emission concentrations from stationary sources;

(k) The Montana source testing protocol and procedures manual (July 1993 ed.), which is a department manual setting forth sampling and data collection, recording, analysis and transmittal requirements;

(l) The U.S. environmental protection agency quality assurance manual (EPA-600/9-76-005, revised Dec. 1984 Vol. I; EPA-600/4-77-027a, revised Jan. 1983, Vol II; EPA-600/4-77-027b, revised Jan. 1982, Vol. III; and EPA-600/4-82-060, Feb. 1983, Vol. IV), which is a federal agency manual and regulations setting forth sampling and data collection, recording, analysis and transmittal requirements;

(m) Section 7412(b)(1) of the Federal Clean Air Act, 42 U.S.C. 7401, et seq., which contains a list of substances designated as hazardous air pollutants;

(n) ARM 16.44.1101, which defines the class of activities subject to regulation under 75-10-405(2)(f) and 75-10-406, MCA, relating to boilers or industrial furnaces;

(o) Section 75-10-403(7), MCA, which sets forth the statutory definition of "hazardous waste";

(p) The administrative rules of Montana found at Title 16, chapter 44, subchapter 3, which set forth the rules pertaining to the identification and listing of hazardous waste.

(q) A copy of the above materials is available for public inspection and copying at the Air Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, 1400 Broadway, Helena, Montana 59620. Copies of the federal materials may also be obtained at EPA's Public Information Reference Unit, 401 M Street SW, Washington, DC 20460, and at the libraries of each of the ten EPA Regional Offices. Interested persons seeking a copy of the CFR may address their requests directly to: Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. AUTH: 75-2-111, MCA; IMP: Title 75, chapter 2, MCA

RULE II SOURCE TESTING PROTOCOL (1)(a) The requirements of this rule apply to any emission source testing conducted by the department, any source, or other entity as required by any rule in this chapter, or any permit or order issued pursuant to this chapter, or the provisions of the Montana Clean Air Act, 75-2-101, et. seq., MCA.

(b) All emission source testing, sampling and data collection, recording, analysis, and transmittal must be performed as specified in the Montana source testing protocol and procedures manual, unless alternate equivalent requirements are determined by the department to be necessary, and prior written approval has been obtained from the department. If the use of an alternative test method requires approval by the administrator, that approval must also be obtained.

(c) Unless otherwise specified in the Montana source testing

protocol and procedures manual or elsewhere in this chapter, all emission source testing must be performed as specified in any applicable sampling method contained in: 40 CFR Part 60, Appendix A; 40 CFR Part 60, Appendix B; 40 CFR Part 61, Appendix B; 40 CFR Part 51, Appendix M; 40 CFR Part 51, Appendix P, and; 40 CFR Part 63 (56 FR 27369, June 13, 1991). Such emission source testing must also be performed in compliance with the requirements of the U.S. EPA quality assurance manual. Alternative equivalent requirements may be used if the department has determined that such alternative equivalent requirements are necessary, and prior written approval has been obtained from the department. If approval by the administrator of an alternative test method is required, that approval must also be obtained.

(d) Failure to comply with this rule shall constitute a violation of this rule, and may result in the partial or complete rejection by the department of the appropriate emission source testing data. The partial or complete rejection by the department of the appropriate emission source testing data may subsequently result in a determination by the department that a permit application is incomplete, that insufficient data is available to determine compliance with an emission limitation or standard and additional testing is necessary to demonstrate compliance, or that insufficient data is available to determine the correct fee required under subchapter 19 and additional testing is necessary. AUTH: 75-2-111, 75-2-203, MCA; IMP: 75-2-203, MCA

RULE III DEFINITIONS For the purpose of this subchapter, the following definitions apply:

(1)(a) "Actual emissions" means the actual rate of emissions of a pollutant from an emissions unit, as determined in accordance with (b)-(d) of this section.

(b) Actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operation. The department may determine that a different time period is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.

(c) The department may presume that source-specific allowable emissions for the unit are equivalent to the actual emissions of the unit.

(d) For any emissions unit which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

(2)(a) "Baseline area" means any intrastate area (and every part thereof) designated as attainment or unclassifiable in 40 CFR 81.327 in which the major source or major modification establishing the minor source baseline date would construct or would have an air quality impact equal to or greater than 1 $\mu g/m^3$ (annual average) of the pollutant for which the minor source baseline date is established.

(b) Area redesignations under section 7407 of the FCAA to at-

tainment or unclassifiable cannot intersect or be smaller than the area of impact of any major stationary source or major modification which:

(i) establishes a minor source baseline date; or

(ii) is subject to 40 CFR 52.21 or regulations approved pursuant to 40 CFR 51.166, and would be constructed in the same state as the state proposing the redesignation.

(3)(a) "Baseline concentration" means that ambient concentration level which exists in the baseline area at the time of the applicable minor source baseline date. A baseline concentration is determined for each pollutant for which a minor source baseline date is established and shall include:

(i) The actual emissions representative of sources in existence on the applicable minor source baseline date, except as provided in (b) of this section; and

(ii) The allowable emissions of major stationary sources which commenced construction before the major source baseline date, but were not in operation by the applicable minor source baseline date.

(b) The following will not be included in the baseline concentration and will affect the applicable maximum allowable increase(s):

(i) Actual emissions from any major stationary source on which construction commenced after the major source baseline date; and

(ii) Actual emissions increases and decreases at any stationary source occurring after the minor source baseline date.

(4) "Begin actual construction" means, in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying of underground pipework, and construction of permanent storage structures. With respect to a change in method of operation this term refers to those on-site activities, other than preparatory activities, which mark the initiation of the change.

(5) "Best available control technology" means an emissions limitation (including a visible emissions standard) based on the maximum degree of reduction for each pollutant subject to regulation under the FCAA, excluding hazardous air pollutants except to the extent that such hazardous air pollutants are regulated as constituents of more general pollutants listed in section 7408(a)(1) of the FCAA, which would be emitted from any proposed major stationary source or major modification which the department, on a case-by-case basis, taking into account energy impacts, environmental impacts (including but not limited to the effect of the control technology option on hazardous air pollutants), and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant. In no event shall application of best available control technology result in emissions of any pollutant which would exceed the emissions allowed by any applicable standard under ARM 16.8.1423 and 1424. If the department determines that technological or economic limitations on the application of measurement methodol-

ogy to a particular emissions unit would make the imposition of an emissions standard infeasible, any design, equipment, work practice, operational standard or combination thereof, may be prescribed instead to satisfy the requirement for the application of best available control technology. Such standard shall, to the degree possible, set forth the emissions reduction achievable by implementation of such design, equipment, work practice or operation, and shall provide for compliance by means which achieve equivalent results.

(6) "Building, structure, facility, or installation" means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel. Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same major group (i.e., which have the same two-digit code) as described in the standard industrial classification manual, 1987.

(7) "Commence", as applied to construction of a major stationary source or major modification, means that the owner or operator has all necessary preconstruction approvals or permits and either has:

(a) begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or

(b) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.

(8) "Complete" means, in reference to an application for a permit, that the application contains all the information necessary for processing the application, except that designating an application complete for purposes of permit processing does not preclude the department from requesting or accepting any additional information.

(9) "Construction" means any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) which would result in a change in actual emissions.

(10) "Emissions unit" means any part of a stationary source which emits or would have the potential to emit any pollutant subject to regulation under the FCAA.

(11) "Federal land manager" means, with respect to any lands in the United States, the secretary of the department with authority over such lands.

(12) "High terrain" means any area having an elevation 900 feet or more above the base of the stack of a source.

(13) "Indian governing body" means the governing body of any tribe, band, or group of Indians subject to the jurisdiction of the United States and recognized by the United States as possessing power of self-government.

(14) "Indian reservation" means any federally recognized reservation established by treaty, agreement, executive order, or act

of congress.

(15) "Innovative control technology" means any system of air pollution control that has not been adequately demonstrated in practice, but would have a substantial likelihood of achieving greater continuous emissions reduction than any control system in current practice or of achieving at least comparable reductions at lower cost in terms of energy, economics, or non-air quality environmental impacts.

(16) "Low terrain" means any area other than high terrain.

(17)(a) "Major modification" means any physical change in, or change in the method of operation of, a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the FCAA, excluding hazardous air pollutants, except to the extent that such hazardous air pollutants are regulated as constituents of more general pollutants listed in section 7408(a)(1) of the FCAA.

(b) Any net emissions increase that is significant for volatile organic compounds will be considered significant for ozone.

(c) A physical change or change in the method of operation shall not include:

(i) Routine maintenance, repair, and replacement;

(ii) Use of an alternative fuel or raw material by reason of any order under sections 2(a) and (b) of the Energy Supply and Environmental Coordination Act of 1974, 15 U.S.C. sections 791, et seq. (1988), or by reason of a natural gas curtailment plan pursuant to the Federal Power Act, 16 U.S.C. sections 791a, et seq. (1988 & Supp. III 1991);

(iii) Use of an alternative fuel by reason of an order or rule under section 7425 of the FCAA;

(iv) Use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste;

(v) Use of an alternative fuel or raw material by a stationary source which:

(A) The source was capable of accommodating before January 6, 1975, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975, pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR subpart I or section 51.166; or

(B) The source is approved to use under any permit issued under 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.166;

(vi) An increase in the hours of operation or in the production rate, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975, pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR subpart I or section 51.166; or

(vii) Any change in ownership at a stationary source.

(18)(a) "Major source baseline date" means:

(i) In the case of particulate matter and sulfur dioxide, January 6, 1975; and

(ii) In the case of nitrogen dioxide, February 8, 1988.

(b) "Minor source baseline date" means the earliest date after the trigger date on which a major stationary source or a major modification subject to 40 CFR 52.21 or to regulations ap-

proved pursuant to 40 CFR 51.166 submits a complete application under the relevant regulation. The trigger date is:

(i) In the case of particulate matter and sulfur dioxide, August 7, 1977; and

(ii) In the case of nitrogen dioxide, February 8, 1988.

(c) The baseline date is established for each pollutant for which increments or other equivalent measures have been established if:

(i) The area in which the proposed source or modification would construct is designated as attainment or unclassifiable in 40 CFR 81.327 for the pollutant on the date of its complete application under 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.166; and

(ii) In the case of a major stationary source, the pollutant would be emitted in significant amounts, or, in the case of a major modification, there would be a significant net emissions increase of the pollutant.

(19)(a) "Major stationary source" means:

(i) Any of the following stationary sources of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any pollutant subject to regulation under the FCAA, excluding hazardous air pollutants, except to the extent that such hazardous air pollutants are regulated as constituents of more general pollutants listed in section 7408(a)(1) of the FCAA: fossil fuelfired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (with thermal dryers), kraft pulp mills, portland cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than 250 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production plants, chemical process plants, fossil fuel boilers (or combinations thereof) totaling more than 250 million British thermal units per hour heat input, petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels, taconite ore processing plants, glass fiber processing plants, and charcoal production plants;

(ii) Notwithstanding the stationary source size specified in (a)(i), above, any stationary source which emits, or has the potential to emit, 250 tons per year or more of any air pollutant subject to regulation under the FCAA, excluding hazardous air pollutants, except to the extent that such hazardous air pollutants are regulated as constituents of more general pollutants listed in section 7408(a)(1) of the FCAA; or

(iii) Any physical change that would occur at a stationary source not otherwise qualifying under (a)(i) or (ii), above, as a major stationary source if the change would constitute a major stationary source by itself.

(b) A major source that is major for volatile organic compounds will be considered major for ozone.

(c) The fugitive emissions of a stationary source may not be

included in determining, for any of the purposes of this subchapter, whether it is a major stationary source, unless the source belongs to one of the following categories of stationary sources:

(i) Coal cleaning plants (with thermal dryers);
(ii) Kraft pulp mills;
(iii) Portland cement plants;
(iv) Primary zinc smelters;
(v) Iron and steel mills;
(vi) Primary aluminum ore reduction plants;
(vii) Primary copper smelters;
(viii) Municipal incinerators capable of charging more than 250 tons of refuse per day;
(ix) Hydrofluoric, sulfuric, or nitric acid plants;
(x) Petroleum refineries,
(xi) Lime plants,
(xii) Phosphate rock processing plants;
(xiii) Coke oven batteries;
(xiv) Sulfur recovery plants;
(xv) Carbon black plants (furnace process);
(xvi) Primary lead smelters;
(xvii) Fuel conversion plants;
(xviii) Sintering plants;
(xix) Secondary metal production plants;
(xx) Chemical process plants;
(xxi) Fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input;
(xxii) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;
(xxiii) Taconite ore processing plants;
(xxiv) Glass fiber processing plants;
(xxv) Charcoal production plants;
(xxvi) Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input; and
(xxvii) Any other stationary source category which, as of August 7, 1980, is being regulated under sections 7411 or 7412 of the FCAA.

(20) "Necessary preconstruction approvals or permits" means those permits or approvals required under federal air quality control laws and regulations and those air quality control laws and regulations which are part of the Montana state implementation plan.

(21)(a) "Net emissions increase" means the amount by which the sum of the following exceeds zero:

(i) Any increase in actual emissions from a particular physical change or change in the method of operation at a stationary source; and

(ii) Any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable.

(b) An increase or decrease in actual emissions is contemporaneous with the increase from the particular change only if it occurs between the date five years before construction on the particular change commenced, and the date that the increase from the particular change occurs.

(c) An increase or decrease in actual emissions is creditable only if the department has not relied on it in issuing a permit for the source under this subchapter, which permit is in effect when the increase in actual emissions from the particular change occurs.

(d) An increase or decrease in actual emissions of sulfur dioxide, particulate matter, or nitrogen oxides which occurs before the applicable minor source baseline date is creditable only if it is required to be considered in calculating the amount of maximum allowable increases remaining available.

(e) An increase in actual emissions is creditable only to the extent that the new level of actual emissions exceeds the old level.

(f) A decrease in actual emissions is creditable only to the extent that:

(i) The old level of actual emissions or the old level of allowable emissions, whichever is lower, exceeds the new level of actual emissions;

(ii) It is federally enforceable at and after the time that actual construction on the particular change begins; and

(iii) It has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change.

(g) An increase that results from a physical change at a source occurs when the emissions unit on which construction occurred becomes operational and begins to emit a particular pollutant. Any replacement unit that requires shakedown becomes operational only after a reasonable shakedown period, not to exceed 180 days.

(22)(a) "Significant" means, in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:

Pollutant and Emissions Rate

Carbon monoxide: 100 tons per year (tpy)
Nitrogen oxides: 40 tpy
Sulfur dioxide: 40 tpy
Particulate matter: 25 tpy of particulate matter emissions
15 tpy of PM-10 emissions
Ozone: 40 tpy of volatile organic compounds
Lead: 0.6 tpy
Fluorides: 3 tpy
Sulfuric acid mist: 7 tpy
Total reduced sulfur (including H_2S): 10 tpy
Reduced sulfur compounds (including H_2S): 10 tpy
Municipal waste combustor organics (measured as total tetra- through octa-chlorinated dibenzo-p-dioxins and dibenzofurans): $3.2 * 10^{-6}$ megagrams per year ($3.5 * 10^{-6}$ tons per year)
Municipal waste combustor metals (measured as particulate matter): 14 megagrams per year (15 tons per year)
Municipal waste combustor acid gases (measured as sulfur dioxide and hydrogen chloride): 36 megagrams per year (40 tons per year)

(b) "Significant" means, in reference to a net emissions increase or the potential of a source to emit a pollutant subject to

regulation under the FCAA, that (a) above does not list, any emissions rate. This does not include hazardous air pollutants, except to the extent that such hazardous air pollutants are regulated as constituents of more general pollutants listed in section 7408(a)(1) of the FCAA.

(c) Notwithstanding (a) above, "significant" means any emissions rate or any net emissions increase associated with a major stationary source or major modification, which would construct within 10 kilometers of a Class I area, and have an impact on such area equal to or greater than 1 $\mu g/m^3$ (24-hour average).

(23) "Stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the FCAA, excluding hazardous air pollutants, except to the extent that such hazardous air pollutants are regulated as constituents of more general pollutants listed in section 7408(a)(1) of the FCAA.

AUTH: 75-2-111, 75-2-203, MCA; IMP: 75-2-202, 75-2-203, 75-2-204, MCA

RULE IV INCORPORATION BY REFERENCE (1) In this subchapter, and unless expressly provided otherwise, where the board has adopted a federal regulation by reference, the reference in the board rule shall refer to the federal agency regulations as they have been codified in the July 1, 1992, edition of Title 40 of the Code of Federal Regulations (CFR).

(2) For the purposes of this subchapter, the board hereby adopts and incorporates herein by reference the following:

(a) 40 CFR 51.102, which sets forth requirements for public hearings for state programs;

(b) 40 CFR Part 58, Appendix B, which sets forth quality assurance requirements for prevention of significant deterioration air monitoring;

(c) 40 CFR Part 60, which sets forth standards of performance for new stationary sources;

(d) 40 CFR Part 61, which sets forth emission standards for hazardous air pollutants;

(e) 40 CFR 81.327, which sets forth the air quality attainment status designations for Montana;

(f) The standard industrial classification manual, 1987, executive office of the President, office of management and budget, (U.S. government printing office stock number 1987 O-185-718), which sets forth a system of industrial classification and definition based upon the composition and structure of the economy;

(g) The guidelines on air quality models (revised) (1986) (EPA publication no. 450/278-027R) and supplement A (1987).

(h) A copy of the above materials is available for public inspection and copying at the Air Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, 1400 Broadway, Helena, Montana 59620. Copies of the federal materials may also be obtained at EPA's Public Information Reference Unit, 401 M Street SW, Washington, DC 20460, and at the libraries of each of the ten EPA Regional Offices. Interested persons seeking a copy of the CFR may address their requests directly to: Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

The standard industrial classification manual (1987) (order no. PB 87-100012) and the guidelines on air quality models (revised) (1986) (EPA publication no. 450/278-027R) and supplement A (1987) may also be obtained from the U.S. Department of Commerce, National Technical Information Service, 5285 Port Royal Road, Springfield, Virginia 22161.
AUTH: 75-2-111, 75-2-203, MCA; IMP: 75-2-202, 75-2-203, 75-2-204, MCA

RULE V AMBIENT AIR INCREMENTS (1) In areas designated as Class I, II, or III, increases in pollutant concentration over the baseline concentration shall be limited to the following:

Pollutant	Maximum allowable increase (micrograms per cubic meter)
CLASS I	
Particulate matter:	
TSP, annual geometric mean	5
TSP, 24-hr maximum	10
Sulfur dioxide:	
Annual arithmetic mean	2
24-hr maximum	5
3-hr maximum	25
Nitrogen dioxide:	
Annual arithmetic mean	2.5
CLASS II	
Particulate matter:	
TSP, annual geometric mean	19
TSP, 24-hr maximum	37
Sulfur dioxide:	
Annual arithmetic mean	20
24-hr maximum	91
3-hr maximum	512
Nitrogen dioxide:	
Annual arithmetic mean	25
CLASS III	
Particulate matter:	
TSP, annual geometric mean	37
TSP, 24-hr maximum	75
Sulfur dioxide:	
Annual arithmetic mean	40
24-hr maximum	182
3-hr maximum	700
Nitrogen dioxide:	
Annual arithmetic mean	50

(2) For any period other than an annual period, the applicable maximum allowable increase may be exceeded during one such period per year at any one location.
AUTH: 75-2-111, 75-2-203, MCA; IMP: 75-2-202, 75-2-203, 75-2-204, MCA

RULE VI AMBIENT AIR CEILINGS (1) No concentration of a pollutant shall exceed the concentration permitted under either the applicable secondary or primary national ambient air quality standard, whichever concentration is lowest for the pollutant for a period of exposure.
AUTH: 75-2-111, 75-2-203, MCA; IMP: 75-2-202, 75-2-203, 75-2-204, MCA

RULE VII RESTRICTIONS ON AREA CLASSIFICATIONS (1) All of the following areas are designated Class I areas and may not be redesignated:

(a) Bob Marshall Wilderness Area;
(b) Anaconda Pintler Wilderness Area;
(c) Cabinet Mountains Wilderness Area;
(d) Gates of the Mountains Wilderness Area;
(e) Glacier National Park;
(f) Medicine Lake Wilderness Area;
(g) Mission Mountains Wilderness Area;
(h) Red Rock Lake Wilderness Area;
(i) Scapegoat Wilderness Area;
(j) Selway-Bitterroot Wilderness Area;
(k) UL Bend Wilderness Area; and
(l) Yellowstone National Park.

(2) Areas which were redesignated as Class I under regulations promulgated before August 7, 1977, shall remain Class I, but may be redesignated as provided in this subchapter.

(3) Any other area, unless otherwise specified in the legislation creating such an area, is initially designated Class II, but may be redesignated as provided in this subchapter.

(4) The following areas may be redesignated only as Class I or II:

(a) An area which, as of August 7, 1977, exceeded 10,000 acres in size and was a national monument, a national primitive area, a national preserve, a national recreational area, a national wild and scenic river, a national wildlife refuge, a national lakeshore or seashore; and

(b) A national park or national wilderness area established after August 7, 1977, which exceeds 10,000 acres in size.

(5) The following three areas have been designated as Class I by EPA and may be redesignated to another class only by EPA:

(a) Northern Cheyenne Reservation;
(b) Flathead Reservation; and
(c) Fort Peck Reservation.

AUTH: 75-2-111, 75-2-203, MCA; IMP: 75-2-202, 75-2-203, 75-2-204, MCA

RULE VIII EXCLUSIONS FROM INCREMENT CONSUMPTION (1) The following concentrations will be excluded in determining compliance

with a maximum allowable increase:

(a) Concentrations attributable to the increase in emissions from stationary sources which have converted from the use of petroleum products, natural gas, or both by reason of an order in effect under sections 2(a) and (b) of the Energy Supply and Environmental Coordination Act of 1974, 15 U.S.C. sections 791, et seq. (1988), over the emissions from such sources before the effective date of such an order;

(b) Concentrations attributable to the increase in emissions from sources which have converted from using natural gas by reason of a natural gas curtailment plan in effect pursuant to the Federal Power Act, 16 U.S.C. sections 791a, et seq. (1988 & Supp. III 1991), over the emissions from such sources before the effective date of such plan;

(c) Concentrations of particulate matter attributable to the increase in emissions from construction or other temporary emission-related activities of new or modified sources;

(d) The increase in concentrations attributable to new sources outside the United States over the concentrations attributable to existing sources which are included in the baseline concentration; and

(e) Concentrations attributable to the temporary increase in emissions of sulfur dioxide, particulate matter, or nitrogen oxides from stationary sources meeting the criteria specified in (3) below.

(2) With respect to (a) or (b) above, no exclusion of such concentrations shall apply more than five years after the effective date of the order to which (a) of this rule refers, or the plan to which (b) of this rule refers, whichever is applicable. If both such order and plan are applicable, no such exclusion shall apply more than five years after the later of such effective dates.

(3) For purposes of excluding concentrations pursuant to (1)(e) of this rule:

(a) The time period for a temporary increase in emissions may not exceed two years and is not renewable.

(b) No emissions increase from a stationary source would be allowed which would:

(i) Impact a Class I area or an area where an applicable increment is known to be violated; or

(ii) Cause or contribute to the violation of a national ambient air quality standard.

AUTH: 75-2-111, 75-2-203, MCA; IMP: 75-2-202, 75-2-203, 75-2-204, MCA

RULE IX REDESIGNATION (1) All areas of the state (except as otherwise provided under [RULE VII]) are designated Class II. Redesignation (except as otherwise precluded by [RULE VII]) shall be subject to the redesignation procedures of this rule. Lands within the exterior boundaries of Indian reservations may be redesignated only by the appropriate Indian governing body, as required by 40 CFR 51.166(g)(4).

(2) The department may submit to the administrator a proposal to redesignate areas of the state Class I or Class II, provided that:

(a) At least one public hearing has been held in accordance with procedures established in 40 CFR 51.102;

(b) Other states, Indian governing bodies, and federal land managers whose lands may be affected by the proposed redesignation were notified at least 30 days prior to the public hearing;

(c) A discussion of the reasons for the proposed redesignation, including a satisfactory description and analysis of the health, environmental, economic, social, and energy effects of the proposed redesignation, was prepared and made available for public inspection at least 30 days prior to the hearing and the notice announcing the hearing contained appropriate notification of the availability of such discussion;

(d) Prior to the issuance of notice respecting the redesignation of an area that includes any federal lands, the department has provided written notice to the appropriate federal land manager and afforded adequate opportunity (not in excess of 60 days) to confer with the department respecting the redesignation and to submit written comments and recommendations. In redesignating any area with respect to which any federal land manager had submitted written comments and recommendations, the department shall have published a list of any inconsistency between such redesignation and such comments and recommendations (together with the reasons for making such redesignation against the recommendation of the federal land manager); and

(e) The department has proposed the redesignation after consultation with the elected leadership of any local governmental bodies located within the area covered by the proposed redesignation.

(3) Any area other than an area to which [RULE VII] refers may be redesignated as Class III if:

(a) The redesignation would meet the requirements of section (2) above;

(b) The redesignation, except any established by an Indian governing body, has been specifically approved by the governor, after consultation with the appropriate committees of the legislature (if it is in session, or with the leadership of the legislature, if it is not in session), and if the local governmental bodies representing a majority of the residents of the area to be redesignated enact ordinances or regulations (including resolutions where appropriate) concurring in the redesignation;

(c) The redesignation would not cause, or contribute to, a concentration of any air pollutant which would exceed any maximum allowable increase permitted under the classification of any other area or any national ambient air quality standard; and

(d) Any permit application for any major stationary source or major modification subject to [RULE XIII], which could receive a permit under this subchapter only if the area in question were redesignated as Class III, and any material submitted as part of that application, were available, as was practicable, for public inspection prior to any public hearing on redesignation of any area as Class III.

(4) If the administrator disapproves any proposed area designation, the classification of the area will be that which was in effect prior to the proposed redesignation which was disapproved, and the state may resubmit the proposal after correcting the defi-

ciencies noted by the administrator.
AUTH: 75-2-111, 75-2-203, MCA; IMP: 75-2-202, 75-2-203, 75-2-204, MCA

RULE X STACK HEIGHTS (1) The degree of emission limitation required for control of any air pollutant under this subchapter may not be affected in any manner by:

(a) So much of a stack height, not in existence before December 31, 1970, as exceeds good engineering practice; or

(b) Any other dispersion technique not implemented before December 31, 1970.
AUTH: 75-2-111, 75-2-203, MCA; IMP: 75-2-202, 75-2-203, 75-2-204, MCA

RULE XI REVIEW OF MAJOR STATIONARY SOURCES AND MAJOR MODIFICATIONS--SOURCE APPLICABILITY AND EXEMPTIONS (1) No major stationary source or major modification shall begin actual construction unless, as a minimum, requirements contained in [RULE XII-XX] have been met.

(2) The requirements contained in [RULE XII-XX] shall apply to any major stationary source and any major modification with respect to each pollutant subject to regulation under the FCAA that it would emit, except as this subchapter would otherwise allow. This does not include hazardous air pollutants, except to the extent that such hazardous air pollutants are regulated as constituents of more general pollutants listed in section 7408(a)(1) of the FCAA, or must be considered in the BACT analysis.

(3) The requirements contained in [RULE XII-XX] apply only to any major stationary source or major modification that would be constructed in an area which is designated as attainment or unclassifiable under 40 CFR 81.327, except that the requirements contained in [RULE XII-XX] do not apply to a particular major stationary source or major modification if:

(a) The major stationary source would be a nonprofit health or nonprofit educational institution or a major modification that would occur at such an institution; or

(b) The source or modification is a portable stationary source which has previously received a permit under requirements contained in [RULE XII-XX], but only if the source proposes to relocate and emissions at the new location would be temporary, the emissions from the source would not exceed its allowable emissions and would impact no Class I area and no area where an applicable increment is known to be violated, and reasonable notice is given to the department prior to the relocation identifying the proposed new location and the probable duration of operation at the new location. Such notice must be given to the department not less than 10 days in advance of the proposed relocation unless a different time duration is previously approved by the department.

(c) The source or modification would be a major stationary source or major modification only if fugitive emissions, to the extent quantifiable, are considered in calculating the potential to emit of the stationary source or modification and such source does not belong to any of the following categories:

(i) Coal cleaning plants (with thermal dryers);

(ii) Kraft pulp mills;
(iii) Portland cement plants;
(iv) Primary zinc smelters;
(v) Iron and steel mills;
(vi) Primary aluminum ore reduction plants;
(vii) Primary copper smelters;
(viii) Municipal incinerators capable of charging more than 250 tons of refuse per day;
(ix) Hydrofluoric, sulfuric, or nitric acid plants;
(x) Petroleum refineries;
(xi) Lime plants;
(xii) Phosphate rock processing plants;
(xiii) Coke oven batteries;
(xiv) Sulfur recovery plants;
(xv) Carbon black plants (furnace process);
(xvi) Primary lead smelters;
(xvii) Fuel conversion plants;
(xviii) Sintering plants;
(xix) Secondary metal production plants;
(xx) Chemical process plants;
(xxi) Fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input;
(xxii) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;
(xxiii) Taconite ore processing plants;
(xxiv) Glass fiber processing plants;
(xxv) Charcoal production plants;
(xxvi) Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input;
(xxvii) Any other stationary source category which, as of August 7, 1980, is being regulated under section 7411 or 7412 of the FCAA.

(4) The requirements contained in [RULE XII-XX] do not apply to a major stationary source or major modification with respect to a particular pollutant if the owner or operator demonstrates that, as to that pollutant, the source or modification is located in an area designated as nonattainment under 40 CFR 81.327.

(5) The requirements contained in [RULE XIII, XV, and XVII] do not apply to a proposed major stationary source or major modification with respect to a particular pollutant, if the allowable emissions of that pollutant from a new source, or the net emissions increase of that pollutant from a modification, would be temporary and impact no Class I area and no area where an applicable increment is known to be violated.

(6) The requirements contained in [RULE XIII, XV, and XVII] as they relate to any maximum allowable increase for a Class II area do not apply to a modification of a major stationary source that was in existence on March 1, 1978, if the net increase in allowable emissions of each pollutant subject to regulation under the FCAA from the modification after the application of best available control technology would be less than 50 tons per year. This does not include hazardous air pollutants, except to the extent that such hazardous air pollutants are regulated as constituents of more general pollutants listed in section 7408(a)(1) of the FCAA.

(7) The department may exempt a proposed major stationary source or major modification from the requirements of [RULE XV], with respect to monitoring for a particular pollutant, if:

(a) The emissions increase of the pollutant from a new stationary source or the net emissions increase of the pollutant from a modification would cause, in any area, air quality impacts less than the following amounts:

(i) Carbon monoxide--575 $\mu g/m^3$, 8-hour average;

(ii) Nitrogen dioxide--14 $\mu g/m^3$, annual average;

(iii) Particulate matter--10 $\mu g/m^3$ TSP, 24-hour average, 10 $\mu g/m^3$ PM-10, 24-hour average;

(iv) Sulfur dioxide--13 $\mu g/m^3$, 24-hour average;

(v) Ozone--No de minimus air quality level is provided for ozone. However, any net increase of 100 tons per year or more of volatile organic compounds subject to this subchapter would be required to perform an ambient impact analysis, including the gathering of ambient air quality data;

(vi) Lead--0.1 $\mu g/m^3$, 3-month average;

(vii) Fluorides--0.25 $\mu g/m^3$, 24-hour average;

(viii) Total reduced sulfur--10 $\mu g/m^3$, 1-hour average;

(ix) Reduced sulfur compounds--10 $\mu g/m^3$, 1-hour average; or

(b) The concentrations of the pollutant in the area that the source or modification would affect are less than the concentrations listed in subsection (7)(a) of this rule; or

(c) The pollutant is not listed in (7)(a) of this rule.

AUTH: 75-2-111, 75-2-203, MCA; IMP: 75-2-202, 75-2-203, 75-2-204, MCA

RULE XII CONTROL TECHNOLOGY REVIEW (1) A major stationary source or major modification shall meet each applicable emissions limitation under the Montana state implementation plan and each applicable emission standard and standard of performance under ARM 16.8.1423 and 1424.

(2) A new major stationary source shall apply best available control technology for each pollutant subject to regulation under the FCAA that it would have the potential to emit in significant amounts, excluding hazardous air pollutants, except to the extent that such hazardous air pollutants are regulated as constituents of more general pollutants listed in section 7408(a)(1) of the FCAA. In evaluating the environmental impacts of any control technology option, the BACT analysis shall consider all pollutants, including hazardous air pollutants.

(3) A major modification shall apply best available control technology for each pollutant subject to regulation under the FCAA for which it would be a significant net emissions increase at the source, excluding hazardous air pollutants, except to the extent that such hazardous air pollutants are regulated as constituents of more general pollutants listed in section 7408(a)(1) of the FCAA. In evaluating the environmental impacts of any control technology option, the BACT analysis shall consider all pollutants, including hazardous air pollutants. This requirement applies to each proposed emissions unit at which a net emissions increase in the pollutant would occur as a result of a physical change or change in the method of operation in the unit.

(4) For phased construction projects, the determination of best available control technology will be reviewed and modified as appropriate at the latest reasonable time which occurs no later than 18 months prior to commencement of construction of each independent phase of the project. At such time, the owner or operator of the applicable stationary source may be required to demonstrate the adequacy of any previous determination of best available control technology for the source.
AUTH: 75-2-111, 75-2-203, MCA; IMP: 75-2-202, 75-2-203, 75-2-204, MCA

RULE XIII SOURCE IMPACT ANALYSIS (1) The owner or operator of the proposed source or modification shall demonstrate that allowable emission increases from the proposed source or modification, in conjunction with all other applicable emissions increases or reductions (including secondary emissions), would not cause or contribute to air pollution in violation of any national ambient air quality standard in any air quality control region or any applicable maximum allowable increase over the baseline concentration in any area.
AUTH: 75-2-111, 75-2-203, MCA; IMP: 75-2-202, 75-2-203, 75-2-204, MCA

RULE XIV AIR QUALITY MODELS (1) All estimates of ambient concentrations required under this subchapter must be based on the applicable air quality models, data bases, and other requirements specified in the guideline on air quality models (revised) (1986) (EPA publication no. 450/278-027R) and supplement A (1987).

(2) Where an air quality impact model specified in the guideline on air quality models (revised) (1986) and supplement A (1987) are inappropriate, the model may be modified or another model substituted. Such a modification or substitution of a model may be made on a case-by-case basis or, where appropriate, on a generic basis for a specific state program. Written approval of the administrator must be obtained for any modification or substitution. In addition, use of a modified or substituted model must be subject to notice and opportunity for public comment under procedures developed in accordance with [RULE XIX].
AUTH: 75-2-111, 75-2-203, MCA; IMP: 75-2-202, 75-2-203, 75-2-204, MCA

RULE XV AIR QUALITY ANALYSIS (1) Any application for a permit pursuant to this subchapter shall contain an analysis of ambient air quality in the area that the emissions from the major stationary source or major modification would affect.

(2) For a major stationary source, the analysis shall address each pollutant that it would have the potential to emit in a significant amount.

(3) For a major modification, the analysis shall address each pollutant for which it would result in a significant net emissions increase.

(4) With respect to any such pollutant for which no national ambient air quality standard exists, the analysis shall contain such air quality monitoring data as the department determines is

necessary to assess ambient air quality for that pollutant in any area that the emissions of that pollutant would affect.

(5) With respect to any such pollutant (other than nonmethane hydrocarbons) for which such a standard does exist, the analysis shall contain continuous air quality monitoring data gathered for purposes of determining whether emissions of that pollutant would cause or contribute to a violation of the standard or any maximum allowable increase.

(6) The continuous air monitoring data that is required under this rule shall have been gathered over a period of one year and shall represent the year preceding receipt of the application, except that, if the department determines that a complete and adequate analysis can be accomplished with monitoring data gathered over a period shorter than one year (but not to be less than four months), the data that is required shall have been gathered over at least that shorter period.

(7) The owner or operator of a proposed major stationary source or major modification of volatile organic compounds who satisfies all conditions of subchapter 17 may provide post-approval monitoring data for ozone in lieu of providing preconstruction data as required under (1) above.

(8) The owner or operator of a major stationary source or major modification shall, after construction of the stationary source or modification, conduct such ambient monitoring as the department determines is necessary to determine the effect emissions from the stationary source or modification may have, or are having, on air quality in any area.

(9) The owner or operator of a major stationary source or major modification shall meet the requirements of 40 CFR Part 58, Appendix B, during the operation of monitoring stations for purposes of satisfying this rule.

AUTH: 75-2-111, 75-2-203, MCA; IMP: 75-2-202, 75-2-203, 75-2-204, MCA

RULE XVI SOURCE INFORMATION (1) The owner or operator of a proposed source or modification shall submit the permit application fee required pursuant to ARM 16.8.1905 and all information necessary to perform any analysis or make any determination required under procedures established in accordance with this subchapter.

(2) Such information shall include the following:

(a) A description of the nature, location, design capacity, and typical operating schedule of the source or modification, including specifications and drawings showing its design and plant layout;

(b) A detailed schedule for construction of the source or modification; and

(c) A detailed description as to what system of continuous emission reduction is planned by the source or modification, emission estimates, and any other information as necessary to determine that best available control technology as applicable would be applied.

(3) Upon request of the department, the owner or operator shall also provide information regarding the following:

(a) The air quality impact of the source or modification, including meteorological and topographical data necessary to estimate

such impact; and

(b) The air quality impacts and the nature and extent of any or all general commercial, residential, industrial and other growth which has occurred since August 7, 1977, in the area the source or modification would affect.

AUTH: 75-2-111, 75-2-203, MCA; IMP: 75-2-202, 75-2-203, 75-2-204, MCA

RULE XVII ADDITIONAL IMPACT ANALYSES (1) The owner or operator shall provide an analysis of the impairment to visibility, soils, and vegetation that would occur as a result of the source or modification and general commercial, residential, industrial, and other growth associated with the source or modification. The owner or operator need not provide an analysis of the impact on vegetation having no significant commercial or recreational value.

(2) The owner or operator shall provide an analysis of the air quality impact projected for the area as a result of general commercial, residential, industrial, and other growth associated with the source or modification.

AUTH: 75-2-111, 75-2-203, MCA; IMP: 75-2-202, 75-2-203, 75-2-204, MCA

RULE XVIII SOURCES IMPACTING FEDERAL CLASS I AREAS--ADDITIONAL REQUIREMENTS (1) The department shall transmit to the administrator a copy of each permit application relating to a major stationary source or major modification and provide notice to the administrator of every action related to the consideration of such permit.

(2) The federal land manager and the federal official charged with direct responsibility for management of Class I lands have an affirmative responsibility to protect the air quality related values (including visibility) of any such lands and to consider, in consultation with the administrator, whether a proposed source or modification would have an adverse impact on such values.

(3) Federal land managers with direct responsibility for management of Class I lands may present to the department, after reviewing the department's preliminary determination required under ARM 16.8.1107, a demonstration that the emissions from the proposed source or modification would have an adverse impact on the air quality-related values (including visibility) of any federal mandatory Class I lands, notwithstanding that the change in air quality resulting from emissions from such source or modification would not cause or contribute to concentrations which would exceed the maximum allowable increases for a Class I area. If the department concurs with such demonstration, the department may not issue the permit.

(4) The owner or operator of a proposed source or modification may demonstrate to the federal land manager that the emissions from such source would have no adverse impact on the air quality-related values of such lands (including visibility), notwithstanding that the change in air quality resulting from emissions from such source or modification would cause or contribute to concentrations which would exceed the maximum allowable increases for a Class I area. If the federal land manager concurs with such demonstration and so

certifies to the department, the department may, provided that applicable requirements are otherwise met, issue the permit with such emission limitations as may be necessary to assure that emissions of sulfur dioxide, particulate matter, and nitrogen oxides would not exceed the following maximum allowable increases over the minor source baseline concentration for such pollutants:

Pollutant	Maximum allowable increase (micrograms per cubic meter)
Particulate matter:	
TSP, annual geometric mean	19
TSP, 24-hr maximum	37
Sulfur dioxide:	
Annual arithmetic mean	20
24-hr maximum	91
3-hr maximum	325
Nitrogen dioxide:	
Annual arithmetic mean	25

(5) The owner or operator of a proposed source or modification which cannot be approved under procedures developed pursuant to (4) of this rule may seek to obtain a sulfur dioxide variance from the governor.

(a) The owner or operator of a proposed source or modification must demonstrate to the governor that the source or modification cannot be constructed by reason of any maximum allowable increase for sulfur dioxide for periods of twenty-four hours or less applicable to any Class I area and, in the case of federal mandatory Class I areas, that a variance under this clause would not adversely affect the air quality-related values of the area (including visibility).

(b) The governor, after consideration of the federal land manager's recommendation (if any) and subject to the concurrence of the federal land manager, may grant, after notice and an opportunity for a public hearing, a variance from such maximum allowable increase.

(c) If the federal land manager does not concur in the governor's recommendations, the recommendations of the governor and the federal land manager shall be transferred to the president, and the president may approve the governor's recommendation if the president finds that such variance is in the national interest.

(d) If such a variance is granted under this rule, the department may issue a permit to such source or modification in accordance with provisions developed pursuant to (6) of this rule, provided that the applicable requirements of the plan are otherwise met.

(6) In the case of a permit issued under procedures developed pursuant to (5) of this rule, the source or modification shall comply with emission limitations as may be necessary to assure that emissions of sulfur dioxide from the source or modification would

not (during any day on which the otherwise applicable maximum allowable increases are exceeded) cause or contribute to concentrations which would exceed the following maximum allowable increases over the baseline concentration and to assure that such emissions would not cause or contribute to concentrations which exceed the otherwise applicable maximum allowable increases for periods of exposure of 24 hours or less for more than 18 days, not necessarily consecutive, during any annual period:

MAXIMUM ALLOWABLE INCREASE
[Micrograms per cubic meter]

PERIODS OF EXPOSURE	Terrain Areas Low	High
24-hr maximum	36	62
3-hr maximum	130	221

AUTH: 75-2-111, 75-2-203, MCA; IMP: 75-2-202, 75-2-203, 75-2-204, MCA

RULE XIX PUBLIC PARTICIPATION (1) The department shall notify all applicants in writing within 30 days of the date of receipt of an application as to the completeness of the application or any deficiency in the application or information submitted as provided in ARM 16.8.1107. In the event of such a deficiency, the date of receipt of the application will be the date on which the department received all required information unless the department notifies the applicant in writing within 30 days thereafter that the application is still incomplete. This, and any subsequent notice of incompleteness shall follow the same form and requirements as the original notice of incompleteness.

(2) In accordance with ARM 16.8.1107, the department shall:

(a) Make a preliminary determination whether construction should be approved, approved with conditions, or disapproved;

(b) Make available, in at least one location in each region in which the proposed source would be constructed, a copy of all materials the applicant submitted, a copy of the preliminary determination, and a copy or summary of other materials, if any, considered in making the preliminary determination;

(c) Notify the public, by advertisement in a newspaper of general circulation in each region in which the proposed source would be constructed, of the application, the preliminary determination, the degree of increment consumption that is expected from the source or modification, and of the opportunity for comment at a public hearing as well as written public comment;

(d) Send a copy of the notice of public comment to the applicant, the administrator, and to officials and agencies having cognizance over the location where the proposed construction would occur, including any local air pollution control agencies, the chief executives of the city and county where the source would be located, any comprehensive regional land use planning agency, and any state, federal land manager, or Indian governing body whose

lands may be affected by emissions from the source or modification;

(e) Provide opportunity for a public hearing for interested persons to appear and submit written or oral comments on the air quality impact of the source, alternatives to it, the control technology required, and other appropriate considerations;

(f) Consider all written comments submitted within a time specified in the notice of public comment and all comments received at any public hearing(s) in making a final decision on the approvability of the application. The department shall make all comments available for public inspection in the same locations where the department made available preconstruction information relating to the proposed source or modification;

(g) Make a final determination whether construction should be approved, approved with conditions, or disapproved; and

(h) Notify the applicant in writing of the final determination and make such notification available for public inspection at the same locations where the department made available preconstruction information and public comments relating to the source or modification.

AUTH: 75-2-111, 75-2-203, MCA; IMP: 75-2-202, 75-2-203, 75-2-204, MCA

RULE XX SOURCE OBLIGATION (1) Approval to construct shall not relieve any owner or operator of the responsibility to comply fully with applicable provisions and requirements under local, state or federal law.

(2) At such time that a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation which was established after August 7, 1980, on the capacity of the source or modification otherwise to emit a pollutant, such as a restriction on hours of operation, then the requirements of [RULE XII-XXI] shall apply to the source or modification as though construction had not yet commenced on the source or modification.

AUTH: 75-2-111, 75-2-203, MCA; IMP: 75-2-202, 75-2-203, 75-2-204, MCA

RULE XXI INNOVATIVE CONTROL TECHNOLOGY (1) An owner or operator of a proposed major stationary source or major modification may request the department approve a system of innovative control technology.

(2) The department may, with the consent of the governor of any other affected state, determine that the source or modification may employ a system of innovative control technology, if:

(a) The proposed control system would not cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation or function;

(b) The owner or operator agrees to achieve a level of continuous emissions reduction equivalent to that which would have been required under [RULE XII](2), by a date specified by the department, provided that such date may not be later than four years from the time of start-up or seven years from permit issuance;

(c) The source or modification would meet the requirements equivalent to those in [RULE XII and XIII], based on the emissions

rate that the stationary source employing the system of innovative control technology would be required to meet on the date specified by the department;

(d) The source or modification would not, before the date specified by the department, cause or contribute to any violation of an applicable national ambient air quality standard or impact any area where an applicable increment is known to be violated;

(e) All other applicable requirements including those for public participation have been met; and

(f) The provisions of [RULE XVIII] (relating to Class I areas) have been satisfied with respect to all periods during the life of the source or modification.

(3) The department shall withdraw any approval to employ a system of innovative control technology made under this subchapter if:

(a) The proposed system fails by the specified date to achieve the required continuous emissions reduction rate;

(b) The proposed system fails before the specified date so as to contribute to an unreasonable risk to public health, welfare, or safety; or

(c) The department decides at any time that the proposed system is unlikely to achieve the required level of control or to protect the public health, welfare, or safety.

(4) If a source or modification fails to meet the required level of continuous emissions reduction within the specified time period, or if the approval is withdrawn in accordance with section (3) of this rule, the department may allow the source or modification up to an additional three years to meet the requirement for the application of best available control technology through use of a demonstrated system of control.

AUTH: 75-2-111, 75-2-203, MCA; IMP: 75-2-202, 75-2-203, 75-2-204, MCA

16.8.1401 PARTICULATE MATTER, AIRBORNE ~~(1) For purposes of this rule the following definitions apply:~~

~~(a) "Airborne particulate matter" means any particulate matter discharged into the outdoor atmosphere which is not discharged from the normal exit of a stack or chimney for which a source test can be performed in accordance with Method 5 (determination of particulate emissions from stationary sources), Appendix A, Part 60.275 (Test Method and Procedures), Title 40, Code of Federal Regulations [CFR] (Revised July 1, 1977).~~

~~(b) "Reasonable precautions" means any reasonable measure to control emissions of airborne particulate matter. Determination of what is reasonable shall be accomplished on a case by case basis taking into account energy, environmental, economic, and other costs.~~

~~(c) "Reasonably available control technology (RACT)" means a limitation of emissions from any source that is determined on a case-by-case basis to be reasonably available, taking into account energy, environmental, and economic impacts and other costs. Such an emission limitation shall only be required after consideration of the necessity of imposing such a limitation in order to attain and maintain a national ambient air quality standard (NAAQS) and~~

~~alternative means of providing for attainment and maintenance of such a NAAQS.~~

~~(d) "Best available control technology (BACT)" means an emission limitation (including a visible emission standard) based on the maximum degree of reduction for each pollutant subject to regulation under the Federal Clean Air Act as amended August 7, 1977, or the Montana Clean Air Act which would be emitted from any proposed stationary source or modification which the department, on a case-by-case basis, taking into account energy, environmental and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such contaminant. In no event shall application of the best available control technology result in emission of any contaminant which would exceed the emissions allowed by the applicable standard under 40 CFR Part 60 and 61. If the department determines that technological or economic limitations on the application of measurement methodology to a particular class of sources would make the imposition of an emission standard infeasible, it may instead prescribe a design, equipment, work practice or operational standard or combination thereof, to require the application of best available control technology. Such standard shall, to the degree possible, set forth the emission reduction achievable by implementation of such design, equipment, work practice or operation and shall provide for compliance by means which achieve equivalent results.~~

~~(e) "Lowest achievable emission rate (LAER)" means for any source, that rate of emissions which reflects:~~

~~(i) The most stringent emission limitation which is contained in the implementation plan of any state for such class or category of source, unless the owner or operator of the proposed source demonstrates that such limitations are not achievable, or~~

~~(ii) The most stringent emission limitation which is achieved in practice by such class or category of source, whichever is more stringent. In no event shall the application of this term permit a proposed new or modified source to emit any pollutant in excess of the amount allowable under applicable new source standards of performance under 40 CFR Part 60 and Part 61.~~

~~(2)~~(1) No person shall cause or authorize the production, handling, transportation, or storage of any material unless reasonable precautions to control emissions of airborne particulate matter are taken. Such emissions of airborne particulate matter from any stationary source shall not exhibit an opacity of 20 percent or greater averaged over six consecutive minutes, except for emission of airborne particulate matter originating from any transfer ladle or operation engaged in the transfer of molten metal which was installed or operating prior to November 23, 1968.

~~(3)~~(2) No person shall cause or authorize the use of any street, road, or parking lot without taking reasonable precautions to control emissions of airborne particulate matter.

~~(4)~~(3) No person shall operate a construction site or demolition project unless reasonable precautions are taken to control emissions of airborne particulate matter. Such emissions of air-

borne particulate matter from any stationary source shall not exhibit an opacity of 20% or greater averaged over six consecutive minutes.

~~(5)~~(4) Within any area designated non-attainment in 40 CFR 81.327 for ~~either~~ the ~~primary or secondary~~ national ambient air quality standards ~~(NAAQS)~~ for ~~total suspended particulate (TSP)~~ PM-10, any person who owns or operates:

(a)-(c) Remain the same.

~~(6)~~(5) The provisions of this rule shall not apply to emissions of airborne particulate matter originating from any activity or equipment associated with the use of agricultural land or the planting, production, harvesting, or storage of agricultural crops (this exemption does not apply to the processing of agricultural products by a commercial business).

AUTH: 75-2-111, 75-2-203, MCA; IMP: 75-2-203, MCA

16.8.1407 WOOD-WASTE BURNERS (1) It is hereby declared to be the policy of the department to encourage the complete utilization of wood-waste residues and to restrict, wherever reasonably practical, ~~all~~ the disposal of wood-waste residues by ~~incineration~~ combustion in wood waste burners. Recent technological and economic developments have enhanced the degree to which wood-waste residues currently being disposed of in wood-waste burners may be utilized or otherwise disposed of in ways not damaging the environment. While recognizing that complete utilization of wood-waste is not presently possible in all instances, this policy applies to the extent practical and consistent with economic and geographical conditions in Montana.

(2) Construction, reconstruction, or substantial alteration of wood-waste burners is prohibited unless the requirements of subchapter 11 of this chapter have been met.

(3) No person shall cause or authorize to be discharged into the outdoor atmosphere from any wood-waste burner any emissions which exhibit an opacity of 20% or greater averaged over six consecutive minutes. The provisions of this section may be exceeded for not more than 60 minutes in eight consecutive hours for building of fires in wood-waste burners.

~~(4) No person shall cause or authorize to be discharged into the outdoor atmosphere from any wood waste burner particulate matter in excess of 0.25 grains per standard cubic foot corrected to twelve percent (12%) CO_2.~~

~~(5)~~(4) A thermocouple and a recording pyrometer or other temperature measurement and recording device approved by the department shall be installed and maintained on each wood-waste burner. The thermocouple shall be installed at a location near the center of the opening for the exit gases, or at another location approved by the department.

~~(6)~~(5) Except as provided in ~~(7)~~(6), a minimum temperature of 700° F shall be maintained during normal operation of all wood-waste burners. A normal start-up period of one hour is allowed during which the 700° F minimum temperature does not apply. The burner shall maintain 700° F operating temperature until the fuel feed is stopped for the day.

~~(7)~~(6) Wood-waste burners in existence on ~~the date of adoption~~

~~of this rule~~ February 10, 1989.~~+~~

~~(a) Have until June 30, 1992 to take corrective actions as necessary to comply with section (4) and section (6) of this rule.~~

~~(b)~~ ~~De~~ do not have to comply with the requirements of ~~(6)~~(5) if they are located outside of ten-micron particulate (PM-10) ~~impact~~ nonattainment areas ~~defined by the department~~.

~~(c) Must obtain a new air quality permit as applicable from the department in accordance with the provisions of subchapter 11 and subchapter 9, prior to reactivation of a wood waste burner which does not combust wood waste for a period of two continuous years or more after the date of adoption of this rule.~~

~~(8)~~(7) ~~The department may require~~ The owner or operator of a wood-waste burner must maintain a daily written log of the wood-waste burner's operation ~~to be maintained by the owner or operator~~ to determine optimum patterns of operations for various fuel and atmospheric conditions. The log shall include, but not be limited to, the time of day, draft settings, exit gas temperature, type of fuel, and atmospheric conditions. The log or a copy of it ~~shall~~ must be submitted to the department within 10 days after it is requested.

~~(9)~~(8) No person shall use a wood-waste burner for the burning of other than production process wood-waste transported to the burner by continuous flow conveying methods.

~~(10)~~(9) Rubber products, asphaltic materials, or other prohibited materials specified in ARM 16.8.1302(2)(b)-(d), (f)-(r), (t) and (u), ~~shall~~ may not be burned or disposed of in wood-waste burners.

~~(11) Exception: For building of fires in wood-waste burners, the provisions of sections (3) and (4) of this rule may be exceeded for not more than sixty (60) minutes in eight (8) hours.~~

AUTH: 75-2-111, 75-2-203, MCA; IMP: 75-2-203, MCA

16.8.1414 SULFUR OXIDE EMISSIONS--LEAD OR LEAD-ZINC SMELTING FACILITIES (1) No person may cause an emission of sulfur dioxide from a lead or lead-zinc smelter stack, as described below, existing on January 1, 1980, in excess of the amount set forth below:

Lead or Lead-Zinc Smelter Source	Emission Limitation
Main (Sinter Machine) Stack	80 tons/day
	20 tons/6 hours
Blast Furnace	23 tons/day
Baghouse Stack	5.75 tons/6 hours

(2) Compliance with (1) of this rule shall be determined by source testing as specified by 40 CFR, Part 60, Appendix A -- Reference Methods, "Method 6 -- Determination of Sulfur Dioxide Emissions from Stationary Sources" ~~(as modified to the satisfaction of the department)~~ or "Method 8 -- Determination of Sulfuric Acid Mist and Sulfur Dioxide Emissions from Stationary Sources," and the source testing shall consist of averaging 3 separate 1-hour tests using the applicable testing methods.

~~(3) The department hereby adopts and incorporates by reference 40 CFR, Part 60, Appendix A -- Reference Methods, Method 6 -- De-~~

~~termination of Sulfur Dioxide Emissions from Stationary Sources and Method 8 -- Determination of Sulfuric Acid Mist and Sulfur Dioxide Emissions from Stationary Sources. 40 CFR, Part 60, Appendix A, Methods 6 and 8 are federal rules setting forth procedures for extracting gas samples from the emitting source and performing tests thereon to determine amounts of contaminants contained in such gases. A copy of 40 CFR, Part 60, Appendix A, Methods 6 and 8, may be obtained from the Air Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana, 59620.~~

AUTH: 75-2-111, MCA; IMP: 75-2-203, MCA

16.8.1423 STANDARD OF PERFORMANCE FOR NEW STATIONARY SOURCES

(1) For the purpose of this rule, the following definitions apply:

(a) "Administrator", as used in 40 CFR Part 60, ~~July 1, 1992,~~ means the department, except in the case of those duties which cannot be delegated to the state by the U.S. Environmental Protection Agency, in which case "administrator" means the administrator of the U.S. Environmental Protection Agency.

(b) "Stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the ~~Federal Clean Air Act, 42 U.S.C. §1857, et seq., as amended in 1990~~ FCAA.

(2) The terms and associated definitions specified in 40 CFR §60.2, ~~July 1, 1992,~~ shall apply to this rule, except as specified in (1)(a).

(3) The owner and operator of any stationary source or modification, as defined and applied in 40 CFR Part 60, ~~July 1, 1992,~~ shall comply with the standards and provisions of 40 CFR Part 60, ~~July 1, 1992~~.

~~(4) For the purpose of this rule, the board hereby adopts and incorporates by reference 40 CFR Part 60, July 1, 1992, which pertains to standards of performance for new stationary sources and modifications. 40 CFR Part 60, July 1, 1992, is available for public inspection and copying at the Air Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, 1400 Broadway, Helena, Montana 59620; at EPA's Public Information Reference Unit, 401 M Street SW, Washington, DC 20460; and at the libraries of each of the ten EPA Regional Offices. Copies are also available as supplies permit from the U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; and copies may be purchased from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.~~

AUTH: 75-2-111, 75-2-203, MCA; IMP: 75-2-203, MCA

16.8.1424 EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS

(1) For the purpose of this rule, the terms and associated definitions specified in 40 CFR §61.02, ~~July 1, 1992,~~ shall apply, except that:

(a) "Administrator", as used in 40 CFR Part 61, ~~July 1, 1992,~~ means the department, except in the case of those duties which cannot be delegated to the state by the U.S. Environmental Protection Agency, in which case "administrator" means the administrator

of the U.S. Environmental Protection Agency.

(2) The owner or operator of any existing or new stationary source, as defined and applied in 40 CFR Part 61, ~~July 1, 1992,~~ shall comply with the standards and provisions of 40 CFR Part 61~~, July 1, 1992~~.

~~(3) For the purpose of this rule, the board hereby adopts and incorporates by reference 40 CFR Part 61, July 1, 1992, which pertains to emission standards for hazardous air pollutants. 40 CFR Part 61, July 1, 1992, is available for public inspection and copying at the Air Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, 1400 Broadway, Helena, Montana 59620; at EPA's Public Information Reference Unit, 401 M Street SW, Washington, DC 20460; and at the libraries of each of the ten EPA Regional Offices. Copies are also available as supplies permit from the U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; and copies may be purchased from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.~~

AUTH: 75-2-111, 75-2-203, MCA; IMP: 75-2-203, MCA

16.8.1425 HYDROCARBON EMISSIONS -- PETROLEUM PRODUCTS

(1)(a)-(b) Remain the same.

(c) Other equipment of equal efficiency provided such equipment has been approved by the ~~administrator~~ department.

(2)(a)-(c) Remain the same.

(d) Other equipment of equal efficiency provided such equipment has been approved by the ~~administrator~~ department.

(e) Remains the same.

(3)-(6) Remain the same.

(7) Facilities used exclusively for the production of crude oil ~~shall be~~ are exempt from this rule.

AUTH: 75-2-111, 75-2-203, MCA; IMP: 75-2-203, MCA

16.8.1427 ODORS (1) Remains the same.

(2) A person operating any business or using any machine, equipment, device or facility or process which discharges into the outdoor air any odorous matter or vapors, gases, dusts, or any combination thereof which create odors, shall provide, properly install, and maintain in good working order and in operation such odor control devices or procedures as may be specified by the ~~administrator~~ department.

(3)-(5) Remain the same.

(6) Whenever dust, fumes, gases, mist, odorous matter, vapors, or any combination thereof escape so as to cause a public nuisance, the ~~administrator~~ department may order that a building or buildings in which processing, handling, and storage are done be tightly closed and ventilated in such a way that all air and gases and air or gas-borne materials leaving the building are treated by incineration or other effective means for removal or destruction of odorous matter or other contaminants before discharge into the open air.

(7) No person shall operate or use any machine, equipment, device or facility for the reduction of animal matter unless all gases, vapors, and gas-entrained effluents from such facility are

incinerated at a temperature of not less than 1200° Fahrenheit for a period of not less than 0.3 seconds, or processed in such manner as determined by the ~~administrator~~ department to be equally or more effective for the purpose of air pollution control.

(8) A person incinerating or processing gases, vapors, or gas-entrained effluents pursuant to this rule shall provide, properly install and maintain in good working order and in operation, devices as specified by the ~~administrator~~ department for indicating temperatures, pressure or other operating conditions.

AUTH: 75-2-111, 75-2-203, MCA; IMP: 75-2-203, MCA

16.8.1428 PROHIBITED MATERIALS FOR WOOD OR COAL RESIDENTIAL STOVES (1) No person may cause or authorize the use of the following materials to be combusted in any residential solid-fuel combustion device such as a wood, coal, or pellet stove or fireplace:

(a)-(m) Remain the same.

(n) hazardous wastes as defined by ~~40 CFR Part 261~~ administrative rules found at ARM Title 16, chapter 44, subchapter 3; or

(o) chemicals.

AUTH: 75-2-111, 75-2-203, MCA; IMP, Sec. 75-2-203, MCA

RULE XXII INCORPORATIONS BY REFERENCE (1) In this subchapter, and unless expressly provided otherwise, the following is applicable:

(a) Where the board has adopted a federal regulation by reference, the reference in the board rule shall refer to the federal agency regulations as they have been codified in the July 1, 1992, edition of Title 40 of the Code of Federal Regulations (CFR);

(b) Where the board has adopted another rule of the department or another agency of the state of Montana that appears in a different title or chapter of the Administrative Rules of Montana (ARM), the reference in this subchapter shall refer to the other rule in the ARM as such rule existed on June 24, 1993.

(2) For the purposes of this subchapter, the board hereby adopts and incorporates herein by reference the following:

(a) 40 CFR, Part 60, Appendix A, method 6, entitled "determination of sulfur dioxide emissions from stationary sources" and method 8, entitled "determination of sulfuric acid mist and sulfur dioxide emissions from stationary sources". Methods 6 and 8 are federal rules setting forth procedures for extracting gas samples from the emitting source and performing tests thereon to determine amounts of contaminants contained in such gases;

(b) 40 CFR 81.327, which sets forth the air quality attainment status designations for Montana;

(c) 40 CFR Part 60, which pertains to standards of performance for new stationary sources and modifications;

(d) 40 CFR Part 61, which pertains to emission standards for hazardous air pollutants;

(e) The administrative rules of Montana found at Title 16, chapter 44, subchapter 3, which set forth the rules pertaining to the identification and listing of hazardous waste;

(f) The standard industrial classification manual, 1987, executive office of the President, office of management and budget,

(U.S. government printing office stock number 1987 0-185-718), which sets forth a system of industrial classification and definition based upon the composition and structure of the economy.

(g) A copy of the above materials is available for public inspection and copying at the Air Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, 1400 Broadway, Helena, Montana. Copies of the federal materials may also be obtained at: EPA's Public Information Reference Unit, 401 M Street SW, Washington, DC 20460; at the libraries of each of the ten EPA Regional Offices; as supplies permit from the U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; and for purchase from the U.S. Department of Commerce, National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161. The standard industrial classification manual (1987) may also be obtained from the U.S. Department of Commerce, National Technical Information Service (order no. PB 87-100012).

AUTH: 75-2-111, 75-2-203, MCA; IMP: 75-2-203, MCA

RULE XXIII DEFINITIONS For purposes of this subchapter, the following definitions apply:

(1) "Airborne particulate matter" means any particulate matter discharged into the outdoor atmosphere which is not discharged from the normal exit of a stack or chimney for which a source test can be performed in accordance with 40 CFR Part 60, Appendix A, Method 5 (determination of particulate emissions from stationary sources).

(2) "Animal matter" means any product or derivative of animal life.

(3) "Best available control technology" means an emission limitation (including a visible emission standard), based on the maximum degree of reduction for each air pollutant which would be emitted from any source or alteration which the department, on a case by case basis, taking into account energy, environment, and economic impacts and other costs, determines is achievable for such sources or alterations through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such air contaminant. In no event shall application of best available control technology result in emission of any air contaminant which would exceed the emissions allowed by any applicable standard under this chapter. If the department determines that technological or economic limitations on the application of measurement methodology to a particular class of sources or alterations would make the imposition of an emission standard infeasible, it may instead prescribe a design, equipment, work practice or operational standard or combination thereof, to require the application of best available control technology. Such standard shall, to the degree possible, set forth the emission reduction achievable by implementation of such design, equipment, work practice or operation and shall provide for compliance by means which achieve equivalent results.

(4) "Existing fuel burning equipment" means fuel burning equipment constructed or installed prior to November 23, 1968.

(5) "Building, structure, facility, or installation" means all of the pollutant-emitting activities which belong to the same in-

dustrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel. Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same major group (i.e., which have the same two-digit code) as described in the standard industrial classification manual, 1987.

(6) "Lowest achievable emission rate (LAER)" means, for any source, that rate of emissions which reflects:

(a) The most stringent emission limitation which is contained in the implementation plan of any state for such class or category of source, unless the owner or operator of the proposed source demonstrates that such limitations are not achievable; or

(b) The most stringent emission limitation which is achieved in practice by such class or category of source, whichever is more stringent. In no event shall the application of this term permit a proposed new or modified source to emit any pollutant in excess of the amount allowable under applicable new source standards of performance under 40 CFR Part 60 and Part 61.

(7) "New fuel burning equipment" means fuel burning equipment constructed, installed or altered after November 23, 1968.

(8) "Process weight" means the total weight of all materials introduced into any specific process which may cause emissions. Solid fuels charged will be considered as part of the process weight, but liquid and gaseous fuels and combustion air will not.

(9) "Process weight rate" means the rate established as follows:

(a) For continuous or long-run steady-state operations, the total process weight for the entire period of continuous operation or for a typical portion thereof, divided by the number of hours of such period or portion thereof.

(b) For cyclical or batch operations, the total process weight for a period that covers a complete operation or an integral number of cycles, divided by the hours of actual process operation during such a period. Where the nature of any process or operation or the design of any equipment is such as to permit more than one interpretation of this definition, the interpretation that results in the minimum value for allowable emissions shall apply.

(10) "Reasonable precautions" mean any reasonable measures to control emissions of airborne particulate matter. Determination of what is reasonable will be accomplished on a case-by-case basis taking into account energy, environmental, economic, and other costs.

(11) "Reasonably available control technology" means devices, systems, process modifications, or other apparatus or techniques that are determined on a case-by-case basis to be reasonably available, taking into account the necessity of imposing such controls in order to attain and maintain a national or Montana ambient air quality standard, the social, environmental, and economic impact of such controls, and alternative means of providing for attainment and maintenance of such standard.

(12) "Reduction" means any heated process, including rendering, cooking, drying, dehydrating, digesting, evaporating, and protein concentrating.

AUTH: 75-2-111, 75-2-203, MCA IMP: 75-2-203, MCA

RULE XXIV DEFINITIONS For the purpose of this subchapter:

(1)(a) "Actual emissions" mean the actual rate of emissions of a pollutant from an emissions unit as determined in accordance with (b)-(d) of this section.

(b) Actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operation. The department may determine that a different time is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.

(c) If the department is unable to determine actual emissions consistent with (1)(b), above, the department may presume that the source-specific allowable emissions for the unit are equivalent to the actual emissions of the unit.

(d) For any emissions unit which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

(2) "Begin actual construction" means, in general, initiation of physical on-site construction activities of a permanent nature on an emissions unit. Such activities include, but are not limited to, installation of building supports and foundations, laying of underground pipework, and construction of permanent storage structures. With respect to a change in method of operation, this term refers to those on-site activities other than preparatory activities which mark the initiation of the change.

(3) "Building, structure, facility, or installation" means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control), except the activities of any vessel. Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same major group (i.e., having the same two-digit code) as described in the standard industrial classification manual, 1987.

(4) "Cause or contribute" means, in regard to an ambient air quality impact caused by emissions from a major source or modification, an ambient air quality impact that exceeds the significance level for any pollutant at any location.

(5) "Commence", as applied to construction of a major stationary source or major modification, means that the owner or operator has all necessary preconstruction approvals or permits and either has:

(a) begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or

(b) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.

(6) "Construction" means any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) which would result in a change in actual emissions.

(7) "Emissions unit" means any part of a stationary source which emits or would have the potential to emit any pollutant subject to regulation under the FCAA.

(8) "Lowest achievable emission rate" means, for any source, the more stringent rate of emissions based on the following:

(a) The most stringent emissions limitation which is contained in the implementation plan of any state for such class or category of stationary source, unless the owner or operator of the proposed stationary source demonstrates that such limitations are not achievable; or

(b) The most stringent emissions limitation which is achieved in practice by such class or category of stationary sources. This limitation, when applied to a modification, means the lowest achievable emissions rate for the new or modified emissions units within a stationary source. In no event shall the application of the term permit a proposed new or modified stationary source to emit any pollutant in excess of the amount allowable under applicable new source standards of performance under 40 CFR Part 60 and Part 61.

(9)(a) "Major modification" means any physical change in, or change in the method of, operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the FCAA.

(b) Any net emissions increase that is considered significant for volatile organic compounds is considered significant for ozone.

(c) A physical change or change in the method of operation does not include:

(i) routine maintenance, repair and replacement;

(ii) use of an alternative fuel or raw material by reason of an order under (2)(a) and (2)(b) of the Energy Supply and Environmental Coordination Act of 1974, 15 U.S.C. sections 791, et seq. (1988), or by reason of a natural gas curtailment plan pursuant to the Federal Power Act, 16 U.S.C. sections 791a, et seq. (1988 & Supp. III 1991);

(iii) use of an alterative fuel by reason of an order or rule under section 7425 of the FCAA;

(iv) use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste;

(v) use of an alternative fuel or raw material by a stationary source which:

(A) the source was capable of accommodating before December 21, 1976, unless such change would be prohibited under any federally enforceable permit condition which was established after December 12, 1976, pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR, Part 51, subpart I, or section 51.166; or

(B) the source is approved to use under any permit issued under regulations approved pursuant to 40 CFR 51.165;

(vi) an increase in the hours of operation or in the production rate, unless such change is prohibited under any federally enforceable air quality preconstruction permit condition which was

established after December 21, 1976 pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR, Part 51, subpart I, or section 51.166;

(vii) any change in ownership at a stationary source.

(10)(a) **"Major stationary source" means:**

(i) any stationary source of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any pollutant subject to regulation under the FCAA; or

(ii) any stationary source of air pollutants located in a serious particulate matter (PM-10) non-attainment area which emits, or has the potential to emit, 70 tons per year or more of PM-10; or

(iii) any physical change that would occur at a stationary source not qualifying under (10)(a)(i) or (ii) as a major stationary source, if the change would constitute a major stationary source by itself.

(b) The fugitive emissions of a stationary source will not be included in determining, for any of the purposes of this subchapter, whether it is a major stationary source, unless the source belongs to one of the following categories of stationary sources:

(i) Coal cleaning plants (with thermal dryers);
(ii) Kraft pulp mills;
(iii) Portland cement plants;
(iv) Primary zinc smelters;
(v) Iron and steel mills;
(vi) Primary aluminum ore reduction plants;
(vii) Primary copper smelters;
(viii) Municipal incinerators capable of charging more than 250 tons of refuse per day;
(ix) Hydrofluoric, sulfuric, or nitric acid plants;
(x) Petroleum refineries;
(xi) Lime plants;
(xii) Phosphate rock processing plants;
(xiii) Coke oven batteries;
(xiv) Sulfur recovery plants;
(xv) Carbon black plants (furnace process);
(xvi) Primary lead smelters;
(xvii) Fuel conversion plants;
(xviii) Sintering plants;
(xix) Secondary metal production plants;
(xx) Chemical process plants;
(xxi) Fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input;
(xxii) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;
(xxiii) Taconite ore processing plants;
(xxiv) Glass fiber processing plants;
(xxv) Charcoal production plants;
(xxvi) Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input; and
(xxvii) Any other stationary source category which, as of August 7, 1980, is being regulated under sections 7411 or 7412 of the FCAA.

(11) **"Necessary preconstruction approvals or permits" mean** those permits or approvals required under federal air quality con-

trol laws and regulations and those air quality control laws and regulations which are part of the Montana state implementation plan.

(12)(a) "Net emissions increase" means the amount by which the sum of the following exceeds zero:

(i) Any increase in actual emissions from a particular physical change or change in the method of operation at a stationary source; and

(ii) Any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable.

(b) An increase or decrease in actual emissions is contemporaneous with the increase from the particular change only if it occurs between the date five years before construction on the particular change commenced, and the date that the increase from the particular change occurs.

(c) An increase or decrease in actual emissions is creditable only if the department has not relied on it in issuing a permit for the source under regulations approved pursuant to 40 CFR 51.165 (July 1, 1993 ed.), which permit is in effect when the increase in actual emissions from the particular change occurs.

(d) An increase in actual emissions is creditable only to the extent that the new level of actual emissions exceeds the old level.

(e) A decrease in actual emissions is creditable only to the extent that:

(i) the old level of actual emissions or the old level of allowable emissions, whichever is lower, exceeds the new level of actual emissions;

(ii) it is federally enforceable at and after the time that actual construction on the particular change begins;

(iii) the department has not relied on it in issuing any air quality preconstruction permit under regulations approved pursuant to 40 CFR Part 51, subpart I (July 1, 1993 ed.), or the state has not relied on it in demonstrating attainment or reasonable further progress; and

(iv) it has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change.

(f) An increase that results from a physical change at a source occurs when the emissions unit on which construction occurred becomes operational and begins to emit a particular pollutant. Any replacement unit that requires shakedown becomes operational only after a reasonable shakedown period, not to exceed 180 days.

(13) "Reasonable further progress" means annual incremental reductions in emissions of the applicable air pollutant which are required by the FCAA or the administrator for attainment of the applicable national ambient air quality standard by the date required in section 172(a) of the FCAA.

(14) "Significance level" means, for any of the following pollutants, an ambient air quality impact greater than any of the averages cited below:

(a) For sulfur dioxide:

(i) an annual average of 1.0 micrograms per cubic meter;

(ii) a twenty-four hour average of 5.0 micrograms per cubic meter;
(iii) a three-hour average of 25.0 micrograms per cubic meter; or
(iv) a one-hour average of 25.0 micrograms per cubic meter.
(b) For PM-10:
(i) an annual average of 1.0 micrograms per cubic meter; or
(ii) a twenty-four hour average of 5.0 micrograms per cubic meter.
(c) For nitrogen dioxide:
(i) an annual average of 1.0 micrograms per cubic meter; or
(ii) a one-hour average of 6.0 micrograms per cubic meter.
(d) For carbon monoxide:
(i) an eight-hour average of 0.5 milligrams per cubic meter; or
(ii) a one-hour average of 2.0 milligrams per cubic meter.
(e) For hydrogen sulfide:
(i) a one-hour average of 0.2 micrograms per cubic meter.
(f) For lead:
(i) a ninety-day average of 0.1 micrograms per cubic meter; or
(ii) a three-month average of 0.1 micrograms per cubic meter.
(g) For ozone:
(i) a one-hour average of .005 parts per million.
(h) For fluorides in forage, settled particulate matter, and visibility:
(i) an air quality impact which is equivalent to 5% of the applicable ambient air quality standard.

(15) "Significant" means, in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:

Pollutant and Emission Rate	
Carbon monoxide:	100 tons per year (tpy)
Nitrogen oxides:	40 tpy
Sulfur dioxide:	40 tpy
Particulate matter:	25 tpy of particulate matter emissions or 15 tpy of PM-10 emissions
Lead:	0.6 tpy

(16) "Stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the FCAA.
AUTH: 75-2-111, 75-2-203, MCA IMP: 75-2-202, 75-2-203, 75-2-204, MCA

RULE XXV INCORPORATION BY REFERENCE (1) In this subchapter, and unless expressly provided otherwise, the following is applicable:

(a) Where the board has adopted a federal regulation by reference, the reference in the board rule shall refer to the federal agency regulations as they have been codified in the July 1, 1992, edition of Title 40 of the Code of Federal Regulations (CFR);

(b) Where the board has adopted a section of the United States Code (U.S.C.) by reference, the reference in the board rule shall refer to the section of the U.S.C. as found in the 1988 edition and Supplement II (1990);

(2) For the purposes of this subchapter, the board hereby adopts and incorporates herein by reference the following:

(a) 40 CFR 81.327, which sets forth the air quality attainment status designations for Montana;

(b) 40 CFR, Part 60, which sets forth standards of performance for new stationary sources;

(c) 40 CFR, Part 61, which sets forth emission standards for hazardous air pollutants;

(d) Subchapter I, part D, subpart IV of the Federal Clean Air Act, 42 U.S.C. sections 7401 et seq., which establishes additional requirements for particulate matter nonattainment areas;

(e) Section 7503 of the Federal Clean Air Act, 42 U.S.C. sections 7401 et seq., which establishes permit requirements for permit programs in nonattainment areas;

(f) The standard industrial classification manual, 1987, executive office of the President, office of management and budget, (U.S. government printing office stock number 1987 O - 185-718), which sets forth a system of industrial classification and definition based upon the composition and structure of the economy.

(g) A copy of the above materials is available for public inspection and copying at the Air Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, 1400 Broadway, Helena, Montana 59620. Copies of the federal materials may also be obtained at EPA's Public Information Reference Unit, 401 M Street SW, Washington, DC 20460, and at the libraries of each of the ten EPA Regional Offices. Interested persons seeking a copy of the CFR may address their requests directly to: Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. The standard industrial classification manual (1987) may also be obtained from the U.S. Department of Commerce, National Technical Information Service, 5285 Port Royal Road, Springfield, Virginia 22161 (order no. PB 87-100012).

AUTH: 75-2-111, 75-2-203, MCA IMP: 75-2-202, 75-2-203, 75-2-204, MCA

RULE XXVI WHEN AIR QUALITY PRECONSTRUCTION PERMIT REQUIRED

(1) Any new major stationary source or major modification which would locate anywhere in an area designated as nonattainment for a national ambient air quality standard under 40 CFR 81.327 and which is major for the pollutant for which the area is designated nonattainment, shall, prior to construction, obtain from the department an air quality preconstruction permit in accordance with subchapter 11 and all requirements contained in this subchapter.

(2) Any source or modification located anywhere in an area designated as nonattainment for a national ambient air quality standard under 40 CFR 81.327 which becomes a major stationary source or major modification for the pollutant for which the area is designated nonattainment solely by virtue of a relaxation in any enforceable limitation which was established after August 7, 1980, on the capacity of the source or modification otherwise to emit a

pollutant (such as a restriction on hours of operation) shall obtain from the department an air quality preconstruction permit as though construction had not yet commenced on the source or modification, in accordance with subchapter 11 and all requirements of this subchapter.
AUTH: 75-2-111, 75-2-203, MCA IMP: 75-2-202, 75-2-203, 75-2-204, MCA

RULE XXVII ADDITIONAL CONDITIONS OF AIR QUALITY PRECONSTRUCTION PERMIT (1) The department shall not issue an air quality preconstruction permit required under [RULE XXVI], unless the requirements of subchapter 11 and the following additional conditions are met:

(a) The permit for the new source or modification contains an emission limitation which constitutes the lowest achievable emissions rate for such source.

(b) The applicant certifies that all existing major sources owned or operated by the applicant (or any entity controlling, controlled by, or under common control with the applicant) in the state of Montana are in compliance with all applicable emission limitations and standards under the FCAA or are in compliance with an expeditious schedule of compliance which is federally enforceable or contained in a court decree.

(c) The new source obtains from existing sources emission reductions (offsets), expressed in tons per year, which provide both a positive net air quality benefit in the affected area in accordance with [RULE XXVIII](6)-(8), and a ratio of required emission offsets to the proposed source's emissions of 1:1 or greater. The emissions reductions (offsets) required under this subsection must be:

(i) obtained from existing sources in the same non-attainment area as the proposed source, except as specified in [RULE XXVIII](6) (whether or not they are under the same ownership);

(ii) subject to the provisions of [RULE XXVIII];

(iii) sufficient to assure that there will be reasonable progress toward attainment of the applicable national ambient air quality standard;

(iv) for the same pollutant (e.g., carbon monoxide increases may only be offset against carbon monoxide reductions);

(v) permanent, quantifiable, and federally enforceable; and

(vi) reductions in actual emissions.

(d) The air quality preconstruction permit contains a condition requiring the source to submit documentation, prior to commencement of operation that the offsets required in the permit have occurred.

(e) The applicant submits an analysis of alternative sites, sizes, production processes and environmental control techniques for such proposed source that demonstrates that benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction or modification.

(2) Any growth allowances which were included in an applicable state implementation plan prior to November 15, 1990 for the purpose of allowing for construction or operation of a new major stationary source or major modification shall not be valid for use in

any area that received or receives a notice from the administrator that the applicable state implementation plan containing such allowances is substantially inadequate.

(3) The requirements of (1)(a) and (1)(c), above, shall only apply to those pollutants for which the major stationary source or major modification is major.

(4) The issuance of an air quality preconstruction permit shall not relieve any owner or operator of the responsibility to comply fully with applicable provisions of the Montana state implementation plan and any other requirements contained in or pursuant to local, state or federal law.

AUTH: 75-2-111, 75-2-203, MCA IMP: 75-2-202, 75-2-203, 75-2-204, MCA

RULE XXVIII BASELINE FOR DETERMINING CREDIT FOR EMISSIONS AND AIR QUALITY OFFSETS (1) Pursuant to section 7503 of the FCAA, emission offsets in nonattainment areas are required to be in the form of, and against, actual emissions. Actual emissions preceding the filing of the application to construct or modify a source are the baseline for determining credit for emission and air quality offsets, as determined in compliance with this subchapter.

(2) Where the emission limitation under the Montana state implementation plan allows greater emissions than the actual emissions of the source, emission offset credit will be allowed only for control below the actual emissions.

(3) For an existing fuel combustion source, credit shall be based on the actual emissions for the type of fuel being burned at the time the application to construct is filed. If the existing source commits to switch to a cleaner fuel at some future date, emissions offsets credit based on the actual emissions for the fuels involved is not acceptable, unless the air quality preconstruction permit is conditioned to require the use of a specified alternative control measure which would achieve the same degree of emissions reduction should the source switch back to a dirtier fuel at some later date. The department shall ensure that adequate long-term supplies of the new fuel are available before granting emissions offset credit for fuel switches.

(4) Emission reductions achieved by shutting down an existing source or curtailing production or operating hours below baseline levels may be generally credited if such reductions are permanent, quantifiable, and federally enforceable, and if the area has an EPA-approved attainment plan. In addition, the shutdown or curtailment is creditable only if it occurred on or after the date specified for this purpose in the Montana state implementation plan, and if such date is on or after the date of the most recent emissions inventory used in the plan's demonstration of attainment. Where the plan does not specify a cutoff date for shutdown credits, the date of the most recent emissions inventory or attainment demonstration, as the case may be, shall apply. However, in no event may credit be given for shutdowns which occurred prior to August 7, 1977. For purposes of this section (4), the department may choose to consider a prior shutdown or curtailment to have occurred after the date of its most recent emissions inventory, if the inventory explicitly includes as current "existing" emissions the emissions

from such previously shutdown or curtailed sources. Such reductions may be credited in the absence of an approved attainment demonstration only if the shutdown or curtailment occurred on or after the date the new source's air quality application is filed, or if the applicant can establish that the proposed new source is a replacement for the shutdown or curtailed source, and the cutoff date provisions described earlier in this section (4) are observed.

(5) All emission reductions claimed as offset credit shall be federally enforceable.

(6) Emission offsets may only be obtained from the same source or other sources in the same nonattainment area, except that the department may allow the owner or operator of a proposed source to obtain such emission reductions in another nonattainment area if:

(a) The other nonattainment area has an equal or higher nonattainment classification for the same pollutant than the area in which the proposed source will locate; and

(b) Emissions from the other nonattainment area contribute to a violation of a national ambient air quality standard in the nonattainment area in which the proposed source will locate.

(7) In the case of emission offsets involving oxides of nitrogen, offsets will generally be acceptable if obtained from within the same nonattainment area as the new source or from other nonattainment areas which meet the requirements of (6). However, if the proposed offsets would be from sources located at considerable distances from the new source, the department shall increase the ratio of the required offsets and require a showing by the applicant that nearby offsets were investigated and reasonable alternatives were not available.

(8) In the case of emission offsets involving sulfur dioxide, particulates, and carbon monoxides, areawide mass emission offsets are not acceptable and the applicant shall perform atmospheric simulation modeling to ensure that the emission offsets provide a positive net air quality benefit. However, the department may exempt the applicant from the atmospheric simulation modeling requirement if the emission offsets provide a positive net air quality benefit, are obtained from an existing source on the same premises or in the immediate vicinity of the new source, and the pollutants disperse from substantially the same effective stack height.

(9) Credits for an emissions reduction can be claimed to the extent that the department has not relied on it in issuing any air quality preconstruction permit under subchapters 9, 11, 17, and 18, or Montana has not relied on it in a demonstration of attainment or reasonable further progress.

(10) Production of and equipment used in the exploration, production, development, storage, or processing of oil and natural gas from stripper wells, are exempt from both the requirements of subchapter I, part D, subpart IV of the FCAA, and the application of this subchapter and subchapter 18 to any nonattainment area designated as serious for particulate matter (PM-10).

(11) Emission reductions otherwise required by any applicable rule, regulation, air quality preconstruction permit condition or the FCAA are not creditable as emissions reductions for the purposes of the offset requirement in [RULE XXVII](1)(c). Incidental

emission reductions which are not otherwise required by any applicable rule, regulation, air quality preconstruction permit or the FCAA shall be creditable as emission reductions for such purposes if such emission reduction meets the requirements of this rule. AUTH: 75-2-111, 75-2-203, MCA IMP: 75-2-202, 75-2-203, 75-2-204, MCA

RULE XXIX DEFINITIONS For the purpose of this subchapter:

(1) The definitions contained in [RULE XXIV] shall be applicable.

(2) "Significance level" means, for any of the following pollutants, an ambient air quality impact greater than any of the averages cited below:

(a) For sulfur dioxide:

(i) an annual average of 1.0 micrograms per cubic meter;

(ii) a twenty-four hour average of 5.0 micrograms per cubic meter; or

(iii) a three-hour average of 25.0 micrograms per cubic meter.

(b) For PM-10:

(i) an annual average of 1.0 micrograms per cubic meter; or

(ii) a twenty-four hour average of 5.0 micrograms per cubic meter.

(c) For nitrogen dioxide, an annual average of 1.0 micrograms per cubic meter.

(d) For carbon monoxide:

(i) an eight-hour average of 0.5 milligrams per cubic meter; or

(ii) a one-hour average of 2.0 milligrams per cubic meter. AUTH: 75-2-111, 75-2-203, MCA IMP: 75-2-202, 75-2-203, 75-2-204, MCA

RULE XXX INCORPORATION BY REFERENCE (1) In this subchapter, and unless expressly provided otherwise, the following is applicable:

(a) Where the board has adopted a federal regulation by reference, the reference in the board rule shall refer to the federal agency regulations as they have been codified in the July 1, 1992, edition of Title 40 of the Code of Federal Regulations (CFR);

(b) Where the board has adopted a section of the United States Code (U.S.C.) by reference, the reference in the board rule shall refer to the section of the U.S.C. as found in the 1988 edition and Supplement II (1990);

(2) For the purposes of this subchapter, the board hereby adopts and incorporates herein by reference the following:

(a) 40 CFR 81.327, which sets forth the air quality attainment status designations for Montana;

(b) 40 CFR, Part 60, which sets forth standards of performance for new stationary sources;

(c) 40 CFR, Part 61, which sets forth emission standards for hazardous air pollutants;

(d) Subchapter I, part D, subpart IV of the Federal Clean Air Act, 42 U.S.C. sections 7401 et seq., which establishes additional requirements for particulate matter nonattainment areas;

(e) Section 7503 of the Federal Clean Air Act, 42 U.S.C. sec-

tions 7401 et seq., which establishes permit requirements for permit programs in nonattainment areas;

(f) The standard industrial classification manual, 1987, executive office of the President, office of management and budget, (U.S. government printing office stock number 1987 0-185-718), which sets forth a system of industrial classification and definition based upon the composition and structure of the economy.

(g) A copy of the above materials is available for public inspection and copying at the Air Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, 1400 Broadway, Helena, Montana 59620. Copies of the federal materials may also be obtained at EPA's Public Information Reference Unit, 401 M Street SW, Washington, DC 20460, and at the libraries of each of the ten EPA Regional Offices. Interested persons seeking a copy of the CFR may address their requests directly to: Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. The standard industrial classification manual (1987) may also be obtained from the U.S. Department of Commerce, National Technical Information Service, 5285 Port Royal Road, Springfield, Virginia 22161 (order no. PB 87-100012).

AUTH: 75-2-111, 75-2-203, MCA IMP: 75-2-202, 75-2-203, 75-2-204, MCA

RULE XXXI WHEN AIR QUALITY PERMIT REQUIRED (1) Any new major stationary source or major modification which would locate anywhere in an area designated as attainment or unclassified for a national ambient air quality standard under 40 CFR 81.327 and which would cause or contribute to a violation of a national ambient air quality standard for any pollutant at any locality that does not or would not meet the national ambient air quality standard for that pollutant, shall obtain from the department an air quality preconstruction permit prior to construction in accordance with subchapters 9 and 11 and all requirements contained in this subchapter.

(2) In the absence of emission reductions compensating for the adverse impact of the source, the air quality preconstruction permit will be denied.

AUTH: 75-2-111, 75-2-203, MCA IMP: 75-2-202, 75-2-203, 75-2-204, MCA

RULE XXXII ADDITIONAL CONDITIONS OF AIR QUALITY PERMIT (1) The department will not issue an air quality preconstruction permit required under [RULE XXXI] unless the requirements of subchapters 9 and 11 and the following additional conditions are met:

(a) The new source is required to meet an emission limitation, as more fully described in (2) and (3) below, which specifies the lowest achievable emission rate for such source;

(b) The applicant certifies that all existing major stationary sources owned or operated by the applicant (or any entity controlling, controlled by, or under common control with the applicant) in the state of Montana are in compliance with all applicable emission limitations and standards under the FCAA or are in compliance with an expeditious schedule of compliance which is federally enforceable or contained in a court decree;

(c) The new source must obtain from existing sources emission reductions (offsets), expressed in tons per year, which provide both a positive net air quality benefit in the affected area as determined in accordance with (3) below, [RULE XXXIII], and [RULE XXXIV], and a ratio of required emission offsets to the proposed source's emissions of 1:1 or greater; and

(d) The air quality preconstruction permit contains a condition requiring the source to submit documentation, prior to commencement of operation that the offsets required in the permit have occurred.

(2) If the department determines that technological or economic limitations on the application of measurement methodology to a particular class of sources would make the imposition of an enforceable numerical emission standard infeasible, the department may instead prescribe a design, operational or equipment standard. In such cases, the department shall make its best estimate as to the emission rate that will be achieved, and must take such steps as are necessary to ensure that this rate is federally enforceable. Any air quality permit issued without an enforceable numerical emission standard must contain enforceable conditions which assure that the design characteristics or equipment will be properly maintained (or that the operational conditions will be properly performed) so as to continuously achieve the assumed degree of control. As used in this subchapter, the term "emission limitation" shall also include such design, operational, or equipment standards.

(3) The requirements of (1)(a) and (1)(c), above, shall only apply to those pollutants for which the major stationary source or major modification is major.

(4) If the emissions from the proposed source would cause a new violation of a national ambient air quality standard but would not contribute to an existing violation, the new source must meet a more stringent and federally enforceable emission limitation, as more fully described in (2), above, and/or control existing sources below allowable levels through federally enforceable methods so that the source will not cause a violation of any national ambient air quality standard. The new emission limitation must be accomplished prior to the new source's startup date.

(5) The issuance of an air quality permit will not relieve any owner or operator of the responsibility to comply fully with applicable provisions of the Montana state implementation plan and any other requirements contained in or pursuant to local, state or federal law.

(6) Emission reductions (air quality offsets) under subsection (1)(c) above must also comply with the additional requirements for determining the baseline and magnitude of emission reductions (air quality offsets) contained in [RULE XXVII](c) and [RULE XXVIII], except that [RULE XXVIII](6)-(8) shall not be applicable to offsets required under this subchapter.

AUTH: 75-2-111, 75-2-203, MCA IMP: 75-2-202, 75-2-203, 75-2-204, MCA

RULE XXXIII REVIEW OF SPECIFIED SOURCES FOR AIR QUALITY IMPACT

(1) For "stable" air pollutants (i.e., sulfur dioxide, particulate matter and carbon monoxide), the determination of whether a

source will cause or contribute to a violation of a national ambient air quality standard generally should be made on a case-by-case basis as of the proposed new source's startup date using the source's allowable emissions in an atmospheric simulation model (unless a source will clearly impact on a receptor which exceeds a national ambient air quality standard).

(2) For sources of nitrogen oxides, the initial determination of whether a source would cause or contribute to a violation of the national ambient air quality standard for nitrogen dioxide should be made using an atmospheric simulation model assuming all the nitric oxide emitted is oxidized to nitrogen dioxide by the time the plume reaches ground level. The initial concentration estimates may be adjusted if adequate data are available to account for the expected oxidation rate.

AUTH: 75-2-111, 75-2-203, MCA IMP: 75-2-202, 75-2-203, 75-2-204, MCA

RULE XXXIV BASELINE FOR DETERMINING CREDIT FOR EMISSIONS AND AIR QUALITY OFFSETS (1) For the purpose of this subchapter the following requirements shall apply:

(a) The requirements of [RULE XXVIII], except that [RULE XXVIII](6) -(8) is not applicable to offsets required under this subchapter;

(b) Emission offsets must be reductions in actual emissions for the same pollutant obtained from the same source or other sources which are located in the same general area of the proposed major stationary source or modification, and that contribute to or would contribute to the violation of the National Ambient Air Quality Standard;

(c) In the case of emission offsets involving volatile organic compounds and oxides of nitrogen, offsets will generally be acceptable if they are obtained from within the areas specified in (b). If the proposed offsets would be from sources located at considerable distances from the new source, the department shall increase the ratio of the required offsets and require a showing by the applicant that nearby offsets were investigated and reasonable alternatives were not available; and

(d) In the case of emission offsets involving sulfur dioxide, particulates, and carbon monoxide, areawide mass emission offsets are not acceptable, and the applicant shall perform atmospheric simulation modeling to ensure that emission offsets provide a positive net air quality benefit. The department may exempt the applicant from the atmospheric simulation modeling requirement if the emission offsets provide a positive net air quality benefit, are obtained from an existing source on the same premises or in the immediate vicinity of the new source, and the pollutants disperse from substantially the same effective stack height.

AUTH: 75-2-111, 75-2-203, MCA; IMP: 75-2-202, 75-2-203, 75-2-204, MCA

3. The proposed amendments to ARM 16.8.701 add a number of new definitions resulting from substantial revisions to the department's prevention of significant deterioration (PSD) and nonattainment permitting programs, new statutory authority provided by the

1993 Legislature, and requirements for the addition of a new operating permit program pursuant to Title V of the Clean Air Act. These amendments also include a number of housecleaning amendments, to clarify the operation of the current rules in areas where confusion has existed. The proposed amendments to ARM 16.8.1407 eliminate the mass particulate emission limitation for wood waste burners, and require owners or operators of such facilities to maintain an operating log to maximize efficient operation. The amendments to subchapter 14 also include a number of housecleaning and structural amendments (including new rule XXIII) to clarify the operation of the current rules in areas where confusion has existed.

The proposed new rules I and XXII are structural changes to simplify and clarify the incorporation by reference process. Proposed new rule II adopts the Montana source testing protocol and procedures manual (July 1993, ed.), which is a department manual setting forth uniform procedures and requirements for sampling and data collection, recording, analysis and transmittal. Proposed new rules III through XXI and XXIV through XXXIV implement substantial revisions to the existing PSD and nonattainment permitting programs, respectively.

The department is proposing these new rules and amendments to existing rules for a number of reasons. First, the department has been notified by the Environmental Protection Agency (EPA) that a number of changes to the department's current permitting authority are necessary, in order to assure the ultimate approveability of various control strategies for PM-10 that have been submitted to EPA for inclusion into the Montana state implementation plan. Specifically, EPA has requested that the department revise the current rules relating to new source review, prevention of significant deterioration (PSD), and nonattainment permitting. In addition, both the federal PSD and nonattainment programs were changed after the 1990 amendments to the federal Clean Air Act, and parts of the nonattainment rules have been modified by court decisions.

Second, through practice and application of the current rules, the department has identified a number of areas in the current permitting rules where confusion existed, primarily because of the differences between the federal language and the current language in the state rules. To eliminate this confusion, the department has attempted to stay as close to the federal language as possible in both the new PSD and nonattainment rules. The department's core rules relating to air quality permitting, found in Title 16, Chapter 8, subchapter 11, will be proposed for revision in a future notice. This notice includes the proposed adoption of new rules for PSD (new rules III through XXI) and nonattainment permitting (new rules XXIV through XXXIV).

Third, and as part of its review of the PM-10 control strategy submittals, EPA has notified the department that the current requirements for source testing protocol are inadequate, are not clearly defined, and are of questionable enforceability. If not corrected, these deficiencies will preclude approval by EPA of the submitted PM-10 control strategies. The department has proposed adoption of new rule II to address these concerns.

Fourth, the department has made several revisions to the wood waste burner rule, ARM 16.8.1407, to address concerns raised by EPA

as to enforceability. The current version of the rule was disapproved by EPA because of this deficiency.

Fifth, several housekeeping and structural changes have been made to current subchapters 7 and 14 for clarity. Several new definitions have been added to subchapter 7 as part of the new rules relating to PSD and nonattainment permitting, as a result of new statutory authority provided by the 1993 Legislature, and in anticipation of the adoption of a new operating permit program pursuant to Title V of the federal Clean Air Act.

4. The department proposes to repeal ARM 16.8.921 through 16.8.943, which can be found on pages 16-172 through 16-195, because they concern the permitting program for the prevention of significant deterioration and proposed new rules III through XXI entirely replace them. The cites for these repeals are: AUTH: 75-2-111 and 75-2-203, MCA; and IMP: 75-2-202 and 75-2-203, MCA.

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

by William J. Gutz
for ROBERT J. ROBINSON, Director

Certified to the Secretary of State June 14, 1993.

Reviewed by:

Eleanor J. Parker
Eleanor Parker, DHES Attorney

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

In the matter of the amendment of ARM 16.14.406 dealing with disposal) fees for solid waste.)	NOTICE OF PUBLIC HEARING FOR PROPOSED AMENDMENT OF ARM 16.14.406 (Solid & Hazardous Waste)

To: All Interested Persons

1. On July 21, 1993, at 9:00 a.m., the department will hold a public hearing in Room C209 of the Cogswell Building, 1400 Broadway, Helena, Montana, to consider the amendment of the above-captioned rule.

2. The rule, as proposed to be amended, appears as follows (new material is underlined; material to be deleted is interlined):

16.14.406 VOLUME-BASED DISPOSAL FEE (1)-(2) Remain the same.

(3) In addition to the volume based fee specified in (1) of this rule, any person licensed to dispose of or incinerate solid waste shall submit to the department a quarterly fee of $0.13 per ton of solid waste generated outside Montana and disposed of or incinerated within Montana. All facilities that accept wastes from outside Montana for the purpose of incineration or disposal must weigh the wastes accepted at that facility to accurately determine the volume accepted.

(4) Each facility receiving waste generated outside Montana must record the weights of all out-of-state waste received and such records must be placed in the operating record and must be reported to the department in the annual report specified in ARM 16.14.407.

AUTH: 75-10-115, 75-10-204, 75-10-221, MCA
IMP: 75-10-115, 75-10-118, 75-10-221, MCA

3. The department is proposing these amendments to the rule in order to implement 75-10-118 and 75-10-204, MCA, as amended by HB64, 53rd Legislature (1993), with regard to the assessment of additional fees for waste generated outside Montana and disposed of or incinerated within Montana.

4. Interested persons may submit their data, views, or arguments concerning the proposed amendments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Pat Crowley, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620, no later than July 23, 1993.

5. Dayna Shepherd has been designated to preside over and conduct the hearing.

for ROBERT J. ROBINSON, Director

Certified to the Secretary of State June 14, 1993.

Reviewed by:

Eleanor Parker, DHES Attorney

BEFORE THE BOARD OF ATHLETICS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment of rules pertaining to athletics	) CORRECTED NOTICE OF 8.8.3102 TICKETS, 8.8.3103 POINT SYSTEM - SCORING, 8.8.3106 SECONDS, 8.8.3407 INSPECTORS, 8.8.3701 REFEREE, 8.8.4001 AUSTRALIAN TAG TEAM WRESTLING

TO: All Interested Persons:

1. On March 25, 1993, the Board of Athletics published a notice of proposed amendment of the above-stated rules at page 363, 1993 Montana Administrative Register, issue number 6. The Board published a notice of adoption at page 1109, 1993 Montana Administrative Register, issue number 10, adopting all but two rules exactly as proposed and two rules as proposed but with amendments.

2. Staff inadvertently omitted amendments that should have been proposed in the original notice. These amendments are similar to those proposed in the original notice (substituting the words "contest", "exhibition", etc. with the words "athletic event"). The other amendments shown in this corrected notice are renumbering subsections correctly, or making amendments which are not substantive in nature that should have been proposed in the original notice.

"8.8.3102 TICKETS (1) through (4) will remain the same as originally proposed and adopted.

(5) Licensed clubs are prohibited from selling any tickets for any price other than the price printed on the ticket, or to change the price of tickets at any time during the ~~exhibition or contest~~ ATHLETIC EVENT for a price less than tickets for the same seats were sold or offered before the ~~exhibition or contest~~ ATHLETIC EVENT.

(6) and (7) will remain the same as originally proposed and adopted."

Auth: Sec. 23-3-405, MCA; IMP, Sec. 23-3-405, MCA

3. Subsection (5) was not proposed for amendment in the orignal notice and should have been proposed as shown above.

"8.8.3103 POINT SYSTEM - SCORING (1) through (3) will remain the same as originally proposed and adopted.

(3) through (5) will remain the same but will be renumbered (4) through (6)."

Auth: Sec. 23-3-405, MCA; IMP, Sec. 23-3-405, MCA

4. The original proposal set forth the language "(3) through (6) will remain the same but will be renumbered (4) through (7)." There are only (5) subsections in ARM 8.8.3103 so the language should read "(3) through (5) will remain the same but will be renumbered (4) through (6)" as shown above.

"8.8.4001 AUSTRALIAN TAG TEAM WRESTLING (1) will remain the same as originally proposed and adopted.

(2) The athletic event begins with one contestant from each team wrestling one contestant from the opposing team while their respective team PARTNERS remain on the apron of the ring outside of the ring ropes. A contestant cannot enter the ring unless his partner is defeated or he is able to touch his partner and to relieve him. He must have hold of a regulation 3-foot rope with a knot in one end and the other end looped over the ring post of his team's corner. At the time of a tag contact between partners, the contestant outside of the ropes must have both feet on the apron floor and must reach over the top rope only to make contact. The referee must see to it that the contestant in the ring after tagging his partner, retires to the outside of the ring before his partner can enter the ring. Not more than 2 referees are permitted to be in the ring at the same time during the athletic event. During the team athletic event, team partners may relieve each other as often as they desire as long as neither has lost a fall for his team. When a contestant loses a fall, he must retire to the ringside at his corner.

(3) through (9) will remain the same as originally proposed and adopted."

Auth: Sec. 23-3-405, MCA; IMP, Sec. 23-3-405, MCA

5. The word "partners" was interlined in the original notice but should remain in the rule as shown above.

6. The implementing sections which are currently cited in ARM 8.8.3406, 8.8.3407 and 8.8.3701 are incorrect. The sections listed are 23-4-402, 23-4-404, 23-4-405, 23-4-501, and 23-4-603, MCA. The sections listed should be 23-3-402, 23-3-404, 23-3-405, 23-3-501, and 23-3-603, MCA. The Board of Athletics is located in Title 23, chapter 3 of the Montana Code Annotated.

BOARD OF ATHLETICS
ANDY VANDOLAH, CHAIRMAN

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

Annie M. Bartos
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, June 14, 1993.

BEFORE THE BOARD OF MEDICAL EXAMINERS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the proposed adoption of a new rule pertaining to the practice of acupuncture	)))	NOTICE OF ADOPTION OF NEW RULE I (8.28.508) UNPROFESSIONAL CONDUCT

TO: All interested persons:

1. On April 15, 1993, the Board of Medical Examiners published a notice of proposed adoption of New Rule I Unprofessional Conduct pertaining to the practice of acupuncture in the State of Montana, at page 498, 1993 Montana Administrative Register, issue number 7. No hearing was requested or held.

2. The Board has adopted new rule I (8.28.508) as proposed but with the following changes:

"8.28.508 UNPROFESSIONAL CONDUCT The term "unprofessional conduct" as used in section 37-13-311, MCA, includes, but is not limited to the following:

(1) Commission of an act of sexual abuse, misconduct, or exploitation. Each of the following acts constitutes sexual abuse, misconduct or exploitation, even where the patient is perceived as seductive:

(a) will remain the same as proposed.

(b) failure to maintain proper boundaries ~~even where the patient is perceived as seductive~~;

(c) will remain the same as proposed.

(d) failure to provide the patient with the opportunity to wear underwear or a patient gown ~~smock~~ during treatment;

(e) through (3) (as set forth in the published notice).

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

COMMENT: A comment was received that the language "appropriate boundaries" might not be clear to members of the acupuncture profession, and therefore subject to challenge for vagueness, especially given the high standards for regulatory and statutory prohibitions that deal with speech.

RESPONSE: The language of the rule, including "appropriate boundaries," was drafted by a committee comprised of three Montana-licensed acupuncturists, one Board member trained in acupuncture, an attorney for the Montana Association of Acupuncture and Oriental Medicine, and an attorney for the Board. The language "appropriate boundaries" is taken from a publication by the American Association of Acupuncture and Oriental Medicine entitled Sexual Ethics Guidelines and Code of Ethical Behavior. The Board therefore believes that if that language is used by and acceptable to these representatives of the acupuncture profession, it will be sufficiently clear to other members of the profession and the public to give fair notice of what is contemplated.

COMMENT: A comment was received that the language "even where the patient is perceived as seductive," appearing in the rule notice as part of subsection (1)(b) was confusingly placed, i.e., it could not be ascertained whether the language was applicable only to subsection (1)(b) or to all other subsections under section (1) of the rule.

RESPONSE: The Board deemed the comment well taken, and has amended the rule as set forth above, moving the language to section (1), second sentence.

COMMENT: A comment was received that the proposed rule should be amended to include a provision that states that performing procedures beyond the authorized scope or level of care or treatment for which the provider is licensed is unprofessional conduct.

RESPONSE: While the concept promoted by the comment may be well taken, the Board believes that such an amendment would introduce new matter substantially different from the rule as noticed. As such, an amendment to that effect would deprive interested parties and the public of appropriate opportunity to comment and participate in the rule-making procedure. Accordingly, the Board declines to adopt the suggested amendment.

In addition, the Board notes that medical conduct beyond the scope of the practitioner's license is already subject to penalty under Sections 37-3-325 and 37-3-326, MCA, and there may be no necessity to include the recommended amendment in the Acupuncture Practice Act in order to adequately protect the public.

COMMENT: A comment was received that section (2) of the proposed rule, dealing with informed consent, was unnecessary in that by merely scheduling an appointment with an acupuncturist a patient was consenting to treatment. The comment further maintained that requiring informed consent "revert[ed] acupuncture back to the 'research setting'" from whence it had derived many years ago.

RESPONSE: The Board believes that current standard of care in the health care professions requires informed consent, and that the mere request for assistance from a health care practitioner does not imply informed consent to each and every possible procedure which the practitioner may employ. The Board believes the specific provisions set forth in section (2) of the proposed rule are necessary and desirable for the protection of the public and adopts them as noticed.

COMMENT: A comment was received that, where a person licensed under both the Acupuncture Practice Act and another professional Practice Act loses the other license for unprofessional conduct, the acupuncture license should be mandatorily revoked.

RESPONSE: The Board believes that mandatory revocation for unprofessional conduct in another field is not necessary for the protection of the public. Where the proven unprofessional conduct violates the Acupuncture Practice Act as well, the Board can and does act on the acupuncture license

to the degree necessary to protect the public. Removal of the Board's discretion in this matter would not substantially assist the Board in its regulation of the profession, or the public.

Additionally, the proposal seeks an amendment which would so substantially differ from the published notice that adoption would deprive interested parties and the public of the opportunity for fair comment and participation in the rule-making process. Accordingly, the Board declines the suggestion.

COMMENT: A comment was received that the word "smock" in subsection (1)(d) commonly refers to a doctor's lab coat or artist's garment, and that a better term would be "patient gown."

RESPONSE: The Board accepts the comment, and approves subsection (1)(d) as amended above.

BOARD OF MEDICAL EXAMINERS
PETER L. BURLEIGH, PRESIDENT

By: _____
ANNIE M. BARTOS, CHIEF COUNSEL
DEPARTMENT OF COMMERCE

_____
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, June 14, 1993

BEFORE THE BOARD OF SOCIAL WORK EXAMINERS
AND PROFESSIONAL COUNSELORS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment of rules pertaining to licensure requirements for social workers and professional counselors	NOTICE OF AMENDMENT OF RULES PERTAINING TO THE PRACTICE OF SOCIAL WORK AND PROFESSIONAL COUNSELING

TO: All Interested Persons:

1. On January 28, 1993, the Board of Social Work Examiners and Professional Counselors published a notice of proposed amendment at page 92, 1993 Montana Administrative Register, issue number 2.

2. The Board has amended ARM 8.61.402 exactly as proposed but with an addition to the statement of reasonable necessity shown below and has amended ARM 8.61.1201 as proposed, but with the changes shown below:

8.61.402 LICENSURE REQUIREMENTS FOR SOCIAL WORK

REASON: Demonstration of 3,000 hours is accomplished through the application itself. The application must therefore reflect the 3,000 hours have been completed before submission of the application. The proposed amendment does not address completion of the hours before sitting for the exam.

"8.61.1201 LICENSURE REQUIREMENTS (1) For the purpose of section 37-23-202, MCA, a planned graduate program of study is one which requires 60 semester hours (90 quarter hours), primarily counseling in nature, six semester hours (nine quarter hours) of which were earned in an advanced counseling practicum which resulted in a graduate degree from an institution accredited to offer a graduate program in counseling. An institution accredited to offer such a degree program is a college or university accredited by various associations of colleges and secondary schools. The planned graduate program shall be recognized by the department chairman OR AN EQUIVALENT POSITION. The applicant's planned graduate program shall meet the following minimum board requirements; an identifiable starting date evidenced by a letter of admission to the program, or other similar document; completion of CACREP core courses as evidenced by submission of a summary sheet on education on a form prescribed by the board; acceptance of a maximum of 12 post-baccalaureate graduate semester (18 quarter) credits or up to 20 semester (30 quarter) credits of a completed graduate counseling degree transferred from other institutions or programs; and acceptance of credits granted six years or less from the applicant's date of graduation from the planned graduate program. Credits shall be completed in the following areas:

(a) through (4) will remain the same as proposed."

Auth: Sec. 37-1-131, 37-23-103, MCA; IMP, Sec. 37-23-202, MCA

REASON: The proposed amendment also standardizes the information to be contained on the application,and allows demonstration of statutory requirements being met through the completion of the information as outlined in the rule.

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

COMMENT NO. 1: ARM 8.61.1201 states that the program shall be recognized by the "department chairman." Different programs within different institutions may have different titles for this position. Suggested language may include "academic unit administering the graduate program in counseling."

RESPONSE: The Board concurs with the comment and will amend the rule as shown above.

COMMENT NO. 2: Two comments were received stating the section of ARM 8.61.1201 which requires graduate programs of study to be completed within six years, and places limits on the number of credits which may be transferred into that program is limiting to those students currently pursuing a planned graduate program.

RESPONSE: The Board has thoroughly considered this issue with input from several academic professionals and feels the proposed rule language is consistent with the requirements set forth at most academic institutions.

COMMENT NO. 3: Two comments were received stating there is a lack of opportunity for those located in rural areas to complete the 2,000 hours of supervised experience as defined by the Board in ARM 8.61.1201, in a timely fashion, and without exorbitant cost.

RESPONSE: The 2,000 hours of supervised experience are required by statute, and the Board must uphold the statutory requirements, in keeping with national standards.

COMMENT NO. 4: Staff of the Administrative Code Committee commented that the statement of reasonable necessity for ARM 8.16.402 did not contain a sufficient statement as to why the statute needed clarification.

RESPONSE: The Board has amended the statement of reasonable necessity as shown above.

COMMENT NO. 5: The Administrative Code Committee commented that the statement of reasonable necessity for ARM 8.61.1201 must state why the Board's amendments are necessary, not just that it is adopting them.

RESPONSE: The Board has amended the statement of reasonable necessity as shown above.

BOARD OF SOCIAL WORK EXAMINERS
AND PROFESSIONAL COUNSELORS
RICHARD SIMONTON, CHAIRMAN

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

BY: _____
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, June 14, 1993.

BEFORE THE LOCAL GOVERNMENTAL ASSISTANCE DIVISION
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the proposed) NOTICE OF AMENDMENT OF
amendment of a rule pertaining) 8.94.4102 REPORT FILING
to report filing fees paid by) FEES
local government entities under)
the Montana Single Audit Act)

TO: All Interested Persons:

1. On May 13, 1993, the Local Government Assistance Division published a notice of proposed amendment of the above-stated rule at page 755, 1993 Montana Administrative Register, issue number 9. The hearing was held on June 2, 1993, at 9:00 a.m., in the large downstairs conference room at the Department of Commerce building, 1424 - 9th Avenue, Helena, Montana.

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

3. Three members of the public attended and testified at the hearing. In addition, the Division received one written comment during the comment period provided for by the Administrative Procedure Act. The Division has thoroughly considered all comments and testimony received. Those comments and the Division's responses follow:

COMMENTS: Neither the oral testimony nor the written comments were in opposition to the Division's proposed amendment, which would reduce the required report filing fees paid by local government entities subject to audit under the Montana Single Audit Act.

All comments received related to the overall acceptability of the filing fee as a method to fund the Division's responsibilities under the Montana Single audit Act, and the ability of county governments to pay the fee because of limited county revenues. Individuals making comments did not believe the filing fee was the appropriate source of revenue to fund the program, and stated that county governments have had their tax revenue frozen and should not have to pay additional fee mandated by the State. In addition, one individual stated that he believed the fee was not proper because the legislature did not provide county governments with additional revenue or an additional funding mechanism to pay it, which he believes is required by State law.

RESPONSE: The testimony received did not relate directly to the proposed amendment to ARM 8.94.4102, which would reduce the required filing fees. The filing fee requirement is established by State statute, and the total amount of the fee required to be raised each year is established by the State Legislature through the approved budget for the Single Audit Act program. The Division does not have the authority to establish an alternative funding mechanism, nor can it establish a filing fee schedule which results in total filing fees being less than that required to fund the approved budget

of the program for each year.

4. No other comments or testimony were received.

LOCAL GOVERNMENT ASSISTANCE
DIVISION

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


ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State June 14, 1993.

BEFORE THE FISH, WILDLIFE, & PARKS COMMISSION
OF THE STATE OF MONTANA

In the matter of the amendment to Rule 12.3.402 relating to license refunds.	)))))	CORRECTED NOTICE OF AMENDMENT OF ARM 12.3.402

To: All Interested Persons

1. On January 28, 1993, the Fish, Wildlife and Parks Commission published notice at page 105 of the Montana Administrative Register, issue no. 2 to consider the amendment of the above-captioned rule. On May 13, 1993, the Fish, Wildlife and Parks Commission published notice of adoption to amend rule 12.3.402, with certain changes made in response to comments, at page 951 of the 1993 Montana Administrative Register, issue number 9.

2. In adopting the rule changes the words "will be granted" were inadvertently omitted from 12.3.402(e). The proper language has been included in the June 30, 1993, replacement pages.

3. The correct text of 12.3.402(e) is as follows:

(e) Refunds <u>will be granted</u> for nonresident combination licenses received through September 1. After September 1, refunds will be issued only for the reasons outlined in (a) through (c) above. After October 1, refunds for nonresident combination or resident and nonresident general licenses will not be issued.

FISH, WILDLIFE AND PARKS COMMISSION

Robert N. Lane
Rule Reviewer

Allen A. Elser
Deputy Director

Certified to the Secretary of State on June 14, 1993.

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

In the matter of the amendment of Montana's prevailing wage rates, pursuant to Rule 24.16.9007	))))	NOTICE OF AMENDMENT OF PREVAILING WAGE RATES-SERVICE OCCUPATIONS

TO ALL INTERESTED PERSONS:

1. On March 25, 1993, the Department published notice at pages 391 to 392 of the Montana Administrative Register, Issue No. 6, to consider the amendment of the above-captioned rule.

2. On April 19, 1993, a public hearing was held in Helena concerning the proposed rules at which oral and written comments were received. Additional written comments were received prior to the closing date of April 26, 1993.

3. After consideration of the comments received on the proposed rules, the Department has adopted the rules as proposed with increases in the rates for the following occupations:

District One - snow-plow operator

District Two - snow-plow operator

District Three - groundskeeper, garbage collector, snow-plow operator, cleaner/janitor, auto mechanic, security guard

District Four - groundskeeper, garbage collector, snow-plow operator, cleaner/janitor, auto mechanic, forest worker

District Five - security guard, janitor-building maintenance, snow-plow operator, cleaner/janitor, janitor services supervisor

District Six - security guard, snow-plow operator

District Seven - snow-plow operator

District Eight - snow-plow operator

District Nine - snow-plow operator

District Ten - snow-plow operator

4. The Department has thoroughly considered the comments and testimony received on the proposed rules. The following is a summary of the comments received, along with the Department's response to those comments:

Comment: Mr. Earl E. Brandt, President, Teamsters Local No. 2, presented additional data for several occupations under

the jurisdiction of his local and requested that certain rates be adjusted.

Response: The Department noted that the data Mr. Brandt submitted was complete except hours worked. Mr. Brandt agreed to furnish the hours and the Department agreed to include the additional information in the wage and benefit calculations for those occupations. Teamsters Local #2 furnished additional data for groundskeeper, garbage collector, snow-plow operator, janitor-building maintenance, cleaner/janitor, and auto mechanic in districts four and three. Rates in these districts for these occupations and statewide averages increased from the preliminary rates as the result of this submission.

Comment: Mr. Gary E. Gray, District Manager, Burns International Security Services, commented that while he was pleased with the rates for most districts, he was concerned that the low rates in Helena and Butte could adversely affect his company. Mr. Gray also submitted written comments that expressed concern over the rates in Helena, Butte and Kalispell.

Response: The Department reviewed all districts for security guards and found that for Kalispell, because there was sufficient data and employer response, no change in the rate was justified. In Butte, Helena, and Bozeman, however, only one employer responded. The Department determined that because a single employer could unduly influence the rate, the statewide average or any collectively bargained rate would become the prevailing rate for that district. The rate for security guard in these three districts increased.

Comment: Mr. Gene Fenderson, President, Montana District Council of Laborers, commented on janitorial rates and rates for garbage collectors. Mr. Fenderson also submitted additional information in writing.

Response: The Department considered Mr. Fenderson's comments and included the data submitted, except where that information duplicated data that had already been submitted by an employer. Rates for the classification of janitor-building maintenance increased as a result of that information.

Mr. Fenderson questioned the distinction between the occupational classification of "janitor-building maintenance" and "cleaner/janitor." The Department uses the job descriptions contained in the U.S. Department of Labor's *Dictionary of Occupational Titles* (DOT). According to the DOT, a "janitor-building maintenance" (DOT 382.664-010) is required to do "light maintenance, plumbing, carpentry, electrical and may be boiler licensed." The "cleaner/janitor" classification (DOT 381.687-014) is required only to "dust, vacuum and mop."

In 1991 the Department renamed the former "janitor" classification (DOT 381.687-014) as "cleaner/janitor" (DOT

381.687-014) to more accurately reflect the duties required of this classification. At the same time, the classification "janitor-building maintenance" (DOT 382.664-010) was added in response to the availability of data submitted by numerous employers and collective bargaining units. The intent was to clarify the difference between these classifications and simplify enforcement.

Data from Helena School District #1, for its "maintenance group" was not used in setting any janitor rates because discussions with the school district indicated that these were skilled craftsman and not janitors. The same discussions indicated that the "custodial group" submission should be classified as "janitors-building maintenance," since those employees are required to be boiler licensed.

Data submitted by Mr. Fenderson for Garbage Collector was a duplicate of data submitted by the employer, and thus did not result in a change of rate.

Comment: Mr. Fenderson commented on several aspects of the prevailing wage law in the context of the inclusion of fringe benefits in the calculation of prevailing wage rates and on Senate Bill 342.

Response: Calculations of fringe benefits were, for a number of years, hindered by the lack of standardization among employers. Historically, the Department relied on collectively bargained fringe benefit rates (if any) in establishing benefit rates for any given classification. In recent years however, the Department has been able to standardize employer benefits data because of changing technology. A recent Federal court ruling, (*United Industry, Inc. v. the Montana Department of Labor and Industry*, No. CV 89-67-BLG-JFB, [D. Mont. Feb. 25, 1991, amended June 14, 1991]), requires the consideration of ERISA plan benefits in the administration and enforcement of prevailing wage laws and rules. As a result, a new source of data on employer paid benefits in the construction industry became available to the Department. The Department has made no changes in methodology or data collection.

One effect of Senate Bill No. 342 (passed by the 1993 legislature and signed by the governor) is to change the language of Montana's prevailing wage law to include the payment of benefit amounts into qualified ERISA plans or other bona fide programs approved by the United States Department of Labor. These changes will be taken into consideration during administration and enforcement of Montana's prevailing wage law.

Comment: Mr. Fenderson also requested a classification for mail carriers.

Response: The Department considered Mr. Fenderson's request for a classification for mail carriers. That occupation

was determined to be best described as a "mail handler." The occupation of "mail handler" is classified as a clerical occupation, according to the U.S Department of Labor's *Dictionary of Occupational Titles* (DOT). The new (1990) Bureau of Census *Alphabetical Index of Industries and Occupations*, classifies "mail handler" as either clerical or labor, depending on whether "mail sorting" is a primary part of the job description. The Department has historically relied exclusively on the *Dictionary of Occupational Titles* for classification determinations. Clerical occupations are specifically excluded from the prevailing wage laws.

There are no requests from a contracting agency regarding a classification determination for mail carriers or mail handlers. However, if the Department receives a request from a contracting agency for a classification of mail handler in the future, a determination regarding where this classification falls will be made at that time based on specific job requirements. The Department contacted the Department of Administration and was told that no request was forthcoming. For these reasons, the Department has not added the requested classifications at this time.

Written comments were also received. The following is a summary of the comments received, along with the Department's response to those comments:

Comment: The Department of Transportation submitted data on snow-plow operators.

Response: The Department added this information to the calculation of the prevailing rate for snow plow operators. As a result, the rate for this occupation increased.

Comment: Mr. Curt Wilson, Business Agent, Montana District Council of Laborers, Great Falls, submitted hours and rates for Forest Workers in District 4.

Response: The Department added this information to the calculation of the prevailing rate for Forest Workers. As a result, the rate for this occupation increased.

Comment: The City of Helena submitted additional data for garbage collectors, auto mechanics, groundskeepers, cleaner/janitors, and janitor services supervisor in District 5.

Response: The Department added this information to the calculation of the prevailing rates for these occupations. As a result, the rate for these occupations increased.

Comment: Sylvan Nursery of Billings, submitted data and commented that they needed a classification for landscape installers and lawn sprinkler installers.

Response: The Department feels that these classifications do not differ significantly from the groundskeeper classification that is included in the rates. The data submitted by this employer included no hours and was not usable. The Department has not received any requests from a contracting agency for landscape installers or lawn sprinkler installers. For these reasons, the Department has not added the requested classifications at this time. The Department will consider including the requested classification in future revisions, however.

Comment: Mr. Daryl K. Gustafson, Gustafson Plumbing, Inc. submitted comments questioning the relationship of prevailing rates and apprenticeship program wages.

Response: Although the Department also establishes wages payable for apprentices enrolled in apprenticeship training programs, there is no direct relationship between apprenticeship wages and the prevailing wages established by this rule.

The Department's authority to establish the standard prevailing rate of wages for public works contracts arises from the "Little Davis-Bacon Act", section 18-2-401, MCA, et seq. These prevailing wage rates apply only to public contracts where federal prevailing wage laws do not apply (§ 18-2-402 (2), MCA). The Research and Analysis Bureau of the Research, Safety and Training Division of the Department surveys Montana employers in order to establish the standard prevailing rate of wages.

Apprenticeship rates, however, apply only to those employment relationships that are bound by the terms of an apprenticeship agreement which is made in conformance with Title 39, Chapter 6, Part 1. The Apprenticeship Bureau surveys a number of employers involved in the applicable trade in the region to establish the apprenticeship wage levels. The survey for apprenticeship purposes is conducted separately from the prevailing wage survey and does not employ as sophisticated an averaging technique as that used for prevailing wage purposes.

5. The amended service occupation rates adopted by this rule are effective July 1, 1993.

David A. Scott
Rule Reviewer

Laurie Ekanger, Commissioner
DEPARTMENT OF LABOR & INDUSTRY

Certified to the Secretary of State, June 14, 1993.

BEFORE THE BOARD OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

In the matter of the amendment of rule 36.12.101, Definitions, 36.12.103, Application and Special Fees, 36.12.104 Issuance of Interim Permits, and new rule on testing and monitoring	NOTICE OF AMENDMENT AND ADOPTION

To: All Interested Persons

1. On April 29, 1993 the Board of Natural Resources and Conservation published a notice of proposed amendment and adoption of the above-stated rules, on pages 593-595, 1993 Administrative Register, issue number 8.

2. No public hearing was contemplated and no hearing was requested by the public. Public comments were accepted until May 28, 1993. One comment from the Administrative Rules Committee was received. It is summarized below.

3. The Board has amended rule 36.12.101, 36.12.103 and 36.12.104 and adopted Rule I as proposed.

COMMENT: The Board provided descriptions of the proposed changes, but did not provide a statement explaining why the amendments and proposed new rule are reasonably necessary at this time as required by 2-4-305, MCA.

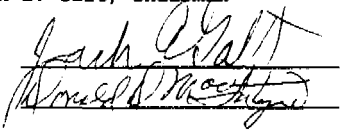
RESPONSE: Rule 36.12.101 was amended to more concisely define what is considered a combined appropriation. The past definition was too ambiguous and therefore difficult to administer 85-2-306(1), MCA, fairly and consistently throughout the state. It required the department to make assumptions when determining whether developments were considered combined appropriations. The amended rule clearly defines what is a combined appropriation without any supposition.

Rule 36.12.103 was amended to maintain the Notice of Completion of Groundwater Development, Form 602, fee at $25 after July 1, 1993. The groundwater assessment account terminates July 1, 1993 and thus $10 of the $25 fee also terminates. The cost of processing and entering the Notice of Completion of Groundwater Development form in the centralized water rights records system is commensurate with other water right documents which require a $25 fee. In order to maintain uniform fees for similar processes the department needed to amend this rule by July 1, 1993.

Rule 36.12.104 was amended after recent review of the past interim permit process and the language of the statute authorizing the issuance of interim permits. The rule amendment now corresponds more closely with the intent of the law.

Rule I was adopted as a result of the amendment to ARM 36.12.104 above. The new rule clarifies that a permit is not required to conduct testing or monitoring of water sources.

Jack E. Galt, Chairman

By: 

Submitted to the Secretary of State on June 14, 1993.

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

In the Matter of Adoption of New Rules and Amendments to Existing Rules Regarding Telecommunications Services and General Utility Tariff and Price List Filing Requirements; and Repeal of Rule 38.5.3340.	NOTICE OF ADOPTION AND AMENDMENT OF TELECOMMUNICATIONS RULES AND UTILITY TARIFF FILING REQUIREMENTS AND REPEAL OF ARM 38.5.3340

TO: All Interested Persons

1. On December 24, 1992 the Department of Public Service Regulation published notice of public hearing on proposed adoption of the proposals identified in the above titles at page 2699, issue number 24 of the 1992 Montana Administrative Register.

2. Oral comments (and supplementary written materials) were received at the public hearing held on February 23, 1993. Written comments were allowed through February 8, 1993.

3. The Department has adopted the following rules as proposed:

38.5.2703 NOTICE, 38.5.2715 RELAXED FORBEARANCE, and 38.5.2716 FORBEARANCE CONTRACTS

Comments - No comments were submitted regarding the proposed amendments to these rules.

Response - The Commission adopts the amendments to these rules as proposed.

38.5.3338 AUTOMATIC DIALING - ANNOUNCING DEVICES

Comments - US West Communications (USWC) stated that it should not be required to incur the expense of auditing compliance with this rule.

Response - The Commission rejects USWC's suggestion and adopts the rule as proposed. Only minor language changes to the existing rule have been proposed, and a new subsection referencing the pertinent federal and state statutes. The Commission believes the rule is a necessary consumer protection.

RULE I. 38.4.3401 DEFINITIONS

Comments - AT&T suggests adding a definition of "Call Aggregator." TRI, in its comments to ARM 38.5.3302, also suggests the Commission address the status of call aggregators.

Response - The notice in this proceeding did not include proposed rules addressing call aggregators. There is also an issue as to the scope of the Commission's jurisdiction over call aggregators. Although no action will be taken in this proceeding with respect to call aggregators, the Commission may reconsider the subject at a later date, either on its own initiative or upon receipt of a petition filed pursuant to § 2-4-315, MCA. The rule is adopted as proposed.

RULE IV. 38.5.3414 CALL SPLASHING PROHIBITED

Comments - Inmate Phone Systems (IPS) suggests that the exceptions to the call splashing prohibition, in Subsection (2) should be deleted.

Response - The Commission retains the call splashing exception of this rule for operator service providers, but is amending Rule VIII to permit the total prohibition of call splashing at correctional facilities.

RULE VI. 38.5.3420 DUTY TO INFORM

Comment - No comments were submitted.

Response - The Commission adopts this rule as proposed.

RULE VII. 38.5.3424 DENIAL OF SERVICE

Comments - Intellicall (IOS) commented that this rule repeats 38.5.3337(8). USWC also objected to this rule for the same reasons it expressed regarding ARM 38.5.3337 and 38.5.3338.

Response - See response to USWC comments to ARM 38.5.3337 below. Repetition is appropriate since 38.5.3337(8) applies to payphones, while Rule VII applies generally to all Operator Service Providers (OSPs).

RULE IX. 38.5.3341 UNANSWERED CALLS

Comments - IOS proposed a revision to this rule to prohibit a carrier from "knowingly" billing for incomplete or unanswered calls to reflect the difficulty of complying with this rule where answer supervision is unavailable.

Response - The Commission believes the rule as written provides a necessary consumer protection. This is a restatement of a rule that has been in effect since 1989 for OSPs.

RULE X. 38.5.3701 APPLICABILITY

Comments - (General comments to Rules X-XVIII) MCI comments that the adoption of Rules X-XVIII is premature until a decision is issued by the Montana Supreme Court in the appeal of PSC Docket No. 88.11.49 (MCI v. PSC, Cause No. 93-053). MCI, AT&T, Sprint and TRI suggest amendments to these rules to clarify and expand their scope, to ensure that all regulated telecommunications providers are subject to the same requirements, except local exchange carriers (LECs). Sprint's suggestion would delete "interexchange" before "carrier" in Rules X-XVIII. TRI also comments that specific company names should be omitted from Rule X.

Response - (General response to comments on Rules X-XVIII) The Commission chooses not to defer the adoption of these rules. The First Order on Reconsideration in Docket No. 88.11.49 was issued March 4, 1992. It states that the Commission would be proposing these rules in order to apply the same standards of regulation on all Interexchange Carriers (IXCs). Order No. 5548b, ¶ 19, pp. 8-9. No stay of the Commission's orders in Docket No. 88.11.49 have been issued. The Commission determines it to be appropriate and timely to adopt these rules, notwithstanding the pending appeal.

In response to TRI's comment that these rules should not apply to LECs, the definition of "interexchange carrier" in Rule X(2) already excludes carriers which provide local ex-

change service. Therefore, Rules X-XVIII (a new subchapter) only apply to IXCs, not LECs.

In response to the other comments by Sprint, TRI and MCI, the Commission believes Rule X as proposed is clear, and no amendments are necessary. For purposes of Rules X-XVIII, the definition of interexchange carrier is more narrow than the definition of interexchange carrier in ARM 38.5.3302(12); in that Rule X excludes LECs while ARM 38.5.3302(12) does not. This is necessary to assure that Commission rules other than Rules X-XVIII which refer to "interexchange carrier" also apply to LECs (since some LECs also carry interexchange traffic.)

MCI, Sprint, TRI and AT&T suggest that Rules X-XVIII also be applied to other telecommunications providers such as operator service providers, inmate calling providers and certain resellers. It was not the Commission's intent in proposing these rules, that Rules X-XVIII would apply to such other carriers. Only Rules I-VII and IX apply to operator service providers; and only Rules VIII and IX apply to inmate calling providers. However, in light of the parties' comments, and complaints the Commission has received, the Commission will discuss the potential need for rate and other regulations for these carriers, when it considers its next telecommunications rulemaking proceeding.

RULE XVI. 38.5.3725 RELAXED FORBEARANCE

Comments - See Comments to Rule X. MCI requests that this rule be deleted, because it unnecessarily repeats ARM 38.5.2715.

Response - See Response to Rule X. Rules X-XVIII are intended to embody the rate related regulations for IXCs in Montana. (They will be placed in a separate subchapter.) The duplication is appropriate for the sake of convenience.

RULE XVII. 38.5.3730 ANNUAL REPORTS

Comments - See Comments to Rule X.

Response - See Response to Rule X.

RULE XVIII. 38.5.3732 MARKET DATA FILING REQUIREMENTS

Comments - See Comments to Rule X.

Response - See Response to Rule X.

RULE XX. 38.5.2732 DEFINITIONS

Comments - Rules XIX-XXVI - MCI states that Rules XIX-XXVI are duplicative, contradictory, confusing and unnecessary. AT&T and Sprint state that the proposed rules are unnecessarily burdensome. TRI states that Rule XXI(1)(e)-(g) should be deleted, because they are burdensome and violate § 69-3-810, MCA. Sprint suggests an amendment to Rule XIX, to clarify the options available to a carrier to file services on a tariffed or detariffed basis. MCI supported AT&T's and Sprint's comments. USWC had no comment on this rule.

Response - The Commission will largely adopt the suggested revisions by Sprint, to clarify the alternative procedures available to carriers to introduce tariffed or detariffed services. Rules XIX through XXV only apply to applications requesting the introduction of a new service on a detariffed service pursuant to § 69-3-810, MCA (adopted by the 1991 Montana legislature). Other procedural options remain

available to request approval of a new service either on a detariffed or tariffed basis. The two other options for detariffing are described in amended Rule XIX. The procedure for introducing new tariffed services remains the same -- i.e. an application is filed with the Commission, which is noticed by the Commission (usually as an information item on the Commission's Agenda or issuance of a Notice of Opportunity for Hearing). Then, the Commission takes action pursuant to the procedures and requirements of the Montana Administrative Procedure Act (usually as an action item on the Commission's Agenda, or issuance of an Order after a hearing). In the case of an IXC, a tariffed new service will be governed by Rules X-XVIII. These rules do not preclude or supersede the use of this traditional process for the introduction of new tariffed services. Rules XIX through XVI are reasonable in light of the provisions of § 69-3-810, MCA, permitting almost automatic detariffing without any showing of competition, and the alternative filing procedures available. § 69-3-810, MCA and these rules are applicable to both LECs and IXCs.

In response to MCI's comment that some of these rules are inconsistent with the filing requirements established in Docket No. 88.11.49, MCI is correct, however these rules only apply when a carrier (IXC or LEC) desires to utilize the provisions of § 69-3-810, MCA, to automatically introduce a new service. As described above and in Rule XIX as revised, other filing procedures are available. The Commission would note, however, that the minimum price provisions (XXI(1)(c) and XXIII(2)(b)) are consistent with Order No. 5548b, Rule XV and § 69-3-811, MCA, in that all rates for telecommunications services are required to be above costs.

In response to TRI's comments, § 69-3-810(1), MCA, specifically permits the PSC to prescribe the appropriate form of notice to implement the statute. See also § 69-3-822, MCA. In addition, Subsection (1) of Rule XXI is intended to streamline the approval process for applications filed pursuant to § 69-3-810, MCA, by providing the Commission information with the application, which is necessary to analyze a filing for compliance with applicable provisions of law.

In response to MCI's final written comment, Rules XXIII and XXIV are not intended to apply to OSPs. Only Rules II-VII and IX in this rulemaking apply to OSPs. Additional regulatory requirements for OSPs will be discussed when the Commission considers proposing additional telecommunications rules. Rules XIX - XVI are intended to apply to IXCs and LECs when utilizing § 69-3-810, MCA, to introduce a new service.

RULE XXI. 38.5.2735 FILING REQUIREMENTS

Comments & Response - See Rule XX.

RULE XXII. 38.5.2740 APPROVAL PROCESS

Comments & Response - See Rule XX.

RULE XXIII. 38.5.2742 PROVISION OF NEW SERVICE

Comments & Response - See Rule XX.

RULE XXIV. 38.5.2744 PRICE LIST REVISIONS

Comments & Response - See Rule XX.

RULE XXV. 38.5.2750 RETARIFFING
Comments & Response - See Rule XX.
RULE XXVI. 38.5.2760 WITHDRAWAL
Comments & Response - See Rule XX.

4. The Department has repealed ARM 38.5.3340 (its provisions are being superseded and replaced by ARM 38.5.3337, 38.5.3341, 38.5.3343, 38.5.3405, 38.5.3410, 38.5.3416 and 38.5.3424).

Comments - AT&T comments that labeling requirements should be imposed for customer owned pay telephones and call aggregator telephone instruments. Sprint, similarly, suggests the Commission mirror the instrument labeling requirements contained in current Federal Communications Commission (FCC) regulations - 47 CFR 64.703(b).

Response - Currently, ARM 38.5.3340(1) contains telephone instrument labeling requirements. Upon consideration of AT&T and Sprint's comments, the Commission elects to retain telephone instrument labeling requirements, in order to maintain an important consumer protection. These provisions, in slightly revised form, will be contained in ARM 38.5.3410. Other provisions of 38.5.3340 are being reenacted in revised form in other rules.

5. The Department has amended and adopted the following rules as proposed with the changes indicated.

38.5.2601 TARIFFS AND PRICE LISTS: FILING FEES AND COPIES (1) and (2) Remain the same.

(3) Every utility which changes its price list sheets for rates, tolls and charges or its detariffed service sheets, shall file the sheets accompanied by a filing fee of ~~five dollars ($5)~~ two dollars ($2) per page up to a maximum filing fee of ~~$500~~ $200 per filing.

(4) Remains the same.

(5) An original and ~~three (3)~~ ten (10) copies of all tariff filings which propose a rate increase ~~, price list and detariffed service sheet filings~~ shall be filed with the commission. ~~If a rate increase (or an increase in a maximum rate provision) is being requested, an original and ten (10) copies~~ An original and three (3) copies of all price lists and other types of filings, shall be filed. AUTH: Sec. 69-3-103, MCA; IMP, Secs. 69-3-204, 69-3-301, 69-3-302, 69-3-304, MCA

Comments - Subsection (3): Sprint, MCI and TRI commented that the current filing fee is excessive, and suggest a flat filing fee of $20. TRI suggests that the PSC bill carriers quarterly. MCI comments that $5 per page should not be required when both tariffs and price lists are simultaneously filed. AT&T states that the filing fee should not apply to detariffed services.

Subsection (5): AT&T comments that 10 copies should not be required for price list or detariffed filings. MCI recommends a consistent copy requirement for all types of filings.

Response - Montana law requires that all fees charged by the Commission be commensurate with the costs incurred in administering the function for which the fee is charged. § 69-1-114, MCA. Upon consideration of this statute and the comments, proposed subsection (3) will only require $2 per page, up to $200, for price list and detariffed service sheets. Subsection (1), which requires $5 per page, up to $500, for tariff pages, was not proposed for amendment in this rulemaking; but, the Commission continues to believe that this fee is reasonable and consistent with the statute. Based upon the statute, the Commission rejects the proposals for a flat filing fee. The Commission also rejects TRI's suggestion of quarterly billing, since it would add a record-keeping burden on the Commission's small staff.

Pursuant to AT&T's comment, subsection (5) is changed to require 10 copies only when a tariff filing proposes a rate increase (for interexchange carriers - IXCs - this would only include maximum allowable rate increases). Only three copies of all other types of filings are required (this includes IXC price list rate increases and decreases and tariff rate/maximum allowable rate decreases). The Commission rejects MCI's proposal for a consistent copy requirement. The Commission's need for copies depends upon the type of filing, and the Commission does not want to require the filing of additional unneeded copies.

38.5.3302 DEFINITIONS In the interpretation of these rules, the following definitions shall be used:

(1) through (2) Remain the same.

(3) "Carrier" means any exchange carrier, inter-exchange carrier, operator service provider, inmate calling provider or other telecommunications provider which provides regulated telecommunications services pursuant to section 69-3-803, MCA.

(4) through (22) Remain the same. AUTH: Sec. 69-3-103, MCA; IMP, Secs. 69-3-102 and 69-3-201, MCA

Comments - Sprint suggests additional language to clarify the definition of carrier. TRI comments that the definition of carrier should be amended to exclude LECs. TRI also states that the PSC should address the status of call aggregators.

Response - The term "carrier" is used throughout the Commission's telecommunications rules, so a broad and accurate definition is important. The Commission adopts Sprint's suggested amendment.

Many of the Commission's existing rules are intended to apply to all telecommunications providers, including both LECs and IXCs (e.g. ARM 38.5.3301 et seq.). Therefore, TRI's suggestion to exclude LECs from the definition of carrier is inappropriate. TRI's comment is addressed by the definition of "inter-exchange carrier" in Rule X(2), which specifically excludes LECs. Rules X-XVIII only apply to IXCs, and will be placed in a separate subchapter of the ARM.

38.5.3331 BUSINESS OFFICES AND TOLL-FREE TELEPHONE INFORMATION (1) Each carrier, operator service provider and

inmate calling provider must have at least one business office to provide customers and others with access to personnel who can provide information on services and rates, accept and process service applications, explain customers' bills, adjust errors, and generally represent the carrier. If one business office serves several exchanges or states, toll-free calling to that office must be provided and the office must be staffed during Montana business hours. ~~local exchange companies shall also provide a toll-free number for other carriers or bills rendered on behalf of carriers, operator service providers and inmate calling providers, and upon request of callers.~~

(2) Exchange carriers which provide billing services for other carriers shall include in such bills the toll-free telephone numbers of such carriers, or their billing agents, which are provided to the exchange carriers in accordance with subsection (3).

(3) Carriers which bill through exchange carriers are required to provide the toll-free telephone number required in subsection (1) to all such exchange carriers. Such carriers may also provide the toll-free telephone number of their billing agent.

(4) Exchange carriers must provide a carrier's toll-free number to a customer, upon request, at no charge. AUTH: Sec. 69-3-103, MCA; IMP, Secs. 69-3-102 and 69-3-201, MCA

Comments - USWC suggests the following replacement to the last sentence of subsection (1), to clarify its meaning: "Local exchange carriers providing billing services for other providers of telecommunications service shall include in their bills the telephone numbers provided them by such providers in accordance with this rule."

IOS and Operator Assistance Network (OAN) suggested revising the rule to allow a carrier's billing agent's toll-free number to be placed on the bill, rather than the carrier's, because many local exchange companies are unable to place the phone numbers of both the billing agent and the service provider on the bill. The Payphone Company said it would be burdensome for small operator service providers to staff an office during normal business hours.

Response - The rule has been amended to incorporate revisions based upon the comments of USWC, IOS and OAN. LECs must include the carrier's (or the carrier's billing agent's) toll-free telephone number on all bills containing charges of that carrier. Although it is sufficient for the billing agent's toll-free number to appear on the bill, a LEC must provide the toll-free number of the actual carrier to a customer upon request. Also in response to USWC's comments, the Commission has added subsection (3) which requires carriers to provide their toll-free number to all exchange carriers which bill for them.

In response to the Payphone Company's comments, the Commission believes providers of telecommunications services, no matter how small, have an obligation to make themselves available to customers during normal business hours.

38.5.3332 CUSTOMER BILLING (1) through (5)(a) Remain the same.

(6) Late billing. If a carrier ~~fails to bill~~ bills a customer for a service ~~within 30~~ more than 60 days after the ~~a~~ service is provided and the customer contacts the carrier (or its billing agent) to question or dispute the late-billed charges, the ~~customer~~ carrier (or its billing agent) must ~~be allowed~~ offer the customer a payment plan that allows an equal period of time to pay the late-billed charges as it took the carrier to bill the customer. During this period, late payment charges must not be assessed on the late-billed service charges, and the carrier is prohibited from taking any collection actions against the customer other than monthly notice by mail of the unpaid charges. Any such monthly notice must not threaten any further collection action, and must contain a verbatim statement of this subsection. AUTH: Sec. 69-3-103, MCA; IMP, Secs. 69-3-102, 69-3-201 and 69-3-221, MCA

Comments - IOS commented generally that this rule should not prohibit carriers from using billing agents and that other carriers are unable to affect LECs billing systems.

(1)(a)(iii) and (5) No comments.

Subsection (6): Most parties had objections to proposed subsection (6) because they contend it is unreasonable from a practical perspective to expect carriers to issue bills within 30 days after a service is provided and/or because carrier billing systems are unable to identify for special handling any late-billed calls from a customer's total bill.

IOS and AT&T said carriers should be allowed 90 days to get bills to customers. OAN, MCI and TRI suggested at least a 60-day billing period. The Payphone Company suggested carriers be allowed 120 days. Operator Service Company (OSC) and AT&T said the proposed rule is unfair because the customer has had the benefit of the carrier's service at no charge while the carrier has incurred the expense of handling the call and the customer should pay even late-billed charges under normal terms and conditions. USWC said its billing system is unable to separate charges over 30 days old from other charges on a customer's bills. AT&T and Sprint said compliance with the proposed rule would be very expensive. Sprint said the proposed rule is unworkable and suggested modified rule language to provide for a 60-day billing period in most cases, and 120 days for charges incurred outside the regular billing cycle, and to prohibit late payment fees on late-billed charges.

Response - Concerning the 30-day billing period in subsection (6), the Commission believes customers are entitled to prompt billing of telecommunications charges. Customers who are billed late for calls they made months earlier often are surprised to receive a larger-than-usual bill that contains their current charges plus the late-billed ones and must expend much time and effort to determine if the charges have been billed in error, or if they might be duplicates of previously billed charges that were already paid. However, in view

of the objections to this proposed rule, it has been revised to extend the amount of time allowed for billing before the rule applies. The revised rule requires an extended payment period only when the customer contacts the carrier and questions the late-billed charges.

38.5.3337 PAY TELEPHONES (1) through (3) Remain the same.

~~(4)--All carrier-owned and customer-owned pay telephones are required to provide emergency call routing services as required by ARM (Rule XXVII).~~

(5) through (8) Remain the same, but are renumbered (4) through (7).

(8) All pay telephones must comply with all applicable state and federal statutes and regulations. AUTH: 69-3-103, MCA; IMP, Secs. 69-3-102 and 69-3-201, MCA

Comments - AT&T said the rule does not provide adequate notice to customers when a pay phone is not owned by the LEC, and suggested adding a provision specifically for customer-owned pay phones that would require them to meet the same standards as carrier-owned pay phones. AT&T suggested that a provision be added to require all pay phones to comply with the Americans With Disabilities Act of 1990 (ADA). MCI agreed with AT&T's comments. The Payphone Company noted it was a privately owned pay phone service provider and that it did not have problems complying with the posting requirements.

Subsection (4): IOS suggested a rewording of this rule because it said the intent of this provision is unclear since only calls to 911 are distinguishable as emergency calls.

Subsections (6) and (7): IOS said the intent of these rules is not clear because the pay phone instrument does not inhibit an operator service provider or inmate calling provider from complying with the other applicable rules herein. IOS suggests required equipment capabilities should be specified in the rules.

Subsection (8): IOS suggested revising the rule to require specific information to be included in notices of noncompliance. USWC objected to the existing requirements that local exchange companies audit pay phones in their service territories for compliance with rules and tariffs and then disconnect service to noncomplying pay phones.

See also comments to 38.5.3340.

Response - Subsection (4) is deleted as unnecessary, since carriers, including operator service providers, are required to comply with the emergency call routing requirements in Rule XXVII. IOS's comments were considered in revising Rule XXVII.

In response to AT&T's suggested addition of a rule that explicitly addresses privately owned pay telephones, the Commission notes that the existing rules require LECs to provide public access lines to customer-owned pay telephones in accordance with the exchange company's tariffs and to audit those phones for tariff compliance. The Commission does not agree that an additional provision is necessary that specifically relates to customer-owned pay telephones.

The Commission sees merit in adding a provision requiring compliance with the ADA, but such a provision was not included in the Notice in this proceeding. The Commission intends to include such a provision in its next notice of proposed telecommunications rules.

The Commission disagrees with IOS's comments on subsections (6) and (7). The Commission does not want operator service or inmate calling providers to have any difficulty complying with the revised OSP rules because pay telephones might not enable them to meet Commission requirements.

Subsection (8) is not a new rule, but an existing one for which minor language changes are being adopted. IOS and USWC both suggest revisions to the substance of this rule, which the Commission declines to adopt. The substantive changes suggested would require renoticing in the Montana Administrative Register. The Commission continues to support the current substantive provisions of this subsection. New subsection (8) is added to simply clarify that the provisions of these rules are not intended to supersede, replace or invalidate any other requirements contained in any state or federal statutes or regulations.

See also response to 38.5.3340.

RULE II. 38.5.3405 GENERAL REQUIREMENTS (1) and (a) Remain the same.

(b) Upon request, fully and immediately disclose to the consumer, at no charge, a quotation of the rates and charges for a call, the provider's method of collecting its charges, a description of the provider's method of resolving consumer complaints, a toll-free telephone number which can be used to report complaints to the provider, and all other requested information pertinent to the consumer's use of the provider's services. This provision also applies to the called party on collect calls.

(c) Remains the same.

~~(2)--Bills for operator service provider calls must be sent to the person responsible for payment within 30 days after the calls are made;~~

~~(3)~~ (2) All operator service providers must connect the consumer to the local exchange company operator or explain dialing instructions for such access upon request, and at no charge.

~~(4)~~ (3) The name, address and toll-free telephone number of the operator service provider or its billing agent must appear on all bills to consumers containing charges for the operator service provider's services.

~~(5)~~ (4) When a caller seeks to charge a call on a calling card or credit card other than one issued by the operator service provider, the caller ~~shall~~ must be informed that the operator service provider's rates will apply, and ~~the caller~~ must be given a toll-free number by which the customer can receive a rate quotation ~~of the applicable rates before the call is connected~~. The information required by this subsection must be given to the customer before the completion of the call.

~~(6)~~ (5) Remains the same. AUTH: Secs. 69-3-103 and 69-3-822, MCA; IMP, Secs. 69-3-102, 69-3-201 and 69-3-802, MCA

Comments - Subsection (1)(c): WCS Long Distance (WCS) suggested that this rule apply only upon customer request.

Subsection (2): AT&T, IOS, IPS, OAN, Sprint, MCI and TRI objected to the 30-day billing requirement as unreasonably short. (See comments to ARM 38.5.3332(6).) No commentor supported the rule as proposed.

Subsection (3): Sprint suggested a revision to the proposed rule to allow operator service providers to inform the customer to hang up and dial 0 to reach the local exchange company's operator. The Payphone Company agreed with Sprint's comments.

Subsection (4): IOS suggested that customer bills contain either the operator service provider's name, address and toll-free number or the billing agent's. The Payphone Company agreed with IOS's comments. OAN questioned the cost and necessity of including the operator service provider's address on customer bills, but did not oppose the provision.

Subsection (5): IOS suggested deletion of this rule because other rules already alert consumers to the provider's identity and require rate quotes upon consumer request. IPS commented that the rule should not apply to inmate phone services because no credit or calling cards are allowed -- i.e. their phones are collect only. MCI and Sprint urged deletion of the rule on the grounds that it would be unnecessary, burdensome and costly to implement. MCI suggested a revision to make the rule applicable only when a caller wants to charge a call on a card issued by another provider capable of providing the same call. Sprint suggested consumers would be protected if the Commission mirrored the FCC's rules that require call branding and labeling of the provider's name, address and toll-free number at or near the phone. The Payphone Company agreed with Sprint's comments. WCS suggested requiring a rate quote only upon customer request.

AT&T suggested the addition of labelling requirements for call aggregators. MCI suggested a new subsection regarding the validation of calling cards (CIID); and a new subsection requiring OSPs to file price lists and a consumer contact.

See also comments to 38.5.3340.

Response - The Commission disagrees with WCS's suggestion on subsection (1)(c) because it believes no customer should be charged for a call that was not connected to the called party.

In view of the comments received objecting to subsection (2), the Commission deletes this proposed rule (but see revision to 38.5.3332(6)).

The existing rule on the subject of local exchange operator access (38.5.3340(1)(f)) allows what Sprint suggests and the Commission has revised proposed subsection (3) accordingly, since consumers will still be able to access the local operator at no charge. The Commission has also responded to Sprint's comments by revising Rule XXVII.

In response to IOS's comments on subsection (4), the Commission has revised the rule to include billing agents.

The Commission disagrees with OAN's comments that an address for the operator service provider is costly and unnecessary. Many consumers prefer to pursue billing inquiries and complaints in writing and need to have the operator service provider's address handy for that reason.

In response to AT&T's comments, the Commission has decided to retain its current AOS labeling provisions. (See also response to AT&T's comments on Rule I above and new Rule XXVIII (38.5.3410).)

MCI's suggestion of new subsections regarding calling card validation (CIID) and OSP price lists cannot be considered here because they were not contained in the original notice. However, the Commission will consider these issues in its next telecommunications rulemaking proceeding.

In view of the comments received on subsection (5) and because a rate quote is available upon request pursuant to Rule II(1)(b), the automatic rate quote requirement of this rule has been deleted; but, in order to ensure consumers have the information necessary to exercise their right to obtain a rate quote, the Commission has added language that requires operator service providers (whether using live or automated operators) to provide callers with additional information.

The Commission has also added a sentence to subsection (1)(b) clarifying that its provisions also apply to the called party on collect calls.

See also Response to 38.5.3340.

RULE III. 38.5.3412 CALL BLOCKING PROHIBITED (1) and (2) Remain the same.

(3) This rule does not prohibit the blocking of 10XXX-1+ or 10XXX-011+ calls. AUTH: Secs. 69-3-103 and 69-3-822, MCA; IMP, Secs. 69-3-102, 69-3-201 and 69-3-802, MCA

Comments - No comments were received.

Response - The Commission is adding a sentence to clarify that this rule is not intended to prohibit blocking of 10XXX-1+ or 10XXX-011+ calls.

RULE V. 38.5.3416 EMERGENCY CALL ROUTING (1) Upon receipt of any emergency telephone call, an operator service provider must immediately provide emergency call routing service in accordance with the requirements of ARM 38.5.3343(5).

~~(2) An operator service provider is prohibited from receiving "0-" calls from a telephone instrument unless the operator service provider complies with all provisions of this rule and ARM (Rule XXVII). If an operator service provider is unable to comply with this rule and ARM (Rule XXVII), all "0-" calls must be automatically and immediately routed to the local exchange company operator.~~ AUTH: Secs. 69-3-103 and 69-3-822, MCA; IMP, Secs. 69-3-102, 69-3-201 and 69-3-802, MCA

Comments - IPS states that inmate phones should be permitted to block 0- emergency calls (See Rule VIII(2)(a) also) to reduce fraud, harassment and other problems.

Response - In response to IPS comments, Rule VIII is being amended (see below). In light of the amendments to Rule

XXVII (38.5.3343), and to prevent duplication, Rule V is being amended accordingly.

RULE VIII. 38.5.3440 INMATE CALLING PROVIDERS (1) and (2) Remain the same.

(a) Comply with the provisions and requirements applicable to operator service providers contained in ARM 38.5.3405 (1), ~~(2)~~, (3), (4), and (5) ~~and (6), IV and V~~. Call blocking is permitted. Notwithstanding ARM 38.5.3414, call splashing may be prohibited without exception.

(b) Remains the same.

(c) Comply with ARM 38.5.3341 (unanswered calls).

(3) and (4) Remain the same. AUTH: Secs. 69-3-103 and 69-3-822, MCA; IMP, Secs. 69-3-102, 69-3-201 and 69-3-802, MCA

Comments - Subsection (1): MCI suggested an amendment to broaden the definition of inmate calling provider.

Subsection (2): AT&T and TRI stated that call splashing should be totally prohibited from correctional facilities, and that only collect calls should be permitted. AT&T also states that Rule II(5) should be deleted from the list in subsection (2)(a), because inmates should not be able to charge calls to a credit card. AT&T also suggests that three-way (conference) calling also be prohibited, in order to deter fraud. IPS and IOS note that Rule II(5) should be deleted from the list in subsection (2)(a) because inmate calls are collect only. IPS agrees with AT&T and TRI that call splashing should be totally prohibited. IOS and IPS also commented that Rule V should be deleted from the list in subsection (2)(a), because emergency calls are blocked, to prevent fraud, harassment and other problems.

Response - The Commission believes the definition of inmate calling providers as proposed is sufficient, but may reconsider MCI's suggestion that it be broadened if the need arises. The Commission does not agree with AT&T's and TRI's suggestion that inmate calling should be limited to collect calls only. The type of calling provided to inmates is a decision properly left to the administrator of each correctional facility. (Also, with respect to conference/three-way calling). The Commission may reconsider these decisions if a demonstrated need is shown. The Commission agrees to permit the total prohibition of call splashing, at the discretion of the inmate calling provider and the correctional facility; so, Rule IV is being deleted from subsection (2)(a) and a permissive sentence is added. The Commission agrees that emergency calling may be prohibited, and therefore deletes Rule II(2) and Rule V from subsection (2)(a). New subsection 2(c) is being added referencing Rule IX (ARM 38.5.3341).

RULE XI. 38.5.3705 TARIFFS AND MAXIMUM ALLOWABLE RATES (1) All interexchange carriers must maintain tariffs on file ~~and approved by~~ with the commission that have been approved by the commission. The tariffs must include "maximum allowable rates" and terms, conditions and descriptions of all intrastate regulated telecommunications services offered by the interexchange carrier in Montana. The "maximum

allowable rate" which shall be listed in the tariff for each service, is the maximum rate which can be charged pursuant to a price list filed pursuant to ARM 38.5.3707.

(2) and (3) Remain the same. AUTH: Secs. 69-3-103 and 69-3-822, MCA; IMP, Secs. 69-3-102, 69-3-201, 69-3-301 and 69-3-801 et seq., MCA

Comments - See comments to Rule X. AT&T suggests a slight clarification. TRI believes this Rule should also apply to OSPs and inmate calling providers. MCI suggests an amendment to clarify this rule's applicability.

Response - See response to Rule X. (Commission response to general comments on Rules X-XVIII.) AT&T suggests a slight clarification to the first sentence of this Rule, which the Commission adopts.

RULE XII. 38.5.3707 PRICE LISTS (1) In addition to the tariffs required in ARM 38.5.3705, interexchange carriers must maintain a separate set of price lists on file with the commission, which contain ~~a brief description and the actual rates charged consumers, for~~ the names of all intrastate regulated telecommunications services offered ~~by the interexchange carrier~~ in Montana, a reference to the section or page number where the service is located in the tariff, and the actual rate charged consumers. ~~The description can be a brief summary of the detailed terms and conditions for the service found in the tariff, but must be consistent with the tariff.~~

(2) - (4) Remain the same. AUTH: Secs. 69-3-103 and 69-3-822, MCA; IMP, Secs. 69-3-102, 69-3-201 and 69-3-801 et seq., MCA

Comments - See comments to Rule X. TRI and AT&T comment that service descriptions in price lists are unnecessary; and price list information should not duplicate tariff information.

Response - See response to Rule X. The rule is being amended in response to the comments.

RULE XIII. 38.5.3709 PRICING FLEXIBILITY (1) Interexchange carriers may ~~refile~~ revise a price list by filing a proposed new price list with the commission which complies with the provisions of this subchapter, and mailing a copy to the commission's interexchange carrier mailing list at least seven (7) days prior to the proposed effective date of the new price list. The interexchange carrier must simultaneously file a certificate of service which affirms compliance with this rule.

(2) and (3) Remain the same. AUTH: Secs. 69-3-103 and 69-3-822, MCA; IMP, Secs. 69-3-102, 69-3-201 and 69-3-801 et seq., MCA

Comments - See comments to Rule X. AT&T suggests a slight wording clarification. Sprint objects to the proposed requirement that price lists be served on a mailing list and a certificate of service filed with the PSC, because it would be overly burdensome and courtesy copies are already provided to other IXCs.

Response - See response to Rule X. This rule allows pricing flexibility (below the maximum rate in the tariff and above relevant costs) without Commission approval, simply on seven days notice. This is a much less stringent form of price regulation than is imposed on other public utilities. The Commission maintains that the notice requirements are quite reasonable and not burdensome, and therefore disagrees with Sprint's comments. The Commission staff will periodically monitor the completeness of the applicable mailing list. AT&T's suggested clarification is adopted.

RULE XIV. 38.5.3715 ACCESS CHARGE FLOW-THROUGH (1) Remains the same.

(2) Whenever a Montana local exchange company's carrier access charges increase or decrease, all interexchange carriers must make a filing with the commission, requesting approval of a commensurate change in maximum allowable rates for appropriate services. All interexchange carriers must make such a filing with the commission no later than ~~fifteen (15)~~ thirty (30) days after the effective date of the change in local exchange company access charges.

(3) Remains the same. AUTH: Secs. 69-3-103 and 69-3-822, MCA; IMP, Secs. 69-3-102, 69-3-201 and 69-3-801 et seq., MCA

Comments - See comments to Rule X. MCI requests that this requirement not be adopted on the grounds that no other state in USWC's territory has such a requirement, and the requirement is a detriment to competition. MCI also states that there was no evidence presented in PSC Docket No. 88.11.49 that this requirement will benefit consumers or promote competition. MCI also questions the proper method to compute flow-throughs. MCI states that this is a very complicated area that the PSC has not thoroughly explored in any proceeding. AT&T also expressed objections to the need for flow-throughs, but stated that equal regulation is required by Montana law. Sprint supported MCI's comments.

AT&T, Sprint and TRI request that subsection (2) be amended to allow 45 days, instead of 15, to submit a flow-through filing, to allow more time for their analysis and paper work.

Response - See response to Rule X. The Commission adopted the access charge flow-through requirement in Docket No. 88.11.49, and determines that it is appropriate to impose the same requirement by this Rule on all similarly situated carriers. See § 69-3-807(6), MCA.

The Commission acknowledges the objections to the 15 day filing requirement, and amends subsection (2) to 30 days. It should be noted that the OCC Order requires new rates to go into effect within 60 days after an access charge change becomes effective. Order No. 5548b, ordering ¶1.F., p. 13. That provision is being superseded by this rule -- new rates will go into effect upon Commission action, after a filing is made pursuant to this Rule (TRI's assumption is incorrect).

MCI's questions as to the particular appropriate flow-through methodology will be addressed by the Commission as appropriate, in the context of specific filings.

RULE XV. 38.5.3720 RATES ABOVE COSTS (1) All inter-exchange carrier rates must be above relevant ~~incremental~~ costs. AUTH: Secs. 69-3-103 and 69-3-822, MCA; IMP, Sec. 69-3-811, MCA

Comments - See comments to Rule X. MCI comments that this requirement is unnecessary in the current competitive IXC market, and would be burdensome and counter-productive. Sprint supported MCI's comments.

Response - See response to Rule X. Section 69-3-811, MCA, requires prices for regulated telecommunications services to be above costs. This legal requirement is present in Montana regardless of whether this rule is adopted. The implementation and enforcement of this section must be on a specific case-by-case basis. The Commission will delete "incremental," but otherwise adopt the rule. Relevant costs may be determined on a marginal, incremental or other basis, as may be determined appropriate in specific circumstances and cases.

RULE XIX. 38.5.2730 APPLICABILITY (1) ARM 38.5.2730 through 38.5.2750 apply to applications by carriers, as defined in ARM 38.5.3302(3), for the approval of a new detariffed telecommunications service introduced pursuant to §69-3-810, MCA~~, and the provision of such services~~. As an alternatives to the procedures in ARM 38.5.2730 through 38.5.2750, carriers may elect to request that a new telecommunications service be detariffed pursuant to: (a) the commission's ~~general~~ detariffing rules, ARM 38.5.2711 through 38.5.2712, ~~or §69-3-807(4), MCA, or approved as a tariffed service~~ and § 69-3-807(2) and (3), MCA, or (b) the standards set forth in § 69-3-807(4), MCA. Nothing in ARM 38.5.2730 through 38.5.2750 precludes a carrier from otherwise introducing a new telecommunications service on a tariffed basis, pursuant to an application filed and approved by the commission. The provisions of ARM 38.5.2730 through 38.5.2750 are not applicable to new services offered on a tariffed basis. AUTH: Sec. 69-3-822, MCA; IMP, Sec. 69-3-810, MCA

Comments & Response - See Rule XX.

RULE XXVII. 38.5.3343 EMERGENCY CALL ROUTING (1) Upon receipt of any emergency telephone call, an exchange carrier must immediately connect the call to the appropriate emergency service which serves the reported location of the emergency. If the location of the emergency is not known, the exchange carrier must immediately connect the call to the appropriate emergency service which serves the originating location of the call.

(2) Consumers shall not be charged for any emergency call.

(3) An exchange carrier must stay connected on an emergency call until it is determined that the caller has been connected to the proper emergency service provider.

(4) ~~Carriers~~ An exchange carrier must provide emergency call routing, as provided in this rule, on a full-time basis, 24 hours per day, 7 days per week.

(5) Upon receipt of any emergency telephone call, inter-exchange carriers and operator service providers must immedi-

ately connect the consumer to the exchange carrier, or explain dialing instructions for access to the exchange carrier. AUTH: Secs. 69-3-103 and 69-3-822, MCA; IMP, Secs. 69-3-102, 69-3-201 and 69-3-802, MCA

Comments - TRI states that it will never receive an emergency call, because its customers will dial either "0", 911, or TRI's contract operator. TRI therefore inquires how the rule would apply to carriers like TRI. Sprint comments that 0- calls are not generally routed to it. But, other dialing sequences (e.g. "00-", "8 and 0-", and "9 and 0-") may be. Sprint states that it does not have an emergency facility database, and it would be expensive and unnecessary to require it to acquire such a database for only certain dialing sequences. Sprint now informs emergency callers to hang up and dial 0-. Sprint requests that the rule be amended to only apply to carriers receiving 0- calls.

Response - The rule is being amended in response to the comments. And, inmate calling providers are not required to comply with this Rule. (See amendments to Rule VIII also.)

NEW RULE XXVIII. 38.5.3410 POSTING REQUIREMENTS (1) Each operator service provider must post on or near each telephone instrument subscribed to its service, in plain view of consumers:

(a) the name, address, and toll-free telephone number of the operator service provider;

(b) a written disclosure that its rates are available upon request;

(c) dialing instructions detailing operator service provider dialing procedures as well as instructions for accessing the local exchange company operator; and

(d) emergency dialing information. AUTH: Sec. 69-3-103, MCA; IMP, Secs. 69-3-102 and 69-3-201, MCA

Comments & Response - See 38.5.3340 (paragraph 4. above).

Bob Anderson
Bob Anderson, Chairman

Reviewed By

CERTIFIED TO THE SECRETARY OF STATE JUNE 11, 1993.

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

In the matter of the adoption of Rules I through VIII, the amendment of rule 46.8.102 and the repeal of rule 46.8.105 pertaining to individual habilitation plans	)))))	NOTICE OF THE ADOPTION OF RULES I THROUGH VIII, THE AMENDMENT OF RULE 46.8.102 AND THE REPEAL OF RULE 46.8.105 PERTAINING TO INDIVIDUAL HABILITATION PLANS

TO: All Interested Persons

1. On May 13, 1993, the Department of Social and Rehabilitation Services published notice of the proposed adoption of Rules I through VIII, the amendment of rule 46.8.102 and the repeal of rule 46.8.105 pertaining to individual habilitation plans at page 881 of the 1993 Montana Administrative Register, issue number 9.

2. The Department has amended rule 46.8.102 and repealed rule 46.8.105 as proposed.

3. The Department has adopted rules 46.8.201 [RULE I], INDIVIDUAL PLAN: PURPOSE; 46.8.206 [RULE III], INDIVIDUAL PLAN: COMPOSITION OF INDIVIDUAL PLANNING TEAM; 46.8.203 [RULE IV], INDIVIDUAL PLAN: COMPONENTS; 46.8.207 [RULE V], INDIVIDUAL PLAN: STATUS REPORTS AND ANNUAL PLANNING MEETING; 46.8.211 [RULE VII], INDIVIDUAL PLAN: DECISION MAKING; AND 46.8.212 [RULE VIII] INDIVIDUAL PLAN: APPEAL COMMITTEE as proposed.

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

46.8.202 [RULE II] INDIVIDUAL PLAN: IMPLEMENTATION Subsection (1) remains as proposed.

(a) family WHERE AN INDIVIDUAL FAMILY SERVICE PLAN (IFSP) EXISTS;

Subsections (1)(b) through (3) remain as proposed.

AUTH: Sec. 53-2-201 and 53-20-204 MCA
IMP: Sec. 53-20-203 MCA

46.8.208 [RULE VI] INDIVIDUAL PLAN: DUTIES OF THE CASE MANAGER Subsections (1) through (1)(h) remain as proposed.

(i) to interpret OR TO APPOINT THE MOST APPROPRIATE INDIVIDUAL TO INTERPRET all documents and forms of the individual planning process to the person receiving services and any person designated to act on behalf of the person; and

Subsection (1)(j) remains as proposed.

AUTH: Sec. 53-2-201 and 53-20-204 MCA
IMP: Sec. 53-20-203 MCA

5. The Department has thoroughly considered all commentary received:

COMMENT: In Rule II(a) the exception provided for family services to the requirement for an IP plan could be misconstrued to cover circumstances where a person is in any state funded services and is living with the person's family.

RESPONSE: The department agrees with the comment and is inserting the language "where an individual family service plan exists". This language limits the exception to persons receiving services under a family services plan.

COMMENT: Is the living skills assessment of Rule IV(1)(a)(ii) required for a person who lives independently or with family and has no interest in residential services or has graduated from residential services? If the living skills assessment is required for such persons, who is responsible for completing the assessment if there is no residential services provider?

RESPONSE: The living skills assessment is required by the rule for persons living independently or with family who have an individual plan. The assessment for such persons would be completed by the case manager if there is not another appropriate person to do the assessment. The assessment for a person living independently or with family may not need to be very extensive if a determination is made that person is coping adequately.

COMMENT: In Rule IV(1)(d) the "must" should be changed to "may". The section would require that the health information listed in the rule be developed and included in the plan. This should be a discretionary matter.

RESPONSE: The development and inclusion of health information for the plan is an important aspect of planning services for a recipient. The IP team should be aware of the health status of the recipient. Health information should be developed or updated when it is medically prudent to do so or the team believes it is necessary.

COMMENT: The requirement in Rule V that the individual plan report be completed on a quarterly basis is a burden upon the case manager. The case manager is already required to complete monthly reports. This requirement should be changed to 6 months.

RESPONSE: Currently, a monthly report is prepared by the individual program coordinator (IPC). The monthly report will no longer be required. A quarterly report will now be required instead with the results provided to the case manager. Review

of the quarterly status report would constitute a case management contact. Since two contacts are required each month by the Medicaid state plan, this will not be an additional duty. The suggested six month period would be too long in duration since the status of the recipient and the circumstances of services during that period may change significantly to the detriment of the recipient.

COMMENT: The training and contract manager (TCM) of the developmental disabilities division rather than the case manager should be responsible for the requirements of Rule V(1)(d) relating to observation of the implementation objectives and the review and analysis of progress data.

RESPONSE: These are appropriate functions for the case manager to assume given the recent changes in the case management system and the functions of the case managers. A case manager may seek the advice and assistance of the TCM in carrying out these functions.

COMMENT: Rule VI(1)(i) should be changed to read: "to interpret or to appoint the most appropriate individual to interpret all documents and forms of the individual planning process to the person receiving services and any person designated to act on behalf of the person".

RESPONSE: The department agrees with the comment and is including the suggested language in the provision.

COMMENT: What actions can an IP team take if there is a lack of progress or there is dissatisfaction due to the conduct of the provider? Does it become a matter of contract compliance?

RESPONSE: The IP team is not responsible for enforcement of provider compliance with its direction. The IP rule is not an appropriate vehicle for setting forth the mechanisms and responsibilities of compliance.

The IHP team would need to bring their concerns to the attention of the regional manager of the department. If the department determined that the provider was failing to perform in accordance with the relevant rules and contract provisions, it would have available in law and under the terms of the contract several recourses for resolving the matter.

Rule Reviewer

Director, Social and Rehabilitation Services

Certified to the Secretary of State June 14, 1993.

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

In the matter of the amendment of rules 46.8.1203, 46.8.1204, 46.8.1206, 46.8.1207, 46.8.1208, 46.8.1211, 46.8.1213, 46.8.1215, 46.8.1216, 46.8.1218, 46.8.1219 and 46.8.1220 and the repeal of rule 46.8.1210 pertaining to developmental disabilities aversive procedures	)	NOTICE OF THE AMENDMENT OF RULES 46.8.1203, 46.8.1204, 46.8.1206, 46.8.1207, 46.8.1208, 46.8.1211, 46.8.1213, 46.8.1215, 46.8.1216, 46.8.1218, 46.8.1219 AND 46.8.1220 AND THE REPEAL OF RULE 46.8.1210 PERTAINING TO DEVELOPMENTAL DISABILITIES AVERSIVE PROCEDURES

TO: All Interested Persons

1. On May 13, 1993, the Department of Social and Rehabilitation Services published notice of the proposed amendment of rules 46.8.1203, 46.8.1206, 46.8.1207, 46.8.1208, 46.8.1211, 46.8.1213, 46.8.1215, 46.8.1216, 46.8.1218, 46.8.1219 and 46.8.1220 and the repeal of rule 46.8.1210 pertaining to developmental disabilities aversive procedures at page 890 of the 1993 Montana Administrative Register, issue number 9.

2. The Department has amended rules 46.8.1206, 46.8.1207, 46.8.1208, 46.8.1211, 46.8.1213, 46.8.1215, 46.8.1216, and 46.8.1219 and repealed rule 46.8.1210 as proposed.

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

46.8.1203 AVERSIVE PROCEDURES: USE ~~OF AVERSIVE PROCEDURES~~

Subsections (1) and (2) remain as proposed.

(3) Aversive procedures may only be used for ~~ameliorating~~ REDUCING OR ELIMINATING maladaptive target behaviors.

Subsection (3) remains the same but will be renumbered (4).

AUTH: Sec. 53-2-201 and 53-20-204 MCA
IMP: Sec. 53-20-203 and 53-20-205 MCA

46.8.1204 AVERSIVE PROCEDURES: DEFINITIONS ~~FOR AVERSIVE PROCEDURES~~ For purposes of this sub-chapter, the following definitions apply:

(1) "~~Advocacy/consumer~~ Advocate" means a ~~trained~~ citizen advocate, A representative of the Montana advocacy program, ~~special~~ A friend ACKNOWLEDGED BY THE PERSON TO BE THE PERSON'S ADVOCATE or the parent/guardian of a person with developmental disabilities.

Subsections (2) through (4) remain as proposed.

(5) "Aversive procedure" means a procedure as defined in and implemented in this subchapter that is aversive in nature and is implemented for the purpose of ~~ameliorating~~ REDUCING OR ELIMINATING a maladaptive target behavior.

Subsections (6) through (40) remain as proposed.

AUTH: Sec. 53-2-201 and 53-20-204 MCA
IMP: Sec. 53-20-203 and 53-20-205 MCA

46.8.1218 AVERSIVE PROCEDURES: APPEAL PROCESS (1) Any decision to ~~recommend~~ approval or disapproval of a proposed level II ~~or level III~~ procedure may be appealed by a member of the person's ~~IHP~~ individual planning team.

(a) Upon receipt of an appeal notice, ~~the division administrator will conduct~~ an administrative review of the matter will be conducted BY THE PROGRAM SERVICES SECTION SUPERVISOR FOR THE DIVISION WITHIN 10 DAYS OF THE RECEIPT OF THE APPEAL FROM THE DDPRC'S OR REGIONAL MANAGER'S DECISION. If the appellant remains dissatisfied after the administrative review, the matter ~~will~~ may be ~~considered by~~ appealed to the ~~department director~~ division administrator who will render a final administrative decision for the department WITHIN 45 DAYS OF THE RECEIPT OF THE APPEAL FROM THE ADMINISTRATIVE REVIEW.

Subsection (1)(b) remains as proposed.

AUTH: Sec. 53-2-201 and 53-20-204 MCA
IMP: Sec. 53-20-203 and 53-20-205 MCA

46.8.1220 AVERSIVE PROCEDURES: UNCLASSIFIED PROCEDURES (1) Proposed aversive procedures which have not been classified will be reviewed by the developmental disabilities program review committee (DDPRC). The DDPRC will classify WITHIN 30 DAYS OF SUBMITTAL the aversive procedure as either nonaversive, level I~~,~~ or LEVEL II ~~or III~~ for purpose of review in the future.

AUTH: Sec. 53-2-201 and 53-20-204 MCA
IMP: Sec. 53-20-203 and 53-20-205 MCA

4. The Department has thoroughly considered all commentary received:

COMMENT: The word "ameliorating" in the proposed amendments in ARM 46.8.1203(3) and 46.8.1204(5) should be replaced with the word "alleviating" or some word more universally understood.

RESPONSE: The department agrees with the comment and is deleting the word "ameliorating" and replacing it with "reducing or eliminating".

COMMENT: The definition of "advocate" in ARM 46.8.1204 should not be predicated on the advocate being trained. There is no mechanism for determining whether an advocate is trained.

RESPONSE: The department agrees with the comment and is deleting the word "trained".

COMMENT: The term "special friend" in the definition of "advocate" in ARM 46.8.1204 should be changed to "friend".

RESPONSE: The department agrees with the comment and is deleting the word "special". The department is inserting the phrase "acknowledged by the person to be the person's advocate". This change clarifies that a friend as advocate must be someone who is acknowledged by the person to be their advocate.

COMMENT: The name of the Montana Advocacy Program should be capitalized in ARM 46.8.1204(1).

RESPONSE: The standards governing the format and presentation of rules do not provide for the capitalization of the names of programs.

COMMENT: ARM 46.8.1218(1)(a) should state who conducts the administrative review and what that review consists of.

RESPONSE: The department agrees that a staff position should be designated for purposes of conducting an administrative review and is inserting language that provides that the program services section supervisor conducts the reviews. The program services section supervisor is an appropriate reviewer since that person will not have been directly involved in the development and approval of any aversive matter at issue. The administrative review is an informal review. Therefore the department does not believe that it is necessary to provide a description of the administrative review in the rule.

COMMENT: ARM 46.8.1218(1)(a) should provide time lines for the appeal process.

RESPONSE: The department agrees and is including time lines.

COMMENT: In ARM 46.8.1220 there should be a time line for the classification of a new procedure by the developmental disabilities program review committee (DDPRC).

RESPONSE: The department agrees and is including a time line.

COMMENT: The definition of "aversive" in ARM 46.8.1204(4) should be written so as to not include desensitization techniques. Desensitization techniques are often used to achieve behavioral outcomes such as the fear of being touched.

RESPONSE: Systematic desensitization techniques are not appropriate subjects for review as aversive procedures. Generally, systematic desensitization training does not involve physical restraint, forced compliance, time out or other aversive procedures as defined in the rule.

Systematic desensitization techniques are derived from a respondent or classical conditioning framework for treating phobias. Such training attempts to alter conditioned stimuli so that they no longer elicit anxiety. The principle desensitization technique involves training the person to relax deeply while images of anxiety eliciting stimuli are presented. Positive reinforcement usually occurs when the person can interact with the stimuli by relaxing and not self reporting anxiety or exhibiting behaviors which would be indicative of this state.

COMMENT: One provider noted that a national accreditation body for developmental disabilities services upon review of the provider's services stated that the department's program review committee process was outdated. The process was outdated in that the procedures subject to approval in the process should not be used or in any way condoned.

RESPONSE: The department does not advocate for the use of aversive procedures. The preferred behavioral management techniques are positive reinforcement, environmental analysis, teaching replacement behaviors and other nonaversive positively based techniques. Aversive programs, however, may be necessary to benefit a person when less restrictive nonaversive techniques have not proven to be successful.

The program review committee process provides criteria and procedures to assure that aversive procedures are not generally used. The process further assures that when aversive procedures are used the procedures selected are the most appropriate and are used in a correct, ethical, safe and humane manner.

Rule Reviewer

Director, Social and Rehabilitation Services

Certified to the Secretary of State June 14, 1993.

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

In the matter of the amendment of rule 46.10.403 pertaining to AFDC assistance standards	))))	NOTICE OF THE AMENDMENT OF RULE 46.10.403 PERTAINING TO AFDC ASSISTANCE STANDARDS

TO: All Interested Persons

1. On May 13, 1993, the Department of Social and Rehabilitation Services published notice of the proposed amendment of rule 46.10.403 pertaining to AFDC assistance standards at page 908 of the 1993 Montana Administrative Register, issue number 9.

2. The Department has amended rule 46.10.403 as proposed.

3. No written comments or testimony were received.

Rule Reviewer

Director, Social and Rehabilitation Services

Certified to the Secretary of State June 14, 1993.

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

In the matter of the amendment of rules 46.10.807, 46.10.808, 46.10.811, 46.10.813, 46.10.815, 46.10.819, 46.10.823, 46.10.825, 46.10.827, 46.10.833 and 46.10.843 and the repeal of rules 46.10.821 and 46.10.845 pertaining to AFDC JOBS program	)	NOTICE OF THE AMENDMENT OF RULES 46.10.807, 46.10.808, 46.10.811, 46.10.813, 46.10.815, 46.10.819, 46.10.823, 46.10.825, 46.10.827, 46.10.833 AND 46.10.843 AND THE REPEAL OF RULES 46.10.821 AND 46.10.845 PERTAINING TO AFDC JOBS PROGRAM

TO: All Interested Persons

1. On April 29, 1993, the Department of Social and Rehabilitation Services published notice of the proposed amendment of rules 46.10.807, 46.10.808, 46.10.811, 46.10.813, 46.10.815, 46.10.819, 46.10.823, 46.10.825, 46.10.827, 46.10.833 and 46.10.843 and the repeal of rules 46.10.821 and 46.10.845 pertaining to AFDC JOBS program at page 638 of the 1993 Montana Administrative Register, issue number 8.

2. The Department has amended rules 46.10.807, 46.10.808, 46.10.811, 46.10.813, 46.10.815, 46.10.819, 46.10.823, 46.10.827, 46.10.833 and 46.10.843 as proposed.

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

46.10.825 SUPPORTIVE SERVICES AND ONE TIME WORK-RELATED EXPENSES AVAILABILITY Subsections (1) through (1)(e) remain as proposed.

(f) MENTAL HEALTH AND/OR DRUG AND ALCOHOL counseling if medicaid services have been exhausted UP TO $1,000 PER 12 MONTH PERIOD BEGINNING WITH THE PARTICIPANT'S ENROLLMENT IN JOBS; and

Subsections (1)(g) through (2)(f) remain as proposed.

(g) medical physicals, prescriptions, eye glasses and immediate dental care not to exceed $50.00 per job; and

~~(h) counseling services not to exceed $500.00 per year; and~~

(~~i~~h) items necessary to search for or obtain employment, NOT TO EXCEED A TOTAL OF $300 PER 12 MONTH PERIOD BEGINNING WITH THE PARTICIPANT'S ENROLLMENT IN JOBS, including legal or housing fees or services; business start-up fees or licenses (not to include loans); energy related emergency, relocation costs; and union dues.

Subsections (3) through (8) remain as proposed.

AUTH: Sec. 53-4-212 and 53-4-719 MCA

IMP: Sec. 53-2-201, 53-4-211, 53-4-215, 53-4-703, 53-4-715, 53-4-716 and 53-4-720 MCA

4. The Department has repealed rules 46.10.821 and 46.10.845 as proposed.

5. The Department has thoroughly considered all commentary received:

COMMENT: ARM 46.10.825 should be further amended to state limits on the amounts which can be spent on counseling services and on items necessary to search for or obtain employment in accordance with federal requirements.

RESPONSE: The Department agrees. The Administration for Children and Families of the U.S. Department of Health and Human Services, the federal agency which administers the AFDC program, requires the states to set limits on the amounts which can be spent on various kinds of supportive services and one time work-related expenses for JOBS participants. In compliance with this requirement, the Department has already stated in its state plan governing the AFDC program a limit of $1,000 per year on supportive service expenditures for counseling and of $300 per year on one time work-related expenses necessary to search for or obtain employment. The Department is now amending ARM 46.10.825 to state these limits also. Subsection (1)(f) is being changed to provide for the cap of $1,000 per year on counseling and to specify that the kinds of counseling covered are mental health and drug and alcohol counseling. Subsection (2)(i) is being amended to state the $300 per year limit on expenses needed to search for employment.

The Department is also deleting subsection (2)(h) of ARM 46.10.825, which provides for the payment of up to $500 per year for counseling services necessary to accept or maintain employment. JOBS participants for whom the Department would have paid for counseling under (2)(h) still can receive counseling as a supportive service under subsection (1)(f). However, the amount of counseling the Department will pay for will be subject to the $1,000 limit in (1)(f). Currently the Department will pay up to $500 of counseling expenses necessary to accept or maintain employment each time a participant changes jobs pursuant to (2)(h). Thus, in cases where a participant changed jobs often, the Department could pay more than $1,000 per year for counseling. Due to budgetary constraints, the Department now has chosen to limit total expenditures for counseling per participant to the $1,000 limit stated in ARM 46.10.825(1)(f).

Rule Reviewer

Director, Social and Rehabilitation Services

Certified to the Secretary of State June 14, 1993.

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

In the matter of the amendment of rules 46.12.555 through 46.12.557 and 46.12.1428 pertaining to medicaid personal care services	)))))	NOTICE OF THE AMENDMENT OF RULES 46.12.555 THROUGH 46.12.557 AND 46.12.1428 PERTAINING TO MEDICAID PERSONAL CARE SERVICES

TO: All Interested Persons

1. On May 13, 1993, the Department of Social and Rehabilitation Services published notice of the proposed amendment of rules 46.12.555 through 46.12.557 and 46.12.1428 pertaining to medicaid personal care services at page 922 of the 1993 Montana Administrative Register, issue number 9.

2. The Department has amended rules 46.12.555, 46.12.557 and 46.12.1428 as proposed.

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

46.12.556 PERSONAL CARE SERVICES, REQUIREMENTS Subsections (1) through (8) remain as proposed.

(9) The recipient may not subject the personal care attendant to physical or verbal abuse, ~~or~~ threats of physical harm, OR SEXUAL HARASSMENT.

(10) HOUSEHOLD TASKS AND ESCORT SERVICES MUST BE PROVIDED ONLY IN CONJUNCTION WITH OTHER PERSONAL CARE SERVICES AND MUST BE DIRECTLY RELATED TO A RECIPIENT'S MEDICAL NEEDS.

Subsections (10) and (11) remain as proposed in text but are renumbered (11) and (12).

~~(12~~13) A recipient ~~who is also a recipient of medicaid home and community services (HCS)~~ may receive PERSONAL CARE SERVICES THROUGH THE MEDICAID home and community ~~personal care~~ services FOR ELDERLY AND PHYSICALLY DISABLED PERSONS, THE MEDICAID HOME AND COMMUNITY SERVICES FOR PERSONS WITH DEVELOPMENTAL DISABILITIES, OR THE MEDICAID HOME AND COMMUNITY OBRA SERVICES FOR PERSONS WITH DEVELOPMENTAL DISABILITIES in addition to the personal care services provided through these rules. ~~The number of hours of personal care available through the home and community program is determined in accordance with ARM 46.12.1411.~~

Subsections (13) through (21) remain as proposed in text but are renumbered (14) through (22).

AUTH: Sec. 53-2-201 and 53-6-113 MCA
IMP: Sec. 53-6-101, 53-6-131 and 53-6-141 MCA

4. The Department has thoroughly considered all commentary received:

COMMENT: The definition of personal care services in ARM 46.12.555 should limit cleaning as a household task to the area used solely by the recipient.

RESPONSE: The suggested limit of cleaning to areas used solely by the recipient would preclude the cleaning of areas either used by the recipient or needed for the recipient's care such as bathrooms and kitchens. Such areas must be clean in order to assure the health of the recipient. The department does not believe that the proposed limitation would be in the best interest of the recipient's health and continued residence at home.

COMMENT: The definition of personal care services in ARM 46.12.555 under escort services appears to allow for personal care services as simply a medical transportation service. Escort as a personal care service should only be provided where it complements the primary personal care services. Personal care services should not be used solely for transportation since that is an inappropriate use of the personal care attendants as a resource.

RESPONSE: The department agrees with the comment and is adding a provision to the requirements that allows for the provision of escort services and household tasks only in conjunction with personal care services and when directly related to recipient's medical needs.

COMMENT: Shopping for medical or nutritional items should remain a primary personal care task. This aspect of services should not be included under household tasks as proposed in the amendment to ARM 46.12.555(2) (a). Grocery shopping is essential to meal preparation which is a primary personal care service.

The commentor apparently is concerned with the limitation in ARM 46.12.556, concerning requirements, of household tasks to no more than one-third of the total time allocated per week for personal care services.

RESPONSE: The time allocated to shopping for a person's essential medical and nutritional needs can reasonably be expected to be undertaken in the time allowed under the new limitation in ARM 46.12.556 even where other household tasks are being performed.

COMMENT: Sections (d),(h) and (j) of deleted section (8) in ARM 46.12.556, providing criteria for quality assurance and client

grievances, should not be deleted. The rules should provide standards to ensure the quality of service delivery by the contractor for services or require the contractor to adopt standards. Without standards the department will be unable to evaluate the effectiveness of the service and to provide for expression of client satisfaction.

RESPONSE: The department includes the standards to ensure the quality of service delivery within the Request for Proposal which subsequently becomes a part of the contract file, along with the contractor's proposal and the actual contract. The compliance review completed by the department evaluates the effectiveness of the personal care services provided. A client may request a fair hearing as provided in ARM 46.12.556(15).

COMMENT: ARM 46.12.556(9), providing that the recipient may not subject the personal care attendants to abuse and threats, should include sexual abuse.

RESPONSE: The department agrees with the comment and is including sexual harassment in the rule.

COMMENT: ARM 46.12.556(12) as proposed would allow recipients of home and community medicaid services for elderly and physically disabled persons to receive the personal care available through that program in addition to that available under these rules. The rule should provide the same opportunity for recipients of medicaid home and community services for persons with developmental disabilities and of medicaid home and community OBRA services for persons with developmental disabilities.

RESPONSE: The department agrees with the comment and is adding language to provide for this.

COMMENT: Will the department provide the written notices provided in ARM 46.12.556(19) and (20) which relate to termination and denial of personal care services? Currently, the personal care contractor is responsible for these notices.

RESPONSE: The proposed amendment of these sections did not change the notice requirement. The notice requirement has been in the past delegated by the department to the contractor. The department does not anticipate any change in this delegation.

Prior to providing notice of termination or denial, the contractor must consult with the department and receive approval from the department for such actions.

COMMENT: The language in ARM 46.12.557(3), providing that a person retained personally by a recipient to deliver personal care services may not be reimbursed for personal care services by the department, should be changed to read: "All personal care providers to be reimbursed by the department must meet the

employment criteria of the contractor specifically contracted with the department for the delivery of personal care services prior to the initiation of services".

This change would allow informal care givers who are familiar with the recipient and who are capable caregivers to become employed by the contractor in order to continue serving the recipient.

RESPONSE: The language in the rule does not preclude an informal caregiver from being employed by the contractor once a person becomes a recipient of the program.

The suggested language is inappropriate in that a personal care provider must be an employee of the contractor. The department only reimburses the contractor for the services delivered by its employees. A personal care attendant does not receive reimbursement directly from the department for services provided but is instead paid an hourly wage by the contractor.

COMMENT: The personal care services provided through the home and community service medicaid program should not be limited to the definitions and requirements of the regular medicaid personal care program. Nor should that program have to use the same contractor as the regular medicaid program. The home and community services program is intended to be a flexible program which may provide services beyond those of the regular medicaid program. The regular personal care program is too rigid and limited and the provision of services is limited to one provider.

RESPONSE: The personal care services of the home and community services program under the rules for that program include coverage that is in addition to that of the regular personal care services program.

Administrative efficiency is served by the provision of the regular personal care services program through one contractor. The costs of the regular personal care services program are more effectively controlled by careful programmatic definition of the services.

Rule Reviewer

Director, Social and Rehabilitation Services

Certified to the Secretary of State June 14, 1993.

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

In the matter of the amendment of rules 46.12.583 and 46.12.584 pertaining to organ transplantation	)))	NOTICE OF THE AMENDMENT OF RULES 46.12.583 AND 46.12.584 PERTAINING TO ORGAN TRANSPLANTATION

TO: All Interested Persons

1. On April 29, 1993, the Department of Social and Rehabilitation Services published notice of the proposed amendment of rules 46.12.583 and 46.12.584 pertaining to organ transplantation at page 604 of the 1993 Montana Administrative Register, issue number 8.

2. The Department has amended rules 46.12.583 and 46.12.584 as proposed.

3. The Department has thoroughly considered all commentary received:

COMMENT: Commentor stated that the idea to save money by eliminating transplants was the idea of the department, not the legislature's. The analysis of the department did not anticipate that the people who don't receive a transplant will remain sick and that will not result in a cost savings. The department did not take into account the costs associated with continuing medical expenses that will be incurred by the sick people in order to maintain them over time rather than providing an organ transplant and eliminating continued medical expenses. This is not a cost effective approach the department is taking with this rule amendment.

RESPONSE: The department has not eliminated all organ transplants. Transplants will still be reimbursable under the Montana medicaid program for cornea, kidney and bone marrow. In addition, no transplants are performed in Montana hospitals, thus there will be no adverse financial impacts to Montana hospital providers. Although the initiative to limit transplants may have resided with the department, the legislature fully discussed the proposed change and decided the medicaid program simply could not afford to pay for every possible service available. We disagree with the commentor that the rule change is not cost effective. The Montana medicaid program may incur some expenses to treat persons who do not receive a transplant, however, we believe these expenses will be relatively small in comparison to actual transplant costs and post-transplant costs. In addition, many of the persons requiring transplants remain on waiting lists for extensive periods of time and thus the continuing medical expenses are often not new expenses.

Rule Reviewer

Director, Social and Rehabilitation Services

Certified to the Secretary of State June 14, 1993.

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

In the matter of the amendment of rules 46.12.590 through 46.12.593 and 46.12.595 pertaining to inpatient psychiatric services	)))))	NOTICE OF THE AMENDMENT OF RULES 46.12.590 THROUGH 46.12.593 AND 46.12.595 PERTAINING TO INPATIENT PSYCHIATRIC SERVICES

TO: All Interested Persons

1. On April 29, 1993, the Department of Social and Rehabilitation Services published notice of the proposed amendment of rules 46.12.590 through 46.12.593 and 46.12.595 pertaining to inpatient psychiatric services at page 646 of the 1993 Montana Administrative Register, issue number 8.

2. The Department has amended rules 46.12.591, 46.12.593 and 46.12.595 as proposed.

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

46.12.590 ~~INPATIENT PSYCHIATRIC~~ RESIDENTIAL TREATMENT SERVICES, PURPOSE AND DEFINITIONS Subsections (1) through (2)(j) remain as proposed.

(~~n~~k) "Residential treatment facility" means a facility ~~operated for the primary purpose of providing residential psychiatric care to persons under 21 years of age~~ licensed by the department of health and environmental sciences, or the equivalent agency in the state in which the facility is located, as a residential treatment facility as defined in 50-5-~~103~~101, MCA or the equivalent category in the state where the facility is located.

Subsection (2)(l) remains as proposed.

(~~pm~~) ~~"Emergency admission" means an admission for treatment of a sudden onset of a psychiatric condition manifesting itself by acute symptoms of such severity that the absence of immediate medical attention could reasonably be expected to result in serious dysfunction of a bodily organ or part or in the death of the individual or in harm to another person by the individual in a residential treatment facility is required.~~

Subsections (2)(n) through (2)(p) remain as proposed in text but are renumbered (2)(m) through (2)(o).

Subsections (3) through (5) remain as proposed.

AUTH: Sec. 53-6-113 MCA
IMP: Sec. 53-6-101, 53-6-113 and 53-6-141 MCA

46.12.592 ~~INPATIENT- PSYCHIATRIC~~ RESIDENTIAL TREATMENT SERVICES, REIMBURSEMENT Subsections (1) through (1)(b) remain as proposed.

(2) Allowable cost will be determined in accordance with generally accepted accounting principles as defined by the American institute of certified public accountants, subject to the provisions of the ~~health insurance manual 15 (HIM-15) medicare coverage issues~~ PROVIDER REIMBURSEMENT manual (HCFA-Pub. 15) except where further restricted in this administrative rule. The department hereby adopts and incorporates herein by reference the ~~HIM-15~~ medicare ~~coverage issues~~ PROVIDER REIMBURSEMENT manual (HCFA-Pub. 15), which is a manual published by the United States department of health and human services, social security administration, which provides guidelines and policy to implement medicare regulations which set forth principles for determining the reasonable cost of provider services furnished under the Health Insurance for Aged Act of 1965, as amended. A copy of the ~~HIM-15~~ medicare ~~coverage issues~~ PROVIDER REIMBURSEMENT manual (HCFA-Pub. 15) may be obtained through the Medicaid Services Division, Department of Social and Rehabilitation Services, ~~Medicaid Services Division,~~ P.O. Box 4210, 111 Sanders, Helena, Montana 59604-4210.

Subsections (2)(a) and (2)(b) remain as proposed.

(c) Educational and vocational training costs are ~~not~~ an allowable cost ~~except to the extent~~ IF such costs qualify for federal financial participation under the provisions of 42 CFR 441.13(b), as amended effective December 21, 1992.

Subsections (3) through (5)(b) remain as proposed.

(c) Base period operating costs exclude the costs of malpractice insurance and capital-related costs described in 42 CFR 413.130(i) (October 1, 1992), which is a federal regulation which the department hereby adopts and incorporates by reference. A copy of the cited regulations may be obtained through the Medicaid Services Division, Department of Social and Rehabilitation Services, P.O. Box 4210, 111 Sanders, Helena, MT 59604-4210.

Subsections (6) through (6)(b) remain as proposed.

(~~d~~c) The cost per day ceiling established under this section applies to operating costs incurred by a provider in furnishing inpatient services. ~~These~~ FOR PURPOSES OF CALCULATING AND APPLYING THE RATE OF INCREASE CEILING ON OPERATING COSTS UNDER THESE RULES, operating costs exclude the costs of malpractice insurance and capital-related costs described in ~~42 CFR 413.130, which is a federal regulation which the department hereby adopts and incorporates by reference. A copy of the cited regulations may be obtained through the Department of Social and Rehabilitation Services, Medicaid Services Division, P.O. Box 4210, 111 Sanders, Helena, MT 59604-4210~~ subsection (5)(c). SUCH COSTS SHALL BE ALLOWABLE OPERATING COSTS TO THE EXTENT OTHERWISE PERMITTED BY THESE RULES.

Subsection (6)(d) remains as proposed.

(~~fe~~) The ~~target rate~~ maximum increase percentage for each ~~calendar year~~ provider's cost reporting period will equal the prospectively estimated ~~increase in the~~ market basket index for

~~that calendar year~~ hospitals and hospital units excluded from the medicare prospective payment system, most recently published in the federal register prior to the start of the provider's cost reporting period. The market basket index is a hospital wage and price index that incorporates ~~appropriately~~ approximately weighted indicators of changes in wages and prices that are representative of the mix of goods and services included in the most common categories of inpatient hospital operating costs subject to the ceiling ~~as described in subsection (5)(d) of~~ established under this subsection. The maximum increase percentage is not the upper limit set forth in the federal law commonly referred to as the Tax Equity and Fiscal Responsibility Act (TEFRA) update factor.

Subsections (7) through (9)(c) remain as proposed.

(d) Providers will receive no reimbursement for costs incurred in excess of the ceilings established under this rule, EXCEPT AS PROVIDED IN SUBSECTION (9)(b).

Subsections (10) through (13) remain as proposed.

AUTH: Sec. 53-6-113 MCA
IMP: Sec. 53-6-101, 53-6-113 and 53-6-141 MCA

4. The Department has thoroughly considered all commentary received:

COMMENT: A number of commentors expressed the opinion that state and federal laws and regulations do not allow the department to eliminate medicaid coverage of psychiatric hospital services under the inpatient psychiatric services for individuals under age 21 program. Because federal law allows coverage of services provided in inpatient hospital and residential treatment facility settings, both services must be provided under federal Early and Periodic Screening, Diagnosis and Treatment (EPSDT) laws. Further, section 53-6-101(k), MCA does not give the department the authority to limit this program to residential treatment facility coverage. Federal law prohibits the department from restricting services based on diagnosis, type of illness or condition. The proposed rule also would violate children's freedom of choice under state and federal medicaid statutes. Federal law requires the state to provide services in the best interests of recipients. Because the proposed rule conflicts with state and federal statutory authority, it would be invalid.

COMMENT: The department has considered fully the comments on this issue. The question of whether the law requires the department to continue medicaid coverage of inpatient psychiatric services provided in psychiatric hospitals has been the subject of considerable debate. The department has carefully reviewed this question with its legal counsel and disagrees with the arguments of hospital providers that state or federal laws or regulations require the department to provide coverage of the service in hospitals. The elimination of hospital coverage is not a restriction of services based upon diagnosis, type of

illness or condition, and does not violate the freedom of choice laws. The "best interest" requirement does not require the state to provide coverage of a particular service which otherwise is optional under federal and state law. The department believes that the elimination of medicaid coverage of inpatient psychiatric services provided in psychiatric hospitals is consistent with applicable laws and regulations and within the department's legal authority.

COMMENT: The department received a letter from the Health Care Financing Administration (HCFA) indicating that a state must demonstrate there will be sufficient access to services for all children. Although the Department has stated its hope that "individuals who require hospitalization to stabilize a severe psychiatric condition will be treated in an acute care hospital," there has been no specific factual showing that acute care hospitals will in fact be able to provide medically necessary inpatient hospital services to Medicaid-eligible children. This is required by federal law, and in the absence of a specific factual showing that this can be done, the commentor believes the Department does not have the authority to adopt the proposed amendments. Are there studies that indicate there are sufficient services available? The department cannot demonstrate sufficient services without inpatient hospitalization coverage.

RESPONSE: The department disagrees with the commentor's legal interpretation that suggests that the department has no legal authority to eliminate a service coverage until it has demonstrated to the hospital providers' satisfaction that medically necessary hospital services will be available. The department believes the law requires that medically necessary treatment be provided, but the law does not require that the service be provided in a particular setting. The various state agencies involved in providing services to children believe, based upon information and observation obtained in administration of their programs, that medically necessary services will be available, although not in freestanding psychiatric hospitals in Montana. This informal study has provided the department with sufficient information to conclude that the needs of children will be met under the proposed rule.

COMMENT: The Department should clearly inform the public that only 4 hospitals in Montana are certified to provide stabilizing treatment to Medicaid eligible children, and only 2 facilities are prepared to treat SRS children under twelve years old. The Department of Corrections and Human Services, Department of Family Services and SRS should all clearly communicate to the community based providers that hospital emergency rooms are not an appropriate placement option for SED children in crisis. Rather, non-hospital providers should adopt plans regarding the appropriate referral of SED children to hospitals that provide mental health services. SRS understands clearly that acute care hospital psychiatric units are not able to fully replace the

longer term services previously offered at Shodair and Rivendell Hospitals. Acute care hospitals have neither the capacity, nor the specialized programs to provide treatment beyond crisis intervention and stabilization services. Because SRS allows only a fixed price under the DRG payment program, which is intended to provide medical stabilization rather than treatment, state agencies must work diligently to foster timely transfers to alternative treatment settings.

RESPONSE: The department believes that the question of what services are medically necessary for a particular child depends upon the circumstances of the child's case. The department does believe that psychiatric hospitalization has been used far more frequently than medically necessary, and that children can often be treated in less restrictive settings.

The Department of Corrections and Human Services is coordinating the development and implementation of a community-based continuum of care for severely emotionally disturbed (SED) children. Several other agencies are participating in this project, including the Department of Health and Environmental Sciences (DHES), the Department of Social and Rehabilitation Services (SRS), the Department of Family Services (DFS), the Office of Public Instruction (OPI), and the Board of Crime Control. The service network, as currently proposed, will consist of five regional teams throughout the state which will coordinate services for children. The regional teams will be overseen by a state team which will establish policy and implement quality assurance standards.

These agencies will be working with providers to assure that children receive the services they need. These agencies also will provide such public notices as they deem appropriate in the context of their respective programs and constituencies. Medical providers are also in a position to notify the general public and particular users of their services as to what services they consider appropriate for treatment of particular conditions.

We expect that providers will monitor the market place and occupancy trends, and if deemed appropriate, will design, develop and implement services accordingly. We believe that the availability or non-availability of medicaid coverage and the need for services are some of many factors that may lead providers to develop new or additional services to respond to patient needs.

COMMENT: Does the Department agree that, in some circumstances, SED children will need inpatient hospital care beyond the scope of stabilization services provided by acute care hospitals?

RESPONSE: The Department believes that in most cases, after a child is stabilized in an acute care facility, that the child can be placed in a less restrictive setting. Options available

include residential treatment centers, outpatient hospital services, therapeutic group care, therapeutic foster care, and other community-based services including psychiatrist and psychologist services. In those cases where hospital level treatment is required but is unavailable in Montana, services may be provided out of state.

COMMENT: How will the Department reimburse hospitals under EPSDT guidelines for inpatient hospital treatment beyond that provided by acute care hospitals? Which facilities will the Department allow the necessary treatment to be provided in?

RESPONSE: The Department will continue to reimburse acute care hospitals based on the payment methodology set forth in the inpatient hospital rules. The department is revising its inpatient hospital rules to increase significantly the DRG reimbursement for these services. This reimbursement will be available to all hospitals who are qualified to provide the services and are enrolled as Montana Medicaid providers.

COMMENT: Once a child is stabilized and prepared for transfer to an alternative setting, what rights to admission do SED children have to other providers who contract with the State of Montana to provide care?

RESPONSE: Children eligible for Medicaid will participate in the managed care program discussed above. The managed care team or managed care specialist will determine and arrange the most appropriate treatment options. Under medicaid contracts, the provider determines its admission policies, subject to applicable laws. Medicaid recipients as such do not have any admission preference over other prospective patients. The department cannot comment on what admission rights may arise under contracts with other state agencies.

COMMENT: Does the Department intend by ending freestanding hospital care for SED children to expand services offered in acute care hospital units? Does the Department (or the DFS or DCHS), intend to increase the capacity of hospitals to treat children, either by adding beds at existing hospitals, or creation of new units at more hospitals?

RESPONSE: The Department does not have an agenda with respect to the expansion of services offered in acute care hospitals. As noted above we expect that providers will monitor the market place and occupancy trends, and if deemed appropriate, will design, develop and implement services accordingly. If providers determine that additional services are needed, it may be more appropriate to convert underutilized existing beds rather than adding new beds or units. The department cannot speak for DFS or DCHS on these issues.

COMMENT: Once a SED child is medically stabilized in a psyche unit, are additional hospital services billable to state

agencies who extend hospitalization beyond that period covered by DRG payment?

RESPONSE: Absent a specific contractual liability or court order, the department does not normally consider DFS or DCHS as third parties with a prior responsibility to pay for services before medicaid will pay. Accordingly reimbursement provided under the inpatient hospital rule will be payment in full. Hospitals receiving DRG payments will receive the DRG amount plus any appropriate outlier payments.

COMMENT: Commentor suggests the Department strike the requirement at ARM 46.12.590 (2)(b) that facilities who participate in Medicaid be "devoted exclusively to children." This policy forces providers to construct single use facilities rather than integrating services in available, underutilized facilities. SRS' policy is more costly to the public, and contrary to Department cost containment goals.

RESPONSE: The rules require that the facility be devoted to residential psychiatric care and that the facility's goals, purpose and care be devoted exclusively to persons under the age of 21. The rules do not require that the facility be devoted exclusively to residential psychiatric care. The department believes that the requirement of exclusive devotion to children under 21 is necessary to require that medicaid inpatient psychiatric services for children under age 21 be provided in facilities separate from adult facilities. The department will maintain this requirement. However, the medicaid rules do not prohibit residential treatment service providers from providing other services to children under age 21 if applicable department of health and environmental sciences licensing and certification are met for the residential treatment facility.

COMMENT: SRS should amend the definition at ARM 46.12.590 (2)(p) that "beds available" are those beds licensed and which physically exist. SRS should consider that facility licensure is sometimes not relevant to actual bed capacity in many facilities. For example, Holy Rosary Hospital in Miles City is licensed for 100 beds, but operates only about 50 beds. Most of the 50 other beds don't actually exist. Similar situations exist at St. James Hospital in Butte and Columbus Hospital in Great Falls. SRS' policy is antiquated and should be reconsidered.

RESPONSE: Because occupancy will be a major component in the computation of capital costs, it is essential that the department have a standard and objective measure of the beds available. The department has entered into protracted discussions with providers regarding "beds available" in the past and has found that numerous definitions exist. A facility has the option to reduce the number of licensed beds to more adequately reflect the number of beds in use. We believe that the use of

the number of licensed beds for determining occupancy is appropriate.

COMMENT: One commentor stated that the department should redefine the term "occupancy rate" and replace the term "beds available" with the term "licensed beds" in ARM 46.12.590(2)(o).

RESPONSE: We appreciate the commentors suggestion, however, we believe that the commentor's version and proposed rule version will be construed to mean the same thing and would thus be applied identically. No change will be made.

COMMENT: On page 6 of the rule, SRS amends its reference to HIM-pub.15 to read "medicare coverage issues manual" rather than "health insurance manual". The HIM-15 is still the "health insurance manual". The "medicare coverage issues manual" is actually a special section within HIM-10, which is the "medicare hospital manual". Commentor recommends that SRS retain the original language in the rule.

RESPONSE: The reference in the current rule to the Health Insurance Manual (HIM)-15 is incorrect. The manual referred to as the HIM-15 is actually called the Medicare Provider Reimbursement Manual, HCFA-Pub 15. The amended reference in the proposed rule was also incorrect and will be corrected in the final rule notice. This change in the current rule language is a correction only and does not make a change in the manual which is used to determine allowable costs.

COMMENT: One commentor stated that they did not understand why a change was proposed with respect to the department's reliance upon the HIM-15, particularly since residential treatment facilities are not certified by Medicare.

RESPONSE: As noted above, the proposed amendment was intended to correct the HIM-15 reference to state the actual name of the manual, the Medicare Provider Reimbursement Manual, HCFA-Pub 15. The "HIM-15" and the Medicare Provider Reimbursement Manual, HCFA-Pub 15 refer to same document. The department intends to make the change to reflect the titles as published on the cover page of the manual. There is no change from the current rule in the manual being used.

Residential treatment centers will continue to be reimbursed on a retrospective cost basis under the proposed rule and thus the costs incurred by providers are subject to audit. Although the Provider Reimbursement Manual is issued by Medicare, we believe that it is more practical and appropriate to utilize these national standards rather than developing and implementing standards specific to only the Montana Medicaid program.

COMMENT: One commentor stated that they had attempted to get a copy of the manual, but that the department indicated that it did not have any available.

RESPONSE: The department does not routinely maintain additional copies of the manual due to the time and expense required to maintain them. The department did not have extra copies already prepared. The manual was in existence and available. Upon request, we will make a copy of the document for the commentor, allow the commentor to make his own copy or make it available for review in this office during regular business hours. The manual consists of approximately 1,000 pages of double sided copies or about 2,000 pages in all. The first 20 pages of a document will be copied for free. All subsequent copies will be charged at a rate of $.20 per page. The commentor was also informed that a manual could be obtained directly from HCFA.

COMMENT: In ARM 46.12.592(2)(c), SRS should clarify that education costs are reimbursable retroactive to be the effective date of the applicable federal regulation, and further, that this benefit is extended to inpatient hospital programs. Commentor also requests that SRS clarify that education program benefits are reimbursable in addition to DRG payments in acute care hospitals. Further, it would be more appropriate to phrase the rule in a positive fashion, rather than a negative one. Commentor's suggestion is that the provision on educational costs be amended to provide that educational costs will be allowable under Medicaid to the extent that they are allowed under the recent amendments to the federal regulations, and that educational costs will be allowable effective on the date of enactment of the new federal regulations.

RESPONSE: The department agrees that educational costs are allowable to the extent allowable under the amended federal regulation. The rule language has been revised to state the rule in a positive fashion. The department will apply the federal regulation for services provided on or after December 21, 1992, although this is not stated in the rule. Educational costs incurred by acute care general hospitals are outside the scope of the above noted regulation and these rules. Moreover, educational costs are allowable only for residents of intermediate care facilities for the mentally retarded (ICFs/MR) as defined in 483.440(a) and for individuals under the age 21 receiving inpatient psychiatric services as defined in 441.154.

COMMENT: Commentor suggests SRS adopt a "hospital hold days" policy similar to the program in long term care. It is well known that residential and group home facilities hospitalize patients and then refuse to allow readmission to the facility upon stabilization by the hospital. Since the state is shifting emphasis away from hospitals to residential and group home models, the state must protect the children's right to readmission to their "home". Such a policy will also protect hospitals from being used as a dumping ground for group homes and residential facilities.

RESPONSE: The department does not believe that a "hospital hold days" policy is necessary for residential psychiatric services.

Hospital hold days are used in the long term care program primarily because of the exceptionally high occupancy rates experienced by nursing facilities and because of the importance of being able to return an elderly individual to the same nursing facility after experiencing an acute care episode. In most instances, the residential treatment center will only be "home" for a duration of six months or less, whereas a nursing home is often the permanent home of an elderly person.

COMMENT: Commentor suggests that SRS reconsider the adoption of the hospital market basket index in place of the TEFRA limits. Adoption of an indexed cost system without any incentive payments will discourage adoption of cost containing strategies. The more restrictive policies also discourage the development of new programs and facilities, which is contrary to legislative efforts to increase residential programs needed to bring Montana's children back to the state for treatment. SRS policies also fail to recognize that development of treatment programs takes more than twelve months. New facilities spend several years developing staff and program resources needed to provide care to children. SRS should consider a partner role in the development of programs, rather than erecting barriers to development of treatment programs.

RESPONSE: The department assumes that the commentor meant to suggest that TEFRA should be used in place of the hospital market basket index, since the rule does incorporate the market basket index without any incentives. While we believe it is important to contain cost increases, we do not agree that it is necessary to pay providers an incentive to control costs. We believe that the upper limits will provide sufficient incentive to control cost increases. The department does recognize that the development of new services and programs can take some time. However, we do not believe that the use of the market basket index instead of TEFRA for trending inflation will impede the development of new programs or services.

COMMENT: It is important to remember that residential treatment is not a substitute for inpatient hospital treatment. The two types of treatments are not the same, as evidenced by the fact that JCAHO accredits the two types of facilities under different sets of standards. We believe Montana would run afoul of both JCAHO accreditation standards and federal law if it were to attempt to use residential treatment in situations in which inpatient hospital treatment is required.

RESPONSE: The department does not intend to suggest that residential treatment facilities should accept patients whose conditions actually require a more restrictive level of care.

COMMENT: The proposed rules use the terms "residential treatment services" and "residential psychiatric care" interchangeably. The rules should be amended to use only the term "residential treatment services" to avoid confusion and because

it is more accurate. Also, "residential treatment facility" is defined in section 50-5-101, MCA rather than 50-5-103 as stated in the proposed rule.

RESPONSE: The two separate terms were used purposely. The terms are separately defined, and follow the similar separate definitions specified in section 50-5-101(40) and (41), MCA. The department believes these terms are clear and will retain the use of the separate terms. The department agrees that the statutory citation is incorrect and has corrected the citation in the final rule.

COMMENT: The commentor believes that the provision concerning emergency admissions should be deleted entirely.

RESPONSE: The department concurs and will delete the reference to emergency admissions.

COMMENT: One provider stated that they disagreed with setting the base period as the first full 12-month cost reporting period ending after June 30, 1985 with no exceptions, because they had planned to combine the first two years of cost reporting to make this determination.

RESPONSE: It is not the intent of the department to change the base year for residential treatment facilities who have had their base year previously determined. The department has already determined which year will be the base year for the commentor and thus the commentor will not be negatively impacted by the proposed rule changes. We would also like to note that, contrary to the commentor's statements, the provider has not requested permission to use the first two years of operations as the base period, nor has the department agreed to such a change. We believe the provider may be confused by the department's intent to audit the first two years of operations at the same time. Although the audit will span a two year period, the administrative rules regarding base years and ceilings will be applied to each applicable period.

COMMENT: The commentor felt that ARM 46.12.592(5)(c) may be confusing since it may not be clear as to which capital-related costs would be excluded from the base period.

RESPONSE: The department concurs with the commentor and has amended the rule language to specify subsection (i) of 42 CFR 413.130.

COMMENT: An objection was raised with respect to the use of the market basket index for setting maximum increase percentages for residential treatment centers since RTCs are not hospitals. The commentor also objected to the elimination of the upper limit as contained in TEFRA.

RESPONSE: It is the department's position that the current rule does not utilize TEFRA and that this is not a change in the reimbursement policy. Clarification has been added to the proposed rule to make sure providers are aware that TEFRA will not be applied.

The department believes that the market basket index is the most appropriate standard to apply to residential treatment facilities. The market basket index is an inflationary ceiling applied to hospitals who are exempt from prospective payment reimbursement. Inpatient psychiatric facilities are among those facilities which are exempt from the Medicare prospective payment system. While residential treatment centers are not inpatient psychiatric hospitals, they are similar in nature. We also believe that the use of the market basket index is a generous application and should be advantageous to the residential treatment facilities. As noted by the commentor, RTCs are not hospitals. Accordingly RTCs do not incur many of the costs to which hospitals attribute cost increases.

COMMENT: The Department proposes to set a ceiling on reimbursable operating costs. This appears to be terribly discriminatory to efficient operators. There is no financial incentive for holding costs down under this type of scenario. This Section tells residential treatment facilities that if they artificially increase expenses and inflate costs in their base year, they will be way ahead in the future. Yet, those who limit those costs by exerting efficient controls on their operation will essentially be penalized. This section must be revised to encourage efficient operations.

RESPONSE: The department strongly disagrees with the commentor's suggestion that operating ceilings should not be imposed. Numerous studies of cost reimbursement principles and practices have shown that if no ceilings are applied to operating costs, that costs cannot be controlled. Providers would have no incentive to control costs if no ceiling were applied.

COMMENT: One provider objected to limiting annual cost increases by using prospectively estimated market basket indexes as specified in ARM 46.12.592(8)(a), because the provider has no way to control the annual percentage increases in such items as utilities, food prices, workers' compensation premiums, and other insurance premiums. The commentor stated that the whole system must be retrospective in order for it to work.

RESPONSE: It appears that the commentor is again suggesting that all costs be reimbursed regardless of the rate of increase in costs. The department strongly disagrees. The department believes that costs would increase unreasonably if there were no limitations. We believe the limitations set forth in the proposed rules are reasonable and are generally accepted practices of cost containment for cost-based providers within

the health care industry. By establishing ceilings in advance, providers are encouraged to develop and monitor budgets and contain costs. The market basket index is a hospital wage and price index that incorporates approximately weighted indicators of changes in wages and prices that are representative of the mix of goods and services included in the most common categories of inpatient hospital operating costs. We believe this index more than takes into account increases in the items mentioned by the commentor.

COMMENT: ARM 46.12.592(9)(a) should allow providers to receive at least their ceiling amount for any period.

COMMENT: The proposed rule should be amended to provide that Medicaid will recognize and pay the maximum increase even in periods where Medicare may not provide for a target rate increase. The rule should state that this maximum increase percentage applies except in those cases where Medicare specifically precludes Medicaid from applying the increased percentage.

RESPONSE: The department disagrees with the concept of reimbursing providers for the maximum increase percentage if costs have not been incurred to warrant such an increase. If providers keep costs within the established ceilings, the costs will be reimbursed to the extent the costs are reasonable and allowable as specified in these rules. We do not believe it is either necessary or appropriate to reimburse facilities for costs that are not incurred.

COMMENT: The commentor believes that TEFRA incentives should be included in the rule to encourage cost containment. By limiting incentive payments and establishing ceilings, etc., the Department is encouraging cost explosions which will ultimately cost the Department much more money in the long run.

RESPONSE: The department disagrees with the commentor that costs will explode. To the contrary, the department believes that the use of base rates and ceilings will control the rate of cost increases in residential treatment facilities and will encourage economic and efficient operations. TEFRA incentives are an integral component of the Medicare prospective payment system. Neither the current rule, nor the proposed rule will utilize TEFRA incentives for medicaid purposes. Residential treatment centers are not reimbursed on a prospective basis at this time and we do not believe it is either necessary or appropriate to provide incentive payments under a cost based retrospective reimbursement system. In addition, Medicare does not provide incentives for hospitals which are exempt from the PPS reimbursement system.

COMMENT: ARM 46.12.592(9)(d) clearly contradicts the provisions contained in paragraph (9)(b). Under subpart (b) providers can obtain exceptions to the ceilings. But under subpart (d), the

Department will not reimburse for those costs even if an exception is allowed.

RESPONSE: The department will clarify the language in (9)(d) to make it clear that when exceptions to the ceilings are allowed by the department, that those costs will be reimbursable.

COMMENT: One commentor questioned why the reference to disproportionate share hospitals in the current rule was being removed in the proposed rule. Commentor felt that if inpatient psychiatric facilities were eligible for DSH then residential treatment centers should also be eligible.

RESPONSE: Only hospitals are eligible for DSH payments. Since residential treatment facilities are not hospitals, the reference to DSH payments was removed from the proposed rules.

COMMENT: One commentor expressed concern that the proposed rule excludes malpractice insurance costs from operating costs.

RESPONSE: The rationale for excluding malpractice insurance costs from the base period operating costs is because historically these costs have fluctuated wildly from year to year and have caused or would have caused significant impacts on the base period costs and future ceilings. The malpractice insurance costs are reimbursable and are added back during the computation of the cost settlement amount. The department will clarify the rule to make this point clear.

COMMENT: The proposed rule needs to clearly state that leave days not reimbursed by Montana Medicaid are not to be included in Medicaid inpatient days for purposes of this calculation.

RESPONSE: Therapeutic home visit days not reimbursed by Montana Medicaid are not included in Medicaid inpatient days for purposes of the calculation in ARM 46.12.592(6)(d). The computer system used by the department's fiscal intermediary to generate cost settlement information counts only those days actually paid for by Medicaid as Medicaid days. We do not believe additional clarification is needed.

COMMENT: The commentor felt that SRS should set forth time frames for requesting exceptions to operating cost ceilings and establish procedures to be followed by the provider in making the request and by the department in reviewing and responding to the request for exceptions. The rule should set forth the method for adjusting an approved rate exception and should also set forth whether an exception must be requested year after year, or if once granted, is approved for so long as the condition or circumstance giving rise to the exception exists.

RESPONSE: The department does not believe further changes to this section of the rule are warranted. We do not believe the establishment of specific time frames will improve the process

and in fact they may be detrimental to either or both the provider and the state if the matter is of such a nature that a resolution cannot be arrived at within preestablished time frames. The method for adjusting rate exceptions may vary depending on the circumstances and we do not believe a "one size fits all" approach is appropriate for this process.

COMMENT: Commentor suggested the rule clearly specify the type of report the department requires to be filed for cost reports.

RESPONSE: The department requires facilities to complete the HCFA-2552 cost report form. We do not believe it is necessary to specify the form number.

COMMENT: The requirement that business records of any related party including any parent or subsidiary firm be available at the facility is impractical and should be deleted. At a minimum, this section should be modified to state that these records be made available at the related entity's offices.

RESPONSE: The intent of this section is to require facilities to provide adequate documentation to support the costs they have claimed for Medicaid reimbursement. We do not believe it is reasonable to require an auditor to travel to the place of business of a related party or parent company. The responsibility of documenting the allowability of all costs claimed rests with the provider and we believe the provider should be required to produce the documentation at the facility.

COMMENT: The commentor expressed concern that out-of-state providers do not file the HCFA-2552 cost report and also do not have a separate audit report issued each year. The proposed rule will require such out-of-state facilities to prepare separate audited financial statements at an additional expense. The rules should provide for the submission of financial statements which are part of a consolidated financial statement.

RESPONSE: The department would much prefer that all residential treatment centers complete and file HCFA-2552 cost reports, however, in those instances where a provider is not required to file the HCFA-2552, audited financial statements will be required. Cost report information or audited financial statements are needed to set interim rates and to perform cost settlements to ensure that all Medicaid payments reflect only those costs allowable under the Montana Medicaid program. Consolidated financial statements do not provide the detailed information necessary to complete these tasks. If the department determines that audited financial statements do not provide adequate information for Medicaid purposes, the department may change the rule at a later date to require the submission of HCFA-2552 from all providers regardless of whether they are located in state or out of state.

COMMENT: Each of the proposed rules continues to rely on 53-6-141, MCA as part of the statutory authority being implemented. This code section, formerly detailing the amount, scope, and duration of assistance, was repealed by the Montana legislature in 1989. It is no longer good implementing authority for the proposed rules.

RESPONSE: The department does not rely on section 53-6-141, MCA in adopting these rules. The citation to this section has been retained in the list of implementing authorities for historical purposes. The department is required to retain this reference. The department actually relies upon only the underlined sections of the code for purposes of the proposed amendments.

COMMENT: The occupancy percentage should be applied only to the depreciation, interest and other capital costs allocable to patient care areas of the facility. To apply the minimum occupancy factor to general service overhead capital costs allocable to administration, medical records and similar areas of the facility inappropriately excludes a portion of these costs, when the objective should be to exclude excess and unused patient care space.

RESPONSE: The department believes that the minimum occupancy percentage should operate to exclude recognition of all excess capacity in the facility, not just patient areas. The rule will not be revised as suggested.

5. These amendments are effective July 1, 1993 and apply to services provided on or after July 1, 1993.

Rule Reviewer

Director, Social and Rehabilitation Services

Certified to the Secretary of State June 14, 1993.

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

In the matter of the amendment of rules 46.12.1222, 46.12.1226, 46.12.1229, 46.12.1231, 46.12.1235, 46.12.1237, 46.12.1243, 46.12.1246, 46.12.1249, 46.12.1258 and 46.12.1260 pertaining to medicaid nursing facility reimbursement	)))))))))))	NOTICE OF THE AMENDMENT OF RULES 46.12.1222, 46.12.1226, 46.12.1229, 46.12.1231, 46.12.1235, 46.12.1237, 46.12.1243, 46.12.1246, 46.12.1249, 46.12.1258 AND 46.12.1260 PERTAINING TO MEDICAID NURSING FACILITY REIMBURSEMENT

TO: All Interested Persons

1. On April 29, 1993, the Department of Social and Rehabilitation Services published notice of the proposed amendment of rules 46.12.1222, 46.12.1226, 46.12.1229, 46.12.1231, 46.12.1235, 46.12.1237, 46.12.1243, 46.12.1246, 46.12.1249, 46.12.1258 and 46.12.1260 pertaining to medicaid nursing facility reimbursement at page 662 of the 1993 Montana Administrative Register, issue number 8.

2. The Department has amended rules 46.12.1235, 46.12.1237, 46.12.1249 and 46.12.1258 as proposed.

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

46.12.1222 DEFINITIONS Subsections (1) through (14)(e)(xxxi)(D)(V) remain as proposed.

~~(E) vitamins, multivitamins, vitamin supplements and calcium supplements; and~~

Subsection (14)(e)(xxxi)(F) remains as proposed in text but is renumbered (14)(e)(xxxi)(E).

Subsections (14)(e)(xxxii) through (20) remain as proposed.

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

46.12.1226 NURSING FACILITY REIMBURSEMENT Subsections (1) through (3)(b) remain as proposed.

(c) A provider's per diem rate effective July 1 of the rate year shall not exceed the provider's AVERAGE per diem private pay rate for a semi-private bed, PLUS THE AVERAGE COST, IF ANY, OF ITEMS SEPARATELY BILLED TO PRIVATE PAY RESIDENTS, as specified by the provider in the department's survey of private pay rates conducted annually between April 1 and July 1 prior to the rate year. Providers who do not respond to the department's

survey by July 1 of the rate year, will be subject to withholding of their medicaid reimbursement in accordance with ARM 46.12.1260. THE RATE SPECIFIED BY THE PROVIDER IN THIS SURVEY WILL BE REFERRED TO AS THE REPORTED RATE.

(i) Upon request, providers must provide the department or its agents with records and information regarding the private pay rates charged to residents. If the department determines after desk review or audit that the provider's HAS DECREASED THE REPORTED private pay rate ~~has decreased from~~ or that the provider has in fact customarily charged private paying residents less than, the REPORTED rate ~~specified in the department's survey described in subsection (c)~~, the department will decrease the provider's medicaid per diem rate, retroactive to July 1 of the rate year, to the amount of the decreased or actual private pay rate customarily charged to private paying residents during the rate year. THE DEPARTMENT WILL DECREASE THE MEDICAID RATE ONLY IF THE DECREASED AMOUNT OF THE AVERAGE PRIVATE PAY RATE AND SEPARATELY BILLED ITEMS IS LOWER THAN THE COMPUTED MEDICAID RATE. ~~and a~~Any overpayment will be collected as provided in ARM 46.12.1261.

Subsections (3)(c)(ii) through (13) remain as proposed.

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

46.12.1229 OPERATING COST COMPONENT Subsections (1) through (3) remain as proposed.

(4) The operating cost limit is ~~110%~~ ~~115%~~ 110% of median operating costs.

Subsection (5) remains as proposed.

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

46.12.1231 DIRECT NURSING PERSONNEL COST COMPONENT Subsections (1) through (3) remain the same.

(4) The direct nursing personnel cost limit is ~~125%~~ ~~130%~~ 125% of the statewide median average wage, multiplied by the provider's most recent average patient assessment score, determined in accordance with ARM 46.12.1232.

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

46.12.1243 INTERIM PER DIEM RATES FOR NEWLY CONSTRUCTED FACILITIES AND NEW PROVIDERS Subsections (1) through (2)(c) remain as proposed.

(d) FOR CHANGES IN PROVIDER OCCURRING ON OR AFTER JULY 1, 1993, T~~t~~he provider's interim rate shall remain in effect until the provider has filed with the department in accordance with ARM 46.12.1260 a complete and accurate cost report covering a period of ~~at least~~ six months participation in the medicaid program in a newly constructed facility, as a new provider or following a change in provider as defined in ARM 46.12.1241.

Subject to subsection (2)(d)(iv), ~~T~~the interim rate will be adjusted only upon computation of a new interim rate effective July 1 of each rate year, or following a rate adjustment request by a new provider with an interim rate set using a previous provider's cost report, as follows:

Subsections (2)(d)(i) through (2)(d)(iv) remain as proposed.

(A) ~~the applicable maximum rate under the provisions of ARM 46.12.1226, as applied to the facility's average per diem rate in effect for the entire previous rate year, as if no change in provider had occurred; or~~ if the previous ~~owner's~~ PROVIDER'S rate was less than or equal to the bed-weighted median rate for all facilities for the current year, then the new provider's interim rate shall be the lesser of:

(I) the previous ~~owner's~~ PROVIDER'S rate adjusted by an amount, if any, determined in accordance with subsections (2)(d)(i) through (iii); or

Subsection (2)(d)(iv)(A)(II) remains as proposed.

(B) ~~the bed-weighted median rate for all facilities, whichever is less.~~ if the previous ~~owner's~~ PROVIDER'S rate was greater than the bed-weighted median rate for all providers for the current year, then the new provider's interim rate shall be the previous ~~owner's~~ PROVIDER'S rate.

Subsections (2)(e) through (3)(b)(iii) remain as proposed.

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

46.12.1246 ITEMS BILLABLE TO RESIDENTS Subsections (1) through (1)(b) remain as proposed.

(~~f~~c) cosmetics AND GROOMING ITEMS AND SERVICES IN EXCESS OF THOSE FOR WHICH PAYMENT IS MADE BY MEDICARE OR MEDICAID;

(~~i~~d) PERSONAL COMFORT ITEMS, INCLUDING tobacco products and accessories, NOTIONS, NOVELTIES, AND CONFECTIONS;

Subsections (1)(e) and (f) remain as proposed.

(~~l~~g) television, RADIO and private telephone rental;

(~~m~~h) less-than-effective drugs (exclusive of stock items); ~~and~~

(i) VITAMINS, MULTIVITAMINS, VITAMIN SUPPLEMENTS AND CALCIUM SUPPLEMENTS;

(j) PERSONAL READING MATERIALS;

(k) PERSONAL CLOTHING;

(l) FLOWERS AND PLANTS;

(m) PRIVATELY HIRED NURSES OR AIDES;

(n) SPECIALLY PREPARED OR ALTERNATIVE FOOD REQUESTED INSTEAD OF FOOD GENERALLY PREPARED BY FACILITY; AND

Subsection (1)(i) remains as proposed in text but is renumbered (1)(o).

Subsections (2) through (2)(b) remain as proposed.

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

46.12.1260 COST REPORTING, DESK REVIEW AND AUDIT Subsections (1) through (4)(a)(ii) remain as proposed.

(iii) FOR CHANGES IN PROVIDERS OCCURRING ON OR AFTER JULY 1, 1993, within 90 days after six months participation in the medicaid program for providers with an interim rate established under ARM 46.12.1243. Subsequent cost reports are to be filed in accordance with section (i) above and subsequent cost reports shall not duplicate previous cost reporting periods.

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

AUTH: Sec. 53-2-201 and 53-6-113 MCA
IMP: Sec. 53-6-101 and 53-6-113 MCA

4. The amendments to ARM 46.12.1222(14)(e) and ARM 46.12.1246 will be effective October 1, 1993 and will be applied to nursing facility services provided on or after October 1, 1993. All other amendments specified in this notice will be effective July 1, 1993 and will apply to nursing facility services provided on or after July 1, 1993.

5. The Department has thoroughly considered all commentary received:

Licensed to Non-licensed Ratio

COMMENT: The department is proposing to calculate providers' licensed to non-licensed ratio from cost report information rather than from the wage survey. Because this ratio is so important in determining staffing requirements and if the change causes a significant shift in the ratio, the department should not implement this change or should phase-in this change. Draft information provided does not indicate that this change in calculation of the ratio has changed the ratio significantly.

COMMENT: The department should provide an assurance in the response to comments that changing the source of data used by SRS in computation of the licensed management minutes will not appreciably affect the staffing requirements or the average patient assessment score.

RESPONSE: The department proposed to use cost report information for the calculation of the licensed to non-licensed ratio because we believe it is more accurate. This information is an accumulation of 12 months of data rather than a one-month snap shot of information as is presented on the monthly wage survey of providers. The department's analysis indicates that the cost report information computes an accurate licensed to non-licensed ratio that is not significantly different from the survey results that we have accumulated over the last several years.

Proposed 1994 ratio	1.793
1993 ratio	1.804
1992 ratio	1.779
1991 ratio	1.764

The department will eliminate use of the survey of wages, benefits and hours, and will use the cost report information to compute the licensed to non-licensed ratio for fiscal year 1994 and subsequent years.

Resident Funds Charges

COMMENT: The department is adopting the regulations pertaining to charges to resident funds effective July 1, 1993. These federal regulations are not effective until October 1, 1993. These rules should not be implemented until the federally required effective date of October 1, 1993.

RESPONSE: The department agrees with this request and will make these changes effective on the federal regulation implementation date of October 1, 1993, as published in the November 12, 1992 federal register.

COMMENT: The proposed rule contains changes in costs which may be charged separately to medicaid patients and those which must be included in the medicaid daily rate. This is being done to comply with federal regulations published November 12, 1992 in the Federal Register. We do not believe that the federal regulations dealing with costs for which facilities may not charge residents require facilities to provide vitamins, multivitamins, vitamin supplements and calcium supplements as part of the daily rate. Because the regulation does not clearly require these items to be included, we recommend that these items be removed from section 46.12.1222 and be inserted back into section 46.12.1246 as items billable to residents. Without a clear federal mandate, there is no reason for the department to require a facility to provide these items and drive up the cost of nursing home care.

RESPONSE: The federal regulations and the comments and responses that were issued with these regulations do not address specifically whether vitamins, multivitamins, vitamin supplements and calcium supplements are resident billable items. Health Care Financing Administration staff have indicated in conversations with department staff that these items are not addressed specifically in these regulations and that it is left to the state to determine its policy on this issue. Since there is no clear federal mandate to include these items as part of the per diem rate, the department will list them as patient-billable in ARM 46.12.1246 until such time as there may be a federal requirement to include these specific items and their costs in the per diem rate.

COMMENT: Section 46.12.1246 should be expanded to include the complete list of items billable to residents as specified in the federal regulation. Items listed in the federal regulation but not included in the proposed rule at section 46.12.1246 include the following: personal comfort items, including smoking

materials, notions and novelties, and confections; grooming items and services in excess of those for which payment is made under medicaid or medicare; personal clothing; personal reading matter; flowers and plants; noncovered special care services such as privately hired nurses or aides; specially prepared or alternative food requested instead of the food generally prepared by the facility. We believe that adding these items would bring the rules more closely in line with the federal rules and avoid any confusion.

RESPONSE: The department agrees that the addition of these items and services in the list of items billable to residents in the administrative rules would serve to clarify the list of billable items for facilities and would be in line with the federal regulations. ARM 46.12.1246 has been modified to include this list of items and services.

Private Pay Limits

COMMENT: I support the change regarding the private pay limitation. Medicaid should not be paying facilities in excess of their private pay charges.

COMMENT: The definition for the per diem private pay rate should be changed to clarify that the "per diem private pay rate" means the average per diem rate charged to private pay individuals plus the average cost of items separately billed to private pay residents that are included in the medicaid per diem rate.

COMMENT: The rule should be changed to allow for a medicaid rate that has been limited because of a private pay rate to be increased if the private pay rate increases during the rate year. The legislative language provided that medicaid would not pay more than the private pay rate. It did not provide that facilities be penalized for keeping their private pay rate as low as possible for as long as possible. Once a facility's private pay rate is at least equal to the facility's calculated medicaid rate under the formula the facility should be entitled to that rate. Facilities should be allowed to phase in higher rates during the year, rather than make a large increase at one time and the department should adjust rates for limited nursing facilities who raise their rates throughout the year.

COMMENT: We are concerned with the wording in 46.12.1226 (3)(c)(i) regarding the statement that any decrease in the amount customarily charged private paying residents from that reported in the department's annual survey will result in decreased reimbursement to a facility. This drop in the customary charges to private paying customers should not result in decreased reimbursement to a facility unless the total charges drop below the medicaid reimbursement level. I believe the department intended to apply this section in the following

manner and would suggest the following wording change: the department will decrease the provider's medicaid per diem rate to the extent the medicaid aggregate charges, expressed as a per diem, computed using actual rates customarily charged private paying residents is below the provider's medicaid per diem rate as calculated in sections 46.12.1229-46.12.1258 retroactive to July 1 of the rate year, and any overpayment will be collected as provided in ARM 46.12.1261.

COMMENT: We recommend that the private pay limit be modified to allow for changes in the private pay rate if such changes correspond with the beginning of a facility's fiscal year rather than on a state fiscal year.

COMMENT: We oppose the method of implementing a private pay limit in the payment formula. The savings will likely be immaterial, and would actually force some providers to raise private pay rates to match medicaid payments. This limit flies in the face of facility efforts to contain medical costs. Providers who support the department's bed tax proposal now must explain that the policies of taxing bed days and the private pay limits mean that their rates must be increased.

RESPONSE: The department was directed to implement the private pay limit as part of a legislative cost containment provision that was included in House Bill 2, the general appropriations bill, during the 1993 legislative session. The legislative language limits a facility's medicaid rate to no more than the facility's private pay rate. The proposed rule would implement a limit on medicaid reimbursement if a facility's private pay rate is lower than the computed medicaid rate. The department will survey nursing facilities to determine the private pay rate effective July 1, 1993. If the private pay rate is less than the July 1 medicaid rate computed under the reimbursement formula, then the facility's medicaid reimbursement is limited to the facility private pay rate for the entire rate year.

The survey form sent to all providers requires providers to report their private pay rate effective July 1, 1993. The department requested that each facility report its per diem rate based upon a semi-private room and a per bed day amount for separately billable items and services which are included in the medicaid per diem rate. If the facility has a range of private pay rates for semi-private rooms, facilities should average these rates or report the rate for the level of services that most closely matches the medicaid requirements. Facilities were also notified that the department will not set the final 1994 nursing facility per diem rate until the facility responds to the survey.

The private pay limit is intended to insure that the medicaid program is not paying more for nursing facility services than private paying residents are charged. Additional language will be added to the rule to clarify the department's intent that the

facility's medicaid rate will decrease during the rate year if the private pay rate is less than the rate specified in the survey, and the average private pay rate and separately billed items are lower than the computed medicaid rate.

The private pay limit will be based upon the private pay rate effective July 1 and rates will not be adjusted upward for private pay rate increases occurring during the year. To monitor private rates and to continually adjust rates would be costly and is not administratively feasible. Each facility will need to evaluate the cost of providing nursing facility care and compare this to the private pay charges in order to determine if the private pay rate is reflective of the cost of providing care for the year beginning July 1. Based on this analysis, some private pay rates may need to be raised, not because of the limit on the medicaid rate but because the cost of providing this care is greater than what is being charged to the private paying resident for this care. Medicaid should not be responsible for absorbing costs of providing care to private paying residents. If facilities increase their private pay rates during the year there will be no adjustments to the computed Medicaid rate established on July 1.

Property Component

COMMENT: Although we are not in agreement with the property component calculation we will not object to those rules as the department continues to work on revising the property methodology.

COMMENT: The department should consider potential adjustment to the property rate upon a change of ownership if a provider incurs additional property costs with the goal of implementing efficiencies in the operations of the provider. Since the medicaid program will benefit significantly from these savings it would be appropriate to provide a consideration for a special property rate adjustment in these cases if the operating cost savings exceed the property cost increases.

RESPONSE: The department will continue during the next year to evaluate changes to the system for reimbursing property costs. The department will be analyzing the recently completed property reimbursement study and, in conjunction with a property reimbursement task force, will consider property reimbursement changes for rate year 1995. The department is interested in any ideas from providers on possible changes in the property reimbursement methodology.

Change in Provider Provisions

COMMENT: ARM 46.12.1260 requires a cost report to be filed after six months participation following a change of ownership.

This cost report would be used to issue a more prompt retroactive settlement. While it is desirable to implement a final retroactive settlement as soon as possible there are some issues which need to be addressed in making a change such as this. Due to timing of the change in ownership the provider's expenses for the first six months may not include the full amount of some expenses that the facility will be incurring. These expenses can be distorted depending on the timing and circumstances of the change in ownership.

Suggestions for options when a change in ownership occurs are:

Leave the cost reporting requirement as it has been in the past to allow the provider flexibility in selecting the most representative period for cost reporting. Or, adopt the proposal requiring a six month cost report, but allow flexibility in the rate setting procedure to adjust the expenses on the six month cost report for issues which can be documented as costs not included in the cost base. Adjust the costs to reflect six months of expenses rather than one or two months costs for items that are not fully reported. Another option to encourage efficiency would be to set the rate based on a blend of the rate computed from the six month cost report and the rate computed using the prior owner's cost report. The midpoint could be used to compute the settled rate. We would suggest that the rate computed by the blend be used for the retroactive adjustment to the rate for the initial period as well as the subsequent July 1 rate setting, and would be considered the base period cost report. These changes would allow more equity to the rate setting process.

RESPONSE: The department proposed to modify the rule regarding interim rate providers in order to require the submission of a cost report after six months participation in the medicaid program. This rule was proposed to allow new providers and the department a method to speed up the settlement process with interim rate providers. Most providers who are operating under an interim rate computation are requesting that they be able to submit cost reports of six months participation to settle up on the interim rate. While it may be true that for some providers the six month cost report does not include all of the costs that may be incurred by the provider, in most instances six months of cost data will be representative of the operations of the new provider and will be accurate cost information to settle the interim rate for that provider. All providers could argue that there are some costs that are not fully represented in their cost base that would require this type of adjustment to be considered. The proposal to project future costs and add them to six months of actual cost does not make sense. Under this proposal the interim rate would then be settled based partly on projections of costs or approximations of costs, rather than on actual cost.

The use of a six month report will allow the department to keep interim rates to a minimum and will allow providers to have settlements of these rates in a more timely manner. This will eliminate the issuance of two and three rate changes for providers when the cost report is filed and the settlement impacts two or three rate periods. This will reduce complexity from a provider standpoint and will lessen the administrative time involved for the department in adjusting rates retroactively over several reimbursement periods.

Allowing providers to choose from a six month report and a regularly filed cost report of at least six months would unduly complicate the settlement process and would provide an opportunity for providers to game the settlement process depending on the cost experience during those two reporting periods. Since the majority of providers with interim rates prefer the quicker settlement of the interim rate the department will adopt the rule as proposed and will require the six month report for the settlement of an interim rate. In order to provide providers sufficient notice, we will implement the six month filing requirement for changes in provider occurring on or after July 1, 1993. Current rules will apply for interim rates and cost report filings for changes in provider occurring prior to July 1, 1993. The department has also revised the proposed rule references to changes in ownership to refer to changes in provider, consistent with other language in the rules.

Direct Nursing Computation:

COMMENT: Some providers commented on the computation of the direct nursing component and the use of base period cost report information and base period patient assessment history to compute a base period wage rate prior to application of inflation. The concern was that the use of the patient assessment information does not compute a true wage rate and that the use of the staffing report patient assessment component might compute a better approximation of the wage rate in the base period. There were suggestions that this change should be made to the direct nursing computation.

RESPONSE: The use of the staffing report information in the computation of the direct nursing component may have some merit for further analysis. The department's understanding of how this would change the direct nursing computation would be that the base period nursing costs would be divided by averaged staffing report patient assessment information from the same cost reporting period to compute the base period wage. Providers with high costs and low staffing would have a higher base period wage component prior to inflation being added. Conversely, providers who have average or high costs and who also use more staff would receive a lower component based on how the facility staffed in the base period.

There are some inherent problems with using the staffing reports as a indicator of wages. For example, the staffing reports are reflective of only direct care hours. Cost reports include all costs associated with nursing. Abstracts are reflective of the care needs during the base period, while the staffing report is reflective of how the facility staffed (at the minimum, within 10% or higher). The patient assessment information is validated during the year, while the staffing report information is validated only on selective audit. Using the staffing report, facilities which staff to the minimum may receive more money in this component than the one who staffs at higher ratios. There are many unanswered questions about using the staffing report to compute the wage component and this would be considered a major change in the methodology which would impact every provider and the computation of the nursing component. The department will consider the merit of this change in its analysis of the patient assessment system and conversion to a system of reimbursement that incorporates the minimum data set.

Percentage Changes:

COMMENT: Legislative appropriations are insufficient to fund the methodology with the operating limit percentage at 115% of the median and the direct nursing limit at 130% of the median.

RESPONSE: In the final rule, the department has reduced the percentages for the operating and direct nursing component limits from those proposed in the rule notice. The operating component limit will be set at 110% of the median and the direct nursing component limit will be set at 125%. The rates set using the current percentages will comply with legal requirements that rates be reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable state and federal laws, regulations, and quality and safety standards. The department proposed using the increased percentage levels to meet target levels which the department agreed to meet if sufficient funds were appropriated. Sufficient funds were not appropriated to implement these percentage levels, and the department does not believe that the higher levels are necessary to comply with legal requirements. The percentages for the incentive component will remain as proposed in the first notice of the rule. The department estimates that any funding that is not projected to be distributed through initial rates set for July 1 will actually be distributed as nursing facility reimbursement as the result of rate appeals, patient assessment adjustments, increased reimbursement for services provided to head-injured residents and other adjustments to providers rates during the year. The department believes that this is a necessary decision in light of the legislative mandate that there will be no supplemental appropriations for any programs during this fiscal year.

Rule Reviewer

Director, Social and Rehabilitation Services

Certified to the Secretary of State June 14, 1993.

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

In the matter of the amendment of rule 46.12.1928 pertaining to targeted case management for adults	))))	NOTICE OF THE AMENDMENT OF RULE 46.12.1928 PERTAINING TO TARGETED CASE MANAGEMENT FOR ADULTS

TO: All Interested Persons

1. On May 13, 1993, the Department of Social and Rehabilitation Services published notice of the proposed amendment of rule 46.12.1928 pertaining to targeted case management for adults at page 920 of the 1993 Montana Administrative Register, issue number 9.

2. The Department has amended rule 46.12.1928 as proposed.

3. No written comments or testimony were received.

Rule Reviewer

Director, Social and Rehabilitation Services

Certified to the Secretary of State June 14, 1993.

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

In the matter of the amendment of rules 46.12.3002, 46.12.3801, 46.12.3803 and 46.12.3804 pertaining to medically needy	)))))	NOTICE OF THE AMENDMENT OF RULES 46.12.3002, 46.12.3801, 46.12.3803 AND 46.12.3804 PERTAINING TO MEDICALLY NEEDY

TO: All Interested Persons

1. On May 13, 1993, the Department of Social and Rehabilitation Services published notice of the proposed amendment of rules 46.12.3002, 46.12.3801, 46.12.3803 and 46.12.3804 pertaining to medically needy at page 913 of the 1993 Montana Administrative Register, issue number 9.

2. The Department has amended rules 46.12.3002, 46.12.3801, 46.12.3803 and 46.12.3804 as proposed.

3. No written comments or testimony were received.

Rule Reviewer

Director, Social and Rehabilitation Services

Certified to the Secretary of State June 14, 1993.

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

In the matter of the amendment of rules 46.12.4002, 46.12.4004 and 46.12.4006 pertaining to AFDC-related institutionalized individuals	))))	NOTICE OF THE AMENDMENT OF RULES 46.12.4002, 46.12.4004 AND 46.12.4006 PERTAINING TO AFDC-RELATED INSTITUTIONALIZED INDIVIDUALS

TO: All Interested Persons

1. On May 13, 1993, the Department of Social and Rehabilitation Services published notice of the proposed amendment of rules 46.12.4002, 46.12.4004 and 46.12.4006 pertaining to AFDC-related institutionalized individuals at page 905 of the 1993 Montana Administrative Register, issue number 9.

2. The Department has amended the following rules as proposed with the following changes:

46.12.4002 GROUPS COVERED, AFDC-RELATED INSTITUTIONALIZED INDIVIDUALS Subsection (1) as proposed.

~~(a) Individuals who continue to receive AFDC even though they are in a medical institution or intermediate care facility. Such individuals are limited to those under age 19 who continue to receive AFDC under ARM 46.10.302 which provides for continued eligibility when the dependent child is temporarily absent from the home. Under ARM 46.10.302, caretaker relatives are ineligible for AFDC when in a medical institution or intermediate care facility, even though for a temporary period.~~

Subsections (1)(b) and (1)(c) remain as proposed but will be renumbered (1)(a) and (1)(b).

Subsection (2) remains as proposed.

(a) individuals described in subsections (1)(~~b~~a) and (1)(~~c~~b) who are ineligible for coverage as categorically needy because of excess income.

AUTH: Sec. 53-6-113 MCA
IMP: Sec. 53-6-131 MCA

46.12.4004 NON-FINANCIAL REQUIREMENTS, AFDC-RELATED INSTITUTIONALIZED INDIVIDUALS Subsection (1) remains as proposed.

(2) For individuals under age 21 in intermediate care facilities, including intermediate care facilities for the mentally retarded, or receiving treatment in psychiatric facilities or programs pursuant to the requirements of ARM 46.12.4002(1)(eb), the nonfinancial requirements for medicaid under this subchapter, whether as categorically needy or medically needy, consist of the age requirement and applicable service requirements.

AUTH: Sec. 53-6-113 MCA
IMP: Sec. 53-6-131 MCA

46.12.4006 FINANCIAL REQUIREMENTS, AFDC-RELATED INSTITUTIONALIZED INDIVIDUALS Subsection (1) remains as proposed.

(2) For individuals under age 21 in intermediate care facilities, including intermediate care facilities for the mentally retarded, or receiving treatment in psychiatric facilities or programs pursuant to the requirements of ARM 46.12.4002(1)(eb), the financial requirements for medicaid under this subchapter as categorically needy are the AFDC financial requirements which are set forth in ARM 46.10.401 through 46.10.406 and 46.10.505 through 46.10.514. These will be used to determine whether:

(3) For individuals under age 21 in intermediate care facilities, including intermediate care facilities for the mentally retarded, or receiving treatment in psychiatric facilities or programs pursuant to the requirements of ARM 46.12.4002(1)(eb) who are ineligible under subsection (2) because of excess income, the financial requirements for medicaid under this subchapter as medically needy are the medically needy financial requirements for noninstitutionalized AFDC-related families and children which are set forth in subchapter 38. The financial provisions of this subchapter which apply to individuals under 21 who are ineligible for medicaid under ARM 46.12.3401(1)(b)(iii) and ARM 46.12.3401(3) apply identically to the above described individuals under 21.

AUTH: Sec. 53-6-113 MCA
IMP: Sec. 53-6-131 MCA

3. The Department has thoroughly considered all commentary received:

COMMENT: ARM 46.12.4002 needs to specify that individuals receiving IV-E foster care maintenance are eligible for Medicaid whether or not they are court ordered to the custody of the Department of Family Services.

RESPONSE: Foster care eligibility for Medicaid is covered in ARM 46.10.307. If a dependent child has been removed as a result of a judicial determination and the child is subsequently placed in a foster family home or child-caring institution, they will continue to be eligible for Medicaid.

ARM 46.12.4002, 4004 and 4006 deal with groups of individuals whose eligibility is determined by the fact that they are in an institutional setting and are included as a reasonable classification in the state plan.

Since these rules do not in any way pertain to criteria used to determine Medicaid eligibility for non-institutionalized AFDC-related individuals, including foster care, ARM 46.12.4002 will be further amended by deleting subsection (1)(a) and the rest of the subsections will be renumbered.

COMMENT: Are youths who are out of the home under voluntary placement agreements "in the custody of the department of family services" as the term is used in the proposed amendment?

RESPONSE: No. "[I]n the custody of the department of family services" means that custody has been transferred to the Department of Family Services through court proceedings.

Rule Reviewer

Director, Social and Rehabilitation Services

Certified to the Secretary of State June 14, 1993.

VOLUME NO. 45 OPINION NO. 7

CITIES AND TOWNS - Authority of self-governing city to enact photo-radar ordinance;
HIGHWAYS - Authority of self-governing city to enact photo-radar ordinance;
MOTOR VEHICLES - Authority of self-governing city to enact photo-radar ordinance;
MUNICIPAL GOVERNMENT - Authority of self-governing city to enact photo-radar ordinance;
TRAFFIC - Authority of self-governing city to enact photo-radar ordinance;
MONTANA CODE ANNOTATED - Sections 7-1-111 to 7-1-114, 7-5-4101, 7-14-4102, 7-14-4103, 45-2-301, 45-2-302, 61-8-303, 61-8-306, 61-8-309, 61-8-310, 61-8-312, 61-8-313, 61-8-353 to 61-8-356, 61-8-711, 61-12-101;
OPINIONS OF THE ATTORNEY GENERAL - 44 Op. Att'y Gen. No. 42 (1992), 44 Op. Att'y Gen. No. 34 (1992), 43 Op. Att'y Gen. No. 53 (1990), 43 Op. Att'y Gen. No. 41 (1989), 37 Op. Att'y Gen. No. 68 (1977).

HELD: The City of Billings, under its self-government charter, is not precluded by statute from enacting a photo-radar ordinance providing either for accountability on the part of the registered owner for illegal speeding by any person operating the vehicle with the owner's permission, or for a permissive inference that the registered owner was the speeding violator.

June 7, 1993

Mr. James L. Tillotson
Billings City Attorney
P.O. Box 1178
Billings, MT 59103

Dear Mr. Tillotson:

You have requested my opinion on a question which I have rephrased as follows:

> May the City of Billings, under its self-government charter, enact a photo-radar ordinance providing for either accountability on the part of the registered owner for illegal speeding by any person operating the vehicle with the owner's permission or for a permissive inference that the registered owner was the speeding violator?

I have used the term "accountability" in place of "vicarious liability" because Montana's criminal code, MCA title 45,

recognizes legal accountability as the only method by which one individual may be held responsible for the criminal conduct of another.

I understand that by photo-radar, you mean a sophisticated device which not only records the actual speed of passing vehicles but which also takes a photograph of each vehicle in conjunction with the radar reading. The photographs would show the vehicle's license plate, the speed of the vehicle, the time and date the speed reading was made and the location of the speed reading. The photograph would also identify the officer operating the unit at the time the speed reading and photograph were made and provide a good image of the driver's face, even after dark.

The City of Billings proposes to enact an ordinance which would provide for the mailing of a complaint and summons to the registered owner of a vehicle which was determined by the photo-radar device to have been illegally speeding. Under your proposal, the registered owner would either: (a) be accountable for a speeding violation committed by any driver using the vehicle with the owner's permission, or (b) face a permissive inference that the owner was, in fact, the illegal speeder.

Previous opinions from this office have held that, in determining whether a self-government city is authorized to exercise a particular power, it is necessary to engage in a three-part analysis:

> (1) consult the charter and consider constitutional ramifications;
>
> (2) determine whether the exercise is prohibited under the various provisions of title 7, chapter 1, part 1, MCA, or other statute specifically applicable to self-government units; and
>
> (3) decide whether it is inconsistent with state provisions in an area affirmatively subjected to state control as defined by section 7-1-113.

44 Op. Att'y Gen. No. 34 (1992), 43 Op. Att'y Gen. No. 53 at 184, 185-86 (1990), 43 Op. Att'y Gen. No. 41 at 130, 132 (1989), and 37 Op. Att'y Gen. No. 68 at 272, 274 (1977).

Regarding the first step of this analysis, in adopting the Billings city charter the city has reserved all powers available to a self-government city under the Constitution and the laws of Montana. See City of Billings Charter, Art. I. All reserved powers are vested in the city council, which, together with the mayor, constitutes the legislative branch. See City of Billings Charter, Art. III. I can find no provision in the charter itself denying the city council's authority to enact either version of the proposed ordinance.

With respect to the constitutional ramifications of the proposals, the constitutionality of a proposed legislative act is not an appropriate subject for an Attorney General's Opinion. 44 Op. Att'y Gen. No. 42 (1992). A presumption exists that legislative acts are constitutional and as Attorney General I am routinely called upon to defend the validity of legislation. I therefore express no opinion on the constitutionality of the proposed ordinances.

The second step of the analysis requires consideration of MCA §§ 7-1-111 and -112 which limit the exercise of power by local governments with self-government powers, and MCA § 7-1-114, which enumerates those provisions of state law with which a local government with self-government powers must comply.

It could be argued that MCA § 7-1-111(8) prohibits the adoption of either version of the proposed ordinance. That provision denies to a local government unit with self-government powers the exercise of "any power that defines as an offense conduct made criminal by state statute." State law places the criminal responsibility for speeding on the person who actually violates speeding laws. MCA § 61-8-711. See also MCA §§ 61-8-303, -306, -309, -310, -312 and -313. Since either version of the proposed ordinance would make it theoretically possible for a registered owner to be convicted of speeding when the owner had not driven the vehicle in violation of the speed limit, the ordinance could be viewed as redefining the offense of speeding, which is what MCA § 7-1-111(8) appears designed to prevent.

That same prohibitory statute, however, also includes language which allows a local government unit with self-government powers to exercise such powers in regard to conduct made criminal by state statute if "specifically authorized by statute." All cities and towns have broad legislative power for the general management of their affairs. MCA § 7-5-4101. They also have legislative authority to regulate motor vehicles and their speed. MCA §§ 7-14-4102 and -4103; see also MCA §§ 61-8-310 and -12-101. In addition to these powers which are applicable to any city or town, the authority of a local government entity with self-government powers is to be liberally construed. MCA § 7-1-111.

These statutory provisions, when taken together, clearly constitute specific authorization for the City of Billings to regulate the speed of vehicles within its proper jurisdiction. What remains is the question of whether the city may so regulate in a manner which is inconsistent with state law.

In City of Missoula v. Shea, 202 Mont. 286, 661 P.2d 410 (1983), the Montana Supreme Court upheld a parking ordinance which provided for accountability (vicarious liability) on the part of a registered owner for any illegal parking of the vehicle. This decision was reached despite the fact that state law imposes criminal responsibility only on the person who actually

illegally parks the vehicle. MCA § 61-8-711. See also MCA §§ 61-8-353 to -356. Critical to this decision was a recognition that the type of accountability at issue has been historically accepted in regard to traffic regulations. The Court also noted that Montana law provides for the criminal responsibility of one person for the criminal act of another. MCA §§ 45-2-301 and -302.

It appears, therefore, that under the Shea rationale, the proposed ordinance providing for accountability of a registered owner for illegal speeding by any person operating the vehicle with the owner's permission would be lawful despite the language of MCA § 7-1-111(8). Such an ordinance would not be prohibited by the other provisions of MCA § 7-1-111 or by MCA §§ 7-1-112 and -114.

In regard to the alternative proposal that the ordinance create a permissive inference that the registered owner was driving at the time the speeding occurred, the holding in City of Missoula v. Shea appears to authorize such an ordinance. Although that case dealt with an ordinance imposing accountability, it recognized a city's ability to legislate broadly in the area of traffic regulation. In addition, State v. Leverett, 245 Mont. 124, 799 P.2d 119 (1990), acknowledged the propriety of using a permissive inference in relation to an element of a criminal offense.

The third step of the analysis requires consideration of MCA § 7-1-113 which prohibits a self-governing local government from exercising any power in a manner inconsistent with state law or administrative regulation in any area affirmatively subjected by law to state regulation or control. Stated conversely, this statute "allows a local government with self-government powers to enact any ordinance unless the ordinance (1) is inconsistent with state law or regulation and (2) concerns an area affirmatively subjected by law to state control." 44 Op. Att'y Gen. No. 34 (1992), citing 43 Op. Att'y Gen. No. 53 at 184, 186 -87 (1990), and 43 Op. Att'y Gen. No. 41 at 130, 134 (1989) (emphasis in original). Neither version of the proposed ordinance would be prohibited by this statute as the regulation of speeding is clearly not an area affirmatively subjected to exclusive state control. MCA § 7-1-113(3) provides that a subject matter is "affirmatively subjected to state control if a state agency or officer is directed to establish administrative rules governing the matter or if enforcement of standards or requirements established by statute is vested in a state officer or agency." No state agency is given exclusive power to establish administrative rules governing speed of traffic in cities and towns, nor is enforcement of speed regulations exclusively vested in a state agency. MCA § 7-1-113 therefore does not apply in this area.

THEREFORE, IT IS MY OPINION:

The City of Billings, under its self-government charter, is not precluded by statute from enacting a photo-radar ordinance providing either for accountability on the part of the registered owner for illegal speeding by any person operating the vehicle with the owner's permission, or for a permissive inference that the registered owner was the speeding violator.

Sincerely,

JOSEPH P. MAZUREK
Attorney General

NOTICE OF FUNCTIONS OF ADMINISTRATIVE CODE COMMITTEE

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

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

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

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

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

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

Use of the Administrative Rules of Montana (ARM):

Known Subject Matter	1. Consult ARM topical index. Update the rule by checking the accumulative table and the table of contents in the last Montana Administrative Register issued.
Statute Number and Department	2. Go to cross reference table at end of each title which lists MCA section numbers and corresponding ARM rule numbers.

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies which have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through March 31, 1993. This table includes those rules adopted during the period April 1, 1993 through June 30, 1993 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 March 31, 1993, this table and the table of contents of this issue of the MAR.

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BOARD APPOINTEES AND VACANCIES

House Bill 424, passed by the 1991 Legislature, directed that all appointing authorities of all appointive boards, commissions, committees and councils of state government take positive action to attain gender balance and proportional representation of minority residents to the greatest extent possible.

One directive of HB 424 was that the Secretary of State publish monthly in the *Montana Administrative Register* a list of appointees and upcoming or current vacancies on those boards and councils.

In this issue, appointments made in May, 1993, are published. Vacancies scheduled to appear from July 1, 1993, through September 30, 1993, are also listed, as are current recent vacancies due to resignations or other reasons.

Individuals interested in serving on a new board should refer to the bill that created the board for details about the number of members to be appointed and qualifications necessary.

Each month, the previous month's appointees are printed, and current and upcoming vacancies for the next three months are published.

IMPORTANT

Membership on boards and commissions changes constantly. The following lists are current as of June 4, 1993.

For the most up-to-date information of the status of membership, or for more detailed information on the qualifications and requirements to serve on a board, contact the appointing authority.

BOARD AND COUNCIL APPOINTEES: MAY, 1993

Appointee	Appointed by	Succeeds	Appointment/End Date
Board of Aeronautics (Transportation)			
Mr. Robert M. Hector	Governor	Teslovick	5/4/1993
Billings			1/1/1995
Qualifications (if required): airline representative			
Board of Occupational Therapy Practice (Commerce)			
Ms. Linda Botten	Governor	Rosemore	5/17/1993
Bozeman			12/31/1996
Qualifications (if required): occupational therapist			
Board of Respiratory Care Practitioners (Commerce)			
Mr. Paul A. Bergman	Governor	Grainey	5/17/1993
Miles City			1/1/1997
Qualifications (if required): public member			
Ms. Iris L. Bungay	Governor	Johnson	5/17/1993
Cut Bank			1/1/1997
Qualifications (if required): respiratory care practitioner			
Mr. John H. Gildersleeve	Governor	Biggins	5/17/1993
Helena			1/1/1997
Qualifications (if required): respiratory care practitioner			
Mr. Rich Lundy	Governor	not listed	5/17/1993
Billings			0/0/0
Qualifications (if required): none specified			

BOARD AND COUNCIL APPOINTEES: MAY, 1993

Appointee	Appointed by	Succeeds	Appointment/End Date
Commission for Human Rights (Labor and Industry)			
Ms. Jane Meyer	Governor	not listed	5/17/1993
Great Falls			0/0/0
Qualifications (if required): none specified			
Ms. Evelyn Stevenson	Governor	Kuhr	5/17/1993
Pablo			1/1/1997
Qualifications (if required): attorney			
Family Services Advisory Council (Family Services)			
Sen. Thomas F. Keating	Governor	Cobb	5/28/1993
Billings			4/15/1994
Qualifications (if required): legislator on Human Services & Aging Joint Subcommittee			
Ms. Jani McCall	Governor	not listed	5/28/1993
Billings			4/15/1994
Qualifications (if required): represents interests of youth & family treatment providers			
Ms. Melisa Parker Stilger	Governor	Wetzel	5/28/1993
Havre			4/15/1994
Qualifications (if required): Native American			
Microbusiness Finance Program Advisory Council (Commerce)			
Ms. Barbara Burke	Governor	not listed	5/10/1993
Missoula			7/1/1995
Qualifications (if required): represents experts in revolving loan fund administration, 1st Congressional District			
Ms. Anita Dupuis	Governor	not listed	5/10/1993
Pablo			7/1/1995
Qualifications (if required): represents minorities in Montana, 1st Congressional District			

BOARD AND COUNCIL APPOINTEES: MAY, 1993

Appointee	Appointed by	Succeeds	Appointment/End Date
Microbusiness Finance Program Advisory Council (Commerce) cont.			
Mr. Harold J. Fraser Missoula Qualifications (if required): represents banking industry, 1st Congressional District	Governor	not listed	5/10/1993 7/1/1995
Mr. Richard T. Greenshields East Glacier Park Qualifications (if required): represents microbusiness owners, 1st Congressional District	Governor	not listed	5/10/1993 7/1/1995
Ms. Dolph Harris Sidney Qualifications (if required): represents statewide business owners, 2nd Congressional District	Governor	not listed	5/10/1993 7/1/1995
Ms. Judith Johnston Helena Qualifications (if required): represents microbusiness owners, 1st Congressional District	Governor	not listed	5/10/1993 7/1/1995
Ms. Jamie Kay Missoula Qualifications (if required): represents microbusiness owners, 1st Congressional District	Governor	not listed	5/10/1993 7/1/1995
Mr. Richard C. King Havre Qualifications (if required): represents expertise in revolving loan fund administration, 2nd Congressional District	Governor	not listed	5/10/1993 7/1/1995
Mr. Duane Kurokawa Wolf Point Qualifications (if required): represents banking industry, 2nd Congressional District	Governor	not listed	5/10/1993 7/1/1995

BOARD AND COUNCIL APPOINTEES: MAY, 1993

Appointee	Appointed by	Succeeds	Appointment/End Date
Microbusiness Finance Program Advisory Council (Commerce) cont.			
Ms. Jeanne Moller	Governor	not listed	5/10/1993
Billings			7/1/1995
Qualifications (if required): represents city with population greater than 15,000, 2nd Congressional District			
Mr. Rick Sharp	Governor	not listed	5/10/1993
Havre			7/1/1995
Qualifications (if required): represents low-income persons, 2nd Congressional District			
Mr. Craig Smith	Governor	not listed	5/10/1993
Wolf Point			7/1/1995
Qualifications (if required): represents city with population less than 15,000, 2nd Congressional District			
State Advisory Council on Food and Nutrition (Health and Environmental Sciences)			
Mr. Dean Folkvord	Governor	Rispens	5/28/1993
Three Forks			8/30/1993
Qualifications (if required): general public who knows & active in food, nutrition & hunger			
Veterans Cemetery Advisory Council (Military Affairs)			
Mr. Herb Ballou	Director	not listed	5/1/1993
Helena			5/1/1995
Qualifications (if required): none specified			
Mr. Dick Baumberger	Director	not listed	5/1/1993
Helena			5/1/1995
Qualifications (if required): none specified			

BOARD AND COUNCIL APPOINTEES: MAY, 1993

Appointee	Appointed by	Succeeds	Appointment/End Date
Veterans Cemetery Advisory Council (Military Affairs) cont.			
Mr. Joel Cusker	Director	not listed	5/1/1993
Helena			5/1/1995
Qualifications (if required): none specified			
Ms. Alma Dickey	Director	not listed	5/1/1993
Helena			5/1/1995
Qualifications (if required): none specified			
Mr. Lee Dickey	Director	not listed	5/1/1993
Helena			5/1/1995
Qualifications (if required): none specified			
Mr. James W. Duffy	Director	not listed	5/1/1993
Helena			5/1/1995
Qualifications (if required): none specified			
Mr. M. Herbert Goodwin	Director	not listed	5/1/1993
Helena			5/1/1995
Qualifications (if required): none specified			
Mr. Jim Heffernan	Director	not listed	5/1/1993
Helena			5/1/1995
Qualifications (if required): none specified			
Mr. James F. Jacobson	Director	not listed	5/1/1993
Helena			5/1/1995
Qualifications (if required): none specified			
Mr. Robert C. McKenna	Director	not listed	5/1/1993
Helena			5/1/1995
Qualifications (if required): none specified			

BOARD AND COUNCIL APPOINTEES: MAY, 1993

Appointee	Appointed by	Succeeds	Appointment/End Date
Veterans Cemetery Advisory Council (Military Affairs) cont.			
Mr. Mickey Nelson Helena Qualifications (if required): none specified	Director	not listed	5/1/1993 5/1/1995
Mr. Carl L. Nordberg Helena Qualifications (if required): none specified	Director	not listed	5/1/1993 5/1/1995
Mr. Fred Olson Fort Harrison Qualifications (if required): none specified	Director	not listed	5/1/1993 5/1/1995
Mr. George Paul Helena Qualifications (if required): none specified	Director	not listed	5/1/1993 5/1/1995
Ms. Irma Paul Helena Qualifications (if required): none specified	Director	not listed	5/1/1993 5/1/1995
Mr. Ray Read Helena Qualifications (if required): none specified	Director	not listed	5/1/1993 5/1/1995
Mr. Ruddy Reilly Helena Qualifications (if required): none specified	Director	not listed	5/1/1993 5/1/1995
Ms. Rose Marie Storey Helena Qualifications (if required): none specified	Director	not listed	5/1/1993 5/1/1995

BOARD AND COUNCIL APPOINTEES: MAY, 1993

Appointee	Appointed by	Succeeds	Appointment/End Date
Vocational Education Advisory Council (Governor)			
Mr. Fred "Rocky" Clark Butte Qualifications (if required): none specified	Governor	reappointed	5/1/1993 5/1/1995
Mr. Jeff Dietz Billings Qualifications (if required): none specified	Governor	reappointed	5/1/1993 5/1/1995
Ms. Aleta Ann Haagenstad Clancy Qualifications (if required): none specified	Governor	reappointed	5/1/1993 5/1/1995
Dr. Jon Jourdonnais Great Falls Qualifications (if required): none specified	Governor	reappointed	5/1/1993 5/1/1995
Dr. August "Gus" Korb Havre Qualifications (if required): none specified	Governor	reappointed	5/1/1993 5/1/1995
Dr. Dennis Lerum Missoula Qualifications (if required): none specified	Governor	reappointed	5/1/1993 5/1/1995
Mr. Jesse O'Hara Great Falls Qualifications (if required): none specified	Governor	reappointed	5/1/1993 5/1/1995
Dr. Robert Schaal Kalispell Qualifications (if required): none specified	Governor	reappointed	5/1/1993 5/1/1995

BOARD AND COUNCIL APPOINTEES: MAY, 1993

Appointee	Appointed by	Succeeds	Appointment/End Date
Vocational Education Advisory Council (Governor)		cont.	
Mr. James Schultz Lewistown Qualifications (if required): none specified	Governor	reappointed	5/1/1993 5/1/1995
Colonel Gordon Simmons Missoula Qualifications (if required): none specified	Governor	reappointed	5/1/1993 5/1/1995
Rep. Chuck Swysgood Dillon Qualifications (if required): none specified	Governor	reappointed	5/1/1993 5/1/1995
Ms. Avis Ann Tobin Helena Qualifications (if required): none specified	Governor	reappointed	5/1/1993 5/1/1995
Mr. Howard Williams Helena Qualifications (if required): none specified	Governor	reappointed	5/1/1993 5/1/1995

VACANCIES ON BOARDS AND COUNCILS -- July 1, 1993 through September 30, 1993

Board/current position holder	Appointed by	Term end
Advisory Council on Food and Nutrition (Health)		
Mr. Bill Carey, Missoula	Governor	8/30/1993
Qualifications (if required): none specified		
Mr. Dean Folkvord, Three Forks	Governor	8/30/1993
Qualifications (if required): general public who knows & active in food, nutrition & hunger		
Sen. Ethel M. Harding, Polson	Governor	8/30/1993
Qualifications (if required): none specified		
Ms. Frieda Hicks, Helena	Governor	8/30/1993
Qualifications (if required): represents Montana Food Stamp Program		
Ms. Minkie Medora, Missoula	Governor	8/30/1993
Qualifications (if required): none specified		
Ms. Judy Morrill, Bozeman	Governor	8/30/1993
Qualifications (if required): none specified		
Ms. Lynn Paul, Bozeman	Governor	8/30/1993
Qualifications (if required): none specified		
Rep. Jim Rice, Helena	Governor	8/30/1993
Qualifications (if required): none specified		
Ms. Annette Sutherland, Box Elder	Governor	8/30/1993
Qualifications (if required): represents Elder Nutrition Program		
Mr. David Thomas, Helena	Governor	8/30/1993
Qualifications (if required): none specified		

VACANCIES ON BOARDS AND COUNCILS -- July 1, 1993 through September 30, 1993

Board/current position holder	Appointed by	Term end
Aging Advisory Council (Governor)		
Mr. Gary Watt, Helena	Governor	8/30/1993
Qualifications (if required): none specified		
Ms. Dorothea C. Neath, Helena	Governor	7/18/1993
Qualifications (if required): member from Region IV		
Ms. Pauline Nikolaisen, Kalispell	Governor	7/18/1993
Qualifications (if required): member from Region IV		
Ms. Mary Alice Rehbein, Lambert	Governor	7/18/1993
Qualifications (if required): member from Region I		
Agriculture Development Council (Agriculture)		
Ms. Julie Burke, Glasgow	Governor	7/1/1993
Qualifications (if required): active in agriculture		
Mr. John W. Morse Jr., Dillon	Governor	7/1/1993
Qualifications (if required): active in agriculture		
Mr. John Swanz, Judith Gap	Governor	7/1/1993
Qualifications (if required): active in agriculture		
Alfalfa Leaf Cutting Bee Advisory Council (Agriculture)		
Mr. Tim Wetstein, Joliet	Governor	7/1/1993
Qualifications (if required): member of alfalfa seed growers		
Board of Banking (Commerce)		
Mr. C. David Bliss, Conrad	Governor	7/1/1993
Qualifications (if required): public member		
Mr. Jack Hensley, Kalispell	Governor	7/1/1993
Qualifications (if required): officer of state bank		

VACANCIES ON BOARDS AND COUNCILS -- July 1, 1993 through September 30, 1993

Board/current position holder	Appointed by	Term end
Board of Barbers (Commerce)		
Sergeant James Thul, Great Falls Qualifications (if required): barber	Governor	7/1/1993
Mr. Robert L. "Lanny" White, Townsend Qualifications (if required): public member	Governor	7/1/1993
Board of Cosmetologists (Commerce)		
Ms. Janet Markle, Glasgow Qualifications (if required): public member	Governor	7/1/1993
Mr. Scott Stekly, Great Falls Qualifications (if required): 1 of 3 licensed cosmetologists	Governor	7/1/1993
Board of Directors, Montana Self Insurers Guaranty Fund (Administration)		
Mr. Charles J. Gilder, Butte Qualifications (if required): none specified	Governor	7/1/1993
Mr. Donald E. Jenkins, Great Falls Qualifications (if required): none specified	Governor	7/1/1993
Mr. Donald Mizner, Missoula Qualifications (if required): none specified	Governor	7/1/1993
Board of Hearing Aid Dispensers (Commerce)		
Mr. Ben Havdahl, Helena Qualifications (if required): public member	Governor	7/1/1993
Mr. Walter Hopkins, Great Falls Qualifications (if required): hearing aid dispenser	Governor	7/1/1993

VACANCIES ON BOARDS AND COUNCILS -- July 1, 1993 through September 30, 1993

Board/current position holder	Appointed by	Term end
Board of Landscape Architects (Commerce)		
Mr. Bruce F. Lutz, Kalispell	Governor	7/1/1993
Qualifications (if required): licensed landscape architect		
Mr. Tom Selstad, Great Falls	Governor	7/1/1993
Qualifications (if required): public member		
Board of Medical Examiners (Commerce)		
Mr. Ben P. Broderick, Great Falls	Governor	9/1/1993
Qualifications (if required): public member		
Ms. Cindy Brown, Helena	Governor	9/1/1993
Qualifications (if required): licensed nutritionist		
Dr. Peter L. Burleigh, Great Falls	Governor	9/1/1993
Qualifications (if required): doctor of medicine		
Mrs. Lillian La Croix, Missoula	Governor	9/1/1993
Qualifications (if required): public member		
Board of Morticians (Commerce)		
Mr. John Patrick Hoffman, Havre	Governor	7/1/1993
Qualifications (if required): licensed mortician		
Board of Nursing (Commerce)		
Ms. Elizabeth Campo, Great Falls	Governor	7/1/1993
Qualifications (if required): 1 of 4 registered professional nurses		
Board of Pharmacy (Commerce)		
Ms. Diana M. Pennell, Lewistown	Governor	7/1/1993
Qualifications (if required): public member		

VACANCIES ON BOARDS AND COUNCILS -- July 1, 1993 through September 30, 1993

Board/current position holder	Appointed by	Term end
Board of Physical Therapy Examiners (Commerce)		
Ms. Joyce Dougan, Missoula	Governor	7/1/1993
Qualifications (if required): physical therapist		
Board of Private Security Patrolmen and Investigators (Commerce)		
Colonel Robert Griffith, Helena	Governor	8/1/1993
Qualifications (if required): member/Peace Officers Standards & Training Advisory Council		
Ms. Gay Ann Masolo, Townsend	Governor	8/1/1993
Qualifications (if required): public member		
Board of Psychologists (Commerce)		
Ms. Alice Omang, Helena	Governor	9/1/1993
Qualifications (if required): public member		
Dr. David Schuldberg, Missoula	Governor	9/1/1993
Qualifications (if required): licensed psychologist engaged in teaching psychology		
Board of Public Accountants (Commerce)		
Mr. Marvin Stephens, Lewistown	Governor	7/1/1993
Qualifications (if required): certified public accountant		
Board of Radiologic Technologists (Commerce)		
Ms. Robin Anderson, Bozeman	Governor	7/1/1993
Qualifications (if required): radiologic technologist		
Ms. Debra Metz, Big Arm	Governor	7/1/1993
Qualifications (if required): public member		
Ms. Debbie Sanford, Lewistown	Governor	7/1/1993
Qualifications (if required): limited permit radiologic technologist		

VACANCIES ON BOARDS AND COUNCILS -- July 1, 1993 through September 30, 1993

Board/current position holder	Appointed by	Term end
Board of Radiologic Technologists (Commerce) cont.		
Dr. J.D. "Jerry" Wolf, Billings	Governor	7/1/1993
Qualifications (if required): medical doctor		
Board of Sanitarians (Commerce)		
Mr. Danny Corti, Missoula	Governor	7/1/1993
Qualifications (if required): licensed sanitarian & not a public member		
Mr. Donald E. Sampson, Missoula	Governor	7/1/1993
Qualifications (if required): public member		
Board of Veterinary Medicine (Commerce)		
Ms. Anne Johnson, Malta	Governor	7/31/1993
Qualifications (if required): licensed veterinarian		
Burial Preservation Board (Commerce)		
Dr. Tom Foor, Missoula	Governor	8/22/1993
Qualifications (if required): rep. from Montana State Historic Preservation Office		
Mr. Carl Fourstar, Poplar	Governor	8/22/1993
Qualifications (if required): rep. Assiniboine and Sioux Tribes		
Mr. Pat Lefthand, Pablo	Governor	8/22/1993
Qualifications (if required): rep. Salish & Kootenai Tribes		
Mr. Jay Stovall, Billings	Governor	8/22/1993
Qualifications (if required): public member		
Mr. William Tallbull, Buzby	Governor	8/22/1993
Qualifications (if required): rep. Northern Cheyenne Tribe		
Mr. Clarence "Curly Bear" Wagner, Browning	Governor	8/22/1993
Qualifications (if required): rep. Blackfeet Tribe		

VACANCIES ON BOARDS AND COUNCILS -- July 1, 1993 through September 30, 1993

Board/current position holder	Appointed by	Term end
Chemical Dependency Advisory Council (Corrections & Human Services)		
Rep. Steve Benedict, Hamilton Qualifications (if required): none specified	Director	7/1/1993
Mr. Gene Bukowski, Billings Qualifications (if required): none specified	Director	7/1/1993
Ms. Carole Carey, Ekalaka Qualifications (if required): none specified	Director	7/1/1993
Ms. Dana L. Christensen, Kalispell Qualifications (if required): none specified	Director	7/1/1993
Mr. Terry Dennis, Billings Qualifications (if required): none specified	Director	7/1/1993
Mr. Jim Gamell, Great Falls Qualifications (if required): none specified	Director	7/1/1993
Ms. Carol Judge, Helena Qualifications (if required): none specified	Director	7/1/1993
Ms. Sandra Lambert, Miles City Qualifications (if required): none specified	Director	7/1/1993
Mr. Marko Lucich, Butte Qualifications (if required): none specified	Director	7/1/1993
Mr. Curtis C. Moxley, Chinook Qualifications (if required): none specified	Director	7/1/1993

VACANCIES ON BOARDS AND COUNCILS -- July 1, 1993 through September 30, 1993

Board/current position holder	Appointed by	Term end
Commission on Uniform State Laws (Governor)		
Mr. Ed Eck, Missoula	Governor	7/1/1993
Qualifications (if required): recog. bar member or faculty of state university law school		
Mr. Joseph P. Mazurek, Helena	Governor	7/1/1993
Qualifications (if required): none specified		
Mr. James E. Vidal, Kalispell	Governor	7/1/1993
Qualifications (if required): recog. bar member or faculty of state university law school		
Committee on Telecommunication Services for the Handicapped (Social and Rehabilitation Services)		
Mr. Ralph Foster, Joplin	Governor	7/1/1993
Qualifications (if required): member who is handicapped		
Ms. Joan Mandeville, Helena	Governor	7/1/1993
Qualifications (if required): member of independent local exchange		
Ms. Rebecca Plaggemeyer, Helena	Governor	7/1/1993
Qualifications (if required): member of an InterLATA carrier		
Mr. Edward G. VanTighem, Great Falls	Governor	7/1/1993
Qualifications (if required): handicapped - deaf or hard of hearing		
Electrical Board (Commerce)		
Mr. Kenneth Olsen, Billings	Governor	7/1/1993
Qualifications (if required): none specified		

VACANCIES ON BOARDS AND COUNCILS -- July 1, 1993 through September 30, 1993

Board/current position holder	Appointed by	Term end
Historical Society Board of Trustees (Education)		
Mr. John Burke, Butte	Governor	7/1/1993
Qualifications (if required): member		
Mr. Stuart W. Conner, Billings	Governor	7/1/1993
Qualifications (if required): none specified		
Mr. William M. Holt, Lolo	Governor	7/1/1993
Qualifications (if required): recognized archeologist		
Ms. Helen L. Hornby, Livingston	Governor	7/1/1993
Qualifications (if required): none specified		
Incentive Awards Advisory Council (Administration)		
Mr. Jim Adams, Helena	Director	7/1/1993
Qualifications (if required): general public member		
Ms. Ann Bartel, Great Falls	Director	7/1/1993
Qualifications (if required): general public member		
Ms. Laurie Ekanger, Clancy	Director	7/1/1993
Qualifications (if required): ex-officio non-voting member		
Mr. Jack Ellery, Helena	Director	7/1/1993
Qualifications (if required): state employee		
Ms. Renee Erdmann, Helena	Director	7/1/1993
Qualifications (if required): state employee		
Mr. Russell G. McDonald, Helena	Director	7/1/1993
Qualifications (if required): state employee		

Board/current position holder	Appointed by	Term end
Incentive Awards Advisory Council (Administration) cont.		
Ms. Lois A. Menzies, Helena Qualifications (if required): state employee	Director	7/1/1993
Ms. Janet Myren, Helena Qualifications (if required): state employee	Director	7/1/1993
Mr. John H. Noble, Helena Qualifications (if required): state employee	Director	7/1/1993
Job Training Coordinating Advisory Council (Labor and Industry)		
Ms. M. Colleen Allison, Columbia Falls Qualifications (if required): none specified	Governor	9/26/1993
Mr. Duane L. Ankney, Colstrip Qualifications (if required): none specified	Governor	9/26/1993
Mr. Forrest "Buck" Boles, Helena Qualifications (if required): none specified	Governor	9/26/1993
Ms. Barbara Campbell, Deer Lodge Qualifications (if required): none specified	Governor	9/26/1993
Mr. Tom Dahl, Havre Qualifications (if required): none specified	Governor	9/26/1993
Ms. Helen Kellicut, Deer Lodge Qualifications (if required): none specified	Governor	9/26/1993
Mr. Marvin McMichael, Missoula Qualifications (if required): none specified	Governor	9/26/1993

VACANCIES ON BOARDS AND COUNCILS -- July 1, 1993 through September 30, 1993

Board/current position holder	Appointed by	Term end
Job Training Coordinating Advisory Council (Labor and Industry) cont.		
Mr. Jack E. Sands, Billings	Governor	9/26/1993
Qualifications (if required): none specified		
Rep. Chuck Swysgood, Dillon	Governor	9/26/1993
Qualifications (if required): none specified		
Sen. Gene Thayer, Great Falls	Governor	9/26/1993
Qualifications (if required): none specified		
Judicial Standards Commission (Judicial)		
Mr. Marvin Cowdrey, Bozeman	Governor	7/1/1993
Qualifications (if required): none specified		
Mental Disabilities Board of Visitors (Governor)		
Ms. Pat Aanrud, Lewistown	Governor	8/1/1993
Qualifications (if required): consumer		
Ms. Arlene Breum, Missoula	Governor	8/1/1993
Qualifications (if required): mental disabilities representative		
Ms. Marjorie Fehrer, Bozeman	Governor	8/1/1993
Qualifications (if required): consumer member		
Mr. Wallace A. King, Helena	Governor	8/1/1993
Qualifications (if required): professional		
Ms. Lanelle Petersen, Brady	Governor	8/1/1993
Qualifications (if required): consumer from Developmentally Disabled Board		
Mr. Robert W. Visscher, Livingston	Governor	8/1/1993
Qualifications (if required): professional		

VACANCIES ON BOARDS AND COUNCILS -- July 1, 1993 through September 30, 1993

Board/current position holder	Appointed by	Term end
Montana Health Facility Authority Board (Commerce)		
Dr. Amos Little, Helena	Governor	7/29/1993
Qualifications (if required): none specified		
Montana Mint Committee (Agriculture)		
Mr. Brian Schweitzer, Whitefish	Governor	7/1/1993
Qualifications (if required): active mint grower		
Motorcycle Safety Advisory Committee (Office of Public Instruction)		
Ms. Anita Drews, East Helena	Attorney General	7/1/1993
Qualifications (if required): represents Department of Justice		
Ms. Pat Wherley, Three Forks	Governor	7/1/1993
Qualifications (if required): motorcycle rider representing motorcycle riding groups		
Rehabilitative Services Advisory Council (Social and Rehabilitation Services)		
Mr. Mark Bowlds, Helena	Director	9/18/1993
Qualifications (if required): none specified		
Mr. W.R. "Bob" Donaldson, Kalispell	Director	9/18/1993
Qualifications (if required): none specified		
Special Education Advisory Council (Office of Public Instruction)		
Rep. Bob Bachini, Havre	Superintendent of Schools	7/1/1993
Qualifications (if required): legislator		
Ms. Sherry Bock, Great Falls	Superintendent of Schools	7/1/1993
Qualifications (if required): teacher of children with handicapping conditions		
Mr. James F. Canan, Billings	Superintendent of Schools	7/1/1993
Qualifications (if required): parent of child with handicapping condition		

VACANCIES ON BOARDS AND COUNCILS -- July 1, 1993 through September 30, 1993

Board/current position holder	Appointed by	Term end
Special Education Advisory Council (Office of Public Instruction) cont.		
Mr. Mike Hanshew, Helena Qualifications (if required): state agency	Superintendent of Schools	7/1/1993
Ms. Betty Jo Vance, Helena Qualifications (if required): deaf/blind representative	Superintendent of Schools	7/1/1993
State Employee Group Benefits Advisory Council (Administration)		
Ms. Cindy Anders, Helena Qualifications (if required): none specified	Director	9/1/1993
Mr. Mark Cress, Helena Qualifications (if required): none specified	Director	9/1/1993
Ms. Nancy Ellery, Helena Qualifications (if required): none specified	Director	9/1/1993
Mr. Dave Evenson, Helena Qualifications (if required): none specified	Director	9/1/1993
Ms. Debbie Gebase, Boulder Qualifications (if required): none specified	Director	9/1/1993
Mr. Ken Givens, Helena Qualifications (if required): none specified	Director	9/1/1993
Ms. Sheila Hogan, Butte Qualifications (if required): none specified	Director	9/1/1993
Mr. Tom McCarthy, Warm Springs Qualifications (if required): none specified	Director	9/1/1993

VACANCIES ON BOARDS AND COUNCILS -- July 1, 1993 through September 30, 1993

Board/current position holder	Appointed by	Term end
State Employee Group Benefits Advisory Council (Administration) cont.		
Mr. Curt Nichols, Helena Qualifications (if required): none specified	Director	9/1/1993
Mr. William Salisbury, Helena Qualifications (if required): none specified	Director	9/1/1993
Mr. Thomas Schneider, Helena Qualifications (if required): none specified	Director	9/1/1993
Mr. Scott Seacat, Helena Qualifications (if required): none specified	Director	9/1/1993
Teachers' Retirement Board (Administration)		
Ms. Verna Green, Helena Qualifications (if required): public member	Governor	7/1/1993
Ms. Nancy Keenan, Helena Qualifications (if required): Superintendent of Public Instruction	Governor	7/1/1993
Mr. John Kranick, Great Fall Qualifications (if required): retired teacher	Governor	7/1/1993
Ms. Nancy B. Trackwell, Great Falls Qualifications (if required): public member	Governor	7/1/1993
Tourism Advisory Council (Commerce)		
Mr. Arnold D. "Smoke" Elser, Missoula Qualifications (if required): from Glacier Country	Governor	7/1/1993
Mr. Ken Hoovestol, Great Falls Qualifications (if required): from Russell Country	Governor	7/1/1993

VACANCIES ON BOARDS AND COUNCILS -- July 1, 1993 through September 30, 1993

Board/current position holder	Appointed by	Term end
Tourism Advisory Council (Commerce) cont.		
Mr. Richard D. Krott, Helena	Governor	7/1/1993
Qualifications (if required): from Gold West Country		
Mr. Larry McRae, Kalispell	Governor	7/1/1993
Qualifications (if required): from Glacier Country		
Water Plan Advisory Council (Natural Resources and Conservation)		
Mr. Joe Aldegarie, Missoula	Governor	7/25/1993
Qualifications (if required): none specified		
Sen. Esther Bengtson, Shepherd	Governor	7/25/1993
Qualifications (if required): none specified		
Mr. Stan Bradshaw, Helena	Governor	7/25/1993
Qualifications (if required): none specified		
Ms. Ana Brenden, Scobey	Governor	7/25/1993
Qualifications (if required): none specified		
Mr. Jay Chamberlain, Dillon	Governor	7/25/1993
Qualifications (if required): none specified		
Ms. Connie Cole, Helena	Governor	7/25/1993
Qualifications (if required): none specified		
Mr. Jack Galt, Martinsdale	Governor	7/25/1993
Qualifications (if required): none specified		
Mr. Pat Graham, Helena	Governor	7/25/1993
Qualifications (if required): none specified		

Board/current position holder	Appointed by	Term end
Water Plan Advisory Council (Natural Resources and Conservation) cont.		
Mr. Dennis Iverson, Helena Qualifications (if required): none specified	Governor	7/25/1993
Representative Tom Lee, Bigfork Qualifications (if required): none specified	Governor	7/25/1993
Mr. Glenn Marx, Helena Qualifications (if required): none specified	Governor	7/25/1993
Mr. Don Pfau, Lewistown Qualifications (if required): none specified	Governor	7/25/1993
Mr. Jerald Sorensen, Polson Qualifications (if required): none specified	Governor	7/25/1993
Mr. John Wardell, Helena Qualifications (if required): none specified	Governor	7/25/1993
Mr. Jim Wedeward, Billings Qualifications (if required): none specified	Governor	7/25/1993
Wheat and Barley Committee (Agriculture)		
Mr. Ernest Bahnmiller, Big Sandy Qualifications (if required): resides in District IV & affiliated with Republican Party	Governor	8/20/1993
Mr. Jim Squires, Glendive Qualifications (if required): producer from District VII	Governor	8/20/1993

VACANCIES ON BOARDS AND COUNCILS -- July 1, 1993 through September 30, 1993

Board/current position holder	Appointed by	Term end
Women in Employment Advisory Council (Governor)		
Ms. Jeanne Amsberry, Helena Qualifications (if required): none specified	Governor	8/9/1993
Ms. Judy Birch, Helena Qualifications (if required): none specified	Governor	8/9/1993
Ms. Virginia Bliss, Conrad Qualifications (if required): none specified	Governor	8/9/1993
Ms. Aubyn Curtiss, Fortine Qualifications (if required): none specified	Governor	8/9/1993
Ms. Ilene Dallum, Cascade Qualifications (if required): none specified	Governor	8/9/1993
Ms. Dolores Havdahl, Helena Qualifications (if required): none specified	Governor	8/9/1993
Ms. Darlene Johnson, Wolf Point Qualifications (if required): none specified	Governor	8/9/1993
Ms. Carolyn Linden, Helena Qualifications (if required): none specified	Governor	8/9/1993
Ms. Carolyn Miller, Helena Qualifications (if required): none specified	Governor	8/9/1993
Ms. Blanche Proul, Anaconda Qualifications (if required): none specified	Governor	8/9/1993
Ms. Antoinette Fraser Rosell, Billings Qualifications (if required): none specified	Governor	8/9/1993

VACANCIES ON BOARDS AND COUNCILS -- July 1, 1993 through September 30, 1993

Board/current position holder	Appointed by	Term end
Women in Employment Advisory Council (Governor)	cont.	
Ms. Sue Weingartner, Helena	Governor	8/9/1993
Qualifications (if required): none specified		