MONTANA ADMINISTRATIVE REGISTER

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MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 15

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 The notice section contains state agencies' proposed new, amended or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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 PUBLIC EMPLOYEES' RETIREMENT BOARD
OF THE STATE OF MONTANA

In the matter of proposed amendment of ARM 2.43.204 relating to administrative procedures for contested cases	) NOTICE OF PROPOSED AMENDMENT)) NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons.

1. On September 22, 1994, the Public Employees' Retirement Board proposes to amend ARM 2.43.204 relating to administrative procedures for contested cases.

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

2.43.204 CONTESTED CASE PROCEDURES (1) Remains the same.
(a) remains the same
(b) The hearing examiner may establish pre-hearing and hearing calendar and procedures, rule on procedural matters, make proposed orders, findings and conclusions, and otherwise regulate the conduct and adjudication of contested cases as provided by law. The hearing, unless the parties stipulate otherwise, shall be conducted in the following order: the statement and evidence of the petitioner opposing agency action; the statement and evidence of the agency; rebuttal testimony.
(c) and (d) remain the same.
(e) In contested cases, exceptions to proposals for decisions which are allowed by statute must be filed with the division and served upon opposing counsel within 20 days of service of the proposal for decision. Any response must be filed within 10 days of service of the exceptions. Briefs do not have to be filed, but if filed, must be filed simultaneously with exceptions or responses. Date of service and date of filing shall be the date of actual delivery or the postmarked date of mailing. The board may request additional briefing by the parties.
(f) The oral argument, if requested in writing, will be heard at the next regular board meeting held more than 15 days after time allowed for exceptions and responses.
(2) through (4) remain the same.
AUTH: 19-2-403, MCA
IMP: 19-2-403, MCA

3. Amendments to 2.43.204 are necessary to include procedures and requirements for filing exceptions to proposals for decisions which are allowed by statute in contested cases and to specify the order of presenting evidence in contested cases which is different than the order contained in the attorney general's model procedural rules.

4. Interested persons may present their data, views, or arguments concerning the proposed amendments in writing no later

than September 12, 1994 to:

Linda King, Administrator
Public Employees' Retirement Division
P.O. Box 200131
Helena, Montana 59620-0131

5. If a person who is directly affected by the proposed amendment wishes to express data, views and arguments orally or in writing at a public hearing, the person must make written request for a hearing and submit this request along with any written comments to the above address. A written request for hearing must be received no later than September 12, 1994.

6. If the agency receives requests for a public hearing on the proposed amendments from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed action; from the administrative code committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 4277 persons based on February 1994 payroll reports of active and retired members.

Linda King, Administrator
Public Employees' Retirement Division

Dal Smilie, Chief Legal Counsel and
Rule Reviewer

Certified to the Secretary of State on August 1, 1994.

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

In the matter of the repeal of rule 16.10.1001 concerning annual jail inspections.	))))	NOTICE OF PROPOSED REPEAL NO PUBLIC HEARING CONTEMPLATED

(Jail Inspections)

To: All Interested Persons

1. On September 12, 1994, the department proposes to repeal ARM 16.10.1001, concerning the inspections of jails.

2. The rule, as proposed to be repealed, is found on page 16-471 of the Administrative Rules of Montana.

3. The department is proposing to repeal this rule for a number of reasons. First, the rule was enacted in 1972 and no authority section was given for its implementation. Upon reviewing its rules, the department concluded that it did not have the authority to promulgate the rule, as there is no rulemaking authority in the statutes for such a rule. In addition, the rule mimics the statutory language of § 50-1-203, MCA, but adds the additional requirement that all jails must be inspected annually. There is no statutory basis to support this additional requirement and the rule goes beyond the clear language of the statute. For these reasons, the department is proposing to repeal the rule until and unless appropriate statutory authority is given to the department to authorize the promulgation of rules in this area.

4. Interested persons may submit their data, views, or arguments concerning the proposed repeal, in writing, to Mitzi Schwab, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620, and must submit them in sufficient time so that they are received no later than 5:00 p.m. on September 9, 1994.

5. If a person who is directly affected by the proposed repeal wishes to express his/her data, views, and arguments orally or in writing at a public hearing, he/she must make written request for a hearing and submit this request along with any written comments he/she has to Mitzi Schwab, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620. A written request for hearing must be received no later than 5:00 p.m. on September 9, 1994.

6. If the agency receives requests for a public hearing on the proposed repeal from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed action; from the administrative code committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who

will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be in excess of 25 persons, based on the number of county and city jails in the State of Montana and the number of persons incarcerated in them.

for ROBERT J. ROBINSON, Director

Certified to the Secretary of State August 1, 1994.

Reviewed by:

Eleanor Parker, DHES Attorney

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

In the matter of the amendment of rules 16.8.708, 16.8.946, 16.8.1120, 16.8.1429, 16.8.1702, 16.8.1802 and 16.8.2003, regarding incorporation of federal air quality rules and incorporation of the Montana source testing protocol and procedures manual	NOTICE OF PUBLIC HEARING FOR PROPOSED AMENDMENT OF RULES

(Air Quality)

To: All Interested Persons

1. On September 16, 1994, at 8:30 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.

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

16.8.708 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~~ 1993, edition of Title 40 of the Code of Federal Regulations (CFR);

(b)-(d) Remain the same.

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

(a)-(j) Remain the same.

(k) The Montana source testing protocol and procedures manual (July ~~1993~~ 1994 ed.), which is a department manual setting forth sampling and data collection, recording, analysis and transmittal requirements;

(l)-(p) Remain the same.

(q) A copy of the above materials is available for public inspection and copying at the Air Quality ~~Bureau~~ Division, Department of Health and Environmental Sciences, ~~Cogswell Building, 1400 Broadway~~ 836 Front St., 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 10 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

16.8.946 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~~ 1993, edition of Title 40 of the Code of Federal Regulations (CFR).

(2)(a)-(g) Remains the same.

(h) A copy of the above materials is available for public inspection and copying at the Air Quality ~~Bureau~~ Division, Department of Health and Environmental Sciences, ~~Cogswell Building, 1400 Broadway~~ 836 Front St., 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 10 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, DC 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

16.8.1120 INCORPORATION BY REFERENCE (1) For the purpose of this subchapter, the board hereby adopts and incorporates by reference 40 CFR Part 60, (July 1, ~~1992~~ 1993 ed.), which sets forth standards of performance for new stationary sources; 40 CFR Part 61, (July 1, ~~1992~~ 1993 ed.), which sets forth emission standards for hazardous air pollutants; 40 CFR Part 51, subpart I, (July 1, ~~1992~~ 1993 ed.), which sets forth requirements for state programs for issuing air quality preconstruction permits; 40 CFR 52.21, (July 1, ~~1992~~ 1993 ed.), which sets forth federal regulations for prevention of significant deterioration of air quality, and 40 CFR Part 52, subpart BB (July 1, ~~1992~~ 1993 ed.), which sets forth the Montana state implementation plan for the control of air pollution in Montana. Copies of the above regulations and the state implementation plan are available for review and copying at the Air Quality ~~Bureau~~ Division, Department of Health and Environmental Sciences, ~~Cogswell Building~~ 836 Front St., Helena, Montana, 59620.

AUTH: 75-2-111, 75-2-204, MCA; IMP: 75-2-211, MCA

16.8.1429 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~~ 1993, edition of Title 40 of the Code of Federal Regulations (CFR);

(b) Remains the same.

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

(g) A copy of the above materials is available for public inspection and copying at the Air Quality ~~Bureau~~ Division, Department of Health and Environmental Sciences, ~~Cogswell Building, 1400 Broadway~~ 836 Front St., 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 10 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 87-1000-12).

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

16.8.1702 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~~ 1993, edition of Title 40 of the Code of Federal Regulations (CFR);

(b) Remains the same.

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

(g) A copy of the above materials is available for public inspection and copying at the Air Quality ~~Bureau~~ Division, Department of Health and Environmental Sciences, ~~Cogswell Building, 1400 Broadway~~ 836 Front St., 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 10 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, DC 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

16.8.1802 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~~ 1993, edition of Title 40 of the Code of Federal Regulations (CFR);

(b) Remains the same.

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

(g) A copy of the above materials is available for pub-

lic inspection and copying at the Air Quality ~~Bureau~~ Division, Department of Health and Environmental Sciences, ~~Cogswell Building, 1400 Broadway~~ 836 Front St., 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 10 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, DC 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; AUTH: 75-2-202, 75-2-203, 75-2-204, MCA

16.8.2003 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~~ 1993, edition of Title 40 of the Code of Federal Regulations (CFR);

(b) Remains the same.

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

(e) A copy of the above materials is available for public inspection and copying at the Air Quality ~~Bureau~~ Division, Department of Health and Environmental Sciences, ~~Cogswell Building, 1400 Broadway~~ 836 Front St., 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 DC 20402. The standard industrial classification manual (1987) (Order no. PB 87-100012) may also be obtained from the U.S. Department of Commerce, National Technical Information Service, 5285 Port Royal Road, Springfield, Virginia 22161.
AUTH: 75-2-217, MCA; IMP: 75-2-217, 75-2-218, MCA

3. The proposed amendments incorporate the most recent version of the federal air quality rules and the most recent version of the Montana source testing protocol and procedures manual. These amendments are necessary to keep state air quality law at least as stringent as federal law and, thereby, retain state control over the state air quality program. Incorporation of the most recent version of the Montana source testing protocol and procedures manual is necessary to implement revised requirements for sampling and data collection, recording, analysis and transmittal.

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 Yolanda Fitzsimmons, Department of

Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620, no later than September 15, 1994.

5. Will Hutchison has been designated to preside over and conduct the hearing.

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

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

Certified to the Secretary of State August 1, 1994.

Reviewed by:
Eleanor Parker by Terry Cohen
Eleanor Parker, DHES Attorney

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

In the matter of the amendment of rules 16.8.945, 16.8.947, 16.8.953 & 16.8.960, regarding prevention of significant deterioration of air quality.	NOTICE OF PUBLIC HEARING FOR PROPOSED AMENDMENT OF RULES

(Air Quality)

To: All Interested Persons

1. On September 16, 1994, at 8:30 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.

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

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

(1)-(2) Remain the same.

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

(c) Any baseline area established originally for the total suspended particulate increments shall remain in effect and shall apply for purposes of determining the amount of available PM-10 increments, except that such baseline area shall not remain in effect if the department rescinds the corresponding minor source baseline date in accordance with (21)(d) below.

(4)-(20) Remain the same.

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

(d) Any minor source baseline date established originally for the total suspended particulate increments shall remain in effect and shall apply for purposes of determining the amount of available PM-10 increments, except that the department may rescind any such minor source baseline date where it can be shown, to the satisfaction of the department, that the emissions increase from the major stationary source, or the net emissions increase from the major modification, responsible for triggering that date did not result in a significant amount of PM-10 emissions.

(22)-(23) Remain the same.

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

(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. With respect to particulate matter, only PM-10 emissions may be used to

evaluate the net emissions increase for PM-10.

(e)-(g) Remains the same.

(25)-(29) Remain the same.

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

16.8.947 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~~ PM-10, annual ~~geometric~~ arithmetic mean	5 4
~~TSP~~ PM-10, 24-hr maximum	~~10~~ 8
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~~ PM-10, annual ~~geometric~~ arithmetic mean	~~19~~ 17
~~TSP~~ PM-10, 24-hr maximum	~~37~~ 30
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~~ PM-10, annual ~~geometric~~ arithmetic mean	~~37~~ 34
~~TSP~~ PM-10, 24-hr maximum	~~75~~ 60
Sulfur dioxide:	
Annual arithmetic mean	40
24-hr maximum	182
3-hr maximum	700
Nitrogen dioxide:	
Annual arithmetic mean	50

(2) Remains the same.

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

16.8.953 REVIEW OF MAJOR STATIONARY SOURCES AND MAJOR MODIFICATIONS--SOURCE APPLICABILITY AND EXEMPTIONS

(1)-(6) Remain the same.

(7) The department may exempt a proposed major stationary source or major modification from the requirements of ARM 16.8.957, 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)-(ii) Remain the same.

(iii) Particulate matter--~~10 µg/m³ TSP, 24 hour average,~~ 10 µg/m³ PM-10, 24-hour average;

(iv)-(ix) Remain the same.

(b)-(c) Remain the same.

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

16.8.960 SOURCES IMPACTING FEDERAL CLASS I AREAS--ADDITIONAL REQUIREMENTS

(1)-(3) Remain the same.

(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~~ PM-10, annual ~~geometric~~ arithmetic mean	~~19~~ 17
~~TSP~~ PM-10, 24-hr maximum	~~37~~ 30
Sulfur dioxide:	
Annual arithmetic mean	20
24-hr maximum	91
3-hr maximum	325
Nitrogen dioxide:	
Annual arithmetic mean	25

(5)-(6) Remain the same.

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

In the matter of the amendment of rules 16.8.1903 and 16.8.1905 concerning air quality operation and permit fees	))))	NOTICE OF PUBLIC HEARING FOR PROPOSED AMENDMENT OF RULES

(Air Quality)

To: All Interested Persons

1. On September 16, 1994, at 8:00 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.

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

16.8.1903 AIR QUALITY OPERATION FEES (1)-(2) Remain the same.

(3) The air quality operation fee is based on the actual or estimated actual amount of air pollutants emitted during the previous calendar year and is the greater of a minimum fee of $250 or a fee calculated using the following formula:

tons of total particulate emitted,
multiplied by ~~$8.55~~ 10.56; plus
tons of sulfur dioxide emitted,
multiplied by ~~$8.55~~ 10.56; plus
tons of lead emitted,
multiplied by ~~$8.55~~ 10.56; plus
tons of oxides of nitrogen emitted,
multiplied by ~~$2.14~~ 2.64; plus
tons of volatile organic compounds emitted,
multiplied by ~~$2.14~~ 2.64.

(4)-(5) Remain the same.

AUTH: 75-2-111, 75-2-220, MCA; IMP: 75-2-211, 75-2-220, MCA

16.8.1905 AIR QUALITY PERMIT APPLICATION FEES

(1)-(4) Remain the same.

(5) The fee is the greater of:

(a) a fee calculated using the following formula:

tons of total particulate emitted,
multiplied by ~~$8.55~~ 10.56; plus
tons of sulfur dioxide emitted,
multiplied by ~~$8.55~~ 10.56; plus
tons of lead emitted,
multiplied by ~~$8.55~~ 10.56; plus
tons of oxides of nitrogen emitted,
multiplied by ~~$2.14~~ 2.64; plus

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

3. The proposed amendments conform the state rules for prevention of significant deterioration of air quality to changes in federal rules that replace increments for total suspended particulate with increments for particulate matter of 10 microns or less (PM-10). The amendments are necessary to keep state air quality law at least as stringent as federal law and, thereby, retain state control over the state air quality program.

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 Yolanda Fitzsimmons, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620, no later than September 15, 1994.

5. Will Hutchison has been designated to preside over and conduct the hearing.

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

by for ROBERT J. ROBINSON, Director

Certified to the Secretary of State August 1, 1994.

Reviewed by:

Eleanor Parker by Fitzsimmons /CC
Eleanor Parker, DHES Attorney

tons of volatile organic compounds emitted, multiplied by ~~$2.14~~ 2.64;

(b) Remains the same.

AUTH: 75-2-111, 75-2-220, MCA; IMP: 75-2-211, 75-2-220, MCA

3. The proposed amendments increase the existing fees associated with the air quality bureau's operation permit program. ARM 16.8.1902 requires the department to report to the board annually regarding the air quality permit fees anticipated for the next calendar year. The proposed amendments adjust existing fees to meet the Legislature's increased appropriation for FY95. The amount of the increase is based upon the amount of fees carried over from the last fiscal year and emissions during the last calendar year. The fees are raised from $8.55 to $10.56 per ton of pollutant for particulates, lead and sulfur dioxide, and from $2.14 to $2.64 for nitrogen oxides and volatile organic compounds.

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 Yoli Fitzsimmons, Board of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620, no later than September 15, 1993.

5. Will Hutchison has been designated to preside over and conduct the hearing.

for William J. Spitz
ROBERT J. ROBINSON, Director

Certified to the Secretary of State August 1, 1994.

Reviewed by:

Eleanor Parker by Kathrin
Eleanor Parker, DHES Attorney

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

In the matter of the amendment of rule 16.8.1908 concerning fees for Christmas tree wastes and commercial film production open burning.	NOTICE OF PUBLIC HEARING FOR PROPOSED AMENDMENT OF RULE (Air Quality)

To: All Interested Persons

1. On September 16, 1994, at 8:00 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 rule.

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

16.8.1908 AIR QUALITY OPEN BURNING FEES FOR CONDITIONAL, ~~AND~~ EMERGENCY, CHRISTMAS TREE WASTE, AND COMMERCIAL FILM PRODUCTION OPEN BURNING PERMITS (1) Concurrent with the submittal of an air quality open burning permit application, as required in ARM Title 16, chapter 8, subchapter 13 (Open Burning), 16.8.1307 (Conditional Air Quality Open Burning Permits), ~~and~~ 16.8.1308 (Emergency Open Burning Permits), 16.8.1309 (Christmas Tree Waste Open Burning Permits), and 16.8.1310 (Commercial Film Production Open Burning Permits), the applicant shall submit an air quality open burning fee.

(2)-(3) Remain the same.

(4) The open burning air quality permit application fee shall be:

(a) Remains the same.

~~(b) $1,000 for a creosote treated railroad tie open burning permit under ARM 16.8.1307;~~

~~(c)~~ (b) No fee is required for an untreated wood-waste open burning permit at a licensed landfill site under ARM 16.8.1307. The required fee for this activity is included in the solid waste management system licensing fee, submitted pursuant to ARM Title 16, chapter 14, subchapter 4;

~~(d)~~ (c) $100 for an emergency open burning permit under ARM 16.8.1308. A fee for an emergency open burning permit application need not be submitted with the initial oral request to the department, but must be submitted with the subsequent written application required under ARM 16.8.1308. Submittal of the fee is a condition of any authorization given by the department under ARM 16.8.1308, and the failure to submit the fee is considered a violation of such authorization and may be subject to ~~further~~ enforcement action~~.~~;

(d) $100 for a Christmas tree waste open burning permit

under ARM 16.8.1309; and

(e) $100 for a commercial film production open burning permit under ARM 16.8.1310.

AUTH: 75-2-111, 75-2-211, 75-2-220, MCA; IMP: 75-2-211, 75-2-220, MCA

3. The board recently adopted new rules providing a permit process for commercial film production open burning and changing the classification of Christmas tree waste open burning from conditional trade waste open burning to a separate classification. The board is proposing the present amendments to the rule because they are necessary to add fee requirements to cover the department's reasonable costs of operating a permit program for Christmas tree waste open burning and commercial film production open burning. The amendments produce the fees calculated by the department's Air Quality Division as necessary to process permit applications for both types of open burning. The board also proposes editorial amendments to subsections (1) and (4)(b), as noted in this notice, that are necessary for internal consistency and the board proposes an editorial amendment to subsection (4)(c) to delete an unnecessary word that may create an ambiguity in the rule.

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 Yolanda Fitzsimmons, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620, no later than September 15, 1994.

5. Will Hutchison has been designated to preside over and conduct the hearing.

/s William J. Spitz
ROBERT J. ROBINSON, Director

Certified to the Secretary of State August 1, 1994.

Reviewed by:

/s Eleanor Parker by Kathleen Williams
Eleanor Parker, DHES Attorney

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

In the matter of the proposed amendment of rules related to unemployment insurance benefit eligibility) NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT OF ARM 24.11.202, 24.11.442, 24.11.451, 24.11.452 24.11.457, 24.11.463, 24.11.464 and 24.11.613

TO ALL INTERESTED PERSONS:

1. On September 12, 1994, at 1:30 p.m., a public hearing will be held in the first floor conference room at the Walt Sullivan Building (Dept. of Labor Building), 1327 Lockey Street, Helena, Montana, to consider the amendment of rules related to unemployment insurance benefit eligibility.

The Department of Labor and Industry will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing. If you request an accommodation, contact the Department by not later than 5:00 p.m., September 7, 1994, to advise us of the nature of the accommodation that you need. Please contact the Unemployment Insurance Division, Attn: Mr. Ben Harris, P.O. Box 8011, Helena, MT 59604-8011; telephone (406) 444-2937; TDD (406) 444-0532; fax (406) 444-2699. Persons with disabilities who need an alternative accessible format of this document in order to participate in this rule-making process should contact Mr. Harris.

2. The Department of Labor and Industry proposes to amend the rules as follows: (new matter underlined, deleted matter interlined)

24.11.202 DEFINITIONS (1) through (7) Remain the same.
AUTH: Sec. 39-51-301, 39-51-302, MCA
IMP: Sec. ~~39-51-101-3207~~ Title 39, chapter 51, MCA

24.11.442 INITIAL MONETARY DETERMINATION---WAGES---REVISIONS (1) through (4) Remain the same.

(5) The following payments are wages assignable in the following manner:

(a) Payments based upon length of employment or paid upon termination of the employment ~~with a base period employer~~ will be treated as follows: The ~~portion of pay~~ attributable portion of the payment ~~to the base period~~ will be prorated from the date of hire or from the beginning of the base period, whichever occurs later, through the date of separation ~~within the base period, if the period of employment for which the payment is issued includes weeks preceding the base period or ending after the base period~~. No ~~pay~~ portion of the payment will be assigned ~~to the base period~~ past the date of separation. However, if the accumulated pay is ~~$300~~ $1,000 or less, the pay will be

attributed to the quarter in which the separation occurred. Such payments include:

(i) through (iii) Remain the same.

(b) through (e) Remain the same.

(6) through (8) Remain the same.

AUTH: 39-51-301, 39-51-302, MCA
IMP: 39-51-2105, and 39-51-2201~~, 39-51-2202, 39-51-2203, 39-51~~ through -2204, MCA

24.11.451 SIX-WEEK RULE (1) and (2) Remain the same.

(3) If the department finds that the claimant was discharged for an act of gross misconduct, as defined in 39-51-201~~(12)~~, MCA:

(a) committed at any time from the beginning of the claimant's base period to the effective date of the claim, the 52-week disqualification of ~~section~~ 39-51-2303(2), MCA, controls the eligibility determination and is applied forward from the effective date of the first claim filed after the act of gross misconduct leading to the discharge~~;~~; or~~;~~

(b) Remains the same.

AUTH: 39-51-301, 39-51-302, 39-51-2407, MCA
IMP: 39-51-2301 through 2304, MCA

24.11.452 ABLE, AVAILABLE, AND ACTIVELY SEEKING WORK

(1) A claimant is not able, available or actively seeking work within the meaning of 39-51-2104, MCA, if the claimant:

(1) through (5) Remain the same, but are renumbered (a) through (e).

(~~6~~f) is not willing to accept a substantial amount of suitable work for which the claimant is reasonably fitted by experience, education or training, ~~work for any shift or day normally required~~ in the claimant's customary occupation or in an occupation determined by the department to be suitable for the claimant under 39-51-2304, MCA; or

(7) Remains the same, but is renumbered as (g).

AUTH: Sec. 39-51-301, 39-51-302, MCA
IMP: Sec. 39-51-2101, 39-51-2104, 39-51-2304, MCA

24.11.457 LEAVING WORK WITH GOOD CAUSE ATTRIBUTABLE TO THE EMPLOYMENT (1) A claimant has left work with good cause attributable to employment if:

(a)(i) compelling reasons arising from the work environment caused the claimant to leave;

(~~b~~ii) the claimant attempted to correct the problem in the work environment; and

(~~c~~iii) the claimant informed the employer of the problem and gave the employer a reasonable opportunity to correct it; or

(~~d~~b) the claimant left work which the department determines to be unsuitable under 39-51-2304, MCA. For the purpose of this rule, a job is not unsuitable if the claimant was employed in that same occupation during more than 6 weeks during the period that starts at the beginning of the base period and runs through the present. However, the mere fact that the claimant has been employed in an occupation during less than 6 weeks does not, by

itself, mean that the occupation is "unsuitable."

(2) and (3) Remain the same.

AUTH: Sec. 39-51-301, 39-51-302 MCA
IMP: Sec. 39-51-2302, 39-51-2307 MCA

24.11.463 LIE DETECTOR TESTS -- BLOOD AND URINE TESTING

(1) A claimant will not be disqualified under this chapter solely for the reason that the claimant:

(a) is denied employment or continuation of employment for refusing to submit to a polygraph test or any form of a mechanical lie detector test, or on the basis of the results of any such test.; or

(b) is denied employment or continuation of employment for refusing to submit to a blood or urine test, or on the basis of the results of any such test, unless the test is ~~required for employment in a hazardous work environment or in a job the primary responsibility of which is security, public safety, or fiduciary responsibility and the test procedure conforms to the requirements of~~ appropriately administered pursuant to 39-2-304~~(2)~~, MCA.~~;~~

~~(c) is denied continuation of employment for refusing to submit to a blood or urine test unless the employer requiring the test can demonstrate good cause to believe that the claimant's facilities were impaired on the job as a result of alcohol consumption or illegal drug use and the test procedure conforms to the requirements of 39-2-304(2), MCA;~~

~~(d) is denied employment or continuation of employment as a consequence of a positive blood or urine test result, unless the test procedure conforms to the requirements of 39-2-304(2), MCA, and the claimant has been given the opportunity to rebut the test results as provided in 39-2-304(3) and 39-2-304(4), MCA.~~

AUTH: 39-51-301, 39-51-302, MCA
IMP: 39-51-2302, 39-51-2303, 39-51-2304, MCA

24.11.464 BENEFITS BASED ON SERVICES IN EDUCATIONAL INSTITUTIONS AND EDUCATIONAL SERVICE AGENCIES ~~(1) The intent of 39-51-2108, MCA, is to deny unemployment benefits during periods when the claimant's unemployment is due to school not being in session.~~

~~(2) This provision applies if all the following factors are present:~~

~~(a) the claimant is an employee of an educational institution;~~

~~(b) the claimant's benefits are based on employment for an educational institution or governmental agency established and operated exclusively for the purpose of providing services to an educational institution. The service performed may be in any capacity including professional employees such as teachers and principals and non professional employees such as teachers aides and janitors;~~

~~(c) school is not in session or the claimant is on a paid sabbatical leave; and~~

~~(d) the claimant has reasonable assurance of returning to~~

~~work at an educational institution during the next regular term or year or following a holiday recess or vacation period. The educational institution is not limited to the same school where the claimant was employed during the base period and includes all elementary and secondary schools and institutions of higher education, including private and governmental schools.~~

~~(3) The phrase "reasonable assurance" as used in 39-51-2108, MCA, means a written, oral, or implied contract that a claimant will perform services in the same or similar capacity during the next academic year or following a holiday or vacation break. A claimant does not have reasonable assurance and may be eligible for benefits if:~~

~~(a) the commitment for rehire for the next academic year depends upon whether or not funding becomes available;~~

~~(b) the claimant will perform services during the next academic year as a substitute worker or the claimant's benefits are based on services as a substitute worker;~~

~~(c) the conditions and terms of the work to be performed during the next academic year are substantially less favorable than the work performed during the previous academic year;~~

~~(d) a "crossover" situation arises. This occurs when a claimant working in one capacity, such as a teacher, receives assurance of continued employment in the second academic term in another capacity, such as a teacher's aide. The claimant would not be denied benefits between academic terms but would be denied benefits during holiday or vacation breaks within terms.~~

~~(e) the claimant customarily works during a holiday or vacation break and is unemployed because funding is not available.~~

~~(f) the claimant has been advised that employment will not be offered when the next school term begins.~~

~~(4) To be an educational institution it is not necessary for the school to be non-profit or controlled by a school district, however, the instruction provided must be sponsored by an "institution" which meets all of the following conditions:~~

~~(a) participants are offered an organized course of study or training designed to give them knowledge, skills, information, doctrines, attitudes or abilities from, by, or under the guidance of an instructor(s) or teacher(s);~~

~~(b) the course of study or training offered is academic, technical, trade, or preparation for gainful employment in an occupation;~~

~~(c) the institution must be approved, licensed or issued a permit to operate as a school by the office of public instruction or other government agency authorized to issue such license or permit.~~

~~(5) All employees of an educational institution, even though not directly involved in educational activities, are subject to these provisions.~~

~~(6) Employees of a state or local government entity are subject to these provisions, if the entity is established and operated exclusively for the purpose of providing services to or on behalf of an educational institution. For example, if the claimant is a school bus driver employed by the city, the~~

~~claimant is not subject.~~

~~(7) A claimant may be denied benefits for weeks which begin during a period when school is not in session that are:~~

~~(a) between two successive academic years or terms; or~~

~~(b) during a break in school activity between two regular terms even if the terms are not successive, including school vacations and holidays as well as the break between academic terms; or~~

~~(c) during a paid sabbatical leave if the claimant has reasonable assurance of working in any capacity in the school term following the sabbatical leave.~~

~~(8) If the claimant's benefits are not based on services in an instructional, research or administrative capacity, retroactive payments may be paid if the claimant:~~

~~(a) continues to be unemployed when the second academic year or term commences;~~

~~(b) filed weekly claims in a timely manner;~~

~~(c) was denied benefits solely under 39-51-2108, MCA.~~

~~(9) A claimant who is subject to these provisions may be paid benefits based on non-school wages. If the claimant continues to be unemployed when school commences, the claimant may be entitled to benefits based on the combined school and non-school wages.~~

(1) For the purpose of this rule, the following definitions apply, unless the context clearly indicates otherwise:

(a) "Bona fide offer" means an offer of employment that:

(i) was made by an individual with the authority to make such an offer on behalf of the employer;

(ii) the circumstances under which the claimant would be employed are within the control of the employer or the employer can provide evidence that the employee would normally or customarily perform services under similar circumstances in the following academic year or term; and

(iii) the economic terms and conditions of the job offered in the second academic year or term are not substantially less than the economic terms and conditions for the job in the preceding academic year or term.

(b) "Educational institution" means all elementary and secondary schools and institutions of higher education, including private and government operated schools. To be an educational institution it is not necessary for the school to be non-profit or controlled by a school district, but the instruction provided must be sponsored by an institution which meets all of the following conditions:

(i) participants are offered an organized course of study or training designed to give them knowledge, skills, information, doctrines, attitudes or abilities from, by, or under the guidance of an instructor(s) or teacher(s);

(ii) the course of study or training offered is academic, technical, trade, or preparation for gainful employment in an occupation;

(iii) the institution must be approved, licensed or issued a permit to operate as a school by the office of public

instruction or other government agency authorized to issue such license or permit.

(c) "Educational services agency" means, as defined by 39-51-2108, MCA, a governmental agency or governmental entity which is established and operated exclusively for the purpose of providing such service to one or more educational institutions.

(d) "Non-professional" means services that are not in a professional capacity.

(e) "Professional" means services that are in an instructional, research or principal administrative capacity.

(f) "Reasonable assurance", as it relates to the probability of performing services in the next academic year or term, means a written, oral, or implied agreement that the employee will perform services in the same or similar capacity during the next academic year or term. However, the term "reasonable assurance" as it relates to the probability of performing services following a customary vacation break or holiday recess, means a written, oral, or implied agreement that the employee will perform services in any capacity, professional or non-professional, following the customary vacation break or holiday recess.

(g) "Same or similar capacity" means that employment offered is in the class of capacity (either professional or non-professional) as the previous academic year or term's service.

(2) 39-51-2108, MCA, provides that employees of educational institutions will be ineligible to receive unemployment insurance benefits, based on such educational employment, between academic years or terms and during customary vacation periods and holiday recesses within terms if the employee has a "reasonable assurance" of performing services in any educational institution in the following year, term, or remainder of a term. These provisions also apply to employees of educational service agencies if the employee has a "reasonable assurance" of performing services in any educational service agency in the following year, term, or remainder of a term.

(3) An employee who is initially determined not to have reasonable assurance will be denied benefits between academic years or terms and during customary vacation periods and holiday recesses within terms from the point forward that the employee is determined to have subsequently received reasonable assurance.

(4) In the absence of substantial evidence to the contrary, an employee who performed services immediately preceding a customary vacation period or holiday recess will be considered to have reasonable assurance of performing services in some capacity for the remainder of the term following the vacation period or holiday recess. An employee who performed services in the preceding academic year or term will be considered to have reasonable assurance of performing services in the same or similar capacity in the next academic year or term if the employee has been given a bona fide offer of a specific job in the same or similar capacity in the next academic year or term.

(5) Employees of educational institutions or educational service agencies who customarily work during the period between academic years or terms or during customary vacation periods or holiday recesses within terms are not subject to the ineligibility provisions of this rule.

(6) If the claimant's benefits are based on services in a professional capacity and the claimant was previously determined to have reasonable assurance, but continues to be unemployed when school commences, the claimant may be allowed benefits from the date the offer of employment was withdrawn or from the date the claimant was given reasonable assurance if it is determined that the original offer of employment was not a bona fide offer.

(7) If the claimant's benefits are based on services in a non-professional capacity, retroactive payments may be paid if the claimant:

(a) continues to be unemployed when the second academic year or term commences;

(b) filed weekly claims in a timely manner; and

(c) was denied benefits solely because of the provisions of 39-51-2108, MCA.

AUTH: Sec. 39-51-301, 39-51-302, MCA
IMP: Sec. 39-51-2108, MCA

24.11.613 CHARGING BENEFIT PAYMENTS TO EXPERIENCE-RATED EMPLOYERS---CHARGEABLE EMPLOYERS (1) Remains the same.

(2) ~~A "reduction in hours or wages" as used in 39-51-1214, MCA, is determined to have occurred if:~~

~~(a) the hours of employment are reduced by one hour or more per week; or~~

~~(b) the gross earnings are reduced by $1.00 or more per week.~~ An employer has not reduced hours or wages as used in 39-51-1214, MCA, if continued work was available for the same number of hours prior to the date the initial claim was filed as at the time of most recent hire. If the claimant was hired on a part-time basis with no guaranteed hours, no reduction has occurred unless the wages paid or the hours available for the month prior to the filing date of the claim were 10 percent less than any prior month in the most recent completed calendar quarter.

(3) Remains the same.

AUTH: Sec. 39-51-301, 39-51-302, MCA
IMP: Sec. 39-51-1214, MCA

REASON: All of the proposed amendments address issues which have recently come to the attention of staff over the course of the last several months. The proposed amendments to ARM 24.11.464 are reasonably necessary to ensure that Montana administrative rules are in conformance with federal laws and regulations governing eligibility for unemployment insurance benefits. The proposed substantive amendments for the remaining rules are reasonably necessary to clarify the rules so that claimants and employers are more likely to understand their rights and obligations under the law and to ensure that benefits are paid in appropriate circumstances. In addition, technical

corrections and style changes are reasonably necessary to bring the rules into conformance with the requirements promulgated by the Administrative Rules Bureau of the Secretary of State. The amendment to the implementation citation form for ARM 24.11.202 is reasonably necessary to concisely provide cross-references for the rule.

3. 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:

Joanne Loughney-Finstad, Bureau Chief
Benefits Bureau
Unemployment Insurance Division
Department of Labor and Industry
P.O. Box 8011
Helena, Montana 59604-8011

and must be received by no later than 5:00 p.m., September 19, 1994.

4. The Department proposes to make these amendments effective October 30, 1994. The Department reserves the right to adopt only portions of these proposed amendments, or to adopt some or all of the amendments at a later date.

5. The Hearing Bureau of the Legal/Centralized Services Division of the Department has been designated to preside over and conduct the hearing.

David A. Scott
Rule Reviewer

Laurie Ekanger, Commissioner
DEPARTMENT OF LABOR & INDUSTRY

Certified to the Secretary of State: August 1, 1994.

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

In the matter of adoption of new Rules I through III and amendment of ARM 26.4.301, 26.4.303, 26.4.304, 26.4.308, 26.4.314, 26.4.321, 26.4.404, 26.4.405, 26.4.410, 26.4.501A, 26.4.505, 26.4.519A, 26.4.524, 26.4.601, 26.4.602, 26.4.603, 26.4.605, 26.4.623, 26.4.633, 26.4.634, 26.4.638, 26.4.639, 26.4.642, 26.4.645, 26.4.646, 26.4.702, 26.4.711, 26.4.721, 26.4.724, 26.4.725, 26.4.726, 26.4.821, 26.4.825, 26.4.924, 26.4.927, 26.4.930, 26.4.932, 26.4.1116, 26.4.1141, and 26.4.1212, pertaining to the regulation of strip and underground mining for for coal and uranium.	NOTICE OF PROPOSED ADOPTION AND AMENDMENT NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On October 17, 1994, the Board of Land Commissioners and Department of State Lands propose to adopt new Rules I through III and amend ARM 26.4.301, 26.4.303, 26.4.304, 26.4.308, 26.4.314, 26.4.321, 26.4.404, 26.4.405, 26.4.410, 26.4.501A, 26.4.505, 26.4.519A, 26.4.524, 26.4.601, 26.4.602, 26.4.603, 26.4.605, 26.4.623, 26.4.633, 26.4.634, 26.4.638, 26.4.639, 26.4.642, 26.4.645, 26.4.646, 26.4.702, 26.4.711, 26.4.721, 26.4.724, 26.4.725, 26.4.726, 26.4.821, 26.4.825, 26.4.924, 26.4.927, 26.4.930, 26.4.932, 26.4.1116, 26.4.1141, and 26.4.1212, pertaining to the regulation of strip and underground mining of coal and uranium.

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

26.4.301 DEFINITIONS The following definitions apply to all terms used in the Strip and Underground Mine Reclamation Act and sub-chapters 3 through 13 of this chapter:

Sections (1) through (77) remain the same.

(78) "Owned or controlled" and "owns or controls" mean any one or a combination of the following relationships:

(a) being a permittee of a surface coal mining operation;

(b) based on instruments of ownership or voting securities, owning of record in excess of 50 percent of an entity;

(c) having any other relationship which gives one person authority, directly or indirectly, to determine the manner in

which an applicant, operator, or other entity conducts strip or underground coal mining operations; or

(d) unless it is demonstrated that the person does not in fact have the authority, directly or indirectly, to determine the manner in which the relevant coal mining operation is conducted:

(i) being an officer or director of an entity;

(ii) being the operator of a coal mining operation;

(iii) having the ability to commit the financial or real property assets or working resources of an entity;

(iv) being a general partner in a partnership;

(v) based on the instruments of ownership or the voting securities of a corporate entity, owning of record 10 through 50 percent of the entity; or

(vi) owning or controlling coal to be mined by another person under a lease, sublease, or other contract and having the right to receive such coal after mining or having authority to determine the manner in which that person or another person conducts this coal mining operation.

Sections (78) through (118) remain the same, except they are renumbered Sections (79) through (119).

~~(119)~~ (120) "Test pit" means an excavation for prospecting by means other than drilling. Materials obtained from a test pit are used for test purposes ~~or for the purpose of developing a market~~ and not for direct economic profit.

Sections (120) through (132) remain the same, except they are renumbered (121) through (133).

(134) "Waste disposal structure" means a facility for the disposal of underground development waste or coal processing waste outside the mine workings and the mined out surface area. The term does not include impoundment or embankment.

Sections (133) through (135) remain the same, except they are renumbered Sections (135) through (137).

(AUTH: Sec. 82-4-204, 205, MCA; IMP, Sec. 82-4-203, MCA.)

26.4.303 LEGAL, FINANCIAL, COMPLIANCE, AND RELATED INFORMATION Each application must contain the following information:

(1) through (19) remain the same.

(20) a list of all other licenses and permits needed by the applicant to conduct the proposed mining. This list must identify each license and permit by:

(a) through (b) remain the same.

(c) identification numbers of applications for those permits or licenses or, if issued, the identification numbers of the permits or licenses; and

(d) if a decision has been made, the date of approval or disapproval by each issuing authority; ~~and~~

~~(c)~~ (21) the name and address of the public office where the applicant will file a copy of the application for public inspection;

~~(21)~~ (22) the name, address, and telephone number of the resident agent who will accept service of process on behalf of the applicant;

~~(22)~~ (23) a copy of the newspaper advertisement of the ap-

plication and proof of publication as required in ARM 26.4.401~~,~~; and

~~(23)~~(24) a map of the mine plan area showing the areas upon which strip or underground mining occurred:

(a) prior to August 3, 1977;

(b) after August 3, 1977, and prior to May 3, 1978;

(c) after May 3, 1978, and prior to April 1, 1980;

(d) after April 1, 1980, and before January 13, 1989.

This map must designate the areas from which coal removal had not commenced as of January 13, 1989.

(AUTH: Sec. 82-4-204, 205, MCA; IMP, Sec. 82-4-222,MCA.)

26.4.304 BASELINE INFORMATION: ENVIRONMENTAL RESOURCES The following environmental resources information must also be included as part of an application for a strip or underground mining permit:

(1) through (4) remain the same.

(5) all hydrologic and geologic data necessary to evaluate baseline conditions, probable hydrologic consequences and cumulative hydrologic impacts of mining, and to develop a plan to monitor water quality and quantity pursuant to ARM 26.4.314(3) and 82-4-222, MCA~~.~~ ~~Groundwater quality monitoring shall at a minimum, be conducted quarterly and include total dissolved solids, field specific conductance corrected to 25 C, Ph, total iron, total manganese, major cations (Ca, Mg, Na, K), major anions (SO_4, HCO_3, CO_3, Cl, NO_3) and water levels. Such data must be generated in accordance with ARM 26.4.645 (2) and (3) and 26.4.646 (1), (1)(a), (3), (5), and (6). Existing baseline data, with departmental approval, may supplement data collected by the applicant. If the information necessary to provide the description is not available from the appropriate state and federal agencies, the applicant may gather and submit this information to the department as part of the permit application. The application must not be deemed complete until this information is made available in the application~~;

(6) hydrologic and geologic descriptions pursuant to section (5) above including:

(a) a narrative and graphic account of groundwater hydrology, including but not limited to:

(i) the lithology, thickness, structural controls, hydraulic conductivity, transmissivity, recharge, storage and discharge characteristics, extent of aquifer, production data, water quality analyses and other relevant aquifer characteristics for each aquifer within the mine plan area and adjacent areas; ~~and~~

(ii) the results of a minimum of one year of quarterly monitoring of groundwater for total dissolved solids, specific conductance corrected to 25°C, pH, major dissolved cations (Ca, Mg, Na, K), major dissolved anions (SO_4, HCO_3, CO_3, Cl, NO_3), concentrations of dissolved metals as prescribed by the department, and water levels. These data must be generated in accordance with the standards contained in ARM 26.4.645 (2), (3), and (6); and

(iii) a listing of all known or readily discoverable wells and springs located within 3 miles downgradient from the proposed permit area and within 1 mile in all other directions unless ~~a~~ hydrologic ~~boundary justifies a lesser distance~~ conditions justify different distances;

(b) a narrative and graphic account of surface water hydrology within the mine plan area and adjacent areas, including but not limited to:

(i) the name, location, and description of all surface water bodies such as streams, lakes, ponds, springs, ~~or~~ and impoundments; and

(ii) descriptions of surface drainage systems sufficient to identify, in detail, the seasonal variations in water quantity and quality, including but not limited to:

(A) minimum, maximum, and average discharge conditions which identify critical low flow and peak discharge rates of streams and springs; and

(B) water quality data to identify the characteristics of surface waters discharging into or receiving flows from the proposed mine plan area, including total suspended solids~~,~~, total dissolved solids~~,~~, specific conductance corrected to 25°C~~,~~, pH, ~~alkalinity, and acidity; total and dissolved iron; total manganese;~~ major dissolved cations (Ca, Mg, Na, K)~~,~~ major dissolved anions (SO_4, CO_3, HCO_3, NO_3, Cl), and concentrations of metals as prescribed by the department. Such data must be generated in accordance with the standards contained in ARM 26.4.646(1), (1)(a), (3), (5), and (6);

(c) remains the same.

(d) such other information that the department determines is relevant~~.~~;

(7) and (8) remain the same.

(9) vegetative surveys as described in 82-4-222(2)~~(k)~~, MCA of the Act, which must include:

(a) through (c) remain the same.

(10) a narrative of the results of a wildlife survey. The operator shall contact the department soon enough before planning the wildlife survey to allow the department to consult state and federal agencies with fish and wildlife responsibilities to determine the scope and level of detail of information required in the survey to help design a wildlife protection and enhancement plan. At a minimum, the wildlife survey must include:

(a) through (c) remain the same.

(d) a wildlife habitat map for the entire wildlife survey area including habitat types that are discussed in subsection (c) above, and ARM 26.4.751~~(7)(2)(f)~~ through ~~(9)(2)(h)~~; and

(e) remains the same.

(11) and (12) remain the same.

(AUTH: Sec. 82-4-204, 205, MCA; IMP, Sec. 82-4-222, MCA.)

26.4.308 OPERATIONS PLAN Each application must contain a description of the mining operations proposed to be conducted during the life of the mine within the proposed mine plan area,

including at a minimum, the following:

(1) remains the same.

(2) a narrative, with appropriate cross sections, design drawings and other specifications sufficient to demonstrate compliance with ARM 26.4.609, explaining the construction, modification, use, maintenance, and removal of the following facilities (unless retention of such facilities is necessary for postmining land use as specified in ARM 26.4.762):

(a) through (e) remain the same.

(f) other support facilities as designated in ARM 26.4.609;

~~(f)~~ (g) water and air pollution control facilities; and

~~(g)~~ (h) any additional information the department deems useful~~;~~.

(3)(a) a description of measures to be employed to ensure that all debris, acid, toxic, acid-forming, and toxic-forming materials, materials constituting a fire hazard, and otherwise undesirable materials are properly disposed of; and

(b) remains the same.

(4) and (5) remain the same.

(AUTH: Sec. 82-4-204, 205, MCA; IMP, Sec. 82-4-222, MCA.)

26.4.314 PLAN FOR PROTECTION OF THE HYDROLOGIC BALANCE

(1) and (2) remain the same.

(3) The application must also include a determination pursuant to (1) and (2) above of the probable hydrologic consequences of the proposed mining operation, on the proposed mine plan area and adjacent areas, with respect to the hydrologic balance. This determination must:

(a) remains the same.

(b) list and summarize all probable hydrologic ~~impacts~~ consequences of the proposed mining operation~~;~~ including:

(i) whether adverse impacts may occur to the hydrologic balance;

(ii) whether acid-forming or toxic-forming materials that could result in the contamination of surface or ground water supplies are present;

(iii) whether the proposed operation may proximately result in contamination, diminution or interruption of an underground or surface source of water within the proposed permit or adjacent areas which is used for domestic, agricultural, industrial or other legitimate purpose; and

(iv) what impact the proposed operation will have on:

(A) sediment yields from the disturbed area;

(B) acidity, total suspended and dissolved solids, and other important water quality parameters of local impact;

(C) flooding or streamflow alteration;

(D) ground water and surface water availability; and

(E) other characteristics as required by the department; and

(c) explain to what extent each hydrologic ~~impact~~ consequence can be mitigated by measures taken pursuant to sections (1) and (2) above~~; and~~

~~(d) provide a summary of the probable hydrologic consequences of the proposed mining operation~~.

(4) and (5) remain the same.
(AUTH: Sec. 82-4-204, 205, MCA; IMP, Sec. 82-4-222, MCA.)

26.4.321 TRANSPORTATION FACILITIES PLAN

(1) Each application must contain a detailed description of each road, conveyor, or rail system to be constructed, used, or maintained within the proposed permit area. The description must include a map, appropriate cross-sections, and the following:

(a) and (b) remain the same.

(c) a description of measures to be taken to obtain approval of the department for alteration or relocation of a natural drainageway; ~~and~~

(d) a description of measures, other than use of a rock headwall, to be taken to protect the inlet end of a ditch relief culvert for approval by the department under ARM 26.4.605 (3)(a)(i)~~;~~.

(e) demonstration of compliance with ARM 26.4.601 through 26.4.606;

(f) demonstration of compliance with any design criteria established by the department; and

(g) in accordance with standards of subchapters 5, 6, 7, and 8, a description of measures that will be used to reclaim any roads that will not be reclaimed as part of the reclamation activities of the mine excavations.

(2) remains the same.

(3) The plans and drawings for each road shall be prepared by, or under the direction of, and certified by a qualified registered professional engineer~~, or a registered land surveyor,~~ with experience in the design and construction of roads. The certification must state that ~~The~~ the road designs ~~must~~ meet the performance standards ~~outlined in~~ of ARM 26.4.321(1) and (2), ARM 26.4.601 through 26.4.606 and current prudent engineering practices.
(AUTH: Sec. 82-4-204, 205, MCA; IMP, Sec. 82-4-222, MCA.)

26.4.404 REVIEW OF APPLICATION

(1) through (4) remain the same.

(5) The department shall assure that:

(a) remains the same.

(b) a determination of effect is completed for all listed or eligible cultural resource sites in accordance with 36 CFR 800;

(c) and (d) remain the same.

(6) through (9) remain the same.
(AUTH: Sec. 82-4-204, 205, MCA; IMP, Sec. 82-4-226, 231, MCA.)

26.4.405 FINDINGS AND NOTICE OF DECISION

(1) through (4) remain the same.

(5) Simultaneously with distribution of the written findings and notice of decision under sections ~~(2) and~~ (3) and (4) above, the department shall:

(a) and (b) remain the same.

(6) The department may not approve an application

submitted pursuant to ARM 26.4.401(1) unless the application affirmatively demonstrates and the department's written findings confirm, on the basis of information set forth in the application or information otherwise available that is compiled by the department, that:

(a) remains the same.

(b) the permit area is not within an area being considered for or has not been designated as unsuitable for mining;

(c) through (e) remain the same.

(f) the applicant has complied with applicable federal and state cultural resource requirements, including ARM 26.4.318, 26.4.1131 and 26.4.1137~~,~~;

(g) through (j) remain the same.

(k) for mining operations where the private mineral estate to be mined has been severed from the private surface estate, the applicant has submitted the documentation required under ARM 26.4.303; ~~and~~

(l) the applicant proposes to use existing structures in compliance with ARM ~~26.4.309~~ 26.4.1302~~,~~;and

(m) remains the same.

(7) and (8) remain the same.

(AUTH: Sec. 82-4-204, 205, MCA; IMP, Sec. 82-4-226, 231, MCA.)

26.4.410 PERMIT RENEWAL

(1) through (3) remain the same.

(4)(a) The department shall, upon the basis of application for renewal and completion of all procedures required under this rule, issue a renewal of a permit, unless it is established and written findings by the department are made that:

(i) remains the same.

(ii) the present strip or underground mining operations are not in compliance with the environmental protection standards of the act or sub-chapters 5 through 9~~,~~;

(iii) remains the same.

(iv) the operator has not provided evidence that ~~any performance bond required to be in effect for the operations will continue in full force and effect for the proposed period of renewal, as well as any additional bond the department might require~~;

(A) and (B) remain the same.

(v) through (viii) remain the same.

(b) through (d) remain the same.

(5) An operating permit need not be renewed for a site at which coal extraction, processing, and handling have been completed. Permit expiration does not relieve the operator of the duty to comply with the Act, this subchapter, and the permit and to retain the bond and liability insurance in full force and effect until final bond release.

(AUTH: Sec. 82-4-204, 205, MCA; IMP, Sec. 82-4-221, 226, MCA.)

26.4.501A FINAL GRADING REQUIREMENTS

(1) and (2) remain the same.

(3) Final grading must be kept current with mining operations. To be considered current, grading and backfilling must

meet the following requirements, unless exceptions are granted:

(a) On lands affected by area strip mining, the grading and backfilling may not be more than ~~two~~ four spoil ridges behind the pit being worked unless otherwise approved by the department. Rough backfilling and grading must be completed within 180 days following coal removal. The department may grant additional time for rough backfilling and grading if the permittee demonstrates, through a detailed written analysis, that additional time is necessary~~; and~~.

(b) remains the same.

(AUTH: Sec. 82-4-204, MCA; IMP, Sec. 82-4-231, 232, 234, MCA.)

26.4.505 BURIAL AND TREATMENT OF WASTE MATERIALS

(1) and (2) remain the same.

(3) Wastes must be hauled or conveyed and placed for final placement in a controlled manner to:

(a) minimize adverse effects of leachate and surface water runoff on surface and groundwater quality and quantity;

(b) ensure mass stability and prevent mass movement during and after construction;

(c) ensure that the final disposal facility is suitable for reclamation and revegetation compatible with the natural surroundings and the approved postmining land use;

(d) not create a public hazard; and

(e) prevent combustion.

(4) The disposal facility shall be designed using current, prudent engineering practices and shall meet any design criteria established by the department. A qualified registered professional engineer, experienced in the design of similar facilities, shall certify the design of the facility. The facility shall be designed to attain a minimum long-term static safety factor of 1.5, except that waste disposed of in the mine workings or excavation must attain a long-term static safety factor of 1.3. The foundation abutments must be stable under all conditions of construction.

(5) Sufficient foundation investigations, as well as any necessary laboratory testing of foundation material, must be performed in order to determine the design requirements for foundation stability. The analyses of the foundation conditions must take into consideration the effect of underground mine workings, if any, upon the stability of the disposal facility.

~~(3)~~(6) Wastes must not be used in the construction of embankments for impoundments.

(7) Wastes from a strip mine may not be disposed of in a waste disposal structure that is located on the surface of the ground.

~~(4)~~(8) Whenever waste is temporarily impounded:

(a) the impoundment must be designed and certified, constructed, and maintained:

(i) in accordance with ARM 26.4.603, 26.4.639, and 26.4.642 using current prudent-design standards; and

(ii) for structures meeting the criteria of 30 CFR 77.216(a), to safely discharge the 6-hour, probable maximum precipitation (PMP) or greater event;

(b) the impoundment must be designed, and when operational must be managed, so that at least 90 percent of the water stored during the design precipitation event can be and is removed within a the 10-day period following the event; and

(c) spillways for coal impounding structures must be designed to ~~protect~~ provide adequate protection against erosion and corrosion; and

(d) inlets must be protected against blockage.

~~(5)~~(9) ~~Structures impounding coal~~ Coal waste impoundments must not be retained as a part of the approved postmining land use.

(10) If any examination or inspection discloses that a potential hazard exists at a waste disposal facility, the department must be informed promptly of the finding and of the emergency procedures formulated for public protection and remedial action. If adequate procedures cannot be formulated or implemented, the department must be notified immediately. The department shall then notify the appropriate agencies that other emergency procedures are required to protect the public.

(11) Wastes may be disposed of in underground mine workings, but only in accordance with a plan approved by the department and mine safety and health administration under ARM 26.4.901(1)(e) through (g) and (2).

(AUTH: Sec. 82-4-204, 205, MCA; IMP, Sec. 82-4-231, MCA.)

26.4.519A THICK OVERBURDEN AND EXCESS SPOIL (1) Where thick overburden is encountered, ~~all highwalls and depressions must be eliminated with spoil and suitable waste materials, unless otherwise approved by the department in accordance with ARM 26.4.313(3)(b) and 26.4.821 through 26.4.824.~~ ~~The~~ the operator shall demonstrate that the volume of spoil and suitable waste materials is more than sufficient to restore the disturbed area to approximate original contour. Any excess spoil material must be disposed in accordance with ARM 26.4.520. Thick overburden occurs where the final spoil thickness exceeds 1.2 times the sum of the overburden thickness and mineral thickness. Final spoil thickness is the product of the overburden thickness times the bulking factor, which is to be determined for each mine area.

(AUTH: Sec. 82-4-204, MCA; IMP, Sec. 82-4-231, 232, MCA.)

26.4.524 SIGNS AND MARKERS

(1) remains the same.

(2) Signs identifying the mine area must be displayed at all points of access to the permit area from public roads and highways. Signs must show the name, business address and telephone number of the permittee ~~and~~, identification numbers of current mining and reclamation permits and the mine safety and health administration identification number for the site, and, where the operation is conducted for the permittee by a contractor, the name, business address and telephone number of the person who conducts the mining activities. Such signs must not be removed until after release of all bonds.

(3) through (6) remain the same.

(AUTH: Sec. 82-4-204 and 82-4-205, MCA; IMP, Sec. 82-4-231, MCA)

26.4.601 GENERAL REQUIREMENTS FOR ROAD AND RAILROAD LOOP CONSTRUCTION

(1) through (4) remain the same.

(5) Following construction or reconstruction of each road other than a ramp road, the permittee shall submit to the department a report, prepared by a qualified registered professional engineer experienced in the design and construction of roads, that the roads have been constructed or reconstructed in accordance with the plan approved pursuant to ARM 26.4.321.

~~(5)~~(6) All appropriate methods must be employed by the operator to prevent loss of haul or access road surface material in the form of dust.

~~(6)~~(7) Immediately upon abandonment of any road or railroad loop, the area must be graded to approximate original contour and ripped, subsoiled or otherwise tilled in accordance with the approved plan. If necessary, embankment and fill materials must be hauled away and disposed of properly. All bridges and culverts must be removed and natural drainage patterns restored. The area must be resoiled, conditioned and seeded in accordance with sub-chapter 7. Adequate measures must be taken to prevent erosion by such means as cross drains, dikes, water bars, or other devices. Such areas must be abandoned in accordance with all provisions of the Act and of the rules adopted pursuant thereto.

~~(7)~~(8) Upon completion of mining and reclamation activities, all roads must be closed and reclaimed unless retention of the road is approved as part of the approved postmining land use pursuant to ARM 26.4.762 and the landowner requests in writing and the department concurs that certain roads or specified portions thereof are to be left open for further use. In such event, necessary maintenance must be assured by the operator or landowner and drainage of the road systems must be controlled according to the provisions of ARM 26.4.601 through 26.4.610. (AUTH: Sec. 82-4-204, MCA; IMP, Sec. 82-4-231, 232, MCA.)

26.4.602 LOCATION OF ROADS AND RAILROAD LOOPS

(1) remains the same.

(2) All roads, insofar as possible, must be located on ridges or on the available flatter and more stable slopes to minimize erosion. Stream fords are prohibited ~~unless they are specifically approved by the department as~~, except for temporary routes across dry, ephemeral streams that are specifically approved by the department. The department may approve crossings that will not adversely affect sedimentation or fish, wildlife, or related values, and that will not be used for hauling. Other stream crossings must be made using bridges, culverts or other structures designed and constructed to meet the requirements of this paragraph. Roads must not be located in ~~active~~ stream channels or be constructed or maintained in a manner that increases erosion or causes significant sedimentation or flooding. However, nothing in this paragraph prohibits relocation of stream channels in accordance with ARM 26.4.631 through 26.4.637.

(AUTH: Sec. 82-4-204, 205, MCA; IMP, Sec. 82-4-231, 232, MCA.)

26.4.603 EMBANKMENTS All embankments must be designed and certified by a registered professional engineer ~~or registered land surveyor~~ experienced in the design of earth and/or rock structures. Embankment sections must be constructed in accordance with the following provisions:

(1) through (8) remain the same.

(9) ~~The minimum safety factor for all embankments must be 1.5 under any condition of loading likely to occur, or such higher factor as the department requires.~~ All embankments must have a minimum seismic safety factor of 1.2 and a minimum static safety factor of 1.5 under any condition of loading likely to occur, or such higher factor as the department determines to be reasonably necessary for safety or protection of property.

(10) through (13) remain the same.

(AUTH: Sec. 82-4-204, MCA; IMP, Sec. 82-4-231, 232, MCA.)

26.4.605 HYDROLOGIC IMPACT OF ROADS AND RAILROAD LOOPS

(1) and (2) remain the same.

(3)(a)(i) All ~~access and haul~~ roads other than ramp roads must be adequately drained using structures such as, but not limited to, ditches, water barriers, cross-drains, and ditch-relief drainages. For ~~access and haul~~ roads that are to be maintained for more than six months and for all roads used to haul coal or spoil (excluding ramp roads) or to be retained for the postmining land use, water-control structures must be designed with a discharge capacity capable of passing the peak runoff from a 10-year, 24-hour precipitation event without impounding water at the entrance. Culverts with an end area of greater than 35 square feet and bridges with a span of 30 feet or less must be designed to safely pass a 25-year, 24-hour precipitation event. All other bridges must be designed to safely pass the 100-year, 24-hour precipitation event or greater event as specified by the department. Drainage pipes and culverts must be constructed to avoid plugging or collapse and erosion at inlets and outlets. Trash racks and debris basins must be installed in the drainage ditches wherever debris from the drainage area could impair the functions of drainage and sediment control structures. Culverts must be covered by compacted fill to a minimum depth of 1 foot. Culverts must be designed, constructed, and maintained to sustain the vertical soil pressure, the passive resistance of the foundation, and the weight of vehicles to be used.

(ii) remains the same.

(b) through (d) remain the same.

(AUTH: Sec. 82-4-204, MCA; IMP, Sec. 82-4-231, 232, MCA.)

26.4.623 BLASTING SCHEDULE

(1) remains the same.

(2)(a) A blasting schedule must not be so general as to cover the entire permit area or all working hours, but it must identify as accurately as possible the location of the blasting sites and the time periods when blasting will occur.

(b) The blasting schedule must contain at a minimum:

(i) and (ii) remain the same.

(iii) days and time periods when explosives are to be detonated. These periods must not exceed an aggregate of 4 8 hours in any one day. However, the department may impose more restrictive conditions pursuant to ARM 26.4.624;

(iv) through (vi) remain the same.

(3) remains the same.

(AUTH: Sec. 82-4-204, 205, MCA; IMP, Sec. 82-4-231, MCA.)

26.4.633 WATER QUALITY PERFORMANCE STANDARDS

(1) remains the same.

(2) Sediment control through BTCA practices must be maintained until the disturbed area has been restored, the revegetation requirements of ARM 26.4.711 through ~~26.4.735~~ 26.4.733 have been met, the area meets state and federal requirements for the receiving stream, and evidence is provided that demonstrates that the drainage basin has been stabilized to the extent that it was prior to mining, assuming proper management.

(3) through (6) remain the same.

(AUTH: Sec. 82-4-204, MCA; IMP, Sec. 82-4-231, MCA.)

26.4.634 RECLAMATION OF DRAINAGES (1) Design of reclaimed drainages must emphasize channel and floodplain dimensions that approximate the premining configuration and that will blend with the undisturbed drainage system above and below the area to be reclaimed. The average stream gradient must be maintained with a concave longitudinal profile and the channel and floodplain must be designed and constructed to:

(a) establish or restore the drainage channel to its natural habit or characteristic pattern with a geomorphically acceptable gradient as determined by the department. The habits or characteristics of individual streams include their particular reactions to general laws related to stream work, whether or not streams have attained the conditions of equilibrium, and the stream channel morphology and stability;

(b) through (f) remain the same.

(g) restore, enhance where practicable, or maintain natural riparian vegetation in order to comply with ARM 26.4.711 through 26.4.73~~5~~3.

(2) At least 120 days prior to reclamation of a ~~significant~~ drainage ~~as determined in consultation with and requiring approval by the department,~~ channel depicted on the postmining drainage map, or those channels indicated to the operator by the department, the operator shall submit to the department detailed designs for the drainage channel or any modifications from the approved design based on sound geomorphic and engineering principles. These designs must be certified by a qualified registered professional engineer ~~meeting~~, and must meet the performance standards and applicable design criteria set by these rules. These designs must represent the state-of-the-art in reconstruction of geomorphically stable channels and must be approved by the department before construction begins. The operator shall notify the department when construction begins. The regraded drainage channel must not be resoiled or seeded

until it is inspected and approved by the department.

(3) and (4) remain the same.

(AUTH: Sec. 82-4-204, MCA; IMP, Sec. 82-4-231, MCA.)

26.4.638 SEDIMENT CONTROL MEASURES

(1) remains the same.

(2) Sediment control measures include practices carried out within or adjacent to the disturbed area. The sedimentation storage capacity of practices in and downstream from the disturbed area must reflect the degree to which successful mining and reclamation techniques are applied to reduce erosion and control sediment. Sediment control measures consist of the utilization of proper mining and reclamation methods and sediment control practices, singly or in combination. Sediment control methods include but are not limited to:

(a) disturbing the smallest practicable area at any one time during the mining operation through progressive backfilling, grading, and prompt revegetation ~~as required~~ in accordance with ARM 26.4.711 through ~~26.4.735~~ 26.4.733;

(b) through (g) remain the same.

(AUTH: Sec. 82-4-202, 204, MCA; IMP, Sec. 82-4-231, 232, 233, 234, MCA.)

26.4.639 SEDIMENTATION PONDS AND OTHER TREATMENT FACILITIES (1) Sedimentation ponds, either temporary or permanent, may be used individually or in series and must:

(a) remains the same.

(b) be located as near as possible to the disturbed area, and out of major stream courses, unless another site is approved by the department; ~~and~~

(c) provide an adequate sediment storage volume equal to:

(i) (A) the accumulated sediment volume from the drainage area to the pond for a minimum of 3 years. Sediment storage volume must be determined using the universal soil loss equation, including gully erosion rates and the sediment delivery ratio converted to sediment volume information if applicable, or using either the sediment density method or another empirical method derived from regional sediment pond studies, if the method is approved by the department; or

~~(ii)~~ (B) not less than 0.035 acre-foot for each acre of disturbed area within the upstream drainage area, unless the operator affirmatively demonstrates that the sediment volume for any site-specific area is less, or demonstrates that sediment removed by other sediment control measures will result in a reduction in the sediment load. A value greater than 0.035 acre-feet per acre must be used whenever the department determines it is necessary to contain a higher sediment yield ~~All ponds must be accurately surveyed immediately after construction in order to provide a baseline for future sediment volume measurements~~; and, as applicable~~,~~;

~~(iii)~~ (ii) the accumulated sediment volume necessary to retain sediment for 1 year in any discharge from an underground mine passing through the pond~~,~~; and

(d) be accurately surveyed immediately after construction

in order to provide a baseline for future sediment volume measurements.

(2) through (9) remain the same.

(10) Sedimentation ponds must be constructed to provide:

(a) ~~An appropriate~~ a combination of principal and emergency spillways or a single spillway only ~~must be provided~~ to safely discharge the runoff from a 25-year, 24-hour precipitation event, or larger event specified by the department. The elevation of the crest of the emergency spillway must be a minimum of 1 foot above the crest of the principal spillway. Emergency spillway grades and allowable velocities must be approved by the department;

(b) containment of runoff from a 25-year, 24-hour precipitation event, or greater event as specified by the department, with no spillway required, provided that the impounding structure does not meet any of the criteria of 30 CFR 77.216(a), and provided further that adequate provisions are made for safe dewatering of the pond within an appropriate time after the design precipitation event occurs, using current, prudent engineering practices; or

(c) for ponds meeting any of the criteria of 30 CFR 77.216(a), containment of runoff from the probable maximum precipitation of a 6-hour event, or greater event as specified by the department, with no spillway required, provided that adequate provisions are made for safe dewatering of the pond within an appropriate time after the design precipitation event occurs, using current, prudent engineering practices.

(11) through (17) remain the same.

(18) If a sedimentation pond ~~has an embankment that is more than 20 feet in height, as measured from the upstream toe of the embankment to the crest of the emergency spillway, or has a storage volume of 20 acre-feet or more~~ meets any of the criteria of 30 CFR 77.216(a), the following additional requirements must be met:

(a) remains the same.

~~(b) The embankment must be designed and constructed with a static safety factor of at least 1.5, and a seismic safety factor of at least 1.2. The department may designate higher safety factors to ensure stability;~~

(b)~~(c)~~ Appropriate barriers must be provided to control seepage along conduits that extend through the embankment; and

(c)~~(d)~~ The criteria of the mine safety and health administration as published in 30 CFR 77.216 and ARM 26.4.315 must be met.

(19) remains the same.

(20) The entire embankment, including the surrounding areas disturbed by construction, must be stabilized with a vegetative cover or other means immediately after the embankment is completed in order to protect against erosion and sudden drawdown. The active upstream face of the embankment where water will be impounded may be riprapped or otherwise stabilized. Areas in which the vegetation is not successful or where rills and gullies develop must be repaired and revegetated in accordance with ARM 26.4.711 through 26.4.735.

(21) remains the same.

(22)(a) Sedimentation ponds and other treatment facilities must not be removed:

(i) sooner than 2 years after the last augmented seeding within the drainage, unless otherwise approved by the department in compliance with ARM 26.4.633 ~~and evidence is provided that the drainage basin has stabilized to the extent that it was in the undisturbed state~~;

~~(ii) until the disturbed area has been restored and the vegetation requirements of ARM 26.4.711 through 26.4.735 are met;~~

(ii) ~~(iii)~~ until the drainage entering the pond has met the applicable state and federal water quality requirements for the receiving stream; and

(iii) ~~(iv)~~ until evidence is provided that demonstrates that the drainage basin has stabilized to the extent that it was in the undisturbed state.

(b) When the sedimentation pond is removed, the affected land must be regraded and revegetated in accordance with ARM 26.4.711 through ~~26.4.735~~ 26.4.733.

(c) remains the same.

(23) through (25) remain the same.

(AUTH: Sec. 82-4-204, MCA; IMP, Sec. 82-4-231, MCA.)

26.4.642 PERMANENT AND TEMPORARY IMPOUNDMENTS

(1) through (4) remain the same.

(5) All embankments, the surrounding areas, and diversion ditches disturbed or created by construction must be graded, fertilized, seeded, and mulched to comply with the requirements of ARM 26.4.711 through ~~26.4.735~~ 26.4.733 immediately after the embankment is completed, except that the active upstream face of the embankment where water will be impounded may be riprapped or otherwise stabilized. Areas in which the vegetation is not successful or where rills and gullies develop must be repaired and revegetated to comply with the requirements of ARM 26.4.711.

(6) and (7) remain the same.

(8) All dams and embankments ~~that meet or exceed the size or other criteria of 30 CFR 77.216(a)~~ must be inspected and certified to the department by a qualified registered professional engineer, immediately after construction and annually thereafter, as having been constructed and maintained to comply with the requirements of this section. ~~All dams and embankments that do not meet the size or other criteria of 30 CFR 77.216(a) must also be inspected and certified annually until bond release by a qualified registered professional engineer.~~ Inspection reports must be submitted until the dams and embankments are removed or until phase IV bond release, whichever occurs first. ~~These~~ Certification reports must be submitted to the department annually, either concurrently with the annual report (ARM 26.4.1129) or with the second semi-annual hydrology report (ARM 26.4.645(8) and 26.4.646(2)). ~~and the~~ The operator shall retain a copy of each report at or near the minesite. Certification reports must include statements on:

(a) through (d) remain the same.

(9) remains the same.

(10) If an impoundment does not meet the requirements of sections (1) through (6), the impoundment area must be regraded to approximate original contour and revegetated in accordance with ARM 26.4.711 through ~~26.4.735~~26.4.733.

(AUTH: Sec. 82-4-204, MCA; IMP, Sec. 82-4-231, MCA.)

26.4.645 GROUNDWATER MONITORING

(1) remains the same.

(2) Monitoring must:

(a) include the measurement of the quantity and quality of water in all disturbed or potentially affected geologic strata within and adjacent to the permit area. Affected strata are all those adjacent to or physically disturbed by mining disturbance and any aquifers below the base of the spoils that could receive water from or discharge water to the spoils. Monitoring must be of sufficient frequency and extent to adequately identify~~,~~ changes in groundwater quantity and quality resulting from mining operations; and

(b) remains the same.

(3) and (4) remain the same.

(5) Groundwater monitoring must proceed through mining and continue until Phase IV bond release. The department may allow modification of the monitoring requirements, except those required by the Montana pollutant discharge elimination system permit, including the parameters covered and sampling frequency, if the operator or the department demonstrates, using the monitoring data obtained under this paragraph, that:

(a) remains the same.

(b) monitoring is no longer necessary to achieve the purposes set forth in the monitoring plan approved under this rule~~,~~; or

(c) remains the same.

(6) Sampling and water quality analyses must be conducted according to the methodology in either the current 15th edition of "Standard Methods for Examination of Water and Wastewater" or the methodology in 40 CFR Parts 136 and 434 and the department of health and environmental sciences document entitled "Circular WQB-7, Montana Numeric Water Quality Standards", dated April 4, 1994. Copies of these documents are available at the department's main office in Helena. Sampling and analyses must include a quality assurance program acceptable to the department.

(7) and (8) remain the same.

(AUTH: Sec. 82-4-204, 205, MCA; IMP, Sec. 82-4-231, 232, MCA.)

26.4.646 SURFACE WATER MONITORING

(1) through (5) remain the same.

(6) ~~The permittee shall provide an analytical quality control program including standard methods of sampling and analyses such as those specified in 40 CFR 136 and 434 or according to the methodology in the current 15th edition of "Standard Methods for the Examination of Water and Wastewater."~~Sampling and water quality analyses must be conducted according to 40 CFR, parts

136 and 434, and the April 4, 1994, version of the department of health and environmental sciences document entitled "Circular WQB-7, Montana Numeric Water Quality Standards". Copies of these documents are available at the Department of State Lands, Capitol Station, Helena, Montana 59620-1601.

(7) Surface water monitoring must proceed through mining and continue until phase IV bond release. The department may allow modification of the monitoring under the same criteria as are contained in ARM 26.4.645(5).

(AUTH: Sec. 82-4-204, 205, MCA; IMP, Sec. 82-4-231, 232, MCA.)

26.4.702 REDISTRIBUTION AND STOCKPILING OF SOIL

(1) through (3) remain the same.

(4) Prior to soil redistribution, regraded areas must be:

(a) sampled and analyzed to determine the physicochemical nature of the surficial spoil material in accordance with ARM 26.4.313(5)(i);

(b) scarified on the contour, whenever possible, to a minimum 12-inch depth ~~deep-tilled, subsoiled, or otherwise treated as required by the department~~ to eliminate any possible slippage potential at the soil/spoil interface, to relieve compaction, and to promote root penetration and permeability of spoils. ~~This preparation must be done on the contour whenever possible and to a minimum depth of 12 inches.~~

(5) through (7) remain the same.

(AUTH: Sec. 82-4-204, MCA; IMP, Sec. 82-4-232, MCA.)

26.4.711 ESTABLISHMENT OF VEGETATION (1) A diverse, effective, and permanent vegetative cover of the same seasonal variety and utility as the vegetation native to the area of land to be affected must be established. This vegetative cover must also be capable of meeting the criteria set forth in 82-4-233, MCA and must be established on all areas of land affected except on road surfaces and below the low-water line of permanent impoundments that are approved as a part of the postmining land use. Vegetative cover is considered of the same seasonal variety if it consists of a mixture of species of equal or superior utility when compared with the natural vegetation during each season of the year.

(2) Reestablished plant species must be compatible with the plant species of the area.

(3) Reestablished vegetation must meet the requirements of applicable state and federal laws and regulations governing seeds, poisonous and noxious plants and introduced species.

(4) For areas designated prime farmland that are to be revegetated to a vegetative cover as previously described in this rule, the requirements of ARM 26.4.811 and 26.4.815 must also be met.

(5) Vegetative cover and stocking and planting of trees and shrubs must not be less than that required to achieve the approved postmining land use.

(6) The department shall ~~make the necessary determinations~~ determine cover, planting, and stocking specifications for each operation based on local and regional conditions after consultation with and approval by:

(a) the ~~appropriate state agencies~~ department of fish, wildlife, and parks for reclamation to land uses involving fish and wildlife habitat; and

(b) the administrator of the division of forestry of the department for reclamation to land uses involving commercial forest land.

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

26.4.721 ERADICATION OF RILLS AND GULLIES (1) When rills

or gullies ~~deeper than 9 inches~~ form in areas that have been regraded and resoiled, the rills ~~and~~ or gullies must be filled, graded, or otherwise stabilized and the area reseeded or replanted if rills or gullies are:

(a) disrupting the approved postmining land use or reestablishment of the vegetative cover; or

(b) causing or contributing to a violation of water quality standards for a receiving stream.

~~(2) The department shall specify that rills or gullies of lesser size be stabilized and the area reseeded or replanted if the rills or gullies are disruptive to the approved postmining land use or may result in additional erosion and sedimentation.~~ The department shall ~~also~~ specify time frames for completion of rill and gully repair work. Repair work will result in restarting the period of responsibility for reestablishing vegetation, unless it can be demonstrated that such work is a normal conservation practice and is limited to:

(a) minor erosional features on land for which proper erosion-control practices are in use; and

(b) ~~to~~ rills and gullies that affect only small areas and do not recur.

(3) If reclaimed areas have experienced extensive rill or gully erosion, submittal of a plan of mitigation for such features the department may require for department approval prior to implementation of repair work.

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

26.4.724 USE OF REVEGETATION COMPARISON STANDARDS

(1) through (5) remain the same.

~~(6) The success of revegetation on operations of less than 100 acres disturbance may be based on USDA or USDI technical guides whenever this acreage is not a segment of a larger area proposed for disturbance by mining. The applicant shall submit a detailed description of how the USDA or USDI technical guides will be applied to determine the success of revegetation.~~

(AUTH: Sec. 82-4-204, 205 MCA; IMP, Sec. 82-4-233, 235, MCA.)

26.4.725 PERIOD OF RESPONSIBILITY (1) The minimum period of responsibility for reestablishing vegetation begins after the last seeding, planting, fertilizing, irrigating, or other activity related to final reclamation as determined by the department unless it can be demonstrated that such work is a normal husbandry practice that can be expected to continue as part of the postmining land use or if discontinuance of the practices after the liability period expires will not reduce the probability of permanent revegetation success. Normal husbandry practices are those approved by the federal regulatory authority as an amendment to the Montana state program pursuant to 30 U.S.C. 1253.

(2) remains the same.

(AUTH: Sec. 82-4-204, 205, MCA; IMP, Sec. 82-4-233, 235, MCA.)

26.4.726 VEGETATION PRODUCTION, COVER, DIVERSITY, DENSITY, AND UTILITY REQUIREMENTS

(1) remains the same.

(2) The current vegetative production must be measured by clipping and weighing each morphological class on the revegetated area and the reference areas (morphological classes must be segregated by native and introduced: annual grasses, perennial cool-season grasses, perennial warm-season grasses, annual forbs, biennial forbs, perennial forbs, shrubs and half-shrubs). Vegetative cover must be documented for each species present on revegetated areas and on all other areas where a vegetation data base is required. At least 51% of the species present on the revegetated areas must be native species genotypically adapted to the area. A countable species must be contributing at least 1% of the live cover for the area.

(3) The sampling techniques for measuring success must use a 90% statistical confidence interval for total production and total live cover and for other parameters as required by the department using a one-sided test with a 0.1 alpha error. The following vegetation parameters for revegetated area data must be at least 90% of identically composited reference area data and/or technical standards derived from historical data:

(a) remains the same.

(b) total ~~non-stratified~~ live vegetative cover; and

(c) remains the same.

(4) through (9) remain the same.

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

26.4.821 ALTERNATE RECLAMATION; SUBMISSION OF PLAN

(1) Each operator who desires to conduct alternate reclamation pursuant to 82-4-232(7), MCA (and (8) for alternate revegetation) shall submit his plan to the department. The plan must contain appropriate descriptions, maps and plans that show:

(a) through (f) remain the same.

(g) for areas proposed for alternate revegetation, the area(s) of undisturbed land to which the mined and reclaimed land shall be compared or technical standards derived from historical data that will be used for bond release purposes.

(2) remains the same.

(AUTH: Sec. 82-4-204, 205, MCA; IMP, Sec. 82-4-233, MCA.)

26.4.825 ALTERNATE RECLAMATION; ALTERNATE REVEGETATION

(1) through (3) remain the same.

(4)(a) If an area is proposed for special use pasture ~~or hayland~~ after disturbance, the area must have a history of being utilized for special use pasture or ~~hayland~~ cropland for at least 5 years prior to operator lease, purchase or control. The department may allow deviations of the proposed postmining location from the exact premining location of the special use pasture ~~or hayland~~ whenever the applicant demonstrates that the proposed location is more appropriate for the approved postmining land use and is in an area in which the postmining landscape is more conducive to establishment of this alternate use.

(b) remains the same.

(c) Success of vegetation on special use pasture ~~or hayland~~ must be determined using ~~the applicable~~ all criteria of

ARM 26.4.723 ~~to~~ through 26.4.732, except 26.4.724(1) and 26.4.728.

(5) remains the same.

(6) Where cropland~~,~~ or special use pasture~~, or hayland~~ is proposed to be the alternate postmining land use, the following is required:

(a) and (b) remain the same.

(AUTH: Sec. 82-4-204, 205, MCA; IMP, Sec. 82-4-233, MCA.)

26.4.924 DISPOSAL OF UNDERGROUND DEVELOPMENT WASTE: GENERAL REQUIREMENTS

(1) and (2) remain the same.

(3) Underground development waste must be hauled or conveyed to and placed in designated disposal areas within a permit area. Underground development waste may not be placed in an impoundment or an embankment. The waste must be placed in a controlled manner to ensure:

(a) and (b) remain the same.

(c) that reclamation and revegetation of the waste disposal area ~~pursuant to~~ will be achieved in accordance with subchapters 5 through 8, except, in the case of waste disposal structures outside of mine excavation areas, those provisions of subchapter 5 related to approximate original contour~~, will be achieved~~ are not required;

(d) (e) remain the same.

(4)(a) Each waste disposal structure must be designed using current prudent design standards, certified by a registered professional engineer experienced in the design of similar earth and waste structures, and approved by the department.

(b) ~~Coal waste refuse~~ Waste disposal structures must meet the requirements of 30 CFR 77.214 and 77.215.

(5) All vegetation and other organic materials must be removed from the disposal ~~area~~ site and the soil must be removed, segregated, and stored or replaced pursuant to ARM 26.4.701 through 26.4.703. If approved by the department, organic material may be used as mulch or may be included in the soil to control erosion, promote growth of vegetation, or increase moisture retention of the soil.

(6) and (7) remain the same.

(8) The waste must be hauled or conveyed and placed in horizontal lifts of not greater than 4 feet in thickness in a controlled manner, concurrently compacted as necessary to ensure mass stability and prevent mass movement, ~~covered,~~ and graded to allow surface and subsurface drainage to be compatible with the natural surroundings and ensure a long-term static safety factor of 1.5.

(9) Following final grading of the waste disposal structure, the waste must be covered with a minimum of 4 feet of the best available non-toxic and non-combustible material, in a manner that does not impede drainage from the underdrains, unless the applicant demonstrates and the department finds that a lesser depth will provide for revegetation consistent with ARM 26.4.711 through 26.4.733. Toxic, acid-forming, and other

deleterious waste must be handled and covered in accordance with ARM 26.4.501(2) and 26.4.505(2).

~~(9)~~(10) The final configuration of a structure must be suitable for post-mining land uses approved in accordance with ARM 26.4.762, except that no depressions or impoundments may be placed on the completed structure.

~~(10)~~(11) The final configuration of the structure must be designed to minimize erosion. Terraces may be utilized to control erosion and enhance stability if approved by the department. The outslope of the fill must not exceed 1v:3h, unless otherwise approved in writing by the department, but in no case may the outslope exceed 1v:2h.

~~(11)~~(12) Where the natural slope ~~in~~ of the disposal ~~area~~ site exceeds 1v:3h, or such lesser slope as may be designated by the department based on local conditions, keyway cuts (excavations to stabilized bedrock) or rock toe buttresses must be constructed to stabilize the fill. Where the toe of the underground development waste rests on a downslope, stability analyses must be performed in accordance with ARM 26.4.320 to determine the size of the rock toe buttresses and keyway cuts.

~~(12)~~(13) If the disposal ~~area~~ site contains springs, natural or manmade watercourses, or wet-weather seeps, an underdrain system consisting of durable rock must be constructed in a manner that prevents infiltration of the water into the underground development waste material and to ensure stability of the disposal structure.

~~(13)~~(14) The underdrain system for a structure must be constructed in accordance with the following:

(a) through (d) remain the same.

~~(14)~~(15) An alternative subdrainage system may be utilized after approval by the department upon a thorough analytical demonstration that such an alternative will ensure the applicable static safety factor, stability of the fill, and protection of the surface and groundwater in accordance with applicable rules.

~~(15)~~(16) Drainage must not be directed over the outslope of the fill.

~~(16)~~(17) Surface water runoff from the area above a structure must be diverted away from the structure and into stabilized diversion channels designed to pass safely the runoff from a 100-year, 24-hour precipitation event or larger event specified by the department. Surface runoff from the structure surface must be diverted to stabilized channels off the fill that will safely pass the runoff from a 100-year, 24-hour precipitation event. Diversion design must comply with the requirements of ARM 26.4.637.

~~(17)~~(18) The foundation and abutments of a structure must be stable under all conditions of construction and operation. Sufficient foundation investigation and laboratory testing of foundation materials must be performed in order to determine the design requirements for stability of the foundation. Analyses of foundation conditions must include the effect of underground mine workings, if any, upon the stability of the structure.

~~(18)~~(19)(a) and (b) remain the same.

(c) Quarterly inspections by the engineer or specialist

must also be conducted during placement and compaction of underground development waste. More frequent inspections must be conducted if the department determines that a danger of harm exists to the public health and safety or the environment or that more frequent inspection is necessary to ensure compliance. Inspections must continue until the ~~refuse~~ waste disposal structure has been finally graded and revegetated or until a later time as required by the department.

(d) through (f) remain the same.

~~(19)~~(20) If any inspection discloses that a potential hazard exists, the department must be informed promptly of the finding and of the emergency procedures formulated for public protection and remedial action. If adequate procedures cannot be formulated or implemented, the department must be notified immediately. The department shall then notify the appropriate emergency agencies that other emergency procedures are required to protect the public. The department shall also notify the owner of land upon which the disposal structure is located (if that owner is different from the mining company), adjacent landowners, residences, and businesses that could be adversely affected, including those at least 1 mile down gradient from the disposal site, of the potential hazard and of the actions being taken.

(21) Disposal of underground waste in the mined out surface area must be in accordance with sections 3 through 6, 8, 9, and 12 through 19 of this rule, except that a long-term static safety factor of 1.3 must be achieved.

(AUTH: Sec. 82-4-204, 205, and 231(10)(h), MCA; IMP, Sec. 82-4-227, 231, 232, and 233, MCA.)

26.4.927 DISPOSAL OF UNDERGROUND DEVELOPMENT WASTE: DURABLE ROCK FILLS

(1) remains the same.

(2)(a) and (b) remain the same.

(c) The durable rock fill must be designed with the following factors of safety:

Case	Design Condition	Minimum Factor Of Safety
I	Long-term ~~End of construction~~	1.5
II	Earthquake	1.1

(3)(a) The design of the durable rock fill ~~constructed as a head-of-hollow or valley fill~~ must include an internal drainage system, in accordance with ARM 26.4.924(14) or (15), that will ensure continued free drainage of anticipated seepage from precipitation and from springs or wet-weather seeps.

(b) through (d) remain the same.

(4) through (7) remain the same.

(AUTH: Sec. 82-4-204, 205, and 231(10)(h), MCA; IMP, Sec. 82-4-227, 231, 232, and 233, MCA.)

26.4.930 PLACEMENT AND DISPOSAL OF COAL PROCESSING WASTE: SPECIAL APPLICATION REQUIREMENTS

(1) through (2) remain the same.

(3) If the application includes a proposal to impound coal

processing waste, the following is required:

(a) design information that meets the requirements of ARM 26.4.505(4);

(b) demonstration of compliance with the requirements of 30 CFR 77.216-1 and 77.216-2;

(c) the results of a geotechnical investigation of the proposed dam or embankment and impoundment foundation areas to determine the structural competence of the geological materials there to support the dam or embankment and impounded wastes. The geotechnical investigation must be planned and supervised by an engineer or engineering geologist in accordance with the following criteria:

(i) the number, location, and depth of borings and test pits must be determined using current prudent engineering practice for the size of the dam or embankment, quantity of wastes to be impounded, and subsurface conditions;

(ii) the character of the overburden and bedrock, the proposed abutment sites, and any adverse geotechnical conditions which may affect the particular dam, embankment, or impoundment site must be considered;

(iii) all springs, seepage, and groundwater flow observed or anticipated during wet periods in the area of the proposed dam or embankment must be identified;

(iv) consideration must be given to the possibility of mudflows, rock-debris falls, or other landslides into the dam, embankment, or impounded wastes; and

(d) if the dam or embankment is at least 20 feet high or the impoundment has a proposed capacity of more than 20 acre-feet:

(i) a stability analysis, which must include, but not be limited to, strength parameters, pore pressures, and long-term seepage conditions; and

(ii) a description of each engineering design assumption and calculation with a discussion of each option considered in selecting the specific design parameters and construction methods.

(AUTH: Sec. 82-4-204, 205, and 231, MCA; IMP, Sec. 82-4-222, MCA.)

26.4.932 DISPOSAL OF COAL PROCESSING WASTE

(1) through (4) remain the same.

(5)(a) remains the same.

(b) Inspection must occur at least quarterly, beginning within 7 days after the preparation of the disposal area begins, and be made in accordance with the same critical construction period schedule as contained in ARM 26.4.924(19)(b). The department may require more frequent inspection based upon an evaluation of the potential danger to the health or safety of the public and the potential harm to land, air and water resources. ~~Inspections may terminate when the coal processing waste has been graded and has been covered in accordance with (9) of this rule, and soil has been distributed in accordance with ARM 26.4.702, or at such a later time as the department may require.~~

(c) through (d) remain the same.

(6) through (7) remain the same.

(8)(a) During construction or modification of all coal processing waste structures, coal processing waste must be:

(i) remains the same.

(ii) compacted to attain 90 percent of the maximum dry density to prevent spontaneous combustion and to provide the strength required for stability of the coal processing waste. Dry densities must be determined in accordance with the American Association of State Highway and Transportation Officials (AASHTO) Specifications ~~T99-74 (Twelfth Edition) (July 1978)~~T99-93 (Sixteenth Edition, 1993) or an equivalent method. ~~AASHTO T99-74 is hereby incorporated by reference as it exists on the date of adoption of this rule.~~ This publication is on file and available for inspection at the Helena and Billings offices of the department.

(b) remains the same.

(9) and (10) remain the same.

(AUTH: Sec. 82-4-204, 205, and 231(10)(h), MCA; IMP, Sec. 82-4-227, 231, 232, and 233, MCA.)

26.4.1116 BONDING: CRITERIA AND SCHEDULE FOR RELEASE OF BOND

(1) through (6) remain the same.

(7) For the purposes of these rules, reclamation phases are as follows:

(a) and (b) remain the same.

(c) Reclamation phase III is deemed to have been completed when:

(i) the applicable responsibility period (which commences with the completion of any reclamation treatments as defined in ARM 26.4.725) has expired and the revegetation criteria in ARM 26.4.711, ~~26.4.719~~ 26.4.716, 26.4.717, 26.4.724, 26.4.726, 26.4.728, 26.4.730 through ~~26.4.735~~ 26.4.733, 26.4.815 and 26.4.825 are met;

(ii) remains the same.

(iii) the lands are not contributing suspended solids to stream flow or runoff outside the permit area in excess of the requirements of the Act, ARM 26.4.633, or the permit; and

(iv) the provisions of a plan approved by the department for the sound future management of any permanent impoundment by the permittee or landowner have been implemented to the satisfaction of the department~~;~~. ~~and~~

(d) Reclamation phase IV is deemed to have been completed when:

(i) through (iv) remain the same.

(v) the reestablishment of essential hydrologic functions and agricultural productivity on alluvial valley floors has been achieved; ~~and~~

(vi) and (vii) remain the same.

(AUTH: Sec. 82-4-204, 205, MCA; AUTH Extension, Sec. 2, Chap. 288, L. 1985, Eff. 10/1/85; IMP, Sec. 82-4-223, 232, 235, MCA.)

26.4.1141 DESIGNATION OF LANDS UNSUITABLE: DEFINITION For

purposes of 82-4-228, MCA, the following definitions apply:

(1) and (2) remain the same.

(3) "~~national~~ natural hazard lands" means geographic areas in which natural conditions exist which pose or, as a result of strip or underground coal mining operations, may pose a threat to the health, safety or welfare of people, property or the environment, including areas subject to landslides, cave-ins, large or encroaching sand dunes, severe wind or soil erosion, frequent flooding, avalanches and areas of unstable geology;

(4) remains the same.

(AUTH: Sec. 82-4-204, 205, MCA; IMP, Sec. 82-4-227, MCA.)

26.4.1212 POINT SYSTEM FOR CIVIL PENALTIES AND WAIVERS

(1) The department shall assign points for each violation based upon the following criteria:

(a) History of recent violations. One point must be assigned for each violation contained in a notice of noncompliance and five points must be assigned for each violation contained in a cessation order. ~~Violations must be counted for 1 year after the notice of noncompliance was issued. A violation for which the notice of noncompliance or cessation order has been vacated or which is subject to a pending administrative or judicial appeal must not be counted. Violations subject to administrative or judicial appeal must be counted for 1 year after resolution of the final appeal.~~ A violation must not be counted if the notice or order is subject to a pending administrative or judicial review or if the time to request review or to appeal any administrative or judicial decision has not expired. Thereafter it must be counted for one year, except that a violation for which the notice or order has been vacated or dismissed must not be counted.

(b) through (d) remain the same.

(2) through (5) remain the same.

(AUTH: Sec. 82-4-204(3), 205(7), and 254(2), MCA; IMP, Sec. 82-4-254(2), MCA.)

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

RULE I REASSERTION OF JURISDICTION

(1) The department may terminate its jurisdiction over a reclaimed site or portion thereof pursuant to ARM 26.4.1114 and 26.4.1116.

(2) Following final bond release, the department shall reassert jurisdiction under the act and this chapter if it is demonstrated that the bond release or statement of reasons made pursuant to 26.4.1114(4) was based upon fraud, collusion, or misrepresentation of a material fact.

(AUTH: Sec. 82-4-205, MCA; IMP, Sec. 82-4-235, MCA.)

RULE II IMPROVIDENTLY ISSUED PERMITS: GENERAL PROCEDURES

(1) If the department determines that it has reason to believe it improvidently issued an operating permit, it shall review the circumstances under which the permit was issued, using the criteria in section (2). If the department finds that

the permit was improvidently issued, it shall comply with section (3).

(2) The department shall find that an operating permit was improvidently issued whenever:

(a) under the violations review criteria of ARM 26.4.404 at the time the permit was issued:

(i) the department should not have issued the permit because of an unabated violation or a delinquent penalty or fee; or

(ii) the permit was issued on the presumption that a notice of violation was in the process of being corrected to the satisfaction of the agency with jurisdiction over the violation, but a cessation order was subsequently issued;

(b) the violation, penalty or fee:

(i) remains unabated or delinquent; and

(ii) is not the subject of a good faith appeal, or of an abatement plan or a payment schedule with which the permittee or other person responsible is complying to the satisfaction of the responsible agency; and

(c) if the permittee was linked to the violation, penalty or fee through ownership or control, under the violations review criteria of ARM 26.4.404 at the time the permit was issued and the ownership or control link between the permittee and the person responsible for the violation, penalty or fee still exists, or where the link was severed the permittee continues to be responsible for the violation, penalty or fee.

(3) Whenever the department finds under section (2) that because of an unabated violation or delinquent penalty or fee that a permit was improvidently issued, it shall impose one or more of the following remedial measures:

(a) implementation, with the cooperation of the permittee or other responsible person, and of the responsible agency, of a plan for abatement of the violation or a schedule for payment of the penalty or fee;

(b) imposition on the permit of a condition requiring that in a reasonable period of time the permittee or other person responsible abate the violation or pay the penalty or fee;

(c) suspension of the permit until the violation is abated or the penalty or fee is paid; or

(d) if action under (b) or (c) is unsuccessful, revocation of the permit under [Rule III].

(AUTH: 82-4-205; IMP: 82-4-204, 82-4-205, 82-4-222, and 82-4-227, MCA.)

RULE III IMPROVIDENTLY ISSUED PERMITS: REVOCATION (1) If the department, pursuant to [Rule II(3)(d)], elects to revoke an improvidently issued permit, it shall serve on the permittee a notice of proposed suspension and revocation. The notice must include the reasons for the finding under [Rule II(3)] and state that:

(a) after a specified period of time not to exceed 90 days, the permit automatically will become suspended, and not to exceed 90 days thereafter revoked, unless within those periods the permittee submits proof, and the department finds, that:

(i) the finding of the department under [Rule II(2)] was erroneous;

(ii) the permittee or other person responsible has abated the violation on which the finding was based, or paid the penalty or fee, to the satisfaction of the responsible agency;

(iii) the violation, penalty or fee is the subject of a good-faith appeal, or of an abatement plan or payment schedule with which the permittee or other person responsible is complying to the satisfaction of the responsible agency; or

(iv) since the finding was made, the permittee has severed any ownership or control link with the person responsible for, and does not continue to be responsible for, the violation, penalty or fee;

(b) after permit suspension or revocation, the permittee shall cease all coal mining and reclamation operations under the permit, except for violation abatement and for reclamation and other environmental protection measures required by the department; and

(c) the permittee may file an appeal under ARM 26.4.413. (AUTH: 82-4-205; IMP: 82-4-204, 82-4-205, 82-4-222, and 82-4-227, MCA.)

4. This rulemaking is being proposed for several reasons. First, 30 USC 1253 provides that, in order to have authority to regulate coal mining, a state must have adopted statutes and rules that are as effective as the federal Surface Mining Control and Reclamation Act and the regulations adopted pursuant to that Act by the Office of Surface Mining Reclamation and Enforcement (OSM) of the United States Department of the Interior. Thirty CFR, Part 732, requires that a state modify its statute and rules to comply with any amendments made to the federal law or regulations. OSM has notified the Department that it must make a number of changes in the rules and adopt several new rules. To comply with this directive, the agency is proposing the changes to 26.4.301, 303 (except (20), (21) and (22)), 314, 321, 404, 405(8), 407, 505, 601, 602, 603, 605, 711(6), 725, 930, 1206, and 1212. In addition, new Rules I, II, and III are proposed in response to OSM's requirements.

Second, the Department is proposing seven amendments that will have some substantive effect but are not required by OSM. Those are as follows:

- **26.4.501A** - This amendment would amend the contemporaneous backfilling and grading requirements of the rules by requiring backfilling and grading to be conducted no more than four spoil ridges behind the pit, instead of the current requirement of two spoil ridges. This is being proposed to allow for a more realistic time frame and increase flexibility in the grading of spoils. The current rules allow for variances from the two-spoil-ridge requirement, and applications for those variances are commonly granted. The change would eliminate the necessity for an application and processing of an application for a variance.

- **26.4.623** - This amendment increases from four hours to eight hours the aggregate time period during which explosives may be detonated during any one day. This amendment would provide more flexibility for the operator and allow the Department to require more stringent requirements where public safety concerns would so require.

- **26.4.639(10)** - This change would allow an operator to construct a sedimentation pond with a single spillway whenever a combination of spillways is not necessary to meet the other performance standards for sedimentation ponds or for total containment without a spillway. It would eliminate the need to construct spillways when they are not necessary.

- **26.4.721** - This change is being proposed to replace the requirement that rills or gullies deeper than nine inches be stabilized with a requirement that rills or gullies that would have a detrimental effect on post-mine land use or water quality laws must be repaired. This is being proposed because the Department has found that the nine-inch requirement is sometimes unnecessary and at other times not stringent enough to ensure reclamation or protect water quality.

- **26.4.726** - This clarifies that only live vegetation can be used in determining whether the cover requirements have been met. This is the accepted scientific methodology and the methodology that has been used by the Department. However, the current language does not specifically so state.

- **26.4.821** - This amendment allows use of historical data in determining standards for reclamation success for areas that are reclaimed using alternate revegetation. Historical data is sometimes the only data available or more accurate than other data. This change was made for nonalternate reclamation in 26.4.724 several years ago, and there is no reason to exclude its use for alternate revegetation.

- **26.4.825** - The term "hayland" is proposed for deletion because it is not defined in the rules as a primary land use term. Use of the word "cropland" is substituted for "hayland" in (4)(a) to allow land that was in crop before mining to be reclaimed to special use pasture after mining. This change gives the operators more flexibility. In addition, special use pasture provides more species diversity and is more effective in preventing erosion than cropland.

The remainder of the changes are being made to eliminate ambiguities or redundancies, correct errors, or update references to outdated documents or rules.

5. Interested parties may submit their data, views, or arguments concerning the proposed new rules and amendments, in writing, to Bonnie Lovelace, Chief, Coal and Uranium Bureau, Department of State Lands, PO Box 201601, Helena, MT 59620-1601.

To guarantee consideration, comments must be received or postmarked no later than September 13, 1994.

6. If a person who is directly affected by the proposed adoption or amendment wishes to express his or her data, views, or arguments orally or in writing at a public hearing, he or she must make written request for hearing and submit this request along with any written comments to Bonnie Lovelace, Chief, Coal and Uranium Bureau, Department of State Lands, PO Box 201601, Helena, MT 59620-1601. A written request for hearing must be received no later than September 13, 1994.

7. If the agency receives request for public hearing on the proposed adoption or amendment, from either 10 percent or 25, whichever is less, of the persons who are directly affected by the proposed action; from the Administrative Code Committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be one person based on fewer than 10 active coal miners in Montana.

Reviewed by:

John F. North
Chief Legal Counsel

Arthur R. Clinch
Commissioner

Certified to the Secretary of State August 1, 1994.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT of ARM 42.12.128 relating to Catering Endorsement	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT of ARM 42.12.128 relating to Catering Endorsement

TO: All Interested Persons:

1. On September 9, 1994, at 1:30 p.m., a public hearing will be held in the Fourth Floor Conference Room of the Mitchell Building, at Helena, Montana, to consider the amendment of ARM 42.12.128 relating to catering endorsements for liquor licensees.

2. On May 3, 1994, the Montana Tavern Association, (MTA), P.O. Box 1018, Helena, Montana, according to 2-4-315, MCA and ARM 1.3.205, petitioned the Department of Revenue to amend ARM 42.12.128, Catering Endorsement.

3. The petitioners proposed the following language in their formal petition to amend:

42.12.128 CATERING ENDORSEMENT (1) Any all-beverages licensee, having obtained a catering endorsement under the provisions of 16-4-204, MCA, is authorized to sell alcoholic beverages to persons attending a special event upon premises not otherwise licensed. ~~Only the licensee or the licensee's employees are authorized to sell and serve alcoholic beverages at the special event.~~

(2) Any on-premises beer and wine licensee who is engaged primarily in the business of providing meals with table service, having obtained a catering endorsement under the provisions of 16-4-111, MCA, is authorized to sell beer and wine to persons attending a special event upon premises not otherwise licensed.

(3) A licensee granted a catering endorsement by the department as described in this rule may not cater a special event of which the licensee is the sponsor. A licensee shall be deemed to be the sponsor of the special event if the premises upon which the special event is held is owned, rented or leased by the licensee, a member of the licensee's immediate family, or by a shareholder of the licensee. For purposes of this rule, the term "immediate family" shall be defined as including the licensee's spouse, or the parent, sibling or child of the licensee or the licensee's spouse.

(4) Only the licensee or the licensee's employees are authorized to sell and serve alcoholic beverages at the special event.

(5) ~~The holder of~~ A licensee with a catering ~~permit~~ endorsement may sell and serve ~~all~~ alcoholic beverages at retail

only at a booth, stand, or other fixed place of business within the exhibition enclosure, confined to specified premises or designated areas described in the ~~application, and approved by the division~~ notice given to the local law enforcement agency that has jurisdiction over the premises where the event is to be catered. ~~A holder of any such permit~~ Such a licensee, or his agents or employees may also sell and serve beer or beer and wine in the grandstand or bleacher.

~~(3)~~ (6) Licensees granted ~~approval to cater such special events~~ a catering endorsement by the department are subject to the provisions of 16-3-306 Proximity to churches and schools restricted, 16-6-103 Examination of retailer's premises and carriers' cars and aircraft, 16-6-314, MCA, Penalty for violating code -- revocation of license -- penalty for violation by underage person and ARM 42.13.101 Compliance with laws and rules.

AUTH: 16-1-103, MCA; IMP: Secs. 16-3-103, 16-4-111, and 16-4-204, MCA.

4. The request from the Petitioner, MTA, which is a trade association composed of the owners and operators of Montana liquor licenses, states that the reason for the suggested amendments is because "the existing administrative rule governing catering endorsements does not set forth standards to determine whether or not the licensee with a catering endorsement is actually sponsoring a special event. The amendments offered by the Petitioner would clearly eliminate the practice of a licensee purchasing, leasing, or having a financial interest in a second building to regularly cater special events, in essence operating two establishments with one license. The Petitioner has complained to the Department of this practice in the past but was advised that the existing administrative rule did not clearly prohibit this practice. Therefore, the department stated that it was unable to take administrative action against these licensees unless the rule was amended. In addition, the 1993 Montana Legislature enacted House Bill 495, as Chapter 599, Session Laws of 1993, which provides that certain beer-wine on-premises licensees may also obtain a special catering endorsement. ARM 42.12.128, as proposed also implements provisions for beer-wine catering endorsements."

5. Interested parties may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to:

Cleo Anderson
Department of Revenue
Office of Legal Affairs
Mitchell Building
Helena, Montana 59620

no later than September 16, 1994.

6. Cleo Anderson, Department of Revenue, Office of Legal Affairs, has been designated to preside over and conduct the hearing.

CLEO ANDERSON
Rule Reviewer

MICK ROBINSON
Director of Revenue

Certified to Secretary of State August 1, 1994

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT of ARM 42.11.301; 42.11.303; and 42.11.304 and ADOPTION of NEW RULES I through V relating to Agency Franchise Agreements for the Liquor Division	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT of ARM 42.11.301; 42.11.303; and 42.11.304 and ADOPTION of NEW RULES I through V relating to Agency Franchise Agreements for the Liquor Division

TO: All Interested Persons:

1. On September 9, 1994, at 1:30 p.m., a public hearing will be held in the Fourth Floor Conference Room of the Mitchell Building, at Helena, Montana, to consider the amendment of ARM 42.11.301; 42.11.303 and 42.11.304 and the adoption of New Rules I through V relating to Agency Franchise Agreements for the Liquor Division.

2. The proposed new rules I through V do not replace or modify any section currently found in the Administrative Rules of Montana.

3. The amendments as proposed provide as follows:

42.11.301 DEFINITIONS (1) As used in this subchapter, the following definitions apply:

(a) remains the same.

(b) "Agent" means a person, partnership, or corporation that markets liquor on a commission basis under an agency franchise agreement with the department and provides all the resources, including personnel and store premises, needed to market liquor under the agreement except the liquor product, which is owned by the department until purchased by a customer.

(c) "Community" means:

(i) in an incorporated city, the area within the incorporated city boundaries;

(ii) in an unincorporated city, the area identified by the federal bureau of the census as a community for census purposes; and

(iii) in a consolidated city-county government, the area of the consolidated city-county not otherwise incorporated.

~~(c)~~ (d) remains the same.

(e) "Principal manager" means a natural person designated by an agent to be at the agency premises at least three-fourths of the time that the agency is open for business and will be responsible for maintaining the agency in proper operating condition on a day-to-day basis by maintaining product inventory, retailing the product, depositing daily sales receipts, communicating with and reporting to the department as required by the agency franchise agreement, and other duties assigned by the agent. The principal manager may be the agent,

in the case of a sole proprietorship, a partner or employee of the partnership which is the agent, or an employee of the corporation which is the agent.

~~(d)~~ (f) remains the same.

~~(e)~~ (g) remains the same.

~~(f)~~ (h) remains the same.

~~(g)~~ (i) remains the same.

(j) "Similar sales volumes" means either the liter sales for an agent or a group of agents during a recent and common 12-month period that fall within one of the volume ranges specified in ARM 42.11.305 or the liter sales for a state employee operated store or a group of state employee operated stores during a recent and common 12-month period that fall within one of the volume ranges specified in ARM 42.11.305.

(2) remains the same.

AUTH: Sec. 16-1-303, MCA; IMP: 16-2-101, MCA.

42.11.303 SELECTION OF AGENT (1) The agent for a state liquor store qualifying for conversion to an agency store, an agency store with a terminated agency franchise agreement, or a new agency store, will be selected according to competitive procedures under the Montana Procurement Act, 18-4-121 through 18-4-407, MCA.

(a) For stores in communities with less than 3,000 population according to the federal bureau of the census' ~~last decennial final census~~ most recent population count estimate available at the time the request for proposals is being prepared, the agent will be selected according to the procedures for competitive sealed proposals as defined in ARM 2.5.602 with the agent's commission fixed at 10% of adjusted gross sales. When more than one person meets the minimum merchandising qualifications, and the minimum location and space requirements, the agency will be offered to the person who possesses the greatest combination of merchandising qualifications, and location and space provisions specified in (2) and (3).

(b) For stores in communities with a population of 3,000 or more according to the federal bureau of the census' ~~last decennial final census~~ most recent population count estimate available at the time the invitation for bids is being prepared, the agent will be selected according to the procedures for competitive sealed bids as defined in ARM 2.5.601 with the agent's commission being the percentage of adjusted gross sales bid by the lowest responsible and responsive bidder as specified in the invitation for bids.

(2) A person selected as agent must meet the following minimum merchandising qualifications:

(a) The combination of the agent's and the agent's principal manager's work experience includes at least two years of retail sales experience as a clerk or higher position that involves directly selling merchandise to customers.

(b) There is no evidence that either the agent or the principal manager were terminated from employment or convicted

of fraud, theft, embezzlement or mismanagement of funds.

(3) The person selected as agent must operate the agency at a premises that meets the following minimum location and space requirements:

(a) The premises is on or within one block of a business street zoned for retail purposes, or if no zoning is established, on or within one block of a street commonly used for retail purposes.

(b) The premises is at least within one-half mile of the community's business center in an unincorporated city. A community's business center is the street intersection or street location that is the approximate collective mid-point among at least three-fourths of the community's businesses.

(c) Shelves for displaying liquor products have at least the minimum linear feet specified as follows for the historical annual sales volume applicable to the state liquor store location that the agent will service:

(i) For locations with an annual sales volume of more than 125,000 bottles, the minimum linear feet of shelving is 450 feet plus 25 feet for each 100,000 bottles sold.

(ii) For locations with an annual sales volume less than 125,000 bottles and greater than or equal to 70,000 bottles, the minimum linear feet of shelving is 120 feet plus 30 feet for each 10,000 bottles sold.

(iii) For locations with an annual sales volume of less than 70,000 bottles, the minimum linear feet of shelving is 40 feet plus 4 feet for each 1,000 bottles sold.

(d) Customer service area for displaying liquor products on shelves and on floor displays, and providing space for customers to make product selections and make their purchases has at least the minimum square feet specified as follows for the historical annual sales volume applicable to the state liquor store location that the agent will service:

(i) For locations with an annual sales volume of more than 280,000 bottles, the minimum square feet of customer service area is 1,525 square feet plus 140 square feet for each 100,000 bottles sold.

(ii) For locations with an annual sales volume equal to or less than 280,000 bottles, the minimum square feet of customer service area is 130 square feet plus 6 square feet for each 1,000 bottles sold.

(e) Product storage area for maintaining inventory that is not otherwise displayed in the customer service area has at least the minimum square feet specified as follows for the historical annual sales volume applicable to the state liquor store location that the agent will service:

(i) For locations with an annual sales volume of more than 145,000 bottles, the minimum square feet of product storage area is 2,750 square feet plus 160 square feet for each 100,000 bottles sold.

(ii) For locations with an annual sales volume equal to or less than 145,000 bottles, the minimum square feet of product

storage is 125 square feet plus 20 square feet for each 1,000 bottles sold.

AUTH: Sec. 16-1-303, MCA; IMP: 16-2-101, MCA.

42.11.304 CLOSURE OF A STATE LIQUOR STORE (1) The department may close a state liquor store without legislative approval after:

(a) and (b) remain the same.

(c) the lease for the store premises has expired, or the agency franchise agreement has terminated.

(2) A temporary closure of a state liquor store may occur when the department has attempted to convert a store operated by state employees to an agency store under ARM 42.11.302 or to contract for an agent to succeed an agency franchise agreement that has terminated, but was unable to select an agent who met the requirements under ARM 42.11.303.

(a) remains the same.

AUTH: Sec. 16-1-303, MCA; IMP: 16-2-101, MCA.

4. The new rules as proposed are as follows:

RULE I AGENCY FRANCHISE AGREEMENTS - DOCUMENTING NONPERFORMANCES OR DEFICIENCIES (1) The department will document specific nonperformances of the franchise agreement that may result in the department's termination of the agency franchise agreement. The following examples of nonperformance of the franchise agreement may result in termination of the franchise agreement:

(a) the agent has not met one or more of the requirements specified in the agency franchise agreement, and the department finds that the nonperformances, either individually or cumulatively, impair the public's ability to be aware of or have access to products and services mandated by law to be available only through state liquor stores; or

(b) the agent has not met one or more of the requirements specified in the agency franchise agreement, and the department finds that the nonperformances, either individually or cumulatively, impair the department's ability to effectively:

(i) monitor an agent's performance under the agency franchise agreement;

(ii) control state assets at the state liquor store; or

(iii) communicate with the agent about agency franchise agreement performance.

(2) The department upon confirmation of a nonperformance or series of nonperformances will send the agent a letter of warning documenting the nonperformances which could result in the department's termination of the agency franchise agreement. The letter will:

(a) identify all known nonperformances that the department has not previously communicated;

(b) indicate what actions the agent must take to perform satisfactorily;

(c) explain how the nonperformances affect the public pursuant to (1) (a), or the department pursuant to (1) (b); and

(d) state that the letter documents one or more nonperformances that could lead to the department's termination of the agency franchise agreement.

(3) When the department sends an agent a letter documenting nonperformances that cause the department to terminate the agency franchise agreement pursuant to 16-2-101, MCA, the letter will:

(a) identify all nonperformances that cause the department to terminate the agreement;

(b) explain how the nonperformances affect the public pursuant to (1) (a) or the department pursuant to (1) (b);

(c) state that the agent has not satisfactorily performed the requirements of the agency franchise agreement in accordance with RULE II; and

(d) state that the agent may contest the agency franchise agreement termination pursuant to 16-2-101, MCA.

(4) The department may send letters to agents that identify deficiencies that need correction. Deficiency letters document minor problems with an agent's performance under the agency franchise agreement. Individual deficiencies do not rise to the level of nonperformance. Cumulative deficiencies may constitute nonperformance if they are documented in a letter pursuant to (2) or (3).

AUTH: Sec. 16-1-303, MCA; IMP: 16-2-101, MCA.

RULE II AGENCY FRANCHISE AGREEMENTS - TERMINATION FOR CAUSE

(1) The department will terminate an agency franchise agreement when three letters documenting nonperformances pursuant to RULE I have been sent to the agent during any three consecutive years. The termination will proceed pursuant to 16-2-101, MCA.

(2) The department will terminate an agency franchise agreement when there is suspected theft, or unauthorized use of state assets by the agent or agent's employee. Three letters documenting nonperformances pursuant to RULE I are not required for terminations of this type. The termination will proceed pursuant to 16-2-101, MCA.

(3) The department will terminate an agency franchise agreement when adequate comprehensive general liability insurance and liquor liability insurance is not maintained pursuant to 16-2-101, MCA, or adequate performance security is not maintained pursuant to 16-2-101, MCA. Three letters documenting nonperformances pursuant to RULE I are not required for terminations of this type. The termination will proceed pursuant to 16-2-101, MCA.

AUTH: Sec. 16-1-303, MCA; IMP: 16-2-101, MCA.

RULE III AGENCY FRANCHISE AGREEMENTS - TEN-YEAR RENEWAL

(1) An agency franchise agreement may be renewed for additional 10-year periods pursuant to 16-2-101, MCA, after

determining whether:

(a) the agent has satisfactorily performed all the requirements of the agency franchise agreement; and

(b) a decrease in the commission percentage to be paid to the agent is in the best interest of the state.

(2) An agent is deemed to have performed all the requirements of the agency franchise agreement if action to terminate the agreement for cause pursuant to RULE II is not in progress.

(3) The department will find that a decrease in the commission percentage to be paid to the agent upon renewal is in the best interest of the state if:

(a) the state liquor store is located in a community with a population of 3,000 or more according to the federal bureau of the census' most recent population estimate available at the time of renewal; and

(b) the commission percentage paid under the agency franchise agreement is higher than the average operating expense percentage for state-employee operated liquor stores with similar sales volumes and which return at least 10% profit to the state pursuant to ARM 42.11.302.

(c) The average operating expense percentage is calculated by adding store direct expenses for the most recent fiscal year for the group of state-employee operated stores, dividing by the sum of adjusted gross sales for the most recent fiscal year for the stores in the group and multiplying by 100. Direct expenses are those associated with operating the store exclusive of product costs, freight charges, indirect costs associated with liquor division central office expenses, and taxes on product. Adjusted gross sales are gross sales minus discounts.

(4) If the department finds that the agent has satisfactorily performed all the requirements of the agency franchise agreement pursuant to (2) and that a decrease in the commission percentage to be paid to the agent is not in the best interest of the state pursuant to (3), then the department will proceed to renew the agency franchise agreement for an additional ten years pursuant to 16-2-101, MCA.

(5) If the department finds that the agent has satisfactorily performed all the requirements of the agency franchise agreement pursuant to (2) and that a decrease in the commission percentage to be paid to the agent is in the best interest of the state pursuant to (3), then the department will proceed with the renewal process pursuant to 16-2-101, MCA.

(6) The department will determine whether a request for an administrative hearing referenced in 16-2-101, MCA, will be granted or not.

(a) If the department does not grant the hearing, the agent may appeal within 60 days to the state tax appeal board pursuant to 15-2-302, MCA.

(b) If the department grants the hearing, the hearing will be conducted pursuant to the Montana Administrative Procedure Act.

AUTH: Sec. 16-1-303, MCA; IMP: 16-2-101, MCA.

RULE IV AGENCY FRANCHISE AGREEMENTS - FIVE-YEAR COMMISSION ADJUSTMENTS (1) The commission percentage that the department pays an agent may be increased five years after the agency franchise agreement started or upon renewal pursuant to 16-2-MCA, if:

(a) the state liquor store is located in a community with a population of 3,000 or more according to the federal bureau of the census's most recent population estimate available at the time the increase is being considered;

(b) the agent's commission is less than the sum of the commissions being paid all agents with similar sales volumes divided by the number of all agents with similar sales volumes;

(c) action to terminate the agreement for cause pursuant to RULE II is not in progress; and

(d) the agent has submitted a request to increase the commission at least 90 days before the fifth or tenth anniversaries of the agency franchise agreement.

AUTH: Sec. 16-1-303, MCA; IMP: 16-2-101, MCA.

RULE V AGENCY FRANCHISE AGREEMENTS - ASSIGNMENTS (1) The department may not unreasonably withhold approval of an agent's request to assign the agency franchise agreement to another person pursuant to 16-2-101, MCA. The only circumstances under which the department may withhold approval of an assignment are:

(a) that the merchandising qualifications of the assignee do not equal or exceed the minimum qualifications specified in ARM 4.11.303;

(b) that the assignee's agency premises will be different from the agent's premises, and the assignee's premises does not meet or exceed the minimum location and space requirements specified in ARM 4.11.303; or

(c) that termination of the agency franchise agreement for cause is in progress pursuant to RULE II.

AUTH: Sec. 16-1-303, MCA; IMP: 16-2-101, MCA.

5. These new rules and amended rules result from passage and adoption of House Bill 279, chapter 228, Laws 1993, during the 53rd legislative session. This act established requirements for liquor agency store franchise agreements. Agency franchise agreements entirely replace existing agency agreements. Most notably, this legislation provides for 10-year renewable agreements that may be assigned to other persons if the department agrees. Existing agreements are limited to three year terms with renewals left to the discretion of the department and with no opportunity to assign the agreements. These new rules and amendments address the use of terms or phrases that are not defined in the law. There are three situations in law that are controlled by a determination which "the agent has satisfactorily performed all the requirements of the agency franchise agreement." The three situations are: when

an agreement is to be terminated for cause (Rule II); to be renewed (Rule III); or the commission percentage is to be adjusted (Rule IV). Rule V also adopts this determination as one of the conditions that the department may use to reasonably deny an agent's request to assign the agreement to another person.

Rules I (documenting nonperformances or deficiencies) and II (termination for cause) establish the framework for determining unsatisfactory performance by defining nonperformances of the contract and the number of nonperformances that it would take to terminate a contract. Rule II states the circumstances which will cause the department to terminate an agreement: the accumulation of documented nonperformances, suspected theft or unauthorized use of state assets, inadequate comprehensive general liability insurance and liquor liability insurance, or inadequate performance security. Unsatisfactory performance as provided in Rules III, IV and V only occurs when an action to terminate the agreement is in progress pursuant to Rule II.

The law states that at renewal time, the department can adjust the commission paid an agent if the adjustment is "in the best interests of the state". Rule III indicates when an adjustment is in the best interest of the state.

The law provides for a hearing when an agent contests an adjustment in the commission at renewal time. This request will be approved if the department finds the agent's reasons for the hearing are consistent with the law. Rule III provides the procedures to be used when the department agrees to hold a hearing and the avenue for appealing the department's decision to deny the hearing.

The law allows the commission to be adjusted up or down under certain circumstances. Since 16-2-101, MCA, fixes the commission at 10% for state liquor stores in communities with populations under 3,000, Rules III and IV limit any changes in the commissions to state liquor stores located in communities with 3,000 or more in population.

The law allows the commission to be increased every five years if the commission that is being paid is less than the average that is being paid other agents with similar sales volumes and upon request of either party. Rule IV includes the method of calculating the average commission. Rule IV also specifies when an agent must request a commission increase.

The law states that the department may not unreasonably withhold approval of the assignment of an agreement to another person. Rule V indicates the circumstances under which the department may withhold approval. One of the circumstances requires that the assignee meet minimum merchandising qualifications for agents which are in ARM 42.11.303 as amended. The minimum qualifications apply to the agent and the agent's principal manager. A definition of "principal manager" is provided as an amendment to ARM 42.11.301.

Rules III and IV reference "communities with a population

of 3,000 or more." A definition of "community" is provided as an amendment to ARM 42.11.301 to clarify its meaning under three different forms of community organization. The new definition will also apply to ARM 42.11.303 which has been amended to specify the minimum criteria for selecting agents. The minimum criteria for merchandising qualifications also apply to a person to whom an agent is assigning the agent's franchise agreement. The minimum criteria for location and store space apply to an assignee's premises when the premises is different from the agent's premises.

Rules III and IV reference stores with "similar sales volumes." A definition of "similar sales volumes" is provided as an amendment to ARM 42.11.301 to clarify its meaning. Stores are grouped by type (agency or state employee operated) and by volume groups. The volume groups that are used are those that designate the number of state stores which can be located in a community under a rule that allows new state liquor stores to be opened under certain circumstances.

6. Interested parties may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to:

Cleo Anderson
Department of Revenue
Office of Legal Affairs
Mitchell Building
Helena, Montana 59620

no later than September 16, 1994.

7. Cleo Anderson, Department of Revenue, Office of Legal Affairs, has been designated to preside over and conduct the hearing.

CLEO ANDERSON
Rule Reviewer

MICK ROBINSON
Director of Revenue

Certified to Secretary of State August 1, 1994

BEFORE THE PUBLIC EMPLOYEES' RETIREMENT BOARD
OF THE STATE OF MONTANA

In the matter of proposed adoption of new rules relating to medical review of members, discontinuance of disability retirement benefits, and procedures for requesting an administrative hearing; amendment of ARM 2.43.201, 2.43.202, 2.43.302, and 2.43.502 relating to model rules, definitions, and the disability application process; and repeal of ARM 2.43.507 relating to election of disability coverage	CORRECTED NOTICE OF ADOPTION, AMENDMENT AND REPEAL OF RULES

TO: All Interested Persons.

1. On July 7, 1994, the Public Employees' Retirement Board published notice of the adoption of new rules pertaining to medical review of members, discontinuance of disability retirement benefits, and procedures for requesting administrative hearings; amendment of ARM 2.43.201, 2.43.202, 2.43.302, and 2.43.503 pertaining to model rules, definitions, and the disability application process; and repeal of ARM 2.43.507 in the Montana Administrative Register, Issue number 13, page 1816. The original notice of the proposed adoption was published on May 12, 1994 in the Montana Administrative Register, issue number 9, starting on page 1191 and inclusive of page 1199.

2. Paragraph 2 of the notice of adoption incorrectly stated no comments were received. No written comments were received; however one verbal comment was received.

3. The comment and the reply are as follows:

COMMENT: The notice of proposed adoption, amendment and repeal, published May 12 in the Montana Administrative Register, Issue Number 9, starting at page 1191 and inclusive of page 1199, does not contain a sufficient statement of reasonable necessity for the proposed new rules.

REPLY: The division conducted an internal audit of disability determination and review procedures and cancellation of disability benefits and it was determined that administrative rules did not provide adequate information about the disability review process. Rules I through VI are necessary to provide the detailed procedures and information required for a member to complete a satisfactory disability review. Rules V through VII are necessary to provide members with notice concerning suspension or permanent loss of disability benefits in the event a member refuses to complete a disability review or a member's medical status changes and the member is determined to be no

longer disabled. Rule VIII is necessary to notify members of their appeal rights and procedures if administrative or board action results in an adverse decision.

The board hears numerous contested cases of extreme importance to the contestants, which may involve property rights. The rules previously in effect were incomplete in describing procedures to be used in the conduct of contested cases. For example, previous rules addressed only contested case procedures to be used for disability determinations, without comparable rules for other contested matters. Rules IX through XI are necessary to remedy that oversight. These rules provide more specifically applicable procedures than are available in the attorney general's model rules and provide more clear and complete procedures than are available elsewhere in the statutes or rules.

4. On June 23, 1994, the Public Employees' Retirement Board adopted, amended and repealed the rules as proposed.

Linda King

Linda King, Administrator
Public Employees' Retirement Division

Del Sallie, Chief Legal Counsel and
Rule Reviewer

Certified to the Secretary of State August 1, 1994.

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

In the matter of amendment of Rule 2.55.324 pertaining to premium ratesetting.	)))	NOTICE OF AMENDMENT

TO: All Interested Persons:

1. On June 9, 1994, the board published notice of proposed amendment of Rule 2.55.324 concerning premium ratesetting at page 1497 of the 1994 Montana Administrative Register, Issue No. 11.

2. The Board has amended Rule 2.55.324 as proposed.
AUTH: 39-71-2315 and 39-71-2316, MCA
IMP: 39-71-2211, 39-71-2311 and 39-71-2316.

3. Mr. Sam Murfitt, Executive Director of the Montana Board of Horse Racing, testified in support of the amendment, and seven written comments were received in support as well. The board has amended the rule exactly as proposed.

Dal Smilie, Chief Legal Counsel
Rule Reviewer

Rick Hill
Chairman of the Board

Nancy Butler, General Counsel
Rule Reviewer

Certified to the Secretary of State August 1, 1994.

BEFORE THE DEPARTMENT OF AGRICULTURE
STATE OF MONTANA

In the matter of the adoption of a new rule	) NOTICE OF THE ADOPTION OF) AN EMERGENCY RULE TO ALLOW) THE USE OF THE PESTICIDE) PIRIMOR UNDER SECTION 18) OF FIFRA

TO: All Interested Persons.

1. Montana Alfalfa Seed Growers are facing potential catastrophic crop losses due to infestations of aphids which have become resistent to Capture 2EC (Bifenthrin) which is currently the only pesticide registered by the EPA for such use. Under FIFRA (Federal Insecticide, Fungicide and Rodenticide Act) states may apply for what is called a section 18 exemption from registration, which allows the temporary use of a pesticide for a particular purpose where the circumstances require such emergency use. Restrictions are imposed to ensure the effective and safe use of the product.

Given the current aphid infestation levels, the state has sought approval from the EPA for a section 18 use of Pirimor 50-DF (Pirimicarb). EPA has advised it will consider a section 18 application upon the state's first adopting an emergency rule justifying the application. Upon adoption of this emergency rule, the department will apply for a section 18, and this rule will be implemented when the section 18 is issued, which the department expects within the next several working days. Section 18's have been issued for this particular use in the state of Washington and other neighboring states and the rule will be similar to the section 18 requirements permitting that usage in these states.

Without the use of this product, the infected crops will be destroyed and the resistent aphids will be allowed to spread and continue to propogate, threatening other crops and future generations of crops.

2. The text of the rules is as follows:

NEW RULE I USE OF PIRIMOR ON APHID INFESTATIONS IN ALFALFA SEED CROPS UNDER A FIFRA SECTION 18 EXCEPTION TO REGISTRATION (1) The pesticide Pirimor is permitted for use as specified under a section 18 FIFRA registration exemption for use only on fields in production of alfalfa seed. This use is not permitted on fields producing alfalfa for livestock feed and no portion of the treated field, including seed, seed screening, hay forage or stubble, may be used for human or animal feed.

(2) The current year's treated alfalfa seed crop may not be cut for hay or forage nor can grazing take place on the current year's treated alfalfa seed crops.

(3) Screenings from alfalfa seed processing shall not enter feed channels. All Pirimor treated alfalfa seed screenings must be immediately removed from the feed market. Treated alfalfa seed is not to be used for sprouting.

(4) All alfalfa seed treated with Pirimor shall be tagged at processing plants and such tag shall state **NOT FOR HUMAN CONSUMPTION.** It shall be the grower's responsibility to notify the processing plants of any seed crops treated with Pirimor.

(5) All usage, in addition to the requirements of this rule, shall be in compliance with the Pirimor label under the section 18 exemption for the state of Montana.

(6) Producers desiring to purchase and use Pirimor will be required at the time of purchase to read and sign a form which acknowledges their receipt of the compound and secures their agreement to use the compound only as permitted by this rule and the section 18 and their agreement that they will not allow any treated alfalfa seed, stock, screenings, or other similar material described above to enter into any human food or animal feed channels.

AUTH: 2-4-303, MCA IMP: 80-8-105, MCA

3. The emergency action is effective on this date. The use of Pirimor as described above will be allowed on the date that the EPA issues a section 18 exemption. The department will notify respective alfalfa growers of the Section 18 approval.

LEO A. GIACOMETTO, DIRECTOR
DEPARTMENT OF AGRICULTURE

By: Gingery L. Gingery
Administrator

Timothy J. Meloy
Rule Reviewer

Certified to the secretary of state July 22, 1994

BEFORE THE STATE AUDITOR AND COMMISSIONER OF INSURANCE
OF THE STATE OF MONTANA

In the matter of the adoption of new rules regarding small employer carrier reinsurance program	))))	NOTICE OF ADOPTION

To: All Interested Persons.

On May 12, 1994, the state auditor and commissioner of insurance of the state of Montana published notice of public hearing regarding small employer carrier reinsurance program under the Small Employer Health Insurance Availability Act. The notice was published at page 1200 of the 1994 Montana Administrative Register, issue number 9.

1. The agency has adopted the new rules I (6.6.5101), IV (6.6.5107), V (6.6.5109), VII (6.6.5113), X (6.6.5119), XII (6.6.5123) as proposed.

2. The agency has adopted new rules II (6.6.5103), III (6.6.5105), VI (6.6.5111), VIII (6.6.5115), IX (6.6.5117), XI (6.6.5121), XIII (6.6.5125) with the following changes (material stricken is interlined; new matter added is underlined):

NEW RULE I (6.6.5101) APPLICABILITY AND SCOPE
This rule remains the same as proposed.

AUTH: 33-1-313 and 33-22-1822, MCA
IMP: 33-22-1819, MCA

NEW RULE II (6.6.5103) DEFINITIONS For the purposes of this subchapter, the terms defined in 33-1-202, 33-22-110, 33-22-903(a), 33-22-1803, 33-31-102, MCA, and ARM 6.6.~~4301~~5001 will have the same meaning in this subchapter, unless clearly designated otherwise. For the purposes of this subchapter, the following terms have the following meanings:

(1) through (5) remains the same as proposed.

(6) "Whole group" means all eligible employees, extra eligible employees, and eligible dependents.

AUTH: 33-1-313 and 33-22-1822, MCA
IMP: 33-22-1819, MCA

NEW RULE III (6.6.5105) BOARD OF DIRECTORS OF PROGRAM

(1) through (1)(o) remains the same as proposed.

(p) Amendments to the plan of operation and suggestions of technical corrections to the act require the concurrence of a majority of the entire board and the approval, after notice and hearing, of the commissioner.

AUTH: 33-1-313 and 33-22-1822, MCA

IMP: 33-22-1819, MCA

NEW RULE IV (6.6.5107) SUPPORT COMMITTEES
This rule remains the same as proposed.

AUTH: 33-1-313 and 33-22-1822, MCA
IMP: 33-22-1819, MCA

NEW RULE V (6.6.5109) SELECTION, POWERS, AND DUTIES OF ADMINISTERING CARRIER This rule remains the same as proposed.

AUTH: 33-1-313 and 33-22-1822, MCA
IMP: 33-22-1819, MCA

NEW RULE VI (6.6.5111) REINSURANCE WITH THE PROGRAM
(1) through (1)(a) remain the same as proposed.
(b) When an employer fails to qualify as a small employer ~~on two consecutive plan anniversary dates, all reinsurance provided by the program will terminate as of the second anniversary date in which the employer fails to qualify as a small employer~~, reinsurance shall continue until coverage ceases under ARM 6.6.5004.
(1)(c) through (2)(c)(ii)(C) remain the same as proposed.
(D) must address at least the following subjects, but which need not be included in the policy or contract:
(2)(c)(ii)(D)(I) through (3)(a)(i) remain the same as proposed.
(ii) If a member, except as a new enrollee, has previously withdrawn reinsurance of coverage for any group, that member cannot again reinsure the withdrawn group but may reinsure timely enrollees that are eligible to be reinsured on an individual basis described in (4) below;
(3)(a)(iii) through (4)(a)(v) remain the same as proposed.
(5) Reinsurance coverage may remain in effect and may continue as long as there is coverage under the small employer health plan for the covered employee and dependents~~, but no longer than the second plan anniversary date after the small employer ceases to be a small employer~~ under ARM 6.6.5004.
(5)(a) remains the same as proposed.
(b) Reinsurance of an individual's coverage under a small employer's plan ceases at the termination of the individual's status as a covered employee or dependent for reasons such as retirement or other termination of active employment, divorce of a spouse, a child's attainment of age 19, or termination of full-time student status after age 23, except if coverage is allowed to continue under Public Law 99-272, 100 stat 82 (Comprehensive Omnibus Budget Reconciliation Act of 1986). If a member provides coverage for an individual beyond termination of employment or dependent status, for contractual or other reasons, reinsurance may be continued for no more than 30 days after the termination date.

(c) Reinsurance must cease for any coverage of an individual under a small employer's plan, including an individual whose coverage under that plan has continued as required by law, except if coverage is allowed to continue under Public Law 99-272, 100 stat 82 (Comprehensive Omnibus Budget Reconciliation Act of 1986), at termination of the member's coverage of the group in which that individual was previously covered as an employee or dependent.

(6) through (9)(i) remain the same as proposed.

(10) Claims shall be submitted to the administrative carrier in a timely basis or Wwithin 20 days after the close of each quarter ~~or month, all members shall furnish to the program the following information with respect to reinsured losses submitted to the program by the member during said month:~~

~~(a) the small employer's identification;~~

~~(b) the employee's name and social security number;~~

~~(c) the claimant's name and date of birth;~~

~~(d) the claim incurred date and paid date;~~

~~(e) the reinsurance claim amount; and~~

~~(f) the claim coding as required by the board, such as CPT and ICD9~~.

(11) remains the same as proposed.

AUTH: 33-1-313 and 33-22-1822, MCA
IMP: 33-22-1819, MCA

NEW RULE VII (6.6.5113) AUDIT FUNCTIONS

This rule remains the same as proposed.

AUTH: 33-1-313 and 33-22-1822, MCA
IMP: 33-22-1819, MCA

NEW RULE VIII (6.6.5115) ASSESSMENTS

(1) through (4) remain the same as proposed.

(5) Assessments must be paid when billed. If the assessment payment is not received by the administering carrier within 30 days of the billing date, the assessable carrier shall be charged interest on the unpaid balance of assessments from the billing date at the annual rate of prime plus 3%, based on the weekly rate of the Minneapolis Federal Reserve Bank. The board may suspend reinsurance rights if payments are not made in accordance with this article.

(6) through (7) remain the same as proposed.

AUTH: 33-1-313 and 33-22-1822, MCA
IMP: 33-22-1819, MCA

NEW RULE IX (6.6.5117) REPORTS OF REINSURED RISKS

(1) Unless specifically waived by the board, the following information must be timely~~,~~ provided to the board by members and the administering carrier for all reinsured risks:

(1)(a) through (2)(e) remains the same as proposed.

AUTH: 33-1-313 and 33-22-1822, MCA
IMP: 33-22-1819, MCA

NEW RULE X (6.6.5119) FINANCIAL RECORD KEEPING AND ADMINISTRATION

This rule remains the same as proposed.

AUTH: 33-1-313 and 33-22-1822, MCA
IMP: 33-22-1819, MCA

NEW RULE XI (6.6.5121) ERRORS, ADJUSTMENTS, PENALTIES, AND SUBMISSION OF DISPUTES

(1) through (1)(h) remains the same as proposed.

(i) All premium refunds due from the program under this rule must be limited to an amount covering a period of 12 months from the date the error was ~~corrected~~discovered and reported, unless the limitation or some part thereof is expressly waived by the board.

(1)(j) remains the same as proposed.

AUTH: 33-1-313 and 33-22-1822, MCA
IMP: 33-22-1819, MCA

NEW RULE XII (6.6.5123) PROPOSALS FOR AMENDMENTS TO PLAN

This rule remains the same as proposed.

AUTH: 33-1-313 and 33-22-1822, MCA
IMP: 33-22-1819, MCA

NEW RULE XIII (6.6.5125) STANDARDS FOR PRODUCER COMPENSATION LEVELS AND FAIR MARKETING OF PLANS

(1) through (4)(b) remain the same as proposed.

~~(c) (4)(a) does not prohibit a carrier or a producer in the small employer market from providing a small employer with information about an established geographic service area or a restricted network provision of the health carrier.~~

(~~d~~c) Carriers and producers shall not delay the quotation of a rate to a group in order to avoid enrolling a high risk group.

(5) remains the same as proposed.

(6) Carriers shall not set commission levels for the sale of basic and standard plans in each class of business at a level less than 75% of the producer compensation schedule for the sale of other small ~~group~~employer products.

(7)(a) Carriers and producers shall not directly or indirectly:

(~~a~~i) encourage or direct small employers to refrain from filing applications for coverage with a carrier because of the health status of the employer's employees or the claims

experience, industry, occupation, or geographic location of the small employer;

(~~b~~ii) encourage or direct small employers to seek coverage from another carrier because of the health status of the employers's employees or the claims experience, industry, occupation, or geographic location of the small employer; or

(~~c~~iii) encourage or direct an employee not to apply for coverage under small employer health plan in order to obtain a more favorable rate or benefit package for the employer.

(b) (7)(a) does not prohibit a carrier or a producer in the small employer market from providing a small employer with information about an established geographic service area or a restricted network provision of the health carrier.

(8) Notwithstanding (7) above, carriers shall not engage in any practice which is inconsistent with the purposes of this rule.

(9) remains the same as proposed.

AUTH: 33-1-313 and 33-22-1822, MCA
IMP: 33-22-1819, MCA

4. A public hearing on the proposed rules was held. 16 interested persons attended the hearing. At the hearing on the proposed rules there were representatives of the health insurance industry.

The agency has fully considered all written and oral submissions respecting the proposed rules and responds as follows:

GENERAL COMMENTS

COMMENT:

A concern that 33-22-1819 (8)(b), MCA, provided for ". . . possible cross-subsidization of the group market by those participating in the individual market."

RESPONSE:

The reinsurance board (board) and commissioner realize that this is one of more controversial aspects of the proposed rules, but this is set by statute and not rule.

COMMENT:

There is no meaningful cap on what an assessable carrier may be required to pay for program shortfalls.

RESPONSE:

Legislative intent was specific as to not placing a cap. The board discussed this issue fully and commented that,

"The program will attempt to act in a prudent and responsible manner."

Rule II DEFINITIONS

COMMENT:

ARM 6.6.4301 cannot be identified.

RESPONSE:

The rule citation is corrected to correspond to the definitions included in the small employer reform rules.

COMMENT:

Provision (2)(c)(iii) "Covered Claims" omits from claims costs the costs of operation of managed care, cost containment, or related programs. We believe that these costs should be included in claims costs. Operation of managed care programs is geared toward a reduction in the costs of a managed care program and the costs of claims, it is submitted that carriers should be encouraged to invest in managed care and recapture that investment as a part of claims costs.

RESPONSE:

The board discussed this issue and will currently leave it as proposed, however, they will review it periodically in the future.

The commissioner agrees with the conclusion and will assist the board in periodically reviewing it.

COMMENT:

Subsection (6) "Whole group." This definition should be compared with definitions for group coverage under small group rules to assure that it does not in some manner conflict with the small group rules.

RESPONSE:

This recommendation is well taken and the definition is changed to identify dependent as "eligible dependent" to correspond to the definition found in the small employer reform rules.

RULE III BOARD OF DIRECTORS OF PROGRAM

COMMENT:

Subsection (1)(a) which describes the terms of directors goes beyond the statutory authority for terms. Section 33-22-1818, MCA, establishes the board as consisting, in part, of a representative from each of the five small employer carriers with the highest annual premium volume derived from health benefit plans in Montana. The proposed rule, however, allows directors to serve out their terms even though the entity which they represent ceases to be eligible for a representative.

Subsection (1)(b) provides for filling a seat which is refused by one of the top five carriers from the next largest carrier. This provision, while practical, is not provided for in the statute. The statute rather limits the membership to the top five carriers.

RESPONSE:

The board and the commissioner have reviewed this in depth and do not see conflict and make no change. The directors, under statute, are appointed for a term and should be allowed to complete the term to which they have been appointed.

COMMENT:

Section (1)(p) provides for amendments to the plan of operation. It should be noted that such an amendment may be done only after notice and hearing. See 33-22-1819(1), MCA.

RESPONSE:

The proposed rule has been amended to reflect this suggestion.

RULE IV SUPPORT COMMITTEES

COMMENT:

Subsection (1) makes it appear that 33-22-1819, MCA, requires the appointment of four committees. That section only names two, the legal and the actuarial committee. It is recommended that at line three, the word "must" be stricken and "are" be substituted.

RESPONSE:

This suggestion is rejected because the statute is permissive and there is a need for more than two committees.

COMMENT:

Subsection (7) limits the membership of the committees to five individuals representing carriers participating in the program. We believe that participation by carriers who are not serving on the board may be difficult to obtain and, consequently, the committees may be difficult to constitute. It was recommended that the membership of the committees be changed as follows: following "consist of" strike "five individuals representing carriers participating in the program," and insert, "not less than three nor more than five individuals representing carriers participating in the program, or others deemed appropriate by the board."

RESPONSE:

This suggestion is rejected because the board desires to see how the provision operates before scaling back the committees.

RULE V SELECTION, POWERS, AND DUTIES OF ADMINISTERING CARRIER:

COMMENT:

Subsection (7) requires the reinsuring carrier to maintain records for seven years. It is noted that a third-party administrator is required to maintain records for the duration of its administration or for 5 years thereafter (33-17-602, MCA). We recommend that the record retention policy be that which is required of third-party administrators.

RESPONSE:

The suggestion is rejected and the board and the commissioner choose to remain with 7 years, which is consistent with IRS Rules.

RULE VI REINSURANCE WITH THE PROGRAM:

COMMENT:

Under Subsection (1)(b), when an employer fails to qualify as a small employer on two plan anniversary dates, reinsurance will terminate. The small employer

reform rules, however, allow the employer to remain under small group coverage. See ARM 6.6.5004(7) which requires notice to the employer that protection under the rules cease to apply if the employer fails to renew or buys another plan.

The effect of these two rules is to allow an employer to remain under small group coverage, but to remove the protection of reinsurance for that group's small employer carrier. We disagree with the elimination of reinsurance if an employer is allowed to retain the option to purchase coverage under the small group provisions.

RESPONSE:

The proposed rules, as adopted, have been made consistent with the small employer reform rules.

COMMENT:

Under subsection (2)(ii)(B), the language ". . . must be made available on the same terms to all small employers with the same number of eligible employees" may preclude special plans now offered by associations; however, adding at the end of this item, "within the class of business" recognizes that carriers may have unique plans under the act for specific classes of business.

RESPONSE:

The board and commissioner reject this change as it would carve out a new line of business which is outside of the intent of the law.

COMMENT:

Subsection (2)(c)(ii)(D)(I) provides that in order to qualify for reinsurance a plan must address takeover provisions in the contract. Takeover provisions are normally in underwriting standards. It should be made clear that takeover provisions need not be in the contract.

RESPONSE:

This section is amended to adopt the suggestion.

COMMENT:

Subsection 2: this section and its subsection are critical to companies participating under the reinsurance

program. An honest error in claims handling or other error could risk company solvency.

RESPONSE:

Board is unable to link this statement to specifics and believes that this rule complies with the statutes and will remain as written.

COMMENT:

Subsection (2)(C)(iii). The language "...documentation to be included in reporting reinsurance census data and reinsurance premiums to the administering carrier" could be expensive and an unnecessary burden which precludes electronic reinsurance transactions.

RESPONSE:

This is standard operating procedure and nothing in this section precludes electronic reinsurance transfers.

COMMENT:

Subsection(3)(a)(ii). This section may pose a problem in the event that a case is lost to another carrier and then reacquired.

RESPONSE:

Agree, and will add new language as follows: "Except as a new enrollee."

COMMENT:

The language in subsection (4)(a)(iii) refers to "mother" and might better read "parent."

RESPONSE:

There is no change since the risk is based upon the mother.

COMMENT:

Subsection (5) provides that if a small employer ceases to be a small employer, its reinsurance ceases.

RESPONSE:

This suggestion was previously adopted and the same change is made here.

COMMENT:

The language in subsection (5) and (6) precludes reinsurance on initially insured and renewed handicapped children. The law requires carriers to cover these previously uninsurable persons with the promise of reinsurance to avoid solvency concerns.

RESPONSE:

The language does not preclude reinsurance on initially insured or renewed handicapped children. Under 33-22-506 and 33-30-1003, MCA, a handicapped child is not terminated.

COMMENT:

Subsection (5)(b)(c) provides for the termination of reinsurance on an individual when that individual's status as a covered employee or dependent ceases for a number of reasons. It is not clear whether reinsurance would remain in force for persons who are employed by an employer who is subject to the continuation of coverage feature of the COBRA 1986 law (i.e., an employer of 20 or larger employees). Under COBRA, an individual is allowed to retain group coverage for a certain term following happening of a qualifying event. It was suggested that the rule be amended to allow reinsurance for COBRA-eligible persons.

RESPONSE:

This suggestion was adopted and the proposed rules have been accordingly amended.

COMMENT:

Subsection (9) requires members to promptly adjudicate all claims on ceded risks. If the intention is to assure that members treat claims for ceded risks in the same manner of those for nonceded risks, the rule should be modified to so state.

RESPONSE:

Refers to reinsurance risk only and not claims for the ceded risks and, therefore, there is no need to modify it.

COMMENT:

Subsection (9)(g) provides that the reinsurer will recover first out of any third-party recovery. While it is recognized that the reason for recovery first by the program is because reinsurance is only for excess losses, the effect of this rule could be to reduce the incentive for the member to recover from third parties when the amount of recovery is projected to be limited. It is recommended that the rules be amended to allow for proration of the amount recovered between the member and the reinsurance fund.

RESPONSE:

Reinsurer always has first priority and is historical in practice and, therefore, there is no need to change such practice.

COMMENT:

Subsection (10) requires all members to report certain information with respect to reinsured losses submitted to the program by the member during the month. This is information the administrative carrier will already have and could submit without duplicating effort. However, if this language allows the administering carrier to receive the information as a surrogate for the board, we would appreciate that clarification.

RESPONSE:

This suggestion is agreed to and previous language will be deleted and the following wording will be added: ". . . claims shall be submitted to the administrative carrier in a timely basis or within 20 days of the close of the quarter." The plan of operation is changed to reflect this.

RULE VII AUDIT FUNCTIONS

COMMENT:

It is not clear from the language in section (7) who pays for additional audits or who deems additional audits appropriate.

RESPONSE:

The board and commissioner clarify that "Carriers pay for the audits."

COMMENT:

The proposed rule imposes a requirement that each member of the program conduct an audit of the various accounts related to program reinsurance and assessments. The result will be to impose an additional cost on each member. Such an additional restriction could have a chilling effect on continued coverage by carriers with limited business in Montana.

RESPONSE:

This proposed change is rejected, and the board and commissioner retain the requirement of audit of accounts related to program reinsurance and assessments when doing normal annual audit functions of the business.

COMMENT:

It is appropriate to require an audit if the board suspects that a member is not complying with the requirements of the reinsurance program or reporting figures accurately for the assessment. Under ordinary circumstances, however, it is suggested that, rather than requiring a separate independent audit, the department incorporate the audit into the financial examination conducted at least once each three years.

RESPONSE:

The board and commissioner make no change and clarify that this audit will be a function of the regular annual audit of the business performed by CPA or other individual hired for that purpose.

COMMENT:

Subsection (5)(a)(i) requires that the auditor sample whether, as part of determining eligibility, there is a consistent application of business conduct rules. It is unclear how this would be accomplished and what the imposition of that requirement would do to the cost of the audit.

RESPONSE:

The cost should be minimal and this requirement will be clarified if the auditors find it difficult to comply with.

RULE VIII ASSESSMENTS

COMMENT:

Under subsection (3)(b), it is not clear whether existing reinsurance may remain in effect.

RESPONSE:

The reinsurance continues to exist through the period in which the premiums are paid.

COMMENT:

The interest rates set by subsection (5) refer to a prime rate plus three percent; some reference should be made as to the sources of the prime rate. A rate set at 1½% per month would reduce potential disputes.

RESPONSE:

The source of the prime rate is based on the weekly publication of the Minneapolis Federal Reserve Bank and the proposed rule is amended accordingly.

RULE IX REPORTS OF REINSURED RISKS

COMMENT:

There appears to be a typo on line three. Following "timely," the comma should be omitted.

RESPONSE:

Agree, and the comma is deleted.

COMMENT:

Subsection (1)(f). Some carriers do not use industry as a rating characteristic and, therefore, do not track SIC codes. This code should only be reported if routinely available to the carrier.

RESPONSE:

Stable reporting is essential to the program and standard industrial codes will be used.

COMMENT:

Under Subsection (1)(j), the date of each applicable employee's initial employment is only relevant for new

employees and may not even be then. It is not needed for new small employers.

RESPONSE:

This suggestion is rejected because the information is needed and is relevant.

RULE X FINANCIAL RECORD KEEPING AND ADMINISTRATION

COMMENT:

This section (1) provides very little flexibility to the administrator to carry out duties in the most efficient manner. The administering carrier is required to provide copies to the commissioner, as requested, but not to the board. It would be appropriate to send copies to the board. Under the act, the board, not the commissioner, is supposed to run the program.

RESPONSE:

The language will remain as presented in the rules, as the commissioner shall request copies from the administering carrier in order to carry out the commissioner's duties as mandated in statute.

RULE XI ERRORS, ADJUSTMENTS, PENALTIES, AND SUBMISSION OF DISPUTES

COMMENT:

Section (1) would impose "charges," "interest," and "actual cost incurred" throughout the subsection. There should be a defined basis for all penalties to avoid potential disputes.

RESPONSE:

Proposed subsection (h) clarifies this question. The rate of interest under this rule is 10% per annum. The administrative charge under this rule is the actual cost incurred.

COMMENT:

Under subsection (1)(i), premium refunds are limited to the date the error was "corrected" under this provision. We would suggest that "discovered and reported" may be a better reference.

RESPONSE:

This suggestion is adopted.

RULE XII STANDARDS FOR PRODUCER COMPENSATION LEVELS AND FAIR MARKETING OF PLANS

COMMENT:

This rule, unlike others, repeats statutory language. It interjects confusion by adding the standards to the reinsurance rules rather than the small group rules. It is recommended that those portions of this rule which are repetitive and not specifically applicable to reinsurance be omitted.

RESPONSE:

The rule needs to remain the same as proposed so that it reads properly, but it will be re-examined in light of any changes that may be made to the small employer reform rules.

COMMENT:

Section (3) is too vague and difficult to interpret.

RESPONSE:

The language was purposely left open to allow the carrier to market products in a fair and competitively-priced manner. The market place will determine whether the product is attractive to market.

COMMENT:

Subsection (4)(c) quotes a statutory prohibition; however, under the statute quoted, this exception appears to be in the wrong place. Rather, it should be inserted as (7)(b). Compare with 33-22-1813(2)(a), MCA.

RESPONSE:

This suggestion is agreed to and the appropriate change is made in the proposed rules.

COMMENT:

Subsection (6) refers to "other small group products" which is an undefined term while the statute references "small employers." We suggest that "group" be changed to

"employer." This would be consistent with the changes made to the prior rules.

RESPONSE:

This suggestion is adopted.

COMMENT:

Concerns were expressed on compensation for sales of product to assure fair return to agent.

RESPONSE:

The board and the commissioner wished to assure that agents would have a minimum of 75% of the producer compensation schedule and is a guide and not necessarily to be used as the standard. This was a way to assure that the plan would be marketed. The proposal to change this compensation figure is rejected by the board.

State Auditor and
Commissioner of Insurance

By: Mark O'Keefe
Mark O'Keefe

Gary L. Spaeth
Rules Reviewer

Certified to the Secretary of State this 1st day of August, 1994.

BEFORE THE BOARD OF HORSE RACING
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment of rules pertaining to permissible medication and trifecta wagering	))))	NOTICE OF AMENDMENT OF 8.22.1402 PERMISSIBLE MEDICATION AND 8.22.1802 REQUIREMENTS FOR LICENSEE

TO: All Interested Persons:

1. On June 9, 1994, the Board of Horse Racing published a notice of proposed amendment of the above-stated rules at page 1507, 1994 Montana Administrative Register, issue number 11.

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

3. No comments or testimony were received.

BOARD OF HORSE RACING
MALCOLM ADAMS, 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, August 1, 1994.

BEFORE THE DEPARTMENT OF FISH, WILDLIFE AND PARKS

OF THE STATE OF MONTANA

In the matter of the adoption of a rule classifying certain types of actions taken under the River Restoration Program as categorical exclusions	))))))	NOTICE OF ADOPTION OF 12.2.454

TO: All Interested Persons:

1. On June 23, 1994, the Department of Fish, Wildlife and Parks published notice of a new rule pertaining to the River Restoration Program at page 1649, 1994 Montana Administrative Register, issue number 12.

2. The department has adopted the rule as proposed.

3. No comments or testimony were received

Department of Fish, Wildlife and Parks

Robert N. Lane
Rule Reviewer

Patrick J. Graham
Director

Certified to the Secretary of State on July 11, 1994.

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

In the matter of the amendment of rule 16.8.1907 dealing with the fees for the smoke management program.	))))	NOTICE OF AMENDMENT OF RULE

(Air Quality)

To: All Interested Persons

1. On June 9, 1994, the board published notice of public hearing on the above-captioned amendment at page 1511 of the 1994 Montana Administrative Register, issue number 11.

2. The board has adopted the amendment as proposed with no changes.

3. There were no comments on the proposed amendment.

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

ROBERT J. ROBINSON, Director
Department of Health and Environmental Sciences

Certified to the Secretary of State August 1, 1994.

Reviewed by:

Eleanor Parker, DHES Attorney

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

In the matter of the amendment of rules 16.20.202-205, 207, 208, 210-214, 216, 217, 222, 229, 234, 242, 251 and 261, and adoption of new rule I setting standards for public drinking water	NOTICE OF AMENDMENT OF RULES AND ADOPTION OF NEW RULE I (Drinking Water)

To: All Interested Persons

1. On May 26, 1994, the board published notice of public hearing on the above-captioned amendment and adoption at page 1362 of the 1994 Montana Administrative Register, issue number 10.

2. The board adopted the rules as proposed with the following changes (new material is underlined; material to be deleted is interlined):

16.20.202 DEFINITIONS Same as proposed.

16.20.203 MAXIMUM INORGANIC CHEMICAL CONTAMINANT LEVELS Same as proposed.

16.20.204 MAXIMUM ORGANIC CHEMICAL CONTAMINANT LEVELS Same as proposed.

16.20.205 MAXIMUM TURBIDITY CONTAMINANT LEVELS Same as proposed.

16.20.207 MAXIMUM MICROBIOLOGICAL CONTAMINANT LEVELS Same as proposed.

16.20.208 TREATMENT TECHNIQUES--FILTRATION AND DISINFECTION Same as proposed.

16.20.210 BACTERIOLOGICAL QUALITY SAMPLES Same as proposed.

16.20.211 CHEMICAL AND RADIOLOGICAL QUALITY SAMPLES

(1) Same as proposed.

(2) Same as proposed.

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

(c) A community or non-transient non-community water system ~~which~~ that either uses unfiltered surface water or unfiltered groundwater under the direct influence of surface water or serves a population of 10,000 or more individuals must be monitored by the supplier for total trihalomethanes if the system adds a disinfectant to the water supply. The department may waive this requirement for a public water supplier that uses surface water and does not practice filtration, if the supplier is in compliance with a department administrative

order, court order, or court-ordered consent decree to provide filtration and if the supplier agrees to comply with an alternative monitoring plan acceptable to the department.

(i)-(ii) Same as proposed.

(4)-(8) Same as proposed.

16.20.212 SAMPLING AND REPORTING RESPONSIBILITY Same as proposed.

16.20.213 VERIFICATION SAMPLES Same as proposed.

16.20.214 SPECIAL SAMPLES Same as proposed.

16.20.216 CONTROL TESTS--GENERAL Same as proposed.

16.20.217 CONTROL TESTS--SURFACE SUPPLIES Same as proposed.

16.20.222 SANITARY SURVEYS Same as proposed.

16.20.229 PUBLIC NOTIFICATION FOR COMMUNITY AND NON-COMMUNITY SUPPLIES Same as proposed.

16.20.234 VARIANCE AND EXEMPTIONS FROM MAXIMUM CONTAMINANT LEVELS (MCL'S) FOR ORGANIC AND INORGANIC CHEMICALS AND FROM TREATMENT REQUIREMENTS FOR LEAD AND COPPER Same as proposed.

16.20.242 DESIGNATED CONTACT PERSON Same as proposed.

16.20.251 VARIANCE "B" Same as proposed.

16.20.261 ADOPTION AND INCORPORATION BY REFERENCE Same as proposed.

RULE I (16.20.262) DEPARTMENT RECORDKEEPING Same as proposed.

3. The board received the following comments and department response follows:

Comment: Gary France of Belgrade, Montana, expressed concern over the "mountain of paperwork" created for small water system operators over the past 8 to 10 months pursuant to the implementation of new Safe Drinking Water Act (SDWA) requirements.

Response: To a substantial degree the new contaminants regulated under the 1986 SDWA were not previously monitored. Although small system suppliers feel especially burdened with performing this monitoring and reporting results, it is important to determine if health concerns are present for all consumers, not just large system consumers. Unfortunately, a large number of contaminants are now present within our environment that can affect water quality. One can no longer simply install a well into the nearest ground water source and

guarantee the water is safe to consume.

Further, the Department of Health and Environmental Sciences (DHES) must operate under the minimum requirements of the federal rules in order to retain primary enforcement authority (primacy) for the SDWA. The proposed rules meet the minimum requirements necessary to maintain primacy, but do not place any further burden upon system suppliers. A task force, assembled by Governor Stephens and the DHES in 1990 to study the SDWA primacy issue, recommended the DHES pursue primacy regarding the 1986 SDWA amendments because it is best suited to implement these laws in Montana. This task force consisted of a cross section of system operators, regulators, health professionals, and engineering professionals. The Governor and 1991 Legislature supported that recommendation. The other option is to return primacy to the Environmental Protection Agency (EPA), which would then implement the SDWA Rules.

Comment: Mr. France also questioned why it is necessary to sample homes for lead and copper when his distribution system is PVC and he does not control the plumbing in homes.

Response: It is the water that can cause lead and copper to corrode from the plumbing (solder, old lead service lines, plumbing fixtures and copper plumbing are likely sources of lead and copper). EPA's Lead and Copper rule attempts to mitigate the effects of corrosive water supplies. For example, water that is corrosive must be treated to protect against release of corrosion byproducts. Even if lead or copper piping does not exist in a water supply system, brass and bronze fixtures can contribute to lead and copper levels at a customer's taps. Both lead and copper are components of these alloys.

A survey performed in 1993, sponsored by the American Water Works Association Research Foundation, determined that the public wants to know if their water is safe to consume and is willing to pay more for safe water. The intent of the 1986 amendments to the SDWA was to improve the quality of water supplied to all U.S. citizens.

Comment: Phillip G. Smith, president of the Forest Creek Homeowners Association stated that sampling costs for his association totaled $2761.53 between January 1, 1993, and June 12, 1994. Mr. Smith states that this expense has nearly depleted the system's reserves.

Response: The Forest Creek water system is supplied by two wells, each of which must be tested for a large number of contaminants under the new regulations. The system's sampling costs should be less than $300 for the remaining 18 months of the three-year compliance period. Averaging the cost of sampling over the three years and 15 service connections, the monthly cost per service connection should be approximately $5.70 per service connection. Although this may be a large increase for many residential water customers, it is not excessive when compared to other utility costs. By completing these

tests, consumers are assured that their water supply has been tested for 16 inorganic and 80 organic chemicals, all of which can have harmful effects if high levels are present. The DHES has attempted to be flexible in requiring monitoring to the extent permitted by federal rule, in part by pursuing statewide sampling waivers for the 5 most expensive water tests.

Comment: Hilda C. Korrell, mayor of the town of Lima requested a complete copy of the proposed rules and went on to state that projections of future compliance costs would exceed the entire town budget.

Response: Copies of the proposed rules were sent to Mayor Korrell. The DHES has offered as much flexibility as allowed by the SDWA and EPA's rules. The DHES will also apply to EPA for statewide waivers from sampling for 5 of the most expensive chemical tests; dioxin, glyphosate, diquat, endothall and asbestos. Even though many small systems sampled for most of the contaminants in these proposed rules during the past 12 months, sampling costs should not have exceeded approximately $2000 for a town with one source of water. Also, these costs will dramatically decrease for most systems now that the first round of sampling is completed.

Comment: Marty Swickard, Region VIII Lead & Copper Rule Coordinator, Environmental Protection Agency (EPA), is responsible for review of the DHES' Lead and Copper Rule proposal for conformance with Federal guidelines for State adoption. In her June 9, 1994, comment letter Ms. Swickard identified six items within Circular PWS-4 that must be revised to meet the minimum Federal requirements.

Response: The problems described by Ms. Swickard were in an earlier, draft version of the proposed rules. The proposed rules published in the Montana Administrative Register include all of the changes requested by Ms. Swickard.

Comment: David Schmidt, EPA Region VIII Phase II and V Rule Coordinator had three comments regarding the proposed changes to Department Circular PWS-1. The first comment was with respect to the language describing nitrate and nitrite maximum contaminant level (MCL) exceedances. Mr. Schmidt correctly pointed out that the circular must address the <u>total</u> nitrate + nitrite MCL in addition to the separate nitrate and nitrite MCLs. Mr. Schmidt also suggested that the footnotes on page 14 of the Department Circular PWS-1 be moved to page 13. Finally, Mr. Schmidt noted that the best available technology for treating cyanide is better described as "alkaline chlorination" instead of "chlorine". DHES staff will change "chlorine" to "alkaline chlorination with pH $\geq$ 8.5" in the table on page 33 of Department Circular PWS-1.

Response: These changes were made in Department Circular PWS-1.

Comment: Jim Melstad, Supervisor of DHES' Drinking Water Section, requests that ARM 16.20.211(3) be amended to provide that trihalomethane (THM) monitoring requirements for certain public water supply systems may be waived if the system is addressed by an administrative or court order.

Response: The rules were amended to incorporate this change.

Comment: Joe Steiner, Plant Superintendent, City of Billings Public Utilities Department, expressed concern over the DHES Public Water Supply Program's ability to administer additional rules with its limited staff. Mr. Steiner also noted a subsection within Circular PWS-4 that was different than the federal rule dealing with lead service line sample collection methodology.

Response: The public drinking water task force prepared a report in 1991, which was submitted to then-Governor Stephens and the Legislature, that also identified inadequate staffing as a problem. Since then, the DHES has expanded its drinking water staff.

Comment: Raymond Wadsworth, Executive Director, Montana Rural Water Systems, emphasized that the Public Water Supply Program should integrate future federal amendments that may ease the cost and burden placed on small public water supplies by these rules.

Response: If future amendments are made to the federal Safe Drinking Water Act to ease the present, stringent regulatory requirements, any subsequent amendment by the Environmental Protection Agency to federal drinking water rules will be seriously considered for integration into the state rules.

Comment: Al Ortman, Billings Christian School, expressed concern about the adoption of rules more stringent than those already in place.

Response: The rules proposed herein are equivalent to the current federal rules.

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

ROBERT J. ROBINSON, Director
Department of Health and
Environmental Sciences

Certified to the Secretary of State August 1, 1994.

Reviewed by:

Eleanor Parker, DHES Attorney

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

In the matter of the amendment of rules 16.20.603, 616-624, and 641, concerning surface water quality standards	NOTICE OF AMENDMENT OF RULES (Water Quality)
In the matter of the adoption of new rules I through IX and the repeal of rules 16.20.701 through 16.20.705 regarding implementation of the Water Quality Act's nondegradation policy	NOTICE OF ADOPTION OF NEW RULES I-IX AND REPEAL OF 16.20.701-705 (Water Quality Nondegradation)
In the matter of the amendment of rules 16.20.1003 and 16.20.1010-16.20.1011 regarding ground water quality standards, mixing zones, and water quality nondegradation.	NOTICE OF AMENDMENT OF RULES (Water Quality)
In the matter of the adoption of new rules I-X concerning the use of mixing zones.	NOTICE OF ADOPTION OF NEW RULES I-X (Water Quality)

TO: All Interested Persons

1. As described more fully in paragraphs 2-5, the board has published notices of proposed adoption, amendment and repeal of rules pertaining to surface water quality standards, rules pertaining to authorization to degrade state waters, ground water quality standards and mixing zones. These rule sets each refer to terminology and concepts in the other rule sets and it is therefore efficient to promulgate final notices of adoption, amendment and repeal simultaneously.

2. On November 24, 1993, the board published notice at page 2737 of the Montana Administrative Register, Issue No. 22, of the proposed amendment of rules 16.20.603, 616 through 624, and 641. On April 14, 1994, the board published a supplemental notice at page 827 of the Montana Administrative Register, Issue No. 7, noticing an additional public hearing on May 20, 1994, and extending the comment period on the proposed amendment of rules 16.20.603, 616 through 624, and 641.

3. On November 24, 1993, the board of health and environmental sciences ("board") published notice at page 2723 of the Montana Administrative Register, Issue No. 22, of the proposed adoption of new rules I through IX and the repeal of 16.20.701 through 16.20.705. On April 14, 1994, the board published a supplemental notice at page 849 of the Montana Administrative Register, Issue No. 7, noticing an additional public hearing on May 20, 1994, and extending the comment period on the proposed adoption of new rules I through IX and repeal of 16.20.701 through 16.20.705.

4. On February 10, 1994, the board published notice at page 244 of the Montana Administrative Register, Issue No. 3, of the proposed amendment of 16.20.1003 and 16.20.1010-16.20.1011 regarding ground water quality standards, mixing zones, and water quality nondegradation. On April 14, 1994, the board published a supplemental notice at page 846 of the Montana Administrative Register, Issue No. 7, noticing an additional public hearing on May 20, 1994, and extending the comment period on the proposed amendment of 16.20.1003 and 16.20.1010-16.20.1011.

5. On April 15, 1994, the board published notice at page 835 of the Montana Administrative Register, Issue No. 7, of the proposed adoption of new rules I-X concerning the use of mixing zones.

6. The rules as amended from the versions published on April 14, 1994, appear as follows (new material is underlined; material to be deleted is interlined):

16.20.603 DEFINITIONS Same as proposed.

16.20.616 A-CLOSED CLASSIFICATION Same as proposed.

16.20.617 A-1 CLASSIFICATION (1)-(2) Remain the same.

(3) No person may violate the following specific water quality standards for waters classified A-1:

(a) Remains the same.

(b) Dissolved oxygen concentration must not be reduced below the applicable standards ~~levels~~ given in department circular WQB-7.

(c)-(g) Remain the same.

(h)(i) Concentrations of carcinogenic, bioconcentrating, toxic, or harmful parameters which would remain in the water after conventional water treatment may not exceed the applicable standards ~~levels~~ set forth in department circular WQB-7.

(ii) Dischargers issued permits under ARM Title 16, chapter 20, subchapter 9, shall conform with ARM Title 16, chapter 20, subchapter 7, the nondegradation rules, and may not cause receiving water concentrations to exceed the applicable standards ~~levels~~ contained in department circular WQB-7 when stream flows equal or exceed the design flows specified in ARM 16.20.631(4).

(iii) If site-specific criteria are developed using the procedures given in the Water Quality Standards Handbook (US EPA, Dec. 1983), and provided that other routes of exposure to toxic parameters by aquatic life are addressed, the criteria ~~limits~~ so developed shall ~~may~~ be used as water quality standards for the affected waters and as the basis for permit limits instead of the applicable standards ~~levels~~ in department circular WQB-7.

(iv) Remains the same.

(4) Remains the same.

16.20.618 B-1 CLASSIFICATION (1) Remains the same.

(2) No person may violate the following specific water

quality standards for waters classified B-1:

(a)-(g) Remain the same.

(h)(i) Concentrations of carcinogenic, bioconcentrating, toxic or harmful parameters which would remain in the water after conventional water treatment may not exceed the applicable standards ~~levels~~ set forth in department circular WQB-7.

(ii) Dischargers issued permits under ARM Title 16, chapter 20, subchapter 9, shall conform with ARM Title 16, chapter 20, subchapter 7, the nondegradation rules, and may not cause receiving water concentrations to exceed the applicable standards ~~levels~~ specified in department circular WQB-7 when stream flows equal or exceed the design flows specified in ARM 16.20.631(4).

(iii) If site-specific criteria are developed using the procedures given in the Water Quality Standards Handbook (US EPA, Dec. 1983), and provided that other routes of exposure to toxic parameters by aquatic life are addressed, the criteria ~~limits~~ so developed shall ~~may~~ be used as water quality standards for the affected waters and as the basis for permit limits instead of the applicable standards ~~levels~~ in department circular WQB-7.

(iv) Remains the same.

(3) The board hereby adopts and incorporates by reference the following:

(a) Department circular WQB-7, entitled "Montana Numeric Water Quality Standards" (1994 edition), which establishes standards ~~limits~~ for toxic, carcinogenic, bioconcentrating, and harmful parameters in water; and

(b)-(c) Remain the same.

16.20.619 B-2 CLASSIFICATION (1) Remains the same.

(2) No person may violate the following specific water quality standards for waters classified B-2:

(a) Remains the same.

(b) Dissolved oxygen concentration must not be reduced below the applicable standards ~~levels~~ given in department circular WQB-7.

(c)-(g) Remain the same.

(h)(i) Concentrations of carcinogenic, bioconcentrating, toxic or harmful parameters which would remain in the water after conventional water treatment may not exceed the applicable standards ~~levels~~ set forth in department circular WQB-7.

(ii) Dischargers issued permits under ARM Title 16, chapter 20, subchapter 9, shall conform with ARM Title 16, chapter 20, subchapter 7, the nondegradation rules, and may not cause receiving water concentrations to exceed the applicable standards ~~levels~~ specified in department circular WQB-7 when stream flows equal or exceed the design flows specified in ARM 16.20.631(4).

(iii) If site-specific criteria are developed using the procedures given in the Water Quality Standards Handbook (US EPA, Dec. 1983), and provided that other routes of exposure to toxic parameters by aquatic life are addressed, the criteria ~~limits~~ so developed shall ~~may~~ be used as water quality stan-

dards for the affected waters and as the basis for permit limits instead of the applicable standards ~~levels~~ in department circular WQB-7.

(iv) Remains the same.

(3) The board hereby adopts and incorporates ~~herein~~ by reference the following:

(a) Department circular WQB-7, entitled "Montana Numeric Water Quality Standards" (1994 edition), which establishes standards ~~limits~~ for toxic, carcinogenic, bioconcentrating, and harmful parameters in water; and

(b)-(c) Remain the same.

16.20.620 B-3 CLASSIFICATION (1) Remains the same.

(2) No person may violate the following specific water quality standards for waters classified B-3:

(a) Remains the same.

(b) Dissolved oxygen concentration must not be reduced below the applicable standards ~~levels~~ specified in department circular WQB-7.

(c)-(g) Remain the same.

(h)(i) Concentrations of carcinogenic, bioconcentrating, toxic, or harmful parameters which would remain in the water after conventional water treatment may not exceed the applicable standards ~~levels~~ set forth in department circular WQB-7.

(ii) Dischargers issued permits under ARM Title 16, chapter 20, subchapter 9, shall conform with ARM Title 16, chapter 20, subchapter 7, the nondegradation rules, and may not cause receiving water concentrations to exceed the applicable standards ~~levels~~ specified in department circular WQB-7 when stream flows equal or exceed the design flows specified in ARM 16.20.631(4).

(iii) If site-specific criteria are developed using the procedures given in the Water Quality Standards Handbook (US EPA, Dec. 1983), and provided that other routes of exposure to toxic parameters by aquatic life are addressed, the criteria ~~limits~~ so developed shall ~~may~~ be used as water quality standards for the affected waters and as the basis for permit limits instead of the applicable standards ~~levels~~ specified in department circular WQB-7.

(iv) Remains the same.

(3) The board hereby adopts and incorporates by reference the following:

(a) Department circular WQB-7, entitled "Montana Numeric Water Quality Standards" (1994 edition), which establishes standards ~~limits~~ for toxic, carcinogenic, bioconcentrating, and harmful parameters in water; and

(b)-(c) Remain the same.

16.20.621 C-1 CLASSIFICATION (1) Remains the same.

(2) No person may violate the following specific water quality standards for waters classified C-1:

(a) Remains the same.

(b) Dissolved oxygen concentration must not be reduced below the applicable standards ~~levels~~ given in department cir-

cular WQB-7.

(c)-(g) Remain the same.

(h)(i) Concentrations of carcinogenic, bioconcentrating, toxic, or harmful parameters may not exceed levels which render the waters harmful, detrimental or injurious to public health. Concentrations of toxic parameters also may not exceed the applicable standards ~~levels~~ specified in department circular WQB-7.

(ii) Dischargers issued permits under ARM Title 16, chapter 20, subchapter 9, shall conform with ARM Title 16, chapter 20, subchapter 7, the nondegradation rules, and may not cause receiving water concentrations to exceed the applicable standards ~~levels~~ specified in department circular WQB-7 when stream flows equal or exceed the design flows specified in ARM 16.20.631(4).

(iii) If site-specific criteria are developed using the procedures given in the Water Quality Standards Handbook (US EPA, Dec. 1983), and provided that other routes of exposure to toxic parameters by aquatic life are addressed, the criteria ~~limits~~ so developed shall ~~may~~ be used as water quality standards for the affected waters and as the basis for permit limits instead of the applicable standards ~~levels~~ in department circular WQB-7.

(iv) Remains the same.

(3) The board hereby adopts and incorporates by reference the following:

(a) Department circular WQB-7, entitled "Montana Numeric Water Quality Standards" (1994 edition), which establishes standards ~~limits~~ for toxic, carcinogenic, bioconcentrating, and harmful parameters in water; and

(b)-(c) Remain the same.

16.20.622 C-2 CLASSIFICATION (1) Remains the same.

(2) No person may violate the following specific water quality standards for waters classified C-2:

(a)-(g) Remain the same.

(h)(i) Concentrations of carcinogenic, bioconcentrating, toxic, or harmful parameters may not exceed levels which render the waters harmful, detrimental or injurious to public health. Concentrations of toxic parameters also may not exceed the applicable standards ~~levels~~ specified in department circular WQB-7.

(ii) Dischargers issued permits under ARM Title 16, chapter 20, subchapter 9, shall conform with ARM Title 16, chapter 20, subchapter 7, the nondegradation rules, and may not cause receiving water concentrations to exceed the applicable standards ~~levels~~ specified in department circular WQB-7 when stream flows equal or exceed the design flows specified in ARM 16.20.631(4).

(iii) If site-specific criteria are developed using the procedures given in the Water Quality Standards Handbook (US EPA, Dec. 1983), and provided that other routes of exposure to toxic parameters by aquatic life are addressed, the criteria ~~limits~~ so developed shall ~~may~~ be used as water quality stan-

dards for the affected waters and as the basis for permit limits instead of the applicable standards ~~levels~~ in department circular WQB-7.

(iv) Remains the same.

(3) The board hereby adopts and incorporates by reference the following:

(a) Department circular WQB-7, entitled "Montana Numeric Water Quality Standards" (1994 edition), which establishes standards ~~limits~~ for toxic, carcinogenic, bioconcentrating, and harmful parameters in water; and

(b)-(c) Remain the same.

16.20.623 I CLASSIFICATION (1) Remains the same.

(2) No person may violate the following specific water quality standards for waters classified I:

(a)-(g) Remain the same.

(h)(i)-(ii) Remain the same.

(iii) Beneficial uses are considered supported when the concentrations of toxic, carcinogenic, or harmful parameters in these waters do not exceed the applicable standards ~~levels~~ specified in department circular WQB-7 when stream flows equal or exceed the flows specified in ARM 16.20.631(4) or, alternatively, for aquatic life when site-specific criteria are developed using the procedures given in the Water Quality Standards Handbook (US EPA, Dec. 1983), and provided that other routes of exposure to toxic parameters by aquatic life are addressed. The limits so developed shall be used as water quality standards for the affected waters and as the basis for permit limits instead of the applicable standards in department circular WQB-7.

(iv) Limits for toxic, carcinogenic, or harmful parameters in new discharge permits issued pursuant to the MPDES rules (ARM Title 16, chapter 20, subchapter 9) are the larger of either the applicable standards ~~levels~~ specified in department circular WQB-7, site-specific standards, or one-half of the mean in-stream concentrations immediately upstream of the discharge point.

(3) The board hereby adopts and incorporates by reference the following:

(a) Department circular WQB-7, entitled "Montana Numeric Water Quality Standards" (1994 edition), which establishes standards ~~limits~~ for toxic, carcinogenic, bioconcentrating, and harmful parameters in water; and

(b)-(c) Remain the same.

16.20.624 C-3 CLASSIFICATION (1) Remains the same.

(2) No person may violate the following specific water quality standards for waters classified C-3:

(a) Remains the same.

(b) Dissolved oxygen concentration must not be reduced below the applicable standards ~~levels~~ specified in department circular WQB-7.

(c)-(g) Remain the same.

(h)(i) Concentrations of carcinogenic, bioconcentrating,

toxic, or harmful parameters which would remain in the water after conventional water treatment may not exceed the applicable standards ~~levels~~ set forth in department circular WQB-7.

(ii) Dischargers issued permits under ARM Title 16, chapter 20, subchapter 9, shall conform with ARM Title 16, chapter 20, subchapter 7, the nondegradation rules, and may not cause receiving water concentrations to exceed the applicable standards ~~levels~~ specified in department circular WQB-7 when stream flows equal or exceed the design flows specified in ARM 16.20.631(4).

(iii) If site-specific criteria are developed using the procedures given in the Water Quality Standards Handbook (US EPA, Dec. 1983), and provided that other routes of exposure to toxic parameters by aquatic life are addressed, the criteria ~~limits~~ so developed shall ~~may~~ be used as water quality standards for the affected waters and as the basis for permit limits instead of the applicable standards ~~levels~~ specified in department circular WQB-7.

(iv) Remains the same.

(3) The board hereby adopts and incorporates by reference the following:

(a) Department circular WQB-7, entitled "Montana Numeric Water Quality Standards" (1994 edition), which establishes standards ~~limits~~ for toxic, carcinogenic, bioconcentrating, and harmful parameters in water; and

(b)-(c) Remain the same.

16.20.641 RADIOLOGICAL CRITERIA (1) No person may cause radioactive materials in surface waters to exceed the standards ~~levels~~ specified in department circular WQB-7.

(2) The board hereby adopts and incorporates by reference department circular WQB-7, entitled "Montana Numeric Water Quality Standards" (1994 edition), which establishes limits for toxic, carcinogenic, bioconcentrating, and harmful parameters in water. Copies of the circular may be obtained from the Water Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620.

Rules 16.20.701 through 705 were repealed as proposed and can be found at pages 16-973 through 16-979 of the Administrative Rules of Montana.

RULE I (16.20.706) PURPOSE Same as proposed.

RULE II (16.20.707) DEFINITIONS Unless the context clearly states otherwise, the following definitions, in addition to those in 75-5-103, MCA, apply throughout this subchapter (Note: 75-5-103, MCA, includes definitions for "degradation", "existing uses", "high quality waters", and "parameter".):

(1)-(2) Same as proposed.

~~(3) "Existence value" means the value of the benefit that people may derive from the existence of a resource, without~~

~~regard to their use or consumption of it.~~

(3) "Degradation" is defined in 75-5-103, MCA, and also means any increase of a discharge that exceeds the limits established under or determined from a permit or approval issued by the department prior to April 29, 1993.

(4)-(8) Same as proposed.

(9) "Level 2 treatment" means ~~treatment which will remove at least 60% of the nitrogen from the raw state.~~ a waste water treatment system that will provide a higher degree of treatment than conventional systems, including the removal of at least 60% of nitrogen as measured from the raw influent load to the system. The term does not include treatment systems for industrial waste.

(10)-(17) Same as proposed.

~~(18) "Opportunity cost" means the value of a resource when used in its highest valued alternate use, regardless of its price or value in its current use.~~

~~(19)~~(18) "Outstanding resource waters" or "ORW" means all state waters that are located in national parks, national wilderness or primitive areas. ORW also means state waters that have been identified as possessing outstanding ecological, ~~recreational~~ or domestic water supply significance and subsequently have been classified as an ORW by the board.

~~(20)~~(19) "Permit" means either an MPDES permit or an MGWPCS permit.

~~(21)~~(20) "Reporting values" means the values listed as reporting values in department circular WQB-7, and are the detection levels that must be achieved in reporting ambient ~~or compliance~~ monitoring results to the department unless otherwise specified in a permit, approval or authorization issued by the department.

(22)-(25) Same as proposed but are renumbered (21)-(24).

RULE III (16.20.708) NONDEGRADATION POLICY--APPLICABILITY AND LIMITATION (1) Same as proposed.

(2) Department review of proposals for new or increased sources will determine the level of protection required for the impacted water as follows:

(a) Same as proposed.

(b) For high quality waters, degradation may be allowed only according to the procedures in [RULE VI]. These rules apply to any activity that may cause degradation of high quality waters, for any parameter, unless the changes in existing water quality resulting from the activity are determined to be nonsignificant under [Rules VII or VIII]. If degradation of high quality waters is allowed, the department will assure that within the United States geological survey hydrologic unit upstream of the proposed activity, there shall be achieved the highest statutory and regulatory requirements for all point and nonpoint sources. This assurance will be achieved through ongoing administration by the department of mandatory programs for control of point and nonpoint discharges.

(c) Same as proposed.

(3) Same as proposed.

RULE IV (16.20.709) INFORMATIONAL REQUIREMENTS FOR NON-DEGRADATION SIGNIFICANCE/AUTHORIZATION REVIEW (1) Any person proposing an activity which may cause degradation is responsible for compliance with 75-5-303, MCA. Except as provided in (2) below, ~~A~~a person may either:

(a) Same as proposed.

(b) submit an application to the department pursuant to ~~(2)~~ (3) below, for the department to make the determination.

(2) ~~Any person proposing an activity or class of activities which may cause degradation may complete a department "Application for Determination of Significance". Information required on the application includes but is not limited to the following:~~ The department will determine whether a proposed activity may cause degradation based on information submitted by the applicant for all activities that are permitted, approved, licensed, or otherwise authorized by the department.

(3) Any person proposing an activity or class of activities which may cause degradation and is not an activity included under (2) above may complete a department "Application for Determination of Significance". Information required on the application includes, but is not limited to, the following:

(a)-(e) Same as proposed.

(3)-(6) Same as proposed but renumbered (4)-(7).

~~(7)~~(8)(a) ~~In order for the department to determine whether or not the proposed activity will result in important economic or social development that exceeds the benefit to society of maintaining existing high quality waters and exceeds the costs to society of allowing degradation of high quality waters, the application shall include an analysis of the benefits and costs, including external environmental costs of the proposed activity, and including the net present value to society of the proposed activity as measured by the following:~~

~~(i) the present value of the benefits provided to society by the output of the proposed activity over its useful life; minus~~

~~(ii) the present value of the direct resource costs of construction and operation of the proposed activity over its useful life; and minus~~

~~(iii) the present value of the external environmental resource costs of the proposed activity over its useful life, including costs persisting after the proposed activity has ceased; and~~

~~(iv) an analysis of the loss or costs to society resulting from the lower water quality.~~

~~(b) Factors which should be considered in the analyses in (a) above include, but are not limited to, changes in any of the categories listed below:~~

~~(i) the value society places on the output to be produced by the proposed activity;~~

~~(ii) uncertainty in each of the factors that make up (a)(i) through (iv);~~

~~(c) Factors which also may be considered in the analyses in (a)(iii) and (iv) above include, but are not limited to, changes in any of the categories listed below:~~

~~(i) employment dependent on existing water quality;~~
~~(ii) effects on public health and the environment;~~
~~(iii) resource utilization and depletion;~~
~~(iv) existence values; or~~
~~(v) opportunity costs;~~ An applicant must demonstrate that the proposed activity will result in important economic or social development that exceeds the costs to society of allowing the proposed change in water quality. Factors to be addressed in the application may include, but are not limited to, the positive and negative effects of the following:

(i) allowing the proposed change in water quality;

(ii) employment considering the existing level of employment, unemployment, and wage levels in the area (i.e., increasing, maintaining, or avoiding a reduction in employment);

(iii) the fiscal status of the local, county, or state government and local public schools;

(iv) the local or state economies (i.e., increased or reduced diversity, multiplier effects);

(v) social or historical values;

(vi) public health;

(vii) housing (i.e., availability and affordability);

(viii) existing public service systems and local educational systems; or,

(ix) correction of an environmental or public health problem.

(b) Factors included in the demonstration required in (a) above must be quantified whenever this can be done reliably and cost-effectively. Other factors, which cannot be quantified, may be represented by an appropriate unit of measurement. If the department determines that more information is required, the department may require additional information from the applicant or seek such additional information from other sources.

(8)-(12) Same as proposed but renumbered (9)-(13).

RULE V (16.20.710) DEPARTMENT PROCEDURES FOR NONDEGRADATION REVIEW (1)-(2) Same as proposed.

(3) To determine that degradation is necessary because there are no economically, environmentally, and technologically feasible alternatives to the proposed activity that would result in no degradation, the department shall consider the following:

~~(a) In determining economic feasibility:~~

~~(i) any non-degrading or less degrading alternative water quality protection practices which are less than 125% of the present worth of capital and operating costs of the water quality protection practices proposed by the applicant will be rebuttably considered economically feasible without further assessment by the department;~~

~~(ii) for any non-degrading or less degrading alternative water quality protection practices which are equal to or exceed 125% of the present worth of capital and operating costs of the water quality protection practices proposed by the applicant,~~

~~the department will determine the economic feasibility of the alternative water quality protection practices by evaluating the benefits of the additional resulting water quality and the amount of the private net benefits with and without the alternative water quality protection practices.~~

(a) The department will determine the economic feasibility of the alternative water quality protection practices by evaluating the cost effects of the proposed alternatives on the economic viability of the project and on the applicant by using standard and accepted financial analyses.

(b) - (c) Same as proposed.

(4)(a) To determine that the proposed activity will result in important economic or social development that exceeds the benefit to society of maintaining existing high-quality waters and exceeds the costs to society of allowing degradation of high-quality waters, the department ~~must find, based on an analysis of the benefits and costs, including external environmental costs of the proposed activity and of the benefits of the existing water quality:~~

~~(i) that the benefits of the proposed activity are reasonably likely to significantly exceed the sum of all its costs, including the costs of lowered water quality;~~

~~(ii) that the risk inherent in finding (i) above is reasonable, given the uncertainty in benefits and costs.~~

~~(b) In making these findings the department shall consider the net present value to society of the proposed activity as measured by:~~

~~(i) the present value of the benefits provided to society by the output of the proposed activity over its useful life; minus~~

~~(ii) the present value of the direct resource costs of construction and operation of the proposed activity over its useful life; and minus~~

~~(iii) the present value of the external environmental resource costs of the proposed activity over its useful life, including costs persisting after the proposed activity has ceased; and~~

~~(iv) an analysis of the loss or costs to society resulting from the lower water quality.~~

~~(c) Factors which should be considered in the analyses in (a) and (b) above include, but are not limited to, changes in any of the categories listed below:~~

~~(i) the value society places on the output to be produced by the proposed activity;~~

~~(ii) uncertainty in each of the factors that make up (b)(i) through (iv) above;~~

~~(d) Factors which also may be considered in the analyses in (b)(iii) and (iv) above include, but are not limited to, changes in any of the categories listed below:~~

~~(i) employment dependent on existing water quality;~~

~~(ii) effects on public health and the environment;~~

~~(iii) resource utilization and depletion;~~

~~(iv) existence values; or~~

~~(v) opportunity costs;~~

~~(c) In making the finding in (4)(a), the department shall weigh those factors that are reasonably quantifiable, and must find that the magnitudes of the unquantifiable factors are not likely to reverse the finding.~~ must find that the proposed activity will provide important economic or social development which outweighs any cost to society of allowing the proposed change in water quality. In making its determination, the department may consider factors that include, but are not limited to, the following:

(i) effects on the state or local community resulting from increased employment opportunities considering the existing level of employment, unemployment, and wage levels in the area;

(ii) effects on the state or local economies;

(iii) effects on the fiscal status of the local, county or state governments and local public schools;

(iv) effects on the local or state economies (i.e., increased or reduced diversity, multiplier effects);

(v) effects on social or historical values;

(vi) effects on public health;

(vii) effects on housing (i.e., availability and affordability);

(viii) effects on existing public service systems and local educational systems; or,

(ix) correction of an environmental or public health problem.

(b) In making the determination required in (a) above, the department must weigh any costs associated with the loss of high quality waters against any social or economic benefits demonstrated by the applicant. The department may also consider as a cost to society any identified and/or quantifiable negative social or economic effects resulting from the proposed activity.

(5)-(8) Same as proposed.

RULE VI (16.20.711) DEPARTMENT PROCEDURES FOR ISSUING PRELIMINARY AND FINAL DECISIONS REGARDING AUTHORIZATIONS TO DEGRADE (1) Same as proposed.

(2) The preliminary decision must include the following information, if applicable:

(a)-(h) Same as proposed.

(i) a ~~description~~ specific identification of any mixing zone the department proposes to allow.

(3)-(8) Same as proposed.

RULE VII (16.20.712) CRITERIA FOR DETERMINING NONSIGNIFICANT CHANGES IN WATER QUALITY (1) The following criteria will be used to determine whether certain activities or classes of activities will result in nonsignificant changes in existing water quality due to their low potential to affect human health or the environment. These criteria consider the quantity and strength of the pollutant, the length of time the changes will occur, and the character of the pollutant. Except as provided in (2) below, changes in existing surface or ground water qual-

ity resulting from the activities that meet all the criteria listed below are nonsignificant, and are not required to undergo review under 75-5-303, MCA:

(a) activities that would increase or decrease the mean monthly flow of a surface water by less than 15% or the 7-day 10 year low flow by less than 10%;

(b) discharges containing carcinogenic parameters or parameters with a bioconcentration factor greater than 300 at concentrations less than or equal to the concentrations of those parameters in the receiving water;

(c) discharges containing toxic parameters or nutrients, except as specified in (d) and (e) below, which will not cause changes that equal or exceed the trigger values in department circular WQB-7. Whenever the change exceeds the trigger value, the change is not significant if the resulting concentration outside of a mixing zone designated by the department does not exceed 15% of the lowest applicable standard;

(d) changes in the concentration of nitrogen in ground water which will not impair existing or anticipated beneficial uses, where: ~~water quality protection practices approved by the department, referenced as level 2 treatment in Table I below, have been fully implemented, and where the sum of the resulting concentrations of nitrate, nitrite, and ammonia, all measured as nitrogen, outside of any applicable mixing zone designated by the department, will not exceed the values given in the table below, as long as such changes will not result in increases greater than 0.01 milligrams per liter in the nitrogen concentration in any perennial surface water;~~

(i) the incremental increase of nitrogen from human waste in ground water may not be more than 2.5 mg/l at the boundary of the applicable mixing zone;

(ii) the sum of the resulting concentrations of nitrate as nitrogen, outside of any applicable mixing zone, will not exceed the values given in Table I; and

(iii) the change will not result in increases greater than 0.01 milligrams per liter in the nitrogen concentration in any surface water.

See next page for Table I

Table I

EXISTING NITROGEN CONCENTRATION IN GROUND WATER	PRIMARY SOURCE OF EXISTING NITROGEN	NITROGEN CONCENTRATION AFTER THE PROPOSED ACTIVITY	REQUIREMENTS FOR NONSIGNIFICANCE
< 2.5 MG/L	HUMAN WASTE	<2.5 MG/L	NONE
		>2.5 <5.0 MG/L	LEVEL 2 TREATMENT
	OTHER	<5.0 MG/L	NONE
		>5<10 MG/L	SIGNIFICANT
2.5-5.0 MG/L	HUMAN WASTE	<5 MG/L	LEVEL 2 TREATMENT
		>5<10	SIGNIFICANT
	OTHER	<5	NONE
		>5<7.5	LEVEL 2 TREATMENT
		>7.5>10	SIGNIFICANT
5.0-7.5	HUMAN WASTE	ANY INCREASE	SIGNIFICANT
	OTHER	<7.5	NONE
		>7.5<10	SIGNIFICANT
>7.5	ANY	ANY INCREASE	SIGNIFICANT
		>10	NOT ALLOWED, VIOLATES STANDARDS
ANY LEVEL	ANY	NO CHANGE	NOT SIGNIFICANT

Table I. Criteria for determining nonsignificant changes for nitrogen in ground water. **(See next page for new Table I)**

EXISTING NITROGEN CONCENTRATION IN GROUND WATER AS OF APRIL 29, 1993	PRIMARY SOURCE OF EXISTING NITROGEN	PREDICTED NITROGEN CONCENTRATION AT THE EDGE OF THE MIXING ZONE AFTER THE PROPOSED ACTIVITY	REQUIREMENTS FOR NONSIGNIFICANCE FOR HUMAN WASTE DISPOSAL	REQUIREMENTS FOR NONSIGNIFICANCE FOR DISPOSAL OF OTHER WASTES
< 2.5 MG/L	HUMAN WASTE	<2.5 MG/L	NONE	NONE
		2.5 <5.0 MG/L	LEVEL 2 TREATMENT	NONE
		5<7.5	SIGNIFICANT	SECONDARY TREATMENT AS DEFINED BY THE DEPARTMENT
	OTHER	<5.0 MG/L	NONE	NONE
		5<7.5 MG/L	LEVEL 2 TREATMENT	SECONDARY TREATMENT AS DEFINED BY THE DEPARTMENT
		7.5<10	SIGNIFICANT	SIGNIFICANT
2.5-5.0 MG/L	HUMAN WASTE	<5 MG/L	LEVEL 2 TREATMENT	SECONDARY TREATMENT AS DEFINED BY THE DEPARTMENT
		5<7.5	SIGNIFICANT	SECONDARY TREATMENT AS DEFINED BY THE DEPARTMENT
	OTHER	<5	NONE	NONE
		5<7.5	LEVEL 2 TREATMENT	SECONDARY TREATMENT AS DEFINED BY THE DEPARTMENT
		>7.5	SIGNIFICANT	SIGNIFICANT
5.0-7.5	HUMAN WASTE	ANY INCREASE	SIGNIFICANT	SIGNIFICANT
	OTHER	<7.5	LEVEL 2 TREATMENT	SECONDARY TREATMENT AS DEFINED BY THE DEPARTMENT
		7.5	SIGNIFICANT	SIGNIFICANT
>7.5	ANY	ANY INCREASE	SIGNIFICANT	SIGNIFICANT
		10 or greater	NOT ALLOWED VIOLATES STANDARDS	NOT ALLOWED VIOLATES STANDARDS
ANY LEVEL	ANY	NO CHANGE	NOT SIGNIFICANT	NOT SIGNIFICANT

(e)-(g) Same as proposed.

(2)-(3) Same as proposed.

RULE VIII (16.20.713) CATEGORIES OF ACTIVITIES THAT CAUSE NONSIGNIFICANT CHANGES IN WATER QUALITY (1) The following categories or classes of activities have been determined by the department to cause changes in water quality that are nonsignificant due to their low potential for harm to human health or the environment and their conformance with the guidance found in 75-5-301(5)(c), MCA:

(a) activities which are nonpoint sources of pollution ~~on land~~ where reasonable land, soil, and water conservation practices are applied and existing and anticipated beneficial uses will be fully protected;

(b) Same as proposed.

(c) changes in existing water quality resulting from an emergency or remedial ~~response~~ activity that is designed to protect public health or the environment and is approved, authorized, or required by the department;

(i) Same as proposed.

(d)-(e) Same as proposed.

~~(f) activities which cause increases in the concentration of nitrogen in ground water which do not exceed those listed as nonsignificant in the table in Rule VII(1)(d) and the changes caused by such activities will not result in a change in the nitrogen concentration in any perennial surface water which exceeds the trigger values listed in department circular WQB-7;~~

~~(g)~~ (f) land application of animal waste, domestic septage, or waste from public sewage treatment systems ~~or other wastes~~ containing nutrients where wastes are land applied in a beneficial manner, application rates are based on agronomic uptake of applied nutrients and other parameters will not cause degradation;

(h)-(n) Same as proposed but renumbered (g)-(m).

~~(o) discharges of storm water in conformance with a permit issued by the department under the storm water permit program (ARM 16.20.1301 et seq.)~~

(2) Same as proposed.

RULE IX (16.20.714) IMPLEMENTATION OF WATER QUALITY PROTECTION PRACTICES Same as proposed.

16.20.1003 GROUND WATER QUALITY STANDARDS Same as proposed.

16.20.1010 MIXING ZONE Same as proposed.

16.20.1011 NONDEGRADATION Same as proposed.

RULE I (16.20.1801) PURPOSE Same as proposed.

RULE II (16.20.1802) DEFINITIONS The following definitions, in addition to those in 75-5-103, MCA, and ARM Title 16, chapter 20, subchapters 6 and 7, apply throughout this subchap-

ter:

(1)-(10) Same as proposed.

(11) "Standard mixing zone" means a mixing zone that meets the requirements of [RULES VIII and IX] and involves less data collection and demonstration than required for a source specific ~~nonstandard~~ mixing zone.

(12) Same as proposed.

(13) "Zone of influence" means the area under which a well can be expected to remove water.

~~(13)~~(14) The board hereby adopts and incorporates by reference department circular WQB-7, entitled "Montana Numeric Water Quality Standards" (1994 edition), which establishes standards ~~limits~~ for toxic, carcinogenic, bioconcentrating, and harmful parameters in water. Copies of the circular are available from the Water Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, MT 59620.

RULE III (16.20.1803) GENERAL CONSIDERATIONS FOR MIXING ZONE DESIGNATIONS (1) After an assessment of information received from ~~by~~ the applicant concerning the biological, chemical, and physical characteristics of the receiving water, as specified in [RULE IV] or as requested by the department, the department will determine the applicability of a mixing zone and, if applicable, its size, configuration, and location. In defining a mixing zone, the department will consider the following principles:

(a)-(b) Same as proposed.

(c) For sources discharging under a permit issued by the department prior to April 29, 1993, any mixing zone allowed under the permit will remain in effect until renewal. Upon renewal, any previously allowed mixing zone will be designated in the renewed permit, unless there is evidence that the previously allowed mixing zone will impair existing or anticipated uses.

(c)-(e) Same as proposed but are renumbered (d)-(f).

(2) Where the department determines that allowing a mixing zone at a given level for a parameter would threaten or impair existing ~~unreasonably interfere with or threaten a~~ beneficial use pursuant to this subchapter, discharge limitations will be modified as necessary to prevent the interference with or threat to the beneficial use. If necessary, these modifications may require achieving applicable numeric water quality criteria at the end-of-pipe for the parameter so that no mixing zone will be necessary or granted.

RULE IV (16.20.1804) WATER QUALITY ASSESSMENT (1) No mixing zone will be granted if it would threaten or impair existing ~~cause unreasonable interference with or danger to existing~~ beneficial uses. Before any mixing zone is allowed, the applicant must provide information, as requested by the department, to determine whether a mixing zone will be allowed as well as the conditions which should be applied.

(2) In making its determination, the department will con-

sider the following factors:

(a)-(g) Same as proposed.

(h) Ground water discharges to surface water: In the case of a discharge to ground water which in turn ~~ground water mixing zones may be modified where the ground water~~ discharges to surface water within a reasonably short time or distance, the mixing zone may extend into the surface water, and the same considerations which apply to setting mixing zones for direct discharges to surface water will apply in determining the allowability and extent of the mixing zone in the surface water ~~and currently available data indicate that surface water quality standards will be exceeded in the receiving surface water~~.

(i) Same as proposed.

RULE V (16.20.1805) SPECIFIC RESTRICTIONS FOR SURFACE WATER MIXING ZONES (1) Mixing zones for surface waters are to comply with the following water quality standards:

(a) Narrative water quality standards, standards for harmful substances, numeric acute and chronic standards for aquatic life, and standards based on human health must not be exceeded beyond the boundaries of the surface water mixing zone;

(b) Same as proposed.

(2) Same as proposed.

~~(3) A discharge which contains a parameter that is a carcinogen or that has a bioconcentration factor which exceeds 300 will not be granted a surface water mixing zone for that parameter. For these parameters, discharge limitations must be set at or below the naturally occurring concentration of the receiving water at the point of discharge.~~

(4) Remains the same but is renumbered (3).

RULE VI (16.20.1806) SPECIFIC RESTRICTIONS FOR GROUND WATER MIXING ZONES (1) Mixing zones for ground water are to be limited and comply with the following water quality standards:

(a) Human health based ground water standards must not be exceeded beyond the boundaries of the mixing zone~~;~~.

~~(b) A discharge which contains a parameter that is a carcinogen will not be granted a ground water mixing zone for that parameter. In this case, discharge limitations must be set at or below the naturally occurring concentration of the receiving water at the point of discharge.~~

(2) Same as proposed.

RULE VII (16.20.1807) DEPARTMENT PROCEDURES (1) The department will determine whether a mixing zone is appropriate for a particular discharge during the department's permit, permit renewal, approval, order, or authorization review process pursuant to the rules in this subchapter. The department may determine that:

(a)-(b) Same as proposed.

(c) the source specific ~~nonstandard~~ mixing zone applied for is appropriate; or

(d) Same as proposed.

(2) Same as proposed.

(3) ~~Any nonstandard mixing zone must be approved by the department.~~ A source specific mixing zone may not be used unless approved by the department.

(4) In making a determination of nonsignificance under the rules in ARM Title 20, chapter 16, subchapter 7, a person may use a standard mixing zone without approval from the department or request that the department specifically designate a mixing zone, which may be either a standard or source specific ~~nonstandard~~ mixing zone.

(5)-(6) Same as proposed.

RULE VIII (16.20.1808) STANDARD MIXING ZONES FOR SURFACE WATER (1)-(2) Same as proposed.

(3) Facilities that meet the terms and conditions in (a) through ~~and~~ (d) below qualify for a standard mixing zone as follows:

(a) Same as proposed.

(b) Facilities that discharge a mean annual flow less ~~greater~~ than 1 MGD ~~or that discharge~~ to a stream segment with a dilution less than 100:1. In cases where dilution is less than 100:1, discharge limitations will be based on dilution with 25% of the 7Q10.

(c) Facilities that discharge to surface waters through the ground may qualify for a standard surface water mixing zone ~~provided that acute and chronic standards are not exceeded in the surface water mixing zone~~.

(d) Same as proposed.

(4) The length ~~area~~ of a standard mixing zone for flowing surface water, other than a nearly instantaneous mixing zone, must not ~~exceed one half of the cross sectional area~~ extend downstream more than the one-half mixing width distance or extend downstream more than 10 times the stream width, whichever is more restrictive. For purposes of making this determination, the stream width as well as the discharge limitations are considered at the 7Q10 low flow. The recommended calculation to be used to determine the one-half mixing width distance ~~area~~ is described below.

(a)-(c) Same as proposed.

(5)-(6) Same as proposed.

RULE IX (16.20.1809) STANDARD MIXING ZONES FOR GROUND WATER (1) The following criteria apply to determine which discharges qualify for a standard ground water mixing zone:

(a)-(b) Same as proposed.

(c) To determine if the discharge qualifies for a standard ground water mixing zone, the person proposing the discharge must estimate the anticipated concentration of pollutants at the downgradient boundary of the mixing zone (aquatic life standards do not apply in ground water). If the estimated concentration meets the nonsignificance criteria at the boundary of the mixing zone, as specified in ARM Title 16, chapter 20, subchapter 7, the discharge qualifies for a standard mixing

zone.

(d) The estimation required in (1)(c) above, must be based on a calculation of the volume of water moving through a standard cross-section of aquifer. The calculated volume of water moving through the aquifer cross-section is hypothetically mixed with the known volume and concentration of the discharge to determine the resulting concentration at the boundary of the mixing zone. The recommended method to determine the resulting concentration at the boundary of a standard ground water mixing zone is described below:

(i)-(vii) Same as proposed.

(viii) The downgradient boundary of the standard mixing zone extends:

(A)-(B) Same as proposed.

(C) For subdivisions with centralized water service, to the exterior boundaries of the contiguous surrounding undeveloped land, if development of that land is prohibited in perpetuity and title evidence of this fact is provided to the department.

(C) Same as proposed but renumbered (D).

(ix) Same as proposed.

RULE X (16.20.1810) SOURCE SPECIFIC ~~NONSTANDARD~~ MIXING ZONES (1) If adequate information regarding stream flow or ground water flow is not available or if a standard mixing zone is not applicable or desired by the applicant, an applicant may request a source specific ~~nonstandard~~ mixing zone.

(2) A source specific ~~nonstandard~~ surface or ground water mixing zone will only be granted after the applicant demonstrates to the department that the requested mixing zone will comply with the requirements of [RULE IV and V] and the provisions of 75-5-303, MCA.

(3) Same as proposed.

(4) ~~For other surface waters, mixing zones must not exceed three fourths of the cross sectional area or 15 times the stream width, whichever is more restrictive. These area and width calculations must be performed using the procedures in [RULE VIII].~~

~~(5) The applicant may also demonstrate through field studies approved by the department that the requirements of 75-5-301(4), MCA, are satisfied.~~ For source specific mixing zones in other surface water, the applicant shall provide information adequate to demonstrate to the department that the requirements of 75-5-301(4), MCA, are satisfied. In addition, the applicant shall present a discussion of the mixing zone in the context of the restrictions and general considerations specified in [Rule IV], and information addressing the following items, as applicable:

(a)-(j) Same as proposed.

~~(6)~~ (5) For source specific ~~nonstandard~~ mixing zones in ground water the applicant shall provide information adequate to demonstrate to the department that the requirements of 75-5-301(4), MCA, are satisfied. In addition, the applicant shall present a discussion of the mixing zone in the context of

the restrictions and general considerations specified in [Rule IV], and information addressing the following items, as applicable:

(a)-(l) Same as proposed.

7. The board received a number of comments on these four sets of rules. All of the comments have been consolidated and reviewed; department response follows:

RESPONSES TO COMMENTS ON THE PROPOSED ADOPTION OF RULES I THROUGH IX REGARDING THE NONDEGRADATION POLICY AND THE PROPOSED AMENDMENT OF THE STATE'S SURFACE WATER QUALITY STANDARDS

The following responses have been prepared for comments submitted pursuant to MAR Notice No. 16-2-440 (Nondegradation rules) and for MAR Notice No. 16-2-441 (Amendments of Surface Water Quality Standards). The first portion of the responses address comments on the amendments of the surface water quality standards, including the adoption of WQB-7. The second portion of the responses are for comments on the proposed adoption of the nondegradation rules.

Each rule or section of a rule that was commented upon has been set forth with the comments and responses listed under that particular rule. The responses address requested changes in the rules, as well as questions on the application or meaning of a rule. To the extent practicable, each commentor has been identified by number in the comments. An index of the commentors has been attached for the reader's reference.

PUBLIC COMMENTS RECEIVED
NOVEMBER 15, 1993 TO DECEMBER 22, 1993

NO.	NAME		
1	Robert Hafferman	22	Dave Gano
2	John Standish	23	Senator Steve Doherty
3	Ronald B. Willson	24	Janice B. Metzmaker
4	Ralph A. Stone	25	Dr. William M. Schafer
5	Deborah E. Boots	26	Mr. Grant D. Parker
6	Ron Stirling	27	Mr. Dan Fraser
7	Martin S. "Marty" Dirden	28	Mr. Dan Fraser
8	Gary R. Maxwell	29	Dr. Abe Horpestad
9	John Agnew	30	Dr. Vicki Watson
10	Gordon J. Stockstad	31	Jack A. Stanford
11	Louis & Marie Zinne	32	Jim Carlson
12	Bill Leonard	33	Paul Hawks
13	Anne Hamilton	34	Richard C. Parks
14	William E. Leonard	35	Florence Ore
15	Jim Valeo	36	Dick Wollin
16	Robert F. Lindstrom	37	Dennis J. Klukan
17	Senator Bill Yellowtail	38	John F. Wardell
18	M.B. FitzGerald	39	David W. Simpson
19	Jim Barrett	40	C.B. Pearson
20	Elbert "Butch" Ott	41	Roger Perkins
21	David K. Young	42	Alan Joscelyn
		43	Bruce Gilbert

44 John E. Bloomquist
45 Montana Stockgrowers Assn
46 Ted Doney
47 Alan Rollo
48 Ken Haag
49 Joe Steiner
50 Nancy Griffin
51 Brian Sugden
52 Rick Duncan
53 John W. Duncan
54 Vicki Hyatt
55 James E. Leiter
56 Ruth Watkins
57 Bill, Plummer Enterprises
58 Representative Gary Feland
59 Bill Schottelkorb
60 Will I. Selser
61 Lewis & Clark Co. Water Quality Protection District
62 Myrtle Olson
63 Clarence & Maxine Kohles
64 Don A. Essig
65 Montana Coal Council
66 Byron D. Stahly
67 Carla & Chandler Pyle
68 Senator Henry McClernan
Senator Chuck Swysgood
Senator Lorents Grosfield
69 Wilbur Wood
70 Jim Milligan
71 Constance M. Cole
72 Janet H. Ellis
73 Michael E. Murphy
74 Edgar C. Scott
75 Bruce Farling
76 David Sawyer
77 John H. Hoak
78 Ted J. Doney
79 Curtice Martin Herefords
80 David Owen
81 Paul R. & Bettie Erickson
82 Gary W. Christianson
83 Ric Smith
84 Collin Bangs
85 C.R. Kendall
86 Jerry Iverson
87 Arlene Montgomery
88 John Bloomquist
89 Linda L. Saul
90 Senator Lorents Grosfield
91 Leo A. Giacometto
92 Dr. William M. Schafer
93 Charles M. Rose
94 Jill Davies
95 Gary Amestoy
96 Howard Newman
97 Vito A. Ciliberti, Jr.
98 Dale Ortman
99 Mavis & Bob McKelvey
100 Jack Logozzo
101 Dennis & Pauline Gordon
102 Stuart E. Crook
103 Elbert "Butch" Ott
104 Michael W. Fraser
105 Ellen Knight
106 Michael McLane
107 Mark Simonich
108 Rhonda Swaney
109 Peter Lesica
110 Mary S. Beer
111 Leo Berry
112 Don Allen & Associates
113 Peggy Olson Trenk
114 John Youngberg
115 Sandra M. Stash
116 Bob & Pegs Shotliff
117 Alice & Briggs Austin
118 Paul Langley
119 Vicki Watson
120 Richard Parks
121 Allan R. Lowry
Fred Pambrun
Dan Geer
122 Gordon Morris
123 Rosebud County
Powell County
Park County
Garfield County
Powder River County
Sweet Grass County
Toole County
McCone County
Treasure County
Beaverhead County
Wibaux Board of County Commissioners
Blaine County
Gallatin County
Golden Valley County
Madison County
Custer County
Lincoln County
124 Unified Disposal Board
125 Mr. M.K. Botz

PERSONS WHO COMMENTED ORALLY ONLY, AND INDEX TO THOSE COMMENTS

1 Ms. Kathy Smitt. Response covered in the response to written comments Nos. 6, 7, 40, 43, 70, 314.
2 Ms. Joan Humiston. Response covered in the response to written comments Nos. 321, 324, 361.
3 Ms. Tamara Sue Blackford. Response covered in the response to written comments Nos. 173, 321, 324, 361.
4 Mr. Scott Anderson. This oral comment was a statement of support for the proposed rules. The comment is noted.
5 Ms. Mona Jamison. Response covered in the response to written comments Nos. 39, 86, 90, 92, 324, 257.
6 Mr. Don McAndrew. Response covered in the response to written comments Nos. 362, 368, 283.
7 Mr. Doug Parker. Response covered in the response to written comments Nos. 6, 7, 43, 58, 59, 60, 64, 70.
8 Mr. John Marsden. Response covered in the response to written comments Nos. 1, 6, 7, 46, 58, 60, 77, 122, 134, 175, 168, 181, 208, 233, 262, 266, 301, 312, 314, 343.

CIRCULAR WQB-7: MONTANA NUMERIC WATER QUALITY STANDARDS

1. COMMENT: Commentors 2, 25, 39, 42, 43, 73, 77, 78, 80, 96, 112, 113, and 125 state that the water quality standards of WQB-7 should be established using the criteria that are used by EPA in establishing maximum contaminant levels (MCL's) pursuant to the Safe Drinking Water Act.

RESPONSE: This approach was considered and rejected for the following reasons: (1) The MCL's are derived through a process which first develops the desirable safety level or goal, the Maximum Contaminant Level Goal or the "MCLG". For most carcinogenic substances that level is zero. The MCL standard is then derived through practical considerations such as the ability or inability to achieve the MCLG by treatment and the costs of such treatment. In many cases the safe level cannot be achieved regardless of cost, in other cases the costs are prohibitive. Thus, many of the MCL's are deliberately set at levels that are known to be unsafe. In the case of water quality standards, these standards are set to prevent increases of contaminants in our waters because we know they are harmful and because we know that it is either too expensive or impossible to remove them once they are introduced to state waters; and, (2) Due to the considerations used in the process of deriving MCLs for the treatment of drinking water, EPA will not approve state water quality standards that are based on practical considerations of costs or the technical feasibility of treatment. Rather, the standards must be set to protect and maintain water quality. Therefore, the standards will remain as proposed subject to modifications made in response to comments.

2. COMMENT: Commentors 20 and 103 state that it is unclear how the proposed standards were set. What studies were conducted to validate these standards for Montana?

RESPONSE: For the most part these standards are the water quality criteria developed by the EPA under Section 304(a) of the Federal Clean Water Act or the MCLG's developed by the EPA under the Safe Drinking Water Act. Validating these standards for Montana in a manner that would be scientifically defensible would require many years of research at a prohibitive cost. As an alternative to such validation, a provision in the water quality standards allows a discharger to develop site specific standards using approved procedures. These site specific standards will then become the state standards for that water. See e.g., ARM 16.20.623 (2)(h)(iii). Unfortunately, this present language is not clear and, as a result, modifications to this language are being made in the revised surface water quality standards.

3. COMMENT: Commentor 20 states that we recognize the need to comply with federal standards. We do not believe that the standards need to be overly stringent to reach required compliance levels. We believe this can be done in such a way that the door to future growth and development is not shut.

RESPONSE: The proposed rules, as modified in response to comments, achieve this balance.

4. COMMENT: Commentors 74, 85, 92, and 93 state that WQB-7 should use drinking water MCL's and Gold Book aquatic life standards - not standards based on human health risks.

RESPONSE: The rational for not using the MCL's is given in Response 1. In addition, the current aquatic life standards as developed by EPA are the standards listed in WQB-7. Many of the Gold Book Standards are outdated and, therefore, will not be used as the appropriate level for the protection of human health and the environment.

5. COMMENT: Commentors 30 and 119 state that in WQB-7 there should be an amendment to clarify that, when two criteria are cited, the lower or more protective of the two will be used.

RESPONSE: This change has been made for clarification.

6. COMMENT: Commentors 71, 93, 98, 113, 114, 115, and 126 state that Practical Quantification Levels (PQL's) must be established for all parameters in WQB-7, and detection levels should be the PQL's.

RESPONSE: Practical Quantification Levels (PQL) are not applicable to water quality standards and significance determinations under the nondegradation rules. WQB-7 has been modified to replace "detectable" with "trigger values" for toxic parameters and a required reporting level for all parameters. The trigger value represents a level of change in a parameter in the receiving water, which determines whether or nor the activity would result in degradation. It should be applied in a

predictive manner. If the change in water quality is less than the trigger level then the activity is considered nonsignificant.

The trigger value is based on the Method Detection Limit (MDL) approach and does not consider Practical Quantification Levels (PQL). The MDL is a statistical method of estimating the lowest concentration that can be determined to be statistically different from a blank specimen (zero concentration) with a 99% probability. This is a valid approach within the context of Montana's Nondegradation Policy as expressed in SB 401. The trigger value does not represent a level of analysis for routine sampling. Also see Response 8.

7. COMMENT: Commentor 93 states that the PQL's must be demonstrated to have been exceeded using established statistical methods.

RESPONSE: Practical Quantification Levels (PQL) are not used to determine compliance with water quality standards. PQLs are arbitrarily set at 2 to 500 times the Method Detection Limit (MDL) depending on the media. The required reporting level is based on levels actually achievable at both commercial and government laboratories using accepted methods. Neither WQB-7 or the nondegradation rules are proposing procedures for determining compliance. Compliance is established through the use of statistical techniques as well as other technical review criteria which are established on a programmatic basis. Also see Response 6.

8. COMMENT: Commentor 115 states that metal standards should be based on dissolved concentrations, because using total recoverable concentrations is too conservative, and is in conflict with EPA recommendations.

RESPONSE: While the use of total recoverable concentrations is conservative, their use is appropriate for the following reason. Aquatic organisms are subjected to elevated metal concentrations from sources other than water. These other sources include ingestion of contaminated sediment and organisms with elevated concentrations of metals. EPA's recommendation for the use of dissolved concentrations acknowledges these other sources and states that these sources can be controlled through the use of standards for contaminants in sediment. At the present time, standards for sediments have not been developed. When such standards are developed, the issue of total recoverable versus dissolved concentrations will be revisited. For these reasons, the proposed change to dissolved concentrations will not be made.

9. COMMENT: Commentor 115 states that MCL's are standards for the protection of human health and should be used for ground water nondegradation review. Other values in WQB-7 for human health are based on water and fish ingestion and are not appropriate for the protection of ground water.

RESPONSE: The issue of MCL's has been discussed in response to comment 1. While it is true that the human health values are based on water and fish ingestion, the effect of recalculating these values to exclude fish ingestion is minor for most parameters (for arsenic the recalculated value is .020 parts per billion (PPB) compared to 0.018 PPB). In addition, most discharges to ground water end up in surface water and, in many cases surface water standards are below the measurable levels. This means that once there is a discharge to ground water, it is not possible to determine at what level the contaminant is when it reaches surface water. For this reason, the rules will not be changed in response to this comment.

10. COMMENT: Commentor 119 states that the lack of a standard for Acenaphythlene (CASRN 208969) represents a decrease in protection for this parameter, as it was listed in the previous standards.

RESPONSE: Acenaphythlene was inadvertently left out of the originally proposed WQB-7. The final version of WQB-7 includes this parameter.

11. COMMENT: Commentor 119 states that the Gold Book aquatic life criteria for Acrolein should be added to WQB-7. The Department should not adopt any standards in WQB-7 that are higher than the standards in the Gold Book without written justification.

RESPONSE: Acrolein was listed in EPA's Gold Book but was not listed as a standard. The Gold Book listing for this parameter listed the "lowest observed effect levels" and a note that there is "sufficient data to develop criteria". The criteria for Acrolein will remain as proposed since it is consistent with EPA criteria.

12. COMMENT: Commentors 115 and 125 state that Montana should not adopt the human health risk based number for arsenic for the following reasons: (1) recent evidence casts doubt on the validity of this number; (2) the proposed level cannot be detected; and (3) the natural background concentration of arsenic exceeds the proposed standard.

RESPONSE: The human health number for arsenic in the proposed rule will not be changed for the following reasons: (1) Although recent evidence may cast some doubt on this number, it is not prudent to change the standard until the issue is resolved; (2) Detection levels have no relationship to standards. That is, standards must be set to protect uses, not because the parameter can or cannot be measured at that level; and (3) The effect on public health is not determined by the source of the contaminant, but only by its level. The standards refer to any increases of a contaminant, not to natural levels.

13. COMMENT: Commentor 10 states that color is categorized as

"harmful" without any standards adopted. How will degradation be determined? To effectively implement this in the field concise guidelines are necessary.

RESPONSE: The standards for color are contained in the surface water quality standards and WQB-7 refers to these standards. Nondegradation for color is determined by (1)(f) of Rule VII.

14. COMMENT: Commentor 10 suggests that phosphorus is a ground water problem and unrelated to surface water impacts. The rules should not require that phosphorus be addressed in surface water related activities.

RESPONSE: Phosphorus is not a problem in ground water, but has a major effect on water uses through its fertilizing effect in surface waters. Therefore, the final rules will require that phosphorus be addressed in surface water related activities.

15. COMMENT: Commentor 95 states that the iron limit in WQB-7 is more restrictive than the current permit limits; how will this affect current permit holders? Will there be a transition process?

RESPONSE: The limits in permits are set so that the standards in the receiving water will not be violated. The limit in WQB-7 for iron is the same as the current standards. Therefore, there should be no change or need for a transition period in setting permit limits.

16. COMMENT: Commentors 30, 32, 47, and 119 state that WQB-7 changes the standards for dissolved oxygen. In some instances this appears to be less protective than are current standards. As such, these provisions may violate the Water Quality Act or the Federal Clean Water Act (CWA), which do not allow lowering the water classifications except under specific circumstances.

RESPONSE: There is no prohibition against modification of standards. There is a prohibition against downgrading of classifications, if it may impact a protected use. If a standard such as dissolved oxygen is more stringent than necessary to protect the uses under a classification, it can be changed without violating the Montana Water Quality Act or the CWA.

17. COMMENT: Commentor 38 states that dissolved oxygen, pH, and temperature should not be classified as "toxic parameters" but as "habitat parameters."

RESPONSE: Introduction of a new classification such as "Habitat Parameters" is unnecessary and undesirable as these parameters are adequately controlled under the proposed categorizations.

18. COMMENT: Commentor 3 stated that the first line on page 13 of WQB-7 should be changed from "silver, total recoverable" to "silver, dissolved."

RESPONSE: Although the use of a "total recoverable" analysis may be conservative in some instances, all of the standards are based on this analysis. The rational for using total recoverable has been discussed in Response 8. For the reasons stated in Response 8, the proposed change will not be made.

19. COMMENT: Commentor 3 states that the Human Health Standard for silver listed in WQB-7 should be deleted because silver does not have human health concerns.

RESPONSE: EPA's current standards, which replace the Gold Book, are listed in "EPA Region VIII CWA Section 304(a) Criteria Chart Indicating Published Criteria and Updated Human Health Values", dated July 1, 1993. This publication lists human health criteria for silver. To be consistent with federal standards, the criteria for silver will remain as proposed.

20. COMMENT: Commentor 64 asks what is the definition of "harmful"? Who determines what parameters are harmful and at what level?

RESPONSE: Harmful is used to designate those parameters for which secondary drinking water standards were established by EPA and adopted by the State. The term also includes other parameters that are known to cause objectionable taste or odors in water or fish flesh. Levels for these parameters are established to prevent impacts on the use of waters for public consumption.

21. COMMENT: Commentor 115 states that it appears that waters classified B-2 have two sets of dissolved oxygen standards in note 15 of WQB-7.

RESPONSE: This error has been corrected in the final rule. One of the B-2 classifications should have been listed as B-3.

22. COMMENT: Commentor 125 states that "...EPA Group B-2 parameters ("...inadequate or lack of human data.") and Group C parameters ("...inadequate or lack of human data.") are listed as carcinogens on the table. The EPA has recently changed the status of the B-2 parameters beryllium and states "Beryllium-no longer considered human carcinogen..." (1993 USEPA Region IV document). Parameters in the B-2 and C categories in Circular 7 should be more closely evaluated before they are defined as carcinogens."

RESPONSE: EPA has been consulted on the status of Beryllium and, due to the conflicting positions within EPA on whether or not this parameter is a human carcinogen, the state standards should list Beryllium as a carcinogen until more information is obtained. The inclusion of possible carcinogens (Group C), probable carcinogens (Group B), as well as known carcinogens (Group A) is consistent with EPA requirements. Therefore, these categories will remain as proposed.

23. COMMENT: Commentor 125 states that in the equations for acute and chronic toxicity a footnote should be added to the effect that, if water hardness is less than 25 mg/L, the hardness will be made equal to 25 mg/L.

RESPONSE: This change has been made in WQB-7. In addition, an upper limit of 400 mg/l has also been set so that the equation relating hardness to toxicity is limited to the range of data used to develop the relationship.

24. COMMENT: Commentor 38 states that in reviewing WQB-7, they found a number of what appear to be typographical errors, the circular should undergo one more thorough review.

RESPONSE: The values in WQB-7 have been thoroughly reviewed and are correct based on current information.

25. COMMENT: Commentor 49 asks the following: (1) what is the basis to determine what additional parameters to add to WQB-7, beyond those in the Gold Book; and (2) what is the criteria that was used to set the level of the standards?

RESPONSE: In addition to the parameters required by EPA pursuant to section 304(a) of the Federal Clean Water Act (i.e., the state's surface water quality standards), WQB-7 includes parameters for which the EPA has adopted drinking water standards and also includes standards currently listed in the state's surface water quality standards for which there are no EPA criteria. The criteria for setting current levels in WQB-7 were derived from "EPA Region VIII CWA Section 304(a) Criteria Chart Indicating Published Criteria and Updated Human Health Values" (dated July 1, 1993), EPA's drinking water standards, and existing state standards.

26. COMMENT: Commentor 68 states that any changes in WQB-7 must go through the normal rulemaking process.

RESPONSE: Any changes in WQB-7 will be made in accordance with the requirements of § 2-4-307, MCA, which authorizes adoption by reference of certain publications.

27. COMMENT: Commentor 115 states that many of the values in WQB-7 are not consistent with EPA criteria, including Aldrin, Endosulfan, Endrin, Heptachlor, Heptachlor Epoxide, and Gamma-hexachlorocyclohexane.

RESPONSE: The values in WQB-7 for all parameters are consistent with current EPA criteria.

28. COMMENT: Commentor 125 suggests that due to the recent development of Circular WQB-7, there has not been sufficient time to evaluate the implications of these newly imposed standards.

RESPONSE: Of the 188 parameters in WQB-7, there are state-adopted standards for 135 of these parameters in the current standards. Of the remainder, 30 are required by EPA under section 304(a) of the federal Clean Water Act, and the remaining 23 are based on State drinking water standards.

29. COMMENT: Commentor 125 states that some parameters in Circular WQB-7 are termed harmful (e.g. odor, temperature, and turbidity) but are defined as toxic by proposed Rule II(18).

RESPONSE: This has been corrected in WQB-7.

30. COMMENT: Commentor 125 states that a minor problem in Circular WQB-7 is an inconsistency between the table, which lists metals as total recoverable and page 1, note 17 of WQB-7.

RESPONSE: Note 17 has been modified to clarify that surface water quality standards are based on total recoverable analyses. In contrast, the trigger values and reporting values for ground water are based on dissolved concentration analyses.

PROPOSED AMENDMENT OF RULES 16.20.603, 616-624, AND 641

16.20.603(2) - DEFINITIONS - BIOCONCENTRATING PARAMETERS
31. COMMENT: Commentor 64 asks why the value is 300 for bioconcentration factor in defining "bioconcentrating parameters", what is the rationale or significance of a factor of 300?

RESPONSE: When the bioconcentration factor exceeds 300, the potential impact to human health from consumption of aquatic organisms exceeds that from consumption of water. Thus, there can be serious impacts to human health when the bioconcentration factor exceeds 300, even though the concentration of the parameter in the water is very low.

16.20.603(15) - DEFINITIONS - NATURALLY OCCURRING
32. COMMENT: Commentor 94 suggested that the term "naturally occurring" in the surface water quality standards should be amended. The definition, as it now reads, results in adverse impacts to water quality from nonpoint sources and a lack of enforcement over these sources.

RESPONSE: The proposed rule changes are being made to update the state's surface water quality standards, not to address the regulatory control of nonpoint sources. More importantly, the definition of "naturally occurring" is derived from the definition of "natural" contained in § 75-5-306(2), MCA. The definition in the rule will not be changed as it is consistent with existing state law.

16.20.603(30) - DEFINITIONS - WQB-7
33. COMMENT: Commentor 115 states that WQB-7 should be reviewed annually and revised as necessary.

RESPONSE: Section 75-5-301, MCA, of the Montana Water Quality Act requires the Department to review adopted standards at intervals not to exceed three years and to revise them as necessary. This review includes the standards adopted in WQB-7.

16.20.617 through 622 and 16.20.624 - CLASSIFICATION

34. COMMENT: Commentor 49 states that section (h)(i) and (ii) in 16.20.617 through 622 and 16.20.624 should be clarified due to the difference in terms proposed under those sections. Paragraph (h) (i) seems to indicate that effluent concentrations cannot exceed the MDHES WQB-7 standards. Yet paragraph (h)(ii) seems to indicate that instream concentrations for MPDES permittees shall not be exceeded. Is it instream concentrations or effluent concentrations?

RESPONSE: Sections (h)(i) and(ii), read together with (3) of the above referenced classification rules, clearly indicate that (h)(i) refers to the waters, which indicates "instream concentrations", not "effluent concentrations". Therefore, no clarification in the rules is necessary.

16.20.623 - I CLASSIFICATION - PARAMETERS

35. COMMENT: Commentor 95 states that the regulated parameters in ARM 16.20.623 are different than those in the other rules establishing surface water standards. Is this deliberate?

RESPONSE: Yes. ARM 16.20.623 refers to the I classification of waters. The uses, and therefore the standards for waters within this classification, are different from the standards established to protect different uses in the other classifications.

PROPOSED ADOPTION OF NEW RULES AND REPEAL OF EXISTING RULES (NONDEG)

RULE I(1) - PURPOSE

36. COMMENT: Commentor 108 states that the term "limited circumstances" in Rule I is not clear and should be defined.

RESPONSE: The term is clear when read in conjunction with the requirements imposed by § 75-5-303, MCA, and the proposed rules. Section 75-5-303, MCA, allows degradation only upon a demonstration that there is no alternative treatment that would prevent degradation and upon a showing of economic and social importance. Since the rules describe the limited circumstances in which degradation is allowed, no further clarification in the rules is necessary.

RULE II - DEFINITIONS - FIRST PARAGRAPH UNNUMBERED

37. COMMENT: Commentor 95 states that in Rule II "indicates" should replace "states" because the context of a rule usually does not clearly state.

RESPONSE: The intent of using "states" is to clarify that the meanings provided under Rule II are controlling. If a particular rule expressly states that a different meaning is intended

for purposes of that rule, only then will the meaning differ from that given under the definition. The term "states" more clearly expresses the intent of the rule and will remain as proposed.

38. COMMENT: Commentor 95 states that the following terms should be defined in Rule II: surface water mixing zones, ground water mixing zones, intrinsic values, point sources, and nonpoint sources.

RESPONSE: Definitions for "mixing zone" and "point source" are found in the Water Quality Act and, therefore, will not be repeated in the proposed rules. Under Rule II, "nonpoint source" and "existence values" are defined. The term "intrinsic values" has been deleted from the rules and has been replaced with "existence values".

39. COMMENT: Commentor 104 states that degradation must be defined as a change which diminished or inhibits a use, thus, the limit for nitrogen should be the drinking water standard of 10 mg/l or slightly less at the property boundary.

RESPONSE: Degradation is defined in the statute and cannot be changed by rule. The definition, together with the policy, is intended to maintain existing high quality waters, not protect uses. Therefore, changing the definition to allow levels of contaminants to reach the standards, which are designed to protect uses, is inappropriate.

RULE II(3) - DEFINITIONS - DETECTABLE

40. COMMENT: Commentor 27 is DHES' proposal to change the definition of "detectable". The proposed change will clarify that this definition is to be used for determinations of significance, not for the establishment of monitoring requirements.

RESPONSE: It became apparent during the comment period that the use of the word "detectable" causes unnecessary confusion. Therefore, the proposal of DHES to modify this definition is not included in the final rule. "Detectable" has been replaced with "trigger value" to more clearly indicate that these values are to be used only as a "trigger" or "action" levels to determine if a given activity will cause degradation.

In addition, many commentors pointed out the need for standards that can actually be detected under natural conditions. When the standards for a parameter are lower than the detection levels, enforcing the standards becomes problematic. In the response to comment 1, it is explained that standards should be set at effect levels, not at detection levels. However, WQB-7 has been modified to include a "reporting level". This is the detection level that must be achieved in reporting ambient or compliance monitoring results to the department. In addition WQB-7 includes a provision that higher detection levels may be used if it has been demonstrated that the higher detection levels will be less than 10% of the median levels in

the sample.

41. COMMENT: Commentors 73 and 85 state that the levels used for determining "detectable" should be consistently and accurately achieved in normal laboratory practice.

RESPONSE: See Response 1.

42. COMMENT: Commentor 106 supports the department's proposed change to the definition of detectable.

RESPONSE: Comment noted.

43. COMMENT: Commentors 122 and 125 state that in Rule II the definition of "detectable" should be replaced with the definition of "Practical Quantification Level"(PQL). PQL is the lowest concentration of a parameter in water that can be reliably determined within specified limits of precision and accuracy by well-operated laboratories operating conditions using analytical methods described in 40 CFR 136. Commentor 125 further suggests adding a definition of "measurable increase", which measures increases in the values of a parameter using PQLs and 40 CFR 136.

RESPONSE: See Response Nos. 6 and 7.

RULE II(4) - DEFINITIONS - EXISTING WATER QUALITY

44. COMMENT: Commentors 73 and 93 state that the last half of Rule II(4) should be deleted so that the existing water quality would be the quality immediately prior to commencing a proposed activity.

RESPONSE: The nondegradation policy was enacted to protect existing high quality waters beginning in 1971 when the policy was first adopted. The definition of "existing water quality" is consistent with the purpose of the nondegradation policy, which is to maintain and improve the quality of water. Whenever water quality improved after 1971, the nondegradation policy has acted to protect that quality of water. Therefore, the definition of "existing high quality" will remain as proposed, as it protects the highest quality of water achieved since the policy's enactment in 1971.

45. COMMENT: Commentor 38 states that the rules contain no details explaining exactly how existing water quality will be determined. EPA expects the Water Quality Bureau to develop specific guidance in this area.

RESPONSE: Guidance will be developed for implementation of the rules when problems and issues related to implementation of the policy become more concrete. At that time, guidance will be developed to clarify procedures for implementation of the nondegradation policy. This guidance will likely be revised whenever necessary to address issues that arise during implementa-

tion and to conform to any changes required by law.

RULE II(13) - DEFINITIONS - NEW OR INCREASED SOURCE

46. COMMENT: (1) Commentor 42, 43, 44, 45, 46, 73 and 88 request deletion of all language after "water right" in Rule II(13)(c) because any new water right will be subject to the Water Quality Act regardless. The change should be made to prevent conflicts between DNRC's administration of water rights and DHES' enforcement of the Water Quality Act. (2) A second sentence to exempt return flows from a valid water right should be included in this section. (3) Commentors 42, 43, 44, and 45 recommend that the term "activity" in the definition of "new or increased source" should be deleted and replaced with "discharge".

RESPONSE: (1) Section 13(c) makes it clear that only valid water rights existing prior to the effective date of the nondegradation law are excluded from the nondegradation requirements. The policy applies to any activity, such as the acquisition of a water right, that may degrade high quality waters. Furthermore, there is no authority under the Water Quality Act to exempt water rights acquired after the effective date from the nondegradation policy. Any potential conflicts that may arise between DNRC and DHES concerning their authority to administer programs is not an appropriate basis for the proposed exemption. Therefore, the requested change will not be made.

(2) Section 13(c)'s exclusion of valid water rights existing prior to April 29, 1993, is intended to include return flows of that water right. As this is a logical extension of the rule, no change to the proposed rule is necessary.

(3) SB 401 authorizes the board to adopt rules that will determine when an activity or class of activities is or is not degradation. The term "activity", as used in the proposed rule, is appropriate and will not be changed.

47. COMMENT: Commentors 26, 30 and 120 state that it is inappropriate for the legislation to apply only to new or increased sources, if such activities take place after April 29, 1993. The definition should include all new or increased sources occurring since 1971, the date of the state's original nondegradation policy.

RESPONSE: The nondegradation policy enacted in 1971 was amended by SB 401, which expressly states that it applies to applications received after the amendment's effective date of April 29, 1993. The law is clear that the new requirements and procedures established by SB 401 are to apply only to new or increased sources occurring after the effective date. New or increased sources occurring between July 1, 1971 and April 29, 1993, were subject to the requirements and procedures of the 1971 policy.

48. COMMENT: Commentors 32, 47, and 120 state that Rule II(13)(a) allows a "grand-fathering" of permitted and approved

facilities, not currently discharging to state waters. As such, the rule does not comply with legislative intent to protect and maintain existing quality of state waters. This provision, by excluding future increases of discharge to state waters from the nondegradation policy, is allowing for substantial degradation of water, potentially up to the state's water quality standards.

RESPONSE: While Rule II(13)(a) allows changes to water quality as a result of sources discharging under a permit or approval obtained prior to the enactment of the new law, the legislature never intended to subject those specific sources to the requirements of SB 401. This conclusion is based upon Section 10 of SB 401, discussions before the Senate Natural Resources Committee, and the comments of the legislators who appeared before the board in support of the proposed rules. Rule II(13)(a) will remain as proposed because it follows legislative intent in excluding such permitted discharges from the new law.

49. COMMENT: Commentors 44, 45 and 114 state that the definition of "new or increased source" allows retroactive application of the new nondegradation policy to nonpoint sources discharging prior to April 29, 1993, where management practices or mitigation measures have not been implemented. There was no intent that SB 401 apply retroactively, therefore, there is no statutory basis for this provision and it must be removed.

RESPONSE: The intent of Rule II(13)(b) is to clarify that nonpoint sources using practices that prevented impacts to water uses prior to the effective date of the new law were excluded from its requirements. Nonpoint sources have been and continue to be subject to the State's nondegradation policy and water quality standards. It is not the intent of the rule, however, to require nonpoint sources that were in violation of the Water Quality Act prior to April 29, 1993, to seek authorization to degrade under SB 401. The rule will be changed to clarify the intent to exclude all nonpoint sources discharging prior to April 29, 1993, from the procedures of the new law.

50. COMMENT: Commentor 49 states that the definition of "new or increased source" needs to be expanded to show how parameters not currently included in MPDES permits will be considered for establishing the April 29, 1993 baseline. Will the department assume typical concentrations or require wastewater profiling?

RESPONSE: The details for determining the proper application of the term "new or increased source" will likely be established in implementation guidance to be developed at a later time. In regard to this question, some flexibility will be used in making these kinds of determinations. It is likely that the use of wastewater profiling or the use of typical concentrations on a case-by-case basis will be allowed.

51. COMMENT: Commentors 73, 78, and 88 state that (a) and (b) of Rule II(13) fail to exclude from the definition of new or increased sources irrigation or other activities that did not require a water discharge permit prior to April 29, 1993. Further, a determination of what constitutes reasonable land, soil, and conservation practices is subjective. Therefore, (a) and (b) are contrary to legislative intent and must be deleted or modified.

RESPONSE: Nonpoint sources that were not required to obtain a discharge permit prior to April 29, 1993, are excluded from the requirements of SB 401 under Rule II(13)(b). Although the rule intended to exclude activities that did not require a permit prior to the enactment of SB 401, modifications will be made to address possible retroactive application as discussed in Response 49.

52. COMMENT: Commentor 78 asks whether Rule II(13)(c) exempts withdrawals of water pursuant to valid water rights with priority dates before April 29, 1993?

RESPONSE: Rule II(13)(c) recognizes the use of valid water rights existing prior to the effective date of the new nondegradation policy. Montana law prohibits the retroactive application of law where such application affects vested rights. Subsection (c), therefore, excludes valid water rights that have been obtained with a priority date prior to April 29, 1993, from the requirements of the new nondegradation policy.

53. COMMENT: Commentor 78 states that the water quality effects of new water rights are covered in § 85-2-311, MCA. These rules should be changed to reflect § 85-2-311, MCA.

RESPONSE: Section 85-2-311, MCA, provides water quality protection for prior appropriators and for holders of water discharge permits. The protection of water provided by § 85-2-311, MCA, is more closely associated with protecting water quality standards than with preventing degradation. The nondegradation policy applies to all activities with the potential to degrade high quality waters, regardless of whether or not those activities are subject to other laws or requirements. Because the water quality protection provided by § 85-2-311, MCA, does not address nondegradation, the rules will not be changed to exclude water rights obtained after April 29, 1993, on the basis of that provision.

RULE II(14) - DEFINITIONS - NONPOINT SOURCE

54. COMMENT: Commentor 39 points out that certain agricultural practices can minimize the effect of nonpoint source pollution from irrigation but only at the risk of becoming a point source and subject to nondegradation requirements. To encourage conservation practices that protect water quality, Commentor 39 suggests the following definition: "Management or Conservation practice" means a measure to control or minimize pollution of

ground and surface waters from a nonpoint source. Examples of such measures include, but are not limited to, revegetation of disturbed soils, grazing management to prevent overgrazing, contour farming, strip farming, protection of riparian areas, drainage control, and impoundments which detain surface runoff or irrigation return water for sediment control."

RESPONSE: The suggested definition may encourage practices that protect water quality and will be included in the rules.

55. COMMENT: Commentor 95 asks would the nitrates released from blasting with ANFO at a coal mine be a nonpoint source?

RESPONSE: Whether or not the release of nitrates described in this comment is a point or nonpoint source would be determined on a case-by-case basis. Nitrates released from coal mines are considered industrial wastes pursuant to § 75-5-103(10), MCA, and are subject to regulation under the Water Quality Act, including the nondegradation policy, if they are likely to contaminate state waters.

56. COMMENT: Commentor 95 states that disturbance of rock and soil should be considered nonpoint sources as long as they are not placed into a perennial stream.

RESPONSE: Wastes which are discharged to state waters via a discrete and discernible method of conveyance are considered point sources. If a rock or soil disturbance discharges to state water through a point source conveyance, then a discharge permit is required. In either case, if it results in degradation of state waters, the activity is required to undergo nondegradation review.

RULE II(15) - DEFINITIONS - OUTSTANDING RESOURCE WATERS

57. COMMENT: Commentor 26 states that "Outstanding Resource Waters" (ORW) should be amended to include state parks and wildlife areas as well as national facilities.

RESPONSE: The types of waters designated as ORWs in the proposed definition are identical to the ones included in the definition of "National Resource Waters (NRW)" currently found in ARM 16.20.701(5). The new definition simply maintains the status of waters currently listed as NRWs. The proposed addition of state parks and wildlife areas to the definition of ORWs will not be included in the final rule, as further expansion of waters currently designated NRW is not necessary for implementation of the nondegradation policy. Furthermore, additional public participation should be solicited before designating additional waters to this classification.

58. COMMENT: (1) Commentors 39, 42, 43, 44, 45, 51, 73, 85, 111, 112, 113, 114, and 125 state that the definition of "Outstanding Resource Waters"(ORW) is too broad. (2) Commentor 39 suggests using "federally designated wilderness areas" versus

"national wilderness or primitive areas" to avoid ambiguities and uncertainty. (3) In addition, this definition, together with Rule III(2)(c), would provide a classification that absolutely prohibits degradation. There is no authorization in Section 75-5-303, MCA, for the board to absolutely prohibit degradation of high quality waters through a classification system.

RESPONSE: (1) As discussed in Response 57, the proposed definition of ORWs simply re-enacts the definition for waters currently designated as National Resource Waters (NRW) under the old nondegradation rules. See, ARM 16.20.701(5). Since the proposed rule simply maintains the status quo for these waters currently protected under the old rule, the proposed definition is not overly broad in its application. (2) The term "federally designated wilderness areas" may provide less certainty than the proposed language. For this reason, the suggested change will not be made. See also Response 57. (3) The authority of the board to classify waters according to "their present and future most beneficial use" is found in § 75-5-301, MCA. There is nothing in that rulemaking authority which would prohibit the board from establishing a classification of waters that protects their outstanding ecological, recreational, or public water supply significance. The rule's absolute prohibition against degrading ORWs is designed to protect their most beneficial use, i.e., outstanding ecological, recreational, and public water supply significance.

59. COMMENT: Commentors 39, 112 and 125 believe that allowing the board to designate ORWs would provide an avenue for hamstringing a proposed development until a proposed ORW classification could be resolved.

RESPONSE: The designation of ORWs will occur through a rulemaking proceeding, which includes public comment and review by the legislative code committee under Title 2, Chapter 4, MCA. The ability of the public to participate by commenting on proposed rules for classifying waters as ORWs is no different than the adoption of any rule by the board. It is unlikely that a proposed project will be unduly delayed by this process. In addition, EPA's Region VIII "Guidance for Nondegradation Implementation" recommends a process for public nomination and participation in the designation of ORWs. The proposed rule follows this guidance.

60. COMMENT: Commentor 42 states that the second sentence of the ORW definition would allow the board to extend the absolute prohibition against degradation to any waters which the board finds to have outstanding ecological, recreational, or domestic water supply significance. This provision is beyond the board's authority and imposes a needless prohibition. Montana's water quality standards are already devised to protect all existing uses of water with a large safety factor. Given the protection provided by the standards, absolute prohibition

against degradation is superfluous.

RESPONSE: The intent of designating certain waters as ORWs and prohibiting their degradation is to provide a further level of protection for waters with outstanding significance than otherwise provided by the water quality standards. The protection provided to ORWs under the policy is not superfluous, because standards are designed to protect uses, not to maintain water quality that is better than the standards. See Response 58 for the authority of the board to provide this additional protection. For these reasons, the final rule will remain as proposed.

61. COMMENT: Commentor 73 states that if ORW's are kept in the rules, existing water storage and irrigation facilities and other areas approved for development should be excluded from the ORW designation.

RESPONSE: Generally, existing water storage and irrigation facilities and other areas approved for development by the department are excluded from the definition of "new or increased source". Therefore, their inclusion in the definition of ORW will have no impact until such time as those facilities request a new or increased discharge.

62. COMMENT: Commentors 68, 73, 74 and 112 state that the designation of ORW's by the board requires legislative approval. At a minimum, these designations require guidelines or criteria before a water is classified an ORW.

RESPONSE: The legislature has authorized the board to adopt rules establishing the classification of all waters according to their most beneficial use pursuant to § 75-5-301, MCA. Further legislative approval is not necessary for the board to classify waters with outstanding ecological, recreational, and public water supply significance as ORWs. See Response 58.

63. COMMENT: Commentor 83 states that these rules should include a procedure for establishing ORW's.

RESPONSE: The procedures for designating ORWs will conform to the requirements under Title 2, Chapter 4, MCA, regarding agency rule making. The inclusion of these procedures in the nondegradation rules is not necessary for implementation of the policy. Therefore, no change in the proposed rules will be made in response to this comment.

64. COMMENT: Commentors 88, 122, and 125 state that the last sentence of the ORW definition should be deleted and, thus, maintain the status quo.

RESPONSE: The proposed rule maintains the status quo because it does not require the addition of any waters to the status of ORW other than those currently designated as such under ARM

16.20.701(5). Although additional ORWs are not required, the rule does provide for such additions. This provision conforms to the requirements of 40 CFR 131.12(3), which requires states to establish a classification for waters determined to have outstanding ecological or recreational significance. Since the proposed rule is consistent with federal requirements, the requested deletion from the rule will not be made.

65. COMMENT: Commentor 93 states that outstanding ecological or recreational significance is too vague.

RESPONSE: Until further rulemaking or guidance is developed for the designation of ORWs, these terms will be defined on a case-by-case basis through hearings before the board requesting the ORW classification for specific waters.

66. COMMENT: Commentors 44, 45, and 113 state that the rule goes beyond the federal requirements under the Clean Water Act (CWA). They suggest that the State should not voluntarily designate ORWs until and unless the CWA is amended to require such designations.

RESPONSE: The federal antidegradation requirements are not found in the CWA, but are established at 40 CFR 131.12. This section requires states to adopt a nondegradation policy consistent with its requirements. If the policy does not meet federal requirements, EPA must disapprove those portions of the policy not in conformance with those requirements and then promulgate federal rules for state implementation. Given this requirement, it is irrelevant that amendments to the CWA regarding ORWs may or may not be adopted. The proposed rule will not be changed because it meets federal requirements and does not go beyond those requirements.

RULE II(18) - DEFINITIONS - TOXIC PARAMETERS

67. COMMENT: Commentor 39 states that the proposed definition of "Toxic Parameters" refers to Circular WQB-7, and the water quality standards. Also there are several parameters noted in the surface water standards which have numerical limits that have nothing to do with toxicity, such as coliforms, dissolved oxygen, pH, turbidity, temperature and color. It is suggested that this definition be revised to delete the references to surface and ground water standards.

RESPONSE: The categorization of parameters as "harmful", "toxic", or "carcinogenic" is necessary to comply with the requirement that "greater significance be associated with parameters that bioaccumulate or biomagnify". Changes in the definition of "toxic parameters" have been made to clarify its application. See also Response 29.

68. COMMENT: Commentor 125 states that, by reference to ARM 16.20.601 and 16.20 1001, the definition of "toxic parameters" results in classification of temperature, pH, dissolved oxygen,

color, coliforms, odor, turbidity, and specific conductance as toxic parameters. This is inconsistent with Circular 7 and probably is not the intent of the Department. This definition should delete everything after the words "...Circular 7."

RESPONSE: This was not the intent of the proposed rule and the final definition of "toxic parameters" will be changed.

RULE II - DEFINITIONS - GENERAL

69. COMMENT: Commentor 120 states that "significant" and "non-significant" degradation should be defined in the rules. This would help to limit the unjustifiable and perhaps illegal discretion the board is trying to secure through its categorical exclusions. The commentor suggests that "significant" degradation must include the granting of a mixing zone.

RESPONSE: Degradation has been defined statutorily to include any change in water quality except those changes determined nonsignificant under rules adopted by the board. The board's rule making authority requires the adoption of criteria for determining what activities or classes of activities are non-significant. Simply defining "significant" or "nonsignificant" degradation would conflict with the requirement to adopt criteria. Finally, the proposed definitions would conflict with the statutory definition of degradation, which includes any change in water quality whether significant or not, except for those activities determined nonsignificant by the board.

The use of mixing zones will be established under a separate rule making proceeding and does not need to be addressed here.

70. COMMENT: Commentor 125 states that the term "measurable increase" should be added to the definitions as follows: "Measurable Increase" means an increase in the value of a parameter at a 99% level of confidence using PQL's and using analytical methods described in 40 CFR 136.

RESPONSE: The suggested changes to WQB-7 and the replacement of "detectable" with "trigger values" have satisfied this concern.

71. COMMENT: Commentor 126 states that in order to allow for annual stream variations the term "detectable increase" is proposed. "Detectable increase" is a statistically significant increase in the concentration of a parameter at a 90% confidence level, that the mean of the sample set is greater than the mean of the base line samples.

RESPONSE: See Responses 6, 7 and 70.

RULE III(2)(a) - NONDEGRADATION POLICY - EXISTING AND ANTICIPATED USES

72. COMMENT: Commentor 38 states that EPA suggests an additional step in which the state would first confirm that uses designated in the water quality standards rule include all existing

uses. We suggest the process explained in the EPA Region VIII guidance, which begins with confirmation that existing uses are appropriately designated in standards, be included in the proposed rule or addressed in more detailed implementation guidance.

RESPONSE: This process does not need to be included in the proposed rule because the uses designated in the classification standards (except for Class I surface waters) include all possible uses.

73. COMMENT: Commentor 93 states that "anticipated uses" should be changed to anticipated activities and then defined.

RESPONSE: Rule III establishes the level of protection the department must apply to protect the quality of state waters pursuant to § 75-5-303(1) and 75-5-303(3)(c), MCA. Those sections require the protection of existing and anticipated uses of state waters. The rule will not be changed as suggested because the statute requires the protection of "uses", not "activities".

RULE III(2)(b) - NONDEGRADATION POLICY - HIGH QUALITY WATERS

74. COMMENT: Commentors 4, 8, 11, 13, 14, 15, 16, 18, 19, 22, 26, 30, 31, 33, 36, 38, 40, 47, and 60 state that Montana's high quality waters are of utmost importance to the state and everything possible should be done to prevent degradation of those valuable resources. To do otherwise would be shortsighted.

RESPONSE: The proposed rules are intended to implement the requirements for the protection of high quality waters legislatively imposed under SB 401. To the extent that the rules conform to those requirements, the degree of protection authorized by the new legislation has been achieved.

75. COMMENT: Commentors 6, 15, 47, and 130 state that the type of activities considered as "nonsignificant" should be limited to those commonly accepted as temporary and inconsequential.

RESPONSE: Section 75-5-301(5)(c) authorizes the board to adopt criteria for determining nonsignificant activities by considering a number of various factors. The duration of the activity causing degradation is only one among several factors to be considered in establishing these criteria. The proposed rules have been developed after consideration of all the factors provided in the rulemaking authority. Therefore, the proposed rules will not be changed to allow only activities that are short term.

76. COMMENT: Commentors 39 and 125 suggest Rule III(2)(b) should be revised to read "any bioconcentrating, carcinogenic, harmful or toxic parameter listed in Circular WQB-7." If a parameter does not fall into one of these categories, is a

change reasonably considered degradation?

RESPONSE: Section 75-5-103(4), MCA, defines degradation as "a change in water quality that lowers the quality of high-quality water for a parameter". High quality waters are defined as those waters whose existing quality is better than the state's water quality standards. Therefore, a change in water quality that lowers the quality of "high quality waters" can only occur by reference to the parameters in WQB-7 or other state water quality standards.

77. COMMENT: Commentors 39, 42, 44, 45, and 125 state that Rule III(2)(b) should be changed to delete the phrase "there have been achieved". It would be more workable if revised to: "If degradation of high quality waters is allowed, the department will assure compliance with Montana statutory and regulatory requirements for point and nonpoint sources in the USGS Hydrologic Unit upstream of the proposed project."

Another alternative would be to replace the phrase "there have been achieved", with "there shall be achieved". Without this or a similar change a comprehensive audit of the hydrologic unit upstream would be necessary.

RESPONSE: The language "there shall be achieved" is specified in the federal requirements for states' nondegradation policies at 40 CFR 131.12(2). In order to be consistent with the federal requirements, the suggested change from "there have been achieved" to "there shall be achieved" has been made in the final rules.

78. COMMENT: Commentors 73 and 111 state that the requirement in the final sentence of Rule III(2)(b) regarding achievement of the "the highest statutory and regulatory requirements...." should be deleted because it is beyond the board's rulemaking authority and is technically and economically unfeasible.

RESPONSE: The board's rule making authority for implementing SB 401 is contained in § 75-5-301(5) and 75-5-303(7). These sections authorize the board to adopt rules "...implementing the nondegradation policy". The requirement for achieving the highest statutory and regulatory requirements is required for all states' nondegradation policies pursuant to 40 CFR 131.12(2). This requirement is necessary to implement the state's nondegradation policy because the policy must comply with federal requirements in order to be approved by EPA. See also, Response 80. Therefore, the rule will remain as proposed.

79. COMMENT: Commentors 74, 78, and 88 state that "The department will assure that within the USGS Hydrologic Unit upstream of the proposed activity..." should have the following language added "This assurance will be achieved through the ongoing administration by the department of the existing permits and programs for control of point and nonpoint source discharges.

This subsection does not require an audit of upstream sources as a condition of allowance of degradation by a new or increased source."

RESPONSE: The intent of the proposed rule is to require a review of existing permits and programs to ensure compliance before degradation is allowed in conformance with 40 CFR 131.12(2). EPA rules require some accounting, whether or not it is considered an audit, for loads within the basin in terms of both point and nonpoint sources in order to determine existing quality as well as compliance with regulatory requirements. The proposed language will not be used because it may unnecessarily preclude some future use of a broader based assessment of water quality than currently provided by existing permits and nonpoint source programs.

80. COMMENT: Commentor 112 states that Rule III(2)(b) could cause a nightmare of expenses and delays.

RESPONSE: Rule III(2)(b), together with the definition of "highest statutory and regulatory requirements" allows the department to authorize degradation provided all requirements of the Water Quality Act are being met. For those sources found to be in noncompliance, degradation may be allowed only if compliance schedules, for purposes of MPDES permits, are in place or a plan that assures compliance over nonpoint sources has been developed. While there may be some delay due to this requirement, the implementation of this rule will be guided by a standard of "reasonableness".

RULE III(2)(c) - NONDEGRADATION POLICY - OUTSTANDING RESOURCE WATERS

81. COMMENT: Commentor 38 states that Rule III ensures that the water quality of designated Outstanding Resource Waters (ORWs) will be maintained and protected. This is consistent with the federal requirements. We believe it would be worthwhile to include additional detail explaining how the prohibition would be accomplished in practice.

RESPONSE: The plain prohibition in Rule III against the degradation of ORWs is self explanatory. Therefore, no further procedures are necessary to implement the prohibition. Information submitted by the applicant will be reviewed in accordance with the proposed rules to determine the effect on downstream ORWs and will be denied whenever degradation of an ORW would occur.

82. COMMENT: Commentors 40 and 47 ask that in Rule III (2)(c) a method to allow for petitioning to establish outstanding resource waters be inserted, as it was in previous drafts of the rules.

RESPONSE: The Montana Administrative Procedure Act (MAPA) at § 2-4-315, MCA, provides that any interested person may petition

an agency requesting the repeal, amendment, or promulgation of a rule. The ability of a person to petition for a rulemaking is independent of department procedures for implementing the nondegradation policy. Therefore, the requested reference to MAPA will not be included in the proposed rules.

83. COMMENT: Commentors 88 and 114 state that reference to ORW in Rule III(2)(c) be deleted until the concept is further defined in the federal clean water act.

RESPONSE: Rules adopted by EPA set requirements for States' nondegradation policies. Included in this is a requirement for a class of waters that are generally referred to as outstanding resource waters (ORWs). Pursuant to 40 CFR 131.12, no degradation can be allowed in ORWs. While the CWA at this time does not contain requirements for ORWs, the State remains subject to the federal requirements for states' nondegradation policies at 40 CFR 131.12. Therefore, the rules pertaining to ORWs will not be deleted.

RULE III(3) - NONDEGRADATION POLICY - COMPLIANCE

84. COMMENT: Commentor 95 states that time frames for compliance with MEPA should be established in Rule III(3).

RESPONSE: Time frames and procedures for agency compliance with the Montana Environmental Policy Act (MEPA) are established in DHES Procedural Rules (ARM 16.2.601 et seq.) and are not repeated here.

RULE III - NONDEGRADATION POLICY - GENERAL LIMITATION

85. COMMENT: Commentors 5, 6, 15, and 130 state that additional polluting activities should not be allowed in any watershed that already exceeds the standards for any one pollutant.

RESPONSE: A prohibition against allowing degradation in a watershed that exceeds the standard for one pollutant is contrary to the purpose of the nondegradation policy. The policy is intended to protect high quality waters on a parameter-by-parameter basis. A watershed may have water quality that is worse than the standards for one parameter, yet be higher than the standards for all other parameters. In this situation, § 75-5-303, MCA, authorizes the department to allow degradation, if the requirements of the policy are met.

86. COMMENT: Commentors 67, 87, 88, 109, 110, 111, and 117 state that all degradation is significant.

RESPONSE: The legislature specifically recognized the concept of nonsignificant changes to water quality, which are not considered degradation in § 75-5-103(4), MCA. In addition, the rulemaking authority of the board requires the adoption of criteria to determine which activities would result in nonsignificant changes. Therefore, the rules will remain as proposed.

87. COMMENT: Commentor 97 states that there should be no degradation, the cost of preventing degradation should be part of the cost of doing business, otherwise the cost of lowered water quality are paid by the public.

RESPONSE: The legislature enacted SB 401, which expressly authorizes the department to allow degradation provided all the requirements in § 75-5-303, MCA, are met. To adopt rules prohibiting any degradation would conflict with the intent of the legislature as expressed in the Water Quality Act and the statement of intent for SB 401.

88. COMMENT: Commentor 105 states that there should be no degradation allowed until and unless we have comprehensive water conservation policies.

RESPONSE: The development and enactment of a comprehensive water conservation policy is beyond the scope of this rule making. The rulemaking authority for the proposed rules is specifically limited to the implementation of SB 401. Moreover, the effective date of the Act on April 29, 1993, does not allow for a moratorium on the implementation of the policy. Consequently, delay in the adoption of these rules or the implementation of the policy is not warranted.

89. COMMENT: Commentor 69 states that because the department is subject to pressure from industry, the department should not be able to propose rules for determinations of significance.

RESPONSE: Although the department has developed the rules, the board is the entity authorized to adopt the rules. The rules adopted by the board are subject to public comment and the requirement that a concise statement of reasons for and against the adoption of a rule must be provided. This process ensures that the rationale for adopting a rule is available to the public and that all comments received by the agency have been fully considered.

RULE IV(1) - SIGNIFICANCE REVIEW - SELF DETERMINATION

90. COMMENT: Commentors 17, 26, 30, 32, and 40 state that the DHES should look at the potential for unlawful delegation of authority associated with "self determination" provisions of the proposed rules.

RESPONSE: It is clear that the department has the responsibility for enforcing the nondegradation policy, yet there is no clear statutory requirement that the department make determinations of significance. More importantly, the rules do not delegate the department's authority by allowing an individual determination of significance to preempt a conflicting determination by the department. The rules simply set criteria that allow the department or individual to assess whether or not a proposed change in water quality reaches the level of degradation. Ultimately, it is the responsibility of the individual

not to cause degradation unless authorized by the department. For these reasons, the rules are not an unlawful delegation and will remain as proposed.

91. COMMENT: Commentor 17 states that the DHES should attempt to develop clear, concise language in proposed Rule IV(1) that will allow the general public to make informed and reasonable significance determinations. The rule could be supplemented by educational materials prepared by DHES. Additionally, the DHES should consider listing activities that either are or are not suitable for self determination.

RESPONSE: The proposed rules, although technical in nature, are consistent with the guidance in § 75-5-301(5)(c), MCA. While the proposed rules may be difficult for an individual to use to make an informed determination, each individual has the option of requesting a determination from the department. Lists of activities that are clearly nonsignificant have been developed in Rule VIII. Implementation guidance may be developed that will assist individual determinations. At this time, however, no further changes to the rules will be made.

92. COMMENT: Commentor 32 states that the self determination portions of the rule weaken the legislation. The department should be required to review an application for nonsignificance for all department permits and approvals. To allow a mining company or a land developer to make the determination without DHES review renders the rule ineffectual and contrary to the intent of the legislature.

RESPONSE: All activities requiring a department permit or approval will be reviewed for significance by the department. As far as the objection to self determinations, the rules do not weaken the legislation, but are consistent with the responsibilities of the department as expressed in SB 401 and the Water Quality Act. See Response 90.

93. COMMENT: Commentor 68 states that a provision for self determination of significance is necessary.

RESPONSE: Comment noted.

94. COMMENT: Commentor 83 states that self determination of significance should not be allowed, particularly in view of the definitions set out in Rule VIII.

RESPONSE: See Response 90.

95. COMMENT: Commentor 98 states that Rule IV(1) requires the initial self-determination to consider all 188 parameters in WQB-7. This is too big a burden. The cost for complete analyses is about $3,000. Must each person know what the levels of each of the 188 parameters are in the proposed discharge?

RESPONSE: Generally, a discharger knows what is likely to be present in their discharge, and the rules do not require an individual to test for all of the parameters in WQB-7 for determinations of nonsignificance. Rule IV(1) allows a person to make this determination by using the criteria for nonsignificance provided under Rules VII and VIII. If the activity is categorically excluded under Rule VIII, generally there would be no need to test for any parameters. As indicated in Response 91, guidance may be developed for using the criteria in Rule VII.

96. COMMENT: Commentor 106 states that Rule IV(1) needs to clarify the different processes available for determining nonsignificance. This Commentor suggests that the latter portion of that rule should state: "A person may either:(a) determine for themselves using the standards contained in [Rules VII and VIII] that the proposed activity will not cause significant changes in water quality as defined in Rule III, or (b) submit an application to the Department pursuant to (2) below, for the department to make the determination."

RESPONSE: Modification of Rule IV(1) has been made to clarify the rule.

97. COMMENT: Commentor 106 supports the concept of self determinations but suggests that there is a significant difference in procedures for departmental determinations and self evaluations, because there is no departmental or public review of self-determinations. This commentor finds that some type of reporting needs to be required to assure consistency and to hold accountable those making improper evaluations. Without a reporting system, it will be impossible to track cumulative impacts.

RESPONSE: The intent expressed in the nondegradation policy is to remove activities considered nonsignificant from departmental review and regulation. While the board is required to adopt criteria for making these determinations, it is the responsibility of the individual, not the department, to assure that their activities will not degrade state waters. The individual may either make this determination or request departmental review. A reporting system might help the department track cumulative effects, but it adds a burden on limited government resources that is not required under the law. Therefore, the rules will not be changed to require additional reporting.

98. COMMENT: Commentor 50 states that since the inception of the proposed rules by the agency, our association has objected to the procedures proposed by the department, which place the burden of proof on the individual for determining whether a proposed activity is "nonsignificant". In our opinion this is a function of the agency.

RESPONSE: The proposed rules give the individual a choice of either making their own determination or requesting a determi-

nation from the department. No change to the rules is necessary because the burden for making a self determination is optional.

RULE IV(2)(d) - SIGNIFICANCE REVIEW - WATER QUALITY ANALYSIS
99. COMMENT: Commentor 64 states that in Rule IV(2)(d) the idea of "including natural variations" is good and reasonable, however, it is too vague as stated to be useful guidance. To what degree are natural variations to be quantified, and what is the time frame of most interest - diurnal, daily, weekly, seasonal, annual, inter-annual, etc.?

RESPONSE: The development of implementation guidance, as discussed throughout these responses, may be necessary to flesh out the details of making these determinations, best professional judgement will be used to make these determinations, when in doubt applicants should consult with the department.

100. COMMENT: Commentor 94 states that significance determinations under Rule VII depend on monitoring for various parameters. The rule is deficient because it does not adequately address monitoring requirements such as, required baseline data, collection duration, frequency, locations, required detection levels, statistical methods etc. To simplify the process, it would be better to treat toxics in the same manner as carcinogens.

RESPONSE: The development of implementation guidance, as discussed throughout these responses, may be necessary to flesh out the details of making determinations of nonsignificance. Further, while it might be simpler to treat toxic parameters as carcinogens, it would not be consistent with legislative guidance under the rule making authority. Criteria for determinations of significance must be based upon harm to human health or the environment, pursuant to Section 75-5-301(5)(c), MCA. Therefore, no change in the proposed rule will be made.

101. COMMENT: Commentor 96 states that the wording "any downstream waters" in Rule IV(2)(d) is too open ended and should be better defined so that the applicant will know the department's sampling requirements and assessment of seasonal variations on a previously unsampled stream.

RESPONSE: "Any downstream waters" has been modified in the final rule to clarify the rule's application.

RULE IV(3) - SIGNIFICANCE REVIEW - 60 DAYS
102. COMMENT: Commentor 10 states that if it is determined that MDT will degrade the water (after a 60 day process), a degradation application has to be completed. DHES has 180 days to authorize or deny the permit. This could present some obvious problems.

RESPONSE: The time frames established for departmental deci-

sions on significance and on a complete application to degrade are based upon a reasonable estimate of the time it would take to review the information and make an informed decision. Given limited agency resources, it would not be prudent to require a shorter period for agency determinations.

103. COMMENT: Commentors 17, 19, 22, 33, 34, 40, and 47 state that the DHES should examine the potential for allowing public comment on DHES significance decisions. The DHES should analyze the adequacy of allowing for this public comment through the public comment process involved with other DHES permit decisions associated with the activity, or through the formal public comment process for the nondegradation rules themselves. It is not the intent that allowing for public comment unreasonably increase the time frame for a DHES significance determination.

RESPONSE: For all permitted activities, the public will have the opportunity to review and comment on all significance determinations made by the department through the normal permitting process. That is, discharge permits must include a statement of basis that will include the basis for agency decisions on significance. For unpermitted activities, there is no existing framework for public comment. The opportunity for public comment on agency determinations of significance for unpermitted activities is through this rulemaking proceeding. Finally, the definition of degradation and the plain language of § 75-5-303, MCA, indicate that activities found to be nonsignificant under rules adopted by the board are not subject to the nondegradation law and the requirements for public review of agency decisions provided in § 75-5-303(4), MCA.

104. COMMENT: Commentor 17 states that the DHES should develop a mechanism to ensure that requests for significance determinations are acted on in a timely manner.

RESPONSE: Within the limits of its resources, the department will process all requests for significance determinations within the time frames established by these rules.

105. COMMENT: Commentors 67 and 83 state that if there is public interest, there should be a public hearing on nonsignificance determinations.

RESPONSE: See Response 103.

106. COMMENT: Commentor 73 states that the time frames in Rules IV(3)(11), V(7), and VI(4)(6) should be trimmed to the maximum extent possible.

RESPONSE: The time frames in the proposed rules reflect a realistic assessment of agency resources. These time frames may be shortened if work load and resources permit. In addition, the time for public comment under Rule VI(4) will depend on the

complexity of the project and public interest.

107. COMMENT: Commentor 89 states that while self determination is reasonable, the department needs to track all such determinations, this can be done by requiring that the department must be notified of each self determination.

RESPONSE: See Response 97.

108. COMMENT: Commentor 95 asks if DHES determines that an activity is nonsignificant is no further review necessary? If so, this should be stated.

RESPONSE: There is no requirement in the rules for further submission of an application or agency review once a determination has been made that an activity is nonsignificant. Therefore, no change in the rules is necessary, as the rules clearly specify that only activities that are likely to degrade state waters need authorization to degrade from the department.

109. COMMENT: Commentor 9 states that the rules should state that uses categorized as nonsignificant are not subject to retroactive agency review.

RESPONSE: The categorical exclusions for nonsignificant activities are listed in Rule VIII and excluded from application of SB 401 under Rule II(13)(d). For pre-existing water rights, those activities or uses are excluded under the definition of "new or increased source" in Rule II(13)(c). No further exclusions or clarifications in the rules are necessary.

RULE IV(4) - SIGNIFICANCE REVIEW - MONITORING

110. COMMENT: Commentor 111 states that Rule IV(4) should be deleted. If there is no degradation, monitoring cannot be required.

RESPONSE: § 75-5-602, MCA, authorizes the department to require monitoring "in order to carry out the objectives of this chapter [i.e., Water Quality Act]". The rule serves to notify the individual of this authority as well as allow the department to determine that an activity is nonsignificant without requiring irrefutable evidence from the applicant. If there is some question on the water quality impacts of an activity found to be nonsignificant, then additional monitoring may be required to carry out the objectives of the nondegradation policy. The rule will remain as proposed for the reasons given above.

RULE IV(4-5) - SIGNIFICANCE/AUTHORIZATION REVIEW

111. COMMENT: Commentor 95 asks whether "significant" should precede "degradation" in (4) and (5) of Rule IV.

RESPONSE: Degradation is defined in the Water Quality Act to mean any change in water quality except for those changes that are nonsignificant. Any change that is not considered nonsig-

nificant is degradation. There is no authority in the law for distinguishing various degrees of degradation once the activity is considered degradation. Therefore, the suggested change will not be made.

RULE IV(5) - AUTHORIZATION REVIEW - APPLICATIONS & FEES

112. COMMENT: Commentors 30 and 32 state that the rules should include some fees for application review and compliance monitoring on larger development actions.

RESPONSE: The proposed rules implement the nondegradation policy under the authority of § 75-5-301 and 303, MCA. That authority does not include authority to promulgate rules for the assessment of fees. Rules adopted by the board pursuant to § 75-5-516, MCA, however, do provide for the assessment of fees for nondegradation review.

113. COMMENT: Commentor 117 states that all applications to degrade should be widely publicized.

RESPONSE: The rules include provisions that require public notice and opportunity to comment on all applications to degrade. The rules require the department to issue a preliminary decision accompanied by a statement of basis explaining the basis for the decision pursuant to Rule VI(4). No further changes to the rules are necessary to provide an opportunity for public involvement.

RULE IV(6) - AUTHORIZATION REVIEW - NO ALTERNATIVES

114. COMMENT: Commentor 19 states that the lack of economically, environmentally, or technologically feasible alternative to allowing degradation should be a last drastic resort employed in the most dire circumstances where the benefits to mankind so far outweigh the value of the high quality water.

RESPONSE: The nondegradation policy allows the department to authorize degradation, if the applicant shows by a preponderance of the evidence that the requirements of § 75-5-303, MCA, are met. The proposed rules implement this requirement. The suggested change will not be made because it would shift the burden to a higher standard than that provided by statute.

115. COMMENT: Commentors 22 and 67 state that the rules should require best available pollution control technologies including source reduction.

RESPONSE: The rules require that water quality protection practices be implemented if degradation is allowed by the department. Those practices include pollution control technologies, which would include source reduction.

RULE IV(6) - AUTHORIZATION REVIEW - GENERAL

116. COMMENT: Commentor 95 states that implementation guidelines should be developed as soon as possible, especially for

Rule IV(6).

RESPONSE: As discussed throughout these responses, implementation guidance may be developed to assist agency decisions and inform the regulated community of the details of nondegradation review.

RULE IV(6)(i) - AUTHORIZATION REVIEW - GROUND WATER FLOW

117. COMMENT: Commentor 10 suggests the compliance with the requirement of Rule IV(6)(i), regarding an analysis of ground water flow and water bearing characteristics of subsurface materials and the rate and direction of ground water flow, is not feasible due to their limitation of conducting projects within a public right-of-way.

RESPONSE: It is possible that this analysis cannot be provided, if restricted to the boundaries of a particular area owned or controlled by an applicant. When determined necessary, additional information outside the area owned or controlled by the applicant will be required. If it cannot be obtained, the applicant may have to adjust the project or activity to ensure no degradation would occur.

RULE IV(6)(j) - AUTHORIZATION REVIEW - CUMULATIVE EFFECTS

118. COMMENT: Commentor 10 states that it will not be feasible to assess cumulative effects as required by Rule IV(6)(j) without baseline quality information. Gathering the necessary data could take years. The rules do not discuss what will be required to avoid postponing projects.

RESPONSE: In some cases, it may not be feasible to assess cumulative impacts without baseline quality information. It is true that gathering such information could delay projects, but such information is necessary in order to make an informed decision before allowing an applicant to degrade state waters. The suggested language specifying how to avoid delay will not be included in the rules due to circumstances when delay may be inevitable.

119. COMMENT: Commentor 130 states that discharges should not be allowed where the effect of multiple discharges will create a cumulative effect that is detrimental to the potential recreational uses of the resource.

RESPONSE: Both the water quality standards and the nondegradation policy protect existing uses of a particular water body. In addition, the nondegradation policy protects anticipated uses, such as a potential recreational use. The final rules allow a consideration of cumulative impacts during the department's initial determination of significance. No further change in the rules is necessary to address this concern.

RULE IV(7)(a)(i) - AUTHORIZATION REVIEW - ECONOMIC DEVELOPMENT

120. COMMENT: Commentor 94 states that the only important eco-

nomic or social development is that which is sustainable, this should be reflected in Rule IV(7)(a)(i) by adding "important sustainable economic or social development".

RESPONSE: § 75-5-303, MCA, does not require a showing that the social and economic development also be sustainable. The factors for demonstrating social and economic importance are broad enough to include the concept of sustainability in the analysis. Therefore, no change is necessary.

RULE IV(7)(b) - AUTHORIZATION REVIEW - ECONOMIC AND SOCIAL FACTORS

121. COMMENT: Commentor 26 states that in Rule IV(7)(b) the factors for determining whether or not a proposed activity may result in an important economic or social development should be mandatory, requiring the replacement of the word "may" with shall.

RESPONSE: The proposed rule provides a non-exclusive list of factors that would be considered by the department in an economic and social analysis. It is the burden of the applicant, however, to provide an analysis that clearly demonstrates the importance of the project. It is to their advantage to supply as comprehensive an analysis as possible. It is not necessary or appropriate to require the applicant to provide an analysis that includes all the factors. Therefore, the suggested change will not be made.

RULE IV(7)(b)(vii-ix) - AUTHORIZATION REVIEW - VALUES

122. COMMENT: Commentor 107 has objected to the procedures used to weigh the factors in this section because those procedures and factors are not consistent with well established theories and practices of economics. Commentor 107 has proposed changes for clarity and process that are too extensive to set forth in the comments, but have been included in the final rule and will not be repeated here. In addition, Commentors 39, 42, and 43 state that Rule IV and Rule V refer to "intrinsic values", "opportunity values" and "social or cultural values" as factors to be considered. These are qualitative value judgements. None of the WQB staff have the necessary expertise to make such evaluations, therefore, evaluation of the data would have to be contracted out of the department. They also state that there is not statutory guidance regarding how to evaluate or weigh discernible differences. The applicant should be required to submit only that information which can be quantified, and hence, these items should be deleted along with "resource utilization and depletion".

RESPONSE: The suggested changes in those portions of the rules containing requirements for a determination of economic and social importance have been completely rewritten based on the suggested changes submitted by Commentor 107. This includes changes in terms to be consistent with economic practices. "Intrinsic values" has been replaced with "existence values"

and "opportunity values" has been replaces with "opportunity costs", both of which are defined in the rules. "Social and cultural values" were removed from the list of factors because those values are considered impacts and are not appropriate in a cost-benefit analysis. "Resource utilization and depletion" remains in the final rule as it is considered a cost to society resulting from the project.

The changes also include a method to weigh non-quantifiable factors, i.e., "qualitative value judgments", and a clear statement of the findings that must be made by the department before it may authorize degradation. These changes address many of the comments dealing with this section.

123. COMMENT: Commentors 73, 74, 78, and 114 state that subsections vii through ix in Rules IV(7)(b) and V(4)(b) are subjective and should be deleted.

RESPONSE: See Response 122.

RULE IV(8) - AUTHORIZATION REVIEW - PROTECTED USES

124. COMMENT: Commentor 95 asks whether the applicant determines their own mixing zone in Rule IV(8)(a)?

RESPONSE: The applicant must provide information demonstrating that the change will not result in a violation of standards outside of a mixing zone. The determination of the mixing zone provided by the applicant must conform to the requirements of the mixing zone rules.

125. COMMENT: Commentor 97 states that the applicants should bear the cost of proving there is no effect on other uses.

RESPONSE: The informational requirements under Rule IV place the burden on the applicant to provide this type of information.

126. COMMENT: Commentors 109, 110, 120, and 130 state that mixing zones must be deleted from Rule IV(8)(a).

RESPONSE: Mixing zones are essential to the state's water quality program, particularly implementation of the nondegradation policy. If mixing zones were not allowed, all activities would either violate standards or cause degradation.

RULE IV(11) - AUTHORIZATION REVIEW - INCOMPLETENESS OF APPLICATION

127. COMMENT: Commentors 33, 34, 94, and 120 state that Rule IV (11) proposes during the completeness review that "in any review subsequent to the first, the department may not make a determination of incompleteness on the basis of a deficiency which could have been noted in the first review." While the intent here may be innocent, its application could be devastating to protecting water quality in an age of budget cuts and staff shortages. This language should be deleted.

RESPONSE: Although the primary purpose of the rules is to protect high quality waters, the purpose of this particular rule is to ensure a timely review by the department by requiring that requests for supplemental information will not unduly delay the application process. Fees for nondegradation review should alleviate staff cut-backs. For these reasons, the requested change will not be made.

RULE IV - SIGNIFICANCE/AUTHORIZATION REVIEW - GENERAL

128. COMMENT: Commentor 35 states that the board is urged to amend Rule IV to ensure that the applicant has the financial ability and resources to carry out the water quality protection practices. Bonding should be considered.

RESPONSE: Rule IV(9) addresses the viability of the applicant. It is clearly not the intent to authorize degradation unless an applicant has the resources necessary to comply with the provisions of the authorization. There is currently no authority under the Water Quality Act to require bonding. Therefore, no change to the rule will be made.

129. COMMENT: Commentor 49 states that we would like it established for the record that no fees will be assessed for determinations of significance.

RESPONSE: The department's authority to require fees for reviewing applications to degrade does not include the authority to assess fees for determinations of significance. As this limitation is clearly in the law, there is no need to address it in the rules.

130. COMMENT: Commentor 80 states that too much of the cost of this process is being placed on the applicants. The citizens have a stake in clean water and should pay part of the costs.

RESPONSE: § 75-5-303(3) places the burden upon the applicant to demonstrate "by a preponderance of the evidence" that certain conditions will be met. The requested change would conflict with this statutory requirement and, therefore, will not be made.

131. COMMENT: Commentors 75 and 106 state that fees should be charged for determinations of significance.

RESPONSE: See Response 129.

RULE V(3)(a)(i-ii) - DEPARTMENT REVIEW - ECONOMIC DETERMINATION

132. COMMENT: Commentor 94 states that in Rule V(3)(a), regarding determinations of economic feasibility, (i) and (ii) appear to cancel each other out. If an alternative leaves room for profit, no matter how small, the alternative should be considered economically feasible.

RESPONSE: Subsection (i) does not conflict with (ii), but rather provides a presumption of economic feasibility whenever an alternative meets the conditions provided in that subsection. If an alternative cannot be presumed to be economically feasible under (i), then (ii) allows the department to consider other factors in determining the feasibility of an alternative. A rule that would deem an alternative economically feasible up to the point where the return in profits would be marginal does not allow the flexibility of the proposed rules. Therefore, the suggested change will not be made.

133. COMMENT: Commentor 93 states that the word "significant" should be inserted before "less degrading alternatives..." in Rule V(3)(a)(i)and(ii).

RESPONSE: It is unclear how the term "significant" is relevant to an evaluation of alternative water quality protection practices. Therefore, the suggested change will not be made.

RULE V(3)(b) - DEPARTMENT REVIEW - ENVIRONMENTAL DETERMINATION

134. COMMENT: Commentors 42 and 43 believe that Rule V(3)(b) is too subjective and unnecessary since the standards already protect public health. Commentor 42 suggests that economic feasibility requires comparisons of environmental impacts of the various alternative to other environmental media and proposes the following change: "In order to determine the environmental feasibility of an alternative, the department will consider whether such alternative practices are available, and will compare the overall environmental impacts of the various alternatives and the commitment of resources necessary to achieve the alternatives ~~and consistent with the protection of the environment and public health~~."

RESPONSE: The proposed rule is broad enough to include a comparison of environmental impacts of the various alternatives on other environmental media. The proposed change would require this analysis and would limit the subjectivity of the rule. Therefore, the suggested change clarifying this requirement will be made.

RULE V(4)(a) - DEPARTMENT REVIEW - ECONOMIC & SOCIAL FACTORS

135. COMMENT: Commentor 21 states that the rules should address the use of best engineering practices and standards so that the most economical and socially acceptable method of treatment will be obtained.

RESPONSE: Rule V(3)(c) requires an assessment of alternatives demonstrating technological feasibility based on accepted engineering principles. This assessment is part of the demonstration an applicant must make, which includes other factors such as economic and environmental feasibility. This approach should result in obtaining treatment methods that are both economically and socially acceptable and no further change in the rules is necessary to accomplish this objective.

136. COMMENT: Commentor 94 states that in Rule V(4)(a)(i) "sustainable" should be inserted before "economic" and factors to address "sustainable" should be considered.

RESPONSE: See Response 120.

137. COMMENT: Commentor 102 asks the department to please keep in mind that any degradation is irreversible and affects more people negatively than the few it will benefit. Cumulative effects should be taken into account.

RESPONSE: Rule V addresses the concern that the department's decision must take into account the loss to society associated with a loss of water quality. Cumulative effects is addressed in Rule VII(2).

138. COMMENT: Commentor 93 states that the analysis called for in Rule V(4)(a)(ii) should be restricted to a finite period of time in which losses and costs to society can be reasonably estimated.
RESPONSE: The proposed rule allows the applicant to submit an analysis that evaluates the losses and costs to society resulting from the proposed project. The intent of the rule is to allow the applicant to prove his project is important based on a reasonable analysis of factors provided in the rule. The suggested restriction will not be made because restricting the analysis to a definite period of time may make it more difficult for an applicant to prove the social and economic importance of the proposal.

RULE V(4)(b)(vii) & (viii) - DEPARTMENT REVIEW - ECONOMIC & SOCIAL FACTORS
139. COMMENT: Commentor 125 objects to the inclusion of "intrinsic values" and "opportunity values" in an analysis of economic feasibility. We are unaware of any federal or state laws or regulations that require consideration of these parameters. There is no methodology proposed to quantify these parameters and any evaluations of them would likely be very contentious and could deadlock the administrative process. Commentor 107 (DNRC) objects to the procedures for weighing the criteria in this section and has proposed changes that are too extensive to include in the comments.

RESPONSE: The rule as proposed has been changed to clarify procedures for weighing the criteria and to include only those factors that are appropriately considered as costs or benefits. See Response 122.

RULE V(7) - DEPARTMENT REVIEW - 180 DAYS
140. COMMENT: Commentor 49 states that the time frame for degradation reviews should be coordinated with the time frame for MPDES permit applications or renewals.

RESPONSE: To the extent practical, the agency will coordinate

MPDES permit and nondegradation reviews.

141. COMMENT: Commentor 74 states that even though an EIS is required, any additional time allowed for the EIS and preliminary decision should be restricted to 180 days.

RESPONSE: It is reasonable and often necessary to allow an extension of time beyond the 180 days when an environmental impact statement is required. The suggested restriction will not be included in the final rule as the restriction may preclude compliance "to the fullest extent possible" with the terms of MEPA.

142. COMMENT: Commentor 95 states that these rules must include timeframes for EIS development to facilitate interagency cooperation - the timeframes could be extended with the agreement of the applicant.

RESPONSE: Rule V(7) provides for an extension of time when an environmental impact statement is prepared. No further change in the rule is necessary to allow an extension. In addition, the time frames for EIS development are established in ARM 16.2.633-642 and will not be repeated in these rules.

RULE V - DEPARTMENT REVIEW - GENERAL

143. COMMENT: Commentor 28 (DHES) proposes to change the language in Rule V(4)(a) to make it consistent with the requirement for a social and economic analysis in Rule IV(7).

RESPONSE: Due to the modifications made to this section in response to Comment 122, the department's proposed change will not be included in the final rule as those changes are inconsistent with the final rule.

RULE VI(2)(b) - DECISION PROCEDURES - OUTSTANDING RESOURCE WATERS

144. COMMENT: Commentor 49 states that Rule VI(2)(b) should delete the reference to ORW's because degradation of ORW's is prohibited.

RESPONSE: Rule III establishes the level of protection provided for state waters. Under Rule III, no degradation is allowed in ORWs. Therefore, the department must consider whether or not an ORW is subject to potential degradation when making decisions regarding authorizations to degrade. For this reason, the proposed modification will not be made.

RULE VI(2)(f) - DECISION PROCEDURES - AMOUNT OF DEGRADATION

145. COMMENT: Commentor 84 states that accurate projections of water quality deterioration cannot be made using present methods.

RESPONSE: Predictions of changes in water quality can be made using present methods. The accuracy of these predictions de-

pends upon the validity of assumptions used to calculate the predictions and the quality of site-specific data. In some settings the accuracy of predicted changes in water quality will be good, at other sites it will be poor.

146. COMMENT: Commentor 93 states that the amount of allowed degradation in Rule VI(2)(f) should be defined in terms of concentration or load or both.

RESPONSE: The determination as to concentrations of loads will be based on best professional judgment as to what is necessary to prevent degradation.

RULE VI(2)(g) - DECISION PROCEDURES - WATER QUALITY PRACTICES

147. COMMENT: Commentor 93 states that department approved water quality practices need to be compiled by the department prior to finalizing these rules.

RESPONSE: Water quality protection practices are statutorily defined and include treatment requirements that have been adopted by the board. The definition is broad enough, however, to include practices that are not established by rule, but may be required on a case-by-case basis pursuant to Section 75-5-303(3)(d), MCA. Rule VI(2)(g) implements the requirements of Section 75-5-303(4)(b) by requiring the department to specify the required water quality protection practices in its preliminary decision. There is no requirement in the law that such practices must be compiled prior to adopting these rules or prior to implementing the policy.

RULE VI(2)(h) - DECISION PROCEDURES - MONITORING REQUIREMENTS

148. COMMENT: Commentor 105 states monitoring of water quality is vital and suggests that this can be accomplished through partnerships between the government, educational institutions, nonprofit groups, business organizations or industries, and the general citizenry.

RESPONSE: Although monitoring is an integral part of the Water Quality Act, the comment requests implementation of a monitoring program that is beyond the scope of these rules.

RULE IV(4) - DECISION PROCEDURES - PUBLIC NOTICE

149. COMMENT: Commentor 45 states that Rule IV(4) should be deleted because it requires monitoring by a particular source at the discretion of the department. Because monitoring costs may be very significant in many instances, the commentor suggests that the department itself conduct monitoring. Under this rule, the potential for abuse by the department exists and, additionally, it imposes significant real costs on individuals.

RESPONSE: See Response 110.

150. COMMENT: Commentor 49 states that all down-gradient drinking water suppliers should be notified of any preliminary decisions to allow degradation.

RESPONSE: The rules require public notice of all preliminary decisions in accordance with ARM 16.20.1334. Therefore, no change in the rules is necessary to address this concern.

151. COMMENT: Commentor 93 states that the words "at least" in Rule VI(4) should be deleted.

RESPONSE: The requirement for a minimum comment period of 30 days is statutorily imposed pursuant to § 75-5-303(4), MCA. Therefore, the rule will not be changed to conflict with this requirement.

RULE VII(1) - NONSIGNIFICANT DETERMINATIONS - CRITERIA

152. COMMENT: Commentor 38 states that it is not clear to EPA that all of the conditions in (1) of Rule VII must be met in order for an activity to be found nonsignificant. The record should clarify the scope and intent of this provision.

RESPONSE: Rule VII(1) states in the last sentence that "except as provided in (2) below, changes in existing surface or ground water quality resulting from the activities that meet all the criteria listed below are nonsignificant, and are not required to undergo review under 75-5-303, MCA." No further clarification of this requirement is necessary.

153. COMMENT: Commentor 50 proposes that (a) and (b) in Rule VII(1) should be moved to Rule VIII to clarify that uses categorized as nonsignificant are not subject to retroactive agency review.

RESPONSE: Subsections (a) and (b) under Rule VII(1) are two of the criteria that activities must meet in order to be nonsignificant. They are not categories of activities and, therefore, do not belong in Rule VIII, which applies only to categories of nonsignificant activities.

154. COMMENT: Commentor 64 asks whether the criteria in (a), (b), and (c) in Rule VII(1) apply only to surface water?

RESPONSE: The criteria of Rule VII(1) apply to both surface and ground water except when the rules expressly state otherwise. The proposed rules do not limit (a) through (c) to either ground water or surface water. In Response to Comment 159. However, (a) of Rule VII(1) will be changed to limit its application to surface water.

155. COMMENT: Commentor 64 requests clarification of the language in (b),(c), and (g) in Rule VII(1) as follows: If there is any practical distinction in the wording "less than or equal to" in (b), "detectable changes" in (c), and "measurable chang-

es" in (g) it should be stated. The commentor suggests that the only changes that one can be aware of and, therefore, act upon are those that are measurable.

RESPONSE: The terms were chosen to distinguish between concentrations of parameters considered nonsignificant based on the character of the pollutant and the potential for harm to human health and the environment, pursuant to § 75-5-301(5)(c), MCA. In order to determine whether a proposed activity is nonsignificant, there is a critical difference in the terms. If increases in carcinogens were allowed to occur to the point that their concentration were "detectable" or "measurable", water quality standards would be violated. Violations of standards for these parameters should not be considered nonsignificant according to the criteria in § 75-5-301(5), MCA. For the above reasons, the suggested change will not be made.

RULE VII(1)(a) - NONSIGNIFICANT DETERMINATIONS - MEAN FLOW

156. COMMENT: Commentors 26, 30, 31, 32, and 40 state that the consideration of mean annual flow in Rule VII(1)(a) is not protective. "Mean annual flow" should be replaced with "low flow" criteria.

RESPONSE: See Response 160.

157. COMMENT: Commentors 42 and 43 state that Rule VII(1)(a) should be changed as follows: "Activities that would increase or decrease the mean annual flow by less than 15% as measured at the nearest downstream stream flow gauging station."

RESPONSE: To provide any meaningful information regarding the impact of a flow change, the flow would have to be determined at the point where the change in water quality will occur. The flow at the nearest downstream flow gauging station is very likely to be meaningless. Therefore, the suggested change will not be made.

158. COMMENT: Commentors 44, 45, and 51 state that in Rule VII(1)(a) it is important that the nondegradation policy not potentially undermine established rights to quantities of water recognized by the Montana Constitution and Montana law. Further, SB 401 provides that nonsignificance criteria are to be established based on the quality and strength of a pollutant. Flow has nothing to do with the discharge of a pollutant. Therefore, this provision should be removed as it adds nothing to whether an activity discharges a pollutant to a water body.

RESPONSE: Established rights recognized by the Montana Constitution and State law are excluded from application of the rules pursuant to Rule II(13)(c). Further, this provision is consistent with legislative guidance for establishing nonsignificant criteria as it recognizes the fact that changes in flow can, and do, impact water quality. Section 75-5-301(5)(c) addresses, among other things, the potential for harm to human health

and the environment, not just discharge of pollutants. Therefore, the final rule will address changes in flow.

159. COMMENT: Commentor 49 states that in Rule VII(1)(a) we assume you are referring to surface waters. How is ground water addressed?

RESPONSE: The rule is intended to refer only to surface waters. The final rule will be changed to clarify this intent.

160. COMMENT: Commentors 72 and 89 state that the 15% change in mean annual flow in Rule VII(1)(a) should be changed to mean daily flow.

RESPONSE: The final rule has been changed to require an assessment of the mean monthly flow rather than the suggested mean daily flow. A change to mean daily flow will not be made due to the difficulty of obtaining data.

161. COMMENT: Commentors 73 and 114 state that the point at which mean flow will be determined should be defined in Rule VII(1)(a).

RESPONSE: The point where the flow determination must be made is the point where the increase or decrease will occur. No further clarification in the rules is necessary.

162. COMMENT: Commentor 74 states that "as measured at the nearest downstream flow gauging station, if available." should be added to Rule VII(1)(a).

RESPONSE: See Response 157.

163. COMMENT: Commentor 83 states that activities which change the monthly mean flow by more than 15% or the 7-day low flow by 10% are significant.

RESPONSE: The suggested change is appropriate because it is more protective of water quality and is feasible to implement. Therefore, the final rule will be modified accordingly.

164. COMMENT: Commentor 88 states that the reference to flow in Rule VII(1)(a) should be deleted.

RESPONSE: See Response 158.

165. COMMENT: Commentor 95 states that it appears these rules consider quantity of flow as a quality parameter. If quantity of flow remains in the rules, then guidelines as to how much and for how long must be developed.

RESPONSE: Such guidelines are more appropriately included in implementation guidance rather than rules implementing the nondegradation policy. Therefore, no change, other than those

made in response to Comment 163, will be made.

166. COMMENT: Commentor 106 recommends that "mean annual flow" be changed to "mean monthly" or "mean daily" flow in order to establish a threshold for change and account for natural variation in stream flows. In addition, based solely on a 15% change in surface water flow, it is likely that hundreds of new water right applications per year may be subject to nondegradation review, unless a categorical exclusion is provided in Rule VIII.

RESPONSE: The final rule has been changed from "mean annual" to "mean monthly" flow in response to similar comments. Although hundreds of new water rights applications may require nondegradation review under the proposed rules, the statute does not provide an exemption for any activity with a potential to cause degradation. Therefore, the rules will not include a categorical exemption for new water rights.

RULE VII(1)(b) - NONSIGNIFICANT DETERMINATIONS - PARAMETERS

167. COMMENT: Commentors 34 and 95 state that Rule VII(1)(b) needs rewording. Does the rule mean to say, "Discharges containing carcinogenic parameters or parameters with bioconcentration factors greater than 300 at concentrations. . .?"

RESPONSE: Changes have been made in the final rule to provide the clarification requested by the commentors.

168. COMMENT: Commentors 42 and 43 state that in Rule VII(1)(b): Add to end of subsection: ". . . or the detection level for the parameter as provided in the definition of "detectable" (Rule II(3)).

RESPONSE: The proposed language would allow violations of water quality standards to occur and would be inconsistent with the guidance in § 75-5-301(5)(c), MCA. Therefore, the suggested change will not be made. In addition, the definition for "detectable" has been replaced in the final rule with "trigger values."

169. COMMENT: Commentor 49 asks whether in Rule VII(1)(b) this requirement is with or without a mixing zone? What level will be used when the parameter is less than detection limits? Are the standards in WQB-7 to be used as in-stream standards or, as in this section, effluent limitations?

RESPONSE: Rule VII(1)(b) does not allow mixing zones because a mixing zone would not be consistent with the requirement that the concentration of the pollutant be "less than or equal to" the concentration in the receiving water. Procedures for addressing situations where instream concentrations are less than detection limits are addressed in WQB-7 by the inclusion of "reporting levels". Finally, the standards in WQB-7 are to be used as instream water quality standards, but may be used as

effluent limitations in certain situations.

170. COMMENT: Commentor 49 states that the proposed nondegradation rules indicate that the discharge of any substance with a bioconcentration factor less than 300 at a concentration not exceeding the background is considered nonsignificant. It is unclear what the impact is, if the discharge concentration for these parameters exceed the background concentration. What standard is then applied?

RESPONSE: If a substance is not a carcinogen and if its bioconcentration factor is less than 300, Rule VII(1)(b) does not limit its discharge. To be considered nonsignificant, however, the discharge must meet all of the other provisions of Rule VII(1).

171. COMMENT: Commentor asks whether carcinogenic parameters with bioconcentration factors less than 300 are considered toxic for the purpose of Rule VII(1)(b)?

RESPONSE: No. All carcinogens are treated as carcinogens. However, toxins with bioconcentration factors greater than 300 are treated like carcinogens under Rule VII(1)(b).

172. COMMENT: Commentor 95 asks whether natural carcinogens should be treated differently than other carcinogens (e.g., allowance for mixing zones). Any disturbance, such as road construction, could cause a temporary increase in the dissolution of natural carcinogens, such as arsenic. This rule should also cross reference § 75-5-308, MCA.

RESPONSE: Activities that are allowed short term exceedences of the water quality standards under § 75-5-308, MCA, are included in Rule VIII as a category of activities meeting the criteria of Rule VII. The proposed change will not be made, as it would be inappropriate to include a category of activities in the rule establishing criteria for nonsignificance. See also Response 12.

RULE VII(1)(c) - NONSIGNIFICANT DETERMINATIONS - MIXING ZONES

173. COMMENT: Commentors 4, 5, 6, 8, 15, 19, 22, 33, 40, and 56 state that activities which require mixing zones should not be considered as "nonsignificant".

RESPONSE: The inclusion of certain activities that require mixing zones under the proposed rules is consistent with the criteria for determining nonsignificant activities pursuant to § 75-5-301(5)(c). Therefore, the inclusion of mixing zones will remain in the final rules.

174. COMMENT: Commentor 41 suggests that, due to limited resources, the determination of mixing zones should be left to the professionals submitting applications. Final approval of the mixing zones would rest with the department.

RESPONSE: Mixing zones will be established according to rules adopted by the board pursuant to § 75-5-301(4), MCA.

175. COMMENT: Commentor 95 asks what the rationale is for not allowing mixing zones for carcinogenic and bioconcentrating parameters?

RESPONSE: See Response 169.

176. COMMENT: Commentor 120 states that all reference to mixing zones in Rules VII and VIII must be deleted. In addition, provisions in the rules allowing the department or individuals make determinations of nonsignificant activities without public review violate Article II, Section 8, of the 1972 Montana Constitution, regarding the public's right to participate in agency decisions.

RESPONSE: The use of mixing zones in the rules has been addressed in prior responses (e.g., Response 173). In regard to the public's right to participate in agency determinations of nonsignificance, this right has been secured through the public comment period for the rules establishing nonsignificant criteria. No further public participation or review is required by law or the Montana Constitution.

RULE VII(1)(c) - NONSIGNIFICANT DETERMINATIONS - TOXIC PARAMETERS

177. COMMENT: Commentor 32 states that Rule VII(1)(c), as it relates to dissolved oxygen, should be modified to show that detectable decreases will cause degradation.

RESPONSE: The final rule has been modified to clarify that certain "changes" rather than "increases" will cause degradation.

178. COMMENT: Commentor 125 states that the term "detectable increases" should be replaced by the term "measurable increase" for consistency and clarity.

RESPONSE: "Detectable" has been replaced with "trigger values" to clarify the rules.

RULE VII(1)(d) - NONSIGNIFICANT DETERMINATIONS - NITROGEN

179. COMMENT: Commentors 4, 5, 6, and 15 state that discharges of nitrates into state waters should not be allowed unless nitrate concentrations are never allowed to exceed 1.0 mg/l or, alternatively, another level established by a panel of nutrient experts. Generally, these commentors suggest that 2.5 mg/l is too high and supports development.

RESPONSE: In many instances the nitrate level in ground water can exceed 1.0 mg/l and still be nonsignificant according to the guidance in § 75-5-301(5)(c), MCA. The proposed rules reflect those instances and will not be changed as suggested. In addition, the proposal to have a panel of experts establish

levels of nitrates conflicts with the rulemaking authority of the board. Under that authority, the board has been legislatively delegated the responsibility of establishing nonsignificant criteria through the adoption of rules.

180. COMMENT: Commentors 30, 31, and 95 state that treatment of nitrogen containing compounds in Rules VII and VIII incorrectly imply that the only concern is related to public health. In fact, nitrogen is a nutrient which is responsible for degradation, including violations of standards, in many of Montana's surface waters. The rules, as written, do not adequately address this fact and, therefore, are not protective of water as required by the Water Quality Act.

RESPONSE: Rule VII and Rule VIII protect surface waters by prohibiting an increase above the "trigger value" in nitrate concentrations in those waters. This requirement precludes violations of water quality standards for high quality waters and allows minimal change in surface water nutrient concentrations. Therefore, no change to the proposed rules is necessary.

181. COMMENT: Commentors 42 and 43 propose new language for Rule VII(1)(d): Changes in the concentration of nitrogen in ground water which will not impair existing or anticipated beneficial uses, where water quality protection practices approved by the department have been fully implemented, ~~and where the sum of the resulting concentration of nitrate, nitrite, and ammonia, all measured as nitrogen, outside of any applicable mixing zone designated by the department, will not exceed 2.50 mg/l,~~ as long as such changes will not result in a detectable change in the nitrogen concentration in any perennial surface water;

Rationale: This change provides complete protection for existing uses.

RESPONSE: The proposed changes to Rule VII(1)(d) would disallow any consideration of degradation caused by nitrate, nitrite and ammonia in ground water. This is clearly not consistent with legislative intent and the nondegradation policy. For this reason, the proposed change will not be made.

182. COMMENT: Commentor 43 states that criteria under Rules VII and VIII, where it applies to nitrogen concentrations in surface water, should be modified to allow for inorganic nitrogen levels of 1.0 mg/l in surface waters be classified as nonsignificant.

RESPONSE: In many surface waters a level of 1.0 mg/l of inorganic nitrogen could violate surface water quality standards. The department and EPA have used 1.0 mg/l as an indication of impaired surface waters in the State's report on water quality under Section 305(b) of the Clean Water Act. Clearly such

levels cannot be allowed to occur and be considered nonsignificant.

183. COMMENT: Commentors 43 and 45 state that Rule VII(1)(d) should be changed to provide equitable treatment for sources of nitrogen other than domestic wastewater treatment systems.

RESPONSE: Rule VII(1)(d) is not limited in application to domestic wastewater treatment systems but applies to all new or increased sources. Therefore, no change in the rules is necessary to address this concern.

184. COMMENT: Commentors 50, 52, 59, and 68 state that these rules treat the discharge of nitrate too stringently. There is no reason for a standard nearly 5 times more stringent than the MCL. Following the agency's rationale to its logical conclusion, the only solution is to stop development.

RESPONSE: The levels for nitrate established under the rules is consistent with the guidance in § 75-5-301(5)(c). Nitrate can, particularly with domestic waste water systems, be an indicator of other parameters which may be of even greater concern such as viruses, bacteria and other pathogens. Establishing significance levels for nitrates below the standard is consistent with a policy designed to maintain high quality waters, especially when establishing criteria that will exclude certain sources from the requirements of § 75-5-303, MCA. Changes to Rule VII(1)(d) have been made in order to distinguish concentrations of existing nitrate levels resulting from sewage as opposed to other sources. Where background concentrations of nitrates do not result from sewage disposal, then the concern over viruses and other pathogens is lacking. For this reason, Rule VII(1)(d) now provides for varying levels of nitrates considered nonsignificant depending upon the source of existing nitrates. In addition, 2.5 mg/l has been replaced with a scale of allowable changes in nitrates depending upon the existing level of nitrates as well as the source of nitrates.

185. COMMENT: Commentor 64 asks why in Rule VII(1)(d) is the criteria used 2.5 mg/l when the MCL is 10.0 mg/l?

RESPONSE: The level of 2.5 mg/l for nitrates in ground water was established according to the guidance in § 75-5-301(5)(c) for determining nonsignificance. The standard for surface water is 1.0 mg/l. The drinking water standard of 10.0 mg/l was established for another purpose, i.e., to protect the public from drinking water that is contaminated. The nondegradation law was meant to protect losses of existing high water quality that is better than the standards established under the Public Water Supply Act. The originally proposed level of 2.5 mg/l of nitrates has been modified, however, for the reasons given in Response 184.

186. COMMENT: Commentor 72 states the 2.5 mg/l in Rule

VII(1)(d) is set too high and is not protective of existing high quality waters.

RESPONSE: See Response 184 and 185.

187. COMMENT: Commentors 66, 73, and 79 state that the nonsignificant level for nitrate should be 10 mg/l rather than 2.5 mg/l.

RESPONSE: See Response 184 and 185.

188. COMMENT: Commentor 75 states that the "acceptable" level for nitrates in ground water is unknown. Nitrate may be useful as an indication of the presence of other harmful substances.

RESPONSE: See Response 184. Nitrate derived from human wastes, such as septic tank effluent, does indicate the possibility that other undesirable constituents, such as viruses, may be present. The level for nitrate increases, as modified in the final rule, represents the acceptable level for purposes of being considered a nonsignificant change in water quality.

189. COMMENT: Commentor 75 states that nitrate increases in surface water caused by increased concentrations in ground water are significant.

RESPONSE: Changes less than the "trigger value" in the nitrogen concentration of surface waters are generally nonsignificant. In unusual cases, the provisions of Rule VII(2) would allow the department to determine that an activity causing changes less than the "trigger value" would be significant.

190. COMMENT: Commentor 76 states that nonsignificance criteria for nitrate should be dropped and standards set by a scientific panel.

RESPONSE: See Response 179.

191. COMMENT: Commentor 77 states that "reasonably" should be added in front of "anticipated" in Rule VII(1)(d).

RESPONSE: The language in the rule is consistent with the statutory requirement under § 75-5-303(2)(c) of the policy to protect existing and anticipated uses. Because the protection of uses was not modified by the term "reasonably" under the statute, the proposed change will not be made as it may limit the scope of the statutory requirement.

192. COMMENT: Commentor 77 states that "approved by the department" should be deleted in Rule VII(1)(d) because requiring prior approval of these practices will place additional burdens on the department and further delay the process.

RESPONSE: Rule VII(1)(d) allows certain increase in the level

of nitrate in ground water provided certain conditions are met. Approval of water quality protection practices by the department assures that the activity will not cause nitrate concentrations above the level established in the rule. Therefore, the proposed change will not be made.

193. COMMENT: Commentor 77 states that since ammonia is more toxic it should be specifically limited at Gold Book levels in Rule VII(1)(d).

RESPONSE: Toxicity of ammonia in ground water is not a concern as people will not consume waters with harmful levels of ammonia. It is a concern in surface water, and is included as a toxic parameter and limited by WQB-7. Therefore, the requested change will not be made.

194. COMMENT: Commentor 77 states that the allowable level for nitrate in non-sewage effluent should be higher than in sewage effluent because such effluent does not contain viruses and other harmful contaminants.

RESPONSE: See Response 184.

195. COMMENT: Commentor 77 states that the nitrate nitrogen limits for mining effluent should be the MCL.

RESPONSE: Use of the water quality standard as a level for determining nonsignificant changes is not consistent with the purpose of the policy to maintain quality better than the standards. Therefore, the proposed change will not be made.

196. COMMENT: Commentors 81 and 84 state that changes up to 5 mg/l nitrate in ground water should not be considered significant.

RESPONSE: See Response 184.

197. COMMENT: Commentor 84 states that the reasons of the department for finding a nitrogen level of 3 mg/l insignificant in its letter to John Diddel also apply to support a level of 5 mg/l.

RESPONSE: The rationale for making the specific determination of nonsignificance mentioned in this comment was based on the guidance provided by § 75-5-301(5)(c) in the Water Quality Act. This approach was an interim measure to implement the policy prior to adoption of the rules. The rationale under the interim measure for making a site specific determination does not generally apply to allow a level of 3.0 mg/l or 5.0 mg/l in every instance. See also, Response 184.

198. COMMENT: Commentor 84 states that the department should set the level at 5 mg/l while they try to find reasonable solutions to the problem of ground water contamination.

RESPONSE: The rules for nonsignificant determinations must be consistent with the guidance in the rulemaking authority of the board. As stated in Response 184-185, the criteria in the final rule are consistent with this guidance. Setting an arbitrary level at 5.0 mg/l is less likely to be consistent with the legislative guidance to protect human health and the environment. Therefore, the proposed change will not be made.

199. COMMENT: Commentor 95 asks what the basis is for the 2.5 mg/l limit for nitrate?

RESPONSE: The proposed level of nitrogen concentrations in ground water, as modified in the final rule, is based upon best professional judgment using the guidance in § 75-5-301(5)(c), MCA. It is also based upon information gathered during the informal comment period prior to publication of the proposed rules. See Response 184.

200. COMMENT: Commentor 96 suggests that a "maximum target" level of 5.0 mg/l nitrate should be used as the basis for evaluating proposed increases of nitrates to ground water. In addition, an "action level" of 5.0 or 7.0 mg/l, determined by actual measured levels, be established as a point where an investigation by the department will be initiated to determine the cause and to take appropriate action against the source.

RESPONSE: The adoption of "action levels" or "maximum target" levels is not authorized by the rule-making authority of the board. In addition, it would be inappropriate to establish levels for nitrates which will likely impact uses. For the above reasons, the suggested change will not be made.

201. COMMENT: Commentor 96 asks whether "detectable change" in Rule VII(1)(d) is to be determined using the Bouman and Schafer model or will changes be determined by monitoring? A "trigger" of 2.5 mg/l is too low, if the conservative modeling techniques are used.

RESPONSE: The rules do not specify a single method or model an applicant must use when determining "detectable change". If an applicant can show they have a model or method which is better than the one generally used by the department, that model or method may be used in lieu of the department's. On the other hand, basing a change on monitoring allows changes to occur while the monitoring takes place. The purpose of the policy is to prevent a change in water quality. Therefore, some type of modeling must be used.

202. COMMENT: Commentor 125 states that the term "detectable change" should be replaced by the term "measurable increase" for consistency and clarity.

RESPONSE: See Response 40 and 43.

RULE VII(1)(e) - NONSIGNIFICANT DETERMINATIONS - PHOSPHORUS

203. COMMENT: Commentor 64 questions why is 50 years included in Rule VII(1)(e).

RESPONSE: Phosphorus is removed from soil solution in two ways. First, some fine soil particles can absorb phosphorus. The amount of phosphorus absorbed by soils is limited by the soil texture and the type of soil particles present. The absorptive capacity can be determined through the proper tests. Second, phosphorus can also be removed from soil solution through the process of precipitation. Although the amount of precipitation is determined by the chemical characteristics of the soil solution, the process for making this determination is very complex and not well understood.. The available data indicates, however, that if the absorptive capacity of the soil exceeds 50 years, it is likely that phosphorus will be effectively removed due to precipitation. The 50 year requirement may be modified when better data is available.

204. COMMENT: Commentor 95 asks whether mixing zone in Rule VII (1)(d) refers to surface water, ground water or both? Is the mixing zone an extension of a treatment system?

RESPONSE: Rule VII(1)(d) applies to ground water. Therefore, the mixing zone specified under that rule refers to a ground water mixing zone. The mixing zone is not an extension of a treatment system.

RULE VII(1)(f) - NONSIGNIFICANT DETERMINATIONS - WATER QUALITY CHANGES

205. COMMENT: Commentor 26 states that Rule VII(1)(f) is contrary to Montana law because it expressly allows degradation without any consideration for permanency of degradation, potential impacts, or the unique criteria of a particular situation.

RESPONSE: Rule VII(1)(f) applies only to parameters which have a low potential for harm to human health and the environment and is, therefore, consistent with the guidance in § 75-5-301(5)(c), MCA. The rule will remain as proposed.

206. COMMENT: Commentor 38 suggests that Rule VII(1)(f) be clarified because it might be interpreted as allowing circumvention of the de minimis test of significance where the existing water quality exceeds 40% of the standard. The intent of this provision should be clarified.

RESPONSE: The rule clearly applies to parameters which have a low potential for harm to human health and the environment and limits increases for these parameters to 50% of the standards. Moreover, there is no de minimis standard in the rule making authority for establishing nonsignificance criteria. The rule is consistent with the guidance in § 75-5-301, MCA, and requires no further clarification.

207. COMMENT: Commentor 125 states that this section provides a

good framework for changes in "harmful parameters", but is inconsistent with definition (18) of Rule II and Circular WQB-7. A modification of the definition and Circular WQB-7, as well as wording to clarify the limits of change for pH will make the rules consistent and clearer.

RESPONSE: This has been clarified by modifications to WQB-7 and changes in the definition of "toxic parameters". No change is necessary for pH as it will be treated as a harmful parameter.

RULE VII(1)(g) - NONSIGNIFICANT DETERMINATIONS - NARRATIVE STANDARDS

208. COMMENT: Commentors 42 and 43 propose new language for Rule VII(1)(g): Changes in the quality for any parameter for which there are only narrative water quality standards if the changes will not have a measurable adverse effect on any existing or anticipated uses or cause measurable adverse changes in aquatic life ~~or ecological integrity~~.

RESPONSE: Narrative standards are meant to protect both aquatic life and ecological integrity of a stream. Since the ecological integrity of a stream covers more than a change in species, it will remain in the final rule.

RULE VII(2) - NONSIGNIFICANT DETERMINATIONS - MONITORING

209. COMMENT: Commentors 33 and 34 state that in Rule VII(2) "monitoring" should be added.

RESPONSE: The ability to require monitoring is found in the part of Rule VII(2)(g) which states, "any other information deemed relevant...." Therefore, no change is necessary to address this comment.

RULE VII(2)(a) - NONSIGNIFICANT DETERMINATIONS - CUMULATIVE IMPACTS

210. COMMENT: Commentors 19, 26, 30, 32, 40, 41, 56, and 105 state that very close scrutiny must be applied to activities classified as nonsignificant to ensure the cumulative impacts of those activities do not cause unacceptable changes in Montana's high quality waters.

RESPONSE: The rules, as currently written, address cumulative impacts to some extent by establishing an upper level beyond which all increases are generally found to be significant and by addressing cumulative impacts in Rule VII(2). Methods of assessing cumulative impacts are more appropriately addressed in implementation guidance.

211. COMMENT: Commentors 44, 45, 50, 88, 112, and 113 suggest that allowing the department to re-evaluate determinations of significance under Rule VII(2) will result in uncertainty by giving excessive discretion to the department. In addition, the criteria regarding cumulative impacts or synergistic affect was in a draft bill of SB 401 and was removed. The department

should not be allowed to add cumulative impacts or synergistic affects as an end run on the intent of SB 401.

RESPONSE: It is unlikely that a set of criteria for nonsignificance can be developed that would sufficiently fulfill the goal of preventing degradation in every instance. Given that implementation of the policy under the rules has yet to be tested, it is important that the department have discretion to make a determination of significance independent of the criteria in Rule VII(1). In addition, the committee minutes on SB 401 do not indicate that a draft bill was ever introduced that addressed cumulative impacts or synergistic effects. The department's position throughout the passage of SB 401 was that preventing cumulative impacts, or the incremental degradation of water, was the very essence of the nondegradation policy. Therefore, no specific wording addressing cumulative impacts was necessary in the proposed legislation. This does not, however, preclude the inclusion of cumulative impacts or synergistic effects in the rules implementing the policy. For the above reasons, the rule will remain as proposed.

212. COMMENT: Commentor 75 states that cumulative impacts of many small "insignificant activities" may be significant and suggests setting "caps" for the total loads allowed in surface or ground water basins.

RESPONSE: The proposal for the adoption of "caps" for total loads to address cumulative impacts on nonsignificant determinations is beyond the statutory authority for adopting rules implementing the policy. The rules do establish some limits by setting levels above which an activity will be considered degradation.

213. COMMENT: Commentor 89 states that short term activities which occur repetitively are significant, this should be covered and limited to less than once every 10 years.

RESPONSE: Rule VII(2)(a) and (g) allow the department to make case-by-case evaluations that would preclude short term repetitive activities from being found nonsignificant. Establishing a time limit by rule would not be practical considering the varying types of short term activities that may occur. Therefore, the proposed change will not be made.

RULE VII(2)(b) - NONSIGNIFICANT DETERMINATIONS - SUBSTANTIVE INFORMATION

214. COMMENT: Commentor 49 asks in Rule VII(2)(c) what is considered "substantive information"?

RESPONSE: As used in the rule the term "substantive information" refers to information that is essential to the issue of determining the significance of a proposed change in water quality.

215. COMMENT: Commentor 111 states that Rule VII(2)(c) should

be narrowed and public comment should be directed to one of the criteria found in (1) of the rule.

RESPONSE: The purpose of Rule VII(2) is to allow a determination of significance independent of the criteria in (1). Limiting public comment to (1) would, therefore, serve no purpose and the proposed change will not be made.

RULE VII(2)(d) - NONSIGNIFICANT DETERMINATIONS - FLOW CHANGES

216. COMMENT: Commentor 73 states that Rule VII(2)(d) contradicts (1)(a), language should be added to remove the contradiction.

RESPONSE: Rule VII(2)(d) allows a consideration of changes in flow when the department makes a determination of significance independent of the criteria in (1). Any conflicts between the criteria in Rule VII(1) and the rationale for the agency's decision under (2) is irrelevant for the purposes of allowing a determination unrestricted by the criteria in (1).

RULE VII(2)(g) - NONSIGNIFICANT DETERMINATIONS - RELEVANT INFORMATION

217. COMMENT: Commentor 95 states that Rule VII(2)(g) is a catch-all which negates the previous criteria and recreates the guessing game as to what and how the nondegradation policy will be applied.

RESPONSE: See Response 211.

RULE VII(3) - NONSIGNIFICANT DETERMINATIONS - MONTANA CODE GUIDANCE

218. COMMENT: Commentor 26 states that Rule VII(3) should be deleted. The department should have no undefined and ambiguous procedure for classifying an activity as nonsignificant. This provision is ripe for abuse.

RESPONSE: There will be instances where an activity might not meet all of the criteria in Rule VII(1) and still be nonsignificant according to the guidance of § 75-5-301(5)(c), MCA. As evidence of this, there are several categories of activities in Rule VIII which may not meet all the criteria in Rule VII(1), but should be considered nonsignificant under the guidance in the Act.

219. COMMENT: Commentor 27 (DHES) proposes an addition to Rule VII(3), which will allow public comment on agency decisions under subpart (3).

RESPONSE: This proposal is in response to earlier comments received by the department, and the final rule incorporates the proposed change.

220. COMMENT: Commentor 32 states that Rule VII(3) does not make sense or provide any clarification to the law and, there-

fore, should be deleted.

RESPONSE: See Response 218.

RULE VII - NONSIGNIFICANT DETERMINATIONS - GENERAL

221. COMMENT: Commentors 19 and 22 state that polluting activities that cause violations of water quality standards should not be classified as nonsignificant.

RESPONSE: Polluting activities, i.e., activities that cause violations of water quality standards, are not considered nonsignificant under Rule VII. Therefore, no change to the proposed rules is necessary.

222. COMMENT: Commentor 27 (DHES) proposes an amendment to Rule VII(1)(c) to clarify that this section applies to "nutrients", which include both nitrogen and phosphorus.

RESPONSE: This proposed change has been included in the final rules.

223. COMMENT: Commentor 27 (DHES) found that significance cannot be based upon limits of detection or quantitation for many parameters, because technology is not available to provide the protection to water quality required by the Clean Water Act and Water Quality Act. To establish nonsignificance using these limits would create an anomalous situation in which violations of water quality standards for carcinogens and other parameters would be considered nonsignificant under the nondegradation policy.

RESPONSE: Significance criteria have been established pursuant to the guidance in the Water Quality Act. It is not logical that, in most cases, long-term violations of standards for parameters such as carcinogens should be found to be nonsignificant. Changes have been made to WQB-7 that provide "trigger values" for determining nonsignificance.

224. COMMENT: Commentor 88 states that the department's proposed amendment to Rule VII(3) should be rejected, as this is covered in (2)(c).

RESPONSE: The department's proposed amendment of Rule VII(3) provides an opportunity for public comment prior to a final agency decision that an activity is nonsignificant based on § 75-5-301, MCA. Under (2), there is no requirement for public comment prior to an agency determination that an activity will cause degradation, because once that determination is made, further public review is required. For these reasons, the department's proposed amendment will be included in the final rule.

225. COMMENT: Commentor 95 states that Rule VII should include a timeframe for issuance of the notice of decision. Alterna-

tively, the term "upon issuing" could be defined in Rule II.

RESPONSE: A maximum period of sixty days for issuing a decision regarding nonsignificance is specified in Rule IV(3). Therefore, no change to address this concern is necessary.

RULE VIII(1) - NONSIGNIFICANT ACTIVITIES - EXEMPTIONS

226. COMMENT: Commentor 1 states that installations contributing domestic sewage in the amount of 350 gpd or developments of less than 40 acres should be exempt from the rules so long as downgradient monitoring is provided.

RESPONSE: All activities that have the potential to degrade are covered by the nondegradation policy. Exemptions for small installations contributing sewage has not been provided in the Water Quality Act and, therefore, cannot be provided by rule. For these reasons, the proposal will not be included in the final rule.

227. COMMENT: Commentor 25 states that if reduction of nitrate discharges is a priority, then categorical exemptions of agricultural production under Rule VIII is highly inconsistent.

The most stringent requirements apparently apply to sources that account for a small portion of nitrate discharges to state waters. The rules unreasonably require a small percentage of dischargers that contribute to nitrate increases in state waters to bear the entire economic burden of attaining the regulatory goal for reduced nitrate.

RESPONSE: There may be some inconsistency in the rules' application to point sources and nonpoint sources of nitrate. This inconsistency is attributable to the differences in the statutory basis for regulating point versus nonpoint sources under both the Montana Water Quality (WQA) and the federal Clean Water Act (CWA). Primarily, there are no regulatory controls, such as permit requirements, that apply to nonpoint sources and § 75-5-306, MCA, considers impacts caused by reasonable land, soil, and water conservation practices to be the natural condition of the stream. For these reasons, the categorical exemptions of certain nonpoint sources in Rule VIII are consistent with the requirements of the WQA and will remain in the final rule.

228. COMMENT: Commentor 26 states that the proposed rules do not comply with the Water Quality Act's current nondegradation policy. The proposed rules, with their "nonsignificant" categorical exemptions ignore the promises DHES made to the Montana Legislature, as well as the statutory and constitutional requirements regarding degradation. The legislative intent, as stated in the Statement of Intent for SB 401, must be considered when adopting these rules.

RESPONSE: The proposed rules, as modified in response to comments, are consistent with the law, specifically § 75-5-

301(5)(c), MCA, as well as the statement of intent for SB 401. Therefore, the categorical listing of nonsignificant activities will remain in the final rule.

229. COMMENT: Commentor 26 states that the BHES must add a provision to Rule VIII, which would allow any potential source of degradation, be classified as significant regardless of any categorical exclusion upon petition of potentially interested persons.

RESPONSE: Rule VII(3) provides that a change in water quality resulting from an activity or class of activities may be determined to be significant by the department. This rule addresses the concern of the commentor that an activity may be found significant regardless of a categorical exclusion. Since the department is responsible for administering the WQA, it is not appropriate to mandate a determination of significance based upon a petition requesting this determination. For these reasons, the proposed change will not be made.

230. COMMENT: Commentor 27 (DHES) proposes the addition of category (n) in Rule VIII(1), which will allow solid waste management systems, motor vehicle wrecking facilities, and county motor vehicle graveyards, which are in compliance with ARM Title 16, chapter 14, to be nonsignificant.

RESPONSE: Since these systems are designed to be non discharging, any discharge which could cause degradation would be a violation of their permit or license. At that point, these facilities would no longer meet the criteria for a categorical exclusion and would also be subject to an enforcement action for violations of the permit. For these reasons, the proposed amendment will be included in the final rule.

231. COMMENT: Commentor 27 is a proposal by the department to add category (o) in Rule VIII(1), which will allow hazardous waste management facilities, which are in compliance with ARM Title 16, chapter 44, to be nonsignificant.

RESPONSE: See Response 230.

232. COMMENT: Commentor 41 states that if a change of land use from agricultural to residential use results in no net degradation, this change should be considered nonsignificant.

RESPONSE: If a change in land use would not constitute a new or increased source, it would not be subject to the nondegradation requirements. No change in the rules is necessary to address this comment. The following information, however, indicates that in many cases a change in land use would result in a new or increased source.

Probable nitrate losses to ground water resulting from agricultural operations may be only 10% of the actual amount of applied nitrogen. See, Bauder, Sinclair, and Lund, "Physio-

graphic and Land Use Characteristics Associated with Nitrate-Nitrogen in Montana Groundwater", 22 J. Environ. Qual. 255 (1993). In addition, data from AgriChemicals (Belgrade, Montana) indicate that only in the case of intensive cropping, such as sugar beet or corn operations, will more than 200 pounds of applied nitrogen be applied per acre. Thus, if 10% of the nitrogen is lost to the ground water from intensive cropping, there would be an annual input of about 20 pounds of nitrogen per acre. Conversely a household on one acre will contribute about 30 pounds of nitrogen to the disposal system.

Depending on the removal efficiency of the disposal system, development at a rate of 1 unit per acre may or may not be an increased source of nitrate. See also Response 283.

233. COMMENT: Commentors 42, 43, 48, and 78 propose a new subsection for Rule VIII(1): Discharges of storm water from areas covered by a permit issued under the department's storm water permit program (ARM 16.20.401);

RESPONSE: The general storm water permit program is a first attempt to permit nonpoint sources by requiring certain best management practices. Facilities with general storm water permits must comply with a Storm Water Pollution Prevention Plan designed to prevent storm water runoff. Therefore, the proposed addition of storm water discharges in compliance with the requirements of a general storm water permit will be included in the final rule.

234. COMMENT: Commentor 45 suggests the addition of "customary and historical maintenance and repair of existing irrigation facilities meeting requirements of § 75-7-103(5)(b), MCA," as nonsignificant under Rule VIII. The rationale is to support an existing program of the Conservation Districts.

RESPONSE: The intent of the proposed exclusion is to exempt from the nondegradation policy customary practices currently excluded from the definition of "project" under the Natural Streambed and Land Preservation Act of 1975. Although "customary and historic practices" may be nonsignificant, there may be instances where such practices result in degradation. Without further information, the final rules will not include this commentor's proposal.

235. COMMENT: Commentors 48, 54, 55, and 60 state that state approved landfills should be excluded from the nondegradation rules. To establish additional landfill regulations is an unnecessary layer of regulatory control and economically prohibitive. Rule VIII(1)(n) Solid waste landfills that are subject to the standards of 40 CFR Part 258 and the department's regulations pertaining to solid waste management.

RESPONSE: See Response 230.

236. COMMENT: Commentor 65 states that one major concern of the

coal industry is the potential for conflicting regulatory procedures and additional burdens on the industry when regulatory controls under one agency are already in place to protect the environment. Specifically, the extensive controls under Title 82, MCA, Chapter 4, MCA, and implementing rules found at ARM 26.4.631, et. seq., meet the criteria found in § 75-5-301(5), MCA. We therefore request that Rule VIII(1)(m) be amended as follows: (m) Coal and uranium mining performed in accordance with ARM 26.4.631, et. seq., and coal and uranium . . .

RESPONSE: The regulatory controls for coal and uranium mining do not ensure that high quality waters will not be degraded during mining operations. Since it is unknown whether every mining operation will result in nonsignificant changes in water quality, the suggested change will not be made. See also Response 238.

237. COMMENT: Commentors 68, 80, and 88 state that a provision for categorical exemptions is necessary.

RESPONSE: The proposed rules provide for categories of activities that are nonsignificant. Therefore, no change in the final rule to address this comment is necessary.

238. COMMENT: Commentor 71 states that the solid and hazardous waste treatment facilities designed as zero discharge facilities should not be categorically excluded, because many mines are also designed as zero discharge operations.

RESPONSE: The critical difference between excluding facilities that are required by law to meet zero discharge and mining operations is the lack of any requirement to meet zero discharge under the laws applicable to mines. Since some mines are not designed for zero discharge, a categorical exclusion is inappropriate. For this reason, the proposed change will not be made in the final rule.

239. COMMENT: Commentor 88 suggests that the following category should be added to Rule VIII(1): " Operations permitted pursuant to [the Montana Water Quality Act] and Section 401 of the federal clean water act."

RESPONSE: The nondegradation policy applies to all new or increased discharges to state waters and, therefore, applies to any application for a new or increased discharge under a permit issued by the department. Absent a nondegradation policy, such permits could be issued that would allow degradation up to the standards. The proposed exclusion circumvents the plain requirement of the policy, i.e., the department must ensure that no degradation will occur without authorization. For these reasons, the proposed change will not be included in the final rule.

240. COMMENT: Commentor 113 supports categorical exclusions and

questions whether the department can adequately process requests for significance determinations under Rule VII.

RESPONSE: These determinations will undoubtedly result in a significantly increased workload for the department. If necessary, additional staff will be requested or possibly reassigned in order to administer the policy.

241. COMMENT: Commentor 120 states that there should be no categorical exclusions. These would constitute an abdication of the departments responsibilities. In addition, the commentor proposes a purpose section to Rule I which states:

"(e) carrying out a programmatic environmental impact statement through which the department, with board oversight and approval, would review the water protection practices of other agencies in order to:

(i) determine which water protection practices of other agencies will result in "nonsignificant" degradation, and

(ii) develop recommendations on how to bring those polluting activities regulated by other agencies--found through the programmatic EIS review to be causing significant degradation--into compliance with Montana's nondegradation policy."

RESPONSE: See Response 228 regarding categorical exclusions. The requirements of MEPA apply only to actions undertaken by an agency. The department's rules implementing MEPA define "action" as ". . . a project, program, or activity directly undertaken by the agency. . . . ." ARM 16.2.625. Programmatic review is only required when the ". . .agency is contemplating a series of agency initiated actions, programs, or policies." The suggested programmatic review is beyond the intent of MEPA in that it requires the department to review the actions or programs of other agencies. In addition, this proposed amendment is beyond the rulemaking authority for implementing the nondegradation policy. For these reasons, the proposed amendment will not be included in the final rule.

242. COMMENT: Commentor 120 states that any activities which violate water quality standards in a mixing zone are significant and must not be categorically declared nonsignificant.

RESPONSE: See Response 86, 126, 173.

243. COMMENT: Commentors 121, 122, 123, and 124 state that waste management systems should be included under Rule VIII.

RESPONSE: See Response 230.

244. COMMENT: Commentor 120 states that proposed amendments (1), (k), (n) and (o) must be deleted as there was no public notice or comment period.

RESPONSE: There is no requirement in the law that a rule must be adopted precisely as it was proposed. The rationale is to

allow an agency to make a desirable change, either in response to public comment or on its own volition, and not be required to engage in endless public comment. The only requirement under MAPA is to provide a description of the difference between the proposed and adopted rule, along with a statement of reasons for the change. In order to provide further public comment on related rules prior to the final adoption of the nondegradation rules, public comment has been extended. Therefore, the concerns of this commentor have been addressed.

RULE VIII(1)(a) - NONSIGNIFICANT ACTIVITIES - NONPOINT SOURCES

245. COMMENT: Commentor 10 states that Rule VIII discusses beneficial use and pollution on land where reasonable land, soil, and water conservation practices are applied... Will agencies have to respond to this with formal programs and/or formal consultation?

RESPONSE: Reasonable land soil and water conservation practices are included in the surface water quality standards. This definition essentially requires the application of best management practices and further requires that present and reasonably anticipated uses must be protected. In practice the department will become involved when it discovers that uses are not being protected. The law does not require, however, the development of programs by other agencies or formal consultation with DHES.

246. COMMENT: Commentors 26, 30, 32, 40, 47, 83, and 89 state that the BHES should consider requiring that, "best management practices", rather than "reasonable land, soil, and water conservation practices" be utilized.

RESPONSE: Requiring best management practices provides only partial protection, as it would not require the protection of present and anticipated uses. In addition, the term "reasonable land, soil, and water conservation practices" is derived from the Water Quality Act. Therefore, the proposed change will not be made.

247. COMMENT: Commentor 39 states that mitigation measures to treat nonpoint sources often result in a point source discharge. The rules should be modified to encourage these treatment measures for nonpoint sources by providing for their inclusion under the nonsignificance criteria. A definition of Management or Conservation Practice" should be included in the rules.

RESPONSE: See Response 54.

248. COMMENT: Commentor 51 states that nonpoint sources are by no means held unaccountable for their actions. With respect to timber harvest activities, the nondegradation rules require that forest land managers apply an appropriate set of land, soil, and water conservation practices which will ensure that

beneficial uses are fully protected. This is the most effective way to deal with the hundreds of thousands of nonpoint activities throughout the state.

RESPONSE: Comment noted.

249. COMMENT: Commentor 72 states that livestock use should not be categorically excluded from the policy unless based on best management practices developed and approved by the state.

RESPONSE: The water impacts resulting from livestock use is covered by the requirement of "reasonable land, soil and water conservation practices" under § 75-5-306, MCA. As defined by rule, this requirement assures protection of uses, which best management practices may not protect. Therefore, the change to best management practices will not be made.

250. COMMENT: Commentor 73 states that the language "on land where reasonable land, soil and water conservation practices have been applied" should be deleted in Rule VIII(1)(a), as this calls for a subjective interpretation.

RESPONSE: See Response 51.

251. COMMENT: Commentor 83 states that Rule VIII(1)(a) should be modified to replace all language after "reasonable" with "department approved best management practices."

RESPONSE: See Response 245, 246, and 249.

252. COMMENT: Commentor 88 states that Rule VIII(1)(a) should be amended to read "new or increased sources which are nonpoint sources of pollution where reasonable land, soil and water conservation practices are applied and existing and anticipated beneficial uses will be fully protected." This change would ensure prospective application of the law by imposing mandatory requirements only on "new" sources.

RESPONSE: The proposed rules apply only to new or increased sources. Excluded from the definition or new or increased sources are activities or categories of activities under Rule VII and Rule VIII. This exclusion precludes the application of the policy to certain nonpoint sources meeting the conditions of (1)(a). Since the suggested modification is not necessary to prevent retroactive application and may be confusing, the suggested change will not be made.

253. COMMENT: Commentor 94 states that Rule VIII(1)(a) should be deleted because best management practices do not protect beneficial uses.

RESPONSE: See Response 245, 246, and 249.

254. COMMENT: Commentor 95 states that under Rule VII(1)(a), if

mean annual changes in flow are to be considered, then every new dam, sediment pond, stock pond, many new mines, and spreader dike irrigation systems will be significant. The rule should also define the level of data required for this determination.

RESPONSE: Changes to Rule VII(1)(a) have been made in response to Comments 160 and 163, which may address some of the concerns of this commentor. It is not anticipated that the activities listed above will automatically result in degradation due to a consideration of changes in stream flow. Finally, the level of data required for this determination will be based upon best professional judgment.

255. COMMENT: Commentor 112 states that Rule VIII(1)(a) should remain as it is.

RESPONSE: Comment noted.

256. COMMENT: Commentor 114 states that "reasonable land, soil, and water conservation practices" should be clarified. If best management practices are used and impacts result, there should be opportunity to change the practices without triggering nondegradation.

RESPONSE: This term is defined in the surface water quality standards. In practice, if impacts result the department would have numerous enforcement options including requiring a change in the practices.

257. COMMENT: Commentor 118 suggests that "reasonable land, soil, and water conservation practices" be better defined and asks whether current best management practices for fertilizer application are considered "reasonable land, soil, and water conservation practices? The rules should also provide an exclusion for certain nonpoint source agricultural operations as required by Section 13 of HB 757.

RESPONSE: The surface water quality standards defines the term "reasonable land, soil, and water conservation practices", therefore, no further clarification is necessary for the purpose of these rules. Rule VIII(1)(b) provides a categorical exclusion for the use of agricultural chemicals in accordance with a chemical ground water management plan in order to be consistent with the provisions of § 80-15-219, MCA. This section requires the state's water quality standards to include within the definition of "reasonable land, soil, and water conservation practice" the application of agricultural chemicals according to an agricultural chemical ground water management plan, for both point and nonpoint sources, and to exclude those sources from the ground water permit requirements. In addition, the use of agricultural chemicals, including pesticides, fertilizers, insecticides and herbicides, in accordance with label directions is considered a reasonable practice. The

department, in co-operation with the USDA Soil Conservation Service, will continue to evaluate fertilizer practices to determine if such practices should be modified to further protect water quality.

RULE VIII(1)(b) - NONSIGNIFICANT ACTIVITIES - AGRICHEMICAL

258. COMMENT: Commentor 82 states that the categorical exclusion for agricultural practices in Rule VIII(1)(b) should be deleted. These practices are one of the major factors degrading water quality.

RESPONSE: See Response 257.

259. COMMENT: Commentor 91 asks whether Rule VIII(1)(a) and (b) allows use of agricultural chemicals without review under these rules? Does this include the application of aquatic herbicides?

RESPONSE: The use of agricultural chemicals without review is provided under Rule VIII(1)(b) provided the conditions in that rule are met. The application of aquatic herbicides is covered by Rule VIII(1)(c) and (e).

260. COMMENT: Commentor 96 states that the agricultural activities exempted in Rule VIII(1)(b) may cause more impact than rural residential development.

RESPONSE: See Response 257.

261. COMMENT: Commentor 118 asks whether Rule VIII(1)(a) and (1)(b) apply to products used for mosquito control?

RESPONSE: This activity is covered under Rule VIII(c) and (e). See also Response 257.

RULE VIII(1)(c) - NONSIGNIFICANT ACTIVITIES - EMERGENCIES

262. COMMENT: Commentors 42 and 43 propose new language for Rule VIII(1)(c): Changes in existing water quality resulting from an emergency or remedial activity or water treatment or management that is designed to protect public health or the environment and is approved, authorized, or required by the department;

This language recognizes that changes resulting from treatment or water management that is desirable for the protection of public health or the environment properly should be deemed nonsignificant.

RESPONSE: Generally, treatment requirements are part of the MPDES permit requirements. Nondegradation review will apply whenever the department issues a permit. Therefore, a categorical exclusion based on water treatment or management is inappropriate and the suggested change will not be included in the final rule.

263. COMMENT: Commentor 49 asks whether in Rule VIII(1)(c) does "remedial activity" include mandatory repairs to treatment plants?

RESPONSE: No, however these are not likely to be "new or increased sources.

264. COMMENT: Commentor 125 states that the words "or water treatment or management" should be added after the words "remedial activity."

RESPONSE: See Response 262.

RULE VIII(1)(d) - NONSIGNIFICANT ACTIVITIES - WELLS

265. COMMENT: Commentor 27 (DHES) proposes changes to Rule VIII(1)(d) and (k) to provide clarification of the types of oil and gas drilling activities that are covered under (k) and to correct citations under both (d) and (k).

RESPONSE: The proposed changes made for clarification and to correct citations have been adopted in the final rules.

266. COMMENT: Commentors 42 and 43 propose new language for Rule VIII(1)(d), as follows: "Use of drilling fluids, sealants, additives, disinfectants and rehabilitation chemical in water well or monitoring well or test hole drilling, development, or abandonment, or in exploratory drilling approved by the Department of State Lands under the Metal Mine Reclamation Act, if used according to department-approved water quality protection practices. . . ."

Similar language was also proposed for inclusion in (k) of this rule.

RESPONSE: The purpose of hard rock exploration holes is to obtain rock samples, not produce water. The Department of State Lands' (DSL) regulations covering hardrock exploration drilling do not specify the type of materials that may be used during drilling, other than a prohibition against the use of "hazardous materials". In addition, DSL regulations do not require complete plugging of abandoned exploration test holes. On the other hand, materials used during water well or monitoring well drilling are used in a manner that does not significantly change ground water quality. The net result of such drilling is a well that produces drinking water or water used for monitoring changes in water quality. Due to the different impacts to water quality resulting from well drilling as opposed to exploratory drilling, the proposed amendment is not justified.

267. COMMENT: Commentor 66 states that the criteria in Rule VII(1)(d) should allow total allowable nitrates in groundwater (including background nitrates) to the level of 10 mg/l and to delete Rule VIII(1)(d) in its entirety.

RESPONSE: In regard to nitrate limits, see Response 184 and 185. In regard to justification for leaving Rule VIII(1)(d) as proposed, see Response 266.

268. COMMENT: Commentor 96 states that many deep wells in western Montana are contaminated with bacteria. Since bacteria require oxygen to live, it appears that this contamination results from poor well construction.

RESPONSE: Some bacteria cannot live in the presence of oxygen and many bacteria cannot carry on their life cycles in the presence of oxygen. The presence of bacteria in ground water is not necessarily related to well construction.

269. COMMENT: Commentor 125 states that this section needs expansion to include test drilling for a variety of purposes that are not related to water wells or monitoring wells.

RESPONSE: Changes in water quality caused by other types of drilling is already included in Rule VIII(k) and (m). See Response 266.

RULE VIII(1)(e) - NONSIGNIFICANT ACTIVITIES - SHORT TERM

270. COMMENT: Commentor 10 states that nearly all highway projects will fail under Rule VIII(1)(e). Extensions to the 60 day time period have to be included in the rules.

RESPONSE: The 60 day limit may not be practical in certain instances and the rule will be amended to delete reference to a specific time.

RULE VIII(1)(f) - NONSIGNIFICANT ACTIVITIES - SEWAGE SYSTEMS

271. COMMENT: Commentor 7 asks whether individual wastewater systems utilizing designs approved and mandated by the Water Quality Bureau are inadequate to protect ground water?

RESPONSE: Generally such systems will prevent violations of standards. Most of these systems, however, are not adequate to prevent degradation of water quality. See Response 290.

272. COMMENT: Commentor 9 suggests that "nitrate risk zones" be established in lieu of the restrictive 2.5 mg/l standard in Rule VII and require the involvement of local health officials and county sanitarians in order to put the burden of proving there is a water problem on the professionals instead of requiring the property owner to show there is not a problem.

RESPONSE: The suggested change does not explain what a nitrate risk zone is or how it would be implemented. In addition, it is the department, not local health officials, which is authorized by law to administer and enforce the provisions of the Water Quality Act. Finally, it is the duty of each individual to comply with the provisions of that Act. For these reasons, the suggested changes will not be included in the final rule.

273. COMMENT: Commentors 12, 14, 24, 26, 27, 30, 31, 32, 34, 37, 40, 41, 47, 52, 62, and 63 state that a critical issue in this matter is the general inefficiency of septic systems and the risks to human health and the environment associated with their use. Extensive attachments, information, and comments were enclosed to provide the board with information on this issue. In general, these commentors propose that septic systems are ineffective in removal of many kinds of pollutants including viruses and solvents. While the rules evaluate the significance of septic systems based upon nitrogen, a nutrient, there are other pollutants which are more of a risk to human health and the environment. Therefore, the provision on lenient significance criteria for septic systems, based primarily upon nitrogen, does not honestly address the criteria and the guidance established in the Water Quality Act or SB 401.

RESPONSE: See Response 179, 183 through 190.

274. COMMENT: Commentor 37 states that through November of this year, 790 sewage treatment systems have been installed in Flathead County. In reviewing past and present ground water nitrogen data for water systems there is an obvious overall increasing trend (table enclosed). These water systems are not located in areas of high agricultural practice. Most of the increases in nitrate concentration could be attributed to on-site sewage treatment systems. We can expect the concentrations of nitrate to continue to increase if stricter controls are not established.

RESPONSE: Comment noted.

275. COMMENT: Commentor 41 states that the strict standard of 2.5 mg/l will require a complex model for analysis of each subdivision as the simplistic models, such as the Bauman-Schafer mass balance, will over-predict nitrate contributions. This requirement will increase the costs for developers.

RESPONSE: See Response 201.

276. COMMENT: Commentor 41 suggests that the drinking water standard of 10 mg/l compared with the 2.5 mg/l limit in Rule VII raises a question as to the factor of safety that should be required. We are now at 10 mg/l for a MCL and 2.5 mg/l will soon become a new standard under these rules. There should be a scientific basis for the selection of numbers in the rules.

RESPONSE: See Response 199.

277. COMMENT: Commentor 50 proposes a two fold solution: (1) establish as a nitrate discharge standard for domestic sewage treatment systems the 10.0 mg/l drinking water standard; (2) authorize the department of health to designate "nitrate risk zones". This concept would obviously require the agency to solicit the input from local sanitarians and water district

professionals to locate those areas of our state which are in risk of nitrate pollution. A property owner within these risk zones would then know that mitigation procedure A or mitigation procedure B would be required. It places the burden of proof upon the water professionals, to isolate problem areas and work with local sanitarians and developers within those areas to protect ground water. The commentor proposes the following definition: "Nitrate risk zones" means a district created by DHES at the request of local government to identify where nitrate levels for domestic sewage treatment systems where resulting nitrate concentrations, outside of any applicable mixing zones, will not exceed 10.0 mg/l. Districts shall be established by DHES considering the following criteria: (i) density of septic systems, (ii) number of wells in shallow aquifers, (iii) soil type.

RESPONSE: For purposes of implementing the nondegradation policy, allowing increases in nitrates to the level of the standard directly contravenes the purpose of the policy, i.e., the protection of high quality waters. In addition, there is no authority under the Water Quality Act or under the rulemaking authority of the board that would allow the department to establish nitrate risk zones in a community. The nondegradation policy is to prevent degradation, not to assess problem areas and prescribe mitigation for polluted areas. For these reasons, the proposed change will not be included in the final rule.

278. COMMENT: Commentor 50 proposes changes for Rule VIII(f) and (g): (f) Domestic sewage treatment systems which discharge to ground water and which are designed, constructed and operated in accordance with the applicable standards; and ~~where resulting concentration, outside of any applicable mixing zone designated by the department, will not exceed 2.50 mg/l (nitrogen compounds measured as nitrogen),~~ as long as the changes caused by such systems will not result in a detectable change in the nitrogen concentration in any perennial surface water are located outside of designated "nitrate risk zones".

(g) Domestic sewage systems in areas in ~~which the existing nitrogen concentration is over 2.50 mg/l.....; will not exceed 5.00 mg/l (Nitrogen compounds measured as nitrogen).~~ nitrate risk zones" which apply best management practices and/or advanced treatment system to reduce pollutants.

RESPONSE: See Response 277, 184 and 185.

279. COMMENT: Commentors 72 and 89 state that domestic sewage systems should not be allowed to degrade ground water to 2.5 mg/l and 5 mg/l in Rule VIII.

RESPONSE: See Response 184 and 185.

280. COMMENT: Commentors 78 and 81 state there must be a Rule VIII. All septic systems will require a mixing zone. It is not

practical for the department to go through the review process for all of them.

RESPONSE: Comment noted.

281. COMMENT: Commentor 84 states that if the department wishes to outlaw or severely restrict the use of septic tanks, they should identify and approve alternatives, provide cost and effectiveness statistics, and go to the legislature and let them decide.

RESPONSE: The proposed rules do not prohibit the use of septic systems, but will impose limits on the concentration of nitrates from those systems.

282. COMMENT: Commentor 84 states that the state has adopted the Bauman Schafer model.

RESPONSE: This is not correct. Until a better model is proven acceptable, the department will continue using this method. Applicants are free to use more precise and less conservative methods as long as they can justify their use.

283. COMMENT: Commentor 96 states that these rules could increase the cost of housing and eliminate a number of homesites in eastern Montana, if the acceptable level of nitrate is 2.5 mg/l and if the conservative Bauman and Schafer model is used.

RESPONSE: Rule VII(1)(d) has been modified to allow a consideration of background nitrogen levels. See Response 184. The rational for considering background levels is in response to comments including the following information.

Data has been obtained on present nitrate-nitrogen concentrations in the ground water of various counties in Montana by sampling 3,400 wells, which were randomly selected. See, Bauder, Sinclair, and Lund, "Physiographic and Land Use Characteristics Associated with Nitrate-Nitrogen in Montana Groundwater", 22 J. Environ. Qual. 255 (1993). In 35 of the counties the average nitrate concentration exceeded 1 mg/l; in 21 of those counties, nitrate concentrations exceeded 2.5 mg/l. Of the total 3,400 wells tested, nearly 6% of the wells had nitrate concentrations exceeding the drinking water standard of 10 mg/l. The elevated nitrate concentrations did not seem to be associated with residential development.

In addition, calculations preformed by DHES staff for a typical household with a standard disposal system and drainfield oriented perpendicular to the direction of ground water flow, the nitrate-nitrogen value at the edge of the mixing zone would be 5.9 mg/l. This calculation is based on current assumptions of mixing, a background value of 1 mg/l nitrate-nitrogen, an aquifer of clean sand (i.e., K=1000 gal/day/sqft), and a gradient of .001. The above calculations are also based on a nitrate-nitrogen concentration of 60 mg/l nitrate-nitrogen for a standard drainfield along with a 17% reduction in the

drainfield. The value of 60 mg/l is relatively well established. The 17% reduction is not well established but appears slightly conservative.

Using the same assumptions except for the aquifer, evaluated as clean gravelly sand (i.e., K=10,000 gal/day/sqft), the value at the edge of the mixing zone would be 1.5 mg/l nitrate-nitrogen. Using the same assumptions except for the aquifer, evaluated as a silty sand aquifer (i.e., K=100 gal/day/sqft), the value at the edge of the mixing zone would be 26.7 mg/l nitrate-nitrogen.

Using the same assumptions given above except for the background nitrate-nitrogen value, now evaluated as being 2.5 mg/l, the corresponding values for nitrate-nitrogen at the edge of the mixing zone are the following: 6.8 (clean sand); 2.5 (clean gravelly sand); and 28.7 (silty sand). Based on this analysis and the information on existing nitrate concentrations in Montana ground water, it was evident that application of the originally proposed nonsignificance criteria would determine that many, if not most, standard disposal systems would cause degradation or result in values of nitrate above 2.5 mg/l at the edge of a mixing zone.

The costs for various systems and their estimated nitrate removal efficiencies are:

1. Standard in-ground septic tank drainfield on-site systems; $1500 - $2500; 10% removal.
2. Shallow place cap and fill systems: $2000 - $3000; 10% to 20% removal.
3. Low pressure systems: $3000 - 4000; 10% removal.
4. Bottomless sand filters: $5000 - $8000; about 50% removal.
5. Typical trench discharge sand filters: $6000 - 10,000; 50% to 70% removal.
6. Mound system or fill systems: $5000 - $10,000; 50% to 70% removal.
7. Soil discharge aeration chamber systems: $6000 - 8,000; 50% to 80% removal.

Costs for on-site sewage system are site specific. Therefore, costs will vary depending on site conditions, access, availability of material and contractor discretion, expertise, or bidding practices.

Other costs associated with on-site sewage systems include costs incurred when improper siting, density, design, construction, or maintenance results in a health hazard. States and local governments expend hundreds of thousands of dollars per year in man hours rectifying problems caused by inadequate systems. In certain areas in the state, such as at Frenchtown, homeowners and lending agencies have lost either the use of the property or the value of the property due to inadequate sewage treatment.

There are also instances where health hazards caused by inadequate on-site sewage systems required the construction and use of public treatment works in certain areas of the State. In Montana, the cost associated with constructing these facilities ranges from $10,000 to $30,000 per lot.

284. COMMENT: Commentor 96 asks how will the department handle cases where there are conflicting results from ground water monitoring; where there are varying levels of nitrate in the ground water?

RESPONSE: Spacial and temporal variations of nitrate in ground water can be natural or caused by the activities of man. In the event of conflicting results from ground water monitoring, additional samples are often necessary. Determining what action is appropriate will depend upon the range of discrepancy between monitoring results and the best professional judgement of department staff.

285. COMMENT: Commentor 104 states that as engineers we are required to use the Bauman-Schafer model. We should be able to use other models and the results should be viewed as guides. A higher limit and a realistic model are necessary.

RESPONSE: The use of a particular model is not required. See Response 201 and 282. See Response 184 and 185 regarding changes in the nonsignificance criteria.

286. COMMENT: Commentor 119 states that septic systems must not be considered nonsignificant. Flathead Lake is apparently being impacted now from such discharges and much of the ground water in the Missoula Valley is becoming unfit to drink due to septic systems. Nitrates are not just toxic in themselves, they also serve as an indicator of other contaminants, such as viruses. This commentor proposes a level at 1 or .1 ppm.

RESPONSE: See Response 184 and 185.

RULE VIII(1)(g) - NONSIGNIFICANT ACTIVITIES - SEWAGE SYSTEMS

287. COMMENT: Commentor 7 asks whether properly constructed individual wastewater systems remove 50% of the nitrogen load of raw sewage as required in part (g).

RESPONSE: Response 283 lists the estimated nitrogen removals for several types of systems. Some of these systems exceed 50% removal.

288. COMMENT: Commentor 7 asks how applicable mixing zones will be determined for individual wastewater system?

RESPONSE: Mixing zones will be determined using the mixing zone regulations adopted by the board.

289. COMMENT: Commentor 7 asks which alternatives are available for homes where the nitrogen level in ground water is greater than 2.5 mg/l.

RESPONSE: See Response 283 for alternative treatment systems. See Response 184 and 185 for changes in nitrate levels.

290. COMMENT: Commentor 7 states that current design standards for individual wastewater systems are adequate to protect state waters and systems constructed in compliance with those standards should be considered to be nonsignificant.

RESPONSE: Current design criteria for individual wastewater systems will likely result in significant changes in water quality and may also cause a violation of standards in certain instances. Therefore, the proposal to consider individual wastewater systems nonsignificant, if constructed according to current design criteria, will not be included in the final rule.

291. COMMENT: Commentor 50 proposes changes for Rule VIII(1)(g): (g) Domestic sewage treatment systems in areas in which the existing nitrogen concentration is over 2.50 mg/l ..., will not exceed 5.00 mg/l ... ~~perennial surface water~~ "nitrate risk zones" which apply best management practices and/or advanced treatment systems to reduce pollutants.

RESPONSE: See Response 277.

292. COMMENT: Commentor 83 states that the proposed non-significance levels of 2.5 and 5 mg/l are too high to provide an adequate safety margin.

RESPONSE: See Response 184 and 185.

293. COMMENT: Commentor 96 states that in regard to Rule VIII(1)(g), there is documented evidence that nitrate concentrations of effluent below septic tank systems are less than the 50 mg/l currently being used in the Bauman and Schafer model to approximate nitrogen loading. It might be better to address nitrogen loading of ground water in terms of an overall average.

RESPONSE: The nitrate concentrations delivered to ground water from standard septic systems are not well documented. The department will use the best available data in its evaluations. At the present time, 50 mg/l for total nitrogen appears to be reasonable. If an applicant can document that other levels are appropriate, those levels will be used.

294. COMMENT: Commentor 96 states that the depth of mixing in ground water is not always 10 feet and because a mixing zone cannot be defined in confined or leaky confined aquifers or bedrock or recharge or discharge zones - the actual mixing zone should be determined by the investigator (or applicant?) with final decision left to the department.

RESPONSE: Mixing zones will be determined according to rules adopted by the board.

295. COMMENT: Commentor 96 states that because of the mixing

zone depth, downgradient wells which are considerably deeper than the mixing depth should not be allowed to object.

RESPONSE: There is no provision in the law that provides an opportunity or right for downgradient well users to object.

296. COMMENT: Commentor 96 states that the model used by the department to predict impacts to ground water incorrectly assumes a worst case nitrate concentration in the effluent and in the natural precipitation.

RESPONSE: The model used by department staff is based upon conservative assumptions. The applicant can always provide justification for the use of different assumptions. If those assumption are defensible, they will be used instead of the normal model.

297. COMMENT: Commentor 96 asks how the department will deal with seasonal changes in groundwater levels and concentrations?

RESPONSE: Seasonal changes will be addressed based on available data and best professional judgement.

298. COMMENT: Commentor 96 states that the department has overlooked the need for proper maintenance of septic systems in these rules.

RESPONSE: The proposal to address proper maintenance of septic systems in these rules is beyond the scope of this rulemaking. Therefore, the proposed change will not be made.

299. COMMENT: Commentor 96 states that the department should make it easier to get approval for alternatives to the conventional septic systems.

RESPONSE: This comment does not directly relate to the proposed rules and, therefore, cannot be addressed. There are plans, however, for the department to examine and perhaps recommend alternative systems.

RULE VIII(1)(h) - NONSIGNIFICANT ACTIVITIES - LAND APPLICATION

300. COMMENT: Commentors 30 and 47 state that land application of large amounts of wastes should require a department approved plan to be categorically excluded from department nondegradation review.

RESPONSE: To be excluded as nonsignificant, land application of wastes containing nutrients must be applied in a beneficial manner and meet certain conditions. Application rates must be based upon agronomic uptake of applied nutrients and other parameters cannot cause degradation. These restrictions are enough to meet the criteria in § 75-5-301(5)(c) to categorically exclude the activity without departmental review or approval.

301. COMMENT: Commentors 42, 43, and 125 propose new language for Rule VIII(1)(h): Land application of process wastes, including, but not limited to, animal waste, domestic septage, or waste from public sewage treatment systems, ~~or other wastes~~ containing nutrients, where wastes are land applied in a beneficial manner, and application rates are based on the amounts of applied nutrients and other parameters which ~~a complete agronomic uptake of applied nutrients and other parameters~~ will not cause degradation.

RESPONSE: The term "other wastes" include process wastes. Therefore, its proposed inclusion in the rule is not necessary. Since complete agronomic uptake may never occur, the proposal to delete that portion of the rule requiring "complete" agronomic uptake has been included in the final rule. The other changes are unnecessary and will not be made.

302. COMMENT: Commentor 45 states that the language in Rule VIII(1)(h) should be changed from "complete agronomic uptake" to "annual maximum agronomic uptake". Complete uptake may be impossible to comply with.

RESPONSE: See Response 301.

303. COMMENT: Commentors 73 and 88 state that immediate and complete agronomic uptake is unattainable, thus, "complete" should be replaced in Rule VII (1)(h) with "reasonable expectation of" and "during normal cropping or growing cycles" should be inserted following "of applied nutrients" in this section.

RESPONSE: See Response 301.

304. COMMENT: Commentor 95 states that an allowance for a mixing zone should be reiterated in Rule VIII(1)(h).

RESPONSE: Allowances for mixing zones are not required for this rule. Therefore, the suggested change will not be made.

305. COMMENT: Commentor 95 asks whether mixing zones will apply to land application of waste water?

RESPONSE: No.

RULE VIII(1)(i) - NONSIGNIFICANT ACTIVITIES - LEAKAGE

306. COMMENT: Commentors 30 and 34 state that incidental leakage in Rule VIII(1)(i) should not be classified categorically as nonsignificant. If the effect is short term it is covered under (1)(e). If the effect is long term, it should be considered significant. The board should not provide exclusions for lack of rigor in design, construction, or operation of these systems. Commentor 47 states that (i), (j) and (k) in Rule VIII should be deleted because they are based on standards that do not meet the intent of SB 401, which is to prevent degradation.

RESPONSE: Incidental leakage from waste water systems designed in accordance with standards adopted pursuant to the state's Public Water Supply Act are considered nonsignificant because that amount of leakage is within the allowable limits of the best available technology applicable to those systems. Those activities excluded under (i) and (j) are considered nonsignificant based on the fact that there is no better technology for these systems and the amount of leakage is nonsignificant. For activities excluded under (k), see Response 310.

307. COMMENT: Commentor 89 states that the term "incidental" needs to be defined in Rule VIII(1)(i).

RESPONSE: The amount of incidental leakage allowed under current design standards will vary depending on the type of waste water system. Since the amount of leakage is not universally applicable to all systems, a definition describing the amount is not feasible.

308. COMMENT: Commentor 95 asks whether incidental leakage of cyanide is included in Rule VIII(1)(i).

RESPONSE: No. Rule VIII(1)(i) includes only those activities that are subject to the requirements of ARM 16.20.401-405. Those rules require department review and approval prior to the siting, construction, or modification of any public water supply and waste water systems.

RULE VIII(1)(j) - NONSIGNIFICANT ACTIVITIES - WATER TESTS

309. COMMENT: Commentor 93 states that the reference to discharges in Rule VIII(1)(j) needs to be followed by the word "water" also "wastewater from hardrock exploratory drilling and geotechnical drilling" needs to be added to this section.

RESPONSE: "Water" has been added to the final rule for clarification. The addition of "wastewater from hardrock exploratory drilling and geotechnical drilling" is not appropriate for the reasons stated in Response 266.

RULE VIII(1)(k) - NONSIGNIFICANT ACTIVITIES - OIL & GAS

310. COMMENT: Commentor 108 states that oil and gas activities are not insignificant sources of water pollution. This categorical exclusion should be deleted.

RESPONSE: Activities carried out in accordance with ARM Title 36 chapter 22 will not cause significant effects on water quality and, therefore, meet the guidance under § 75-5-301(5)(c), MCA. For this reason, the final rule will include these activities as nonsignificant.

RULE VIII(1)(l) - NONSIGNIFICANT ACTIVITIES - SHORT-TERM

311. COMMENT: Commentor 108 states that many everyday activities, such as fording streams with vehicles and stock watering along streambanks, cause significant degradation. These are

long term, cumulative, and significant.

RESPONSE: The categories of activities included as nonsignificant under Rule VIII were included after an assessment of their effect on water quality. Based upon best professional judgment, these activities were included only upon a determination that they met the guidance under § 75-5-301(5)(c), MCA. For this reason, the final rule will include certain everyday activities as nonsignificant.

RULE IX - IMPLEMENTATION - GENERAL
312. COMMENT: Commentors 42 and 43 state that the intended function of Rule IX is not clear. It should be clarified or deleted.

RESPONSE: Rule IX is necessary in those instances were there are no established water quality protection practices for a proposed activity.

313. COMMENT: Commentor 78 asks whether Rule IX recaptures activities that are exempt under Rule VIII?

RESPONSE: No. Rule II(13)(d) excludes from the definition of "new or increased source" activities that are categorically excluded under Rule VIII. See also Response 312.

GENERAL - NONDEG - IN ORDER OF APPEARANCE
314. COMMENT: Commentors 2, 21, 25, 25, 30, 39, 40, 42, 43, 64, and 71 state that the minimum detection limit (MDL) is inappropriate for use in the rules because it is set at a level for which technology is unavailable for reliable monitoring.

RESPONSE: See Response 1 through 12.

315. COMMENT: Commentor 17 states that the DHES should strive for the adoption of mixing zone rules as soon as possible.

RESPONSE: Comment noted.

316. COMMENT: Commentor 20 states that care must be taken to be sure the rules do not vary from the original intent of the legislature in passing SB 401.

RESPONSE: Comment noted.

317. COMMENT: Commentor 20 asks what kind of assessment has been done to determine the economic impact of these rules on Montana. Commentor 129 states that extreme care should be taken to assure the standards set are financially feasible.

RESPONSE: None. The proposed rules are being adopted in response to the legislative enactment of SB 401. This law requires the adoption of rules implementing its provisions. It is not appropriate for the agency to withhold the adoption of

rules based upon economic considerations when those rules implement legislative intent.

318. COMMENT: Commentor 23 recommends incorporating language from the Statement of Intent in SB 401. This language may provide additional guidance, which would ensure that the agency and the public understand how the economic and social criteria are to be analyzed according to the intent of the policy.

RESPONSE: The Statement of Intent (Statement) was considered during the drafting of these proposed rules in order to implement the legislative intent to maintain existing high quality waters. Specific language from the Statement regarding the adoption of economic and social criteria provides little guidance on how the actual analysis should be conducted. For the reasons given above, specific language from the Statement will not be included in the final rule.

319. COMMENT: Commentor 23 states that the subcommittee recommends that the DHES analyze the entire nondegradation review process to ensure adequate opportunity for public involvement at each decision point.

RESPONSE: § 75-5-303, MCA, requires public involvement prior to a final decision by the department to allow degradation. Beyond this requirement, the rules include opportunity for public comment wherever it was considered practical or good policy. Public involvement in the rulemaking proceeding also guides agency decision making regarding agency procedures and criteria to implement the policy.

320. COMMENT: Commentor 26 states that DHES's proposed rules do not comply with Montana's Constitution.

RESPONSE: The proposed rules are being adopted in response to the enactment of SB 401. The constitutionality of a legislative enactment is prima facie presumed. Fallon County v. State, 231 Mont. 443, 753 P.2d 338 (1988). Moreover, the constitutional validity of SB 401 was considered during the debates regarding its passage. Since the proposed rules do nothing more than implement the law, the proposed rules are constitutionally valid.

321. COMMENT: Commentors 26, 30, 33, 34, 40, 47, 60, 72, 73, 75, 78, 83, 106, 115, 120 and 129 state that the proposed rules do not comply with the legislative mandate to ensure implementation of the nondegradation policy, because parts of the proposed rules are contingent upon a proper characterization and definition of mixing zones. Therefore, any part of the rules that rely on mixing zones should not be promulgated until mixing zone regulations have been adopted.

RESPONSE: Mixing zone rules have been developed and filed with the Secretary of State for adoption by the board. If possible,

those rules will be adopted concurrently with the nondegradation rules. If this is not possible, the nondegradation rules could be adopted and implemented prior to the adoption of the mixing zone rules. In that event, the department would establish mixing zones according to the guidance in § 75-5-301(4), MCA.

322. COMMENT: Commentors 27 and 77 encourage early adoption of these rules, recognizing they will need modification as more experience in implementation of the nondegradation policy is achieved. The statute has been in effect since April 29, 1993, and continued implementation without promulgated rules exposes the department and the regulated community to uncertainty and risks.

RESPONSE: Comment noted.

323. COMMENT: Commentor 27 (DHES) suggests that the board must look to the guidance in the Water Quality Act to ensure the rules' compliance with legislative intent. This is of particular concern in terms of the establishment of criteria for the determination of nonsignificance and categories of nonsignificant activities.

RESPONSE: Comment noted.

324. COMMENT: Commentor 30 states that the rules should have a provision which makes it clear that a department determination of significance will over-rule a self determination of nonsignificance.

RESPONSE: § 75-5-211 and 75-5-303, MCA, vest the department with the administration and enforcement of the Water Quality Act's nondegradation requirements. A prohibition against degrading without authorization from the department is also contained in § 75-5-605(1)(d), MCA. This authority clearly establishes that, if the department determines that an activity will cause degradation, then appropriate action may be taken to enforce the provisions of the policy. No change in the rules is necessary to clarify this authority.

325. COMMENT: Commentors 30, 40, and 83 state that the rules should contain a clear statement that degradation violates the Water Quality Act. Penalties for such violations should appear in the rules.

RESPONSE: Under § 2-4-305(2), MCA, agency rules cannot unnecessarily repeat statutory language. Since § 75-5-605(1)(d), MCA, states that it is unlawful to cause degradation without authorization, there is no need to repeat that language in the rules. Penalties for violations are beyond the scope of this rulemaking and will not be included in the rules.

326. COMMENT: Commentor 30 states that the Water Quality Act

and the nondegradation policy are intended to protect aquatic life and communities. The department is developing biotic criteria. Rule VII(2) should be modified to state that these criteria will be used to determine that degradation is significant.

RESPONSE: These biotic criteria may at some point be adopted as standards. Presently, it appears that any detectable biological change would be a violation of standards. The nondegradation rules prevent any measurable changes in water quality and therefore, will be more stringent than adopting biological "triggers" for the purpose of determining nonsignificance.

327. COMMENT: Commentors 33, 34, and 40 state that SB 401 requires a five year review of nondegradation exemptions. The October 20, 1993 draft rules addressed this in Rule X. Rule X should be reinstated in these proposed rules.

RESPONSE: § 2-4-305(2), MCA, prohibits the promulgation of rules that unnecessarily repeat statutory language. § 75-5-303(6), MCA, expressly states that authorizations to degrade shall be reviewed every 5 years. For this reason, Rule X was not included in the final rules.

328. COMMENT: Commentors 38, and 44 state that the intent of SB 401 was to implement a workable nondegradation policy for Montana. While the legislation is strict, and will protect water quality, the proposed rules have gone beyond the intent of SB 401 and should be modified. These rules should not be adopted until their entire ramifications are understood.

RESPONSE: The proposed rules conform to the guidance in § 75-5-301 and 75-5-303, MCA, and will remain as proposed except for changes made as discussed herein. Delaying the adoption of the rules until their ramifications are known is not a solution to the immediate need for implementation of the policy.

329. COMMENT: Commentor 46 states that the rules should not address water rights because adequate protection is afforded in 85-2-311, MCA. (g) the water quality of a prior appropriator will not be adversely affected; (h) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1), MCA; and (i) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

RESPONSE: See Response 53.

330. COMMENT: Commentor 49 asks what protocol is to be applied to substances that are monitored for and found to be at less than detection limits? This commentor suggests that the protocol should be established to allow any substance with a reported concentration less than detection limits be deemed not pres-

ent or zero.

RESPONSE: Any levels less than the required "reporting" levels in WQB-7 will be considered as zero, provided there is no conflicting evidence. Since the reporting levels address this commentor's concern, no change is necessary in the proposed rules.

331. COMMENT: Commentor 50 states that if maintaining no change in water quality is the only framework under which implementation of the policy can be accomplished, there is no point in considering any of the comments.

RESPONSE: The proposed rules do allow nonsignificant changes in water quality, as well as provide procedures for obtaining an authorization to degrade.

332. COMMENT: Commentor 50 states that rational people support the concept that whenever, in the establishment of public policy, you have scientific evidence which established that as a result of an action people's health will suffer, that is an objective criteria. There are always changes which will occur; these changes may or may not be harmful to human health.

RESPONSE: See Response 333.

333. COMMENT: Commentor 50 states that the agency concludes that no chemical change to the water is the standard. This commentor suggests that a standard is reasonable if it does not compromise public health. Therefore, the rules should be based on standards that protect human health rather than a "no change" standard.

RESPONSE: The nondegradation policy was enacted to protect quality better than the standard by maintaining that high quality. The difference between the policy and the water quality standards is that the standards protect public health and the environment, while the nondegradation policy protects and maintains existing water quality. Therefore, rules implementing the policy must be based on the maintenance of quality rather than the protection of health.

334. COMMENT: Commentor 50 states that the legislature was clear that it expected the agency to develop reasonable standards and expressed concern about social and economic factors. The legislature expected significant changes would be monitored by the agency. What they got, is that every proposed water use in the state of Montana is subject to agency review, with the applicant forced to prove they do not have a problem. I do not believe this is what the legislature intended.

RESPONSE: Activities that meet the nonsignificance criteria are not necessarily under department review, unless the individual requests a nonsignificance determination from the department or

the activity is otherwise permitted by the department.

335. COMMENT: Commentor 52 states that the original intent of individuals proposing the nondegradation legislation was to make subdivision developments accountable for degradation of surface waters in a manner similar to that being required for the mining industry. Since the issue of ground water degradation is now part of the policy, the allowable limits for nitrate in ground water should be based on modelling bacterial-/viral transport versus nitrate.

RESPONSE: The committee notes show that the legislature was aware that SB 401 applied to both surface and ground water. Using nitrate as an indicator for bacterial/viral transport, however, is not appropriate. In situations where nitrate levels are the result of naturally occurring nitrate or applied nitrates from agricultural operations, there is no concern over bacterial/viral transport.

336. COMMENT: Commentor 52 states that work must progress towards promoting state of the art rather than acceptance of the status quo in the appropriate technologies. We desperately need to abandon the outmoded emphasis which utilize only system-by-system impact analyses. An approach which first takes into account cumulative effects and then considers the particular impacts, regardless of any specific focus or parameter, may soon be seen as being an absolute requirement.

RESPONSE: Cumulative effects on water quality are addressed through monitoring and wellhead protection programs. While the proposed rules do not specify procedures for tracking cumulative impacts, those effects will be addressed when required.

337. COMMENT: Commentor 57 states that the proposed rules approach to increased population must be brought closer to reality.

RESPONSE: Comment noted.

338. COMMENT: Commentor 58 submitted a verbatim transcript of the summarized paragraph in minutes of the House Taxation Committee on February 4, 1993, on the department's proposed fee bill.

RESPONSE: This comment is not germane to the proposed rule.

339. COMMENT: Commentor 59 states that the rules must have all references to retroactive agency review deleted.

RESPONSE: Rule II(13) defines new or increased sources as those activities occurring on or after the effective date of the nondegradation statute. No further change is necessary to prevent retroactive application of the rules.

340. COMMENT: Commentor 60 states that many of the comments submitted by the Lewis & Clark Water Quality Protection District were not addressed in the final draft and most of the questions asked remain unanswered. This is disappointing given the time spent in reviewing the proposed rules.

RESPONSE: During the informal review process all comments were considered and the proposed rule reflects the result of this consideration. The law does not require a formal agency response to informal rule proposals. More importantly, the volume of these comments and limited agency resources precluded the development of formal responses.

341. COMMENT: Commentor 67 states that mixing zones should not be exempt from the degradation policy.

RESPONSE: See Response 173.

342. COMMENT: Commentors 67, 69, 70, and 129 state that strict limits, perhaps in scope and duration, should be placed on the size of the mixing zones.

RESPONSE: The proposed rules implement the nondegradation policy, not the mixing zone requirements. Comments on the mixing zone rules will be considered during the adoption of those rules.

343. COMMENT: Commentor 67 states that the mixing zones limits should be available for public review prior to nondegradation approval.

RESPONSE: See Response 342. Public review of mixing zone limits will be available during the rulemaking proceeding for mixing zone requirements. In addition, a supplemental notice for the nondegradation rules will allow public comment on mixing zones concurrently with the nondegradation rules.

344. COMMENT: Commentor 68 states that the proposed rules reflect the intent of the legislature.

RESPONSE: Comment noted.

345. COMMENT: Commentor 68 states that standards should be measurable and achievable.

RESPONSE: See Response 1 through 12.

346. COMMENT: Commentor 69 states that citizens must have access to information in all phases of the permitting process.

RESPONSE: See Response 103.

347. COMMENT: Commentor 69 states that prohibiting subsurface mixing zones should be considered.

RESPONSE: Prohibiting subsurface mixing zones is not practical. Therefore, the final rules will allow such mixing zones.

348. COMMENT: Commentor 70 states that the concept of mixing zones should be retained in the nondegradation rules.

RESPONSE: The final rules allow mixing zones.

349. COMMENT: Commentor 71 states that the department should not propose changes to the rules during the hearing without opportunity for public comment.

RESPONSE: See Response 244.

350. COMMENT: Commentor 71 states that the board should reconsider the entire concept of categorical exclusions.

RESPONSE: § 75-5-301(5)(c), MCA, authorizes the adoption of criteria for "... determining whether a proposed activity or class of activities will result in nonsignificant changes in water quality..." This provision allows the adoption of categories of activities that are nonsignificant. Those categories will remain in the final rule as implementation of the policy without such categories is not feasible.

351. COMMENT: Commentor 71 states that the proposed rules interpret the nondegradation too broadly in that they equate any change in the environment to pollution.

RESPONSE: The proposed rules allow nonsignificant changes in water quality, as well as provide procedures for authorizations to degrade. For this reason, the proposed rules fairly meet the intent of the nondegradation statute and will not be changed to conflict with that intent.

352. COMMENT: Commentor 73 states that the rules should be amended to provide a more reasonable approach to economic development in the State. Without amendment, the rules will seriously discourage and impede economic growth.

RESPONSE: The proposed rules have been modified in response to public comment. Whether or not the economic impact of the rules is lessened as a result of those modifications is unknown. More importantly, it is not appropriate for the agency to consider the economic impact of rules when those rules are a direct response to a legislative enactment.

353. COMMENT: Commentor 75 states that these rules will not irreparably harm the agriculture and timber industries and will not ruin the hardrock and real estate development industries. The rules will make them pay for the environmental costs of their actions--as they should.

RESPONSE: Comment noted.

354. COMMENT: Commentor 75 states that the real-estate industry complains that these rules will potentially harm housing availability, yet they are responsible for impacts on the environment. The industry has promoted the benefits of clean water without accepting responsibility for degrading the resources.

RESPONSE: Comment noted.

355. COMMENT: Commentors 75, 76, and 89 state that if a discharge needs a mixing zone, it is significant.

RESPONSE: See Response 173.

356. COMMENT: Commentor 75 states that mixing zones are not appropriate for substances that bioaccumulate or biomagnify.

RESPONSE: The proposed rules do not allow mixing zones for these substances. Therefore, no change in the rules is necessary to address this comment.

357. COMMENT: Commentor 75 states that Montana does not have plenty of clean water to throw away. We must have a strong and enforceable nondegradation policy.

RESPONSE: Comment noted.

358. COMMENT: Commentors 76 and 77 state that anti-degradation means no loss of beneficial uses. Please, reconsider your proposed changes to ensure the protection of uses.

RESPONSE: The proposed rules include an overriding requirement in Rule III(2)(a) that assures the protection of existing and anticipated uses. Therefore, no change to the rules is necessary to protect beneficial uses.

359. COMMENT: Commentor 77 states that nitrate limits for domestic sewage should be controlled by amending rules for permitting domestic sewage systems.

RESPONSE: The nondegradation requirements are separate from the permitting requirements for domestic sewage systems. The proposed rules must implement the policy consistent with the requirements of the statute and according to the guidance in the rulemaking authority. Neither the nondegradation statute nor the rulemaking authority provide for rules regulating the permitting requirements of domestic sewage systems.

360. COMMENT: Commentors 77 and 78 state that the rules need to balance the need for protecting the environment with the need to maintain and promote a mining industry in Montana.

RESPONSE: This comment is not specific enough to provide a response. The proposed rules are reasonably necessary to implement the policy and are consistent with its requirements.

361. COMMENT: Commentors 78, 80, 88, 93, 94, 96, 112, 113, and 115 state that adoption of the proposed rules should be delayed until the board's meeting in March in order to properly consider the comments and to allow review of the effects of the mixing zone rules, which should be ready at that time.

RESPONSE: Adoption of the proposed rules is being delayed until all responses to comments have been addressed. The mixing zone rules will be adopted at the same time as the nondegradation rules if possible.

362. COMMENT: Commentor 79 states that these rules amount to confiscation of private property by reducing the value of property for alternate uses.

RESPONSE: It is presumed that legislative enactments are constitutional. See e.g., Response 320. Therefore, it must be presumed that the nondegradation statute and its implementing regulations do not take away or destroy the use of private property in violation of the constitution.

363. COMMENT: Commentors 79 and 80 state that these rules are an expression of the anti-business government policy.

RESPONSE: This comment is not specific enough to formulate a response. As far as the general criticism of the proposed rules, the proposed rules fairly meet the intent of and are consistent with the nondegradation statute enacted by the Legislature.

364. COMMENT: Commentor 80 states that some of these rules will preclude the possibility of responsible development.

RESPONSE: The rules implement the nondegradation policy. The policy is meant to protect the state's water and thereby promote responsible development.

365. COMMENT: Commentors 83 and 94 state that these rules, by allowing further pollution, put the Bull Trout in further jeopardy.

RESPONSE: The nondegradation statute and Rule III(2)(a) protect existing and anticipated uses by requiring the quality of water necessary to protect those uses. For this reason, the proposed rules will not endanger the Bull Trout.

366. COMMENT: Commentor 84 states that these rules will add to the problem of affordable housing.

RESPONSE: Comment noted.

367. COMMENT: Commentor 84 states that the department needs to be consistent and not change its position on significance.

RESPONSE: Comment noted. The final rules will include the nonsignificant criteria as modified in response to comments.

368. COMMENT: Commentor 84 states that we do not have enough basic data about existing conditions in ground water to adopt new rules.

RESPONSE: The board is required by law to adopt rules implementing the nondegradation policy. Obtaining data on existing ground water conditions is not reason to delay the promulgation of rules required for the protection of those waters. For this reason, delay in adopting the rules is inappropriate.

369. COMMENT: Commentor 84 states that instead of adopting rules that would prohibit septic tanks and drainfields, the state should identify and provide specific alternatives, provide the public with detailed cost and effectiveness statistics, and present a proposal to the Legislature to outlaw or restrict septic tanks and drainfields.

RESPONSE: Implementation of the policy concerns the protection of water, not the identification of alternatives or an analysis of costs for alternative systems. In addition, although the policy and its implementing rules may limit or restrict the use of these systems, they do not impose an absolute ban on their use.

370. COMMENT: Commentor 84 suggests a rule for determining nonsignificance that would prohibit discharges to ground water within 1000 feet of a major stream, unless the discharge waters are of equal or better quality than the receiving stream. The rationale for this rule is that the proposed rules require methods of detecting water quality that are not feasible. Commentor 79 suggests that there should be no distance requirement.

RESPONSE: Limitations in the nonsignificance rules are based upon the criteria in § 75-5-301(5)(c), MCA, which require a consideration of the effects on water quality. A rule that is not based on the effects on water quality is inappropriate, especially when it relies on an arbitrary distance from water. Therefore, the suggested change will not be included in the final rule.

371. COMMENT: Commentor 84 and 85 state that the new rules do not have acceptable methods for determining compliance and that professional people in the field cannot furnish the required data.

RESPONSE: See Response 40.

372. COMMENT: Commentor 85 states that the objectives of SB 401 have not been achieved by these rules. They should be revised.

RESPONSE: This comment is not specific enough to formulate a response.

373. COMMENT: Commentor 86 states that the requirements for reviews of authorizations every 5 years should be in these rules.

RESPONSE: See Response 327.

374. COMMENT: Commentor 89 states that the only provision for public participation is in the proposed amendment to Rule VII(3). There should be more opportunity for citizen participation on activities that have the potential to degrade state waters.

RESPONSE: See Response 103.

375. COMMENT: Commentor 90 states that there is no absolute constitutional prohibition against degradation, but the protection of water must be balanced against the inalienable rights of pursuing life's basic necessities, including the right to acquire property and use water for beneficial purposes. The rules should implement the nondegradation policy by defining the details of this balance in a reasonable way. To be reasonable the rules must define achievable goals and parameters.

RESPONSE: The proposed rules were drafted in view of the Statement of Intent included in SB 401 and the guidance in § 75-5-301, MCA. For these reasons, the rules should achieve this balance.

376. COMMENT: Commentor 92 states that the current provisions for development of site specific standards should be retained.

RESPONSE: Proposed amendments to the water quality standards retain the provisions for site specific criteria. The current provisions have been modified in this rulemaking and extended to other stream classifications, which do not include provisions for site specific criteria.

377. COMMENT: Commentors 92 and 93 state that these rules do not treat all sources of nitrate equally. Agricultural practices contribute large amounts of nitrate, some of which are unregulated. All sources should be treated equally.

RESPONSE: See Response 227.

378. COMMENT: Commentor 93 asks whether lowering of water quality means concentration, load, or both?

RESPONSE: See Response 146.

379. COMMENT: Commentor 95 states asks What the relationship is

between "significance" as used in these rules and "significance as used in MEPA? If they are not the same, a different term should be used in these rules.

RESPONSE: There is no relationship between the use of the term "significance" in these rules and as it is used in MEPA. "Significance", as used under the proposed rules, provides a method for determining what types of activities are considered nonsignificant according to criteria which addresses potential for harm to human health and the environment. Under those criteria, activities found nonsignificant are excluded from the definition of "degradation" due to their low potential to significantly change existing water quality. This determination of significance is a very narrow assessment of the change in existing water quality. Significance under MEPA, on the other hand, considers a broad range of impacts to the "human environment", including secondary impacts, in order to determine whether an Environmental Impact Statement is required. Through this rulemaking proceeding, a consideration of impacts to water quality has been conducted similar to the analysis required by MEPA. The use of the term "significance" will remain in the final rule, as it is consistent with the legislative directive to develop criteria for determining nonsignificant changes in water quality.

380. COMMENT: Commentor 95 asks whether these rules apply to hard rock and placer exploration? Is the department prepared to review approximately 300 to 600 such activities per year? Should they be categorically exempted?

RESPONSE: Yes, the rules do apply to hard rock and placer exploration. The department will, within the constraints imposed by staffing limitations, review all such exploration activities in a timely manner.

381. COMMENT: Commentor 96 states that these rules do not "prohibit" degradation.

RESPONSE: The proposed rules are consistent with the nondegradation policy, which does not prohibit degradation but provides a process for making an informed decision on whether or not degradation may be allowed according to the requirements of § 75-5-303, MCA.

382. COMMENT: Commentor 98 asks how the cases where the actual levels are less than reliable quantification levels will be handled?

RESPONSE: See Response 6, 7, 12, and 40.

383. COMMENT: Commentor 99 states that water is our most important resource and the proposed rules must achieve a balance in determining what kinds of human activities are important enough to compromise water quality.

RESPONSE: The proposed rules have been developed according to the guidance in the nondegradation statute and in response to public comment. Accordingly, the proposed rules allow only nonsignificant changes in water quality and provide a process for full public participation in any decision to authorize degradation. The procedures for allowing degradation ensure that only those activities that benefit society will be allowed.

384. COMMENT: Commentor 100 states that the current policy should not be weakened and opposes its amendment by SB 401.

RESPONSE: This comment cannot be addressed because the 1971 nondegradation policy was amended by SB 401 during the 1933 legislative session. Consequently, the proposed rules implement the new nondegradation policy.

385. COMMENT: Commentors 101, 105, 106, 109, 110, 127, 128, and 129 state that our water quality should not be lowered. Our water quality should be raised.

RESPONSE: The nondegradation policy is not meant to improve the quality of water, but to maintain existing water quality. The proposed rules implement this policy.

386. COMMENT: Commentor 103 states that the final decision of these rules should be postponed for 6 months to allow for further study and public input. In the interim, the current standards and rules should be applied.

RESPONSE: During the 1993 legislative session, the provisions of the 1971 nondegradation law were repealed and replaced by the provisions of SB 401. With the repeal of the 1971 provisions, the rules implementing the 1971 policy were no longer consistent with the requirements of SB 401. Consequently, those rules cannot implement the requirements of the new law, which became effective April 29, 1993. The suggestion to delay adoption of the proposed rules and use the old rules would contravene existing statutory requirements and, therefore, must be rejected.

387. COMMENT: Commentor 103 asks what the economic impact of the rules is?

RESPONSE: The proposed rules were developed as a result of a legislative mandate to adopt rules according to the statutory guidelines of § 75-5-301, MCA. There is no authority in the statutory guidance or in the Water Quality Act for the agency to consider the economic impacts resulting from implementation of the policy. Consequently, no economic analysis was considered or developed regarding the adoption of these rules.

388. COMMENT: Commentor 103 states that the ones who use Mon-

tana's water should pay the costs of keeping it clean.

RESPONSE: This comment is not specific enough to formulate a response.

389. COMMENT: Commentor 107 (DNRC) states that all state agencies should employ the same basic approach when using a cost benefit analysis in their environmental impact statements and their permitting decisions. The cost benefit analysis should conform to well established, professionally defensible theories and practices of economics. Therefore, this commentor proposes amendments to the rules, particularly Rule V, regarding the economic analysis required under that rule in order to avoid conflicts with the cost benefit analysis conducted by DNRC under the Major Facility Siting Act and the Water Reservation Program.

RESPONSE: Rule IV(7) and Rule V(4) were modified in response to Commentor 107 for the reasons given in Response 122. The primary reason for the modifications was to provide guidance to the public and the agency regarding the method to be used in weighing the benefits and costs to society resulting from a proposal to degrade.

390. COMMENT: Commentor 108 (Confederated Salish and Kootenai Tribes) state that they remain willing to work with the board to achieve comprehensive water quality protection for all Montana waters.

RESPONSE: Comment noted.

391. COMMENT: Commentor 113 states that the procedures for preforming cost benefits must be improved. A two tier process should be established so that less effort is required for projects with little impact.

RESPONSE: The parts of the rules dealing with cost benefit analyses have been modified to clarify them. The suggestion for a two tier process was considered and rejected as unnecessarily complex.

392. COMMENT: Commentor 115 states that provision for the development of site specific standards and associated permit limits for all waters needs to be in these rules.

RESPONSE: This change is included in the surface water quality standards. See Response 376.

393. COMMENT: Commentor 115 states that the use of site specific criteria developed by an applicant must not be conditional if the results are obtained in conformance with the rules. Thus, the language proposed in the surface water quality standards dealing with site specific standards must be changed back to the current language.

RESPONSE: The provision for site specific criteria must be changed in order for the department to consider other routes of exposure, such as sediment contact and ingestion of organisms with elevated concentrations of toxicants.

394. COMMENT: Commentor 116 asks the board to be conservative in labeling things nonsignificant.

RESPONSE: Comment noted.

395. COMMENT: Commentor 118 asks how and where the department has complied with the 1989 HB 757 section 13?

RESPONSE: See Response 257.

396. COMMENT: Commentor 119 asks that what is significant not be tied to what is detectable.

RESPONSE: See Response 6 and 7.

397. COMMENT: Commentor 119 states that for standards that are below detection levels, standards should be based on calculated concentrations in the receiving water. Any change that would cause a 10% increase in the receiving water should be considered significant in these cases.

RESPONSE: See Response 6 and 7.

398. COMMENT: Commentor 120 states that the categorical exclusions for nonsignificance makes it impossible to comply with MEPA requirements to assess and mitigate cumulative impacts which will escape public review.

RESPONSE: The rules adopted by the board implementing MEPA allow the agency to use an interdisciplinary approach in evaluating alternatives and determining the significance of a state action pursuant to ARM 16.2.626. Through this process the agency may determine that a proposed action, including the adoption of rules, meets the functional equivalence of an EA, provided the action does not result in significant impacts requiring an EIS. The legislative guidance for establishing nonsignificance require the agency to take into account harm, length of time, character of the pollutant, and equate significance with those parameters that are potentially harmful to human health or the environment. The agency has considered the impacts to the environment through the development of the criteria, whose function is to protect existing water quality, and taken into account public comment. This has been accomplished through this rulemaking proceeding. Since the agency has determined that the adoption of the categorical exclusions under Rule VIII is not a significant state action and the objectives of MEPA have been met through this rulemaking, adoption of these rules complies with MEPA.

399. COMMENT: Commentor 120 states that the provision of 75-5-303 (4)(B), MCA, requiring the preliminary decision to include "the limits of degradation authorized" and the "methods for determining compliance with the authorization to degrade." The proposed rules must include these requirements.

RESPONSE: Rule VI(2) requires the preliminary decision issued by the department to contain the following: (1) "(f) the amount of allowed degradation"; and (2) "(h) a description of all monitoring and reporting requirements". Those requirements meet the requirements of § 75-5-303, MCA, regarding the inclusion in the preliminary decision of the limits of degradation and the methods for determining compliance. Therefore, no further change is necessary.

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1. COMMENT: Commentors 1, 2, 4-20, 22-51, 53-59, 61, 65-70, 75-80, 82, 83, 87-94, 96, 98-101, 112, 119, 120, 122, 123, 125, 126, 128, 129, 131, 132, 134-136, 140-141, 149, 151, 152, 153, 156, 158-163, 168, 169, 171, 174, 179, 180, 216, 218, 230, 271, 277-288, and 291-308 state that it is critical to use septic tanks and drainfields until suitable alternative systems can be identified and that the department should approve alternative systems state wide as rapidly as possible.

RESPONSE: Suitable systems are available, as cited in Department Circular WQB-5, which contains minimum design standards for on-site alternative wastewater treatment systems. Those systems include the following: waste segregation systems, elevated sand mound systems (Wisconsin Mounds), aerobic package plant systems, intermittent sand filters systems, recirculating sand filter systems, nutrient removal systems, and other systems provided they have been demonstrated to perform reliably and meet state standards. Counties, however, are not bound by state approval of these systems and may adopt more stringent requirements. The department plans to hold training sessions at various points throughout the state after the rules are adopted. These sessions will include explanation of the rules, how they should be applied and options acceptable under the rules. No change in the rules will be made to address this comment.

2. COMMENT: Commentors 3 and 251 believe that most people in Montana desire clean water and that the board should dedicate itself to the greatest good for the state.

RESPONSE: Comment noted. These rules implement the requirements of the amended Water Quality Act.

3. COMMENT: Commentor 21 makes the same comment as No. 1, and in addition states that it is not fair to treat all properties the same regardless of their size.

RESPONSE: Rule IX(1)(d)(viii)(A), (B) and (C) in the mixing zone rules generally allow larger mixing zones for larger properties. The rules have been changed to add a new provision (C), which specifically allows larger mixing zones where public health will be protected by conditions imposed prohibiting development on adjacent land.

4. COMMENT: Commentors 52, 73, 74, 81, 85, 86, 95, 97, 105, 106, 109, 117, 127, 133, 137, 142, 146, 151, 154, 155, 165, 173, 175, 176, 178, 185, 186, 193, 198, 200, 213,217, 219, 223, 224, 226, 228, 232, 238, 239, 250, 251, 253, 257-261, 263, 266, 270, 272, 275, 276, 309, 310, 314 and 315 state that the self determination of significance is unacceptable and must be deleted. They suggest that all applicants should be required to submit a checklist to the department. The department would then make these checklists available to the public and would audit a percentage of them to determine compliance. These

checklists would also be used to maintain a tracking system to determine long term compliance.

RESPONSE: Under the law the department must assure that all activities reviewed, authorized or permitted by the department comply with the law. This means that the department will determine significance in most cases, and language has been added in Rule IV(1) to clarify this. Therefore, the suggested modifications to the rules are not necessary and will not be adopted into these rules. The final rule will include a provision clarifying that all activities that are permitted or authorized by the department will be reviewed for nonsignificance by the department.

5. COMMENT: Commentors 60, 62, 71, 72, 112, 183, 195, 196 and 225 point out that the cost of sand filtration systems would drastically hurt affordability, could stop home construction in some areas, and have not been proven to reduce nitrates to 2.5 parts per million.

RESPONSE: This comment is not specific enough to justify a change in the rules so none will be made. The use of level 2 treatment could increase the cost of a new home by approximately 2% to 5%. As stated in Response 1, there are several treatment systems that will comply with the level 2 removal requirements and allow the activity to be considered nonsignificant.

6. COMMENT: Commentors 60, 62, 71, 72, 112, 183, 191, 195, 196 and 225 contend that it will be virtually impossible for a homeowner to prove that they are in compliance with the nondegradation requirements.

RESPONSE: This comment is not specific enough to justify a change in the rules so none will be made. The nondegradation requirements apply to new or increased activities. Thus, existing homeowners are exempt from the requirements. The rules are designed to prevent construction of systems that will result in degradation. For new or increased sources, homeowners will be in compliance provided their waste treatment systems are determined to cause nonsignificant changes in water quality.

7. COMMENT: Commentors 60, 62, 71, 72, 113, 183, 191, 195, 196, 225, 242, 243 and 289 infer that the state cannot afford to monitor these regulations and that the expertise to assure nondegradation may not be available or affordable.

RESPONSE: This comment is not specific enough to justify a change in the rules so none will be made. As mentioned in Response 6, the concept of nondegradation is to prevent problems not to correct them. Although difficult to project, the administration of these rules does not appear to be an unreasonable burden on the State. Expertise does exist to comply with these rules.

8. COMMENT: Commentors 60, 62, 71, 72, 112, 183, 191, 195, 196 and 225 contend that these rules have the potential to force all Montanans to live on central services and that the resulting load cannot be absorbed by the municipalities.

RESPONSE: This comment is not specific enough to justify a change in the rules so none will be made. These rules may result in more people choosing to live where they can use central systems. They will not require central systems; in many cases properly utilized on-site systems will continued to be the preferred type of disposal.

9. COMMENT: Commentors 60, 62, 71, 72, 183, 191, 195, 196 and 225 contend that there is conflicting scientific evidence concerning the measurement of nitrates in ground water.

RESPONSE: This comment is not specific enough to justify a change in the rules so none will be made. There is some conflicting data regarding the expected concentrations of nitrate in the effluent from septic tanks and in the ground below the drainfield trench. In the absence of specific data, the department will use conservative assumptions of 50 mg/l under the drainfield for standard systems, 27 mg/l under the drainfield for pressure dosed closed bottomed sand filters, 36 mg/l under pressure dosed open bottomed intermittent sand filters, and tested values plus 10% under the drainfields for other systems.

10. COMMENT: Commentors 60, 62, 71, 72, 183, 195, 196 and 225 contend that the Board has an obligation to seek a change in the nondegradation law at the next session of the legislature because it cannot administer the present code.

RESPONSE: Until rules are adopted, it is too speculative to say that the department will be unable to administer these requirements of the Water Quality Act. While the present law and the draft rules may require modifications in staff responsibilities or staffing levels, it is presumed that the department can administer them. No change will be made based upon this comment.

11. COMMENT: Commentor 63 contends that these rules will not prevent degradation and that all these rules will do is prevent further development because the criteria cannot be attained. The rules are "over kill".

RESPONSE: These rules will limit degradation while still allowing responsible development.

12. COMMENT: Commentor 64 supports clean water.

RESPONSE: Comment noted. This comment was not specific enough to formulate a response.

13. COMMENT: Commentors 73, 74, 85, 95, 97, 106, 118, 127, 137, 142, 146, 151, 154, 155, 157, 165, 175, 185, 186, 188, 197, 213, 217, 219, 223, 232, 250, 251, 258 and 272 contend that dischargers should be required to do everything possible to meet water quality standards at the end of the pipe with no mixing zone. If the discharger cannot meet this requirement, a nondegradation application should be required for any mixing zone that will "significantly" change water quality.

RESPONSE: The proposed mixing zone rules have been developed in conformance with the guidance in the board's rulemaking authority provided in § 75-5-301(4), MCA. There is nothing in that guidance or in the Water Quality Act itself that suggests mixing zones should generally be denied and discharges should generally be required to obtain authorization to degrade under § 75-5-303, MCA. The only statutory requirements for mixing zones is that they are as small as practicable with minimum effect on water uses and have definable boundaries. This commentor's suggestion is contrary to the rulemaking authority of the board and will not be adopted.

14. COMMENT: Commentors 73, 81 and 198 contend that increases of nitrate concentration above 5 parts per million in the ground water are significant.

RESPONSE: The levels for nitrate established under the rules is consistent with the guidance in § 75-5-301(5)(c). Nitrate can, particularly with domestic waste water systems, be an indicator of other parameters which may be of even greater concern such as viruses, bacteria and other pathogens. For this reason the proposed rules treat nitrate from domestic waste water systems more stringently than from other sources. These rules limit nitrate increases from domestic waste to 5 parts per million. Table I of the rules has been changed, however, to prevent a change in the background nitrate level from exceeding 2.5 mg/l for all sources.

15. COMMENT: Commentor 81 states that existing dischargers be required to comply with the mixing zone requirements, while Commentor 227 asks how this will be done.

RESPONSE: Since the applicability section in SB 401 indicated that the new law would only apply to new or increased sources commencing after April 29, 1993, the new mixing zone requirements will not be retroactively applied to existing permits. Existing discharge permits will be reviewed at the time of their renewal and any new permit issued will have a mixing zone with definable boundaries. A proposed modification to Rule III of the mixing zone rules clarifies this point.

16. COMMENT: Commentors 97, 105 and 107 contend that there should not be any categorical exclusions and to delete Rule VIII.

RESPONSE: Degradation has been defined statutorily to include any change in water quality except those changes determined nonsignificant under rules adopted by the board. The board's rule making authority requires the adoption of criteria for determining what activities or classes of activities are non-significant. For this reason, the proposed change will not be made.

17. COMMENT: Commentors 104 and 186 question the source of the 60% removal requirement in level treatment and contends that level 2 treatment should require 80 percent removal for industrial sources.

RESPONSE: The 60% figure was chosen because several systems for treating human waste can achieve this figure. The definition of level 2 treatment has been modified to clearly exclude industrial wastes. Treatment requirements for nitrate resulting from industrial wastes will be established by the department as provided in the surface water quality rules.

18. COMMENT: Commentor 104 states that the department should develop and provide a list of acceptable treatment techniques that will achieve the required removal.

RESPONSE: A partial list for systems treating human wastes was developed in the previous response to comments, which is provided below.

The costs for various systems and their estimated nitrate removal efficiencies are:

1. Standard in-ground septic tank drainfield on-site systems; $1500 - $2500; 10% removal.
2. Shallow place cap and fill systems: $2000 - $3000; 10% to 20% removal.
3. Low pressure systems: $3000 - 4000; 10% removal.
4. Bottomless sand filters: $5000 - $8000; about 50% removal.
5. Typical trench discharge sand filters: $6000 - 10,000; 50% to 70% removal.
6. Mound system or fill systems: $5000 - $10,000; 50% to 70% removal.
7. Soil discharge aeration chamber systems: $6000 - 8,000; 50% to 80% removal.

Costs for on-site sewage system are site specific. Therefore, costs will vary depending on site conditions, access, availability of material and contractor discretion, expertise, or bidding practices.

Other costs associated with on-site sewage systems include costs incurred when improper siting, density, design, construction, or maintenance results in a health hazard. States and local governments expend hundreds of thousands of dollars per year in man hours rectifying problems caused by inadequate systems. In certain areas in the State, such as at Frenchtown, homeowners and lending agencies have lost either the use of the property or the value of the property due to inadequate sewage

treatment.

There are also instances where health hazards caused by inadequate on-site sewage systems required the construction and use of public treatment works in certain areas of the state. In Montana, the cost associated with constructing these facilities ranges from $10,000 to $30,000 per lot.

19. COMMENT: Commentor 104 points out that definition (24) in Rule II does not include nutrients while in Rule VII(1)(c) refers to trigger values for nutrients. It is also stated that there is no trigger value for nitrogen in WQB-7.

RESPONSE: The definition of trigger values should be modified by inserting "and nutrients" after toxins. In addition nitrate plus nitrite, nitrate and phosphorus in surface waters need to be categorized as nutrients in WQB-7. There is a trigger value for nitrate plus nitrite and for nitrate in WQB-7.

20. COMMENT: Commentor 104 contends that increased dischargers, as defined in Rule II(15) of the nondegradation rules, should not be entitled to both their permitted or approved discharge and the increases allowed by the significance thresholds specified in the rules.

RESPONSE: In order to clarify that existing discharges cannot increase above limits established in a permit without obtaining an authorization to degrade, the following language will be added to the definitions in Rule II of the Nondegradation rules as follows: "(3) "Degradation" is defined in 75-5-103, MCA, and also means any proposed increase of a discharge that exceeds the limits established under or determined from a permit or approval issued by the department prior to April 29, 1993."

21. COMMENT: Commentors 104, 186, 197, 198, 238 and 258 contend that the significance thresholds for nitrate in ground water are too high and points out that the increases should be tied to existing values. The increases of nitrate proposed in Table I may degrade surface water. In addition, there is a lack of data to establish that treatment systems, which remove nitrate, also remove a proportionate amount of pathogens. The proposed rules encourage discharges to ground water while moving towards tighter nutrient controls for municipal discharges.

RESPONSE: The levels for nitrate established under the rules are consistent with the guidance in § 75-5-301(5)(c). Proposed changes to Table I clarify that "existing values" refers to the levels existing at the time the law was passed. Section (1)(d) of Rule VII specifically limits the effect of nitrate increases in ground water based on the expected effects on surface water. While it is not possible at this time to quantify the pathogen removal efficiency associated with nitrate removal systems, professional judgement indicates that a significant amount of viruses, bacteria and other pathogens will be removed with

these systems. Finally, these rules will not encourage discharges to ground waters but will in fact discourage them. For the reasons stated above, no further changes will be made based upon this comment.

22. COMMENT: Commentor 104 contends that nitrate, nitrite and ammonia increases in ground water caused by septic tank disposal systems should be covered by encouraging a class authorization for these systems.

RESPONSE: While class authorizations may be appropriate for certain activities, the on-going construction of homes argues against delaying the adoption of rules that allow nonsignificant changes in nitrate levels resulting from on-site treatment systems. Class authorizations for individual counties would delay construction throughout the state until those activities are approved through a process that may take years to accomplish. Clearly the legislature did not intend this result.

23. COMMENT: Commentors 105, 106, 198, 217, 219, 251, 257, 260, and 275 contend that the significance threshold for nitrate increases in ground water should be 2.5 parts per million.

Response: See Response 14.

24. COMMENT: Commentors 105, 186 and 228 contend that the board should adopt a definition of "natural condition" in these rules.

RESPONSE: The provision referencing "natural condition" is derived from § 75-5-306, MCA, in the Water Quality Act. The term is used in the surface water quality standards, and its inclusion in rules amending the surface water quality standards and establishing requirements for mixing zones is appropriate. Defining this term is not necessary for the adoption of these rules.

25. Comment: Commentors 106, 198, 217, 219, 257, 261 and 275 contend that all "nonsignificant" activities should be required to use approved best management practices.

RESPONSE: The use of reasonable land, soil, and water conservation practices are more protective than best management practices (BMP) and are required for nonpoint sources. The suggested change will not be made as BMPs are not appropriate for point sources that may qualify as nonsignificant.

26. COMMENT: Commentors 107 and 217 contend that degradation should not be allowed.

RESPONSE: The rules have been written in response to SB 401, which specifically allows degradation under limited circumstances. Therefore, no change will be made based upon this

comment.

27. COMMENT: Commentor 107 contends that there should be no increase allowed in the nitrate concentration in ground water.

RESPONSE: The levels for nitrate established under the rules are consistent with the guidance in § 75-5-301(5)(c), MCA.

28. COMMENT: Commentors 108, 198 and 262 point out that protecting the ground water will in the long run enhance property values, and that allowing nitrate contamination of the ground water will depress the real estate market. This commentor contends that a significance threshold of 7.5 parts per million is too high.

RESPONSE: The draft rules will prevent nitrate concentrations resulting from the disposal of human waste from exceeding 5 parts per million and will require level 2 treatment, if the increases will exceed 2.5 parts per million. The levels for nitrate established under the rules are consistent with the guidance in § 75-5-301(5)(c), MCA. A modification of Table I is proposed, which would clarify that "existing values" refers to levels existing existed at the time the law was passed, thereby eliminating the use of changing background levels.

29. COMMENT: Commentor 110 contends that the rules should contain a provision for the designation of outstanding resource waters (ORW).

RESPONSE: Rule II(19) defines ORW as any waters that are classified as such by the board. Under § 2-4-315, MCA, any person may petition the board for the adoption or amendment of rules that would classify a particular water as an ORW.

30. COMMENT: Commentor 110 contends that the term "unreasonable interference with or danger to existing beneficial uses" in Rule III(2) and Rule IV(1) of the mixing zone rules should be changed to "threaten or impair existing beneficial uses" as this term is used in Rule VIII(6).

RESPONSE: For consistency, the suggested change will be made.

31. COMMENT: Commentor 110 contends that the language "may be appropriate" in Rule IV(2)(a), (c), (e) and (g) of the mixing zone rules should be changed to "may be nonsignificant due to their low potential for harm to human health or the environment"

RESPONSE: The present language accurately expresses the intent to provide agency discretion in designating mixing zones. The term "nonsignificant" refers to changes in water that do not cause degradation. Inclusion of that term in the mixing zone rules would only cause confusion. Consequently, the proposed change will not be made.

32. COMMENT: Commentor 110 contends that allowing the use of a standard mixing zone without approval from the department is not legal.

RESPONSE: There is nothing in the rule making authority under § 75-5-301(4), MCA, which precludes allowing individuals to use a standard mixing zone without approval from the department. Generally, this will only occur when individuals make "self-determinations" of nonsignificance. As stated in a prior response, instances of self-determinations will seldom occur in practice.

33. COMMENT: Commentor 110 contends that allowing a standard mixing zone for leakage from an impoundment or seepage from a land application area will allow an escape from department review.

RESPONSE: See Response 4.

34. COMMENT: Commentor 110 asks how can there be enough dilution, if a discharge flow exceeds the flow of the receiving water?

RESPONSE: This comment is not specific enough to justify a change in the rules so none will be made. In response to the comment, this means that the discharge will be very rapidly mixed, but it does not address the resulting concentrations in the stream. Those concentrations may or may not comply with the requirements for minimum impact and compliance with standards.

35. COMMENT: Commentor 110 contends that Rule VI(2)(i) of the nondegradation rules should be modified by deleting "description" of the mixing zone and inserting "specifically identifying" the mixing zone.

RESPONSE: This change will be made in order to conform to the requirements in § 75-5-301(4), MCA.

36. COMMENT: Commentors 110 and 186 contend that the language "In any review subsequent to the first, the department may not make a determination of incompleteness on the basis of a deficiency which could have been noted in the first review" in Rule IV(11) of the nondegradation rules should be deleted.

RESPONSE: The provisions in this rule require the information as necessary to conduct a thorough review. This particular requirement will ensure a timely review by the department because it ensures that any requests for supplemental information will not unduly delay the application process. The rule will remain as proposed.

37. COMMENT: Commentor 110 contends that the language dealing with the required 5 year review in previous version of these

rules in Rule X should be reinstated.

RESPONSE: Rule X was deleted because it unnecessarily repeated statutory language, which is prohibited under the Montana Administrative Procedure Act. Therefore, the suggested change will not be made.

38. COMMENT: Commentor 111, 209-211 and 243 contend that "Existence values" in Rule II(3) and "Opportunity cost" in Rule II(18) should be deleted and no reference should be made to those terms in the rules.

RESPONSE: Because the quantification of projected social costs and benefits (i.e., opportunity costs and existence values) are imprecise and uncertain, these terms have been removed from the rules.

39. COMMENT: Commentors 111, 209-211, 221 and 243 suggest deleting the definition in Rule II(1), which provides examples of "management or conservation practice".

RESPONSE: This language adds clarity and will be retained as proposed.

40. COMMENT: Commentors 111, 209-211, 221 and 243, contend that the definition of outstanding resource waters, Rule II(19), should be deleted and all requirements for these waters removed from the rules.

RESPONSE: Under federal rules, all states are required to designate outstanding resource waters (ORW) and provide additional levels of protection. The suggested deletion would result in disapproval of these rules and promulgation of federal rules, which the state would be required to enforce. The rule will remain as proposed rather than allow a federal rule, which may list additional waters as ORWs and corresponding requirements to protect them. The rule has been modified, however, to delete the term "recreational" because existing recreational activities would be excluded and because there is no direct relationship between degradation and outstanding recreational significance.

41. COMMENT: Commentor 111 suggests that reporting values should be deleted from WQB-7.

RESPONSE: See Response 90.

42. COMMENT: Commentors 111 and 209-211 contend the "trigger values" in Rule II(24) should be deleted and it should not be used in the rules.

RESPONSE: See Response 90.

43. COMMENT: Commentors 111 and 209-211 contend that the non-

degradation Rule III(2)(b) is unworkable and at a minimum the Phrase "The assurance will be achieved through ongoing administration by the department of the existing programs for control of point and nonpoint source discharges" should be used in Rule III(2)(b).

RESPONSE: The intent of the proposed rule is to require a review of existing permits and programs to ensure compliance before degradation is allowed in conformance with 40 CFR 131.12(2). The proposed language will not be used because it may unnecessarily preclude some future use of a broader based assessment of water quality than currently provided by existing permits and nonpoint source programs. The rules will be changed, however, to provide that assurance will be achieved through the administration of any approved program of the department (i.e., existing or future program).

44. COMMENT: Commentors 111 and 209-212 contend Rule IV(7) should be changed to delete the list of information which must be submitted and instead say that "an applicant shall include an analysis demonstrating that the proposed activity will provide important economic or social development which exceeds any cost to society of allowing the proposed change in water quality."

RESPONSE: While this change simplifies the rule, it fails to clarify what type of factors the department will consider in the applicant's demonstration. Therefore, it will not be adopted.

45. COMMENT: Commentors 111, 209, 210, 212 and 221 suggest modifying Rule V(4) by deleting the current language and replacing it with a list of criteria that would allow the department to approve a project based on the ability of the project to provide employment, create or maintain a supply of goods and services, increase local or state revenues, or provide a public service. The proposal allows the department to weigh these benefits against any quantifiable harm to any person caused by the change in water quality, as well as the ability of the proposed to foreclose a project that would provide greater benefits to society. This change should be made because the enabling legislation did not contemplate the type of cost benefit analysis proposed in the current rules.

RESPONSE: In response to the extensive comments on the cost/benefit analysis in the proposed rules, Rules IV(8) and V(4) have been modified to provide flexibility in considering other societal benefits and goals than previously allowed. Many of the proposed changes suggested by this commentor have been included in the proposed rules. In addition, the rules now give the department discretion to simplify the analysis depending upon the complexity or magnitude of the proposed activity.

46. COMMENT: Commentors 111, 209-212 and 221 suggest deletion of any reference to changes in flow.

RESPONSE: This provision is consistent with legislative guidance for establishing nonsignificant criteria as it recognizes the fact that changes in flow can, and do, impact water quality. § 75-5-301(5)(c) addresses, among other things, the potential for harm to human health and the environment, not just discharges of pollutants. Therefore, the suggested change will not be made.

47. COMMENT: Commentor 111 suggests changing the language in Rule VII(1)(c) to treat toxic parameters in the same manner as harmful parameters. This would allow a 10% increase as long as the existing water quality is less than 50% of the standard, or if the standard is lower than the reporting value, changes up to the reporting value should be allowed without considering the change significant.

RESPONSE: This approach does not consider the potential for harm to the environment as required in § 75-5-301(5)(c), MCA. This proposal, in conjunction with the commentor's suggested reporting values, allows significantly greater changes in water quality than allowed under the proposed rules to be consider nonsignificant. Therefore, the proposed change will not be made.

48. COMMENT: Commentor 111 suggested changes in Rule VII(1)(f), which consist of grammar changes and the inclusion of the provision dealing with reporting values discussed in Comment 47.

RESPONSE: In conjunction with the suggested reporting values, this proposed change would allow significantly greater changes in water quality to be considered nonsignificant and is contrary to the intent of the nondegradation policy. Therefore, the suggested change will not be made.

49. COMMENT: Commentor 11, 209-211 and 221 call for deletion of Rule VII(2)(a) dealing with cumulative impacts or synergistic effects. The issue of cumulative impacts and synergistic effects was deleted from SB 401 by the Montana Legislature. For the Department to have such discretion was viewed as improper by the legislature, and should not be included in these rules.

RESPONSE: The purpose of the nondegradation policy is to prevent cumulative impacts or the incremental degradation of water. Since this is the essence of the policy, no specific wording addressing cumulative impacts was necessary in the proposed legislation, nor was it proposed. This does not, however, preclude the inclusion of cumulative impacts or synergistic effects in the rules implementing the policy. For the above reasons, the rule will remain as proposed.

50. COMMENT: Commentors 111, 209 and 211 contend that "remedial" should be added after "emergency" in Rule VIII(1)(c).

RESPONSE: In order to clarify that remedial actions are not subject to the application procedures under the nondegradation policy, the suggested change will be included in the final rule.

51. COMMENT: Commentors 111, 209-212 and 221 suggest adding a new categorical exclusion as (p) of Rule VIII(1) as follows: "Activities permitted pursuant to § 75-7-101, MCA, and section 404 of the Clean Water Act."

RESPONSE: One of the proposed exclusions would exempt activities permitted under Section 404 of the Clean Water Act (CWA). Those activities, however, must be certified by the department under Section 401 of the CWA for compliance with state water quality laws. Since 404 activities are subject to department review, they must be reviewed for compliance with the nondegradation policy. An exclusion of those activities is not justified as they may cause degradation.

The suggestion to exempt activities currently permitted under the Natural Streambed and Land Preservation Act of 1975 is allowed under Rule VIII(1)(e). This categorical exclusion allows activities to be considered nonsignificant that result in short-term changes in water quality as specified under § 75-5-308, MCA. This would include construction or hydraulic projects conducted under § 75-7-101 et seq., MCA. Therefore, no change in the rules is necessary to address this comment.

52. COMMENT: Commentor 111 suggests insertion of a statement that recognizes the validity of mixing zones made or recognized by the department prior to the adoption of these rules and that nonsignificant activities are not required to obtain mixing zone designations or approval from the department.

RESPONSE: Under Rule III of the mixing zone rules, a provision has been added that recognizes the continuing validity of mixing zones under existing permits, provided those mixing zones do not impair existing or anticipated uses. The suggested exemption for nonsignificant activities from the requirement to obtain a mixing zone from the department will not be made as some of those activities may require a permit or other form of authorization from the department.

53. COMMENT: Commentor 111 requests that the language "zone of passage for migrating fish or other species" be used in Rule IV(2)(e) instead of "passage of aquatic organisms".

RESPONSE: This suggested change would only cause confusion, not clarity. Therefore, the suggested change will not be made.

54. COMMENT: Commentors 111, 209 and 211 contend that (2)(g) of Rule IV dealing with aquifer characteristics should be de-

leted.

RESPONSE: While predictions of changes in water quality can be made using present methods, the accuracy of these predictions depends upon the validity of assumptions used to calculate the predictions and the quality of the site specific data. In some settings the accuracy of predicted changes in water quality will be good, at some other sites it will be poor. This section gives the department authority to deny mixing zones when the actual mixing zone cannot be accurately predicted. Therefore, the rule will remain as proposed.

55. COMMENT: Commentor 111 suggested changes to (h) of Rule IV of the mixing zone rules to clarify its intent.

RESPONSE: This change will be made for clarification.

56. COMMENT: Commentor 111 requested changing (1)(b) of Rule V of the mixing zone rules so that acute standards may be exceeded in the zone immediately surrounding the outfall regardless of its effect on existing beneficial uses.

RESPONSE: This change will not be made as the Water Quality Act and the nondegradation policy require the protection of existing beneficial uses.

57. COMMENT: Commentors 111 and 209-211 propose that the ban on mixing zones for carcinogens and bioaccumulatives be deleted from the sections containing specific restrictions for ground water and surface water mixing zones.

RESPONSE: The rules will be modified to remove those provisions as the Water Quality Act does not impose this prohibition.

58. COMMENT: Commentor 111 requested including a statement in Rule VI(1)(a) of the mixing zone rules to clarify that aquatic life standards do not apply to ground water.

RESPONSE: This change will be made for clarification.

59. COMMENT: Commentors 111 and 209-211 contend that "an alternative or modified mixing zone, as defined by the department" should be replaced with "a source specific mixing zone" in Rule VII(1)(d) and add a provision to clarify what a "source specific mixing zone" is in Rule X(5).

RESPONSE: This change will be made for clarification.

60. COMMENT: Commentors 111 and 209-211 contend that (7) of Rule VIII should be changed to state that once a mixing zone is granted, it may only be modified in response to a change in the discharge.

RESPONSE: The rules must allow flexibility on the part of the

department to modify permitted mixing zones due to changing technology and the development of new information regarding the effects of the mixing zone. Therefore, the requested change will not be made.

61. Comment: Commentors 111 and 209-211 contend that (3)(b) of Rule VIII should be modified to allow discharge limitations proportionate to the dilution of the 7Q10.

RESPONSE: The commentor apparently misunderstands the intent of this section. It is intended to allow standard mixing zones when the dilution, even at low flow, is much larger than the flow of the receiving water so that impacts to uses are relatively unlikely. If the dilution is less than 100:1, and the discharge limitations are based on less than 25% of the 7Q10, this would not be the case. Therefore, the suggested change will not be made.

62. COMMENT: Commentors 111 and 209-211 contend that (3)(c) of Rule VIII should be modified in the interests of clarity.
RESPONSE: This change will be made for clarification.

63. COMMENT: Commentors 111 and 209-211, suggest adding a clarifying phrase to (1)(c) of Rule IX of the mixing zone rules stating that aquatic life standards do not apply to ground water.

RESPONSE: This change will be made to clarify the rules.

64. COMMENT: Commentors 111 and 209-211, contend that the proposed consideration of other routes of exposure in the development of site specific standards in the surface water quality standards rules should not be adopted and that these effects should be dealt with through standards for toxics in sediments recommended by the EPA.

RESPONSE: Unfortunately, criteria for toxics in sediment have not been developed. The present EPA guidance lacks a consideration of the potential effects of ingestion of sediment, vegetation, and smaller aquatic organisms. These must be considered to assess the potential impacts on aquatic life. Therefore, the suggested change will not be made.

65. COMMENT: Commentor 112 contends that the depth of the mixing zone in ground water should be 25 feet.

RESPONSE: Fifteen feet is a reasonable value for the standard ground water mixing zone and will remain as proposed. In specific cases, an applicant may demonstrate to the department that a greater depth is justified in an application for a non-standard mixing zone. Since this flexibility is provided in the rules, the change from 15 feet to 25 feet will not be included in the rules.

66. COMMENT: Commentor 112 recommends that the nitrate chart be modified to change all references to "significant" to read "Level 2 treatment".

RESPONSE: The proposed change will not be made because at certain levels, the change in nitrate concentrations in ground water will cause degradation and require authorization from the department. In addition, level 2 treatment refers only to domestic waste while industrial wastes discharges are required, under both federal and state law, to provide "best available treatment" or its equivalent or meet "new source performance standards". These requirements are not comparable to level 2 treatment. Table I will be modified to clarify treatment requirements for various sources.

67. COMMENT: Commentor 113 states that the provision that mixing zones may not be allowed for discharges containing carcinogenic or bioconcentrating substances should be deleted. This restriction is unnecessarily restrictive.

RESPONSE: This section will be deleted as the Water Quality Act and nondegradation rules will provide the protection necessary for carcinogenic or bioconcentrating parameters.

68. COMMENT: Commentor 113 states that the proposed rules prohibit mixing zones unless the requirement for "near instantaneous mixing" is met. Municipal discharges would be required to use effluent diffusers extending the entire stream width, which would result in environmental damage far greater than any potential water degradation.

RESPONSE: Commentor 113 states that the proposed rules do not require "near instantaneous mixing" for all discharges, but allow the use of diffusers as one way of achieving "near instantaneous mixing". The other provisions for standard or nonstandard mixing zones may be appropriate for other discharges, including municipal discharges. For these reasons, no change will be made in response to this comment.

69. COMMENT: Commentor 113 contends that Rule VIII of the nondegradation rules is in conflict with federal law, which exempts all municipalities with populations less than 100,000 from being required to have approved storm water permits.

RESPONSE: The provision exempting certain activities covered by a general storm water permit has been removed from the final rules in response to comments suggesting that such activities should be reviewed on a case-by-case basis for compliance with the nondegradation policy. Due to its removal from the rule, no further change will be made in response to this comment.

70. COMMENT: Commentors 113 and 208 contend that the rules are complex, confusing and unworkable.

RESPONSE: The rules are complex because the issues are complex. Under the circumstances, the proposed rules are as simple, clear, and practical as possible. Future implementation and refinement of the rules should provide more clarity and certainty to the process. For the reasons stated above, no specific change will be made in response to this comment.

71. COMMENT: Commentor 114 asks what the department is doing to "conduct or encourage necessary research and demonstration concerning water pollution"?

RESPONSE: This comment does not request proposed changes to the rules so none will be made in response to this comment. In response to this question, the department does not have sufficient funds to have a formal program in this area. The department informally encourages such research and demonstrations.

72. COMMENT: Commentor 117 contends that the significance thresholds for nitrate increases in ground water in the nondegradation rules are too high.

RESPONSE: In many instances, the nitrate level in ground water can exceed 1.0 mg/l and still be nonsignificant according to the guidance in § 75-5-301(5)(c), MCA. The proposed rules reflect those instances and will not be changed as suggested.

73. COMMENT: Commentor 117 contends that the rules should prohibit development that relies on septic systems and all developments should be hooked to existing city disposal systems.

RESPONSE: In many cases, the use of properly installed and maintained on-site systems are the preferred type of disposal and will protect the public health and the environment. Therefore, no change to the rules will be made in response to this comment.

74. COMMENT: Commentor 118 contends that any proposed activity which will increase ground water nitrate level by 5 mg/l should be considered significant. That is, an absolute limit should apply rather than the proposed relative limit. The commentor also suggests that nitrate levels alone are not sufficient to determine the potential human health effects of bacteria and viruses present in septic tank leachate.

RESPONSE: Because the potential human health effects of bacteria and viruses present in septic tank leachate are not associated with other sources of nitrate, those other sources have a lower potential for harm to public health. Thus, there is little justification for not allowing relative limits and the requested change will not be made. See Response 14, 27, and 28.

75. COMMENT: Commentors 121, 185, 212 and 255 contend that the

nitrate threshold for nitrate in ground water should be 5 rather than 2.5 mg/l.

RESPONSE: The proposed limits are appropriate and no change will be made in response to this comment. See Responses 14, 27, 28 and 75.

76. COMMENT: Commentors 127, 139, 228, 233-235 and 272 contend that any change is degradation, and allowing individuals to determine for themselves what is degradation makes a mockery of the policy.

RESPONSE: SB 401 specifically recognizes small changes in water quality as being nonsignificant. The provision allowing individuals to make determinations of nonsignificance will not include any activity regulated by the department. In effect, there will be very few instances when an individual will not be subject to department review and approval. The provisions for allowing self-determinations of nonsignificance will remain as proposed.

77. COMMENT: Commentors 130 and 208 ask who is responsible in cases where an existing well must be abandoned or re-drilled because of pollution that results from new development? Will the new home(s) be forced to remedy the problem? What if the problem cannot be fixed by a new well or attachment to a public source? Is the state liable for permitting degradation that is economically or physically harmful to existing home owners?

RESPONSE: This comment does not request a change in the rules so none will be made in response to this comment. The issue of liability is complex and dependent on applicable law and specific facts. It may be in some instances liability will attach to the state or the developer. Under the current proposed rules, authorizing degradation must protect any existing or beneficial uses. Therefore, it is unlikely the issue of harm to adjacent land owners will ever arise.

78. COMMENT: Commentors 142, 151, 155, and 175 contend that all nonsignificant activities should be required to use best management practices.

RESPONSE: The use of best management practices applies only to nonpoint sources and does not include point sources. Since many nonsignificant activities are point sources, the use of best management practices would not be appropriate or applicable for many of those activities. Therefore, the suggested change will not be made.

79. COMMENT: Commentors 142, 151, 154, 155, 165, 175-177 and 257
contend that any increase in nitrate concentration above 2.5 mg/l is significant and that treatment should be required in these cases.

RESPONSE: See Responses 14, 27, 28, and 75.

80. COMMENT: Commentors 143, 148, 154, 155, 167, 184, 186, 188, 193, 194, 197, 226, 231, 236, 244-247, 249, 256, 264-266, 272, 274 and 309 contend that the rules are too lenient and will allow problems to occur that the citizens will ultimately pay to clean up.

RESPONSE: This comment is not specific enough to formulate a response regarding any proposed changes in the rules. The rules as proposed, however, are consistent with the requirements of the Water Quality Act and are meant to ensure that high quality waters are protected from degradation. The rules are meant to ensure that changes in existing water quality are only allowed in limited circumstances and under certain conditions. The rules do not address remedial activities for sources that violate water quality standards. Enforcement procedures for such violations may fall under the Water Quality Act or other state laws and requirements.

81. COMMENT: Commentors 144 and 145 support the comments made by WETA (Commentor 111).

RESPONSE: See Responses 38 through 67.

82. COMMENT: Commentor 146 contends that these rules allow many loopholes for the mining and logging industries.

RESPONSE: This comment is not specific enough to justify a change in the rules so none will be made. The rules apply equally to all activities from ranching and housing development to industrial development. They are intended to be as stringent as the law requires.

83. COMMENT: Commentor 147 contends that the body is unable to accommodate high levels of nitrate and other toxic materials.

RESPONSE: This comment is not specific enough to justify a change in the rules so none will be made. All substances are harmful or toxic at some level. The standards are set at levels which will protect all beneficial uses of water. The rules prohibit significant changes in existing nitrate levels without authorization from the department.

84. COMMENT: Commentor 154 contends that the potential health effects from bacteria and viruses in septic tank leachate should be determined from specific testing and not extrapolated from nitrate levels.

RESPONSE: This comment does not specifically propose a change in the rules so none will be made in response to this comment. In regard to testing the effects of bacteria and viruses, this should be done. However, determining the potential health effects of viruses in septic tank leachate is not technologi-

cally or politically possible due to liability issues involved with on-site research and the difficulty in recovering and identifying viruses.

85. COMMENT: Commentor 154 contends that the rules allowing mixing zones are discriminatory in effect because this commentor cannot obtain a permit to dump an old car body into the Clark Fork River, while an existing discharger has a permit to discharge using an 8-mile mixing zone.

RESPONSE: The rules follow statutory guidance and allow mixing zones so long as they have minimal effect and are as small as practicable. If a discharge qualifies for a discharge permit, the mixing zone rules apply equally without discriminatory effect. Therefore, no change will be made in response to this comment.

86. COMMENT: Commentors 155 and 208 contend that the rules, as proposed, would encourage potential polluters to request mixing zones as large as possible in order to avoid having to go through the process to apply for a nondegradation exemption.

RESPONSE: This comment is not specific enough to justify a change in the rules. All discharges must comply with the mixing zone requirements, which are intended to be as small as practicable with minimum effect. They are not intended as an exemption from the nondegradation process.

87. COMMENT: Commentor 155 contends that any discharger requesting the use of a mixing zone prove that no harm will be caused to any beneficial use.

RESPONSE: A mixing zone that may harm a beneficial use cannot be granted. Information requested or received by the department will ensure this protection. Therefore, no change will be made in response to this comment.

88. COMMENT: Commentor 165 contends that mines abandoned prior to 1955 should not be considered natural.

RESPONSE: This comment is not specific enough to justify a change in the rules. In addition, this issue will not be addressed in these rules as it is outside the scope of this rule making.

89. COMMENT: Commentor 165 contends that the department is having secret meetings with industry.

RESPONSE: This comment is not specific enough to justify a change in the rules so none will be made. In response to the comment, the department has met many times with all types of individuals and interest groups during the development of these rules. It is impractical to provide public notice on a day to day basis whenever department staff meet with industry or other

interest groups to discuss the rules.

90. COMMENT: Commentors 111, 170, 209 and 221 recommend that WQB-7 use Method Limits (ML) or practical quantification limits rather than Method Detection Limits (MDLs). ML's are essentially (MDL's X 3.18), which are supposed to be obtainable and quantifiable. In contrast, MDL's can only reliably be determined to be not zero.

RESPONSE: Practical Quantification Levels (PQL) are not applicable to water quality standards and significance determinations under the nondegradation rules and policy. WQB-7 includes trigger levels for toxic parameters and a required reporting level for all parameters. The trigger level represents a level of change in a parameter in the receiving water caused by a discharge. This predicted change will determine whether or not the activity would result in degradation. It should be applied in a predictive manner. If the change in water quality is less than the trigger level, then the activity is considered nonsignificant.

Use of trigger values alone, however, includes a consideration of the relationship of the increase to the standard. That is, where a trigger value is similar in magnitude to the standard, then use of the trigger value will allow a relatively large change that will be considered nonsignificant. If the trigger value is much less than the standard, then use of the trigger value would allow only a very small change be found nonsignificant. To correct this disparity, the following change has been added to Rule VII(1)(c) of the nondegradation rules: "Whenever the change in water quality exceeds the trigger value the change is not significant, if the resulting concentration outside of a mixing zone designated by the department does not exceed 15% of the lowest applicable standard".

The trigger level is based on the Method Detection Limit (MDL) approach and does not consider Practical Quantification Levels (PQL). The MDL is a statistical method of estimating the lowest concentration that can be determined to be statistically different from a blank specimen (zero concentration) with a 99% probability. This is a valid approach of measuring concentrations of ambient water within the context of the nondegradation policy as expressed in SB 401. The trigger level does not represent a level of analysis for routine sampling, only for determining a predicted change.

Practical Quantification Levels (PQL) are not used to determine compliance with water quality standards. PQL are arbitrarily set at 2 to 500 times the MDL depending upon the media. The required reporting level is the department's best determination of a level of analysis that can be achieved in routine sampling. The reporting level is based on levels actually achieved at both commercial and governmental laboratories within Montana using accepted methods. Neither WQB-7 nor the nondegradation rules are proposing procedures for determining compliance. Compliance is established through the use of statistical techniques, as well as other technical review criteria

that are established on a programmatic basis.

For the 7 inorganic substances, Aluminum, Antimony, Arsenic, Lead, Mercury, Silver, and Thallium, the reporting values based on MDLs have been replaced with the MLs which is 3.18 times as great as the MDLs.

Since the use of MDL, trigger levels, and reporting levels are most protective of water quality, no change will be made in response to this comment.

91. COMMENT: Commentor 170 contends that the methods for hexavalent chromium and organic mercury are not EPA approved they should be deleted from WQB-7. In addition WQB-7 should refer to the "latest edition of EPA/600-4-9-010".

RESPONSE: In response to this comment, the rules will be changed to delete the methods which are not EPA approved. The suggested change to use the "latest edition" will not be made for the following reason. Rules cannot refer to the "latest edition" but must by law refer to a published document existing at the time the rules are adopted. The date of that document must be published in the rule incorporating the document.

92. COMMENT: Commentor 172 contends that the tiered scheme of nonsignificant nitrate levels violate the notion of what should be considered to be maximum allowable level. This level needs to be defined and any level above this amount is unacceptable.

RESPONSE: See Responses 14, 27, 28, and 75.

93. COMMENT: Commentors 176 and 226 contend that the department should stop using site specific analysis of pollution to determine cumulative impacts and begin using watershed analysis to determine the full impact of pollution.

RESPONSE: This comment is not specific enough to justify a change in the rules. In response, the department is developing methods for watershed management. However, because of the greater complexity and cost of this approach, site specific analysis of pollution is, and will remain for the foreseeable future, a major emphasis for new discharges.

94. COMMENT: Commentors 176, 186, 232 and 263 contend that there are too many categorical exceptions in the nondegradation rules.

RESPONSE: This comment is not specific enough to justify removing a particular categorical exemption, so no change will be made in the proposed rules. In addition, categorical exceptions are available for only those classes of activities that are nonsignificant according to the guidance given in the law.

95. COMMENT: Commentor 178 suggests the concept of Best Available Technology (BAT) is missing from the equation of water quality to allow individual systems the flexibility to meet

standards.

RESPONSE: BAT for individual treatment systems has not been defined. Thus, the approach of defining minimum acceptable removal, which can be reasonably achieved, has been adopted through the requirement for level 2 treatment. Therefore, no change will be made in response to this comment.

96. COMMENT: Commentor 178 contends that any discussion of socioeconomic impacts concerning the protection of Montana's waters is moot. The responsibility of the department is to protect water. SB 401 concerns itself with the environment, not economics.

RESPONSE: SB 401 specifically requires a determination of social and economic importance before degradation can be allowed. In addition, the rule making authority of the board requires the adoption of criteria for determining social and economic importance. Therefore, the inclusion of an economic analysis will remain in the final rules.

97. COMMENT: Commentor 182 contends that Department Circular WQB-7 must be approved as part of the rule package and all revisions and modifications of WQB-7 must go through the formal rulemaking process.

RESPONSE: Department Circular WQB-7 will be adopted through its incorporation by reference in the surface water quality standards and other water quality rules. All future revisions and modifications of WQB-7 must go through the formal rule-making process. Therefore, no change is necessary in response to this comment.

98. COMMENT: Commentor 186 suggests changes to the section in the rules concerning site specific standards so that they may be used only if they are equal or more stringent than the levels in WQB-7.

RESPONSE: Such a restriction would destroy the intent of this section, which provides flexibility in setting standards. The provision for site specific standards is intended to be used whenever the levels in WQB-7, which are based on average conditions, are demonstrated to be unnecessarily restrictive in protecting all uses. In those instances, site specific standards may be developed and used. For the above reasons, no change will be made in the proposed rule.

99. COMMENT: Commentor 186 contends that the word "other" be reinstated wherever the phrase "... which establishes limits for toxic, carcinogenic, bioconcentrating, and ~~other~~ harmful parameters in water: ..." appears in these rules.

RESPONSE: Because WQB-7 categorizes substances as carcinogenic, toxic, and harmful, the use of "other harmful" in this phrase

would be confusing. Therefore, the change will not be made.

100. COMMENT: Commentor 186 objects to the definition of "currently available data". It should include "currently obtainable data".

RESPONSE: The term "currently obtainable" could be construed broadly to include data that must be developed by the applicant, but which may not be necessary for the protection of water. Under Rule VII, the department may require additional information as necessary for an informed decision. Therefore, the requested change will not be made.

101. COMMENT: Commentor 186 contends that the definitions of the terms "recreational" and "recreational area" are too narrow. By limiting those definitions to "swimming" and "public beaches or swimming areas", the rules ignore the wide range of recreational activities that now make up a significant part of Montana's growing recreation-based economy and which could be severely impacted by a mixing zone. This commentor suggests the following: "a leisure-time activity engaged in for the sake of refreshment or entertainment".

RESPONSE: The definition, as proposed in the rules, includes those activities where public health may be affected by the presence of a mixing zone. The definition is intended to include any human contact with the water. The definition suggested by this commentor could include activities occurring on a golf-course, in a home, or other places where mixing zones are not an issue. Therefore, the suggested change will not be made and the rule will remain as proposed.

102. COMMENT: Commentor 186 suggests that Rule VI(1)(a) should read "Human health and aquatic life based ground water standards must not be exceeded beyond the boundaries of the mixing zone".

RESPONSE: There are no aquatic life standards for ground water. Therefore the proposed change will not be made.

103. COMMENT: Commentor 186 suggests that wherever publications are adopted by reference that they be preceded by a general explanation of what the publications are for, e.g., standards or testing procedures. There should also be an explanation of why they are needed, i.e., compliance with federal regulations.

RESPONSE: The present language in the proposed rule lists the content of the adopted material after the incorporation by reference. For example, ARM 16.20.1003(1)(b) states in relevant part. "These publications set forth EPA approved testing procedures ...". The reason for these materials is the requirement for their use throughout the rules. For the above reasons, no change will be made in response to this comment.

104. Comment: Commentor 186 suggests that throughout the rules the issue of prohibitive versus optional language should be carefully reviewed.

RESPONSE: This comment is not specific enough to justify a change in the rules. In response, the rules are reviewed for consistency with the enabling law and the requirements of the Montana Administrative Procedure Act as required by law.

105. COMMENT: Commentor 186 contends that there is no provision in the rules for comprehensive protection of outstanding resource waters.

RESPONSE: Comprehensive protection is provided by (2)(c) of Rule III of the nondegradation rule, which states that no degradation of outstanding resource waters is allowed. Therefore, any activity that is authorized to degrade will be prohibited from degrading at the point where impacts from the proposed discharge meet an outstanding resource water. No change is necessary to address this comment.

106. Comment: Commentor 186 contends that the threshold for nonsignificance must be set at low levels to ensure that substances that are known or even suspected of being harmful are kept out of our water rather than arguing over how much is or is not there.

RESPONSE: Adoption of trigger values will ensure that nonsignificance thresholds are set at the lowest practical levels. Therefore, no change will be made to address this comment.

107. COMMENT: Commentors 186 and 208 feel that "where reasonable land, soil and water conservation practices have been implemented and the discharge does not impact existing or anticipated uses" on Page 3 of 18, Rule II(16)(b) should not have been deleted.

RESPONSE: The intent of this rule is to clarify that nonpoint sources using practices that prevented impacts to water uses prior to the effective date of the new law were excluded from its requirements. Nonpoint sources have been and continue to be subject to the state's nondegradation policy. It is not the intent of the rule, however, to require nonpoint sources that were in violation of the Water Quality Act prior to April 29, 1993, to seek authorization to degrade. The final rule will remain as proposed to clarify the intent to exclude all nonpoint sources discharging prior to April 29, 1993, from the procedures of the new law.

108. COMMENT: Commentor 186 objects to the retroactive application of the proposed "nonsignificance criteria" and consequent exemption of such activities under the definition of "new or increased sources" in Rule II(16)(d).

RESPONSE: In Section 10 of SB 401 an applicability date for the amended nondegradation was expressly stated as April 29, 1993. The amended policy allows certain activities or class of activities to be considered nonsignificant. The rules are not retroactive in their effect, but recognize that, at the time of the adoption of these rules, certain activities are considered nonsignificant. As these rules are consistent with the law, no change will be made in response to this comment.

109. COMMENT: Commentor 186 contends that all terms relating to the socio-economic determinations required by the nondegradation rules will require much more detailed definition in order to be useful to the regulated public.

RESPONSE: This comment was not specific enough to justify a change in the rules so none has been made based upon this comment. In response to the numerous comments on the socio-economic analysis, the rules have been modified to allow greater flexibility in determining social benefit than was formerly proposed. The rules have also been changed to require a demonstration of costs and benefits that can be quantified.

110. COMMENT: Commentors 186, 198 and 208 suggest that "reporting values" and "trigger values" be more completely explained.

RESPONSE: Changes have been made in the final rules to clarify the use of these terms.

111. COMMENT: Commentor 186 objects to the substitution of the words "shall be" for the words "have been" in Rule III(1)(b).

RESPONSE: The language, "there shall be achieved", is specified in the federal requirements for state's nondegradation policies at 40 CFR 131.12(2). In order to be consistent with the federal requirements, the language has been changed from "there have been achieved" to "there shall be achieved". This language will remain as proposed in the final rule.

112. COMMENT: Commentor 186 objects to Rule VII(b) of the nondegradation rules. This rule essentially states that if there already are concentrations of carcinogenic and bioconcentrating parameters in the receiving waters then the Department will allow discharges with the same parameter to be non-significant this; does not protect water quality.

Response: Where there are naturally occurring concentrations of carcinogenic or bioconcentrating parameters in a stream, the effects of those parameters are not increased by discharges that do not increase those concentrations. Therefore, no change will be made in response to this comment.

113. COMMENT: Commentor 186 asks how does Rule VII(1)(c) and (d) which both make reference to a "mixing zone designated by

the department" apply to mixing zones that are allowed by virtue of a self-determination on non-significance?

RESPONSE: There are instances that the department will not designate a mixing zone in "self determinations of nonsignificance". The rules will be modified to clarify that all mixing zones will comply with the rules adopted by the board.

114. COMMENT: Commentor 186 contends that Rule VII(1)(d) should include intermittent or ephemeral after perennial in the last line.

RESPONSE: This section has been modified in response to comments and the term perennial has been removed as the trigger value for determining nonsignificance applies to toxins in all state surface waters.

115. COMMENT: Commentor 186 contends that the treatment by chlorination of public water supplies should not be categorically excluded as nonsignificant because of the probable health effect of chlorinated compounds.

RESPONSE: At the present time available data indicates that the beneficial health effects of chlorination far outweigh any demonstrated detrimental effects. This issue will be revisited when or if detrimental effects are identified. For this reason, no change will be made in response to this comment.

116. COMMENT: Commentor 185 contends that "short-term changes" needs to be defined and limited in some way in the categorical exclusions from significance.

RESPONSE: Rule VII(2)(a) and (g) allow the department to make case-by-case evaluations that would preclude short term repetitive activities from being considered nonsignificant. Establishing a time limit by rule would not be practical considering the varying types of short term activities that may occur. Therefore, the proposed change will not be made.

117. COMMENT: Commentor 188 does not believe any waters should be degraded from their present pristine qualities.

RESPONSE: The legislature enacted SB 401, which expressly authorizes the department to allow degradation provided all the requirements in § 75-5-303, MCA, are met. To adopt rules prohibiting any degradation would conflict with the intent of the legislature as expressed in the Water Quality Act and the Statement of Intent for SB 401. Therefore, the suggested change will not be made.

118. Comment: Commentor 192 contends that there are a number of instances where the "Trigger Level" is the same level as the "Required Reporting Limit" in WQB-7 (for example, nitrate plus nitrite has a "Trigger Level" of 10 ppm). If the trigger and

required reporting levels for toxic, carcinogenic, or harmful chemicals are the same, damage to human health and the environment may be beyond repair.

RESPONSE: This comment was not specific enough to justify a change so none will be made. In addition, there is no relationship between "trigger values", "reporting values" and standards. Standards are set at levels which will prevent effects on uses. Trigger values are values which can theoretically measure change. Reporting values are the detection values achievable in good quality laboratories. The trigger value for nitrate plus nitrite is 10 ppb.

119. COMMENT: Commentor 192 contends if mixing zones are granted for individual parameters, the size of the zone may be different for different constituents. This will cause inconsistent and problematic reporting requirements. This commentor also asks for the technical documentation used in the determination of mixing zone area calculations.

RESPONSE: No change in the rule is necessary to clarify that the parameter which results in the most limiting requirements will govern the mixing zone requirements. The calculations are based on EPA guidance.

120. COMMENT: Commentor 192 contends that there should be specific restrictions for groundwater mixing zones for parameter that are toxic and harmful parameters.

RESPONSE: The concentrations of toxic and harmful parameters are adequately restricted by the general mixing zone requirements.
Therefore, no change is necessary to address this comment.

121. COMMENT: Commentor contends that values for hydraulic conductivities should not be estimated from field observations as there are accurate technical methods for determining hydraulic conductivities.

RESPONSE: Under the "General Considerations" in Rule III(1)(d), the rules provide that "estimated parameter levels in the mixing zone area will be calculated, unless the department determines that monitoring is necessary due to the potential harm to the impacted water and its beneficial uses". This concept will also be applied in determining hydraulic conductivities. No change in the rules will be made based upon this comment.

122. COMMENT: Commentor 198 contends that public participation in the review of application completeness and the preliminary decision by the department to authorize degradation is essential. The department will be given up to 180 days to review complete applications to degrade, and the public should be involved in this process from the start.

RESPONSE: Completeness review by the department consists of a technical review and analysis that is time consuming and generally beyond the expertise of the general public. The rules do include, however, provisions that require public notice and opportunity to comment on all applications to degrade. The rules require the department to issue a preliminary decision accompanied by a statement of basis explaining the basis for the decision pursuant to Rule VI(4). No further changes to the rules are necessary to provide an opportunity for public involvement.

123. COMMENT: Commentor 198 contends that most carcinogens are persistent in the environment, and hence, it is the total load of these parameters that is a concern, not simply their concentration in the discharge.

RESPONSE: The effects of carcinogens are manifested through the concentration of the intake not through the load in the environment. No changes to the rules are necessary to address this comment.

124. COMMENT: Commentor 198 contends that the background nitrate concentrations in ground water should be determined in accordance with definition (3) of Rule II.

RESPONSE: Definition (3) of Rule II does not apply to ground water and, therefore, no change will be made in response to this comment.

125. COMMENT: Commentor 198 contends that unless the Board or the department has a specifically proven method to distinguish the source of nitrate in ground water, we must assume all nitrogen is from human wastes and apply the more stringent standards to properly protect human health as well as the environment.

RESPONSE: The are no specific methods to determine the source of nitrate in ground water. In practice the source of nitrate in ground water will be determined by using all available data including past and present land uses in the area. Since the background source of nitrate can generally be determined, the rules will not be changed as suggested.

126. COMMENT: Commentor 198 contends that the public must have the opportunity to participate in the development of the preliminary decision regarding a petition to degrade.

RESPONSE: See Response 122.

127. COMMENT: Commentor 198 contends that categorically excluded activities should not be exempt from the intent of the Nondegradation Law. If these activities are in fact found to be degrading state waters, they should be corrected or stopped. More importantly, anyone planning to carry out these activi-

ties, particularly oil and gas drilling operations, must demonstrate to the department that they are using state accepted water conservation and pollution prevention practices.

RESPONSE: Categorically excluded activities are not exempt from the law. If these activities are degrading state waters they will be corrected or stopped. There is no need for a demonstration because it has been determined that these activities, if conducted in conformance with law, will not cause degradation. If they are not in conformance with law, then they are subject to enforcement proceedings. In addition, there are no approved state water conservation and pollution prevention practices at this time.

128. COMMENT: Commentor 198 contends that the dissolved oxygen limits in WQB-7 must be re-addressed as fish eggs need higher oxygen levels in order for them to reach juvenile life stages. Also, the aquatic insects the fish feed on need dissolved oxygen as well.

RESPONSE: The proposed dissolved oxygen limits will adequately protect all life stages of all types of aquatic life. Therefore, no change will be made in response to this comment.

129. COMMENT: Commentor 199 requests that the department evaluate and report the socio-economic effects of the proposed rules.

RESPONSE: This comment does not request a change in the rules so none will be made. In response, the proposed rules are being adopted in response to the legislative enactment of SB 401, which was adopted in April of 1993 and effective immediately upon adoption. This law requires the adoption of rules implementing its provisions. It is not appropriate for the agency to withhold the adoption of rules based upon economic considerations when those rules implement legislative intent.

130. COMMENT: Commentors 200, 260, 261, 263, contend that permitted stormwater discharges should not be categorically excluded as nonsignificant.

RESPONSE: This exclusion has been removed in response to comments.

131. COMMENT: Commentor 200 asks how will wildlife be kept away from mixing zones? How will the area be monitored to ensure the zone doesn't enlarge and slip contaminated water through an irrigation ditch headgate to damage hay or poison cattle?

RESPONSE: This comment is not specific enough to justify a change so none will be made. Potential effects on wildlife and irrigation withdrawals will be considered under Rule IV(1) of

the mixing zone rules.

132. COMMENT: Commentor 208 contends that mixing zones are only appropriate for substances which can be assimilated.

RESPONSE: The mixing zones allowed in the proposed rules are consistent with the criteria of § 75-5-301(4), MCA, which do not limit the applicability of mixing zones to substances that can be assimilated. For this reason, the suggested change will not be made.

133. COMMENT: Commentor 208 asks why trigger values are not listed for all parameters?

RESPONSE: This commentor did not suggest a change, so none have been made in response. In response, trigger values are used to determine significance for substances categorized as toxic. For carcinogens, any increase is significant however small so that trigger values do not apply. For less detrimental substances, such as sulfate, a 10% increase is significant.

134. COMMENT: Commentor 208 contends that Note 19 in WQB-7 should say that the reporting level is the minimum detection level that must be achieved.

RESPONSE: The addition of the word "minimum" does not add to the clarity of this footnote and, therefore, the suggested change will not be made.

135. COMMENT: Commentor 208 contends that in Rule III(1) the size, configuration and location of mixing zones, both standard and nonstandard, should always be described, instead of only when "applicable".

RESPONSE: The term "applicable" acknowledges that in some cases a mixing zone will not be granted and thus a requirement to describe the mixing zone is not always "applicable". For this reason, the suggested change will not be made.

136. COMMENT: Commentor 208 contends that the mixing zone requirement should apply when re-issuance of MPDES or GWPCS permits occur.

RESPONSE: The mixing zone rules will not be applied retroactively to existing permits. At the time of their renewal, however, the department will review any mixing zone previously allowed in a permit to determine whether it is as small as practicable and does not impair any existing or anticipated uses. Rule III(1) of the mixing zone rules has been modified to clarify this issue.

137. COMMENT: Commentor 208 states that it is unclear as to what type of data would satisfy Rule IV of the mixing zone rules and what occurs in the absence of data. If, for example,

data is unavailable or incomplete for any of these items, would a proposed mixing zone be rejected?

RESPONSE: This comment is not specific enough to justify a change in the rules so none will be made. In response, the department will determine the potential impacts of a proposed mixing zone on a case-by-case basis. In cases where sufficient data does not exist to make a reasoned decision, the department will err on the side of protecting water quality and either deny the mixing zone or request sufficient data to make a reasoned decision.

138. COMMENT: Commentor 208 asks what does "a period of years" mean in Rule IV(2)(d) of the mixing zone rules?

RESPONSE: This will be determined on a case-by-case basis based upon best professional judgment of the department. No change in the rules will be made to address this comment.

139. COMMENT: Commentor 208 contends that mixing zones should be prohibited for any substance that is both toxic and persistent.

RESPONSE: Flexibility is important in dealing with toxic and persistent. Everything is "toxic" and "persistent" to some degree. Therefore, no change will be made to prohibit these substances from using mixing zones.

140. COMMENT: Commentor 208 contends that acute criteria should never be exceeded in the mixing zone.

RESPONSE: The authority for allowing exceedences of standards is expressly stated in the definition of mixing zones in § 75-5-103(13), MCA, which defines a mixing zone as an area where standards may be exceeded. Although Rule V(1)(b) constrains exceedences of acute standards in the mixing zone, it does allow such exceedences if certain conditions are met. For the above reasons, the suggested change will not be made.

141. COMMENT: Commentors 208, 260, 261 contend that discharges to wetlands (other than constructed, pollution-reducing wetlands) should not be granted mixing zones especially if they contain bioaccumulative, bioconcentrating and biomagnifying substances.

RESPONSE: Section (2) of Rule V of the mixing zone rules prohibit mixing zones in wetlands for any substance for which the state has adopted numeric standards. This requirement, together with the general requirements of the mixing zone rules, will protect wetlands. Therefore, no change in the rules is necessary to address this comment.

142. COMMENT: Commentor 208 contends that "zone of influence" used in Rule VI(2) of the mixing zone rules needs to be de-

fined.

RESPONSE: The following definition has been added to the mixing zone rules in response to comments: "Zone of influence" means the area from which a well can be expected to withdraw water.

143. COMMENT: Commentor 208 states that it is unclear who provides the data and what quality it must be in Rule VIII of the mixing zone rules.

RESPONSE: As provided in Rule IV, the applicant must provide the information necessary to allow a determination regarding the applicability of a mixing zone. In most cases, this data will be developed by the discharger. The final decision as to the validity of the data will be made by the department. Since this is a decision based on professional judgment, no change in the rules will be made to address this comment.

144. COMMENT: Commentor 208 contends that Rule VIII(3)(c) is unclear, as is its relationship to nondegradation. Does this grant a groundwater mixing zone? Can MCLs be exceeded in the groundwater?

RESPONSE: This comment is not specific enough to justify a change in the rules so none has been made. Mixing zones are authorized by law and independent of the nondegradation policy. Rule VIII(3)(c) applies in those cases where a discharge to ground water will also affect surface water. The requirements for ground water mixing zones will still apply in these cases, but the discharge may also qualify for a standard surface water mixing zone provided certain conditions are met.

145. COMMENT: Commentors 208, 261, contend that monitoring of all surface water mixing zones should be required.

RESPONSE: The suggested requirement will not be adopted because there may be instances where it is not warranted. Monitoring will be required, however, when there is a reason for monitoring.

146. COMMENT: Commentor 208 disagrees that a standard mixing zone "is generally applicable to unconfined aquifers..." (Rule IX(1)(a)). The understanding of groundwater hydrology is not that precise.

RESPONSE: The intent of this language is to limit standard mixing zones to unconfined aquifers where ground water hydrology is relatively precise compared to semi-confined and confined aquifers. Therefore, the rule will remain as proposed.

147. COMMENT: Commentor 208 ask what happens when monitoring reveals that a unacceptable situation has occurred?

RESPONSE: This comment is not specific enough to justify a

change in the rules so none has been made. Violations of law will be dealt with through enforcement proceedings and department policy.

148. COMMENT: Commentors 208, 217, 260, contend that mixing zones should not be allowed in lakes due to their inability to "mix" discharges and allow pollutants to accumulate.

RESPONSE: The suggested change will not be made because the requirements in the mixing zone rules will protect the uses of lakes.

149. COMMENT: Commentor 208 asks how will a contingency plan work in the case of subdivision when there are multiple-owners causing a cumulative effect as provided in Rule X(6) of the mixing zone rules?

RESPONSE: This comment is not specific enough to justify a change in the rules so none will be made. In response, the contingency plan required in this section must demonstrate that alternative actions exist that will ensure compliance with the mixing zone restrictions regardless of potential impacts of other discharges.

150. COMMENT: Commentor 208 contends that the practices defined in Rule II(11) in the nondegradation rules should be EPA or state-approved.

RESPONSE: No change in the rules is necessary to address this comment. For the present these practices will be approved as needed by the department.

151. COMMENT: Commentor 208 contends that any discharge that includes carcinogenic parameters or substances that bioconcentrate, irrespective of how much, should be considered significant.

RESPONSE: Many, if not most discharges will contain some level of carcinogenic parameters or substances that bioconcentrate. The significance levels are set taking into consideration the harm that may occur due to the character of the discharge. To prohibit any discharge of the above referenced parameters is not required by law and is not necessary to comply with the intent of the nondegradation policy. For this reason, the suggested change will not be made.

152. COMMENT: Commentor 208 contends that Nondegradation Rule VII(1)(d) and Table 1 should be simplified and the table stricken. The significance threshold for nitrates for groundwater should be 2 mg/l (if the existing quality exceeds that, then a nondegradation petition should be required). The significance threshold for surface water, including existing quality should be 0.01 mg/l. The table is simply unworkable, and the thresholds will allow for unacceptable cumulative levels of nitrogen compounds in groundwater, which will in turn put at risk nearby

surface waters, despite language in the rules that implies streams, lakes and wetland will be protected. The monitoring burden would simply be overwhelming. In addition, the concept of separating sources of nitrates in doing calculation will be complicated in many areas of Montana where residential development is mingled with ranches and farms. Finally the levels allowed for nitrogen concentrations do not account for its role as a surrogate for potentially harmful pathogens and toxins associated with sewage.

RESPONSE: The significance language of the act specifically refers to "changes". The changes allowed by the language in the rule and the table will protect public health and the environment. The rules do consider the other potentially harmful substances/organisms associated with human waste, the potential effect on surface water, and the proposed rules are implementable.
For these reasons, the suggested change will not be made.

153. COMMENT: Commentor 208 contends that SB 401 did not authorize automatic exemptions from significance review as are provided by Rule VIII of the nondegradation rules (categorical exceptions). This section appears to conflict with the statute.

RESPONSE: SB 401 specifically allows for classes of activities to be considered nonsignificant. Therefore, the rule will remain as proposed.

154. COMMENT: Commentor 209 contends that it is unclear as to what "character of the discharge" means in nondegradation Rule IV (3)(c).

RESPONSE: The term is derived from the criteria for determining nonsignificance under § 75-5-301(5)(c)(iv). In order to implement the requirements of that section, this information is required in Rule IV(3) of the nondegradation rules. The term "character of the discharge" is self explanatory (i.e., the type of pollutant in the discharge) and no change will be made to clarify this term.

155. COMMENT: Commentor 209 contends that all subparts of Nondegradation Rule VII(a), (b), and (c) should be deleted. These rules are extremely vague and subject to very loose interpretation and qualification.

RESPONSE: These parts of the rules are precise and as simple as possible. Therefore, no change will be made in response to this comment.

156. COMMENT: Commentor 209 contends that Nondegradation Rule VI (2)(e) should be revised to read as follows: "A determination that all existing and <u>reasonably</u> anticipated uses will or will not be fully protected."

RESPONSE: Agency decisions are held to a standard of reasonableness. In determining an anticipated use, the department will include only those uses that are reasonably anticipated for the particular stream. No change will be made to address this comment.

157. COMMENT: Commentors 213 and 258 contend that there should be restrictions on the introduction of sediment into our streams and rivers by activities such as road construction and logging.
RESPONSE: Sections (1)(f) of Rule VIII and (2)(a) of Rule III restrict such activities. Therefore, no change is necessary to address this comment.

158. COMMENT: Commentors 217 and 235 contend that the 125% rule appears to be an open invitation to the applicant to propose the lowest possible cost water quality protection practice, because the department cannot impose treatment which exceeds this cost.

RESPONSE: This commentor misunderstands this rule. If the cost of alternative treatment is less than 125% the applicant must use the treatment; if the cost exceeds 125% an applicant may be required to use such treatment. The rule is being modified to reduce the percentage from 125% to 110% in response to comments.

159. COMMENT: Commentor 217 contends that any attempt at cost/benefit analysis is an exercise in futility. If an activity or project cannot be developed in a manner that provides for protection of the environment, or if the applicant is unwilling to bear the cost of environmentally responsible development of his activity or project, the activity or project should not be allowed.

RESPONSE: The law specifically requires a demonstration that the proposed activity will result in important economic or social development that exceeds the cost to society of lower water quality. Therefore, the rule will remain as proposed.

160. COMMENT: Commentor 221 contends that the last sentence of Rule III(2)(b) be clarified so that a workable policy is developed that is able to be administered. The federal provision does not require that upstream of the proposed activity, there shall be achieved the highest statutory and regulatory requirements for all point and nonpoint sources. The following sentence is suggested: "This assurance will be achieved through the on-going administration by the department of existing point and nonpoint programs."

RESPONSE: The intent of the proposed rule is to require a review of existing permits and programs to ensure compliance before degradation is allowed in conformance with 40 CFR 131.12(2). EPA rules require some accounting for loads within

the basin in terms of both point and nonpoint sources in order to determine existing quality as well as compliance with regulatory requirements. The proposed language will be used with modifications as it clarifies that the "highest statutory and regulatory requirements" will be achieved through an assessment of approved department programs. In addition, while the federal rule does not specify that the assessment must be "upstream", this term is meant to limit the water quality assessment to upstream compliance rather than state-wide compliance. For the above reason, this language will remain as proposed.

161. COMMENT: Commentor 221 contends that Rule VII(2) should be stricken. This language is obviously too broad and should be changed or eliminated.

RESPONSE: It is unlikely that a set of criteria for nonsignificance can be developed that would sufficiently fulfill the goal of preventing degradation in every instance. Given that implementation of the policy under the rules has yet to be tested, it is important that the department have discretion to make a determination of significance independent of the criteria in Rule VII(1). Therefore, the rule will remain as proposed.

162. COMMENT: Commentor 221 suggests modifying Nondegradation Rule VIII(1)(a) by striking "on land". Therefore, the provision should read as follows: "Activities which are nonpoint sources of pollution where reasonable land, soil and water conservation practices are applied and existing and anticipated beneficial uses will be fully protected."

RESPONSE: This change has been made to clarify that nonpoint sources are excluded whenever they are using reasonable conservation practices, whether or not those practices take place on land or in water.

163. COMMENT: Commentor 221 contends that WQB-7 should be modified to establish water quality standards in Montana which are measurable, reasonable, and protect existing and anticipated beneficial uses of water.

RESPONSE: The standards in WQB-7 are reasonable and protective of existing and anticipated uses of water. Due to analytical limitations, however, some of the standards are not measurable. The US EPA requires standards to be set at levels that will protect uses, regardless of the ability to measure at those levels with present methods. The levels set in WQB-7 are based on EPA recommended levels for protecting beneficial uses. Since the standards in WQB-7 are protective of present and anticipated uses, no change will be made based upon this comment.

164. COMMENT: Commentor 221 contends that the effect of the nondegradation law is restricted to changes which occur after the adoption of the law.

RESPONSE: Comment noted.

165. COMMENT: Commentor 221 contends that it should be clear in the proposed rules that activities which are exempt from the requirement to obtain MPDES or MGWPCS permits and nonsignificant activities under the nondegradation law are not required to obtain any mixing zone approval from the Department. Language should be added which reflects this concept.

RESPONSE: The rules are clear in this respect and no change is necessary to address this comment.

166. COMMENT: Commentor 221 states that the nondegradation Rule V(2), concerning mixing zone requirements for wet lands should be re-analyzed. Natural wetlands have generally been recognized as natural filters of pollutants.

RESPONSE: Natural wetlands are in some cases effective "filters" for pollutants. Unfortunately, such filtering may not be good for the wetland. For this reason, the rule will remain as proposed.

167. COMMENT: Commentor 227 supports the comments made by Commentor 111.

RESPONSE: See response to Commentor 111.

168. COMMENT: Montana's classification system for state waters is too broad.

RESPONSE: This comment is not specific enough to justify a change and none will be made. Although the classification system for state waters may need to be more detailed, the classification system is part of this rulemaking process.

169. COMMENT: Commentor 227 contends that these rules are more restrictive than the written guidance from US EPA Region VIII and regulations adopted by neighboring states.

RESPONSE: This comment is not specific enough to justify a change in the rules so none will be made. In response, the proposed rules contain the minimum restrictions necessary to implement Montana law and meet federal requirements.

170. COMMENT: Commentor 227 notes that the very low levels listed for a number of parameters are not measurable and are exceeded naturally in many Montana streams. Does the department intend to ignore a public health standard once it is adopted? How does the department propose to use the human health standards? Will recreational use be restricted?

RESPONSE: This comment is not specific enough to justify a change in the rules so none will be made. In response, upon adoption of these rules, the department is required by law to

administer and enforce their provisions.

171. COMMENT: Commentor 228 contends that it is inappropriate to discharge pollutants or toxic substances in water bodies containing native fish known to be considered sensitive, threatened or endangered.

RESPONSE: At the present time there are no provisions of law which specifically prohibit discharges to water bodies containing sensitive or threatened native fish. The nondegradation law, however, prohibits changes in water quality which would affect existing or potential beneficial use. Support of sensitive, threatened or endangered species is an existing use of some waters and protected by the rules. Therefore, no change is necessary to address this comment.

172. COMMENT: Commentor 228 states that data on many fish and aquatic species is unavailable simply because studies have not been conducted. How can we protect the fish from effluent plumes blocking migration into tributary segments, if the data is not available?

RESPONSE: This comment is not specific enough to justify a change in the rules so none will be made. In response, there will be many cases where all of the data necessary to make a "fully informed decision" is lacking. Until sufficient data accumulates, the department will make decisions that are as protective as possible of water quality based on available data. When there is doubt, any errors made will be on the side of protecting existing uses.

173. COMMENT: Commentor 228 asks whether there are existing standard water mixing zone permits for lakes or wetlands and if so, will they be subject to this rule when the current permit expires?

RESPONSE: This comment is not specific enough to justify a change in the rules so none will be made. In response, the mixing zone rules have been changed to clarify that existing permits may continue to use any mixing zone allowed under the permit until the permit expires. At that time, the permit will be reissued with the mixing zone specifically identified, as long as the continued use of the prior mixing zone will not harm existing or anticipated uses.

174. COMMENT: Commentor 228 asks what are the impacts from 1 million gallons per day entering a stream segment in terms of bank erosion, bed load movement, sedimentation and fisheries habitat? (with respect to the allowance for a standard mixing zone for discharges of less than 1 million gallons per day at a dilution of 100:1)

RESPONSE: This comment is not specific enough to justify a change in the rules so none will be made. In response, under

the circumstances described above, allowing a standard mixing zone is unlikely to impact uses.

175. COMMENT: Commentor 228 contends that monitoring should be part of the permit process.

RESPONSE: This comment is not specific enough to justify a change in the rules so none will be made. Discharge permits, however, require self monitoring and the department periodically monitors to ensure compliance.

176. COMMENT: Commentor 228 contends that the department should have the capability to assess cumulative impacts.

RESPONSE: This comment is not specific enough to justify a change in the rules so none will be made. Although the department should have this capability in order to fully protect water quality, the extremely high cost of developing background data and tracking changes prevent the department from doing this at the present time.

177. COMMENT: Commentor 235 contends that monitoring mixing zones should be a standard procedure. Estimates and calculations should not be used as provided in the rules.

RESPONSE: Mixing zones can only be monitored after a discharge exists. Estimates and calculations must be used to predict effects and make a reasoned decision. For this reason, the rules will remain as proposed.

178. COMMENT: Commentor 235 contends that multiple mixing zones could be confusing and difficult or expensive to monitor. Only one should be allowed.

RESPONSE: Section (1)(f) of the mixing zone Rule IV gives the department sufficient authority to deal with multiple mixing zones. Therefore, the rules allowing multiple mixing zones will remain as proposed.

179. COMMENT: Commentor 235 contends that the "natural" condition of water (i.e., before human impacts) should be used as the "existing" water quality for nondegradation limitations.

RESPONSE: At this time it is essentially impossible to determine what water quality existed prior to any man caused impacts. In addition, § 75-5-303(2)(b), MCA, specifically refers to protecting existing high-quality waters, as well as existing uses. For this reason, no change will be made in response to this comment.

180. COMMENT: Commentor 235 contends that the rules should define how the department will determine environmental and technological feasibility.

RESPONSE: Although the law and the rules require this determination, there is no practical way to define environmental or technological feasibility other than listing the considerations taken into account as provided in Rule V of the nondegradation rules. The determination must be made on a case-by-case basis, based on best professional judgment of the department. For this reason, no change will be made in response to this comment.

181. COMMENT: Commentor 235 asks how will the Department determine that the specified water quality protection practice will remain in place until the degradation no longer occurs?

RESPONSE: This comment is not specific enough to justify a change in the rules so none will be made. In response, this determination will be made during the authorization review process.

182. COMMENT: Commentor 235 contends that these rules do not comply with § 75-5-301(5)(c), MCA, which requires establishment of "criteria" for determining those activities that cause non-significant activities. These rules exempt activities from review without establishing that they result in non-significant changes.

RESPONSE: The categorical activities listed in Rule VIII and the criteria provided in Rule VII were developed to conform to the nonsignificance criteria given in the law. Therefore, the rules will remain as proposed.

183. COMMENT: Commentors 241, 254, support the comments of commentor 111.

RESPONSE: See Response to Comments made by Commentor 111.

184. COMMENT: Commentor 241 contends that the proposed rules governing hard rock exploration activities will comply with the criteria for nonsignificance and suggests that a categorical exclusion be provided for such activity as follows: "(q) metallic and non-fuel, non-metallic mineral exploration performed in accordance with ARM 26.4.104A".

RESPONSE: Until the proposed rules regulating hard rock exploration activities are adopted, it would be inappropriate to exclude such activities prior to the ability of the state to enforce such requirements. For this reason, the suggested change will not be made.

185. COMMENT: Commentor 241 lists a series of major problems with the cost-benefit analysis, as contained in the proposed rules, and urges the Board to review the attached comments and reject the cost/benefit approach that is currently contained within the rules.

RESPONSE: In response to the extensive comments received criticizing the proposed cost/benefit analysis, the rules have been modified to address this commentor's concern. Therefore, no further change is necessary.

186. COMMENT: Commentors 242 and 243 support the comments of commentor 111. In addition they have re-submitted comments prepared for the earlier hearings.

RESPONSE: See Response to Comments made by Commentor 111 and the Response to Comments prepared for the earlier board hearings regarding the re-submitted comments of Commentor 242 and 243.

187. COMMENT: Commentor 260 contends that the categorical exemption in Rule VIII(1)(g) creates an untenable loophole in the nondegradation policy and must be revised. First, any waste stream containing nitrogen could fall within this exemption, even if the waste stream contained other harmful constituents. Second, "a complete" was deleted. By eliminating the term "complete" the most recent draft of these rules has added an unnecessary element of discretion into this exemption. Finally, this provision states that VIII(1)(g) applies only if "other parameters will not cause degradation." What does this mean? Rule VIII(2) provides that the discharger will determine whether this exemption is applicable.

RESPONSE: The term "other sources" has been deleted from the final rule and the categorical exclusion now applies only to nitrogen from human wastes in order to address this commentor's concern. Immediate and complete agronomic uptake, however, is unattainable and will not be included in the final rule.

188. COMMENT: Commentor 261 contends that the department has insufficient resources to adequately administer an effective nondegradation program and consequently should direct its resources away from small sources of pollution to Montana's waters. A potential, partial solution would be to increase revenues through new or increased fees.

RESPONSE: This comment is not specific enough to justify a change in the rules so none will be made. In response, the department is required to administer the requirements of the Water Quality Act as it applies to all sources of pollution, regardless of size. The department has the authority to charge fees for processing requests to degrade and has adopted a schedule for implementation of the fees.

189. COMMENT: Commentor 261 contends that activities excluded from coverage by Rule VII for nondegradation consideration must still be liable for pollution to state waters, if they cause degradation.

RESPONSE: This comment is not specific enough to justify a

change in the rules so none will be made. In response, under § 75-5-605(1)(d), MCA, no activity may cause degradation unless authorized by the department. If an activity fails to conform to the criteria in Rule VII and thereby causes degradation, the person conducting the activity is in violation of the law and subject to enforcement proceedings.

190. COMMENT: Commentor 261 contends that the limit for nitrate concentration in groundwater should be 2.0 ppm. In the case where groundwater drains directly or immediately into surface water, any source that will cause nitrate level to exceed 2.0 should be considered significant.

RESPONSE: In many instances the nitrate level in ground water can exceed 1.0 mg/l and still be nonsignificant according to the criteria in § 75-5-301(5)(c), MCA. The proposed rules reflect those instances and will not be changed as suggested.

191. COMMENT: Commentor 261 suggests that the nondegradation rules need to be more clear regarding their relationship to the Montana Environmental Policy Act (MEPA).

RESPONSE: The department is required by law to follow the requirements of MEPA and has adopted rules establishing procedures for compliance with the Act in ARM 16.2.601 et seq. Those rules establish time-frames for agency decisions and criteria for determining when an Environmental Impact Statement must be prepared. Restating those requirements in the nondegradation rules would be unduly cumbersome and repetitive. Therefore, the suggested change will not be made.

192. COMMENT: Commentor 261 suggests that in cases where a chemical detection level is lower than the level set for the standard, the trigger level should be set at 10% to 50% of the standard.

RESPONSE: There is no rational basis for selection of lower trigger values and, therefore, the suggested change will not be made.

193. COMMENT: Commentor 261 Recommends further review of the following chemicals and their associated standards:
* dichlorodifluoromethane, set @ 6,900ppb. Maybe needs to be set at 1,000ppb. * 2,4-dinitrotoluene, set @ 0.11ppb. Maybe needs to be set at 0.05ppb. * endrin, set @ 0.76ppb. Maybe needs to be set at 0.2ppb. * simazine, set @ 4ppb. Maybe needs to be set at 1.7ppb. * toluene, set @ 1,000ppb. Maybe needs to be set at 343ppb. * trichlorofluoromethane, set @ 10,000ppb. Maybe needs to be set at 3,490ppb. * vinyl chloride, set @ 2ppb. Maybe needs to be set at 0.2ppb. * xylenes, set @ 10,000ppb. Maybe needs to be set at 620.

RESPONSE: * dichlorodifluoromethane, set @ 6,900 micrograms per liter. This is an updated value of the published 304(a) Human

Health Criteria for water plus fish consumption. The updated information was published by EPA Region VIII on July 1, 1993. The previously published value was 0.19 micrograms per liter. * 2,4-dinitrotoluene, set @ 0.11 micrograms per liter. This value did was not changed from the previously published Human Health Criteria. * endrin, set @ 0.76 micrograms per liter. This is an updated value of the published 304(a) Human Health Criteria for water plus fish consumption. The updated information was published by EPA Region VIII on July 1, 1993. The previously published value was 0.2 micrograms per liter. Footnotes indicate the value was based on drinking water MCL's. * simazine, set @ 4 micrograms per liter. Based on published drinking water MCL criteria. * toluene, set @ 1,000 micrograms per liter. This value was based on drinking water MCL's. The updated value of the published 304(a) Human Health Criteria for water plus fish consumption was published by EPA Region VIII on July 1, 1993. The update gave the new value of 6,800 micrograms per liter. The previously published value was 14,300 micrograms per liter. In setting the standard, the department used the more restrictive value derived from the drinking water MCL.

194. COMMENT: Commentor 261 suggests that the following 25 chemicals be added to WQB-7:
* acetone * butylate * carbaryl * chloramben * cyanazine * dicamba * 1,1-dichloroethylene * dimethoate * eptam (EPTC) * ethylene glycol * di(2-ethylhexyl)phthalate --- bis(2-ethylhexyl)phthalate * formaldehyde * methyl ethyl ketone (MEK) * metolachlor * methyl isobutyl ketone (MIBK) --- isopropylacetone * methyl tert-butyl ether (MTBE) --- 2-methoxy-2-methylpropane * metribuzin * tetrahydrofuran * trifluralin

RESPONSE: There are tens-of-thousands of chemicals/compounds not listed in WQB-7. Those listed in WQB-7 come from two primary sources. One is the U.S. EPA's list of 126 "Priority Pollutants" and the second being chemicals listed for drinking water MCL's. If a chemical/compound was on either list, it is in WQB-7. A few chemicals are not found on either list but are in WQB-7 because they affect quality factors such as organoleptic effects, oil & suspended solids, or other aesthetic considerations.
WQB-7 is not intended to be an all inclusive list of harmful pollutants. It is meant to list a minimum set of chemical-/compounds that needs to be controlled. This determination and proof is left with the U. S. EPA. Future changes, both additions and deletions, to WQB-7, will reflect EPA's changes based on its scientific evidence and recommendations. The department simply does not have the resources to conduct these types of investigations to make a rational choice regarding what must be in WQB-7. Incidently, di(2-ethylhexyl)phthalate -- bis(2-ethylhexyl)phthalate is listed on page 13. 1,1-dichloroethylene is listed on page 16.

195. COMMENT: Commentor 261 states that the following 7 chemi-

cal/compounds found on the EPA's list of 126 "Priority Pollutants" were omitted from WQB-7: * 2-chloronaphthalene * parachlorometa cresol * 1,1-dichloroethylene * dichlorobromethane * di-n-butyl phthalate * diethyl phthalate * dimethyl phthalate

RESPONSE: * 2-chloronaphthalene, listed on page 2 of WQB-7. * parachlorometa cresol, listed on page 11 of WQB-7. * 1,1-dichloroethylene, listed on page 16 of WQB-7. * dichlorobromethane, listed on page 9 of WQB-7. * di-n-butyl phthalate, listed on page 14 of WQB-7. * diethyl phthalate, listed on page 18 of WQB-7. * dimethyl phthalate, listed on page 18 of WQB-7.

196. COMMENT: Commentor 261 states that some "Toxic Pollutants" were left out of WQB-7.

RESPONSE: Many of those suggested as missing by this Commentor seem to be from a general class of chemicals. WQB-7, whenever possible, lists chemicals individually. WQB-7 does include all 126 "Priority Pollutants" plus chemicals with Drinking Water MCL's plus those other few chemicals/compounds where justification exists for inclusion. Therefore, the suggested change will not be made.

197. COMMENT: Commentor 261 suggests that compounds (organic reagents) associated with processing mining ores be included in WQB-7.

RESPONSE: WQB-7 is not an all inclusive list of harmful pollutants. It is a minimum set of chemical/compounds that should be limited to make it useable. Future changes, both additions and deletions, to WQB-7, will reflect scientific evidence and EPA recommendations. Therefore, the suggested change will not be made.

198. COMMENT: Commentor 261 suggests that another column(s) be added to WQB-7 to contain the uses of the compounds (organic reagents) listed, as well as the main effluents in which organic reagents will be found.

RESPONSE: WQB-7's scope is and will remain limited to Water Quality Standards and their associated values. While additional information can add value to a document, it can also unnecessarily clutter or cause confusion. Discussions of socio-economic impacts, chemistry, and mining engineering practices are better left to another format. Therefore, the suggested change will not be made.

199. COMMENT: Commentor 261 points out that the value for "Ratio", concerning the chronic ammonia standard, is 13.5 in WQB-7, but was listed as 16.0 in the old EPA Gold Book.

RESPONSE: This value, 13.5, was published by EPA Region VIII on

July 1, 1993. The previously published value for Ratio was 16.0. The value as listed in WQB-7 is correct and will remain as proposed.

200. COMMENT: Commentor 261 suggests footnotes 4 and 5 in the dissolved oxygen table in WQB-7 seem to contradict one another. Footnote 4 should be eliminated.

RESPONSE: There is a contradiction. Footnote 4 will be eliminated in response to this comment.

201. COMMENT: Commentor 261 contends that footnote 2 in the dissolved oxygen table in WQB-7 should include eggs.

RESPONSE: This footnote includes "all embryonic and larval stages". Thus, eggs are included and no change is necessary.

202. COMMENT: Commentor 261 suggests that in each of the water use classifications in the water quality standards (16.20.616-624), Section (h)(i) states: "Concentrations of carcinogenic, bioconcentrating, toxic, or harmful parameters which would remain in [drinking] water after conventional [drinking] water treatment...". To avoid confusing this with ambient water and wastewater treatment, add the word drinking (shown above in brackets).

RESPONSE: The suggested change will not be made as it is beyond the scope and purpose of this rulemaking.

203. COMMENT: Commentor 261 contends that the proposed language for site specific standards in Class I waters would mean that site-specific standards can only be less stringent and not more stringent than WQB-7, even though the EPA recommends that site-specific standards may sometimes need to be more stringent than its general criteria.

RESPONSE: The language regarding site specific standards in the surface water quality rules will be modified for the reasons stated by this commentor.

204. COMMENT: Commentor 261 contends that ARM 16.20.623 (2)(h)(iv) does not specify the period used to determine the "mean instream concentrations immediately upstream". As such, Class I streams effectively are excluded from the nondegradation rules, which was not the intent of the legislature and ultimately weakens the application of water quality standards. It certainly is not the intent of the legislature that any impaired stream be further degraded. Therefore, this section of the rules should be removed. Please note that the previous section, ARM 16.20.623 (2)(h)(iii), appropriately states that the standards for Class I streams are the applicable levels in WQB-7 or site-specific standards developed under the appropriate guidance from EPA.

RESPONSE: The use of one-half of the upstream quality as a discharge limit results in improved water quality and therefore, will not be changed as requested. In addition, the legislature specifically excluded Class I waters from the nondegradation law by excluding such waters in the definition of high-quality waters. Section (h)(iii) effectively set goals for the water quality in these streams. Therefore, no change will be made.

205. COMMENT: Commentor 261 recommends the following change concerning mixing zone rules, Rule III(1): "Information received by the applicant" should be changed to: "information received from the applicant".

RESPONSE: This change will be made.

206. COMMENT: Commentor 261 recommends the following change concerning mixing zone rules, Rule III(1): the department needs to indicate how concentrations in the mixing zone will be calculated (by what approach or model).

RESPONSE: Due to the large variety of situations that may arise, it is not possible to specify precisely how these calculations will be made except to say that best professional judgement will be employed. Therefore, the suggested change will not be made.

207. COMMENT: Commentor 261 recommends the following change concerning mixing zone rules, Rule V(1): The rule says "No mixing zone will be granted, if it would cause unreasonable interference with or danger to existing beneficial uses." The word "unreasonable" should be dropped since it is not defined and is very subjective.

RESPONSE: The language cited above has been changed in Response to Comment 30. The term "unreasonable" has been removed and the rule now refers to "threaten or impair existing beneficial uses" for consistency with Rule VIII(6) of the mixing zone rules. No further change is necessary to address this comment.

208. COMMENT: Commentor 261 recommends the following changes concerning Rule V(3) of the mixing zone rules: This commentor believes that whether or not a pollutant is granted a surface water mixing zone should depend more on its fate than on its effect on humans. Therefore, only substances and situations that meet the following criteria should be granted mixing zones: (a) the substance does not bioconcentrate (BCF<100); (b) the substance is rapidly broken down to nontoxic, harmless compounds (The half-life of the substance in surface waters is <1 day); (c) the oxygen depletion in the receiving water must have recovered fully before allowing the next oxygen-demanding mixing zone.

RESPONSE: This commentor overlooks the slogan of the patholo-

gists that "the dose makes the poison". There are no "nontoxic harmless compounds" so that implementation of the requested change would result in no mixing zones for any pollutant. The mixing zone rules as proposed will adequately protect all present and anticipated uses of water and will remain as proposed.

209. COMMENT: Commentor 261 recommends the following change concerning mixing zone rules, Rule VIII(3): The rule now states that facilities which meet conditions in (a) and (d) qualify for standard mixing zones. This should be changed to "(a) through (d)".

RESPONSE: This was an error and the requested change will be made.

210. COMMENT: Commentor 261 contends that there is an error in mixing zone Rule VIII(3)(b). She contends that if you add the conditions in (b) to the conditions in (a), it would include all facilities because (a) and (b) together specify every conceivable combination of discharges and dilution rates and requests that (b) be eliminated or corrected.

RESPONSE: For the reasons stated above, (b) has been changed to address this comment.

211. COMMENT: Commentor 261 recommends the following change concerning mixing zone rules, Rule VIII(3)(d): Facilities with instantaneous mixing zones (<2 stream widths) should not be given
standard mixing zones (10 stream widths) because the legislature intended that mixing zones should be as small as practicable.

RESPONSE: Facilities with instantaneous mixing zones (<2 stream widths) under the above cited rule are granted a standard mixing zone, which is less than 2 stream widths in length. This is as short as practical and, therefore, the suggested change will not be made.

212. COMMENT: Commentor 261 contends that mixing zone Rule VIII(6) is unnecessary in light of nonstandard mixing zones.

RESPONSE: The above cited rule is necessary to clarify the authority of the department to modify standard mixing zones as needed to protect uses. Therefore, the rule will remain as proposed.

213. COMMENT: Commentor 261 recommends the following change concerning Rule IX(1)(c) of the mixing zone rules: Change the last line from "discharge qualifies for a standard mixing zone" to "discharge may qualify for a standard mixing zone" because it may not satisfy Rule IX(1)(a).

RESPONSE: If the ground water discharge is subject to the limi-

tations in (a), a standard mixing zone may not be appropriate. Where the limitations in (a) do not apply, then the discharge clearly qualifies for a standard mixing zone whenever the conditions in (c) are met. XXX

214. COMMENT: Commentor 261 contends that in mixing zone Rule IX(1)(d)(viii): the downgradient boundary of a standard mixing zone should be limited by its distance to the nearest groundwater well. The same is true of nonstandard mixing zones.

RESPONSE: Protection of drinking water supply wells is assured by Rule VI(2). Therefore, no further change is necessary to address this comment.

215. COMMENT: Commentor 261 contends that nondegradation Rule II(16)(a) should be deleted because a point source discharging under an existing permit can cause degradation if it significantly increases its discharge.

RESPONSE: The above referenced rule is renumbered as Rule II(15)(a) in the nondegradation rules. The rule allows changes in water quality under an existing permit or approval obtained prior to the enactment of the new law. This is consistent with legislative intent as clearly expressed in Section 10 of SB 401 and discussions before the Senate Natural Resources Committee. Therefore, the rule will remain as proposed.

216. COMMENT: Commentor 261 recommends nondegradation Rule II(16)(b) should read: "nonpoint sources discharging prior to April 29, 1993, which have had no increase in land disturbance (that is, no increase in acres disturbed, no increase in grazing or tree harvest rates)".

RESPONSE: The requested change will not be made because the increased land disturbance, if it caused degradation, would fall under the definition of "new or increased source" in Rule II(15).

217. COMMENT: Commentor 261 recommends the following change concerning nondegradation Rule VI(2)(d): after "determination of economic or social importance" add "of the proposed activity and of the loss of existing water quality".

RESPONSE: In response to numerous comments on the economic analysis required under the rules, this entire section has been changed. No further change is necessary to address this comment.

218. COMMENT: Commentor 261 recommends the following change concerning nondegradation Rule VII(1)(a): before "10%" add the words "less than".

RESPONSE: This change has been made.

219. COMMENT: Commentor 261 recommends adding teratogenic and mutagenic substances to nondegradation Rule VII(1)(b) as parameters that cannot exceed background levels.

RESPONSE: To the best of our knowledge, there is no adequately documented list of such parameters and the department does not have the means to develop a defensible list. Therefore, the suggested change will not be made.

220. COMMENT: Commentor 261 recommends the following change concerning nondegradation Rule VII(1)(b): add "Where parameters are below detection in receiving water upstream of a discharge, the parameters will be assumed to be zero for the purposes of determining the allowed levels in that discharge."

RESPONSE: This change will not be made as such an assumption is not reasonable.

221. COMMENT: Commentor 261 recommends the following change concerning nondegradation Rule VII(1)(e): delete the words "for a period of 50 years".

RESPONSE: Phosphorus is removed from soil solution in two ways. First, some fine soil particles can absorb phosphorus. The amount of phosphorus absorbed by soils is limited by the soil texture and the type of soil particles present. The absorptive capacity of the soil can be determined through the proper tests. Second, phosphorus can also be removed from soil solution through the process of precipitation. Although the amount of precipitation is determined by the chemical characteristics of the soil solution, the process for making this determination is very complex and not well understood. The available data indicates, however, that if the absorptive capacity of the soil exceeds 50 years, it is likely that phosphorus will be effectively removed due to precipitation. The 50 year requirement will not be deleted but may be modified when better data is available.

222. COMMENT: Commentor 261 contends that nondegradation Rule VIII(1)(f) should be deleted.

RESPONSE: Since increases in nitrate are covered in Rule VII of the nondegradation rules, the proposed change will be made.

223. COMMENT: Commentor 263 points out that the equation for a "one-half area" in mixing zone Rule VIII(4) is actually an equation for the distance downstream it takes for the mixing zone plume to get to one-half the width of the stream. This rule should be modified to indicate that the equation should be used to calculate the downstream distance to one-half width mixing.

RESPONSE: The equation will be changed in response to this comment.

224. COMMENT: Commentors 273 and 316 urge the board to approve composting toilet systems.

RESPONSE: See Response 1.

225. COMMENT: Commentors 276, 311, 313, and 315 contend that if a mixing zone is needed, the activity is significant. Therefore the nonsignificance criteria in the nondegradation rules should not include mixing zones.

RESPONSE: The inclusion of certain activities that require mixing zones under the proposed rules is consistent with the criteria for determining nonsignificant activities pursuant to § 75-5-301(5)(c), MCA. Therefore, the inclusion of mixing zones will remain in the final rules.

226. COMMENT: Commentor 276 contends that any increase greater than 5.0 mg/l is significant.

RESPONSE: See Response No. 14.

227. COMMENT: Commentor 289 agrees with the substance of comments made by Commentor 111.

RESPONSE: Comment noted.

228. COMMENT: Commentor 290 contends that the categorical exclusion for agricultural chemicals in Rule VIII(1)(b) should be deleted and a section added to clarify that under the provisions of 85-15-212, MCA, these activities are exempt from permitting.

RESPONSE: The requested change will not be made because unpermitted nonpoint source activities remain subject to the nondegradation policy and its requirements. This exclusion recognizes that the activities are nonsignificant provided they comply with the conditions set forth in the rule.

229. COMMENT: Commentor 290 contends that "anticipated beneficial uses" should be deleted from nondegradation Rule VIII(1)(b) because it is not defined.

RESPONSE: §§ 75-5-303(1) and 75-5-303(3)(c), MCA, require the protection of existing and anticipated uses of state waters. The rule will not be changed as suggested because the law requires the protection of "anticipated uses".

230. COMMENT: Commentor 290 contends that the nitrate standards should be the same for both surface and ground water.

RESPONSE: The standards to protect public health are the same. However, nitrate may cause undesirable changes in aquatic growth for surface waters at concentrations far below the levels which are protective of public health. In contrast, ni-

trate does not cause undesirable changes in aquatic growth for ground waters. Due to its effect in surface water, it is appropriate that the standard be more stringent. For this reason, the rule will remain as proposed.

231. COMMENT: Commentor 314 contends that if there are mistakes during the completeness review, it should not be possible to correct them.

RESPONSE: This requirement would be counterproductive and therefore, will not be included in the rules.

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

By _____
ROBERT J. ROBINSON, Director

Certified to the Secretary of State August 1, 1994.

Reviewed by:
Eleanor Parker by _____
Eleanor Parker, DHES Attorney

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

In the matter of the amendment of rule 16.28.1005 containing TB control requirements for schools and day care facilities	))))	NOTICE OF AMENDMENT OF RULE (Tuberculosis)

To: All Interested Persons

1. On June 23, 1994, the department published notice of the proposed amendment of ARM 16.28.1005, concerning measures required to prevent the spread of tuberculosis in schools and day care facilities, at page 1652 of the Montana Administrative Register, issue number 12.

2. The agency has amended ARM 16.28.1005 as proposed.

3. No comments were received.

ROBERT J. ROBINSON, Director

Certified to the Secretary of State August 1, 1994.

Reviewed by:

Eleanor Parker, DHES Attorney

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

In the matter of the proposed adoption of new rules I-XXII and the repeal of 16.32.380-388 dealing with licensure of personal care facilities.	)))))	NOTICE OF REPEAL OF ARM 16.32.380-388 AND ADOPTION OF NEW RULES I-XXII PERTAINING TO PERSONAL CARE

1. On May 26, 1994, the Department published notice of public hearing on the above stated proposed repeal of rules and adoption of new rules at page 1342 of the 1994 Montana Administrative Register, issue number 10.

2. The Department has repealed rules 16.32.380 through 16.32.388 as proposed.

3. The Department has adopted the following rules as proposed with the following changes.

RULE I (16.32.901) APPLICATION OF RULES Same as proposed.

RULE II (16.32.902) DEFINITIONS (1)-(3) Same as proposed.

(4) "Licensed Hhealth care professional" means a physician, a physician assistant-certified, a nurse practitioner, or a registered nurse practicing within the scope of his/her license.

~~(5) "Medically related social services" means services provided by the personal care facility staff to assist residents in maintaining or improving their ability to manage their everyday physical, mental, and psychosocial needs.~~

(65) "Personal care facility" means a home or institution that is licensed to provide personal care to either category A or category B residents under 50-5-227, MCA.

(76) "Resident" means anyone accepted for care, through contractual agreement, in a personal care facility.

(7) "Social services" means services provided by the personal care facility staff to assist residents in maintaining or improving their ability to manage their everyday physical, mental, and psychosocial needs.

RULE III (16.32.903) ADMINISTRATION (1) Each personal care facility shall employ an administrator~~, who must be in good physical and mental health, be of reputable and responsible moral character, and exhibit concern for the safety and well-being of residents, and~~ who must:

(a)-(c) Same as proposed;

~~(d) not be convicted of a crime involving violence, fraud, deceit, theft, or other deception for which he/she is still under state supervision;~~

(ed) have knowledge of and the ability to deliver or direct the delivery of appropriate care to residents; and

(~~f~~e) show evidence of at least 6 hours of annual continuing education in at least one of the following areas:

(i)-(vi) Same as proposed;

(vii) basic and advanced emergency first aid.

(2)-(3) Same as proposed.

~~(4) Either the administrator or a designated representative who meets the qualifications of the administrator must be awake and on duty at the facility at least 40 hours per week.~~

(~~5~~4) In the absence of the administrator, ~~or his/her designated representative and~~ in order that service to residents is not interrupted, the duties of the administrator must be delegated to a responsible adult who:

(a)-(c) Same as proposed.

(~~6~~5) The administrator or designated representative shall initiate transfer of a resident through the resident's physician, ~~and/or~~ appropriate agencies, and/or the resident's personal representative or responsible party when the resident's condition is not within the scope of services of the personal care facility.

(~~7~~6) Whenever a resident of a category A facility needs skilled nursing services, the administrator is responsible for documenting when the resident is receiving the third-party nursing services ~~coordinating with the nursing personnel providing those services to ensure that the following duties are carried out:~~

~~(a) implementing physician's orders;~~

~~(b) planning and directing the delivery of nursing care;~~

~~(c) treatments, procedures, and other services assuring that each resident's needs are met;~~

~~(d) care planning, based on orders and needs;~~

~~(e) notifying the resident's physician promptly when the resident is injured or when there is a sudden or marked change in a resident's signs, symptoms or behavior;~~

~~(f) notifying the resident's family of injury to the resident or change in his/her signs, symptoms, or behavior, after notice has been provided pursuant to (7)(e) above; and~~

~~(g) providing adequate equipment to meet the needs of residents~~.

(~~8~~7) If the facility cannot provide the care required by the resident, the administrator must notify the resident's family and physician and request that the family relocate the resident within 30 days. A category A facility ~~The~~ resident has the right to appeal this decision by following the procedures outlined in [RULE XVII(2)(b)].

(~~9~~8) The administrator of a personal care facility shall ~~provide~~ ensure and documented that orientation is provided to all employees that is appropriate to the employee's job responsibilities and includes, at a minimum:

(a)-(c) Same as proposed;

(d) the aging process ~~and emotional problems of illness~~;

(e)-(f) Same as proposed;

(g) emergency procedures, such as basic first aid, CPR, and procedures used to contact outside agencies, physicians,

and individuals; and

(h) Same as proposed.

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

(~~12~~11) The administrator shall comply with the Montana Elder and Developmentally Disabled Abuse Prevention Act, found at 52-3-801 et seq., MCA ~~notify the state long term care ombudsman, the department, and the nearest peace officer, law enforcement agency, or protective services agency whenever there is reason to believe that a resident has been subject to abuse, neglect, or exploitation. The administrator shall require and encourage the staff to report observations or evidence of abuse and shall investigate and take corrective action as indicated~~.

(13) Same as proposed but renumbered (12).

(~~14~~13) The administrator is responsible for maintaining ~~adequate~~ personnel records and must maintain a current list of the names, addresses, and telephone numbers of all employees, including substitute personnel.

(~~15~~14) The administrator must ensure that the facility ~~adopts a statement of resident rights~~ complies with the Montana Long-Term Care Residents' Bill of Rights, found at 50-5-1101, et seq., MCA ~~that includes, at a minimum, the rights delineated in [RULE XVI], and must:~~

~~(a) post a copy of the statement of resident rights in a conspicuous place visible to the public;~~

~~(b) present the statement in a format that can be read easily by the residents and by the public; and~~

~~(c) ensure that the requirements of 50-5-1105, MCA, are met, and that the signed acknowledgment referred to therein is placed in the resident's record~~.

(~~16~~15) The administrator must ensure that a resident who is ambulatory only with mechanical assistance is able to safely self-evacuate the facility without the aid of an elevator or similar mechanical lift ~~is not housed above the ground floor of the facility~~.

RULE IV (16.32.904) STAFFING (1) Each employee of the personal care facility must meet the following minimum qualifications:

(a) ~~offer evidence of suitable character, temperament, experience, and ability~~ be able to function in his/her appointed capacity;

(b) Same as proposed;

(c) be free from any medical condition~~, including drug or alcohol addiction,~~ that limits the employee's ability to ~~provide personal care services~~ perform his/her job description with reasonable skill and safety;

(d) Same as proposed;

(e) not be convicted of a crime involving violence, fraud, deceit, theft, ~~or~~ other deception, or a violation of 52-3-825, MCA, for which the person is still under state supervision.

(2) Same as proposed:

(a)-(b) Same as proposed;

(c) bowel and bladder care, in a category B facility only;

(d)-(e) Same as proposed;

~~(f) methods of making residents physically comfortable;~~

(~~g~~f) food, nutrition, and diet planning, in a category B facility only;

(~~h~~g) health-oriented record keeping, including time/employment records and resident records; and

(~~i~~h) assistance with medications.

(3) Employees may perform cooking, housekeeping, laundering, general maintenance, and office work. Any employee providing any ~~who might be responsible to deliver occasional~~ direct care, however, is subject to the orientation and training requirements for direct care staff.

(4) There must be a personnel record for each employee that includes the employee's name, address, and social security number, his/her ~~health~~ tuberculosis records, an annual evaluation of performance, a record of the employee's previous experience, and documentation of orientation and on-the-job training, along with a signed acknowledgement by the employee that the training was provided and included specific mention of resident rights.

(5) The following rules must be followed in staffing the personal care facility:

(a) Direct care ~~s~~Staff ~~members~~ shall have knowledge of each resident's health conditions, the residents' needs, and any events about which the employee should notify the administrator or his/her designated representative;

(b)-(c) Same as proposed;

(d) The staff shall provide for the care and safety of residents without abuse, exploitation or discrimination; ~~and~~

(e) The individual in charge of each work shift shall have keys to all exit doors, medication cabinets, and resident records; and

(f) Direct care staff may not perform any service for which they have not received appropriate training by an appropriate instructor.

(6)-(7) Same as proposed.

AUTH: 50-5-103, 50-5-226, 50-5-227, MCA; IMP: 50-5-226, 50-5-227, MCA

RULE V (16.32.905) RECREATIONAL ACTIVITIES Same as proposed.

RULE VI (16.32.906) LAUNDRY (1) Same as proposed.

(2) If a health care facility processes its laundry on the facility site, it must:

(a) ~~set aside and utilize an area solely for laundry purposes~~ have a separate area used solely as a laundry, including an area for sorting soiled and clean linen and clothing. No laundry may be done in a food preparation or dishwashing area;

(b) Same as proposed;

~~(c) have a separate area or room designed for use as a~~

~~laundry, including an area for sorting soiled and clean linen and clothing. No laundry may be done in a food preparation or dishwashing area;~~

(~~d~~c) provide well-maintained containers to store and transport laundry that are impervious to moisture, keeping those used for soiled laundry separate from those used for clean laundry;

(~~e~~d) dry all bed linen, towels, and wash cloths in the dryer;

(~~f~~e) protect clean laundry from sources of contamination; and

(~~g~~f) ensure that facility staff handling laundry cover their clothes while working with soiled laundry, use separate clean covering for their clothes while handling clean laundry, and wash their hands both after working with soiled laundry and before they handle clean laundry.

(3) If a personal care facility processes its laundry off the facility site, it must utilize a commercial laundry (not self-service) which satisfies the requirements of (2) above and must set aside and utilize an area solely for laundry purposes.

(4) Resident's personal clothing must be laundered by the facility unless the resident or the resident's family accepts this responsibility. If the facility launders the resident's personal clothing, the ~~clothing must be marked with the resident's name and returned to the correct resident~~ facility is responsible for returning the clothing. Residents capable of laundering their own personal clothing and wishing to do so ~~must~~ may be provided the facilities and necessary assistance.

RULE VII (16.32.907) PHYSICAL PLANT (1) Same as proposed.

(2) All rooms with toilets or shower/bathing facilities must have an operable window to the outside or must be exhausted to the outside by a mechanical ventilation system.

(3) Same as proposed.

(4) Same as proposed:

(a)-(e) Same as proposed;

(f) mirror mounted or secured to allow for convenient use by both wheelchair bound residents and ambulatory persons ~~on the wall or door at convenient height in each bedroom~~;

(g)-(h) Same as proposed.

(5)-(6) Same as proposed.

(7) Any provision of this rule may be waived at the discretion of the department if conditions in existence prior to the adoption of this rule or construction factors would make compliance extremely difficult or impossible and if the department determines that the level of safety to residents and staff is not diminished.

AUTH: 50-5-103, 50-5-226, 50-5-227, MCA; IMP: 50-5-226, 50-5-227, MCA

RULE VIII (16.32.908) ENVIRONMENTAL CONTROL (1) A personal care facility must be constructed and maintained so as to prevent as much as possible the entrance and harborage of

rats, mice, insects, flies, and other vermin.

(2) Hand cleansing soap or detergent and individual towels must be available at each sink in the commonly-shared areas of the facility. A waste receptacle must be located near each sink. Towels for common use are not permitted.

(3) A minimum of 10 foot candles of light must be available in all rooms ~~and hallways~~, with the following exceptions:

(a)-(d) Same as proposed.

AUTH: 50-5-103, 50-5-226, 50-5-227, MCA; IMP: 50-5-226, 50-5-227, MCA

RULE IX (16.32.909) WRITTEN POLICIES AND PROCEDURES

(1) Same as proposed:

(a)-(c) Same as proposed;

(d) a disaster plan that includes an evacuation plan and a plan for a backup source of oxygen;

(e)-(g) Same as proposed.

RULE X (16.32.910) RESIDENTIAL SERVICES (1) The personal care facility shall provide a clean, comfortable, and well-maintained home, free of unpleasant odors, that is safe ~~and comfortable~~ for residents and employees at all times.

(2) The facility shall have a written disaster plan in effect that includes an evacuation plan in event of fire, and that is available to all staff members and residents. In addition, the facility must conduct an annual drill and maintain a written record of that drill.

(3) Same as proposed.

(4) The facility shall stock and maintain appropriate first aid supplies in ~~a single~~ at least one location.

(5)-(6) Same as proposed.

(7) Same as proposed:

(a)-(c) Same as proposed;

(d) Garbage and trash must be stored for final disposal in areas separate from those used for preparation and storage of food and must be removed from the facility daily. Garbage containers must be cleaned at least once a week.

(8) At all times, the facility shall provide ~~keep~~ a supply of clean linen in good condition at all times that is sufficient to change beds often enough to keep them clean, dry, and free from odors. Residents may use their own linen in the facility if they choose. In addition, the facility must ensure that each resident is supplied with clean towels and washcloths that are changed at least twice a week, a moisture-proof mattress cover and mattress pad, and enough blankets to maintain warmth and comfort while sleeping.

(9) Same as proposed.

~~(10) The facility shall maintain a record of all repairs and services provided to maintain the facility.~~

(~~11~~10) Temperature in resident rooms, bathrooms, and common areas must be maintained at a minimum of 70°F and a maximum of 80°F, and the facility must give appropriate consideration to each resident's preferences regarding the temperature ~~between 75°F and 80°F during the months from October to~~

~~March and between 70°F and 75°F during the months from April to September~~.

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

RULE XI (16.32.911) PERSONAL SERVICES Same as proposed.

RULE XII (16.32.912) INFECTION CONTROL (1) Same as proposed.

(2) The facility must ensure that, at the time of admission and annually thereafter, a resident in a personal care facility provides documentation from a licensed ~~physician~~ health care professional showing that the resident is free from communicable tuberculosis.

(3) The personal care facility must establish and maintain infection control policies and procedures sufficient to provide a safe environment and to prevent the transmission of disease. Such policies and procedures must include, at a minimum, the following requirements:

(a) Any employee contracting a communicable disease that is transmissible to residents through food handling or direct care must not appear at work until the infectious diseases can no longer be transmitted. The decision to return to work must be made by the administrator in accordance with the policies and procedures instituted by the facility;

(b) Same as proposed.

(4) Same as proposed.

RULE XIII (16.32.913) SOCIAL SERVICES (1) The personal care facility shall provide ~~medically related~~ social services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident.

(2)-(4) Same as proposed.

AUTH: 50-5-103, 50-5-226, 50-5-227, MCA; IMP: 50-5-226, 50-5-227, MCA

RULE XIV (16.32.914) PETS (1) Same as proposed:

(a)-(b) Same as proposed;

(c) Birds and fish must be kept in appropriate enclosures; and

(d) Pets that are kept at the facility shall have documentation of current vaccinations, including rabies, as appropriate~~; and~~

~~(e) Iguanas, snakes, other reptiles, rodents, monkeys, ferrets, or other exotic pets may not be kept in a personal care facility~~.

(2)-(4) Same as proposed.

RULE XV (16.32.915) FOOD SERVICE (1) The ~~food service~~ facility must establish and maintain standards relative to food sources; refrigeration; refuse handling; pest control; storage, preparation, procuring, serving, and handling food; and dishwashing procedures that are sufficient to prevent food spoilage and the transmission of infectious disease. These standards must include the following:

(a)-(d) Same as proposed.

(2) Foods must be served in amounts and a variety sufficient to meet the nutritional needs of each resident, and the facility must provide therapeutic diets when prescribed by the resident's physician. At least three meals must be ~~served~~ offered daily and at regular times, with not more than a 14-hour span between an evening meal and breakfast.

(3) Same as proposed.

(4) If a resident is unable to eat a meal or refuses to eat a meal, this ~~non participation~~ must be documented in the resident's record if there is a medical reason or it is otherwise appropriate to do so.

(5)-(11) Same as proposed.

(12) Tobacco products may not be used in the food preparation and kitchen ~~or service~~ areas.

AUTH: 50-5-103, 50-5-226, 50-5-227, MCA; IMP: 50-5-226, 50-5-227, MCA

RULE XVI (16.32.916) RESIDENT RIGHTS (1) The facility shall comply with the Montana long-term care residents' bill of rights, found at 50-5-1101, et seq., MCA ~~shall adopt a statement of resident rights that includes, at a minimum, the statement of resident rights found at 50-5-1104, MCA, and must post such statement in accordance with 50-5-1105, MCA~~.

(2)-(3) Same as proposed.

RULE XVII (16.32.917) RESIDENCY APPLICATION PROCEDURES

(1) Same as proposed.

(a) an application form requiring the prospective resident's name, address, sex, social security number, date of birth, marital status, insurance or financial responsibility information, religious affiliation, next of kin, and his/her physician's name, address, and telephone number, and whether the prospective resident has any health care decision making instruments in effect; and

(b) a statement which informs the resident and the resident's physician, if applicable, of the requirements of 50-5-226, MCA.

(2) If a category A ~~the personal care~~ facility determines that it must reject ~~may not admit the~~ a prospective resident because the prospective resident is not appropriate for residence in a category A facility based on the criteria of 50-5-226, MCA, or determines it must relocate a resident because the resident is no longer appropriate for residence in a category A facility based on the criteria of 50-5-226, MCA; or if the department determines a category A facility resident must be relocated because s/he is no longer appropriate for residence in the category A facility based on the criteria of 50-5-226, MCA, the following rules apply:

(a) The facility, or department, if appropriate, must provide written notice of rejection or relocation of the resident's ~~application~~ that includes:

(i) the grounds for the rejection or relocation;

(ii) the right to appeal the decision to the department

within 15 days after the date of the written notice ~~of rejection~~; and

(iii) the information that the appeal request must contain, as delineated in (b) below.

(b) A person or facility appealing a rejection or relocation must send the department, within 15 calendar days after the date of written notice of rejection or relocation ~~rejection~~, written notice containing the following:

(i) name of the individual concerning whom the rejection or relocation ~~screening~~ decision was made;

(ii) name of the personal care facility affected and whether the decision was made by that facility or by the department;

(iii) grounds for the rejection or relocation ~~screening~~ decision; and

(iv) statement of evidence contradicting the rejection or relocation ~~screening~~ decision.

(c) Unless the appealing party agrees to a time extension, the director of the department ~~of health and environmental sciences~~ must make a final decision regarding the appeal within 15 working days after receipt of the notice.

(3) Same as proposed:

(a)-(e) Same as proposed;

(f) a listing of specific charges to be incurred for the resident's care, frequency of payment, ~~and~~ rules relating to non-payment, and the facility's policy relating to refunds.

(4)-(6) Same as proposed.

AUTH: 50-5-103, 50-5-226, 50-5-227, MCA; IMP: 50-5-226, 50-5-227, MCA

RULE XVIII (16.32.918) RESIDENT RECORDS (1)-(2) Same as proposed.

(3) The record must be kept current and shall include at least the following:

(a) Same as proposed;

(b) records of third-party nursing services provided to each category A facility resident ~~third-party agreements, if any, signed and dated~~;

(c) Same as proposed;

(d) resident's weight on admission and at least quarterly thereafter, if the resident and/or the resident's licensed health care professional determine a weight check is necessary;

(e) personal/social information and preferences, such as food preferences, special interests and hobbies, or community and religious contacts, if the resident voluntarily discloses this information;

(f) Same as proposed;

(g) a progress note at least quarterly ~~every 30 days~~, setting forth the resident's current condition, level of functioning, participation in activities, social interactions, problems noted, and concerns stated by family members or other visitors, if any;

(h) the resident's care plan for all category B residents and for category A residents, if necessary and appropriate;

(i)-(j) Same as proposed;

~~(k) record of services provided by third party providers;~~

(~~l~~k) dates of overnight absences from the home;

(m)-(n) Same as proposed but are renumbered (l)-(m).

AUTH: 50-5-103, 50-5-226, 50-5-227, MCA; IMP: 50-5-226, 50-5-227, MCA

RULE XIX (16.32.919) MEDICATIONS AND OXYGEN (1) Same as proposed:

(a)-(c) Same as proposed;

(d) Medications that require refrigeration must be segregated from food items and stored within the temperature range specified by the manufacturer ~~at temperatures between 36°F and 46°F~~; and

(e) Same as proposed.

(2)-(4) Same as proposed.

(5) The facility shall maintain for each resident a medication administration record listing all medications used and all doses taken or not taken by the resident, and shall state the reason for omission of any scheduled dose of medication. ~~This record shall include the following:~~

~~(a) any changes from the original prescription; and~~

~~(b) the reason that a p.r.n. (as needed) medication, including an over the counter medication, was used by a resident and the results obtained.~~

(6)-(7) Same as proposed.

RULE XX (16.32.920) CONSTRUCTION (1)-(2) Same as proposed.

AUTH: 50-5-103, 50-5-226, 50-5-227, MCA; IMP: 50-5-226, 50-5-227, MCA

RULE XXI (16.32.921) REQUIREMENTS FOR CATEGORY B FACILITIES ONLY (1) At the time of admission, the administrator shall assure that a licensed health care professional assesses each resident ~~is assessed~~, in writing, for at least the following:

(a)-(g) Same as proposed.

(2) Within 3 days after admission, the administrator shall assure that there is a plan of care for each resident that is prepared by a licensed health care professional, and, to the extent practicable, with the participation of the resident, the resident's family, or the resident's legal representative; and that the plan of care is available to and followed by all direct care staff. The plan of care must include but need not be limited to:

(a)-(d) Same as proposed.

(3) The facility shall develop its own policy regarding the contents of care plans that includes a requirement that all care plans be reviewed and updated at least quarterly ~~yearly~~ or more frequently, if necessary, to account for significant changes in a resident's physical, mental, or social condition or needs. In addition, at a minimum, the facility must comply with the following rules:

(a) Within 3 days after the admission of a resident, a licensed health care professional must visit the resident in the facility and develop a plan of care for that resident, unless the physician who certified the resident developed a plan of care for the resident, which plan must be included in the resident's record; or

(b) Same as proposed.

(4)-(7) Same as proposed.

(8) Chemical or medical restraints ordered by the physician are permitted, and a licensed health care professional must monitor the resident's response to use of the medication and communicate with the pharmacist and physician to implement a regimen that ensures the least medication and fewest negative consequences ~~under the following conditions:~~

~~(a) A licensed health care professional must monitor the resident's response to use of the medication and communicate with the pharmacist and physician to implement a regimen that ensures the least medication and fewest negative consequences; and~~

~~(b) The resident must remain alert and interact with other residents~~.

(9) Same as proposed.

(10) ~~Only soft, p~~Physical restraints ordered by the physician are permitted when needed to manage resident behavior that endangers themselves or others, and only under the following conditions:

(a) Same as proposed;

(b) The ~~soft~~ restraints must be applied by a licensed health care professional;

(c)-(e) Same as proposed.

(11) A facility must institute, through policies and procedures, restraint reduction programs and restraint assessments.

(11)-(12) Same as proposed but renumbered (12)-(13).

XXII (16.32.922) FEES (1)-(2) Same as proposed.

(3) The department shall collect a screening fee of $100 from a ~~personal care facility for each screening of a resident or prospective resident of that facility that is conducted by the department~~ prospective resident, resident, or facility appealing a rejection or relocation decision made pursuant to [Rule XVII].

4. The Department has thoroughly considered all commentary received. The comments and the Department's response to each are noted below:

RULE II **Subsection 4** --

COMMENTS: Rose Hughes, Montana Health Care Association (Hughes): The term "health care professional" excludes LPNs, but later in the rule the term is used to describe individuals providing nursing services to residents of category B facilities. This seems to exclude LPNs from providing nursing services they are licensed to provide. The rule should be amended

to correct this problem.

Eunice Ash, Administrator of Eunice's Personal Care Facility (Ash): commented "intend to staff a residents Personal Care Home with Nursing services, again SB118 was only to help us maintain those in need of assisting nursing skills which are provided as a doctor prescribes."

Nancy Ellery, Administrator of Medicaid Services Division, Department of Social and Rehabilitation Services (Ellery): "health care professionals" is defined but the rules refer to licensed health care professional. They need to be the same. Also, we recommend adding licensed practical nurse to the definition.

RESPONSE: As to Hughes' comment, the Department agrees that facially the definition seems to exclude LPNs; however, under these rules, LPNs are still free to operate within the scope of their licensure. The definition as used in these rules applies primarily to assessments and certifications, which must be accomplished by one of the defined licensed health care professionals. LPNs are not precluded from assisting one of the defined professionals or from working under the supervision of one of the defined professionals.

As to Ash's comment, the Department acknowledges it, but, because it does not understand what was meant by the comment, made no change in the rule.

As to Ellery's comment, the Department agrees that the terms should be consistent and have amended this rule to define the term "licensed health care professional." As to adding LPN to the definition, please see the response above.

Subsection 6 --

COMMENT: Ellery: In these rules, the definitions of category A and B facilities is critical to understanding the differences between the nature of the facilities and services provided. We recommend clarifying the difference by specifically defining category A and category B residents in the rule.

RESPONSE: The Department acknowledges this comment, but notes that § 2-4-305, MCA, states that "[r]ules may not unnecessarily repeat statutory language." The Department believes that the statutes are sufficiently clear in their definitions of category A and B facilities and that repeating the statutory language in the rules is not necessary.

RULE III **Subsection 1 --**

COMMENTS: Hughes: The department is authorized to adopt rules relating to "staffing" in category A facilities and is authorized to adopt rules relating to "qualifications and training" of staff in category B facilities. The department does not have authority to adopt rules regarding levels of education and training for administrators of category A facilities.

Christopher and Manolita Connor, Administrators of Maplewood Manor Personal Care (Connors): This is vague and subjective, and rules should be objective and precise.

Don and Margo Hamilton, Administrators of Hamilton House (Hamiltons): "moral" is vague.

RESPONSE: As to Hughes' comment, the Department has broad statutory rulemaking authority to promulgate and adopt rules pertaining to health care facilities. Specifically, § 50-5-103, MCA, provides that "[t]he department shall promulgate and adopt rules and minimum standards for implementation of parts 1 and 2." § 50-5-226, MCA, authorizes the Department to adopt rules relating to the staffing of category A facility, and § 50-5-227, MCA, also gives the department authority to adopt standards for licensing and operating personal care facilities. Given these three grants of rulemaking authority, the Department's position remains that it has clear statutory authority to adopt rules fully implementing all of parts 1 and 2 of the health facility statutes and rules governing the operation of personal care facilities. This necessarily requires adopting rules regarding category A facility administrators.

As to Connors' and Hamiltons' comments, the Department agrees and the rule has been amended accordingly.

COMMENTS: 1(b) -- Hughes: As it pertains to category B facility administrators, a high school diploma or GED does not qualify a person to manage a skilled nursing facility, which is what a category B facility is authorized to be.

Liz Lewis, Hillcrest Retirement Community (Lewis) a category A facility administrator should not be required to have a high school diploma or a GED if the person has the knowledge and ability to conform to the applicable rules and laws relating to personal care.

Doug Blakley, State Ombudsman (Blakley): in general, the requirements for being an administrator need upgrading, as they are too lenient.

RESPONSE: The Department has considered these comments, but declines to amend the rule. A high school diploma or GED establishes some baseline of minimum knowledge, and satisfies the expectation that a person can read and write, which are essential functions of the administrator. The Department does not feel the requirement should be upgraded or downgraded, but will establish the required minimum. The statutes which establish personal care facilities have placed responsibility on the physician to certify initially, and then quarterly, that the category B facility is meeting the resident's needs. This high level of oversight means that an administrator may not need the same level of education and experience required of a licensed nursing home administrator. In addition, nursing home administrators must be licensed pursuant to §§ 37-9-101, et seq., MCA, and there are no similar licensing statutes for personal care facility administrators.

COMMENTS: 1(d) -- Don Sekora, Program Officer for the Department of Family Services (Sekora): End the sentence after the word "deception" and delete the rest. This rule, as written,

exposes vulnerable residents to the risk of becoming a victim. The Department of Family Services and its legal staff have determined that protecting vulnerable persons is a greater legal and ethical obligation than protecting specific job opportunities for persons convicted of crimes or having substantiated cases of abuse, neglect, or exploitation on their record. Allowing persons convicted of crimes to be licensed and failing to exclude persons convicted of abuse, neglect, or exploitation in the rules conflicts with section 1 and section 3(b) and also with rule IV section 5(d). Also, add the following as a separate item: "not be convicted of abuse, sexual abuse, neglect, or exploitation as defined in 52-3-803."
Blakley: This seems to be in indirect conflict with other requirements the Department is responsible for enforcing. The requirements should be tied to the Elder Abuse Act.

Hamiltons: We are unclear if no person convicted can ever serve as administrator, or if a person may serve as administrator if not on parole.

RESPONSE: The Department has considered these comments and believes that § 50-5-207, MCA, governs this issue and therefore no rule is required. For that reason, this portion of the rule has been deleted and the statutory provisions on the issue will properly govern.

COMMENT: 1(e) -- Hughes: Without licensing, certification, or testing procedures, there is no way to know if administrators "have knowledge of and the ability to conform to" applicable laws and rules governing the facility or "have knowledge of and the ability to deliver or direct the delivery" of appropriate care. The department should require a specific amount and type of training, education, or experience for category B facility administrators.

RESPONSE: The Department has carefully considered this comment and believes that requiring specific amounts and types of training, education, and experience is not necessary. The issue is whether the administrators are, in fact, capable of ensuring that the required care is given to residents, not whether a specific education level is present. In addition, the survey process will reveal an administrator's knowledge, or lack thereof, by inspecting for compliance with all rules and regulations. In addition, see the response to 1(b) above.

COMMENTS: 1(f) -- Hughes: Six hours of continuing education is not sufficient to maintain the skills required to administer a skilled nursing facility. Also, there is no base level of education required, so how is the education "continuing"? Six hours is required in only one of the areas listed, and there is a need to have knowledge in all areas listed.

Hamiltons: More than basic first aid should be required in (vii).

Connors: If there is an education requirement, there should be a corresponding license.

RESPONSE: As to Hughes' comment, the Department has considered this and agrees that administrators need to have knowledge in all the areas listed. However, the Department is unable to determine how many hours of continuing education the commentator believes would be appropriate. Therefore, the rule has not been amended to increase the continuing education requirements. However, if it appears at some time in the future that this requirement is not adequate, an amendment to the rule could be proposed. As to the comment that there is no base level of education so the education can not be "continuing," the Department's position is that the continuation of education is in the area of personal care knowledge and its many components, and no base line of education i.e., a baccalaureate degree or master's degree, is required to "continue" one's education.

As to Hamiltons' comment, the Department agrees and the rule has been amended accordingly.

As to Connors' comment, the Department is authorized to issue licenses for the facility only, not for an administrator. Therefore, the Department cannot issue a corresponding license.

COMMENT: **1(g)** -- Jan Overbaugh, Flor-Haven Personal Care Home (Overbaugh): Would the administrator receive a catalog stating what classes are offered and where and the price?

RESPONSE: It is the administrator's responsibility to seek out appropriate courses in the areas required and needed to improve and enhance the individual administrator's knowledge and skills. The Department does not coordinate this continuing education.

COMMENTS: **Subsection 4** -- Connors: A forty hour minimum work week on premises is petty and unenforceable. Is every nursing home administrator on duty forty hours a week?

Overbaugh: Can the combined hours of the administrator and the designated representative add up to 40 hours? Can there be more than 1 administrator and more than 1 designated representative?

RESPONSE: As to Connors' comment, the Department agrees that the administrator should not be required, by rule, to be on the premises forty hours a week. This is covered by Rule IV, which requires 24-hour staffing of a personal care facility. The rule has been amended accordingly.

As to Overbaugh's comments, the Department believes that there can be more than one administrator. As to the designated representative, this subsection is being deleted so no response is required.

COMMENT: **Subsection 5(a)**-- Lewis: Does the administrator of a category A facility need to be able to write if s/he can communicate? Is this an essential function or does it conflict with the ADA?

RESPONSE: The ability to read and write is an essential func-

tion of the administrator's position. The administrator must be able to document training, keep adequate records, and do a whole host of other functions which require, at a minimum, the ability to read and write.

COMMENT: Subsection 6 -- Hamiltons: Add "and/or resident's personal representative or responsible party."

RESPONSE: The Department agrees that this language is appropriate and the rule has been amended accordingly.

COMMENTS: Subsection 7 -- Hamiltons: Third-party providers must be compelled to allow said supervision.

Leisure Care: The administrator does not have the medical background to coordinate nursing care. Much of the nursing care will be provided by third party contract and the administrator should not be responsible for another agency's employee. The administrator could be responsible for documenting visits; however, the resident's right to privacy would be invaded if the facility must be involved in coordinating all nursing care.

Hughes: An administrator of a category A facility should never be involved in coordinating nursing personnel or services, as category A facilities have no statutory authority to be involved in nursing services. The statute simply allows category A residents to make arrangements with third parties, and all arrangements should be between the resident and the third party.

Ronald Gersack, Windward Place (Gersack): The facility should not be involved in third-party contracts.

RESPONSE: The Department has carefully considered all these comments, agrees that third-party contracts should not require the involvement of the administrator, and agrees with Leisure Care's comment that the administrator could be responsible for documenting visits. In addition, the Department agrees that an administrator in a category A facility should not coordinate nursing services. Therefore, the requirements of subsection 7 have been removed, and the only remaining requirement is that the category A facility administrator document skilled nursing services provided by a third-party, in order to allow the administrator to ensure that a category A resident does not receive nursing services for more than twenty consecutive days at a time.

COMMENT: 7(c) -- Bob Duncan: Nurses need to stay in the medical realm and not be involved in the administration of services. This rule should be amended to read "treatments and the delivery of nursing services."

RESPONSE: The Department has noted this comment; this subsection has been removed for the reasons set forth above.

COMMENT: 7(e) -- Hamiltons: Add alternatives when a resident's primary physician is unavailable.

RESPONSE: The Department has noted this comment; this subsection has been removed for the reasons set forth above.

COMMENTS: **7(f)** -- Hamiltons: Add "and/or representative/ responsible party."

Leisure Care: family members should be notified before the physician.

RESPONSE: The Department has noted these comments; this subsection has been removed for the reasons set forth above.

COMMENTS: **Subsection 8** -- Hamiltons: What if no appropriate beds are available in the area?

Leisure Care: Is it necessary to notify the physician when relocating the resident?

RESPONSE: As to Hamiltons' comment, it is the Department's position that, if a facility is unable to provide the necessary care required by a resident, that resident must be transferred. The Department is charged with ensuring the safety, health, and welfare of the public, and cannot write rules based on a local concern.

As to Leisure Care's comment, the Department believes it is appropriate that the resident's physician should be notified of a relocation so that the physician knows where his/her patient is.

COMMENT: **Subsection 9** -- Blakley: You should set a minimum number of hours of training for aides. Because of the pivotal relationship to delivering services, this is one area in which setting minimums makes sense. At least 16 hours of training should be required.

Hughes: This requires the administrator to provide orientation and training to staff, but the administrator may not be the best person to train staff. This should be a facility requirement.

Ash: The administrator trains employees individually and the department has licensing and enforcement control over the facility, not the administration or employees.

RESPONSE: As to Blakley's comment, the Department has declined to set a minimum number of required training hours, because more time may be required to adequately train staff. For that reason, the rules require that staff is adequately trained in all areas to meet the needs of residents, rather than setting a minimum number of training hours.

As to Hughes' comment, the Department agrees and has amended the rule accordingly.

As to Ash's comment, the Department notes that the administrator is responsible for the operation of the facility and for ensuring compliance with all rules and regulations, and the staff is required to follow rules governing the facility. If compliance with all rules is not present, the facility license is jeopardized.

COMMENT: **9(d)** -- Leisure Care: What is meant by "emotional problems of illness?" Is this training on common geriatric illnesses or the emotions related to loss of physical capabilities?

RESPONSE: The Department takes note of this comment and believes the language is vague. For that reason, this requirement has been deleted and the rule has been amended accordingly.

COMMENTS: **9(g)** -- Leisure Care: A facility is not licensed to train in basic first aid, which should be taught by a certified instructor. The rule should be reworded to say that direct care staff should be trained and certified in basic first aid.

Ellery: Add "CPR" after basic first aid.

RESPONSE: As to both comments, the Department agrees and the rule has been amended accordingly.

COMMENT: **Subsections 10-16** -- Hughes: The rules should be amended to read "the facility will" rather than "the administrator must" because the department has licensing and enforcement control over the facility, not the administrator.

RESPONSE: The Department has reviewed this comment and believes that the language, as proposed, is adequate. The administrator is responsible for the operation of the facility and for ensuring compliance with all rules and regulations. If compliance is not present, the facility license is jeopardized.

COMMENTS: **Subsection 12** -- Sekora: The words "and the nearest peace officer, law enforcement agency, or protective services agency" should be deleted in accordance with § 52-3-811, MCA.

Hughes: This should simply refer to the Montana Elder Abuse Act.

RESPONSE: The Department agrees with both commentators that the Montana Elder and Developmentally Disabled Abuse Prevention Act governs this issue and has amended the rule accordingly.

COMMENTS: **Subsection 13** -- Connors: Are nursing home residents or hospital patients allowed access to corporate policy books?

Leisure Care: Is it necessary for the facility to make its complete policy and procedure manual available to residents? Much of the manual contains confidential information specific to operating the business, so what, if any, sections of the manual are pertinent for the resident to see?

RESPONSE: The Department has carefully reviewed these comments and believes that the rule, as written, is appropriate. Not every aspect of the business must be included in the policies and procedures manual, but residents have a right to know the policies and procedures governing their care. If information on certain operating aspects of the business is considered

private, the facility may consider, after consultation with legal counsel, not including that information in the manual. The rules governing nursing homes and hospitals are not relevant, as these are personal care facility rules.

COMMENTS: Subsection 14 -- Hamiltons: Define "adequate."

Connors: This is unnecessary because other regulations are already in place for tax purposes and benefit programs, but other agencies give a facility a period of time to prepare the list and send it in, and do not expect it to be ready and waiting at a moment's notice.

RESPONSE: As to Hamiltons' comment, the term is vague and has been deleted from the rule, and the rule has been amended accordingly.

As to Connors' comment, this rule encompasses a number of issues. The Department believes having ready access to this information through the facility is required to adequately investigate allegations of abuse, neglect, or exploitation. In addition, this information is necessary for surveyors to fully and adequately inspect the facility, as discussions with employees often are necessary to the process. In addition, a disaster plan typically contains a "calling tree" for personnel in the event of a disaster, which requires records of staff telephone numbers and addresses. Maintaining these records is not burdensome, as they are normally kept in the everyday course of business, and the information in the records could potentially be very important. For those reasons, the rule has not been amended on that issue.

COMMENT: Subsection 15 -- Hughes: This should require facilities to comply with Montana's long term care facility resident rights statutes, as personal care facilities are covered there.

RESPONSE: The Department agrees and has amended the rule accordingly.

COMMENTS: Subsection 16 -- Leisure Care: Limiting residents with mechanical ambulation devices to the ground floor conflicts with the Fair Housing Act.

Lewis: If there is adequate access to a second level there is no reason not to house a resident above ground floor. The wording should be amended to read: "The administrator must ensure that a resident who is ambulatory with medical assistance has access to and from the facility as required by the ADA."

Bob Westerman, Cambridge Court and the Rainbow (Westerman): This conflicts with the federal Fair Housing Amendment Act and the Americans with Disabilities Act. Residing on any floor above ground level should be based on a resident's ability to self-evacuate the building, not on the presence of an assisted device.

RESPONSE: The Department has considered these comments and

agrees that the issue is a resident's ability to self-evacuate. Therefore, the rule has been amended accordingly.

RULE IV

COMMENTS: Subsection 1 -- Hughes: The department can only prescribe qualifications and training of staff for category B facilities.

Sekora: Add the following as a separate item: "not be convicted of abuse, sexual abuse, neglect, or exploitation as defined in 52-3-803."

RESPONSE: As to Hughes' comment, the Department has broad statutory rulemaking authority to promulgate and adopt rules pertaining to health care facilities. Specifically, § 50-5-103, MCA, provides that "[t]he department shall promulgate and adopt rules and minimum standards for implementation of parts 1 and 2." Section 50-5-226, MCA, authorizes the Department to adopt rules relating to the staffing of a category A facility, and § 50-5-227, MCA, also gives the department authority to adopt standards for licensing and operating personal care facilities. Given these three grants of rulemaking authority, the Department's position remains that it has clear statutory authority to adopt rules fully implementing all of parts 1 and 2 of the health facility statutes and rules governing the operation of personal care facilities. This necessarily requires adopting rules regarding category A facility staff.

As to Sekora's comment, the Department agrees with the nature of the comment and has amended the rule to incorporate a violation of the Montana Elder and Developmentally Disabled Abuse Prevention Act.

COMMENTS: 1(a) -- Hamiltons: Define "evidence."

Connors: What is "evidence" of "suitable character?"

RESPONSE: The Department has reviewed these comments and believes the language is vague. For that reason, the language has been stricken and the rule amended accordingly.

COMMENT: 1(c) -- Hughes: May conflict with the Americans with Disabilities Act, which governs the issue. This should require that employees be able to perform their functions with reasonable skill and safety. It should not discuss specific medical conditions, and talks about the ability to perform "personal care services," which not every employee does.

RESPONSE: The Department acknowledges this comment and has amended the rule accordingly.

COMMENTS: 1(e) -- Hughes: § 50-5-207, MCA, addresses this issue and the rule may be in conflict with the statute.

Hamiltons: Administrators must be granted access to official records to confirm status.

RESPONSE: As to Hughes' comment, the Department does not be-

lieve the rule conflicts with § 50-5-207, MCA, because that statute only applies to "[t]he applicant [for a health care facility license] or any person managing it. . . ." By its language, the statute does not apply to staff. Therefore, the Department has determined that such language is necessary to adequately protect the public health, safety, and welfare.

As to Hamiltons' comment, the Department notes that administrators can access the abuse registry for potential employees who are certified nurse aides. As to potential nursing employees, the administrator may be able to obtain relevant information through the Montana Board of Nursing. Records of conviction in justice and district courts are available through the county, and records of convictions in municipal courts are available through the city. As to accessing other information, the administrator should consult with legal counsel to determine an appropriate way to obtain this information, perhaps through the use of a release.

COMMENTS: Subsection 2 -- Hughes: Direct care staff should be required to complete the seventy-five hour training and competency evaluation program required of nurse aides, so that residents of category B facilities, which can provide skilled care, receive care from properly trained people. At the very least, the rule should include language that direct care staff not perform any service for which they have not received appropriate training by an appropriate instructor.

Lewis: Add the following language to the last sentence of the first paragraph: "at a minimum, if the service is provided by the facility."

RESPONSE: As to Hughes' comment, the Department notes that the seventy-five hour training program is a federal requirement and is not provided for under state law. Mandating such a program is appropriate for the legislature, but not appropriate by rule. However, the Department agrees that direct care staff should not perform any service for which they have not received appropriate training, and have added (f) to subsection 5 to incorporate this requirement.

As to Lewis' comment, the Department disagrees, and believes that the items listed are basic skills all direct care staff should have, and are personal services all facilities must provide.

COMMENT: 2(a-i) -- Hamiltons: Orientation should be specific to the job an individual was hired for (e.g., cook training for bowel care).

RESPONSE: The rule specifically states that only direct care staff must receive this orientation, so there will be no need for a cook to receive training in bowel care, unless the cook also provides direct care.

COMMENT: 2(f) -- Leisure Care: What is meant by training in "methods of making residents physically comfortable?"

RESPONSE: The Department believes this requirement is vague and has deleted the same from the rule.

COMMENT: **2(g)** -- Connors: Should every employee be trained in diet planning? Are all nursing home workers so trained?

RESPONSE: It is not necessary that all employees be trained in diet planning. Again, only direct care staff must receive orientation in this area. The Department does recognize that category A facility staff do not need this training, and have amended the rule accordingly. Whether nursing home workers are so trained is irrelevant, as these are personal care rules.

COMMENT AND RESPONSE: In responding to a comment made by Hughes to Rule XXI, the Department recognizes that category A facility staff do not need training in bowel and bladder care. Therefore, the rule has been amended to require training in this area only for direct care staff in category B facilities.

COMMENT: **Subsection 3** -- Blakley: The "occasional" direct care rule will be difficult to enforce because the term is not defined. Standards for volunteers are higher, and the same standard should apply to any employee who provides direct care. The rule should be changed to read that anyone providing any direct care must have training prior to providing any such care.

RESPONSE: The Department agrees and has removed the word "occasional" from the rule and amended the rule to state that any employee providing any direct care must be provided the required orientation and training.

COMMENTS: **Subsection 4** -- Hamiltons: Why is prior experience required? Can you hire someone with no prior experience?

Connors: What health records should the facility have to maintain? It may be a violation of privacy to require such records. What purpose would keeping such records serve?

Overbaugh: If the employee does not have previous experience, can they be hired if they are provided orientation?

Leisure Care: Health records on all employees is not necessary, and may be an invasion of privacy. Tuberculosis testing and documentation of results is appropriate.

RESPONSE: As to Hamiltons' and Overbaugh's comments, the rule does not require an employee to have prior experience. However, if they do, this experience should be documented in their personnel record. In addition, all employees must receive orientation and training as indicated by the rule.

As to Connors' and Leisure Care's comments, the Department agrees that the facility should not be required to maintain health records, and has amended the rule to indicate that the tuberculosis records are the only ones which are required.

COMMENT: **Subsection 5(a)** -- Leisure Care: Do all staff members

need to know each resident's health condition? This seems to be an invasion of privacy -- health conditions and updates should be known only by direct care staff and the administrator.

RESPONSE: The Department agrees that only direct care staff must have this knowledge and has amended the rule accordingly.

COMMENT: **5(b)(c)** -- Lewis: There is a concern about the potential interpretation of the terms "sufficient staff" and "adequate relief personnel." The facility should be required to designate by policy the number of staff needed on duty to provide proper resident care. If the terms are left to the judgment of a surveyor, the rule should be specific as to the types of employees and the ratio of employees to resident required. Otherwise, facilities may be subjected to the arbitrary judgment of the surveyors.

RESPONSE: The Department has carefully reviewed this comment, and does not believe that setting specific ratios of staff to residents is necessary. Because of the wide divergence of individual resident characteristics and needs, it is difficult to state that a ratio adequate for one facility would be adequate for another. The facility is free to establish policies and procedures which indicate the necessary ratios or numbers of staff, so long as these numbers are sufficient to ensure that all required services are provided.

COMMENT: **Subsection 6** -- Hughes: Volunteer training is more stringent than nursing home requirements and is not appropriate.

RESPONSE: The Department has considered this comment, but believes that requiring volunteers providing direct care to residents to complete the orientation and training is appropriate. Nursing home requirements are not relevant to personal care facilities.

COMMENT: **6(a)** -- Connors: No facility should have to provide a staff member to closely supervise and babysit a volunteer who wants to chat with a resident or read them a story. This requirement is a little extreme.

RESPONSE: The Department has considered this comment, and notes that the rule does not indicate what level of supervision is required of volunteers; obviously, the level of supervision required will be commensurate with what service the volunteer is providing. For example, if a volunteer is providing direct care, some supervision is required. However, it is not anticipated that close supervision would be required for a volunteer who is talking or reading to a resident.

RULE V

COMMENTS: **Subsections 1-3** -- Hughes: Does the department intend

to apply standards similar to nursing facility standards to category A facilities whose residents are higher functioning and more independent?

Lewis: It appears the objective is to ensure that activities are available rather than to mandate the facility to provide the activities. Permissive language should be used, such as "the facility offer or make available" rather than "shall provide," so that residents have a choice whether to participate.

RESPONSE: As to Hughes' comment, the Department is not applying similar standards. § 50-5-225, MCA, requires that a facility provide recreational activities to residents. However, residents are not mandated to participate, and are free to participate or not.

As to Lewis' comment, the provision of recreational activities is required but residents always have a choice to participate.

RULE VI

COMMENT: **Subsection 2(a)** -- Hamiltons: This appears to be a simplified form of 2(c).

RESPONSE: The Department agrees that these two sections are confusing. Subsection 2(c) has been amended and moved to position (a), and subsection 2(a) has been moved to subsection 3 to clearly indicate the intent of the rule.

COMMENTS: **Subsection 4** -- Hamiltons: The last sentence places residents in smaller facilities at risk if there is no room to install equipment, and a resident must be allowed to use commercial equipment, even with supervision.

Leisure Care: This should be reworded to state that the facility will provide personal laundry assistance to residents who chose to receive assistance. The marking of clothing is an institutional approach -- stating that the facility is responsible for the return of clothing would suffice.

Hughes: It is difficult to determine whether residents will be allowed to use the laundry facility used to do facility laundry or whether a separate area must be provided. Statutorily, facilities are required to provide laundry services to residents, but they are not required to provide assistance for those wishing to do their own laundry. This should be an optional service for facilities to offer but should not be required.

Gersack: Residents should be allowed to do their own laundry if they choose to do so.

RESPONSE: As to all comments, the Department agrees and has amended the rule to make the assistance optional, by changing the word "must" to "may."

As to the second portion of Leisure Care's comment, the Department agrees and has amended the rule as requested.

As to Gersack's comment, the Department believes the rule

provides this flexibility.

RULE VII

COMMENT: Subsection 1(b) -- Thomas Towe, Montana State Senator (Towe): New construction should allow for the space set forth in this rule, but existing homes should be allowed to have 80 square feet for one bed, 120 square feet for two beds, and 160 square feet for three beds.

RESPONSE: The Department has included a physical plant waiver in subsection 7 which allows existing facilities who do not meet this standard to apply for a waiver.

COMMENT: 1(d) -- Overbaugh: We have a bathroom off the kitchen and would like to be grandfathered a waiver for this.

RESPONSE: The Department has included a provision to allow facilities to apply for a waiver.

COMMENT: Subsection 2 -- Connors: Since when is a window not considered adequate ventilation for a bathroom?

RESPONSE: The Department has considered this comment and agrees that, in residential settings, a window may provide adequate ventilation. The rule has been amended accordingly.

COMMENTS: Subsection 4(f) -- Hamiltons: Mirrors should be allowed to be a secured free standing floor model.

Hughes: The rule should state that the mirror must be placed in a convenient location.

RESPONSE: The Department has considered both these comments and has amended the rule in a manner which it believes takes into account both comments.

COMMENT: Subsection 7 -- Hughes: The waiver should only be granted if the department determines that the health, welfare, and safety of the resident can be met by an alternative means.

RESPONSE: The Department agrees with this comment in substance and has amended the rule to respond to the commentator's concerns.

COMMENT: Other Comments on Rule VI-- Hughes: There are no provisions relating to sprinklers, smoke detectors, and other fire and life safety issues, which should be dealt with, especially for category B facilities, who may have bedridden or non-ambulatory patients. Also, some provision should be made with respect to arrangements for emergency power in the case of a power outage, due to residents who may be on oxygen.

RESPONSE: Under Rule XX, fire issues are under the jurisdiction of the local authorities, and those authorities set the requirements for the items mentioned. The Department agrees that

some provision should be made with respect to a standby supply of oxygen, and has amended rule IX accordingly.

RULE VIII

COMMENT: Subsection 1 -- Hughes: Just refer to the maintenance of pest control, sanitation, and infection control standards required in other settings.

RESPONSE: The Department has considered this comment, and has amended the rule to reflect the current language being used by the Department as it amends other health facility rules.

COMMENT: Subsection 2 -- Leisure Care: Requiring soap and towels by the sink in each apartment's restroom is invasive to the rights of the residents to set up their living space as they choose.

RESPONSE: The Department has considered this comment and agrees that, in individual, private living areas, a resident should be able to set up the living space as s/he chooses. The rule has been amended to apply only to commonly-shared areas.

COMMENT: Subsection 3(d) -- Connors: It is an invasion of personal choice to have the hall lights on all night long. If a resident needs light at night to traverse a hallway, they can turn on a light. If not, they should not be forced to endure having lights on all night long.

RESPONSE: The Department has carefully considered this comment, but believes that five foot candles of light at the floor is extremely minimal and is commonly supplied by a night light. The Department has amended subsection (3) itself to remove the reference to hallways, so that the rule is not interpreted to require ten foot candles of light in the hallways at all times.

RULE X

COMMENT: Subsection 1 -- Hughes: Delete the reference to safety and comfort of employees. The department is not charged with ensuring the comfort of facility employees, and what is comfortable for a resident is not necessarily comfortable for an employee.

RESPONSE: The Department agrees that the facility is not required to make the facility "comfortable" for its employees, and has amended the rule accordingly to delete this reference. However, the Department does not agree that the facility is not required to provide a "safe" workplace for its employees, and has not removed this requirement.

COMMENT: Subsection 2 -- Hamiltons: Primary and secondary egress routes in accordance with the disaster plan should be posted in resident rooms.

RESPONSE: In response to this comment, the Department agrees

that facilities are free to post these routes if they choose. In addition, the rule has been amended to require that the disaster plan be available to residents, and the evacuation routes will be a part of this disaster plan.

COMMENTS: Subsection 4 -- Hamiltons: Allow for duplicate supplies in multiple locations "in at least one location".

Leisure Care: Why must there only be one first aid supply location? May each floor of a facility contain a first aid kit if they choose?

RESPONSE: The Department agrees with both comments and has amended the rule to require these supplies to be stocked in at least one location.

COMMENT: Subsection 7 -- Hughes: Just state that the facility be clean and sanitary, and do not discuss the availability of specific supplies. The facility might hire an outside cleaning service to do the cleaning, and the number and types of supplies is not an issue so long as the facility is clean and sanitary.

RESPONSE: The Department has considered this comment, but believes that the rule provides appropriate guidance as to cleaning while protecting the health of the residents, and has declined to amend the same. However, the Department agrees that a facility is allowed to use an outside cleaning service to clean the facility, and that service will use products specified by the facility.

COMMENT: 7(d) -- Hughes: This indicates that there will be no trash receptacle in the kitchen, and elsewhere in the rules there is a provision that there be a trash receptacle at every sink. Perhaps the language should prohibit "garbage" in the kitchen.

RESPONSE: The Department agrees that this rule is confusing and has amended the same to indicate that a facility may not store garbage for final disposal in the areas indicated.

COMMENTS: Subsection 8 -- Leisure Care: Can residents provide their own linen if they choose?

Hughes: Residents may choose to bring their own linen to the facility.

RESPONSE: The Department agrees with both comments and has amended the rule accordingly.

COMMENTS: Subsection 10 -- Hamiltons: "all repairs" is too excessive, e.g., changing lightbulbs has to be documented?

Hughes: This is unnecessary, as the issue is not whether there is a record of repairs, but whether the facility is in fact in good repair.

RESPONSE: The Department agrees with these comments and has deleted this requirement from the rule.

COMMENTS: **Subsection 11** -- Connors: It should be enough that a facility's heat system can maintain the 75-80 degree temperature in the bedrooms and living areas, and after that, it is up to the individual resident to lower or raise the heat as they wish.

Leisure Care: Maintaining a minimum temperature of 75 degrees from October to March is extremely expensive and may not be necessary. A more realistic point is 70 degrees. Also, temperatures should be allowed to vary from daylight hours to nighttime hours.

Hughes: This fails to take resident preferences into account, and should refer to maintaining "comfortable" temperatures and state that the temperature cannot fall below a certain temperature or above a certain temperature.

Gersack: The resident should be able to choose the room temperature; it should not be mandated.

RESPONSE: The Department agrees with these comments and has amended the rule in such a way as to take into consideration all comments received. The amended rule reflects a more realistic range which allows resident preferences to govern the temperature.

RULE XII

COMMENT: **Subsection 1** -- Hughes: It should refer to communicable disease instead of just tuberculosis.

RESPONSE: The Department has considered this comment, but disagrees that the rule should be amended. There are a number of communicable diseases, such as sexually transmitted diseases, which an individual has the right to keep private. The only communicable disease requiring documentation is tuberculosis.

COMMENTS: **Subsection 2** -- Hamiltons and Hughes: Can nurses document the absence of tuberculosis?

Hughes: It should refer to communicable disease instead of just tuberculosis.

RESPONSE: The Department has reviewed these comments and amended the rule to state that a licensed health care professional may document the absence of tuberculosis. If this documenting is in the scope of a particular professional's license, the Department would accept such documentation.

As to the second Hughes' comment, the Department declines to amend the rule for the reasons set forth in the response to subsection 1 of this rule.

COMMENTS: **Subsection 3(a)** -- Hamiltons: The administrator is making a medical decision that falls within a physician's jurisdiction.

Connors: Does this mean an employee must not come to work

with a cold?

RESPONSE: As to Hamiltons' comment, the Department disagrees that the administrator is making a medical decision. Rather, the administrator is charged with following established policies and procedures which will govern the issue. The facility always has the right to consult a physician when developing policies and procedures or when interpreting the same.

As to Connors' comment, a facility is free to develop its own policies and procedures on this issue. If, however, residents of a facility are susceptible to upper respiratory infections, sending an ill employee home may be the appropriate policy.

COMMENT: Other Comments on Rule XII -- Hughes: This rule should refer to infection control procedures required by the Center for Disease Control, and category B facilities should be required to follow the same infection control procedures as other health care facilities.

RESPONSE: The Department has carefully considered this comment but declines to amend the rule which, as proposed, sets out the minimum standards a facility must comply with and which the Department has determined to be minimally sufficient. However, the facility is free to adopt universal precautions or other CDC recommendations through the use of its policies and procedures. In addition, a facility can tailor its policies and procedures on infection control to meet the needs of the particular facility and its residents.

RULE XIII

COMMENTS: Subsection 1 -- Leisure Care: The definition is not clear and needs to be clarified. "Medically-related social services" seems to indicate the need for physical, occupational, and speech therapy, which would require the services of a licensed health care professional and would increase the cost.

Hughes: Category A facilities should not be required to provide medically related social services. With respect to category B facilities, qualifications of staff providing these services should be included.

Lewis: Social services must be available to the residents if needed, but staff should not be required to provide the services. Amend the rule to state "the personal care facility shall have a referral source for these residents in need of medically related social services."

Westerman: The definition of social services should be clarified, as "medically related social services" suggests physical, occupational, and speech therapies. Does a category A facility have to staff for this?

Gersack: The resident should be able to choose whether to receive social services.

RESPONSE: As to Leisure Care's, Hughes', and Westerman's comments, the Department agrees and has removed the language "med-

ically-related" both from this rule and from the definition found in Rule II.

As to the second portion of Hughes' comment, the Department has removed the language "medically-related" and thus does not believe that qualifications for staff in category B facilities need to be included. The scope and range of services provided in all facilities will depend in large part on the individual needs and characteristics of the facility's residents, and each facility is required to meet the resident's individual needs. Therefore, the facilities will have to determine, through policy, what staff are adequate to meet their residents' needs.

As to Lewis' and Gersack's comments, the personal care facility is required to provide social services, but the rule does not require a resident to participate or receive the services. If the facility elects to meet this requirement by depending on referrals, that may be an option, so long as each resident is having his/her individual needs met. The rule does not require that specific staff be hired for this purpose, but rather requires that the facility ensure that the appropriate services are provided.

RULE XIV

COMMENT: Subsection 1 -- Leisure Care: The facility should have the right to decide if it will allow the residents to keep pets.

RESPONSE: The Department notes that the rule specifically states "[u]nless the facility disallows it. . . ." Therefore, the facility does have the right to decide, by policy, whether pets will be allowed in the facility.

COMMENTS: 1(e) -- Hughes: Delete this rule, because if pets are clean, disease-free, in appropriate enclosures, and have current vaccinations, it shouldn't matter what kind of pet it is.

Lewis: Is it necessary to limit the type of pet as long as the environment is safe and clean?

RESPONSE: The Department agrees with these comments, and this language has been removed. The facility will retain the authority to decide what pets, if any, will be allowed in the facility.

RULE XV

COMMENT: Subsection 1 -- Hughes: The phrase "the food service must establish" should read "the facility must establish."

RESPONSE: The Department acknowledges this comment and the rule has been amended accordingly.

COMMENT: 1(b) -- Lewis: This is restrictive, as some residents have gardens and preserve their own food. The wording should state that home canned goods be labeled and dated.

RESPONSE: The Department disagrees with this comment. The facility cannot use home canned foods to serve to residents. However, residents may use home canned food in their own individual living areas, so long as it is not the facility which is serving and/or providing the canned food.

COMMENT: **1(d)** -- Connors: We have enough sense to know when perishables are too old, and no amount of writing dates will help.

RESPONSE: The Department notes this comment, but believes this requirement is reasonable to guarantee that all staff members and residents are aware of the age of the food. Not every person opening a refrigerator will know when a particular perishable was prepared, so labeling is required.

COMMENTS: **Subsection 2** -- Hughes: This requires that no more than 14 hours can pass between the evening meal and breakfast. In a category A facility, this should be a matter of resident choice. Also, the facility should not have to provide 3 meals to every resident, as a resident may wish to fix their own meal or go out. They should be able to contract for the services they want as a matter of choosing which services to buy.

Connors: If the facility is to provide therapeutic diets more elaborate than low-salt, low-sugar, or high potassium diets already provided upon request, the State will have to provide the facility with reasonable remuneration for such specialty diets.

Gersack: A resident should have a choice when to eat and should not be required to eat twice in a fourteen hour span.

RESPONSE: As to Hughes' and Gersack's comments, the Department agrees that when to eat should be a matter of resident choice, especially in a category A facility. The rule has been amended to state that at least three meals must be offered daily, with no more than fourteen hours between the evening and morning meal. With that amendment, the facility must offer the meal, and whether a resident takes that meal is up to that individual's preference. In addition, a resident can then contract for the meals that s/he wants.

As to Connors' comment, the Department notes the same but is not the agency which provides reimbursement, so no further response is required.

COMMENTS: **Subsection 4** -- Hughes: This should not apply to category A facilities, as these residents may not need to be observed to determine how much food is eaten.

Connors: A resident has the right to miss an occasional meal. If there is no medical reason why it is important to document the loss of a single meal, a single missed meal on occasion is not noteworthy for the average individual.

RESPONSE: The Department agrees with these comments, and has amended the rule to state that documentation must occur only if

there is a medical reason or it is otherwise appropriate to document a missed meal.

COMMENT: **Subsection 12** -- Hughes: Smoking should not be banned in eating areas, as it should be a matter of resident choice and facility policy.

RESPONSE: The Department agrees with this comment, and has removed the language regarding smoking in service areas. This gives a facility the ability to establish policies regarding smoking in service areas. However, § 50-40-106, MCA, prohibits smoking in all kitchens in health care facilities, so the words "and kitchen" have been added to the rule.

COMMENT: **Other Comments on Rule XV** -- Hughes: Category B facilities should be required to use a dietician.

RESPONSE: The Department has considered this comment, but believes mandating this requirement is appropriately done by the legislature. Facilities are free to utilize the services of a dietician, but the Department does not believe mandating that a category B facility use a dietician is supportable. However, the facility is still required to meet all the needs, including dietetic, of each resident.

RULE XVI

COMMENTS: **Subsection 1** -- Blakley: This rule should mention the requirement that a facility must meet all applicable state and federal requirements. Amend the rule to read as follows: (1) The facility shall adopt a statement of resident rights that includes, at a minimum, the statement of applicable federal and state resident rights found at § 50-5-1104, MCA, and must post such statement in accordance with § 50-5-1105, MCA.

Hughes: This rule should refer to the Montana resident rights statute.

RESPONSE: The Department agrees that the issue is governed by Montana's resident rights statute. Therefore, the rule has been amended to refer to these statutory provisions.

COMMENT: **Subsection 2** -- Leisure Care: A personal care facility is not a medical facility with trained, licensed health care professionals, so is it realistic to hold the staff accountable for making such decisions as to when a person is in cardiac arrest in order to uphold advanced directives?

RESPONSE: The Department has reviewed this comment, and believes it is appropriate that every direct care staff member be aware if a resident has an advanced directive and what that directive means.

COMMENTS: **Other Comments on Rule XVI** -- Lewis: § 50-5-1104, MCA, states that residents must maintain decision making rights in all aspects of health care. The department should ask, with

each rule, if the rule conflicts with resident rights.

Ash: This provision should be adopted and used, not just posted. The rights should be included in any decision pertaining to the resident's care and should be discussed with the doctor and family members.

RESPONSE: The Department acknowledges these comments, but does not believe responses are required. They are statements of policy but do not speak to the substance of the rule.

RULE XVII

COMMENT: **Subsection 1(a)** -- Blakley: Facilities should be required to determine whether a resident has any health care decision making instruments in effect. This is fundamental information facilities need to know in making decisions, planning care, and safeguarding resident rights.

RESPONSE: The Department agrees and has amended the rule accordingly.

COMMENT AND RESPONSE: **Subsection 2** -- Upon amending the proposed rules and responding to the comments, particularly those made by Senator Towe, the Department realized that an error was made in the appeal process found in this subsection. Section 50-5-226, MCA, provides an appeal process for prospective residents and residents of category A facilities who are either rejected or relocated because they are no longer appropriate for the A facility (i.e., they fall into the definition of a category B resident). In addition, the statute provides that a facility can appeal a relocation decision based upon a screening made by the Department. For those reasons, the language in this subsection has been amended to provide for all the appeals contemplated by the statute.

COMMENT: **Subsection 3** -- Hughes: The department should not require an admission agreement, which is beyond the statutory authorization for rulemaking. The department can make rules for an application or placement procedure.

RESPONSE: The Department has broad statutory rulemaking authority to promulgate and adopt rules pertaining to health care facilities. Specifically, § 50-5-103, MCA, provides that "[t]he department shall promulgate and adopt rules and minimum standards for implementation of parts 1 and 2." Section 50-5-226, MCA, authorizes the Department to adopt rules relating to the application or placement procedures of a facility, and § 50-5-227, MCA, also gives the department authority to adopt standards for licensing and the operation of personal care facilities. Given these three grants of rulemaking authority, the Department's position remains that it has clear statutory authority to adopt rules fully implementing all of parts 1 and 2 of the health facility statutes and rules governing the operation of personal care facilities. This necessarily requires adopting rules regarding application and placement

procedures, and the Department has determined that an admission agreement is an appropriate component of these procedures.

COMMENT: **3(b)(c)** -- Hamiltons: This will necessitate a new agreement with each price change, so price lists should be separate from the agreement.

RESPONSE: The Department has reviewed this comment, but disagrees that a price change will necessitate a new agreement. An addendum to the original agreement would satisfy this rule.

COMMENT: **3(f)** -- Blakley: This rule should require a facility to state its policy regarding refunds. Problems relating to refunds are a frequent source of complaints in personal care homes. The language would not require facilities to give refunds, but would require the facilities to inform residents in writing, in advance, what the policies are.

RESPONSE: The Department agrees and has amended the rule accordingly.

COMMENT: **Other Comments on Rule XVII** -- Hughes: Subsections 3(b)(c)(e)(f), 4, 5, and 6 go beyond statutory intent.

RESPONSE: The Department has reviewed this comment but disagrees; please see the response to subsection 3 above.

RULE XVIII

COMMENTS: **Subsection 2(b)** -- Overbaugh: Do we need a physician's certification for category A residents?

Hughes: Certification statements only applies to category A facilities.

RESPONSE: As to both comments, § 50-5-226(4), MCA, specifically states that residents of both category A and B facilities must have a certification statement. This rule applies to both categories of facility.

COMMENT: **Subsection 3(a)** -- Hughes: This refers to administration of medication, and category A facilities are not allowed do this.

RESPONSE: The Department agrees that category A facilities are not allowed to administer medications, but are still required to keep a record of medications self-administered by each resident. Some requirements of Rule XIX regarding the medication administration record have been amended in response to this comment and others regarding this issue.

COMMENTS: **3(b)** -- Leisure Care: A resident maintains the right to contract with a third party without notifying management, so it is unrealistic to require the facility to be liable for maintaining this information. Revise the rule to state: "third-party agreements, if any, upon notification to manage-

ment, signed and dated."

Hughes: This should not apply to category A facilities. Third party agreements are between the client and a separate agency and the facility should not be involved or keep records of such agreements.

RESPONSE: The Department has considered both comments and agrees in part. Category A residents may only receive skilled nursing services by a third-party provider for twenty consecutive days at a time. If more service is needed, the resident is no longer appropriate for an A facility. For that reason, a facility must know when a category A resident is receiving skilled nursing services. The rule has been amended to require a category A facility to keep records of third-party skilled nursing services provided to each resident. The facility is not required to have the agreements, and does not have to document other third-party services. The Department believes this is an adequate compromise between a facility's statutory duties and a resident's right to privacy.

COMMENTS: **3(d)** -- Leisure Care: If the resident has an unstable weight or health concern centered around eating, requiring quarterly weight checks is appropriate. Otherwise, a resident's right to privacy supersedes this concern, and weight checks should be optional, taking place when the resident or physician requests one.

Westerman: If a resident has an unstable weight or health concerns centered around eating, then a weight check is appropriate. Otherwise, a weight check should be optional.

Gersack: Weight checks are unreasonable and conflict with the idea of independent living.

RESPONSE: The Department agrees with these comments and has amended the rule to require weight checks only if a resident and his/her licensed health care professional determines such a weight check is necessary.

COMMENT: **3(e)** -- Leisure Care: Requesting information about a resident must be balanced against a resident's right to privacy. Food preferences, special interests, and hobbies should be information that is volunteered by the resident, not required by the facility.

RESPONSE: The Department agrees and has modified the rule to state that a facility must keep record of this information only if a resident voluntarily discloses the information.

COMMENT: **3(g)** -- Leisure Care: Progress notes should be made quarterly and as needed for any changes in status, instead of every thirty days. More frequent documentation may be appropriate for a category B facility.

RESPONSE: The Department agrees and has amended the rule to require quarterly progress notes.

COMMENT: **3(h)** -- Hughes: This requires a care plan for all residents, and not all category A residents require care plans.

RESPONSE: The Department agrees and has amended the rule to require care plans for all category B residents and category A residents only if a care plan is necessary or appropriate.

COMMENT: **3(k)** -- Hughes: This should not apply to category A facilities. Third party agreements are between the client and a separate agency and the facility should not be involved or keep records of such agreements.

RESPONSE: The Department agrees, but also recognizes that a category A facility must maintain records of third-party skilled nursing services. This subsection has been deleted, as subsection (b), as amended above, adequately addresses Departmental concerns.

RULE XIX

COMMENT: **Subsection 1(d)** -- Hamiltons: These temperatures may not meet with the manufacturer's specifications, putting the resident at risk -- change to "within the temperature range specified by the manufacturer."

RESPONSE: The Department agrees and has amended the rule as requested.

COMMENT: **Subsection 2(b)** -- Leisure Care: As currently stated, the rule reads that a licensed health care professional staff member may not provide assistance to residents with medication. This rule should be rewritten to state than an unlicensed health care professional may provide medication assistance. Also, 2(c) assumes that all medication is dispensed from the pharmacy into bottles. What about bubble packs -- are they allowed?

RESPONSE: The Department has reviewed this comment, but does not agree that the rule reads as stated. Any person, licensed or unlicensed, can provide the assistance as outlined. The Department does agree that bubble packs are allowed.

COMMENTS: **Subsection 3** -- Leisure Care: If the facility has a licensed health care professional on staff, may that person provide this care? The rule should be amended to strike the requirement of working under third-party contract.

Hughes: This allows health care professionals to perform nursing tasks, and the proposed definition excludes LPNs. Some of the tasks discussed in this rule can be performed by LPNs, so this rule should be clarified.

RESPONSE: As to Leisure Care's comment, the rule specifically uses the language "working under third-party contract with a resident or employed by the facility." Therefore, a staff member could provide the care. The Department disagrees with

the second portion of the comment, as there is no requirement that the professional be working under third-party contract.

As to Hughes' comment, the Department does not believe that LPNs are excluded from practicing within the scope of their license, which requires an LPN to work under the supervision of one of the professionals.

COMMENT: **3(b)** -- Ash: These require nursing judgment and skills; how will unlicensed people be able to do these things?

RESPONSE: An unlicensed person may not provide these services, as they are specifically within the scope of a licensed health care professional.

COMMENT: **Subsection 5(b)** -- Hughes: These require nursing judgment and skills -- how will unlicensed people be able to do these things?

RESPONSE: The Department has reviewed this comment and believes that the subsections (a) and (b) should be removed from the rule. The facility must keep a record of medications used, and the details to be included in that record are a matter of facility policy and category of facility.

COMMENT: **Subsection 6** -- Hughes: These require nursing judgment and skills -- how will unlicensed people be able to do these things?

RESPONSE: The Department has considered this comment, and states that the facility is responsible for providing adequate training to its staff to ensure that the staff have the skill to report, as required by rule.

COMMENT: **Subsection 7** -- Ash: These require nursing judgment and skills; how will unlicensed people be able to do these things?

RESPONSE: The Department has reviewed this rule and does not believe nursing judgment or skill is required to comply.

RULE XXI

COMMENT: **Subsection 1** -- Blakley: It should require that a qualified health care professional do the assessment, as the assessment is the foundation for care.

RESPONSE: The Department agrees with this comment and has amended the rule accordingly.

COMMENTS: **Subsection 2** -- Ellery: Amend to read: "...there is a plan of care for each resident that is prepared with the resident's health care professional, and to the extent practicable, with the participation of the resident, the resident's family or the resident's legal representative; and that the plan of care...."

Hamiltons: Why can't this be an office visit? Sometimes the physician won't come to the facility.

Leisure Care: The rule should allow a licensed health care professional who is on staff with the facility to develop the resident's plan of care.

RESPONSE: As to Ellery's comment, the Department agrees and has amended the rule accordingly. However, the language regarding the resident's health care professional has been changed to state "a licensed health care professional."

As to Hamiltons' comment, a physician, during an office visit, is free to develop a plan of care which the facility can follow. However, if the physician does not develop a plan of care for the resident, it is the facility's responsibility to ensure one is prepared.

As to Leisure Care's comment, the Department has amended the rule and believes the amendment meets the concern stated.

COMMENTS: **Subsection 3(a)** -- Towe: The care plan developed when the physician certifies the resident for admission should be sufficient, and a new care plan should be not required.

Hughes: There should be quarterly assessments, not yearly.

Ellery: § 50-5-226(4), MCA, requires a quarterly certification, so this rule should require care plans to be reviewed and updated at least quarterly.

RESPONSE: As to Towe's comment, the Department agrees that, if a care plan is developed when the physician certifies the resident for admission and at each quarterly certification, no new care plan is required. However, if no care plan is developed at the time of certification, one must be developed within three days.

As to Hughes' and Ellery's comments, the Department agrees and has amended the rule accordingly.

COMMENT: **Subsection 7** -- Hughes: There should be a requirement for bowel and bladder training.

RESPONSE: The Department has considered this comment, and notes that this requirement is found in Rule IV(2)(b). However, category A facility staff do not need this training, and the rule has been amended to reflect this requirement for category B facility staff.

COMMENT: **Subsection 8** -- Lewis: Does this imply that category B facilities must employee a physician, physician assistant, nurse practitioner, or registered nurse? Please define "must monitor."

RESPONSE: The Department has reviewed this comment, and states that, if a facility wishes to keep a patient that requires restraints, that facility must ensure that a licensed health care professional, either employed by the facility or on contract with the facility, monitors those restraints. The moni-

toring requirement would be met if the professional observed the resident to ensure that no harmful adverse side effects occurred, and to ensure that the other restraint rules are met.

COMMENT: **8(b)** -- Hamiltons: What if the resident did not do either of these things prior to restraint?

RESPONSE: The Department agrees that the rule is vague and has deleted (b) and moved (a) to the end of subsection 8.

COMMENTS: **Subsection 9** -- Hughes: There should be specific requirements for restraint reduction programs and restraint assessments.

Lewis: Does this imply that category B facilities must employee a physician, physician assistant, nurse practitioner, or registered nurse?

RESPONSE: As to Hughes' comment, the Department agrees and has amended the rule to require that the facility institute policies and procedures relating to restraint reduction programs and restraint assessments.

As to Lewis' comment, the Department states that, if a facility wishes to keep a patient that requires restraints, that facility must ensure that a licensed health care professional, either employed by the facility or on contract with the facility, monitors those restraints in compliance with the rules.

COMMENT: **Subsection 10** -- Hughes: Definitions of soft restraints and protective devices should be added.

RESPONSE: The Department has carefully reviewed this comment, and has explored the possibility of defining these terms. However, the Department believes that the nature of the restraint will be defined by the physician, as the physician must order the restraints. However, the term "soft" is vague and has been deleted from the rule.

COMMENT: **10(b)** -- Hamiltons: If a lay person can perform indwelling catheter care after appropriate instruction, why are they prohibited from applying soft restraints after instruction?

RESPONSE: The Department has reviewed this comment and believes this issue is one which must be put to the Montana Board of Nursing to determine whether applying restraints is a nursing task for which a license is required. However, because of the nature of restraints and the strict rules in place which govern restraints, the Department believes that only licensed health care professionals should be involved in the use of restraints.

COMMENTS: **Other Comments on Rule XXI** -- Hughes: Care planning and other resident care issues should be handled the same as in nursing homes. How can the department justify less stringent

requirements in facilities treating the same kinds of residents? There are no provisions for qualifications and training of staff other than what is required for category A facilities, and there should be, given the difference in the level of care. Category B facilities should be required to provide 24-hour licensed staff according to the needs of residents.

Penny Hale, Billings Chapter of the National Committee for the Prevention of Elder Abuse (Hale): The requirements for category B facilities are not strict enough and may create an environment ripe for neglect. The rule allows the provision of nursing home services without the strict requirements placed on these licensed nursing facilities. Oversight and enforcement must be provided to insure the safety and wellbeing of the category B residents.

RESPONSE: As to both comments, the Department notes that nursing home regulations are almost entirely based on federal statutes and rules. The State has not enacted similar rules and regulations, and the Department does not believe the intent was to place identical federal requirements on state personal care facilities. There is no indication that the legislature intended to make category B facilities mirror nursing home requirements and, in fact, the legislature provided for oversight by the physician certifying the resident quarterly. For that reason, the Department has endeavored to protect the public health and safety to the greatest extent possible while complying with statutory mandates. In addition, both types of facilities are required to provide twenty-four hour staffing to provide proper resident care, and there are specific requirements relating to staff training for category B residents. The Department agrees that oversight and enforcement must be provided to insure the safety and wellbeing of all personal care facility residents.

RULE XXII

COMMENTS: **Subsection 2** -- Lewis: Language should be added to allow a reprieve for those facilities who are in substantial compliance with the rules. Also, the resident screening fee is high, especially for category A facilities. Amend the language to state:

(2)(a) $70.00 per bed for an inspection of a Category A facility. This includes inspection of the operations and any resident screenings.

(b) $90.00 per bed for an inspection of a Category B facility. This includes inspection of the operations and any resident screenings.

Any facility found in substantial compliance should be excused from a routine inspection for a three year period, and the department could still inspect upon a complaint.

Connie Thisselle, Hillside Manor (Thisselle): objects to the inspection fees, as no one can afford them.

Connors: This is an outrageous amount of money. It represents the total monthly income from four SSI residents combined. What the department does in one day's inspection is not

as valuable to the resident as what the facility does for an entire month. If the facility can pass the cost along to all the residents, then it may be possible, but still outrageous.

Ellery: The fees should be reduced and a cap or upper limit should be set. At a minimum, some schedule for progressively increasing fees over time would seem more appropriate. We are also concerned that licensure fees are considered health care related taxes under the donations and taxes provision of federal regulations. If revenue gathered is greater than the cost of licensing, it is an impermissible tax and we are at risk of losing FFP.

Betty Asplin: The fee is discriminatory, because nursing homes and large personal care facilities are not charged the same fee.

Westerman: The fee should be reviewed, because the cost will get passed on to the residents, which may drive people out of the facility and on to the State's rolls.

Hughes: There should be a limit on the inspection fee, or the amount paid could be outrageous. The new legislation changed nothing with respect to category A facilities yet they will be charged substantial new fees, even though the department is doing less when inspecting these facilities because the rules remove the requirement to screen each resident for appropriate placement at the time of each inspection. The legislature funds the department to perform inspections, and the department's fiscal notes when the new legislation was considered indicated that the department's increased costs would be caused by substantial new numbers of facilities being licensed. Thus, the fees should be applicable only to the initial inspection of new facilities. This would get the department through the current biennium and allow an evaluation of fees by the 1995 legislature.

RESPONSE: As to Lewis' comment, the Department has reviewed the same but does not believe the amended language is necessary or appropriate, as there is a difference in cost between screening and inspecting. Statutorily, the Department has the authority to issue one to three year licenses and, if a facility is in substantial compliance, the possibility for an extended license is present and does not need to be added by rule. The Department does not understand the comment regarding the resident screening fee being high in category A facilities, as the screening is the same in both types of facilities, and is commensurate with service costs.

As to Thisselle's, Connors', and Westerman's comments, the Department notes the same and states that it has carefully reviewed the fee amount and, based on the best estimates available of surveyor time and involved expenses, the fee is clearly commensurate with the service cost of performing the inspections; the fee computes to $.19 per day for a category A facility and $.25 per day for a category B facility. If the Department finds that the fee is too low or too high, it can be adjusted in the future.

As to Ellery's comment, the Department does not believe

that a schedule for progressively increasing fees is appropriate. The Department is authorized to set inspection fees which are reasonably related to service costs, and that is what the Department has done, using the best information available. Increasing fees over time would not necessarily be related to service costs, and would thus contravene the statute. As to the concern regarding health care related taxes, the revenue gathered under these inspection fees is not greater than cost; revenue gathered is enough for approximately .75 FTE. Thus, this is not an impermissible tax and does not threaten FFP.

As to Asplin's comment, the Department disagrees that the fee is discriminatory. All personal care facilities will be charged the fee, regardless of size, and what nursing homes are charged is irrelevant, as they cannot be assessed an inspection service fee unless there is statutory authority to do so.

As to Hughes' comment, the Department has estimated, with the best information available, how much inspecting a facility costs. The new legislation authorized the department to establish inspection fees, and the department has done that. The cost of screening each resident was not taken into consideration when computing the fee, because the Department is no longer obligated to conduct these screenings on every resident. In addition, the Department does not believe it is appropriate to charge the inspection service fee only to new facilities, as the statute does not indicate that the inspection fees are only supposed to be charged to new facilities. In complying with the statute, the inspection service fees apply across the board and are applicable to all facilities. The Department agrees that it is in the legislature's discretion to review the fees and evaluate the same.

COMMENT: Subsection 3 -- Towe: What is meant by a screening? Does this apply for each admission, or only on an appeal?

RESPONSE: A "screening" involves a number of different scenarios under the statute: (1) if a category A facility rejects a prospective resident because the person falls into the definition of a category B resident and that prospective resident appeals the facility's decision, the Department may have to conduct a "screening" using the definitions of § 50-5-226, MCA; (2) if a category A facility determines that a resident must be relocated because the person has progressed to the point where s/he is no longer appropriate for category A facility residence, and the resident appeals the facility's decision, the Department may have to conduct a "screening" using the definitions of § 50-5-226, MCA; and (3) if the Department receives a complaint or other notice regarding the placement of a category A resident or if during inspection a surveyor determines a resident is inappropriately placed in a category A facility, the facility or the resident may appeal the surveyor's "screening" to the director of the Department. All these appeals will be based on the process outlined in Rule XVII, which has been amended pursuant to this comment to more clearly reflect when an appeal may be taken. The screening fee will not apply on

each admission; rather, it will apply on a category A facility admission application rejected by the facility based on the criteria of § 50-5-226, MCA, which is appealed by the prospective resident. It will also be assessed on an appeal based on a facility's relocation decision if a surveyor is required to survey the resident and/or facility to determine whether the category A facility is an appropriate place for the resident. The fee rule has been amended to reflect the intention to assess the screening fee against the appealing party. The other scenario where it could be assessed is if the Department receives a complaint or other notice of inappropriate placement and is required to determine whether placement of the category A facility resident is appropriate. However, upon reviewing this comment, the Department recognizes that assessing a screening fee based on complaint is difficult, at best, in that assessing the fee against the complaining party might discourage complaints. Similarly, it may not be appropriate to assess a screening fee based upon a complaint against the facility, especially if the complaint is not verified. Therefore, the Department has determined that it will not assess a screening fee based upon complaint, and that this fee will only be assessed on an appeal against the appealing party. In addition, if, during a routine inspection subject to the inspection fees of subchapter (2) of this rule, a surveyor determines a resident is inappropriately placed, the facility will not be subjected to both the inspection fee and the screening fee, unless that decision is appealed.

MISCELLANEOUS COMMENTS

COMMENT: Overbaugh: If we apply for A and B licenses, can we choose not to have category B residents?

RESPONSE: It is up to the facility how many residents, if any, it chooses to house up to the maximum allowed by its license, and up to the facility to decide what type of residents to allow within the scope of its license.

COMMENT: Hughes: The intent of the 1993 legislation was not to impose additional requirements on category A facilities, but rather to provide additional requirements for category B facilities. Current requirements for A facilities should be maintained, as the new rules make these facilities look like nursing homes. An individual requiring a nursing home level of care admitted to a B facility deserves the same quality of services that are mandated in nursing facilities.

RESPONSE: The Department has previously responded to this in various other areas of the rules, but will reiterate that the statute specifically directs the Department to establish standards for operating both types of facilities. In addition, the Department has broad rulemaking authority to implement all health care facility statutes. The Department does not agree that the rules for category A facilities look like nursing home regulations, and believes that it has balanced its statutory

obligations and legislative intent with its obligation to protect the health, safety, and welfare of residents in all personal care facilities.

COMMENT: Thisselle: The intent of the new legislation has been misunderstood. A task force should be enacted before finalizing the rules.

RESPONSE: The Department acknowledges this comment but does not agree that the intent of the new legislation has been misunderstood, as explained throughout these responses.

COMMENT: Hale: Currently, many small facilities are operating without a license, and there does not appear to be any enforcement or follow-up. How will this be different under the new rules, and how frequently will on-site visits be made to ensure compliance? Also, there are numerous reports of neglect and exploitation in many small personal care facilities -- what system will be put into place to investigate reports of abuse and force corrective action?

RESPONSE: The new legislation did not give the Department any new enforcement authority, so enforcement and follow-up inspections will be based on statutes in place prior to the 1993 legislation. Visits will be made as necessary to ensure compliance with statutes and rules. Any reports of neglect and exploitation will be investigated in compliance with the Montana Elder and Developmentally Disabled Abuse Prevention Act.

COMMENT: Ellery: We have general concerns about the increased restrictiveness introduced into the proposed rules for category A facilities.

RESPONSE: The Department acknowledges this comment but does not believe a separate response is necessary, given prior responses in this notice.

COMMENT: Westerman: As to category A facility rules, they should be based on a social model and these rules have a medical tinge to them.

RESPONSE: The Department acknowledges this comment, and states that the statutes authorizing personal care facilities are found within the health care statutes, and invariably there will be a medical aspect to the rules. In addition, there are many different definitions of "social model," and the Department is unsure of which definition this commentator would apply. The Department does not believe that any other response is necessary to this comment.

COMMENT: Bill McClain, Aspen Meadows: the personal care facilities are in a free market, because there is no state reimbursement. For that reason, the state should not be regulating as much, but let the free market do its own regulating. Also,

many of the rules infringe on a resident's right to choose, and the regulations are driving the cost of service up.

RESPONSE: The Department notes that the legislature has specifically directed the Department to regulate various aspects of health care, in order to guarantee the public health, safety, and welfare. Facilities are operating in a free market, but the Department is statutorily mandated to regulate health care facilities, and has attempted to regulate the facilities in a way that infringes on resident's choices as little as possible.

COMMENT: Ash: We work with the doctor's orders, V.N.S. staff, and family members to assure that the best quality of 24 hour care is being provided. Because a category B facility is for a residential setting with five or less persons, the intent of the legislation has been overlooked. The intent of the legislation was to provide some regulation to personal care homes in a residential setting, not to make them look like nursing facilities.

RESPONSE: The Department has previously responded to similar comments, but reiterates that the plain language of the statutes directs the Department to adopt a number of different standards applying to and governing both category A and B facilities, and has complied with the legislative mandate.

COMMENT: Sue Hash, The Sage Company: Category A facilities look too regulated and category B facilities are like a five bed nursing home and should be more regulated, although ideally, nursing home regulations should be lessened. Less regulation is appropriate if safety issues are considered.

RESPONSE: The Department acknowledges this comment and states that it believes an appropriate compromise between regulation and safety is met by these rules.

ROBERT J. ROBINSON, Director

Certified to the Secretary of State August 1, 1994.

Reviewed by:

Eleanor Parker, DHES Attorney

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

In the matter of the repeal of the organizational rule for the former Division of Workers' Compensation	) NOTICE OF REPEAL OF) ARM 24.29.101))

1. Pursuant to Chapter 613, Laws of 1989, the former Division of Workers' Compensation ceased to exist on the earlier signing of an executive order creating the state compensation mutual insurance fund on January 1, 1990. The regulatory functions of the former Division of Workers' Compensation were transferred to the Department of Labor and Industry effective January 1, 1990. The administrative rules of the former Division of Worker's Compensation (which had been attached to the Department of Labor and Industry for administrative purposes) were transferred in their entirety to the Employment Relations Division of the Department of Labor and Industry without change in citation or location. Because the organizational structure of the former Division of Workers' Compensation is no longer in existence, the Department is repealing ARM 24.29.101 in its entirety.

2. Pursuant to 2-4-201, MCA, an agency does not have to comply with the notice and hearing requirements contained in 2-4-302, MCA, for matters regarding its organizational rules. This Notice is made for the purpose of providing a record of the reasons for the repeal of ARM 24.29.101.

David A. Scott
Rule Reviewer

Laurie Ekanger, Commissioner
DEPARTMENT OF LABOR & INDUSTRY

Certified to the Secretary of State: July 25, 1994.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT) of ARM 42.16.104 relating to) Net Operating Loss Carryback)	NOTICE OF THE AMENDMENT of ARM 42.16.104 relating to Net Operating Loss Carryback

TO: All Interested Persons:

1. On June 23, 1994, the Department published notice of the proposed amendment of ARM 42.16.104 relating to net operating loss carryback at page 1657 of the 1994 Montana Administrative Register, issue no. 12.

2. No public comments were received regarding this rule.

3. Therefore, the Department amends the rule as proposed.

CLEO ANDERSON
Rule Reviewer

MICK ROBINSON
Director of Revenue

Certified to Secretary of State August 1, 1994.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT OF ARM 42.23.606, 42.23.607, 42.23.608 and 42.23.609 relating to Estimated Tax Payments	))))	NOTICE OF THE AMENDMENT of ARM 42.23.606, 42.23.607, 42.23.608 and 42.23.609 relating to Estimated Tax Payments

TO: All Interested Persons:

1. On June 23, 1994, the Department published notice of the proposed amendment of ARM 42.23.606, 42.23.607, 42.23.608, and 42.23.609 relating to estimated tax payments at page 1659 of the 1994 Montana Administrative Register, issue no. 12.

2. No public comments were received regarding these rules.

3. Therefore, the Department amends the rules as proposed.

CLEO ANDERSON
Rule Reviewer

MICK ROBINSON
Director of Revenue

Certified to Secretary of State August 1, 1994.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT of ARM 42.25.1201, 42.25.1206, and 42.25.1207; ADOPTION of RULE I (ARM 42.25.1028 and 42.25.1208), II (ARM 42.25.1029 and 42.25.1209), and III (ARM 42.25.1030 and 42.25.1210); and REPEAL of ARM 42.25.1203, 42.25.1204, and 42.25.1205 relating to Horizontal Wells	NOTICE OF THE AMENDMENT of ARM 42.25.1201, 42.25.1206, and 42.25.1207; ADOPTION of RULES I (42.25.1028 and 42.25.1208), II (ARM 42.25.1029 and 42.25.1209), and III (ARM 42.25.1030 and 42.25.1210); and REPEAL of ARM 42.25.1203, 42.25.1204, and 42.25.1205 relating to Horizontal Wells

TO: All Interested Persons:

1. On June 23, 1994, the Department published notice of the proposed amendment, adoption, and repeal of the above-referenced rules relating to horizontal wells at pages 1663 of the 1994 Montana Administrative Register, issue no. 12.

2. A Public Hearing was held on July 14, 1994, to consider the proposed action. Leo Barry, attorney for Meridian Oil Company appeared at the hearing but did not present any testimony but did address his concerns with the Department staff prior to the hearing. The Department then advised the hearing officer that there were amendments to two of the new rules. Those amendments are incorporated in this notice of adoption.

Oral comments received prior to the hearing are summarized as follows along with the response of the Department:

COMMENT: Rule I (1) is not clear regarding what will occur if the certification is received by the department after the month in which production for sale first occurs.

RESPONSE: The Department will prepare clarifying language for this rule.

COMMENT: Rule III (4) should reference "net proceeds" rather than "LGST".

RESPONSE: The Department will amend this rule to correct that error.

COMMENT: The Department pointed out that these new rules should be placed both in the severance and net proceeds sections of Title 42, Administrative Rules of Montana since the rules apply to requirements for both areas of taxation.

RESPONSE: New rules I through III will be placed in both sub-chapter 10 and sub-chapter 12 of chapter 25, Title 42, ARM.

3. The Department has adopted the amendments to ARM 42.25.1201, 42.25.1206, 42.25.1207; and new Rule II (ARM 42.25.1029 and 42.25.1209) as proposed. The Department adopts new Rule I (42.25.1028 and 42.25.1208) and III (42.25.1030 and

42.25.1210) with the following amendments:

NEW RULE I (ARM 42.25.1028 AND 42.25.1208) HORIZONTALLY COMPLETED OR RECOMPLETED WELLS

(1) For horizontally completed or horizontally recompleted wells the operator must provide to the department of revenue a copy of the horizontal certification from the board of oil and gas conservation. If the operator does not provide the certification, or the well is not certified by the board as horizontally completed or recompleted, the well will not qualify for the 18 month exemption until such time as operator provides the certification to the department. IF A CERTIFICATION IS RECEIVED BY THE DEPARTMENT AFTER THE MONTH IN WHICH PRODUCTION FOR SALE FIRST OCCURS, AND THE TAXPAYER HAS FILED AND PAID TAXES ON PRODUCTION THAT WOULD OTHERWISE BE EXEMPT HEREIN, A REFUND OR CREDIT WILL BE GRANTED TO THE TAXPAYER.

(2) through (5) remains the same.

AUTH: Sec. 15-1-201 MCA; IMP: Secs. 15-6-208, 15-23-601, 15-23-602, 15-23-603, 15-23-607, 15-23-612, 15-36-101 MCA.

NEW RULE III (ARM 42.25.1030 AND 42.25.1210) ALLOCATION OF INCREMENTAL PRODUCTION

(1) through (3) remains the same.

(4) Incremental production to be reported as ~~LGST~~ NET PROCEEDS and subject to tax rates imposed by 15-23-607, MCA is the amount of production computed when the NPT ratio determined above is multiplied times the total incremental production for the quarter. The amount of non-incremental net proceeds production to be reported and subject to tax rates imposed by 15-23-607, MCA is determined by subtracting the amount of net proceeds incremental production from the total net proceeds production.

(5) remains the same.

AUTH: Secs. 15-1-201 and 15-23-614 MCA; IMP: Secs. 15-23-601, 15-23-602, 15-23-603, 15-23-607, 15-23-612, and 15-36-101 MCA.

4. The Department repeals ARM 42.25.1203, 42.25.1204, and 42.25.1205 as proposed.

CLEO ANDERSON
Rule Reviewer

MICK ROBINSON
Director of Revenue

Certified to Secretary of State August 1, 1994

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

In the matter of the amendment of rules 46.10.803, 46.10.805, 46.10.807, 46.10.811, 46.10.819, 46.10.825, 46.10.841 and 46.10.843 pertaining to AFDC JOBS program	)))))))	NOTICE OF THE AMENDMENT OF RULES 46.10.803, 46.10.805, 46.10.807, 46.10.811, 46.10.819, 46.10.825, 46.10.841 AND 46.10.843 PERTAINING TO AFDC JOBS PROGRAM

TO: All Interested Persons

1. On June 9, 1994, the Department of Social and Rehabilitation Services published notice of the proposed amendment of rules 46.10.803, 46.10.805, 46.10.807, 46.10.811, 46.10.819, 46.10.825, 46.10.841 and 46.10.843 pertaining to AFDC JOBS program at page 1515 of the 1994 Montana Administrative Register, issue number 11.

2. The Department has amended rules 46.10.803, 46.10.805, 46.10.807, 46.10.811, 46.10.819, 46.10.825, 46.10.841 and 46.10.843 as proposed.

3. No written comments or testimony were received.

4. The amendment of ARM 46.10.805(3)(g) will be applied retroactively to July 1, 1994, because the legislature mandated that this change be made by that date. The amendments to ARM 46.10.825 will be effective on October 1, 1994, to coincide with the effective date of the same amendments to the department's state plan governing the AFDC program.

Rule Reviewer

Director, Social and Rehabilitation Services

Certified to the Secretary of State August 1, 1994.

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, 1994. This table includes those rules adopted during the period April 1, 1994 through June 30, 1994 and any proposed rule action that was 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, 1994, this table and the table of contents of this issue of the MAR.

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