MONTANA ADMINISTRATIVE REGISTER

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MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 1

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 The notice section contains state agencies' proposed new, amended or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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

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RULE SECTION

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

In the matter of the amendment of rule 2.55.404 pertaining to scheduled rating - high loss modifier.	)))	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF RULE 2.55.404

TO: All Interested Persons:

1. On February 2, 1995, the State Compensation Insurance Fund will hold a public hearing at 2:00 p.m., in Room 303 of the State Compensation Insurance Fund Building, 5 South Last Chance Gulch, Helena, Montana, to consider the amendment of rule 2.55.404.

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

2.55.404 SCHEDULED RATING - HIGH LOSS MODIFIER (1) With board approval, the state fund will annually implement a surcharge of 20 percent on premium of a high loss policyholder. The surcharge is additional premium payable when regular premium payments are due and will be effective for one full fiscal year following notice to the policyholder. ~~However, if implemented, the initial surcharge effective January 1, 1994 will be in place only until June 30, 1994, and is subject thereafter to annual reevaluation in accordance with these rules.~~ Failure to pay the additional premium will result in cancellation of the policy.

(2) The current policy and any prior policies will be evaluated annually to identify a high loss policyholder for the next fiscal year, ~~except the period January 1, 1994 through June 30, 1994, will be based on an evaluation of data pre-fiscal year 1993 and will occur in the first half of fiscal year 1994~~.

(3) A policyholder will be subject to the 20 percent additional premium if the policyholder:

(a) has coverage in all or a portion of any of the ~~three~~ five most recent complete fiscal years; and

(b) has total earned premium in any of the ~~three~~ five most recent complete fiscal years which meets or exceeds the established minimum premium amount for the respective years; and

(c) will not be assigned an experience modification factor in the ~~future~~ next fiscal year ~~(if implemented effective January 1, 1994, an experience modification factor will not be assigned for the period January 1, 1994 through June 30, 1994)~~; and or

(d) will be assigned an experience modification factor in the next fiscal year. ~~one of the following criteria is met:~~

~~(i) A policyholder whose earned premium exceeds the minimum premium in all three fiscal years will be subject to 20 percent additional premium if the loss ratio in each of the three fiscal years exceeds a percentage of no less than 50 percent and the combined three-year loss ratio exceeds a percentage of no less than 80 percent. The specific percentages are to be approved by the board. If the policyholder meets the criteria in (i), the policyholder will not be subject to analysis in (ii) and (iii).~~

~~(ii) A policyholder whose earned premium exceeds the minimum premium in only two of any of the three fiscal years will be subject to the 20 percent additional premium if the loss ratio in each of the two fiscal years exceeds a percentage of no less than 100 percent. The specific percentage is to be approved by the board. If the policyholder meets the criteria in (ii), the policyholder will not be subject to analysis in (i) or (iii).~~

~~(iii) A policyholder whose earned premium exceeds the minimum premium in only one of any of the three fiscal years will be subject to the 20 percent additional premium if the loss ratio in that year exceeds a percentage of no less than 125 percent. The specific percentage is to be approved by the board. If the policyholder meets the criteria in (iii), the policyholder will not be subject to analysis in (i) or (ii).~~

(4) A policyholder who meets the requirements of (3)(a), (b), and (c) will be analyzed in the following order of priority: (a), (b), (c), (d), and according to the criteria as follow:

(a) A policyholder whose earned premium meets or exceeds the minimum premium in all five most recent complete fiscal years will be subject to 20 percent additional premium if the loss ratio in each of the two most recent complete fiscal years meets or exceeds a percentage approved by the board and the average five year loss ratio meets or exceeds a percentage approved by the board. If the policyholder meets the criteria in (a), the policyholder will not be subject to analysis in (b), (c), or (d).

(b) A policyholder whose earned premium meets or exceeds the minimum premium in the four most recent complete fiscal years will be subject to 20 percent additional premium if the loss ratio in each of the two most recent complete fiscal years meets or exceeds a percentage approved by the board and the average four year loss ratio meets or exceeds a percentage approved by the board. If the policyholder meets the criteria in (b), the policyholder will not be subject to analysis in (c) or (d).

(c) A policyholder whose earned premium meets or exceeds the minimum premium in the three most recent complete fiscal years will be subject to 20 percent additional premium if the loss ratio in each of the two most recent complete fiscal years meets or exceeds a percentage approved by the board and the average three year loss ratio meets or exceeds a percentage approved by the board. If the policyholder meets the criteria in (c), the policyholder will not be subject to analysis in (d).

(d) A policyholder whose earned premium meets or exceeds the minimum premium in the two most recent complete fiscal years will be subject to 20 percent additional premium if the loss ratio in each of the two most recent complete fiscal years meets or exceeds a percentage approved by the board and the average two year loss ratio meets or exceeds a percentage approved by the board.

(5) A policyholder who meets the requirements of (3)(a), (b), and (d) will be analyzed in the following order of priority: (a), (b), (c), (d), and according to the criteria as follow:

(a) A policyholder whose earned premium meets or exceeds the minimum premium in all five most recent complete fiscal years will be subject to 20 percent additional premium if the loss ratio in each of the two most recent complete fiscal years meets or exceeds

a percentage approved by the board and the average five year loss ratio meets or exceeds a percentage approved by the board. If the policyholder meets the criteria in (a), the policyholder will not be subject to analysis in (b), (c), or (d).

(b) A policyholder whose earned premium meets or exceeds the minimum premium in the four most recent complete fiscal years will be subject to 20 percent additional premium if the loss ratio in each of the two most recent complete fiscal years meets or exceeds a percentage approved by the board and the average four year loss ratio meets or exceeds a percentage approved by the board. If the policyholder meets the criteria in (b), the policyholder will not be subject to analysis in (c) or (d).

(c) A policyholder whose earned premium meets or exceeds the minimum premium in the three most recent complete fiscal years will be subject to 20 percent additional premium if the loss ratio in each of the two most recent complete fiscal years meets or exceeds a percentage approved by the board and the average three year loss ratio meets or exceeds a percentage approved by the board. If the policyholder meets the criteria in (c), the policyholder will not be subject to analysis in (d).

(d) A policyholder whose earned premium meets or exceeds the minimum premium in the two most recent fiscal years will be subject to 20 percent additional premium if the loss ratio in each of the two most recent fiscal years meets or exceeds a percentage approved by the board and the average two year loss ratio meets or exceeds a percentage approved by the board.

AUTH: Sec. 39-71-2315 and 39-71-2316 MCA
IMP: Sec. 39-71-2316 and 39-71-2341 MCA

3. The rulemaking is being proposed for the following reasons:

This rule is amended to more accurately apply the surcharge to long term high loss employers (up to five years instead of three) and employers with more recent high loss experience (by analyzing the last two years for higher losses). The amendments delete the criteria in (d)(i)-(iii) and replace criteria for up to five years in (4)(a)-(d) for nonexperience modified employers, and in (5)(a)-(d) for experience modified employers. The amendments give the board flexibility in establishing percentages based upon changes in loss analysis from year to year. The one year criteria was eliminated to conform with the approach of analyzing losses over a longer period of time and looking at high loss experience in more recent years.

This rule contemplates the State Fund Board of Directors establishing loss ratios for a long period of time (up to five years) and loss ratios for each of the two most recent complete years for nonexperience modified policyholders and a separate set of loss ratios for experience modified policyholders. The experience modification system does take into account frequency during a three year period of exposure. It does not react to longer periods of continual high losses and minimizes severity patterns. This rule is designed to address high loss nonmodified

policyholders and to fill the short fall left by experience modification for modified policyholders by adding the amendment in (3)(d).

Any reference to application of the surcharge for fiscal year 1994 in (1), (2), and (3)(c) was eliminated as it is no longer necessary for future application of the rule. Amendments in (3)(a) and (b) are to conform to the change to the five year analysis and have consistency in language between (3)(a) and (b).

4. The State Compensation Insurance Fund makes reasonable accommodations for persons with disabilities who wish to participate in this public hearing. Persons needing accommodations must contact the State Fund, Attn: Ms. Dwan Ford, P.O. Box 4759, Helena, MT 59604; telephone (406) 444-6480; TDD (406) 444-5971; fax (406) 444-6555, no later than 5:00 p.m., January 26, 1995, to advise as to the nature of the accommodation needed and to allow adequate time to make arrangements.

5. Interested persons 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 state fund attorney Nancy Butler, Legal Department, State Compensation Insurance Fund, 5 South Last Chance Gulch, Helena, Montana 59604-4759, and must be received no later than 5:00 p.m. February 10, 1995.

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

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 January 3, 1995.

BEFORE THE BOARD OF REALTY REGULATION
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the proposed amendment of rules pertaining to license discipline, application for licensure and discipline of property management licensees	)))))))))	NOTICE OF PROPOSED AMENDMENT OF 8.58.419 GROUNDS FOR LICENSE DISCIPLINE - GENERAL PROVISIONS - UNPROFESSIONAL CONDUCT, 8.58.702 APPLICATION FOR LICENSURE AND 8.58.714 GROUNDS FOR DISCIPLINE OF PROPERTY MANAGEMENT LICENSEES - GENERAL PROVISIONS - UNPROFESSIONAL CONDUCT

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On February 11, 1995, the Board of Realty Regulation proposes to amend the above-stated rules.

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

"8.58.419 GROUNDS FOR LICENSE DISCIPLINE - GENERAL PROVISIONS - UNPROFESSIONAL CONDUCT (1) through (4)(r) will remain the same.

(s) Licensees shall not represent to any lender, guaranteeing agency or other interested party, either orally or through the preparation of false documents, an amount ~~in excess of~~ different from the true and actual sale price of the real estate or terms differing from those actually agreed upon.

(t) through (ab) will remain the same.

(ac) Licensees shall disclose to the broker-owner, responsible broker, business partner or any other responsible business associate any and all additional wages, tips, bonuses or gifts which have been or are to be recovered by the licensee in a real estate transaction which are not considered to be real estate commission(s).

(ad) through (6) will remain the same."

Auth: Sec. 37-1-131, 37-1-136, 37-51-203, 37-51-321, MCA; IMP, Sec. 37-51-201, 37-51-202, 37-51-321, 37-51-512, MCA

REASON: The Board proposes to expand upon subsection (s) to make it a violation to represent terms that may be less than those actually agreed upon by the parties or that in some other manner deviates from the terms agreed upon by the parties. The Board feels there are situations in which individuals may attempt to represent terms that are less than those actually agreed upon and thus the rule needs to be clarified to state that this practice also could lead to discipline. In subsection (ac) the Board is clarifying that the real estate licensee must disclose to a responsible broker

or other associate those matters of compensation that arise out of a real estate transaction. The Board wants to make it clear that compensation arising from something other than a real estate transaction is not subject to these rules.

"8.58.702 APPLICATION FOR LICENSURE (1) through (1)(b) will remain the same.

(c) provide an original copy of a ~~receipt~~ recent credit report issued within the past six months;

(d) and (e) will remain the same.

(2) Real estate ~~licensees~~ broker wishing to obtain a property management license must complete the property management pre-licensing course, make application and pay the required fee ~~without any additional requirements~~.

(3) Real estate salespersons wishing to obtain a property management license must meet all existing licensing requirements, including completion of the pre-licensing course, examination, make application and pay the required fee."

Auth: Sec. 37-1-131, 37-51-202, 37-51-203, MCA; IMP, Sec. 37-51-603, MCA

REASON: This amendment is necessary to streamline and clarify procedures to obtain property management licensure.

"8.58.714 GROUNDS FOR DISCIPLINE OF PROPERTY MANAGEMENT LICENSEES - GENERAL PROVISIONS - UNPROFESSIONAL CONDUCT

(1) through (3)(p) will remain the same.

(q) Licensees when entering into a management agreement shall make a prompt effort to verify that the principal entering the agreement is the owner or is authorized by the owner to enter such agreement.

(4) will remain the same."

Auth: Sec. 37-1-131, 37-51-202, 37-51-203, MCA; IMP, Sec. 37-51-606, MCA

REASON: The responsibility for insuring that the party wishing to enter into a property management agreement is entitled to execute that agreement lies with the real estate broker or property management licensee. The Board, by this proposed amendment, is placing upon property management licensees the same responsibility that the Board imposes upon real estate brokers to determine that the individual wishing to enter into the property agreement either owns the subject property or is authorized by the owner to enter into such an agreement. Failure to do so could result in discipline of the property manager's license.

3. Interested persons may submit their data, views or arguments concerning the proposed amendments in writing to the Board of Realty Regulation, Lower Level, Arcade Building, 111 North Jackson, P.O. Box 200513, Helena, Montana 59620-0513, to be received no later than 5:00 p.m., February 9, 1995.

4. If a person who is directly affected by the proposed amendments wishes to present his data, views or arguments orally or in writing at a public hearing, he must make written

request for a hearing and submit the request along with any comments he has to the Board of Realty Regulation, Lower Level, Arcade Building, 111 North Jackson, P.O. Box 200513, Helena, Montana 59620-0513, to be received no later than 5:00 p.m., February 9, 1995.

5. If the Board receives requests for a public hearing on the proposed amendments from either 10 percent or 25, whichever is less, of those persons who are directly affected by the proposed amendments, from the Administrative Code Committee of the legislature, from a governmental agency or subdivision or from an association having no less than 25 members who 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 545 based on the 5450 licensees in Montana.

BOARD OF REALTY REGULATION
STEVE CUMMINGS, CHAIRMAN

ANNIE M. BARTOS
RULE REVIEWER

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

Certified to the Secretary of State, January 3, 1995.

BEFORE THE BOARD OF VETERINARY MEDICINE
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the proposed adoption of a rule pertaining to licensees from other states	)))	NOTICE OF PUBLIC HEARING ON THE PROPOSED ADOPTION OF A NEW RULE PERTAINING TO LICENSEES FROM OTHER STATES

TO: All Interested Persons:

1. On February 13, 1995, at 10:00 a.m., a public hearing will be held in the Professional and Occupational Licensing conference room, Lower Level, Arcade Building, 111 N. Jackson, Helena, Montana, to consider the proposed adoption of a new rule pertaining to licensees from other states.

2. The proposed new rule will read as follows:

"I LICENSEES FROM OTHER STATES A license to practice veterinary medicine in the state of Montana may be issued at the discretion of the board provided the applicant meets all of the following requirements:

(1) The candidate has graduated from and holds a degree/diploma from a school of veterinary medicine accredited or approved by the American veterinary medical association council on education as evidenced by a certified copy of the transcript sent directly from the veterinary school. Graduates of foreign veterinary schools must have completed the requirements of the American veterinary medical association's education commission for foreign veterinary graduates (E.C.F.V.G.);

(2) The candidate has passed the national board examination and the clinical competency test within the previous five years with a converted score of 70 or greater as received by the board from the official score reporting agency;

(3) The candidate holds a valid and unrestricted license to practice veterinary medicine in another state or jurisdiction, and has been continuously in practice for one year in the state or jurisdiction from which he/she applies immediately preceding the date of his/her application for a license in this state. Official written verification of such licensure status must be received by the board directly from the other state or jurisdiction;

(4) The candidate's license to practice veterinary medicine has had no disciplinary sanction during the last five years of licensure and no license suspension or license revocation at any time;

(5) The candidate provides a work history of all employment, concurrent as well as consecutive, starting at the date of application and working back to graduation;

(6) The candidate has completed and filed with the board an application for licensure, and the required application fee;

(7) The candidate has not previously taken and failed to pass the veterinary licensing examination in this state;

(8) The candidate has passed a jurisprudence examination prepared to measure the competence of the applicant regarding the statutes and rules governing the practice of veterinary medicine in Montana with a score of 70% or greater. If the candidate fails the jurisprudence examination, it may not be re-taken for six months;

(9) The candidate provides on the application a signed statement by the state from which he/she is applying affirming that the state will offer reciprocal licensing to candidates licensed as veterinarians by the Montana board of veterinary medicine."

Auth: Sec. 37-1-131, 37-18-202, MCA; IMP, Sec. 37-18-304, MCA

REASON: The proposed new rule will set forth the requirements for admission of licensees from other states as provided for in 37-18-304, MCA. This rule will allow licensure of veterinarians who have a license in another state, and who meet the criteria in the rule, to be licensed without taking the oral and practical state examinations now required of all applicants.

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 the Board of Veterinary Medicine, 111 North Jackson, P.O. Box 200513, Helena, Montana 59620-0513, to be received no later than 5:00 p.m., February 13, 1995.

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

BOARD OF VETERINARY MEDICINE
MINOTT PRUYN, DVM, PRESIDENT

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

_____
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, January 3, 1995.

BEFORE THE DEPARTMENT OF
FAMILY SERVICES OF THE
STATE OF MONTANA

In the matter of the amendment of Rule 11.7.501 pertaining to foster care review committees	NOTICE OF PROPOSED AMENDMENT OF RULE 11.7.501 PERTAINING TO FOSTER CARE REVIEW COMMITTEES

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On February 23, 1995, the Department of Family Services proposes to amend Rule 11.7.501 pertaining to foster care review committees.

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

11.7.501 FOSTER CARE REVIEW COMMITTEE Subsections (1) and (2) remain the same.

(3) The committee shall be composed of not less than ~~four~~ five nor more than seven members including:

(a) a representative of the department;

(b) a representative of the youth court;

(c) someone knowledgeable in the needs of the children in foster care placements not employed by the youth court or department;

(d) a representative of a local school district;

(e) the foster parent of the child whose care is under review, if there is one. The foster parent's appointment is effective only for and during that review.

(f) if the child under review is an Indian, an Indian person or a person knowledgeable about Indian cultural and family matters who is appointed for that review only.

(4) Three of the ~~four~~ five required committee members must be in attendance to constitute an official review.

(a) A chairperson shall be selected by the committee prior to each meeting.

Subsections (5) and (6) remain the same.

AUTH: Sec. 41-3-1115, MCA. IMP: Sec. 41-3-1115, MCA.

3. The existing rule conflicts with the governing statute by setting a minimum of four rather than five committee members. Section 41-3-1115, MCA.

4. Interested persons may submit their data, views or arguments to the proposed amendment in writing to the Office of Legal Affairs, Department of Family Services, 48 North Last Chance Gulch, P.O. Box 8005, Helena, Montana 59604, no later than February 10, 1995.

5. If a person who is directly affected by the proposed amendment wishes to express data, views and arguments orally or in writing at a public hearing, that person must make a written request for a public hearing and submit such request, along with any written comments, to the Office of Legal Affairs, Department of Family Services, 48 North Last Chance Gulch, P.O. Box 8005, Helena, Montana 59604, no later than February 10, 1995.

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

DEPARTMENT OF FAMILY SERVICES

Hank Hudson, Director

John Melcher, Rule Reviewer

Certified to the Secretary of State, January 3, 1995.

BEFORE THE OFFICE OF THE GOVERNOR
OF THE STATE OF MONTANA

In the matter of the proposed amendment of Rules 14.8.201, 14.8.203, and 14.8.205 pertaining to electrical supply shortage	))))	NOTICE OF PROPOSED AMENDMENT NO PUBLIC HEARING CONTEMPLATED

To: All Interested Persons.

1. On March 6, 1995, the Governor proposes to amend Rules 14.8.201, 14.8.203, and 14.8.205, pertaining to electrical supply shortage.

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

14.8.201 PURPOSES Sections (1) through (2)(e) remain the same.

(3) It is the intent of these rules to use the regional curtailment plan for electric energy prepared by the northwest load curtailment plan task force as a basis for responding to an electricity supply shortage in the pacific northwest regional electricity system.

AUTH: Sec. 90-4-316, MCA
IMP: Sec. 90-4-316, MCA

14.8.203 REGISTRATION (1) Upon promulgation of these rules, the governor shall request the northwest power pool, midcontinent area power pool, ~~water-and-power-resource-service~~ bureau of reclamation, and each utility supplying electricity in Montana to designate an employee who shall be responsible for supplying information requested under these rules and to supply the name, address, and telephone number of the employee to the administrator of the energy division, department of natural resources and conservation, ~~32--south--ewing~~ 1520 east sixth avenue, Helena, Montana 59620.

AUTH: Sec. 90-4-316, MCA
IMP: 90-4-305, MCA

14.8.205 INFORMATION (1) Information and data regarding electricity supply shortages which may require curtailment action shall be provided as follows:

~~(1)~~ (a) For regional hydro-electric supply shortages, the northwest power pool and the ~~water-and-power-resource-service~~ bureau of reclamation shall provide reservoir inventory information upon which decisions regarding the need for curtailment actions will be based. This information shall be updated as current information becomes available.

Subsection (2) remains the same, but is renumbered (b).

~~(3)~~ (c) The information provided under this rule shall be submitted to the energy division, department of natural resources and conservation, ~~32--south--ewing~~ 1520 east sixth avenue, Helena, Montana 59620.

AUTH: Sec. 90-4-316, MCA
IMP: 90-4-305, MCA

RATIONALE: The proposed rule change to ARM 14.8.201 does not affect the Governor's emergency powers, but provides additional information and a consistent basis on which to evaluate and implement regional curtailment of electricity given a protracted electricity shortage in the Pacific Northwest. The proposed amendments to ARM 14.8.203 and 14.8.205 reflect changes in the agency name and address.

3. Interested persons may present their data, views, or arguments concerning the proposed amendments in writing to:
Judy Browning, Chief of Staff
Governor's Office
State Capitol Building
Helena, MT 59620

no later than February 24, 1995.

4. If a person who is directly affected by the proposed amendment wishes to express his data, views, and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to Chief of Staff, Judy Browning, State Capitol Building, Helena, MT 59620, no later than February 24, 1995.

5. If the Governor's office receives requests for a public hearing on the proposed amendment 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 greater than 25 persons based on the Montana Energy Data Handbook, December 1992.

MARC RACICOT
GOVERNOR

JUDY BROWNING
RULE REVIEWER

Certified to the Secretary of State January 4, 1995.

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

In the matter of the amendment of rule 16.32.302 concerning construction standards for health care facilities	NOTICE OF PROPOSED AMENDMENT NO PUBLIC HEARING CONTEMPLATED

(Health Care Facilities)

To: All Interested Persons

1. On February 13, 1995, the department proposes to amend rule 16.32.302 regarding the construction requirements for a health care facility.

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

16.32.302 MINIMUM STANDARDS OF CONSTRUCTION FOR A LICENSED HEALTH CARE FACILITY--ADDITION, ALTERATION, OR NEW CONSTRUCTION--GENERAL REQUIREMENTS (1) Except as may otherwise be provided in (2) of this rule, a health care facility and the construction of, alteration, or addition to a facility shall comply with:

(a) all standards set forth in:

(i) the 1992-1993 "Guidelines for the Construction and Equipment for Hospitals and Medical Facilities", and NFPA 101, "Life Safety Code, ~~1991~~ 1994 edition," except that a facility already licensed under an earlier edition of the "Life Safety Code" published by the national fire protection association, is not required to comply with later editions of the "Life Safety Code". Copies of the cited editions are available at the department.

(ii) Remains the same.

(b)-(c) Remain the same.

(2)-(3) Remain the same.

(4) The department hereby adopts and incorporates by reference:

(a) Remains the same.

(b) NFPA 101, "Life Safety Code ~~1991~~ 1994 edition", published by the national fire protection association, which sets forth construction and operation requirements designed to protect against fire hazards.

(c)-(e) Remain the same.

(f) Copies of the materials cited above are available at the Health Facilities Division, Department of Health and Environmental Sciences, Cogswell Building, ~~Capitol Station~~ PO Box 200901, Helena, Montana, 59620-0901.

AUTH: 50-5-103, MCA; IMP: 50-5-103, 50-5-201, 50-5-204, MCA

3. The department is proposing to amend this rule

because incorporation of the most current nationally-accepted life safety code standard applicable to the construction of health care facilities is necessary in order to adequately protect the public health, welfare, and safety and to allow the professionals who design health care facilities to do so utilizing the latest technological advances in the field.

4. Interested persons may submit their data, views, or arguments concerning the proposed amendment, in writing, to Cynthia Brooks, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, PO Box 200901, Helena, Montana, 59620-0901, no later than February 10, 1995.

5. If a person who is directly affected by the proposed amendment 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 Cynthia Brooks, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, PO Box 200901, Helena, Montana, 59620-0901. A written request for hearing must be received no later than February 10, 1995.

6. If the agency receives requests for a public hearing on the proposed amendment 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 health care facilities in the State, the number of potential new health care facilities in the State, and the number of persons served by these facilities.

ROBERT J. ROBINSON, Director

Certified to the Secretary of State January 3, 1995.

Reviewed by:

Eleanor Parker, DHES Attorney

BEFORE THE MONTANA DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

In the matter of amending Rule 36.14.502 pertaining to interim minimum spillway capacities on high-hazard dams	) NOTICE OF PUBLIC HEARING) ON PROPOSED AMENDMENT OF) RULES FOR INTERIM MINIMUM) SPILLWAY CAPACITIES ON HIGH-) HAZARD DAMS.

TO: All Interested Persons

1. On February 28, 1995, at 10 a.m., a public hearing will be held in the Director's Conference room of the Department of Natural Resources and Conservation, 1520 East Sixth Ave., Helena, Montana, to consider the amendment of Rule 36.14.502

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

36.14.502 HYDROLOGIC STANDARD FOR EMERGENCY AND PRINCIPAL SPILLWAYS Sections (1) through (5) and Table A remain the same.

(6) The above spillway inflow design flood capacity requirements in Table A are held in abeyance for an interim period ending on December 31, 1997 for existing high-hazard dams. In the interim a minimum spillway hydraulic capacity shall be not less than actual design capacity of the spillway and not less than the 500-year inflow to the reservoir computed by using the appropriate regression equation in U.S. Geological Survey Water Resources Investigative Report 92-4048.

AUTH: 85-15-110, MCA
IMP: 85-15-210 through 213, MCA

RATIONALE: The Department of Natural Resources and Conservation has entered into a study with the U.S. Geological Survey to examine the recurrence intervals of extreme storm events in Montana. The results of the study are expected before December 31, 1997. The above spillway requirements will likely be amended on or before that date. A minimum spillway requirement for existing high-hazard dams is specified to hold the status quo.

3. Interested parties may submit their data, views, or arguments, either orally or in writing, at the public hearing. Written data, views, or arguments may also be submitted to Laurence Siroky, Bureau Chief, Water Operations, Department of Natural Resources and Conservation, 1520 East Sixth Avenue, Helena, MT 59620, to be received no later than March 3, 1995.

4. Laurence Siroky has been designated to preside over and conduct the hearing.

5. The authority of the Department to make the proposed rule is based on section 85-15-110(4), MCA, and the rule implements 85-15-210 through 213, MCA.

Don MacIntyre, Rule Reviewer

Mark Simonich, Director

Certified to the Secretary of State January 3rd, 1995

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

In the matter of the amendment of rule 2.55.327 pertaining to the Construction Industry Premium Credit Program.	))))	NOTICE OF AMENDMENT

TO: All Interested Persons:

1. On November 10, 1994, the Board published an amended notice of public hearing on the proposed amendment of rule 2.55.327 pertaining to the Construction Industry Premium Credit Program at page 2881 of the 1994 Montana Administrative Register, Issue No. 21. The hearing was held on November 30, 1994 at 2:00 p.m. in Helena, Montana.

2. The Board has amended rule 2.55.327 as proposed.

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

COMMENT: The Montana State Council of Carpenters commented that the new percentages are more in line with the intent of House Bill 187 (1991), but still does not go far enough to level the playing field as would changing to an hour-based system. When premium is calculated as a percentage of payroll and not hours worked, employers will continue to pay more than their fair share of premium.

A sample table was used to compare the premium paid as a rate per hour using the proposed credits for the wage range utilized most by contractors employing carpenters in class code 5403. For an employer to pay the same premium on a $10.00/hour carpenter as on a $15.50/hour carpenter may not be financially equitable for the State Fund due to the higher indemnity payment. The most commonly used wage rate seems to be about $12.50 per hour.

RESPONSE: State Fund concurs with the comments concerning the intent of the 1991 legislation (HB 187), which was to "level the playing field" in the construction industry. However, the "leveling of the playing field" must take into consideration other factors affecting premium charged such as experience modification and volume discount, not just the manual rate per $100 of payroll and the discount table in these rules. In consideration of those factors, the change made this year in the credit table, and to minimize the load on the construction classifications and thereby provide rate stabilization, we believe the proposed table to be valid. The State Fund agrees

to study the results of this year's program to determine if further changes should be made next year.

COMMENT: In addition, the Montana state council of Carpenters commented on the State Fund's process of surveying employers to determine whether or not they are eligible for the premium credit program. Employees of a specific employer are lumped together. If lower paid office employees are lumped with higher paid construction hands, or if class codes are mixed which have employees at varying wage rates due to qualifications and expertise, that employer's average paid wage is lowered and the employer is not given enough premium credit. In addition, the premium has been increased by a load factor designed to make this program revenue neutral, and more is charged per class code, thereby charging the employer improperly.

RESPONSE: Commentor's second issue concerns the inclusion of lower paid employees in the analysis of a company to determine their construction credit. This inclusion is valid since the credit factor will be applied to all premium paid by the company.

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 January 3, 1995.

BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

In the matter of the amendment of a rule pertaining to classification and standards for) pesticide applicators) CORRECTED NOTICE OF AMENDMENT FOR ARM 4.10.203

TO: All Interested Persons

1. On November 10, 1994, the Department of Agriculture published notice of the proposed amendment of the above-mentioned rule at pages 2883 to 2884 of the 1994 Montana Administrative Register, Issue No. 21. On December 22, 1994, the Department published notice of the amendment of the above-mentioned rule at page 3183 of the Montana Administrative Register, Issue No. 24. The department inadvertently omitted a portion of the text.

2. The correct rule amendment should read as follows with the omitted portion underlined. This then changed the numbers as indicated:

4.10.203 COMPETENCY STANDARDS FOR LICENSING AND CERTIFICATION-LICENSING OF PESTICIDE APPLICATORS (1) through (5)(e) remain the same.

(f)	Seed Treatment and Elevator Pest Control	1987
(g)	Aquatic Pest Control	1986
(h)	Right-of-Way Pest Control	1989
(i)	Industrial, Institutional, Structural, and Health Related Pest Control (i) remain the same	1987
(j)	Wood Product Pest Control	1986
(k)	Public Health Pest Control	1988
(l)	Regulatory Pest Control: (i) through (vi) remain the same	
(m)	Demonstration and Research Pest Control	1987

AUTH: 80-8-105, MCA IMP: 80-8-105, MCA

Timothy J. Meloy
Rule Reviewer
Department Attorney

Leo A. Giacometto
Director
DEPARTMENT OF AGRICULTURE

Certified to the Secretary of State: December 30, 1994

BEFORE THE BOARD OF RADIOLOGIC TECHNOLOGISTS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment of rules pertaining to permits	NOTICE OF AMENDMENT OF 8.56.602A PERMITS AND 8.56.602C PERMIT EXAMINATIONS

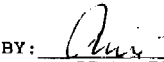
TO: All Interested Persons:

1. On November 10, 1994, the Board of Radiologic Technologists published a notice of proposed amendment of the above-stated rules at page 2886, 1994 Montana Administrative Register, issue number 21.

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

3. No comments or testimony were received.

BOARD OF RADIOLOGIC
TECHNOLOGISTS
JIM WINTER, RT, CHAIRMAN

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


ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, January 3, 1995.

BEFORE THE BOARD OF REAL ESTATE APPRAISERS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment of rules pertaining to appraisal reports and application requirements	NOTICE OF AMENDMENT OF 8.57.402 APPRAISAL REPORT AND 8.57.404 APPLICATION REQUIREMENTS

TO: All Interested Persons:

1. On October 13, 1994, the Board of Real Estate Appraisers published a notice of proposed amendment of the above-stated rules at page 2696, 1994 Montana Administrative Register, issue number 19.

2. The Board is amending ARM 8.57.404 exactly as proposed, but voted not to adopt the proposed amendment to ARM 8.57.402.

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

COMMENT: Three comments were received in opposition to the proposed amendment of ARM 8.57.402. The opponents stated that they felt the amendments, if adopted, would make the rule more stringent than USPAP requirements.

RESPONSE: The Board concurred and voted not to adopt the proposed amendments to ARM 8.57.402.

BOARD OF REAL ESTATE APPRAISERS
JANET DAVIS, CHAIRMAN

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

_____
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, January 3, 1995.

BEFORE THE DEPARTMENT OF
FAMILY SERVICES OF THE
STATE OF MONTANA

In the matter of the amendment of Rule 11.14.103 and 11.14.105 pertaining to registration and licensing of day care facilities.	NOTICE OF CORRECTED AMENDMENT OF RULE 11.14.103 AND 11.14.105 PERTAINING TO REGISTRATION AND LICENSING OF DAY CARE FACILITIES

TO: All Interested Persons

1. On August 25, 1994, the Department of Family Services published notice of the proposed amendment of Rules 11.14.103, pertaining to registration and licensing of day care facilities at page 2393 of the 1994 Montana Administrative Register, issue number 16. On December 22, 1994 the department published notice of amendment of Rule 11.14.103 at page 2742 of the 1994 Montana Administrative Register, issue number 19.

2. Both notices failed to set out the proper rule to be amended in regard to (6). Referring to the first notice, immediately following the proposed amendment of (1) in ARM 11.14.103, the proposal should have stated that (2) - (6) remain the same. Following this statement, the proposal should have set out ARM 11.14.105 as follows:

11.14.105 DAY CARE FACILITIES, REGISTRATION AND LICENSING PROCEDURES (1) through (5) remain the same.

(6) The department, after written notice to the applicant, licensee or registrant, may deny, suspend, restrict, revoke or reduce to a provisional status a registration certificate or license upon finding that:

(a) The applicant has not met the requirements for licensure or registration set forth in these rules, and

(b) the licensee or registrant has received 3 warnings of non-compliance with the registration or licensing requirements.

(c) However, suspension or revocation may be immediate if:

(i) upon referral of suspected child abuse or neglect regarding an operating day care facility, the initial investigation reveals that there are reasonable grounds to believe that a child in the facility may be in danger of harm, suspension or revocation will be immediate; ~~or~~

(ii) the department requests and is denied access to the licensed or registered facility;

~~(c)~~ (iii) the provider has made any misrepresentations to the department, either negligent or intentional, regarding any information requested on the application form or necessary for registration or licensing purposes; or

~~(d)~~ (iv) the provider, a member of the provider's household or staff has been named as the perpetrator in a substantiated report of child abuse or neglect as defined in ARM

11.5.515.
Subsections (7) through (11) remain the same.

AUTH: Section 52-2-704, MCA. IMP: Sections 52-2-721; 52-2-732; 52-2-733, MCA .

3. The rule ARM 11.14.103 is amended as originally proposed, except that the amendments designed to amend 11.14.105 which were erroneously set out in connection with the amendment of this rule, are withdrawn. The rule ARM 11.14.105 is amended as detailed in this notice.

Hank Hudson, Director

John Melcher, Rule Reviewer

Certified to the Secretary of State, January 3, 1995.

BEFORE THE DEPARTMENT OF
FAMILY SERVICES OF THE
STATE OF MONTANA

In the matter of the adoption of Rule I pertaining to day care facilities.	CORRECTED NOTICE OF ADOPTION OF RULE I PERTAINING TO DAY CARE FACILITIES

TO: All Interested Persons

1. On November 10, 1994, the Department of Family Services published notice of the proposed adoption of Rule I pertaining to prohibiting smoking in day care facilities at page 2890 of the 1994 Montana Administrative Register, issue number 21. On December 22, 1994, the department published notice of adoption of Rule I as proposed, at page 3188 of the 1994 MAR, issue number 24. The notice of adoption erroneously assigned Rule I the number 11.14.107. This rule number was previously assigned to another rule earlier in the last quarter of 1994.

2. Rule I is therefore adopted as proposed, but with the rule number 11.14.112.

3. No comments have been received on this rulemaking.

DEPARTMENT OF FAMILY SERVICES

/s/ Hank Hudson

Hank Hudson, Director

/s/ John Melcher

John Melcher, Rule Reviewer

Certified to the Secretary of State, January 3, 1995.

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

In the matter of the amendment of 16.10.239, 303, 633, and 1311, and the adoption of new rules I-XIII dealing with minimum performance requirements for local health authorities	NOTICE OF CORRECTED AMENDMENT AND ADOPTION OF NEW RULES I-XIII (Food and Consumer Safety)

To: All Interested Persons

1. On November 10, 1994, the Department published notice of amendment and adoption of the above stated rules at page 2941 of the 1994 Montana Administrative Register, issue number 21.

2. The Department has amended and adopted the rules as proposed with the following changes.

RULE VI (16.10.~~504~~ 507) MINIMUM PERFORMANCE REQUIREMENTS FOR LOCAL HEALTH AUTHORITIES Same as proposed.

3. The Department had already assigned 16.10.504 to another rule, so we need to correct the number for Rule VI.

ROBERT J. ROBINSON, Director

Certified to the Secretary of State January 3, 1995.

Reviewed by:

Eleanor Parker, DHES Attorney

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

In the matter of the amendment of rules 16.45.1201-16.45.1227 and 16.45.1229-16.45.1240 dealing with underground storage tank installer and inspector licensing, tank permits, and tank inspections, and the repeal of rule 16.45.1228 concerning inspector licensing fees)	NOTICE OF CORRECTED AMENDMENT OF RULES

(Underground Storage Tanks)

To: All Interested Persons

1. On October 13, 1994, the department published notice of amendment of rules and repeal of 16.45.1228 at page 2744 of the 1994 Montana Administrative Register, issue number 19.

2. The department has amended the rules as proposed, with the following changes (new material is underlined; material to be deleted is interlined):

16.45.1220 INSPECTION FEES (1) Except as provided in (2) and (3) of this rule, an inspection fee deposit of ~~$65~~ $62.50 for the use of a local inspector and ~~$80~~ $70 for the use of a department inspector shall be submitted to the department for each installation or closure not conducted by a licensed installer. The inspection fee deposit must be submitted with the permit application in accordance with ARM 16.45.1214, 16.45.1216 to 1217, and 16.45.1219 and must be paid in the form of a check or money order made payable to the Montana department of health and environmental sciences.

(2)-(6) Same as proposed.

3. The department is making this correction to conform the fee amounts that subsection (1) requires to be deposited to the amended reference to those same deposit amounts cited in subsection (5) of the rule.

ROBERT J. ROBINSON, Director

Certified to the Secretary of State January 3, 1995.

Reviewed by:

Eleanor Parker, DHES Attorney

BEFORE THE FIRE PREVENTION AND INVESTIGATION BUREAU

DEPARTMENT OF JUSTICE

STATE OF MONTANA

In the matter of the adoption of an emergency rule amendment on the expiration of provisional endorsements for fire alarm, suppression, and extinguishing systems	)))))	NOTICE OF EMERGENCY AMENDMENT

TO: All Interested Persons

1. The Department of Justice has determined that a significant number of persons who sell, service, or install fire alarm systems, special agent fire suppression systems, or fire extinguishing systems hold provisional endorsements, issued pursuant to ARM 23.7.133(3). Under the current wording of that rule, all provisional endorsements will expire on December 31, 1994. This will imperil the public welfare and safety in that after that date, persons who install fire alarm systems, special agent fire suppression systems, and fire extinguishing systems will not service or install such systems, or persons who do not possess the legally required endorsements will service and install such systems. This rule could not be amended under regular procedures in time to prevent this imminent peril to the public welfare and safety.

Therefore, the Department intends to make the following emergency amendment to ARM 23.7.133(3). The rule, as amended, will be mailed to all persons who hold a provisional endorsement and all persons known to the Department who wish to comment, as well as being published as an emergency rule in the next issue of the register.

2. The emergency rule will be effective December 31, 1994.

3. The text of the emergency rule is as follows:

23.7.133 EXAMINATION FOR ENDORSEMENT

(1) and (2) remain the same.

(3) Individuals applying for any endorsement described herein may be issued a provisional endorsement. The provisional endorsement will expire ~~on December 31, 1994~~ one year after receipt of the individual's completed application, unless the Department finds good cause to extend the provisional endorsement or to terminate it at an earlier date. At the time of renewal, the

applicant must submit appropriate documentation verifying that the applicant qualifies for endorsement.

AUTH: Section 50-3-102, 50-3-103 and 50-39-107 MCA. IMP: Section 50-3-102, 50-39-101 through 50-39-107 MCA.

4. The rationale for the emergency rule is set forth in paragraph 1.

5. A standard rulemaking procedure will be undertaken prior to the expiration of this emergency rule.

6. Interested persons are encouraged to submit their comments during the upcoming standard rulemaking process. If interested persons wish to be personally notified of that rulemaking process, they should submit their names and addresses to Bruce Suenram, Montana State Fire Marshal, 303 North Roberts, Room 365, P.O. Box 201417, Capitol Station, Helena, MT 59620-1417.

DEPARTMENT OF JUSTICE

By: _____
JOSEPH P. MAZUREK
Attorney General

By: _____
RULE REVIEWER

Certified to the Secretary of State, 12/22/94.

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

In the matter of amendment of ARM 26.4.301, 26.4.303, 26.4.404, 26.4.405, 26.4.407, and 26.4.1206, regarding refusal to issue operating permits because of violation of reclamation or environmental laws.	)))))))	NOTICE OF AMENDMENT

1. On September 8, 1994, the Board of Land Commissioners and Department of State Lands proposed amendment of ARM 26.4.301, 26.4.303, 26.4.404, 26.4.405, 26.4.407, and 26.4.1206, all pertaining to refusal to issue operating permits because of violation of reclamation or environmental laws, at page 2498 of the 1994 Montana Administrative Register, Issue No. 17.

2. The agency has amended the rules as proposed.

3. A summary of the only comment received, and the agency's response to that comment, are as follows:

COMMENT: Does the new definition in 26.4.301(78) diminish or strengthen the old criteria?

RESPONSE: Prior to October 1, 1993, the Department had no authority to deny a permit based on a violation by an entity that owns or controls the applicant or an entity under common control with the applicant. The Department could deny only on the basis of violations by the applicant. The Department, therefore, could not implement the standards contained in the proposed rules. However, the Office of Surface Mining's authority was broader and included the criteria that are contained in the Department's proposed rules. Because most coal mines in Montana contain at least some federal land, and because the current cooperative agreement requires both a state and a federal permit for mines with private and federal lands, these standards were applied to most mines via the federal permit. The Department's authority was broadened in Chapter 225, Laws of 1993, which became effective on October 1, 1993. Since that date the Department has been evaluating applications in accordance with the criteria in the proposed rules.

Reviewed by:

John F. North
Chief Legal Counsel

Arthur R. Clinch
Commissioner

Certified to the Secretary of State January 3, 1995.

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

In the matter of adoption of new Rule I and amendment of ARM 26.4.301, 26.4.1001, 26.4.1002, 26.4.1005, 26.4.1006, 26.4.1007, 26.4.1009, 26.4.1011, and 26.4.1014, pertaining to the regulation of prospecting for coal and uranium.	NOTICE OF ADOPTION AND AMENDMENT

1. On August 25, 1994, the Board of Land Commissioners and Department of State Lands published notice of proposed adoption of new Rule I and amendment of ARM 26.4.301, 26.4.1001, 26.4.1002, 26.4.1005, 26.4.1006, 26.4.1007, 26.4.1009, 26.4.1011, and 26.4.1014, all pertaining to prospecting for coal and uranium, at page 2414 of the 1994 Montana Administrative Register, Issue No. 16.

2. The agency has adopted Rule I (26.4.1001A) as proposed.

3. The agency has amended ARM 26.4.301, 26.4.1001, 26.4.1002, 26.4.1006, 26.4.1007, 26.4.1009, 26.4.1011, and 26.4.1014 as proposed.

4. The agency has adopted the amendments to ARM 26.4.1005 with the following modifications:

26.4.1005 DRILL HOLES

(1) and (2) same as proposed.

(3) Unless alternative procedures are approved or required by the department, the ~~permittee~~ prospector shall use the following reclamation techniques:

(a) through (c) same as proposed.

(d) ~~(i) Whenever the permittee encounters, or the permittee or the department anticipates encountering, drilling conditions such that the drill hole cannot be adequately plugged in accordance with the performance standards described in section (2) of this rule using procedures described in paragraphs (3)(c)(i) or (3)(c)(ii) above, or both procedures, the permittee shall propose or the department shall stipulate an alternative plugging procedure. Alternative plugging procedures approved by the department, must be implemented promptly after exploration is completed on a site. The department may approve alternate plugging procedures only if it finds that the procedures required in paragraphs (3)(c)(i) or (3)(c)(ii) would not meet the requirement of subsection (a) and the alternative procedures would meet those requirements. Upon request of the department, the permittee must document why standard procedures would not be effective.~~

~~(ii) Whenever the department, upon inspection of a drill~~

~~hole, determines that the hole may not have been plugged in accordance with subsections (3)(a) through (3)(d) above or may not meet the standards of section (2), it shall notify the permittee in writing. Within 30 days of receipt of the notice, the permittee shall submit a mitigation plan. If the department finds that the proposed plan would not be effective, the department shall provide an opportunity for informal conference within 30 days. After the informal conference, the department shall either approve the proposed plan or order compliance with an amended plan. Upon approval, the permittee must implement the plan within a reasonable time set by the department~~ A detailed description of all methods and materials to be used for casing and grouting all water wells, monitor wells, or holes that are not abandoned in accordance with (c) immediately after drilling must be provided to the department. All cased holes, water wells, and monitor wells must be completed in a manner approved by the department. All wells and other drill holes must be constructed and maintained in compliance with the performance standards contained in ARM 26.4.632, 26.4.647, 26.4.1005, and 26.4.1011 through 1013 AND ARM TITLE 36, CHAPTER 21, SUBCHAPTERS 6 AND 8.

(e) same as proposed.

(4) same as proposed.

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

5. A summary of comments objecting to or proposing modification of the rules, and the agency's responses to those comments, are as follows:

COMMENT 1: The changes in ARM 26.4.1001(2)(c) will place significant burden, costs, and delay onto prospectors without providing significant benefit to society. No change should be made in existing language.

RESPONSE: 30 CFR 772.12(b)(8) requires this information for exploration permit applications. The Office of Surface Mining has notified Montana that its current prospecting rules do not comply with this rule. Therefore, this change must be made.

COMMENT 2: The information required in ARM 26.4.1001(2)(q)(iii)(C) and (F) may not be available in full detail at the time of application. The rule should reflect that a reasonable attempt to estimate route and species habitat is all that is required.

RESPONSE: The amendment to subparagraph (C) does not make any substantive change in the rule. No change, other than numbering and cross-reference changes, is made in (F). The suggested change is beyond the scope of any other proposed amendment. The suggested change cannot therefore be made.

COMMENT 3: The language in ARM 26.4.1001(2)(h)(iii) should reflect that actual hole locations may not match proposed hole locations due to unanticipated conditions encountered in the field.

RESPONSE: No change in this subparagraph is proposed, and the suggested language is beyond the scope of any other proposed change in the rule. The suggested change, therefore, cannot be made.

COMMENT 4: Proposed ARM 26.4.1001(3) should be amended to provide that prospecting permits are issued on a five-year basis, in order to avoid unnecessary expense to the public.

RESPONSE: Section 82-4-226(6), MCA, provides that a prospecting permit is valid for one year. An agency may not adopt a rule that contravenes a statute.

COMMENT 5: The phrase "completely avoid" in ARM 26.4.1005(1) should be replaced with alternative language such as "minimize."

RESPONSE: The Department did not propose any changes to section (1). The suggested language is outside the scope of any other change proposed by the Department. The suggested change, therefore, cannot be made.

COMMENT 6: For clarification, the last sentence in ARM 26.4.1005(1)(b) should be separated into subparagraph (c).

RESPONSE: This change cannot be made because this sentence cannot fit grammatically or conceptually under the first sentence.

COMMENT 7: ARM 26.4.1005(2)(a) should specify the circumstances under which escape of water must be prevented.

RESPONSE: The only change proposed to Section (2) is the change of the word "operator" to "prospector." The suggested change is beyond the scope of the proposed amendment and any other amendment proposed in this rulemaking proceeding. The suggested change, therefore, cannot be made.

COMMENT 8: ARM 26.4.1005(1)(d) should be revised to read, "reclaim all <u>significant</u> surface impacts...."

RESPONSE: The only change proposed to Section (2) is the change of the word "operator" to "prospector." The suggested change is beyond the scope of the proposed amendment and any other amendment proposed in this rulemaking proceeding. The suggested change, therefore, cannot be made.

COMMENT 9: ARM 26.4.1005(3)(b) contains no plugging requirements. If plugging is not required, this subsection should refer to the Water Well Contractors Board requirements on well abandonment.

RESPONSE: Subsection (3)(c) requires plugging. It is applicable to all drill holes for which an exemption is not specifically granted by the Department. This includes cased drill holes.

COMMENT 10: The proposed changes to ARM 26.4.1005(3)(c)(iii) appear to set well construction standards. If so, the rule needs only to require standards already put in

effect by the Board of Water Well Contractors. To have different standards would create a serious problem.

RESPONSE: The language to which the commentor refers is actually ARM 26.4.1005(3)(d). The Department's rules are in some instances more stringent than those of the Board of Water Well Contractors (BWWC). For example, ARM 26.4.1005 does not allow construction with cuttings slurry grout or compacted clay cuttings. The Department is of the opinion that these requirements are necessary to insure adequate construction. Furthermore, BWWC has the authority to grant exemption from its standards. See ARM 36.21.802(10). However, to insure consistency to a large degree, the rule has been amended to provide for construction consistent with the BWWC rules. To the extent ARM 26.4.1005 is more stringent, it will apply. This is consistent with the BWWC rules, specifically 36.21.802(9).

COMMENT 11: The requirement for full hole plugging with bentonite grout is reasonable where a significant potential for interaquifer leakage exists. Where significant potential does not exist, partial hole plugging down to approximately 15 feet below ground surface should suffice. Language in ARM 26.4.1005(3)(c)(ii) should be rewritten to allow this flexibility to prospectors.

RESPONSE: This flexibility is already in the introductory clause in 1005(3). It provides that the standards are applicable "[u]nless alternative procedures are approved or required by the department."

COMMENT 12: What is the definition and range of characteristics for "artificially flat areas" in ARM 26.4.1007(1) in comparison to the "approximate original contour?" Are the abandonment requirements specified in ARM 26.4.1005, to grout wells within two feet of the surface, applied to the artificially flat areas or the approximate original contour?

RESPONSE: Section 26.4.1007(1) is proposed to bring the rule into compliance with 30 CFR 815.15(c). Artificially flat areas are areas that have been altered from the original landscape configuration by prospecting operations. These areas must be recontoured to closely approximate the original landscape configuration. The grouting requirements in ARM 26.4.1005(3)(c)(i) and (ii) pertain to the ground surface existing at the time of drill-hole reclamation. After the plugging requirements are met, the land must be returned to approximate original contour.

COMMENT 13: The proposed language, "for development of a mining operation for which an operating permit application is to be submitted in the near future," should be deleted because test pits are important for potential coal sales to a prospective buyer who may or may not purchase coal. An operator cannot predict or guarantee if an operating permit application will be submitted in the near future.

RESPONSE: The proposed language is required by 30 CFR 772.14(b).

COMMENT 14: In this language, "is to" should be changed to "may," and "near" should be stricken.

RESPONSE: The proposed language is required by 30 CFR 772.14(b).

COMMENT 15: In ARM 26.4.1014(2)(c)(i), the proposed language, "including why the mineral may be so different from the end user's other mineral supplies as to require testing," should be deleted. Potential buyers may require test burns before they guarantee a purchase and issue a coal sales contract.

RESPONSE: The proposed language is required by 30 CFR 772.14(b)(2)(i).

COMMENT 16: With regard to Rule I, what is a prospector prospecting for if not the location, quality, or quantity of a natural mineral deposit? Also is there a difference between a natural and an unnatural mineral deposit?

RESPONSE: Section 82-4-203(26) includes within the definition of "prospecting" the determination of the quality and quantity of overburden and the gathering of environmental baseline conditions before mining. A natural mineral deposit is one that is in the location it was placed by geologic process. A mineral deposit that was placed in a location by humans, such as a waste pit, is not a natural mineral deposit.

COMMENT 17: The intent to prospect procedure could be seriously abused. The current rule requires a permit for all prospecting. Rule I will probably not meet the requirements of the federal coal exploration rules. The previous rules required a permit for all prospecting.

RESPONSE: The notice of intent to prospect procedure is contained in 82-4-226(8), MCA. The agency has no authority to eliminate this statutorily mandated procedure by rule. The statute was enacted by the Legislature in 1993 to comply with 30 CFR, Part 772, which provides for the notice of intent to prospect procedure. This procedure applies only to forms of prospecting that have been added to the definition of prospecting since 1990--i.e., determination of overburden characteristics and environmental data collection. The form of prospecting that has been subject to the permit requirement since adoption of the Act in 1973--determination of the location, quality, or quantity of coal--continues to be subject to the permit requirement.

COMMENT 18: In ARM 26.4.1005(2)(c)(ii), what is the reason for replacing slurry with clay grout for hole plugging? Have the standards in the current rule proven unsatisfactory and allowed settling or water mixing?

RESPONSE: Evaluations conducted over the last 14 years of past plugging of coal and uranium drill holes where bentonite slurries were used revealed that slurries did not remain static in holes under a variety of conditions. In cases where problems with slurries were noted, exploration companies were required to re-abandon drill holes with cement, or with slurries consisting

of the highest bentonite solids (less than about 15% solids/unit volume) that could be pumped. In the early 1980's several "mud" companies began producing high solids (generally greater than 50% solids/unit volume), dry "chip" and "granular" bentonite products for use as (among other things) a drill hole abandonment grout or sealant. These materials are emplaced in drill holes in dry condition, not blended with water to form a slurry. ARM 26.4.1005 up to now required that cement or a bentonite slurry be used for hole abandonment. The department recently conducted thorough investigations of a variety of commonly used hole plugging materials and methods, including the high solids, dry bentonite. The high solids, dry bentonite product proved to be a superior hole plugging material compared to slurries. The changes to ARM 26.4.1005 take into account the superior performance of the high solids, dry bentonite material.

Reviewed by:

John F. North
Chief Legal Counsel

Arthur R. Clinch
Commissioner

Certified to the Secretary of State January 3, 1995.

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

In the Matter of Adoption of Rules Pertaining to Motor Carriers of Property.	)))	NOTICE OF ADOPTION OF NEW RULES I THROUGH XII

TO: All Interested Persons

1. On November 10, 1994 the Department of Public Service Regulation published notice of public hearing on the proposed adoption of rules pertaining to motor carriers of property at pages 2894-2896, issue number 21 of the 1994 Montana Administrative Register.

2. The Commission is adopting Rule II 38.3.902 DEFINITIONS and Rule V 38.3.908 ANNUAL PER VEHICLE REGISTRATION exactly as proposed but is not adopting Rule I.

3. The Commission has adopted the following rules as proposed, but with the following changes:

RULE III. 38.3.904 ~~FINANCIAL RESPONSIBILITY --~~ INSURANCE (1) Except as provided in ARM 38.3.906, a motor carrier of property must comply with the motor carrier bodily injury and property damage liability insurance requirements of ARM 38.3.701, 38.3.702, 38.3.704, 38.3.705 and 38.3.706. AUTH: Sec. 69-12-201, MCA; IMP, Sec. 69-12-402, MCA

RULE IV. 38.3.906 ~~FINANCIAL RESPONSIBILITY --~~ SELF-INSURANCE (1) A motor carrier of property may apply to the commission for self-insurance approval pursuant to ARM 38.3.708 and 38.3.709. AUTH: Sec. 69-12-201, MCA; IMP, Sec. 69-12-402, MCA

RULE VI. 38.3.910 ~~CERTIFICATE OF CARRIER COMPLIANCE~~ CARRIER INSURANCE REGISTRATION (1) A motor carrier of property will not engage in transportation operations in this state without first having ~~been issued a certificate of carrier compliance~~ registered insurance with the commission and received a notice of carrier insurance registration from the commission.

(2) A ~~certificate of carrier compliance~~ notice of carrier insurance registration from the commission acknowledges that the motor carrier of property has demonstrated appropriate ~~financial responsibility through~~ insurance coverage pursuant to ARM 38.3.904 or self-insurance coverage pursuant to ARM 38.3.906 and has registered vehicles with the commission pursuant to ARM 38.3.908. AUTH: Sec. 69-12-201, MCA; IMP, Secs. 69-12-201, 69-12-402 and 69-12-421, MCA

RULE VII. 38.3.911 APPLICATION FOR ~~CERTIFICATE~~ CARRIER INSURANCE REGISTRATION (1) An application for ~~a certificate of carrier compliance~~ carrier insurance registration may be made to the commission on a form approved by the commission. The fee for application will be ~~$50.00~~ $25.00, plus the per vehicle registration fee as prescribed by ARM 38.3.908. AUTH: Sec. 69-12-201, MCA; IMP: Secs. 69-12-201, 69-12-402 and 69-12-421, MCA

RULE VIII. 38.3.912 ~~CERTIFICATES~~ CARRIER INSURANCE REGISTRATION FOR EXISTING MOTOR CARRIERS (1) A motor carrier holding a certificate of public convenience and necessity issued by the commission on or before December 31, 1994, which, in whole or in part authorizes transportation within the definition of "motor carrier of property," ~~shall be issued a certificate of carrier compliance, for operations and services within the definition of motor carrier of property, without application to the commission, so long as compliance~~ must comply with the application provisions of ARM 38.3.911, applicable insurance requirements of ARM 38.3.904 or 38.3.906 and vehicle registration requirements ARM 38.3.908 ~~are current~~ as of the effective date of this sub-chapter.

(2) Motor carriers of property granted a ~~certificate~~ notice of insurance registration under this rule must thereafter comply with the ~~certificate~~ maintenance provisions of ARM 38.3.914.

(3) Motor carriers maintaining current insurance certificates on file with the commission need not submit new certificates to the commission under this rule. AUTH: Sec. 69-12-201, MCA; IMP, Secs. 69-12-201, 69-12-402 and 69-12-421, MCA

RULE IX. 38.3.914 MAINTENANCE OF ~~CERTIFICATE~~ CARRIER INSURANCE REGISTRATION (1) Unless ~~the certificate of carrier compliance~~ registration is under a period of voluntary suspension, approved by the commission, a motor carrier of property shall maintain ~~a certificate of operating authority~~ registration by maintaining proof of ~~financial responsibility~~ insurance as required by ARM 38.3.904 and 38.3.906 and maintaining current per vehicle registration as required by ARM 38.3.908. AUTH: Sec. 69-12-201, MCA; IMP, Sec. 69-12-201, MCA

RULE X. 38.3.915 RENEWAL OF ~~CERTIFICATE~~ CARRIER INSURANCE REGISTRATION (1) So long as a motor carrier of property maintains the ~~certificate of compliance~~ registration as required in ARM 38.3.914, renewal, annual or otherwise, will not be required. AUTH: Sec. 69-12-201, MCA; IMP, Sec. 69-12-201, MCA

RULE XI. 38.3.917 LEASE OF POWER UNITS (1) A motor carrier of property may lease power units pursuant to the provisions of: ARM 38.3.2001(2); ~~ARM~~ 38.3.2002(2)(a), (b), (c), (e) and (f); and ~~ARM~~ 38.3.2003(1)(a), (b) and (h). A copy of the lease must be carried in the leased power unit at all times. AUTH: Sec. 69-12-201, MCA; IMP, Secs. 69-12-201 and 69-12-611, MCA

RULE XII. 38.3.919 TRANSFER OF ~~CERTIFICATE~~ CARRIER INSURANCE REGISTRATION (1) A ~~certificate of carrier compliance~~ notice of carrier insurance registration cannot be transferred or leased. AUTH: Sec. 69-12-201, MCA; IMP, Sec. 69-12-201, MCA

4. Comments received and responses by the Commission:

Response: Rule I is not adopted because it is now unnecessary. The rules become effective upon publication, by law.

Comment: Andrew D. Harvie, Harvie's Hotshot Service & Trucking Inc., submitted written comments in opposition to deregulation. Vern Justice, in oral comments, stated that he prefers regulation the way it has been. Response: These comments are appreciated, but federal law preempting state regulation will govern.

Comment: The City of Helena, through Kim Milburn, Public Works Director, in written comments, objected to the PSC's intent to continue to regulate transportation of solid waste. Response: The PSC overrules this comment as such regulation is required by Montana law and not preempted by federal law.

Comment: Max Bauer, Jr., Divisional Vice-President, Browning-Ferris Industries, submitted written comments that the proposed rules' reference to "organic and inorganic matter" should be deleted, as in certain forms such matter has value and is property. Response: The PSC overrules this comment as the referenced language is statutory. However, the referenced language has been (and will continue to be) interpreted as applying only to matter having no value.

Comment: The Montana Motor Carrier's Association, in written and oral comments submitted by its attorney John Shontz, noted that existing certificates may have a value deductible for tax purposes when rendered totally valueless by law. It therefore cautions that rules which allow "carry-over" rights for current holders and rules which continue to use terms used in former economic regulation may create a suspicion that value is somehow retained. It also advocates a required return of certificates to emphasize that the authorities have no value. Jerome Anderson commented at hearing that the Association's concerns are unfounded as the tax laws will respect the substance of deregulation. Response: The PSC determines that the Association's interests can be accommodated to some extent and amends the proposed rules accordingly. The PSC disagrees that a physical return of certificates is necessary.

Comment: The Association also proposes that no fee be charged to anyone, existing or new, but if a fee is charged it be the same for both. It suggests that no fee need be charged because the administrative requirements are minimal. It also questions the existing per vehicle fee, as not being related to any regulatory function of the agency. Response: The PSC overrules these comments, except with the above amendments it can economically reduce the insurance registration fee. The one-time fee is minimal and is necessary to cover the costs of administration and maintenance of records. The existing per vehicle fee is required as the Commission, by law, must assess a fee commensurate with costs.

Nancy McCaffree, Chairman

CERTIFIED TO THE SECRETARY OF STATE JANUARY 3, 1995.

Reviewed By

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

In the Matter of Amendment of a Rule Pertaining to Pipeline Safety by Adopting Federal Rules Applicable to Liquefied Natural Gas Facilities and Reenacting the Existing Rule.	)))))	NOTICE OF AMENDMENT OF RULE 38.5.2202

TO: All Interested Persons

1. On October 27, 1994 the Department of Public Service Regulation published notice of the proposed amendment to ARM 38.5.2202 at pages 2794-2795, issue number 20 of the 1994 Montana Administrative Register.

2. The Commission has amended Rule 38.5.2202 as proposed.

3. No comments were received on the proposed amendment.

Nancy McCaffree, Chairman

CERTIFIED TO THE SECRETARY OF STATE JANUARY 3, 1995.

Reviewed By

VOLUME NO. 45 OPINION NO. 30

ATHLETICS AND SPORTS - Use of small transit-type bus to transport students to and from activity events;
EDUCATION - Use of small transit-type bus to transport students to and from activity events;
MOTOR VEHICLES - Use of small transit-type bus to transport students to and from activity events;
PUBLIC EDUCATION, BOARD OF - Use of small transit type bus to transport students to and from activity events;
SCHOOL DISTRICTS - Use of small transit-type bus to transport students to and from activity events;
TRANSPORTATION, PUBLIC - Use of small transit-type bus to transport students to and from activity events;
ADMINISTRATIVE RULES OF MONTANA - Section 10.64.355;
CODE OF FEDERAL REGULATIONS - Title 49, parts 390 to 393, 395 to 397 (1993);
MONTANA CODE ANNOTATED - Sections 20-2-121, 20-10 101, -111;
OPINIONS OF THE ATTORNEY GENERAL - 40 Op. Att'y Gen. No. 53 (1984).

HELD: A small, transit-type bus (which is smaller than a greyhound bus but larger than a nine-passenger van) is a "school bus" under Mont. Code Ann. § 20-10-101(2) and may not be used to transport students to extracurricular activities unless it meets the 1990 National Standards for School Buses adopted by the Montana Board of Public Education.

December 27, 1994

Mr. Scott B. Spencer
Lincoln County Attorney
512 California Avenue
Libby, MT 59923

Dear Mr. Spencer:

You have requested my opinion on the following question:

> May a small, transit-type bus be used to transport students to extracurricular activities without meeting the requirements of the National Standards for School Buses if it meets federal safety standards for over-the-road use?

Your question arises because the Libby Public School District wants to use a passenger bus which is smaller than a greyhound-type bus but larger than a nine-passenger van to transport students to activity events without having to paint the bus

yellow and black. The yellow and black paint requirement is contained in the 1990 National Standards for School Buses which have been adopted by the Montana Board of Public Education. Mont. Code Ann. §§ 20-2-121(4), 20-10-111; Mont. Admin. R. 10.64.355. These standards apply to all school buses operated in the State of Montana. Mont. Code Ann. § 20-10-101(2)(a).

A "school bus" is defined in Mont. Code Ann. § 20-10-101(2)(a) as any motor vehicle that:

> (i) complies with the bus standards established by the board of public education as verified by the Montana department of justice's semiannual inspection of school buses and the superintendent of public instruction; and
>
> (ii) is owned by a district or other public agency and operated for the transportation of pupils to or from school or owned by a carrier under contract with a district or public agency to provide transportation of pupils to or from school.

The following vehicles are specifically excluded from this definition:

> A school bus does not include a vehicle that is:
>
> (i) privately owned and not operated for compensation under this title;
>
> (ii) privately owned and operated for reimbursement under 20-10-142;
>
> (iii) either district-owned or privately owned, designed to carry not more than nine passengers, and used to transport pupils to or from activity events or to transport pupils to their homes in case of illness or other emergency situations; or
>
> (iv) an over-the-road passenger coach used only to transport pupils to activity events.

Mont. Code Ann. § 20-10-101(2)(b). Unless excepted under these provisions, the vehicle you describe is a "school bus" and is subject to the paint requirements and other safety provisions of the National Standards for School Buses.

The exception in Mont. Code Ann. § 20-10-101(2)(b)(iii) does not apply because the vehicle you describe is designed to carry more than nine passengers. Thus, the only way that a "small transit-type bus" is exempt from the paint requirement, or any other

requirement of the National Standards for School Buses, is if the vehicle qualifies as an "over-the-road passenger coach" used only to transport pupils to activity events. Mont. Code Ann. § 20-10-101(2)(b)(iv).

The phrase "over-the-road passenger coach" was construed in a 1984 opinion issued by former Attorney General Greely. The question there was whether a 14-passenger van used to transport students to and from activity events was exempted from the definition of a "school bus" under Mont. Code Ann. § 20-10-101(3)(b) (1983), which is presently Mont. Code Ann. § 20-10-101(2)(b). Concluding that it was not, Attorney General Greely reasoned:

> The term "over-the-road" is commonly associated with long-distance highway transportation, while the term "passenger coach" normally refers to a large common carrier type of bus. Moreover, even if the phrase "over-the-road passenger coach" were ambiguous, legislative history clearly indicates that subsection (3)(b)(iv) is inapplicable to a small passenger van such as that involved here. In written analysis before the House Committee on Education and Cultural Resources, that portion of House Bill 794 later enacted as section 20-10-101(3)(b)(iv), MCA, was explained as exempting only "the greyhound-type buses used by many school districts for various activity events." . . . A 14-passenger van does not fall within this exception. Instead, the van here is the general type of vehicle contemplated by the subsection (3)(b)(iii) exclusion but, because its passenger capacity exceeds nine, is not excepted thereunder.

40 Op. Att'y Gen. No. 53 (1984) at 217 (citation omitted). That opinion implied that any vehicle smaller than a "greyhound-type bus" does not qualify as an "over-the-road passenger coach."

Nonetheless, you suggest that the term "over-the-road passenger coach" should be construed to mean all vehicles which meet federal standards for over-the-road use under the Federal Motor Carrier Safety Regulations, 49 C.F.R. pts. 390-393 and 395-397 (1993). Those regulations only apply, however, to motor vehicles which transport property or passengers in interstate commerce. 49 C.F.R. § 390.3. In addition, a recent rule published by the United States Department of Transportation, Office of Motor Carriers, indicates that as of January 1, 1995, any transportation performed by a governmental agency such as a public school district is not subject to the Federal Motor Carrier Safety Regulations. Consequently, there is no guarantee that a small, transit-type vehicle used to transport public school students to extracurricular activities will meet federal safety standards for over-the-road use. Without this guarantee,

I am reluctant to adopt your interpretation and approve the use of any vehicle other than a "greyhound-type bus," which was clearly authorized by the legislature.

At the time the exemption for an "over-the-road passenger coach" was created, it is likely that small, transit-type buses were not widely in use as they are today. However, any attempt to expand that exemption beyond "greyhound-type buses" should be directed to the legislature, which can adequately address the issue of safety that I consider to be foremost.

THEREFORE, IT IS MY OPINION:

> A small, transit-type bus (which is smaller than a greyhound bus but larger than a nine-passenger van) is a "school bus" under Mont. Code Ann. § 20-10-101(2) and may not be used to transport students to extracurricular activities unless it meets the 1990 National Standards for School Buses adopted by the Montana Board of Public Education.

Sincerely,

JOSEPH P. MAZUREK
Attorney General

jpm/ja/brf

VOLUME NO. 45 OPINION NO. 31

HEALTH - Patient's infectious disease: disclosure by health care facility to assisting emergency services provider;
HEALTH AND ENVIRONMENTAL SCIENCES, DEPARTMENT OF - Patient's infectious disease: disclosure by health care facility to assisting emergency services provider;
HOSPITALS - Patient's infectious disease: disclosure by health care facility to assisting emergency services provider;
ADMINISTRATIVE RULES OF MONTANA - Rule 16.30.801;
MONTANA CODE ANNOTATED - Title 50, chapter 16, part 5; sections 50-16-504(6), 525, -702, -703;
MONTANA LAWS OF 1989 - Chapter 390;
MONTANA LAWS OF 1993 - Chapter 476, section 3.

HELD: 1. Mont. Code Ann. §§ 50-16-702 and -703 (1993) require a health care facility, whenever a patient transported to it is diagnosed with one of the transmittable infectious diseases designated in Mont. Admin. R. 16.30.801, to report that fact back to the designated officer(s) of the emergency medical services provider(s) who assisted the patient, even if no report of exposure was filed with the facility concerning the transported patient and there is no evidence an actual exposure has occurred.

2. A disclosure of certain health care information is specifically provided by law in Mont. Code Ann. §§ 50-16-702 and -703 (1993). The Uniform Health Care Information Act contains an exception for disclosures specifically provided by law. The statutes are not in conflict.

December 30, 1994

Mr. Robert J. Robinson, Director
Department of Health and Environmental Sciences
Cogswell Building, Room C108
P.O. Box 200901
Helena, MT 59620-0901

Dear Mr. Robinson:

You have requested my opinion on the following questions:

1. When a patient transported to a health care facility is diagnosed with one of the transmittable infectious diseases designated in Mont. Admin. R. 16.30.801, do Mont. Code Ann. § 50-16-702 and -703 (1993) require the facility to report that fact to the designated officer of the emergency medical services provider(s) who

assisted the patient, even if no report of exposure was filed with the facility concerning the transported patient and there is no evidence an actual exposure has occurred?

2. Are the disclosure requirements in Mont. Code Ann. §§ 50-16-702 and -703 (1993) in conflict with the restrictions on release of health care information contained in the Uniform Health Care Act (Mont. Code Ann. tit. 50, ch. 16, pt. 5)?

In 1989, the Montana Legislature adopted an act to "allow emergency service personnel exposed to infectious disease during transport of patients to health care facilities to be notified of measures necessary to prevent or control the spread of disease." 1989 Mont. Laws, ch. 390. As adopted in 1989, Mont. Code Ann. §§ 50-16-701 to -705 required notification of an employed or volunteer emergency services provider after unprotected exposure to infectious disease only if the emergency services provider had filed a report of unprotected exposure with the health care facility.

The 1993 legislature extensively amended Mont. Code Ann. title 50, chapter 16, part 7. 1993 Mont. Laws, ch. 476. The statutes retain provision for a report of exposure by an emergency services provider followed by notification from the health care facility of whether the patient had an infectious disease, whether such a determination has been made, and the name of the disease and the date of transport if the patient was infected. Mont. Code Ann. § 50-16-702(1)(a), (c), (d) (1993). The diseases designated by the Department of Health and Environmental Sciences, in Mont. Admin. R. 16.30.801, as transmittable infectious diseases are AIDS or HIV infection, hepatitis B, hepatitis C, hepatitis D, communicable pulmonary tuberculosis, meningococcal meningitis, diphtheria, plague, hemorrhagic fevers and rabies.

Mont. Code Ann. § 50-16-702(2) (1993) is a new subsection added in 1993. It states:

> If a health care facility receiving a patient determines that the patient has an airborne infectious disease, the health care facility shall notify the designated officer and the department [of health and environmental sciences] within 48 hours after the determination has been made. The department shall, within 24 hours, notify the designated officer of the emergency services provider who transported the patient.

For purposes of Mont. Code Ann. § 50-16-702(2) (1993), communicable pulmonary tuberculosis and meningococcal meningitis are considered airborne infectious diseases. Mont. Admin. R. 16.30.801(2). No requirement that a report of exposure be

filed prior to the notification by the health care facility or the department is included in this section concerning airborne infectious disease. Nor is there any provision for a refusal to disclose if the health care facility is aware of no evidence an actual exposure occurred.

Further, the 1993 amendments deleted from Mont. Code Ann. §§ 50-16-703 and -704 any reference to an emergency services provider's report of exposure. 1993 Mont. Laws, ch. 476, § 3. Mont. Code Ann. § 50-16-703 (1993) now provides:

> (1) After a patient is transported to a health care facility, a physician shall inform the health care facility within 24 hours if the physician determines that the transported patient has an infectious disease.
>
> (2) The health care facility shall orally notify within 48 hours after the time of diagnosis and notify in writing within 72 hours after diagnosis the designated officer of the emergency services provider who attended the patient prior to or during transport or who transported the patient with the infectious disease.
>
> (3) The notification must state the disease to which the emergency services provider was exposed and the appropriate medical precautions and treatment that the exposed person needs to take.

The requirement that a report of exposure be filed by the emergency services provider as a prerequisite to notification of transport of a patient suffering from an infectious disease is no longer contained in the statute. Again, there is also no provision for a failure to notify if there is no evidence an actual exposure occurred.

In the construction of a statute, it is my function simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Mont. Code Ann. § 1-2-101 (1993). I find no basis in the amended statutes for requiring a report of exposure or evidence of an actual exposure as a prerequisite to the notification required by statute. Whenever a patient transported to a health care facility is diagnosed with one of the transmittable infectious diseases designated in Mont. Admin. R. 16.30.801, the health care facility must report that fact back to the designated officer of each emergency medical services provider who assisted the patient, even if no report of exposure was filed with the facility concerning the transported patient and there is no evidence an actual exposure has occurred.

My conclusion is in accord with the testimony of the sponsor of House Bill 220, the 1993 bill amending the statutes. The sponsor, Rep. Bruce Simon, testified before the Senate Committee on Public Health, Welfare and Safety that "[House Bill 220] does not require mandatory testing of anybody, but allows for emergency care providers who may have been exposed to know about it." Minutes, Senate Public Health, Welfare and Safety Committee, Mar. 10, 1993, at 8.

My conclusion is also in accord with the legal opinion on the statutes issued by the Department of Health and Environmental Sciences, the agency designated by law to promulgate rules and administer the law. A court would be obligated to show great deference to an interpretation given a statute by the agency charged with its administration, Norfolk Holdings v. Montana Dep't of Rev., 249 Mont. 40, 44, 813 P.2d 460, 462 (1991), and I have found no basis for rejection of the department's interpretation.

Your second question is whether the provisions in Mont. Code Ann. §§ 50-16-702 and -703 (1993), that a diagnosis of a specified communicable disease in a transported patient be reported back to the designated officer(s) of the emergency medical services provider(s) assisting the patient, and, ultimately, to the emergency medical services provider(s) who did the assisting, is in conflict with the requirements of the Uniform Health Care Information Act, Mont. Code Ann. §§ 50-16-501 to -553 (1993).

When a report of exposure has been filed by an emergency services provider, Mont. Code Ann. § 50-16-702(1)(c) (1993) requires notice to the designated officer and the emergency services provider who has assisted the patient, of whether or not the patient was infected with an infectious disease, the name of the disease, and the date of transport. Further, Mont. Code Ann. § 50-16-702(2) (1993) mandates that a health care facility disclose to the designated officer of the emergency services provider who transported a patient a determination that the patient has an airborne infectious disease. Similarly, Mont. Code Ann. § 50-16-703 (1993) specifically requires that the health care facility receiving a transported patient who has a specified infectious disease notify the designated officer of the emergency services provider who assisted the patient of the disease to which the emergency services provider was exposed and the appropriate medical precautions and treatment the exposed person needs to take. None of these disclosures would include the name of the patient. However, when coupled with the information regarding the time of exposure, the disclosures would often reveal "health care information" as defined in the Uniform Health Care Information Act, Mont. Code Ann. § 50-16-504(6) (1993), because they contain information that can readily be associated with the identity of a patient and relates to the patient's health care.

Nonetheless, I find no conflict between Mont. Code Ann. §§ 50-16-702 and -703 (1993) and the Uniform Health Care Information Act. While a disclosure of certain health care information is mandated in Mont. Code Ann. §§ 50-16-702 and -703 (1993), the Uniform Health Care Information Act contains an exception for disclosures specifically provided by law. Mont. Code Ann. § 50-16-525(1) (1993), expressly states:

> Except as authorized in 50-16-529 and 50-16-530 *or as otherwise specifically provided by law* or the Montana Rules of Civil Procedure, a health care provider, an individual who assists a health care provider in the delivery of health care, or an agent or employee of a health care provider may not disclose health care information about a patient to any other person without the patient's written authorization.

A disclosure pursuant to Mont. Code Ann. §§ 50-16-702 or -703 (1993) is a disclosure otherwise specifically provided by law, and does not conflict with the Uniform Health Care Information Act.

THEREFORE, IT IS MY OPINION:

1. Mont. Code Ann. §§ 50-16-702 and -703 (1993) require a health care facility, whenever a patient transported to it is diagnosed with one of the transmittable infectious diseases designated in Mont. Admin. R. 16.30.801, to report that fact back to the designated officer(s) of the emergency medical services provider(s) who assisted the patient, even if no report of exposure was filed with the facility concerning the transported patient and there is no evidence an actual exposure has occurred.

2. A disclosure of certain health care information is specifically provided by law in Mont. Code Ann. §§ 50-16-702 and -703 (1993). The Uniform Health Care Information Act contains an exception for disclosures specifically provided by law. The statutes are not in conflict.

Sincerely,

JOSEPH P. MAZUREK
Attorney General

jpm/ks/brf

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(406) 543-8261
Attorney for Petitioner

BEFORE THE BOARD OF OPTOMETRY
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT OR REPEAL OF ARM 8.36.406	)))	PETITION

TO: ALL INTERESTED PERSONS.

1. Petitioner, is Dr. Heidi G. Brott, O.D. who resides at 5522 Prospect Lane, Missoula, MT 59802.

2. Petitioner is the owner of an Optometrist Practice and leases office space at Sears located in Southgate Mall in Missoula, Montana.

3. Dr. Brott's office has an entrance located at the southeastern part of the mall. That entrance is a full-size-clear glass door labeled with Dr. Brott's name and profession; leading directly into her waiting room. Patients using this entrance push the door to move from the outside, open air, to walk through it directly into Dr. Brott's office. Another door in the office, number 24, provides an entrance into Sears Optical.

4. The Board of Optometry submitted a letter to Dr. Brott dated April 25, 1994, stating that Dr. Brott's practice is not separate and outside the confines of another store, in violation of ARM 8.36.406 and ordered her to permanently seal door number 24.

5. The Board's action was the result of a complaint filed against Dr. Brott by Gary E. Eudaily, O.D.

6. The rule at issue is set forth as follows:

8.36.406 GENERAL PRACTICE REQUIREMENTS (1) Optometrists may conduct a practice in or at any desired location, under the following conditions:

(a) the practice must be owned and under the direct supervision of an optometrist with valid Montana certificate or registration, except that a duly licensed optometrist is not prohibited from associating himself with other duly licensed optometrists and/or medical doctors for the purpose of practicing optometry within the scope of his license.

(b) **office space must be private, separate, and outside the confines of any store;**

(c) professional advertising must indicate without question that the practice is being conducted by the optometrist and no impression given that any company or corporation is conducting the practice. The name of the optometrist must be in type at least twice as legible as that of his location. Advertisements must also state that the optometrist is located at or in the named place and must not indicate that an optometric department is being conducted at or in the location.

(d) advertising of an optometrist must be kept separate from advertising of the company or corporation from whom he is renting;

(e) all professional signs and advertising, etc., must include the optometrist's name and the title "Optometrists", "Doctor of Optometry", or initials "O.D." in connection therewith;

(f) the board will consider all advertising appearing over the signature of an individual as having been inserted and approved by that individual, and will hold the individual responsible for such advertising. If advertising appears over the signature of a company, firm, or corporation all the individual officers or partners of the organization will be considered individually responsible for such advertising.

(2) Each registered optometrist must file and have on record with the board annually, the location of each and every office wherein the practice of optometry is conducted by him or her.

(3) Each registered optometrist must maintain accurate patient records for not less than five years from the last time the patient was treated. (Emphasis Added.)

7. The Rule should be amended. Specifically, subsection (b) requiring the space to be separate and outside the confines of any store should be deleted for the following reasons:

A. The language at issue is ambiguous and overly broad subjecting it to a differing interpretation. In a letter dated November 25, 1994, the Board of Optometry notified Dr. Brott that it stands by the interpretation of its rules used by the Administrative Code Committee. According to the Board, that committee has previously discussed ARM 8.36.406, the Board's rule on general practice requirements, which states that when optometric practices are placed in retail stores, they must "be

private, separate, and outside the confines of any store." The Administrative Code Committee stated that it was appropriate to place an optometric practice in a retail store under this regulation so long as the practice had its own entrance from outside the store. (Attorney Verdon's letter dated November 25, 1994.) As noted above Dr. Brott's office has an outside entrance. Furthermore, Dr. Brott contends that door number 24 is sufficient separation in accordance with the Rule. The Board has requested Dr. Brott to reconstruct her office to seal door number 24. The fact remains that with or without door number 24, Dr. Brott's office is separate and has an outside entrance in compliance with the rule. However, the Board mandates that the door be sealed to comply with the rule. Dr. Brott believes that she is in compliance with the rule. Her practice is private and it is in no way connected to any other business in the mall.

Reconstructing the office to seal the door will not only result in immediate expense but may damage Dr. Brott's business and render her office less safe. Door number 24 allows another entrance for the convenience and "safety" of clients and Dr. Brott. The door provides an extra entrance in a warm and dry environment and it also provides an extra escape route should the need arise.

B. There is no rational basis for the rule which has a discriminatory effect rendering the rule unconstitutional. Equal protection of laws is guaranteed by the Federal and Montana constitutions. U.S.C.A. Const. Amend.14 §1. Mont. Const. Art. 2 §4. There must be a rational basis for a discriminatory law. None appears within the statute. Equal protection of the law requires that all persons be treated alike under like circumstances. Billings Associates Plumbing, Heating and Cooling Contractors v. State Bd. of Plumbers, 184 Mont. 249, 602 P.2d 597 (1979). The statute has no effect on private practitioners who are able to locate space separate and apart from any commercial space. The portion of rule at issue applies only to those optometrists who might lease or own space which is within the confines of other commercial space.

For the rule to withstand constitutional scrutiny it must be rationally related to a legitimate government purpose. State v. Austin, 217 Mont. 269, 704 P.2d 55 (1984). No reason for the rule is apparent from the statute and no rational reason can be inferred for the arbitrary treatment.

Furthermore, the rule has been arbitrarily and selectively enforced by the Board which has taken action against a female optometrist while no action has been taken against male optometrists, similarly situated.

8. Persons known to Petitioner to have an interest in the proposed agency action are:

Dr. Mike Simons and Dr.David Kramer
Pearle Vision Center, 2810 Brooks, Missoula, MT 59801

Dr. Tom Ferguson and Dr. Gregory Zell
Skopko Optical, 2510 Reserve St., Missoula, MT 59801

Mr. Mark J. Thompson, Owner/Optician
Treasure State Optical, Paxson Plaza, Missoula, MT 59801

Dr. David Vainio
Eyecare & Eyecare USA, Southgate Mall, Missoula, MT 59801

Dr. Steven V. Previsich
WalMart - Eyecare Leasing Corporation
4000 Highway 93 South, Missoula, MT 59801

WHEREFORE, Petitioner respectfully requests the Board of Optometry repeal subsection (b) of ARM 8.36.406.

DATED this 5 day of December, 1994.

Petitioner, Dr. Heidi Brott

MARSILLO, TORNABENE, SCHUYLER & McKENNA

By: _____
Sydney E. McKenna
Attorney for Petitioner
103 South 5th Street East
Missoula, Montana 59801

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 September 30, 1994. This table includes those rules adopted during the period October 1, 1994 through December 31, 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 September 30, 1994, this table and the table of contents of this issue of the MAR.

This table indicates the department name, title number, rule numbers in ascending order, catchphrase or the subject matter of the rule and the page number at which the action is published in the 1994 Montana Administrative Register.

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