MONTANA ADMINISTRATIVE REGISTER

1995 ISSUE NO. 3
FEBRUARY 9, 1995
PAGES 150-242

MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 3

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 The notice section contains state agencies' proposed new, amended or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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

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NOTICE SECTION

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

In the matter of the proposed repeal of ARM 2.43.612, 2.43.613, and 2.43.614 pertaining to eligibility for and calculation of annual benefit adjustments for Montana Residents and annual certification of benefits paid by local pension plans.	NOTICE OF PROPOSED REPEAL NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons.

1. On March 23, 1995, the Public Employees' Retirement Board proposes to repeal ARM 2.43.612, 2.43.613, and 2.43.614 pertaining to eligibility for and calculation of the annual benefit adjustment for all retired members residing in Montana, and the annual certification of local pension plans to receive an allocation from the general fund to pay the annual benefit adjustment to eligible instate resident retirees. These rules can be found on pages 2-3169 and 2-3170 of ARM. The authority cites for ARM 2.43.612 and 2.43.613 are Secs. 19-3-304, 19-5-201, 19-6-201, 19-7-201, 19-8-201, 19-9-201, 19-12-203, and 19-13-202, MCA, and the implementing cite is 19-15-102, MCA. The authority and implementing cite for ARM 2.43.614 is 19-15-101, MCA.

2. The Board proposes to repeal these rules because the Montana Supreme Court has ruled the annual benefit adjustments unconstitutional.

3. Interested persons may present their data, views, or arguments concerning the proposed amendments in writing no later than March 9, 1995 to:

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

4. If a person who is directly affected by the proposed amendment wishes to express data, views and arguments orally or in writing at a public hearing, the person must make written request for a hearing and submit this request along with any written comments to the above address. A written request for hearing must be received no later than March 9, 1995.

5. If the agency receives requests for a public hearing on the proposed amendments from either 10% or 25, whichever is less, of the persons 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 4,214 persons based on August 1994 payroll reports of active and retired members.

Terry Teichrow, President
Public Employees' Retirement Board

Dal Smilie, Chief Legal Counsel and
Rule Reviewer

Certified to the Secretary of State on January 30, 1994.

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

In the matter of the adoption of new rules implementing the Montana life and health insurance guaranty association act and notice concerning coverage limitations and exclusions	)))))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION

TO: All Interested Persons.

1. On March 1, 1995, at 10:00 a.m., a public hearing will be held in Room 160 of the Mitchell Building, 126 N. Sanders, Helena, Montana. The hearing will be to consider the proposed adoption of new rules implementing the Montana life and health insurance guaranty association act and notice concerning coverage limitations and exclusions.

2. The proposed new rules provide as follows:

RULE I PURPOSE OF RULES (1) Residents of Montana who purchase life insurance, annuities, or health insurance should know that the insurance companies licensed in this state to write these types of insurance are members of the Montana life and health insurance guaranty association.

(2) The purpose of this association is to assure that policyholders will be protected, within limits, in the unlikely event that a member insurer becomes financially unable to meet its obligations. If this should happen, the association will assess its other member insurance companies for the money to pay the claims of insured persons who reside in Montana and, in some cases, to keep coverage in force.

AUTH: 33-10-210 MCA IMP: 33-10-210 MCA

RULE II LIMITATIONS ON PROTECTIONS (1) The valuable extra protection provided by these insurers through the association is not unlimited. This protection is not a substitute for consumers' care in selecting companies that are well-managed and financially stable.

AUTH: 33-10-210 MCA IMP: 33-10-210 MCA

RULE III DISCLAIMER (1) The Montana life and health insurance guaranty association may not provide coverage for this policy. If coverage is provided, it may be subject to substantial limitations or exclusions, and require continued residency in Montana. A person should not rely on coverage by the Montana life and health insurance guaranty association in selecting an insurance company or in selecting a life insurance, annuities, or health insurance policy.

(2) Insurance companies or their agents are required by law to give or send a person this notice. However, insurance companies and their agents are prohibited by law from using

the existence of the association to induce a person to purchase any kind of insurance policy. This information is provided by:

Montana Life and Health Insurance Guaranty Association
P.O. Box 2006
Missoula, MT 59806
(406) 728-4071

State of Montana Department of Insurance
Sam W. Mitchell Building
P.O. Box 4009
Helena, MT 59604-4009
(406) 444-2040
1-800-332-6148

AUTH: 33-10-210 MCA IMP: 33-10-210 MCA

RULE IV DESCRIPTION OF MONTANA LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATION ACT (1) The state law that provides for this safety-net coverage is called the Montana life and health insurance guaranty association act. Rules V through XI explain the law's coverage, exclusions, and limits. This summary does not cover all provisions of the law; nor does it in any way change anyone's rights or obligations under the act or the rights or obligations of the association.

AUTH: 33-10-210 MCA IMP: 33-10-210 MCA

RULE V COVERAGE (1) Generally, individuals will be protected by the Montana life and health insurance guaranty association if they live in this state and hold a life or health insurance contract, or an annuity, or if they hold certificates under a group life or health insurance contract or annuity, issued by a member insurer. The beneficiaries, payees or assignees of insured persons are protected as well, even if they live in another state.

AUTH: 33-10-210 MCA IMP: 33-10-210 MCA

RULE VI EXCLUSIONS FROM COVERAGE BECAUSE OF RESIDENCY (1) Persons holding such policies or contracts are not protected by this association if:

(a) they are not residents of the state of Montana; and

(b) the insurer was not authorized or licensed to do business in Montana at the time the policy or contract was issued.

AUTH: 33-10-210 MCA IMP: 33-10-210 MCA

RULE VII ADDITIONAL EXCLUSION FROM COVERAGE (1) The association also does not provide coverage for:

(a) persons holding policies issued by a non-profit hospital or medical service organization, an

HMO, a fraternal benefit society, a mandatory state pooling plan, a mutual assessment company or similar plan in which the policyholder is subject to future assessments, or by an insurance exchange;

(b) any policies or contract or any part of the policies or contracts under which the risk is borne by the policyholder;

(c) any policy of reinsurance (unless an assumption certificate was issued);

(d) interest rate yields that exceed an average rate;

(e) plans of employers, associations or similar entities to the extent they are self-funded or uninsured (that is, not insured by an insurance company, even if an insurance company administers them);

(f) dividends;

(g) experience rating credits;

(h) credits given in connection with the administration of a policy or contract;

(i) any unallocated annuity contract issued to an employee benefit plan that is protected under the federal pension benefit guaranty corporation; and

(j) any portion of any unallocated annuity contract that is not issued to or in connection with a specific employee, union, or association of natural persons benefit plan or a governmental lottery.

AUTH: 33-10-210 MCA IMP: 33-10-210 MCA

RULE VIII LIMITS ON AMOUNT OF COVERAGE (1) The act also limits the amount the association is obligated to pay out. The association cannot pay more than what the insurance company would owe under a policy or contract. Furthermore, the amounts the association is authorized to pay are limited.

AUTH: 33-10-210 MCA IMP: 33-10-210 MCA

RULE IX ALLOCATED CONTRACTS (1) For anyone life insured, the association will pay a maximum of $300,000 - no matter how many policies and contracts there were with the same company, even if they provided different types of coverage. Within this overall $300,000 limit, the association will not pay more than $100,000 in cash surrender values, $100,000 in health insurance benefits, $100,000 in present value of annuity benefits, or $300,000 in life insurance death benefits - again, no matter how many policies and contracts there were with the same company, and no matter how many different types of coverage.

AUTH: 33-10-210 MCA IMP: 33-10-210 MCA

RULE X UNALLOCATED CONTRACTS (1) With respect to each individual participating in a governmental retirement plan established under section 401, 403(b), or 457 of the internal revenue code and covered by an unallocated annuity contract or

with respect to the beneficiaries of each individual, if deceased, the association will pay, in the aggregate, $100,000 in present value annuity benefits, including surrender and withdrawal values. With respect to any one contract holder covered by any other unallocated annuity contract, the association will pay up to $5 million in benefits, irrespective of the number of contracts held by that contract holder.

AUTH: 33-10-210 MCA IMP: 33-10-210 MCA

RULE XI POLICY DISCLOSURE (1) The insurer or insurance producer must give a separate written notice in addition to the notice provided under rules I through X prior to or at the time of delivery that clearly and conspicuously discloses that a policy or contract described in Section 33-10-201(4), MCA and excluded under 33-10-201(6), MCA is not covered by the life and health insurance guaranty association.

(2) The form and content of the Notice should be as follows:

IMPORTANT NOTICE CONCERNING YOUR POLICY OR CONTRACT

The Montana Life and Health Guaranty Association Act (MCA section 33-10-201 et seq.) created an Association to protect policyowners, insureds, beneficiaries, annuitants, payees, and assignees of life insurance policies, health insurance policies, annuity contracts, and supplemental contracts, subject to certain limitations and exclusions, against failure by an insurance company in the performance of contractual obligations due to its financial impairment.

COVERAGE IS NOT PROVIDED BY THE MONTANA LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATION FOR YOUR POLICY OR CONTRACT OR ANY PORTION OF IT UNDER WHICH THE RISK IS BORNE BY YOU, THE POLICYHOLDER.

The issuing insurer is required to supply this written Notice to you by the Montana State Insurance Commissioner:

State of Montana Department of Insurance
Sam W. Mitchell Building
P.O. Box 4009
Helena, Montana 59604-4009
(406) 444-2040
1-800-332-6148

(3) The Notice shall be the cover sheet of any policy or contract delivered, and the insurer or insurance producer must retain in policy file a duplicate original of the signed notice.

AUTH: 33-10-210 MCA IMP: 33-10-210 MCA

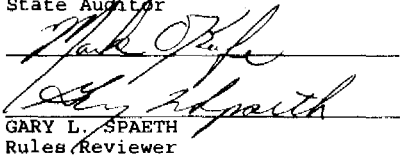
3. REASON: These rules are being proposed because the Commissioner must approve the Notice to Policyholders submitted by the Life and Health Insurance Guaranty Association and to adopt rules specifying the form and content of any contract which is not covered by the life and health insurance guaranty association.

4. Interested persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Frank Cote', Deputy Commissioner of Insurance, P.O. Box 4009, Helena, Montana 59604, and must be received no later than March 9, 1995.

5. The State Auditor will make reasonable accommodations for persons with disabilities who wish to participate at this public hearing. If you request an accommodation, please contact the State Auditor's Office not later than 5:00 p.m., February 28, 1995, and advise the office of the nature of the accommodation needed. Please contact Frank Cote', Deputy Commissioner of Insurance, P.O. Box 4009, Helena, Montana 59604; telephone (406) 444-2997; toll free dial 1 and then 800-332-6148; fax (406) 444-3497.

6. Gary L. Spaeth, State Auditor's Office, 126 N. Sanders, P.O. Box 4009, Helena, Montana 59604-4009, has been designated to preside over and conduct the hearing.

MARK O'KEEFE
State Auditor

By: 

GARY L. SPAETH
Rules Reviewer

Certified to the Secretary of State this 30th day of January, 1995.

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

In the matter of the general revision of the rules regarding Annual Audited Reports and Establishing Accounting Practices and Procedures to be Used in Annual Statements	)))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Interested Persons.

1. On March 1, 1995, at 9:00 a.m., a public hearing will be held in Conference Room 160 of the Mitchell Building, 126 N. Sanders, Helena, Montana. The hearing will be to consider the revision of rules regarding the designation of Independent Certified Public Accountant; notification of Adverse Financial Condition; Accountant's Letter of Qualifications; and valuation of Securities other than those specifically referred to in Statutes for the purpose of complying with the National Association of Insurance Commissioner accreditation requirements.

2. The rules proposed for amendment are as follows:

6.6.3505 DESIGNATION OF INDEPENDENT CERTIFIED PUBLIC ACCOUNTANT (1) remains the same.

(2) The insurer shall obtain a letter from the accountant, and file a copy with the commissioner, stating that the accountant is aware of the provisions of ~~Title 33, MCA~~the insurance code, and the administrative rules of the insurance department of the insurer's state of domicile that relate to accounting and financial matters, and affirming that he will express his opinion on the financial statements in terms of their conformity with the statutory accounting practices prescribed or otherwise permitted by that department, specifying such exceptions as he may believe appropriate.

(3) remains the same.

AUTH: 33-1-313 and 33-2-1517 MCA IMP: 33-2-1517 MCA

6.6.3509 NOTIFICATION OF ADVERSE FINANCIAL CONDITION

(1) remains the same.

(2) An independent public accountant shall not be liable in any manner to any person for any statement made in connection with ARM 6.6.3509(1) if such statement is made in good faith in compliance with ARM 6.6.3509(1).

(~~2~~3) If the accountant, subsequent to the date of the audited financial report filed pursuant to this rule, becomes aware of facts which might have affected ~~his~~the report, it has

the obligation to take such action as prescribed in Volume 1, Section AU 561 of the Professional Standards of the AICPA.

AUTH: 33-1-313 and 33-2-1517 MCA IMP: 33-2-1517 MCA

6.6.3511 ACCOUNTANT'S LETTER OF QUALIFICATIONS

(1) through (1)(c) remain the same.

(d) That the accountant consents to the requirements of ARM 6.6.35~~08~~12 and that the accountant consents and agrees to make available for review by the commissioner, his designee or his appointed agent, the workpapers, as defined in ARM 6.6.35~~08~~12.

(1)(e) through (1)(f) remain the same.

AUTH: 33-1-313 and 33-2-1517 MCA IMP: 33-2-1517 MCA

6.6.4001 VALUATION OF SECURITIES OTHER THAN THOSE SPECIFICALLY REFERRED TO IN STATUTES (1) Securities and assets ~~other than those specifically referred to in 33-2-532, 533, 534, and 535, MCA,~~ must be valued in accordance with valuation standards of the NAIC published in its 19~~90~~4 Accounting Practices and Procedures manual and its December 31, 19~~92~~4 Valuation of Securities manual.

(2) The department hereby adopts and incorporates herein by reference the standards adopted by the NAIC for valuation of securities and other investments appearing in its 19~~90~~4 Accounting Practices and Procedures manual and its December 31, 19~~92~~4 Valuation of Securities manual. These are nationally-recognized models for such standards. Copies of the manuals are available for inspection at the office of the Commissioner of Insurance, Room 270, Sam W. Mitchell Building, Helena, Montana. Copies of the Accounting Practices and Procedures manual and the Valuation of Securities manual may be obtained by writing to the National Association of Insurance Commissioners, 120 West 12th Street, Suite 1100, Kansas City, MO 64105-1925. Persons obtaining copies of such manuals may be required to pay the NAIC's costs of providing such copies.

AUTH: 33-1-313 and 33-2-1517 MCA IMP: 33-2-1517 MCA

3. REASON: These rules are being proposed because of recommendations made by the accredition team from the National Association of Insurance Commissioners to comply with their accreditation standards.

4. Interested persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Frank Coté, Deputy Commissioner of Insurance, P.O. Box 4009,

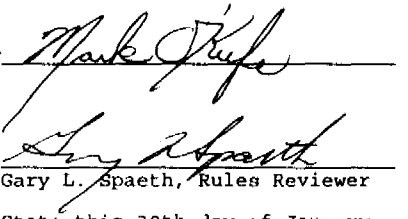
Helena, Montana 59604, and must be received no later than March 9, 1995.

5. The State Auditor will make reasonable accommodations for persons with disabilities who wish to participate at this public hearing. If you request an accommodation, please contact the State Auditor's Office no later than 5:00 p.m., February 27, 1995, and advise the office of the nature of the accommodation needed. Please contact Frank Coté, Deputy Commissioner of Insurance, P.O. Box 4009, Helena, Montana 59604; telephone (406) 444-5237; toll free dial 1 and then 800-332-6148; fax (406) 444-3497.

6. Gary L. Spaeth, P.O. Box 4009, Helena, Montana, has been designated to preside over and conduct the hearing.

MARK O'KEEFE, State Auditor

and Commissioner of Insurance

By 

Gary L. Spaeth, Rules Reviewer

Certified to the Secretary of State this 30th day of January, 1995.

BEFORE THE BOARD OF COSMETOLOGISTS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the proposed amendment of a rule pertaining to fees	)	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF 8.14.814 FEES - INITIAL, RENEWAL, PENALTY AND REFUND FEES

TO: All Interested Persons:

1. On March 2, 1995, at 9:00 a.m., a public hearing will be held in the conference room of the Professional and Occupational Licensing Bureau, Lower Level, Arcade Building, 111 N. Jackson, Helena, Montana, to consider the proposed amendment of the above-stated rule.

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

"8.14.814 FEES - INITIAL, RENEWAL, PENALTY AND REFUND FEES (1) Student registration fees shall be ~~$5.00~~ 10 for initial enrollment plus ~~$5.00~~ 10 for each re-enrollment following each withdrawal.

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

(2) Temporary license fee for cosmetologists shall be ~~$5.00~~ 10.

(3) The cosmetology examination fee shall be ~~$20.00~~ 50, plus ~~$10.00~~ 15 manager/operator license fee.

(4) Examination to teach shall be $100~~.00~~, plus ~~$15.00~~ 20 instructor license fee.

(5) Reciprocal license shall be ~~$50.00~~ 75, plus ~~$25.00~~ 15 manager-operator or manicurist license fee.

(6) Duplicate license fee shall be ~~$5.00~~ 10.

(7) Initial inspection fee for all salons shall be ~~$25.00~~ 60.

(8) Transcripts - certification of training and licensing shall be ~~$10.00~~ 20.

(9) Manager-operator and manicurist license fee shall be ~~$10.00~~ 15.

(10) All salon license fees shall be ~~$15.00~~ 20.

(a) All booth rental license fees shall be ~~$15.00~~ 20.

(11) Basic school license fee shall be ~~$50.00~~ 65.

(a) Manicuring school license fee shall be ~~$50.00~~ 65.

~~(12) Advance training school license fee shall be $25.00, plus basic school license fee.~~

(13) through (16) will remain the same, but will be renumbered (12) through (15).

~~(17)~~ (16) A penalty fee for late renewal shall be ~~$25.00~~ 50 for each year a license has lapsed in addition to the regular annual license fee. Any portion of a year is considered to be a full year.

(18) will remain the same, but will be renumbered (17).

~~(19)~~ (18) Refunds for errors in payment of fees will be made only if in excess of $5~~.00~~.

~~(20)~~ (19) Manicurists examination fee shall be ~~$40.00~~ 50 plus ~~$10.00~~ 15 license fee.

~~(21)~~ (20) Electrology examination fee shall be $100~~.00~~ plus ~~$10.00~~ 15 license fee.

(22) will remain the same, but will be renumbered (21)."

Auth: Sec. 37-1-134, 37-31-203, 37-31-323, 37-32-201, MCA; IMP, Sec. ~~37-31-301~~, 37-31-302, 37-31-303, 37-31-304, 37-31-306, 37-31-307, 37-31-309, 37-31-311, 37-31-312, 37-31-321, 37-31-322, ~~37-31-323~~, 37-32-301, 37-32-304, 37-32-305, 37-32-306, MCA

REASON: The proposed amendments are necessary to set fees commensurate with costs of administering the statutory responsibilities of the Board of Cosmetologists. The Board last amended the fee schedule in 1987, when it lowered the fees in order to bring the cash balance down to an acceptable level. The cash balance is now at a level whereby, if the fees are not adjusted, the Board will not bring in sufficient revenue to cover the program costs. The major program costs include personal services for two inspectors and board member per diem; expenses relating to examinations, including examiners, rent of facilities, and use of national written examination; legal fees and court costs; travel for inspectors, staff and board members; and administrative recharges for common and fixed costs. Administrative recharges include salary and benefits for bureau personnel, rent, fixed costs associated with computers, office equipment, mail distribution and audit fees.

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 Cosmetologists, 111 North Jackson, P.O. Box 200513, Helena, Montana 59620-0513, to be received no later than 5:00 p.m., March 9, 1995.

4. Colleen Graham, attorney, has been designated to preside over and conduct this hearing.

BOARD OF COSMETOLOGISTS
MARY L. BROWN, CHAIRMAN

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

Anne M. Bartos
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, January 30, 1995.

**BEFORE THE BOARD OF MILK CONTROL
OF THE STATE OF MONTANA**

In the matter of proposed amendments to several rules: rule 8.86.502 as it relates to initial determination of quota; rule 8.86.505 as it relates to quota adjustment; rule 8.86.511 as it relates to pooling plan definitions; rule 8.86.513 as it relates to computation of quota and excess prices; rule 8.86.515 as it relates to payments to pool dairymen.	**NOTICE OF PROPOSED AMENDMENT** **NO PUBLIC HEARING CONTEMPLATED** **DOCKET #22-95**

TO: ALL LICENSEES UNDER THE MONTANA MILK CONTROL ACT (SECTION 81-23-101, MCA, AND FOLLOWING), AND ALL INTERESTED PERSONS:

1. On March 11, 1995, the board of Milk Control (Board) proposes to amend the following rules: ARM 8.86.502(1); 8.86.505(1)(c)(iv),(v); 8.86.511(1)(i); 8.86.513(1)(a),(d), and (f); and 8.86.515(1)(b).

2. The rule as proposed to be amended provides as follows: (text of rule with matter to be omitted interlined and new matter added, then underlined)

"8.86.502 INITIAL DETERMINATION AND/OR LOSS OF QUOTA

(1) Meadow Gold and Black Hills producers shall retain their quota existing at the time of the adoption of these regulations. All other initial quota for eligible producers will be determined as set forth in subsections (2) and ~~(3)~~(4) below.

(2)-(9) remains the same."

AUTH: 81-23-302, MCA
IMP: 81-23-302, MCA

3. The rule as proposed to be amended provides as follows: (text of rule with matter to be omitted interlined and new matter added, then underlined)

"8.86.505 READJUSTMENT AND MISCELLANEOUS QUOTA RULES

(1)-(c)(iii) remains the same.

(iv) determine the total pounds of quota that has been forfeited during the preceding twelve (12) month period pursuant to ARM 8.86.502~~(5),(6)~~(7),(8), 8.86.504(1)(g) and 8.86.505(1)(a)(iv) hereof or for any other reason;

(v) combine the pounds determined pursuant to sections (1)~~(d)~~(c)(iii),(iv) hereof with any pounds carried over from the previous year;

(vi)-(e) remains the same."

AUTH: 81-23-302, MCA
IMP: 81-23-302, MCA

4. The rule as proposed to be amended provides as follows: (text of rule with matter to be omitted interlined and new matter added, then underlined)

"8.86.511 POOLING PLAN DEFINITIONS

(1)(a)-(h) remains the same.

(i) "Utilization value" means a sum of money computed for each pool handler with respect to the butterfat and skim milk contained in pool milk received from pool dairymen and disposed of or utilized during the month, such sum to be computed, using the class prices therefore and the classification thereof, as established pursuant to ARM ~~8.79.101~~ 8.79.102, and subject to any interplant hauling, reclassification, or other charges or credits which are established under rules of the milk control bureau.

(j)-(k) remains the same."

AUTH: 81-23-302, MCA
IMP: 81-23-302, MCA

5. The rule as proposed to be amended provides as follows: (text of rule with matter to be omitted interlined and new matter added, then underlined)

"8.86.513 COMPUTATION OF PRICE FOR QUOTA MILK AND EXCESS MILK

(1) remains the same.

(a) Combine into one figure the utilization values for all pool handlers for the month, as computed under ARM 8.86.301 and ~~8.79.101~~ 8.79.102 and add thereto one-half of the remaining balance in the pool settlement reserve.

(b)-(c) remains the same.

(d) Subtract an amount of money equal to twelve cents per hundredweight of quota milk, and adjust this figure downward (after making the computations under paragraph ~~(2)~~(1)(e) hereof) as necessary to offset the fractional balance resulting from rounding their quota price. The amount so computed shall be deposited into the pool settlement reserve.

(e) Remains the same.

(f) Announce to all interested persons on or before the 13th day of each month, or the first business day thereafter, the quota and excess prices for milk testing 3.5% butterfat as computed pursuant to paragraphs ~~(2)~~(1)(c) and ~~(2)~~(1)(e) hereof, and a butterfat differential for quota and excess milk as provided for producer milk under ARM 8.86.301 to adjust for differences in butterfat content of the milk."

AUTH: 81-23-302, MCA
IMP: 81-23-302, MCA

6. The rule as proposed to be amended provides as follows: (text of rule with matter to be omitted interlined and new matter added, then underlined)

"8.86.515 PAYMENTS TO POOL DAIRYMEN AND ADJUSTMENT OF ACCOUNTS

(1)-(a) remains the same.

(b) Payments must be made to each pool dairyman, or his authorized agent, not later than 15 days after the end of the month for the pool milk of such pool dairyman for such month. This payment must be at the appropriate quota and/or excess price as adjusted for butterfat content (the rate of such adjustment to be based on the weighted average value of butterfat in the different classes of utilization), and subject to deductions for partial payments under paragraph ~~(4)~~(1)(a) hereof, administrative assessments, hauling and other deductions authorized under ARM ~~8.79.101(4)~~ 8.79.102(3), and it must be accompanied by a statement to each pool dairyman setting forth the information required in ARM ~~8.79.101(11)~~ 8.79.102(10).

(c) Remains the same."

AUTH: 81-23-302, MCA
IMP: 81-23-302, MCA

7. Full text of these rules can be found in the Administrative Rules of Montana as follows: rule 8.86.502, pages 8-2556 thru 8-2557; rule 8.86.505, pages 8-2560 thru 8-2560.1; rule 8.86.511, pages 8-2562 thru 8-2563; rule 8.86.513, page 8-2565; and rule 8.86.515, pages 8-2566 thru 8-2567.

8. Rules 8.86.502, 8.86.505, 8.86.511, 8.86.513, and 8.86.515 are being amended on the board's own motion because the reference to particular sections in other rules were not changed when the particular section they refered to was. These changes are reflected through prior rule changes in dockets #80-87, 98-89, 18-93, and 19-93.

9. Interested parties may submit their data, views, or arguments concerning the proposed amendments in writing to the Milk Control Bureau, 1520 East Sixth Avenue-Room 50, PO Box 200512, Helena, MT 59620-0512, no later than March 16, 1995.

10. If a person who is directly affected by the proposed amendments wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written comments he has to the Milk Control Bureau, 1520 East Sixth Avenue-Room 50, PO Box 200512, Helena, MT 59620-0512. A written request for hearing must be received no later than March 16, 1995.

11. If the agency receives requests for a public hearing on the proposed amendments from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed action; from the Administrative Code Committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 18 persons based on 176 licensed milk producers and 6 licensed Montana distributors.

MONTANA BOARD OF MILK CONTROL
MILTON J. OLSEN, Chairman

By: _____
Andy J. Poole, Deputy Director
Department of Commerce

By: _____
Annie M. Bartos, Rule Reviewer
Commerce Chief Legal Counsel

Certified to the Secretary of State January 30, 1995.

BEFORE THE BOARD OF HOUSING
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the proposed amendment of rules pertaining to financing programs, lending institutions and income limits and loan amounts	)))))	NOTICE OF PROPOSED AMENDMENT OF 8.111.303 FINANCING PROGRAMS, 8.111.305 QUALIFIED LENDING INSTITUTIONS AND 8.111.405 INCOME LIMITS AND LOAN AMOUNTS

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On March 11, 1995, the Board of Housing proposes to amend the above-entitled rules.

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

"8.111.303 FINANCING PROGRAMS (1) through (2)(e) will remain the same.

(3) No person or family qualifying for a loan under the board's single family program may obtain more than one loan at a time under the board's programs ~~provided, however, that a second loan may be approved by the board if the person or family relocates their principal residence by more than thirty statutory miles, as determined by the shortest highway route on the official Montana highway map in effect at that time~~.

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

Auth: 90-6-104, 90-6-106, 90-6-108, MCA; IMP, Sec. 90-6-104, 90-6-106, MCA

REASON: The board is proposing this amendment to allow additional subsequent Board of Housing loans to borrowers relocating their principal residence within thirty statutory miles of a prior principal residence.

"8.111.305 QUALIFIED LENDING INSTITUTIONS (1) through (2)(c) will remain the same.

(d) a certificate of errors and omissions insurance coverage in a minimum amount as is required by the program documents for each bond issue in which the lending institution participates and a fidelity bond of an amount currently required by the FHA but not less than $300,000.

(e) through (7) will remain the same."

Auth: Sec. 90-6-104, 90-6-106, 90-6-108, MCA; IMP, Sec. 90-6-104, 90-6-106, MCA

REASON: The board is proposing this amendment to achieve adequate security for performance by approved lenders under the board's programs.

"8.111.405 INCOME LIMITS AND LOAN AMOUNTS (1) The annual income limits to be eligible for a reverse annuity mortgage loan shall not exceed ~~the following:~~

~~(a) one person household, $10,500.00;~~

~~(b) two person household, $13,800.00;~~

~~(c) three person household and up, $15,500.00.~~

two hundred percent (200%) of the poverty level per household size as set forth by the U.S. Department of Health and Human Services, changing each year.

(2) will remain the same."

Auth: Sec. 90-6-104, 90-6-106, 90-6-507, MCA; IMP, Sec. 90-6-104, 90-6-106, 90-6-503, MCA

REASON: The Board is proposing these amendments to achieve adequate flexibility to periodically change the maximum dollar amount of a loan dependent upon current Federal poverty guidelines.

3. Interested persons may submit their data, views or arguments concerning the proposed amendments in writing to the Board of Housing, 2001 11th Avenue, P.O. Box 200528, Helena, Montana 59620-0528, to be received no later than 5:00 p.m., March 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 Housing, 2001 11th Avenue, P.O. Box 200528, Helena, Montana 59620-0528, to be received no later than 5:00 p.m., March 9, 1995.

5. If the Board receives requests for a public hearing on the proposed amendment from either 10 percent 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 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.

BOARD OF HOUSING
BOB THOMAS, CHAIRMAN

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

_____
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, January 30, 1995.

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

In the matter of the amendment of rules 16.20.401 & 16.20.407 modifying and updating minimum requirements for public sewage systems.	)))))	NOTICE OF PUBLIC HEARING FOR PROPOSED AMENDMENT OF RULES (Water Quality)

To: All Interested Persons

1. On March 24, 1995, at 8:00 a.m., the board will hold a public hearing in Room C209 of the Cogswell Building, 1400 Broadway, Helena, Montana, to consider the amendment of the above-captioned rules.

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

16.20.401 PLANS FOR PUBLIC WATER SUPPLY OR WASTEWATER SYSTEM (1)-(3) Remain the same.

(4) Before commencing the construction, alteration or extension of a public water supply system or wastewater system, the applicant shall submit a design report along with the necessary plans and specifications for the system to the department or a delegated division of local government for its review and written approval. Two sets of plans and specifications are needed for final approval. Approval by the department or a delegated division of local government is contingent upon construction and operation of the public water supply or wastewater system consistent with the approved design report, plans, and specifications. Failure of the system to operate according to the approved plans and specifications or the department's conditions of approval is an alteration that requires resubmittal of a design report, plans, and specifications for department approval.

(a)-(b) Remain the same.

(c) The design report, plans and specifications for all wastewater systems, except non-community sewage systems and other public subsurface sewage treatment systems, must be prepared and designed by a professional engineer in accordance with the format and criteria set forth in ~~the Great Lakes-Upper Mississippi River Board of State Sanitary Engineers Recommended Standards for Sewage Works, also known as the Ten State Standards, 1978 edition, published by the Health Education Service, Inc., P. O. Box 7126, Albany, New York, 12224~~ department circular WQB-2, "Montana Department of Health and Environmental Sciences Design Standards for Wastewater Facilities," 1995 edition. The design report, plans and specifications for a wastewater system must also be designed to protect public health and ensure compliance

with the Montana Water Quality Act, Title 75, chapter 5, MCA, and rules adopted under the act, including ARM Title 16, chapter 20, subchapter 7.

(d)-(g) Remain the same.

(5)-(11) Remain the same.

(12)(a) The department hereby adopts and incorporates by reference the following publications:

(i) Remains the same.

(ii) ~~The Great Lakes-Upper Mississippi River Board of State Sanitary Engineers, Recommended Standards for Sewage Works, 1978 edition, also known as the "Ten States Standards", published by the Health Education Service, Inc., P. O. Box 7283, Albany, New York, 12224~~ department circular WQB-2, 1995 edition, which sets forth the requirements for the design and preparation of plans and specifications for sewage works.

(iii)-(v) Remains the same.

(b) A copy of any of the documents adopted under (a) above may be obtained from the Water Quality ~~Bureau~~ Division, Department of Health and Environmental Sciences, Capitol Station, Box 200901, Helena, Montana 59620-0901.

AUTH: 75-6-103, MCA; IMP: 75-6-103, 75-6-112, 75-6-121, MCA

16.20.407 FEES (1) Remains the same.

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

(a) Remains the same.

(b) The fee schedule for designs requiring review for compliance with ~~Recommended Standards for Sewage Works, 1978 edition~~ department circular WQB-2, 1995 edition, is set forth in Schedule II, as follows:

SCHEDULE II

Chapter 10 Engineering reports and facility plans,	
engineering reports (minor)	$ 75
comprehensive facility plan (major)	$ 500
Chapter ~~20 Sewer collection system~~ 30 Design of sewers	
< 1320 lineal feet with standard spec	$ 50
< 1320 lineal feet without standard spec	$ ~~225~~
> 1320 lineal feet with standard spec	$ 100
> 1320 lineal feet without standard spec	$ 275
Sewer extension certified checklist	$ 25
Chapter ~~30~~ 40 Sewage pumping station	
100 gpm or less	$ 250
greater than 100 gpm	$ 500
Chapter ~~50~~ 60 Screening grit removal	$ 500
Chapter ~~60~~ 70 Settling	$ 400
Chapter ~~70~~ 80 Sludge handling	$ 800
Chapter ~~80~~ 90 Biological treatment	$1200
non-aerated treatment ponds	$ 400
aerated treatment ponds	$ 700

Chapter ~~90~~ 100 Disinfection.....$ 250
~~Chapter 100 Wastewater treatment ponds (lagoons)~~
~~non-aerated.....$ 400~~
~~aerated.....$ 700~~
Appendices A, B, C & D (per design).....$ 350

(c)-(f) Remain the same.
(3)-(5) Remain the same.
AUTH: 75-6-108, MCA; IMP: 75-6-108, MCA

3. The board is proposing these amendments to the rules in order to implement and update various requirements for public sewage systems authorized through rulemaking required under 75-6-108, MCA. The update is accomplished by adoption of a new Department Circular, WQB-2. This circular replaces the 1978 Ten States Standards. The update is necessary in order to most adequately protect public health by incorporating the most up-to-date engineering standards for sewage systems and to address problems peculiar to Montana. A review fee is also proposed for plans and specifications associated with engineering reports developed for public sewage systems commensurate with the use of department resources in conducting the review. Finally, a $350 fee is specified for review of plans and specifications for public sewage system components identified in appendices to Circular WQB-2. These additions are necessary to provide the department full reimbursement for its costs of reviewing public sewage systems as required by 75-6-108, MCA.

4. A copy of Circular WQB-2 may be obtained by contacting the Water Quality Division, Montana Department of Health and Environmental Sciences, Cogswell Building, P.O. Box 200901, Helena, MT 59620-0901 [(406)444-2406].

5. Interested persons may submit their data, views, or arguments concerning the proposed amendments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Yolanda Fitzsimmons, Department of Health and Environmental Sciences, Cogswell Building, P.O. Box 200901, Helena, Montana 59620-0901, no later than the close of hearing on March 24, 1995.

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

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

by _____
ROBERT J. ROBINSON, Director

Certified to the Secretary of State January 30, 1995.

Reviewed by:

_____
Eleanor Parker, DHES Attorney

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

In the matter of the adoption of new rule I adding T classification to surface water quality standards	NOTICE OF PUBLIC HEARING FOR PROPOSED ADOPTION OF NEW RULE I

(Water Quality)

To: All Interested Persons

1. On March 24, 1995, at 8:30 a.m., the board will hold a public hearing in Room C209 of the Cogswell Building, 1400 Broadway, Helena, Montana, to consider the adoption of the above-captioned rule.

2. The new rule appears as follows:

RULE I T CLASSIFICATION (1) The goal of the state of Montana is to have these waters fully support the following uses: drinking, culinary, and food processing purposes after conventional treatment; bathing, swimming, and recreation; growth and propagation of fishes and associated aquatic life, waterfowl, and furbearers; and agricultural and industrial water supply. The board may on its own, upon recommendation of the department, or upon a petition for rulemaking submitted by a person, place waters in this classification in those instances where the water body or segment is clearly not supporting its designated uses and available evidence indicates that the water quality limiting factors cannot be corrected within 4 years through the imposition of conditions or limitations in discharge permits.

(2) Before temporary water quality standards are established for a particular water body or segment, a support document and implementation plan must be prepared by the department or petitioner, as applicable, for use by the board in determining whether to adopt a proposed temporary water quality standard.

(3) If a person petitions for rulemaking, the petition must specifically describe the affected state water, the existing ambient water quality for the parameter or parameters at issue, the water quality standard or standards affected, and the temporary modifications sought. Within 180 days after the board grants a petition to initiate rulemaking, the petitioner shall prepare and submit to the board and department a proposed support document and implementation plan that sets forth:

(a) information demonstrating that the water body or segment was originally misclassified, as required by 75-5-302, MCA;

(b) the water quality limiting factors affecting the water body or segment;

(c) the existing beneficial uses and the beneficial uses

deemed attainable in the absence of water quality limiting factors;

(d) an implementation plan to eliminate the water quality limiting factors to the extent deemed achievable; and

(e) a schedule for implementing the plan that ensures that the water quality standards are met as soon as reasonably practicable.

(4) Upon the board's adoption of a temporary water quality standard, the department will ensure that conditions and limitations designed to achieve compliance with the plan are established in appropriate discharge permits.

(5) In no event may placing waters in this classification result in adverse impacts to existing beneficial uses or may waters be in this classification for a period longer than 20 years.

(6) The board shall review waters in this classification at least every 3 years at a public hearing where notice and an opportunity for comment have been provided. The board may reclassify any waters in this classification based on information submitted at the time of its review.

(7) The board shall remove waters from this classification if:

(a) values for the factors limiting attainment of the goals of this classification improve to conditions equal to or better than the original water quality standard for the water; or

(b) the plan in support of the T classification is not being adequately implemented.

(8) If the state water is removed from this classification because the plan is not being adequately implemented, a person may re-request a T classification by submitting a petition for rulemaking and a plan that meets the requirements of (3) above. However, the board may not so reclassify a state water for a period that would extend the T classification beyond 20 years from the date of the board's adoption of the initial reclassification for the state water.

(9) No person may violate the following specific water quality standards for waters classified T:

(a) During periods when the daily maximum water temperature is greater than 60°F, the geometric mean number of organisms in the fecal coliform group must not exceed 200 per 100 milliliters, nor are 10% of the total samples during any 30-day period to exceed 400 fecal coliforms per 100 milliliters.

(b) Dissolved oxygen concentration must not be reduced below 3.0 milligrams per liter.

(c) Hydrogen ion concentration must be maintained within the range of 6.5 to 9.5.

(d) No increase from naturally occurring turbidity is allowed which will or is likely to create a nuisance or render the waters harmful, detrimental, or injurious to public health, recreation, safety, welfare, livestock, wild animals, birds, fish, or other wildlife.

(e) No increase from naturally occurring temperature is allowed which will or is likely to create a nuisance or render

the waters harmful, detrimental, or injurious to public health, recreation, safety, welfare, livestock, wild animals, birds, fish, or other wildlife.

(f) No increases above naturally occurring concentrations of sediment and settleable solids, oils, or floating solids are allowed which will or are likely to create a nuisance or render the waters harmful, detrimental, or injurious to public health, recreation, safety, welfare, livestock, wild animals, birds, fish, or other wildlife.

(g) No increase from naturally occurring true color is allowed which will or is likely to create a nuisance or render the waters harmful, detrimental, or injurious to public health, recreation, safety, welfare, livestock, wild animals, birds, fish, or other wildlife.

(h)(i) No discharges of toxic, carcinogenic, or harmful parameters may commence or continue which lower or are likely to lower the overall water quality of these waters.

(ii) Beneficial uses are considered supported when the concentrations of toxic, carcinogenic, or harmful parameters in these waters do not exceed the applicable standards specified in department circular WQB-7 when stream flows equal or exceed the flows specified in ARM 16.20.631(4) or, alternatively, for aquatic life when site-specific criteria are developed using the procedures given in the Water Quality Standards Handbook (US EPA, Dec. 1994), and provided that other routes of exposure to toxic parameters by aquatic life are addressed. The criteria so developed shall be used as water quality standards for the affected waters and as the basis for permit limits instead of the applicable standards in department circular WQB-7.

(10) The board hereby adopts and incorporates by reference the following:

(a) Department circular WQB-7, entitled "Montana Numeric Water Quality Standards" (1994 edition), which establishes standards for toxic, carcinogenic, bioconcentrating, and harmful parameters in water; and

(b) The Water Quality Standards Handbook (US EPA, Dec. 1994).

(c) Copies of this material are available at the Water Quality Division, Department of Health and Environmental Sciences, Cogswell Building, PO Box 200901, Helena, MT 59620-0901.

AUTH: 75-5-201, 75-5-301, MCA; IMP: 75-5-301, MCA

3. The board is proposing the adoption of the rule in order to provide a classification of waters designed to require the improvement of impacted waters that are not supporting their designated uses. This rule is being proposed in response to a petition for a rulemaking submitted by Crown Butte Mines, Inc. The rule is necessary to provide a classification in which improvements in water quality may be achieved by the imposition of permit conditions and limitations designed to achieve those improvements.

4. Interested persons may submit their data, views, or arguments concerning the proposed adoption, either orally or in writing, at the hearing. Written data, views, or arguments may

also be submitted to Yolanda Fitzsimmons, Department of Health and Environmental Sciences, Cogswell Building, PO Box 200901, Helena, MT 59620-0901, no later than March 24, 1995.

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

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

by _____
ROBERT J. ROBINSON, Director

Certified to the Secretary of State January 30, 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 rule 16.14.540 amending financial assurance requirements for class II landfills.	NOTICE OF PROPOSED AMENDMENT OF RULE NO PUBLIC HEARING CONTEMPLATED (Solid Waste)

To: All Interested Persons

1. On March 13, 1995, the department proposes to amend ARM 16.14.540 concerning financial assurance requirements for Class II landfills.

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

16.14.540 FINANCIAL ASSURANCE REQUIREMENTS FOR CLASS II LANDFILLS (1)(a) Remains the same.

(b) The requirements of this rule are effective April 9, 1996 ~~1995, except for units meeting the requirements of ARM 16.14.506(16), which must comply by October 9, 1995~~.

(2)-(4) Remain the same.

(5) The mechanisms used to demonstrate financial assurance under this rule must ensure that the funds necessary to meet the costs of closure, post-closure care, and corrective action for known releases will be available whenever they are needed. Owners and operators must choose from the options specified in (a)-(g) below.

(a)-(b) Remain the same.

(c)(i) An owner or operator may satisfy the requirements of this section by obtaining an irrevocable standby letter of credit which conforms to the requirements of this paragraph. The letter of credit must be effective before the initial receipt of waste or before the effective date of this section, ~~(April 9, 1994),~~ whichever is later, in the case of closure and post-closure care, or no later than 120 days after the corrective action remedy has been selected in accordance with the requirements of ARM 16.14.708. The owner or operator must supply the department with a copy of the letter of credit and place a copy of the letter of credit in the operating record. The issuing institution must be an entity which has the authority to issue letters of credit and whose letter-of-credit operations are regulated and examined by a federal or state agency.

(ii)-(iv) Remain the same.

(d)-(h) Remain the same.

AUTH: 75-10-204, MCA; IMP: 75-10-204, MCA

3. The department is proposing these amendments to the rule in order to conform to the proposed delay in implementation of the equivalent federal rule on financial assurance. The rule was originally written to meet federal requirements concerning landfill financial assurances, but EPA has subsequently decided to delay implementation of the federal rules on the subject while it considers revising them. If the department did not amend ARM 16.14.540 as proposed, Class II landfills would be forced to meet, by April 9, 1995, requirements that may thereafter be changed, thereby unnecessarily burdening them. The amendment is necessary to prevent that eventuality.

4. Interested persons may submit their written data, views, or arguments concerning this amendment to Frank P. Crowley, Department of Health and Environmental Sciences, Cogswell Building, PO Box 200901, Helena, MT 59620-0901, no later than March 10, 1995.

5. If a party who is directly affected by the proposed amendments 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 Frank P. Crowley, Department of Health and Environmental Sciences, Cogswell Building, PO Box 200901, Helena, MT 59620-0901, no later than March 10, 1995.

6. If the department receives requests for a public hearing on the proposed amendments, from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed amendments; from the Administrative Code Committee of the legislature; from a governmental subdivision or agency; or from an association having not fewer than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be three (3), based on the number of licensed landfills in Montana.

ROBERT J. ROBINSON, Director

Certified to the Secretary of State January 30, 1995 .

Reviewed by:

Eleanor Parker, DHES Attorney

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

In the matter of the proposed amendment of rules related to requirements for employers that self-insure for workers' compensation purposes	) NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT OF ARM 24.29.702A; 24.29.702B; 24.29.702C; 24.29.702D; 24.29.702E; 24.29.702F; AND 24.29.702J

TO ALL INTERESTED PERSONS:

1. On March 3, 1995, at 10:00 a.m., a public hearing will be held in the first floor conference room at the Walt Sullivan Building (Dept. of Labor Building), 1327 Lockey Street, Helena, Montana, to consider the amendment of rules related to employers that self-insure for workers' compensation purposes.

The Department of Labor and Industry will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing. If you request an accommodation, contact the Department by not later than 5:00 p.m., February 27, 1995, to advise us of the nature of the accommodation that you need. Please contact the Employment Relations Division, Attn: Ms. Linda Wilson, P.O. Box 8011, Helena, MT 59604-8011; telephone (406) 444-6531; TDD (406) 444-5549; fax (406) 444-4140. Persons with disabilities who need an alternative accessible format of this document in order to participate in this rule-making process should contact Ms. Wilson.

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

24.29.702A SOLVENCY AND ABILITY TO PAY (1) Proof of solvency and financial ability to pay compensation, benefits and liabilities is required. Employers or groups of employers electing to be self-insured ~~must~~ shall demonstrate financial ~~stability~~ ability to pay compensation, benefits and all liabilities which are likely to be incurred under the Workers' Compensation and Occupational Disease Acts by providing audited financial statements, evidence of excess insurance, and a security deposit (if required), that upon analysis indicates sufficient security, as determined by the ~~division~~ department, if that decision is concurred in by the Montana self-insurers guaranty fund, to protect the interests of injured workers.

(2) ~~These shall consist of analysis of financial conditions, current and historical, including, but not limited to, the following factors~~ The department will analyze the financial information provided by the employer or group of employers. The analysis will include review and consideration of financial ratios related to the financial soundness of the employer or group of employers. The ratios reviewed typically

include, but are not necessarily limited to:

(a) quick ratio$_{TI}$
(b) current ratio$_{TI}$
(c) current liabilities to net worth$_{TI}$
(d) current liabilities to inventory$_{TI}$
(e) total liabilities to net worth$_{TI}$
(f) fixed assets to net worth$_{TI}$
(g) collection period$_{TI}$
(h) inventory turnover$_{TI}$
(i) assets to sales$_{TI}$
(j) sales to net working capital$_{TI}$
(k) accounts payable to sales$_{TI}$
(l) return on sales$_{TI}$
(m) return on assets$_{TI}$
(n) return on net worth$_{TI}$
(o) contingent liabilities$_{TI}$
(p) comparison to industry standards$_{TI}$ and
(q) income from ongoing operations and corporate bond rating.

(3) An individual employer electing to self-insure that does not have audited statements prepared as a normal business practice may substitute reviewed financial statements for audited financial statements if the employer furnishes an increased security deposit.

(4) Only an employer or group of employers meeting financial standards acceptable to the ~~division~~ department, if that decision is concurred in by the Montana self-insurers guaranty fund, ~~shall~~ may be granted permission to be bound as a plan no. 1 self-insurer.

AUTH: 39-71-203 MCA
IMP: 39-71-403 and 39-71-2101 to 39-71-2109 MCA

24.29.702B WHEN SECURITY REQUIRED (1) Security must be deposited with the ~~division~~ department by the employer or group of employers on order of the ~~division~~ department, if that decision is concurred in by the Montana self-insurers guaranty fund, under any of the following conditions:

(a) ~~Every employer or group of employers must deposit security with the department. The deposit requirement may be waived in whole or in part by the division for individual employers or groups of employers only who provide substantive evidence that the full amount of the deposit is not needed. This evidence shall consider criteria for solvency and ability to pay as set forth in ARM 24.29.702A.~~

~~(b)~~ The employer or group of employers no longer has the solvency or ability to pay compensation, benefits, and liabilities as determined under standards applied in ARM 24.29.702A.

(eb) The employer or group of employers does not have sufficient securities on deposit with the ~~division~~ department under section 39-71-2107, MCA, to meet current liabilities, in addition to all other liabilities.

(c) The employer is substituting reviewed financial statements for audited financial statements.

(2) The deposit requirement may be waived in whole or in part by the department, if that decision is concurred in by the Montana self-insurers guaranty fund, only for those individual employers or groups of employers that provide clear and convincing evidence that the full amount of the deposit is not needed in order to provide reasonable protection and guaranty of the payment of outstanding liabilities. The evidence must address the criteria for solvency and ability to pay set forth in ARM 24.29.702A.

AUTH: 39-71-203 MCA
IMP: 39-71-403, 39-71-2105, 39-71-2106 and 39-71-2107 MCA

24.29.702C ~~SURETY BOND~~ SECURITY DEPOSIT--AMOUNTS REQUIRED (1) When security is required under ARM 24.29.702B, the ~~division will require that such~~ security must be deposited ~~in the following amounts:~~

~~(a) Under ARM 24.29.702B(1)(a), the amount shall be the greater of: $250,000 or an average of the workers' compensation liabilities incurred by the employer in Montana for the past 3 calendar years.~~

~~(b) Under ARM 24.29.702B(1)(b), the amount shall be equivalent to the employer's or group of employers' total workers' compensation and occupational disease liabilities.~~

~~(c) Under ARM 24.29.702B(1)(c), the amount shall be~~ in an amount which, in the ~~division's~~ judgment of the department, if that decision is concurred in by the Montana self-insurers guaranty fund, provides reasonable protection and guaranty of the payment of outstanding liabilities.

(2) In the absence of clear and convincing evidence indicating that the amount of the deposit should be more or less than the amount provided by 39-71-2106(1)(a), MCA, the amount of security required is the amount provided by 39-71-2106(1)(a), MCA.

AUTH: 39-71-203 MCA
IMP: 39-71-403, 39-71-2106 and 39-71-2107 MCA

24.29.702D SURETY BONDS--CRITERIA (1) ~~Surety bonds are required under ARM 24.29.702C(1)(a) and (c) above.~~ When a surety bond is ~~required~~ offered as a security deposit, the following criteria ~~shall~~ apply:

(a) The ~~division~~ department shall accept a surety bond only from companies certified by the United States Department of Treasury as "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and as Acceptable Reinsuring Companies," ~~as published in the most recent Federal Register, which is published annually every July 1, copies are~~ A list of companies so qualified is available from the ~~Division of Workers' Compensation, 5 South Last Chance Gulch, Helena, Montana, 59601~~ department of labor and industry, employment relations division, P.O. Box 8011, Helena, Montana, 59604-8011, and the Superintendent of Documents, United States Government Printing Office, Washington, D.C., 20402. Surety must specify agreement to provide a claims guarantee payment bond.

(b) A bond replaced with another surety bond must be in

identical form, be of the same coverage amount and contain inclusive dates of surety coverage. The ~~division~~ department must be advised immediately of such a change.

(c) Surety bonds ~~shall~~ must name the Montana ~~division of workers' compensation~~ department of labor and industry as obligee and be held by the ~~division~~ department. Upon discontinuance of self-insured status for any reason, the ~~division~~ department shall hold surety bonds of that employer as reserves for all outstanding workers' compensation liabilities. The ~~division~~ department shall retain surety bonds until it is satisfied that all liabilities have been met or are properly reserved. In the event liabilities have not been met, the ~~division~~ department shall disburse the proceeds of such surety bonds to the maximum extent possible to workers' compensation claimants and providers.

(d) The bond must include a statement that the bonding company is required to give ~~thirty (30)~~ days notice of its intent to terminate future liability to both the principal and the ~~division~~ department. However, the bonding company shall not be relieved of liability for injuries occurring prior to the date of termination.

(e) A surety bond ~~shall~~ must be issued on the form prescribed by the ~~division~~ department ~~as set forth in appendix A~~.

~~(2) When the division determines an employer or group has lost its solvency or ability to pay under ARM 24.29.702B(1)(b), or the employer has provided substantive evidence that it has attempted and has been unable to obtain a surety bond, an employer may deposit any other security described in section 39-71-2106(3), MCA, with the division's prior approval.~~

AUTH: Sec. 39-71-203 MCA
IMP: Sec. 39-71-403, 39-71-2106 and 39-71-2107 MCA

24.29.702E EXCESS INSURANCE (1) Specific excess and aggregate excess insurance ~~shall be~~ is required of all employers and groups of employers electing coverage under plan no. 1 as a proof of financial ability to pay compensation benefits and other liabilities. Aggregate excess insurance will be required of all employers or groups of employers but may be waived by the ~~division~~ department, if that decision is concurred in by the Montana self-insurers guaranty fund, ~~for individual employers who provide substantive~~ if there is clear and convincing evidence that the policy is not needed. This evidence ~~shall consider~~ must take into account diversification of risk, type of industry, financial resources, self-insured retention levels, policy limits of the specific excess policy, safety program, loss experience and other appropriate factors as determined relevant by the ~~division~~ department. The contract or policy of specific excess insurance and aggregate excess insurance ~~shall~~ must comply with all of the following:

(a) It is issued by a carrier licensed in the United States with a Best's Rating of A+, A, or B+. Excess coverage issued by a carrier not rated by Best's will be considered for approval in the discretion of the ~~division~~ department, if that

decision is concurred in by the Montana self-insurers guaranty fund.

(b) It is not cancelable or nonrenewable unless written notice by registered or certified mail is given to the other party to the policy and to the ~~division~~ department not less than ~~thirty (30)~~ days before termination by the party desiring to cancel or not renew the policy.

(c) Any contract or policy containing a commutation clause ~~shall~~ must provide that any commutation effected thereunder ~~shall~~ must not relieve the underwriter or underwriters of further liability in respect to claims and expenses unknown at the time of such commutation or in regard to any claim apparently closed at the time of initial commutation which is subsequently reopened by or through a competent authority. If the underwriter proposes to settle a liability for future payments payable as compensation for accidents or occupational diseases occurring during the term of the policy by the payment of a lump sum to the employer or group of employers to be fixed as provided in the commutation clause of the policy, then not less than ~~thirty (30)~~ days prior notice to such commutation ~~shall~~ must be given by the underwriter(s) or its (their) agent by registered or certified mail to the ~~division~~ department. If any commutation is effected, the ~~division~~ department shall have the right to direct such sum be placed in trust for the benefit of the injured employee(s) entitled to such future payments of compensation.

(d) If an employer or group of employers becomes insolvent and is unable to make benefit payments, the excess carrier shall make such payments to claimants as would have been made by the excess carrier to the employer, after it has been determined the retention level has been reached on the excess contract, as directed by the ~~division~~ department.

(e) All of the following ~~shall~~ must be applied toward the reaching of retention level in the excess insurance contract:

(i) payments made by the employer or group of employers;

(ii) payments due and owing to claimant by the employer or group of employers; and

(iii) payments made on behalf of the employer or group of employers ~~by~~ from any ~~surety bond under a bond~~ security required by the ~~division~~ department ~~or defined in ARM 24.29.702C~~.

(f) Copies of the certificates and policies of the specific excess insurance and aggregate excess insurance ~~shall~~ must be filed with the ~~division~~ department for a determination that such policy fully complies with the provisions of the Workers' Compensation and Occupational Disease Acts and these rules.

AUTH: Sec. 39-71-203 MCA
IMP: Sec. 39-71-403, 39-71-2101, 39-71-2102 and 39-71-2103 MCA

24.29.702F INITIAL ELECTION--INDIVIDUAL EMPLOYERS (1) An individual employer initially electing to be bound as a self-insurer must provide the following:

(a) a completed application on forms provided by the ~~division~~ department;

(b) audited financial statements for the last ~~two (2)~~ years, or, an employer that does not have audited statements prepared as a normal business practice, may substitute reviewed financial statements if the employer furnishes an increased security deposit;

(c) proof that it has been in business for a period of not less than ~~five (5)~~ years; however,

(i) an employer in business less than ~~five (5)~~ years may be considered if its liability is guaranteed by a parent corporation which has been in business for a period of not less than ~~five (5)~~ years;

(ii) an employer whose liability is guaranteed by a parent corporation must provide a corporate resolution and an agreement of assumption and guarantee of workers' compensation liabilities on forms prescribed by the ~~division~~ department ~~as set forth in appendices B and C.~~;

(d) evidence that it has obtained an insurance policy of specific excess and aggregate excess insurance with policy limits, nature of coverage and retention amounts acceptable to the ~~division~~ department, if that decision is concurred in by the Montana self-insurers guaranty fund, as required in ARM 24.29.702E. ~~Excess insurance must be managed by a third party administrator.~~ Evidence must include the administrator's approved specific and aggregate self insured retention and maximum policy limits;

(e) through (h) Remain the same.

(i) ~~a surety bond~~ security, in an amount as required in ARM 24.29.702C;

(j) Remains the same.

(k) evidence that internal policies and procedures are satisfactory to administer a self-insured program~~.~~ ; and

(l) for a private employer applicant, proof of membership in the Montana self-insurers guaranty fund.

AUTH: 39-71-203 MCA
IMP: 39-71-403, 39-71-2101, 39-71-2102, and 39-71-2103 MCA

24.29.702J RENEWAL--INDIVIDUAL EMPLOYERS (1) An individual employer renewing an election to be bound as a self-insurer under plan no. 1 must provide the following:

(a) Remains the same.

(b) its latest year's audited financial statement, or, an employer that does not have audited statements prepared as a normal business practice, may substitute reviewed financial statements if the employer furnishes an increased security deposit;

(c) and (d) Remain the same.

(e) an employer whose liability is guaranteed by a parent corporation must provide a corporate resolution and an agreement of assumption and guarantee of workers' compensation liabilities on forms prescribed by the ~~division~~ department ~~as set forth in appendices B and C~~;

(f) a loss run and summary for the preceding year and, on forms provided by the ~~division~~ department, its number of open claims, the amounts paid to date on open claims and its

estimated compensation and medical liabilities;

(g) a statement indicating whether or not estimated compensation and medical liabilities are included in the employer's balance sheet~~.~~ ; and

(h) for a private employer, proof of continuing membership in the Montana self-insurers guaranty fund.

AUTH: 39-71-203 MCA IMP: 39-71-403, and 39-71-2104 MCA

REASON: There is reasonable necessity to amend these rules because there has been a request for the substantive amendments by certain Montana employers who would otherwise qualify as self-insurers, but do not, as a part of their regular business operations, have audited financial statements prepared. The request has been joined by the Montana Self-Insurers Association and the Montana Self-Insurers Guaranty Fund. There is reasonable necessity for the technical changes in the rules to update terminology, reflect the role of the Montana Self-Insurers Guaranty Fund that was added as part of Ch. 150, L. of 1993, and update the citation of implementing authority.

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:

Dennis Zeiler, Bureau Chief
Workers' Compensation Regulations Bureau
Employment Relations Division
Department of Labor and Industry
P.O. Box 8011
Helena, Montana 59604-8011

and must be received by no later than 5:00 p.m., March 10, 1995.

4. The Department proposes to make these amendments effective May 1, 1995. The Department reserves the right to adopt only portions of these proposed amendments, or to adopt some or all of the amendments at a later date.

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

Laurie Ekanger, Commissioner
DEPARTMENT OF LABOR & INDUSTRY

David A. Scott
Rule Reviewer

By: David A. Scott
David A. Scott, Chief Counsel
DEPARTMENT OF LABOR & INDUSTRY

Certified to the Secretary of State: January 30, 1995.

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

In the matter of the proposed) NOTICE OF PUBLIC HEARING ON
amendment and repeal of rules) PROPOSED AMENDMENT OF
related to occupational safety) ARM 24.30.102 AND PROPOSED
and health standards for) REPEAL OF ARM 24.30.103
public sector employment)

TO ALL INTERESTED PERSONS:

1. On March 10, 1995, at 10:00 a.m., a public hearing will be held in the auditorium of the Social and Rehabilitation Services building (north entrance), 111 North Sanders, Helena, Montana, to consider the amendment of ARM 24.30.102, related to safety and health rules applicable to public sector employment, the repeal of ARM 24.30.103, regarding the same topics, and to generally incorporate by reference the current version of federal health and safety regulations in ARM 24.30.102.

The Department of Labor and Industry will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing. If you request an accommodation, contact the Department by not later than 5:00 p.m., March 6, 1995, to advise us of the nature of the accommodation that you need. Please contact the Employment Relations Division, Safety Bureau, Attn: Mr. Dave Folsom, P.O. Box 1728, Helena, MT 59624-1728; telephone (406) 444-6418; TDD (406) 444-5549; fax (406) 444-4140. Persons with disabilities who need an alternative accessible format of this document in order to participate in this rule-making process should contact Mr. Folsom.

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

24.30.102 OCCUPATIONAL SAFETY AND HEALTH CODE FOR ~~GENERAL INDUSTRY~~ PUBLIC SECTOR EMPLOYMENT (1) ~~1910.1 Purpose and scope.~~ Section 50-71-311 MCA, of the Montana Safety Act provides that the department of labor and industry may adopt, amend, repeal and enforce rules for the prevention of accidents to be known as "safety codes" in every employment and place of employment, including the repair and maintenance of such places of employment to render them safe. The federal Occupational Safety and Health Act of 1970 does not include safety standards coverage for employees of this state or political subdivisions of this state. ~~Therefore, i~~It is the intent of ~~these rules adopted in subsection (3) below under the Montana Safety Act~~ this rule that public sector employees of this state and political subdivisions of this state shall be protected to the greatest extent possible by the same safety standards for employments covered by the federal Occupational Safety and Health Act of 1970. The department is therefore adopting by

reference certain occupational safety and health standards, adopted by the United States Secretary of Labor under the Occupational Safety and Health Act of 1970 ~~which are found in the federal register as indicated below~~. ~~Under section 2-4-307 MCA, the department consents to the omission from publication in the code or register the rules adopted below because t~~The department has determined, with the assent of the secretary of state, that publication of the rules would be unduly cumbersome and expensive. Copies of the ~~The~~ rules ~~in printed form~~ adopted by reference are available and ~~copies~~ may be obtained at cost from the Montana Department of Labor and Industry, P.O. Box 1728, Helena, Montana 59624, or the Superintendent of Documents, United States Government Printing Office, 941 North Capitol Street, Washington, D.C. 20401.

(2) ~~1910.2 Definitions.~~ As used in the rules adopted by reference in subsection (3) below, unless the context clearly requires otherwise, the following definitions apply:

(a) "Act" means the Montana Safety Act (sections 50-71-101 through 50-71-334 MCA).

(b) "Assistant secretary of labor" or "secretary" means the commissioner of the Montana department of labor and industry.

(c) "Employee" or "public sector employee" means every person in this state, including a contractor other than an independent contractor, who is in the service of ~~an~~ a public sector employer, as defined ~~above~~ below, under any appointment or contract of hire, expressed or implied, oral or written.

(d) "Employer" or "public sector employer" means this state and each county, city and county, city school district, irrigation district, all other districts established by law and all public corporations and quasi public corporations and public agencies therein who have any person in service under any appointment or contract of hire, expressed or implied, oral or written.

(3) ~~1910.3 Adoption by reference.~~ The department of labor and industry hereby adopts ~~under section 50-71-311 MCA,~~ a safety code for every place of employment conducted by ~~an~~ a public sector employer ~~as defined in subsection (2) above~~. This safety code ~~is adopted~~ adopts by reference ~~to~~ the following occupational safety and health standards found in the Code of Federal Regulations, ~~Title 29, Part 1910, as of July 1, 1990, and Federal Register Vol 55, No. 151, published Monday, August 6, 1990, pp 32015-32020, together with all safety standards adopted therein, as adopted by the United States secretary of labor pursuant to his authority under section 6 of the federal Occupational Safety and Health Act of 1970~~ as of July 1, 1994:

(a) Title 29, Part 1910;

(b) the provisions of 29 CFR 1910.146 appendix C, example 1, part A, as mandatory provisions that are applicable to all confined spaces; and

(c) Title 29, Part 1926.

(4) All sections adopted ~~above~~ by reference are binding on every public sector employer ~~as defined in subsection (2) above~~ even though the sections are not separately printed in a

separate state pamphlet and even though they are omitted from publication in the Montana Administrative Register and the Administrative Rules of Montana. The safety standards adopted above and printed in the Code of Federal Regulations, Title 29, ~~Part 1910~~, as of July 1, ~~1990~~ 1995, ~~and Federal Register Vol 55, No. 151, published Monday, August 6, 1990, pp 32015-32020, together with all safety standards adopted therein,~~ are considered under this rule as the printed form of the safety code adopted under this subsection, and shall be used by the department and all public sector employers, employees, and other persons when referring to the provisions of the safety code adopted under this subsection. All the provisions, remedies, and penalties found in the Montana Safety Act (sections 50-71-101 through 50-71-334 MCA) apply to the administration of the provisions of the safety code adopted ~~in this subsection~~ by this rule.

(~~4~~5) ~~1910.4 Numbering.~~ For convenience, the federal number of a particular section found in the code of federal ~~register~~ regulations shall be used when referring to a section in the safety code adopted in subsection (3) above. The federal number shall be preceded by the term (~~5~~6). Thus, when section 1910.27 of the Code of F~~f~~ederal ~~register~~ Regulations pertaining to fixed ladders is to be referred to or cited, the correct cite would be "subsection (~~5~~6) 1910.27 of section 24.30.102 ARM" or "ARM 24.30.102 (6) 1910.27".

AUTH: Sec. 50-71-311 MCA
IMP: Sec. 50-71-311 and 50-71-312 MCA

REASON: The proposed amendments to this rule are reasonably necessary to incorporate by reference the current federal rules promulgated by the Occupational Health and Safety Administration (OSHA). The rules were last updated in 1991, incorporating the 1990 version of certain OSHA rules. The proposed amendments are also reasonably necessary to add the portion of the OSHA rules related to construction, because the Department has proposed repealing ARM 24.30.103, which had incorporated those requirements. Additional amendments are reasonably necessary to improve the readability of the rule, clarify the scope of the rule's applicability, correct technical errors, and make the rule conform with style guidelines promulgated by the Secretary of State, Administrative Rules Bureau.

3. The Department of Labor and Industry proposes to repeal ARM 24.30.103 in its entirety. ARM 24.30.103 is found at pages 24-2407 through 24-2408.1 of the Administrative Rules of Montana. Authority to repeal the rule is section 50-71-311, MCA. There is reasonable necessity for the proposed repeal because the proposed amendments to ARM 24.30.102 will provide a more concise form of the rule, and having a single rule will be less confusing than the current separation into two similar rules.

4. Interested persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written

data, views or arguments may also be submitted to:

John Maloney, Bureau Chief
Safety Bureau
Employment Relations Division
Department of Labor and Industry
P.O. Box 1728
Helena, Montana 59624-1728

and must be received by no later than 5:00 p.m., March 17, 1995.

5. In addition to the publication of this notice in the Montana Administrative Register, an abbreviated Notice of Public Hearing is being published in one or more daily newspapers of general circulation in this state, as required by 50-71-302, MCA. Persons interested in viewing or obtaining a copy of the abbreviated Notice of Public Hearing published in a newspaper should contact Mr. Folsom at the address listed in paragraph 1 of this Notice.

6. The Department proposes to make these amendments and repeal effective May 1, 1995; however, the Department reserves the right to make these amendments and/or repeal effective at a later date, or not at all.

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

Laurie Ekanger, Commissioner
DEPARTMENT OF LABOR & INDUSTRY

David A. Scott
David A. Scott
Rule Reviewer

By: David A. Scott
David A. Scott, Chief Counsel
DEPARTMENT OF LABOR & INDUSTRY

Certified to the Secretary of State: January 30, 1995.

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

In the matter of the proposed adoption of new rules related to the operation of boilers and the licensing of boiler inspectors, and the repeal of ARM 24.30.701 through 24.30.749 inclusive	) NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION OF NEW RULES AND REPEAL OF EXISTING RULES

TO ALL INTERESTED PERSONS:

1. On March 6, 1995, at 10:00 a.m., a public hearing will be held in the first floor conference room at the Beck Building, 1805 Prospect Ave., Helena, Montana, to consider the adoption of new rules related to the operation of boilers and the licensing of boiler inspectors, and the repeal of ARM 24.30.701 through 24.30.749, inclusive.

The Department of Labor and Industry will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing. If you request an accommodation, contact the Department by not later than 5:00 p.m., February 28, 1995, to advise us of the nature of the accommodation that you need. Please contact the Employment Relations Division, Safety Bureau, Attn: Mr. Tim Gottsch, P.O. Box 1728, Helena, MT 59624-1728; telephone (406) 444-6420; TDD (406) 444-5549; fax (406) 444-4140. Persons with disabilities who need an alternative accessible format of this document in order to participate in this rule-making process should contact Mr. Gottsch.

2. The Department of Labor and Industry proposes to adopt new rules as follows:

RULE I SCOPE OF RULES (1) This subchapter is promulgated in order to provide definitions and rules for the safe construction, installation, operation, inspection, and repair of equipment covered by Title 50, chapter 74, MCA.

(2) Because Title 50, chapter 74, MCA, does not give the department of labor and industry jurisdiction over pressure vessels, this subchapter does not apply to pressure vessels.

AUTH: Sec. 50-74-101 MCA IMP: Title 50, chapter 74 MCA

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

(1) "Act" means the Montana Safety Act, codified at Title 50, Chapter 74, MCA.

(2) "Alteration" means a change in any item described on the original manufacturer's data report which affects the pressure capability of a boiler. Non-physical changes such as an increase in the maximum allowable working pressure (internal or external) or design temperature of a boiler are considered an

alteration. A reduction in minimum temperature such that additional mechanical tests are required is also considered an alteration.

(3) "API/ASME" means the American petroleum institute/ American society of mechanical engineers, an organization which establishes standards for boilers used in the petroleum industry.

(4) "Approved" means approval by the department.

(5) "ASME" means the American society of mechanical engineers.

(6) "ASME code" means the boiler and pressure vessel code of the ASME, as adopted by the department in [RULE V].

(7) "Certificate inspection" means an inspection, the report of which is used by the department as justification for issuing, withholding or revoking the inspection certificate.

(8) "Commissioner" means the commissioner of the Montana department of labor and industry.

(9) "Department" means the Montana department of labor and industry.

(10) "Degrees" mean degrees Fahrenheit.

(11) "External inspection" means an inspection of the exterior portions of a boiler, preferably made when the boiler is in operation.

(12) "Internal inspection" means as complete an examination as can reasonably be made of the internal and external surfaces of a boiler while it is shut down, when such manhole plates, handhole plates or other inspection opening closures are opened or removed as required by the inspector.

(13) "Jurisdiction" means a state, commonwealth, county or municipality of the United States or a province of Canada which has adopted one or more sections of the ASME code, one of which is Section I, and maintains a duly constituted department, bureau, or division for the purpose of enforcement of the ASME code.

(14) "National board" means the National Board of Boiler and Pressure Vessel Inspectors, whose membership is composed of the chief inspectors of jurisdictions who are charged with the enforcement of the provisions of the ASME code.

(15) "National board commission" means a commission issued by the national board to a holder of a certificate of competency who desires to make shop inspections or field inspections in accordance with the national board by-laws.

(16) "National board inspection code" means the manual for boiler and pressure vessel inspectors published by the national board.

(17) "Operating certificate" means a certificate issued by the department to the owner or user following an inspection by an inspector.

(18) "Owner" means any person, firm, corporation, state, county, or municipality owning or possessing for operation any boiler within the state.

(19) "Psig" means pounds per square inch gauge.

(20) "Repair" means the work necessary to restore a boiler to a safe and satisfactory operating condition.

(21) "State" means the state of Montana, unless it is clear from the context that another state is meant.

(22) "User" means any person, firm, corporation, state, county or municipality operating any boiler within the state.

AUTH: Sec. 50-74-101 MCA IMP: Sec. 50-74-101 MCA

RULE III DEFINITIONS OF TYPES OF BOILERS For the purposes of this subchapter, the following definitions apply:

(1) "Boiler" means a closed vessel in which water is heated, steam is generated, steam is superheated, or any combination thereof, under pressure or vacuum, for use external to itself, by the direct application of heat. The term boiler includes fired units for heating or vaporizing liquids other than water where these units are separate from processing systems and complete within themselves. The term does not include a vessel which bears the ASME "U" stamp.

(2) "Condemned boiler" means a boiler that has been inspected and declared unsafe, or disqualified by legal requirements, by an inspector and a stamping or marking designating its condemnation has been applied by an inspector.

(3) "Heating boiler" means a steam or vapor boiler operating at pressures not exceeding 15 psig or a hot water boiler operating at pressures not exceeding 160 psig or temperatures not exceeding 250 degrees.

(4) "Heat recovery boiler" means a vessel or system of vessels comprised of one or more heat exchanger surfaces used for the recovery of waste heat as defined in ASME code section I.

(5) "High temperature water boiler" means a water boiler intended for operation at pressures in excess of 160 psig or temperatures in excess of 250 degrees, or both.

(6) "Hot water heating boiler" means a boiler in which no steam is generated, from which hot water is circulated for heating purposes and then returned to the boiler, and which operates at a pressure not exceeding 160 psig and/or a temperature of 250 degrees, measured at or near the boiler outlet.

(7) "Hot water supply boiler" means a boiler completely filled with water that furnishes hot water to be used externally to itself, such as domestic hot water heaters and pool heaters, at pressures not exceeding 160 psig or at temperatures not exceeding 250 degrees, measured at or near the boiler outlet.

(8) "Miniature boiler" means a power boiler or high temperature water boiler which does not exceed any of the following limits:

(a) 16 in. inside diameter of shell;

(b) 20 sq. ft. heating surface, except that this limitation does not apply to electric boilers;

(c) 5 cu. ft. gross volume exclusive of casing and insulation; or

(d) 100 psig maximum allowable working pressure.

(9) "Nonstandard boiler" means a boiler that does not bear the ASME stamp, API/ASME stamp, or the stamp of any jurisdiction which has adopted a standard of construction equivalent to that required by the national board.

(10) "Portable boiler" means a boiler which is primarily intended for temporary location and the construction and usage permits it to be readily moved from one location to another.

(11) "Power boiler" means a boiler in which steam or other vapor is generated at a pressure of more than 15 psig.

(12) "Pressure vessel" means a vessel in which the pressure is obtained from an external source, or by the application of heat from an indirect source, or from a direct source other than a boiler.

(13) "Reinstalled boiler" means a boiler removed from its original setting and reinstalled at the same location or at a new location without change of ownership.

(14) "Second-hand boiler" means a boiler which has changed both location and ownership since primary use.

(15) "Standard boiler" means a boiler which bears the stamp of the state of Montana or of another state which has adopted a standard of construction equivalent to that required by the state of Montana, or bears the stamp of the ASME or the national board.

(16) "Steam heating boiler" means a steam boiler for operation at pressures not exceeding 15 psig.

(17) "Traction engine or hobby boiler" means a standard or non-standard power boiler, including free-lance and scale models, owned and operated by historical groups or individuals who preserve, maintain, exhibit and only occasionally operate these boilers on a not for profit basis and for the primary purpose of perpetuating the agricultural and pioneer heritage of Montana.

(18) "Water heater" means a closed vessel providing corrosion resistance for supplying potable water at pressures not exceeding 160 psig and shall include all controls and devices necessary to prevent water temperatures from exceeding 210 degrees.

AUTH: Sec. 50-74-101 MCA IMP: Sec. 50-74-101 MCA

RULE IV DEFINITIONS OF TYPES OF BOILER INSPECTORS For the purpose of this subchapter, the following definitions apply:

(1) "Chief inspector" means the chief state boiler inspector designated by the commissioner.

(2) "Inspector" means a state inspector or special boiler inspector.

(3) "Special boiler inspector" means those persons referred to by 50-74-202, MCA.

(4) "State inspector" means a person employed by the department for the purpose of inspecting boilers.

AUTH: Sec. 50-74-101 MCA
IMP: Sec. 50-74-101, 50-74-201 and 50-74-202 MCA

RULE V ADOPTION BY REFERENCE OF CERTAIN PUBLICATIONS, CODES AND STANDARDS (1) The department hereby adopts by reference the following documents published by the ASME:

(a) ASME code, 1992 edition, with 1993 and 1994 addenda, but only as to the following sections:

(i) Section I, power boilers;

(ii) Section II, parts a, b, c, and d, material specifications;

(iii) Section IV, heating boilers;

(iv) Section V, nondestructive examination;

(v) Section VI, guidelines for care and operation of heating boilers;

(vi) Section VII, rules for care of power boilers; and

(vii) Section IX, welding and brazing qualifications; and

(b) Controls and Safety Devices for Automatically Fired Boilers, CSD-1, 1992 edition with 1993 and 1994 addenda. This publication and its addenda apply to automatically fired boilers which are directly fired with electricity, gas, oil, or a combination of gas and oil.

(c) Copies of ASME documents are available from the American Society of Mechanical Engineers, 345 East 47th Street, New York, NY 10017.

(2) The department hereby adopts by reference the national board inspection code, 1992 edition with 1993 and 1994 addenda, which is available from the National Board of Boiler and Pressure Vessel Inspectors, 1055 Crupper Avenue, Columbus, OH 43229.

AUTH: Sec. 50-74-101 MCA IMP: Sec. 50-74-101 MCA

RULE VI SPECIAL BOILER INSPECTOR'S IDENTIFICATION CARDS

(1) Application for certification as a special boiler inspector is made on forms provided by the department and must be accompanied by a facsimile of the applicant's national board commission and commission card. Certificates issued by the department shall be held at the office requesting certification, and a file record must be kept at the department office.

(2) A numbered Montana identification card along with the certificate will be issued to the special boiler inspector after submission of the required documents and completion of an interview with the chief inspector.

(3) The certificate and identification card are valid for as long as the special boiler inspector is employed by the same employer.

(4) A special boiler inspector's certificate and identification card may be suspended by the department for good cause. Good cause includes, but is not limited to, neglect of duty, incompetence, untrustworthiness or conflict of interest of the special boiler inspector, or for willful falsification of a report of any inspection made by the special boiler inspector. The department will investigate allegations of conduct that may lead to suspension of a certificate. Such investigation will be made within a reasonable time after the department becomes aware of the conduct.

(5) Written notice of any such suspension must be given by the department to the special boiler inspector and employer. A special boiler inspector whose certificate has been suspended is entitled to an appeal to the department as provided for in the act, and to be present in person and represented by counsel at the hearing of the appeal.

AUTH: Sec. 50-74-101 MCA IMP: Sec. 50-74-202 MCA

RULE VII BOILERS EXEMPTED FROM INSPECTION (1) The rules in this sub-chapter do not apply to:

(a) boilers under federal control;

(b) steam heating boilers operated at not over 15 psig in private residences or apartments of 6 or fewer families; or

(c) hot water heating or supply boilers operated at not over 250 degrees when in private residences or apartments of 6 or fewer families.

(2) Hot water supply boilers and heaters exempt from inspections must be equipped with appropriate safety devices.

AUTH: Sec. 50-74-101 MCA IMP: Sec. 50-74-103 MCA

RULE VIII FREQUENCY OF BOILER INSPECTIONS (1) Power boilers and high-pressure, high-temperature water boilers must receive an annual internal inspection when construction permits; otherwise it must be as complete an inspection as possible. Such boilers must also be inspected externally annually while under pressure if possible, approximately 6 months from the date of the internal inspection.

(2) Low pressure boilers must receive a certificate inspection annually.

(a) Steam heating boilers must have an external inspection annually and every two years an internal inspection when construction permits.

(b) Hot water heating boilers and hot water supply boilers must have an external inspection annually, and at the discretion of the inspector, an internal inspection when construction will permit.

(3) Based upon documentation of such actual service conditions by the owner or user of the operating equipment, the department may, in its discretion, permit variations in the inspection frequency requirements.

AUTH: Sec. 50-74-101 MCA IMP: Sec. 50-74-209 MCA

RULE IX NOTIFICATION OF INSPECTION (1) The required certificate inspection must be carried out prior to the expiration date of the certificate at a time mutually agreeable to the inspector and owner or user. External inspections may be performed by the inspector during reasonable hours and without prior notification. When, as a result of external inspection or determination by other objective means it is the inspector's opinion that continued operation of the boiler constitutes a menace to public safety, the inspector may request an internal inspection or an appropriate pressure test or both to evaluate conditions. In such instances the owner or user shall prepare the boiler for such inspection or test as the inspector designates.

(2) All boilers must be prepared for the inspection, or hydrostatic test whenever necessary, by the owner or user within a reasonable period of time of the date specified by the inspector.

(3) The owner or user shall prepare a boiler for internal inspection to the satisfaction of the inspector.

(a) Prior to draining the boiler, the boiler must be allowed to cool, and the water then must be drawn off and the boiler thoroughly washed of all loose sludge and sediment.

(b) All manhole and handhole plates, washout plugs, cross tee plugs, low water cutoffs and boiler internal equipment considered necessary for adequate inspection must be removed, and the furnace and combustion chambers thoroughly cooled and cleaned.

(c) The boiler will be entered by personnel only after proper confined space entry procedures have been followed.

(4) If a boiler has not been properly prepared for an internal inspection or the owner or user fails to comply with the requirements for hydrostatic test as set forth in these rules, the inspector shall refuse to make the inspection or test, and the operating or inspection certificate shall be withheld until the owner or user complies with the requirements.

AUTH: Sec. 50-74-101 MCA
IMP: Sec. 50-74-210, 50-74-214 and 50-74-215 MCA

RULE X PENALTY FOR OPERATION OF UNSAFE BOILERS (1) If, upon inspection, a boiler is found to be in such condition that it does not meet the adopted code requirements, rendering it unsafe to operate, the inspector shall notify the department and the inspection certificate may be suspended by the department. Correction of defects to the satisfaction of the department allows the department to re-issue the operating certificate.

(2) Any person, firm, partnership or corporation causing such objects to continue to operate is subject to the penalty provided in the act.

AUTH: Sec. 50-74-101 MCA IMP: Sec. 50-74-208 MCA

RULE XI INSPECTION REPORTS TO BE SUBMITTED BY SPECIAL INSPECTORS (1) Inspections completed by special inspectors, of both standard and non-standard boilers, must be reported on form NB-6 of the national board.

(2) Inspection reports as required must be submitted within 30 days from date of inspection on each separate boiler.

(3) All code violations pertaining to the boiler must be reported immediately to the department on national board form 6.

AUTH: Sec. 50-74-101 MCA IMP: Sec. 50-74-202 MCA

RULE XII INSURANCE COMPANIES TO NOTIFY THE DEPARTMENT OF NEW, CANCELED OR SUSPENDED INSURANCE ON BOILERS (1) All insurance companies shall notify the department, within 30 days, of all boilers on which insurance is written, canceled, not renewed or suspended because of unsafe conditions.

AUTH: Sec. 50-74-101 MCA IMP: Sec. 50-74-102 MCA

RULE XIII SPECIAL INSPECTORS TO NOTIFY THE DEPARTMENT OF UNSAFE BOILERS (1) If a special inspector, upon inspection of a boiler, finds that a boiler, or any appurtenance thereof, is in such condition that the company would refuse insurance, the company shall immediately notify the department and submit a report on the defects.

(2) If upon inspection, a special inspector finds a boiler does not meet code requirements, leading the boiler to be unsafe for further operation, the inspector shall properly notify the owner or user, stating what repairs or other corrective measures are required to bring the object into compliance with these rules. Until such corrections have been made no further operation of the boiler involved is permitted.

(3) If an inspection certificate for the object is required and in force, it must be suspended by the department. When reinspection establishes that the necessary repairs have been made or corrective actions have been taken and that the boiler is safe to operate, the department shall be notified. At that time an inspection certificate, where applicable, will be issued.

AUTH: Sec. 50-74-101 MCA
IMP: Sec. 50-74-102 and 50-74-202 MCA

RULE XIV DEFECTIVE CONDITIONS DISCLOSED AT TIME OF EXTERNAL INSPECTION (1) If, upon an external inspection, there is evidence of a leak or crack, sufficient covering of the boiler must be removed to permit the inspection to satisfactorily determine the safety of the boiler. If the covering cannot be removed at that time, the inspector may order the operation of the boiler stopped until such time as the covering can be removed and proper examination made.

AUTH: Sec. 50-74-101 MCA
IMP: Sec. 50-74-102 and 50-74-215 MCA

RULE XV OWNER OR USER TO NOTIFY DEPARTMENT OF ACCIDENT (1) When an accident or failure occurs, which renders the boiler inoperable, the owner or user shall promptly notify the department by submitting a detailed report of the accident. In the event of a personal injury, notice must be given immediately by the quickest means possible, and neither the boiler or any parts thereof shall be removed or disturbed before permission has been given by an inspector except for the purpose of saving human life and limiting consequential damage.

AUTH: Sec. 50-74-101 MCA
IMP: Sec. 50-74-102 and 50-74-215 MCA

RULE XVI INSPECTION CERTIFICATE (1) If a boiler, after inspection, is found to be suitable and to conform to these rules, the owner or user shall be issued an operating certificate valid for one year from the inspection date.

(2) A grace period of 60 days will be allowed for scheduling inspections.

AUTH: Sec. 50-74-101 MCA
IMP: Sec. 50-74-102 and 50-74-206 MCA

RULE XVII VALIDITY OF INSPECTION CERTIFICATE (1) Except as provided in (2), an inspection certificate, issued in accordance with these rules, shall be valid until expiration unless some defect or condition affecting the

safety of the boiler is disclosed.

(2) A certificate issued for a boiler inspected by a special inspector shall be valid only if the boiler for which it was issued continues to be insured by a duly authorized insurance company.

AUTH: Sec. 50-74-101 MCA
IMP: Sec. 50-74-102, 50-74-206 and 50-74-209 MCA

RULE XVIII APPLICATION OF STATE SERIAL NUMBER (1) At the time of the initial certificate inspection of an existing installation each steel boiler must be stamped by an inspector with a serial number of the state, consisting of letters and figures to be not less than 5/16 inch in height and arranged as follows: MTB 00000.

(2) All cast iron, low pressure heating boilers must have the state serial number written on the boiler in permanent marker in two locations.

AUTH: Sec. 50-74-101 MCA
IMP: Sec. 50-74-102 and 50-74-206 MCA

RULE XIX RESTAMPING BOILERS (1) When the stamping on a boiler becomes indistinct, the inspector shall instruct the owner or user to have it restamped. Request for permission to restamp the boiler must be made to the department and proof of the original stamping must accompany the request. The department may grant such authorization. Restamping authorized by the department shall be done in accordance with the national board inspection code. Notice of completion of such restamping must be filed with the department by the inspector who witnessed the stamping on the boiler, together with a facsimile of the stamping applied.

AUTH: Sec. 50-74-101 MCA
IMP: Sec. 50-74-102, 50-74-205 and 50-74-206 MCA

RULE XX CONDEMNED BOILERS (1) Any boiler having been inspected and declared unfit for further service by an inspector must be stamped on both sides of the state number with the letters "XXX" as shown by the following example "XXXMTB00XXX". This will designate a condemned boiler. Any inspector stamping a boiler indicating that the boiler is condemned must immediately notify the department.

(2) Any person, firm, partnership, or corporation using or offering for sale a condemned boiler for operation within the state shall be subject to the penalties provided by the act.

AUTH: Sec. 50-74-101 MCA
IMP: Sec. 50-74-102 and 50-74-209 MCA

RULE XXI MINIMUM CONSTRUCTION STANDARDS FOR BOILERS (1) All new boilers, unless otherwise exempt, to be operated in the state, must be designed, constructed, inspected, stamped and installed in accordance with the ASME code and adopted addenda in effect and these rules and regulations must bear the manufacturer's "NB" number as registered with the national board. A copy of the manufacturer's data report,

signed by the manufacturer's representative and the national board commissioned inspector must be filed with the department through the national board.

(2) Manufacturer's data reports on all boilers, unless exempted, must be filed with the department.

(3) No boiler, except those exempted, may be installed in the state unless it has been constructed, inspected, stamped and is approved, registered, and inspected in accordance with the requirements of these rules.

(4) If a boiler cannot bear the ASME stamp, details in the English language and United States customary units of the proposed construction material specifications and calculations must be submitted to the department by the owner or user and approval as "State Special" must be obtained from the department before construction is started.

(5) Before a second-hand boiler is installed, application for permission to install it must be filed by the owner or user with the department and approval is obtained. Before a second-hand boiler can be operated in the state, an inspection must be made by an inspector.

(6) Unless approved by the department, operation of a non-standard boiler or any circumstances other than above, is prohibited in the state.

(7) A boiler having the standard stamping of another state that has adopted a standard of construction equivalent to the standard of the state may be accepted by the department.

AUTH: Sec. 50-74-101 MCA
IMP: Sec. 50-74-102, 50-74-206 and 50-74-209 MCA

RULE XXII REQUIREMENTS FOR NEW INSTALLATIONS (1) No boiler shall be installed in the state unless it has been constructed in conformity with the ASME code, and installed in conformity with these rules except those exempt by the act.

(2) The stamping must not be concealed by lagging or paint and must be exposed at all times unless a suitable record is kept of the location of the stamping so that it may be readily uncovered at any time this may be desired.

(3) Upon completion of the new installations, all boilers must be inspected by an inspector.

AUTH: Sec. 50-74-101 MCA IMP: Sec. 50-74-102 MCA

RULE XXIII SAFETY APPLIANCES (1) No person shall attempt to remove or do any work on any safety appliance prescribed by these rules while the appliance is subject to pressure.

(2) Should any of these appliances be removed for repair during an outage of a boiler, they must be reinstalled and in proper working order before the object is again placed in service.

(3) No person shall alter safety or safety relief valves in any manner to maintain a working pressure in excess of that stated on the boiler inspection certificate.

(4) Repair of safety or safety relief valves must be made only by an organization which holds a valid certificate of authorization for use of the national board "VR" safety or

safety relief valve repair symbol stamp.

(5) These valves must be rated to relieve the maximum BTU rating, as stamped on the boiler, and must bear the ASME or national board stamp.

AUTH: Sec. 50-74-101 MCA
IMP: Sec. 50-74-102, 50-74-108 and 50-74-217 MCA

RULE XXIV REINSTALLATION OF BOILERS (1) When a standard boiler located in this jurisdiction is to be moved outside the jurisdiction for temporary use or repair, application must be made by the owner or user to the department for permission to reinstall the boiler in the jurisdiction.

(2) When a non-standard boiler is removed from this state, it must not be reinstalled within this state.

(3) In any case where a boiler is reinstalled, the fittings and appliances must comply with the adopted codes.

(4) When a stationary boiler is moved and reinstalled, the attached fittings and appurtenances must comply with these rules and regulations.

AUTH: Sec. 50-74-101 MCA
IMP: Sec. 50-74-102, 50-74-206 and 50-74-207 MCA

RULE XXV INSTALLATION OF USED OR SECOND-HAND BOILERS (1) Before a used or second-hand boiler can be shipped for installation in the state, an inspection must be made by a state inspector or by an inspector holding a valid national board commission, and data submitted by the inspector must be filed by the owner or user of the boiler with the department for approval. Such boilers when installed in the jurisdiction must be equipped with fittings and appurtenances that comply with the rules and regulations for new installations.

AUTH: Sec. 50-74-101 MCA
IMP: Sec. 50-74-102, 50-74-206 and 50-74-207 MCA

RULE XXVI INSTALLATION AND OPERATION (1) The installation, operation, sale or the offering for sale of non-standard boiler in the state is prohibited without permission from the department.

AUTH: Sec. 50-74-101 MCA IMP: Sec. 50-74-102 MCA

RULE XXVII WORKING PRESSURE FOR EXISTING INSTALLATIONS (1) Any inspector may decrease the working pressure on any existing installation if the condition warrants it. If the owner or user does not concur with the inspector's decision, the owner or user may request from the department a joint inspection by the chief inspector or a state inspector and the original inspector. The chief inspector shall render the final decision, based upon the data contained in the inspector's reports.

AUTH: Sec. 50-74-101 MCA
IMP: Sec. 50-74-102, 50-74-215 and 50-74-218 MCA

RULE XXVIII MAXIMUM ALLOWABLE WORKING PRESSURE FOR STANDARD BOILERS (1) The maximum allowable working pressure for standard boilers shall be determined in accordance with the

applicable provisions of the edition of the ASME code under which they were constructed.
AUTH: Sec. 50-74-101 MCA
IMP: Sec. 50-74-102, 50-74-215 and 50-74-218 MCA

RULE XXIX MAXIMUM ALLOWABLE WORKING PRESSURE FOR NON-STANDARD BOILERS (1) The maximum allowable working pressure of a non-standard boiler shall be determined by the strength of the weakest section of the structure, computed from the thickness of the plate, the tensile strength of the plate, the efficiency of the longitudinal joint or tube ligaments, the inside diameter of the weakest course and the factor of safety allowed by these rules. Nonstandard boilers with welded seams must not be operated at pressures exceeding 15 psig for steam and 30 psig for water.

$$mawp = \frac{(TS)tE}{R(FS)}$$

where:

mawp = maximum allowable working pressure
TS = ultimate tensile strength of shell plates, psig
t = minimum thickness of shell plate, in weakest course, in inches
E = efficiency of longitudinal joint: For tube ligaments, E shall be determined by the rules given in section I of the ASME code. For riveted construction refer to the national board inspection code. For seamless construction, E shall be considered 100 percent.
R = inside radius of the weakest course of the shell, in inches
FS = factor of safety permitted

(2) When the tensile strength of steel or wrought iron shell plates is not known, it must be taken as 55,000 psig for steel and 45,000 psig for wrought iron.

(3) When computing the ultimate strength of rivets in shear, the following values in pounds per square inch of the cross-sectional area of the rivet shank must be used:

	PSIG
Iron rivets in single shear	38,000
Iron rivets in double shear	76,000
Steel rivets in single shear	44,000
Steel rivets in double shear	88,000

When the diameter of the rivet holes in the longitudinal joints of a boiler is not known, the diameter and cross-sectional area of rivets, after driving, may be selected from the following table, or as ascertained by cutting out one rivet in the body of the joint.

TABLE OF RIVET SIZES BASED ON PLATE THICKNESS

Thickness of plate-in.	1/4	9/32	5/16	11/32	3/8	13/32
Diameter of rivet after driving - in.	11/16	11/16	3/4	3/4	13/16	13/16

Thickness of plate-in.	7/16	15/32	1/2	9/16	5/8
Diameter of rivet after driving - in.	15/16	15/16	15/16	1-1/16	1-1/16

(4) The working pressure must be decreased by the inspector if the condition and safety of the boiler warrant. The following factors of safety represent minimum values to be used:

(a) The lowest factor of safety permissible on existing installations is 4.5, except for horizontal-return-tubular boilers having continuous longitudinal lap seams more than 12 ft. in length, where the factor of safety must be 8.

(b) When this latter type of boiler is removed from its existing setting, it may not be reinstalled for pressures in excess of 15 psig.

AUTH: Sec. 50-74-101 MCA
IMP: Sec. 50-74-102, 50-74-215 and 50-74-218 MCA

RULE XXX WORKING PRESSURE FOR CAST IRON (1) The maximum allowable working pressure on a water tube boiler, the tubes of which are secured to cast iron or malleable iron heaters, or which have cast iron mud drums, may not exceed 160 psig.

(2) The maximum allowable working pressure for any cast iron boiler, except hot water boilers, is 15 psig.

AUTH: Sec. 50-74-101 MCA
IMP: Sec. 50-74-102, 50-74-215 and 50-74-218 MCA

RULE XXXI REPAIRS (1) Repairs must be made in accordance with the codes adopted by these rules. Repairs must be reported to the department by the party completing the work within 30 days after completion.

(2) When repairs or replacements are made to fittings or appliances covered in these rules, the work must be in accordance with these rules for new installations.

(3) Weld repairs on power boilers may only be completed by a holder of the national board "R" symbol stamp.

(4) For weld repairs on low pressure boilers the party making the repair shall adopt a welding program in accordance with the "R" stamp requirements, with the exception of the shop review being conducted by the department. Upon approval the department will issue a certificate of authorization.

AUTH: Sec. 50-74-101 MCA
IMP: Sec. 50-74-102, 50-74-207, 50-74-215 and 50-74-218 MCA

RULE XXXII ALTERATIONS (1) Alterations to boilers must be made in accordance with the codes adopted by these rules. Before an alteration is made, the owner or user shall obtain permission from an inspector to make the alteration.

(2) Alterations to boilers may only be performed by a holder of the national board "R" symbol stamp.

AUTH: Sec. 50-74-101 MCA
IMP: Sec. 50-74-102, 50-74-207, 50-74-215 and 50-74-218 MCA

RULE XXXIII LAP SEAM CRACKS (1) The shell or drum of a boiler in which a lap seam crack develops along a longitudinal lap-riveted joint must be condemned. A lap seam crack is a crack found in lap seams extending parallel to the longitudinal joint and located either between or adjacent to rivet holes.

AUTH: Sec. 50-74-101 MCA
IMP: Sec. 50-74-102, 50-74-215 and 50-74-218 MCA

REASON: The proposed new rules are reasonably necessary to adopt in order to update terminology, incorporations by reference, and procedures for boiler operation and the licensing of boiler inspectors, as part of a general revision of rules in this area. Despite changes in boiler design, operation and inspection techniques, most of the existing rules have not been amended since their adoption in 1980. The general revision of the rules is also reasonably necessary to make the rules comply with style requirements of the Secretary of State, Administrative Rules Bureau. As part of the general revision of the rules, the 49 existing rules on the subject are proposed for repeal.

3. The Department of Labor and Industry proposes to repeal ARM 24.30.701 through 24.30.749 in their entirety. ARM 24.30.701 through 24.30.749 are found at pages 24-2611 through 24-2627 of the Administrative Rules of Montana. Authority to repeal the rules is section 50-74-101, MCA. There is reasonable necessity for the proposed repeals because of the proposed adoption of new rules that will address the same subject matter.

4. Interested persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to:

John Maloney, Bureau Chief
Safety Bureau
Employment Relations Division
Department of Labor and Industry
P.O. Box 1728
Helena, Montana 59624-1728

and must be received by no later than 5:00 p.m., March 13, 1995.

5. The Department proposes to make these amendments and repeals effective April 15, 1995; however, the Department reserves the right to make these amendments and/or repeals effective at a later date, or not at all.

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

Laurie Ekanger, Commissioner
DEPARTMENT OF LABOR & INDUSTRY

David A. Scott
Rule Reviewer

By: David A. Scott
David A. Scott, Chief Counsel
DEPARTMENT OF LABOR & INDUSTRY

Certified to the Secretary of State: January 30, 1995.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT of ARM 42.21.159 relating to Property Audits and Reviews	NOTICE OF THE PROPOSED AMENDMENT of ARM 42.21.159 relating to Property Audits and Reviews

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On March 31, 1995, the Department of Revenue proposes to amend ARM 42.21.159 relating to property audits and reviews.

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

42.21.159 ~~COMMERCIAL PERSONAL~~ PROPERTY AUDITS AND REVIEWS (1) The ~~audit bureau will~~ department may conduct audits and reviews of ~~commercial personal~~ property. These audits and reviews will be performed in order to implement 15-8-104, MCA~~, as amended by the legislature during 1985~~.

(2) remains the same.

~~(3) Those commercial personal property assets which are appraised by the industrial property bureau will not be subject to this audit program. Those commercial personal property assets which are included in the appraisal of a centrally assessed company will not be subject to this audit program.~~

~~(4)~~(3) ~~The appraisal/assessment bureau will prepare a master list of all commercial personal property owners. This list will be developed based upon information supplied by the~~ For purposes of this audit and review, the department may utilize information supplied by the secretary of state, department of livestock ~~department~~, department of revenue, department of agriculture ~~department~~, department of commerce, federal agricultural stabilization and conservation service offices, and local government entities to determine the taxable value of the property subject to taxation.

~~(5)~~(4) The purpose of ~~this audit program~~ property audits and reviews is to ensure that property owners are returning correct and accurate cost data on property returns, and that all taxable ~~commercial personal~~ property has been reported ~~by taxpayers~~ for assessment purposes ~~and to ensure that all commercial personal property taxpayers are returning correct and accurate cost data on personal property returns~~.

~~(6)~~(5) The department of revenue will seek access to the following records for purposes of conducting the audits and reviews, pursuant to 15-8-304~~(b)~~, MCA:

(a) personal property returns on file in county ~~assessors'~~ appraisal/assessment offices,

(b) income statements, receipts of purchase, asset listings, asset registers, asset ledgers, and any information in the possession of the ~~commercial personal~~ property ~~taxpayer~~

owner or lessee which would reflect capital asset investment costs,

(c) remains the same.

(d) any other information in the possession of the ~~county assessor~~ department and/or ~~the commercial personal~~ property ~~taxpayer~~ owner or lessee which is necessary in order to conduct a thorough audit or review.

AUTH: Sec. 15-1-201 MCA; IMP: Sec. 15-8-104 MCA.

3. The department is proposing these amendments to handle a housekeeping and a statutory change. There are references to the "audit bureau" and "audit program" throughout the rule and those terms no longer apply. The division has been reorganized and under this reorganization there is no longer an "audit bureau" so those areas of the rule have been changed to reflect the "department". The law was amended during the Special Session of 1993 to make the audit or review more discretionary to the department rather than mandatory. Therefore, the language of the rule is being amended to reflect this statutory change.

4. Interested parties may submit their data, views, or arguments concerning the proposed adoption in writing to:

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

no later than March 10, 1995.

5. If a person who is directly affected by the proposed amendments 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 Cleo Anderson at the above address no later than March 10, 1995.

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

CLEO ANDERSON
Rule Reviewer

MICK ROBINSON
Director of Revenue

Certified to Secretary of State January 30, 1995

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

In the matter of the amendment of ARM 2.43.203 pertaining to the deadline for submitting facts and matters when a party requests reconsideration of an adverse administrative decision.	NOTICE OF AMENDMENT

TO: All Interested Persons.

1. On December 22, 1994, the Public Employees' Retirement Board published notice of a proposed amendment to ARM 2.43.203 pertaining to the deadline for submitting facts and matters when a party requests reconsideration of an adverse administrative decision at p. 3116 of the 1994 Montana Administrative Register, Issue No. 24.

2. No written or oral comments were received from any interested party.

3. On January 26, 1995, the Public Employees' Retirement Board amended ARM 2.43.203 as noticed.

Terry Teichrow

Terry Teichrow, President
Public Employees' Retirement Board

Dal Smilie, Chief Legal Counsel and
Rule Reviewer

Certified to the Secretary of State on January 30, 1995.

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

In the matter of the amendment of ARM 2.43.509, 2.43.513, and 2.43.514 pertaining to periodic medical review of disability retirees and cancellation of disability benefits	))))))	NOTICE OF AMENDMENT

TO: All Interested Persons.

1. On November 10, 1994, the Public Employees' Retirement Board published notice of a proposed amendment to ARM 2.43.509, 2.43.513, and 2.43.514 pertaining to travel costs associated with periodic medical review, information which the board may consider during a medical review, members affected by the effective date of cancellation of disability benefits, and employers which must be notified that a member is no longer disabled and is available for reemployment at p. 2878 of the 1994 Montana Administrative Register, Issue No. 21.

2. No written or oral comments were received from any interested party.

3. On January 26, 1995, the Public Employees' Retirement Board amended ARM 2.43.509, 2.43.513, and 2.43.514 as noticed.

Terry Teichrow, President
Public Employees' Retirement Board

Dal Smilie, Chief Legal Counsel and
Rule Reviewer

Certified to the Secretary of State on January 30, 1995.

BEFORE THE BOARD OF INVESTMENTS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment of a rule pertaining to the Intercap Program	)	NOTICE OF AMENDMENT OF 8. 97.919 INTERCAP PROGRAM - SPECIAL ASSESSMENT BOND DEBT - DESCRIPTION - REQUIREMENTS

To: All Interested Persons:

1. On December 8, 1994, the Board of Investments published a notice of public hearing on the proposed amendment of the above-stated rule at page 3069, 1994 Montana Administrative Register, issue number 23. The hearing was held on December 28, 1994, at 9:00 a.m. in Helena, Montana.

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

3. No comments or testimony were received.

BOARD OF INVESTMENTS
WARREN VAUGHAN, CHAIRMAN

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

_____
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, January 30, 1995.

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

In the matter of the adoption of new rules I-V establishing administrative enforcement procedures for the public water supply act.	)))))	NOTICE OF ADOPTION OF NEW RULES I-V (Public Water Supply)

To: All Interested Persons

1. On August 25, 1994, the board published notice of the proposed adoption of the above-captioned rules at page 2398 of the Montana Administrative Register, Issue No. 16.

2. The board adopted the rules as proposed, with the following changes (new material is underlined, material to be deleted is interlined):

RULE I (16.20.501) PURPOSE (1) This subchapter implements 75-6-103, MCA, which requires rules establishing administrative enforcement procedures and administrative penalties authorized under the Public Water Supply Act, Title 75, chapter 6, part 1, MCA. These rules are to be applied in accordance with the enforcement policies and procedures adopted by the department for water quality related laws and programs administered by the department.

AUTH: 75-6-103, MCA; IMP: 75-6-109, MCA

RULE II (16.20.502) DEFINITIONS Unless the context clearly states otherwise, the following definitions, in addition to those in 75-6-102, MCA, and ARM 16.20.202 apply throughout this subchapter.

(1) Same as proposed.

(2) "Class I violation" means a violation of the act or regulations requiring an immediate action or response by a person because of the health risk involved. These violations include, but are not limited to, the following:

(a) failure to act in the best interest of public health in an emergency situation, including, but not limited to, disease outbreaks, spills, tampering~~,~~ and treatment facility failures~~, interruption in service, and natural disasters~~;

(b) Same as proposed.

(c) failure to respond to nitrate, total coliform, turbidity, or other MCL violations that pose an acute risk to public health, including ~~reporting to the department,~~ check sampling, ~~implementation of corrective action within 24 hours,~~ and public notification.

(3)-(7) Same as proposed.

(8) "Final order" means an order of the department issued or in force pursuant to 75-6-109, MCA, the recipient of which has failed to exercise ~~in timely fashion~~ within 30 days its right to a hearing before the board or has waived such right, or has exercised such right to a hearing, following which the

board has issued a final order either affirming or modifying the department's order.

(9)-(12) Same as proposed.

RULE III (16.20.503) ENFORCEMENT PROCEDURES (1) Administrative enforcement under this subchapter encourages progressive enforcement from an initial enforcement response, such as a written or verbal communication, through optional follow-up or additional enforcement actions. ~~The department may proceed with higher levels of enforcement actions, including the immediate imposition of penalties, whenever the violator has not responded to the initial enforcement response or is not expected to comply with the initial response, or whenever the violation is a Class I violation.~~ The initial enforcement action taken will be determined according to the following:

(a) A Class I violation may be responded to by the issuance of a notice of violation (NOV) and order for immediate corrective action and may include a penalty. An NOV and order issued pursuant to this subsection, which includes penalties, must be signed by the director or designee.

(b)-(d) Same as proposed.

(2)-(3) Same as proposed.

RULE IV (16.20.504) ADMINISTRATIVE PENALTIES (1) Any imposition of penalties under this subchapter becomes effective upon issuance of a final order and due according to a schedule established in the order. If a person submits compelling financial evidence, the department may, prior to issuing an NOV and order, incorporate into an order a reasonable payment schedule, taking into consideration the person's ability to pay and allowing consecutive monthly payments for a penalty assessed pursuant to this rule. The department may charge an additional amount in interest for funds owed to the state of Montana at the interest rate established by the Montana department of revenue ~~department~~.

(2) Same as proposed.

RULE V (16.20.505) SUSPENDED PENALTIES (1) Same as proposed.

(2) Whenever the director or designee determines that suspended penalties are appropriate, then written documentation will be provided stating the basis for the determination using the criteria listed in (1)(a)-(e) above.

~~(2)~~(3) Penalties suspended under this provision will be deemed waived if the violator complies with all provisions of the administrative order and remains in compliance for a period of one year from the date of ~~issuance of~~ compliance with the administrative order.

3. The board has thoroughly considered all comments received. The comments and the board's responses are noted below:

1. **COMMENT: Josh Hofer, Loring Colony, Loring.** Mr. Hofer

states that their public water supply well has always tested satisfactorily, and he does not believe that there is a need for more rules and regulations.

RESPONSE: Section 75-6-103(2)(j), MCA, of the Public Water Supply Act requires the Board to adopt rules establishing "administrative enforcement procedures and administrative penalties authorized under this part." This provision mandates the promulgation of rules establishing administrative penalties and failure of the Board to do so would violate a duty imposed by the legislature. In the "Statement of Intent" for the proposed rules, the legislature "recognize(d) that an economic hardship may be imposed on a public water supply system in order for that system to be brought into compliance...and that this hardship may be further increased by the levying of administrative and civil penalties for noncompliance."

The proposed rules would not impact a public water supplier that is in compliance with standards established by state regulations. In general, the rules provide the supplier an opportunity for returning to compliance when Class II violations occur by requiring the department to notify the public water supplier by letter. The proposed rules do not require the assessment of penalties, but allow the department to include such penalties, when appropriate, in an Administrative Order issued by the department.

Under internal procedures developed by the department, the Public Water Supply (PWS) Program will prioritize violations and take varying types of enforcement actions accordingly, relying upon EPA's definitions for significant non-compliers (SNCs) and other factors.

2. **COMMENT: Thomas and Evadeane Walchuk, Ronan.** Mr. and Mrs. Walchuk state that they do not want to test their well that serves their campground monthly, especially when the campground is closed.

RESPONSE: They are only required to test their well when the campground is open. They therefore would not have to test during the months that their campground is closed (approximately November through March) and would not be subject to penalties during the months that the campground is not open.

3. **COMMENT: Ed Kessel, Glenbowl Lanes, Glendive.** Mr. Kessell states that he would like to avoid monthly testing and would be willing to remove his drinking water fountain and apparently provide water from an approved source for drinking water. He would be willing to test once or twice per year.

RESPONSE: Since this comment addresses matters outside of this rulemaking, changes to the proposed rules cannot adequately address this commentor's concerns.

4. **COMMENT: Sandra Zeiler, Helena.** Ms. Zeiler states that the proposed rules appear to be too lenient and that the fines are

ludicrously low considering the importance of water quality issues.

RESPONSE: The provision authorizing the use of administrative penalties for violations of the Public Water Supply Act (PWSA) set a maximum penalty of $500 for each day of violation. Therefore, administrative penalties will typically be used for less serious violations. The penalties specified in the proposed rules are set at levels intended to promote compliance by simply making compliance less expensive than non-compliance. Administrative penalties can be assessed more quickly and require less resources in time and staff than bringing an action for civil penalties. Civil penalties can be assessed at levels up to $10,000 per day and are reserved for the more serious and/or more complicated non-compliance situations.

5. **COMMENT: Dean Chaussee, Helena.** Mr. Chaussee requests that the rules require written documentation by the director of the department when penalties are suspended. The documentation should take into consideration the criteria for suspending penalties enumerated in Rule V.

RESPONSE: Providing documentation for suspending penalties is consistent with the documentation required for denying an enforcement request according to the interim "Compliance/Enforcement Manual" adopted by the department. For this reason, the proposed rules will be modified to read as follows:

> RULE V(2) Whenever the director or designee determines that suspended penalties are appropriate, then written documentation will be provided stating the basis for the determination using the criteria listed in (1)(a)-(e) above.

6. **COMMENT: Darla Agtung.** Ms. Agtung requests that sampling "calendars" be given to water system owners/operators, that the rules establish pre-set penalty amounts, including maximum amounts and that no penalties be assessed for less serious violations.

RESPONSE: The proposed Rule IV establishes minimum penalty amounts for the most common violations. The maximum penalty amount of $500 per day per violation has already been established by the 1991 Legislature in the Public Water Supply Law. An attempt to establish greater maximum penalty amounts in this proposed rule would therefore be inconsistent with the law. As mentioned above, suppliers are given opportunities to comply prior to any penalties being assessed for Class II violations. Decisions to take formal administrative enforcement action or seek civil penalties will be in accordance with the department's internal guidance procedures and a penalty policy. As stated above, these rules are intended to establish appropriate penalties for less serious violations but do not require the department to seek such penalties for every violation. For the

above reasons, no change in the proposed rules will be made in response to this comment.

7. **COMMENT: James and Beverly Hurley.** Mr. and Mrs. Hurley manage a mobile home park and state that they are concerned with the language in Rule II, definition (2)(a) that includes failure to act following ..."tampering, treatment facility failures, interruption in service and natural disasters" as a Class I violation. They also requested that more training and on-site assistance be provided to suppliers.

RESPONSE: The definition does not hold the supplier liable for tampering by third parties, treatment failures, or the interruption in services and natural disasters. The definition of Class I violations was intended to include situations where the supplier fails to act in emergency situations that threaten public health. The inclusion of those situations is to ensure that a supplier will take all reasonable measures to provide safe drinking water following such incidents. For clarification, the rule has been modified to delete references to natural disasters and interruption in services, which may include equipment failures. **See also, Response No. 9.** In addition, subsection (c) of the definition was modified to delete reference to reporting violations to the department and taking corrective action within 24 hours since these requirements are not specified in the rules governing public water supplies. The proposed changes to Rule II are as follows:

RULE II (2)(a) failure to act in the best interest of public health in an emergency situation, including, but not limited to, disease outbreaks, spills, tampering and treatment facility failures~~, interruption in service, and natural disasters~~;
(2)(c) failure to respond to nitrate, total coliform, turbidity or other MCL violations that pose an acute risk to public health, including ~~reporting to the department,~~ check sampling, ~~implementation of corrective action within 24 hours,~~ and public notification.

8. **COMMENT: NORTH VALLEY COUNTY WATER DISTRICT BOARD MEMBERS, ST. MARIE.** The board members suggest that the rules give consideration to small systems since they are the ones that can least afford to comply. The board also encourages common sense in assessing penalties and that care be used in determining the responsible party when violations occur.

RESPONSE: The proposed rules establish smaller penalties for small systems. As mentioned above, penalties are normally assessed after opportunities for compliance are offered for less serious violations and are not automatically assessed for every violation. Penalties should, therefore, not be assessed inappropriately under the proposed rules. In addition, proposed Rule V allows moderation of penalties on a case-by-case basis.

Under the enforcement authority of the Public Water Supply

Act, the department cannot take action against a party that is not responsible for compliance. For these reasons, no change in the proposed rules will be made to address this comment.

9. **COMMENT: David G. Rice, attorney for Hill County Water District.** Mr. Rice recommends that the department make use of consent orders in lieu of standard administrative orders, asks for an interpretation of Class II violations, notes that many small water suppliers cannot afford penalties for unintentional acts, and asks for more assistance in solving compliance problems rather than assessment of penalties, perhaps through the hiring of additional staff.

RESPONSE: The proposed rules do not specify the conditions under which a consent order will be used by the department. Consent orders will be considered and used according to the enforcement procedures now being developed. Generally, consent orders may be appropriate in situations where the responsible party is willing to achieve compliance according to a schedule agreed upon by the department.

The proposed rules define Class II violations to include all routine water quality sampling and monitoring, operator certification requirements, treatment technique requirements (except for disinfection), and public notification requirements not associated with an acute health risk. Class I violations are defined to include those violations associated with imminent public health risks. In contrast, Class II violations are associated with risks to public health that are not acute in nature. The rule will not be modified to list every possible Class II violation as that would result in a rule listing nearly every regulation governing public water supplies. This is unnecessary as non-compliance with those regulations may result in penalties. The definition of Class I violations has been modified, however, in response to this and similar comments. The change has been made in order to clarify the distinction between Class I and II violations. **See, Response No. 7.**

The assessment of penalties under the proposed Rule IV specifies that the department will consider, among other things, the size of the system and the culpability of the violator. That is, unintentional acts are less culpable than reckless or negligent behavior. In addition, the minimum penalties specified in Table I under Rule IV adjusts the penalty downward for small systems. Under Rule V, penalties may be modified by suspending all or a portion of those penalties when appropriate. Finally, when the cost of returning to compliance is significant, consideration will be given to a schedule for returning to compliance.

10. **COMMENT: Ray Wadsworth, Montana Rural Water Systems Inc.** Mr. Wadsworth requests that a step-by-step enforcement procedure be agreed to by all personnel of the department, approved by the department administration and the Board of Health and Environmental Sciences (BHES), and provided to every water system that may be subject to the penalties. He requests that

adoption of rules be postponed until reauthorization of the Safe Drinking Water Act occurs. He requests that consent orders be utilized in lieu of standard administrative orders. He requests that clarification be provided to define violations, that instructions (with some flexibility) be provided to assist suppliers in returning to compliance, that an opportunity to meet with the regulatory agency be provided to determine what exactly will be required to come into compliance, that sufficient time be given to make changes following the agreement upon the necessary steps to return to compliance, and that sufficient warning be given whenever possible to allow a supplier to budget for compliance issues.

RESPONSE: The department is in the process of developing an enforcement policy that is scheduled for completion in January. In the meantime, interim enforcement policy and procedures have been adopted by the department. These will be used as the standard for all enforcement actions within the Water Quality Division. The enforcement policy will not be adopted in these rules, however, because it is intended as internal guidance for department review and selection of enforcement actions. These proposed rules will be modified, however, to indicate that the administrative penalty rules will be applied in conformance with the enforcement policy and procedures adopted by the department, as follows:

> RULE I PURPOSE (1) This subchapter implements 75-6-103, MCA, which requires rules establishing administrative enforcement procedures and administrative penalties authorized under the Public Water Supply Act, Title 75, chapter 6, part 1, MCA. These rules are to be applied in accordance with the enforcement policies and procedures adopted by the department for water quality-related laws and programs administered by the department.

Reauthorization of the SDWA did not occur in the 103rd Congress and may take months or longer to come to closure. Delay of the rules until then is inappropriate due to the mandate of the state law, enacted in 1991, requiring the adoption of administrative penalty rules.

Consent orders are not objectionable in certain situations and will be used when appropriate. Consent orders may, however, require more time than the department staff has available. The proposed rules are intended to avoid any arbitrary assessment of penalties, and should help the public better understand the potential consequences of non-compliance.

Any violation may subject a supplier to penalties but generally it is the more serious violations that will result in penalties. Serious violations include those listed as Class I violations, as well as those included in EPA's significant noncomplier definitions, which could be Class I or Class II violations. Table I in Rule IV in the proposed rules establishes minimum penalties for the most common violations. Class I violations are those that result in imminent health risks and

may result in penalties. Class II violations may also result in penalties, but only after opportunity is given to return to compliance through informal enforcement efforts.

The administrative penalties specified under the proposed rules are designed to make compliance cheaper than non-compliance, and are not intended to be excessive. The supplier can avoid penalties by remaining in compliance, especially after warning letters are received. A supplier should already have a budget established to cover compliance costs such as monitoring costs. The department is not required to allow a system time to budget the costs of non-compliance, i.e., penalties, for failure to do monitoring. A system can avoid all costs of noncompliance simply by complying with all requirements in a timely manner. Under Rule V, the department can also suspend penalties where appropriate; the ability to pay is a consideration that must be addressed when suspension is considered.

11. **COMMENT: Dennis Riddell, Rae County Water & Sewer District, Bozeman.** Mr. Riddell requests better definitions for violations. He requests that procedures be included for how fines are to be assessed and how the total amount of the fine will be determined. He is concerned that there is no apparent consideration for the time that it may take for a supplier to secure funding for necessary improvements. He states that the proposed rules do not recognize that equipment failure and power outages are out of the control of the supplier. Finally, Mr. Riddell requests that more time be allowed for adoption of the rules so that the department can work with suppliers and groups like Montana Rural Water Systems Inc. to formulate an agreeable solution.

RESPONSE: The definition of Class I violations is being clarified in response to this and similar comments in order to clarify the distinction between Class I and II violations. **See, Response No. 7.**

The proposed rules will not include the method or philosophy behind a decision to seek penalties as the inclusion of this method would be too burdensome for rulemaking. The department is developing an enforcement manual that will specify the procedures and criteria used in determining the appropriate enforcement response, including the assessment of penalties. That manual is expected to be complete by January 1995.

A reasonable time for reaching compliance is generally a consideration in any order issued by the department. Since this is determined on a case-by-case basis, no change to the rules will be made to address this concern.

Finally, the rules do not require that the department take action against a supplier for power failure or equipment failure. The rules define Class I violations as a failure of the supplier to take appropriate measures after certain emergency events occur. As stated in Response No. 7, the rules have been modified to address this concern by deleting reference to "interruption in services", which would include equipment failures.

12. **COMMENT: Mr. Glenn Decker, Great Falls.** Mr. Decker is concerned that past violations are proposed to be subject to penalties. He indicates that a bad sample recently taken by the department would subject him to penalties. He also found that he recently did not take required lead and copper samples and is concerned that he would be liable for penalties. He states that residents of his mobile home court were required to have their homes tested for lead and copper levels in the tap water, but city residents were not.

RESPONSE: Although all violations are theoretically subject to penalties, only those that are determined by the department to be significant due to the seriousness of the violation or those that occur with significant frequency will likely result in a penalty. As stated above, the proposed rules do not specify when penalties will be assessed due to the complexity of this determination.

The proposed penalties specified in the rule are not intended to be retroactive in their application.

13. **COMMENT: Mr. Larry Rasmussen, Great Falls.** Mr. Rasmussen states that penalties will not make the water any better. He states that penalties of $500 per day can result from differences of opinion and is concerned that only one person's opinions may be considered when penalties are assessed.

RESPONSE: Penalties are intended to deter violations of the Public Water Supply Act and to ensure that action is taken to return to compliance after routine, informal efforts have failed. Penalties therefore are specifically intended to make sure that the water is safe for human consumption.

Penalties will not result from one person's opinion but will be determined according to the interim enforcement procedures manual adopted by the department. The procedures require monthly reviews by program staff to determine which violations will require formal administrative enforcement and may include the assessment of penalties. Final review and selection will be done by the Division Administrator.

14. **COMMENT: Anne Boothe, Philco Economic Growth Council, Malta.** Ms. Booth encourages regulations that are conducive to economic growth. She also encourages a reduction from the required monthly coliform sampling to quarterly sampling.

RESPONSE: The penalty rules will not impact a supplier that complies with the requirements of the Public Water Supply Act. The proposed rules do not address requirements for sampling frequency. Therefore, no change in the proposed rules will be made to address this comment.

15. **COMMENT: Marvin Pretz, Belgrade.** Mr. Pretz protests that the proposed rules will place the department in an adversarial position with water suppliers. He suggests that the department hire engineers to facilitate compliance rather than propose

penalties. He suggests that a fee for this service be considered for this additional service.

RESPONSE: As stated above, the proposed rules simply specify minimum penalty amounts for certain violations and describe procedures for issuing orders. The suggestion to hire engineers and charge fees for this service is outside the scope of this rulemaking. No change in the rules is necessary to address the concerns of this commentor.

16. **COMMENT: Richard John Kingdon, Grubstake Restaurant, Hamilton.** Mr. Kingdon complains that his water tests are already very expensive and that further penalties are unnecessary. He believes that his spring, which is developed at the edge of Forest Service property, is not vulnerable to contamination and should not be subject to such stringent sampling requirements.

RESPONSE: As stated above, the legislature adopted a law in 1991 that requires the Board to adopt rules establishing enforcement procedures for the issuance of administrative orders and the imposition of administrative penalties. The proposed rules implement legislative intent.

17. **COMMENTS: Chris Henderson, Loring Club, Loring. Scott & Barb Waters, Evan Waters, Homesteaders Pizza, Malta. Joe and Wanda Joe's In and Out, Malta. Hines N-L, Malta.** The commentors state that there have been problems with the bureau in the past. They suggest that the DHES Public Health Lab has been at fault in some positive coliform sample results. They state that monthly samples are required now and that 10 check samples are required for positive coliform results. They state that the department requires a notarized compliance letter when a routine sample is missed and that the department recommends revocation of business licenses when compliance letters are not sent. They state that restrictions and limits need to be placed on the bureau.

RESPONSE: Although the department does use bi-lateral compliance agreements (BCA) for enforcement purposes, the proposed rules do not address those agreements. The proposed rules implement the administrative order authority and administrative penalty authority granted to the department under the Public Water Supply Act. No change in the rules is necessary to address this comment.

18. **COMMENT: Nancy Brekke, Wilderness Treatment Center, Marion.** Ms. Brekke requests that sampling return to quarterly for small public systems.

RESPONSE: The proposed rules do not address requirements for sampling frequency. Therefore, no change in the proposed rules will be made to address this comment.

19. **COMMENT: Peter Wipf, representing 33 Hutterite colonies.**

Mr. Wipf expresses his concern about the proposed penalties and how they will be used. He also expressed an interest in working with DHES to resolve differences and to avoid penalties whenever possible.

RESPONSE: The proposed rules will be used in conjunction with an interim compliance/enforcement procedures manual adopted by the department and in conjunction with the penalty policy now being developed. Those procedures and policies will clarify how and when penalties will be assessed. The rules have been modified to express this intent. **See Response No. 10.**

20. **COMMENT: R.H. Scott, Seeley Lake-Missoula County Water District.** Mr. Scott requests that the department spend resources in technical assistance rather than in adoption of penalty rules. Mr. Scott also requested the following changes to the rules: (A) Rule II, definition 2 should be changed to allow for factors beyond the control of the supplier, such as equipment failure, testing facilities and lack of full-time employees (Mr. Scott suggests the inclusion of specific time frames for responses); (B) Rule II, definition 3 should be revised to include all potential violations; (C) Rule II, definition 8 should be changed to include an exact time frame for the recipient of an order to request a hearing, instead of the phrase "timely fashion"; (D) Rule III, section (1) should be changed to strike the phrase "... or is not expected to comply with the initial response",...; (E) Rule III, section (1)(b) administrative costs should be clarified; (F) Rule III, section (1)(d)(ii) should be changed to allow for equipment failure, engineering miscalculations etc.; and (G) Rule III, section (2)(d) should be changed to allow for additional connections to a water system if interim measures to protect public health are implemented. In addition, Mr. Scott recommends flexibility in writing and implementation of the rule, and that DHES concentrate on problem solving rather than enforcement.

RESPONSE: The department is required by the 1991 amendments to the Public Water Supply Law to adopt rules for implementation of administrative enforcement and administrative penalty authority. These rules are therefore necessary.

Following are responses to comments listed immediately above: (A) This definition will be clarified. The intent was not to penalize suppliers for situations beyond their control. The intent was to encourage compliance in situation where the public health is threatened unnecessarily because of failure to act by the supplier. **See Response No. 7 and 9.** (B) Including all possible violations under Class II would cover nearly all violations of the rules regulating public water supplies. This would result in a rule that would be extremely lengthy and duplicative of the regulations currently established for public water supply systems. Therefore, the suggested change will not be made. **See also, Response No. 9.** (C) This definition will be changed to specify the 30 days allowed by law. (D) This phrase has already been deleted from the proposed rules so that

no further change is necessary. (E) This comment is not clear. Administrative costs are not addressed in this section. This section allows the department to pursue penalties in instances where a person does not respond to a warning letter. Therefore, no change to the proposed rules will be made to address this comment. (F) This section does not require the imposition of a penalty but gives the department the discretion to assess penalties if the same or similar violation occurs within 12 months. A change in the rule, therefore, is not necessary to address this comment. (G) Rule III(2) simply lists a number of requirements that may be included in an order. The proposed change to Rule III(2)(d) will not be made as the possibility for additional service connections is not precluded by that rule. (H) The rules, in conjunction with department approved procedures and enforcement policy, will allow some discretion. The rules are intended, however, to more clearly define the department's enforcement authority under the Public Water Supply Act.

21. **COMMENT: Staff of department's Water Quality Division.** Changes to clarify certain sections of the rules are necessary for the following reasons. (1) The second sentence of Rule III(1) should be deleted because it conflicts with the requirement in the rules providing that a warning letter must precede the imposition of penalties for all Class II violations. In addition, Rule III(1)(a) should be modified to clarify that penalties are not mandatory for all Class I violations but may be imposed without issuance of a warning letter; (2) Rule IV (1) should be modified to correct the name of the Montana Department of Revenue; and (3) Rule V(2) should be amended to clarify that compliance must be maintained for one year after achieving compliance.

RESPONSE: For the reasons stated above, the rules have been modified as suggested.

22. **COMMENT: John Campbell, City of Polson.** Mr. Campbell requested clarification of certain definitions and wording of the rules, as follows: (A) The term "tampering" as used in the definition for Class I violations in Rule II(2)(a) should be clarified. Tampering could refer to actions of someone employed by the water supplier or the actions of someone else. He expressed concern over the liability of the supplier resulting from the actions of someone not under the supplier's control; (B) The phrase "interruptions in service" in the same definition should be deleted or clarified since a water supplier typically has little or no control over interruptions in service; (C) Failure to provide continuous disinfection should be removed from the Class I violations listed in Rule II(2)(b). He stated that equipment failures are possible even when a back up system is available; (D) Examples of Class II violations should be listed in Rule II(3); (E) Rule III(2)(d)(i) should be deleted because requiring a supplier to cease use of a water or sewer system until all written approvals are obtained is an

unreasonable requirement; (F) Rule V was excellent; and, (G) Suppliers should be provided with calendars to indicate when sampling is to be done in order to promote compliance.

RESPONSE: (A) "Tampering" is included as a Class I violation to address incidents of vandalism that may result in threats to human health. Although the supplier may have no control over such incidents, the supplier remains responsible for minimizing the health risk resulting from the actions of others. For example, vandals entered a steel tank serving a public water system in Montana and defecated in the tank. Residents consumed the water until routine sampling detected the problem. The supplier reacted immediately and minimized public health risks after the problem was found by flushing and disinfecting the system, taking repeat samples and providing a new lock on the tank. If the supplier had not reacted immediately, the health risks are obvious. Due to the gravity of harm that may result from a supplier's delay in protecting public health, the rule will remain as proposed; (B) The phrase "interruption in service" has been deleted from the revised rule proposal. **See Response No. 7 and 9;** (C) Even though failure to provide continuous disinfection is listed as a Class I violation, penalties are not automatically imposed. The decision to pursue penalties for Class I violations will be made according to department policies and procedures currently under development. Such penalties would be assessed only when appropriate under that guidance. Since continuous disinfection is an extremely important barrier against waterborne disease, failure to do so will remain a Class I violation as originally proposed; (D) Including examples of Class II violations in the definition may be misleading as not all violations can be listed and those that are listed would not completely inform the reader of the specific requirements necessary for achieving compliance. Examples of Class II violations are failure to take required routine coliform, chemical or radiological samples, failure to perform routine water quality monitoring (chlorine residual, turbidity etc.), failure to submit required water quality monitoring reports, failure to provide public notification for violations that are not acute public health risks (e.g., notice for failure to take routine chemical samples) etc. As stated above, the examples will not be included in the definition of Class II violations as they may cause unnecessary confusion; (E) The rule allows the Department to issue an administrative order prohibiting the use of a water or sewer systems. The ability to use this prohibition is discretionary and not required in every order issued by the department. The rule notifies the regulated community that the prohibition may be used when appropriate. For example, if a restaurant was built without approval and obtained its water from an untreated surface water source, the department could not allow such a facility to remain open until the plans for the facility were reviewed and approved. This rule clarifies the Department's authority to prevent further use of the system and will remain as proposed; (F) No response required. (G) Comment noted. Since the commentor's suggestion is beyond the

scope of the proposed rulemaking, no change will be made to address this comment.

23. **COMMENT: Will Snodgrass, Missoula.** Mr. Snodgrass opposed striking the second sentence of paragraph (1) in Rule III. He described several examples of possible violations that he apparently believed would warrant imposition of larger penalties than those specified in Table I in Rule IV.

RESPONSE: The flexibility to increase penalties above the amounts listed in Table I is already available in the statute. Therefore, the proposed deletion of this sentence will be made in the final rule.

24. **COMMENT: Christine Anderson, Loring.** Ms. Anderson stated that she had forgotten to take a sample from the water system serving the Loring Bar. She stated that her business is now in jeopardy for the next six months. She stated that the water from her well has always tested satisfactory, and she is concerned about the costs of these rules.

RESPONSE: The rules will not add any costs to the operation of a public water supply if the supplier is in compliance with current regulations. Also, violations do not automatically result in penalties as described in previous responses. Finally, the department is required by law to adopt the rules. Therefore, no changes to the rules will be made in response to this comment.

ROBERT J. ROBINSON, Director

Certified to the Secretary of State January 30, 1995 .

Reviewed by:

Eleanor Parker, DHES Attorney

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

In the matter of a new rule to reject, modify, or condition permit applications in the Truman Creek Basin	))))	NOTICE OF ADOPTION OF ARM 36.12.1019 TRUMAN CREEK BASIN CLOSURE

TO: All Interested Persons

1. On November 23, 1994, the Department of Natural Resources and Conservation published a notice of public hearing on the proposed new rule to reject, modify, or condition permit applications in the Truman Creek Basin at pages 3007 and 3008, Montana Administrative Register, Issue number 22. Notices were also published on November 17 and 24 and December 1, 1994, in the Daily Inter Lake. Individual notices were mailed on November 10, 1994, to 45 water users in the proposed closure area.

2. On January 5, 1995, at 7:00 p.m., a public hearing was held in the conference room of the Fish, Wildlife & Parks building in Kalispell, Montana. During the hearing and the prescribed comment period, the Department received oral comments from interested persons. Further written comments were accepted through January 11, 1995.

3. The proposed new rule is being adopted as proposed. The closure period will be from July 15 through August 31.

4. The Department has thoroughly considered all written and oral comments received. The following is a summary of the comments and the Department's response to these comments:

COMMENT: The water shortage in the Truman Creek basin is not due to the domestic and agricultural uses. It is caused by clear cutting in the watershed which reduces the amount of snowpack which supplies water to the Truman Creek basin. The state of Montana should not allow clear cutting.

RESPONSE: Clear cutting may reduce the amount of snowpack; however, this Department has no jurisdiction over the practice of clear cutting. The only remedy for a water shortage caused by clear cutting over which the Department has jurisdiction, is the basin closure. Land use issues can be best addressed through other regulatory agencies at the local, state, and federal levels. Regardless of the cause, the Department's water availability report for the basin shows there is not sufficient water during the closure period except for existing water users who often experience a shortage of water.

COMMENT: Purchasers of new property in the Truman Creek drainage, would not be able to obtain water rights.

There seems to be no scientific, measurable, or reasonable explanation of a problem with Truman Creek. There has been no study to indicate a problem.

RESPONSE: The closure period is from July 15 through August 31. An application to appropriate surface water during the period outside the closure period would be accepted and processed. If one wishes to construct a storage facility to appropriate and store water during the period outside the closure period for use during the closure period, the application would be accepted and processed by the Department. Ground water appropriations over 35 gallons per minute can be made if the source of water is not directly connected to surface sources. A notice of completion of ground water appropriation under 35 gallons per minute could also be filed and the Department is required by law to issue a water right certificate for such wells.

The Department researched water right records; reviewed precipitation maps; obtained soils and topographic maps, runoff and flow measurement records, and actual water use information; and performed an hydrologic analysis. This analysis produced the information that the basin was water short only during the period from July 15 through August 31, the proposed closure period. This was explained before the hearing and the water availability report was available for review at the hearing.

COMMENT: The Department should allow those who have been using the water without a permit to be grandfathered in. The depletion of water due to an outside source should not warrant punishment to land owners who have the creek on their land. In one instance, water has been used without a water right for 15 years and another for five years. There was a moratorium on water right applications in 1991 and we were not allowed to make application for new use.

RESPONSE: There is no provision in Montana Water Law for a person using water illegally to be granted a beneficial water use permit by grandfathering. The moratorium proclaimed by the Governor in 1991 was in effect for approximately five months due to drought conditions. An application could have been made by these users at any time before and after the moratorium. The closure will not punish any land owner who has obeyed the law by filing for and receiving a beneficial water use permit prior to appropriating the water. Those who have not filed for a beneficial water use permit, but use the water without a permit are guilty of a misdemeanor and may be subject to civil penalty as well.

COMMENT: The ground water users were not informed of this procedure as they should have been by law. Paragraph four of the closure places the burden of proof that the ground water to be appropriated is not directly connected to the surface water upon the applicant. The Department has a great deal of discretion in denying an application. It would become a battle of the hydrologists. The burden of proof should be placed upon the more senior water right holders and on the Department, not on future ground water users.

RESPONSE: Mont. Code Ann. § 85-2-319(4) (1993) states in relevant part, "Title 2, chapter 4, parts 1 through 4, govern rulemaking proceedings conducted under this section, except that in addition to the notice requirements of those parts, the department notice of the rulemaking hearing must be published at least once each week for 3 successive weeks, not less than 30 days before the date of the hearing, in a newspaper of general circulation in the county or counties in which the source is located. The department shall serve by mail a copy of the notice, not less than 30 days before the hearing, upon each person or public agency known from the examination of the records of the department to be a claimant, appropriator, or permitholder of water in the source." Since ground water is not the source of water concerned in this closure the Department was not required to notify ground water right owners.

An applicant for a ground water permit has always had the burden to prove the proposed appropriation will not adversely affect other water users, including any surface water users. One of the methods to prove no adverse effect is having a hydrologist perform a study and produce a report. This is not a new concept. The Department has no additional powers as a result of this closure.

COMMENT: Emmons Creek is a very small creek of very short length used as a primary source of household water. The people now living on Emmons Creek cannot use all the water it contains, but the full amount of water would make no difference to ranches on Truman Creek. Emmons Creek users are being penalized with possible loss of water due to logging and timber sales. To lose water on Emmons Creek would put a hardship on almost every family up and down the creek. The average deep well is about $6,000 to put down which is more than most people can afford on short notice. One solution would be to delete Emmons Creek from the proposed Truman Creek basin closure.

RESPONSE: Closing the basin to further appropriation would not reduce the amount of water available to the people who have water rights and use the water now. It would protect the current flows and not allow the water to be further depleted during the closure period. The waters of Emmons Creek will not be taken from the current users with valid water rights to be used in Truman Creek.

COMMENT: Fire protection is an issue. Since there is not enough water in the creek to fill the fire trucks, they must travel to Smith Lake to refill which would use valuable fire-fighting time. One user has tried to keep 30 feet of green vegetation around their house, but could only water 15 to 20 minutes in each spot and for only one hour at a time before the hose ran dry and dribbled 10 inches from the sprinkler head. Then the users could not run any water at all for the next three or four hours.

RESPONSE: Keeping a span of green vegetation around one's home is one way to protect from fire; however, the same result could be obtained by a cultivated span around the home, thinning of nearby trees, and removal of underbrush. Perhaps, since water is so short, that should be considered instead of using the water to promote the growth of vegetation. Also temporary appropriations of water from any surface source in the basin is exempt from this closure when used to fight fires.

COMMENT: Closing the basin for a small part of summer is ludicrous at best. A dry spring and dry fall will take a lot of water out of the creek at a crucial time when trout are spawning. There is a need to close it all year against further use.

RESPONSE: The record supports the closure of the Truman Creek basin from July 15 to August 31. There are no factual data of record to support closure for a longer period. Moreover, there are no water rights for the protection of any instream flows for fisheries. If conditions in the Truman Creek basin change and the petitioners have factual data demonstrating there is a shortage during other periods of the year, they can petition the Department at that time to close the basin during those periods.

COMMENT: Many people draw from Truman Creek that do not have water rights. Who is responsible for policing water appropriators? Why do some users have to follow the laws and others get away with doing whatever they please?

RESPONSE: The Department simply does not have the resources (personnel, money, and time) to police every stream in the State. The Kalispell Water Resources Regional Office manages four counties, some of the most heavily populated areas in the State. When a formal complaint is filed, it is investigated to the extent allowed by the available resources and the illegal water use is either stopped voluntarily or the matter may be pursued through legal channels. Each senior water user has a duty to call for water when it is needed and the junior is required to cease or reduce water use until the senior's right is satisfied. If a senior calls for water and the junior does not release the water, a formal complaint may be filed with the Department. However, if the Department is unable to pursue the matter, the senior always has the option of taking the matter to court without the Department.

5. No other written or oral comments were received.

Reviewed by :

Donald D. MacIntyre

Mark Simonich, Director

Certified to the Secretary of State January 30, 1995.

BEFORE THE BOARD OF PRIVATE SECURITY PATROL OFFICERS
AND INVESTIGATORS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the petition for declaratory ruling on the licensure exemption of Federal Defenders of Montana, Inc. investigators	)))))	DECLARATORY RULING

Introduction

1. On May 26, 1994, the Board of Private Security Patrol Officers and Investigators published a Notice of Petition for Declaratory Ruling in the above-entitled matter at page 1462, 1994 Montana Administrative Register, issue number 10.

2. On July 14, 1994, the Board presided over a hearing in this matter to consider written and oral testimony from interested individuals.

3. On October 18, 1994, the Board made a motion to deny the petition for declaratory ruling.

The Question Presented

4. Petitioner requests a ruling on whether investigators employed by Federal Defenders of Montana, Inc. qualify for an exemption under the licensure requirement for private investigators under section 37-60-105, MCA.

Applicable Law

5. Petitioner seeks a ruling that FDM investigators qualify for one or more of the following exemptions:

a. Section 37-60-105(1)(a), MCA. [This chapter does not apply to:] any one person employed singly and exclusively by any one employer in connection with the affairs of such employer only and where there exists an employer-employee relationship and the employee is unarmed, does not wear a uniform, and is guarding inside a structure which at the time is not open to the public;

b. Section 37-60-105(1)(b)(iii), MCA. [This chapter does not apply to:] a person . . . who has received training as a private security guard from the employer or at the employer's direction;

c. Section 37-60-105(2), MCA. [This chapter does not apply to:] an officer or employee of the United States of America or of this state or a political subdivision thereof while such officer or employee is engaged in the performance of his official duties;

d. Section 37-60-105(4)(b), MCA. [This chapter does not apply to:] a legal intern, paralegal, or legal assistant employed by one or more lawyers, law offices, governmental agencies, or other entities;

e. Section 37-60-105(9), MCA. [This chapter does not apply to:] an internal investigator or auditor, while making an investigation incidental to the business of the agency or company by which he is singularly and regularly employed.

Facts Presented

6. At the hearing, Mr. Gallagher testified as follows: The FDM is a nonprofit corporation established under the Criminal Justice Act, 18 U.S.C. Section 3006A(a), Community Defender Organization Model. The Criminal Justice Act provides for three models of indigent defense plans. In Montana, a panel of Federal District Court judges adopted the Community Defender Organization Model. The Community Defender Organization Model follows guidelines established by the Administrative Office of the United States Courts. Pursuant to those guidelines, the FDM incorporated under the laws of Montana. The organization is funded by the federal government.

7. Mr. Gallagher further testified that FDM investigators are full-time salaried employees of the FDM who work under the supervision of the Chief Federal Defender. They receive training from the Administrative Office of the United States Courts. FDM investigators gather evidence and assist attorneys in the defense of indigent criminal clients and federal habeas corpus litigants.

Legal Analysis

8. FDM investigators do not qualify under any exemption listed in section 37-60-105, MCA. Subsection (1)(a) is inapplicable because FDM investigators are not "guarding inside a structure." Subsection (1)(b)(iii) is inapplicable because FDM investigators do not meet the definition of "private security guard" found at section 37-60-101(15), MCA. Subsection (9) is inapplicable because FDM investigators are not "internal investigators or auditors" as defined at ARM 8.50.423(5) as a person who "investigates incidents occurring within the internal affairs of an agency or company . . . and only investigates acts committed by persons who are employed by that company or agency."

9. FDM investigators do not meet the requirements for exemption as a paralegal or legal assistant under subsection (4)(b). Section 37-60-101(12), MCA defines "paralegal" or "legal assistant" as

> a person qualified through education, training, or work experience to perform substantive legal work that requires knowledge of legal concepts and that is customarily but not exclusively performed by a lawyer and who may be retained or employed by one or more lawyers, law offices, governmental agencies, or other entities or may be authorized by administrative, statutory, or court authority to perform this work.

The definition of private investigator appears at section 37-60-101(14), MCA:

> a person other than an insurance adjuster who for any consideration whatsoever makes or agrees to make any investigation with reference to:
>
> (a) crimes or wrongs done or threatened against the United States or any state or territory thereof;
> (b) the identity, habits, conduct, business, occupation, honesty, integrity, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, reputation, or character of any person;
> (c) the location, disposition, or recovery of lost or stolen property;
> (d) the cause or responsibility for fires, libels, losses, accidents, or injury to persons or property; or
> (e) securing evidence to be used before any court, board, officer, or investigating committee.

The Board notes that the FDM employees in question are referred to as "investigators," and not as "legal assistants" or "paralegals." Under the facts presented, FDM investigators are not performing "substantive legal work." The substance of FDM investigators' work is to investigate crimes alleged against FDM clients and to secure evidence to be used in court to assist in their legal defense.

10. Finally, FDM investigators do not qualify for exemption under section 37-60-105(2), MCA because they are employees of the corporation and not employees of the "United States of America or of this state or a political subdivision thereof . . . ."

Conclusion

11. The Petition for Declaratory Ruling and Petitioner's request for exemption from licensing requirements is DENIED.

DONE this 17th day of January, 1995.

BOARD OF PRIVATE SECURITY PATROL OFFICERS AND INVESTIGATORS

BY: GARY GRAY, CHAIRMAN

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 and 1995 Montana Administrative Register.

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