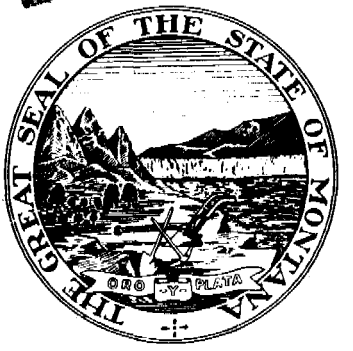
MONTANA ADMINISTRATIVE REGISTER

1998 ISSUE NO. 7
APRIL 16, 1998
PAGES 807-1052



MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 7

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 The notice section contains state agencies' proposed new, amended or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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 found at the back of each register.

Inquiries regarding the rulemaking process, including material found in the Montana Administrative Register and the Administrative Rules of Montana, may be made by calling the Administrative Rules Bureau at (406) 444-2055.

Page Number

TABLE OF CONTENTS

NOTICE SECTION

BEFORE THE MONTANA WHEAT AND BARLEY COMMITTEE
OF THE STATE OF MONTANA DEPARTMENT OF AGRICULTURE

In the matter of the proposed amendment of ARM 4.9.401, Wheat and Barley Assessment and refunds	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT OF WHEAT AND BARLEY COMMITTEE RULES

TO: All Interested Persons:

1. On May 7, 1998 at 1:00 p.m., a public hearing will be held at W.H.E.A.T. Building, Basement Conference Room, 750 6th Street SW, Great Falls, Montana 59404, to consider amending the above stated Wheat and Barley rule.

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

4.9.401 WHEAT AND BARLEY ASSESSMENT AND REFUNDS

(1) There shall be levied an assessment of:

(a) 10 ~~8~~ mills per bushel upon all wheat sold in the state of Montana; and

(b) 15 ~~10~~ mills per hundred weight on all barley sold in the state of Montana.

(2) All assessments are subject to refund provided the following criteria are met:

(a) application for assessment refund shall be in writing on forms provided by the committee.

(i) Forms will be furnished upon application to the Montana Wheat and Barley Committee, PO Box 3024, Great Falls, Montana 59403-3024.

(b) Written application for refund of the wheat or barley assessments must be submitted by the first seller of the wheat or barley or by an individual with the first seller's power of attorney.

(c) Refund application forms shall be submitted 30 days after the date of first sale and no later than 90 days from the date of the first sale of wheat or barley for which a refund is filed.

Auth: Sec. 80-11-205, MCA IMP, Sec. 80-11-206, MCA

REASON: The producer-directors of the Montana Wheat and Barley Committee have chosen to raise the assessment on both wheat and barley to bring revenues in line with demand for wheat and barley research and marketing activities.

3. Interested persons may submit their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to Will Kissinger, Administrator, Agricultural Development Division, Department of Agriculture, PO Box 200201, Helena, MT 59620-0201, Fax (406) 444-5409, or "e" mail: AGR@MT.GOV no later than May 14, 1998.

4. The Montana Department of Agriculture will make reasonable accommodations for persons with disabilities who wish to participate in the public hearing. If you wish to request an accommodation, contact the Department no later than 5:00 p.m., April 27, 1998, to advise us of the nature of the accommodation that you need. Please contact Will Kissinger, Administrator, Agricultural Development Division, Department of Agriculture, PO Box 200201, Helena, MT 59620-0201, Fax (406) 444-5409, or "e" mail: AGR@MT.GOV. Persons with disabilities who need an alternative accessible format of this document in order to participate in this rule-making process should contact Will Kissinger at the above-stated address.

5. As required by HB 389, 1997 Montana legislative session, this notice advises that the committee maintains an interested person list for purposes of providing notice on rule making matters. Any person wishing to be on that list must provide to the committee, in writing, their name, mailing address and a brief description of the subject matter in which they are interested.

6. Timothy J. Meloy, Attorney, Department of Agriculture, will preside over and conduct the hearing.

Duane Arneklev, Chair
Montana Wheat and Barley Committee

Ralph Peck, Director
Montana Department of Agriculture

Timothy J. Meloy, Attorney
Rule Reviewer

Certified to the Secretary of State April 6, 1998.

BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

In the matter of the proposed amendment of ARM 4.5.203 pertaining to Category 2 noxious weeds.	) NOTICE OF PROPOSED) AMENDMENT))

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On May 29, 1998, the Montana Department of Agriculture proposes to amend ARM 4.5.203 Category 2 noxious weeds.

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

4.5.203 CATEGORY 2 (1) through (2)(b) remain the same.
(c) Tansy ragwort (Senecio jacobaea L.)
(d) Meadow Hawkweed complex (Hieracium pratense, H. floribundum, H. piloselloides)
(e) Orange hawkweed (Hieracium aurantiacum L.)

AUTH: 7-22-2101, MCA IMP: 7-22-2101, MCA

REASON: The Montana Department of Agriculture received a petition from the Montana Weed Control Association to include tansy ragwort, the meadow hawkweed complex and orange hawkweed as Category 2 noxious weeds. The department has reviewed the biology of these weeds and has determined they have the potential for rapid spread and invasion of non-infested lands. These weeds are capable of economically and biologically adversely affecting range, forest and other lands. These determinations, resulting in the designation as Category 2 noxious weeds, will increase public awareness and recognition of these weeds; encourage education on identification and control; improve monitoring for infestations; improve control and containment of existing infestations and eradication of new or small infestations.

3. Interested persons may submit their written data, views, or arguments concerning this proposed amendment to Gary Gingery, Administrator, Department of Agriculture, Agricultural Sciences Division, PO Box 200201, Helena, MT 59620-0201, Phone (406)444-2944, FAX (406)444-5409, or E-Mail: AGR@MT.GOV, no later than May 14, 1998.

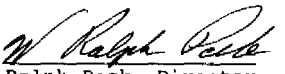
4. If a party who is directly affected by the proposed amendment wishes to express his/her data, views, and arguments orally or in writing at a public hearing, he/she must make written request for a hearing and submit this request along with any written comments he/she has to Gary Gingery, Administrator, Department of Agriculture, Agricultural

Sciences Division, PO Box 200201, Helena, MT 59620-0201, Phone (406)444-2944, FAX (406)444-5409, or E-Mail: AGR@MT.GOV no later than May 14, 1998.

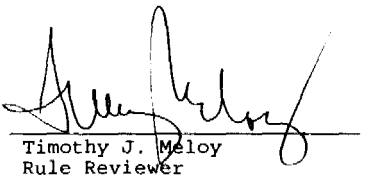
5. If the department receives requests for a public hearing on the proposed amendment from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed action; from the Administrative Code Committee of the legislature; from a governmental subdivision or agency; or from an association having not 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 45 based on the number of Montana Weed Control Association members.

6. As required by HB 389, 1997 Montana legislative session, this notice advises that the department maintains an interested person list for purposes of providing notice on rule making matters. Any person wishing to be on that list must provide to the department, in writing, their name, mailing address and a brief description of the subject matter in which they are interested.

DEPARTMENT OF AGRICULTURE



Ralph Peck, Director



Timothy J. Meloy
Rule Reviewer

Certified to the Secretary of State on April 6, 1998.

BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

In the matter of the proposed adoption of a New Rule pertaining to Weed district supervisor training	)))))	NOTICE OF THE PROPOSED ADOPTION OF NEW RULE NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On May 29, 1998, the Department of Agriculture proposes to adopt the above captioned rule.

2. The New Rule, as proposed to be adopted, appears as follows:

RULE I WEED DISTRICT SUPERVISOR TRAINING

(1) Each weed district supervisor will become licensed as a Government Pesticide Applicator in the Weed Control Category prior to that person doing any actual herbicide applications in the county.

(2) Within 6 months of the date of hire, all new weed district supervisors will become familiar with the Weed District Supervisor's Handbook and complete the self-test approved by the Weed District Supervisor's Support Committee.

(3) All weed district supervisors will attend at least one training session annually (several may be offered) that has been recommended by the Department or the Montana Noxious Weed Control Association.

(4) Training (over a four year period) will include, but is not limited to the following topics and subjects:

(a) Weed Species Identification;
(b) Pesticide Selection;
(c) Pesticide mixing, loading, storage and disposal;
(d) Integrated Weed Management;
(e) Equipment Selection and Maintenance;
(f) Environmental protection (surface water, ground water, endangered species, sensitive plants);
(g) Weed Mapping;
(h) Pesticide Application;
(i) Pesticide Statutesand Rules;
(j) Public and Worker Safety; and
(k) Weed Management Plans.

Auth: 7-22-2130, MCA IMP, 7-22-2130, MCA

Reason: The legislative Audit Division conducted a performance audit of noxious weed control activities of the Montana Department of Agriculture during 1997. Several of the recommendations made to the department were to: (1) Establish long-term goals for training to include weed supervisors, weed board members and county commissioners. (2) Develop training objectives for administering weed management programs and improving management practices. (3) Prepare administrative rules for the level and type of weed supervisor training. The proposed rules will provide a framework for weed district supervisor training throughout Montana. These rules were developed incooperation with some weed supervisors representing supervisors throughout the state.

3. Interested persons may submit their written data, views, or arguments concerning the proposed action(s) to Gary Gingery, Administrator, Agricultural Sciences Division, Department of Agriculture, P.O. Box 200201, Helena, MT 59620-0201, Phone (406) 444-2944, FAX (406) 444-5409, or E-Mail: AGR@MT.GOV, no later than May 14, 1998.

4. If a party who is directly affected by the proposed action(s) wishes to express his/her data, views, and arguments orally or in writing at a public hearing, he/she must make written request for a hearing and submit this request along with any written comments he/she has to Gary Gingery, Administrator, Agricultural Sciences Division, Department of Agriculture, P.O. Box 200201, Helena, MT 59620-0201, Phone (406) 444-2944, FAX (406) 444-5409, or E-Mail: AGR@MT.GOV no later than May 14, 1998.

5. If the department receives requests for a public hearing on the proposed action(s) from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed action(s); 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 approximately 6 persons based on the number of county weed supervisors.

6. As required by Sec. 2-4-302, MCA (HB 389, 1997 Montana legislative session), this notice advises that the department maintains an interested person list for purposes of providing notice on rule making matters. Any person wishing to be on that list must provide to the department, in writing, their name, mailing address and a brief description of the subject matter in which they are interested.

Ralph Peck, Director
DEPARTMENT OF AGRICULTURE

Timothy J. Meloy, Attorney
Rule Reviewer

Certified to the Secretary of State April 6, 1998.

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

In the matter of the amendment of rule 6.6.5101 pertaining to the plan of operation for the small employer health reinsurance program.	)))))	NOTICE OF PROPOSED AMENDMENT OF RULE 6.6.5101 NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On May 18, 1998, the State Auditor and Commissioner of Insurance proposes to amend Rule 6.6.5101 pertaining to the plan of operation for the small employer health reinsurance program.

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

6.6.5101 PLAN OF OPERATION (1) The plan of operation for the Montana small employer health reinsurance program developed by the board of directors of the program and adopted by the commissioner pursuant to 33-22-1819, MCA, with changes through ~~June 16, 1997~~ February 17, 1998, is hereby adopted and incorporated by reference. A copy of the plan of operation is available for public inspection at and a copy may be obtained from the Office of the Commissioner of Insurance, Room 270, Sam W. Mitchell Building, 126 N. Sanders, P.O. Box 4009, Helena, MT 59620-4009. AUTH: 33-1-313, 33-22-1822, MCA
IMP: 33-22-1819, MCA

3. REASON: Rule 6.6.5101 is being amended because the plan referenced was amended by the program's board at its annual meeting.

4. Interested parties may submit their data, views or arguments concerning the proposed amendment in writing to Claudia Clifford, Montana Insurance Department, P.O. Box 4009, Helena, Montana 59604, and must be received no later than May 17, 1998.

5. If a person who is directly affected by the proposed amendment wishes to express his data, views and arguments orally or in writing at a public hearing, he must make a written request for a hearing and submit this request along with any written comments he has to Claudia Clifford, Montana Insurance Department, P.O. Box 4009, Helena, Montana 59604. A written request for hearing must be received no later than May 17, 1998.

6. If the agency receives requests for a public hearing on the proposed amendment from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed

action; from the administrative code committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 30 persons based on the 300 persons who have indicated interest in the rules of this agency and who the agency has determined could be directly affected by these rules.

7. The State Auditor's Office maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices and specifies whether the person wishes to receive notices regarding insurance rules, securities rules, or both. Such written request may be mailed or delivered to the State Auditor's Office, P.O. Box 4009, Helena, MT 59604, faxed to the office at 406-444-3497, or may be made by completing a request form at any rules hearing held by the State Auditor's Office.

MARK O'KEEFE, State Auditor
and Commissioner of Insurance

By: _____
Frank Coté
Deputy Insurance Commissioner

By: _____
Russell B. Hill
Rules Reviewer

Certified to the Secretary of State this 3rd day of April, 1998.

BEFORE THE BOARD OF OUTFITTERS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the proposed amendment of rules pertaining to outfitter applications and renewals, guide or professional guide licenses and qualifications, safety provisions and unprofessional conduct	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF RULES PERTAINING TO THE OUTFITTING INDUSTRY

TO: All Interested Persons:

1. On May 8, 1998, at 9:00 a.m., a public hearing will be held in the downstairs conference room of the Department of Commerce building, 1424 9th Avenue, Helena, Montana, to consider the proposed amendment of rules pertaining to the outfitting industry.

2. The proposed amendment of ARM 8.39.505, 8.39.508, 8.39.512, 8.39.514, 8.39.515, 8.39.518, 8.39.704 and 8.39.709 will read as follows: (new matter underlined, deleted matter interlined)

"8.39.505 LICENSURE--OUTFITTER APPLICATION (1) through (2)(a) will remain the same.

(b) an operations plan application form which shall be considered under the guidelines of 37-47-304(2), MCA, and ARM ~~8.39.512~~ 8.39.804.

(3) will remain the same."

Auth: Sec. 37-1-131, 37-47-201, MCA; IMP, Sec. 37-47-201, 37-47-304, 37-47-307, MCA

REASON: This rule is being amended to delete an incorrect citation and replace it with the correct cites.

"8.39.508 LICENSURE--RENEWAL (1) and (1)(a) will remain the same.

~~(b) a copy of the licensee's current basic first aid or cardiopulmonary resuscitation card (outfitters, guides, and professional guides);~~

(c) through (e) will remain the same, but will be renumbered (b) through (d).

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

Auth: Sec. 37-1-101, 37-1-131, 37-47-201, MCA; IMP, Sec. 37-1-101, 37-47-201, 37-47-302, 37-47-303, 37-47-304, 37-47-306, 37-47-307, 37-47-312, MCA

"8.39.512 LICENSURE - INACTIVE (1) and (2) will remain the same.

(3) Outfitters on inactive status may not book or serve clients, and are subject to all requirements applicable to

outfitters licensed on active status, other than those relating to insurance ~~and current basic first aid card~~."

Auth: Sec. 37-1-319, MCA; IMP, Sec. 37-1-319, MCA

"8.39.514 LICENSURE - GUIDE OR PROFESSIONAL GUIDE LICENSE (1) will remain the same.

~~(2) A new, first time applicant who has not previously been licensed with the Montana board of outfitters must submit proof of current basic first aid or cardiopulmonary resuscitation certification no later than 90 days after the date of application.~~

~~(3) A new applicant who has previously been licensed with the Montana board of outfitters must submit proof of current basic first aid or cardiopulmonary resuscitation certification with his or her application.~~

(4) will remain the same, but will be renumbered (2).

(3) An outfitter may employ a guide for 10 days or for one excursion, whichever is less, using a one-time temporary guide license on a form provided by the board.

(a) The outfitter must certify on the form that the guide is competent to provide guiding services in the area in which the guide will operate and in the activity in which the guide will engage.

(b) One temporary guide form will be provided to each outfitter annually. The board will permit the outfitter to use one temporary guide license per licensure period. An outfitter is prohibited from sharing temporary guide licenses with another outfitter.

(c) The sponsoring outfitter shall designate the name of the temporary guide on the outfitter's log along with the clients guided and the dates during which the guide was employed.

(d) If this temporary guide wishes to have a permanent license, a complete application must be received in the board office within 10 days of receiving a temporary permit. In this instance, the temporary permit will remain in effect until the guide receives a permanent license and will be allowed to perform services during the interim period."

Auth: Sec. 37-1-131, 37-47-201, MCA; IMP, Sec. 37-47-201, 37-47-301, 37-47-307, MCA

REASON: The Board is proposing new (3) to provide the outfitter with the opportunity to employ a temporary guide in emergency situations.

"8.39.515 LICENSURE - GUIDE OR PROFESSIONAL GUIDE QUALIFICATIONS (1) and (1)(a) will remain the same.

(b) knowledge of ~~game and~~ hunting and fishing techniques to provide the particular services ~~advertised~~ contracted to the client by the endorsing outfitter; and~~,~~

(c) through (3) will remain the same."

Auth: Sec. 37-1-131, 37-47-101, 37-47-201, MCA; IMP, Sec. 37-47-101, 37-47-201, 37-47-303, 37-47-307, MCA

REASON: The proposed amendment will allow a guide who specializes in only one type of service, such as fishing, to comply with the requirements for guide or professional guide qualifications. The current language requires a guide applicant to be knowledgeable and capable of providing all the services the endorsing outfitter advertises. It fails to recognize that some guides can only provide limited guiding services.

"8.39.518 LICENSURE--FEES FOR OUTFITTER, OPERATIONS PLAN AND GUIDE OR PROFESSIONAL GUIDE (1) through (f)(i) will remain the same.

(ii) ~~first-time guide application processing, original (or temporary if applied for)~~ 75."

Auth: Sec. 37-1-131, 37-1-134, 37-47-201, 37-47-303, 37-47-304, 37-47-306, MCA; IMP, Sec. 37-1-134, 37-47-304, 37-47-306, 37-47-307, 37-47-308, MCA

REASON: These amendments are being proposed to clarify that the first-time guide application processing fee is the original guide application fee and to add a fee for temporary licensure for guides. The fees must be commensurate with program area costs and this fee covers the administrative process for a temporary license.

"8.39.704 SAFETY PROVISIONS ~~(1) Outfitters are required to hold a current basic first aid or cardiopulmonary resuscitation card at all times licensed.~~

~~(2) Except for the one-time, 90 day exemption provided for new, first-time applicants in ARM 8.39.514(2), guides and professional guides are required to hold a current basic first aid or cardiopulmonary resuscitation card at all times licensed.~~

(3) through (5) will remain the same, but will be renumbered (1) through (3)."

Auth: Sec. 37-47-201, MCA; IMP, Sec. 37-47-201, MCA

"8.39.709 STANDARDS FOR OUTFITTERS, GUIDES, AND PROFESSIONAL GUIDES - UNPROFESSIONAL CONDUCT AND MISCONDUCT (1) through (1)(l) will remain the same.

(m) obtain and maintain a reasonable degree of supervision over the guide or professional guide to insure that the services offered are being provided in accordance with the laws and rules, with particular regard to those laws and rules pertaining to the health, safety, and welfare of the participants, the public, and landowners; or

~~(n) not employ or retain a new, first-time licensed guide or professional guide after the 90th day following the date of the guide's or professional guide's application for licensure without first confirming that the guide or professional guide has current basic first aid or cardiopulmonary resuscitation certification;~~

~~(o) not employ or retain a previously licensed guide or professional guide without first confirming that the guide or professional guide has current basic first aid or cardiopulmonary resuscitation certification; or~~

(p) will remain the same, but will be renumbered (n).

(2) through (3)(o) will remain the same."

Auth: Sec. 37-1-319, 37-47-201, 37-47-341, MCA; IMP, Sec. 37-47-201, 37-1-312, 37-47-341, MCA

REASON: The amendments to ARM 8.39.508, 8.39.512, 8.39.514, 8.39.704 and 8.39.709 deleting the requirement for outfitters, guides and professional guides to possess a cardiopulmonary resuscitation card (CPR) and basic first aid are being proposed, as the Board feels that such training and subsequent card requirements are unnecessary to adequately protect public health, safety and welfare.

3. The Department of Commerce will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing. If you wish to request an accommodation, contact the Department no later than 5:00 p.m., April 30, 1998, to advise us of the nature of the accommodation that you need. Please contact Mat Rude, Executive Director, Board of Outfitters, 111 N. Jackson, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 444-3739; Montana Relay 1-800-253-4091; TDD (406) 444-2978; facsimile (406) 444-1667. Persons with disabilities who need an alternative accessible format of this document in order to participate in this rule-making process should contact Mat Rude.

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 the Board of Outfitters, 111 North Jackson, P.O. Box 200513, Helena, Montana 59620-0513, or by facsimile, number (406) 444-1667, to be received no later than 5:00 p.m., May 14, 1998.

5. R. Perry Eskridge, attorney, has been designated to preside over and conduct this hearing.

6. Persons who wish to be informed of all Board of Outfitter administrative rulemaking proceedings or other administrative proceedings may be placed on a list of interested persons by advising the Board at the hearing or in writing to the Board of Outfitters, 111 North Jackson, P.O. Box 200513, Helena, Montana 59620-0513 or by phone at (406) 444-3739.

BOARD OF OUTFITTERS
ROBIN CUNNINGHAM, CHAIRMAN

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

_____
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, April 6, 1998.

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

In the matter of the proposed amendment of rules pertaining to grounds for license discipline	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF 8.58.419 GROUNDS FOR LICENSE DISCIPLINE - GENERAL PROVISIONS - UNPROFESSIONAL CONDUCT AND 8.58.714 GROUNDS FOR LICENSE DISCIPLINE OF PROPERTY MANAGEMENT LICENSEES GENERAL PROVISIONS - UNPROFESSIONAL CONDUCT

TO: All Interested Persons:

1. On May 15, 1998, at 2:30 p.m., a public hearing will be held in the conference room of the Division of Professional and Occupational Licensing, Lower Level, Arcade Building, 111 North Jackson, Helena, Montana, to consider the proposed amendment of the above-stated rules.

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

"8.58.419 GROUNDS FOR LICENSE DISCIPLINE - GENERAL PROVISIONS - UNPROFESSIONAL CONDUCT (1) through (3)(e) will remain the same.

(f) Licensees, when entering into a listing agreement shall make a prompt effort to verify that the principal listing the property is the owner or is authorized by the owner to list the property. The licensee may, but is not required to, conduct a title search or obtain a title report at the initial listing. The licensee is not required to either investigate or disclose whether a registered sexual or violent offender resides in proximity to any property with which the licensee lists, shows, negotiates for the purchase or otherwise is involved.

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

Auth: Sec. 37-1-131, 37-1-136, 37-51-102, 37-51-203, 37-51-321, MCA; IMP, Sec. 37-51-102, 37-51-201, 37-51-202, 37-51-321, 37-51-512, MCA

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

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

(e) Licensees must endeavor to ascertain all pertinent facts concerning every property in any transaction in which the licensee acts, so that the licensee may fulfill the obligation to avoid error, exaggeration, misrepresentation or concealment of pertinent facts. The licensee is not required to either investigate or disclose whether a registered sexual or violent

offender resides in proximity to any property with which the licensee manages, shows, negotiates for the rental or otherwise is involved.

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

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

REASON: The amendments are being proposed to clarify that real estate licensees are not responsible to determine if a person convicted of a sex crime resides in an area where a buyer is looking at housing. The Board does not feel that it furthers the public health, safety and welfare to require real estate licensees to inquire into the background of residents of a neighborhood. Although the Board is aware of the effect of such a disclosure on the sale of a house and the ramifications on the purchaser of a house, the Board feels that it is better left to the purchaser to contact local law enforcement to determine whether sexual offenders reside within the neighborhood.

3. The Department of Commerce will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing. If you wish to request an accommodation, contact the Department no later than 5:00 p.m., May 5, 1998, to advise us of the nature of the accommodation that you need. Please contact Grace Berger, Board of Realty Regulation, 111 N. Jackson, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 444-2961; Montana Relay 1-800-253-4091; TDD (406) 444-2978; facsimile (406) 444-1667. Persons with disabilities who need an alternative accessible format of this document in order to participate in this rule-making process should contact Grace Berger.

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 the Board of Realty Regulation, 111 North Jackson, P.O. Box 200513, Helena, Montana 59620-0513, or by facsimile, number (406) 444-1667, to be received no later than 5:00 p.m., May 14, 1998.

5. R. Perry Eskridge, attorney, has been designated to preside over and conduct this hearing.

6. Persons who wish to be informed of all Board of Realty Regulation administrative rulemaking proceedings or other administrative proceedings may be placed on a list of

interested persons by advising the Board at the hearing or in writing to the Board of Realty Regulation, 111 North Jackson, P.O. Box 200513, Helena, Montana 59620-0513 or by phone at (406) 444-2961.

BOARD OF REALTY REGULATION
JACK K. MOORE, CHAIRMAN

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

_____
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, April 6, 1998.

BEFORE THE BOARD OF SANITARIANS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the proposed amendment of rules pertaining to minimum standards for licensure and continuing education	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT OF ARM 8.60.408 MINIMUM STANDARDS FOR LICENSURE AND 8.60.414 CONTINUING EDUCATION

TO: All Interested Persons:

1. On May 15, 1998, at 1:00 p.m., a public hearing will be held in the downstairs conference room of the Division of Professional and Occupational Licensing, Lower Level, Arcade Building, 111 North Jackson, Helena, Montana, to consider the proposed amendment of the above-stated rules.

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

"8.60.408 MINIMUM STANDARDS FOR LICENSURE (1) will remain the same.

(2) ~~Center for disease control correspondence course #3018-G, #3016-G or #3012-G will be accepted in lieu of a specific college microbiology course.~~ The board will review microbiology correspondence courses on a case-by-case basis for appropriate equivalency."

Auth: Sec. 37-40-203, MCA; IMP, Sec. 37-40-302, MCA

REASON: This amendment is being proposed because the Center for Disease Control no longer prints their microbiology correspondence courses.

"8.60.414 CONTINUING EDUCATION (1) will remain the same.

(2) A licensee must ~~submit proof with~~ affirm on his license renewal form ~~of~~ that the licensee has ~~obtaining~~ obtained 15 clock hours (50 to 60 minutes per hour) or 1.5 continuing education units in every odd numbered year ~~beginning in 1993~~. ~~Copies of continuing education certificates shall be attached to the renewal form.~~

(3) It is the responsibility of the licensee to maintain records of ~~his~~ continuing education and to provide documentation of compliance if so requested during a random audit. A random audit will be conducted on a biennial basis.

(4) through (9) will remain the same."

Auth: Sec. 37-40-203, MCA; IMP, Sec. 37-40-203, MCA

REASON: This amendment is being proposed because the Division of Professional and Occupational Licensing has determined that performing audits on 100% of licensees, which is the current procedure, is too time consuming for administrative staff.

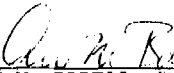
3. The Department of Commerce will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing. If you wish to request an accommodation, contact the Department no later than 5:00 p.m., May 5, 1998, to advise us of the nature of the accommodation that you need. Please contact Helena Lee, Board of Sanitarians, 111 N. Jackson, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 444-3091; Montana Relay 1-800-253-4091; TDD (406) 444-2978; facsimile (406) 444-1667. Persons with disabilities who need an alternative accessible format of this document in order to participate in this rule-making process should contact Helena Lee.

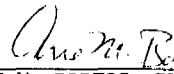
4. Interested persons may present their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to the Board of Sanitarians, 111 North Jackson, P.O. Box 200513, Helena, Montana 59620-0513, or by facsimile, number (406) 444-1667, to be received no later than 5:00 p.m., May 14, 1998.

5. R. Perry Eskridge, attorney, has been designated to preside over and conduct this hearing.

6. Persons who wish to be informed of all Board of Sanitarians administrative rulemaking proceedings, or other administrative proceedings, may be placed on a list of interested persons by advising the Board at the hearing or in writing to 111 North Jackson, P.O. Box 200513, Helena, Montana 59620-0513 or by phone at (406) 444-3091.

BOARD OF SANITARIANS
DENISE MOLDROSKI, CHAIRMAN

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


ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, April 6, 1998.

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

In the matter of the amendment of Teacher Certification	))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT TO ARM 10.57.204 EXPERIENCE VERIFICATION

To: All Interested Persons

1. On May 21, 1998, at 1:00 p.m., or as soon thereafter as it may be heard, a public hearing will be held at the Board of Public Education Offices, 2500 Broadway, Helena, in the matter of the proposed amendment to ARM 10.57.204 Experience Verification.

2. The Board of Public Education will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you request an accommodation, contact the Board of Public Education no later than 5:00 p.m. on May 15, 1998, to advise us of the nature of the accommodation that you need. Please contact Dr. Wayne Buchanan, Board of Public Education, 2500 Broadway, Helena, MT 59620; telephone (406) 444-6576; FAX (406) 444-0847.

3. The rule as proposed to be amended provides as follows. Matter to be added is underlined. Matter to be deleted is interlined.

10.57.204 EXPERIENCE VERIFICATION

(1) through (6) will remain the same.

(7) Instructional assistant experience may be considered for renewal if the following conditions are met:

(a) The individual must hold a valid Montana teaching certificate when the experience is acquired.

(b) The experience must be within the K-12 structure.

(c) It must be verified by the appropriate administrative supervisor as an instructional experience. Instructional assistant experience is defined as experience utilizing the course of instruction prescribed by the trustees or administrative board under an employment agreement ~~of at least 100 days full time equivalent (600) hours in any one instructional year~~ for a period of no less than 100 days during the five-year period of a current Montana certificate.

(d) This experience shall apply toward renewal only. It cannot be used for initial certification of another class or endorsement for which experience is required.

(e) Non-instructional aide experience will not apply toward renewal.

AUTH: 20-2-121, MCA IMP: 20-4-102, MCA

4. The proposed amendment is to make the requirements

equitable within certification requirements.

5. Interested parties may submit their data, views or arguments either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to Storrs Bishop, Chairman of the Board of Public Education, 2500 Broadway, Helena, MT 59620, no later than 5:00 p.m., May 20, 1998.

6. Storrs Bishop, Chairman of the Board of Public Education, 2500 Broadway, Helena, has been designated to preside over and conduct the hearing.

7. The Board of Public Education maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices. Such written request may be mailed or delivered to the Board of Public Education office, 2500 Broadway, Helena, MT 59620, or faxed to the office at (406) 444-0847.

8. The two bill sponsor notice requirements of section 2-4-302 MCA do not apply.

Wayne Buchanan

Wayne Buchanan, Executive Secretary
Board of Public Education

Certified to the Secretary of State on 4/6/98

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

In the matter of the amendment of Teacher Certification	))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT TO ARM 10.57.406 CLASS 6 SPECIALIST CERTIFICATE

To: All Interested Persons

1. On May 21, 1998, at 1:15 p.m., or as soon thereafter as it may be heard, a public hearing will be held at the Board of Public Education Offices, 2500 Broadway, Helena, in the matter of the proposed amendment to ARM 10.57.406 Class 6 Specialist Certificate.

2. The Board of Public Education will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you request an accommodation, contact the Board of Public Education no later than 5:00 p.m. on May 15, 1998, to advise us of the nature of the accommodation that you need. Please contact Dr. Wayne Buchanan, Board of Public Education, 2500 Broadway, Helena, MT 59620; telephone (406) 444-6576; FAX (406) 444-0847.

3. The rule as proposed to be amended provides as follows. Matter to be added is underlined. Matter to be deleted is interlined.

10.57.406 CLASS 6 SPECIALIST CERTIFICATE

(1) through (4) will remain the same.

(5) Reinstatement and recent training.

(a) Reinstatement of lapsed certificates or initial certification for applicants with training more than 5 but less than 15 years old, a class 6 certificate cannot be issued until the required number of graduate credits are presented.

(b) ~~Credits presented must have been earned within the 5 year period preceding the date of application on the basis of 8 graduate semester (12 graduate quarter) credits for the first 5 years plus 4 graduate semester (6 graduate quarter) credits for training.~~ Applicants for initial certification or reinstatement whose most recent degree or period of lapse is over 5 but under 15 years must meet requirements listed in ARM 10.57.220(1).

(c) Applicants for initial specialist certification or reinstatement whose most recent degree or period of lapse is over 15 years must meet requirements listed in ARM 10.57.220(1) and (2).

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

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

AUTH: 20-2-121, MCA IMP: 20-4-102, MCA

4. The proposed amendment is necessary to limit the number

of credits required during provisional certification.

5. Interested parties may submit their data, views or arguments either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to Storrs Bishop, Chairman of the Board of Public Education, 2500 Broadway, Helena, MT 59620, no later than 5:00 p.m., May 20, 1998.

6. Storrs Bishop, Chairman of the Board of Public Education, 2500 Broadway, Helena, has been designated to preside over and conduct the hearing.

7. The Board of Public Education maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices. Such written request may be mailed or delivered to the Board of Public Education office, 2500 Broadway, Helena, MT 59620, or faxed to the office at (406) 444-0847.

8. The two bill sponsor notice requirements of section 2-4-302 MCA do not apply.

Wayne Buchanan, Executive Secretary
Board of Public Education

Certified to the Secretary of State on 4/6/98

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

In the matter of the amendment of Teacher Certification	)))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT TO ARM 10.57.220 RECENCY OF CREDIT

To: All Interested Persons

1. On May 21, 1998, at 1:30 p.m., or as soon thereafter as it may be heard, a public hearing will be held at the Board of Public Education Offices, 2500 Broadway, Helena, in the matter of the proposed amendment to ARM 10.57.220 Recency of Credit.

2. The Board of Public Education will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you request an accommodation, contact the Board of Public Education no later than 5:00 p.m. on May 15, 1998, to advise us of the nature of the accommodation that you need. Please contact Dr. Wayne Buchanan, Board of Public Education, 2500 Broadway, Helena, MT 59620; telephone (406) 444-6576; FAX (406) 444-0847.

3. The rule as proposed to be amended provides as follows. Matter to be added is underlined. Matter to be deleted is interlined.

10.57.220 RECENCY OF CREDIT

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

(d) Class 6 specialist certificate:

8 graduate semester (12 graduate quarter) credits.

(2) An applicant for initial certification whose degree is over 15 years old or an applicant whose period of lapse is over 15 years must obtain the credits listed in (1) and the following credits based on teaching or specialist experience:

No teaching/specialist or equivalent experience since the original training ~~.~~	+4 additional sem (6 qtr) credits (graduate level for specialists)
1-4 years teaching/specialist or equivalent experience~~.~~	+3 additional sem qtr) credits (graduate level for specialists)
5-10 years teaching/specialist or equivalent experience~~.~~	+2 additional sem (2 qtr) credits (graduate level for specialists)
Over 10 years teaching/specialist equivalent experience~~.~~	+0 additional sem (2 qtr) credits (graduate level for specialists)

(3) remains the same.

(4) Credits for recency or reinstatement of ~~a teaching or administrative~~ any certificate must supplement, strengthen and /or update the ~~teacher's or administrator's~~ basic preparation. ~~Such credits should be those that:~~

~~(a) Would be approved by an accredited college as part of a teacher preparation program, or;~~

~~(b) The college would allow on a new area of endorsement, or;~~

~~(c) Include new developments in education which were not part of the teacher's original preparation (i.e. computer assisted instruction, mainstreaming, gifted and talented), or;~~

~~(d) Provide instruction in a language other than English.~~

(5) remains the same.

AUTH: 20-2-121, MCA IMP: 20-4-102, MCA

4. The proposed amendment is to bring this standard into compliance with the specialist recency requirements as provided in ARM 10.57.406 Class 6 Specialist Certificate.

5. Interested parties may submit their data, views or arguments either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to Storrs Bishop, Chairman of the Board of Public Education, 2500 Broadway, Helena, MT 59620, no later than 5:00 p.m.,May 20, 1998.

6. Storrs Bishop, Chairman of the Board of Public Education, 2500 Broadway, Helena, has been designated to preside over and conduct the hearing.

7. The Board of Public Education maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices. Such written request may be mailed or delivered to the Board of Public Education office, 2500 Broadway, Helena, MT 59620, or faxed to the office at (406) 444-0847.

8. The two bill sponsor notice requirements of section 2-4-302 MCA do not apply.

Wayne Buchanan

Wayne Buchanan, Executive Secretary
Board of Public Education

Certified to the Secretary of State on 4/6/98

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

In the matter of the amendment of Teacher Certification	))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT TO ARM 10.57.301 ENDORSEMENT INFORMATION

To: All Interested Persons

1. On May 21, 1998, at 1:45 p.m., or as soon thereafter as it may be heard, a public hearing will be held at the Board of Public Education Offices, 2500 Broadway, Helena, in the matter of the proposed amendment to ARM 10.57.301 Endorsement Information.

2. The Board of Public Education will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you request an accommodation, contact the Board of Public Education no later than 5:00 p.m. on May 15, 1998, to advise us of the nature of the accommodation that you need. Please contact Dr. Wayne Buchanan, Board of Public Education, 2500 Broadway, Helena, MT 59620; telephone (406) 444-6576; FAX (406) 444-0847.

3. The rule as proposed to be amended provides as follows. Matter to be added is underlined. Matter to be deleted is interlined.

10.57.301 ENDORSEMENT INFORMATION (1) through (2) remain the same.

(3) Appropriate teaching areas acceptable for certificate endorsement include: agriculture, art K-12, biology, business education, chemistry, computer science, drama, earth science, economics, elementary education, English, English as a second language K-12, family and consumer science, French K-12, geography, German K-12, guidance and counseling K-12, health, history, history-political science, ~~home economics,~~ industrial arts, journalism, Latin K-12, library K-12, marketing, mathematics, music K-12, other language K-12, physical education and health K-12, physical science, physics, political science, psychology, reading K-12, Russian K-12, science (broadfield), social studies (broadfield), sociology, Spanish K-12, special education P-12, speech-communication, speech-drama, technology education, trade and industry, traffic education.

(4) through (7) remain the same.

(8) Applicants with ~~terminal~~ graduate degrees in an endorsable field of specialization may use experience instructing in relevant higher education courses as credit in that endorsement area certification.

(9) through (10) remain the same.

AUTH: 20-2-121, MCA IMP: 20-4-102, MCA

4. The proposed amendment is to conform with developing curriculum in this area.

5. Interested parties may submit their data, views or arguments either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to Storrs Bishop, Chairman of the Board of Public Education, 2500 Broadway, Helena, MT 59620, no later than 5:00 p.m., May 20, 1998.

6. Storrs Bishop, Chairman of the Board of Public Education, 2500 Broadway, Helena, has been designated to preside over and conduct the hearing.

7. The Board of Public Education maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices. Such written request may be mailed or delivered to the Board of Public Education office, 2500 Broadway, Helena, MT 59620, or faxed to the office at (406) 444-0847.

8. The two bill sponsor notice requirements of section 2-4-302 MCA do not apply.

Wayne Buchanan, Executive Secretary
Board of Public Education

Certified to the Secretary of State on 4/6/98

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

In the matter of the amendment of Teacher Certification	))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT TO ARM 10.57.401 CLASS 1 PROFESSIONAL TEACHING CERTIFICATE

To: All Interested Persons

1. On May 21, 1998, at 2:00 p.m., or as soon thereafter as it may be heard, a public hearing will be held at the Board of Public Education Offices, 2500 Broadway, Helena, in the matter of the proposed amendment to ARM 10.57.401 Class 1 Professional Teaching Certificate.

2. The Board of Public Education will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you request an accommodation, contact the Board of Public Education no later than 5:00 p.m. on May 15, 1998, to advise us of the nature of the accommodation that you need. Please contact Dr. Wayne Buchanan, Board of Public Education, 2500 Broadway, Helena, MT 59620; telephone (406) 444-6576; FAX (406) 444-0847.

3. The rule as proposed to be amended provides as follows. Matter to be added is underlined. Matter to be deleted is interlined.

10.57.401 CLASS 1 PROFESSIONAL TEACHING CERTIFICATE

(1) remains the same.

(2) Basic Education: Master's degree or one year of study consisting of at least 30 graduate semester (45 graduate quarter) credits beyond the bachelor's degree in professional education or endorsable teaching area(s).

(3) through (7) remain the same.

AUTH: 20-2-121, MCA IMP: 20-4-102, MCA

4. The proposed amendment is to correct an error in a previous amendment.

5. Interested parties may submit their data, views or arguments either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to Storrs Bishop, Chairman of the Board of Public Education, 2500 Broadway, Helena, MT 59620, no later than 5:00 p.m., May 20, 1998.

6. Storrs Bishop, Chairman of the Board of Public Education, 2500 Broadway, Helena, has been designated to preside over and conduct the hearing.

7. The Board of Public Education maintains a list of

interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices. Such written request may be mailed or delivered to the Board of Public Education office, 2500 Broadway, Helena, MT 59620, or faxed to the office at (406) 444-0847.

8. The two bill sponsor notice requirements of section 2-4-302 MCA do not apply.

Wayne Buchanan, Executive Secretary
Board of Public Education

Certified to the Secretary of State on 4/6/98

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

In the matter of the amendment of Teacher Certification	))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT TO ARM 10.57.215 RENEWAL REQUIREMENTS

To: All Interested Persons

1. On May 21, 1998, at 2:15 p.m., or as soon thereafter as it may be heard, a public hearing will be held at the Board of Public Education Offices, 2500 Broadway, Helena, in the matter of the proposed amendment to ARM 10.57.215 Renewal Requirements.

2. The Board of Public Education will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you request an accommodation, contact the Board of Public Education no later than 5:00 p.m. on May 15, 1998, to advise us of the nature of the accommodation that you need. Please contact Dr. Wayne Buchanan, Board of Public Education, 2500 Broadway, Helena, MT 59620; telephone (406) 444-6576; FAX (406) 444-0847.

3. The rule as proposed to be amended provides as follows. Matter to be added is underlined. Matter to be deleted is interlined.

10.57.215 RENEWAL REQUIREMENTS

(1) through (2)(c) remain the same.

(d) the instruction of relevant higher education course(s), based upon academic credit of course(s), by a Montana certificate holder, who has achieved a graduate degree in an endorsed field of specialization~~.~~, or

(e) the completion of the assessment process for national board certification, or renewal of national board certification, through the standards of the national board for professional teaching standards. Verification of completion of the National Board assessment will earn 60 renewal units. Renewal earned may apply to renewal of an expiring license, with excess carried over to the next validation period. Class 2 certificate holders may use national board renewal units in lieu of college course credits as required in ARM 10.57.215(1) and re-stated in ARM 10.57.402(3).

(3) through (5) remain the same.

AUTH: 20-2-121, MCA IMP: 20-4-102, MCA

4. The proposed amendment would ensure recognition of the professional development potential in the National Board Certification assessment process.

5. Interested parties may submit their data, views or

arguments either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to Storrs Bishop, Chairman of the Board of Public Education, 2500 Broadway, Helena, MT 59620, no later than 5:00 p.m., May 20, 1998.

6. Storrs Bishop, Chairman of the Board of Public Education, 2500 Broadway, Helena, has been designated to preside over and conduct the hearing.

7. The Board of Public Education maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices. Such written request may be mailed or delivered to the Board of Public Education office, 2500 Broadway, Helena, MT 59620, or faxed to the office at (406) 444-0847.

8. The two bill sponsor notice requirements of section 2-4-302 MCA do not apply.

Wayne Buchanan, Executive Secretary
Board of Public Education

Certified to the Secretary of State on 4/6/98

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

In the matter of the amendment of Teacher Certification	))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT TO ARM 10.57.301 ENDORSEMENT INFORMATION

To: All Interested Persons

1. On May 21, 1998, at 2:30 p.m., or as soon thereafter as it may be heard, a public hearing will be held at the Board of Public Education Offices, 2500 Broadway, Helena, in the matter of the proposed amendment to ARM 10.57.301 Endorsement Information.

2. The Board of Public Education will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you request an accommodation, contact the Board of Public Education no later than 5:00 p.m. on May 15, 1998, to advise us of the nature of the accommodation that you need. Please contact Dr. Wayne Buchanan, Board of Public Education, 2500 Broadway, Helena, MT 59620; telephone (406) 444-6576; FAX (406) 444-0847.

3. The rule as proposed to be amended provides as follows. Matter to be added is underlined. Matter to be deleted is interlined.

10.57.301 ENDORSEMENT INFORMATION

(1) through (3) remain the same.

(4) Appropriate administrative areas acceptable for certificate endorsement include: elementary principal, secondary principal, K-12 principal, superintendent and supervisor.

(5) through (10) remain the same.

AUTH: 20-2-121, MCA IMP: 20-4-102, MCA

4. The proposed amendment would add flexibility in the grade levels for the principal positions.

5. Interested parties may submit their data, views or arguments either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to Storrs Bishop, Chairman of the Board of Public Education, 2500 Broadway, Helena, MT 59620, no later than 5:00 p.m., May 20, 1998.

6. Storrs Bishop, Chairman of the Board of Public Education, 2500 Broadway, Helena, has been designated to preside over and conduct the hearing.

7. The Board of Public Education maintains a list of interested persons who wish to receive notices of rulemaking

actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices. Such written request may be mailed or delivered to the Board of Public Education office, 2500 Broadway, Helena, MT 59620, or faxed to the office at (406) 444-0847.

8. The two bill sponsor notice requirements of section 2-4-302 MCA do not apply.

Wayne Buchanan, Executive Secretary
Board of Public Education

Certified to the Secretary of State on 4/6/98

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

In the matter of the amendment of Teacher Certification	)))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT TO ARM 10.57.403 ADMINISTRATIVE CERTIFICATE

To: All Interested Persons

1. On May 21, 1998, at 2:45 p.m., or as soon thereafter as it may be heard, a public hearing will be held at the Board of Public Education Offices, 2500 Broadway, Helena, in the matter of the proposed amendment to ARM 10.57.403 Administrative Certificate.

2. The Board of Public Education will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you request an accommodation, contact the Board of Public Education no later than 5:00 p.m. on May 15, 1998, to advise us of the nature of the accommodation that you need. Please contact Dr. Wayne Buchanan, Board of Public Education, 2500 Broadway, Helena, MT 59620; telephone (406) 444-6576; FAX (406) 444-0847.

3. The rule as proposed to be amended provides as follows. Matter to be added is underlined. Matter to be deleted is interlined.

10.57.403 CLASS 3 ADMINISTRATIVE CERTIFICATE

(1) through (8)(d)(vii) remain the same.

(9) K-12 principal endorsement:

(a) Eligibility for the class 1 or class 2 teaching certificate.

(b) Master's degree in an approved school administration program or the equivalent.

(c) Full eligibility for an elementary or a secondary principal endorsement.

(d) Verification of a minimum of three years of successful experience as an appropriately certified and assigned teacher at any level within K-12.

(e) At least 6 graduate semester (9 graduate quarter) credits in educational leadership and curriculum at the elementary level, if eligible at the secondary level, or educational leadership and curriculum at the secondary level, if eligible at the elementary level.

~~(9)~~ (10) remains the same.

AUTH: 20-2-121, MCA IMP: 20-4-102, MCA

4. The proposed amendment would add flexibility in the grade levels for the principal positions.

5. Interested parties may submit their data, views or arguments either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to Storrs Bishop, Chairman of the Board of Public Education, 2500 Broadway, Helena, MT 59620, no later than 5:00 p.m., May 20, 1998.

6. Storrs Bishop, Chairman of the Board of Public Education, 2500 Broadway, Helena, has been designated to preside over and conduct the hearing.

7. The Board of Public Education maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices. Such written request may be mailed or delivered to the Board of Public Education office, 2500 Broadway, Helena, MT 59620, or faxed to the office at (406) 444-0847.

8. The two bill sponsor notice requirements of section 2-4-302 MCA do not apply.

Wayne Buchanan, Executive Secretary
Board of Public Education

Certified to the Secretary of State on 4/6/98

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the adoption of new Rules I and II, providing for assessment of administrative penalties for violations of the underground storage tank act, and amendment of 17.56.1227, providing for issuance of emergency underground storage tank permits	NOTICE OF PUBLIC HEARING FOR PROPOSED ADOPTION AND AMENDMENT OF RULES (Underground Storage Tanks)

To: All Interested Persons

1. On May 19, 1998, at 9:30 a.m., the Department will hold a public hearing in the Lewis Conference Room of the Phoenix Building, 2209 Phoenix Avenue, Helena, Montana, to consider the adoption and amendment of the above-captioned rules.

The Department will make reasonable accommodations for persons with disabilities who wish to participate in this hearing. If you need an accommodation, contact the Department no later than 5 p.m., May 12, 1998, to advise the Department of the nature of the accommodation you need. Please contact the Department at 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2544; fax (406) 444-4386.

2. The proposed new rules are as follows:

RULE I NOTICE OF ASSESSMENT OF ADMINISTRATIVE PENALTY

(1) When the department assesses an administrative penalty under these rules, the department shall serve written notice on the alleged violator or the alleged violator's agent personally or by certified mail. Service by mail is complete on the day of receipt. The notice must state:

(a) the provisions alleged to be violated;

(b) the facts alleged to constitute the violation;

(c) the amount of the administrative penalty assessed under these rules;

(d) the amount, if any, of the penalty to be suspended upon correction of the condition that caused the assessment of the penalty;

(e) the nature of the corrective action that the department requires, whether or not a portion of the penalty is to be suspended;

(f) an estimate of the costs of compliance with the corrective action;

(g) where to receive help to correct the alleged violation;

(h) as applicable, the time within which the corrective action is to be taken and the time within which the administrative penalty is to be paid;

(i) the right to appeal or to a hearing to mitigate the penalty assessed and the time, place, and nature of any hearing; and

(j) that a formal proceeding may be waived.

AUTH: 75-11-505(6), MCA; IMP: 75-11-505(6), 75-11-525, MCA

RULE II DETERMINATION OF ADMINISTRATIVE PENALTIES

(1) Administrative penalties assessed under these rules may not exceed $500 per day for each violation and may not be less than the minimum penalty prescribed in (2) of this rule.

(2) For each violation, the department shall assess the maximum administrative penalty, and allow the time for corrective action, specified in this subsection. Pursuant to 75-11-525(4), MCA, the department may suspend a portion of the maximum administrative penalty based on the cooperation and degree of care exercised by the person assessed the penalty, how expeditiously the violation was corrected, and whether significant harm resulted to the public health or the environment from the violation.

VIOLATION	MAXIMUM PENALTY $	MINIMUM PENALTY $	VIOLATION CORRECTABLE	TIME ALLOWED FOR CORRECTION
Failure to notify the department of an UST system	300	150	yes	10 days
Failure to register an UST system	100	50	yes	10 days
Failure to report a suspected or confirmed release/spill within 24 hours	500	500	no	na*
Failure to investigate or respond to a release	500	250	yes	15 days
Failure to temporarily or permanently close an UST system properly	500	250	yes	30 days
Failure to properly install an UST system	500	250	yes	30 days
Failure to install release detection or corrosion protection	500	250	yes	30 days
Failure to provide spill/overfill prevention equipment	500	250	yes	15 days
Failure to provide automatic line leak detection	500	250	yes	15 days
Failure to install properly designed and constructed UST system components	300	150	yes	45 days
Failure to perform release detection	300	150	yes	30 days
Failure to provide financial assurance	300	150	yes	30 days
Failure to maintain release detection or corrosion protection equipment	200	100	yes	30 days
Failure to provide required records within 48 hours of notice	100	100	no	na*
Failure to maintain required records	100	50	yes	30 days

* na = not applicable

(3) Upon receipt of a written notice that corrective action required by the department has been completed, the department may suspend a portion of the administrative penalty.

(4) To verify that corrective action has been completed, the department may inspect the site of the violation and any records regarding the corrective action.

AUTH: 75-11-505(6), MCA; IMP: 75-11-505(6), 75-11-525, MCA

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

17.56.1227 EMERGENCY PERMIT APPLICATION AND ISSUANCE

(1) and (2) Remain the same.

(3) For the purposes of this rule, an emergency is an imminent and substantial threat to the public health or safety or to the environment, including a threat to public health or safety or to the environment identified in a judicial order or an order of the department.

AUTH: 75-11-204, MCA; IMP: 75-11-204, 75-11-212, MCA

4. The Department is proposing these new rules and amendments to implement Sections 75-11-505 and 525, MCA, of the Montana Underground Storage Tank Act. Section 75-11-505(6), MCA, provides that the Department may adopt rules providing a penalty schedule and a system for assessment of administrative penalties, notice, and appeals, and Section 75-11-525(4), MCA, provides that the Department shall publish a schedule of maximum and minimum penalties for specific violations. The proposed new rules are necessary to provide uniform and expeditious administrative procedures to enforce the Department's statutes and rules regarding prevention and correction of leakage from underground storage tanks. The proposed amendment to ARM 17.56.1227 is necessary to provide for issuance of emergency permits that may be required under an administrative order to take corrective action or under a judicial order.

5. Interested persons may submit their data, views, or arguments concerning the proposed actions, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Marty Tuttle, Department of Environmental Quality, Metcalf Building, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana 59620-0901, no later than 5 p.m. May 26, 1998.

6. Marty Tuttle has been designated to preside over and conduct the hearing.

Reviewed by:

John F. North,
Rule Reviewer

Mark A. Simonich, Director

Certified to the Secretary of State April 6, 1998.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of rule 17.30.502 amending the Montana mixing zone rules.	)))	NOTICE OF PUBLIC HEARING FOR PROPOSED AMENDMENT OF RULE

(Water Quality)

To: All Interested Persons

1. On May 11, 1998, at 1:00 p.m., the Board will hold a public hearing at Room 35 of the Metcalf Building, 1520 E. 6th Ave., Helena, Montana, to consider the amendment of the above-captioned rule.

The Board will make reasonable accommodations for persons with disabilities who wish to participate in this hearing. If you need an accommodation, contact the Board no later than 5 p.m., May 10, 1998, to advise us of the nature of the accommodation you need. Please contact the Board at P.O. Box 200901, Helena, MT 59620-0901; phone (406)444-2544; fax (406)444-4386.

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

17.30.502 DEFINITIONS The following definitions, in addition to those in 75-5-103, MCA, and ARM Title 17, chapter 30, subchapters 6 and 7, apply throughout this subchapter:

(1)-(12) Remain the same.

(13) "Zone of influence" means the area ~~under~~ within which a pumping well ~~can be expected to remove water~~ either causes or may cause a decrease in the ground water elevation or potentiometric surface in confined or semi-confined conditions that is equal to or greater than 0.01 feet.

~~(14) The board hereby adopts and incorporates by reference department Circular WQB-7, entitled "Montana Numeric Water Quality Standards" (December, 1995 edition), which establishes standards for toxic, carcinogenic, bioconcentrating, and harmful parameters in water. Copies of the circular are available from the Department of Environmental Quality, PO Box 200901, Helena, MT 59620-0901.~~

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

3. The Montana Water Quality Act and the rules adopted pursuant to that act authorize the Department to create mixing zones in a permit or nondegradation decision. A mixing zone is an area of surface or ground water where dilution of a discharge takes place. Water quality standards may be exceeded in a mixing zone. The Board has adopted rules that set requirements for creation of mixing zones. One of those rules, ARM

17.30.508, prohibits creation of a mixing zone that would intercept the zone of influence of a drinking water well. The purpose of this rule is to prevent contamination of drinking water supplies.

ARM 17.30.502(13) defines the term "zone of influence" as "the area under which a well can be expected to remove water." Under this definition, the zone of influence may extend many hundreds or thousands of feet up gradient. Most of this ground water will not contribute significant amounts of water to the well and will not cause contamination of drinking water. The definition is therefore over broad. The proposed amendments to the definition would limit the term to ground water that is likely to enter a well.

The Department is also proposing the deletion of section (14), which incorporates WQB-7 by reference into the mixing zone rules. WQB-7 contains water quality standards. Incorporation of WQB-7 into the mixing zone rules serves no purpose because the mixing zone rules do not establish water quality standards.

4. Interested persons may submit their data, views, or arguments concerning the proposed amendments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to the Board of Environmental Review, Department of Environmental Quality, Metcalf Building, PO Box 200901, Helena, MT 59620-0901, no later than May 15, 1998.

5. Claudia L. Massman has been designated to preside over and conduct the hearing.

BOARD OF ENVIRONMENTAL REVIEW

CINDY E. YOUNKIN, Chairperson

Reviewed by:

JOHN F. NORTH, Rule Reviewer

Certified to the Secretary of State April 6, 1998.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the repeal of ARM 17.8.220, regarding settled particulate matter	)	NOTICE OF PROPOSED REPEAL
	)	NO PUBLIC HEARING CONTEMPLATED
	)	(Air Quality)

To: All Interested Persons.

1. On June 12, 1998, the board proposes to repeal ARM 17.8.220 regarding the settled particulate matter. This rule may be found on page 17-279 of the Administrative Rules of Montana.

AUTH: 75-2-111 and 75-2-202, MCA
IMP: 75-2-202, MCA

2. ARM 17.8.220 contains the settled particulate 'dustfall' standard. It was adopted in 1980 to combat nuisance dustfall on material surfaces. For example, homeowners or businesses located adjacent to lumber mills, rock crushers, or other process equipment often suffered property damage or inconvenience due to thick layers of process-related dustfall.

Repeal of this standard does not weaken the protection of public health or welfare for several reasons. First, the state and federal ambient air quality standards and ARM 17.8.308, which regulates airborne particulate matter, remain in effect. This latter rule requires the use of reasonable precautions to control dust emissions from the production, handling, transportation or storage of materials; the use of streets, roads, and parking lots; and the operation of construction and demolition projects. The rule also establishes opacity limits and special requirements for nonattainment areas. And second, there have been significant improvements to particulate control equipment since ARM 17.8.220 was adopted. ARM 17.8.220 is therefore no longer necessary.

3. Interested persons may submit their data, views, or arguments either orally or in writing, to the Board of Environmental Review, P.O. Box 200901, Helena, MT 59620-0901, no later than May 15, 1998.

4. If a person who is directly affected by the proposed repeal wishes to express his/her data, views, and arguments orally or in writing at a public hearing, he/she must make written request for a hearing and submit this request along with any written comments he/she has to the Board of Environmental Review, P.O. Box 200901, Helena, MT 59620-0901. A written request for a hearing must be received no later than May 15, 1998.

5. If the agency receives requests for a public hearing on the proposed repeal from either 10 percent or 25

persons, whichever is less, of the persons who are directly affected by the proposed action; from the administrative code committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be in excess of 25 persons, based on the large number of persons who may be affected by this repeal.

BOARD OF ENVIRONMENTAL REVIEW

by _____
CINDY E. YOUNKIN, Chairperson

Reviewed by:

_____
John F. North, Rule Reviewer

Certified to the Secretary of State April 6, 1998.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of 17.8.101, 801 and 901, revising the definition of volatile organic compounds, the amendment of 17.8.102, updating the incorporations by reference, and the amendment of 17.8.302, incorporating by reference maximum achievable control technology standards for primary aluminum reduction plants.	) NOTICE OF PUBLIC HEARING) FOR PROPOSED AMENDMENT) OF RULES

(AIR QUALITY)

To: All Interested Persons.

1. On May 15, 1998, at 3:00 p.m., or as soon thereafter as it may be heard, the board will hold a public hearing at Room 35 of the Metcalf Building, 1520 E. Sixth Ave., Helena, Montana, to consider amendment of the above captioned rules.

The board will make reasonable accommodations for persons with disabilities who wish to participate in this hearing. If you need an accommodation, contact Leona Holm no later than 5 p.m., May 7, 1998, to advise the board of the nature of the accommodation you need. Please contact the board at 1520 E. Sixth Avenue, P.O. Box 200901, Helena, MT 59620-0901; phone (406)444-2544; fax (406)444-4386.

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

17.8.101 DEFINITIONS As used in this chapter, unless indicated otherwise in a specific subchapter, the following definitions apply:

(1) - (39) remain the same.

(40)(a) "Volatile organic compounds (VOC)" means any compound of carbon, excluding carbon monoxide, carbon dioxide, carbonic acid, metallic carbides or carbonates, and ammonium carbonate, which participates in atmospheric photochemical reactions, and including any such organic compound other than the following, which have been determined to have negligible photochemical reactivity: methane; ethane; methyl acetate; methylene chloride (dichloromethane); 1,1,1-trichloroethane (methyl chloroform); 1,1,1-trichloro-2,2,2-trifluoroethane (CFC-113); trichlorofluoromethane (CFC-11); dichlorodifluoromethane (CFC-12); chlorodifluoromethane (CFC-22); trifluoromethane (FC-23); 1,2-dichloro-1,1,2,2-tetrafluoroethane (CFC-114); chloropentafluoroethane (CFC-115); 1,1,1-trifluoro-2,2-dichloroethane (HCFC-123); difluoromethane (HFC-32); ethylfluoride (HFC-161); 1,1,1,3,3,3-

hexafluoropropane (HFC-236fa); 1,1,2,2,3-pentafluoropropane (HFC-245ca); 1,1,2,3,3-pentafluoropropane (HFC-245ea); 1,1,1,2,3-pentafluoropropane (HFC-245eb); 1,1,1,3,3-pentafluoropropane (HFC-245fa); 1,1,1,2,3,3-hexafluoropropane (HFC-236ea); 1,1,1,3,3-pentafluorobutane (HFC-365mfc); chlorofluoromethane (HCFC-31); 1,2-dichloro-1,1,2-trifluoroethane (HCFC-123a); 1 chloro-1-fluoroethane (HCFC-151a); 1,1,1,2,2,3,3,4,4-nonafluoro-4-methoxy-butane (C4F9OCH3); 2-(difluoromethoxymethyl)-1,1,1,2,3,3,3-heptafluoropropane ([CF3]2CFCF2OCH3); 1-ethoxy-1,1,2,2,3,3,4,4,4-nonafluorobutane (C4F9OC2H5); 2-(ethoxydifluoromethyl)-1,1,1,2,3,3,3-heptafluoropropane ([CF3]2CFCF2OCH2H5); hydrofluoro-carbon (HFC) 43-mee; hydrochlorofluorocarbon (HCFC) 225ca and cb; 1,1,1,2-tetrafluoroethane (HFC-134a); 1,1-dichloro-1-fluoroethane (HCFC-141b); 1-chloro-1,1-difluoroethane (HCFC-142b); 2-chloro-1,1,1,2-tetrafluoroethane (HCFC-124); pentafluoroethane (HFC-125); 1,1,2,2-tetrafluoroethane (HFC-134); 1,1,1-trifluoroethane (HFC-143a); 1,1-difluoroethane (HFC-152a); parachlorobenzotrifluoride (PCBTF); cyclic, branched, or linear completely methylated siloxanes; acetone; perchloroethylene (tetrachloroethylene) and perfluorocarbon compounds which fall into these classes:

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

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

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

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

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

(41) - (42) remain unchanged.

AUTH: 75-2-211, MCA; IMP: Title 75, chapter 2, MCA

17.8.102 INCORPORATION BY REFERENCE--PUBLICATION DATES AND AVAILABILITY OF REFERENCED DOCUMENTS (1) Unless expressly provided otherwise, in this chapter where the board has:

(a) adopted a federal regulation by reference, the reference is to the July 1, ~~1996~~ 1997, edition of the Code of

Federal Regulations (CFR);

(b) Remains the same.

(c) referred to a section of the Montana Code Annotated (MCA), the reference is to the ~~1995~~ 1997 edition of the MCA;

(d) adopted another rule of the department or of another agency of the state of Montana by reference, the reference is to the December 31, ~~1996~~ 1997 edition of the Administrative Rules of Montana (ARM).

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

17.8.302 INCORPORATION BY REFERENCE (1) For the purposes of this subchapter, the board hereby adopts and incorporates herein by reference the following:

(a)-(d) Remain the same.

(e) 40 CFR Part 60, which pertains to standards of performance for new stationary sources and modifications, including the final rule published at 62 FR 52399 on October 7, 1997, "Determination of Total Fluoride Emissions from Selected Sources at Primary Aluminum Production Facilities," Test Method 14A of 40 CFR Part 60, Appendix A;

(f)-(h) Remains the same.

(i) 40 CFR Part 63, specifying emission standards for hazardous air pollutant source categories including the final rule published at 62 FR 52407 on October 7, 1997, "National Emission Standards for Hazardous Air Pollutants for Primary Aluminum Reduction Plants," to be codified at 40 CFR Part 63, Subpart LL;

(j) Remains the same.

(2)-(4) Remain the same.

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

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

(1) - (28) remain unchanged.

(29)(a) "Volatile organic compounds (VOC)" means any compound of carbon, excluding carbon monoxide, carbon dioxide, carbonic acid, metallic carbides or carbonates, and ammonium carbonate, which participates in atmospheric photochemical reactions, and including any such organic compound other than the following, which have been determined to have negligible photochemical reactivity: methane; ethane; methyl acetate; methylene chloride (dichloromethane); 1,1,1-trichloroethane (methyl chloroform); 1,1,1-trichloro-2,2,2-trifluoroethane (CFC-113); trichlorofluoromethane (CFC-11); dichlorodifluoromethane (CFC-12); chlorodifluoromethane (CFC-22); trifluoromethane (FC-23); 1,2-dichloro-1,1,2,2-tetrafluoroethane (CFC-114); chloropentafluoroethane (CFC-115); 1,1,1-trifluoro-2,2-dichloroethane (HCFC-123); difluoromethane (HFC-32); ethylfluoride (HFC-161); 1,1,1,3,3,3-hexafluoropropane (HFC-236fa); 1,1,2,2,3-pentafluoropropane (HFC-245ca); 1,1,2,3,3-pentafluoropropane (HFC-245ea); 1,1,1,2,3-pentafluoropropane (HFC-245eb); 1,1,1,3,3-

pentafluoropropane (HFC-245fa); 1,1,1,2,3,3-hexafluoropropane (HFC-236ea); 1,1,1,3,3-pentafluorobutane (HFC-365mfc); chlorofluoromethane (HCFC-31); 1,2-dichloro-1,1,2-trifluoroethane (HCFC-123a); 1 chloro-1-fluoroethane (HCFC-151a); 1,1,1,2,2,3,3,4,4-nonafluoro-4-methoxy-butane (C4F9OCH3); 2-(difluoromethoxymethyl)-1,1,1,2,3,3,3-heptafluoropropane ([CF3]2CFCF2OCH3); 1-ethoxy-1,1,2,2,3,3,4,4,4-nonafluorobutane (C4F9OC2H5); 2-(ethoxydifluoromethyl)-1,1,1,2,3,3,3-heptafluoropropane ([CF3]2CFCF2OCH2H5); hydrofluoro-carbon (HFC) 43-mee; hydrochlorofluorocarbon (HCFC) 225ca and cb; 1,1,1,2-tetrafluoroethane (HFC-134a); 1,1-dichloro-1-fluoroethane (HCFC-141b); 1-chloro-1,1-difluoroethane (HCFC-142b); 2-chloro-1,1,1,2-tetrafluoroethane (HCFC-124); pentafluoroethane (HFC-125); 1,1,2,2-tetrafluoroethane (HFC-134); 1,1,1-trifluoroethane (HFC-143a); 1,1-difluoroethane (HFC-152a); parachlorobenzotrifluoride (PCBTF); cyclic, branched, or linear completely methylated siloxanes; acetone; perchloroethylene (tetrachloroethylene) and perfluorocarbon compounds which fall into these classes:

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

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

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

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

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

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

17.8.901 DEFINITIONS For the purposes of this subchapter:

(1) - (19) remain unchanged.

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

photochemical reactivity: methane; ethane; methyl acetate; methylene chloride (dichloromethane); 1,1,1-trichloroethane (methyl chloroform); 1,1,1-trichloro-2,2,2-trifluoroethane (CFC-113); trichlorofluoromethane (CFC-11); dichlorodifluoromethane (CFC-12); chlorodifluoromethane (CFC-22); trifluoromethane (FC-23); 1,2-dichloro-1,1,2,2-tetrafluoroethane (CFC-114); chloropentafluoroethane (CFC-115); 1,1,1-trifluoro-2,2-dichloroethane (HCFC-123); difluoromethane (HFC-32); ethylfluoride (HFC-161); 1,1,1,3,3,3-hexafluoropropane (HFC-236fa); 1,1,2,2,3-pentafluoropropane (HFC-245ca); 1,1,2,3,3-pentafluoropropane (HFC-245ea); 1,1,1,2,3-pentafluoropropane (HFC-245eb); 1,1,1,3,3-pentafluoropropane (HFC-245fa); 1,1,1,2,3,3-hexafluoropropane (HFC-236ea); 1,1,1,3,3-pentafluorobutane (HFC-365mfc); chlorofluoromethane (HCFC-31); 1,2-dichloro-1,1,2-trifluoroethane (HCFC-123a); 1 chloro-1-fluoroethane (HCFC-151a); 1,1,1,2,2,3,3,4,4-nonafluoro-4-methoxy-butane (C4F9OCH3); 2-(difluoromethoxymethyl)-1,1,1,2,3,3,3-heptafluoropropane ([CF3]2CFCF2OCH3); 1-ethoxy-1,1,2,2,3,3,4,4,4-nonafluorobutane (C4F9OC2H5); 2-(ethoxydifluoromethyl)-1,1,1,2,3,3,3-heptafluoropropane ([CF3]2CFCF2OCH2H5); hydrofluoro-carbon (HFC) 43-mee; hydrochlorofluorocarbon (HCFC) 225ca and cb; 1,1,1,2-tetrafluoroethane (HFC-134a); 1,1-dichloro-1-fluoroethane (HCFC-141b); 1-chloro-1,1-difluoroethane (HCFC-142b); 2-chloro-1,1,1,2-tetrafluoroethane (HCFC-124); pentafluoroethane (HFC-125); 1,1,2,2-tetrafluoroethane (HFC-134); 1,1,1-trifluoroethane (HFC-143a); 1,1-difluoroethane (HFC-152a); parachlorobenzotrifluoride (PCBTF); cyclic, branched, or linear completely methylated siloxanes; acetone; perchloroethylene (tetrachloroethylene) and perfluorocarbon compounds which fall into these classes:

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

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

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

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

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

reactive compounds in the source's emissions.
AUTH: 75-2-111, 75-2-203, MCA; IMP: 75-2-202, 75-2-203, 75-2-204, MCA

3. The board is proposing the amendments to ARM 17.8.101, 17.8.801 and 17.8.901 to conform the definition of volatile organic compounds (VOC's) in the state air quality rules to the most recent revision of the definition in the federal air quality regulations. The board is proposing the amendments to ARM 17.8.102 to update the incorporations by reference by incorporating the most recent editions of the Code of Federal Regulations, the Montana Code Annotated and the Administrative Rules of Montana. The board is proposing the amendments to ARM 17.8.302 to incorporate by reference maximum achievable control technology (MACT) standards for primary aluminum reduction plants promulgated by EPA on October 7, 1997.

Incorporation of the MACT standards for primary aluminum reduction plants is necessary to control emissions of hazardous air pollutants from these facilities. The other proposed amendments are necessary to allow the department to follow the most recent editions of state statutes and rules and federal regulations.

4. Interested persons may submit their data, views, or arguments either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to the Board of Environmental Review, P.O. Box 200901, Helena, MT 59620-0901, no later than May 15, 1998.

5. Jim Madden has been appointed to preside over and conduct the hearing.

BOARD OF ENVIRONMENTAL REVIEW

by Cindy E. Younkin
CINDY E. YOUNKIN, Chairperson

Reviewed by:

John F. North
John F. North, Rule Reviewer

Certified to the Secretary of State April 6, 1998.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of rule 17.30.610 amending the Montana surface water quality standards.	)NOTICE OF PUBLIC HEARING) FOR PROPOSED AMENDMENT) OF RULE)

(Water Quality)

To: All Interested Persons

1. On May 11, 1998, at 3:00 p.m., the Board will hold a public hearing at Room 35 of the Metcalf Building, 1520 E. 6th Ave., Helena, Montana, to consider the amendment of the above-captioned rule.

The Board will make reasonable accommodations for persons with disabilities who wish to participate in this hearing. If you need an accommodation, contact the Board no later than 5 p.m., May 10, 1998, to advise us of the nature of the accommodation you need. Please contact the Board at P.O. Box 200901, Helena, MT 59620-0901; phone (406)444-2544; fax (406)444-4386.

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

17.30.610 WATER-USE CLASSIFICATIONS--MISSOURI RIVER DRAINAGE EXCEPT YELLOWSTONE, BELLE FOURCHE, AND LITTLE MISSOURI RIVER DRAINAGES The water-use classifications adopted for the Missouri River are as follows:

(1)-(4) Remain the same.

(5) Missouri River drainage from Marias River to Fort Peck Dam except waters listed in (a)-(f) below C-3

(a)-(b) Remain the same.

(c) Judith River drainage except waters listed in (i)-(iv) below B-1

~~(i) Big Spring Creek (mainstem) from the Mill Ditch headgate to the Judith River . . . . . B-2~~

(ii)-(v) Remain the same but are renumbered (i)-(iv).

(d)-(f) Remain the same.

(6)-(7) Remain the same.

(8) Milk River drainage from the International Boundary to the Missouri River except the tributaries listed in (a)-(e d) below B-3

(a) Sage Creek drainage to the section line between sections 1 and 12 T36N R5W B-1

~~(a)~~(b) Big Sandy Creek drainage to Town of Big Sandy infiltration wells B-1

~~(b)~~(c) Beaver, Little Box Elder and Clear Creek drainage (near Havre) B-1

~~(c)~~(d) Peoples Creek drainage to and including the South Fork of Peoples Creek drainage B-1

(9) Remains the same.

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

3. The Montana Water Quality Act directs the Board to classify streams according to their uses and to set water quality standards to protect those uses. ARM 17.30.610 classifies much of the Missouri River drainage. It classifies the mainstem of Big Spring Creek from the Mill Ditch headgate to the Judith River as B-2. B-2 waters are suitable for marginal propagation of salmonid fish and associated aquatic life, waterfowl, and furbearers. The Department of Fish, Wildlife, and Parks has advised the Department that this stretch is suitable for normal propagation of salmonid fish and associated aquatic life, waterfowl, and furbearers and is therefore misclassified. The Department agrees and has therefore proposed deleting (5)(c)(i) from the rule. The effect of this deletion would be to classify this stretch as B-1, which is the classification for waters that support normal propagation of salmonid fish.

The Milk River drainage is classified in ARM 17.30.610(8) as B-3 except for certain streams that are specifically classified differently within the rule. Currently all of the Sage Creek drainage is classified B-3. The Sage Creek Water Users Association has advised the Department that this drainage to the section line between sections 1 and 12, T36N, R5E, support the growth and propagation of trout, a salmonid fish, and therefore should be classified B-1. The Department has confirmed that this is the case. The amendment to ARM 17.30.610(8) would so reclassify that stretch of the stream.

4. Interested persons may submit their data, views, or arguments concerning the proposed amendments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to the Board of Environmental Review, Department of Environmental Quality, Metcalf Building, PO Box 200901, Helena, MT 59620-0901, no later than May 15, 1998.

5. Mark Smith has been designated to preside over and conduct the hearing.

BOARD OF ENVIRONMENTAL REVIEW

CINDY E. YOUNKIN, Chairperson

Reviewed by:

JOHN F. NORTH, Rule Reviewer

Certified to the Secretary of State April 6, 1998.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of amendment of ARM 17.8.514, updating the air quality major open burning fees.)	NOTICE OF PUBLIC HEARING FOR PROPOSED AMENDMENT OF RULE

(AIR QUALITY)

To: All Interested Persons.

1. On May 15, 1998, at 1:00 p.m., or as soon thereafter as it may be heard, the board will hold a public hearing at Room 35 of the Metcalf Building, 1520 E. Sixth Ave., Helena, MT, to consider amendment of the above-captioned rule.

The board will make reasonable accommodations for persons with disabilities who wish to participate in this hearing. If you need an accommodation, contact Leona Holm no later than 5 p.m., May 7, 1998, to advise the board of the nature of the accommodation you need. Please contact the board at 1520 E. Sixth Avenue, P.O. Box 200901, Helena, MT 59620-0901; phone (406)444-2544; fax (406)444-4386.

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

17.8.514 AIR QUALITY OPEN BURNING FEES (1)-(3) Remain the same.

(4)(a) The major open burning air quality permit application fee shall be based on the actual or estimated actual amount of air pollutants emitted by the applicant in the last calendar year during which the applicant conducted open burning pursuant to an air quality open burning permit for major open burning sources, as required under ARM 17.8.610 (Major Open Burning Source Restrictions). The fee shall be the greater of the following, as adjusted by any amount determined pursuant to (b), below:

(i) a fee calculated using the following formula:

tons of total particulate emitted in the previous appropriate calendar year,
multiplied by ~~$5.65~~ 11.25; plus
tons of oxides of nitrogen emitted in the previous appropriate calendar year,
multiplied by ~~$1.41~~ 2.81; plus
tons of volatile organic compounds emitted in the previous appropriate calendar year,
multiplied by ~~$1.41~~ 2.81; or

(ii) a minimum fee of $250.

(b) Remains the same.

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

3. The Board is proposing these amendments to increase the air quality permit fees charged to persons conducting major open burning. Presently, there are 16 major open burning permit holders in the state, 14 of which belong to the Montana State Airshed Group, including state and federal land management agencies and private timber companies.

The fees fund the Department's activities in the Smoke Management Program, which the Department operates in conjunction with the Airshed Group during the fall burning season. The Smoke Management Program establishes burning time restrictions, is included in the Montana State Implementation Plan (SIP) for air quality, and is the required control mechanism for open burning during the fall burning season.

Each year, in consultation with the Airshed Group, the Department develops a budget that reflects the Department's costs for operating the Smoke Management Program. The total fee paid by a major open burner is based on the burner's actual, or estimated actual, emissions of air pollutants during the last calendar year which the burner conducted open burning pursuant to an air quality major open burning permit.

As of mid-1997, the Department had accrued approximately $20,000 in fees in excess of the cost to operate the Program. In August of 1997, the Board reduced the fees for the 1997/1998 burning season to use a portion of this accrued amount. The proposed fee increase is based on the budget for the 1998/1999 open burning season and is necessary to operate the Smoke Management Program during the upcoming open burning season.

4. Interested persons may submit their data, views, or arguments either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to the Board of Environmental Review, P.O. Box 200901, Helena, MT 59620-0901, no later than May 15, 1998.

5. Jim Madden has been appointed to preside over and conduct the hearing.

BOARD OF ENVIRONMENTAL REVIEW

by Cindy E. Younkin
CINDY E. YOUNKIN, Chairperson

Reviewed by:

John F. North
John F. North, Rule Reviewer

Certified to the Secretary of State April 6, 1998.

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

In the matter of the proposed adoption of new rules relating to financial assistance available under the drinking water state revolving fund act	)))))	NOTICE OF PROPOSED ADOPTION OF NEW RULES NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons.

1. On May 18, 1998, the Department of Natural Resources and Conservation proposes to adopt new Rules I through XX, which implement the provisions of the Drinking Water State Revolving Fund Act.

2. The proposed new rules provide as follows:

RULE I PURPOSE (1) The purpose of this chapter is to implement the provisions of the Drinking Water State Revolving Fund Act pursuant to Title 75, Chapter 6, Part 2; and the Federal Safe Drinking Water Act; 42 U.S.C. 300f to 42 U.S.C. 300j-26, inclusive, as amended to January 1, 1997.

(2) The act establishes a program under which the state may provide financial assistance to community water systems and nonprofit noncommunity water systems.

(3) The act delegates implementation of certain financial provisions to the department and certain technical provisions to the department of environmental quality.

(4) The act authorizes the department and the department of environmental quality to adopt rules within their respective authorities.

(5) The board of environmental review has adopted rules to assure that the state's regulations pertaining to public water supplies complies with the Federal Safe Drinking Water Act. ARM 17.38.101 et seq. and 17.38.201 et seq.

(6) The department of environmental quality may adopt rules or amend existing rules to implement the program.

(7) The act authorizes the use of the revolving fund to make loans to community water systems and nonprofit community water systems and to provide financial and technical assistance to any public water system as part of a capacity development strategy.

(8) The department proposes rules to implement the making of loans to community water systems and nonprofit noncommunity water systems from the revolving fund. The act further authorizes the revolving fund to be used to purchase insurance for or to guarantee obligations issued by municipalities. The department reserves the right to adopt

rules to implement a guarantee and insurance component of the program if it determines it is necessary or desirable. AUTH: 75-6-205 and 75-6-232, MCA; IMP: 75-6-221, MCA

RULE II DEFINITIONS In this chapter, the following terms have the meanings indicated below and are supplemental to the definitions contained in Title 75, Chapter 6, Parts 1 and 2, MCA, sections 300f through 300j-26 of the Federal Safe Drinking Water Act, 42 U.S.C., as amended, and ARM 17.38.101 et seq. and 17.38.201 et seq. Terms used but not defined herein have the meanings prescribed in ARM 17.38.101 et seq. and 17.38.201 et seq. or the indenture of trust.

(1) "Act" means Drinking Water State Revolving Fund Act, Title 75, Chapter 6, Part 2, MCA.

(2) "Administrative costs" means costs incurred by the department and the department of environmental quality in the administration of the program, including but not limited to:

(a) costs of servicing loans and issuing debt;

(b) program startup costs;

(c) financial, management, and legal consulting fees; and

(d) reimbursement costs for support services from other state agencies.

(3) "Administrative expense surcharge" means a surcharge on each loan charged by the department to the borrower expressed as a percentage per annum on the outstanding principal amount of the loan, payable by the borrower on the same dates that payments of principal and interest on the loan are due, calculated in accordance with these rules.

(4) "Administrative fee" means the fee expressed as a percentage of the initial committed amount of the loan retained by the department from the proceeds of the loan at closing, calculated in accordance with these rules.

(5) "Application" means the form of application provided by the department and the department of environmental quality which must be completed and submitted in order to request a loan.

(6) "Binding commitment" means an executed commitment agreement.

(7) "Bond" means an obligation issued by a municipality pursuant to the provisions of Montana law and the code.

(8) "Bond Anticipation Note" means a note issued by a municipality under the provisions of 7-7-109, MCA, in anticipation of the issuance of long-term indebtedness for a project.

(9) "Borrower resolution" means a resolution of a municipality authorizing the issuance of bonds and establishing the terms and conditions and providing security therefore.

(10) "Borrower" means an entity to whom a loan is made.

(11) "Borrower obligation" means a bond or a loan agreement.

(12) "Closing" means, with respect to a loan, the date of delivery of the borrower resolution and the borrower obligation to the department.

(13) "Code" means the Internal Revenue Code of 1986, as amended.

(14) "Commitment agreement" means a written agreement between the borrower and the department pursuant to which the department agrees to make a loan to the borrower in a specified principal amount on or before the date and subject to the terms and conditions specified in the agreement.

(15) "Community water system" means a public water system that is owned by a private person or a municipality and that serves at least 15 service connections used by year-round residents of the area served by the system or regularly serves at least 25 year-round residents. The term does not include a public water system that is owned by the federal government.

(16) "Cost" means, with reference to a project, all capital costs incurred or to be incurred for a public water system, including but not limited to:

(a) engineering, financing, and other fees;

(b) interest during construction;

(c) construction; and

(d) a reasonable allowance for contingencies to the extent permitted by the federal act and rules promulgated under the federal act.

(17) "Debt" means debt incurred to acquire, construct, extend, improve, add to, or otherwise pay expenses related to the system, without regard to the source of payment and security for such debt.

(18) "Department" means the Montana department of natural resources and conservation.

(19) "Department of Environmental Quality" means the Montana department of environmental quality.

(20) "Disadvantaged municipality" means one in which the service area of a public water system meets the affordability criteria established in these rules.

(21) "EPA" means the United States environmental protection agency.

(22) "EPA agreement" means the operating agreement between the state and the EPA.

(23) "Federal act" means the Federal Safe Drinking Water Act, 42 U.S.C. 300f. et seq., as that act read on May 5, 1997.

(24) "General obligation" means an obligation of a municipality pledging the full faith and credit of and unlimited taxing power of the municipality.

(25) "Governing body" means the duly elected or appointed board, council, or commission or other body authorized by law to govern the affairs of the municipality.

(26) "Gross revenues" means with respect to revenue bonds, all revenues derived from the operation of the system, including but not limited to rates, fees, charges, and rentals imposed for connections with and for the availability, benefit, and use of the system as now constituted and of all replacements and improvements thereof and additions thereto, and from penalties and interest thereon, and from any sales of property acquired for the system and all income received from the investment of all moneys on deposit in system accounts.

(27) "Indenture of trust" means the indenture of trust

between the board of examiners and a trustee establishing and implementing the program, establishing certain terms and conditions for the sale and issuance of the state's bonds to fund the program, providing for the application of the proceeds of the state's bonds and the repayments of the state's bonds and establishing the funds and accounts for the program.

(28) "Indian tribe" means an Indian tribe that has a federally recognized governing body carrying out substantial governmental duties and powers over any area.

(29) "Intended use plan" means the annual plan adopted by the department of environmental quality and submitted to the EPA that describes how the state intends to use the money in the revolving fund.

(30) "Loan" means a loan of money from the revolving fund for project costs.

(31) "Loan agreement" means an agreement entered into between a borrower other than a municipality and the department evidencing a loan.

(32) "Loan loss reserve surcharge" means a surcharge expressed as percentage per annum on the outstanding principal amount of the loan at the rate determined in these rules and imposed on all borrowers unless waived in accordance with the provisions of these rules.

(33) "Municipality" means a state agency, city, town, or other public body created pursuant to state law or an Indian tribe.

(34) "Net revenues" means the entire amount of gross revenues of the system less the actual operation and maintenance cost plus additional annual costs of operation and maintenance estimated to be incurred, including sums to be deposited in an operating reserve.

(35) "Noncommunity water system" means a public water system that is not a community water system.

(36) "Nonprofit noncommunity water system" means a noncommunity water system owned by an organization that is organized under Montana law and that qualifies as a tax-exempt organization under the provisions of section 501(c)(3) of the Internal Revenue Code.

(37) "Origination fee" means the fee imposed on borrowers to pay a proportionate share of costs of issuing the state's bonds to fund the program, as adjusted from time to time as may be required by the department.

(38) "Outstanding indebtedness bond" means with respect to a municipality any bonds currently outstanding payable from gross or net system revenues and with respect to a private person, any loan payable in whole or in part from the same source as a proposed loan.

(39) "Priority list" means the list of projects expected to receive financial assistance under the program, ranked in accordance with a priority system developed under Section 216 of the act.

(40) "Private person" means an individual, corporation, partnership, or other nongovernmental legal entity.

(41) "Program" means the drinking water state revolving

fund program established by Title 75, Chapter 6, Part 2.

(42) "Project" means improvements or activities that are:

(a) to be undertaken for a public water system and that are of a type that will facilitate compliance with the national primary drinking water regulations applicable to the system; or

(b) to further the health protection objectives of the federal act.

(43) "Public water system" means a system for the provision to the public of water for human consumption, through pipes or other constructed conveyances, if that system has at least 15 service connections or regularly serves at least 25 individuals. The term includes any collection, treatment, storage, and distribution facilities under control of an operator of a system that are used primarily in connection with a system and any collection or pretreatment storage facilities not under control of an operator and that are used primarily in connection with a system.

(44) "Reserve requirement" means the amount required to be maintained in a reserve fund securing the payment of a bond as set forth in the commitment agreement which amount shall be the lesser of:

(a) 10% of the principal amount of the bond; or

(b) maximum annual debt service on the bond in the then current or any future fiscal year.

(45) "Revenue" means revenues (gross or net) received by the municipality from or in connection with the operation of the system.

(46) "Revenue bonds" means bonds payable from the net revenues derived from the system.

(47) "Revolving fund" means the drinking water state revolving fund established by 75-6-211, MCA.

(48) "Security agreements" means agreements entered into by borrowers to provide additional security for loans, including letters of credit and mortgage, personal or corporate guarantee pledge agreements.

(49) "Special assessments" means assessments imposed on a property benefitted from the construction or operation of a project in accordance with Title 7, Chapter 7, Parts 21, 41 and 42, MCA.

(50) "Special improvement district bonds" means bonds payable from special assessments.

(51) "State allocation account" means the account in which state monies received through the sale of the state's bonds are deposited.

(52) "State bonds" means the state's general obligation drinking water revolving fund program bonds.

(53) "State revolving fund" means the drinking water revolving fund.

(54) "System" means the public water system and all extensions, improvements, and betterments thereof.

(55) "Tax-backed revenue bonds" means bonds issued by county water and sewer districts pursuant to 7-13-2324 and 7-13-2302, MCA.

AUTH: 75-6-205, MCA; IMP: 75-6-202, MCA

RULE III CONSTRUCTION OF RULES (1) Any conflict between this subchapter and the indenture of trust shall be resolved in favor of the indenture of trust.

AUTH: 75-6-205, MCA; IMP: 75-6-205, MCA

RULE IV USE OF THE REVOLVING FUND (1) The program must be administered in accordance with the act and the federal act and these rules. To the extent of any conflict therein, the act and federal act take precedence over the rules.

(2) Money in the revolving fund may be used, subject to limitations and compliance in any fiscal year with the intended use plan, to:

(a) make loans to community water systems and nonprofit noncommunity water systems as provided in these rules;

(b) buy or refinance the debt obligation of a municipality at an interest rate that does not exceed market rates, provided that the obligations were incurred and construction of the project began after July 1, 1993;

(c) leverage the total amount of revolving funds available by providing a source of revenue or security for the payment of principal and interest on revenue or general obligation bonds issued by the state, the net proceeds of which are deposited in the revolving fund;

(d) pay reasonable administrative costs of the program, not to exceed 4% of the annual capitalization grant or the maximum amount allowed under the federal act;

(e) if matched by an equal amount of state funds, pay the department's costs in an amount not to exceed 10% of the annual capitalization grant for the following:

(i) public water system supervision programs;

(ii) administering or providing technical assistance through source water protection programs;

(iii) developing and implementing a capacity development strategy under section 300g-9 of the federal act; and

(iv) administering an operator certification program in order to meet the requirements of section 300g-8 of the federal act;

(f) pay the costs in an amount not to exceed 2% of the annual capitalization grant for the purpose of providing technical assistance to public water systems serving 10,000 or fewer persons. No less than 1.5% of the annual capitalization grant must be contracted by the department to private organizations or individuals for the purposes of this subsection; and

(g) reimburse the expenses, as provided for in 2-18-501 through 2-18-503 and 5-2-302, MCA, of the advisory committee while on official committee business.

(3) Except as provided in (4), money in the fund may not be used for:

(a) expenditures related to monitoring, operation, and maintenance;

(b) the acquisition of real property or any interest in real property, unless the acquisition is integral to a project authorized under this rule and the purchase is from a willing seller;

(c) providing assistance to a public water system that:

(i) does not have the financial, managerial, and technical capability as determined by the department and the department of environmental quality to ensure compliance with the requirements of the federal act; or

(ii) is in significant noncompliance with any requirement of a national primary drinking water regulation or variance; or

(d) any other activity prohibited from funding under the federal act.

(4) A public water system described in (3)(c) may receive assistance under this part if:

(a) the use of the assistance will ensure compliance; and

(b) for a system that the department has determined does not have the financial, managerial, or technical capability to ensure compliance with the federal act, the owner or operator of the system agrees to undertake feasible and appropriate changes in operations, including ownership, management, accounting, rates, maintenance, consolidation, alternative water supply, or other procedures, as determined necessary by the department and the department of environmental quality to ensure compliance.

(5) Prior to providing assistance to a public water system that is in significant noncompliance with any requirement of a national primary drinking water regulation or variance pursuant to the federal act, the department shall determine whether the provisions of (3)(c)(i) apply to the system.

AUTH: 75-6-205, MCA; IMP: 75-6-212, MCA

RULE V ELIGIBILITY FOR GENERAL LOAN AND ASSISTANCE PROGRAMS (1) The department will make loans only to community water systems and nonprofit noncommunity water systems for eligible projects included in the intended use plan according to priorities established therein and adopted in compliance with 75-6-231, MCA, and department of environmental quality rules regarding the intended use plan and only for projects that qualify under the act and the federal act.

AUTH: 75-6-205, MCA; IMP: 75-6-221, MCA

RULE VI APPLICATION (1) The department shall, after consultation with the department of environmental quality, establish loan application procedures, including forms for the applications. Each application for a loan must include:

(a) a reasonably detailed description of the project;

(b) a reasonably detailed estimate of the cost of the project;

(c) a timetable for the construction of the project and for payment of the cost of the project;

(d) identification of the source or sources of funds to be used in addition to the proceeds of the loan to pay the cost of the project;

(e) the source or sources of revenue proposed to be used to repay the loan;

(f) a current financial statement of the system showing assets, liabilities, revenues, and expenses;

(g) a statement as to whether, at the time of application, there are any outstanding loans, notes, bonds or other obligations payable from the revenue of the public water system and, if so, a description of the loans, notes, bonds or other obligations;

(h) if the applicant is a private person, a statement as to whether, at the time of the application, there are any outstanding loans, notes, or other obligations of the private person and, if so, a description of the loans, notes, or other obligations;

(i) any information that the department may require in order to determine the effect of making the loan on the tax exempt status of the state's bonds; and

(j) any other information that the department or the department of environmental quality may require to determine the feasibility of a project and the applicant's ability to repay the loan, including but not limited to:

(i) engineering reports;

(ii) economic feasibility studies; and

(iii) legal opinions.

(2) Each application for a loan subsidy must include:

(a) a reasonably detailed description of the project;

(b) a reasonably detailed estimate of the cost of the project;

(c) a timetable for the construction of the project and for payment of the cost of the project;

(d) identification of the source or sources of funds to be used in addition to the proceeds of the grant to pay the cost of the project;

(e) a statement as to whether, at the time of application, there are any outstanding loans, notes, bonds or other obligations payable from the revenue of the public water system and, if so, a description of the loans, notes, bonds or other obligations;

(f) an explanation, including supporting information, as to why a subsidy is requested;

(g) evidence that the applicant qualifies as a disadvantaged municipality; and

(h) any other information that the department or the department of environmental quality may require.

AUTH: 75-6-205, MCA; IMP: 75-6-223, MCA

RULE VII EVALUATION OF PROJECTS AND APPLICATIONS (1) The department and the department of environmental quality shall

evaluate projects and loan applications. In evaluating projects and applications, the following factors must be considered:

(a) the technical design of the project to ensure compliance with all applicable statutes, rules, and design standards;

(b) the financial capability of the applicant;

(c) the financial, managerial, and technical ability of the applicant to properly operate and maintain the project;

(d) the total financing of the project to ensure completion;

(e) the viability of the public water system;

(f) the ability of the public water system to pay the costs of the project without the requested financial assistance;

(g) the total amount of loan funds available for financial assistance in the revolving fund;

(h) the total amount requested by other applications that have been received or that are likely to be received;

(i) the ranking of the project on the priority list in the intended use plan; and

(j) any other criteria that the department determines to be appropriate, considering the purposes of the program and the federal act.

AUTH: 75-6-205, MCA; IMP: 75-6-224, MCA

RULE VIII PROOF OF FINANCIAL, MANAGERIAL OR TECHNICAL CAPABILITY (1) The program may not provide assistance to a public water system that does not have financial, managerial and technical capability to assume compliance with the requirements of the federal act, except as provided herein. For purposes of these rules those terms shall have the following meanings:

(a) "Financial capability" shall mean the financial resources of the water system, including but not limited to the revenue sufficiency, credit worthiness, and fiscal controls.

(b) "Managerial capability" shall mean the management structure of the water system, including but not limited to ownership accountability, staffing and organization.

(c) "Technical capability" shall mean the physical infrastructure of the water system, including but not limited to the source water adequacy, infrastructure adequacy, and technical knowledge based on information provided by the borrower and its own inquiry of system operators.

(2) Each applicant for financial assistance under the program shall complete a capability assessment questionnaire provided by the department of environmental quality, which will elicit from the borrower relevant information that will enable the department and the department of environmental quality to determine the borrower's capabilities. In determining whether the borrower has the relevant capability, the department and department of environmental quality shall

consider, among other things:

(a) Financial capability:

(i) Whether the revenues cover the costs of the system;

(ii) Whether the rates and charges cover the costs by providing water service;

(iii) Whether adequate books and records are maintained; and

(iv) Whether appropriate budgeting, accounting and financial planning methods are used.

(b) Managerial capability:

(i) Whether the system owner(s), operator(s) and manager(s) are clearly identified;

(ii) Whether system owner(s) can be held accountable for the system;

(iii) Whether the system is properly staffed and organized;

(iv) Whether personnel understand the management aspects of regulatory requirements and system operations;

(v) Whether personnel have adequate expertise to manage water system operations;

(vi) Whether personnel have the necessary licenses and certifications;

(vii) Whether the system interacts well with customers, regulators, and other entities; and

(viii) Whether the system is aware of available external resources, such as technical and financial assistance.

(c) Technical capability:

(i) Whether the system has a certified operator;

(ii) Whether the system is operated with technical knowledge of applicable standards;

(iii) Whether personnel are able to implement technical knowledge effectively;

(iv) Whether the operators understand the technical and operational characteristics of the system; and

(v) Whether the system has an effective operation and maintenance program.

AUTH: 75-6-205, MCA; IMP: 75-6-222, MCA

RULE IX FINANCIAL AND OTHER REQUIREMENTS FOR LOANS TO MUNICIPALITIES (1) If a municipality is determined to have financial, technical, and managerial capabilities consistent with these rules and rules adopted by the department of environmental quality, the following types of bonds will be accepted by the department as evidence of and security for a loan under the program if Montana law authorizes the municipality to issue such bonds to finance the project and the department determines the municipality has the ability to repay the loan. Notwithstanding compliance with the provisions of state law, the department may determine that it will not approve the loan if it determines that the loan is not likely to be repaid in accordance with its terms or in the alternative it may impose additional security requirements

that in its judgment it considers necessary.

AUTH: 75-6-205, MCA; IMP: 75-6-222, MCA

RULE X GENERAL OBLIGATION BONDS (1) The department may accept general obligation bonds issued by a municipality, upon the following terms:

(a) the bond will not cause the municipality to exceed its statutory indebtedness limitation;

(b) all statutory requirements for the issuance of such bonds shall have been met prior to the issuance of the bonds; and

(c) the election authorizing the issuance of the bonds has been conducted by the date of a binding commitment unless such requirement is waived by the department.

(2) The department may accept general obligation bonds issued by county water and sewer districts upon the following terms:

(a) all statutory requirements for the issuance of such bonds shall have been met prior to the issuance of the bonds;

(b) the election authorizing the issuance of the bonds has been conducted by the date of a binding commitment unless such requirement is waived by the department.

AUTH: 75-6-205, MCA; IMP: 75-6-222, MCA

RULE XI REVENUE BONDS (1) The department may accept revenue bonds issued by a municipality in accordance with the provisions of Title 7, Chapter 7, Part 44, or Title 7, Chapter 13, Part 2, MCA, or other applicable statutory provisions, subject to the following terms and conditions:

(a) the bonds must be payable from the revenues of the system on a parity with any outstanding revenue bonds payable from the system. The bond must be secured by a pledge of the net revenues of the system. If bonds are currently outstanding payable from the gross revenues of the system, a gross revenue pledge will be acceptable provided the requirements of (1)(b) through (d) are met.

(b) the payment of principal and interest on the revenue bonds must be secured by a reserve account equal to reserve requirement, such requirement to be met upon the issuance of the bonds;

(c) the municipality shall covenant to collect and maintain rates, charges, and rentals such that the revenue for each fiscal year the bonds are outstanding will be at least sufficient to pay the current expenses of operation and maintenance of the system, to maintain the operating reserve, and to produce net revenues during each fiscal year not less than 125% of the maximum amount of principal and interest due on all outstanding bonds payable from the revenues of the system in any future fiscal year;

(d) the municipality shall agree not to incur any additional debt payable from the revenues of the system,

unless the net revenues of the system for the last complete fiscal year preceding the issuance of such additional bonds have equaled at least 125% of the maximum amount of principal and interest payable from the revenue bond account in any subsequent fiscal year during the term of the then outstanding bonds and the additional bonds proposed to be issued. For the purpose of the foregoing computation, the net revenues must be those shown by the financial reports caused to be prepared by the municipality, except that if the rates and charges for service provided by the system have been changed since the beginning of the preceding fiscal year, then the rates and charges in effect at the time of issuance of the additional bonds must be applied to the quantities of service actually rendered and made available during such preceding fiscal year to ascertain the gross revenues, from which there shall be deducted, to determine the net revenues, the actual operation and maintenance cost plus any additional annual costs of operation and maintenance which the engineer for the municipality estimates will be incurred because of the improvement or extension of the system to be constructed from the proceeds of the additional bonds proposed to be issued. In no event may any such additional bonds be issued and made payable from the revenue bond account if there then exists any deficiency in the balances required to be maintained in any of the accounts of the fund or if the municipality is in default in any of the other provisions;

(e) applications indicating the loan will be evidenced by the issuance of a revenue bond must be accompanied by:

(i) audited financial statements of the system for the last two completed fiscal years;

(ii) a certificate as to the municipality's current population and number of system users, a schedule of the 10 largest users of the system showing the percentage of total revenues provided by such user and the amount of outstanding system debt;

(iii) a description of the existing and proposed facilities constituting the system, including a discussion of the additional capital needs for the system over the next three-year period;

(iv) a copy of the ordinance or resolution establishing and describing the system of rates and charges for the use or availability of the system;

(v) a pro forma showing revenues of the system in an amount sufficient to meet the requirements of these rules and any outstanding obligations payable from the system;

(vi) if the pro forma indicates an increase in rates and charges to meet the requirements of these rules, a copy of the proposed rates and charge resolution and a proposed schedule for the adoption of the charges and if subject to review or approval by another entity, the schedule for the rate approval; and

(vii) any other information deemed necessary by the department to assess the feasibility of the project and the financial security of the bonds.

(A) notwithstanding the fact that the municipal revenue bond act does not require that the issuance of revenue bonds be approved by the voters, the department may require the municipality to conduct an election to evidence community support and acceptance of the project or require the bonds be authorized by the electors and issued as general obligation bonds in accordance with 7-7-4202, MCA. A municipality shall conduct an election to evidence community support and acceptance of the project when in the opinion of the department there are projected large rate increases due to the improved facility or the facility is a projected high-cost facility.

(2) Tax-backed revenue bonds issued by county water and sewer districts created pursuant to Title 7, Chapter 13, Parts 22 and 23, MCA, will be accepted as evidence of the loan, subject to the following terms and conditions:

(a) the issuance of the bonds must be authorized by the electors of the district as provided in 7-13-2321 through 7-13-2328, MCA;

(b) the election authorizing the incurrence of the debt shall be conducted by the date of the binding commitment, unless such requirement is waived by the department;

(c) the district shall covenant that it will cause taxes to be levied to meet the district's obligation on any bond issued to the department in the event that the revenues of the system are inadequate therefore in accordance with the provisions of 7-13-2302 through 7-13-2310, MCA;

(d) the bonds must be payable from the revenues of the system on a parity with any outstanding revenue bonds payable from the system;

(e) the district shall covenant to collect and maintain rates, charges, and rentals such that the revenue for each fiscal year the bonds are outstanding will be at least sufficient to pay the current expenses of operation and maintenance of the system, to maintain the operating reserve and to produce net revenues during each fiscal year not less than 110% of the maximum amount of principal and interest due on all outstanding bonds payable from the revenues of the system in any future fiscal year;

(f) the payment of principal and interest on the bonds must be secured by a reserve account equal to the reserve requirement, such requirement to be proportionately funded from each periodic draw so that the requirement is fully satisfied upon the final draw;

(g) the district shall agree not to incur any additional debt payable from the revenues of the system without the written consent of the department, unless the net revenues of the system for the last complete fiscal year preceding the issuance of such additional bonds have equaled at least 110% of the maximum amount of principal and interest payable from the revenue bond account in any subsequent fiscal year during the term of the then outstanding bonds and the additional bonds proposed to be issued. For the purpose of the foregoing computation, the net revenues must be those shown by the

financial reports caused to be prepared by the district, except that if the rates and charges for services provided by the system have been changed since the beginning of the preceding fiscal year, then the rates and charges in effect at the time of issuance of the additional bonds must be applied to the quantities of service actually rendered and made available during such preceding fiscal year to ascertain the gross revenues, from which there shall be deducted, to determine the net revenues, the actual operation and maintenance cost plus any additional annual costs of operation and maintenance which the engineer for the district estimates will be incurred because of the improvement or extension of the system to be constructed from the proceeds of the additional bonds proposed to be issued. In no event shall any such additional bonds be issued and made payable from the revenue bond account if there then exists any deficiency in the balances required to be maintained in any of the accounts of the fund or if the district is in default in any of the other provisions;

(h) an application by a district must be accompanied by:

(i) financial statements of the system for the last two completed fiscal years if there is an existing system (the department in its discretion may require that at least one year's financial statement be audited);

(ii) a map depicting the boundaries of the district;

(iii) a certificate as to numbers of persons in the district subject to levy described in (v) and the number of wastewater system customers and the amount of outstanding wastewater debt;

(iv) a pro forma showing revenues of the system in an amount sufficient to meet the requirements of these rules and any outstanding obligations payable from the system;

(v) if the pro forma indicates an increase in rates and charges to meet the requirements of these rules, a copy of the proposed rates and charge resolution and a proposed schedule for the adoption of the charges.

AUTH: 75-6-205, MCA; IMP: 75-6-222, MCA

RULE XII SPECIAL IMPROVEMENT DISTRICTS (1) The department may accept as evidence of the loan, bonds issued by a municipality payable from assessments levied upon real property included within a special improvement district and specially benefitted by the project being financed from the proceeds of the loan, upon the following terms and conditions:

(a) the district be created in accordance with the provisions of Title 7, Chapter 12, Part 21 and/or Title 7, Chapter 12, Parts 41 and 42, MCA;

(b) the city or county agrees to maintain a revolving fund as authorized by 7-12-2181 through 7-12-2186 and 7-12-4221 through 7-12-4225, MCA, (respectively, the revolving fund statutes) and covenants to secure the bonds by such revolving fund and agrees to provide funds for the revolving fund by levying such tax or making such loan from the general fund as

authorized by the revolving fund statutes;

(c) five percent of the principal amount of the loan be deposited into the revolving fund and the city or county shall agree to maintain in the revolving fund to the extent allowed by law, an amount not less than 5% of the principal of the bonds secured by the revolving fund. The department may, if the financial risks associated with a proposed district warrant it, as a condition to the purchase of such bond, require the city or county to establish a district reserve fund and fund it from the proceeds of the loan, as permitted by law;

(d) the special improvement district be at least 75% developed. For purposes of this rule, a district will be deemed to be 75% developed if 75% of the lots or assessable area in the district has a habitable residential dwelling thereon that is currently occupied or there is a commercial, professional, manufacturing, industrial, or other non-residential facility thereon;

(e) the total amount of special assessment debt including the amounts to be assessed for repayment of the loan against the lots or parcels of land in the district does not exceed 50% of the fair market value of such lots or parcels within the district; and

(f) if the project to be financed from the loan secured by a special assessment bond is not part of a system currently existing and operated by the municipality receiving the loan and for the normal maintenance and operation of which the municipality is responsible and provides for such through rates and charges, a special maintenance district must be created at the time the improvement district is created pursuant to the applicable statutes in order to provide for the operation and maintenance of the project or an agreement must have been entered into at the time the loan is made between the municipality and another governmental entity, pursuant to which the governmental entity agrees to operate and maintain the project.

AUTH: 75-6-205, MCA; IMP: 75-6-222, MCA

RULE XIII LOANS TO DISADVANTAGED MUNICIPALITIES

(1) The department may provide additional subsidies to disadvantaged municipalities in the form of interest rates below that set for other borrowers under the program. A municipality is considered economically disadvantaged when its combined monthly water and wastewater system rates are greater than or equal to 2.2% of the municipality's Median Household Income (MHI), as defined by United States Bureau of Census. If the municipality has only a water system, the percentage is 1.4% of the municipality's MHI. If a municipality is determined to be a disadvantaged municipality, the department will waive the loan loss surcharge which will result in a lower annual rate on interest on the loan. The amount of subsidies available to disadvantaged municipalities is set annually in the intended use plan. The awarding of subsidies

to disadvantaged municipalities will be allocated on a first come, first served basis. The value of subsidies provided for disadvantaged municipalities during a federal fiscal year may not exceed 20% of the annual capitalization grant for that year.

(2) The department may allow a disadvantaged municipality to repay its loan over a term not to exceed 30 years, rather than 20 years, provided that the term of the loan does not exceed the expected design life of the project being financed.

AUTH: 75-6-205, MCA; IMP: 75-6-224, 75-6-226, MCA

RULE XIV OTHER TYPES OF BONDS OR ADDITIONAL SECURITY OR COVENANTS FOR MUNICIPALITIES (1) If a municipality wishes to secure a loan by a type of bond not specifically authorized in these rules, the department may accept the bond if the bond is duly authorized and issued in accordance with Montana law as evidenced by an opinion of bond counsel to that effect and the Department determines that the terms and conditions of the bond, including the security therefore, are adequate. The Department may impose upon the municipality wishing to issue such bonds such terms, conditions, and covenants consistent with the provisions of the law authorizing the issuance of such bonds that it deems necessary to make the bonds creditworthy and thus protect the viability of the program.

AUTH: 75-6-205, MCA; IMP: 75-6-212, 75-6-223, MCA

RULE XV FINANCIAL AND OTHER REQUIREMENTS FOR LOANS TO PRIVATE PERSONS (1) It is anticipated that private persons or entities eligible for financing under the program may differ substantially in organizational structure, capitalization, creditworthiness, type and availability of security or collateral for the loan, and the numbers of users of the system. The department has determined it is not feasible to establish by rule specific underwriting criteria applicable to each type of loan to a private party. In general, for a loan to a private person or entity, the department shall determine, based on representations of the borrower and other information available to it, that adequate revenues exist, or are reasonably expected to be produced, to pay the principal of and interest on the loan when due, and that the borrower will provide, or cause to be provided, to the department security or other collateral providing reasonable assurance of payment in the event of a default.

(2) The department is authorized to request and review any financial information of the borrower or third parties who may provide collateral or additional security that the Department may deem necessary and appropriate to make the determination required under (1).

(3) The department may require such security or collateral for a loan to a private person or entity as it may determine necessary and appropriate in the circumstances,

taking into account, among other things, the nature of the borrower, the principal amount of the loan and the project being financed, including, but not limited to:

(a) a mortgage on the facilities being financed;

(b) a mortgage on other property of the borrower or a third party;

(c) an assignment of revenues or accounts receivable;

(d) personal, corporate or other guarantees;

(e) letters or lines of credit;

(f) certificates of deposit; and

(g) assignments or pledges of stock or other securities.

(4) The department may as a condition of the loan impose financial covenants on the borrower, including, for example, a limit on the ability of the borrower to incur additional indebtedness, and any covenants necessary to obtain, if feasible, or maintain the tax exempt status of the state bonds sold to finance the loan.

AUTH: 75-6-205, MCA; IMP: 75-6-222, MCA

RULE XVI COVENANTS REGARDING FACILITIES FINANCED BY LOANS

(1) Specific requirements and covenants with respect to the system or improvements to the system being financed from the proceeds of the loan must be contained in the bond resolution or loan agreement, forms of which are available from the department, and may include the requirements and covenants set forth herein. The bond resolution or loan agreement should be consulted for more specific detail as to each of these covenants.

(2) The borrower must meet the requirements listed in the federal act for projects providing legal assurance that all necessary property titles, easements, and rights-of-way have been obtained to construct, operate, and maintain the project.

(3) The borrower must submit an engineering report complying with plan and specification requirements for public water systems established by the board.

(4) The borrower must acquire:

(a) all property rights necessary for the project including rights-of-way and interest in land needed for the construction, operation, and maintenance of the facility;

(b) furnish title insurance, a title opinion, or other documents showing the ownership of the land, mortgages, encumbrances, or other lien defects; and

(c) obtain and record the releases, consents, or subordinations to the property rights for holders of outstanding liens or other instruments as necessary for the construction, operation, and maintenance of the project.

(5) The borrower shall agree to operate and maintain the project properly over its structural and material design life, which may not be less than the term of the loan.

(6) The borrower at all times shall acquire and maintain with respect to the system property and casualty insurance and liability insurance with financially sound and reputable

insurers, or self-insurance as authorized by state law, against such risks and in such amounts, and with such deductible provisions, as are customary in the state in the case of entities of the same size and type as the borrower and similarly situated and shall carry and maintain, or cause to be carried and maintained, and pay or cause to be paid timely the premiums for all such insurance. All such insurance policies shall name the department as an additional insured. Each policy must provide that it cannot be canceled by the insurer without giving the borrower and the department 30 days' prior written notice. The borrower shall give the department prompt notice of each insurance policy it obtains or maintains to comply with this rule and of each renewal, replacement, change in coverage or deductible under or amount of or cancellation of each such insurance policy and the amount and coverage and deductibles and carrier of each new or replacement policy. The notice shall specifically note any adverse change as being an adverse change.

(7) The department, the department of environmental quality, and the EPA and their designated agents have the right at all reasonable times during normal business hours and upon reasonable notice to enter into and upon the property of the borrower for the purpose of inspecting the system or any or all books and records of the borrower relating to the system.

(8) The borrower that is a municipality agrees that it will comply with the provisions of the Montana Single Audit Act, Title 2, Chapter 7, Part 5, MCA, and to the extent not required by the single audit act to also provide for each fiscal year to the department and the department of environmental quality, promptly when available:

(a) the preliminary budget for the system, with items for the project shown separately; and

(b) when adopted, the final budget for the system, with items for the project shown separately.

(9) The borrower shall maintain proper and adequate books of record and accounts to be kept showing complete and correct entries of all receipts, disbursements, and other transactions relating to the system, the monthly gross revenues derived from its operation, and the segregation and application of the gross revenues in accordance with this resolution, in such reasonable detail as may be determined by the borrower in accordance with generally accepted governmental accounting practice and principles. It will maintain the books on the basis of the same fiscal year as that utilized by the borrower. The borrower shall, within 120 days after the close of each fiscal year, cause to be prepared and supply to the department a financial report with respect to the system for such fiscal year. The report must be prepared at the direction of the financial officer of the borrower in accordance with applicable generally accepted accounting principles and, in addition to whatever matters may be thought proper by the financial officer to be included therein, must include the following:

(a) a statement in detail of the income and expenditures of the system for the fiscal year, identifying capital expenditures and separating them from operating expenditures;

(b) a balance sheet as of the end of the fiscal year;

(c) the number of premises connected to the system at the end of the fiscal year;

(d) the amount on hand in each account of the fund at the end of the fiscal year; and

(e) a list of the insurance policies and fidelity bonds in force at the end of the fiscal year, setting out as to each the amount thereof, the risks covered thereby, the name of the insurer or surety and the expiration date of the policy or bond.

(10) The borrower shall covenant to take all necessary and legal action to collect such rates and charges, including terminating service, imposing reconnection fees and placing delinquent charges as a lien against the property and enforcing such lien to the extent permitted by law. The borrower must, if rates are regulated by the public service commission, notify the department of any proceedings before the public service commission regarding rates.

(11) The borrower shall also have prepared and supplied to the department and the department of environmental quality, within 120 days of the close of every other fiscal year, an audit report prepared by an independent certified public accountant or an agency of the state, if the borrower is a municipality, in accordance with generally accepted governmental accounting principles and practice with respect to the financial statements and records of the system. The audit report shall include an analysis of the borrower's compliance with the provisions of the bond resolution or loan agreement.

(12) The borrower shall agree to comply with all conditions and requirements of the federal act pertaining to the loan and the project.

(13) The borrower shall agree not to sell, transfer, lease, or otherwise encumber the system, any portion of the system, or interest in the system without the prior written consent of the department while the bond resolution or loan agreement is in effect.

(14) The borrower shall agree to secure written approval from the department for any changes or modifications in the project before or during construction as set forth in the bond resolution or loan agreement.

AUTH: 75-6-205, MCA; IMP: 75-6-224, MCA

RULE XVII FEES (1) The following fees and charges are established and imposed for participation in the revolving fund program.

(a) If an environmental impact statement is required pursuant to the Montana Environmental Policy Act and the department or the department of environmental quality rules, the applicant shall bear the cost of the environmental impact

statement.

(b) An administrative fee up to 1% of the amount of the committed amount of the loan must be charged each borrower. The department shall retain the administrative fee from the proceeds of the loan at the time of closing and transfer the fee to the state revolving fund administration account as provided in the indenture of trust. The department and department of environmental quality may determine, establish and revise from time to time, the precise amount of the administrative fee to be charged, based on the projected costs of administering the Program and other revenues available to pay such costs.

(c) Each borrower shall be charged an administrative expense surcharge on its loan equal to .75% per annum on the outstanding principal amount of the loan, payable on the same dates that payment of principal and interest on the loan are due. The department and department of environmental quality may determine and establish from time to time, the precise amount of the administrative expense surcharge to be charged, based on the projected costs of administering the program and other revenues available to pay such costs. The administration expense surcharge must be deposited in the special administrative costs account as provided in the indenture of trust.

(d) Each borrower shall be charged an origination fee up to 1% of the amount of the commitment loan that must be charged to each borrower. Each borrower's origination fee shall be paid at closing by the retention by the department of such amount from the proceeds of the loans. The department and department of environmental quality may determine, establish and revise from time to time, the precise amount of the administrative fee to be charged, based on the projected costs of administering the program and other revenues available to pay such costs.

(e) All borrowers unless meeting the requirements of a disadvantaged municipality and awarded a subsidy by the department shall pay a loan loss reserve surcharge equal to 1% per annum on the outstanding principal amount of the loan, payable on the same dates that payments of principal and interest are paid. The loan loss surcharge must be deposited in the loan loss reserve account established in the indenture of trust until the loan loss reserve requirement as defined in the Indenture is satisfied at which point it can be deposited in the state allocation account or to such other fund or account in the state treasury authorized by state law as a department of environmental quality or department representative shall designate, or segregated in a separate subaccount in the loan loss reserve account and applied to any costs of activities under the program authorized by state law as a department of environmental quality or department representative shall designate. The department and department of environmental quality may determine and establish from time to time, the precise amount of the loan loss reserve surcharge to be charged, based on the loan loss reserve requirement and

the amounts in the match account. The borrower shall repay the following items: the loan at an interest rate determined in accordance with ARM 36.24.110, plus the loan loss reserve surcharge plus the administrative expense surcharge. The borrower shall propose rates and charges for all water services necessary to repay the above items.

AUTH: 75-6-205, MCA; IMP: 75-6-224, MCA

RULE XVIII EVALUATION OF FINANCIAL MATTERS AND COMMITMENT AGREEMENT (1) Before the commitment agreement is executed, the department shall conduct a review of the applicant's financial status and determine based on the information available whether the borrower will be able to repay the loan. This review must include an analysis of all assets and liabilities as well as an analysis of the system's financial capability and may include but not be limited to: condition of the system, number of current and potential users, existing and proposed user fees for system, existing and proposed user fees for other utilities in the jurisdiction, overlapping indebtedness within the jurisdiction and any other financial or demographic condition relevant to the applicant's ability to repay the loan, or any additional security to be provided. If on the review of such material, the department determines that the loan cannot be repaid in accordance with its terms, the application must be denied.

(2) Upon approval of the application, if the borrower is a municipality, the department may require the municipality, upon approval by its governing body, to enter into a commitment agreement in the form provided by the department with the department, pursuant to which the municipality agrees to adopt the bond resolution and issue the bond described therein, and to pay its origination fee in the event the municipality elects not to issue its bond.

(3) Upon approval of the application, if the borrower is a private person, the department may require the private person, upon approval by the appropriate person or entity, to enter into a commitment agreement in the form provided by the Department with the department, pursuant to which the private person agrees to adopt the loan agreement and issue the bond described therein, and to pay its origination fee in the event the private person elects not to issue its bond.

AUTH: 75-6-205, MCA; IMP: 75-6-224, MCA

RULE XIX REQUIREMENTS FOR DISBURSING OF LOAN (1) Loans will be disbursed by warrants drawn by the department of administration or wire transfers authorized by the state treasurer in accordance with the provisions of this rule, and the indenture of trust. No disbursement of any loan shall be made unless the department has received from the borrower, the following:

(a) a duly approved and executed bond resolution in a

form acceptable to the department;

(b) a duly executed bond or promissory note in a principal amount equal to the amount of the loan in a form acceptable to the department;

(c) a certificate of the borrower that there is no litigation threatened or pending challenging the borrower's authority to undertake the project, to incur the loan, or issue the bonds, collect the system charges in a form acceptable to the department or to pledge its revenues or assets to the repayment of the loan or bonds;

(d) in the case of a borrower that is a municipality, an opinion of bond counsel acceptable to the department that the bond is a valid and binding obligation of the municipality payable in accordance with its terms and that the interest in a form acceptable to the department thereon is exempt from state and federal income taxation in a form acceptable to the department;

(e) in the case of a borrower who is a private person, an opinion of bond counsel to the department that the note and loan agreement are valid and binding obligations of the private party payable in accordance with its terms and that the making of the loan will not cause any bonds issued as tax-exempt bonds by the state to finance the program to become taxable;

(f) such other closing certificates or documents that the department or bond counsel may require to satisfy requirements of these rules;

(g) if all or part of a loan is being made to refinance a project or reimburse the borrower for the costs of a project paid prior to the closing, evidence satisfactory to the department and the bond counsel:

(i) that the acquisition or construction of the project was begun no earlier than March 7, 1985;

(ii) of the borrower's title to the project;

(iii) of the costs of such project and that such costs have been paid by the borrower; and

(iv) if such costs were paid in a previous fiscal year of the borrower, that the borrower intended at the time it incurred such costs to finance them with tax-exempt debt or a loan under a state revolving fund program such as the program.

(h) any certificate of insurance as evidencing insurance coverage as required by these rules and the bond resolution;

(i) a certified copy of the rate and charge ordinance, if applicable, and if subject to approval by another entity, evidence that such approval has been obtained;

(j) all permits or licenses that may be required by the state, any of its agencies and political subdivisions with respect to the project;

(k) executed copy of the construction contract accompanied by the appropriate performance and payment bonds;

(l) any additional documents required by the department or department of environmental quality as a condition to the approval of the loan described in the bond purchase agreement;

(m) a written order signed by a department of

environmental quality representative authorizing a disbursement;

(n) a copy of the municipality's request for such disbursement on the form prescribed by the department; and

(o) payment of the origination fee.

AUTH: 75-6-205, MCA; IMP: 75-6-224, MCA

RULE XX TERMS OF LOAN AND BONDS (1) The source of funding of the loans under this program initially will be 83.33% from the EPA and 16.67% from the proceeds of the state's bonds. The interest rate on the loan will be determined by the department at the time the loan is made. The rate on a loan must be such that the interest payments thereon and on other loans funded from the proceeds of the state's bonds will be sufficient, if paid timely and in full, with other available funds in the revolving fund including investment income, from which the loan was funded to pay the principal of and interest on the state's bonds issued by the state.

(2) The rate of interest on loans from the program will vary in accordance with the rate on the state's bonds from which the loan is made. The rate of interest on all loans financed from the proceeds of a specific issue of bonds will be the same. The net interest cost on any loan may not exceed the net interest cost to the state on the state bonds from which such loan was made.

(3) Unless the department otherwise agrees, each loan shall be payable, including principal and interest thereon and the administrative expense surcharge and loan loss reserve surcharge, if any, over a term approved by the Department, not to exceed 20 years. In no case shall the term of a loan exceed the useful life of the project being financed. Interest, administrative expense surcharge and loan loss reserve surcharge, if any, payments on each disbursement of each loan or portion thereof which is not a construction loan shall begin no later than 15 days prior to the next interest payment date (unless the loan is closed within 15 days of the next interest payment date, in which case the first payment date shall be no later than 45 days prior to the next following interest payment date). For construction loans, the department may permit principal amortization to be delayed until as late as one year after completion of the project, provided that the payment of interest on each disbursement of a construction loan shall begin no later than 45 days prior to the next interest payment date (unless the loan is closed within 15 days of the next interest payment date, in which case the first payment date shall be no later than 15 days prior to the next following interest payment date) unless the state has provided for the payment of interest on its bonds by capitalizing interest. In any event, the payment of interest must commence no later than the payment of principal.

(4) The department may also permit the borrower of a

construction loan not to pay administrative expense surcharge and loan loss reserve surcharge, if any, on such construction loan until up to five months after the completion of construction of the project, but such administrative expense surcharge and loan loss reserve surcharge, if any, shall nonetheless accrue and shall be payable not later than the fifth month following completion of construction. Notwithstanding the previous sentence, the borrower shall pay all interest, administrative expense surcharge and loan loss reserve surcharge, if any, accrued on any construction loan disbursement no later than the twenty-fourth month after such disbursement is made and must thereafter make regular payments of interest, administrative expense surcharge and loan loss reserve surcharge, if any, on such disbursement.

AUTH: 75-6-205, MCA; IMP: 75-6-224, MCA

3. The proposed new rules implement the Drinking Water State Revolving Fund Act. The adoption of new rules I through XX is reasonably necessary to implement the legislative directive pertaining to the use of the drinking water state revolving fund; the making of loans to community water systems and nonprofit noncommunity water systems; the evaluation of projects and loan applications; the establishment of eligibility criteria; the establishment of application, procedures, criteria, fees and forms; the establishment of terms and conditions for the making and disbursement of loans and the security instruments and other necessary agreements; the establishment of the terms for loans and bonds; and establishing affordability criteria to be used in awarding subsidies to disadvantaged communities.

4. Interested parties may submit their data, views or arguments concerning the proposed adoption in writing to Anna Miller, Conservation and Resource Development Division, Department of Natural Resources and Conservation, 1625 Eleventh Avenue, Helena, MT 59620-1601. Any comments must be received no later than May 14, 1998.

5. If a person who is directly affected by the proposed adoption wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to Anna Miller, Conservation and Resource Development Division, Department of Natural Resources and Conservation, 1625 Eleventh Avenue, Helena, MT 59620-1601. A written request for hearing must be received no later than May 14, 1998.

6. If the agency receives requests for a public hearing on the proposed adoption from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed 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 more than 25 persons based on the number of communities in the State of Montana receiving community loans.

7. The Department of Natural Resources and Conservation maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list have a right to be placed on the Department's list. A person must make a written request which includes the name and mailing address of the person to receive notices and specifies whether the person wishes to receive notices of administrative rules regarding conservation districts and resource development, forestry, oil and gas conservation, trust land management, water resources or combination thereof. Such written request may be mailed or delivered to the Department of Natural Resources and Conservation, 1625 Eleventh Avenue, P.O. Box 201601, Helena, MT 59620-1601, faxed to the office at (406) 444-2684, or may be made by completing a request form at any rules hearing held by the Department of Natural Resources and Conservation.

8. In accordance with House Bill 199, the department has provided written notice to the sponsors of the Drinking Water State Revolving Fund Act, Title 75, Chapter 6, Part 2.

Department of Natural Resources and Conservation

for Randy Mosley, Acting
Arthur R. Clinch, Director

Donald D. MacIntyre
Donald D. MacIntyre, Rule Reviewer

Certified to the Secretary of State April 6, 1998.

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES OF THE
STATE OF MONTANA

In the matter of the proposed adoption of rules I through VIII, amendment of rules 46.12.4810 and 46.12.5007 and repeal of rules 46.12.1601, 46.12.1603, 46.12.1605, 46.12.1607, 46.12.1701, 46.12.1703, 46.12.1705 and 46.12.1707 pertaining to rural health clinics and federally qualified health centers	)))))))))))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION, AMENDMENT AND REPEAL OF RULES

TO: All Interested Persons

1. On May 6, 1998, at 1:30 p.m., a public hearing will be held in the auditorium of the Department of Public Health and Human Services Building, 111 N. Sanders, Helena, Montana to consider the proposed adoption of rules I through VIII, amendment of rules 46.12.4810 and 46.12.5007 and repeal of rules 46.12.1601, 46.12.1603, 46.12.1605, 46.12.1607, 46.12.1701, 46.12.1703, 46.12.1705 and 46.12.1707 pertaining to rural health clinics and federally qualified health centers.

The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you request an accommodation, contact the department no later than 5:00 p.m. on April 27, 1998, to advise us of the nature of the accommodation that you need. Please contact Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210; telephone (406)444-5622; FAX (406)444-1970.

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

[RULE I] RURAL HEALTH CLINICS AND FEDERALLY QUALIFIED HEALTH CENTERS, DEFINITIONS In [Rules I through VIII] the following definitions apply:

(1) "Crossover claim" means a claim for services provided to medicare/medicaid dual eligibles or qualified medicare beneficiaries.

(2) "Federally qualified health center (FQHC)" means an entity which is a federally-qualified health center as defined in 42 USC 1396d(l)(2)(B) (1995 Supp.). For purposes of defining "federally qualified health center" the department hereby adopts

and incorporates herein by reference 42 USC 1396d(1)(2)(B) (1995 Supp.), which is a federal statute defining "federally qualified health center" for purposes of the medicaid program. A copy of the cited statute is available upon request from the Department of Public Health and Human Services, Health Policy and Services Division, 1400 Broadway, P.O. Box 202951, Helena, Montana 59620-2951.

(3) "FQHC" means federally qualified health center.

(4) "FQHC core services" means the FQHC ambulatory services defined in 42 USC 1396d(1)(2)(A) and described in 42 USC 1395x(aa)(1). For purposes of defining and describing FQHC core services, the department hereby adopts and incorporates herein by reference 42 USC 1396d(1)(2)(A) and 42 1395x(aa)(1) (1995 Supp.). The cited statutes are federal medicaid and medicare statutes defining certain FQHC services for purposes of the medicaid and medicare programs. Copies of the cited statutes are available upon request from the Department of Public Health and Human Services, Health Policy and Services Division, 1400 Broadway, P.O. Box 202951, Helena, Montana 59620-2951.

(5) "FQHC other ambulatory services" means ambulatory FQHC services, other than FQHC core services, that would be covered under the Montana medicaid program if provided by an individual or entity other than an FQHC in accordance with applicable medicaid requirements.

(6) "FQHC services" means FQHC core services and FQHC other ambulatory services.

(7) "Independent entity" means a rural health clinic or an FQHC that is not a provider-based entity.

(8) "Provider" means the entity enrolled in the Montana medicaid program as a provider of RHC or FQHC services.

(9) "Provider-based entity" means an FQHC or RHC that is an integral and subordinate part of a hospital, skilled nursing facility, or home health agency that is participating in the medicare program and that is operated with other departments of the provider under common licensure, governance and professional supervision.

(10) "Reporting period" means a period of 12 consecutive months specified by an RHC or FQHC as the period for which the entity must report its costs and utilization. The reporting period must correspond to the provider's fiscal year. The first and last reporting periods may be less than 12 months.

(11) "RHC" means rural health clinic.

(12) "Rural health clinic (RHC)" means a clinic determined by the secretary of the United States department of health and human services to meet the rural health clinic conditions of certification specified in 42 CFR, part 491, subpart A.

(13) "RHC core services" means the rural health clinic services described in 42 CFR 440.20(b)(1) through (4).

(14) "RHC other ambulatory services" means other ambulatory services furnished by an RHC as described in 42 CFR 440.20(c).

(15) "Rural health clinic (RHC) services" means RHC core services and RHC other ambulatory services.

(16) "Visit" means a face to face encounter between a clinic or center patient and a clinic or center health professional for the purpose of providing RHC or FQHC core or other ambulatory services. Encounters with more than one clinic or center health professional, and multiple encounters with the same clinic or center health professional, that take place on the same day and at a single location constitute a single visit, except when one of the following conditions exist:

(a) after the first encounter, the patient suffers illness or injury requiring additional diagnosis or treatment; or

(b) for FQHCs, the patient has a medical visit and a mental health visit as defined in (i) and (ii) of this subsection.

(i) For purposes of (16)(b), a "medical visit" is a face to face encounter between an FQHC patient and an FQHC health professional for medical services that are not mental health services.

(ii) For purposes of (16)(b), a "mental health visit" is a face to face encounter between an FQHC patient and an FQHC clinical psychologist, clinical social worker or other health professional for mental health services.

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-2-201, 53-6-101, 53-6-111 and 53-6-113, MCA

[RULE II] RURAL HEALTH CLINICS AND FEDERALLY QUALIFIED HEALTH CENTERS, PROVIDER PARTICIPATION REQUIREMENTS (1) The requirements of [Rules I through VIII] are in addition to those contained in rule provisions generally applicable to medicaid providers.

(2) As a condition of participation in the Montana medicaid program, an RHC or FQHC must maintain a current Montana medicaid provider enrollment according to the requirements of ARM 46.12.302.

(3) As a condition of participation in the Montana medicare program, a rural health clinic must be and remain certified by the medicare program under the conditions of certification specified in 42 CFR part 491, subpart A.

(4) As a condition of participation in the Montana medicare program, an FQHC must be a federally qualified health center as defined in 42 USC 1396d(l)(2)(B).

AUTH: Sec. 53-6-113, MCA
IMP: Sec. 53-2-201, 53-6-101, 53-6-111 and 53-6-113, MCA

[RULE III] RURAL HEALTH CLINICS AND FEDERALLY QUALIFIED HEALTH CENTERS, SERVICE REQUIREMENTS (1) The Montana medicare

program will cover and reimburse under the RHC or FQHC services programs only those services that are RHC services or FQHC services as defined in [Rule I] and subject to the provisions of [Rules I through VIII].

(2) The Montana medicare program will not reimburse an RHC or FQHC for RHC or FQHC services that are:

(a) mental health services as defined in ARM 46.20.103, except as provided in [Rule VII]; or

(b) services covered by a health maintenance organization for an enrolled recipient, as provided in ARM Title 46, chapter 12, subchapter 48, except as provided in [Rule VII].

(3) RHC services are covered by Montana medicaid when provided in accordance with these rules to a recipient at the clinic, the recipient's residence or a hospital or other medical facility.

(4) FQHC services are covered by Montana medicaid when provided in accordance with these rules to a recipient in an outpatient setting only, which may include the recipient's place of residence. The recipient's place of residence may include a skilled nursing facility or a nursing facility. FQHC services are not covered by Montana medicaid when provided to a hospital patient.

(5) The Montana medicaid program will cover and reimburse RHC or FQHC services only if the services are provided in accordance with the same requirements that would apply if the service were provided by an individual or entity other than an RHC or an FQHC, except as specifically provided otherwise in [Rules I through VIII]. These requirements include but are not limited to the following:

(a) The health professional providing the RHC or FQHC service must meet the same requirements that would apply if the health professional were to enroll directly in the Montana medicaid program in the category of service to be provided. Such requirements include but are not limited to applicable licensure, certification and registration requirements and applicable restrictions upon the form of entity or category of individual provider that may provide particular services. The health professional is not required to enroll separately as a medicaid provider.

(b) The RHC or FQHC services are subject to any applicable limitations on the amount, scope or duration of services covered by the medicaid program, e.g., scope of practice restrictions under state licensure law, coverage exclusions, e.g., non-coverage of physical therapy maintenance services, limits on the number of hours, visits or other units of service covered in a particular period or on the frequency of services covered, limits on the type of items or services covered within a particular category, medical necessity requirements, including specific medical necessity criteria applicable to a particular item or service, and early and periodic screening, diagnostic and treatment services (EPSDT) program requirements and restrictions.

(c) In addition to general record requirements under ARM 46.12.308, RHCs and FQHCs must comply with any additional particular record or documentation requirements applicable to the particular category or type of service, e.g., requirements for documentation of compliance with supervision and protocol requirements, requirements for written documentation of prescription or referral, requirements for written care plans and prerequisites for receipt of a particular item or service by a particular recipient.

(d) Providers must bill for RHC or FQHC services using the revenue codes specified in the department's RHC/FQHC services provider manual. The department must provide 30 days prior written notice to providers of any changes in revenue codes.

(e) RHCs and FQHCs must comply with requirements for medicare program authorization prior to provision of services or prior to payment, as applicable to the particular category of services being provided.

(f) Reimbursement will be made to RHCs and FQHCs for RHC and FQHC services as provided in [Rules V through VIII], rather than as provided in the rules applicable to the particular category of services. This rule shall not be construed to provide that reimbursement of services provided by health professionals will be made under [Rules V through VIII] when the services are not provided as an RHC or FQHC service and when the health professional is separately enrolled in and providing services under a particular medicaid service category, subject to the rules applicable to the particular service category.

(6) A provider must notify the department at least 30 days in advance of first offering a category of RHC other ambulatory services or FQHC other ambulatory services to medicaid recipients of its intent to do so and must request that the department approve the provider to offer the category of service. A provider may combine more than one category of service in a single approval request.

(a) As a condition of approval, the department may require the provider to submit documentation and information necessary to demonstrate compliance with requirements applicable to the category of service.

(b) Medicaid coverage and reimbursement of other ambulatory services will not be available to a provider unless department approval was granted prior to provision of the services and unless the services comply with all applicable requirements. Department approval will be prospective only.

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-2-201, 53-6-101, 53-6-111 and 53-6-113, MCA

[RULE IV] RURAL HEALTH CLINICS AND FEDERALLY QUALIFIED HEALTH CENTERS, RECORD KEEPING AND REPORTS (1) A provider must meet the record keeping and other requirements of ARM 46.12.308 in addition to the requirements of this rule.

(2) A provider must make and maintain adequate financial and statistical records in accordance with generally accepted accounting principles, as defined by the American Institute of Certified Public Accountants. The provider's records must be sufficient to allow the department and its agents to determine payment for the RHC or FQHC services provided to medicaid recipients and to provide a record that is auditable through the application of generally accepted auditing standards. Such records must be maintained for a period of 6 years, 3 months after a cost report is filed with respect to the period covered by such records or until such cost report is finally settled, whichever is later.

(3) The records described in (2) must be available at the provider facility at all reasonable times and shall be subject to inspection, review and audit by the department or its agents, the United States department of health and human services, the general accounting office, the Montana legislative auditor, and other governmental agencies as authorized by law.

(4) Upon failure or refusal of the provider to make available and allow access to such records, upon failure or refusal to submit a required cost report or upon submission of a cost report that is incomplete or otherwise not in compliance with department rules and instructions, the department may recover in full all payments made to the provider during the reporting period to which such records relate and may suspend any further payments to the provider until such time as the provider fully complies with this rule.

(5) No later than 30 days prior to the beginning of its initial reporting period as a new provider or following a change in ownership:

(a) a provider that is either an independent entity or a provider-based entity other than an RHC in a rural hospital with less than 50 beds must submit to the department or its agent an estimate of budgeted costs and visits for RHC or FQHC services for the reporting period in the form and detail required by the department and such other information as the department may require to establish an interim payment rate; and

(b) a provider that is an RHC in a rural hospital with less than 50 beds, must submit to the department or its agent a copy of the provider's most recent medicare hospital cost report that has been settled by medicare, and such other information as the department may require to establish an interim payment rate.

(6) All providers must submit to the department or its agent in the form and detail required by the department, a cost report within 150 days after the close of the reporting period. Extensions of the due date for filing a cost report may be granted by the department only when a provider's operations are significantly adversely affected due to extraordinary circumstances over which the provider has no control, such as flood or fire.

(7) For all providers other than provider-based RHCs in rural hospitals with less than 50 beds, the cost report must be

in the form prescribed by the department and must contain the following information:

(a) the allowable costs actually incurred in providing RHC or FQHC services for the period and the actual number of visits for RHC or FQHC services provided during the period;

(b) with respect to services provided to medicaid recipients, the amounts of all payments received or due from other payors, including but not limited to medicare and private insurers, with respect to such services; and

(c) any other information or documentation requested by the department and necessary to determine the reimbursement due to a provider under these rules.

(8) Provider-based RHCs in rural hospitals with less than 50 beds must submit a copy of the hospital's settled medicare cost report for each reporting period.

(9) Within 30 days after the end of a provider's reporting period end, the department will mail to the provider the medicaid cost report forms that the provider is required to complete and submit under this rule, along with any related department instructions for completion and submission of the forms. This rule does not require the department to send any medicare hospital cost report or other medicare forms to a provider.

(10) The department may require a provider to submit any additional information and documentation necessary to determine the provider's interim or final reimbursement rate or amount under [Rules I through VIII].

AUTH: Sec. 53-6-113, MCA
IMP: Sec. 53-2-201, 53-6-101, 53-6-111 and 53-6-113, MCA

[RULE V] RURAL HEALTH CLINICS AND FEDERALLY QUALIFIED HEALTH CENTERS, REIMBURSEMENT FOR CERTAIN PROVIDER-BASED RHCS

(1) For RHC services provided to a recipient in accordance with these rules by provider-based RHCs in rural hospitals with less than 50 beds, the Montana medicaid program will reimburse the provider as specified in this rule. This rule does not apply to independent entities or to provider-based entities other than provider-based RHCs in rural hospitals with less than 50 beds.

(a) For purposes of this rule, the number of beds in a hospital for the cost reporting period is determined by counting the number of available bed days during the cost reporting period, not including beds or bassinets in the healthy newborn nursery, custodial care beds, or beds in excluded distinct part hospital units, and dividing that number by the number of days in the cost reporting period.

(b) For purposes of this rule, rural hospitals are those hospitals not located in a metropolitan statistical area.

(2) Provider-based RHCs in rural hospitals with less than 50 beds will be reimbursed the lower of the provider's usual and

customary charges for RHC services or 100% of the reasonable costs of providing rural health clinic services to medicare recipients. The provider's medicaid reimbursement for providing rural health clinic services to medicaid recipients shall be calculated as follows:

(a) Based upon the provider's medicare hospital cost report for the reporting period, a medicare cost to charge ratio shall be calculated separately for each cost center for which charges were made by the provider to and paid by the medicaid RHC services program for services provided during the reporting period. The medicare cost to charge ratio for each such cost center shall be calculated by dividing the total charges for all payers for the cost center by the total reasonable cost for the cost center.

(b) The total medicaid reasonable cost for each cost center shall be calculated by multiplying the provider's total charges in each cost center made by the provider to and paid by the medicaid RHC services program for services provided during the reporting period, by the medicare cost to charge ratio for the cost center, determined as provided in (2)(a).

(c) The total medicaid charges for all cost centers shall be calculated by adding the total charges in each cost center made by the provider and paid by the medicaid RHC services program for services provided during the reporting period.

(d) The total medicaid reasonable cost for all cost centers shall be calculated by adding the total medicaid reasonable cost for each cost center, determined as provided in (2)(b), for each cost center for which charges were made by the provider and paid by the medicaid RHC services program for services provided during the reporting period.

(e) The department will compare the total medicaid charges for all cost centers determined as provided in (2)(c) with the total medicaid reasonable cost for all cost centers determined as provided in (2)(d) to arrive at the lower of the provider's usual and customary charges for RHC services or 100% of the reasonable costs of providing rural health clinic services to medicare recipients, for purposes of (2).

(3) For purposes of this rule, the reasonable costs of providing rural health clinic services to medicaid recipients shall be determined based upon the provider's medicare hospital cost report for the reporting period, subject to desk review or audit, and according to medicare cost reimbursement principles applicable to provider-based RHCs, as specified in 42 USC 1395x(v), as implemented by 42 CFR 405.2462(a) and 2468, 42 CFR Part 413, and the Medicare Provider Reimbursement Manual, HCFA Pub. 15 (referred to as Pub. 15 or HIM-15). The cited authorities are federal statutes, regulations and manuals specifying the methods and rules used to determine reasonable cost for purposes of the medicare program. For purposes of determining the reasonable costs of providing rural health clinic services to medicaid recipients under this rule, the department hereby adopts and incorporates herein by reference 42

USC 1395x(v) (1995 Supp.), as implemented by 42 CFR 405.2462(a) and 2468 (1997), 42 CFR Part 413 (1997), and the Medicare Provider Reimbursement Manual, HCFA Pub. 15 (referred to as Pub. 15 or HIM-15). Copies of the cited authorities may be obtained from the Department of Public Health and Human Services, Health Policy and Services Division, P.O. Box 202951, Helena, Montana 59620-2951.

(a) For purposes of applying the provisions of 42 USC 1395x(v), 42 CFR 405.2462(a) and 2468, 42 CFR Part 413, and the Medicare Provider Reimbursement Manual, HCFA Pub. 15 (referred to as Pub. 15 or HIM-15) as provided in (3), any reference in such authorities to medicare, medicare beneficiary, beneficiary, intermediary or secretary shall be deemed to refer also to medicaid, medicaid recipient, recipient, the department or the department, respectively.

(b) For purposes of this rule, costs and charges include the reasonable costs of and charges for providing RHC services, regardless of payor source.

(c) Charges include the costs of and charges for providing mental health services, as defined in ARM 46.20.103, and the cost of providing services covered by a health maintenance organization for an enrolled recipient as provided in ARM Title 46, chapter 12, subchapter 48.

(4) Reimbursement under (2) will be determined retrospectively based upon the provider's medicare hospital cost report for the corresponding period.

(5) Until the retrospective determination of reimbursement under (2), the Montana medicaid program will reimburse the provider a temporary interim reimbursement which shall be 100% of the provider's usual and customary charges for RHC services charges.

(6) Interim payments made to a provider-based RHC in a rural hospital with less than 50 beds during a reporting period will be subject to reconciliation and settlement as provided in [Rule VIII].

(7) To the extent provided in [Rule VII], if any, the provider may receive supplemental payments to cover the difference between payments received from a managed care organization or health maintenance organization and the amount the provider would otherwise be entitled to receive for the services under this rule.

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-6-101 and 53-6-113, MCA

[RULE VI] RURAL HEALTH CLINICS AND FEDERALLY QUALIFIED HEALTH CENTERS, REIMBURSEMENT FOR OTHER PROVIDER-BASED ENTITIES AND FOR INDEPENDENT ENTITIES (1) Independent entities and provider-based entities, other than RHCs in rural hospitals with

less than 50 beds, will be reimbursed as provided in this rule. This rule does not apply to provider-based RHCs in rural hospitals with less than 50 beds, which shall be reimbursed as provided in [Rule V].

(2) For RHC or FQHC services provided to eligible recipients by independent entities and by provider-based entities, other than RHCs in rural hospitals with less than 50 beds, the department will reimburse a provider an all-inclusive rate per visit for core services and an all-inclusive rate per visit for each category of other ambulatory services, each rate determined retrospectively in accordance with this rule, less the amount of any medicare and other third party payments and less any applicable medicaid copayment amount. Reimbursement for RHC and FQHC services under this rule is subject to all applicable medicaid requirements.

(3) The provider's all-inclusive rate per visit for core services shall be the provider's allowable RHC or FQHC cost per visit for core services for the reporting period, subject to applicable tests of reasonableness, including the applicable medicare RHC or FQHC productivity screening guidelines and medicare RHC or FQHC per-visit payment caps, as provided in (6) and (7).

(a) For purposes of (3), the provider's allowable RHC or FQHC costs for RHC or FQHC core services are the provider's costs actually incurred which are reasonable in amount and necessary and proper to the efficient delivery of RHC or FQHC core services. The allowability of costs shall be determined in accordance with medicare reasonable cost principles as set forth in 42 CFR Part 413 and medicare RHC or FQHC allowable cost principles set forth in 42 CFR 405.2468, and HCFA manual provisions applicable to FQHCs, including the medicare provider reimbursement manual, HCFA Pub. 15 (referred to as Pub. 15 or HIM-15) and HCFA Pub. 27. For purposes of determining the provider's allowable RHC or FQHC costs for RHC or FQHC core services, the department hereby adopts and incorporates by reference 42 CFR Part 413 (1997), 42 CFR 405.2468 (1997), HCFA Pub. 15 and HCFA Pub. 27. The cited authorities are federal statutes, regulations and manuals specifying the methods and rules used to determine reasonable cost for purposes of the medicare program. Copies of the cited regulations and manuals are available upon request from the Health Policy and Services Division, Department of Public Health and Human Services, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

(i) For purposes of applying the provisions of 42 CFR Part 413, 42 CFR 405.2468, HCFA Pub. 15 and HCFA Pub. 27 as provided in (3)(a), any reference in such authorities to medicare, medicare beneficiary, beneficiary, intermediary or secretary shall be deemed to refer also to medicaid, medicaid recipient, recipient, the department or the department, respectively.

(b) The provider's total RHC or FQHC costs for core services in the reporting period shall be divided by the provider's total number of visits for core services in the

reporting period, subject to any applicable productivity screening guidelines as provided in (6), to determine the cost per visit for core services. The provider's cost per visit for core services is subject to the applicable medicare RHC or FQHC per-visit payment cap, as provided in (6) or (7).

(4) The provider's all-inclusive rate per visit for each category of other ambulatory services shall be the provider's allowable RHC or FQHC cost per visit for the category of other ambulatory services for the reporting period.

(a) For purposes of (4), the provider's allowable RHC or FQHC costs for each category of other ambulatory services are the provider's costs actually incurred which are reasonable in amount and necessary and proper to the efficient delivery of the category of RHC or FQHC other ambulatory services. The allowability of costs shall be determined in accordance with medicare reasonable cost principles as set forth in 42 CFR Part 413 and medicare RHC or FQHC allowable cost principles set forth in 42 CFR 405.2468, and HCFA manual provisions applicable to RHCs or FQHCs, including the medicare provider reimbursement manual, HCFA Pub. 15 (referred to as Pub. 15 or HIM-15) and HCFA Pub. 27. For purposes of determining the provider's allowable RHC or FQHC cost per visit for each category of other ambulatory services, the department hereby adopts and incorporates by reference 42 CFR Part 413 (1997), 42 CFR 405.2468 (1997), HCFA Pub. 15 and HCFA Pub. 27. The cited authorities are federal statutes, regulations and manuals specifying the methods and rules used to determine reasonable cost for purposes of the medicare program. Copies of the cited regulations and manuals are available upon request from the Health Policy and Services Division, Department of Public Health and Human Services, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

(i) For purposes of applying the provisions of 42 CFR Part 413, 42 CFR 405.2468, HCFA Pub. 15 and HCFA Pub. 27 as provided in (4)(a), any reference in such authorities to medicare, medicare beneficiary, beneficiary, intermediary or secretary shall be deemed to refer also to medicaid, medicaid recipient, recipient, the department or the department, respectively.

(b) For purposes of determining allowable costs of each category of other ambulatory services, the provider's costs actually incurred which are reasonable in amount and necessary and proper to the efficient delivery of the category of RHC or FQHC other ambulatory services are allowable, notwithstanding the provisions of any medicare statute, regulation or manual adopted by the Montana medicaid program that might otherwise exclude allowability of such costs because the particular category of service is not covered as an RHC or FQHC service by medicare.

(c) The provider's total RHC or FQHC costs for each category of other ambulatory services in the reporting period shall be divided by the provider's total number of visits for the category of other ambulatory services in the reporting

period to determine the cost per visit for other ambulatory services.

(5) For purposes of (3) and (4), allowable RHC or FQHC cost includes only costs of providing RHC or FQHC services. For providers that provide services other than RHC or FQHC services, the department may apply reasonable methods, including but not limited to a cost to charge ratio methodology to allocate the provider's direct and indirect costs between or among RHC or FQHC services and other services.

(a) For purposes of determining a provider's cost per visit under these rules, costs include the all reasonable costs of providing RHC or FQHC services and visits include all RHC or FQHC visits, regardless of payor source.

(b) For purposes of determining a provider's cost per visit under these rules, costs include the costs of providing mental health services, as defined in ARM 46.20.103, and the cost of providing services covered by a health maintenance organization for an enrolled recipient as provided in ARM Title 46, chapter 12, subchapter 48.

(c) For purposes of determining a provider's cost per visit under these rules, visits include visits for mental health services, as defined in ARM 46.20.103, and visits covered by a health maintenance organization for an enrolled recipient as provided in ARM Title 46, chapter 12, subchapter 48.

(6) The provider's allowable cost per visit for RHC and FQHC core services shall be determined using the medicare RHC or FQHC productivity screening guidelines applicable to the provider's reporting period.

(a) The productivity screening guidelines applicable to the provider's reporting period shall be the applicable RHC or FQHC productivity screening guidelines established by the secretary of the United States department of health and human services pursuant to 42 CFR 405.2468(c), as set forth in section 503 of HCFA Pub. 27. For purposes of determining and applying the medicare RHC and FQHC productivity screening guidelines, the department hereby adopts and incorporates by reference 42 CFR 405.2468(c) (1997) and HCFA Pub. 27, section 503. The cited authorities are a federal regulation and manual section pertaining to productivity screening guidelines for RHCs and FQHCs. Copies of the cited regulation and manual are available upon request from the Health Policy and Services Division, Department of Public Health and Human Services, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

(i) For purposes of applying the provisions of 42 CFR 405.2468(c) and HCFA Pub. 27, section 503, as provided in (6)(a), any reference in such authorities to medicare, medicare beneficiary, beneficiary, intermediary or secretary shall be deemed to refer also to medicaid, medicaid recipient, recipient, the department or the department, respectively.

(b) If the provider's staffing levels consist of various combinations of physicians and nurse practitioners or physician assistants, a blended screening approach shall be applied to

calculate the applicable screening guideline.

(c) The productivity screening guidelines shall be adjusted as necessary to reflect the applicable medicare RHC and FQHC productivity guidelines published by the Health Care Financing Administration (HCFA).

(7) The provider's allowable cost per visit for RHC or FQHC core services shall not exceed the applicable medicare RHC or FQHC per-visit payment cap for the provider's reporting period.

(a) The applicable medicare RHC or FQHC per-visit payment caps shall be the applicable RHC or FQHC maximum payment per visit established by the secretary of the United States department of health and human services pursuant to 42 CFR 405.2468(c), as set forth in section 505 of HCFA Pub. 27. For purposes of determining and applying the medicare RHC and FQHC maximum payment per visit, the department hereby adopts and incorporates by reference 42 CFR 405.2468(c) (1997) and HCFA Pub. 27, section 505. The cited authorities are a federal regulation and manual section pertaining to payment limitations for RHCs and FQHCs. Copies of the cited regulation and manual are available upon request from the Health Policy and Services Division, Department of Public Health and Human Services, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

(i) For purposes of applying the provisions of 42 CFR 405.2468(c) and HCFA Pub. 27, section 505, as provided in (7)(a), any reference in such authorities to medicare, medicare beneficiary, beneficiary, intermediary or secretary shall be deemed to refer also to medicaid, medicaid recipient, recipient, the department or the department, respectively.

(b) The per-visit caps shall be adjusted periodically to reflect the per-visit medicare RHC and FQHC payment caps published by HCFA.

(8) The medicare RHC and FQHC productivity screening guidelines and the medicare RHC and FQHC per-visit payment caps provided in (6) and (7) do not apply to a provider's all-inclusive per visit rate for RHC or FQHC other ambulatory services.

(9) Costs for which productivity screening guidelines or payment caps have not been established by medicare or by the department may be disallowed pursuant to (3)(b) or (4)(b) if the department determines that the costs are unreasonable or unnecessary or otherwise contrary to the medicare reasonable cost principles adopted in (3)(b) or (4)(b).

(10) For crossover claims, the medicaid payment will be:

(a) for RHC crossover claims, up to the full amount of the medicare allowable charge, including applicable medicare deductibles and coinsurance, less any applicable medicaid copayment amount and any other third party payments in addition to medicare; and

(b) for FQHC crossover claims, the difference between the medicare payments for the visit and the RHC's or FQHC's medicaid all-inclusive rate per visit applicable to the service

determined in accordance with (2) through (9), less any applicable medicaid copayment amount and any other third party payments in addition to medicare.

(11) The amount of reimbursement due to an FQHC under (2) through (9) shall be determined retrospectively by the department following submission of and based upon review or audit of the reporting period cost report required under [Rule IV].

(a) The department will make cost settlements as provided in [Rule VIII] on the provider's fiscal year basis, but in doing so will separately determine the provider's single all-inclusive rate per visit for each provider reporting period and for any portion of the provider's reporting period in which the applicable productivity screening guidelines or per-visit payment cap differ.

(12) For providers that are independent entities or provider-based entities, other than RHCs in rural hospitals with less than 50 beds, the department will establish temporary interim rates per visit for each provider reporting period. The interim rates shall be based for the initial period upon the estimate and related information required under [Rule IV] and based for subsequent years upon the provider's most recent cost report filed as required under [Rule IV]. Separate interim rates will be established for core services and for each category of other ambulatory services.

(a) The interim rates will be determined by dividing the estimated total allowable costs by estimated total visits for each category of RHC or FQHC services, such as core services and each separate category of other ambulatory services. For purposes of the interim rate determination, the medicare RHC or FQHC tests of reasonableness, including the medicare RHC or FQHC productivity screening guidelines and medicare RHC or FQHC per-visit payment caps provided in (6) and (7) shall apply to RHC or FQHC core services but not to RHC or FQHC other ambulatory services.

(b) Subject to the medicare RHC or FQHC tests of reasonableness, including the medicare RHC or FQHC productivity screening guidelines and medicare RHC or FQHC per-visit payment caps provided in (6) and (7), the department may, at the request of a provider or on its own initiative, review and increase or decrease any interim rate established under (12) during the reporting period to assure that each interim payment rate approximates the provider's anticipated final average rate per visit for the category of RHC or FQHC services if:

(i) there is a significant change in the utilization of RHC or FQHC services;

(ii) actual allowable costs vary materially from the clinic's estimated allowable costs; or

(iii) the department in its discretion determines that other circumstances warrant an adjustment.

(c) The interim rates determined under this rule are temporary rates and are subject to adjustment and settlement as

provided in (12)(b) and [Rule VIII] upon retrospective determination of the provider's all-inclusive core and other ambulatory service rates per visit as provided in (2) through (9).

(d) For new providers, including providers new to the Montana medicare program or new providers after a change in ownership, the department will establish interim rates under this rule based upon the cost report and other information submitted in accordance with [Rule IV(5)]. The department will establish the interim rates within 30 days following submission of all information and documentation required under [Rule IV(5)]. The provider's claims will not be paid until an applicable interim rate has been established under this rule.

(e) For existing providers for which the department previously has established an interim rate, the department may revise the interim rate at any time as provided in this rule. The provider may continue to submit claims for payment at the interim rate most recently established by the department and, to the extent all other requirements are met, claims will be paid at such interim rate according to medicare requirements and procedures.

(13) To the extent provided in [Rule VII], if any, the provider may receive supplemental payments to cover the difference between payments received from a managed care organization or health maintenance organization and the amount the provider would otherwise be entitled to receive for the services under this rule.

AUTH: Sec. 53-2-201 and 53-6-113 MCA
IMP: Sec. 53-2-201, 53-6-101, 53-6-111 and 53-6-113 MCA

[RULE VII] RURAL HEALTH CLINICS AND FEDERALLY QUALIFIED HEALTH CENTERS, SUPPLEMENTAL PAYMENTS FOR MENTAL HEALTH SERVICES AND HEALTH MAINTENANCE ORGANIZATION (HMO) SERVICES (1) The department may require by administrative rule or contract that a managed care organization or HMO that contracts with an RHC or FQHC for provision of services to medicare recipients make payments under its contract with an RHC or FQHC at rates or in amounts not less than the RHC or FQHC would be entitled to receive for services under [Rules V and VI], and that the managed care organization or health maintenance organization must make additional payments to the RHC or FQHC at least quarterly to the extent necessary to assure that contract payments are no less than the medicaid reimbursement provided under these rules.

(2) If the department requires the managed care organization or health maintenance organization to make payment as provided in (1), the provider must seek such payment from the managed care organization or health maintenance organization rather than from the department.

(3) If the managed care organization or health maintenance

organization subject to the payment requirement described in (1) does not make payment as provided in (1) within 60 days after demand from the provider in accordance with the organization's claim procedures or if the department has not provided by administrative rule or contract for payments by a managed care organization or health maintenance organization as described in (1), the provider may submit a request to the department for such payment. A request to the department must include:

(a) documentation of the type of services provided, e.g., physician services or licensed clinical psychologist services;

(b) documentation of the managed care or health maintenance organization's payment amount per service made to the provider, separately stated for each type of service;

(c) documentation of the number of visits provided, separately stated for each type of service;

(d) the provider's medicaid reimbursement rate or amount for each type of service, if known; and

(e) the total amount of supplemental payment claimed by the provider.

(4) The department may require the provider to submit any additional information or documentation necessary to determine the amount of supplemental payment, if any, due the provider.

(5) The department will determine the amount of supplemental payment, if any, to which the provider is entitled under section 4712(b)(1)(B) of the Balanced Budget Act of 1997, P.L. 105-33 and will make payment to the provider within 30 days of receipt of the provider's claim.

(6) If the department makes supplemental payment to a provider under this rule prior to a determination of the provider's final reimbursement rate or amount, the department will reconcile and settle the amount of such supplemental payments in accordance with the provisions of [Rule VIII].

(7) This rule shall not be construed to permit or require any payment to a provider that is not required by section 4712(b)(1)(B) of the Balanced Budget Act of 1997, P.L. 105-33.

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-2-201, 53-6-101, 53-6-111 and 53-6-113, MCA

[RULE VIII] RURAL HEALTH CLINICS AND FEDERALLY QUALIFIED HEALTH CENTERS, RECONCILIATION AND SETTLEMENT OF INTERIM RATE PAYMENTS (1) For all providers, following submission as required by [Rule IV] of a complete and accurate cost report and any other information and documentation necessary to determine the provider's final reimbursement for a reporting period, the department will determine the provider's final reimbursement for the reporting period.

(2) Following determination of the provider's final reimbursement for the reporting period, the department will compare the provider's final reimbursement for the reporting period with the interim reimbursement for the reporting period

and determine whether an overpayment or underpayment has been made to the provider.

(a) If the department has made supplemental payment to a provider under [Rule VII(5)] prior to a determination of the provider's final reimbursement rate or amount, as part of the reconciliation and settlement provided in this rule, the department will reconcile and settle the amount of such supplemental payments to assure that such supplemental payments are consistent with the actual payments made by the managed care or health maintenance organization and with the final medicare reimbursement rates and/or amounts determined in accordance with these rules.

(3) In addition to the determinations required under (1) and (2), the department may in its discretion perform earlier partial reconciliations or settlements as the department deems necessary or appropriate to assure that interim payments more closely approximate final payments or to limit or reduce the amount of overpayment or underpayment that would otherwise require adjustment at the time of reconciliation and settlement under (1) and (2).

(4) Overpayments and underpayments will be collected or paid as provided in ARM 46.12.509(7) and references in that rule to a "hospital" shall be deemed to be references to an RHC or FQHC. The department shall notify the provider in writing of the overpayment or underpayment.

(5) A provider's cost report and/or reconciliation and settlement of rates may be reopened or amended as provided in section 2931 of the medicare provider reimbursement manual, HCFA Pub. 15 (referred to as Pub. 15 or HIM-15). For purposes of governing reopening and amendment of cost reports and rate reconciliations and settlement, the department hereby adopts and incorporates by reference section 2931 of HCFA Pub. 15 (referred to as Pub. 15 or HIM-15), which is a medicare manual provision addressing reopening and amendment of cost reports and rate reconciliations and settlement under the medicare program. Copies of the cited manual section are available upon request from the Health Policy and Services Division, Department of Public Health and Human Services, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

(a) For purposes of applying the provisions of section 2931 of HCFA Pub. 15 (referred to as Pub. 15 or HIM-15), as provided in (6), any reference in such authorities to medicare, medicare beneficiary, beneficiary, intermediary or secretary shall be deemed to refer also to medicaid, medicaid recipient, recipient, the department or the department, respectively.

(6) Nothing in this rule shall be construed to prevent the department or its agents from performing a desk review, audit or other review or investigation of a provider's costs, cost report, claims or other submissions and making any appropriate adjustments or recoveries at any time.

(7) A provider who is aggrieved by an adverse department action with respect to an interim rate determination,

overpayment or underpayment determination or other adverse determination may request an administrative review or fair hearing subject to the department's administrative rules regarding administrative review and fair hearing for medical assistance providers.

AUTH: Sec. 2-4-201 and 53-6-113, MCA
IMP: Sec. 2-4-201, 53-2-201, 53-6-101, 53-6-111 and 53-6-113, MCA

3. The rules as proposed to be amended provide as follows. Matter to be added is underlined. Matter to be deleted is interlined.

46.12.4810 HEALTH MAINTENANCE ORGANIZATIONS: COVERED SERVICES (1) through (1)(g) remain the same.

(h) rural health clinic services as defined at ~~ARM 46.12.1601 46.12.1603 and 46.12.1605~~ [Rule I];

(1)(i) through (1)(m) remain the same.

(n) federally qualified health center services as defined at ~~ARM 46.12.1701 and 46.12.1703~~ [Rule I];

(1)(o) through (5) remain the same.

AUTH: 53-2-201 and 53-6-113, MCA
IMP: 53-2-201, 53-6-101, 53-6-113 and 53-6-116, MCA

46.12.5007 PASSPORT TO HEALTH PROGRAM: SERVICES (1) through (1)(a)(iv) remain the same.

(v) federally qualified health center services as defined in ~~ARM 46.12.1701~~ [Rule I];

(vi) rural health clinic services as defined in ~~ARM 46.12.1601~~ [Rule I].

(1)(a)(vii) through (4) remain the same.

AUTH: 53-2-201 and 53-6-113, MCA
IMP: 53-2-201, 53-6-101, 53-6-111, 53-6-113 and 53-6-116, MCA

4. The rules as proposed to be repealed are on pages 46-2201 through 46-2240 of the Administrative Rules of Montana.

46.12.1601 RURAL HEALTH CLINICS, DEFINITIONS on page 46-2201 of the Administrative Rules of Montana.

AUTH: Sec. 53-6-113, MCA
IMP: Sec. 53-6-101, MCA

46.12.1603 RURAL HEALTH CLINIC, SERVICES on page 46-2202 of the Administrative Rules of Montana.

AUTH: Sec. 53-6-113, MCA
IMP: Sec. 53-6-101, MCA

46.12.1605 RURAL HEALTH CLINICS, REQUIREMENTS on page 46-2207 of the Administrative Rules of Montana.

AUTH: Sec. 53-6-113, MCA
IMP: Sec. 53-6-101, MCA

46.12.1607 RURAL HEALTH CLINICS, REIMBURSEMENT on page 46-2208 of the Administrative Rules of Montana.

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

46.12.1701 FEDERALLY QUALIFIED HEALTH CENTERS, DEFINITIONS on pages 46-2231 and 46-2232 of the Administrative Rules of Montana.

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-6-101, MCA

46.12.1703 FEDERALLY QUALIFIED HEALTH CENTERS, REQUIREMENTS on page 46-2232 of the Administrative Rules of Montana.

AUTH: Sec. 53-6-113, MCA
IMP: Sec. 53-6-101, MCA

46.12.1705 FEDERALLY QUALIFIED HEALTH CENTERS, RECORD KEEPING AND REPORTS on pages 46-2235 and 46-2236 of the Administrative Rules of Montana.

AUTH: Sec. 53-6-113, MCA
IMP: Sec. 53-6-101, MCA

46.12.1707 FEDERALLY QUALIFIED HEALTH CENTERS, REIMBURSEMENT on pages 46-2239 and 46-2240 of the Administrative Rules of Montana.

AUTH: Sec. 53-6-113, MCA
IMP: Sec. 53-6-101, MCA

5. Proposed rules I through VIII would replace with a single set of rules the existing separate two sets of rules addressing medicaid coverage and reimbursement of rural health clinics (RHCs) (ARM 46.12.1601 through 46.12.1607) and federally qualified health centers (FQHCs) (ARM 46.12.1701 through 46.12.1707). The current RHC and FQHC rules are outdated, and do not specifically address a number of issues that have arisen in the program since adoption of the current rules, including issues that have resulted in litigation. The proposed rules would combine the RHC and FQHC rules in a single set of rules because the RHC and FQHC provisions are very similar, and combination of the rules will reduce the number of rules and rule pages necessary for these programs. The existing rules

(ARM 46.12.1601 through 46.12.1607 and 46.12.1701 through 46.12.1707) would be repealed.

General rule approach

The department's options for cost effective approaches to medicaid coverage and reimbursement of RHCs and FQHCs are limited because of the particular provisions of federal medicaid law relating to these service categories. The RHC and FQHC services that must be covered by the Montana medicaid program are dictated by the federal definitions of these services and the other service categories offered under Montana's medicaid state plan. Federal law requires that state medicaid programs cover the RHC and FQHC services covered by medicare, known as "core services." The state medicaid program must also cover "other ambulatory services," which include any other ambulatory service provided by RHCs or FQHCs that would be covered by the program under the state plan when provided by individuals or entities other than RHC or FQHCs, such as physical therapy services. The proposed rules would implement these federal requirements and specify the substantive and administrative requirements that must be met to obtain medicaid coverage and reimbursement for these services.

With respect to reimbursement, current federal law requires that RHC and FQHC services be reimbursed at 100% of the reasonable cost of providing the services. The state is permitted to develop its own approach to determining the reasonableness of costs or may rely upon medicare tests of reasonableness. However, it is significantly more costly and problematic for the state to develop its own reasonableness tests. Medicare has vastly more resources available for that task, including a much larger source of RHC and FQHC cost and visit data. Further, because federal law specifically permits the state to use medicare reasonableness limits, adoption of the medicare methodology and limits provides a readily available and legally defensible reimbursement methodology. The option of development of the state's own reasonableness tests would be expensive and providers may be more likely to challenge the untested methodology. For these reasons, the proposed rules generally adopt medicare reimbursement methodologies, including medicare tests of reasonableness where applicable, rather than establishing other optional approaches to reimbursement and tests of reasonableness. The proposed rules specify the methodologies and limits that apply, to what services they apply and the manner in which the methodologies and limits apply.

The proposed rules also define terms used in the rules, specify program participation requirements and specify various administrative and supervisory mechanisms necessary to provide the department with adequate information to apply the specified rate methodologies, to provide for temporary reimbursement

pending availability of actual cost data to set final rates, to reconcile temporary payments with final reimbursement amounts, to implement certain supplemental payment requirements newly enacted in federal law, and to assure compliance with program requirements.

Rule I

Proposed Rule I defines key terms used throughout Rules I through VIII. Several of the defined terms must be defined simply because they have no common meaning, and the only option in defining these terms is to state what they mean. These include the terms "crossover claim," "FQHC," and "RHC". Other terms must be specifically defined because their meaning determines the entities that are qualified to participate in the program, the services that are covered under the program, how a particular entity will be reimbursed and what period must be covered by a cost report.

The proposed definitions of "federally qualified health center," "FQHC core services," "FQHC other ambulatory services," "independent entity," "provider-based entity," "Rural health clinic," "RHC core services," "RHC other ambulatory services" and "visit" have been proposed because they follow federal statutory and regulatory law which are not optional to the state. In addition to the incorporated references, see 42 USCA 1396d(l)(1) and 42 CFR 447.371.

In discussions with provider association representatives prior to filing this proposal, it was suggested that the department should delete from the proposed definition of "FQHC other ambulatory services" in Rule I(5) the term "ambulatory." The department believes that under federal law "other ambulatory services" include only ambulatory services that meet the other requirements of the definition. The definition as proposed is intended to assure that "other ambulatory services" are limited to ambulatory state plan services, especially in light of association arguments that FQHCs may provide hospital services. The providers' preferred option was not selected because such an interpretation is contrary to federal law. It should be noted that the same term appears in the definition of "FQHC core services".

In proposed Rule I(10), "reporting period" is defined to coincide with the provider's fiscal period, and this definition serves to define the time period basis on which cost reports must be filed. This is consistent with medicare requirements, and the department believes this is the only option that assures that the provider's cost report will present a consistently representative portrayal of the provider's cost to provide the covered services.

Rule I(16) defines the term "visit", which is a key provision with respect to reimbursement. In general, total allowable costs are divided by the number of visits to determine cost per visit, and the definition functions to limit the number of encounters between the patient and a provider health professional in a single day that will be reimbursed by the program. This definition follows the federal medicare and medicare definitions of this term.

Association representatives have suggested that the term "health professional," which appears in the definition of "visit," is defined in 42 CFR 447.371(d) and that it should also be defined in these rules. The cited federal regulation actually refers only to a "health professional whose services are reimbursed under the state plan." The department's proposed rules follow that principle, but define the concept in far greater detail. Rule III(5)(a) provides that while the health professional need not enroll separately in the medicaid program, the health professional must meet the same requirements that would apply if the professional were to enroll in the related state plan service category. Under the proposed rules, a health professional is a professional whose category of service is either a core service or a state plan service when not provided by an FQHC or RHC, and who meets the same requirements that would apply if the professional were to enroll separately and directly in the related medicare service program, such as the physician services program or the physical therapy program. The department did not select the option of adding a further definition because it believes the term is defined adequately by the proposed rules.

Rule II

Rule II specifies the particular requirements that must be met by entities to participate in the program as an RHC or FQHC. These requirements are in addition to requirements generally applicable to medicaid providers in all service categories, for example, the requirements contained in ARM Title 46, chapter 12, subchapter 3. Providers must enroll in the program to provide the particular category of services, so that the department can obtain and review documentation that the applying provider has the required qualifications, credentials, etc., so that the provider will sign the required agreement to follow requirements applicable to the category of service and so that the department may provide the entity with information about those requirements. Specification of the requirements contained in (3) and (4) is necessary because federal financial participation would not be available to the state to pay for RHC or FQHC services if providers did not meet these requirements. The department does not find any acceptable options to the proposed Rule II, because the specified requirements are mandatory and the rule is necessary to clearly notify providers of the

participation requirements.

Rule III

Rule III specifies requirements that must be met for services to be covered and reimbursed by the medicaid program, such as the credentials that health professionals must have to provide services under the program. Subsection (2) reinforces other medicaid program rules providing that mental health and HMO services are reimbursable only under those programs respectively and not under the RHC/FQHC services programs. This provision is necessary to avoid confusion, because while visits for these services are not reimbursable under the RHC/FQHC services programs, the cost and visit data for these services must be included in reported cost and visit information to assure rates are representative of all costs and visits, so that rate limits will function properly, and so that the supplemental payment provisions of Rule VII will function properly. The option of paying for such services under the medicare RHC/FQHC programs is already foreclosed by other department rules. The option of no rule addressing this point is deemed unacceptable because it could lead to disputes over payment for such services.

Subsections (3) and (4) are necessary to specify in accordance with federal law the settings in which services may be provided. The option of extending service coverage to other settings is foreclosed by federal law, and the option of no rule on this point was rejected because advance notice of these requirements will avoid disputes that could arise after providers have served recipients in prohibited settings, submitted payment claims and had their claims denied because of these restrictions.

Under federal law, each category of services provided by RHCs and FQHCs must meet most of the same requirements applicable to the category of services when provided by other provider types. Subsection (5) through (5)(f) are necessary to implement this requirement by describing the requirements that apply and those that do not apply. The department believes that federal law requires these provisions be met, and to avoid confusion and disputes, these requirements must be described in considerably more detail than the current rule provides.

Rule III(6) requires that providers notify the department in advance and obtain department approval before offering a category or categories of other ambulatory services. While core services consist of a specific group of service categories, other ambulatory services consists of a variety of unrelated services. Upon program enrollment, the department can give providers information regarding core services requirements, but under current rules the department does not know what if any other ambulatory services the provider will offer. The department typically does not find out what services are being

offered until years later in the cost settlement process, at which time issues may arise because the provider was unaware of the requirements applicable to the service category and did not know how to report costs, visits and other information relating to the service. Often, the cost settlement process is more difficult because it is difficult or impossible to tell what services were provided. This rule provision is intended to prevent such problems by making it clear in advance what services will be provided.

This advance approval requirement is an exercise of the department's authority to administer and supervise the medicaid program as authorized and directed by the legislature in 53-2-201, 53-6-101, 53-6-111, and 53-6-113, MCA. The prior approval requirement is an extension of provider enrollment. Prior approval is necessary to enable the department to track and obtain data regarding the types and utilization of other ambulatory services being provided by each provider, to allow the department to follow up to assure that the services are provided in accordance with applicable standards and requirements and to allow the department an opportunity to give each provider advance information and instructions regarding applicable standards and requirements. In addition, the department needs to know what other ambulatory service categories are being offered because under Rule VI the department will set a separate per visit rate for each category of other ambulatory services offered by the provider. The department finds the current lack of a prior notice and approval requirement an unacceptable option and therefore proposes Rule III(6) through (6)(b).

Rule IV

Rule IV specifies record keeping and reporting requirements that must be met by RHC and FQHC providers. These requirements are in addition to the requirements of ARM 46.12.308.

Under (2), financial records must be kept in accordance with generally accepted accounting principles and the records must be auditable through the application of generally accepted auditing standards. The record requirements and standards are necessary to assure the integrity of cost claims, by requiring records to be kept according to widely accepted principles of accounting and auditable through the use of widely accepted auditing standards. There are no suitable alternative principles or standards available for this purpose. The option of adopting a rule without requiring records to be kept in accordance with generally accepted accounting principles or auditable according to generally accepted auditing standards is unacceptable, as it would result in a lack of uniformity and reliability, and would fail to provide any assurance or opportunity for controls to assure the integrity of cost claims.

Under (6), (7) and (8), all providers are required to file annual costs reports, and the proposed rule specifies the time of filing and the nature of the forms that must be filed. Annual cost reports must be submitted by each provider because the reimbursement methodology requires actual cost and visit data on an annual basis to set the specific reimbursement for each provider. Federal law requires that RHC and FQHC providers be reimbursed 100% of reasonable cost, and the department must obtain the cost report information to set rates in compliance with this federal requirement. The time of filing is the same time of filing required by the medicare program and the department proposes to use the same rule for purposes of consistency with medicare, as most or all providers also participate in the medicare program and in many cases the same or very similar costs reports are required by the medicare and medicaid programs. The option of permitting providers to use reporting periods other than their fiscal year is not proposed because it could lead to cost reports that are inconsistent with the provider's other financial and accounting records, which are kept on a fiscal year basis. Such a rule would also lead to increased paperwork because a separate medicaid cost report would be required in cases where the medicare report would otherwise suffice.

The department has worked with provider representatives to develop revised cost reporting and cost settlement forms, and these forms may be revised or updated from time to time. These forms will be available from the department upon request. Further, (9) provides that within 30 days after the end of the provider's reporting period, the department will mail to the provider the medicare cost report and forms that the provider is required to complete and submit. This rule will assure that providers have a complete set of the most current forms and any related instructions well in advance of the filing deadline.

New providers and providers changing ownership must submit estimated cost and other information or a medicare cost report to the department no later than 30 days prior to the beginning of the new provider's initial reporting period. This requirement is necessary to provide the department with an adequate basis to establish an interim payment rate for the provider consistent with the provider's particular cost experience or estimated costs, and so that the provider can begin billing and receiving payment for services provided to medicare recipients. The option of a single interim rate for all providers or for all services was not selected because it would be more likely to result in substantial overpayments and underpayments, since the interim rate would not necessarily relate to the provider's cost and visit data on which the final rate will be based.

Under (3), the providers records must be available for

inspection at all reasonable times by any authorized governmental authority or their agents. This requirement is necessary to assure that the records actually exist and are available in the event of an audit or other review by authorized governmental entities. Because reimbursement is based upon the provider's costs and visits, it is essential for program integrity purposes that providers clearly and adequately document their costs, visits and related information. Record keeping, access to records and submission of complete and compliant cost reports are conditions of receiving and retaining program payments. Under (4), if a provider refuses to allow access or if the provider fails to submit a complete cost report in compliance with requirements, the department may recover all payments made for the reporting period to which the records relate and may suspend all further payment to the provider until full compliance is achieved. This rule is necessary to assure compliance with these essential program requirements. Department experience has shown that often the mere existence of such requirements and requests for compliance alone are insufficient to achieve compliance as long as the provider's payments are not interrupted. The recovery of payments for a period for which records or cost reports are not submitted and the suspension of further payments are necessary tools to achieve compliance, or lacking compliance, to recover unsupported payments and prevent further payments that may not be proper.

The options of not providing for recovery and suspension of payments, or of providing for an enforcement mechanism separate from payments was not selected because such approaches have proven ineffective in the past. Also, payments are conditioned on supporting records and should not be available if the supporting records are not maintained and accessible as required by this rule.

Rule V

Under current rules, all provider-based RHCs are reimbursed on a retrospective reasonable cost methodology. This is the methodology that is described in proposed Rule V(2) through (4). Proposed Rule V would continue to apply this methodology to provider-based RHCs in rural hospitals with less than 50 beds, but all other provider-based RHCs will be reimbursed on the cost per visit basis, subject to the medicare per-visit payment caps and productivity screening guidelines.

Under federal medicare law, the state must pay for RHC and FQHC services at 100% of the costs which are reasonable and related to the cost of furnishing such services or based on such other tests of reasonableness as the secretary of the U.S. department of health and human services prescribes in regulations under 42 USCA 1395l(a)(3) or, in the case of services to which those

regulations do not apply, based upon the same methodology used under 42 USCA 1395l(a)(3). See 42 USCA 1396a(a)(13)(C), as amended by P.L. 105-33 (the Balanced Budget Act of 1997 or "BBA"). The language of 42 USCA 1395l(a)(3) provides that for FQHC and RHC services medicare will make payment for the costs which are reasonable and related to the cost of furnishing services or based on such other tests of reasonableness as the secretary prescribes in regulations. The secretary has prescribed tests of reasonableness in the form of limits on the rate of payment per visit and productivity screening guidelines. See 42 CFR 405.2468 and HCFA Pub. 27, sections 502, 503 and 505.

A related statute, 42 USCA 1395l(f), provided (prior to BBA) that in establishing limits under 42 USCA 1395l(a) on payment for RHC service provided by independent RHCs, the secretary shall establish certain cost per visit limitations. Under BBA, the language of 42 USCA 1395l(f) was amended to require the secretary to extend the same limits to provider-based RHCs other than RHCs in rural hospitals with less than 50 beds. Because this amendment modifies 42 USCA 1395l(a)(3), the amendment also applies to the medicare program which specifically authorizes states to apply the secretary's tests of reasonableness prescribed under 42 USCA 1395l(a)(3). For this reason, the department is authorized by federal law to apply the extension of the cost per visit methodology and related payment limits to provider-based RHCs other than provider-based RHCs in rural hospitals with less than 50 beds. The definitions related to identification of provider-based RHCs other than provider-based RHCs in rural hospitals with less than 50 beds, specified in (1), follow the applicable federal definitions, as specified in medicare intermediary transmittal no. A-97-20 (January 1998).

The adoption of this methodology is necessary to assure that payments for RHC services under the medicare program are limited to payment of reasonable cost. The option of continuing to reimburse all provider-based RHCs under the reasonable cost methodology was not selected. Without the cost per visit limits, there are no specific reasonableness limits applied under the provider-based methodology. As stated above, it is significantly more costly and problematic for the state to develop its own reasonableness tests. Because federal law specifically permits the state to use medicare reasonableness limits, adoption of the medicare methodology and limits provides a readily available and legally defensible reimbursement methodology.

Subsections (3) and (4) specify the source of information and the standards applied to determine the reasonable cost that is reimbursable under Rule V. The determination will be based upon medicare reasonable cost principles as applied to each provider's medicare hospital cost report. To assure uniformity, all charges and costs are included in reaching the

determination, regardless of payment source. Subsections (5) and (6) provide for interim payments until the final reimbursement amounts can be determined. Interim and final payments are then subject to reconciliation under Rule VIII. Provider-based RHCs in rural hospitals with less than 50 beds may be entitled to the supplemental payments provided under Rule VII.

Rule VI

Rule VI specifies the reimbursement methodology for independent entities and provider-based entities other than RHCs in rural hospitals with less than 50 beds. These providers will be reimbursed generally using the medicare all-inclusive rate per visit methodology, with core services subject to the applicable medicare per-visit caps and productivity screening guidelines. A single rate per visit will be determined individually for each provider for core services, based upon the provider's costs of providing core services and the number of core service visits. A separate rate per visit will be determined individually for each provider for each other ambulatory service category, based upon the provider's costs of providing each other ambulatory service and the number of visits for each other ambulatory service category. Because the medicare per-visit caps and productivity screening guidelines were developed based upon core service cost and visit data, those limitations will not apply to other ambulatory services. Subsections (6), (7) and (8) specify the applicability of the limits.

Separate core service rates will be set to assure that the core services cost per-visit is determined on a comparable basis to medicare core services cost per-visit amounts so that the medicare caps and productivity screening guidelines will function properly. The option of a single rate per visit for core and other ambulatory services was not selected. If core and other ambulatory service costs and visits were combined, the limits would not function appropriately, because they were established based upon core service data. Cost per visit might be less than the cap because other ambulatory service costs per visit were lower than core services cost per visit, or cost per visit might be more than the cap because other ambulatory service costs per visit were higher than core services cost per visit. Depending upon the circumstances, the caps could unfairly penalize or benefit a provider.

Separate rates per visit will be set for each category of other ambulatory service category to minimize the amounts of overpayments and underpayments that may occur through interim rates. The mix of other ambulatory services may vary significantly from one year to the next and even within a single year, which could lead to large overpayments or underpayments if the cost of services actually being provided varies

significantly from the cost of services used to set the per visit rate.

As stated above, federal medicare law authorizes the state to pay for medicare RHC and FQHC services at 100% of reasonable cost, based on tests of reasonableness prescribed by the secretary of the U.S. department of health and human services. The option of no limits would be cost prohibitive to the program. For the same reasons stated above with respect to Rule V, the adoption of the methodology specified in Rule VI is necessary to assure that payments for RHC and FQHC services under the medicare program are limited to payment of reasonable cost per visit. As stated above, it is significantly more costly and problematic for the state to develop its own reasonableness tests. Because federal law specifically permits the state to use medicare reasonableness limits, adoption of the medicare methodology and limits provides a readily available and legally defensible reimbursement methodology. For these reasons, the department has adopted the medicare tests of reasonableness for RHCs and FQHCs, i.e., the limits on the rate of payment per visit and the productivity screening guidelines, rather than selecting the option of developing its own approach to reasonableness limits or no limits at all.

Subsections (3) and (4) specify the source of information, the standards applied and the methodology used to determine the provider's cost per visit for core and other ambulatory services. Cost will be based upon medicare reasonable cost principles. To assure uniformity, all costs and visits are considered in reaching the determination, regardless of payment source.

Rule VI(4)(b) is intended to protect providers from a potential interpretation of the incorporated medicare regulations that could result in disallowance of reported costs for other ambulatory services. Medicare covers only the RHC and FQHC services that are referred to in these rules as core services. Medicare covers additional services, referred to as other ambulatory services. The medicare regulations contain some language that could be construed to disallow costs for services not covered by medicare. The department's intent is to allow the reasonable costs of all the services that are covered by medicare, according to the medicare reasonable cost principles.

Subsection (5) of Rule VI provides that a provider's costs include only the cost of providing RHC or FQHC services. Subsection (5)(a) provides that a provider's costs and visits include costs and visits for all services, regardless of payer source. This is necessary to assure that the cost per visit is calculated based upon all cost and visit data, rather than upon only those costs and visits related to medicare recipients. This assures that the cost per visit will more accurately

reflect cost per visit, rather than being impacted up or down by allocations of cost among payor groups. Subsections (5)(b) and (c) are necessary to clearly specify that these costs and visits include RHC and FQHC services covered by HMOs and managed care organizations (MCOs). As provided in Rule II(2), medicare will not reimburse those services under the RHC or FQHC services programs. However, the costs and visits for those services must be included in the cost per visit calculations so that the applications of screening guidelines and caps will function appropriately and so that the per visit rates can be used for comparison to HMO and MCO rates for purposes of supplemental payments under Rule VII.

Rule VI(5) provides that only the costs of providing RHC or FQHC services will be considered in determining cost per visit under these rules. For providers that offer other services, the department may apply reasonable methods to allocate costs among the service types provided, and such methods may include a cost to charge ratio methodology. Provider representatives have contended that the use of cost to charge ratios is prohibited by federal law, but the department is unaware of any such prohibition and no authority has been presented to the department to support such a prohibition. The department is not proposing to reimburse providers on a cost to charge ratio methodology, and that is not the effect of this rule. The use of the cost to charge ratio under this subsection is only for the purpose of allocating costs among RHC or FQHC services and other categories of services offered by the provider. The use of this methodology may be necessary to readily and appropriately allocate costs for purposes of reimbursement determinations. The department has not selected the providers' preferred option of prohibiting the use of cost to charge ratio based allocations because the department believes it is consistent with federal law and in some cases may be the most reasonable and appropriate method.

Rule VI(9) is modeled after a provision in the Pub. 27 (section 502), the Health Care Financing Administration (HCFA) manual that sets forth the medicare RHC and FQHC cost per visit methodology and limits. This provision complements the reasonable cost rules in (3)(b) and (4)(b), by reiterating that all costs are subject to the medicare reasonable cost requirements established in the rule. This provision makes it clear that even though there may not be a specific limit such as a cap that applies to the cost item, the cost is subject to disallowance under the adopted medicare reasonable cost principles. These principles apply to all costs under this rule, regardless of whether the costs are subject to limits under medicare or under (6) or (7) of this rule. Under the medicare reasonable cost principles in 42 CFR part 413, costs would be reviewed and allowed or disallowed on a case by case basis using appropriate measures of reasonableness. This provision does not impose an across the board limit in every

case regardless of the specific circumstances involved.

Under (11), reimbursement is determined retrospectively based upon actual cost and visit information. Subsection (12) provides for interim payments until the final reimbursement amounts can be determined. Interim and final payments are then subject to reconciliation and settlement under Rule VIII. Subsection (13) specifies that providers may be entitled to the supplemental payments provided under Rule VII, as required under BBA.

Subsection (10) specifies the medicare payment for RHC and FQHC crossover claims. Payment for these claims has been the subject of disputes in the past, and no rule provisions existed to resolve the issue. These provisions are necessary to specify the crossover claim payment methodology for these services that is included in Montana's state plan, to prevent disputes regarding payment for these claims.

Rule VII

Section 4712 of BBA requires that the state make payment to RHCs and FQHCs at least quarterly of a supplemental payment equal to the amount, if any, by which the rates payable to the RHC or FQHC under these rules exceeds the amounts paid to the RHC or FQHC by managed care organizations and health maintenance organizations for services provided to medicaid recipients. Rule VII addresses this requirement by requiring providers to seek payment from MCOs and HMOs to the extent that the MCO or HMO is required by its contract with the department to make such payments, and by permitting providers to obtain payment directly from the state if the MCO or HMO fails to pay.

The department has not selected the option of direct payment from the state because the department believes it is significantly more efficient and reasonable to address the supplemental payment issue through its contracts with MCOs and HMOs, rather than to provide for payment directly by the state in all cases. Currently, MCOs are required under their contracts with the department to pay FQHCs and RHCs in the first instance at the same rates these providers would receive under the department's medicare reimbursement rates. Such a provision could be included in HMO contracts as well. In many cases, no supplemental payment will be required. If the MCO's or HMO's initial payment amount is inadequate under the BBA standard, then the MCO or HMO would be required to supplement that payment in compliance with the federal standard. In such cases, the provider will receive the required reimbursement directly from the MCO or HMO without any need to initiate a further claim directly to the state, with the attendant paperwork and exchange of information among the provider, the MCO or HMO and the state. However, in cases where the MCO or HMO does not fulfill its

responsibility to pay as required by its contract, the rule provides a mechanism for the provider to receive payment directly from the state.

Provider representatives have suggested that federal law requires the state to make the supplemental payments itself and that the state is not permitted by federal law to delegate this responsibility to a contractor. The department agrees that there are some instances in which federal law specifically prohibits the state from delegating certain functions, such as the authority to issue policies or rules on medicare program matters. See 42 CFR 431.10. However, the state generally may perform many of its responsibilities under the federal medicare laws through various contractors who act on the state's behalf, where such delegation is not prohibited by law. The department, of course, remains accountable for the proper performance of its federal medicare responsibilities.

Rule VIII

Rule VIII provides procedures for reconciliation and settlement of interim payment rates. As noted above, providers are reimbursed under Rules V and VI on an interim basis until actual cost and visit or charge data is available. Final reimbursement rates are then determined based upon the actual data, and the difference between the interim and final rates is reconciled and settled under the provisions of Rule VIII. Because final reimbursement rates or amounts may not be available at the time supplemental payments are made under Rule VII, these payments also must be reconciled and settled upon determination of final rate or reimbursement amounts. This rule is necessary to assure that providers are reimbursed based upon actual cost, charge and /or visit data, so that the department can assure compliance with the federal requirement that providers are reimbursed 100% of reasonable cost. Given the federal requirement for 100% reasonable cost reimbursement, the department does not find any acceptable options to this approach.

Provider representatives asked the department to impose a specific time limit, e.g., 15 to 18 months after a provider's fiscal year, in which the department must complete cost settlements under Rule VIII(1). The department declines to adopt this option, because there are various factors over which the department has no control that affect the timing of cost settlements. These factors include the fact that the department must complete a variety of tasks for each of a large number of providers, whereas each provider is responsible only for submission of its own cost reports and related documentation and information. Since the department uses settled medicare cost reports and rates, and medicare limits, the department's cost settlements must await receipt of medicare program information, the timing of which is beyond the department's control. In

addition, the department does not have adequate staff to assure that every cost settlement always can be completed within a particular period of time. The staff available to complete the cost settlements for FQHCs and RHCs also must complete cost settlements for a number of other provider types and must complete other administrative duties. While the department prefers to complete cost settlement as soon as possible after the receipt of all required information and documentation, it is not feasible to specify a particular period by which the department must complete cost settlements.

Rule VIII(7) provides that providers aggrieved by adverse department determinations may request an administrative review or fair hearing. The department has not selected the option of including references to the specific hearing rules. Currently, fair hearings for FQHCs are available under the provisions of ARM 46.12.509A and the supplementary provisions of ARM Title 46, chapter 2, subchapter 2 and fair hearings for RHCs are available under the provisions of ARM Title 46, chapter 2, subchapter 2. However, the department expects in the very near future to propose rule changes that will revise the references to applicable hearing procedure rules. Those anticipated rule changes may overlap this rule process, and specification of the specific references here might lead to confusion or the need for further amendments. If the applicable specific hearing rule references become available prior to the notice of adoption of these rules in final form, the department will include the references in the final rule. Also, the department will include the specific references in provider manual revisions that will follow adoption of these rules in final form.

46.12.4810 and 46.12.5007

The amendments to these rules are necessary to revise the references to current ARM 46.12.1601, 46.12.1603, 46.12.1605, 46.12.1701 and 46.12.1703, because those rules are being repealed and replaced with new rules.

6. The proposed rules and amendments will become effective and will apply to services provided on or after July 1, 1998.

7. Interested persons may submit their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210, no later than May 14, 1998. The Department also maintains lists of persons interested in receiving notice of administrative rule changes. These lists are compiled according to subjects or programs of interest. For placement on the mailing list, please write the person at the address above.

8. The Office of Legal Affairs, Department of Public Health and Human Services has been designated to preside over and conduct the hearing.

Dawn Slevin
Rule Reviewer

Michael J. Ballweg for
Director, Public Health and Human Services

Certified to the Secretary of State April 6, 1998.

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

In the matter of the amendment of ARM 2.43.302, 2.43.304, 2.43.308, and 2.43.309 which pertain to definitions used in rules and statutes, actuarial data, and mailing for non-profit groups	)))))	NOTICE OF AMENDMENT

TO: All Interested Persons.

1. On February 12, 1998, the Public Employees' Retirement Board Published a notice of proposed amendment of ARM 2.43.302, 2.43.304, 2.43.308, and 2.43.309 which pertain to definitions used in rules, actuarial data, and mailing for non-profit groups at page 376 of the 1998 Montana Administrative Register, issue number 3.

2. The Board has amended ARM 2.43.302, 2.43.304, 2.43.308, and 2.43.309 as proposed.

3. No written or oral comments were received.

Terry Teichrow, President
Public Employees' Retirement Board

Dal Smilie, Chief Legal Counsel and
Rule Reviewer

Kelly Jenkins, General Counsel and
Rule Reviewer

Certified to the Secretary of State on March 30, 1998.

BEFORE THE BOARD OF ALTERNATIVE HEALTH CARE
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment of a rule pertaining to out-of-state licensure	)))	NOTICE OF AMENDMENT OF 8.4.510 LICENSURE OF OUT-OF-STATE APPLICANTS

TO: All Interested Persons:

1. On February 26, 1998, the Board of Alternative Health Care published a notice of proposed amendment of the above-stated rule at page 515, 1998 Montana Administrative Register, issue number 4.

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

3. No comments or testimony were received.

BOARD OF ALTERNATIVE HEALTH CARE
MICHAEL BERGKAMP, ND, CHAIRMAN

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

_____
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, April 6, 1998.

BEFORE THE BOARD OF DENTISTRY
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment of a rule pertaining to fees and the adoption of a new rule pertaining to dentist licensure by credentials	)))))	NOTICE OF AMENDMENT OF 8.16.405 FEES AND ADOPTION OF NEW RULE I (8.16.412) DENTIST LICENSURE BY CREDENTIALS

TO: All Interested Persons:

1. On December 1, 1997, the Board of Dentistry published a notice of proposed amendment and adoption of the above-stated rules at page 2157, 1997 Montana Administrative Register, issue number 23.

2. The Board has adopted new rule I (8.16.412) exactly as proposed. The Board has amended ARM 8.16.405 as proposed, but with the following changes:

"8.16.405 FEE SCHEDULE

(1) through (3) will remain the same as proposed.

(4) Credentialing fee ~~1200~~ 500

(5) through (11) will remain the same as proposed."

Auth: Sec. 37-1-134, 37-4-205, MCA; IMP, Sec. 37-1-134, 37-1-304, 37-4-301, 37-4-303, 37-4-307, MCA

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

COMMENT NO. 1: One comment was received stating proposed new rule I, which would allow licensing without testing for the applicants' convenience, will not benefit the public. Instead, there would be a large influx of dentists from populated and less desirable living areas to enjoy the Montana lifestyle. There would also be an influx because Managed Care has had trouble establishing themselves in Montana, allowing companies to hire dentists and set them up with deals if they join the plans. This influx would hurt existing dentists, and subject the public to more company restraints, with less freedom to choose a doctor.

RESPONSE: The Board noted that the reason for the proposed rule is to better serve the public by allowing greater choice of licensed dentists in Montana. This new rule will give the practitioners greater flexibility in their choice of places to live. Finally, limiting the number of licensed dentists in Montana is not a goal of the licensing Board, nor would it be proper to propose a rule for this purpose.

COMMENT NO. 2: One comment was received stating new rule I(1)(c)(iii) should show the mechanism by which the Board will insure that the clinical test completed by the applicant is comparable to the WREB exam.

RESPONSE: The Board noted that much of new rule I's requirements on clinical skill, listed at (1)(c)(iii)(A) through (E), was taken directly from the WREB exam requirements. By using the same list of entry level clinical skills, the Board has ensured the applicant's skills will be comparable to WREB examinees. Other licensing exams may not meet this list, and would therefore not be comparable, and will not be allowed for licensure by credentialing.

COMMENT NO. 3: Two comments were received stating new rule I should include reciprocity for Montana dentists to other states, and should also address the issue of foreign-trained dentists.

RESPONSE: The Board noted that new rule I is actually an endorsement procedure, and not reciprocity. Endorsement looks at each individual applicant and the applicant's specific credentials, whereas reciprocity merely considers which state they hold a license in, without scrutinizing the applicant's credentials. The Board noted it had been granted authority to allow licensure of out-of-state applicants by endorsement by 37-1-304, MCA, and has set up this endorsement process with the licensing by credentialing rule.

COMMENT NO. 4: One comment was received stating support for the proposed new rule I.

RESPONSE: The Board acknowledges receipt of the comment in support.

COMMENT NO. 5: One comment was receive stating new rule I will not safeguard the public's health. The credentialing proposal should be further discussed. Discussion should include a recent Montana Supreme Court decision disapproving credentialing allowed within the legal profession in Montana.

RESPONSE: The Board noted the Montana Supreme Court decision was not a precedent for the dental profession. The dentistry credentialing would be allowed specifically by state statute, and the process would differ from the lawyer credentialing at issue in the court case. The Board further noted it had been considering the credentialing proposal for some time, and had conducted extensive research into nation-wide efforts at credentialing. Therefore, the Board feels the rule is appropriate at this time.

COMMENT NO. 6: The Board entered its own comment on the proposed amendment to ARM 8.16.405, Fees. The Board noted its proposed fee of $1200 will be too high, if the Board contracts with a service to collect and evaluate all the credentialing information such as transcripts, exam scores, licensure status in other states, etc. Since the Board has voted to enter such a contract, the fee should be reduced to $500.

RESPONSE: The Board will amend the rule as shown above.

BOARD OF DENTISTRY
MARY YOUNGBAUER, DDS, CHAIRMAN

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

_____
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, April 6, 1998.

BEFORE THE BOARD OF OPTOMETRY
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment of rules pertaining to fees, licensure of out-of-state applicants, continuing education requirements and approved programs or courses	)))))	NOTICE OF AMENDMENT OF RULES PERTAINING TO THE PRACTICE OF OPTOMETRY

TO: All Interested Persons:

1. On January 29, 1998, the Board of Optometry published a notice of proposed amendment of rules pertaining to the practice of optometry at page 235, 1998 Montana Administrative Register, issue number 2.

2. The Board has amended ARM 8.36.409 and 8.36.417 exactly as proposed. The Board will withdraw the proposed amendment to ARM 8.36.601, and will not adopt changes to this rule. The Board will adopt ARM 8.36.602 as proposed, but with the following changes:

"8.36.602 APPROVED PROGRAMS OR COURSES (1) through (2) will remain the same as proposed.

(3) Continuing education courses offered and completed on the internet or via other similar electronic means may be accepted, if all criteria listed below are met, ~~for a maximum of six credits annually, with a total of 12 credits reported on each biennial form~~.

(a) through (c) will remain the same as proposed."

Auth: Sec. 37-1-319, 37-10-202, MCA; IMP, Sec. 37-1-306, MCA

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

COMMENT NO. 1: One comment was received stating ARM 8.36.601 should allow 12 hours of CE to be acquired by correspondence or electronically via the Internet for every two year CE reporting cycle. The rule should not require 6 hours annually, as it makes no difference if 8 hours are acquired one year and 4 the next, as long as no more than 12 hours are reported every two years. Other CE hours are not required to be split annually during the two year CE cycle.

RESPONSE: The Board intended that 6 hours of CE be allowed via correspondence, OR the Internet, not both. The Board agreed it would be possible to use language allowing 12 CE hours biannually, and not divide the hours into 6 every year. The Board will withdraw the proposed amendment to 8.36.601 at this time, and will re-notice the proposed rule amendment with new language on correspondence and Internet totals to be obtained biannually.

COMMENT NO. 2: One comment was received stating ARM 8.36.601 should not allow 6 hours of CE by correspondence and 6 hours of CE via the Internet annually. This would allow an individual to obtain 2/3 of their required CE without ever attending a meeting. The comment stated the interchange of ideas through discussion at a live meeting is far more beneficial than individually obtained CE. The board should allow no more than 50% of the CE credits to allowed through correspondence and Internet means.

RESPONSE: The Board agrees with the comment, and will withdraw the proposed amendment to 8.36.601 at this time. See response to Comment No. 1 above.

BOARD OF OPTOMETRY
CYNTHIA JOHNSON, OD, CHAIRMAN

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

_____
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, April 6, 1998.

BEFORE THE BOARD OF PSYCHOLOGISTS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment of rules pertaining to application procedures and continuing education, the repeal of rules pertaining to unprofessional conduct and ethical practice of psychology and the adoption of new rules pertaining to unprofessional conduct	)))))))	NOTICE OF AMENDMENT, REPEAL AND ADOPTION OF RULES PERTAINING TO THE PRACTICE OF PSYCHOLOGY

TO: All Interested Persons:

1. On January 15, 1998, the Board of Psychologists published a notice of proposed amendment, repeal and adoption of rules pertaining to the practice of psychology, at page 57, 1998 Montana Administrative Register, issue number 1.

2. The Board has amended ARM 8.52.604, 8.52.702, new rule II (8.52.802), III (8.52.803) and new rule V (8.52.805) and repealed ARM 8.52.617 and 8.52.618 exactly as proposed. The Board has adopted new rules I (8.52.801) and IV (8.52.804) as proposed, but with the following changes: (authority and implementing sections remain the same as proposed)

"8.52.801 REPRESENTATION OF SELF AND SERVICES (1) and (1)(a) will remain the same.

(b) shall not represent him/herself as a psychologist ~~while unlicensed or~~ while the practitioner's license is currently suspended, revoked or not renewed;

(c) through (2)(b) will remain the same as proposed.

(c) shall not solicit testimonials from current psychotherapy clients, ~~or~~ patients or other persons, who~~,~~ because of their particular circumstances, are vulnerable to undue influence;

(d) through (3)(g) will remain the same as proposed."

"8.52.804 RELATIONSHIPS (1) will remain the same as proposed.

(a) shall not undertake or continue a professional relationship with a client when the objectivity of the licensee is~~, or could reasonably be construed to be,~~ impaired because of present or previous familial, social, sexual, emotional, financial, supervisory, political, administrative or legal relationship with the client or a relevant person directly associated with or related to the client.

(2) through (3)(b) will remain the same as proposed."

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

COMMENT NO. 1: One comment was received stating new rule V on privileged information and records should address the length of time it is necessary for a psychologist to keep records, especially basic data. The comment stated time limits should be included for records such as answer sheets, raw data, outside practitioner data, correspondence, etc.

RESPONSE: The Board will certainly consider a section addressing record retention in future proposed rule notices, and agreed that this is an important issue for psychologists. However, the Board is not able to insert a substantive change such as this with details on records retention at this time. Such a change would not allow for public comment on the matter. Instead, the Board will discuss this issue and send out for public comment with a future proposed rule change.

COMMENT NO. 2: One comment was received stating new rule I(1) and (1)(b) appear to contain conflicting language. Subsection (1) states a "licensee" shall not..., while (1)(b) addresses an "unlicensed" person representing him or herself as a psychologist. A person cannot be both licensed and unlicensed at the same time.

RESPONSE: The Board agreed with the comment, and will amend the rule as shown above to delete the phrase "while unlicensed."

COMMENT NO. 3: One comment was received stating new rule I(2)(c) refers to "current psychotherapy clients or patients or other persons who are vulnerable to undue influence." The rule is not clear, however, on whether the phrase "vulnerable to undue influence" refers to other persons, or all groups mentioned.

RESPONSE: The Board agreed with the comment and will amend the rule as shown above to make grammatical changes. The changes will indicate a list of persons who ALL may be vulnerable to undue influences was intended.

COMMENT NO. 4: One comment was received stating new rule I(3)(c) which prohibits a psychologist from compensating the press in return for "publicity or a news item" is unclear as to how that relates to paying for advertising.

RESPONSE: The Board noted that paying for an advertisement is already addressed earlier in the rules at new rule I(2)(b), and is therefore distinguished from this section.

COMMENT NO. 5: One comment was received stating the Board's process and sources used to draft the proposed rules should be better outlined by the Board. The Board should indicate which specific documents were considered as sources, what process was used for decision, and who made the decisions. The Board should also indicate the timetable for reviewing and revising rules. Finally, the Board should outline the mechanisms for internal and external review of the Board's actions.

RESPONSE: The Board noted that its Statement of Reasonable Necessity, included in the proposed rule notice, did identify Montana Code sections, APA, and ASPPB ethical standards as the documents and sources used in drafting the proposed rules. In addition, the Board is required to, and did follow all Montana Administrative Procedure Act rule-making procedures in proposing the rules. Under this mandatory process, the public is allowed to participate and comment, as this commentor has done, and this process allows for public input and revision of proposed rules in keeping with the comments received.

COMMENT NO. 6: Two comments were received stating new rule IV(1)(a) regarding multiple relationships is not in accordance with a 1992 APA ethical guideline. That guideline stated it may not be feasible or reasonable in many communities to avoid social or other relationships with a client. The APA guideline states that care must be taken that a psychologist is sensitive to the potential harmful effects of other contacts on those persons with whom they deal. This standard would be much more feasible for psychologists in rural Montana, or even small-town Montana, where the psychologists become acquainted with many or most people in town.

RESPONSE: The Board agreed with the comments, and will amend the rule as shown above. The Board will delete the phrase "or could reasonably be construed to be." This change will create a higher standard of proof in showing the licensee's objectivity was actually impaired in this multiple relationship. This will alleviate the concerns expressed in the comments, and allow greater contact in rural situations.

BOARD OF PSYCHOLOGISTS
JAMES MURPHEY, Ph.D., CHAIRMAN

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

_____
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, April 6, 1998.

BEFORE THE CONSUMER AFFAIRS DIVISION
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the adoption of rules pertaining to the New Motor Vehicle Warranty Act) CORRECTED NOTICE OF ADOPTION

TO: All Interested Persons:

1. On January 15, 1998, the Consumer Affairs Division published a notice of adoption of rules pertaining to the New Motor Vehicle Warranty Act at page 68, 1998 Montana Administrative Register, issue number 1. The notice of adoption was published at page 746, 1998 Montana Administrative Register, issue number 6.

2. The Division adopted Rule IX (8.78.509) as proposed but with changes to (2)(d), (2)(g)(i), and (2)(g)(iii). In the adoption notice the Department stated in Rule IX (8.78.509) that (1) through (1)(g)(i) will remain the same as proposed. The statement was incorrect. The rule should have stated that (1) through (2)(g)(i) will remain the same as proposed. In response to a written comment submitted by Mr. John Flintosh, the Department adopted Rule IX (8.78.509) by substituting the word "non-conformity" for the word "defect" in (2)(g)(ii) and (2)(g)(v). The Department failed to also substitute the word "non-conformity" for the word "defect" in (2)(d), (2)(g)(i) and (2)(g)(iii). The Department is filing a corrected notice to remedy this oversight. The Department will substitute the word "non-conformity" for the word "defect" in these sections for uniformity and for these reasons as set forth in the adoption notice filed on March 16, 1998.

3. The adoption of Rule IX (8.78.509) should have appeared as follows:

"8.78.509 CONSUMER'S REQUEST FOR ARBITRATION (1) through (2)(c) will remain the same as adopted.

(2)(d) all financial information related to the purchase and/or ~~defect~~ non-conformity(ies);

(e) and (f) will remain the same as adopted.

(g) information regarding the ~~defect~~ non-conformity(ies), including:

(i) the nature of the ~~defect(s)~~ non-conformity(ies);

(ii) the date and mileage when the ~~defect(s)~~ non-conformity(ies) first occurred;

(iii) the date the ~~defect(s)~~ non-conformity(ies) was (were) first reported to the dealer or manufacturer;

(iv) will remain the same as adopted.

(v) the mileage when the ~~defect(s)~~ non-conformity(ies) was (were) so reported;

(vi) through (3) will remain the same as adopted."

4. Replacement pages for this rule were submitted on March 31, 1998.

CONSUMER AFFAIRS DIVISION

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

Annie M. Bartos
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, April 6, 1998.

BEFORE THE LOCAL GOVERNMENT ASSISTANCE DIVISION
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the adoption of a new rule pertaining to administration of the 1998 Treasure State Endowment (TSEP) Program	)))))	CORRECTED NOTICE OF ADOPTION

TO: All Interested Persons:

1. On December 15, 1997, the Local Government Assistance Division published a notice of proposed adoption of rules pertaining to administration of the 1998 Treasure State Endowment (TSEP) Program at page 2228, 1997 Montana Administrative Register, issue number 24. The department published a notice of adoption at page 758, 1998 Montana Administrative Register, issue number 6.

2. The Division stated in Rule I (8.94.3804) that (2)(b) will remain the same as proposed. This statement is incorrect due to the fact the years are wrong. It should state estimated amount of TSEP funds available in FY 2000 and 2001, instead of estimated amount of TSEP funds available in 1998 and 1999. In changing the years this will make the rule correct.

3. The adoption of Rule I (8.94.3804) should have appeared as follows:

"8.94.3804 INCORPORATION BY REFERENCE OF RULES FOR ADMINISTERING THE 1998 TREASURE STATE ENDOWMENT PROGRAM

(1) will remain the same as adopted.

(2) and (2)(a) will remain the same as adopted.

(b) estimated amount of TSEP funds available in FY ~~1998~~ 2000 and ~~1999~~ 2001;

(c) through (3) will remain the same as adopted."

4. Replacement pages for this rule were submitted on March 31, 1998.

LOCAL GOVERNMENT ASSISTANCE DIVISION
DEPARTMENT OF COMMERCE

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

Annie M. Bartos
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, April 6, 1998.

BEFORE THE TRAVEL PROMOTION AND DEVELOPMENT DIVISION
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment of a rule pertaining to the Tourism Advisory Council	) NOTICE OF AMENDMENT OF A RULE PERTAINING TO THE) TOURISM ADVISORY COUNCIL

TO: All Interested Persons:

1. On February 26, 1998, the Travel Promotion and Development Division published a notice of proposed amendment of ARM 8.119.101 at page 526, 1998 Montana Administrative Register, issue number 4.

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

3. No comments or testimony were received.

TRAVEL PROMOTION AND DEVELOPMENT DIVISION

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

_____
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, April 6, 1998.

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

In the matter of the amendment of Teacher Certification	)))	NOTICE OF AMENDMENT TO ARM 10.57.404 CLASS 4 VOCATIONAL CERTIFICATE

To: All Interested Persons

1. On February 12, 1998, the Board of Public Education published a notice of proposed amendment concerning ARM 10.57.404 Class 4 Vocational Certificate on page 409 of the 1998 Montana Administrative Register, Issue No. 3.

2. The Board has amended ARM 10.57.404 as proposed.

3. The Board received three letters of concern in the area of Adult Basic Education certification. Clarification of the rule was offered by the Office of Public Instruction which illustrated the concern was unfounded.

Wayne Buchanan, Executive Secretary
Board of Public Education

Certified to the Secretary of State on 4/6/98.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the repeal of 16.2.501 definitions.	))	NOTICE OF REPEAL OF RULE

(Major Facility Siting Act)

To: All Interested Persons

1. On January 29, 1998, the board published notice of the proposed repeal of the above-captioned rule at page 279 of the Montana Administrative Register, Issue No. 2.

2. The rule was repealed as proposed with no changes.

3. No comments were received.

BOARD OF ENVIRONMENTAL REVIEW

By _____
CINDY E. YOUNKIN, Chairperson

Reviewed by

_____
John F. North, Rule Reviewer

Certified to the Secretary of State April 6, 1998.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of rule 17.30.716 regarding categorical exclusions.	)))	NOTICE OF AMENDMENT OF RULE

(Water Quality)

To: All Interested Persons

1. On January 29, 1998, the Board published notice of proposed amendment of ARM 17.30.716, at page 274 of the Montana Administrative Register, Issue No. 2.

2. The Board has amended the rule with the following changes from the original proposal. Matter to be added is underlined. Matter to be deleted is interlined.

17.30.716 CATEGORIES OF ACTIVITIES THAT CAUSE NONSIGNIFICANT CHANGES IN WATER QUALITY (1) Same as proposed.

(2) For purposes of (1)(a) of this rule:

(a) "Aquifer" means a saturated, permeable geologic material that is capable of sustained groundwater yield sufficient to meet domestic needs. ~~geologic material that is saturated and sufficiently permeable to transmit adequate quantities of water to wells and springs for domestic or livestock watering purposes. Specifically, a saturated geologic material is an aquifer if:~~

~~(i) there is an existing water supply well or spring within 1/4 mile of the exterior boundaries of the lot being reviewed, which obtains water from the same geologic material; or~~

~~(ii) a report published by or for a state or federal agency indicates the saturated geologic material is an aquifer;~~

~~(iii) reliable data from at least 3 local well logs demonstrate that the saturated geologic material meets any of the criteria in (iv)(A), (B), or (D) below; or~~

~~(iv) the results of site specific investigations indicate that the saturated geological material meets any 2 of the following criteria:~~

~~(A) it can produce water at a rate greater than 150 gallons per day from 15 feet or less of aquifer from a borehole 12 inches or less in diameter (aquifer thickness is the screened interval, open hole interval, or 10 feet for open bottom wells); or~~

~~(B) if the saturated geologic material is greater than 15 feet thick, it can produce water at a rate greater than 10 gallons per day per foot of aquifer from a borehole 12 inches or~~

~~less in diameter (aquifer thickness is the screened interval, open hole interval or 10 feet for open bottom wells); or~~

~~(C) if the saturated geologic material is unconsolidated, it is equal to or greater than 3 feet in thickness (thickness is either a single layer or combination of layers separated by less permeable materials) and less than 12% of any one of 3 samples from the permeable geologic material passes through a No. 200 American Society for Testing and Materials (ASTM) sieve, where samples shall be collected and analyzed per the appropriate ASTM method from 3 separate depths in the geologic material; or~~

~~(D) if the saturated geologic material is consolidated, it is equal to or greater than 10 feet in thickness with significant secondary porosity (e.g., fractures, karst, etc.), where thickness is defined by either a single layer or combination of layers separated by less permeable materials; or~~

~~(E) the saturated geologic material meets the thickness requirements of (C) or (D) above and has a hydraulic conductivity equal to or greater than 0.1 feet/day as determined by any one of 3 slug tests conducted on 3 separate wells completed within that geologic material, or determined by a single pumping test conducted for a minimum of 4 hours on a well completed within that geologic material, where the methodology used to conduct and analyze the tests is accepted by the department prior to the test.~~

(2)(b),(c), and (3) remain as proposed.

3. The Board received comments regarding the proposed amendments. A summary of the comments and the Board's responses are as follows:

COMMENT 1: The Board received numerous comments regarding the proposed definition of "aquifer". The concerns presented include the following: the proposed definition was too complex, was difficult to understand and implement, could be expensive to implement, and may be inconsistent with definitions in other state rules and statutes. Commentors requested that the Board retain the current definition of "aquifer" while additional study is conducted to address these issues.

RESPONSE: The Board has withdrawn the proposed definition of "aquifer" so that further study can be conducted to address the issues raised. Until the study process is completed, the existing definition of "aquifer" has been reinstated.

COMMENT 2: The proposed amendments create a process for local governments and landowners to petition the Department of Environmental Quality to suspend categorical exclusions in areas where degradation of groundwater has or is expected to occur. The petition process allows 25% or 20, whichever is fewer, of the landowners in an affected geographic area to file a petition. One commentor suggested that the rule be amended to delete the reference to 20 landowners. Otherwise 20 landowners in a populated area would have a disproportionate power to raise a petition.

RESPONSE: The threshold of "25 percent or 20, whichever is fewer" was selected because it is the same as that used by the legislature for petitions to create or modify controlled ground water areas. Section 85-2-506(2), MCA. The similarity of the two procedures justifies a similar petition threshold. It should be noted that most of the highly populated areas in the state do not qualify for the categorical exemptions and therefore a petition would be denied.

COMMENT 3: A commentor asked whether the Department can suspend categorical exclusions without input, information, or discussion from the area landowners.

RESPONSE: The rule requires public participation and an opportunity to comment prior to the Department's final decision on a petition. See proposed ARM 17.30.716(3)(e)(iii) and (f).

COMMENT 4: A county government expressed opposition to any procedure for varying categorical exclusions. The county stated that a waiver makes the process more confusing and complicated.

RESPONSE: The Board proposed the petition process in response to public comments received when the categorical exclusions were adopted. The purpose of the petition process is to provide recourse to local landowners or units of government who believe that the categorical exclusion would not adequately protect their water resources.

COMMENT 5: The proposed rule allows the Department 90 days after the receipt of all information to make a preliminary decision, and 60 days after public comment to make a final decision. One commentor suggested that these timeframes both be reduced to 30 days.

RESPONSE: The time periods stated in the proposed rule are necessary to allow a complete review of the detailed and complex information which may be contained in each submittal.

COMMENT 6: One commentor asked whether it is legally required to give written notice of the Department's final decision to all commentors, and suggested that this is an unnecessary burden on the Department. The commentor suggested that a published notice should be sufficient unless a person specifically requests notice by mail.

RESPONSE: Because the granting of a petition might have impacts on landowners who wish to install septic systems on their property, the Board believes that all commentors should be personally notified in writing.

BOARD OF ENVIRONMENTAL REVIEW

By _____
CINDY E. YOUNKIN, Chairperson

Reviewed by

_____
John F. North, Rule Reviewer

Certified to the Secretary of State April 6, 1998.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the adoption of new Rules I - IV, providing for assessment of administrative penalties for violations of water quality act.	)))))	NOTICE OF ADOPTION OF NEW RULES I-IV (Water Quality)

To: All Interested Persons

1. On January 29, 1998, the board published notice of proposed adoption of the above-captioned rules, at page 263 of the 1998 Montana Administrative Register, Issue No. 2.

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

RULE I [17.30.2001] DEFINITIONS For purposes of [Rules I-IV], the following terms have the meanings or interpretations indicated below and must be used in conjunction with and supplemental to those definitions contained in 75-5-103, MCA:

(1) - (3) Remain as proposed.

(4) "Compliance" means meeting requirements of the Water Quality Act, Title 75, chapter 5, MCA, ARM Title 17, chapter 30, and any ~~administrative~~ permit, authorization, or order issued under any of these authorities.

(5) "Extent and gravity of the violation" means the extent of a violator's deviation from the applicable permit, authorization, rule, statute, or order. Relevant factors include concentration, volume, percentage, duration, toxicity, and the actual or potential effects of the violation on human health or state waters. Any single factor may be conclusive.

(6) and (7) Remain as proposed.

(8) "Requirement" means any applicable provision of the Water Quality Act (Title 75, chapter 5, MCA), or its implementing rules (ARM Title 17, chapter 30), or any provision of a permit, authorization, or ~~administrative~~ order issued under any of these authorities.

(9) "Violation", unless otherwise specified within a rule, means a transgression of any requirement of the Water Quality Act, Title 75, chapter 5, MCA, ARM Title 17, chapter 30, and any permit, authorization, or order issued under any of

these authorities.
IMP: 75-5-611, MCA; AUTH: 75-5-201, MCA

RULE II [17.30.2003] ENFORCEMENT ACTIONS FOR ADMINISTRATIVE PENALTIES

(1) Remains as proposed.

(2) Except for a violation specified under (7) of this rule, the department shall first issue a written notice letter to a violator by certified mail or personal delivery that:

(a) - (c) Remain as proposed.

(d) discloses that, unless the ~~alleged violation~~ notice is vacated or dismissed, the department will include the alleged violation in the violator's history for purposes of assessing penalties for any future violations even though this violation may ultimately be resolved without assessment of a penalty.

(3) Remains as proposed.

(4)(a) The department may not assess a penalty for a violation cited in the notice letter if the violator submits to the department in writing within the time specified in the notice letter:

(i) a response signed by the violator certifying that its activity was, or is now, in compliance with all requirements cited in the notice letter; or

(ii) a proposal that describes a plan and schedule for corrective action that will bring the activity into timely compliance with the requirements cited in the notice letter and that is approved by the department.

(b) The department shall respond to a proposed corrective action plan within 30 days either approving or disapproving the proposed plan.

(5)-(7) Remain as proposed.
IMP: 75-5-611, MCA; AUTH: 75-5-201, MCA

RULE III [17.30.2005] FORMULA FOR DETERMINING ADMINISTRATIVE PENALTIES

(1) Remains as proposed.

(2) The department shall assign points for each violation based on the following criteria:

(a) Remains as proposed.

(b) The department shall consider the circumstances of the violation. If a violation has occurred through no negligence on the part of the ~~permittee~~ violator, it must not be assigned points under this category. A violation involving ordinary negligence, which is failure to exercise toward the

violated legal requirement the care ordinarily exercised by a person of common prudence, must be assigned 1 to 15 points depending upon the degree of negligence. If the violation occurred due to gross negligence which is gross or reckless disregard for the violated legal requirement, or intentional conduct, it must be assigned 16 to 30 points depending upon the degree of fault.

(c)(i) ~~The~~ In calculating a penalty, the department shall consider the violator's history of violations within the 3 years prior to the date of the violation for which a penalty is being assessed. One point must be assigned for each class III violation; 3 points for each class II violation; and 5 points for each class I violation. Except as provided in (ii) below, any violation of which the violator has received written notice must be counted regardless of whether further enforcement action was taken.

(ii) A violation must not be counted if:

(A) the notice or order was vacated; or

(B) the notice or order is subject to a pending administrative or judicial ~~review~~ action or if the time to request review or to appeal any administrative or judicial decision has not expired. ~~Thereafter it must be counted for 3 years, except that a violation for which the notice or order has been vacated or dismissed must not be counted.~~

(d) Remains as proposed.

(3) The points from (2)(a) through (d) of this rule are totaled and the amount of penalty must be ~~assessed based on~~ determined from the following point schedule:

Points	Dollars	Points	Dollars
10 and below	$200	56	$3,600
11	$220	57	$3,700
12	$240	58	$3,800
13	$260	59	$3,900
14	$280	60	$4,000
15	$300	61	$4,100
16	$320	62	$4,200
17	$340	63	$4,300
18	$360	64	$4,400
19	$380	65	$4,500
20	$400	66	$4,600
21	$420	67	$4,700
22	$440	68	$4,800
23	$460	69	$4,900
24	$480	70	$5,000
25	$500	71	$5,100

26	$600	72	$5,200
27	$700	73	$5,300
28	$800	74	$5,400
29	$900	75	$5,500
30	$1,000	76	$5,600
31	$1,100	77	$5,700
32	$1,200	78	$5,800
33	$1,300	79	$5,900
34	$1,400	80	$6,000
35	$1,500	81	$6,200
36	$1,600	82	$6,400
37	$1,700	83	$6,600
38	$1,800	84	$6,800
39	$1,900	85	$7,000
40	$2,000	86	$7,200
41	$2,100	87	$7,400
42	$2,200	88	$7,600
43	$2,300	89	$7,800
44	$2,400	90	$8,000
45	$2,500	91	$8,200
46	$2,600	92	$8,400
47	$2,700	93	$8,600
48	$2,800	94	$8,800
49	$2,900	95	$9,000
50	$3,000	96	$9,200
51	$3,100	97	$9,400
52	$3,200	98	$9,600
53	$3,300	99	$9,800
54	$3,400	100 and above	$10,000
55	$3,500		

(4) The ~~total penalty assessed under this system is determined by multiplying the~~ penalty amount determined under ~~(1) through~~ (3) of this rule is multiplied by the number of days on which the practice or condition constituting the violation has occurred, subject to the limits provided in 75-5-611, MCA.

(5) The department shall determine any economic benefit or savings that the violator gained as a result of the violation. The department shall use the best information reasonably available to it at the time of calculating the penalty to determine the economic benefit or savings. The dollar value of the economic benefit or savings, if any, shall be added to the penalty amount calculated in (1) through (4) of this rule to determine the total penalty amount.

(6)(a) Remains as proposed.

(b) The department may reduce a penalty determined under this rule based on the violator's inability over the long term to pay the full penalty amount pursuant to (a) above. If the violator seeks to reduce the penalty based on its inability to pay the penalty, the violator shall provide to the department documentary evidence demonstrating the violator's financial limitations. However, the full penalty amount may not be lowered to a value less than the violator's economic benefit resulting from the violation.

(c) Remains as proposed.

(7) Remains as proposed.

AUTH: 75-5-201, MCA; IMP: 75-5-611, MCA

RULE IV [17.30.2006] EXTENT AND GRAVITY OF THE VIOLATION (1) ~~In addition to factors described in [Rule I],~~ For the purpose of [Rules I-III], the extent and gravity of the violation must be characterized as major, moderate, or minor according to the following criteria:

(a) A violation is "major" if:

(i) the violation presents a high likelihood of exposing humans to significant pollution; or

(ii) the violator deviates from the applicable requirements such that there is significant noncompliance in terms of both degree of deviation and length of time.

(b) A violation is "moderate" if:

(i) the violation has exposed or will likely expose state waters, but probably not humans, to significant pollution; or

(ii) the violator deviates from applicable requirements such that there is significant noncompliance in terms of either degree of deviation or length of time, but not both.

(c) A violation is "minor" if:

(i) the violation poses a relatively low likelihood of exposing humans and a low likelihood of exposing state waters to significant pollution; and

(ii) the violator deviates from applicable requirements but not to the extent that there is significant noncompliance in terms of either degree of deviation or length of time.

AUTH: 75-5-201, MCA; IMP: 75-5-611, MCA.

3. The board received the following comments:

Comment 1: Tony Tweedale, an individual residing in Missoula, Montana, submitted written comments prior to the hearing. He commented that there is a lot of leeway to use the proposed

rules when more serious penalties are appropriate. Mr. Tweedale stated that the department has said that it plans to use administrative penalties only after the department has lent technical assistance and sent two warning letters, however, administrative penalties should be used for rapid compliance in nonserious situations. Mr. Tweedale stated that the department should use standard formulas to determine the economic benefit component of a penalty, such as are used by the Environmental Protection Agency (EPA). Mr. Tweedale stated that the term "significant" means "anything more than trivial," but that the Department has asserted that it intends to determine whether a violation is "significant" on a case-by-case basis. Mr. Tweedale commented that the board should revise the proposed new rules to penalize a violator not only for the initial day or days of an infraction but until cleanup occurs.

Response: The board believes that the new rules will provide appropriate penalties for violations of the Water Quality Act. The rules will allow the Department to waive the point system if the department documents that the penalty under the point system would be an inadequate deterrent. Also, in every case, the Department has the discretion to proceed with a judicial action for a penalty up to $25,000 per day of violation, rather than proceeding with an administrative penalty action under these rules.

The department has the discretion to determine when it is appropriate to issue a warning letter or to offer technical assistance prior to initiating a penalty action. These rules will not require the department to take any particular action regarding warning letters or technical assistance prior to issuing a notice letter.

Rule III(5) will require the department to add to a penalty any economic benefit derived by a violator from noncompliance. The board does not believe it is appropriate or necessary to limit the method used to calculate economic benefit by specifying a particular method in the rules.

The board does not believe it is necessary to define the term "significant," for purposes of classifying violations as major, moderate or minor, under rule IV. The board intends the term to have its commonly understood meaning.

The board believes that these rules will adequately address

continuing violations. If a violation has not ceased, or if the department does not approve a corrective action plan, rule III(4) will require the department to multiply the penalty derived under the point system by the number of days of violation. The department may also pursue a judicial penalty if the department determines that these rules would not provide an adequate remedy for a particular continuing violation.

Comment 2: Mr. Tweedale commented that the rules should be revised to tighten consideration of a violator's ability to pay, including consideration of allowing installment payments, prior to allowing the department to waive a penalty on the basis of inability to pay.

Response: Rule III(6)(b)(i) will provide the department with discretion to reduce a penalty due to a violator's documented inability to pay the penalty "over the long term." The board intends this provision to apply only to violators who document that they cannot pay the full penalty even with a reasonable payment schedule.

Comment 3: Candy A. Wells, an individual residing near Hardin, Montana, submitted written comments prior to the hearing. She commented that, to avoid the risk of further harm to public health and/or the environment, the written notice letter should include an order assessing a penalty, with the time frame for calculating a penalty beginning when the Department first determines a violation has occurred and with additional penalties being assessed if the violator does not adhere to the notice to take corrective action.

Response: Under Sections 75-5-611(1)(e) and 617(2), MCA, generally, the department may not assess an administrative penalty until it has first sent a written notice to the violator. Under Section 75-5-617(2), MCA, the department may immediately issue an order without first sending out a written notice only when the violation poses an imminent threat to human health, safety, or welfare or to the environment. Under Section 75-5-611(2)(a)(ii), MCA, the Department may issue an administrative order and notice in lieu of the notice letter if the department believes that state waters have been, or will be, polluted.

Rule II(4)(a)(ii) will require a violator to submit a corrective action plan to bring the activity into timely

compliance. Rule II(5)(a) provides that, if the violator does not adquately respond to a notice letter, the department may assess a penalty. Rule II(5)(c) provides that, if a violator is not in compliance as certified or, if a violator fails to adhere to an approved corrective action plan, the department may assess a penalty. The board believes that these provisions provide the department with adequate authority, within the limits of Section 75-5-611, MCA, to assess a penalty for a violation that has not been corrected.

Comment 4: Janice Rehberg, attorney with the Billings, Montana law firm of Crowley, Haughey, Hanson, Toole & Dietrich, submitted written comments after the hearing. She commented that, to provide an incentive for quick response, the rules should consider the length of a violation, providing a lower penalty at first with an escalator for extended periods of noncompliance.

Response: Rule III(4) will factor in the length of a violation by providing for multiplication of a penalty by the number of days of violation. Also, the point schedule is not linear. The monetary increments are larger for points toward the end of the point schedule than they are for points at the beginning of the schedule. The board believes that these factors should provide incentives for quick response.

Comment 5: Ms. Rehberg commented that, to avoid exceeding the statutory maximum penalty of $10,000 per day and the total penalty limit of $100,000, the penalties under the point system should be lowered, to leave room for additional assessments for any economic benefit derived from noncompliance.

Response: If an administrative penalty would exceed the maximum statutory limits for administrative penalties of $10,000 per day of violation, with a total cumulative limit of $100,000 for any related series of violations, the department has the discretion to seek the maximum penalty or pursue a judicial penalty that would be subject to a higher statutory limit of $25,000 per day of violation with no cumulative limit. All violations do not include an economic benefit component, and the board believes it is not necessary or appropriate to lower the penalty amounts under the point system on the basis that some violators may derive an economic benefit from noncompliance.

Comment 6: Ms. Rehberg commented that specifying the statutory maximum penalties would make it easier for lay persons to understand the rules.

Response: The board does not believe it's necessary to repeat the maximum penalties specified by statute.

Comment 7: Ms. Rehberg commented that the rules should specify how the Department is to make the initial "determination" that a violation has occurred.

Response: By statute, a written notice of violation must specify the provisions of the statute, rule, permit, or approval alleged to have been violated and the facts alleged to constitute the violation. These rules are intended to describe the process for calculating and assessing administrative penalties once the department has determined that a violation has occurred. The board does not believe it's appropriate to address in these rules the method used by the department to determine that a violation occurred.

Comment 8: Ms. Rehberg commented that the rules should clarify the review process for the Department's determination that a violation has occurred. She stated that the alternatives in proposed rule II(4) presuppose that a violation occurred and that the only way for a person to avoid a penalty assessment is to admit that a violation occurred, even if this is not correct. She stated that providing for a hearing only after the department has made its determination appears to be contrary to the intent of Section 75-5-611(5), MCA.

Response: Section 75-5-611(4), MCA, provides that a violator may request a hearing before the board no later than 30 days after service of a notice and order. Section 75-5-611(5), MCA, provides that any hearing must be public and must be held in the county where the violation is alleged to have occurred. The board does not believe that the rules are inconsistent with these provisions. The board intended for rule III(4)(a)(i) to allow a person receiving a notice letter the opportunity to deny the allegations specified in the notice. The board has revised rule II(4)(a) to clarify that the department may not assess a penalty if the violator certifies that its activity "was, or is now, in compliance . . . ."

Comment 9: Ms. Rehberg commented that, because the right to a

hearing is waived if a hearing request is not timely filed, the rules should clarify how the hearing provisions of the statute will interface with the rules.

Response: Section 75-5-611(4)-(7), MCA, and the Montana Administrative Procedure Act (MAPA), specify the procedures for any contested case hearing requested by a person receiving a notice of violation. The board does not believe it's necessary to specify any further procedures in the rules.

Comment 10: Joe Steiner, environmental engineer for the City of Billings Public Utilities Department, submitted written comments after the hearing. Mr. Steiner commented that, to eliminate classification of minor permit exceedances as Class I violations, the definition of Class I violation should tie Rule I(1)(b) - (e) to Rule I(f).

Response: Under these rules, a minor permit exceedance would be considered a Class III or Class II violation, not Class I. All of the specific violations defined as Class I violations in rule I(1)(b)-(e) are serious violations, by themselves, without a specific demonstration, under rule I(1)(f), of major harm or major risk of harm to public health or the environment. The board does not believe it's necessary to determine that the types of violations specified in rule I(1)(b)-(e) cause major harm or pose a major risk of harm to public health or the environment for these violations to be classified as Class I violations.

Comment 11: Mr. Steiner commented that the permit fee rule already provides adequate penalties for failure to pay a permit fee. Including this in the definition of Class II violation constitutes double jeopardy.

Response: The prohibition on placing a person in double jeopardy bars subsequent criminal proceedings under certain circumstances after a prior civil or criminal proceeding has occurred, and the prohibition would not apply to an administrative penalty proceeding. Also, assessment of an administrative penalty for violation of the fee rule would not involve recovery of two penalties. ARM 17.30.201(4) provides that, if a person fails to pay a permit fee, the department may impose an additional assessment of 15% of the fee, plus interest. This assessment is a late fee rather than an administrative penalty. If a permittee pays the late fee, no

violation will occur and the department will not assess a penalty.

Comment 12: Mr. Steiner commented that the rules should provide more flexibility regarding reporting violations. He stated that failure to submit one discharge permit monitoring report, as opposed to a history of failure to submit reports, should not constitute a violation. He stated that a single pH exceedance should not constitute a violation.

Response: All violations of permit requirements, rules or statutes constitute violations and it would not be appropriate for the department to consider a minor violation as not being a violation. It is appropriate, however, for the department to consider the significance of a violation and to make any penalty commensurate with the violation. These rules will not affect the department's discretion to address insignificant violations through technical assistance, rather than through assessment of an administrative penalty.

Comment 13: Mr. Steiner commented that holding a discharger to within 20% of an effluent limitation would be inconsistent with the acceptable ranges of testing. He stated that, for the City's last MPDES laboratory audit, the acceptable range for biochemical oxygen demand (BOD) as plus or minus 36% for a value of mg/l.

Response: The effluent limits in the proposed rules are not inconsistent with the acceptable ranges of testing. The acceptable range of error in laboratory analysis for BOD may be as great as ± 36%. The MPDES permit limits for BOD, carbonaceous biochemical oxygen demand (CBOD) and total suspended solids (TSS) referred to in Rule I(3)(c) are usually based on a 30-day average. Averaging 30 separate analyses neutralizes the variability inherent in laboratory analysis for these parameters. A typical 30-day average permit limit for BOD is 30 mg/l. An individual BOD analysis may be as low as 20 mg/l or as high as 40 mg/l and still be within the acceptable accuracy range for the analysis. But, the average of the variable analytical results for 30 days must meet the 30 mg/l, 30-day average limit. The fact that an individual analysis may vary by as much as 36%, does not mean that the department should consider a 20% exceedence of a 30-day average permit limit to be insignificant. Under these rules, a minor exceedance would be classified as a Class III or Class II

violation and would be subject to a lower penalty.

Comment 14: Mr. Steiner commented that, under proposed new rule III, only Water Quality Act violations should be considered for purposes of determining whether there is a history of violations.

Response: The board intended to consider only violations of the Water Quality Act. The board has revised the rules to clarify this, by revising the proposed definition of "violation" in rule I(9) to conform to the definition of "compliance" in new rule I(4), which refers to the requirements of the Water Quality Act.

Comment 15: Mr. Steiner commented that, under ARM 17.30.201, an administrative penalty of $100 against the City of Billings would result in the City losing eligibility for a reduction of its annual fee, costing Billings residents approximately $10,000. He stated that, therefore, the discretion for assessing a penalty should be clearly defined.

Response: Penalty reduction eligibility is controlled by Section 75-5-516(2)(b)(ii), MCA. Under that provision, a permittee with a violation of "any effluent limit," regardless of classification, during the previous calendar year is not eligible for a fee reduction for the following year.

Comment 16: John F. Wardell, Director of the Montana Office of the Environmental Protection Agency (EPA), submitted written comments after the hearing. He commented that the board should revise proposed new rule II(4)(a) to state that the department will not assess a penalty if the violator submits to the department a certification of compliance or a corrective action plan "within 30 days," rather than "within the time specified in the notice letter."

Response: The appropriate time line for submission of a certification of compliance or a corrective action plan may depend upon the circumstances of the violation. Therefore, the board is not specifying a particular time line in the rules.

Comment 17: Mr. Wardell commented that the board should delete the words "represents an imminent threat to human health, safety, or welfare or to the environment" in proposed new rule II(7). He stated that this language would unnecessarily

restrict the Department, that whether a threat is imminent is subjective and can be difficult to determine, and that EPA does not find this language in Sections 75-5-605 or 611, MCA.

Response: Section 75-5-617(2), MCA, provides that "[u]nless an alleged violation represents an imminent threat to human health, safety, or welfare or to the environment, the department shall first issue a letter notifying the person of the violation and requiring compliance." This provision restricts the department from immediately issuing an order assessing an administrative penalty, except under those circumstances.

Comment 18: Mr. Wardell commented that, in practice, it will be very rare that the points under the point schedule will exceed 50, which would bias the penalty to a cap of $3,000. He stated that this would result in a gap and conflict between penalties calculated under the proposed rules and penalties determined under EPA's Clean Water Act Settlement Penalty Policy.

Response: Under these rules, points assessed under rule III(2)(a) for the nature, extent and gravity of a violation will range from 1-50 points. Adding 1-30 more points under rule III(2)(b) for the circumstances of the violation may result in total points greater than 50 for a one-day violation. Under rule III(4), the points assessed under rule III(2)(a)-(d) will be multiplied by the number of days on which the violation occurred. The only cap is the statutory limit of $10,000 per day, with a total cumulative limit of $100,000 for any related series of violations.

Comment 19: Mr. Wardell commented that, because the proposed rules do not provide for higher penalties for the "size of violator," proposed rule III may result in lower penalties for non-municipalities than would be assessed under the EPA penalty policy and result in a conflict between the two policies.

Response: These rules are intended to provide penalties that are commensurate with the violation. Under rule III(6) and (7), the department can consider the violator's ability to pay a penalty and other matters as justice may require. If a penalty for a particular violation is demonstrably inadequate as a deterrent due to the size of the violator, rule III (7) will provide the department with authority to waive the point system

and consider the size of the violator and other matters that justice may require, to determine an appropriate penalty. If the circumstances of a violation indicate that a greater penalty is necessary for deterrence, the department will also have the discretion to pursue a judicial enforcement action and request a penalty up to the statutory maximum for judicial actions of $25,000 per day of violation.

Comment 20: Mr. Wardell commented that the board should eliminate proposed rule III(2)(b), regarding consideration of the circumstances of the violation. He stated that this section does not appear to add anything and seems to muddle later guidance explaining which violations are major, moderate or minor. He stated that, generally, negligence is a criminal issue and that EPA is unsure if the subjective determination of negligence is appropriate in the assessment of administrative penalties.

Response: Sections 75-5-611(9)(c) and 631(4), MCA, provide that, in assessing an administrative penalty, the department must consider the "circumstances" of the violation. Negligence is frequently an issue in civil actions and it is appropriate for the department to determine whether a violator was negligent, or grossly negligent, in considering the circumstances of a violation.

Comment 21: Mr. Wardell commented that, in rule III(2)(c)(i), the Board should clarify whether the maximum points assigned to a current violation for prior violations are 5, 3 or 1, or whether each prior violation may result in additional points of 5, 3 or 1.

Response: New rule III(2)(c)(i) provides that the department shall consider a violator's history of violations and assign points for "each" violation. The board does not believe it's necessary to clarify this provision.

Comment 22: Mr. Wardell commented that, rather than stating the time period for consideration of past violations in proposed new rule III(2)(c)(ii)(B), the board should include the time period in Rule III(2)(c)(i).

Response: The board agrees and has made the suggested revision.

Comment 23: Mr. Wardell commented that, to conform with EPA's

policy regarding consideration of past violations, the board should revise proposed rule III(2)(c) to specify that the department will consider violations that occurred in the past 5 years, rather than 3 years.

Response: This provision was intended to make the rules consistent with other department penalty rules providing for consideration of violations that occurred 3 years prior to the violation for a which a penalty is being assessed.

Comment 24: Mr. Wardell commented that the board should eliminate the provision in proposed rule III(2)(c)(ii)(B) that states that a past violation will not be counted in a history of violations if the time to request administrative or judicial review has not expired. He stated that this provides unnecessary leniency and stays enforcement simply because the violator has a hypothetical chance of contesting the violation.

Response: If an enforcement action is pending before the board or in court, or if the time for appeal of an administrative order to the board has not expired, a final determination regarding the department's allegations has not been made. The board believes that it's not appropriate to count pending enforcement actions in a violator's history of violations and that it would not be appropriate to delete this provision of the rules.

Comment 25: Mr. Wardell commented that, to decrease the amount of judgment required to make these determinations, the board should revise rule IV(1) to provide more guidance to the department regarding what constitutes a "significant" deviation from a requirement and what constitutes a "significant" length of noncompliance.

Response: Determination of whether a deviation from a requirement is significant includes consideration of many factors such as the toxicity, volume, impacts and duration of the violation. The board believes the department's staff has the knowledge and ability to exercise appropriate judgment on a case-by-case basis as to what constitutes a significant deviation or significant length of violation. The board believes that it would be unduly cumbersome and restrictive to define the term "significant" and that it is unnecessary to do so.

Comment 26: Don Allen, executive director of the Western Environmental Trade Association (WETA), submitted written comments after the hearing. He asked several questions and suggested certain revisions to the proposed new rules. He asked whether a person will have an opportunity to challenge the department's determination regarding a violation prior to issuance of a notice letter.

Response: These rules do not specifically provide for the opportunity to formally challenge the department's determination that a violation has occurred prior to issuance of a notice letter. However, the rules do not affect the department's discretion, prior to issuance of a written notice, to contact an alleged violator verbally and/or in writing and discuss the alleged violation.

Comment 27: Mr. Allen asked whether the opportunity for a hearing occurs only after issuance of the notice letter.

Response: Section 75-5-611(4), MCA, provides that, within 30 days after service of a notice and order, an alleged violator may request a hearing before the board.

Comment 28: Mr. Allen asked whether, for purposes of calculating a penalty, the number of days of violation begins when the violation occurred or began, or when the person learned of the violation. He stated that extreme penalties could result from including days when a violation was unknown, if all precautions had been taken, all permit requirements were met and required maintenance was performed.

Response: Rule III(4) provides that the penalty is multiplied "by the number of days on which the practice or condition constituting the violation has occurred." The board intends for the department to consider all days during which the department can demonstrate that a violation occurred.

Comment 29: Mr. Allen asked how the Department will comply with the statutory limit on penalties of $10,000 per day when the point system reaches that amount prior to the Department assessing a penalty for economic benefit?

Response: If the severity of a violation and the economic benefit derived from noncompliance are such that an administrative penalty would be greater than the statutory

limits on administrative penalties, the department would have the discretion to assess the maximum penalty or file a judicial action for a greater penalty.

Comment 30: Mr. Allen commented that the board should clarify what is meant in the proposed new Rule I(1)(f) by the terms "major harm" and "major risk of harm to public health or the environment."

Response: As with determination of what constitutes a significant deviation and a significant length of violation, discussed above in response to EPA's suggestion for definitions of those terms, determination of what is "major" would include consideration of many factors such as the toxicity, volume, impacts and duration of the violation. The board believes that the department's staff has the knowledge and ability to exercise appropriate judgment on a case-by-case basis as to what constitutes "major harm" or "major risk of harm to public health or the environment." The board believes that it would be unduly cumbersome and restrictive to develop rules defining these terms and that it is unnecessary to do so.

Comment 31: Mr. Allen commented that proposed new rule II should more specifically describe how the Department will determine that a violation occurred, including specification of how the alleged violator can be involved in this determination.

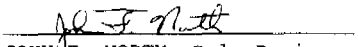
Response: These rules are intended to describe the process for calculating and assessing administrative penalties after the department has determined that a violation occurred. The written notice will inform the alleged violator of the facts alleged to constitute the violation and Rule II(4)(a) will allow an alleged violator the opportunity to respond to the allegations.

4. In addition to the revisions discussed above that the board made in response to comments, the board made several clerical revisions to the new rules to correct clerical errors and to make the rules internally consistent.

BOARD OF ENVIRONMENTAL REVIEW

By: Cindy E. Younkin
CINDY E. YOUNKIN, Chairperson

Reviewed by:



JOHN F. NORTH, Rule Reviewer

Certified to the Secretary of State April 6, 1998.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the adoption of new rules I-VI, and the repeal of 17.38.105 pertaining to cross-connections in drinking water supplies.	)))))	NOTICE OF ADOPTION OF NEW RULES AND REPEAL OF EXISTING RULE (Water Quality)

To: All Interested Persons

1. On January 29, 1998, the board published notice of proposed adoption of new rules I-VI and proposed repeal of ARM 17.38.105, at page 257 of the 1998 Montana Administrative Register, Issue No. 2.

2. Based upon comments received, the board has repealed ARM 17.38.105 and adopted the new rules I through VI, to be numbered I (17.38.301), II (17.38.305), III (17.38.310), IV (17.38.311), V (17.38.312), and VI (17.38.302), with the following changes (new material is underlined, material to be deleted is interlined):

RULE I 17.38.301 DEFINITIONS For the purposes of this subchapter, unless the context requires otherwise, the following definitions, in addition to those in 75-6-102, MCA, apply:

(1)-(9) Remain as proposed.

(10) Water ~~contamination~~ pollution hazard means a condition that causes or creates a potential for water ~~contamination~~ quality degradation but does not constitute a health hazard.

RULE II 17.38.305 CROSS-CONNECTIONS: REGULATORY REQUIREMENTS

(1) Remains as proposed.

(2) For the cross-connections identified below, the following types of approved backflow prevention assemblies or devices must be used:

(a) and (b) Remain as proposed.

(c) A water ~~contamination~~ pollution hazard created by a cross-connection that may be subject to back pressure must be eliminated, at a minimum, by an approved double check valve assembly. The cross-connection condition described in this subsection may also be eliminated by an air-gap or by an approved reduced pressure zone backflow prevention assembly.

(d) A water ~~contamination~~ pollution hazard created by a cross-connection that may be subject to back siphonage, but is not subject to back pressure, must be eliminated, at a minimum, by an approved double check valve assembly, pressure vacuum breaker assembly, or an atmospheric vacuum breaker device. The cross-connection condition described in this subsection may also be eliminated by an air-gap or by an approved reduced pressure zone backflow prevention assembly.

(3)-(5) Remain as proposed.

RULE III 17.38.310 VOLUNTARY CROSS-CONNECTION CONTROL PROGRAMS: APPLICATION REQUIREMENTS (1) Remains as proposed.

(2) The application must be accompanied by a copy of the local ordinances or plan of operations that describes the methods for implementing the cross-connection control program. The local ordinances or plan of operations must include the following:

(a)-(b) Remain as proposed.

(c) a requirement for a survey to be conducted by the owner or operator of a public water supply system for the purpose of identifying locations where cross-connections are likely to occur and evaluating the degree of hazard at each location;

(d)-(f) Remain as proposed.

(g) a provision for ~~maps~~ maintaining permanent records of ~~that indicate~~ the locations and types of ~~any~~ backflow prevention ~~assembly~~ assemblies or devices ~~identified or~~ installed ~~in the survey~~ in the public water supply system and a provision requiring records regarding the inspection and testing of these backflow prevention assemblies or devices.

(h) Remains as proposed.

RULE V 17.38.312 VOLUNTARY CROSS-CONNECTION CONTROL PROGRAMS: STANDARDS AND REQUIREMENTS FOR CROSS-CONNECTION CONTROL

(1) The department shall approve a voluntary program for cross-connection control if:

(a) the applicant has submitted an application that meets the requirements of [Rule III];

(b) the program provides for elimination of cross-connections, health hazards, and water ~~contamination~~ pollution hazards, and for installation and maintenance of backflow protection devices in accordance with [Rule II];

(c) the program provides that backflow prevention assemblies or devices must be inspected and tested, at least annually, in accordance with the "Manual of Cross-Connection Control", incorporated by reference in [Rule VI]; and

(d) the program provides that inspection and testing of backflow prevention assemblies or devices must be performed by a certified backflow prevention assembly tester.

(2) A cross-connection is exempt from the standards in this rule if the following conditions are met:

(a) the cross-connection is with a public water supply system that has been approved by the department;

(b) the owner or operator of the public water supply that is or will be connected to the system with the approved voluntary cross-connection control program:

(i) sends a written request for an exemption to the public water supplier with the approved voluntary program; and

(ii) submits a sanitary survey conducted within the 3 years preceding the request for an exemption that:

(A) indicates that there are no cross-connections that violate the requirements of [Rule II(1) and (2)] within the public water supply system that is or will be connected; and

(B) has been conducted by the department or a person who has contracted with the department for the purpose of performing the sanitary survey; or

(C) has been determined by the department to be complete

and reliable; and

(c) the public water supplier with the approved voluntary program determines that the public water supply that is or will be connected is acceptable as a source.

3. The board received the following comments; board responses follow:

Comment: One commentor stated that the list of approved backflow prevention assemblies in proposed new Rule II(2)(a)-(d) is difficult to understand and suggested that the rules list all approved assemblies or devices for each of the described cross-connection conditions.

Response: The new rules are intended to specify the minimum types of assemblies acceptable for each cross-connection condition, and the rules incorporate by reference a list of approved backflow prevention assemblies. The list incorporated by reference consists of 42 pages and it's not appropriate or necessary to include such a lengthy list in the rules. The appropriate device for a given cross-connection condition must be determined based on hydraulic characteristics and details of installation. Therefore, it would not be appropriate to list all approved assemblies or devices for each of the described cross-connection conditions. The Manual of Cross-Connection Control, incorporated by reference in new Rule VI, contains the details necessary to determine the specific backflow prevention assembly or device type for a given cross-connection condition, hydraulic characteristic and installation details.

However, so that the rules do not appear to limit the choice of backflow prevention assemblies or devices to only the minimum standard, it is appropriate to list all of the types of devices, one of which would be acceptable, for each cross-connection condition, even if some of those device types exceed the minimum requirements. For this reason, and to make new Rule II(2)(c) and (d) consistent with new Rule II(2)(a) and (b), the board has added sentences to new Rule II(2)(c) and (d) stating that the cross-connection conditions described in those subsections may also be eliminated by an air-gap or an approved reduced pressure zone backflow prevention assembly.

Comment: One commentor suggested revising new Rule III(2)(b) to specify that the local ordinance or plan of operations must include a requirement that surveys for identifying the location of any cross-connections be conducted by the owner or operator of the public water supply system.

Response: The board agrees with this comment and has made the suggested revision. The board does not intend for this revision to prevent an owner or operator from contracting with another person or entity to conduct the survey for the owner or operator.

Comment: One commentor suggested that the board revise the new

rules to specify that the cross-connection survey must be completed prior to installation of any approved backflow assembly or device.

Response: The degree of hazard posed by an individual cross-connection should be determined prior to installation of a backflow prevention assembly or device. However, it could take a long time to complete a survey of the cross-connections in a large system and it would not be appropriate for the rules to require survey of an entire system prior to installation of any backflow prevention assemblies or devices, so the board has not made this revision.

Comment: One commentor stated that the rules should place the burden for cross-connection elimination on the owner of the property or facility that has created the cross-connection. The commentor stated that the board should revise new Rule III(2)(c) to state that the "water user" shall eliminate cross-connections.

Response: The board believes it is better to maintain flexibility in the rules that will allow the department to approve an application for approval of a local program based upon the needs of the particular local area. It may be appropriate for a program to include this requirement. However, it isn't necessary to specify this requirement in the rules.

Comment: Two commentors suggested deletion of the requirement in new Rule III(2)(g) for maintenance of maps of all backflow prevention assemblies or devices. One commentor stated that this requirement would fall on the water system owner or operator, is too burdensome to justify, and could cause an owner or operator not to establish a program due to lack of resources to maintain the mapping.

Response: The board has deleted the mapping requirement from new Rule III(2)(g) and has revised the rule to require record keeping that records the location and types of backflow prevention assemblies and devices installed in a system and that records inspection and testing of backflow prevention assemblies or devices.

Comment: One commentor stated that the titles of professional organizations listed in new Rule I(7) should be capitalized.

Response: The rules were drafted to conform to the capitalization style of the Office of the Secretary of State, which publishes state agency administrative rules.

Comment: One commentor suggested changing the term "water contamination hazard" in new rule I(10) and new rule II(2)(c)and (d) to "water pollution hazard" and changing the term "water contamination" in new rule I(10) to "water quality degradation." The commentor stated that these changes would make the terms in the new rules more consistent with industry practice, with the

University of Southern California Manual of Cross-Connection Control and Hydraulic Research Manual of Cross-Connection Control, and with the American Water Works Association Manual M14 (Recommended Practice for Backflow Prevention and Cross-Connection Control).

Response: Based upon these comments, the board has revised the rules to use the suggested terms. In addition, for purposes of consistency, the board has changed the term "water contamination hazards" to "water pollution hazards" in Rule V.

Comment: One commentor suggested including language in the new rules stating that the rules provide minimum standards and that local public water supply operators may adopt more stringent requirements.

Response: The board believes that it isn't necessary or appropriate to make this revision. The new rules do not restrict a local program from adopting more stringent standards. However, whether a local program can adopt more stringent requirements is a matter of state statute and local ordinance.

Comment: One commentor suggested adding language to new rule II stating that a local public water supply operator may allow use of only one specific method of cross-connection control as long as that method meets the requirements of the rule.

Response: Section 75-6-103(2)(j), MCA, directs the board to adopt rules for a voluntary cross-connection control program. The board believes that, in a voluntary program, it would not be appropriate to restrict the methods of cross-connection control to one method, as long as the methods used are appropriate and meet minimum requirements.

4. At the hearing, the hearing officer suggested clarifying, in new rule III(2)(g), whether the rule is intended to require identification of backflow prevention assemblies or devices installed "during" the survey. The rule is intended to require identification of all backflow prevention assemblies or devices in the public water supply system and the board has clarified this language in the rule.

BOARD OF ENVIRONMENTAL REVIEW

CINDY E. YOUNKIN, Chairperson

Reviewed by

JOHN F. NORTH, Rule Reviewer

Certified to the Secretary of State April 6, 1998.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the repeal of 26.4.1301 modification of existing permits.	NOTICE OF REPEAL OF RULE (Reclamation)

To: All Interested Persons

1. On January 29, 1998, the board published notice of the proposed repeal of the above-captioned rule at page 281 of the Montana Administrative Register, Issue No. 2.

2. The rule was repealed as proposed with no changes.

3. No comments were received.

BOARD OF ENVIRONMENTAL REVIEW

By Cindy E. Younkin
CINDY E. YOUNKIN, Chairperson

Reviewed by

John F. North
John F. North, Rule Reviewer

Certified to the Secretary of State April 6, 1998.

BEFORE THE DEPARTMENT OF TRANSPORTATION
OF THE STATE OF MONTANA

In the matter of the adoption of new rules pertaining to the seizure of improperly imported motor fuels	))))	NOTICE OF ADOPTION OF NEW RULES I - VI (18.11.101 THROUGH 18.11.106)

TO: All Interested Persons.

1. On January 15, 1998, the Department of Transportation published notice of the proposed adoption of the new rules referenced above at page 97 of the 1998 Montana Administrative Register, issue number 1.

2. With the exception of proposed Rule III (18.11.103), all of the proposed rules are adopted as proposed.

3. No written comments on the rules were received by the Department. The Department did receive a phone call from a staff attorney of the Administrative Code Committee with two comments.

Comment No. 1: The attorney asked for clarification of the use of the word "and" in Rule II (18.11.102(1)) in the first sentence. She asked if the Department intended to give an offender "one free bite" since it required the transporter to already be on the warning list.

Response: The Department confirmed that was the intent of the Rule. Because the writing of a citation under sections 15-70-233 and 15-70-357, MCA, constitutes criminal enforcement, it was decided to give the agency discretion in the actual seizure of the product. To inform the carriers and transporters of the seriousness of their actions in not obtaining a license, the written warning and the first offense would be employed before actually seizing the product.

Comment No. 2: The attorney also questioned Rule IV (18.11.104) which makes no provision for the possible return of seized fuel to a transporter in the event the fuel is found not to have been improperly imported.

Response: The Department has chosen the option of compensating the transporter for the fuel as allowed by sections 15-70-233(8) and 15-70-357(8), MCA. Because of the time between seizing the fuel, conducting all of the administrative hearings, and other legal challenges, to keep the seized fuel would become expensive. The fuel should be sold as quickly as possible. If the transporter is found not to be in violation of the law, he will be reimbursed for the cost of the product. It is not practical to keep the fuel for the time period it may take to conduct the legal review.

Comment No. 3: In addition, the hearing officer, Stephen F. Garrison, recommended a revision to Rule III (18.11.103) to clarify the meaning of the 30-day period.

Response: The rule has been adopted with the following changes:

RULE III (18.11.103) NOTIFICATION OF SEIZURE OF FUEL

(1) same as proposed.

(2) The department shall provide the transporter, consignor, and consignee a blank form with which to claim interest or title to the seized fuel and/or request a hearing. Parties may use the form to claim interest or title to the fuel, and must request any desired hearing within 30 calendar days after the date of seizure. Claims received and postmarked after 30 days are automatically denied.

AUTH: 15-70-104, MCA; IMP: 15-70-233 and 15-70-357, MCA

MONTANA DEPARTMENT OF TRANSPORTATION

By: Marvin Dye
MARVIN DYE, Director

Lyle Manley
Lyle Manley, Rule Reviewer

Certified to the Secretary of State April 6, 1998.

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

In the matter of the amendment of ARM 24.30.1302, related to safety standards for coal mines	) CORRECTED NOTICE OF AMENDMENT) OF ARM 24.30.1302))

TO ALL INTERESTED PERSONS:

1. On February 12, 1998, the Department published notice at pages 443 through 446 of the Montana Administrative Register, Issue No. 3, to consider the amendment of the above-captioned rule.

2. On March 26, 1998, the Department published a Notice of Amendment at page 760 of the Montana Administrative Register, Issue No. 6. Thereafter, the Department noticed that a word had been omitted from the text of a portion of the rule.

3. The Department has amended ARM 24.30.1302 exactly as proposed, but with the following change: (deleted material stricken, new material underlined, added material in CAPITALS)

24.30.1302 COAL MINING CODE (1) Same as proposed.
(a) through (g) Same as proposed.
(h) "Secretary" means the administrator of the employment relations division of ~~workers' compensation~~ THE department of labor and industry.
(2) and (3) Same as proposed.
AUTH: Sec. 50-71-301, MCA
IMP: Sec. 50-73-103, MCA

4. The corrected version of the text was filed with the Secretary of State with the March 31, 1998, replacement pages.

David A. Scott
Rule Reviewer

Patricia Haffey, Commissioner
DEPARTMENT OF LABOR & INDUSTRY

Certified to the Secretary of State: April 6, 1998.

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES OF THE
STATE OF MONTANA

In the matter of the adoption of rules I through XVIII pertaining to tattoo rules	)))	NOTICE OF ADOPTION

TO: All Interested Persons

1. On January 15, 1998, the Department of Public Health and Human Services published notice of the proposed adoption of rules I through XVIII pertaining to tattooing at page 108 of the 1998 Montana Administrative Register, issue number 1.

2. The Department has adopted rules I (16.10.1601), III (16.10.1606), XIV (16.10.1635), XVII (16.10.1643) and XVIII (16.10.1646) as proposed.

3. The Department has adopted the following rules as proposed with the following changes from the original proposal. Matter to be added is underlined. Matter to be deleted is interlined.

RULE II [16.10.1605] TATTOOING: TATTOO SHOP REQUIREMENTS (1) and (1)(a) remain as proposed.

(b) be maintained in good repair at all times during which the shop is operating. ~~All parts of the shop and its premises must be kept clean and free of rubbish and sources of airborne dust~~ Work rooms, restrooms, hand washing facilities, and all shop areas to which clients have access must be kept clean and free of garbage, litter, unnecessary articles, dust, dirt, and sources of airborne dust. Utility rooms, garbage can storage rooms and workshop rooms, separated from other areas of the shop by closed doors, must be cleaned periodically as necessary to prevent insect or rodent harborage, airborne dust, airborne solvents or toxics or other contaminants;

(1)(c) through (4)(d) remain as proposed.

AUTH: Sec. 50-1-202, MCA
IMP: Sec. 50-1-202, MCA

RULE IV [16.10.1607] TATTOOING: UTENSILS AND SUPPLIES (1) Needles and bars must be:

(a) either single use and disposable and discarded after one use or ~~if not single use,~~ the needle portion must be detached from the bar and discarded after one use. The bar may be reused after attachment of a new needle and sterilization ~~sterilized~~, in accordance with ARM 16.10.1613; and

(1)(b) through (4)(c) remain as proposed.

(4)(d) ~~twenty-four~~ eighteen sets of sterilized needles and bars per tattooist. For purposes of this requirement, one set of needles and bars consists of one liner needle soldered to a

bar and one shader soldered to a bar;

(e) ~~twenty-four~~ eighteen sterile liner tubes per tattooist;

(f) ~~twenty-four~~ eighteen sterile shader tubes per tattooist;

(4)(g) and (h) remain as proposed.

AUTH: Sec. 50-1-202, MCA
IMP: Sec. 50-1-202, MCA

RULE V [16.10.1612] TATTOOING: HEPATITIS B VACCINATION (1) through (1)(b) remain as proposed.

~~(2) Tattooists who contract hepatitis B, C or D must cease tattooing until the tattooist is no longer infective and does not present a communicable disease risk as evidenced by written medical or serologic evidence.~~

AUTH: Sec. 50-1-202, MCA
IMP: Sec. 50-1-202, MCA

RULE VI [16.10.1613] TATTOOING: STERILIZATION REQUIREMENTS (1) Each tattooist must:

(a) use sets of individually wrapped, sterilized needles, bars and tubes for each new client. ~~Rusty, d~~Defective or faulty needles may not be used;

(b) except as provided in (2) below, sterilize ~~reusable~~ needles, bars, tubes and any other articles which may come into contact with blood or body fluids, using autoclave sterilization, by placing the wrapped needles, bars and tubes in an autoclave for 20 minutes at 15 pounds pressure at a temperature of 250 degrees Fahrenheit, or in accordance with the manufacturer's instructions. Autoclave packaging must be used to sterilize needles, bars, tubes, and any other articles which may come into contact with blood or body fluids. Testing indicator strips for checking temperature must be used each time the autoclave is operated. After autoclaving, the package must be date marked and initialed by the tattooist. If the sterilized needle, bar or tube is not used within 60 days of the sterilization date, the article must be resterilized before use;

(1)(c) through (2) remain as proposed.

AUTH: Sec. 50-1-202, MCA
IMP: Sec. 50-1-202, MCA

RULE VII [16.10.1614] TATTOOING: ULTRASONIC CLEANING UNIT (1) An ultrasonic cleaning unit, when used for needles, tubes or other parts which may become contaminated during the tattooing process, must be used in accordance with the manufacturer's instructions. An ultrasonic cleaning unit does not satisfy the sterilization requirements in ARM 16.10.1613, with or without the addition of chemical sanitizers.

(2) If the tattooist uses the ultrasonic unit at the work

station to rinse needles between pigment changes, a disposable cup or single use liner must be placed in the tank prior to use and changed between clients, unless the tank is autoclaved between clients. The used liner must be disposed of in accordance with ARM 16.10.1630.

AUTH: Sec. 50-1-202, MCA
IMP: Sec. 50-1-202, MCA

RULE VIII [16.10.1620] TATTOOING: SKIN PREPARATION (1) through (1)(b) remain as proposed.

(c) wear a clean ~~sleeved~~ outer garment and hair restraint. The hair restraint must be sufficient to prevent contact by the tattooist's hair with the tattoo site. Tie backs or hair nets are acceptable; and

(1)(d) clean and wash the client's skin area to be tattooed with hot water and a germicidal cleanser. If it is not necessary to shave the client's skin area, the tattooist must then rinse the skin area at the tattoo site with a 70% isopropyl alcohol solution or an equivalent rinsing agent commercially labeled for direct use on the skin which contains alcohol or other solvents to remove all cleaning compounds and chemical residue.

(2) through (2)(b) remain as proposed.

(2)(c) rinse the skin at the tattoo site with a 70% isopropyl alcohol solution or an equivalent rinsing agent commercially labeled for direct use on the skin which contains alcohol or other solvents to remove all cleaning compounds and chemical residue.

AUTH: Sec. 50-1-202, MCA
IMP: Sec. 50-1-202, MCA

RULE IX [16.10.1622] TATTOOING: PATTERN TRANSFER (1) through (3) remain as proposed.

~~(4) An adherent or emollient used for a pattern transfer may be a pine oil and alcohol preparation, a tincture green soap, carbolated petrolatum or antibacterial ointment. Deodorant sticks may not be used on a client's skin for adherent or emollient purposes.~~

~~(5)~~ (4) After preparing the client's skin for tattooing, including washing and if necessary, shaving, and setting up the equipment and supplies for the tattooing procedure ~~the transfer or design is applied~~, the tattooist must put on a pair of disposable latex or vinyl examination gloves to be used only for that particular tattooing procedure. If the tattooist wore gloves to wash or shave the client's skin ~~or to transfer the pattern to the client's skin~~, the tattooist must discard those gloves after completing those procedures. The tattooist must then put on a new pair of disposable latex or vinyl examination gloves before proceeding with the ~~application of the~~ tattooing.

AUTH: Sec. 50-1-202, MCA
IMP: Sec. 50-1-202, MCA

RULE X [16.10.1624] TATTOOING: TATTOO APPLICATION (1) through (1)(c) remain as proposed.

(2) During the process of tattooing, each tattooist must:

(a) use single use disposable ink cups for pigments and dispose of the ink cups after each client so that ink cups may not be reused on another client or for any other purpose. If additional pigment must be added to the ink cup during the tattooing procedure, a disposable handling liner may be used or the tattooist must wash and re-glove. Ink storage containers and other surfaces must be considered as potentially contaminated. Individual pigment portions and ink cups must be disposed of in accordance with ARM 16.10.1630;

(2)(b) through (2)(e) remain as proposed.

AUTH: Sec. 50-1-202, MCA
IMP: Sec. 50-1-202, MCA

RULE XI [16.10.1626] TATTOOING: AFTERCARE (1) After applying the tattoo, each tattooist must wash the completed tattoo with a piece of sterile gauze or sterile cotton saturated with a germicidal cleanser or tincture surgical soap, and allow the tattooed skin to air dry. After drying, anti-bacterial ointment must be applied from a collapsible ~~metal or plastic~~ tube, ~~or~~ a single use package, or a supply container using a disposable instrument such as a sterile tongue depressor. After one use, the disposable instrument must be discarded. The entire tattooed skin area must be covered with a non-stick sterile gauze and bandage or other effective means of protection and infection prevention.

(2) remains as proposed.

AUTH: Sec. 50-1-202, MCA
IMP: Sec. 50-1-202, MCA

RULE XII [16.10.1628] TATTOOING: COLORS, DYES AND PIGMENTS

(1) Each tattooist must use ~~only sterile~~ colors, dyes and pigments from reputable suppliers, stored in appropriate containers, to insure and maintain their integrity and sterility. After completing the tattooing procedure, the remaining dye or pigment in the disposable ink cup must be regarded as infectious waste, and must be discarded in accordance with ARM 16.10.1630.

(2) Pigments mixed or prepared in the tattoo shop must be ~~sterilized, stored in sterile containers and kept sterile~~ non-toxic and sanitary and must be prepared and stored in accordance with the manufacturer's instructions.

(3) and (4) remain as proposed.

AUTH: Sec. 50-1-202, MCA
IMP: Sec. 50-1-202, MCA

RULE XIII [16.10.1630] TATTOOING: HANDLING AND DISPOSAL OF INFECTIOUS MATERIAL (1) through (1)(a)(i) remain as proposed.

(1)(a)(ii) not be ~~overfilled~~ filled more than 3/4 full; and

(1)(a)(iii) through (1)(e) remain as proposed.

AUTH: Sec. 50-1-202, MCA
IMP: Sec. 50-1-202, MCA

RULE XV [16.10.1636] TATTOOING: CONSENT FORM (1) through (1)(c) remain as proposed.

(1)(c)(i) is free from a ~~current~~ communicable ~~or infectious~~ respiratory or diarrheal disease;

(1)(c)(ii) and (iii) remain as proposed.

AUTH: Sec. 50-1-202, MCA
IMP: Sec. 50-1-202, MCA

RULE XVI [16.10.1640] TATTOOING: RESTRICTIONS AND PROHIBITIONS

(1) and (1)(a) remain as proposed.

(1)(b) if either the tattooist or the client has a ~~current~~ communicable ~~or infectious disease which may be transmitted during the procedure~~ respiratory or diarrheal disease;

(1)(c) if the client has not signed the consent form required by ARM 16.10.1636; or

(1)(d) if the client is under the age of majority, without the explicit in-person consent of the client's parent or guardian as provided in 45-5-623(1)(e), MCA. Failure to adequately verify the identity of a parent or guardian is not an excuse for violation of 45-5-623(1)(e), MCA.

(2) and (3) remain as proposed.

AUTH: Sec. 50-1-202, MCA
IMP: Sec. 50-1-202, MCA

4. The Department has thoroughly considered all commentary received. The comments received and the department's response to each follow:

COMMENT #1: Requirements pertaining to body piercing should be included in the rules. Body piercing should be licensed and regulated given the higher risk of complications and infections. Body piercing should require a "certificate of sanitation" just as tattooing does.

RESPONSE: By Act of April 3, 1995, ch. 324, 1995 Laws of Montana (the Act), the 1995 legislature amended 50-1-202, MCA, to require that the department adopt minimum sanitation

requirements for tattooing and 50-2-116, MCA, to define the term, "tattoo." Tattoo means, "making permanent marks on the skin by puncturing the skin and inserting indelible colors." The Act solely addressed the practice of tattooing and did not address the issue of body piercing. While body piercing has associated health risks, the department does not have statutory authority to propose and adopt regulations governing the practice of body piercing.

COMMENT #2: What if the tattooist practices tattooing and body piercing?

RESPONSE: These rules apply only to the practice of tattooing. As required by Rule XVII (16.10.1643), Operation, each tattooist must have and display a current "certificate of sanitation" from the department. The certificate would only apply to the tattooing operations, whether the tattooist is engaged in body piercing or not.

COMMENT #3: What if the tattooist uses the same utensils and supplies for tattooing that the tattooist uses for body piercing?

RESPONSE: The tattooing machine and needles are not amenable to body piercing. Typically, body piercing involves the use of a piercing "gun" for ear lobes, or a tubular needle for other body piercing locations. Piercing equipment is vastly different from tattooing needle/bar setups. Some of the supplies might be used for both, such as skin cleansing compounds and antiseptics. Using supplies for piercing which are also used for tattooing is not in itself a significant risk factor, if both practices are done by persons who are trained in "universal precautions," a focus of these rules, and who correctly utilize the supplies.

COMMENT #4: Is body piercing regulated by some other department?

RESPONSE: The department does not know of any Montana department that regulates body piercing.

RULE I (16.10.1601) TATTOOING: DEFINITIONS

COMMENT #5: A more specific definition of "environmental surfaces" [used in the definition of "disinfectant" in Rule I(5) (16.10.1601) is needed so that the area required to be durable and sanitized is clear.

RESPONSE: A more specific delineation of the areas requiring disinfection is already contained in paragraph (4) of Rule III (16.10.1606), Work Room Requirements. Rule III(4) (16.10.1606) clarifies that work tables, counter tops and other client contact surfaces must be sanitized between clients with a

disinfectant solution. Cleaning compounds and disinfectants are formulated for use on environmental surfaces. Accordingly, the department believes the term "environmental surfaces" does not require further clarification.

COMMENT #6: With respect to the definition of "disposable" in Rule I(6) (16.10.1601), used needles should be destroyed in front of the client to demonstrate that they are never re-used.

RESPONSE: It is apparently the commentors' intent that needles be required to be single use only. Paragraph (1)(a) of Rule IV (16.10.1607), Utensils and Supplies required that needles be either single use or be autoclaved sterilized between uses. Although the department agrees that destruction of used needles in view of the client is a good practice, there is no valid health reason to justify its inclusion as a requirement in these rules. The department has determined, however, that reusing needles, after autoclaving, usually results in a duller, less polished needle, more pain for the client, a poorer line, more subcutaneous hardening, keloid scarring, and a greater risk of long term problems. Accordingly, the department has amended Rule IV(1)(a) (16.10.1607) to require single use, disposable needles or that the needle portion be detached from the bar and discarded after use on a client, with the ability to continue to use the bar, after attachment of a new needle and sterilization. In either case, a needle may not be reused after use on a single client. The department has also amended paragraph (1)(b) of Rule VI (16.10.1613), Sterilization Requirements, to clarify that needles are not reusable.

COMMENT #7: "Single use cups" should be required in the definitions listed in Rule I (16.10.1601).

RESPONSE: Rule I (16.10.1601) is not the appropriate place to require single use cups. Paragraph (4) of Rule IV (16.10.1607), Utensils and Supplies, already requires the tattoo shop to maintain a specific quantity of single use ink cups. Paragraph (2)(a) of Rule X (16.10.1624), Tattoo Application, always required the tattooist to use single use disposable ink cups. However, those rules did not require that single use cups be discarded after use and not reused. Accordingly, the department has amended Rule X (16.10.1624) to require that ink cups be discarded after each client so that ink cups may not be used on another client or for any other purpose.

COMMENT #8: A definition of "rubbish" should be included in Rule I (16.10.1601). The term is used in Rule II (16.10.1605), Tattoo Shop Requirements. The commentor wanted to be sure of what the department meant by the term "rubbish".

RESPONSE: The department agrees that the term "rubbish" is unclear. The department has amended Rule II (16.10.1605),

Tattoo Shop Requirements, by deleting the term "rubbish" and in its place, specifying that work rooms, restrooms, hand washing facilities and all shop areas to which clients have access, must be kept clean and free of garbage, litter, unnecessary articles, dust, dirt and sources of airborne dust. Further, the department has clarified that utility rooms, garbage can rooms, and workshop rooms, separated from other areas of the shop by closed doors, must be cleaned periodically to prevent insect or rodent harborage, airborne dust, airborne solvents, toxics or other contaminants.

RULE II (16.10.1605) TATTOOING: TATTOO SHOP REQUIREMENTS

COMMENT #9: "Durable, sealable bags" for potentially infectious wastes should be required in Rule II(1)(d) (16.10.1605).

RESPONSE: The issue raised by the commentor is the handling of infectious waste. The department dealt with that issue in paragraph (1)(b) of Rule XIII (16.10.1630), Handling and Disposal of Infectious Material. Specifically, infectious disposable waste, other than sharps, must be placed in moisture-proof disposable containers or securely tied bags of a strength sufficient to prevent ripping, tearing, or bursting under normal conditions of use. Single plastic trash can liners may not be used to store or transport infectious waste.

RULE III (16.10.1606) TATTOOING: WORK ROOM REQUIREMENTS

COMMENT #10: What is meant by the term "barrier" used in Rule III(1) (16.10.1606).

RESPONSE: Rule III (16.10.1606) already describes what is meant by the term "barrier". Specifically, Rule III(1) (16.10.1606) provides that the room need not have complete physical separation, but must be segregated by counters, barriers and self-closing doors, such that clients or other employees may not enter the work room unless they open a door to gain access.

COMMENT #11: The work room should have a minimum of 50 foot-candles as opposed to the minimum requirement in Rule III(2)(a) (16.10.1606) of 10 foot-candles.

RESPONSE: Field tests in well-lit shops have been in the area of 10 to 12 foot-candles. Getting results as high as 15 are unusual. Other state standards, where light is mentioned, are set at 10 foot-candles. The department believes 10-foot candles provide adequate lighting and declines to amend Rule III (16.10.1606) as requested.

RULE IV (16.10.1607) TATTOOING: UTENSILS AND SUPPLIES

COMMENT #12: The requirement to use isopropyl alcohol in Rule

IV(4)(b) (16.10.1607) should be changed to allow the use of stericlean. Most tattooists use stericlean. Isopropyl is very drying to the skin and can cause the skin to crack. The use of stericlean should be standard. It will kill HIV and hepatitis and should be used to clean everything. Isopropyl is flammable. There are better alternatives. Doctors also use stericlean.

RESPONSE: In clarification, Rule VIII (16.10.1620), Skin Preparation, is the only rule that requires alcohol to be used on a client's skin, and in that case, only once. Please refer to the department's response to comment number 21. Germicidal cleansers are for external application only and should be rinsed off prior to puncturing the skin so that these chemically active compounds are not introduced to the blood stream, even in small amounts. Isopropyl alcohol is the most common and effective solvent for this purpose, and is required by many other states in their regulations. The department has, however, amended Rule VIII (16.10.1620) to allow, as an alternative to 70% isopropyl alcohol, the use of an equivalent rinsing agent commercially labeled for direct use on the skin, which contains alcohol or other solvents to remove all cleaning compounds and chemical residue.

COMMENT #13: The requirements in Rule IV(d)(e) and (f) (16.10.1607) to maintain 24 sets are too high. The sets are expensive for the smaller shops who survive on smaller cash flow. The required quantity is unnecessary and should be reduced to 12 or 18.

RESPONSE: The minimum quantities specified in Rule IV (16.10.1607) are comparable with the regulations of other states. Estimates on this one-time cost are from $600 to $1000; in comparison to the average price charged for tattoos, the cost of maintaining the proposed quantities does not seem to be inordinate. However, because many Montana shops are lower volume operations when compared to shops in more populated states, the department has amended Rule IV(4)(d), (e), and (f) (16.10.1607) to reduce the required quantity from 24 to 18.

COMMENT #14: What is meant by "set" in Rule IV(4)(d) (16.10.1607) reference to needles? We use some needles for both liners and shaders.

RESPONSE: The word "set" means one liner needle soldered to a bar and one shader soldered to a bar (one liner and one shader). The practice of splitting a four needle shader (using a disposable razor blade) into a two needle set or down to a one needle liner is not prohibited by these rules, but it is a practice which increases the risk of cuts or needle sticks. The equipment and supply numbers in Rule IV(4) (16.10.1607) are minimums. The tattoo shop may certainly maintain more than 18 of one or the other if the practice of splitting requires a

greater quantity.

RULE V (16.10.1612) TATTOOING; HEPATITIS B VACCINATION

COMMENT #15: Rule V(2) (16.10.1612), Rule XV(1)(c) (16.10.1636), and Rule XVI(1)(b) (16.10.1640) deal with tattoo artists who have communicable diseases. The way these provisions are worded, anyone in a chronic carrier state with Hepatitis B, C or D, or who is HIV positive, would be deprived of a livelihood. The department should reconsider these rules.

RESPONSE: Federal law prohibits the discrimination against anyone who is HIV positive. Even health care workers are not excluded for HIV or Hepatitis B, C, or D. The department did not intend to exclude a person from a career as a tattooist because of HIV infection or Hepatitis B chronic carrier status. The universal precautions which are woven into the rules are intended to prevent transmissions of such infections. It was, however, the department's intent to prohibit tattooists or clients who have such illnesses as bronchitis, measles, flu, diarrhea, chicken pox, etc., from tattooing or being tattooed until the symptoms had passed. The department has amended Rule XV (16.10.1636), Consent Form, and Rule XVI (16.10.1614), Restrictions and Prohibitions, to clarify that tattooists and clients must be free from a communicable respiratory or diarrheal disease. With respect to Rule V (16.10.1612), the department has deleted paragraph (2) in its entirety. The department does note that Administrative Rules of Montana (ARM) Title 16, chapter 28, establishes rules regarding communicable disease control. ARM Title 16, chapter 28, subchapter 2 establishes reporting requirements for reportable diseases. Specifically, ARM 16.28.202 defines hepatitis A, B, or non-A or non-B as reportable diseases. ARM Title 16, chapter 28, subchapter 6 pertains to specific control measures. Specifically, ARM 16.28.612 and 16.28.612A establishes control standards for hepatitis B, non-A and non-B. A copy of the communicable disease rules may be obtained from the Department of Public Health and Human Services, Food and Consumer Safety Section, P.O. Box 202951, Helena, Montana 59620-2951.

RULE VI (16.10.1613) TATTOOING; STERILIZATION REQUIREMENTS

COMMENT #16: The term "rusty" in Rule VI (16.10.1613) should be removed because needles are stainless. Many tattooists build their own needles and inspect them before and after they are built, and sterilized. Tattooists should not be allowed to use anything other than stainless steel needles.

RESPONSE: The department agrees that the term "rusty" is not needed and has deleted the same. In clarification, paragraph (1)(b) of Rule IV (16.10.1607), Utensils and Supplies, always required that needles and bars be made of commercially

manufactured stainless steel, nickel plated carbon steel, or similar corrosion resistant material.

COMMENT #17: The requirement in Rule VI (16.10.1613) that tubes and needles be resterilized if not used in 60 days is not necessary. It should not be a concern if the tubes and needles have been sterilized.

RESPONSE: The department has declined to amend the rule as requested. Sterility is compromised where packets become shopworn. The most common standard in other states is to require re-sterilization after 30 days. The resterilization requirement is supported by the Alliance of Professional Tattooists.

COMMENT #18: There should be no grandfathering clause in Rule VI (16.10.1613) for the use of dry heat sterilizers; only autoclave sterilization should be allowed. Either shorten its authorized use to 6 months or delete the grandfathering clause in its entirety.

RESPONSE: If a shop had no autoclave and had to retrofit the facility, pay for the autoclave, and the installation, the total cost would probably be greater than $2,000. The department feels that immediate implementation of the autoclave requirement would place an undue financial burden on shop owners and that the interim risk of continued usage of dry heat sterilization is minimal.

COMMENT #19: Rule VI(1)(b) (16.10.1613) describes the standard for autoclaving (20 minutes at 15 pounds pressure at a temperature of 250 degrees Fahrenheit). The Alliance for Professional Tattooists supports a different standard (55 minutes at 15 pounds pressure at a temperature of 273 degrees Fahrenheit). The department should consider raising the autoclave standards.

RESPONSE: Section 50-1-202, MCA, authorizes the department to adopt minimum sanitation requirements solely oriented for the protection of public health and prevention of communicable disease. The department believes the minimum autoclaving standards necessary to protect public health and prevent communicable disease are those standards already in Rule VI (16.10.1613) (20 minutes at 15 pounds pressure at a temperature of 250 degrees Fahrenheit). Nothing in these rules would prohibit a tattooist from using a higher temperature for a longer period of time.

RULE VII (16.10.1614) TATTOOING: ULTRASONIC CLEANING UNIT

COMMENT #20: A disposable cup liner should be required in Rule VII (16.10.1614) when the ultrasonic unit is used to rinse

needles during pigment changes.

RESPONSE: The department agrees and has amended Rule VII (16.10.1614) accordingly.

RULE VIII (16.10.1620) TATTOOING: SKIN PREPARATION

COMMENT #21: The repeated use of isopropyl alcohol in Rule VIII (16.10.1620) should not be required; paragraphs, (1)(d) and (2)(c) both call for an alcohol rinse.

RESPONSE: Only one alcohol rinse is called for in Rule VIII (16.10.1620). Rule VIII(1)(d) (16.10.1620) requires rinsing the chemical residue off the skin with alcohol if shaving the tattoo site is unnecessary. If shaving is necessary, a tattooist would not be required to do that rinse required by Rule VII(1)(d) (16.10.1614). Instead, Rule VIII(2)(c) (16.10.1620) would be applicable which requires rinsing the chemical residue off the skin with alcohol after shaving. It would not be necessary or required to do both rinses. Please also refer to department's response to comment number 12.

COMMENT #22: The purpose of the alcohol rinse should be stated in Rule VIII (16.10.1620), for example, "to remove all chemical residue from the skin."

RESPONSE: The department agrees and has amended Rule VIII(1)(d) and (2)(c) (16.10.1620) accordingly.

COMMENT #23: Please define or clarify the term "hair restraint" in Rule VIII(1)(c) (16.10.1620). Tattooists don't want to use hair nets. The use of hats or caps is opposed because of heat; the heat causes sweating which is a worse problem than hair.

RESPONSE: The department agrees with the commentor and has amended Rule VIII (16.10.1620) to clarify that hair restraints must be sufficient to prevent inadvertent contact with the tattoo site and that tie backs or nets are acceptable.

COMMENT #24: Please define or clarify what is meant by the term "sleeved outer garment" in Rule VIII(1)(c) (16.10.1620).

RESPONSE: The reason for sleeves, as found in other state standards, is not clear. No additional health risk is seen where sleeves are absent. The department has retained the requirement for a "clean outer garment," but has deleted the requirement that the garment be "sleeved".

RULE IX (16.10.1622) TATTOOING: PATTERN TRANSFER

COMMENT #25: The use of deodorant sticks should be allowed in Rule IX (16.10.1622), if they are rendered single use by using

a sterile disposable tongue depressor to extract material from the stick. Also the use of paper towels to clean the stick or transfer material makes them single use. Commentors use deodorant to transfer a pattern and it is an industry standard. The adherent is used before any blood is ever exposed.

RESPONSE: The department, in prohibiting the use of deodorant sticks, was concerned about their potential misuse and the possibility of cross-contamination between clients. Paragraph (3) of Rule IX (16.10.1622) requires that the method of applying adherents or emollients be single use. Given that paragraph (3) assures that cross-contamination will not occur, notwithstanding the particular adherent or emollient used, the department does not believe that there is a need to reference specific adherents or emollients in the rule. Accordingly, the department has deleted paragraph (4) of Rule IX (16.10.1622) which referenced specific adherents or emollients and prohibited the use of deodorant sticks.

COMMENT #26: I glove before shaving, why should I have to reglove before tattooing as required by Rule IX(5) (16.10.1622)? Gloves are expensive.

RESPONSE: During the washing/shaving/transfer process, many items are handled by the tattooist and come into contact with the client's skin. This may include soap, water, shaving cream, razor, transfer pencil or sheet, pattern, emollient, and items outside the work field. Gloving during this part of the process is optional. However, if the tattooist elects to glove for washing or shaving the client's skin, those gloves may become soiled or contaminated and would not satisfy the requirement to wash and glove immediately prior to tattooing. This is part of universal precautions. The expense associated with gloving is minimal, even for those who glove for both skin preparation and tattooing. The department has amended Rule IX(5) (16.10.1622) to clearly state that the tattooist must put on a pair of disposable latex or vinyl gloves after preparing the client's skin for tattooing and setting up the equipment and supplies.

COMMENT #27: The use of disposable gloves in Rule IX(5) (16.10.1622) should always be done and required before the transfer of the design as well as after the transfer.

RESPONSE: While the department does not discourage the use of gloving during the skin preparation stage, there is not a sufficient health risk to justify requiring, in these rules, that gloves be worn during that stage.

COMMENT #28: The detailed requirements in Rule IX (16.10.1622) regarding procedures were opposed. The commentor uses different procedures.

RESPONSE: Rule IX (16.10.1622) clarifies, briefly, the different methods of pattern transfer and requires that the method of applying adherent or emollient be single use and that a clean pair of gloves be put on immediately prior to tattooing. The department does not believe that it has specified overly burdensome procedural requirements.

RULE XI (16.10.1626) TATTOOING: AFTER CARE

COMMENT #29: A large supply container should be allowed for antibacterial ointment in Rule XI(1) (16.10.1626). The supplier sells the ointment in a one pound tub and the commentor uses a tongue depressor once to scoop out ointment making it single use.

RESPONSE: The department agrees and has amended Rule XI (16.10.1626) accordingly.

RULE XII (16.10.1628) TATTOOING: COLORS, DYES AND PIGMENTS

COMMENT #30: What are sterile colors as used in Rule XII(1) (16.10.1628)? The department should change the word "sterile"; as soon as the colors are put into small bottles or exposed to air, they are no longer sterile. To use each bottle only once would create a huge expense.

RESPONSE: The department agrees and has amended Rule XII(1) (16.10.1628) accordingly.

COMMENT #31: The requirement that mixed pigments must be sterilized in Rule XII(2) (16.10.1628) was questioned. Most pigments come premixed. What procedure must be used to sterilize pigments? Also, tattooists have no way of knowing what manufacturers use to make pigments.

RESPONSE: The requirements for pigments in Rule XII(2) (16.10.1628) apply only to those pigments produced or mixed on site. Usually, pigments are accompanied by manufacturer instructions for mixing and maintaining safety. The department has amended Rule XII(2) (16.10.1628) to remove the word "sterilized" and to require that the pigments be non-toxic and sanitary and prepared and stored in accordance with the manufacturer's instructions.

RULE XIII (16.10.1630) TATTOOING: HANDLING AND DISPOSAL OF INFECTIOUS MATERIAL

COMMENT #32: Rule XIII(1)(a)(ii) (16.10.1630) should be changed so that the sharps container is never allowed to be more than three-quarters full. Filling or near filling the container increases the risk of needle sticks.

RESPONSE: The department agrees and has amended Rule XIII (16.10.1630) accordingly.

RULE XIV (16.10.1635) TATTOOING: CLIENT RECORD

COMMENT #33: The written physician referral was questioned in Rule XIV (16.10.1635). Who determines when a referral is needed?

RESPONSE: Pursuant to paragraph (2) of Rule XVI (16.10.1640), Restrictions and Prohibitions, a physician referral is required only in the cases of IV drug abuse, psoriasis, hemorrhage risk, sunburn or skin rash or apparent allergy. Most states prohibit tattooing in such instances. Rule XVI (16.10.1640) provides the Montana tattooist an alternative to simply refusing to do the tattoo by having the client provide a written physician referral. The tattooist may also delay tattooing or require a medical referral before tattooing persons whose physical health, understanding or judgment may be in question.

COMMENT #34: Some commentors indicated that their clients object to having records kept of their tattoos. The requirement to maintain client records was opposed for reasons of privacy; it violates the client's right to privacy. One commentor requested that two separate forms be used, one for consent and one for client information. By having two separate forms, the consent can be provided without having to provide the additional client information if the client does not want a record.

RESPONSE: Only one client record is required; the consent form required by Rule XV (16.10.1636), Consent Form, can be and usually is a part of the client record. Like all health or private records, no one has access to the information in the record, except the tattooist and the department. The client information required by Rule XIV (16.10.1635) enables the department to track and contact persons if necessary in a communicable disease investigation.

RULE XVI (16.10.1640) TATTOOING: RESTRICTIONS AND PROHIBITIONS

COMMENT #35: The provision pertaining to clients under 18 in Rule XVI(1)(d) (16.10.1640) should be more strict. The commentor requires that a parent be present and the parent must also show ID to eliminate problems and sign the consent form. The consent form without the parent is insufficient as he has had people try to pull a fast one. The form must be signed by everyone in his shop.

RESPONSE: The department notes that 45-5-623(1)(e), MCA, prohibits tattooing a child under the age of majority without the explicit in-person consent of the child's parent or guardian. The statute requires that a parent or guardian

consent in-person and does not contemplate that a consent form, in lieu of in-person consent by the parent or guardian, would meet the requirements of the statute. The department does note that 45-5-623(1)(e), MCA, also provides that the failure to adequately verify the identity of a parent or guardian is not an excuse for violation of 45-5-623(1)(e), MCA, and has amended Rule XVI (16.10.1640) to reflect the same.

Rule Reviewer

Director, Public Health and Human Services

Certified to the Secretary of State April 6, 1998.

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

In the Matter of Adoption of Rules Pertaining to IntraLATA Equal Access Presubscription.	) NOTICE OF ADOPTION OF RULES I - V (38.5.4101 - 38.5.4105), RULES VI - VIII (38.5.4110 - 38.5.4112), RULES IX AND X (38.5.4115 AND 38.5.4116) AND RULE XI (38.5.4120)

TO: All Interested Persons

1. On November 17, 1997, the Montana Public Service Commission (Commission) published a Notice of Public Hearing on the proposed adoption of telecommunications rules pertaining to intraLATA equal access presubscription at page 2048, issue number 22 of the 1997 Montana Administrative Register. The Commission heard oral comments at a public hearing held on December 18, 1997, and received pre- and post-hearing written comments.

Telecommunications industry entities providing written comments include the Telecommunications Resellers' Association (TRA) (a national organization representing nearly 500 telecommunications service providers and their suppliers, who offer a variety of competitive telecommunications services throughout the United States), Eclipse Communications Corporation (Eclipse), Montana Independent Telecommunications Systems (MITS), Montana Telephone Association (MTA), AT&T Communications of the Mountain States, Inc. (AT&T), combined comments of Ronan Telephone Company and Hot Springs Telephone Company (Ronan/Hot Springs), and U S WEST Communications, Inc. (U S WEST). The Commission also received brief written comments from a number of consumers: Delores Danelson, Virginia Koss, LaVonne Westland, Robert Hurly, Rosella Toews, Ellen Wilson, Jean White, and C.A. and Roberta Guy. U S WEST, AT&T, MITS, MTA, and Ronan/Hot Springs also provided oral comments at the hearing.

The rules as published represented the Commission's attempt to consolidate and compromise prior formal and informal comments in a set of rules which recognize the concerns of all commenters and provide a fair and reasonable means of transitioning to intraLATA dialing parity. Many of the comments restate comments which the Commission considered extensively prior to publishing proposed rules.

General Comments:

COMMENT NO. 1: U S WEST comments that the rules adopted in this proceeding should be flexible enough to accommodate local exchange companies who desire to implement 1+ intraLATA presubscription immediately, as well as U S WEST, which intends to implement presubscription coincident with receiving interLATA relief or by February 8, 1999.

RESPONSE: The Commission's rules on dialing parity implementation adopted by this notice provide the flexibility needed to accommodate U S WEST in its unique circumstances, companies

that choose to implement intraLATA dialing parity or implement such pursuant to a bona fide request, and companies whose economic or other circumstances warrant a waiver or extension of time for implementation of intraLATA dialing parity.

COMMENT NO. 2: Some of the comments argue for further modification to the rules as published which would include sections which have not been subject to public comment. One such comment is U S WEST's which argues that any Commission order which prescribes competitively neutral business office practices be allowed to expire one year following the introduction of 1+ intraLATA presubscription. Another is AT&T's suggestion for additional language in ARM 38.5.4116 which would include a process for lifting the restriction on business office practices.

RESPONSE: The Commission will not adopt material changes which should be open to further comment. U S WEST cited California as one state which has established a sunset date of one year which assumes the market will become truly competitive by that time, and also stated that states where presubscription has been implemented have seen true competition completely evolve within the first year. Such anecdotal information, particularly from states which are not similarly situated to Montana, has little weight and should not be included in the Commission's rules without further comment from all interested parties. The procedure suggested by AT&T can be accommodated under the Commission's existing rules and is unnecessary, particularly without the benefit of additional comments.

COMMENT NO. 3: The comments from members of the public who are consumers interested in intraLATA presubscription are general comments not directed to any specific rules. Not all relate directly to this rulemaking, but they do express frustration with the present intraLATA status and/or carrier of intraLATA toll.

Delores Danelson of Scobey commented that the present situation requires the dialing of additional digits, which can be extremely frustrating if the called number is busy, particularly for persons with certain disabilities or illnesses. She expressed concern about higher costs for calls that are completed through the default intraLATA toll provider and her hope that the State of Montana can provide some relief soon for these inequities.

Virginia Koss of Malta urged the Commission to "rid eastern Montana of the LATA ruling now."

LaVonne Westland of Opheim stated that the LATA ruling that forces her to use U S WEST as her long distance carrier is unfair and causes inconvenience and hardship to those who live in remote areas of Montana. She expressed frustration with changing long distance carriers, punching in access codes, and being unable to ascertain even from her telecommunications provider where the dividing line for the LATA is (she lives close to the LATA boundary). Some people using her phone do not use the access code because they do not understand it and she is

charged $.30 per minute for a U S WEST call instead of $.10 per minute if the call was completed through her presubscribed long distance carrier's access code for intraLATA calls. Ms. Westland also states that the Commission should change this ruling so rural Montana can be like the rest of the United States and can choose options for lower rates.

Robert Hurly of Glasgow emphasized that the public does not benefit from what he considers a "silly" rule--only U S WEST benefits--and there can be no possible justification for the Commission to impose a rule on Montanans which "requires that our long distance phone service in half of the state has to go to U S WEST, at $.25 or more per minute, when many of us are signing up with special plans that give us phone calls in the other half of the State and all over the U. S. at $.10 or $.15 a minute. Mr. Hurly further commented that the Commission is certainly doing no "public service," as is its job, by requiring people in his area to do business with a company that dumped all of northeast Montana when it sold out years ago and that charges them twice as much for phone calls as they pay without the rule. Mr. Hurly urges the Commission to do this now because he believes changing to intraLATA dialing parity can be done as easily as changing from one long distance carrier to another.

Ms. Rosella Toews of Glasgow commented that she objects to the ruling of LATA which requires that calls in eastern Montana must be routed through U S WEST which requires that extra charges be paid. She urges the Commission to get rid of the LATA ruling immediately.

Ellen Wilson of Helena commented that the LATA rule should be done away with. Another Helenan, Jean White, urged the Commission to "ease up on the LATA rule" that means she pays $.35 a minute within her LATA and can call other areas in Montana for $.10 a minute. Ms. White questioned this difference in rates within Montana.

C.A. and Roberta Guy of St. Marie urge the Commission to drop the LATA now. They state that they want to use only their present interLATA long distance carrier for all in-state calling and that the Commission should drop old, out-dated laws and rules.

RESPONSE: These comments from consumers highlight the need for reform of the present status of presubscription. They also illustrate a misunderstanding--certainly justified and not limited to only a few persons--of the current laws and regulations applicable to the interLATA and intraLATA toll markets. Certainly it has been confusing and frustrating as well for consumers since the breakup of the Bell System in 1984 when LATAs were created. Some states have only one LATA and all calls within the state are intraLATA calls which have not been subject to required presubscription. Other states were assigned two or more LATAs.

Shortly after this divestiture, customers were given ballots for choosing their preferred long distance carrier among the few operating at that time. Since then, the interLATA market has expanded in terms of the number of carriers offering long distance calls and this competition has resulted in lower

rates. Yet, these interexchange carriers (IXCs) have not been able to offer their customers the same ease of dialing for intraLATA calls. In most exchanges, those calls have continued to default to U S WEST unless an access code is first dialed. The level of frustration created by this restriction is evident from the comments above. Many consumers do not understand why this has continued.

The 1984 divestiture of AT&T, which separated parts of its business for antitrust reasons, allocated the interLATA toll part of the Bell System--toll between LATAs within a state or between states--to AT&T. It prohibited the Bell Operating Companies (U S WEST is one of these "BOCs") from doing business in that market and at the same time, made these companies the default carriers for toll in their regions, but only within LATAs. This Commission has no authority to combine Montana's two LATAs or "get rid of LATAs" as some consumers have urged it to do. This is entirely within the jurisdiction of the Federal Communications Commission (FCC). When U S WEST and the other BOCs have opened their markets to local exchange service competition sufficiently and are allowed by the FCC to enter the interLATA market, there will be no need for retaining the LATAs.

Very few states implemented intraLATA presubscription (or dialing parity) prior to the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (amending scattered sections of the Communications Act of 1934, 47 U.S.C. 151, et seq.) (1996) (the "federal Act" or the "1996 Act"). Those that did so were states where competition in the local exchange market was beginning to emerge and where protection of this source of revenue for the BOCs was no longer seen as necessary because the separate businesses created from the breakup of the Bell System were all thriving and prospering. The Montana Commission began a proceeding to implement presubscription for intraLATA calling in addition to interLATA presubscription. That proceeding was interrupted by the passage of the 1996 Act as it affects U S WEST. U S WEST is not required to provide intraLATA dialing parity in its territory until February 8, 1999, unless it has met the requirements of the federal law and the regulations of the FCC for opening its markets to competition in the local exchange.

Therefore, the Commission's adoption of these rules will not hasten the ability of many consumers in Montana to access their preferred intraLATA carrier without using carrier access codes. Nor will it immediately affect those consumers who are subscribers to local exchange carriers (LECs) other than U S WEST whose intraLATA toll is carried by U S WEST, although some rates charged by U S WEST for intraLATA toll may decrease as a result of a docket pending with the Commission wherein U S WEST proposes to decrease the rates for intraLATA toll and to increase the rates for local exchange service. U S WEST has attempted to renegotiate its existing contracts with the independent companies and some companies have begun carrying their own intraLATA toll or have contracted with another provider for intraLATA toll.

The Commission's rules for 1+ intraLATA presubscription establish procedures and requirements for local exchange companies when they implement intraLATA dialing parity. Except in the case of U S WEST, they do not require companies to implement dialing parity without a bona fide request (BFR). Even if a BFR is made, the local exchange carrier may request a waiver as provided for in these rules. Software upgrades are necessary to implement dialing parity and the cost of implementation may be prohibitively high for some companies. Thus, and contrary to the assumptions inherent in many of the comments from individuals, the Commission's adoption of these rules will not accelerate the implementation of 1+ equal access presubscription. The date of implementation remains a decision largely within the control of the local exchange carrier serving the exchange. In the case of U S WEST in particular, the Commission has no jurisdiction to require such prior to February 8, 1999.

2. The Department has amended and adopted the following rules:

38.5.4101 SCOPE AND PURPOSE OF RULES (1) and (2) remain as proposed. AUTH: Sec. 69-3-103 and 69-3-822, MCA; IMP, Sec. 69-3-102, ~~and~~ 69-3-201 and 69-3-834, MCA

COMMENT NO. 4: AT&T comments that the objectives noted in (1) are in keeping with the benefits that can be reasonably expected when the intraLATA toll market becomes effectively competitive. MTA questions the Commission's jurisdiction and authority to adopt substantive rules, asserting that the Commission can only adopt procedural rules for regulated companies and can adopt no rules for companies that were exempt from regulation prior to passage of Senate Bill 89 by the 1997 Montana Legislature.

MTA states that the Commission's reliance on its general rulemaking authority contained in 69-3-103, MCA, is suspect given the more limiting language of 69-3-833, MCA. MTA emphasizes that (2) describes the purpose of the rules is to provide guidelines and procedures for the Commission to carry out its duties under the 1996 Act and that the dialing parity requirement of section 251(b) of the 1996 Act was adopted by the Montana Legislature and codified as 69-3-834(2)(b), MCA. MTA states that the Commission's rulemaking authority is limited to rules of procedure and to the extent that the Commission's proposed rules contain substantive requirements, such action could very well exceed the Commission's rulemaking authority in implementing this particular requirement of the Federal Act and 69-3-103, MCA. MTA further states, "Certainly to the extent the Commission relies on its general rulemaking authority for the promulgation of substantive intraLATA equal access rules, the same will have no application to otherwise unregulated telecommunications carriers, including cooperatives."

RESPONSE: MTA previously raised a similar issue concerning the Commission's jurisdiction to adopt any kind of substantive rules in the Commission's rulemaking proceeding for rules on

local service competition and interconnection. The Commission disagreed with that argument, noting that the Montana Administrative Procedure Act (MAPA) specifically refers to substantive rules in 2-4-102(11) and 2-4-305(5), MCA, and that substantive rulemaking authority is granted to the Commission in 69-3-103, MCA. Further grants of unqualified rulemaking authority are found in 69-3-310, MCA, and in the Montana Telecommunications Act (the "Montana Act") at 69-3-822, MCA. For mediation, arbitration, and approval of interconnection agreements between previously unregulated telecommunications providers such as cooperatives and for designation of eligible carrier status for such companies, 69-3-833, MCA, limits the Commission to adopt procedural rules. It has no application in this rulemaking, however.

The limitation to procedural rules for such matters in 69-3-833, MCA, does not affect the Commission's rulemaking for dialing parity because the rulemaking neither involves interconnection agreements which must be arbitrated, mediated, or approved, nor are any issues relating to eligible carrier status affected. Section 833 states that the Commission may adopt procedural rules to implement 69-3-836 through 69-3-840, MCA. Section 834, which MTA's comment relates to, is not included in that grant of limited rulemaking authority. Moreover, 69-3-822, MCA, states that the Commission may adopt rules to implement the Montana Act, does not restrict the Commission to procedural rules, and applies to all sections except those specifically limited by section 833 for carriers now subject to very limited regulatory provisions. MTA commented at the hearing that it recognizes that 69-3-833, MCA, does not refer to section 834; however, it reiterated its prior argument that the Commission has procedural rulemaking authority only over regulated carriers and that it has no rulemaking authority over other carriers.

The Commission believes that the logical interpretation of these grants of authority is as follows: The Commission was given general authority under 69-3-103, MCA, which describes its general powers and rulemaking authority. This section describes the nature of the Commission's rulemaking authority and together with 69-3-102 and 69-3-201, MCA, clearly provides for substantive rulemaking. These sections together provide for authority over regulated public utilities. Section 69-3-822, MCA, specifically grants rulemaking authority--both substantive and procedural--to carry out the provisions of part 8, the Montana Act. This rulemaking authority is limited to procedural rules by 69-3-833, MCA, for sections 69-3-836 through 69-3-840, MCA. The Montana Legislature granted additional jurisdiction to the Commission beyond that in 69-3-102, MCA, and limited jurisdiction in 69-3-822 for purposes of implementing 69-3-831 through 69-3-839, MCA. Montana law presumes that the legislature is aware of existing law relating to a subject when attempts are made to change it and that the legislature has full knowledge of the conditions and policies of industries when making legislation affecting them. *See* Blythe v. Radiometer America, Inc.,

(1994) 262 Mont. 464, 475; and Leuthold v. Brandjord, (1935) 100 Mont. 96, 106-07.

The Commission is amending the statutory references to its authority to adopt these rules to include 69-3-822, MCA, and to include 69-3-834, MCA, as a statute being implemented.

38.5.4102 DEFINITIONS (1) through (5) remain as proposed.

(6) "Primary toll carrier" means the current provider of intraLATA long distance service. In certain instances, the primary toll carrier is the current local exchange carrier.

(7) "Primary (or presubscribed) interexchange carrier" or "PIC" means the telecommunications carrier with whom a customer may presubscribe to provide 1+/0+ toll service without the use of access codes, following equal access presubscription implementation.

(~~7~~8) "Registered local exchange carrier" means a carrier that has registered with the commission to provide local exchange service within Montana using its own facilities or those of another carrier or entity.

(~~8~~9) "2-PIC" is the equal access presubscription option that affords customers the opportunity to select one telecommunications carrier for all interLATA 1+/0+ toll calls, and at the customers' options, to select another telecommunications carrier for all intraLATA 1+/0+ toll calls. AUTH: Sec. 69-3-103 and 69-3-822, MCA; IMP, Sec. 69-3-102, ~~and~~ 69-3-201 and 69-3-834, MCA

COMMENT NO. 5: AT&T comments that the definitions in this section are generally consistent with definitions commonly employed in the industry. AT&T emphasizes that (1) should eliminate any concerns that the BFR provision in these rules applies to anything other than initiating intraLATA presubscription in specified exchanges; that (6) is helpful as it defines PIC as being either the presubscribed interchange carrier, or the primary interexchange carrier, and the terms have been used interchangeably in different jurisdictions; and the inclusion of (4) defining local exchange carrier as any carrier who provides local exchange service in Montana clearly indicates that the rules apply to both incumbent LECs and new entrants.

U S WEST believes that references to "primary toll carrier" used throughout the rules to distinguish between a local exchange carrier's responsibility and another carrier's responsibility is confusing and misleading. It suggests a definition of "primary toll carrier" be added to this section, or that any references to primary toll carrier can be eliminated from the rules.

RESPONSE: The Commission agrees that further clarity should be provided to define "primary toll carrier." The rule is amended to add the definition suggested by U S WEST.

38.5.4103 EQUAL ACCESS PRESUBSCRIPTION IMPLEMENTATION (1) U S west communications, inc. is required to implement intraLATA equal access presubscription in its Montana territory when it begins providing in-region interLATA services pursuant

to 47 USC 271 or on February 8, 1999, whichever is earlier. U S west communications, inc. shall file an intraLATA dialing parity implementation plan consistent with the requirements of ARM 38.5.4120. Any grant of authority to U S west communications, inc. to provide in-region interLATA services pursuant to 47 USC 271 will not affect the timing requirements applied to other carriers in the provision of intraLATA dialing parity. None of the provisions of (2) below apply to U S west communications, inc.

(2) remains as proposed. AUTH: Sec. 69-3-103 and 69-3-822, MCA; IMP, Sec. 69-3-102, ~~and~~ 69-3-201 and 69-3-834, MCA

COMMENT NO. 6: MTA comments that it assumes ARM 38.5.4103 reflects the statutory requirement in 69-3-834, MCA, that LECs are not required to implement equal access without a BFR unless the company so chooses and not an attempt to impose equal access requirements on LECs that have not received a BFR or do not choose to implement it without a BFR. MTA also comments that new facilities-based carriers should not be required to file a plan for implementation until they receive a BFR or choose to implement equal access, given that carriers need not provide equal access until receiving a BFR. Further, MTA reiterates its argument that the Commission may not implement substantive rules and states that the imposition of the 2-PIC methodology constitutes a substantive rule as do the requirements for waiver in 69-3-834, MCA. MTA suggests that 69-3-834(5) be incorporated into the rule, or the rule be deleted entirely.

RESPONSE: See comment 4 regarding MTA's comment about substantive rules. The Commission recognizes the requirements of section 251(b) of the 1996 Act and particularly the duty of all local exchange carriers to provide dialing parity. While it is reasonable to not require incumbent LECs to file dialing parity plans until they have received a BFR or choose to implement equal access, other sound reasons argue for requiring new local exchange carriers to provide a plan when they begin to offer service in Montana. New entrants have a duty to implement dialing parity and should have plans for such when entering the local exchange market. They do not have the same operating constraints that incumbent LECs have. The Montana consumers who commented in this rulemaking proceeding have expressed their frustrations with the present system and thus it seems reasonable to require new entrants to file such plans without having received a BFR.

COMMENT NO. 7: Ronan/Hot Springs request that ARM 38.5.4103 be amended to adopt longer time frames for implementation by small independent LECs. They suggest at least 36 months in keeping with the FCC's interLATA order.

RESPONSE: Subsection (2)(d) provides for a process to obtain an extension of time, thereby making it unnecessary to provide for longer time frames in the rule. Not only is a specified time certain unnecessary, it is also unreasonable to provide defined times when requests for extensions of time should be handled on a case-by-case basis. The Commission believes this section should remain as proposed.

COMMENT NO. 8: U S WEST suggests the addition of language to further clarify its unique situation: "U S WEST will file with the Commission a detailed implementation plan outlining the introduction of intraLATA presubscription. This plan will be filed 6 months in advance of U S WEST's entry into the interLATA market, or no later than August 8, 1998. U S WEST will request the Commission approve the plan no later than 30 days after filing."

RESPONSE: U S WEST's request for addition of language to clarify its unique position is well taken. Section (1) is amended as set forth above and ARM 38.5.4120 is amended as discussed below. The last additional sentence requested by U S WEST is not proper content for an administrative rule, however, and should not be included in the rules. U S WEST may request at the time it files its implementation plan that the Commission approve it by a time certain. The Commission will not amend the rule to require U S WEST to make that request.

COMMENT NO. 9: AT&T comments that ARM 38.5.4103 provides a workable and practical approach to implementing intraLATA presubscription, and the waiver provision of (2)(c) along with the extension opportunity provided by (2)(d) should serve to avoid undue hardship on LECs. AT&T objects to the requirement of a performance bond in (2)(e), however, as it is unnecessary because multiple toll carriers can be expected to participate in intraLATA presubscription. If a performance bond is required, this section should include a provision to apply only when a toll carrier requests intraLATA presubscription and does not participate and when no other carriers participate in the process. AT&T states that when other toll carriers participate, there would be no need for the forfeiture set forth in (2)(e).

RESPONSE: The Commission considers it reasonable to require a performance bond as set forth in this section. Although other toll carriers will likely participate in presubscription in most areas of the state, this is not as clear for the areas served by rural carriers. AT&T's concerns are addressed by the inclusion of the requirement that forfeiture of the performance bond is required only upon a finding of good cause by the Commission. The concern expressed by MITS in its informal comments and shared by the Commission is that companies may choose not to participate in intraLATA presubscription after forcing its implementation through the BFR process.

38.5.4104 CUSTOMER EDUCATION AND PRESUBSCRIPTION PROCEDURES (1) In exchanges with existing interLATA dialing parity, the local exchange carrier shall provide written information to customers, at least 30 days prior to its scheduled implementation, describing intraLATA dialing parity and explaining presubscription procedures. Written information provided to customers pursuant to this rule shall advise customers with existing interLATA toll freezes on their account that their freeze will also apply to their existing intraLATA toll carrier until they take action to change it. Any customer commencing service after that mailing, but before implementation of equal

access presubscription, shall also receive a copy of the written information from the local exchange carrier providing service.

(2) and (3) remain as proposed.

(4) Informational materials, forms and scripts developed for use in compliance with this rule shall be complete, clear, and unbiased. U S west communications, inc. shall file these materials, forms, and scripts with the commission as part of its implementation plan pursuant to ARM 38.5.4120. For implementation of presubscription in all other exchanges, tThe local exchange carriers or primary toll carriers shall file these materials, forms, and scripts with the commission not more than 60 days after the receipt of a bona fide request, denial of waiver, or the expiration of the waiver, for intraLATA equal access presubscription so that they can be reviewed by the commission prior to commission approval or modification. The carrier shall promptly make any changes required by the commission before using the materials, forms or scripts. AUTH: Sec. 69-3-103 and 69-3-822, MCA; IMP, Sec. 69-3-102, ~~and~~ 69-3-201 and 69-3-834, MCA

COMMENT NO. 10: MTA reiterates its view that the Commission cannot implement substantive rules. It further comments that scripts should only be provided to the Commission upon a showing of need by impacted interexchange carriers and then using the existing complaint process. MTA is concerned that customer service personnel may need to deviate from the scripted information.

RESPONSE: MTA's comment concerning substantive rules is discussed in comment 4 above. The Commission disagrees that scripts should only be provided upon a showing of need by interexchange carriers and declines to amend this rule as suggested by MTA. The complaint process is not adequate for the implementation of dialing parity because it contemplates responding to abuses after they have occurred. It is reasonable to act proactively in this instance where scripts will be used for a brief period of time.

COMMENT NO. 11: AT&T supports this rule generally but comments that the process for Commission review of scripts in (4) would be more effective if interested parties were also able to review the material prior to Commission approval and suggests adding the phrase "and other interested parties" to modify the next to last sentence in (4).

RESPONSE: Under Montana and federal law, the Commission is responsible for encouraging competition in a competitively neutral manner. This can best be done by objectively reviewing the scripts prior to their use. Some incumbent LECs have asserted these scripts are proprietary trade secret information. Materials submitted with a proposed dialing parity implementation plan that are claimed to be proprietary should be treated in a similar manner as proprietary information filed in other Commission proceedings.

COMMENT NO. 12: U S WEST suggests changing (1) to begin no earlier than 60 days prior to scheduled implementation in exchanges with existing interLATA dialing parity.

RESPONSE: Subsection (1) does not require provision of written information prior to 60 days before implementation of intraLATA dialing parity and U S WEST's suggested change to (1) is unnecessary. Subsection (1) is amended to reflect the Commission's requirement for educational materials to explain that subscribers must take affirmative action if they want to have their intraLATA toll carrier changed. ARM 38.5.4116 is amended by this notice to require that an existing freeze on an interLATA carrier also apply to the existing intraLATA carrier until a consumer takes action to change the intraLATA carrier freeze. See Comment 28.

COMMENT NO. 13: U S WEST also suggests that (4) should be modified to reflect U S WEST's unique circumstances as U S WEST is not subject to the BFR, waiver, or extension provisions in the rules. U S WEST further comments that scripts be deemed proprietary and submitted only in instances where the Commission feels that such a review is necessary to ensure competitive neutrality because it is not appropriate that its competitors have input into its practices, policies or procedures. It states that it will submit scripts upon request to the Commission for the purpose of determining competitive neutrality.

RESPONSE: The Commission agrees with U S WEST that (4) should reflect U S WEST's unique circumstances and is amending (4) to reflect this. However, the Commission will require U S WEST to submit scripts as part of its implementation plan required by ARM 38.5.4120. The Commission believes that such a review is necessary prior to implementation.

38.5.4105 NOTICE AND IMPLEMENTATION (1) remains as proposed.

(2) Not more than 45 days after receipt of a bona fide request for implementation of intraLATA equal access ~~presubscription~~, if no waiver has been sought, or, not more than 45 days after filing its dialing parity implementation plan in the case of U S west communications, inc., the local exchange carrier or primary toll carrier shall make available to all registered carriers that intend to ~~subscribe to~~offer intraLATA equal access presubscription a complete list, upon request, which may be provided electronically, of the primary toll carrier's customers by name, telephone number and address. The primary toll carrier shall also update the list upon request. Any charges for such lists shall be cost-based and non-discriminatory. The registered carrier shall use such lists only for purposes of presubscription solicitation exclusively to its own end user subscribers of record and no longer than 180 days after implementation of dialing parity. AUTH: Sec. 69-3-103 and 69-3-822, MCA; IMP, Sec. 69-3-102, ~~and~~ 69-3-201 and 69-3-834, MCA

COMMENT NO. 14: MTA suggests that the timing of implementation of equal access, as with any interconnection, service, or network elements requested pursuant to 69-3-834 and 835, MCA, is subject to the specific negotiation and arbitration time lines contained in the federal Act and specifically in 69-3-837, MCA. It further states that the Commission has no authority to bypass

the negotiation and voluntary agreement process envisioned by federal and Montana statutes by substantive administrative rules without a negotiated or arbitrated interconnection agreement.

RESPONSE: MTA's comments have been addressed in comment 4 above.

COMMENT NO. 15: TRA is concerned that customer lists may potentially be unavailable to non-facilities-based resellers who do not subscribe to intraLATA presubscription, pursuant to (2). If the rule is enacted in its present form, TRA is concerned that resellers who are technically incapable of subscribing to intraLATA presubscription will be significantly disadvantaged competitively in relation to their competitors who do subscribe to it because they would not gain access to customer lists under the proposed language in (2). TRA suggests that the word "offer" be substituted for the proposed language to seal an inadvertent yet potentially dangerous loophole existing in the rule as proposed and to afford all intraLATA service providers the opportunity to compete on a fair and equitable basis.

RESPONSE: The Commission agrees that all intraLATA service providers should have the opportunity to compete fairly and that (2) should be amended so not to inadvertently create the loophole identified by TRA. Subsection (2) is amended as requested to address this concern. The Commission is also amending (2) to clarify that LECs implement equal access and companies offering equal access presubscription do not.

COMMENT NO. 16: U S WEST comments that it does not make economic sense to provide customer lists for the stated purpose when they can only solicit to their own subscribers of record and it would be impossible to police the usage of the lists if provided in their entirety. U S WEST argues that this complies with 47 C.F.R. 64.1201(c)(1)(ii) which permits "bulk disclosure to an interexchange carrier of the billing name and address (BNA) information on all the customers already presubscribed to that carrier." AT&T does not agree with U S WEST's interpretation of section 64.1201. U S WEST states that it agrees to make available to competing providers, upon request, a list of their subscribers of record. AT&T comments that the procedures set forth in this rule appear to be both fair and workable. It agrees with U S WEST's suggestion that the words "upon request" be inserted in the first sentence in (2).

RESPONSE: In AT&T v. FCC (1997), 113 F.3d 225, the Court addressed a disputed interpretation of 47 C.F.R. 64.1201 concerning the provision by LECs of bulk disclosure of BNA information. Section 64.1201, according to that opinion, permits bulk disclosure for (1) BNA presubscribed to a particular carrier to that carrier at any time, and (2) bulk disclosure for activities associated with the initial conversion to equal access in a particular central office. The rationale for this decision applies equally to conversions to equal access in the intraLATA market. Provision of customer lists should not be required without a request from a carrier, and the Commission is amending the rule to insert the words "upon request" as requested by U S WEST. Further, the manner in which the LEC uses customer information itself for marketing purposes is how it should be

made available for use by other carriers, subject to limitations on such use by statute, the FCC and the Commission.

COMMENT NO. 17: U S WEST also comments that (1) does not reflect U S WEST's unique circumstances and that the information to be included in the notice proposed in this rule will be included in its implementation plan to be filed with the Commission as described in its recommended addition to ARM 38.5.4103. U S WEST further comments that the use of the term "primary toll carrier" is not appropriate in this context and leads to confusion and misunderstanding. U S WEST also suggests that the language in (2) be revised to indicate that U S WEST's implementation process is not tied to receipt of a BFR, to reflect that the lists will be provided upon request, and to change references to "primary toll carrier" to local exchange carrier.

RESPONSE: The Commission is amending (2) to reflect U S WEST's unique circumstances as requested. U S WEST will be required to comply with ARM 38.5.4120 concerning its implementation plan, however, and not ARM 38.5.4103 as it has suggested. The Commission has included a definition of "primary toll carrier" in ARM 38.5.4102 as requested by U S WEST. U S WEST's other concerns are adequately covered by (2) and no further amendment is necessary.

38.5.4110 BALLOTING (1) through (3) remain as proposed. AUTH: Sec. 69-3-103 and 69-3-822, MCA; IMP, Sec. 69-3-102, ~~and~~ 69-3-201 and 69-3-834, MCA

COMMENT NO. 18: The sole commenter on this rule is AT&T; AT&T supports this rule.

RESPONSE: This rule is adopted as proposed.

38.5.4111 CHARGES (1) through (3) remain as proposed. AUTH: Sec. 69-3-103 and 69-3-822, MCA; IMP, Sec. 69-3-102, ~~and~~ 69-3-201 and 69-3-834, MCA

COMMENT NO. 19: MTA comments that customers changing both their interLATA and intraLATA primary PICs at the same time should be subject to separate charges or a combined charge. MITS comments that current interLATA PIC change charges are insufficient to recover processing costs and this rule will exacerbate the shortfall when applied to intraLATA PIC changes. If the interLATA and intraLATA change charge are the same, the interLATA charge should be increased to truly cover costs. MITS also comments that two separate PIC charges should apply, although the second charge could be discounted by some percentage to account for shared costs.

Concerning (2), U S WEST believes that end user customers who request a simultaneous change to their interLATA and intraLATA carriers (either to the same or a different carrier) should be charged the FCC-presubscribed interLATA PIC change charge of $5.00, and a discounted intraLATA PIC change charge of $2.50. U S WEST states that this is consistent with what the Commission has authorized for Clark Fork and Citizens as part of their implementation plans, it is fair and reasonable in light of the increased expenses which can result from such changes,

and two charges heighten customer awareness that order activity of some kind has occurred on their account. U S WEST states that customers are more likely to notice something on their bill that indicates a change has been made and gives the following example from another state that implemented dialing parity. A competing carrier had marketed their intraLATA service by offering $5.00 food coupons at a major grocery chain. Customers signing the coupons in order to use them were unknowingly authorizing a change of their intraLATA carrier and did not discover this until they received their bill.

AT&T further comments that LECs should only be allowed to recover the incremental cost of PIC changes and this should be implemented rather than the $5.00 charge which is not cost-based. AT&T also supports the single PIC change charge for multiple changes when only one transaction is involved. Further, AT&T states evidence suggests that the PIC charge may be excessive and clearly is not based on incremental costs. AT&T states that LECs should submit incremental cost studies if they feel the charge is not compensatory and seek a waiver to use a cost-based rate.

RESPONSE: The charge for changing PICs has been extremely controversial throughout this proceeding. The Commission chose to propose a single PIC change charge if both interLATA and intraLATA PICs are changed at the same time. Although the LECs argue that there are incremental costs associated with a second PIC change, the fact remains that it involves a single transaction up until the time the actual change is physically made and this single transaction does not warrant a double charge or even a discounted charge as suggested if the $5.00 PIC change charge is not cost-based. Although AT&T asserts that the evidence suggests the PIC change charge is not cost-based, there is no evidence that clearly establishes whether PIC change charges are or are not cost-based. The Commission declines to amend (2). Further, U S WEST's example has been addressed by the Montana Legislature and the Commission's "slamming" rules adopted pursuant to 1997 legislation.

COMMENT NO. 20: MTA comments that the free PIC change period in (1) should not be extended to six months as suggested by AT&T; the maximum period allowed should be no more than 90 days. MTA also comments that the foregone charges during the free period should be recoverable under ARM 38.5.4115. MTA also reiterates its assertion that, because this is a substantive rule, the Commission has no authority to adopt it.

U S WEST comments regarding (1) that it does not support a waiver period, but if a waiver period is allowed, then beginning the notification process 60 days in advance of implementation and then allowing the customer one change for a time period extending 60 days following implementation is more than adequate. It states that its systems cannot adequately track order activity for longer than 60 days.

AT&T comments that the free PIC change period should be 180 days so that customers have an ample opportunity to become aware of the service and carrier options that will be available to them when intraLATA dialing parity is effective. AT&T urges the

Commission to reject U S WEST's claim that its systems cannot adequately track order activity longer than 60 days. It notes that U S WEST could track order activity for 180 days when interLATA dialing parity was implemented and its position now is also at odds with the position it took in a similar Oregon proceeding in which U S WEST recommended either a 90-day or a 120-day grace period for free PIC changes.

RESPONSE: The Commission has carefully considered all comments received relating to the length of the free PIC change period and determined that 90 days is a reasonable period of time. With interLATA presubscription implementation, a 180-day period was allowed. The reasons for allowing a more lengthy period do not correspond to intraLATA presubscription implemented separately from interLATA presubscription. Customers have become familiar with the concept of presubscription in the interLATA toll market and there is no reason to expand the period beyond 90 days when customers know what presubscription is. The Commission declines to amend (1). U S WEST explained at the hearing that the problem with its systems was not that the technical capability to track more than 60 days did not exist, but rather the difficulty was with the "aging off" of account information. This is a difficulty that can be accommodated.

38.5.4112 SCOPE OF INTRALATA EQUAL ACCESS PRESUBSCRIPTION (1) and (2) remain as proposed.

(3) The application of intraLATA equal access presubscription shall extend to semi-public and public payphones within the converting exchanges and the ~~premises owner or lessee~~payphone location provider shall be responsible for the selection of the intraLATA PIC(s) for payphones. AUTH: Sec. 69-3-103 and 69-3-822, MCA; IMP, Sec. 69-3-102, ~~and~~ 69-3-201 and 69-3-834, MCA

COMMENT NO. 21: The Commission received numerous comments both written and oral relating to this rule. The comments focused on U S WEST's proposed change to (2) which provides that intraLATA calling shall continue until the customer selects a different carrier or the current intraLATA carrier no longer serves the area in which the customer is located. U S WEST opposed the proposed rule as written because it claims it would limit U S WEST's ability to cease being the designated carrier in certain independent company territories, and to require a carrier to provide service in an area through these rules is contrary to competitive market forces and a remnant of traditional monopolistic regulation.

Ronan/Hot Springs comment that the proposed rules are intended to require, under certain conditions and limitations, the implementation of intraLATA equal access and (2) as proposed merely states that a customer's carrier will not be changed until the customer selects another carrier. They further comment that no amendment is necessary; in particular, the additional phrase suggested by U S WEST raises a multitude of new, complex issues that are far beyond the scope of this proceeding involving U S WEST's status as the designated toll carrier/carrier of last resort. AT&T concurs with Ronan/Hot

Springs' comment that the question of U S WEST's withdrawal should not be addressed in this rulemaking proceeding.

MTA also recommends that the Commission should continue to reject U S WEST's suggestion that it could discontinue intraLATA toll service whenever it desires. Further, U S WEST's actions, according to MTA, belie its statement at the hearing that it is not suggesting it will abandon those routes. MTA also echoes the views of other commenters that this issue is beyond the scope of this proceeding.

RESPONSE: The Commission agrees with the commenters that this issue is beyond the scope of this proceeding and is better addressed in a proceeding where a full examination of designated carrier/carrier of last resort issues can be explored and fully considered.

COMMENT NO. 22: U S WEST also commented that implementing (3) as written will result in a direct violation of 47 C.F.R. 64.1340. U S WEST suggested additional language to rectify this. In contrast, AT&T states that it is appropriate to adopt the rule as proposed.

RESPONSE: The Commission added (3) in response to comments submitted prior to publishing these rules. AT&T suggested including a new subsection to explicitly address the matter of presubscription at payphones to be consistent with the provisions of §§ 251(b)(3) and 276(b)(1) of the 1996 Act and the FCC's September 26, 1996 Report and Order in FCC96-388 which concludes that the benefits of dialing parity should extend to all payphone location providers. AT&T's proposed language included the phrase, "the selection of the PIC shall involve the premises owner who will have the ultimate decision making authority." The Commission concluded this does not conform to 47 C.F.R. 64.1340 because it does not contemplate that the premises owner may have leased the premises to another party. The FCC's order uses the term "payphone location provider." The term "payphone location provider" encompasses more than the premises owner, as does the phrase "premises owner or lessee." U S WEST has not explained how (3) as proposed violates FCC Order 96-439. Its suggested language states that the intraLATA carrier is a negotiable matter. This would conflict with the FCC's Order and with the first sentence of U S WEST's proposed amendment to (3) because that order clearly states that the benefits of dialing parity shall extend to semi-public and public payphones. One of the major benefits of dialing parity is customer choice. A requirement that the customer must negotiate this with the payphone owner is not consistent with that benefit and would directly conflict with 47 C.F.R. 64.1340. The Commission is amending (3) to use the term "payphone location provider" to be consistent with the FCC's Order.

38.5.4115 EQUAL ACCESS PRESUBSCRIPTION COST RECOVERY (1) through (4) remain as proposed. AUTH: Sec. 69-3-103 and 69-3-822, MCA; IMP, Sec. 69-3-102, and 69-3-201 and 69-3-834, MCA

COMMENT NO. 23: MTA again states that cost recovery is a substantive issue subject to jurisdictional and rulemaking authority comments made in response to other rules. MTA

believes this too should be subject to the negotiation and arbitration process set forth in federal and state law. This position notwithstanding, MTA comments that recoverable costs should include the costs associated with any free PIC changes made pursuant to the proposed rules.

AT&T comments that the proposed rule does a good job of identifying the general types of implementation costs that should be recovered by LECs. However, AT&T also comments that (1) should be clarified to include the incremental cost incurred by the LECs in the provision of a free PIC change following the implementation of presubscription, and to state that a separately identified "equal access recovery charge" is to be developed pursuant to the procedures set forth in (1) rather than an additive to an existing access charge element.

RESPONSE: MTA's comments on Commission rulemaking authority are addressed in comment 4. The Commission declines to amend (1) to clarify recovery of costs associated with free PIC changes as recovery for such costs is better addressed in the context of reviewing an implementation plan. It will be necessary for LECs to demonstrate net cost recovery in their implementation plans; that is, to show that costs recovered via the PIC change charges are not recovered again in originating minutes surcharges.

COMMENT NO. 24: U S WEST comments that the most equitable method of cost recovery is to base the assessment on both originating and terminating minutes of use. Basing recovery on originating minutes of use serves to incent bypass and forces U S WEST and Montana ratepayers to subsidize interexchange carriers' entry into the intraLATA market. U S WEST further recommends that cost recovery be based on intrastate minutes of use rather than intraLATA minutes of use.

AT&T supports cost recovery based on all originating intraLATA minutes of use, including those of the incumbent toll service provider.

RESPONSE: The Commission declines to amend this rule as dialing parity is a concern at call origination, not termination. Further, the intraLATA market is the market which will be directly affected and costs should be recovered from the toll carriers in that market. This is consistent with the concept that subsidies should be eliminated and the cost-causer should be responsible for such costs.

COMMENT NO. 25: U S WEST also suggests additional language to clarify that the true-up process in (4) will begin at the end of the second year following implementation of intraLATA equal access presubscription.

RESPONSE: The Commission considers this comment to be better addressed with the review of an implementation plan.

38.5.4116 SAFEGUARDS (1)(a) through (e) remain as proposed.

(f) The local exchange carrier shall ~~not~~ assume that customers who have an interLATA PIC freeze on their account prior to implementation of intraLATA presubscription wish to have the freeze extend to intraLATA toll service following intraLATA presubscription implementation. AUTH: Sec. 69-3-103 and 69-3-822, MCA; IMP, Sec. 69-3-102, ~~and~~ 69-3-201 and 69-3-834, MCA

COMMENT NO. 26: U S WEST opposes restrictions placed on its personnel in marketing service options and wishes this rule clarified to allow it to engage in promotional efforts for its own toll service offerings if the customer agrees to hear about them. U S WEST asserts that, "During customer initiated contacts received in [its] business offices, where the customer is currently provided intraLATA toll services by U S WEST, customer contact personnel will engage in conversation regarding intraLATA toll services where doing so may be beneficial to the end user. Furthermore, where the customer indicates a willingness to hear about the local exchange carriers intraLATA toll services, U S WEST will answer all questions and attempt to market to the customer."

AT&T comments that ARM 38.5.4116 provides appropriate competitive safeguards to ensure that LECs do not utilize their role as a local service provider to disadvantage competitors in the intraLATA toll market and treats all toll service providers in a non-discriminatory manner. AT&T further suggests a quite lengthy and substantial revision to (1)(b) relating to safeguards designed to restrict business office personnel from engaging in anticompetitive marketing.

RESPONSE: U S WEST stated generally that rules adopted in this proceeding should not allow any competitor to attain an unfair advantage in light of the competitive environment in which they will be administered. U S WEST is in the unique position of being the dominant intraLATA toll carrier. The major purpose of the 1996 Act is to introduce competition in the local exchange market. Until that objective is achieved, U S WEST and other incumbent LECs will have the advantage of numerous opportunities for customer contact which could result in an unfair competitive advantage if no restrictions are implemented. The incumbent LEC receives customer-initiated contacts in its business office for many reasons that do not relate to intraLATA toll. The incumbent LECs should not be restricted from marketing their toll offerings when they receive customer-initiated calls which specifically request information on intraLATA toll. This rule as proposed prevents the incumbent LEC with monopoly power from obtaining further competitive advantage over its competitors who lack comparable opportunities. The Commission declines to amend (1)(b) to remove this important safeguard. The Commission also declines to amend (1)(b) as suggested by AT&T for the reasons stated in response to comment 2.

COMMENT NO. 27: U S WEST also states that its systems will not be ready to accommodate any form of preselection prior to the implementation date and (1)(e) should be amended to read that Letters of Authorization (LOAs) may not be submitted to the LEC if they are dated earlier than 30 days prior to the dialing parity implementation date. Further, U S WEST states that it will only accept carrier initiated LOAs on the date of implementation and also that its systems cannot accommodate LOAs prior to the implementation date. AT&T opposes U S WEST's suggested modification to (1)(e), stating that this is an unwarranted limitation and should be rejected.

RESPONSE: Subsection (1)(e) provides that LOAs shall be accepted no earlier than 60 days prior to the implementation date. This provision applies to carriers and customers alike and is a reasonable compromise between extreme positions taken in former comments. If the local exchange carrier receives LOAs during this 60-day period, it will have a much better idea of the volume of changes that will have to be made on the implementation date and can better prepare for implementation. Further, a requirement that LOAs must be dated within the 30 days prior to the implementation date places an unreasonable restriction on the LEC's competitors.

COMMENT NO. 28: Regarding (1)(f), U S WEST asserts that its systems do not and can not differentiate and individually apply the freeze at the intraLATA and/or interLATA level, but it will take customer requests to make a change if the customer contacts a U S WEST business office to make such a request.

MTA comments that its experience with PIC changes would indicate that customers who have an interLATA PIC freeze on their account would, in all likelihood, wish to have that freeze extended to intraLATA toll service, and recommends (1)(f) be changed accordingly.

AT&T comments that (1)(f) recognizes that the intraLATA and interLATA markets are different. Extending the freeze to the intraLATA carrier would have the effect of allowing someone else to make the choice of intraLATA PIC. AT&T also comments that it would be just as logical to assume that the customer would want the PIC freeze to apply to the chosen interLATA carrier for both interLATA and intraLATA toll as to assume the customer wants the incumbent intraLATA carrier frozen. AT&T comments that (1)(f) is consistent with the practices employed by a number of LECs, including GTE and Bell South, and asserts that the ability of other LECs to perform the task of separating freezes by markets disproves U S WEST's claim that it is unable to perform this function.

RESPONSE: Although the small number of consumers commenting on this does not justify a multiple freeze, their comments illustrate that customers want choice in the intraLATA carrier. Although U S WEST asserts that its systems do not and cannot handle separating freezes by markets, the experience with LECs in other jurisdictions indicates that this is in fact technically possible. U S WEST does not state that its systems will not be able to accommodate such requests when intraLATA dialing parity is implemented. The telecommunications technology which

will allow this separation should be included as part of system upgrades to implement intraLATA dialing parity. In the initial implementation stages, however, the Commission believes that consumers who have requested a freeze for their interLATA toll carrier would also wish to have the intraLATA toll carrier frozen until such time as they make an express choice of an intraLATA toll carrier. Educational materials provided to all consumers prior to implementation of intraLATA dialing parity should conspicuously explain procedures to change the intraLATA toll carrier when intraLATA dialing parity is implemented. ARM 38.5.4104 is being amended by this notice to reflect this requirement. Subsection (1)(f) is amended to require that a freeze be extended to the intraLATA carrier.

38.5.4120 DIALING PARITY PLANS (1) Local exchange carriers shall file their toll dialing parity plans carrying out the intraLATA equal access presubscription implementation rules set forth in ARM 38.5.4101 through 38.5.4116~~, within 120 days of the effective date of these rules~~. U S west communications, inc. shall file its implementation plan six months in advance of its expected entry into the interLATA market and no later than August 8, 1998. All other local exchange carriers shall file their implementation plans within 60 days of receiving a bona fide request for intraLATA equal access presubscription or within 60 days of termination of waiver, which ever is later. Interested parties who wish to comment upon a local exchange carrier's toll dialing parity plan shall have a reasonable opportunity to comment on the plan ~~may file comments within 30 days thereafter, and the local exchange carrier may file a reply within 14 days of the filing of such comments~~.

(2) and (3) remain as proposed.

~~(4) If the local exchange carrier is seeking a waiver from implementing presubscription in a particular end office in accordance with ARM 38.5.4103(2)(c) and (d), the local exchange carrier is not required to file a toll dialing parity plan. If the waiver is requested based on technical grounds, the local exchange carrier must set forth in such waiver request the nature of the difficulty, the local exchange carrier's plans for resolving the problem, and a statement specifying when the difficulty will be resolved and presubscription implemented.~~

AUTH: Sec. 69-3-103 and 69-3-822, MCA; IMP, Sec. 69-3-102, ~~and~~ 69-3-201 and 69-3-834, MCA

COMMENT NO. 29: MITS, MTA, and Hot Springs/Ronan expressed strong opposition to (1) requiring all LECs to file their toll dialing parity plans carrying out ARM 38.5.4101 through 38.5.4116 within 120 days of the effective date of these rules. They point out an inconsistency between (1) and ARM 38.5.4103(2) which states that dialing parity must be provided only in response to a BFR or where the LEC chooses to provide it. MITS comments that (2) through (4) appear to duplicate the requirements of ARM 38.5.4101 through 38.5.4116 and that this rule is unnecessary and overly burdensome. Ronan/Hot Springs also state that the rule is unnecessary.

AT&T comments that this rule reasonably requires all LECs to file their implementation plans in order to allow orderly implementation of toll dialing parity. AT&T further states that the rule does not duplicate the requirements of ARM 38.5.4101 through 38.5.4116; rather, it deals with how things are to be done and establishes an orderly process for reviewing details of implementation early in the presubscription process, making it possible to identify potential problems at an early stage when corrections are readily made. In addition, it will facilitate the planning efforts of toll service providers and hasten the day when consumers in Montana can realize the benefits of a competitive intraLATA marketplace.

U S WEST comments that, as stated in its comments to ARM 38.5.4103(1), it will file its plan consistent with its suggested modification to that rule. It states that as long as its plan is in conformance with the Commission's rules, there is no need for additional comments by intervening parties.

RESPONSE: This rule was proposed by AT&T after the FCC's rules concerning dialing parity plans were vacated. The Eighth Circuit Court of Appeals vacated the FCC's rules for jurisdictional reasons. The Commission solicited comments on the rule as proposed without modification and agrees with commenters that it is inconsistent with ARM 38.5.4103 and should be modified. All LECs should not be required to submit their dialing parity implementation plans within 120 days of the effective date of these rules and (1) is amended to reflect this. The Commission is also amending (1) to restrict comments on scripts and to remove the proposed times for submitting comments and to substitute a more general statement that interested parties shall be given a reasonable opportunity for commenting.

Incumbent LECs other than U S WEST should submit their plans only after receiving a BFR for dialing parity implementation, or, if a waiver is requested and granted, after the waiver has terminated. As previously stated, new facilities-based or partially facilities-based LECs should be required to submit their dialing parity plans before entering the local exchange market as required by ARM 38.5.4103(2).

The Commission concludes that it is necessary to include in any implementation plan a description of how the plan is to be implemented, however, and will therefore retain (2) and (3). The Commission agrees with other commenters that (4) is unnecessary and should be stricken.

Dave Fisher

Dave Fisher, Chair

CERTIFIED TO THE SECRETARY OF STATE APRIL 6, 1998.

Martin Jacobson

Reviewed by Martin Jacobson

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT) NOTICE OF AMENDMENT AND
of ARM 42.15.507 and ADOPTION) ADOPTION
of NEW RULES I(42.15.513), II)
(42.15.514), III(42.15.515),)
IV(42.15.516), V(42.15.517),)
and VI(42.15.518)relating to)
Charitable Endowment Funds)

TO: All Interested Persons:

1. On January 15, 1998, the Department published notice of the proposed amendment of ARM 42.15.507 and adoption of new rules I(ARM 42.15.513), II(42.15.514), III(42.15.515), IV(ARM 42.15.516), V(ARM 42.15.517), and VI(ARM 42.15.518) relating to Charitable Endowment Funds at page 150 of the 1998 Montana Administrative Register, issue no. 1.

2. A Public Hearing was held on February 6, 1998, to consider the proposed amendment and adoptions where comments were received.

3. Comments received during and subsequent to the hearing from KPMG Peat Marwick LLP; Montana Land Reliance; Rocky Mountain College; Crowley Law Firm; Lutheran Church Missouri Synod-Montana District; Western Valleys Chapter of the American Red Cross; Lewis and Clark County Chapter of the American Red Cross; and Dr. James Korn representing Charitable Planned Giving Specialists, are summarized as follows along with the Department's responses:

COMMENT: The majority of the entities submitting comments suggested the department change the language in ARM 42.15.507(9) restricting endowment fund income from "exclusively" benefiting Montana residents to "largely for the benefit" or "significantly benefitting" Montana residents.

They also suggested the department either delete the paragraph or change the last sentence in ARM 42.15.507(9) to read, "For the purpose of the qualified endowment credit, the fund must be used primarily for the benefit of Montana citizens".

Is it acceptable if the endowment fund and its income aids a strictly Montana 501(c)(3) organization, but conceivably benefits a few non-Montana citizens who come to Montana for a youth outdoor ministry program?

RESPONSE: The department will agree to change the language in the last paragraph from "exclusively" to "primarily" so as not to restrict the endowment credit from potentially being disallowed because a few non-Montana citizens may benefit from the endowment. However, the department will not delete the last paragraph in its entirety because the legislature clearly intended that the contributions primarily benefit Montana communities and citizens. ARM 42.15.507(9) will be amended to

delete the term "exclusively" and add the term "primarily".

COMMENT: KPMG Peat Marwick, LLP, suggested New Rule I(1)(a), be amended to delete the word "is" to make the sentence clearer.

RESPONSE: The department agrees. This change is simply a grammatical change.

COMMENT: KPMG Peat Marwick, LLP, asked if it is true that each corporate entity joining in a consolidated return or a combined (unitary group) return should be eligible for the maximum credit? If so, the department should clarify the extent to which the department will expect separate tax calculations by, or allocations of tax among, the corporations joining in the consolidated or combined return.

RESPONSE: A consolidated return is filed by companies whose entire business income/loss is from operating exclusively in Montana. A consolidated return is treated as one return and has a maximum of a $10,000 endowment credit for the consolidated return. In a consolidated return there is no proration of the endowment credit.

A combined return is one in which a combination of companies file together and each must pay a minimum of at least $50. In the case of a combined return, the maximum $10,000 endowment credit applies separately to each of the companies. The credit would be computed based on the separate tax liability of each company with a taxable nexus. The tax liability is computed by applying the ratio of the separate company apportionment factors over the total combined factors to the income/loss of the combined unitary group.

COMMENT: KPMG Peat Marwick, LLP, Rocky Mountain College and the Crowley Law Firm commented about partnerships, small business corporations, and limited liability companies and asked if the maximum credit of $10,000 applied at the entity level or at the individual level?

RESPONSE: For these business entities, the $10,000 maximum credit applies at the individual level and not at the entity level. The department agrees to amend the rule and clarify that the $10,000 maximum applies at the individual level and not the entity level for partnerships, small business corporations and limited liability companies. However, the $10,000 maximum does apply at the entity level for regular corporations.

COMMENT: The Montana Land Reliance, Rocky Mountain College, the Crowley Law Firm and Dr. James Korn suggested the definition for "corpus" in ARM 42.15.507 be changed to "historic value" as defined in 72-30-102(4), MCA. This would give charities the ability to invest the endowment to create capital gains as well as interest income.

They indicated that in order to make it possible to predict income levels from endowment funds, they have adopted what is

commonly referred to as a "total return" policy in the investment of our permanent endowments. A set percentage is distributed each year from the endowments. It was suggested that the department allow the flexibility of distribution appreciation in order to avail the boards of the benefits of the total return doctrine of endowment investment management.

Under 72-30-102(4), MCA, the question seems to be, at what point in time does the "historic dollar value" become the irrevocable endowment fund; when originally gifted in the planned gift or when that planned gift ends and the remainder dollars actually go to the charity for the endowment program? Also, what is the endowment value, the actual remainder interest or the original calculation of the present value of the remainder interest?

RESPONSE: The department agrees to change the word "corpus". However, the department agrees with the commentor who noted that "historic dollar" value also contains an ambiguity. The intent of the act is that any appreciation over the present value of the gift at the time it is contributed by the donor can be spent. However, the "present value of the gift" at the time of the contribution must remain in the qualified endowment fund. Therefore, ARM 42.15.507(9) will be amended.

COMMENT: Anderson Zurmuehlen & Co. stated the Montana itemized charitable deductions are tied to Internal Revenue Code 170. Under federal law, any excess contributions carried over to the 5 succeeding taxable years are deemed paid in the year to which they are carried. For purposes of the Montana endowment tax credit, when are the charitable contributions deemed paid?

RESPONSE: Section 15-30-166(3), MCA, states: "There is no carry back or carry forward of the credit permitted under this section, and the credit must be applied to the tax year in which the contribution is made." Therefore, the contributions are deemed paid in the year of contribution.

COMMENT: The Crowley Law Firm suggested the department make it clear in New Rule II(2), whether the excess contribution deduction allowed after the full credit is taken can be used as a deduction in the year of the contribution or only as a carry forward in future years.

RESPONSE: The present language in the rule states any excess contributions can be used as an itemized deduction and are only subject to the regular deduction limitations. Under normal deduction principles of tax law any contributions not used can be carried forward (see 15-30-121(1), MCA. Therefore, the excess deduction can be claimed in the year of the contribution and the New Rule II does not need to be amended.

COMMENT: The Governor's Task Force on Endowed Philanthropy and the Crowley Law Firm commented on the proposed language in ARM 42.15.507(8). They suggested the department change the first sentence to read: "Paid-up life insurance policies in

which all of the premiums have been paid prior to the policies being contributed to a qualified endowment". This allows for the possibility that the donor may not be the person who paid all of the premiums.

RESPONSE: The department agrees. ARM 42.15.507(8) will be amended.

COMMENT: The Governor's Task Force on Endowed Philanthropy also commented on ARM 42.15.507(9) and suggested the department amend the rule to state: "A permanent irrevocable fund is a fund which receives, or will receive, the charitable gift portion of a planned gift or a direct charitable contribution."

RESPONSE: The department agrees.

COMMENT: The Crowley Law Firm suggested the term "present value of the" be inserted before, "allowable contributions," in the sixth line of the example in New Rule II(2).

They also suggested the department delete the term "amount" after the term "allowable contributions" in the sixth line of the example.

RESPONSE: The department agrees. The term "present value of the" will be inserted before all four of the terms "allowable contributions" in the examples in New Rule II(2). Additionally, the term "amount" will be deleted.

COMMENT: The Crowley Law Firm suggested the department change the term "money" at the end of the paragraph to "portion of a contribution" in New Rule II(5).

RESPONSE: The department agrees.

COMMENT: The Crowley Law Firm also suggested the department insert a new Example 3 which would clarify a separate planned gift by one spouse can be used to generate a credit against the tax liability of both spouses, if they file jointly in New Rule II(6).

RESPONSE: An example is not needed. Any tax credit earned by one spouse can be used against both spouses' tax liability when they file jointly.

COMMENT: The Crowley Law Firm and the Rocky Mountain College suggested changes to New Rule II as follows:

Insert "At the time a planned gift is made, if it is in the form of a trust that under federal tax law is not required to irrevocably designate a particular tax exempt organization in the trust document to receive any or all of the charitable gift portion of the planned gift, the trust document need not irrevocably designate a particular tax exempt organization, as long as the trust document makes it clear that the only possible recipient(s) of the charitable gift portion of the planned gift is a qualified endowment".

There would be no objection to a donor subsequently requesting substitution of another permanent endowment for the

permanent endowment initially named.

RESPONSE: The department agrees in concept but wishes to use alternative language which will make it clear that a donor may substitute another qualified endowment for the one initially named. Therefore, a new subsection (7) will be added to to New Rule II to clarify this issue.

COMMENT: The Governor's Task Force and the Crowley Law Firm commented on New Rule III(1) and suggested the department change the term "planned gift document" to "gift instrument" in the first sentence. In addition, insert a sentence at the end of the paragraph which states: "For outright contributions of cash or other property from non-individual taxpayers and contributions of paid-up life insurance policies, the applicable gift instrument is a separate writing setting forth the restriction that must be delivered to the qualified endowment within a reasonable time of making the contribution".

They also suggested a new sentence be added to New Rule III(1) which states, "For permanent endowments created by outright gifts from corporations or partnerships, a restriction to a permanent endowment, by letter or other written instrument, must accompany the gift."

RESPONSE: The department agrees that persons making outright contributions also should be able to create qualified endowment funds in an accompanying document. Therefore, the department will amend New Rule III to add a new subsection (2) and renumber the other subsections.

COMMENT: The Governor's Task Force and the Crowley Law Firm suggested the department insert a sentence at the end of the paragraph in New Rule III(1) which states: "By creating a permanent, irrevocable fund in this manner and receiving the credit, the taxpayer waives the taxpayer's right under 72-30-207(1) to release the restriction in the gift instrument".

RESPONSE: The department agrees and a new subsection will be added to New Rule III.

COMMENT: The Governor's Task Force and the Crowley Law Firm suggests New Rule III(2) and (3) be deleted because it may lead the public to believe only charitable organizations can create a qualified endowment fund.

RESPONSE: The department notes that both charitable organizations and donors can create qualified endowment funds. Therefore, New Rule III will be amended to provide for this allowance. The department declines to delete New Rule III(2) and (3) altogether because it should be noted that charitable organizations also can create endowment funds.

COMMENT: The Governor's Task Force and the Crowley Law Firm had several comments regarding New Rule IV. They suggested the department insert "held" at the end of the paragraph in (1)(c). They suggested the addition to the requirement "...in the case

of a charitable trust where the charity is yet to be named, the taxpayer shall include a copy of the disposition clause of the charitable trust which gives evidence of a permanent endowment fund on behalf of a qualified charity yet to be named."

RESPONSE: The department agrees and will amend New Rule IV to cover these suggestions.

COMMENT: Lance Pedersen representing the Lutheran Church Missouri Synod - Montana District, Lewis & Clark and the Western Valley Chapters of the American Red Cross, and Alden Pedersen suggested the rules be amended to recognize that although the foundation is not incorporated within the State of Montana, that it is "established" in the State of Montana by reason of being able to ear-mark gifts for the sole benefit of Montana Charitable Organizations, and further, because it has local representation, such as chapter and affiliations, within the State.

The Red Cross affiliates advised the department that the Montana chapters of the American Red Cross are separate and distinct entities not only from the National American Red Cross but also from each other. The American Red Cross's charter prohibits the establishment of individual endowment funds by the local chapters, but allows them to participate as a distinct entity within the national endowment fund structure. All of the funds endowed to a local chapter with the requirement that the funds be held solely by the local chapter for the benefit of those in a certain jurisdiction are so preserved. Does a qualified gift to the permanent endowment of the American Red Cross held solely in the name of a Montana chapter but administered by the National American Red Cross qualify for the endowment credit under 15-30-165, MCA?

The organizations also seek a broadening of the rule defining Montana established organizations that are attached to national charitable organizations to be eligible for the endowment credit.

They suggested the department add a definition of Montana "established" as including "state or local chapters of National charitable organizations exempt from federal income tax under 26 USC 501(c)(3), whose geographical area of providing benefits and services is limited to Montana communities and citizens".

RESPONSE: The department declines to amend the rules as suggested. Section 15-30-165(2), MCA, specifically states that a qualified endowment fund must be held by a "Montana incorporated or established organization". It is clear from the context of the statute that "established" means formed in Montana by means other than incorporation. Established does not mean that an organization merely has a presence or conducts activities in Montana. This does not preclude organizations, such as the Red Cross, from availing themselves of the credit pursuant to the statute. They may establish a qualified endowment fund which can be administered by a qualified Montana bank or trust company.

COMMENT: Dr. James Korn representing Charitable Planned Giving Specialists, inquired whether real estate exchanged to a qualified charity for a charitable gift annuity and that real estate itself is used by the charity as an irrevocable endowment to provide permanent use to the charity under its tax exempt purpose would qualify for the Montana Endowment Tax Credit.

RESPONSE: Section 15-30-165(1)(f) & (g), MCA, allows donors to contribute real property by means of a charitable gift annuity.

COMMENT: Dr. James Korn also asked if the purchase of a new single premium life insurance policy would qualify for the Montana Endowment Tax Credit.

RESPONSE: A single premium life insurance policy would qualify for the endowment tax credit as long as the donor makes the tax-exempt organization, to whom the insurance policy is donated, the owner and beneficiary of the policy, and the premium is paid before the policy is contributed.

COMMENT: Dr. James Korn stated that he would welcome an adopted statement in the regulations that could be used in all planned giving documents that would properly acknowledge the gift to be an "Irrevocable, Permanent Fund".

RESPONSE: The department declines to adopt such a statement. A donor should maintain flexibility in drafting their own gift documents.

COMMENT: Dr. James Korn commented on New Rule IV, regarding the definition of "permanent irrevocable fund". Dr. Korn stated that it is assumed the "permanent irrevocable fund" is the fund that actually receives the charitable remainder portion of the planned endowment gift when that planned gift matures at the life of the donor(s) end or the specific term of years expires.

RESPONSE: A "permanent irrevocable fund" is defined in ARM 42.15.507(9). The department will further amend this rule to include language to cover this issue.

4. Based on the foregoing comments the Department has amended the rules as set forth below. Additional amendments have been made to clarify that the rules which apply to estates also apply to trusts.

42.15.507 DEFINITIONS (1) "Allowable contribution" for the purposes of the qualified endowment credit is a charitable gift made to a qualified endowment. The contribution from an individual to a qualified endowment must be by means of a planned gift as defined in 15-30-165, MCA. A contribution from a corporation, small business corporation, estate, TRUST, partnership, or limited liability company may be made by means of a planned gift or may be made directly to a qualified endowment.

(2) through (7) remain the same.

(8) "Paid-up life insurance policies" are life insurance policies in which ~~the donor has paid~~ all the premiums HAVE BEEN PAID prior to the policies being contributed to a qualified endowment. The donor must make the tax-exempt organization the owner and beneficiary of the policy.

(9) A "permanent irrevocable fund" is a fund which receives, OR WILL RECEIVE, the charitable gift portion of a planned gift or a direct charitable contribution and holds the charitable gift or contribution on behalf of a tax-exempt organization under 26 U.S.C. 501(C)(3) for the life of the organization. The ~~corpus~~ PRESENT VALUE of the fund AT THE TIME THAT THE DONOR MAKES A PLANNED GIFT OR AN OUTRIGHT CONTRIBUTION TO THE FUND is not expendable by the tax exempt organization on a current basis under the terms of the applicable gift document or other governing documents. For the purpose of the qualified endowment credit, the fund must be used ~~exclusively~~ PRIMARILY for the benefit of Montana communities and citizens.

(10) "Present value of the charitable gift portion of a planned gift" is the allowable amount of the charitable contribution as defined in 15-30-121 AND 15-30-136, MCA, or for corporations as defined in 15-31-114, MCA, prior to any percentage limitations.

(11) through (14) remain the same.

~~(14)~~ (15) "Rent" is the amount of money charged to a tenant for the occupying of a dwelling. "Rent" does not include amenities such as meals, housekeeping, nursing care, etc.

AUTH: Sec. 15-30-305, 15-31-501, and 15-32-611, MCA; IMP, Sec. 15-30-165, 15-30-166, 15-30-167, 15-31-161, 15-31-162, 15-32-601 15-32-602, 16-32-603, 15-32-604, 15-32-609, and 15-32-610, MCA

NEW RULE I (42.15.513) ELIGIBILITY REQUIREMENTS TO HOLD A QUALIFIED ENDOWMENT (1) To hold a qualified endowment an organization must be:

(a) incorporated or otherwise formed under the laws of Montana and ~~is~~ exempt from federal income tax under 26 U.S.C. 501(C)(3); or

(b) a bank or trust company, as defined in 15-30-165, MCA, holding an endowment fund on behalf of a Montana or foreign 501(C)(3) organization.

AUTH: 15-30-305 and 15-31-501, MCA; IMP: 15-30-165, 15-30-167, 15-31-161 and 15-31-162, MCA

NEW RULE II (42.15.514) TAX CREDIT AND DEDUCTION LIMITATIONS (1) The credit allowed against the corporate, estate, TRUST or individual tax liability is equal to 50% of the present value of the allowable contribution as defined in ARM 42.15.507. The maximum credit that may be claimed in one year is $10,000 per taxpayer. A contribution made in a previous tax year cannot be used for a credit in any subsequent tax year.

(2) The balance of the allowable contributions, if not

used in the credit calculation, may be used as a deduction subject to the limitations and carryover provisions found in 15-30-121, MCA, or for corporations the limitations and carryover provisions found in 15-31-114, MCA.

Example 1:

Credit Allowed	
PRESENT VALUE OF THE Allowable contributions	$50,000
Credit calculation (50,000 x 50%)	25,000
Maximum credit allowed	$10,000
Excess Contribution Deduction Allowed	
PRESENT VALUE OF THE Allowable contributions ~~amount~~	$ 50,000
Less maximum contribution used in credit computation ($10,000 x 2)	-20,000
Balance allowed as an itemized deduction	$30,000

Example 2:

Credit Allowed	
PRESENT VALUE OF THE Allowable contributions	$15,000
Credit calculation (15,000 x 50%)	7,500
Maximum credit allowed	$7,500
Excess Contribution Deduction Allowed	
PRESENT VALUE OF THE Allowable contributions	$15,000
Less contribution used in credit computation ($7,500 x 2)	-15,000
Balance allowed as an itemized deduction	$0

(3) The contribution to a qualified endowment from a small business corporation, partnership or limited liability company is passed through to the shareholders, partners, or members or managers in the same proportion as their distributive share of the entity's income or loss for Montana income tax purposes. The proportionate share of the contribution passed through to each shareholder, partner or member or manager becomes an allowable contribution for that taxpayer for that year, and the credit allowed and the excess contribution deduction allowed are calculated as set forth in (1) and (2). THE CREDIT MAXIMUMS APPLY AT THE CORPORATION AND INDIVIDUAL LEVELS AND NOT AT THE PASS-THROUGH ENTITY'S LEVEL FOR PARTNERSHIPS, SMALL BUSINESS CORPORATIONS AND LIMITED LIABILITY COMPANIES.

(4) Deductions and credit limitations for an estate OR TRUST are as follows:

(a) if an estate OR TRUST claims a credit based on the computation of the full amount of the contribution, there is no credit available to beneficiaries;

(b) any portion of a contribution not used in the calculation of credit for the estate may be passed through to the beneficiaries, in the same proportion as their distributive share of the estate's OR TRUST'S income or loss for Montana income tax purposes; however, beneficiaries may deduct only that portion of allowable contributions not used toward the credit or deduction claimed by the estate OR TRUST; or

(c) if the estate OR TRUST has deducted the full amount of the contribution, the credit may not be claimed by either the estate, TRUST or the individual beneficiaries.

(5) At no time can a corporation, small business corporation, partnership, limited liability company, estate, TRUST or individual be allowed to receive the benefit of both a contribution deduction and a credit from the same ~~money~~ PORTION OF A CONTRIBUTION.

(6) remains the same.

(7) A CONTRIBUTOR MAY AT A LATER DATE NAME OR SUBSTITUTE THE PARTICULAR TAX-EXEMPT ORGANIZATION TO RECEIVE THE PLANNED GIFT. HOWEVER, THE TRUST DOCUMENT OR GIFT DOCUMENT MUST PROVIDE THAT THE RECIPIENT OF THE CHARITABLE GIFT PORTION OF THE PLANNED GIFT IS A QUALIFIED ENDOWMENT AS DEFINED IN 15-30-165, MCA.

AUTH: 15-30-305, 15-31-501, MCA IMP: 15-30-165, 15-30-166, 15-30-167, 15-31-161 and 15-31-162, MCA

NEW RULE III (42.15.515) CREATING A PERMANENT IRREVOCABLE FUND (1) A permanent, irrevocable fund can be created by a restriction in the applicable planned gift document indicating the donor's intention that the contribution shall be held in a permanent, irrevocable fund. For planned gifts other than paid-up life insurance policies, the applicable planned gift document is the trust document, gift annuity contract, life estate agreement or pooled income fund agreement.

(2) A PERMANENT IRREVOCABLE FUND CAN BE CREATED IN A SEPARATE GIFT DOCUMENT ACCOMPANYING AN OUTRIGHT CONTRIBUTION.

~~(2)~~ (3) A permanent irrevocable fund may be created by ~~one of the~~ EITHER A qualified organizations referenced in Rule I under a separate governing document OR WHEN A DONOR CREATES AN ENDOWMENT THROUGH A GIFT DOCUMENT.

(4) BY CREATING A PERMANENT, IRREVOCABLE FUND AND RECEIVING THE CREDIT, THE TAXPAYER WAIVES THE RIGHT UNDER 72-30-207, MCA TO RELEASE THE RESTRICTION IN THE GIFT DOCUMENT.

~~(3)~~ (5) All funds created by donors or qualified organizations must meet the requirements of a permanent irrevocable fund provided in these rules.

AUTH: 15-30-305, 15-31-501, MCA IMP: 15-30-165, 15-30-167, 15-31-161 and 15-31-162, MCA.

NEW RULE IV (42.15.516) REPORTING REQUIREMENTS (1) The taxpayer must attach a copy of the following information to the tax return reporting the credit:

(a) a receipt acknowledging the amount of the allowable contribution from:

(i) the tax-exempt organization under 26 U.S.C. 501(C)(3) holding the qualified endowment receiving the contribution;

(ii) from the trustee of the trust administering the planned gift; or

(iii) from the bank or trust company holding a qualified endowment on behalf of a tax exempt organization.

(b) the date of the contribution to the qualified endowment

or the planned gift;

(c) the name of the organization incorporated or established in Montana holding the qualified endowment fund or the name of the tax exempt organization on behalf of which the qualified endowment fund is held; ~~and~~

(d) IN THE CASE OF A CHARITABLE TRUST WHERE THE CHARITY IS YET TO BE NAMED, THE TAXPAYER SHALL INCLUDE A COPY OF THE DISPOSITION CLAUSE OF THE CHARITABLE TRUST WHICH GIVES EVIDENCE THAT A QUALIFIED ENDOWMENT FUND HAS BEEN CREATED; AND

~~(d)~~ (e) a description of the type of gift, i.e. outright gift, charitable remainder unitrust, charitable gift annuity, etc.

(2) remains the same.

AUTH: 15-30-305, 15-31-501, MCA IMP: 15-30-166, 15-30-167, 15-31-161 and 15-31-162, MCA

5. The amendment to ARM 42.15.507(14) is a correction for an error on the original notice in 1998 MAR issue no. 1, which reflected two (14) subsections. The change correctly shows the second one as (15).

6. Therefore, the Department adopts New Rules V(42.15.517) and VI(42.15.518) as proposed and adopts ARM 42.15.507, New Rule I(42.15.513), II(42.15.514), III(42.15.515), and IV(42.14.416) with the amendments listed above.

CLEO ANDERSON
Rule Reviewer

MARY BRYSON
Director of Revenue

Certified to Secretary of State April 6, 1998

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT of ARM 42.15.601, 42.15.602, 42.15.603, and 42.15.604 relating to Medical Care Savings Account	NOTICE OF AMENDMENT

TO: All Interested Persons:

1. On December 15, 1997, the Department published notice of the proposed amendment of ARM 42.15.601, 42.15.602, 42.15.603, and 42.15.604 relating to Medical Care Savings Account at page 2273 of the 1997 Montana Administrative Register, issue no. 24.

2. Written comments received from the Montana Credit Union Network are summarized as follows along with the responses of the Department:

COMMENT: The rules should be amended to contain a separate section dealing with financial institutions. The amendment would clarify that financial institutions have no responsibility for analyzing the eligibility or non-reimbursement of expenses when a depositor withdraws money from a medical savings account.

RESPONSE: Section 15-61-204, MCA, states in part "[a] financial institution is not responsible for the use or application of funds" and "[t]he burden of proving that a withdrawal from a medical savings account was made for an eligible medical expense is upon the account holder and not upon the account administrator or the employer of the account holder." Montana law currently addresses financial institution's responsibility with regard to analyzing the eligibility of expenses when a depositor withdraws money from a medical savings account. An amendment will be added to 42.15.604(1) which states that a financial institution is not responsible for analyzing the eligibility of expenses if the account holder attests that the withdrawals made are for eligible medical expenses.

COMMENT: It was suggested the rules be amended to reference two forms prescribed by the department. One form would allow the account holder to attest to the eligibility and non-reimbursement of an expense when a withdrawal is made. It would also hold the financial institution harmless. The second form would state the 10% penalty of a withdrawal must be turned over to the department.

RESPONSE: When a person "self-administers" their own medical savings account, they are responsible for assuring withdrawals are for the eligible medical expenses. If the withdrawals are not for eligible medical expenses, then the person, not the financial institution, is responsible for

submitting the 10% penalty to the state. In the case where a "financial institution" is the account administrator, a statement to the effect that the withdrawal is made for eligible medical expenses is sufficient. However, this form is the responsibility of the financial institution and not the department since it is the financial institution's liability they are protecting.

COMMENT: An amendment to clarify regular fees, not account administrator fees, charged by a financial institution may be deducted from a medical savings account.

RESPONSE: Section 15-60-204, MCA, states a person who acts as his own account administrator may not use funds held in an account to pay expenses of administering the medical savings account. The law is very clear on this issue; therefore, a rule is not needed. Bank fees are deemed to be expenses of administering the account.

COMMENT: The rules should clarify an account holder is able to designate a pay on death beneficiary on the medical saving account as provided in 72-6-212, MCA.

RESPONSE: Section 15-61-202(8), MCA states that upon the death of the account holder, the account administrator shall distribute the principal and interest of the account to the estate of the account holder. Under this law, a pay on death beneficiary is not allowed.

3. Based on the comments received and review of the proposal, the Department further amends ARM 42.15.602 and 42.15.604 as follows:

42.15.602 MEDICAL SAVINGS ACCOUNT ADMINISTRATOR REPORTING AND PAYMENTS (1) Every self-administered account holder or account administrator is required to annually submit the following information regarding each medical savings account:

(a) ~~the~~ name of the account holder;

(b) ~~the~~ address of the account holder;

(c) ~~the~~ taxpayer identification number of the account holder;

(d) deposits made during the tax year by the account holder;

(e) amount of withdrawals made during the tax year by the account holder;

(f) dates of any withdrawals;

(g) interest earned on the proceeds of the medical savings account; and

(h) ~~the~~ amount of penalties withheld and remitted.

(2) The self-administered account holder must also include the name and address of where the account is established and the account number.

(2) through (8) remain the same, but will be renumbered (3) through (9). (AUTH: Sec. 15-30-305, MCA; IMP, Sec. 15-61-204, MCA)

42.15.604 INDIVIDUAL LIABILITY (1) If a corporate account administrator, limited liability company or a limited partnership fails to withhold or fails to remit any penalties withheld to the department as required, the officers and owners are individually responsible for the penalties. A FINANCIAL INSTITUTION IS NOT RESPONSIBLE FOR ANALYZING THE ELIGIBILITY OF THE EXPENSES IF THE ACCOUNT HOLDER ATTESTS THAT THE WITHDRAWALS MADE ARE FOR ELIGIBLE MEDICAL EXPENSES.

(2) remains the same.

(3) In the case of a bankruptcy by an account administrator, the liability for the penalties remainS unaffected and the individual or owners remain liable for the amount of penalties withheld but unpaid.

(AUTH: Sec. 15-30-305, MCA; IMP, Sec. 15-61-203, MCA)

4. The Department adopts the amendments to ARM 42.15.601 and 42.15.603 as proposed and ARM 42.15.602 and 42.15.604 as further amended above.

Cleo Anderson
CLEO ANDERSON
Rule Reviewer

Mary Bryson
MARY BRYSON
Director of Revenue

Certified to Secretary of State April 6, 1998

VOLUME NO. 47 OPINION NO. 11

COUNTY COMMISSIONERS - Authority to approve salaries of employees of weed board, mosquito control board, and city-county health board;
COUNTY OFFICERS AND EMPLOYEES - Salaries of employees of weed board, mosquito control board, and city-county health board;
HEALTH BOARDS AND DISTRICTS - Authority of city-county health board to set salary of health officer;
MOSQUITO CONTROL DISTRICTS - Authority of mosquito control board to set salaries of employees;
SALARIES - Authority of city-county health board, weed control board and mosquito control board to set salaries of employees;
WEED CONTROL DISTRICTS - Authority of weed control board to set salaries of employees;
MONTANA CODE ANNOTATED - Title 7, chapter 6, parts 23, 42; sections 7-1-201, -201(2)(b)(i), (4), (16), 7-6-604(5)(c), -2314(1)(a), -2315(2), -2325(1), -2348(1), 7-22-2103(1), -2109(1)(a), -2141, -2142(1), -2143, -2145, -2411, -2415(2), -2431, -2432, -2432(5), 22-1-301 to -317, 22-1-304(1), 50-2-106, -111, -111(1)(b), (c), (d), (2)(b), (c), (d), -116(1)(a), (c);
OPINIONS OF THE ATTORNEY GENERAL - 44 Op. Att'y Gen. No. 35(1992), 41 Op. Att'y Gen. No. 91 (1986), 38 Op. Att'y Gen. No. 35 (1979).

HELD: The weed board, mosquito control board, and city-county health board do not have the authority to set the level of compensation of their employees without the approval of the board of county commissioners, and, in the case of the city-county health board, also the approval of the governing body of the city.

March 23, 1998

Mr. Brant S. Light
Cascade County Attorney
Cascade County Courthouse
Great Falls, MT 59401

Dear Mr. Light:

You have requested my opinion on the following question:

> Does the Board of County Commissioners have authority to set salary increases for employees of the local Weed and Mosquito Management District and the City-County Health Department (local health board)?

Resolution of the question involves a detailed analysis of the statutes creating and granting powers to these boards, as well as the funding and budgeting procedures for each. It should be noted that statutory powers differ from board to board, and the issues you pose relate only to the three boards specified in your

question. I express no opinion here on the budget authority of any other local boards or agencies.

I.

The weed board and the mosquito control board are created by the county commissioners pursuant to Mont. Code Ann. §§ 7-22-2103(1) and -2411, respectively. These boards are subject to the provisions of Mont. Code Ann. § 7-1-201. Administrative boards created by the county commissioners are not independent entities for purposes of filing lawsuits or being sued. Mont. Code Ann. § 7-1-201(4). Under Mont. Code Ann. § 7-1-201(2)(b)(i), an administrative board may "exercise administrative powers as granted by resolution, except that it may not pledge the credit of the county or impose a tax unless specifically authorized by state law." The resolution creating the administrative board "must contain, if applicable, budgeting and accounting requirements for which the board, district or commission is accountable to the county commissioners." Mont. Code Ann. § 7-1-201(16). With the exception of a public library board of trustees and an airport authority, the proposed budgets of all appointed boards are subject to approval by the local governing body. Mont. Code Ann. § 7-6-2348(1). The board of county commissioners may revise and change any amounts in the proposed budget, including wages and salaries. Mont. Code Ann. §§ 7-6-604(5)(c), -2314(1)(a), -2315(2). See 38 Op. Att'y Gen. No. 35 (1979).

The statutory powers of a weed board include the power to "employ a supervisor and other employees as necessary and provide for their compensation." Mont. Code Ann. § 7-22-2109(1)(a). The source of funding for the activities of the board is to be provided by the board of county commissioners, according to Mont. Code Ann. § 7-22-2142(1), which states:

> The commissioners may create the noxious weed fund and provide sufficient money in the fund for the board to fulfill its duties, as specified in 7-22-2109 . . . .

See also Mont. Code Ann. § 7-22-2141. The statute gives various funding alternatives including drawing from the general fund and levying taxes. All expenditures from the noxious weed fund are to be made, after approval by the commissioners, in accordance with recommendations from the board. Mont. Code Ann. §§ 7-22-2143, -2145. A prior Attorney General's Opinion examined in depth the authority of the weed board, and concluded that "the weed board's recommendations in budget matters are subject to final approval by the commissioners" and that there was no means by which the weed board could compel funding by the board of county commissioners. 44 Op. Att'y Gen. No. 35 at 147 (1992).

The mosquito control board's powers and duties include the power to "employ suitable and competent assistants and employees as may be necessary and provide for their compensation." Mont. Code Ann. § 7-22-2415(2). Alternative funding methods to be chosen by the

board of county commissioners are authorized by Mont. Code Ann. § 7-22-2432, and the fund is to be earmarked for the purposes for which the mosquito control district was created, Mont. Code Ann. § 7-22-2432(5). According to Mont. Code Ann. § 7-22-2431, the board of county commissioners "shall establish a mosquito control fund" and warrants upon the fund "shall be drawn by the board of county commissioners upon the presentation of claims approved by the mosquito control board." While these statutes purport to grant final authority to the mosquito control board, 44 Op. Att'y Gen. No. 35 (1992) requires that they be read in conjunction with the limitations imposed by Mont. Code Ann. §§ 7-1-201 and 7-6-2348(1), and with the general statutes governing county budgeting.

Your letter suggests that Cascade County has created a joint board to administer its weed control and mosquito control districts. By statute both kinds of district boards are authorized to "provide for" the compensation of supervisors and staff. The boards have suggested that this provision allows them to set the amount of compensation to be paid without the control of the board of county commissioners. In my opinion, the term "provide for" does not change the ultimate authority of the commissioners to set salary levels of county employees in the county budget process.

Under general county budget procedures, the commissioners retain the authority to set budgets for the weed board. Mont. Code Ann. § 7-6-2348(1). These general budget procedures include provisions for setting the salaries of county employees, which salaries may differ from those submitted by the county agencies in their budget proposals. 38 Op. Att'y Gen. No. 35 (1979). Once the budget is adopted, transfers of funds within categories cannot result in an increase in a budgeted salary amount. Mont. Code Ann. § 7-6-2325(1). While Mont. Code Ann. § 7-1-201(16) indicates that the specific budget requirements for an administrative board must be set forth in the resolution creating the board, it need not be determined in this opinion whether that provision would allow a county to deviate from the established budget submission procedures for a particular board. In either case, the commissioners would retain the ultimate control over the board's budget.

If the legislature had intended to except board employees from this process it easily could have expressly so provided. Cf. Mont. Code Ann. §§ 22-1-307 to -317 (establishing independent budget authority for county library boards); see 41 Op. Att'y Gen. No. 91 (1986). In my opinion, therefore, the ability of the boards to "provide for" the compensation of employees means only that the boards have the power to contract for the services of the employees and to compensate them as allowed by the budgets adopted by the board of county commissioners. "Provide for" does not necessarily imply the power to exercise independent budget authority over the employees' compensation.

II.

The city-county board of health is established pursuant to Mont. Code Ann. § 50-2-106, by agreement between the city and the county. The local board of health is given the power to appoint a local health officer, to "fix the health officer's salary," and to "employ necessary qualified staff." Mont. Code Ann. § 50-2-116(1)(a), (c). Funding is a joint responsibility of the city and the county. Mont. Code Ann. § 50-2-111. One alternative for funding is to appropriate shares from the county budget and from the city budget during the general budgeting process set forth in title 7, chapter 6, parts 23 and 42. Mont. Code Ann. § 50-2-111(1)(b), (c). Another alternative is for the county and the city to levy taxes, following approval of the respective budgets during the general budgeting process set forth in title 7, chapter 6, parts 23 and 42. Mont. Code Ann. § 50-2-111(2)(b), (c). In either case, when a city-county board of health is created, the county commissioners and the governing body of the city must mutually agree upon the division of expenses, Mont. Code Ann. § 50-2-111(1)(a), (2)(a), and the money goes into the county treasury to be disbursed as county funds. Mont. Code Ann. § 50-2-111(1)(d), (2)(d).

The legislature used the term "provide for" in delineating the powers of the weed and mosquito boards while allowing the city-county board of health to "fix the salary" of its director. Ordinarily a reviewing court would presume that by use of a different term the legislature intended some difference in the scope of the powers of the respective board. However, any inference that the power to "fix the salary" of the city-county health officer overrides the power of the city and county over the board's budget is repelled by the specific budget statutes governing the board. In delineating the budget procedures for a city-county health board, the law provides that both the city and the county are to budget for the board "in the way provided for other [city and] county offices under Title 7, chapter 6, part[s 23 and 42, respectively]." Mont. Code Ann. § 50-2-111(1)(b), (c), (2)(b), (c). As noted above, for the counties, these procedures authorize the commissioners to set salaries for agency staff. While the statutes are not without ambiguity, in my opinion the legislature, by reference to the usual budget procedures that govern county and city agencies, intended to maintain the traditional control over county financial expenditures, including the authority to approve the salary fixed by the city-county board of health for the city-county health officer.

It is certainly possible for a city and county to disagree regarding the appropriate salary. Since both jurisdictions must agree on a division of the budget responsibilities, it appears that neither has the final word without the agreement of the other. In the event an impasse occurs on such an issue, the entities must either resolve the impasse through negotiation or withdraw from the interlocal arrangement which created the joint board initially.

THEREFORE, IT IS MY OPINION:

The weed board, mosquito control board, and city-county health board do not have the authority to fix the level of compensation of their employees without the approval of the board of county commissioners, and, in the case of the city-county health board, also the approval of the governing body of the city.

Sincerely,

JOSEPH P. MAZUREK
Attorney General

jpm/pjj/dm

VOLUME NO. 47 OPINION NO. 12

CONTRACTS - Site-specific nature of prevailing wage requirements applicable to public contracts;
COUNTIES - Site-specific nature of prevailing wage requirements applicable to public contracts;
LABOR RELATIONS - Site-specific nature of prevailing wage requirements applicable to public contracts;
PREVAILING WAGE - Site-specific nature of prevailing wage requirements applicable to public contracts;
ADMINISTRATIVE RULES OF MONTANA - Section 24.16.9002;
CODE OF FEDERAL REGULATIONS - 25 C.F.R. § 5.2(l) (1997);
MONTANA CODE ANNOTATED (1997) - Sections 18-1-102, 18-2-201, -401, -403, -406, -411, -421, -422, -431, -432;
MONTANA CODE ANNOTATED (1995) - Section 18-2-401;
MONTANA LAWS OF 1997 - Chapter 522;
MONTANA LAWS OF 1975 - Chapter 531;
MONTANA LAWS OF 1931 - Chapter 102;
OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 60 (1988);
UNITED STATES CODE - 25 U.S.C. § 276; 40 U.S.C. §§ 270a to 270f, 276a to 276a-7;
UNITED STATES CONSTITUTION - Article I, section 8, clause 3;
UNITED STATES STATUTES AT LARGE - 46 Stat. 1494, 48 Stat. 1011.

HELD: The prevailing wage requirements in Mont. Code Ann. § 18-2-403(2)(b) apply to fabrication of materials performed off-site by a contractor for installation or use at the site of construction under a public works contract. The prevailing wage district with respect to such off-site services is the district where the on-site construction occurs.

March 31, 1998

Mr. Robert L. "Dusty" Deschamps III
Missoula County Attorney
200 West Broadway, Courthouse
Missoula, MT 59802

Dear Mr. Deschamps:

You have requested my opinion concerning a question which I have phrased as follows:

> Does the prevailing wage requirement in Mont. Code Ann. § 18-2-403 with respect to public works contracts apply to a construction contractor's off-site fabrication of items to be installed or used on-site by the contractor and, if so, are the prevailing wage rates those established for the district where the site is located or for the location where the off-site fabrication occurs?

I conclude that the prevailing wage requirements in § 18-2-403(2) apply to all "construction services" performed by the contractor under a "public works contract" regardless of whether carried out on or off the site of the involved construction and that the appropriate prevailing wage rate is the rate applicable in the prevailing wage district where the project is located.

I.

Missoula County routinely enters into construction contracts within the scope of the term "public works contracts" as defined in Mont. Code Ann. § 18-2-401(8). Such contracts are subject to the prevailing wage rate requirements in Mont. Code Ann. § 18-2-403(2):

> All public works contracts under subsection (1) . . . must contain a provision requiring the contractor to pay:
>
> (a) the travel allowance that is in effect and applicable to the district in which the work is being performed; and
>
> (b) the standard prevailing rate of wages, including fringe benefits for health and welfare and pension contributions, that:
>
> (i) meets the requirements of the Employee Retirement Income Security Act of 1974 and other bona fide programs approved by the United States department of labor; and
>
> (ii) is in effect and applicable to the district in which the work is being performed.

Consistent with its obligations under that section and Mont. Code Ann. § 18-2-422, the county includes within a project's bid specifications and contract a provision requiring the contractor to pay prevailing wages. The Commissioner of Labor and Industry has established ten prevailing wage districts, with Missoula County located in District 2. Mont. Admin. R. 24.16.9002(6); see Mont. Code Ann. § 18-2-411(1) (requiring Commissioner to divide state into at least ten districts).

Among the contract documents prepared by Missoula County in connection with public works contracts is a "proposal for construction" describing generally the work to be performed and including a bid form on which the bidders must assign costs to discrete tasks identified by the county as necessary to complete the project. The completed proposal for construction is submitted under seal to the county. The county ordinarily must then award the contract to the lowest responsible bidder. Mont. Code Ann. § 18-1-102(1)(a)(i).

Construction contractors on occasion fabricate off-site items necessary to complete the work included within the bid. The off-

site fabrication location will vary and may be outside the prevailing wage district within which the site itself is located or, conceivably, even outside Montana. The Commissioner of Labor and Industry has not adopted rules addressing this situation but has indicated her position that the Montana statute has the same geographical scope of work coverage as the Secretary of Labor's regulations defining the term "site of the work" under the Davis-Bacon Act. See 25 C.F.R. § 5.2(l) (1997). Under those rules, Davis-Bacon prevailing wage requirements apply to "the physical place or places where the construction called for in the contract will remain when work on it has been completed and . . . any other adjacent or nearby property used by the contractor or subcontractor in such construction which can reasonably be said to be included in the site." Id. § 5.2(l); but see L.P. Cavett Co. v. United States Dep't of Labor, 101 F.3d 1111, 1114-15 (6th Cir. 1996) (refusing to defer to Department of Labor's regulations concerning "site of work" requirement insofar as they extend prevailing wage requirements to areas other than the actual project location); Ball, Ball & Brosamer, Inc. v. Reich, 24 F.3d 1447, 1452-53 (D.C. Cir. 1994) (same). You have concluded, in contrast, that the prevailing wage rates apply to all work which the involved contractor has agreed to undertake under a public works contract. You further believe the wages of employees performing such work must be determined by the rates established for the district in which the construction project itself is located.

II.

The current prevailing wage provisions in title 18, chapter 2, part 4 derive from 1931 Montana Laws chapter 102, which is known as Montana's "Little Davis-Bacon Act." Hunter v. City of Bozeman, 216 Mont. 251, 253, 700 P.2d 184, 185-86 (1985); 42 Op. Att'y Gen. No. 60 at 232, 233 (1988). The Davis-Bacon Act itself now applies expressly to the "construction, alteration, and/or repair, including painting and decorating, of public buildings or public works," by "mechanics and laborers employed directly upon the site of the work" (25 U.S.C. § 276a(a)) but, as initially enacted in 1931, described its scope of coverage as all contracts exceeding $5000 for "the construction, alteration, and/or repair of any [federal] public buildings" (Act of Mar. 3, 1931, ch. 411, 46 Stat. 1494). In 1935 the federal statute was extended to "public works" and the phrase "employed directly upon the site of the work" was added. Act of Aug. 30, 1935, ch. 825, 48 Stat. 1011; see Ball, 24 F.3d at 1452 n.3. The 1935 amendments were designed to expand the federal law's scope by including all public works, not merely public buildings, where contracts exceeding $2000 were let and expressly extending the federal law's reach to "painting and decorating." S. Rep. No. 1155, 74th Cong., 1st Sess. (1935); H.R. Rep. No. 1756, 74th Cong., 1st Sess. (1935). The amendments resulted from an investigation by the Senate Committee on Education and Labor that found substantial noncompliance with the Davis-Bacon Act and a need not only to clarify its coverage but also to strengthen its enforcement mechanisms. 79 Cong. Rec. 12,073 (1935) (statement of Sen. Walsh).

The 1931 Montana statute was comparable to the Davis-Bacon Act in its original form insofar as the state law used the terms "construction, repair and maintenance" in describing the general scope of the public contracts covered and did not limit the employees covered to those performing work directly on the project site. The legislature has never adopted the "employed directly upon the site of the work" language added to the federal act in 1935. A 1975 amendment to the Montana statute does require employers to post statements of prevailing wages "in a prominent and accessible site on the project or work area," but, as the disjunctive "or" suggests, the term "work area" may include areas other than a construction project itself. 1975 Mont. Laws ch. 531, § 1 (codified at Mont. Code Ann. § 18-2-406).

There is a second difference between the 1931 federal and state statutes relevant to the question whether the latter's prevailing wage requirement is limited to work on the job site. The 1931 Montana law defined the term "labor" to include "all services performed in the construction, repair or maintenance of all state, county, municipal and school work" and not to include "engineering, municipal, superintendence, management, or office or clerical work." 1931 Mont. Laws ch. 102, § 2. This definition was carried forward with little change until 1997. Mont. Code Ann. § 18-2-401(6) (1995) ("'[l]abor means all services in excess of $25,000 performed in the construction, maintenance, or remodeling work in a state, county, municipal, school district, or political subdivision project and does not include engineering, management, or office or clerical work'"). The term "labor" did not appear elsewhere in the statute and was deleted in 1997 Montana Laws chapter 522. The substance of the definition nonetheless was retained under the 1997 amendments through addition of definitions for the terms "construction services," "nonconstruction services," and "public works contract." 1997 Mont. Laws ch. 522, § 1 (excluding from the definition of "construction services," inter alia, "engineering, superintendence, management, office, or clerical work on a public works contract"; excluding from the definition of "nonconstruction services," inter alia, "management, office, or clerical work"; and defining "public works contract" as "a contract for construction services or nonconstruction services let by the state, county, municipality, school district, or political subdivision in which the total cost of the contract is in excess of $25,000").

As presently codified in § 18-2-403(2), the prevailing wage requirement extends to any "public works contract" without the limiting site-specific language of the Davis-Bacon Act. Although the 1931 legislature may have intended the state statute to have the same general scope as the federal act, both laws have undergone substantial modification over the nearly 70 years since their enactments and now bear little resemblance to one another except to the extent each is directed at requiring that certain minimum wage levels be paid for work under particular classes of government contracts. The 1997 amendments to the Montana statute, moreover, support a conclusion that the prevailing wage requirement has no

work-situs limitation, since in defining "construction services" the amendments include "work performed by an individual in construction, heavy construction, highway construction, and remodeling work" without imposing such a restriction.

I recognize that the Commissioner of Labor and Industry has concluded the prevailing wage requirement extends only to construction services performed at the job site or nearby property. The Commissioner's interpretation of a statute committed to her agency's enforcement often is entitled to substantial deference. See Reno v. Koray, 515 U.S. 50, 60-61 (1995). Nevertheless, here a literal reading of § 18-2-403(2) does not support a job-situs limitation, and I therefore decline to defer to the Commissioner's construction of § 18-2-403(2)(b). See Dole v. United Steelworkers, 494 U.S. 26, 42 (1990) (deference not accorded agency interpretation where statute, read as a whole, indicated a contrary congressional intent). I cannot supply a restriction unsupported by the language of the law itself. Farmers Alliance Mut. Ins. Co. v. Holeman, 278 Mont. 274, 287, 924 P.2d 1315, 1323 (1996).

Finally, no reasonable dispute exists that a contractor's off-site fabrication of items for on-site installation constitutes "construction" within the scope of the term "construction services." Even on the most basic definitional level, such activity involves "[t]he process or art of constructing; the act of building; erection; the act of devising and forming; fabrication; composition." Webster's II: New Riverside Univ. Dictionary (1988) <http://www.nbc-med.org/dictionary.html>. It nonetheless must be emphasized that this opinion does not address the proper interpretation of the term "construction services" except in this specific context. I note that the definition of "construction services" excludes, inter alia, "contracts with commercial suppliers for goods and supplies" and that the term "subcontractor" as used in Mont. Code Ann. §§ 18-2-421, -422 and -432 is not defined. Questions over the reach of "construction services" in other situations may well demand careful factual analysis of the particular facts and the statute's language and purpose. Cf. J.M. Bateson Co. v. United States ex rel. Bd. of Trustees, 434 U.S. 586, 591-92 (1978) (the term "subcontractor" under the Miller Act, 40 U.S.C. §§ 270a-270f, encompasses only entities or persons having a direct contractual relationship with the prime contractor); F.D. Rich Co. v. United States ex rel. Indus. Lumber Co., 417 U.S. 116, 123-24 (1974) (scope of term "subcontractor" under the Miller Act); United States ex rel. Conveyor Rental & Sales Co. v. Aetna Cas. & Surety Co., 981 F.2d 448, 451-52 (9th Cir. 1992) (identifying factors to be considered in distinguishing "subcontractors" from "materialmen" under the Miller Act); Robintech, Inc. v. White & McNeil Excavating, Inc., 218 Mont. 404, 407-08, 709 P.2d 631, 633 (1985) (rejecting contention that claimant was not "subcontractor" under bond issued pursuant to Mont. Code Ann. § 18-2-201 merely because it did not perform on-site work).

III.

The remaining aspect of your question requires interpretation of the term "work" in the phrase "the district in which the work is being performed." Mont. Code Ann. § 18-2-403(2)(b)(ii). Although it is possible to construe that term as referring to the services performed by individual employees, the more plausible interpretation is that it refers to the location of the project, or "work," to which the public works contract itself relates. Cf. Gaston v. Cooperative Farm Chem. Ass'n, 450 S.W.2d 174, 179 (Mo. 1970) ("[i]n considering the word 'work' as used in the statute we are concerned here with the work of installing a urea plant and are not considering it in the narrow sense of the particular phase of the work being done"); Bone v. Hackett, 185 P. 131, 132 (Ariz. 1919) ("[t]he words 'work,' 'all work,' 'such work,' and 'said work' doubtless have reference to the whole program of construction or improvement"). This interpretation is supported textually, since the legislature in the 1997 amendments chose to refer to the specific labor of individual employees in the definitions of "construction services" and "nonconstruction services" but left unchanged the term "work" in subsection (2)(b)(ii); i.e., had the legislature intended the location of a particular employee's work to be controlling, it presumably would have used the terms "construction services" and "nonconstruction services" in that subsection. Adopting a contrary interpretation additionally would raise the specter of different prevailing wage rates for similar job classifications under the same public works contract--a result not only increasing the administrative burden on the contracting parties and the Department but also potentially leading to labor unrest or conflict.

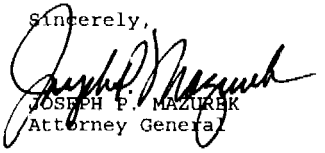
Your opinion request also inquires concerning whether the Montana prevailing wage statute may be applied to work performed outside this state. The Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 3, prohibits "a statute that directly controls commerce occurring wholly outside the boundaries of [that] State" (Healy v. Beer Institute, 491 U.S. 324, 336 (1989)), but this prohibition conceivably may not apply in a situation where, for example, a contractor or a subcontractor performs work under the public works contract both within and without Montana. The involved contract also may make the prevailing wage provisions applicable as a matter of private agreement, and such a consensual adjustment of the parties' rights and obligations ordinarily will be given effect. E.g., C.A. May Marine Supply Co. v. Brunswick Corp., 557 F.2d 1163, 1167 (5th Cir. 1977) ("[w]hen . . . parties to a contract have contact with more than one state, the parties are expected, and encouraged, to stipulate which state's substantive law will govern"); cf. Lix v. Kenney, 246 Mont. 426, 428-29, 804 P.2d 391, 392-93 (1991) (regardless of whether the Commissioner of Labor and Industry had adopted prevailing wage rates properly, employer was bound contractually to pay those rates). Because of the possible factual variation and its effect on any determination concerning application of the prevailing wage provisions as to work performed outside Montana, the

extraterritoriality issue is inappropriate for resolution in this opinion.

THEREFORE, IT IS MY OPINION:

> The prevailing wage requirements in Mont. Code Ann. § 18-2-403(2)(b) apply to fabrication of materials performed off-site by a contractor for installation or use at the site of construction under a public works contract. The prevailing wage district with respect to such off-site services is the district where the on-site construction occurs.

Sincerely,



JOSEPH P. MAZUREK
Attorney General

jpm/crs/dm

VOLUME NO. 47 OPINION NO. 13

CONSTITUTIONS - Right of participation and right to know provisions as applied to county commissioners;
COUNTY COMMISSIONERS - Compliance with open meeting and public participation laws;
COUNTY COMMISSIONERS - Convening of quorum of county commissioners as meeting which must be open to public;
COUNTY COMMISSIONERS - Determining whether matter is of "significant public interest" to trigger notice and public participation requirements;
OPEN MEETINGS - Convening of quorum of county commissioners as meeting which must be open to public;
RIGHT TO KNOW - Determining whether matter is of "significant public interest" to trigger notice and public participation requirements;
MONTANA CODE ANNOTATED - Title 2, chapter 3; sections 2-3-103, -104, 2-3-111, -112, 2-3-201 to -203, 7-5-2122, -2125;
MONTANA CONSTITUTION - Article II, sections 8, 9;
OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 51 (1988).

HELD: 1. A county commission which establishes the hours of 9:30 a.m. to 5 p.m., Monday through Friday, as its regular meeting date for public notice purposes is not in compliance with Montana's public participation constitutional provisions and statutes.

2. Public notice is required of any convening of a quorum of county commissioners at which any matter of significant public interest is to be discussed, deliberated or determined. Additionally, the public must be given the opportunity to participate in any decision of the commission, other than ministerial acts, if there is any question whether the decision is of "significant interest to the public."

April 6, 1998

Mr. Mark Harshman
Blaine County Attorney
P.O. Box 1567
Chinook, MT 59523-1567

Dear Mr. Harshman:

You have requested my opinion on the following question:

> Does a county commission comply with Montana's open meeting and public participation laws by establishing the hours of 9:30 a.m. to 5 p.m., Monday through Friday, as its regular meeting date for public notice purposes? If not, what are appropriate guidelines and procedures for

counties to follow in determining which matters are of "significant public interest" so as to require public notice?

I.

Montana's open meeting and public participation laws are derived from two fundamental rights contained within the Montana Constitution: the Right to Know and the Right of Participation, Mont. Const. art. II, §§ 8, 9. I will discuss these provisions individually as they relate to your question.

Right to Know

> **Right to know.** No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

Mont. Const. art. II, § 9.

Statutory provisions regarding the public's right "to observe the deliberation of all public bodies or agencies of state government and its subdivisions" are found at title 2, chapter 3, part 2 of the Montana Code Annotated. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 Mont. 324, 326, 329, 868 P.2d 604, 605, 607 (1994). The legislature's intent in adopting these statutes was to ensure that public agencies, which exist to "aid in the conduct of the peoples' [sic] business," conduct all "actions and deliberations" openly. Mont. Code Ann. §§ 2-3-201, -203(1), (2). It has long been recognized that county commissions are bound by Mont. Const. article II, section 9 and its associated statutes. Board of Trustees, Huntley Project Sch. Dist. No. 24 v. Board of County Comm'rs, 186 Mont. 148, 154, 606 P.2d 1069, 1072 (1980). Additionally, Mont. Code Ann. § 7-5-2125 provides that "[a]ll meetings of the board of county commissioners must be public." Under the constitution the right applies to any meeting "except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure." Mont. Const. art. II, § 9. For purposes of the discussion herein, I assume that your question has as a premise that this exception does not apply.

Montana's open meeting statutes define the term *meeting* very broadly. *Meetings* are "the convening of a quorum" of the subject public agency "to hear, discuss, or act upon a matter over which the agency has supervision, control, jurisdiction, or advisory power." Mont. Code Ann. § 2-3-202. See also Common Cause of Mont.

The statutory definition of *meeting* was previously analyzed by Attorney General Greely at 42 Op. Att'y Gen. No. 51 at 198 (Mont.

1988). A *quorum* was determined to be "a majority of the entire body" when members are acting as a group, "not merely the action of a particular number of members as individuals." 42 Op. Att'y Gen. No. 51 at 200-01. The terms *discuss*, *deliberations*, and *discussions* were found to contemplate "collective discussion and collective acquisition of information among the 'constituent membership' of the agency." Id.

Likewise, the Wisconsin Supreme Court, in interpreting open meeting laws similar to Montana's, held that a convening of members open to the public occurs when a group of members "gather to engage in formal or informal governmental business." State ex rel. Newspapers v. Showers, 398 N.W.2d 154, 166 (Wis. 1987). Informal governmental action, which includes discussions and information-gathering, must be considered a meeting open to the public as "[l]istening and exposing itself to facts, arguments and statements constitutes a crucial part of a governmental body's decision making. 'The possibility that a decision could be influenced dictates that compliance with the law be met.'" State ex rel. Badke v. Village Bd., 494 N.W.2d 408, 415 (Wis. 1993), citing Lynch v. Conta, 239 N.W.2d 313 (Wis. 1976), and State ex rel. Newspapers v. Showers, 398 N.W.2d 154 (Wis. 1987).

Thus, as your county has already recognized, the gathering of at least two of Blaine County's three commissioners to discuss either between themselves or with members of the public issues over which the commission has authority is a *meeting* subject to the open meeting laws of Montana. Commissioners are trusted with the responsibility of ensuring they do not "hear, discuss, or act upon a matter over which the agency has supervision, control, jurisdiction, or advisory power" unless the gathering is treated as a meeting open to the public. Clearly, if a member of the public enters the commissioners' work area while such a meeting is occurring, that person must be permitted to remain and observe the discussion, absent an overriding privacy right of another individual.

The importance attached to the open meeting requirement is underscored by Mont. Code Ann. § 2-3-212, which requires that minutes of all open meetings be kept and made available for public inspection. I bring this statute to your attention for informational purposes only as you have posed no question pertaining to the keeping of minutes by county commissions.

Right of Participation

Article II, section 8 of the Montana Constitution provides:

> **Right of participation.** The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law.

Statutory provisions regarding the public's right to participate are found at Mont. Code Ann. title 2, chapter 3, part 1, entitled "Notice and Opportunity to Be Heard." Each public agency must adopt policies which permit and encourage public participation in agency decisions and which "assure adequate notice and assist public participation before a final agency action is taken that is of significant interest to the public." Mont. Code Ann. § 2-3-103(1). Thus, consideration of matters of "significant public interest" triggers the notice requirements associated with the constitutional right of participation.

The required policies and procedures "must include a method of affording interested persons reasonable opportunity to submit data, views, or arguments, orally or in written form, prior to making a final decision that is of significant interest to the public." Mont. Code Ann. § 2-3-111(1). Public participation may be waived when the agency decision: (1) concerns "an emergency situation affecting the public health, welfare or safety"; (2) maintains or protects the interests of the agency itself; or (3) is nothing more than a ministerial act. Mont. Code Ann. § 2-3-112.

Beyond Mont. Code Ann. § 2-3-103, notice of meetings conducted by county commissioners is mandated by Mont. Code Ann. § 7-5-2122. That statute provides:

> **7-5-2122. Meetings of board of county commissioners.** (1) The governing body of the county shall establish by resolution a regular meeting date and notify the public of that date.
>
> (2) The governing body of the county, except as may be otherwise required of them, may meet at the county seat of their respective counties at any time for the purpose of attending to county business. Commissioners may, by resolution and prior 2 days' posted public notice, designate another meeting time and place.

The Blaine County Commission has established and notified the public of a regular meeting date--9:30 a.m. to 5 p.m., Monday through Friday. You have asked whether this method of providing notice of meetings complies with Montana's open meeting and public participation laws. The open meeting laws contain no explicit notice requirements. Rather, notice requirements originate in Montana's public participation laws and attach only when an issue is of significant public interest. Montana Supreme Court decisions which engraft notice requirements to open meeting provisions have been limited to situations where a matter of significant public interest was being determined. See Board of Trustees, Huntley Project Sch. Dist. No. 24, supra, involving a final commission decision on a subdivision; and Common Cause of Mont., supra, involving the adoption of recommendations to the governor on the appointment of an important government official.

In my opinion, article II, section 9 requires that any meeting of the commissioners be open to the public, whether the matter being considered involves large issues of policy or the smallest ministerial act. However, the obligation to afford the public prior notice and opportunity to participate attaches under article II, section 8, only to meetings which consider matters of significant interest to the public. I further conclude Blaine County's practice does not satisfy Montana's constitutional requirements.

District Judge Joe L. Hegel addressed a similar situation in Rosebud County. The Rosebud County Commission passed a resolution notifying the public that it conducts meetings from 8 a.m. to 5 p.m. on regular business days. Judge Hegel ruled that the resolution did not "satisfy the provisions of the Public Participation in Government Act [Mont. Code Ann. §§ 2-3-101 to -114] or of Article II, section 8 of the Montana Constitution." Seliski v. Rosebud County, No. DV 94-13, slip op. at 5 (Mont. 16th Jud. Dist. Apr. 12, 1995).

> A notice that business will be conducted from 8:00 a.m. to 5:00 p.m. on all regular business days is really no notice at all. Such a policy would require interested citizens to examine the commissioner's desk calendars on a daily basis to find out if a discussion or decision of significant interest was going to be held anytime soon. This is impractical for most people and can hardly be said to encourage or assist public participation in such decisions as required by the Montana Constitution and by statute.

Seliski, slip op. at 4. I agree with Judge Hegel that a notice stating that unspecified business will be conducted some time between 9:30 a.m. and 5 p.m. on specified days of the week does not, by itself, satisfy the requirements of article II, section 8 and its implementing statutes.

II.

Having anticipated my response to your first question, you have also asked for "appropriate guidelines and procedures for counties to follow in determining which matters are of 'significant public interest' so as to require public notice." As discussed above, the public participation statutes require that the public be allowed to participate in the resolution of matters of significant public interest. Thus, matters of significant public interest require notice, as well as an opportunity for the public to participate in the decision-making process prior to the final decision being made.

The term *significant public interest* is neither defined in the statutes regarding public participation nor discussed in the legislative minutes pertaining to those statutes. There is also no

Montana Supreme Court decision which defines *significant public interest* in this context.

The 1997 legislature defined the term "significant interest to the public" for purposes of the Montana Administrative Procedure Act (Mont. Code Ann. §§ 2-4-101 to -711) as "agency actions under this chapter regarding matters that the agency knows to be of widespread citizen interest. These matters include issues involving a substantial fiscal impact to or controversy involving a particular class or group of individuals." Mont. Code Ann. § 2-4-102(12).

The legislature's stated intention that this definition be limited to agency actions under the Montana Administrative Procedure Act precludes reliance on the definition to interpret the term *significant public interest* as it is used in the Public Participation in Governmental Operations Act. Mont. Code Ann. § 1-2-107; Department of Rev. of State of Mont. v. Gallatin Outpatient Clinic, Inc., 234 Mont. 425, 430, 763 P.2d 1128, 1130-31 (1988).

Additionally, the Montana Administrative Procedure Act uses the term *significant interest to the public* to describe subject matter for which a hearing is required before a rule can be adopted, amended or repealed. Public participation is nonetheless permitted through the opportunity to comment in writing, whether the subject matter is of *significant interest to the public* or not. Conversely, the term *significant public interest* is used in the Public Participation in Governmental Operations statutes to describe when public participation of any sort is required. Mont. Code Ann. § 2-3-111(1).

The term *significant public interest* as used in this opinion is limited at the very least by Mont. Code Ann. § 2-3-112(3), which excepts "a decision involving no more than a ministerial act" from the public participation mandates. A ministerial act is generally performed pursuant to legal authority, and requires no exercise of judgment.

> [A] duty is to be regarded as ministerial when it . . . has been positively imposed by law, and its performance required at a time and in a manner or upon conditions which are specifically designated; the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion.

State ex rel. Workers' Compensation Div. v. District Court, 246 Mont. 225, 229, 805 P.2d 1272, 1275 (1990).

At the other end of the spectrum, District Judge Dorothy McCarter found the extension of a school superintendent's contract to be of *significant public interest* in Citizens for Accountability in Education v. Board of Trustees, School District No. 9, No. ADV-92-

450, slip op. at 6 (Mont. 1st Jud. Dist. Oct. 7, 1992). Similar conclusions were reached in Texas where the termination of a school superintendent and a police chief were found to be of "special public interest" requiring "full and adequate notice" to the public. Cox Enter., Inc. v. Board of Trustees of Austin Indep. Sch. Dist., 706 S.W.2d 956, 959 (Tex. 1986) (school superintendent); Mayes v. City of De Leon, 922 S.W.2d 200, 203 (Tex. 1996) (police chief).

Judge Hegel's decision in Seliski v. Rosebud County is also instructive. "Since the Public Participation in Government [Act] is implementing a constitutional mandate, in developing and applying such procedures, the Commissioners should resolve any doubts about whether a decision is 'of significant interest' or as to the adequacy of the notice in favor of increased citizen participation." Seliski, slip op. at 4.

"When interpreting statutes, it is fundamental that words and phrases are to be given their plain, ordinary and usual meaning." Common Cause of Mont., 263 Mont. at 330, 868 P.2d at 608 (citations omitted). Webster's *Third International Dictionary* defines *significant* as "having a meaning," "full of import," and "deserving to be considered." *Public* means "of or pertaining to the people," "relating to, belonging to or affecting a community at large," and is "opposed to private." The term *interest*, when used in this context, is defined as a "concern" or the "state of being concerned or affected." Thus, an action of *significant public interest* is an action which has meaning to and deserves to be considered by the people it affects.

Applying Judge Hegel's instructions to resolve any doubt in favor of increased public participation, any non-ministerial decision or action of a county commission which has meaning to or affects a portion of the community requires notice to the public and the opportunity for the public to participate in the decision-making process.

I recognize the challenges these requirements may create for county commissions. I surveyed Montana's counties seeking to identify an existing procedure for providing notice which complies with Montana's public participation laws while not unduly impeding county commissions. The results ranged from less compliance than in Blaine County to very detailed procedural mandates.

Several of the responding counties have developed a process which appears to balance the public's rights with its commission's need to conduct business and serve the public. Those counties set regular meetings at a recurring time each week or month, for example 9 a.m. the first and third Mondays of each month. An agenda is prepared and posted sufficiently in advance to give notice to the public of the topics to be discussed and actions to be considered by the commission. Forty-eight hours is generally

considered sufficient to notify the public of contemplated action. Citizens for Accountability, slip op. at 6.

Often the notice and agenda are published by the local press. New items are not added to the agenda but carried over to the next regularly scheduled meeting. Matters of significant public interest are reserved for those regularly scheduled meetings. Commissions may also schedule additional or special meetings to discuss matters of significant public interest by issuing a resolution and providing two days' posted public notice. Mont. Code Ann. § 7-5-2122(2).

These commissions keep the public apprised of their day-to-day activity and action on routine matters in various ways. A common, and informative, process is to post and distribute the commission's weekly calendar and to post or make available each commissioner's daily calendar. Commissioners are encouraged to avoid discussing issues of significant public interest when part of a quorum and to inform the public that issues of significant public interest will not be resolved outside the regularly scheduled meeting.

Judge Hegel endorsed similar processes in Seliski:

> The [Public Participation in Government] Act requires the commissioners to develop policies and procedures to determine whether a particular decision is of "significant interest to the public," or whether it is merely a daily housekeeping function. The Act also requires the commissioners to adopt procedures to provide adequate notice to the public of all such significant decisions as they arise. This may very well mean placing such items on an agenda for a meeting to be held on a regular day each month, or at a special meeting date, with posted notice of the meeting date and agenda, and/or publication of notice. The amount of notice given should increase with the relative significance of the decision to be made. The procedures must be designed to encourage and assist citizen participation and must provide adequate notice.

Id., slip op. at 5.

THEREFORE, IT IS MY OPINION:

1. A county commission which establishes the hours of 9:30 a.m. to 5 p.m., Monday through Friday, as its regular meeting date for public notice purposes is not in compliance with Montana's public participation constitutional provisions and statutes.

2. Public notice is required of any convening of a quorum of county commissioners at which any matter of significant public interest is to be discussed, deliberated or determined. Additionally, the public must be given the

opportunity to participate in any decision of the commission, other than ministerial acts, if there is any question whether the decision is of "significant interest to the public."

Sincerely,

JOSEPH P. MAZUREK
Attorney General

jpm/mas/dm

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 December 31, 1997. This table includes those rules adopted during the period January 1, 1998 through March 31, 1998 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 December 31, 1997, 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 1996, 1997 and 1998 Montana Administrative Registers.

To aid the user, the Accumulative Table includes rulemaking actions of such entities as boards and commissions listed separately under their appropriate title number. These will fall alphabetically after department rulemaking actions.

GENERAL PROVISIONS, Title 1

1.2.419	Filing, Compiling, Printer Pickup and Publication of the Montana Administrative Register, p. 1913, 2301

ADMINISTRATION, Department of, Title 2

I	and other rules - State Procurement, p. 1107, 1816
I-VI	and other rules - Payroll Administration - Decedent's Warrants, p. 1855, 2278
2.13.201	and other rules - 9-1-1 Emergency Telephone Systems, p. 1691, 2178
2.21.122	and other rules - Sick Leave, p. 971, 1440, 2057
2.21.216	and other rules - Annual Vacation Leave, p. 966, 1442
2.21.619	and other rules - Holidays, p. 962, 1444
2.21.1412	and other rules - Employment Preference for Persons with Disabilities, p. 1845, 2277, 157
2.21.3603	and other rules - Veterans' Employment Preference, p. 956, 1445
2.21.3704	and other rules - Recruitment - Selection, p. 1861, 2279
2.21.3802	and other rules - Probation, p. 952, 1446
2.21.5006	and other rule - Reduction in Work Force, p. 946, 1447

(Classification Review Committee)
6.6.8301 Updating References to the NCCI Basic Manual for Workers Compensation and Employers Liability Insurance, 1996 Edition, p. 599
6.6.8301 Updating References to the NCCI Basic Manual for Workers Compensation and Employers Liability Insurance, 1996 Edition, p. 1419, 2059

COMMERCE, Department of, Title 8

8.63.101 and other rules - Passenger Tramways, p. 1960, 643

(Board of Alternative Health Care)
8.4.405 and other rules - Naturopathic Physician Continuing Education Requirements - Licensing by Examination - Midwives Continuing Education Requirements - Natural Substances Formulary List, p. 2134, 529
8.4.510 Licensure of Out-of-State Applicants, p. 515

(Board of Architects)
8.6.405 and other rules - Licensure of Out-of-State Applicants - Examinations - Individual Seal - Renewals - Unprofessional Conduct - Fees - Architect Partnerships - Screening Committee - Solicitation of Business by Architects from other States - Use of Title, p. 2142, 449

(Chemical Dependency Counselors Certification Program)
I-XVIII Chemical Dependency Counselor Certification, p. 602
I Fees, p. 1008, 1451

(Board of Chiropractors)
8.12.601 and other rules - Applications - Examination Requirements - Temporary Permit - Renewals - Unprofessional Conduct - Endorsement, p. 49

(Board of Clinical Laboratory Science Practitioners)
8.13.303 and other rules - Fees - Renewal - Inactive Status - Reactivation of License, p. 54

(Board of Cosmetologists)
8.14.401 and other rules - Practice of Cosmetology - Electrology - Manicuring - Esthetics, p. 1709, 2181, 159

(Boilers, Blasters and Crane Operators Program)
8.15.103 and other rules - Construction Blasters - Hoisting Operators - Crane Operators - Boiler Engineer Training, p. 2149, 453

(Board of Dentistry)
8.16.405 and other rule - Fees - Dentist Licensure by Credentials, p. 2157

(State Electrical Board)
8.18.402 and other rules - Applications - General Responsibilities - Continuing Education - Screening Panel, p. 1625, 2161, 455

(Fire Prevention Program)
8.19.108 and other rules - Practice of Selling, Servicing or Installing Fire Prevention Systems, p. 2163, 458

(Board of Hearing Aid Dispensers)
8.20.401 and other rules - Traineeship Requirements and Standards - Examinations - Definitions - Transactional Document Requirements, p. 1743, 2281

(Board of Horse Racing)
8.22.502 and other rules - Parimutuel Wagering - Annual License Fees - Timers - Jockeys - Trainers - General Requirements - Weight-Penalties and Allowances - Exacta Betting - Requirements of Licensee - Bonus for Owners of Montana Breds, p. 615

(Board of Medical Examiners)
8.28.414 and other rules - Physician Temporary Certificate - Fee Schedule - Acupuncture - Podiatry - Nutrition Practice Rules, p. 1746, 2197

(Board of Nursing)
8.32.1408 Standards Relating to the Licensed Practical Nurse's Role in Intravenous (IV) Therapy, p. 623

(Board of Nursing Home Administrators)
8.34.414A Application for Licensure, p. 1423, 161

(Board of Optometrists)
8.36.409 and other rules - Fees - Licensure of Out-of-State Applicants - Continuing Education Requirements - Approved Programs or Courses, p. 235

(Board of Outfitters)
I Watercraft Identification, p. 2224, 740

(Board of Pharmacy)
8.40.404 and other rules - Fees - Internship Regulations - Pharmacy Technicians, p. 1628, 2060, 163

(Board of Physical Therapy Examiners)
8.42.402 and other rules - Fees - Temporary Licenses - Continuing Education, p. 2169, 460

(Board of Plumbers)
8.44.402 and other rule - Definitions - Fees, p. 1751, 2226

(Board of Professional Engineers and Land Surveyors)
Establishment of a Negotiated Rulemaking Committee on Fire Extinguisher Systems - Need for Engineering Services, p. 700
Establishment of a Negotiated Rulemaking Committee on Wastewater Treatment Systems - Need for Engineering Services, p. 703
8.48.507 Classification of Experience, p. 1504, 534

(Board of Psychologists)
8.52.604 and other rules - Application Procedures - Continuing Education - Unprofessional Conduct - Ethical Practice of Psychology - Unprofessional Conduct, p. 57

(Board of Public Accountants)
8.54.408 and other rules - Education Requirements - Fees - Enforcement Against Licensees, p. 2172, 463

(Board of Radiologic Technologists)
8.56.602C and other rules - Permit Examinations - Permit Fees - Inspections - Continuing Education - Continuing Education--Waiver, p. 977, 1576

(Board of Real Estate Appraisers)
8.57.407 and other rules - Qualifying Education Requirements for Licensed Appraisers - Residential Certification - General Certification - Continuing Education - Ad Valorem Tax Appraisal Experience, p. 238, 744

(Board of Realty Regulation)
8.58.411 and other rules - Fees - Continuing Education - Renewal of License, p. 1333, 1819
8.58.413 Reactivation of Licenses, p. 407

(Board of Sanitarians)
8.60.413 Fee Schedule, p. 1243, 1578

(Board of Speech-Language Pathologists and Audiologists)
8.62.413 Fees, p. 1012, 1453

(Board of Veterinary Medicine)
8.64.401 and other rules - Definitions - Application Requirements - Temporary Permits - Support Personnel, p. 1633, 464

(Building Codes Bureau)
8.70.101 and other rules - Building Codes Bureau, p. 1509, 2061, 164

(Weights and Measures Bureau)
8.77.101 and other rules - Voluntary Registration of Servicepersons and Service Agencies - Uniform Regulation of National Type Evaluation, p. 517

(Consumer Affairs Division)
I-XX New Motor Vehicle Warranty Act, p. 68, 746
8.78.401 and other rules - Proprietary Schools, p. 2016, 165

(Banking and Financial Institutions Division)
I-VIII Annual Fees - Examinations - Reports by the Foreign Capital Depositories, p. 1871, 2283
I-XVII Foreign Capital Depositories, p. 1534
8.87.204 and other rules - Application Procedures to Establish a New Branch Bank - Procedural Rules for a Banking Board Hearing, p. 1014, 1454

(State Banking Board)
I-XI Application Procedure for a Charter - Notice of Hearing - Grounds for Denial - Procedural Rules for Determination - Procedural Rules for Discovery and Hearing - Application Charter Fee for the Foreign Capital Depositories, p. 1882, 2286

(Local Government Assistance Division)
I Administration of the 1998 Treasure State Endowment Program (TSEP), p. 2228, 758
8.94.3707 and other rule - 1991 Federal Community Development Block Grant Program - Administration of the 1998 Federal Community Development Block Grant Program, p. 2230, 751
8.94.3714 Administration of the 1998 Federal Community Development Block Grant Program, p. 706

(Board of Investments)
8.97.1301 and other rules - General Requirements for All Investments in Mortgages and Loans, p. 859, 1361, 1579, 1823

(Economic Development Division)
8.99.401 and other rules - Microbusiness Advisory Council - Microbusiness Finance Program, p. 1547, 466

(Hard-Rock Mining Impact Board)
8.104.203A Administration of the Hard-Rock Mining Impact Act - Definitions, p. 981, 1337, 2070

(Board of Housing)
8.111.402 and other rules - Reverse Annuity Mortgage (RAM) Loans, p. 92, 644

(Travel Promotion and Development Division)
8.119.101 Tourism Advisory Council, p. 526

(Burial Preservation Board)
I-VI Unmarked Burials Within the State of Montana, p. 2233, 478

EDUCATION, Title 10

(Board of Public Education)
10.57.301 Teacher Certification - Endorsement Information, p. 1962, 347
10.57.404 Teacher Certification - Class 4 Vocational Certificate, p. 409
10.58.527 Teacher Certification - Areas of Permissive Special Competency, p. 1964, 348
10.65.101 and other rules - Hours and Days of Instruction - Pupil Instruction-Related Days, p. 1966, 349

(State Library Commission)
10.101.101 and other rule - State Library Commission - Library Service Advisory Council, p. 1119, 1991

(Montana Historical Society)
I-XVI Procedures that State Agencies must Follow to Protect Heritage Properties and Paleontological Remains - General Procedures which the State Historic Preservation Office must Follow in Implementing its General Statutory Authority, p. 411

FISH, WILDLIFE, AND PARKS, Department of, Title 12

I-III Angler Education Events, p. 626
12.3.202 Establishing a New Class of License Agent who may Receive Compensation from Clients for Preparation of Hunting License and Permit Applications, p. 629

(Fish, Wildlife, and Parks Commission)
I Defining Guiding Services for Use of Class B-10 and B-11 Licenses Which are Outfitter-sponsored Nonresident Big Game Combination Licenses, p. 1753, 166
I-VIII Creating "Primitive Fishing Access Site Designation" where Site Development and Maintenance are Limited, p. 423
12.6.901 Limiting the Use of Motor-propelled Water Craft to Ten Horsepower on Lake Helena, p. 95

ENVIRONMENTAL QUALITY, Department of, Title 17

17.36.303 Subdivisions - Authority of the Department to Allow Use of Alternative Water Systems in Subdivisions, p. 375, 1458

(Board of Environmental Review)
I Water Quality - Temporary Water Standards for Daisy Creek, Stillwater River, Fisher Creek, and the Clark's Fork of the Yellowstone River, p. 1652, 1872, 2211, 1049, 2502, 534, 1636, 631
I-IV Water Quality - Assessment of Administrative Penalties for Violations of Water Quality Act, p. 263

JUSTICE, Department of, Title 23

I-VII Valuation and Taxation of Light Motor Vehicles - Imposition of Fees in Lieu of Tax on Buses, Heavy Trucks, Truck Tractors and Trailers, p. 1901, 2292
23.16.101 and other rules - Public Gambling, p. 2023
23.17.108 Establishment of a Tuition Fee at the Montana Law Enforcement Academy, p. 709

LABOR AND INDUSTRY, Department of, Title 24

24.16.9003 and other rule - Prevailing Wage Rates - Establishing Rates for Building Construction Services, p. 718
24.21.414 Adoption of Wage Rates for Certain Apprenticeship Programs, p. 723
24.29.1425 and other rules - Hospital Rates Payable in Workers' Compensation Cases, p. 433, 759
24.30.102 Occupational Safety and Health Standards for Public Sector Employment, p. 439
24.30.1302 Safety Standards for Coal Mines, p. 443, 760

(Workers' Compensation Court Judge)
24.5.101 and other rules - Workers' Compensation Court, p. 711

LIVESTOCK, Department of, Title 32

(Board of Livestock)
32.3.212 Brucellosis Vaccination(s), p. 1641, 656

(Board of Milk Control)
32.24.504 and other rules - Quota Rules, p. 1339, 1662

NATURAL RESOURCES AND CONSERVATION, Department of, Title 36

I&II Streamside Management Zone, p. 1552, 1992
I-III and other rule - Extensions of Time to Complete a Water Use Permit or Change Authorization - Application and Special Fees, p. 1643, 2084
I-IV Marketing of Water at State Water Projects, p. 728
36.24.104 Types of Bonds - Financial and Other Requirements in the Wastewater Revolving Fund Act, p. 102, 538

(Board of Land Commissioners and Department of Natural Resources and Conservation)
I Grazing of Domestic Sheep on State Tracts Within or Adjacent to Occupied Bighorn Ranges, p. 731
26.2.703 and other rules - Transfer from the Department of State Lands - Citizen Participation in Agency Decisions, p. 726
26.5.101 and other rules - Transfer from the Department of State Lands - Resource Development Division -

Establishment, Administration and Management of State Natural Areas, p. 761

(Board of Oil and Gas Conservation)

36.22.1231 and other rules - Notice of Application and Objections - Injection Fee and Well Classification - Disposal by Injection - Application--Contents and Requirements - Board Authorization - Notice of Commencement of Discontinuance--Plugging of Abandoned Wells - Records Required, p. 1245, 1589

36.22.1303 and other rules - Well Plugging Requirement - Plugging and Restoration Bond - Financial Responsibility, p. 1646, 2038, 482

36.22.1308 Plugging and Restoration Bond, p. 636

PUBLIC HEALTH AND HUMAN SERVICES, Department of, Title 37

Establishment of a Negotiated Rulemaking Committee on Bed and Breakfast Establishments, p. 1774

Establishment of a Negotiated Rulemaking Committee on Guest Ranches and Outfitting and Guide Facilities, p. 1778

I and other rules - Medicaid Outpatient Drugs, p. 2241, 495

I-XVIII Tattoos, p. 108

I-XXI and other rules - Youth Care Facilities, p. 1759, 489

I-XXI and other rule - Minimum Standards for Mental Health Centers, p. 1556, 539

I-XXIII and other rules - Child Support Enforcement Guidelines, p. 317, 447

11.5.101 and other rules - Transfer from the Department of Family Services - Protective Services, p. 657

11.5.401 and other rules - Transfer from the Department of Family Services - Supplemental Security Income Payments, p. 2294

11.6.101 and other rules - Transfer from the Department of Family Services - Adoptive Services, p. 659

11.7.105 and other rules - Transfer from the Department of Family Services - Foster Care Services, p. 2250, 488

11.7.313 Model Rate Matrix Used to Determine Foster Care Maintenance Payments, p. 1149, 1663

11.9.101 and other rules - Transfer from the Department of Family Services - Residential Alcohol and Drug Treatment for Indigent Juveniles, p. 2295

11.11.101 and other rules - Transfer from the Department of Family Services - Licensure of Child Placing Agencies, p. 661

11.12.101 and other rules - Transfer from the Department of Family Services - Youth Care Facilities, p. 663

11.12.115 and other rules - Qualifications of Child Care Staff, Foster Parents, and Regular Members of Foster Parents' Households, p. 1145, 1664

PUBLIC SERVICE REGULATION, Department of, Title 38