MONTANA ADMINISTRATIVE REGISTER

1999 ISSUE NO. 1
JANUARY 14, 1999
PAGES 1-204
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MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 1

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 The notice section contains state agencies' proposed new, amended or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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

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NOTICE SECTION

BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

In the matter of the proposed amendment of rules 4.10.1001, 4.10.1003, 4.10.1005 through 4.10.1007 and 4.10.1501 and the adoption of new rules I through IV pertaining to pesticide enforcement)	)NOTICE OF PROPOSED AMEND-)MENT AND ADOPTION OF NEW)RULES PERTAINING TO)PESTICIDE ENFORCEMENT)

NO PUBLIC HEARING
CONTEMPLATED

TO: All Interested Persons.

1. On February 13, 1999, the Department of Agriculture proposes to amend rules 4.10.1001, 4.10.1003, 4.10.1005 through 4.10.1007 and 4.10.1501 and adopt the new rules I through IV pertaining to pesticide enforcement.

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

4.10.1001 DEFINITIONS (1) remains the same.

(2) "Exposure" means the process and/or result of introducing a pesticide by any method or route onto or into humans, livestock, animals, crops, plants or the environment. Entry into treated areas in violation of a restricted entry interval, failure to provide required protective equipment (PPE) or clothing, failure to provide required decontaminating facilities or failure to provide required facilities for care, storage or cleaning PPE or clothing constitutes exposure.

(3) through (5) remain the same.

(6) "Proven exposure" in cases of misuse means:

(a) to establish the validity or authenticity of exposure by documentation of pesticide residues on or in humans, agricultural commodities or livestock by laboratory analysis or bioassay;

(b) documentation of exposure by other investigative or scientific methods including signs and symptoms caused by exposure to pesticides;

(c) documentation of entry by a person into a treated area in violation of a restricted entry interval; or

(d) documentation of failure to provide protective equipment, clothing, decontamination facilities, or facilities for care, storage or cleaning of personal protective equipment required by a pesticide label.

(7) "Proven harm" in cases of misuse means to establish the validity or authenticity of exposure, harm or poisoning by demonstrating adverse effects through verification by a

recognized animal, plant, human health, or pesticide specialist, which ~~in most cases~~ may include~~s~~ documentation of the pesticide by laboratory analytical or bioassay confirmations or other approved scientific methods.

~~(6)~~(8) "Significant harm" means having a measurable or verified observation of adverse effect(s), on health, environment, agricultural crops or livestock.

AUTH: 80-8-105, MCA IMP: 80-8-306, MCA

4.10.1003 ABILITY TO STAY IN BUSINESS (1) Where a determination of the appropriate amount of the penalty must be made under 80-80-306(5)~~(c)~~(d), MCA, the "effect on the person's ability to stay in business" will ~~not~~ be considered~~, until such time and to the extent~~ when the charged person ~~places~~ submits bonafide financial information ~~in issue by presentation thereof,~~ accompanied by appropriate documentary evidence. The charged person may request a reduction in a civil penalty or an alternate payment schedule.

AUTH: 80-8-105, MCA IMP: 80-8-306, MCA

4.10.1005 PENALTY DETERMINATION (1) Each violation of the Montana Pesticides Act and/or rules adopted thereunder is considered a separate offense. Each offense is subject to a separate penalty not to exceed ~~$1,000~~ $2,500, with the exception of farm applicators whose penalty cannot exceed ~~$200~~ $500 for the first offense.

(2) The penalty matrixes ~~set forth~~ in this rule establish the ~~initial~~ penalty ~~value~~ for each offense that is a major violation or reoccurrence of a major violation. The values in parentheses establish the penalty for farm applicators possessing a permit. The ~~significance~~ gravity of the violation, the degree of care exercised and the degree of ~~whether significant~~ harm ~~resulted~~ to health, environment, agricultural ~~crops~~ commodities, or livestock~~,~~ may decrease or increase the ~~matrix~~ penalties listed below. ~~A person may present information on their ability to stay in business, as set forth in ARM 4.10.1003, petitioning for a reduction in the proposed civil penalty.~~ The department shall have the option to select the most appropriate penalty and penalty value for each ~~and every~~ violation. ~~of the act.~~

(3) Where a penalty is assessed for reoccurrence of a violation within two years of the first violation, the two year period will start on the date that the preceding violation occurred. All appeals procedures and rights to contest and a final order concluding the violation must be completed for the preceding violation(s).

~~PENALTY MATRIX~~

~~Type of Violation~~	~~1ST Offense~~	~~2ND Offense~~	~~3RD and Subsequent Offense~~
~~(1) Misuse resulting in proven harm to:~~			
~~A. Humans~~			
~~1. Proven exposure subacute illness~~	~~500 1,000~~	~~1,000~~	~~1,000~~
~~2. Illness or death~~	~~1,000~~	~~1,000~~	~~1,000~~
~~3. Exposure chronic illness or death~~	~~1,000~~	~~1,000~~	~~1,000~~
~~B. Livestock~~			
~~1. Residues prevent marketing of the animal or their by products~~	~~500 1,000~~	~~1,000~~	~~1,000~~
~~2. Illness~~	~~500 1,000~~	~~1,000~~	~~1,000~~
~~3. Death~~	~~1,000~~	~~1,000~~	~~1,000~~
~~C. Crops~~			
~~1. Residues that prevent or inhibit the marketing of all or part of the crop~~	~~500 1,000~~	~~500 1,000~~	~~500 1,000~~
~~2. Residue damage to crop~~	~~100 1,000~~	~~250 1,000~~	~~500 1,000~~
~~3. Crop destroyed~~	~~100 1,000~~	~~250 1,000~~	~~500 1,000~~
~~D. Environment~~			
~~1. Water~~			
~~a. poisoning or harm to aquatic plants or animals~~	~~100 1,000~~	~~500 1,000~~	~~750 1,000~~
~~b. cannot be used for domestic, livestock or irrigation purposes~~	~~500 1,000~~	~~750 1,000~~	~~1,000~~
~~c. ground or surface water contaminated at or above state or federal health standards~~	~~500 1,000~~	~~750 1,000~~	~~1,000~~
~~2. Soil~~			
~~a. illegal residues that prevent growth of plants~~	~~100 500~~	~~250 750~~	~~750 1,000~~
~~b. erosion results~~	~~100 500~~	~~250 750~~	~~750 1,000~~
~~c. soil runoff that causes water contamination~~	~~100 500~~	~~250 750~~	~~750 1,000~~
~~d. soil animal relation ships that are adversely affected~~	~~100 500~~	~~250 750~~	~~750 1,000~~
~~3. Animals~~			
~~a. illness~~	~~100 500~~	~~500 750~~	~~750 1,000~~
~~b. death~~	~~250 1,000~~	~~500 1,000~~	~~750 1,000~~
~~c. residues that prevent or~~	~~250 750~~	~~500 1,000~~	~~1,000~~

~~restrict consumption by humans~~
~~d. habitat destruction, proven harm to animals~~ ~~250 1,000 500 1,000 750 1,000~~
~~e. bees reduction in production*~~ ~~100 1,000 250 1,000 500 1,000~~
~~4. Plants other than crops~~
~~a. plant damaged, normal the following season~~ ~~100 500 250 750 750 1,000~~
~~b. plant damaged, abnormal the following season~~ ~~250 500 500 750 750 1,000~~
~~c. plant destroyed~~ ~~250 1,000 500 1,000 1,000~~
~~5. Air~~
~~a. contaminated at or above state or federal health standards in confined environments~~ ~~100 1,000 500 1,000 1,000~~

~~(2) Sale of a restricted pesticide to a person not certified or authorized to purchase said pesticide~~ ~~100 500 250 1,000 500 1,000~~

~~(3) Use or Sale of an unregistered pesticide~~

~~A. Registrant~~ ~~500 500 1,000 750 1,000~~
~~B. Others~~
~~1. General~~ ~~100 250 250 500 750 1,000~~
~~2. Restricted~~ ~~250 500 500 1,000 750 1,000~~
~~C. Use or Sale of a canceled or suspended pesticide which is not registered except as provided for under state statute or allowed by the agency, whichever is more restricted.~~ ~~100 500 500 1,000 750 1,000~~

~~(4) Failure to maintain any individual pesticide application and sales records~~
~~A. Commercial, government, non commercial or public utility applicators or dealers~~
~~1. General~~ ~~100 250 250 500 500 1,000~~
~~2. Restricted~~ ~~250 500 500 750 750 1,000~~

~~*The department, in determining the reduction in production, shall consider such factors as damage to brood, nurse bees, forage bees, time of year and the number of hives involved.~~

~~B. Farm Applicator~~
~~1. General~~ ~~100 100 250 500 1,000~~
~~2. Restricted~~ ~~100 200 200 500 500 1,000~~

~~(5) Use of a pesticide without having obtained the required license or permit~~

~~A. Commercial, government, public utility or non-commercial applicators or operators~~

~~1. General~~	~~100-250~~	~~250-750~~	~~750-1,000~~	
~~2. Restricted~~	~~100-500~~	~~500-750~~	~~750-1,000~~	

~~B. Farm Applicator~~

~~1. Restricted~~	~~100-200~~	~~200-500~~	~~500-1,000~~

~~(6) Sale of a pesticide without having obtained the required license~~

~~A. General~~	~~100-250~~	~~250-750~~	~~750-1,000~~	
~~B. Restricted~~	~~100-500~~	~~500-1,000~~	~~750-1,000~~	

~~(7) Reoccurrence of any identical violation of this chapter (Title 80, Chapter 8, MCA) within the same calendar year excluding the major violations set forth above.~~

~~Type of Reoccurrence~~	~~1ST Reoc currence~~	~~2ND Reoc currence~~	~~3RD Reoc currence~~
~~A. Violations dealing with permits, licenses and/or reports.~~	~~100-200~~	~~200-500~~	~~500-1,000~~
~~B. Violations dealing with general use pesticides.~~	~~100-250~~	~~250-500~~	~~500-1,000~~
~~C. Violations dealing with restricted use pesticides.~~	~~100-500~~	~~500-1,000~~	~~750-1,000~~
~~D. All other violations not covered in A., B., or C.~~	~~100-500~~	~~250-750~~	~~500-1,000~~

(4) Penalties are assessed according to the following penalty matrix:

(a) Misuse resulting in proven exposure or proven harm to:

Violation	1st Offense	2nd Offense	3rd and Subsequent Offense
Humans or human health			
Proven exposure	$500 (100)	$1,000	$2,500
Illness	1,000 (200)	2,500	2,500
Chronic illness or death	2,500 (500)	2,500	2,500
Agricultural Commodities			
Proven exposure	$250 (50)	$500	$1,000
Reduced yield or price	750 (150)	1,500	2,000
Damage or residues that prevent marketing	1,000 (200)	2,000	2,500
Destruction	2,000 (400)	2,500	2,500

Livestock			
Proven exposure	$250(50)	$500	$1,000
Illness or residues that prevent marketing of livestock or by-products	1,000(200)	2,000	2,500
Death	2,500(500)	2,500	2,500

(b) Misuse resulting in proven harm to environment:

Surface or ground water			
Poisoning or harm to aquatic plants or animals	$500(100)	$1,000	$2,500
Domestic, livestock, or irrigation purposes or other beneficial uses affected	1,000(200)	2,000	2,500
Residues equal or exceed state or federal standards	1,000(200)	2,500	2,500
Soil			
Residues that prevent growth of plants	500(100)	1,000	2,500
Structure or biota adversely affected	500(100)	1,000	2,000
Animals			
Illness or harm	500(100)	1,000	2,500
Death	1,000(200)	2,000	2,500
Residues that prevent or restrict consumption by humans	1,000(200)	2,000	2,500
Plants other than agricultural commodities			
Damaged, normal the following season	500(100)	1,500	2,500
Damaged, abnormal the following season	1,000(200)	2,000	2,500
Destroyed	2,000(400)	2,500	2,500
Air			
Contaminated at or above state or federal health standards	1,000(200)	2,500	2,500

(c) Sale of a restricted pesticide to a person not certified or authorized to purchase restricted pesticides:

Sale of a restricted pesticide to a person not certified or authorized to purchase restricted pesticides	$1,000(100)	$1,500	$2,500

(d) Use or sale of an unregistered pesticide:

General	$1,000(200)	$2,000	$2,500
Restricted	1,500(300)	2,500	2,500
Canceled or suspended	1,500(300)	2,500	2,500

(e) Failure to maintain any individual pesticide application and sales records:

General use pesticides	$250(50)	$500	$1,000
Restricted use pesticides	500(100)	750	1,500

(f) Use of a pesticide without having obtained the required license or permit:

Commercial, government, public utility or non-commercial applicators or operators or farm applicators			
General	$500	$1,500	$2,500
Restricted	1,000	2,000	2,500
Permitted Farm Applicator			
Restricted	250	1,000	2,000

(g) Sale of a pesticide without having obtained the required license:

General	$500(100)	$1,500	$2,500
Restricted	1,000(200)	2,000	2,500

(h) Noncompliance with pesticide worker protection standards and labeling:

Misuse violations not causing proven exposure of humans, agricultural commodities or livestock; or proven harm to human health, commodities, livestock or the environment	$250(50)	$500	$1,000

Retaliation by an employer against workers or handlers	1,000(200)	1,500	2,500
Failure to provide emergency assistance	1,500(300)	2,000	2,500
Sale of a misbranded pesticide not having the required worker protection label language	500(100)	1,500	2,500

(i) Noncompliance with pesticide ground water and environmental protection agency endangered species standards and labeling:

Misuse violations not causing proven exposure of humans, agricultural commodities or livestock; or proven harm to human health, commodities, livestock or the environment	$250(50)	$500	$1,000

(j) Noncompliance with pesticide or pesticide container disposal, labeling or handling requirements and standards:

Misuse violations not causing proven exposure of humans, agricultural commodities or livestock; or proven harm to human health, commodities, livestock or the environment	$250(50)	$500	$1,000
Sale of a misbranded pesticide	500(100)	1,500	2,500

(k) Reoccurrence of any identical violation of this chapter (Title 80, chapter 8, MCA) within two years of the first violation excluding the major violations set forth above:

Type of Reoccurrence	1st Reoccurrence	2nd Reoccurrence	3rd Reoccurrence
Violations dealing with permits, licenses and/or reports	$500	$1,000	$2,500

Violations dealing with general use pesticides	500	1,000	2,500
Violations dealing with restricted use pesticides	1,000	2,000	2,500
All other violations	500	1,000	2,500

AUTH: 80-8-105, MCA IMP: 80-8-306, MCA

4.10.1006 ~~SIGNIFICANCE~~ GRAVITY OF VIOLATIONS (1) The department, in determining the ~~significance~~ gravity of a major violation as set forth in 80-8-306(5)~~(d)~~(e), MCA, will consider certain factors. These factors are normally established by statute, rules, labeling and similar standards or requirements and will be documented to the violator. The factors set forth below are examples of standards that may be used. They are neither inclusive or necessarily additive in substance, order presented, or number. ~~A violation may be considered more significant when:~~

(a) through (e) remain the same.

(f) the extent, type, kind, nature and severity of ~~the~~ exposure or ~~violation results in~~ harm to human health, commodities, environment, ~~agriculture, crops,~~ or livestock;

~~(g) use is inconsistent with label direction and precautions;~~

~~(h)~~(g) the person's history of compliance with the Montana Pesticides Act, rules, and department orders illustrates continued noncompliance or disregard for compliance;

~~(i)~~(h) whether ambient air levels of a pesticide exceed state or federal standards or guidelines;

~~(j) a restricted pesticide is sold to or provided in any manner to a person not qualified, licensed, certified or permitted;~~

~~(k) a person uses or sells a pesticide which is not registered or labeled, or a product which is canceled, suspended or banned, except as allowed by statute, rule or order.~~

~~(l) a person does not possess the proper license credential, permit or certificate to use, sell or purchase a pesticide, or is not supervised as required by the pesticide act or rules adopted thereunder;~~

~~(m) records are not maintained or are improperly maintained;~~

~~(n) a person allows another person to use their license, certificate, permit or credential for the purpose of purchasing a pesticide, except as provided for by the act or rules;~~

~~(o) a person purchases or uses a pesticide which he is~~

~~not qualified to purchase or use;~~

(i) timeliness in correcting a violation;

(j) cooperation during an inspection or investigation;

(k) multiple violations are present;

(l) violations that have potential to result in exposure or harm;

(m) timely and voluntary settlement of damages;

~~(p)~~ (n) the person has knowledge of the act ~~and~~ or rules ~~adopted there under~~ which ~~he~~ were violated.

AUTH: 80-8-105, MCA IMP: 80-8-306, MCA

4.10.1007 DEGREE OF CARE - MISUSE (1) For purposes of these rules implementing civil penalties, ~~the word "misuse", as used in 80-8-306(5)(d)(i), MCA means the use of any pesticide;~~

~~(a) In a manner inconsistent with label directions, cautions or warnings; or~~

~~(b) In violation of any provision of law including statutes, rules, or orders of the department or the agency~~.

~~(2) If~~ conduct that falls within ~~into any of~~ the ~~above~~ definedition of misuse under 80-8-306(5)(e)(i), MCA ~~categories, it~~ shall constitute misuse per se, without regard to the standard of care ~~he may have~~ exercised. However, the charged party may present evidence of standard of care exercised, which may be considered by the department for purpose of determining and mitigating the amount of penalty [80-8-306(5)~~(c)~~(d), MCA]. Such evidence will be evaluated and categorized as follows:

(a) through (c) remain the same.

~~(3)~~ (2) In further determining the applicability of the above categories, the following definitions will apply:

(a) through (d) remain the same.

AUTH: 80-8-105, MCA IMP: 80-8-306, MCA

4.10.1501 DEFINITION OF TERMS These definitions apply to all regulations and rules adopted under the Montana Pesticides Act, Title 80, chapter 8, MCA unless specified differently by statute or individual rules.

(1) through (64) remain the same.

(65) "Misuse" means the use, handling, or release of a pesticide~~s~~ by a person in a manner inconsistent with the label or labeling ~~directions, cautions, and warnings~~ or in violation of department pesticide application, storage, mixing, and loading rules or pesticide and container disposal rules (see 80-8-306(5)(e)(i), MCA).

(66) through (102) remain the same.

(103) "Use" means ~~any act of~~ the handling or release of a pesticide by a person in a manner that is consistent with the label or labeling and in compliance with department rules on application, storage, mixing, loading, pesticide and container disposal and required supervision. ~~or exposure of~~

~~man or the environment to a pesticide,including but not limited to:~~

~~Application of a pesticide, including mixing and loading, and any required supervisory action in or near the area of application; storage actions for pesticides and pesticide containers; disposal action for pesticides and pesticide containers.~~

(104) through (107) remain the same.

AUTH: 80-8-105, MCA IMP: 80-8-306, MCA

NEW RULE I NONCOMPLIANCE WITH PESTICIDE WORKER PROTECTION STANDARDS AND LABELING (1) For purposes of administering civil penalties for noncompliance with worker protection standards, the department hereby adopts the worker protection statements and worker protection standard as set forth in the Code of Federal Regulations, Title 40, part 156, subpart K and Title 40, part 170, revised as of July 1, 1998. A copy can be obtained from the Montana Department of Agriculture, Agricultural Sciences Division, PO Box 200201, Helena, MT 59620-0201, (406 444-2944).

(2) Failure to comply with the worker protection standard and associated labeling requirements is a violation of the Montana Pesticides Act and is subject to civil penalties pursuant to 80-8-306, MCA.

(a) When the worker protection standard is referenced on a pesticide label pursuant to 40 CFR, Part 156, subpart K, persons using the pesticide must comply with the worker protection statements and the worker protection standard. Failure to comply constitutes use of a pesticide in a manner inconsistent with the label.

(b) Any pesticide that is labeled for use in the production of agricultural plants on an agricultural establishment as defined in 40 CFR 170.3, shall be labeled with the worker protection statements set forth in 40 CFR Part 156, subpart K. A pesticide not so labeled is misbranded. It is a violation for any person to distribute, sell, or offer for sale or deliver for transportation or transport in intrastate commerce any pesticide that is misbranded, and such violation is subject to a civil penalty pursuant to 80-8-306, MCA.

AUTH: 80-8-105, MCA IMP: 80-8-306, MCA

NEW RULE II NONCOMPLIANCE WITH PESTICIDE GROUND WATER AND ENVIRONMENTAL PROTECTION AGENCY ENDANGERED SPECIES STANDARDS AND LABELING (1) The following are considered violations:

(a) Failure to comply with label or labeling directions relating to ground water or endangered species requirements including requirements in bulletins referenced by labels;

(b) Failure to comply with administrative rules requiring containment, spill reporting, spill cleanup, or emergency response plans; or

(c) Failure to comply with ground water specific

management plans adopted as administrative rules pursuant to Title 80, chapter 15, MCA.

(2) For the purpose of determining civil penalties, any such violations shall constitute misuse. If a misuse violation results in proven exposure of humans, agricultural commodities, or livestock, or proven harm to human health, agricultural commodities, livestock, or the environment, the amount of a civil penalty may be determined by using the penalty matrix established for 80-8-306(5)(e)(i), MCA. Other violations will be subject to civil penalties established in ARM 4.10.1005(4)(i) of the civil penalty matrix.

AUTH: 80-8-105, MCA IMP: 80-8-306, MCA

NEW RULE III NONCOMPLIANCE WITH PESTICIDE OR PESTICIDE CONTAINER DISPOSAL, LABELING OR HANDLING REQUIREMENTS AND STANDARDS (1) The following are considered violations:

(a) Failure to comply with label directions for disposal of a pesticide;

(b) Failure to comply with ARM 4.10.801 through 4.10.808 (Rinsing and Disposing of Pesticide Containers);

(c) Failure to comply with pesticide label directions for handling such as application instructions, storage, protective clothing or equipment, precautionary statements, restrictions, re-entry intervals, mixing and loading instructions and others; or

(d) Distribution, sale, or offering for sale or delivering for transportation, or transport in intrastate commerce between points in the state any pesticide that is not labeled as required by ARM 4.10.702.

(2) For the purpose of determining civil penalties, violations in (1)(a) through (d) shall constitute misuse. If a misuse violation results in proven exposure of humans, agricultural commodities, or livestock, or proven harm to human health, agricultural commodities, livestock, or the environment, the amount of a civil penalty may be determined by using the penalty matrix established for 80-8-306(5)(e)(i), MCA. All other violations under this rule will be subject to civil penalties established in ARM 4.10.1005(4)(j) of the civil penalty matrix.

AUTH: 80-8-105, MCA IMP: 80-8-306, MCA

NEW RULE IV REMEDIAL ACTION IN LIEU OF CIVIL PENALTIES (1) A person subject to a civil penalty or charged with a violation may submit a written application to conduct remedial action (80-8-306(3), MCA) in lieu of all or part of a civil penalty. The department will consider remedial actions that exceed the requirements of statute, rules or orders and that: (a) correct harm caused by pesticides to human health, agricultural commodities, livestock, or the environment;

(b) prevent the occurrence of harm; and

(c) benefit the public.

(2) The department will consider applications upon receipt of a written application or plan that describes in detail the remedial action, procedures, costs, the benefits of the remedial action, responsible persons, dates and schedules.

(3) The department may require that the persons submit written confirmation upon satisfactory completion of the action.

(4) Upon demonstration by the charged person that remedial actions are completed as approved by the department, the civil penalty or a portion thereof may be dismissed.

AUTH: 80-8-105, MCA IMP: 80-8-306, MCA

Reason: The department finds it necessary to amend administrative rules for Title 80, chapter 8, MCA (Montana Pesticides Act) to reflect amendments to this statute enacted in 1995 (HB 212). These amendments raised the maximum civil penalty for pesticide violations from $1,000 to $2,500 except for permitted farm applicators where the maximum civil penalty was raised from $200 to $500 for the first violation. Amendments also made additional violations subject to civil penalties, including failure to comply with worker protection standards, pesticide ground water and EPA endangered species standards and labeling, and pesticide or pesticide container disposal, labeling, or handling requirements. Therefore, the department is proposing to amend the civil penalty matrix for pesticide violations (ARM 4.10.1005) to reflect the changes in civil penalty amounts and to add penalty matrixes for the additional violations subject to civil penalties.

The department is amending a penalty matrix to establish the standard penalty amounts that the department will assess for various violations. To determine reasonable standard penalties within the maximums set forth in Title 80, chapter 8, MCA, the department considered factors such as the severity of the violation, the potential of the violation to cause harm, and the degree of actual harm; and the department consulted with private organizations that represented pesticide applicators and dealers. The department will exercise the discretion authorized by Title 80, chapter 8, MCA in selecting an appropriate penalty amount and in reducing or enhancing the standard amounts in the matrix depending upon the gravity of a violation, the degree of care exercised, whether significant harm occurred, and the effect on a person's ability to stay in business.

New rules are being proposed to further define what constitutes a violation of worker protection standards, pesticide ground water and EPA endangered species standards and labeling, and pesticide or pesticide container disposal, labeling, or handling requirements.

The 1995 amendments to Title 80, chapter 8, MCA clarified that misuse resulting in proven exposure to humans, agricultural

commodities, or livestock is subject to civil penalties as is misuse resulting in proven harm to human health, agricultural commodities, livestock, or the environment. To implement this amendment, the department is proposing to amend the definition of "exposure", to define "proven exposure", and to further amend the penalty matrix rule (ARM 4.10.1005) to establish penalties for misuse resulting in proven exposure. The 1995 amendments to Title 80, chapter 8, MCA also changed the meaning of "misuse" for purposes of implementing civil penalties. The department is therefore proposing to amend ARM 4.10.1501 to redefine "misuse" and "use" to make these definitions consistent with the use of the term "misuse" in Title 80, chapter 8, MCA.

The department is proposing a new rule to further define administrative procedures for implementing 80-8-306(3), MCA which allows the department to require "other remedial action" in lieu of other forms of prosecution when the department believes this to be in the interests of the public. The department is therefore proposing that charged persons may submit written applications to conduct remedial action in lieu of all or part of a civil penalty. The rule establishes the procedures for applying and general standards for the kinds of actions that will qualify for offset of a civil penalty.

Additional minor amendments to ARM 4.10.1001, 4.10.1003, 4.10.1005 through 4.10.1007 and 4.10.1501 are being proposed as clarifications.

The amendments and new rules are combined in this notice in the interest of cost-savings, and because they deal with similar subject matter.

3. Interested persons may submit their data, views, or arguments concerning the proposed actions 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@state.mt.us, no later than February 11, 1999.

4. If a party who is directly affected by the proposed actions 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@state.mt.us no later than February 11, 1999.

5. If the department receives requests for a public hearing on the proposed actions from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed actions; 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 1,065 persons based on the total number of pesticide dealer and applicator licenses.

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.

DEPARTMENT OF AGRICULTURE

Ralph Peck, Director

Timothy J. Meloy, Attorney
Rule Reviewer

Certified to the Secretary of State January 4, 1999.

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

In the matter of the amendment of rules 6.6.801, 6.6.803 through 6.6.806 pertaining to annuity disclosures.	)))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT OF RULES

TO: All Interested Persons

1. On February 8, 1999, at 10:00 a.m., a public hearing will be held in the conference room of the State Auditor's Office in the Mitchell Building at 126 N. Sanders, Room 270, at Helena, Montana, to consider the amendment of rules 6.6.801, 6.6.803 through 6.6.806 pertaining to annuity disclosures.

2. The proposed amendments provide as follows (new text is underlined; text to be deleted is interlined):

6.6.801 PURPOSE (1) The purpose of this sub-chapter is to provide standards for the disclosure of certain minimum information about annuity contracts to protect consumers and foster consumer education. These rules specify the minimum information which must be disclosed and the method for disclosing it in connection with the sale of annuity contracts. The goals of these rules are to ensure that purchasers of annuity contracts understand certain basic features of annuity contracts. ~~Insurers shall define terms used in the disclosure statement in language that facilitates the understanding by a typical person within the segment of the public to which the disclosure statement is directed.~~

AUTH: Sec. 33-1-313 and 33-20-308, MCA
IMP: Sec. 33-20-308, MCA

6.6.803 APPLICABILITY AND SCOPE (1) and (a) will remain the same.

(b) Immediate and deferred annuities that contain no non-guaranteed elements ~~if the contract describing the benefits is provided at time of application or if it is provided at time of delivery and a 30-day free-look is provided~~;

(c) through (f) will remain the same.

(g) Funding agreements.

AUTH: Sec. 33-1-313 and 33-20-308, MCA
IMP: Sec. 33-20-308, MCA

6.6.804 DEFINITIONS For the purposes of this sub-chapter:

(1) "Charitable gift annuity" means a transfer of cash or other property by a donor to a charitable organization in

return for an annuity payable over one or two lives, under which the actuarial value of the annuity is less than the value of the cash or other property transferred and the difference in value constitutes a charitable deduction for federal tax purposes, but does not include a charitable remainder trust or a charitable lead trust or other similar arrangement where the charitable organization does not issue an annuity and incur a financial obligation to guarantee annuity payments.

(1) will remain the same but is renumbered (2).

~~(2) "Contract premium" means the gross premium that is required to be paid under a fixed premium contract, including the premium for a rider for which benefits are shown in the illustration.~~

(3) "Determinable elements" means elements that are derived from processes or methods that are guaranteed at issue and not subject to company discretion, but where the values or amounts cannot be determined until some point after issue. These elements include the premiums, credited interest rates (including any bonus), benefits, values, non-interest based credits, charges or elements of formulas used to determine any of these. These elements may be described as guaranteed but not determined at issue. An element is considered determinable if it was calculated from underlying determinable elements only, or from both determinable and guaranteed elements.

(4) "Funding agreement" means an agreement for an insurer to accept and accumulate funds and to make one or more payments at future dates in amounts that are not based on mortality or morbidity contingencies.

(3) will remain the same but is renumbered (5).

~~(4)~~ (6) "Guaranteed elements" means the ~~benefits, values, credits and charges under an annuity contract that are guaranteed and determined at issue~~ premiums, credited interest rates (including any bonus), benefits, values, non-interest based credits, charges or elements of formulas used to determine any of these, that are guaranteed and determined at issue. An element is considered guaranteed if all of the underlying elements that go into its calculation are guaranteed.

~~(5)~~ (7) "Non-guaranteed elements" means the ~~benefits, values, credits and charges under an annuity contract that are not guaranteed or not determined at issue~~ premiums, credited interest rates (including any bonus), benefits, values, non-interest based credits, charges or elements of formulas used to determine any of these, that are subject to company discretion and are not guaranteed at issue. An element is considered non-guaranteed if any of the underlying non-guaranteed elements are used in its calculation.

(8) "Structured settlement annuity" means a "qualified funding asset" as defined in section 130(d) of the Internal Revenue Code or an annuity that would be a qualified funding asset under section 130(d) but for the fact that it is not owned by an assignee under a qualified assignment.

~~(6) "Premium outlay" means the amount of premium to be actually paid or assumed to be paid by the contract owner or~~

~~other premium payer out-of-pocket.~~

AUTH: Sec. 33-1-313 and 33-20-308, MCA
IMP: Sec. 33-20-308, MCA

6.6.805 STANDARDS FOR THE DISCLOSURE DOCUMENT (1) ~~An applicant for an annuity contract shall be given a disclosure document as described in (2) as early in the sales process as practicable. The disclosure document shall be provided at the time of application or, in the case of a sale conducted by means of the telephone, mailed to the applicant within two business days~~ Where the application for an annuity contract is taken in a face-to-face meeting, the applicant shall at or before the time of application be given both the disclosure document described in (2) and the Buyer's Guide contained in Appendix A.

(a) Where the application for an annuity contract is taken by means other than in a face-to-face meeting, the applicant shall be sent both the disclosure document and the Buyer's Guide no later than five business days after the completed application is received by the insurer.

(i) With respect to an application received as a result of a direct solicitation through the mail:

(A) providing a Buyer's Guide in a mailing inviting prospective applicants to apply for an annuity contract shall be deemed to satisfy the requirement that the Buyer's Guide be provided no later than five business days after receipt of the application.

(B) providing a disclosure document in a mailing inviting a prospective applicant to apply for an annuity contract shall be deemed to satisfy the requirement that the disclosure document be provided no later than five business days after receipt of the application.

(ii) With respect to an application received via the Internet:

(A) taking reasonable steps to make the Buyer's Guide available for viewing and printing on the insurer's website shall be deemed to satisfy the requirement that the Buyer's Guide be provided no later that five business days of receipt of the application.

(B) taking reasonable steps to make the disclosure document available for viewing and printing on the insurer's website shall be deemed to satisfy the requirement that the disclosure document be provided no later than five business days after receipt of the application.

(iii) A solicitation for an annuity contract provided in other than a face-to-face meeting shall include a statement that the proposed applicant may contact the insurance department of the state for a free annuity Buyer's Guide. In lieu of the foregoing statement, an insurer may include a statement that the prospective applicant may contact the insurer for a free annuity Buyer's Guide.

(b) Where the Buyer's Guide and disclosure document are not provided at or before the time of application, a free look

period of no less than fifteen days shall be provided for the applicant to return the annuity contract without penalty. This free look shall run concurrently with any other free look provided under state law or regulation.

(2) will remain the same.

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

(c) A description of the contract and its benefits, emphasizing its long-term nature ~~and describing in plain language the operation of the annuity including how principal and interest are accumulated and paid out~~, including examples where appropriate:

(i) the guaranteed, ~~and~~ non-guaranteed and determinable elements of the contract, and their limitations, if any, and an explanation of how they operate;

(ii) through (e) will remain the same.

(3) ~~All disclosure and marketing material shall be written using plain language with the negatives and positives of all features and concepts clearly presented~~ Insurers shall define terms used in the disclosure statement in language that facilitates the understanding by a typical person within the segment of the public to which the disclosure statement is directed.

~~(4) Any concepts that are not specified in the requirements in (2) for the disclosure document that are included in the contract or offered with the contact by the company shall be included and clearly explained in the disclosure document.~~

AUTH: Sec. 33-1-313 and 33-20-308, MCA
IMP: Sec. 33-20-308, MCA

6.6.806 ANNUAL NOTICE TO CONTRACT OWNERS (1) ~~The insurer shall provide each contract owner with an annual report on the status of the contract that shall contain at least the following information~~ For annuities in the payout period with changes in non-guaranteed elements and for the accumulation period of a deferred annuity, the insurer shall provide each contract owner with a report, at least annually, on the status of the contract that contains at least the following information:

(a) will remain the same.

(b) The accumulation and cash surrender value, if any, at the end of the previous report period and at the end of the current report period;

(c) The total amounts, if any, that have been credited, ~~or~~ charged to the contract value or paid during the current report period; and

(d) The amount of outstanding loans, if any, as of the end of the current report period.

AUTH: Sec. 33-1-313 and 33-20-308, MCA
IMP: Sec. 33-20-308, MCA

3. These rules shall become effective July 1, 1999, and shall apply to policies sold on or after the effective date.

4. REASON: The rules proposed for amendment were adopted on July 20, 1998, based upon draft model rules proposed by the National Association of Insurance Commissioners (NAIC). In December of 1998, the NAIC adopted final model rules on this subject. These final model rules differ substantially from the draft model rules. In order to assure nationwide consistency in requirements for annuity disclosures, the amendments are being proposed to conform Montana's rules to the adopted national model.

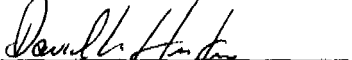
5. Interested persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Frank Coté at the State Auditor's Office, P.O. Box 4009, Helena, Montana, 59604, and must be received no later than February 12, 1999.

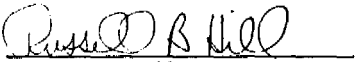
6. The State Auditor's Office will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing. If you require an accommodation, contact the office no later than 5:00 p.m., February 1, 1999, to advise us as to the nature of the accommodation needed. Please contact Sandi Binstock at 126 North Sanders, Mitchell Building, Room 270, Helena, Montana, 59620; telephone (406) 444-1744; Montana Relay 1-800-332-6148; TDD (406) 444-3246; facsimile (406) 444-3497. Persons with disabilities who need an alternative accessible format of this document in order to participate in this rule-making process should contact Sandi Binstock.

7. Peter Funk, attorney, has been designated to preside over and conduct the hearing.

8. 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: 
David L. Hunter
Deputy State Auditor

By: 
Russell B. Hill
Rules Reviewer

Certified to the Secretary of State this 4th day of January, 1999.

BEFORE THE BOARD OF NURSING
AND THE BOARD OF MEDICAL EXAMINERS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the proposed amendment of a rule pertaining to quality assurance of advanced practice registered nurse practice	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF ARM 8.32.1508 QUALITY ASSURANCE OF ADVANCED PRACTICE REGISTERED NURSE PRACTICE

TO: All Interested Persons:

1. On February 17, 1999 at 9:00 a.m., a public hearing will be held in the Professional and Occupational Licensing Conference room, Lower Level, Arcade Building, 111 North Jackson, Helena, Montana, to consider the proposed amendment of the above-stated rule.

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

"8.32.1508 QUALITY ASSURANCE OF ADVANCED PRACTICE REGISTERED NURSE PRACTICE (1) through (2)(e) will remain the same.

~~(f) submission of duplicate prescriptions for the scheduled drugs to the board of nursing.~~

(3) will remain the same."

Auth: Sec. 37-8-202, MCA; IMP, Sec. 37-8-202, MCA

REASON: This amendment is being proposed because the Boards of Nursing and Medical Examiners have determined that the submission of duplicate prescriptions is no longer necessary. Duplicate prescriptions have been submitted since the inception of prescriptive authority for advanced practice registered nurses (APRNs), which was 1991. No problems have been identified from that date to the present on any of the submissions made by the APRNs. The submission of duplicate prescriptions is creating a burden on the APRNs as well as the individuals evaluating the duplicate prescription submissions.

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., February 1, 1999, to advise us of the nature of the accommodation that you need. Please contact Dianne Wickham, Executive Director, Board of Nursing, 111 N. Jackson, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 444-2071; 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 Dianne Wickham.

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 Nursing, 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., February 11, 1999.

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

BOARD OF NURSING
BOARD OF MEDICAL EXAMINERS

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, January 4, 1999.

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

In the matter of the proposed amendment of rules pertaining to definitions, applications, fees, inactive licenses, trust account requirements, continuing education, grounds for license discipline, general license administration requirements, pre-licensing education, definitions, license renewal, inactive licenses - reactivation, continuing property management education, trust account requirements for property management, grounds for license discipline for property management licensees; and the proposed repeal of a rule pertaining to foreign land sales practices act	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT AND REPEAL OF RULES PERTAINING TO THE PRACTICE OF REAL ESTATE

TO: All Interested Persons:

1. On February 16, 1999, at 9:00 a.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 and repeal of rules pertaining to the practice of real estate.

2. The proposed amendment of ARM 8.58.301, 8.58.406A, 8.58.406C, 8.58.411, 8.58.412, 8.58.414, 8.58.415A, 8.58.415B, 8.58.415C, 8.58.419, 8.58.423, 8.58.425, 8.58.701, 8.58.702, 8.58.707, 8.58.708, 8.58.709, 8.58.710, 8.58.712, 8.58.714 will read as follows: (new matter underlined, deleted matter interlined)

"8.58.301 DEFINITIONS (1) and (1)(a) will remain the same.

(b) "agency" or "agency relationship" shall include those ~~which are express and those which are implied in fact or in law~~ relationships which are expressed in 37-51-102 and 37-51-313, MCA, and specifically do not include the common law of agency;

(c) will remain the same.

(d) "agricultural," "farm" and "ranch" shall include real estate parcels over ~~20~~ 30 acres in size principally used for, or capable and intended for use in, the production of plant or animal crops;

(e) through (g) will remain the same.

(h) "distance education" is a course or courses in which the instruction does not take place in a traditional classroom setting but rather through other media where the teacher and student are separated by distance and sometimes by time.

(h) through (k) will remain the same, but will be renumbered (i) through (l).

(m) "supervising broker/managing broker" is a broker owner or broker associate who has been designated by other broker owners of a real estate brokerage company to be the designated broker responsible for the maintenance of a trust account, if any, supervision of all licensed salespersons associated with the office and the appropriate administration of all regulations and laws pertaining to the licensed functions of the individual real estate licensees associated with the office.

(l) and (m) will remain the same, but will be renumbered (n) and (o)."

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

"8.58.406A APPLICATION FOR LICENSE--SALESPERSON AND BROKER (1) through (5) will remain the same.

(6) For salesperson applications, the board will require ~~a recent credit rating, supervising broker certification and references attesting to good repute, honesty, trustworthiness and competency. The board may utilize the content of the credit report in its assessment of the salesperson's qualifications, only to the extent that such report discloses judgements or similar items in which the applicant has been found liable for mismanagement, fraud, conversion or conduct of a similar nature. When the board finds that an applicant's credit problems could possibly be a potential risk to the general public, the board can require an applicant to make arrangements satisfactory to the board to eliminate the problem~~ in a form acceptable to the board, the proposed supervising broker's certification of the applicant's good repute and the broker's written acceptance of responsibility for supervising the licensed activities of the salesperson.

~~(7) For broker applicants, the board will require a recent credit rating and references attesting to good repute, honesty, trustworthiness and competence. The board may utilize the content of the credit report in its assessment of the broker's qualifications, only to the extent that such report discloses judgments or similar items in which the applicant has been found liable for mismanagement, fraud, conversion or conduct of similar nature. When the board finds that an applicant's credit problems could possibly be a potential risk to the general public, the board can require an applicant to make arrangements satisfactory to the board to eliminate the problem.~~

~~(8)~~ (7) For the purpose of determining ~~the 37-51-302(2)(c), MCA qualifications of a broker applicant, "actively engaged" will~~

~~be applied to mean "engaged substantially full-time, day-to-day, as an occupation" and having obtained:~~

~~(a) 30 real estate property transactions in two years. No more than 10 properties can be bare, non-agricultural land. A minimum number of five listings and five sales must be obtained; or~~

~~(b) 10 farm and ranch, agricultural and/or commercial real estate property transactions in two years. A minimum of two listings and two sales must be obtained. No more than two commercial lease transactions may be used. Land will be considered farm and ranch or agricultural only if it contains a minimum of 80 acres.~~ if a broker applicant as been "actively engaged as a licensed real estate salesperson" the applicant will be required to provide evidence acceptable to the board that the salesperson has performed functions as a licensee as follows:

(a) 30 real estate property transactions in the last three years from the date of application for a residential applicant. With the 30 transactions, the applicant must have secured five listings and five of the transactions must include activities other than listing such as sales, leases or exchanges; or

(b) 10 transactions within the last three years for an agricultural, farm, ranch or commercial applicant. With the last 10 transactions, the applicant must have secured two listings and two of the transactions must include activities other than listings such as sales, leases or exchanges. No more than two commercial lease transactions may be used;

(c) By furnishing evidence satisfactory to the board, an applicant may receive credit for both sides of a transaction.

~~(9)~~ (8) ~~This~~ The experience ~~in~~ required by ~~(8)~~ (7)(a) and (b) ~~above may be~~ shall have been obtained while licensed within the state, or licensed in another state. ~~This subsection is advisory only, but may be a correct interpretation of the law. Applicant must provide adequate documentation for each side of the transaction for which they are seeking credit.~~

~~(10) For the broker applicants, the sales and listing experience must be obtained within the previous three years from the date of the Montana broker license application.~~

(11) will remain the same, but will be renumbered (9)."

Auth: Sec. 37-1-131, 37-51-203, MCA; IMP, Sec. 37-1-135, 37-51-202, 37-51-302, MCA

"8.58.406C APPLICATION FOR DETERMINATION OF ~~EQUIVALENCY~~ EQUIVALENT EXPERIENCE -- BROKER ~~(1) Application for a broker license based upon equivalent education or experience may be made on forms approved by the board and accompanied by the required fee.~~

~~(2) A salesperson must have a minimum of one year of current licensing as a real estate salesperson and activity equal to that required to obtain a broker license as found in ARM 8.58.406A(8).~~

~~(3) The granting of an equivalency to an applicant shall automatically be revoked for failure of examination twice.~~

(1) A salesperson who has been licensed for the preceding 12 months may apply to the board for a determination that the applicant possesses experience equivalent to that required for broker licensing.

(2) An applicant has received a determination by the board that the applicant's experience is equivalent to that required for broker licensing, but who fails the examination on two occasions, shall have the determination of equivalency withdrawn.

(3) Applications for determination of equivalent experience shall be made on forms approved by the board and accompanied by the required fee."

Auth: Sec. 37-1-131, 37-51-203, MCA; IMP, Sec. 37-51-202, 37-51-302, MCA

"8.58.411 FEE SCHEDULE (1) Except as otherwise provided by statute or rule, the following fees are required by the board for each of the licensing services listed below. All fees are subject to change by the board, within the limitations provided in 37-51-311, MCA.

~~(2) No part of any fees paid in accordance with the provisions of this chapter is refundable.~~ Fees are deemed earned by the board upon receipt.

(3) through (24) will remain the same."

Auth: Sec. 37-1-131, 37-1-134, 37-51-203, 37-51-204, MCA; IMP, Sec. 37-1-134, 37-51-202, 37-51-204, 37-51-207, 37-51-303, 37-51-310, 37-51-311, MCA

"8.58.412 INACTIVE LICENSES (1) A licensee who ~~is unemployed must~~ wishes to retain his/her license but not engage in licensed activities shall place his or her license on inactive status by:

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

(d) A real estate licensee who has caused ~~his~~ the licensee's real estate license to be placed on inactive status with the board has the sole responsibility to keep the board informed as to any change of ~~his~~ the licensee's residency or mailing address during the period of time the real estate licensee remains on inactive status.

(2) will remain the same."

Auth: Sec. 37-1-131, 37-51-203, MCA; IMP, Sec. 37-51-202, 37-51-204, 37-51-208, 37-51-302, MCA

"8.58.414 TRUST ACCOUNT REQUIREMENTS (1) Each broker or managing broker shall maintain a separate bank account which shall be designated a trust account wherein all down-payments, earnest money deposits, rent payments, security deposits or other trust funds received by the broker or his salesperson on behalf of a principal, third-party or any other person shall be deposited ~~except as provided in (19) below~~. However, any broker, broker owner or managing broker does not need to maintain a trust account if:

(a) the broker, broker owner or managing broker does not receive down payments, earnest money deposits, rent payments, security deposits or other trust funds on behalf of a principal, third party or any other person; or

(b) the broker, broker owner or managing broker elects to use a title company to hold all down payments, earnest money deposits, rent payments, security deposits or other trust funds received from principals, third parties or other persons.

(2) ~~Such~~ Broker trust accounts may be maintained in interest-bearing accounts with the interest payable to the broker, principal, third-party or any other person, as may be designated by agreement. Interest payable to the broker shall be identified by agreement as consideration for services performed. Offices or firms having more than one broker, whether broker-owner or broker-associate, may utilize a single trust account.

~~(2) Trust accounts shall be maintained in a financial institution located in Montana.~~

(3) Broker trust accounts must comply with the following:

(a) All monies, belonging to others and accepted by the broker while acting in his capacity as a broker, shall be deposited in a ~~federally~~ generally insured financial institution located in Montana in an account separate from money belonging to the broker~~.~~;

(a) through (d) will remain the same, but will be renumbered (b) through (e), and the ending periods will be changed to semi-colons.

(f) No payments of personal indebtedness of the broker shall be made from such trust account other than a withdrawal of earned commissions payable to such broker or withdrawals made on behalf of the beneficiaries of such trust account;

(g) Money held in the trust account which is due and payable to the broker must be withdrawn within 5 business days after such money becomes due and payable to the broker;

(h) A broker shall not be entitled to any part of the earnest money or other monies paid to him in connection with any real estate transaction as part or all of his commission or fee until the transaction has been consummated or terminated. The listing agreement shall include a provision for division of monies taken in earnest, when the transaction is not consummated and such monies are retained as forfeiture payment;

(i) A broker shall maintain in his office a complete record of all monies received or escrowed on real estate transactions, in the following manner:

(i) a bank deposit slip showing the date of deposit, amount, source of the money, and where deposited;

(ii) monthly bank statements are to be retained and kept on file;

(iii) trust account checks shall be numbered and all voided checks retained. The checks shall denote the broker's business name, address, and should be designated as "trust account";

(iv) a record book which shows the chronological sequence in which funds are received and disbursed;

(v) for funds received, the journal must include the date, the name of the party who is giving the money, the name of the principal, and the amount;

(vi) for deposit, the checkbook journal must include the date, the name of the party who is giving the money, the name of the principal and the date;

(vii) for disbursements, the checkbook journal must include the date, the payee, and the amount;

(viii) a running balance must be shown after each transaction;

(j) A ledger shall be kept to show the receipts and the disbursements as they affect a single, particular transaction as between the buyer and seller, etc. The ledger must include the names of both parties to a transaction, the dates and the amounts received. When disbursing funds, the date, payee, and amount must be shown. A running balance must be shown after each transaction;

(k) The trust account must be reconciled monthly except in the case where there has been no activity during that month;

(l) Every broker shall keep permanent records of all funds and property of others received by him for not less than 5 years from date of receipt of any such funds or property;

(m) Each broker shall authorize the board to examine such trust account by a duly authorized representative of the board. Such examination shall be made at such time as the board may direct;

(n) Existing checks, documents and forms bearing the name "depository account" may be used until current supplies are depleted;

(o) A salesperson shall place all deposits in the custody of the supervising broker in adequate time for the broker to comply with all trust account requirements.

(4) If a broker elects to use a title company to hold earnest money deposits, the broker shall:

(a) obtain from the title company a dated, signed receipt showing the date upon which the earnest money was delivered to the title company;

(b) maintain a detailed ledger showing the amounts deposited with the title company;

(c) instruct the title company that the earnest money is to be immediately deposited in the title company's trust account.

~~(4)~~ (5) ~~Each broker shall only deposit trust funds received on real estate transactions in his trust account and~~ Trust funds received for or in connection with a real estate transaction shall be deposited into a broker's trust account and the broker shall not commingle ~~his~~ broker's personal funds or other funds in said trust account with the exception that a broker may deposit and keep a sum not to exceed $1000 ~~in said account from~~ of ~~his~~ broker's personal funds in the trust account, which sum ~~including~~ includes ~~the~~ any interest earned on the trust account if the trust account is maintained in an

interest-bearing account and the interest accrues to the broker~~, which sum shall be specifically identified and deposited to cover bank service charges relating to said trust account~~.

(5) will remain the same, but will be renumbered (6)

~~(6) Each broker shall deposit all real estate money received by him or his salesman in the broker's trust account within three business days of receipt of said money by said broker or said salesman unless otherwise provided in the purchase contract (lease agreement or rental agreement).~~

(7) Each broker, broker owner or managing broker shall ensure that all real estate money received by the broker, broker owner or managing broker or his or her salesperson is deposited in the broker or title company's trust account within three business days of the broker's or salesperson's (whichever is earlier) receipt of the money, unless otherwise provided in the buy/sell agreement, lease agreement or rental agreement.

~~(7)~~ (8) When a salesperson or broker associate is ~~registered in the office of the board as in the employ of another~~ licensed with a broker owner, the responsibility for ~~the maintenance~~ maintaining ~~of a~~ the trust account shall be ~~the responsibility~~ that of the ~~employing~~ broker owner or the brokerage's managing broker.

~~(8) Brokers are responsible at all times for deposits and earnest money accepted by them or their salesman.~~

(9) The broker owner or the designated managing broker is responsible at all times for the proper handling of earnest money, security deposits or other funds received by the broker owner or the designated managing broker, or the broker owner's or designated managing broker's salespersons, on behalf of customers or clients.

~~(9) No payments of personal indebtedness of the broker shall be made from such trust account other than a withdrawal of earned commissions payable to such broker or withdrawals made on behalf of the beneficiaries of such trust account.~~

~~(10) Money held in the trust account which is due and payable to the broker must be withdrawn within 5 business days after such money becomes due and payable to the broker.~~

~~(11) A broker shall not be entitled to any part of the earnest money or other monies paid to him in connection with any real estate transaction as part or all of his commission or fee until the transaction has been consummated or terminated. The listing agreement shall include a provision for division of monies taken in earnest, when the transaction is not consummated and such monies retained as forfeiture payment.~~

~~(12) A broker shall maintain in his office a complete record of all monies received or escrowed on real estate transactions, in the following manner:~~

~~(a) a bank deposit slip showing the date of deposit, amount, source of the money, and where deposited;~~

~~(b) monthly bank statements are to be retained and kept on file;~~

~~(c) trust account checks shall be numbered and all voided checks retained. The checks shall denote the broker's business name, address, and should be designated as "trust account".~~

~~(d) a record book which shows the chronological sequence in which funds are received and disbursed;~~

~~(i) For funds received, the journal must include the date, the name of the party who is giving the money, the name of the principal, and the amount.~~

~~(ii) For disbursements, the checkbook journal must include the date, the payee, and the amount.~~

~~(iii) A running balance must be shown after each transaction.~~

~~(13) A ledger shall be kept to show the receipts and the disbursements as they affect a single, particular transaction as between the buyer and seller, etc. The ledger must include the names of both parties to a transaction, the dates and the amounts received. When disbursing funds, the date, payee, and amount must be shown. A running balance must be shown after each transaction.~~

~~(14) The trust account must be reconciled monthly except in the case where there has been no activity during that month.~~

~~(15) Every broker shall keep permanent records of all funds and property of others received by him for not less than 5 years from date of receipt of any such funds or property.~~

~~(16) Each broker shall authorize the board to examine such trust account by a duly authorized representative of the board. Such examination shall be made at such time as the board may direct.~~

~~(17) Existing checks, documents and forms bearing the name "depository account" may be used until current supplies are depleted.~~

~~(18) A salesperson shall place all deposits in the custody of the supervising broker in adequate time for the broker to comply with all trust account requirements.~~

~~(19) If a broker elects to use a title company to hold earnest money deposits, the broker shall:~~

~~(a) obtain from the title company a dated, signed receipt showing the date upon which the earnest money was delivered to the title company;~~

~~(b) maintain a detailed ledger showing the amounts deposited with the title company;~~

~~(c) instruct the title company that the earnest money is to be immediately deposited in the title company's trust account."~~

Auth: Sec. 37-1-131, 37-1-316, 37-51-203, MCA; IMP, Sec. 37-1-316, 37-51-202, 37-51-203, 37-51-321, MCA

"8.58.415A CONTINUING REAL ESTATE EDUCATION (1) through (3) will remain the same.

(4) No more than six hours of elective topics may be carried over. No mandatory hours may be carried over to any other year except as elective credits.

(5) through (11) will remain the same."

Auth: Sec. 37-1-131, 37-51-203, 37-51-204, MCA; IMP, Sec. 37-51-202, 37-51-203, 37-51-204, MCA

"8.58.415B CONTINUING REAL ESTATE EDUCATION -- COURSE APPROVAL (1) Requests for approval of a continuing real estate education course must be made on forms approved by the board and submitted 45 days prior to the date of the intended course, with payment of the required fee.

(2) and (3) will remain the same.

(4) Courses ~~must consist of at least two hours of instruction and~~ must be designed so that no more than 10 minutes per hour are allowed for breaks in instruction. Break time may be accumulated and used in blocks.

~~(5) No credit for continuing education correspondence or video courses will be allowed except that the use of videos in a monitored, approved instruction program will be permitted.~~

~~(6)~~ (5) Courses offered in another state and approved by that state's real estate licensing body for continuing education are recognized and approved~~, but must meet established topic requirements~~.

(6) Upon request the board may, without requiring further qualification, approve courses authorized or approved by another state's licensing authority.

(a) Courses which lead to designations or certifications approved by the national association of realtors or other recognized trade and professional association are automatically approved without requiring further qualification.

(b) Courses approved under this rule must fall within the topics or subject matter specified by the board for education credit.

(7) Distance education courses shall be approved if the board determines that:

(a) the distance education course serves to protect the public by contributing to the maintenance and improvement of the quality of real estate services provided by real estate licensees to the public;

(b) an appropriate and complete application has been filed and approved by the board;

(c) the information specified in the guidelines for distance education as adopted by the board has been submitted and approved;

(d) the distance education course meets the content requirements as established under ARM 8.58.415A(3); and

(e) the distance education course meets all other requirements as prescribed in the statutes and rules that govern the operation of approved courses.

(8) Courses which are presently association of real estate license law officials (ARELLO) certified will be approved under this rule by providing appropriate documentation that the ARELLO certification is in effect and that the course meets the content requirements of ARM 8.58.415A(3), along with any other requirements of the board. Approval under this subsection will cease immediately should ARELLO certification be discontinued for any reason." Auth: Sec. 37-1-131, 37-51-

202, 37-51-203, 37-51-204, MCA; IMP, Sec. 37-51-202, 37-51-204, MCA

"8.58.415C CONTINUING REAL ESTATE EDUCATION -- INSTRUCTOR APPROVAL (1) Request for approval of a continuing education instructor must be made on forms approved by the board and submitted 45 days prior to the date of the intended instruction with payment of the required fee.

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

Auth: Sec. 37-1-131, 37-51-203, 37-51-204, MCA; IMP, Sec. 37-51-202, 37-51-204, MCA

"8.58.419 GROUNDS FOR LICENSE DISCIPLINE - GENERAL PROVISIONS - UNPROFESSIONAL CONDUCT (1) In any transaction in which a licensee is involved as a licensee or as a party, has held himself or herself out as a licensee, or in which any party has reasonably relied on a licensee's status as a licensee, violation of any statute or rule administered by the board may be considered by the board in determining whether or not the licensee:

~~(a)~~ has failed to meet the generally-accepted standards of practice.

(2) and (3) will remain the same.

~~(a) licensees shall maintain a level of knowledge customary for licensees of this state, including laws and rules administered by the board, and shall not violate laws and rules affecting any transaction in which he or she acts.~~

(3)(b) through (g) will remain the same, but will be renumbered (a) through (f), and the ending periods will be changed to semi-colons.

~~(h)~~ (g) Licensees shall not falsify documents, place any party's signatures on a documents or alter or amend a document on behalf of any party without authority~~.~~ of a written power of attorney from the party, advise that an offer or counter offer has been accepted unless the licensee has in licensee's possession a document signed by the party evidencing the party's acceptance, or commit any act of forgery, fraud, misrepresentation, deception, misappropriation, conversion, theft or any other like act~~.~~;

(i) will remain the same, but will be renumbered (h), and the ending period will be changed to a semi-colon.

~~(j) licensees shall not enter a transaction or agreement with the intent not to perform.~~

(k) will remain the same, but will be renumbered (i), and the ending period will be changed to a semi-colon.

(j) Licensees shall make a reasonable attempt to obtain all agreements, financial obligations and recommendations between the principals regarding all real estate transactions in writing. Licensees should attempt to document in writing, and have signed by the parties, any changes as to the terms and provisions of the transaction which occur between the time a buy/sell is executed and the closing of a transaction.

(k) When acting as a listing broker, licensees shall continue to submit to the seller all offers and counter offers

received by the licensee until such time as a pending transaction has been closed or the listing agreement terminated, unless the seller has waived this obligation in writing. Licensees are not obligated to continue to actively market the property after an offer has been accepted by the seller. Licensees acting as agents of buyers shall submit to the buyer all offers and counter offers until an offer as been accepted but have no obligation to continue to show properties to their clients after an offer has been accepted unless otherwise agreed in writing;

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

~~(m) Licensees shall make a reasonable attempt to advise their principals to obtain all agreements, financial obligations and recommendations regarding all real estate transactions in writing.~~

~~(n) Licensee shall submit all written offers to a principal when such offers are received prior to the listing agreement having been terminated or the transaction based on that listing having been closed, whichever occurs first. However, continuing to present offers after an offer has been accepted shall not be deemed to be a violation of governing statutes or regulations.~~

~~(o) Licensees shall not disclose the name of a person making an offer or the amount or terms of an offer to other persons interested in making offers, except that this shall not prohibit disclosing the existence of an offer. A buyer's broker may disclose this data to his/her principals. If a buyer broker has principals making competitive offers on the same property, the buyer broker cannot disclose the terms of competing offers to their other principals.~~

~~(p)~~ (m) The licensee shall inform his/her principal at the time an offer is prepared or presented of the estimated costs and fees associated with that offer. A dual agent shall inform both parties to the transaction. A statutory broker and a dual agent will inform both parties to the transaction. A statutory broker will inform all parties not otherwise represented~~.~~;

~~(q) Licensees shall not lend a broker's license to a salesman, or permit a salesman to operate as a broker.~~

~~(r) Salespersons shall not act as brokers.~~

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

(t) will remain the same, but will be renumbered (o), and the ending period will be changed to a semi-colon.

(p) Licensees acting as listing agents shall not disclose the name of a person making an offer or the amount or terms of

an offer to other persons interested in making offers except that this shall not prohibit the listing agent from disclosing that an offer has been made. If a buyer broker has principals making offers on the same property, the buyer broker cannot tell a buyer the terms and provisions of the competing buyer's offer;

(q) Licensees, while managing properties for owners, shall abide by the requirements of 37-51-607, MCA, and the requirements of the board of realty regulation's rules for property management as set forth in ARM 8.58.712 and 8.58.714;

(u) through (y) will remain the same, but will be renumbered (r) through (v), and the ending periods will be changed to semi-colons.

~~(z)~~ (w) Licensees may not induce a party to a listing agreement, or a contract of sale or lease to break the ~~contract~~ agreement for the purpose of entering into a new ~~contract~~ agreement with another ~~principal~~ party~~.~~;

(aa) will remain the same, but will be renumbered (x), and the ending period will be changed to a semi-colon.

~~(ab)~~ (y) Licensees may not negotiate a sale, exchange or lease of real property directly with a seller or buyer if the licensee knows that the seller/buyer has a written, ~~outstanding~~ exclusive agency contract ~~in connection with the property granting an exclusive agency to~~ with another broker~~.~~;

(ac) through (af) will remain the same, but will be renumbered (z) through (ac), and the ending periods will be changed to semi-colons.

~~(ag)~~ (ad) Licensees, when advertising, shall present a true picture. Licensees shall not advertise without disclosing the licensee's name~~, identity as a real estate licensee and real estate brokerage~~ or brokerage company and identify that the advertisement is made by a real estate licensee. Licensees shall disclose their identity as a real estate licensee whenever the licensee negotiates or attempts to negotiate the listing, sale, purchase, exchange, rent or lease of real estate~~.~~;

(ae) Licensees advertising or marketing on a site on the Internet that is either owned by, or controlled by, the licensee must include on each page of the site on which the licensee's advertisement or information appears, the following:

(i) the licensee's name or the name of the firm with which the licensee is affiliated;

(ii) the city, state/province and country in which the licensee's office is located; and

(iii) the regulatory jurisdiction(s) in which the licensee holds a real estate broker or salesperson license;

(af) Licensees using any Internet electronic communication for advertising or marketing, including, but not limited to, e-mail, e-mail discussion groups and bulletin boards must include, on the first or last page of all communications, the following:

(i) licensee's name or the name of the firm with which the licensee is affiliated;

(ii) the city, state/province and country in which the licensee's office is located; and

(iii) the regulatory jurisdiction(s) in which the licensee holds a real estate broker or salesperson license;

(ah) will remain the same, but will be renumbered (ag).

(4) will remain the same."

Auth: Sec. 37-1-131, 37-1-136, 37-1-306, 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

"8.58.423 GENERAL LICENSE ADMINISTRATION REQUIREMENTS

(1) At any time that an salesperson's or broker associate's association with a broker owner is terminated, the license ~~and pocket card~~ of the salesperson or broker associate shall be immediately mailed, by the broker owner, to the board office with a letter noting the termination.

(2) No dispute between an salesperson or broker associate and a broker~~, arising from or causing termination,~~ shall be cause for ~~failure~~ failing to immediately mail the license ~~and pocket card~~ of the salesperson or broker associate to the board office. ~~In the event that no reasonable communication may be had between a broker and associate upon termination, the broker shall immediately mail the associate's license and the associate shall immediately mail the pocket card, both with a letter noting termination.~~

(3) When requested in writing to do so by a salesperson formerly associated with a broker owner, the broker owner or managing broker of the brokerage company shall promptly provide the former sales associate with a certified statement on the form prescribed by the board identifying all real estate transactions in which the sales associate was involved in connection with the sales associate's association with the broker owner or brokerage company within the preceding three years.

~~(3)~~ (4) Upon termination of an ~~associate's~~ salesperson's association with a broker owner or managing broker, the broker owner or managing broker shall immediately notify all principals ~~and third parties known to have been dealing with the associate~~ as to the listings or pending transactions in which the salesperson was involved, that the salesperson is no longer affiliated or associated with the broker owner or brokerage company.

~~(4)~~ (5) Listings and pending transactions are the responsibility of the broker upon termination of an association.

(6) The broker owner or managing broker is responsible for the salesperson under his or her supervision for the salesperson's performance as a real estate licensee. For any complaints submitted to the board of realty regulation alleging improper conduct on the part of a real estate salesperson licensee, a screening panel shall notify the salesperson's broker owner or managing broker that a complaint has been filed by providing a copy of the complaint to the broker owner or managing broker.

~~(5) The supervising broker is responsible for all real estate actions of the salespersons under his/her supervision.~~

~~(6)~~ (7) The supervising broker or managing broker must provide on-going training in the area of real estate activity to all salespersons under his/her supervision. Broker owners are not responsible to provide training or ongoing supervision of broker associates.

~~(7)~~ (8) All listings obtained by a salesperson must be reviewed, signed and dated by the supervising broker or managing broker before the listing is effective.

(8) will remain the same, but will be renumbered (9).

~~(9)~~ (10) A broker owner shall not sign the application of a salesperson unless the broker owner and salesperson will be in lawful association, through employment contract or otherwise, ~~and the broker will supervise the salesperson~~.

~~(10)~~ (11) The broker/owner may designate another broker to be the managing broker of the office."

Auth: Sec. 37-1-131, 37-51-203, MCA; IMP, Sec. 37-51-202, 37-51-203, 37-51-309, MCA

"8.58.425 PRE-LICENSING EDUCATION - SALES AND BROKERS

(1) and (2) will remain the same.

~~(3) Final course examination must consist of a minimum of 75 questions for 30 hours of instruction, or 150 questions for 60 hours of instruction.~~

~~(4) Candidates must receive a minimum of 70% on each pre-licensing course examination.~~

(5) through (6)(f) will remain the same, but will be renumbered (3) through (4)(f).

Auth: Sec. 37-1-131, 37-51-202, 37-51-203, MCA; IMP, Sec. 37-51-203, 37-51-308, MCA

"8.58.701 DEFINITIONS The terms used in this chapter shall have their common meaning as used in the property management industry and, unless the content otherwise requires, the following meanings shall also apply:

(1) "Salaried employee" means an individual employed by an owner to manage the property of that owner. This term does not include an unlicensed real estate or property management secretary or the holder of a similar position employed to manage many owners' property for a single broker or property manager. Property manager is one who is engaged in property management as defined in 37-51-602, MCA.

(2) will remain the same."

Auth: Sec. 37-1-131, 37-51-202, 37-51-203, MCA; IMP, Sec. 37-51-102, 37-51-602, MCA

"8.58.702 APPLICATION FOR LICENSURE (1) and (1)(a) will remain the same.

~~(b) submit three letters of professional reference from those familiar with the applicant's character;~~

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

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

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

(5) A property management applicant must have completed the property management prelicensing course within the 24-month period immediately preceding the date of application."

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

"8.58.707 LICENSE RENEWAL - LATE RENEWAL (1) and (2) will remain the same.

(a) payment of the current renewal fee as prescribed by the board by ~~January~~ February 15;

(2)(b) through (d) will remain the same.

(3) Any licensee not renewed by ~~January~~ February 15 is automatically canceled and may not be reinstated."

Auth: Sec. 37-1-131, 37-51-202, 37-51-203, MCA; IMP, Sec. 37-1-101, 37-51-604, MCA

"8.58.708 INACTIVE LICENSES - REACTIVATION

~~(1) Licensees who fail to provide evidence of meeting the required continuing education at the appropriate requirement period must place their license on inactive status by:~~

~~(a) paying the required fee;~~

~~(b) forwarding the license and pocket card to the board office for cancellation of active license status; and~~

~~(c) providing a written request that the license be placed on inactive status.~~

~~(2) Property management licensees who have placed their property management license on inactive status have the sole responsibility to keep the board informed as to any change of residency or mailing address during the period of time the licensees remain on inactive status.~~

~~(3) Inactive licensees must renew their license annually to maintain licensed status.~~

~~(4) For inactive property management licensees to again become active, they must:~~

~~(a) file a written change of address and pay the required fee;~~

~~(b) submit proof of obtaining eight classroom or equivalent hours of continuing education for each two-year period of inactive status or any combination of active and inactive status.~~

(1) A licensee who wishes to retain licensee's license but not engage in licensed activities shall place licensee's license on inactive status by:

(a) paying the required fee in accordance with 37-51-311, MCA, and ARM 8.58.713;

(b) forwarding the license to the board office for cancellation of active license; and

(c) indicating, in writing, "inactive at present".

(2) A property management licensee who has caused his or her property management license to be placed on inactive status with the board has the sole responsibility to keep the board

informed as to any change of the licensee's residency or mailing address during the period of time the property management licensee remains on inactive status.

(3) To maintain licensed status, inactive licensees must pay the renewal fee and annually complete the required education, and provide verification of that education."

Auth: Sec. 37-1-131, 37-51-202, 37-51-203, MCA; IMP, Sec. 37-51-311, 37-51-603, MCA

"8.58.709 CONTINUING PROPERTY MANAGEMENT EDUCATION

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

~~(7) All approved education must be open and available to all licensees.~~"

Auth: Sec. 37-1-131, 37-51-202, 37-51-203, MCA; IMP, Sec. 37-1-101, 37-51-604, MCA

"8.58.710 CONTINUING PROPERTY MANAGEMENT EDUCATION -- COURSE APPROVAL ~~(1) Requests for approval of any change in subject matter, and renewal of approval, of a continuing property management education course must be made on forms approved by the board and submitted 45 days prior to the intended course, with payment of the required fees.~~

~~(2) Approval of a course and renewal of approval of a course shall be for two-year periods, but may be revoked for cause.~~

~~(3) Courses must consist of at least two hours of instruction and must be designed so that no more than 10 minutes per hour are allowed for breaks in instruction.~~

~~(4) Property management courses offered in other states and approved by those other states' real estate licensing agency for continuing education and which meet the property management topic requirements are recognized and approved, but must meet established topic requirements.~~

(1) Requests for approval of a continuing real estate education course must be made on forms approved by the board and submitted 45 days prior to the date of the intended course, with payment of the required fee.

(2) Expiration of course approval is December 31 of each year, but may be revoked for cause. The initial approval of a course will be in effect for the remainder of that calendar year, and the next calendar year in its entirety, expiring on December 31.

(3) Instructor approval will be for specific topics and will not carry over to other topics of education. An instructor must make application for each topic and may not be deemed approved for other topics without approval from the board.

(4) Courses must be designed so that no more than 10 minutes per hour are allowed for breaks in instruction. Break time may be accumulated and used in blocks.

(5) Courses offered in another state and approved by that state's property management licensing body for continuing education, are recognized and approved. Courses must fall within the topics or subject matter specified for the board for

education credit. Licensees shall provide evidence of course completion or proof of attendance satisfactory to the board.

(6) Upon request the board may, without requiring further qualification, approve courses authorized or approved by another state's licensing authority.

(a) Courses which lead to designations or certifications approved by the national association of realtors or other recognized trade and professional associations are automatically approved without requiring further qualification.

(b) Courses approved under this rule must fall within the topics or subject matter specified by the board for education credit.

(7) The distance education course shall be approved if the board determines that:

(a) the distance education course serves to protect the public by contributing to the maintenance and improvement of the quality of property management services provided by property management licensees to the public;

(b) an appropriate and complete application has been filed and approved by the board;

(c) the information specified in the guidelines for distance education as adopted by the board has been submitted and approved;

(d) the distance education course meets the content requirements as established under ARM 8.58.709(1); and

(e) the distance education course meets all other requirements as prescribed in the statutes and rules which govern the operation of approved courses.

(8) Courses which are presently ARELLO certified will be approved under this rule by providing appropriate documentation that the ARELLO certification is in effect and that the course meets the content requirements of ARM 8.58.709(1), along with any other requirements of the board. Approval under this subsection will cease immediately should ARELLO certification be discontinued for any reason."

Auth: Sec. 37-1-131, 37-51-202, 37-51-203, MCA; IMP, Sec. 37-1-101, 37-51-604, MCA

"8.58.712 TRUST ACCOUNT REQUIREMENTS (1) through (5) will remain the same.

(a) If the agreement by which a licensee is managing a property for the owner is terminated for any reason while the licensee is holding funds deposited by a tenant, the licensee shall promptly and in writing advise the tenant that the funds will be transferred to the owner within 30 days of the notification. The notice shall also contain the name and address of the owner to whom the funds are to be transferred.

(6) through (12) will remain the same."

Auth: Sec. 37-1-131, 37-1-316, 37-51-203, MCA; IMP, Sec. 37-1-316, 37-51-202, 37-51-321, 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) Licensees may not falsify documents, place signatures on documents without authority of a written power of attorney from the party or commit any act of forgery, fraud, misrepresentation, deception, misappropriation, conversion, theft or any other like act.

(g) and (h) will remain the same.

~~(i) licensees may not lend a property management license to an unlicensed person.~~

(j) through (s) will remain the same, but will be renumbered (i) through (r).

~~(t) licensees must obtain a written management agreement with the owner or owner's agent within 10 days of conducting any property management activity.~~

(4) will remain the same.

(5) A licensed property manager is responsible for the actions of their employees who aid or assist the property manager in the performance of property management functions."

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

REASON: These amendments are being proposed to comply with 2-4-314, MCA. The amendments will eliminate conflicts within the existing rules. They will allow brokers to designate a managing broker and implement Internet advertising and distance education standards for course approval.

3. The Board is proposing to repeal ARM 8.58.410, text of which is located at page 8-1604.2 and 8-1604.3. The statute that granted the authority to implement the foreign land sales rule has been repealed so the rule is no longer relevant. The authority sections are 37-1-131, 37-51-203, 76-4-1203, MCA, and the implementing sections are 76-4-1203, 76-4-1211, MCA.

4. 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., February 6, 1999, to advise us of the nature of the accommodation that you need. Please contact Grace Berger, Executive Secretary, 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.

5. 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 the close of hearing on February 16, 1999.

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

7. 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
JOHN BEAGLE, CHAIRMAN

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

Annie M. Bartos
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, January 4, 1999.

BEFORE THE FISH, WILDLIFE AND PARKS COMMISSION AND DEPARTMENT OF FISH, WILDLIFE AND PARKS OF THE STATE OF MONTANA

In the matter of the proposed amendment of ARM 12.3.123 and ARM 12.3.402 regarding license refunds.	NOTICE OF PROPOSED AMENDMENTS NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons.

1. On February 15, 1999, the Fish, Wildlife and Parks Commission (commission) and the Department of Fish, Wildlife and Parks (department) propose to amend ARM 12.3.123 and ARM 12.3.402 pertaining to criteria qualifying license holders for refunds.

2. The proposed rule amendments provide as follows:

12.3.123 COMBINATION LICENSE ALTERNATE LIST (1) The department may initially issue more nonresident combination licenses than are set by quota. Quotas will be met by reduction of initial sales through the refund process. In addition, ~~U~~upon completion of the initial sale of nonresident combination licenses, the department will randomly draw ~~600~~ names of unsuccessful general big game combination license applicants for an alternates' list and ~~200~~ names ~~each~~ for alternates' lists for the general and landowner-sponsored nonresident deer combination licenses. These unsuccessful applicants may be contacted and given the opportunity to purchase a license in the event refunds are issued to successful applicants which leave quotas unmet.

(2) In the event the alternate list is exhausted and refunded licenses remain to be issued, a secondary alternate list shall be prepared. Names shall be placed on the secondary alternate list on a first come, first served basis. ~~Sportsman~~ Individuals must request in writing to have their names placed on the list.

AUTH: 87-1-201, MCA IMP: 87-2-511, MCA

12.3.402 LICENSE REFUNDS (1) No refund will be issued for any hunting, fishing, or trapping license sold by the department except as provided in (a) through (e) of this rule. The department will review all applicable information in evaluating requests.

(a) A surviving heir may receive a refund ~~in~~ if ~~the event of the death of~~ the license holder dies and has not used the license. A license holder may receive a 90% refund if an immediate family member dies and the license holder has not used the license. A ~~claim~~ request for such refund must be accompanied by ~~verification of death of the license holder and will be made payable to the personal representative of the estate of the deceased~~ appropriate supporting documentation which includes, at a minimum, a copy of the death certificate of the license holder or immediate family member. ~~No refund will be awarded for any license if death occurs after the opening of~~

~~the season for which the license is valid. If the request for a refund includes an archery license, the opening of the season is the beginning of the general archery hunting season for that species;~~ For a hunting license, the request must be postmarked by the end of that calendar year;

(b) License holders may receive a 90% refund in the event that a medical emergency prevents the license holder from using the license. A request for a medical emergency refund ~~due to medical disability,~~ must be ~~verified by a statement signed by a licensed physician~~ accompanied by appropriate supporting documentation which includes, at a minimum, a statement signed by a licensed physician. The physician must describe the nature of the ~~disability~~ medical emergency and state ~~that~~ why it precludes ~~hunting~~ using the license. ~~No refund will be awarded for any license if medical disability occurs after the opening of the season for which the license is valid. If the request for a refund includes an archery license, the opening of the season is the beginning of the general archery hunting season for that species;~~ For a hunting license, the request must be postmarked by the end of the calendar year;

(c) A resident who has purchased a conservation, bear, deer, elk, bird, or fishing license may request a refund by returning the license to the Helena or regional office at the time of application for a ~~sportsman's~~ combination license. A nonresident who has purchased a conservation, season bird, season fishing or deer ~~combination~~ license may request a refund by returning ~~such~~ the license to the Helena office at the time of application for a nonresident big game combination license. A nonresident who has purchased a conservation, season bird or season fishing license may request a refund by returning the license to the Helena office at the time of application for a nonresident deer or elk only combination license;

(d) If an applicant is issued an incorrect license (e.g., a sportsman over 62 years old is issued a regular conservation license and elk license for full price instead of the half price elk license) through the fault of the department or a license agent, the license fees will be refunded;

(e) ~~Refunds will be granted for nonresident combination licenses if requests are postmarked on or before September 1. After September 1, refunds will be issued only for the reasons outlined in (a) through (e) above if requests are postmarked on or before October 1. After October 1, refunds for nonresident combination or resident and nonresident general licenses will not be issued~~. Except for refunds under (a), (b), and (c), nonresident combination license holders may receive a license refund according to the following schedule, provided the nonresident certifies that the license was not used:

(i) 80% refund if postmarked on or before August 1 of the license year;

(ii) 50% refund if postmarked after August 1 of the license year, but on or before the general big game hunting season with the following exceptions:

(A) if the license holder is outfitter sponsored and lack of success in drawing a permit eliminates opportunity to use the

license, the amount retained by the agency will be $100, provided that the request is postmarked on, or prior to, October 1;

(B) If the license holder is landowner sponsored and lack of success in drawing a permit eliminates opportunity to use the license, the amount retained by the agency will be $50, provided the request is postmarked on, or prior to, October 1.

(iii) No refund will be issued after the opening of the general big game hunting season.

(f) For the purpose of considering refunds, any license ordered by mail shall be considered sold when the department receives a valid application.

(g) The director, or his designee, may authorize exceptions to the refund policy due to extenuating circumstances including but not limited to the following:

(i) declaration of war or police action; or

(ii) catastrophic or major natural disaster or man-made event that necessitates the assistance from state or federal emergency management agency.

AUTH: 87-1-301, MCA IMP: 87-1-301, MCA

3. Rationale: The department and commission propose to amend ARM 12.3.402 in an effort to make their license refund policies as fair as possible. Each year compelling circumstances arise such as the death of a license holder or the family member of a license holder. Holders of nonresident combination licenses pay a significant sum of money to purchase the license. These kinds of circumstances do not always qualify for a refund within the current policy. In addition, sometimes instances exist where abuse allows a refund. By implementing these changes, the commission and department believe that the refund policy would curb abuse, while allowing refunds for individuals who aren't able to use their hunting and fishing licenses due to unfortunate circumstances.

The commission and department propose to amend ARM 12.3.123 as ARM 12.3.402 and ARM 12.3.123 go hand-in-hand. The amendment of ARM 12.3.123 will allow the department to compensate for refunded licenses and smooth out the handling of refunds. Under the rule amendment, the department will slightly "oversell" the licenses, calculated on the percentage of license refunds expected. Although, because of refunds, the actual number of licenses used will remain about the same as stated currently in ARM 12.3.123, department resources will be more wisely used as fewer reselling efforts will be needed, customer service will be greatly improved as last minute customer notification of left-over licenses will be reduced, license handling will operate more efficiently, and the department's risk of revenue loss due to refunds will be minimized.

4. Interested persons may present their data, views or arguments concerning the proposed amendments in writing no later than February 12, 1999, to Barney Benkelman, Department of Fish, Wildlife and Parks, P.O. Box 200701, Helena, MT 59620-0701.

5. If a person who is directly affected by the proposed amendment wishes to express his or her views, data and arguments orally or in writing at a public hearing, he or she must make written request for a hearing and submit this request along with any written comments to Barney Benkelman, Department of Fish, Wildlife and Parks, P.O. Box 200701, Helena, Montana 59620-0701, no later than February 12, 1999.

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 amendment; from the administrative code committee of the legislature; from a governmental agency or subdivision; or from any association having no less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register and mailed to all interested persons. Ten percent of those most directly affected has been determined to be in excess of 2370 persons based 23,695 nonresident combination licenses sold in 1997.

7. The Department of Fish, Wildlife and Parks maintains a list of persons interested in both department and commission rulemaking proceedings. Any person wishing to be on the list must make a written request to the department, providing name, address and description of the subject or subjects of interest. Direct the request to Montana Fish, Wildlife and Parks, Legal Unit, PO Box 200701, Helena, MT 59620-0701.

RULE REVIEWER

Robert N. Lane

FISH, WILDLIFE AND PARKS COMMISSION

Patrick J. Graham, Secretary

DEPARTMENT OF FISH, WILDLIFE AND PARKS

Patrick J. Graham, Director

Certified to the Secretary of State January 4, 1999.

BEFORE THE BOARD OF LIVESTOCK
OF THE STATE OF MONTANA

In the matter of the proposed adoption of new rules I and II relating to inspector examination and certification.	NOTICE OF PROPOSED ADOPTION NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On February 15, 1999, the Montana board of livestock proposes to adopt new Rules I and II pertaining to inspector examination and certification.

2. The proposed rules provide as follows:

"RULE I INSPECTOR EXAMINATION REQUIREMENTS (1) The inspector examination set for passage by the Montana Law Enforcement Academy and the requirements for passage thereof are hereby adopted by the Montana board of livestock for those inspectors designated as law enforcement officers pursuant to the provisions of 81-1-201, MCA."

AUTH: 81-3-202, MCA
IMP: 81-3-202, MCA

"RULE II CERTIFICATION OF SPECIALLY QUALIFIED DEPUTY STOCK INSPECTORS (1) A specially qualified deputy stock inspector shall be certified by the district inspector in the county, subsequent to attainment of proper training and a demonstration of a satisfactory knowledge of all appropriate laws, rules and regulations, proper completion of inspection documents and job performance duties."

AUTH: 81-3-202, MCA
IMP: 81-3-202, MCA

3. These rules are being proposed for adoption to comply with requirements of 81-1-201, MCA.

4. Interested parties may submit their data, views or arguments concerning the proposed adoption in writing to the Board of Livestock, 301 N. Roberts St., PO Box 202001, Helena, MT 59620-2001. Any comments must be received no later than February 12, 1999.

5. If a person who is directly affected by the new Rules 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 the Board of Livestock, 301 N. Roberts St., PO Box 202001, Helena, MT 59620-2001. A written

request must be received no later than February 12, 1999.

6. If the board 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 100 persons based upon the number of ranches and livestock producers in the state and the various livestock organizations.

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

8. The board of livestock maintains a list of interested persons who wish to receive notices of rule making 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 Livestock, 301 N. Roberts St., PO Box 202001, Helena, MT 59620-2001, or faxed to the office at (406)444-1929.

MONTANA DEPARTMENT OF LIVESTOCK
JOHN PAUGH, BOARD CHAIRMAN

By: _____
Marc Bridges, Acting Exec. Officer
Board of Livestock
Department of Livestock

By: _____
Lon Mitchell, Rule Reviewer
Livestock Chief Legal Counsel

Certified to the Secretary of State January 4, 1999.

BEFORE THE DEPARTMENT OF MILITARY AFFAIRS
OF THE STATE OF MONTANA

In the matter of the proposed adoption of new rules for the administration of the Education Benefit Program for the Montana National Guard	))))	NOTICE OF PROPOSED ADOPTION OF NEW RULES I THROUGH VI PERTAINING TO THE ADMINISTRATION OF THE PROGRAM FOR THE MONTANA NATIONAL GUARD

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On February 16, 1999, the department of military affairs proposes to adopt new rules I through VI pertaining to the administration of the Montana national guard education benefit program (EBP).

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

RULE I ELIGIBILITY OF MEMBERS (1) Any active member of the Montana army national guard or air national guard who meets the established criteria, may be eligible to participate in the education benefit program (EBP), if attending state funded institutions of higher learning.

(2) The EBP is a tuition waiver scholarship. The tuition type waiver would pay for the cost of tuition for credit bearing courses only. Tuition is defined as the total semester hour cost of instruction to a student as published in the catalog of the institution, specifically excluding mandatory fees, book charges, and room and board.

(3) The EBP incentive applies to members who are accepted, enrolled and matriculated at state funded institutions on a full-time or part-time basis in an undergraduate degree-granting program. Members must meet the institution's eligibility requirements for admission in a degree granting program before this incentive can be used. Members must be pursuing their first undergraduate degree.

(4) Minimum enrollment for a part-time student is at least 3, but less than 12, credit hours per semester. Minimum enrollment for a full-time student is at least 12 or more semester credit hours.

(5) An applicant must be a resident student of the state of Montana as defined by 20-25-501(1)(d), MCA in order to apply for the EBP.

(6) Members may receive the EBP award for no more than 8 semesters of full-time study, or the equivalent of 4 academic years, or, for no more than 16 semesters of part-time study in an approved undergraduate degree-granting program. Periods of federal active duty and activation by the governor of the state of Montana will be excluded from the above computation of the maximum period of eligibility. The adjutant general

may, for exceptional circumstances, grant an extension of the eligibility period upon a written application from the member.

(7) The adjutant general may prioritize participation in this program in accordance with supplemental criteria that is deemed necessary to maintain readiness of the state military militia.

AUTH: 20-25-421, MCA
IMP: 10-1-121, MCA

RULE II ELIGIBILITY CRITERIA (1) A member may apply for the EBP if he is an active member of the Montana army national guard or the Montana air national guard. Members of the active military, inactive national guard (ING), individual ready reserve (IRR) or active guard and reserve (AGR) are not eligible.

(2) An applicant must be a graduate of an initial active duty for training (IADT) or a commissioning source.

(3) Applicants must be in a pay grade of enlisted - E1-E7, warrant officer - WO1-WO2, or officer - O1-O2.

(4) Applicants must have attended all scheduled unit training assemblies and scheduled annual training periods or have authorized absences. January 1 through June 30 establishes eligibility for the fall semester; July 1 through December 31 establishes eligibility for the winter semester as well as pre-approved summer courses. Members who cannot attend unit training assemblies due to sickness, injury, or some other unforeseen circumstance beyond the individual's control will be given the opportunity to perform equivalent training in accordance with regulations in order to maintain eligibility for the EBP. Prior service enlistees or appointees may gain eligibility if they have joined the Montana army national guard or air national guard prior to the start of a semester and meet all other eligibility requirements. The enlistment or appointment date as entered on the individual's contract or commissioning document will be used to determine eligibility. The first day of class at the college/university establishes the start of the semester.

(5) Applicants must have an expiration of term of service (ETS)/expiration of service (EOS) or service obligation date beyond the semester for which the EBP is being requested. Individuals who extend or reenlist for the EBP must do so for six years and provide appropriate documentation of extensions with their application for the tuition benefit.

(6) Applicants must not be flagged for favorable personnel actions.

(7) Applicants must have been accepted and matriculated for admission or enrolled at a Montana institution of higher education, either part-time or full-time, in a first award undergraduate degree-granting program.

(8) Applicants may not apply for the EBP prior to college/university acceptance.

(9) Applicants must be in good academic standing according to definition of the institution. Additionally, the

enrolled service member must maintain a cumulative grade point average of 2.0 or better.

(10) If employer reimbursement for tuition is being received, the EBP award shall be reduced by the amount of such education reimbursement.

AUTH: 10-1-121, MCA
IMP: 10-1-121, MCA

RULE III SUSPENSION/TERMINATION OF EDUCATIONAL BENEFITS (1) During a semester, an applicant's/member's eligibility for the EBP will be suspended for that semester anytime the applicant/member fails to meet the eligibility requirements that have been established. If EBP is suspended, the applicant/member may be liable for the payment of the value of tuition that was waived during that semester.

AUTH: 10-1-121, MCA
IMP: 10-1-121, MCA

RULE IV ELIGIBILITY REVIEW AND CONTINUATION PROGRAM (1) Participation in the EBP will be determined on a semester-by-semester basis in accordance with the applicable eligibility criteria set forth in these rules. Applicants may apply for participation in the EBP by submitting a Montana national guard scholarship program application, which is available from the Montana national guard education office.

(2) Commitment to any individual member of continued EBP assistance beyond that authorized for a particular semester is contingent upon an annual funding availability and the applicant/member meeting eligibility criteria contained within these rules then in effect under the statute.

AUTH: 10-1-121, MCA
IMP: 10-1-121, MCA

RULE V OBLIGATION TO REPAY EDUCATIONAL BENEFITS (1) Any member failing to complete an active term of enlistment may be held liable for repayment of the value of EBP benefits received during that term of enlistment.

AUTH: 10-1-121, MCA
IMP: 10-1-121, MCA

RULE VI AVAILABILITY OF THE TUITION FEE WAIVER (1) The availability of the EBP is contingent upon approval by the Montana board of regents.

AUTH: 20-25-421, MCA
IMP: 20-25-421, MCA and 10-1-121, MCA

3. In accordance with 2-4-302(2)(d), MCA, Representative Robert Pavlovich from Butte, and Senator Don Hargrove from Belgrade, who sponsored the bill, have been provided copies of these proposed rules.

4. Interested parties may submit data, views or arguments in writing to: MAJ James P. Moran, Full-Time Staff Judge Advocate, Department of Military Affairs, PO Box 4789, Helena, MT 59604-4789. Any comments must be received no later than February 11, 1999.

5. Any person/party may be placed on the Department of Military Affairs' list of interested persons/parties by contacting MAJ James P. Moran, Full-Time Staff Judge Advocate, Department of Military Affairs, in writing, at the address listed above or may be made by completing a request form at any rules hearing held by the department.

6. If a person who is directly affected by the proposed adoption wishes to express data, views and arguments orally or in writing at a public hearing, the person must make written request for a hearing and submit this request along with any written comments to: MAJ James P. Moran, Full-Time Staff Judge Advocate, Department of Military Affairs, PO Box 4789, Helena, MT 59604-4789. A written request for hearing must be received no later than February 11, 1999.

7. 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 adoption; 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 the persons directly affected has been determined to be at least 40 persons based upon the average number of 400 Montana army and air national guard members who are matriculated in institutions of higher learning during a semester.

8. Alternative accessible formats of this document will be provided upon request. Persons who need an alternative format of this rule notice, or who require some other reasonable accommodation in order to participate in this process, should contact MAJ James P. Moran, Full-Time Staff Judge Advocate, Department of Military Affairs, PO Box 4789, Helena, MT 59604-4789; telephone: (406) 841-3325.

DEPARTMENT OF MILITARY AFFAIRS

BY: _____
James P. Moran
Rule Reviewer

_____
John E. Prendergast
Major General, MTNG
Director

Certified to the Secretary of State this 4th day of January 1999.

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 2.21.812, 2.21.814, 2.21.821 and 2.21.822 related to the sick leave fund	))))	NOTICE OF THE AMENDMENT OF ARM 2.21.812, 2.21.814, 2.21.821 and 2.21.822 RELATED TO THE SICK LEAVE FUND

TO: All Interested Persons.

1. On August 13, 1998, the Department of Administration published notice of the proposed amendment of ARM 2.21.812, 2.21.814, 2.21.821 and 2.21.822 related to the sick leave fund at page 2133 of the Montana Administrative Register, issue number 15.

2. The department has amended the rules as proposed.

3. No written or oral comments were received.

BY: _____ _____

Dal Smilie
Rule Reviewer

Lois Menzies
Director

Certified to the Secretary of State January 4, 1999.

BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

In the matter of the adoption of new rules I through IX pertaining to pesticide reporting, cleanup and pesticide containment	)))))	NOTICE OF ADOPTION

TO: All Interested Persons

1. On November 5, 1998, the Montana Department of Agriculture published a notice of proposed adoption of new rules I through IX pertaining to pesticide reporting, cleanup and pesticide containment, at page 2924 of the 1998 Montana Administrative Register, Issue No. 21.

2. The department has adopted new rule I and new rules III through IX (4.10.1101 and 4.10.1103 through 4.10.1109) exactly as proposed.

3. The Department has adopted new rule II as proposed, but with the following changes. (new material is underlined; material to be deleted is interlined):

NEW RULE II (4.10.1102) GENERAL SPILL CLEANUP, REPORTING, AND CONTAINMENT REQUIREMENTS (1) remains the same.

(a) An immediate response to pesticide spills should be undertaken according to local emergency operations plans; and responsible persons can, where appropriate, contact the local emergency operations jurisdiction or the state 24-hour number for disaster and emergency services at 406-444-6911.

(2) All persons shall report to the department within 48 hours spills occurring as a result of their use of pesticides or spills of pesticides in facilities or from equipment under the control of that person. ~~Spills shall be verbally reported to the department immediately, subject to any immediate actions a person can undertake to contain and confine the spill.~~

(2)(a) through (4) remains the same.

(5) Persons using water to mix or load pesticides or to clean or rinse pesticide equipment or containers shall use a backflow prevention device or procedures, such as an air gap or check valve, to prevent contamination of all water sources. Any person using a public water supply must comply with ~~ARM 17.38.105.~~ ARM 17.38.301 and 17.38.305.

(6) through (9) will remain the same.

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

4. The Department has thoroughly considered all comments and testimony received. Those comments, and the Department's responses thereto, are as follows:

COMMENT #1: A commenter suggested we incorporate the use of the Disaster Emergency Service (DES) telephone number when reporting a pesticide spill.

RESPONSE: The Montana Department of Agriculture has agreed and responded by incorporating the change in New Rule II (4.10.1102(1)(a) and (2)).

COMMENT #2: A commenter questioned whether the ARM citation in New Rule II(5) (4.10.1102(5)) remained current.

RESPONSE: The new citation for New Rule II(5) (4.10.1102(5)) is as stated in the correction.

DEPARTMENT OF AGRICULTURE

Ralph Peck
DIRECTOR

Timothy J. Meloy, Attorney
Rule Reviewer

Certified to the Secretary of State January 4, 1999.

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

In the matter of the amendment of rules 6.10.101, 6.10.103, 6.10.111, 6.10.120, and 6.10.127, the adoption of new rules I through IX, pertaining to registration, unethical practices, financial requirements, bonding, and books and records requirements in the business of securities, and the repeal of 6.10.122 and 6.10.123.	)))))))))))	NOTICE OF AMENDMENT, ADOPTION AND REPEAL OF RULES

TO: All Interested Persons

1. On September 24, 1998, the State Auditor published notice of the proposed adoption, amendment, and repeal of the above-stated rules at page 2527, 1998 Montana Administrative Register, issue number 18. The hearing was held on October 27, 1998, in Helena, Montana.

2. The State Auditor has amended ARM 6.10.101, 6.10.103, 6.10.111, and 6.10.120 exactly as proposed.

3. The State Auditor has amended ARM 6.10.127 as proposed, but with the following changes (new text is underlined; text to be deleted is interlined).

6.10.127 FRAUDULENT, UNETHICAL AND DECEPTIVE PRACTICES PROHIBITED (1) A person who is a federal covered adviser or an investment adviser is a fiduciary and has a duty to act for the benefit of its clients. The provisions of this rule apply to federal covered advisers to the extent that the conduct alleged is fraudulent, deceptive, or as otherwise permitted by the National Securities Markets Improvement Act of 1996 (PL 104-290). While the extent and nature of this duty varies according to the nature of the relationship between an investment adviser or a federal covered adviser and its clients and the circumstances of each case, an investment adviser or a federal covered adviser shall not engage in unethical business practices, including the following:

(a) through (r) will remain the same as proposed.

(s) entering into, extending, or renewing any advisory contract contrary to the provisions of section 205 of the Investment Advisers Act of 1940. This provision is hereby adopted and incorporated herein, and applies to all advisers registered or required to be registered under the Securities Act of Montana, notwithstanding the fact that ~~whether~~ such

investment adviser is not registered or required to be registered under ~~would be exempt from federal registration pursuant to~~ section 203 ~~(b)~~ of the Investment Advisers Act of 1940. Section 205 establishes standards for investment advisory contracts entered into by the adviser and may be obtained from the Commissioner of Securities, P.O. Box 4009, Helena, MT 59604;

(t) to indicate, in an advisory contract, any condition, stipulation, or provisions binding any person to waive compliance with any provision of this act or of the Investment Advisers Act of 1940, or any other practice contrary to the provisions of section 215 of the Investment Advisers Act of 1940, which is hereby adopted and incorporated herein notwithstanding the fact that such investment adviser is not registered or required to be registered under Section 203 of the Investment Advisers Act of 1940. Section 215 of the Investment Advisers Act of 1940 establishes standards for the validity of advisory contracts, and may be obtained from the Commissioner of Securities, P.O. Box 4009, Helena, MT 59604;

(u) through (w) will remain the same as proposed.

AUTH: Sec. 30-10-107, MCA
IMP: Sec. 30-10-201 and 10-10-301, MCA

4. The State Auditor has repealed ARM 6.10.122 and 6.10.123 as proposed.

5. The State Auditor has adopted new rules I (ARM 6.10.136) and VI (ARM 6.10.150) exactly as proposed.

6. The State Auditor has adopted new rules II (ARM 6.10.145), III (ARM 6.10.140), IV (ARM 6.10.141), V (ARM 6.10.147), VII (ARM 6.10.149), VIII (ARM 6.10.138), and IX (ARM 6.10.143) as proposed, but with the following changes (new text underlined; text to be deleted is interlined).

NEW RULE II (ARM 6.10.145) NOTICE FILING REQUIREMENTS FOR FEDERAL COVERED ADVISERS (1) and (2) will remain the same as proposed.

(3) The renewal of the notice filing for a federal covered adviser pursuant to 30-10-209(2)(c), MCA, shall be filed upon the first page of an executed Form ADV (Uniform Application for Investment Adviser Registration (17 CFR 279.1 (1998)), and shall contain the fee required under 30-10-209, MCA. Such filing shall be accompanied by any amendments or documents filed with the Securities and Exchange Commission that have not previously been provided to the Commissioner.

AUTH: Sec. 30-10-107, MCA
IMP: Sec. 30-10-201, MCA

NEW RULE III (ARM 6.10.140) MINIMUM FINANCIAL REQUIREMENTS FOR INVESTMENT ADVISERS (1) ~~Unless,~~ Except as provided in (5), unless an investment adviser posts a bond

pursuant to ARM 6.10.141 an investment adviser registered or required to be registered under the Securities Act of Montana who has custody of client funds or securities shall maintain at all times a minimum net worth of $35,000. An investment adviser registered or required to be registered under the Securities Act of Montana who has discretionary authority over client funds or securities but does not have custody of client funds or securities, shall maintain at all times a minimum net worth of $10,000.

(2) through (5) will remain the same as proposed.

AUTH: Sec. 30-10-107, MCA
IMP: Sec. 30-10-107 and 30-10-201, MCA

NEW RULE IV (ARM 6.10.141) BONDING REQUIREMENTS FOR CERTAIN INVESTMENT ADVISERS (1) Every investment adviser having custody of or discretionary authority over client funds or securities shall be bonded in ~~an~~ the amount of $35,000 ~~determined by the commissioner based upon the number of clients and the total assets under management of the investment adviser by a bonding company qualified to do business in this state~~.

(2) will remain the same as proposed.

AUTH: Sec. 30-10-107, MCA
IMP: Sec. 30-10-107, and 30-10-201, MCA

NEW RULE V (ARM 6.10.147) NOTICE FILINGS FOR OFFERINGS OF INVESTMENT COMPANY SECURITIES (1) A notice filing for a security that is a federal covered security under section 18(b)(2) of the Securities Act of 1933 shall consist of the fees required under 30-10-209, MCA, a Form U-2, Uniform Consent to Service of Process, unless incorporated by reference by ARM 6.10.150, and either a copy of the issuer's federal registration statement as filed with the Securities and Exchange Commissioner or an originally executed Form NF, Uniform Notice Filing Form.

(2) through (6) will remain the same as proposed.

AUTH: Sec. 30-10-107, MCA
IMP: Sec. 30-10-202 and 30-10-211, MCA

NEW RULE VII (ARM 6.10.149) NOTICE FILING PROCEDURES FOR RULE 506 OFFERINGS (1) An issuer offering a security that is a covered security under section 18(b)(4)(D) of the Securities Act of 1933 shall file a notice on Form ~~form~~ D (17 CFR 239.500), a consent to service of process on a form prescribed by the commissioner and pay the fee required by 30-10-209(1)(a) and (1)(c), MCA, no later than fifteen days after the first sale of the security in this state.

(2) will remain the same as proposed.

AUTH: Sec. 30-10-107, MCA
IMP: Sec. 30-10-202 and 30-10-211, MCA

NEW RULE VIII (ARM 6.10.138) BROKER-DEALER BOOKS AND RECORDS (1) Unless otherwise provided by order of the commissioner, each registered broker-dealer shall make, maintain and preserve books and records in compliance with the United States Securities and Exchange Commission Rules 17a-3 (17 CFR 240.17a-3 (1998)), 17a-4 (17 CFR 240.17a-4 (1998)), and 15c2-11 (17 CFR 240.15c2-11 (1998)) which are adopted and incorporated herein by this reference and establish recordkeeping requirements related to the conduct of the business as a securities broker-dealer. Copies of these rules may be obtained from the Commissioner of Securities, P.O. Box 4009, Helena, MT 59604.

(2) will remain the same as proposed.

AUTH: Sec. 30-10-107, MCA
IMP: Sec. 30-10-201, MCA

NEW RULE IX (ARM 6.10.143) INVESTMENT ADVISER BOOKS AND RECORDS

(1) Except as otherwise provided in (5) of this rule, an ~~Every~~ investment adviser registered or required to be registered under the Securities Act of Montana must make and keep true, accurate, and current the following books, ledgers and records:

(a) those books and records required to be maintained and preserved in compliance with rules 204-2(a)(1)-(5), (7), (9), (10), (12), (13), (15), and (16) of the Investment Advisers Act of 1940 (17 CFR 275.204-2 (1998)), hereby adopted and incorporated by reference, notwithstanding the fact that the investment adviser is not registered or required to be registered under the Investment Advisers Act of 1940. Rule 204-2 establishes books and records maintenance requirements pertaining to the conduct of business as an investment adviser. Copies of these rules may be obtained from the Commissioner of Securities, P.O. Box 4009, Helena, MT 59604;

(b) and (c) will remain the same as proposed.

~~(d) a copy in writing of each agreement entered into by the investment adviser with any client;~~

~~(e)~~(d) a file containing a copy of each record required by rule 204-2(a)(11) of the Investment Advisers Act of 1940 (17 CFR 275.204-2(a)(11)(1998)), including any communication by electronic media that the investment adviser circulates or distributes directly or indirectly to two or more persons, other than persons connected with the investment adviser;

~~(f)~~(e) a copy of each written statement and each amendment or revision given or sent to any client or prospective client of the investment adviser in accordance with the provisions of ~~rule 203(b)(1) of this act~~ 30-10-201(12)(b), MCA and a record of the dates that each written statement, and each amendment or revision was given or offered to be given to any client or prospective client who subsequently becomes a client;

(g) will remain the same but is relettered (f).

~~(h)~~(g) all records required by rule 204-2(a)(16) of the

Investment Advisers Act of 1940 ~~including~~ include, but are not limited to, electronic media that the investment adviser circulates or distributes, directly or indirectly, to two or more persons (other than persons connected with the investment adviser);

(i) through (k) will remain the same as proposed but are relettered (h) through (j).

~~(l)~~(k) a file containing a copy of ~~a~~ each document (other than any notices of general dissemination) that was filed with or received from any state or federal agency or self regulatory organization and that pertains to the registrant or its investment adviser representatives which file should contain, but is not limited to, all applications amendments, renewal filings, and correspondence.

(2)and (2)(a) will remain the same as proposed.

(b) books and records required to be made under (1)(b) through (1)(k) must be maintained and preserved in an easily accessible place for a period of not less than ~~seven~~ five years from the end of the fiscal year during which the last entry was made on such record, the first two years in the principal office of the investment adviser or for the time period during which the investment adviser was registered or required to be registered in the state, if less.

(3) and (3)(a) will remain the same as proposed.

(i) sections (a)(3), (a)(7), (a)(9)-(10), (a)~~(14)~~(15)-(16), (b) and (c) inclusive, of SEC rule 204-2 of the Investment Advisers Act of 1940 (17 CFR 275.204-2 (1998));

(ii) ~~subsection~~ subsections (1)(c), (1)(e), (1)(i) ~~through~~ and (1)(k) of this rule~~; and~~ .

~~(b) the records or copies required under the provision of (1)(k) which records or related records identify the name of the investment adviser representative providing investment advice from that business location, or which identify the business locations' physical address, mailing address, electronic mailing address, or telephone number. These records will be maintained for the period described in (2)(b).~~

(4) and (5) will remain the same as proposed.

AUTH: Sec. 30-10-107, MCA
IMP: Sec. 30-10-201, MCA

7. The State Auditor thoroughly considered all comments and testimony received. Those comments, and the Department's responses thereto, are as follows:

Comment 1: The Investment Company Institute (ICI) commented that the National Securities Markets Improvements Act (NSMIA) preempted a state's authority to proscribe "unethical" conduct by federal covered advisers and that the state has exceeded its authority by applying a rule governing ethical practices to federal covered advisers. ICI also commented that "unethical practices" prohibitions apply solely in the context of registration (see Section 30-10-201(13)(g), MCA) from which federal covered advisers are exempt, and that application of

these prohibitions to federal covered advisers is beyond the authority of the State Auditor in any other context.

Response: The State Auditor rejects this reasoning. The State Auditor recognizes that NSMIA preempts state authority to register federal covered advisers, and consequently preempts state authority to conduct proceedings which would adversely affect the registration of a federal covered adviser; however, NSMIA specifically recognized state authority to investigate and bring enforcement actions against a federal covered adviser for allegations of fraud and deceit. The State Auditor believes that inclusion of the new introductory phraseology in 6.10.127 adequately recognizes the limitations placed on state enforcement authority by Congress while providing notice to federal covered advisers of the type of conduct from which state enforcement action may ensue. While NSMIA was relatively vague in reference to what constitutes "deceitful" conduct by a federal covered adviser, the rule is an attempt to generally outline proscribed conduct while recognizing that, in some cases, proscription of certain types of conduct is preempted by NSMIA.

The State Auditor also recognizes that 6.10.127 originally defined "unethical practices" for the purposes of Section 30-10-201(13)(g), MCA; however, the drastic changes in investment adviser regulation brought about by NSMIA necessitated rewriting the rule to provide notice to registered advisers of what the Commissioner will consider "unethical" for the purposes of registration actions, as well as to provide notice to federal covered advisers or unregistered advisers that some types of conduct may be considered "fraudulent or deceptive" for the purposes of proceedings under section 30-10-301, MCA.

Comment 2: ICI recommended that references to both federal covered advisers and investment advisers be included in the introductory language of proposed 6.10.127(1), MCA, if the State Auditor intended to apply the rule to both types of advisers.

Response: The State Auditor agrees and has incorporated the amendment suggested by ICI.

Comment 3: ICI recommended that proposed 6.10.127(1)(s)-(u) be amended to consistently utilize language adopting federal laws and applying those laws to persons notwithstanding the fact that the persons may be otherwise exempt from those laws.

Response: The State Auditor agrees and has amended the language of the proposed rule to reflect ICI's suggested approach.

Comment 4: ICI recommended that proposed 6.10.127(1)(u) be amended to revise the reference to "section 206(4) of the Investment Advisers Act of 1940" to "section 206," and to include "the Securities Act of Montana or" after "required to be registered under."

Response: The State Auditor rejects this proposal, as inclusion of section 206 in its entirety would incorporate language which is unnecessarily duplicative of Section 30-10-

301, MCA, and inclusion of a reference to "the Securities Act of Montana" is unnecessary for application of the rule to advisers that are not registered federally or with the state.

Comment 5: ICI recommended that proposed new rule II(1)(a) be amended to include the option of filing an originally executed form ADV for the purpose of consenting to service of process by a federal covered adviser.

Response: The State Auditor rejects this suggestion as the language in rule II(1) already refers to the fact that a federal covered adviser must notice file on a form ADV which includes the consent to service of process. Proposed new rule II(1)(a) simply allows the federal covered adviser to utilize the provisions of proposed new rule VI, rather than originally execute the consent to service of process on form ADV.

Comment 6: ICI recommended the addition of language at the end of proposed new rule II which requires the filing of amendments or documents filed with the SEC by a federal covered adviser.

Response: The State Auditor agrees and has incorporated the language suggested by ICI.

Comment 7: ICI recommended that proposed new rule III be amended to include clarifying language that references new rule III(5) in the introductory language of the rule.

Response: The State Auditor agrees and has incorporated the language suggested by ICI.

Comment 8: ICI recommended that proposed new rule IV lacks specificity with respect to the actual amount in which investment advisers must be bonded and that the State Auditor may wish to consider inclusion of a finite amount for bonding purposes.

Response: The State Auditor agrees and has incorporated a bonding amount of $35,000 as suggested by ICI.

Comment 9: ICI recommended that proposed new rule V include reference to the option of utilizing the provisions of new rule VI for the purposes of filing consents to service of process for investment company securities.

Response: The State Auditor agrees and has incorporated the amendment suggested by ICI.

Comment 10: ICI recommended that proposed new rule VII be amended for the purposes of capitalizing the term "form" in new rule VII(1), in order to be consistent with new rule VII(2).

Response: The State Auditor agrees and has incorporated the amendment suggested by ICI.

Comment 11: A securities law attorney recommended that proposed new rule VII be amended to continue the practice of not requiring renewal fees from issuers of Rule 506 offerings. As the rule is currently drafted, renewal fees would be required for such offerings, despite the fact that such fees had not been required in the past.

Response: The State Auditor agrees and has amended proposed new rule VII to reflect the current fee structure pertaining to Rule 506 offerings.

Comment 12: ICI recommended that proposed new rule VIII

be amended to use the term "broker-dealer," as opposed to "dealer" in order to be consistent with terminology defined in the Securities Act of Montana.

Response: The State Auditor agrees and has incorporated the amendment suggested by ICI.

Comment 13: ICI recommended that proposed new rule IX be amended to include a reference to the circumstances under which an investment adviser is exempt from the requirements of rule IX in the introductory portion of the provision.

Response: The State Auditor agrees and has incorporated the amendment suggested by ICI.

Comment 14: ICI recommended that proposed new rule IX be substantially revised to eliminate unnecessary duplication of the language of Rule 204-2 of the Investment Advisers Act of 1940. ICI suggests that the incorporation of Rule 204-2 and the itemized list of records in new rule IX is confusing because of the duplication of requirements already found in Rule 204-2. Specifically, ICI has asserted that new rule IX (1)(b) duplicates SEC Rule 204-2(a)(6); IX(1)(c) duplicates SEC Rules 204-2(a)(3), (7), (8), (9), and (10); IX(1)(d) duplicates 204-2(a)(10); IX(1)(e) duplicates SEC Rule 204-2(a)(11); IX(1)(f) duplicates SEC Rule 204-2(a)(14); IX(1)(g) duplicates SEC Rule 204-2(a)(15); IX(1)(h) duplicates SEC Rule 204-2(a)(16); IX(1)(i) duplicates SEC Rule 204-2(a)(7); and, IX(1)(j) duplicates SEC Rule 204-2(a)(3), (7), and (10).

Response: The State Auditor disagrees with ICI's contention that only new rule IX(1)(k) and (1)(l) are not included in SEC Rule 204-2 and finds that the provisions cited by ICI as duplicative of the SEC Rule are slightly varied or supplemented versions of SEC Rule 204-2 provisions. The State Auditor agrees that, to the extent that portions of adopted federal rules are restated in new rule provisions IX(1)(b) through (1)(l), the provisions governing an investment adviser's books and records may be confusing. As such, the State Auditor will adopt only those portions of SEC Rule 204-2 which the State Auditor intends to apply to investment advisers verbatim.

The portions of proposed new rule IX which impose similar, but supplemented or varied, provisions of the SEC rule will be restated with the supplemental or variant provisions. Thus, the State Auditor will not adopt SEC Rule 204-2(a)(6), (8), (11), and (14) wholesale, but will restate those provisions as they will be enforced in Montana. The State Auditor will remove IX(1)(d), as it duplicates SEC Rule 204-2(a)(10) verbatim. The State Auditor will adopt SEC Rule 204-2(a)(16) wholesale, but will include a supplemental provision which clarifies that electronic media is included in the records retention requirement.

Comment 15: ICI commented that, in addition to being duplicative, proposed new rule IX(1)(f) does not make sense because: (1) the reference to rule 203(b)(1) is not a reference that can be found in Montana law; and, (2) the rule (which mirrors SEC Rule 204-2(a)(14)) does not appear to have an

affirmative disclosure obligation as does the federal rule. ICI suggests that no records are required to be kept under this provision without an affirmative disclosure obligation (like the SEC's brochure rule).

Response: The State Auditor agrees that the reference to rule 203(b)(1) is an erroneous reference to a Model Securities Act provision. The corresponding provision under Montana law is Section 30-10-201(12)(b), MCA, and this provision will be substituted for the erroneous reference. Also, there are affirmative disclosure obligations in ARM 6.10.127 to which this recordkeeping requirement would apply. Consequently, the State Auditor will retain this provision in proposed new rule IX.

Comment 16: ICI suggests that the proposed rule IX(2) is problematic in that it imposes a seven year record retention requirement for certain types of records when a five-year requirement is the standard used federally, by the North American Securities Administrators Association, and by most states. ICI also notes that the statute of limitations runs after five years in Montana and that it is unnecessary to require longer periods for some types of recordkeeping.

Response: The State Auditor agrees and will amend the provision to set a five-year recordkeeping requirement to all records required to be kept under proposed new rule IX.

Comment 17: ICI suggests that proposed rule IX(3) is not consistent with federal law and that the lack of a definition of "the business location ... from which the customer or client is being provided or has been provided with investment advisory services" renders the section too vague to apply with certainty.

Response: The State Auditor agrees that proposed rule IX(3) is not consistent with federal law, but does not agree with removing or amending the provision on that basis. Because the rule applies to state registered advisers, it is not necessary to maintain consistency with federal law. The State Auditor also believes that proposed new rule IX(3) is sufficiently specific in its use of language for an investment adviser to determine where investment advisory services were provided to clients without limiting, expanding, or qualifying statutorily defined terms.

Comment 18: ICI commented that proposed new rule IX(3)(b) is confusing in that it imposes informational requirements with respect to supervisory procedures records which are not listed in IX(1)(k) itself. ICI suggested that if the State Auditor desired to impose those requirements with respect to IX(1)(k) records, then the appropriate place to do so would be in IX(1)(k).

Response: The State Auditor agrees and will remove the provision.

Comment 19: ICI commented that the State Auditor's rationale for the amendments to ARM 6.10.127 in the Notice of Public Hearing pertaining to these rule overstates the Auditor's authority with respect to enforcement of fraudulent or deceptive practices. ICI suggests that NSMIA preempted

state authority to regulate non-fraudulent behavior by federal covered advisers and suggested amendment of the State Auditor's reason statement.

Response: The State Auditor disagrees with ICI's characterization of the reason statement published in the initial notice as an overstatement. The State Auditor believes that continued characterization of state enforcement authority as limited to fraudulent conduct is misleading in light of Congressional inclusion of the "deceit" by federal covered advisers as actionable in state forums. Furthermore, neither the SEC releases cited by ICI nor NSMIA prohibits state administrators from adopting rules that contain affirmative statements that federal covered advisers will be subject to state enforcement actions if their conduct is fraudulent or deceptive. The State Auditor is very aware that some rules defining "unethical practices" formerly enforced against what are now federal covered advisers are preempted by NSMIA, though some of those practices are still well within the state's enforcement authority to the extent they are fraudulent or deceptive.

MARK O'KEEFE, State Auditor
and Commissioner of Securities

By: _____
David L. Hunter
Deputy Securities Commissioner

By: _____
Russell B. Hill
Rules Reviewer

Certified to the Secretary of State this 18th day of December, 1998.

BEFORE THE BOARD OF FUNERAL SERVICE
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment, repeal and adoption of rules pertaining to the funeral service industry	)))	AMENDED NOTICE OF AMENDMENT, REPEAL AND ADOPTION OF RULES PERTAINING TO THE FUNERAL SERVICE INDUSTRY

TO: All Interested Persons:

1. On May 14, 1998, the Board of Funeral Service published a notice of proposed amendment, repeal and adoption of rules pertaining to the funeral service industry at page 1228, 1998 Montana Administrative Register, issue number 9. On July 16, 1998, the Board published an amended notice of public hearing on the same amendments, repeals and adoptions at page 1833, 1998 Montana Administrative Register, issue number 13. On November 5, 1998, the Board of Funeral Service published its notice of adoption of the rules at page 2959, 1998 Montana Administrative Register, issue number 21.

2. The Board amended, repealed and adopted the rules as shown in issue number 21.

3. The Board has determined that the amendment of ARM 8.30.407 may be in conflict with CI-75 passed by a vote of the people of Montana on November 3, 1998, and is rescinding, by this amended notice, the adoption of that rule.

BOARD OF FUNERAL SERVICE
DAVID FULKERSON, CHAIRMAN

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

Annie M. Bartos
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, January 4, 1999.

BEFORE THE BOARD OF NURSING HOME ADMINISTRATORS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment of rules pertaining to examinations and fees	AMENDED NOTICE OF AMENDMENT OF ARM 8.34.414 EXAMINATIONS AND 8.34.418 FEE SCHEDULE

TO: All Interested Persons:

1. On August 13, 1998, the Board of Nursing Home Administrators published a notice of proposed amendment of rules pertaining to the examinations and fees at page 2139, 1998 Montana Administrative Register, issue number 15. On November 5, 1998, the Board of Nursing Home Administrators published its notice of adoption of the rules at page 2964, 1998 Montana Administrative Register, issue number 21.

2. The Board amended the rules as shown in issue number 21.

3. The Board has determined that the amendment of ARM 8.34.414 and 8.34.418 may be in conflict with CI-75 passed by a vote of the people of Montana on November 3, 1998, and is rescinding, by this amended notice, the adoption of those rules.

BOARD OF NURSING HOME
ADMINISTRATORS
DONNA KAY JENNINGS, CHAIRMAN

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

Annie M. Bartos
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, January 4, 1999.

BEFORE THE WEIGHTS AND MEASURES BUREAU
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment and adoption of rules pertaining to the Weights and Measures Bureau	NOTICE OF AMENDMENT OF RULE 8.77.103 NIST HANDBOOK 44 - SPECIFICATION, TOLERANCE AND USER REQUIREMENT FOR WEIGHING DEVICES AND ADOPTION OF NEW RULE I (8.77.304) RECEIPT TO BE LEFT AT TIME OF DELIVERY

TO: All Interested Persons:

1. On December 3, 1998, the Weights and Measures Bureau published a notice of proposed amendment and adoption of the above-stated rules at page 3188, 1998 Montana Administrative Register, issue number 23.

2. The Bureau has amended and adopted the rules exactly as proposed.

3. No comments or testimony were received.

WEIGHTS AND MEASURES BUREAU
JACK KANE, BUREAU CHIEF

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, January 4, 1999.

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION
OF THE STATE OF MONTANA

In the matter of repeal, amendment, and adoption of rules relating to procedures for evaluation and determination of eligibility for special education and related services	))))))	NOTICE OF REPEAL, AMENDMENT, AND ADOPTION OF RULES RELATING TO PROCEDURES FOR EVALUATION AND DETERMINATION OF ELIGIBILITY FOR SPECIAL EDUCATION AND RELATED SERVICES

TO: All interested persons.

1. On August 27, 1998, the Superintendent of Public Instruction (OPI) published notice of public hearing on the proposed repeal, amendment and adoption of the rules referenced above, at page 2233 of the 1998 Montana Administrative Register, Issue No. 16.

2. An opportunity for public hearing was held on September 30, 1998. The hearing was recorded and the tape is included in the file on this matter. In addition, written comments were received at the hearing and prior to the closing of the comment period.

3. After consideration of the comments received, the following rules are being repealed as proposed: 10.16.1101, 10.16.1103, 10.16.1106, and 10.16.1121. No comments were received on the repeal of these rules.

4. After consideration of the comments received, the following rules are being amended as proposed: 10.16.1117, 10.16.1118, 10.16.1120, and 10.16.1123.

10.16.1117 CRITERIA FOR IDENTIFICATION OF STUDENT AS HAVING DEAF-BLINDNESS

COMMENT 1: Leonard Orth, Director of Yellowstone Special Services Cooperative, and Arlyn Sundsted, Director of Sheridan Daniels Cooperative at Plentywood, commented that to clarify this rule, "and" should be placed between (a), (b), and (c), because all have to be met.

RESPONSE 1: Standard construction of administrative rules provides that "and" connecting the last of a listing of items or subsections means that requirements of each of the subsections must be met. Adding additional "ands" between subsections would be inconsistent with other administrative rules and inconsistent with standards for writing administrative rules of Montana.

5. After consideration of the comments received, the following rule is being adopted as proposed and codified as follows: RULE III (10.16.1127).

10.16.1127 CRITERIA FOR IDENTIFICATION OF STUDENT AS HAVING OTHER HEALTH IMPAIRMENT

COMMENT 2: Leonard Orth commented that he is a proponent of (3), the requirement of a medical diagnosis.

RESPONSE 2: Positive comment noted.

6. After consideration of the comments received, the following rules are being amended with the changes given below, new material underlined, deleted material interlined.

10.16.1113 COMPREHENSIVE EDUCATIONAL EVALUATION PROCESS

(1) remains the same as proposed.

~~(4)~~(2) For initial evaluations, the child study team report shall address:

(a) and (b) remain the same as proposed.

~~(5)~~(3) For all initial evaluations and re-evaluations, the child study team report shall address a review of existing evaluation data on the student, including:

(a) remains the same as proposed.

(b) Current classroom-based assessments and observations which include the student's involvement and progress in the general curriculum; and

(c) remains the same as proposed.

~~(2)~~(4) The child study team shall determine whether the evaluation is adequate and whether the student has a disability which adversely affects the student's ~~performance~~ involvement and progress in the general curriculum and because of that disability needs special education.

~~(3)~~(5) The child study team shall prepare a written report of the results of the evaluation. The report shall include the results of assessments and shall include statements of implications for educational planning in terms understandable to all team members.

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

COMMENT 3: Sondra Strong, Chairperson of the Montana State Special Education Advisory Panel, commenting on behalf of the Panel, strongly recommended that, as part of the evaluation process, there be included a requirement to evaluate the student's involvement and progress in the general curriculum, as addressed in federal regulations (34 CFR 300.344, 347, 532 & 533). This would address the requirement by the CST to determine whether the student has a disability that adversely affects the student's performance in the general curriculum. Classroom-based assessments and

observations are not the same as evaluating the child's involvement and progress in the general curriculum. This should be added to (4) and (5).

RESPONSE 3: OPI agrees.

COMMENT 4: Gail Surwill, Principal of Washington Elementary in Billings, and Pat Gumm, Director of Special Education in the Billings Public Schools, commented that they feel there is no purpose to assembling a CST when the IEP team has determined that a child continues to be eligible and no additional testing is needed. Areas of curriculum based assessment, observation and parent input are part of the IEP process done every year.

RESPONSE 4: OPI disagrees. A reevaluation of each student with a disability is conducted if conditions warrant or if the child's parent or teacher request a reevaluation, but at least once every three years. This requirement applies whether or not additional data are needed for the process of reevaluation. In accordance with ARM 10.60.103(2), a Child Study Team shall be used to identify children with disabilities. For reevaluations, the Child Study Team is composed of the members of the IEP Team and other qualified professionals, as appropriate.

COMMENT 5: Mike Kinne, Special Services Director in the Whitefish School District, and Leonard Orth commented that they feel "observations by teachers and related services providers," are of minimal value in the CST/IEP process.

RESPONSE 5: IDEA at 20 USC 1414(c)(1)(A), requires the review of existing evaluation data on the child, including current classroom-based assessments and observations, and teacher and related services providers observation as part of an initial evaluation and as part of any reevaluation.

COMMENT 6: Leonard Orth commented that in (9), "upon request" should be added to "A copy of the report shall be provided to the parent."

RESPONSE 6: IDEA at 20 USC 1414(b)(4)(B), requires that a copy of the evaluation report and the documentation of determination of eligibility be given to the parent.

COMMENT 7: Ann Whiteman, Speech Pathologist at Lodge Grass, Leonard Orth, and Mike Kinne commented that in (3), written parental consent prior to evaluation has been struck. It would be inappropriate not to let parents know that these tests are being performed.

RESPONSE 7: IDEA at 20 USC 1414(a)(1)(C)(i), requires informed consent from the parent before the initial evaluation is conducted. IDEA at 20 USC 1414(c)(3) requires informed parental consent prior to conducting any reevaluation of a child with a disability.

COMMENT 8: Mike Kinne wondered about Bob Runkel's comments on "attached reports that were presented at the meeting." Does this mean stapled to the CST report or noted on the CST that a particular report is included in the student's current file.

RESPONSE 8: ARM 10.16.1113(5) requires that the CST report shall include the results of assessments and shall include statements of implications. The CST report must indicate whether the assessment will be summarized in the CST document itself or whether the assessment will be attached as a separate, written report. Either option is acceptable provided that the attached report is available at the time of the meeting and remains with all copies of the CST report.

10.16.1114 COMPOSITION OF A CHILD STUDY TEAM (1) The initial evaluation for determining eligibility for special education and related services is made by the child study team that includes the following members:

(a) remains the same as proposed.

(b) At least one regular education teacher of the student if the student is or may be participating in the regular education environment;

(c) through (g) remain the same as proposed.

(2) remains the same.

COMMENT 9: Linda Null, Elementary Principal at Hardin Public Schools, Mike Kinne, and Leonard Orth questioned whether the rule means that if a student is in a self-contained classroom, there is no longer a need to have regular education representation.

RESPONSE 9: OPI has amended the rule for clarification.

COMMENT 10: Leonard Orth commented that with focus on the rights of a student at age 18, "and/or the adult student" should be added to (1)(a). What are the parental notification requirements after the student turns 18?

RESPONSE 10: At the age of majority (chronological age 18) the LEA shall provide any notice required under the procedural safeguards of 20 USC 1415 to both the adult student and the parents. All other rights accorded to parents under 20 USC 1411-1414 transfer to the adult student. LEA's are, therefore, required to provide written prior notice to the

parents, including the parents of an adult student, whenever the LEA proposes to initiate or change, or refuses to initiate or change, the identification evaluation or educational placement of the student or the provision of a free appropriation public education. Thus, the parents of the adult student are to be notified of the meeting and would have the opportunity to participate, unless the adult student objected. The particular provisions of ARM 10.16.1114 correspond to federal requirements found in 20 USC 1414, where rights do transfer to the adult student at age of majority.

COMMENT 11: Arlyn Sundsted commented that there may not be parents available to satisfy (1)(a). This rule appears to limit the definition of parents.

RESPONSE 11: The language in (1)(a) is consistent with the federal requirement found at 20 USC 1414(d)(1)(B)(i). Nothing in this rule limits the definition of parent as found in 20 USC 1001(19). Following the provisions of 34 CFR 300.345 would satisfy the parent participation requirement of this administrative rule in the event the parent chooses not to attend.

COMMENT 12: Laurie Salo, Special Services Director in the Belgrade School District, commented that if the student is participating in regular education, does this eliminate school counselors as representing a regular education teacher? Many counselors are certified teachers and are aware of curriculum and work in the classroom.

RESPONSE 12: School counselors and certain other specialists who are certified as general education teachers meet the requirements of a general education teacher by the nature of their credential.

COMMENT 13: Laurie Salo commented that there are many students who are 18 and living on their own or living with relatives who do not have guardianship but have 6 months power of attorney. When writing IEPs which have a duration of 1 year, and power of attorney is only 6 months, how is this handled? For students in temporary foster care who have a guardian ad litum, there is a problem with getting a response.

RESPONSE 13: Issues of parental authority, foster care and guardianship are not altered by the proposed rule.

COMMENT 14: Arlyn Sundsted commented that if "administrative representative or designee of the local educational agency" means someone from the school district, this may be difficult to comply with because some smaller schools don't have qualified special education teachers.

Would a representative from a cooperative qualify as representing the local educational agency?

RESPONSE 14: By nature of the inter-local agreement creating special education cooperatives, personnel of the cooperative may represent the district as requested by the district.

10.16.1119 CRITERIA FOR IDENTIFICATION OF STUDENT AS HAVING A HEARING IMPAIRMENT (1) The student may be identified as having a hearing impairment if an audiological report documents that the student has ~~an organic~~ permanent hearing loss in excess of 20 dB better ear average in the speech range (500, 1,000, 2,000 Hz), unaided, or has a history of fluctuating hearing loss which has interrupted the normal acquisition of speech and language and continues to adversely affect educational performance. "Adversely affect the student's educational performance" means that the student's ability to learn in the regular education setting remains severely affected even when classroom interventions are applied or accommodations provided, to the degree that the student needs special education and related services.

(2) remains the same.

COMMENT 15: Gail Surwill and Pat Gumm commented that the word "permanent" should be added to the sentence "the student may be identified as having a permanent hearing impairment if..." because it is in the federal definition.

RESPONSE 15: OPI agrees.

10.16.1122 CRITERIA FOR IDENTIFICATION OF STUDENT AS HAVING SPECIFIC LEARNING DISABILITY (1) The student may be identified as having a specific learning disability if, when provided learning experiences appropriate to the student's age and ability levels:

(a) remains the same as proposed.

(b) The student has a severe discrepancy between the student's intellectual ability and academic achievement in one or more of the following areas: oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematics calculation, mathematics reasoning~~, phonological awareness skills~~; and

(c) The severe discrepancy between ability and achievement is not correctable without special education and related services.

(i) remains the same as proposed.

~~(ii) The child study team may determine that, based on a phonological awareness assessment which indicates that the student's scores fall two or more standard deviations below the norm, the student's knowledge of sounds, how they blend together to form words, phrases and sentences severely limits the student's ability to perform basic reading skills~~

~~at a level appropriate to the student's ability.~~

(iii) remains the same as proposed, but is renumbered (ii).

(2) and (3) remain the same as proposed.

COMMENT 16: Philip House, Psy.D., NCSP, from Billings; Cynthia Paugh Shumaker, M.Ed. from Billings; Fred Appelman, Director of Missoula Area Education Cooperative; Margaret Tryon, Director of Miles City School District Special Services; Gail Surwill; Leonard Orth; and Pat Gumm commented that phonological awareness skills should be removed. It is a component of the basic reading skills disability already included in the eligibility criteria.

COMMENT 17: Mark Taylor, NCSP, LCPC from Billings, commented that he supports the addition of the phonological awareness category as it would conform with what is actually known about reading disabilities. Current practice forces the schools to wait until the child is in the third grade to evaluate for learning disability.

RESPONSE 16 & 17: OPI concurs with the comments that reference to phonological awareness should be removed.

COMMENT 18: Leonard Orth, Pat Gumm, and Ann Whiteman commented that each disability category needs to include the exclusionary factors of limited English proficiency and lack of instruction in reading & math.

RESPONSE 18: ARM 10.16.1113 incorporates by reference 20 USC 1414 and its implementing regulations. Section 1414(b)(5) requires that a student shall not be determined to be a child with a disability if the determinate factor for such determination is lack of instruction in reading or math or limited English proficiency. Rather than repeating this requirement in each of the disability criteria, this section of federal law and/or its implementing regulations will be included in future reprints of the Montana Special Education Reference Manual (MSERM).

COMMENT 19: Mike Kinne commented that in (2)(b), a student may be identified only when written documentation supports that "at least two intervention techniques have been tried," the wording should be changed to read "at least two intervention techniques <u>over a regular extended amount of time</u> have been tried." An intervention technique would have to be more than working with a student for a couple of days after school without seeing improvement and considering that as one intervention technique.

RESPONSE 19: Circumstances with individual students differ and it is up to the professionals involved to determine the length of time and intensity of efforts sufficient to constitute an intervention.

7. After consideration of the comments received, the following rules are being adopted as proposed with those changes given below, new material underlined, deleted material interlined.

RULE I [10.16.1125] CRITERIA FOR IDENTIFICATION OF STUDENT AS HAVING AUTISM (1) and (2) remain the same as proposed.

(3) The student may not be identified as having autism if the student has a hearing impairment, ~~serious~~ emotional disturbance or global cognitive defects in which the student exhibits "autistic-like" behavior, such as Rett's disorder, Asperger's disorder, or childhood disintegrative disorder.

COMMENT 20: Gail Surwill commented that the wording for health factors as an exclusionary factor should include "socially maladjusted unless it is determined that they have an emotional disturbance."

RESPONSE 20: OPI amends the rule. The rule states that serious emotional disturbance is an exclusionary factor for autism. Using the term "serious" implies a condition other than what is defined as emotional disturbance under RULE II [10.16.1126]. This is not what is intended.

COMMENT 21: Leonard Orth commented he feels the rule is cumbersome. Subsection (2) is hard to follow.

RESPONSE 21: The multiple factors necessary to consider eligibility for this disability category make the rule complex.

COMMENT 22: Pat Gumm commented positively on the exclusion of Asperger's. Those students can qualify for services under other disability categories if they don't qualify under autism.

RESPONSE 22: Positive comment noted.

RULE II [10.16.1126] CRITERIA FOR IDENTIFICATION OF STUDENT AS HAVING EMOTIONAL DISTURBANCE (1) through (3) remain the same as proposed.

(4) The student may not be identified as having emotional disturbance if:

(a) Delays in educational performance are primarily due to visual impairment, hearing impairment, orthopedic impairment, cognitive delay, health factors, cultural factors or limited educational opportunity; or

(b) remains the same as proposed.

(5) The term emotional disturbance does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance.

COMMENT 23: Pat Gumm commented that there is language in the federal definition that should be added to (4). Health factors and the use of social maladjustment should be added as exclusionary factors.

RESPONSE 23: OPI agrees.

COMMENT 24: Leonard Orth commented that (1) is not limiting enough. It would be difficult to justify not including a student with very bad behavior. He would like to see more definition or perhaps two or more characteristics.

RESPONSE 24: Federal regulations use the terms "one or more of the following characteristics." To require two or more characteristics would be more restrictive than federal regulation would allow.

COMMENT 25: Leonard Orth commented that (3)(c)(i), documenting interventions and observations including procedures used, their duration, and results, appears to be new and will generate more paperwork.

RESPONSE 25: Documenting interventions and observations is essential for identification of this disability category.

RULE IV [10.16.1128] CRITERIA FOR IDENTIFICATION OF STUDENT AS HAVING TRAUMATIC BRAIN INJURY (1) and (2) remain the same.

(3) The term traumatic brain injury applies to open or closed head injuries resulting in impairments in one or more areas such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual, and motor abilities; psycho-social behavior; physical function; information processing; and speech.

(3) remains the same as proposed but is renumbered (4).

COMMENT 26: Pat Gumm commented that the federal regulations have a specific category for traumatic brain injury that would be helpful if included in the definition: cognition, language memory, attention, reasoning, abstract thinking, judgement, problem solving, sensory perception, and motor difficulties.

RESPONSE 26: OPI agrees.

8. After consideration of the comments received the following rule will not be adopted.

RULE V CRITERIA FOR CONTINUED ELIGIBILITY

COMMENT 27: Leonard Orth, Pat Gumm and Arlyn Sundsted commented that this rule appears to indicate that for continued eligibility there is no longer a need to meet criteria. In subsequent reevaluations, there is no longer a need to document a disability, only the need for ongoing special education and related services.

RESPONSE 27: The process and criteria for determining continued eligibility is contained in ARM 10.16.1113 which has been reordered to describe the eligibility determination process as it occurs chronologically. Therefore, this rule will not be adopted.

9. Based on the foregoing, the Superintendent of Public Instruction hereby repeals, amends and adopts the rules as proposed, with changes noted above.

Geralyn Driscoll
Rule Reviewer
Office of Public Instruction

Nancy Keenan
Superintendent
Office of Public Instruction

Certified to the Secretary of State January 4, 1999.

BEFORE THE DEPARTMENT OF FISH, WILDLIFE AND PARKS
OF THE STATE OF MONTANA

In the matter of the repeal of rules 12.6.1501 through 12.6.1519 and adoption of new rules I through XXV relating to game farms.	) NOTICE OF REPEAL) AND ADOPTION) OF GAME FARM RULES))

TO: All Interested Persons.

1. On October 8, 1998, the Department of Fish, Wildlife and Parks (department) published notice of public hearings regarding the department's consideration of proposed game farm rules at page 2646 in the 1998 Montana Administrative Register, issue number 19.

2. Pursuant to the Montana Negotiated Rulemaking Act, Title 2, chapter 5, part 1, MCA, the department and the department of livestock published an announcement at page 926 of the 1996 Montana Administrative Register, issue number 7, seeking nominations for persons to serve on a committee to consider changes in game farm rules as authorized by the 1995 Legislature. Rules were developed jointly with the department of livestock, and public hearings were held jointly in Billings, Great Falls and Missoula. The department accepted written comments regarding the proposed rules through November 13, 1998.

3. The department has repealed ARM 12.6.1501, 12.6.1502, 12.6.1502A, 12.6.1503, 12.6.1503A, 12.6.1504, 12.6.1504A, 12.6.1505, 12.6.1506, 12.6.1507, 12.6.1508, 12.6.1509, 12.6.1510, 12.6.1511, 12.6.1512, 12.6.1513, 12.6.1514, 12.6.1515, 12.6.1516, 12.6.1517, 12.6.1518, and 12.6.1519 as proposed.

4. After consideration of public written and oral comments, the department adopted rule I (ARM 12.6.1520), rule II (ARM 12.6.1521), rule III (ARM 12.6.1522), rule IV (ARM 12.6.1523), rule V (ARM 12.6.1524), rule VI (ARM 12.6.1525), rule VII (ARM 12.6.1526), rule VIII (ARM 12.6.1527), rule IX (ARM 12.6.1528), rule X (ARM 12.6.1529), rule XI (ARM 12.6.1530), rule XIV (ARM 12.6.1533), rule XV (ARM 12.6.1534), rule XVI (ARM 12.6.1535), rule XVII (ARM 12.6.1536), rule XVIII (ARM 12.6.1537), rule XXI (ARM 12.6.1540), rule XXII (ARM 12.6.1541), rule XXIV (ARM 12.6.1543), and rule XXV (ARM 12.6.1544) as proposed. The department has adopted rule XII (ARM 12.6.1531), rule XIII (ARM 12.6.1532), rule XIX (ARM 12.6.1538), rule XX (ARM 12.6.1539), and rule XXIII (ARM 12.6.1542) with the following changes from the original proposal. Matter to be deleted is interlined. Matter to be added is underlined.

RULE XII (ARM 12.6.1531) MINIMUM FENCE STANDARDS FOR APPLICATIONS FILED AFTER JANUARY 15, 1999 FOR FACILITIES HOLDING CLOVEN-HOOFED UNGULATES (1) through (2) remain as proposed.

(3) Exterior fence posts must extend a minimum of 8 feet

above the ground and be of sufficient strength to maintain the fence integrity.

(a) line post requirements are as follows:

(i) through (ii) remain as proposed.

(iii) t-posts and channel steel posts must be a minimum of 1.33 pounds per foot and be spaced no more than 20 feet apart, and must be supported by a wooden or steel pipe post every ~~80~~ 60 feet;

(3)(a)(iv) through (3)(c)(vi) remain as proposed.

(4) All exterior fence gates must be maintained in a closed, locked position at all times except when in use. The gates must have one latching and at least one locking device. All gates must be installed in location approved by the department.

AUTH: 87-4-422, MCA IMP: 87-4-426, MCA

RULE XIII (ARM 12.6.1532) MINIMUM FENCE STANDARDS FOR FACILITIES HOLDING CARNIVORES AND OMNIVORES (1) Facilities for holding ~~carnivores and omnivores~~ black bears and mountain lions constructed or reconstructed after January 15, 1999, must be constructed and maintained in compliance with the following minimum fencing standards:

(a) all open topped enclosures must meet the following minimum standards:

(i) all exterior fence barriers must be constructed to a minimum of 12 feet in height with ~~woven wire~~ chain link or other material approved by the department at least 9 gauge in strength or with a solid material that cannot be destroyed and prevents climbing by species contained therein. Enclosures must provide a minimum of 300 square feet of dry resting area for one animal and be increased by 50 percent for each additional animal;

(1)(a)(ii) through (2) remain as proposed.

AUTH: 87-4-422, MCA IMP: 87-4-426, MCA

RULE XIX (ARM 12.6.1538) EGRESS AND INGRESS (1) through (2) remain the same.

(3) The licensee shall make every reasonable effort to recapture or destroy escaped game farm animals within the following time periods from the date of discovery or notice of the escape:

(a) forty-eight hours for males during the breeding seasons specified below:

(i) pronghorn antelope - August through September;

(3)(a)(ii) through (8) remain as proposed.

AUTH: 87-4-419 and 87-4-422, MCA IMP: 87-4-419, MCA

RULE XX (ARM 12.6.1539) GAME FARM RECORDS AND REPORTS (1) The licensee shall maintain records, including records and reports prepared on forms provided by the department and the department of livestock, inspection certificates, receipts, invoices, agreements of sale, canceled checks, and bills of sale, in accordance with 87-4-417, MCA. The licensee shall keep such records on or near the premises of the game farm and shall make the records kept on forms provided by the department and the department of livestock available for inspection upon the

department's request. The licensee shall declare in the license application the location of a licensee's game farm records and reports and shall notify the department of any changes in their location.

(2) through (7) remain the same.

(8) Upon the termination, revocation, or surrender (including the failure to renew) of a license, a licensee shall, within 10 days of the removal of the game farm animals, submit a final report, including records and reports prepared on forms provided by the department and the department of livestock, showing the disposition of the animals.

AUTH: 87-4-417 and 87-4-422, MCA IMP: 87-4-426, MCA

RULE XXIII (ARM 12.6.1542) ELK-RED DEER HYBRIDIZATION

(1) Licensees shall test all elk born on or prior to December 31, ~~1998~~ 1999, for elk-red deer hybridization by January 1, ~~1999~~ 2000.

(2) Licensees shall test all elk born between January 1, ~~1999~~ 2000, and December 31, ~~2000~~ 2001, for elk-red deer hybridization by January 1 of the year following the year of birth or when the animal is sold or transported from the game farm, whichever comes first. Game farms that provide documentation to the department verifying that all game farm elk on the facility have been hybrid tested prior to January 1, 1999 may apply for a waiver of the requirement to test offspring born in 2001. To be granted a waiver by the department, a game farm must:

(a) provide a list of all elk on the game farm as of December 31, 1998, and copies of laboratory hybrid test results to the department by March 1, 1999;

(b) provide copies of laboratory hybrid test results to the department for any elk purchased or otherwise acquired on the game farm during 1999;

(c) hybrid test all offspring born on the game farm during 1999 and 2000.

(3) through (5) remain as proposed.

AUTH: 87-4-422, MCA IMP: 87-4-407 and 87-4-424, MCA

5. The department received a total of 67 comments regarding these rules. The following is a summary of the comments received opposing the rules or suggesting changes, along with the department's responses to those comments:

COMMENT 1: There are many things in these rules that are not the consensus of the negotiated rulemaking committee.

RESPONSE 1: All six caucuses in the negotiated rulemaking committee agreed to the rules that were proposed with the one exception regarding records and reports. In a comparison of the proposed rules with the final draft agreed to by the negotiated rulemaking committee, facilitator Gerald Mueller noted only two minor word changes, which did not alter the meaning of the rules.

COMMENT 2: Only a current licensee or the department should be permitted to petition to change the species of animals that may be kept on a game farm.

RESPONSE 2: Rule II (ARM 12.6.1521) only allows the addition or deletion of cloven-hoofed ungulates to the list of approved or disapproved game farm animals; it does not allow changes to be made to the statutory definition of game farm animals. Any changes in the list of cloven-hoofed ungulate species must be made through a rulemaking process that provides for public discussion and comment. This is not a process that is easily undertaken, and any of the statutorily authorized species of game farm animals cannot be deleted from the rule. The criteria for denial or approval of a species change are established in statute and rule.

COMMENT 3: Individuals need to be able to make modifications in their operations that could require a new Environmental Assessment (EA) or Environmental Impact Statement (EIS) at the discretion of the department. Montana Alternative Livestock Producers (MALP) would like Montana Environmental Policy Act (MEPA) implementation to be consistent and reasonable. The MEPA process should be used fairly or not at all. It should be less stringent on the game farmer. The department should streamline the process and make it more cost effective.

RESPONSE 3: The proposed rules describe a consistent process for MEPA review and game farm modifications that require the applicant or licensee to describe the proposed action that will be reviewed by the department to avoid misunderstandings. Some modifications of licenses are specifically excluded from MEPA review and others are subject to a supplemental MEPA review only if the original MEPA review did not address all the impacts or concerns. One of the important purposes of a MEPA review is to identify site-specific conditions that warrant special requirements to ensure that the facility will operate within the game farm laws. Consequently, there will be times when the MEPA review will identify important license stipulations to mitigate potentially serious impacts of the proposal.

A programmatic review could help simplify the checklist EA, but based on the variability of sites, it is unlikely that the process would be simplified to the extent that is desired. Categorical exclusions can only be provided for a group of actions that have no impacts based on a comprehensive analysis; such an analysis has not been conducted on game farms.

COMMENT 4: Nowhere in this rulemaking process is there an analysis of costs versus revenues to allow the reader to determine if we will continue spending sports-persons' money to help a failing agriculture business get into another line of income.

RESPONSE 4: Game farm license fees are established in

statutes and cannot be changed in these rules.

COMMENT 5: The requirement for peak animal numbers in a game farm application is bothersome because this may need to be changed over time. Animal numbers should not be regulated.

RESPONSE 5: The game farmer is best suited to estimate the maximum number of animals that will be held on the licensed facility. This information is necessary to prepare the environmental assessment. An applicant may estimate any peak number that he reasonably foresees. No limitation is placed on the applicant. Changes may be made at any time that a licensee anticipates the possibility that his/her peak number may be exceeded. The need for a supplemental environmental review will be determined by the department.

COMMENT 6: In rule III (ARM 12.6.1522)(4) the language which states, "and under the same ownership or secured lease" should be stricken. Neighbors may form a business relationship to establish a game farm on both properties, or a licensee may wish to utilize multiple leases for establishment of a game farm operation. This is not an animal welfare issue. Single location would be better defined using more geographic data such as streams, roads, buildings, etc. instead of land ownership.

RESPONSE 6: The current language does not preclude any of the situations identified as concerns. Neighbors may form a partnership to share land that is owned or leased between them. Multiple leases may be incorporated into a single game farm.

COMMENT 7: The three year time period permitted in rule III (ARM 12.6.1522)(5) is a very generous time allotment to allow construction. These activities could be completed in a much shorter time period.

RESPONSE 7: Three years was determined to be a reasonable time in which to complete construction, during which no significant changes in the surrounding land uses or laws would have occurred. Larger facilities may take the full three years to construct, but approval is given on a phased-in basis to assure appropriate environmental analysis.

COMMENT 8: There should not be any regulations limiting the hunting of game farm animals. No one should tell the game farmer when he can shoot his animals; they are private property.

RESPONSE 8: Montana statutes require the department to evaluate public safety issues associated with the shooting of game farm animals.

COMMENT 9: Will the renewal fees based upon number of animals on the facility as of December 31 of each year lead to manipulation of inventories before year end followed by a ballooned inventory during the rest of the year? Why doesn't

the department assess the renewal fee based upon the peak number during the year?

RESPONSE 9: Game farm animals must be held on a licensed facility at all times. The cost of the veterinary inspection and disease testing that are generally required for the transport of animals from one facility to another would exceed the additional license fee cost in most cases.

The renewal fee is based on the number of animals on hand as reported to the department in the January report submitted by all game farms. The increased workload associated with determining the peak number for each game farm would not likely be offset by any increase in license fees collected.

COMMENT 10: All costs of licensing, inspection, management, and enforcement must be underwritten by a licensee.

RESPONSE 10: Game farm license fees are established in statute and cannot be changed in these rules.

COMMENT 11: If a licensee fails to submit the renewal fee and required reports by April 1 of each year and then files a new license application accompanied by the initial application fee, will there ever be an occasion when this will result in a lower fee? What if an applicant has legally raised the peak number since the initial application?

RESPONSE 11: If a licensee fails to renew the license, the new application will be based on projected peak numbers for the facility. The new application fee would always be greater than the renewal fee.

COMMENT 12: Why does it have to take so long to get a license renewed?

RESPONSE 12: Under Montana statute, records and reports must be reviewed for accuracy and completeness prior to license renewal. For some game farms, it takes a long time to verify reports. The proposed rules address this concern by allowing the department to issue a license renewal without verifying the records.

COMMENT 13: There is no time frame stated for processing a transfer and receiving approval.

RESPONSE 13: Time frames would be the same as for any other game farm application. Montana statutes define the criteria for a license transfer.

COMMENT 14: MALP recommends changing rule XII (ARM 12.6.1531)(3)(a)(iii), regarding t-posts to read "...and must be supported by a wooden or steel pipe post every 60 feet". The industry has determined this to be a safer spacing distance.

Facilities that are already constructed with the 80-foot distance should be grandfathered.

RESPONSE 14: The department concurs and has made this change in the proposed rules. Facilities that were constructed under the waiver provisions will not be required to change their post spacing unless a problem is identified.

COMMENT 15: Only proven fact should be used to justify extra fencing stipulations. Recent license stipulations have required increased fence height on steep slopes that exceed the agreed upon fencing standards in the proposed rules. The department should have to provide proof that a fence is not in game proof condition before requiring a modification.

RESPONSE 15: The department relies on information from game farmers concerning ingress and egress, as well as visual observations and reports to determine that there is a problem with the fences. Holes under fences and gates must be addressed prior to evidence that there has been ingress or egress.

COMMENT 16: Interactions between wild animals and game farm animals pose an unacceptable risk for the spread of disease. Fencing requirements must be such that animals cannot get in or out, and a fenced buffer zone must be compulsory.

RESPONSE 16: Site-specific conditions are used to define the necessary requirements for a game proof fence. When disease issues become a concern, Montana department of livestock and the department have the authority to require double fencing or other measures to control the potential spread of disease. The department evaluates each proposed game farm site to determine if the minimum standards will be adequate to prevent ingress/egress. In some locations, additional fencing requirements are necessary. If ingress or egress becomes a problem after a facility has been licensed, the department may require additional measures to improve the fence.

A fenced buffer zone would help control ingress and egress by virtue of the double fence that would be necessary. Double fencing is an expensive requirement that has only been recommended in situations where no other alternative was expected to provide a game proof enclosure.

COMMENT 17: Existing game farms should be grandfathered in and should only have to comply with the rules in place when they were licensed. They should not have to meet these new rules.

RESPONSE 17: Currently licensed facilities that have maintained fencing in a game proof condition are exempt from the new fencing standards unless the facility fences are reconstructed or a problem is identified.

COMMENT 18: We need to reconsider the requirement that all

gates must be self-closing and equipped with two locking devices. The game farmers would like to have one latching and one locking device.

RESPONSE 18: Rule XII (ARM 12.6.1531)(4) has been clarified to require one latching and at least one locking device for exterior fence gates. Gates do not have to be self-closing, but must be kept closed and locked except when in use.

COMMENT 19: I am concerned about these big fences, the ones that stretch a mile or so, on our wildlife in terms of migration corridors or certain features in the landscape that enable them to survive. I would like to see the department analyze the impact of all these fences.

RESPONSE 19: The EA that is completed for each game farm application analyzes the effect of fencing on surrounding wildlife. There is specific statutory authority for denying or mitigating impacts on wildlife.

COMMENT 20: There should be a cost assessed to the game farmer for removing all the wild game from the game farm enclosure.

RESPONSE 20: Such a fee would have to be implemented by the Montana legislature.

COMMENT 21: For carnivores/omnivores, minimum fence standards should not apply to existing facilities. Also, an alternative to chain link fence for carnivore/omnivore cages should be allowed if there is something better and more economical.

RESPONSE 21: The proposed rules specifically exempt carnivore/omnivore cages constructed prior to the effective date of these rules. Language has been added to provide the opportunity to use alternative fence material that is approved by the department.

COMMENT 22: Ingress or egress on a grandfathered facility should result in the loss of license until current fence standards are met.

RESPONSE 22: The game farm statutes do not provide the authority for a temporary license suspension. The department can initiate a deferred license revocation proceeding to remedy the fencing problems.

COMMENT 23: With regard to carnivores/omnivores, the licensee should not have to get an inspection every time a licensee moves an animal for filming or photography. In the past, agreements have been worked out with the department and this circumstance should be part of the rules.

RESPONSE 23: The purpose of this rule is to provide

consistency in the tracking of game farm animal movements. Under the waiver provision, the department may agree to an alternative tracking system for the movement of carnivores and omnivores as long as it can be consistently applied and allows for appropriate monitoring of the animals.

COMMENT 24: Costs related to capture and identification of escaped game farm animals by department personnel should be charged to the legal owner upon capture.

RESPONSE 24: The Montana legislature would have to provide this authority.

COMMENT 25: Failure to report ingress or egress should result in the termination of all permits.

RESPONSE 25: A game farm license may be revoked for failure to comply with the statutes or rules regulating game farms. Failure to report ingress or egress will be grounds for license revocation under the proposed rules. The statutes do not provide authority for license termination without due process.

COMMENT 26: MALP did not agree to new rule XX (ARM 12.6.1539) (1) This rule seeks private documents which have no bearing on current records required by the department. This requirement is not enforceable and should be left out, or explain what gives the department the right to do as they want when the industry won't agree to the rule as written. The department would have to have a court order to get those records anyway. In new rule XX (ARM 12.6.1539)(8) the ambiguity associated with "records" should be eliminated by changing the language to read, "including records and reports prepared on forms provided by the department and the department of livestock...."

RESPONSE 26: The rule clarifies what records must be maintained by a game farmer to document lawful purchases and sales of game farm animals. The rule states that a licensee needs to provide forms/reports that are required by the department and the department of livestock, unless a court orders other requirements. These records must be available to resolve unlawful game farm activities. This rule is included despite a lack of consensus in negotiated rulemaking because it is necessary for game farmers to be aware of the records that must be maintained for adequate accountability of game farm animals.

The language concerning which records to provide has been added to the proposed rule.

COMMENT 27: Reports should be once a year, Jan. 1, regardless of the number of transactions. The July report does not give an accurate report because of new births.

RESPONSE 27: The proposed rules provide a process for most

game farmers to report only once per year, in January. The 1995 legislature reduced the reporting requirement from three times per year (January, April, September) to two times per year (January and July) based on considerable discussion with the game farm industry. The Legislature would have to change the times of year for reporting. The July report is expected to be an accurate report of animals on hand as of June 30, and any subsequent births would be included on the supplemental reports that would be submitted in January.

COMMENT 28: The department is premature in deleting the restrictions on possessing caribou/reindeer and moose for purposes of game farming west of the continental divide. No one has clearly precluded the reestablishment of native woodland caribou in the Yaak or North Fork of the Flathead and the elimination of the restriction at this time will place a major hurdle before any future consideration of such effort.

RESPONSE 28: Appropriate authorities were contacted and there is no basis for excluding caribou/reindeer from game farming operations. Game farm location would determine any additional fencing requirements that might be necessary to prevent escape in potentially sensitive areas. Moose may be difficult to contain and raise in captivity, but the department of livestock can restrict the import of these animals for disease control, which was the primary concern for prohibiting them in the past.

COMMENT 29: The dates for testing elk should be changed to provide operators time to test animals. The dates should be the same as those prescribed in department of livestock new rule VIII (MAR notice 32-3-142). Game farmers should have until January 1, 2000 to test all the animals. Game farms should only have to test all elk born between January 1, 1999 and December 31, 2000.

RESPONSE 29: The department changed Rule XXIII (ARM 12.6.1542) to require that all game farm animals born on or prior to December 31, 1999 in Montana be tested prior to January 1, 2000. All elk born between January 1, 2000 and December 31, 2001 must also be tested. Game farms that conducted hybrid testing on all game farm elk in 1998 may request a waiver from the requirement for testing offspring born in 2001. A waiver will be granted if it is determined that all elk were tested in 1998, the game farm demonstrates that all elk acquired during 1999 were tested, and all offspring were hybrid tested in 1999 and 2000.

COMMENT 30: Animals should only have to be tested if they are sold or transported from the game farm. If they stay on the farm, they are not going to spread any disease or red deer to any other game farms. This is what was agreed to in negotiated rulemaking process.

RESPONSE 30: Red deer and red deer hybrids are prohibited in

Montana. All game farm animals must be tested to verify that there are no hybrids in the state. The language in the proposed rule is what was agreed to by the negotiated rulemaking committee.

COMMENT 31: The testing for elk-red deer hybrids is not 100% accurate, and too much emphasis may be placed on a less than perfect test.

RESPONSE 31: The department understands that the test is not always effective in identifying hybrids, however, this is the best test currently available for use in determining compliance with the requirements. If a better test becomes available, department of livestock has the authority to require its use.

COMMENT 32: How long will the red deer testing last? Will it end after three years? It is unclear if all elk born after 2001 will continue to be tested for elk-red deer hybridization.

RESPONSE 32: Elk imported into Montana will always have to be red deer hybrid tested. Testing of elk within Montana will end after three years, all elk will be tested by December 31, 2001.

COMMENT 33: If it is not currently required, a new section should be added to require the testing of offspring beyond the next two years, or will there be an elk-red deer hybrid - free status?

RESPONSE 33: The elk-red deer hybrid test is not accurate enough to determine a hybrid-free status. Three years of testing offspring was agreed upon to verify the presence or absence of hybrids in a herd.

COMMENT 34: If all my elk were tested in the past and none were hybrids, how could I have a red deer hybrid calf now?

RESPONSE 34: The hybrid test does not identify 100% of possible hybrids. Crossing two animals that both test negative for red deer hybrid genetics can result in offspring that test positive. Testing at least three years of offspring was agreed upon to verify the presence or absence of hybrids in the herd.

COMMENT 35: The state vet came and tested all game farm elk for red deer a few years ago. Do we have to do the testing over again.

RESPONSE 35: Test results from approved laboratories may be submitted to the department of livestock. Individual animals whose tests can be verified do not have to be retested.

COMMENT 36: FWP should be required to give waivers on reasonable requests. One comment suggested the addition of a new rule XXV (ARM 12.6.1543)(5) to the waiver provision: "Waiver can be made when rule creates an undue hardship (or can't be

met) as in accepting subdivisions (zoning, etc.)." This change should be made if the waiver would not threaten the health and safety of wildlife, livestock and the public.

RESPONSE 36: Waivers provide exemptions from the requirements that all other game farmers are subject to; they are only granted when an undue hardship can be justified and there is no adverse affect on the health and safety of wildlife, livestock or the public. Game farm rules are intended to be applied consistently to all facilities.

COMMENT 37: "Undue hardship" should be defined so it is consistently applied at all times and by all agencies.

RESPONSE 37: The department intends to use the general dictionary definition of these terms. Undue means excessive or beyond what is expected or required. Hardship means suffering or privation which is difficult to bear.

RULE REVIEWER

Robert N. Lane

FISH, WILDLIFE AND PARKS

Patrick J. Graham, Director

Certified to the Secretary of State January 4, 1999.

BEFORE THE FISH, WILDLIFE AND PARKS COMMISSION
OF THE STATE OF MONTANA

In the matter of the adoption of new rules creating "primitive fishing access site designation" where site development and maintenance are limited.	)))))	NOTICE OF ADOPTION OF RULES

To: All Interested Persons.

1. On July 30, 1998, the Montana Fish, Wildlife and Parks Commission (commission) published notice of the proposed adoption of the above-captioned rules at page 1991, 1998 Montana Administrative Register, issue number 14.

2. The commission has adopted rule I (ARM 12.8.701), rule II (ARM 12.8.702), rule IV (ARM 12.8.704), rule V (ARM 12.8.705), rule VI (ARM 12.8.706), and rule VII (ARM 12.8.707) as proposed.

3. The commission has adopted rule III (ARM 12.8.703), rule VIII (ARM 12.8.708), and rule IX (12.8.709) with the following changes from the original proposal. Matter to be deleted is interlined. Matter to be added is underlined.

There were two sites in Region 2 that are owned by the bureau of land management (BLM) and managed via cooperative agreement by the department of fish, wildlife and parks (FWP). The BLM was not comfortable limiting the potential for future developments on these sites via the primitive fishing access site (FAS) designation and requested that they be removed from the list. The regional parks staff provided two additional sites for the list. For the proposed sites in Region 7, two spelling corrections were made. The commission's concern with regard to providing adequate road maintenance to fishing access sites resulted in a change to the development and improvements allowed at fishing access sites.

"RULE III (ARM 12.8.703) PRIMITIVE FISHING ACCESS SITES IN REGION 2 (1) The following sites are designated as primitive fishing access sites within Region 2:

(a) Aunt Molly;
(b) Bass Creek;
(c) Cedar Meadows;
(d) Erskine;
~~(d)~~ (e) Forks;
~~(e)~~ (f) Harry Morgan;
~~(f)~~ (g) Marco Flats;
~~(g)~~ (h) Natural Pier;
~~(h)~~ (i) Poker Joe;
~~(i)~~ ~~Red Rock~~;
(j) River Junction;
~~(k)~~ ~~Sheep Flats~~;
~~(l)~~ (k) Thibodeau;
(l) Turah;

(m) Whitaker Bridge."
AUTH: 87-1-301, MCA IMP: 87-1-301, 87-1-605, MCA

"RULE VIII (ARM 12.8.708) PRIMITIVE FISHING ACCESS SITES IN REGION 7 (1) The following sites are designated as primitive fishing access sites within Region 7:

(a) Amelia Island;
(b) ~~Broads~~ Broadus Bridge;
(c) Diamond Willow;
(d) Elk Island;
(e) ~~Falcon~~ Fallon Bridge;
(f) Joe's Island (adjacent to Intake FAS);
(g) Little Powder River;
(h) Myers Bridge;
(i) Powder River Depot;
(j) Seven Sisters;
(k) Twelve Mile Dam."

AUTH: 87-1-301, MCA IMP: 87-1-301, 87-1-605, MCA

"RULE IX (ARM 12.8.709) DEVELOPMENTS AND IMPROVEMENTS ALLOWED AT FISHING ACCESS SITES (1) The following management and development limitations will be applied to primitive fishing access sites. All new or future developments or improvements for primitive fishing access sites are limited as provided in this rule:

(a) no perimeter fencing unless necessary for the security of the site or to prevent conflicts off the site;

(b) ~~existing~~ access roads will be maintained in ~~the same condition as when the site was acquired or purchased or will be developed as a single lane gravel road only with designated pullouts for safe passage of vehicles~~ a condition which will prevent the degradation of the site and provide appropriate vehicular passage;

(c) through (j) remain as proposed.

AUTH: 87-1-301, MCA IMP: 87-1-301, 87-1-605, MCA

4. The commission received a total of 3 comments regarding the adoption of these rules. The comments the commission received are summarized below along with the commission's responses.

COMMENT 1: An individual attending a public meeting expressed concern that existing jet-boat launching opportunities on the Yellowstone River might be reduced or lost if the commission adopts the proposed primitive FAS designation.

RESPONSE 1: The intent of the proposed primitive FAS rule is to formally limit future development at selected FAS sites. The rule does not remove any existing FAS facilities, and current access opportunities will not be lost.

COMMENT 2: In the first primitive FAS proposal, MAR notice number 12-240, published at page 423, 1998 Montana Administrative Register, issue number 3, Paradise FAS was

included in the Region 3 listing of proposed primitive FAS sites. A landowner adjacent to the Paradise FAS south of Livingston responded in writing, opposing the primitive FAS designation for this specific site. The concern was that the primitive FAS designation would further limit FWP's ability to manage ongoing recreation/landowner conflicts at this site.

RESPONSE 2: The Paradise FAS was deleted from the proposed primitive FAS designation for Region 3. This second notice of rulemaking is the basis for this adoption.

COMMENT 3: An individual responded in writing to the proposed primitive FAS designation, requesting that FWP formally adopt the best management practices (BMPs) which are defined in 77-5-301, MCA, and ARM 26.6.601 [transferred to ARM 36.11.301]. These BMPs were enacted to protect stream management zones and pertain directly to timber harvest activities in the areas immediately adjacent to streams and bodies of water.

RESPONSE 3: As the BMPs are already in the Montana statutes and ARM rules, FWP is required to comply with the laws when constructing new roads and conducting timber harvest activities on any lands it controls. It is unnecessary to formally incorporate these BMP requirements into the proposed primitive FAS designation as the laws already apply to FWP activities.

RULE REVIEWER

Robert N. Lane

Robert N Lane

MONTANA FISH, WILDLIFE AND PARKS COMMISSION

Stan Meyer, Chairman

Certified to the Secretary of State on January 4, 1999

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of rules 17.30.602, 17.30.622 through 17.30.629, 17.30.702, 17.30.1001; the adoption of new rules I through III and the repeal of rules 17.30.1002 and 17.30.1003 pertaining to the Montana surface water quality standards, the nondegradation rules, and the groundwater pollution control system	NOTICE OF AMENDMENT, ADOPTION AND REPEAL OF RULES (Water Quality)

TO: All Interested Persons

1. On July 16, 1998, the Board of Environmental Review published notice of public hearing on the proposed amendments, adoption and repeal outlined above at page 1835 of the 1998 Montana Administrative Register, Issue No. 13.

2. The Board repealed rules 17.30.1002 and 17.30.1003 as proposed.

3. The Board has adopted NEW RULE I (17.30.1005) as proposed.

4. The Board has amended the following rules as proposed with the following changes. Matter to be added is underlined. Matter to be deleted is interlined.

17.30.602 DEFINITIONS In this subchapter the following terms have the meanings indicated below and are supplemental to the definitions given in 75-5-103, MCA:

(1) through (29) Remain as proposed.

(30) The board hereby adopts and incorporates by reference department Circular WQB-7, entitled "Montana Numeric Water Quality Standards" (~~August~~ November 1998 edition), which establishes limits for toxic, carcinogenic, bioconcentrating, nutrient, and other harmful parameters in water. Copies of Circular WQB-7 may be obtained from the Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901.

(31) Remains as proposed.

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

17.30.622 A-1 CLASSIFICATION STANDARDS (1) through (3) Remain as proposed.

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

(a) department Circular WQB-7, entitled "Montana Numeric Water Quality Standards" (~~August~~ November 1998 edition), which

establishes limits for toxic, carcinogenic, bioconcentrating, nutrient, and other harmful parameters in water; and

(4)(b) and (c) Remain as proposed.

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

17.30.623 B-1 CLASSIFICATION STANDARDS (1) and (2) Remain as proposed.

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

(a) department Circular WQB-7, entitled "Montana Numeric Water Quality Standards" (~~August~~ November 1998 edition), which establishes standards for toxic, carcinogenic, bioconcentrating, nutrient, and harmful parameters in water; and

(3)(b) and (c) Remain as proposed.

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

17.30.624 B-2 CLASSIFICATION STANDARDS (1) and (2) Remain as proposed.

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

(a) department Circular WQB-7, entitled "Montana Numeric Water Quality Standards" (~~August~~ November 1998 edition), which establishes standards for toxic, carcinogenic, bioconcentrating, nutrient, and harmful parameters in water; and

(3)(b) and (c) Remain as proposed.

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

17.30.625 B-3 CLASSIFICATION STANDARDS (1) and (2) Remain as proposed.

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

(a) department Circular WQB-7, entitled "Montana Numeric Water Quality Standards" (~~August~~ November 1998 edition), which establishes standards for toxic, carcinogenic, bioconcentrating, nutrient, and harmful parameters in water; and

(3)(b) and (c) Remain as proposed.

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

17.30.626 C-1 CLASSIFICATION STANDARDS (1) and (2) Remain as proposed.

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

(a) department Circular WQB-7, entitled "Montana Numeric Water Quality Standards" (~~August~~ November 1998 edition), which establishes standards for toxic, carcinogenic, bioconcentrating, nutrient, and harmful parameters in water; and

(3)(b) and (c) Remain as proposed.

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

17.30.627 C-2 CLASSIFICATION STANDARDS (1) and (2) Remain as proposed.

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

(a) department Circular WQB-7, entitled "Montana Numeric Water Quality Standards" (~~August~~ November 1998 edition), which establishes standards for toxic, carcinogenic, bioconcentrating, nutrient, and harmful parameters in water; and

(3)(b) and (c) Remain as proposed.

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

17.30.628 I CLASSIFICATION STANDARDS (1) and (2) Remain as proposed.

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

(a) department Circular WQB-7, entitled "Montana Numeric Water Quality Standards" (~~August~~ November 1998 edition), which establishes standards for toxic, carcinogenic, bioconcentrating, nutrient, and harmful parameters in water; and

(3)(b) and (c) Remain as proposed.

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

17.30.629 C-3 CLASSIFICATION STANDARDS (1) and (2) Remain as proposed.

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

(a) department Circular WQB-7, entitled "Montana Numeric Water Quality Standards" (~~August~~ November 1998 edition), which establishes standards for toxic, carcinogenic, bioconcentrating, nutrient, and harmful parameters in water; and

(3)(b) and (c) Remain as proposed.

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

17.30.702 DEFINITIONS Unless the context clearly states otherwise, the following definitions, in addition to those in 75-5-103, MCA, apply throughout this subchapter (Note: 75-5-103, MCA, includes definitions for "degradation", "existing uses", "high quality waters", and "parameter."):

(1) through (23) Remain as proposed.

(24)(a) The board hereby adopts and incorporates by reference:

(i) department Circular WQB-7, entitled "Montana Numeric Water Quality Standards" (~~August~~ November 1998 edition), which establishes limits for toxic, carcinogenic, bioconcentrating, nutrient, and harmful parameters in water; and

(24)(a)(ii) through (b) Remain as proposed.

AUTH: 75-5-301 and 75-5-303, MCA; IMP: 75-5-303, MCA

17.30.1001 DEFINITIONS For the purpose of this subchapter, the following definitions, in addition to those in 75-5-103, MCA, will apply:

(1) "Beneficial use" means a use of groundwater designated under the appropriate classification in ARM ~~17.30.1003~~ 17.30.1006.

(2) through (9) Remain as proposed.

(10) through (14) Remain as proposed.

(15) "WQB-7" means department Circular WQB-7, entitled

"Montana Numeric Water Quality Standards" (~~August~~ November 1998 edition), which establishes limits for toxic, carcinogenic, bioconcentrating, nutrient, and harmful parameters in water. AUTH: 75-5-201 and 75-5-401, MCA; IMP: 75-5-301 and 75-5-401, MCA

5. The Board 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 (17.30.1006) CLASSIFICATIONS, BENEFICIAL USES AND SPECIFIC STANDARDS FOR GROUNDWATERS

(1)(a) and (b) Remain as proposed.

(c) Except as provided in Rule I(2) ~~and Rule II(5)~~, a person may not cause a violation of the following specific water quality standards in Class I groundwater:

(1)(c)(i) through (2)(b) Remain as proposed.

(c) Except as provided in Rule I(2) ~~and Rule II(5)~~, a person may not cause a violation of the following specific water quality standards for Class II groundwater:

(2)(c)(i) through (3)(b)(iii) Remain as proposed.

(3)(b)(iv) drinking, culinary and food processing purposes where the specific conductance is less than ~~5,000~~ 7,000 microSiemens/cm at 25°C.

(3)(c) Remains as proposed.

(3)(c)(i) the human health standards listed in WQB-7, except that the nitrate nitrogen and nitrate plus nitrite nitrogen standards listed in WQB-7 do not apply to groundwaters with a specific conductance equal to or greater than ~~5,000~~ 7,000 microSiemens/cm at 25°C. The nitrate nitrogen and nitrate plus nitrite nitrogen standards for these waters are each 50 mg/l; and

(3)(c)(ii) through (4)(c)(i) Remain as proposed.

(4)(c)(ii) for concentrations of parameters in WQB-7 which are not listed as carcinogens, no increase of a parameter to a level that would adversely affect existing beneficial uses. The nitrate nitrogen and nitrate plus nitrite nitrogen standards ~~listed in WQB-7 do not apply to Class IV waters~~ are each 50 mg/l;

(4)(c)(iii) and (d) Remain as proposed.

(5) For Class III or IV waters, ~~W~~where it can be demonstrated to the satisfaction of the department that the field hydraulic conductivity is less than 0.1 feet per day in an affected or potentially affected groundwater zone, the nitrate nitrogen and nitrate plus nitrite nitrogen standards in ~~WQB-7~~ (3)(c)(i) and (4)(c)(ii) ~~and the nondegradation provision of 75-5-303, MCA, for nitrate and nitrate plus nitrite nitrogen,~~ do not apply ~~to Class I, Class II or Class III waters~~, provided that all existing and anticipated uses of the groundwaters are protected.

(6) Remains as proposed.

AUTH: 75-5-301, 80-15-105 and 80-15-201, MCA; IMP: 75-5-301 and

80-15-201, MCA

RULE III (17.30.1007) SAMPLE COLLECTION, PRESERVATION, AND ANALYSIS METHODS (1) and (2) Remain as proposed.

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

(a) ~~D~~department Circular WQB-7, entitled "Montana Numeric Water Quality Standards", ~~August~~ November 1998;

(3)(b) through (4) Remain as proposed.

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

6. The Board amended WQB-7 by (1) removing the numeric human health standards for iron and manganese and replacing them with narrative standards; adopting a numeric standard for Methyl Tertiary-Butyl Ether (MTBE) of 30 mg/L; and adopting a numeric standard for fecal coliform bacteria in groundwater of no fecal coliform bacteria (<1 MPN/100ml based on fermentation tube technique or <1 colony/100ml based on membrane filter technique). The Board adopted WQB-7 as proposed with the following exceptions:

a. The Board did not adopt any new or revised Required Reporting Values (RRVs);

b. The Board did not amend the standard for cyanide in WQB-7; and

c. In addition the Board adopted some changes in grammar and made other changes to correct numbers and language.

For more detailed information regarding the specific changes from those that were proposed, the November 1998 edition of WQB-7 may be obtained from the department upon request. This November 1998 edition indicates changes from those proposed by interlining the material to be removed and underlining the material to be added.

7. The Board received the following comments; Board responses follow:

REMOVE NITRATE STANDARDS FOR SOME GROUND WATERS

COMMENT #1: The Montana Constitution guarantees a right to a clean and healthful environment. Thus, it is illegal to allow high quality waters to be degraded. Furthermore, the proposed rule changes are contrary to the nondegradation provisions of 75-5-303, MCA, that states the quality of high quality waters including Class I, Class II and Class III groundwater must be maintained. The DNRC groundwater policy under development states, "it is the policy and practice of Montana to protect and improve the quality of its groundwater resources". The proposed rules do not advance that policy instead they undermine it.

RESPONSE: The proposed rule changes for groundwater Classes I, II, III and IV continue to support the Montana Constitutional right to a clean and healthful environment by requiring at a

are protected.

The definition of high quality waters (75-5-103(9)(a), MCA) exempts Class III and IV groundwaters from the nondegradation provisions for all parameters. The proposed rule, as modified in response to comments, limits the exemptions for nitrate nitrogen and nitrate plus nitrite nitrogen to slow-moving groundwater in Class III and IV waters. Therefore, the proposed rules do not affect the nondegradation provisions for parameters in WQB-7. In addition, all existing and anticipated beneficial uses of these slow-moving groundwaters are protected under the proposed rule changes.

The policy of the Board is to protect the quality of groundwater (and surface water) as well as ensure that the beneficial uses of all state waters are protected for present and future users. The Board believes that the rules as adopted are consistent with all applicable constitutional, statutory and policy requirements.

COMMENT #2: Groundwater is worthy of protection even if it is slow moving, or if it isn't the best natural quality. Adoption of these rules would hinder efforts to prevent future exceedances of the nitrate standard.

RESPONSE: Based on public comments, the Board has decided to adopt a nitrate nitrogen and nitrate plus nitrite nitrogen standard of 50 mg/L for groundwaters with a specific conductance equal to or greater than 7,000 μS/cm (part of Class III and all of Class IV). Furthermore the proposed groundwater rules are designed to protect the beneficial uses of all groundwater. To further that purpose the proposed rules include explicit reference to the beneficial uses that are to be protected and maintained for each groundwater class. For those slow-moving groundwaters that are being used as a drinking water supply, increases in nitrate nitrogen and nitrate plus nitrite nitrogen would be limited by the requirement that the water quality for existing uses be maintained.

COMMENT #3: Hydraulic conductivity can change dramatically over an aquifer. How will the Department determine when an aquifer has a conductivity of 0.1 feet per day? Specific conductance can change over an aquifer; how will the Department determine what the conductance is? Who will make the determination that an aquifer is "bad?" The state does not have an accurate picture of how high and low quality aquifers interact with each other and with surface waters. A hydraulic conductivity of 0.1 feet per day is not very protective of an aquifer or a drinking water well. It will take only 2 years 9 months to travel 100 feet. A hydraulic conductivity of .01 feet per day yields a more protective 27 years 5 months to travel the same distance. At the time the rule was discussed with the Water Pollution Control Council a hydraulic conductivity of 0.01 ft/day was indicated but the rule notice was 0.1 ft/day.

RESPONSE: The Board realizes that hydraulic conductivity is variable and the average hydraulic conductivity is dependent on the size of the area under consideration. The Department will address each new activity on an individual basis using existing permit requirements or provisions. The characteristics and interactions of Montana's groundwaters are indeed complex. Therefore, the best available data describing the aquifer in question and the best professional judgement of the DEQ will be used to evaluate each proposed activity. All applicants for a permit or approval from the Department are required to submit sufficient information for the Department to make a decision.

Hydraulic conductivity does not directly indicate the rate at which groundwater moves. To determine the rate of groundwater movement the following equation must be solved:

(Hydraulic Conductivity feet/day * gradient feet/feet)/ porosity = rate of movement ft/day.

For example: hydraulic conductivity = 0.1 ft/day,
gradient = 0.01 ft/ft,
porosity = .5,

(0.1 * 0.01) /0.5= 0.002 ft/day *365 days/yr = 0.73 ft/yr or 137 yrs/100 ft.

Instead of 2 years 9 months to travel 100 feet it will actually take 137 years to travel 100 feet. This slow rate of travel, restricting the provision to only Class III and IV waters, and requiring the protection of all existing and anticipated uses of these waters will protect usable aquifers and drinking water wells.

The figure of 0.01 discussed with the Water Pollution Control Advisory Council was with reference to the definition of "zone of influence" in the Mixing Zone Rules.

COMMENT #4: There may be some basis to relax the standards for certain kinds of systems but an upper limit to the change allowed is needed [for nitrate].

RESPONSE: The Board agrees and has adopted nitrate nitrogen and nitrate plus nitrite nitrogen standards of 50 mg/L for waters with a specific conductance equal to or greater than 7,000 μS/cm. In addition the requirement that existing and anticipated beneficial uses must be maintained acts as an upper limit to the allowed changes in nitrate nitrogen and nitrate plus nitrite nitrogen concentrations within and adjacent to slow-moving groundwaters.

COMMENT #5: Even though numerical standards are being eliminated, narrative standards still exist to protect beneficial uses. But the Department admits that it has no current written policy on how to interpret narrative standards. Just because beneficial uses are protected does not mean that we should relax standards so as to allow as much pollution as possible and still protect uses.

RESPONSE: Based on public comments, the Board has decided to adopt nitrate nitrogen and nitrate plus nitrite nitrogen standards of 50 mg/L for groundwaters with a specific conductance equal to or greater than 7,000 μS/cm (part of Class III and all of Class IV). Other "relaxations" of standards are the result of changes in EPA criteria. Standards are set at levels that will protect uses. The nondegradation regulations have not been changed and they are designed to maintain the quality of waters whose quality is better than the standards.

COMMENT #6: Considering the limited resources of DEQ, DEQ will have to rely on industry to determine those areas of "slow-moving groundwater." What requirements will be used to define these areas; will one well be sufficient or will more be needed?

RESPONSE: It is the responsibility of a permit applicant to provide the Department with sufficient information to make the appropriate decisions about impacts to beneficial uses and necessary limits. If, during the completeness review of a permit application, DEQ finds more information is necessary, it may require additional data or information. The scope of data needed will depend upon each specific case. The permits require monitoring and all permits are subject to revocation.

COMMENT #7: If excessive nitrate levels don't cause cows to abort their calves, the nitrate and nitrate plus nitrite nitrogen levels may still affect their health, productivity and performance.

RESPONSE: Nitrate nitrogen and nitrate plus nitrite nitrogen concentrations are not generally a problem for livestock until levels are over 50 mg/L. It is highly unlikely that such levels will be reached as a result of agricultural activities or housing developments. In response to comments, the Board has decided to adopt nitrate nitrogen and nitrate plus nitrite nitrogen standards of 50 mg/L for those waters with a specific conductance greater than 7,000 μS/cm (part of Class III and all of Class IV). The nitrate nitrogen and nitrate plus nitrite nitrogen standards for other classes of ground water will remain at 10 mg/L. The Board believes the rules as adopted include sufficient standards to protect livestock health, productivity, and performance.

COMMENT #8: Removing the nondegradation review requirements and nitrate standard for slow-moving groundwaters may undermine some of the efforts ongoing in the Missoula Valley to reduce the impact of septic tank discharges on the Missoula Valley sole-source aquifer and the Clark Fork River.

RESPONSE: The proposed rule changes would allow approval of septic systems without nondegradation review for nitrate

nitrogen and nitrate plus nitrite nitrogen only in areas where the groundwater moves very slowly and/or has a specific conductance greater than 2,500 μS/cm. These septic systems would be reviewed for compliance with both ground and surface water quality standards. If the discharge is to a groundwater where the hydraulic conductivity is high and the specific conductance is less than 2,500 μS/cm or to surface water, the nondegradation requirements would apply to those waters. During the nondegradation review of a proposed subdivision, or of an application for a groundwater permit, the applicant is required to provide the information necessary to demonstrate that other waters will not be adversely affected. The Department, in reviewing permit applications, will also look at the cumulative impact when a number of permits are being sought in the same area. Groundwater permits are issued for a definite time period and generally do not exceed 5 years. When a permit is reissued, the impacts of the discharges allowed by the permit are reevaluated. Additionally, during the lifetime of a permit, monitoring will be performed and permits may be revoked upon a showing of adverse impact on other waters.

The Clark Fork River is the subject of a voluntary nutrient reduction program. Nitrate nitrogen and nitrate plus nitrite nitrogen is one of the nutrients at issue. Because of the difficulty in assessing and limiting the cumulative impacts of nitrate nitrogen and nitrate plus nitrite nitrogen originating from septic tank disposal of domestic wastes on surface waters, the Board has decided that the nitrate nitrogen and nitrate plus nitrite nitrogen exclusion for slow-moving groundwaters will not apply to the Missoula Valley or other areas near surface water where nutrients are likely to be a major concern. This can be accomplished by restricting the nitrate nitrogen and nitrate plus nitrite nitrogen standard exclusions to only Class III and Class IV groundwaters. These groundwaters seldom, if ever, occur adjacent to surface water where nutrients are a major concern. The Board has made this change.

COMMENT #9: Was the Non-Degradation Task Force consulted about the proposed exemption from nondegradation review?

RESPONSE: Yes.

COMMENT #10: The change to the nitrate standard for Class III and IV and slow-moving groundwater is reasonable because the Montana Water Quality Act (75-5-301, MCA) requires the Board to classify waters according to present and future beneficial uses and to adopt standards of water quality giving consideration to the economics of waste treatment and because activities that could potentially impact groundwater quality are currently regulated under either state or local jurisdiction and receive close scrutiny.

RESPONSE: The Board has considered all relevant information and

public comments in reaching its decision to set a standard of 50 mg/L for "salty waters", and to restrict the provision for slow-moving groundwater to Class III and IV waters.

CHANGE THE IRON AND MANGANESE STANDARDS.

COMMENT #11: Even though iron and manganese are not toxic at the levels in the present standards they should be maintained because they are good indicators of other problems to come. The present standards are very protective of groundwater and should be retained.

RESPONSE: In the case of a mine or any other permitted discharge, the permit requires monitoring for those parameters likely to be affected by the discharge. Thus, iron and manganese are not needed as indicators. Actually, an increase in iron and manganese concentrations may indicate that reducing (anoxic) conditions are present in the groundwater. Thus, they are not good indicators of specific impacts.

COMMENT #12: Changes to the iron (Fe) and manganese (Mn) standards are in response to requests by the mining industry. Specifically to "help" with Fe and Mn because they were a problem at the East Boulder Mine near Big Timber. Who may benefit and who will have negative impact ("loses") from the proposed changes to the Fe and Mn standards?

RESPONSE: The possible changes in the iron and manganese standards are in response to public comments on WQB-7 without regard to the commentor's occupation. Standards are set to protect the present and future beneficial uses of state water, giving consideration to the economics of waste treatment and prevention (75-5-301, MCA). The current iron and manganese standards are intended to protect the potability of waters for public water supply, but are currently applied to all state water including those waters whose classification does not include public water supply use (Class C-1, C-2, and I surface water, and Class III and IV groundwater) or are marginal for drinking water (Class C-3 surface water and Class II groundwater). It was the Department's intent to apply the current standards to those waters which are classified as suitable for drinking water through the application of narrative standards. The current practice, is to use the best available information when interpreting narrative standards, including the use of secondary maximum contaminate levels.

Based on public comments the Board is retaining the current 1000 µg/L aquatic life standard for iron and setting narrative standards that establish guidelines of 300 µg/L for iron and 50 µg/L for manganese as aesthetic standards to prevent taste, odor, and staining effects.

A "benefit" in terms of reduced treatment costs may be realized by those facilities which discharge to waters which are

not protected for public water.

COMMENT #13: The proposed changes to the Fe and Mn standards may be a health risk for individuals who are required to reduce or track the daily intake of trace minerals. There is an official recommended daily intake (RDI) for both of these substances. The major indirect antioxidant nutrients like copper, iron, zinc and manganese should be kept at or near RDI levels. Toxicity does occur beyond these levels. High levels of manganese can affect livestock health due to relative copper deficiencies. This may require supplements to maintain livestock health.

RESPONSE: The Reference Daily Intake (RDI) is a component of the Daily Values published by the Food and Drug Administration (FDA). The RDIs are developed for food components that have Recommended Dietary Allowances (RDA). RDA is one of three sets of recommended values established by the National Academy of Sciences (NAS), National Research Council (NRC), and Food and Nutrition Board. The RDA is the dietary intake level that is sufficient to meet the nutrient requirements of nearly all individuals in the various subgroups (infants, children, adult males and females, lactating and pregnant females). The RDA for iron varies from six to 30 mg per day for infants to pregnant females, respectively. The RDI for iron is 18 mg/day. Although manganese is an essential nutrient, there is no RDA or RDI for manganese.

Based on this information, individuals limiting consumption to the RDI should not consume water which exceeds 1,750 µg/L (1.75 mg/L) of iron based on standard assumptions and 20% relative source contribution from drinking water. The current aquatic life standard is 1,000 µg/L.

Furthermore, based on public comments the Board is setting narrative standards that establish guidelines of 300 µg/L for iron and 50 µg/L for manganese as aesthetic standards to prevent taste, odor, and staining effects. These values are well below those that would affect individuals who are limiting, or should limit, their iron consumption.

COMMENT #14: I'm opposed to a rule change that would allow an upstream discharger to affect the taste and smell of my water just because someone says that change isn't going to kill me or make me sick.

RESPONSE: Based on public comments, the Board has set narrative standards that establish guidelines of 300 µg/L for iron and 50 µg/L for manganese as aesthetic standards to prevent taste, odor, and staining effects. Thus, these proposed rule changes should not impact the taste and smell of drinking water.

COMMENT #15: Colorado has an aquatic life standard for Mn. Was it considered in this proposal?

RESPONSE: An aquatic life standard was not part of the proposed rule changes. Although Colorado does have an aquatic life standard, the basis for this standard is not well established.

Furthermore, because of the limited solubility of manganese in natural surface waters it is very unlikely that manganese concentrations will reach levels harmful to aquatic life.

COMMENT #16: Fe and Mn should be removed because the present standards are not based on human health criteria. Combining numeric standards based on aesthetic or cosmetic effects with standards based on human health effects misrepresents the potential adverse impacts of these parameters. Iron and Manganese should not be included in WQB-7, and combined with health-hazard criteria such as benzene and cadmium.

RESPONSE: The Montana Water Quality Act directs the Department to adopt standards to protect, maintain and improve the quality and potability of state waters used as drinking water. The current standards are based on aesthetic properties of water that will affect its suitability when used as a source of domestic water. Because the current standards are not based on human health the numbers will be removed from the human health column and replaced with a footnote. The footnote will say: "The concentration of iron (manganese) must not reach values that interfere with the uses specified in the surface and groundwater standards (ARM 17.30.601 et seq. and 17.30.1001 et seq., respectively). The Secondary Maximum Contaminate Level (SMCL) of 300 micrograms per liter (µg/L) (50 µg/L for manganese) which is based on aesthetic properties such as taste, odor and staining, may be considered as guidance to determine the levels that will interefere with the specified uses."

COMMENT #17: Other parameters that are not based on human health criteria such as copper, lead and zinc should be removed from human health standards.

RESPONSE: The comment is beyond the scope of the proposed rulemaking. The water quality standard for lead is based on the protection of human health. Also, see the response to comment #16.

COMMENT #18: The proposed changes to the Fe and Mn standards would allow ASARCO to optimize the iron-salt treatment process in a cost-effective manner and remove antimony to permitted levels, as well as significantly reducing arsenic, all without adversely affecting water quality.

RESPONSE: The Montana Water Quality Act does not contain provisions for allowing violations of some standards in order to prevent, or minimize, violations of other standards. This is true even if allowing an exceedance of a standard for relatively non-toxic substance will simplify achieving the standards for a

more toxic substance. ASARCO, and other dischargers to state waters, are required to meet all applicable water quality standards.

COMMENT #19: Fe and Mn should have narrative rather than numeric standards.

RESPONSE: The Board agrees. Because the current standards are not based on human health the numbers will be removed from the human health column and replaced with a footnote. The footnote will say: "The concentration of iron (manganese) must not reach values that interfere with the uses specified in the surface and groundwater standards (ARM 17.30.601 et seq. and 17.30.1001 et seq., respectively). The Secondary Maximum Contaminate Level (SMCL) of 300 micrograms per liter (µg/L) (50 µg/L for manganese) which is based on aesthetic properties such as taste, odor and staining, may be considered as guidance to determine the levels that will interefere with the specified uses."

COMMENT #20: Montana should use the aquatic life standard of 1.6 mg/l for Mn if necessary.

RESPONSE: Adoption of a manganese standard for aquatic life is beyond the scope of the notice of proposed rulemaking and therefore the Board is proposing no action on this issue.

ADOPT A FECAL COLIFORM STANDARD FOR GROUNDWATER

COMMENT #21: Fecal coliform monitoring has long been recognized as a public health tool, but it is just a tool. It is an indicator and a parameter for which a hard-and-fast standard should not be set. Water quality standards should be set as the result of scientific documentation and studies and should be reflective of a reasonable risk factor. Rather than setting a standard for fecal coliform DEQ should focus more on ensuring the review of those activities that pose a threat are properly conducted. Prohibition based upon essential zero tolerance with a standard of one is unrealistic. The proposed standard would merely result in added regulatory impediments that we fear could be used to force unnecessary and costly changes in, for example, livestock and irrigation management practices.

RESPONSE: Fecal coliform bacteria are not normally found in groundwater because the groundwater environment is not conducive to the survival or growth of fecal coliform bacteria. Temperature of groundwater (40-50 degrees F) is much lower than that needed for fecal coliform survival, e.g., 98.6 degrees F. If groundwater is able to transport viable fecal coliform bacteria, it is very probable that other pathogens more tolerant of the groundwater environment are also being transported. In light of the Board's responsibility to protect the beneficial

uses of groundwater and human health the Board considers the proposed standard for fecal coliform reasonable and prudent.

COMMENT #22: The proposed fecal coliform standard is clearly protective of human health. The presence of fecal coliform bacteria is the best indicator available and affordable to test for contamination of water by sewage. It is the best organism to test for the presence of other pathogenic organisms in water, including viruses, other bacteria and pathogens. We very much support the concept of a zero-discharge standard for fecal coliform bacteria.

RESPONSE: Based on public comments the Board has decided to adopt a groundwater standard for fecal coliform bacteria. Please see response to comment #21.

ADOPT A STANDARD FOR MTBE IN GROUND WATER

COMMENT #23: Toxicological studies have not determined levels of human health impacts of MTBE and a numeric standard would limit cleanup flexibility.

RESPONSE: The proposed standard is not based on toxic endpoints, rather it is based on undesirable taste and odor, as discussed in the public notice. It is unclear how a standard would limit the flexibility of remedial actions. Rather, it may better define the scope and degree of these actions.

COMMENT #24: An MTBE standard should be adopted. MTBE is very strongly objectionable to people. It is objectionable based on taste and odor. MTBE is a substance that has known human health effects, and odor and taste effects at much lower levels than is proposed. A standard for MTBE will aid in the cleanup of contamination.

RESPONSE: The proposed standard will prevent taste and odor problems for all but the most sensitive individuals and is much lower than the levels that cause health problems.

PROPOSED CHANGES TO THE CYANIDE ANALYSIS METHOD

COMMENT #25: Total cyanide is the most conservative way of expressing cyanide, it is an indicator of a processed fluid leak, generally from a precious metals mine.

RESPONSE: The cyanide standard is based on its toxicity and the method of measurements should provide an accurate measurement of this condition. Total cyanide may be mandated in a permit for monitoring purposes even if the standard is expressed in other terms.

COMMENT #26: WAD cyanide is probably a better measure for decontamination of tailing impoundments or heap leach operation

because it is a better indicator of human health risk, but total cyanide is more protective and really a better indicator that something has gone wrong.

RESPONSE: The toxic form of cyanide is free cyanide, as discussed in the public notice of proposed rulemaking. Adoption of a standard expressed in one form of cyanide would not limit monitoring of discharges based on another form of cyanide.

COMMENT #27: Free cyanide is very difficult to measure both accurately and consistently.

RESPONSE: There are constituents that interfere with the direct measurement of free cyanide. Most of these interferences are removed during the sample preparation and pretreatment specified by the analytical method. For this reason, there are no EPA approved methods for direct measurement of free cyanide.

COMMENT #28: If the analysis method for cyanide were changed to WAD the standard should be adjusted to reflect the change in analytical technique.

RESPONSE: The standard is based on free cyanide, or 100% dissociation of the cyanide species. For this reason, a change in the numeric value of the standard is not warranted. Total cyanide and WAD cyanide, as well as other analytical methods, measure the dissociated cyanide as well as other forms that have a low propensity to dissociate.

COMMENT #29: The present WQB-7 standard is for total cyanide which includes cyanide compounds that are harmless. The Public Drinking Water Program Requirements refer to cyanide as free cyanide, thus, the precedent exists in the state regulatory system to use free cyanide. The US EPA does not measure (use) total cyanide. EPA has a new proposal for an analysis method called "available cyanide." The cyanide standard should be based on "free CN." The total CN method is too conservative. Use the existing numeric value as the standard if the method is changed.

RESPONSE: The state and federal drinking water programs are intended to protect consumers of public water supplies, whereas, WQB-7 considers both human health effects, aquatic life and other uses. There are no stand-alone approved analytical methods for "free" cyanide under either program. Free or dissociated cyanide is measured after preliminary treatment (digestion). The Department is aware of the proposed revisions to 40 CFR 136 that, if adopted, would add available cyanide (Method OIA-1677: Available Cyanide by Flow Injection, Ligand Exchange, and Amperometry, FR 36810, July 7, 1998) to the list of approved methods. However, this method was not available to the Department at the time the proposed rule amendments were developed. For this reason, the Board has not changed the

cyanide standard at this time.

COMMENT #30: The cyanide standard should be based on WAD analysis and the present numeric value retained as the standard.

RESPONSE: Please refer to previous comments (#25 through #29) for more information.

COMMENT #31: The present drinking water standard for CN based on the MCL is for "free CN."

RESPONSE: The drinking water standard is expressed as free cyanide however, as previously discussed, it is not measured as free cyanide.

PROPOSED CHANGES TO THE STANDARDS FOR CLASS III, AND IV GROUNDWATER

COMMENT #32: Groundwater is worthy of protection even if it isn't the best natural water in the state.

RESPONSE: See the response to comment #2.

COMMENT #33: There is a lack of information to accurately picture how the state's high quality and low quality aquifers interact with each other and surface water.

RESPONSE: It is not possible to accurately map on a statewide basis all aquifers and determine their interaction. The characteristics and interactions of Montana's groundwaters are indeed complex and will probably never be completely understood. However, on a local scale it is feasible to delineate the aquifers that an activity may impact and through modeling techniques and monitoring determine the interaction between aquifers and with surface water. Therefore, the best available data describing the aquifer in question and the best professional judgment of the DEQ will be used to evaluate each proposed activity. It is the responsibility of a permit applicant to provide information to the Department that will enable the Department to evaluate the effects of the proposal including the impacts on water other than Class III and Class IV groundwater. In addition, permits require monitoring and are subject to revocation.

COMMENT #34: These are very sweeping changes to be made when DEQ cannot identify all the locations which would be affected by the proposed rule change.

RESPONSE: The proposed groundwater rules are intended to protect the beneficial uses of all classes of groundwater regardless of extent, size or depth or area of concern. Knowledge of the exact location of an aquifer is not necessary to establish the water quality standards needed to protect all aquifers

water quality standards needed to protect all aquifers statewide. Please refer to response to comment #33.

COMMENT #35: Class III and IV groundwaters have beneficial uses besides drinking, and those uses must be protected. The proposed rule change neglects the process that the former Board of Health went through to recognize those uses in 1982.

RESPONSE: The proposed changes do not affect the designated uses set up by the Board of Health and Environmental Sciences in 1982. Under the proposed changes all existing beneficial uses must be protected.

COMMENT #36: Class III groundwater above 5000 μS/cm is being used for agricultural uses. That's a dangerous place to draw the line.

RESPONSE: Review of the groundwater database available through the Ground Water Information Center (GWIC) for Electrical Conductivity (EC) above 3000 μS/cm and Total Dissolved Solids (TDS) indicates that waters with an EC of 5000 μS/cm have approximately 5000 mg/l (TDS). This value is very close to the maximum recommended TDS for livestock use (National Academy of Sciences, (1974), Nutrients and Toxic Substances in Water for Livestock and Poultry, Washington, D.C.). The Secondary Maximum Contaminate Level (SMCL) for total dissolved substances established by the EPA for drinking water is 500 mg/l. In light of the concerns expressed, the Board has revised Rule I(3)(b)(iv) [17.30.1006] to "where the specific conductance is less than 7,000 microSiemens/cm at 25°F." Use of 7,000 μS/cm approximates 7,000 mg/l TDS. Waters approaching or at this salinity may be used with reasonable safety but should be avoided by pregnant or lactating animals. Waters with salinity greater than 7,000 μS/cm may present considerable risk to pregnant or lactating livestock, young livestock or animals under heat stress. Older livestock may be able to subsist on waters between 7,000 and 10,000 mg/l TDS (about 7,000-10,000 μS/cm) under conditions of low stress. Waters greater than 7,000 μS/cm should receive treatment prior to any use. Treatment to remove TDS will also remove nitrate nitrogen and nitrate plus nitrite nitrogen and other parameters which have human health standards in WQB-7.

Based on public comments, the Board has decided to revise the specific conductance threshold from 5,000 to 7,000 μS/cm.

COMMENT #37: Class III groundwater with EC greater than 5,000 μS/cm is being used as a drinking water source, however the proposed rules would not protect that existing use from nitrate contamination.

RESPONSE: The rules as adopted by the Board require that the

Secondary Maximum Contaminant Level (SMCL) for Total Dissolved Solids (TDS) is 500 mg/l. Water above this level should receive treatment prior to use as a domestic drinking water. Also, see the response to comment #36.

COMMENT #38: How will surface waters that are hydraulically connected to Class III or Class IV groundwaters be protected from potential increases in nitrate or toxics?

RESPONSE: Surface waters that receive part or all of their flow from groundwaters that have received a discharge must meet the applicable surface water standards. All applications for a groundwater discharge permit are reviewed for possible impacts to surface water.

COMMENT #39: Class III and IV groundwaters should not be exempted from any standards.

RESPONSE: The human health standards listed in WQB-7 will continue to apply to Class III groundwaters except for nitrate nitrogen and nitrate plus nitrite nitrogen where the specific conductance exceeds 7,000 μS/cm. With respect to Class III groundwaters, only the standards for nitrate nitrogen and nitrate plus nitrite nitrogen are being changed and only when the specific conductance exceeds 7,000 μS/cm. In nearly all cases Class IV groundwaters will naturally exceed many of the noncarcinogenic parameters listed in WQB-7. Treatment to remove TDS to support a specific use will effectively remove those constituents. Thus all uses of groundwater are being protected.

COMMENTS ABOUT CHANGING NITRATE STANDARDS FOR SLOW-MOVING GROUNDWATER

COMMENT #40: There are vast areas of Montana (east and west) that could be classified as being of low hydraulic conductivity.

RESPONSE: True. However, based on public comments the Board has decided to restrict the nitrate nitrogen and nitrate plus nitrite exclusions for slow-moving groundwaters to Class III and IV. Furthermore, the proposed changes to the rules would continue to protect the beneficial uses of these waters.

COMMENT #41: High quality groundwater is a very precious resource where it exists regardless of how fast it moves. It is clearly an illegal proposal to allow for high quality waters to be degraded by rule under law and the Montana Constitution.

RESPONSE: See response to comment number #1.

COMMENT #42: How will DEQ decide what is an aquifer with a hydraulic conductivity of 0.1 feet/day or less especially considering hydraulic conductivity is scale dependent?

RESPONSE: The specific methods (i.e., number of test wells and type of field tests) necessary to determine field hydraulic conductivity are case and site specific. See the response to comments #3 and #34.

COMMENT #43: We can expect people to buy land surface over slow-moving groundwater for one purpose and one purpose only--to dump all kinds of waste on that ground.

RESPONSE: All Class I, II, and III groundwaters are protected from "dumping" by the standards in WQB-7. The standards for carcinogenic parameters in WQB-7 apply to Class IV groundwaters. In no case can the existing or anticipated beneficial uses be degraded. The ability of aquifers with a hydraulic conductivity less than 0.1 feet per day to assimilate additional water or a waste is extremely low and would not be attractive for waste "dumping."

COMMENT #44: When you classify an aquifer, which one will cause the declassification? The top one? The second one? The tenth one? And how deep is an aquifer considered an aquifer?

RESPONSE: Each "aquifer" will be classified according to its own conductivity (EC) regardless of its depth below the ground surface, thickness or position relative to other aquifers. See response to comment #45.

COMMENT #45: Concern about ramifications of the exemption from nondegradation provisions of Title 75 of the Montana Water Quality Act that pertain to Class I, II and III waters and possible conflict with 1994 policy of the Subdivision Program which states that regardless of the hydraulic conductivity or other characteristics of the shallow aquifer it does constitute state water and warrants protection under the nondegradation rules.

RESPONSE: All groundwaters are state waters and the Montana Water Quality Act does not designate a minimum rate of movement (75-5-103(29) MCA). The definition of high quality waters in the Act (75-5-103(10) MCA) exempts Class III and IV groundwaters from the provisions of the Nondegradation Policy (75-5-303 MCA).

COMMENT #46: The slow-moving groundwater rule changes will worsen an existing problem for Missoula County.

RESPONSE: See the response to comment #8.

COMMENT #47: There needs to be some type of upper limit to the degradation from increased nitrate.

RESPONSE: The maximum change to water quality for slow-moving groundwater is the requirement that all designated or existing

beneficial uses must be supported. Please see response to comment #2.

COMMENT #48: Is DEQ up to meeting its responsibility that should include: (1) identify all current beneficial uses; (2), all hydrological connections to surface waters; (3), make sure the waters that are being dumped in fact really are low-quality or slow moving; (4), put a system in place to make sure no one in the future uses the polluted water without treatment; and (5), identify the extent of the water that will be dumped into the groundwater.

RESPONSE: (1) All groundwater classes have designated beneficial uses, if there are additional existing uses they will be identified during the activity (permit) review process.

(2) The number of aquifers and possible hydraulic connections with surface water make this impossible on a statewide basis. Instead the hydraulic connections will be determined during the permit review process.

(3) During the review process for the necessary permits the hydraulic conductivity and the specific conductance of the appropriate aquifers will be determined.

(4) A "system" is not necessary because beneficial uses are to be maintained regardless of the type of discharge to an aquifer.

(5) This will be addressed in the permit application process.

COMMENT #49: How will high quality groundwater be protected from contamination from a Class III, IV or slow-moving aquifer because of well drilling or fractures?

RESPONSE: The Department's review of a proposed activity subject to Department approval or permit includes assessing the potential impacts to all state waters. If it is determined that violations of the Act or Rules will occur, the approval or permit will not be issued. Potential or actual violations of well drilling requirements should be addressed under the appropriate regulations, not under the Water Quality Act.

Well drilling activities are supervised by the Department of Natural Resources and Conservation through the Board of Water Well Contractors (Title 37, chapter 43 MCA, and Title 36, chapter 21, ARM).

Fractures and other discontinuities in a geologic formation or aquifer are natural and their effects on groundwater flow characteristics are not controllable. Such geological features will be considered during the approval or permit process.

COMMENT #50: Where are the "slow groundwaters?"

RESPONSE: See response to comment #33.

PROPOSED CHANGES TO WQB-7

COMMENT #51: The ability to respond to the changes to WQB-7 presented at the hearing was limited.

RESPONSE: In opening statements, the Department identified typographical and other errors it found in WQB-7 after the notice was mailed. The Department wanted to be sure that the public was informed of these necessary corrections at the earliest opportunity and while there was still time remaining for comment.

COMMENT #52: Concern that the proposed change in the Fe and Mn standards was at the request of Stillwater Mining Co.

RESPONSE: See response to comment #12.

COMMENT #53: Don't weaken the arsenic standard from 18 to 20 µg/L.

RESPONSE: The proposed version of WQB-7 contained a typographical error indicating that the existing standard is 20 µg/L. The standard for surface waters will remain 18 µg/L not the indicated 20 µg/L.

COMMENT #54: Standards for metals in WQB-7 should be for the dissolved fraction of the water column sample or the standards should be based on the Water Effect Ratio (WER). This comment includes a contention that the "California Rule" "requires" the use of "dissolved metals and metal standards based on the water-effect ratio."

RESPONSE: This proposal to express standards for metals as the dissolved fraction or as a function of the water-effect ratio is beyond the scope of the rule notice. Therefore the comment proposing this change cannot be addressed at this time.

However, it should be noted that the "California Rule" contains the statement that ". . .until the scientific uncertainties are better resolved, a range of different risk management decisions can be justified". EPA recommends that State water quality standards be based on dissolved metal. EPA will also approve a State management decision to adopt standards based on total recoverable metal, if those standards are otherwise approvable as a matter of law. The adoption of the Metals Policy did not change EPA's opinion that the existing total recoverable criteria published under section 304(a) of the CWA were scientifically defensible. EPA believed, and continues to believe, that when a state develops and adopts its standards, the state in making its risk management decision may want to consider sediment, food chain effects and other fate related issues and decide to adopt total recoverable or dissolved metals criteria. (Federal Register, Vol. 62, No. 150, Tuesday, August

5, 1997, proposed rules, page 42172).

With respect to metals standards based on water effect ratios, provision for the development of such standards is included in the Montana Code at 75-5-310.

COMMENT #55: DEQ was arbitrary in selecting parts of the National Toxics Rule and the California Standard Rule for the proposed changes to WQB-7.

RESPONSE: See the response to comment #54.

COMMENT #56: The proposed changes to WQB-7 may be more stringent than the corresponding federal standards because they express metals as total recoverable.

RESPONSE: The proposed standards are not more stringent than the corresponding federal standards. See the response to comment #54.

COMMENT #57: MCLs are incorrectly cited as the source of the human health standards for Arsenic, Chlorine, Copper, Di (2-ethyhexl) Adapate, Gamma Emitters, Iron, Lead, Manganese, and Uranium.

RESPONSE: The standard for Arsenic is based on a priority pollutant criteria. The standard for Chlorine is based on a proposed MCL. The standard for copper is based on a priority pollutant criteria. The standard for Di (2-ethyhexl) Adapate was incorrect. The standard based on the MCL has been changed to 400 micro grams per liter. The standard for Gamma Emitters is based on a proposed MCL. The standards for Iron and Manganese are based on secondary MCLs (SMCL). Please see response to comment #19 for a discussion of iron and manganese standards. The standard for Lead is based on the "action level" for public supplies. If the action level is reached or exceeded in public water supplies, corrective actions must be taken. The standard for Uranium is based on a proposed MCL. WQB-7 has been changed to address these comments.

COMMENT #58: DEQ should have a "docket" summarizing the basis for each parameter in WQB-7.

RESPONSE: The basis for each parameter in WQB-7 is given in the introduction and the footnotes.

COMMENT #59: The standard for TCDD (Dioxin) should be changed to one based on toxicity equivalence quotient TEQ maintaining the same numeric value.

RESPONSE: This proposal is beyond the scope of the rule notice. Therefore the comment proposing this change cannot be addressed at this time. However, the Board has directed the Department to

begin rulemaking to address this issue.

COMMENT #60: The standards for PCB should be updated.

RESPONSE: Updated standards have been adopted.

COMMENT #61: Changes to Cu, Hg, As and dioxin standards need careful review to ensure changes will not adversely affect beneficial uses.

RESPONSE: All changes are based on the most recent data concerning the relationship between concentrations and effects. In addition the Board has directed the Department to begin rulemaking to modify the Dioxin standard to include more Dioxins and Furans.

COMMENT #62: This Commentor presented detailed comments on 51 pesticides listed in WQB-7. These comments included noting incorrect spellings, incorrect CASRN numbers, and possibly incorrect groundwater Human Health Standards and required reporting values (RRVs).

RESPONSE: As a result of this comment, Dichloroethylene has been removed from WQB-7. In addition, the CASRNs for Metribuzin, and Terbacil have been corrected; the spelling of "Chlorosulfuron," has been corrected to "Chlorsulfuron", the spelling of "Fonophos" has been corrected to "Fonofos"; the standard for Toxaphene has been corrected from 0.3 to 3 μg/L, the standard for Chlordane has been corrected from 0.3 to 2 μg/L, the standard for Ephichlorohydrin has been corrected from 14 to 40 μg/L, the standard for Dioxin has been corrected from 0.00003 to 0.000002, and the standard for Heptachlor Epoxide has been corrected from 0.02 to 0.04 μg/L. The proposed required reporting values for new pesticides have been deleted.

COMMENT #63: Analysis methods in WQB-7 need to be added to or modified to conform to requirements of other agencies or Departments.

RESPONSE: The methods listed in WQB-7 are the proper EPA approved methods for the analysis of ambient waters. The methods required by other agencies or the Department are used for other types of media and for other purposes.

COMMENT #64: It is not clear when WQB-7 values were calculated and when MCLs were used.

RESPONSE: The introduction to WQB-7 states that MCLs for pesticides were used if available, if not, primary data on reference doses were used to calculate a standard.

COMMENT #65: Specific concerns were expressed about

Benzopyrene, Naphthalene, Vinyl chloride, Pyrone and Fluorene and a suggested formula was given for calculating a standard.

RESPONSE: The suggested formula includes an assumed exposure period of 9 years. Section 75-5-301(2)(b)(i), MCA, requires that standards be based on lifetime exposure. The suggested changes will not be made.

CHANGES TO THE REQUIRED REPORTING VALUES (RRV)

COMMENT #66: The changes to the RRV are in many cases lower than the lowest method detection limit listed by EPA. The M.L. is the lowest value that can be reliably measured and some of the methods cited are not appropriate for natural waters or wastewater analysis. Below the M.L. a substance can be detected but not quantified.

RESPONSE: The Board has decided to not adopt any new or revised RRVs at this time. The Board has directed the Department to form a "task force" or work group that will determine the RRVs that should be listed in WQB-7.

COMMENT #67: Use the PQL as defined in the national Primary Drinking Water regulations for the RRV.

RESPONSE: The PQL may be used in the drinking water program, however, because the PQL allows for arbitrary adjustment of the value depending on the sample matrix it is not acceptable for monitoring ambient water quality or wastewater discharges under the MPDES program. The ML and the PQL should be identical for ambient waters.

COMMENT #68: If the proposed changes are adopted for the RRV, amend the rules to clarify that the RRV is not to be used for enforcement purposes or use detected/not-detected rather than actual numbers.

RESPONSE: Any enforcement response initiated by the Department would be based on the specific regulation in question and would need to be based on weight of evidence. Compliance with standards is based on magnitude of exceedence, duration and frequency. Therefore, it is unlikely that an enforcement action would be initiated based on the results from a single sample, however, this would be evaluated on a case-by-case basis. Compliance under the MPDES program uses specific technical review criteria which are not affected by RRVs. Please see the response to comment #66.

COMMENT #69: The proposed changes to the Required Reporting Value(s) are appropriate especially for parameters where the Human Health standard is lower than the MDL.

RESPONSE: Please see the response to comment #66.

GENERAL COMMENTS

COMMENT #70: Omit reference to "natural" until the term is properly defined.

RESPONSE: "Naturally occurring" is defined in ARM 17.30.602(17). This definition is used by DEQ as the definition of "natural".

COMMENT #71: An objective economic analysis of the impacts of the proposed rule changes needs to be done.

RESPONSE: Consideration is not required for those standards for which the Legislature has directed the Board to set the standard at a particular level because the Board can exercise no discretion in the matter. The Board is therefore not required to consider the economics of waste treatment and prevention for standards for pesticides in groundwater (80-15-201 and 75-5-301(2)(b)(i), MCA.) and carcinogens (75-5-301(2)(b)(i), MCA.).

In addition, 40 CFR. 131.11 provides that a state's water quality standards must be protective of the most sensitive use that can be made of each state water. EPA has adopted standards to meet this requirement. 33 U.S.C. 1313(c) provides that, should a state fail to adopt these standards, EPA must adopt the standards for the state. Therefore, the Board cannot, based on economic considerations, make these standards less stringent.

COMMENT #72: Amend rule to remove nitrate standard for only Class IV groundwater (EC >10,000 μS/cm).

RESPONSE: See response to comment #36.

COMMENT #73: Amend rule for "slow groundwater" to define hydraulic conductivity as "field hydraulic conductivity".

RESPONSE: The Board has made this change to avoid problems arising from the application of laboratory data to field conditions.

COMMENT #74: DEQ will be (is) unable to enforce and regulate the provisions of the proposed rules pertaining to slow-moving groundwaters.

RESPONSE: The proposed rules regarding slow moving groundwater has been restricted to Class III and IV groundwaters to lessen the potential for impairment of uses. Please see the response to comments #1 and #2.

COMMENT #75: It is better to spend money and require pollution controls before water quality degrades and the water needs to be cleaned up.

RESPONSE: The Board agrees. The rules are designed to provide reasonable protection of water quality and prevent the need to restore the quality of any water.

COMMENT #76: The Federal Register citation in WQB-7 for the California Standards Rule is wrong.

RESPONSE: The correct citation for the "California Standards Rule" is 62 F.R. 42159 (1997) and will be inserted in WQB-7.

COMMENT #77: Montana could lose primacy for groundwaters impacted by nitrate if there is no standard.

RESPONSE: The EPA has no authority over the State's groundwater standards. Therefore, primacy is not an issue.

COMMENT #78: It is not possible to maximize use and enhance water quality at the same time.

RESPONSE: Comment noted.

COMMENT #79: The proposed changes to groundwater standards and WQB-7 may need an EIS.

RESPONSE: A separate environmental review document prepared under the Montana Environmental Policy Act (MEPA) is not required because this rulemaking process provides the functional equivalent of the MEPA process.

COMMENT #80: The adoption of pesticide standards is taking too much time, the Montana Department of Agriculture is not able to comply with Montana Agricultural Chemical Ground Water Protection Act (ACGWPA) because WQB-7 is not complete.

RESPONSE: DEQ is proceeding with adopting standards for pesticides as rapidly as its resources and state rule adoption procedures allow.

COMMENT #81: The proposed changes appear to be driven entirely by industry.

RESPONSE: The Board disagrees. See response to comment #12.

COMMENT #82: Were the standards of other states taken into consideration?

RESPONSE: No. However, most state water quality standards are based on federal criteria. As a result, there are many similarities between the states. Many of the updates to WQB-7 are based on criteria established for California by the EPA. Please see response #15.

COMMENT #83: The slow groundwater language is extremely

ambiguous (beneficial uses, satisfaction of the Department).

RESPONSE: Because these factors are site specific, it is not possible to use more precise language.

COMMENT #84: The trigger value for nitrate should not be changed as it removes an alarm mechanism that triggers nondegradation review.

RESPONSE: The proposed modification to the nitrate nitrogen and nitrate plus nitrite nitrogen standards will not remove the "alarm mechanism" for nondegradation review. The change is being proposed to equalize the nonsignificance thresholds for all sources of domestic sewage.

COMMENT #85: In the absence of definitive and undisputed evidence that reduction of a standard will cause no harm the standard should remain in place.

RESPONSE: The Board uses the most recent scientific information available when it reviews water quality standards. That information may support an increase, decrease, or no change in a specific standard.

COMMENT #86: Comment that exposure to Silver Creek water by wading for an hour or more each day for several months to remove materials from a culvert (beaver's daily work) caused nosebleeds. The commentor asks for an investigation and corrective actions, or at least posting health notice.

RESPONSE: This comment is beyond the scope of this rule notice.

COMMENT #87: The current water quality standards are weak because they do not take into account combined effects or interactions.

RESPONSE: Water quality standards are not to be violated regardless of the number of sources and their combined effects.

Reviewed by: BOARD OF ENVIRONMENTAL REVIEW

John F. North by *Cindy E. Younkin*
John F. North, Rule Reviewer CINDY E. YOUNKIN, Chairperson

Certified to the Secretary of State January 4, 1999.

BEFORE THE DEPARTMENT OF CORRECTIONS
STATE OF MONTANA

In the matter of the repeal of ARM Title 20, Chapter 9, Sub-Chapter 5, and the adoption of new rules I through XXXIV pertaining to licensure of youth detention facilities	))))))	NOTICE OF REPEAL OF ARM TITLE 20, CHAPTER 9 SUB-CHAPTER 5, AND ADOPTION OF NEW RULES I THROUGH XXXIV - 20.9.601 THROUGH 20.9.634

TO: All Interested Persons

1. On October 22, 1998, the Department of Corrections published a notice of the proposed repeal of existing and adoption of new rules pertaining to licensure of youth detention facilities at page 2813 of the 1998 Montana Administrative Register, Issue Number 20.

2. On November 12, 1998, a public hearing was held in Helena concerning the proposed repeal and adoption of rules. Oral and written comments were offered at that time. Additional written comments were received prior to the closing date of November 19, 1998.

3. The Department has repealed the following rules as proposed: ARM 20.9.501, 20.9.503, 20.9.506, 20.9.510, 20.9.513, 20.9.515, 20.9.518, 20.9.520, 20.9.524, 20.9.526, 20.9.528, 20.9.533, 20.9.535, 20.9.538, 20.9.541, 20.9.545, 20.9.547, 20.9.550, 20.9.555, 20.9.558, 20.9.561, 20.9.566, 20.9.569, 20.9.572, 20.9.575, and 20.9.578.
AUTH: 41-5-1802, MCA IMP: 41-5-1801, MCA

4. The Department has adopted new rules I through III (20.9.601 through 20.9.603), V (20.9.605), VI (20.9.606), VIII (20.9.608), IX (20.9.609), XI (20.9.611), XIII through XVII (20.9.613 through 20.9.617), XX through XXII (20.9.620 through 20.9.622), XXIV (20.9.624), XXVI through XXVIII (20.9.626 through 20.9.628), and XXXI through XXXIV (20.9.631 through 20.9.634) exactly as proposed.

5. The Department has adopted new rules IV (20.9.604), VII (20.9.607), X (20.9.610), XII (20.9.612), XVIII (20.9.618), XIX (20.9.619), XXIII (20.9.623), XXV (20.9.625), XXIX (20.9.629) and XXX (20.9.630) but with the following changes:

IV (20.9.604) LICENSING PROCEDURES (1) remains the same as proposed.

(2) Upon receipt of an application for license or renewal of license, the department shall conduct a licensing study to determine if the applicant meets applicable licensing requirements established in these rules. A licensing study must include an on-site visit for review of incident reports,

logs, ~~facility personnel files~~ portions of the employee record as listed in ARM 20.9.610, policies and procedures, other written rules, as well as interviews with detained youth and staff members.

(3) remains the same as proposed.

AUTH: 41-5-1802, MCA IMP: 41-5-1801, MCA

VII (20.9.607) CONFIDENTIALITY OF RECORDS AND INFORMATION (1) ~~All~~ Rrecords maintained by a facility ~~and all personal information made available to a facility pertaining to an individual youth must be kept confidential and~~ may be released ~~only~~ to the following:

(a) ~~Those parties entitled to access to records in accordance with 41-5-215, MCA~~ the youth court and its professional staff;

(b) representatives of any agency providing supervision and having legal custody of a youth;

(c) any other person, by order of the court, having a legitimate interest in the case or in the work of the court;

(d) any court and its probation and other professional staff or the attorney for a convicted party who had been a party to proceedings in the youth court when considering the sentence to be imposed upon the party;

(e) the county attorney;

(f) the youth who is the subject of the report or record, after emancipation or reaching the age of majority;

(g) a member of a county interdisciplinary child information team formed under 52-2-211, MCA, who is not listed in this rule;

(h) members of a local interagency staffing group provided for in 52-2-203, MCA;

(i) persons allowed access to the records referred to under 45-5-624, MCA;

(j) persons allowed access under 42-3-203, MCA; and

(b) remains the same as proposed but is renumbered (k).

(2) ~~In addition to the requirements of (1) of this rule, f~~Facility record keeping must meet ~~any additional~~ state ~~or~~ and federal records requirements, and facility policy must provide:

(a) remains the same as proposed.

(b) that all electronic or paper records are marked confidential and kept in ~~locked~~ secure files to safeguard against unauthorized or improper use or disclosure; and

(c) remains the same as proposed.

AUTH: 41-5-1802, MCA IMP: 41-5-1801, MCA

X (20.9.610) ADMINISTRATION (1) through (7) remain the same as proposed.

AUTH: 41-5-1802, MCA IMP: 41-5-1801 and 41-5-1803, MCA

XII (20.9.612) MANAGEMENT, STAFF AND TRAINING (1) Each facility must have a director or program manager to whom all employees or units are responsible and who has responsibility

and accountability for the day-to-day operations of the facility.

(a) The director must have the following qualifications:

(i) a bachelor's degree supplemented with experience ~~in an area relating to professional child care~~ working with youth or appropriate graduate education, or an equivalent combination of education and experience;

(ii) through (iv) remain the same as proposed.

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

AUTH: 41-5-1802, MCA IMP: 41-5-1801, MCA

XVIII (20.9.618) SEARCHES (1) and (2) remain the same as proposed.

(3) A search ~~plan~~ policy must be established and made available to both staff and youth. The search ~~plan~~ policy must be reviewed at least annually and updated as needed.

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

AUTH: 41-5-1802, MCA IMP: 41-5-1801, MCA

XIX (20.9.619) ADMISSION (1) remains the same as proposed.

(2) Any youth held in detention must be between the ages of 10 and 18 years, may not be ~~mentally ill~~ suffering from a mental disorder, and may not be criminally adjudicated.

(3) through (12) remain the same as proposed.

AUTH: 41-5-1802, MCA IMP: 41-5-103, 41-5-332, 41-5-341, 41-5-1801, 52-5-128 and 52-5-129, MCA

XXIII (20.9.623) HEALTH CARE (1) remains the same as proposed.

(a) The health authority may be a physician, physician assistant, nurse practitioner, health administrator, or health agency. When the authority is other than a physician, final medical judgments must rest with a single designated physician.

(1)(b) through (11) remain the same as proposed.

AUTH: 41-5-1802, MCA IMP: 41-5-1801, MCA

XXV (20.9.625) EDUCATION (1) through (2)(a)(i) remain the same as proposed.

(ii) the opportunity to participate in an educational program ~~being taught by a Montana state certified teacher~~. At the discretion of the facility, this program may be provided in conjunction with cooperating school districts or may be provided by the facility.

(b) through (d) remain the same as proposed.

AUTH: 41-5-1802, MCA IMP: 41-5-1801, MCA

XXIX (20.9.629) ADMINISTRATIVE SEGREGATION AND DISCIPLINARY DETENTION (1) and (2) remain the same as proposed.

(3) Disciplinary detention may be used to control a youth ~~convicted of~~ found to have committed a serious rule violations and may only be utilized for a maximum of four hours.

~~(a) Disciplinary detention is a sanction that is used when a youth commits a serious rule violation.~~

~~(b)~~ Facility policy must identify acts which are considered to be serious rule violations.

(4) The youth must be provided a due process disciplinary ~~proceeding~~ hearing within 48 hours when placed in disciplinary detention.

(5) Each facility which utilizes disciplinary detention shall have a written ~~statement of its~~ policies which describe, at a minimum:

(a) remains the same as proposed.

(b) the procedure for a due process hearing ~~use of disciplinary detention~~; and

(c) the procedure by which a youth can appeal ~~decisions of the disciplinary committee~~ the findings of a due process hearing to the facility director or designee.

(6) remains the same as proposed.

AUTH: 41-5-1802, MCA IMP: 41-5-1801, MCA

XXX (20.9.630) MECHANICAL RESTRAINT (1) remains the same as proposed.

(2) The use of four- or five-point restraints is prohibited in youth detention facilities.

(2) through (10) remain the same as proposed but are renumbered (3) through (11).

AUTH: 41-5-1802, MCA IMP: 41-5-1801, MCA

4. The Department has thoroughly considered all comments and testimony received. Those comments, and the Department's responses thereto, are as follows:

COMMENT 1: Captain Mike O'Hara of the Missoula County Sheriff's Office stated that Missoula County believes these 'rules' are overly directive in scope. Missoula County has operated a juvenile facility since 1966 with little problem. As that facility became outdated a new juvenile wing was built in 1983. When our jail became overcrowded and jeopardized the sight and sound requirements we abandoned this facility and joined a regional juvenile facility. We also, at great cost, developed a '96 hour' juvenile facility that remains in operation today. In October of 1999, we will open a $2 million juvenile detention facility to help keep our kids closer to home. Because of the overcrowding in juvenile corrections in this region we drive as far as Poplar, Montana, and Medical Lake, Washington, to hold juveniles. We have never been sanctioned over the last 30 years and feel that these rules as a whole indicate past problems not associated with Missoula County that we are now being asked to comply with. Some of our concerns deal with definitions or semantics, while the State of Montana should not govern others we feel.

RESPONSE: These rules were drafted by a committee of stakeholders in Montana juvenile detention. The process began as follows: Judge John Larson of Missoula County provided the group with a list of standards the American Correctional Association has promulgated and termed 'mandatory standards' for the operation of juvenile detention centers. The Legislative Council also provided a letter with comments regarding the previous publication of these rules. This letter addressed technical problems which needed to be remedied in the redraft. The Department then received a request from the Correctional Standards and Oversight Committee to appoint this committee, focusing on life, health, safety and constitutional issues, the 'mandatory standards' and the Administrative Code Committee's letter in order to redraft these rules.

All long-term detention facilities were represented in this process, including Missoula County which is in the process of building a long-term detention facility. Each rule was read and discussed by the committee. If a consensus was not reached regarding the rule, a vote was taken, and the decision was made by simple majority. Missoula County had at least one representative at each of these meetings, and sometimes as many as four representatives voting at the table.

The rules are intended to provide a regulatory framework to guide detention facilities in their operations. Statements were made at the rule drafting meetings by the long-term detention facility directors that they believe the rules to be beneficial, and that the Department's enforcement of them is helpful in operating their facilities.

Rules such as these have been in place since the inception of juvenile detention centers in the state. Missoula County's concern about being over-governed by these rules was addressed at the rule-writing meetings by taking out many portions of the old licensing rules which were overly bureaucratic, burdensome or unenforceable. Again, this was done by consensus or vote.

The Department believes these rules have been written through a participatory process. The rules have been intelligently and thoroughly considered by all the stakeholders, and comport with the intention of the legislature for drafting.

COMMENT 2: Captain Mike O'Hara asked to know more about the inspection process. He asked if there were rules that would be interpreted as 'pass/fail' or will all of the rules simply have points deducted for noncompliance.

RESPONSE: The inspection or audit instrument has been simplified and revised. There will not be any particular points that are 'pass/fail.' It is designed to state the rules applicable to the compliance issue, to state the area of noncompliance and to set out a time frame within which the facility must cure the area of noncompliance. In other words, the process is designed to bring about voluntary compliance. However, failure to comply may result in a denial, suspension,

restriction, reduction to provisional status, or revocation of a facility's license.

COMMENT 3: Captain Mike O'Hara said that Missoula County would suggest that the licensing function for juvenile detention facilities be transferred to the Montana Board of Crime Control (MBCC), similar to the request for Adult Jail Standards, as it makes sense to have this program under one umbrella. He made that suggestion based on the makeup of the MBCC board.

RESPONSE: Upon the reorganization of state government which moved juvenile corrections from the Department of Family Services to the Department of Corrections, the legislature left the detention licensing with the department which operated juvenile corrections. The legislature could pass legislation to move the licensing function from Corrections to the MBCC. However, this responsibility presently rests with the Department of Corrections. In an informal discussion between the Department Director and the MBCC Executive Director, the possibilities of the MBCC assuming juvenile detention licensing or the Department assuming responsibility for the formula grant money were discussed. They concluded the agencies would not recommend either change to the 56th Legislature.

COMMENT 4: Captain Mike O'Hara, Lieutenant Alan Egge and Sergeant Dan Minton of the Missoula County Sheriff's office submitted a written statement which said, "There are references in the rules that make reference to ACA standards." They point out that there are 350 non-mandatory standards and only 26 mandatory standards.

RESPONSE: It is assumed that the commentors are referring to the charge given the committee by the Corrections Oversight Committee to use the ACA mandatory standards. The Oversight Committee did not limit the drafting committee to 'only' the 26 mandatory standards. The committee did incorporate the mandatory standards into the rules, but there are other areas which are addressed by the ACA non-mandatory standards that the committee felt were important enough to refer back to the ACA standards.

COMMENT 5: Captain O'Hara, Lieutenant Egge and Sergeant Minton submitted a written statement that they would like to see the title of Juvenile Detention Officer substituted where appropriate.

RESPONSE: The term 'Juvenile Detention Officer' is used in the rules. The term 'staff member' is also used as a more encompassing term for persons employed by the facility and working with the youth, and who may not be detention officers, such as teachers, nurses, transporting officers and the administrator.

COMMENT 6: The Missoula County group submitted the following written comment regarding Rule IV (20.9.604), Licensing Procedures, Section 2: We continue to object to anyone viewing personnel files. It violates county policy. We have offered to have the personnel director examine the files for compliance, or the employee may sign a voluntary waiver.

RESPONSE: The Department has been working with Steve Johnson, personnel director for Missoula County, to work through this problem in a manner that will satisfy both Missoula County's policy and the need for the licensing specialist to review staff records to determine compliance with these rules. Having the employee sign a voluntary waiver would be an acceptable solution for the Department. The language in Rule IV (20.9.604) is changed so it does not refer to 'personnel files' but 'portions of the employee record.' This should clarify that the licensing specialist is not interested in any portion of an employee's record except those which relate to the care and custody of juveniles.

COMMENT 7: The Missoula County group submitted the following comment in writing regarding Rule VII (20.9.607) Section(2)(b), Confidentiality of Records and Information: In our new facility we would be storing some records in a computer, others would be placed in a record storage area in the administrative office area. This appears to conflict with the language in this section. Is this a conflict?

RESPONSE: The proposed rules did not address the confidentiality of electronic files. Therefore, this rule is amended to include electronic files.

COMMENT 8: Missoula County submitted the following comment in writing regarding Rule XII (20.9.612) Section (1)(a)(i) Management, Staff and Training: We object to the qualifications of the director. This should reside with the Missoula County Personnel Department and the county commissioners. The ACA standard is nonmandatory.

Judge John Larson, Missoula County District Court, also submitted a written comment regarding this rule. He stated that the education and experience requirements for detention directors should be left to the discretion of the counties. He further stated that the child care requirement for directors is appropriate for shelter care facilities only, which these are not. He further stated it has no support in the standards of the American Correctional Association (ACA).

RESPONSE: Youth detained in these facilities are often as young as 10 years of age. The language is purposely not specific to a certain type of training in order to give the counties flexibility in using this language, but still to give them notice that child care is a piece of running a juvenile detention facility.

The ACA model policy on appointing a facility director includes as a minimum requirement, two years of experience working with juveniles, among others that may differ from a county's qualifications. The term 'child care' may be misleading. The rule is amended to say 'experience working with youth.'

COMMENT 9: Missoula County submitted the following comment in writing regarding Rule XII (20.9.612) Section (4)(a), Management, Staff and Training: Does this mean that all juvenile detention officers must have a post secondary degree? Or does the term 'youth care facility staff' refer to another class of employee? If in fact this refers to a juvenile detention officer, we believe that we can hire qualified candidates, put them through the Academy, provide site specific training in our F.T.O. Program, to achieve a very competent juvenile detention officer. We oppose having a post-secondary degree for an entry level position. ACA refers only to training requirements not qualifications.

RESPONSE: A post secondary degree is not required for a juvenile detention officer or youth care facility staff. This rule states that a youth care facility staff must have "a post secondary degree or (emphasis supplied) extensive/relevant experience working with youth..." The term 'youth care facility staff' is inclusive of juvenile detention officer.

COMMENT 10: Missoula County submitted the following comment in writing regarding Rule XVIII (20.9.618) Section (3), Searches: Search plans should NOT be made available to inmates. However, the policy can be and is provided in their rule manuals.

RESPONSE: The term 'policy' better describes the intent of the rule. The rule is amended to reflect this change.

COMMENT 11: Missoula County submitted the following comment in writing regarding Rule XXIII (20.9.623) Section (1)(a): Please add Nurse Practitioner to the list of medical professionals.

RESPONSE: It is assumed that by 'health care professional' the commentor means the person designated in the rule as the health care authority with responsibility for health care pursuant to a written agreement, contract, or job description. The rule is amended to add 'nurse practitioner' to this list.

COMMENT 12: Missoula County submitted the following comment in writing regarding Rule XXVIII (20.9.628), Passive Physical Restraints. Passive physical restraint training is not defined in terms of the program or program length. The current CPI program is costly to send a staff member to become certified. ACA does not mandate this training. Will the Academy or the State provide this training?

RESPONSE: Because there are numerous programs which train in passive physical restraint, the rules do not specify a particular program. While ACA does not mandate this training, all long-term detention facility directors stated that they use passive physical restraint, often referred to as nonviolent crisis intervention, in their facilities. Therefore, it is in the interest of the facility to provide adequate training in this area. The Montana Law Enforcement Academy provides training in nonviolent restraint and crisis intervention through the National Crisis Prevention Institute.

COMMENT 13: Missoula County submitted the following comment in writing regarding Rule XXX (20.9.630) Mechanical Restraint, Section (6)(f). If this includes the mobile passive restraint chair, then we do not object. This chair can provide a level of protection to the inmate should he become violent. Unlike other restraint procedures the chair can help prevent positional asphyxia when used properly.

RESPONSE: At the time the rules were being drafted the committee did not have the use of 4-point restraint listed as a mandatory standard for its consideration. The August 1991 ACA Standards Manual for Juvenile Detention Facilities (defined as containing over 20 beds) does include a standard which permits the use of 4-point restraint in such a facility. The ACA Standards for Small Juvenile Detention Facilities (fewer than 20 beds) did not provide for 4- or 5-point restraint until the August 1998 ACA standards supplement.

Montana may promulgate rules and standards which are not as permissive as the ACA standards, and such is the case with this rule. The former Montana rules did not allow mechanical restraint of a youth, only passive physical restraint and hand or ankle cuffs when transporting. The committee saw the need for using further mechanical restraints such as handcuffs, leg irons and belly chains. Therefore, the new rules allow for these methods of restraining youth with strict protections in place so the youth does not become injured.

The use of a mechanical restraint chair was thoroughly discussed by the drafting committee, and upon a vote of the committee, it was determined that mechanical restraint chairs or beds (typically known as 4- or 5-point restraint devices) were not appropriate for use in youth detention facilities where the majority of youth are pre-adjudicatory detainees. This issue was also presented to the Department of Corrections Management Team, which decided that it could not support the use of 4- or 5-point restraints in youth detention facilities when the Department does not use such devices in its secure facilities. The issue was also presented to the Department of Corrections medical director who had firsthand knowledge of the use of such a restraint device and recommended against its use anywhere except in a psychiatric setting.

Because this rule is still confusing, it will be amended to specifically preclude 4- or 5-point restraints.

COMMENT 14: Judge John Larson of the Missoula County District Court submitted the following written comment: "...[T]he law enforcement training sanctioned by the Post Council, which was deleted, Rule XII 5(b) (20.9.612). I want to stress this requirement is clear and has been interpreted by the Attorney General to require this training. While it may be the desire of Billings and Great Falls to have something different, they can pursue their remedy in the legislature. I see huge liability issues for the continued failure to require such training before issuing a license.

RESPONSE: The language the commentor is referring to is the language in the set of rules which were published but not adopted just prior to the committee process being employed to complete the drafting of these rules. There is no formal Attorney General opinion on this issue. However, on 9/25/96, Rob Smith, Assistant Attorney General, issued an informal memorandum in which he concluded there was "no statutory support for distinction between juvenile and adult detention officers." His memorandum does not state that POST training is required for juvenile detention officers, and it does not have the force of law because it is simply an informal memorandum, not a formal Attorney General's opinion. The rule states that training must meet the requirements of Montana law. This would include statute, administrative rule, case law and Attorney General's opinion.

COMMENT 15: Judge John Larson of the Missoula County District Court submitted the following written comment: "[T]he education requirements, Rule XXV(2)(a)(ii) (20.9.625), would prelude the excellent program at Kalispell run by Literacy Volunteers of America, sanctioned by their county superintendent of schools and supported by a Board of Crime Control grant. Local control and flexibility are a hallmark of our education system. We should adopt the same policy for detention. Simply put, this is not an accredited school, so why require a certified school teacher?"

RESPONSE: The committee received a written submission from the Office of Public Instruction whose representative was present at drafting sessions which concerned the educational portion of these rules. The committee reviewed and adopted OPI's submission, almost in its entirety, regarding education for youth confined in detention facilities. The language the commentor is referring to is that which states that a youth detained more than ten days should be provided the opportunity to participate in an educational program being taught by a Montana state certified teacher. Most of the detention facilities have arrangements with their local school districts and do provide accredited programs for detained youth. However, since some financial burden may still flow to the county by requiring a certified teacher, the rule is amended to delete that requirement.

Literacy Volunteers of America (LVA) does not run the educational program in Flathead County. That educational program is run by a three-quarter F.T.E. Montana accredited teacher who uses a curriculum approved by the county superintendent of schools. The LVA comes in weekly to work with the youth on life skills issues. The grant monies LVA will receive from the MBCC is going to be used to put in a library of contemporary, school-approved books. The language in the rule is not in conflict with this very important service.

COMMENT 16: The Administrative Code Committee, through its attorney, submitted the following written comment: The notice should clearly indicate not only the statutory authority for the rules but also the statutory provisions that are implemented by the rules. It is not sufficient to cite only the statute that grants rule making authority. See 2-4-305(3), MCA.

RESPONSE: This was an oversight in the publication notice. 2-4-305, MCA, provides for correction of this deficiency when the rules are adopted, and the implementing statutes are included in this adoption publication.

COMMENT 17: The Administrative Code Committee, through its attorney, submitted the following written comment. Rule XII (20.9.612) Management, Staff and Training: This rule requires facility directors to have experience in an area relating to 'professional child care.' It seems at the least, that this could use clarification. Again, the statutory authority and reasonable necessity must be there.

RESPONSE: See response to Comment 8.

COMMENT 18: The Administrative Code Committee, through its attorney, submitted the following written comment: Rule XXIX (20.9.629) Administrative Segregation and Disciplinary Detention: Subsection (3) provides that disciplinary detention is to be used to control a youth 'convicted' of serious rule violations. What does 'conviction' mean in this instance? Generally conviction refers to conviction in court after trial, but this cannot be what is intended in the circumstances to which this rule applies. Again clarification is recommended. Also, subsection (4) provides that a youth must be provided a due process disciplinary proceeding 'when placed in disciplinary detention.' What does this mean? Does a 'due process disciplinary proceeding' mean a hearing? Before whom? When? Before, during, or after the segregation (at which time it would be meaningless). At a minimum, due process requires notice and opportunity to be heard. This rule is not clear on this issue.

RESPONSE: The language 'convicted of a serious rule violation' is not appropriate. The rule is amended and the language replaced with 'found to have committed a serious rule violation'.

The rule requires the facility's policies to comport with the ACA standards in this area; therefore, it is not specific in any of the areas mentioned above. The operant ACA policies would include Rules and Regulations, Resolution of Minor Violations, Disciplinary Reports, Confinement and Special Management and Major Disciplinary Hearings. These set out the constitutional safeguards necessary in a disciplinary hearing, and resulting confinement of a youth in disciplinary detention. The rule is amended to specifically address a due process hearing, a time frame, and appeals process.

COMMENT 19: The Administrative Code Committee, through its attorney, submitted the following written comment: How does Rule VII (20.9.607) which provides for confidentiality of youth records and information comport with public disclosure provisions of 41-5-217, MCA, of the Youth Court Act, the public's constitutional right to know and the provisions of Title 2, chapter 6, MCA, and the Supreme Court's holding in Worden v. Montana Board of Pardons and Parole, 1998 MT 168 (1998)?

RESPONSE: The public disclosure addressed in 41-5-217 is for "youth court records on file with the clerk of court." While a juvenile detention center may have copies of some of these documents, this statute cannot be construed to apply to juvenile detention files. It applies to those records in the custody of the clerk of court. However, Title 2, chapter 6 regarding public writings may apply to juvenile detention centers owned and operated by counties. Some juvenile detention centers are privately owned and operated, and Title 2, chapter 6 would not apply to those facilities.

Further, there are two types of records maintained by a detention facility. One is the records kept by the facility regarding its operations. These likely would be construed to be 'other official documents' as listed in 2-6-101(3)(c), and therefore would be public writings. The second is personal information regarding youth who are detained. It is not clear that this information is public. While the people of the state of Montana have a constitutional right to know, it must be balanced against a person's right to privacy. There may be victim, medical, psychological or psychiatric information or family history information in which the detained youth and others have the expectation of privacy. These types of information may not be public information. There may also be psychological and health services records which must be kept confidential for security reasons.

The Montana Supreme Court in Worden v. Montana Board of Pardons and Parole held that "[i]nmates' files are 'documents of public bodies' within the scope of Article II, Section 9 of the Montana Constitution." The Court further stated that "...the requests of third parties must be considered on a

case-by-case basis to determine whether an Inmate or third party has a privacy interest in the documents that outweighs the requesting party's right to know." In light of the decision in Worden, which was written as these rules were being written, the rule is amended to delete the confidentiality language, and detention centers will simply be asked to comport with state and federal records requirements.

COMMENT 20: Rule VII (20.9.607) is confusing in that 41-5-215, MCA refers not to juvenile detention records but youth court records. The rules should list the individuals who have access to the juvenile detention records.

RESPONSE: The rule is amended to reflect the list of persons who have access to juvenile detention records.

COMMENT 21: Allen Horsfall, Program Specialist, Board of Crime Control, submitted the following written comment: Having been involved in the process since 1992 of writing, rewriting, and marketing the Adult Jail Standards... I was particularly pleased to have been a part of that process. Likewise I am pleased to have been a part of the process for the Licensing Criteria (Standards) for Juvenile Detention. As you know, I have come from such a diversified background that I have seen these Standards from virtually all angles. I began this process as a County Commissioner with both a Law Enforcement and a Juvenile Probation background. Since that time I actually administered a juvenile detention facility and 'lived' under the license criteria. As a Juvenile Justice Specialist for the Board of Crime Control, I still feel as always that somebody of oversight needs to monitor the activities of Juvenile Detention Facilities and the job done by the Department of Corrections has been excellent. A steady improvement of juvenile detention services has resulted. From the quality of people hired to do these jobs, to the day by day operations of these facilities, the licensing criteria has had its influence.

I have sat on two different Committees since 1995 to rewrite these standards twice. The Committee appointed to rewrite the present standards was well represented not only in stakeholders directly involved in Juvenile Detention, but from across the State as well. Billings, Missoula, Kalispell, Helena, Great Falls, and Butte representatives were all at the table. The Office of Public Instruction, The Montana Association of Counties, the Department of Corrections, the long term Detention Facilities in Kalispell, Great Falls, and Billings, the short term detention centers in Missoula and Butte, the Board of Crime Control, the Department of Public Health and Human Services, State Fire Marshall people, and others too numerous to mention, were all involved in the writing of these new proposed standards.

With all the above said, I would like to further remark that these proposed standards are not perfect, nor do I know of any that are. However, I personally feel that they are a

product that is acceptable for contemporary times that represent a collective experience and a democratic process to create the rule. I have reviewed them with a jaundiced eye as if I were still running a facility. I find them acceptable and as close to the ACA as we will probably get without adopting them across the board. These standards are still for Montanans trying to provide these services in competition for funding and available bed space.

Congratulations on a job well done. However, please be prepared for opposition to these rules. There will always be those who feel that they are good enough, without supervision, to provide services like these. Keep in mind some of those people are right and they are good enough. It's when they are replaced by another and then another that the consistency of the rule really starts to make a difference.

Thank you for the opportunity to participate in this project and to evaluate the outcome.

RESPONSE: The commentor's views are duly noted.

COMMENT 22: Scott Osler, Director of the Flathead County Juvenile Detention Center, submitted the following written comment: Recently I was involved in the rewrite of the Administrative Rules of Montana with regard to licensure of youth detention facilities. Change is never easy. Many people took time from their busy schedules to help to meet and discuss ways to improve and update the ARM. Although we may not all agree or wholeheartedly embrace each and every detail of these rules and/or the changes made in this rewrite process, the ARM serve as a uniform framework under which Montana's youth detention facilities may operate.

I appreciate the opportunity to have been a part of the process to review and change the rules. Further, as a new director, I also appreciate the guidance provided by the ARMs so I know exactly what is required to run my facility safely and properly. The fact that the ARM are as complete and detailed as they are serves to ensure the safety of youth and staff and the security of our facilities.

RESPONSE: The commentor's views are duly noted.

COMMENT 23: Kellie Gibson, Administrator of the Cascade County Regional Youth Services Center submitted the following written comment: I would like to take a moment and comment on the Administrative Rules for detention that were completed during the course of this year by a committee of qualified professionals and peers in the field of corrections and human services. I found the process to be fair and educational. I was impressed by your ability to facilitate a sometimes difficult group and maneuver your way through at times hostile and uncomfortable subjects. I thank you for the opportunity to participate and I know the rules that were revised and created will help insure a safe and secure environment for community, staff, and youth.

In addition, I would hope that the process agreed upon by the group will be honored throughout the hearings process. I still stand firm and support the Department of Corrections stand on the restraint chair, the forbidden use of it. Secondly, I believe the education component that was decided on by the group is not only a needed aspect of the rules but also a constitutional right.

In conclusion, I thank you again for the opportunity to participate in an event that is guaranteed to provide protection for youth and community. In light of today's announcement by Amnesty International concerning the treatment of juveniles in detention in America's facilities, I believe Montana is on the right track.

RESPONSE: The commentor's views are duly noted.

Rick Day, Director
Department of Corrections

Lois Adams
Rule Reviewer

Certified to the Secretary of State, January 4, 1999.

BEFORE THE DEPARTMENT OF LIVESTOCK
OF THE STATE OF MONTANA

In the matter of the adoption of new rules I through XXV for the regulation of game farms in the state of Montana.	)))))	NOTICE OF ADOPTION

TO: All Interested Persons

1. On October 8, 1998, the department of livestock published notice of public hearings on the proposed adoption of new rules as they relate to regulation of game farms. Notice was published at page 2681 of the 1998 Montana Administrative Register, Issue No. 19.

2. Opportunity for public hearing was held on November 2, 1998, in Billings, on November 4, 1998, in Great Falls, and on November 5, 1998, in Missoula. The hearings were recorded and transcripts of the hearings are included in the files on this matter. In addition, written comments were received prior to the closing of the comment period.

3. The department has adopted the following new rules as proposed (comments received and the responses follow each rule): RULE II (32.4.201), RULE III (32.4.202), RULE IV (32.4.203), RULE VI (32.4.302), RULE VII (32.4.401), RULE IX (32.4.403), RULE X (32.4.404), RULE XI (32.4.405), RULE XII (32.4.406), RULE XIII (32.4.501), RULE XIV (32.4.502), RULE XV (32.4.601), RULE XVI (32.4.602), RULE XVII (32.4.701), RULE XVIII (32.4.702), RULE XIX (32.4.801), RULE XX (32.4.802), RULE XXII (32.4.901), RULE XXIII (32.4.902), RULE XXIV (32.4.1001), and RULE XXV (32.4.1002).

RULE II (32.4.201) IDENTIFICATION OF GAME FARM ANIMALS WITH THE EXCLUSION OF OMNIVORES AND CARNIVORES

COMMENT 1: I don't understand yet why two tags are required in an animal. Why isn't the metal USDA tag sufficient?

RESPONSE 1: 87-4-414, MCA, requires game farm animals be marked with a highly visible tag issued by the department. 81-3-102 (2), MCA, requires all game farm animals, with the exclusion of carnivores and omnivores, be identified with a recorded whole herd mark or brand. Therefore, each game farm animal is required to have the Montana official ear tag and a tattoo (whole herd mark). The USDA official ear tag is an official tag issued by the Animal and Plant Health Inspection Service, United States Department of Agriculture for use by an accredited veterinarian when performing official functions required by the Code of Federal Regulations, Title 9.

COMMENT 2: 32.4.201(2)(a) is unclear and (b) should allow the retattoo of an animal with the tattoo assigned to the current owner.

RESPONSE 2: The department's requirement for the retattoo of an animal with the original tattoo is to facilitate the trace back of an animal to its herd of origin. Retattooing the animal with the current owner's tattoo would alter the "permanent identification" of that animal and may affect the department's ability to trace the animal's movement from the herd of origin.

RULE III (32.4.202) IDENTIFICATION OF OMNIVORES AND CARNIVORES

COMMENT 3: Several comments were received stating that additional identification requirements for mountain lions and bears (beyond the tattoo required by the department of fish, wildlife and parks under 87-1-231, MCA) would be detrimental to an individual who owned such an animal for photographic purposes. Collars are seen as a hazard by which the animal might hang itself in the cage.

RESPONSE 3: 87-4-414, MCA, requires each game farm animal to be tagged with individual identification that is visible from a distance. The department recognizes the legitimate use of these animals for photographic purposes and has provided the licensee an option of applying for a waiver (ARM 32.4.203) to the tagging requirements. The department requested input from the department of fish, wildlife and parks on what types of identification might be appropriate for omnivores and carnivores. The department of fish, wildlife and parks recommended the use of collars as a means of identification that they successfully use in the wild.

COMMENT 4: A comment was received that the requirement in ARM 32.4.203(1)(c) to test cervidae annually for TB and brucellosis is unnecessary and places an extreme hardship on the animal.

RESPONSE 4: The annual TB and brucellosis tests are required for cervidae that are not tagged with the highly visible tag required by 87-4-414, MCA. If these animals escape to the wild, they may not be easily recaptured because they do not have the required game farm tag. The department determined that annual documentation of the health status of these animals is very important should they escape and not be recovered from the wild. Many game farm animals are routinely tested for TB and brucellosis without creating a hardship on the animal. The department has a requirement for a catch pen and handling device (ARM 32.4.801) to minimize the risk to the animal during the tagging and testing procedures.

RULE VI (32.4.302) INSPECTION OF GAME FARM ANIMALS AND

INTERNAL FACILITIES

COMMENT 5: An owner/manager needs to be present for the inspection of game farm animals and internal facilities.

RESPONSE 5: The issues at hand and an established need for an immediate action by the department to respond to a disease threat or other issue may not afford the department the time to contact the owner or manager and comply with their time constraints. The department will in most cases make contact with the licensee prior to the inspection date.

RULE XVII (32.4.701) TRANSPORT WITHIN AND INTO MONTANA

COMMENT 6: A comment was received that one should grandfather any existing management practices that do not meet the requirements proposed.

RESPONSE 6: The movement of animals between properties is required to be within a secured and enclosed vehicle. This requirement was made to minimize the risk of escape of game farm animals and was supported by the industry. If a licensee has another means of moving animals between two properties, it must be reviewed by the department and approved as a method of movement that also minimizes the risk of escape of game farm animals. If the other means of movement requires an alteration of the game farm perimeter fence, the department of fish, wildlife and parks must review the proposed alteration of the perimeter fence.

RULE XXII (32.4.901) IMPOSITION OF QUARANTINE

COMMENT 7: Any FWP check station finding any game animal having chronic wasting disease (CWD) shall result in all game farms within a 50 mile radius of the kill site going under an immediate quarantine.

RESPONSE 7: Quarantines are imposed by the state veterinarian under the authority of 81-2-102, MCA. In order to impose a quarantine, the department must determine that the premise is infected or contaminated with an infectious, contagious, communicable or dangerous disease. Finding a diseased animal in the wild does not document the origin of the disease. No changes were made.

COMMENT 8: We shouldn't be allowing the movement of animals into or within the state with the very real threat of chronic wasting disease spreading to and throughout the state.

RESPONSE 8: The department has no evidence of chronic wasting disease in wildlife or on game farms in Montana. The department has addressed import requirements under ARM 32.4.601. The department is drafting administrative rules to specifically address chronic wasting disease.

4. The board has also adopted new Rules I (32.4.101), V (32.4.301), VIII (32.4.302) and XXI (32.4.803) with the following changes (text of rule with matter stricken interlined and new matter added, then underlined):

RULE I (32.4.101) DEFINITIONS

(1) through (26) remain the same.

~~(27) "Single location" means contiguous parcels of property comprising the game farm under the same ownership or secured lease. Contiguous property may include parcels separated by a legal public or private road or a river or stream.~~

~~(28)~~ (27) "Solid Wall" means a wall constructed with no visible cracks between construction units or underneath the wall unit.

~~(29)~~ (28) "State waters" means a body of water so defined by 75-5-103, MCA.

~~(30)~~ (29) "Transfer" means ~~the movement of any game farm animal to or from a game farm and also includes~~ the change in ownership interest or any part of an ownership interest in a game farm animal.

~~(31)~~ (30) "Transportation" means the movement of a game farm animal to or from ~~one~~ a licensed game farm to another licensed game farm, a market or any other approved destination.

~~(32)~~ (31) "USDA official ear tag" means an identification ear tag that provides unique identification for each individual animal by conforming to the alphanumeric national uniform eartagging system.

~~(33)~~ (32) "Whole herd mark" means an artificial mark or brand recorded by the department for the exclusive sole use of the individual in whose name the mark or brand is recorded. The whole herd mark assigned by the department for game farm animals is the herd tattoo.

AUTH: 87-4-422, MCA
IMP: 87-4-422, MCA

COMMENT 9: Numerous comments were received addressing the definition of single location. The commentors stated a single location should be defined in terms of terrain and proximity, not by leases or ownership of land. The commentors stated it is their right to have a game farm on multiple leased land units or on land owned by several different parties.

RESPONSE 9: The department has reviewed the rule content and determined this definition is unnecessary. The issue of licensing properties at a single location falls under the jurisdiction of the department of fish, wildlife and parks and should be resolved within their rules.

COMMENT 10: Catch pen should be changed to "holding pen" since the pen is used for holding the animals and not catching

them.

RESPONSE 10: The department considered the above comment, but determined the term catch pen provides the interpretation needed in both 32.4.801(1) and 32.4.801(3). One may have a catch pen on a game farm pasture that is not used to hold animals for any length of time, but is used to facilitate the loading and movement of the animals to another location or facility.

COMMENT 11: Transportation should be defined as taking place "to or from" a licensed game farm, market or other approved destination.

RESPONSE 11: The department agrees with this change. To further clarify the rules, the department has changed the definition of transfer to reflect a change in ownership of an animal and the definition does not include any reference to the change in location or transportation of the animal.

COMMENT 12: A comment was received that the use of the term of "alternative livestock veterinarian" should be replaced with the term "wildlife veterinarian."

RESPONSE 12: The individuals trained by the department to perform regulatory work on game farm animals are deputy state veterinarians and not wildlife veterinarians. A wildlife veterinarian could be trained and approved by the department to act in the capacity of an alternative livestock veterinarian. No change was made to the definition of "alternative livestock veterinarian."

COMMENT 13: The definition of herd plan should include some reference to maintenance of a disease free status after achieving eradication of a disease.

RESPONSE 13: This is the definition of a herd plan and was not intended to outline the requirements of a herd plan.

RULE V (32.4.301) INSPECTION OF GAME FARM ANIMALS

(1) Prior to the sale, transfer of ownership, or transportation of a live animal from a licensed game farm, with the exclusion of omnivores and carnivores, the animal must be inspected by the department designated agent with the following exceptions:

(1)(a) through (d) remain the same.

(e) Omnivores and carnivores must meet the inspection and transportation requirements of the department of fish, wildlife and parks.

(2) through (7) remain the same.

AUTH: 87-4-422, MCA
IMP: 87-4-422, MCA

COMMENT 14: Several comments were received that expressed the concern that the inspection of mountain lions and bears each time the animal was removed from the farm for photographic purposes would be "expensive and hamper their business."

RESPONSE 14: The changes made in this section are necessary because the department of fish, wildlife and parks has the regulatory jurisdiction over the inspection and transport of omnivores and carnivores. ARM 32.4.702 lists the requirements for the inspection and transport of omnivores and carnivores. The department of livestock has no jurisdiction over the inspection and movement of omnivores and carnivores.

COMMENT 15: If a sick or injured animal can be moved from the game farm without an inspection, but only with a department waiver will there be someone at a department number that is available at all times of the day and night to issue such a waiver? Sickness and injury do not always occur during the office hours.

RESPONSE 15: ARM 32.4.301(1)(c) specifically addresses the movement of an animal for emergency medical treatment. No changes are necessary in the proposed rules to address this comment.

COMMENT 16: The requirement for an alternative livestock veterinarian to make a determination of whether an animal's reported condition meets the department's emergency criteria is biased and may cause a delay in treatment that could result in the death of an animal. We challenge the department's dictation of who we must use and when.

RESPONSE 16: 87-4-415, MCA, requires the inspection of game farm animals prior to selling, transferring, transporting or disposition. The department in this rule has outlined the circumstances under which the department could authorize the movement of an animal prior to having an inspection completed. These procedures do not dictate which veterinarian the licensee must use to treat an animal that requires emergency treatment. The rule requires a department designated agent to review the conditions of the animal to prevent an abuse of this procedure and to ensure the designated agent inspects the animal at the proposed destination.

COMMENT 17: It is sometimes in our best interest, as a businessman, to be able to take those baby fawns or something to the veterinarian to be tagged and so forth. Why can't I take them -- haul them and take them to him (the veterinarian) at my convenience, have them tagged and return them to the game farm without all this red tape?

RESPONSE 17: 87-4-415(1), MCA, states that the game farm animal is to be inspected prior to selling, transferring,

transporting or disposing of the game farm animals. The department requires tagging and marking of animals prior to movement from the game farm to facilitate the recapture of an animal should it escape, and to reference the animal's identification for disease tests that are also required prior to movement.

COMMENT 18: I would like to see the inspector (for the department of livestock) that comes to a slaughter plant and takes blood from the animal be able to remove tags so I don't have to pay the alternative livestock veterinarian to come out and say the paperwork's signed, it died from a gunshot to the head when it was slaughtered.

RESPONSE 18: The rules as written allow the department the discretion of determining who performs work as a "department designated agent." It has not been determined at this time who might serve as the "department designated agent" at a licensed slaughter plant.

RULE VIII 32.4.402 ELK-RED DEER HYBRIDIZATION TESTS

(1) remains the same.

(2) The licensee shall test all elk born on or prior to December 31, ~~1998~~ 1999 for elk-red deer hybridization by January 1, ~~1999~~ 2000.

(3) The licensee shall test all elk born between January 1, ~~1999~~ 2000 and December 31, ~~2000~~ 2001 for elk-red deer hybridization by January 1 of the year following the year of birth or when the animal is sold or transported from the game farm, whichever comes first.

(4) A licensee that has completed elk-red deer hybrid testing on his entire herd by January 1, 1999, may submit those results to the department and request a waiver to ARM 32.4.402(3) from the department of fish, wildlife and parks.

(4) and (5) remain the same, but are renumbered (5) and (6).

AUTH: 87-4-422, MCA
IMP: 87-4-422, MCA

COMMENT 19: The time frame for having a herd tested by January 1, 1999, seems unreasonable. I would suggest that a date of 6 months from the date of adoption of the rules be implemented to allow a game farm owner time to plan to have the testing accomplished and time to schedule an approved veterinarian. Will only one test be required for each animal that tests negative for hybrid influence?

RESPONSE 19: Changes were made to the rule that recognize the testing of the entire herd prior to January 1999. However, the waiver to the testing required in the years 2000 and 2001 must be made by the department of fish, wildlife and parks.

COMMENT 20: Another comment was made that all elk born between January 1, 1998, and December 31, 2000, should be tested for elk-red deer hybridization if the animals are sold or transported from the game farm. Maybe one could have an agreement to test for 5 years for all elk that are sold or transported from the game farm.

RESPONSE 20: It was determined in the negotiated rule making process, that it was in the best interest of the industry to test all game farm elk for elk-red deer hybridization for a period of three years. Any waiver to the elk-red deer test requirements of 32.4.402 would be made by the department of fish, wildlife and parks.

RULE XXI (32.4.803) MODIFICATION OF ~~INTERNAL~~ QUARANTINE FACILITIES

(1) Remains the same.

AUTH: 87-4-422, MCA
IMP: 87-4-422, MCA

COMMENT 21: The heading should read "modifications of quarantine" since the rule discusses a quarantine area and not internal facilities.

RESPONSE 21: The department agreed with the comment and made the appropriate change.

MONTANA DEPARTMENT OF LIVESTOCK

By: _____
Marc Bridges, Acting Exec. Officer
Board of Livestock
Department of Livestock

By: _____
Lon Mitchell, Rule Reviewer
Livestock Chief Legal Counsel

Certified to the Secretary of State January 4, 1999.

BEFORE THE BOARD OF LIVESTOCK
OF THE STATE OF MONTANA

In the matter of the amendment to ARM 32.8.101 relating to incorporation by reference of the Procedures Governing the Cooperative State-Public Health Service/Food and Drug Administration Program for Certification of Interstate Milk Shippers.	)	NOTICE OF AMENDMENT

TO: ALL INTERESTED PERSONS:

1. On October 8, 1998, the Montana board of livestock published notice of the proposed amendment to rule 32.8.101 concerning fluid milk and grade A milk products. Notice was published at page 2699 of the 1998 Administrative Register, issue no. 19, as MAR No. 32-3-143.

2. The board has amended the rule with the following change: (text of rule with matter stricken interlined and new matter added, then underlined)

32.8.101 ADOPTION OF GRADE A PASTEURIZED MILK ORDINANCE AND ASSOCIATED DOCUMENTS

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

(f) "Procedures Governing the Cooperative State-Public Health Service/Food and Drug Administration Program for Certification of Interstate Milk Shippers," ~~1995~~ 1997 Edition.

(2) and (3) remain the same.

AUTH: 81-2-102, MCA
IMP: 81-2-102, MCA

3. One comment was received. The comment was that the 1997 Edition would be the most appropriate. The board of livestock adopted that change.

DEPARTMENT OF LIVESTOCK

By: /s/ Marc Bridges
Marc Bridges, Acting Exec. Officer
Board of Livestock
Department of Livestock

By: Lon Mitchell
Lon Mitchell, Rule Reviewer
Livestock Chief Legal Counsel

Certified to the Secretary of State January 4, 1999.

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

In the matter of the amendment of rule 16.32.320 pertaining to hospital swing beds	)))	NOTICE OF AMENDMENT

TO: All Interested Persons

1. On July 16, 1998, the Department of Public Health and Human Services published notice of the proposed amendment of rule 16.32.320 pertaining to hospital swing beds at page 1890 of the 1998 Montana Administrative Register, issue number 13.

2. The Department has amended the following rule as proposed with the following changes from the original proposal. Matter to be added is underlined. Matter to be deleted is interlined.

16.32.320 MINIMUM STANDARDS FOR A HOSPITAL--GENERAL REQUIREMENTS (1) A hospital shall comply with the Conditions of Participation for Hospitals in 42 CFR 482.2 through ~~482.66~~ 482.62, revised as of October 1, 1995~~, with the following amendment:~~ .

~~(a) Delete the text in 42 CFR 482.66(a)(6)(i) and (ii) and replace with the following text:~~

~~"(6) A hospital must transfer a long term care patient occupying a hospital swing bed to a skilled or intermediate care nursing facility located within the local service area or the patient's home community within 5 days (excluding weekends and holidays) after learning that a skilled or intermediate nursing care bed is available, or in the case of a prospective notification, within 5 days of the date the nursing home bed becomes available, unless:~~

~~(i) the patient elects in writing to continue to receive care in the hospital swing bed after the hospital has informed the patient in writing of the differences in services required to be offered to a long term care patient occupying a skilled nursing facility bed, as identified in 42 CFR 483,(b), and those services required to be offered to a long term care patient occupying a hospital swing bed as identified in (b) of 42 CFR 482.66; or~~

~~(ii) the patient's physician certifies, as required under 42 CFR 424.20, that the transfer is not medically appropriate."~~

(2) If a hospital provides skilled nursing care or intermediate nursing care, as those levels of care are defined in 50-5-101, the hospital shall comply with the skilled nursing facility requirements listed in 42 CFR 482.66(b) revised as of October 1, 1995.

~~(b)~~ (3) The department hereby adopts and incorporates by reference 42 CFR 482.2 through ~~482.66~~ 482.62 and 42 CFR 482.66 (b), revised as of October 1, 1995~~, as amended by this rule~~. 42

CFR 482.2 through ~~482.66~~ 482.62 set forth the conditions of participation a hospital must meet to participate in the medicare program. 42 CFR 482.66(b) sets forth the skilled nursing facility requirements a hospital provider of long term care services must meet to participate in the medicare program. A copy of the regulations may be obtained from the Department of Public Health and Human Services, Quality Assurance Division, Licensing Bureau, Cogswell Building, P.O. Box 202951, 1400 Broadway, Helena, Montana 59620-2951.

AUTH: Sec. 50-5-103, MCA
IMP: Sec. 50-5-103 and 50-5-204, MCA

3. The Department has thoroughly considered all commentary received. The comments received and the department's response to each follow:

COMMENT #1: The amendment of ARM 16.32.320 was opposed for the following reasons:

(a) The proposed regulations are unnecessary. Hospitals must meet federal conditions of participation no matter what the department might propose to the contrary. The federal regulations in place today, and incorporated in department rules, are sufficient to ensure that appropriate care is provided to patients. The department does not need to inject new restrictions on who might be best served in swing bed hospitals. There is no statutory directive to produce this proposed rule, no compelling public interest and no evidence that patient care is compromised by swing care providers.

(b) Swing bed hospitals are legitimate providers of long term care services. Swing bed care is a legitimate long term care setting created to more efficiently utilize scarce medical resources in rural communities. Swing beds are intended to supplement, rather than replace, long term care facilities. The proposed regulations do nothing to promote quality patient care or patient safety nor do they serve the patients' interests. All nursing home beds do not offer the same level of care and the same environment for nursing home residents.

(c) The proposed rules conflict with Medicare and Medicaid regulations. The department introduces conflict and confusion into program administration. In order to hold a license to do business in Montana, the department would require swing bed providers to abide by its proposed regulations. But the swing bed provider would need to ignore these same rules in order to participate in the Medicaid and Medicare programs.

(d) Swing beds provide just 1 percent of all long term care. According to the 1996 Annual Survey of Hospitals, Montana's swing bed providers admitted 1,715 patients who received 25,277 days of care, an average length of stay of 14.74 days. According to information supplied by the department, Montana's nursing homes provide 2.4 million days of care, or 99 percent of the total. The evidence shows that the swing beds

are used temporarily as intended. Those that did not were by patient choice.

(e) The department's proposed rules create new administrative costs and burdens. The department proposes new paperwork and creates the potential for new conflicts and patient confusion about the health care system. The proposed rule removes patient choice unless more paper work is generated by either the hospital or the physician with no outcome that will ultimately benefit the patient. The proposed transfer requirement would inhibit private insurance contracting by adding additional stipulations. The department should disclose what punishment would be imposed upon a provider who failed to comply with the new transfer regulation.

RESPONSE: (a) The department notes that the proposed amendment of ARM 16.32.320 encompassed more than simply a transfer requirement. The proposed amendment of ARM 16.32.320 incorporated by reference various federal skilled nursing facility requirements that must be met by hospitals offering extended care services. The department believes that the requirements enumerated in 42 CFR 482.66(b) should apply to all licensed hospitals in Montana to ensure the requisite quality of care in swing beds and to provide a basis for licensure action if necessary. Accordingly, the department has amended ARM 16.32.320 to require hospitals that provide skilled nursing care or intermediate nursing care, as those levels of care are defined in 50-5-101, MCA to comply with the skilled nursing facility requirements listed in 42 CFR 482.66(b). Additionally, the department has retained the licensure requirement that a hospital comply with the Conditions of Participation for Hospitals in 42 CFR 482.2 through 482.62, which are the same requirements that have been in administrative rule since 1996.

(b) With respect, however, to the proposed transfer requirement in ARM 16.32.320, the department agrees with the comments in (b) through (e). Specifically, the department agrees that swing bed hospitals are legitimate providers of long term care services. No evidence was submitted by commentors that documented quality of care issues with respect to patient retention in swing beds for extended periods of time. To date, there have been no complaints filed with the department regarding the quality of care provided by swing bed hospitals nor have any complaints been alleged by swing bed patients claiming they were not allowed to transfer to a nursing facility. Accordingly, the department has determined that there are no public health or safety issues which would require the department to move forward with the adoption of the proposed transfer requirement.

(c) Medicare and Medicaid already regulate access and use of swing beds. At the very least, the conflicting transfer requirements between Medicaid, Medicare and the proposed licensure transfer requirement would create confusion for those patients occupying a swing bed. A patient might well assume

that the licensure transfer requirement gives the resident an absolute right to remain in a swing bed. In fact, for example, if the payor is Medicaid or if the patient does not meet the skilled Medicare criteria Part A payment, the patient would not have a choice to stay if the patient wants the days paid for, unless he or she pays privately. The licensure transfer requirement would inject confusion into an already complicated health care system without any compelling health or safety issues to justify its adoption.

(d) Statistics, taken from the 1996 Annual Survey of Hospitals and Department data, show that swing beds provide just 1 percent of all long term care in Montana. The department believes that these statistics, in the absence of evidence that patient care is compromised by swing bed providers, do not necessitate the imposition of a transfer requirement.

(e) Currently, Medicare patients in hospitals with fewer than 50 beds and private pay patients may choose where to obtain their care, with no requirement to make an affirmative written election to continue to receive care in a swing bed. The department agrees that the proposed licensure transfer requirement creates new paperwork and imposes new administrative costs and burdens that are not justified in the absence of documented quality of care issues in swing beds. For the reasons noted above, the department has deleted the transfer requirement from ARM 16.32.320.

COMMENT #2: The department's proposed swing bed transfer requirement was supported because it recognized the patient's right to decide where they wish to have care and allowed a physician to determine what setting provides the most medically appropriate care. However, the commentors could not support the amendment of ARM 16.32.320(1)(a)"(6)(i)", particularly the requirement that the patient be informed of the differences in services required to be offered to a patient occupying a skilled nursing facility bed and those services required to be offered to a hospital swing bed patient. The legal requirements of the services that are to be performed does not necessarily describe the services that are actually performed at a particular facility and can be misleading and lead to inappropriate decisions in many cases. A hospital that elects to offer more than the required services to its swing bed patients should be allowed to include those services in the description of differences given to the swing bed patient. Further, the hospital should have a description of each nursing home's services to give the patient as not all nursing homes offer the same services. ARM 16.32.320(1)(a)"(6)(i)" should be amended to read: "(i) the patient elects in writing to continue to receive care in the hospital swing bed". The rest of subsection (i) should be deleted.

RESPONSE: With the department's deletion of the proposed licensure transfer requirement in ARM 16.32.320, private pay

patients and Medicare patients in hospitals with fewer than 50 beds will continue to be able to choose where to obtain their care.

COMMENT #3: The proposed amendment of ARM 16.32.320 was supported, particularly the transfer requirement, as being in keeping with long standing department policy which recognizes that the use of swing beds is "temporary" in nature and designed for use when regularly licensed beds are not available. Given the differences in the standards which regularly licensed nursing facility beds must meet as compared to hospital swing beds, it is appropriate public policy. However, the rule should be clarified and strengthened as follows:

(a) Delete 42 CFR 482.66(a)(6) in its entirety to clarify that the introductory language which precedes (i) and (ii) is also being deleted and is being replaced in its entirety by the substituted text. This will ensure that the proposed transfer provisions will apply to all hospitals, as opposed to only hospitals with 50 or more beds.

(b) Amend ARM 16.32.320(1)(a) to add language that requires the swing bed hospital to inquire of long term care facilities in the community and local service area about the availability of beds in order to expedite the appropriate transfer of swing bed patients contemplated by this rule.

(c) The proposed amendment of ARM 16.32.320(1)(a) refers to 42 CFR 424.20 which appears to apply to swing bed hospitals with 50 or more beds. ARM 16.32.320(1)(a) should be changed to clarify that it applies to all swing bed stays regardless of the size of the hospital. The term "medically appropriate" should be defined in the rule as it does not appear to be defined in either state or federal regulations. Perhaps the department should clarify that "medical appropriateness" is determined at least in part by whether a Skilled Nursing Facility (SNF) in the community or service area provides the specific services required by the patient. This rule should be changed to put all providers on notice of what is expected.

(d) Swing bed hospitals are not required by the proposed rule to meet the same standards as regularly licensed nursing home beds. This is appropriate if swing beds are considered "temporary". However, the proposal allows hospital swing beds to be used in exactly the same manner as regularly licensed beds if a patient wishes to remain in a swing bed. The proposal should be changed to either limit the total length of stay in a hospital swing bed to no more than 30 days, or in the alternative, to provide that patients who remain in a swing bed for more than 30 days will be entitled to care that meets all of the standards that must be met by regularly licensed nursing homes.

RESPONSE: The department has deleted the proposed transfer requirement in ARM 16.32.320; please refer to the department's response to Comment #1 for more information. Because comments

(a) through (c) pertain specifically to the transfer requirement, which has been deleted, it is not necessary to make the changes suggested therein.

With respect to comment (d), the department does not believe that is necessary, even without a specified length of stay, to require swing bed hospitals to meet all of the regularly licensed nursing home regulations. With the incorporation of 42 CFR 482.66(b), swing bed hospitals will meet some but not all of the federal standards that nursing home beds must meet. The Health Care Financing Administration (HCFA) analyzed this issue extensively in its initial adoption of rules implementing swing bed provisions. In determining which nursing home standards were necessary and appropriate to meet the needs of long term care patients, HCFA reasoned that swing bed hospitals typically have a lower daily census of long term care patients than do nursing homes, and that patients in swing beds are less likely to become long term care residents. HCFA found that the following SNF standards, or parts thereof, would meet the needs of long term care patients in hospital swing beds: resident rights; admission, transfer, and discharge rights; resident behavior and facility practices; patient activities; social services; discharge planning; specialized rehabilitation services; and dental services. Some of the federal SNF requirements applicable to nursing homes duplicated those already required of hospitals. For example, skilled nursing facilities are required by federal conditions of participation to provide pharmaceutical and dietetic services. Because hospitals are already required to provide those same services, those specific SNF requirements are not reflected in the list of SNF requirements applicable to swing bed hospitals. In short, swing bed care is not considered to be a second class level of care by either the federal government or the department.

In the absence of any information showing that patient care has been compromised by swing bed providers, and with the incorporation of 42 CFR 482.66(b) the department feels that swing bed hospitals will provide the requisite quality of care to ensure that the particular needs of long term care patients are met.

COMMENT #4: The rule amendment was supported but the true meaning of the rule may not be met by the proposed changes, without adding more stringent requirements. Many times swing beds are used more for the convenience of physicians or hospitals. Some hospitals used and held patients in swing beds even though there were nursing home beds available. One hospital went 1 ½ years without a patient being transferred to the nursing home although there were patients in swing beds. Patients have been presented with swing bed paperwork already filled out before checking whether the patients wanted to go to a nursing home. The requirements applicable to swing beds should be equivalent to that of a nursing facility if hospitals are going to keep patients in swing beds long term. People

should be in swing beds when appropriate, but hospital employees and patients need to be educated.

RESPONSE: Please refer to the department's response to Comment #1 regarding deletion of the licensure transfer requirement and the department's response to Comment #3 regarding the particular skilled nursing requirements applicable to hospital swing beds.

COMMENT #5: Swing beds can be used temporarily and permanently under the proposed transfer rule. Accordingly, there are certificate of need issues with this rule that need to be addressed.

RESPONSE: The Certificate of Need (CON) Program does count the number of swing bed days in determining whether there is an unmet bed need for nursing home services in a particular community. As amended herein, ARM 16.32.320 will not require a hospital to transfer a swing bed patient to a nursing home bed for licensure purposes. However, it is important to state again that this will impact only private pay patients and Medicare patients in hospitals with fewer than 50 beds. Medicare (for patients in hospitals with more than 50 beds but fewer than 100) and Medicaid both impose and will continue to enforce transfer requirements for swing bed patients. Medicare does not allow hospitals with more than 100 beds to use swing beds. While the number of swing bed days may increase in communities, it is unlikely that the increases will be significant in light of the Medicaid and Medicare transfer rules that regulate the greater number of patients in swing beds.

Further, there are 34 hospitals in Montana that, pursuant to CON and federal approval, are authorized to provide swing bed care. Of those, 29 operate a nursing facility. If a licensure transfer requirement were in place, it is likely that the majority of swing bed providers would simply transfer a patient to their own nursing facility.

In addition, the department must be guided by public health and safety concerns in determining the need for licensure requirements. In the absence of information that patient care has been or is being compromised by swing bed providers, the department does not believe a licensure transfer requirement is mandated.

Dawn Sliva
Rule Reviewer

Laura Clauson
Director, Public Health and Human Services

Certified to the Secretary of State January 4, 1999.

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

In the Matter of the Amendments to Rules Pertaining to Pipeline Safety	)))	NOTICE OF AMENDMENT

TO: All Interested Persons

1. On November 5, 1998, the Department of Public Service Regulation published notice of public hearing on the proposed amendment of rules pertaining to pipeline safety, at pages 2947 through 2948 of the 1998 Montana Administrative Register, Issue Number 21.

2. The Department has amended the following rules as proposed:

38.5.2202 INCORPORATION BY REFERENCE OF FEDERAL PIPELINE SAFETY REGULATIONS

AUTH: Sec. 69-3-207, MCA; IMP: Sec. 69-3-207, MCA.

38.5.2302 INCORPORATION BY REFERENCE OF FEDERAL PIPELINE SAFETY REGULATIONS -- DRUG AND ALCOHOL TESTING AND PREVENTION PROGRAMS

AUTH: Sec. 69-3-207, MCA; IMP: Sec. 69-3-207, MCA.

3. No comments regarding the proposed amendments were received.

Dave Fisher

Dave Fisher, Chairman

CERTIFIED TO THE SECRETARY OF STATE JANUARY 4, 1999.

Robin A. McHugh

Reviewed By Robin A. McHugh

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT) CORRECTED NOTICE OF AMENDMENT
of ARM 42.21.113, 42.21.122,)
42.21.123, 42.21.131, 42.21.)
137, 42.21.138, 42.21.139,)
42.21.140, 42.21.151, 42.21.)
153, and 42.21.155 relating)
to Personal Property Trended)
Depreciation Schedules and)
Valuations for Tax Year 1999)

TO: All Interested Persons:

1. On December 17, 1998, the Department published notice of the amendments to ARM 42.21.113, 42.21.122, 42.21.123, 42.21.131, 42.21.137, 42.21.138, 42.21.139, 42.21.140, 42.21.151, 42.21.153, and 42.21.155 relating to Personal Property Trended Depreciation Schedules and Valuations for Tax Year 1999 at page 3316 of the 1998 Montana Administrative Register, issue no. 24.

2. This corrected notice is being filed to correct an error in ARM 42.21.155.

3. ARM 42.21.155 is corrected as follows:

42.21.155 DEPRECIATION SCHEDULES (1) remains the same.

(2) The trended depreciation schedules for tax year ~~1998~~ 1999 are listed below. The categories are explained in ARM 42.21.156. The trend factors are derived according to ARM 42.21.156 and 42.21.157.

Category Tables 1 through 8 remain the same.

(3) remains the same.

Auth: Sec. 15-1-201, MCA; IMP: Sec. 15-6-135, 15-6-136, 15-6-138, 15-6-139, 15-6-207, 15-24-921, 15-24-922, and 15-24-925, MCA.

4. The department makes this correction based on an oversight of this year's date being changed with the other dates in this rule.

5. All other rule changes adopted within the notice published on December 17, 1998, regarding personal property trended depreciation schedules and valuations for tax year 1999 remain the same.

Cleo Anderson
CLEO ANDERSON
Rule Reviewer

Mary Bryson
MARY BRYSON
Director of Revenue

Certified to Secretary of State January 4, 1999

VOLUME NO. 47 OPINION NO. 21

BUILDING CODES - Interpreting plumber licensing laws;
BUILDING CODES - When plumbing license required;
LICENSES, PROFESSIONAL AND OCCUPATIONAL - Interpreting plumber licensing laws;
LICENSES, PROFESSIONAL AND OCCUPATIONAL - When plumbing license required;
PLUMBERS, BOARD OF - Interpreting plumber licensing laws;
PLUMBERS, BOARD OF - When plumbing license required;
MONTANA CODE ANNOTATED - Sections 37-1-131, 37-69-102, -202, -301, -303, -306, -324;
OPINIONS OF THE ATTORNEY GENERAL - 38 Op. Att'y Gen. No. 60 (1980).

HELD: 1. The Board of Plumbers has the legal authority to interpret Mont. Code Ann. title 37, chapter 69, and any other laws or rules pertaining to the licensing of plumbers in Montana. The Board's interpretation must be given deference unless it is incorrect.

2. The Board of Plumbers' statutory authority to prevent the unlicensed practice of plumbing is limited to situations where a person works in the field of plumbing in any incorporated city, town or other area served by a public water supply or a public sewer system, or who while working in the field of plumbing connects or disconnects plumbing from a public water supply or sewer system (Mont. Code Ann. § 37-69-301), assuming that the person's work does not fit within the exceptions of Mont. Code Ann. § 37-69-102 and a waiver has not been granted pursuant to Mont. Code Ann. § 37-69-301.

December 16, 1998

Peter S. Blouke, Ph.D., Director
Montana Department of Commerce
P.O. Box 200501
Helena, MT 59620-0501

Dear Dr. Blouke:

The Department of Commerce has asked my opinion on two related questions which I have rephrased as follows:

1. Which entity, the Board of Plumbers or the Building Codes Division of the Department of Commerce, has the legal authority to interpret Mont. Code Ann. title 37, chapter 69 of the Montana Code Annotated and any other laws or

rules pertaining to the licensing of plumbers in Montana?

2. Does the Board of Plumbers' statutory authority to pursue action against the unlicensed practice of plumbing extend to situations where a person works in the field of plumbing or is it limited to situations where a person works in the field of plumbing in an incorporated city, town or other area served by a public water supply or public sewer system, assuming in either instance that the person's work does not fit within the exceptions of Mont. Code Ann. § 37-69-102 and that a plumbing license is required any time a person connects or disconnects plumbing from a public water supply or sewer system?

The Montana Board of Plumbers regulates the plumbing profession and oversees the licensing of journeyman and master plumbers in the State of Montana. Mont. Code Ann. §§ 37-1-131, -302(1), 37-69-306(2). The Board of Plumbers' powers include the ability to adopt rules to implement Mont. Code Ann. title 37, chapter 69, Mont. Code Ann. § 37-69-202(1), and the duty to "set and enforce standards and rules governing the licensing . . . and conduct" of plumbers, Mont. Code Ann. § 37-1-131.

The Department of Commerce is responsible for issuing plumbing permits, Mont. Code Ann. §§ 50-60-505 to -509, and inspecting facilities "to ensure compliance with the requirements of the state plumbing code." Mont. Code Ann. § 50-60-510. The Department of Commerce has assigned these duties to its Building Codes Division which, as part of its inspection duties, must "request proof of licensure from any person who is required to be licensed who is involved with or, in the inspector's judgment, appears to be involved with plumbing activities if the person is on the site." § 50-60-510. License violations uncovered by a Building Codes Division investigator must be reported by that investigator to the Building Codes Division, which must then report the violation to the Board of Plumbers. § 50-60-510. However, the Department of Commerce's rule-making authority with respect to plumbing licenses is limited to "setting expiration, renewal and termination dates." Mont. Code Ann. § 37-1-101(7).

From my review of the above-cited statutes, I conclude that the legal authority to interpret Mont. Code Ann. title 37, chapter 69 and any other rules and laws pertaining to the licensing of plumbers rests with the Board of Plumbers. The Board of Plumbers' interpretations are entitled to deference and are controlling, unless they are legally incorrect. Christenot v. State, 272 Mont. 396, 401, 901 P.2d 545, 548 (1995); Grouse Mountain Assoc. v. PSC, 284 Mont. 65, 943 P.2d 971 (1997).

I understand that this question regarding which entity has the legal authority to interpret plumbing licensing laws arises, at least in part, as a result of Mont. Admin. R. 8.70.304(3). That rule was adopted by the Building Codes Bureau of the Department of Commerce while the Board of Plumbers was administratively attached thereto. I have not been asked to and do not offer an opinion on whether Mont. Admin. R. 8.70.304(3) was properly promulgated. However, I do reiterate that the Board of Plumbers has the legal authority to establish and enforce laws governing the licensing of plumbers, while the Building Codes Division's inspection duties include the obligation to "request proof of licensure from any person who is required to be licensed" as a plumber. Mont. Code Ann. § 50-60-510. Thus, the Board of Plumbers and the Building Codes Division must be consistent in their interpretation of when an individual engaged in the field of plumbing must be licensed.

Regarding the second issue, the Department of Commerce asks whether the Montana Board of Plumbers' interpretation of Mont. Code Ann. §§ 37-69-301 to -324 is correct. The Board apparently interprets those statutes to require any person who engages in the "field of plumbing" to have a plumbing license, regardless where the plumbing activity occurs. The only exceptions would be for the type of plumbing installations listed in Mont. Code Ann. § 37-69-102 and when the license requirement has been properly waived pursuant to Mont. Code Ann. § 37-69-301. I cannot interpret Mont. Code Ann. §§ 37-69-301 to -324 in such a manner.

When interpreting statutes, the intent of the legislature controls. State ex rel. Neuhausen v. Nachtsheim, 253 Mont. 296, 299, 833 P.2d 201, 204 (1992). Legislative intent is determined by first examining the language of the statutes and the apparent purpose to be served by the statutes. State v. Austin, 217 Mont. 265, 268, 704 P.2d 55, 57 (1985). If the legislature's intent can be determined from the plain meaning of the words used, together with the context of the statutes, there is no need to look further. Clover Leaf Dairy v. State, 948 P.2d 1164 (1997); McClanathan v. Smith, 186 Mont. 56, 61, 606 P.2d 507, 510 (1980).

Part 3 of chapter 69, title 37, Mont. Code Ann., contains the licensing provisions applicable to persons engaged in the "field of plumbing" in this state. Section 37-69-301 is the substantive statute which dictates when an individual working at the field of plumbing must be licensed as a plumber, and provides for the waiver of the licensing requirements by various entities. It states:

> **37-69-301. License required--temporary exception by municipal resolution when licensed plumber not available.** Any person working at the field of plumbing in any incorporated city, town, or in any

> other area served by a public water supply or a public sewer system in this state, either as a master plumber or as a journeyman plumber, or who while working at the field of plumbing shall connect plumbing to or disconnect plumbing from a public water supply or public sewer system shall first secure a state license as hereinafter provided. The council or commission of any city or town or board of directors or managers of a water or sewer district or water utility, in cases where a duly licensed person or persons are not reasonably available, may by ordinance, rule, or resolution duly adopted and upon reasonable notice by certified letter to the board of plumbers and upon their approval, or after 30 days from the date of the postmark of the certified letter if the board fails to respond to the certified letter, authorize the practice in the field of plumbing by a person or persons who have not obtained the state licenses as hereinafter provided until such time as a duly licensed person or persons are reasonably available or until the board of plumbers withdraws its authorization.

According to the plain language of the first sentence of the statute, a plumbing license is required for: (1) any person who works in the field of plumbing in any incorporated city or town; (2) any person who works in the field of plumbing in any area served by a public water supply or a public sewer system; and (3) any person who while working at the field of plumbing connects plumbing to or disconnects plumbing from a public water supply or public sewer system. See 38 Op. Att'y Gen. No. 60, at 215 (Mont. 1980) (one factor for determining when a plumbing license is required is whether "the work must be accomplished 'in any incorporated city, town, or in any other area served by a public water supply or a public sewer system in this state'").

The historical evolution of Mont. Code Ann. § 37-69-301 is also instructive. The predecessor to the above provision was initially adopted in 1949 as the first section of the original act which established a system of state examination for master and journeyman plumbers. It provided: "Any person working at the business of plumbing, in any incorporated city or town in this state containing more than one thousand inhabitants, either as a master plumber or as a journeyman plumber, shall first secure a state license as hereinafter provided." It is clear from this language that a person working at the business of plumbing had to obtain a state master plumber or journeyman plumber license only in the event that person worked as a plumber in an incorporated city or town. Plumbing work conducted outside the limits of an incorporated city or town did not require a plumbing license.

The original section has been amended several times since 1949. Amendments adopted in 1961 expanded the plumbing license

requirement to a person who, while working at the business of plumbing, connected plumbing to or disconnected plumbing from the city or town's water or sewer system. The 1975 Legislature changed the term "business of plumbing" to "field of plumbing" and greatly expanded the license requirement by making it applicable to persons who work in the field of plumbing in any area served by a public water supply or a public sewer system, or who connect or disconnect plumbing from a public water supply or a public sewer system. Significantly, however, there has been no amendment expanding the plumbing license requirements to a person working in the field of plumbing anywhere in the state. In fact, such an amendment was defeated in committee during the 1997 legislative session.

The 1961 Legislature also amended the original law by adding the predecessor to the second sentence of Mont. Code Ann. § 37-69-301. The second sentence now allows a city or similar entity to temporarily waive the license requirements of the first sentence in the event a licensed plumber is not reasonably available and the Board of Plumbers expresses no objection. This "waiver" refers to the licensing requirements found in the first sentence of the statute and is in addition to, not instead of, those licensing requirements. The licensing requirements set forth in the first sentence control unless the exceptions contained in Mont. Code Ann. § 37-69-102 apply or a waiver is obtained.

The remaining substantive sections contained in chapter 69 of title 37, Mont. Code Ann., pertain to the use of apprentices, and the process for licensing journeyman plumbers and master plumbers in the state of Montana. See Mont. Code Ann. §§ 37-69-302, -303, and -306. They set forth the qualifications required of a journeyman plumber and a master plumber, as well as the licensing, examination and discipline process. Those statutes, while a part of the regulatory scheme applicable to plumbers generally, do not establish when a license is required of a person working in the field of plumbing. Mont. Code Ann. § 37-69-301 is the sole statute wherein that information is found.

Mont. Code Ann. § 37-69-324 imposes misdemeanor penalties for violations of the licensing provisions. It states:

> **37-69-324. Penalty.** A person who works at the field of plumbing or maintains or conducts a plumbing business or an individual who connects or disconnects plumbing from a public water or sewer system *in violation of any provisions of this chapter* or at a time when he is not exempt from the provisions of this chapter pursuant to the provisions of a duly enacted and subsisting ordinance of a city or town is guilty of a misdemeanor and, upon conviction thereof in any court of competent jurisdiction, is guilty of a misdemeanor. However, this chapter may not be

> construed to apply to or affect plumbing or pipefitting as indicated in the 37-69-102 exceptions.

(Emphasis supplied.) It is apparently the position of the Board of Plumbers that Mont. Code Ann. § 37-69-324, when read with Mont. Code Ann. § 37-69-301, imposes a penalty on any person engaged in the field of plumbing who is not licensed. Again, I cannot agree.

Penalty statutes are not self-executing. Crane v. State, 200 Mont. 280, 284, 650 P.2d 794, 797 (1982). Rather, they set forth the penalties to be imposed whenever provisions of substantive statutes are proven to have been violated. Id. Section 37-69-324 is no different. That section specifically provides that a person who works at the field of plumbing, a person who conducts a plumbing business or an individual who connects or disconnects plumbing from a public water or sewer system is guilty of a misdemeanor if that person is "in violation of any provisions of this chapter." Mont. Code Ann. § 37-69-301 limits the licensing requirement to plumbing work conducted within a city, a town or an area served by a public water supply or a public sewer system, and work which connects or disconnects plumbing from a public water supply or a public sewer system, provided the work is not subject to the exclusions listed in Mont. Code Ann. § 37-69-102 and the requirement has not been waived pursuant to Mont. Code Ann. § 37-69-301.

A "public sewer system" is "any common sewer carrying liquid wastes from two or more dwellings or any other facility that serves the public." A "public water supply" is "any community well, water hauler for cisterns, water bottling plant, water dispenser, or other water supply that serves 10 or more families or 25 or more persons on a regular and continuous basis." Mont. Code Ann. § 37-69-101(8), (9). Applying these definitions to Mont. Code Ann. § 37-69-301, it is apparent that any person who works in the field of plumbing on any sewer system which serves two or more dwellings or any other facility which serves the public, or any water supply which serves 10 or more families or 25 or more persons on a regular and continuous basis, must be a licensed plumber. The only exceptions are those listed in Mont. Code Ann. § 37-69-102, or when a waiver has been properly obtained pursuant to the second sentence of Mont. Code Ann. § 37-69-301. No plumbing license is required for an individual who works in the field of plumbing in other areas, including an individual who installs plumbing in a single family dwelling which has its own well and septic system, is located outside the limits of an incorporated city or town, and is not owned by the individual doing the plumbing.

THEREFORE, IT IS MY OPINION:

1. The Board of Plumbers has the legal authority to interpret Mont. Code Ann. title 37, chapter 69, and

any other laws or rules pertaining to the licensing of plumbers in Montana. The Board's interpretation must be given deference unless it is incorrect.

2. The Board of Plumbers' statutory authority to prevent the unlicensed practice of plumbing is limited to situations where a person works in the field of plumbing in any incorporated city, town or other area served by a public water supply or a public sewer system, or who while working in the field of plumbing connects or disconnects plumbing from a public water supply or sewer system (Mont. Code Ann.§ 37-69-301), assuming that the person's work does not fit within the exceptions of Mont. Code Ann. § 37-69-102 and a waiver has not been granted pursuant to Mont. Code Ann. § 37-69-301.

Sincerely,

JOSEPH P. MAZUREK
Attorney General

jpm/mas/dm

VOLUME NO. 47 OPINION NO. 22

ADMINISTRATIVE LAW AND PROCEDURE - Responsibility of administrative board to adopt rules mandated by legislature;
COMMERCE, DEPARTMENT OF - Responsibility of administrative board to adopt rules mandated by legislature;
OUTFITTERS, BOARD OF - Adequacy of Net Client Hunting Use Rules;
STATUTORY CONSTRUCTION - Delegation of rule-making authority;
ADMINISTRATIVE RULES OF MONTANA - Section 8.39.804;
MONTANA CODE ANNOTATED - Sections 37-47-201, -201(5)(d);
MONTANA LAWS OF 1995 - Chapter 328;
OPINIONS OF THE ATTORNEY GENERAL - 39 Op. Att'y Gen. No. 68 (1982).

HELD: The Montana Board of Outfitters' decision initially to forego the adoption of rules pertaining to undue conflict, choosing instead to determine undue conflict on a case-by-case basis, was not a proper implementation of Mont. Code Ann. § 37-47-201(5)(d).

December 30, 1998

Mr. Robin Cunningham, Chair
Montana Board of Outfitters
Department of Commerce
111 North Jackson
P.O. Box 200513
Helena, MT 59620-0513

Dear Mr. Cunningham:

You have asked my opinion on a question which I have rephrased as follows:

> Did the Montana Board of Outfitters' decision initially to forego the adoption of rules pertaining to undue conflict, choosing instead to determine undue conflict on a case-by-case basis, constitute proper implementation of Mont. Code Ann. § 37-47-201(5)(d)?

As a preliminary matter, the constitutionality of a statute is presumed. A statute will be upheld unless proven unconstitutional beyond a reasonable doubt. T & W Chevrolet v. Darvial, 196 Mont. 287, 292, 641 P.2d 1368, 1370 (1982). You have not challenged the constitutionality of Mont. Code Ann. § 37-47-201(5)(d), and that issue is not a proper subject for an Attorney General's Opinion.

Section 37-47-201(5)(d) was adopted by the Montana legislature as part of the 1995 Montana Laws, chapter 328. Chapter 328, introduced as House Bill 196, was enacted to generally revise the law relating to outfitters and guides. The revisions

required, among other things, that outfitters submit operations plans to the Board of Outfitters (hereinafter referred to as the Board) for review and approval, and that the Board establish a system for review of the submitted plans.

Section 37-47-201 states:

> **37-47-201. Powers and duties of board relating to outfitters, guides, and professional guides.** The board shall:
>
> . . . .
>
> (5) adopt:
>
> . . . .
>
> (d) rules specifying standards for review and approval of proposed new operations plans involving hunting use or the proposed expansion of net client hunting use under an outfitter's existing operations plan in order to determine if the proposal will cause an undue conflict with existing hunting use of the area, constituting a threat to the public health, safety, or welfare. The board may not approve a new operations plan or the proposed expansion of net client hunting use under the existing operations plan if it finds that the proposal will cause an undue conflict with existing hunting use of the area. Approval is not required when part or all of an existing operations plan is transferred from one licensed outfitter to another licensed outfitter. Rules adopted pursuant to this section must provide for solicitation and consideration of comments from hunters and sportspersons in the area to be affected by the proposal who do not make use of outfitter services.

Following the adoption of chapter 328, the Board of Outfitters engaged in an extended administrative rule-making process. Mont. Admin. Reg. Notice No. 8-39-11, Issue No. 17 at 1761-66 (Sept. 14, 1995). The end result of that process was the amendment of Mont. Admin. R. 8.39.518 (1995) and the adoption of Mont. Admin. R. 8.39.801 - .804 (1996). See Mont. Admin. Reg. Vol. 21 at 2388-96 (Nov. 9, 1995); Mont. Admin. Reg. Vol. 24 at 2797 (Dec. 21, 1995); and Mont. Admin. Reg. Vol. 1 at 145-50 (Jan. 11, 1996).

The Notice of Proposed Adoption contained the following standards to be used by the Board when reviewing any new or expanded operations plans involving hunting use:

(a) any documentation of prior hunting use by non-outfitted parties;

(b) any documentation of prior conflicts or other altercations between outfitted and non-outfitted parties in the area;

(c) any documentation of prior hunting use by outfitted parties;

(d) any documentation of prior conflicts or other altercations between clients of one outfitter with the clients of another outfitter in the area; and

(e) any data available from the department of fish, wildlife & parks or other agency as to the availability of game animals in the area . . . and the potential effect on such availability.

See proposed new rule IV(7), Mont. Admin. Reg. Notice No. 8-39-11 at 1764. According to the Board, the above standards were included in the proposed rules because House Bill 196 "mandates" adoption of standards for review of proposed operations plans.

The Board wanted the rules in place as close as possible to the effective date of the statute "in order to evaluate applications submitted on or after that date." See "Reason," Mont. Admin. Reg. Notice No. 8-39-11 at 1765. However, when the rules were finally adopted, the above-listed standards were eliminated and, contrary to Mont. Code Ann. § 2-4-305(2), replaced with language identical to that in Mont. Code Ann. § 37-47-201(5)(d). The adopted rule prohibited approval of the proposed plan if the Board "finds that the proposal will cause an undue conflict with existing hunting uses of the area, constituting a threat to the public health, safety or welfare." Mont. Admin. R. 8.39.804 (1996). Nothing in the rule addressed standards for determining undue conflict.

The Board's summary of comments regarding the proposed standards, and its reasons for not adopting those standards, are instructive. The comments fail to indicate any public support for a case-by-case determination of undue conflict, and indicate that a very limited number of comments were received. The comments provide, in part:

COMMENT 7: One person commented that the data on availability of game was an unreliable source for the board to use as criteria for determining undue conflict. Another comment suggested that a private landowner's desire to lease his or her property to an outfitter for hunting use be added to the criteria considered by the board in its review of proposed new use.

RESPONSE: In response to the comments, the Board has deleted the criteria as unnecessarily limiting to what it could consider as evidence of undue conflict and perhaps too suggestive in terms of framing comments submitted.

. . . .

COMMENT 11: One comment suggested that the rule state that the board "shall approve" the proposal unless it finds that the proposed use presents a threat to the public health, safety, and welfare, contending there is no safeguard against arbitrary disapproval of expansion plans.

RESPONSE: The Board accepts the comment and has amended the rule accordingly.

Mont. Admin. Reg. Vol. 1 at 149-50 (Jan. 11, 1996).

Additionally, a review of the transcript of the hearing indicates that requests for case-by-case determinations were directed toward the issue of which years would be used for determining client numbers, not the issue of undue conflict. Public comment favoring case-by-case determinations concerning undue conflict would not outweigh a clear mandate from the legislature to adopt rules.

Following the Board's decision not to adopt rules regarding undue conflict, applications for proposed new and expanded operations plans were reviewed and decided by the Board on a case-by-case basis. The applications were apparently granted unless evidence was introduced that the application would threaten the public health, safety, and welfare.

According to the Board's attorney, prior to August 1997, the Board received at most one comment from the public concerning the proposed use applications brought before it. Thus, the Board's reviews of the applications were conducted at the Board's regularly scheduled meetings. The reviews were based primarily on the outfitter's application and, if the application affected state lands, a letter from the Montana Department of Natural Resources and Conservation. "The Board determined that it was unnecessary to proceed with findings and conclusions when there was absolutely no controversy demonstrated with respect to an application." Rather, "it would be appropriate to issue an order simply stating that, based upon the application (and letter when appropriate), there was no issue relative to public health, safety and welfare." Board of Outfitters' Reply at 6-7 (Sept. 2, 1998). The "orders" were issued in letter format.

This rather informal process continued at least until August 1997, when comments from the public resulted in the Board's conducting public hearings on two proposed operations plans. Orders issued by the Board following those hearings included findings of fact and conclusions of law. The applications were either granted or denied, based on the impact on hunters already hunting in the area. One application was denied because "granting the additional client numbers . . . will result in increased hunting pressure on lands already heavily utilized by hunters in the region and around the state and increase the competition between outfitters and members of the hunting public for the reservation of private lands." In re Application for Net Client Hunting Use Expansion of Rocky Niles, Outfitter License Number 425 at 3 (Nov. 25, 1997). The other application was granted because "[t]he propose[d] expansion will not cause an undue conflict with existing hunting use as the area . . . has not had a history of public hunting use, and therefore, would not create a conflict." In re Application for Net Client Hunting Use Expansion of Herb Weiss, Outfitter License Number 442 at 3 (Nov. 25, 1997). Neither order mentions the impact of the proposed operations plans on the public health, safety, or welfare.

Subsequent contested applications have resulted in orders containing findings of fact and conclusions of law. The outfitter's application has generally been granted. See In re Proposed Expansion in Net Client Hunting Use for Charles Gary Duffy, Harold Gilchrist, Dwane K. Kiehl and Ed Schaffer, all dated May 12, 1998. The orders address various factors, including alleged hunting capacity of the existing land being used (Duffy and Kiehl), the lack of other outfitters using the area (Duffy), alleged transfers between outfitters (Schaffer), additional land obtained to support proposed expansions (Gilchrist), the exclusivity of affected leases and use permits (Gilchrist and Kiehl), and the financial viability of the existing outfitting business (Kiehl).

Responding to comments from the Montana Administrative Code Committee, and after it had submitted this opinion request, the Board, on June 11, 1998, again noticed its intent to adopt standards or criteria by which it would identify undue conflict as that term is defined in Mont. Code Ann. § 37-47-201(5)(d). Following a public hearing and comment, the Board amended Mont. Admin. R. 8.39.804(8) (1998) to include five criteria to consider when identifying undue conflict:

> (a) sufficiency of land for personal safety of the hunters and sufficient wildlife to support the proposed net client hunting use;
>
> (b) restriction of public access points to public lands utilized for public hunting use;

(c) pending disciplinary actions or current license restrictions;

(d) veracity of statements made in application; and

(e) existing hunting uses of the area.

Mont. Admin. R. 8.39.804(8)(a) to (e) (1998). Despite the adoption of this rule, the issue you have raised is not moot as many applications were granted or denied prior to the recent adoption of criteria by which to determine whether undue conflict exists. The effect of my ruling on those applications is not a subject of this opinion. Neither the Board nor any other entity with standing has asked what effect this decision has on existing permits. Furthermore, such an opinion would require a factual analysis of permitting process, an exercise beyond the scope of an Opinion of the Attorney General.

You have asked whether the Board's decision initially to forego the adoption of rules pertaining to undue conflict, choosing instead to determine undue conflict on a case-by-case basis, constitutes proper implementation of Mont. Code Ann. § 37-47-201(5)(d). I find that the Board did not properly implement § 37-47-201(5)(d), and that rules for determining undue conflict should have been adopted prior to case-by-case determinations being made.

Section 37-47-201(5) provides that the Board *shall* adopt rules in several areas related to outfitters, guides and professional guides (emphasis supplied). The term "shall adopt rules" has consistently been interpreted to mandate the adoption of rules. Orozco v. Day, 281 Mont. 341, 353-54, 934 P.2d 1009, 1016, (1997); Common Cause of Montana v. Argenbright, 276 Mont. 382, 390, 917 P.2d 425, 430, (1996); Cash v. Otis Elevator Co., 210 Mont. 319, 326, 684 P.2d 1041, 1044-45 (1984).

Having determined that Mont. Code Ann. § 37-47-201(5) mandates the adoption of rules by the Board, I must next ascertain exactly what rules are required by § 37-47-201(5)(d). Statements of intent were still required when 1995 Mont. Laws, ch. 328 was adopted. See Mont. Code Ann. § 5-4-404 (repealed 1997 Mont. Laws, ch. 11, § 4). Statements of intent "provide guidance to an agency in adopting administrative rules under authority delegated by the Legislature." 39 Op. Att'y Gen. No. 68 at 259 (Mont. 1982), citing ch. 11, Joint Rules, Rules of the Montana Legislature, 47th Leg. (1981). The statement of intent accompanying chapter 328 provides in pertinent part: "The legislature intends that rules on operations plans be directed toward a reduction in new hunting uses of areas by outfitters when the new uses will cause undue conflict with existing hunting uses of the areas." II Mont. Session Laws 1995, at 1027 (1995).

The statement of intent affirms the clear language of Mont. Code Ann. § 37-47-201(5)(d). That subsection provides for the adoption of rules "specifying standards for review and approval of proposed new operations plans . . . in order to determine if the proposal will cause an undue conflict with existing hunting use of the area, constituting a threat to the public health, safety, or welfare." None of the standards for review and approval initially adopted by the Board address when the approval of an operations plan will create undue conflict. Therefore, the initial rules adopted by the Board in 1996 fall short of addressing an issue which the legislature clearly intended to be addressed through rules.

The Board relies on Ramage v. Department of Revenue, 236 Mont. 69, 768 P.2d 864 (1989), to support its decision to develop criteria relating to undue conflict on a case-by-case basis rather than through the rule-making process. However, Ramage involved a statute which granted discretionary, as opposed to mandatory, rule-making authority to the Department of Revenue. See Mont. Code Ann. § 16-1-303, which provides that the department "may make rules not inconsistent with this code." Similarly, the primary case relied on by the Ramage court, NLRB v. Bell Aerospace Co., 416 U.S. 267, 293 (1974), involved a statute which required the adoption of "such rules and regulations as may be necessary to carry out the provisions of this chapter." 29 U.S.C. § 156. There was no requirement that the agency adopt rules regarding any particular area. Rather, in that case it was up to the agency to determine whether and what rules were necessary to carry out the intent of the statute.

Conversely, the language of Mont. Code Ann. § 37-47-201(5), as well as the accompanying statement of legislative intent, makes clear that the legislature intended the Board to adopt rules regarding undue conflict. Otherwise, neither an outfitter nor the public has knowledge or notice of what "standards for review and approval" are being considered by the Board.

Again relying on Ramage v. Department of Revenue, 236 Mont. 69, 768 P.2d 864, the Board further contends that the legislature's delegation of rule-making authority to the Board is so vague as to be impossible to carry out. The relevant statute in Ramage, Mont. Code Ann. § 16-4-203, requires the Department of Revenue to determine public convenience and necessity when asked to approve the issuance of a new liquor license or the transfer of an existing liquor license. The Montana Supreme Court, in approving the Department's decision to determine public convenience and necessity on a case-by-case basis, acknowledged the "difficulties inherent in defining the term" and held: "Because the determination of public convenience and necessity involves such a fact-intensive inquiry, it is not necessary that DOR adopt rigid rules defining the term." Ramage, 236 Mont. at 73, 768 P.2d at 866.

However, several factors distinguish that decision from the issue currently before me. First, as discussed above, the Department of Revenue's rule-making authority was discretionary, while Mont. Code Ann. § 37-47-201(5)(d) mandates the adoption of rules specifying standards for review and approval of operations plans with respect to whether the plan causes an "undue conflict with existing hunting uses." Second, Mont. Code Ann. § 16-4-203 specifically provides that the issue of public convenience and necessity should be determined at a hearing, while Mont. Code Ann. § 37-47-201(5)(d) specifically provides for the adoption of rules regarding undue conflict. Finally, and most importantly, the legislature's delegation of rule-making authority to the Board of Outfitters is neither vague nor arbitrary. Rather, the legislature provided specific direction to the Board to determine whether the proposal will cause an undue conflict with existing hunting use which constitutes a threat to the public's health, safety, or welfare. This direction is sufficient to constitute a valid delegation of power by the legislature to an administrative agency.

> If the legislature fails to prescribe with reasonable clarity the limits of power delegated to an administrative agency, or if those limits are too broad, its attempt to delegate is a nullity.
>
> On the other hand a statute is complete and validly delegates administrative authority when nothing with respect to a determination of what is the law is left to the administrative agency, and its provisions are sufficiently clear, definite, and certain to enable the agency to know its rights and obligations.

Matter of Peila, 249 Mont. 272, 276-77, 815 P.2d 139, 142 (1991), citing Milk Control Board v. Rehberg, 141 Mont. 149, 161, 376 P.2d 508, 515 (1962); see Bacus v. Lake County, 138 Mont. 69, 354 P.2d 1056 (1960).

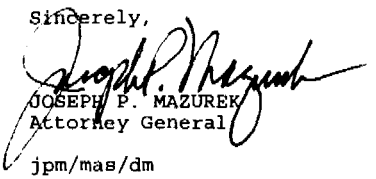
The legislature's directive to the Board differs from that in Ramage, in that the legislature did not instruct the Board to merely adopt rules regarding the approval of proposed operations plans. Rather, the legislature instructed the Board to determine whether the proposal unduly conflicts with existing hunting uses, keeping in mind the public's health, safety, and welfare. I find that this direction is "sufficiently clear, definite and certain" as to constitute sufficient guidance to the Board for the adoption of rules.

THEREFORE, IT IS MY OPINION:

> The Montana Board of Outfitters' decision initially to forego the adoption of rules pertaining to undue conflict,

choosing instead to determine undue conflict on a case-by-case basis, was not a proper implementation of Mont. Code Ann. § 37-47-201(5)(d).

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.

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Known Subject Matter	1. Consult ARM topical index. Update the rule by checking the accumulative table and the table of contents in the last Montana Administrative Register issued.
Statute Number and Department	2. Go to cross reference table at end of each title which lists MCA section numbers and corresponding ARM rule numbers.

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies which have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through September 30, 1998. This table includes those rules adopted during the period October 1, 1998 through December 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 September 30, 1998, 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 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.

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