RESERVE

MONTANA ADMINISTRATIVE REGISTER

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MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 11

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 The notice section contains state agencies' proposed new, amended or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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

In the matter of the proposed amendment of a rule pertaining to approved drugs) NOTICE OF PROPOSED AMENDMENT OF ARM 8.36.804 APPROVED DRUGS

NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons:

1. On July 3, 1999, the Board of Optometry proposes to amend the above-stated rule.

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

"8.36.804 APPROVED DRUGS (1) The following classification of drugs can be administered, dispensed and prescribed for use in ocular treatment limited to the anterior segment of the eye and adnexa:

~~(1) Topical drugs:~~
~~(a) Anti-biotic agents;~~
~~(b) Anti-viral agents;~~
~~(c) Anti-fungal agents;~~
~~(d) Anti-inflammatory agents;~~
~~(e) Anti-histamines;~~
~~(2) Oral drugs:~~
~~(a) Oral analgesics;~~
~~(i) Codeine;~~
~~(ii) Propoxyphene;~~
~~(iii) Hydrocodone;~~
~~(iv) Dihydrocodeine:~~
(a) Oral analgesics;
(b) Anti-allergy agents;
(c) Antibiotics;
(d) Anti-inflammatory agents;
(e) Anti-glaucomatous agents.

(b) and (c) will remain the same, but will be renumbered (f) and (g)."

Auth: Sec. 37-10-202, MCA; IMP, Sec. 37-10-101, 37-10-304, MCA

REASON: The Montana Legislature passed House Bill 85 in the 1999 session which allows optometrists to treat Glaucoma. This amendment will implement that bill by stating that anti-glaucoma drugs can be prescribed by an optometrist.

3. Interested persons may submit their data, views or arguments concerning the proposed amendment in writing to the

Board of Optometry, 111 N. Jackson, P.O. Box 200513, Helena, Montana 59620-0513, or by facsimile to (406) 444-1667, to be received no later than 5:00 p.m., July 1, 1999.

4. If a person who is directly affected by the proposed amendment wishes to present his data, views or arguments orally or in writing at a public hearing, he must make written request for a hearing and submit the request along with any comments he has to the Board of Optometry, 111 N. Jackson, P.O. Box 200513, Helena, Montana 59620-0513, or by facsimile to (406) 444-1667, to be received no later than 5:00 p.m., July 1, 1999.

5. If the Board receives requests for a public hearing on the proposed amendment from either 10 percent or 25, whichever is less, of those persons who are directly affected by the proposed amendment, from the Administrative Rule Review Committee of the legislature, from a governmental agency or subdivision or from an association having no less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 27 based on the 267 licensees in Montana.

6. Persons who wish to be informed of all Board of Optometry administrative rulemaking proceedings, or other administrative proceedings, may be placed on a list of interested persons by advising the Board in writing at 111 North Jackson, P.O. Box 200513, Helena, Montana 59620-0513 or by phone at (406) 444-5924.

BOARD OF OPTOMETRY
CHARLIENE STAFFANSON, CHAIRMAN

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

Anne M. Bartos
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, May 21, 1999.

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

In the matter of the proposed amendment of rules pertaining to board organization and continuing education	)))	NOTICE OF PROPOSED AMENDMENT OF ARM 8.57.101 BOARD ORGANIZATION AND 8.57.411 CONTINUING EDUCATION

NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons:

1. On July 3, 1999, the Board of Real Estate Appraisers proposes to amend the above-stated rules.

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

"8.57.101 BOARD ORGANIZATION (1) will remain the same.

(2) One person in attendance at a screening panel or adjudicative panel meeting shall constitute a quorum.

Auth: Sec. 37-54-105, MCA; IMP, Sec. 2-4-201,

REASON: To clarify a policy used by the Board when conducting screening panel and adjudicative panel meetings.

"8.57.411 CONTINUING EDUCATION (1) through (4) will remain the same.

~~(5) A maximum of 30 continuing education hours in excess of the 45 hours needed, can be carried over to the next renewal cycle. (The uniform standards of professional appraisal practice cannot be carried over.)~~"

Auth: Sec. 37-1-131, 37-1-306, 37-54-105, MCA; IMP, Sec. 37-1-131, 37-1-306, 37-54-105, 37-54-210, 37-54-303, 37-54-310, MCA

REASON: This amendment is being proposed to conform to the national criteria as mandated by federal law.

3. Interested persons may submit their data, views or arguments concerning the proposed amendments in writing to the Board of Real Estate Appraisers, 111 N. Jackson, P.O. Box 200513, Helena, Montana 59620-0513, or by facsimile to (406) 444-1667, to be received no later than 5:00 p.m., July 1, 1999.

4. If a person who is directly affected by the proposed amendments wishes to present his data, views or arguments orally or in writing at a public hearing, he must make written request for a hearing and submit the request along with any comments he has to the Board of Real Estate Appraisers, 111 N. Jackson, P.O. Box 200513, Helena, Montana 59620-0513, or by facsimile to (406) 444-1667, to be received no later than 5:00 p.m., July 1, 1999.

5. If the Board receives requests for a public hearing on the proposed amendments from either 10 percent or 25, whichever is less, of those persons who are directly affected by the proposed amendments, from the Administrative Rule Review Committee of the legislature, from a governmental agency or subdivision or from an association having no less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 42 based on the 420 licensees in Montana.

6. Persons who wish to be informed of all Board of Real Estate Appraisers administrative rulemaking proceedings, or other administrative proceedings, may be placed on a list of interested persons by advising the Board in writing at 111 North Jackson, P.O. Box 200513, Helena, Montana 59620-0513 or by phone at (406) 444-3561.

BOARD OF REAL ESTATE APPRAISERS
A. FARRELL ROSE, 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, May 21, 1999.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of amendment of 17.8.102, 17.8.103, 17.8.106, 17.8.202, 17.8.204, 17.8.206, 17.8.302 and 17.8.316 pertaining to air quality incorporation by reference rules	)	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT (AIR QUALITY)

TO: All Interested Persons

1. On July 7, 1999, at 1:30 p.m. or as soon thereafter as the matter may be heard, the Board will hold a public hearing in Room 44 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed amendments of the above-captioned rules.

The Board will make reasonable accommodations for persons with disabilities who wish to participate in this hearing. If you need an accommodation, contact the Board no later than 5 p.m., June 30, 1999, to advise us of the nature of the accommodation you need. Please contact the Board at P.O. Box 200901, Helena, Montana, 59620-0901; phone (406) 444-2544; fax (406) 444-4386.

2. The rules as proposed to be amended appear as follows. Matter to be added is underlined. Matter to be deleted is interlined.

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

(a) adopted a federal regulation by reference, the reference is to the July 1, ~~1997~~ 1998, edition of the Code of Federal Regulations (CFR);

(b) and (c) Remain the same.

(d) adopted another rule of the department or of another agency of the state of Montana by reference, the reference is to the December 31, ~~1997~~ 1998, edition of the Administrative Rules of Montana (ARM).

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

17.8.103 INCORPORATION BY REFERENCE (1) through (1)(i) Remain the same.

(j) 40 CFR Part 63 ~~(56 FR 27369, June 13, 1991)~~, which sets forth ~~the protocol for field validation of emission concentrations from stationary sources~~ general requirements and emission standards for hazardous air pollutant source categories;

(k) the Montana ~~s~~Source ~~t~~Test~~ing protocol and procedures m~~Manual (~~July 1994~~ March 1999 ed.), which is a department manual

setting forth sampling and data collection, recording, analysis and transmittal requirements;

(l) the ~~US Environmental Protection Agency Quality Assurance Manual~~ EPA Handbook for Air Pollution Measurement Systems, Volume I: A Field Guide to Environmental Quality Assurance (EPA-600/~~9-76-005~~ R-94/038a, revised ~~Dec. 1984~~ April 1994)~~,~~ ~~Vol. I~~; EPA Handbook for Air Pollution Measurement Systems, Volume II: Ambient Air Specific Methods (EPA-600/~~4-77-027a~~ R-94/038b, revised ~~Jan. 1983~~ April 1994)~~,~~ ~~Vol II~~; EPA Handbook for Air Pollution Measurement Systems, Volume III: Stationary Source Specific Methods (EPA-600/~~4-77-027b~~ R-94/038c, revised ~~Jan. 1982~~ September 1994)~~,~~ ~~Vol. III~~; and, EPA Handbook for Air Pollution Measurement Systems, Volume IV: Meteorological Methods (EPA-600/~~4-82-060~~ R-94/038d, ~~Feb. 1983~~ March 1995), ~~Vol. IV)~~, which is a federal agency manual ~~and regulations~~ setting forth sampling and data collection, recording, analysis and transmittal requirements;

(m) through (4) Remain the same.

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

17.8.106 SOURCE TESTING PROTOCOL (1)(a) Remains the same.

(b) All emission source testing, sampling and data collection, recording, analysis, and transmittal must be performed as specified in the Montana ~~s~~Source ~~t~~Test~~ing protocol and procedures m~~Manual, unless alternate equivalent requirements are determined by the department and the source to be appropriate, and prior written approval has been obtained from the department. If the use of an alternative test method requires approval by the administrator, that approval must also be obtained.

(c) Unless otherwise specified in the Montana ~~s~~Source ~~t~~Test~~ing protocol and procedures m~~Manual or elsewhere in this chapter, all emission source testing must be performed as specified in any applicable sampling method contained in: 40 CFR Part 60, Appendix A; 40 CFR Part 60, Appendix B; 40 CFR Part 61, Appendix B; 40 CFR Part 51, Appendix M; 40 CFR Part 51, Appendix P, and; 40 CFR Part 63 ~~(56 FR 27369, June 13, 1991)~~. Such emission source testing must also be performed in compliance with the requirements of the ~~US EPA quality assurance manual~~ EPA Handbook for Air Pollution Measurement Systems. Alternative equivalent requirements may be used if the department and the source have determined that such alternative equivalent requirements are appropriate, and prior written approval has been obtained from the department. If approval by the administrator of an alternative test method is required, that approval must also be obtained.

(d) Remains the same.

(e) Any changes to the Montana ~~s~~Source ~~t~~Test~~ing protocol and procedures m~~Manual shall follow the appropriate rulemaking procedures.

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

17.8.202 INCORPORATION BY REFERENCE (1) and (1)(a) Remain the same.

(b) ~~the United States Environmental Protection Agency Quality Assurance Manual (Vol. I,~~ EPA Handbook for Air Pollution Measurement Systems, Volume I: A Field Guide to Environmental Quality Assurance, (EPA/600/R-94/038a, revised April 1994); ~~Vol. II,~~ EPA Handbook for Air Pollution Measurement Systems, Volume II: Ambient Air Specific Methods, (EPA/600/R-94/038b, revised April 1994~~),~~; ~~Vol. III,~~ EPA Handbook for Air Pollution Measurement Systems, Volume III: Stationary Source Specific Methods, (EPA/600/~~4 77/027b~~ R-94/038c, revised ~~August 1988~~ September 1994); and, ~~Vol. IV,~~ EPA Handbook for Air Pollution Measurement Systems, Volume IV: Meteorological Methods, (EPA~~/~~-600/R-94/038d, revised ~~April 1994~~ March 1995~~, and Vol. V, EPA/600/R-94/038e, revised April 1994~~), a federal manual specifying sampling and data collection, recording, analysis and transmittal requirements;

(c) Remains the same.

(d) 40 CFR Part 50, ~~including Appendices A through K~~, specifying the national ambient air quality standards and ambient air quality monitoring reference methods;

(1)(e) through (4) Remain the same.

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

17.8.204 AMBIENT AIR MONITORING (1) Remains the same.

(2) Except as otherwise provided in this chapter, or unless written approval is obtained from the department for an exemption from a specific part of the Montana Quality Assurance Project Plan ~~Manual~~, all sampling and data collection, recording, analysis, and transmittal, including but not limited to site selection, precision and accuracy determinations, data validation procedures and criteria, preventive maintenance, equipment repairs, and equipment selection must be performed as specified in the Montana Quality Assurance Project Plan ~~Manual~~, incorporated by reference in ARM 17.8.202, except when more stringent requirements are determined by the department to be necessary pursuant to the ~~US Environmental Protection Agency Quality Assurance Manual~~ EPA Handbook for Air Pollution Measurement Systems, or 40 CFR Part 50 ~~including Appendices A through E~~, Part 53 ~~including Appendix A~~, and Part 58 ~~including Appendices A through G,~~ also incorporated by reference in ARM 17.8.202, at which time the latter 2 documents shall be adhered to for the specific exception.

(3) Remains the same.

AUTH: 75-2-111, MCA; IMP: 75-2-201, 75-2-202, MCA

17.8.206 METHODS AND DATA (1) Except as otherwise provided in this subchapter, or unless written approval is obtained from the department for an exemption from a specific part of the Montana Quality Assurance Project Plan ~~Manual~~, all sampling and data collection, recording, analysis and transmittal, including but not limited to site selection, calibrations, precision and accuracy determinations must be performed as specified in the Montana Quality Assurance Project Plan ~~Manual~~, incorporated by reference in ARM 17.8.202, except when more stringent requirements are contained in the ~~US~~

~~Environmental Protection Agency Quality Assurance Manual~~ EPA Handbook for Air Pollution Measurement Systems or 40 CFR Part 50 ~~including Appendices A through B~~, Part 53 ~~including Appendix A~~, and Part 58 ~~including Appendices A through G~~, also incorporated by reference in ARM 17.8.202.

(2) and (3) Remain the same.

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

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

~~(a) 40 CFR Part 60, Appendix A, method 6, entitled "Determination of Sulfur Dioxide Emissions from Stationary Sources" and method 8, entitled "Determination of Sulfuric Acid Mist and Sulfur Dioxide Emissions from Stationary Sources". Methods 6 and 8 are federal rules setting forth procedures for extracting gas samples from the emitting source and performing tests thereon to determine amounts of contaminants contained in such gases;~~

~~(b) 40 CFR Part 60, Appendix A, method 9, which sets forth a method for visual determination of the opacity of emissions from stationary sources;~~

~~(c) 40 CFR Part 60, Appendix B, performance specification 1, which sets forth specifications and test procedures for opacity continuous emission monitoring systems in stationary sources;~~

(d) Remains the same, but is renumbered (a);

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

(f) through (h) Remain the same, but are renumbered (c) through (e).

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

~~(j) 40 CFR Part 60, Subpart Cc, specifying emission guidelines for existing municipal solid waste landfills that would be subject to a standard of performance if they were new sources.~~

~~(k) 40 CFR Part 60, Subpart Ce (currently found at 62 Fed. Reg. 48340, September 1997), specifying emission guidelines for existing hospital/medical/infectious waste incinerators that would be subject to a standard of performance if they were new sources.~~

(2) through (4) Remain the same.

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

17.8.316 INCINERATORS (1) through (4) Remain the same.

(5) This rule applies to performance tests for determining emissions of particulate matter from incinerators. All performance tests shall be conducted while the affected facility is burning solid or hazardous waste representative of normal operation. Testing shall be conducted in accordance with ARM 17.8.106 and the Montana Source Test~~ing Protocol and Procedures~~ Manual.

(6) Remains the same.

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

3. The Board is proposing the amendments to ARM 17.8.102 to update the incorporations by reference by adopting the most recent editions of the Code of Federal Regulations, the Montana Code Annotated and the Administrative Rules of Montana. These proposed amendments are necessary to allow the Department to follow the most recent editions of state statutes and rules and federal regulations. The failure to adopt the most recent edition of the Code of Federal Regulations may result in the loss of primacy for the air program.

The Board is proposing the amendments to ARM 17.8.103(1)(l), 17.8.106(1)(c), 17.8.202(1)(b), 17.8.204(2), and 17.8.206(1) to include the correct references to the EPA Handbook for Air Pollution Measurement Systems, and to make the references in the rules consistent. The EPA Handbook is a federal manual that specifies requirements for ambient air monitoring and stationary source testing, including sampling and data collection, recording, analysis and transmittal. The EPA Handbook is regularly updated to reflect new technology and methodology. In addition to the editorial corrections noted above, these amendments incorporate by reference more recent editions of parts of the EPA handbook, specifically Volume III entitled Stationary Source Specific Methods, and Volume IV entitled Meteorological Methods. These amendments are necessary to allow the Department to follow the most recent edition of the federal EPA Handbook.

The Board is proposing the amendments to ARM 17.8.103(1)(k) to incorporate by reference a more recent edition of the Montana Source Test Manual (formerly the Montana Source Testing Protocol and Procedures Manual). The Montana Source Test Manual is a manual of the Department of Environmental Quality that sets forth requirements for stationary source sampling and data collection, recording, analysis, and transmittal. Most of the changes clarify the requirements in the Manual, or represent editorial revisions.

The Manual is being revised to clarify that the failure of a source to reach maximum operating capacity does not relieve it from the obligation to perform a source test. The obligation of a source to conduct a source test is not addressed by the Manual, and is not dependent upon the ability of a source to reach maximum operating capacity. This change is necessary to clarify this relationship. Further, the revisions to the Manual clarify that if the source test is not performed at maximum operating capacity, then the operating rate achieved during testing will be considered representative of the maximum

permitted operating capacity until compliance can be demonstrated at a higher rate. This language is necessary to avoid confusion and to foreclose the possibility that a source could be in violation of its emission limit when operating at maximum operating capacity.

The Manual is also being revised to clarify that the absence of cyclonic flow must be verified if the stack configuration is conducive to cyclonic flow on all intended stack sampling locations. Although this is implicit in the current version of the Manual, which references EPA Method 1, the Board believes this change is necessary to explicitly state this requirement and minimize confusion over its application.

Other revisions to the Manual are proposed by the Board to clarify that the Manual does not impose a requirement for "back-half testing" to determine condensable particulate emissions, but merely specifies the proper procedures for such testing. The requirement for "back-half testing" comes from state emission limits that apply to all particulate emissions, not just the fine particulate emissions governed by federal requirements. The Board also proposes to review the Manual to clarify the formula to be used to determine heat input when a source has no feasible method for determining fuel feed rates. These changes are necessary to minimize confusion over application of these provisions.

The Board is proposing to change the Manual to provide that if a source test report is not reviewed by the Department within 90 days of receipt, this does not represent automatic approval of the test. Currently, if the Department fails to notify the source within 90 days of receipt of the report, it is deemed to be automatically accepted by the Department. The Board does not believe it is appropriate for possible noncompliance to be sanctioned by the procedural failure to conduct a timely review. Under the proposed change, if the Department is unable to complete its review within 90 days, it must notify the source and provide a time frame for completion of the review. The approach proposed by the Board represents a reasonable balance between the interests of the Department in verifying that source tests have been done correctly, and the source in knowing its compliance status.

The proposed amendments to ARM 17.8.106 and 17.8.316 are necessary to reflect that the name of the manual has been changed.

For more detailed information regarding the specific proposed changes to the standards, a copy of the Montana Source Test Manual (April 1999 edition) may be obtained from the Department upon request. The April 1999 edition of the manual indicates each proposed change by interlining of the material to be removed and underlining of the material to be added.

The Board is proposing the amendments to ARM 17.8.103(1)(j) because the scope and purpose of 40 CFR Part 63 has significantly expanded from when this language was first adopted. These federal regulations now contain general requirements and emission standards for hazardous air pollutant source categories, and these amendments are necessary to reflect

this change. The deletion of the Federal Register reference from both this rule and ARM 17.8.106(1)(c) is necessary because the reference is outdated.

The Board is proposing amendments to ARM 17.8.202(1)(d), 17.8.204(2), and 17.8.302(1)(a), (b), (c), (e), (i), (j) and (k) to remove language that is now superfluous because of the incorporation by reference of the July 1, 1998, edition of the Code of Federal Regulations. Separate references to the specific subparts and appendices of 40 CFR Parts 50, 53, 58, 60 and 63 are no longer necessary, as such provisions are contained in the 1998 CFR.

The Board is proposing editorial changes to ARM 17.8.204(2) and 17.8.206(1) to make the reference to the Montana Quality Assurance Project Plan consistent with ARM 17.8.202(1)(a).

4. Interested persons may submit their data, views or arguments concerning the proposed rules either in writing or orally at the hearing. Written data, views or arguments may also be submitted to the Board of Environmental Review, P.O. Box 200901, Helena, Montana, 59620-0901, no later than July 14, 1999. To be guaranteed consideration, the comments must be postmarked on or before that date.

5. James B. Wheelis, Board Attorney, has been appointed to preside over and conduct the hearing.

BOARD OF ENVIRONMENTAL REVIEW

by: *Joe Gerbase*
JOE GERBASE, Chairperson

Reviewed by:

David Rusoff
David Rusoff, Rule Reviewer

Certified to the Secretary of State May 21, 1999.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of 17.30.1341 pertaining to permit requirements of lagoons	))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT (WATER QUALITY)

TO: All Interested Persons

1. On June 23, 1999, at 1:30 p.m. or as soon thereafter as the matter may be heard, the Board will hold a public hearing in Room 35 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed amendment of the above-captioned rule.

The Board will make reasonable accommodations for persons with disabilities who wish to participate in this hearing. If you need an accommodation, contact the Board no later than 5 p.m., June 14, 1999, to advise us of the nature of the accommodation you need. Please contact the Board at P.O. Box 200901, Helena, Montana, 59620-0901; phone (406) 444-2544; fax (406) 444-4386.

2. The rule as proposed to be amended appears as follows. Matter to be added is underlined. Matter to be deleted is interlined.

17.30.1341 GENERAL PERMITS (1) through (1)(g) Remain the same.

(h) ~~common facultative~~ domestic sewage treatment lagoons;

(i) through (12) Remain the same.

AUTH: 75-5-201, 75-5-401, MCA; IMP: 75-5-401, MCA

3. The Water Quality Act at § 75-5-401, MCA, authorizes the Board to adopt rules governing the issuance of permits to discharge sewage and other wastes into state waters. ARM 17.30.1341 lists general permits that may be authorized if they meet the criteria of 40 CFR 122.28.

The criteria of 40 CFR 122.28 require in pertinent part that general permits for similar discharges meet the following conditions:

(a) Involve the same or substantially similar types of operations;

(b) Discharge the same types of wastes;

(c) Require the same effluent limitations, operating conditions, or standards for sewage use or disposal;

(d) Require the same or similar monitoring; and

(e) In the opinion of the Director, are more appropriately controlled under a general permit than under individual permits.

Currently 29 domestic sewage treatment lagoons are authorized to operate under the general permit category titled "common facultative sewage lagoons". This term usually refers

to lagoons without mechanical aeration. However, subsequent to issuance of these authorizations, about 5 of these permittees upgraded their facilities by adding mechanical aeration. This presents no practical problem because the terms of the general discharge permit for "common facultative sewage lagoons" are equally appropriate for many lagoons that have mechanical aeration. The problem arises because the title of the category of general permit, "common facultative sewage lagoons", may legally preclude authorizing these mechanically aerated systems under a general permit. The proposed change would allow these authorizations to continue and would allow about 8 additional permittees with individual permits to be authorized under the general permit. The Department would retain authority under ARM 17.30.1341(4) to deny coverage under the general permit for domestic sewage treatment lagoon systems and require an individual permit where the Department determines that additional requirements are necessary to protect water quality.

4. Interested persons may submit their data, views or arguments concerning the proposed rules either in writing or orally at the hearing. Written data, views or arguments may also be submitted to the Board of Environmental Review, P.O. Box 200901, Helena, Montana, 59620-0901, no later than June 30, 1999. To be guaranteed consideration, the comments must be postmarked on or before that date.

5. James B. Wheelis, Board Attorney, has been appointed to preside over and conduct the hearing.

BOARD OF ENVIRONMENTAL REVIEW

by: *Joe Gerbase*
JOE GERBASE, Chairperson

Reviewed by:

David Rusoff
David Rusoff, Rule Reviewer

Certified to the Secretary of State May 21, 1999.

BEFORE THE STATE ELECTRICAL BOARD
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment) NOTICE OF AMENDMENT OF ARM
of a rule pertaining to fees) 8.18.407 FEE SCHEDULE

TO: All Concerned Persons:

1. On March 25, 1999, the State Electrical Board published a notice of proposed amendment of the above-stated rule at page 441, 1999 Montana Administrative Register, issue number 6.

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

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

COMMENT NO. 1: The Board received two comments expressing concern with the non-refundable application and license fee.

RESPONSE: The Board would like to note that the fee is set commensurate with the cost of administering the program and processing the application and license. Even when an applicant does not achieve licensure, time is expended by the program manager processing the application.

STATE ELECTRICAL BOARD
GENE KOLSTAD, PRESIDENT

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, May 21, 1999.

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

In the matter of the amendment of a rule pertaining to fees) NOTICE OF AMENDMENT OF ARM 8.30.407 FEE SCHEDULE

TO: All Concerned Persons:

1. On March 25, 1999, the Board of Funeral Service published a notice of public hearing on the proposed amendment of the above-stated rule at page 450, 1999 Montana Administrative Register, issue number 6. The hearing was held on April 14, 1999, in Helena, Montana.

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

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

COMMENT NO. 1: One comment was received from Central Montana Memorial Gardens in Lewistown, Montana, expressing concern about the amount of the fee proposed.

RESPONSE: This commentor is a nonprofit cemetery association and is exempt from licensure requirements pursuant to Mont. Code Ann. §37-19-803, MCA.

COMMENT NO. 2: One comment was received expressing concern with the increase in the license fee from $60 to $125. The commentor stated that he would need to raise his rates to cover the increase and felt that most would not be willing to hire him. This commentor is a vacation relief person hired by cemeteries on a short-time basis while others are on vacation or leave from the business.

RESPONSE: While the Board understands the concern raised by the commentor, the costs of administering the licensing program have risen. The board does not think the increase in fees is excessive since fees have not been significantly increased since 1989.

COMMENT NO. 3: One commentor stated concerns with the increase in fees because of being a privately-owned cemetery. Commentor feels that having to compete with one church funded and two tax funded cemeteries causes enough of a hardship, without having to pay higher licensing fees.

RESPONSE: The legislature saw fit to give only private, for-profit cemetery regulation to the Board. While the Board understands this commentor's concerns, who and what is regulated is determined by the legislature.

COMMENT NO. 4: One commentor expressed concern with the raise in fees, as he is only a vacation relief person. He feels the raise in fees will reduce the number of people in his position who are available to relieve full-time professionals in this business for vacations, etc.

RESPONSE: See response to comment number 2.

COMMENT NO. 5: One comment was received from the County of Butte Silver Bow indicating that the County has assumed responsibility for a cemetery that was previously operated for profit. The County, through a court action, is trying to dissolve the corporation through an involuntary bankruptcy and to develop a plan to put the cemetery either up for sale or turn it over to a nonprofit organization. The county would like the Board to make an exception to the county so it would not have to pay the fees in ARM 8.30.407(14), (15), (16) and (17).

RESPONSE: While the Board understands this commentor's concerns, the Board cannot address a specific situation in rulemaking. The appropriate time to request a waiver of these fees is at the time of application.

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, May 21, 1999.

BEFORE THE BOARD OF PUBLIC ACCOUNTANTS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment of rules pertaining to fees and statement by permit holders	))))	NOTICE OF AMENDMENT OF ARM 8.54.410 FEE SCHEDULE AND 8.54.903 STATEMENT BY PERMIT HOLDERS

TO: All Concerned Persons:

1. On March 25, 1999, the Board of Public Accountants published a notice of proposed amendment of the above-stated rules at page 463, 1999 Montana Administrative Register, issue number 6.

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

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

COMMENT NO. 1: One comment was received stating opposition to fees imposed upon CPAs for the "privilege" of having reports reviewed. The individual commenting also requested that the board schedule a hearing on this matter.

RESPONSE: The board requires permit holders issuing reports on financial statements to participate in the profession monitoring program (PMP) if they do not undergo peer or quality review. The fees to be charged to firms for report review under the PMP are set commensurate with program costs. The only individual commenting on the proposed rule amendments also requested a hearing. The board noted that in order to be required to hold a hearing, it must be requested from either 10 percent or 25 interested persons, whichever is less. Therefore, a hearing will not be held on these matters.

BOARD OF PUBLIC ACCOUNTANTS
CURTIS AMMONDSON, CPA, CHAIRMAN

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

Anne M Bartos
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, May 21, 1999.

BEFORE THE LOCAL GOVERNMENT ASSISTANCE DIVISION
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the adoption of a new rule for the administration of the 1999 Federal Community Development Block Grant Program	)))))	NOTICE OF ADOPTION OF NEW RULE I (8.94.3714) INCORPORATION BY REFERENCE OF RULES FOR ADMINISTERING THE 1999 FEDERAL COMMUNITY DEVELOPMENT BLOCK GRANT (CDBG) PROGRAM

TO: All Interested Persons:

1. On December 17, 1998, the Department of Commerce published a notice of public hearing on the proposed adoption of the above-stated rules at page 3245, 1998 Montana Administrative Register, issue number 24. The hearing was held on January 20, 1999, and oral and written testimony was received. Written comments were accepted until 5:00 p.m. January 22, 1999.

2. The Department has adopted rule I (8.94.3714) exactly as proposed. However, in response to comments received at the public hearing and during the public comment period, the Department has made several changes in the application guidelines. These changes are discussed in item 3, below.

3. Five members of the public attended and testified at the hearing, and the Department received 20 written comments during the public comment period provided for by the Administrative Procedure Act. Except as noted below these comments supported the changes proposed by the Department. A summary of the negative comments, by topic, and the Department's responses to them follow:

Public Facilities and Housing

COMMENT: As originally proposed the Department's 1999 guidelines would have established two options under which applicants for public facilities grants could earmark part of the requested grant funds for community revitalization activities. The first of these options would have allowed applicants to designate up to 10 percent of the requested grant for community revitalization activities without providing any local funds to match this set aside. The second option would allow applicants to designate up to 20 percent of a requested public facility grant for community revitalization activities if the applicant agreed to provide a 25 percent local match. The first of these two options is unnecessary.

RESPONSE: The Department concurs and has withdrawn the 10 percent/no match proposal but has adopted the 20 percent/25 percent match option.

Economic Development

COMMENT: The Department has proposed to set aside up to $250,000 for grants to Microbusiness Development Corporations (MBDCs). These funds could be better used for the Department's regular CDBG ED program activities and for the Small Business Innovative Research (SBIR) initiative.

RESPONSE: The Department believes there is merit in the proposal and so has decided to pursue it on a trial basis but on a reduced scale. It will set aside $150,000, rather than the originally proposed $250,000. Further, the set aside will not be absolute. The Department will award the funds on a competitive, rather than entitlement, basis and will redirect any unused funds to the regular CDBG ED programs.

LOCAL GOVERNMENT ASSISTANCE
DIVISION
DEPARTMENT OF COMMERCE

BY: Anne M Bartos
ANNIE M. BARTOS, CHIEF COUNSEL

Anne M Bartos
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, May 21, 1999.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter the amendment of ARM 17.8.705 and 17.8.733 and the repeal of 17.8.708, regarding de minimis changes that may be made to a facility without an application to revise the facility's air quality permit	NOTICE OF AMENDMENT AND REPEAL (AIR QUALITY)

TO: All Interested Persons

1. On February 11, 1999, the Board of Environmental Review published notice of public hearing on the proposed amendment and repeal of rules outlined above at page 261 of the 1999 Montana Administrative Register, Issue No. 3.

2. The Board has amended rule 17.8.733 and repealed rule 17.8.708 as proposed.

3. The Board has amended the following rule as proposed with the following changes. Matter to be added is underlined. Matter to be deleted is interlined.

17.8.705 WHEN PERMIT REQUIRED--EXCLUSIONS (1) Remains as proposed.

(2) An air quality preconstruction permit may be modified pursuant to ARM 17.8.733(2), for changes made under (1)(r) above that would otherwise violate an existing condition in the permit. Conditions in the permit concerning control equipment specifications, operational procedures, or testing, monitoring, record keeping, or reporting requirements may be modified if the modification does not violate any statute, rule, or the state implementation plan. Conditions in the permit establishing emission limits, or production limits in lieu of emission limits, may be changed or added under (1)(r), if requested by the ~~applicant~~ permittee.

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

4. The Board has revised proposed ARM 17.8.705(2) by changing the word "applicant" to "permittee" in the last sentence of that subsection that read "[c]onditions in the permit establishing emission limits, or production limits in lieu of emission limits, may be changed or added under (1)(r), if requested by the 'applicant'." A permit modification under this subsection does not require a formal application as with an application for an air quality permit. The Board made the change to avoid confusion with the air quality permit application rules and to more precisely identify the person or entity requesting the permit modification as the person or

entity holding the air quality permit.

5. The Board received the following comments in opposition to the proposed amendment and repeal; Board responses follow:

COMMENT #1 (representative of regulated facility): I would really like to thank the Department for all the work they've done on this rulemaking and I agree that it is the best language that could come out of consensus. If new regulations have to be adopted, this is probably the best language that could come from the consensus. However, the information that the Department is asking for is generally available. It's also available annually on the emissions inventory. So, they really are not gathering any new information. They're just getting it in a little different time frame. I'm not opposed to supplying this to the Department, but is it necessary to put it into a rule? You add another piece of enforcement in case somebody makes a mistake or forgets. I just don't feel it provides anything for the environment or for the Department that they don't already have.

RESPONSE: The Department needs information regarding any change to be submitted in a timely manner to assure that facilities comply with applicable statutes, rules, and permit conditions. The Department needs a means to ensure that any changes asserted as de minimis are bona fide de minimis changes and that no violations of other permitting rules occur, such as the Prevention of Significant Deterioration of Air Quality and New Source Review rules.

Requiring submission of information prior to startup or use of the changed operation will provide the Department with information it would otherwise wait to receive until the facility submits its annual emission inventory. Supplying the information in advance of startup or use should not unduly burden a facility making a de minimis change.

COMMENT #2 (same commenter as Comment #1 above): For purposes of House Bill 521, I don't agree that there are no applicable federal standards. The federal new source review standards are applicable and the proposed rulemaking is considerably more stringent.

RESPONSE: The Board does not agree that the federal new source review standards constitute comparable federal standards or guidelines for purposes of House Bill 521 from the 1995 Montana Legislative Session, codified in the Clean Air Act of Montana as § 75-2-207, MCA. Section 75-2-207, MCA, provides that the Board may not adopt a rule that is more stringent than comparable federal regulations or guidelines unless the Board makes written findings based on the record after a public hearing and public comment that the proposed state standard or requirement protects public health or the environment, can mitigate harm to the public health or environment, and is achievable under current technology.

Federal new source review regulations specify requirements

for modification of major stationary sources. The threshold levels for review of major source modifications are 25 to 100 tons per year, depending upon the pollutant in question.

Federal regulations do not include minor source permitting requirements, which are left to state regulation. Federal regulations require states to maintain programs to ensure that construction and modification of air pollutant sources do not interfere with attainment and maintenance of national ambient air quality standards (NAAQS). 40 CFR §§ 51.160 through 164. However, federal regulations do not specify that this must be accomplished by a minor source permitting program and federal regulations do not specify requirements for state minor source permitting programs. The de minimis rule expressly applies only to changes to facilities when the changes are not subject to major source permitting requirements.

The Department has a major source permitting program that is equivalent to the comparable federal regulations. Revisions to the Department's major source permitting requirements would be subject to review under House Bill 521. However, because there are no federal minor source permitting regulations or guidelines, the de minimis rule is not subject to review under House Bill 521.

Some of the proposed amendments make the current preconstruction permit rules less stringent than the current rules. The only proposed amendment that makes the current rules more stringent than the existing rules is amendment of the requirement for notice of de minimis changes to require 10-day advance notice to the Department rather than the current requirement of notice at the time of submission of the facility's annual emission inventory. The proposed amendments would also allow notice "as soon as reasonably practicable in the event of an unanticipated circumstance causing the de minimis change".

It is not clear that HB 521 would apply to these amendments even if there were comparable federal regulations. Section 75-2-207, MCA, provides that state standards or requirements subject to HB 521 must be achievable under current technology and the written finding must reference peer-reviewed scientific studies contained in the record. The notice requirement in question is a procedural requirement and not a standard or requirement, such as an ambient air quality standard, for which there might be peer-reviewed studies and questions regarding technological feasibility.

However, if HB 521 does apply to the proposed amendments of the notice requirement in the de minimis rule, the Board finds, based on the record of the public hearing, including the comments submitted to the Board, that the 10-day advance notice requirement protects public health or the environment, can mitigate harm to public health or the environment, and is achievable under current technology. The Department presented testimony that the revised notice requirement will allow the Department to better track changes and identify compliance problems and help regulated facilities comply with applicable requirements. The applicable requirements include major source

permitting requirements designed to achieve and maintain compliance with ambient air quality standards, which have been found to be necessary to protect public health and welfare.

The notice requirement was developed by a consensus of members of the Clean Air Act Advisory Committee (CAAAC), which includes industry representatives, as well as representatives of environmental groups and other persons. None of the comments received by the Board indicate that the notice requirement is not achievable or that the cost would be unreasonable. Commenting on behalf of several regulated facilities, one industry commenter has recommended that the Board adopt the proposed amendments. Another representative of a regulated facility commented that he is not opposed to the notice requirement but would rather the Board not place the requirement in a rule.

COMMENT #3 (representative of a regulated facility): Although, the preconstruction permitting regulation is more stringent than comparable federal regulation, it was in place prior to passage of HB 521. The existing de minimis rule served to relax somewhat the requirements of the preconstruction permit rule but in a manner that is still more stringent than federal regulations. However, the proposed modifications will make the rule even more stringent. In summary, the proposed amendments will modify an existing rule that is already more stringent than comparable federal regulation and make it even more stringent. Therefore, the amendment does not appear to be approvable under HB 521.

RESPONSE: See response to Comment #2, above.

COMMENT #4 (Environmental Protection Agency, Region VIII): The de minimis rule could allow sources to violate major source permitting requirements. ARM 17.8.705(1)(r)(iv) should require advance notice of a de minimis change to be submitted to the Department at least 10 days prior to commencing construction on the proposed de minimis change. The rule should also provide for the Department to request further information from a source and to prevent construction on a change while the Department is determining whether a change is de minimis.

State review of a de minimis change 10 days prior to source operation is too late, in most cases, to meet the requirements of federal regulations. An owner or operator of a source may think a change qualifies as de minimis, but the State may find that the change requires a major source preconstruction permit.

The de minimis exemptions are based on a different comparison of emissions than under the major source permitting requirements. This could result in faulty implementation of the major source permitting rules. ARM 17.8.705(1)(r)(i) compares the potential to emit of a source before a modification to the potential to emit of that source after a modification to determine if the increase is less than the 15 ton per year (tpy) threshold. The major source permitting rules generally require comparison of actual emissions before the change to potential

emissions after the change.

RESPONSE: The de minimis rule would not allow violations of major source permitting requirements. The rule contains a provision, ARM 17.8.705(1)(r)(i)(B), that specifies that any construction or changed conditions of operation at a facility that would constitute a modification of a major stationary source is not considered a de minimis action.

The advance notice required under the rule will allow the Department to ensure that changes do not violate major source permitting requirements. If a facility proposes to "net out" of major source permitting requirements, the Department will have ample opportunity to ensure that such netting is done correctly under the rules before the changes at a facility are made. With the advance notice requirement, the Department will also have sufficient opportunity to ensure that calculations are done correctly when determining if a proposed action results in a significant net emissions increase.

In determining whether a proposed action would result in a significant net emissions increase triggering major modification review rules, it is necessary to compare actual emissions before the change to actual emissions after the change. Also, the provision of ARM 17.8.705(1)(r)(i) that refers to consideration of increases in potential emissions is in the current de minimis rule and is not part of the proposed rulemaking. Any revision of that language to refer to actual emissions would be outside the scope of the public notice of rulemaking for this proceeding.

The Department has been implementing the existing de minimis rule for over 2 years and is familiar with the types of changes that occur under the de minimis rule, and the Department developed the advance notice requirement after extensive discussions with interested parties. The Department believes that 10-day advance notice is sufficient to determine whether an action meets the conditions of the de minimis rule. The Department's staff are capable of reviewing a proposed action and determining within 10 days whether any violations of the major new source permitting programs would occur.

The notice language proposed by EPA would not be appropriate for de minimis changes that do not involve construction. It would not be appropriate to require notice prior to construction when no construction is involved in the action.

In developing the proposed amendments, the Department extensively discussed with interested persons the amount and type of information a facility should submit prior to conducting a de minimis change. The required information will allow the Department to conduct the calculations necessary to determine whether proposed actions fall below the de minimis threshold. Because of the variety of de minimis changes that may occur, it is not possible to specify in the rule every item of information that may be needed by the Department.

COMMENT #5 (EPA): ARM 17.8.705(1)(r)(i)(E) should be revised

by deleting the proposed language that would allow consideration of offsets when they are made federally enforceable. If a source is proposing a significant emissions increase and wants credit for emission decreases that have occurred, to make the reductions federally enforceable, the source must obtain a preconstruction permit that meets all public participation requirements. In addition, EPA's major source permitting regulations require all source-wide creditable increases and decreases that have occurred in the last 5 years to be included in determining a net emissions increase. ARM 17.8.705(1)(r)(i)(E) does not meet these requirements. Such "netting actions" should not be exempt from permitting requirements as de minimis.

RESPONSE: The amendments are intended to clarify that an emission reduction at a facility cannot be used to artificially create a de minimis action. The amendments do not allow emission reductions to be considered unless they are made federally enforceable.

EPA is concerned that the Department will not properly implement the netting provisions of the major new source review (NSR) permitting programs. If a facility proposes to make an emission reduction federally enforceable, the Department will ensure that any netting actions are properly conducted. This rule, as well as ARM 17.8.704 and ARM 17.8.710, contains provisions to ensure compliance with all requirements of EPA's NSR permitting regulations. The de minimis rule also applies to a large number of facilities not subject to any portion of NSR because they are small facilities not regulated by EPA.

EPA has taken the position that public participation must occur for a permit condition to be characterized as federally enforceable. However, the applicable EPA guidance document in effect, EPA's Draft October 1990 NSR Workshop Manual, does not specify that public participation is required to establish federal enforceability. EPA has not required public participation in the process for establishing synthetic minor sources under EPA's Title V operating permit program, when the Department has included federally enforceable conditions in preconstruction permits. The Department has changed many permits to include necessary federally enforceable permit conditions without public participation. EPA has reviewed these permit changes and has not commented that the process lacked the opportunity for public participation. The Department's current rules do not require public participation when establishing federally enforceable conditions in a permit and federal regulations do not specify this requirement.

COMMENT #6 (EPA): The de minimis rule could allow sources to violate the State Implementation Plan (SIP) or interfere with attainment plans. ARM 17.8.705(2) should be revised to provide that conditions in the permit establishing emission limits, or production limits in lieu of emission limits, may not be changed or added under ARM 17.8.705(1)(r).

The proposed rule does not state that these limits cannot be changed if they are specified in the SIP. In addition, while the SIP's control strategy may not specify an emission limit for a source, that source may have been modeled at a certain level of emissions in the attainment demonstration for an area. If the State allows such sources to increase emissions, it could jeopardize the area's attainment strategy.

In ARM 17.8.705(1)(r)(i)(A) through (E),the list of actions that do not qualify as de minimis changes does not include changes that would violate the SIP. Under the federal Clean Air Act, the State can't change SIP emission limits or other requirements, such as compliance determining methods, without adopting a SIP revision and receiving approval from EPA.

RESPONSE: The de minimis rule does not allow facilities to violate the SIP or interfere with attainment plans. The existing and proposed rules contain a provision renumbered as ARM 17.8.705(1)(r)(i)(A) specifying that an action is not considered de minimis if it would violate any applicable Department air quality rule. ARM 17.8.710(2) provides that an air quality permit may not be issued unless the facility can be expected to operate in compliance with the rules adopted under the Clean Air Act of Montana, regulations and requirements of the Federal Clean Air Act, and any applicable control strategies in the SIP, and that it will not cause or contribute to a violation of any Montana or national ambient air quality standard. Because ARM 17.8.710 is an applicable Department rule, violation of the SIP and interference with an attainment plan are expressly prohibited under the de minimis rule.

COMMENT #7 (EPA): The 15 ton per year (tpy) de minimis level is the same as, or greater than, the major modification significance level for two criteria pollutants - PM-10 and lead. Thus, it is difficult to consider this level as having a trivial environmental effect. Under the Part 70 [40 CFR Part 70] operating permit program, EPA has allowed activities with emissions of up to 5 tpy to be considered insignificant. The State must explain why an emission increase of 15 tpy is considered to have a trivial environmental effect when this rule is submitted to EPA as a SIP revision. Alternatively, the State could reduce the de minimis threshold in ARM 17.8.705(1)(r)(i).

RESPONSE: The 15 tpy threshold is contained in the current de minimis rule and is not being amended within this rulemaking. Revision of that threshold would be outside the scope of the public notice of rulemaking in the present rulemaking proceeding.

EPA reviewed the rule during the original de minimis rulemaking in 1996. The 1996 rule amendments included the 15 tpy threshold; EPA submitted comments to the Department in July of 1996 on the 1996 proposed de minimis rule, stating that, although EPA had reservations on some portions of the rule, the rule as proposed at that time would be acceptable to EPA for

approval as part of the SIP. That letter did not identify any concerns over the 15 tpy threshold in the rule.

Fifteen tpy is an appropriate level for requiring a permit. With the exception of lead and PM-10, the 15 tpy level in the de minimis rule, is far more stringent than EPA's major modification permit threshold levels, which range from 25 to 100 tpy, depending upon the pollutant in question. A 15 tpy emission increase of lead or PM-10 would not be allowed if the increase occurred at a major facility and if the change was subject to major new source permitting requirements, as explained above.

The 15 tpy emission level contained in the de minimis rule represents potential emissions and not actual emissions. New facilities are not required to obtain an air quality permit unless their potential emissions exceed 25 tpy. Therefore, it would not be appropriate to require a permitted facility to obtain another permit if it is increasing potential emissions by 15 tpy when a new facility locating in the same area would not require a permit until its potential emissions exceeded 25 tpy. In addition, the Department permits many sources under its minor source permitting program that would not require an initial permit under EPA's regulations.

COMMENT #8 (EPA): The de minimis rule could allow sources to violate preconstruction permit process requirements. The State is broadly expanding the de minimis rule because changes to emission limits are prohibited under the current rule. Further, the proposed rule does not prohibit changes in emission limits that stem from federal or state statute/regulation or from the SIP. EPA cannot envision any acceptable circumstance for implementing this provision. Revisions to an emission or production limit previously established in a permit must go through a full permit revision, including State, EPA, and public review. In addition, a source can't violate a SIP emission limit without the State adopting a SIP revision and receiving EPA approval.

RESPONSE: The de minimis rule does not allow facilities to violate preconstruction permit process requirements. The de minimis rule is not a "stand alone" provision. This rule is contained within the Department's permitting rules in Title 17, Chapter 8, Subchapter 7, of the Administrative Rules of Montana. Pursuant to this subchapter, the Department adequately and effectively operates a minor source permitting program to protect the air quality in the State of Montana.

There are situations when a production or emission limit can be changed or added without public participation. As discussed above, the Department has been adding or modifying federally enforceable production and/or emission limits in facility permits to create synthetic minor exemptions from the Title V Operating Permits Program. The Department has never received comments from EPA suggesting that the opportunity for public comment is necessary to effect these changes.

Changing or adding production or emission limits without public participation is also appropriate when the change or addition would result in a decrease in emissions. ARM 17.8.733(1)(b), which is an EPA-approved rule contained in the SIP, currently allows the Department to modify a permit for changed conditions that do not result in an increase in emissions beyond permitted limits. The Department routinely changes or adds conditions in permits that result in decreased emissions and has not received comments from EPA on the issue.

Changing or adding production limits without public participation is appropriate when a facility is replacing a piece of equipment with another piece of equipment. As an example, natural gas compressor stations in Montana frequently swap engines as maintenance activities occur. A facility simply removes one engine with certain emission limits from a site and replaces it with an engine of equal or smaller size. The current de minimis rule allows the engine swap but prohibits the Department from applying the existing emission limits to the new engine. Because the new engine lacks emission limits, it will not be tested. Under the rule amendments, the emission limits from the existing engine can be applied to the new engine. This example assumes such equipment replacement does not violate any provisions of the NSR program.

While the Board favors appropriate public participation in the permitting process, de minimis changes occurring at a facility are insignificant and, therefore, do not warrant the public participation EPA suggests. Only changes below EPA's permitting thresholds may occur without public participation. Also, the rule amendments allow for department discretion by specifying that the Department may change production or emission limits; such changes are not mandated. Such discretion can be properly exercised to change or add production or emission limits when an appropriate situation arises.

COMMENT #9 (EPA): A statement should be added in ARM 17.8.705(1)(r)(i) that "sources in nonattainment areas or areas subject to a SIP call that are proposing to increase emissions of the nonattainment/SIP call pollutant are not de minimis and must meet all preconstruction permitting requirements."

RESPONSE: The Board does not believe it is necessary to add this provision. As discussed above, the proposed rule already contains provisions that ensure compliance with applicable rules, including ambient air quality standards, and with the SIP and control strategies within the SIP. Also, if a permit modification is necessary to implement a de minimis change, ARM 17.8.710 contains a provision prohibiting the Department from issuing a permit to a facility until it demonstrates that it can be expected to operate in compliance with all applicable rules and standards, including any control strategy contained in the SIP. Further, it's not appropriate to require a facility operating under a permit in a nonattainment area to obtain a new permit for any emission increase when other facilities operating in the same area without a permit are not subject to any

permitting requirements unless they have a potential to emit more than 25 tons of a pollutant per year.

COMMENT #10 (EPA): A new section 17.8.705(1)(r)(i)(F) should be added to state that "any construction or changed conditions that would violate a requirement of the SIP are prohibited".

RESPONSE: The Board does not believe it is necessary to add this provision to the rule. The current rule contains a provision, renumbered as 17.8.705(1)(r)(i)(A), specifying that an action is not considered de minimis if it violates any applicable rule contained in the Department's air quality rules. As discussed above, ARM 17.8.710(2), of the Department's air quality rules prohibits violation of the SIP.

COMMENT #11: By letter of May 13, 1999, the EPA wrote that, having discussed the proposed rule with the DEQ and Jim Wheelis, the Board's attorney, it has decided to support the adoption of the rule as proposed. The letter noted that approval of the rule could not be guaranteed and that the EPA recognized that most of the changes it had requested were outside the scope of the rulemaking notice.

RESPONSE: The Board acknowledges the modified response of the EPA.

BOARD OF ENVIRONMENTAL REVIEW

by: *Joe Gerbase*
JOE GERBASE, Chairperson

Reviewed by:

David Rusoff
David Rusoff, Rule Reviewer

Certified to the Secretary of State May 21, 1999.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the adoption of new RULES I and II, and the amendment of ARM 17.8.1301, 17.8.1302, 17.8.1305, 17.8.1306, and 17.8.1310 through 17.8.1313, pertaining to air quality transportation and general conformity determinations	)	NOTICE OF ADOPTION AND AMENDMENT OF RULES (AIR QUALITY)

TO: All Interested Persons

1. On February 11, 1999, the Board of Environmental Review published notice of public hearing on the proposed adoption and amendments outlined above at page 244 of the 1999 Montana Administrative Register, Issue No. 3.

2. The Board has adopted NEW RULE I (17.8.1401) and II (17.8.1402) as proposed.

3. The Board has amended rules 17.8.1301, 17.8.1305, 17.8.1306, 17.8.1310, 17.8.1311, 17.8.1312, and 17.8.1313 as proposed.

4. The Board has amended the following rule as proposed with the following changes. Matter to be added is underlined. Matter to be deleted is interlined.

17.8.1302 INCORPORATIONS BY REFERENCE (1) For the purposes of this subchapter, the board hereby adopts and incorporates herein by reference the following:

(a) 40 CFR Part 93, subpart A, which sets forth the conformity to state or federal implementation plans of transportation plans, programs and projects developed, funded or approved under Title 23 USC or the Federal Transit Act, with the following changes:

(i) 40 CFR 93.102(c), as it applies to federally funded projects, is not incorporated;

(i) through (iii) Remain as proposed, but are renumbered (ii) through (iv).

(v) 40 CFR 93.118(e)(1), beginning "or beginning 45 days" and ending "transportation conformity purposes" is not incorporated;

(iv) Remains as proposed, but is renumbered (vi).

(vii) 40 CFR 93.120(a)(2) third sentence beginning "during the first 120 days" is not incorporated;

(viii) 40 CFR 93.121(a) beginning "the requirements of one of the following are met" and 40 CFR 93.121(a)(1) in its entirety, are not incorporated;

(v) Remains as proposed, but is renumbered (ix).

(x) 40 CFR 93.124(b), second sentence beginning "such an implementation plan revision" is not incorporated;

(vi) Remains as proposed, but is renumbered (xi).
(2) Remains as proposed.
AUTH: 75-2-111, MCA; IMP, 75-2-202, MCA

5. The Board received the following comment; the Board's response follows:

COMMENT #1: The Department of Environmental Quality testified that several amendments to the proposed rules were necessary to address the recent court decision in Environmental Defense Fund v. EPA, 1999 U.S. App. LEXIS (March 2, 1999). In this decision, the U.S. Circuit Court of Appeals for the D.C. Circuit struck down portions of the EPA transportation conformity rules, finding those rules to be inconsistent with the federal Clean Air Act. The amendments proposed by the Department strike from the proposed rules those portions of the federal rules that were invalidated by the court.

RESPONSE: The Board agrees that such changes are appropriate, and adopts the amendments offered by the Department.

BOARD OF ENVIRONMENTAL REVIEW

by: *Joe Gerbase*
JOE GERBASE, Chairperson

Reviewed by:

David Rusoff
David Rusoff, Rule Reviewer

Certified to the Secretary of State May 21, 1999.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the adoption of NEW RULE I (17.30.630) pertaining to temporary water quality standards for Daisy Creek, the Stillwater River and Fisher Creek	NOTICE OF ADOPTION (WATER QUALITY)

TO: All Interested Persons

1. On March 25, 1999, the Board of Environmental Review published notice of public hearing on the proposed adoption outlined above at page 482 of the 1999 Montana Administrative Register, Issue No. 6.

2. The Board has adopted 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.

RULE I (17.30.630) TEMPORARY STANDARDS FOR NEW WORLD MINING DISTRICT (1) The goal of the state of Montana is to have these waters support the uses listed for waters classified B-1 at ARM 17.30.623(1). The standards for the parameters listed in this rule temporarily modify the specific standards for those parameters provided in ARM 17.30.623 for each of the water bodies listed below, until the temporary standards expire or are terminated by the board. The standards for parameters not listed in this rule are the specific standards listed in ARM 17.30.623. The existing uses of the water bodies listed below must be maintained during the period that these temporary standards are in effect. No increase from existing conditions for any of the parameters that have been temporarily modified (no decrease for pH) is allowed at any point in the affected stream segments. The numerical standards for specific parameters listed below apply only at the downstream end of the stream segment. The requirements of ARM 17.30.623 apply to the waters listed in this rule except where those requirements conflict with the temporary standards listed below.

(2) through (2)(b) Remain as proposed.

(c) Temporary water quality standards for Fisher Creek, from its headwaters to its confluence with Lady of the Lake Creek, the headwaters of the Clark's Fork of the Yellowstone River, are as follows. No increase from existing conditions (no decrease for pH) is allowed at any point in Fisher Creek for any of the following parameters. These standards are in effect until June 4, 2014. Metals standards are in terms of micrograms per liter (µg/liter) total recoverable concentrations and pH standards are in standard units (su).

Parameter	In Fisher Creek at its confluence with ~~the Stillwater River~~ Lady of the Lake Creek, the following standards shall not be exceeded more than 3% of the time. µg/liter
Aluminum	470.
Copper	110.
Iron	750.
Lead	2.
Manganese	82.
Zinc	44.
pH	must be maintained above 5.7 su.

AUTH: 75-5-201, 75-5-312, MCA; IMP: 75-5-312, MCA

3. The Board received the following comments; Board responses follow:

COMMENT #1: The Board should require (or lacking authority, recommend) a water quality monitoring program consistent with the Board's ruling including the following elements:

(1) Designed and carried out by an unaffected, technical organization of state government, such as Montana State University;

(2) Including all streams and aquifers that emanate from or pass through areas that will be affected by the project activities (not limited to the 3 streams for which temporary standards are being considered);

(3) Commencing before project work begins in order to establish a pre-project baseline;

(4) Employing aquatic biological indicators in addition to traditional water sampling and laboratory analysis as a tool to indicate changes in water quality. This could serve as a measure of project success and indicate the appropriate permanent standard at project completion.

(5) Should be designed to accomplish the following:

(a) Detect changes in constituent concentrations or pH resulting from project activities. The data should serve the purpose of enforcing both the narrative and numerical standards;

(b) Serve as a measure (baseline) of success for the pollution abatement measures employed as part of the project; and

(c) Serve as a quantitative basis upon which to establish permanent, non-degradation standards upon completion of project work.

RESPONSE: A plan for actions to correct the sources of water pollution (called the implementation plan) was submitted in support of the application for temporary standards pursuant to § 75-5-312, MCA, and constitutes the basis for the temporary standards. The Board must review efforts to implement the plan, including monitoring, at least every 3 years. The Board may terminate the temporary standards if, upon review, it finds that the applicant is not complying with the approved implementation

plan. See § 75-5-312(6) and (7), MCA.

The implementation plan does not itself provide a detailed monitoring plan, but appropriately leaves such technical matters up to the U.S. Forest Service upon consultation with the Department. The Board has neither the legal authority nor the technical capability to direct or make recommendations as to the details of water quality monitoring.

The implementation plan does require the Forest Service to submit detailed annual monitoring and work plans to the Department by May 1, 1999, and each subsequent year for review and comment by the Department. The Forest Service must submit annual reports, including remedial activities and monitoring results, to the Department by December 31, 1999, and each subsequent year. Details of the monitoring program will not be known until the 1999 project work plan has been finalized. The Department has indicated that it will take the commentors' suggestions under consideration in reviewing and commenting on the project work plan. No modification of the rule is required for the Department to do this.

COMMENT #2: Commentor wishes to emphasize the importance of accurate and reliable monitoring during and after completion of the project. To that end we request consideration be given to implementing the multi-point approach for stream segment sampling by the year 2000 work season, while proceeding with the adoption of the rule as presented at this time.

RESPONSE: See response to Comment #1.

COMMENT #3: These temporary standards encompass the highest concentrations observed with no seasonal timeframes attached to these limits. While this approach may be appropriate in light of the reclamation work, the proposed standards do not drive the process toward improving water quality. Therefore, DEQ should explicitly state that the goal of the reclamation process is to rehabilitate this area so that B-1 standards might be met.

RESPONSE: The rule has been changed to make this goal explicit. It is not likely that implementation of reclamation activities will cause any major increases in concentrations of these parameters. Although the temporary standards are only intended to protect existing water quality, the implementation of planned reclamation activities facilitated by these temporary standards will improve water quality at the New World Mine District.

COMMENT #4: Sub-section (2)(c) of the proposed rule erroneously specifies the confluence of Fisher Creek and the Stillwater River. This should be the confluence of Fisher Creek and Lady of the Lake Creek.

RESPONSE: This correction has been made.

BOARD OF ENVIRONMENTAL REVIEW

by: *Joe Gerbase*
JOE GERBASE, Chairperson

Reviewed by:

David Rusoff
David Rusoff, Rule Reviewer

Certified to the Secretary of State May 21, 1999.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.38.215 pertaining to bacteriological quality samples for public water supply systems	)))))	NOTICE OF AMENDMENT (PUBLIC WATER SUPPLY)

TO: All Interested Persons

1. On February 11, 1999, the Board of Environmental Review published notice of public hearing on the proposed amendment outlined above at page 257 of the 1999 Montana Administrative Register, Issue No. 3.

2. The Board has amended rule 17.38.215 as proposed.

3. The Board received the following comments; Board responses follow:

COMMENT #1: Two commenters stated that monthly sampling is unnecessary to protect public health. Both are owners of public water supplies that are small and serve relatively few people.

RESPONSE: Public water suppliers that have been allowed to sample quarterly under the existing rule will be allowed to continue quarterly sampling unless one or more of the conditions in (1)(d) of the rule occur. These criteria were developed to determine when quarterly sampling will not be adequate to ensure water quality. Additionally, public water suppliers that are now sampling monthly and can meet the conditions of ARM 17.38.215(1)(b) may be allowed to sample quarterly.

COMMENT #2: One commenter stated that the Board must consider appropriate scientifically defensible information before a rule is adopted that is more stringent than the comparable federal rule.

RESPONSE: The Board acknowledges HB 521 (codified at Section 76-2-116, MCA) prohibits adoption of state administrative rules which are more stringent than comparable federal regulations or guidelines that address the same circumstances, unless certain findings are made.

The record in this rulemaking proceeding indicates that the amended rule will result in a more stringent state requirement than the present comparable federal requirement. These regulations require sampling for coliform bacteria by transient noncommunity public water supply systems not under the direct influence of surface water and serving a maximum daily population of 1,000 persons or fewer. The comparable federal regulation for this same class of system is found at 40 CFR 141.21(a)(3)(i). The federal regulation provides that this class of system must monitor quarterly unless allowed by the

state to monitor less frequently based on a sanitary survey. Monitoring frequency cannot be reduced to less than once per year.

The Board has considered this matter over the course of a previous rulemaking proceeding commencing in January 1998 in which the same provision of this rule was amended to change the required sampling frequency for this class of system from monthly to quarterly. The Board heard testimony and considered written comments on this matter at its meetings on April 3, 1998, and June 12, 1998. (See 1998 MAR Issue #8, page 1167; and Issue #12, page 1730). On August 28, 1998, the Board considered the petition of the Missoula City-County Health Department to implement rulemaking. These prior proceedings, as well as the present rulemaking proceedings, constitute the record upon which the Board bases its decision in this matter.

Based upon these deliberations, the Board concludes that the amended rule, which returns the required sampling frequency to monthly subject to certain exceptions, protects the public health, can lessen the risk of harm to the public health, and is achievable under current technology.

At the August 28, 1998, Board meeting, the Missoula City-County Health Department (Missoula) provided testimony in support of its August 3, 1998, petition to require monthly, rather than quarterly, coliform bacteria sampling of this class of public water supplies.

Missoula stated in the petition and in testimony that monthly monitoring is simply more likely to detect contamination that may be present in the water. Missoula also stated that quarterly sampling may not detect seasonal variations in water quality that may occur during spring runoff, for example. Missoula stated nearly 6 months could lapse between samples that are taken at the beginning of one quarter and at the end of the subsequent quarter.

In a letter dated February 23, 1998, Missoula also presented testimony in opposition to the Department's original proposal to allow quarterly sampling. In the letter, Missoula cited a waterborne disease outbreak in Milwaukee that resulted in numerous deaths. Missoula also referenced two public water supplies in Missoula County that have experienced seasonal water contamination that was detected through monthly sampling. Missoula asserted in the letter that quarterly sampling would not be adequate to detect contamination discovered through monthly sampling at these water supplies. Several other local health officers submitted testimony in support of Missoula's position.

Jim Melstad, supervisor of the Department's public water supply section testified that the cost of sampling is estimated to be about $35 per sample including the time involved in taking and mailing the sample and postage. The amendment will not increase costs for those water suppliers who have already been allowed to go to quarterly sampling but will apply mostly to new public water supplies. New systems will be required to sample monthly for 24 months before being allowed to sample quarterly.

The testimony and petition demonstrated the need to revise

ARM 17.38.215 to require monthly sampling. For these reasons, the Board decided to again request that the Department develop a rule to require monthly monitoring for this group of public water suppliers, with provisions to allow quarterly monitoring under certain circumstances.

BOARD OF ENVIRONMENTAL REVIEW

by: *Joe Gerbase*
JOE GERBASE, Chairperson

Reviewed by:

David Rusoff
David Rusoff, Rule Reviewer

Certified to the Secretary of State May 21, 1999.

BEFORE THE DEPARTMENT OF JUSTICE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 1.3.101, 1.3.102, 1.3.201, 1.3.202, 1.3.203, 1.3.204, 1.3.205, 1.3.206, 1.3.207, 1.3.208, 1.3.209 and 1.3.210, the model rules of procedure and the amendment of the sample forms attached to the model rules	)	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On April 8, 1999, the Department of Justice published notice of the proposed amendment of ARM 1.3.101, 1.3.102, and 1.3.201 through 1.3.210, the Attorney General's Model Rules of Procedure, and notice of the proposed amendment of the sample forms attached to the model rules at pages 600 through 610 of the 1999 Montana Administrative Register, Issue Number 7.

2. The Department of Justice has amended ARM 1.3.101, 1.3.102, 1.3.201 through 1.3.205, 1.3.207 and 1.3.210 exactly as proposed.

The Department of Justice has amended ARM 1.3.206, 1.3.208 and 1.3.209 with the following changes, stricken matter interlined, new matter underlined:

1.3.206 MODEL RULE 3 RULEMAKING, NOTICE (1) through (3)(a)(i)(A)(II) same as proposed.

(III) The agency shall include in its notice an easily understood statement of reasonable necessity which contains the ~~principle~~ principal reasons and the rationale for each proposed rule. One statement may cover several proposed rules if appropriate, and if the language of the statement clearly indicates which rules it covers. An inadequate statement of reasonable necessity cannot be corrected in an adoption notice. The corrected statement of reasonable necessity must be included in a new notice of proposed action.

(3)(a)(i)(A)(IV) through (3)(c)(i) same as proposed.

AUTH: 2-4-202, MCA
IMP: 2-4-202, 2-4-302, 2-4-305, MCA

1.3.208 MODEL RULE 5 RULEMAKING, AGENCY ACTION (1) through (2)(a)(iii) same as proposed.

(3) Objection by ~~the~~ an administrative rule review committee made pursuant to 2-4-305(9), 2-4-306(4), or 2-4-406(1), MCA.

(a) through (b)(iii) same as proposed.

(4) Effective Date. Absent an objection of the type referred to in (3) by ~~the appropriate~~ an administrative rule review committee, the agency action is effective on the day following publication of the notice in the register, unless a later date is required by statute or specified in the notice.

AUTH: 2-4-202, MCA
IMP: 2-4-202, 2-4-305, MCA

1.3.209 MODEL RULE 6 RULEMAKING, TEMPORARY EMERGENCY RULES AND TEMPORARY RULES (1) through (1)(b)(ii) same as proposed.

(iii) take appropriate and extraordinary measures to make emergency rules known to persons who may be affected by them, 2-4-306(4), MCA, including delivery of copies of the rule to a state wire service and to any other news media the agency considers appropriate. Extraordinary measures include, but are not limited to immediate personal delivery of copies of the rule to affected parties, and immediate delivery of copies of the rule to associations whose members are affected. 2-3-105, MCA.

(1)(c) through (2)(d) same as proposed.

AUTH: 2-4-202, MCA
IMP: 2-4-202, 2-4-303, 2-4-306, MCA

3. The Department of Justice has amended the proposed sample forms to reflect style and format corrections, to ensure consistency, and to clarify how the forms are to be used. None of the changes are of a substantive nature.

4. The following comments were received and appear with the Department of Justice's responses.

COMMENT 1: The Montana Administrative Procedure Act permits an administrative rule review committee to make various types and levels of objections. ARM 1.3.208 should be amended to clarify which objections can result in delay in the adoption or effective date of a proposed adoption, amendment or repeal of a rule.

RESPONSE: The Department agrees and has made the suggested amendments to ARM 1.3.208(3).

COMMENT 2: ARM 1.3.209(1)(b)(iii) is proposed to be amended to require that extraordinary, as well as appropriate, measures be taken to notify persons who may be affected by temporary emergency rules. However, there is no definition of an extraordinary measure. The term should either be defined or eliminated.

RESPONSE: The Department agrees. The term "extraordinary" was added by the 1997 legislature. The Department has amended ARM 1.3.209(1)(b)(iii) to provide suggested "extraordinary" notification measures. Other measures may be used as the situation warrants.

COMMENT 3: Two comments were received regarding the replacement of the term "interested persons" with "concerned persons" in each notice's salutation. The first notes that the use of the term "concerned persons" appears to narrow the category of persons to whom the notices are addressed. The second states that the term "interested persons" is statutorily correct while the term "concerned persons" is too vague.

RESPONSE: The Department proposed to replace "interested persons" with "concerned persons" as 1997 Mont. Laws ch. 489 defines an "interested person" as someone who requests to be put on an agency's interested persons' list. The notices are directed to a larger audience than an agency's interested persons' list. It is the Department's intent to address the notices to the larger audience. The term "concerned" is synonymous with "interested", but not subject to being confused with an agency's interested persons' list. The Department has adopted the amendment as proposed.

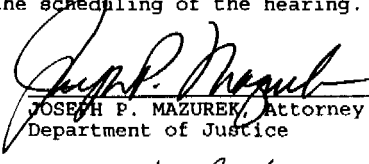
COMMENT 4: ARM 1.3.206, as proposed to be amended, provides for notification to a bill's chief sponsor when an agency first begins work on the initial rule proposal implementing one or more sections of the sponsor's legislation. The agency must also provide the chief sponsor with the notice of proposed adoption. Is there any requirement to provide the chief sponsor with the notice of adoption?

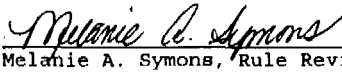
RESPONSE: There is no statutory requirement to provide the chief sponsor with the notice of adoption. However, an agency may choose to do so as a courtesy.

COMMENT 5: The use of the phrase "shall schedule an oral hearing at least 20 days from the publication of the notice of proposed action" in ARM 1.3.204(4)(b)(ii) is incorrect as it requires the hearing to be held within 20 days after the date of publication. Also, it is unclear whether the hearing is to be held within the 20-day period or only scheduled within 20 days.

RESPONSE: The phrase "at least 20 days from the publication of the notice of proposed action" does not mean "within 20 days after publication". It means that at least 20 days must pass

between the date of publication and the hearing date. The phrase is consistent with statutory language. The notice of proposed agency action contains the hearing date. Since the hearing is already scheduled when the notice is published, there should be no confusion over whether the language is referring to the hearing itself or the scheduling of the hearing.

By: 
JOSEPH P. MAZUREK, Attorney General
Department of Justice


Melanie A. Symons, Rule Reviewer

Certified to the Secretary of State May 21, 1999.

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

In the matter of the amendment of ARM 16.38.307 pertaining to state laboratory fees for analyses	))))	NOTICE OF AMENDMENT

TO: All Interested Persons

1. On April 8, 1999, the Department of Public Health and Human Services published notice of the proposed amendment of the above-stated rule at page 628 of the 1999 Montana Administrative Register, issue number 7.

2. The Department has adopted the rule 16.38.307 as proposed.

3. No comments or testimony were received.

Rule Reviewer

Director, Public Health and Human Services

Certified to the Secretary of State May 21, 1999.

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

In the matter of the amendment of ARM 37.12.310 and 37.12.311 pertaining to laboratory licensure fees and the duration of a license	)))))	NOTICE OF AMENDMENT

TO: All Interested Persons

1. On April 8, 1999, the Department of Public Health and Human Services published notice of the proposed amendment of the above-stated rules at page 625 of the 1999 Montana Administrative Register, issue number 7.

2. The Department has adopted the rule 37.12.311 as proposed.

3. 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.

37.12.310 LICENSURE FEES (1) through (1)(b) remain as proposed.

(c) $250 plus travel expenses for a second inspection during the 3 year term of a license that is necessary for approval of a new laboratory location; there is no charge for one inspection during the term of the license;

(1)(d) through (1)(f) remain as proposed.

(g) $250 per day, plus travel expenses of environmental laboratory staff, for on site training and technical assistance outside of licensure inspections by the environmental laboratory;

~~(h) $60 per hour or part thereof for each hour in excess of one hour per year for telephone consultation provided by the environmental laboratory. The fee and the hourly calculation apply separately to the areas of microbiology and chemistry, and there is no charge for up to one hour per year of consultation in each of those areas.~~

AUTH: Sec. 50-1-202, MCA
IMP: Sec. 50-1-202, MCA

4. The Department has thoroughly considered all commentary received. The comments received and the department's response to each follow:

COMMENT #1: Are the first year fees for a start up microbiology laboratory $975 under ARM 37.12.310? If so, this amount is excessive.

RESPONSE: The fees for a startup microbiology laboratory are $450 in year one, $350 in year two, and $200 in year three. There may be additional training fees in year one if the analyst starting the laboratory has not previously been certified by the state. The department does not agree that the fees are excessive. Rather, they are designed to recover the costs of the laboratory licensure program over a three year period.

COMMENT #2: Does a provisionally certified laboratory incur $150 as in subsection (b) of ARM 37.12.310 for the 1 year inspection, or $250 plus expenses as in subsection (c)?

RESPONSE: The answer is $150. Subsection (c) of ARM 37.12.310 does not apply to provisional license inspections but, rather, to an inspection necessary to approve a new laboratory location.

COMMENT #3: The phrase "plus expenses" in ARM 37.12.310(c) and (g) is undefined. It must be either defined or the phrase "not to exceed" added.

RESPONSE: The department intended the expenses in question to be travel expenses, since those are the expenses for which state employees, by law, may be reimbursed. The department, therefore, has added the word "travel" to subsection (c) of ARM 37.12.310 to define those expenses intended to be covered. This modifier already appears in subsection (g) and no further changes were made to that subsection.

COMMENT #4: ARM 37.12.310(f) will discourage the expansion of analytical capability within Montana. If this fee is imposed, DPHHS should do away with requirement for analyst training in the state laboratory and accept experience and training in the certified laboratory after PE samples have been successfully analyzed. Not both. Federal requirements do not include training in the certifying authority's laboratory.

RESPONSE: The department does not agree. In the development of the licensure rules, no adverse comments were received regarding this requirement. Eliminating the fee for the training would result in an increase in the overall licensure fee to cover its cost. Laboratories who participated in rule development meetings did not want the cost of the training rolled into the overall licensure fee. Laboratories with high employee turnover would cause the licensure fees to increase for all laboratories, and it was the general consensus that laboratories should be responsible for the direct costs of their licensure whenever possible.

COMMENT #5: When are the fees in section (g) of ARM 37.12.310 applicable? The department must define the distinctions between the circumstances to which subsections (a), (b), and (c) apply and those described in subsection (g).

RESPONSE: The department has changed the rule to clarify that

the fees in subsection (g) apply to on site training and technical assistance sought in addition to licensure inspections.

COMMENT #6: The fee in subsection (h) of ARM 37.12.310 may discourage laboratories from seeking technical assistance.

RESPONSE: The department has deleted subsection (h) from the rule.

COMMENT #7: Why is the increase in fees necessary? The role of the department does not seem to be significantly expanded under the new licensure rules.

RESPONSE: The department's role is somewhat expanded under the new licensure rules, but the fee increase is necessitated by the fact that the current fees do not cover the cost of the licensure program. Even though the percentage increase of these fees seem large, the dollar amounts are still relatively small and are considerably less than other states with which the department is familiar.

A number of other statements, opinions, and questions were offered as comments but, since they were not germane to substance of the rules themselves, no response is necessary in this notice.

Dana Shea
Rule Reviewer

Laurie Flanagan
Director, Public Health and Human Services

Certified to the Secretary of State May 21, 1999.

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

In the Matter of the Proposed Adoption and Repeal of Rules Implementing The Electric Utility Industry Restructuring and Customer Choice Act (Title 69, chapter 8, MCA), And The Natural Gas Utility Restructuring and Customer Choice Act (Title 69, chapter 3, MCA), Pertaining to Consumer Information and Protection	)	NOTICE OF ADOPTION AND REPEAL

TO: All Interested Persons

1. On December 3, 1998, the Department of Public Service Regulation, Public Service Commission (commission), published a notice of public hearing on the proposed adoption and repeal of rules pertaining to implementation of The Electric Utility Industry Restructuring and Customer Choice Act and The Natural Gas Utility Restructuring and Customer Choice Act, at page 3191 of the 1998 Montana Administrative Register, issue number 23.

2. The commission conducted the public hearing on January 7, 1999, in its offices, 1701 Prospect Avenue, Helena, Montana, in the Bollinger Hearing Room. Eleven individuals representing themselves or their companies or associations commented at the public hearing. The commission received written comments through the January 28, 1999, comment deadline from the following: Montana Consumer Counsel (MCC); Natural Resources Defense Council, Northwest Energy Coalition and Renewable Northwest Project (collectively NRDC); Department of Environmental Quality (DEQ); Thomas Schneider on behalf of City of Helena and League of Cities and Towns; Glacier Electric Cooperative (Glacier Electric); Granite Peak Energy, Inc. (Granite Peak); Western Montana Electric Generating & Transmission Cooperative, Inc. (WMG&T); Big Horn County Electric Cooperative (Big Horn); Enron; Montana Electric Cooperatives' Association (MECA); Montana-Dakota Utilities Co. (MDU); Montana Environmental Information Center (MEIC); District XI Human Resource Council (District XI HRC); Montana Public Interest Research Group (MontPIRG); Energy West, Inc.; Montana Power Company-Energy Services Division (MPC-ESD); Montana Power Trading & Marketing (MPT&M); Jeremy Hueth; Phyllis Marshik; Michael Krebs; Arlene Ward Braun; Toddy Perryman and Patrick Leonard; and Charles L. McEvers. The comments are summarized and addressed in paragraph 5.

3. The commission has adopted the following rules as proposed, with amendments in response to concerns raised in comments. Matter to be added is underlined and matter to be deleted is interlined. The commission added a definition rule, NEW RULE (38.5.6001), setting forth definitions of "small customer," "residential customer," "small electricity commercial customer," and "small natural gas commercial customer." Adding the definition rule allowed the commission to delete repetitive statements throughout the rules on these types of customers.

NEW RULE (38.5.6001) DEFINITIONS (1) "Small customer" means a residential customer or a small electricity or natural gas commercial customer of a distribution utility.

(2) "Residential customer" means a residential customer of a distribution utility.

(3) "Small electricity commercial customer" means a commercial electricity customer whose individual account averaged a monthly demand in the previous calendar year of less than 300 kilowatts (kW) or a new commercial customer whose individual account is estimated to average a monthly demand of less than 300 kW.

(4) "Small natural gas commercial customer" means a commercial natural gas customer with usage per year on an individual account which averages under 500 dekatherm units (dkts) or 500 mcf (each mcf unit is one-thousand cubic feet) or a new commercial customer whose individual account is estimated to average a monthly usage under 500 dkts or mcf per year.

AUTH: 69-3-1404 and 69-8-403, MCA; IMP: 69-3-1404 and 69-8-403, MCA.

RULE I. (38.5.6002) VERIFICATION OF SMALL CUSTOMER CHOICE OF SUPPLIER (1) A supplier may not initiate or effect a change in a small customer's choice of supplier except when the supplier initiating the change has obtained the customer's written authorization in a form that meets the requirements in this rule. The supplier must retain this authorization for at least 12 months from the date of initiation of service.

(2) The letter of authorization shall be a separate document (or an easily separable document) ~~containing~~that is delivered to the prospective customer along with the service contract. The letter of authorization shall contain~~only~~ the authorizing language described in (4) of this rule, the sole purpose of which is to authorize a natural gas or electricity supplier to initiate a change in the customer's choice of supplier. The letter of authorization must be signed and dated by the customer who is responsible for payment of the natural gas or electricity account.

(3) The letter of authorization shall not be a part of any sweepstakes, contest or similar promotional program.

(4) At a minimum, the letter of authorization must be printed with a readable type of sufficient size to be clearly

legible and must contain clear and unambiguous language that confirms:

(a) The customer's billing name and address and each account number to be covered by the change order;

(b) The decision to change the customer's choice of supplier from the current supplier to the prospective supplier;

(c) ~~That the customer designates~~The customer's designation to the supplier to act as the customer's agent for the supplier change; ~~and~~

(d) ~~That the customer understands~~The customer's understanding that ~~any change in supplier may involve a charge to the customer for changing suppliers~~by authorizing a change in supplier he or she authorizes access by that supplier to his or her usage and account information~~.~~; and

(e) The customer's acknowledgment of receipt of the supplier's service contract and agreement to its terms and conditions.

AUTH: 69-3-1404 and 69-8-403, MCA; IMP: 69-8-410 and 69-3-1404, MCA.

RULE II. (38.5.6003) COMPLAINTS OF UNAUTHORIZED SUPPLIER SWITCHES. Adopted as proposed

RULE III. (38.5.6004) SMALL CUSTOMER SERVICE CONTRACT

(1) All rates, terms and conditions for supply service must be provided to a ~~retail~~small customer in a service contract, written in plain language. The service contract must include the letter of authorization required by ARM 38.5.6002 and the letter of authorization must be returned by the customer to the supplier before any supply service is provided. ~~For residential and commercial electricity customers (under 300 kW) and natural gas customers (under 500 dkt or mcf), the~~The front page of a service contract shall prominently and clearly disclose in a uniform information label prescribed by the commission and as available on the commission's internet website:

(a) the ~~term of~~length of time the contract will be in effect;

(b) the effective price for supply service, in cents per kilowatt-hour for electricity or, for gas, price per either dekatherm or mcf, whichever billing unit is used by the distribution services provider, for various levels of consumption typical for the customer's customer segment;

(c) whether the price is fixed or variable and, if variable, a general description of the potential range and possible causes of price variations and the pricing formula or index, as applicable; and

(d) the toll-free telephone number for customer inquiries and the hours during which the customer can contact the supplier at that number.

(2) The service contract must include the information required to appear on the information label and:

(a) an explanation of conditions under which the supplier will terminate the supply agreement;

(b) a prominent identification and explanation of any and all charges, fees and penalties; and

(c) a conspicuous disclosure that there is a 3-day grace period during which the customer may rescind the contract without penalty and explicit information how to do so.

(3) No supplier, regulated distribution ~~service provider~~ utility, transmission service provider, ~~system services provider,~~ energy service provider, metering service provider, billing service provider, or other company or individual involved in the sale or delivery of electricity or natural gas, may disclose individual customer information to others without prior written consent from the customer except as provided by commission rule or order.

(4) ~~Residential and small commercial (under 300 kW or 500 dkt or mcf)~~Small customers shall have a 3-day grace period from the time of entering into a service contract to notify the supplier of termination of the contract without incurring liability for supply services not consumed or taken under the contract. A supplier may not inform the distribution utility of the customer's decision to change suppliers until after the 3-day grace period elapses.

(5) ~~Residential and small commercial (under 300 kW or 500 dkt or mcf)~~Small customers may terminate a service contract without incurring liability for supply services not consumed or taken under the contract by notifying the supplier that the customer is relocating outside the geographic area served by the supplier, or is moving to a location where the customer is not responsible for payment of the service consumed.

(6) A supplier must notify its affected customers, the commission and the distribution companies in writing at least ~~30~~ 60 days prior to ceasing business under an existing license or terminating service to an entire customer segment.

(7) The contract must clearly explain that distribution and transmission charges ~~from the customer's local distribution utility are not part of the contract, and whether transmission charges are a part of the contract~~remain regulated, are not provided by the supplier, and shall identify which entity, the distribution utility or the supplier, will bill the customer for distribution and transmission charges.

(8) Each supplier must provide its service contract to ~~each of its customers annually, or~~a customer upon request.

(9) At least 60 days prior to the expiration date of the customer's service contract, the supplier must provide written notice to the customer of either:

(a) the existence and operation of an automatic renewal provision present in the customer's contract; or

(b) the need for the customer to affirmatively renew to retain service from the supplier at the end of the contract term.

(10) If the service contract contains an automatic renewal provision, the supplier may not ~~materially~~ change the terms and conditions of the contract upon the renewal date unless the customer has been provided with written notice of the ~~material~~ changes at least 60 days in advance of their effective date and of his or her right to change suppliers rather than renew the contract. With the written notice of contract changes, the supplier must provide the customer a letter of authorization approving the contract changes to return to the supplier. Without a signed letter of authorization, the supplier may not renew the contract.

AUTH: 69-3-1404 and 69-8-403, MCA; IMP: 69-8-403 and 69-3-1404, MCA.

RULE IV. (38.5.6005) SUPPLIER TERMINATION OF SMALL CUSTOMER CONTRACT DUE TO CUSTOMER'S NONPAYMENT (1) A supplier terminating a small customer's service contract because of nonpayment shall provide written notice to the customer and the customer's distribution services provider at least 14 days in advance of termination. The notice of contract termination to the customer must clearly state:

(a) the reasons for termination;

(b) the name, address and telephone number of the supplier representative or department who can address questions concerning the contract termination; and

(c) the date on which the supplier will terminate the service contract.

(2) A supplier's notice ~~of contract termination must not state or suggest in any manner that cancellation of the customer's contract with the supplier will result in termination of the customer's service~~to a customer that the supplier is terminating the contract shall inform the customer that a default provider will continue providing the customer's electric or natural gas supply in the event of contract termination.

(3) The notice of contract termination to the customer must be mailed or provided separately from the bill.

(4) The supplier must notify the distribution ~~services provider prior to~~utility at least one day in advance of the scheduled contract termination date if the customer and the supplier make arrangements which void or otherwise alter the scheduled termination.

AUTH: 69-3-1404 and 69-8-409, MCA; IMP: 69-8-409 and 69-3-1404, MCA.

RULE V. (38.5.6006) BILLS TO SMALL CUSTOMERS (1) If charges for unregulated supply and energy services are combined with regulated charges on a single bill, the unregulated charges must be identified as unregulated and presented as separate line items.

(2) Bills must prominently identify ~~The~~ the name of each company for which charges are billed ~~must be prominently identified on all bills~~ in close proximity to each company's charges. Bills for small customers ~~(under 300 kW or 500 dkt~~

~~or mcf)~~ must provide each company's toll-free telephone number for billing inquiries.

(3) The commission's address and toll-free telephone number for customer complaints must appear on all bills for ~~residential and~~ small ~~commercial~~ customers ~~(under 300 kW or 500 dkt or mcf)~~.

(4) The payment due date must appear on all bills.

(5) Electric and natural gas distribution ~~services providers and natural gas system services providers~~utilities may enter into agreements with electricity or natural gas suppliers for billings and collections. The two companies must establish an efficient method of resolving customer inquiries and disputes. The billing entity must be able to provide the customer with the name, address and telephone number of an employee or department responsible for customer dispute resolution.

(6) Bills for electricity services must clearly itemize each service component and its respective ~~price~~charge, including:

(a) electricity supply;

(b) transmission and distribution;

(i) if charges for transmission and ancillary services are paid by a supplier and passed on to a retail customer in electricity supply charges, the supplier must identify the transmission portion of the charges;

(c) transition charges; and

(d) universal system benefits.

(7) Bills for natural gas services must clearly itemize each service component and the ~~price~~charge associated with each service component, including:

(a) natural gas supply;

(b) transportation and distribution;

(i) if charges for transportation and ancillary services are paid by a supplier and passed on to a retail customer in natural gas supply charges, the supplier must identify the transportation portion of the charges;

(c) transition charges; and

(d) universal system benefits.

(8) Bills must separately subtotal charges for regulated and unregulated services. Bills combining charges for both electric and natural gas services must separate the electricity-related portion of the bill from the natural gas-related portion and separately subtotal the regulated and unregulated charges for each.

(9) Bills must provide the actual cents per kilowatt hour or mcf/dkt charged to the customer for the customer's usage of electricity or natural gas supply for the current billing period, calculated by dividing the total charge for supply service by the customer's usage for the current billing period.

(~~9~~10) Undesignated partial payments of a bill must be applied first to regulated service, then to service other than regulated service in the percentage of each service provider's charges to the total charges to the customer for services

other than regulated service. Regulated service may not be affected by billing disputes over unregulated service or service provided by other companies.

(~~10~~11) A for-profit affiliate of a cooperative utility that uses a regulated distribution ~~service provider's~~ utility's facilities to supply electricity or natural gas to customers outside the cooperative utility's distribution ~~facility~~ service territory must satisfy the billing provisions of this rule.

AUTH: 69-3-1404 and 69-8-409, MCA; IMP: 69-8-409 and 69-3-1404, MCA.

RULE VI. (38.5.6007) DEFAULT SUPPLIER (1) The regulated electric distribution ~~service provider~~utility shall serve as the default supplier in its distribution ~~facilities~~ service territory when a ~~residential or~~ small ~~commercial~~ customer ~~(less than 300 kW)~~ is without supply service because the customer has not selected a competitive supplier or due to contract termination by an electricity supplier, including termination for nonpayment. The regulated natural gas ~~system services~~ distribution utility shall serve as the default supplier in its distribution service territory when a ~~residential or~~ small ~~commercial~~ customer ~~(less than 500 dkt or mcf)~~ is without supply service because the customer has not selected a competitive supplier or due to contract termination by a natural gas supplier, including termination for nonpayment. ~~Default service shall terminate when the customer begins receiving supply service from a competitive supplier.~~

(2) A customer ~~enrolled in~~receiving default supply service ~~shall~~must remain in that service until his account is cleared with the default supplier. Once a customer's past due account is cleared, the customer may select a competitive service option ~~of~~from an alternative supplier. A default supplier may disconnect service to a customer who ~~is in default of payment~~has not paid for its distribution services or default electricity or natural gas supply services. The deposit and termination rules of the commission apply to a default supplier (see ARM 38.5.1101 through 38.5.1112 and ARM 38.5.1401 through 38.5.1418).

(3) After a competitive bid solicitation, ~~an~~a regulated electric or natural gas distribution ~~services provider or natural gas system services provider~~utility may contract with a third-party supplier to acquire the necessary electric or natural gas supply to allow the distribution provider to meet its default supplier obligations ~~for a term not to exceed two years~~. The regulated electric or natural gas distribution ~~services provider or natural gas system services provider~~ utility is responsible for ensuring compliance with the commission's deposit and termination rules.

AUTH: 69-3-1404, 69-8-403 and 69-8-409, MCA; IMP: 69-8-409 and 69-3-1404, MCA.

RULE VII. (38.5.6008) SERVICE DISCONNECTION (1) ~~An electric~~A regulated electric distribution ~~service provider~~ utility may not disconnect or deny electric distribution service to a customer due to the customer's failure to pay for unregulated service or service provided by another entity. A regulated natural gas ~~system services provider~~distribution utility may not shut off or deny regulated natural gas distribution service to a customer due to the customer's failure to pay for unregulated service or service provided by another entity. When the same ~~company acts as~~regulated utility is both a customer's natural gas ~~system services provider~~ distribution utility and electric distribution ~~service provider~~utility, it may not deny, disconnect or shut off natural gas service ~~due to the customer's failure to pay for electric service,~~ or ~~deny or disconnect~~ electric service due to the customer's failure to pay for ~~natural gas~~the other utility service.

(2) Regulated distribution utilities may offer agreements to landlord small customers to allow them to authorize the utility to switch a rental unit's electricity and/or natural gas service to the default supplier or to a specified competitive supplier in the event of a tenant customer's service termination.

AUTH: 69-3-1404 and 69-8-403, MCA; IMP: 69-8-403 and 69-3-1404, MCA.

RULE VIII. (38.5.6009) SUPPLIER COMPLAINT PROCEDURE (1) Each licensed supplier shall have an internal customer complaint procedure which allows for complete, fair and timely decisions and responses regarding complaints by customers. ~~The name, address and toll-free telephone number of the supplier representative responsible for complaints shall be identified on all supplier communications to small residential and commercial customers under 300 kW or 500 dkt.~~ Suppliers shall keep a record of customer complaints.

(2) The commission shall resolve disputes among suppliers and small customers regarding the provisions of this rule according to the following procedures:

(a) Each supplier must provide at least one employee, (whose duties need not be limited to this obligation) during business hours to respond to questions and resolve complaints from customers and to work with the commission and its staff on complaint resolution;

(b) When a supplier becomes aware of a complaint by a customer, the supplier must investigate the complaint, report the results of its investigation to the customer and attempt in good faith to resolve the complaint; and

(c) If the supplier cannot resolve the dispute with the customer, the supplier must orally inform the customer of his or her right to file an informal complaint with the commission and provide the commission's toll-free consumer complaints telephone number.

AUTH: 69-3-1404 and 69-8-403, MCA; IMP: 69-8-403 and 69-3-1404, MCA.

RULE IX. (38.5.6010) CLAIMS MADE IN MARKETING ELECTRICITY OR NATURAL GAS (1) A supplier shall include in its license application and in its annual reports sufficient documentation to substantiate any claims made to customers ~~intending to advertise, market, promote or represent to customers~~in advertising, marketing, promoting, or representing that electricity or natural gas purchased from the supplier is environmentally beneficial, environmentally benign, preserves or enhances environmental quality, is produced primarily with renewable energy sources, or is produced with specific resources or technologies ~~shall include in its license application and in its annual reports sufficient documentation to substantiate any claims made to customers~~.

(2) The commission may, on its own motion or in response to a complaint from a customer or another supplier, initiate a proceeding to investigate any claims made by a supplier in advertising, marketing, promoting and representing its services to customers. On determining that a supplier's claims are misleading, deceptive, false or fraudulent, the commission may apply appropriate penalties, including license revocation, pursuant to 69-4-408 and 69-3-1405, MCA.

(3) ~~In advertising, marketing, promoting and representing unregulated electricity or natural gas supply and/or retail energy services to customers,~~ uUnregulated supply affiliates of former vertically integrated, regulated public utilities ~~and for profit affiliates of cooperative utilities~~ may not refer to, or imply any association with, the reliability, safety, quality, value, history, or economic benefits of service formerly provided by the vertically integrated, regulated utility business when advertising, marketing, promoting or representing unregulated electricity or natural gas supply and/or retail energy services to customers in the service area of the former vertically integrated, regulated public utility.

~~(4) Promotional material mailed, delivered or given to residential and small commercial (less than 300 kW or 500 dkt or mcf) customers must prominently display the information label described in Rule III.~~

AUTH: 69-3-1404, 69-8-403, MCA; IMP: 69-8-403 and 69-3-1404, MCA.

4. Rule 38.5.8006 is repealed as proposed.

AUTH: 69-8-403, MCA; IMP: 69-8-404, 69-8-408, 69-8-409 and 69-8-410, MCA.

5. The commission received the following comments and responds as follows.

Part 1, COMMENTS ON RULES GENERALLY: (i) Enron suggests the rules are unnecessary for large customers because large customers are sophisticated and able to negotiate protections into their contracts with suppliers. RESPONSE: The commission agrees and has revised some rules to indicate that they apply only to the provision of service to small

customers. In addition, a rule has been added to define small customer.

(ii) MPC-ESD comments that the rules should protect the legitimate interests of suppliers and distribution providers, as well as customers. RESPONSE: The commission believes the rules balance the interests of all parties involved.

(iii) MPC-ESD is willing to serve as default supplier, but if the default supply function is assigned to an entity rather than being subject to competition, then the default supplier's rates will need to be regulated. Even if default supply is competitively bid, according to MPC-ESD, service terms and conditions will require commission oversight. RESPONSE: The commission agrees.

(iv) District XI HRC urges adoption of additional rules dealing with the following subjects, for which suggested language is provided: creation of a do-not-call list; protection of customer information; unfair or deceptive practices; excessive collection costs; application for service/denial of credit; and conducting business with unauthorized entities. RESPONSE: The commission appreciates the suggestions offered by District XI HRC, but believes the rules as revised provide sufficient customer protection for now in keeping with the rulemaking authority in the restructuring legislation. The commission will consider further consumer protection rulemaking if problems develop as restructuring progresses.

(v) MontPIRG suggests establishment of a citizen utility board to advocate on behalf of small business and residential customers. RESPONSE: The commission sees no need for such a board, because that is the role of the Montana Consumer Counsel.

(vi) MEIC and MontPIRG urge the commission to re-insert the environmental disclosure provisions that had been included in previous drafts of these rules but are no longer included. RESPONSE: this will be the subject of future rulemaking to consider regional efforts toward development of an environmental disclosure model.

(vii) MDU recommends that the definition of small electric customer be revised downward. MPC-ESD agrees and asserts that, throughout the rules, the definition of small customer at 300 kW or 500 dkt takes in almost all of the residential and commercial classes and would cause administrative problems. MDU suggests that the phrase "per year" be added to each reference to "under 500 dkt or mcf." RESPONSE: A new rule has been added to define "small customer," but the thresholds of 300 kW and 500 dkt will remain. The 300 kW threshold is consistent with the electricity supplier licensing rules. "Per year" has been added as suggested to the definition of small natural gas commercial customer.

(viii) WMG&T suggests that the rules make clear that Rules I, II, III, IV, V, VIII and IX would apply only to a cooperative that forms a for-profit subsidiary to supply electricity outside its service territory, and that Rules VI

and VII do not apply to electric cooperatives. MECA recommends the addition of language explicitly exempting cooperatives from Rules VI and VII and clarifying that Rules I through V, VII and IX apply only to that portion of a for-profit cooperative affiliate marketing electricity outside its traditional service territory. RESPONSE: The commission has no jurisdiction over rural electric cooperatives. However, the rules apply to a rural electric cooperative's for-profit supply affiliate operating outside the cooperative's service area and using regulated distribution providers' facilities in the same way that they apply to other suppliers.

(ix) Tom Schneider comments that the provisions of Rules I, III and V differ from previously adopted requirements and recommends existing customer contracts should be grandfathered. RESPONSE: These rules apply only to contracts entered into after the rules' effective date.

(x) Michael Krebs, Charles L. McEvers, Toddy Perryman and Patrick Leonard comment that full disclosure by suppliers of generation source, air emissions and price, as well as a clear and understandable contract are important to enable consumers to make informed choices. Jeremy Hueth objects to the removal from these rules of the environmental disclosure requirements that were included in previous drafts of these rules. RESPONSE: Environmental disclosures will be the subject of future rulemaking.

(xi) Mr. Krebs emphasizes the importance of uninterrupted supply of gas and electricity if customers do not pay on time or dispute a bill and comments that a default supplier must be available. RESPONSE: The rules include a default supplier rule.

Part 2, COMMENTS ON RULE I: (i) NRDC suggests that the letter of authorization (LOA) should provide the supplier's terms and prices. RESPONSE. Price disclosure on the LOA is not necessary, since it must be provided on the service contract that must be delivered with the LOA. Also, (4)(e) was added to require a statement to be included on the LOA to indicate the customer has reviewed the service contract and agreed to its terms and conditions.

(ii) Energy West suggests allowing e-mail authorization, in a form that meets the requirements of this rule. RESPONSE. E-mail authorization does not comply with 69-8-410, MCA, which requires written authorization, because no valid signature is obtained from the customer using e-mail. (iii) Enron recommends this rule apply only to residential and small commercial customers. RESPONSE: The commission has revised the rule to apply to small customers only. (iv) District XI HRC recommends adding provisions to prohibit a customer's LOA from being combined with a check or other negotiable instrument and to require the LOA to contain an explicit authorization to allow the supplier to obtain access to the customer's usage and account information from the distribution company. RESPONSE: The commission declines to adopt provisions to prohibit an LOA from being combined with a check

or other negotiable instrument because (2), as amended, and (3) provide sufficient protection. (2) was revised to require the LOA, whether attached or a separate document, to be delivered to the prospective customer along with the service contract. (4) was revised to add a provision that the LOA contain a statement that the customer, by signing the LOA, authorizes the supplier to obtain access to the customer's usage and account information from the distribution utility.

(v) MPC-ESD suggests that (4) should require the service address, type of service, account number, meter number, billing option, customer name and, possibly, outgoing supplier to be included in the LOA as necessary information for the distribution utility, which would allow the LOA and notification to the distribution utility to be combined in one document. RESPONSE: This suggestion is rejected because it is not clear the additional information requested is necessary and because requiring too much information on the LOA could make the process of switching suppliers more difficult for consumers. (vi) MPC-ESD's recommends that a copy of the LOA be sent to the distribution utility and to the previous supplier, with the new supplier being responsible for informing the previous supplier. RESPONSE: The commission rejects this as burdensome. The commission will not require that paper copies of LOAs be the only allowable means for a supplier to inform the distribution company of a customer's decision to change suppliers when it is likely that electronic or other methods will be developed.

(vii) Glacier Electric recommends that the co-op's local governing authority authorize its own LOA form, and MECA requests clarification that electric cooperatives supplying electricity to their own members in their own territories are exempt from this rule. RESPONSE: This rule does not apply to rural electric co-ops, except for their for-profit supply affiliates operating outside the co-op's service area and using regulated distribution utilities' facilities.

(viii) Tom Schneider comments that the originally proposed rule may cause customer uncertainty and that the administrative cost of changing suppliers should be weighed against the barrier to choice of any charge. RESPONSE: (4)(d) was revised to eliminate the requirement that an LOA include a statement that there may be a charge for switching suppliers. (ix) DEQ suggests eliminating the requirement for written authorization. RESPONSE: The commission may not eliminate from this rule or others the requirement for written authorization because 69-8-410, MCA, requires suppliers to obtain written permission from customers before changing their supplier choice.

Part 3, COMMENTS ON RULE II. (i) NRDC, District XI HRC, MEIC, MontPIRG and Phyllis Marshik all recommend the addition of penalty provisions that would apply to suppliers that switch customers without their authorization. RESPONSE: The commission is authorized by 69-8-408, MCA, to suspend or revoke licenses of suppliers that slam customers. That

authority, along with this rule's provision that consumers are not liable for payment of charges to unauthorized suppliers, should be sufficient protection against slamming. (ii) MontPIRG recommends that the rule be clarified as to whether the supplier or customer carries the burden of proof in slamming complaints. RESPONSE: The rule states that the supplier, not the customer, carries the burden of proving it had prior authorization from the customer, because the supplier must either produce a valid LOA or must refund or credit to the customer all supply charges it billed to the customer. (iii) Enron comments that suppliers to large customers should be determined to have met the LOA requirement if they produce a service contract authorizing service to the large customer. RESPONSE: The commission agrees.

(iv) District XI HRC maintains that the rule should take into account the possibility that suppliers might forge signatures or obtain signatures without the customer's knowing consent by using deception or a language not understood by the customer. RESPONSE: It is not clear how this could be done in a rule. A supplier using fraudulent or deceptive practices to obtain LOAs will presumably be found out through consumer complaints to the commission, at which time the commission would consider the appropriate action.

(v) Glacier Electric and MECA ask that any complaints from co-op customers regarding slamming should be referred to the co-op for review and action. RESPONSE: The commission licenses and has limited regulatory authority over suppliers, not co-ops. It is important for the commission to be aware of complaints about licensed suppliers and of how suppliers respond to customer complaints. Co-op customers may pursue slamming complaints against suppliers on their own, through their co-op distribution utility, or by contacting the commission. (vi) MPC-ESD recommends that slammers be required to reimburse the distribution utility as well as the slammed customer for any costs the utility incurs because of slamming, because the contract between the supplier and the distribution utility is the appropriate location for such a provision. RESPONSE: The commission declines to adopt this requirement. (vii) DEQ recommends eliminating the requirement that a supplier provide written proof of authorization. RESPONSE: It is not possible to allow something other than production of the LOA to suffice because written authorization is the only method allowed by state law for obtaining new customers.

Part 4, COMMENTS ON RULE III. (i) NRDC and MEIC urge reinstating the environmental disclosures from previous informal drafts of this rule to be required on the information label. RESPONSE: The commission intends to consider these requirements as development of a regional model progresses. (ii) NRDC maintains that the standard offer requirement is missing from the rule. RESPONSE: The standard offer provisions exist unchanged at ARM 38.5.8005. (iii) MECA comments that cooperatives' boards of directors retain authority over policies regarding their members and that

requiring service contracts to include complex pricing information may create barriers to choice. RESPONSE: For-profit supply affiliates of rural electric co-ops operating outside the co-op's service area and using regulated distribution utilities' facilities are subject to these rules. Co-ops determine policies regarding their members for their traditional utility service, but not for suppliers that must be licensed by the commission pursuant to 69-8-404, MCA. The requirement that suppliers provide pricing information in their service contracts does not create a barrier to choice. The price disclosure requirement is not complex and provides consumers with the information necessary for them to make informed choices. (iv) Tom Schneider suggests that the terms for the label in (1) and (2) should be standardized as "uniform information label." RESPONSE: The commission has made this change.

(v) District XI HRC notes that (1) requires the customer's signed service contract to be returned to the supplier, which means the customer will not have it available for future review. District XI recommends that the rule either require the supplier to issue the terms of service document to the customer within three days of receiving the customer's LOA or require the service contract to contain a tear-off sheet, which could have the required LOA disclosures, for the customer's signature. RESPONSE: (1) of this rule was revised to require that only the signed LOA be returned to the supplier, not the service contract, which will therefore remain in the customer's possession.

(vi) Energy West suggests that the rule allow electronic transmission, authorization and return of the service contract. RESPONSE: These rules do not prohibit electronic transmission of the service contract and the LOA to the customer, but no service may be provided by the supplier until the supplier is in receipt of an LOA signed by the customer which conforms to these rules. (vii) MDU suggests that the supplier's contract provide the effective price in the same billing units used by the distribution utility. RESPONSE: (1)(b) was revised to do so.

(viii) NRDC recommends that the uniform information label provisions at (1) also include the information in (2)(b), which is an identification and explanation of all charges, fees and penalties. RESPONSE: The commission rejects NRDC's suggestion. The purpose of the label is to provide basic information in a uniform manner about supply service, not details. (ix) Big Horn advises that it will be difficult to define typical consumption levels for customer segments because there are too many variables. RESPONSE: There will be no need for the supplier to define the consumption levels. The common levels of usage will be contained in the commission-prescribed format for the uniform information label.

(x) Big Horn states there are technological barriers to be resolved before a supplier can offer pricing at the level of detail required by (1)(c). RESPONSE: The commission finds

no evidence of any technological barriers that preclude the provision of the required price information. Suppliers of other commodities offer retail customers prices with more certainty than wholesale prices. The pricing arrangement offered by the supplier and accepted by a customer will reflect how risk is shared. Furthermore, the information required in (1)(c) is not overly detailed; it provides customers general information so they will know what to expect if they accept the supply offer. (xi) Tom Schneider was concerned that, depending on the area and scope of service offered, the supplier might not have a toll-free number as required by (1)(d). RESPONSE: It is important that small customers have free, convenient access to their suppliers when they have questions about their service. A supplier serving one town with one local calling area meets the requirement for toll-free access with its local phone number, but if it serves small customers in towns outside that local calling area who would incur long-distance charges to call the supplier on the local number, then a toll-free number must be established.

(xii) District XI HRC says that the price disclosure provision should require a supplier to include all fixed and variable recurring charges in the cents per kWh disclosure and that these should be included for common levels of usage. RESPONSE: This issue is sufficiently addressed by (1)(b), which requires the price disclosure to disclose the *effective* price. (xiii) HRC suggests that common levels of usage for residential customers are 250 kWh/month, 750 kWh/month and 1500 kWh/month. RESPONSE: The small customer usage levels are not included in these rules, but Rule III(1) provides that the commission will prescribe a form for the uniform information label that will include usage levels.

(xiv) HRC recommends that all services be itemized and generation cost be separately itemized. RESPONSE: There is no need to add a requirement that suppliers itemize each service on the service contract because this rule already requires suppliers to disclose all charges in the service contract and the rule regarding billing requires itemization of charges on bills. (xv) Tom Schneider requests clarification of (2)(b). RESPONSE: The rule states that "any and all" charges, fees and penalties must be prominently identified and explained in the contract.

(xvi) NRDC suggests that the three-day grace period in (2)(c) is too short and should be extended to 10 days because 3 days provides a reasonable time for a consumer to change his or her mind about a change in suppliers and is a standard rescission period. RESPONSE: The commission declines to adopt NRDC's suggestion. (xvii) HRC suggests that the customer should be informed orally or in writing how to cancel the contract without penalty. RESPONSE: (2)(c) has been revised to add the requirement that the supplier inform the customer how to rescind a decision to change suppliers.

(xviii) MCC supports adopting (3) as proposed, asserting that it does not rule out take-or-pay contracts and that

suppliers can reasonably assess risks. MDU suggests, and MPC-ESD concurs, that (3) should be modified to apply only to information about the customer's gas or electric supply. RESPONSE: The commission does not adopt MDU's suggestion because information about individual customers should not be disclosed without the customer's permission, whether the disclosing entity is a supplier, distribution utility, metering entity or billing entity.

(xix) MPC-ESD maintains that the commission lacks jurisdiction to prohibit metering, billing and energy service providers from disclosing customer information unless they also provide distribution or transmission. RESPONSE: The commission points to 69-8-403(8) and (9), and 69-3-1404(2), MCA, which authorize the commission to adopt rules to protect consumers from abusive practices. (xx) Tom Schneider suggests that if (3) is retained, then Rule I should also include disclosure authorizations necessary to seek competitive supplies. RESPONSE: Rule I has been modified as suggested.

(xxi) Referring to (4), MPC-ESD suggests that suppliers should not inform the distribution utility and the previous supplier of a customer switch until after the 3-day grace period elapses. RESPONSE: The commission agrees the distribution utility should be notified after the grace period and has revised (4) accordingly.

(xxii) MPC-ESD recommends revisions to (5) to require notice of a move to be provided by the customer or supplier to the distribution utility and to require non-performance penalty provisions in supplier-customer contracts to be honored by customers. RESPONSE: The distribution utility should be aware of a customer's move to a new location because customers who move typically notify the distribution utility to disconnect their service so they will no longer be responsible for payment. Enforcement of non-performance penalty provisions in service contracts is a matter for suppliers to resolve with their customers. Those contracts may not allow customers to be penalized because they terminate their contracts early due to their relocation outside the supplier's service area or a move to a location where they are no longer the party responsible for payment of the service. If a customer neglects to notify the supplier of a move, he or she continues to be responsible for payment of supply service provided to the original customer location until the supplier is notified. The default supplier will not be at risk because default supply service will not begin at all. Rule VI provides that default supply is available when either the customer has not selected a supplier or a supplier has terminated a service contract. In the case of a customer move contemplated by this rule, it is the customer who terminates the supply contract, not the supplier.

(xxiii) MPC-ESD suggests that (6) be revised to require 60-day notification, rather than 30 days because a billing cycle takes 30 days. RESPONSE: The rule has been revised as suggested. (xxiv) WMG&T recommends clarifying that a supplier that decides to stop serving one customer segment does not

have to notify customers outside that segment. RESPONSE: The rule has been amended as suggested.

(xxv) Big Horn recommends revising (7) to clarify that the local utility bill may include transmission as well as distribution charges. Granite Peak Energy proposes replacing (7) with language to require the contract to clearly explain if distribution charges from the distribution utility and transmission charges are a part of the contract. RESPONSE: The rule has been amended.

(xxvi) MPT&M and MDU recommend elimination of (8) as unnecessary because other provisions require specific contract information and notification to customers prior to contract expiration or automatic renewal. RESPONSE: The commission has amended the rule to eliminate the requirement that contracts be mailed annually to consumers, but the requirement that suppliers provide consumers with copies of their contracts upon request remains.

(xxvii) MDU recommends eliminating (9) because it burdens suppliers with the responsibility of affirmatively notifying customers before their contract expiration dates when customers should bear the responsibility. RESPONSE: The commission disagrees because small customers may not be sophisticated enough, especially in the first years of choice, to track their contract expiration dates.

(xxviii) NRDC suggests that (10) include obvious examples of "material changes" to the service contract. MDU recommends that to avoid questions over "material changes," (10) should be modified to provide that no change in terms and conditions is effective unless a copy has been provided to the customer. MEIC recommends that (10) be revised to require the customer's signature to signify approval of any contract changes. RESPONSE: The rule has been amended to delete "material" and to require suppliers to obtain customer approval on an LOA of all changes in contract terms and conditions. (xxix) MDU also suggests striking the phrase following "effective date" because it claims this rule makes contracts longer than one year unenforceable, which will limit the available service offerings. RESPONSE: The commission disagrees that the rule limits service contracts to one year.

(xxx) Granite Peak and Enron recommend clarifying the parts of the rule that apply only to small customers. RESPONSE: The rule has been amended. (xxxi) Glacier Electric recommends clarifying that the rule does not apply to unregulated electric co-ops and also suggests keeping the service contract simple. Glacier Electric states it is difficult to comment on the uniform label referenced in this rule because the commission has not provided an example of it. RESPONSE: there is no need to repeat in rules that the commission does not regulate rural electric co-ops. The commission notes that the information that is required to appear on the label is specified in this rule. The uniform format and appearance of the label that will be prescribed by the commission will be similar to the example that was

distributed during the informal comment rounds of this rulemaking.

(xxxii) District XI HRC recommends adding provisions to require disclosures that would inform the customer of his or her right to complain to the commission and include the commission's toll-free number; inform the customer of the existence of low-income programs and how to find out about them; include payment due date and consequences, if any, of late payment; and inform the customer of any supplier limitations on warranties and damages. HRC also recommends implementing a "do-not-call" list and disclosure on the service contract to inform the customer of this option and how to get on the list. RESPONSE: It is unnecessary to require the supplier's service contract to contain information about the commission or low-income programs or limitations on damages and warranties. Distribution utilities operate universal system benefit programs on behalf of low-income customers and are a more appropriate source for information about them. Customers should call the supplier, not the commission, with their questions about the service contract. If a customer has a problem with the supplier's service, the commission's toll-free number will be listed on every supplier's bill to small customers. If there is a charge for late payment, the supplier must identify and explain it in the service contract. Supplier bills will list the payment due date and suppliers may include it in their contract at their discretion. The federal Telephone Consumer Protection Act and the Federal Communications Commission's "do-not-call" rules already require telemarketers to keep "do-not-call" lists of consumers who do not want to receive telemarketing calls.

PART 5, COMMENTS ON RULE IV. (i) Enron suggests that (1) be modified to apply only to small customers' suppliers and that a new rule be added that allows large customers to negotiate termination provisions other than those required by this rule. RESPONSE: The rule has been amended. (ii) District XI HRC suggests this rule apply not just to supplier termination due to a customer's nonpayment, but to any customer default. RESPONSE: The commission rejects the suggestion because it is doubtful there will be any cause for a supplier to terminate a customer's contract except for the customer's nonpayment. (iii) MEIC recommends extending the 14-day notice in (1) to 30 days because mail delivery time will delay customers' receipt of the notice and reduce the time available for them to respond. RESPONSE: The commission believes 14 days is sufficient time for the notice to get to the customer and for the customer to respond.

(iv) Big Horn asserts that (2) does not take into account the situation where the consumer owes an unpaid bill to the default supplier, and the service may be interrupted because the default supplier will not accept the customer. RESPONSE: The commission disagrees that this situation will occur because a default supplier's customer with a past due balance may not leave default supply for a competitive supplier until

the past due balance is paid. (v) Big Horn also states that, for co-ops, issues of membership, deposits and other charges must be resolved before transferring service. RESPONSE: These rules do not apply to cooperatives providing service within their traditional service areas.

(vi) MPT&M, HRC, Tom Schneider and WMG&T suggest amending (2) with language to clarify that the default supplier will provide service if the supplier terminates the contract for nonpayment. RESPONSE: The rule has been amended. (vii) MPC-ESD recommends addition of a second sentence to (2) that provides for termination of service for nonpayment of regulated charges. RESPONSE: The commission does not believe that information would be an appropriate inclusion on supplier notices. (viii) WMG&T recommends clarifying (2) to allow a supplier to indicate to the nonpaying customer that termination will result in the supplier having no obligation to serve the customer, that the supplier may pursue any available legal remedies to recover the unpaid bill, and that once the customer is switched to the default supplier, the default supplier's bill payment rules will apply. RESPONSE: This rule requires suppliers to include certain information on their termination notices; the rule does not prohibit suppliers from providing more information than that which is required. (ix) MECA generally agrees with WMG&T regarding (2) and further suggests that customers be informed they must comply with the default supplier's policies, which may include, in the case of cooperative utilities, paying membership fees and related charges and complying with co-op service termination rules. RESPONSE: These rules do not apply to co-ops acting as default suppliers in their own service areas.

(x) Tom Schneider requests clarification of the relationship of (2) to Rule VII, which prohibits service disconnection for nonpayment of unregulated service. RESPONSE: There was no relationship prior to (2) being amended, and there is still no relationship now that (2) has been amended. (xi) MPC-ESD suggests that (4) include a provision to require a supplier to notify the distribution utility at least one day in advance of the proposed termination date if the customer takes action to avert termination by the supplier. RESPONSE: The rule has been amended. (xii) MPC-ESD recommends that contract terminations should coincide with a cycle meter reading and, if they do not, the supplier should be required to pay for obtaining an off-cycle read. RESPONSE: This issue can be worked out between the distribution utility and suppliers. The issue can be revisited if problems occur.

PART 6, COMMENTS ON RULE V. (i) District XI HRC recommends redrafting Rule V for clarification. RESPONSE: The rule seems clear but it may require modifications as actual experience with competitive supplier billing is gained. (ii) HRC suggests revisions to require monthly billing for residential customers, to itemize all competitive charges, and to graphically separate competitive charges from regulated

charges. HRC also recommends that bills be required to show the customer's total payments applied to any outstanding balance, the total amount owed for generation service, and the total amount in arrears for both regulated and competitive charges. HRC suggests requirements for plain-language bills and for bill formats designed to educate the customer. RESPONSE: The requirements contained in the rule are sufficient to provide small customers with the information they need to understand their bills. (iii) To HRC it is important that any bill containing generation services should disclose the actual cents per kWh for supply service charged to the customer during the current billing period. HRC urges adoption of HRC's suggested language to require supplier bills to show the total charge for generation service divided by the customer's usage for the billing period. RESPONSE: The commission agrees and added a new provision to the rule.

(iv) Enron urges modifications to (1), (2), (3), (4), (6), (7) and (8) to limit their applicability to small customers. RESPONSE: The rule has been amended to apply to small customers. (v) Glacier Electric, Big Horn and MECA recommend explicitly excluding rural electric co-ops from this rule. RESPONSE: The commission has no jurisdiction over rural electric co-ops; however, the rule does apply to a co-op's for-profit supply affiliate operating outside the co-op's service area and using regulated distribution providers' facilities in the same way that it applies to other suppliers.

(vi) Tom Schneider recommends revising (1), (5), (8) and (9) to recognize the possibility of the distribution provider contracting with a municipal utility to provide billing, collection, metering and meter reading or vice versa. RESPONSE: These suggestions are unnecessary at this time because the commission has not yet decided on unbundling metering, meter reading or billing.

(vii) Big Horn suggests that the requirement in (3) that the commission's address and toll-free phone number appear on all small customer bills will contribute to overloading the consumer with information on the bill. RESPONSE: The commission disagrees. It is important that the commission contact information appear on supplier bills. (viii) Tom Schneider notes that some suppliers will not provide toll-free numbers and cites the cities of Helena and Philipsburg and the League of Cities and Towns as examples. RESPONSE: Suppliers must provide small customers with free calling to their customer service/billing inquiry offices.

(ix) Granite Peak suggests that (6) should require separate line items for distribution charges, transmission charges and ancillary services. Tom Schneider requests clarification on whether ancillary services are to be separately identified or included in transmission. RESPONSE: Senate Bill 390 does not indicate that ancillary services should be separately identified so the commission's rule does not require ancillary services to be identified separately from transmission service. Since the rule applies to small customers, not specifically identifying ancillary service

charges should not adversely affect the development of markets. (x) MPC-ESD suggests replacing the word "price" in (6) and (7) with "charge." RESPONSE: Because 69-8-409, MCA, refers to "charge," the rule has been amended. (xi) At (8), MPC-ESD requests the commission to clarify each component of each subtotal and each component of each total that must appear on the bill. RESPONSE: The rule as drafted is clear.

(xii) Tom Schneider questions whether there is a distinction at (9) between "undesignated" partial payments and partial payments. At the hearing, he recommended striking the word "undesignated." MPC-ESD, too, recommends deletion of "undesignated" because customer designation of partial payments would create a difficult billing problem for the distribution utility. Enron suggests that (9) be limited to situations where a non-utility service provider is issuing a combined bill to a customer and the undesignated partial payment is due to a billing dispute with the non-utility service provider. RESPONSE: The commission does not adopt these suggestions. Where a customer is billed on one bill for the services of more than one entity, the customer should be able to designate the manner in which a payment that is not sufficient to cover the total multi-entity balance should be allocated to each entity's portion of the bill. (9) comes into play only when a customer neglects to designate the preferred allocation of a partial payment on a multi-entity bill. (xiii) Enron argues it is unfair to give a utility first position on undesignated partial payments when the partial payment is not the result of any action of the supplier. RESPONSE: The distribution utility is given first position in order to decrease the likelihood the customer will have his or her service shut off due to nonpayment.

PART 7, COMMENTS ON RULE VI. (i) Several commenters (Enron, DEQ, Tom Schneider and MPC-ESD) made suggestions regarding the establishment and operation of default suppliers. RESPONSE: Senate Bill 406 and House Bill 211, both enacted by the 1999 Legislature after the publication of this rulemaking notice, relate to the designation of electricity default suppliers and necessitate that the commission initiate further rulemaking on the subject of default suppliers. Senate Bill 406 requires the commission to adopt electricity default supplier licensing rules in accordance with the bill no later than December 1, 1999. The issues raised by commenters in this rulemaking will be addressed in the default supplier rulemaking. In the meantime, this rule, as amended, will be in effect.

(ii) Tom Schneider requests clarification regarding whether the last sentence of (1) means that once a customer selects a competitive supplier he or she may not resume default supply service. RESPONSE: The sentence is not necessary and has been deleted. (iii) MPC-ESD suggests that (2) may incorrectly apply the commission's deposit and termination rules to the default supplier if the default supplier is not the distribution service provider. Granite

Peak Energy requests clarification of the intent of (2). RESPONSE: (2) reflects its intention that the default supplier has the ability to shut off a small customer's service; therefore, whether or not the default supplier is the regulated distribution service provider, it is subject to the commission's deposit and termination rules. (2) also provides a default supplier with some protection against high levels of uncollectible accounts by requiring a default supply customer to pay his or her bill owing to the default supplier before selecting a competitive supplier and by allowing the default supplier to disconnect service to a nonpaying customer, following the procedures prescribed in the commission's termination rules.

(iv) Tom Schneider comments that the unique ability of the default supplier to disconnect nonpaying customers will stifle supplier competition and the development of alternative default supplier options. RESPONSE: The commission does not agree that providing default suppliers with the ability to disconnect service will stifle competition, but notes that the default supplier is the only supplier with the ability to disconnect a nonpaying customer's service because the default supplier has the same obligation to serve as regulated gas and electric utilities have traditionally had. Senate Bill 406 and House Bill 211 allow the development of alternative electricity default supplier options.

(v) In pre-hearing comments, MCC suggests eliminating (3) or modifying it to provide a commission approval process prior to any contractual shifting of default service obligations. In its post-hearing comments, MCC recommends that the commission adopt (1) to require the electric and natural gas distribution providers to act as default suppliers and further suggests elimination of (3), asserting that the commission should not provide by rule that utilities may contract away their default service obligations to third-party suppliers. MEIC comments that (3) is confusing because it is not clear whether it means the distribution utility may take bids for electricity supply while serving as the default provider and provider of last resort, or whether the distribution utility may auction away this responsibility. RESPONSE: The commission has revised (3) in response to MCC's and MEIC's concerns.

(vi) MCC further maintains that in presuming that the distribution provider will be the default supplier, a single price will be obtained and aggregation of small customers will be possible. RESPONSE: The commission responds that other default supplier options will be considered as mandated by Senate Bill 406 and House Bill 211. (vii) MPC-ESD recommends that (3) should clarify that the competitive bid process is for the total default supplier service and not for individual contracts to provide that service. Because MPC already has contracts in place to bridge the transition period, it should not be vulnerable to falling market prices. RESPONSE: The future rulemaking referred to above will address this issue. (viii) Energy West and WMG&T suggest that (3) should be

revised so as not to limit the term of a default supplier to a given number of years. RESPONSE: The rule has been amended.

(ix) MEIC suggests that any decision on default supplier designation should await likely legislative action. RESPONSE: The commission will propose a new set of default supplier rules as a result of legislative action, but this rule will be in effect until new ones are adopted. (x) MEIC is concerned that the default supplier rate will be high because the default supplier will serve a large number of customers who are unable to pay their bills, thus leaving those who can least afford it with expensive electricity or gas. RESPONSE: It is not known at what rate default supply service will be offered, but nevertheless default supply service will be needed for those small customers who do not choose a competitive supplier and to ensure existing shutoff protections for those whose competitive supply contracts are terminated due to nonpayment.

(xi) District XI HRC suggests the rule should describe in more detail the distribution utility's obligations and how default service will be obtained and priced. RESPONSE: These issues will be addressed in the future rulemaking referred to above. (xii) HRC urges adoption of a rule to require default service to be provided using the same rate design as currently exists for residential rates and to consider a requirement that default service be priced at a fixed rate over at least an annual time period. RESPONSE: Default supply rates are regulated, and the commission will address pricing issues as part of the ratemaking process.

(xiii) MPC-ESD suggests adding a new part to this rule to allow a landlord to authorize the distribution utility to switch to a default supplier if a tenant's service is terminated and to require the default supplier to notify the landlord immediately of the switch. RESPONSE: The commission agrees and has amended Rule VII.

(xiv) Big Horn believes this rule implies that the commission is regulating co-ops that "opt in" to competition. MECA comments that co-ops acting as default suppliers for members within their traditional service territories are not subject to commission authority and that the commission should not be able to impede service termination by for-profit cooperative affiliates. WMG&T and Glacier Electric suggest the rule should explicitly state that it does not apply to electric co-ops that have opened their service territories to competition. RESPONSE: The commission is not attempting to assert jurisdiction over co-ops; these rules do apply to a co-op's for-profit supply affiliate operating outside the co-op's service area and using regulated distribution providers' facilities in the same way that it applies to other suppliers.

PART 8, COMMENTS ON RULE VII. (i) Big Horn, MECA, WMG&T and Glacier Electric assert that this rule implies commission jurisdiction over co-ops that "opt in" to competition. RESPONSE: See Part 7, Comments (xiv) above.

(ii) Big Horn recommends making provisions to avoid manipulating the system where distribution and supply are provided by the same entity. RESPONSE: Regulated distribution utility service should not be denied or shut off due to a customer's nonpayment of unregulated supply service. A regulated distribution utility and its unregulated supply affiliate are not the same entity, but two different entities. (iii) While District XI HRC supports the rule, DEQ recommends revising this rule to reiterate the commission's winter shutoff policy and to specify which entity is responsible for applying it. RESPONSE: Regulated distribution utilities will continue to comply with the commission's termination rules, including the winter shutoff rules, and default suppliers will also comply with these rules as stated in Rule VI.

(iv) MPC-ESD comments that it does not believe the metering entity should be the disconnection entity and suggests that this rule stand until more is known about competitive metering. RESPONSE: The commission notes that competitive metering is not an issue now, but if it becomes an issue, the commission will address it. (v) Tom Schneider argues that it is an unbalanced approach to allow default suppliers to disconnect service while foreclosing that option for competitive suppliers. RESPONSE: Default suppliers have an obligation to serve that is not shared by competitive suppliers. (vi) Mr. Schneider suggests that the licensing authority may provide the commission with an avenue to ensure the consumer protections sought while avoiding barriers to suppliers. RESPONSE: Competitive suppliers should be able to operate freely in the market with as few rules as necessary.

PART 9, COMMENTS ON RULE VIII. (i) Big Horn recommends modifying the requirement that the supplier complaint contact information be included on all communications to small customers to require it only when the reason for the communication is related to customer education. RESPONSE: The rule has been amended to eliminate the requirement entirely because the supplier contact information required by Rules III, IV and V is sufficient. (ii) District XI HRC recommends including more detail to clarify the policy and provides suggested language. RESPONSE: The commission agrees with the suggestion and has added several provisions to the rule to clarify the complaint procedure. (iii) MEIC suggests that suppliers and the commission keep a record of customer complaints and make those records available to the public. RESPONSE: The commission already keeps records of consumer complaints. The numbers and types of complaints about suppliers will continue to be available to the public.

PART 10, COMMENTS ON RULE IX. (i) MECA recommends deleting this rule or modifying it to reflect that co-ops retain authority over the content of advertising claims made by their for-profit affiliates. Glacier Electric recommends that rural electric co-ops be specifically excluded from this rule. RESPONSE: This rule applies to advertising claims of

for-profit co-op supply affiliates providing supply service outside of the co-op's service territory.

(ii) MEIC comments that it is not clear in (2) whether a customer bringing a fraudulent marketing complaint against a supplier will carry the burden to prove the case or whether the commission will pursue the complaint once it is received. MEIC recommends that if the customer carries the burden, then the costs should be reimbursed in some manner and, if the complaint is found to be valid, the supplier should provide the reimbursement. RESPONSE: On receipt of a fraudulent marketing complaint, the commission will investigate the allegation and decide whether to initiate a formal proceeding that provides due process to the accused supplier. A customer should not incur any costs by making a complaint.

(iii) MPT&M, MPC-ESD and MDU assert that (3) should be deleted because the commission lacks jurisdiction over utility supply affiliates or co-op's for-profit supply affiliates, and the marketing activity prohibited in (3) is not an anticompetitive or abusive practice pursuant to 69-8-403(8), MCA. MDU asserts that there are constitutional limits to regulation of advertising. RESPONSE: (3) ensures that supply affiliates of former vertically integrated utilities do not infer or imply in their advertising that the reputation that may have been earned by the former vertically integrated utility over the years is present in the newly formed supply affiliate. The supply affiliate is a different entity selling a different product, and the affiliate may not gain advantage in the competitive market by trading on the good name and reputation earned by the former vertically integrated utility.

(iv) Energy West suggests modifying (3) so that the limitations apply only to unregulated supply affiliates of formerly vertically integrated, regulated public utilities when such entities are advertising, marketing and promoting services in the service territory of their affiliated utility for the commodity sold by their affiliated utility. RESPONSE: The commission revised (3) to provide that it will apply only to the supply affiliate promoting its service in the service territory of its affiliated utility. The commission did not adopt the suggestion that the limitations apply only when the same commodity is being sold.

(v) WMG&T suggests that (3) improperly restricts electric co-ops from describing their for-profit businesses to potential customers and that the reference to for-profit affiliates of electric cooperatives be stricken. RESPONSE: The rule has been amended as suggested.

(vi) WMG&T requests clarifying whether (3) would apply to suppliers other than those specifically referred to in the rule. RESPONSE: It does not.

(vii) Energy West suggests replacing "retail energy services" in (3) with "previously regulated services" because "retail energy services" could be interpreted to prohibit affiliates from sales of any product. Energy West recommends striking the phrase "value, history, or economic benefits" as too vague. RESPONSE: The rule does not prohibit marketing of

any product, but only relates to the manner in which it is marketed. The commission disagrees that the terms are vague and responds that they are intended to prohibit supply affiliates from associating their service with that of the former vertically integrated regulated utility.

(viii) MPT&M and MPC-ESD suggest deleting (4) because the commission has no jurisdiction to regulate and limit how a supplier advertises and (4) cannot be justified as consumer protection or prohibiting illegal practices. MPC-ESD also comments that the term "promotional material," if broadly interpreted, could include information presented by the distribution utility on customer bills and suggests clarifying the rule to exempt the distribution service provider's bill from this requirement. RESPONSE: The commission has deleted (4) but advises that when the commission initiates its rulemaking on environmental disclosure requirements, there will be an opportunity to reconsider the disclosure requirements for promotional material appearing in supplier advertising such as newspapers.

(ix) MEIC recommends including specific definitions of what is meant by claims made in marketing materials. RESPONSE: The commission is reluctant to define the term so as not to limit the types of claims that may require investigation.

(x) MPC-ESD notes its previous objections to the source and environmental disclosure requirements included in previous drafts of these rules, but indicate its preference from previous draft rules if the commission decides to re-insert them in the rules. MPC-ESD opposes any requirement that environmental labeling be included on customer bills. RESPONSE: Source and environmental disclosure requirements will be the subject of future rulemaking.

Nancy McCaffree, Vice-Chair

Reviewed By Robin A. McHugh

CERTIFIED TO THE SECRETARY OF STATE MAY 11, 1999.

NOTICE OF FUNCTIONS OF ADMINISTRATIVE RULE REVIEW COMMITTEE

Interim Committees and the Environmental Quality Council

Administrative rule review is a function of interim committees and the Environmental Quality Council (EQC). These interim committees and the EQC have administrative rule review, program evaluation, and monitoring functions for the following executive branch agencies and the entities attached to agencies for administrative purposes.

Business and Labor Interim Committee:

- Department of Agriculture;
- Department of Commerce;
- Department of Labor and Industry;
- Department of Livestock;
- Department of Public Service Regulation; and
- Office of the State Auditor and Insurance Commissioner.

Education Interim Committee:

- State Board of Education;
- Board of Public Education;
- Board of Regents of Higher Education; and
- Office of Public Instruction.

Children, Families, Health, and Human Services Interim Committee:

- Department of Public Health and Human Services.

Law, Justice, and Indian Affairs Interim Committee:

- Department of Corrections; and
- Department of Justice.

Revenue and Taxation Interim Committee:

- Department of Revenue; and
- Department of Transportation.

State Administration, Public Retirement Systems, and Veterans' Affairs Interim Committee:

- Department of Administration;
- Department of Military Affairs; and
- Office of the Secretary of State.

Environmental Quality Council:

- Department of Environmental Quality;
- Department of Fish, Wildlife, and Parks; and
- Department of Natural Resources and Conservation.

These interim committees and the EQC have 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. They also 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, amend, or repeal a rule.

The interim committees and the EQC welcome comments and invite members of the public to appear before them or to send written statements in order to bring to their attention any difficulties with the existing or proposed rules. The mailing address is PO Box 201706, Helena, MT 59620-1706.

HOW TO USE THE ADMINISTRATIVE RULES OF MONTANA AND THE MONTANA ADMINISTRATIVE REGISTER

Definitions: Administrative Rules of Montana (ARM) is a looseleaf compilation by department of all rules of state departments and attached boards presently in effect, except rules adopted up to three months previously.

Montana Administrative Register (MAR) is a soft back, bound publication, issued twice-monthly, containing notices of rules proposed by agencies, notices of rules adopted by agencies, and interpretations of statutes and rules by the attorney general (Attorney General's Opinions) and agencies (Declaratory Rulings) issued since publication of the preceding register.

Use of the Administrative Rules of Montana (ARM):

Known Subject Matter	1. Consult ARM topical index. Update the rule by checking the accumulative table and the table of contents in the last Montana Administrative Register issued.
Statute Number and Department	2. Go to cross reference table at end of each title which lists MCA section numbers and corresponding ARM rule numbers.

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies which have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through March 31, 1999. This table includes those rules adopted during the period April 1, 1999 through June 30, 1999 and any proposed rule action that was pending during the past 6-month period. (A notice of adoption must be published within 6 months of the published notice of the proposed rule.) This table does not, however, include the contents of this issue of the Montana Administrative Register (MAR).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through March 31, 1999, 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 and 1999 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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