MONTANA ADMINISTRATIVE REGISTER

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MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 13

The Montana Administrative Register (MAR or Register), a twice-monthly publication, has three sections. The Proposal Notice Section contains state agencies' proposed new, amended, or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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 Adoption Section contains final rule notices which show any changes made since the proposal stage. All rule actions are effective the day after publication of the adoption notice unless otherwise specified in the final notice. The Interpretation Section contains the Attorney General's opinions and state declaratory rulings. Special notices and tables are found at the end 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 Secretary of State's Office, Administrative Rules Services, at (406) 438-6122.

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

In the matter of the adoption of New Rules I through VIII and the amendment of ARM 6.6.6701, 6.6.6705, and 6.6.6707 pertaining to Term and Universal Life Insurance Reserve Financing	))))))	NOTICE OF PROPOSED ADOPTION AND AMENDMENT NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons

1. On September 1, 2022, the Commissioner of Securities and Insurance, Office of the Montana State Auditor (CSI) proposes to adopt and amend the above-stated rules.

2. CSI will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact CSI no later than 5:00 p.m. on July 19, 2022, to advise us of the nature of the accommodation that you need. Please contact Sam Loveridge, Communications Director, 840 Helena Avenue, Helena, Montana, 59601; telephone (406) 444-2040 or 1-800-332-6148; fax (406) 444-3497; TDD (406) 444-3246; or e-mail csi@mt.gov.

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

NEW RULE I PURPOSE AND INTENT (1) The purpose and intent of [New Rules I through VIII] is to establish uniform, national standards governing reserve financing arrangements pertaining to life insurance policies containing guaranteed nonlevel gross premiums, guaranteed nonlevel benefits and universal life insurance policies with secondary guarantees; and to ensure that, with respect to each such financing arrangement, funds consisting of primary security and other security, as defined in [New Rule IV], are held by or on behalf of ceding insurers in the forms and amounts required herein.

(2) In general, reinsurance ceded for reserve financing purposes has one or more of the following characteristics:

(a) some or all of the assets used to secure the reinsurance treaty or to capitalize the reinsurer:

(i) are issued by the ceding insurer or its affiliates; or

(ii) are not unconditionally available to satisfy the general account obligations of the ceding insurer; or

(iii) create a reimbursement, indemnification, or other similar obligation on the part of the ceding insurer or any of its affiliates (other than a payment obligation under a derivative contract acquired in the normal course and used to support and hedge liabilities pertaining to the actual risks in the policies ceded pursuant to the reinsurance treaty).

AUTH: 33-1-313, 33-2-1517, MCA
IMP: 33-2-1216, 33-2-1217, MCA

NEW RULE II APPLICABILITY (1) [New Rules I through VIII] pertain to all covered policies, in force as of and after September 1, 2022.

(2) [New Rules I through VIII] shall apply to reinsurance treaties that cede liabilities pertaining to covered policies, as that term is defined in [New Rule IV], issued by any life insurance company domiciled in this state. [New Rules I through VIII] and ARM Title 6, chapter, 6, subchapter 38 shall apply to such reinsurance treaties, provided that in the event of a direct conflict between [New Rules I through VIII] and ARM Title 6, chapter, 6, subchapter 38, [New Rules I through VIII] shall apply, but only to the extent of the conflict.

AUTH: 33-1-313, 33-2-1517, MCA
IMP: 33-2-1216, 33-2-1217, MCA

NEW RULE III EXEMPTIONS (1) [New Rules I through VIII] do not apply to the situations described below:

(a) reinsurance of:

(i) Policies that satisfy the criteria for exemption set forth in ARM 6.6.6709(5) and (6) and (11) through (13) or ARM 6.6.6709(14), and which are issued before the later of:

(A) September 1, 2022; and

(B) The date on which the ceding insurer begins to apply the provisions of VM-20 to establish the ceded policies' statutory reserves, but in no event later than January 1, 2020;

(ii) Portions of policies that satisfy the criteria for exemption set forth in ARM 6.6.6709(7) through (10) and which are issued before the later of:

(A) September 1, 2022; and

(B) The date on which the ceding insurer begins to apply the provisions of VM-20 to establish the ceded policies' statutory reserves, but in no event later than January 1, 2020;

(iii) Any universal life policy that meets all of the following requirements:

(A) Secondary guarantee period, if any, is five years or less;

(B) Specified premium for the secondary guarantee period is not less than the net level reserve premium for the secondary guarantee period based on the commissioners standard ordinary (CSO) valuation tables and valuation interest rate applicable to the issue year of the policy; and

(C) The initial surrender charge is not less than 100% of the first year annualized specified premium for the secondary guarantee period;

(iv) Credit life insurance;

(v) Any variable life insurance policy that provides for life insurance, the amount or duration of which varies according to the investment experience of any separate account or accounts; or

(vi) Any group life insurance certificate unless the certificate provides for a stated or implied schedule of maximum gross premiums required in order to continue coverage in force for a period in excess of one year.

(b) Reinsurance ceded to an assuming insurer that meets the applicable requirements of 33-2-1216(5), MCA; or

(c) Reinsurance ceded to an assuming insurer that meets the applicable requirements of 33-2-1216(2), (3), or (4), MCA, and that, in addition:

(i) Prepares statutory financial statements in compliance with the NAIC Accounting Practices and Procedures Manual, without any departures from NAIC statutory accounting practices and procedures pertaining to the admissibility or valuation of assets or liabilities that increase the assuming insurer's reported surplus and are material enough that they need to be disclosed in the financial statement of the assuming insurer pursuant to Statement of Statutory Accounting Principles No. 1 (SSAP 1); and

(ii) Is not in a company action level event, regulatory action level event, authorized control level event, or mandatory control level event as those terms are defined in Title 33, chapter 2, part 19, MCA, when its RBC is calculated in accordance with the life risk-based capital report including overview and instructions for companies, as the same may be amended by the NAIC from time to time, without deviation; or

(d) Reinsurance ceded to an assuming insurer that meets the applicable requirements of 33-2-1216(2), (3), or (4), MCA, and that, in addition:

(i) Is not an affiliate, as that term is defined in 33-2-1101, MCA, of:

(A) The insurer ceding the business to the assuming insurer; or

(B) Any insurer that directly or indirectly ceded the business to that ceding insurer;

(ii) Prepares statutory financial statements in compliance with the NAIC Accounting Practices and Procedures Manual;

(iii) Is both:

(A) Licensed or accredited in at least 10 states (including its state of domicile); and

(B) Not licensed in any state as a captive, special purpose vehicle, special purpose financial captive, special purpose life reinsurance company, limited purpose subsidiary, or any other similar licensing regime; and

(iv) Is not, or would not be, below 500% of the authorized control level RBC as that term is defined in Title 33, chapter 2, part 19, MCA, when its risk-based capital (RBC) is calculated in accordance with the life risk-based capital report including overview and instructions for companies, as the same may be amended by the NAIC from time to time, without deviation, and without recognition of any departures from NAIC statutory accounting practices and procedures pertaining to the admission or valuation of assets or liabilities that increase the assuming insurer's reported surplus; or

(e) Reinsurance ceded to an assuming insurer that satisfies one of the following requirements:

(i) meets the conditions set forth in 33-2-1216(7), MCA; or

(ii) is certified in this state as a reinsurer pursuant to 33-2-1216(6), MCA; or

(iii) maintains at least $250 million in capital and surplus when determined in accordance with the NAIC Accounting Practices and Procedures Manual, excluding the impact of any permitted or prescribed practices and:

(A) is licensed in at least 26 states; or

(B) is licensed in at least 10 states, and licensed or accredited in a total of at least 35 states; or

(f) Reinsurance not otherwise exempt under (a) through (e) of this rule if the commissioner, after consulting with the NAIC Financial Analysis Working Group (FAWG) or other group of regulators designated by the NAIC, as applicable, determines under all the facts and circumstances that all of the following apply:

(i) The risks are clearly outside of the intent and purpose of [New Rules I through VIII] (as described in [New Rule I(2)]);

(ii) The risks are included within the scope of [New Rules I through VIII] only as a technicality; and

(iii) The application of [New Rules I through VIII] to those risks is not necessary to provide appropriate protection to policyholders. The commissioner shall publicly disclose any decision made pursuant to this provision to exempt a reinsurance treaty from [New Rules I through VIII], as well as the general basis therefor (including a summary description of the treaty).

AUTH: 33-1-313, 33-2-1517, MCA
IMP: 33-2-1216, 33-2-1217, MCA

<u>NEW RULE IV DEFINITIONS</u> For purposes of [New Rules I through VIII]:

(1) "Actuarial method" means the methodology used to determine the required level of primary security, as described in [New Rule VI].

(2) "Covered policies" means, subject to the exemptions described in [New Rule III], those policies, other than grandfathered policies, of the following types:

(a) Life insurance policies with guaranteed nonlevel gross premiums and/or guaranteed nonlevel benefits, except for flexible premium universal life insurance policies; or,

(b) Flexible premium universal life insurance policies with provisions resulting in the ability of a policyholder to keep a policy in force over a secondary guarantee period.

(3) "Grandfathered policies" means policies of the types described in (2) that were:

(a) issued prior to January 1, 2015; and

(b) ceded, as of December 31, 2014, as part of a reinsurance treaty that would not have met one of the exemptions set forth in [New Rule III] had that rule then been in effect.

(4) "Non-Covered policies" means any policy that does not meet the definition of covered policies, including grandfathered policies.

(5) "Required level of primary security" means the dollar amount determined by applying the actuarial method to the risks ceded with respect to covered policies, but not more than the total reserve ceded.

(6) "Primary security" means the following forms of security:

(a) cash;

(b) securities listed by the securities valuation office meeting the requirements of 33-2-1217(2)(b), MCA, but excluding any synthetic letter of credit, contingent note, credit-linked note, or other similar security that operates in a

manner similar to a letter of credit, and excluding any securities issued by the ceding insurer or any of its affiliates; and

(c) for security held in connection with funds-withheld and modified coinsurance reinsurance treaties:

(i) commercial loans in good standing of CM3 quality and higher;

(ii) policy loans; and

(iii) derivatives acquired in the normal course and used to support and hedge liabilities pertaining to the actual risks in the policies ceded pursuant to the reinsurance treaty.

(7) "Other security" means any security acceptable to the commissioner other than security meeting the definition of primary security.

(8) "Valuation manual" means the valuation manual adopted by the NAIC as described in 33-2-402 and 33-2-403, MCA, and in ARM 6.6.4501 that are effective for the financial statement date on which credit for reinsurance is claimed.

(9) "VM-20 means "Requirements for Principle-Based Reserves for Life Products," including all relevant definitions, from the Valuation Manual.

AUTH: 33-1-313, 33-2-1517, MCA
IMP: 33-2-1216, 33-2-1217, MCA

NEW RULE V THE ACTUARIAL METHOD (1) The actuarial method to establish the required level of primary security for each reinsurance treaty subject to [New Rules I through VIII] shall be VM-20, applied on a treaty-by-treaty basis, including all relevant definitions, from the Valuation Manual as then in effect, applied as follows:

(a) For covered policies described in [New Rule IV(2)(a)], the actuarial method is the greater of the deterministic reserve or the net premium reserve (NPR) regardless of whether the criteria for exemption testing can be met. However, if the covered policies do not meet the requirements of the stochastic reserve exclusion test in the Valuation Manual, then the actuarial method is the greatest of the deterministic reserve, the stochastic reserve, or the NPR. In addition, if such covered policies are reinsured in a reinsurance treaty that also contains covered policies described in [New Rule IV(2)(b)], the ceding insurer may elect to instead use (1)(b) below as the actuarial method for the entire reinsurance agreement. Whether (1)(a) or (1)(b) are used, the actuarial method must comply with any requirements or restrictions that the Valuation Manual imposes when aggregating these policy types for purposes of principle-based reserve calculations.

(b) For covered policies described in [New Rule IV(2)(b)], the actuarial method is the greatest of the deterministic reserve, the stochastic reserve, or the NPR regardless of whether the criteria for exemption testing can be met.

(c) Except as provided in (a), the actuarial method is to be applied on a gross basis to all risks with respect to the covered policies as originally issued or assumed by the ceding insurer.

(d) If the reinsurance treaty cedes less than 100% of the risk with respect to the covered policies then the required level of primary security may be reduced as follows:

(i) If a reinsurance treaty cedes only a quota share of some or all of the risks pertaining to the covered policies, the required level of primary security, as well as any adjustment under (iii) below, may be reduced to a pro rata portion in accordance with the percentage of the risk ceded;

(ii) If the reinsurance treaty in a non-exempt arrangement cedes only the risks pertaining to a secondary guarantee, the required level of primary security may be reduced by an amount determined by applying the actuarial method on a gross basis to all risks, other than risks related to the secondary guarantee, pertaining to the covered policies, except that for covered policies for which the ceding insurer did not elect to apply the provisions of VM-20 to establish statutory reserves, the required level of primary security may be reduced by the statutory reserve retained by the ceding insurer on those covered policies, where the retained reserve of those covered policies should be reflective of any reduction pursuant to the cession of mortality risk on a yearly renewable term basis in an exempt arrangement;

(iii) If a portion of the covered policy risk is ceded to another reinsurer on a yearly renewable term basis in an exempt arrangement, the required level of primary security may be reduced by the amount resulting by applying the actuarial method including the reinsurance section of VM-20 to the portion of the covered policy risks ceded in the exempt arrangement, except that for covered policies issued prior to January 1, 2017, this adjustment is not to exceed [c_x/ (2 * number of reinsurance premiums per year)] where c_x is calculated using the same mortality table used in calculating the net premium reserve; and

(iv) For any other treaty ceding a portion of risk to a different reinsurer, including but not limited to stop loss, excess of loss, and other non-proportional reinsurance treaties, there will be no reduction in the required level of primary security.

(e) It is possible for any combination of (d)(i), (ii), (iii), and (iv) above to apply. Such adjustments to the required level of primary security will be done in the sequence that accurately reflects the portion of the risk ceded via the treaty. The ceding insurer should document the rationale and steps taken to accomplish the adjustments to the required level of primary security due to the cession of less than 100% of the risk.

(f) The adjustments for other reinsurance will be made only with respect to reinsurance treaties entered into directly by the ceding insurer. The ceding insurer will make no adjustment as a result of a retrocession treaty entered into by the assuming insurers.

(g) If a reinsurance treaty subject to [New Rules I through VIII] cedes risk on both covered and non-covered policies, credit for the ceded reserves shall be determined as follows:

(i) The actuarial method shall be used to determine the required level of primary security for the covered policies, and [New Rule VI] shall be used to determine the reinsurance credit for the covered policy reserves; and

(ii) Credit for the non-covered policy reserves shall be granted only to the extent that security, in addition to the security held to satisfy the requirements of (i) above, is held by or on behalf of the ceding insurer in accordance with 33-2-1216 and 33-2-1217, MCA. Any primary security used to meet the requirements of this

subsection may not be used to satisfy the required level of primary security for the covered policies.

(h) In no event will the required level of primary security resulting from application of the actuarial method exceed the amount of statutory reserves ceded.

(i) If the ceding insurer cedes risks with respect to covered policies, including any riders, in more than one reinsurance treaty subject to [New Rules I through VIII], in no event will the aggregate required level of primary security for those reinsurance treaties be less than the required level of primary security calculated using the actuarial method as if all risks ceded in those treaties were ceded in a single treaty subject to [New Rules I through VIII].

(2) For the purposes of both calculating the required level of primary security pursuant to the actuarial method and determining the amount of primary security and other security, as applicable, held by or on behalf of the ceding insurer, the following shall apply:

(a) For assets, including any such assets held in trust, that would be admitted under the NAIC Accounting Practices and Procedures Manual if they were held by the ceding insurer, the valuations are to be determined according to statutory accounting procedures as if such assets were held in the ceding insurer's general account and without taking into consideration the effect of any prescribed or permitted practices; and

(b) For all other assets, the valuations are to be those that were assigned to the assets for the purpose of determining the amount of reserve credit taken. The tables of asset spreads and asset default costs shall be incorporated into the actuarial method in the manner specified in VM-20.

AUTH: 33-1-313, 33-2-1517, MCA
IMP: 33-2-1216, 33-2-1217, MCA

NEW RULE VI REQUIREMENTS APPLICABLE TO COVERED POLICIES TO OBTAIN CREDIT FOR REINSURANCE; OPPORTUNITY FOR REMEDIATION

(1) Subject to the exemptions described in [New Rule III] and the provisions of (2) below, credit for reinsurance shall be allowed with respect to ceded liabilities pertaining to covered policies pursuant to 33-2-1216 or 33-2-1217, MCA, if, and only if, in addition to all other requirements imposed by law or regulation, the following requirements are met on a treaty-by-treaty basis:

(a) The ceding insurer's statutory policy reserves with respect to the covered policies are established in full and in accordance with the applicable requirements of Title 33, chapter 2, part 4, MCA, and related regulations and actuarial guidelines, and credit claimed for any reinsurance treaty subject to [New Rules I through VIII] does not exceed the proportionate share of those reserves ceded under the contract; and

(b) The ceding insurer determines the required level of primary security with respect to each reinsurance treaty subject to [New Rules I through VIII] and provides support for its calculation as determined to be acceptable to the commissioner; and

(c) Funds consisting of primary security, in an amount at least equal to the required level of primary security, are held by or on behalf of the ceding insurer, as

security under the reinsurance treaty within the meaning of 33-2-1217, MCA, on a funds-withheld, trust, or modified coinsurance basis; and

(d) Funds consisting of other security, in an amount at least equal to any portion of the statutory reserves as to which primary security is not held pursuant to (1)(c) above, are held by or on behalf of the ceding insurer as security under the reinsurance treaty within the meaning of 33-2-1217, MCA; and

(e) Any trust used to satisfy the requirements of this rule shall comply with all of the conditions and qualifications of trusts set forth in ARM Title 6, chapter 6, subchapter 38, except that:

(i) Funds consisting of primary security or other security held in trust, shall for the purposes identified in [New Rule V(2)], be valued according to the valuation rules set forth in [New Rule V(2)], as applicable; and

(ii) There are no affiliate investment limitations with respect to any security held in such trust if such security is not needed to satisfy the requirements of (1)(c) above; and

(iii) The reinsurance treaty must prohibit withdrawals or substitutions of trust assets that would leave the fair market value of the primary security within the trust (when aggregated with primary security outside the trust that is held by or on behalf of the ceding insurer in the manner required by (1)(c)) below 102% of the level required by (1)(c) at the time of the withdrawal or substitution; and

(iv) The determination of reserve credit under ARM 6.6.3862 shall be determined according to the valuation rules set forth in [New Rule V(2)], as applicable; and

(f) The reinsurance treaty has been approved by the commissioner.

(2) Requirements at inception date and on an ongoing basis, and remediation, are as follows:

(a) The requirements of (1) must be satisfied as of the date that risks under covered policies are ceded (if such date is on or after September 1, 2022) and on an ongoing basis thereafter. Under no circumstances shall a ceding insurer take or consent to any action or series of actions that would result in a deficiency under (1)(c) or (1)(d) with respect to any reinsurance treaty under which covered policies have been ceded, and in the event that a ceding insurer becomes aware at any time that such a deficiency exists, it shall use its best efforts to arrange for the deficiency to be eliminated as expeditiously as possible.

(b) Prior to the due date of each quarterly or annual statement, each life insurance company that has ceded reinsurance within the scope of [New Rule II] shall perform an analysis, on a treaty-by-treaty basis, to determine, as to each reinsurance treaty under which covered policies have been ceded, whether as of the end of the immediately preceding calendar quarter (the valuation date) the requirements of (1)(c) and (1)(d) were satisfied. The ceding insurer shall establish a liability equal to the excess of the credit for reinsurance taken over the amount of primary security actually held pursuant to (1)(c), unless either:

(i) The requirements of (1)(c) and (1)(d) were fully satisfied as of the valuation date as to such reinsurance treaty; or

(ii) Any deficiency has been eliminated before the due date of the quarterly or annual statement to which the valuation date relates through the addition of primary security and/or other security, as the case may be, in such amount and in such form

as would have caused the requirements of (1)(c) and (1)(d) to be fully satisfied as of the valuation date.

(c) Nothing in (2)(b) above shall be construed to allow a ceding company to maintain any deficiency under (1)(c) and (1)(d) for any period of time longer than is reasonably necessary to eliminate it.

AUTH: 33-1-313, 33-2-1517, MCA
IMP: 33-2-1216, 33-2-1217, MCA

NEW RULE VII PROHIBITION AGAINST AVOIDANCE (1) No insurer that has covered policies as to which [New Rules I through VIII] apply (as set forth in [New Rule II]) shall take any action or series of actions, or enter into any transaction or arrangement or series of transactions or arrangements if the purpose of such action, transaction, or arrangement or series thereof is to avoid the requirements of [New Rules I through VIII], or to circumvent their purpose and intent, as set forth in [New Rule I].

AUTH: 33-1-313, 33-2-1517, MCA
IMP: 33-2-1216, 33-2-1217, MCA

NEW RULE VIII SEVERABILITY (1) If any provision of [New Rules I through VIII] is held invalid, the remainder shall not be affected.

AUTH: 33-1-313, 33-2-1517, MCA
IMP: 33-2-1216, 33-2-1217, MCA

4. The rules as proposed to be amended provide as follows, new matter underlined, deleted matter interlined:

6.6.6701 PURPOSE (1) The purpose of ~~these rules~~ ARM 6.6.6701 through 6.6.6713 is to provide:

(a) through (c) remain the same.

(2) The method for calculating basic reserves defined in ~~these rules~~ ARM 6.6.6701 through 6.6.6713 will constitute the commissioners' reserve valuation method for policies to which ~~these rules~~ they are applicable.

AUTH: 33-1-313, 33-2-418, MCA
IMP: 33-2-407, 33-2-408, 33-2-409, 33-2-410, 33-2-411, 33-2-412, 33-2-413, 33-3-414, 33-2-415, 33-2-416, 33-2-417, MCA

6.6.6705 DEFINITIONS For purposes of ~~this subchapter~~ ARM 6.6.6701 through 6.6.6713:

(1) through (12) remain the same.

AUTH: 33-1-313, 33-2-418, MCA
IMP: 33-2-407, 33-2-408, 33-2-409, 33-2-410, 33-2-411, 33-2-412, 33-2-413, 33-2-414, 33-2-415, 33-2-416, 33-2-417, MCA

6.6.6707 GENERAL CALCULATION REQUIREMENTS FOR BASIC RESERVES AND PREMIUM DEFICIENCY RESERVES (1) through (2)(a) remain the same.

(b) the select mortality factors in ARM 6.6.6713 ~~of these rules~~;

(c) through (c)(vii)(B) remain the same.

(C) the appointed actuary shall annually opine for all policies subject to ~~these rules~~ ARM 6.6.6701 through 6.6.6713 as to whether the mortality rates resulting from the application of X meet the requirements of (2)(c). This opinion shall be supported by an actuarial report, subject to appropriate actuarial standards of practice promulgated by the actuarial standards board of the American academy of actuaries. The X factors shall reflect anticipated future mortality, without recognition of mortality improvement beyond the valuation date, taking into account relevant emerging experience;

(d) through (6) remain the same.

AUTH: 33-1-313, 33-2-418, MCA

IMP: 33-2-407, 33-2-408, 33-2-409, 33-2-410, 33-2-411, 33-2-412, 33-2-413, 33-2-414, 33-2-415, 33-2-416, 33-2-417, MCA

5. REASON: The Commissioner of Securities and Insurance, Montana State Auditor, Troy Downing (commissioner) is the statewide elected official responsible for administering the Montana Insurance Code and regulating the business of insurance. Chapter 65, passed by the 67th Montana Legislature (effective March 23, 2021), amended 33-2-1216 and 33-2-1217, MCA, regarding credit for reinsurance, a practice regularly used in the insurance industry.

The National Association of Insurance Commissioners (NAIC) is an organization of insurance regulators from the 50 states, the District of Columbia, and the U.S. Territories. The NAIC provides a forum for the development of uniform policy and regulation when uniformity is appropriate. The statutory amendments passed in 2021 were based on the NAIC model law regarding credit for reinsurance. Proposed New Rules I through VIII are derived from the NAIC Term and Universal Life Insurance Reserve Financing Model Regulation (#787) (2016) and are necessary to implement the statutory changes made in 2021 and to conform with the NAIC model regulations. Further, they ensure uniformity with other states and are necessary to meet the NAIC accreditation standards.

It is anticipated that the proposed new rules would be placed in ARM Title 6, chapter 6, subchapter 67, and thus where existing rules in that subchapter make general references to "these rules" or "this subchapter," those references would become overly broad and inaccurate. To avoid such overbreadth, existing rules ARM 6.6.6701, 6.6.6705, and 6.6.6707 are proposed to be amended to specify the scope of their application.

6. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Sam Loveridge, CSI Communications Director, 840 Helena Avenue, Helena, Montana, 59601; telephone (406) 444-2040 or 1-800-332-6148; fax (406)

444-3497; TDD (406) 444-3246; or e-mail CSI@mt.gov, and must be received no later than 5:00 p.m., August 5, 2022.

7. If persons who are directly affected by the proposed actions wish to express their data, views, or arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments to Sam Loveridge at the above address no later than 5:00 p.m., August 5, 2022.

8. If the agency receives requests for a public hearing on the proposed actions from either 10 percent or 25, whichever is less, of the persons directly affected by the proposed actions; from the appropriate administrative rule review committee of the Legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those directly affected has been determined to be far in excess of 25 persons based on the potential for the actions to impact every person insured by a Montana domestic insurance company if that company chooses to use a certified reinsurer.

9. CSI maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list must make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in paragraph 6 above or may be made by completing a request form at any rules hearing held by CSI.

10. An electronic copy of this proposal notice is available through the Secretary of State's website at http://sosmt.gov/ARM/Register.

11. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

12. With regard to the requirements of 2-4-111, MCA, CSI has determined that the adoption and amendment of the above-referenced rules will not significantly and directly impact small businesses.

/s/ Kirsten Madsen
Kirsten Madsen
Rule Reviewer

/s/ Ole Olson
Ole Olson
Chief Legal Counsel
Commissioner of Securities and Insurance,
Office of the Montana State Auditor

Certified to the Secretary of State June 28, 2022.

BEFORE THE FISH AND WILDLIFE COMMISSION
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 12.5.507 and 12.5.508 pertaining to angling restriction and fishing closure criteria	))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On August 1, 2022, at 1:30 p.m., the Fish and Wildlife Commission (commission) will hold a telephonic public hearing via the ZOOM meeting platform to consider the proposed amendment of the above-stated rules. There will be no in-person hearing. Interested parties may access the remote conferencing in the following way:

(a) Dial by telephone:1 206 337 9723
Meeting ID: 846 4460 0798
Password: 327085

2. The commission will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Fish, Wildlife and Parks (department), no later than 5:00 p.m. on July 22, 2022, to advise us of the nature of the accommodation that you need. Please contact Jessica Snyder, Department of Fish, Wildlife and Parks, P.O. Box 200701, Helena, Montana, 59620-0701; telephone (406) 444-9785; or e-mail jesssnyder@mt.gov.

3. The rules as proposed to be amended provide as follows, new matter underlined, deleted matter interlined:

12.5.507 ANGLING RESTRICTION AND FISHING CLOSURE CRITERIA

(1) The department shall use the following criteria to determine whether to implement angling restrictions in streams:

(a) angling pressure as determined by the department has the potential to contribute to excessive fish mortality; and

(b) one or more of the following environmental conditions has been determined by the department to exist:

(i) ~~on~~ in ~~streams managed for~~ nonnative salmonid streams designated by the department in the Statewide Fisheries Management Plan, daily maximum water temperatures reach or exceed 73 degrees Fahrenheit at any time during the day for three consecutive days;

~~(ii)~~ (iv) stream ~~or river~~ flows fall to or below the 5th percentile of daily mean values for this day flow level based upon hydrologic records for that water body; or

(ii) in cutthroat trout streams designated by the department in the Statewide Fisheries Management Plan, daily maximum water temperature equal to or

exceeding 66 degrees Fahrenheit at any time during the day for three consecutive days;

(iii) in bull trout streams designated by the department in the Statewide Fisheries Management Plan, a daily maximum water temperature equal to or exceeding 60 degrees Fahrenheit at any time during the day for three consecutive days; ~~or~~

~~(iv)~~ (v) water conditions meet the criteria for angling restrictions as stated in a ~~D~~drought ~~M~~management ~~P~~plan~~.~~; or

(c) other biological or environmental conditions such as, but not limited to, water body pollution, disease, or concentration of angling pressure due to other restrictions or closures that the department determines have the potential to contribute to excessive fish mortality.

(2) A fishing closure may be implemented when:

(a) conditions of (1) develop or degrade;

(b) dissolved oxygen is equal to or less ~~that~~ than 4 ppm when measured in the early morning before sunrise; or

(c) water conditions meet the criteria for fishing closures as stated in a ~~D~~drought ~~M~~management ~~P~~plan.~~; or~~

~~(d) other biological or environmental conditions such as, but not limited to, water body pollution, disease, and shifts in angling pressure exist that the department determines have the potential to adversely affect the fishery.~~

(3) An angling restriction or fishing closure may be delayed or may not be implemented by the department if closure criteria are forecast to be met for a short duration.

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

12.5.508 REOPENING WATERS (1) Except on waters with a drought management plan, ~~Once~~ an angling restriction or fishing closure ~~is implemented, it~~ will remain in effect until ~~September 15 or until~~ reopening criteria described in (2), ~~or~~ (3), or (4) have been met, or until August 31.

(2) The department may reopen streams managed for nonnative salmonids when the department determines in its discretion that daily maximum water temperature does not exceed 70 degrees Fahrenheit for three consecutive days.

(3) The department may reopen streams managed for cutthroat trout when the department determines that daily maximum water temperature does not exceed 66 degrees Fahrenheit for three consecutive days.

~~(3)~~ (4) Streams designated by the department to have bull trout shall remain closed until the following conditions occur:

(a) daily maximum water temperature equals or does not exceed 60 degrees Fahrenheit for three consecutive days; and

(b) when flow regimes provide adequate security habitat.

(5) Reopening waters may be delayed by the department if:

(a) reopening criteria is forecast to be met for a short duration;

(b) conditions on priority waters defined by the department in the Statewide Fisheries Management Plan do not provide adequate security habitat; or

(c) angling pressure due to restrictions and closures on other waterbodies has the potential to contribute to excessive fish mortality.

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

REASON: In 2008, the Fish and Wildlife Commission adopted administrative rules, authorizing the department to implement angling restrictions or angling closures during periods of drought pursuant to criteria in ARM 12.5.507. These rules are intended to minimize fishery impacts from angling during periods of extremely high temperature, low flow, or both. In most years, angling restrictions and closures, as defined in these rules, may be used on only one or two waters. In extreme years, such as 2021, 33 restrictions or closures were implemented.

The commission is proposing amendments to ARM 12.5.507 and 12.5.508 to incorporate criteria for cutthroat trout fisheries and to provide additional guidance for when a restriction or closure will be implemented or lifted. FWP data and other research has found that the current restriction and closure criteria for salmonids (daily maximum temperatures reach or exceed 73 degrees Fahrenheit any time of day for three consecutive days) exceed the mortality threshold for cutthroat trout. The department has determined that adopting criteria at 66 degrees Fahrenheit for cutthroat fisheries would better reduce angling impacts to cutthroat during drought. Other proposed amendments are intended to avoid scenarios where restrictions or closures would be implemented or lifted over a short period of time before a closure or restriction would be re-implemented or lifted again (i.e., an on-again-off-again scenario). For example, a hoot owl restriction (i.e., fishing allowed only from midnight to 2:00 p.m.) may be in place on a river section, and rain or a short-term weather event may push water temperature above reopening criteria. Under this scenario, water conditions are expected to only improve for a handful of days before temperatures rise again. Under existing rules, the department must lift a restriction for a few days before restricting again when conditions deteriorate. This reduces the closure's benefit to the fishery because it fails to minimize angling impact during what is still a biologically stressful time for fisheries. It also increases public confusion because the public would not have a clear understanding of when a restriction has been lifted or when one has been implemented.

4. Concerned persons may submit their data, views, or arguments orally at the telephonic hearing. Written data, views, or arguments may also be submitted to: Department of Fish, Wildlife and Parks, Attn: Fisheries, P.O. Box 200701, Helena, Montana, 59620-0701; or e-mail fwpfishcomments@mt.gov, and must be received no later than August 5, 2022.

5. Jessica Snyder or another hearing officer appointed by the department has been designated to preside over and conduct the hearing.

6. The department maintains a list of interested persons who wish to receive notice of rulemaking actions proposed by the department or commission. Persons

who wish to have their name added to the list shall make a written request that includes the name and mailing address of the person to receive the notice and specifies the subject or subjects about which the person wishes to receive notice. Such written request may be mailed or delivered to: Department of Fish, Wildlife and Parks, Legal Unit, P.O. Box 200701, 1420 East Sixth Avenue, Helena, MT 59620-0701, or may be emailed to jesssnyder@mt.gov.

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

8. With regard to the requirements of 2-4-111, MCA, the commission has determined that the amendment of the above-referenced rules will not significantly and directly impact small businesses.

/s/ Kevin Rechkoff	/s/ Lesley Robinson
Kevin Rechkoff	Lesley Robinson
Rule Reviewer	Chair
	Fish and Wildlife Commission

Certified to the Secretary of State June 28, 2022.

BEFORE THE FISH AND WILDLIFE COMMISSION
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 12.9.1403 pertaining to grizzly bear demographic objective for the Northern Continental Divide Ecosystem	)))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On August 2, 2022, at 9:00 a.m., the Fish and Wildlife Commission (commission) will hold a telephonic public hearing via the ZOOM meeting platform to consider the proposed amendment of the above-stated rule. There will be no in-person hearing. Interested parties may access the remote conferencing in the following way:

(a) Dial by telephone: 1 213 338 8477
Meeting ID: 829 8168 9817
Password: 591174

2. The commission will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Fish, Wildlife and Parks (FWP), no later than 5:00 p.m. on July 22, 2022, to advise us of the nature of the accommodation that you need. Please contact Jessica Snyder, Department of Fish, Wildlife and Parks, P.O. Box 200701, Helena, Montana, 59620-0701; telephone (406) 444-9785; or e-mail jesssnyder@mt.gov.

3. The rule as proposed to be amended provides as follows, new matter underlined, deleted matter interlined:

12.9.1403 GRIZZLY BEAR DEMOGRAPHIC OBJECTIVES FOR THE NORTHERN CONTINENTAL DIVIDE ECOSYSTEM (1) Upon delisting from the Endangered Species Act, management of the grizzly bear and its habitat in the Northern Continental Divide Ecosystem (NCDE) will be guided by the Conservation Strategy for Grizzly Bears in the Northern Continental Divide Ecosystem (NCDE Conservation Strategy). The department and federal land management agencies will endorse and commit themselves to the NCDE Conservation Strategy by entering into a memorandum of understanding detailing their agreement to implement it. The department will be a signatory to the implementation memorandum.

(2) ~~When and so long as the NCDE Conservation Strategy is in effect, t~~The department and the commission shall, within their lawful authority to do so, maintain the recovered status of the grizzly bear in the NCDE by implementing interagency cooperation, population and habitat management and monitoring, and other

provisions of the NCDE Conservation Strategy in accordance with the responsibilities described therein.

(3) ~~Specific to population management in the NCDE, a~~As described in the NCDE Conservation Strategy, the commission ~~specifically~~ adopts the following demographic objectives. The department shall:

(a) maintain a well-distributed grizzly bear population within the demographic monitoring area as described in the NCDE Conservation Strategy and maintain the documented presence of females with offspring in at least 21 of 23 bear management units of the primary conservation area and in at least six of seven occupancy units of Zone 1 at least every six years. Adherence to this objective will be evaluated by monitoring the presence of females with offspring (cubs, yearlings, or 2-year-olds) within defined geographic units of the NCDE;

(b) manage mortalities from all sources, including hunting and the loss of grizzly bears by translocation out of the NCDE, to support an estimated probability of at least 90% that the grizzly bear population within the demographic monitoring area remains above 800 bears, considering the uncertainty associated with all of the demographic parameter and further manage mortality against a 6-year running average within the following threshold objectives:

(i) ~~using a 6-year running average,~~ maintain estimated annual survival rate of independent females within the demographic monitoring area of at least 90% and a rate at or above the minimum level consistent with a projected probability of at least 90% that the population within the demographic monitoring area will remain above 800 bears based on population modeling;

(ii) ~~using a 6-year running average,~~ limit annual estimated number of total reported and unreported mortalities of independent females within the demographic monitoring area to a number that is no more than 10% of the number of independent females estimated within the demographic monitoring area based on population modeling and a number that is at or below the maximum level consistent with a projected probability of at least 90% that the population within the demographic monitoring area will remain above 800 bears based on population modeling; and

(iii) ~~using a 6-year running average,~~ limit annual estimated number of total reported and unreported mortalities of independent males within the demographic monitoring area to a number that is no more than 15% of the number of independent males estimated within the demographic monitoring area based on population modeling~~.~~;

(c) monitor demographic and genetic connectivity among populations by the following means:

(i) estimating spatial distribution of the NCDE grizzly bear population biennially; and

(ii) identifying the population of origin for individuals sampled inside and outside of the demographic monitoring area to detect movements of individuals to and from other populations or recovery areas.

(4) Hunting would cease if the probability that the grizzly bear population remains above 800 within the demographic monitoring area falls below 90% and would not resume until the probability is 90% or greater that the population of bears remains above 800.

(5) Hunting will not be allowed in a year if mortality thresholds as described in (3)(b)(ii) or (iii) were exceeded in the previous year.

AUTH: 87-1-301, MCA
IMP: 87-1-201, 87-1-301, MCA

REASON: The commission previously proposed and approved amendments to ARM 12.9.1403; however, due to a procedural filing error after the April 19, 2022 commission meeting, the amendments must be reproposed. The commission proposed amendments to ARM 12.9.1403 on January 14, 2022, at page 8 of the Montana Administrative Register, Issue No. 1. Public comments were received, including comments at a hearing on February 8, 2022. Upon consideration of the comments received, the commission approved amending (5) to read "Hunting will not be allowed in a year if mortality thresholds as described in (3)(b)(ii) or (3)(b)(iii) were exceeded in the previous year" instead of "(3)(b)(ii) and (3)(b)(iii)." This modification is a more conservative approach to evaluating closing hunting and is reflected in the current proposal.

All public comments received during the public comment period for the January 14, 2022 proposal will be considered for this proposal.

4. Concerned persons may submit their data, views, or arguments orally at the telephonic hearing. Written data, views, or arguments may also be submitted to: Grizzly Bear ARM, Department of Fish, Wildlife and Parks, P.O. Box 200701, Helena, Montana, 59620-0701; or e-mail GrizzlyBearARM@mt.gov, and must be received no later than August 5, 2022.

5. Jessica Snyder or another hearing officer appointed by the department has been designated to preside over and conduct the hearing.

6. The department maintains a list of interested persons who wish to receive notice of rulemaking actions proposed by the department or commission. Persons who wish to have their name added to the list shall make a written request that includes the name and mailing address of the person to receive the notice and specifies the subject or subjects about which the person wishes to receive notice. Such written request may be mailed or delivered to: Department of Fish, Wildlife and Parks, Legal Unit, P.O. Box 200701, 1420 East Sixth Avenue, Helena, MT 59620-0701, or may be emailed to jesssnyder@mt.gov.

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

8. With regard to the requirements of 2-4-111, MCA, the commission has determined that the amendment of the above-referenced rule will not significantly and directly impact small businesses.

/s/ Zach Zipfel
Zach Zipfel
Rule Reviewer

/s/ Lesley Robinson
Lesley Robinson
Chair
Fish and Wildlife Commission

Certified to the Secretary of State June 28, 2022.

BEFORE THE FISH AND WILDLIFE COMMISSION
OF THE STATE OF MONTANA

In the matter of the adoption of NEW RULE I pertaining to recreational use on the Boulder River	)))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION

TO: All Concerned Persons

1. On August 3, 2022, at 9:30 a.m., the Fish and Wildlife Commission (commission) will hold a telephonic public hearing via the ZOOM meeting platform to consider the proposed adoption of the above-stated rule. There will be no in-person hearing. Interested parties may access the remote conferencing in the following way:

(a) Dial by telephone: 1 206 337 9723
Meeting ID: 811 9782 6322
Password: 950565

2. The commission will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Fish, Wildlife and Parks (FWP), no later than 5:00 p.m. on July 22, 2022, to advise us of the nature of the accommodation that you need. Please contact Jessica Snyder, Department of Fish, Wildlife and Parks, P.O. Box 200701, Helena, Montana, 59620-0701; telephone (406) 444-9785; or e-mail jesssnyder@mt.gov.

3. The rule as proposed to be adopted provides as follows:

NEW RULE I BOULDER RIVER (1) The Boulder River and its tributaries are closed to all motorized watercraft, as defined in 23-2-502, MCA, except:
(a) motorized watercraft 10 horsepower or less are permitted from the Natural Bridge Falls to the Yellowstone River from April 1 to September 30.

AUTH: 87-1-303, MCA
IMP: 87-1-303, MCA

REASON: The commission previously proposed and approved adopting NEW RULE I regarding recreational use on the Boulder River; however, due to a procedural filing error after the April 19, 2022 commission meeting, the amendments must be reproposed. The commission proposed adoption of NEW RULE I on January 14, 2022, at page 12 of the Montana Administrative Register, Issue No. 1. Public comments were received, including comments at a hearing on February 15, 2022.

All public comments received during the public comment period for the January 14, 2022 proposal will be considered for this proposal.

4. Concerned persons may submit their data, views, or arguments orally at the telephonic hearing. Written data, views, or arguments may also be submitted to Phil Kilbreath, Department of Fish, Wildlife and Parks, P.O. Box 200701, Helena, Montana, 59620-0701; or e-mail pkilbreath@mt.gov, and must be received no later than August 5, 2022.

5. Jessica Snyder or another hearing officer appointed by the department has been designated to preside over and conduct the hearing.

6. The department maintains a list of interested persons who wish to receive notice of rulemaking actions proposed by the department or commission. Persons who wish to have their name added to the list shall make a written request that includes the name and mailing address of the person to receive the notice and specifies the subject or subjects about which the person wishes to receive notice. Such written request may be mailed or delivered to: Department of Fish, Wildlife and Parks, Legal Unit, P.O. Box 200701, 1420 East Sixth Avenue, Helena, MT 59620-0701, or may be emailed to jesssnyder@mt.gov.

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

8. With regard to the requirements of 2-4-111, MCA, the commission has determined that the adoption of the above-referenced rule will not significantly and directly impact small businesses.

/s/ Zach Zipfel
Zach Zipfel
Rule Reviewer

/s/ Lesley Robinson
Lesley Robinson
Chair
Fish and Wildlife Commission

Certified to the Secretary of State June 28, 2022.

BEFORE THE FISH AND WILDLIFE COMMISSION
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 12.11.6705 pertaining to extending the implementation date of the Madison River commercial use cap	)))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On August 2, 2022, at 6:00 p.m., the Fish and Wildlife Commission (commission) will hold a telephonic public hearing via the ZOOM meeting platform to consider the proposed amendment of the above-stated rule. There will be no in-person hearing. Interested parties may access the remote conferencing in the following way:

(a) Dial by telephone: 1 206 337 9723
Meeting ID: 813 8036 3244
Password: 534920

2. The commission will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Fish, Wildlife and Parks (department), no later than 5:00 p.m. on July 22, 2022, to advise us of the nature of the accommodation that you need. Please contact Jessica Snyder, Department of Fish, Wildlife and Parks, P.O. Box 200701, Helena, Montana, 59620-0701; telephone (406) 444-9785; or e-mail jesssnyder@mt.gov.

3. The rule as proposed to be amended provides as follows, new matter underlined, deleted matter interlined:

12.11.6705 MADISON RIVER COMMERCIAL USE CAP (1) Fishing outfitters and guides may only operate on the Madison River as long as they have a Madison River Special Recreation Permit and trips allotted them as provided by these rules.

(2) The total number of fishing outfitting and guided trips per individual outfitter and guide is capped at the number of trips reported in 2019 or 2020, whichever is higher.

(3) ARM 12.11.6705 will be implemented ~~January 1, 2023.~~ upon adoption of:

(a) an allocation method; or

(b) a comprehensive river plan and rule package.

(4) The commission will review ARM 12.11.6705 in 2023 as prescribed by ARM 12.11.6711.

AUTH: 87-1-301, MCA

IMP: 87-1-301, MCA

REASON: On December 24, 2020, the Fish and Wildlife Commission adopted administrative rules regarding the recreational use of the Madison River (Madison River Recreation Management rules). ARM 12.11.6705 pertains to the Madison River Commercial Use Cap. The commercial use cap is scheduled to be implemented on January 1, 2023. The Madison River Recreation Management rules also provide for a Madison River Commercial Use Work Group to develop recommendations to the commission for approval regarding the Madison River Recreation Management rules including allocation of opportunity pursuant to the commercial use cap.

The commission is proposing language amending ARM 12.11.6705 extending implementation of the commercial use cap upon adoption of an allocation method or a comprehensive river plan and rule package.

4. Concerned persons may submit their data, views, or arguments orally at the telephonic hearing. Written data, views, or arguments may also be submitted to Department of Fish, Wildlife and Parks, attn: Charlie Sperry, P.O. Box 200701, Helena, Montana, 59620-0701 or e-mail madisonrivercom@mt.gov, and must be received no later than August 5, 2022.

5. Jessica Snyder or another hearing officer appointed by the department has been designated to preside over and conduct the hearing.

6. The department maintains a list of interested persons who wish to receive notice of rulemaking actions proposed by the department or commission. Persons who wish to have their name added to the list shall make a written request that includes the name and mailing address of the person to receive the notice and specifies the subject or subjects about which the person wishes to receive notice. Such written request may be mailed or delivered to: Department of Fish, Wildlife and Parks, Legal Unit, P.O. Box 200701, 1420 East Sixth Avenue, Helena, MT 59620-0701, or may be emailed to jesssnyder@mt.gov.

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

8. With regard to the requirements of 2-4-111, MCA, the commission has determined that the amendment of the above-referenced rule will not significantly and directly impact small businesses.

/s/ Zach Zipfel
Zach Zipfel
Rule Reviewer

/s/ Lesley Robinson
Lesley Robinson
Chair
Fish and Wildlife Commission

Certified to the Secretary of State June 28, 2022.

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.24.101, 17.24.102, 17.24.103, 17.24.105, 17.24.106, 17.24.107, 17.24.117, 17.24.119, 17.24.120, 17.24.121, 17.24.128, 17.24.153, 17.24.157, and 17.24.181 pertaining to the application and administration of hard rock small mining exclusion statements, exploration licenses, and operating permits	)	NOTICE OF PROPOSED AMENDMENT NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons

1. On September 23, 2022, the Department of Environmental Quality proposes to amend the above-stated rules.

2. The Department of Environmental Quality will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Environmental Quality no later than 5:00 p.m. on August 1, 2022, to advise us of the nature of the accommodation that you need. Please contact the Department of Environmental Quality at P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-1388; fax (406) 444-4386; or e-mail DEQHardRockRule2022@mt.gov.

3. The rules as proposed to be amended provide as follows, new matter underlined, deleted matter interlined:

17.24.101 GENERAL PROVISIONS (1) The Act and this subchapter provide that no person may engage in activities regulated under the Act without first obtaining the appropriate exploration license or operating permit from the department, or filing a valid small miner exclusion to the requirement of obtaining an operating permit. Activities regulated under the Act include:

(a) exploration for, or mining of minerals on or below the surface of the earth~~,~~;

(b) ~~engage~~ engaging in ore processing~~,~~;

(c) reprocessing of mine waste rock or tailings~~,~~;

(d) ~~construct~~ constructing or ~~operate~~ operating a hard rock mill~~,~~;

(e) ~~use~~ using cyanide or other metal leaching solvents or ore-processing reagents~~, or~~; and

(f) ~~disturb~~ disturbing land in anticipation of any of these activities ~~without first obtaining the appropriate license or permit from the department~~.

(2) Prior to receipt of an exploration license or operating permit the applicant, other than a public or governmental agency, shall deposit with the department a reclamation performance bond in a form and amount as determined by the department in accordance with 82-4-338, MCA. The license or permit may be issued following receipt and acceptance of the reclamation performance bond, and, at such time, operations may commence.

(2) remains the same but is renumbered (3).

~~(3)~~(4) The mining of certain substances is excluded from the Act and this subchapter. See definition of "mineral" in ~~ARM 17.24.102~~ 82-4-303, MCA.

~~(4)~~(5) A small miner who signs an agreement described in 82-4-305, MCA, and does not violate the Act and this subchapter, is excluded from certain requirements of the Act as they relate to mining, except as noted in 82-4-305, MCA. See definition of "small miner" in ~~ARM 17.24.102~~ 82-4-303, MCA. All exploration operations, regardless of size, must comply with the requirements of 82-4-331 and 82-4-332, MCA, and ARM 17.24.103 through ~~17.24.107~~ 17.24.108. See definitions of "exploration" in ARM 17.24.102 and "mining" in ~~ARM 17.24.102~~ 82-4-303, MCA.

(5) through (8) remain the same but are renumbered (6) through (9).

AUTH: 82-4-321, MCA
IMP: 82-4-305, 82-4-309, 82-4-320, 82-4-331, 82-4-332, 82-4-335, 82-4-361, 82-4-362, MCA

REASON: The proposed amendment to (1) changes the format used to describe the activities regulated under the Act for clarity. The general provision regarding bonding is set forth in (2) because it is a requirement that is independent to the description of the activities regulated under the Act set forth in (1). The proposed amendment to (4) corrects the reference to the definition of "mineral," which is defined in 82-4-303, MCA, rather than in ARM 17.24.102.

The proposed amendment to (5) corrects the reference to the definition of "small miner," which is defined in 82-4-303 MCA, rather than in ARM 17.24.102. The proposed amendment also changes the reference of ARM 17.24.107 to ARM 17.24.108 in order to be inclusive of all administrative rules pertaining to exploration operations. Finally, the proposed amendment corrects the reference to the definition of "mining," which is defined in 82-4-303, MCA, rather than in ARM 17.24.102.

17.24.102 DEFINITIONS As used in the Act and this subchapter, the following definitions apply:

(1) through (4) remain the same.

(5) "Collateral bond" means an indemnity agreement for a fixed amount, payable to the department, executed by the operator and supported by ~~the deposit~~ depositing with the department ~~of~~ cash, negotiable bonds of the United States (not treasury certificates), state or municipalities, negotiable certificates of deposit or an irrevocable letter of credit of any bank organized or authorized to transact business in the United States or other surety acceptable to the department.

(6) "Disturbed and unreclaimed ~~surface~~" means, as used in the definition of "small miner" ~~and ARM 17.24.101(4)~~ in 82-4-303, MCA, land affected by mining activities, including reprocessing of tailing or waste material, that has not been restored to a continuing productive use, with proper grading and revegetative procedures to assure:

(a) through (15) remain the same.

~~(16) "Small miner" is defined in 82-4-303, MCA.~~

(17) remains the same but is renumbered (16).

AUTH: 82-4-321, MCA
IMP: 82-4-303, 82-4-305, 82-4-309, 82-4-310, 82-4-331, MCA

REASON: The proposed amendment to (6) deletes the unnecessary reference to ARM 17.24.101(4). Giving definition to "disturbed and unreclaimed" as found in the definition of "small miner" in 82-4-303, MCA will carry forward in ARM 17.24.101(4) and all other statutory and administrative rule provisions in which the term "small miner" is found. The proposed amendment also deletes the unnecessary reference to the statutory definition of "small miner."

17.24.103 EXPLORATION LICENSE--APPLICATION AND CONDITIONS

(1) To secure an exploration license an applicant shall:

(a) remains the same.

(b) submit an application for an exploration license~~, complete with a notarized signature, in duplicate~~ to the department upon forms prepared and furnished by it;

(c) submit an exploration plan of operations and a map or sketch in sufficient detail to locate the area to be explored as well as the actual proposed disturbances, and to allow the department to adequately determine whether significant environmental problems would be encountered. The plan of operations must state the type of exploration techniques that would be employed in disturbing the land and include a reclamation plan in sufficient detail to allow the department to determine whether the specific reclamation and performance requirements of ARM 17.24.104 through ~~17.24.107~~ 17.24.108 would be satisfied;

(d) through (4) remain the same.

AUTH: 82-4-321, MCA
IMP: 82-4-332, MCA

REASON: The proposed amendment to (1)(b) removes the requirement that an application for an exploration license be notarized and submitted in duplicate because DEQ is moving toward electronic submission of permit or license applications. The proposed amendment to (1)(c) corrects the reference of ARM 17.24.107 to ARM 17.24.108 to make the reference inclusive of all administrative rules pertaining to reclamation of exploration disturbances.

17.24.105 CONDUCT OF EXPLORATION OPERATIONS (1) through (6) remain the same.

~~(7) If an artesian aquifer is intercepted during a drilling operation, the drill hole must be plugged at depth (top to bottom) prior to removal of the drill rig.~~

(8) and (9) remain the same but are renumbered (7) and (8).

~~(10)~~(9) Pilot ore processing plants or sites, as ~~defined~~ included in the definition of "exploration" in ARM 17.24.102, and permitted under an exploration license, are subject to all applicable requirements of 82-4-335 through 82-4-337, MCA.

(11) remains the same but is renumbered (10).

AUTH: 82-4-321, MCA
IMP: 82-4-332, MCA

REASON: The proposed amendment deletes existing (7) regarding the plugging of drill holes that intercept an artesian aquifer because that subject is addressed in ARM 17.24.106. The proposed amendment also corrects the erroneous representation that "pilot ore processing plants or sites" is defined in ARM 17.24.102.

17.24.106 EXPLORATION DRILL HOLE PLUGGING (1) and (2) remain the same.

(3) Exceptions to (1) and (2) of this rule may be granted by the department if:

(a) remains the same.

(b) the drill hole contained no water, is not geologically likely to contain water or ~~and~~ the hole is to be destroyed during mining or mining related disturbances;

(c) and (d) remain the same.

(4) All ~~flowing or artesian~~ drill holes must be plugged prior to removing the drill rig from a hole unless removing the drill rig is necessary to the hole plugging operation or unless otherwise approved by the department.

(5) If the flow of an artesian drill hole is not completely stopped, after exhaustion of all methods, the operator must:

(a) through (6) remain the same.

AUTH: 82-4-321, MCA
IMP: 82-4-302, 82-4-332, 82-4-355, MCA

REASON: The proposed amendment to (3)(b) changing the conjunctive "and" to "or" gives the department additional latitude to exempt drill holes from being plugged; the three circumstances set forth in (3)(b) each provide an independent basis for not requiring the drill hole to be plugged. The proposed amendment to (4) allows the department the discretion to consider other circumstances in which removal of a drill rig prior to plugging the drill hole is warranted. The proposed amendment also sets forth the requirements that an operator must follow if the flow from an artesian drill hole is not completely stopped in its own section for clarity.

17.24.107 RECLAMATION REQUIREMENTS—EXPLORATION (1) and (2) remain the same.

(3) Access roads constructed by the licensee to accommodate the exploration project must be returned to a stable slope that approximates the original contour to the extent possible. Where this is not possible (as determined by the department), compacted surfaces must be ripped or otherwise loosened, drainage structures must be installed in accordance with ARM 17.24.104(11), and the roads must be closed to access by use of locked gates, kelly humps/dips, or other effective method. Exceptions may be made in accordance with the provisions of ARM ~~17.24.103(2)~~ 17.24.103(3). This requirement may be waived by the department if the landowner requests in writing that the access road be left in place for an identified, alternative, feasible and practicable purpose.

(4) remains the same.

(5) When such actions will not obscure significant evidence relating to the possible presence of an ore deposit or physically hinder further development of the claim, all trenches, bulk sample or discovery pits, and other excavations must be backfilled with the excavated spoil material. If, following a site investigation and discussions with the licensee, the department confirms the necessity for the excavation to remain open, backfilling requirements may be postponed providing the licensee remains in compliance with 82-4-331, and 82-4-332, MCA, and ARM 17.24.103, 17.24.105, ~~17.24.151,~~ and 17.24.153.

(6) through (13) remain the same.

AUTH: 82-4-321, MCA
IMP: 82-4-332, MCA

REASON: The proposed amendment corrects the reference of ARM 17.24.103(2) to ARM 17.24.103(3). The proposed amendment deletes the reference to ARM 17.24.151 because that administrative rule has been repealed.

17.24.117 PERMIT CONDITIONS (1) The following conditions accompany the issuance of each permit:

(a) The permittee shall conduct all operations as described in:

(i) through (iii) remain the same.

(iv) mitigation measures mutually developed by the department and permittee pursuant to ~~75-1-201(5)(b),MCA;~~ 75-1-201(4)(b), MCA;

(v) through (c) remain the same.

AUTH: 82-4-321, MCA
IMP: 82-4-335, 82-4-336, 82-4-351, MCA

REASON: The proposed amendment corrects the statutory reference. The statutory provision that used to be set forth in 75-1-201(5)(b) is now set forth in 75-1-201(4)(b).

17.24.119 PERMIT AMENDMENTS (1) through (3)(c) remain the same.

(d) contain a statement of the applicant's rationale for asserting nonsignificance pursuant to ~~82-4-337(7), MCA;~~ 82-4-342(5), MCA;

(e) through (4) remain the same.

AUTH: 82-4-321, ~~82-4-337, 82-4-342,~~ MCA
IMP: 82-4-337, 82-4-342, MCA

REASON: The proposed amendment corrects the statutory reference. The statutory provision that used to be set forth in 82-4-337(7), MCA is now set forth in 82-4-342(5), MCA.

17.24.120 PERMIT REVISIONS (1) and (1)(a) remain the same.
(b) a statement of the applicant's rationale for asserting nonsignificance pursuant to ~~82-4-337(7), MCA;~~ 82-4-342(5), MCA;
(c) through (2) remain the same.

AUTH: 82-4-321, MCA
IMP: 82-4-337, 82-4-342, MCA

REASON: The proposed amendment corrects the statutory reference. The statutory provision that used to be set forth in 82-4-337(7), MCA is now set forth in 82-4-342(5), MCA.

17.24.121 PERMIT REVIEWS (1) remains the same.
(2) If the department determines that the modification of the reclamation plan is authorized under 82-4-337(4), MCA, it may require such modification under the procedures of (3) through (6).
(3) through (6) remain the same.

AUTH: 82-4-321, MCA
IMP: 82-4-337, MCA

REASON: The proposed amendment to (2) provides clarity by directing the reader to the specific statutory provision being implemented by the administrative rule.

17.24.128 INSPECTIONS: FREQUENCY, METHOD, AND REPORTING
(1) through (1)(b)(i) remain the same.
(ii) has ~~a permit requirement to monitor for potential~~ expected or ongoing acid rock drainage; or
(iii) through (3) remain the same.

AUTH: 82-4-321, MCA
IMP: 82-4-337, 82-4-339, MCA

REASON: The proposed amendment deletes the requirement that the department inspect an operation three times a year based solely on a provision of the operation's permit requiring monitoring for potential rock drainage. Three annual

inspections are not needed for such operations when acid rock drainage is not expected. Three annual inspections are warranted for operations where the generation of acid rock drainage is expected or is occurring.

17.24.153 GENERAL COMPLIANCE (1) The operator shall comply with all federal and state laws, and such rules and regulations as are promulgated by the ~~board~~ department under the Act.

AUTH: 82-4-321, MCA
IMP: 82-4-336, MCA

REASON: The proposed amendment implements enactment of SB 233 in the 2021 Legislative Session allocating rulemaking authority to the department rather than to the Board of Environmental Review.

17.24.157 BLASTING OPERATIONS: COMPLAINT PROCEDURE
(1) through (2)(e) remain the same.
(f) making written findings, including, if possible, a determination of whether any of the standards in ARM 17.24.159~~(6)(a), (11)(a), or (15)(c),~~ (2)(f)(i), (2)(k)(i), and (2)(o)(iii) were exceeded.
(3) remains the same.

AUTH: 82-4-321, MCA
IMP: 82-4-356, MCA

REASON: The proposed amendment corrects the administrative rule references containing standards applicable to blasting.

17.24.181 SMALL MINER PLACER AND DREDGE BONDING (1) A small miner who operates a placer or dredge mine shall post a $10,000 bond unless the department approves a lower amount based on the criteria ~~below~~ outlined in (2) or unless it is documented that a bond for reclamation is posted with another government agency.
(a) through (2)(f) remain the same.
(g) a topographic map locating mine pit, ponds, diversions, roads, process area, and stream drainages and materials storage sites. This map should include a reference to existing locatable monuments or landmarks on the ground~~, be one inch to 100 feet unless a different scale is approved by the department, and be based on fixed reference points so that all mapped information is interchangeable~~;
(h) through (o) remain the same.
(p) whenever applicable, a description of the status of 404 permits issued pursuant to the federal Clean Water Act and plans of operation required by federal land management agencies; and
(q) remains the same.

AUTH: 82-4-321, MCA
IMP: 82-4-305(1), MCA

REASON: The proposed amendment to (1) includes a specific reference to (2) for clarity. The proposed amendment to (2)(g) deletes map scale requirements that are not necessary given the prevalence of digital maps and aerial imagery.

4. Concerned persons may submit their data, views, or arguments concerning the proposed actions in writing to: the Department of Environmental Quality at P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-1388; fax (406) 444-4386; or e-mail DEQHardRockRule2022@mt.gov, and must be received no later than 5:00 p.m., August 8, 2022.

5. If persons who are directly affected by the proposed actions wish to express their data, views, or arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments to the Department at the above address no later than 5:00 p.m., August 8, 2022.

6. If the agency receives requests for a public hearing on the proposed action from either 10 percent or 25, whichever is less, of the persons directly affected by the proposed action; from the appropriate administrative rule review committee of the Legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those directly affected has been determined to be 40 persons based on approximately 400 interested parties of individuals and companies.

7. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person above or may be made by completing a request form at any rules hearing held by the department.

8. An electronic copy of this proposal notice is available through the Secretary of State's web site at http://sosmt.gov/ARM/Register.

9. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

10. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment of the above-referenced rules will not significantly and directly impact small businesses.

/s/ Angela Colamaria
ANGELA COLAMARIA
Rule Reviewer

BY: */s/ Christopher Dorrington*
CHRISTOPHER DORRINGTON
Director
Department of Environmental Quality

Certified to the Secretary of State June 28, 2022.

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.24.201, 17.24.202, 17.24.212, 17.24.213, 17.24.214, 17.24.218, 17.24.219, 17.24.220, 17.24.221, 17.24.222, and 17.24.226 and the adoption of New Rule I, New Rule II, and New Rule III pertaining to the opencut mining program	)	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT AND ADOPTION (OPENCUT MINING)

TO: All Concerned Persons

1. On August 8, 2022, at 10:00 a.m., the Department of Environmental Quality (department) will hold an in-person public hearing in Room 111 of the Metcalf Building, at 1520 E. Sixth Avenue, Helena, Montana, to consider the proposed amendment and adoption of the above-stated rules. Interested parties may also attend the hearing electronically in the following ways:

Join Zoom Meeting Please click the link below to join the webinar:
https://mt-gov.zoom.us/j/89365372147?pwd=UW8wckxOTEpzYVZwZTU3UzVNcHVhQT09
Passcode: 698110

Or One tap mobile :
US: +12133388477,,89365372147#,,,,*698110# or +12063379723,,89365372147#,,,,*698110#

Or Telephone:
Dial (for higher quality, dial a number based on your current location):
US: +1 213 338 8477 or +1 206 337 9723 or +1 646 558 8656

Webinar ID: 893 6537 2147
Passcode: 698110

International numbers available: https://mt-gov.zoom.us/u/k5i9vbm0R

Or an H.323/SIP room system:
H.323: 162.255.37.11 (US West) or 162.255.36.11 (US East)
Meeting ID: 893 6537 2147
Passcode: 698110
SIP: 89365372147@zoomcrc.com
Passcode: 698110

The hearing will begin with a brief introduction by department staff to explain the use of the video conference and telephonic platform. All participants will be muted except when it is their time to speak. If you encounter technical issues, please contact the department, by telephone at (406) 444-1388, or by e-mail, DEQOpenCutRulemaking@mt.gov.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or who need an alternative accessible format of this notice. Contact the department, at the telephone number or e-mail in the preceding paragraph, no later than 5:00 p.m., on August 1, 2022, to request an accommodation.

3. GENERAL STATEMENT OF REASONABLE NECESSITY: With several exceptions, these proposed rule amendments and new rules implement amendments to the Opencut Mining Act (Opencut Act) enacted by passage of HB 599 (Sections 2 through 9, Ch. 545) and SB 284 (Sec. 2, Ch. 428) in the 2021 Legislative Session, and SB 343 (Sections 3 through 17, Ch. 334) in the 2019 Legislative Session.

4. The rules proposed to be amended are as follows, stricken matter interlined, new matter underlined:

17.24.201 APPLICABILITY (1) remains the same.

(2) An operator conducting opencut operations must comply with the provisions of a contract or permit issued under the Act and this subchapter. Except as provided in (5) and (6), a permit is required before an operator ~~commences~~ conducts ~~the following~~ opencut operations.~~:~~

~~(a) an opencut operation that results in the removal of more than 10,000 cubic yards of materials and overburden;~~

~~(b) more than one opencut operation where each operation results in the removal of less than 10,000 cubic yards of materials and overburden, but the several operations result in the removal of a total of 10,000 cubic yards or more of materials and overburden; or~~

~~(c) an opencut operation where overburden and materials are removed from a previously mined site and the amount mined, combined with the amount of previously removed materials and overburden, exceeds 10,000 cubic yards.~~

(3) Contracts and permits in effect before ~~March 19, 2016~~ September 27, 2022, need not be amended to comply with rules and rule amendments adopted on ~~March 19, 2016,~~ September 27, 2022. Applications for permits, permit amendments, and permit assignments that the department determined to be complete prior to ~~March 19, 2016~~ September 27, 2022, remain subject to provisions of this subchapter relating to application requirements as they read on the date the department determined the application to be complete.

(4) remains the same.

(5) Except as provided in ARM 17.24.226(5), an operator holding a permit issued under the Act may commence a limited opencut operation that meets the criteria in ARM 17.24.226 and 82-4-431, MCA, after the operator has submitted ~~the~~

a complete limited opencut operation form to the department.

(6) As provided by 82-4-431(3), MCA, a landowner may remove up to 10,000 cubic yards of opencut materials on the landowner's real property for personal or agricultural uses without obtaining a permit unless a removal affects surface water, including intermittent or perennial streams, ground water, or water conveyance facilities. Opencut materials must not be transported outside the borders of the property from which they are mined or adjoining property owned by the same individual or entity.

AUTH: 82-4-422, MCA
IMP: 82-4-431, MCA

REASON: The proposed amendment to (2) proposes to delete existing criteria for determining whether a permit is required to implement Sec. 3, Ch. 545, Laws of 2021, which deleted these criteria from the Opencut Act (82-4-401, et seq., MCA). The criteria for determining when a permit is required is set forth in 82-4-431, MCA, as amended by Sec. 3, Ch. 545, Laws of 2021, and is not repeated in the proposed rule amendment.

The proposed amendment to (3) notifies permitted operators and applicants that the proposed amendments to the subchapter do not apply to permits and applicants determined to be complete as of the effective date of these proposed amendments.

The proposed amendment to (5) is required to specify that a limited opencut operation form submitted by a permitted operator for an operation that meets the criteria of ARM 17.24.226 and 82-4-431, MCA, must be complete, and not incomplete, when submitted in order for the operator to commence operations. The limited opencut operation form is effective upon submission; there is no process for the department to approve the form.

The proposed amendment to (6) implements an exemption from the permitting process for landowners removing up to 10,000 cubic yards of materials created by Sec. 3, Ch. 545, Laws of 2021. The proposed amendment provides that the mined materials may not be removed from the real property owners' property to implement the provision of Sec. 3, Ch. 545, Laws of 2021, requiring the material to be mined for the personal use of the real property owner in order to qualify for the exemption.

17.24.202 DEFINITIONS When used in this subchapter, unless a different meaning clearly appears from the context, the following definitions apply:

(1) through (4) remain the same.

(5) "Dryland permit" means a permit required under 82-4-432(1)(c), MCA and subject to 82-4-432(14), MCA.

(6) "Intermittent stream" means a stream or reach of a stream that is below the local water table for at least some part of the year and obtains its flow from both ground water discharge and surface runoff.

(5) and (6) remain the same but are renumbered (7) and (8).

(9) "Occupied dwelling unit" has the meaning given in 82-4-403, MCA.

(7) through (9) remain the same but are renumbered (10) through (12).

(13) "Perennial stream" means a stream or part of a stream that flows continuously during all of the calendar year as a result of ground water discharge or surface runoff.

(10) through (13) remain the same but are renumbered (14) through (17).

(18) "Standard permit" is a permit that is required under 82-4-432(1)(b), MCA and that is subject to 82-4-432(2) through (13), MCA.

~~(14)~~(19) "Tilling" means breaking up the substrate or soil before seeding to a depth of at least one foot to improve conditions for plant growth.

AUTH: 82-4-422, MCA
IMP: 82-4-403, 82-4-422, 82-4-431, 82-4-432, 82-4-434, MCA

REASON: Reasonable necessity exists to amend ARM 17.24.202 to update definitions and to bring them into compliance with changes to the Opencut Act made by Sections 2 and 4, Ch. 545, Laws of 2021. Because Sec. 4, Ch. 545, Laws of 2021 created two distinct permits, a Standard permit and a Dryland permit, the proposed amended rule proposes new definitions to explain new terms and to provide regulatory clarity to operators and the public.

New (5) and (18) are necessary to implement Sec 4, Ch. 545, Laws of 2021 which created two types of permits to be issued under the Opencut Act. Operations that affect groundwater or surface water or where 10 or more occupied dwelling units are within one-half mile of the permit boundary require a permit which is defined in new (18) as a "standard permit." All other operations required a permit which is defined in new (5) as a "dryland permit."

New (6) and (13) are necessary to define "intermittent stream" and "perennial stream" to implement Sections 3 and 4, Ch. 545, Laws of 2021, which introduced these terms into the Opencut Act to prescribe operations that would affect surface water.

New (9) is necessary to implement Sec. 2, Ch. 545, Laws of 2021, which introduces this term into the Opencut Act to specify how the presence of occupied buildings within half a mile of a proposed permit may influence which type of permit an operator is required to have, and to specify which landowners may request a public meeting for a standard permit.

17.24.212 REVIEW OF AN APPLICATION (1) remains the same.

(2) Except as provided in 75-1-208(4)(b), MCA, within five working days of receipt of an application to conduct opencut operations, the department shall determine and notify the applicant whether the application is complete. A complete application must be submitted on forms provided by the department, or alternative forms approved by the department prior to submission, and must contain the materials and information required by 82-4-432(1) and (2), MCA, and the plan of operation required by ARM 17.24.218 through 17.24.223.

(3) remains the same.

(4) A permit application is acceptable if the materials and information provided to the department demonstrate that the proposed opencut operation complies with requirements of 82-4-432(1) and (2), MCA~~,~~. An application for a standard permit must contain ~~and contains~~ a plan of operation that meets the

requirements of this subchapter.

~~(5) Before determining that an application for a permit is acceptable, the department shall submit a copy of the plan of operation, including site and area maps, to the state historic preservation office for evaluation of possible cultural resources in the proposed permit area. Based on information provided by the state historic preservation office and as required by law, the department may require that the operator sponsor a cultural resources survey by an archaeological professional and provide a plan to protect archeological and historical values on affected lands. Unless prohibited by law, the department shall make available a response received from the state historic preservation office.~~

~~(6)~~(5) A permit must provide that the operator shall comply with the requirements of the Act and this subchapter. Before determining that an application for a permit or amendment is acceptable, the department may condition a permit as necessary to accomplish the requirements of the Act and this subchapter. ~~including, but not limited to, requiring surface water and ground water quality and quantity monitoring before, during, and after opencut operations inside and outside the permit area.~~

(7) remains the same but is renumbered (6).

AUTH: 82-4-422, MCA
IMP: 82-4-402, 82-4-422, 82-4-423, 82-4-431, 82-4-432, 82-4-434, MCA

REASON: The proposed amendment to (2) would allow an applicant the flexibility to submit permit application materials to the department on forms provided by partner agencies which own or manage land on which an operation is proposed to be located, instead of filling out duplicative forms from different agencies for the same operation; the applicant may use alternative application forms provided the applicant obtains the department's approval prior to submission of the forms.

The proposed amendment to (4) requires submission of a plan of operation only in the application for a standard permit, implementing Sec. 4, Ch. 545, Laws of 2021 which does not require submission of a plan of operation in an application for a dryland permit.

The proposed deletion of (5) is necessary to implement Sec. 5, Ch. 545, Laws of 2021. In a plan of operation required for a standard permit, archaeological and historical values on affected land must be given "legally required" protection, replacing the previous requirement that these values be given "appropriate protection".

The proposed amendment to new (5) implements Sec. 5, Ch. 545, Laws of 2021, which removed the monitoring requirements formerly set forth in 82-4-434(2)(n), MCA.

17.24.213 AMENDMENT OF PERMITS (1) through (2)(c) remain the same.

(d) if the application to amend is for a standard permit, a revised plan of operation.

~~(3) For an amendment application solely to extend the reclamation date for a period of no more than five years that is submitted no later than five years after the first approval date of the permit, the applicant shall apply to extend the reclamation~~

~~date on a form provided by the department and provide an updated landowner consultation form.~~

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

AUTH: 82-4-422, MCA
IMP: 82-4-432, 82-4-433, 82-4-434, 82-4-436, MCA

REASON: The proposed amendment to (2)(d) implements Sec. 4, Ch. 545, Laws of 2021,which does not require submission of a plan of operation in an application for a dryland permit.

The proposed amendment deletes (3) to implement Sec. 3, Ch. 545, Laws of 2021, which provides new provisions governing extension of reclamation dates codified at 82-4-431(6)(b)(v)(A) and (B), MCA. Because the application and granting of extensions of reclamation dates are provided by statute, there is no need to address the application and granting of reclamation dates in the administrative rules implementing the Opencut Act.

17.24.214 ANNUAL PRODUCTION REPORT (1) remains the same.

(2) The annual production report must be submitted electronically or on a form provided by the department. The report must list all sites where the operator engaged in permitted, unpermitted, or limited opencut operations and describe the amount of materials removed for each site.

(3) The annual production report must be accompanied by payment of the annual fee, in accordance with 82-4-437, MCA~~,~~. ~~for the sites listed according to (2).~~ The federal government, state of Montana, counties, cities, and towns are exempt from annual fees.

(4) remains the same.

AUTH: 82-4-422, MCA
IMP: 82-4-402, 82-4-434, MCA

REASON: The proposed amendment to (2) would add allow an operator to submit the annual production report form to the department electronically to facilitate the department's move to electronic permitting.

The proposed amendment to (3) would implement Sec. 2, Ch. 428, Laws of 2021, which amended 82-4-405, MCA, to exempt counties, cities, and towns from paying the annual fees required under 82-4-437, MCA.

17.24.218 PLAN OF OPERATION (SITE CHARACTERIZATION, SITE PREPARATION, SOIL AND OVERBURDEN HANDLING, MINING, AND PROCESSING PLANS) AND PERFORMANCE STANDARDS (1) An application for a standard permit or standard permit amendment requires a plan of operation that complies with 82-4-432, MCA and ~~The plan of operation must include~~ includes the following:

(a) through (d)(v) remain the same.

(vi) never stockpile overburden or conduct any opencut operations on areas where soil has not been stripped to the depth required by the permit; and

(vii) remains the same.

(viii) where required by 82-4-434, MCA, berms constructed of soil and/or overburden, must be a minimum of 6 feet high, protected from erosion, commingling, contamination, compaction, and unnecessary disturbance. At the first seasonal opportunity, the operator must shape and seed, with weed-free seed mix, any berm capable of sustaining plant growth;

(e) remains the same.

~~(f) a section describing the hours of operation of the proposed opencut operation. The department may reasonably limit hours to reduce adverse impacts on residential areas. The department may require an operator to keep and maintain a complete and accurate record of the hours operated. The operator shall submit the record to the department within two work days after receipt of a request from the department;~~

(g) remains the same but is renumbered (f).

~~(i) the depths, water levels, and uses of water wells in and within 1,000 feet of the permit area;~~

(ii) remains the same but is renumbered (i).

~~(iii) copies of all available well logs;~~

~~(iv)~~ (ii) the estimated seasonal high and seasonal low water table levels in the permit area and the information sources used, such as landowners, field observations, nearby surface water, and water well logs~~; and~~.

~~(v) in the event that the proposed opencut operation involves or may result in the diversion, capture, or use of water, acknowledgement that the operator consulted with the regional office of the Department of Natural Resources and Conservation, Water Resources Division, concerning the requirements to obtain water rights and possible adverse impacts to existing water rights;~~

~~(h) a water quality protection and management section that includes:~~

~~(i) a description of the source, quantity, storage, use, and discharge of water to be used for opencut operations;~~

~~(ii) an explanation of measures to prevent pollution of state waters or impairment of a water right including, but not limited to:~~

~~(A) an explanation of water management and erosion control plans for stormwater, ground water, and surface disturbances that discharge off-site or intercept any waterway with a defined channel; and~~

~~(B) an explanation of proposed measures to protect the water rights of other parties or to replace an adversely affected water source that has a beneficial use;~~

~~(iii) a statement that the operator will keep non-mobile equipment above the seasonal high water level of surface water and ground water;~~

~~(i) a spill prevention and management section that includes a statement that the operator will:~~

~~(i) install or construct fuel storage containment structures in accordance with the current codes adopted by the state fire marshal for each single-wall, non-mobile, fuel storage tank placed and used in and within 300 feet of the permit area; and~~

~~(ii) routinely inspect and maintain these tanks to prevent leaks and spills, retrieve and discard spilled fuel and contaminated materials in a lawful manner, and report to the department a fuel spill that reaches state waters, as defined in 75-5-103, MCA, or is greater than 25 gallons;~~

(j) remains the same but is renumbered (g).

(i) opencut operations may not occur within ~~a~~ prohibited ~~area~~ areas described in the permit; ~~for purposes that include, but are not limited to, reclamation of a highwall or protection of an easement, a right of way, a drainage, or a waterway area;~~

(ii) and (iii) remain the same.

~~(k) an additional impacts section that includes:~~

~~(i) a description of the methods and materials to be used to minimize impacts, as necessary, on the residential areas and structures identified under ARM 17.24.221(4)(h);~~

~~(ii) repair or replacement of man-made structures affected by opencut operations within the permit area; and~~

~~(iii) identification of other opencut operation impacts not addressed in other sections of the plan of operation;~~

(l) and (l)(i) remain the same but are renumbered (h) and (h)(i).

~~(ii) take proper precautions to prevent wildfires;~~

~~(iii) provide appropriate protection for cultural resources that could be affected by opencut operations; and~~

~~(iv)~~(ii) promptly notify the state historic preservation office ~~should~~ if ~~such resources~~ archaeological or historical values are ~~be~~ found.

(2) An application for a dryland permit or to amend a dryland permit does not require submission of a plan of operation.

(2) and (3) remain the same but are renumbered (3) and (4).

AUTH: 82-4-422, MCA
IMP: 82-4-402, 82-4-422, 82-4-423, 82-4-431, 82-4-432, 82-4-434, MCA

REASON: The proposed amendment to (1) implements Sec. 4, Ch. 545, Laws of 2021, which requires an application for a standard permit to include a plan of operation but not an application for a dryland permit. The proposed amendment also clarifies that a plan of operations must satisfy the requirements of 82-4-432, MCA, in addition to the requirements of (1).

The proposed amendment adds new (1)(d)(viii) to implement Sec. 5, Ch. 545, Laws of 2021, which requires the construction of berms between the opencut operation and residences located within 300 feet of the permit boundary.

The proposed amendment deletes (1)(f) to implement Sec. 5, Ch. 545, Laws of 2021, which deleted the requirement that a plan of operation include reasonable limits on hours of operation.

The proposed amendment deletes (1)(g)(i), (iii), and (v) to implement Sec. 5, Ch. 545, Laws of 2021, which removed the requirement that a plan of operation include appropriate protection of surface and ground water from deterioration of water quality and quantity.

The proposed amendment to (1)(g)(iv) adds "nearby surface water" to the list of other information required to be included in the water resources section to provide adequate information for the department to assess potential impacts to surface water that might result from approval of an application.

The proposed amendment deletes (1)(h) to implement Sec. 5, Ch. 545, Laws of 2021, which removed the requirement that a plan of operation included appropriate protection of surface and ground water from deterioration of water quality and quantity.

The proposed amendment to (1)(j)(i) deletes the requirement that a plan of operations contain a spill and management provision to remove duplicative regulation. A permittee would still be required to follow all applicable local and state codes and laws regarding spill containment and reporting.

The proposed amendment deletes (1)(k) to implement Sec. 5, Ch. 545, Laws of 2021, which deleted the requirement that a plan of operation included additional procedures necessary to prevent significant physical harm to the affected land or adjacent land, structures, improvements, or life forms.

The proposed amendment deletes (1)(l)(ii) to implement Sec. 5, Ch. 545, Laws of 2021, which deleted the requirement that a plan of operations provide that the opencut operation be conducted to avoid range and wild land fires.

The proposed amendment deletes (1)(l)(iii) to implement Sec. 5, CH. 545, Laws of 2021, under which archaeological and historical values on affected land are to be given "legally required" protection, replacing the previous requirement that these values are to be given "appropriate protection."

The proposed amendment revises language in (1)(l)(iv) to improve syntax; no substantive change is intended.

The proposed amendment adds new (2) to implement Sec. 4, Ch. 545, Laws of 2021, which requires an application for a standard permit to include a plan of operation but not an application for a dryland permit.

17.24.219 PLAN OF OPERATION, RECLAMATION PLAN, AND PERFORMANCE STANDARDS (1) An application for a dryland permit or to amend a dryland permit does not require a plan of operation. An application for a standard permit or to amend a standard permit must include a plan of operation that complies with 82-4-434, MCA and ~~The plan of operation must include~~ the following: ~~site reclamation plan commitments and information:~~

(a) a postmining land uses section that includes a description of the type, location, and size of each postmining land use area in the permit area. Postmining land use types include, but are not limited to, internal roads, material stockpile areas, ~~water source~~ pond, wetland, ~~fish pond,~~ riparian area, grassland, rangeland, shrubland, woodland, pasture, hayland, cropland, wildlife habitat, recreation site, and residential, commercial, and industrial building sites;

(b) through (c)(v) remain the same.

(vi) ~~replace all soil, and overburden if sufficient soil is unavailable, to a minimum depth of 24 inches or to another depth approved in writing by the department and record the average thicknesses of soil replaced;~~ if available, up to 24 inches of soil and overburden must be stripped, salvaged, and replaced for reclamation. If overburden is a mine material or will be used as binder, an appropriate quantity must first be stripped and salvaged to satisfy the soil plus overburden replacement thickness requirement (24 inches cumulative);

(vii) through (2) remain the same.

AUTH: 82-4-422, MCA
IMP: 82-4-402, 82-4-422, 82-4-423, 82-4-431, 82-4-432, 82-4-434, MCA

REASON: The proposed amendments to (1) implements Sec. 5, Ch. 545, Laws of 2021, which requires an application for a standard permit to include a plan of operation but not an application for a dryland permit. The proposed amendment to (1) clarifies that the plan of operation must comply with the provisions of 82-4-434, MCA, and (1).

The proposed amendment to (1)(c)(vi) recognizes that in some instances, there may not be sufficient soil and overburden to replace soil and overburden to a minimum 24-inch depth. Furthermore, before overburden is mined material or will be used as binder, soil and overburden must first be stripped and stockpiled in sufficient quantities to satisfy the minimum 24-inch depth requirement. These provisions are necessary to ensure that successful revegetation can occur as required by 82-4-434(2)(g) and (h), MCA (2021).

17.24.220 ~~PLAN OF OPERATION--~~RECLAMATION BOND CALCULATION

(1) For all permits and amendments, a ~~A~~ proposed reclamation bond calculation must be submitted ~~as part of the plan of operation~~ on a form provided by the department or in another format approved by the department in writing. The bond amount must be based on a reasonable estimate of the cost for the department to procure the services of a third-party contractor to reclaim, in accordance with this subchapter ~~and the plan of operation~~, the anticipated maximum disturbance during the life of the bonded opencut operation, including equipment mobilization, contractor profit, and overhead costs. The department shall review the proposed bond calculation and make a final determination.

(2) The estimate of the reclamation costs must address the following considerations:

(a) the requirements for reclamation provided in [New Rule III], ARM 17.24.219, and 82-4-434, MCA;

(b) replacement of all soil ~~(~~and overburden ~~if sufficient soil is unavailable) to a minimum depth of 24 inches or to another depth approved in writing by the department;~~ as described in [New Rule III] and ARM 17.24.219;

(c) the ~~plan of operation and the~~ permit application; and

(d) through (4) remain the same.

AUTH: 82-4-422, MCA
IMP: 82-4-405, 82-4-431, 82-4-432, 82-4-433, 82-4-434, MCA

REASON: The proposed amendment to (1) implements Sec. 5, Ch. 545, Laws of 2021, which requires an application for a standard permit to include a plan of operation but not an application for a dryland permit. The requirement for submission of a reclamation bond calculation is keyed off an application for a permit or permit amendment, which applies to both standard and dryland permits, rather than submission of a plan of operation which would apply only to an application for a standard permit or permit amendment. The proposed amendment to (2)(a) adds a reference to the reclamation requirements set forth in New Rule III. The reclamation

cost estimates must include costs covering the reclamation requirements set forth in New Rule III so that the department has sufficient funds to perform the reclamation in the event of bond forfeiture.

The proposed amendment to (2)(b) replaces language describing the required depth of soil and overburden replacement with references to New Rule III and ARM 17.24.219. New Rule III and ARM 17.24.219(1)(c)(vi) provide soil and overburden reclamation requirements for dryland permits and standard permits, respectively. The proposed amendment to (2)(c) deletes the term "plan of operation" to implement Sec. 5, Ch. 545, Laws of 2021, which does not require a plan of operation to be included in an application for a dryland permit. Reference to the "permit application" is sufficient to require the reclamation cost estimate to consider a plan of operation associated with a standard permit because the application for a standard permit is required to include the plan of operation.

17.24.221 PLAN OF OPERATION--MAPS (1) For a standard permit or standard permit amendment, a plan of operation must comply with 82-4-434(2), MCA and include: ~~An application must include~~ a site map, area map, reclamation map, location map, and other maps necessary to describe the proposed opencut operation. Except as provided in (6), maps submitted to the department in accordance with this subchapter must be legible, on an air-photo base, and in a scale sufficient to clearly describe the subject matter. An application supported by a map submitted in an electronic format that is incompatible with the department's systems, that cannot be reviewed, or that is otherwise illegible is not acceptable. A map submitted in other than electronic format must fill an 8 1/2- by 11- or 11- by 17-inch sheet leaving margins of approximately 1/2 inch.

(2) remains the same.

(3) Site maps must show and identify the following existing and proposed features as applicable:

(a) through (e) remain the same.

~~(f) sedimentation ponds and other water quality control structures;~~

(g) through (q) remain the same but are renumbered (f) through (p).

~~(r) existing and proposed monitoring well locations;~~

(s) through (s)(iv) remain the same but are renumbered (q) through (q)(iv).

(v) all surface waters including, but not limited to, ponds, lakes, wetlands, and defined and/or eroded channels of waterways including, but not limited to, rivers, creeks, intermittent or perennial streams, drainages, ditches, water conveyance facilities, and other waterways;

~~(t)~~(r) above and below ground utilities and easements within the permit boundary;

~~(u)~~(s) roads crossing areas where opencut activities are prohibited by ARM 17.24.218(1)(g)~~(j)~~ ~~at a 90-degree angle or as close to a 90-degree angle as site conditions allow~~;

(v) through (y) remain the same but are renumbered (t) through (w).

(4) through (4)(b) remain the same.

(c) water wells based on readily available information, and other water conveyance facilities;

(d) natural and man-made drainage features including, but not limited to,

~~ephemeral,~~ intermittent~~, and~~ or perennial streams, wetlands, ponds, springs, ditches, and impoundments in and within 500 feet of access roads and show the defined and/or eroded channel of any such feature and any setback areas, along with a description of the use of any man-made feature;

(e) remains the same.

~~(f) above and below ground utilities;~~

(g) remains the same but is renumbered (f).

~~(h)~~(g) ~~residential areas and structures that could be impacted by opencut operations, such as inhabitable dwellings and commercial and industrial facilities~~ residences located within 300 feet of the permit boundary; and

(i) remains the same but is renumbered (h).

(5) remains the same.

(6) The location map may be on an aerial or topo base and must show the site's location in relation to the nearest town~~,~~ or city, ~~or major intersection~~ and be sufficient to allow the public to locate the proposed site.

(7) For all permits and amendments, complete ~~Complete~~ and accurate maps must be submitted. The department may require that part or all of the area in and within 500 feet of permitted access roads and 1,000 feet of the permit area be surveyed to provide sufficient map detail and accuracy.

(8) remains the same.

AUTH: 82-4-422, MCA
IMP: 82-4-402, 82-4-422, 82-4-423, 82-4-431, 82-4-434, MCA

REASON: The proposed amendment to (1) implements Sec. 4, Ch. 545, Laws of 2021, which requires an application for a standard permit to include a plan of operation but not an application for a dryland permit. Thus, the mapping requirements in this administrative rule are tied to applications for a standard permit that include a plan of operation, rather than to all permit applications.

The proposed amendment deletes (3)(f) to implement Sec. 5, Ch. 545, Laws of 2021, which deleted the requirement that a plan of operation provide 1) reasonable devices to control water drainage and sediment, and 2) appropriate protection of surface and ground water from deterioration of water quality or quantity.

The proposed amendment deletes (3)(r) to implement Sec. 5, Ch. 545, Laws of 2021, which deleted the requirement that a plan of operation include additional procedures, including monitoring, to prevent significant physical harm to the affected or adjacent land, structures, improvements, or life forms.

The proposed amendments to (3)(s)(v) are necessary to delineate the types of surface water features that must be shown on site maps in the plan of operation submitted with an application for a standard permit. These amendments are necessary to implement Sec. 4, Ch. 545, Laws of 2021, which requires that an application for a standard permit be submitted for all operations which affect ground water or surface water, including intermittent or perennial streams, or water conveyance facilities. The proposed amendments would also implement New Rule II, which sets forth setback requirements for surface waters.

The proposed amendment to (3)(t) clarifies that site maps must show only those above and below ground utilities and easements that are within the permit

boundary to eliminate the need for operators to provide the department with unessential information.

The proposed amendment to (3)(u) also deletes the requirement that the site map show the above-described road crossing areas at a 90-degree angle or as close to a 90-degree angle as site conditions allow to provide operators the flexibility to plan road crossings based on site-specific conditions.

The proposed amendment to (4)(c) requires the operator to submit a map of water wells within 1,000 feet outside of the permit boundary to provide adequate information for the department to assess potential impacts to surface water that might result from approval of an application. The proposed amendment to (4)(c) also implements Sec. 4, Ch. 545, Laws of 2021, which requires a plan of operation to provide for procedures to prevent physical harm to water conveyance facilities or that allow the owner of a water conveyance facility to authorize in writing the relocation or disturbance of the water conveyance facility.

The proposed amendment to (4)(d) deletes the requirement that ephemeral streams be shown on the area map. No provision of the Opencut Act addresses ephemeral streams. Sec. 4, Ch. 545, Laws of 2021, requires an operation that may affect surface water, including intermittent or perennial streams, to obtain a standard permit. Under New Rule II, surface water includes perennial or intermittent streams.

The proposed amendment to (4)(f) eliminates the redundant provision requiring above and below ground utilities to be shown on the area map. Above and below ground utilities are required to be identified on site maps under the proposed amendment to ARM 17.24.221(3)(r).

The proposed amendment to (4)(h) implements Sec. 5, Ch. 545, Laws of 2021, which requires a plan of operation to provide for the construction of berms between the opencut operation and residences located within 300 feet of the permit boundary.

The proposed amendment to (6) eliminates the requirement that a location map show the site's location in relation to the nearest major intersection. Requiring the applicant to show the location of the operation in relation to the nearest town or city is sufficient for the department and the public to determine the location of the operation.

The proposed amendment to (7) makes it clear that complete and accurate maps must be submitted in all applications for permits and permit amendments.

17.24.222 ~~PLAN OF OPERATION~~ ADDITIONAL INFORMATION AND CERTIFICATION (1) The department may require that an operator provide additional information ~~for the plan of operation~~ that includes, but is not limited to:

(a) through (d) remain the same.

(e) ~~fish and wildlife surveys and assessments~~ water conveyance facilities.

(2) remains the same.

(3) ~~The plan of operation~~ All applications for permits and amendments must include a statement signed and dated by the operator certifying that:

(a) and (b) remain the same.

(c) the operator will follow and adhere to the ~~plan of operation and all other~~ requirements ~~of the operator~~ described in the application and the permit and ~~as~~ any

amendments to the permit. ~~may be amended by the department in accordance with the Act and this subchapter.~~

AUTH: 82-4-422, MCA
IMP: 82-4-402, 82-4-422, 82-4-423, 82-4-431, 82-4-432, 82-4-434, 82-4-436, MCA

REASON: The proposed amendments to (1)(a) and (3) implement Sec. 5, Ch. 545, Laws of 2021, which requires an application for a standard permit to include a plan of operation but not an application for a dryland permit. Thus, the authority for the department to require additional information cannot be specifically tied to submission of a plan of operation. Because the department intends to retain discretion to require additional information and certification for all permits, the phrase "plan of operation" is removed. By deleting the phrase "plan of operation," (1) would apply to all permit applications, not just permit applications that include a plan of operation.

The proposed amendment to (1)(e) deletes "fish and wildlife surveys and assessments" to implement Sec. 5, Ch. 545, Laws of 2021, which removed the requirement that a plan of operation include additional procedures to prevent significant physical harm to life forms from the Opencut Act, formerly codified at 82-4-434(2)(n), MCA.

The proposed amendment to (3)(c) simplifies the rule by simply stating an operator is required to follow any amendments to the permit. The phrase "as may be amended by the department in accordance with the Act and this subchapter" is unnecessary because a permit amendment requires the department's approval.

17.24.226 ADMINISTRATIVE REQUIREMENTS FOR LIMITED OPENCUT OPERATIONS (1) An operator holding an opencut permit may conduct a limited opencut operation (LOO) that meets the criteria in 82-4-431(2), MCA, without first obtaining an additional permit or an amendment to an existing permit when, prior to commencing the limited opencut operation, the operator completes and submits to the department appropriate site and opencut operation information on a limited opencut operation form provided by the department.

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

(e) plans to expand or continue the limited opencut operation in accordance with 82-4-431~~(4)~~, MCA;

(f) through (3) remain the same.

(4) A person conducting a limited opencut operation~~, authorized under~~ must comply with the requirements of 82-4-431(2), MCA. ~~,may not remove more than~~ The amount of materials and overburden removed from the site cannot exceed 10,000 cubic yards ~~of materials and overburden~~ and the total area from which the materials and overburden are removed cannot exceed five acres. This limitation does not include the volume of soil and overburden that is stripped and stockpiled on the limited opencut operation site for site reclamation.

(5) remains the same.

AUTH: 82-4-422, MCA

IMP: 82-4-431, MCA

REASON: The proposed amendment to (1) provides the acronym "LOO" for "limited opencut operation" to provide a short-hand reference to the type of opencut operation described in 82-4-431(2), MCA. This short-hand reference is already used by the department and the regulated community.

The proposed amendment to (2)(e) deletes reference to subsection (4) of 82-4-431, MCA, because the provisions of that subsection are now set forth in 82-4-431(2)(c)(i), MCA, following enactment of Sec. 3, Ch. 545, Laws of 2021.

The proposed amendment to (4) clarifies that a limited opencut operation must be conducted in compliance with 82-4-431(2), MCA. The proposed amendment also adds the requirement that a limited opencut operation may not remove material and overburden from an area that exceeds five acres. This acreage limitation along with the volume limitation already included in the rule are the hallmarks of a limited opencut operation.

5. The proposed new rules are as follows:

NEW RULE I ADDITIONAL REQUIREMENTS FOR SOIL MINES (1) In addition to the requirements imposed by ARM 17.24.203, 17.24.206, and 17.24.218 through 17.24.222, the operator must submit, as part of the application for soil mining, soil and overburden characterization and handling sections as specified in ARM 17.24.218(1)(c) and (d).

(2) The operator must salvage the top 24 inches of soil for reclamation, or if the operator intends to mine any portion of the top 24 inches of soil, the operator must provide testing and analysis demonstrating that a minimum of 24 inches of growth media remains and that it is capable of supporting the proposed postmining land use. Required analysis of the remaining 24 inches of soil and overburden must include:

(a) pH;
(b) electrical conductivity;
(c) sodium adsorption ratio;
(d) percent sand, silt, clay, and rock; and
(e) additional characteristics the department may require.

(3) A soil analysis required under (2) must describe:

(a) the identifying number and depth of each sample taken;
(b) the methods by which the samples were taken;
(c) the names and addresses of the persons who took the samples;
(d) the analytical methods used; and
(e) the names and addresses of the persons who analyzed the samples.

(4) A soil analysis required by (2) must be accompanied by a map that describes:

(a) the soil types identified in the top 24 inches removed from the site;
(b) the soil types identified in the 24 inches to remain for reclamation;
(c) the location and depth of each sample taken;
(d) thicknesses of soil and overburden to be stripped for each soil type; and
(e) the dominant vegetative species present on each soil type.

(5) A soil analysis required under (2) must include within the application the above sampling information and a detailed summary that demonstrates the remaining soil can meet the proposed postmining land use.

AUTH: 82-4-422, MCA
IMP: 82-4-432, 82-4-434, MCA

REASON: Proposed New Rule I provides reclamation requirements that are specific to operators that mine soil materials. This proposed rule requires operators that mine soil materials to either strip the top 24 inches of soil, salvage it, and use it for reclamation, or if an operator plans to mine any portion of the top 24 inches of soil, demonstrate that at least 24 inches of growth media that will support the post-mining land use remains. This ensures that the reclaimed area will support vegetative re-growth as required by 82-4-434(2)(b) and (g), MCA.

NEW RULE II SURFACE WATER SETBACK REQUIREMENTS (1) Dryland opencut mining operations must:

(a) not affect surface water, including but not limited to, perennial or intermittent streams;

(b) have a permit boundary that is a minimum of 50 feet from the edge of the high water mark of surface water, or as otherwise approved by the department, including but not limited to, perennial or intermittent streams.

(2) Standard opencut mining operations with a permit boundary that is located less than 50 feet from the edge of the high water mark of surface water, including but not limited to perennial or intermittent streams, must follow the Stream/Waterway Worksheet and include specific, detailed design criteria in the application demonstrating:

(a) a productive postmining land use can be achieved; and

(b) defined channels can be reconnected to undisturbed drainages/waterways in a stable manner to ensure downstream flow is maintained.

(3) Limited opencut operations (LOOs) may not:

(a) affect surface water, including but not limited to, perennial or intermittent streams;

(b) conduct operations within 50 feet of the edge of the high water mark of surface water, including but not limited to, perennial or intermittent streams.

AUTH: 82-4-422, MCA
IMP: 82-4-431, 82-4-432, MCA

REASON: Proposed New Rule II implements Sections 3 and 4, Ch. 545, Laws of 2021. Reasonable necessity exists to adopt this rule because limited opencut operations (LOOs) and dryland operations cannot affect surface water. The 50-foot setback for LOOs and dryland operations is a reasonable, "bright-line" rule which will make it easier for operators to avoid affecting surface water. The proposed "bright-line" rule will also make it faster and simpler for the department to process LOO forms and dryland permit applications, and to determine and enforce violations. Additionally, the rule requires standard permit operations with boundaries

located less than 50 feet from a high water mark to complete the Stream/Waterway worksheet to show that a productive postmining land use can be achieved as required by 82-4-434(2)(a), MCA.

NEW RULE III REQUIREMENTS FOR DRYLAND PERMIT APPLICATIONS AND RECLAMATION (1) Dryland permits must meet all the application requirements of 82-4-432(14), MCA.

(2) Before submitting a dryland permit application, an operator must provide public notice. The applicant must:

(a) post notice of the following in at least two prominent locations at the proposed opencut site, including near a public road if possible:

(i) applicant's name, address, and telephone number;

(ii) proposed permitted acreage;

(iii) type of material to be mined; and

(iv) proposed reclamation date;

(b) mail the notice to surface landowners of land located within one-half mile of the boundary of the proposed opencut permit area using the most current known owners of record as shown in the records of the county clerk and recorder for the county where the proposed opencut operation is located. The mailed notice must include the following:

(i) applicant's name, address, and telephone number;

(ii) location map meeting the requirements of ARM 17.24.221;

(iii) proposed permitted acreage;

(iv) type of material to be mined; and

(v) proposed reclamation date;

(c) publish a notice at least twice, a minimum of a week apart, in a newspaper of general circulation in the locality of the proposed opencut operation. The published notice must include the following:

(i) applicant's name, address, and telephone number;

(ii) location map meeting the requirements of ARM 17.24.221;

(iii) proposed permitted acreage;

(iv) type of material to be mined; and

(v) proposed reclamation date.

(3) If available, up to 24 inches of soil and overburden must be stripped, salvaged, and replaced for reclamation. If overburden is a mine material or will be used as binder, an appropriate quantity must first be stripped and salvaged to satisfy the soil plus overburden replacement thickness requirement (24 inches cumulative).

(4) The operator must complete phase I reclamation and begin phase II reclamation on any area that the operator no longer needs for opencut operations or no longer has the right to use, within one year after the cessation of such operations or termination of such right. The operator must request release using forms provided by the department. If it is not practical for the operator to reclaim a certain area until other areas are also available for reclamation, the operator may propose an alternate reclamation schedule.

(5) Boundary markers and road markers must be placed so that no fewer than two consecutive markers are readily visible in any direction from any point on a

line. The following requirements apply to marking boundaries and permitted access roads to be improved or constructed:

(a) markers must be in place before submitting an application for a permit or a permit amendment;

(b) markers should be durable, stout posts made of steel, wood, or similar high-quality materials. A prominent, permanent feature such as a pole, tree, or large rock may also serve as a marker. Each marker, whether man-made or natural, must be painted or flagged;

(c) road markers may be removed as the road is constructed, but each boundary marker must be maintained in place and readily visible until the adjacent permit area is reclaimed and released;

(d) the following areas and features must be marked according to this rule:

(i) proposed permit or proposed amended permit boundaries;

(ii) non-bonded areas;

(iii) proposed permitted access roads to be improved or constructed;

(iv) phase I release areas previously approved by the department; and

(v) before submission of an application for bond release, areas that are the subject of an application for phase I or phase II bond release; and

(vi) the requirements of (5) do not apply to active hayland, cropland, or existing roads to be permitted.

(6) Where required by 82-4-434, MCA, berms constructed of soil and/or overburden must be a minimum of 6 feet high, protected from erosion, commingling, contamination, compaction, and unnecessary disturbance. At the first seasonal opportunity, the operator must shape and seed, with weed-free seed mix, any berm capable of sustaining plant growth.

(7) The only map required for a dryland permit is a location map as described in ARM 17.24.221(2) and (6).

AUTH: 82-4-422, MCA
IMP: 82-4-432, MCA

REASON: Proposed New Rule III implements Sec. 3, Ch. 545, Laws of 2021, by setting forth the permitting and reclamation requirements for dryland permits.

The proposed rule's notice requirements are necessary to inform the public and specific landowners located within one-half mile of the proposed permit boundary of the proposed dryland opencut operation.

The proposed rule also requires the salvage and replacement of an adequate quantity of soil to support vegetative regrowth as required by 82-4-434(2)(b) and (g), MCA.

The proposed rule specifies the timeline for completing phase I reclamation and beginning phase II reclamation to ensure that concurrent reclamation is being performed as required by 82-4-434(2)(i), MCA.

In addition, the proposed rule requires the placement and maintenance of boundary markers so that the area disturbed by the permittee does not exceed the area permitted to be disturbed.

Finally, the proposed rule specifies dimensions and maintenance of berms required under 82-4-434(2)(k), MCA.

6. Concerned persons may submit their comments either orally or in writing at the hearing. Written comments may also be submitted to the Department of Environmental Quality, at 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana 59620-0901; faxed to (406) 444-4386; or emailed to DEQOpenCutRulemaking@mt.gov, no later than 5:00 p.m., August 8, 2022. Mailed comments must be postmarked on or before that date.

7. An electronic copy of this proposal notice is available through the Secretary of State's web site at http://sosmt.gov/ARM/Register.

8. Lee McKenna, attorney for the department, has been designated to preside over and conduct this hearing.

9. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list must make a written request with their name, e-mail, and mailing address and specifying the program(s) of interest. Notices will be sent by e-mail unless otherwise requested. Written requests for notices of rulemaking actions may be submitted to the department by regular mail, e-mail, or in person at any rules hearing held by the department.

10. The bill sponsor contact requirements of 2-4-302, MCA, apply. The bill sponsor was notified by letter dated April 29, 2022, and sent by regular mail.

11. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment and adoption of the above-referenced rules will significantly and directly beneficially impact small businesses because HB 599 streamlined opencut permitting processes, and the new rules and proposed amendments to existing rules implement those changes.

/s/ Edward Hayes
EDWARD HAYES
Rule Reviewer

/s/ Christopher Dorrington
CHRISTOPHER DORRINGTON
Director
Department of Environmental Quality

Certified to the Secretary of State June 28, 2022.

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the adoption of New Rule I pertaining to temporary water quality standards variances	))))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION (WATER QUALITY)

TO: All Concerned Persons

1. On August 18, 2022, at 10:00 a.m., the Department of Environmental Quality (department) will hold a public hearing in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed adoption of the above-stated rule.

DEQ is committed to preventing the spread of COVID-19 and promoting the health and wellness of others. Members of the public may participate either in-person or virtually. For in-person meetings, while face masks are not required, meeting attendees are welcome to wear masks. If you are not feeling well, please do not attend the in-person meeting. Registration with Zoom may be made at the following link: Join Zoom Meeting

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Please contact Loryn Johnson, paralegal, at the Department of Environmental Quality at (406) 444-1388 or Loryn.Johnson2@mt.gov should you encounter any difficulties.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Loryn Johnson, paralegal, no later than 5:00 p.m. on August 12, 2022, to advise us of the nature of the accommodation that you need. Please contact Loryn Johnson at the Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-1388; fax (406) 444-4386; or e-mail Loryn.Johnson2@mt.gov.

3. The rule proposed to be adopted provides as follows:

NEW RULE I TEMPORARY WATER QUALITY STANDARDS VARIANCES

(1) The department may issue a temporary variance from a water quality standard in compliance with this rule and 40 CFR 131.14.

(2) To obtain a temporary variance, a permittee shall submit to the department an application that:

(a) identifies the pollutant(s) for which the variance is sought;

(b) identifies the applicable variance factor(s) under 40 CFR 131.14(b)(2)(i)(A)(1);

(c) identifies the permittee by name, address, and telephone number;

(d) identifies the permitted activity;

(e) identifies the receiving water body;

(f) demonstrates to the department's satisfaction that the requirements of (1) are met;

(g) demonstrates that the variance will not result in a lowering of currently attained, ambient water quality;

(h) demonstrates that the permittee cannot reasonably expect to meet a water quality standard during the permit term for which the variance is requested;

(i) demonstrates that a permit compliance schedule is not feasible to preclude the need for a variance during the permit term for which the variance is requested;

(j) includes an optimization study evaluating facility operations and infrastructure that maximize pollutant reduction; and

(k) proposes, with supporting documentation, the term of the variance and a variance level that is:

(i) the highest attainable interim standard in the receiving water body;

(ii) the interim effluent condition that reflects the greatest pollutant reduction achievable; or

(iii) if no additional feasible pollutant control technology can be identified, the interim standard or effluent condition that reflects the greatest pollutant reduction achievable with the pollutant control technologies installed at the time the variance is submitted. For a variance under this subsection, the permittee shall prepare and implement a pollutant minimization plan that contains a structured set of activities to improve processes and pollutant controls that will prevent and reduce pollutant loading.

(3) The department shall review each application to determine whether a reasonable alternative is available that would eliminate the need for the variance. Reasonable alternatives include:

(a) a permit compliance schedule;

(b) reuse, trading, recharge, or land application of the pollutant;

(c) a TMDL for the pollutant requiring the permittee to meet an established waste load allocation; or

(d) other department or permittee actions.

(4) If the department makes a preliminary finding that a reasonable alternative to approving a variance is available, the department shall consult with the applicant prior to making a decision regarding the variance.

(5) If the department determines that no reasonable alternative to a variance exists, the department shall determine whether the information provided by the applicant meets the requirements of (1) and (2). If the department makes a preliminary finding that the requirements of (1) and (2) are met, the department shall conduct a hearing following no less than 45 days' notice to the public. All written or oral public comments related to the variance shall be presented to the department during this public comment period. Following the public comment period, the department shall deny, approve, or approve with conditions the requested variance. An approved variance shall require the implementation of optimization study actions identified in (2)(j) as terms and conditions of the MPDES discharge permit.

(6) Within 30 days after approval of the variance, the department shall submit the variance and any supporting documentation and analysis to EPA. For new approvals or modifications, the variance is not approved for federal Clean Water Act purposes until EPA notifies the department that the variance complies with the federal Clean Water Act, 33 USC 1251, et seq.

(7) The variance may be used to develop MPDES permit limits. A permit incorporating a variance issued by the department under this rule is subject to ARM Title 17, chapter 30, subchapter 13.

(8) For a variance with a term greater than five years, the variance must be reviewed by the department every five years after EPA approval to reevaluate the conditions in (2)(k). Based on this review, the department may terminate, continue, or modify the variance. To continue or modify the variance, the permittee shall provide information demonstrating compliance with (1) and (2).

(9) Based on the review conducted under (8), the department may approve the variance with any modifications after public comment and public hearing under (5). Within 30 days after department approval of the variance, the department shall submit the variance and any supporting analysis to EPA. The variance is not approved for federal Clean Water Act purposes until EPA notifies the department that the variance complies with the federal Clean Water Act, 33 USC 1251, et seq.

(10) The department may decide of its own volition to issue a temporary water quality standards variance that is applicable to individual or multiple dischargers, pursuant to the procedures and requirements of this rule.

(11) The department adopts and incorporates by reference 40 CFR 131.14 (July 1, 2021).

(12) A copy of 40 CFR 131.14 may be obtained from the Department of Environmental Quality, P.O. Box 200901, Helena, MT 59601-0901.

AUTH: 75-5-320, MCA
IMP: 75-5-320, MCA

REASON: Section 75-5-320, MCA, gives the department authority to adopt rules providing criteria and procedures for the department to issue temporary variances to water quality standards, under certain conditions. NEW RULE I sets forth these criteria and procedures. Section 75-5-320, MCA, was enacted during the 2019 regular session of the Montana Legislature and provides the means for dischargers to qualify for water quality standards variances under state law and as provided in federal law at 40 CFR 131.14 (the federal regulation for water quality standards variances). For purposes of consistency with federal law, NEW RULE I adopts 40 CFR 131.14 by reference.

A water quality standards variance is a time-limited water quality standard for a specific pollutant(s) or water quality parameter(s) that reflects the highest attainable condition during the term of the variance. When a variance is approved, the goal remains full attainment of the underlying beneficial use and criterion from which the variance is sought, and all other applicable standards not specifically addressed by the water quality standards variance remain applicable.

Under NEW RULE I, a variance may be granted for one of the six factors referenced at 40 CFR 131.14(b)(2)(i)(A)(1). Under 75-5-313, MCA (now repealed), the department has approved water quality standards variances for nutrients under the variance factor providing relief from permit limits based on substantial and widespread economic and social impacts. The department continues to see a critical need to use variances to regulate the discharges of nutrients, whether such variances are from narrative or numeric nutrient standards. The requirement to meet water quality standards can result in substantial and widespread economic and social impacts on an affected community. Temporary water quality standards variances under NEW RULE I provide a means to preclude these economic and social impacts because a variance can be based on affordability. The affordability evaluation ensures that dollars expended for purposes of meeting a water quality standard are kept to a feasible level for a community.

When the department approves a variance, it must also be submitted to the U.S. Environmental Protection Agency (EPA) for their approval under the federal Clean Water Act. Once approved, the water quality standards variance will apply for purposes of developing permit limits in discharge permits. NEW RULE I also requires the department to conduct a hearing and provide no less than 45 days' notice to the public prior to approving a variance. Finally, under NEW RULE I, the department must also review any issued variance every five years to determine if the variance should continue, be modified, or if the variance is no longer necessary.

4. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Loryn Johnson, paralegal, Department of Environmental Quality, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana 59620-0901; faxed to (406) 444-4386; or e-mailed to loryn.johnson2@mt.gov, no later than 5:00 p.m.,

August 22, 2022. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

5. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding: air quality; hazardous waste/waste oil; asbestos control; water/wastewater treatment plant operator certification; solid waste; junk vehicles; infectious waste; public water supply; public sewage systems regulation; hard rock (metal) mine reclamation; major facility siting; opencut mine reclamation; strip mine reclamation; subdivisions; renewable energy grants/loans; solar and wind energy bonding, wastewater treatment or safe drinking water revolving grants and loans; water quality; CECRA; underground/above ground storage tanks; MEPA; or general procedural rules other than MEPA. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to Loryn Johnson, Paralegal, Department of Environmental Quality, 1520 E. Sixth Ave., P.O. Box 200901, Helena, Montana 59620-0901, faxed to the office at (406) 444-4386, e-mailed to Loryn Johnson at Loryn.Johnson2@mt.gov, or may be made by completing a request form at any rules hearing held by the board.

6. Kurt R. Moser, attorney for the department, or another department attorney, has been designated to preside over and conduct the hearing.

7. The bill sponsor contact requirements of 2-4-302, MCA, apply. An attempt to contact the bill sponsor was made on June 8, 2022. The department contacted the Legislative Services Division via email and was informed the legislator is deceased. To the extent possible, the department has complied with the bill sponsor contact requirements.

8. With regard to the requirements of 2-4-111, MCA, the department has determined that the proposed adoption of the above-stated rule will not significantly and directly impact small businesses.

/s/ Edward Hayes
EDWARD HAYES
Rule Reviewer

BY: */s/ Christopher Dorrington*
CHRISTOPHER DORRINGTON
Director
Department of Environmental Quality

Certified to the Secretary of State June 28, 2022.

BEFORE THE DEPARTMENT OF TRANSPORTATION
OF THE STATE OF MONTANA

In the matter of the adoption of New Rules I and II, the amendment of ARM 18.7.203, 18.7.204, and 18.7.206, and the repeal of 18.7.205 and 18.7.221 pertaining to Utility Right-of-Way Occupancy	))))))	NOTICE OF PUBLIC HEARING AND EXTENSION OF COMMENT PERIOD ON PROPOSED ADOPTION, AMENDMENT, AND REPEAL

TO: All Concerned Persons

1. On May 27, 2022, the Department of Transportation (MDT) published MAR Notice No. 18-187 pertaining to the public hearing on the proposed adoption, amendment, and repeal of the above-stated rules at page 722 of the 2022 Montana Administrative Register, Issue Number 10.

2. MDT has received requests for additional time to submit comments on the proposed adoption, amendment, and repeal of the rules. MDT will extend the deadline for written comment to 5:00 p.m., July 15, 2022. A first public hearing was held June 22, 2022. A second public hearing will be held on July 15, 2022, at 9:30 a.m. via Zoom. Register in advance for this meeting:

https://mt-gov.zoom.us/meeting/register/tZYkf-msqTlsE9zf0WGMVy9K0nWkG29V27AC

3. MDT will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact MDT no later than 5:00 p.m. on July 12, 2022, to advise us of the nature of the accommodation that you need. Please contact Steve Giard, Utility Section Manager, Department of Transportation, P.O. Box 201001, Helena, Montana, 59620-1001; telephone (406) 444-6080; fax (406) 444-7254; TTY Service (800) 335-7592 or through the Montana Relay Service at 711; or e-mail sgiard@mt.gov.

4. Concerned persons may submit their data, views, or arguments concerning the proposed actions in writing to: Steve Giard, Utility Section Manager, Department of Transportation, P.O. Box 201001, Helena, Montana, 59620-1001; fax (406) 444-7254 or e-mail sgiard@mt.gov, and must be received no later than 5:00 p.m., July 15, 2022.

/s/ Carol Grell Morris
Carol Grell Morris
Rule Reviewer

/s/ Malcolm "Mack" Long
Malcolm "Mack" Long
Director
Department of Transportation

Certified to the Secretary of State June 28, 2022.

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

In the matter of amendment of ARM 36.14.101, 36.14.201, 36.14.309, 36.14.402, 36.14.406, 36.14.407, 36.14.501, 36.14.601, 36.14.602, and 36.14.603 and the repeal of ARM 36.14.311 pertaining to Dam Safety	))))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT AND REPEAL

TO: All Concerned Persons

1. On August 9, 2022, at 10:00 a.m., the Department of Natural Resources and Conservation will hold a public hearing in the Montana Room, First Floor, located at 1539 Eleventh Avenue, Helena, MT, and via Zoom, to consider the proposed amendment and repeal of the above-stated rules. Interested parties may access the remote conferencing platform in the following ways:

a. Join Zoom Meeting: https://mt-gov.zoom.us/j/89397282722?pwd=TFR0N1QrS3JYemtPdHBsZDNQdzViZz09; Meeting ID: 893 9728 2722; Password: 061282; or

b. Dial by Telephone: +1 646 558 8656 or +1 406 444 9999; Meeting ID: 893 9728 2722; Password: 061282

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m. on July 29, 2022, to advise us of the nature of the accommodation that you need. Please contact Jamie Price, Department of Natural Resources and Conservation, 1539 Eleventh Avenue, P.O. Box 201601, Helena, MT 59620-1601, 406-444-6615, or e-mail jsprice@mt.gov.

3. The rules proposed to be amended provide as follows, new matter underlined, deleted matter interlined:

<u>36.14.101 DEFINITIONS</u> In addition to the terms defined by 85-15-106, MCA, the following definitions apply in this subchapter, unless the context requires and clearly states otherwise.

(1) and (2) remain the same.

<u>(3) "Certification" means a statement of opinion by an engineer whose work on a dam has been conducted in accordance with the standard of care within dam engineering practice. Certification does not constitute a warranty or guarantee of facts or conditions certified.</u>

(3) through (8) remain the same but are renumbered (4) through (9).

<u>(10) "Five-year dam evaluation" means an assessment of the safety and performance of a dam based on both a visual inspection and a safety evaluation.</u>

(9) through (11) remain the same but are renumbered (11) through (13).

(12) and (12)(a) remains the same but are renumbered (14) and (14)(a).

(b) means the elevation of the ~~emergency~~ auxiliary spillway for flood control structures; and

(c) remains the same.

(13) remains the same but is renumbered (15).

(16) "Operation and maintenance inspection" means the inspection of the dam that is performed on an annual basis by the dam owner as part of regular operation and maintenance activities.

(14) and (15) remain the same but are renumbered (17) and (18).

(19) "Safety evaluation" means the assessment of dam condition that is typically accomplished through an analysis of instrumentation, stability, seepage, hydraulic adequacy, hydrologic adequacy, and compliance with current standards.

(20) "Visual inspection" means a physical visit to the dam by a qualified engineer to assess the condition and safety of the dam and features associated with the dam.

AUTH: 85-15-110, MCA
IMP: 85-15-106, 85-15-209, 85-15-210, 85-15-212, MCA

REASON: Defining certification provides clarity for the engineer's role within the standards of professional practice. The proposed definition of certification comes from the Association of State Dam Safety Officials, and 82-4-303, MCA has a similar definition for tailings dams.

Clarifying terminology for the types of dam inspections and evaluations required by the administrative rules and 85-15-213, MCA is necessary to avoid misinterpretation of requirements. Differentiation from the inspection that is typically completed by the dam owner from the inspections that require a licensed engineer is necessary.

The word "emergency" when referring to a spillway is no longer used in the dam safety industry. The word "auxiliary" is preferred.

36.14.201 WHO HAS TO APPLY FOR HAZARD DETERMINATION

(1) and (1)(a) remain the same.

(b) An owner of a dam may request a waiver to the application requirement if:

(i) the dam is not high-hazard as previously classified by the department;

(ii) no additional downstream development has occurred; and

(iii) the size and impounding capacity of the dam is unchanged from the department's original classification.

(2) The department must respond to the waiver request in (1)(b) within 20 calendar days.

(2) remains the same but is renumbered (3).

AUTH: 85-15-110, MCA
IMP: 85-15-107, 85-15-209, MCA

REASON: As it exists presently, a hazard determination application is necessary whenever construction is proposed on a dam, including dams that have previously gone through the determination process and have been classified by the department as not high-hazard. This amendment provides for a waiver where certain conditions are met to allow dam owners the ability to proceed more quickly to construction.

36.14.309 CONSTRUCTION PERMIT - STANDARD TERMS (1) and (1)(a) remain the same.

~~(b) the owner shall provide the department evidence that a performance bond has been obtained by the contractor for the completion of construction of the dam in the amount of at least 100% of the estimated cost of the project;~~

(c) through (i) remain the same but are renumbered (b) through (h).

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

REASON: While performance bonding is important, ARM 36.14.309(1)(b) is not needed for public dam owners since 18-2-201, MCA, provides for performance security requirements for public construction contracts. If a contractor defaults midway through a project, 85-15-215, MCA and ARM 36.14.703 provide the department emergency authority to act by intervening in a construction project and holding the dam owner responsible where needed to protect the public.

36.14.402 OPERATION PERMIT APPLICATION - GENERAL REQUIREMENTS (1) Applications, including applications for renewal of a permit to operate high-hazard dams must include:

(a) an operation plan pursuant to ARM 36.14.403; ~~and~~

~~(b) notification that an inspection has been completed, except for a new dam for which a construction permit has been issued.~~

~~(2)~~(b) a report of the five-year dam evaluation ~~inspection~~ pursuant to ARM 36.14.603; ~~must be submitted to the department within 90 days of the inspection, before the application can be considered complete.~~

(c) a statement of the owner's intent regarding any deficient or unsafe items identified by the report; and

(d) a time schedule to remedy the deficient or unsafe items.

(2) The requirements in (1)(b) through (d) do not apply for a new dam for which a construction permit has been issued. The ~~inspection~~ report of the evaluation must be of the dam in its condition and configuration at the time of the application and must be submitted within 90 days of the visual inspection. If the owner of the dam has opted to split the visual inspection into two separate visits to the dam site, the 90-day requirement begins with the date of the second visual inspection.

(3) and (4) remain the same.

AUTH: 85-15-110, 85-15-213, MCA
IMP: 85-15-212, MCA

REASON: These amendments are reasonably necessary to clarify operation permit application requirements. A portion of the proposed new language is currently contained in ARM 36.14.601 and was determined to be out of place. Pursuant to ARM 36.14.602 and 36.14.603, the periodic owner inspection must contain both a visual inspection and a safety evaluation of dam performance. The amendments better reflect the contents of ARM 36.14.602 and 36.14.603 and are consistent with long-standing department requirements.

If a dam owner splits the visual inspection into two visits pursuant to proposed amendments to ARM 36.14.601, the report submittal requirement that is based on the second visual inspection is needed to ensure the report addresses findings from both visits.

36.14.406 OPERATION PLAN - EMERGENCY PROCEDURES AND WARNING PLANS (1) remains the same.

(2) The plan must be developed in cooperation with those designated by the owner for carrying out the plan in an emergency, such as county disaster emergency coordinators, county sheriff, city police, engineer, and others. ~~A written statement of agreement to participate in the plan must be signed by those responsible and be attached to the plan.~~

(3) The owner shall file the plan with the appropriate disaster and emergency services coordinator. ~~after approval by the department and the owner shall provide certification of its filing to the department.~~

(4) remains the same.

(a) a map of the evacuation area downstream of the dam based on the estimated inundation caused by a sudden breach of the dam ~~during the design flood and non-flooding failure conditions. The evacuation area must be depicted on a USGS quadrangle map with the approximate travel time indicated at significant locations~~;

(b) an up-to-date notification directory with phone numbers of key county or municipal and emergency management officials, an engineer familiar with the dam's characteristics, the department, and a procedure to notify downstream residents located ~~requiring immediate notification~~ within the inundation area ~~(listed in order by those affected first), and the department~~;

(c) through (5) remain the same.

AUTH: 85-15-110, MCA
IMP: 85-15-212, MCA

REASON: The current process of requiring signatures and certifications on the emergency plans causes substantial delays in the distribution of the plans.

The type of downstream evacuation map to be included in the plan depends on the dam and other unique circumstances. Decisions regarding what is depicted on the evacuation maps should remain with the dam owners in consultation with their engineers and local emergency responders.

Modern reverse 911 notifications and widespread use of mobile phones have eliminated the need for prescriptive requirements on how downstream residents should be listed in the evacuation plan.

36.14.407 OPERATING PERMIT - CONDITIONS AND TERMS (1) and (1)(a) remain the same.

(b) the owner of the dam or reservoir, or their representative, shall complete an annual operation and maintenance inspection;

(b) through (g) remain the same but are renumbered (c) through (h).

(2) through (4) remain the same.

AUTH: 85-15-110, 85-15-213, 85-15-216, MCA
IMP: 85-15-212, MCA

REASON: ARM 36.14.404(1)(f) requires dam owners to inspect their dams annually. The annual operation and maintenance inspection requirement should be listed in ARM 36.14.407 for clarity and consistency. The department has required dam owners to conduct annual inspections and this amendment memorializes that long-standing practice. An annual operation and maintenance inspection is considered the current industry standard of care.

36.14.501 HIGH-HAZARD DAM DESIGN CRITERIA (1) through (3) remain the same.

~~(4) Except as otherwise specified in ARM 36.14.501 to 36.14.504, concrete dams must be designed and constructed in accordance with principles at least equivalent to United States bureau of reclamation Design of Small Dams to its specified limits, or Design of Gravity Dams and Design of Arch Dams.~~

~~(5) Except as otherwise specified in ARM 36.14.501 to 36.14.504, earth dams retaining a flood water capacity of less than 12,500 acre-feet or a total capacity of less than 25,000 acre-feet measured to the primary emergency spillway must be designed and constructed in accordance with principles at least equivalent to United States soil conservation service TR-60, Earth Dams and Reservoirs. In this paragraph, total capacity means the total volume of space available for water and sediment upstream from a dam below the elevation at which discharge begins in the primary emergency spillway. In this paragraph, floodwater detention capacity is the capacity between the crest of the principal spillway and the elevation at which discharge begins in the primary emergency spillway sediment.~~

~~(6) Except as otherwise specified in ARM 36.14.501 to 36.14.504, earth dams greater than the limits specified in (5) must be designed and constructed at least equivalent to the United States bureau of reclamation Design of Small Dams to its limit of a 50-feet dam height, and to the corps standard beyond a 50-feet dam height.~~

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

REASON: This amendment is reasonably necessary to remove references in the rule that are outdated. The amendment provides the engineer flexibility to determine the design standard most applicable to the situation, in consultation with the department. The department has the opportunity to review the engineer's decision-making during the standard construction permit review process described in ARM 36.14.303.

36.14.601 ~~PERIODIC OWNER INSPECTIONS~~ FIVE-YEAR DAM EVALUATION - GENERAL REQUIREMENTS (1) The owner of a high-hazard dam shall have ~~periodic inspections~~ a five-year dam evaluation conducted by a qualified engineer.

(2) ~~Periodic inspections~~ A visual inspection of the dam must be ~~made~~ conducted ~~and a report completed on a frequency of~~ at least once every ~~5~~ five years or within the period stated in the terms of an operation permit for a high-hazard dam. The visual inspection may be split into two separate visits to the dam site, if the first visit to the dam site does not exceed the inspection frequency set forth in the approved operation permit.

(3) The frequency of ~~periodic~~ the five-year dam evaluation ~~inspections~~ shall be set by the department after considerations including the condition of the dam, proximity to population centers, current design technology, and type of construction.

(4) remains the same.

~~(5) Within 90 days of the periodic inspection, the owner shall deliver a copy of the report to the department, together with a statement of the owner's intent in regard to any deficient or unsafe items identified by the report, and a time schedule to remedy the items. The original copy of the report shall be retained by the owner.~~

~~(6)~~(5) The owner shall bear the cost of the ~~inspection~~ five-year dam evaluation.

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

REASON: This amendment is reasonably necessary to provide clarity in the following manner:

The term "periodic owner inspection" is confusing since the inspection must be completed by a qualified engineer and not the owner. The periodic owner inspection must contain both a visual inspection and a safety evaluation of dam performance. The amendment better reflects the contents of ARM 36.14.602 and 36.14.603 and is consistent with long-standing department requirements.

Reference to the engineer's report was confusing and out of place.

Dam owners have frequently commented on the need to split the visual inspection into two separate visits to the dam site to better coordinate with reservoir operation. This amendment will allow dam owners flexibility to conduct part of the visual inspection in the spring, when the reservoir is full, and part of the inspection in the fall, when the spillways are dewatered.

Dam owners have long been required to provide a statement of their intent to follow engineers' report recommendations before the operation permit application is considered complete. It is more logical to have this requirement in ARM 36.14.402.

In addition, with virtually all reports being distributed electronically, a need no longer exists to require retention of the original copy of the report.

36.14.602 ~~PERIODIC OWNER INSPECTIONS~~ FIVE-YEAR DAM EVALUATION – VISUAL INSPECTION AND SAFETY EVALUATION ITEMS

(1) The visual inspection and safety evaluation must include, but not be limited to:

(a) review and analysis of previous visual inspection and safety evaluation reports and available data on the design, construction, operation, and maintenance of the dam and its appurtenances;

(b) through (j) remain the same.

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

REASON: This amendment clarifies terminology that has been a source of confusion. The amendment also makes consistent terminology changes in other proposed rule amendments, better reflecting the contents of ARM 36.14.602 and 36.14.603 and long-standing department practice.

36.14.603 ENGINEER'S REPORT OF ~~PERIODIC INSPECTION~~ FIVE-YEAR DAM EVALUATION (1) remains the same.

(2) The engineer shall deliver the report and discuss it with the owner within 60 days of the ~~investigation~~ visual inspection. If the owner decides to split the visual inspection into two separate visits pursuant to ARM 36.14.601(2), the 60-day report delivery requirement begins with the date of the second visual inspection.

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

REASON: This amendment clarifies terminology and makes consistent terminology from other proposed rule amendments. If a dam owner splits the visual inspection into two visits pursuant to ARM 36.14.601, the report delivery requirement that is based on the second visual inspection is needed to ensure the report addresses findings from both visits.

4. The department proposes to repeal the following rule:

36.14.311 RELEASE OF THE PERFORMANCE BOND

AUTH: 85-15-110, 85-15-211, MCA
IMP: 85-15-210, MCA

REASON: This rule is being repealed because the proposed amendment to ARM 36.14.309(1)(b) eliminates the performance bonding requirement.

5. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted in writing to: Martin Balukas, Department of Natural Resources and Conservation, 1539 Eleventh Avenue, P.O. Box 201601, Helena, MT 59620-1601, or e-mail at MBalukas@mt.gov, and must be received no later than 5:00 p.m. on August 9, 2022.

6. Martin Balukas, Department of Natural Resources and Conservation, has been designated to preside over and conduct this hearing.

7. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 2 above or may be made by completing a request form at any rules hearing held by the department.

8. An electronic copy of this proposal notice is available through the Secretary of State's web site at http://sosmt.gov/ARM/Register.

9. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

10. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment and repeal of the above-referenced rules will not significantly and directly impact small businesses.

/s/ Amanda Kaster
AMANDA KASTER
Director
Natural Resources and Conservation

/s/ Joslyn Hunt
JOSLYN HUNT
Rule Reviewer

Certified to the Secretary of State on June 28, 2022.

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

In the matter of the adoption of NEW RULE I and the repeal of ARM 38.2.2401, 38.2.2403, 38.2.2404, 38.2.2405, and 38.2.2406 pertaining to interventions	)))))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION AND REPEAL

TO: All Concerned Persons

1. On August 2, 2022, at 1:00 p.m., the Department of Public Service Regulation will hold a public hearing in the Bollinger Room, 1701 Prospect Avenue, Helena, Montana, to consider the proposed adoption and repeal of the above-stated rules.

2. The Department of Public Service Regulation will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Public Service Regulation no later than 5:00 p.m. on July 29, 2022, to advise us of the nature of the accommodation that you need. Please contact Tarin Slayton, Department of Public Service Regulation, 1701 Prospect Avenue, P.O. Box 202601, Helena, Montana, 59620-2601; telephone (406) 444-6170; fax (406) 444-7618; or e-mail tarin.slayton@mt.gov.

3. The rule as proposed to be adopted provides as follows:

NEW RULE I INTERVENTION (1) The commission may establish a deadline for intervention in commission proceedings.

(2) The Montana Consumer Counsel is a party to any proceeding upon filing a notice of intervention before the intervention deadline. After the deadline for intervention, the Montana Consumer Counsel may intervene by filing a late motion as described in (6).

(3) Except as provided in (2), any person seeking to intervene in a commission proceeding must file a motion to intervene. Motions must state:

(a) to the extent known, the position taken by the movant and the basis in fact and law for that position; and

(b) sufficient detail to demonstrate that:

(i) the movant has a right to participate which is expressly conferred by statute or by commission rule, order, or other action;

(ii) the movant has or represents an interest that is presently and directly affected by the outcome of the proceeding, including any interest as a consumer, customer, competitor, or security holder of a party; or

(iii) the movant's participation is in the public interest.

(4) Objections to any motion for intervention must be filed within seven days after the date the motion was filed. Objections must be in the form of a brief and

contain a short and plain statement of the reasons why intervention should be denied. Movants may file a reply brief to an objection within seven days after the date the objection was filed. No additional briefing is permitted without prior commission approval.

(5) Timely motions for intervention will be deemed granted if no objection is filed and the commission does not otherwise act on the motion before the deadline provided in (4).

(6) If a motion is filed after the deadline for intervention, the movant must demonstrate why late intervention should be granted. When ruling on a motion for late intervention, the commission or hearing examiner may consider whether:

(a) the movant had good cause for the failure to file a timely motion;

(b) any delay might result from granting intervention;

(c) the movant's interest is not adequately expressed by other parties in the proceeding;

(d) granting intervention might result in prejudice to or undue burden upon existing parties; and

(e) the motion conforms to the requirements of (3).

(7) Except in extraordinary circumstances, an untimely intervention will not be permitted to delay or defer any procedural schedule established before a party's late intervention.

(8) When necessary to avoid delay, unreasonable duplication of positions, or prejudice to other parties, the commission or hearing examiner may, for good cause and at any time in the proceeding, limit or condition an intervenor's participation in the proceeding.

AUTH: 69-1-110, 69-2-101, 69-3-103, 69-12-201, MCA
IMP: 69-2-101, MCA

REASON: The commission's rules regarding intervention have not been revised since 1977. Consistent with its obligations under 2-4-314, MCA, the commission has determined that its existing intervention rules can be modernized and simplified into a single rule.

Section (1) of the proposed rule reflects current commission practice, where intervention deadlines are set in an initial notice, where appropriate.

Section (2) of the rule recognizes that the Montana Consumer counsel has a statutory right to participate in commission proceedings, and no formal action granting a timely request for intervention should be required. All other interested parties will be required to file a motion for intervention that satisfies the requirements of (3). Subsection (3)(a) requires movants to state their position, but only to the extent it is known at the time the motion is filed. Subsection (3)(b) is disjunctive, and a movant need only establish one of the three grounds for intervention. Subsection (3)(b)(ii) is intended to apply to only those parties that can show a present interest that will be affected by the proceeding. The broader basis for intervention in (3)(b)(iii) allows intervention by parties who may not have a present interest, but whose participation would nonetheless be in the public interest.

Because commission proceedings operate on short statutory deadlines, (4) creates a standard schedule for briefing motions for intervention. In the interest of administrative efficiency, if no objections are filed with respect to a motion and the commission has not acted on the motion within the time allowed in (4), the motion will be deemed granted.

Sections (6) and (7) provide clear standards for evaluating late motions for intervention and the circumstances under which a late motion may delay the normal course of a proceeding.

Section (8) is carried forward from existing commission regulations. Consistent with the commission's authority to efficiently manage its proceedings, the proposed rule allows the commission to limit intervention when necessary to avoid delay, unreasonable duplication of positions, or prejudice to other parties. The specific circumstances in which intervention may be limited under this rule protect the due process rights of parties appearing before the commission.

4. The department proposes to repeal the following rules:

38.2.2401 CONTENTS OF PETITION

AUTH: 69-1-110(3), 69-2-101, 69-3-103, 69-12-201(2), MCA
IMP: 69-2-101, MCA

38.2.2403 GENERAL INTERVENTION

AUTH: 69-1-110(3), 69-2-101, 69-3-103, 69-12-201(2), MCA
IMP: 69-2-101, MCA

38.2.2404 SPECIAL INTERVENTION

AUTH: 69-1-110(3), 69-2-101, 69-3-103, 69-12-201(2), MCA
IMP: 69-2-101, MCA

38.2.2405 DISPOSITION OF PETITIONS AND MOTIONS TO INTERVENE

AUTH: 69-1-110(3), 69-2-101, 69-3-103, 69-12-201(2), MCA
IMP: 69-2-101, MCA

38.2.2406 LIMITATION ON INTERVENTION

AUTH: 69-1-110(3), 69-2-101, 69-3-103, 69-12-201(2), MCA
IMP: 69-2-101, MCA

REASON: The commission's proposed intervention rule will replace all currently effective intervention rules.

5. Interested persons may submit their written data, views, or arguments to Tarin Slayton, Legal Division, Department of Public Service Commission, 1701 Prospect Avenue, P.O. Box 202601, Helena, MT 59620-2601, telephone (406)444-6170, fax (406) 444-7618, or email tarin.slayton@mt.gov and must be received no later than 5:00 p.m., on August 8, 2022.

6. The Montana Consumer Counsel, 111 North Last Chance Gulch, Suite 1B, Helena, MT 59620-1703, telephone (406) 444-2771, is available and may be contacted to represent consumer interests in this matter.

7. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by the department. Persons who wish to have their name added to the list shall make a written request which includes the name, e-mail address, and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding: electric utilities, providers, and suppliers; natural gas utilities, providers, and suppliers; telecommunications utilities and carriers; water and sewer utilities; common carrier pipelines; motor carriers; rail carriers; and/or administrative procedures. Such written request may be mailed or delivered to the Department of Public Service Regulation, Legal Division, 1701 Prospect Avenue, P.O. Box 202601, Helena, MT 59620-2601, e-mailed to tarin.slayton@mt.gov, or may be made by completing a request form at any rules hearing held by the department.

8. With regard to the requirements of 2-4-111, MCA, the department has determined that the adoption and repeal of the above-referenced rules will not significantly and directly impact small businesses.

9. An electronic copy of this proposal notice is available through the Secretary of State's web site at http://sosmt.gov/ARM/Register.

10. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

/s/ LUCAS HAMILTON
Lucas Hamilton
Rule Reviewer

/s/ JAMES BROWN
James Brown
President
Montana Public Service Commission
Department of Public Service Regulation

Certified to the Secretary of State June 28, 2022.

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

In the matter of the adoption of New Rule I pertaining to Group Capital Calculation	)))	NOTICE OF ADOPTION

TO: All Concerned Persons

1. On May 27, 2022, the Commissioner of Securities and Insurance, Office of the Montana State Auditor (CSI) published MAR Notice No. 6-268 pertaining to the proposed adoption of the above-stated rule at page 708 of the 2022 Montana Administrative Register, Issue Number 10.

2. A public hearing was not contemplated or requested. The department received no comments or testimony on the proposed rule.

3. CSI has adopted New Rule I (6.6.3719) as proposed, effective September 1, 2022.

/s/ Kirsten Madsen
Kirsten Madsen
Rule Reviewer

/s/ Ole Olson
Ole Olson
Chief Legal Counsel
Commissioner of Securities and Insurance,
Office of the Montana State Auditor

Certified to the Secretary of State June 28, 2022.

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

In the matter of the amendment of	)	NOTICE OF AMENDMENT
ARM 6.6.3843 and 6.6.3850	)	
pertaining to Credit for Reinsurance	)	
and Certified Assuming Insurers	)	

TO: All Concerned Persons

1. On May 13, 2022, the Commissioner of Securities and Insurance, Office of the Montana State Auditor (CSI) published MAR Notice No. 6-270 pertaining to the proposed amendment of the above-stated rules at page 643 of the 2022 Montana Administrative Register, Issue Number 9.

2. A public hearing was not contemplated or requested. The department received no comments or testimony on the proposed amendments.

3. CSI has amended the above-stated rules as proposed.

/s/ Kirsten Madsen
Kirsten Madsen
Rule Reviewer

/s/ Mary Belcher
Mary Belcher
Deputy State Auditor
Commissioner of Securities and Insurance,
Office of the Montana State Auditor

Certified to the Secretary of State June 28, 2022.

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

In the matter of the repeal of the emergency rule closing the Yellowstone River from the Yellowstone National Park Boundary to the Springdale Bridge Fishing Access Site	))))))	NOTICE OF REPEAL OF EMERGENCY RULE

TO: All Concerned Persons

1. On June 13, 2022, the Department of Fish, Wildlife and Parks (department) adopted an emergency rule closing the Yellowstone River to all recreational use from the Yellowstone National Park boundary to the Springdale Bridge Fishing Access Site, published as Notice No. 12-562 at page 1025 of the 2022 Montana Administrative Register, Issue No. 12. There was a drastic spike in water flow on the Yellowstone River that caused water to channel and flood multiple portions of the river. Persons recreating on the Yellowstone River would be at risk of injury or drowning. This situation constituted an imminent peril to the public health, safety, and welfare to anyone using the river.

2. As this situation no longer constitutes an imminent peril to public health, safety, and welfare, the department is repealing RULE I YELLOWSTONE RIVER EMERGENCY CLOSURE. However, river levels continue to be high and at potentially dangerous levels. Closures of the fishing access sites along the Yellowstone River remain in effect. Therefore, RULE II YELLOWSTONE RIVER FISHING ACCESS SITES EMERGENCY CLOSURE remains in effect. Check the department website for updates and more information regarding closures and restrictions on specific fishing access sites.

3. The repeal of Emergency Rule I is effective June 24, 2022.

4. The special notice requirements of 2-4-303, MCA have been met. All committee members and staff of the Environmental Quality Council, with addresses provided on the Montana Legislature's website (leg.mt.gov), were contacted by e-mail on June 24, 2022.

/s/ Mike Volesky
Mike Volesky
Chief of Operations
Department of Fish, Wildlife and Parks

/s/ Kevin Rechkoff
Kevin Rechkoff
Rule Reviewer

Certified to the Secretary of State June 24, 2022.

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

In the matter of the adoption of an emergency rule closing the Yellowstone River in Park County	)))	NOTICE OF ADOPTION OF EMERGENCY RULE

TO: All Concerned Persons

1. The Department of Fish, Wildlife and Parks (department) has determined the following reasons justify the adoption of an emergency rule:

(a) Due to recent severe flooding, dangerous conditions exist in a section of the Yellowstone River between the Highway 89 Bridge Fishing Access Site and the Sheep Mountain Fishing Access Site, including a downed power pole and downed power lines. The riverbanks have become unstable due to erosion of the riverbank.

(b) Persons recreating on the river are at risk of injury or drowning due to collision with the downed power pole and power lines.

(c) Therefore, as this situation constitutes an imminent peril to public health, safety, and welfare, and this threat cannot be averted or remedied by any other administrative act, the department adopts the following emergency rule. The emergency rule will be sent as a press release to newspapers throughout the state. Also, signs informing the public of the closure will be posted at access points. The rule will be sent to interested parties and published as an emergency rule in Issue No. 13 of the 2022 Montana Administrative Register.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process and need an alternative accessible format of the notice. If you require an accommodation, contact the department no later than 5:00 p.m. on July 15, 2022, to advise us of the nature of the accommodation that you need. Please contact Crissy Bell, Fish, Wildlife and Parks, 1420 East Sixth Avenue, P.O. Box 200701, Helena, MT 59620-0701; telephone (406) 444-4594; or e-mail cbell@mt.gov.

3. The emergency rule is effective June 24, 2022, when this rule notice is filed with the Secretary of State.

4. The text of the emergency rule provides as follows:

RULE I YELLOWSTONE RIVER EMERGENCY CLOSURE (1) A portion of the Yellowstone River is in Park County.

(2) The Yellowstone River is closed to all recreational use from the Highway 89 Bridge Fishing Access Site to the Sheep Mountain Fishing Access Site.

(3) This rule will remain in effect until the department determines that the affected area of the Yellowstone River is again safe for public occupancy and recreational use. Signs closing the river will be removed when the rule is no longer effective.

AUTH: 2-4-303, 87-1-202, MCA
IMP: 2-4-303, 87-1-202, MCA

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

6. Concerned persons are encouraged to submit their comments to the department. Please submit comments along with names and addresses to: Crissy Bell, Department of Fish, Wildlife and Parks, P.O. Box 200701, Helena, MT, 59602-0701; e-mail cbell@mt.gov. Any comments must be received no later than July 22, 2022.

7. The department maintains a list of interested persons who wish to receive notice of rulemaking actions proposed by the department or commission. Persons who wish to have their name added to the list shall make written request that includes the name and mailing address of the person to receive the notice and specifies the subject or subjects about which the person wishes to receive notice. Such written request may be mailed or delivered to Fish, Wildlife and Parks, Legal Unit, P.O. Box 200701, 1420 East Sixth Avenue, Helena, MT 59620-0701, faxed to the office at (406) 444-7456, or may be made by completing the request form at any rules hearing held by the department.

8. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

9. The special notice requirements of 2-4-303, MCA have been met. All committee members and staff of the Environmental Quality Council, with addresses provided on the Montana Legislature's website (leg.mt.gov), were contacted by e-mail on June 24, 2022.

/s/ Mike Volesky
Mike Volesky
Chief of Operations
Department of Fish, Wildlife and Parks

/s/ Kevin Rechkoff
Kevin Rechkoff
Rule Reviewer

Certified to the Secretary of State June 24, 2022.

BEFORE THE BOARD OF PARDONS AND PAROLE
OF THE STATE OF MONTANA

In the matter of the adoption of NEW RULES I and II; the amendment of ARM 20.25.101, 20.25.102, 20.25.103, 20.25.201, 20.25.306, 20.25.307, 20.25.401, 20.25.402, 20.25.501, 20.25.504, 20.25.601, 20.25.702, 20.25.801, 20.25.901, 20.25.902, 20.25.903, 20.25.904; and the repeal of ARM 20.25.202 and 20.25.505 pertaining to Board of Pardons and Parole paroling decision, early parole consideration, administrative reviews and reappearances, board operating processes, and executive clemency functions	)	NOTICE OF ADOPTION, AMENDMENT, AND REPEAL

TO: All Concerned Persons

1. On February 11, 2022, the Board of Pardons and Parole (board) published MAR Notice No. 20-25-71 pertaining to the public hearing on the proposed adoption, amendment, and repeal of the above-stated rules at page 193 of the 2022 Montana Administrative Register, Issue Number 3.

2. The board has adopted New Rule I (20.25.403) and New Rule II (20.25.804) as proposed.

3. The board has amended the following rules as proposed: ARM 20.25.101, 20.25.102, 20.25.103, 20.25.306, 20.25.307, 20.25.401, 20.25.402, 20.25.504, 20.25.601, 20.25.702, 20.25.801, and 20.25.903.

4. The board has repealed the following rules as proposed: ARM 20.25.202 and 20.25.505.

5. The board has amended the following rules as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

<u>20.25.201 OBJECTIVES</u> (1) and (2) remain as proposed.

(3) The board's primary responsibility in making decisions about parole ~~and executive clemency~~ is public safety. The board applies Montana law in affording offenders with impartial hearings, respecting offender rights, and considering the safety of victims and the public.

(4) remains as proposed.

20.25.501 DECISION AND RECONSIDERATION (1) A final decision of the hearing panel must be by a majority vote, must be in writing, and must be signed by at least two panel members. ~~The board will not grant early consideration.~~

(2) through (7) remain as proposed.

20.25.901 APPLICATIONS FOR CLEMENCY (1) and (2) remain as proposed.

(3) An offender whose application has been denied may not reapply for executive clemency unless the offender submits evidence of substantial change in circumstances since the last application. A hearing panel will screen reapplications for clemency and if the offender has submitted evidence of substantial change of circumstances, it will determine if it will order an investigation and hearing ~~as indicated in~~ pursuant to ARM 20.25.902. Clemency applications that have been submitted and denied prior to October 1, 2015, may be resubmitted to the board for additional consideration, subject to the applicable provisions of the administrative rules.

~~(4) Clemency applications that has been submitted and denied prior to October 1, 2015, may be resubmitted to the board for additional consideration, subject to this section (4) and the applicable provisions of the administrative rules.~~

~~(a) If a resubmitted application is substantively similar to a previously denied application, then the board shall proceed as follows:~~

~~(i) Board staff will first assess whether an application is substantively similar to a previous application.~~

~~(ii) If an application is substantively similar to a previous application, the board's hearing panel may assess the application without further investigation, evaluation, or a hearing. The panel may rely on the existing record.~~

~~(iii) The panel may, in its discretion, direct that further investigation or evaluation be conducted, or that an additional hearing be held.~~

~~(b) If a resubmitted application includes substantive new material or evidence, the panel may request that an investigation be conducted with regard to the new material or evidence. The panel, in its discretion, may also request a psychological evaluation or schedule a hearing that may be limited to the new material or evidence.~~

~~(c) Upon completion of its assessment, the board shall forward to the Governor's office its recommendation to grant or deny clemency, together with all relevant documents. The board shall also forward to the Governor's office a proposed executive order if its recommendation is to grant clemency. If the board's recommendation is to deny clemency, it shall forward to the Governor's office and the applicant a board-recommended disposition summarizing the reasons for denial.~~

~~(d) If the board recommends denial of a resubmitted application without a hearing, it will give notice to the applicant and will post the recommended denial on the board's web site within 21 calendar days of the board's recommendation.~~

~~(e) The board shall conduct a hearing if, after review by the Governor's office, the Governor directs that a hearing be conducted. The board shall direct that further investigation into specific aspects of an application be conducted if requested by the Governor.~~

(5) and (6) remain as proposed but are renumbered (4) and (5).

20.25.902 INVESTIGATIONS FOR CLEMENCY AND ORDER FOR HEARING (1) remains as proposed.

~~(a) The hearing panel, based on its preliminary review, may accept or reject the application. The panel will base its decision to accept or reject an application on:~~

~~(i) all the circumstances surrounding the crime for which the applicant was convicted; and~~

~~(ii) the individual circumstances relating to social conditions of the applicant prior to the commission of the crime, at the time the offense was committed, and at the time of the application for clemency.~~

~~(b) If a hearing panel decides to reject the application, it shall within ten working days transmit the application to the Governor's office for review by the Governor. The board shall conduct a hearing, if after review by the Governor's office, the Governor directs that a hearing be conducted. The board shall direct that further investigation into specific aspects of an application be conducted if requested by the Governor.~~

~~(c)~~ (2) ~~If a hearing panel decides to accept the application, it will conduct an investigation.~~ The hearing panel may request a psychological evaluation of the applicant, a background check of the applicant, and any other reports the panel deems necessary as part of the ~~investigation~~ preliminary review.

~~(d)~~ (3) After ~~investigation~~ preliminary review, a hearing panel shall consider whether to hold a hearing on the application pursuant to 46-23-301, MCA.

~~(e)~~ (4) Pursuant to 46-23-302, 46-23-303, and 46-23-305, MCA, ~~If~~ if in the opinion of the hearing panel sufficient cause appears to conduct a hearing on the application, the panel shall initiate an investigation and ~~will~~ sign an order indicating the following:

(i) through (iv) remain as proposed but are renumbered (a) through (d).

~~(f) If the panel recommends denial of the application without a hearing, it shall:~~

~~(i) within ten working days transmit the application to the Governor's office for review by the Governor; and~~

~~(ii) forward a board-recommended disposition summarizing the reasons for denial and post the recommended denial on the board's web site within 21 calendar days of the board's decision.~~

~~(g) If ordered by the Governor, the board shall conduct a hearing. The board shall direct that further investigation into specific aspects of an application be conducted if requested by the Governor.~~

~~(2)~~ (5) If the board receives an application for clemency for an inmate for whom the death penalty has been imposed, the board will set a date for a hearing on the application. The ~~B~~board ~~staff~~ will give notice of the hearing date, as prescribed by law, and as described in ~~(1)(e)~~(4).

20.25.904 RECOMMENDATION CONCERNING CLEMENCY

(1) ~~Upon conclusion of the hearing the hearing panel will take the entire case under advisement or may issue an immediate recommendation. If the panel takes the case under advisement, it must make a recommendation in writing within 30~~

~~days to grant or deny clemency.~~ Upon completion of its preliminary review or hearing, the hearing panel shall transmit within 30 days to the Governor, the application or reapplication along with its recommendation to grant or deny clemency, together with relevant documentation.

~~(a) In cases in which the death penalty has not been imposed, the hearing panel will make a recommendation to grant or deny clemency.~~

~~(b) The hearing panel shall forward to the Governor's office its recommendation to grant or deny clemency, together with all relevant documents for the Governor's final determination. If the hearing panel makes a recommendation that the Governor grant clemency, it shall also forward a proposed executive order to the Governor's office. If the panel does not recommend clemency, it will forward a board-recommended disposition summarizing the reasons for denial.~~

~~(c) In cases in which the death penalty has been imposed, the hearing panel will, immediately after making its decision, forward all relevant documents and a recommendation to grant or deny clemency to the governor for the governor's final determination.~~

(2) ~~If the governor grants executive clemency, the signed executive order will be sent to the Secretary of State. The Secretary of State will file the attested order and return the attested order to the board for dissemination to the applicant, Department of Corrections, Department of Justice, and Federal Bureau of Investigation ID bureau for appropriate action.~~ If a hearing was held, the hearing panel may take the entire case under advisement or may issue an immediate recommendation.

(3) In cases in which the death penalty has been imposed, the hearing panel will, immediately after making its decision, forward all relevant documents and a recommendation to grant or deny clemency to the Governor for the Governor's final determination.

(4) The board shall also give notice to the applicant of its recommended disposition and the reasons for its recommendation to deny or approve the application or reapplication.

(5) The board shall post its recommended disposition on the board's website within 21 calendar days of its recommendation.

(6) If the Governor grants executive clemency, the signed executive order will be sent to the Secretary of State. The Secretary of State will file the attested order and return the attested order to the board for dissemination to the applicant, the Department of Corrections, the Department of Justice, and the Federal Bureau of Investigation ID bureau for appropriate action.

6. The board has thoroughly considered the comments and testimony received. A summary of the comments that were received and the board's responses are as follows:

COMMENT #1: The commenter requested that the proposal notice be distributed to all inmates who are within 12 or fewer months of parole because it is unfair to change rules when an inmate may have been planning and preparing for years for a hearing. The commenter stated the inmates need to be able to send comments and that the rule hearing should be postponed until April or May.

RESPONSE #1: The proposal notice was published February 11, 2022. Comment #1 was received February 14, 2022, the hearing was conducted March 3, 2022, and the comment period closed at 5:00 pm on March 11, 2022, all as provided in MAR Notice No. 20-25-71, and in accord with statutory requirements (2-4-302, MCA). Accordingly, the board declines the request for postponement.

If the rule hearing were postponed as requested, then in the interim, more inmates would come within 12 or fewer months of parole, inevitably prompting more requests for postponements, and so on.

An inmate may request at any time to be added to the consolidated Department of Corrections and Board of Pardons and Parole interested persons list as explained in paragraph 8 of published MAR Notice No. 20-25-71. Indeed, Comment #2 was received from an inmate who had previously requested to have his name added to the interested persons list.

COMMENT #2: The commenter made three general comments as follows: 1) the proposed rule amendments omit important information that is included in statute; 2) the board has not reduced the prison population by paroling more parole-eligible offenders in accordance with legislative intent; and 3) the board has engrafted criteria that are in conflict with the enabling statute.

RESPONSE #2: 1) The commenter is correct, in part. The board purposely deleted existing language from rules which unnecessarily duplicated statutory language. It did so to comply with 2-4-305(2), MCA, which states in pertinent part: "Rules may not unnecessarily repeat statutory language." Elimination of duplicative statutory language from rules will make the rules more concise and avoid possible future discrepancies arising between rules and statutes as statutory language is amended and the duplicative language in rule is not amended to match it or be removed. 2) The commenter's second comment is a general observation or opinion that the board releases too few parole-eligible individuals to reduce the prison population. That subject is outside the scope of MAR Notice No. 20-25-71 and will therefore not be addressed. 3) The commenter's third comment pertains to alleged engrafting of unspecified parole-related criteria in an unidentified rule causing it to conflict with an unspecified enabling statute. Insufficient information was provided in the comment to enable the board to substantively respond. No evidentiary support was submitted with the comment. For these reasons, the board declines to respond to issue number 3 raised by the commenter.

COMMENT #3: A commenter recommended that the board review and: 1) remove from the executive clemency rules, language that is already specified in statute pursuant to 2-4-305(2), MCA; 2) reorganize the substance of the executive clemency rules; 3) eliminate redundancy between rules; and 4) make uniform a 30-day requirement for recommendations to be made to the Governor. The commenter requested removal of the reference to executive clemency in AR 20.25.201 pertaining to the board's objectives. The commenter also called the board's

attention to a seemingly extraneous and out-of-place sentence that the board proposed to add to ARM 20.25.501(1), noting that the meaning of the sentence is unclear. The commenter recommended that the board review that sentence again.

RESPONSE #3: The board agreed with the commenter and made all specifically recommended changes to the executive clemency rules. The board also removed the reference to executive clemency in ARM 20.25.201 pertaining to the board's objectives and eliminated the extraneous, out-of-place, and unclear sentence from ARM 20.25.501(1) in the proposal notice.

/s/ Colleen E. Ambrose
Colleen E. Ambrose
Rule Reviewer

/s/ Steve Hurd
Steve Hurd
Chair
Board of Pardons and Parole

Certified to the Secretary of State June 28, 2022.

NOTICE OF FUNCTION 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.

Economic Affairs Interim Committee:

- Department of Agriculture;
- Department of Commerce;
- Department of Labor and Industry;
- Department of Livestock;
- Office of the State Auditor and Insurance Commissioner; and
- Office of Economic Development.

Education and Local Government 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 and Justice Interim Committee:

- Department of Corrections; and
- Department of Justice.

Energy and Telecommunications Interim Committee:

- Department of Public Service Regulation.

Revenue and Transportation Interim Committee:

- Department of Revenue; and
- Department of Transportation.

State Administration 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.

Water Policy Interim Committee (where the primary concern is the quality or quantity of water):

- 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 P.O. 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 or Register) is an online 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

1. Consult ARM Topical Index.
   Update the rule by checking recent rulemaking and the table of contents in the last Montana Administrative Register issued.

Statute

2. Go to cross reference table at end of each number and title which lists MCA section numbers and department corresponding ARM rule numbers.

RECENT RULEMAKING BY AGENCY

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies that have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through March 31, 2022. This table includes notices in which those rules adopted during the period January 14, 2022, through June 24, 2022, occurred and any proposed rule action that was pending during the past 6-month period. (A notice of adoption must be published within six months of the published notice of the proposed rule.) This table does not include the contents of this issue of the Montana Administrative Register (MAR or Register).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through March 31, 2022, this table, and the table of contents of this issue of the Register.

This table indicates the department name, title number, notice numbers in ascending order, the subject matter of the notice, and the page number(s) at which the notice is published in the 2022 Montana Administrative Register.

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