

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the amendment of ARM)	NOTICE OF PROPOSED
17.4.701, 17.4.702, and 17.4.703 pertaining))	AMENDMENT AND REPEAL
to fees and the repeal of ARM 17.4.720,)	(MONTANA ENVIRONMENTAL
17.4.721, 17.4.722, 17.4.723, and 17.4.724)	POLICY ACT)
pertaining to fee assessment categories)	
and departmental assistance to applicants)	
)	NO PUBLIC HEARING
)	CONTEMPLATED

TO: All Concerned Persons

1. On October 12, 2015, the Department of Environmental Quality proposes to amend and repeal the above-stated rules.

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 Elois Johnson, Paralegal, no later than 5:00 p.m., September 21, 2015, to advise us of the nature of the accommodation that you need. Please contact Elois Johnson at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail ejohnson@mt.gov.

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

17.4.701 FEES: DETERMINATION OF AUTHORITY TO IMPOSE

(1) Whenever an application for a lease, permit, contract, license, or certificate is expected to ~~result in~~ require the ~~agency incurring~~ department to incur expenses in excess of \$2,500 to compile an EIS, ~~and the department does not require payment of a fee pursuant to 75-1-205, MCA,~~ the applicant is required to pay a fee in an amount the agency reasonably estimates, as set forth in this rule, will be expended to gather information and data necessary to compile an EIS.

(2) If the department does not require payment of a fee pursuant to 75-1-205, MCA, ~~The agency the department~~ shall determine within 30 days after a completed application is filed whether it will be necessary to compile an EIS and assess a fee as prescribed by this rule. If it is determined that an EIS is necessary, the ~~agency~~ department shall make a preliminary estimate of its costs. This estimate must include a summary of the data and information needs and the itemized costs of acquiring the data and information, including salaries, equipment costs, and any other expense associated with the collection of data and information for the EIS.

(3) Whenever the preliminary estimated costs of acquiring the data and information to prepare an EIS total more than \$2,500, ~~and the department does not require payment of a fee pursuant to 75-1-205, MCA,~~ the agency department shall notify the applicant that a fee must be paid and submit an itemized preliminary

estimate of the cost of acquiring the data and information necessary to compile an EIS. The ~~agency department~~ shall also notify the applicant to prepare and submit a notarized and detailed estimate of the cost of the project being reviewed in the EIS within 15 days. In addition, the ~~agency department~~ shall request the applicant to describe the data and information available or being prepared by the applicant which can possibly be used in the EIS. The applicant may indicate which of the ~~agency's department's~~ estimated costs of acquiring data and information for the EIS would be duplicative or excessive. The applicant must be granted, upon request, an extension of the 15-day period for submission of an estimate of the project's cost and a critique of the agency's preliminary EIS data and information accumulation cost assessment.

AUTH: 75-1-202, MCA

IMP: 75-1-202, 75-1-203, 75-1-205, 75-1-206, 75-1-207, MCA

17.4.702 FEES: DETERMINATION OF AMOUNT (1) If the department determines that it will charge a fee pursuant to ARM 17.4.701, the department shall, After receipt of the applicant's estimated cost of the project and analysis of an agency's the department's preliminary estimate of the cost of acquiring information and data for the EIS, the agency shall notify the applicant within 15 days of the final amount of the fee to be assessed. The fee assessed must be based on the projected cost of acquiring all of the information and data needed for the EIS. If the applicant has gathered or is in the process of gathering information and data that can be used in the EIS, the agency department shall only use only that portion of the fee that is needed to verify the information and data. Any unused portion of the fee assessed may be returned to the applicant within a reasonable time after the information and data have been collected or the information and data submitted by the applicant have been verified, but in no event later than the deadline specified in these rules. The agency department may extend the 15-day period provided for review of the applicant's submittal but not to exceed 45 days if it believes that the project cost estimate submitted is inaccurate or additional information must be obtained to verify the accuracy of the project cost estimate. The fee assessed must not exceed the limitations provided in 75-1-203(2), MCA.

(2) If an applicant believes that the fee assessed is excessive or does not conform to the requirements of this rule or Title 75, chapter 1, part 2, MCA, the applicant may request a hearing pursuant to the contested case provisions of the Montana Administrative Procedure Act. If a hearing is held on the fee assessed as authorized by this subsection, the ~~agency department~~ shall proceed with its analysis of the project wherever possible. The fact that a hearing has been requested is not grounds for delaying consideration of an application except to the extent that the portion of the fee in question affects the ability of the department to collect the data and information necessary for the EIS.

AUTH: 75-1-202, MCA

IMP: 75-1-202, 75-1-203, 75-1-205, 75-1-206, 75-1-207, MCA

17.4.703 USE OF FEE (1) The fee assessed hereunder pursuant to ARM

17.4.701 may only be used to gather data and information necessary to compile an EIS. No fee may be assessed if ~~an agency~~ the department intends only to compile an EA or a programmatic review. If a department collects a fee and later determines that additional data and information must be collected or that data and information supplied by the applicant and relied upon by the ~~agency~~ department are inaccurate or invalid, an additional fee may be assessed under the procedures outlined in these rules if the maximum fee has not been collected.

(2) Whenever the ~~agency~~ department has completed work on the EIS, it shall submit to the applicant a complete accounting of how any fee was expended. If the money expended is less than the fee collected, the remainder of the fee shall be refunded to the applicant without interest within 45 days after work has been completed on the final EIS

AUTH: 75-1-202, MCA

IMP: 75-1-202, 75-1-203, 75-1-205, 75-1-206, 75-1-207, MCA

4. The rules proposed for repeal are as follows:

17.4.720 FEE ASSESSMENT CATEGORIES: GENERAL REQUIREMENT (AUTH: 75-1-202, MCA; IMP: 75-1-202, MCA), located at page 17-161, Administrative Rules of Montana.

17.4.721 FEE ASSESSMENT CATEGORIES: HARD ROCK (AUTH: 75-1-202, MCA; IMP: 75-1-202, MCA), located at page 17-161, Administrative Rules of Montana.

17.4.722 FEE ASSESSMENT CATEGORIES: OPEN CUT (AUTH: 75-1-202, MCA; IMP: 75-1-202, MCA), located at page 17-162, Administrative Rules of Montana.

17.4.723 FEE ASSESSMENT CATEGORIES: STRIP AND UNDERGROUND MINE SITING (AUTH: 75-1-202, MCA; IMP: 75-1-202, MCA), located at pages 17-162 and 17-163, Administrative Rules of Montana.

17.4.724 FEE ASSESSMENT CATEGORIES: STRIP AND UNDERGROUND MINE RECLAMATION (AUTH: 75-1-202, MCA; IMP: 75-1-202, MCA), located at pages 17-163 and 17-164, Administrative Rules of Montana.

REASON: ARM 17.4.701 to 17.4.725 implement 75-1-202, MCA. That statute, which became law in 1975, provides that an agency may adopt rules providing that a permit applicant, who files an application that requires preparation of an EIS, must pay a fee that the agency will use to pay the cost of collecting data and information necessary to prepare the EIS. Section 75-1-203, MCA, sets a cap, which is a percentage of the cost of the project for which the permit is sought, on the amount of fees that the applicant may be required to pay.

In 2005, the Legislature amended 75-1-205, MCA, to provide a second EIS fee that is independent of the fee authorized in 75-1-202, MCA. As amended, 75-1-

205 provides that an agency may charge a permit applicant a fee sufficient to pay all costs of preparing an EIS, not just the cost of data and information collection. In addition, this statute contains no cap. It further provides that, if the agency cannot make the findings required in 75-1-205(1)(a) for assessment of a fee under that statute, the agency may charge a fee under 75-1-202, MCA.

The amendments to ARM 17.4.701, 17.4.702, and 17.4.703 amend those rules to provide that they are applicable only when a fee is not charged under 75-1-205, MCA. This conforms these rules to 75-1-202 and 75-1-205, MCA, as they currently read. In addition, the amendments substitute the word "department" for "agency" for clarification.

ARM 17.4.720 through 17.4.724 provide categories of project cost for use determining the cost of mining projects in order to implement 75-1-202, MCA. These rules are unnecessary because project costs can be determined without rules that require that the costs be broken down into categories. In fact, the department has no similar rules for most of the types of projects that it permits. Furthermore, allowing these rules to remain in effect could mislead permit applicants into preparing unnecessary and useless cost estimates as part of their preparation of a permit application.

5. Concerned persons may submit their data, views, or arguments concerning the proposed action in writing to Elois Johnson at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail ejohnson@mt.gov, no later than October 8, 2015. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

6. If persons who are directly affected by the proposed action 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 they have to Elois Johnson at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail ejohnson@mt.gov, no later than October 8, 2015.

7. If the department receives requests for a public hearing on the proposed action from either 10 percent or 25, whichever is less, of the persons who are 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 persons directly affected has been determined to be more than 25 persons based on the more than 250 persons who could submit a permit application that would require preparation of an EIS.

8. 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; 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 Elois 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 Elois Johnson at ejohnson@mt.gov, or may be made by completing a request form at any rules hearing held by the department.

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.

Reviewed by:

DEPARTMENT OF ENVIRONMENTAL
QUALITY

/s/ John F. North
JOHN F. NORTH
Rule Reviewer

BY: /s/ Tom Livers
TOM LIVERS, Director

Certified to the Secretary of State, August 31, 2015.