

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY  
OF THE STATE OF MONTANA

In the matter of the amendment of ARM	)	NOTICE OF AMENDMENT AND
17.36.101, 17.36.102, 17.36.103,	)	ADOPTION
17.36.104, 17.36.106, 17.36.110,	)	
17.36.116, 17.36.310, 17.36.312,	)	(SUBDIVISIONS/ON-SITE
17.36.328, 17.36.330, 17.36.331,	)	SUBSURFACE WASTEWATER
17.36.332, 17.36.333, 17.36.334,	)	TREATMENT)
17.36.335, 17.36.336, 17.36.340,	)	
17.36.605, 17.36.802, and 17.36.804 and	)	
the adoption of New Rules I and II	)	
pertaining to subdivision applications and	)	
review, subdivision requirements,	)	
subdivision waivers and exclusions,	)	
subdivision review fees, and on-site	)	
subsurface wastewater treatment systems	)	

TO: All Concerned Persons

1. On April 24, 2014, the Department of Environmental Quality published MAR Notice No. 17-358 regarding a notice of public hearing on the proposed amendment and adoption of the above-stated rules at page 706, 2014 Montana Administrative Register, Issue Number 8.

2. The department has amended ARM 17.36.102, 17.36.103, 17.36.110, 17.36.312, 17.36.328, 17.36.331, 17.36.332, 17.36.333, 17.36.335, and 17.36.336 and adopted New Rule II (17.36.314) exactly as proposed. The department has amended ARM 17.36.101, 17.36.104, 17.36.106, 17.36.116, 17.36.310, 17.36.330, 17.36.334, 17.36.340, 17.36.605, 17.36.802, and 17.36.804 and adopted New Rule I (17.36.112) as proposed, but with the following changes, stricken matter interlined, new matter underlined:

17.36.101 DEFINITIONS For purposes of subchapters 1, 3, 6, and 8, the following definitions apply:

(1) remains as proposed.

(2) "Bedrock" means material that cannot be readily excavated by hand tools, or material that does not allow water to pass through or that has insufficient quantities of fines to provide for the adequate treatment and disposal of wastewater. The term does not include gravel and other rock fragments as defined in Department Circular DEQ-4, Appendix B.

(3) through (18) remain as proposed.

(19) "Floodplain" means the area adjoining the watercourse or drainway that would be covered by ~~the floodwater of a flood of 100-year frequency except for sheetflood areas that receive less than one foot of water per occurrence and are considered zone B or a shaded X zone by the Federal Emergency Management Agency~~ a flood that is expected to recur on the average of once every 100 years or

by a flood that has a one percent chance of occurring in any given year. The floodplain consists of the floodway and the floodfringe, as defined in ARM 36.15.101.

(20) through (45) remain as proposed.

(46) "Registered sanitarian" means a person licensed to practice the profession of sanitarian in Montana pursuant to Title 37, chapter 40, MCA.

(46) through (65) remain as proposed, but are renumbered (47) through (66).

(66) (67) "Wastewater" means water-carried wastes. For purposes of these rules, wastewater does not include storm water. The term including includes, but is not limited to, the following:

(a) through (d) remain as proposed.

(67) (68) "Wastewater treatment system" or "wastewater disposal system" means a system that receives wastewater for purposes of treatment, storage, or disposal. The term includes, but is not limited to, all disposal methods described in Department Circulars DEQ-2 and DEQ-4.

(68) through (70) remain as proposed, but are renumbered (69) through (71).

17.36.104 APPLICATION--LOT LAYOUT DOCUMENT (1) remains as proposed.

(2) The following information must be provided on the lot layout documents. Other information (e.g., percolation test results, soil profile descriptions) may be included on the lot layout documents only if the documents remain legible:

(a) through (e) remain as proposed.

(f) locations of existing and proposed roads and utilities;

(g) through (i) remain as proposed.

(j) information as set out in Table 1 for the specific water supply and wastewater systems in the subdivision. All systems must be labeled as "existing" or "proposed."

TABLE 1  
REQUIREMENTS FOR LOT LAYOUTS

	Subdivisions served by nonmunicipal wells	Subdivisions served by nonmunicipal wastewater systems	Subdivisions served by municipal water	Subdivisions served by municipal wastewater systems
Existing and proposed wells, setbacks in ARM 17.36.323 Table 2, and features listed in ARM 17.36.103(1)(e)	X	X	X	X
Water lines (suction and pressure)			X	X
Water lines (extension and	<u>X</u>	X	X	<u>X</u>

connections)				
Existing and proposed wastewater systems (drainfield, replacement area, and existing septic tanks)	X	X		
Existing and proposed gray water irrigation systems	X	X	X	X
Percent and direction of slope across the drainfield	X	X		
Sewer lines (extensions and connections)	X	X	X	X
Lakes, springs, irrigation ditches, wetlands and streams	X	X		
Percolation test locations, if provided, keyed to result form		X		
Soil pit locations keyed to soil profile descriptions		X		
Ground water monitoring wells keyed to monitoring results form	<u>X</u>	X	<u>X</u>	<u>X</u>
Floodplain boundaries	X	X	X	X
Cisterns	<u>X</u>	X	<u>X</u>	<u>X</u>
Existing and proposed building locations	<u>X</u>	X	<u>X</u>	<u>X</u>
Driveways	<u>X</u>	X	<u>X</u>	<u>X</u>
Road cuts and escarpments or slopes > 25 percent		X		

Mixing zone boundaries and direction of ground water flow	X	X		
Locations, sizes, and design details of existing and proposed storm water facilities	X	X	X	X

17.36.106 REVIEW PROCEDURES--APPLICABLE RULES (1) through (2)(c) remain as proposed.

(3) Subdivision lots recorded with sanitary restrictions prior to July 1, 1973, shall be reviewed in accordance with requirements set forth in this chapter. In cases where any requirements of this chapter would preclude the use for which each lot was originally intended, then the applicable requirements (including the absence thereof) in effect at the time such lot was recorded shall govern except that sanitary restrictions in no case shall be lifted from any such lot which cannot satisfy any of the following requirements:

(a) remains as proposed.

(b) unless a waiver is granted pursuant to ARM 17.36.601 after consultation with the local health department:

(i) and (ii) remain as proposed.

(iii) no part of the lot utilized for the subsurface wastewater treatment system components addressed in Department Circular DEQ-4, Chapter 6 may be located in a 100-year floodplain; and

(iv) and (4) remain as proposed.

17.36.116 CERTIFICATION OF LOCAL DEPARTMENT OR BOARD OF HEALTH (1) A local department or board of health, if it requests certification, must be certified as the reviewing authority if the following requirements are met and the sanitarian or engineer is qualified as described in (2):

(a) the local department or board of health employs a ~~licensed~~ registered sanitarian or a professional engineer responsible to perform the actual review. Those local governments employing more than one registered sanitarian or professional engineer shall designate one such person to be responsible for the review program;

(b) through (c)(iv) remain as proposed.

(2) A ~~licensed~~ registered sanitarian or ~~registered~~ professional engineer, prior to performing subdivision review, shall:

(a) through (a)(vi) remain as proposed.

(b) have a minimum of one year's experience performing subdivision review under the direct supervision of the department or of a department-approved ~~licensed~~ registered sanitarian or professional engineer.

(3) through (4) remain as proposed.

17.36.310 STORM DRAINAGE (1) remains as proposed.

(2) Except as provided in (3), a storm drainage plan must be designed in accordance with Department Circular DEQ-8.

(a) for lots proposed for uses other than as ~~single-family dwellings~~ living units, a storm drainage plan submitted under (2) must be prepared by a professional engineer and the storm drainage system is subject to the requirements in ARM 17.36.314;

(b) through (7) remain as proposed.

17.36.330 WATER SUPPLY SYSTEMS--GENERAL (1) through (2)(b) remain as proposed.

(3) For lots two acres in size or less, the applicant shall physically identify the proposed well location by staking or other acceptable means of identification. For lots greater than two acres in size, the department may require the applicant to physically identify the well location.

(3) and (4) remain as proposed, but are renumbered (4) and (5).

17.36.334 WATER SUPPLY SYSTEMS: OPERATION AND MAINTENANCE, OWNERSHIP, EASEMENTS, AND AGREEMENTS (1) through (3) remain as proposed.

(4) Easements must be obtained if the reviewing authority determines they are needed to allow adequate operation and maintenance of the system or to comply with 76-4-104(6)(i), MCA. Easements must be ~~in writing and signed by the grantor of the easement. In addition, the easement must~~ filed with the county clerk and recorder at the time the certificate of subdivision approval issued under this chapter is filed. Easements must be in one of the following forms:

(a) ~~be filed with the county clerk and recorder at the time the certificate of subdivision approval issued under this chapter is filed~~ the easement must be in writing signed by the grantor of the easement; or

(b) if the same person owns both parcels, the easement must be shown on the plat or certificate of survey for the proposed subdivision.

(5) remains as proposed.

17.36.340 LOT SIZES (1) remains as proposed.

(2) Subject to (4), each proposed new subdivision lot, area proposed for condominiums, or area proposed for permanent multiple spaces for recreational camping vehicles or mobile homes, must be of sufficient size to satisfy all of the following criteria:

(a) remains as proposed.

(b) drainfield mixing zones must be located ~~wholly within the boundaries of the proposed subdivision, pursuant to~~ in compliance with ARM 17.36.322(5);

(c) well isolation zones must be located ~~wholly within the boundaries of the proposed subdivision, pursuant to~~ in compliance with ARM 17.36.330(4); and

(d) as shown on the lot layout document, each lot must have adequate space for the sewage treatment system, drainfield replacement area, water supply, and all permanent structures including, but not limited to, driveways, houses, garages, ditches, service lines, easements, and utilities. Easements may be used to satisfy

this requirement.

(3) and (4) remain as proposed.

17.36.605 EXCLUSIONS (1) remains as proposed.

(2) The reviewing authority may exclude the following parcels created by divisions of land from review under Title 76, chapter 4, part 1, MCA, unless the exclusion is used to evade the provisions of that part:

(a) through (b)(ii) remain as proposed.

(c) a ~~boundary line adjustment to a parcel that~~ will be affected by a proposed boundary line adjustment, if the parcel has existing facilities for water supply, wastewater disposal, storm drainage, or solid waste disposal that were not subject to review, and have not been reviewed, under Title 76, chapter 4, part 1, MCA, and if:

(i) no facilities, other than those ~~existing at the time of~~ in existence prior to the boundary line adjustment, or those that were previously approved as replacements for the existing facilities, will be constructed on ~~any of the parcels affected by the boundary line adjustment;~~

(ii) existing facilities on the parcels complied with state and local laws and regulations, including permit requirements, which were applicable at the time of installation; and

(iii) the local health officer determines that existing facilities are adequate for the existing use. As a condition of the exemption, the local health officer may require evidence that:

(A) remains as proposed.

(B) the parcels includes acreage or features sufficient to accommodate a replacement drainfield;

(C) through (3) remain as proposed.

17.36.802 FEE SCHEDULES (1) An applicant for approval of a division of land into one or more parcels, condominiums, mobile home/trailer courts, recreational camping vehicle spaces, and tourist campgrounds shall pay the following fees:

	<u>UNIT</u>	<u>UNIT COST</u>
<u>TYPE OF LOTS</u>		
Subdivision lot	lot/parcel	\$ 125
Condominium/trailer court/recreational camping vehicle campground	unit/space	\$ 50
Resubmittal fee – previously approved lot, boundaries are not changed	lot/parcel	\$ 75
<u>TYPE OF WATER SYSTEM</u>		
Individual or shared water supply system (existing and proposed)	unit	\$ 85

Multiple user system (non-public) - new system	each	\$ 315 (plus \$105/hour for review in excess of four hours)
- new distribution system design - connection to distribution system	lineal foot lot/unit	\$ 0.50 \$ 70
Public water system New system per DEQ-1	component	per ARM 17.38.106 fee schedule
- new distribution system design - connection to distribution system	lineal foot lot/structure	\$ 0.50 \$ 70
<u>TYPE OF WASTEWATER DISPOSAL</u>		
Existing systems	unit	\$ 75
New gravity fed system	drainfield	\$ 95
New pressure-dosed, elevated sand mound, ET systems, intermittent sand filter, ETA systems, recirculating sand filter, recirculating trickling filter, aerobic treatment unit, nutrient removal, and whole house subsurface drip irrigation systems	design	\$ 190 (plus \$105/hour for review in excess of two hours)
New pressure-dosed, elevated sand mound, ET systems, intermittent sand filter, ETA systems, recirculating sand filter, recirculating trickling filter, aerobic treatment unit, nutrient removal, and whole house subsurface drip irrigation systems	drainfield	\$ 50
	<u>UNIT</u>	<u>UNIT COST</u>
Gray water reuse systems. This is a stand-alone fee and all gray water reuse systems will be reviewed at the unit cost	unit	\$ 95 (plus \$105/hour in excess of two hours)

	<u>UNIT</u>	<u>UNIT COST</u>
Multiple user wastewater system (non-public) - new collection system design - connection to collection system	lineal foot lot/unit	\$ 0.50 \$ 70
New public wastewater system per DEQ-2  - new collection system design - connection to collection system	component  lineal foot lot/structure	per ARM 17.38.106 fee schedule  \$ 0.50 \$ 70
<u>OTHER</u>		
Deviation from circular	request or per design	\$ 200 (plus \$105/hour for review in excess of two hours)
Waiver from rule	request	\$ 200 (plus \$105/hour for review in excess of two hours)
Reissuance of original approval statement	request	\$ 60
Review of <del>modified</del> <u>revised</u> lot layout document	request	\$ 125
Municipal facilities exemption checklist (former master plan exemption)	application	\$ 100

	<u>UNIT</u>	<u>UNIT COST</u>
Nonsignificance determinations/categorical exemption reviews - individual/shared systems	drainfield	\$ 60
- multiple-user non-public systems	lot/structure	\$ 30
- public systems	drainfield	per ARM 17.38.106 fee schedule

	<u>UNIT</u>	<u>UNIT COST</u>
Storm drainage plan review		
- plans exempt from Circular DEQ-8	lot	\$ 40
- Circular DEQ-8 review	design	\$ 180
	lot	\$ 40 (plus \$105/hour for review in excess of 30 minutes per lot)
Preparation of environmental assessments/environmental impact statements	----	actual cost

17.36.804 DISPOSITION OF FEES (1) through (1)(g) remain as proposed.

(2) The department shall reimburse local governing bodies under department contract to review subdivisions as follows:

(a) for subdivisions with individual wastewater treatment systems, the department shall reimburse \$25 per lot plus 80 percent of the review fee under ARM 17.36.802 for the following actions performed by the local governing body:

- (i) and (ii) remain as proposed.
- (iii) review of ~~modified~~ revised lot layout documents.
- (3) and (4) remain as proposed.

NEW RULE I (17.36.112) RE-REVIEW OF PREVIOUSLY APPROVED FACILITIES: PROCEDURES (1) through (5) remain as proposed.

(6) Facilities previously approved under Title 76, chapter 4, MCA, are not subject to re-review, if they are not proposed to be changed and are not affected by a proposed change to another facility. To determine whether previously approved water and sewer facilities are operating properly, the reviewing authority may require submittal of well logs, water sampling results, any septic permit issued, and evidence that the septic tank has been pumped in the previous three years.

(7) and (8) remain as proposed.

3. The following comments were received and appear with the department's responses:

COMMENT NO. 1: The new definition of "accessory building" in ARM 17.36.101(1) is confusing because it is similar to the term "dependent living unit" that is used by this county. A "dependent living unit" is one that does not contain laundry or kitchen facilities. The definition of "accessory building" does not appear to have this limitation. The definition should be modified to clarify whether an accessory building is the same as a dependent living unit.

RESPONSE: The definition of "accessory building" is the same as the definitions in Department Circular DEQ-4, 2013 edition, and in the public water supply and public sewage system rule at ARM 17.38.101(3)(a). The term is used in the revised definition of "connection" in order to designate a water or sewer line serving a main building and accessory buildings as a service connection rather than as a main.

The examples of accessory buildings listed in the definition include guest houses and church rectories. These examples show that an accessory building is not the same as, but would include, a "dependent living unit" as the county uses that term.

COMMENT NO. 2: The definition of "bedrock" in ARM 17.36.101(2) is not consistent with some of the provisions in Department Circular DEQ-4. The definition states that bedrock includes material that "has insufficient quantities of fines to provide for the adequate treatment and disposal of wastewater." Gravel could meet this condition if it had few fines. However, gravel is not treated as bedrock in Department Circular DEQ-4, Section 2.1.7.

RESPONSE: The commenter correctly points out that the Circular does not treat gravel as bedrock. Four feet of vertical separation with natural soil is required between absorption trenches and bedrock. However, Section 2.1.7 of Department Circular DEQ-4 allows absorption trenches to be installed less than four feet above gravel if the system is pressure-dosed and the trenches are sand-lined. To be consistent with the Circular provisions, the definition of "bedrock" has been modified to clarify that the term does not include gravel and other rock fragments that are defined in Department Circular DEQ-4, Appendix B. A corresponding change to the definition of "bedrock" in Department Circular DEQ-4 will be proposed at a later date.

COMMENT NO. 3: It is not clear from the definition of "connection" in ARM 17.36.101(9) whether it is the same as a "service connection." The definition should also reference different types of lines, e.g., internal lot connections versus external lot connections.

RESPONSE: The definition of "connection" states that the term is synonymous with "service connection." The definition makes no distinction between connections that are internal or external to the lot.

COMMENT NO. 4: The definition of "facilities" in ARM 17.36.101(17) alters the statutory definition in 76-4-102(6), MCA, by adding storm water to the listed types of facilities. It is not proper to expand in rule a definition found in statute.

RESPONSE: The Sanitation in Subdivisions Act clearly requires the department to review storm water drainage structures in proposed subdivisions. See 76-4-104(6)(e), MCA. The department has determined that storm water drainage structures are included within the statutory definition of "facilities," because storm water structures are a "method by which water... might be transported or distributed." Section 76-4-102(6), MCA. Expressly referencing storm water in the rule's definition of "facilities" is appropriate to clarify that storm water structures are subject to Sanitation in Subdivisions Act requirements.

COMMENT NO. 5: The definition of "floodplain" in ARM 17.36.101(19) should be the same as the revised definition of "floodplain" in ARM 17.36.912(10).

RESPONSE: The two definitions should be the same. ARM 17.36.101(19) has been modified accordingly to match the definition in ARM 17.36.912.

COMMENT NO. 6: In the definition of "impervious layer" in ARM 17.36.101(19), the limitation of 240 minutes per inch is unnecessary. This county has successfully installed evapotranspiration absorption (ETA) systems in soils that are tighter than 240 minutes per inch. Our concern is that the 240 minutes per inch limit will unnecessarily result in declaring properties undevelopable.

RESPONSE: This definition is the same as the definition in the recently revised Department Circular DEQ-4. The department has found that soils with percolation rates slower than 240 minutes per inch have very little capacity for wastewater infiltration, requiring that other treatment options be assessed.

COMMENT NO. 7: The definition of "living unit" in ARM 17.36.101(27) refers to units that have facilities for "sleeping, cooking, and sanitation." This county has different criteria to distinguish guest houses from a main house. A unit can be considered a guest house if it has no facilities for laundry and limited or no kitchen facilities. The term "cooking" is not helpful and could mean a hot plate, microwave, or barbeque grill.

RESPONSE: The amendments conform this definition to the definition in Department Circular DEQ-4. The reference to "sleeping, cooking, and sanitation" facilities reflects the department's long-standing interpretation of the facilities that are necessary to constitute a living unit. The department has not found laundry facilities to be essential in a living unit. Cooking appliances such as hot plates, microwaves, and barbeque grills could be cooking facilities for purposes of this definition, depending on the purpose of the particular unit and the nature of the other facilities within it.

COMMENT NO. 8: The terms "sewage" and "wastewater" are used throughout the rules. The definition of "sewage" in ARM 17.36.101(46) states "sewage" is synonymous with "wastewater." It is not clear why the rules use two separate terms if they are synonymous.

RESPONSE: The use of the two separate terms was an inadvertent result of inconsistent terminology in rule amendments adopted over a number of years. There is no substantive effect because, as the commenter notes, the terms "sewage" and "wastewater" are defined as synonymous for purposes of these rules. Standardizing the terminology is outside the scope of this rulemaking, but may be addressed in a future rulemaking.

COMMENT NO. 9: The proposed amendments to the definition of "wastewater" in ARM 17.36.101(66) delete the provision that refers to discharge from a building, in order to include waste segregation systems like incinerating toilets. However, the amendment broadens the definition so that it now could include storm water running off roofs or down the street, carrying waste and detritus with it. The definition should also be amended to clarify that it applies to human

excreta, whether water carried or not.

RESPONSE: Storm water is not treated as wastewater in these rules and applicable department Circulars. The definition of "wastewater" has been modified to clarify that it does not include wastes carried in storm water. A corresponding change to the definition of "wastewater" in Department Circular DEQ-4 will be proposed at a later date. The wastes listed in (a) through (d) are water-carried wastes by definition, regardless of whether they are in fact carried in water.

COMMENT NO. 10: The proposed amendments to the definition of "wastewater treatment system" in ARM 17.36.101(67) refer to systems described in Department Circulars DEQ-2 and DEQ-4. By striking the words "but not limited to," the amendments limit the definition to systems addressed by the Circulars. Systems such as cesspools are not addressed in the Circulars, but a subdivision reviewer should be able to require that existing cesspools be shown on lot layout documents submitted with a subdivision application. The "but not limited to" language should be restored in the definition.

RESPONSE: The language "but is not limited to" has been restored in the definition. A corresponding change to the definition of "wastewater treatment system" in Department Circular DEQ-4 will be proposed at a later date.

COMMENT NO. 11: When proposed subdivision wastewater disposal facilities require a ground water discharge permit under the Water Quality Act, the proposed amendments to ARM 17.36.103(1)(k) require that the developer first obtain the discharge permit in order to provide the permit nondegradation determination to the subdivision reviewer. This will have the effect of preventing a county health department from reviewing and commenting on the proposed wastewater system before the discharge permit is approved. This could be alleviated if the applicant or the department was required to notify the county at the time the discharge permit application was submitted.

RESPONSE: The rules currently require an applicant to notify the county health department prior to submitting a subdivision application if facilities for subsurface wastewater disposal are proposed. ARM 17.36.102(6). The purpose of that requirement is to allow the local health department to conduct a preliminary site assessment to determine whether the site meets applicable state and local requirements. The rules addressing public notice for the department discharge permit program are not within the scope of this rulemaking. However, ARM 17.30.1040, which is in the ground water rules, requires public notice of ground water permit applications and provides that persons may be placed on a mailing list for all ground water applications.

COMMENT NO. 12: Section 76-3-604(7), MCA, requires that comments from public hearings held under the Subdivision and Platting Act be provided to the department with Sanitation in Subdivisions Act applications. ARM 17.36.103 should be amended to include this requirement in the Sanitation in Subdivisions Act rules. ARM 17.36.103(1)(o) requires an applicant to submit a copy of applicable letters of approval or denial from local government officials, but this does not appear to cover public comments from Platting Act hearings.

RESPONSE: The rules currently require submission of either a copy or a summary of any public comments on preliminary sanitation information that is collected in public hearings held under the Subdivision and Platting Act. See ARM 17.36.103(1)(r).

COMMENT NO. 13: Proposed new ARM 17.36.103(1)(s) would require applicants to provide information to the department about the status of the water rights for any proposed water supply using wells or springs. Except for connections to existing public water supply systems, the amendment would require the applicant to provide either proof of a water right or a letter of determination from the Montana Department of Natural Resources and Conservation (DNRC) stating that the proposed subdivision water supply is exempt from DNRC permitting requirements. A county health department is concerned that the requirement for consultation with DNRC will create a review bottleneck.

RESPONSE: The department and DNRC will enter into a Memorandum of Understanding (MOU) that will partially mitigate this problem. The draft MOU specifies that DNRC will issue letters of determination that no water right is required within 20 days after application receipt. In discussions with the department, DNRC regional engineers have stated that this time frame is feasible, and 20 days is compatible with the 55-day review time frame for Sanitation in Subdivisions Act applications. If a water right is required, the commenter is correct that there could be a significant time lapse between the receipt of a subdivision application and the applicant's obtaining proof of a water right from DNRC. However, the department believes this rule is necessary to allow the department to better assess the dependability of a proposed subdivision water supply and to help prevent the development of a subdivision when water is not legally available for use.

COMMENT NO. 14: The proposed amendments to ARM 17.36.104(1) raise a question whether lot layouts can be accompanied by separate sheets showing design details for storm water structures. Storm water design details can be too detailed for a typical single-page lot layout.

RESPONSE: The proposed amendments to ARM 17.36.104(2)(g) require that design details of storm water structures be shown on lot layout documents. The proposed amendments to the lot layout rule in ARM 17.36.104(1) retain the current provisions allowing multiple sheets for lot layouts, with the restriction that individual lots may not be split across two sheets. An applicant can provide multiple lot layout sheets if needed to show the reviewer the design details of storm water structures.

COMMENT NO. 15: Table 1 in ARM 17.36.104 should be modified. The elements required by the Table on lot layouts for non-municipal wells should be the same as those for non-municipal wastewater systems.

RESPONSE: The department agrees with this comment. The following elements have been added in the column for non-municipal wells: water lines (extensions and connections), ground water monitoring wells, cisterns, existing and proposed building locations, and driveways. Percolation test locations and road cuts/steep slopes have not been added to the column for non-municipal wells, since these elements pertain solely to wastewater systems.

COMMENT NO. 16: ARM 17.36.106(3)(b)(iii) states that no part of a lot utilized for a subsurface wastewater treatment system may be located in a 100-year floodplain. This is inconsistent with the rule that allows placement of sealed components (sewer lines, sewer mains, septic tanks, grease traps, dosing tanks, and pumping chambers) in floodplains. See Table 2 in ARM 17.36.323.

RESPONSE: The commenter is correct that this prohibition should only apply to the soil absorption systems addressed in Chapter 6 of Department Circular DEQ-4. ARM 17.36.106(3)(b)(iii) has been modified accordingly.

COMMENT NO. 17: The proposed amendments to ARM 17.36.110(3) incorrectly number the section. They show as (3) what is actually (4) in the rules.

RESPONSE: The section is correctly numbered in the amendments.

COMMENT NO. 18: A proposed amendment to ARM 17.36.116 replaces the term "registered sanitarian" with "licensed sanitarian." The amendment is incorrect. The term for a sanitarian licensed in Montana is "registered sanitarian," which is the term currently used in ARM 17.36.116. See 37-40-101(4), MCA. The rules should include a definition for "registered sanitarian" to clarify that the sanitarian must be licensed in the State of Montana.

RESPONSE: The commenter is correct. The term "registered" has been reinserted and the term "licensed" stricken. A definition of "registered sanitarian" has been added to clarify that the sanitarian must be licensed in Montana.

COMMENT NO. 19: The proposed amendments to ARM 17.36.116 replace the term "registered professional engineer" with "professional engineer," with the registration requirement being moved to a definition. The amendments inadvertently left two occurrences of the term "registered professional engineer" in ARM 17.36.116(2).

RESPONSE: The correction has been made to ARM 17.36.116(2).

COMMENT NO. 20: Use of the term "single family dwellings" in ARM 17.36.310(2)(a) is inconsistent with the revised terminology in the rest of the rules. The proposed amendments to these rules would replace the term "family dwelling" with "living unit."

RESPONSE: ARM 17.36.310(2)(a) is modified to replace the term "single family dwellings" with "single living units."

COMMENT NO. 21: ARM 17.36.312 addresses potential contamination of state waters caused by sewage, but does not address potential contamination caused by storm water runoff.

RESPONSE: Impacts to state waters caused by storm water are addressed in ARM 17.36.310(6).

COMMENT NO. 22: Language should be added to ARM 17.36.313 (Condominium Conversions) prohibiting an increase in wastewater flow caused by a conversion to condominium use.

RESPONSE: This comment is outside the scope of the current rulemaking,

since no amendments were proposed to ARM 17.36.313.

COMMENT NO. 23: On lots that have drainfields identified by stakes or other methods, the department should also require identification of water well locations. This will facilitate compliance with the requirement that well isolation zones be located on the lot.

RESPONSE: The rules place restrictions on well isolation zones crossing subdivision boundaries, but they do not require that isolation zones be kept within every lot in the subdivision. Nevertheless, the department agrees that the location of proposed wells should be staked or otherwise physically identified. ARM 17.36.322(6) currently requires that drainfield locations be physically identified. Adding a similar requirement for wells will help ensure the proper separation between wells and drainfields. ARM 17.36.330 has been modified accordingly.

COMMENT NO. 24: The provisions regarding easements in ARM 17.36.334(4) should be amended to require that easements be described by metes and bounds on a certificate of survey or easement document.

RESPONSE: The land surveyor rules already contain a requirement that certificates of survey show locations, bearings, distances, and curve data for any easement that will be created by reference to the survey. ARM 24.183.1104(1)(d)(xv). It is not necessary to re-state that requirement in these rules.

COMMENT NO. 25: In the provisions for easements in ARM 17.36.334(4), it is not clear whether an easement document signed by the grantor must be submitted to the reviewing authority when an easement is shown on a plat or certificate of survey (COS). Our county health department requires that separate easement documents also be provided when easements are shown on a COS.

RESPONSE: The rule has been modified to clarify that a signed easement document is not required when the same person owns both of the affected parcels. A signed easement document in that situation is void, because landowners cannot grant an easement to themselves. In that situation, the easement can be documented by showing it on the plat or COS. When the property is later sold, the easement is created when the deeds are issued that describe the parcel by reference to the plat or COS.

COMMENT NO. 26: The existing provisions in ARM 17.36.334(5) require that user agreements for shared (two-party) water systems be signed when the lots are sold. This provision is problematic because there is no way that the department or county can ensure compliance. When the lots are sold, buyers are often unaware of the existence of the user agreement. Buyers could also sign an agreement that is different than what the department approved. This county health department requires use of a declaration format in this situation. The declaration is essentially a covenant which, when filed with the clerk and recorder, is binding on subsequent purchasers of the property. We recommend that the declaration format be used instead of the user agreement.

RESPONSE: Although the Sanitation in Subdivisions Act requires that a developer provide initial buyers with a copy of the certificate of subdivision approval,

the department recognizes that this notification requirement is sometimes overlooked at the time of sale. See 76-4-113, MCA. However, covenants can also be problematic. To be effective, covenants must be filed in the county public records and subsequent property deeds must make reference to them. Ensuring that these steps occur may be more feasible for a county health department than for a state agency. The department believes that the requirement for user agreements for shared systems is reasonably effective and should be retained.

COMMENT NO. 27: A county health department supports the proposed changes to the lot size rule in ARM 17.36.340 and believes that the changes will be protective of public health and the environment.

RESPONSE: Comment noted.

COMMENT NO. 28: A private citizen supports the proposed changes to the lot size rule in ARM 17.36.340, stating that it will help her put a second dwelling on a lot so she can live there to assist her aging parents.

RESPONSE: Comment noted.

COMMENT NO. 29: Two county health departments oppose the revisions to the lot size rule in ARM 17.36.340. They express the concern that the revisions rely too heavily on designated drainfield mixing zones to protect human health and the environment. The counties maintain that the dilution model used to establish mixing zones is unreliable and unscientific. One county states that the non-significance determination process is commonly referred to as "voodoo science." The other county states that the revised rule will likely decrease the size of lots. The county cites an example of a subdivision where too many septic systems in too small an area caused ground water degradation.

RESPONSE: The purposes of the lot size rule are to protect human health and water quality by creating sufficient separation between wells and contamination sources, and to allow sufficient area for construction of subdivision improvements such as water, sewer, houses, garages, and driveways. The proposed amendments to the lot size rule eliminate the one-acre minimum required in the current rule for lots with on-site wells and drainfields. In the revised rule, the three primary methods to establish lot size are: designation of mixing zones, application of the setbacks in ARM 17.36.323, and verifying on the lot layout document that there is adequate size for all planned facilities and structures. The amendments also incorporate the statutory requirements that mixing zones and well isolation zones be located wholly within the subdivision.

Unlike dilution modeling, the one-acre limit was adopted without any clear scientific basis. After the development of nondegradation rules in 1993, the department began to rely on nondegradation analysis and dilution modeling as the primary method to designate the area needed for subsurface wastewater treatment. Dilution modeling designates mixing zone areas on each lot for primary and replacement drainfields, which are then protected through setbacks. The department does not agree that dilution modeling is unreliable or unscientific. The model most often employed is Bauman-Schafer, which was adopted for use by the department in 1993. The mass loading calculations in the model calculate dilution of

nutrients by both ground water and precipitation. The model's variable hydraulic conductivity allows use in both alluvial and bedrock aquifers and allows calculation of cumulative impacts from multiple systems. The model uses conservative assumptions that enhance its protectiveness. It is simple to use and its results are readily understandable by the general public. The department has found that Bauman-Schafer is protective of state waters and effective at limiting nutrient loading from point sources such as septic systems. Bauman-Schafer is not the only acceptable model for nonsignificance analysis. Other models or methods may be used if the applicant can demonstrate their effectiveness.

As noted above, the amended lot size rule also uses the setbacks in ARM 17.36.323 to establish minimum lot size. The Table in ARM 17.36.323 has numerous setbacks to ensure adequate separation between drinking water supplies and potential sources of contamination. Proposed amendments to the setback rule add a new 100-foot separation between mixing zones and drinking water wells, which will provide increased protection for drinking water wells. The revised lot size rule also requires verification that lots have adequate space for the sewage treatment system, drainfield replacement area, water supply, and all permanent structures including, but not limited to, driveways, houses, garages, ditches, service lines, easements, and utilities. As discussed in the Response to Comment No. 33 below, the amendments will require that developers and subdivision reviewers use lot layout documents as a tool to verify that lot sizes will be adequate for the planned development.

Rather than using a rule of thumb like the one-acre rule, the revised lot size rule focuses on specific health, environmental, and development factors that affect lot size. The one-acre rule does not add to the health and environmental protections provided by setbacks and mixing zones. As discussed in the Response to Comment No. 33 below, the amendments to the lot layout rule will increase the effectiveness of the lot layout document for creating adequate size for proposed and anticipated developments. The department believes that the amendments will be more effective at addressing the purposes of the rule. The revised rule will also be simpler and easier to administer than the one-acre rule with its numerous exceptions.

COMMENT NO. 30: A county health department requests that the department abandon the nonsignificance determination/mixing zone method for determining the area needed for subsurface wastewater treatment.

RESPONSE: Since the development of nondegradation rules in 1993, the department has relied on nondegradation analysis and dilution modeling as the primary method to designate the area needed for subsurface wastewater treatment. The mixing zone method is well established in these rules and other department rules. See, e.g., ARM Title 17, Chapter 30, Subchapter 5 (Mixing Zones in Surface and Ground Water). Mixing zones are also recognized in statute. See, e.g., 75-5-301(5)(d), MCA (allowing mixing zones to meet non-significance levels for nitrate in ground water); and 76-4-104(6)(i), MCA (placing restrictions on mixing zones crossing the boundaries of proposed subdivisions). Abandoning the nonsignificance determination/mixing zone method is impractical and unnecessary. The nonsignificance determination/mixing zone method provides the department with an important tool for determining effective wastewater treatment.

COMMENT NO. 31: The department should consider a prescriptive approach to protecting state waters. For example, if a project is within a given distance to surface or ground water, in a given soil, a particular treatment system would be prescribed. If high quality waters are potentially impacted, advanced treatment should be required.

RESPONSE: Soil type and distance to surface and ground water are factors that are already included in nondegradation analysis. Soil type is addressed in phosphorus breakthrough and categorical exemptions. Distance to surface water is addressed in the phosphorus breakthrough and nitrate sensitivity analysis. Distance to ground water is assumed in the nitrate sensitivity analysis to be at the bottom of the test pit. This protects state waters while allowing applicants flexibility in designing treatment systems. The prescriptive approach would unduly limit the applicant's options.

COMMENT NO. 32: A county health department states that the revised lot size rule essentially does away with minimum lot sizes altogether. The county already has problems with consultants proposing lots that barely accommodate a house and associated facilities. This will become a much larger problem under the revised rule.

RESPONSE: The revised rule will result in a definitive lot size for each lot that is protective of health and the environment and provides adequate space for development.

COMMENT NO. 33: If subdivision lots are tightly planned, the one-acre rule is necessary to leave some room to adjust for site discrepancies such as slope, or to allow some changes in development plans by the eventual lot owner. For example, owners may want to greatly expand the size of the house, or add a garage or a shop. The amendments attempt to address this by requiring, in ARM 17.36.340(2)(d), that development be shown on the lot layout. However, it is impossible for the developer to predict the size of future homes, driveways, outbuildings, and parking areas. Furthermore, buyers seldom have the lot layout presented to them when they purchase a lot.

RESPONSE: New ARM 17.36.340(2)(d) requires that each lot have adequate space for the sewage treatment system, drainfield replacement area, water supply, and all permanent structures including, but not limited to, driveways, houses, garages, ditches, service lines, easements, and utilities. Amendments were also proposed to the lot layout rule in ARM 17.36.104 to clarify that both existing and proposed structures must be shown on lot layouts. The intent of these amendments is to require developers and subdivision reviewers to use the lot layout document as a tool to verify that lot sizes will be adequate for the planned development. Site conditions should be also considered when the lot layout is prepared. The possibility of later changes by the lot owner should be addressed to the extent possible. Inconsistent later changes by the eventual lot buyer are also addressed by giving buyers a copy of the approved lot layout. The Sanitation in Subdivisions Act requires that a developer provide initial buyers with a copy of the certificate of subdivision approval. See 76-4-113, MCA. The department recognizes that this notification requirement is sometimes overlooked at the time of sale. Some room to

adjust the minimum lot size is provided by new ARM 17.36.340(4), which allows the reviewing authority to require lot sizes larger than the minimum if necessary to protect human health or water quality.

To clarify that the lot layout document is the method for verifying compliance with the requirement in ARM 17.36.340(2)(d), a reference to the lot layout has been added to ARM 17.36.340(2)(d). The facilities and structures listed in ARM 17.36.340(2)(d) are the same as the items required for lot layouts in ARM 17.36.104, except that "utilities" are not listed in ARM 17.36.104. To allow lot layout documents to be used to verify compliance with ARM 17.36.340(2)(d), the term "utilities" has been added to ARM 17.36.104(2)(f). In addition, Table I in ARM 17.36.104 has been modified to indicate that these facilities and structures must be shown on the lot layout.

COMMENT NO. 34: New ARM 17.36.340(4) allows the reviewing authority to require lot sizes larger than those allowable than the minimum if necessary to protect human health or water quality. This will be difficult to implement fairly and consistently across the state.

RESPONSE: There are 19 counties whose health departments have been certified to review subdivisions under the Sanitation in Subdivisions Act. Achieving consistency in reviews across the state can be challenging, but the department strives to keep counties informed about how the department interprets and applies the Act and rules. New ARM 17.36.340(4) is no more challenging in this regard than many of the other rules.

COMMENT NO. 35: Local health departments work with potential subdividers to help them understand the applicable requirements. Now when someone comes to the counter with a question about lot size, we have clear rules. With the revised lot size rule, the only answer we can give them is "it depends."

RESPONSE: The current lot size rule, with its numerous exceptions, is actually more complex than the revised rule. The setback rules are simple to explain, as are mixing zones and the need to show planned developments on each lot. For inquiries at the counter, a simple lot sketch could be used to illustrate how the new requirements would affect lot sizes.

COMMENT NO. 36: Reviewing the complex lot layout document required in ARM 17.36.340(2)(d) will be difficult for the reviewer. If review time increases, review fees should be increased, but this will make lots ultimately more expensive for the buyer.

RESPONSE: The elements listed in ARM 17.36.340(2)(d) are not different than those currently required to be shown on lot layout documents, except for utilities, which are not currently in the lot layout requirements stated in ARM 17.36.104. Because the lot layout is to be the primary method to determine compliance with ARM 17.36.340(2)(d), the term "utilities" has been added to ARM 17.36.104. Lot layout documents should not be more complex than they are currently, nor should review time be significantly increased. The new provisions simply require that lot layouts now be used as a tool for evaluating lot size.

COMMENT NO. 37: The time required for an environmental consultant to develop a lot layout that contains all of the elements in ARM 17.36.340(2)(d) will result in additional chargeable hours for their clients. Developers will decrease their profit through consultant fees.

RESPONSE: See the Response to Comment No. 36 above.

COMMENT NO. 38: In the revised lot size rule, ARM 17.36.340(2)(b) and (c) require that drainfield mixing zones and well isolation zones be located wholly within the subdivision. These subsections should not be part of the lot size rule because they apply to the whole subdivision and not to individual lots. These subsections also refer to ARM 17.36.322(5) and 17.36.330(4), which allow easements to be used to satisfy the requirement that mixing zones and well isolation zones remain within a subdivision. Since (2)(b) and (c) do not mention easements, it is not clear if they are allowed under the lot size rule.

RESPONSE: The requirements that drainfield mixing zones and well isolation zones be located wholly within the subdivision are set out in statute at 76-4-104(6)(i), MCA, and restated in the rules at ARM 17.36.322(5) and 17.36.330(4). The requirements are referenced in the amended lot size rule because they can affect the configuration of facilities and the sizes of lots, especially those on the perimeter of the subdivision. However, to eliminate the ambiguity pointed out by the commenter, ARM 17.36.340(2)(b) and (c) have been amended to simply reference ARM 17.36.322(5) and 17.36.330(4).

COMMENT NO. 39: The revisions to ARM 17.36.605(2)(c) exempt boundary line adjustments (BLAs) from review under certain conditions. One condition is that the local health officer has determined that existing facilities are adequate for the proposed use. This essentially requires the health officer to conduct a complete review of all of the facilities on the parcel in order to exempt them from review. Implementing this exemption will be time-consuming and expensive for local health departments, yet no fees apply to review of exemptions. If full review is required, the parcel should not be exempted, but should go through the review process with appropriate fees.

RESPONSE: The exemption language states that, in making the determination that existing facilities are adequate, the local health officer "may" require evidence regarding specific facilities. The local health officer has discretion to not allow the exemption, if reviewing the facilities proposed for exemption would essentially constitute a full subdivision review or require undue amounts of staff time or resources. The department agrees that, if extensive information and review is needed to approve the exemption, the parcel should go through the full subdivision review process with appropriate fees. The exemption is intended for situations where extensive review is not necessary. Examples would be BLAs to parcels in a city that are already connected to city water and sewer, or BLAs to parcels that have been recently developed in accordance with local permit requirements.

COMMENT NO. 40: A county health department states that surveyors, who are required to state exclusions in full on plats and surveys, may object to the length of the exclusion in ARM 17.36.605(2)(c).

RESPONSE: The statement of the exclusion is longer than others in ARM 17.36.605, but the department has not heard from surveyors that this exemption is too long to put on plats or surveys. A number of surveyors received copies of this rulemaking proposal.

COMMENT NO. 41: As proposed to be amended, the exclusion in ARM 17.36.605(2)(c) states that a parcel that is affected by a boundary line adjustment (BLA) may be exempted under certain conditions. The conditions in ARM 17.36.605(2)(c)(i), (ii), and (iii) refer to "parcels," which implies that all of the parcels affected by a BLA must meet the conditions in (2)(c)(i), (ii), and (iii) before one parcel may be exempted.

RESPONSE: The use of the plural "parcels" in the amendments was in error. The intent of the exemption is that a parcel affected by a BLA may be exempted if that parcel meets the stated conditions, regardless of whether the other parcels affected by the BLA meet those conditions. The rule has been modified in response to this comment.

COMMENT NO. 42: One of the conditions of the exclusion in ARM 17.36.605(2)(c) is that no new facilities be constructed on the exempted parcel. This will be impossible to track.

RESPONSE: The commenter is correct that there is no simple way for counties or the department to track subsequent development on parcels that are excluded from review under this exemption. The same is true for parcels excluded under the existing "no facilities" exemption in ARM 17.36.605(2)(a). Some counties can track development through building permits, well permits, or septic permits. Other counties may not have those mechanisms available. However, the development prohibition in the rule is an enforceable restriction that applies to the exempted parcel. If noncompliance is later discovered, the parcel owner can be required to correct the noncompliance, either by removing the new facilities or by bringing the new facilities in for subdivision review.

COMMENT NO. 43: The revised exemption in ARM 17.36.605(2)(c) should be struck in its entirety. Review of developed lots has never been a problem in the past.

RESPONSE: The department has received numerous requests in the past to exempt minor BLAs on parcels that have not previously been required to undergo subdivision review. The intent of the exemption is to allow the BLA without Sanitation in Subdivisions Act review if no new facilities are proposed and existing facilities comply with applicable regulations and are not affected by the BLA.

COMMENT NO. 44: The "remainder" exemption in 76-4-125(2)(e), MCA, should be changed to include all discharge sources, not just those in existence before April 29, 1993.

RESPONSE: This comment would require a change to statute, and is outside the scope of this rulemaking.

COMMENT NO. 45: The rule addressing waivers and deviations refers to a

"waiver" from a department circular. ARM 17.36.601(2). This is inconsistent with the other provisions in the rule, which refer to "deviations" from circulars and "waivers" from rules.

RESPONSE: The commenter is correct that the use of "waiver" in ARM 17.36.601(2) is incorrect and that the term should be "deviation." The comment is outside the scope of this rulemaking, but may be addressed in a future rulemaking.

COMMENT NO. 46: A county health department reviews exemption requests to make sure they meet exemption criteria. The county requests that there be a fee specified in ARM 17.36.802 for review of exempt lots.

RESPONSE: The department would like further input on this subject from county health departments and other stakeholders. The department is willing to consider amending the fee rules based on that input.

COMMENT NO. 47: The new fee for review of a "modified lot layout document" should use the term that is used in New Rule I, which is "revised lot layout document."

RESPONSE: The department agrees that the terms used should be consistent in the rules. ARM 17.36.802 and 17.36.804 have been amended to use the term "revised lot layout document."

COMMENT NO. 48: In ARM 17.36.804(2)(a), the reimbursement for local review of lots should be raised to \$50. The current compensation of \$25 does not come close to covering the county's cost of going to the site to investigate specific conditions. The reimbursed amount has not changed since 2002, even though the department has increased its lot fee a number of times since then.

RESPONSE: The department would like further input on this subject from county health departments and other stakeholders. The department is willing to consider amending the fee rules based on that input.

COMMENT NO. 49: New Rule I should be amended to allow the reviewing authority to ask for information about previously approved facilities, even if they are not changing. For existing wells, the information could include well logs and water sampling results. For existing septic systems, the information could include the septic permit, evidence that the system is operating properly, and evidence that the septic tank has been pumped within the previous three years.

RESPONSE: New Rule I has been modified to allow the reviewing authority to require this information.

Reviewed by:

DEPARTMENT OF ENVIRONMENTAL  
QUALITY

/s/ John F. North

JOHN F. NORTH  
Rule Reviewer

By: /s/ Tracy Stone-Manning

TRACY STONE-MANNING, DIRECTOR

Certified to the Secretary of State, September 8, 2014.