MONTANA ADMINISTRATIVE REGISTER

2023 ISSUE NO. 7
APRIL 14, 2023
PAGES 317-369

ISSUE NO. 7

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 The Proposal Notice Section contains state agencies' proposed new, amended, or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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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PROPOSAL NOTICE SECTION

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

In the matter of the repeal of ARM 6.6.2809 pertaining to the Approved Risk List	)	NOTICE OF PROPOSED REPEAL
	)	NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons

1. The Commissioner of Securities and Insurance, Office of the Montana State Auditor (CSI) proposes to repeal the above-stated rule.

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 April 25, 2023, 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. CSI proposes to repeal the following rule:

6.6.2809 APPROVED RISK LIST -- INSURANCE PRESUMED UNOBTAINABLE FROM AUTHORIZED INSURERS

AUTH: 33-1-313, 33-2-316, MCA
IMP, 33-2-301, 33-2-302, 33-2-303, 33-2-305, 33-2-306, 33-2-308, 33-2-310, 33-2-311, 33-2-312, 33-2-313, 33-2-316, 33-2-321

4. REASON: As part of the biannual review of CSI's rules as required by 2-4-314, MCA, Montana State Auditor Troy Downing (commissioner) identified ARM 6.6.2809 for revision. ARM 6.6.2809 mandates the commissioner make available the so-called approved risk list at least semiannually. House Bill 156, Section 8, of the 68th Legislature would subsume ARM 6.6.2809 and proposes to codify the approved risk list language into statute. House Bill 156, Section 8 would change the timing of the notification requirement of the approved risk list from semiannually to annually and remove the formation of a committee to compile the approved risk list. Input from stakeholders would continue to be received by CSI without the need for a formal committee. Thus, the commissioner has determined that it is no longer in the public interest to have a duplicative law and proposes to eliminate the rule.

5. Concerned persons may submit their data, views, or arguments concerning the proposed actions in writing 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., May 12, 2023.

6. 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., May 12, 2023.

7. 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 one person based on a conservative estimate of how frequently CSI receives questions about the above-stated rule per year.

8. 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 5 above or may be made by completing a request form at any rules hearing held by CSI.

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

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

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

/s/ *Chris McConnell*
Chris McConnell
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 April 4, 2023.

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of ARM 24.29.1433 and 24.29.1538 pertaining to workers' compensation medical fee schedule	))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On May 18, 2023, at 9:00 a.m., a public hearing will be held via remote conferencing to consider the proposed changes to the above-stated rules. There will be no in-person hearing. Interested parties may access the remote conferencing platform in the following ways:

a. Join Zoom Meeting, https://mt-gov.zoom.us/j/86057836868
Meeting ID: 860 5783 6868, Passcode: 837526
-OR-

b. Dial by telephone, +1 406 444 9999 or +1 646 558 8656
Meeting ID: 860 5783 6868, Passcode: 837526

2. The Department of Labor and Industry (department) will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing 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 May 11, 2023, to advise us of the nature of the accommodation that you need. Please contact the department at P.O. Box 1728, Helena, Montana 59624-1728; telephone (406) 444-5466; Montana Relay 711; or e-mail laborlegal@mt.gov.

3. GENERAL STATEMENT OF REASONABLE NECESSITY: There is reasonable necessity to amend ARM 24.29.1433 and 24.29.1538 to comply with the provisions of 39-71-704(2), MCA, that require that the department annually establish a medical fee schedule for workers' compensation purposes.

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

24.29.1433 FACILITY SERVICE RULES AND RATES FOR SERVICES PROVIDED ON OR AFTER JULY 1, 2013 (1) through (10) remain the same.

(11) The following applies to inpatient services provided at an acute care hospital:

(a) The department may establish the base rate annually.

(i) The base rate effective ~~July 1, 2022~~ July 1, 2023, is ~~$9,435~~ $10,011.

(ii) through (g) remain the same.

(12) The following applies to outpatient services provided at an acute care hospital or an ASC:

(a) The department may establish a base rate annually.

(i) The base rate effective ~~July 1, 2022~~ July 1, 2023, is $130.

(ii) remains the same.

(b) The department may establish a base rate annually for ASCs at 75 percent of the hospital outpatient base rate.

(i) The base rate effective ~~July 1, 2022~~ July 1, 2023, is $98.

(ii) through (g) remain the same.

AUTH: 39-71-203, MCA
IMP: 39-71-704, MCA

24.29.1538 CONVERSION FACTORS FOR SERVICES PROVIDED ON OR AFTER JANUARY 1, 2008 (1) remains the same.

(2) The conversion factors established by the department for goods and services, other than anesthesia services are:

(a) ~~$61.05~~ $60.47 on or after ~~July 1, 2022~~ July 1, 2023.

(b) remains the same.

(3) The conversion factors established by the department for anesthesia services are:

(a) ~~$64.84~~ $65.73 on or after ~~July 1, 2022~~ July 1, 2023.

(b) through (5) remain the same.

AUTH: 39-71-203, MCA
IMP: 39-71-704, MCA

5. Concerned persons may present their data, views, or arguments at the hearing. Written data, views, or arguments may also be submitted at dli.mt.gov/rules or P.O. Box 1728; Helena, Montana 59624. Comments must be received no later than 5:00 p.m., May 26, 2023.

6. An electronic copy of this notice of public hearing is available at dli.mt.gov/rules and sosmt.gov/ARM/register.

7. The agency maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by the agency. Persons wishing to have their name added to the list may sign up at dli.mt.gov/rules or by sending a letter to P.O. Box 1728; Helena, Montana 59624 and indicating the program or programs about which they wish to receive notices.

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

9. Pursuant to 2-4-111, MCA, the agency has determined that the rule changes proposed in this notice will not have a significant and direct impact upon small businesses.

10. Department staff has been designated to preside over and conduct this hearing.

/s/ QUINLAN L. O'CONNOR
Quinlan L. O'Connor
Rule Reviewer

/s/ LAURIE ESAU
Laurie Esau, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State April 4, 2023.

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

In the matter of the amendment of ARM 38.5.1010 pertaining to construction of utility lines and facilities	))))))	SECOND NOTICE OF PROPOSED AMENDMENT AND EXTENSION OF COMMENT PERIOD NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons

1. On February 10, 2023, the Department of Public Service Regulation published MAR Notice No. 38-5-260 pertaining to the proposed amendment of the above-stated rule at page 152 of the 2023 Montana Administrative Register, Issue Number 3. The published notice established a deadline of March 10, 2023, for interested persons to submit written comments to the department regarding the proposed amendment of the above-stated rule.

2. The published notice contained language that may have led to confusion about whether a public hearing was contemplated for the proposed amendment of the above-stated rule. This notice clarifies that no public hearing is currently contemplated for the proposed amendment, but under the circumstances described below a public hearing will be held. This notice also affords interested parties an additional opportunity to comment on the proposed amendment of the above-stated rule.

3. Concerned persons may submit their data, views, or arguments concerning the proposed action in writing to the Department of Public Service Regulation, 1701 Prospect Avenue, P.O. Box 202601, Helena, MT, 59620-2601; telephone (406) 444-6199; fax (406) 444-7618; or e-mail pschelp@mt.gov, and must be received no later than 5:00 p.m., May 12, 2023.

4. 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 to the Department of Public Service Regulation, 1701 Prospect Avenue, P.O. Box 202601, Helena, MT 59620-2601 no later than 5:00 p.m., May 12, 2023.

5. 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 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 by the proposed action has been determined to be 2 persons based on 20 entities.

6. 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 May 5, 2023, to advise us of the nature of the accommodation that you need. Please contact the Department of Public Service Regulation, 1701 Prospect Avenue, P.O. Box 202601, Helena, MT, 59620-2601; telephone (406) 444-6199; fax (406) 444-7618; or e-mail pschelp@mt.gov.

7. 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.

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

/s/ DANIEL POLKOW
Daniel Polkow
Rule Reviewer

/s/ JAMES BROWN
James Brown
President
Public Service Commission

Certified to the Secretary of State April 4, 2023.

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the adoption of NEW RULE I, the transfer of ARM 17.36.309, 17.36.312, 17.36.313, the amendment and transfer of ARM 17.36.314, 17.36.326, 17.36.328, 17.36.345, the amendment of ARM 17.36.101, 17.36.102, 17.36.103, 17.36.104. 17.36.106, 17.36.108, 17.36.112, 17.36.116, 17.36.310, 17.36.320, 17.36.322, 17.36.323, 17.36.327, 17.36.340, 17.36.914, and 17.38.101 and the repeal of ARM 17.36.330, 17.36.331, 17.36.332, 17.36.333, 17.36.334, 17.36.335, 17.36.336 pertaining to the review of storm water designs, individual, and shared onsite wastewater systems, and well locations, including the reorganization of existing rules. In addition, the adoption of Circular DEQ-20, the amendment of Circular DEQ-3 and Circular DEQ-4, and the repeal of Circular DEQ-11 and Circular DEQ-17	)	NOTICE OF ADOPTION, TRANSFER, TRANSFER AND AMENDMENT, AMENDMENT, AND REPEAL (SUBDIVISIONS)

TO: All Concerned Persons

1. On December 23, 2022, the Department of Environmental Quality published MAR Notice No. 17-421 pertaining to the public hearing on the proposed adoption, transfer, transfer and amendment, amendment, and repeal of the above-stated rules at page 2278 of the 2022 Montana Administrative Register, Issue Number 24.

2. The department has adopted: NEW RULE I (17.36.117) as proposed.

3. The department has transferred ARM 17.36.309 (17.36.120), 17.36.312 (17.36.124), and 17.36.313 (17.36.125) as proposed.

4. The department has transferred and amended ARM 17.36.314 (17.36.121), 17.36.326 (17.36.122), and 17.36.345 (17.36.126) as proposed.

5. The department has amended ARM 17.36.102, 17.36.106, 17.36.108, 17.36.112, 17.36.116, 17.36.322, 17.36.327, 17.36.340, 17.36.914, and 17.38.101, and Circular DEQ-3 and Circular DEQ-4 as proposed.

6. The department has repealed ARM 17.36.330, 17.36.331, 17.36.332, 17.36.333, 17.36.334, 17.36.335, and 17.36.336, and Circular DEQ-11 and DEQ-17 as proposed.

7. The department transfers and amends the following rule as proposed but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

17.36.328 (17.36.123) CONNECTION TO PUBLIC WATER SUPPLY AND WASTEWATER SYSTEMS (1) New water supply and sewage disposal facilities in a proposed subdivision must be provided by a connection to a public water supply or public wastewater system if any boundary of the subdivision is within 500 ~~300~~ feet of any component of the public system and the public system meets the requirements of (2)(a) and (b). The department may grant a waiver, pursuant to ARM 17.36.601, of the requirement to connect to a public system if the applicant demonstrates that connection to the public system is physically or economically impractical, or that easements cannot be obtained. For purposes of this rule, a connection is economically practical if the cost of constructing the connection to the system is less than or equal to three times the cost of constructing approvable systems on the site. ~~unless a waiver is granted under (4).~~

(2) and (3) remain as proposed.

~~(4) The department may grant a waiver to the requirement in (1). In addition to the requirements of ARM 17.36.601, a waiver request from this setback must demonstrate that:~~

~~(a) connection to the public system is physically impractical; or~~

~~(b) easements cannot be obtained.~~

8. The department amends the following rules as proposed but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

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

(1) "Accessory building" has the same meaning as defined in ARM 17.38.101(3)(a).

(2) through (47) remain as proposed.

~~(48) "Seasonal use" means use for not more than a total of four months (120 days) during any calendar year.~~

(49) through (68) remain as proposed but are renumbered (48) through (67).

17.36.103 APPLICATION--CONTENTS (1) In addition to the completed application form required by ARM 17.36.102, the following information must be submitted to the reviewing authority as part of an application:

(a) remains as proposed.

(b) for multiple-user and public systems, one copy of a design report and one copy of plans and specifications for water supply, wastewater treatment, and storm water systems. For individual and shared systems, see the specific requirements in

Circulars DEQ-4 and DEQ-20. Prior to final approval, the reviewing authority will require three copies of final plans and specifications for multiple-user and public systems;

(c) remains as proposed.

(d) vicinity maps or plans showing the locations of the following features:

(i) ~~a small-scale vicinity map showing~~ lakes, streams, irrigation ditches, wetlands, and springs ~~located within 1/2 mile from any existing or proposed well or drainfield or perimeter of the subdivision~~; and

(ii) a large-scale vicinity map showing existing, previously approved, and proposed wells, wastewater treatment systems, drainfields, existing and approved mixing zones and other sources of contamination within 100 feet of the proposed subdivision, or approved public water and public wastewater ~~facilities~~ mains ~~drainfields, existing and approved mixing zones, or other sources of contamination~~ within 500 feet of the boundaries of the subdivision; and lagoons within 1,000 feet of any existing or proposed drinking well;

(e) through (o) remain as proposed.

(p) a copy of any applicable existing certificate of subdivision approval and the approved lot layout document;

(q) through (s) remain as proposed.

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 (h) remain as proposed.

(i) information as set out in Table 1 for the specific water supply, wastewater, and storm water facilities in the subdivision, and those located within 100 feet of the perimeter of the subdivision or parcel. All systems must be labeled as "existing" or "proposed." For individual and shared systems, the locations and design details do not have to be shown on the lot layout if those details will not be determined until the time of septic permitting.

TABLE 1
REQUIREMENTS FOR LOT LAYOUTS

	Subdivisions served by nonmunicipal wells	Subdivisions served by nonmunicipal wastewater systems	Subdivisions served by municipal water or municipal sewer systems
Existing wells and proposed well locations or	X	X	X

approved drilling areas, setbacks in ARM 17.36.323 Table 2, and features listed in ARM 17.36.103(1)(d) within 100 feet of the subdivision			
Water lines (suction and pressure)			X
Water lines (extension and connections)	X	X	X
Existing and proposed wastewater systems (drainfield, replacement area, and existing septic tanks)	X	X	
Existing and proposed gray water irrigation systems	X	X	X
Percent and direction of slope across the drainfield	X	X	
Sewer lines (extensions and connections)	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	X	X	X
Floodplain boundaries	X	X	X
Cisterns	X	X	X
Existing and proposed building locations	X	X	X
Driveways	X	X	X
Road cuts and escarpments or slopes > 25%		X	
Mixing zone boundaries and direction of ground water flow	X	X	
Locations, sizes, and design details of proposed storm water facilities	X	X	X
Locations and sizes of existing storm water facilities	X	X	X

17.36.310 STORM DRAINAGE (1) through (5) remain as proposed.

(6) The reviewing authority ~~may~~shall exempt the requirements of (1), (2), (3), and (4) for either of the following:

(a) remains as proposed.

(b) lots ~~over~~ 5 acres or larger in size if the ~~following conditions are met:~~ applicant provides information demonstrating that the total impervious area on the lot will be less than 5% of the lot area, including easements and right-of-ways.

~~(i) the proposed impervious area on the lot will be less than 5% of the lot area, including easements and right-of ways;~~

~~(ii) the proposed development will include best management practices to prevent pollution of state waters and reduce erosion and sedimentation; and~~

~~(iii) the applicant must provide information demonstrating the subject parcels qualify for the criteria in (i) and (ii).~~

(7) through (10) remain as proposed.

17.36.320 SEWAGE SYSTEMS: DESIGN AND CONSTRUCTION

(1) and (2) remain as proposed.

(3) Subsurface wastewater treatment systems must comply with ARM Title 17, chapter 36, subchapter 3, and Circular DEQ-4.

(a) The applicant must provide the following minimum information for wastewater submittals:

(i) site evaluation information, ~~including topography,~~ soil profile descriptions, percolation tests if required, and other pertinent soil information for each proposed drainfield, and seasonal high ground water information;

(ii) through (5) remain as proposed.

17.36.323 SETBACKS (1) Minimum setback distances, in feet, shown in Table 2 of this rule must be maintained, except as provided in the table footnotes or as allowed through a deviation granted under ARM Title 17, chapter 38, subchapter 1. The setbacks in this rule are not applicable to gray water irrigation systems that meet the setbacks and other requirements of ARM 17.36.319.

TABLE 2
SETBACK DISTANCES
(in feet)

From	To Drinking Water Wells	To Sealed Components (1) and Other Components (2)	To Drainfields/Soil Absorption Systems (3)
Public or multiple-user drinking water wells/springs	-	100 (4)	100
Individual and shared drinking water wells	-	50 (4)	100
Other wells (5)	-	50 (4)	100 (4)
Suction lines	-	50	100
Cisterns	-	25	50
Roadcuts, escarpment	-	10 (6)	25
Slopes > 35 percent (7)	-	10 (6)	25
Property boundaries	10 (8)	10 (8)	10 (8)
Subsurface drains	-	10	10
Water mains	-	10 (9)	10

Drainfields/Soil absorption systems	100	10	-
Foundation walls	-	10	10
Surface water (10), springs	100 (4) (11) (12)	50 (4) (11)	100 (4) (11) (13)
Floodplains	10 (4) (11)	- Sealed components - no setbacks (1) Other components - 100 (2) (4) (11)	100 (11) (14)
Mixing zones	100 (4)	-	-
Storm water ponds and ditches (15)	25 (4) (16)	10 (4)	25 (4)
Sewage Lagoons	1000 (17)	-	-

Footnote (1) Sealed components include holding tanks, sealed pit privies, raw wastewater pumping stations, the components addressed in chapters 4 and 5 of Department Circular DEQ-4, and those components completely contained within a sealed vessel. ~~Vents and access ports for sealed components must be located a minimum of 1 foot above the 100-year flood elevation.~~ Sealed components must meet the requirements of ARM 17.36.322(4). Drainfields do not have to meet setbacks to effluent transport pipes, manifolds, drop boxes, and distribution pipes as described in section 4.3 of DEQ-4.

Footnotes (2) through (17) remain as proposed.

9. The changes to Circular DEQ-20 are as follows:

Circular DEQ-20 1.1 PURPOSE AND APPLICABILITY:

This 2023 version of DEQ Circular 20 is the first version of this circular. The information in this circular is based on information contained in the 2018 version of Circular DEQ-3 and sections of the Administrative Rules of Montana (ARM) 17.36 that were last revised in 2018. DEQ-20 also incorporates the requirements previously listed in department circular DEQ-11 and department circular DEQ-17

This circular provides design standards for nonpublic water systems which are defined as individual, shared and multiple-user water systems. Nonpublic water systems are water supply systems with a population of less than 25 persons served less than 60 days per year or with less than 15 connections, that do not meet the definition of public water systems listed in Title 75, chapter 6, MCA, and ARM 17, chapter 38, subchapter 1. In estimating the population that will be served by a proposed residential system, the reviewing authority shall multiply the number of living units by 2.5.

Plans for facilities that will be public water supply systems must be reviewed in accordance with the provisions of Title 75, chapter 6, Montana code Annotated (MCA), and ARM 17, chapter 38, subchapter 1. Definitions relevant to this circular are adopted in ARM 17.36.101 and in the DEQ-1 Glossary.

The images, pictures, examples, and spreadsheets found in this Circular are presented for illustration purposes only and may not include all design requirements. Please refer to the specific rule standards in this Circular pertaining to each element for details.

Circular DEQ-20: 1.3 APPLICATION MATERIALS

As part of the review of a joint subdivision application under Title 76, Chapter 4, MCA, evidence that existing or proposed individual, shared, or multiple-user water supply systems are sufficient in terms of quantity, quality, and dependability must be provided. Each application must include a design report or cover letter as described in the specific sections.

Circular DEQ-20: 1.3.1 DESIGN REPORT OR COVER LETTER

Circular DEQ-20: 1.4.2 LOCATION

(a) through (b) remain as proposed.

(c) Each proposed well isolation zone as defined in ARM 17.36.101 must be located wholly within the boundaries of a lot, unless the criteria listed in ~~ARM 17.36.122(4)~~ARM 17.36.122(6) are met.

(d) through (e) remain as proposed.

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

Circular DEQ-20 1.6 EXISTING SYSTEMS

This section applies to existing nonpublic water supply systems. For existing nonpublic water supply systems, the applicant shall submit information to allow the reviewing authority to review the quality, quantity, and dependability of the existing system.

The applicant shall submit to the reviewing authority the following information for all nonpublic systems included in a subdivision application:

(a) The applicant shall submit, for each existing water supply source, water quality analyses for nitrates, nitrites~~, arsenic~~ and specific conductance. If an existing well is currently being used as a potable water supply within a proposed subdivision, The nitrates, nitrites~~, arsenic~~ and specific conductance sample may not be older than one year prior to the date of the application.

(b) through (f) and the rest of the section remain as proposed.

Circular DEQ-20 1.7 ALTERNATE WATER SUPPLY SYSTEMS:

Alternate water supply systems addressed in this circular include only:

(a) through (d) remain as proposed.

An alternate water supply system proposed for nonpublic water systems within the project boundary may only be developed if the applicant provides the following:

~~(a) Evidence that ground water quality, quantity, or dependability is unacceptable; and~~

(b) and (c) remain as proposed, but are renumbered (a) and (b).

Circular DEQ-20 2.1.2.2 SAMPLING

(a) The applicant must submit to the reviewing authority water quality data that shows the concentration of the following constituents:

(1) and (2) remain as proposed.

~~(3) Arsenic~~

~~(4)~~(3) Total Coliform Bacteria (existing wells)

(b) and (c) remain as proposed.

(d) Nitrate Sampling Requirement: The department requires a nitrate+ nitrite analysis for proposed water sources. The nitrate analysis must be conducted using water from the same well used for the ~~arsenic and~~ specific conductance analysis.

~~(e) Arsenic Sampling Requirement: The department requires an arsenic analysis (Method 200.7, 200.8, 200.9 at 0.001 mg/l or lower reporting limit) for proposed water sources. The arsenic must be conducted using water from the same well used for the nitrate and specific conductance analysis.~~

(f) through (h) remain as proposed, but are renumbered (e) through (g).

Circular DEQ-20 2.1.3.1 MINIMUM DEPTH Wells must have unperforated casing to a minimum depth of 25 feet below ground surface. A deviation from the minimum depth may be granted, pursuant to Section 1.2 of this Circular. The deviation request must be based on geological information provided by the applicant showing that a lesser depth will ensure the requirements of this Circular are met.

The reviewing authority may require unperforated casing to a depth greater than 25 feet of water if better chemical or microbiological quality can be obtained from a deeper zone.

If the deviation request requires a variance from the Board of Water Well Contractors, the approved variance must be submitted with the deviation request.

~~Circular DEQ-20 2.3.3 ARSENIC TREATMENT~~

~~Arsenic is a chronic contaminant, unlike microbial and nitrate contamination. For individual and shared wells, the reviewing authority will require that an arsenic contamination is addressed in each submittal. If arsenic is detected in untreated source water at levels above the 0.010 mg/L MCL, a statement will be placed in the COSA indicating that arsenic treatment must be installed.~~

Circular DEQ-20 3.2.2 QUALITY

The applicant shall demonstrate that water quality is sufficient for the proposed multiple-user water system. The reviewing authority may not approve a proposed water supply system if there is evidence that, after approved treatment, the concentration of any water quality constituent exceeds the maximum contaminant levels established in ARM Title 17, chapter 38, subchapter 2. The necessary quality and quantity of water must be available at all times.

(a) and (b) remain as proposed.

(c) Physical and chemical quality

(iii) remains as proposed but is renumbered (i).

~~(iv)~~(ii) Testing must include nitrate/nitrite, total dissolved solids or conductivity, and pH~~, and arsenic~~ as a minimum for multiple-user water systems.

Additional testing may be required for other parameters where the reviewing authority has information suggesting they may be present in harmful quantities or where additional regulatory requirements apply.

(v) remains as proposed but is renumbered (iii).

10. The department has thoroughly considered the comments received. A summary of the comments received and the department's responses are as follows:

GENERAL RESPONSE TO COMMENTS: The department received many comments concerning rules or design standards that were not proposed to be changed and were therefore outside the scope of this rulemaking. Similarly, moving a requirement from a rule to a circular is not a substantive change and the department did not ask for public comment on those changes. The department appreciates these comments, but it is necessary to provide further opportunities for the public and interested stakeholders to consider and comment on these issues before adopting them as rules.

COMMENT NO. 1: One commenter supported the addition of approved well drilling areas in ARM 17.36.101(2).

RESPONSE NO. 1: The department appreciates the comment.

COMMENT NO. 2: One commenter stated that the agency should not adopt a definition for "permanent space" in ARM 17.36.101 but should leave it for the Legislature. The commenter noted that changing the definition in rule may have implications beyond the Sanitation in Subdivisions Act.

RESPONSE NO. 2: As discussed in the notice of proposed rulemaking, a definition of "permanent space" is necessary to provide regulatory transparency and consistency for when department review under the Sanitation in Subdivisions Act is triggered. By their own terms, the definitions in ARM 17.36.101 apply only to subdivisions reviewed under that Act and cannot affect other statutes not administered by the department. The department has adopted the rule as proposed.

COMMENT NO. 3: One commenter stated that defining "seasonal use" in ARM 17.36.101 to not more than four months is not consistent with past DEQ approvals. They recommend changing it to six months to be consistent with previous approvals.

RESPONSE NO. 3: The department has decided to remove the definition because water and wastewater facilities in a subdivision may not be designed for only seasonal use.

COMMENT NO. 4: One commenter indicated that the correct cross-reference to "accessory building" should be ARM 17.38.101(3)(a) rather than ARM 17.38.101.

RESPONSE NO. 4: The department concurs with this recommendation and has revised the reference from ARM 17.38.101 to ARM 17.38.101(3)(a).

COMMENT NO. 5: One commenter disagreed with the proposed definition of "seasonal use," noting that water and wastewater facilities in a subdivision are not allowed to operate for seasonal use only.

RESPONSE NO. 5: Although water and wastewater facilities are allowed to operate in a "seasonal use" fashion, the systems must be designed to function throughout the year. For the same reason as noted in Response No. 3, the department has not adopted the proposed definition.

COMMENT NO. 6: One commenter stated that there needs to be clarification in ARM 17.36.103(1)(b) for what types of systems will require plans and specifications. They believe it will be left to interpretation by the individual reviewer if not clarified.

RESPONSE NO. 6: The department concurs that clarification would be helpful and has modified the rule in response to this comment to differentiate the requirements for the different types of water systems.

COMMENT NO. 7: One commenter stated that the proposed small-scale vicinity map in ARM 17.36.103(1)(d) would complicate an already cumbersome application and that it provides no additional value and conflicts with the Governor's Red Tape Relief Initiative. The commenter believed that the rules dictate that proposed and existing wells and drainfields must be greater than 100 feet from surface water features and that showing the surface water feature within 1/2 mile provides no value to the reviewer. Furthermore, the commenter stated that, for nondegradation purposes, the impacts to the first receiving water are what is required and that these waters could be closer than 1/2 mile and therefore the map adds no value to the review.

RESPONSE NO. 7: The department disagrees that the small-scale vicinity map would add additional red tape. The purpose of the small-scale vicinity map is to allow the reviewing authority the ability to address the potential impacts between facilities and surface waters, including the adjacent-to-surface-water trigger-value analysis that is required for many projects to be evaluated for high quality surface waters within 1/2 mile. Nevertheless, the department will reconsider whether the small-scale map is the best approach and has not made the proposed change at this time.

COMMENT NO. 8: One commenter requested clarification regarding the proposed requirement for a vicinity map in ARM 17.36.103(1)(d)(i), noting that the requirement could get very complicated, costly, and add red tape to the process.

RESPONSE NO. 8: Please see Response to Comment No. 7. The department will reconsider the appropriate application materials and has not made the proposed change at this time.

COMMENT NO. 9: Three commenters believed that the large-scale vicinity map requirement in ARM 17.36.103(1)(d)(ii) was unreasonably cumbersome and complicated, required information that was not readily available, would lead to

inconsistency between reviewers, and would be costly and add red tape to the review process.

RESPONSE NO. 9: The department has reconsidered in light of these comments and has concluded that information regarding potential sources of contamination within 500 feet of the subdivision are adequately addressed in the design report requirement in Circular DEQ-20. The department has modified the rule in response to these comments to require that potential sources of contamination be identified on the vicinity map if they are within 100 feet, except for information regarding sewer lagoons and public water and wastewater mains. Sewer lagoons must be shown if they are within 1,000 feet of the proposed subdivision to comply with ARM 17.30.1702, and the reviewing authority must know of the location mains in order to determine whether the project must address connection to the systems. Moving these items off of the lot layout and onto the vicinity map also will help make the layout less cluttered. The department has modified the rule accordingly.

COMMENT NO. 10: One commenter stated that the proposed amendment to ARM 17.36.103(1)(p) requiring an applicant to provide any existing approval or lot layout provides no value to a reviewer and creates unnecessarily cumbersome applications and that the proposed change should be modified to apply to only applicable (not existing) documents.

RESPONSE NO. 10: The department concurs that, in many instances, an existing certificate of subdivision approval will be superseded by the new certificate of subdivision approval or voided. The department has modified this section in response to the comment to require existing approvals and layouts only if applicable.

COMMENT NO. 11: One commenter stated that the agency does not have the authority to adopt rules regarding sage grouse habitat in ARM 17.36.103(1)(q). They believe that the agency's authority comes only from Title 76, chapter 4, MCA, and not through the executive branch.

RESPONSE NO. 11: The rule as proposed is necessary for the department to meet its obligations under Executive Order 12-2015 and the Montana Environmental Policy Act, Title 75, chapter 1, MCA, and is within the scope of authority of 76-4-104(1) and (2), MCA.

COMMENT NO. 12: Two commenters stated that the requirement for a letter from the Montana Sage Grouse Habitat Conservation Program in ARM 17.36.103(1)(q) in all cases was unnecessary. The commenters noted that the sage grouse online mapping tool provided sufficient detail to determine when a letter was required.

RESPONSE NO. 12: As proposed, the proposed rule requires a letter from the Montana Sage Grouse Habitat Conservation Program or evidence that the subdivision is located outside designated sage grouse habitat. The sage grouse online mapping tool can provide such evidence that the subdivision is located outside sage grouse habitat, so modification of the rule as proposed is unnecessary.

COMMENT NO. 13: One commenter was concerned with Table 1 in ARM 17.36.104, which proposed to remove the requirements that size information and design details for existing storm water facilities be shown on the lot layout. The commenter stated that this information would help ensure that future owners comply with the approval and that the facilities are operating properly.

RESPONSE NO. 13: The department agrees that the size of the existing facilities should be shown on the lot layout to ensure that appropriate setbacks and other relevant requirements are met. The design details of existing facilities are described in the storm water plan and are unnecessary on the lot layout. The department has modified the rule by retaining the size requirement in response to this comment.

COMMENT NO. 14: One commenter stated that Table 1 of ARM 17.36.104 needs to define "storm water facility," since not all gutters, landscape areas, ponds, and culverts need to be identified on lot layouts.

RESPONSE NO. 14: The section referenced by the commenter was not proposed to be changed at this time. The term "storm water facility" is used throughout the existing rules, and defining the term would have implications beyond the rule referenced by the commenter. The department will take this comment under consideration for future rule making. Please see the General Response to Comments above.

COMMENT NO. 15: One commenter stated that ARM 17.36.104(2)(f) should be modified because it is not clear whether the rule includes driveways or which utilities must be included on the lot layout. At the time of review, these locations are a wild guess and will not be accurate.

RESPONSE NO. 15: This comment is outside the scope of the rulemaking because ARM 17.36.104(2)(f) was not proposed to be changed. The department will take this comment under consideration for future rulemaking. Please see the General Response to Comments above.

COMMENT NO. 16: One commenter stated that the table in ARM 17.36.104 should be modified with respect to showing existing and proposed water lines, sewer lines, and buildings. They believe that showing existing water and sewer lines, proposed sewer and water mains, and existing septic tanks is reasonable but that guessing the locations of future buildings and septic tanks would be a wild guess and therefore very inaccurate.

RESPONSE NO. 16: The department agrees that some information is not available until the time of septic permitting. Because of this, in conjunction with the adopted changes to ARM 17.36.320, the department has modified the rule to state that location and design details for individual and shared systems need not be shown on the lot layout when those details will be determined at the time of septic permitting. Please also see Response No. 15.

COMMENT NO. 17: One commenter believes that the section in ARM 17.36.106(2)(b)(ii) which states that "the site for any subsurface wastewater

treatment system may not exceed 25% in slope" should be updated to be consistent with ARM 17.36.322(1) and (2), which allow the placement of a system on slopes up to 35% with certain conditions.

RESPONSE NO. 17: The department appreciates the comment, but it is outside the scope of the rulemaking, as ARM 17.36.106(2)(b)(ii) was not a proposed change. Please see the General Response to Comments above. The department notes, however, that both rules allow greater slopes subject to a waiver request.

COMMENT NO. 18: One commenter believed that all local health departments should be allowed to approve minor deviations from certificates of subdivision approval under ARM 17.36.112, stating that they are already required to hire a registered sanitarian or a registered professional engineer and that the department should not limit the deviations to only those health departments certified as a reviewing authority.

RESPONSE NO. 18: The department is unable to make this change. Under 76-4-130, MCA, only a "reviewing authority" may approve deviations from a certificate of subdivision approval. Under 76-4-102(18), MCA, a "reviewing authority" is only the department or a local department or board of health certified to conduct a review under 76-4-104, MCA.

COMMENT NO. 19: One commenter believed that ARM 17.36.112 oversteps department authority for rulemaking by requiring that the revised lot layout be filed with the county clerk and recorder. They further indicated that the Sanitation Act does not require certificates of subdivision approval to be filed with the clerk and recorder; some recorded revised lot layouts would have no previously recorded reference document.

RESPONSE NO. 19: The requirement referenced by the commenter is existing language from ARM 17.36.112(8), which was adopted in 2014. The proposed changes to ARM 17.36.112 maintained this requirement but moved it to (4)(c). Please see the General Response to Comments above. The department notes, however, that it is necessary for revised lot layouts to be recorded to ensure that all parties are aware of the changes to the conditions of approval reflected in the new layout.

COMMENT NO. 20: One commenter stated that the proposed changes to ARM 17.36.112(4) were unclear, stating it was unclear what types of modifications to previously approved facilities can be incorporated into a revised lot layout document and that the proposed rule should be deleted or further defined.

RESPONSE NO. 20: Under ARM 17.36.112(4)(a), modifications can be completed as long as they consist solely of the relocation or modification of previously approved facilities that do not affect the conditions of the approval in the certificate of subdivision approval (per (i)), there are no changes in lot boundaries (per (ii)), and comply with applicable rules (per (iii)). Because each certificate of subdivision approval is unique, defining what can and cannot be modified would be impossible.

COMMENT NO. 21: One commenter opposed the proposed change to ARM 17.36.112(1), which provides that a facility previously approved under Title 76, chapter 4, MCA, is not subject to re-review if it is not proposed to be changed, is not affected by a proposed change to another facility, and meets the conditions of its existing approval and is operating properly. The commenter stated that the department has a statutory obligation to review the sanitation facilities proposed for a division of land and that the department could not exempt facilities through the rulemaking process.

RESPONSE NO. 21: The department agrees with the commenter that the Sanitation in Subdivisions Act requires all facilities subject to the department's jurisdiction to be reviewed and approved by the department. Nothing in the proposed rule exempts facilities from review; it merely provides that facilities that already have been approved by the department do not have to be re-reviewed if they are not proposed to be changed, are not affected by a proposed change to another facility, and meet the conditions of their approval and are operating correctly. The department has adopted the rule as proposed.

COMMENT NO. 22: One commenter enthusiastically supports the proposed change to ARM 17.36.112 because it is similar to what was proposed in the 2021 legislative session for Senate Bill 165.

RESPONSE NO. 22: The department appreciates the comment.

COMMENT NO. 23: One commenter believed that differentiating between contracted and non-contracted counties in ARM 17.36.112 puts non-contracted counties at a disadvantage in providing healthy development by not allowing changes (which have not historically triggered approval from the department) to occur at the local level.

RESPONSE NO. 23: The department is unable to make this change for the reasons stated in Response No. 18. The commenter did not explain what changes they described as not historically triggering review, but counties may contract with the department to complete revised lot layouts only and would not have to take on the complete review of subdivisions, which would allow them to continue to provide healthy development in their communities.

COMMENT NO. 24: One commenter believed that ARM 17.36.112(4) was good.

RESPONSE NO. 24: The department appreciates the comment.

COMMENT NO. 25: One commenter believed that ARM 17.36.112(5) was good.

RESPONSE NO. 25: The department appreciates the comment.

COMMENT NO. 26: One commenter believed that the changes in ARM 17.36.112(5) implied that a county could not approve minor changes that have traditionally caused no real trigger for a rewrite or a formal deviation unless the county is contracted with the department. They also believe that upgrading a

drainfield to one that is more protective should not require a rewrite, such as going from a standard gravity system to a pressure dosed system.

RESPONSE NO. 26: The department is unable to make this change for the reasons discussed in Response Nos. 18 and 23. Counties may contract with the department to allow minor deviations which can be utilized to allow the "upgrading" of a system to one that is more protective.

COMMENT NO. 27: One commenter commented on ARM 17.36.112, stating that a previously approved parcel that is getting larger via a boundary line adjustment should not be reviewed because the well and drainfield were previously approved. They indicated that this should be true even if the house is located on the newly acquired property since the home will utilize a previously approved well and drianfield.

RESPONSE NO. 27: The criteria for previously approved facilities are set forth in ARM 17.36.112(1). As the department understands the commenter's hypothetical, review would not be required because the previously approved facilities would meet the requirements of ARM 17.36.112(1).

COMMENT NO. 28: The department received multiple comments regarding the mixing zone and isolation requirements proposed in ARM 17.36.122. These commenters believed that the agency had exceeded its rulemaking authority by applying these requirements to rewrites, revised lot layouts, and minor revisions. One comment indicated that this would remove the ability to correct errors in an existing approval or improve setbacks to neighboring facilities. The commenters also believed that the agency could not require that mixing zones and isolation zones stay within lot boundaries, noting that subdivisions typically have multiple lots and that the Legislature did not prohibit mixing zones and isolation zones from crossing lot boundaries within the subdivision. One comment noted that the requirements of 76-4-104, MCA, do not apply to septic permits approved under Title 50 or to wells drilled pursuant to ARM Title 36, chapter 21 and that those facilities could become unapprovable if they are subdivided in the future.

RESPONSE NO. 28: The department proposed the language in ARM 17.36.122(6) to effectuate the Legislature's intent in adopting the mixing zone and isolation zone requirements of 76-4-104(6), MCA–that is, to allow a person to develop their own property as they see fit (including creating a multiple-lot subdivision in which the mixing zones and isolation zones of the proposed facilities would cross internal lot boundaries) while ensuring that neighboring lots owned by different property owners were not unduly impacted without their consent through the provision of an easement.

To achieve these purposes, the department clarified in the rule that it applied to rewrites, revised lot layout, and minor revisions. The impact to the adjacent landowner is not lessened if the mixing zone or isolation zone is submitted in a rewrite rather than a new application. The department notes that these requirements apply only to lots that were created after the statutory effective dates, and a rewrite of a lot that was created before those effective dates would not be subject to the rule. For those lots that were created after the effective date of the statute, however, the rule must also apply to subsequent reviews of those lots.

Under the commenters' proposed interpretation, a new lot would be subject to the requirement on Monday when submitted as a new application but would not be subject to the requirement on Tuesday when submitted as a rewrite. In either case, the impact to the adjoining property owner is the same, and the loophole proposed by the commenters would render the requirement meaningless. The department notes that this is one of the reasons the Governor vetoed a similar provision with similar consequences in the 2021 session in Senate Bill 165.

The department also notes that the proposed rule would not prohibit a developer from proposing a multiple-lot subdivision with mixing zones and isolation zones that cross the proposed internal boundaries. This is explicit in (6)(a)(i) and (6)(b)(i) of the proposed rule. The proposed language is necessary to eliminate ambiguity in the rule for the many types of permutations of applications received by the department. By defining the rule in terms of the lot and lot ownership, the rule eliminates ambiguity regarding the exterior vs. interior boundaries of the subdivision; rewrites; and other types of lots not subject to review, such as lots owned by the same property owner that are not "subdivisions" within the meaning of 76-4-103, MCA. The language as proposed is clear that a property owner can develop their own property, even by crossing their own property lines, but that they must obtain an easement if they seek to affect their neighbor's property.

The department agrees that it would be better if the requirements for septic permits and well drilling were amended to align with the statutory requirements of the Sanitation in Subdivisions Act, but the department cannot ignore those requirements until those other statutes are amended.

COMMENT NO. 29: One commenter believes that DEQ should not expand the definition of a mixing zone in ARM 17.36.122 to include setback envelopes or provisional mixing zones without legislative authority or changes in the rules adopted under ARM Title 17, chapter 30.

RESPONSE NO. 29: "Setback envelopes" and "provisional mixing zones" are concepts related to the nondegradation rules, whereas the setback requirements in ARM 17.36.122(6) are related to impacts to neighboring properties caused by the presence of a mixing zone or isolation zone that interferes with the adjacent property owner's use of their own property. The department cannot approve wells within 100 feet of provisional mixing zones or setback envelopes because of the risks posed to the well. For example, a system with a provisional mixing zone or setback envelope may be treated differently for purposes of the nondegradation analysis but would have the same impacts to adjacent properties as a standard septic system. Under the commenter's proposed interpretation, a person could avoid the requirements of this rule and 76-4-104(6)(i), MCA, by installing, for example, a level 2 system instead of a standard septic system, even though the impacts to the adjoining property owner were exactly the same. The department's authority to adopt this requirement is not just from 76-4-104(6)(i), MCA, but also from the general rulemaking authority granted in ARM 17.36.104(1) and (2). The department has adopted this rule as proposed.

COMMENT NO. 30: One commenter believes that due to a December 10, 2012, legal memo, it is not allowable to provide an express written easement

between two lots when both lots are owned by the same person under ARM 17.36.122(4). The commenter believes that if legal attitudes have changed regarding this issue, that the reason statement should incorporate these changes.

RESPONSE NO. 30: The rule that implements the conclusions of the legal memo referenced by the commenter is set forth in ARM 17.36.122(4)(b). These requirements were transferred unchanged from the existing requirements in ARM 17.36.326. Under this existing requirement, the easement must be shown on the plat or certificate of survey if the lots are owned by the same person.

COMMENT NO. 31: One commenter believes that a deed and easement exhibit in ARM 17.36.122(6) are also acceptable means to provide easements.

RESPONSE NO. 31: The substantive requirements for easements were not proposed to be changed in this rulemaking. Please see Response No. 30. The department will consider whether other methods of providing easements are feasible but will not make any changes without providing the public notice and the opportunity to comment. Please also see the General Response to Comments.

COMMENT NO. 32: The department received several comments relating to the proposed amendments to ARM 17.36.328 (17.36.123). These commenters expressed concern that the term "physically impractical" is vague and that without a clear definition and waiver criteria the rule would be impossible to implement. Another commenter suggested that an economic exclusion should still be available.

RESPONSE NO. 32: The department has decided not to amend the rule as proposed at this time and will take the comments into consideration as it reexamines changes to this regulation in the future, including defining "physically impractical" and developing specific criteria that may include economic metrics.

COMMENT NO. 33: One commenter wanted the department to allow an exception to the hookup rule in ARM 17.36.123(4) if the public system would not allow the connection.

RESPONSE NO. 33: For the reasons discussed in Response No. 32, the department has decided not to amend the rule at this time and will take these comments into consideration in the future.

COMMENT NO. 34: One commenter was concerned about a provision in ARM 17.36.125(2). The commenter was not sure if this section was being added per the original draft. The commenter was concerned as to why conversions of existing structures into condominiums was limited to Class I or II city, if it is an existing structure.

RESPONSE NO. 34: The department believes the commenter is referring to an earlier draft of the rulemaking package that contemplated transferring and amending ARM 17.36.313 to a new section in ARM 17.36.125. Ultimately, the department transferred the requirements unchanged. Please see the General Response to Comments.

COMMENT NO. 35: One commenter believed that the storm water exemption in ARM 17.36.310 should include lots 5 acres and greater, not just lots over 5 acres, based on the statutory language in 76-4-104, MCA.

RESPONSE NO. 35: The department concurs with this comment and has modified the rule accordingly in response to this comment.

COMMENT NO. 36: One commenter believed that the permissive language in ARM 17.36.310(6) that allows the reviewing authority to exempt certain subdivisions from storm water requirements should be changed to mandatory language so that an applicant knows that they will qualify for the exemption if they meet the requirements of the section.

RESPONSE NO. 36: The department agrees with this comment and has modified the rule in response to this comment.

COMMENT NO. 37: One commenter stated that the department should consider using 8% impervious area for the storm water exemption in ARM 17.36.310(6)(b)(i), noting that the proposed 5% was too low and basically eliminated the exemption. Another commenter noted that the allowable impervious area should be 10% or 15%, as the 5% threshold does not allow enough impervious area to construct a driveway long enough in many instances on a 5-acre lot.

RESPONSE NO. 37: The department appreciates the comments, but the 5% criteria was enacted by the Legislature in 76-4-104, MCA. Expanding that beyond 5% would require a statutory change.

COMMENT NO. 38: One commenter stated that the requirement in ARM 17.36.310(6)(b)(ii) regarding best management practices should be tied to the threshold that requires a storm water pollution prevention plan, since there otherwise would not be any way to implement the requirement.

RESPONSE NO. 38: The department disagrees that the best management practices (BMPs) necessarily should be tied to the storm water pollution prevention plan. However, the department agrees that the BMPs should be better defined and therefore has not made the proposed change at this time.

COMMENT NO. 39: One commenter believed the change in ARM 17.36.320(4)(a) conflicts with standard 6.8.2.2 of Circular DEQ-4.

RESPONSE NO. 39: While the department proposed some reorganization of the rule, the department did not propose any substantive changes to the existing requirement in ARM 17.36.320 that at least six feet of natural soil must exist between the infiltrative surface or the liner of a lined system and a limiting layer on a slope of greater than 15 percent. The wording in this rule was deliberately adopted at page 3371, 2000 Montana Administrative Register, issue number 23. The department will take the issue under consideration in future revisions of Circular DEQ-4, but has adopted the rule as proposed for the reasons in the General Response to Comments.

COMMENT NO. 40: One commenter opposed the proposed changes in ARM 17.36.320 that would require an applicant to submit information regarding drainfield

dimensions, including lateral length and lateral width based on application rate and design flow. The commenter noted that drainfield dimensions and flow rates are more appropriately reviewed by the local health department once site-specific construction information is available. The commenter proposed that the rule be modified to identify the type of sewage treatment system, to eliminate the requirement for drainfield dimensions, and to allow local health departments to review construction specifics at the time of septic permitting.

RESPONSE NO. 40: The department does not concur with this comment. The dimensions of the drainfield (length and width) are utilized in the phosphorous breakthrough calculation to determine the impacts of the drainfield on the nearest down gradient surface water. The dimensions are also needed to guarantee that the drainfield is sized appropriately based on the soils and proposed wastewater flows. Finally, the dimensions help ensure that the drainfield will meet all appropriate setbacks. Consequently, these requirements are necessary for department review and cannot be left solely for septic permitting. The department has adopted the rule as proposed.

COMMENT NO. 41: One commenter stated that topographical information should not be required under ARM 17.36.320(3)(a)(i) because it is adequately addressed in ARM 17.36.320(3)(a)(ii).

RESPONSE NO. 41: The department agrees and has removed topography from the rule in response to this comment.

COMMENT NO. 42: One commenter believed that the amendment to ARM 17.36.320(4)(b) was good.

RESPONSE NO. 42: The department appreciates the comment.

COMMENT NO. 43: One commenter would like to see ARM 17.36.320(5) amended to remove the requirement that, if a size reduction is approved the system, [missing language?] the replacement area must have an area sufficient for the system without the size reduction. The commenter noted that if a level 2 system is approved, it should be able to be replaced by a level 2 system with the same size replacement area. The commenter recommended allowing the same size replacement area as the drainfield area since technology will only improve as time goes on.

RESPONSE NO. 43: This comment is outside the scope of this rulemaking as ARM 17.36.320(5) was not proposed to be changed. Please see the General Response to Comments above.

COMMENT NO. 44: One commenter believes clarification is needed in ARM 17.36.321(1) so that a "full blown" design for every proposed sewage system is not required to be submitted during sanitation review and questioned whether this rule was consistent with the new requirements in ARM 17.36.320.

RESPONSE NO. 44: The department disagrees with this comment because ARM 17.36.321 specifies what types of sewage systems are allowed for new and replacement systems and does not specify submittal requirements. The submittal requirements are outlined in ARM 17.36.320(3) and section 1.1.1 of Circular DEQ-4.

COMMENT NO. 45: One commenter recommended considering the allowance of cut systems for new systems in ARM 17.36.321(3).

RESPONSE NO. 45: This comment is outside the scope of this rulemaking because ARM 17.36.321(3) was not proposed to be changed. Please see the General Response to Comments above. The department will consider this in future rulemakings.

COMMENT NO. 46: One commenter recommended amending ARM 17.36.322(6) to identify the amount of staking required to physically locate the drainfield location and that a one-size-fits-all rule was inappropriate.

RESPONSE NO. 46: This comment is outside the scope of this rulemaking because ARM 17.36.322(6) was not proposed to be changed. Please see the General Response to Comments above. The department will consider this in future rulemakings.

COMMENT NO. 47: One commenter believed that the department should eliminate the proposed change in ARM 17.36.323 requiring vents and access ports for sealed components be located a minimum of one foot above the 100-year flood elevation because not all sites will have standing water on them and because determining the floodplain elevation may require a detailed topographic map.

RESPONSE NO. 47: The department concurs with the comment that there may be other options available that can ensure that the vents and access ports do not allow flood water to enter into the systems. The department has not adopted this proposed requirement at this time but will take this issue under further consideration to see if there are other options available.

COMMENT NO. 48: One commenter believes the proposed amendments to footnote 1 of Table 2 of ARM 17.36.323 creates a setback conflict between drainfields and sealed components. Table 2 requires a 10-foot separation between drainfields and the sealed components of Circular DEQ-4 section 4.3 (transport pipes, manifolds, and distribution pipe materials), and since a drainfield cannot maintain a setback to its own components, the proposed change needs to be reconciled.

RESPONSE NO. 48: The department concurs with this recommendation and has modified the rule in response to this comment to clarify that the drainfield does not need to be set back from its own components.

COMMENT NO. 49: One commenter opposed the setbacks to property lines for sealed components and drainfields and the allowance to meet those setbacks by easement in footnote 8 to Table 2 of ARM 17.36.323.

RESPONSE NO. 49: This comment is outside the scope of this rulemaking because this setback was not proposed to be changed. Please see the General Response to Comments above.

COMMENT NO. 50: One commenter provided suggestions that they believed would improve ARM 17.36.325(3)(c), which requires that at least three test holes be

dug for each multiple-user and public drainfield and at least one test hole for each zone of a pressure-dosed drainfield.

RESPONSE NO. 50: This comment is outside the scope of this rulemaking because ARM 17.36.325(3)(c) was not proposed to be changed. Please see the General Response to Comments above.

COMMENT NO. 56: One commenter noted that ARM 17.36.326(4)(b) (17.36.122) should be modified to allow covenants in lieu of showing an easement on the plat or certificate of survey.

RESPONSE NO. 56: Please see Response Nos. 30 and 31.

COMMENT NO. 57: One commenter stated that ARM 17.36.914(6) and 17.36.915(6), which require connection to public systems when those systems are within 200 feet, should be modified to be consistent with the proposed ARM 17.36.123, which proposed a 300-foot distance to connection to a public system.

RESPONSE NO. 57: The department appreciates the comment, but this comment is outside the scope of this rulemaking because ARM Title 17, chapter 36, subchapter 9 rules have not been proposed to be changed. As discussed in Response No. 32, the department has decided not to modify the hookup rule in new proposed ARM 17.36.123 at this time.

COMMENT NO. 58: The commenter suggested the department change ARM 17.36.916(3) and to consider using absorption beds for new systems with a waiver, not just replacement systems.

RESPONSE NO. 58: The department appreciates the comment, but this comment is outside the scope of this rulemaking because ARM Title 17, chapter 36, subchapter 9 rules are not proposed to be changed in this rulemaking. Please see the General Response to Comments above.

COMMENT NO. 59: One commenter expressed concerns about the proposed point-of-use (POU) treatment allowed for the treatment of high nitrates in Circular DEQ-20. They stated that point-of-use systems are only useful if the owner knows (1) that the POUs are needed to ensure safe drinking water and (2) that the POUs must be maintained to do so. Because Montana is a "buyer beware" state, the commenter believed that it is unlikely that the buyer will be notified that the POU is needed. They asserted that point-of-use treatment systems for high nitrates are insufficient to protect families from high nitrates in private water sources.

RESPONSE NO. 59: Point-of-use treatment can ensure that drinking water is below 10 mg/L, and the department has previously considered point-of-use treatment appropriate under ARM 17.36.331. As proposed, the circular requires submission of plans and specifications to the reviewing authority, and the approved nitrate treatment plans must be recorded with the certificate of subdivision approval. Likewise, 76-4-113, MCA, requires the conditions of approval to be provided to each purchaser of the property.

COMMENT NO. 60: The department received multiple comments on the design report requirement proposed in section 1.3.1 of Circular DEQ-20. The

commenters stated that a full design report is unnecessary for individual or shared wells, that a report was never required in the past which seemed to work just fine, that the description of the proposed groundwater source could be accomplished by checking a box on the application and submittal of nearby well logs for estimated depth to water bearing zones and lithology, and that instead a simple cover letter would be adequate.

RESPONSE NO. 60: As discussed in the notice of proposed rulemaking, the department proposed the design report requirement to allow the department to more easily and efficiently locate the required information needed to evaluate water systems. The department agrees that this same information can be provided in a cover letter for individual and shared water systems and has modified the circular accordingly to allow that information to be provided in a cover letter.

COMMENT NO. 61: Two commenters disagreed with the requirement in standard 1.3.1(e) of Circular DEQ-20 that all potential sources of contamination within 500 feet of the proposed water supply system be identified and discussed, noting that 100 feet should be sufficient for individual and shared wells.

RESPONSE NO. 61: The department appreciates the comment, but it is outside the scope of this rulemaking. The 500-foot requirement was the existing requirement in ARM 17.36.330 and was not proposed to be changed in this rulemaking. Please also see the General Response to Comments above.

COMMENT NO. 62: One commenter stated that condominium units should not be required to provide easements for shared or multiple-user water systems in 1.3.5 of Circular DEQ-20 because they already have the necessary safeguards in place within the condominium declaration.

RESPONSE NO. 62: The department cannot predict every iteration of condominium declaration and therefore cannot conclude that the proposed rule is unnecessary. The department has adopted the rule as proposed.

COMMENT NO. 63: One commenter stated that the requirement in section 1.4.1 of Circular DEQ-20 regarding necessary documentation for evaluation of risk of surface water influence was unclear. The commenter stated that the requirement should be clarified or stricken.

RESPONSE NO. 63: The department appreciates the comment, but it is outside the scope of this rulemaking. This section is functionally equivalent to ARM 17.36.336(5) and is not proposed to be changed with the rulemaking. Please see the General Response to Comments above.

COMMENT NO. 64: One commenter opposed standard 1.4.1 of Circular DEQ-20, which provides that a surface water or ground water under the influence of surface water source may not be used for a nonpublic system and that there is no deviation allowed from this requirement. The commenter stated that the prohibition on deviations was not in the previous administrative rule and that there are times that an individual system could go through the steps to use a well under the influence of surface water.

RESPONSE NO. 64: The department appreciates the comment, but it is outside the scope of this rulemaking. Section 1.4.1 of Circular DEQ-20 replaces a portion of ARM 17.36.331. No deviation was allowed in ARM 17.36.331, and it was not proposed to be changed with this rulemaking. Please see the General Response to Comments above.

COMMENT NO. 65: One commenter identified a typographical error in a citation in 1.4.2(c) of Circular DEQ-20.

RESPONSE NO. 65: The department agrees with this comment and has modified the Circular to refer to ARM 17.36.122(6), not ARM 17.36.122(4).

COMMENT NO. 66: One commenter suggested that the existing requirement in ARM 17.36.330(2)(a) that potential sources of contamination and mixing zones within 500 feet of a proposed ground water source be reduced to 100 feet for individual and shared wells.

RESPONSE NO. 66: The department proposed reducing the lot layout requirement to sources of contamination within 100 feet, but maintaining the requirement that sources within 500 feet be addressed by providing that information in the design report. Please also see Response No. 61 and the General Response to Comments above.

COMMENT NO. 67: Multiple commenters requested changes to section 1.4.2(f) of Circular DEQ-20, stating that the requirement to physically identify the proposed well location on lots two acres in size or less should be permissive, rather than mandatory. The commenters believe this requirement is not consistent with allowing a well drilling area in ARM 17.36.101(2).

RESPONSE NO. 67: Due to the increased risk of wells being placed in a compromised location, the department disagrees that the rule should be permissive. However, the department agrees that this section should account for well drilling areas and has modified the rule in response to this comment to require physical identification of the proposed well location or well drilling area.

COMMENT NO. 68: One commenter stated that proposed standard 1.4.3 of Circular DEQ-20 requiring wells that have no further use to be abandoned is beyond the scope of the department's statutory authority. They believe that the section should replace "wells that have no further use" with "wells that are proposed to be abandoned."

RESPONSE NO. 68: The wording in 1.4.3 is existing language copied from 3.2.5.9 of Circular DEQ-3 (2018 Edition), which was not proposed to be modified in this rulemaking. Because both sections would need to be modified for consistency across agency circulars, the department will not make the proposed change for the reasons stated in the General Response to Comments above. The department will consider this change in future rulemakings. .

COMMENT NO. 69: One commenter opposed section 1.6 of Circular DEQ-20, which requires additional information and a deviation request to be submitted if an application proposes an existing well without a well log as a water source. The

commenter stated that this requirement adds a burden and expense to applicants, and it should be modified to exclude existing water supply wells that meet the water quality, quantity, and dependability requirements of the Circular.

RESPONSE NO. 69: Well logs provide vital information needed to review the existing well such as casing length, grouting depth, static water level, well volume, etc. Furthermore, having a well log typically gives the reviewer a level of confidence that the well was drilled to the water well drilling standards of the time it was installed. The information required in section 1.6 of Circular DEQ-20 provides the information necessary for the department to make a decision as to whether the well can provide dependable safe water. The department has adopted this section of the Circular as proposed, except for minor amendments to proposed section 1.6(a) which are not relevant to this comment.

COMMENT NO. 70: One commenter raised several concerns about the requirement in section 1.6 of Circular DEQ-20 that a total coliform analysis must be conducted. The commenter stated that the requirement that all existing wells must be evaluated for total coliform is an unnecessary expense and provides no value in assessing aquifer characteristics. Coliform tests cost approximately $25 and bacteria in a well that is not used as a potable water supply poses no risk to health, safety, or the environment and it does not provide information regarding well construction. The bacteria could be a result of debris in the well that will be extracted once a pump is installed. The requirement should be modified to apply to only existing drinking water wells.

RESPONSE NO. 70: The department appreciates the comment, but it is outside the scope of this rulemaking. This rule is functionally unchanged from ARM 17.36.335(3)(a). Section 1.6 of DEQ-20 simply replaces ARM 17.36.335 and did not propose any changes to the coliform analysis requirements. Please see the General Response to Comments.

COMMENT NO. 71: Multiple commenters indicated that they believe that requiring arsenic to be sampled for existing wells adds unnecessary expense ($15 to $25) especially because arsenic is not found throughout the state. Another commenter stated that a full design for arsenic treatment should not be required as part of the submittal.

RESPONSE NO. 71: Based on these comments, the department will reconsider the requirement and will not make the proposed changes regarding arsenic at this time.

COMMENT NO. 72: One commenter stated that the requirement in standard 1.7 of Circular DEQ-20 would compel lots to use groundwater. They believe that if the alternate water supply shows it has adequate water quality and quantity and is dependable, there is no health risk in using an alternative supply.

RESPONSE NO. 72: The department agrees that the requirement in section 1.7 of Circular DEQ-20 appears to compel lots to use groundwater even though alternate water supplies can provide adequate water quality, quantity, and dependability. The department has modified the circular in response to this comment.

COMMENT NO. 73: One commenter believes 1.7.1 of Circular DEQ-20 should be modified to allow springs to be used for multiple-user systems and should be allowed if properly designed.

RESPONSE NO. 73: The Circular did not propose springs to be used for multiple-user systems, so the Circular does not provide or contemplate construction details for multiple-user systems, and the department cannot make this proposed change at this time. Please also see the General Response to Comments above.

COMMENT NO. 74: One commenter stated that the requirement in 2.1.1 of Circular DEQ-20 regarding well yield when used with a cistern for a water supply is not necessary, noting that well yield and aquifer dependability are not always correlated and that a low producing well might continually be used to fill a cistern. The water supply design can supplement a low yielding well with an oversized cistern. The regulation should be deleted.

RESPONSE NO. 74: The department disagrees with this comment and believes that the standards will ensure that the well can provide the water volume necessary to supply the proposed development. For example, by providing evidence that the sustained yield is being supplied from the aquifer and not just the well bore storage helps validate that the aquifer can replenish itself and not be depleted.

COMMENT NO. 75: One commenter opposed the requirement in 2.1.1(a)(vi) of Circular DEQ-20, which provides that one of the ways that minimum flows can be required to be demonstrated by the reviewing authority is through "well logs and testing of nearby wells." The commenter stated that this requirement was unreasonable for an applicant wanting to use a groundwater supply for an individual or shared well and that the requirement should be modified to allow information from a well log or from well testing, which would provide adequate information for review.

RESPONSE NO. 75: This section merely replaces ARM 17.36.332(2), which was not proposed to be changed during this rulemaking. Please see the General Response to Comments. The department notes that it has historically implemented this requirement in the manner suggested by the commenter.

COMMENT NO. 76: One commenter disagreed with the pump test requirements for groundwater sources used with supplemental cisterns in 2.1.1(a)(vii) of Circular DEQ-20. The commenter believed that the requirement to show three times the average day demand plus irrigation was too conservative and that it should be sufficient to show that the source could meet the average day demand.

RESPONSE NO. 76: Pumping standards will ensure that the well can provide the water volume necessary to supply the proposed development. For example, by providing evidence that the volume is being supplied from the aquifer and not just the well bore storage helps validate that the aquifer can replenish itself and not be depleted. Likewise, a well that produces the average day demand will fall short during peak usage, and will have no capacity for occasional extra demands. Three times average day demand accommodates normal variations in

water usage throughout the day and throughout the year. The department has adopted this section of the Circular as proposed.

COMMENT NO. 77: One commenter stated that a pump test was excessive for individual and shared systems and that 2.1.1(b) of Circular DEQ-20 should be modified to allow a simpler, less expensive test for individual and shared wells, such as a "bucket test."

RESPONSE NO. 77: The department believes that the "bucket test" can continue to be used to meet 2.1.1(a)(i) and (ii) in many situations and that a pump test is often not needed. However, the reviewing authority may need to require a pump test when sufficient quantity or dependability of the groundwater sources is uncertain. The department has adopted the circular as proposed.

COMMENT NO. 78: One commenter believed that section 2.1.2.1 of Circular DEQ-20, regarding surface water influence, was misplaced and should be located in standard 1.7.

RESPONSE NO. 78: The department appreciates the comment, but this section is not specific to alternative water supply systems and should remain in the proposed location. The department has adopted this section as proposed.

COMMENT NO. 79: One commenter was concerned with section 2.1.2.1 of Circular DEQ-20, stating that they believe that it needs to be clear regarding the required criteria for individual and shared wells. For multiple-user wells with three or more users, the commenter agreed with this requirement and preparing the PWS-5 report. But for individual and shared wells, the commenter noted, there needs to be an exact threshold of when additional analysis will be required so it is not interpreted differently by various reviewers and exactly what will be required.

RESPONSE NO. 79: The department appreciates the comment, but it is outside the scope of this rulemaking, as this section simply replaces ARM 17.36.336(5), and DEQ did not propose any substantive changes to that rule as part of this rulemaking. Please also see the General Response to Comments above.

COMMENT NO. 80: One commenter was concerned with the requirement in 2.1.4(b) of Circular DEQ-20 that the reviewing authority may require all potential sources of contamination be shown in accordance with PWS-6. The commenter stated that this was a new requirement and questioned what criteria the reviewing authority would use in applying it.

RESPONSE NO. 80: The department appreciates the comment, but it is outside the scope of this rulemaking, as this section simply replaced existing ARM 17.35.330(2) and DEQ did not propose any substantive changes to ARM 17.35.330(2) as part of this rulemaking. Please also see the General Response to Comments above.

COMMENT NO. 81: One commenter suggested that the requirements for multiple-user systems were reaching levels of cost and complexity that would cause people to drill two wells to get around the requirements. The commenter suggested

that there be different levels of multiple-user systems, with possible exemptions for certain uses, like a completely private use or some commercial uses.

RESPONSE NO. 81: The department did not propose significant substantive changes to the requirements for multiple-user systems in this rulemaking, and the department believes that multiple-user systems serve more people than individual and shared systems and therefore require increased level of design and plan review. The department will consider the comment that there be different levels of multiple-user systems for future rulemakings. Please also see the General Response to Comments above.

COMMENT NO. 82: One commenter had concerns with section 3.2.1 of Circular DEQ-20. They believe that there are opportunities in other states such as Washington to design storage to meet the max day demand if the well produces the average daily flow.

RESPONSE NO. 82: This comment is outside the scope of this rulemaking because the requirement was proposed unchanged from the existing requirement in Circular DEQ-3. This section of DEQ-20 simply replaces the previous requirement in DEQ-3 without any changes. Please also see the General Response to Comments above.

COMMENT NO. 83: One commenter believed that a definition of terms in Circular DEQ-20 at 3.2.1(a) of "Average Day Demand, Maximum Day Demand and Peak Instantaneous Demand" is needed.

RESPONSE NO. 83: The department agrees with this comment, and has added a cross-reference to the DEQ-1 Glossary at the beginning of DEQ-20.

COMMENT NO. 84: One commenter questioned whether multiple-user wells need to meet a 100-foot setback from all storm water related facilities, including roof drains and storm water ponds, in section 3.2.3 of Circular DEQ-20. They went on to say that setbacks are listed in the setback tables and in miscellaneous sections throughout which leads to confusion.

RESPONSE NO. 84: The setbacks in section 3.2.3 for multiple-user systems were not proposed to be changed from Circular DEQ-3. Therefore, any substantive changes to the requirements are outside the scope of this rulemaking. Please see the General Response to Comments above. The department has maintained their proposed location in section 3.2.3 because they are specific to multiple-user systems.

COMMENT NO. 85: One commenter suggested that section 1.4.1 of Circular DEQ-20 should allow use of existing wells under the influence of surface water on a case-by-case basis and that the statement that no deviation is available should be removed.

RESPONSE NO. 85: Wells that are under the influence of surface water are currently prohibited in the rules under ARM 17.36.331(1)(f) without the ability to receive a waiver. Moving the requirement from the rule to the Circular without the ability to receive a deviation is not a change, and is therefore, outside the scope of this rulemaking. Please see the General Response to Comments above.

COMMENT NO. 86: One commenter was opposed to the requirement that a total coliform analysis be conducted on existing wells after they are converted to potable use in section 1.6(b) of Circular DEQ-20. The commenter noted that this an unreasonable mandate and that there was no practical way to enforce the regulation.

RESPONSE NO. 86: The department appreciates the comment. This section is unchanged from the existing requirement in ARM 17.36.335(3)(a) and was not proposed to be changed in this rulemaking. Therefore, it is outside the scope of this rulemaking. Please see the General Response to Comments above.

COMMENT NO. 87: One commenter stated that the requirement in 2.1.2.2 Circular DEQ-20 that a total coliform test be provided for all wells is an added burden and expense to applicants, noting that total coliform is indicative of influences from surface water on a specific well and does not reflect overall aquifer characteristics. The commenter stated that the results of this test have no value in determining water qualify for a proposed well and that the requirement should be deleted.

RESPONSE NO. 87: The requirement for total coliform samples applies only to existing wells, as set forth in 2.1.2.2.f and 1.6. This requirement is unchanged from the existing requirement in ARM 17.36.335(3)(a). The department notes that total coliform bacteria are "indicator" organisms and their counts give a general indication of the sanitary conditions of the well. To clear up any confusion, the department has modified 2.1.2.2.a to explicitly refer to existing wells.

COMMENT NO. 88: One commenter believed that section 2.1.3 of Circular DEQ-20 conflicts with ARM 36.21.654 requiring all new wells be sealed to a minimum depth of 25 feet. The commenter stated that deviations from ARM Title 36, chapter 21 would require a well driller to receive a variance from the Department of Natural Resources and Conservation (DNRC) water well driller board, and coordination between agencies should also be a requirement of a deviation.

RESPONSE NO. 88: The department agrees that coordination between agencies is important and has modified section 2.1.3 of Circular DEQ-20 in response to this comment to require an approved variance from the DNRC Board of Water Well Contractors prior to submittal of the deviation to the department.

COMMENT NO. 89: The department received multiple comments on existing language in Circular DEQ-3. These comments included suggestions regarding deviation procedures in 1.4.1.d, sample taps in 2.1, continued protection in section 3.2.3.2, and discharge piping in 3.2.7.2.

RESPONSE NO. 89: The department appreciates these comments, but these comments are outside the scope of this rulemaking because these requirements were not proposed to be changed in this rulemaking, aside from removing references to public systems. Please also see the General Response to Comments above.

COMMENT NO. 90: Multiple commenters raised questions regarding section 3.0 of Circular DEQ-20 for multiple-user systems. They wondered if there will be a

well location approval prior to drilling the well. In addition, they questioned whether a water system serving two guest houses and main residence needs to be considered multiple-user since it is for private use.

RESPONSE NO. 90: The department has not proposed any substantive changes to these requirements for multiple-user systems. Please see the General Response to Comments. The department notes that multiple-user systems are defined in ARM 17.36.101 as nonpublic systems that serve or are intended to serve more than two living or commercial units, so a water system serving two guest houses and a main residence would be considered a multiple-user water system.

COMMENT NO. 91: The department received multiple comments that suggested that other sections of Circular DEQ-4 should be modified to be consistent with the proposed changes to ARM 17.36.320, noting that these other sections (namely, various footnotes to table 2.1-1 in section 2.1.7 and section 4.2.3.3.B) had been interpreted to require a full design be submitted to the reviewing authority.

RESPONSE NO. 91: The department believes that these concerns have been addressed adequately by the proposed changes to section 1.1.1, which provides that the information required to be submitted is set forth in ARM 17.36.320(3). The department has adopted the Circular as proposed.

COMMENT NO. 92: The department received multiple comments and suggested language regarding existing sections of Circular DEQ-4 that were not proposed to be changed. These included comments regarding soil data in footnote (b) of table 2.1-1, cut systems in 2.2.3, concrete tanks in 5.1.7.1, elevated sand mounts in 6.7.3.3, and appendix D.

RESPONSE NO. 92: The department appreciates these comments, but these comments are outside the scope of this rulemaking because these sections were not proposed to be changed. Please also see the General Response to Comments above. The department has adopted the Circular as proposed.

COMMENT NO. 93: One commenter believes that these changes were proposed without public outreach to consultants, engineers, other agencies, or interested parties and the changes are so far reaching, the new Circular should be pulled to allow the department time to reconcile the deficiencies.

RESPONSE NO. 93: The department conducted a dozen public meetings in 2022 to provide outreach for the proposed rule package. In-person meetings were conducted in Butte, Bozeman, Helena, and Kalispell. Additionally, in developing this rule package, the department sought the input from interested stakeholders, including the Subdivision Advisory Task Force, consultants, and contracted counties.

/s/ *Angela Colamaria*
ANGELA COLAMARIA
Rule Reviewer

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

Certified to the Secretary of State April 4, 2023.

BEFORE THE BOARD OF OUTFITTERS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of ARM 24.171.401, 24.171.502, 24.171.520, 24.171.601, 24.171.602, and 24.171.701 and the repeal of ARM 24.171.505 pertaining to the Board of Outfitters	))))))	NOTICE OF AMENDMENT AND REPEAL

TO: All Concerned Persons

1. On December 23, 2022, the Board of Outfitters (agency) published MAR Notice No. 24-171-42 regarding the public hearing on the proposed changes to the above-stated rules, at page 2345 of the 2022 Montana Administrative Register, Issue No. 24.

2. A public hearing was scheduled for January 13, 2023, at 9:00 a.m., via remote conferencing to consider the proposed amendment and repeal of the above-stated rules. Due to unforeseen technical difficulties, the hearing was not held.

3. On January 27, 2023, the agency published an amendment to MAR Notice No. 24-171-42 regarding the public hearing on the proposed changes to the above-stated rules, at page 71 of the 2023 Montana Administrative Register, Issue No. 2.

4. On February 17, 2023, a public hearing was held on the proposed changes to the above-stated rules via the videoconference and telephonic platform. Comments were received by the deadline.

5. The agency has thoroughly considered the comments received. A summary of the comments and the agency responses are as follows:

COMMENT 1: Several commenters supported the rules package as proposed.

RESPONSE 1: The board appreciates all comments received during the rulemaking process.

COMMENT 2: One commenter who supports the rule package stated the amendments will lessen burden on staff and simplify outfitting standards.

RESPONSE 2: The board agrees.

COMMENT 3: Many of the commenters who support the rule amendments specifically noted support for the amendment of ARM 24.171.701 but gave no rationale for their support.

RESPONSE 3: The board appreciates all comments received during the rulemaking process.

COMMENT 4: One commenter who supports the amendment of ARM 24.171.701 noted that this change will likely benefit new outfitters in the industry.

RESPONSE 4: The board agrees that this will allow newly licensed outfitters better opportunity to serve clients by having more flexibility to purchase NCHU.

COMMENT 5: Some commenters who support the rules package, and in particular the change to ARM 24.171.701, noted an excess demand for category 3 NCHU without enough NCHU available to meet demand. These commenters feel the amendments benefit the entire outfitting industry. Specifically, amending ARM 24.171.701 as proposed will allow licensees in the industry greater flexibility to meet demand without increasing the aggregate amount of NCHU available, and thus the aggregate number of client hunters on the landscape.

RESPONSE 5: The board agrees.

COMMENT 6: Several commenters oppose the amendments to ARM 24.171.701. Some commenters who oppose the amendments assert the proposed changes will increase competition for upland bird-hunting, an area which is already over-crowded. One commenter noted this will negatively impact public hunting opportunities.

RESPONSE 6: The board feels the proposed change in ARM 24.171.701 will benefit hunting opportunities in this state by adding flexibility to help meet the current demand for upland bird game hunting without negatively impacting public hunting opportunities or causing over-crowding in the field.

COMMENT 7: Some commenters opposed the changes proposed to ARM 24.171.701, asserting that it devalues category 3 NCHU. These commenters noted that there are more category 2 NCHU than category 3 NCHU and the proposed change will alter these numbers by allowing category 2 NCHU holders to operate as if they hold category 3. The commenters believe the change would have a net effect of increasing NCHU thereby causing economic and financial harm by devaluing the commenters' existing category 3 NCHU.

RESPONSE 7: The board notes that the value of category 2 and category 3 NCHU on the market are substantially the same. The board has no information indicating that the proposed changes would materially affect the value of either category of NCHU, and the board is not prepared to speculate on these perceived impacts. Also, as noted in the statement of reasonable necessity, the board is not increasing the total number of NCHU available, only allowing flexibility to serve clients who are interested in multiple specie opportunities. Therefore, the board is not exceeding its statutory authority by increasing the number of NCHU available.

COMMENT 8: Some commenters who oppose the changes to ARM 24.171.701 assert the board lacks statutory authority to implement these changes and believe the amendment sidesteps an important outfitting regulation by taking historical use out of the equation for NCHU, and this could possibly add thousands more category 3 NCHU. The commenters further believe that the board does not have the statutory authority to expand NCHU by combining category 2 and 3.

RESPONSE 8: The board agrees with these commenters that much of the statutory authority initially granted to the board to regulate NCHU has been repealed since 2011. Included in these statutory changes is the board's authority to consider historic use as a basis for increasing NCHU available to licensees. However, along with the authority the board retained to maintain categories of NCHU at all, the board has determined that it also has authority to determine how those NCHU categories may be used. Additionally, as stated in response to comment 7, the total number of NCHU available remains the same and, therefore, the board is not exceeding its statutory authority by increasing the number of NCHU available.

COMMENT 9: One commenter opposed any changes in AMR 24.171.701 and feels the proposed change would create a hardship on the industry and see the death of a category of NCHU. The commenter feels there is currently a shortage of category 3 NCHU, and the change could cause a shortage of category 2 NCHU. Another commenter agreed that the ability of an outfitter to "downgrade" category 2 NCHU to category 3 will lead to a shortage of category 2 NCHU.

RESPONSE 9: The board does not feel the proposed changes will create hardship on the industry. Further the overall numbers of category 2 and category 3 NCHU are not changing and the proposed amendment simply allows category 2 NCHU to be used as category 3. The board believes that this will not contribute to any additional shortage of NCHU.

COMMENT 10: One commenter opposed to the amendments to ARM 24.171.701 suggested that any outfitter who switches their category 2 NCHU to category 3 use should undergo an audit or, as a matter of fairness, that the board should also allow outfitters with category 3 NCHU to be used for category 2 services.

RESPONSE 10: The board notes that these proposed changes are outside of the scope of the proposed amendments. However, the board will continue to review its rules and may consider additional amendments to ARM 24.171.701 in the future.

6. The agency has amended ARM 24.171.401, 24.171.502, 24.171.520, 24.171.601, 24.171.602, and 24.171.701as proposed.

7. The agency has repealed ARM 24.171.505 as proposed.

BOARD OF OUTFITTERS
JOHN WAY, CHAIRPERSON

/s/ QUINLAN L. O'CONNOR
Quinlan L. O'Connor
Rule Reviewer

/s/ LAURIE ESAU
Laurie Esau, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State April 4, 2023.

BEFORE THE DEPARTMENT OF LIVESTOCK
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 32.8.202 pertaining to Time From Processing That Fluid Milk May Be Sold for Public Consumption	))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On February 10, 2023, the Department of Livestock published MAR Notice No. 32-23-333 pertaining to the proposed amendment of the above-stated rule at page 145 of the 2023 Montana Administrative Register, Issue Number 3.

2. The department has amended the above-stated rule as proposed.

3. No comments or testimony were received.

/s/ Darcy Alm
Darcy Alm
Rule Reviewer

/s/ Michael S. Honeycutt
Michael S. Honeycutt
Executive Officer
Department of Livestock

Certified to the Secretary of State April 4, 2023.

BEFORE THE DEPARTMENT OF LIVESTOCK
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 32.3.2001 pertaining to Brands and Earmarks	)))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On February 10, 2023, the Department of Livestock published MAR Notice No. 32-23-337 pertaining to the proposed amendment of the above-stated rule at page 147 of the 2023 Montana Administrative Register, Issue Number 3.

2. The department has amended the above-stated rule as proposed.

3. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

COMMENT #1: A commenter has no problem with the addition of the ear tattoo as a method of identification. However, the commenter wonders if the electronic ID that is mandatory for Canadian cattle is a better option for commercial livestock movement. The commenter suggests that tattoos are more difficult to achieve in older ears and time consuming to say the least, both to do apply and to read. The commenter works with a Canadian-owned feedlot in central Montana and recognizes that applying a tattoo to all those animals as they go north would be an improbable task should this rule be reciprocated by Canada. The commenter knows tags can be removed but who is going to read all these tattoos at the border crossings? The commenter would like the board to reconsider this proposal going forward. Is it the technology we need going forward in cross border trade? Please reconsider your position on this proposal.

RESPONSE #1: The department appreciates the comment. While the state of Montana could entirely waive the requirement for a CAN tattoo and hot iron CAN brand, those practices are mandated by federal rules, so the change in Montana rules would not alter what happens at the international border. However, such a change would set Montana up to lift import obstacles, if the federal government eliminated the CAN brand or tattoo requirement in the future.

We agree that in most cases the electronic ID that is already being placed on Canadian origin animals crossing the border is a more effective tracing tool than a country identifier. Those individual animals IDs are already being recorded on border-crossing paperwork.

COMMENT #2: The Montana Farmers Union (MFU) opposes the amendments proposed in ARM 32.3.2001(1)(b), regarding "Cattle originating from Canada." MFU opposes the addition of having cattle originating from Canada having the option to

use a "tattoo" as a permanent origin identification. MFU has concerns about the level of "permanence" of an ear tattoo in identifying cattle.

MFU supports the use of a permanent hot iron brand, to serve as the required brand type for cattle originating from Canada. MFU supports the rule as currently written in code, and asks that it remains the same for import of cattle originating from Canada into Montana. Knowing the origin of beef imports into the state is important for herd health security and food security. MFU knows that the current standards of brands are easy to view and permanent.

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MFU says that this change would also create different standards for cattle originating from Canada and Mexico. MFU supports keeping the current standards, maintaining the current requirements for identification of cattle originating from Canada and Mexico.

RESPONSE #2: The department appreciates the comment. The basis for requiring a CAN brand on Canadian origin cattle is based on concerns with Bovine Spongiform Encephalopathy, otherwise known as BSE or Mad Cow disease. A hot iron brand served as an easily recognizable, indelible mark that could be linked to the country of import in case a Canadian origin animal was diagnosed with BSE after importation to the United States.

With Canada being recognized by the World Organization for Animal Health (OIE) as "negligible risk status" for BSE in May 2021, disease risk no longer warrants the exclusive use of a hot iron brand for permanently designating the country of birth. The department believes that methods other than a hot iron brand are available and effective at maintaining traceability of animals from Canada.

Differing entry requirements for imported cattle from Mexico and Canada are primarily based on different levels of risk of tuberculosis and brucellosis. Further, a significant portion of farm and ranch income is generated by international trade. An important part of international trade negotiations that provide access for U.S. agricultural commodities to foreign markets is removing non-tariff trade barriers when they are no longer needed to mitigate disease risk.

COMMENT #3: The Deputy Minister for Alberta Agriculture and Irrigation commented that they would be pleased to provide feedback about the proposed amendment of ARM 32.3.2001, which pertains to brands and earmarks, specifically those related to the export of cattle from Canada. The deputy minister said this rule was created in response to detection of BSE in Canada in 2003. The World Organization for Animal Health recognized Canada's BSE Negligible Risk Status in May 2021, and the decision to revisit this Montana requirement is appreciated.

Given the proposed amendment appears to convey alignment with the current requirements from the United States Department of Agriculture (USDA), the deputy minister suggests that either:

- the amendment be modified to only refer to whatever the USDA requirement is at the time; or
- remove the requirement completely.

Either of these approaches, the deputy minister says, would avoid unnecessary duplication of restrictions at the state level. In the event that the USDA reduces its requirements in recognition of Canada's Negligible Risk Status, Montana's position would immediately align with that of the USDA.

RESPONSE #3: The department thanks the deputy minister for the comment. As this comment states, the proposed rule would be duplicative with federal regulations. However, the state of Montana would retain authority to enforce markings of Canadian origin cattle while not placing additional burden on importers or Montana citizens. Should the United States federal government remove the requirements for a CAN hot iron brand or tattoo on cattle imported from Canada, the department may re-evaluate state requirements.

COMMENT #4: A commenter supported the change.

RESPONSE #4: The department thanks the commenter for the comment and agrees. The department has previously received feedback that hot iron branding may not be appropriate for extremely young animals, animals destined for temporary stay in the United States, animals moving directly to slaughter, long haired animals such as Scottish Highlanders, or for cosmetic or humane concerns. The department believes that Canada's recognition as negligible BSE risk by the World Organization for Animal Health justifies additional options to the hot iron brand for physical means of identification of cattle of Canadian origin. Providing the option for either the hot iron brand or tattoo maintains exporting country traceability with high confidence.

/s/ Darcy Alm
Darcy Alm
Rule Reviewer

/s/ Michael S. Honeycutt
Michael S. Honeycutt
Executive Officer
Department of Livestock

Certified to the Secretary of State April 4, 2023.

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 ADOPTION AND REPEAL

TO: All Concerned Persons

1. On December 9, 2022, the Department of Public Service Regulation published MAR Notice No. 38-2-258 pertaining to the public hearing on the proposed adoption and repeal of the above-stated rules at page 2259 of the 2022 Montana Administrative Register, Issue Number 23. On February 10, 2023, the department published a Notice of Second Public Hearing and Extension of Comment Period on Proposed Adoption and Repeal at page 150 of the 2023 Montana Administrative Register, Issue Number 3.

2. The department has adopted the following rule as proposed: New Rule I (38.2.2407).

3. The department has repealed the above-stated rules as proposed.

4. No comments or testimony were received.

/s/ LAURA D. VACHOWSKI
Laura D. Vachowski
Rule Reviewer

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

Certified to the Secretary of State April 4, 2023.

NOTICE OF FUNCTION OF ADMINISTRATIVE RULE REVIEW COMMITTEES

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 (Commissioner of Securities and Insurance)
- Office of Economic Development
- Division of Banking and Financial Institutions
- Alcoholic Beverage Control Division
- Cannabis Control Division

Education Interim Committee

- State Board of Education
- Board of Public Education
- Board of Regents of Higher Education
- Office of Public Instruction
- Montana Historical Society
- Montana State Library

Children, Families, Health, and Human Services Interim Committee

- Department of Public Health and Human Services

Law and Justice Interim Committee

- Department of Corrections
- Department of Justice

Energy and Telecommunications Interim Committee

- Department of Public Service Regulation

Revenue Interim Committee

- Department of Revenue
- Montana Tax Appeal Board

State Administration and Veterans' Affairs Interim Committee

- Department of Administration
- Montana Public Employee Retirement Administration
- Board of Investments
- Department of Military Affairs
- Office of the Secretary of State
- Office of the Commissioner of Political Practices

Transportation Interim Committee

- Department of Transportation
- Motor Vehicle Division (Department of Justice)

Environmental Quality Council

- Department of Environmental Quality
- Department of Fish, Wildlife and Parks
- 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
- 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 December 31, 2022. This table includes notices in which those rules adopted during the period October 7, 2022, through March 10, 2023, 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 December 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 or 2023 Montana Administrative Register.

To aid the user, this table includes rulemaking actions of such entities as boards and commissions listed separately under their appropriate title number.

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2-43-634 Amendment by Reference of the State of Montana Public Employee Deferred Compensation (457) Plan Document and Trust Agreement, p. 165

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4-22-276 Wheat and Barley Assessment and Refunds, p. 1786, 11

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COMMERCE, Department of, Title 8

8-111-200 Public Participation - Incorporation of Model Rules - Meetings of the Board - Definitions, p. 200

(Board of Investments)
8-97-101 Board of Investments Rules, p. 1212, 12

EDUCATION, Title 10

PUBLIC SERVICE REGULATION, Department of, Title 38

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42-1063 Agricultural Commodity Prices and Values, p. 2179, 2366
42-1064 Revisions to Railroad Income Apportionment Factors, p. 2182, 45
42-1065 2023 Personal Property Depreciation Schedules and Trend Tables, p. 2186, 2368

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APRIL 14, 2023
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