

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the amendment of ARM)	NOTICE OF PUBLIC HEARING ON
17.55.102, 17.55.108, 17.55.111, and)	PROPOSED AMENDMENT,
17.55.114 pertaining to definitions, facility)	ADOPTION, AND REPEAL
listing, facility ranking, and delisting a)	
facility on the CECRA priority list; adoption)	(CECRA REMEDIATION)
of New Rules I through V pertaining to)	
incorporation by reference, proper and)	
expeditious notice, third-party remedial)	
actions at order sites, additional remedial)	
actions not precluded, and orphan share)	
reimbursement; and repeal of ARM)	
17.55.101 pertaining to purpose)	

TO: All Concerned Persons

1. On November 5, 2009, at 9:00 a.m., a public hearing will be held in Room 122 of the Last Chance Gulch Building, 1100 North Last Chance Gulch, Helena, Montana, to consider the proposed amendment, adoption, and repeal of the above-stated rules.

2. The 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, please contact Elois Johnson, Paralegal, no later than 5:00 p.m., October 26, 2009, to advise us of the nature of the accommodation that you need. Please contact Elois Johnson at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail ejohnson@mt.gov.

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

17.55.102 DEFINITIONS In this subchapter the following terms have the meanings indicated below and are supplemental to the definitions in 75-10-701, MCA:

(1) remains the same.

(2) "Final permanent remedy" means all of the remedial actions identified by the department in a record of decision.

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

~~(3) "Friable asbestos-containing material" means any material containing more than 1% asbestos by weight which, when dry, may be crumbled, pulverized, or reduced to powder by hand pressure.~~

(4) "Imminent and substantial endangerment" means contaminant concentrations in the environment exist or have the potential to exist above risk-

based screening levels adopted by the department in [NEW RULE I] or other statutory or regulatory cleanup levels.

(4) remains the same, but is renumbered (5).

(6) "Record of decision" means the final agency decision document that identifies and explains the final remedial actions selected by the department that will be used to clean up a facility. It does not include a voluntary cleanup plan approved under 75-10-736, MCA.

(5) remains the same, but is renumbered (7).

~~(6) The department adopts and incorporates by reference:~~

~~(a) department Circular DEQ-4, entitled "Montana Standards for Subsurface Wastewater Treatment Systems," 2004 edition, which establishes technical standards for construction of subsurface wastewater treatment systems; and~~

~~(b) Department Circular DEQ-7, "Montana Numeric Water Quality Standards" (February 2008 edition).~~

AUTH: 75-10-702, 75-10-704, MCA

IMP: 75-10-702, 75-10-704, 75-10-711, MCA

REASON: Adopting a rule to define what constitutes the final permanent remedy and how it is selected, through a record of decision (which is also defined by this rule) at a facility, is critical to determining when and how cost recovery actions will be pursued. The June 2008 Performance Audit ("Program and Policy Issues Impacting State Superfund Operations") indicated that the department needs to pursue cost recovery and memorialize rules and policies related to when the department will bring legal action for nonpayment of costs.

The department has determined that friable asbestos-containing material does not need to be defined separately for listing purposes because it is, by definition, already a hazardous and deleterious substance addressed by the rules. Therefore, the definition has been deleted.

Section 75-10-711, MCA, requires that an imminent and substantial endangerment be present before the department takes or requires remedial action and this requirement is reflected in ARM 17.55.108. The department has consistently determined that an imminent and substantial endangerment may exist if contaminant concentrations exceed certain risk-based screening levels. Concentrations that fall below these screening levels will not trigger CECRA action. Adoption of this amendment to define "imminent and substantial endangerment" with reference to the risk-based screening levels adopted in New Rule I will provide clarity to the department's interpretation.

The rule deletes the reference to DEQ-4 because these technical standards for wastewater treatment systems are not used in the definition section or for any screening purposes. The rule deletes the reference to DEQ-7 because all adoptions by reference are being incorporated into New Rule I.

As stated above, the June 2008 Performance Audit recommended the department adopt rules for cost recovery purposes. Adopting the definition of a record of decision is necessary to ensure it is clear what agency decision document identifies the final permanent remedy.

17.55.108 FACILITY LISTING (1) The department may list a facility on the CECRA priority list if the department determines there is a confirmed release or substantial threat of a release of a hazardous or deleterious substance that may pose an imminent and substantial ~~threat~~ endangerment to public health, safety, or welfare or the environment.

(2) through (4) remain the same.

AUTH: 75-10-702, 75-10-704, MCA

IMP: 75-10-702, 75-10-704, 75-10-711, MCA

REASON: The department is proposing to amend ARM 17.55.108 because the term "imminent and substantial threat" does not match the terminology used in CECRA, which is "imminent and substantial endangerment." This is a clerical correction and is not intended to have a substantive effect on the rule itself.

17.55.111 FACILITY RANKING (1) remains the same.

(2) A maximum priority designation must be given to a facility that exhibits one or more of the following characteristics:

(a) documented release to surface water in a drinking water intake that is a public drinking water supply with:

(i) a documented or probable exceedance of a Montana water quality human health standard listed in department Circular DEQ-7, entitled "Montana Numeric Water Quality Standards," or a standard established as a drinking water maximum contaminant level listed at 40 CFR 141 (~~1997~~); or

(ii) for substances whose parameters for human health are not listed in DEQ-7 or 40 CFR 141 (~~1997~~), concentrations at levels that render the water harmful, detrimental, or injurious to a beneficial use;

(b) documented release to ground water in a drinking water well that is a public drinking water supply with:

(i) a documented or probable exceedance of a Montana water quality human health standard listed in department Circular DEQ-7, entitled "Montana Numeric Water Quality Standards," or a standard established as a drinking water maximum contaminant level listed at 40 CFR 141 (~~1997~~); or

(ii) for substances whose parameters for human health are not listed in DEQ-7 or 40 CFR 141 (~~1997~~), concentrations at levels that render the water harmful, detrimental, or injurious to a beneficial use;

(c) documented release into a drinking water line that is part of a public drinking water supply with:

(i) a documented or probable exceedance of a Montana water quality human health standard listed in department Circular DEQ-7, entitled "Montana Numeric Water Quality Standards," or a standard established as a drinking water maximum contaminant level listed at 40 CFR 141 (~~1997~~); or

(ii) for substances whose parameters for human health are not listed in DEQ-7 or 40 CFR 141 (~~1997~~), concentrations at levels that render the water harmful, detrimental, or injurious to a beneficial use;

(d) documented release to surface water in a drinking water intake that is a domestic or commercial drinking water supply with:

(i) a documented or probable exceedance of a Montana water quality human health standard listed in department Circular DEQ-7, entitled "Montana Numeric Water Quality Standards," or a standard established as a drinking water maximum contaminant level listed at 40 CFR 141 (1997); or

(ii) for substances whose parameters for human health are not listed in DEQ-7 or 40 CFR 141 (1997), concentrations at levels that render the water harmful, detrimental, or injurious to a beneficial use;

(e) documented release to ground water in a drinking water well that is a domestic or commercial drinking water supply with:

(i) a documented or probable exceedance of a Montana water quality human health standard listed in department Circular DEQ-7, entitled "Montana Numeric Water Quality Standards," or a standard established as a drinking water maximum contaminant level listed at 40 CFR 141 (1997); or

(ii) for substances whose parameters for human health are not listed in DEQ-7 or 40 CFR 141 (1997), concentrations at levels that render the water harmful, detrimental, or injurious to a beneficial use;

(f) documented release into a drinking water line that is a domestic or commercial drinking water supply with:

(i) a documented or probable exceedance of a Montana water quality human health standard listed in department Circular DEQ-7, entitled "Montana Numeric Water Quality Standards," or a standard established as a drinking water maximum contaminant level listed at 40 CFR 141 (1997); or

(ii) for substances whose parameters for human health are not listed in DEQ-7 or 40 CFR 141 (1997), concentrations at levels that render the water harmful, detrimental, or injurious to a beneficial use;

(g) through (i) remain the same.

(3) A high priority designation must be given to a facility whose release does not exhibit any of the characteristics provided in (2) but exhibits one or more of the following characteristics:

(a) documented release to surface water that is a drinking water source with:

(i) no documented or probable exceedance of a Montana water quality human health standard listed in department Circular DEQ-7, entitled "Montana Numeric Water Quality Standards," or a standard established as a drinking water maximum contaminant level listed at 40 CFR 141 (1997) in a drinking water supply intake; and

(ii) for substances whose parameters for human health are not listed in DEQ-7 or 40 CFR 141 (1997), no concentration at levels that render the water harmful, detrimental, or injurious to a beneficial use in a drinking water supply intake;

(b) documented release to ground water that is a drinking water source with:

(i) no documented or probable exceedance of a Montana water quality human health standard listed in department Circular DEQ-7, entitled "Montana Numeric Water Quality Standards," or a standard established as drinking water maximum contaminant level listed at 40 CFR 141 (1997) in a drinking water supply well; and

(ii) for substances whose parameters for human health are not listed in DEQ-7 or 40 CFR 141 (1997), no concentrations at levels that render the water harmful, detrimental, or injurious to a beneficial use in a drinking water supply well;

(c) remains the same.

(d) documented release of ~~friable asbestos-containing material~~ a hazardous or deleterious substance on the ground surface that poses a threat to public health;

(e) through (8) remain the same.

AUTH: 75-10-702, 75-10-704, MCA

IMP: 75-10-702, 75-10-704, 75-10-711, MCA

REASON: The department removed the references to 1997 because it is adopting the most recent versions of DEQ-7 and 40 CFR 141 in New Rule I. Also, the department has determined that there is no need for friable asbestos-containing material to have its own listing criteria as it is more appropriately addressed by the term "hazardous and deleterious substance".

17.55.114 DELISTING A FACILITY ON THE CECRA PRIORITY LIST

(1) through (1)(c) remain the same.

(2) In determining whether to delist a facility from the CECRA priority list, the department shall consider whether:

(a) remains the same.

(b) liable persons or other persons have completed all appropriate remedial actions required by the department, including, but not limited to, completion of a final long term remedy, required by the department and payment of the state's remedial action costs including interest and, if applicable, penalties under 75-10-715(3), MCA; and

(c) through (7) remain the same.

AUTH: 75-10-702, 75-10-704, MCA

IMP: 75-10-702, 75-10-704, 75-10-711, 75-10-715, 75-10-722, MCA

REASON: The June 2008 Performance Audit ("Program and Policy Issues Impacting State Superfund Operations") directed the department to pursue cost recovery and memorialize rules and policies related to when the department will bring legal action for nonpayment of costs. Ensuring that reimbursement of the state's costs is made prior to delisting promotes remediation of contamination by providing money for a revolving fund for remediation of other sites.

4. The proposed new rules provide as follows:

NEW RULE I INCORPORATION BY REFERENCE (1) For the purposes of this subchapter, the department adopts and incorporates by reference:

(a) Department Circular DEQ-7, Montana Numeric Water Quality Standards (February 2008);

(b) Drinking Water Maximum Contaminant Levels, published at 40 CFR 141 (2008);

(c) Montana Tier 1 Risk-based Corrective Action Guidance for Petroleum Releases (September 2009);

(d) U.S. Environmental Protection Agency, Regional Screening Levels for

Chemical Contaminants at Superfund Sites (April 2009), except when:

(i) comparing contaminant concentrations to the regional screening levels, with the exception of lead, the department will adjust the non-carcinogenic levels by dividing by ten to account for cumulative potential health effects;

(ii) comparing contaminant concentrations to the protection of ground water soil screening levels, the department will adjust the dilution attenuation factor to ten to account for a state-specific attenuation factor;

(iii) comparing contaminant concentrations to the protection of ground water soil screening levels, the department will apply an appropriate adjustment to ensure that contaminants potentially leaching to ground water will not exceed Montana numeric water quality standards found in department Circular DEQ-7.

(e) Montana Department of Environmental Quality, Remediation Division, Action Level for Arsenic in Surface Soil (April 2005); and

(f) U.S. Environmental Protection Agency Region 3 Biological Technical Assistance Group Freshwater Sediment Screening Benchmarks (August 2006).

(2) All references in this subchapter to the documents incorporated by reference in this rule are to the edition specified in this rule.

(3) Copies of the documents incorporated by reference in this rule may be obtained from the Department of Environmental Quality, Remediation Division, P.O. Box 200901, Helena, MT 59620-0901.

AUTH: 75-10-702, 75-10-704, MCA

IMP: 75-10-702, 75-10-704, 75-10-711, MCA

REASON: It is necessary to adopt these references to ensure that the risk-based screening levels, relied upon by the department to determine "imminent and substantial endangerment" which may trigger listing, are clearly identified, as well as to ensure the most recent versions of the documents are used in making listing decisions.

Department Circular DEQ-7 standards are appropriate, as they have already been adopted by the Board of Environmental Review as the standards that apply to surface water and ground water in Montana to protect uses that are being or may be made of state waters. The department has used these levels consistently when evaluating potential risk to surface water and ground water. Use of the maximum contaminant levels is appropriate as they have been adopted by EPA for protection of public drinking water supplies. The department has used these levels consistently when evaluating potential risks to drinking water.

The risk-based corrective action guidance sets soil screening levels using input modeling parameters representative of estimated statewide conditions. They are based on both direct contact with contaminated soil and leaching to ground water. They are also based on residential, industrial, or construction/excavation exposure and various depths to ground water and take into account multiple pathways and cumulative exposure. These screening levels are based on a 10^{-6} screening level for carcinogens, which allows the department to ensure that cumulative carcinogenic risk at sites does not exceed the 10^{-5} cumulative risk level. This is the risk level established by the Montana Legislature for adoption of water quality standards. For non-carcinogenic contaminants, the guidance uses a

cumulative hazard index of 1, which represents the value which indicates that no adverse non-cancer human health effects are expected to occur.

The regional screening levels are being used by various states and EPA and provide conservative screening values that provide the same levels of protection for non-petroleum compounds as are provided by the risk-based guidance for petroleum discussed above. The regional screening levels are based on ingestion, inhalation, and dermal contact and include residential and industrial exposure and are used to screen potential risk at a wide variety of sites. The department uses these levels but makes two adjustments to the levels to ensure adequate protectiveness of human health and the environment. With the exception of lead, the department will adjust the non-carcinogenic levels in the regional screening levels by dividing by 10. This ensures that, when multiple contaminants are found at a site that may have the same health effects, cumulative potential health effects are considered. As part of the development of the risk-based corrective action guidance, the department evaluated dilution attenuation factors for Montana and determined an average statewide factor of 10. Therefore, when comparing contaminant concentrations to the protection of ground water soil screening levels found in the regional screening level document, the department will adjust the dilution attenuation factor to 10 to account for that state-specific attenuation factor. Finally, if the DEQ-7 standard differs from the maximum contaminant level or the tap water regional screening level, when comparing contaminant concentrations to the protection of ground water soil screening levels, the department will apply an appropriate adjustment to ensure that contaminants potentially leaching to ground water will not exceed Montana numeric water quality standards found in department Circular DEQ-7. This ensures that state water quality is adequately protected and meets state standards.

Use of the action level for arsenic in surface soil is appropriate as it considers background arsenic soil concentrations in Montana and recognizes the presence of naturally-occurring levels of arsenic in this state. It uses data from around the state and, through the use of standard statistical methodology, determines an appropriate screening level for arsenic in residential soil that will prevent adverse human health effects above those expected to occur because of natural conditions.

Use of the sediment screening benchmarks is appropriate as they are already being used by various states and EPA and provide a conservative screening value. The sediment screening benchmarks provide screening for toxicity to aquatic organisms which aids the department in evaluating one potential risk to the environment.

NEW RULE II PROPER AND EXPEDITIOUS NOTICE (1) At a facility on the CECRA priority list for which no administrative or judicial order under 75-10-711, MCA, has been issued, the department shall, as resources allow and considering the facility ranking, take the following actions:

(a) ensure that a person liable or potentially liable under 75-10-715, MCA, is expeditiously performing remedial actions as required by 75-10-711, MCA, by requiring the establishment of a department-approved schedule for remedial actions. When establishing the schedule, the department shall consider the size and complexity of the facility and may approve, disapprove, or modify the schedule proposed by the person liable or potentially liable under 75-10-715, MCA;

(b) send a letter to a person liable or potentially liable under 75-10-715, MCA, providing the opportunity to conduct the required remedial actions; and

(c) ensure that a person liable or potentially liable under 75-10-715, MCA, is properly performing the remedial actions by reviewing work plans, reports, or other documents submitted by the person and identifying required revisions. The person liable or potentially liable under 75-10-715, MCA, must be given one opportunity to address all of the department's required revisions on each submittal. If the department determines that its required revisions were not adequately addressed, the department shall incorporate its required revisions electronically into the document so that it can be finalized.

(2) A person liable or potentially liable under 75-10-715, MCA, shall complete all remedial actions required by the department according to the department's approved schedule, unless an extension is requested and approved by the department.

(3) If a person liable or potentially liable under 75-10-715, MCA, does not comply with the approved schedule or does not incorporate the department's required revisions on work plans, reports, or other documents, the department may determine that the person is not properly and expeditiously performing the appropriate remedial actions and may:

(a) issue a unilateral order requiring the person liable or potentially liable under 75-10-715, MCA;

(b) file a civil action as provided in 75-10-711, MCA;

(c) conduct the required remedial actions and seek cost recovery and penalties as provided in 75-10-711, MCA;

(d) file a cost recovery action as provided in 75-10-722, MCA; or

(e) pursue any other action allowed by law.

(4) All submittals to the department from a person or potentially liable person under 75-10-715, MCA, including those from its consultant or contractor, must be in both hard copy as well as modifiable electronic format.

AUTH: 75-10-702, 75-10-704, MCA

IMP: 75-10-702, 75-10-704, 75-10-706, 75-10-711, MCA

REASON: The purpose of CECRA is to protect human health and the environment against the dangers arising from releases of hazardous or deleterious substances. Generally, the department can take remedial action when it determines that none of the potentially liable persons under 75-10-715, MCA, are acting properly and expeditiously to perform the necessary work. To ensure that the procedures leading up to such a department determination are clear, it is appropriate to adopt rules defining the process by which parties will be given the chance to conduct remedial work without an administrative order and to ensure that Montana citizens are protected against these dangers. In addition, the November 2006 HJR 34 Study Report ("Improving the State Superfund Process") recommended that the department develop a framework for more timely and consistent use of its enforcement authority and this rule addresses that recommendation. It also addresses the concern that the department respond to submittals in a timely fashion. By requiring the submittal of electronic documents, the department can use the

"redline/strikeout" method of commenting, which will shorten the response time on documents.

NEW RULE III THIRD PARTY REMEDIAL ACTIONS AT ORDER SITES

(1) At a facility for which an administrative or judicial order under 75-10-711, MCA, has been issued, a person not subject to that order may not conduct any remedial action at the facility that is subject to the order without the written permission of the department.

(2) When requesting permission, the person wishing to conduct the remedial action shall submit a work plan or other document request for such permission in writing to the department at least 30 calendar days in advance of the proposed start date for the remedial action. The document must include:

- (a) a map or figure showing the location of the requested remedial action in relation to the facility boundary;
- (b) a work plan that clearly states the objective of the remedial action;
- (c) a description of the proposed remedial action;
- (d) a description of whether investigation-derived waste including, but not limited to, drill cuttings, excavated soil, purge water, decontamination water, and personal protective equipment, will be generated and, if so, how the waste will be disposed;
- (e) a description of any proposed laboratory analyses;
- (f) if monitoring wells are proposed for installation, a statement that the wells will be constructed and later abandoned according to Montana regulations by a licensed well driller;
- (g) a statement that an appropriate health and safety plan will be used for the work;
- (h) provision of a summary report upon completion of the work to be submitted within a specified time after completion of the remedial action; and
- (i) any other information required by the department.

(3) The department shall review the request and shall either provide permission or require revision to the document to ensure that:

- (a) the proposed remedial action will not conflict with ongoing work at the facility;
- (b) the proposed work, if conducted in the manner described in the document, will not spread, worsen, or otherwise exacerbate the contamination; and
- (c) other relevant factors are considered by the department.

(4) The department's permission under this rule does not provide the right to access the property and the person wishing to conduct the remedial action is responsible for gaining permission to access any property necessary to conduct the work.

(5) The department's permission does not waive or otherwise alleviate the need to obtain permits that may be required to conduct the work.

(6) If the department provides written permission to conduct the work, the person conducting the work is responsible for ensuring that all work complies with applicable laws and regulations that may govern that work.

(7) If the department provides written permission to conduct the remedial action, the person conducting that action must notify the department of the date that

the person is commencing the remedial action at least ten calendar days prior to the start of the remedial action and must provide the department with any further requested information including, but not limited to, a summary report upon completion of the work, laboratory data, log books, field notes, photographs, or other information.

AUTH: 75-10-702, 75-10-704, MCA

IMP: 75-10-702, 75-10-704, 75-10-706, MCA

REASON: In order to assist third parties who desire to conduct remedial actions at a facility under order, it is appropriate to adopt rules describing the steps necessary to get department permission. The department has seen an increase in the number of third parties who are requesting this permission and adoption of a rule will help streamline the process for them to obtain department permission in a timely fashion. The information required in this rule is the information the department needs in order to determine in a timely manner whether the work will meet the criteria in (3). The criteria are necessary to ensure that third-party activities do not pose an unacceptable risk to human health or the environment.

The requirement in (7) is necessary to monitor the work performed to ensure that it is performed in accordance with the plan.

NEW RULE IV ADDITIONAL REMEDIAL ACTIONS NOT PRECLUDED

(1) If the department selects or approves a remedial action and subsequently determines that the remedial action has failed or that additional remedial actions are required, the department shall require further remedial action at the facility by a person liable or potentially liable under 75-10-715, MCA.

AUTH: 75-10-702, 75-10-704, MCA

IMP: 75-10-702, 75-10-704, 75-10-711, MCA

REASON: The November 2006 HJR 34 Study Report ("improving the State Superfund Process") recommended that the department take steps to avoid "paralysis by analysis," which it partially described as the perception that the department is slow to approve interim or other remedial actions because of the fear of remedy failure or that the department will be precluded from requiring additional actions. This rule addresses this issue by providing that, should remediation fail to be effective, the department may require additional remediation. Therefore, approval of interim or other actions may be made with a lesser degree of certainty than if the department could not require additional actions.

NEW RULE V ORPHAN SHARE REIMBURSEMENT (1) Upon completion and department approval of the final report evaluating the nature and extent of contamination at a facility with an approved stipulated agreement under 75-10-750, MCA, the lead liable person under 75-10-746, MCA, may submit a claim to the department for reimbursement of the orphan's share of the cost associated with the preparation of that report.

(2) Upon completion and department approval of the final report formulating

and evaluating final remedial alternatives at a facility with an approved stipulated agreement under 75-10-750, MCA, the lead liable person under 75-10-746, MCA, may submit a claim to the department for reimbursement of the orphan's share of the cost associated with the preparation of that report.

(3) Upon completion of the department-approved remedial action plan at the facility and department approval of that completion, the lead liable person under 75-10-745, MCA, may submit a claim to the department for reimbursement of the orphan's share of the cost associated with completion of the department-approved remedial action plan.

(4) Reimbursement under (1), (2), and (3) is limited to those eligible costs, as provided for in 75-10-743(5), MCA, incurred by the lead liable person and is governed by the other provisions of 75-10-743, MCA.

(5) If the department determines the lead liable person is eligible for hardship reimbursement under 75-10-743(7), MCA, the department may reimburse the lead liable person for the orphan's share of ongoing remedial action costs but shall, at a minimum, retain the orphan's share of remedial action costs incurred prior to the date the hardship determination was made in order to ensure the completion of all required remedial actions.

AUTH: 75-10-702, MCA

IMP: 75-10-702, 75-10-743, MCA

REASON: The 2009 Legislature, in SB 71 (Chapter 266, Laws of 2009), revised the Controlled Allocation of Liability Act to allow for reimbursement of claims at two distinct points in the remediation process, as well as for final reimbursement after the completion of cleanup. This rule is necessary to ensure that the three reimbursement points (approval of final remedial investigation including all supplemental investigations, approval of final feasibility study, and completion of final remedy) are clearly defined. The legislation identified some points in the process prior to final cleanup when the department could provide reimbursement but did not clearly define those points. The rule clarifies that the reimbursement is only for the orphan share's portion of the eligible costs. This implements 75-10-743(6)(b), MCA, which provides that, to be eligible for reimbursement from the orphan share fund, a person must have paid a share of the costs attributable to the orphan share. The rule also provides that partial reimbursements may be made only if there is an approved stipulated agreement in place. This is added because, without an approved stipulated agreement, the proportion of costs attributed to the orphan share may not have been established at the investigation or remedy evaluation stages. In addition, of the three allocations completed by the department, two have included hardship determination requests. Identifying what the department will consider in evaluating these requests and how early reimbursement can occur will assist allocation participants in making such requests. One of the fundamental purposes of CALA is to ensure that final cleanup occurs and that is the reason that only limited reimbursement may occur before final cleanup is complete. Withholding a portion of the orphan share's costs provides the incentive for the lead person to complete the work, thus meeting this fundamental purpose.

5. The rule proposed to be repealed is as follows:

17.55.101 PURPOSE (Located at page 17-5911, Administrative Rules of Montana. Auth: 75-10-702, 75-10-704, MCA; IMP: 75-10-702, 75-10-704, MCA)

REASON: It is necessary to repeal this rule because the department is proposing to adopt rules which address more than the current listing, delisting, and ranking rules to which the current purpose rule applies. Therefore, the rule is being repealed because the revised rules are implementing additional portions of the Montana Comprehensive Environmental Cleanup and Responsibility Act.

6. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Elois Johnson, Paralegal, Department of Environmental Quality, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana 59620-0901; faxed to (406) 444-4386; or e-mailed to ejohnson@mt.gov, no later than November 12, 2009. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

7. Cynthia Brooks, attorney, has been designated to preside over and conduct the hearing.

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

9. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The rules in this notice are the first rules to implement SB 171 (2009), which revises the orphan share reimbursement requirements under the Controlled Allocation of Liability Act. The sponsor of SB 171 was informed by letter on August 24, 2009, that the department was beginning to work on the substantive content of the rules.

Reviewed by:

DEPARTMENT OF ENVIRONMENTAL
QUALITY

/s/ John F. North

JOHN F. NORTH

Rule Reviewer

BY: /s/ Richard H. Opper

RICHARD H. OPPER, Director

Certified to the Secretary of State, October 5, 2009.