Montana Department of
ENVIRONMENTAL QUALITY

Brian Schweitzer, Governor

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February 17, 2010

Todd Everts
Legislative Environmental Analyst
Legislative Services Division
PO Box 201706
Room 110, State Capitol
1301 East Sixth Avenue
Helena, MT 59601

Re: CECRA Rulemaking Economic Impact Statement

Dear Mr. Everts:

The Montana Department of Environmental Quality received a request in November for a statement of economic impact for rules that it proposed in the October 15, 2009, Montana Administrative Register. The rules were proposed pursuant to Comprehensive Environment Cleanup and Responsibility Act (CECRA), Montana's state superfund law. These rules were intended to meet a number of needs and to provide further follow-up on HJR 34 recommendations, as recommended by the Legislative Auditors.

We have completed the enclosed statement of economic impact for filing, pursuant to Title 2-4-205(3), MCA, with the department's administrative rule review committee, the Environmental Quality Council, for its consideration. The document includes an analysis of four alternatives and discusses the impacts of these alternatives to affected parties.

My staff and I are available for questions and look forward to receiving feedback from the committee.

Sincerely,

Richard H. Opper
Director

c: Tom Livers
Remediation Division

EQC
MARCH 5, 2010
EXHIBIT 2

ECONOMIC IMPACTS

of

Proposed Amendments and Additions to the Montana Department of Environmental Quality's CECRA Rules

ARM 17.55.101 *et seq*

Prepared by
Montana Department of Environmental Quality
February 2010

Executive Summary

This economic impact statement was prepared in response to a request received by the Montana Department of Environmental Quality (DEQ) under § 2-4-405, MCA, to evaluate the costs and benefits of rules proposed by DEQ for administration of the state's superfund program. In the document, four alternatives were evaluated:

- Alternative 1 – No Action
- Alternative 2 – Proposed Rules
- Alternative 3 – Rules with Lesser Impact
- Alternative 4 – Rules Considered but Rejected

Under Alternative 1, the benefits and costs under CECRA would be the same as they currently are to liable persons, the public, the environment, contractors and DEQ. The proposed rules are intended to mirror DEQ's practices that have been in place since at least December 2005 and codify those practices to provide transparency and to ensure consistent application. Therefore, the overall benefits and costs to all parties under Alternative 2 would not be significantly different from No Action. The benefits of Alternative 3 compared to the baseline would be very similar to Alternative 2; however, the costs to both liable persons and DEQ may be slightly less under Alternative 3 due to several changes. In general, there was an increased cost associated with Alternative 4. In most cases, for Alternative 4 the costs and workload to DEQ would be greatly increased with little environmental benefit. In turn, the costs for liable persons would likely increase due to the nature of each of these rejected rules.

Overall, Alternatives 2 and 3 are more efficient and effective than Alternative 1 with Alternative 3 being the most efficient. The options considered but rejected, Alternative 4, would be the least efficient and effective due to significantly higher costs than the other three alternatives with little or no benefit.

INTRODUCTION

This economic impact statement is being prepared in response to a request received by DEQ under § 2-4-405, MCA. The purpose of this impact statement is to evaluate the costs and benefits of rules proposed by DEQ for administration of the state's superfund program.

DEQ, through its Site Response Section, is charged with administering the Comprehensive Environmental Cleanup and Responsibility Act (CECRA, §§ 75-10-701 *et. seq.*, MCA) known as the state superfund law. CECRA is designed to address sites that are not being addressed under the federal superfund process (Comprehensive Environmental Response, Compensation and Liability Act – CERCLA) and therefore the criteria for listing a CECRA site are not the same as the criteria under CERCLA. Under CECRA, liable persons are responsible for cleaning up contamination in order to protect human health and the environment and for reimbursing DEQ's costs in administering the program. The statute is supplemented by rules at ARM 17.55.101 *et. seq.* and by guidelines published on the DEQ's website.

The purposes of CECRA as provided for in § 75-10-706, MCA, are to:

> (a) protect the public health and welfare of all Montana citizens against the dangers arising from releases of hazardous or deleterious substances;
> (b) encourage private parties to clean up sites within the state at which releases of hazardous or deleterious substances have occurred, resulting in adverse impacts on the health and welfare of the citizens of the state and on the state's natural, environmental, and biological systems; and
> (c) provide for funding to study, plan, and undertake the rehabilitation, removal, and cleanup of sites within the state at which no voluntary action has been taken.

CECRA itself is a very detailed statute and over the years few rules have been adopted. The existing CECRA rules, in place since 1999, define a few terms in ARM 17.55.102, but these terms have been limited to those definitions immediately needed to implement requirements at the time the revisions to § 75-10-702, MCA, were passed. DEQ has consistently interpreted other terms used in CECRA and in listing rules without defining them. This periodically results in miscommunication as others come up with their own, but different, interpretations.

DEQ periodically evaluates what rules need to be added, deleted or changed, in order to provide transparency, improve efficiency, or otherwise clarify processes while fulfilling Legislative requirements when implementing a given statute. It was clear that as a result of work over the last few years with the Environmental Quality Council (EQC), the auditors, and others, that additional rules would clarify some of the ongoing practices exercised in the implementation of CECRA. In addition, some rules were needed specifically to address changes in the Controlled Allocation of Liability Act (CALA) that occurred during the 2009 Legislative session.

DEQ published proposed changes, additions and deletions to the rules (Appendix A) in the Montana Administrative Register on October 15, 2009, and held a public hearing on the proposed rules November 5, 2009. The comment period was extended to November 20, 2009. The comments are now being evaluated and DEQ will be modifying the proposed rules in

response to comments. In addition, responses to comments will be prepared. The goal is to complete this work no later than mid-spring. A description of the proposed rules is summarized as Alternative 2 in the alternatives analysis below.

Economic Impacts

Section 2-4-405, MCA, sets forth the required contents of an economic impact statement. Requirements include identification of parties affected by the rule and evaluation of the costs and benefits of the proposed rules to each affected party. An economic impact statement must also analyze various alternatives and the costs and benefits to the affected parties of each alternative. Affected parties within this analysis are described below.

Affected Parties – Section 2-4-405(2)(a), MCA

There are several parties affected by the proposed rulemaking, including 29 parties on the interested parties' mailing list. One of the main affected parties consists of those who are liable for the costs of cleanup under CECRA. Under CECRA, there are four groups of persons who are potentially liable for the costs of remediation (§ 75-10-715, MCA) that would be affected by proposed rulemaking. These persons include 1) current owners and operators of a facility; 2) past owners and operators of a facility; 3) generators and arrangers (those who arrange for disposal or treatment or transportation) of a hazardous or deleterious substance; and 4) transporters of a hazardous or deleterious substance. Currently, most of the persons who are financially affected under CECRA are medium to large businesses. Under the statute, these are the persons who currently bear the financial cost of a CECRA-related cleanup and these persons will bear any corresponding costs or benefits associated with the rules. Throughout the remainder of this statement, these persons will be referred to as "liable persons." In addition, for ease of reading, the terms "facility" and "site" will be used interchangeably, although the defined terminology under CECRA is "facility."

Another major affected party includes those who would share the benefits of the rule and who already currently benefit under CECRA. These parties include all Montana citizens who benefit from and are guaranteed the right to a clean and healthful environment under Montana's Constitution. In particular, those people who live adjacent to, downstream from, or near contaminated sites benefit from cleanup in a number of ways, including safer drinking water, potentially increased property values, and protection of their health. Recreationalists and fishermen benefit from cleanup when surface water is cleaner as a result of CECRA.

The environment also benefits from CECRA-related cleanup, with most benefits going to plants and animals near contaminated sites and to waters beneath or downstream from those sites. Ecological and environmental receptors such as fish, birds, mammals and various habitats also experience benefits from cleanup when protection from contaminants is ensured.

DEQ is another affected party, as it administers CECRA. DEQ currently experiences the costs of administering CECRA, and the benefits from completed cleanups that fulfill its mission of a clean and healthful environment. Currently DEQ is regulating cleanup activities at 32 sites with 51 liable persons. An additional 27 sites are being cleaned up under the Voluntary Cleanup and

Redevelopment Act (VCRA). This combined workload is managed by 17 employees, and contractors at an annual cost of about $ 2,500,000. DEQ would potentially benefit from the proposed rulemaking with more timely cleanups and less resources needed per project to finalize reports and other documents.

Contractors may also be affected parties if their workloads are altered under any of the alternatives.

To the extent that contaminated facilities may occur in economically depressed areas, there might be some environmental justice issues from differences in benefits between the options. In addition, local governments benefit when both idled and active facilities are remediated and put back into productive use or have their use optimized, increasing the local tax base and creating jobs for its residents.

Alternatives Evaluated – Section 2-4-405(2)(b)-(f), MCA

Section 2-4-405, MCA, identifies four alternatives that must be evaluated in an economic impact analysis. These alternatives include the inaction (or No Action) alternative, the Proposed Rules, Alternatives with Lesser Impact, and Alternatives Considered but Rejected. (The Proposed Rules are included in Appendix A). These alternatives are described below in more detail. The No Action alternative is the alternative that describes how DEQ would continue to implement CECRA without the proposed rules. Alternatives with Lesser Impact include modifications to the proposed rules in response to public comment. Alternatives Considered but Rejected include other alternatives identified by DEQ and commenters.

Methodology

Section 2-4-405 (2)(h), MCA, requires the quantification or description of the data upon which this economic analysis is based and a description of how the data was gathered.

Data that was used in this analysis includes the numbers of sites being addressed under CECRA, the number of and salaries of contractors, the number of liable persons at CECRA sites being actively worked on by DEQ, and historical site files. Also, best professional judgment was used.

There was almost no quantitative data used for this economic analysis. The reason is that economic impacts compared to current practices are not expected to be significant to various sectors of the economy under any alternative. In other words, income, jobs, and tax revenues are not expected to be significantly affected under any of the alternatives at the state-wide level. Also, it is very difficult to predict any changes that would occur in those economic variables from the codification of rules and laws that are already mostly being followed in practice. DEQ generally has only very limited information on what liable persons spend for investigation and cleanup. Where costs are identified they are based on numbers for reimbursement from the orphan share fund and cost estimates (not actual costs) from voluntary cleanup plans and feasibility studies.

1. ALTERNATIVE 1: NO ACTION (INACTION) ALTERNATIVE

There are four existing rules (ARM 17.55.102, 17.55.108, 17.55.111, and 17.55.114, found at http://deq.mt.gov/dir/legal/Chapters/CH55-01.pdf), affected by the proposed rule changes. In addition, DEQ is required to interpret the statute to administer the state superfund law in order to provide consistency in cleanup requirements from site to site and from liable person to liable person. These rules and interpretations form the baseline against which other rulemaking alternatives are evaluated. If none of the proposed rules were adopted (i.e. No Action), this baseline describes how DEQ would continue to implement the state superfund law. These rules and interpretations have been organized below by topic.

1.1. CURRENT DEQ IMPLEMENTATION OF CECRA AND RULES (*I.E.* PRE-RULEMAKING)

1.1.1. Listing Facilities

Section 75-10-702, MCA, specifically states which facilities are eligible for listing under CECRA: those that have "a confirmed release or substantial threat of a release of a hazardous or deleterious substance that may pose an imminent and substantial threat to public health, safety, or welfare or the environment." Listing under the state superfund law indicates that a site needs further investigation before a decision is made that cleanup is needed. This is very different from the federal superfund process, where listing of a site on the National Priority List (NPL) does indicate that cleanup is needed. At the time of listing, DEQ does not typically have complete information about the extent of the release at the facility. Listing the site allows DEQ to prioritize the need for remedial action and to allocate resources to sites.

Much of the information necessary to determine whether cleanup is needed is not obtained until a remedial investigation is completed. In § 75-10-711, MCA, DEQ must offer the opportunity to conduct this work to the liable persons. The costs of investigations are high and DEQ is obligated to cost-recover these expenses. Therefore, DEQ is not completing a remedial investigation for a site prior to listing; rather, it uses existing verifiable information to determine if a site is eligible for listing. Since DEQ's limited resources are not diverted to completing these investigations, cleanup delays are minimized at existing high priority sites and the public is provided with access to information about sites that may require cleanup.

Under CECRA, DEQ must adopt rules for listing sites for potential cleanup when certain conditions are met. Specifically, CECRA authorizes DEQ to take action when there is a release or threatened release of a hazardous or deleterious substance at a facility that may pose an imminent and substantial threat to public health, safety or welfare or the environment.

The existing CECRA rules, in place since 1999, define only key terms immediately needed to implement requirements at the time the listing revisions to § 75-10-702, MCA, were passed. DEQ has consistently interpreted other terms used in CECRA and in listing rules without defining them. This periodically results in miscommunication as others come up with their own, but different, interpretations.

The terms "imminent and substantial endangerment" and "imminent and substantial threat" are not defined in statute or existing rule although one of the terms is used in ARM 17.55.108 and both are used multiple times in CECRA. DEQ consistently determines that "imminent and substantial threat" and "imminent and substantial endangerment" may exist if there are concentrations of hazardous or deleterious substances above identified risk-based screening levels. Currently, DEQ and the statute use the words "threat" and "endangerment" interchangeably; however, the rule itself uses only the term "threat."

DEQ has been and is currently using six technical documents to ensure it is adequately assessing potential risk to human health and the environment and to evaluate the potential for an imminent and substantial threat/endangerment. These documents have been referenced in DEQ's VCRA Guide which can be found at http://deq.mt.gov/StateSuperfund/vcraguide.mcpx; however, updated versions of these documents are currently used and revisions to the VCRA Guide will reflect the most recent version. Although these references are provided on DEQ's website and have been in use since 1999, they are not currently cited in rule.

Screening levels are designed to be used during the early evaluation of a site when information may be limited. Because of this constraint, conservative and simplified equations and assumptions are used to calculate the screening levels. These screening levels are not de facto cleanup standards. Rather, they allow DEQ to determine if potentially significant levels of contamination are present to warrant further investigation or evaluation. Screening levels are defined and posted at http://deq.mt.gov/StateSuperfund/pdfs/200904rslmaster.pdf and are based on previous work completed by EPA and DEQ. Additional information is also posted on DEQ's website (http://deq.mt.gov/StateSuperfund/FrequentlyAskedQuestions.mcpx), which provides links to all the screening levels for the different media such as soils and water. Concentrations that fall below these screening levels do not trigger CECRA action. An exceedance of a screening level means a facility needs further investigation to determine the nature and extent of contamination, the potential risk the contamination poses to human health and the environment, and whether DEQ needs to take or require remedial action. DEQ's interpretation of imminent and substantial threat/endangerment and its use of these screening levels have been in place at least since 2002 when the VCRA Guide was first published.

DEQ maintains a potential sites list and DEQ's Enforcement Division may refer sites to the state superfund program for follow up. In 2004, utilizing some one-time only federal funding, DEQ proposed nine facilities for listing on the CECRA priorities list. No additional facilities have been proposed for listing since that time. At seven of the facilities proposed for listing in 2004, sampling results confirmed a release of at least one hazardous or deleterious substance and the results exceeded the screening level for the media in which it was detected. For example, soil concentrations were compared to the adjusted Environmental Protection Agency's (EPA) Region IX Preliminary Remediation Goals, which have since been replaced by EPA's Regional Screening Levels (RSLs) or to DEQ's Risk-based Corrective Action (RBCA) levels. Surface water or groundwater concentrations were compared to EPA Maximum Contaminant Levels (MCLs), Montana Numeric Water Quality Standards in Circular DEQ-7 (DEQ-7) and RBCA levels. Sediment concentrations were compared to Washington State's sediment criteria or the National Oceanic and Atmospheric Administration's (NOAA) sediment values, which have been

replaced by EPA Region III Sediment Screening Benchmarks. At all the facilities that were proposed for listing, appropriate screening levels were exceeded. DEQ did not interpret the statute or rules to mean that just having any amount of contaminant present in a particular media was enough to trigger listing.

1.1.2. Setting a Schedule and Reviewing Documents

CECRA requires that liable persons undertake the work necessary to cleanup a site properly and expeditiously. DEQ is charged with interpreting this statute in order to apply the term "proper and expeditious." Under the "proper and expeditious" requirement, one of DEQ's goals is to establish a project schedule for both the liable person and DEQ. Another goal is to get plans and documents completed and approved faster in order to end the cycle of back-and-forth with liable persons that lead to multiple iterations of documents and get to cleanup faster. DEQ has multiple examples of situations where there were in excess of five versions of one document prepared before it could be approved. In December 2005 DEQ adopted the approach described in section 1.1.2.1 below. DEQ has since experienced a significant decrease in the amount of time for documents to be approved.

DEQ is not applying this process to facilities addressed by VCRA which have statutory guidelines for getting plans approved.

1.1.2.1. Schedules

In order to ensure that both liable persons and DEQ are moving forward in the cleanup process and to communicate effectively with the public about cleanup, it is important to establish a schedule. The schedule is intended to reflect both DEQ's and the liable person's goals in moving forward through the cleanup process. This process involves investigating the type, magnitude, and extent of contamination; determining exposure pathways and risk to human health and the environment; determining and evaluating cleanup options; proposing a final cleanup plan for public comment; and making a decision as to what the final plan for cleanup will be and implementing that plan. The most common question DEQ receives at a public meeting is "when will it be cleaned up?"

As noted above, one of the purposes of CECRA is to protect human health and the environment against the dangers arising from releases of hazardous or deleterious substances. Generally, DEQ can take remedial action when it determines that none of the liable persons are acting properly and expeditiously to perform the necessary work. Therefore, development of a schedule also enables DEQ to determine when things such as site complexity and unexpected sampling results are affecting progress at the site or whether the liable person is merely being recalcitrant.

DEQ currently allows liable persons, in consultation with their experts, to propose a schedule for the necessary work. DEQ reviews the proposed schedule and may approve or require modification to the proposed schedule. DEQ also considers requests to modify the schedule and approves those reasonable requests.

1.1.2.2. Reviewing Documents

When DEQ evaluates a proposed work plan for investigation of contamination or for cleanup, it strives to communicate clearly with liable persons regarding what standards the proposed work plans and actions must meet in order to effectively and efficiently cleanup contaminants that occur at unacceptable levels.

The EQC's November 2006 HJR 34 Study Report ("Improving the State Superfund Process") recommended that DEQ strive for more timely cleanup decisions and actions. In response, DEQ has adopted rigorous tracking of remedial progress on sites it is actively working on and has incorporated new technology into the process, utilizing electronic documents to expedite the process and to communicate more clearly what actions, standards, and processes must be utilized to ensure that statutory requirements are met. This approach expedites the preparation of approvable remedial action plans, which in turn enables DEQ to issue a record of decision and ensure cleanup itself is initiated more quickly.

To ensure that the work is conducted properly, DEQ requires submittal of various work plans, reports and other documents in both hard copy and modifiable electronic format. The liable person submits these to DEQ for review to identify deficiencies. DEQ identifies these deficiencies in writing, which may take the form of a comment or deficiency letter or comments/edits made to an electronic version of the document using the track changes tool feature available in various computer software packages. These comments/edits noting the deficiencies are submitted to the liable person and often DEQ will have a meeting or conference call with the liable person to discuss the comments. These meetings/discussions typically include the liable person's and DEQ's technical experts and specialists. If appropriate, DEQ will revise its comments in response to discussions held with the liable person. After that, the liable person is given another opportunity to adequately incorporate the revisions needed to comply with statute. If DEQ determines that the identified deficiencies were not adequately addressed in the re-submittal, then DEQ makes a final decision regarding plan or document requirements and incorporates those changes into the submittal, if necessary, so that it can be approved and made available to the public. The liable person is then given the opportunity to implement the approved plan. It is important to note that DEQ does not make changes to documents which are required by Montana law to be prepared by a licensed professional such as an engineer or a surveyor if such changes are needed. Rather, DEQ either directs the liable person to make further changes or hires its own licensed professional to make the required changes. Since these procedures have been in place, DEQ has not modified any document required by Montana law to be completed by a licensed professional.

1.1.3. Improved Financial Controls

Under CECRA, DEQ is required to recover its costs of administering the state superfund statute from the liable persons. This is to ensure the continued viability of the Environmental Quality Protection Fund, which was established as a revolving fund under § 75-10-704, MCA.

Under the No Action alternative, the existing rule requires liable persons to complete remedial action in order for a site to be delisted. Section 75-10-701(20), MCA, defines remedial action as

all notification, investigation, administration, monitoring, cleanup, restoration, mitigation, abatement, removal, replacement, acquisition, enforcement, legal action, health studies, feasibility studies and other actions necessary or appropriate to respond to a release or threatened release. The statute also provides that liable persons are responsible for all remedial action costs incurred by the state (§ 75-10-715, MCA). In addition, CECRA requires DEQ to provide oversight of remedial actions; thus, DEQ costs are necessary and appropriate to respond to a release or threatened release and must be reimbursed by liable persons.

When a liable person is significantly behind in cost recovery payments, DEQ takes legal action to recover its costs regardless of where the facility and the liable person are in the cleanup process. If that were to occur concurrent with proposed delisting, DEQ would face the choice of litigating against the liable person or requiring payment before delisting. [Delisting is the final step in the process used to document that remedial action is complete and a site can be closed. This step, described in existing rules, is often triggered by the liable person petitioning or applying for delisting to occur. The petition for closure includes documentation that cleanup has been fully implemented and protection of human health and the environment achieved, as required by CECRA.] Postponing delisting until financial obligations are met is the most cost-effective approach to resolving outstanding bills.

The current interpretation of statute and rule focuses on CECRA's requirement for DEQ to operate a self-supporting program. This interpretation is reinforced by the 2009 Legislature's passage of amendments to explicitly authorize DEQ to halt work on voluntary cleanups when payment of cleanup costs are delinquent (§ 75-10-733, MCA). These amendments were added, in part, to respond to fiscal concerns raised by the Legislative Auditors in the report released in June 2008.

DEQ has not previously established rules or interpreted statute to guide orphan share reimbursement. Orphan share reimbursements until October 1, 2009, were based on the 1997 statute. The modifications to the statute that changed the reimbursement process occurred during the 2009 session and went into effect October 1, 2009. See Alternative 2: Proposed Rules.

1.1.4. Work Conducted by Third Parties

DEQ has been reviewing third-party remedial actions at administrative or judicial order sites since the applicable statute was implemented in 2003. Based on the need to focus its attention on the plans of the liable person, DEQ has required the submittal of minimal information that allows DEQ to ensure that third-party actions will not spread or increase contamination and will not conflict with remedial actions already planned or underway by a liable person. DEQ has reviewed 35 third-party work plans since CECRA was amended in 2003.

1.1.5. Remedy

"Record of Decision" is the term DEQ uses to describe documentation of its decisions regarding final remedy under § 75-10-721, MCA. Similar to records of decision under the Montana Environmental Policy Act, the CECRA Record of Decision documents DEQ's rationale for its final cleanup decision based on the investigation of contamination and the alternatives or options

for cleaning up the contamination to acceptable levels. Records of Decision are routinely published on DEQ's website when they are completed.

Under the No Action alternative, DEQ currently considers the final permanent remedy to be that remedy provided for in the Record of Decision. DEQ's interpretation of "final permanent remedy" ties the statute of limitations to the Record of Decision. This definition clarifies the trigger for DEQ to bring a cost recovery action and ensures consistency in what event triggers the time for DEQ to file a cost recovery action. By defining the trigger as initiation of physical onsite construction of "all of the remedial actions contained within a record of decision," DEQ is making the process more transparent. Section 75-10-713, MCA, of CECRA outlines the requirements for public participation in various DEQ decision-making processes, including the decision as to which remedial actions are included within a record of decision. Therefore, the public has a say in what constitutes the "final permanent remedy," and thus which remedial actions trigger the cost recovery requirement. This six year statute of limitations also applies to contribution actions by liable persons. The anticipated cost of the final permanent remedy is a critical piece of information for a liable person that is deciding whether or not to bring a contribution action against another liable person. By including this new definition, DEQ is ensuring that all liable persons are on notice as to when a contribution action must be filed.

DEQ has interpreted the statute (§ 75-10-715, MCA) to authorize additional remedial action when a remedial action fails or when the remedial action did not address certain contamination that causes unacceptable risk to human health and the environment. The cleanup of contamination is based on site-specific information regarding the type, magnitude, and extent of contamination as well as site-specific information regarding the characteristics of soils and surface and ground waters, as well as long-term land use plans and the current and future impacts to human health and the environment. DEQ currently interprets the statute to require additional remedial action if, using that site-specific information, the cleanup action was less effective than anticipated or if contamination was overlooked prior to the Record of Decision that may cause an unacceptable risk to human health and the environment.

1.1.6. Housekeeping Amendments

Under its facility ranking rules, DEQ is applying current Circular DEQ-7 (February 2008) and EPA's 40 CFR 141 (2008) standards to determine appropriate standards to use in evaluating whether a facility may pose a risk to human health or the environment. This approach is inconsistent with the requirements of ARM 17.55.111 which refers to the 1997 CFR. The current Circular DEQ-7 and 40 CFR 141 being used by CECRA are based on current research and have been through both peer review and public comment and have been reviewed by DEQ's administrative rule review committee (EQC), even though the references in this existing rule are outdated.

DEQ currently treats friable asbestos-containing material the same as other hazardous or deleterious substances, even though it is defined separately in the rules. If asbestos at a facility meets the statutory definition of a hazardous or deleterious substance, it can be addressed under CECRA and no other definition is needed.

1.2. Economic Analysis of No Action

Under Alternative 1, No Action, the benefits and costs under CECRA would be the same to liable persons, the public, the environment, contractors and DEQ as they currently are. What is currently required of a cleanup under CECRA would remain the same. Schedules and remedial action under CECRA would also remain the same.

As mentioned earlier, liable persons include 1) current owners and operators of a facility; 2) past owners and operators of a facility; 3) generators and arrangers of a hazardous or deleterious substance; and 4) transporters of a hazardous or deleterious substance. Costs of cleanup to these parties would remain the same in terms of the process as under current practice. However, costs are rising over time due to increasing fuel prices, labor costs, equipment costs, and material costs of cleanup actions. Under No Action, Montanans would continue to benefit as before from CECRA via safer drinking water, potentially increased property values, and greater protection of their health. Recreationalists and fishermen (including those from out of state) would continue to benefit from cleanup when surface water is cleaned up.

Fish, birds, mammals, aquatic life and riparian vegetation would continue to experience benefits from cleanup when protection of the environment and ecological receptors is ensured. CECRA also results in the following benefits where cleanups have occurred: protected or enhanced wildlife habitats, restored riparian and aquatic habitat for a native fish species, cleaner water, improved flood absorption capacity, increased species diversity in affected habitats and improved aesthetics. All of this benefits property owners adjoining the stream as well as the general public (Duffield, 2003, found at http://fwp.mt.gov/doingBusiness/reference/montanaChallenge/reports/ecovalues.html).

Under No Action, DEQ would be affected in the same way as it currently is under CECRA with program costs and successful cleanups. As explained above, many improvements in the current CECRA process over the past several years have lowered the administrative costs per site for both DEQ and liable persons and have potentially improved the benefits from such cleanup (as a result of fewer delays in the process). It is important to note that the CECRA-related benefits to Montanans and the environment are several among many benefits from all environmental laws in the state. As mentioned above, the costs under No Action are the current costs to various classes of people under CECRA.

Liable Persons

Current costs to liable persons include investigating and cleaning up sites, hiring contractors and attorneys, communicating with DEQ and the public, and reporting environmental obligations in annual reports for publically traded companies. CECRA costs to liable persons under No Action would be expected to continue as they have the past several years assuming that a similar number of active sites will carry forward into future years. This is stated with the understanding that costs expended by liable persons show considerable variation from year to year. Cost trends will likely increase over time due to increasing fuel prices, labor costs, equipment costs, and material costs. Currently, the costs to liable persons can be high due to the cost of investigating and remediating the hazardous or deleterious substances at the facility, and due to the legal obligation

to reimburse DEQ for certain administrative costs. Under the current requirements of the statute and existing rules and interpretations of statute, it is the existence of a confirmed release that may pose a threat to human health and the environment, and the resulting obligation to remediate that release that may financially impact a liable person. That would still be the case under No Action.

The current lack of clarity of certain CECRA requirements to non-DEQ personnel such as liable persons or contractors can slow the process of remediation resulting in potentially higher costs over time to liable persons and to the environment. Lack of definitions in current statute/rules results in inconsistent expectations, increases arguments, and potentially increases litigation risk for all parties. Increased litigation risk can result in higher costs to all affected parties. Under No Action, these issues with lack of clarity would remain.

DEQ

Current costs to DEQ to administer CECRA include personal services (FTEs), contracted services, travel, and related operational costs to manage 32 active sites and 27 voluntary cleanup sites. This workload is managed by 17 FTE and needed contractors at an annual cost of approximately $ 2,500,000. Under No Action, these costs would be expected to continue as they have. As with the case for liable persons, inflation and increasing costs for FTEs and materials will likely raise the cost of administering CECRA over time, which in turn could raise the costs to liable persons who may have to reimburse such costs.

Under the No Action alternative, DEQ would continue to address state superfund sites at the current rate. Pursuant to CECRA, DEQ is required to recover its costs of administering the state superfund statute from the liable persons. Thus, revenues would remain unchanged assuming a similar CECRA caseload in the future. DEQ's process for final remedies and additional remedial action would also remain the same under No Action.

Under current rules, DEQ can experience increased cost and delays by having multiple iterations of documents. Current lack of definitions within CECRA results in inconsistent expectations, increases arguments, and potentially increases litigation risk for all parties. DEQ has consistently interpreted other terms used in CECRA and in listing rules without defining them. This periodically results in miscommunication as others come up with their own, but different, interpretations. The statute currently requires that liable persons undertake the work necessary to address a site properly and expeditiously. However, here too DEQ has been making interpretations of statute in order to apply the term proper and expeditious. Under No Action, the cost of delayed cleanup is felt in terms of the continued spread of contamination which affects the environment, humans, plants and wildlife.

Montanans

Montana citizens would continue to benefit from CECRA under No Action. In particular, those people who live adjacent to, downstream from, or near contaminated sites would continue to benefit from cleanup in a number of ways, including safer drinking water, potentially increased property values, and protection of their health. Recreationalists and fishermen would continue to

benefit from cleanup when surface water is clean. Fish, birds and mammals would continue to experience benefits from cleanup when protection of the environment and ecological receptors is ensured. A small number of businesses may continue to benefit from having cleaned up sites to build businesses on or to continue operating on (and become delisted). Local governments may continue to benefit from any new tax revenue that comes from these sites. However, some cleanup may continue to be delayed under No Action due to certain unclear processes currently within CECRA rules and statute.

Contractors

Contractors would continue to benefit from working both with liable persons and with the State of Montana.

The Environment

If CECRA did not exist, then certain polluted sites would continue to contaminate the environment and groundwater below the site and downstream surface water. Benefits to the environment in the vicinity of polluted sites that are cleaned up as a result of CECRA include improved water quality, healthier aquatic life, healthier wildlife, healthier plant and insect communities, increased biodiversity, and improved water quality. These benefits cannot be monetized, but are significant and long-term.

Benefits to the public and environment would be expected to continue at existing levels under No Action with some delays due to unclear rules. Benefits to public health and the environment have increased in the past few years due to improvements in the CECRA program. Currently, sites are being cleaned up leading to human health and environmental/ecological benefits, but at a potentially slower rate than is possible due to confusion from current law. Specifically, CECRA authorizes DEQ to take action when there is a release or threatened release of a hazardous or deleterious substance at a facility that may pose an imminent and substantial threat to public health, safety or welfare or the environment. To the extent that site cleanup is being delayed from confusion under current practices, human health benefits and environmental / ecological benefits will continue to be less or delayed.

2. ALTERNATIVE 2: RULE MAKING AS PROPOSED

Alternative 2 consists of DEQ's proposed rules published in the October 15, 2009, Montana Administrative Record. In addition to publishing the rules, as required by § 2-4-302, MCA, DEQ sent notice that the rules had been published and that DEQ was accepting comment to interested persons who had previously notified DEQ of the desire to be placed on the list to receive notices of rulemaking actions regarding CECRA. A copy of the published proposed rules is included in Appendix A. The information below is a summary of those proposed rules.

2.1. PROPOSED RULES

2.1.1. Listing Facilities

Under CECRA, listing triggers the requirement for the liable persons to have the opportunity to conduct remedial actions. DEQ proposes to amend administrative rules to identify additional factors it considers when adding a facility to the CECRA Priority List. These amendments include defining "imminent and substantial endangerment" (proposed ARM 17.55.102(4)), modifying the facility listing rule (ARM 17.55.108(1)) to ensure terminology is used consistently, and incorporating six documents into the rule that list the concentrations of hazardous and deleterious substances that may pose an imminent and substantial endangerment to public health, safety, or welfare or the environment (NEW RULE I).

2.1.2. Setting a Schedule and Reviewing Documents

DEQ proposes to add a rule that addresses how it will ensure liable persons act properly and expeditiously to perform remedial actions. DEQ would require the establishment of an approved schedule for specific deliverables and remedial actions that the liable person must perform at the facility (NEW RULE II). This rule would not apply when cleanup is being conducted at sites that are being addressed under the voluntary cleanup program. The other part of the proposed rule addresses how liable persons will provide timely revisions to documents they submit to DEQ. DEQ would require that the liable persons adequately incorporate DEQ's comments to rectify deficiencies in order to ensure that statutory requirements are met. In the event that the liable persons do not fulfill this responsibility, then DEQ would make the necessary revisions so that the document could be approved and work could proceed.

This rule is intended to mirror DEQ's practices in place since December 2005 and codifies those practices to provide transparency and ensure consistent application at these sites. Under this rule, DEQ would continue to notice liable persons and offer them the opportunity to conduct necessary remedial actions (for example, environmental investigations, risk assessments, interim actions, etc.) properly and expeditiously. If the liable persons fail to conduct the work properly and expeditiously, then CECRA authorizes DEQ to pursue appropriate actions, including but not limited to: issuing a unilateral order, filing a civil action or cost recovery action, or conducting the work and recovering the costs from the liable persons.

2.1.3. Improved Financial Controls

Due to past issues with delinquent payment of its costs, DEQ proposed to clarify the existing rule. DEQ proposes to amend the rules to clarify that liable persons must complete all remedial actions required by DEQ, including completion of a long-term remedy and payment of the state's remedial action costs including interest and applicable penalties, prior to the facility being delisted from the CECRA priority list (ARM 17.55.114(1)(b)). This language ensures that liable persons know, up front, payment of DEQ's remedial action costs is itself a remedial action that must be completed.

DEQ also proposes a rule to define the three reimbursement points established in the 2009 Legislative change to the Controlled Allocation and Liability Act made through Senate Bill 71.

2.1.4. Work Conducted by Third Parties

DEQ proposes a rule to outline procedures it will use in granting permission for third parties to conduct remedial actions at CECRA facilities under administrative or judicial order (NEW RULE III). Two factors are considered: to ensure that third-party actions will not spread or increase contamination and to ensure that third-party actions will not conflict with remedial actions already planned or underway by a liable person.

2.1.5. Remedy

DEQ proposes a rule to clarify that additional remedial actions are not precluded if remedial actions fail to provide the intended result (NEW RULE IV). In addition, DEQ proposes definitions for "final permanent remedy" and "record of decision" in rule (ARM 17.55.102(2) and (6), respectively).

2.1.6. Housekeeping Amendments

DEQ proposes other amendments to the rules that are general housekeeping measures and will not have a significant impact if adopted. The purpose for the rules addressed in ARM 17.55.101 is repealed because the proposed rules make this rule obsolete. "Friable asbestos" is removed from the definitions (ARM 17.55.101) and from the facility ranking rule (ARM 17.55.111) because asbestos is already included in the definition of hazardous or deleterious substances under CECRA. Two rules (ARM 17.55.101 and 17.55.111) are amended to consolidate documents previously incorporated by reference into NEW RULE I.

2.2. Economic Analysis of Rulemaking as Proposed

The proposed rules areintended to mirror DEQ's practices that have been in place for many years and codify those practices to provide transparency and to ensure consistent application at all sites. Therefore, the overall benefits and costs to <u>all parties</u> under Alternative 2, Rulemaking as Proposed, would NOT be significantly different from No Action. That is, there would be no significant benefits and costs of the Proposed Rule compared to No Action or the way CECRA currently runs. DEQ would still administer the CECRA process, liable persons would still be responsible for contaminated sites, and citizens and the environment would still benefit from cleanup. Cleanup schedules and remedial action under CECRA would largely remain the same.

Overall, CECRA-based cleanup would largely continue as it does under No Action, but with a process that works better overall and could incrementally better fulfill DEQ's mission of a clean and healthful environment. However, on an individual basis, some significant benefits and costs could occur under proposed rulemaking (as compared to No Action) to certain individual sites, to DEQ, and to certain individual liable persons.

On the benefits side, DEQ would administer a smoother process, and potentially save money and clean up sites more expediently under the proposed rules. The chances of litigation would be less for all parties, potentially saving money for all parties. The environment would benefit to the extent that sites are cleaned up more quickly and completely. Finally, additional sites may be cleaned up both voluntarily and under CECRA as a result of the proposed rules that could lead to a few additional commercial developments in the state (and associated job, income and tax revenue benefits). A few small businesses and overall state revenue collections may benefit from additional sites cleaned up (which could create more opportunities for development), although this effect would be insignificant at the statewide level. Contractors that work for liable persons may have less work under the proposed rule, as DEQ does more of the paperwork and documentation (leading to fewer iterations of documents), but this would likely free those contractors to do other work. Any consultants that DEQ hires may have more work.

The proposed rules would potentially lead, in a limited number of cases, to faster cleanups, more complete cleanups, more clarity to liable persons, and more consistent reimbursement to DEQ. The rules could lead to slightly lower cleanup costs per site for DEQ and liable persons, more timely environmental improvement at certain sites, and less chance for litigation. For example, part of the proposed rule requires the establishment of a DEQ-approved schedule of remedial actions that the liable persons must perform at the facility. In other words, it clarifies what the liable person must do. Also, part of the proposed rule addresses how liable persons will provide timely revisions to documents they submit to DEQ. These two rule changes could speed up cleanups and lower processing and enforcement costs. In such cases, the environment might be cleaned up quicker than under No Action. These benefits to DEQ and the environment might also occur as a result of adding language that ensures that liable persons know, up front, that remedial action costs of DEQ are considered an appropriate remedial action that must be completed prior to delisting. The proposed rule regarding third parties, allowing additional remedial actions, and the general housekeeping rule could also contribute to these benefits.

On the cost side, liable persons still have to pay the costs that are due under CECRA versus No Action, but would also have a better understanding of that obligation. Currently, this would affect 51 liable persons. There is a remote possibility that additional sites could be included as sites that need to be cleaned up as a result of the proposed rules, increasing the number of liable persons.

Additional benefit and cost possibilities and concerns under the proposed rules are addressed below in more detail.

2.2.1. Listing Facilities

DEQ's intent in addressing factors it considers when listing a site is to codify the methodology it currently uses in policy and procedure into administrative rule. Because DEQ's methodology, factors considered, and practices would not change, there would be no cost or benefit impacts associated with adoption of the "Listing Facilities" rules as compared to No Action.

Concerns have been raised that the "listing" portion of proposed rule may go beyond current DEQ practices and cause unintended results with associated costs and benefits. It is estimated

that any associated costs and benefits have a very small chance of occurring and would thus be insignificant. These concerns are addressed individually in the following sections:

2.2.1.1. Although DEQ's intent is to only list facilities that would be listed under current rules, policies, and procedures, the definition proposed under the proposed rules could arguably be interpreted to allow DEQ to list facilities with lesser threats to public health, safety, or welfare or the environment. Some concerns have been raised that these amendments would lower the threshold for listing sites, leading to a significant increase in the number of possible sites to be listed. Some comments received by DEQ state that this rule effectively allows contamination as minor as a grease spot on a driveway to be listed on the CECRA Priority List, thus potentially increasing the number of sites added to the list.

If this rule is adopted, DEQ will make amendments to alleviate these concerns (See Section 3.1). However, even under the proposed rule, listing facilities with a lesser threat than currently listed seems highly unlikely in light of other facility listing rules that are not proposed for amendment. Under ARM 17.55.108(1), DEQ is not required to list a facility that meets the criteria. Also, in order to list a facility, ARM 17.55.108 still requires DEQ to publish notice, accept public comments, and then consider and respond to comments prior to listing. This rule also includes requirements to notify local governments and boards of health, and includes a provision to hold a public meeting in the communities most likely to be threatened by the facility. This required public participation in the listing process should prevent listing of facilities that pose minor threats. Thus, no economic impact from this concern is expected.

Comments received by DEQ state that other factors should be considered to prevent listing of sites that do not pose an unacceptable risk. These factors include: the potential pathway for human or ecological exposure, the quantity, concentration, toxicity, or mobility of the hazardous or deleterious substance, the sensitivity of the receptor population, whether bioaccumulation may occur in living organism, known releases of hazardous or deleterious substances at the facility, physical characteristics of the facility, and the potential or actual impacts to state water. Even with the public participation requirements prior to listing there is a remote possibility that DEQ could list a facility without a requirement to consider these other factors. Because this possibility is so remote, the economic cost and benefit of this unintended outcome is insignificant. Nevertheless, DEQ intends to include consideration of these factors in the rules upon adoption (See Section 3.1).

2.2.1.2. Concerns have been raised that the screening levels proposed in NEW RULE I would not consider naturally occurring background levels of hazardous or deleterious substances. It is known that in certain areas of Montana, some substances, such as arsenic, occur at concentrations above the proposed screening levels. DEQ recognizes that some substances occur in concentrations that exceed screening levels. To this end, DEQ conducted a statewide study of the occurrence of arsenic, which resulted in Montana's state-specific screening level for arsenic that is above concentrations published in other accepted national screening levels. The document listing these state-specific background concentrations is one of the documents proposed for promulgation under these proposed rules (NEW RULE I(1)(e)). The results of this study indicated that some areas of Montana possess naturally occurring concentrations above the national screening level. Although this history clearly documents DEQ's intent to consider

established background or naturally occurring concentrations of hazardous or deleterious substances in its listing decisions, the proposed rule does not require this consideration. There is a remote possibility that DEQ could list a facility where concentrations of a substance are above screening levels proposed in NEW RULE I but below established background of naturally occurring concentrations of that substance in the area. The possibility of this happening is remote due to the public participation requirement in the current rule, discussed in Section 2.2.1.1.

Because, this possibility is so remote, the economic cost and benefit of this unintended outcome is insignificant.

2.2.1.3. Because the proposed rule establishes that the exceedance of a screening level promulgated in NEW RULE I defines "imminent and substantial endangerment," there are concerns that it would be impossible to delist a site following cleanup if these concentrations were still exceeded on the facility. This would, in effect, set presumptive or de facto cleanup levels as low as the screening levels or would not allow DEQ to justify site-specific cleanup levels, which is not DEQ's intent or current practice.

DEQ determines cleanup requirements under § 75-10-721, MCA. That statute provides that cleanup is to be done to meet applicable or relevant state or federal environmental requirements, criteria, or limitations (ERCLs). ERCLs do not include screening levels, and the proposed rules do not indicate that screening levels are to be used in this manner. Therefore proposed NEW RULE I will not cause economic cost or benefit beyond the baseline of current practices. In addition, DEQ will adopt amendments to the proposed rules to clarify that screening levels to not constitute cleanup levels (See Section 3.1).

2.2.1.4. One of the intended outcomes of promulgating screening levels into the rule is to encourage private parties to voluntarily cleanup sites. It is an accepted practice to sample facilities for the presence of hazardous and deleterious substances prior to purchasing, developing, or using a property for collateral in a transaction. By defining a threshold of concentrations that may pose an imminent and substantial endangerment, the rule also clearly establishes concentrations that will not trigger DEQ action. Under the proposed rule, members of the public will be able to assess their properties, determine whether they may trigger DEQ action, and remediate minor contaminated properties without the involvement of DEQ. This is expected to greatly increase voluntary cleanup actions and the economic development of undeveloped and under-developed facilities. DEQ currently receives approximately 12 to 15 inquiries annually from members of the public who have assessed a property and are inquiring whether their sample results indicate a potential problem.

It is unclear how many properties are currently assessed where DEQ is not contacted. However, under the current rules, development may be delayed or discontinued due to the presence of minor contamination. Knowing more precisely what factors may lead to placing facilities on the CECRA Priority List would provide certainty for property owners, developers, and lending institutions. It is thought that this certainty of law would facilitate business practices that could lead to development of more properties throughout Montana - above and beyond those currently being considered for development.

Based on the number of phone calls DEQ receives, it is estimated that this rule may facilitate the development of five medium-sized commercial facilities that would otherwise not be developed. The economic impact would be increased economic activity, additional jobs and income over No Action for an estimated 5 to 50 persons, and increased tax revenue. It might also mean lower costs to DEQ if more sites are voluntarily cleaned up outside the CECRA process. Also, the environment would benefit near these sites from cleanup, and could also experience some costs from the new development itself. On a state-wide scale, these benefits would be insignificant. If this rule facilitated the cleanup of an additional five medium-sized commercial facilities that would otherwise not be cleaned up due to minor contamination, this would provide an environmental improvement as well as additional positive economic impact. The liable persons at those five sites would bear the costs of voluntary cleanup over No Action.

2.2.2. Setting a Schedule and Reviewing Documents

2.2.2.1 Concerns have been raised that the rule as currently proposed could penalize liable persons for missing deadlines through no fault of their own. Although such an outcome is not DEQ's intent or its current practice, the rule does not allow for unexpected outcomes of investigations or remedial work, change in volumes of contaminated media, delays in agency review of documents, or the concept of force majeure.

There are over 200 sites listed on the CECRA priority list and DEQ is working on approximately 32 of the higher priority sites at this time. The rule is intended to address sites that are not being addressed under the voluntary cleanup statutes. It is not appropriate to request schedules for remedial actions on sites where DEQ does not have staff or funding to oversee the work. DEQ believes the rule represents a reasonable middle ground, balancing structure with flexibility, for those sites not yet under order.

If required work at a facility did not adhere to the established schedule, under the proposed rule DEQ could determine that the liable person is not conducting work properly and expeditiously under § 75-10-711, MCA. When this determination is made, DEQ may undertake the remedial action and require reimbursement of its costs. This outcome does not economically impact the liable person who is responsible for payment of cleanup costs regardless of whether the liable person or DEQ incurs those costs. Such an outcome could reduce economic impacts and improve environmental benefits by speeding up the overall remediation of a site.

2.2.2.2 Concerns have been raised that NEW RULE II would remove the opportunity for any technical dialogue of complex situations and not allow meaningful review of DEQ's decisions or an opportunity to develop a record to challenge DEQ's rationale.

The intent of this rule is to codify the current practice that has been in place since December 2005. Since implementing this practice DEQ has found that it has saved time and money for both it and the liable persons. Prior to this policy being in place, it was not unusual for one document to go through multiple iterations of comment and resubmission before it could be approved. Some documents have gone through five or more iterations before DEQ initiated the current practice. This protracted loop of negotiating comments on documents led to a slowdown

in cleanup, inefficiencies, and excessive use of limited resources. The November 2006 HJR34 Study Report recommended that DEQ continue to develop a framework for more timely and consistent use of its enforcement authority, which this rule does. It also helps address the concern that DEQ respond to submittals in a timely fashion. By requiring the submittal of electronic documents, DEQ may use the "redline/strikeout" method of commenting, which has noticeably shortened the response time on documents and reduced the resources needed to finalize documents. Given that private sector salaries are typically greater than DEQ salaries, there may be some decreased costs to the liable persons when DEQ staff modifies documents as well as decreased revenues to the liable person's contractors. Overall, this benefit would be insignificant; however, the significance of cost would vary depending on the size of documents and the number of times it occurs.

The rule, as proposed, may unintentionally allow DEQ to unilaterally make changes on the first draft of a document, and not follow the successful process it implemented in December 2005. This unintended outcome could result in work being completed that was not fully vetted through technical dialogues between the liable person's technical experts and DEQ's experts. Such an outcome could result in significant costs of implementing work that fails to achieve intended goals and environmental costs of ineffective remediation. This result would not be an efficient use of resource, as it could lead to costs providing little or no benefits. Although this outcome does not, and could not, occur under DEQ's December 2005 practice, more detailed procedures in the rule would ensure this unintended result is prevented.

Concerns have been raised that the proposed rule would allow DEQ to modify documents required to be submitted by a licensed professional to be modified by someone who is not a licensed professional. DEQ has not modified a document that is required by Montana law to be prepared by a licensed professional. Such an act would not only be in violation of the policy DEQ intended to promulgate, it would be unlawful under statutes and rules that regulate licensed professionals. If DEQ determined any such document required revision, DEQ would ensure a duly licensed professional made the changes. Therefore, there is no economic cost or benefit associated with these concerns.

2.2.3. Improved Financial Controls

Concerns have been raised that basing the delisting determination on criteria other than health and environmental factors would preclude or delay economic development of a facility or adversely affect property values.

Payment of the state's remedial action costs is one of the obligations of liable persons and the payment of DEQ's administration costs is a "remedial action." DEQ is required to pursue cost recovery after it has billed for its costs and the statute has a statute of limitations period in which to pursue this recovery. DEQ's experience demonstrates that remaining on the list due to unpaid remedial action costs does not affect development or the property's value. In fact, some listed sites have been developed prior to and during cleanup. Once remediated, the property can be used for its highest and most beneficial use regardless of its continued existence on the CECRA Priority List.

2.2.4. Work Conducted by Third Parties

Concerns have been raised that work completed by third parties could negatively interact with the cleanup plan at a facility subject to an order, and that third parties should not be allowed to go forward until the final permanent remedy has been completed.

CECRA requires "the written permission" of DEQ if a "person who is not subject to an administrative or judicial order" wishes to "conduct any remedial action at any facility that is subject to an administrative or judicial order issued pursuant" to CECRA (§ 75-10-706(3), MCA). In drafting NEW RULE III, DEQ is implementing the requirements of this CECRA provision. Under the new rule, DEQ will not provide written permission to a third-party remedial action unless DEQ determines "(a) the proposed remedial action will not conflict with ongoing work at the facility; [and] (b) the proposed work, if conducted in the manner described in the document, will not spread, worsen, or otherwise exacerbate the contamination." Therefore, this rule will have no economic costs or benefit beyond the statute it is intended to implement.

2.2.5. Remedy

Concerns have been raised that that NEW RULE IV would add costs and reduce benefit if DEQ overrules the technical analysis and findings of the liable person's expert as proposed in NEW RULE II and leading to the implementation of remedies that fail to cleanup the site. The costs and benefits of this unintended outcome of NEW RULE II are discussed in Section 2.2.2.2. CECRA provides this authority to DEQ and NEW RULE IV does not have a cost or benefit not already existing in statute. The benefit of being able to go back and fix a failed remedy as the proposed rule and CECRA allow protects the environment, citizens of Montana and human health in cases where the original remedy did not work.

2.2.6. Housekeeping Amendments

The housekeeping amendments described in Section 2.1.6 will not affect costs or benefits in and of themselves. Some of these amendments will be required to properly promulgate other proposed rules; however, discussions of costs and benefit of those other rules are contained in other sub-sections of Section 2.2 of this statement of economic impact document. Therefore, no additional discussion of these amendments is needed.

3. ALTERNATIVE 3: RULES WITH LESSER IMPACT

During the comment period on the proposed rules many of the commenters suggested changes or identified concerns that will lead to changes in the proposed rules. These ideas for change are summarized below. These changes collectively form the group of alternatives identified that would have lesser impact (involve less costly or less intrusive methods for achieving the purpose of the proposed rule). They are organized topically to track with Alternatives 1 and 2 identified above.

3.1. Rules Based on Public Comment

3.1.1. Listing

In interpreting "imminent and substantial endangerment" it became clear that CECRA uses the term interchangeably with "imminent and substantial threat." Therefore it is clear that the rule would be better understood if this was clarified and both terms were used in the definition. This would make it clear and transparent to the regulated community and the public what both terms mean, regardless of where they are used. In addition, given the comments received, modifying the definition to clearly indicate that exceedance of a screening level does not mean that remediation of the facility is required but only indicates that further investigation is warranted to evaluate the nature and extent of the hazardous or deleterious substances and the risk to public health, safety, and welfare and the environment will ensure the rule does not have an impact beyond current practice.

Another modification to the proposed rules which would have lesser impact is to use the term "hazardous and deleterious substance" rather than the term "contaminant" in the listing rules.

Adding criteria to be considered in the decision to list a site or not would have lesser impact by clearly identifying the additional criteria to be used. Factors to consider were suggested in several comments. These additional criteria include considering pathways for exposure, the risk resulting from exposure, background conditions, and actual impacts to water quality, among others.

In considering screening levels as a trigger for listing, concerns were raised that screening levels would become required cleanup levels. Modification of this proposed rule to explicitly clarify that exceedance of a screening level in and of itself does not mean that remediation is required and clarification that the screening levels are not required cleanup levels would have a lesser impact than the proposed rule. Listing under the state superfund law indicates that a site needs further investigation before a decision is made that cleanup is needed. This is very different from the federal superfund process, where listing of a site on the National Priority List (NPL) does indicate that cleanup is needed.

To ensure that exceedance of screening levels are not used by DEQ to initiate condemnation proceedings under the act, the rules could be modified to prohibit the use of screening levels in this way.

3.1.2. Setting a Schedule and Reviewing Documents

Schedules might change for many reasons including the inherent uncertainties in remediation work. Thus, DEQ could modify the proposed rule to ensure that liable persons provide input, to ensure that size and complexity of the site are considered, to ensure there is a process for extending the schedule if needed, and to ensure DEQ delays, such as when staff turnover occurs, do not negatively impact the schedule and the liable person.

The rules could be modified to clarify that DEQ will work with liable persons to reach agreement

on work plans, when possible, but that ultimately it is DEQ's responsibility to identify deficiencies and ensure compliance with statutory requirements.

The rules could explicitly exclude sites being cleaned up under the VCRA from any requirement to have and to meet additional schedules, beyond that required in statute. This would ensure that this rule is not misapplied.

3.1.3. Remedy

There are a variety of reasons why a remedy may not be successful. The proposed rule regarding remedy failure would have less impact if it is clarified that if the decision is reached that failure has occurred, that decision is based on a failure to be adequately protective or comply with environmental laws, which is authorized in CECRA. This would better reflect statutory criteria and provide predictability. For example, "failure" may be a situation where a specific remedial action objective is not met. Another situation may occur if the remedy ultimately does not comply with specific environmental requirements, criteria and limitations, such as a failure to meet DEQ-7 water quality standards. These outcomes underscore the importance of adequately investigating the site and clearly identifying the goal of a remedial action before it is selected or approved.

It is important throughout the remediation process to balance the amount of investigation needed with the goal of moving forward, effectively, in a timely fashion. Unfortunately there is no magic formula for achieving this goal. Therefore, it is important to ensure the remediation process moves forward, while allowing for ways to address the unexpected.

3.2. Economic Analysis of Rules with Lesser Impact

The costs and benefits of Alternative 3 compared to the baseline would be very similar to Alternative 2. Costs to both liable persons and DEQ may be slightly less under Alternative 3, Rules with Lesser Impacts, than Alternative 2-Proposed Rules due to the changes outlined in the previous section. Lesser cost would come mainly from clarifications of liable persons responsibilities under CECRA (compared to Alternative 2, The Proposed Rule). Some of these clarifications would protect liable persons from unforeseen consequences, from being regulated under CECRA when not necessary and from having cleanup levels set too low. Changes in the rules that would lead to such benefits include clarifying the dynamic nature of cleanup schedules, encouraging voluntary cleanup by not requiring schedules for all types of cleanup; streamlining the process of developing an acceptable plan; and increasing the success of a given remedy. Lesser costs to liable persons may include a lesser chance of inappropriate sites coming under CECRA, a lesser burden on liable persons and increasing success of cleanup and closure. This might save DEQ cost and time as well, by focusing more time on the most appropriate sites. The environment, contractors and all Montanans would probably feel very little difference from Alternative 3 compared to Alternative 2, proposed rules. Alternative 3 would be slightly closer to No Action in terms of effects to all parties than Alternative 2.

4. ALTERNATIVE 4: RULES CONSIDERED BUT REJECTED

This alternative outlines the rules considered by DEQ but rejected. Many of these alternatives would be inconsistent with past practice or be inconsistent with the requirements of CECRA. The rationale for the rejections is included in the discussion below.

4.1. EXPLANATION OF POSSIBLE RULES CONSIDERED BUT REJECTED

4.1.1. Listing Facilities

DEQ considered several options when it was developing rules to address various listing issues. One option included adopting the federal Hazard Ranking System (HRS) to determine whether a site was eligible for listing. The U.S. Environmental Protection Agency (EPA) uses this process to list sites which must be cleaned up under federal superfund law (CERCLA). If a site meets the threshold HRS score, it becomes an NPL site. NPL listing means liable persons must cleanup under federal law; however, CECRA listing means there needs to be more investigation. The rule for HRS is several inches thick. In addition, several of the existing state superfund sites have already been through the federal HRS process and EPA determined that while contamination exists, the sites do not warrant expenditure of federal funds and should be addressed by other programs. This process was rejected because it was cumbersome and would pose additional costs on DEQ, the state's budget and the liable persons. DEQ also determined that it was likely that the public would continue to be exposed to unacceptable levels of contamination that would not be addressed if not listed as a state superfund site. Thus, adopting the HRS would lead to costs that result in little or no benefit. Therefore, adopting the HRS would not be an efficient use of state resources.

Another option considered was rather than use a dilution attenuation factor (DAF) of 10 when considering the leaching of chemicals from soil to groundwater to use a DAF of 1. (A DAF is the ratio of the original soil leachate concentration to the receptor point concentration.) This would assume that there is no dilution or attenuation taking place in the ground so that hazardous and deleterious substances would flow directly from the contaminant source to the receptor without any reduction. When appropriate information has been available, actual site-specific DAFs measured at facilities in Montana have ranged from approximately 10 as the low end to100 or higher. DEQ determined that a dilution attenuation factor of 10 was the most appropriate factor that should be applied generically for screening purposes because it uses Montana-specific data. It is appropriate to use this factor when comparing concentrations to screening levels. However, if DEQ determines more work is needed, the dilution attenuation factor specific to a particular site can be calculated and used (even if it is greater than 10), in the same manner that site-specific cleanup levels are calculated and applied during cleanup of a site.

DEQ considered not dividing the non-cancer causing chemicals in the EPA Regional Screening Levels by a factor of 10. However, based upon DEQ's experience, rarely is there only one non-cancer causing chemical present at a site and often times there may be as many as 8 to 10. When more than one non-cancer causing chemical is present, there is the potential for cumulative health effects. Simply adopting the EPA Regional Screening Levels as established would not

provide adequate protection for human health at a very preliminary part of the process where little information is available to evaluate actual risks. Therefore, DEQ rejected this option as having less benefit and as not providing for an efficient use of state resources.

During the HJR 34 study, the development of soil cleanup standards for Montana was discussed. The adoption of soil cleanup standards would eliminate the need for site-specific risk assessments; thereby, shortening part of the superfund process and providing certainty regarding final cleanup levels for both the liable persons and the public. To develop soil cleanup standards would be a significant undertaking for DEQ and would detract from ongoing cleanups. In addition, it would eliminate the flexibility that liable persons currently may use to evaluate risks posed at specific sites, which may result in larger volumes of soil needing cleanup and that would increase the cost of cleanup. The cost of this option of CECRA seems to significantly outweigh the benefits and thus was not pursued.

Another consideration was to incorporate Tier 2 and Tier 3 analysis of Risk Based Corrective Action, using guidance developed by the American Society for Testing and Materials (ASTM) (currently known as "ASTM International"), into the decision-making process for listing. Tier 2 and 3 use a progressively more complex and site-specific analysis after more data is known about site conditions. DEQ allows the use of Tier 2 and Tier 3 equivalent to ASTM site-specific analysis at CECRA sites when appropriate information is available to develop those levels. This information is typically not available at the time of listing. As this would not help the process any, and would not lead to additional benefits, it was dropped.

When interpreting the term "imminent and substantial endangerment" DEQ considered whether it should interpret the terms to mean that any amount of hazardous or deleterious substance in the environment, present above laboratory detection limits (rather than the proposed screening levels), may pose an imminent and substantial endangerment or threat. DEQ concluded that interpretation, however, is overly conservative and would serve only to generate unneeded work showing that many sites with materials present at levels greater than detection limits but below screening levels do not pose a threat. Due to significantly higher costs to both liable persons and DEQ with almost no environmental benefit, this was dropped. Conversely, DEQ considered the merits of setting the bar for determining "imminent and substantial endangerment" very high through the use of other regulatory levels such as the immediately dangerous to life or health concentrations (IDLHs) developed by the National Institute for Occupational Safety and Health (NIOSH). In determining IDLH levels, NIOSH considered the ability of a worker to escape without loss of life or irreversible health effects within a 30-minute exposure. However, at these levels, an emergency situation exists, which does not address the full scope of sites to be addressed by CECRA; therefore, DEQ determined the NIOSH levels were not appropriate to use for listing purposes. DEQ is striving to provide a balance between the potential risk to human health and the environment and the concerns of the regulated community.

Requiring an endangerment or risk assessment as a part of a listing decision was also considered. Such an assessment is typically developed in the baseline risk assessment process required under CECRA. It is based on information gathered to quantify contamination during a remedial investigation. Requiring an endangerment assessment as a part of decision making for listing would increase the cost of remedial actions because the assessment would need to be updated as

contamination is quantified site-wide. Therefore making this a mandatory part of the process was rejected due to the high costs and questionable benefits of this action.

4.1.2. Improved Financial Controls

Section 75-10-743, MCA, was amended in the 2009 legislative session to allow DEQ to reimburse claims for lead liable persons upon completion and approval of the remedial investigation and feasibility study. The statutory amendment allows DEQ the discretion to make these payments but does not make such payment mandatory. Therefore, DEQ could decline to make these payments, allowing money to remain in the orphan share fund for a longer period and potentially be available to other liable persons or state agencies that are liable for cleanup at other sites. This interpretation was rejected because it appears inconsistent with legislative intent.

4.1.3. Work Conducted by Third Parties

DEQ evaluated its application of the statutory requirement to approve work by third parties at order sites when the statute was changed. At that time DEQ considered whether it should require the same level of review for third-party work as is required for work conducted by a liable person. Several concerns were raised with this approach. First, no additional resources were provided for this level of work. Thus, DEQ did not have FTE, and still does not, to add this level of review to any proposed third-party work. In addition, a third party conducting work is not necessarily a liable person. However, if the work they conducted further contaminated a site, they could become a liable person. Therefore DEQ rejected the idea of reviewing the work plans at the same level of review that is required for work conducted by a liable person.

DEQ could also allow third parties to merely send a letter indicating their desire to do work at a particular facility. DEQ could then issue a form letter providing "permission" to conduct the work without any understanding of what the work entails or how it will impact work by the liable person at the same site. This would greatly reduce DEQ's workload. However, this could negatively impact ongoing work at the site and could ultimately increase liable person's costs. Therefore, DEQ rejected this idea as well and ultimately settled upon the proposed rule which balances flexibility and structure.

4.1.4. Comprehensive Rules

Lastly, DEQ considered whether to adopt additional rules at this time that would constitute a "comprehensive" rule making such as adopting the National Contingency Plan. It is important to note that adopting comprehensive rules is outside the scope of this rulemaking. Also, DEQ's philosophy is that rulemaking is a dynamic process that must occur and recur when circumstances change that affect how DEQ and the regulated community and/or the public interact. In addition, there are multiple interpretations of what might constitute comprehensive rulemaking and such a comprehensive effort would detract from ongoing progress to cleanup contaminated sites. Finally, CECRA is a very detailed statute, establishing processes and criteria in a significant amount of detail. Thus it would be duplicative to incorporate this detail into rule.

DEQ will evaluate the need for additional rulemaking if it identifies the need for specific rules in the future.

4.2. Economic Analysis of Rules Considered but Rejected

In general, there was an increased cost associated with each of the rules that were considered but rejected. In most cases, the costs and workload to DEQ would be greatly increased with little environmental benefit. In turn, the costs for liable persons would likely increase due to the nature of each of these rejected rules. This could not only make liable persons worse off financially, but also could delay current cleanups, make liable persons more reluctant to cooperate, and could discourage voluntary cleanups that would make properties more likely to develop. Increasing costs to DEQ could detract from existing CECRA cleanups (such as having to develop comprehensive rules), and in some cases, could expose Montana citizens and the environment to greater danger from contaminated sites.

As one example, the development of soil cleanup standards would eliminate the need to calculate site-specific cleanup levels, ultimately leading to faster cleanup. However, the development of these standards would also eliminate the flexibility that liable persons currently may use to evaluate risks posed at specific sites, which may result in larger volumes of soil needing cleanup and that would increase the cost of cleanup. Also, more sites would likely be listed that wouldn't necessarily need to be if a DAF 1 versus 10 was applied to the screening levels; thereby, drawing limited resources away from other sites with no increased benefit and potentially increasing costs for liable persons because more sites would be listed. DEQ would also have greater costs under these soil standards and might not have the resources to address sites as quickly under CECRA as would happen under the other three alternatives.

Under certain of these rules, the cost for the public would likely increase because of more health problems related to exposure to contamination (HRS and not dividing non-cancer RSLs by 10). DEQ would also have increased costs to conduct an HRS type of listing process, develop soil cleanup standards, and comprehensive rules that are not currently needed. Using the HRS package on CECRA sites is unnecessary and would be expensive and overly burdensome at such an early stage in the process. DEQ would need significant resources to conduct the necessary investigations to perform an HRS type of listing process and DEQ may not be able to recover some of those costs from liable persons. While not dividing the EPA RSLs for non-cancer causing chemicals by 10 would potentially decrease costs for liable persons because some sites might not be listed on the superfund list, there would potentially be increased costs for the public from health impacts.

The environment would be hurt to the extent that these rules that were rejected would delay cleanups. Contractors might gain from the additional work that these rules would entail.

While there are significantly increased costs associated with the rules that were considered but rejected, there are also some benefits. For example, NEW RULE I allows DEQ to use generic screening levels for purposes of listing rather than completing a complex, site-specific risk assessment for each site prior to listing. This results in sites being addressed more quickly

limiting the amount of time to list sites and reach cleanup decisions. Utilizing a DAF of 1 would potentially require more detailed evaluation of leaching to groundwater; however, there would not be a significant benefit to the environment over what is currently proposed. There could potentially be detriments to human health if cumulative risks from non-cancer causing chemicals are not recognized in the screening process. The environment may benefit from having soil cleanup standards because they would clearly establish the level to which a chemical needed to be cleaned up and would decrease the number of disputes over site-specific risk assessments.

Overall, alternatives that were rejected would not have an overall significant benefit on the environment. The mission of DEQ is to help ensure a clean and healthful environment to all Montanans. The best way to do that is to require cleanup at as many sites as possible to levels necessary to ensure there is no unacceptable risk remaining to humans. The alternatives rejected may clean up select sites more thoroughly than the other three alternatives, but generally at a significant cost including other sites potentially not being cleaned up under the rejected rules as compared to the proposed rules. Also, the costs per site cleanup would likely go significantly up due to these alternatives. Thus, few benefits would accrue to Montanans as a result of these alternatives.

COMPARISON OF ALTERNATIVES

This analysis under § 2-4-405, MCA, identified and evaluated the four alternatives. These alternatives are briefly summarized and then compared in the table that follows.

Alternative 1 is the No Action alternative which was based on existing rules (ARM 17.55.102, 17.55.108, 17.55.111, and 17.55.114) and guidelines affected by the proposed rule changes and the many interpretations of statute used by DEQ to administer the state superfund law. These rules and interpretations formed the baseline against which other rulemaking alternatives have been evaluated. If none of the proposed rules were adopted (i.e. inaction or No Action), this baseline describes how DEQ would continue to implement the state superfund law.

Alternative 2 consists of DEQ's Proposed Rules published in the October 15, 2009, Montana Administrative Record.

Alternative 3 identifies possible changes to the proposed rules based on commenters' suggestions. These changes in the proposed rules, if adopted, collectively form the group of Alternatives with Lesser Impact. They would involve less costly or less intrusive methods for achieving the purpose of the proposed rule.

Alternative 4 consists of possible rules considered by DEQ but rejected. Alternatives Considered but Rejected would have unnecessary costs in relation to the benefits provided and may have been inconsistent with past practices or be inconsistent with the requirements of CECRA.

Overall, Alternatives 2 and 3 are more efficient and effective than Alternative 1 with Alternative 3 being the most efficient. The options considered but rejected, Alternative 4, would be the least

Summary of Benefits and Costs of Proposed Rule

Affected Party	Alternative 1-No Action	Alternative 2-Proposed Rule	Alternative 3-Proposed Rule with Lesser Impact	Alternative 4-Rules Considered but Rejected
Liable Persons	The same costs as currently exist. Costs can currently be high due to inherent confusion in existing CECRA process.	Lower costs than Alternative 1 due to less confusion and more clarity.	Potentially lower costs than Alt 2 due to less confusion and less chance of over-regulation under CECRA.	Higher costs to liable persons due to more cleanup required and a more complicated process. Less cooperation.
DEQ	The same costs as currently exist in administering CECRA.	Better fulfills its mission of a clean and healthful environment due to a smoother process, lower costs, better reimbursement, and less chance of litigation.	Potentially a slight savings in cost per site over Alt 2 due to additional clarifications over the Proposed Rule.	Costs and workload could be greatly increased compared to other three alternatives.
Contractors	The same level of work as currently exists.	Slightly less work for those hired by liable persons. Slightly more work for those hired by DEQ.	Same as Alt 2.	Potentially the most work and benefit to contractors of all the options due to greater bureaucracy.
Montana citizens	The same level of welfare and benefit as currently exists from a cleaner environment.	Potentially more benefit than Alt 1 from a cleaner environment. Parties not under CECRA may voluntarily clean up under proposed rules. A few small businesses and tax revenues may benefit from additional sites cleaned up.	Same as Alt 2 with slightly lower costs to select liable persons.	To the extent that DEQ would be detracted from CECRA cleanups, the public could be worse off. Some small benefits could occur from selected improved media such as soil.
The Environment	The same level of benefit as currently exists due to cleaner state waters, and healthier wildlife, aquatic life and vegetation near cleaned up sites.	Improved over Alt 1 as a result of faster cleanups.	Same as Alt 2	Worse off if cleanups are delayed. A few sites better off.

efficient and effective due to significantly higher costs than the other three alternatives with little or no benefit.

CONCLUSIONS

EFFICIENT AND EFFECTIVE ALLOCATION OF PUBLIC AND PRIVATE RESOURCES

Pursuant to § 2-4-405(2)(g), MCA, this impact statement must include a determination as to whether the proposed rule presents an efficient allocation of public and private resources. Of the alternatives considered, Alternative 3 would be the most efficient and effective use of public and private resources. It would do everything that Alternative 2-Proposed Rules would do in terms of clarify existing rules, and implementing portions of CECRA already being addressed by guidance. However, it would also decrease some of the risks of high costs to liable persons that exist under the Proposed Rules-Alternative 2. While Alternative 1, No Action, results in significant benefits from cleaning up hazardous sites, the lack of clarity in the existing rules, sometimes causes unnecessary costs and delays to liable persons, DEQ and the environment. Alternatives 2 and 3 clarify existing rules, may shorten cleanup time and may lead to additional sites being cleaned up over no action. Thus, Alternatives 2 and 3 are more efficient and effective than Alternative 1 with Alternative 3 being the most efficient. The options considered but rejected, Alternative 4, would be the least efficient and effective due to significantly higher costs over the other three alternatives with little or no benefit.

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Appendix A – Proposed Rules

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.55.102, 17.55.108, 17.55.111, and 17.55.114 pertaining to definitions, facility listing, facility ranking, and delisting a facility on the CECRA priority list; adoption 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	)	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT, ADOPTION, AND REPEAL (CECRA REMEDIATION)

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:

<u>17.55.102 DEFINITIONS</u> 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.

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

(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.

<u>NEW RULE II PROPER AND EXPEDITIOUS NOTICE</u> (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.