



Montana Department of
LABOR & INDUSTRY

To: Board of Professional Engineers and Professional Land Surveyors
c/o Michele Peterson-Cook, Board Counsel

From: Brenda Nordlund, Acting Commissioner of Labor & Industry

Date: July 13, 2020

Re: Active Supervision of Proposed Amendment to Admin. R. Mont. 24.183.303(11)

Thank you for your service to the state of Montana as members of the Board of Professional Engineers and Professional Land Surveyors. Pursuant to Mont. Code Ann. § 37-1-121 and -122, this letter serves as notice that the proposed amendment to Admin R. Mont. 24.183.303(11), approved during the May 12, 2020, Board meeting, has been selected for active supervision review.

As you may be aware, the United States Supreme Court requires active supervision of boards for the boards to be considered state actors. *N.C. State Bd. Of Dental Exam 'rs v. FTC*, 574 U.S. 494 (2015). The ruling means that state licensing boards controlled by market participants—including Montana's—are entitled to legal protections when acting for board decisions *only if* the challenged restraint on trade supports clearly articulated and affirmatively expressed state policy and the policy-making process was actively supervised by non-market participants to ensure fairness.

The Court's ruling rests on principles similar to Montana law—particularly Mont. Code Ann. § 37-1-131(1)(a)(ii), that requires any restraint of trade be necessary to protect public health and safety. However, the decision means that board members could face personal liability for decisions the entire board makes (regardless of how individuals vote) unless the state actively supervises the board.

Therefore, Mont. Code Ann. § 37-1-121 and -122 include a formal review process that requires the Commissioner of the Department of Labor & Industry to evaluate board decisions that restrain trade. The review process is set forth in Mont. Code Ann. § 37-1-122. The statute also includes a mechanism to ensure legislative oversight.

As Commissioner, I will review the above-referenced proposed amendment. After following the procedure established in Mont. Code Ann. § 37-1-122, I will issue a decision with a recommendation regarding whether to proceed with rulemaking.

In keeping with that procedure, please provide written comments and materials from the Board justifying the proposed amendment not later than August 31, 2020. Additionally, at your earliest convenience, please provide a list of all organizations and individuals you believe may be interested in this proposed board act.

c. Economic Affairs Interim Committee