

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the adoption of NEW) NOTICE OF ADOPTION
RULES I through XIII, pertaining to)
approved construction techniques for)
fire mitigation)

TO: All Concerned Persons

1. On April 29, 2010, the Department of Labor and Industry (department) published MAR notice no. 24-320-245 regarding the public hearing on the proposed adoption of the above-stated rules, at page 980 of the 2010 Montana Administrative Register, issue no. 8.

2. On May 24, 2010, a public hearing was held on the proposed adoption of the above-stated rules in Helena. Several comments were received by the June 1, 2010, deadline.

3. On September 9, 2010, an amended notice and extension of comment period was published at page 1966 of the 2010 Montana Administrative Register, issue no. 17. Several comments were received by the October 8, 2010, deadline.

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

COMMENT 1: One commenter stated that the proposed rules address only wildfire and wildfire hazards, and questioned whether future rulemaking will address all natural and man-caused hazards per 76-3-504(e) [sic], MCA.

RESPONSE 1: The department only has the authority under Title 50, chapter 60, part 9, "Fire Mitigation Construction Techniques," to "adopt rules identifying appropriate construction techniques that may be used by a local government in mitigation of identified fire hazards pursuant to 76-3-504(1)(e), MCA," and lacks any authority to address all natural and man-caused hazards.

COMMENT 2: One commenter noted that Senate Bill 51 required the Department of Natural Resources and Conservation (DNRC) to write best practices for subdivision development, and the proposed rules are the companion side for the building construction.

RESPONSE 2: The department acknowledges that Senate Bill 51 amended 76-13-109, MCA, to direct the DNRC to adopt, among other rules, rules addressing development within the Wildland-Urban Interface. See 76-13-109(2)(a) through (c), MCA.

COMMENT 3: One commenter questioned the enforceability of these rules, noting that even if a county adopts these requirements, the rules can only be enforced as

subdivision covenant language, which the commenter believes would still render the construction requirements unenforceable.

RESPONSE 3: The department notes that 50-60-902, MCA, provides: "Rules promulgated under 50-60-901, MCA, may be enforced only as provided in Title 76, chapter 3, part 5 [subdivision regulations]. The powers and duties for enforcement provided in 76-3-501, MCA, apply to rules adopted under 50-60-901, MCA, and do not apply to or include any rules adopted under Title 50, chapter 60, parts 1 through 8."

COMMENT 4: A commenter noted that the rules fail to address fire sprinklers inside a structure or on the roof, and opined that fire sprinklers on the interior of structures mitigate fire inside, and potentially eliminates fire spreading to wildland fuels.

RESPONSE 4: The department's responsibility for these rules is to propose best practices regarding construction techniques for fire mitigation. Section 50-60-203, MCA, specifically provides that these techniques may not be construed to be part of the state building code. Fire sprinklers are a part of the state building code and, as such, are not a part of these rules.

COMMENT 5: One commenter opposed the passage of Senate Bill 51 and all of the proposed new rules.

RESPONSE 5: The 2007 Montana Legislature enacted Senate Bill 51 and the department is required to comply with its rulemaking mandates.

COMMENT 6: One commenter opined that Ravalli County residents won the right to vote on zoning and these rules constitute zoning.

RESPONSE 6: The department appreciates all comments received in the rulemaking process.

COMMENT 7: One commenter stated that Montana's fire chiefs were directed to map the state under the guise of safety, and turned out a map to zone out what they claimed to be "high risk" lands, but which actually covers all land from the valley floor to the forest. The commenter further opined that each county commissioner will be able to use the map to stop growth, stop subdivisions, and stop home construction.

RESPONSE 7: The department appreciates all comments received in the rulemaking process.

COMMENT 8: One commenter stated that the zoning and land use designations set forth in the proposed rules devalue Montanan's land holdings, are an illegal "taking," and devalue land by billions of dollars.

RESPONSE 8: The department appreciates all comments received in the rulemaking process.

COMMENT 9: One commenter supported changing the term "rule" in the statement of reasonable necessity to "best practices," because of the financial burden the proposed building codes will have.

RESPONSE 9: The department appreciates all comments received in the rulemaking process. See response 12.

COMMENT 10: A commenter supported changing the reasonable necessity statement to "standard practice" to allow local code officials to have more control of the building process.

RESPONSE 10: The department appreciates all comments received in the rulemaking process. See response 12.

COMMENT 11: One commenter requested changing the WUI language so that the state does not institute building codes, but keeps or maintains recommendations for best practices with no regulatory power.

RESPONSE 11: The department has purposefully avoided instituting a building code in the proposed rules, and has instead proposed language that sets forth best practices concerning construction techniques. As proposed, the rules do not extend regulatory power to the Building Codes Bureau and do not constitute any part of the state building codes. The enforcement of these rules is provided by statute at 50-60-902, MCA, which cannot be changed by administrative rulemaking.

COMMENT 12: One commenter disagrees with changing the reasonable necessity statement to include "best practices," stating that it is too vague and has potential for discriminatory application.

RESPONSE 12: The term "best practices," as it appears in the statement of reasonable necessity, is intended to clarify that the techniques recommended in the rule are not enforceable as building codes, but rather as "techniques" or "best practices," from which a local government may select and enforce. This approach is set forth in the statute and cannot be changed by administrative rulemaking.

Comments 13 through 16 address New Rule I:

COMMENT 13: Two commenters stated that the definition of "Wildland-Urban Interface" (WUI) in New Rule I should be the same as in the statute. The commenter opined that the definition seems broader than the statutory definition, and expressed concern that it would apply to the entire county, instead of just the areas defined by locally adopted wildland fire protection plans.

RESPONSE 13: Since the proposed definition is similar to the definition in 76-13-102(16), MCA, and because consistency in this definition may be desirable to avoid the suggestion that the definitions have substantive difference, the department is amending New Rule I to be consistent with 76-13-102(16), MCA.

COMMENT 14: One commenter stated that the subdivision regulations, which appear to be the enforcement mechanism for New Rule I, are not the legal or appropriate place for a local government to enforce building codes. The commenter supports the department's clearly defining the difference between Montana's building code and the applicability of "approved construction techniques" for wildfire mitigation. The commenter also noted that Senate Bill 51 created a very difficult situation for the department in that it did not give the department authority to enforce the rules, nor did it require that the rules be site specific.

RESPONSE 14: The department appreciates all comments received in the rulemaking process.

COMMENT 15: A commenter recommended additional, stronger definitions in New Rule I to provide uniform application and enforcement predictability. The commenter recommended that the department add language that unless a definition is specifically identified in the rule, the definition found in the International Code Council Codes will apply, e.g., International Wildland-Urban Interface Code 2009 – (IWUIC); International Building Code 2009 – (IBC); or International Residential Code 2009 – (IRC).

RESPONSE 15: The department defined all necessary terms, and without more specific examples, is unable to respond to the comment to increase the number and strength of the proposed definitions.

The department recognizes the validity of the definitions contained in the above-mentioned codes, but asserts that the application of such definitions is limited only to those codes in which they appear, and referencing them would cause confusion that the department is attempting to create a building code, as distinguished from best practices, regarding construction techniques to mitigate wildland fire. Where additional guidance is necessary in selecting the "best practice" for a particular "construction technique," an individual may refer to a variety of the building codes mentioned by the commenter.

COMMENT 16: One commenter suggested expressly defining the terms "heavy timber," "class B roof assembly," and "ignition-resistant construction," as opposed to referencing the IBC, IRC, or IWUIC definitions.

RESPONSE 16: See response to comment 15. In addition, New Rule I does not reference the IBC, IRC, or IWUIC definitions specifically, because terms such as "heavy timber" and "class B roof assembly" are terms of art, which are generally understood in the industry, and although may be defined slightly differently by each of the various appropriate building codes, they do not vary greatly in substance, nor in a manner that is distinguishable for the purposes of these rules.

Where deemed necessary, such as in the case of "ignition-resistant building materials," the department has defined the term, but has not done so by reference to a building code. Finally, even if the term were defined as suggested, it would not change the use of the technique stated in the rule.

COMMENT 17: Two commenters stated that New Rule II uses permissive language and, therefore, makes adoption of the subsequent rules up to the individual boards of county commissioners, and that enforcement of these regulations is being passed from the Building Codes Bureau to local government.

RESPONSE 17: The rules use permissive language because the department does not have the authority to make the rules binding on a local government. The statute referenced in New Rule II, 76-3-504, MCA, gives the local government discretion in whether to use the construction techniques identified by the department. Section 50-60-901(1), MCA, as stated in the proposed rule, required the department to "adopt rules identifying appropriate construction techniques that may be used by a local government in mitigation of identified fire hazards pursuant to 76-3-504(1)(e), MCA."

COMMENT 18: One commenter suggested deleting "and shall prevent the accumulation of leaves and debris by an approved method..." from New Rule VII, and instead inserting: "Gutters and downspouts shall be constructed of noncombustible materials." This change would be consistent with the IWUIC 2009, and eliminate uncertainty for local government to develop and enforce "an approved method" for accumulation of debris.

RESPONSE 18: See response 15 regarding the department's desire to mirror any particular building code language. In addition, the department decided it should provide some latitude in the construction technique, so that alternative methods may be explored and approved for the construction of a gutter system that will prevent the accumulation of additional fuels in the gutter itself. New Rule VII remains exactly as proposed.

COMMENT 19: One commenter suggested deleting (1) from New Rule VIII, stating that the cost of implementing this rule will nearly double the cost of windows in homes located in the WUI, and suggested replacing it with the IWUIC standard for a class 3 structure, which has no additional requirements for windows outside of what is found in the IRC.

RESPONSE 19: See response 15 regarding the department's desire to mirror any particular building code language. The department concluded that the effect of utilizing the IWUIC standard would be the removal of all glazing protection for structures located in a WUI, which does not address the goal of fire mitigation. The 20 percent benchmark on window-to-wall ratio allows designers or builders to mitigate the use of special protective glazing by maintaining a ratio of less than 20 percent. New Rule VIII remains unchanged.

COMMENT 20: One commenter recommended adding "fire-retardant-treated wood" as an option for vehicle access doors in New Rule VIII (3), so that the rule would read: "Vehicle access doors shall be constructed of ignition-resistant building materials or fire-retardant-treated wood." This option would provide adequate fire protection and be consistent with the IWUIC 2009.

RESPONSE 20: See response 15. The department concluded that for the purposes of these rules, "ignition-resistant building material" is synonymous with "fire-retardant-treated wood," and is not modifying the proposed rule.

COMMENT 21: One commenter recommended deleting (1) from New Rule IX, stating that the venting requirements listed are problematic because they may result in moisture issues and poor indoor air quality, and seem to conflict with IRC section 806.2, which requires a minimum amount of venting.

RESPONSE 21: See response 15 regarding the department's desire to mirror any particular building code language. In addition, the department concluded that the venting requirements in New Rule IX do not restrict the number of openings, but only size and location. The total amount of ventilation required by the IRC may still be met with proper placement and sizing of vents. The rule remains as proposed.

COMMENT 22: One commenter stated that the setback requirement of New Rule IX (1)(a) is too restrictive and unnecessary, as all county subdivision regulations already contain adequate setback requirements.

RESPONSE 22: The department concluded that the rule does not require the entire structure to be set back ten feet from property lines; it only requires that the location of gables or dormer vents on the structure be placed at least ten feet from the property line. New Rule IX remains as proposed.

COMMENT 23: One commenter recommended to replace New Rule IX with the following from the California Building Code: "Roof and attic vents shall resist the intrusion of flame and embers into the attic area of the structure, or shall be protected by corrosion-resistant, noncombustible wire mesh with openings a minimum of 1/8-inch (3.2 mm) and shall not exceed 1/4-inch (6 mm) or its equivalent. Vents shall not be installed in eaves and cornices. Exception: Eave and cornice vents may be used provided they resist the intrusion of flame and burning embers into the attic area of the structure."

RESPONSE 23: The department is adopting New Rule IX exactly as proposed. Although the California Building Code language is very similar to the proposed rule, the differences in the proposed rule are intentional, such as the "prevention" of ember or flame in the proposed rule, versus to merely "resist" embers and flames to enter vents, the proscription against placement of wall vents in areas that face heavy vegetation, placement of underfloor ventilation and gable dormer setbacks, and the exclusion of attic vents in certain areas. These differences allow for greater

protection, considering the rural nature of Montana and the potential longer firefighter response times than that of California.

COMMENT 24: One commenter recommended specific language changes to New Rule XII respecting Storage Tanks as follows: delete "buried underground" from (1) and replace with "installed in accordance with the National Fire Protection Standards NFPA 58 Liquefied Petroleum Gas Code and NFPA 30 Flammable and Combustible Liquids (the preferred method for tank installation would be underground)."

The commenter further suggested deleting from (1), "If soil or subsoil conditions prohibit complete burial, then tanks shall be partially covered by at least one foot of earth, sand, or other noncombustible material..." and substituting "Tanks storing flammable/combustible liquids shall be designed and installed in accordance with NFPA 30, and shall be listed and labeled for either aboveground or underground use, and cannot be interchanged. Underground tanks and piping require cathodic protection or shall be listed as corrosion resistant." The commenter suggested inserting in (2) "and NFPA 30" after "NFPA 58" and deleting "in lieu of burial." The commenter stated that optionally, (2) could be deleted entirely, because it is covered in the NFPA codes.

Finally, the commenter suggested deleting (3) entirely if the structure is not in a WUI, because there is no need to deviate from the NFPA.

RESPONSE 24: The department decided to amend New Rule XII to reference NFPA 30 (Flammable and Combustible Liquids) in (2) in addition to NFPA 58 (Liquefied Petroleum Gas Code), because the original rule addressed both "[p]ropane tanks and other flammable or combustible liquids storage." The department is adopting the rest of the rule exactly as proposed to describe the allowable best practices regarding storage tanks within the rule, and alleviate the need to refer to these particular sections of the NFPA.

COMMENT 25: A commenter stated that the construction techniques set forth in the rules should be consistent with the National Fire Protection Association (NFPA) 1144 standards for "development and construction of structures in Wildland-Urban Interface" areas [sic]. In particular, add sections 5.1.1.1 (all new construction in WUI areas should be designed, located, and constructed to comply with NFPA 1144 and the local building code) and 5.1.1.2 (conflicts between local building code and NFPA to be resolved toward the more stringent fire protection requirements).

RESPONSE 25: The department notes that comments 25 – 32 all advocate for the adoption of portions of the NFPA Standard 1144 (Standard for Reducing Structure Ignition Hazards from Wildland Fire). During the development of these rules, department staff and stakeholders reviewed fire mitigation standards from a variety of sources, including the NFPA 1144, NFPA 1141 (Standard for Fire Protection Infrastructure for Land Development in Suburban and Rural Areas); NFPA 220 (Standard on Types of Building Construction); International Code Council (ICC); International Building Code (IBC); International Residential Code (IRC); International Wildland-Urban Interface Code; and International Fire Code (IFC).

With the exception of referring to NFPA 30 and 58, which make reference to allowable alternatives to the best practices stated in the rule, and with respect to the installation of storage tanks containing flammable or combustible liquids, the department intentionally chose to avoid referencing the various building codes in favor of paraphrasing appropriate language from a variety of these building code sources to provide best practices and construction techniques necessary to meet the purpose of these rules. The department concluded that the proposed new rules sufficiently address the same topic of the section of the NFPA cited in comments 25 - 32. It is not the intent of the department to adopt one code in favor of another, where numerous, independent codes address fire mitigation.

COMMENT 26: One commenter recommended defining "Approved" in New Rule I (1)(b) to include the code official or "authority having jurisdiction" (AHJ), which in turn, is defined by NFPA 3.2.2 as "an organization, office, or individual responsible for enforcing the requirements of a code or standard, or for approving equipment, materials, an installation, or a procedure."

RESPONSE 26: In addition to response 25, the department declines to adopt the NFPA definition of "authority having jurisdiction" to avoid the potential that the term could be construed to be broader than the language in the proposed rule, which defines "approved" as the "code official or authority having jurisdiction."

COMMENT 27: One commenter recommended replacing the definition of "Ignition-resistant building material" in New Rule I (1) with the proposed NFPA definition 3.3.13 as follows: "Any product designed for exterior exposure that, when tested in accordance with applicable standards, has a flame spread of not more than 25, shows no evidence of progressive combustion, and whose flame front does not progress more than 10 1/2 ft (3.2 m) beyond the centerline of the burner at any time during the test."

RESPONSE 27: See response 25. The department concluded that it is not necessary to adopt the NFPA term as the proposed rules sufficiently define that term for the purposes of providing construction techniques to mitigate fire in a WUI.

COMMENT 28: A commenter stated that the definition of "Wildland-Urban Interface" in New Rule I fails to define wildland or vegetative fuels, and suggested replacing it with the NFPA 3.3.28 definition as follows: "The presence of structures in locations in which the AHJ determines topographical features, vegetation fuel types, local weather conditions, and prevailing winds result in the potential for ignition of the structures within the area from flames and firebrands of a wildland fire."

RESPONSE 28: See response 25. In addition, because the rules deal with construction techniques, the definition of fuels or individual fuel types is outside the scope of a construction technique.

COMMENT 29: One commenter recommended to "Define Heavy Timber Materials with NFPA Official Definitions 3.3.12* Heavy Timber Construction. Type IV (2HH) construction as defined in *NFPA 5000, Building Construction and Safety Code*."

RESPONSE 29: See responses 9 and 25 on "heavy timber."

COMMENT 30: One commenter recommended that the rules add language to require vegetation/fuel modification as a prerequisite for completion of construction or issuance of final plat approval, specifically, to incorporate the language of NFPA 5.1.34, 6.1, and 6.2.

RESPONSE 30: See response 25. In addition, NFPA Sections 5.1.34, 6.1, and 6.2 deal with vegetation and fuel mitigation; again, although they represent very specific and thorough, good practices with respect to mitigating fires, they do not fall under the scope of building construction techniques as directed in these rules.

COMMENT 31: One commenter recommended changing New Rule XI on accessory structures to NFPA 5.3 "Overhanging Projections."

RESPONSE 31: See response 25. In addition, NFPA 5.3 details the same provisions to protect such projections as those proposed in the rule.

COMMENT 32: One commenter recommended adding a definition for "Structure ignition zone" from NFPA (Annex A) A.3.3.25 as "Structures and their immediate surroundings...."

RESPONSE 32: See response 25. In addition, NFPA (Annex A) A.3.3.25 refers to defensible space dimensions and specifications, and although they represent very specific and thorough, good practices, they do not fall under the scope of construction techniques as directed in these rules.

5. The department has adopted NEW RULE II (24.320.302), NEW RULE III (24.320.303), NEW RULE IV (24.320.304), NEW RULE V (24.320.305), NEW RULE VI (24.320.306), NEW RULE VII (24.320.307), NEW RULE VIII (24.320.308), NEW RULE IX (24.320.309), NEW RULE X (24.320.310), NEW RULE XI (24.320.311), and NEW RULE XIII (24.320.313) exactly as proposed.

6. The department has adopted NEW RULE I (24.320.301) and NEW RULE XII (24.320.312) with the following changes, stricken matter interlined, new matter underlined:

NEW RULE I (24.320.301) DEFINITIONS (1) through (1)(h)(ii) remain as proposed.

(i) "Wildland-Urban Interface" (WUI), means ~~that geographical~~ the line, area, or zone where structures and other human development meet or intermingle with undeveloped wildland or vegetative fuels.

NEW RULE XII (24.320.312) STORAGE TANKS (1) remains as proposed.

(2) Other installation methods such as installation in vaults or other protective methods that comply with NFPA 30 and NFPA 58 standards may be used in lieu of burial.

(3) remains as proposed.

/s/ DARCEE L. MOE
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Alternate Rule Reviewer

/s/ KEITH KELLY
Keith Kelly, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State February 14, 2011