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## Submitter Information

**Name:** Dale Hanson

**Address:**

Museum of the Rockies  
600 W. Kagy Blvd.  
Bozeman, MT, 59717

**Email:** [dale.hanson1@montana.edu](mailto:dale.hanson1@montana.edu)

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# General Comment

See attached file(s)

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## Attachments

Paleo\_regs\_comments

Comments on the proposed rule for Paleontological Resources Preservation  
RIN 1093-AA16

General comments:

A major concern with these proposed regulations is the greatly expanded management responsibilities indicated for the bureaus (see, for examples, sections 49.30 and 49.35 which state “The bureaus will...” not ‘may’), which would be especially challenging for those without any paleontologists on staff. The full implementation of these regulations will require close bureau paleontology coordination with repositories, permittees, law enforcement, the scientific community, and the public, along with increased bureau knowledge and appreciation of the paleontological resource at all levels. The bureaus have neither the staff nor funding to perform these additional duties; a situation unlikely to improve to even minimal levels. These shortages will cause delays involving permit issuance and repository agreements as called for in these rules, and law enforcement investigations of continuing illegal collecting and destruction of paleontological resources will be hampered. It is necessary to have these rules adopted, especially the penalties and permit application sections, but it will be challenging for the bureaus to meet all the requirements of their own regulations under the present conditions. An increased effort to procure the necessary funding is a must.

The permitting section (Subpart B) needs to be expanded to identify the bureaus’ roles in issuing permits. The bureau’s evaluation of the application as outlined here is satisfactory, but there is insufficient information about how the bureau will evaluate the permittee’s performance once a permit is issued. There is also no information on how the bureau will consider the differences between a general ‘survey’ permit application, involving minimal surface disturbance requiring minimal bureau review, and an ‘excavation’ permit, which may involve considerable disturbance and mandate environmental analyses, cultural and biological examinations, additional reviews and approvals at various levels, and other time-consuming actions. This may directly affect the applicant’s time and logistical planning and funding, and this needs to be clearly stated in these regulations. Also, there needs to be some constraints on timing of reviews and decisions on the permitting process to be applied to the bureaus. It is unacceptable to allow the bureau personnel to take months to issue a simple survey permit, or a year for an excavation permit review and decision. Some of the details should properly be handled through bureau policy or internal management, but these regulations need to outline the anticipated time line and the impacts to the permit applicant and the public, so they know what to expect from the bureau. The permittee is held to certain time limits in these proposed rules, and the bureaus should be likewise held to perform the required duties timely.

The proposed rules do not properly separate the permit applicant and the repository. The rules say that the evaluation of the adequacy of the repository will occur after the permit application is received. This is problematic in several circumstances. First, the permit applicant may not be directly associated with the repository, and therefore have no say in evaluating the adequacy of the repository, or correcting any identified problems. The applicant would also not be involved with any bureau/repository relationships in the future. Therefore, any discussions between the bureaus and the repository should not involve the applicant (unless, of course, the applicant is employed by the repository). Second, the evaluation of the repository for approval may take some time, especially given the lack of available bureau paleontology staff. Proper bureau evaluation would necessitate on-site inspections that often involve out-of-state travel which is highly subject to bureau budget and policy limits, coordination and meeting with repository personnel which can be a major issue, and correction of problems which can take time. The approval process should be done independently, and before, the applicant submits an application, not after. Applicants may have relatively short time frames, such as grant deadlines, teaching

responsibilities, graduate students with limited time, short field seasons, or other constraints. Having to wait months for repository approval is not acceptable. The bureaus should maintain a listing of approved repositories, and handle them separately from the permitting process. This approach should include periodic inspections, development of cooperative agreements, coordination after key personnel changes, and other management considerations. The applicant can be furnished this bureau list of approved repositories, and then the applicant can choose from the list, arrange an agreement with the chosen repository, and submit a repository letter during the application process.

It would be helpful, I think, to expand somewhat on the role and responsibility of the repositories in the permitting process. These proposed rules cover the procedures for permit applicants well, but do not address the repository resource in sufficient detail. One issue that could merit further discussion here concerns the flexibility that an existing repository may have in the permitting process, as well as decisions concerning the mitigation of paleontological resources. Many repositories tend to specialize in certain types of fossils, have a limited budget or tight storage space, or just have no interest in acting as a repository for non-staff paleontologists. Bureaus, working with the repository, should identify these issues and determine whether there is a plan or an interest in altering these issues. If no changes in these issues are expected, it should be stated that there will be no adverse impact to their standing as an approved repository. An example would be that a repository specializing in mammal material is approached by a permit applicant who wants to collect sauropod dinosaurs. Another example may be that a large number of dinosaur fossils are discovered on Federal land, and the bureau approaches the nearest repository for mitigation efforts, preparation, and curation. Both these situations may present problems for a repository limited in scope, space, or resources. The repository, therefore, must be able to turn down the request for curation without jeopardizing their repository status. This is a concern with some repositories, who think they must accept all material or lose that status.

In another point concerning repositories, the permit applicant and the repository should be required to consult before a repository agrees to accept paleontological collections. This should include a discussion on what to collect to avoid collecting 'scraps' that the repository doesn't want to (or should) curate, the types of fossils and other material that should be collected (paleobotanical, invertebrate, or geological samples relating to the target specimens), the potential size and amounts of fossils that could be collected, and the types and levels of field data that will be collected, photography, and mapping, to mention a few. A possible approach could be to have the repository develop a formal agreement with the permittee including all collecting terms and conditions, which should be signed by both, and then require the permittee to furnish a copy to the bureau with the application. For consistency, the bureaus and the repository can develop standard terms and conditions as part of the repository agreements prior to the permittee agreement stage, to allow bureau input. Then if needed, additional terms and conditions can be added by the repository on a case-by-case basis and included with the permittee agreements.

Finally, these proposed rules do not discuss other key management issues for the paleontological resource. These include land use planning, mitigation, inclusion in environmental analysis, unanticipated discovery by bureau personnel or the public, public interpretation and education, and other aspects of multiple use of Federal lands. I hope additional regulations and policies are forthcoming to insure proper management of paleontological resources under these issues.

Comments on specific parts follow:

49.5 – Definition of “Collection” needs to expand on the word “replicas.” Does this mean casting of trackways where found, or casts of fossils made sometime in the future, or replicas of associated data, photos, and records, or something else? Unclear.

49.5 – Definition of “Consumptive use” should also cover other techniques, such as drilling small holes to recover dust-like samples for isotopic analysis, etc. which could be construed as non-alteration under this present definition. Maybe use the term ‘sampling’ or ‘invasive sampling’?

49.5 – Definition of “Fossilized” needs to clarify that materials buried recently are not considered ‘fossilized,’ such as modern animals naturally buried in flood events. Past policies have used 10,000 years as a cutoff time, but that is unsatisfactory because it is hard to measure and doesn’t allow for animals found in permafrost settings that may be younger.

49.25(b) – Need to address the approach for consultants holding valid permits. Timely release of this information is critical for consultants to properly perform their activities. Authorized officers should release this information upon request, with no further written agreement necessary, other than the consulting permit. In related fashion, consulting permit terms and conditions should specifically state that no further disclosure is allowed.

49.50(b) – This should be changed to say a permit “is” (not “may be”) required for track/trace study when molding tracks, or introducing substances (except maybe water) to increase visibility of tracks for photography, tracing, etc.; anything that could potentially damage the substrate. Alternately, specific approval of the Authorized Officer should be required for existing permittees to perform that work.

49.50(c) – Including this as a regulation is inconsistent with all other resources, I think. Bureau’s wildlife biologists, archeologists, historians, foresters, etc. are not required by regulation to have permits to do their work. It should be just a condition of the job that the Bureau’s employees have the proper training beforehand (or are professionally trained on-the-job or through outside classes once hired), and get approval thru administrative channels. This is an internal personnel matter and should be addressed through those channels rather than included as a regulation. Use a Delegation of Authority channel or the like.

49.60(a)(2) – Need to specifically state ‘field experience’ to clarify that this refers to field work, rather than “collecting....paleontological data” from publications or museum research efforts.

49.65(a) – Drop the option of each bureau developing their own application and instead use the proposed DI 9002 (or NPS version..but why do they need their own anyway?)(see 49.65(b)). That would avoid confusion for the applicant applying with multiple bureaus having to use different forms, and instead the applicant would only need to change bureau names and addresses for multiple applications (see your chart on pg. 88185 that states the four hour completion time per application). This would also assure the proper information is gathered in a consistent manner.

49.65(b)(6)(ii) – Exempt approved repositories from having to provide a repository letter for their own staff. It’s plain that employees of the repository are pre-approved to reposit fossils in their own repository.

49.65(b)(7) – “past performance” language is unsupported. Past performances have not been graded, so an applicant cannot provide that. Confine this section to request only a listing of past permits and bureaus, and any past legal infractions.

49.65(c) – Drop this section. Use a standard form requesting all the information. The bureaus can ignore the information they don’t require. Having all the information on the application, even if not used to issue the permit initially, allows later investigations into a permittee’s performance if something is amiss, such as environmental damage, work done beyond the perceived scope of the permit conditions, etc.

49.70(b) – Add a section that requires the authorized officer to consider existing or recent permits issued to other permittees to assure that no conflicts with ongoing or past research efforts are impacted, duplicated, or intruded on. This will avoid any issues with new permittees accidentally ‘poaching’ areas of other researcher’s work, including some that may simply be in hiatus, such as intermittent quarrying efforts. Cooperation among permittees should be encouraged.

49.70(b)(4) – Change the word “reduce” to “minimize”

49.70(c) – Simplify this section to simply say “The authorized officer will decide whether to approve the proposed repository, based on the criteria.....” In many instances, the applicant is not associated directly with the repository, so cannot (and should not) be a party to any discussions concerning adequacy of the proposed repository.

49.75(a) – Add a section that requires the permittee to report in writing to the authorized officer any change in the time schedule of performing the work, and require that the authorized officer must approve the change.

49.75(a) – Add a section that requires the permittee to properly safeguard all collections and related data from time of initial recovery until deposited with the approved repository.

49.75(a) – Add a section that requires the permittee to furnish either print or electronic copies of any publications resulting from the research and collections done under the permit. Because fossils may be included in publications far into the future, a reasonable time frame for a cutoff to this requirement should be determined.

49.75(a)(2) – Add that the authorized officer must approve, in writing, of the requested personnel changes. This will maintain consistency with the initial application process.

49.75(a)(7) – Add that the DI 9004 must be submitted as part of the annual report, or other proper time frame.

49.75(a)(10) – Add that the DI 9008 must be submitted as part of the annual report, or other proper time frame.

49.75(a)(14) – Rephrase slightly to say “initial curation of the collection” to clarify that it will exclude future collection reorganizations, facility moves, inventory efforts, etc. decided on by the curation facility.

49.75(a)(15) – Add that the report must be filed: a. annually after the deposition of the collections with the repository, or b. by December 31 yearly, whichever comes first.

49.75(b) – Need to clarify this to reflect the collections that were made under only this permit and its terms and conditions, not other permits or in perpetuity.

49.75(c) – Could this potentially include costs incurred or required by the bureau, such as preparation of NEPA documents, necessary archeological or biological surveys, etc.? If so, this needs to be explicitly stated.

49.80 – Need to determine and state the methodology that will result in these actions. This should include a review considering such issues as: analysis of the circumstances, documented consultations with the permittee, the severity and intent of the violations, any extenuating or modifying issues, which type of action is appropriate and why, etc. That is necessary to avoid the ‘arbitrary and capricious’ challenges.

49.80 – Need to include a section discussing renewal/extension of permits for ongoing research or consulting work of the same type and using the same approaches. This should entail a simple statement or check box on the report form requesting renewal for an additional year(s). It is expected that the bureaus will continue the practice of setting an administrative expiration date, but research or consulting may well continue beyond that period. In other circumstances, the applicant’s work may be extended beyond their original anticipated time frame. It is also suggested that the bureaus issue permits for at least 3 years if the applicant indicates research will continue for multiple years. Having to fully reapply each year for ongoing work is burdensome.

49.80(a) – Amend the third part of this to state “when a potential violation of a term or condition can be prevented” or similar language. A violation should automatically result in a suspension, revocation, or cancellation, or may be subject to civil or criminal penalties (see 49.75(e))

49.80(c) – Edit the phrase “is found to be ineligible for a permit” to read “is later found to be ineligible for a permit.” If the applicant is ineligible for a permit, it should never have been originally issued.

49.205 - Separate the repository approval from permit approval. Permit applicant often has no control over repository qualifications. The bureaus should maintain a listing of already-approved repositories. Either allow permit applicant to choose from that list, or inform them that will need to wait for their permit pending approval/denial of repository, which would be a separate action. Sec. 49.210(a) discusses agreements between the bureaus and the repositories as a separate action, further supporting the separation of repository approval from the permit approval.

49.205(a)(6) – Expand this to allow for release of location data to permitted consultants. They are often under a short time frame and may not have the time to wait for approval on a case-by-case basis (again, considering the shortage of paleontology staff). This can occur when a pipeline route needs to be rerouted or a well pad location needs to be moved within a day or two while all other resource mitigation crews are available on-site to inspect the new location. Include a condition in all consulting permits that specifically states location data will not be released, to allow for this situation.

49.205(a)(6) – Include a requirement that the repository require any researchers using Federal collections to also be bound by the non-disclosure of location data (see for reference section 49.215(a)(5)).

49.205(b) – Change this section to separate the permit action from the repository approval process. Clarify that the repository will not be evaluated for every permit application desiring to use that repository; once the repository is approved, re-evaluation is not necessary in every instance. A suggested rewording follows: “When the authorized officer approves a repository, that repository will be placed on a bureau listing of approved repositories, and will remain approved to curate collections unless the authorized officer ...”

49.210(a) – These steps must be done before the repository is approved or with an agreement with the permit applicant before the permit is ever issued. If fossils are already collected, they must be repositied; decisions whether they will meet the criteria outlined here are too late in the process. Also, it is important that the collections get placed into a repository promptly, rather than being held by the permittee for a long period of time. This section works against that timely deposition.

49.210(b) – Remove the phrase “or the repository” from the first sentence. This requirement is also listed under the permit terms and conditions (49.75(a)(10)) as the responsibility of the permittee, and this responsibility should not be transferred. Also add that the DI 9008 must be submitted as part of the annual report.

49.210(b) – Add a requirement stating that the repository must maintain a copy of the Repository Receipt in their permanent files.

49.215(a)(3) – Unclear. Does this refer to preparation and study by the repository?

49.215(a)(6) – Loans should be addressed in a separate section. Loan agreements should include the same items listed here, and should also identify a length of time, an individual responsible for the loans, and a detailed description of the purpose of the loan. Because institutions or individuals receiving loans may be outside federal repository controls, the lending institution (the federal repository) must take additional care to assure federal specimens and data are properly handled. This should also address insurance, the means of packing and shipping of the specimens, and tracking of that shipping in both directions. Loans can be risky.

49.215(a)(9) – Furnishing publications and reports should not be the responsibility of the repository, but should instead be the responsibility of the permittee. For other non-permit researchers, it should be made a condition of studying federal specimens that the author provides publications. The repository personnel do not have the time or budget to track down every publication.

49.215(a)(10) – Need to add that this could include localities on non-Federal surface estate above Federally-controlled mineral rights (thereby including fossils and data not collected under authorization of a Federal permit) to aid in environmental analyses. This would also include historic localities discovered prior to implementation of the present permitting process.

49.220(a)(3) – The “case-by-case basis” for approval as the default action is not appropriate. Molding, consumptive analysis, histological sampling, 3-D scanning, and isotopic sampling are all standard analysis techniques, performed regularly. Proper training of staff, adherence to professional standards, and



study of current developments in the paleontological profession are part of a repository's mandate. In many cases, the repository staff is more up to date with these practices than bureau staff, and better able to assess potential impacts or issues. A broad approach to these standard procedures should be addressed in the initial repository agreement, as alluded to in the second part of that section, and should also include additional issues such as hand-held examinations (in reference to fragile, mounted, or very large specimens), standard photography and photogrammetry, drawing, flat-bed scanning of specimens, storage cabinets and support cradles, and use/application of substances like ammonium chloride. Also, 'collections' include associated records such as field notes, maps, and photographs. Appropriate care of these records should also be addressed in the repository agreement.

49.810(a)(3)(ii) – Change the phrase “For multiple collectors,” to “For multiple disturbances,” to make it clear that it is meant to apply as a cumulative environmental effect, not as simply separate individuals.