MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 1

The Montana Administrative Register (MAR), a twice-monthly publication, has three sections. The notice section contains state agencies' proposed new, amended or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted. The rule section indicates that the proposed rule action is adopted and lists any changes made since the proposed stage. The interpretation section contains the attorney general's opinions and state declaratory rulings. Special notices and tables are found at the back of each register.

Inquiries regarding the rulemaking process, including material found in the Montana Administrative Register and the Administrative Rules of Montana, may be made by calling the Administrative Rules Bureau at (406) 444-2055.

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BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

In the matter of the proposed amendment of ARM 4.12.402 and 4.12.404 and the proposed adoption of New Rule I relating to feed penalties	)))))	NOTICE OF PROPOSED AMENDMENT AND ADOPTION NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons

1. On February 16, 2002 the Montana Department of Agriculture proposes to amend and adopt the above stated rules relating to feed penalties with a delayed effective date of July 1, 2002. This delayed effective date applies only to civil penalty enforcement, and does not apply to other currently available enforcement activities.

2. The Department of Agriculture will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Agriculture no later than 5:00 p.m. on January 31, 2002 to advise us of the nature of the accommodation that you need. Please contact Gregory H. Ames at the Montana Department of Agriculture, 303 N. Roberts, P.O. Box 200201, Helena, MT 59620-0201; Phone: (406) 444-2944; TTY: (406) 444-4687; Fax: (406) 444-7336; or E-mail: agr@state.mt.us.

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

4.12.402 PENALTIES (1) remains the same.
(2) In determining if a feed is in violation when the analytical result of a nutrient exceeds the action level, the department will consider whether the feed is intended or represented as a principle source of nutrition for that nutrient.
(a) This section will be applied effective July 1, 2002.

AUTH: 80-9-103 and 80-9-303, MCA
IMP: 80-9-303, MCA

REASON: Some feeds contain insignificant amounts of nutrients that according to uniform labeling standards must be reported. However, these nutrients are not intended to be or represented to be the principle source of the nutrient in the animal diet. In these cases, it is not the intent of the department to penalize for such minor discrepancies of inconsequential nutrients. This amendment clarifies that deficiencies of such insignificant nutrients may not be considered a violation.

4.12.404 SIGNIFICANCE OR GRAVITY OF A VIOLATION (1) through (1)(i) remain the same.

(j) label violations that result in the actual or potential failure of a commercial feed to perform according to claims may increase a penalty. Examples of such label violations include deficiency in any ingredient or composition of ingredients represented by the label, misleading, incomplete or incorrect label directions, or misbranding; ~~and~~

(k) a violation that results in condemnation or destruction due to adulteration or other inability to utilize a feed for its intended purpose may be cause for increasing a penalty~~.~~ ; and

(l) the amount of deviation as a result of official analytical results from an official sample beyond the action level as compared to the guaranteed claim may increase or decrease the penalty, respective to the amount of the deviation.

(i) This subsection will be applied effective July 1, 2002.

AUTH: 80-9-103 and 80-9-303, MCA
IMP: 80-9-303, MCA

REASON: This amendment will specifically list that the feed nutrient analysis may be considered in determining the significance or gravity of a violation. Currently, analytical results are not specifically listed as a consideration when the department is determining the appropriate civil penalty. This amendment will allow the department to adjust the civil penalty to coincide with the significance of the violation.

4. The proposed new rule provides as follows:

RULE I ANALYTICAL ACTION LEVELS (1) This rule establishes the action levels as stated in (5).

(2) These action levels, as compared to the guaranteed claim, will be used to determine when a feed or nutrient is considered to be adulterated as defined by 80-9-204(13), MCA.

(3) These action levels will be used by the department when assessing the appropriate enforcement action/civil penalty for an adulterated feed.

(4) Violations may occur solely by one nutrient within an official feed sample exceeding the action level and not meeting the guaranteed claim of that feed nutrient.

(5) Action levels are as follows:

Determination	Analytical Variances (AV%)	Deviation allowed below a minimum guaranteed claim	Deviation allowed above a maximum guaranteed claim
Moisture	12	*	1 AV

Crude protein	20/x + 2	2 AV's	*
NPN equiv	80/x + 3	*	2 AV's
Crude fat	10	2 AV's	*
Crude fiber	30/x + 6	2 AV's**	2 AV's
Calcium	10	2 AV's	2 AV's
Phosphorus	3/x + 8	2 AV's	*
Salt	15/x + 9	2 AV'S	2 AV's
Magnesium	20	35%	*
Potassium	15	25%	*
Sodium	20	30%	30%
Selenium	25	40%	*
Zinc	20	35%	*
Iron	25	40%	*
Iodine	40	45%	*
Copper	30	40%	*
Vitamin A	30	45%	*

x = % guarantee
* no action level established
** applies only to rabbit feeds

(6) This rule will be effective July 1, 2002.

AUTH: 80-9-103 and 80-9-204, MCA
IMP: 80-9-303, MCA

REASON: In December 2000, rules were adopted for the issuance of civil penalties for adulteration of a commercial feed. The definition by statute of an adulterated feed is "its composition or quality falls below or differs from the composition or quality that is purported or represented to possess by its labeling." Currently, a standard does not exist that quantifies at what level a feed's quality "falls below or differs." These action levels will give the Montana Department of Agriculture and the feed industry a standard by which to quantify adulteration from analytical results.

The Montana Department of Agriculture has worked closely with the Montana Feed Association and with animal nutritionists for the past year to determine action levels that are fair to the feed industry and to the consumers, as well as being nutritionally effective for the animal. Action levels apply only when a nutrient does not satisfy the claim for said nutrient on the label guarantee.

Analytical variances (AV) as published by the Association of American Feed Control Officials (AAFCO), were used as guidelines in developing these action levels. The AAFCO AV's were derived from the AAFCO Collaborative Check Sample Program. The AAFCO Collaborative Check Sample Program compares the data of over 200 laboratories and checks the accuracy of approved laboratory methodology. An AV is established from the numbers collected for each nutrient and is considered the accuracy of measurement for that nutrient.

For example, to calculate the action level (AL) on a lot of feed that had a guarantee of 16% protein claimed on the label, the AL for protein is two times the analytical variance calculation of 20% divided by the guarantee (16%) plus 2%, ((20%÷16%)+ 2% = 3.25%). The AL is twice this or 6.5%. This AL calculation is multiplied times the guarantee (16 x 6.5% = 1.04%) that is then subtracted from the guarantee (16 – 1.04% = 14.96%). This gives the amount that the result of an analytical lab test must be larger than or the lab result has exceeded the AL.

The delayed effective date is to allow the feed industry the opportunity to make necessary changes concerning its compliance with these new procedures for evaluating and reporting analytical results. Beginning July 1, 2002, all official feed samples and their respective analysis results will be evaluated using the proposed action levels.

5. Concerned persons may submit their data, views or arguments concerning this proposed action in writing to Gregory H. Ames at the Montana Department of Agriculture, 303 N. Roberts, P.O. Box 200201, Helena, MT 59620-0201; Fax: (406) 444-7336 or E-mail: agr@state.mt.us. Any comments must be received no later than February 14, 2002.

6. If persons who are directly affected by the proposed action wish to express their data, views and arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments they have to Gregory H. Ames at the Montana Department of Agriculture, P.O. Box 200201, Helena, MT 59620-0201; Phone: (406) 444-2944; TTY: (406) 444-4687; Fax: (406) 444-7336 or E-mail: agr@state.mt.us. A written request for hearing must be received no later than February 14, 2002.

7. If the agency receives requests for a public hearing on the proposed action from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed action; from the appropriate administrative rule review committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 70 persons based on 700 commercial feed manufacturers.

8. The Department of Agriculture 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 which includes the name and mailing address of the person to receive notices and specifies that the person wishes to

receive notices regarding noxious weed seed forage, noxious weeds, alfalfa seed, agriculture in Montana schools program, agriculture development, pesticides, warehouseman, produce, feed, fertilizer, mint, seed, alternative crops, wheat research and marketing, rural development and/or hail. Such written request may be mailed or delivered to Montana Department of Agriculture, 303 N. Roberts, P.O. Box 200201, Helena, MT 59620-0201; Fax: (406) 444-7336; or E-mail: agr@state.mt.us or may be made by completing a request form at any rules hearing held by the Department of Agriculture. All department rulemaking notices and adoptions may be reviewed at the Department of Agriculture's website at www.agr.state.mt.us.

9. The bill sponsor notice requirements of 2-4-302, MCA apply and have been fulfilled.

DEPARTMENT OF AGRICULTURE

/s/ W. Ralph Peck
Ralph Peck
Director

/s/ Tim Meloy
Tim Meloy, Attorney
Rule Reviewer

Certified to the Secretary of State January 7, 2002.

**BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION
OF THE STATE OF MONTANA**

In the matter of the proposed adoption of new rule I cooperative driver testing program and the amendment of ARM 10.13.307 through 10.13.313 pertaining to traffic education	NOTICE OF PUBLIC HEARING ON THE PROPOSED ADOPTION AND AMENDMENT OF RULES

TO: All Concerned Persons

1. On February 11, 2002 at 10:00 a.m. a public hearing will be held in the Lewis and Clark County Library, 120 South Last Chance Gulch at Helena, Montana, to consider the adoption and the amendment of the above stated rules relating to traffic education.

2. The Office of Public Instruction 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, contact the Office of Public Instruction no later than 5:00 p.m. on January 28, 2002 to advise us of the nature of the accommodation that you need. Please contact David Huff, P.O. Box 202501, Helena, MT 59620-2501, telephone: (406)444-4396, TDD number: (406)444-0235, FAX: (406)444-1373.

3. The proposed new rule provides as follows:

NEW RULE I COOPERATIVE DRIVER TESTING PROGRAM

(1) The department of justice may authorize public school districts conducting a traffic education program approved by the superintendent of public instruction to administer to the district's traffic education students required standardized knowledge and road tests and to certify the test results to the department of justice, provided that:

(a) the school district completes, signs, and submits an "Intent to Participate" affidavit to the motor vehicle division of the department of justice;

(b) each of the school district's teachers who teach all or part of the district's traffic education curriculum:

(i) is approved under this chapter as a traffic education teacher;

(ii) has attended and successfully completed a cooperative driver testing program training class conducted by the department of justice; and

(iii) has completed, signed, and submitted an "Instructor Compliance Affidavit"; and

(c) the school district and its traffic education teachers administer the program as outlined in the cooperative driver testing program plan prepared by the department of

justice, motor vehicle division.

(2) The school district's cooperative driver testing program shall be subject to review by the department of justice. The department of justice may terminate the district's authorization to participate as a cooperative driver testing school district or a teacher's cooperative driver testing program credentials if the department of justice's review indicates habitual, intentional or negligent non-compliance by agents of the school district and/or the traffic education teacher.

AUTH: Sec. 20-7-502, MCA
IMP: Sec. 61-5-110, MCA

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

10.13.307 PROGRAM REQUIREMENTS (1) An approved traffic education program for ~~student~~ young novice drivers ~~must~~ shall:

(a) be provided only by public school districts operating a junior high school or high school~~.~~ or by a non-public junior high school or high school accredited by the Montana board of public education;

(b) be for students who are 15 years old or older, or who will reach their 15th birthday within six months of course completion~~.~~;

(c) be taught by a teacher(s) of traffic education approved by the superintendent of public instruction~~.~~;

(d) be based on a curriculum guide, or guides, readily available for ~~perusal~~ review from the superintendent of public instruction or traffic education staff. A student must meet the minimum performance objectives identified by the local school district in order to be considered as having successfully completed the program~~.~~;

(e) be scheduled so that a sufficient number of courses are provided to allow every eligible youth within the school's geographic jurisdiction an equitable opportunity to enroll~~.~~;

(f) consist of at least 60 hours of structured learning experiences:

(i) scheduled over no less than 20 student-contact days~~.~~;

(ii) beginning September 1, 2002, scheduled over no less than 21 student-contact days;

(iii) beginning September 1, 2003, scheduled over no less than 23 student-contact days;

(iv) beginning September 1, 2004, scheduled over no less than 25 student-contact days; and

(v) including no fewer than ~~These learning experiences must include at least~~ six hours of behind-the-wheel, in-traffic driving instruction; and

(vi) effective September 1, 2002, including no fewer than six hours of behind-the-wheel, in-traffic driving instruction scheduled over no less than six student-contact days;

(g) to meet the requirements in (1)(f):

(i) ~~T~~twelve hours of simulation may be substituted for two hours of behind-the-wheel instruction for those schools having traffic simulator equipment approved by the office of public instruction~~.~~;

(ii) up to 12 of the 60 hours required hereunder may be satisfied by in-vehicle observation of an approved teacher instructing another novice driver;

~~(g)~~ (h) provide behind-the-wheel instruction only to students who are currently participating in classroom instruction. All traffic education program phases must be conducted ~~concurrently.~~ using concurrent or integrated scheduling;

~~(h)~~ (i) use only dual-control vehicles that are equipped according to standards established by the superintendent of public instruction~~.~~;

~~(i)~~ (j) have property and liability insurance sufficient to protect the school, teachers, students, the public, the vehicle(s), and its owner~~.~~;

~~(j)~~ (k) use the office of public instruction form entitled "School/Dealer Vehicle Use Agreement" (form TE02) or the school's equivalent form when a traffic education loan vehicle is procured from a vehicle dealer~~.~~; and

(l) complete all reports and documents required by the office of public instruction and the department of justice, motor vehicle division in the time frames required.

(2) Remains the same.

(3) A school's failure to comply with the program requirements outlined herein shall be grounds for the superintendent of public instruction to deny or revoke the approval of the school's traffic education program application.

(4) As used in this rule, the following definitions apply:

(a) "Concurrent scheduling" means scheduling the traffic education program without an interruption of instruction between classroom instruction and behind-the-wheel instruction;

(b) "Equitable" means treating all eligible students fairly and without bias in the notification, enrollment, and class administration procedures associated with traffic education;

(c) "Integrated scheduling" means scheduling the traffic education program to include a blend of classroom instruction and associated behind-the-wheel instruction during the duration of the traffic education course.

AUTH: Sec. 20-7-502, MCA
IMP: Sec. ~~20-7-503~~ 20-7-502, MCA

10.13.308 APPLICATION PROCEDURES (1) A public school district or eligible non-public school ~~must~~ shall apply for and receive approval annually from the superintendent of public instruction ~~for the district's traffic education program for student drivers before the program begins to be eligible for~~

~~state reimbursement~~ in order to provide, and prior to commencing, a young novice driver education program. Public school districts eligible for public funding shall apply and receive approval from the superintendent of public instruction prior to starting a young novice driver education program in order to be eligible for state reimbursement from the state traffic education fund.

(2) To obtain approval for a traffic education program, a school district ~~must~~ or eligible non-public school shall complete and submit to the superintendent of public instruction an "~~School District~~ Application for Approval of a Traffic Education Program(s) for ~~Student~~ Young Novice Drivers~~.~~" (form TE01). This application form ~~can~~ may be obtained from the superintendent of public instruction's traffic education specialist. Following action by the superintendent of public instruction, ~~one~~ a copy of the application ~~will~~ shall be returned to the school district, or eligible non-public school, showing the approval status. All necessary forms and materials ~~will~~ shall be forwarded at this time.

(3) The traffic education teacher(s) teaching the program ~~must~~ shall have approval issued by the superintendent of public instruction on or before the beginning date of the program in order for the school district or eligible non-public school to commence a traffic education program for young novice drivers, or for public school districts to be eligible for state reimbursement.

AUTH: Sec. 20-7-502, MCA
IMP: Sec. ~~20-7-503~~ 20-7-502, MCA

10.13.309 REIMBURSEMENT ~~PROCEDURES~~ TO PUBLIC SCHOOL DISTRICTS (1) The administrative official of the eligible public school district ~~or county high school must~~ shall submit a "Traffic Education Program Reimbursement Request" (a certified list of pupils who have completed a state-approved traffic education program) on or before July 10 for all students who completed at least 50% of the program during the preceding fiscal year.

(2) Reimbursement per student ~~is~~ shall be based on ~~course~~ the completion of at least 50% of the classroom portion and 50% of the behind-the-wheel portion of the course, and minimum age requirements. Reimbursement per student ~~is~~ shall be paid whether the student passed or failed the course.

(3) On or before August 31 of each year, the superintendent of public instruction ~~will~~ shall disburse to the eligible public school districts ~~and county high schools~~ the amount of traffic education reimbursement money to which they are entitled based on the number of students listed on the reimbursement forms and on the money available for reimbursement in the state traffic education account.

(4) Traffic education reimbursements received by eligible public school districts must be deposited in the district's traffic education fund and shall only be expended for traffic education related expenses.

(5) State reimbursement for traffic education shall not be issued to public school districts that provide traffic education with unapproved teachers or operate a traffic education program not in compliance with Montana statutory and administrative law.

AUTH: Sec. 20-7-502, MCA
IMP: Sec. ~~20-7-503~~ 20-7-502, 20-7-507, 20-9-510, MCA

10.13.310 TRAFFIC EDUCATION TEACHERS (1) All teachers of traffic education ~~must~~ shall have:

(a) a valid Montana teaching certificate~~.~~;

(b) approval as a teacher of traffic education issued by the superintendent of public instruction. Approval to teach traffic education shall be renewed with each renewal of the teacher's teaching certificate~~.~~;

(c) a minimum of ~~12~~ eight semester or 12 quarter hours of credit course work in traffic safety education. This ~~12~~ eight or 12-hour block must include a ~~basic and advanced traffic education~~ driver task analysis (classroom instruction) and behind-the-wheel (developing vehicle operational skills) course. For each succeeding renewal of the teacher's teaching certificate, after initial approval, the teacher must accumulate four semester or six quarter hours of qualifying credit course work in traffic safety education, until such time as an endorsable minor, or its equivalent (20 semester or 30 quarter qualifying credits), has been completed~~.~~;

(d) a valid ~~Montana~~ driver's license~~.~~; and

(e) a ~~(~~local, state and national~~)~~ driving record free from ~~repeated collision experiences and traffic law violations within the previous two years~~ all of the following:~~.~~

(i) more than one moving traffic conviction within any 12 month period of the previous 36 months;

(ii) any alcohol related traffic conviction within the preceding 36 months;

(iii) any driver's license suspension, cancellation, revocation or denial within the preceding five years;

(iv) any involvement in any fatal traffic accident during the previous five years resulting in:

(A) a conviction of a crime; or

(B) the imposition of civil liability;

(v) a declaration of habitual traffic offender status pursuant to 61-11-201 et seq., MCA.

(2) For the purposes of this rule, "conviction" includes, but is not limited to, entry of a guilty plea, "per se" convictions, pleas of "no contest" or similar pleas.

(3) If a teacher's approval to teach traffic education has expired and the teacher has not met the renewal requirements of (1)(c), the teacher may request an extension for approval to teach traffic education, subject to the following:

(a) A one-time, one-year emergency extension of approval may be granted for a teacher who received initial approval but who has not been able to complete the required four semester or

six quarter traffic education credits for re-approval. The public school district or eligible non-public school shall submit a letter to the office of public instruction stating it has advertised for a traffic education teacher and that no qualified individuals were available to teach. In addition, the teacher for whom the school is seeking an emergency interim approval shall submit to the office of public instruction a plan outlining how the teacher will satisfy the required coursework within the one-year extended period.

(b) A one-time, extenuating circumstance extension of approval may be granted for a period up to two years. The district and teacher shall submit the same documentation required in (2)(a). In addition to the above documentation, the teacher shall submit a statement of a compelling reason why coursework deficiencies cannot be completed within one year, and shall assure the office of public instruction that the teacher will complete the traffic education minor, or its equivalent, within the extension period.

(c) If other traffic education teachers are available to the school district, no emergency or extenuating circumstance extensions shall be granted. Both such extensions are contingent upon the other renewal requirements, including a valid driver's license, an approvable driving record and successful renewal of the teacher's Montana teaching certificate.

(4) A teacher's failure to maintain the requirements for traffic education teacher approval constitutes grounds for the immediate revocation of the approval to teach traffic education. Any revocation of approval may be appealed to the deputy superintendent of public instruction within 30 days of the date of the notice of revocation of approval. The deputy superintendent shall review the revocation and either confirm or reverse the revocation. The deputy superintendent's decision is final.

AUTH: Sec. 20-7-502, MCA
IMP: Sec. ~~20-7-503~~ 20-7-502, MCA

10.13.311 TRAFFIC EDUCATION VEHICLES (1) and (2) remain the same.

(a) Required equipment:

(i) dual-control brake capable of bringing the vehicle to a complete emergency stop;

(ii) all current federal motor vehicle safety standards (FMVSS);

(iii) two exterior mirrors and~~/or an instructor's~~ a teacher's rearview mirror;

(iv) first aid kit with contents appropriate for possible minor injuries sustained during instruction;

(v) flares or reflector warning devices;

(vi) periodically inspected and operable fire extinguisher located in the passenger compartment;

(vii) accident report forms; and

(viii) operable safety belts for each occupant. All

occupants shall utilize a safety belt at any time the vehicle is in motion.

(b) Recommended equipment:

(i) power steering and power brakes;

(ii) split or bucket type front seat;

(iii) four-door sedan;

(iv) air conditioning;

(v) tow cable;

(vi) shovel, ax and bucket;

(vii) flashlight;

(viii) rear window defogger; and

(ix) ignition cut-off switch.

(c) The vehicles assigned for use in the traffic education program shall be kept in a safe operating condition. Maintenance and repair practices ~~should~~ shall be in conformance with manufacturer's recommendations and with the policy established by the school district and participating dealer. Vehicles shall be given a periodic safety inspection by a knowledgeable person. The periodic inspection shall be conducted a minimum of once a year and prior to the annual commencement of behind-the-wheel instruction. The district shall maintain and make available for review by the office of public instruction, or its designee, a record of the safety inspections, which include:

(i) the date of the inspection;

(ii) items inspected;

(iii) condition of items inspected; and

(iv) repairs made.

(d) and (e) remain the same.

(f) "Exempt" license plates shall be obtained for a traffic education vehicle owned by, or provided to the district by a dealer. "Dealer" license plates are not to be used on these vehicles. Responsibility for securing ~~an~~ exempt license plates rests with the school district. The school must obtain the appropriate application from the county treasurer. In the space provided for registered owner, type the name and telephone number of the school district and the name of the dealer providing the vehicle.

(g) Each practice-driving vehicle (including motorcycles) must be covered by an amount of insurance that meets or exceeds minimum requirements of local and state financial responsibility statutes.

(h) ~~The most~~ A common method for procuring practice driving vehicles is a school/dealer use agreement between the school or school district and a cooperative automobile dealer or dealer group. Each school district must use the form entitled "School/Dealer Vehicle Use Agreement" (form TE02) or its equivalent. This agreement form is self-explanatory and can be obtained by writing to Traffic Education Programs, Office of Public Instruction, ~~State Capitol~~ P.O. Box 202501, Helena, MT 59620-2501.

(i) If several dealers express a desire to provide practice-driving vehicles on a loan basis, the school district should either accept an equal number of vehicles from each

dealer or should apply an annual rotation plan worked out with the dealer group or the local vehicle dealers association.

(i) remains the same but is renumbered (j).

AUTH: Sec. 20-7-502, MCA
IMP: Sec. ~~20-7-503~~ 20-7-502, MCA

10.13.312 STUDENT ENROLLMENT (1) The trustees of any district operating a public junior high school or high school may establish and maintain a traffic education course for ~~pupils enrolled in the secondary schools in the districts or county high schools~~ students within the district's geographic jurisdiction, provided that students enrolled in the course will have reached their 15th birthday within six months ~~or~~ of course completion. The district shall not be reimbursed for students completing the course at a younger age.

AUTH: Sec. 20-7-502, MCA
IMP: Sec. ~~20-7-503~~ 20-7-502, MCA

10.13.313 LEARNER LICENSE (1) All students enrolled in the traffic education program and receiving behind-the-wheel instruction ~~must~~ shall have in their immediate possession a valid Montana traffic education permit, a valid Montana traffic education learner license, a valid Montana instruction permit or a valid Montana driver license as prescribed in Title 61, chapter 5 of the Montana Code Annotated (MCA).

(a) A traffic education permit (TEP, also known as a restricted instruction permit or RIP) is authorized and prescribed in 61-5-106, MCA. It is valid from the date of issue until course completion as indicated by the expiration date, provided ~~that the student is accompanied by~~ an approved traffic education ~~instructor~~ teacher accompanies the student while driving. These permits are issued to the school district by the local driver examiner when presented official office of public instruction approval for the current year. These permits shall not be given to the student, but shall be kept by the traffic education teacher and carried with the teacher in the car when the student is receiving behind-the-wheel instruction.

(b) A traffic education learner license (TELL) is authorized and prescribed in 61-5-106(2), MCA. It allows a student to ~~legally~~ practice drive~~ing~~ only with a licensed parent or guardian or a qualified traffic education ~~instructor~~ teacher. It does not allow the student to practice drive~~ing~~ with any other licensed driver. This license can only be obtained while the student is successfully participating in, or has successfully completed, a state-approved traffic education program. ~~It is valid for only six months from the date of purchase of receipt and is issued directly by the Montana highway patrol division providing:~~

(2) A TELL may be obtained:

(a) through the local driver license exam office of the motor vehicle division of the department of justice, provided:

(i) the respective school district personnel authorizes the student to apply for the license by placing his/her name on the ~~gold~~ "Student List" form ~~entitled "Traffic Education Notice of Successful Participation"~~ (TE04) and transmits the ~~original and duplicate to the county treasurer. If the county treasurer does not sell driver licenses, receipts should be transmitted directly to the local driver examiner's office~~ student list, along with the "Certification" form (TE03) signed by the appropriate school district personnel to the local driver license exam office;~~.~~

(ii) Remains the same.

(iii) the student presents the completed, notarized application and receipt~~s~~ for payment of the permit with proof of identity, ~~date of~~ certified birth certificate, proof of residency, and social security number ~~(optional)~~ to the examiner. The permit is valid for six months from the date of the receipt;

(iv) and (v) remain the same.

(vi) the student successfully completes all parts of the driver license examination other that the driving test~~.~~; or

(b) through a public school district participating in the cooperative driver testing program (CDTP) provided:

(i) the student is at least 14 and one-half years of age and is enrolled in an approved traffic education program participating in the CDTP;

(ii) the student presents to the CDTP school district the completed, notarized application with proof of identity, certified birth certificate, proof of residency, and social security number;

(iii) the student successfully completes an eye exam and written knowledge test through the CDTP school district as authorized by the department of justice, motor vehicle division. The permit is valid for six months from the date of successful completion of the written exam; and

(iv) the respective CDTP school district personnel places the student's name on the "Student List" form (TE04) with an indication of a waiver for the knowledge test, and transmits student list, along with the "Certification" form (TE03) signed by the appropriate school district personnel to the local driver license exam office within three days of issuance of the TELL to the student.

AUTH: Sec. 20-7-502, MCA
IMP: Sec. ~~20-7-503~~ 20-7-502, MCA

Statement of Reasonable Necessity: The Office of Public Instruction (OPI) proposes the amendments to these rules and the adoption of New Rule I to fulfill the legislative requirement of 20-7-504, MCA, which, among other things requires OPI to establish basic traffic education course requirements; establish traffic education teacher qualifications; establish criteria for traffic education course approval; and promulgate policy for the distribution of traffic education funds. These particular amendments and the

adoption of New Rule I are proposed at this time for the following reasons:

a) In 1995 the Montana Legislature adopted the Cooperative Driver Testing Program (CDTP) as a joint venture of the Department of Justice and OPI (61-5-110, MCA). Because of this venture, several amendments to existing rules and a new rule are necessary to bring OPI's administrative rules into compliance with and provide guidance to the implementation of this statutory law.

b) Several existing rules lacked clarity or specificity to represent accurately what has been the historical statutory interpretation and policy of OPI. For example, the rules do not accurately reflect the historical interpretation of statute and resulting OPI policy that only public high school and junior high school districts and non-public high schools and junior high schools accredited by the Montana Board of Education are eligible to apply for and receive approval to teach a traffic education program.

c) Several existing rules are too vague to administer and do not reflect current best practices. For example, no specific criteria currently define an acceptable driving record for a traffic education teacher to be qualified to teach. Also, the consequences of driving under the influence of alcohol are not addressed.

d) Other amendments are made to the rules to incorporate changes suggested by educational research, which amendments will provide a better opportunity to the student for a more useful and thorough acquisition of knowledge and skills for safer driving. An example is the proposal to require, by 2004, 25 student contact days rather than 20 and to require that the behind-the-wheel portion of the program be provided over no less than six contact days, eliminating the potential of providing all the behind-the-wheel training in one or two long road trips. Current national standards recommend that classroom instruction be given over no less than 45 days and that behind-the-wheel instruction include no more than 60 minutes of driving per day. See American Driver and Traffic Safety Education Association (ADTSEA) 2000, Traffic safety education life long learning process: Delivery of driver education. Highway Safety Center, Indiana University of Pennsylvania.

The amendments also include the requirement that OPI approve traffic simulator equipment used in traffic education programs. There are many computer simulation programs on the market, but an approvable simulator must have an appropriate driving station, which is similar to a car seat and driver controls, and it must "reproduce driving situations likely to occur in actual driving performance on the street which require the student to evaluate risk, make decisions and responses applicable to the situation presented." (ADTSEA, 2000)

5. Concerned persons may present their data, views or arguments, either orally or in writing, at the hearing.

Written data, views or arguments may also be submitted by mail to the Office of Public Instruction, Traffic Education Division, P.O. Box 202501, Helena, Montana 59620-2501, or by e-mail to opirules@state.mt.us and must be received no later than 5:00 p.m. on February 14, 2002.

6. Jeffrey A. Weldon, OPI Chief Legal Counsel, has been designated to preside over and conduct the hearing.

7. The Office of Public Instruction 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 which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding Office of Public Instruction rulemaking actions or other school related rulemaking actions. Such written request may be mailed or delivered to Legal Division, Office of Public Instruction, P.O. Box 202501, Helena, Montana 59620-2501, faxed to the office at (406) 444-2893, or may be made by completing a request form at any rules hearing held by the Office of Public Instruction.

8. The bill sponsor requirements of 2-4-302, MCA, apply and have been fulfilled. The requirements of 20-1-501, MCA, have been fulfilled. Copies of these rules have been sent to all tribal governments in Montana.

/s/ Linda McCulloch
Linda McCulloch
State Superintendent
Office of Public Instruction

/s/ Jeffrey A. Weldon
Jeffrey A. Weldon
Rule Reviewer
Office of Public Instruction

Certified to the Secretary of State January 7, 2002.

**BEFORE THE FISH, WILDLIFE AND PARKS COMMISSION
OF THE STATE OF MONTANA**

In the matter of the amendment of ARM 12.3.402 pertaining to refunding of the 2-day resident fishing license	)	NOTICE OF PROPOSED AMENDMENT
	)	NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons

1. On February 18, 2002, the Fish, Wildlife and Parks Commission (commission) proposes to amend ARM 12.3.402 which pertains to refunding of the 2-day resident fishing license.

2. The commission will make reasonable accommodations for persons with disabilities who wish to participate in the rule making process and need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m. on January 29, 2002, to advise us of the nature of the accommodation that you need. Please contact Karen Dimmitt, Fish, Wildlife and Parks, 1420 East Sixth Ave, P.O. Box 200701, Helena, MT 59620-0701; Telephone (406) 444-0130, fax (406) 444-4952.

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

12.3.402 LICENSE REFUNDS (1) No refund will be issued for any hunting, fishing, or trapping license sold by the department except as provided in (1)(a) through (e) of this rule. The department will review all applicable information in evaluating requests.:

(a) and (b) remain the same.

(c) A a resident who has purchased a conservation, bear, deer, elk, bird, or fishing license may request a refund by returning the license to the Helena or regional office at the time of application for a combination license. A resident who purchases a two-day fishing license may request a refund by returning the license to the Helena or regional office at the time of application for a season fishing license. A nonresident who has purchased a conservation, season bird, season fishing or deer license may request a refund by returning the license to the Helena office at the time of application for a nonresident big game combination license. A nonresident who has purchased a conservation, season bird or season fishing license may request a refund by returning the license to the Helena office at the time of application for a nonresident deer or elk only combination license;

(d) remains the same.

(e) Eexcept for refunds under (1)(a), (b), and (c), nonresident combination license holders may receive a license

refund according to the following schedule, provided the nonresident certifies that the license was not used:

(i) through (ii)(A) remain the same.

(B) ~~I~~if the license holder is landowner sponsored and lack of success in drawing a permit eliminates opportunity to use the license, the amount retained by the agency will be $50, provided the request is postmarked on, or prior to, October 1~~.~~;

(iii) ~~N~~no refund will be issued after the opening of the general big game hunting season~~.~~;

(f) ~~F~~for the purpose of considering refunds, any license ordered by mail shall be considered sold when the department receives a valid application~~.~~;

(g) through (g)(ii) remain the same.

AUTH: 87-1-301, MCA
IMP: 87-1-301, MCA

4. Beginning on March 1, 2002, Montana residents will be able to purchase a two-day fishing license. The commission requested that the department provide a mechanism to allow two-day resident license purchasers to upgrade to a season license by applying the fee paid for two days of fishing toward the season license. This rule revision is necessary to provide that opportunity.

5. Concerned persons may submit their data, views or arguments concerning the proposed amendment in writing to Karen Zackheim, 1420 East Sixth Avenue, P.O. Box 200701 Helena, MT 59620-0701, or email them to kzackheim@state.mt.us. Any comments must be received no later than February 15, 2002.

6. If persons who are directly affected by the proposed amendment wish to express their data, views and arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments they have to Karen Zackheim, 1420 East Sixth Avenue, P.O. Box 200701 Helena, MT 59620-0701. A written request for hearing must be received no later than February 15, 2002.

7. If the department receives requests for a public hearing on the proposed action from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed action; from the appropriate administrative rule review committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 25 persons based on an estimated 250 people purchasing a resident two-day license in a license year.

8. The department maintains a list of interested persons who wish to receive notice of rulemaking actions proposed by this department. Persons who wish to have their name added to the list shall make written request which includes the name and mailing address of the person to receive the notice and specifies the subject or subjects about which the person wishes to receive notice. Such written request may be mailed or delivered to Fish, Wildlife and Parks, Legal Unit, P.O. Box 200701, 1420 East Sixth Avenue, Helena, MT 59620-0701, faxed to the office at (406) 444-7456, or may be made be completing the request form at any rules hearing held by the department.

9. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

By: /s/ Dan Walker
Dan Walker, Chairman
Fish, Wildlife and Parks
Commission

By: /s/ John F. Lynch
John F. Lynch
Rule Reviewer

Certified to the Secretary of State January 7, 2002.

BEFORE THE DEPARTMENT OF FISH, WILDLIFE AND PARKS OF THE STATE OF MONTANA

In the matter of the proposed adoption of new rules I and II and amendment of ARM 12.9.802 pertaining to the issuance of supplemental game damage licenses to hunters in lieu of kill permits	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION AND AMENDMENT

TO: All Concerned Persons

1. The Department of Fish, Wildlife and Parks (department) will hold public hearings to consider the adoption of new rules I and II and amendment of ARM 12.9.802 pertaining to the issuance of supplemental game damage licenses to hunters in lieu of kill permits. The hearing dates and places are as follows:

February 7, 2002, 7 p.m.
Fish, Wildlife and Parks
Headquarters Commission Room
1420 East Sixth Avenue
Helena, MT

February 11, 2002, 7 p.m.
Fish, Wildlife and Parks
Region 5 Headquarters
2300 Lake Elmo Drive
Billings, MT

February 12, 2002, 7 p.m.
Fish, Wildlife and Parks
Region 4 Headquarters
4600 Giant Springs Road
Great Falls, MT

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, contact the department no later than 5:00 p.m. on January 29, 2002, to advise us of the nature of the accommodation that you need. Please contact Shelly Juvan, Fish, Wildlife and Parks, 1420 East Sixth Avenue, P.O. Box 200701, Helena, MT 59620-0701; telephone (406) 444-2602, fax (406) 444-3023.

3. The proposed new rules provide as follows:

<u>NEW RULE I MANAGEMENT SEASONS</u> (1) When an additional harvest is required to fulfill the department's responsibility to manage game populations according to available habitat,

management seasons may be initiated. Management seasons will be initiated utilizing the same procedures followed by the department and fish, wildlife and parks commission to adopt seasonal rules adopted annually or biennially relating to hunting, 2-4-102, MCA.

AUTH: 2-4-102, 87-1-301, MCA
IMP: 2-4-102, 87-1-301, MCA

NEW RULE II SUPPLEMENTAL GAME DAMAGE LICENSES (1) To assist landowners who qualify for game damage assistance under the provisions of 87-1-225, MCA, the department, through the regional supervisor or designated staff, has the discretion to issue supplemental game damage licenses for antlerless animals to hunters, as an alternative to a kill permit being issued to a landowner. Criteria used to determine when to issue a supplemental game damage license include, but are not limited to, the following:

(a) the number of animals to be killed does not exceed 12;

(b) the animals causing the damage are present on the property during legal hunting hours;

(c) the circumstances make a game damage hunt under ARM 12.9.801 impractical; and

(d) hunting is likely to be an effective way to remove animals causing damage.

(2) The department will specify the number of licenses to be issued, the species to be hunted, the time period in which the license may be lawfully used, and the property or properties where the licenses may be used. The time period for which a supplemental game damage license is issued may be extended by the department.

(3) When the department authorizes the use of a supplemental game damage license, the landowner experiencing the game damage, subject to the provisions of 87-2-520, MCA, may designate some or all of the resident hunters to receive the supplemental game damage licenses by mailing or delivering in person a list of names, on a signed form provided by the department, to the department regional office, local biologist, or local game warden in the region where the game damage is occurring.

(4) When the department must designate resident or nonresident supplemental game damage license recipients, selection will be made using procedures defined in ARM 12.9.801(1)(b)(ii) through (iv).

(5) In order to receive an elk supplemental game damage license, a hunter must surrender to the department any unused valid elk license and special elk permit, if applicable, prior to the supplemental elk game damage license being issued.

(a) if the hunter surrenders to the department an unused valid elk license, there will be no charge for the elk supplemental game damage license and no refund will be issued for the surrendered license and permit. If the hunter has not

purchased an elk license, the price will be the regular license price or an adjusted price set by the commission; and

(b) the department may only issue an elk supplemental game damage license to a nonresident who holds and surrenders a valid, unused B-10 elk license and special elk permit, if applicable. The department will not charge for the elk supplemental game damage license and no refund will be issued for the surrendered license and permit.

(6) Hunters hunting with supplemental game damage licenses are subject to Montana hunting laws and regulations.

(7) Regional supervisor will notify the commissioner in whose district damage is occurring whenever supplemental game damage licenses are authorized for issuance.

AUTH: 87-2-520, MCA
IMP: 87-2-520, MCA

4. The rule as proposed to be amended provides as follows:

12.9.802 ~~MANAGEMENT SEASONS~~ GAME DAMAGE ~~(1) When an additional harvest is required to fulfill the department's responsibility to manage game populations according to available habitat, management seasons may be initiated.~~

~~(2)~~(1) By law, the department is required to respond to all big game damage complaints. General hunting seasons are the primary tool to deal with animals causing or having the potential to cause game damage.

~~(3)~~(2) The department investigates damage complaints as soon as possible, and within 48 hours of the filing of the complaint. If the department person who received the complaint is unable to respond within 48 hours, he will immediately refer the complaint to the nearest department employee who can respond within a 48-hour period. Exceptions may be made if complainant is agreeable to a longer waiting period~~;~~.

~~(4)~~(3) The department of fish, wildlife and parks investigates all damage complaints under this policy with the exception of ~~(5)~~(4). A phone call or on-site visit constitutes an immediate response under this provision.

~~(5)~~(4) Damage caused by nongame, furbearing, or federally listed threatened and endangered species is not covered by this policy, but is addressed on a case-by-case basis.

~~(6)~~(5) In response to legitimate damage complaints, a regional supervisor may address the problem in the following ways:

(a) ~~Special seasons. S~~special seasons may be used under the following conditions:

(i) during the time period of August through February;

(ii) when reasonable hunter access is available to allow for harvest of problem animals;

(iii) when there are enough animals involved to justify public hunting; and

(iv) when the game damage is a recurring problem, and animals are normally unavailable during the general hunting season~~.~~;

(b) ~~Herding. As a temporary measure,~~ herding may be employed as a temporary measure;

(c) ~~Dispersal. A~~ a variety of animal dispersal methods may be employed, such as airplanes, snowmobiles, cracker shells and scareguns;

(d) ~~R~~repellents~~.~~ such as ~~B~~bloodmeal ~~and other repellents~~ may be employed as temporary solutions;

(e) ~~Fencing. If the problem is chronic and involves haystacks, various~~ fencing options may be utilized if the problem is chronic and involves haystacks:

(i) ~~Permanent stackyards. In cases where records show haystack damage occurs annually,~~ stackyards may be used as a permanent solution in cases where records show haystack damage occurs annually. The department will furnish the property owner with posts and wire. It is the landowner's responsibility to construct the fence and to provide proper maintenance. In situations where stackyards enclose several acres, particularly those surrounding round bales, permanent stackyards may not be the most desirable treatment of the problem;

(ii) ~~Electric fencing. In situations where a large area is being used for a stackyard, such as round bale storage,~~ electric fencing may be the most feasible solution in situations where a large area is being used as a bale stackyard such as round bale storage. The department will provide the charger and fencing materials. On the initial installation, the department will assist in setting up the fence. The storage and care of this equipment is the responsibility of the rancher, and with proper care, materials should last three years. If game damage does not recur in succeeding winters, the department will pick up the charger for use in other areas;

(iii) ~~Snowfence. I~~if a haystack has straight sides, a 4 or 6 ~~ft.~~ foot snowfence works well~~, or i~~. I~~n~~ the case of elk, 8 ~~ft.~~ foot panels may be used. It is reasonable to assume the snowfence or panels will last for a minimum of three winters if properly cared for. Rolling and storage are the rancher's responsibility. Depending upon the size of the area and availability, the department will furnish the snowfence or panels, and the property owner will be responsible to put it up, take it down, and provide maintenance;

(iv) ~~I~~it will be the responsibility of the landowner to store materials furnished by the department in a manner consistent with proper care, with reasonable wear expected. A signed agreement with the landowner will record any planned actions and serve as a receipt for any materials that are provided. These agreements will be sent to the individuals. Fence fabric shall be returned to the department when it is ~~not~~ no longer needed for protection from wildlife damage. Materials will be replenished when reasonable wear makes them ineffective;

(f) ~~Kill permits. A~~a kill permit may be considered to be the best immediate solution and may be activated without first exhausting any of the previously mentioned methods. Authorization for kill permits ~~are~~ is issued by regional supervisors~~.~~;

(g) the department, through the regional supervisor or designated staff, has the discretion to issue supplemental game damage licenses for antlerless animals to hunters as an alternative to a kill permit being issued to a landowner. Supplemental game damage license administrative procedures are outlined in [New Rule II];

~~(g)~~(h) ~~In special situations,~~ netting or mechanical devices may be used to reduce tree damage; and

~~(h)~~(i) ~~Hunting methods: When rifle hunting poses a threat to the safety and welfare of persons or property, use of~~ archery, shotgun and/or muzzle loader weapons may be used as an alternative hunting method when rifle hunting poses a threat to the safety and welfare of persons or property.

~~(7)~~(6) ~~Denial of assistance.~~ Assistance may be denied or discontinued to a landowner who:

(a) creates or further contributes to game damage problems by not providing sufficient public hunting to aid in reduction of game populations;

(b) imposes other restrictions which prevent adequate harvests; or

(c) refuses reasonable suggestions, actions or remedies offered by the department. The decision to deny or terminate assistance will be made by the regional supervisor. Denial or discontinuance of assistance will be documented with the reasons, history and other pertinent information used to make that decision. A copy of the written decision will be provided to the landowner. The written decision will explain appeal rights.

~~(8)~~(7) ~~Appeal process.~~

~~(a)~~ A landowner may appeal the denial or discontinuance of assistance to the director of the department. The appeal must be in writing and must contain specific reasons why the regional supervisor's decision is felt to be erroneous. The appeal must be filed within 10 days following receipt of a denial or discontinuance determination from the regional supervisor~~;~~.

~~(b)~~ (a) The director of the department will review the information used by the regional supervisor in making the initial determination and the reasons cited by the landowner for appealing the decision. At the director's discretion, the commission may be asked to review the appeal and make recommendations for the decision. Following the review, a final decision will be rendered by the director.

AUTH: 87-1-225, MCA
IMP: 87-1-225, MCA

5. The substantive amendments to ARM 12.9.802 and the adoption of new rule II are being proposed to implement

legislation passed in the 2001 session. The Montana Legislature passed SB 437 to allow issuance of supplemental game damage licenses to hunters as an alternative to issuing kill permits to landowners in certain game damage situations. SB 437 also created authority for landowners to designate some or all of the resident recipients of supplemental game damage licenses.

Since SB 437 created a new license (supplemental game damage licenses) and provided new authority for how the license will be administered, it is necessary for the department to adopt rules that define the administrative process for issuing the license. The department wants to define these procedures in rule rather than policy so that the public can participate fully in the process and the procedures that are implemented are established in law.

New rule I is being proposed to alleviate confusion within the ARM rules. ARM 12.9.802 deals with game damage issues. However, the title of the rule and the first section of the rule deal with management seasons. Having language that clarifies how management seasons are set within a rule that is primarily a game damage rule has resulted in confusion. The department is proposing separating the management season language into a separate rule that clarifies that management seasons are set in the same way as the normal hunting regulations, by annual or biennial rule. Also, formatting amendments to ARM 12.9.802 are proposed as this rule contained internal catch phrases which are not permitted under ARM 1.2.215. The department has deleted those phrases in the rule amendment to comply with formatting requirements.

6. Concerned persons may present their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to Alan Charles, Fish, Wildlife and Parks, P.O. Box 200701, Helena, MT 59620-0701, telephone (406) 444-3798, fax (406) 444-3023, e-mail acharles@state.mt.us, and must be received no later than February 22, 2002.

7. Paul Sihler or another hearings officer has been designated to preside over and conduct the hearings.

8. The department maintains a list of interested persons who wish to receive notice of rulemaking actions proposed by this department. Persons who wish to have their name added to the list shall make written request which includes the name and mailing address of the person to receive the notice and specifies the subject or subjects about which the person wishes to receive notice. Such written request may be mailed or delivered to Fish, Wildlife and Parks, Legal Unit, P.O. Box 200701, 1420 East Sixth Avenue, Helena, MT 59620-0701, faxed to the office at (406) 444-7456, or may be made be completing the request form at any rules hearing held by the department.

9. The bill sponsor notice requirements of 2-4-302, MCA apply and have been fulfilled.

By: /s/ M. Jeff Hagener
M. Jeff Hagener
Director

By: /s/ Rebecca Dockter Engstom
Rebecca Dockter Engstrom
Rule Reviewer

Certified to the Secretary of State January 7, 2002

**BEFORE THE FISH, WILDLIFE AND PARKS COMMISSION
OF THE STATE OF MONTANA**

In the matter of the adoption of a new rule regulating the use of snowmobiles on open, public water	))))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION

TO: All Concerned Persons

1. The Fish Wildlife and Parks Commission (commission) will hold public hearings to consider the adoption of a new rule regulating the use of snowmobiles on open, public water. The hearing dates and places are as follows:

**February 12, 2002, 7 p.m.
AOH Hall
106 Cherry Street
Anaconda, MT**

**February 19, 2002, 7 p.m.
Region 4 Headquarters
460 Giant Springs Road
Great Falls, MT**

2. The commission 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, contact the department no later than 5:00 p.m. on January 29, 2002, to advise us of the nature of the accommodation that you need. Please contact Gerri Payne, Fish, Wildlife and Parks, 1420 East Sixth Ave, P.O. Box 200701, Helena, MT 59620-0701; Telephone (406) 444-2414, fax (406) 444-4952.

3. The proposed new rule provides as follows:

<u>NEW RULE I SNOWMOBILES ON PUBLIC WATERS</u> (1) All public waters within the state of Montana are closed to snowmobile operation.

(2) Snowmobiles may cross or enter upon public water if the water is frozen or it is necessary to cross a small stream to continue travel on snow. When it is necessary to cross a stream, the stream crossing must be perpendicular to the flow of the stream.

**AUTH: 23-1-106, 87-1-301, 87-1-303, MCA
IMP: 23-2-501, 87-1-303, MCA**

4. On July 8, 2001, an individual drowned on Newlan Creek Reservoir while operating a snowmobile on open water when the individual's craft slowed and sank into the reservoir. This individual could not swim and was not wearing

a personal flotation device. The Commission believes that the health and safety of other individuals engaging in this activity is at risk and believes that adoption and enforcement of this rule may reduce some of the hazards associated with this activity.

5. Concerned persons may present their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to John Ramsey, Fish, Wildlife and Parks, 1420 East Sixth Ave, P.O. Box 200701, Helena, MT 59620-0701; telephone (406) 444-4726, fax (406) 444-4952 or use the web comment forum at www.fwp.state.mt.us, and must be received no later than February 22, 2002. To use the web comment forum, after entering the website, select comments, and then select enforcement in the category section

6. Rebecca Dockter Engstrom has been designated to preside over and conduct the hearings.

7. The department maintains a list of interested persons who wish to receive notice of rulemaking actions proposed by this department. Persons who wish to have their name added to the list shall make written request which includes the name and mailing address of the person to receive the notice and specifies the subject or subjects about which the person wishes to receive notice. Such written request may be mailed or delivered to Fish, Wildlife and Parks, Legal Unit, P.O. Box 200701, 1420 East Sixth Avenue, Helena, MT 59620-0701, faxed to the office at (406) 444-7456, or may be made be completing the request form at any rules hearing held by the department.

8. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

By: /s/ M. Jeff Hagener
M. Jeff Hagener, Secretary
Fish, Wildlife and Parks
Commission

By: /s/ Rebecca Dockter Engstrom
Rebecca Dockter Engstrom
Rule Reviewer

Certified to the Secretary of State January 7, 2002

**BEFORE THE FISH, WILDLIFE AND PARKS COMMISSION
OF THE STATE OF MONTANA**

In the matter of the amendment of ARM 12.7.801, 12.7.802, 12.7.803, 12.7.804, 12.7.805, 12.7.806, 12.7.807, and 12.7.808 pertaining to fishing contest regulations	)))))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. The Fish, Wildlife and Parks Commission (commission) will hold public hearings to consider the amendment of ARM 12.7.801, 12.7.802, 12.7.803, 12.7.804, 12.7.805, 12.7.806, 12.7.807, and 12.7.808 pertaining to fishing contest regulations. The hearings dates and places are as follows:

**February 6, 2002, 7 p.m.
Fish, Wildlife and Parks
Region 6 Headquarters
Rural Route 1 - 4210
Glasgow, MT**

**February 7, 2002, 7 p.m.
Fish, Wildlife and Parks
Region 5 Headquarters
2300 Lake Elmo Drive
Billings, MT**

**February 11, 2002, 7 p.m.
Fish, Wildlife and Parks
Region 2 Headquarters
3201 Spurgin Road
Missoula, MT**

2. The commission 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, contact the department no later than 5:00 p.m. on January 29, 2002, to advise us of the nature of the accommodation that you need. Please contact Karen Dimmitt, Fish, Wildlife and Parks, 1420 East Sixth Ave, P.O. Box 200701, Helena, MT 59620-0701; telephone (406) 444-0130, fax (406) 444-4952.

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

12.7.801 DEFINITION (1) "Fishing contest" is~~, except as otherwise specifically noted,~~ any event, contest, derby or tournament where an entry fee is charged ~~and~~ or where ~~30 or more~~ people are expected to~~, or do in fact,~~ compete to win

prizes or cash ~~worth $200 or more,~~ based on the capture of an individual fish or combination of fish. Fishing contests involving fewer than 30 people with cash prizes or merchandise worth less than $500 do not require a permit but must comply with the provisions of this subchapter.

AUTH: 87-3-121~~(2)~~, MCA
IMP: 87-3-121~~(2)~~, MCA

12.7.802 APPLICATION (1) Any individual, club, organization or business wishing to sponsor a fishing contest on a body of water open to public fishing must submit an application to the department of fish, wildlife and parks as specified in this rule. ~~at least 180 days but not more than 365 days prior to the scheduled date of the contest.~~

(2) Applications must be submitted between September 1 and October 1 for open water contests proposed for the following March 1 through December 1.

(a) applications for benefit fundraising contests received later than October 1 may be accepted.

(3) Applications must be submitted between May 1 and June 1 for ice fishing contests proposed for the following December 1 through March 1.

(a) applications for benefit fundraising contests received later than June 1 may be accepted.

(4) Contest sponsors must provide evidence that they have approval to use each fishing access site not under the ownership or control of the department that is listed in the application.

(5) Contest sponsors are responsible for public safety, trash removal and restroom facilities at department access sites during the duration of the contest.

(6) Contest sponsors must require all participants' boats and trailers to be cleaned and inspected prior to the start and at the conclusion of the contest to prevent transport and introduction of aquatic nuisance species.

AUTH: 87-3-121~~(2)~~, MCA
IMP: 87-3-121~~(2)~~, MCA

12.7.803 EVALUATION AND RECOMMENDATION (1) The department will evaluate the application based on the following criteria: ~~set out in (2).~~

~~(2) The department will consider:~~

(a) ~~I~~impacts of the contest on the fish population of the host body of water, the aquatic ecosystem and the immediate area~~.~~;

(b) ~~C~~compatibility of the contest with fisheries management objectives for the water~~.~~;

(c) ~~P~~purse or participation limits (limits may or may not be imposed depending upon public comments received or potential conflict with other users)~~.~~;

(d) ~~C~~conflicts with other contests proposed ~~or approved~~ for a body of water~~.~~;

(e) ~~C~~compliance with ~~information~~ contest rules, conditions or reporting requirements for previously sponsored contests~~.~~;

(f) environmental conditions (such as relevant historic high water temperatures) and compatibility of check-in format with successful release of live fish for catch and release contests; and

(g) contest boundaries.

~~(3)~~ (2) The department will provide an opportunity for public comment on each application by giving public notice of the application.

AUTH: 87-3-121~~(2)~~, MCA
IMP: 87-3-121~~(2)~~, MCA

12.7.804 COMPETING APPLICATIONS (1) When two or more contests are proposed on a single body of water the department will approve applications which have less impact on resources and offer the best opportunities for public benefits by furthering knowledge of angling ethics and aquatic ecology. The department may request that applicants competing for a permit on the same or consecutive weekends resolve conflicts and allocate limited dates among themselves. ~~More than one contest will be allowed on overlapping dates if the department determines that natural resources will not be adversely affected. Modifications to be required by the department will be discussed with the applicant prior to the department's final action.~~

AUTH: 87-3-121~~(2)~~, MCA
IMP: 87-3-121~~(2)~~, MCA

12.7.805 DEPARTMENT DECISION (1) Within 90 days of receipt of ~~an~~ all application~~s~~, the department will issue a decision. The department may approve the application~~s~~ as submitted, approve the application~~s~~ with modifications or deny one or more of the application~~s~~. When an application is approved with modifications, the applicant must respond to the department, or the commission if an appeal is made under ARM 12.7.809, ~~at least~~ within ~~10~~ 20 days of receipt of the department's decision ~~prior to the scheduled date of the contest~~ that the modifications are acceptable. Failure to do so will constitute withdrawal of the application.

(2) An application may be denied if in the opinion of the department any of the following are found to exist:

(a) ~~T~~the contest will have detrimental impacts on fish populations, the aquatic ecosystem or the surrounding area~~.~~;

(b) ~~T~~the contest would conflict with management goals for the host water~~.~~;

(c) ~~T~~the contest conflicts with other proposed contests or intended uses of the host water~~.~~;

(d) ~~T~~the proposed contest would be held during a period of heavy recreational use on the host body of water, increasing the likelihood of conflicts with other users~~.~~; and

(e) there is significant public opposition to the proposed contest based on biological or recreational conflict concerns.

(3) Conditions may be placed on contests to minimize fish mortality in catch and release contests, regulate harvest, or reduce user conflicts. Tournament boundaries will be defined as necessary to reduce fish mortality or recreational conflict.

(4) Contests may not be scheduled and approved for consecutive weekends on any body of water less than 100,000 surface acres in size.

(5) Contests may not be scheduled on holiday weekends, including but not limited to Memorial Day, Fourth of July and Labor Day.

~~(3)~~(6) The department will notify the applicant ~~and all persons submitting comment~~ of its decision by mail. The department shall notify the public and all persons submitting comments with an announcement released to all major state newspapers and/or through notice published on the department website.

AUTH: 87-3-121~~(2)~~, MCA
IMP: 87-3-121~~(2)~~, MCA

12.7.806 REPORTING REQUIREMENTS (1) Within ~~thirty~~ 30 days after an approved fishing contest, the sponsor shall report to the department, on forms provided, the number of participants, the total number of fish caught, the length and weight of the winning fish, or the average length and aggregate weight of the winning fish, and the number of fish caught and released. The department may require more detailed catch information.

AUTH: 87-3-121~~(2)~~, MCA
IMP: 87-3-121~~(2)~~, MCA

12.7.807 PROHIBITED CONTESTS (1) All ~~C~~contests involving harvest of any Montana listed species of special concern or any of the following Montana species are prohibited ~~of special concern are prohibited, regardless of the value of any prize and regardless of any entry fee~~:

(a) ~~W~~wild trout (~~Salmo~~ Onchorynchus or Salvelinus) ~~in streams~~;

(b) ~~N~~native rainbow trout (~~Salmo gairdneri~~ Onchorynchus mykiss);

(c) ~~B~~bull trout (Salvelinus confluentus);

(d) ~~S~~sturgeon chub (Hybopsis gelida);

(e) ~~S~~sicklefin chub (Hybopsis meeki);

(f) ~~W~~white sturgeon (Acipenser transmontanus);

(g) ~~P~~pallid sturgeon (Scaphirhynchus albus);

(h) ~~P~~paddlefish (Polyodon spathula);

(i) Yellowstone cutthroat trout (~~Salmo~~ Onchorynchus clarki bouvieri);

(j) ~~W~~westslope cutthroat trout (~~Salmo~~ Onchorynchus clarki

lewisi) - includes upper Missouri cutthroat trout;
(k) Aarctic grayling (Thymallus arcticus);
(l) Sshortnose gar (Lepisosteus platostomus);
(m) Ppearl dace (Semotilus margarita);
(n) Nnorthern redbelly dace (Phoxinum eos)/ x finescale dace (P. neogaeus);
(o) Ttrout-perch (Percopsis omiscomaycus);
(p) Sshorthead sculpin (Cottus confusus); and
(q) Sspoonhead sculpin (Cottus ricei); and
(r) sauger (Stizostedion canadense).
(2) Catch-and-release tournaments with weigh-in formats are prohibited during the warm water period of July 1 through September 15.

AUTH: 87-3-121(2), MCA
IMP: 87-3-121(2), MCA

12.7.808 WAIVER (1) Upon a showing of good cause, the department may waive the application of any rule except where waiver is precluded by statute.
(2) During approved catch-and-release fishing contest hours, fish caught for contest purposes and released alive by contest participants are not considered legally taken.

AUTH: 87-3-121(2), MCA
IMP: 87-3-121(2), MCA

4. The commission is proposing the fishing contest rule amendments to generally update the rules and to provide a waiver for catch-and-release contest participants from the daily possession limits. The revised rule addresses problems of language interpretation and angler use conflict resolution that has increased over time because of the growing numbers of fishing contests. The proposed revisions will improve the department's review and approval process, facilitate public involvement, reduce user conflicts, provide additional protection for species of special concern, and exempt catch-and-release contest participants from the daily possession limits during contest hours.
The underlining of the scientific species names in ARM 12.7.807, is not new and will remain in the rule after it is finalized.

5. Concerned persons may present their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to Karen Zackheim, Fish, Wildlife and Parks, 1420 East Sixth Ave, P.O. Box 200701, Helena, MT 59620-0701; telephone (406) 444-3301, fax (406) 444-4952, or email at kzackheim@state.mt.us and must be received no later than February 15, 2002.

6. John F. Lynch, 1420 East Sixth Avenue, P.O. Box 200701, Helena, MT 59620-0701 has been designated to preside over and conduct the hearings.

7. The department maintains a list of interested persons who wish to receive notice of rulemaking actions proposed by this department. Persons who wish to have their name added to the list shall make written request which includes the name and mailing address of the person to receive the notice and specifies the subject or subjects about which the person wishes to receive notice. Such written request may be mailed or delivered to Fish, Wildlife and Parks, Legal Unit, P.O. Box 200701, 1420 East Sixth Avenue, Helena, MT 59620-0701, faxed to the office at (406) 444-7456, or may be made be completing the request form at any rules hearing held by the department.

8. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

By: /s/ Dan Walker
Dan Walker, Chairman
Fish, Wildlife and Parks
Commission

By: /s/ John F. Lynch
John F. Lynch
Rule Reviewer

Certified to the Secretary of State January 7, 2002.

**BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA**

In the matter of the amendment of ARM 17.53.102, 17.53.105, 17.53.107, 17.53.111, 17.53.112, 17.53.113, 17.53.208, 17.53.301, 17.53.402, 17.53.502, 17.53.602, 17.53.802, 17.53.902, 17.53.1002, 17.53.1202, 17.53.1301 and 17.53.1303 pertaining to management of hazardous wastes	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT (HAZARDOUS WASTE)

TO: All Concerned Persons

1. On February 14, 2002, at 1:00 p.m., a public hearing will be held in the downstairs conference room, Department of Commerce Building, 1424 9th Avenue, Helena, Montana, to consider the proposed amendment 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, contact the Department no later than 5:00 p.m., February 7, 2002, to advise us of the nature of the accommodation you need. Please contact the Department at P.O. Box 200901, Helena, Montana, 59620-0901; phone (406) 444-2544; fax (406) 444-4386; or email "bomartin@state.mt.us".

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

17.53.102 SCOPE OF RULES (1) and (2) remain the same.

(3) Injection wells that dispose of hazardous waste are not subject to the permitting requirements of this chapter but may be subject to regulation by the EPA.

(a) Injection wells that are used to dispose of hazardous waste are subject to the permit-by-rule requirements of 40 CFR 270.1(c)(1)(i) and 270.60(b), and the owner or operator must have a permit issued by EPA under the underground injection control program to the extent the permit is required by 40 CFR 144.14.

(b) ~~However, where~~ Where surface facilities that treat, store, or dispose of hazardous waste are associated with injection wells, such associated surface facilities are subject to the permitting requirements of this chapter.

AUTH: 75-10-405, MCA
IMP: 75-10-405, MCA

17.53.105 INCORPORATION BY REFERENCE (1) and (2) remain the same.

(3) When incorporated by reference in this chapter, references to 40 CFR 124 and 40 CFR 260 through 270, 273, or 279 refer to the version of that publication revised as of July 1, ~~1999~~ 2001. References in this chapter to 40 CFR 124 and 40 CFR 260 through 270, 273, or 279 that incorporate publications refer to the version of the publication as specified at 40 CFR 260.11. 40 CFR 60, Appendix A, methods ~~10-5~~ 1-5, are also incorporated by reference.

(4) through (7) remain the same.

AUTH: 75-10-405, MCA
IMP: 75-10-405, MCA

17.53.107 SUBSTITUTION OF STATE TERMS FOR FEDERAL TERMS

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

(e) "Environmental protection agency" or "EPA" means the Montana department of environmental quality, except for:

(i) any references to "EPA form", "EPA identification number", "EPA hazardous waste number", "EPA publication", "EPA acknowledgement of consent"; and

(ii) any reference to EPA in 40 CFR 273.32(a)(3).

(f) through (l) remain the same.

(m) "State", "authorized state", "approved state", and "approved program" mean Montana, except at:

(i) 40 CFR 124.2 in the definitions of "director", "interstate agency", "person", and "state";

~~(i)~~ (ii) 40 CFR 260.10 in the definitions of "person", "state", and "United States";

~~(ii)~~ (iii) 40 CFR 262;

~~(iii)~~ (iv) 40 CFR 264.143(e)(1); 265.143(d)(1); 264.145(e)(1); 265.145(d)(1); 264.147(a)(1)(ii), (b)(1)(ii), (g)(2), and (i)(4); and 265.147(a)(1)(ii), (g)(2) and (i)(4); and

~~(iv)~~ (v) 40 CFR 270.2 in the definitions of "approved program" or "approved state", "director", "final authorization", "person", and "state".

~~(n) "United States" means the state of Montana.~~

(2) through (4)(j) remain the same.

(k) 40 CFR 262, subpart H;

(k) through (m) remain the same but are renumbered (l) through (n).

~~(n) 40 CFR 270.5;~~

(o) 40 CFR 270.10(e)(2) and (4);

(p) 40 CFR 270.10(f) and (g);

(o) through (s) remain the same, but are renumbered (q) through (u).

(5) In 40 CFR 263, as adopted and incorporated by reference in this chapter, the terms "EPA", "United States", and "administrator" have the same meaning as in the federal regulation, except in 40 CFR 263.22(e) "director of the Montana department of environmental quality" is substituted for "administrator".

AUTH: 75-10-405, MCA
IMP: 75-10-405, MCA

17.53.111 REGISTRATION AND EPA IDENTIFICATION NUMBERS FOR GENERATORS AND TRANSPORTERS (1) remains the same.

(a) The phrase "large generator" means the same as "generator" as used in 40 CFR 260 through 279. A "large generator" is a generator of hazardous waste who is not either a "small generator" or "conditionally exempt small quantity generator" as defined below, or who generates at any time in a calendar month, or accumulates at any time:

(i) and (ii) remain the same.

(b) A "small generator" is a generator of hazardous waste who generates in a calendar month between 100 kilograms (220 pounds) and 1000 kilograms (2200 pounds) of hazardous waste~~;~~.

(i) The phrase "small generator" means the same as "small quantity generator" as used in 40 CFR 260 through 279.

(c) remains the same.

(2) A generator shall register with the department by submitting an application on a form (EPA form 8700-12, Notification of Regulated Waste Activity) provided by the department or EPA.

(a) The department's receipt of EPA form 8700-12 initiates the registration process. Registration is complete when the department receives the registration fee required by ARM 17.53.113.

(b) The department shall assign an EPA identification number, if appropriate, upon receipt of a completed EPA form 8700-12.

~~(3) Upon receiving a completed application form and payment of the registration fee as required by ARM 17.53.113, the department shall register the generator for the current registration year, and shall assign an EPA identification number to the generator if one has not yet been assigned.~~

(4) through (7) remain the same, but are renumbered (3) through (6).

AUTH: 75-10-204, 75-10-404, 75-10-405, MCA
IMP: 75-10-204, 75-10-212, 75-10-214, 75-10-221 and 75-10-405, MCA

17.53.112 FACILITY PERMIT FEES: APPLICATION, RENEWAL, MODIFICATION AND MAINTENANCE FEES (1) through (3) remain the same.

(4) The department shall assess a permit modification fee for all permit modifications, at the time the modification process is initiated, regardless of whether the modification is requested by the permittee or initiated by the department.

(a) The fee shall be as follows:

(i) ~~$1,500~~ $3000 for Class 2 or 3 modifications as listed in 40 CFR 270.42, Appendix I, except that, if a Class 2 or 3 modification is so significant as to constitute reissuance of a permit, the fee schedule set forth in (3) of this rule applies in lieu of the ~~$1,500~~ $3000 fee;

(ii) remains the same.

(A) ~~$100~~ $200 for those Class 1 modifications listed in items A through E of Appendix I; and

(B) ~~$500~~ $1000 for those Class 1 modifications listed in items F through L of Appendix I.

(b) through (5) remain the same.

AUTH: 75-10-404, 75-10-405, 75-10-406, MCA
IMP: 75-10-405, 75-10-406, MCA

17.53.113 REGISTRATION FEES: FEE EXEMPTION, FEE ASSESSMENT, AND MAINTAINENCE OF REGISTRATION (1) An annual registration fee must be submitted to the department by each generator registered pursuant to ARM 17.53.111.

(1) and (2) remain the same, but are renumbered (2) and (3).

(4) The registration fee is based on the actual amount of hazardous waste generated during the previous calendar year and is an administrative fee of $95 plus $1 per ton of regulated hazardous waste generated. The $1 per ton fee is not assessed if the amount of regulated hazardous waste generated is less than 13.0 tons.

(a) For generators who generate regulated hazardous waste in a calendar year but are not registered in the next calendar year (one-time generators), the registration fee is based on the actual amount of hazardous waste generated during that registration year.

(5) Annually, the department shall provide each hazardous waste generator required to pay an annual registration fee with written notice of the amount of the fee and the basis for the fee assessment.

(a) Fees will be assessed to:

(i) generators registered as of January 1 of the calendar year in which fees are billed;

(ii) generators the department received a completed EPA form 8700-12 from as of January 1 of the calendar year in which fees are billed, but who did not complete the registration process by January 1 of the calendar year in which fees are billed.

(6) If a generator assessed a registration fee fails to pay the required fee within 60 days after the billing date, the department may impose a late payment charge of 10% of the fee, plus interest on the fee computed at the interest rate established under 75-2-220(5)(a)(i), MCA.

~~(3) The department shall use the following methods to assign each generator who is subject to registration to one of five size classes for the purpose of fee assessments:~~

~~(a) for generators who have been registered in previous years, the department shall use the annual reports submitted pursuant to ARM 17.53.603, for up to a maximum of the three most recent reporting years, to determine an average (mean) annual hazardous waste generation rate;~~

~~(b) for new generators who have not been registered in previous years, the department, after consultation with the~~

~~generator, shall determine the generator's projected annual hazardous waste generation rate.~~

~~(4) The size classes for determining the annual registration fee amount are defined in Table 1 below:~~

~~TABLE 1~~

~~Annual Generation Size Class~~	~~Annual Rate (in tons)~~	~~Generator Reg. Fee~~
~~I Small/Large~~	~~X ≤ 13~~	~~$ 75~~
~~II Large~~	~~13 < X ≤ 100~~	~~$ 200~~
~~III Large~~	~~100 < X ≤ 1000~~	~~$ 600~~
~~IV Large~~	~~1000 < X ≤ 2500~~	~~$1000~~
~~V Large~~	~~2500 < X~~	~~$1500~~

~~(5) Generators assigned to a size class for registration fee assessment purposes remain in that size class each registration year until the department determines that assignment to a new class is appropriate based upon:~~

~~(a) an evaluation of recent annual reports under (3)(a) of this rule; or~~

~~(b) the review of a registered generator's petition that documents that waste generation rates have changed and that the changes are projected to be long-term.~~

~~(6) When a generator has allowed its registration to lapse, through the operation of (1) of this rule, it may reinstate its generator registration for the current registration year by paying a $50 reinstatement fee in addition to any other generator registration fee(s).~~

~~(7) Re-registration of generators shall occur at the beginning of each registration year. The Department shall prepare and mail re-registration invoices by February 1st.~~

~~(8) Registration fees are due within 30 days after the billing date. A late payment charge of 10% per month, or a minimum charge of $10, whichever is greater, may be assessed by the department for fee payments not received within 60 days after the billing date.~~

AUTH: 75-10-404, 75-10-405, MCA
IMP: 75-10-405, MCA

17.53.208 PRIVILEGED CONFIDENTIAL BUSINESS INFORMATION

(1) remains the same.

(2) Claims of confidentiality for the name and address of any permit applicant or permittee will be denied.

AUTH: 75-10-405, MCA
IMP: 75-10-405, MCA

17.53.301 DEFINITIONS (1) through (2)(d) remain the same.

(e) "HSWA" means Hazardous and Solid Waste Amendments of 1984.

(f) "HSWA drip pad" means a drip pad associated with F032 waste.

(g) "HSWA tank" means:

(i) a tank owned or operated by a generator of less than 1000 kg (2200 pounds) of hazardous waste per calendar month;

(ii) a new underground tank; or

(iii) an existing underground tank that cannot be entered for inspection.

(e) remains the same, but is renumbered (h).

(i) "New tank system" or "new tank component" means a tank system or component that will be used for the storage or treatment of hazardous waste:

(i) for which installation commenced after July 14, 1986, for HSWA tanks, as defined in (2)(f) of this rule, and June 7, 1989, for non-HSWA tanks, as defined in (2)(j) of this rule; or

(ii) for the purposes of 40 CFR 264.193(g)(2) and 40 CFR 265.193(g)(2), for which construction commenced after January 12, 1987, for HSWA tanks and March 15, 1991, for non-HSWA tanks.

(j) "Non-HSWA drip pad" means a drip pad associated with F034 or F035 waste.

(k) "Non-HSWA tank" means all tanks except:

(i) a tank owned or operated by a generator of less than 1000 kg (2200 pounds) of hazardous waste per calendar month;

(ii) a new underground tank; and

(iii) an existing underground tank that cannot be entered for inspection.

(f) and (g) remain the same, but are renumbered (l) and (m).

AUTH: 75-10-405, MCA
IMP: 75-10-405, MCA

17.53.402 ADOPTION OF FEDERAL PROCEDURES FOR VARIANCES FROM CLASSIFICATION AS A WASTE OR BOILER (1) The department hereby adopts and incorporates by reference the standards, criteria, and procedures for granting variances from classification as a waste or boiler, contained in 40 CFR 260.30 through 40 CFR 260.33~~, with the exception specified below~~.

~~(2) In 40 CFR 260.33(a), the words "in the region where the recycler is located" are not adopted and incorporated by reference.~~

AUTH: 75-10-405, MCA
IMP: 75-10-405, MCA

17.53.502 EXCEPTIONS AND ADDITIONS TO ADOPTION OF FEDERAL STANDARDS FOR IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

~~(1) This subchapter identifies only some of the materials that are hazardous wastes. A material that is not a hazardous waste as identified in this subchapter is still a hazardous waste if, during an inspection under 75-10-410, MCA, the~~

~~department has reason to believe that the material may be a hazardous waste within the meaning of 75-10-403, MCA, or meets the statutory elements of 75-10-415, MCA.~~

(2) through (7) remain the same, but are renumbered (1) through (6).

AUTH: 75-10-204, 75-10-404, 75-10-405, MCA
IMP: 75-10-203, 75-10-204, 75-10-403, 75-10-405, 75-10-602, MCA

17.53.602 EXCEPTIONS AND ADDITIONS TO ADOPTION OF FEDERAL STANDARDS APPLICABLE TO GENERATORS OF HAZARDOUS WASTE (1) 40 CFR 262.12, pertaining to EPA identification numbers, is not adopted and incorporated by reference. ARM 17.53.111 contains Montana requirements regarding registration and EPA identification numbers for generators and transporters.

(1) through (8) remain the same, but are renumbered (2) through (9).

AUTH: 75-10-204, 75-10-404, 75-10-405, MCA
IMP: 75-10-204, 75-10-225, 75-10-405, MCA

17.53.802 EXCEPTIONS AND ADDITIONS TO ADOPTION OF FEDERAL STANDARDS APPLICABLE TO OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE AND DISPOSAL FACILITIES (1) through (4) remain the same.

(5) In 40 CFR 264.77, "annual" is substituted for "biennial".

(5) and (6) remain the same, but are renumbered (6) and (7).

~~(7)~~ (8) In 40 CFR 264.191(a), pertaining to tank integrity assessments, ~~"January 12, 1992"~~ "January 12, 1988, for HSWA tanks, and March 15, 1991, for non-HSWA tanks" is substituted for "January 12, 1988".

~~(8)~~ (9) In 40 CFR 264.191(c), "July 14, 1986, for HSWA tanks, and March 15, 1991, for non-HSWA tanks, must conduct this assessment within 12 months after the date that the waste becomes a state regulated hazardous waste" is substituted for "July 14, 1986, must conduct this assessment within 12 months after the date that the waste becomes a hazardous waste".

~~(9)~~ (10) In 40 CFR 264.193(a)(2), pertaining to the compliance date for providing secondary containment for tanks, ~~"January 12, 1992"~~ "within two years after January 12, 1987, for HSWA tanks, and within two years after March 15, 1991, for non-HSWA tanks" is substituted for "within two years after January 12, 1987".

~~(10)~~ (11) In 40 CFR 264.193(a)(3), pertaining to the compliance date for providing secondary containment for tanks, ~~"January 12, 1992"~~ "within two years after January 12, 1987, for HSWA tanks, and within two years after March 15, 1991, for non-HSWA tanks" is substituted for "within two years after January 12, 1987".

~~(11)~~ (12) In 40 CFR 264.193(a)(4), ~~"within five years of January 12, 1991"~~ "within eight years after January 12, 1987,

for HSWA tanks, and within eight years after March 15, 1991, for non-HSWA tanks is substituted for "within eight years of January 12, 1987"; and "within two years after January 12, 1991," is substituted for "within two years after January 12, 1987".

~~(12)~~ (13) In 40 CFR 264.193(a)(5), "January 12, 1987, for HSWA tanks, and March 15, 1991, for non-HSWA tanks, within the time intervals required in paragraphs (a)(1) through (a)(4) of this section, except that the date that a material becomes a state regulated hazardous waste must be used in place of January 12, 1987, for HSWA tanks, and March 15, 1991, for non-HSWA tanks." is substituted for "January 12, 1987, within the time intervals required in paragraphs (a)(1) through (a)(4) of this section, except that the date that a material becomes a hazardous waste must be used in place of January 12, 1987."

(13) through (15) remain the same, but are renumbered (14) through (16).

~~(16) In 40 CFR 264.316(f), pertaining to fiber drums, "non-metal containers" is substituted for "fiber drums".~~

AUTH: 75-10-404, 75-10-405, 75-10-406, MCA
IMP: 75-10-405, 75-10-406, MCA

17.53.902 EXCEPTIONS AND ADDITIONS TO ADOPTION OF FEDERAL INTERIM STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE AND DISPOSAL FACILITIES (1) through (4) remain the same.

(5) In 40 CFR 265.77, "annual" is substituted for "biennial".

(5) through (7) remain the same, but are renumbered (6) through (8).

~~(8)~~ (9) In 40 CFR 265.191(a), pertaining to the compliance date for providing tank integrity assessments, ~~"January 12, 1992"~~ January 12, 1988, for HSWA tanks, and March 15, 1991, for non-HSWA tanks is substituted for "January 12, 1988".

~~(9)~~ (10) In 40 CFR 265.191(c), pertaining to the compliance date for providing tank integrity assessments, "July 14, 1986, for HSWA tanks, and March 15, 1991, for non-HSWA tanks, must conduct this assessment within 12 months after the date that the waste becomes a state regulated hazardous waste" is substituted for "July 14, 1986, must conduct this assessment within 12 months after the date that the waste becomes a hazardous waste".

~~(10)~~ (11) In 40 CFR 265.193(a)(2), pertaining to the compliance date for providing secondary containment for tanks, ~~"January 12, 1992"~~ "within two years after January 12, 1987, for HSWA tanks, and within two years after March 15, 1991, for non-HSWA tanks" is substituted for "within two years after January 12, 1987".

~~(11)~~ (12) In 40 CFR 265.193(a)(3), pertaining to the compliance date for providing secondary containment for tanks, ~~"January 12, 1992"~~ "within two years after January 12, 1987, for HSWA tanks, and within two years after March 15, 1991, for non-HSWA tanks" is substituted for "within two years after January 12, 1987".

~~(12)~~ (13) In 40 CFR 265.193(a)(4), ~~"within five years of January 12, 1991"~~ "within eight years after January 12, 1987, for HSWA tanks, and within eight years after March 15, 1991, for non-HSWA tanks is substituted for "within eight years of January 12, 1987"; and "within two years after January 12, 1991" is substituted for "within two years of January 12, 1987".

~~(13)~~ (14) In 40 CFR 265.193(a)(5), "January 12, 1987, for HSWA tanks, and March 15, 1991, for non-HSWA tanks, within the time intervals required in paragraphs (a)(1) through (a)(4) of this section, except that the date that a material becomes a state regulated hazardous waste must be used in place of January 12, 1987, for HSWA tanks, and March 15, 1991, for non-HSWA tanks." is substituted for "January 12, 1987, within the time intervals required in paragraphs (a)(1) through (a)(4) of this section, except that the date that a material becomes a hazardous waste must be used in place of January 12, 1987."

(14) through (17) remain the same, but are renumbered (15) through (18).

~~(18) In 40 CFR 265.316(f), "non-metal containers" is substituted for "fiber drums".~~

AUTH: 75-10-404, 75-10-405, MCA
IMP: 75-10-405, 75-10-406, MCA

17.53.1002 EXCEPTIONS AND ADDITIONS TO ADOPTION OF FEDERAL STANDARDS FOR THE MANAGEMENT OF SPECIFIC HAZARDOUS WASTES AND SPECIFIC TYPES OF HAZARDOUS WASTE MANAGEMENT FACILITIES

(1) remains the same.

~~(2) The following is substituted for 40 CFR 266.80(b), pertaining to spent lead acid batteries being reclaimed: "Owners or operators of facilities that store spent lead acid batteries before reclaiming them, other than spent batteries that are to be regenerated, are subject to the following requirements."~~

(3) through (12) remain the same, but are renumbered (2) through (11).

AUTH: 75-10-404, 75-10-405, MCA
IMP: 75-10-405, 75-10-406, MCA

17.53.1202 EXCEPTIONS AND ADDITIONS TO ADOPTION OF FEDERAL PROCEDURES FOR STATE ADMINISTERED PERMIT PROGRAM (1) and (2) remain the same.

~~(3) "Owners and operators of facilities that require a surface water discharge permit under Title 75, chapter 5, MCA, and rules implementing that chapter, and that treat, store or dispose of hazardous waste must obtain a hazardous waste management permit for such facilities." is substituted for 40 CFR 270.1(c)(1), pertaining to the scope of RCRA permit requirements.~~

~~(4) The following is added to the permitting exclusions listed in 40 CFR 270.1(c)(3): "Injection wells that dispose of hazardous waste are not subject to the permitting requirements of this subchapter but may be subject to regulation by EPA. However, where injection wells have associated surface~~

~~facilities that treat, store, or dispose of hazardous waste, such associated surface facilities are subject to the permitting requirements of this subchapter."~~

~~(5) The following is substituted for 40 CFR 270.1(c)(3)(iii): "In the case of an explosives or munitions emergency response, if a federal, state, tribal or local official acting within the scope of official responsibilities, or an explosives or munitions emergency response specialist, determines that immediate removal of the material or waste is necessary to protect human health or the environment, that official or specialist may authorize the removal of the material or waste by transporters who do not have EPA identification numbers and without the preparation of a manifest. In the case of emergencies involving military munitions, the responding military emergency response specialist's organizational unit shall retain records for 3 years identifying the dates of the response, the responsible persons responding, the type and description of material addressed, and its disposition."~~

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

~~(7)~~ (4) 40 CFR 270.5, pertaining to noncompliance ~~in~~ and program reporting by the department, is not adopted and incorporated by reference.

(8) through (11) remain the same, but are renumbered (5) through (8).

(9) In 40 CFR 270.22(a)(1)(i), pertaining to specific part B information requirements for boilers and industrial furnaces, "provisions of sections 266.104(a)(1), 266.104(a)(2), and 266.105 through 107 of this chapter, and paragraphs (a)(3) and (a)(5) of this section" is substituted for "provisions of sections 266.104 through 107 of this chapter, and paragraphs (a)(3) through (a)(5) of this section".

(12) through (19) remain the same, but are renumbered (10) through (17).

~~(20) 40 CFR 270.64, pertaining to interim status for underground injection controls, is not adopted and incorporated by reference.~~

(18) 40 CFR 270.66(g), pertaining to interim status boilers and industrial furnaces, is not adopted and incorporated by reference.

AUTH: 75-10-404, 75-10-405, MCA
IMP: 75-10-405, 75-10-406, MCA

17.53.1301 ADOPTION OF FEDERAL UNIVERSAL WASTE RULE (40 CFR 273) (1) remains the same.

~~(2) For the purposes of this subchapter, the department hereby adopts and incorporates by reference the final rules published at 64 FR 36465 on July 6, 1999, "Hazardous Waste Management System; Modification of the Hazardous Waste Program; Hazardous Waste Lamps", to be codified at 40 CFR 260.10, 261.9, 264.1, 265.1, 268.1, 270.1, and 40 CFR 273 Subparts A, B, C, D, E, and G.~~

AUTH: 75-10-404, 75-10-405, MCA
IMP: 75-10-405, 75-10-406, MCA

17.53.1303 TREATMENT OF ELECTRIC LAMPS (1) A generator of universal waste may treat waste lamps on-site by crushing or intentional breaking~~,~~ only if:

(a) through (c) remain the same.

(d) an operation and maintenance log book, or similar documentation, is maintained and available for inspection; ~~and~~

(e) all crushing, breaking, handling, and storage of treated lamps complies with the mercury limits specified in 29 CFR 1910.1000~~.~~; and

(f) the management of lamps complies with the requirements of 40 CFR 273.13(d) and 273.33(d).

AUTH: 75-10-405, MCA
IMP: 75-10-405, MCA

4. The reason for each proposed amendment is provided below.

a. Proposed Amendments in Response to EPA Comments.

The Department received comments from the Environmental Protection Agency (EPA), dated November 24, 2000, concerning a previous Department rulemaking proceeding in which the Department revised the format of the hazardous waste management rules by, with some specified exceptions, replacing the state rules with incorporation by reference of the comparable federal regulations. The effective date of this change of format rulemaking was January 26, 2001 (2001 MAR, p. 169). Some of EPA's comments were outside of the scope of the rulemaking. The Department is proposing several amendments in this rulemaking to now address EPA's comments. EPA is requiring the Department to make these amendments to preserve program authorization, and the policy of the Montana legislature has been for the state to maintain primacy over environmental protection programs.

The proposed amendments to ARM 17.53.102(3), and 17.53.1202(3) and (4) would clarify that injection wells are not subject to the permitting requirements of ARM Title 17, chapter 53, but are subject to the permit-by-rule requirements of 40 CFR 270.1(c) and 270.60(b). The Department excluded injection wells from state hazardous waste program permitting requirements when the base hazardous waste program rules were adopted in 1983 (1983 MAR, p. 1252). These amendments would clarify that exclusion.

The proposed amendments to ARM 17.53.107 would clarify the substitution of terms necessary to adapt the applicable portions of the Code of Federal Regulations (CFR) to state use in an incorporation by reference format, by establishing cross-reference conventions.

The proposed amendments to ARM 17.53.111 would correlate the state terms "large generator" and "small generator" to the equivalent federal terms "generator" and "small quantity

generator", respectively. These amendments are needed to adapt the applicable portions of the CFR to state use. Also, the process of generator registration would be clarified.

EPA commented that ARM 17.53.208 is less stringent than the comparable federal regulation, 40 CFR 270.12, concerning privileged business information. 40 CFR 270.12(b) states: "Claims of confidentiality for the name and address of any permit applicant or permittee will be denied." ARM 17.53.208 does not include this language. The proposed amendment to ARM 17.53.208 would add this language to make the rule equivalent to 40 CFR 270.12.

The proposed addition of ARM 17.53.301(2)(f), (h), and (j), and the amendment of 17.53.802(7) through (12) and 17.53.902(8) through (13) would clarify the dates by which certain tank systems must have secondary containment, and would substitute the dates of Montana administrative rule adoption for the compliance dates specified in 40 CFR 264.191, 264.193, 265.191, and 265.193. These amendments are necessary to provide notice to the regulated community of the correct compliance dates. The associated amendments to ARM 17.53.301(2) would add definitions for "HSWA tank", "non-HSWA tank", and "new tank system or new tank component", that are necessary to clarify the rules.

The proposed amendments to ARM 17.53.301(2)(e) and (i) would clarify the dates by which HSWA (Hazardous and Solid Waste Amendments of 1984) drip pad leak collection systems must be installed. The associated amendments to ARM 17.53.301(2) would add definitions of "HSWA drip pad" and "non-HSWA drip pad" that are necessary to clarify the rules. These amendments also would substitute the date of Montana adoption of the HSWA drip pad requirement for the federal promulgation date, which is necessary to provide notice to the regulated community of the correct compliance dates.

Proposed new ARM 17.53.602(1) would clarify that Montana uses the requirements of ARM 17.53.111, instead of 40 CFR 262.12, to address the assignment of EPA identification numbers to generators and transporters. This amendment is necessary to correct an inaccuracy in the incorporation by reference structure.

Proposed new ARM 17.53.802(5) and 17.53.902(5) would substitute "annual" for "biennial" in 40 CFR 264.77 and 265.77, respectively, to establish that Montana requires an annual report from facilities. This amendment is necessary to correct an inaccuracy in the incorporation by reference structure.

The proposed deletion of ARM 17.53.802(16) and 17.53.902(18) would remove the substitution of "non-metal containers" for "fiber drums" in 40 CFR 264.316(f) and 265.316(f), respectively. EPA commented that the substitution of these terms makes the Montana program rules less stringent than the comparable federal regulations. Deletion of ARM 17.53.802(16) and 17.53.902(18) is necessary to make the Montana program rules equivalent to the federal regulations.

Proposed new ARM 17.53.1202(9) would substitute new language for a phrase in 40 CFR 270.22(a)(1)(i), to establish the portions of the CFR concerning permitting requirements for

boilers and industrial furnaces that are incorporated by reference in ARM Title 17, chapter 53. This amendment is necessary to correct an inaccuracy in the incorporation by reference structure.

Proposed new ARM 17.53.1202(18) would exclude 40 CFR 270.66(g), concerning interim status for boilers and industrial furnaces, from the incorporation by reference of 40 CFR Part 270. This amendment is necessary to correct an internal inconsistency in the incorporation by reference structure.

The proposed deletion of ARM 17.53.1202(20) is necessary for the Montana program rules to be equivalent to the federal program regulations. EPA commented on April 12, 2001, that: "Montana has excluded 40 CFR 270.64 from its adoption by reference. Thus, its program is less stringent than the Federal program because it excludes injection wells from regulation . . . ." ARM 17.53.1202(20) inappropriately excludes 40 CFR 270.64, concerning interim status for underground injection controls, from incorporation by reference.

The proposed amendments to ARM 17.53.1303(1) are necessary to clarify that state requirements concerning management of lamps do not apply in lieu of the requirements in 40 CFR 273.13(d) and 273.33(d) and ensure that the state and federal programs are coextensive.

b. Proposed Amendments to Update Incorporation by Reference of Current Publications, Revise Program Fees, and Make Clerical Corrections.

The proposed amendments to ARM 17.53.105(3) would update the incorporations by reference by adopting the most recent edition of the CFR and correcting a prior clerical error. The first amendment in this subsection would allow the Department to follow the most recent edition of federal regulations, and thus maintain comity with EPA, to preserve program authorization. The second amendment in this subsection changes "methods 10-5" to "methods 1-5" to correct the reference to the appropriate methods in 40 CFR 60, Appendix A.

The proposed amendments to ARM 17.53.112 would double the permit modification fees. The Department has not increased these fees since they were established in 1993. Since that time, staff time and effort required to process modifications have been greater than originally estimated, and the costs of the Department's hazardous waste program have increased due to inflation. As a result, processing costs associated with permit modifications have at least doubled since 1993. To meet these additional costs, it is necessary for the Department to increase the fees. Pursuant to Section 2-4-302(1), MCA, the financial impact estimate for these amendments is as follows: Four facilities paid a total of $3,800 in calendar year 1999. Four facilities paid a total of $3,600 in calendar year 2000. Because of a data base conversion project, permit modification fees were not tracked in calendar year 2001. The Department estimates that approximately four facilities would pay $7,000 in calendar year 2002.

The proposed amendments to ARM 17.53.113 would delete the hazardous waste registration fee based on size classes, and replace it with an administrative fee of $95 plus a $1 per ton fee for each ton of regulated hazardous waste generated in the previous calendar year. The $1 per ton fee would not be assessed if the amount of regulated hazardous waste generated is less than 13.0 tons. The Department has not increased the amount of these fees since they were established in 1983. As discussed above, since that time, the costs of the Department's hazardous waste program have increased at least twofold due to inflation and the need to hire additional staff to perform the duties necessary to implement the requirements of the Montana Hazardous Waste Act. To meet these additional costs, it is necessary for the Department to increase the fees. Also, the late payment charge would be revised to conform to air quality program fee rule ARM 17.8.505(4)(c). Pursuant to Section 2-4-302(1), MCA, the financial impact estimate for these amendments is as follows: The Department estimates that approximately 150 generators would pay a total of $43,000 in calendar year 2002. 172 generators paid a total of $20,555 in calendar year 2001. The decrease in the number of generators that would pay registration fees in 2002 represents generators of relatively small quantities of regulated hazardous waste. This decrease is not expected to decrease costs of the program.

ARM 17.53.402 excepts the phrase "in the region where the recycler is located" from the incorporation by reference of 40 CFR 260.33(a). The proposed deletion of ARM 17.53.402(2) is necessary because the phrase has been deleted from the federal regulation.

The proposed deletion of ARM 17.53.1002(2) is necessary to remove language that was inadvertently retained in the previous Department rulemaking. The language is from a draft rule concerning reclamation of spent lead acid batteries that was not intended to be retained, and the language serves no purpose.

The proposed deletion of ARM 17.53.1202(5) would remove the unnecessary substitution of a phrase for 40 CFR 270.1(c)(3)(iii). The phrase is a combination of language from 40 CFR 264.1(g)(8)(iv), concerning explosives or munitions emergency response and EPA identification numbers, and from 40 CFR 270.1(c)(3)(iii), concerning responses involving military munitions and record retention. The phrase is redundant to the incorporations by reference in ARM Title 17, chapter 53, subchapters 8 and 12.

The proposed deletion of ARM 17.53.1301(2) would remove the incorporation by reference of a final regulation contained in 64 Federal Register 36465. This regulation is now codified in the July 1, 2001, edition of the CFR that would be incorporated by reference in this rulemaking, making the separate incorporation of the Federal Register notice unnecessary.

The Department is also proposing the following minor editorial revisions that are not intended to change the meaning of the rules: At ARM 17.53.102(3)(b), the proposed removal of "However," is necessary to logically accommodate the insertion of proposed 17.53.102(3)(a). At 17.53.402(1), the proposed

removal of ", with the exception specified below" is necessary due to the proposed deletion of 17.53.402(2).

c. Proposed Amendment Pursuant to Public Comment.

The proposed deletion of ARM 17.53.502(1) would remove a unique state rule concerning identification of hazardous wastes during an inspection by the Department. In the change of format rulemaking (2001 MAR, p. 169), several commentors objected to ARM 17.53.502(1) as an impermissibly broad grant of discretion to hazardous waste inspectors to define hazardous waste on an ad-hoc basis. The Department agrees, to the extent ARM 17.53.502(1) granted inspectors more discretion than provided in 40 CFR 261.1(b). As the Department is now incorporating 40 CFR 261.1(b) by reference at ARM 17.53.501, this provision is redundant.

5. 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 Mark Steger Smith, Legal Unit, Department of Environmental Quality, P.O. Box 200901, Helena, Montana, 59620-0901, no later than February 21, 2002. To be guaranteed consideration, the comments must be postmarked on or before that date. Written data, views or arguments may also be submitted electronically via e-mail addressed to "mssmith@state.mt.us", no later than 5:00, p.m., February 21, 2002.

6. Mark Steger Smith has been designated to preside over and conduct the hearing.

7. 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, Legal Unit, 1520 E. Sixth Ave., P.O. Box 200901, Helena, Montana 59620-0901, faxed to the office at (406) 444-4386, emailed to "ejohnson@state.mt.us" or may be made by completing a request form at any rules hearing held by the Department.

8. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

DEPARTMENT OF ENVIRONMENTAL QUALITY

BY: *Jan P. Sensibaugh*
JAN P. SENSIBAUGH, Director

Reviewed by:

David Rusoff
David Rusoff, Rule Reviewer

Certified to the Secretary of State, January 7, 2002.

**BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA**

In the matter of the amendment of ARM 17.56.105 and 17.56.221 pertaining to variances and issuance of compliance tags and certificates	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT (Underground Storage Tanks)

TO: All Concerned Persons

1. On February 7, 2002, at 10:00 a.m., a public hearing will be held in the Lewis Room East of the Phoenix Building, 2209 Phoenix Drive, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Department will make reasonable accommodations for persons with disabilities who wish to participate in this hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Department no later than 5:00 p.m., January 28, 2002, to advise us of the nature of the accommodation that you need. Please contact Barbara Williams, Remediation Division, Department of Environmental Quality, P.O. Box 200901, Helena, Montana, 59620-0901; phone (406) 444-1420; email bwilliams@state.mt.us, or fax (406) 444-1901.

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

17.56.105 VARIANCES (1) Any person subject to this chapter may request in writing ~~from the department~~ that a variance from any requirement or procedure of this chapter be granted by the department to ~~that person~~ the requestor if ~~that person~~ the request includes ~~requests the~~ approval of an alternate requirement or procedure.

(2) The written request must include the following:

(a) through (c) remain the same.

(d) ~~t~~The reason ~~why~~ the variance is requested; and

(e) ~~t~~The alternate procedure or requirement for which approval is sought and a demonstration that the alternate procedure or requirement provides an equivalent or greater degree of protection for the public health, welfare, safety and environment ~~of persons and the state, including the lands, surface waters, or groundwaters of the state,~~ as the established requirement.~~; and~~

~~(f) A demonstration that the alternate procedure or requirement is at least as effective as the established procedure or requirement.~~

(3) The department shall grant or deny a ~~the requested~~ variance requested in accordance with (1) within 30 days of ~~the~~ receipt of the information required by (2) above. The department ~~shall~~ may only grant the variance if the applicant

proves compliance with the requirements of (2)~~(d) and~~ (e) by substantial evidence.

(4) The department, on its own initiative, may issue a variance from any requirement or procedure of this chapter when noncompliance is discovered as a result of a compliance inspection, immediate compliance is impracticable, and the cost of immediate compliance is disproportionate to the benefit provided.

(a) A variance under (4) may be issued only when the department makes a written determination that delaying compliance does not create a significant increased threat to the public health, welfare, safety and the environment.

(b) A variance issued under (4) may postpone compliance only until the earliest practicable time for replacement or upgrading the facility UST systems as identified in department findings.

(c) The department may define a time period for each variance granted under (4). In no case may a variance be issued under (4) for a term longer than 15 years.

(5) A variance issued under (4) must include the following:

(a) the specific provision of this chapter to which the variance applies;

(b) the time period for the variance; and

(c) any conditions or other procedures, methods or equipment that the department determines are required in order to minimize the risk of release during the term of the variance.

(6) In order to reduce the risk of a release, any variance granted or issued by the department under this rule may be subject to conditions which may include implementation of procedures, methods, and the use of equipment not specifically required by law or rules.

AUTH: 75-10-405, MCA
IMP: 75-10-405, MCA

REASON: The department proposes to amend ARM 17.56.105 to add a department-initiated process for issuing a variance from the requirements of the Montana Underground Storage Tank rules at Title 17, Chapter 56, Administrative Rules of Montana (herein "UST rules" or the "rules"). Additionally, the department proposes to make some minor clarification changes to the existing variance rule.

The proposed amendments to the variance rule include deleting ARM 17.56.105(2)(f). The deleted provision required a demonstration that the alternate procedure or requirement for which a variance is sought is at least as effective as the established procedure or requirement. This information is also required, at ARM 17.56.105(2)(e), to be submitted to the department by the requestor at the time the variance is requested. The deletion of ARM 17.56.105(2)(f) is necessary in order to avoid redundancy in the rules.

The department anticipates that the compliance inspection program will bring to light several areas of non-compliance which, given the large number of affected systems, may be impracticable to correct by the compliance deadlines. The proposed amendments to the variance rule will allow the department to issue a variance on its own initiative when it makes written findings that delaying compliance will not create a significant increased threat to the public health, welfare, safety and environment. Department-initiated variances may postpone compliance only until the earliest practicable time for upgrading or replacing UST systems at the facility, and in no case longer than fifteen years. The department anticipates that most department-initiated variances would be issued for a term of five years or less.

The proposed rule, in most cases, will be used to address classes of noncompliance discovered as a result of compliance inspections. For example, the rule would be used to allow a variance from regulations that require corrosion protection on vent risers and other non-fill-related risers. The earliest practicable time for compliance would occur when other work is done at a facility that would allow costs to be shared, when the equipment or method is replaced or upgraded, or when access to the equipment subject to the variance is facilitated by removal of concrete for another project. The department-initiated variance would allow the department to postpone full compliance in certain situations, based upon written findings, and subject to conditions designed to protect the public health and environment by reducing the risk of a release.

The department proposes the addition of ARM 17.56.105(6) to authorize it to apply conditions, including implementation of procedures, methods, and use of equipment not specifically required by law or rules, to any variance issued by the department. This provision is necessary to allow imposition of conditions designed to further reduce the risk of a release.

17.56.221 ISSUANCE OF COMPLIANCE TAGS AND CERTIFICATES

(1) and (2) remain the same.

(3) Except as provided in (4), ~~A~~after December 22, 1998, no person may deposit, or contract or arrange with another person to deposit, a regulated substance into an underground storage tank, or dispense a regulated substance from an underground storage tank, unless that tank:

(a) and (b) remain the same.

(4) The department may issue a permit allowing new UST systems to be filled once in order to complete installation in accordance with ARM 17.56.201(4). The department may issue this permit concurrently with an installation permit issued pursuant to subchapter 13.

(4) and (5) remain the same, but are renumbered (5) and (6).

AUTH: 75-11-505, MCA
IMP: 75-11-505, MCA

REASON: The department proposes to amend ARM 17.56.221 by adding (4) to remedy the dilemma created when an owner, operator, or installer needs to fill an underground storage tank (UST) in order to finalize installation, but the UST cannot be filled because no compliance certificate or tag has been issued by the department. While an informal process has been in place for a number of years, the department believes it more appropriate to develop the process in rule. The one-time fill permit would be issued with an installation permit and would require a signature, the date of use and return to the department.

Without this rule change the department could continue to grant one-time fill permits under authority implied from the requirements for installation of new underground storage tank systems at ARM 17.56.201(4). However, this rule amendment will provide a consistent process for the department to issue one-time fill permits for the purpose of properly completing UST installation and testing at the time the department issues the installation permit and prior to issuance of the compliance certificate and tags.

The department proposes to amend ARM 17.56.221(3) to clarify that the prohibition against depositing regulated substances into USTs that do not have compliance tags or compliance certificates applies to owners, operators, fuel distributors, and their independent contractors hired to deliver fuel and deposit it into USTs. This amendment is intended to clarify the existing rule's original intent of making all those parties who would fill an UST that does not have compliance tags liable for such actions. Under the amended rule the department would consider all parties as jointly and severally liable for violation of the rule and resulting penalties.

At ARM 17.56.221(3), the department also proposes to add a clause that prohibits dispensing regulated substances from USTs that do not have compliance tags or compliance certificates. This clause is necessary to make ARM 17.56.221 consistent with the operating permit rule at ARM 17.56.308.

4. 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 David Scrimm, Remediation Division, Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901, faxed to the office at (406) 444-1901, or emailed to "dscrimm@state.mt.us", and must be received no later than 5:00 p.m., February 14, 2002. To be guaranteed consideration, the comments must be postmarked on or before that date.

5. Kirsten Bowers, attorney for the Department, has been designated to preside over and conduct the hearing.

6. 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 the office at (406) 444-4386, emailed to "ejohnson@state.mt.us" or may be made by completing a request form at any rules hearing held by the Department.

7. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

DEPARTMENT OF ENVIRONMENTAL QUALITY

By: *Jan P. Sensibaugh*
JAN P. SENSIBAUGH, Director

Reviewed by:

James Madden
JAMES MADDEN, Rule Reviewer

Certified to the Secretary of State, January 7, 2002.

BEFORE THE DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES OF THE STATE OF MONTANA

In the matter of the adoption of new Rule I pertaining to independent diagnostic testing facilities and the amendment of ARM 37.85.204, 37.85.212, 37.85.406, 37.85.415, 37.86.212, 37.86.1406, 37.86.2905 and 37.86.3005 pertaining to medicaid reimbursement	))))))))))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION AND AMENDMENT

TO: All Interested Persons

1. On February 7, 2002, at 10:00 a.m., a public hearing will be held in the auditorium of the Department of Public Health and Human Services Building, 111 N. Sanders, Helena, Montana to consider the proposed adoption and amendment of the above-stated rules.

The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who need an alternative accessible format of this notice or provide reasonable accommodations at the public hearing site. If you need to request an accommodation, contact the department no later than 5:00 p.m. on January 28, 2002, to advise us of the nature of the accommodation that you need. Please contact Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210; telephone (406)444-5622; FAX (406)444-1970; Email dphhslegal@state.mt.us.

2. The rules as proposed to be adopted provide as follows:

<u>RULE I INDEPENDENT DIAGNOSTIC TESTING FACILITIES</u> (1) Any facility that is enrolled in the federal medicare program as an independent diagnostic testing facility (IDTF) may also enroll in the Montana medicaid program as an IDTF.

(2) IDTFs enrolled in the Montana medicaid program shall be governed by 42 CFR 410.32 and 410.33. The department hereby adopts and incorporates by reference 42 CFR 410.32 and 410.33 (2001). Copies of 42 CFR 410.32 and 410.33 (2001) are available upon request from the Department of Public Health and Human Services, Health Policy and Services Division, 1400 Broadway, P.O. Box 202951, Helena, MT 59620.

(3) In addition to 42 CFR 410.32 and 410.33, IDTFs enrolled in the Montana medicaid program shall comply with all rules generally applicable to medicaid providers.

(4) An IDTF shall be reimbursed for diagnostic services performed pursuant to this rule in accordance with ARM 37.85.406 and 37.86.105.

(5) The IDTFs enrolled in the Montana medicaid program shall also be governed by the IDTF Provider Manual dated January 2002. The department hereby adopts and incorporates by reference the IDTF Provider Manual. Copies of the IDTF Provider Manual are available upon request at the address specified in (2).

AUTH: Sec. 53-6-113, MCA
IMP: Sec. 53-6-111, MCA

3. The rules as proposed to be amended provide as follows. Matter to be added is underlined. Matter to be deleted is interlined.

37.85.204 RECIPIENT REQUIREMENTS, ~~COPAYMENTS~~ COST SHARING

(1) Except as provided in ~~(2)~~ (3) through ~~(4)~~ (5) each recipient must pay to the provider a copayment of $200.00 per discharge for inpatient hospital services, ~~the following copayments~~ not to exceed the cost of the service.

~~(a) inpatient hospital services, $100.00 per discharge;~~
~~(b) outpatient hospital services, $1.00 per service;~~
~~(c) podiatry services, $2.00 per service;~~
~~(d) outpatient physical therapy services, $.50 per unit of service;~~
~~(e) speech therapy services, $.50 per unit of service;~~
~~(f) audiology services, $1.00 per service;~~
~~(g) hearing aid services, $1.00 per service;~~
~~(h) occupational therapy services, $.50 per unit of service;~~
~~(i) home health services not including durable medical equipment and medical supplies, $2.00 per service;~~
~~(j) clinic services, other than public health clinic services, $1.00 per visit;~~
~~(k) public health clinic services, $.50 per service;~~
~~(l) dental services, $2.00 per service;~~
~~(m) outpatient drugs, $1.00 per prescription for generic drugs and $2.00 per prescription for name brand drugs;~~
~~(n) prosthetic devices, durable medical equipment and medical supplies, $.50 per service;~~
~~(o) optometric services, $2.00 per service;~~
~~(p) physician's services, $2.00 per service;~~
~~(q) eyeglasses, except for those eyeglasses purchased by the medicaid program under a volume purchasing arrangement, $1.00 per service;~~
~~(r) mid-level practitioner services, $2.00 per service;~~
~~(s) federally qualified health center services, $2.00 per service;~~
~~(t) rural health clinic services, $2.00 per service;~~
~~(u) free standing dialysis clinic services, $2.00 per service;~~
~~(v) specialized non-emergency medical transportation services, $1.00 per service;~~
~~(w) chiropractor services (for qualified medicare beneficiaries only), $1.00 per service;~~

~~(x) licensed psychologist services, $2.00 per service;~~
~~(y) licensed clinical social worker services, $2.00 per service;~~
~~(z) licensed professional counselor services, $2.00 per service;~~
~~(aa) adult day treatment services provided by a mental health center under ARM 37.88.901 and 37.88.905 through 37.88.907, $0.00 per half-day and $1.00 per full day; and~~
~~(ab) community-based psychiatric rehabilitation and support services provided by a mental health center under ARM 37.88.901 and 37.88.905 through 37.88.907, $1.00 per 1 hour unit of individual service.~~

(2) Except as provided in (3) through (5) each recipient must pay to the provider coinsurance not to exceed the cost of the service. For the following service providers, the rate of coinsurance is 5% of the medicaid allowed amount:
(a) outpatient hospital services;
(b) podiatry services;
(c) physical therapy services;
(d) speech therapy services;
(e) audiology services;
(f) hearing aid services;
(g) occupational therapy services;
(h) home health services;
(i) ambulatory surgical center services;
(j) public health clinic services;
(k) dental services;
(l) denturist services;
(m) outpatient drugs, minimum coinsurance payment $1.00 per prescription;
(n) durable medical equipment, orthotics, prosthetics, and medical supplies;
(o) optometric and optician services;
(p) physician services;
(q) mid-level practitioner services;
(r) federally qualified health center services;
(s) rural health clinic services;
(t) freestanding dialysis clinic services;
(u) services to qualified medicare beneficiaries including chiropractic services;
(v) licensed psychiatrist services;
(w) licensed psychologist services;
(x) licensed clinical social worker services;
(y) licensed professional counselor services;
(z) adult day treatment services provided by a mental health center under ARM 37.88.901 and 37.88.905 through 37.88.907;
(aa) community-based psychiatric rehabilitation and support services provided by a mental health center under ARM 37.88.901 and 37.88.905 through 37.88.907;
(ab) independent diagnostic testing facility services; and
(ac) home infusion therapy services.

~~(2)~~ (3) The following ~~recipients~~ individuals are exempt from ~~copayments~~ cost sharing:

(a) individuals under ~~21~~ 18 years of age; and

(b) pregnant women; and

(c) institutionalized individuals for services furnished to any individual who is an inpatient ~~inpatients~~ in a hospital, skilled nursing facility, intermediate care facility or other medical institution if such individual is required to spend for the cost of care all but their personal needs allowance, as defined in ARM 37.82.1320.

~~(3) Copayments~~ (4) Cost sharing may not be charged for services provided for the following purposes:

(a) emergencies;

(b) family planning;

(c) hospice; ~~or~~

~~(d) services provided by an enrolled medicaid health maintenance organization.~~

(d) personal assistance services;

(e) home dialysis attendant services;

(f) home and community based waiver services;

(g) non-emergency medical transportation services;

(h) eyeglasses purchased by the medicaid program under a volume purchasing arrangement; and

(i) early and periodic screening, diagnostic and treatment (EPSDT) services.

~~(4)~~(5) The total ~~copayment~~ cost sharing for each medicaid recipient shall not exceed $~~200.00~~ 500.00 per state fiscal year. The existing $200.00 cap is replaced by the $500.00 cap on March 1, 2002.

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-6-101, 53-6-113 and 53-6-141, MCA

37.85.212 RESOURCE BASED RELATIVE VALUE SCALE (RBRVS) REIMBURSEMENT FOR SPECIFIED PROVIDER TYPES (1) through (11)(d)(ii) remain the same.

(12) Subject to the provisions of (12)(a), when billed with a modifier, payment for procedures established under the provisions of (7) is a percentage of the rate established for the procedures.

(a) The methodology to determine the specific percent for each modifier is as follows:

(i) through (iii) remain the same.

(iv) Notwithstanding any other provision, procedure code modifiers "80", "81", "82", and "AS", used by assistant surgeons shall be reimbursed at 16% of the department's fee schedule.

(v) Notwithstanding any other provision, procedure code modifier "62" used by co-surgeons shall be reimbursed at 62.5% of the department's fee schedule for each co-surgeon.

(13) and (14) remain the same.

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-2-201, 53-6-101, 53-6-111 and 53-6-113, MCA

37.85.406 BILLING, REIMBURSEMENT, CLAIMS PROCESSING, AND PAYMENT (1) through (20) remain the same.

(21) There is an emergency reimbursement reduction in effect for the following provider types for services provided January 1, 2002 through June 30, 2002:

(a) inpatient hospital;
(b) outpatient hospital;
(c) early periodic screening;
(d) diagnostic and treatment;
(e) nutritional services;
(f) private duty nursing;
(g) chiropractic;
(h) podiatry;
(i) physical therapy;
(j) speech-language pathology;
(k) occupational therapy;
(l) audiology;
(m) optometry;
(n) public health clinic;
(o) dental;
(p) outpatient drugs;
(q) prosthetic devices;
(r) durable medical equipment and supplies;
(s) non-emergency transportation;
(t) ambulance;
(u) physician;
(v) ambulatory surgical center;
(w) non-hospital lab and x-ray;
(x) denturist;
(y) mid-level practitioner;
(z) qualified medicare beneficiary (QMB) services;
(aa) QMB chiropractic; and
(ab) freestanding dialysis clinics.

(22) The net pay reimbursement for the provider types listed in ARM 37.85.406(21) is 2.6% less than the amount provided in the following rules: ARM 37.83.811, 37.83.812, 37.83.825, 37.85.212, 37.86.105, 37.86.205, 37.86.506, 37.86.610, 37.86.705, 37.86.1004, 37.86.1005, 37.86.1105, 37.86.1406, 37.86.1806, 37.86.1807, 37.86.2005, 37.86.2207, 37.86.2209, 37.86.2211, 37.86.2217, 37.86.2405, 37.86.2505, 37.86.2605, 37.86.2801, 37.86.2905, 37.86.3005, 37.86.3007, 37.86.3009, 37.86.3011, 37.86.3014, 37.86.3016, 37.86.3018, 37.86.3020, 37.86.3022, 37.86.3205 and 37.86.4205.

(a) For purposes of this rule, "net pay reimbursement" means the allowed amount minus third party liability payments, copayments, coinsurance, incurments, and other deductions.

(b) Providers affected by this rule may be eligible for a rebate if there are sufficient funds available in the medicaid appropriation at the end of state fiscal year 2002.

(c) The department will define a process for calculating and issuing any rebate.

(23) Notwithstanding any other provision, critical access hospital interim reimbursement is 90% of billed charges. Critical access hospitals will still be reimbursed their actual allowable costs determined on a retrospective basis as provided in ARM 37.86.2801.

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-2-201, 53-6-101, 53-6-111, 53-6-113, 53-6-131 and 53-6-141, MCA

37.85.415 MEDICAL ASSISTANCE MEDICAID PAYMENT

(1) Medicaid will pay only for medical expenses:

(a) through (d) remain the same.

(e) which are not the ~~copayment~~ cost sharing provided for in ARM 37.85.204; and

(f) remains the same.

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-6-101 and 53-6-131, MCA

37.86.1406 CLINIC SERVICES, REIMBURSEMENT

(1) Ambulatory surgical center (ASC) services as defined in ARM 37.86.1401(2) provided by an ASC will be reimbursed on a fee basis as follows:

(a) and (i) remain the same.

(b) For ASC services where no medicare fee has been assigned, the fee is ~~77~~ 55% of usual and customary charges.

(c) through (3)(b) remain the same.

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-6-101 and 53-6-141, MCA

37.86.2905 INPATIENT HOSPITAL SERVICES, REIMBURSEMENT

(1) For inpatient hospital services, the Montana medicaid program will reimburse providers as follows:

(a) through (b) remain the same.

(c) Inpatient hospital services provided in hospitals located more than 100 miles outside the borders of the state of Montana will be reimbursed ~~61%~~ 50% of usual and customary billed charges for medically necessary services.

(1)(c)(i) through (18) remain the same.

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-2-201, 53-6-101, 53-6-111, 53-6-113 and 53-6-141, MCA

37.86.3005 OUTPATIENT HOSPITAL SERVICES, REIMBURSEMENT

(1) remains the same.

(2) Out-of-state facilities more than 100 miles from the nearest Montana border will be paid at ~~61%~~ 50% of usual and customary billed charges for medically necessary services.

(3) and (4) remain the same.

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-2-201, 53-6-101, 53-6-111, 53-6-113 and 53-6-141, MCA

3. Montana Medicaid is a public health program, funded jointly by the State of Montana and the federal government that

provides covered medical services to low-income Montanans. Covered Medicaid services are paid only to enrolled Medicaid providers. Through this new rule, the Department proposes to add a new type of provider, Independent Diagnostic Testing Facilities (IDTF), in order to allow the new provider type to enroll in and bill Medicaid in the same manner as the provider enrolls in and bills Medicare. In order to accurately complete Medicare crossover claims and to facilitate accurate reporting by the Department, it is necessary and prudent to simplify the billing and reporting requirements by creating provider types and billing procedures similar to those used by Medicare.

The IDTF provider type will be applied retroactively to July 1 of 2001 to allow the processing of crossover claims for Montana IDTFs enrolled in Medicare at that time.

Adding the IDTF, as a unique type of provider will not increase, decrease, or change fees, costs, or benefits. The Department considered the option of proceeding without a unique provider type for IDTFs, but determined that option would not allow for proper processing and reporting of Medicare crossover claims.

The Department expects that there will be approximately 18 IDTFs enrolled separately under the proposed rule. Consequently, these rules are expected to impact approximately 56 medical professionals.

The amendments to existing rules herein are being proposed to address unanticipated budget deficits in the Montana Medicaid program for State Fiscal Year 2002. The Department of Public Health and Human Services must bring expenditures within its appropriation by State Fiscal Year end (June 30, 2002). In order to accomplish this, a package of cost-reduction measures is being implemented.

Emergency rules which (1) implemented an across-the-board 2.6% rate reduction for specified Medicaid provider types; (2) reduced rates to co-surgeons, assistant surgeons, and ambulatory surgical centers; and (3) reduced the interim payments made to critical access hospitals have been adopted. The amendments to ARM 37.85.406, 37.86.212, and 37.86.1406 are proposed in order to adopt the emergency amendments on a permanent basis. Emergency rules are valid only for 120 days following the date of adoption. Therefore, in order to implement the emergency rate reimbursement reductions necessary to bring Medicaid expenditures within the appropriation for the program, it is necessary to ensure that the 2.6% reduction listed above is implemented for the period beginning January 1, 2002 through June 30, 2002. Because this period is longer than 120 days, the amendments must be made through the ordinary rule-making process, in addition to the emergency adoption that was necessary to ensure immediate implementation.

In addition to the emergency measures discussed above, it is

necessary for the Department to reduce payments to hospitals located more than 100 miles outside of Montana. The proposed amendment to ARM 37.86.2905 and 37.86.3005 reduces reimbursement to out-of-state hospitals from 61% of billed charges to 50% of billed charges.

Furthermore, due to the budgetary shortfall, it is necessary for recipients of the Montana Medicaid program to contribute slightly more of their own resources to the costs of their care. The proposed amendments to ARM 37.85.204 and 37.85.415 increase the participants' copayment on inpatient hospital stays from $100 to $200. All other copayments are removed and replaced by a five percent coinsurance requirement. Prescriptions shall be subject to a minimum coinsurance contribution of $1. All cost sharing required of Montana Medicaid recipients is capped at $500 per State fiscal year. In addition, under the proposed amendments, individuals between the ages of 18 and 21 will be subject to the cost sharing requirements unless they are exempt from cost sharing in accordance with ARM 37.85.204.

Imminent and substantial budget deficits in the Montana Medicaid program for State fiscal year 2002 require the Department to make substantial, immediate adjustments to these reimbursement rates. The Department believes a savings of $4,255,903 ($1,154,201 of which is State general fund) will result from the proposed amendments, allowing the Department to bring Medicaid expenditures within the appropriation for the program. In addition, the reduction proposed in the amendment to ARM 37.85.405 is expected to result in a savings of approximately $44,200 for psychotropic drugs covered under the Mental Health Services Plan. The Department expects approximately 436 enrolled pharmacists will be impacted by the amendment. The Department considered eliminating certain optional covered services, but determined that the elimination of services may cause severe harm to the health and welfare of Montanans in need. Even though the Department acknowledges that increased cost sharing may be difficult for some recipients, the Medicaid program still provides significantly more benefits with fewer cost sharing requirements than private health insurance policies. Thus, the Department believes that in spite of the cost sharing proposed herein the Montana Medicaid program still offers valuable benefits to eligible Montanans. The Department determined that average out-of-pocket copayments for participants of the Montana Medicaid program totaled $80.71 in federal fiscal year 2000. The Department expects that the average out-of-pocket expense will increase due to these proposed amendments to $102.66 for State fiscal year 2002, and to $146.57 for State fiscal year 2003. Because the proposed amendments increase the cost sharing cap from $200 to $500, participants who had met their cap for State fiscal year 2002 will resume participation in cost sharing until the $500 cap is met.

There are approximately 65,000 Medicaid participants and

approximately 11,600 enrolled providers, all of which may be impacted by these proposed amendments.

4. Interested 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 Kathy Munson, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 202951, Helena, MT 59620-2951, no later than 5:00 p.m. on February 14, 2002. Data, views or arguments may also be submitted by facsimile (406)444-9744 or by electronic mail via the Internet to dphhslegal@state.mt.us. The Department also maintains lists of persons interested in receiving notice of administrative rule changes. These lists are compiled according to subjects or programs of interest. For placement on the mailing list, please write the person at the address above.

5. The Office of Legal Affairs, Department of Public Health and Human Services has been designated to preside over and conduct the hearing.

6. The 2.6% reduction indicated in the amendment to ARM 37.85.406 shall be effective through June 30, 2002.

/s/ Dawn Sliva
Rule Reviewer

/s/ Gail Gray
Director, Public Health and Human Services

Certified to the Secretary of State January 7, 2002.

**BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA**

In the matter of the proposed adoption of New Rule I and amendment of ARM 42.19.1102 relating to treatment of gasohol production facilities) NOTICE OF PROPOSED ADOPTION AND AMENDMENT) NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons

1. On March 15, 2002, the department proposes to adopt New Rule I and amend ARM 42.19.1102 relating to treatment of gasohol production facilities.

2. The Department of Revenue will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Revenue no later than 5:00 p.m. on February 1, 2002, to advise us of the nature of the accommodation that you need. Please contact Cleo Anderson, Department of Revenue, Director's Office, P.O. Box 5805, Helena, Montana 59604-5805; telephone (406) 444-2855; fax number (406) 444-3696; e-mail address canderson@state.mt.us.

3. The proposed new rule does not replace or modify any section currently found in the Administrative Rules of Montana. The proposed new rule provides as follows:

NEW RULE I TREATMENT OF ETHANOL MANUFACTURING FACILITIES

(1) Ethanol manufacturing facilities' manufacturing machinery, fixtures, equipment, and tolls used for the production of fuel grade ethanol from grain during the course of the construction and for 10 years after initial production of fuel grade ethanol are exempt from property taxation.

(2) Initial production is defined as the commencement of operations, which is defined in ARM 42.19.1212.

AUTH: Sec. 15-1-201, MCA
IMP: Sec. 15-6-138 and 15-6-201, MCA

REASONABLE NECESSITY: The department proposes to adopt new rule I because it believes that there is a need to clarify the treatment of ethanol manufacturing facilities as opposed to gasohol production facilities currently defined in law and ARM 42.19.1102. The new rule is necessary to implement legislative changes made by House Bill 362, as codified in 15-6-138 and 15-6-201, MCA, during the 2001 legislative session.

4. The rule proposed to be amended provides as follows:

42.19.1102 TREATMENT OF GASOHOL PRODUCTION FACILITIES

(1) ~~Anhydrous ethanol~~ Gasohol production facilities'

~~utilizing solid or organic wastes to produce ethanol may~~ personal or real property may qualify as class 5 property as defined in 15-6-135, MCA, ~~for a ten-year exemption from property taxation under 15-6-201, MCA. They also may qualify as taxable class 5 property under 15-6-135, MCA, during production and for the first three years of operation~~ during construction and for the first three years of operation.

~~(2) Anhydrous ethanol production facilities utilizing grain to produce ethanol are excluded from the ten year exemption from property taxation under 15-6-201, MCA. It is not a form of nonfossil energy generation specified under 15-32-102, MCA. They may, however, qualify as taxable class 5 property under 15-6-135, MCA, during production and for the first three years of operation.~~

~~(3) Gasohol production plants which perform a mixing function of the ingredient gasoline and the ingredient ethanol do not qualify for a ten year exemption from property taxation under 15-6-201, MCA. It is not a form of nonfossil energy generation specified under 15-32-102, MCA. They may, however, qualify as taxable class 5 property under 15-6-135, MCA, during construction and for the first three years of production.~~

AUTH: Sec. 15-1-201, MCA
IMP: Sec. 15-6-135 ~~and 15-6-201~~, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.19.1102 to implement legislative changes made by House Bill 362 during the 2001 legislative session. The changes are needed to clarify the difference between ethanol and gasohol facilities. The exclusion of anhydrous ethanol production facilities and gasohol production plants no longer applies.

5. Concerned persons may submit their data, views, or arguments concerning the proposed action in writing to:

Cleo Anderson
Department of Revenue
Director's Office
P.O. Box 5805
Helena, Montana 59604-5805
no later than February 15, 2002.

6. If persons who are directly affected by the proposed action wish to express their data, views and arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments they have to Cleo Anderson at the above address no later than February 15, 2002.

7. If the agency receives requests for a public hearing on the proposed action from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed action; from the appropriate administrative rule review committee; from a governmental subdivision or agency; or from

an association having no less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register.

8. An electronic copy of this Proposal Notice is available through the Department's site on the World Wide Web at http://www.state.mt.us/revenue/rules_home_page.htm, under the Notice of Rulemaking section. The Department strives to make the electronic copy of this Proposal Notice conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems.

9. The Department of Revenue 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, which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notice regarding particular subject matter or matters. Such written request may be mailed or delivered to the person in 5 above or faxed to the office at (406) 444-3696, or may be made by completing a request form at any rules hearing held by the Department of Revenue.

10. The bill sponsor notice requirements of 2-4-302, MCA, apply and have been fulfilled.

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

/s/ Kurt G. Alme
KURT G. ALME
Director of Revenue

Certified to Secretary of State January 7, 2002

**BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA**

In the matter of the proposed amendment of ARM 42.31.501, 42.31.502, 42.31.504, and 42.31.510 relating to retail communications excise tax	AMENDED NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On December 6, 2001, the Department published a notice of public hearing in the Montana Administrative Register, issue number 23, at page 2399, advising that a hearing would be held on January 9, 2002, regarding the above-referenced rules. The Montana Telecommunications Association requested a continuance because many of the parties interested in these rules will be attending a meeting previously scheduled by the Public Service Commission on that date. Therefore, the Department files this notice advising the public of the change to the hearing date.

2. On February 20, 2002, at 1:00 p.m., a public hearing will be held in the Fourth Floor Conference Room of the Mitchell Building, at Helena, Montana, to consider the amendment of ARM 42.31.501, 42.31.502, 42.31.504, and 42.31.510 relating to retail communications excise tax.

Individuals planning to attend the hearing shall enter the building through the east doors of the Sam W. Mitchell Building, 125 North Roberts, Room 455, Helena, Montana.

3. The Department of Revenue 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, contact the Department of Revenue not later than 5:00 p.m., January 31, 2002, to advise us of the nature of the accommodation that you need. Please contact Cleo Anderson, Department of Revenue, Director's Office, P.O. Box 5805, Helena, Montana 59604-5805; telephone (406) 444-2855; fax (406) 444-3696; or e-mail canderson@state.mt.us.

4. 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:

**Cleo Anderson
Department of Revenue
Director's Office
P.O. Box 5805
Helena, Montana 59604-5805**

and must be received no later than February 22, 2002.

5. Cleo Anderson, Department of Revenue, Director's Office, has been designated to preside over and conduct the hearing.

6. An electronic copy of this Notice of Public Hearing is available through the Department's site on the World Wide Web at http://www.state.mt.us/revenue/rules_home_page.htm, under the

Notice of Rulemaking section. The Department strives to make the electronic copy of this Notice of Public Hearing conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems.

7. The Department of Revenue 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, which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding particular subject matter or matters. Such written request may be mailed or delivered to the person in 4 above or faxed to the office at (406) 444-3696, or may be made by completing a request form at any rules hearing held by the Department of Revenue.

8. The bill sponsor notice requirements of 2-4-302, MCA, apply and have been fulfilled.

/s/ Cleo Anderson	**/s/ Kurt G. Alme**
CLEO ANDERSON	**KURT G. ALME**
Rule Reviewer	**Director of Revenue**

Certified to Secretary of State January 7, 2002

**BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA**

In the matter of the amendment) of ARM 4.12.3104 and 4.12.3402) relating to seeds)

NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On November 21, 2001 the Department of Agriculture published notice of the proposed amendment of ARM 4.12.3104 and 4.12.3402 relating to seeds at page 2278 of the 2001 Montana Administrative Register, Issue Number 22.

2. The agency has amended ARM 4.12.3104 and 4.12.3402 exactly as proposed.

3. No comments or testimony were received.

/s/ W. Ralph Peck
Ralph Peck
Director

/s/ Tim Meloy
Tim Meloy, Attorney
Rule Reviewer

Certified to the Secretary of State January 7, 2002.

**BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA**

In the matter of the amendment of ARM 4.14.301 relating to loan qualifications	CORRECTED NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On September 6, 2001 the department published a notice at page 1723 of the 2001 Montana Administrative Register, Issue Number 17, of the amendment of the above-captioned rule relating to loan qualifications.

2. The reason for the correction is the notice of amendment was earmarked incorrectly. The corrected rule amendment reads as follows:

4.14.301 DEFINITIONS When used in these rules, unless the context clearly requires a different meaning:

(1) through (12) remain the same.

(13) "Total assets" means assets including, but not limited to the following: cash and deposits in financial institutions etc.; cash crops or feed on hand; livestock held for sale; breeding stock; marketable bonds and securities; securities (not readily marketable); accounts receivable; notes receivable; cash invested in growing crops; net cash value of life insurance; machinery and equipment, cars and trucks; farm and other real estate including life estates, personal residence and summer homes; value of beneficial interest in a trust, government payments or grants; any other assets.

~~(i)~~ (a) Total assets shall not include items used for personal, family or household purposes by the applicant, but in no event shall such property be excluded to the extent a deduction for depreciation is allowable for federal income tax purposes. All assets shall be valued at fair market value by the financial institution. Such value shall be what a willing buyer would pay a willing seller in the locality. A deduction of 10% may be made from fair market value of farm and other real estate.

(14) remains the same.

AUTH: 80-12-103, MCA
IMP: 80-12-102, MCA

3. Replacement pages for the corrected notice of amendment were submitted to the Secretary of State on December 31, 2001.

/s/ W. Ralph Peck
Ralph Peck
Director

/s/ Tim Meloy
Tim Meloy, Attorney
Rule Reviewer

Certified to the Secretary of State January 7, 2002.

BEFORE THE STATE AUDITOR AND COMMISSIONER OF INSURANCE OF THE STATE OF MONTANA

In the matter of the amendment of ARM 6.10.121 pertaining to registration and examination of securities salespersons, investment adviser representatives, broker-dealers, and investment advisers	)))))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On November 21, 2001, the State Auditor and Commissioner of Insurance published a notice of proposed amendment of the above stated rule pertaining to registration and examination of securities salespersons, investment adviser representatives, broker-dealers, and investment advisers at page 2283 of the 2001 Montana Administrative Register, Issue No. 22.

2. The State Auditor has amended ARM 6.10.121 as proposed.

3. No comments or testimony were received.

JOHN MORRISON, State Auditor
and Commissioner of Securities

By: /s/ Angela Caruso
Angela Caruso
Deputy Insurance Commissioner

By: /s/ Elizabeth L. Griffing
Elizabeth L. Griffing
Rules Reviewer

Certified to the Secretary of State on January 7, 2002.

BEFORE THE BOARD OF RESEARCH AND COMMERCIALIZATION TECHNOLOGY DEPARTMENT OF COMMERCE STATE OF MONTANA

In the matter of the amendment of ARM 8.100.104 and 8.100.105 pertaining to definitions and application procedures	**NOTICE OF AMENDMENT**

TO: All Concerned Persons

1. On November 8, 2001, the Board of Research and Commercialization Technology published a notice of proposed amendment of the above-stated rules at page 2203, 2001 Montana Administrative Register, issue number 21.

2. The Board amended the rules exactly as proposed.

3. No comments or testimony were received.

BOARD OF RESEARCH AND COMMERCIALIZATION TECHNOLOGY

BY: *Mark A. Simonich*
MARK A. SIMONICH, DIRECTOR
DEPARTMENT OF COMMERCE

BY: *G. Martin Tuttle*
G. MARTIN TUTTLE, RULE REVIEWER

Certified to the Secretary of State, January 7, 2002.

BEFORE THE BOARD OF HOUSING
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the adoption of new rules I through XV pertaining to the affordable housing revolving loan fund and TANF housing assistance funds	NOTICE OF ADOPTION

TO: All Concerned Persons

1. On August 23, 2001, the Board of Housing published a notice of public hearing on the proposed adoption of new RULES I through XV concerning the affordable housing revolving loan account and TANF housing assistance funds at page 1513, 2001 Montana Administrative Register, issue number 16. The hearing was held on September 19, 2001 in Bozeman, Montana.

2. The Board has adopted new rules I (8.111.501), II (8.111.502), III (8.111.503), IV (8.111.504), V (8.111.505), VI (8.111.506), VII (8.111.507), X (8.111.510), XI (8.111.511), and XIV (8.111.514) exactly as proposed.

3. The Board has adopted new rules VIII (8.111.508), IX (8.111.509), XII (8.111.512), XIII (8.111.513), and XV (8.111.515) as proposed but with the following changes, stricken matter interlined, new matter underlined:

VIII (8.111.508) TANF LINE OF CREDIT ELIGIBLE PURPOSES

(1) There are two categories of TANF lines of credit:

(a) a TANF line of credit - home ownership; and

(b) a TANF line of credit - emergency housing assistance.

(2) A TANF line of credit - home ownership may be used by a housing assistance organization to make loans to eligible recipients:

(a) and (b) remain as proposed.

(c) for the first month's payment on a first mortgage; ~~or~~

(d) to buy down the rate of interest charged on a first mortgage; or

(e) for any other purpose reasonably designed to assist an eligible recipient to purchase a home and which has been approved by the board.

~~(2)~~ (3) A TANF loan made by a housing assistance organization from a TANF line of credit - home ownership is not assumable and must be repaid upon sale of the real property pledged as security for the loan.

(4) The lesser of 10% of the TANF funds available to the board or $200,000 is available for TANF lines of credit - emergency housing assistance. A TANF line of credit - emergency housing assistance may be used by a housing

assistance organization to make loans to eligible recipients for:

(a) assistance in making rent payments;

(b) assistance in paying security deposits;

(c) assistance in making mortgage payments; or

(d) any other purpose reasonably designed to assist an eligible recipient to stay in their home during a time of emergency and which has been approved by the board.

AUTH: 90-6-136, MCA
IMP: 90-6-134, MCA

RULE IX (8.111.509) TANF LINE OF CREDIT ELIGIBILITY

(1) remains as proposed.

(2) The applicant must document to the satisfaction of the board experience in providing housing assistance to low income households or, for a new housing assistance organization, demonstrate the capability to administer a TANF line of credit. Criteria considered by the board include, but are not limited to:

(a) and (b) remain as proposed.

(c) number of low income households to whom applicant has provided home ownership training or post purchase counseling; ~~and~~

(d) involvement in other low and moderate income housing programs of the board, federal agencies and tribal and local governments; and

(e) financial controls and procedures necessary to underwrite and service loans.

(3) ~~A~~ Within available funding, a housing assistance organization may apply for a TANF line of credit - home ownership not to exceed ~~$500,000.00~~ $400,000, a TANF line of credit - emergency housing assistance not to exceed $50,000, or both. At such time as the housing assistance organization has drawn on the full amount of the line of credit for the purpose of TANF loans to eligible recipients, it may apply for ~~an additional~~ a supplemental line of credit not to exceed ~~$500,000.00~~ $400,000 for the TANF line of credit - home ownership and $50,000 for the TANF line of credit - emergency housing assistance. Whether the request is for an initial or a supplemental TANF line of credit, the board may approve a lesser amount than is requested.

AUTH: 90-6-136, MCA
IMP: 90-6-134, MCA

RULE XII (8.111.512) TANF LOAN ELIGIBILITY (1) remains as proposed.

(2) An applicant for a TANF loan from a TANF line of credit - home ownership must successfully complete instruction on the responsibilities of home ownership to the satisfaction of the housing assistance organization through which the applicant is making application for a TANF loan.

(3) An applicant for a TANF loan to be funded by a housing assistance organization from a TANF line of credit - home ownership or for a TANF loan for mortgage payment assistance to be funded from a TANF line of credit - emergency housing assistance must agree to participate in post purchase counseling provided by the housing assistance organization.

AUTH: 90-6-136, MCA
IMP: 90-6-134, MCA

RULE XIII (8.111.513) TANF LOAN TERMS AND CONDITIONS (1) through (1)(d) remain as proposed.

(e) if the loan is from a TANF line of credit - home ownership or is a loan for mortgage payment assistance from a TANF line of credit - emergency housing assistance, be secured at closing by a lien on the real property for which the loan is made, which lien shall be perfected through the use of a trust indenture subordinate to the first mortgage naming the housing assistance organization as beneficiary.

AUTH: 90-6-136, MCA
IMP: 90-6-133 and 90-6-134, MCA

XV (8.111.515) RESPONSIBILITIES OF TANF LOAN HOUSING ASSISTANCE ORGANIZATION (1) through (1)(b) remain as proposed.

(c) must provide training to applicants for TANF loans from a TANF line of credit - home ownership on the responsibilities of home ownership;

(d) must provide post purchase counseling to recipients of TANF loans from a TANF line of credit - home ownership or a loan for mortgage payment assistance from a TANF line of credit - emergency housing assistance.

(2) As compensation for preparing and processing a TANF loan, providing home ownership training and post purchase counseling, the housing assistance organization shall receive from the board an administrative fee in an amount equal to 7% of the amount of each TANF loan made by it, provided however, that once the TANF funds available to the board have been disbursed, there will be no compensation available under this section to a housing assistance organization from the board for preparing and processing any loans made with funds from repayments of initial TANF loans.

(3) and (3)(a) remain as proposed.

(b) As compensation for servicing a TANF loan the housing assistance organization is entitled to a monthly servicing fee in an amount equal to 1/12 of .5% of the outstanding principal balance of the TANF loan immediately prior to the application of the payment, which amount shall be deducted from the TANF loan payment.

(c) remains as proposed.

(4) A housing assistance organization will cooperate with the board in complying with data requests, certifications and reports required by the board to the Montana department of

public health and human services. Within 15 days from the end of each calendar quarter a housing assistance organization will provide the board, on a form provided by the board, with requested data including, but not limited to:

(a) loan recipient demographic data including social security number and family size;

(b) the actual expenditure made by the loan recipient with the loan proceeds and the type of expenditure, e.g. housing loan, one-time housing purchase related expense, non-recurring emergency housing expense;

(c) provider/contractor information including number of households assisted in home ownership program, number of home ownership loans made, average amount of home ownership loan, number of households served by one-time emergency housing assistance, and average one-time emergency housing assistance loan; and

(d) fiscal reporting data, including amount loaned for home ownership loans by current month and year-to-date and amount loaned for emergency housing assistance by current month and year-to-date.

AUTH: 90-6-136, MCA
IMP: 90-6-134, MCA

Comment No. 1: The rules should allow for rental assistance grants or forgivable loans from the TANF funds. Low income people often need emergency housing assistance to pay rent, to make security deposits, or to make mortgage payments and grants should be available for this purpose.

Response: The rules have been amended to allocate 10% of the TANF funds the Board receives under House Bill 273 up to a maximum of $200,000 for low interest loans for emergency housing assistance which will be available to eligible recipients for assistance in making rent payments, security deposits or mortgage payments. Grants will not be available as the Legislature directed that the TANF funds be administered by the Board through the revolving loan fund indicating that the money was to be used as loans. There is no clear indication in the minutes of the legislative hearings on House Bill 273 that the Legislature intended the Board to make grants from the loan fund. Comments were nearly equally split between allowing grants and only providing loans with the TANF funds.

Comment No. 2: Funding from the Revolving Loan Account should be available to mobile home owners for the development of co-operative mobile home parks.

Response: Under the right circumstances, a co-operative mobile home park project may be eligible for a RLA loan from the Revolving Loan Account.

Comment No. 3: The servicing fee provided for in proposed RULE XV(3)(b) of .5% on the outstanding principal

balance of a TANF loan does not appear to be correct and would provide for a $25 monthly servicing fee on a $5,000 loan.

Response: RULE XV(3)(b) has been amended to clarify that the servicing fee of .5% is an annual servicing fee not a monthly servicing fee. The monthly servicing fee = .005 X outstanding principal balance/12.

Comment No. 4: The administrative fees of 7% of each TANF loan made by a housing assistance organization is insufficient to pay for the needed counseling of low-income people. The organizations that will make the loans and provide the counseling do not have the funds to provide these services. The Board should fund the administrative fee up front.

Response: Under Federal regulations and the Board's memorandum of understanding with the Montana Department of Public Health And Human Services a specific limited percentage of the available TANF funds are available for administrative purposes. The rules provide that the available percentage is being split between the Board and the housing assistance organization making the TANF loans. Also, the loan servicing fee is higher than most of the other programs the Board currently administers. TANF funds for a specific loan (including the administrative fee) are not available from the federal government until the actual disbursement of the TANF loan to the eligible recipient. The Board has no discretionary funds it can use to underwrite a housing assistance organization's expenses pending payment of the TANF administrative fee. Loan payments from TANF loans will be kept segregated as TANF funds and will be re-cycled as new loans. There will be no funds available for administrative fees for the re-cycled TANF loans. The costs of preparing and processing re-cycled TANF loans, providing home ownership training and post-purchase training will have to be funded by the housing assistance organization in some other manner. RULE XV(2) has been amended to reflect the unavailability of funds for administrative purposes for loans made from re-cycled TANF funds.

Comment No. 5: Eligibility for rent or security deposit assistance should be expanded to include those households who are at 150% of federal poverty guidelines or less.

Response: Eligibility for households of 200% of federal poverty guidelines or less was determined with the advice of Montana Public Health and Human Services staff who administer the TANF program. Eligibility does not need to be expanded because a household of 150% of federal poverty guidelines will qualify for a TANF loan for emergency housing assistance under the 200% limitation. For consistency and ease of administration, 200% of federal poverty guidelines will be used for all TANF purposes.

Comment No. 6: The Board should service all TANF loans and assume the risk of defaults as loans to households of

persons of 200% of federal poverty guidelines or less will be high risk and the size of the Board's loan portfolio would allow it to more easily absorb bad loans.

Response: The Board has no better ability to absorb bad loans than a housing assistance organization. The Board must maintain a loan portfolio of good standing to receive bond ratings that allow it to obtain favorable interest rates in its bond issuances. The bond indentures (the Board's contracts with bond holders) also preclude the Board from using bond proceeds and proceeds of mortgage payments for loans made with bond proceeds to absorb bad loans from the TANF program. The housing assistance organizations must service the loans and assume the risk of bad loans. RULE XI(2) provides a process whereby a housing assistance organization may request the Board to forgive legitimate, reasonable and uncollectible TANF loan losses.

Comment No. 7: The TANF funds should be allocated on a regional basis or an urban versus rural basis.

Response: The Board administers several programs throughout the state and does not administer any on a regional basis. The Board's experience is that all regions of the state and rural and urban areas all participate in the Board's programs without the Board having to allocate funds. The Board was not given additional FTEs to administer the Revolving Loan Account or the TANF funds and does not have the staff available to administer TANF funds on a regional or rural/urban basis. Also, there is a limited amount of time available to disburse the TANF funds. Designing a system for allocating TANF funds by region or on a rural/urban basis would take a substantial amount of additional time and staff involvement, neither of which is available.

Comment No. 8: Criteria for RLA loan projects should include proximity to services, connection to sewer and power, design, energy efficiencies and so forth.

Response: The Board's current programs already consider these criteria in the process of scoring, ranking and underwriting project applications. These criteria will also be considered in connection with RLA loan applications.

Comment No. 9: First time home buyers should be allowed to apply for RLA loans from the Revolving Loan Account.

Response: Organizations eligible for RLA loans may use the RLA funds to acquire existing housing stock to preserve or convert it to housing for low and moderate income households. Under certain circumstances, this could be done by the organization through loans to first time home buyers.

Comment No. 10: The TANF funds should be distributed through an RFP process.

Response: The Board uses an application process for funds from other Board programs that are available to housing

assistance organizations. If the housing assistance organization meets qualifications and the intended purpose for the funds is consistent with Board goals and guidelines, the application is approved. The Board's experience is that this procedure works well. Further, the Legislature did not provide the Board with any additional FTEs to administer the Revolving Loan Account or the TANF funds and it does not have the staff available to design a request for proposals instrument or evaluate proposals submitted in response to an RFP. An RFP process would also take a substantial amount of additional time, further eroding the time available to use the available TANF fund to their best advantage.

Comment No. 11: The Revolving Loan Fund should be used for assisted living, elderly, handicapped, and mentally ill.

Response: Projects serving any of the described classifications of citizens are eligible for RLA loans.

DEPARTMENT OF COMMERCE
BOARD OF HOUSING

By: *Mark A. Simonich*
MARK A. SIMONICH, DIRECTOR

Reviewed by:

G. MARTIN TUTTLE
G. MARTIN TUTTLE, Rule Reviewer

Certified to the Secretary of State January 7, 2002.

**BEFORE THE BOARD OF HEARING AID DISPENSERS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA**

In the matter of the amendment of ARM 8.20.402, 8.20.403 8.20.412, pertaining to fees, examinations - pass/fail point and minimum testing and recording procedures) CORRECTED NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On December 21, 2000, the Board of Hearing Aid Dispensers published a notice of proposed amendment of a number of rules, including ARM 8.20.412, at page 3485, 2000 Montana Administrative Register, issue number 24. Thereafter, on May 10, 2001, the Board published a notice of amendment of those rules, including ARM 8.20.412, at page 781, 2001 Montana Administrative Register, issue number 9. ARM 8.20.412(3) was amended exactly as proposed.

2. On May 24, 2001, the Board of Hearing Aid Dispensers published a notice of proposed amendment of the above-stated rules at page 819, 2001 Montana Administrative Register, issue number 10. On August 9, 2001, the Board published an amended notice regarding the public hearing on the proposed amendment of the above-stated rules at page 1412, 2001 Montana Administrative Register, issue number 15.

3. On December 6, 2001, the Board published a notice at page 2422, 2001 Montana Administrative Register, issue number 23, that it was amending the rules, including ARM 8.20.412, exactly as proposed.

4. During the preparation of the December 31, 2001, replacement pages for ARM 8.20.412, the Department of Labor and Industry became aware that the language proposed for amendment at the end of subsection (3) had essentially already been placed into the rule, effective May 11, 2001. As amended, effective May 11, 2001, subsection (3) of ARM 8.20.412 reads as follows:

> **(3) All audiometers shall be calibrated to ANSI standards once a year. A copy of an electronic audiometer calibration made within the past 12 months shall be made available by the licensee upon the board's request.**

5. Because the May 24, 2001, notice of proposed amendment of ARM 8.20.412 did not accurately identify the then-existing language of the rule, the Board is not amending ARM 8.20.412 as proposed on May 24. The text of subsection (3) of ARM 8.20.412 will remain as shown above in paragraph 4 of this Corrected Notice of Amendment.

6. The December 31, 2001, replacement page(s) for ARM 8.20.412 have already been corrected and submitted to the Secretary of State.

BOARD OF HEARING AID DISPENSERS
DAVID KING, CHAIRMAN

By: /s/ WENDY J. KEATING
Wendy J. Keating, Commissioner
DEPARTMENT OF LABOR & INDUSTRY

By: /s/ KEVIN BRAUN
Kevin Braun,
Rule Reviewer

Certified to the Secretary of State: January 7, 2002.

**BEFORE THE BOARD OF FUNERAL SERVICE
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA**

In the matter of the amendment of ARM 8.30.406, 8.30.502 and 8.30.504 pertaining to examination, continuing education and sponsors and the adoption of new rule I pertaining to renewal	) NOTICE OF AMENDMENT) AND ADOPTION))))))

TO: All Concerned Persons

1. On July 19, 2001, the Board of Funeral Service published a notice of proposed amendment and adoption of the above-stated rules at page 1297, 2001 Montana Administrative Register, Issue Number 14.

2. On September 6, 2001, a public hearing was held in Helena concerning the proposed amendments and new rule. No oral or written comments were made by members of the public during the public comment period. The Board's staff made a technical comment on NEW RULE I.

3. The Board has amended ARM 8.30.406, 8.30.502, and 8.30.504 exactly as proposed.

4. The Board has adopted NEW RULE I (ARM 8.30.417) as proposed with the following changes, stricken matter interlined, new matter underlined:

NEW RULE I RENEWAL OF LICENSE (1) All licenses, whether individual or establishment, with the exception of cemeteries, expire annually and may be renewed pursuant to the provisions of this rule. If a license is not renewed, practice by a licensee, whether individual or an establishment, after the renewal date set forth in ARM 8.2.208 will constitute unlicensed practice and will subject the licensee to disciplinary action as provided by statute and rule.

(2) through (5) Same as proposed.

**AUTH: 37-19-202, 37-19-301, 37-19-306, MCA
IMP: 37-19-301, 37-19-306, MCA**

5. The Board's staff made a technical comment, to which the Board made the following response:

COMMENT 1: Proposed NEW RULE I does not make note that cemetery licenses are renewed on a five-year cycle pursuant to 37-19-214(2), MCA. The rule should note that exception.

RESPONSE 1: The Board agrees with the comment and has amended NEW RULE I accordingly.

BOARD OF FUNERAL SERVICE
JEAN RUPPERT, CHAIRMAN

By: /s/ WENDY KEATING
Wendy Keating, Commissioner
DEPARTMENT OF LABOR & INDUSTRY

By: /s/ KEVIN BRAUN
Kevin Braun
Rule Reviewer

Certified to the Secretary of State, January 7, 2002.

BEFORE THE BOARD OF PHARMACY
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of ARM 8.40.1301 through 8.40.1308 pertaining to pharmacy technicians and the adoption of new rule I and new rule II pertaining to registration of pharmacy technicians and renewal	)))))))	NOTICE OF AMENDMENT AND ADOPTION

TO: All Concerned Persons

1. On August 9, 2001, the Board of Pharmacy published a notice of proposed amendment and adoption of the above-stated rules at page 1447, Montana Administrative Register, Issue Number 15.

2. A public hearing was held in Helena on September 4, 2001. Several members of the public attended the hearing and offered oral comments. A number of written comments from members of the public were submitted during the comment period.

3. The Board has amended ARM 8.40.1301, 8.40.1302, 8.40.1303, 8.40.1305, 8.40.1307, and 8.40.1308 exactly as proposed.

4. The Board has amended ARM 8.40.1304 and 8.40.1306 as proposed with the following changes, stricken matter interlined, new material underlined and added material in all CAPS.

8.40.1304 TASKS AND FUNCTIONS OF PHARMACY TECHNICIAN

(1) through (1)(f) same as proposed.

(g) answer the telephone, properly identify themselves as a technician, accept verbal orders for REFILL prescriptions from medical practitioners or their designated agents and issue refill requests to the prescriber;

(h) a pharmacy technician may act as agent in charge of the pharmacy to assure its integrity when a registered pharmacist is not physically present, but may not perform any duties which require the exercise of the pharmacist's independent professional judgment.~~;~~ THE TECHNICIAN MAY NOT BE LEFT IN CHARGE FOR MORE THAN 30 MINUTES;

(i) through (k) same as proposed.

(2) Remains the same.

AUTH: 37-7-201, MCA
IMP: 37-7-201, 37-7-301, 37-7-307, MCA

8.40.1306 CONTENTS OF TRAINING COURSE (1) through (1)(e) remain the same.

(f) telephone procedure and communication including taking ~~prescription orders and~~ refill requests;

(g) through (i) same as proposed.

AUTH: 37-7-201, MCA
IMP: 37-7-201, 37-7-307, MCA

5. The Board has adopted NEW RULE II (ARM 8.40.1310) Pharmacy Technician Renewal, exactly as proposed.

6. The Board has adopted NEW RULE I (ARM 8.40.1309) Registration Requirements, as proposed with the following changes, stricken matter interlined, new material underlined:

NEW RULE I (8.40.1309) REGISTRATION REQUIREMENTS

(1) through (2)(b) same as proposed.

(c) provide the name and address of the pharmacy in which the technician-in-training is employed. A change in place of employment will require submission of ~~an~~ updated ~~application~~ information within 10 working days of the change.

(3) The permit to practice as a technician-in-training shall be valid for a period of ~~one year~~ 18 months, and may not be renewed.

AUTH: 37-7-201, MCA
IMP: 37-7-201, MCA

7. The comments received and the Board's responses are as follows:

COMMENT 1: One commentor stated that she supported the limitations placed upon tasks which a pharmacy technician may and may not perform. Other commentors also expressed general support for the proposed amendments and new rules.

RESPONSE 1: The Board acknowledges the support expressed in those comments.

COMMENT 2: Several commentors expressed an opinion on the proposed amendment to ARM 8.40.1301(2), prohibiting dispensing of properly checked new prescriptions when a pharmacist was not present. Some objected to the proposed amendment on the grounds that they believed neither new prescriptions or refills should be dispensed when a pharmacist was not present. Others stated that refills should be allowed to be dispensed without the presence of a pharmacist.

RESPONSE 2: The Board concludes that if a prescription has been properly checked by a pharmacist, that refills should be allowed to be dispensed when a pharmacist is not available. No new prescriptions should be dispensed without the presence of a pharmacist because patient counseling should be done on

all new prescriptions. The pharmacist should make the final decision to hold a refill for counseling or to allow it to be given to the patient by a technician.

COMMENT 3: One commentor stated that the proposed amendments to ARM 8.40.1302 requiring a pharmacy technician be of good moral character would be difficult to implement and another commentor stated that because the requirement is subjective, it should be removed from the proposed amendments.

RESPONSE 3: The Board is already required, by the laws pertaining to the examination of applicants for a pharmacy license, to determine whether applicants are of "good moral character". The Board thus has experience in implementing such a standard. The Board concluded, that in protecting the public health, safety and welfare, that the same standard should apply to pharmacy technicians. The Board also notes that the requirement of "good moral character" is a standard recognized in many professions for which licensing is required by the state.

COMMENT 4: One commentor stated that the utilization plan language needed to be included in ARM 8.40.1304, and applauded the Board for including it. Two other commentors echoed this. The commentor also stated that it is important to focus both on what a technician can do and what functions a clerk may not perform.

RESPONSE 4: The provisions of the rule relating to the utilization plan are part of the existing version of ARM 8.40.1304. The Board concludes that if a rule specifies a duty as a technician duty, it is clearly not a clerk or other auxiliary staff duty.

COMMENT 5: Many commentors addressed the proposed amendment of ARM 8.40.1304(1)(g), regarding a pharmacy technician taking verbal orders for prescriptions. Many commentors objected to the proposal to allow a technician to take verbal orders over the telephone, stating that there was too great a risk for an error in communication. Some commentors also noted the risks associated with communication between a prescriber’s agent and a pharmacy technician. They suggested that the number of times when a pharmacist would need to call back a prescriber to clarify a verbal order would increase. Some of the commentors also suggested that because institutions have a more consistent procedure for verification of verbal orders (compared to community pharmacies), a reasonable distinction could be made between pharmacy technicians working in the two settings. Other commentors would only limit the prohibition to new prescriptions and would allow refill prescriptions to be taken over the telephone. One of the commentors also suggested that indications of what the drug was to be used for be included in

telephone orders to assist in catching errors in sound alike orders.

RESPONSE 5: The Board concludes that there is a greater chance of an error being made when a new prescription is being ordered than when a refill is being authorized. The Board concludes that because creating a two-tiered registration system (institutional versus community-based) for pharmacy technicians goes substantially beyond the scope of the present proposals, making such a distinction at this time is not appropriate. The Board has amended the proposed language to specify that only refill orders are acceptable to take over the phone directly from the prescriber or the prescriber's authorized agent.

COMMENT 6: One commentor stated that a time limitation should be placed in ARM 8.40.1304(1)(h) upon the time that a technician could be in charge of a pharmacy while the pharmacist was gone, suggesting not more than a half an hour.

RESPONSE 6: The Board concurs with the comment and has amended the rule accordingly.

COMMENT 7: One commentor stated that ARM 8.40.1305(1)(b) should be left in and not stricken as proposed by the Board. The commentor suggested that continuing education as required under the certification exam should not replace the requirement for ongoing training in the pharmacy.

RESPONSE 7: The Board agreed that technicians should not limit themselves on the amount of continuing education they seek. However, the Board feels the language in subsection (1)(b) should be deleted as proposed so as to not confuse technicians on PTCB requirements.

COMMENT 8: One commentor stated that in accordance with the comments concerning ARM 8.40.1304(1)(g) on telephone prescription taking, ARM 8.40.1306(1)(f) should delete the reference to training on taking telephone prescriptions.

RESPONSE 8: The Board concurs and has amended the proposal accordingly, in line with the Board's decision on allowing verbal orders for refills only. Please also see Response 5, above.

COMMENT 9: Three commentors stated that inspections of utilization plans and a pharmacy technician's training records should be done in the presence of a pharmacist.

RESPONSE 9: The Board clarified that the policy of the staff is to inspect when a pharmacist is on duty, with the exception of small rural hospitals and nursing homes. The inspector then asks the Director of Nursing to accompany the inspection.

COMMENT 10: One commentor stated with respect to the proposed amendments to ARM 8.40.1308(4) that it is necessary to be more specific with rules to include the institutional memory of the Board of Pharmacy to reflect consistency in the requirements to be included in utilization plans such as: space, configuration of the space, the articulation of how many people work in the space, and who they are, whether there are clerks, technicians, and interns and pharmacists and what those people are doing, checking systems, and a CQI program and articulation of patient care services. The comments were concurred in by other commentors.

RESPONSE 10: The Board concurs that specific criteria should be in rule. The Board will propose specific criteria at a later date in a separate rule-making action.

COMMENT 11: One commentor stated that some of the terminology used in NEW RULE I is confusing. The commentor stated that some employers which use the term "technicians-in-training" to cover both existing technicians seeking registration and trainees in various programs who are seeking on-the-job might cause confusion over how many persons may work under the supervision of a pharmacist without obtaining a ratio waiver. Another commentor suggested using the term technician intern to eliminate potential confusion.

RESPONSE 11: The Board believes ARM 8.40.1308(3) clearly states that one pharmacist can have 1 technician and 1 technician-in-training, enrolled in an approved academic program. The language in subsection (3), however, uses the term "technician trainee", rather than the term "technician-in-training", and it is an oversight not to have proposed amending that wording in subsection (3). The Board will make that terminology change in a future rule-making project. The Board notes that the term "intern" is already defined by statute and the Board's existing rules, and use of the term "technician-intern" would cause greater confusion.

COMMENT 12: One commentor stated that they believed that it was not the Board's intention to require existing technicians to complete an academically approved program to become registered technicians.

RESPONSE 12: The Board notes that completion of an academic program in not a prerequisite for any technician to become certified. The only knowledge-based criterion is certification by the PTCB (unless the Board approves others in the future).

COMMENT 13: Two commentors stated that a certification requirement is a further impediment to finding qualified workers. One noted that there are no certification training programs locally available in eastern Montana. The commentors stated that the requirement will lead to an increase in the

cost of health care. Another commentor stated that registration, certification and continuing education requirements will cause a financial hardship upon pharmacy technicians.

RESPONSE 13: The Board, as noted above, does not require a particular academic background or training as a prerequisite for a pharmacy technician to become certified. The Board believes that certification and registration will not lead to a significant upward pressure in health care costs. Likewise, the Board believes that the costs associated with registration will not cause a significant financial hardship for pharmacy technicians.

COMMENT 14: Several commentors stated that the time period for implementing the phase-in for the certification required by NEW RULE I should be extended. Some commentors suggested that those pharmacy technicians currently employed should be "grandfathered" and exempted from the certification process.

RESPONSE 14: The Board agrees with the comments concerning the phase-in period and has amended the proposal to allow 18 months for a technician-in-training to become certified. The Board believes that in order to appropriately protect the public health and safety, all pharmacy technicians should become certified as meeting minimum standards of competence, as a condition of registration.

COMMENT 15: One commentor stated that a technician should not have to submit a new updated application. It was felt that any time a technician changes locations they should notify the Board within ten days, the same as a pharmacist.

RESPONSE 15: The Board concurs, and has amended NEW RULE I to clarify that a change in place of employment does not require a new application, simply a notification of changes.

COMMENT 16: A commentor questioned whether a pharmacy student would need to become registered as a pharmacy technician in order to be employed as a technician.

RESPONSE 16: A pharmacy student who is a Board-registered intern does not have to be registered as a pharmacy technician to be employed by a pharmacy. A pharmacy student who is not registered as an intern cannot be employed to perform the work of a pharmacy technician unless that individual is properly registered as a pharmacy technician or as a technician-in-training.

COMMENT 17: One commentor stated that NEW RULE II does not address technicians who may let their registrations lapse and what process may be required to regain the registration.

RESPONSE 17: The Board responded that if a registration lapses, that technician cannot practice as a pharmacy technician in the State of Montana. If a technician wishes to reinstate his or her registration, the technician would need to undergo the application process again.

COMMENT 18: Some commentors stated that the renewal periods should be extended to every two years as opposed to every year as proposed as they feel that it will be confusing to have to renew every year, but only submit continuing education information every two years.

RESPONSE 18: The Board acknowledged the comment but will keep the renewal cycle annually. This is consistent with all other license types under the Board of Pharmacy and will ensure that registered technicians maintain certification.

BOARD OF PHARMACY
ALBERT A. FISHER, R.Ph.,
PRESIDENT

By: /s/ WENDY KEATING
Wendy Keating, Commissioner
DEPARTMENT OF LABOR &
INDUSTRY

By: /s/ KEVIN BRAUN
Kevin Braun
Rule Reviewer

Certified to the Secretary of State, January 7, 2002.

**BEFORE THE OFFICE OF THE WORKERS' COMPENSATION JUDGE
OF THE STATE OF MONTANA**

In the matter of the amendment of ARM 24.5.303, 24.5.307, 24.5.307A, and 24.5.331 regarding procedural rules of the Court	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On November 8, 2001, the Workers' Compensation Judge published notice of the proposed amendment to the above-stated rules at page 2211, 2001 Montana Administrative Register, Issue Number 21.

2. The Office of the Workers' Compensation Judge has amended ARM 24.5.303, 24.5.307, 24.5.307A, and 24.5.331 as proposed.

3. No comments or testimony were received.

By: /s/ Mike McCarter
Mike McCarter, Judge
Workers' Compensation Court

/s/ Jay Dufrechou
Jay Dufrechou, Rule Reviewer

Certified to the Secretary of State December 24, 2001

BEFORE THE DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES OF THE STATE OF MONTANA

In the matter of the adoption of temporary emergency amendments of ARM 37.85.212, 37.85.406 and 37.86.1406 pertaining to medicaid reimbursement	)))))	NOTICE OF ADOPTION OF TEMPORARY EMERGENCY RULES

TO: All Interested Persons

1. The Department of Public Health and Human Services is adopting the following temporary emergency rule amendments of ARM 37.85.212, 37.85.406 and 37.86.1406 pertaining to medicaid reimbursement.

The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who need an alternative accessible format of this notice. Please contact Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210; telephone (406)444-5622; FAX (406)444-1970; Email dphhslegal@state.mt.us.

2. The text of the emergency rules is as follows. Matter to be added is underlined. Matter to be deleted is interlined.

37.85.212 RESOURCE BASED RELATIVE VALUE SCALE (RBRVS) REIMBURSEMENT FOR SPECIFIED PROVIDER TYPES (1) through (11)(d)(ii) remain the same.

(12) Subject to the provisions of (12)(a), when billed with a modifier, payment for procedures established under the provisions of (7) is a percentage of the rate established for the procedures.

(a) The methodology to determine the specific percent for each modifier is as follows:

(i) through (iii) remain the same.

(iv) Notwithstanding any other provision, procedure code modifiers "80", "81", "82", and "AS" used by assistant surgeons, shall be reimbursed at 16% of the department's fee schedule.

(v) Notwithstanding any other provision, procedure code modifier "62" used by co-surgeons shall be reimbursed at 62.5% of the department's fee schedule for each co-surgeon.

(13) and (14) remain the same.

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-2-201, 53-6-101, 53-6-111 and 53-6-113, MCA

37.85.406 BILLING, REIMBURSEMENT, CLAIMS PROCESSING, AND PAYMENT (1) through (20) remain the same.

(21) There is an emergency reimbursement reduction in effect for the following provider types for services provided

January 1, 2002 through June 30, 2002:

(a) inpatient hospital;
(b) outpatient hospital;
(c) early periodic screening, diagnostic and treatment;
(d) nutritional services;
(e) private duty nursing;
(f) chiropractic;
(g) podiatry;
(h) physical therapy;
(i) speech-language pathology;
(j) occupational therapy;
(k) audiology;
(l) optometry;
(m) public health clinic;
(n) dental;
(o) outpatient drugs;
(p) prosthetic devices;
(q) durable medical equipment and supplies;
(r) non-emergency transportation;
(s) ambulance;
(t) physician;
(u) ambulatory surgical center;
(v) non-hospital lab and x-ray;
(w) denturist;
(x) mid-level practitioner;
(y) qualified medicare beneficiary (QMB) services;
(z) QMB chiropractic; and
(aa) freestanding dialysis clinic.

(22) The net pay reimbursement for the provider types listed in ARM 37.85.406(21) is 2.6% less than the amount provided in the following rules: ARM 37.83.811, 37.83.812, 37.83.825, 37.85.212, 37.86.105, 37.86.205, 37.86.506, 37.86.610, 37.86.705, 37.86.1004, 37.86.1005, 37.86.1105, 37.86.1406, 37.86.1806, 37.86.1807, 37.86.2005, 37.86.2207, 37.86.2209, 37.86.2211, 37.86.2217, 37.86.2405, 37.86.2505, 37.86.2605, 37.86.2801, 37.86.2905, 37.86.3005, 37.86.3007, 37.86.3009, 37.86.3011, 37.86.3014, 37.86.3016, 37.86.3018, 37.86.3020, 37.86.3022, 37.86.3205 and 37.86.4205.

(a) For purposes of this rule, "net pay reimbursement" means the allowed amount minus third party liability payments, copayments, coinsurance, incurments, and other deductions.

(b) Providers affected by this rule may be eligible for a rebate if there are sufficient funds available in the medicaid appropriation at the end of state fiscal year 2002.

(c) The department will define a process for calculating and issuing any rebate.

(23) Notwithstanding any other provision, critical access hospital interim reimbursement is 90% of billed charges. Critical access hospitals will still be reimbursed their actual allowable costs determined on a retrospective basis as provided in ARM 37.86.2801.

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-2-201, 53-6-101, 53-6-111, 53-6-113, 53-6-

131 and 53-6-141, MCA

37.86.1406 CLINIC SERVICES, REIMBURSEMENT

(1) Ambulatory surgical center (ASC) services as defined in ARM 37.86.1401(2) provided by an ASC will be reimbursed on a fee basis as follows:

(a) and (a)(i) remain the same.

(b) For ASC services where no medicare fee has been assigned, the fee is ~~77~~ 55% of usual and customary charges.

(c) through (3)(b) remain the same.

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-6-101, 53-6-113 and 53-6-141, MCA

3. The Department of Public Health and Human Services is adopting these emergency rules to prevent imminent peril to the public health, safety and the welfare of Medicaid recipients. The number of Medicaid beneficiaries in December, 2001 was substantially higher than the number projected in the current budget. Based on paid claims data through November, 2001, the Department projects imminent and substantial budget deficits in the Montana Medicaid program for State Fiscal Year (SFY) 2002. These projected deficits require the Department to make immediate adjustments to reimbursement policies for the Montana Medicaid program. Under current rules, expenditures will exceed appropriations before June 30, 2002, the end of SFY 2002. 17-8-104, MCA subjects public officials to civil penalties if they fail to keep expenditures, obligations and liabilities within the amount of the legislative appropriation as required by 17-8-103, MCA. If the Department failed to take immediate action to slow the rate of Medicaid expenditures and funding was subsequently exhausted, the Department would be forced to eliminate coverage for medical services and eliminate eligibility for groups for whom coverage is not mandated by the federal Medicaid law. The elimination of medical services and eligibility would immediately imperil the public health, safety and welfare.

Therefore, in addition to other cost-saving measures, the Department adopts these emergency rules to prevent the imminent peril to the public health, safety and welfare that would result from the elimination of medical services or eligible groups. The expected effect of these emergency rules is to reduce total state and federal expenditures for Medicaid services in Montana by approximately $3,205,903 in the fiscal year ending June 30, 2002. Of the total, state expenditures are reduced a total of approximately $869,441. The Department believes the savings from these emergency rule amendments and other cost-saving measures will allow it to stay within legislative appropriations and thus avoid elimination of medical services or the elimination of eligibility for some groups.

The emergency rules amend ARM 37.85.212 to change reimbursement for procedure code modifiers "80", "81", "82" and "AS" used by

assistant surgeons from 50% to 16% of the fee schedule. Procedure code modifier "62" used by co-surgeons would be changed from 55% of billed charges to 62.5% of the fee schedule for each co-surgeon.

The emergency rules also provide for a 2.6% cut in Medicaid reimbursement rates for the specified provider types identified in ARM 37.85.406(21). The Department recognizes the dedication providers have shown in their service of Medicaid beneficiaries. Therefore, providers affected by the emergency rate cut will be eligible for a rebate if there are sufficient funds available in the Medicaid appropriation at the end of SFY 2002.

ARM 37.85.406 is also amended to include a reduction in the interim reimbursement rate paid to Critical Access Hospitals to 90% of billed charges. Critical Access Hospitals will still be reimbursed their actual allowable costs determined on a retrospective basis as provided in ARM 37.86.2801.

ARM 37.86.1406 is amended to reduce the reimbursement from 77% of billed charges to 55% of billed charges for HCFA Common Procedure Coding System (HCPCS) codes without an established fee billed by ambulatory surgical centers.

The Department considered but decided not to adopt the January 1, 2002 Medicare fee schedules for imaging and other diagnostic services. The Medicare program has postponed implementation of its fee schedules because the Center for Medicare and Medicaid Services (CMS) discovered a number of technical miscalculations in the assignment of the cost of certain new technology devices to related procedure codes. CMS will make corrections and then review all outpatient codes to ensure there are no additional calculation errors. The Department will reconsider adoption of the revised rates and codes when they are published in the Federal Register.

42 U.S.C. 1396a(a)(30)(A), requires that a state plan for medical assistance must provide such methods and procedures consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area. The Department believes the rate cuts adopted in these emergency rules will not have a detrimental effect on Medicaid recipients' access to services.

The Department published notice of its intent to adopt these emergency rules in the newspapers of all cities in Montana with a population of 50,000 or more on December 19 and 20, 2001. The Department also provided copies of the notice to provider associations. The notice invited providers, beneficiaries and their representatives, and other concerned Montana residents to submit written data, views or arguments concerning the emergency rate reductions. The Department considered the comments it

received and will make full, detailed, written responses during the standard rulemaking procedure.

The persons affected by these emergency rules are 11,600 providers enrolled in Montana Medicaid. The Department does not anticipate adverse effects upon the recipients of Medicaid services.

4. The emergency amendment will be effective January 1, 2002.

5. A standard rulemaking procedure will be undertaken by the Department prior to the expiration of the emergency rule changes.

6. Interested persons may submit their data, views or arguments during the standard rulemaking process. The Department also maintains lists of persons interested in receiving notice of administrative rule changes. These lists are compiled according to subjects or programs of interest. For placement on the mailing list, please write to Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210, submit by facsimile (406)444-9744 or by electronic mail via the Internet to dphhslegal@state.mt.us.

Russell E. Cater
Rule Reviewer

/s/ Gail Gray
Director, Public Health and Human Services

Certified to the Secretary of State December 31, 2001.

**BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA**

In the matter of the amendment of ARM 42.22.104 relating to motor vehicles and special mobile equipment	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On December 6, 2001, the department published notice of the proposed amendment of ARM 42.22.104 relating to motor vehicles and special mobile equipment at page 2403 of the 2001 Montana Administrative Register, issue no. 23.

2. No comments were received regarding this rule.

3. The department has amended the rule as proposed.

4. An electronic copy of this Adoption Notice is available through the Department's site on the World Wide Web at http://www.state.mt.us/revenue/rules_home_page.htm, under the Notice of Rulemaking section. The Department strives to make the electronic copy of this Adoption Notice conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems.

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

/s/ Kurt G. Alme
KURT G. ALME
Director of Revenue

Certified to Secretary of State January 7, 2002.

NOTICE OF FUNCTION OF ADMINISTRATIVE RULE REVIEW COMMITTEE

Interim Committees and the Environmental Quality Council

Administrative rule review is a function of interim committees and the Environmental Quality Council (EQC). These interim committees and the EQC have administrative rule review, program evaluation, and monitoring functions for the following executive branch agencies and the entities attached to agencies for administrative purposes.

Economic Affairs Interim Committee:

- **Department of Agriculture;**
- **Department of Commerce;**
- **Department of Labor and Industry;**
- **Department of Livestock;**
- **Department of Public Service Regulation; and**
- **Office of the State Auditor and Insurance Commissioner.**

Education and Local Government Interim Committee:

- **State Board of Education;**
- **Board of Public Education;**
- **Board of Regents of Higher Education; and**
- **Office of Public Instruction.**

Children, Families, Health, and Human Services Interim Committee:

- **Department of Public Health and Human Services.**

Law and Justice Interim Committee:

- **Department of Corrections; and**
- **Department of Justice.**

Revenue and Transportation Interim Committee:

- **Department of Revenue; and**
- **Department of Transportation.**

State Administration, and Veterans' Affairs Interim Committee:

- **Department of Administration;**
- **Department of Military Affairs; and**
- **Office of the Secretary of State.**

Environmental Quality Council:

- **Department of Environmental Quality;**
- **Department of Fish, Wildlife, and Parks; and**
- **Department of Natural Resources and Conservation.**

These interim committees and the EQC have the authority to make recommendations to an agency regarding the adoption, amendment, or repeal of a rule or to request that the agency prepare a statement of the estimated economic impact of a proposal. They also may poll the members of the Legislature to determine if a proposed rule is consistent with the intent of the Legislature or, during a legislative session, introduce a bill repealing a rule, or directing an agency to adopt or amend a rule, or a Joint Resolution recommending that an agency adopt, amend, or repeal a rule.

The interim committees and the EQC welcome comments and invite members of the public to appear before them or to send written statements in order to bring to their attention any difficulties with the existing or proposed rules. The mailing address is PO Box 201706, Helena, MT 59620-1706.

HOW TO USE THE ADMINISTRATIVE RULES OF MONTANA AND THE MONTANA ADMINISTRATIVE REGISTER

Definitions: **Administrative Rules of Montana (ARM) is a looseleaf compilation by department of all rules of state departments and attached boards presently in effect, except rules adopted up to three months previously.**

Montana Administrative Register (MAR) is a soft back, bound publication, issued twice-monthly, containing notices of rules proposed by agencies, notices of rules adopted by agencies, and interpretations of statutes and rules by the attorney general (Attorney General's Opinions) and agencies (Declaratory Rulings) issued since publication of the preceding register.

Use of the Administrative Rules of Montana (ARM):

Known Subject	**1. Consult ARM topical index. Update the rule by checking the accumulative table and the table of contents in the last Montana Administrative Register issued.**
Statute Number and Department	**2. Go to cross reference table at end of each title which lists MCA section numbers and corresponding ARM rule numbers.**

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies that have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through September 30, 2001. This table includes those rules adopted during the period October 1, 2001 through December 31, 2001 and any proposed rule action that was pending during the past 6-month period. (A notice of adoption must be published within 6 months of the published notice of the proposed rule.) This table does not, however, include the contents of this issue of the Montana Administrative Register (MAR).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through September 30, 2001, this table and the table of contents of this issue of the MAR.

This table indicates the department name, title number, rule numbers in ascending order, catchphrase or the subject matter of the rule and the page number at which the action is published in the 2000 and 2001 Montana Administrative Registers.

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