MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 21

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 The notice section contains state agencies' proposed new, amended or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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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NOTICE SECTION

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

In the matter of the amendment of ARM 17.56.502, 17.56.504, 17.56.505, 17.56.602 and 17.56.604 and adoption of new rules pertaining to release reporting, investigation, confirmation and corrective action requirements for tanks containing petroleum or hazardous substances	)))))))))	AMENDED NOTICE OF PROPOSED AMENDMENT AND ADOPTION (UNDERGROUND STORAGE TANKS)

TO: All Concerned Persons

1. On October 17, 2002, the Department of Environmental Quality published a notice of public hearing at page 2792, 2002 Montana Administrative Register, issue number 19, pertaining to the above-stated rules. The hearing was held November 6, 2002, in Helena, Montana.

2. The Department will make reasonable accommodations for persons with disabilities who need an alternative accessible format of this notice. If you require an accommodation, contact the Department no later than 5:00 p.m., November 20, 2002, to advise us of the nature of the accommodation that you need. Please contact Mary Talley, Remediation Division, Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-1409; fax (406) 444-1901; or email mtalley@state.mt.us.

3. The Department is publishing this amended notice because a number of interested persons requested that the Department provide additional time for the public to submit comments.

4. Written data, views or arguments may be submitted to Kirsten Bowers, Remediation Division, Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; faxed to (406) 444-1901; or emailed to kbowers@state.mt.us and must be received no later than 5:00 p.m., December 14, 2002. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

Reviewed by: **DEPARTMENT OF ENVIRONMENTAL QUALITY**

James M. Madden
JAMES M. MADDEN
Rule Reviewer

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

Certified to the Secretary of State, November 1, 2002.

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

In the matter of the amendment of ARM 17.74.401, pertaining to fees for asbestos project permits	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT (ASBESTOS)

TO: All Concerned Persons

1. On December 4, 2002, at 10:30 a.m., the Department of Environmental Quality will hold a public hearing in Room 35 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed amendment of the above-stated rule.

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., November 21, 2002, to advise us of the nature of the accommodation that you need. Please contact Vicky Walsh, Air and Waste Management Bureau, P.O. Box 200901, Helena, Montana, 59620-0901; phone (406) 444-9786; fax (406) 444-1499; or email vwalsh@state.mt.us.

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

17.74.401 FEES FOR PERMITS (1) Applicants for permits must pay a permit fee to the department upon application for a permit as follows:

(a) remains the same.

(b) annual permit ..... ~~$1,500~~ $145

~~(c) annual permit with one outside contractor .. $2,000~~

(d) remains the same, but is renumbered (c).

~~(e)~~ (d) amendments to annual permit ..... ~~$400~~ $145

(2) remains the same.

AUTH: 75-2-503, MCA
IMP: 75-2-503, 75-2-504, MCA

REASON: The Department is proposing to amend ARM 17.74.401 to reduce the amount of the fees for an annual asbestos permit ($1,500 to $145) and amendments to an annual permit ($400 to $145). The Department is also proposing to delete the additional fee for an annual permit with one outside contractor. Pursuant to 75-2-504(2), MCA, the fees must reflect the actual cost of the department's application review, permit issuance, and facility inspections.

In fiscal year 2002, the Department issued eight annual asbestos permits and two amended permits. In fiscal year 2003, the Department expects to issue eight permits and, possibly, one

amended permit. In fiscal year 2003, the cumulative amount of the proposed new fees would be $1,305.

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 Vicky Walsh, Department of Environmental Quality, Air and Waste Management Bureau, P.O. Box 200901, Helena, Montana, 59620-0901; phone (406) 444-9786; fax (406) 444-1499; or email vwalsh@state.mt.us no later than 5:00 p.m., December 12, 2002. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

5. Keith Christie 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 the Department of Environmental Quality, 1520 E. Sixth Ave., P.O. Box 200901, Helena, Montana 59620-0901, faxed to the office at (406) 444-4386, 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:

David Rusoff
DAVID RUSOFF, RULE REVIEWER

Certified to the Secretary of State November 1, 2002.

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

In the matter of the amendment of ARM 17.40.301, 17.40.302, 17.40.303, 17.40.308, 17.40.309, 17.40.310, 17.40.311, 17.40.315, 17.40.316, and 17.40.317 pertaining to water pollution control state revolving fund	))))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT (WATER POLLUTION CONTROL STATE REVOLVING FUND)

TO: All Concerned Persons

1. On December 12, 2002, at 1:30 p.m., the Department of Environmental Quality will hold a public hearing in Room 35 of the Metcalf Building, 1520 East Sixth 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., December 2, 2002, to advise us of the nature of the accommodation that you need. Please contact Paul LaVigne, Technical and Financial Assistance Bureau, Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-5321; fax (406) 444-6836; or email plavigne@state.mt.us.

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

17.40.301 PURPOSE (1) The purpose of this subchapter is to implement the ~~Waste~~ Water ~~Treatment~~ Pollution Control State Revolving Fund Act pursuant to Title 75, chapter 5, part 11, MCA, and sections 601 through 607 of the Federal Water Pollution Control Act, 33 U.S.C. 1381 through 1387, as amended.

(2) This program creates a perpetual financing mechanism for ~~waste~~ eligible water ~~treatment projects and certain non-point source~~ pollution control ~~pollution~~ projects through use of loans and other financial incentives.

(3) The ~~board~~ department of natural resources and conservation may also adopt rules that address measures for protecting the financial solvency of the ~~waste~~ water ~~treatment works~~ pollution control state revolving fund, including measures requiring debt security requirements for loans.

AUTH: 75-5-1105, MCA
IMP: 75-5-1105, MCA

REASON: The Department is proposing to amend ARM Title 17, chapter 40, subchapter 3, concerning funding by the Water Pollution Control State Revolving Fund (fund), to make general editorial amendments and update the rules to reflect the changes

in the Water Pollution Control State Revolving Fund Act (Act) that have been made by previous Montana Legislatures. The title of the fund is proposed for amendment to be consistent with the Act. The proposed amendment to the title of the fund is necessary to more accurately define the eligible uses of the fund. The Department is proposing to amend the references to the Federal Water Pollution Control Act (Federal Act) in the rules to cite to the codified law, rather than the section of the Federal Act. For example, an existing citation to section 319 of the Federal Act would be changed to 33 U.S.C. 1329. This amendment is proposed because citation in the existing format may be hard for the public and loan applicants to find. The proposed format is standard in the legal and administrative fields and is necessary to allow the public and potential applicants to find the referenced sections more easily in libraries or through computer databases.

The Department is proposing to make the following amendments to ARM 17.40.301, which concern the purpose of the fund:

Section (1) is proposed for amendment to more accurately define the use of the fund. The name of the fund was changed by the legislature and the proposed amendment is necessary to make the name of the fund properly cite the name of the Act and to make the name of the fund in the rules the same as in the Act.

Section (2) is proposed for amendment to make necessary editorial changes. The word "eligible" is proposed to be added to clarify that a project must be an eligible use of the fund as determined by the Act and the Federal Act. The other proposed amendment would be to eliminate reference to the wastewater and nonpoint source pollution projects in describing the revolving fund program, and simply state that water pollution control projects may be financed through the fund.

Amendments to (3) are being proposed to make needed editorial changes. The word "board" is proposed for deletion to reflect that the Department of Natural Resources and Conservation (DNRC) no longer has a board, so these matters are now determined by the DNRC. The other proposed amendment is to make the name of the fund in the rules consistent with its name in the Act. These proposed amendments are necessary to make the language in the administrative rules consistent with the Act.

17.40.302 DEFINITIONS In this subchapter, the following terms have the meanings indicated below, ~~and~~ certain of which are supplemental to the definitions contained in 75-5-103 and 75-5-1102, MCA, and sections 601 through 607 of the Federal Water Pollution Control Act, 33 U.S.C. 1251 through 1387, as amended. Terms used herein without definition have the meanings given them in the Act or the federal Act.

(1) "Act" means the Water Pollution Control State Revolving Fund Act, Title 75, chapter 5, part 11, MCA.

(2) "Department" means the Montana department of environmental quality established by 2-15-3501, MCA.

(3) "Department of natural resources and conservation" means the Montana department of natural resources and

conservation established by 2-15-3301, MCA.

(4) "Eligible water pollution control projects" means projects that meet the requirements of the federal Act and are approved by the department, including certain wastewater collection and treatment system projects, sewage system projects, storm sewer or storm drainage projects, solid waste management projects, and other nonpoint source projects.

(1) remains the same, but is renumbered (5).

~~(2)~~ (6) "Federal act" means the federal ~~a~~Act as defined in 75-5-1102~~(3)~~, MCA.

(7) "Intended use plan" or "IUP" means the document prepared annually by the department that identifies uses of the funds in the program and describes how those uses support the goals of the program.

~~(3)~~ (8) "Municipality" means municipality as defined in 75-5-1102~~(5)~~, MCA.

~~(4)~~ (9) "Non-point source" means a ~~diffuse~~ source of pollutants that ~~resulting from the activities of man over a relatively large area, the effects of which normally must be addressed or controlled by a management or conservation practice~~ originate from diffuse runoff, seepage, drainage, or infiltration.

(10) "Nonpoint source management plan" means the most recent report submitted by the department to EPA pursuant to 33 U.S.C. 1329.

(11) "Nonpoint source project" means a project that has been approved in the nonpoint source management plan and that is eligible and has qualified for financing under the program pursuant to the federal Act, the Act, these rules, and applicable department of natural resources and conservation rules, and may include, without limitation, the following:

(a) solid waste management systems;

(b) manure storage facilities;

(c) mitigation banks;

(d) urban storm water runoff;

(e) ground water protection;

(f) animal feed operations;

(g) no-till farm equipment;

(h) wetlands restoration and preservation;

(i) stream bank restoration;

(j) submerged aquatic vegetation;

(k) construction runoff; and

(l) conservation easements.

(12) "Project priority list" means the list of projects expected to receive financial assistance under the program, ranked in accordance with a priority system developed under 33 U.S.C. 1296.

~~(5)~~ (13) "Private ~~concern~~ person" means a private ~~concern~~ person as defined in ~~75-5-1103(6)~~ 75-5-1102, MCA.

(6) remains the same, but is renumbered (14).

(15) "Program" means the water pollution control state revolving fund program established by the Act.

(16) "Project" has the same meaning as in 75-5-1102, MCA.

~~(7)~~ (17) "Revolving fund" means the revolving fund as

defined in ~~75-5-1103(9)~~ 75-5-1102, MCA.

~~(8)~~ (18) "Sewage system" means any device for collection or ~~conducting~~ conveyance of sewage~~,~~ or industrial wastes ~~or~~ to an ultimate disposal point.

(19) "Solid waste management system" has the same meaning as in 75-10-203, MCA, except that, for the purposes of this subchapter, the term includes activities of and components and improvements to a solid waste management system including, but not limited to, the acquisition of land, installation of liners, monitoring of wells, construction and closure of landfills or composting facilities, and all necessary and related equipment.

(20) "Treatment works" has the same meaning as in 33 U.S.C. 1292.

~~(9)~~ (21) "~~Waste water~~ Wastewater" means sewage, sewage sludge, industrial waste, other wastes, or any combination thereof.

~~(10)~~ (22) "~~Waste water~~ Wastewater system" means a public sewage system or other system that collects, transports, treats or disposes of ~~waste water~~ wastewater.

AUTH: 75-5-1105, MCA
IMP: 75-5-1102, MCA

REASON: The Department is proposing to amend ARM 17.40.302, which contains the definitions used in the subchapter, to add definitions that were not in the current rules and make some clarifications in the current definitions. The statement "Terms used herein without definition have the meanings given them in the Act or the federal Act." is proposed to clarify that the definitions in the Act or the Federal Act are the defaults if a term is not defined in the rules. The amendments to the definitions are necessary to clarify the meaning of terms used in this subchapter, to correct an incorrect citation to a statute, to add terms that are used in the subchapter that are not defined in the current rules, to eliminate pinpoint citations, and to make the rules consistent with the Act and other rules.

The Department is proposing to eliminate, in (2) [renumbered (6)] and (3) [renumbered (8)], "pinpoint" citations to subsections of 75-10-1102, MCA, which contain definitions, so that only statutory section numbers are cited. The proposed amendment is necessary because, with the current rule's pinpoint citations to statutory subsections, any change by the legislature to a statutory subsection cited in the rule would require an amendment to the rule. If only statutory sections are cited, a change by the legislature to the numbering of subsections would not require an amendment to these rules.

The Department is proposing to add new (1) through (4), (7), (10), (11), (12), (15), (16), (19), and (20). These amendments are necessary to provide definitions for terms that are used in the current rules but are not specifically defined.

Subsection (4) [renumbered (9)] is proposed for amendment to change the definition of "nonpoint source" to match the definition contained in ARM 17.30.602(18) and make it the same

as in the DNRC definitions rule, ARM 36.24.102. This proposed amendment is necessary to make the rules in this subchapter consistent with related rules in other chapters.

The Department is proposing to amend (5) [renumbered (13)] to change the term "private concern" to "private person." The Act uses the term "private person," so this proposed amendment is necessary to make the rules consistent with the Act.

The Department is proposing to amend (7) [renumbered (17)], which defines "revolving fund" by referring to the definition of that term in the Act. The reference in the current rule is to the wrong section of the Act. The proposed amendment is necessary to correct that error by referring to the correct section.

The Department is proposing to amend (8) [renumbered (18)] to substitute the term "conveyance of" for "conducting" in the definition of "sewage system." This proposed amendment is necessary to make the definition reflect current usage.

The Department is proposing to amend (9) and (10) [renumbered (21) and (22)] to change the words "waste water" to "wastewater". This proposed amendment is necessary because one word is now the acceptable form of the term.

17.40.303 USE OF THE REVOLVING FUND--ELIGIBLE ACTIVITIES FOR FUND ASSISTANCE (1) The department shall administer the program in accordance with the federal Act, the Act, the trust indenture regarding the program, and these rules. If there is a conflict among the Act, the trust indenture, or these rules, the department shall resolve the conflict by applying the following order of precedence:

(a) the Act;

(b) the trust indenture;

(c) these rules.

~~(1)~~ (2) The revolving fund may be used, without limitation, to:

(a) provide financial assistance to municipalities for ~~development~~ construction, renovation, rehabilitation, expansion, improvement, or acquisition of publicly owned treatment works ~~as described in section 212 of the federal act,~~ including, but not limited to:

(i) remains the same.

(ii) construction and construction management of treatment works, including devices and systems used in the storage, conveyance, treatment, recycling and reclamation of municipal waste, storm water runoff, or combined sewer overflows.

(b) make loans to municipalities and private ~~concerns~~ persons for projects that are consistent with the non-point source ~~pollution control~~ management ~~program under section 319 of the Federal Act;~~ plan and that have qualified as nonpoint source projects. These projects may include, but are not limited to:

(i) preliminary planning to determine the feasibility of the nonpoint source project, engineering or architectural plans and working drawings; or

(ii) acquisition of land and equipment and construction of facilities relating to nonpoint source projects;

(c) earn interest prior to disbursement, although the revolving fund may not be managed primarily for this purpose; and

~~(d) secure additional bonds, thereby increasing the value of the fund without additional investment by the state; and~~

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

AUTH: 75-5-1105, MCA
IMP: 75-5-1107, MCA

REASON: The Department is proposing to amend ARM 17.40.303, which concerns the uses of the revolving fund, to make needed editorial amendments and to clarify some specific criteria required for funding publicly owned treatment works and for municipalities and private persons for nonpoint source projects.

Section (1) is proposed to be amended to clarify how the program would be operated if conflicts occur among the Act, trust indenture, or rules. The proposed amendment would establish that, in the event of conflict, the order of precedence would be the Act, the trust indenture and then the rules.

The Department is proposing to amend (2)(a) to replace the word "development," currently in the rule, with the words "construction, renovation, rehabilitation, expansion, improvement, or acquisition." This proposed amendment is necessary to have the rule more clearly and completely describe the types of publicly owned treatment works projects that qualify for financing by the fund.

The Department is proposing to amend (2)(a)(ii) to add construction management as an eligible project component. This proposed amendment is necessary to have the rule more clearly and completely describe the eligible elements of construction that qualify for financing by the fund.

Subsection (2)(b) is proposed for amendment to add municipalities as eligible recipients of nonpoint source project funding. The current rule allows funding of nonpoint source projects for private concerns only, and not for municipalities. This proposed amendment is necessary to make the rules consistent with the Act. Additionally, the Department proposes to add a description of types of nonpoint source projects that are eligible for funding to be consistent with the types of projects that qualify for financing by the fund. This proposed amendment is necessary because the Legislature expanded the definition of eligible projects in the Act to include nonpoint source projects and the Department proposes to make the rules consistent with the Act. This proposed amendment is necessary to allow the Department to fund additional types of projects that could reduce nonpoint source pollution.

The Department is proposing to amend (2)(c) to add the word "revolving" for clarification.

The Department is proposing to delete (2)(d). The program has been in operation for approximately 10 years and there has not been a need for additional bonding. The need for additional

bonding in the future is not envisioned. Therefore, it is necessary to delete (2)(d) to eliminate unneeded language from the rule.

17.40.308 TYPES OF FINANCIAL ASSISTANCE (1) The department or the department of natural resources and conservation may provide financial assistance from the revolving fund by:

(a) making a ~~direct~~ loan for the costs of eligible ~~project costs~~ water pollution control projects, subject to the following requirements:

~~(i) the interest rate may not exceed the state's interest rates incurred in borrowing money for the state match;~~

~~(ii)~~ (i) the term may not exceed 20 years after completion of the project, unless otherwise permitted by the federal Act, the Act, the trust indenture regarding the program, the department, and the department of natural resources and conservation;

~~(iii)~~ (ii) repayment must begin as prescribed by the department of natural resources and conservation, but in any event not later than ~~1~~ one year after project completion with all principal and interest payments credited directly to the fund; ~~and~~

~~(iv)~~ (iii) the loan recipient shall establish a dedicated source of revenue for repayment of the loan~~.~~; and

(iv) satisfaction of all additional requirements of the department of natural resources and conservation;

(b) purchasing or refinancing an existing municipal debt obligation for construction of ~~a waste~~ an eligible water ~~system~~ pollution control project begun after March 7, 1985, subject to all applicable requirements of the federal ~~a~~Act;

(c) purchasing bond insurance or guaranteeing full and timely payment of principal and interest on a debt obligation~~, except the fund may not be used to fund a reserve account for a municipal bond issue~~; or

(d) guaranteeing a revolving fund established by a ~~municipal or intermunicipal entity~~ municipality that is similar to the state revolving fund.

AUTH: 75-5-1105, MCA
IMP: 75-5-1107, MCA

REASON: The Department is proposing to amend (1) to make needed editorial changes. The Department of Natural Resources and Conservation was added because the fund is jointly administered by DEQ and the DNRC. Also, the term "revolving" is added for clarification.

The Department is proposing to amend (1)(a) to delete the word "direct." A direct loan is the main eligible use of the fund, but not the only use. For example, an existing debt can be refinanced. Also, "water pollution control projects" is proposed to replace the term "projects" for consistency with the Act.

The Department is proposing to delete (1)(a)(i), concerning

the rate of interest that borrowers have to repay. The Act (see 75-6-211(1)(a), MCA) and the Federal Act require that the fund be perpetually self-sustaining. The Department is proposing that it should have enough flexibility to set the interest rates on loans to keep the fund financially solvent in perpetuity. The interest rate on SRF loans is based on the costs to run the program, including costs to the program to issue its own general obligation bonds to fund its state match (the federal government, through EPA funding, contributes 5/6 of the SRF money available for loans, and the state issues general obligation bonds to provide the other 1/6). The DNRC rules generally address the considerations in establishing the interest rates for SRF loans. The Department does not intend to raise the interest rates, but rather to keep its loan interest rates relatively stable in spite of fluctuations in the bond market. Since the inception of the Water Pollution Control SRF Program in 1991, the interest rate on all loans to municipalities has been between three and four percent, which has been well below the rate on the private market in all cases. The proposed amendment is necessary to give the Department the flexibility to maintain this historical rate.

The Department is proposing to amend (1)(a)(ii) [renumbered (1)(a)(i)] to define when the 20-year loan term would start. The loan term would start after the completion of the project, unless otherwise permitted by the Federal Act, the Act, or trust indenture. Currently, the Federal Act requires a maximum loan term of twenty years for funded projects. The Drinking Water SRF loan program and proposed changes to the Federal Act allow terms longer than twenty years under specific circumstances. The language amendment is necessary to give the program flexibility to incorporate any changes regarding loan terms that may occur in the federal law.

The Department is proposing to amend (1)(a)(iii) [renumbered (1)(a)(ii)] for clarification. Repayment of the loan must begin as prescribed by the DNRC. The DNRC rule (ARM 36.24.110) places several conditions on when repayment of the loan must begin. Rather than repeat the conditions, the Department proposes to defer to DNRC's authority on this matter.

The Department is proposing to amend (1)(a)(iv) [renumbered (1)(a)(iii)] and add new (iv) to require that a loan recipient also satisfy all additional requirements of the DNRC. This proposed amendment is necessary to allow DNRC to require additional securities or information for eligible nonpoint source projects and potential loans to private persons that traditional municipal financing does not require.

The Department is proposing to amend (1)(b) to make changes that more accurately define the use of the fund.

The Department is proposing to amend (1)(c) to allow municipalities to include the required debt service reserve amount in the loan amount. In essence, a municipality would borrow the debt service reserve. Small communities frequently do not have the cash available to fund the debt service reserve and this proposed amendment is necessary to allow them to borrow it and, therefore, meet the loan security provisions.

The Department is proposing to amend (1)(d) to delete a reference to intermunicipal entities because such entities are already included in the definition of municipality under 75-5-1102 and 75-6-304, MCA. Therefore, the reference is unnecessary.

17.40.309 CRITERIA FOR FINANCIAL ASSISTANCE TO MUNICIPALITIES (1) To be eligible for financial assistance from the revolving fund, a municipality must:

(a) meet financial capability requirements set by the ~~board of natural resources and conservation or the~~ department of natural resources and conservation for the proposed project that ensure sufficient revenues will be available to operate and maintain the ~~facility~~ project for its useful life and to repay the loan;

(b) agree to operate and maintain the ~~waste water system~~ facility constructed or improved by the project so that ~~the facility~~ it will function properly over ~~its structural and material design~~ the useful life~~, which may not be less than 20 years~~ of the project;

(c) remains the same.

(d) meet the statutory requirements listed in ~~section 602(b)(6) of the federal act~~ 33 U.S.C. 1382 for projects constructed with funds made available directly by federal capitalization grants;

(e) and (f) remain the same.

(g) meet the applicable plan and specification requirements for the project (for example, for public ~~waste water~~ wastewater systems, ~~as~~ those described in ARM 17.38.101, and for solid waste management systems, those described in ARM 17.50.506);

(h) remains the same.

(i) meet all applicable local, state, and federal laws and ~~authorities~~ regulations.

(2) All projects funded with financial assistance from the revolving fund must be listed on the ~~Montana~~ project priority list and intended use plan as described in ARM 17.40.315 and 17.40.316, respectively.

AUTH: 75-5-1105, MCA
IMP: 75-5-1105, 75-5-1113, MCA

REASON: The proposed amendments to (1)(a), (b), (d) and (2) are necessary to make needed minor editorial changes not intended to have substantive effects.

The proposed amendment to (1)(g) is necessary to make changes that more accurately describe that the fund may be used to finance projects such as public wastewater treatment projects or solid waste management system projects that have undergone required design review by the Department.

17.40.310 CRITERIA FOR LOANS TO PRIVATE ~~CONCERNS~~ PERSONS (1) A private ~~concern~~ person is eligible for a loan from the fund if ~~its~~ the person's project proposal meets the

following criteria:

(a) the project is ~~identified in an approved non-point~~ consistent with the nonpoint source management plan ~~pursuant to section 319 of the federal act~~ and has qualified as a nonpoint source project;

(b) and (c) remain the same.

(d) adequate funding sources are available to completely finance the project; ~~and~~

(e) the project meets the criteria for loans as stated in 75-5-1113, MCA~~.~~; and

(f) the project satisfies all conditions for financing of the project required by the department of natural resources and conservation.

AUTH: 75-5-1105, MCA
IMP: 75-5-1113, MCA

REASON: The Department is proposing to amend (1) to substitute "private person" for "private concern." This proposed amendment is necessary to make the rules in this subchapter consistent with the Act. See discussion for proposed amendment to ARM 17.40.302(12).

The Department is proposing to amend (1)(a) to make minor editorial changes and to delete the reference to the Federal Act. The Federal Act is now referenced in the definition of nonpoint source management plan in ARM 17.40.302(11).

The Department is proposing to add (1)(f) to ensure that all of DNRC's conditions for financing a proposed loan are met. Because the DNRC has the responsibility and authority to ensure that adequate security is in place for each loan, the proposed amendment is necessary to allow the DNRC discretion to determine appropriate loan security for loans to private persons.

17.40.311 APPLICATION PROCEDURES (1) A complete application package ~~must~~ may be submitted to the department ~~no later than October 1 to be considered for the current federal fiscal year (October 1 - September 30)~~ at any time. The department shall consider applications in the order received. If the department determines, in its sole discretion, that it lacks sufficient time to consider an application during the state fiscal year (July 1 through June 30) in which it was submitted, the department shall consider the application during the next fiscal year.

(2) A municipality that seeks direct loan assistance, a loan guarantee, or insurance for a municipal obligation must submit:

(a) a completed ~~revolving fund~~ uniform application form;

(b) ~~an~~ a preliminary engineering or technical report that includes an assessment of the environmental impacts associated with the proposed project;

(c) through (f) remain the same.

(3) A municipality that seeks loan assistance to refinance projects previously constructed and subject to outstanding indebtedness must submit:

(a) a completed ~~revolving fund~~ uniform application form;

~~(b) a project description that includes a construction schedule;~~

(c) through (e) remain the same, but are renumbered (b) through (d).

(4) A private ~~concern that~~ person who seeks financial assistance in connection with a nonpoint source project must submit ~~the following~~:

(a) a completed ~~revolving fund~~ loan application in a form determined by the department and the department of natural resources and conservation to be appropriate for the private person;

(b) remains the same.

(c) an implementation schedule; ~~and~~

(d) a reasonably detailed description of the project;

(e) a reasonably detailed estimate of the cost of the project;

(f) a timetable for the construction of the project and for payment of the cost of the project;

(g) a description of the source or sources of funds to be used in addition to the proceeds of the loan to pay the cost of the project;

(h) a description of the source or sources of revenue proposed to be used to repay the loan;

(i) a current financial statement of the system showing assets, liabilities, revenues, and expenses;

(j) a statement as to whether, at the time of application, there are any outstanding loans, notes, bonds, or other obligations payable from the revenue of the system and, if so, a description of the loans, notes, bonds, or other obligations;

(k) a statement as to whether, at the time of the application, there are any outstanding loans, notes, or other obligations of the private person and, if so, a description of the loans, notes, or other obligations;

(l) all information that the department or the department of natural resources and conservation may require in order to determine the effect of making the loan on the tax exempt status of the state's bonds; and

(m) all other information that the department or the department of natural resources and conservation may require to determine the feasibility of a project and the applicant's ability to repay the loan including, but not limited to:

(i) engineering reports;

(ii) economic feasibility studies; and

(iii) legal opinions.

(d) remains the same, but is renumbered (n).

AUTH: 75-5-1105, MCA
IMP: 75-5-1111, MCA

REASON: The Department is proposing to amend (1) to delete the requirement that applications be submitted before the end of one federal fiscal year to be considered in the next year. The proposed amendment would allow an application to be submitted at

any time. The proposed amendment is necessary to give the Department the flexibility to consider applications as they are submitted. If time is available, the Department will consider an application during the fiscal year it is submitted.

The Department is also proposing to amend (1) to provide that it will consider applications in the order they are received. This proposed amendment is necessary to have the rule reflect current practice and to be fair to the applicants. In addition, the Department is proposing to amend (1) to provide that the Department may consider a loan application in the next fiscal year if time constraints prevent it from considering the application by the end of the fiscal year in which it was submitted. This amendment is also necessary to allow the Department flexibility in considering applications that are received late in the fiscal year. Combined with the proposed amendment discussed above, where it would be required that the Department consider applications in the order received, this proposed amendment is necessary to make the process fair and still give the Department the desired flexibility to postpone consideration of an application if time is unavailable during the current fiscal year. Last, the Department is proposing to delete a reference to the federal fiscal year (October 1 through September 30), and to substitute a reference to the state fiscal year (July 1 through June 30). The proposed amendment is necessary to provide consistency with budgeting and annual reporting periods, which are done on a state fiscal year basis.

The Department is proposing to amend (2)(a) and (b) and (3)(a) to make minor changes in terminology consistent with the names of documents that were developed cooperatively by several funding agencies in Montana to streamline the funding application procedures. The uniform application and preliminary engineering report are documents required by all municipal utility funding agencies in Montana.

The Department is proposing to amend (3)(b) to eliminate the requirement that proposals to refinance projects that have been previously constructed must contain a project description with a construction schedule. It is necessary to eliminate the requirement for a project description because it is already required in the uniform application, and to keep it in the rule would be unnecessarily duplicative.

The Department is proposing to amend (4) to make minor editorial changes and clarifications and to list requirements for the applicants for loans for nonpoint source projects. The list of requirements would give the Department and DNRC the flexibility to require information that may be appropriate for any of the broad range of nonpoint source projects and applicants. The proposed amendments are necessary to require loan applicants to adequately define the scope, feasibility, and schedule of a project and provide information needed to determine the security and tax-exempt status of the loan for that project.

17.40.315 ~~MONTANA~~ PROJECT PRIORITY LIST (1) The ~~Montana~~ project priority list is established for rating and ranking

possible projects for fund assistance.

(2) The department shall list all potential eligible projects on the ~~Montana~~ project priority list, including projects proposed by project applicants and projects that the department determines are needed.

(3) The ~~Montana~~ project priority list must include:

(a) remains the same.

(b) an assignment of a numerical score for each project through use of the ~~Montana priority rating~~ department's ranking criteria and ranking system, which ~~shall~~ must rate and rank projects according to:

~~(i) the severity of public health hazard addressed by the project;~~

~~(ii)~~ (i) ~~the extent to which~~ water quality ~~impacts are reduced by the project;~~ impairment as it relates to:

(A) surface water; and

(B) ground water;

~~(iii) the extent to which aesthetic or nuisance problems would be addressed by the project;~~

~~(iv)~~ (ii) effectiveness of the ~~need for the~~ proposed project in ~~order to maintain existing high-~~ improving water quality ~~water~~;

(iii) activity-specific criteria; and

(iv) the applicant's readiness to proceed; and

~~(v) the extent to which the project will improve system reliability; and~~

~~(vi) other considerations developed under authority of the Federal Act or the Montana water quality act.~~

(c) a system by which limited funds are allocated on an annual basis~~; and~~.

~~(d) a system for evaluating non-point source control projects under section 319 of the federal act.~~

(4) remains the same.

AUTH: 75-5-1105, MCA
IMP: 75-5-1112, MCA

REASON: The Department is proposing to amend ARM 17.40.315, which concerns the priority list for projects requesting funding by the Water Pollution Control State Revolving Fund, to make minor editorial changes. The proposed amendments are necessary to have the rule reflect the proper terminology for the list of projects ranked by the Department each year for funding. Additionally, amendments are proposed to the list of specific requirements for creating the project priority list. These proposed amendments are necessary to have the rule contain the revised ranking criteria developed by the Department. The Department proposes to evaluate and rank both nonpoint source projects and conventional wastewater projects using the proposed ranking criteria. Public health impacts would be addressed in the ranking criteria by the evaluation of affected uses, which include impacts to drinking water. "Readiness to proceed" is proposed for inclusion in the ranking criteria. These amendments are necessary to ensure that the

project priority list is created using criteria that will favor projects that protect the uses such as drinking of water that are of importance to Montanans. The criteria would also ensure that the project priority list will be more realistic and reflect the actual use of funds for projects in the upcoming year.

17.40.316 INTENDED USE PLAN--RANKING FOR FUNDING PURPOSES (1) The department shall prepare an intended use plan (IUP) ~~that describes the projects being considered for fund financial assistance for the upcoming federal fiscal year and establishes a preliminary project ranking~~ annually.

(2) remains the same.

(3) The following factors must be considered in developing the IUP:

(a) and (b) remain the same.

(c) long-term health and viability of the revolving fund, and the ability of the revolving fund to support the project; and

(d) remains the same.

AUTH: 75-5-1105, MCA
IMP: 75-5-1112, MCA

REASON: The Department is proposing to amend ARM 17.40.316 to make needed editorial changes not intended to have a substantive effect.

17.40.317 PUBLIC PARTICIPATION (1) The ~~Montana~~ project priority rating and ranking system, ~~Montana~~ project priority list, and intended use plan are subject to full public scrutiny. Each year the department shall mail the draft priority list ~~must be circulated throughout the state by general mailing~~ to the program's list of interested ~~parties~~ persons as defined in 2-4-102, MCA, ~~and by publishing~~ publish notice of its availability in at least ~~2~~ five newspapers of general circulation, and post such notice on the department's website.

(2) After preparation of the draft Montana rating and ranking system, the draft ~~Montana~~ project priority list, and the draft intended use plan, a formally advertised public hearing must be held to allow public comment concerning the rating and ranking system, project priority list, and intended use plan. All public comments received by the department must be addressed in a written summary.

AUTH: 75-5-1105, MCA
IMP: 75-5-1112, MCA

REASON: The Department is proposing to amend ARM 17.40.317, concerning public participation in the priority listing process for projects considered for funding by the Water Pollution Control State Revolving Fund, to require the Department to post the environmental review documents on the Department's website and to make needed editorial changes not

intended to have substantive effect. The proposed amendment is also necessary to reflect the Department's policy of placing information on the web whenever possible so that the public may more easily access and review it.

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 Paul LaVigne, Technical and Financial Assistance Bureau, Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; by fax (406) 444-6836; or by email to plavigne@state.mt.us, no later than December 12, 2002. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

5. Norm Mullen, attorney, 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, 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.

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

Reviewed by: **DEPARTMENT OF ENVIRONMENTAL QUALITY**

James M. Madden **BY:** *Jan P. Sensibaugh*

JAMES M. MADDEN **JAN P. SENSIBAUGH, Director**

Rule Reviewer

Certified to the Secretary of State, November 1, 2002.

BEFORE THE BOARD OF RADIOLOGIC TECHNOLOGISTS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the proposed amendment of ARM 8.56.409, 8.56.413, 8.56.602A, 8.56.602B, 8.56.602C and 8.56.607 pertaining to fee schedule, temporary permits, permits - practice limitations, course requirements for limited permit applicants, permit examinations, and permit fees, and the adoption of NEW RULE I, related to fee abatements	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT AND ADOPTION

TO: All Concerned Persons

1. On December 6, 2002, at 10:30 a.m., a public hearing will be held in the Business Standards Division, in room 471, 301 South Park Avenue, Helena, Montana to consider the proposed amendment and adoption of the above-stated rules.

2. The Department of Labor and Industry 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 Board of Radiologic Technologists no later than 5:00 p.m., on November 26, 2002, to advise us of the nature of the accommodation that you need. Please contact Helena Lee, Board of Radiologic Technologists, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2385; Montana Relay 1-800-253-4091; TDD (406) 444-2978; facsimile (406) 841-2305; e-mail dlibsdrts@state.mt.us.

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

8.56.409 FEE SCHEDULE (1) remains the same.
~~(a) Examination fee $30~~
(b) through (g) remain the same, but are renumbered (a) through (f).

AUTH: ~~37-1-101,~~ 37-1-134, 37-14-202, ~~37-14-310,~~ MCA
IMP: 37-1-134, ~~37-14-303~~ 37-14-309, 37-14-310, MCA

REASON: The Board finds there is reasonable necessity to amend this rule and eliminate the examination fee because the board has not administered a state-wide examination for radiologic technologists for a number of years. Examinations are administered by specified national organizations. Approximately 40 individuals annually apply for initial licensure as a radiologic technologist. If the Board was collecting the $30

examination fee from those persons, there would be a $12,000 impact to those individuals.

8.56.413 INSPECTIONS (1) through (3) remain the same.

(4) It is up to the employer of a licensee or permit holder to determine whether licenses and permits must be posted at the facility.

(5) Licenses or permits not posted must be immediately available to the inspector upon request.

AUTH: 37-14-202, MCA
IMP: 37-14-307, 37-14-322, MCA

REASON: The Board finds there is reasonable necessity to amend this rule due to safety concerns. At some facilities, licensees do not want to post their licenses because the license includes the licensee's home address, which the licensee may, for reasons of personal safety, not wish to be readily accessible to the public. However, the proposed amendments make it clear that the decision whether or not to post licenses at a facility rests with the employer. If not posted, the license needs to be made available to Board inspectors upon request.

8.56.602A PERMITS - PRACTICE LIMITATIONS (1) Upon successful completion of the required formal training and the required examination, the board may issue a limited permit to the applicant which specifies the x-ray procedures the limited permit technician is authorized to perform. The ~~limitations of the permit are~~ limited permit holder may only take x-rays as follows:

(a) ~~Chest -~~ in the chest area, consisting of the thoracic region including the lungs, AP (anterior posterior) or PA (posterior anterior) views, lateral and apical lordotic routine chest exposures, but in no case involving mammography procedures;

(b) ~~Extremities -~~ of the extremities, AP or PA, lateral and oblique routine exposures ~~of the extremities~~;

(c) ~~Spine -~~ of the spine, AP, lateral and oblique routine exposures of the cervical, thoracic and lumbar ~~spine~~ areas;

(d) ~~Skull - All~~ all routine views of the skull and sinuses, with the exception of internal auditory meatus series and mastoid series;

(e) ~~Abdomen -~~ of the abdomen, consisting of the region from the diaphram to the pubis, routine supine and upright AP abdomen projection, and IVP (intravenous pyelogram) scout and follow-up films as specified by the supervising radiologist or physician; and

(f) for G~~.~~I~~.~~ (gastro-intestinal) tract ~~fluoroscopy~~ and associated overhead films, ~~-~~ the limited permit technician may assist the physician in fluoroscopic examination of the G~~.~~I~~.~~ tract and may produce films of all associated overhead views as ordered by the physician.

(2) A limited practice permit holder may perform bone densitometry examinations upon successful completion of the bone

densitometry equipment operators examination administered by the ARRT or the international society of clinical densitometry (SCD).

(3) Forty-hour limited permit holders are not authorized or permitted to perform fluoroscopy procedures due to the difficulty in monitoring, limiting, and controlling the accumulative doses of ionizing radiation.

(4) A 24-month student is allowed to perform procedures with portable fluoroscopy equipment (also known as c-arm), provided the student has submitted documentation to the board that:

(a) identifies the student as being enrolled in an approved 24-month radiology program;

(b) the student will be performing portable fluoroscopy procedures as a student;

(c) identifies the names of the student's clinical supervisors; and

(d) identifies the facility which will allow the student to receive clinical experience, including the performance of duties outside the scope of a limited permit holder.

(5) If a 24-month student has completed the first 12 months of the program and has become a limited permit holder, that student may perform procedures while operating portable fluoroscopy equipment.

AUTH: 37-14-202 ~~37-14-306~~, MCA
IMP: 37-14-301, 37-14-306, MCA

REASON: The Board finds there is reasonable necessity to amend ARM 8.56.602A to clarify that a physician who is not a radiologist may order certain procedures.

The Board finds there is reasonable necessity to allow limited permit holders who have demonstrated their competence to perform bone densitometry. The board finds there is a need for additional persons to perform bone densitometry in Montana. The ARRT and the SCD perform the examination for bone densitometry and the board recognizes those credentials.

The Board finds there is reasonable necessity to amend the rule to clarify that a 40-hour limited permit holder has not received adequate training in the use of fluoroscopy to adequately protect the public from the risk factors associated with the use of ionizing radiation that is used during fluoroscopy.

The Board finds there is reasonable necessity to amend this rule in order make sure that students enrolled in approved 24-month training programs obtain clinical experience in the use of portable fluoroscopy equipment. Limited permit holders are not otherwise allowed to perform fluoroscopy.

8.56.602B COURSE REQUIREMENTS FOR LIMITED PERMIT APPLICANTS (1) through (3)(e) remain the same.

(f) ~~G.I.~~ tract ~~fluoroscopy~~ and associated overhead films - eight hours,

(g) remains the same.

(4) and (5) remain the same.

AUTH: ~~37-1-131,~~ 37-14-202 ~~37-14-301, 37-14-306~~, MCA
IMP: 37-14-301, 37-14-306, MCA

REASON: The board finds there is reasonable necessity to amend the rule to clarify that eight hours of limited training is insufficient to allow limited permit holders to perform fluoroscopy.

8.56.602C PERMIT EXAMINATIONS (1) through (3) remain the same.

(4) Applicants may review their examination papers with administrative staff for the board at the ~~Division of Professional and Occupational Licensing, 111 North Jackson, Helena, Montana 59620~~ board office.

(5) remains the same.

(6) Applicants for a limited permit (40-hour course) who fail an examination twice must retake that portion of the formal x-ray training before being allowed admission to a third examination. Upon completion of the additional course work in the failed area, the applicant must file a new application accompanied by the appropriate fees, with the board office.

(a) On a case-by-case hardship basis, the board may allow an unsuccessful applicant to receive tutoring in lieu of the additional course work. A tutor must have at least five years experience as a licensed radiologic technologist and possess a current ARRT card. The tutor must submit for board approval the tutor's qualifications and an outline of the materials and topics to be studied by the applicant under the instruction of the tutor. The applicant is responsible for paying all costs associated with the tutorial.

(7) Student permit applications (12-month students in a 24-month program) who have failed the general examination twice must re-take the general examination plus all six category exams.

(8) Temporary permit applicants (24-month graduates) who have failed the AART exam three times must take the general exam plus all six category exams.

(7) and (8) remain the same, but are renumbered (9) and (10).

AUTH: ~~37-1-131,~~ 37-14-202, ~~37-14-306,~~ MCA
IMP: 37-14-306, MCA

REASON: The Board finds there is reasonable necessity to amend this rule to clarify the requirement for additional study in the failed area(s) and re-taking of the exam requirement for the three levels of permit holders for purposes of public safety. The Board has recently heard from unsuccessful applicants who, for reasons of hardship, have sought a speedier alternative to

waiting until the next regular class is offered. The Board finds that requiring additional study in the areas failed is the best way to ensure only qualified applicants are becoming licensed to practice.

8.56.607 PERMIT FEES

(1) through (7) remain the same.

(8) A temporary permittee who applies for a full radiological technologist license shall pay only an additional $20 for the full radiologic technologist license.

AUTH: ~~37-1-134,~~ 37-14-202, 37-14-306, 37-14-310, MCA
IMP: ~~37-1-134, 37-14-303, 37-14-305,~~ 37-14-306, 37-14-309, 37-14-310, MCA

REASON: The Board finds that there is reasonable necessity to charge a person with a temporary permit only an additional $20 fee to equal the full $90 fee radiological technologists must pay to become licensed. A person who has already obtained a temporary permit has already had their application processed by the board, and thus the incremental cost of issuing a full license is much smaller than it would be to an applicant who did not already possess a temporary practice permit. The Board is required to establish fees commensurate with its costs. The proposed amendment will establish in rule the policy the Board has exercised for some time. Approximately 20 persons a year are estimated to be affected by the proposed amendment, but there will be no change in Board revenue or expense.

4. The proposed new rule reads as follows:

NEW RULE I ABATEMENT OF RENEWAL FEES (1) Pursuant to 17-2-302, MCA, state programs that charge a fee for services are generally not permitted to let their cash balance exceed twice the program's annual appropriation. However, despite the best projections of the board, there may be times when cash balances exceed the amount authorized by statute. This rule is intended to provide a process for when the board needs to reduce its cash balance with a standard methodology to do so, in fair and equitable manner. This rule provides for an abatement of certain fees when the board's cash balance is excessive.

(2) Except as provided by (3), when the board has an excessive cash balance, the department may abate the renewal fees for the board's licensees or registrants for one or more renewal cycles until the board's cash balance does not exceed the allowable maximum.

(a) The abatement of renewal fees may be the total amount of the renewal fee, or only a specified portion of the renewal fee.

(b) If the board has more than one category of renewals, the abatement must be made on a roughly proportional basis to fairly, equitably, reasonably and economically distribute the abatement among the program's licensees or registrants. The department may, for good cause, completely abate the renewal fee

for certain classes of licensees or registrants and not for other classes, if the administrative cost of processing a reduced renewal fee for all classes is disproportionately high. In such a case, the department must attempt in any future abatements to equitably treat those classes of renewals which have borne a relatively higher proportion of renewal fees.

(c) The fact that the renewal fee is abated for any given renewal cycle does not excuse the licensee or registrant from otherwise fulfilling the renewal requirements, including submission of a renewal application and/or continuing education documentation. The board, to the extent it so provides by rule, may impose a late fee on untimely submissions of renewal applications or other required documentation.

(3) This rule does not apply when an exception to 17-2-302, MCA, exists and is applicable to the board's cash balance. As an example, if the board adopts a three-year renewal cycle, the board will have an apparent excess cash balance during the first year of the renewal cycle, based on a collection of three year's worth of fees for operations expenses.

(4) This rule does not relieve the board from the duty to establish fees at a level commensurate with costs.

AUTH: 37-1-101 and 37-14-202, MCA
IMP: 17-2-302, 17-2-303, 37-1-101, 37-1-134 and 37-14-310, MCA

REASON: There is reasonable necessity to adopt NEW RULE I to ensure that the Board of Radiologic Technologists and the Department have a methodology in place to promptly eliminate excess cash accumulations in the Board's licensing programs. Excess cash accumulations are generally prohibited by 17-2-302, MCA, and a reduction in fees is required pursuant to 17-2-303, MCA. As the result of a $35,274 refund by the Department to the Board as the result of a mis-allocation of Oracle expenses, the Board's cash balance now exceeds twice its existing annual appropriation authority. The Board proposes that the Department abate renewal fees to bring the Board's cash balance to an appropriate level. The Board and the Department believe that abatement of renewal fees is the best way to target the licensees and limited permit holders who have paid fees into the program for the temporary relief provided by an abatement.

Total annual fee revenue for the Board is approximately $55,850, which is close to the Board's annual appropriation authority. A one-year abatement of renewal fees will affect approximately 730 licensees ($50 annual renewal fee) and approximately 300 limited permit holders ($40 annual renewal fee). The total renewal fees abated in a year is estimated to be $48,500, an amount which should reduce the Board's cash balance to an appropriate level. The Board has concluded that a temporary abatement, rather than a permanent fee reduction, is the most appropriate solution to address the Board's excess cash balance.

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 the Board of Radiologic Technologists, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to dlibsdrts@state.mt.us and must be received no later than 5:00 p.m., December 13, 2002.

6. An electronic copy of this Notice of Public Hearing is available through the Department and Board's site on the World Wide Web at http://www.discoveringmontana.com/dli/rts, in the Rules Notices 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, and that a person's technical difficulties in accessing or posting to the e-mail address does not excuse late submission of comments.

7. The Board of Radiologic Technologists maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this Board. 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 all Board of Radiologic Technologists administrative rulemaking proceedings or other administrative proceedings. Such written request may be mailed or delivered to the Board of Radiologic Technologists, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, faxed to the office at (406) 841-2305, e-mailed to dlibsdrts@state.mt.us or may be made by completing a request form at any rules hearing held by the agency.

8. Lon Mitchell, attorney, has been designated to preside over and conduct this hearing.

9. The Board of Radiologic Technologists will meet on December 20, 2002, at noon in room 438, 301 South Park Avenue, Helena, to consider the comments made by the public, the responses to those comments, and take final action on the proposed amendments. The meeting will be held in conjunction with the Board's regular meeting. Members of the public are welcome to attend the meeting and listen to the Board's deliberations, but the Board cannot accept any comments concerning the proposed amendments beyond the December 13, 2002, deadline.

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

BOARD OF RADIOLOGIC TECHNOLOGISTS
JANE CHRISTMAN, CHAIRMAN

/s/ KEVIN BRAUN
Kevin Braun
Rule Reviewer

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

Certified to the Secretary of State, November 1, 2002.

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

In the matter of the amendment of ARM 17.40.201, 17.40.202, 17.40.203, 17.40.206, 17.40.207, 17.40.208, 17.40.212, 17.40.213, 17.40.214 and 17.40.215 pertaining to wastewater treatment operators	NOTICE OF AMENDMENT (WASTEWATER OPERATORS)

TO: All Concerned Persons

1. On July 11, 2002, the Department of Environmental Quality published a notice of public hearing on the proposed amendment of the above-stated rules at page 1839, 2002 Montana Administrative Register, Issue No. 13. The public hearing was held on August 8, 2002.

2. The Department has amended the rules exactly as proposed.

3. No comments or testimony were received.

Reviewed by: **DEPARTMENT OF ENVIRONMENTAL QUALITY**

John F. North **BY:** *Jan P. Sensibaugh*
JOHN F. NORTH **JAN P. SENSIBAUGH**
Rule Reviewer **Director**

Certified to the Secretary of State, November 1, 2002.

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

In the matter of the amendment of ARM 8.32.1408 and 8.32.1409, relating to LPN IV procedures	))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On August 29, 2002, the Department of Labor and Industry published notice of the proposed amendment of the above-stated rules at page 2294 of the 2002 Montana Administrative Register, Issue Number 16.

2. On September 23, 2002, a public hearing on the proposed amendment of the above-stated rules was conducted in Helena. Comments were received from the Montana Nurses' Association (MNA), prior to the closing of the comment period on September 30, 2002.

3. The Board of Nursing (Board) has thoroughly considered the comments made and the Board's responses are as follows:

8.32.1408 STANDARDS RELATING TO THE LICENSED PRACTICAL NURSE'S ROLE IN INTRAVENOUS (IV) THERAPY

Comment 1: The MNA provided written testimony in support of the proposed rule amendments. The MNA offered three minor editorial suggestions to ARM 8.32.1408, for the purpose of consistency and clarity of language within the LPN rules.

Response 1: The Board thanks the MNA for their comments and suggestions regarding this rule amendment. The Board has considered the editorial suggestions and has incorporated one of them into the rule amendments.

4. After consideration of the comments, the Board has amended the following rule, exactly as proposed:

8.32.1409 PROHIBITED IV THERAPIES

5. After consideration of the comments, the Board has amended the following rule as proposed, with the following changes, stricken matter interlined, new matter underlined:

8.32.1408 STANDARDS RELATING TO THE LICENSED PRACTICAL NURSE'S ROLE IN INTRAVENOUS (IV) THERAPY (1) through (6)(b) remain the same as proposed.

(c) accessing, ~~blood draws~~ drawing blood, ~~flushes~~ flushing with a normal saline solution or a specific heparin flush solution, and ~~dressing changes~~ changing dressings of hemodialysis central-venous catheters; and

(d) remains the same.

AUTH: 37-1-131, 37-8-202, MCA
IMP: 37-1-131, 37-8-202, MCA

BOARD OF NURSING
KIM POWELL, RN, Chair

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: November 1, 2002.

BEFORE THE BOARD OF LANDSCAPE ARCHITECTS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of ARM 24.153.402, 24.153.403, 24.153.502, and 24.153.2101, all pertaining to landscape architects matters	)))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On August 29, 2002, the Board of Landscape Architects published a notice of proposed amendment of the above-stated rules at page 2302, 2002 Montana Administrative Register, Issue Number 16.

2. A public hearing on the proposed amendments was held on September 30, 2002. No public comments were made on the proposed amendments.

3. The Board met on October 16, 2002. The Board has amended the rules exactly as proposed.

BOARD OF LANDSCAPE ARCHITECTS
SHELLY ENGLER, CHAIR

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

/s/ Kevin Braun
Kevin Braun,
Rule Reviewer

Certified to the Secretary of State November 1, 2002

BEFORE THE BOARD OF PROFESSIONAL ENGINEERS AND LAND SURVEYORS DEPARTMENT OF LABOR AND INDUSTRY STATE OF MONTANA

In the matter of the adoption of NEW RULE I, related to fire protection system shop drawings	))))	NOTICE OF ADOPTION

TO: All Concerned Persons

1. On July 25, 2002, the Board of Professional Engineers and Land Surveyors published a notice of proposed adoption of the above-stated rule at page 1968, 2002 Montana Administrative Register, Issue Number 14.

2. A public hearing on the proposed new rule was held on August 16, 2002.

3. The Board has adopted NEW RULE I (24.183.1501) exactly as proposed.

4. The Board received one comment concerning the proposed new rule. The Board has thoroughly considered the comment received. A summary of the comment received and the Board's response is as follows:

Comment No. 1: The commenter spoke in favor of proposed NEW RULE I.

Response No. 1: The Board acknowledges the comment and thanks the commenter for his input and attendance.

BOARD OF PROFESSIONAL ENGINEERS AND LAND SURVEYORS
JANET MARKLE, PRESIDING OFFICER

/s/ KEVIN BRAUN
Kevin Braun
Rule Reviewer

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

Certified to the Secretary of State, November 1, 2002.

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

In the matter of the amendment of ARM 37.80.201 pertaining to early childhood services bureau child care subsidy program	))))	NOTICE OF AMENDMENT

TO: All Interested Persons

1. On September 26, 2002, the Department of Public Health and Human Services published notice of the proposed amendment of the above-stated rule at page 2590 of the 2002 Montana Administrative Register, issue number 18.

2. The Department has amended ARM 37.80.201 as proposed.

3. The Department has thoroughly considered all commentary received. The comments received and the Department's response to each follow:

COMMENT #1: All eligible families are in great need when their income is at, or below, 150% of the federal poverty guidelines. Therefore, there should be no priority based on income; rather, families should be served based on earliest application date.

RESPONSE: Families on the non-TANF waiting list are ranked by their income, relative to family size. A family with the lowest income receives priority in accordance with the federal poverty guidelines. This ranking meets the administration's intent to serve the most needy families first. Consequently, the Department declines to revise the priority at this time.

COMMENT #2: The current rule offers a preference for parents with part-time employment. The need for child care subsidy may be greater for parents working full-time.

RESPONSE: The Early Childhood Services Bureau recognizes concerns that ranking by income, alone, may place families working full-time at a disadvantage when families compete for child care subsidies. While this is a concern, the Department also recognizes that parents working part-time need less child care; and thus, expend fewer State resources. In addition, discussions with the program policy committee of the Montana Early Childhood Advisory Council have pointed out the need for objective demographic information with respect to ranking families on the waiting list. The ability to analyze the dynamics of the non-TANF waiting list is being developed and the program policy committee of the Montana Early Childhood Advisory Council plans to study the issue. A recommendation for changing waiting list priorities may result from the study.

COMMENT #3: Ranking families by income causes a family's

position on the waiting list to constantly change. Some families are never served and it is difficult to effectively communicate the family's status on the waiting list.

RESPONSE: The Department recognizes the difficulty of planning around a fluctuating waiting list. However, the needs of the neediest families outweigh the inconvenience of communicating this process to families.

COMMENT #4: Are teen parents required to work?

RESPONSE: No, teen parents do not have a work requirement while attending high school or an equivalent program to attain a GED.

COMMENT #5: If a teen parent marries, does it affect their eligibility?

RESPONSE: The teen parent attending high school maintains the work requirement waiver while the out-of-school spouse must meet their portion of the work requirement, 60 hours per month.

COMMENT #6: What if the teen or married parent lives at home with the teen's parent? It was requested that the Department take a look at the difference this causes. Those living in a parent's home have advantages over those who do not. It was suggested to count a portion of the teen's parents' income in the Department's calculations.

RESPONSE: The Department's experience with teen parents suggests that including the teen's parents' income caused a breakdown in support for the teen parent attempting to finish high school. Often, the teen's parents could afford to provide room and board, but were working, and not available to provide child care. Including the teen's parents' income generally made the household ineligible for child care assistance. When the household was not eligible, the teen would move out of the home to obtain help with child care and put themselves at risk of not finishing high school. The Department recognizes that some teen parents benefit more than others when their parents' income is not included when determining eligibility. However, the Department is committed to helping teens finish high school and does not want to impede that effort in any way.

COMMENT #7: How many are currently on the non-TANF child care waiting list?

RESPONSE: As of October 25, 2002, 493 children are on the waiting list for non-TANF program funds.

COMMENT #8: Are there time limits for how long they can receive child care assistance?

RESPONSE: No, there is no time limit for child care assistance.

COMMENT #9: **Are there any statistics on how long people stay on child care assistance?**

RESPONSE: **No. The Department plans to develop the capability to generate those statistics in the future.**

Dawn Sliva	**/s/ Gail Gray**
Rule Reviewer	**Director, Public Health and Human Services**

Certified to the Secretary of State November 1, 2002.

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

In the matter of the amendment of ARM 37.85.204 pertaining to medicaid cost sharing	))))	NOTICE OF AMENDMENT

TO: All Interested Persons

1. On September 26, 2002, the Department of Public Health and Human Services published notice of the proposed amendment of the above-stated rule at page 2596 of the 2002 Montana Administrative Register, issue number 18.

2. The Department has amended ARM 37.85.204 as proposed.

3. The Department has thoroughly considered all commentary received. The comments received and the department's response to each follow:

COMMENT #1: Do the changes to the Medicaid cost sharing rule apply to developmental disabilities services Medicaid recipients receive in group homes?

RESPONSE: Yes, these changes do apply to some services received by Medicaid recipients with developmental disabilities who live in group homes. Although (4) of ARM 37.85.204 specifies several classes of individuals which are exempt from cost sharing, recipients with developmental disabilities living in group homes are not a class of individuals that are exempt from cost sharing. Section (2) of the rule lists all services which are subject to cost sharing, including but not limited to physician, hospital and pharmacy services and durable medical equipment and therapies. If a resident of a group home receives any of the services listed in ARM 37.85.204(2) as being subject to cost sharing, the resident will be required to pay the cost share amount specified in the rule. Services not listed in ARM 37.85.204(2) are not subject to cost sharing, so Medicaid recipients including group home residents are not required to make a cost sharing payment to the provider when receiving non-listed services. Thus, some of the services received by group home residents with developmental disabilities will be subject to cost sharing, while other services will not.

The proposed amendments to the cost sharing rule will not change the services which are subject to cost sharing or the classes of individuals which are exempt from cost sharing. The amendments only change the amount of cost sharing payments required and the caps on cost sharing. Therefore, group home residents will pay cost sharing for the same services as before, but the amount of cost sharing they must pay may be different.

COMMENT #2: While the amendments proposed in MAR notice number 37-249 represent a significant improvement over the April 1, 2002 changes, they still raise a number of concerns.

The removal of the annual limitation on cost sharing by Medicaid recipients is particularly troubling. While the proposed amendments include a number of significant increases in cost sharing over the rates prior to April 1, 2002, these amendments simultaneously remove the safeguard of the annual cap.

For Medicaid consumers, small cost sharing requirements or changes can put health care out of reach, resulting in deferred care, aggravated conditions, and long term cost increases to the state, all of which were noted after the April 1st implementation of increases in cost sharing. The recently proposed amendments still represent steep increases in cost sharing over the levels prior to April 1, and these problems will likely continue. Lower cost sharing requirements are better for Medicaid consumers and the state.

The Department of Public Health and Human Services' data show that in state fiscal year 2001, nearly 5,000 Medicaid clients met the cost sharing cap of $200. With the proposed cost sharing requirements, the number of clients spending over $200 will be much higher.

The Department claims few Medicaid recipients will be affected by the removal of the annual cap on cost sharing. If this is true, then the removal of the cap itself will provide little savings to the state.

However, removing the cap on cost sharing has the potential to actually produce much higher long term costs to the state than any negligible savings produced. Clients who have previously been protected by the cap likely have the most serious health care needs, and will be most dramatically affected by the proposed amendments. If higher cost sharing requirements force them to defer care, this deferral is particularly likely to result in aggravated conditions and increased long term costs to the state.

In short, the annual cap of $200 on Medicaid cost sharing should be reinstated.

RESPONSE: Prior to the April 1, 2002 changes to the cost sharing rule, approximately 4,900 Medicaid recipients met the $200 annual cost sharing cap each year. As a result of the April 1, 2002 rule changes, the Department anticipated approximately 2,200 Medicaid recipients would meet the amended annual cost sharing cap of $500 each year.

Numerous changes to the cost sharing rule were proposed on the notice published on September 26, 2002. All of these changes were beneficial to Medicaid recipients except the removal of the

$500 annual cost sharing cap. One of the biggest changes is that Medicaid services were capped at an amount not to exceed $5 per visit. The lone exception to the $5 per visit cap is inpatient hospital services which had its cost sharing amount reduced from $200 per stay to $100 per stay. We put in place a $25 monthly cap on pharmacy items. We now exempt claims where other payers (Medicare or other insurer) have made payment. We also rolled the exempt age back to under 21.

Due to these changes, the Department does not anticipate that many Medicaid recipients will incur annual cost sharing amounts in excess of the former $500 cap. However, the Department believes the cap serves a purpose other than saving the Department the relatively small amount of money a few recipients will pay as cost sharing in excess of $500 per year. The main reason for Medicaid or any health insurance carrier to have a cost sharing plan is to require clients to participate in health care costs. Even relatively small cost sharing amounts require the client to examine their health care needs. The absence of an annual cost sharing cap will require Medicaid recipients to scrutinize their health care needs year round, whereas with an annual cap recipients have less incentive to forego unnecessary services after the cap has been met. Thus, it is anticipated that the savings which will result from eliminating the annual cap will be greater than the amount of cost sharing payments over $500 per year paid by recipients, due to the incentive to forego unnecessary services.

The Department feels that, for the most part, this newest cost sharing system addresses the concerns expressed by Medicaid recipients. The Department will monitor the cost sharing system and will specifically review the consequences of removing the annual cost sharing cap.

Dawn Sliva	**/s/ Gail Gray**
Rule Reviewer	**Director, Public Health and Human Services**

Certified to the Secretary of State November 1, 2002.

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

In the matter of the adoption of new rules I through V pertaining to safety devices in long term care facilities	))))	NOTICE OF ADOPTION

TO: All Interested Persons

1. On September 12, 2002, the Department of Public Health and Human Services published notice of the proposed adoption of the above-stated rules at page 2382 of the 2002 Montana Administrative Register, issue number 17.

2. The Department has adopted the following rules as proposed with the following changes from the original proposal. Matter to be added is underlined. Matter to be deleted is interlined.

RULE I [37.106.2902] DEFINITIONS The following definitions, in addition to those contained in 50-5-1202, MCA, apply to this chapter:

(1) "Assistive device" means any device ~~that, without restricting an individual's movement,~~ whose primary purpose is ~~used~~ to maximize the independence and the maintenance of health of an individual who is limited by physical injury or illness, psychosocial dysfunction, mental illness, developmental or learning disability, the aging process, cognitive impairment or an adverse environmental condition. If the device is primarily used to restrict an individual's movement, it is considered a safety device or restraint rather than an assistive device.

(2) "Licensed health care professional" means a physician, a physician assistant-certified, a nurse practitioner or a registered or practical nurse licensed in the state of Montana.

(3) remains as proposed.

(4) "Postural support" means an appliance or device used to achieve proper body position and balance, to improve a resident's mobility and independent functioning, or to position rather than restrict movement, including, but not limited to, preventing a resident from falling out of a bed or chair. A postural support does not include tying a resident's hands or feet or otherwise depriving a resident of their use.

(5) and (6) remain as proposed.

AUTH: Sec. 50-5-103, 50-5-226, 50-5-227 and 50-5-1205, MCA
IMP: Sec. 50-5-103, 50-5-226, 50-5-227, 50-5-1202 and 50-5-1203, MCA

RULE II [37.106.2904] USE OF RESTRAINTS, SAFETY DEVICES, ASSISTIVE DEVICES, AND POSTURAL SUPPORTS (1) and (2) remain as proposed.

(3) To the extent that a resident needs emergency care,

restraints may be used for brief periods:

(a) remains as proposed.

(b) if a resident's unanticipated violent or aggressive behavior places the resident or others in imminent danger, in which case the resident does not have the right to refuse the use of restraints. In this situation:

(i) through (iv) remain as proposed.

(v) a restrained resident must be monitored as their condition warrants, and restraints must be removed as soon as the need for emergency care has ceased and the resident's safety and the safety of others can be assured.

(4) remains as proposed.

(5) Single or two quarter bed ~~Bed~~ rails that extend the entire length of the bed ~~or two quarter rails used in combination with one another are considered restraints and~~ are prohibited from use as a safety or assistive device; however, a bed rail that extends from the head to half the length of the bed and used primarily as a safety or assistive device is allowed.

(6) Physician-prescribed orthopedic devices used ~~for support of a weakened body part or correction of body parts are considered postural supports and are permissible~~ as postural supports are not considered safety devices or restraints and are not subject to the requirements for safety devices and restraints contained in these rules.

~~(7) Under no circumstances may postural supports include tying or depriving or limiting the use of a resident's hands or feet.~~

(8) remains as proposed but is renumbered (7).

~~(9)~~ (8) All methods of restraint, safety devices, assistive devices and postural supports must be properly fastened or applied in accordance with manufacturer's instructions and in a manner that permits rapid removal by the staff in the event of fire or other emergency.

AUTH: Sec. 50-5-103, 50-5-226, 50-5-227 and 50-5-1205, MCA
IMP: Sec. 50-5-103, 50-5-226, 50-5-227, 50-5-1201, 50-5-1202 and 50-5-1204, MCA

RULE III [37.106.2905] DOCUMENTATION IN RESIDENT'S MEDICAL RECORDS (1) Prior to the use of a restraint or safety device, the following items must be included in the resident's record:

(a) through (a)(ii) remain as proposed.

(b) written authorization from the resident's primary physician that specifies the medical symptom that the restraint or safety device is intended to address and the type of circumstances and duration under which the restraint or safety device is to be used.

(2) When a restraint or safety device is used, the following items must be documented in the resident's record:

(a) frequency of monitoring in accordance with ~~accepted standards of practice~~ documented facility policy;

(b) assessment and provision of treatment if necessary for skin care, circulation and range of motion;

(c) any unusual occurrences or problems; and

(d) the quarterly re-evaluation of the resident's need for continued use of a restraint or safety device.

(3) During a quarterly re-evaluation, a facility must consider:

(a) ~~an effort must be made to use~~ using the least restrictive restraint or safety device ~~and~~ to restore ~~each individual~~ the resident to a maximum ~~possible~~ level of ~~independence~~ functioning;

(b) ~~a thorough assessment of possible~~ causes for the medical symptoms that ~~made~~ led to the use of the restraint or safety device ~~must be made~~; and

(c) alternative safety measures if a restraint or safety device is ~~already being used as part of a care plan, it must not be removed abruptly without planning for alternative safety measures~~ removed. Before removing a restraint or safety device, the resident or the authorized representative and the attending physician must be consulted.

AUTH: Sec. 50-5-103, 50-5-226, 50-5-227 and 50-5-1205, MCA
IMP: Sec. 50-5-103, 50-5-226, 50-5-227, 50-5-1201, 50-5-1203 and 50-5-1204, MCA

RULE IV [37.106.2908] STAFF TRAINING (1) remains as proposed.

(2) Staff training shall include, at a minimum, information and demonstration in:

(a) through (h) remain as proposed.

(i) techniques to identify ~~environmental factors~~ behavioral symptoms that may trigger a resident's need for a restraint or safety device and to determine possible alternatives to their use. These include:

(i) observing the intensity, duration and frequency of the resident's behavior;

(ii) identifying patterns over a period of time and factors that may trigger the behavior; and

(iii) determining if the resident's behavior is:

(A) new or if there is a prior history of the behavior;

(B) the result of mental, emotional, or physical illness; or

(C) a radical departure from the resident's normal personality.

(3) Training described in (2) ~~of this rule~~ must meet the following criteria:

(a) training must be provided by a licensed health care professional or a social worker with experience in a health care facility; and

(b) through (4)(b) remain as proposed.

AUTH: Sec. 50-5-103, 50-5-226, 50-5-227 and 50-5-1205, MCA
IMP: Sec. 50-5-103, 50-5-226, 50-5-227, 50-5-1204 and 50-5-1205, MCA

3. As a result of comments received the department is

adopting New Rule V (37.106.2901) to address the concerns expressed that the proposed rules did not adequately specify the particular types of facilities to which the proposed rules were intended to be applied. The rule is adopted as follows:

RULE V [37.106.2901] RULE APPLICABILITY (1) The provisions of the rules in this subchapter that govern the use of restraints do not apply to a category A personal care facility as defined in 50-5-227(2)(a), MCA, because such a facility is prohibited by law from accepting and serving any resident who is in need of medical, chemical or physical restraint.

AUTH: Sec. 50-5-103, 50-5-226, 50-5-227 and 50-5-1205, MCA
IMP: Sec. 50-5-103, 50-5-226, 50-5-227, 50-5-1202 and 50-5-1203, MCA

4. The Department has thoroughly considered all commentary received. The comments received and the department's response to each follow:

RULE I (37.106.2902)

COMMENT #1: The words "without restricting an individual's movement" should be removed from the definition of "assistive device" in (1) because some devices, such as a Merry Walker, can promote activity.

RESPONSE: The department concurs and has modified its definition to clarify that the purpose for which an assistive device is used determines whether it is an assistive device, safety device or restraint.

COMMENT #2: The department's definitions for "restraint", "safety device" and "medical symptom" may be inconsistent with federal law. The fact that one has consented to a device or that it cannot be easily removed still makes it a restraint and this is not in the definition. A safety device is defined by providing examples and instead should be defined by purpose or effect. The medical symptom definition is inappropriately broadened from the statutory language to include "concern for the resident's physical safety" or a "resident's fear of falling".

RESPONSE: The department reviewed the federal definitions for restraints and disagrees that its definition is inconsistent with federal law. The department agrees that the statutory definition for safety devices was insufficient because it did not define the purpose or effect such a device is supposed to achieve, and this is why the department added the language it did. The department disagrees that the definition for medical symptom is inappropriately broadened, but, instead, incorporates clarifying language taken from 50-5-1201, MCA.
COMMENT #3: The definition for "safety device" in (2) should be

reworded to include language from 50-5-1201 and 50-5-1202(6)(a) and (b), MCA, and for ease of reading.

RESPONSE: The department did not adopt the suggested rewording because there was no essential difference between the two versions and because 2-4-305(2), MCA of the Montana Administrative Procedure Act requires that, if statutory language is used in a rule, there must be a clear indication which language is statutory and which is not. The department's definition does that.

COMMENT #4: Although 50-5-1202, MCA, makes personal care facilities subject to the safety device rules, 50-5-227(2)(b), MCA, states that a category A personal care facility may not accept a resident who needs medical, chemical, or physical restraint. Category B personal care facilities, on the other hand, may do so. The rules need to indicate that the provisions relating to restraints do not apply to category A personal care facilities.

RESPONSE: The department agrees and has added the necessary language to Rule I (37.106.2902).

RULE II (37.106.2904)

COMMENT #5: Rule II(2) (37.106.2904(2)) should be clarified to state why a restraint may be a safety device when requested by the resident or the resident's authorized representative but (5) does not allow bed rails as a safety device.

RESPONSE: Regarding Rule II(2) (37.106.2904(2)), side rails sometimes restrain residents and are prohibited unless they are necessary to treat a resident's medical symptoms. The same device may have the effect of restraining one individual but not another, depending on the individual resident's condition and circumstances. With respect to Rule II(5) (37.106.2904(5)), it is only bed rails that extend the entire length of the bed or two quarter rails used in end-to-end combination with one another that are prohibited as a safety device. A half rail may be used as a safety device.

COMMENT #6: The language of Rule II(2) (37.106.2904(2)) "A restraint may be a safety device...to reduce the risk of falls...." is problematic.

RESPONSE: The department can only infer what the respondent meant by the language being problematic, since no suggestions were offered on how to modify the rule. Side rails are a good example of when a device may be a restraint, a safety device, or an assistive device. If side rails are used to keep a resident from voluntarily getting out of bed, they are a restraint. However, if a half side rail makes it possible for a resident to independently enter and exit the bed, it is an assistive device. To reiterate, the same device may have the effect of restraining

one individual but not another, and this will depend on the individual resident's condition and circumstances.

COMMENT #7: Rule II(3)(b)(i) (37.106.2904(3)(b)(i)) only applies to use of restraints in emergency situations, but should be amended to apply to all usages.

RESPONSE: The department disagrees that the change is needed. Subsection (3)(b) governs how restraints may be used in a special emergency situation, while (1) of the same rule covers all situations and prohibits the application or use of restraints, safety devices, or postural supports except to treat a resident's medical symptoms.

COMMENT #8: Rule II(3)(b)(v) (37.106.2904(3)(b)(v)) should begin with the statement, "Resident restrained must be checked every 15 minutes and..."

RESPONSE: The department agrees that additional language is needed to ensure the safety of an aggressive or highly agitated resident. However, it is not possible to specify by rule how often an agitated individual resident must be checked. For example, some individuals will require constant attendance, while others may be safely monitored every 30 minutes. In response, the department has added language to require monitoring tailored to the condition of the individual restrained.

COMMENT #9: The proposed rule conflicts with a patient's right to choose a bed rail.

RESPONSE: The resident or the resident's authorized representative still has the option to choose a bed rail as a safety device. A bed rail that extends from the head to half the length of the bed and used primarily as a safety or assistive device is allowed.

COMMENT #10: The safety device statutes make no distinction between full or half side rails, and the department is required to follow the clear language of the statutes in (5) of Rule II (37.106.2904) by allowing full side bed rails.

RESPONSE: The department disagrees that the safety device statutes clearly allow full side bed rails, since the law refers only to "bed rails". Montana's safety device statutes offer the resident or the authorized representative the option of using a bed rail as a safety device, although they do not differentiate between the various types of side rails that are available. The department has the responsibility to determine the relative safety of those types and has found that full side bed rails are too dangerous under any circumstances. For the physical safety of residents in long term care (LTC) facilities, the department reviewed the literature on the risks and benefits associated with bed rail use and developed the guideline rules on what

constitute acceptable bed rails, when used as a safety or an assistive device.

There are hazards associated with bed rails that raise the question about their routine use. Bed rails can be used to enable the resident to turn or reposition in bed or to provide a handhold for getting out of bed. However, when bed rails prevent a resident from leaving the bed, they are a form of physical restraint. Bed rails can be especially hazardous for demented or agitated individuals. Severe injuries and even deaths have been associated with residents being caught in or between the rails or falling, while attempting to climb over them. Between the years of 1996 and 1998, Montana had four deaths involving bed side rails because the resident was entrapped.

The U.S. Food and Drug Administration (FDA), Michigan, Minnesota and Ohio have all developed guidelines on the safe use of bed rails in hospitals and LTC facilities. Minnesota reports:

> Today there are about 2.5 million hospital and nursing home beds in use in the United States. Between 1985 and 1999, 371 incidents of patients caught, trapped, entangled, or strangled in beds with rails were reported to the FDA. Of these reports, 228 people died, 87 had a nonfatal injury, and 56 were not injured because staff intervened. Most patients were frail, elderly or confused.

For the foregoing reasons, the rules prohibit the use of full side bed rails, while still allowing the use of half side rails as safety devices, e.g., allowing a resident to turn or reposition in bed or providing a handhold for getting out of bed, while still preventing a fall out of bed.

COMMENT #11: The rules are probably inconsistent with federal law that any bed rail that has the effect of preventing the resident from voluntarily getting out of bed is a restraint.

RESPONSE: The department disagrees. According to the federal publication, Guidance to Surveyors - Long Term Care Facilities, published by Centers for Medicare and Medicaid Services, "The use of side rails as restraints is prohibited unless they are necessary to treat a resident's medical symptoms". In addition, the department has to work within the intent of the state statutes which state that side rails may be used as a safety device, if medical symptoms warrant. The state law and the federal publication, Guidance to Surveyors - Long Term Care Facilities, contain parallel language.

COMMENT #12: The phrase "two quarter rails used in combination with one another are considered restraints" could be misinterpreted to include two quarter rails placed on either side of a bed, as well as two quarter rails on the same side of a bed.

RESPONSE: The department agrees and has edited the sentence in question to clearly prohibit two quarter rails placed on the same side of the bed and stretching its full length.

COMMENT #13: It is unclear what is meant by "permissible" in Rule II(6) (37.106.2904(6)). Can physician-prescribed orthopedic devices be used in any facility? Are they safety devices, or does it mean that they are not restraints? Please clarify.

RESPONSE: "Permissible" means orthopedic devices are allowed in any facility to which these rules apply. These devices are not safety devices or restraints, per se, but they could be, depending upon what the patient's medical symptoms are and why the physician prescribed the device. In order to provide clarification, Rule II(6) (37.106.2904(6)) is amended to indicate that such devices used strictly as postural supports are allowed.

COMMENT #14: Eliminating the use of the words "or limiting" from Rule II(7) (37.106.2904(7)) was recommended, as was moving the provision to the "postural support" definition in Rule I (37.106.2902).

RESPONSE: The department agrees and has made the suggested changes.

COMMENT #15: The provisions for periodic exercise and elimination for restrained residents were appreciated.

RESPONSE: The department appreciates the support.

COMMENT #16: In Rule II(9) (37.106.2904(9)), all devices should be "properly" applied or applied in accordance with manufacturers' instructions. What is important is not how fast they can be removed but whether they are properly applied.

RESPONSE: The department concurs that devices should be properly applied and in accordance with the manufacturer's instructions, and added that language to Rule II(9) (now (8)) (37.106.2904(8)). However, in the interest of safety, a fire, or other emergency, the department maintains that facility staff should be able to remove the devices quickly and retains that requirement.

RULE III (37.106.2905)

COMMENT #17: In Rule III(1) (37.106.2905(1)), it should be required that a behavioral assessment be completed prior to the use of a restraint or safety device.

RESPONSE: The department does not believe it is necessary to restate this in this section, since it is already addressed in

the definition of medical symptom and in Rule II(1) (37.106.2904(1)).

COMMENT #18: Rule III(1)(a)(ii) (37.106.2905(1)(a)(ii)) is unnecessary as it is included in Rule III(1)(a)(i) (37.106.2905(1)(a)(i)) as a "known risk".

RESPONSE: The department believes the language is necessary since a resident may have a pre-existing physical or mental condition that places them at greater risk and which may go beyond "known risks" associated with the use of a restraint or safety device.

COMMENT #19: The physician authorization in Rule III(1)(b) (37.106.2905(1)(b)) should include the medical symptom the restraint or safety device is intended to address.

RESPONSE: The department agrees and has added the suggested provision.

COMMENT #20: A comment was submitted stating that Rule III(2) (37.106.2905(2)) should require that only necessary documentation occur and that facility policy may cover "frequency of monitoring". This should be amended to replace the proposed (2)(a) through (d) with the following:

(a) monitoring of the restraint or device in accordance with accepted standards of practice;

(b) assessment and treatment of problems associated with use of the restraint or device in accordance with accepted standards of practice; and

(c) the quarterly reevaluation of the resident's need for the safety device performed in consultation with the resident, the resident's family and the attending physician.

However, another submitted comment endorsed the specific language requiring documentation of assessment and treatment for skin care, circulation, and range of motion.

RESPONSE: The department agrees that a facility's policy may cover frequency of monitoring and has amended (2)(a) to allow frequency of monitoring in accordance with documented facility policy, instead of accepted standards of practice, the latter of which apparently do not exist. No change was made in the department's proposed (2)(b) and (c) because they are more specific and appropriate. The latter part of the above suggested (2)(c) was incorporated into (3) as a more appropriate placement, since (3) sets requirements for the quarterly evaluations.

COMMENT #21: During the quarterly re-evaluation required by (3), the department's proposed language seems to say that a facility must try a less restrictive restraint or safety device rather than considering whether trying something different might be appropriate. The following substitute (3) was proposed:

"(3) During the quarterly reevaluation, a facility must

consider:

(c) use of the least restrictive restraint or safety device to restore each individual to his/her highest practicable level of functioning;

(d) causes for the medical symptoms leading to the use of the restraint or safety device; and

(e) alternative safety measures if a restraint or safety device is to be removed."

RESPONSE: The department agrees and has incorporated the suggested changes with some editing.

RULE IV (37.106.2908)

COMMENT #22: Mandating annual training for staff is unrealistic. Staff should be trained during their orientation process or when new equipment is introduced into a facility.

RESPONSE: No change was made because the department believes that annual training is necessary because if restraints or safety devices are used improperly they can pose a serious health risk to LTC residents.

COMMENT #23: Not everyone needs the same training because there are different requirements from facility to facility and between different types of caregivers.

RESPONSE: The department believes that Rule IV(1) (37.106.2908(1)) addresses these concerns adequately because it specifies that training must be provided that is specific to services provided by the facility. In addition, the minimum training elements required by (2) were kept because the department found them applicable to and necessary for any facility to which these rules apply.

COMMENT #24: Rule IV (37.106.2908) is fine as is, especially in its minimum training requirements.

RESPONSE: The department agrees, as indicated in its response to comment #23 above.

COMMENT #25: Because up to 40% of residents in a nursing facility exhibit behavior problems, it is crucial that staff be trained to identify and accommodate residents with behavioral problems in a hazard-free environment. Specific language should be added to Rule IV(2) (37.106.2908(2)) to address behavioral problems.

RESPONSE: The department concurs that training should include specific behavior assessment techniques and amended Rule IV(2)(i) (37.106.2908(2)(i)) accordingly.

COMMENT #26: In Rule IV(3)(a) (37.106.2908(3)(a)), licensed practical nurses and social workers should be allowed to provide

training as well as licensed health care professionals as defined in Rule I (37.106.2902).

RESPONSE: The department agrees. The two trainer categories have been added through the addition of "licensed practical nurse" to the definition of "licensed health care professional" in Rule I (37.106.2902) and "social worker" to Rule IV(3)(a), (37.106.2908(3)(a)) with the condition that a social worker would have to have health care facility experience to qualify as a trainer. In addition, the word "care" was inadvertently omitted from the phrase "licensed health care professional" and has been inserted appropriately.

COMMENT #27: It was recommended that the application or use of restraints be prohibited in personal care homes and assisted living facilities.

RESPONSE: The department cannot ban the use of restraints in personal care facilities outright, because 50-5-227, MCA, allows a category B personal care facility to serve a resident needing "medical, chemical, or physical restraint". However, the same statute already bans a category A personal care facility from providing personal care to a resident needing restraint. The recommendation will be taken into consideration if the department proposes legislation in the future about personal care homes or safety devices.

COMMENT #28: It was suggested that the department keep in mind the differences between facilities and residents and strive to structure rules that set appropriate standards by allowing facilities the flexibility to meet the standards in a common sense way.

RESPONSE: The department agrees there needs to be as much flexibility as possible and has tried to provide this flexibility in the proposed rules. At the same time, the department was given the task to develop rules for regulatory purposes and some standards must be set to assure the safety of long term care residents and avoid unnecessary confusion.

COMMENT #29: It is unclear where these particular rules will be placed in the Administrative Rules of Montana (ARM), since they apply to more than one category of long term care facility, i.e., personal care facilities and skilled and intermediate nursing care facilities.

RESPONSE: As noted in the numbers assigned to each rule in this notice, these rules are placed in a separate subchapter of their own, which will have a title indicating the types of facilities to which it applies.

COMMENT #30: The concern was expressed that the safety device rules are based on a philosophy that restraints should be allowed if requested by the family and on the fear of a resident

falling or subsequent injuries, when in fact there is no evidence that restraints reduce the risk of falls or injuries.

RESPONSE: The issue raised is outside the scope of this rulemaking. The enabling legislation for these rules, 2001 Laws of Montana, Chapter 347, established that a fear of falling or subsequent injuries is a legitimate reason to request a safety device.

Dawn Sliva
Rule Reviewer

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

Certified to the Secretary of State November 1, 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 June 30, 2002. This table includes those rules adopted during the period July 1, 2002 through September 30, 2002 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 June 30, 2002, 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 2001 and 2002 Montana Administrative Registers.

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