MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 7

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 The notice section contains state agencies' proposed new, amended or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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

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

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BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

In the matter of the proposed transfer of ARM 4.6.103, 4.6.104, and 4.6.105 relating to the Montana potato research and development program	NOTICE OF PROPOSED TRANSFER NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons

1. On May 8, 2004, the Montana Department of Agriculture proposes to transfer the above-stated rules relating to the Montana potato research and development program.

2. The Department of Agriculture will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Agriculture no later than 5:00 p.m. on April 22, 2004, to advise us of the nature of the accommodation that you need. Please contact Lee Boyer at the Montana Department of Agriculture, 303 N. Roberts, P.O. Box 200201, Helena, MT 59620-0201; Phone: (406) 444-2402; TTY: (406) 444-4687; Fax: (406) 444-5409; or E-mail: agr@state.mt.us.

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

4.6.103 (4.6.201) MONTANA POTATO ADVISORY COMMITTEE (1) through (3) remain the same.

AUTH: 80-11-504, MCA
IMP: 80-11-510, MCA

REASON: Transfer the rule to create a specific sub-chapter and rule number for the potato check off program rather than remain in the generic sub-chapter 1 for all commodities.

4.6.104 (4.6.202) ANNUAL POTATO COMMODITY ASSESSMENT-COLLECTION (1) through (3) remain the same.

AUTH: 80-11-504, MCA
IMP: 80-11-515, MCA

REASON: Transfer the rule to create a specific sub-chapter and rule number for the potato check off program rather than remain in the generic sub-chapter 1 for all commodities.

4.6.105 (4.6.203) APPLICATION FOR POTATO RESEARCH AND MARKETING PROJECT FUNDS (1) through (5) remain the same.

AUTH: 80-11-504, MCA

IMP: 80-11-511, MCA

REASON: Transfer the rule to create a specific sub-chapter and rule number for the potato check off program rather than remain in the generic sub-chapter 1 for all commodities.

4. Concerned persons may submit their data, views or arguments concerning the proposed transfer in writing to Lee Boyer at the Montana Department of Agriculture, 303 N. Roberts, P.O. Box 200201, Helena, MT 59620-0201; Fax: (406) 444-5409; or E-mail: agr@state.mt.us. Any comments must be received no later than May 6, 2004.

5. If persons who are directly affected by the proposed transfer wish to express their data, views and arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments they have to Lee Boyer at the Montana Department of Agriculture, 303 N. Roberts, P.O. Box 200201, Helena, MT 59620-0201; Phone: (406) 444-2402; TTY: (406) 444-4687; Fax: (406) 444-5409; or E-mail: agr@state.mt.us. A written request for hearing must be received no later than May 6, 2004.

6. If the agency receives requests for a public hearing on the proposed transfer from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed action; from the appropriate administrative rule review committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be eight persons based on 60-75 potato producers.

7. The Department of Agriculture maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding noxious weed seed free forage, noxious weeds, alfalfa seed, agriculture in Montana schools program, agriculture development, pesticides, warehouseman, produce, mint, seed, alternative crops, wheat research and marketing, rural development and/or hail. Such written request may be mailed or delivered to Montana Department of Agriculture, 303 N. Roberts, P.O. Box 200201, Helena, MT 59620-0201; Fax: (406) 444-5409; or E-mail: agr@state.mt.us or may be made by completing a request form at any rules hearing held by the Department of Agriculture.

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

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

/s/ Ralph Peck
Ralph Peck
Director

/s/ Tim Meloy
Tim Meloy, Attorney
Rules Reviewer

Certified to the Secretary of State, March 29, 2004.

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

In the matter of the proposed amendment of ARM 10.51.102 relating to board membership	)	NOTICE OF PROPOSED AMENDMENT
	)	NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons

1. On May 10, 2004, the Board of Public Education proposes to amend ARM 10.51.102 relating to board membership and educator licensure.

2. The Board of Public Education will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, contact the Board of Public Education no later than 5:00 p.m. on April 26, 2004 to advise us of the nature of the accommodation that you need. Please contact Steve Meloy, P.O. Box 200601, Helena, MT 59620-0601, telephone: (406) 444-6576, FAX: (406) 444-0847, e-mail smeloy@bpe.montana.edu.

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

10.51.102 BOARD MEMBERSHIP (1) The board of public education consists of seven members appointed by the governor and confirmed by the senate. The governor, superintendent of public instruction and commissioner of higher education are ex officio non-voting members of the board. A student representative, selected ~~annually~~ by the Montana ~~A~~association of ~~S~~student ~~C~~councils, also sits as a non-voting member of the board for a term not more than two years. In order to assure geographical and political representation on the board of public education, the law provides that not more than four of the seven board members may be from one congressional district or affiliated with the same political party. Board members elect a chairman and vice-chairman annually ~~in April~~.

AUTH: Sec. 2-15-1507, 2-15-1508, MCA
IMP: Sec. 2-15-1507, 2-15-1508, MCA

Statement of Reasonable Necessity: The Board of Public Education finds it reasonable and necessary to amend this rule to allow the student member and the Association of Student Councils more flexibility as to the time allowed for each term. Practice has shown, due to the complexity of educational issues that come before the Board of Public education, that 12 months may not be enough time for the student to learn those issues to an extent that maximizes their contributions. This rule will allow the Association of Student Councils the

flexibility to permit a student to serve two years if the appointment merits a full two-year term.

4. Concerned persons may present their data, views or arguments concerning the proposed amendment in writing to the Board of Public Education, P.O. Box 200601, Helena, MT 59620-0601 or by e-mail to smeloy@bpe.montana.edu to be received no later than 5:00 p.m. on May 6, 2004.

5. If persons who are directly affected by the proposed amendment wish to express their data, views and arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments they have to the Board of Public Education, P.O. Box 200601, Helena, MT 59620-0601, or by e-mail to smeloy@bpe.montana.edu. The comments must be received no later than 5:00 p.m. on May 6, 2004.

6. If the Board of Public Education receives requests for a public hearing on the proposed amendment from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed amendment; from the appropriate administrative rule review committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 1,128 persons based on 11,280 students enrolled as juniors in high school in the State of Montana.

7. The Board of Public Education 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 rules promulgated by the Superintendent of Public Instruction. Such written request may be mailed or delivered to the Board of Public Education, P.O. Box 200601, Helena, MT 59620-0601, faxed to the office at (406) 444-0847, or may be made by completing a request form at any rules hearing held by the Board of Public Education.

8. The bill sponsor requirements of 2-4-302, MCA, do not apply. The requirements of 20-1-501, MCA, have been fulfilled. Copies of these rules have been sent to all tribal governments in Montana.

/s/ Kirk Miller
Dr. Kirk Miller, Chairperson
Board of Public Education

/s/ Steve Meloy
Steve Meloy, Rule Reviewer
Board of Public Education

Certified to the Secretary of State March 29, 2004.

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.50.802, 17.50.803, 17.50.809, 17.50.811, 17.50.812, 17.50.813 and 17.50.815 pertaining to cesspool, septic tank and privy cleaners	NOTICE OF EXTENSION OF COMMENT PERIOD ON PROPOSED AMENDMENT (SEPTAGE CLEANING AND DISPOSAL)

TO: All Concerned Persons

1. On October 30, 2003, the Department published MAR Notice No. 17-201 at page 2350 of the 2003 Montana Administrative Register, issue number 20, pertaining to the public hearing on the proposed amendment of the above-stated rules. The Department is extending the time period to submit comments on these proposed changes at the request of interested parties. Comments may be submitted to Pat Crowley, Community Services Bureau, Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-5294; fax (406) 444-1374; or email pcrowley@state.mt.us no later than 5:00 p.m., June 30, 2004. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

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., June 15, 2004, to advise us of the nature of the accommodation that you need. Please contact Pat Crowley, Community Services Bureau, Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-5294; fax (406) 444-1374; or email pcrowley@state.mt.us.

3. 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, emailed to Elois Johnson, Paralegal, at ejohnson@state.mt.us, or may be made by completing a request form at any rules hearing held by the Department.

DEPARTMENT OF ENVIRONMENTAL QUALITY

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

Reviewed by:

David M. Rusoff
DAVID M. RUSOFF, Rule Reviewer

Certified to the Secretary of State, March 29, 2004.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.50.410 pertaining to annual operating license required	NOTICE OF PROPOSED AMENDMENT (SOLID WASTE) NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons

1. On May 22, 2004, the Board of Environmental Review proposes to amend the above-stated rule.

2. The Board will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, contact the Board no later than 5:00 p.m., April 26, 2004, to advise us of the nature of the accommodation you need. Please contact the Board Secretary at P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2544; fax (406) 444-4386; or email ber@state.mt.us.

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

17.50.410 ANNUAL OPERATING LICENSE REQUIRED (1) through (7) and Tables 1 and 2 remain the same.

TABLE 3. APPLICATION REVIEW FEE SCHEDULE

FACILITY	REVIEW FEE
Major Class II facility	$12,000
Intermediate Class II facility	$ 9,000
Minor Class II facility	$ 6,000
Major Class III facility	$ 3,600
Minor Class III facility	$ 2,400
Major Class IV facility	$ 3,600
Minor Class IV facility	$ 2,400
Major incinerator	$12,000
Intermediate incinerator	$ 9,000
Minor incinerator	$ 600
Major landfarm facility	$ 3,600
Intermediate landfarm facility	$ 2,400
Minor landfarm facility	$ 1,200
One-time landfarm (≥800 cubic yds)	$ ~~200~~ 500
One-time landfarm (<800 cubic yds)	$ ~~500~~ 200
Transfer station (≥10,000 tons/yr)	$ 8,400
Transfer station (<10,000 tons/yr)	$ 4,800
Large composter operation	$ 3,600
Small composter operation	$ 0

AUTH: 75-10-115, 75-10-204, 75-10-221, MCA
IMP: 75-10-115, 75-10-204, 75-10-221, MCA

REASON: The rule is being amended to correct the fees set forth for one-time landfarm (≥800 cubic yds) and one-time landfarm (<800 cubic yds). The application review fee for larger landfarms should be more than for smaller landfarms because the review process for larger landfarms is more complex. The amounts were inadvertently reversed in the original notice published on August 14, 2003 under MAR Notice No. 17-197 in issue number 15 of the 2003 Montana Administrative Register. New fees are being imposed on one-time landfarms. Small (less than 800 cubic yards) one-time landfarms would be assessed an application fee of $200 and large one-time landfarms would be assessed an application fee of $500. It is estimated that there will be five new small one-time landfarms and two new large one-time landfarms annually based on past history. This would generate $1,000 in fees from small landfarms and $1,000 from large landfarms.

4. Concerned persons may submit their data, views or arguments concerning the proposed amendment in writing to the Board of Environmental Review, P.O. Box 200901, Helena, Montana, 59620-0901, no later than May 20, 2004. To be guaranteed consideration, mailed comments must be postmarked on or before that date. Written data, views or arguments may also be submitted by fax at (406) 444-4386 or electronically via email addressed to the Board Secretary at ber@state.mt.us, no later than 5:00 p.m. May 20, 2004.

5. If persons who are directly affected by the proposed amendment wish to express their data, views, or arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments they have to the Board of Environmental Review, P.O. Box 200901, Helena, MT 59620-0901, fax (406) 444-4386 or email ber@state.mt.us. A written request for hearing must be received no later than May 20, 2004.

6. If the Board receives requests for a public hearing on the proposed amendment from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed amendment; from the appropriate administrative rule review committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those one-time landfarm facilities directly affected has been determined to be three based on the 30 licensed one-time landfarm facilities.

7. The Board 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 Board of Environmental Review, 1520 E. Sixth Ave., PO Box 200901, Helena, Montana 59620-0901, faxed to the office at (406) 444-4386, emailed to the Board Secretary at ber@state.mt.us, or may be made by completing a request form at any rules hearing held by the Board.

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

Reviewed by: BOARD OF ENVIRONMENTAL REVIEW

David Rusoff By: *Joseph W. Russell*
DAVID RUSOFF JOSEPH W. RUSSELL, M.P.H.,
Rule Reviewer Chairman

Certified to the Secretary of State, March 29, 2003.

BEFORE THE DEPARTMENT OF JUSTICE
STATE OF MONTANA

In the matter of the proposed adoption of New Rules I through X to implement An Act Enhancing Enforcement of the Tobacco Product Reserve Fund Act, 16-11-501 through 16-11-512, MCA	)))))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION

TO: All Concerned Persons

1. On May 10, 2004, at 10:00 a.m., the Montana Department of Justice will hold a public hearing in the Auditorium of the Public Health and Human Services Building, 111 N. Sanders, Helena, Montana, to consider the proposed adoption 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 of Justice no later than 5:00 p.m., April 26, 2004 to advise us of the nature of the accommodation that you need. Please contact Kelly O'Sullivan, Department of Justice, 215 N. Sanders, Helena, Montana 59620-0402; phone (406) 444-2026 or email contactdoj@state.mt.us.

3. The proposed new rules provide as follows:

NEW RULE I QUARTERLY CERTIFICATIONS AND ESCROW DEPOSITS

(1) To promote compliance with 16-11-403, MCA, the attorney general may require nonparticipating manufacturers to certify quarterly their compliance with the Montana Tobacco Product Reserve Fund Act and An Act Enhancing Enforcement of the Tobacco Product Reserve Fund Act. The attorney general may also require nonparticipating manufacturers to make the escrow payments required by 16-11-403, MCA, in quarterly installments during the year in which the sales covered by such payments are made.

(2) This rule applies to nonparticipating manufacturers who meet any of the following criteria:

(a) the nonparticipating manufacturer has not previously established and funded a qualified escrow fund in Montana;

(b) the nonparticipating manufacturer has not made an escrow deposit for more than one year;

(c) the nonparticipating manufacturer has made an untimely or incomplete escrow deposit for any prior calendar year;

(d) the nonparticipating manufacturer has failed to pay any judgment, including any civil penalty, entered for any violation of 16-11-401 through 16-11-512, MCA;

(e) the nonparticipating manufacturer has stamped or sold more than 1,000,000 of their cigarettes in Montana during

a quarter; or

(f) if the attorney general has reasonable cause to believe the nonparticipating manufacturer may not make its full required escrow deposit by April 15 of the year following the year in which the cigarettes sales were made.

AUTH: 16-11-508, 16-11-511, MCA
IMP: 16-11-403, 16-11-508, MCA

NEW RULE II DEADLINE FOR QUARTERLY ESCROW DEPOSITS (1) Nonparticipating manufacturers who are required to make quarterly escrow deposits must do so no later than 30 days after the end of the quarter in which the sales are made. For example, the deadline for making a quarterly escrow deposit for cigarette sales occurring in January through March is April 30 of the same year.

AUTH: 16-11-508, 16-11-511, MCA
IMP: 16-11-508, MCA

NEW RULE III DEADLINE FOR SUBMITTING QUARTERLY CERTIFICATION AND NOTIFYING ATTORNEY GENERAL OF QUARTERLY ESCROW DEPOSIT (1) Nonparticipating manufacturers who are required to make quarterly escrow deposits must provide the attorney general with official notification of the quarterly escrow deposit no later than 15 days after the deadline on which an escrow deposit is required.

(2) Nonparticipating manufacturers must also provide their quarterly certifications and produce documentation sufficient to allow the attorney general to determine the adequacy of the deposit with the same deadline. For example, the deadline for certifying, officially notifying the attorney general of a quarterly escrow deposit, and providing the documentation of the adequacy of the deposit for sales of cigarettes that occurred in January through March is May 15 of the same year.

AUTH: 16-11-508, 16-11-511, MCA
IMP: 16-11-403, 16-11-503, 16-11-508, MCA

NEW RULE IV QUARTERLY PERIODS DEFINED (1) For purposes of this subchapter, the calendar year shall be divided into the following quarters: January 1 through March 31; April 1 through June 30; July 1 through September 30; and October 1 through December 31.

AUTH: 16-11-508, 16-11-511, MCA
IMP: 16-11-508, MCA

NEW RULE V UNTIMELY OR INCOMPLETE QUARTERLY CERTIFICATION OR QUARTERLY ESCROW DEPOSIT (1) The attorney general may remove the delinquent nonparticipating manufacturer and its brand families from the directory required by 16-11-504, MCA, if:

(a) the required quarterly escrow deposit is not timely made in full;

(b) the required quarterly certification is not provided to the attorney general;

(c) the attorney general does not receive timely official notice of the quarterly escrow deposit; or

(d) the manufacturer fails to provide timely documentation sufficient to establish the adequacy of the deposit.

AUTH: 16-11-508, 16-11-511, MCA
IMP: 16-11-504, MCA

NEW RULE VI BURDEN OF ESTABLISHING ENTITLEMENT TO BE LISTED IN THE DIRECTORY (1) The burden of proof is on the tobacco product manufacturer to establish that it or a particular brand family is entitled to be listed on the directory.

AUTH: 16-11-511, MCA
IMP: 16-11-504, MCA

NEW RULE VII WHOLESALER REPORTING (1) Wholesaler reports required by 16-11-507, MCA, shall be filed monthly no later than 15 days after last day of the reporting month.

AUTH: 16-11-507, MCA
IMP: 16-11-511, MCA

NEW RULE VIII LATE FILING ASSESSMENT (1) A penalty will be assessed a wholesaler or tobacco product manufacturer for failing to file a report by 20 days after the last day of the reporting month.

(2) The failure to file a required report shall result in a late filing penalty of $50 for each business day the filing is late, for a maximum penalty of $1,000 per late filing.

AUTH: 16-11-508, 16-11-511, MCA
IMP: 16-11-503, 16-11-507, 16-11-508, MCA

NEW RULE IX TRUTHFULNESS, COMPLETENESS, AND ACCURACY OF SUBMISSIONS (1) A wholesaler or tobacco product manufacturer who submits to the department of justice a report, invoice, receipt, memoranda, or other record is considered to represent to the department of justice, to the best of the wholesaler's or manufacturer's knowledge and belief, that the item is genuine and that its contents, including all statements, claims, and representations contained in the document, are true, complete, accurate and not misleading.

(2) There is an inference that a person who signs or submits a document to the department of justice on behalf or in the name of a wholesaler or manufacturer is authorized by the wholesaler or manufacturer to do so and is acting under

the wholesaler's or manufacturer's direction.

AUTH: 16-11-508, 16-11-511, MCA
IMP: 16-11-118, 16-11-503, 16-11-507, MCA

NEW RULE X COMPLAINTS (1) Complaints regarding violations of 16-11-501 through 16-11-512, MCA, must be submitted in writing in affidavit form and signed by the person with personal knowledge of the allegations in the complaint.

AUTH: 16-11-511, MCA
IMP: 16-11-504, 16-11-505, 16-11-509, MCA

4. New rules I through X are necessary to implement the rulemaking authority granted under An Act Enhancing Enforcement of the Tobacco Product Reserve Fund Act, 16-11-501 through 16-11-512, MCA. New rule I will allow the Department to require installment payments of escrow deposits in certain instances and sets forth the deadlines and requirements for the payment of quarterly installments. Currently nonparticipating manufacturers (NPMs) are required by 16-11-403, MCA, to make annual payments into a qualified escrow account based on their sales in Montana. The annual payment must be made by April 15 of each year. A NPM is a manufacturer who has not joined the master settlement agreement (MSA). So NPMs may sell their products in Montana for one year and four months until they are required to make an escrow payment. Some NPMs do not make their payments on April 15, leaving the department to attempt to sue them for the amounts due. Often these manufacturers are located in foreign countries making service and enforcement of judgments difficult and costly. Quarterly installment payments are necessary to prevent NPMs from selling millions of cigarettes in Montana before they are required to put any money into escrow for those sales.

New rule I will require the following NPMs to make quarterly escrow payments: those who have not previously made an escrow deposit; those who have not made an escrow deposit for more than one year; those who have made an incomplete or untimely deposit; those who have a very large sales volume; those who have an outstanding judgment including any civil penalty owing to the state; or if the attorney general has other reasonable cause to believe that the manufacturer may not make its annual payment. The quarterly payments allow the state to take action earlier against NPMs who cannot make their escrow payments.

New rule II requires the escrow deposit be made 30 days after the end of the calendar quarter. The 30 day period gives the manufacturer sufficient time to gather their records for reporting purposes and place the required sum into escrow.

New rule III gives the manufacturers an additional 15 days after they have placed the money into escrow to certify their compliance to the department. This is designed to allow the escrowing bank sufficient time after the deposit is made to verify the deposit.

New rule IV requires the manufacturer to make quarterly escrow payments at the end of each calendar quarter, or every four months. This is reasonable since it is a commonly used business reporting period.

New rule V allows the attorney general to enforce the quarterly escrow payment requirement in the same manner as the annual escrow payment requirement as allowed by 16-11-504, MCA. This allows the attorney general to take immediate enforcement action against non-compliant NPMs.

New rule VI establishes the burden of proof in an action to be listed on the Directory under 16-11-503, MCA. The burden of proof in an action under 16-11-503, MCA, is currently unclear and this rule will provide needed clarification.

New rules VII through IX set forth requirements for filing of documentation, accuracy of those filings, penalties for late filings and refusal to allow examination of records. These rules are necessary to ensure that filings made with the Department are accurate, timely, and complete. The Department will use the wholesaler filings to determine the accuracy of the quarterly escrow payments made, as well as other things. It is essential that the reports be accurate and received in a timely manner. Currently some wholesalers file reports that are several months late. This will prevent the Department from determining the accuracy of quarterly escrow payments.

Because these rules are new, the department does not know how many wholesalers or tobacco manufacturers may potentially be affected by the late fee rule (New Rule VIII), nor can the department speculate as to what the cumulative amount of the fee for all wholesalers and manufacturers might be. Our hope is that the fee will generate no income, and that all wholesalers and manufacturers will file their reports in a timely fashion.

In addition new rule IX requires that manufacturers who report their sales data for escrow payments do so accurately. Obviously, the state needs complete and accurate reporting by tobacco product manufacturers doing business in this state and must be able to rely on data submitted by both manufacturers and wholesalers.

New rule X establishes a procedure for complaints under the newly enacted statutes. Currently complaints are accepted orally, in writing, or by email. For litigation purposes, it

is necessary to have all complaints in writing in affidavit form. All the new rules are necessary to support the State's efforts to enforce the Tobacco Product Reserve Fund Act and its enhancement.

5. Concerned persons may submit their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to the Department of Justice, P.O. Box 201402, Helena, Montana 59620-1402, faxed to (406) 444-3549 or emailed to Kelly O'Sullivan Department of Justice at contactdoj@state.mt.us and must be received no later than 5:00 p.m., May 20, 2004. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

6. Kelly O'Sullivan, Assistant Attorney General, Office of the Attorney General, P.O. Box 201401, Helena, MT 59620-1401, has been designated to preside over and conduct the hearing.

7. The Department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding the Crime Control Division, the Central Services Division, the Forensic Sciences Division, the Gambling Control Division, the Highway Patrol Division, the Law Enforcement Academy, the Division of Criminal Investigation, the Legal Services Division, the Motor Vehicle Division, the Justice Information Systems Division, or any combination thereof. Such written request may be mailed or delivered to the Department of Justice, 215 N. Sanders, P.O. Box 201402, Helena, Montana 59620-1402, faxed to the office at (406) 444-3549, emailed to the Department of Justice at contactdoj@state.mt.us or may be made by completing a request form at any rules hearing held by the Department.

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

By: /s/ Mike McGrath
MIKE MCGRATH, Attorney General
Department of Justice

/s/ Ali Bovingdon
ALI BOVINGDON, Rule Reviewer

Certified to the Secretary of State March 29, 2004.

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

In the matter of the proposed amendment of ARM 24.147.302, funeral service definitions, ARM 24.147.401, fee schedule, ARM 24.147.1101, crematory facility regulation, ARM 24.147.1114, licensure as a crematory operator, ARM 24.147.1115, licensure as a crematory technician, ARM 24.147.1304, perpetual care and maintenance fund reports, and the proposed adoption of NEW RULE I pertaining to audit expenses	)	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT AND ADOPTION

TO: All Concerned Persons

1. On May 11, 2004, at 9:00 a.m., a public hearing will be held in room B-07, of the Park Avenue Building, 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 Funeral Service no later than 5:00 p.m., on May 4, 2004, to advise us of the nature of the accommodation that you need. Please contact Cheryl Smith, Board of Funeral Service, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2393; Montana Relay 1-800-253-4091; TDD (406) 444-2978; facsimile (406) 841-2305; e-mail dlibsdfnr@state.mt.us.

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

24.147.302 FUNERAL SERVICE DEFINITIONS As used in this chapter, the following definitions apply:

(1) and (2) remain the same.

(3) "Hazardous implant" means any foreign object that has been surgically or otherwise placed in the human body that may present a threat of injury to the operator or to the crematory retort during the cremation process, or the public.

(3) through (12) remain the same but are renumbered (4) through (13).

AUTH: 37-1-131, ~~37-19-101,~~ 37-19-202, MCA
IMP: 37-19-705, 37-19-827, 37-19-828, 37-19-829, MCA

REASON: There is reasonable necessity to amend ARM 24.147.302 to include a definition of the term "hazardous implant." The Board was cited by the legislative auditors for not defining "hazardous implant" in rule as required by 37-19-705(3), MCA. An IMP cite is being added to reflect the implementation of 37-19-705, MCA. In addition, there is reasonable necessity to amend the AUTH cites to delete an erroneous statutory citation.

24.147.401 FEE SCHEDULE (1) through (18) remain the same.

~~(19) Administrative fee (change of name/address) 25~~

AUTH: 37-1-131, ~~37-1-134,~~ 37-19-202, 37-19-703, MCA
IMP: 37-1-134, 37-19-301, 37-19-303, 37-19-304, 37-19-306, 37-19-401, 37-19-402, 37-19-403, 37-19-702, 37-19-703, 37-19-808, 37-19-814, 37-19-815, 37-19-816, MCA

REASON: The Board is required to set fees commensurate with costs, pursuant to 37-1-134, MCA. There is reasonable necessity to amend ARM 24.147.401 because a change of the licensee's name or address can now be done online by the licensee as part of the online license renewal process. This fee now exceeds the cost of this Board service and is therefore proposed to be deleted. The Board notes that during fiscal year 2003, the Board was not collecting the administrative fee for change of name or address, and thus there is no current data upon which to estimate the number of licensees who will be affected annually by this change. Accordingly, the Board cannot estimate the annual decrease in revenue, but it believes that the decrease in revenue is likely to make a minimal impact upon licensees as a whole. An erroneous AUTH cite is being deleted and both AUTH and IMP cites are being added to more accurately reflect the sources of the Board's rulemaking authority and all of the statutes implemented through this rule.

24.147.1101 CREMATORY FACILITY REGULATION (1) remains the same.

(2) The crematory facility shall comply with all applicable local, state and federal building codes ~~and regulations regarding environmental impact on the area in which it is located~~.

(3) through (10) remain the same.

AUTH: 37-1-131, 37-19-202, 37-19-703, MCA
IMP: 37-19-703, 37-19-705, MCA

REASON: There is reasonable necessity to amend ARM 24.147.1101 to clarify its meaning. The Board recently learned that several licensees were confused and incorrectly interpreting the rule to mean they only had to comply with local, state and federal building code regulations when such

regulations were a duplication of state and federal environmental impact requirements. Since state and federal regulations already require compliance with the applicable building codes, the Board rules do not need to address this. An AUTH cite is being added to more accurately reflect the sources of the Board's rulemaking authority.

24.147.1114 LICENSURE AS A CREMATORY OPERATOR

(1) through (2)(b) remain the same.

(c) applicant is of good moral character~~,~~ as shown by two letters of reference~~, one of which must be from a licensed mortician~~.

AUTH: 37-1-131, 37-19-202, MCA
IMP: 37-19-702, 37-19-703, MCA

REASON: There is reasonable necessity to amend ARM 24.147.1114 to address recently raised concerns that the requirement that an applicant needs a reference from a licensed mortician might be construed as requiring authorization from a business competitor as a condition of licensure. In order to avoid the potential for a conflict of interest, the Board proposes to modify the rule. An AUTH cite and an IMP cite are being added to more accurately reflect the sources of the Board's rulemaking authority and the statutes implemented through this rule.

24.147.1115 LICENSURE AS A CREMATORY TECHNICIAN

(1) through (2)(a) remain the same.

(b) name of supervising licensed crematory operator ~~or mortician~~; and

(c) remains the same.

AUTH: 37-1-131, 37-19-202, MCA
IMP: 37-19-702, 37-19-703, MCA

REASON: There is reasonable necessity to amend ARM 24.147.1115 because pursuant to section 37-19-702(4), MCA, the person in charge of a crematory facility must be licensed as a crematory operator by the Board. The statute does not allow a mortician to be in charge. An AUTH cite is being added to more accurately reflect the sources of the Board's rulemaking authority.

24.147.1304 PERPETUAL CARE AND MAINTENANCE FUND REPORTS

(1) A cemetery shall be required to submit an annual report. The report must consist of an audit opinion or attestation opinion on a form provided by the board. The report shall consist of ~~the certificate~~ an opinion of the accountant or auditor preparing such ~~statement and~~ report. The report must be ~~shall be deemed to have been complied with when~~ prepared by an independent certified public accountant or a licensed public accountant, provided that such ~~statements~~ report fully and accurately ~~disclose~~ discloses the position of

the perpetual care and maintenance fund~~,~~. ~~and that such certificate does not contain disclaimers or qualifications such as to preclude the rendering of an independent opinion.~~ Failure to provide the annual report shall void the operating license of the cemetery.

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

(d) In the event that the board requires an audit, the board shall contract with a licensed or certified public accountant and the fee charged by the accountant for the actual cost of the audit must be paid by the cemetery authority.

AUTH: 37-1-131, 37-19-202, 37-19-807, MCA
IMP: 37-19-807, 37-19-822, 37-19-823, MCA

REASON: There is reasonable necessity to amend ARM 24.147.1304 because the Board was cited by the Legislative Auditor for not having in rule the fee the Board would charge the cemetery authority if the Board required an audit. The proposed amendment clarifies that the Board would charge the cemetery authority the full fee charged to the Board by the accountant. Because cemetery licenses are relatively new (the first of the five year renewals occurs in 2004), the Board has no basis upon which to estimate how many cemetery authorities will undertake an audit at the request of the Board. The Board likewise has no basis to estimate the total annual cost of the Board-requested audits.

The Board notes that it considered whether to establish a flat fee for audits. The Board rejected that approach for a number of reasons. First, the Board believes that it would be inequitable for a small cemetery authority, with relatively small amounts in its perpetual care and maintenance fund, to be charged the same as a cemetery with a much larger fund. Second, the establishment of a flat fee would require the Board to solicit proposals or bids from accountants who would be willing to perform the audits for a fixed fee. Such a contract would require the contractor to provide services throughout the state, and thus local accounting firms might tend to be discouraged from bidding. In addition, a flat fee for an audit would have to build in travel costs for the contracted accountant(s), and thus would likely be more expensive than if the audit was performed by a local accountant. Two AUTH cites are being added to more accurately reflect the sources of the Board's rulemaking authority.

4. The Board proposes to adopt NEW RULE I as follows:

NEW RULE I AUDIT FEES (1) In the event that the board requires an audit, the board shall contract with a licensed or certified public accountant and the fee charged by the accountant for the actual cost of the audit must be paid by the cemetery authority.

AUTH: 37-1-131, 37-19-202, 37-19-807, MCA
IMP: 37-19-807, 37-19-808, 37-19-822, 37-19-823, MCA

REASON: There is reasonable necessity to adopt NEW RULE I because the Board was cited by the Legislative Auditor for not having in rule the fee the Board would charge the cemetery authority if the Board required an audit. The proposed amendment clarifies that the Board would charge the cemetery authority the full fee charged to the Board by the accountant. Because cemetery licenses are relatively new (the first of the five year renewals occurs in 2004), the Board has no basis upon which to estimate how many cemetery authorities will undertake an audit at the request of the Board. The Board likewise has no basis to estimate the total annual cost of the Board-requested audits. The Board notes that pursuant to 37-19-808(2)(b), MCA, the costs of an audit must be borne by the cemetery company.

The Board notes that it considered whether to establish a flat fee for audits. The Board rejected that approach for a number of reasons. First, the Board believes that it would be inequitable for a small cemetery authority, with a relatively low volume of internments, to be charged the same as a cemetery with a much larger volume. Second, the establishment of a flat fee would require the Board to solicit proposals or bids from accountants who would be willing to perform the audits for a fixed fee. Such a contract would require the contractor to provide services throughout the state, and thus local accounting firms might tend to be discouraged from bidding. In addition, a flat fee for an audit would have to build in travel costs for the contracted accountant(s), and thus would likely be more expensive than if the audit was performed by a local accountant.

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 Funeral Service, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to dlibsdfnr@state.mt.us, and must be received no later than 5:00 p.m., May 18, 2004.

6. An electronic copy of this Notice of Public Hearing is available through the Department's and Board's site on the World Wide Web at http://www.discoveringmontana.com/dli/fnr. 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 do not excuse late submission of comments.

7. The Board of Funeral Service 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 Funeral Service administrative rulemaking proceedings or other administrative proceedings. Such written request may be mailed or delivered to the Board of Funeral Service, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, faxed to the office at (406) 841-2305, e-mailed to dlibsdfnr@state.mt.us, or may be made by completing a request form at any rules hearing held by the agency.

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

9. Jack Atkins, attorney, has been designated to preside over and conduct this hearing.

BOARD OF FUNERAL SERVICE
JERED SCHERER, CHAIRMAN

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

/s/ MARK CADWALLADER
Mark Cadwallader
Alternate Rule Reviewer

Certified to the Secretary of State March 29, 2004.

BEFORE THE BOARD OF LIVESTOCK
OF THE STATE OF MONTANA

In the matter of the proposed amendment of ARM 32.3.224 and 32.3.403 pertaining to bison imported into Montana	)))))	NOTICE OF PROPOSED AMENDMENT NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons

1. On May 8, 2004, the board proposes to amend ARM 32.3.224 and 32.3.403 pertaining to bison imported into Montana.

2. The board of livestock will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, contact the board of livestock no later than 5:00 p.m. on April 29, 2004, to advise us of the nature of the accommodation that you need. Please contact Marc Bridges, 301 N. Roberts St., Room 308, P.O. Box 202001, Helena, MT 59620-2001; phone: (406) 444-7323; TTD number: 1-800-253-4091; fax: (406) 444-1929; e-mail: mbridges@state.mt.us.

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

32.3.224 BISON (1) Bison may enter the state of Montana provided they enter in conformity with ARM 32.3.201 through 32.3.211 and in addition ~~are~~:

(a) are ~~O~~officially tested negative for brucellosis within 30 days ~~of~~ prior to entry except the following:

(i) and (ii) remain the same.

(iii) a~~A~~n official calfhood vaccinate less than 24 months of age ~~in which~~ (the first pair of permanent incisors has not fully erupted) and which ~~are~~ is not parturient, post parturient, or in the last trimester of pregnancy;

(iv) ~~Originate~~ bison originating in an official certified brucellosis-free bison herd~~.~~;

(b) ~~B~~bison required to be tested for brucellosis prior to entry may be quarantined for a 45 to 120 day brucellosis retest, at the owner's expense, after arrival in Montana. Included here will be all female bison from states or areas with brucellosis classification of A, B, or lower~~.~~;

~~(c) With regards to tuberculosis, all bison are:~~

~~(i) Officially tested negative for tuberculosis within 60 days of entry, or:~~

~~(ii) Consigned to an official slaughtering establishment for immediate slaughter, or:~~

~~(iii) Originate from an accredited tuberculosis free herd.~~

(c) female bison must be officially calfhood vaccinated by an accredited veterinarian prior to entry into Montana, with a Brucella abortus vaccine approved by the administrator of the animal and plant health inspection service, U.S. department of agriculture except the following:

(i) spayed bison;

(ii) bison consigned directly to an official slaughtering establishment for immediate slaughter;

(iii) non-vaccinated bison four to 11 months of age placed under quarantine upon arrival, for official calfhood vaccination or spaying by an accredited veterinarian, within 30 days of their entry;

(iv) non-vaccinated bison less than four months of age, imported without their dams, placed under quarantine upon arrival, for official calfhood vaccination or spaying by an accredited veterinarian, within six months of their entry; and

(v) all bison imported under this rule shall be officially identified prior to importation and listed on the official health certificate; and

(d) all bison imported into Montana must meet the interstate requirements set forth in Title 9 CFR.

AUTH: Sec. 81-2-102, 81-2-103, MCA
IMP: Sec. 81-2-102, 81-2-103, MCA

32.3.403 USE OF BRUCELLA ABORTUS VACCINE (1) Use of Brucella abortus vaccine that does not conform to the definition of "official vaccination" or "official vaccinate" in Title 9 CFR, part 78 is not permitted unless specifically approved by the state veterinarian.

(2) The state veterinarian, upon ~~his finding~~ discovery that the owner of imported livestock eligible for official vaccination cannot or will not otherwise have those cattle or bison officially vaccinated, shall arrange for the official vaccination of such eligible cattle or bison at a reasonable cost to the owner.

AUTH: Sec. 81-2-102, 81-2-103, MCA
IMP: Sec. 81-2-102, 81-2-103, MCA

4. STATEMENT OF REASONABLE NECESSITY The rules are being amended to make bison importation requirements, pertaining to brucellosis and tuberculosis, similar to or equivalent to those importation requirements for cattle. The proposed amendments are consistent with interstate movement requirements set forth in Title 9 CFR, parts 77 and 78.

ARM 32.3.224(1)(a) is being amended to clarify that test-eligible bison must be tested prior to importation into Montana.

ARM 32.3.224(1)(a)(iii) is being amended to clarify the age (less than 24 months) of officially calfhood vaccinated bison

which would be exempt from necessary brucellosis testing prior to importation into Montana.

ARM 32.3.224(1)(a)(iv) is being amended to clarify that bison originating from a certified brucellosis-free herd would be exempt from necessary brucellosis testing prior to importation into Montana.

ARM 32.3.224(1)(b) is being amended to clarify that brucellosis testing will be required on test-eligible bison prior to importation into Montana.

ARM 32.3.224(1)(c)(i), (ii), and (iii) are being deleted to eliminate the tuberculosis testing requirement for bison imported into Montana. Domestic bison, based on past and ongoing nationwide tuberculosis surveillance, do not pose a greater tuberculosis risk than cattle. The last confirmed case of bovine tuberculosis in a commercial bison operation occurred in 1987. This amendment is consistent with Title 9 CFR, part 77, in which cattle and bison are subject to identical interstate movement requirements.

New ARM 32.3.224(1)(c)(i), (ii), (iii), and (iv) are being added to require official brucellosis vaccination of vaccination-eligible female bison imported into Montana. This amendment is consistent with current importation requirements for cattle and consistent with importation requirements of neighboring states (Wyoming and Idaho).

ARM 32.3.403(1) is being amended to conform to terminology and definitions in Title 9 CFR.

ARM 32.3.403(2) is being amended to make the rule gender neutral and to clarify appropriate authorities and remedies related to necessary brucellosis vaccination of imported bison or cattle.

5. Concerned persons may submit their data, views, or arguments concerning the proposed amendments in writing to Marc Bridges, 301 N. Roberts St., Room 308, P.O. Box 202001, Helena, MT 59620-2001, by faxing to (406) 444-1929, or by e-mail to mbridges@state.mt.us to be received no later than 5:00 p.m., May 6, 2004.

6. If persons who are directly affected by the proposed amendments wish to express their data, views, or arguments orally or in writing at a public hearing, they must make a written request for a public hearing and submit this request along with any written comments they have to the same address as above. A request for a public hearing must be received no later than 5:00 p.m., May 6, 2004.

7. If the agency receives requests for a public hearing on the proposed action from either 10% or 25, whichever is

less, of the persons who are directly affected by the proposed action; from the appropriate administrative rule review committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a public hearing will be held at a later date. Notice of the public hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 17, based on the number of persons or business entities in Montana owning bison or importing bison into Montana in 2003.

8. An electronic copy of this Proposal Notice is available through the department's web site at www.liv.state.mt.us.

9. The Montana department of livestock maintains a list of interested persons who wish to receive notice of rulemaking actions proposed by this department. Persons who wish to have their name added to the list shall make a written request, which includes the name and mailing address of the person to receive notices and specifies the area of interest that the person wishes to receive notices regarding. Such written request may be mailed or delivered to Marc Bridges, 301 N. Roberts St., Room 308, P.O. Box 202001, Helena, MT 59620-2001; faxed to (406) 444-1929 "attention Marc Bridges"; or e-mailed to mbridges@state.mt.us. Request forms may also be completed at any rules hearing held by the department.

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

DEPARTMENT OF LIVESTOCK

By: /s/ Marc Bridges
Marc Bridges, Exec. Officer,
Board of Livestock
Department of Livestock

By: /s/ Carol Grell Morris
Carol Grell Morris,
Rule Reviewer

Certified to the Secretary of State March 29, 2004.

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 10.55.907 relating to distance, online, and technology delivered learning	)))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On January 29, 2004, the Board of Public Education published MAR Notice No. 10-55-231 regarding the public hearing on the proposed amendment of a rule concerning distance, online, and technology delivered learning at page 157 of the 2004 Montana Administrative Register, Issue Number 2.

2. The Board of Public Education has amended ARM 10.55.907 with the following changes, stricken matter interlined, new matter underlined:

10.55.907 DISTANCE, ONLINE, AND TECHNOLOGY DELIVERED LEARNING (1) through (2)(a) remain as proposed.

(b) Distance, online, and technology delivered learning programs and/or courses shall meet ~~school district adopted~~ the learner expectations adopted by the school district or aligned with state content and performance standards.

(3) Except as provided in (3)(a), teachers of distance, online, and technology delivered learning programs shall be licensed and endorsed in the area of instruction with such license granted as a result of the completion of a professional educator preparation program accredited by NCATE and/or a state board of education. School districts receiving distance, online, and technology delivered learning programs described in this rule shall have a distance learning facilitator as provided in this rule assigned for each course and available to the students.

(a) remains as proposed.

(b) When a teacher of distance, online, and technology delivered learning programs is licensed and endorsed in the area of instruction, as provided in this rule, the receiving school district's facilitator ~~need not be licensed~~ shall be a licensed teacher or a para-educator.

(c) The school district must ensure that the distance, online, and technology delivered learning facilitator, ~~w~~whether licensed or not, ~~the distance, online, and technology delivered learning facilitator shall~~ receives in-service training on technology delivered instruction pertaining to:

(i) through (5)(a) remain as proposed.

(b) identify all Montana school districts to whom they are providing distance, online, and technology delivered programs and/or courses;

(b) through (d) remain as proposed but are renumbered (c)

through (e).

3. The Board of Public Education has thoroughly considered the comments and testimony received on the proposed amendment of this rule. The following is a summary of the comments received and the Board's responses.

COMMENT 1: Linda Peterson, on behalf of the Office of Public Instruction (OPI), clarified that nothing in the proposed amendments to this rule expand or change the provision for calculating ANB.

RESPONSE: The Board concurs that this particular rule does not impact the current status of ANB money to school districts.

COMMENT 2: Linda Peterson further recommended that (2)(b) be changed to read, "Distance, online, and technology delivered learning programs and/or courses shall meet the learner expectations adopted by the school district or aligned with state content and performance standards."

RESPONSE: The Board concurs with the proposed amendment and considers it "housekeeping" in nature.

COMMENT 3: Linda Peterson further recommended that (3)(c) be amended to read, "The school district must ensure that the distance, online, and technology delivered learning facilitator, whether licensed or not, receive in-service training on technology delivered instruction pertaining to:" and that language be inserted to require providers to identify all Montana school districts to whom they are providing distance, online, and technology delivered programs and/or courses.

RESPONSE: The Board concurs with the proposed amendments.

COMMENT 4: Lance Melton, on behalf of the Montana School Boards' Association (MTSBA), and Dave Puyear, on behalf of the Montana Rural Education Association (MREA), proposed an amendment to the rule to provide that the on-site facilitator is at least qualified as a licensed teacher or para-educator.

RESPONSE: The Board agrees that the new language "may be a licensed teacher or a para-educator" makes the rule more clear as to who can legally serve as a facilitator. The rule has been amended accordingly.

COMMENT 5: Lance Melton, on behalf of MTSBA, testified in support of the amendments to the rule and commented that the education community needs to broaden the ability to deliver education and make it as flexible as possible and to consider home and private settings. He concurred that the ANB issue should be addressed at a later date. He felt the new wording ensures quality of education and that this type of education should receive the same level of scrutiny, not more. He also

stated that local control needs to be preserved and that teacher load requirements are important.

RESPONSE: The Board concurs and appreciates Mr. Melton's comments.

COMMENT 6: Dave Puyear, on behalf of the MREA, testified that MREA strongly supports the rule and amendments proposed by OPI, MTSBA and MEA-MFT. Mr. Puyear requested that the MREA be included in discussions regarding ANB.

RESPONSE: The Board concurs with and appreciates Mr. Puyear's comments.

COMMENT 7: David Smith, on behalf of MEA-MFT, testified in support of the rule amendments and stated that students need to be assured that they will have access to a licensed educator.

RESPONSE: The Board concurs with and appreciates Mr. Smith's comments.

COMMENT 8: Claudette Morton, on behalf of the Montana Small Schools Alliance, testified that all education partners involved should be invited to the table for discussion on issues affecting education in Montana. She also stated that she supported the amendments but had a concern with the language "may be a licensed teacher or a para-educator" and felt this was too permissive.

RESPONSE: Lance Melton and Dave Puyear clarified this language as being the two alternatives made available for a school district's facilitator. The Board concurs with and appreciates Ms. Morton's comments and has replaced the word "may" with "shall" to avoid confusion.

COMMENT 9: Bud Williams, Deputy Superintendent, Office of Public Instruction, testified in support of the proposed rule with the amendments offered at the hearing.

RESPONSE: The Board concurs with and appreciates Mr. Williams' comments.

COMMENT 10: Bruce Messinger, Superintendent of Helena Public Schools, testified in support of the proposed amendments and stated that he would be interested in encouraging greater flexibility in this rule to meet the needs of students. The rule provides an opportunity for "at risk" students to be given alternative settings. He would like to be included in the discussions regarding the ANB issue. He feels the rule is complementary to regionalized delivery of services, will encourage the further development of connectivity and greater development of technology in all schools.

RESPONSE: The Board concurs with and appreciates Superintendent Messinger's comments.

COMMENT 11: Geoff Feiss, on behalf of the Montana Telecommunications Association, testified that he was in general agreement with the concept of the rule but felt the rule erects barriers to distance learning by requiring distance learning programs to have both a licensed/endorsed teacher and facilitator assigned to each course. He recommended totally "scrapping" the rule and rewriting it as follows:

"School districts should utilize distance, online, and technology delivered learning programs without restriction as a resource for maximizing learning opportunities for Montana's students. School districts shall ensure that students utilizing distance, online, and technology delivered learning programs are held to the same educational achievement and assessment standards as other students in the school district."

RESPONSE: The board characterizes these comments as not being adverse to the intent of the rule but rather criticizes the rule as being too restrictive as to the quality requirements and adherence to the standards for providers and receivers. The Board wishes to thank Mr. Feiss but rejects the request to "scrap" the rule as amended but will continue to monitor the rule as it applies to rapidly developing technology.

COMMENT 12: Mary Sheehy-Moe, Dean of Montana State University - Great Falls College of Technology, testified that the Great Falls College of Technology was active in distance learning and dual enrollment. She stated that distance learning does require some facilitation at the K-12 level and stated that the focus needs to be on facilitation as a function rather than as a person. She supports the portion of the rule requiring training for people to become facilitators. She was concerned about the impact this rule would have on the Great Falls College of Technology's running start and dual enrollment coursework. She further indicated that the 1999 legislation entitled "Running Start" does not require faculty to be certified to teach high school juniors and seniors who are taking advantage of dual credit offerings.

RESPONSE: The Board appreciates the comments and thanks Ms. Sheehy-Moe.

COMMENT 13: Dick Kuntz, Assistant Superintendent of the Great Falls Public Schools, testified that he supports the rule with the caveat that the rule be amended to allow college professors to deliver distance courses. He stated that their school needs to continue to utilize dual enrollment from the Great Falls College of Technology to meet K-12 students' needs and that the partnership they have for dual enrollment is crucial for curriculum enrichment. He felt the rule was too restrictive with regards to licensure and endorsement.

RESPONSE: The Board appreciates the comments and thanks Mr. Kuntz.

COMMENT 14: Jerry Pauli, District Superintendent of the Thompson Falls School District submitted a written comment expressing concern regarding the process by which rules are promulgated. He suggested that the Office of Public Instruction show the specifics of how the rule will apply to the districts before the rule is adopted. It was his opinion that no rule should be approved by the Board of Public Education without seeing the specific guidelines prior to the adoption.

RESPONSE: The Board appreciates the comment and assures Superintendent Pauli that there are many checks and balances in place to assure that the implementation guidelines that are developed are consistent with the intent of the rule and the law.

/s/ Kirk Miller
Dr. Kirk Miller, Chair
Board of Public Education

/s/ Steve Meloy
Steve Meloy, Executive Secretary
Rule Reviewer
Board of Public Education

Certified to the Secretary of State March 29, 2004.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.8.102, 17.8.103, 17.8.106, 17.8.130, 17.8.316, 17.8.320, 17.8.340, 17.8.401, 17.8.801, 17.8.819, 17.8.822, 17.8.1201 and 17.8.1204 pertaining to incorporation by reference of current federal regulations and other materials into air quality rules	NOTICE OF AMENDMENT (AIR QUALITY)

TO: All Concerned Persons

1. On December 24, 2003, the Board of Environmental Review published MAR Notice No. 17-202 regarding a notice of public hearing on the proposed amendment of the above-stated rules at page 2801, 2003 Montana Administrative Register, issue number 24.

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

3. No public comments or testimony were received.

BOARD OF ENVIRONMENTAL REVIEW

By: *Joseph W. Russell*
JOSEPH W. RUSSELL, M.P.H.
Chairman

Reviewed by:

David Rusoff
DAVID RUSOFF, Rule Reviewer

Certified to the Secretary of State, March 29, 2004.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.30.502, 17.30.615, 17.30.619, 17.30.651, 17.30.653, 17.30.656, 17.30.657, 17.30.702, 17.30.715, 17.30.1001, 17.30.1006, and 17.30.1007 pertaining to water use classifications and department Circular WQB-7	NOTICE OF AMENDMENT (WATER QUALITY)

TO: All Concerned Persons

1. On December 24, 2003, the Board of Environmental Review published MAR Notice No. 17-203 regarding a notice of public hearing on the proposed amendment of the above-stated rules at page 2808, 2003 Montana Administrative Register, issue number 24.

2. The Board amended the rules exactly as proposed.

3. The following comments were received and appear with the Board's responses:

Comment No. 1: The proposed amendments to the D-2 classification standards are much more restrictive than the existing D-2 classification. The Board should not adopt the amendments because the existing classification sufficiently protects water quality in low flow ditches.

Response: The Board acknowledges that the proposed amendments to the D-2 classification standards are more stringent than those previously adopted one year ago. The new D-2 classification and standards, however, are identical to the classification and standards adopted one year ago in one important aspect. The standards under either the existing or amended D-2 classification will only apply to a specific water body after a Use Attainability Analysis (UAA) has been performed and the U.S. Environmental Protection Agency (EPA) has approved the water body's re-classification. See ARM 17.30.615(2). Prior to a UAA and EPA's approval, all state waters, including those in ditches, are currently classified under one of the water use classifications designated A-1 through C-3 in ARM 17.30.607 through 17.30.614. The standards for those classifications are considerably more stringent than those under the D-2 classification adopted one year ago. Since no water body has been re-classified under the existing D-2 classification, the more stringent standards found in ARM 17.30.607 through 17.30.614 still apply to state waters that flow through ditches.

Moreover, even though the amended standards in D-2 are more stringent than those adopted a year ago, the amendments

explicitly allow the standards for non-priority pollutants to be modified or removed from the new D-2 classification based upon the performance of a UAA. Under EPA's requirements implementing the federal Clean Water Act (CWA), the performance of a UAA is necessary whenever a designated use of a water body is removed. The requirement for a UAA applies to the existing and amended version of the D-2 classification because both versions eliminate certain designated uses that would otherwise apply under ARM 17.30.607 through 17.30.614.

Comment No. 2: Implementation of the proposed amendments could have unintended consequences to the aquatic life present in a ditch that is re-classified as D-2. For example, a company may decide to eliminate its discharge due to the cost of treatment to meet the new standards. Eliminating or removing the discharge would reduce the flow of water in the ditch to the point where aquatic life is harmed or could no longer survive.

Response: As explained in response to Comment No. 1, the standards that are currently in effect for all state waters, including state waters in ditches, are more stringent than those proposed by the Board with these amendments. For this reason, the unintended consequences referred to above could just as easily occur today due to the existing, more stringent standards adopted under ARM 17.30.607 through 17.30.614.

During the process of re-classifying a water in the D-2 classification, the environmental benefit of a discharge to a low flow stream or ditch, as well as the costs associated with treating water to meet the standards under the D-2 classification, may be addressed in a UAA. A finding of net environmental benefit from the discharge, when compared to the cost of treatment and possible elimination of effluent to avoid those costs, may warrant the modification or elimination of certain water quality standards in low flow streams or ditches.

Comment No. 3: The Board should not adopt the proposed amendments given the unintended consequences of harming aquatic life by encouraging dischargers to remove their discharge to another location.

Response: Under the authority of the CWA, EPA disapproved the water quality standards previously adopted by the Board for the D-2 classification. In its disapproval letter, EPA identified specific concerns that must be addressed and recommended changes that would meet those concerns. If not addressed, the CWA requires EPA to promulgate water quality standards for the State. Accordingly, the Board is adopting the proposed amendments since those amendments are necessary to meet the requirements of the CWA.

Comment No. 4: A commentor recommended that the Board adopt regulatory language that gave the Department discretion to adjust water quality standards for low flow streams and

ditches that receive a discharge "if the application of more stringent water quality standards will have negative or little benefit to the environment."

Response: The request to initiate rulemaking is outside the scope of this rulemaking and is not necessary. The proposed amendments to the D-2 classification give the Board authority to modify or remove specific water quality standards based on the findings of a Use Attainability Analysis.

Reviewed by: BOARD OF ENVIRONMENTAL REVIEW

John F. North By: *Joseph W. Russell*
JOHN F NORTH JOSEPH W. RUSSELL, M.P.H.
Rule Reviewer Chairman

Certified to the Secretary of State, March 29, 2004.

BEFORE THE DEPARTMENT OF JUSTICE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 23.7.101A, 23.7.301, 23.7.302, 23.7.303, 23.7.304, 23.7.306, and 23.7.308 to adopt NFPA 1 Uniform Fire Code, and repeal of ARM 23.7.305, 23.7.307, 23.7.309, and 23.7.310 which are superseded by the adoption of NFPA 1 Uniform Fire Code	CORRECTED NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On January 15, 2004, the Department of Justice published MAR Notice No. 23-7-144 regarding a notice of public hearing on the proposed amendment and repeal of the above-stated rules at page 17, 2004 Montana Administrative Register, Issue Number 1. On March 25, 2004, the Department of Justice published the notice of amendment and repeal of the above-stated rules at page 634, 2004 Montana Administrative Register, Issue Number 6.

2. This corrected notice is being filed to correct an error in the amendment of ARM 23.7.306.

3. ARM 23.7.306 is corrected as follows:

23.7.306 PROCESSES (1) through (1)(k) remain as amended.

Section 42.6 - Rural Motor Vehicle Fuel - Dispensing Stations remains as proposed.

AUTH: 50-3-102, MCA
IMP: 50-3-102, MCA

4. Replacement pages for the corrected notice of amendment were submitted to the Secretary of State on March 31, 2004.

By: /s/ Mike McGrath
MIKE MCGRATH
Attorney General
Department of Justice

/s/ Ali Bovingdon
ALI BOVINGDON, Rule Reviewer

Certified to the Secretary of State March 29, 2004.

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

In the matter of the amendment of ARM 24.126.301, definitions, ARM 24.126.401, fee schedule, ARM 24.126.2301, unprofessional conduct, the adoption of NEW RULE I (24.126.511), display of license, and the repeal of ARM 24.126.403, purpose of the board	))))))))	NOTICE OF AMENDMENT, ADOPTION AND REPEAL

TO: All Concerned Persons

1. On January 29, 2004, the Board of Chiropractors published MAR Notice No. 24-126-27 regarding the public hearing on the notice of proposed amendment, adoption and repeal of the above-stated rules relating to definitions, fee schedule, unprofessional conduct, display of license and purpose of the board at page 169, of the 2004 Montana Administrative Register, issue no. 2.

2. The hearing was held on February 18, 2004. One witness testified at the hearing and one written comment was received. The Board has thoroughly considered the comments and the Board's responses are as follows:

COMMENT: Mary Lou Garrett testified on behalf of the Montana Chiropractic Association and stated that they were in favor of amending the rules and in favor of the new rules. She also stated that the Association was opposed to the fee increase of ARM 24.126.401 but could understand that the Board might need to raise fees because of budgetary needs and fees needing to be commensurate with costs.

RESPONSE: The Board was grateful to Ms. Garrett for her comment and stated that it was, indeed, a budgetary necessity for the fee change. The Board also referred to 37-1-134, MCA requiring that fees be commensurate with costs.

COMMENT: The written comment submitted by Ms. Tamara Huffman, DC was regarding the proposed amendment to ARM 24.126.2301 and merely pointed out that the use of "inter" should more appropriately be "intra" because "intra" is defined as "within, inside of..." whereas "inter" is defined as "between or among...with or on each other".

RESPONSE: The Board thanked Ms. Huffman for her incisive comment and determined that it was a very appropriate wording change which would more closely reflect the Board's original intent. The Board amended their original proposal to change "inter" to "intra" throughout ARM 24.126.2301.

3. The Board has amended ARM 24.126.301, 24.126.401, adopted NEW RULE I (24.126.511) and repealed ARM 24.126.403 exactly as proposed.

4. After consideration of the comments, the Board has amended ARM 24.126.2301 with the following changes, deleted matter interlined, new matter underlined:

24.126.2301 UNPROFESSIONAL CONDUCT (1) through (1)(i) remain as proposed.

(j) performing an examination, chiropractic manipulation, or adjustment ~~inter-vaginally~~ intra-vaginally;

(k) performing an adjustment ~~inter-rectally~~ intra-rectally unless the following conditions are met:

(i) remains as proposed.

(ii) the ~~inter-rectal~~ intra-rectal adjustment must be diagnosis related;

(iii) remains as proposed.

(iv) a chaperone is present at all times the patient is examined and treated ~~inter-rectally~~ intra-rectally;

(l) through (r) remain as proposed.

AUTH: 37-1-131, 37-1-319, 37-12-201, MCA
IMP: 37-1-131, 37-1-316, 37-12-201, MCA

BOARD OF CHIROPRACTORS
Pamela Blanchard, D.C., President

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

/s/ DARCEE L. MOE
Darcee L. Moe
Alternate Rule Reviewer

Certified to the Secretary of State March 29, 2004

BEFORE THE BOARD OF MEDICAL EXAMINERS
DEPARTMENT OF LABOR AND INDUSTRY
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 24.156.625, unprofessional conduct) CORRECTED NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On August 28, 2003, the Board of Medical Examiners published MAR Notice No. 24-156-60 regarding the public hearing on the proposed amendment of the above-stated rule relating to unprofessional conduct, at page 1841 of the 2003 Montana Administrative Register, issue no. 16.

2. On January 29, 2004, the Board of Medical Examiners published notice of the amendment of the above-stated rule relating to unprofessional conduct, at page 188 of the 2004 Montana Administrative Register, issue no. 2.

3. During preparation of ARM replacement pages for the first quarter of 2004, the Board noticed a typographical error. The error is corrected as follows, stricken matter interlined, new matter underlined:

24.156.625 UNPROFESSIONAL CONDUCT (1) through (1)(aa) remain as proposed.

(ab) having voluntarily relinquished or surrendered a license or privileges or having withdrawn an application for licensure or privileges, while under investigation or prior to the granting or denial of ~~a~~ an application in this state, or in another state or jurisdiction.

AUTH: 37-1-319, 37-3-203, MCA
IMP: 37-1-131, 37-3-202, 37-3-305, 37-3-309, 37-3-323, MCA

4. Replacement pages for the corrected notice of amendment were submitted to the Secretary of State on March 31, 2004.

BOARD OF MEDICAL EXAMINERS
Van Kirke Nelson, M.D.
President

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

/s/ MARK CADWALLADER
Mark Cadwallader
Alternate Rule Reviewer

Certified to the Secretary of State March 29, 2004.

BEFORE THE BOARD OF REAL ESTATE APPRAISERS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of ARM 24.207.402, regarding adoption of USPAP by reference	))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On December 24, 2003, the Board of Real Estate Appraisers published MAR Notice No. 24-207-21 regarding the proposed amendment of the above-stated rule relating to adoption of USPAP by reference at page 2830 of the 2003 Montana Administrative Register, issue no. 24.

2. No public comments or testimony were received.

3. The Board of Real Estate Appraisers has amended ARM 24.207.402 exactly as proposed.

BOARD OF REAL ESTATE APPRAISERS
TIMOTHY MOORE, CHAIRMAN

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

/s/ DARCEE L. MOE
Darcee L. Moe
Alternate Rule Reviewer

BEFORE THE BOARD OF HORSE RACING
DEPARTMENT OF LIVESTOCK
STATE OF MONTANA

In the matter of the amendment of ARM 32.28.502, 32.28.606, 32.28.712, 32.28.1602, and 32.28.1605; and the adoption of NEW RULE I and NEW RULE II pertaining to horse racing	))))))	NOTICE OF AMENDMENT AND ADOPTION

TO: All Concerned Persons

1. On January 15, 2004, the Board of Horse Racing, Department of Livestock, published MAR Notice No. 32-4-162 regarding the proposed amendment of ARM 32.28.502, 32.28.606, 32.28.712, 32.38.1602, and 32.28.1605 pertaining to program companies and chart companies and the proposed adoption of new rules concerning owner and breeder bonuses and the jockey incentive award program at page 38 of the 2004 Montana Administrative Register, Issue Number 1.

2. The Board of Horse Racing has adopted New Rule I (32.28.503) and New Rule II (32.28.504) exactly as proposed; and amended ARM 32.28.1602 exactly as proposed.

3. The Board of Horse Racing has amended ARM 32.28.502, 32.28.606, 32.28.712 and 32.28.1605 as proposed, but with the following changes. Stricken matter interlined, new matter underlined:

32.28.502 ANNUAL LICENSE FEES The following fees shall be charged annually:

(1) through (12)(u) remain as proposed.

~~(v) Chart company 355~~

(w) through (y) remain as proposed, but are renumbered (v) through (x).

(13) through (15) remain as proposed.

AUTH: Sec. 23-4-104, 23-4-201, 37-1-134, MCA
IMP: Sec. 23-4-104, 23-4-201, 37-1-134, MCA

32.28.606 RACING SECRETARY

(1) through (3)(a) remain as proposed.

(b) any error to the board or commission in the official program for each racing day, except the racing secretary shall not be responsible for errors in past performance lines obtained from a ~~licensed~~ chart company.

(4) through (9) remain as proposed.

AUTH: Sec. 23-4-202, MCA
IMP: Sec. 23-4-201, MCA

32.28.712 ~~CHART COMPANIES~~ PAST PERFORMANCE LINES AND CHARTING (1) ~~Chart companies must provide~~ The racing secretary must obtain current and complete and accurate past performance lines on each horse entered in a race provided that such data are available.

~~(2) Chart companies must submit proofs of past performance lines to the applicable racing secretary and the executive secretary of the board or its representative prior to publication.~~

(3) remains as proposed, but is renumbered (2).

~~(4) The chart company shall be solely responsible for the accuracy of all past performance lines it has supplied, and shall be responsible for any error to the board.~~

AUTH: Sec. 23-4-104, MCA
IMP: Sec. 23-4-104, MCA

32.28.1605 PROGRAMS (1) through (3) remain as proposed.

(4) The daily racing program shall contain past performance lines ~~only~~ as obtained from a ~~licensed~~ chart company. ~~The chart company shall be solely responsible for the accuracy of all past performance lines supplied by that chart company.~~

(5) remains as proposed.

AUTH: Sec. 23-4-202, MCA
IMP: Sec. 23-4-202, 23-4-301, 23-4-302, 23-4-303, MCA

4. The following comment was received and appears with the Board's response:

COMMENT 1: Equibase Company, LLC, Lexington, KY, which conducts charting and produces past performance lines at Montana live race meets commented that ARM 32.28.502, 32.28.606, 32.28.712 and 32.28.1605 which propose to require licensure of chart companies in Montana, and impose responsibility for the past performance lines created by those chart companies, would affect Equibase and would result in additional costs to Equibase. The comment further stated the proposed rule changes would expose Equibase to monetary penalties. The comment further stated Equibase has no nexus with the State of Montana and would have to seriously consider the repercussions should the proposed rule changes be enacted. Finally, the comment states that Equibase has never had to be licensed by a racing commission or a racing board, and believes that as a supplier of supplemental data elements, no licensing is necessary.

RESPONSE 1: The Board initially noted that Equibase is the largest chart company and supplier of past performance lines on horse races in the world. In the past, smaller chart companies competed with each other to produce past performance lines on horse racing in Montana. By and large, these smaller

companies have been absorbed by larger companies such as Equibase, or have discontinued operation. Therefore, Montana racing has now become almost entirely dependent on Equibase to supply past performance lines on Montana races. Equibase clearly stated in its written comment the adoption of the rule changes would have serious "repercussions," and Equibase "has no nexus" with Montana, and thus may certainly choose whether or not to attend live races in Montana and conduct charting operations. Since Equibase has opposed the proposed rule changes which would have simply 1. required licensure of Equibase and other chart companies (if any); 2. required Equibase and other chart companies (if any) to pay a licensing fee; 3. made Equibase and other chart companies (if any) responsible for their own past performance line product; the Board felt it had no choice but to acquiesce to the company's opposition and amend the proposed rule notice as shown. The Board will drop those portions of the proposed rule changes which would have properly attempted to license chart company attendees at Montana live race meets and assign responsibility for past performance line products to the very chart companies which authored the lines in the first place.

By: /s/ Marc Bridges
Marc Bridges, Exec. Officer,
Board of Livestock
Department of Livestock

By: /s/ Carol Grell Morris
Carol Grell Morris,
Rule Reviewer

Certified to the Secretary of State March 29, 2004.

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 VIII and the amendment of ARM 37.85.501 and 37.85.502 pertaining to informal dispute resolution and sanctions	))))))	NOTICE OF ADOPTION AND AMENDMENT

TO: All Interested Persons

1. On February 12, 2004, the Department of Public Health and Human Services published MAR Notice No. 37-319 pertaining to the public hearing on the proposed adoption of the above-stated rules relating to informal dispute resolution and sanctions, at page 295 of the 2004 Montana Administrative Register, issue number 3.

2. The Department has adopted rules I [37.5.601], III [37.5.603] and VII [37.5.615] as proposed.

3. As a result of a comment received the Department is adopting New Rule VIII [37.5.611] to describe the responsibilities of CMS in the informal dispute resolution process. The rule is adopted as follows:

RULE VIII [37.5.611] INFORMAL DISPUTE RESOLUTION, CENTERS FOR MEDICARE AND MEDICAID SERVICES (CMS) RESPONSIBILITIES

(1) The presiding official shall make a written recommendation to CMS, the facility and the state survey agency following the informal dispute resolution.

(2) CMS shall have the final authority to make a determination in the informal dispute resolution process. CMS may accept, reject or amend the recommendation of the presiding official.

(3) If CMS notifies the state survey agency that CMS is making the final determination following informal dispute resolution, the state survey agency will not issue the deficiency citation form until CMS instructs the state to do so.

(4) The deficiency citation form shall be amended as specified in ARM 37.5.607 based on the written determination of CMS. If any amendments are made based on the CMS determination, the amended deficiency citation form will be sent by the state survey agency to CMS and the facility.

AUTH: Sec. 53-6-109 and 53-6-113, MCA
IMP: Sec. 53-6-109 and 53-6-113, MCA

4. The Department has amended ARM 37.85.501 and 37.85.502 as proposed.

5. 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 II [37.5.602] DEFINITIONS The following definitions shall apply to nursing facilities participating in the medicaid program, and to the certification of nursing facilities for participation in the medicaid program by the state survey agency, as provided for at 42 CFR Parts 442, 483 and 488. The following definitions shall also be applicable to the informal dispute resolution process required by 42 CFR 488.331, and outlined in this subchapter. These definitions are in addition to those found in the CFR:

(1) "Actual harm" means the facility's failure to comply with any federal or state standard or condition for participation in the medicaid program ~~resulting~~ resulted in harm to a resident in one of the following ways:

(a) through (2) remain as proposed.

(3) "Centers for medicare and medicaid services (CMS)" means the federal agency that contracts with the state survey agency to perform nursing facility surveys on its behalf.

(3) through (14)(b)(iii) remain as proposed but are renumbered (4) through (15)(b)(iii).

~~(15)~~ (16) "Serious" means having important or dangerous ~~possible~~ consequences, as in the phrase "a serious injury".

(16) and (17) remain as proposed but are renumbered (17) and (18).

~~(18)~~ (19) "Substandard quality of care" means any deficiency citation related to 42 CFR 483.13, resident behavior and facility practices; 43 CFR 483.15, quality of life; or 42 CFR 483.25 quality of care that constitutes:

(a) remains as proposed.

(b) a pattern of or widespread actual harm that is not immediate jeopardy; or

(c) remains as proposed.

(19) through (21) remain as proposed but are renumbered (20) through (22).

AUTH: Sec. 53-6-109 and 53-6-113, MCA
IMP: Sec. 53-6-106, 53-6-109 and 53-6-113, MCA

RULE IV [37.5.606] INFORMAL DISPUTE RESOLUTION FACILITY REQUIREMENTS (1) through (6) remain as proposed.

(7) The facility may request in writing, at the same time the informal dispute resolution is requested, supporting documentation for a disputed deficiency citation from the state survey agency as specified in ARM 37.5.607(3).

(7) through (9) remain as proposed but are renumbered (8) through (10).

AUTH: Sec. 53-6-109 and 53-6-113, MCA
IMP: Sec. 53-6-109 and 53-6-113, MCA

RULE V [37.5.607] INFORMAL DISPUTE RESOLUTION STATE SURVEY AGENCY RESPONSIBILITIES (1) through (2)(d) remain as proposed.

(3) Upon written request of the facility, the state survey agency must mail supporting documentation used in reaching its deficiency citation(s) to the facility and the presiding official. This documentation must be received or postmarked no later than seven calendar days prior to any scheduled telephone or in person conference, or prior to the deadline set by the presiding official for receipt of substantiating materials in the case of a record review. The facility must specify each disputed deficiency for which it is requesting supporting documentation. Information will only be provided for disputed deficiencies. The state survey agency may charge the facility $.20 per page to cover the cost of retrieving, copying and mailing this information. There will not be a charge if fewer than 20 pages are produced.

(4) remains as proposed.

(5) Following informal dispute resolution, the state survey agency shall take one or more of the following actions in accordance with the written ~~determination~~ recommendation of the presiding official or the written determination of CMS:

(a) through (7) remain as proposed.

AUTH: Sec. 53-6-109 and 53-6-113, MCA
IMP: Sec. 53-6-109 and 53-6-113, MCA

RULE VI [37.5.610] INFORMAL DISPUTE RESOLUTION PROCESS

(1) through (8)(e) remain as proposed.

(9) The presiding official shall provide the state survey agency and the facility with a ~~brief,~~ written opinion stating his or her ~~determination~~ recommendation.

(10) The deficiency citation form shall be amended as specified in ARM 37.5.607 based on the determination of the presiding official or the determination of CMS. If any amendments are made, the amended deficiency citation form will be sent to the facility and CMS.

(11) remains as proposed.

AUTH: Sec. 53-6-109 and 53-6-113, MCA
IMP: Sec. 53-6-109 and 53-6-113, MCA

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

RULE II [37.5.602] Definitions

COMMENT #1: RULE II(1) [37.5.602] defines "actual harm". Because "standards and conditions" are not the way nursing facility regulations are currently set out, we recommend that the definition refer to statutes and regulations.

RESPONSE: The Department disagrees. The term "any federal or state standard or condition for participation" more accurately

describes the situation when the definition of "actual harm" will be applied to a deficiency finding, rather than the substitute phrase suggested by the comment. We opted for a broad definition to encompass all federal and state standards or conditions rather than listing them out.

COMMENT #2: The word "resulting" should be "resulted" in the definition of "actual harm".

RESPONSE: The Department agrees and has made the suggested change.

COMMENT #3: RULE II(11) [37.5.602] defining "presiding official" states that the presiding official may not have been directly involved in the certification survey for which informal dispute resolution has been requested. We believe this is not as strict a standard as required in the statute. Section 53-6-109, MCA provides that the individual who conducts the dispute resolution must be "independent of the survey process" and further provides that the individual be able to evaluate the legal sufficiency of cited deficiencies. We recommend that this definition be changed to encompass the statutory requirements. A change in the definition should also be reflected in proposed RULE VI(1) [37.5.610].

RESPONSE: The Department acknowledges that both the statute and the rule apply. The Department defined in the rule what "independent of the survey process" means. By definition, the presiding official may not have been directly involved in the certification survey for which informal dispute resolution has been requested. We believe that this is a reasonable definition and that it clearly states to the public who may serve as a "presiding official".

COMMENT #4: The intent of the 2001 Montana legislature was to have an individual conduct the informal dispute resolution (IDR) who could evaluate the legal sufficiency of the findings of the surveyors. The Department could accomplish this by hiring a hearing officer with legal background, creating a pool of attorneys who would be willing to serve as hearing officers, creating a pool of administrators who would be willing to serve as hearing officers or some combination of the options. I am suggesting some options because the nursing home regulations are detailed and impacts of the survey process can be very significant for the facility (e.g., impacting facility insurance costs and the ability to obtain new residents.) The learning curve could be dramatically shortened if a combination of attorneys and nursing home administrators were used by the Department for the informal dispute resolution process.

RESPONSE: The Department recognizes its obligation to make sure that the presiding official has either the educational background or the training to judge the "legal sufficiency of the findings of the surveyors" in compliance with 53-6-109, MCA.

A number of people from different professional backgrounds could fulfill this requirement. The statute does not require an attorney or a hearing officer.

The idea of a "panel" was considered by the workgroup who offered advice to the Department on the informal dispute resolution process. In calendar year 2003, 56 informal dispute resolutions were conducted. While the idea of a panel was attractive to some members of the workgroup, the Department ultimately decided, with the concurrence of most members of the workgroup, that the logistics, time, and expense of educating and convening 56 "panels" to hear cases are prohibitive.

COMMENT #5: The proposed language for RULE II(11) [37.5.602] implies that the presiding official may not be involved only in the survey itself, but does not address the before and after parts of the survey process. We recommend that the word "process" be inserted so it reads, "certification survey process regarding which informal dispute resolution has been requested".

RESPONSE: The Department disagrees that the word "process" is needed. Indeed, insertion of "process" might complicate the matter since someone could argue that informal dispute resolution itself is part of the survey process.

COMMENT #6: RULE II(15) [37.5.602] defines "serious" as having important or dangerous possible consequences. The term "serious injury" is used as an example. A "serious" injury is not one that has "possible" important or dangerous consequences. A serious injury in fact has important or dangerous consequences. It is possible for a very minor injury to have serious consequences but a serious injury in fact has important or dangerous consequences. We recommend that the word "possible" be removed from this definition.

RESPONSE: The Department agrees and will remove the word "possible" from the definition.

COMMENT #7: RULE II(18) [37.5.602] defining "substandard quality of care" fails to include the limitations found in federal regulations. Federal regulations limit "substandard quality of care" to deficiencies cited at 42 CFR 483.13, Resident Behavior and Facility Practices, 483.15, Quality of Life and 483.25, Quality of Care. We recommend that this definition include these limitations, or that this definition be removed because there is already a definition of substandard quality of care in the federal regulations.

RESPONSE: The Department agrees and has added the suggested language.

COMMENT #8: RULE II(18)(b) [37.5.602] is missing the word "or" between "a pattern of" and "widespread harm". Both constitute "substandard quality of care".

RESPONSE: The Department agrees and has added the suggested language.

RULE III [37.5.603] Opportunity for Informal Dispute Resolution

COMMENT #9: RULE III(4) [37.5.603] provides that "this rule does not require that the informal dispute resolution be conducted prior to the state survey agency making a recommendation to the CMS". We recommend that this section be changed to indicate that the state survey agency will not make a recommendation to CMS prior to dispute resolution being conducted unless awaiting the results of dispute resolution would cause the state agency to exceed a deadline or be out of compliance with a federal law or regulation. There is no argument that the state must comply with federal laws and regulations but if it is possible to complete the dispute resolution process without being out of compliance with federal requirements, it is preferable to make recommendations to the federal government after completion of dispute resolution.

RESPONSE: The Department disagrees that this language is necessary. The suggested language could allow a facility to argue that they do not have to comply with other sections of these proposed rules, i.e., the time lines in RULE IV [37.5.606], because the "agency" had not yet exceeded a "deadline" or was not out of compliance with a federal law or regulation.

RULE IV [37.5.606] Informal Dispute Resolution Facility Requirements

COMMENT #10: RULE IV(1) [37.5.606] should be clarified to require the dispute resolution request be filed no later than the date the plan of correction is due, and there should be a requirement that the state agency inform the provider of the due date. This recommendation is made to account for mailing time calculated into the due date of the plan of correction. When the department transmits the 2567 form (the revised deficiency citation form), it normally includes a due date for the plan of correction, which includes time for mailing. It would be easy to also state the due date for the IDR request, which would be the same as the plan of correction date.

RESPONSE: The Department disagrees. The language that is proposed in the rule was chosen to allow all facilities, including those who may have slower mail service, to have 10 full days from the receipt of the deficiency citation to respond. This requirement mirrors the federal requirement for the plan of correction that also allows 10 full days from the receipt of the deficiency citation to respond. The plan of correction is not referenced in this rule and a reference to it would likely confuse the public.

COMMENT #11: RULE IV(5) [37.5.606] requires the facility to

provide substantiating materials seven days prior to the scheduled conference. The facility is required to do this, even if the Department does not request it. We recommend that proposed RULES IV [37.5.606] be changed to require the state to ask for the supporting documents.

RESPONSE: The proposed requirement to have the facility supply documentation prior to the informal dispute resolution was discussed at great length in the rationale for RULE IV [37.5.606], addressed in MAR Notice No. 37-319 on page 295, 2004 Montana Administrative Register, issue no. 3. RULE IV(5) [37.5.606] of this rule is being proposed to reduce the number of informal dispute resolutions that are conducted. For a variety of reasons, some information is unavailable at the time of the survey and many facilities present information at the time of the informal dispute resolution. In many instances, if this information had been presented prior to the informal dispute resolution, the informal dispute resolution would have been unnecessary because the information persuades the state to withdraw its deficiency finding. By requiring the information ahead of time, the Department hopes to avoid unnecessary informal dispute resolution processes. This is especially important because many times facilities choose to present their information in person and travel great distances for something that could have been resolved through a paper review of the medical records. Unnecessary informal dispute resolutions also place a burden on the state agency and ultimately the taxpayer in terms of staff utilization and cost that might be better spent on other endeavors.

COMMENT #12: RULE IV(7) [37.5.606] requires a facility to provide a list of who will participate in the dispute resolution on behalf of the facility. We recommend that a similar requirement be placed on the state in RULE V [37.5.607], or, in the alternative, that this requirement be removed for facilities.

RESPONSE: The Department disagrees with the recommendations. The proposed requirement to have the facility provide a list of who will participate in the dispute resolution on behalf of the facility has three purposes:

1) To ensure that a facility acknowledges its obligation and takes responsibility for their obligation to ensure that any person, staff member of a professional association, or legal counsel who appears on their behalf must comply with federal HIPAA and state privacy regulations when protected health information is presented at the informal dispute resolution. Failure to require this acknowledgment might result in inadvertent release of protected health information.

2) Because the Department is not in a position to decide whether the aforementioned parties are necessary to present the facility's case, the facility's acknowledgment relieves the state of that burden and puts the onus on the facility to make that decision.

3) The Department must track and make available the names of anyone with whom protected health information has been shared under HIPAA. RULE IV(9) [37.5.606] requires the state to keep record of all participants in the informal dispute resolution when protected health information is discussed. This would include any person participating on the facility's behalf or the state's behalf as well as the presiding official. See also the Department's response to Comment #1 as well as to why a similar requirement is not placed on the Department.

COMMENT #13: The requirements to label and highlight materials and describe the relevance contained in RULE IV(5)(a), (b) and (c) [37.5.606] should be included in RULE V [37.5.607] as requirements for the state agency. In the alternative, these provisions should be removed for providers. Requirements for providing information in advance of the dispute resolution should be the same for the state as it is for facilities. The reason for the state to receive information in advance of the IDR is to provide an opportunity for preparation and response. The facility should have the same opportunity.

RESPONSE: The reason that a facility is required to provide substantiating material is discussed in the response to comment #11. This proposed requirement was discussed extensively with the workgroup who advised the Department during the development of these rules. The workgroup, as a whole, felt that this was a reasonable requirement. The proposed requirement to label, highlight and describe the relevance of the substantiating material being presented is to "give the provider an opportunity to demonstrate that a deficiency has been applied in error or is a misjudgment of true facts" in accordance with 53-6-109, MCA. Facilities often present several inches worth of medical records to dispute a deficiency. If the information is not labeled, the state survey agency and the presiding official will be left to try and guess what the facility is disputing and why they believe that the information presented demonstrates that "a deficiency has been applied in error or is a misjudgment of true facts".

The Department already meets this burden when it sends out the deficiency citation. The citation lists the regulation, why the survey agency believes that the regulation was not met and examples of specific instances and/or people for whom the regulation was not met.

RULE V [37.5.607] Informal Dispute Resolution State Survey Agency Responsibilities

COMMENT #14: The state is not required to provide supporting materials unless the facility requests it. We recommend that proposed RULE V [37.5.607] be changed to require the state to automatically supply its supporting documentation and work papers seven days prior to the IDR, or, in the alternative to require the state to ask for the supporting documents. The

requirements for submitting information and data should apply to both parties of the dispute, the facility and the survey agency.

RESPONSE: The Department disagrees that this information should automatically be sent. The deficiency citation form sent to the facility already lists the regulation, why the survey agency believes that the regulation was not met and examples of specific instances and/or people for whom the regulation was not met. In the past, very few facilities have requested survey work papers and the Department is unaware of any time when these notes were actually presented by a facility to dispute a deficiency finding in the informal dispute resolution. Along with the deficiency citation, the facility is already given a copy of any sources of information such as CDC guidelines or nursing textbooks that the Department used to support its determination. The work papers are currently available upon request and will continue to be available under the proposed rule. A new section (7) has been added to RULE IV [37.5.606] and RULE V(3) [37.5.607] has been re-worded to make the availability of these documents more evident.

COMMENT #15: The Department has discovered a phrase omission error on RULE V(3) [37.5.607]. The words "no later than" should be inserted before the phrase "...seven calendar days prior to any scheduled telephone or in person conference..." Without this clarification, it appears that the documentation can only be received or postmarked on the seventh calendar day.

RESPONSE: The Department agrees and has made the suggested change.

COMMENT #16: Facilities should not be charged for the copies involved in supplying the Department's supporting documentation required in RULE V(3) [37.5.607].

RESPONSE: The Department disagrees. The charges listed in this rule are the same ones applied to all copies of information requested from the Department. They represent a reasonable charge for copying, mailing and redacting information.

COMMENT #17: The language included in RULE V(6)(a) [37.5.607], "In addition, the scope and severity classification is adjusted to reflect only the remaining findings" is also applicable to (6)(b) and should be added to (6)(b).

RESPONSE: The Department disagrees with the proposed change. If a facility chooses option RULE V(6)(b) [37.5.607], the deficiency no longer appears on the deficiency citation form and the scope and severity classification are also deleted. There will no longer be any "remaining findings" as specified in RULE V(6)(a) [37.5.607].

COMMENT #18: RULE V(7) [37.5.607] allows the state survey agency to unilaterally "appeal" the IDR decision by notifying

CMS that it disagrees with the determination. The department has been asked to develop an objective IDR process that allows the department to make survey determinations. The decision of the process, developed by the Department as directed by statute, should be the decision of the Department. If the Department wishes to be able to appeal the decision, we ask that it establish a process whereby either party can appeal. One method would be to allow an appeal under the Montana Administrative Procedure Act. This section negates the validity of the objective IDR process. We understand that CMS may choose to not abide by the state's recommendation, but the state's recommendation should be the one determined by the objective IDR process required by state law. We ask that this provision be removed.

RESPONSE: The Department disagrees. The state survey agency operates under contract with CMS. As part of that contract, the survey agency is evaluated on whether its deficiency citations follow federal requirements and training. The presiding official will be independent of the survey process and may make decisions that do not reflect the training that CMS has provided surveyors. Monetary and other sanctions can be applied to the state survey contract based on whether CMS believes that the survey process has complied with the federal guidelines. The ability of the surveyors to alert CMS to the fact that they disagree with a recommendation of the presiding official is a protection for that contractual relationship. This is not an appeal. It is merely a notification. As a courtesy, the rule requires the survey agency to notify both the presiding official and the facility if it notifies CMS. Nothing in this rule prohibits a facility from expressing to CMS when it disagrees with the presiding official's recommendation.

As the comment acknowledges, neither the state survey agency in the current informal dispute resolution process, nor the presiding official under the proposed rule can make the final decision as to whether a deficiency is upheld or removed following the informal dispute resolution process. Both merely make a recommendation to CMS. CMS is free to consider other opinions and sources of information beyond this recommendation when they make their decision. Once CMS makes a decision, the appeal of an informal dispute resolution and/or a survey deficiency is dictated by federal regulations.

The state legislature did not require that survey findings be subject to the Montana Administrative Procedure Act. Section 53-6-109, MCA requires the state to define the informal dispute resolution process, which it has done.

COMMENT #19: CMS realizes that the IDR process is a state process and we believe that states should have some flexibility in carrying out the process. However, CMS also has the responsibility of insuring that deficiencies written by state surveyors and disputed by providers are reviewed appropriately

and with a level of expertise that will maintain continued high quality health and safety standards in nursing homes. Due to concerns about the proposed change in the IDR process, CMS will require that all IDRs that have one or more harm level (scope/severity "G") or above deficiencies be forwarded to the CMS Region VIII office before the provider is notified of the IDR decision. CMS will review the IDR decision and determine whether to let it stand or amend it. All information used by the presiding official to review the case should be included. CMS will notify the state survey agency when the IDR results may be released to the provider.

RESPONSE: The Department agrees in part. It is clear in the federal regulations that CMS retains the final authority to uphold, amend or rescind a state survey agency deficiency citation. The Department will therefore send all IDR "recommendations", where deficiencies of one or more harm level (scope/severity "G") or above were involved, to the CMS Region VIII office prior to issuing a revised deficiency citation form (commonly referred to as a 2567 form) to the facility. The revised deficiency citation form will be sent out upon instructions from CMS and will reflect the CMS decision as to whether a deficiency should stand, be amended or be deleted. In those instances where the decision is made by CMS rather than the Department, a notation will be added to the revised deficiency citation form to reflect that the CMS regional office made the decision. The recommendation of the presiding official, however, will be sent to the surveyors, the facility, and CMS at the time that it is completed. This recommendation will clearly state that it is only a recommendation and that the final decision rests with CMS. This will be done to avoid potential confusion. Facilities need to know both what the recommendation of the presiding official was and that the final decision is being made by CMS. They also need to be given the name of a contact in CMS if they have any questions about the process.

Several changes to the proposed rules are necessary to respond fully to this comment. RULE II [37.5.602] was amended to add a definition for the Centers for Medicaid and Medicare Services (CMS). A new rule, RULE VIII [37.5.611], was created to describe the responsibilities of CMS in the informal dispute resolution process. RULE V [37.5.607] and VI [37.5.610] were amended to reflect that the presiding official makes a "recommendation" rather than a decision, and that in some instances, the deficiency citation may be changed upon the instruction of CMS. Because CMS always retains the right to make the final "decision" about a deficiency, the rule language will reflect that the state survey agency will defer to CMS, upon CMS's request, to review the deficiency citation form and make a final decision as to whether the original cited deficiency should stand, be amended or be deleted. This change will also cover other instances, such as deficiencies with less than a "G" level of scope and severity, when CMS may instruct

the state that CMS wishes to amend or rescind the state's informal dispute resolution recommendation prior to the final deficiency citation form being sent to the nursing facility.

RULE VI [37.5.610] Informal Dispute Resolution Process

COMMENT #20: RULE VI(9) [37.5.610] provides that the presiding official will provide a "brief" written opinion stating his or her determination. We ask that the word "brief" be removed. The written opinion should be detailed enough to put a facility and the state on notice about how the decision on each challenged deficiency was arrived at. It is important and instructive for both the facility and the state to understand these determinations.

RESPONSE: The Department agrees. The word "brief" will be deleted. The length of the opinion will be left solely to the discretion of the presiding official. It must be noted that neither the state statute nor the federal requirements for informal dispute resolution require a written opinion on the merits of or particular facts surrounding the contested deficiency. The Department agrees with the comment, however, that such an opinion may help both parties better understand the recommendation.

COMMENT #21: RULE VI(11) [37.5.610] provides that the presiding officer's determinations will not be considered as setting precedent. Some IDRs involve legal issues that beg to be resolved. Time and resources of both the state and providers will be wasted if the same legal issue must be presented over and over again once a determination has been made. We recommend that language be added to allow the presiding officer to determine which issues lend themselves to being used as precedent, or in the alternative, to recommend to the Department that certain determinations lend themselves to future applicability so an effort can be made to lay certain issues to rest when that is appropriate. This is in the best interests of both providers and the Department.

RESPONSE: The Department disagrees. The presiding official's recommendation is based on the specific facts surrounding the cited deficiency and the additional information presented in the informal dispute resolution. Precedent cannot be established.

RULE VII [37.5.615] Incorporation of Standards for Monitoring and Referral for Medications and Treatments in the Certification Process

COMMENT #22: It is inherent in the survey process that if a violation of any federal or state standard or condition of participation exists, a deficiency will be cited. It is unnecessary to reiterate this in RULE VII(1)(c) [37.5.615], as it implies that even if the facility follows the monitoring standards in (1)(a), they may or may not receive a deficiency.

If the facility is following the standards in this rule, but the survey agency disagrees with physician practice, that is between the surveyor and physician. RULE VII(1)(c) [37.5.615] should be removed.

RESPONSE: The Department disagrees. The Department does not have the authority to waive the federal conditions of participation or survey standards for nursing facilities. If a deficiency exists, despite the facility's best attempts to prevent it, the Department is obligated to cite it.

The federal survey requirements pertain to nursing facilities. There are no similar requirements for survey of physicians and the Department has no authority to cite a physician under federal law. Section 53-6-109(3), MCA does require the Department to report the physician to the board of medical examiners if it is questioning the efficacy of the medication or treatment ordered. RULE VII(1)(c) [37.5.615] outlines when this will be done.

COMMENT #23: My interpretation of this rule is even if the facility is complying with RULE VII(1)(b) [37.5.615] but the surveyors interpret there is still an issue, the facility would be cited. The facility does not have a license to practice medicine and therefore should not be cited for a deficiency if the surveyors have an issue with the licensed medical provider.

RESPONSE: If a facility complies with RULE VII(1)(b) [37.5.615] as well as (1)(a) they would not be cited for the deficiency. The facility, however, could be cited if they only comply with RULE VII(1)(a) [37.5.615].

COMMENT #24: RULE VII(1)(d) [37.5.615] is a given. Providers assume with all rules that if they are not followed, noncompliance can be the result, with deficiency citations as a possible consequence. We recommend removing RULE VII(1)(c) [37.5.615] and (d) and adding a (2) which addresses the need for the survey agency to report substandard practice of the physician. This issue is separate from the facility responsibilities and should be in a different subsection.

RESPONSE: The Department disagrees. RULE VII(1)(d) [37.5.615] describes a situation in which a referral to the board of medical examiners is not required. Please also see the two previous responses for further detail.

General Comments

COMMENT #25: Overall, I believe the rules meet the intent of SB 476 passed by the 2001 Montana Legislature. However, I believe that this rule making process should be considered a "work in progress" which will need to be tweaked as all parties gain experience with the new system. I am concerned with all of the "calendar day" deadlines that the facility must meet for an IDR

event. The minimum of 17 days with existing time lines means it will be likely that a facility plan of correction and resurvey could occur prior to results of the IDR. Then if the IDR results in changes, both the facility and the Department will need to change the plan of correction. If this scenario occurs, a second survey may be required.

RESPONSE: The Department agrees that the rulemaking process should be subject to change as the need arises. The workgroup that advised the Department on the development of these rules struggled with the time frames. Some thought that they gave the facilities and the Department too little time to respond. Some feared the scenario described in this comment. It became clear, after much discussion, that there was no perfect time frame and the time frames in the rule represented the most reasonable alternative at the time this rule was proposed. The Department remains open to reexamining these time lines as we gain more experience with the process.

COMMENT #26: These rules are only the starting point for achieving consistency in the survey process. I strongly encourage the continued training for nursing facility surveyors and an investment in "round table" discussions between the Department certification staff, facility administrators, and facility director of nursing services to promote education of all parties.

RESPONSE: This suggestion is beyond the scope of these rules, but the Department agrees that continuing education and communication between all parties is crucial. For several years, the Department has made presentations at both major nursing facility provider association meetings. These meetings present an excellent opportunity for communication. The associations, with input from their membership and the Department, develop the association meeting agendas. The Department is also willing to meet with providers in other venues upon request.

COMMENT #27: The rationale as originally published by the Secretary of State references RULE IV(6) [37.5.606] when discussing HIPAA. It should be RULE IV(7) [37.5.606].

RESPONSE: The Department thanks the commentor for pointing out the mistake.

Russ Cater
Rule Reviewer

John Chappuis for
Director, Public Health and Human Services

Certified to the Secretary of State March 29, 2004.

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

In the matter of the amendment of ARM 37.86.1506 pertaining to home infusion therapy services reimbursement	))))	NOTICE OF AMENDMENT

TO: All Interested Persons

1. On February 12, 2004, the Department of Public Health and Human Services published MAR Notice No. 37-317 pertaining to the public hearing on the proposed amendment of the above-stated rule relating to home infusion therapy services reimbursement, at page 258 of the 2004 Montana Administrative Register, issue number 3.

2. The Department has amended ARM 37.86.1506 as proposed.

3. No comments or testimony were received.

Dawn Sliva
Rule Reviewer

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

Certified to the Secretary of State March 29, 2004.

VOLUME NO. 50 OPINION NO. 5

ELECTIONS - Statutory form of local government study commission ballot question precludes addition of mill levy question;
LOCAL GOVERNMENT STUDY COMMISSIONS - Optional local government funding of study commission cannot be provided by combining mill levy question with study commission question;
STATUTORY CONSTRUCTION - Provision that ballot question be in "substantially" the form required by statute precludes substantial additions to the statutory form;
MONTANA CODE ANNOTATED - Sections 7-3-171 to -193, -173(2), -175, -176, -177, -183, -184, (1), (2), (3), (4), 15-10-420, -425, (3), 20-9-426, 22-1-703;
MONTANA CONSTITUTION - Article XI, section 9; (2);
MONTANA LAWS OF 1983 - Chapter 697, section 16;
MONTANA LAWS OF 1999 - Chapter 584, sections 1, 7.

HELD: In an election on the question of establishing a local government study commission, a local government may not combine a mill levy question with the study commission question, because the combined questions do not "substantially" conform to the statutory form required by Mont. Code Ann. § 7-3-175.

March 19, 2004

Mr. Michael Grayson
Anaconda-Deer Lodge County Attorney
118 East 7th Street, Suite 1-B
Anaconda, MT 59711

Dear Mr. Grayson:

You have requested my opinion concerning the following question:

> May a question of conducting a local government review and establishing a study commission pursuant to Mont. Code Ann. § 7-3-175 also provide for a mill levy to support the study?

Article XI, section 9(2) of the Montana Constitution provides in part that "[t]he legislature shall require an election in each local government to determine whether a local government will undertake a review procedure once every ten years after the first election." Pursuant to Section 9(2), the legislature enacted sections 7-3-171 through -193 to provide procedures by which local electors can establish a local government study commission and vote on any recommendation submitted by the study commission.

By statute, a local (county or municipal) governing body "shall call for an election, to be held on the primary election date, on the question of conducting a local government review and establishing a study commission" beginning in 1984 and thereafter whenever ten years have elapsed since the last study commission election. Mont. Code Ann. § 7-3-173(2).

Section 7-3-175 provides that:

> "the question of conducting a local government review and establishing a study commission shall be submitted to the electors in substantially the following form:
>
> Vote for one:
>
> [_] FOR the review of the government of (insert name of local government) and the establishment of a local government study commission consisting of (insert number of members) members to examine the government of (insert name of local government) and submit recommendations thereon.
>
> [_] AGAINST the review of the government of (insert name of local government) and the establishment of a study commission.

The local governing body may set membership of the proposed study commission at an odd number not less than three. See Mont. Code Ann. § 7-3-177.

If a majority of those voting on the question vote for the study commission, the members are elected at the next regularly scheduled election held more than ninety days after the election establishing the study commission; candidates must be local voters, but may not be elected officials of the local government. See Mont. Code Ann. § 7-3-176. Once constituted, the commission has broad powers to employ and compensate consultants, or contract with other agencies, public or private, "as it considers necessary for assistance in carrying out the purposes for which the commission was established", and may "do any other act consistent with and reasonably required to perform its function." Mont. Code Ann. § 7-3-183.

The study commission shall prepare an annual budget and "may apply for and accept available private, state, and federal money and may accept donations from any source." Mont. Code Ann. § 7-3-184(3). The local government shall provide "office and meeting space", and may at its option (subject to the mill levy limitations of section 15-10-420) "appropriate an amount necessary to fund the study" or "provide additional funds and

other assistance." Mont. Code Ann. § 7-3-184(2). Nothing in the statute requires a local government to finance the study commission, but the study commission shall submit its budget "to the local governing body for approval." Mont. Code Ann. § 7-3-184(1). Furthermore, "[u]pon termination of the study commission, unexpended money reverts to the general fund of the local government." Mont. Code Ann. § 7-3-184(4).

Originally, section 7-3-184 provided that "each local government under study shall appropriate an amount necessary to fund the study", and allowed local governments a mill levy to do so. 1983 Mont. Laws, ch. 697, § 16 (emphasis added). In its enactment of Senate Bill No. 184, which limited the authority of local governments to impose mill levies, the 1999 Legislature eliminated the local government's power to levy for the study commission in favor of a generic mill levy election procedure, and changed the mandatory "shall appropriate" to a permissive "may appropriate". 1999 Mont. Laws, ch. 584, §§ 1, 7. An attempt in 2003 to again empower local governments to impose a mill levy for study commissions failed. See H.B. 535, 58th Leg., Reg. Sess. (2003). Thus, under current law, local governments may choose whether or not to fund study commissions, but if they choose to do so the appropriation is subject to the mill levy limitations of section 15-10-420.

The opinion request follows the circulation of draft language from the Montana Association of Counties ("MACo"), which would modify the statutory form of the ballot question provided by section 7-3-175 as follows:

> Statement of Impact, subject to 15-10-425, of the approval of the voter review of local government: residences valued at $100,000 and $200,000 would be assessed approximately $3.30 and $6.60, respectively, in additional property taxes in each tax year.
>
> [_] FOR the review of the government of (insert name of local government), the establishment of a local government study commission consisting of (insert the number of members) funded by a levy, for each fiscal year the study commission is in existence, of up to 1 mill in excess of all other mill levies authorized by law for the support of the study commission and it[]s examination of the government of (insert the name of the local government) and recommendations thereon.
>
> [_] AGAINST the review of the government of (insert name of local government), the establishment of a local government study commission consisting of (insert the number of members) funded by a levy, for each fiscal year the study commission is in

> existence, of up to 1 mill in excess of all other mill levies authorized by law for the support of the study commission and it[]s examination of the government of (insert the name of the local government) and recommendations thereon.

The proposed language would combine the question on the study commission with a question on a mill levy, pursuant to section 15-10-425, to fund the study commission.

Section 7-3-175 requires that the question be submitted in "substantially" the form provided by statute. Language "substantially" conforms to a statutory form when it meets the substance of the form, even if does not adopt the form literally, or if it only differs from the form technically. See State v. Wong Sun, 114 Mont. 185, 191, 133 P.2d 761 (1943) (holding that "substantial, but not literal, adoption [of the statutory form for an information] is all that is required."); cf. Evers v. Hudson, 36 Mont. 135, 155, 92 P. 462 (1907) (holding that the statutory form for a school establishment ballot "means that a substantial, as distinguished from a strictly technical, compliance with those provisions will be insisted upon."). The most recent application of this rarely visited statutory term came in the challenge to a school bond ballot which used the words "for" and "against" rather than the statutory form of "yes" and "no"; there the Supreme Court doubted that such a variation "would substantially deviate from the statutory recommendation." Elliot v. School Dist. No. 64-JT, 149 Mont. 299, 303, 425 P.2d 826 (1967).

The addition of a mill levy question to the study commission question is more than a literal or technical deviation from the statutory form. It alters the substance of the form from a single question on the establishment of a study commission to a compound question, which conditions local electors' approval of a study commission on their acceptance of a mill levy. Elsewhere in the Montana Code, the legislature has made clear when a ballot question on a matter requiring funding should also provide for that funding. See, e.g., Mont. Code Ann. § 20-9-426 (form of ballot for school district bond election); § 22-1-703 (form of ballot for creation of public library district). The general-purpose mill levy election statute, on the other hand, does not set forth a statutory form of ballot, but instead requires that the ballot "reflect the content of the resolution" providing for the purpose, amount, number of mills, and duration of the levy, and include a "statement of impact" of the levy on homeowners. Mont. Code Ann. § 15-10-425(3). The question at issue, however, is not a generic local government purpose falling under section 15-10-425; it is a constitutionally mandated election for which the legislature has specifically provided a form of ballot in section 7-3-175, and that form of ballot controls.

Sections 7-3-175, 7-3-184, and their neighboring provisions create a statutory scheme that separates the questions of establishment and funding of study commissions, putting only the former before the electors while leaving the latter to the choice of the study commission (who may accept money from "any source") and the local government. Thus, the local government cannot combine a mill levy question with the study commission question.

I express no opinion on any constitutional questions raised by the ballot questions or statutes at issue.

THEREFORE, IT IS MY OPINION:

> In an election on the question of establishing a local government study commission, a local government may not combine a mill levy question with the study commission question, because the combined questions do not "substantially" conform to the statutory form required by Mont. Code Ann. § 7-3-175.

Very truly yours,

/s/ Mike McGrath
MIKE McGRATH
Attorney General

mm/acj/jym

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;
- Office of the State Auditor and Insurance Commissioner; and
- Office of Economic Development.

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.

Energy and Telecommunications Interim Committee:

- Department of Public Service Regulation.

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 December 31, 2003. This table includes those rules adopted during the period January 1, 2004 through March 31, 2004 and any proposed rule action that was pending during the past six-month period. (A notice of adoption must be published within six 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 December 31, 2003, 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 2003 and 2004 Montana Administrative Registers.

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