ISSUE NO. 19

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 The notice section contains state agencies' proposed new, amended or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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

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

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NOTICE SECTION

BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

In the matter of the proposed amendment of ARM 4.3.601, 4.3.602 and 4.3.604 relating to rural development loans	)	NOTICE OF PROPOSED AMENDMENT
	)	NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons

1. On November 6, 2004, the Montana Department of Agriculture proposes to amend the above-stated rules relating to rural development loans.

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 October 21, 2004, to advise us of the nature of the accommodation that you need. Please contact Will Kissinger 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 amended provide as follows, stricken matter interlined, new matter underlined:

4.3.601 OBJECTIVES (1) ~~Objectives of the rural assistance loan program are to assist substandard income, rural persons in obtaining financing to continue in or develop agricultural enterprises; thereby furthering their continued interest in agriculture and assisting in the economic development and welfare of Montana agriculture.~~ The objective of the rural assistance loan program is to assist substandard income rural persons, or persons who are unable to obtain reasonable commercial credit at reasonable rates and terms. The further objective is to provide for such other rural rehabilitation purposes permissible under the Montana rural rehabilitation assets use agreement and the former Montana rural rehabilitation corporation's charter.

AUTH: 80-2-106, MCA
IMP: 80-2-103, MCA

REASON: To clarify that the objectives of the rural assistance loan program, and assistance it provides, also includes such other rural rehabilitation permissible under the Montana Rural Rehabilitation Assets Use Agreement and the purposes of the former Montana Rural Rehabilitation Corporation.

4.3.602 QUALIFICATIONS (1) through (3) remain the same.

(4) An applicant's net worth including that of spouse and minor children cannot exceed ~~$250,000~~ $450,000 at the time of application as determined using generally accepted accounting principles (GAAP):

(a) through (9) remain the same.

AUTH: 80-2-106, MCA
IMP: 80-2-103, MCA

4.3.604 LIMITATIONS (1) Loan amounts shall not exceed ~~$50,000~~ $75,000 for any one individual.

(2) Loans may be renegotiated up to the maximum of ~~$50,000~~ $75,000.

(3) through (7)(c) remain the same.

AUTH: 80-2-106, MCA
IMP: 80-2-103, MCA

REASON: Due to the fact that the current net worth cap and maximum loan amount are too low, the department has been unable to assist potential borrowers who were unable to obtain reasonable commercial financing but were over qualified for the Rural Assistance Loan Program. With these adjustments the department will be able to assist more producers and still not be in direct competition with the commercial lending industry.

There will be an economic impact due to the loan amount limit being raised; however, the amount of the impact is unknown since the number of applicants who apply for a loan in the range of the increase is unknown.

4. Concerned persons may submit their data, views or arguments concerning the proposed amendment in writing to Will Kissinger 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 November 4, 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 Will Kissinger 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. A written request for hearing must be received no later than November 4, 2004.

6. If the agency 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 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 20 persons based on 200 existing or potential borrowers.

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 Amendment 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.

DEPARTMENT OF AGRICULTURE

/s/ Ralph Peck	/s/ Tim Meloy
Ralph Peck	Tim Meloy, Attorney
Director	Rules Reviewer

Certified to the Secretary of State, September 27, 2004.

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

In the matter of the proposed amendment of ARM 6.6.511, pertaining to sample forms outlining coverage	)))))	NOTICE OF PROPOSED AMENDMENT NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons

1. On November 6, 2004, the State Auditor proposes to amend ARM 6.6.511 pertaining to sample forms outlining coverage.

2. The State Auditor's Office 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 State Auditor's Office no later than 5:00 p.m., on November 1, 2004, to advise us of the nature of the accommodation needed. Please contact Darla Sautter, State Auditor's Office, 840 Helena, Helena, Montana 59601; telephone (406) 444-2726; facsimile (406) 444-3497; or e-mail to dsautter@state.mt.us.

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

6.6.511 OPERATING RULES FOR THE ASSOCIATION (1) through (2)(g) PLAN F or HIGH DEDUCTIBLE PLAN F MEDICARE (PART A) - HOSPITAL SERVICES - PER BENEFIT PERIOD remain the same.

PLAN F or HIGH DEDUCTIBLE PLAN F

MEDICARE (PART B) - MEDICAL SERVICES - PER CALENDAR YEAR

*Once you have been billed $100 of Medicare-approved amounts for covered services (which are noted with an asterisk), your Part B deductible will have been met for the calendar year.
**This high deductible plan pays the same or offers the same benefits as plan F after one has paid a calendar year $1650 deductible. Benefits from the high deductible plan F will begin until out-of-pocket expenses are $1650. Out-of-pocket expenses for this deductible are expenses that would ordinarily be paid by the policy. This includes the Medicare deductibles for Part A and Part B, but does not include the plan's separate foreign travel emergency deductible.

SERVICES	MEDICARE PAYS	AFTER YOU PAY $1650 DEDUCTIBLE,** PLAN PAYS	IN ADDITION TO $1650 DEDUCTIBLE,** YOU PAY

MEDICAL EXPENSES- IN OR OUT OF THE HOSPITAL AND OUTPATIENT HOSPITAL TREATMENT such as physician's services, inpatient and outpatient medical and surgical services and supplies, physical and speech therapy, diagnostic tests, durable medical equipment, First $100 of Medicare approved amounts* Remainder of Medicare approved amounts Part B excess charges (above Medicare approved amounts)	$0 Generally 80% $0	$100 (Part B deductible) Generally 20% ~~$~~100%	$0 $0 $0
BLOOD First 3 pints Next $100 of Medicare approved amounts* Remainder of Medicare approved amounts	$0 $0 80%	All costs $100 (Part B deductible) 20%	$0 $0 $0
CLINICAL LABORATORY SERVICES - BLOOD TESTS FOR DIAGNOSTIC SERVICES	100%	$0	$0

PLAN F OR HIGH DEDUCTIBLE PLAN F
PARTS A & B

through (2)(k) PLAN J or HIGH DEDUCTIBLE PLAN J
MEDICARE (PART A) - HOSPITAL SERVICES - PER BENEFIT PERIOD
remain the same.

PLAN J or HIGH DEDUCTIBLE PLAN J

MEDICARE (PART B) - MEDICAL SERVICES - PER CALENDAR YEAR

*Once you have been billed $100 of Medicare-approved amounts for covered services (which are noted with an asterisk), your Part B deductible will have been met for the calendar year.
**This high deductible plan pays the same or offers the same benefits as plan J after one has paid a calendar year $1650 deductible. Benefits from the high deductible plan J will not begin until out-of-pocket expenses are $1650. Out-of-pocket expenses for this deductible are expenses that would ordinarily be paid by the policy. This includes the Medicare deductibles for Part A and Part B, but does not include the plan's separate foreign travel emergency deductible.

SERVICES	MEDICARE PAYS	AFTER YOU PAY $1650 DEDUCTIBLE,** PLAN PAYS	IN ADDITION TO $1650 DEDUCTIBLE,** YOU PAY

MEDICAL EXPENSES-IN OR OUT OF THE HOSPITAL AND OUTPATIENT HOSPITAL TREATMENT Such as physician's services, inpatient and outpatient medical and surgical services and supplies, physical and speech therapy, diagnostic tests, durable medical equipment, First $100 of Medicare approved amounts* Remainder of Medicare approved amounts Part B excess charges (Above Medicare approved amounts)	 $0 Generally 80% $0	 $100 (Part B deductible) Generally 20% ~~$0~~100%	 $0 $0 $0
BLOOD First 3 pints Next $100 of Medicare approved amounts* Remainder of Medicare approved amounts	$0 $0 80%	All costs $100 (Part B deductible) 20%	$0 $0 $0
CLINICAL LABORATORY SERVICES - BLOOD TESTS FOR DIAGNOSTIC SERVICES	100%	$0	$0

PLAN J OR HIGH DEDUCTIBLE PLAN J
PARTS A & B remains the same.

OTHER BENEFITS - NOT COVERED BY MEDICARE

SERVICES	MEDICARE PAYS	AFTER YOU PAY $1650 DEDUCTIBLE,** PLAN PAYS	IN ADDITION TO $1650 DEDUCTIBLE,** YOU PAY
FOREIGN TRAVEL - NOT COVERED BY MEDICARE Medically necessary emergency care services beginning during the first 60 days of each trip outside the USA First $250 each calendar year Remainder of charges	 $0 $0	 $0 80% to a lifetime maximum benefit of $50,000	 $250 20% and amounts over the $50,000 lifetime maximum
EXTENDED OUTPATIENT PRESCRIPTION DRUGS - NOT COVERED BY MEDICARE First $250 each calendar year Next $6,000 each calendar year Over $6,000 each calendar year	 $0 $0 $0	 $0 50 ~~80~~%-$3,000 calendar year maximum benefit $0	 $250 50% All costs

***PREVENTIVE MEDICAL CARE BENEFIT-NOT COVERED BY MEDICARE Some annual physical and preventive tests and services such as: digital rectal exam, hearing screening, dipstick urinalysis, diabetes screening, thyroid function test, tetanus and diphtheria booster and education, administered or ordered by your doctor when not covered by Medicare			
First $120 each calendar year	$0	$120	$0
Additional charges	$0	$0	All costs

***Medicare benefits are subject to change. Please consult the latest Guide to Health Insurance for People with Medicare.

AUTH: 33-1-313 and 33-22-904, MCA
IMP: 33-15-303, 33-22-901, 33-22-902, 33-22-903, 33-22-904, 33-22-905, 33-22-906, 33-22-907, 33-22-908, 33-22-909, 33-22-910, 33-22-911, 33-22-921, 33-22-922, 33-22-923 and 33-22-924, MCA

4. REASONABLE NECESSITY STATEMENT: It is necessary to amend ARM 6.6.511(2)(g), Plan F, Medicare (Part B) - Medical Services - Per Calendar Year in order to adopt a change that was made in 1998, but never officially adopted.

It is necessary to amend ARM 6.6.511(2)(k), Plan J, Medicare (Part B) - Medical Services - Per Calendar Year, and Plan J, Other Benefits - Not Covered by Medicare, to conform with the 2002 NAIC Model Regulation.

5. Concerned persons may present their data, views, or arguments concerning the proposed amendment in writing to Christina Goe, State Auditor's Office, 840 Helena Avenue, Helena, Montana 59601, or by facsimile (406) 444-3497, or by e-mail to cgoe@state.mt.us, and must be received no later than 5:00 p.m., November 4, 2004.

6. 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 Christina Goe, State Auditor's Office, 840 Helena Avenue, Helena, Montana 59601, or by e-mail to cgoe@state.mt.us no later than November 4, 2004.

7. If the department 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 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 250 persons who have indicated interest in the rules of this department and who the department has determined could be directly affected by these rules.

8. The State Auditor's Office maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this department. 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 specify that the person wishes to receive notices regarding insurance rules, securities rules, or both. Such written requests may be mailed or delivered to Darla Sautter, State Auditor's Office, 840 Helena Avenue, Helena, Montana 59601, or by e-mail to dsautter@state.mt.us, or by completing a request form at any rules hearing held by the State Auditor's Office.

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

JOHN MORRISON, State Auditor
and Commissioner of Insurance

By: /s/ Alicia Pichette
Alicia Pichette
Deputy Insurance Commissioner

By: /s/ Christina L. Goe
Christina L. Goe
Rule Reviewer

Certified to the Secretary of State on September 27, 2004.

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

In the matter of the adoption of a new rule pertaining to hunting season extensions	))))	AMENDED NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION

TO: All Concerned Persons

1. On August 19, 2004, the Fish, Wildlife and Parks Commission (commission) published MAR Notice No. 12-308 at page 1887 of the 2004 Montana Administrative Register, Issue Number 16 regarding a public hearing on the proposed adoption of the above-stated rule. The notice of proposed agency action is amended to provide an additional hearing date. The commission will hold a hearing on October 27, 2004, at 7 p.m. at the Fish, Wildlife and Parks Headquarters, 1420 East Sixth Avenue, Helena, Montana.

2. The commission will make reasonable accommodations for persons with disabilities who wish to participate in this hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m. on October 18, 2004, to advise us of the nature of the accommodation that you need. Please contact Gary Hammond, Fish, Wildlife and Parks, 1420 East Sixth Avenue, P.O. Box 200701, Helena, MT 59620-0701; telephone (406) 444-5672; fax (406) 444-4952; email ghammond@state.mt.us.

3. 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 Gary Hammond, Fish, Wildlife and Parks, 1420 East Sixth Avenue, P.O. Box 200701, Helena, MT 59620-0701; or emailed to ghammond@state.mt.us, and must be received no later than November 5, 2004.

4. Gary Hammond or another officer appointed by the department has been designated to preside over and conduct the hearing.

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

or may be made by completing the request form at any rules hearing held by the department.

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

By: Rebecca J. Dockter
Rebecca J. Dockter
Rule Reviewer

Certified to the Secretary of State September 27, 2004

BEFORE THE DEPARTMENT OF JUSTICE
OF THE STATE OF MONTANA

In the matter of the proposed amendment of ARM 1.3.102 regarding guidelines governing public participation at public meetings	)))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On October 27, at 9:30 a.m., a public hearing will be held in the auditorium of the Scott Hart Building, 303 North Roberts, in Helena, Montana, to consider the amendment of ARM 1.3.102 regarding guidelines governing public participation at public meetings.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m. on October 22, 2004, to advise us of the nature of the accommodation that you need. Please contact Ali Bovingdon, Department of Justice, Office of the Attorney General, P.O. Box 201401, Helena, MT 59620-1401; (406) 444-2026; FAX (406) 444-3549; email contactdoj@state.mt.us.

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

1.3.102 MODEL RULE 1 NOTICE OF AGENCY ACTION THAT IS OF SIGNIFICANT INTEREST TO THE PUBLIC (1) and (2) remain the same.

(3) Public comment on any public matter, as limited in 2-3-103(1)(b), MCA, that is within the jurisdiction of an agency must be allowed at any public meeting as defined by 2-3-202, MCA. The opportunity for public comment must be reflected on the meeting agenda and incorporated into the official minutes of the meeting. For purposes of this rule and 2-3-103(1)(b), MCA, contested case is defined at 2-4-102(4), MCA. Public matter does not include any matter involving an interest in individual privacy protected by Article II, Section 10 of the Montana Constitution, if the presiding officer determines that the demand of individual privacy clearly exceeds the merits of public disclosure.

AUTH: 2-4-202, 2-4-302, MCA
IMP: 2-3-103, 2-4-202, MCA

4. The amendment is necessary to implement the requirements of 2-3-103, MCA. The changes arise out of passage of House Bill 94 in the 2003 legislative session which is codified at 2-3-103, MCA and requires adoption of

procedures to ensure adequate notice and to assist public participation before any agency action on a matter that is of significant interest to the public.

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 Ali Bovingdon, Department of Justice, Office of the Attorney General, P.O. Box 201401, Helena, MT 59620-1401; (406) 444-2026; FAX (406) 444-3549; email contactdoj@state.mt.us, and must be received no later than 5:00 p.m., November 5, 2004.

6. An electronic copy of this notice is available through the department's site at www.doj.state.mt.us/resources/administrativerules.asp.

7. The Department of Justice 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 rules proposed by the Motor Vehicle Division, the Forensic Science Division, the Highway Patrol Division, the Fire Prevention and Investigation Bureau, the Division of Criminal Investigation, the Board of Crime Control or the Law Enforcement Academy, or proposed rules pertaining to certificates of public advantage for health care. Such written request may be mailed or delivered to Ali Bovingdon, Department of Justice, Office of the Attorney General, P.O. Box 201401, Helena, MT 59620-1401, faxed to the office at (406) 444-3549, 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 September 27, 2004.

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

In the matter of the proposed amendment of ARM 8.32.402 licensure by examination, ARM 8.32.403 reexamination - registered nurse, and ARM 8.32.404 reexamination - practical nurse	)))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On November 15, 2004, at 10:00 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 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 Nursing no later than 5:00 p.m., November 10, 2004, to advise us of the nature of the accommodation that you need. Please contact Joan Bowers, Board of Nursing, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2342; Montana Relay 1-800-253-4091; TDD (406) 444-2978; facsimile (406) 841-2305; e-mail dlibsdnur@state.mt.us.

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

8.32.402 LICENSURE BY EXAMINATION (1) through (9) remain the same.

(10) Candidates who fail shall receive the results of the examination and are not eligible to re-test for ~~90~~ 45 days.

(11) Each school of nursing in Montana shall receive ~~a~~ quarterly statistical summary reports of ~~the test results from that school~~ its NCLEX results as well as state and national NCLEX results.

(12) and (13) remain the same.

AUTH: 37-8-202, MCA
IMP: 37-8-406, 37-8-416, MCA

REASON: The Board of Nursing finds it necessary to amend this rule because the National Council of State Boards of Nursing has recently revised its rules to allow an individual to retest after only 45 days. The previous waiting period was 90 days. Amending this rule will allow those who fail the exam to retest within 45 days instead of waiting 90 days. The Board believes that the sooner an individual passes the exam

and begins working as a nurse, the less likely the individual is to lose clinical competency skills.

The amendment will affect all license applicants who fail the NCLEX examination. Approximately 12 practical nursing applicants and 15 registered nursing applicants fail the NCLEX each year in Montana.

This amendment presents no fiscal impact.

8.32.403 RE-EXAMINATION - REGISTERED NURSE

(1) Candidates who fail the licensing examination will be permitted to retake the examination after ~~90~~ 45 days. Effective October 1, 2000, a candidate may retake the examination one time. If a candidate does not pass the retake, the candidate will be required to present a plan of study to the board before becoming eligible to take the examination again. A candidate may take the test a maximum of five times in three years. If a candidate does not pass the examination within three years, the individual will be required to complete a school of nursing program before being able to test a sixth time.

AUTH: 37-8-202, MCA
IMP: 37-8-202, 37-8-406, MCA

REASON: The Board of Nursing finds it necessary to amend this rule because the National Council of State Boards of Nursing has recently revised its rules to allow an individual to retest after only 45 days. The previous waiting period was 90 days. Amending this rule will allow those who fail the exam to retest within 45 days instead of waiting 90 days. The Board believes that the sooner an individual passes the exam and begins working as a nurse, the less likely the individual is to lose clinical competency skills.

The amendment will affect all license applicants who fail the NCLEX examination. Approximately 15 registered nursing applicants fail the NCLEX each year in Montana.

This amendment presents no fiscal impact.

8.32.404 RE-EXAMINATION - PRACTICAL NURSE

(1) Candidates who fail the licensing examination will be permitted to retake the examination after ~~90~~ 45 days. Effective October 1, 2000, a candidate may retake the examination one time. If a candidate does not pass the retake, the candidate will be required to present a plan of study to the board before becoming eligible to take the examination again. A candidate may take the test a maximum of five times in three years. If a candidate does not pass the examination within three years, the individual will be required to complete a school of nursing program before being able to test a sixth time.

AUTH: 37-8-202, MCA
IMP: 37-8-202, 37-8-416, MCA

REASON: The Board of Nursing finds it necessary to amend this rule because the National Council of State Boards of Nursing has recently revised its rules to allow an individual to retest after only 45 days. The previous waiting period was 90 days. Amending this rule will allow those who fail the exam to retest, and hopefully pass within 45 days instead of waiting 90 days. The Board believes that the sooner an individual passes the exam and begins working as a nurse, the less likely the individual is to lose clinical competency skills.

The amendment will affect all license applicants who fail the NCLEX examination. Approximately 12 practical nursing applicants fail the NCLEX each year in Montana.

This amendment presents no fiscal impact.

4. 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 Nursing, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to dlibsdnur@state.mt.us, and must be received no later than 5:00 p.m., November 23, 2004.

5. 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/nur. The Department strives to make the electronic copy of this 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, and that a person's technical difficulties in accessing or posting to the e-mail address do not excuse late submission of comments.

6. The Board of Nursing 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 Nursing administrative rulemaking proceedings or other administrative proceedings. Such written

request may be mailed or delivered to the Board of Nursing, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, faxed to the office at (406) 841-2305, e-mailed to dlibsdnur@state.mt.us, or may be made by completing a request form at any rules hearing held by the agency.

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

8. Lorraine Schneider, attorney, has been designated to preside over and conduct this hearing.

BOARD OF NURSING
KAREN POLLINGTON, RN, 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 September 27, 2004.

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

In the matter of the proposed amendment of ARM 24.141.405, and ARM 24.141.506 pertaining to fee schedule and master electrician qualifications	)))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On November 9, 2004, at 9:00 a.m., a public hearing will be held in room 471 of the Park Avenue Building, 301 South Park Avenue, Helena, Montana to consider the proposed amendment 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 who need an alternative accessible format of this notice. If you require an accommodation, contact George Edwards no later than 5:00 p.m., November 3, 2004, to advise us of the nature of the accommodation you need. Please contact George Edwards, State Electrical Board, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2329; Montana Relay 1-800-253-4091; TDD (406) 444-2978; Facsimile (406) 841-2305; e-mail dlibsdele@state.mt.us.

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

24.141.405 FEE SCHEDULE

~~(1) Examination fee (paid directly to the testing agency upon board approval of application) $ 75~~

(1) Examination fees are set by the testing agency and vary by examination. Contact the board office for a current schedule of test section fees. Fees are to be paid directly to the testing agency upon the board's approval of an application.

(2) Application fee for a license by examination (includes original license fee) $120

(3) through (9) remain the same.

AUTH: ~~37-1-131,~~ 37-1-134, 37-68-201, MCA
IMP: 37-1-134, 37-1-304, 37-1-305, 37-68-304, 37-68-307, 37-68-310, 37-68-311, 37-68-312, 37-68-313, MCA

REASON: There is reasonable necessity to amend ARM 24.141.405 in anticipation of the Board finalizing a contract with a new examination vendor. The rule change will have no impact on the State Electrical Board's budget, as the exam administration fees will be paid directly to the testing agency. The Board expects that examination fees will decrease

by $15.00 for journey level and residential examinations, and decrease by $5.00 for master level examinations. Based on the number of persons sitting for the examination in fiscal year 2004, the Board estimates that approximately 21 residential, 98 journeyman, and 148 master applicants per year will be affected by the proposed amendment. The Board estimates that there will be a net decrease in examination fees of approximately $2525 per year.

24.141.506 MASTER ELECTRICIAN QUALIFICATIONS

(1) remains the same.

(2) The journeyman level experience required by (1)(a), (b) or (c) must be obtained by a combination of residential, commercial and industrial work.

~~(a)~~ No less than ~~10%~~ 20%, but no more than 50% of the required experience may be obtained by residential work.

~~(b) No more than 70% of the required experience may be obtained by either commercial or industrial work.~~

AUTH: 37-1-131, 37-68-201, MCA
IMP: 37-1-131, 37-68-201, 37-68-301, 37-68-304, MCA

REASON: There is reasonable necessity to amend ARM 24.141.506 to clarify the percentage of needed experience in the Master Electrician Qualifications rule. The current rule adopted in April 2004 does not clearly identify percentages of residential time combined with commercial and industrial work, and has been confusing to both applicants and staff.

4. Concerned persons may present their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted by mail to George Edwards, State Electrical Board, Department of Labor and Industry, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to dlibsdele@state.mt.us and must be received no later than 5:00 p.m., November 17, 2004.

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

6. The State Electrical Board 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 that includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding all State Electrical Board administrative rulemaking proceedings or other administrative proceedings. Such written request may be mailed or delivered to the State Electrical Board, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, faxed to the office at (406) 841-2305, e-mailed to dlibsdele@state.mt.us or may be made by completing a request form at any rules hearing held by the agency.

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

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

MONTANA STATE ELECTRICAL BOARD
TONY MARTEL, PRESIDENT

/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 September 27, 2004.

BEFORE THE BOARD OF RESPIRATORY CARE PRACTITIONERS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the proposed amendment of ARM 24.213.301 definitions, ARM 24.213.402 application for licensure, ARM 24.213.405 temporary permit, ARM 24.213.408 examination and adoption of NEW RULES I and II pertaining to institutional guidelines concerning education and certification and authorization to perform pulmonary function testing and spirometry	)	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT AND ADOPTION

TO: All Concerned Persons

1. On November 8, 2004, at 10:00 a.m., a public hearing will be held in room 471, 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 Respiratory Care Practitioners no later than 5:00 p.m. on November 1, 2004, to advise us of the nature of the accommodation that you need. Please contact Helena Lee, Board of Respiratory Care Practitioners, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2385; Montana Relay 1-800-253-4091; TDD (406) 444-2978; facsimile (406) 841-2305; e-mail dlibsdrcp@state.mt.us.

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

24.213.301 DEFINITIONS (1) through (4) remain the same.

(5) The board defines "formal pulmonary function testing" to include, but not be limited to:

(a) diffusion capacity studies; and

(b) complete lung volumes and flows.

(6) The board defines "informal screening spirometry" to include, but not be limited to:

(a) peak expiration flow rate;

(b) screening spirometry forced expiration volume for one second;

(c) forced vital capacity; and

(d) simple vital capacity.

AUTH: Sections (2) and (3) are advisory only, but may be a correct interpretation of the statute, 37-28-104, MCA
IMP: 37-28-101, 37-28-102, MCA

REASON: There is reasonable necessity to adopt new (5) and (6) to clarify information currently found in New Rule II, to differentiate a formal study from a basic screening tool.

24.213.402 APPLICATION FOR LICENSURE (1) through (7) remain the same.

(8) ~~An applicant who presents from an unlicensed state must provide documentation of active employment. An applicant who has not worked in the profession of respiratory care for a period of up to three years must provide documentation of having acquired continuing education equivalent to that which would have been required had the applicant been a licensee in this state. An applicant who has not worked in the profession of respiratory care for over three years shall provide evidence that they have successfully passed the NBRC certification or registration examination within one year prior to application for licensure.~~ An applicant who has been away from the practice of the profession of respiratory care for more than three years shall provide evidence of competency. The applicant may demonstrate competency by:

(a) providing proof of completion (within the last 60 months) of a minimum of 30 hours of continuing education acceptable to the board;

(b) retaking the respective examination(s) for the credential being renewed and achieving a passing score; or

(c) passing another national board for respiratory care (NBRC) credentialing examination, not previously completed.

AUTH: 37-28-104, MCA
IMP: 37-28-201, 37-28-202, MCA

REASON: The Board finds it reasonable and necessary to amend ARM 24.213.402 in order to maintain a competency level for individuals who have been away from practice in the field for more than three years. This language provides the standard to ensure competency of those who are reentering the field after an absence of more than 36 months.

24.213.405 TEMPORARY PERMIT (1) An applicant for a temporary practice permit ~~must~~ shall have graduated within the ~~12 months immediately~~ 30 days prior to the date of application for the temporary practice permit.

(a) A temporary practice permit will only be issued if the applicant is scheduled to take the NBRC examination within 30 days of applying for the temporary practice permit.

(b) A temporary practice permit expires not later than 45 days after it is issued.

(2) The application fee for a temporary practice permit may be applied to the application fee for a licensed respiratory care practitioner if that temporary permit holder applies for

the licensed respiratory care practitioner's license within ~~six months~~ 45 days from the issuance of the temporary practice permit.

(3) remains the same.

AUTH: ~~37-1-305,~~ 37-28-104, MCA
IMP: 37-1-305, 37-28-206, MCA

REASON: There is reasonable necessity to amend ARM 24.213.405 to shorten the time in which a recent respiratory therapy school graduate may practice before having taken the license examination. Several respiratory department managers have recently requested that the Board amend its rule. In addition, the Board notes that the NBRC, the national testing entity, is in the process of implementing a rule that will require students to take and pass the examination prior to graduation. That NBRC rule is expected to go into effect January 1, 2005.

The Board notes that the NBRC examination is now conducted via electronic means, and can be scheduled and taken in a very short time. Examination results are available within seven days of taking the examination. The Board therefore concludes that the reduction of time a temporary practice permit is valid is appropriate in light of the new, speedier test administration, and will serve to protect the public health and safety by minimizing the amount of time a recent graduate can practice without having passed the examination, which provides an objective demonstration of the graduate's competency.

The Board notes that 15 individuals currently have an active temporary practice permit, and 6 individuals have a lapsed temporary practice permit. Individuals with an active temporary practice permit will not be affected by the proposed change to the Board's rule.

24.213.408 EXAMINATION (1) remains the same.

(2) ~~Except as provided in ARM 24.213.402(8), applicants~~ Applicants for original licensure shall provide evidence that they have successfully passed the examination ~~within one year prior to application for licensure~~.

AUTH: 37-28-104, MCA
IMP: 37-28-104, 37-28-202, MCA

REASON: There is reasonable necessity to amend ARM 24.213.408 to shorten the time in which a recent respiratory therapy school graduate may practice before having taken the license examination. Several respiratory department managers have recently requested that the Board amend its rule. In addition, the Board notes that the NBRC, the national testing entity, is in the process of implementing a rule that will require students to take and pass the examination prior to graduation. That NBRC rule is expected to go into effect January 1, 2005.

The Board notes that the NBRC examination is now conducted via electronic means, and can be scheduled and taken in a very short time. Examination results are available within seven days of taking the examination. The Board therefore concludes that the reduction of time a temporary practice permit is valid is appropriate in light of the new, speedier test administration, and will serve to protect the public health and safety by minimizing the amount of time a recent graduate can practice without having passed the examination, which provides an objective demonstration of the graduate's competency.

The Board notes that 15 individuals currently have an active temporary practice permit, and 6 individuals have a lapsed temporary practice permit. Individuals with an active temporary practice permit will not be affected by the proposed change to the Board's rule.

4. The proposed new rules provide as follows:

NEW RULE I INSTITUTIONAL GUIDELINES CONCERNING EDUCATION AND CERTIFICATION -- WHEN REQUIRED (1) Respiratory care practitioners shall meet the adopted specific guidelines regarding education and training of those institutions that use or employ respiratory care practitioners who administer intravenous (IV) conscious sedation.

(2) The board recommends the following be incorporated as minimum standards into an institution's guidelines regarding conscious sedation:

(a) at least one qualified individual trained in basic life support skills, such as CPR and bag-valve-mask ventilation, should be present in the procedure room; and

(b) there must be immediate availability (not more than five minutes away) of an individual with advanced life support skills training and equipment, such as tracheal intubation, defibrillation, and resuscitation medications.

(3) The board recommends regarding conscious sedation that an individual with advanced life support skills training and equipment, such as tracheal intubation, defibrillation, and resuscitation medications, be present in the procedure room.

(4) The board recommends, but does not require, that all respiratory care practitioners performing IV conscious sedation have advanced cardiac life support (ACLS) accreditation.

(5) The board recommends that individuals responsible for patients receiving sedation or analgesia should understand the pharmacology of the agents that are administered, as well as the role of pharmacologic antagonists for opioids and benzo-diazepines. Individuals monitoring patients receiving sedation or analgesia should be able to recognize the associated complications.

AUTH: 37-1-131, 37-28-104, MCA
IMP: 37-28-101, 37-28-102, MCA

REASON: The Board believes it is reasonable and necessary to adopt NEW RULE I to clarify and establish the meaning of the Declaratory Ruling dated January 6, 2003, published at page 26 of the 2003 Montana Administrative Register, Issue Number 1, wherein it was stated that the Board would establish the prerequisites for proper administration and monitoring of conscious intravenous (IV) sedation and the scope of authority. NEW RULE I(1) clarifies that a licensee must abide by the specific procedures and protocols adopted by the licensee's employer in use at the particular facility where conscious IV sedation is being performed. NEW RULE I further recommends minimum standards and proposes that an individual with advanced life support skills be immediately available (within five minutes) for conscious sedation. Based upon the concerns raised by the Montana Board of Nursing, the Board of Respiratory Care Practitioners believes NEW RULE I will serve to help protect the public health, safety and welfare.

NEW RULE II AUTHORIZATION TO PERFORM FORMAL PULMONARY FUNCTION TESTING AND INFORMAL, BASIC SCREENING SPIROMETRY

(1) Properly licensed health care providers performing informal pulmonary function testing or spirometry should meet minimum competency standards as established by the national institute for occupational safety and health (NIOSH) or the national board for respiratory care (NBRC).

(2) A licensee is authorized to perform formal pulmonary function testing and spirometry if the individual has passed any one of the following certification or registry examinations:

(a) entry level respiratory therapist (CRT);

(b) advanced level respiratory therapist (RRT);

(c) entry level pulmonary function technologist (CPFT); or

(d) advanced pulmonary function technologist (RPFT).

AUTH: 37-1-131, 37-28-104, MCA
IMP: 37-1-131, 37-28-102, 37-28-104, MCA

REASON: There is reasonable necessity to adopt NEW RULE II to clarify what credentials are required to perform formal pulmonary function testing and spirometry, based on recent questions posed by licensees. The new rule clarifies information currently found in ARM 24.213.301(4), above, and presents it in a more user-friendly format.

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 Respiratory Care Practitioners, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to dlibsdrcp@state.mt.us and must be received no later than 5:00 p.m., November 17, 2004.

6. An electronic copy of this Notice of Public Hearing is available through the department's site on the World Wide Web at http://discoveringmontana.com/dli/bsd under the Board of

Respiratory Care Practitioner's rule notice section. The department strives to make the electronic copy of this 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, 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 comment forum do not excuse late submission of comments.

7. The Board of Respiratory Care Practitioners maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by the board. Persons who wish to have their name included on 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 all Board of Respiratory Care Practitioners administrative rulemaking proceedings. Such written request may be mailed or delivered to the Board of Respiratory Care Practitioners, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, faxed to the office at (406) 841-2305, e-mailed to dlibsdrcp@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. Lon Mitchell, attorney, has been designated to preside over and conduct this hearing.

BOARD OF RESPIRATORY CARE PRACTITIONERS
GREGORY PAULAUSKIS, PRESIDENT

/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 September 27, 2004

BEFORE THE BOARD OF LIVESTOCK
OF THE STATE OF MONTANA

In the matter of the proposed amendment of ARM 32.23.301 pertaining to fees charged by the department on the volume on all classes of milk	)))))	NOTICE OF PROPOSED AMENDMENT NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons

1. On November 6, 2004, the department proposes to amend ARM 32.23.301 pertaining to fees charged by the department on the volume on all classes of milk.

2. The department 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 department of livestock no later than 5:00 p.m. on October 19, 2004 to advise us of the nature of the accommodation that you need. Please contact Marc Bridges, 301 N. Roberts Street - Room 308, PO 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 rule proposed to be amended provides as follows, new matter underlined, deleted matter interlined:

32.23.301 LICENSEE ASSESMENTS

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

(e) A fee of ~~$0.125~~ $0.135 per hundredweight per month, with a minimum of $50.00 per month, whichever is greater, or a maximum of $1,050.00 per month, on the volume of all classes of milk produced and sold by a person licensed by the department, to be used for the administration of the milk inspection and milk diagnostic laboratory functions of the department.

(i) remains the same.

AUTH: Sec. 81-23-104, 81-23-202, MCA
IMP: Sec. 81-23-103, 81-23-202, MCA

4. STATEMENT OF REASONABLE NECESSITY. The rule is being amended to increase fees that are currently charged by the department of livestock for administration of milk inspections and the milk diagnostic laboratory. The fee increase will allow the Department to cover its budget costs as costs for these functions have increased in the past year. The department must, by statute, charge fees commensurate with costs.

Approximately 104 persons would be affected, as there are currently 104 producers in the state. The total projected revenue will be approximately $387,000 per year, based on the fee amount imposed by this proposed amendment.

5. Concerned persons may submit their data, views or arguments concerning the proposed amendment in writing to Marc Bridges, 301 N. Roberts Street - Room 308, PO Box 202001, Helena, MT 59620-2001, by faxing to (406)444-1929 or e-mailing to mbridges@state.mt.us to be received no later than 5:00 p.m., November 4, 2004.

6. If persons who are directly affected by the proposed amendment wish to express their data, views and arguments orally or in writing at a public hearing, they must make a written request for a hearing and submit this request along with any written comments they have to the same address as above. A request for hearing must be received no later than 5:00 p.m., November 4, 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 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 10 based upon the current number of producers in the state.

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 Street - Room 308, PO Box 202001, Helena, MT 59620-2001, faxed to (406)444-1929, e-mailed to mbridges@state.mt.us, or may be made by completing a request form at any rules hearing held by the department.

10. The bill sponsor notice 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 September 27, 2004.

BEFORE THE STATE BOARD OF LAND COMMISSIONERS AND
THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 36.25.117, Renewal of Lease or License and Preference Right	))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. The Department of Natural Resources and Conservation will hold four public hearings on the proposed amendment of the above-stated rule relating to the renewal of lease or license and preference right by the Department on behalf of the State Board of Land Commissioners. The hearing dates and locations are as follows:

October 28, 2004, 7:00 p.m.
Beaverhead County High School Auditorium
104 North Pacific
Dillon, Montana

November 2, 2004, 7:00 p.m.
Glasgow High School Auditorium
#1 Scotty Pride Drive
Glasgow, Montana

November 3, 2004, 7:00 p.m.
VA Auditorium
210 Winchester
Miles City, Montana

November 4, 2004, 7:00 p.m.
MSU Great Falls Campus - Heritage Hall Auditorium
College of Technology
2100 16th Avenue South
Great Falls, Montana

2. The Department of Natural Resources and Conservation and the State Board of Land Commissioners will make reasonable accommodations for persons with disabilities who wish to participate in these public hearings or need an alternative accessible format of this notice. If you require an accommodation, contact the agency no later than 5:00 p.m. on October 22, 2004, to advise us of the nature of the accommodation you need. Please contact Kevin Chappell, Agriculture & Grazing Management Bureau Chief, Department of Natural Resources and Conservation, P.O. Box 201601, Helena, MT 59620-1601; telephone (406) 444-2074; FAX (406) 444-2684; e-mail kchappell@state.mt.us.

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

36.25.117 RENEWAL OF LEASE OR LICENSE AND PREFERENCE RIGHT (1) The board retains the right to select the best lessee possible to fulfill the operating obligations under any lease. In the exercise of the board's discretion to select the best lessee possible for agriculture and grazing leases, the board recognizes that retention of stable, long-term lessees who are familiar with the operating history and characteristics of the lease promotes good stewardship of the land. Such security of land tenure encourages the lessee to place and develop improvements which, in turn, increases the productivity of the land and improves its management. Consequently, it is the board's policy to allow an incumbent lessee in good standing, a preference right to meet the high bid and retain the lease.

(2) A current lessee or licensee shall be sent an application to renew his lease or license if he has paid all rentals due. The application shall be accepted under the same conditions as specified in ARM 36.25.115; however, applications for renewal will only be accepted after December 1 of the year preceding the expiration of the lease or license and must be postmarked on or before January 28 of the year of expiration of the lease or license. Failure to submit a renewal application by the lessee or licensee postmarked on or before January 28 will result in an unleased or unlicensed tract and will be subject to the requirements for leasing or licensing an unleased or unlicensed tract under ARM 36.25.115.

(a) remains the same.

~~(2)~~ (3) Unless the board decides on its own volition and sole discretion that a lease should be given to a better qualified applicant, ~~A~~ a surface lessee or licensee who has strictly complied with the applicable conditions set forth in 77-6-113(1), MCA, has a preference right to meet the high bid offered for the lease or license and may retain the lease or license subject to the provisions in (8), if all rentals have been paid and appropriate reports submitted and ~~(3)~~ (4) has not been violated. When an agricultural lessee or licensee meets the high bid and retains his lease or license, the new rental rate must be paid for all crops harvested after the renewal date even if such crops were planted before the lessee met the high bid. The lease or license shall be renewed at the fair market rental provided no other applications for the lease or license have been received by the department within the time limits as set forth by ARM 36.25.116(2). Grazing or agricultural uses on classified forest lands may be terminated if it is determined that the resources under that classification are being damaged or not perpetuated.

(a) A cabinsite lease is not subject to bids upon renewal if the lessee continues the lease and the lessee has paid all rentals and ~~(3)~~ (4) is not violated. The lease shall be renewed at the rental provided by law.

(b) If, during the previous lease term, an existing lessee has violated any condition set out within 77-6-113(1), MCA, the lessee shall not have the right to renew the lease or

match any other bids submitted. The department shall notify the lessee if it determines that they have failed to comply with the requirements of 77-6-113(1), MCA. The notice shall include the factual basis for that determination.

(c) The lessee may, within 15 days of receipt of the notice, appeal the decision by requesting an informal hearing before the director or his designee. If the director, or his designee, concludes that the conditions under 77-6-113(1), MCA, have not been met by the lessee during the previous terms, no preference right shall be recognized. The renewal lease shall then be advertised for competitive bids as provided in ARM 36.25.115.

(d) No applicant shall have the right to seek an administrative hearing to challenge the award of a lease to any lessee chosen by the board under this rule or the board's policies.

(3) remains the same but is renumbered (4).

~~(a) For leases or licenses issued before 1987, a lessee or licensee who has only subleased prior to April 7, 1987, under the lease or license may exercise the preference right at renewal if he has not subleased for more than 30% of the term of the lease at the time of renewal. If such lessee or licensee subleases at any time after April 7, 1987, the other provisions of this rule apply.~~

~~(b) For leases or licenses issued before 1987, that have been subleased for two years prior to April 7, 1987, the lessee or licensee may sublease only one year after April 7, 1987, during the current lease term and retain the preference right at renewal.~~

~~(c) For leases or licenses issued before 1987, that have been subleased for one year prior to April 7, 1987, the lessee or licensee may sublease only two years after April 7, 1987, during the current lease term and retain the preference right at renewal.~~

~~(d) For leases or licenses issued before 1987, that have not been subleased prior to April 7, 1987, then the provisions of (3) apply.~~

(e) through (g) remain the same but are renumbered (a) through (c).

~~(4)~~ (5) If a lease or license is renewed pursuant to the preference right and it is later discovered that the lessee or licensee was not entitled to exercise such preference right pursuant to ~~(3)~~ (4) during the prior lease or license term, then the renewed lease or license shall be canceled and readvertised for lease or license. However, the department will retain all rentals paid until the time the renewed lease or license is canceled. The prior lessee or licensee shall be allowed to bid in this instance.

(5) remains the same but is renumbered (6).

(6)(a) and (b) remain the same but are renumbered (7) and (7)(a).

~~(7)~~ (8) If other applications are received by January 28 of the year the lease or license expires, and the lessee or licensee has not violated ~~(3)~~ (4) or 77-6-113(1), MCA, the

lessee or licensee shall have a preference right to renew his lease or license provided he meets the high bid for such lease or license. Such bid is deemed to be met if the amount of the high bid is received by the department prior to the expiration of the lease or license or, in the case of agricultural land leased solely on a crop share rental basis, if the lessee or licensee agrees in writing to meet the high bid prior to the expiration of the lease or license.

(a) A lessee or licensee who believes the bid to be excessive may request in writing a hearing before the director after he meets the high bid. The request for a hearing must contain a statement of reasons and supporting evidence why the lessee or licensee believes the bid not to be in the state's best interest, because it is above community standards for a lease of such land; or would cause damage to the tract; or impair its long-term productivity. The lessee or licensee shall also submit evidence of rental rates for similar land in the area with his request.

(b) The director may grant or deny a request for a hearing. If a hearing is granted, the director shall consider testimony and evidence from the lessee and high bidder regarding the rental rate. The lessee and high bidder may also provide a basis for why they should be selected as the best lessee by the board. The director shall recommend to the board whether there should be a reduction to the bid rate, and who should be selected as the lessee. ~~and if the request is granted, t~~The director may recommend to the board that the bid be lowered only if he feels that it is in the best interests of the state to do so. The hearing is not subject to the Montana Administrative Procedure Act. The board may accept or reject the director's recommendation.

(c) The lessee is obligated to lease or license the property at the rate determined by the board. It is the duty of the board to achieve fair market value. The lease or licensing of such land shall be such so as to generate revenue commensurate with the highest and best use of the land or portions thereof, as determined by the department.

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

AUTH: 77-1-209, MCA
IMP: 77-6-205, 77-6-208, and 77-6-210, MCA

REASONABLE NECESSITY: In July, District Court Judge Jeffrey Sherlock ruled the preference right provision in 77-6-205, MCA is unconstitutional because it denies the State Board of Land Commissioners the discretion to choose the best lessee possible for the trust. The proposed amendment is to establish a process for the board to reissue the 800 to 1000 agricultural and grazing leases that expire each year.

4. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearings. Written data, views, or arguments may also be submitted to

Kevin Chappell, Chief, Agriculture & Grazing Management Bureau, Department of Natural Resources and Conservation, P.O. Box 201601, Helena, MT 59620-1601; telephone (406) 444-2074; FAX (406) 444-2684; or e-mailed to kchappell@state.mt.us. All written data, views, or arguments must be received no later than 5:00 p.m. on November 8, 2004.

5. Kevin Chappell, Agriculture & Grazing Management Bureau Chief, Department of Natural Resources and Conservation, will preside over and conduct the hearings.

6. An electronic copy of this Notice of Proposed Amendment is available through the department's website at http://www.dnrc.state.mt.us. The department strives to make the electronic copy of this Notice of Proposed Amendment conform to the official version, as printed in the Montana Administrative Register. However, the department advises that it will decide any conflict between the official printed version and the electronic version in favor of the official printed version. In addition, the department advises that the website might be inaccessible at times, due to system maintenance or technical problems.

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 may make a written request, which includes their name and mailing address. Interested persons should specify that they wish to receive notices regarding conservation districts and resource development, forestry, oil and gas conservation, trust land management, water resources, or a combination of topics. The written request may be mailed or delivered to Legal Unit, Department of Natural Resources and Conservation, P.O. Box 201601, 1625 11th Avenue, Helena, MT 59620-1601, or faxed to the office at (406) 444-2684 or may be made by completing a request form at any rules hearing held by the department.

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

BOARD OF LAND COMMISSIONERS

By: /s/ Judy Martz
JUDY MARTZ
Chair

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

By: /s/ Arthur R. Clinch
ARTHUR R. CLINCH
Director

By: /s/ Tommy H. Butler
TOMMY H. BUTLER
Rule Reviewer

Certified to the Secretary of State September 27, 2004.

BEFORE THE SECRETARY OF STATE
OF THE STATE OF MONTANA

In the matter of the proposed amendment of ARM 1.2.419 regarding the scheduled dates for the Montana Administrative Register	)))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On October 28, 2004, a public hearing will be held at 10:00 a.m. in the Secretary of State's Office Conference Room, Room 260, State Capitol Building, Helena, Montana, to consider the proposed amendment of ARM 1.2.419 regarding the scheduled dates for the Montana Administrative Register.

2. The Secretary of State 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 Secretary of State no later than 5:00 p.m. on October 22, 2004, to advise us of the nature of the accommodation that you need. Please contact Kathy Lubke, Secretary of State's Office, P.O. Box 202801, Helena, MT 59620-2801; telephone (406) 444-2055; FAX (406) 444-5833.

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

1.2.419 FILING, COMPILING, PRINTER PICKUP AND PUBLICATION SCHEDULE FOR THE MONTANA ADMINISTRATIVE REGISTER

(1) The scheduled filing dates, time deadlines, compiling dates, printer pickup dates and publication dates for material to be published in the Montana Administrative Register are listed below:

~~2004~~ 2005 Schedule

Filing	Compiling	Printer Pickup	Publication
January ~~5~~ 3	January ~~6~~ 4	January ~~7~~ 5	January ~~15~~ 13
January ~~16~~ 14	January ~~20~~ 18	January ~~21~~ 19	January ~~29~~ 27
~~February 2~~	February ~~3~~ 1	February ~~4~~ 2	February ~~12~~ 10
January 31			
February ~~17~~ 14	February ~~18~~ 15	February ~~19~~ 16	February ~~26~~ 24
March ~~1~~ 7	March ~~2~~ 8	March ~~3~~ 9	March ~~11~~ 17
March ~~15~~ 21	March ~~16~~ 22	March ~~17~~ 23	March ~~25~~ 31
~~March 29~~	~~March 30~~	~~March 31~~	April ~~8~~ 14
April 4	April 5	April 6	
April ~~12~~ 18	April ~~13~~ 19	April ~~14~~ 20	April ~~22~~ 28
~~April 26~~	~~April 27~~	~~April 28~~	~~May 6~~
May ~~10~~ 2	May ~~11~~ 3	May ~~12~~ 4	May ~~20~~ 12
May ~~24~~ 16	May ~~25~~ 17	May ~~26~~ 18	~~June 3~~ May 26

June ~~7~~ 6	June ~~8~~ 7	June ~~9~~ 8	June ~~17~~ 16
June ~~21~~ 20	June ~~22~~ 21	June ~~23~~ 22	~~July 1~~ June 30
July ~~12~~ 1	July ~~13~~ 5	July ~~14~~ 6	July ~~22~~ 14
July ~~26~~ 18	July ~~27~~ 19	July ~~28~~ 20	~~August 5~~ July 28
August ~~9~~ 1	August ~~10~~ 2	August ~~11~~ 3	August ~~19~~ 11
August ~~23~~ 15	August ~~24~~ 16	August ~~25~~ 17	~~September 2~~ August 25
~~September 13~~ August 29	~~September 14~~ August 30	~~September 15~~ August 31	September ~~23~~ 8
September ~~27~~ 12	September ~~28~~ 13	September ~~29~~ 14	~~October 7~~ September 22
~~October 8~~ September 26	~~October 12~~ September 27	~~October 13~~ September 28	October ~~21~~ 6
October ~~25~~ 17	October ~~26~~ 18	October ~~27~~ 19	~~November 4~~ October 27
~~November 8~~ October 31	November ~~9~~ 1	November ~~10~~ 2	November ~~18~~ 10
November ~~22~~ 14	November ~~23~~ 15	November ~~24~~ 16	~~December 2~~ November 23
~~December 6~~ November 28	~~December 7~~ November 29	~~December 8~~ November 30	December ~~16~~ 8
December 12	December 13	December 14	December 22

(2) remains the same.

AUTH: Sec. 2-4-312, MCA
IMP: Sec. 2-4-312, MCA

4. ARM 1.2.419 is proposed to be amended to set dates pertinent to the publication of the Montana Administrative Register during 2005. The schedule is proposed during the month of October in order that it may be adopted during November or December. This allows state agencies the opportunity to plan their rulemaking schedule to meet program needs for the upcoming year.

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 Kathy Lubke, Secretary of State's Office, P.O. Box 202801, Helena, Montana 59620-2801, or by e-mailing klubke@state.mt.us, and must be received no later than November 4, 2004.

6. Janice Doggett, Secretary of State's Office, P.O. Box 202801, Helena, Montana 59620-2801 has been designated to preside over and conduct the hearing.

7. The Secretary of State 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 administrative rules, corporations, elections, notaries, records, uniform commercial code or combination thereof. Such written request may be mailed or delivered to the Secretary of State's Office, Administrative Rules Bureau, 1236 Sixth Avenue, P.O. Box 202801, Helena, MT 59620-2801, faxed to the office at (406) 444-5833, or may be made by completing a request form at any rules hearing held by the Secretary of State's Office.

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

/s/ Bob Brown
BOB BROWN
Secretary of State

/s/ Janice Doggett
JANICE DOGGETT
Rule Reviewer

Dated this 27th day of September 2004.

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

In the matter of the adoption of New Rule II (ARM 6.10.148), pertaining to custody of notice filings for offerings of federal covered securities under 18(b)(3) or (4) of the Securities Act of 1933	))))))	CORRECTED NOTICE OF ADOPTION

TO: All Concerned Persons

1. On July 17, 2003, the State Auditor and Commissioner of Securities published MAR Notice No. 6-141 regarding a public hearing on the proposed adoption of the above-stated rule at page 1427 of the 2003 Montana Administrative Register, Issue Number 13. On December 24, 2003, the State Auditor published notice of the adoption at page 2850 of the 2003 Montana Administrative Register, Issue Number 24.

2. The reason for this notice is to correct the discrepancy between the catchphrase and the existing text, which should read the same. The corrected rule reads as follows:

6.10.148 NOTICE FILINGS FOR OFFERINGS OF FEDERAL COVERED SECURITIES UNDER 18(b)(3) OR (4) OF THE SECURITIES ACT OF 1933

(1) A notice filing for a security that is a federal covered security under 18(b)(3) ~~of~~ or (4) of the Securities Act of 1933 shall consist of:

(a) a letter explaining that the security is a federal covered security pursuant to 18(b)(3) ~~of~~ or (4) of the Securities Act of 1933;

(b) through (2) remain the same.

AUTH: 30-10-107, MCA
IMP: 30-10-107 and 30-10-201, MCA

JOHN MORRISON, State Auditor
and Commissioner of Securities

By: /s/ Karen E. Powell
Karen E. Powell
Deputy Securities Commissioner

By: /s/ Patrick M. Driscoll
Patrick M. Driscoll
Rules Reviewer

Certified to the Secretary of State on September 27, 2004.

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

In the matter of the repeal of ARM 12.9.204 pertaining to Lone Pine Game Preserve) NOTICE OF REPEAL

TO: All Concerned Persons

1. On May 6, 2004, the Fish, Wildlife and Parks Commission (commission) and the Department of Fish, Wildlife and Parks (department) published MAR Notice No. 12-306 regarding a public hearing on the proposed repeal or amendment of ARM 12.9.204 pertaining to Lone Pine Game Preserve at page 1101 of the 2004 Montana Administrative Register, Issue Number 9. On July 22, 2004, the commission and department published MAR Notice No. 12-309 extending the public comment period on the proposed repeal or amendment at page 1552 of the 2004 Montana Administrative Register, Issue Number 14.

2. The agency has repealed ARM 12.9.204 as proposed in Option A.

AUTH: 87-1-301, MCA
IMP: 87-1-305, MCA

3. According to the first rule proposal notice, the public comment period ended June 4, 2004. The public hearing was held at 7:00 pm at Lone Pine State Park on June 2, 2004.

The draft Environmental Assessment (EA) for the Abandonment of the Lone Pine Game Preserve included three alternatives:

- Alternative A is the no-action alternative or status quo; leave the preserve as is.
- Alternative B proposes the commission and department abandon all of the preserve. This is the preferred alternative.
- Alternative C would remove the preserve from just the applicants' land, Spring Brook Ranch, about 1,000 acres.

Department staff issued the draft EA for abandoning all or a portion of the Lone Pine Game Preserve on May 10, 2004, to 42 interested individuals, organizations, or agencies. The department also placed paid legal ads in the two local daily newspapers in Flathead and Lake counties on May 10, 2004. Legal ads were published May 15 in the Daily Interlake (Flathead County) and May 20 in the Missoulian for Lake County. The department issued a press release to all major news organizations on May 13, 2004. The Daily Interlake published a major article on the proposed abandonment on May 25, 2004. All these notices mentioned public comment would be taken through June 10, 2004.

On June 9, 2004, a guest opinion by Jay McCadden opposing the abandonment of the Lone Pine Game Preserve was published in the editorial section of the Daily Interlake. A follow up guest opinion supporting the petition by Jim Watson was published in the same paper on June 12, 2004.

At least 25 members of the public signed in at the public hearing at Lone Pine State Park, 7:00 pm on June 2, 2004. Of these, 13 testified in favor of the commission and department abandoning some or all of the Lone Pine Preserve while four spoke in opposition of abandoning the preserve.

On June 11, the commission and department received a request for a time extension for public comments due to the lateness of the Daily Interlake article with respect to the public hearing and the end of the public comment period. Also, this individual felt the applicants had much more time preparing their case and getting people to the hearing than any opposition. In mid-July, the commission and department agreed to extend the public comment period until August 13, 2004.

On July 14, 2004, commission and department also issued a press release to all news organizations in the region announcing the extension for the Lone Pine Preserve Abandonment until August 13, 2004. On July 15, 2004, the commission and department mailed postcards to members of the public that submitted comments through the mail (45 addresses) and emailed the same information to those that commented electronically (10 addresses). On July 16, 2004, the commission and department sent legal ads to the two daily newspapers in Flathead and Lake Counties notifying the public of the public comment extension; these legal ads were published on July 21, 2004, and July 22, 2004, respectively.

In all, the department received a total of 54 comments from 45 parties (people or organizations) including two comments from the petitioners or their attorney on the proposed rule change. Of the 54 comments, 16 came from public testimony at the public hearing, 16 from letters, 12 by email, 8 by phone or phone message, and 2 in person.

Nearly all the commenters were residents from the preserve. There were 17 parties (20 comments) in favor of Alternative A or the No Action Alternative. There were an equal number of unique parties (17 parties making 22 comments) completely supporting Alternative B, to abandon the entire Lone Pine Preserve. In addition, there were 7 parties supporting Alternative C only, remove the preserve status from just the Spring Brook Ranch including 2 comments from petitioners or their attorney. Several individuals supported one or more alternative: One supported A or B but not C; three supported A or C.

The following comments were received and appear with the commission and department's responses:

COMMENT 1: Safety was mentioned as a concern in 27 comments of the 54 received, particularly from those parties supporting Alternative A, no action, and/or Alternative C, Spring Brook Ranch only. These individuals felt there were too many people now living in the preserve on small lots or in subdivisions for shooting to be safe. They were also concerned about the safety of people on their horses, their livestock, and when they were engaged in recreation (walking, hiking, trail riding, bike riding) in and around the preserve. Some mentioned major concerns with rifle use in the area if the preserve were removed. Many of these residents mentioned that they did not have covenants in their neighborhoods that restricted either shooting or hunting.

RESPONSE: Similar to other areas in the Flathead Valley, the department does not believe that the hunting or shooting that might occur under alternative B (abandon the preserve) or C (Spring Brook Ranch only) will significantly affect safety levels from what they are today within the preserve. Several of the neighborhoods along Orchard Ridge and off Lone Pine Road do have some protective covenants for shooting and/or hunting. However, the commission and department do recognize that many smaller lots are not in subdivisions and do not have covenants that address shooting or hunting.

However, the commission and department believe that most people are reasonable. Because the Lone Pine Preserve consists almost entirely of private land (excluding Lone Pine State Park which is closed to all shooting and hunting), most of the residential and small lot landowners will probably not permit others to shoot or hunt with a firearm in places where these activities would not be safe. These private landowners, could, however, allow archery hunting or possibly shotgun use given appropriate terrain and other factors. The commission and department's recent history with requests to abandon game preserves does not support that there would be a dramatic change in safety for residents. Since 1982 the following game preserves have been abandoned: Augusta (1982), Green Meadow (2003), Manhattan (1990), Skalkaho (1996), and Warm Springs (1990). Brinkman game Preserve (1984) and Teton Spring Creek Preserve (2004) have had boundary adjustments, decreasing the amount of land within the preserves. There is no evidence to support a contention that these areas are less safe than other areas of the state where hunting is allowed.

The commission could consider a standard firearm restriction (shotgun, muzzle loader, handgun, archery only) for the Lone Pine Preserve area during the 2005 season-setting process that begins this November 2004. A decision to restrict firearm use applies only to hunting.

COMMENT 2: Two people disagreed with the draft EA about the safety impacts being "minor" if the preserve is abandoned. They

thought that if hunters or target shooters used rifles, the risk to safety was major.

RESPONSE: See also response to issue #1. Regarding general hunting safety, the 2003 edition of the Montana Hunter Education Manual published by the Montana Department of Fish, Wildlife and Parks published the following statistics:

Outdoor Activity	Number of Participants	Annual Injuries	Injuries per 100,000 Participants
Football	15,500,000	424,665	2,740
Bicycling	64,500,000	604,566	937
Swimming	60,300,000	130,286	216
Hunting-related Shooting	15,000,000	1,094	7

According to the National Safety Council, hunting is among the safest outdoor activities. In a 15-year period between 1984 and 1999, Montana had 138 hunting-related, firearms accidents. In 66 of those accidents, the shots were self-inflicted. In the 72 accidents where someone shot people, half were less than 10 yards away. Only six were shot by someone more than 100 yards away. Thirty-five of the accidents happened in getting in or out of a vehicle. The statistics do not support a significant change in risk to residents of the Lone Pine Preserve due to hunting.

There are also existing laws that protect people from unsafe shooting. Under 45-8-101, MCA, it is illegal to knowingly disturb the peace by making loud or unusual noises or discharging firearms, except at a shooting range during hours of operation. In addition, a person may not knowingly or negligently engage in conduct that creates a substantial risk of death or serious bodily injury to another, such as using a firearm in an unsafe manner. See, 45-5-207, MCA. This statute pertains to shooting undertaken in such a manner as to have the bullets or pellets move across property lines or to be hazardous to someone else. The County Sheriff's office has authority over these shooting instances. However the department is the appropriate entity to contact regarding hunting.

Additionally, the only public land in the Preserve is Lone Pine State Park, administered by the department. This park is closed to all hunting and shooting. Anyone shooting into the Park would be violating the law.

COMMENT 3: Nine comments addressed preferred types of firearms that could be legally used under alternatives B and C. Six favored a firearm restriction while three favored legal use of all firearms.

RESPONSE: Since the Lone Pine Game Preserve is within the boundaries of hunting district 120, the regulations that apply to this hunting district apply to the abandoned game preserve. The existing hunting district 120 regulations allow all legal use of firearms. The commission could apply a standard firearm restriction (shotgun, muzzle loader, handgun, archery only) for the abandoned area(s) of the Lone Pine Preserve. Usually, the commission adopts firearm restrictions after gathering public comment during the normal annual season-setting process. Scoping for issues for the next season-setting process is fall 2004 with decisions on season dates or firearm restrictions due in January 2005. The next season-setting process applies to the 2005 hunting season. A decision to restrict firearms within any area withdrawn from the preserve by the commission would apply only to hunting and not other legal forms of gun use such as target practice. However, as stated in the department's response to comment two, shooting of any kind must be done in a manner that does not threaten or harm anyone else or trespass across property boundaries.

COMMENT 4: Several individuals stated that the existence of the preserve was the reason they lived where they lived. Removing it would negatively affect their lifestyle and quiet neighborhoods by increasing noise and decreasing their property values.

RESPONSE: The commission and department recognize that the Lone Pine Game Preserve was established more than 60 years ago and its restriction on hunting and shooting has become important, one way or another, to many residents. A change in preserve status could affect lifestyles either positively or negatively depending on one’s point of view. Some residents indicate they would like to maintain an area where shooting and hunting are restricted in a rural setting and that this will maintain or enhance their lifestyle and property values. Others indicate that the preserve status is a problem, a lifestyle restriction denied to them, and an impediment to their ability to address wildlife problems that affect them economically (rodents, mountain lions, bears, deer). The reason the preserve was created in 1940 was to restore wildlife populations. According to 87-5-401(1), MCA "There are game preserves within the state for the better protection of all the game animals and birds within their limits".

Wildlife population goals for this area were achieved a long time ago. The commission and department would like residents to have some ability or flexibility to legally address wildlife issues on their own lands. In making decisions such as this one, the commission must balance a variety of interests and, as a result, will probably not be able to satisfy everyone.

COMMENT 5: Several comments focused on the fact that the public testimony at the public hearing was skewed to proponents as they had more time than other residents to contact individuals about

the issues and the hearing. One individual requested a formal extension of the public comment period because he believed he had inadequate time to review the proposals and comment.

RESPONSE: The commission and department recognized this concern after the comments were received and extended the public comment period through August 13. The department also promptly notified all attendees of the public meeting and those that already submitted comments as well as the rest of the previous mailing list about the extension. The department also placed legal ads in the two major daily newspapers and issued a standard press release. This extra time did allow for additional comment on the issue. The commission and department received another nine comments from the public during the extension.

COMMENT 6: Several people believed the problem of the existing rules governing game preserves that prohibit people from possessing firearms should be addressed legislatively. They thought the department and commission should propose legislation to amend 87-5-407, MCA, to allow people to possess firearms in preserves.

RESPONSE: Modifying 87-5-407, MCA, to allow for possession of firearms in game preserves only would address the gun possession issue but none of the other game damage, wildlife management issues outlined in the petition or the draft EA.

COMMENT 7: Several people suggested the petitioners and other landowners with problem predators such as mountain lions or coyotes could get relief through the existing permitting process identified in 87-5-401(2), MCA, of the preserve rules that allow landowners to take certain animals. One individual noted that the department actually failed to include reference to this statute in the draft EA and that this omission was an indication of department bias.

RESPONSE: The commission and department recognize that the provision in 87-5-401(2), MCA, was not included in the draft EA until this was pointed out just prior to the hearing. This was an inadvertent oversight of the statute and its provisions. The department recognizes that this part of the statute does allow the department to issue permits for depredating wildlife and fur bearing animals as well as for individuals carrying firearms. The statute 87-5-401(2), MCA, states:

"Permits to capture animals or birds for the purpose of propagation or for scientific purposes, to trap fur-bearing animals, to destroy mountain lions, wolves, foxes, coyotes, wildcats, lynx or other predatory animals or birds or to carry firearms may be issued by the director upon payment of the fee and in accordance with rules established for the preserve by the commission."

The department staff did identify this part of the statute at the public hearing and have since considered its use of the permit system as a way for landowners to address problem wildlife in the preserve.

At this point, the commission and department would not support the use of this exception because it requires creating additional rules, criteria, and other processes to implement and its implementation would be limited to a case-by-case basis. Wildlife issues rarely lend themselves to a single landowner problem as wildlife moves from one location to another. This approach also does not address the full gamut of wildlife issues. It is not a preferred approach to overall wildlife management of this area and would add a tremendous burden to the department for only a small gain in wildlife management flexibility.

The permit approach also does not address the full range of other issues affecting the landowners in the preserve. The petitioners and several other landowners have mentioned their need to control rodents and their desire for some hunting in a safe and ethical manner. These issues were some of petitioners' reasons for removal from the preserve, and this should have also been stated in the draft EA. The commission, department, and the petitioners recognize hunting as a valid tool for wildlife management that can be used to address game damage problems to property. As stated in the draft EA (page 9 under Summary Statement), "Abandoning the preserve will give landowners and the Department improved wildlife management options and private landowners the ability to control the amount and kinds of wildlife related recreational opportunities on their property. Additionally, abandonment will give the Department some degree of flexibility to address wildlife management concerns while improving compliance and enforcement capabilities."

COMMENT 8: This same individual also claims the draft EA is biased to the preferred alternative as it makes a blanket statement that "It appears the Commission intended to remove the preserve at some time after its establishment to allow hunting and trapping to once again to occur" and then offers no supporting evidence.

RESPONSE: As stated in "Game Management in Montana" by Tom Mussehl, 1977, the establishment of game preserves was one of the earliest conservation tools used by the department; the first preserve was established in 1911. According to Mussehl, "The number of game preserves increased to a maximum of 46 by 1935 and decreased thereafter" (pg 11). In the early 1900s, game populations had been at historically low levels and were in the process of being recovered through various means such as trapping and transplanting, protective laws and regulations, and release of captive reared wildlife. It was thought that the preserves would allow wildlife to recover and repopulate surrounding areas. It would be decades later after growing

complaints of property damage that the department began to remove game preserves. Since 1982, the commission had removed four game preserves and modified boundaries of two others as stated in the response to comment 1. The commission and department agree that the intent to reopen game preserves for hunting may not have been that clear during their time of establishment.

COMMENT 9: The same individual claims there are no distinctions between Alternatives B and C. "If any exception is made for one landowner, there no longer exists any basis to deny an "exception" for any others who petition the FWP."

RESPONSE: The commission agrees with this analysis and this is one of the underlying reasons the department's preferred alternative is the abandonment of the entire preserve.

COMMENT 10: This same individual noted that the draft EA's discussion of the alternatives "becomes more an editorial as to why the department would like to remove the preserve, rather than a balanced discussion of the alternatives."

RESPONSE: The purposes of the draft EA are to analyze and disclose the environmental effects of a proposed action or alternatives and to obtain public input on the issues associated with those actions or alternatives. We need and appreciate public input. Based on this input, the commission recognizes that there are some advantages of Alternative A. One advantage to some landowners would be their continuing to feel safer and to possibly have quieter neighborhoods than under the other two alternatives. One disadvantage of Alternative C is the potential for subsequent requests by other landowners to remove their lands from the preserve or later add them back in. One advantage of Alternative C over B for the petitioners is that alternative C most directly addresses their petition and does not affect as many landowners as Alternative B.

The benefits now identified for Alternative A are not the reasons for the preserve's establishment. The purpose of the Lone Pine Game Preserve was to restore game populations for the benefit of the public; this objective has long been reached. The commission's authority is for wildlife management and regulating how and where hunting, trapping, propagation, and other forms of wildlife management can take place. The department advises the commission and carries out that management. From our perspective, the preserve system is a disadvantage to our goals and objectives for wildlife management. The need for landowners and the department to address game damage and other wildlife issues is stated in the EA on page 6 under Alternatives B and C.

COMMENT 11: This same individual noted that the department should consider a balanced approach that includes removing the Preserve, offering limited hunting/shooting by short-range

firearms in some areas, retaining a moratorium on hunting/shooting in some areas (related to lot size, proximity to Lone Pine State Park) and allowing predator control where necessary and safe. The department should "make every attempt to determine a solution that provides the highest satisfaction rather than just choosing [that] which is simple to implement."

RESPONSE: The commission believes removal of the entire preserve is the best approach to wildlife management in this area. The commission has had recent experience with trying to draw and redraw boundaries for various firearm restrictions in the Teton-Spring Creek preserve area, and this has been frustrating and time-consuming as well as an ineffective process with respect to deer and land management objectives. Boundary adjustments for various firearms could be requested continually resulting in confusion and frustration for landowners and the public.

Additionally, the commission believes the permit process allowed by the preserve statute is cumbersome and does not address other game damage complaints. Abandoning the entire preserve would give the ability of managing firearm use and legal wildlife management to the private landowners. Some would choose to exercise these rights while some would not. Except for Lone Pine State Park which is closed to hunting or shooting, the entire area is private.

In terms of firearm restriction for the entire area, the commission could consider a firearm restriction during the fall 2005 hunting season-setting process. This option might help address safety concerns associated with changes resulting from abandonment.

COMMENT 12: Two individuals noted that the existing conservation easement for the Spring Brook Ranch did not exclude game farms or fee hunting. The property already has game proof fences all around it. The removal of preserve status might allow the ranch owners to charge for "canned hunts."

RESPONSE: The conservation easement prohibits a game farm on the east half of the ranch. Additionally, I-143, passed in the November of 2000 general election, already prohibits "canned hunts." More importantly, I-143 prohibits the granting of any additional alternative livestock (game farm) licenses. The petitioners do not hold an alternative livestock license, so their property could not become an alternative livestock ranch in the future under I-143.

The petitioners did not mention outfitting or fee hunting as reasons for the removal of their ranch from the preserve. They did mention that the ranch might be used for horseback riding, cross country skiing and wildlife viewing in the future. Spring Brook Ranch is private property. If the owners wanted to

provide fee hunting through outfitting, they have the right to do so if allowed by their conservation easement.

COMMENT 13: Two commenters noted that if the commission and department allow Spring Brook Ranch out of the preserve, others will also petition to be let out. This is opening Pandora's box. Several people felt it should be an all or none decision.

RESPONSE: The commission and department agree that the potential for others to petition the department for inclusion or exclusion from the preserve is a major issue under alternative C. At least five other landowners within the preserve testified at the public hearing that they wanted to be added to the area to be abandoned. Immediately after the boundaries of the Teton Spring Creek Bird Preserve near Choteau were changed, the commission and department were petitioned to remove another landowner and, again, adjust the boundaries. Continued petitioning for removal is not a desirable outcome of this process. This is one of the reasons the department's preferred alternative is to abandon the entire preserve.

COMMENT 14: At least five individuals that supported alternative C felt that shooting or hunting on the ranch can be done in a safe and responsible manner.

RESPONSE: The commission and department also believe that to be true. The commission and department also believe that hunting on many other lands could also be done in a safe and responsible manner and would provide the best scenario for managing current wildlife populations.

COMMENT 15: One individual thought that the abandonment would result in local police monitoring the improper hunting on private land, rather than fighting other crimes.

RESPONSE: Presently, the department responds to any reported hunting activity within the preserve while the Sheriff's Office responds to any shooting or unsafe conduct outside of the hunting season. The city police respond to any shooting within the city boundaries, a portion of which is included in the Lone Pine Game Preserve. If the commission and department decided to abandon the preserve, these same entities would investigate any complaints of misconduct or illegal activity that might still occur.

COMMENT 16: Two individuals believed the wildlife should be left alone; they wanted to enjoy the wildlife.

RESPONSE: The commission and department believe that wildlife populations are healthy and at a level where they are causing crop and private property damage, at least in some areas of the preserve. If landowners do not want shooting or hunting, they can close their lands. The commission and department recognize that hunting or shooting can affect wildlife movements. There

is a strong likelihood that deer and other wildlife will remain relatively abundant and visible in the more developed areas and within the Lone Pine State Park. Under any alternative, Lone Pine State Park will still remain an area where the public can continue to view wildlife and where hunting and shooting cannot occur.

COMMENT 17: One person mentioned that they were not opposed to predator control but felt residents could go across the road to hunt.

RESPONSE: The commission and department acknowledge that hunting recreation does occur in the rest of HD 120. However, this does not address all the reasons for the petitioners' request nor the commission's and department's desire to allow some types of wildlife management to occur within the preserve.

COMMENT 18: One individual believed that lifting the preserve wouldn't make any difference in populations of deer or their predators because wildlife can come and go from the preserve now.

RESPONSE: The commission and department acknowledge that this is true; most larger animals such as deer, lions, or coyotes will move to and from the preserve. The commission and department also recognize that if a problem animal such as a mountain lion is removed from an area, in time another animal could likely take its place. That is one of the reasons why the department believes it is more effective to allow landowners the flexibility to manage wildlife within the constraints of the rules governing hunting on their own property.

COMMENT 19: Of the 18 supporters for Alternative B, nine individual parties mentioned wildlife problems they experience as a reason to support this alternative. Several of these were landowners requesting that they be excluded from the preserve. Specific wildlife problems identified included rodent damage to crops, hay fields, or horse pastures; deer or turkey damage; and concern for too many predators, particularly mountain lions, but also others such as coyotes and skunks. One landowner mentioned loss of sheep due to dogs and another mentioned loss of chickens to various predators.

RESPONSE: The commission and department have found that most of these recurring wildlife damage problems are best addressed by landowners using legal hunting seasons and means for controlling problem animals. Often in residential/agricultural settings such as this one, deer, turkeys, skunks, raccoons, and ground squirrels can increase to such a point that they cause significant property damage. By abandoning the preserve, the commission and department allow affected landowners to direct control efforts to problem-causing animals. Under preserve status, landowners do not have a legal means to satisfactorily address these types of recurring problems. In the bigger

picture and over time, depending on what populations of animals, such as deer, do, the commission has the ability to regulate the take of animals through our general season-setting process if too much wildlife is harvested.

COMMENT 20: Two residents requested that they also be excluded from the Lone Pine Game Preserve because they wanted the ability to target practice or use guns to train dogs.

RESPONSE: The commission and department recognize that these activities will likely occur as a result of abandoning the preserve, except within Lone Pine State Park and that portion of Lone Pine Preserve that is now within the Kalispell city limits. If these activities are not undertaken in a safe manner within the confines of the landowner's land and permitted by the landowner, affected residents can contact the local authority (county sheriff) to address their concerns.

COMMENT 21: One small landowner wants the ability to shoot or control dogs taking her sheep.

RESPONSE: Contacting the dog owners is the preferable means for dealing with a dog that kills livestock. However, under 81-7-401, MCA, the owner of the livestock may kill a dog that harasses, destroys or injures livestock.

By: M. Jeff Hagener
M. Jeff Hagener,
Secretary Fish, Wildlife and Parks Commission and
Director of the Department of Fish, Wildlife and Parks

By: Martha Williams
Martha Williams
Rule Reviewer

Certified to the Secretary of State September 27, 2004

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.50.215 pertaining to disposal of junk vehicles through state disposal program	NOTICE OF AMENDMENT (JUNK VEHICLE)

TO: All Concerned Persons

1. On April 22, 2004, the Department of Environmental Quality published MAR Notice No. 17-211 regarding a notice of public hearing on the proposed amendment of the above-stated rule at page 885, 2004 Montana Administrative Register, issue number 8.

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

3. No public comments or testimony were received.

Reviewed by: DEPARTMENT OF ENVIRONMENTAL QUALITY

David R. Rusoff By: *Jan P. Sensibaugh*
DAVID R. RUSOFF JAN P. SENSIBAUGH, DIRECTOR
Rule Reviewer

Certified to the Secretary of State, September 27, 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 AMENDMENT (SEPTAGE CLEANING AND DISPOSAL)

TO: All Concerned Persons

1. On October 30, 2003, the Department of Environmental Quality published MAR Notice No. 17-201 regarding a notice of public hearing on the proposed amendment of the above-stated rules at page 2350, 2003 Montana Administrative Register, issue number 20. On April 8, 2004, the Department published MAR Notice No. 17-208 regarding a Notice of Extension of Comment Period on Proposed Amendment of the above-stated rules at page 698, 2004 Montana Administrative Register, issue number 7.

2. The Department has amended ARM 17.50.802 and 17.50.815 exactly as proposed, and has amended ARM 17.50.803, 17.50.809, 17.50.811, 17.50.812 and 17.50.813 as proposed but with the following changes, stricken matter interlined, new matter underlined:

17.50.803 LICENSURE, LICENSE APPLICATION, ANNUAL RENEWAL

(1) Except as provided in 75-10-1210, MCA, a person may not engage in the business of cleaning cesspools, septic tanks, portable toilets, privies, grease traps, car wash sumps, or similar treatment works, or disposal of septage and other wastes from these devices, unless licensed by the department. A person wishing to engage in any of these businesses shall submit an application for a license to the department on a form provided by the department. A person wishing to renew a license shall do so on the form provided by the department. The following information, if applicable, must be provided:

(a) through (g) remain as proposed.

(h) a certification by the local health officer or the local health officer's designated representative in the county where the business is located that:

(i) each vehicle used for surface application of septage is equipped with ~~proper~~ spreading ~~and screening~~ equipment that complies with ARM 17.50.811; and

(ii) if, pursuant to ARM 17.50.811, the department has required the licensee or applicant to screen septage before applying it to land, that the licensee or applicant has screening equipment or a device that complies with ARM 17.50.811.

(2) Before a licensee places a new vehicle in service, the licensee shall have the vehicle inspected by the local health officer or the local health officer's designated representative,

either in person or, if the vehicle is readily identifiable in a photograph, by submission of a photograph. The licensee shall ~~and~~ provide the department with the certification required in ~~the previous sentence~~ (1)(h).

(3) Only one certification required in (1) must be submitted to the department during the service life of a vehicle, screening equipment, or device.

(4) To obtain the certification of screening equipment or a device that is at a fixed location, a licensee may either:

(a) request the local health officer or designated representative, or the department, to inspect it at the fixed location; or

(b) if the location is readily identifiable in a photograph, submit a photograph of the equipment or device to the local health officer or designated representative.

(2) through (2)(l) remain as proposed, but are renumbered (5) through (5)(l).

(m) a proposed disposal operation and maintenance plan for each land application site including provisions for access control, if necessary, and the types and sources of wastes to be managed on the site. The operation and maintenance plan must include a description of the vector attraction reduction and pathogen reduction methods proposed for use on the site and a listing of equipment available for managing each type of waste~~;~~. At the request of the local health officer or designated representative of the county where a land application site is located, the department shall mail a copy of the operation and maintenance plan to that person;

(n) through (p) remain as proposed.

(q) for land application sites, a certification by the landowner, facility manager, or authorized representative of the landowner, that the ~~landowner~~ person making the certification is aware that:

(i) through (iv) remain as proposed.

(3) through (10) remain as proposed, but are renumbered (6) through (13).

17.50.809 SPECIFIC SITE CRITERIA (1) through (14) remain as proposed.

(15) The local health officer or the local health officer's designated representative may reject sites for public health or public nuisance problems or for proximity to ~~neighbors or~~ public water supplies, but in no case may a site be within 500 feet of an occupied or inhabitable building or within 100 feet of a drinking water source.

(16) The local health officer or the local health officer's designated representative may withdraw approval of previously approved sites ~~due to changing land use patterns~~ if:

(a) the site has not been properly managed for vectors or litter;

(b) waste has been applied in excess of the agronomic rate or improperly applied;

(c) the minimum separation distances as required in this rule are not being met; or

(d) the site is in proximity to new ~~drinking water sources or~~ public water supplies.

17.50.811 OPERATION AND MAINTENANCE REQUIREMENTS FOR LAND APPLICATION OR INCORPORATION OF SEPTAGE (1) through (8) remain as proposed.

(9) A person ~~applying~~ required by this rule to screen septage prior to application to land shall first screen the septage with a screen having a maximum opening width of three-quarters of an inch to remove non-putrescible wastes and shall dispose of the non-putrescible wastes in a Class II solid waste management facility licensed in accordance with 75-10-221, MCA. Screening is not required during the months of December, January, or February, but nonputrescible wastes must be removed from the land application site within one week after the snow melts.

(10) remains as proposed.

(11) If the department determines that a licensee's litter control has been inadequate, it may require that a licensee screen septage prior to future land applications. The department may also take any other action provided by law or rule.

17.50.812 INSPECTIONS AND ENFORCEMENT (1) The department and local health officers or local designated health representatives may conduct inspections of proposed disposal facilities for septage and other wastes regulated under this subchapter. Upon request, an inspector shall present credentials.

(2) and (3) remain as proposed.

17.50.813 RECORDKEEPING REQUIREMENTS (1) and (2) remain as proposed.

(3) A ~~l~~licensee~~s~~ shall submit a summary of the records required in (1) to the department on the following schedule:

~~(a) for the period of January 1 through March 31, by April 15;~~

~~(b) for the period of April 1 through June 30, by July 15;~~

~~(c) for the period of July 1 through September 30, by October 15;~~

~~(d) for the period of October 1 through December 31, January 15.~~

(a) for the period of January 1 through June 30, by July 15;

(b) for the period of July 1 through December 31, with the annual license renewal.

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

17.50.803 LICENSURE, LICENSE APPLICATION, ANNUAL RENEWAL and 17.50.812 INSPECTIONS AND ENFORCEMENT

COMMENT NO. 1: The Department received a number of comments on (1)(h), which would require inspection of screening and spreading equipment. Two comments supported the proposed amendment; three opposed it; two comments cited cost considerations; one comment requested that the word "or" be inserted into the requirement; and one comment inquired if current trucks would be "grandfathered."

RESPONSE: The Department has amended the proposed rule to address the cost concerns by allowing for the use of photographs for compliance verification. This would remove the necessity for county officials to conduct site visits of remote sites or for the regulated community to make a special trip with its pumper truck. The Department agrees with the comment on the insertion of the word "or" because not all pumpers will be required to screen. The rule has also been amended to make it clear that the inspection for screening devices is done only if the devices are required. See Comment No. 8. The proposed rule has also been amended to clarify that a screening and/or spreading device needs to be inspected only once in its service life. This certification will be part of the annual license renewal during the first year that the rule is applicable. In this case it will be the December, 2004, renewal period. No one will be "grandfathered."

The inspection of screening and spreading equipment is necessary to ensure that the licensee is properly equipped to land-apply material in a manner protective of human health and the environment. The requirement that trucks be inspected prior to being placed in service allows for the licensees to change and upgrade equipment while ensuring that each vehicle is properly equipped.

COMMENT NO. 2: The Department received a comment on proposed (2)(m), which requires that an applicant for a land application site provide an operation and maintenance plan, requesting that the Department supply local health departments with a copy of the operation and maintenance plan for land application sites.

RESPONSE: The Department will supply local health departments with the public records if requested.

COMMENT NO. 3: The Department received several comments on proposed (2)(p), which would require the submission of a sketch or map of the proposed land application site, the area available for land application after setbacks are met, and the distance from area houses. The comments stated that it is difficult to provide accurate maps to the department.

RESPONSE: The Department believes the proposed rule is clear in that a "sketch" is sufficient and does not require a survey or other elaborate mapping. The addition of (2)(p) is necessary because the map or sketch will inform the Department of the actual area available for land application and the

location of nearby neighbors. These items are necessary so the Department can evaluate the acreage available for land application and calculate the amount of septage that may be applied to a site. They will also alert the Department to possible conflicting uses in the vicinity of the site that may dictate alternative management practices that may need to be followed either regularly or on a seasonal basis. For example, some sites may need alkali treatment to avoid odor impacts, restrictions for the types of pumpings that can be placed on the site, or restrictions on site use during the winter. Topographic maps available to the Department are often outdated and do not reflect current site conditions. The addition of a simple sketch will facilitate the Department's site evaluation process and is not beyond the capabilities of the average person.

COMMENT NO. 4: The Department received comments objecting to the addition of (2)(q), which specifies that the owner of land application sites must certify the owner's awareness of crop, use, and access restrictions, and that inspections may occur. Comments requested that the Department provide 48 hour or five working days' written notice to the landowner and pumper, that the pumper or a representative be present and that the inspections could occur only during regular working or business hours and upon presentation of proper credentials. A comment was received that the manager of the land should be allowed to sign for the owner when the owner is absent or lives out-of-state.

RESPONSE: The proposed rule is necessary so that landowners are made fully aware of the consequences of allowing land application. For example, pastures that receive septage that has not been alkali-stabilized may not be grazed for 30 days after application. Landowners must also be aware that the application rate is dependent upon crop nutrient requirements and that proper management techniques must be followed. This is necessary because many landowners provide tillage services and crop management for the licensees and they need to be aware of the rule requirements.

Because the Department or local health officers or representatives may inspect disposal sites, it is appropriate to require an applicant or licensee to give the landowner notice and obtain the landowner's certification of awareness that the Department may inspect the landowner's property.

The following discussion is also relevant to ARM 17.50.812 that concerns inspections. The restriction suggested in the comment on Department inspections would unduly restrict the Department's ability to protect the environment by not allowing spot inspections or by restricting the time that the Department could inspect sites for violations. For example, if septage is land-applied at 2:00 p.m., the department might need to inspect the site after 8:00 p.m. to ascertain if the tillage requirements in ARM 17.50.811(3)(b) were met. This would be outside of "regular working hours" but necessary to verify compliance. The Department inspects required records during

"reasonable business hours" according to ARM 17.50.813(3) so as not to inconvenience licensees, but reserves the right to conduct inspections of land application sites or pH records contained in the truck as needed to ensure compliance.

Unannounced inspections are necessary to ensure compliance. Advance notification of all inspections would not allow the Department to determine if the sites were actually in compliance during normal operating conditions, i.e., at times at which inspections are not anticipated. The Department has amended ARM 17.50.812 to provide that its inspectors will present credentials if requested.

The Department agrees with the comment concerning absentee owners and inserted language to allow for notice of site use requirements to other appropriate parties.

17.50.809 SPECIFIC SITE CRITERIA

COMMENT NO. 5: The Department received several comments on proposed (1) objecting to the insertion of the term "inhabitable" and requesting that "inhabitable" be defined, because they felt that only inhabited structures should be subject to setbacks.

RESPONSE: This amendment is necessary to ensure that seasonally inhabited, or uninhabited buildings that may subsequently become inhabited, have the same setbacks as ones currently occupied. Many cabins are occupied only seasonally, and some buildings may be temporarily vacant. However, those residents should have the same health and environmental protection as residents of currently occupied buildings. While it is true that the owner of a currently used site may be restricted by future development, the property rights and health of adjacent landowners must also be respected. The Department believes that the common dictionary definition of "inhabitable," meaning a dwelling place, is sufficient for regulatory purposes.

COMMENT NO. 6: A comment was received that the reason for the denial of new or the withdrawal of previously approved sites in (15) and (16) should be for public health or nuisance reasons to be consistent with EPA guidance. A comment was also received that invoked the Montana definition of "nuisance" found in 27-30-101, MCA, and "public nuisance" found in 45-8-111, MCA. Comments were received that sites that operate in accordance with the rules should not be withdrawn simply because of nearby homeowner objection. Commentors opposed (16), which would allow local officials to rescind site approval based on changing local conditions. They felt that once a site was approved, it should remain permanently approved.

RESPONSE: The Department has amended proposed (15) for the denial of new sites to be more consistent with EPA guidance. Existing agricultural practices such as the beneficial application of septage may be allowed to continue even if the conditions change at neighboring properties, as normal agricultural operations are not a "nuisance." Since the rule is designed to protect human health and the environment, the

withdrawal of approval for a site or a portion of a site must be for reasons where the practices could harm either human health or the environment. Section (16) has been amended to include specific reasons for the withdrawal of site approval for poor operational practices or over-application of material. The proposed rule has also been amended to specify that site approval may be withdrawn if separation distances to inhabitable buildings, water supplies, or roads are no longer being met. Larger sites that can operate with the required setbacks would not have approval withdrawn because of new development.

COMMENT NO. 7: The Department received several comments objecting to (15). One commentor stated that the local health officer could revoke approval for illegitimate reasons and the other indicated that if leach fields could be placed, with a variance, within 50 feet of a well, septage should be able to be land-applied with the same separation.

RESPONSE: Proposed (15) and (16) listed specific causes for site rejection and revocation. The proposed rule is necessary because it allows local authorities flexibility in site approval based on local conditions, both current and future. Sites that would otherwise meet minimum Department criteria may not be acceptable from a local use point of view. Impacts to public water supplies would have a greater effect on more people than the possible impact to a single private well. Public water supplies are required to delineate source water protection zones. Land application in these zones could be a cause for concern to the users, and the local officials should have the ability to address these concerns. Proposed (15) and (16) have been amended to more closely reflect the language in EPA guidance. See the Response to Comment No. 6. This change requires that the local officials must have reason to reject for public health or public nuisance or withdraw site approval based on public health, or the location of new wells or public water supplies. The Department presumes that local officials will act in compliance with the rule in their dealings with the regulated community. According to ARM 17.36.323, which regulates the horizontal setbacks of sewage systems, there is no ability to waive the mandatory 100 foot separation between leach fields and wells. Land application sites are deemed to require 100 feet of separation because the allowable application rate of septage is at the total amount of nitrogen that the plants would need and the rule provides the proper protection for public health. The minimum 100 foot setback requirement for separation from wells in the proposed rule is the same as current requirements of ARM 17.50.809(4), which was not proposed for amendment.

17.50.811 OPERATION AND MAINTENANCE REUQIREMENTS FOR LAND APPLICATION OR INCORPORATION OF SEPTAGE

COMMENT NO. 8: A number of comments were received regarding the proposed screening requirement in (9). The comments centered on the technical impracticability in winter, the cost of screening, and the lack of screen specification.

Current licensees stated that the Department was proposing difficult requirements on all pumpers based on the actions of a few. Three persons additionally commented that the use of dispersive mechanisms was a good thing.

RESPONSE: Section (9) requires a licensee to screen septage prior to land application to remove wastes that do not decompose. Section (10) requires haulers to apply the wastes in a dispersed manner by using a splash plate or spreader bar. The sections were proposed to address two of the most significant causes for complaints at septage land application sites -- litter and the application of wastes in a narrow stream directly from the truck. The use of a screen to remove litter from septage and the use of a splash plate is recommended by the USEPA in its publication, "Process Design Manual, Land Application of Sewage Sludge and Domestic Septage", p. 136 (EPA/625/R-95/001). The application of septage in a narrow band suppresses vegetative growth in pastures, at least temporarily, whereas spread septage does not have the same effect and makes nitrogen available for immediate plant use. In response to the comments received, septage screening will not be required except in cases where litter control is inadequate. In response to comments, the Department modified proposed (9) to eliminate the mandatory screening requirement, to specify a 3/4" maximum screen opening, and to eliminate the requirement for screening during the winter months when the screens might possibly freeze.

The amendments should address most of the concerns expressed about technical issues. The Department has retained the screening requirement during the periods of the year when the vast majority of septage is pumped, for those sites where litter control is a problem. It would also keep the requirement during the period of the year when the most problematic waste stream is pumped, i.e., the vault toilets. The maximum opening of 3/4" was selected because that is the size that would catch the majority of the objectionable nonputrescible wastes while not obstructing flow and is also the size of a readily available construction material, expanded metal plate.

Department research indicates that the costs of screening wastes are minor. A simple screen box and steel splash plate could be constructed at a material cost of less than $100. This box, two feet in all dimensions, made out of expanded metal screen, 3/16" angle iron, and a 3/16" thick steel splash plate beneath the box, could readily be attached to the back of the truck beneath the tank outlet.

17.50.813 RECORDKEEPING REQUIREMENTS

COMMENT NO. 9: The Department received a number of comments regarding (3). Commentors stated that the reporting requirements were too onerous, little pumping was done in the winter quarter, the requirements were duplicative and paperwork-intensive, and that the EPA only requires a five-year record retention requirement.

RESPONSE: The proposed addition of new (3) would have required licensees to make quarterly reports of septic pumping

records to the Department. The Department agrees with the comments that this would place a significant paperwork burden on the licensees. The intent of the proposed rule changes can be satisfied with a semi-annual reporting of a summary of the actual kinds and amounts and an increased field inspection schedule. This will enable the Department to verify the amount and kinds of material generated and land-applied and enable the Department to better advise licensees if the Department notices applications approaching the agronomic uptake rate. By reviewing records in the office, the Department will provide a review for all licensees and not just the ones the Department was able to visit in the field. By requiring only a summary, the paperwork requirement is reduced.

The record retention time of five years specified in ARM 17.50.813(2) was not proposed for amendment and remains the same as the EPA requirement.

COMMENT NO. 10: The Department received several comments regarding the need for increased training by the Department for the licensees.

RESPONSE: While the Department agrees with the comments, they are outside the scope of the proposed rulemaking procedure. Increased training requirements cannot, therefore, be added.

DEPARTMENT OF ENVIRONMENTAL QUALITY

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

Reviewed by:

John F. North
JOHN F. NORTH, Rule Reviewer

Certified to the Secretary of State, September 27, 2004.

BEFORE THE DEPARTMENT OF TRANSPORTATION
OF THE STATE OF MONTANA

In the matter of the adoption of New Rule I, amendment of ARM 18.8.101, 18.8.204, 18.8.205, 18.8.420, 18.8.422, 18.8.504, 18.8.509, 18.8.510B, 18.8.511A, 18.8.902, and 18.8.1101, and the repeal of 18.8.203 and 18.8.208 concerning the Motor Carrier Services regulations for overdimensional vehicles and loads	)	NOTICE OF ADOPTION, AMENDMENT, AND REPEAL

TO: All Concerned Persons

1. On July 22, 2004, the Department of Transportation published MAR Notice No. 18-104 pertaining to the proposed adoption, amendment and repeal of the above-stated rules relating to the Motor Carrier Services regulations for overdimensional vehicles and loads, at page 1558 of the 2004 Montana Administrative Register, issue number 14.

2. The Department of Transportation has adopted rule I (18.8.1301) as proposed.

3. The Department of Transportation has amended ARM 18.8.101, 18.8.204, 18.8.205, 18.8.420, 18.8.422, 18.8.504, 18.8.509, 18.8.510B, 18.8.511A, 18.8.902, and 18.8.1101 as proposed.

4. The Department of Transportation has repealed ARM 18.8.203 and 18.8.208 as proposed.

5. The department received two comments supporting the proposed adoption, amendment and repeal of the above-stated rules. The department did not receive any public comment opposing the proposals.

6. The Department acknowledges and thanks the proponents for their comments.

DEPARTMENT OF TRANSPORTATION

/s/ James Currie
James Currie
Deputy Director

/s/ Lyle Manley
Lyle Manley, Attorney
Rule Reviewer

Certified to the Secretary of State, September 27, 2004.

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

In the matter of the amendment of ARM 8.32.405, licensure by endorsement, ARM 8.32.406, licensure for foreign nurses, ARM 8.32.412, inactive status, ARM 8.32.425, fees, ARM 8.32.501, grounds for denial of license, ARM 8.32.502, license probation or reprimand of a licensee, and ARM 8.32.1401, definitions, and the adoption of NEW RULES I (ARM 8.32.1413), II (ARM 8.32.1414), III (ARM 8.32.426), and IV (ARM 8.32.427), regarding licensure of medication aides	)	NOTICE OF AMENDMENT AND ADOPTION

TO: All Concerned Persons

1. On June 3, 2004, the Board of Nursing (Board) published MAR Notice No. 8-32-62 regarding the public hearing on the proposed amendment and adoption of the above-stated rules at page 1277 of the 2004 Montana Administrative Register, issue no. 11.

2. A public hearing on the proposed amendment and adoption was held on July 1, 2004. Members of the public testified at the hearing. Written comments were also received prior to the end of the comment period on July 9, 2004.

3. The Board has thoroughly considered all of the comments made. A summary of the comments received (grouped by rule) and the Board's responses are as follows:

ARM 8.32.405 LICENSURE BY ENDORSEMENT

Comment 1: The Montana Nurses' Association and Montana Hospital Association support the amendments relating to foreign educated nurses.

Response 1: The Board thanked the commenters for their comments.

Comment 2: One commenter noted that there was an error in the authority citation for this rule.

Response 2: A typographical error was made in the rulemaking authority citation in the rule notice. The correct citation should be 37-1-131 instead of 31-1-131.

ARM 8.32.406 LICENSURE OF FOREIGN NURSES

Comment 1: The Montana Nurses' Association and the Montana Hospital Association supported the proposed amendments relating to foreign educated nurses.

Response 1: The Board thanked the commenters for their comments.

Comment 2: Montana Hospital Association (MHA) believes that if a foreign educated nurse has passed NCLEX, it is reasonable to presume that the nurse has a functional level of English proficiency. MHA opposes requiring completion of the commission on graduates of foreign nursing schools (CGFNS) screening examination by nurses who were educated in countries other than those listed in the proposed amendment where the applicants have passed NCLEX, particularly if they have been practicing nursing in the United States for a number of years. MHA notes that English is broadly taught and spoken in Sweden and in other European countries, South Africa, parts of the Caribbean, and islands in the South Pacific. MHA notes that CGFNS is a slower and more complicated testing process than NCLEX.

MHA proposes the following language modification to ARM 8.32.406(2)(b): "...those applicants who have passed the NCLEX or the state board test pool examination or who have graduated from a college...". MHA further recommends that the board add to the rule other countries where college level education is provided in English and require verification that the applicant's education was provided in English.

In light of ARM 8.32.406 being applicable to both initial licensure and licensure by endorsement, MHA believes its proposed language modification is a more reasonable approach for streamlining the licensure process for those endorsement applicants who have already shown they meet safe practice requirements.

MHA recommends that (3) of the rule be eliminated and that LPNs be included in ARM 8.32.406(1) and (2) in order to make the process consistent for RNs and LPNs.

Response 2: Regardless of an applicant's work experience, the Board does not have the expertise or the means to objectively measure the person’s English proficiency except by relying on CGFNS, which is a nationally recognized program that performs that function for the Board. The Board notes that a person could pass NCLEX and hold a license in another state for a number of years without having actually worked in the nursing profession there. In addition, the Board points out that English is not necessarily the sole language or even the primary language spoken in some health care facilities in the United States, so work experience acquired in such facilities is not necessarily indicative of English proficiency.

The Board agrees that other countries where nursing education is conducted in English should be considered for exemption from the CGFNS requirements. While the proposed rule amendment was under consideration, CGFNS recommended the addition of Trinidad and Tobago to the list of foreign countries whose nursing program graduates are exempted from the CGFNS process. The National Council of State Boards of Nursing (NCSBN) adopted the CGFNS recommendation. Therefore, the Board deems inclusion of Trinidad and Tobago in its own list of foreign country exemptions in this rule to be appropriate.

CGFNS does not have an LPN NCLEX predictor exam and so the board has adopted separate processes for licensure of foreign LPNs.

Comment 3: To make the rule more user-friendly, the Department of Labor and Industry recommends that the list of foreign countries in ARM 8.32.406(2)(b) be alphabetized and set out in an earmarked format as follows:

(b) those applicants who have passed the NCLEX or the state board test pool examination and who have graduated from a college, university or professional training school located in:

(i) Australia;
(ii) Canada (except Quebec);
(iii) Ireland;
(iv) New Zealand; or
(v) United Kingdom.

Response 3: The Board agrees that listing the foreign countries in this rule in alphabetical order in an earmarked format would make the rule easier to use and to later amend if appropriate.

Comment 4: Nancy Heyer, RN, notes that the NCSBN recently added Trinidad and Tobago to the list of countries whose nursing school graduates are eligible to take the NCLEX without completing the CGFNS exam and she recommends that Trinidad and Tobago be added to the list of foreign countries in ARM 8.32.406(2)(b). Ms. Heyer states that historically the CGFNS requirement has been deemed obstructive to the licensure endorsements of persons outside the United States and she is happy to see progress made in the rules.

Response 4: The Board agrees that other countries where nursing education is conducted in English should be considered for exemption from the CGFNS requirements. While the proposed rule amendment was under consideration, CGFNS recommended the addition of Trinidad and Tobago to the list of foreign countries whose nursing program graduates are exempted from the CGFNS process. The NCSBN adopted the CGFNS recommendation. Therefore, the Board deems inclusion of

Trinidad and Tobago in its own list of foreign country exemptions in this rule to be appropriate.

ARM 8.32.412 INACTIVE STATUS

Comment 1: The Montana Nurses' Association and the Montana Hospital Association supported the proposed amendment.

Response 1: The Board thanked the commenters for their comments.

8.32.1401 DEFINITIONS, NEW RULE I (ARM 8.32.1413) PURPOSE OF STANDARDS OF PRACTICE FOR THE LICENSED MEDICATION AIDE, NEW RULE II (ARM 8.32.1414) STANDARDS RELATED TO THE MEDICATION AIDE'S RESPONSIBILITIES AS A MEMBER OF HEALTH TEAM, NEW RULE III (ARM 8.32.426) GENERAL REQUIREMENTS FOR LICENSURE AS MEDICATION AIDE and NEW RULE IV (ARM 8.32.427) GENERAL REQUIREMENTS FOR MEDICATION AIDE TRAINING PROGRAMS AND INSTRUCTORS

Comment 1: The Montana Nurses' Association (MNA) supports the proposed amendment and new rules and appreciates that the Board worked with a variety of groups on the medication aide issue and rules. MNA is pleased that the Board was given the regulatory oversight of medication aides because the Board understands the role of nurses in assuring patient safety. MNA believes that the rules reflect an effort to assure optimum patient care by putting safeguards in place, which are important due to the significant number of medication errors that occur in the health care system. The MNA reiterates its position that while medication aides may be appropriate in assisted living facilities, the MNA continues to oppose allowing the administration of medication by this type of worker in nursing homes and acute care facilities due to the fragile condition of patients in those settings.

Comment 2: The Montana Hospital Association (MHA) supports the new rules relating to medication aides and appreciates having been invited by the Board to collaborate in the drafting of these rules.

Comment 3: The Montana Health Care Association (MHCA) supports the proposed New Rules I through IV and all other rules relating to the medication aides. Assisted living is the service of choice for many and it is a cost-effective service. The proposed new rules that allow for administration of medication by medication aides in assisted living facilities provide strong protection to residents and keep more options regarding their care open to the residents. The rules also allow assisted living facilities to continue to provide cost-effective services.

MHCA expressed appreciation for the collaborative approach in the drafting of the rules that allowed for input from many sources. MHCA had no suggestions for changes.

Comment 4: Balaly Richardson expressed concern that the language used in the exam for medication aides not be so complicated that people without college educations would have difficulty understanding it. She also expressed concern about the number of aides that would be required per shift.

Response 1-4: The committee that reviewed and recommended a medication aide education program and exam for Board approval noted that the selected program and exam are in wider use than others around the country. The committee determined the selected exam was superior to some others because the content was more thorough relating to drug interactions and reactions. Committee members recalled that the exam is written to be understood by persons with a sixth grade education.

The Board has no jurisdiction over staffing issues and the new rule does not address staffing issues.

Comment 5: One commenter noted that "opthalmic" was spelled incorrectly as it should be spelled "ophthalmic".

Response 5: The Board thanked the commenter for the notification of the incorrect spelling and the rule will be changed accordingly.

4. After consideration of the comments, the Board has amended ARM 8.32.412, ARM 8.32.425, ARM 8.32.501 and ARM 8.32.502, and has adopted NEW RULES I (ARM 8.32.1413), II (ARM 8.32.1414), III (ARM 8.32.426) and IV (ARM 8.32.427), exactly as proposed.

5. After consideration of the comments, the Board has amended ARM 8.32.405, ARM 8.32.406 and ARM 8.32.1401 as proposed, with the following changes (stricken matter interlined, new matter underlined):

8.32.405 LICENSURE BY ENDORSEMENT (1) through (4) remain as proposed.

AUTH: ~~31-1-131~~, 37-1-131, 37-8-202, MCA
IMP: 37-1-304, MCA

8.32.406 LICENSURE FOR FOREIGN NURSES (1) through (2)(a) remain as proposed.

(b) those applicants who have passed the NCLEX or the state board test pool examination and who have graduated from a college, university or professional school located in ~~Australia, Ireland, New Zealand, Canada, (except Quebec) or the United Kingdom.~~:

(i) Australia;

(ii) Canada (except Quebec);
(iii) Ireland;
(iv) New Zealand;
(v) Tobago;
(vi) Trinidad; or
(vii) United Kingdom.
(3) remains as proposed.

AUTH: 37-1-131, 37-8-202, MCA
IMP: 37-8-101, 37-8-406, 37-8-416, MCA

8.32.1401 DEFINITIONS As used in this sub-chapter, the following definitions apply:
(1) "Allowable routes" means oral, sublingual, topical, ~~opthalmic,~~ ophthalmic, otic, nasal, and inhalant methods of administration, except as otherwise provided by rule.
(2) through (13) remain as proposed.

AUTH: 37-1-131, 37-8-202, MCA
IMP: 37-1-131, 37-8-101, 37-8-102, 37-8-202, 37-8-422, MCA

BOARD OF NURSING
KAREN POLLINGTON, RN, CHAIRMAN

/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 September 27, 2004

BEFORE THE STATE BOARD OF LAND COMMISSIONERS AND
THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 36.25.128, repeal of ARM 36.25.129 and 36.25.130, and adoption of new rules I through XVII regarding land banking	)))))	NOTICE OF AMENDMENT, REPEAL AND ADOPTION

TO: All Concerned Persons

1. On July 1, 2004, the Board of Land Commissioners published MAR Notice No. 36-25-97 regarding the public hearing on the proposed amendment, repeal and adoption of the above-stated rules relating to land banking, at page 1452 of the 2004 Montana Administrative Register, issue no. 13.

2. The Board has amended ARM 36.25.128 exactly as proposed.

3. The Board has repealed ARM 36.25.129 and 36.25.130 exactly as proposed.

4. The Board has adopted New Rules II (36.25.802), VI (36.25.807), VIII (36.25.809), IX (36.25.810), X (36.25.811), XI (36.25.812), XII (36.25.813), XIII (36.25.814), XIV (36.25.815), XV (36.25.816), and XVI (36.25.817) exactly as proposed.

5. The Board has adopted the following rules as proposed but with the following changes, stricken matter interlined, new matter underlined:

NEW RULE I (36.25.801) DEFINITIONS As used in this subchapter, the following definitions apply, except where the context clearly indicates otherwise:

(1) through (10) remain as proposed.

(11) "Lessee" means the current lease holder of any agricultural, grazing, commercial, cabin or home site, or other surface lease of state trust land.

(11) remains as proposed but is renumbered (12).

~~(12)~~ (13) "Parcel" means one section ~~(640 acres)~~ or less~~, irrespective of ownership,~~ that can be identified by legal description, independent of any other parcel of land, using documents on file in the records of the county clerk and recorder's office or in the department's records.

(13) through (16) remain as proposed but are renumbered (14) through (17).

NEW RULE III (36.25.803) CONSIDERATIONS IN THE SALE OF STATE TRUST LAND PURSUANT TO LAND BANKING

(1) through (4) remain as proposed.

(5) If the sale of a parcel would extinguish ~~historic~~ access to adjacent private land, the department shall provide an opportunity for the landowner to make application to purchase an easement under 77-1-107, 77-1-130, or 77-2-101, MCA.

(6) remains as proposed.

NEW RULE IV (36.25.805) PROCEDURES FOR NOMINATING AND EVALUATING STATE TRUST LANDS FOR SALE PURSUANT TO LAND BANKING

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

(e) When a parcel is nominated, the department shall notify ~~the lessee of the parcel,~~ all persons holding a license on the parcel, ~~and~~ the representative of the trust beneficiary, and the lessee of the parcel if board or department nominated. Notice to the trust beneficiary must go to the representative identified for each trust affected by the proposed sale.

~~(4) The department shall conduct a preliminary review of each nominated parcel to determine whether further review is warranted. The department may consider the following factors in the preliminary review:~~

~~(a) the parcel produces low income, as calculated by:~~

~~(i) high market value and low return on asset;~~

~~(ii) high administrative costs relative to other similar parcels; or~~

~~(iii) the potential to increase productive capacity of the land is low;~~

~~(b) whether the parcel is isolated. On a non-isolated parcel, the department shall describe the existing level of access;~~

~~(c) the parcel's impact on the diversity of the overall asset portfolio and within its land classification;~~

~~(d) the extent of infrastructure, such as roads, utilities, power, telephone, water, or sewer availability;~~

~~(e) the estimated net annual income from the parcel, based on information in the "Report on the Return on Asset Value By Trust and Land Office for State Trust Land";~~

~~(f) the potential for appreciation or depreciation in the value of the parcel, based on the best available information from the local real estate market;~~

~~(g) the parcel's potential for development or value added activities that complement local and statewide economic development;~~

~~(h) whether and to what degree the sale of the parcel would affect access to other public lands; and~~

~~(i) whether the parcel is adjacent to other public land or private land under conservation easement, as documented by current information in the Montana natural heritage program database or similar source.~~

(5) remains as proposed but is renumbered (4).

~~(6)~~ (5) After evaluation of the preliminary review and the MEPA analysis, ~~T~~ the department shall determine whether a parcel is suitable for sale and report to the board on the parcel's suitability for sale.

(a) If the department determines the parcel is not suitable for sale, the department may remove the parcel from nomination and eliminate the parcel from further review without board approval.

(b) The department shall post the report required by ~~[Rule IV(5)]~~ (4), including the MEPA analysis, in a dated notice on the department website or other equivalent electronic medium. The notice must be posted at least 15 days before the next meeting of the board.

(c) and (d) remain as proposed.

(e) Any person may appeal to the board the department's removal of a parcel from nomination within 15 days of the department posting the report on the website or other equivalent electronic medium. The board shall place the appeal on the next available agenda of a regularly scheduled board meeting no later than 15 days before the meeting.

(f) remains as proposed.

(7) remains as proposed but is renumbered (6).

~~(8)~~ (7) Upon the department's report to the board under ~~[Rule IV(5)]~~ (4), the board shall approve or reject the proposed sale.

(a) and (b) remain as proposed.

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

~~(10)~~ (9) Any person may commission, at that person's own expense, another appraisal from a list of department approved appraisers.

(a) through (c) remain as proposed.

(11) through (14)(c) remain as proposed but are renumbered (10) through (13)(c).

(d) all adjacent landowners of record;

(e) remains as proposed.

(f) the board of county commissioners in the county where ~~in which~~ the parcel is located;

(g) remains as proposed.

(h) any surface lessees by certified mail. The notice to lessees must include an estimate of costs necessary to complete the sale if the lessees nominated the parcel.

~~(15)~~ (14) If necessary, the department shall conduct a survey of the parcel or parcels proposed for sale. The department shall pay for the survey, to be reimbursed by the appropriate party under ARM 36.25.807(2)(c) or [Rule VII(7)~~(8)~~(d)] (36.25.808(7)(d)).

NEW RULE V (36.25.806) REQUIREMENTS FOR LAND BANKING EARNEST MONEY DEPOSIT (1) remains as proposed.

(2) If the lessee does not submit earnest money within 30 days of notice of availability for sale, the department shall remove the parcel from nomination unless conominated by the board or the department.

(3) remains as proposed.

NEW RULE VII (36.25.808) PROCEDURE FOR CONDUCTING STATE TRUST LAND SALES (1) through (5) remain as proposed.

(6) In accordance with 77-2-324, MCA, the lessee has the preference right to match the high bid.

(7) through (7)(c) remain as proposed.

(d) survey, if necessary; and

(e) water rights transfer.

(8) and (9) remain as proposed.

(10) If the final bidder who agrees to consummate the sale fails to comply with the terms of the sale for any reason, that bidder's bid deposit is forfeit and must be credited to the land banking fund, after deduction of sale costs incurred by the department if the department has returned their bid deposit.

6. The addition of New Rule XVIII (36.25.804) is necessary because it sets forth a preliminary rule process. Aspects of New Rule XVIII were taken from New Rule IV and expanded to create a preliminary review process.

NEW RULE XVIII (36.25.804) PRELIMINARY REVIEW OF PARCELS BEFORE NOMINATION (1) The department shall conduct a preliminary review of each parcel prior to nomination to determine whether further review is warranted. The department may consider the following factors in the preliminary review:

(a) the parcel produces low income, as calculated by:

(i) high market value and low return on the asset;

(ii) high administrative costs relative to other similar parcels; or

(iii) low potential to increase productive capacity of the land;

(b) whether the parcel is isolated. On a nonisolated parcel, the department shall describe the existing level of access;

(c) the parcel’s impact on the diversity of the overall asset portfolio and within its land classification;

(d) the extent of infrastructure, such as roads, utilities, power, telephone, water, or sewer availability;

(e) the estimated net annual income from the parcel, based on information in the "Report on the Return on Asset Value by Trust and Land Office for State Trust Land";

(f) the potential for appreciation or depreciation in the value of the parcel, based on the best available information from the local real estate market;

(g) the parcel’s potential for development or value-added activities that complement local and statewide economic development;

(h) whether and to what degree the sale of the parcel would affect access to other public lands; and

(i) whether the parcel is adjacent to other public land or private land under conservation easement, as documented by current information in the Montana natural heritage program database or similar source.

(2) Based on the preliminary review, the department will recommend to the nominator whether the parcel qualifies for nomination.

AUTH: 77-1-204, 77-2-308, 77-2-362, MCA
IMP: 77-2-328, 77-2-363, MCA

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

COMMENT 1: Neither DNRC nor the Land Board should sell lands that are surrounded by other public lands or that are habitat for threatened and endangered species unless they are purchased by the adjacent public land agency. DNRC should strive to work with other public landowners or holders of conservation easements to protect values of these lands.

RESPONSE 1: New Rule III(1) states that the board may only sell land completely surrounded by other public land if the board provides compelling reasons for sale.

New Rule III(3) states that the board may only sell land that is determined to be significant for threatened or endangered species if the board provides compelling reasons for sale.

Section 77-2-306(3), MCA, prohibits sale of state land to the federal government or to an agency of the federal government, except for the purposes of building federal facilities and structures. This limitation does not apply to tribal governments.

DNRC presently works with the Department of Fish, Wildlife and Parks to facilitate conservation easements. Section 77-2-101(1)(e), MCA, limits the scope of agencies and organizations DNRC can work with to create conservation easements.

COMMENT 2: Trust land provides more than just income to trust beneficiaries. The wildland resource provides an outdoor classroom for natural resource education pursuits. To merely put a cash flow value on the land without assessing its other values is a disservice to the school trust now and in the future.

RESPONSE 2: The Montana Environmental Protection Act (MEPA) process identifies those wildlands with unique or sensitive resource values, including wildlife and vegetation species, and archaeological and geological features. Those values are considered in the decision to retain or dispose of a nominated parcel.

COMMENT 3: Rule IV should include an assessment of the value of land proposed for sale by conducting an inventory of soils, vegetation, wildlife use, presence of sensitive, threatened and endangered species, mineral characteristics, public use, recreational use, aesthetic values, cultural values, surrounding land use, zoning, planning information, weeds,

floodplain information, water resources, fisheries, wetlands, and riparian characteristics.

RESPONSE 3: The MEPA analysis takes into account the items mentioned in Comment 3 and more.

COMMENT 4: There must be a mechanism for public notification of the MEPA scoping and analysis process as well as an opportunity for public comment. The rules must contain the provisions for requesting public input on the nominated parcels of land and outlining how the public can participate in the process.

RESPONSE 4: The Land Banking process will be on the DNRC website and open to public scrutiny. Once a parcel is nominated for sale or acquisition, it will be posted on the website concurrent with the initiation of the MEPA scoping process. The rules require ongoing updating of the status of any nominated parcel, posting the department report and recommendation to the board including the MEPA analysis and other documentation or recommendation by the department to the board.

The following parties are directly contacted by the department in the course of a sale or acquisition: lessee, licensee, beneficiary, Department of Fish, Wildlife and Parks, Department of Transportation, Department of Environmental Quality, adjacent landowners of record, and the board of county commissioners in the county(ies) in which the parcel is located.

COMMENT 5: How will DNRC and the Land Board factor in market conditions before selling or purchasing land? Prudent financial management requires that land be sold only in an optimum market to get the greatest monetary return for a particular parcel. Allowing the lessee to nominate a parcel and determine when the parcel is sold may not be in the best interest of trust, and is a conflict of interest.

RESPONSE 5: Real estate markets fluctuate with location over time. While rapid increases in value have occurred in the western portion of the state in recent years, a slow decline in prices has occurred in the eastern portion of the state. Due to the type of land specified by statute that can be sold, DNRC anticipates that much of the land nominated for sale will be in the eastern portion of the state. Land prices in this area vary by location, but generally are flat or depressed. This results in some state trust land depreciating in value. Divesting of land decreasing in value, and producing a low rate of return (for example, minimally productive rangeland for which the beneficiary receives the minimum grazing rate) and purchasing more productive land with a higher rate of return (for example, irrigated agriculture) is a prudent investment. Real estate investment incorporates both the

timing of the market and achieving a higher rate of return on the replacement investment.

COMMENT 6: How do the draft rules fit with the Real Estate Management Plan? If the Land Banking process has already identified land for sale, how will the nomination and evaluation process be consistent with the Real Estate Management Plan Proposed Environmental Impact Statement.

RESPONSE 6: Land Banking is one tool used to implement the Real Estate Management Plan. The goals of land banking are primarily to:

- Consolidate trust land ownership;
- Prudently maximize the sustained rate of return to the trust;
- Diversification of land holdings to minimize the risk of loss (diversify the trust land portfolio); and,
- Improve access to trust land.

These goals are consistent with the Real Estate Management Plan.

Additionally, DNRC is not required to sell every parcel of land nominated. We can choose among the parcels nominated to optimize market conditions and return to the trust, thus achieving the best possible outcome for the trust beneficiaries and the public.

COMMENT 7: The concept of selling state trust land to generate revenue to the trust is a flawed concept that will cost the state money over time. It is best to retain all state trust land for present and future generations.

RESPONSE 7: The state has had the right to sell state trust land. However, the proceeds of the sale were required to go into the permanent trust resulting in a net loss of trust land acreage. There was no provision to purchase replacement land.

The purpose of the land banking program is to "temporarily hold proceeds from the sale of trust land pending the purchase of other land, easements, or improvements for the benefit of the beneficiaries of the respective trusts".

With the advent of land banking in 77-2-361 through 77-2-367, MCA, it is now possible for the DNRC to sell land and put the proceeds in the land banking account. The combined funds from several sales can then be used to purchase higher income producing parcels, and replace acreage sold.

COMMENT 8: What is the method used to sell land? Why sell the surface and retain the mineral estate? How will the land be appraised?

RESPONSE 8: Trust land will be sold as per 77-2-321, MCA, at a public, oral auction, which will be advertised for a minimum of four consecutive weeks prior to the auction (77-2-322, MCA).

DNRC will advertise trust land to achieve the best possible price. We have negotiated a link between the DNRC land banking website and the Montana Association of Realtors (MAR) website, so all MAR members in the state will have information about our sale parcels. Other advertising options will be utilized to achieve the highest possible sale price on a parcel by parcel basis.

The state is statutorily prohibited from selling the mineral estate (77-2-304, MCA).

Trust land will be appraised by licensed appraisers. The appraisers will use the Uniform Appraisal Standards for Federal Land Acquisition (77-2-364(4), MCA). The minimum bid will be at or above the appraised value, and set by the Board of Land Commissioners.

COMMENT 9: Will there be a comprehensive inventory of all public resources on land prior to sale?

RESPONSE 9: An Environmental Assessment will be prepared for each parcel prior to sale as per 75-1-201 and 77-1-121, MCA.

COMMENT 10: "Isolated parcel" is not defined in the Draft Real Estate Management Programmatic Environmental Impact Statement.

RESPONSE 10: The definition of "isolated parcel" is found in the Land Banking statute (77-2-361(1), MCA) as "...any state land not possessing a legal right of access by the public".

COMMENT 11: The four parties that dissented the portion of rules requiring a written explanation for each finding of "no impact" on the Checklist Environmental Assessments (Checklist EA) provided individual testimony at the June 21, 2004 meeting of the Board of Land Commissioners. They felt it would set a new standard for Checklist EAs, thus potentially changing the standard for Checklist EAs across the board, including those of other state agencies, and those used in other DNRC decisions. The Checklist is used to avoid lengthy and unnecessary explanations of what is and is not an impact. If every "no impact" requires an explanation, what is the point of a Checklist EA? If someone wants to know the reason behind the finding of no impact, they need only to call DNRC. A suggested solution is to drop the last sentence of Rule V(5).

The dissenting parties were the Montana Association of Counties, the Montana Wood Products Association, the Montana

Farm Bureau Federation, and Montana Tech. They did not file a minority report.

The vote on the issue was 9 to 4, with one abstention.

RESPONSE 11: Under ARM 36.2.525 PREPARATION AND CONTENTS OF ENVIRONMENTAL ASSESSMENTS, (1), (2) and (2)(d) provide that state agencies determine the level of analysis that may take the form of an environmental assessment checklist and/or as appropriate, a narrative containing more detailed analysis.

Providing an explanation of "no impact" under an EA checklist does not change the level of evaluation from a checklist to a narrative that provides a more detailed analysis. Rather, requiring an explanation of "no impact" under a checklist EA provides that reader the rationale leading to a determination of "no impact".

COMMENT 12: The Montana Wildlife Federation, Skyline's Sportsman Association, Montana Audubon, and Montana Environmental Information Center share the concern that the language in RULE III(1), (2), and (3) does not provide adequate guidance to the Board of Land Commissioners regarding when State lands should not be sold. RULE III should discourage – in the strongest terms possible – the sale of any state lands that are wholly surrounded by public land or conservation easements, or that would have a significant impact on threatened or endangered species. The suggested change of verbiage in Rule III, Sections (1), (2), and (3) is:

(1) The board may only sell a parcel to "may not sell a parcel" that is wholly surrounded by other public land if the board provides compelling reasons for the sale.

(2) The board may only sell a parcel to "may not sell a parcel" that is wholly surrounded by land under conservation easement if the board provides compelling reasons for the sale.

(3) The board may only sell a parcel to "may not sell a parcel" that the department, in compliance with the Montana Environmental Policy Act, determines significant for threatened or endangered species if the board provides compelling reasons for sale.

RESPONSE 12: The proposed change in wording was debated at length by the committee. The final vote on this item was 11 to 2 to have the existing verbiage. Those dissenting filed a minority report. DNRC feels that the intent of the rule is clearly that only under very limited conditions may the board approve a sale, and wanted to keep the overall tone and language of the rules positive rather than negative (i.e., this is what you can do rather than this is what you can’t do).

8. An electronic copy of this notice of amendment, repeal and adoption is available through the department’s

website at http://www.dnrc.state.mt.us. The department strives to make the electronic copy of this notice of amendment, repeal and adoption conform to the official version, as printed in the Montana Administrative Register. However, the department advises that it will decide any conflict between the official printed version and the electronic version in favor of the official printed version. In addition, the department advises that the website might be inaccessible at times, due to system maintenance or technical problems.

BOARD OF LAND COMMISSIONERS

By: /s/ Karl Ohs
KARL OHS
Chair

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

By: /s/ Arthur R. Clinch
ARTHUR R. CLINCH
Director

By: /s/ Tommy H. Butler
Tommy H. Butler
Rule Reviewer

Certified to the Secretary of State September 20, 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 VII, the amendment of ARM 37.5.304, 37.5.307, 37.47.315, 37.47.601, 37.47.602, 37.47.607 and 37.47.608, and the repeal of ARM 37.47.301, 37.47.304, 37.47.609, 37.97.125, 37.100.313 and 37.100.413 pertaining to substantiation of child abuse and neglect and fair hearing rights	)	NOTICE OF ADOPTION, AMENDMENT AND REPEAL

TO: All Interested Persons

1. On July 22, 2004, the Department of Public Health and Human Services published MAR Notice No. 37-332 pertaining to the public hearing on the proposed adoption, amendment and repeal of the above-stated rules relating to substantiation of child abuse and neglect and fair hearing rights, at page 1571 of the 2004 Montana Administrative Register, issue number 14.

2. The Department will not be adopting proposed new rules I through III at this time.

3. The Department has amended ARM 37.47.315, 37.47.601, 37.47.602, 37.47.607 and 37.47.608 and repealed 37.47.301, 37.47.304, 37.47.609, 37.97.125, 37.100.313 and 37.100.413 as proposed.

4. 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 IV [37.47.610] CHILD PROTECTIVE SERVICES: RIGHT TO FAIR HEARING TO CONTEST SUBSTANTIATED REPORTS (1) The subject of a ~~level one or level two~~ substantiated report may request a fair hearing unless the circumstances provided in ~~[RULE VII]~~ [RULE VI] ARM 37.47.615 exist. ~~No fair hearing right exists for subjects of deferred substantiation reports.~~

(2) through (6) remain as proposed.

AUTH: Sec. 2-4-201 and 41-3-208, MCA
IMP: Sec. 2-4-201, 2-4-612, 41-3-202 and 41-3-205, MCA

RULE V [37.47.613] CHILD PROTECTIVE SERVICES: LISTING OF DETERMINATION IN THE PROTECTION INFORMATION SYSTEM

(1) When the department substantiates a ~~level one or two~~ report of child abuse, neglect or exploitation, the department

will list in its protective services information system, as provided in ARM 37.47.315, that the report's final determination is pending. The report will be pending for a period of 30 days from the date of the department's initial notice of its substantiation determination.

(2) If, after receiving the initial notice of the department's ~~level one or two~~ substantiation, the subject does not request a fair hearing within the 30 day time period required by ARM 37.47.610(2), the department will list the report in its protective services information system as being substantiated ~~at the designated level~~.

(3) remains as proposed.

AUTH: Sec. 2-4-201 and 41-3-208, MCA
IMP: Sec. 2-4-201, 41-3-202 and 41-3-205, MCA

RULE VI [37.47.615] CHILD PROTECTIVE SERVICES: EXCEPTIONS TO RIGHT TO FAIR HEARING (1) The subject of a ~~level one or two~~ substantiated report of child abuse, neglect or exploitation is not entitled to a fair hearing if:

(a) through (c) remain as proposed.

AUTH: Sec. 2-4-201 and 41-3-208, MCA
IMP: Sec. 2-4-201 and 41-3-205, MCA

RULE VII [37.5.118] ~~LEVEL ONE AND TWO~~ SUBSTANTIATED REPORTS OF CHILD ABUSE OR NEGLECT: APPLICABLE HEARING PROCEDURES (1) Hearings contesting ~~levels one or two~~ substantiated reports of child abuse, neglect or exploitation are available to the extent provided in ARM 37.47.610. The procedures specified in ARM 37.5.304, 37.5.307, 37.5.313, 37.5.322, 37.5.325, 37.5.334 and 37.5.337 apply to such hearings, subject to the limitations specified in ARM 37.47.615.

AUTH: Sec. 2-4-201 and 41-3-208, MCA
IMP: Sec. 2-4-201, 2-4-612 and 41-3-202, MCA

5. The Department has amended 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.

37.5.304 DEFINITIONS For purposes of this subchapter, unless the context requires otherwise, the following definitions apply:

(1) "Adverse action" means:

(a) through (m) remain as proposed.

(n) a department's ~~level one or two~~ substantiation determination of a report of child abuse, neglect or exploitation under ARM Title 37, chapter 47, subchapter 6.

(2) through (4) remain as proposed.

(5) "Claimant" means:

(a) through (c) remain as proposed.

(d) a subject of a ~~level one or two~~ substantiated report of child abuse or neglect; or

(e) through (12)(d) remain as proposed.

AUTH: Sec. 2-4-201, 41-3-208, 41-3-1142, 52-2-111, 52-2-112, 52-2-403, 52-2-704, 52-3-304, 52-3-804, 53-2-201, 53-2-606, 53-2-803, 53-3-102, 53-3-107, 53-4-111, 53-4-212, 53-4-403, 53-4-503, 53-5-304, 53-5-504, 53-6-111, 53-6-113, 53-7-102 and 53-20-305, MCA

IMP: Sec. 2-4-201, 41-3-202, 41-3-208, 41-3-1103, 52-2-704, 52-2-726, 53-2-201, 53-2-306, 53-2-606, 53-2-801, 53-3-107, 53-4-112, 53-4-404, 53-4-503, 53-4-513, 53-5-304, 53-6-111, 53-6-113 and 53-20-305, MCA

37.5.307 OPPORTUNITY FOR HEARING (1) A claimant who is aggrieved by an adverse action of the department shall be afforded the opportunity for a hearing as provided in this chapter.

(a) and (b) remain the same.

(c) A request for a hearing by a claimant must be received by the department within 90 days after the date of mailing of notice of the adverse action, except as otherwise provided in these rules.

(i) A hearing request from a claimant must be received in writing within 30 days of the date of mailing of notice of the adverse action regarding:

(i)(A) and (B) remain as proposed.

(C) a ~~level one or two~~ substantiated report of child abuse, neglect or exploitation;

(ii) Hearing requests must be mailed or delivered to the department's Office of Fair Hearings, P.O. Box 202953, Helena, MT 59620-2953, except hearing requests to contest a ~~level one or two~~ substantiated report of child abuse, neglect or exploitation must be mailed or delivered to the Division Administrator, Department of Public Health and Human Services, Child and Family Services Division, 1400 Broadway, P.O. Box 8005, Helena, MT 59604-8005.

(d) through (4) remain the same.

AUTH: Sec. 2-4-201, 41-3-208, 41-3-1142, 52-2-111, 52-2-112, 52-2-403, 52-2-704, 52-3-304, 52-3-804, 53-2-201, 53-2-606, 53-2-803, 53-3-102, 53-4-111, 53-4-212, 53-4-403, 53-4-503, 53-5-304, 53-6-111, 53-6-113, 53-7-102 and 53-20-305, MCA

IMP: Sec. 2-4-201, 41-3-202, 41-3-205, 41-3-1103, 52-2-603, 52-2-704, 52-2-726, 53-2-201, 53-2-306, 53-2-606, 53-2-801, 53-4-112, 53-4-212, 53-4-404, 53-4-503, 53-4-513, 53-5-304, 53-6-111, 53-6-113 and 53-20-305, MCA

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

COMMENT #1: Regarding Rule I, levels are allowed under 41-3-202(1), MCA, regarding the Department's ability to assess

reports of child abuse or neglect, determine the necessary level of responses required, and determine the time frames in which the responses should be initiated after receiving reports. Rule I does not provide how the determination levels are tied to the levels of responses. Also, the legal authority for Rule I is not 41-3-205, MCA, which pertains to confidentiality and disclosure requirements of reports of child abuse or neglect.

RESPONSE: The Department respectfully disagrees, however it has removed Rule I for other reasons. The rule, along with Rules II and III, cover determinations, not investigations. The Department believes 41-3-205(3)(o), MCA, allows it latitude in disclosing substantiation determinations for purposes of employment background information because the statute states that the Department "may" disclose "information that indicates a risk to children . . . as determined by the department." The Department decided to remove Rule I due to concerns listed under comment #5.

COMMENT #2: The rationale states that Rule II is needed because persons who are the subject of deferred substantiation reports should not lose employment rights. However, 41-3-203(2), MCA provides: "A person who provides information pursuant to 41-3-201 that is substantiated by the department or a person who uses information received pursuant to 41-3-205 that is substantiated by the department to refuse to hire or to discharge a prospective or current employee, volunteer, or other person who through employment or volunteer activities may have unsupervised contact with children is immune from civil liability unless the person acted in bad faith or with malicious purpose."

RESPONSE: The Department thanks the commentor for pointing out 41-3-203, MCA, however it does not believe the statute applies. The Department aimed to preserve constitutionally-protected employment rights when it proposed Rule II. To that end, the rule pertains to employees or potential employees, not employers who are covered under 41-3-203, MCA. The Department decided to remove Rule II due to concerns listed under Comment #5.

COMMENT #3: Rules II and III prevent record disclosure in cases of deferred substantiations, or for certain time periods for levels one and two reports. The rules cannot supercede the statutory requirements in Title 41, chapter 3, MCA, regarding disclosure to the courts and child victims who are the subjects of the reports.

RESPONSE: The Department agrees and thanks the commentor for identifying this problem, but the Department has removed Rules II and III for other reasons. The intent of the rules was not to circumvent report disclosures to courts, child victims, or other persons who are not associated with employment

background checks and who are authorized to receive reports. The Department recognizes that the rules do not clarify the limits on disclosure, and it believes that simple clarification in the rules before adoption is needed. However, because of concerns raised in comment #5, the Department has removed the rules.

COMMENT #4: Rule III does not appear to comport with the state constitutional requirement for non-disclosure of public records only when the demands of individual privacy exceed the merits of public disclosure.

RESPONSE: The Department respectfully disagrees but has removed Rule III for other reasons. Article II, section 9, of the Montana Constitution provides that the public has the right to examine documents of all public bodies, including that of the Department. Article II, section 10, of the Montana Constitution provides for citizens' right to privacy. Both constitutional rights must be weighed and balanced against each other. However, reports of child abuse or neglect are inherently confidential through 41-3-205, MCA. That statute provides a list of exceptions. The Department's intent behind Rule III was not to circumvent any of the disclosure provisions in 41-3-205, MCA, and it believes simple clarification in the rule is needed to address the commentor's concern. Rule III was removed due to the issues raised in comment #5.

COMMENT #5: Rules I, II and III engraft additional requirements not contemplated by the state legislature. The Department further lacks statutory authority to designate substantiation decisions as deferred determinations or levels one or two determinations. The statutes in Title 41, chapter 3, MCA, must specifically allow for the classifications.

RESPONSE: The Department thanks the commentor for this input, however it believes it has legal authority for the rules' enactment. Section 41-3-208, MCA, provides that the Department may adopt rules to "govern the disclosure" of records pertaining to child abuse or neglect. No other requirements are listed in the statute. Also, there is no statutory definition of "substantiation". Section 41-3-205(3)(o), MCA, contains permissive language in that the Department "may" disclose record information about employees or potential employees who may pose a risk to children as determined by the department. The Department believes state case law supports its endeavors seen in Rules I through III.

Because of the legal issues raised, Rules I through III have been removed, and the Department possibly will revisit the issue in the future. Mentions of level one and two reports were removed from ARM 37.5.304, 37.5.307, Rules IV [37.47.610], V [37.47.613], VI [37.47.615], and VII [37.5.118].

Eleanor A. Parker for
Rule Reviewer

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

Certified to the Secretary of State September 27, 2004.

BEFORE THE SECRETARY OF STATE
OF THE STATE OF MONTANA

In the matter of the adoption of NEW RULE I (44.5.201) regarding the filing of certification authorities	)))))	NOTICE OF ADOPTION

TO: All Concerned Persons

1. On August 19, 2004, the Secretary of State published MAR Notice No. 44-2-125 regarding the proposed adoption of the above-stated rule at page 1945, 2004 Montana Administrative Register, issue number 16.

2. The Secretary of State has adopted NEW RULE I (44.5.201) exactly as proposed.

3. No comments or testimony were received.

4. This rule will be applied retroactively to September 8, 2004.

/s/ Bob Brown
BOB BROWN
Secretary of State

/s/ Janice Doggett
JANICE DOGGETT
Rule Reviewer

Dated this 27th day of September 2004.

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 June 30, 2004. This table includes those rules adopted during the period July 1, 2004 through September 30, 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 June 30, 2004, 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.

To aid the user, the Accumulative Table includes rulemaking actions of such entities as boards and commissions listed separately under their appropriate title number.

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