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 The notice section contains state agencies' proposed new, amended or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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 4.17.106 and 4.17.107 relating to organic certification fees	)))))	NOTICE OF PROPOSED AMENDMENT NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons

1. On January 2, 2005, the Montana Department of Agriculture proposes to amend the above-stated rules relating to organic certification fees.

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 December 16, 2004, to advise us of the nature of the accommodation that you need. Please contact Gregory H. Ames at the Montana Department of Agriculture, 303 N. Roberts, P.O. Box 200201, Helena, MT 59620-0201; Phone: (406) 444-2944; TTY: (406) 444-4687; Fax: (406) 444-5409; or E-mail: agr@state.mt.us.

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

4.17.106 APPLICATION FEES AND FEES FOR SERVICES

(1) remains the same.

(a) the application fee is $165 for operations having less than ~~$100,000~~ $20,000 in gross sales annually~~, which includes $15 to provide Organic Materials Review Institute (OMRI) lists to the applicant~~;

(b) the application fee is ~~$240~~ $200 for operations having $20,000 to $100,000 ~~or more~~ in gross sales annually~~, which includes $15 to provide OMRI lists to the applicant~~;

(c) the application fee is $300 for operations having more than $100,000 in gross sales annually;

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

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

(i) through (iii) remain the same.

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

(2) remains the same.

(a) the application fee is $215 per facility for operations having less than ~~$100,000~~ $20,000 in gross sales annually~~, which includes $15 to provide OMRI lists to the applicant~~;

(b) the application fee is ~~$315~~ $250 per facility for operations having $20,000 to $100,000 ~~or more~~ in gross sales annually~~, which includes $15 to provide OMRI lists to the applicant~~;

(c) the application fee is $400 per facility for operations having more than $100,000 in gross sales annually;

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

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

(3) Each applicant for certification will be inspected initially and yearly thereafter, in compliance with 7 CFR 205.403, to assess compliance with certification standards. Fees will be charged to the applicant in amounts sufficient to cover costs of the inspection ~~or to cover contract inspection fees~~:

(a) for any inspections conducted by department staff, the inspection charge will be ~~$25~~ $35 per hour for time incurred in the inspection and writing the report. The department will also charge per diem and mileage at standard state rates~~; and~~ , plus a 10% administrative charge; and

(b) for inspections conducted by contracted inspectors, the inspection charge will be equal to that specified in the contract with the inspector and paid to the inspector by the department, plus a 10% administrative charge.

(4) remains the same.

(5) through (9) remain the same.

AUTH: 80-11-601, MCA
IMP: 80-11-601, MCA

REASON: Authorizing legislation for the organic program requires the program to operate with "no negative impact on the state budget." In the past two fiscal years, program expenses have exceeded revenues. The department has used grant funds to offset the operating deficits during the past biennium. The fees established by this rule revision, combined with the changes to assessments fees (ARM 4.17.107), should allow the program to generate sufficient revenue from fees to meet program expenses. The cumulative amount of the proposed increase, for all certified organic producers, handlers and processors, would be $7,682 in fiscal year 2005, $7,625 in fiscal year 2006 and $7,403 in fiscal year 2007. The number of affected certified organic producers, handlers and processors impacted by the increase in assessment fees will be 42 in fiscal year 2005 and is projected to be 60 in fiscal year 2006 and 67 in fiscal year 2007.

Since all producers, handlers and processors are subject to inspections, the additional 10% administrative inspection cost increase will apply to all certified entities. The average inspection cost is $400. Ten percent increase would be $40 per producer, processor and handler. The total producers, handlers and processors impacted by the 10% administrative inspection increase in inspection costs will be 102 in fiscal year 2005 and is projected to be 125 in fiscal year 2006 and 138 in fiscal year 2007.

The change in hourly rate charged for department conducted inspections is expected to affect two processors, handlers or producers in fiscal year 2005 and 10 producers, handlers or processors in fiscal years 2006 and 2007. On

average, for those producers, processors and handlers inspected by the department, the cost would increase an average of $100 per inspection. Costs are dependent upon the type and complexity of the inspection being conducted. The Organic Materials Review Institute (OMRI) lists are provided as part of the application package and are inclusive of the application fee paid. Listing of this item while not specifically listing other items and including the associated fee is confusing and misleading to the reader.

4.17.107 ANNUAL REPORT AND ASSESSMENT FEES (1) through (2) remain the same.

(a) the fee for certified producers is 1.0% of gross sales ~~exceeding $20,000;~~ of organic crops, livestock and products;

(b) remains the same.

(i) ~~no assessment fee~~ $25 for handlers whose gross sales and handling charges are less than ~~$20,000~~ $5,000 per year;

(ii) ~~$100~~ $50 for handlers with gross sales and handling charges of ~~$20,000~~ $5,000 to ~~$40,000~~ $20,000;

(iii) $100 for handlers with gross sales and handling charges of $20,001 to $40,000;

(iii) remains the same, but is renumbered (iv).

(iv) remains the same, but is renumbered (v).

(v) remains the same, but is renumbered (vi).

(vi) remains the same, but is renumbered (vii).

(vii) remains the same, but is renumbered (viii).

(3) remains the same.

(a) for sales of products represented as certified by the department, the assessment fee is 1% of gross sales ~~exceeding $20,000~~; and

(b) for sales of products certified by the department, but represented as certified by a certifier other than the department, the assessment fee is .5% of gross sales ~~exceeding $20,000~~.

(4) and (5) remain the same.

AUTH: 80-11-601, MCA
IMP: 80-11-601, MCA

REASON: Authorizing legislation for the organic program requires the program to operate with "no negative impact on the state budget." In the past two fiscal years, program expenses have exceeded revenues. The department has used grant funds to offset the operating deficits during the past biennium. The fees established by this rule revision, combined with the changes to application and inspection fees (ARM 4.17.106), should allow the program to generate sufficient revenue from fees to meet program expenses. The cumulative amount of the proposed increase, for all certified organic producers, handlers and processors, would be $8,850 in fiscal year 2005, $11,775 in fiscal year 2006 and $14,125 in fiscal year 2007. The increase in assessments will affect those certified producers, processors and handlers with gross

sales under $20,000 per year. The number of affected certified organic producers, handlers and processors will be 60 in fiscal year 2005 and is projected to be 65 in fiscal year 2006 and 71 in fiscal year 2007. The Organic Materials Review Institute (OMRI) lists are provided as part of the application package and are inclusive of the application fee paid. Listing of this item while not specifically listing other items and including the associated fee is confusing and misleading to the reader.

4. Concerned persons may submit their data, views or arguments concerning the proposed amendment in writing to Gregory H. Ames at the Montana Department of Agriculture, 303 N. Roberts, P.O. Box 200201, Helena, MT 59620-0201; Fax: (406) 444-5409; or E-mail: agr@state.mt.us. Any comments must be received no later than December 30, 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 Gregory H. Ames 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 December 30, 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 10 persons based on 102 certified organic producers and handlers.

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, apply and have been fulfilled.

DEPARTMENT OF AGRICULTURE

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

Certified to the Secretary of State, November 22, 2004.

BEFORE THE CLASSIFICATION REVIEW COMMITTEE
OF THE STATE OF MONTANA

In the matter of the proposed amendment of ARM 6.6.8301, concerning updating references to the NCCI Basic Manual for new classifications for various industries	)))))	NOTICE OF PROPOSED AMENDMENT NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons

1. On January 14, 2005, the Montana Classification Review Committee proposes to amend ARM 6.6.8301 concerning updating references to the NCCI Basic Manual for Workers Compensation and Employers Liability Insurance 2001 ed., and adoption of new classifications that apply to various industries.

2. The Montana Classification Review Committee 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 Montana Classification Review Committee no later than 5:00 p.m., on January 6, 2005, to advise us of the nature of the accommodation needed. Please contact the Montana Classification Review Committee, attn: Tim Hughes, National Council on Compensation Insurance, Inc., 10920 W. Glennon Dr., Lakewood, Colorado 80226; telephone (303) 969-9456; fax (303) 969-9423; e-mail tim_hughes@ncci.com.

3. The rule shown below was recently amended, and no changes will be made to that rule. However, there are codes referenced by this rule that are being updated.

6.6.8301 ESTABLISHMENT OF CLASSIFICATION FOR COMPENSATION PLAN NO. 2 (1) and (2) remain the same.

AUTH: 33-16-1012, MCA
IMP: 2-4-103, 33-16-1012, MCA

4. REASONABLE NECESSITY STATEMENT: It is necessary to amend ARM 6.6.8301 to update references to the NCCI Basic Manual for Workers Compensation and Employers Liability. Changes to the NCCI Basic Manual for Workers Compensation and Employers Liability affect classifications that apply to various industries. The proposed classifications changes are as follows:

a. Code 2576-CANVAS GOOD MFG.-NOC-SHOP and Code 2578-BAG OR SACK MFG.-CLOTH will be discontinued due to their low use nationwide. Businesses performing these

operations will be combined into Code 2501-CLOTHING MANUFACTURING.

b. Code 4308-LINOTYPE OR HAND COMPOSITION will be discontinued due to its low use nationwide. Businesses performing this operation will be combined into Code 4299-PRINTING.

c. Code 2150-ICE MANUFACTURING will be discontinued due to its low use nationwide. Businesses performing this operation will be combined into Code 8203-ICE DEALER AND DRIVERS.

d. Code 8050-STORE: FIVE AND TEN CENT will be discontinued due to its low use nationwide. Businesses performing this operation will be combined into Code 8017-STORE: RETAIL NOC.

e. At present, all restaurants in Montana are classified to a single classification, Code 9079-RESTAURANT NOC. This single classification approach will be discontinued and replaced with three classifications for restaurants. The three new classifications are Code-9082 RESTAURANT NOC, Code 9083 RESTAURANT: FAST FOOD, and Code-9084 BAR, DISCOTHEQUE, LOUNGE, NIGHT CLUB, OR TAVERN.

f. Real estate agency outside employees will be removed from Code 8742-SALESPERSONS, COLLECTORS OR MESSENGERS-OUTSIDE and assigned to Code 8721-REAL ESTATE APPRAISAL COMPANY-OUTSIDE EMPLOYEES.

g. The current classification phraseology for Code 9519-HOUSEHOLD APPLIANCES-ELECTRICAL-INSTALLATION, SERVICE OR REPAIR & DRIVERS is amended to include commercial appliance installation, service or repair.

h. The current classification phraseology for Code 5191-OFFICE MACHINE OR APPLIANCE INSTALLATION, INSPECTION, ADJUSTMENT OR REPAIR is amended and will exclude appliance installation or repair. Appliance installation or repair will be assigned to Code 9519-HOUSEHOLD APPLIANCES-ELECTRICAL-INSTALLATION, SERVICE OR REPAIR & DRIVERS.

i. Code 3821-AUTOMOBILE DISMANTLING & DRIVERS currently includes store operations, such as employees that sell used or new auto parts. This code is being amended to allow store employees who do not engage in automobile dismantling to be assigned to Code 8046-STORE: AUTOMOBILE PARTS AND ACCESSORIES NOC & DRIVERS.

j. Code 8072-STORE: BOOK, RECORD, COMPACT DISC, SOFTWARE, VIDEO OR AUDIO CASSETTE-RETAIL is amended to

add clarifying language to better address the application and intent of this classification.

k. The notes Section of Code 5537-HEATING, VENTILATION, AIR-CONDITIONING AND REFRIGERATION SYSTEMS-INSTALLATION, SERVICE AND REPAIR & DRIVERS is amended to read:

> Applicable to installation, service and repair including residential and commercial. Division of payroll between Code 5537 and any other contracting classification is not permitted when all or a majority portion of the work for an HVAC contract is performed by a single contractor. Separately rate portable air-conditioning units to Code 9519.

5. This amendment is intended to be applied retroactively to January 1, 2005.

6. Concerned persons may present their data, views, or arguments concerning the proposed amendment in writing to Tim Hughes, National Council on Compensation Insurance, Inc., 10920 W. Glennon Dr., Lakewood, Colorado 80226, or by e-mail to tim_hughes@ncci.com and must be received no later than 5:00 p.m., January 6, 2005.

7. 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 Tim Hughes, National Council on Compensation Insurance, Inc., 10920 W. Glennon Dr., Lakewood, Colorado 80226, or by e-mail to tim_hughes@ncci.com no later than January 6, 2005.

8. If the committee 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 150 persons based on the 15 businesses who have indicated interest in the rules of this committee and who the committee has determined could be directly affected by these rules.

9. The Montana Classification Review Committee maintains a list of concerned persons who wish to receive notices of rulemaking actions proposed by this committee. 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 rulemaking actions of the Classification Review Committee. Such written requests may be mailed or delivered to Tim Hughes, National Council on Compensation Insurance, Inc., 10920 W. Glennon Dr., Lakewood, Colorado 80226, or by e-mail to tim_hughes@ncci.com, or by completing a request form at any rules hearing held by the Montana Classification Review Committee.

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

CLASSIFICATION
REVIEW COMMITTEE

By: /s/ Tom Clarke
Tom Clarke
Review Committee Chairperson

By: /s/ Alicia Pichette
Alicia Pichette
Rule Reviewer

Certified to the Secretary of State on November 22, 2004.

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

In the matter of the amendment of ARM 12.11.3985, pertaining to a no wake zone on Seeley Lake	)))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On January 5, 2005, at 5:30 p.m. a public hearing will be held at the United States Forest Service Seeley Lake Ranger Station, Seeley Lake, Montana, to consider the amendment of ARM 12.11.3985 pertaining to a no wake zone on Seeley Lake.

2. The Fish, Wildlife and Parks Commission (commission) will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m. on December 10, 2004, to advise us of the nature of the accommodation that you need. Please contact DiAnne Schmautz, Fish, Wildlife and Parks, 3201 Spurgin Road, Missoula, MT 59804; telephone (406) 542-5547; fax (406) 542-5529; email dschmautz@state.mt.us.

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

12.11.3985 SEELEY LAKE (1) Seeley Lake is located in Missoula County.

(2) All watercraft on Seeley Lake pulling, taking off with, and landing water skiers on Seeley Lake will travel in a general, consistent, counterclockwise direction.

(3) Seeley Lake is limited to a controlled no wake speed, as defined in ARM 12.11.101(1), in the following area:

(a) the northernmost portion of the lake with the boundary being from where Deer Creek flows into the west side of the lake, following a straight line across the lake to where Rice Creek flows into the east side of the lake and continuing north to shore, as marked.

AUTH: 23-1-106, 87-1-303, MCA
IMP: 23-1-106, 87-1-303, MCA

4. Seeley Lake is situated in the Clearwater chain of lakes and is located about 60 miles east of Missoula. The lake is 1,047 acres in size. Seeley Lake has always been a recreation destination by both residents and tourists. However, over the last 20 years the amount of recreational use has increased significantly. During the same time period technology in motorboats and other motorized recreational watercraft has advanced to produce faster, more powerful watercraft. Some of the newer watercraft can now access

shallower waters than was previously possible. This has led to two conflicts that support the establishment of the proposed "no wake" area on the north end of Seeley Lake.

Historically, at least three pairs of loons have nested on the lake. Now, only one pair of loons remains. The last pair of loons nest on the north end of the lake in shallow weedy cover in the area of the proposed no wake zone. Loons are particularly susceptible to disturbance especially during the period of their nesting and rearing of young in the spring and early summer. Department personnel believe increased disturbances from motorized watercraft in the loon nesting area caused the reduction of nesting loons on the lake. Reducing the speed of watercraft in the area will eliminate wakes and reduce the noises and other disturbances that negatively impact the remaining loons nesting in the area.

The commission believes the proposed no wake zone will also reduce safety concerns on the north end of Seeley Lake. The Clearwater River canoe trail ends on the north end of Seeley Lake near the Forest Service Ranger Station. Conflicts between canoes and motorized watercraft occasionally occur when canoes enter the lake from the river on the way to the canoe take-out at the Ranger Station and Rice Creek. The adoption of the proposed no wake zone would promote the safety of those exiting the canoe trail by slowing motorized watercraft enough to reduce wakes that may overturn canoes. Slower motorized watercraft speeds will also reduce the likelihood of collisions between motorized watercraft and canoes.

Additionally, anglers would also benefit from the proposed no wake zone when fishing the outer weed beds of this shallow portion of the lake. The safety of anglers in fishing boats in the proposed no wake area is sometimes compromised by large wakes from watercraft traveling at high rates of speed.

Establishing a 40-acre "no wake" area would address multiple problems while still providing over 1,000 acres for skiing, boating and other water related recreation.

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 DiAnne Schmautz, Fish, Wildlife and Parks, 3201 Spurgin Road, Missoula, MT; telephone (406) 542-5547; fax (406) 542-5529; or email at dschmautz@state.mt.us and must be received no later than January 10, 2004.

6. Rebecca Dockter, or another hearing officer appointed by the department, has been designated to preside over and conduct the hearing.

7. The department maintains a list of interested persons who wish to receive notice of rulemaking actions proposed by this 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 be completing the request form at any rules hearing held by the department.

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

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

/s/ Rebecca Dockter
Rebecca Dockter
Rule Reviewer

Certified to the Secretary of State November 22, 2004

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.56.101, 17.56.1301, 17.56.1303, 17.56.1304, 17.56.1401, 17.56.1404 and 17.56.1410 pertaining to the installation of underground storage tanks	)))))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT (UNDERGROUND STORAGE TANKS)

TO: All Concerned Persons

1. On December 22, 2004, at 9:00 a.m., the Department of Environmental Quality will hold a public hearing in Room 239/240 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Department will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Department no later than 5:00 p.m., December 13, 2004, to advise us of the nature of the accommodation that you need. Please contact Lisa Tucker, Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-3840; fax (406) 444-1901; or email ltucker@state.mt.us.

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

17.56.101 DEFINITIONS (1) through (46) remain the same.

(47) "Petroleum storage tank" or "PST" means a tank that contains petroleum or petroleum products and that is:

(a) through (c) remain the same.

(d) aboveground pipes associated with tanks under ~~(45)~~(47)(b) and (c), except that pipelines regulated under the following laws are excluded:

(i) remains the same.

(ii) state law comparable to the provisions of law referred to in ~~(45)~~(47)(d)(i), if the facility is intrastate.

(48) through (69) remain the same.

AUTH: 75-11-319, 75-11-505, MCA
IMP: 75-11-302, 75-11-319, 75-11-505, MCA

REASON: This proposed amendment is necessary to correct an internal reference citation.

17.56.1301 DEFINITIONS (1) through (5) remain the same.

(6) "Major installation" means the installation of underground storage tanks, piping, vapor or ground water monitoring wells, corrosion protection, interstitial tank probes

and sensors and corrosion protection system anodes. Repair or modification of the above-listed items, and activities not defined as a "minor installation" are also considered major installations.

(7) "Minor installation" means the installation of replacement spill buckets, offset sleeves on tank risers, boots on piping flex connectors, ball-float vent valves in existing risers, drop-tubes, drop-tube shut-off valves and auto dialers, and the extension or replacement of vent standpipes. Minor installation also includes the decommissioning of ground water and vapor monitoring wells.

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

AUTH: 75-11-204, 75-11-505, MCA
IMP: 75-11-204, 75-11-209, 75-11-210, 75-11-212, 75-11-509, MCA

REASON: The Legislative Audit Committee recommended that the installation permit review process for certain less-involved underground storage tank installations and modifications be streamlined. The proposed amendments provide for two distinct review tracks. Minor installations and closures correspond to less environmental risk and less technical review than major modifications and installations. Technical staff other than the staff engineer can complete these less technical reviews, and first-in, first-out review of the applications can be maintained within the two tracks. Under the proposed amendments, review of minor installation permits and closure permits will no longer be hindered by review of more complicated installation permits. In order to implement the audit recommendation, the proposed amendments are necessary to identify the types of activities subject to the separate process.

17.56.1303 INSTALLATION AND CLOSURE PERMIT REQUIREMENT--APPLICATION (1) remains the same.

(2) Except as provided in ~~(5) of this rule~~ (6):

(a) a completed application for a major installation permit must be filed by the permit applicant on a form provided by the department at least 30 days prior to the proposed date of installation ~~or closure~~; and

(b) a completed application for a minor installation or closure permit must be filed by the permit applicant on a form provided by the department at least 20 days prior to the proposed date of installation or closure.

(3) If the installation or closure is to be conducted by:

(a) and (b) remain the same.

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

~~(5)~~ (6) The department, in its discretion, may waive the 30-day requirement in (2) ~~of this rule~~ if the applicant makes a sufficient showing of unforeseen and unforeseeable circumstances and if the applicant does not qualify for an emergency permit under ARM 17.56.1306.

AUTH: 75-11-204, MCA
IMP: 75-11-204, 75-11-209, 75-11-212, MCA

REASON: The proposed amendment is necessary to execute the Legislative Audit Committee's recommendation that certain less-complicated underground storage tank installations and modifications be reviewed by the Department under a shorter timeframe.

17.56.1304 PERMIT APPLICATION REVIEW FEES (1) and (2) remain the same.

(3) Subject to the limitation in (4), for the installation or closure of an underground storage tank system, the permit applicant shall pay the following permit application review fees:

~~(a) tank installations or closures .$50/permit plus $.01/gallon of tank capacity~~

~~(b) piping only. . . . . .$25/50 feet ($25-min, $200-max)~~

~~(c) other modifications and repairs only . . . . . $50~~

(a) any application, or group of applications, proposing work at a facility that includes the installation or closure of an underground storage tank . . . . . $100/permit plus $0.02/gallon of tank capacity;

(b) any application solely for a minor installation. .$50;

(c) any application solely for piping installation and/or closure:

(i) greater than 50 feet . . . . . $100; or

(ii) 50 feet or less . . . . . $ 50; and

(d) any combination of applications in (3)(b) and (c), or any other permit application . . . . . $100.

(4) To determine whether a proposed piping installation or closure exceeds the 50-foot threshold in (3)(c), piping length shall be calculated as the sum of the linear feet of all pipe proposed to be installed and closed.

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

AUTH: 75-11-204, MCA
IMP: 75-11-204, 75-11-209, 75-11-212, MCA

REASON: The proposed rule amendment is necessary to more clearly delineate departmental review services, the costs of those services, and to adequately fund the UST permitting program. The Department receives many permit applications with incorrect fees enclosed. The proposed amendments clarify the amount of fees due for each type of review. Fees are restructured corresponding to the newly delineated Department review services. Further, in fiscal year 2003 program expenses were approximately $98,000, but revenue from permit and license fees amounted to only $42,200. Grants from EPA and other fees have been used to fill in the gap, but over time the EPA grants have not kept pace and the budgetary gap has increased. The

proposed permit fee increase would not fully fund the permitting program, but would reduce the drain on revenue sources whose purposes are more appropriately spent in other UST program areas. This increase will impact approximately 250 owners per year resulting in an aggregate increase of $13,400 in fees.

17.56.1401 GENERAL LICENSE REQUIREMENTS; DEFINITIONS (1) Except as provided in 75-11-213(7) and 75-11-510(2), MCA, ~~A~~ a person may not install, close, or inspect an underground storage tank system unless that individual has a valid license issued by the department under 75-11-210 or 75-11-214, MCA, and this subchapter.

(2) through (7) remain the same.

AUTH: 75-11-204, 75-11-505, MCA
IMP: 75-11-204, 75-11-209, 75-11-210, 75-11-212, 75-11-214, 75-11-509, MCA

REASON: This amendment is necessary to clear up a conflict between the existing rule and the cited statutory provision. As written, the current rule would seem to conflict with the statutory provision that allows the Department to inspect UST facilities to ensure compliance with UST laws and rules. The proposed amendment would eliminate any conflict between the law and the rule.

17.56.1404 LICENSE FEES (1) An individual applying for an underground storage tank installer's license shall pay to the department the applicable fee(s) provided in (2) ~~of this rule~~. All fees are ~~non-~~refundable.

(2) Licensing fees are as follows:

(a) remains the same.

(b) annual license renewal fee . . . . . $ ~~50~~ 100

(c) through (5) remain the same.

AUTH: 75-11-204, MCA
IMP: 75-11-204, 75-11-210, 75-11-211, 75-11-509, MCA

REASON: The proposed amendment is necessary to more adequately fund the UST permitting and licensing program. In FY03, program expenses were approximately $98,000, but revenue from permit and license fees amounted to only $42,200. Grants from EPA and other fees have been used to fill in the gap, but over time the EPA grants have not kept pace and the budgetary gap has increased. The proposed license fee increase would not fully fund the permitting and licensing program, but would reduce the drain on revenue sources whose purposes are more appropriately spent in other UST program areas. This increase will impact approximately 50 licensed individuals per year resulting in an aggregate increase of $2,500 in fees per year.

17.56.1410 LICENSEE RECORD KEEPING (1) Within 30 days of completion of an underground storage tank system installation or closure, a licensed installer shall submit to the department and

to the owner or operator:

~~(a) one copy of the completed department inspection checklist, or one copy of the completed manufacturer's installation checklist;~~

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

(2) remains the same.

AUTH: 75-11-204, MCA
IMP: 75-11-204, 75-11-210, 75-11-211, MCA

REASON: The Department is eliminating requirements for submittal of the inspection checklist because it is not critical to environmental protection. Verifying completion of the inspection checklist was of value when the program was training installers to conduct work in accordance with industry-recognized best practices. The need for such oversight has substantially decreased. The checklist remains integral to product warranty validation, but the Department believes that those concerns are best left to the private sector.

4. Concerned persons may submit their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to Kirsten Bowers, Remediation Division, Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; by fax (406) 444-1902; or by email to kbowers@state.mt.us, no later than December 30, 2004. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

5. Keith Jones, attorney, has been designated to preside over and conduct the hearing.

6. The Department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding: air quality; hazardous waste/waste oil; asbestos control; water/wastewater treatment plant operator certification; solid waste; junk vehicles; infectious waste; public water supplies; public sewage systems regulation; hard rock (metal) mine reclamation; major facility siting; opencut mine reclamation; strip mine reclamation; subdivisions; renewable energy grants/loans; wastewater treatment or safe drinking water revolving grants and loans; water quality; CECRA; underground/above ground storage tanks; MEPA; or general procedural rules other than MEPA. Such written request may be mailed or delivered to Elois Johnson, Paralegal, Legal Unit, 1520 E. Sixth Ave., P.O. Box 200901, Helena, Montana 59620-0901, faxed to the office at (406) 444-4386, emailed to ejohnson@state.mt.us or may be made by completing a request form at any rules hearing held by the Department.

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

Reviewed by: DEPARTMENT OF ENVIRONMENTAL QUALITY

James M. Madden BY: *Jan P. Sensibaugh*
JAMES M. MADDEN JAN P. SENSIBAUGH, Director
Rule Reviewer

Certified to the Secretary of State, November 22, 2004.

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

In the matter of the amendment of ARM 37.86.2105, 37.86.2801, 37.86.2901, 37.86.2905, 37.86.2907, 37.86.2918, 37.86.3001, 37.86.3007, 37.86.3009, 37.86.3020, and 37.86.3025 pertaining to medicaid eyeglass reimbursement and medicaid hospital reimbursement	)	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Interested Persons

1. On December 22, 2004, at 10:00 a.m., a public hearing will be held in the auditorium of the Department of Public Health and Human Services Building, 111 N. Sanders, Helena, Montana to consider the proposed amendment of the above-stated rules.

The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who need an alternative accessible format of this notice or provide reasonable accommodations at the public hearing site. If you need to request an accommodation, contact the department no later than 5:00 p.m. on December 13, 2004, to advise us of the nature of the accommodation that you need. Please contact Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210; telephone (406)444-5622; FAX (406)444-1970; Email dphhslegal@state.mt.us.

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

37.86.2105 EYEGLASSES, REIMBURSEMENT (1) Eyeglasses are paid by the department through a single volume purchase contract.

(2) Reimbursement for contact lenses or dispensing fees is as follows:

(a) The department pays the lower of the following:

(i) the provider's usual and customary charge for the service; or

(ii) the amount specified for the particular service or item in the department's fee schedule.

(3) The department adopts and incorporates by reference the department's fee schedule dated December ~~2002~~ 2004 which sets forth the reimbursement rates for eyeglasses, dispensing services and other related supplies for optometric services. A copy of the department's fee schedule may be obtained from the

Department of Public Health and Human Services, Health ~~Policy and Services~~ Resources Division, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

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

37.86.2801 ALL HOSPITAL REIMBURSEMENT, GENERAL

(1) through (3)(e) remain the same.

(4) Upon the request of a ~~an inpatient or outpatient~~ hospital located more than 100 miles outside the borders of the state of Montana~~:~~, the department may grant retroactive authorization for the provision of the hospital's services under the following circumstances only:

(a) ~~the department may grant retrospective authorization if~~ the person to whom services were provided was determined by the department to be retroactively eligible for Montana medicaid benefits including hospital benefits; ~~or~~

(b) ~~the department may grant retrospective authorization if~~ the hospital is retroactively enrolled as a Montana medicaid provider, and the enrollment includes the dates of service for which authorization is requested; ~~but~~ or

(c) the hospital can document that at the time of admission it did not know, or have any basis to assume, that the patient was a Montana medicaid client. ~~the department may not grant retrospective authorization to a hospital under any other circumstances.~~

AUTH: Sec. 2-4-201, 53-2-201 and 53-6-113, MCA
IMP: Sec. 2-4-201, 53-2-201, 53-6-101, 53-6-111, 53-6-113 and 53-6-141, MCA

37.86.2901 INPATIENT HOSPITAL SERVICES, DEFINITIONS

(1) through (7) remain the same.

(8) "DRG hospital" means a hospital reimbursed pursuant to the diagnosis related group (DRG) system. DRG hospitals are classified as such by the centers for medicare and medicaid services (CMS) in accordance with 42 CFR 412.

(8) through (22) remain the same but are renumbered (9) through (23).

AUTH: Sec. 53-6-113, MCA
IMP: Sec. 53-2-201, 53-6-101, 53-6-111, 53-6-113, 53-6-141 and 53-6-149, MCA

37.86.2905 INPATIENT HOSPITAL SERVICES, GENERAL REIMBURSEMENT (1) ~~For~~ Except as provided in (2), which is applicable to exempt hospitals and critical access hospitals (CAH), in-state inpatient hospital service~~s,~~ providers, including those providing inpatient rehabilitation services and services ~~provided~~ in a setting that is identified by the department as a distinct ~~part~~ rehabilitation unit, ~~provided within the state of Montana, providers~~ will be reimbursed under the ~~diagnosis related groups (~~DRG~~)~~ prospective payment system

described in ARM 37.86.2907, 37.86.2912, 37.86.2914, 37.86.2916, 37.86.2918, 37.86.2920 and 37.86.2924.

(2) Exempt hospital and CAH interim reimbursement is based on a hospital specific medicaid inpatient cost to charge ratio, not to exceed 100%. Exempt hospitals and CAHs will be reimbursed their actual allowable costs determined according to ARM 37.86.2803.

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

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

37.86.2907 INPATIENT HOSPITAL PROSPECTIVE REIMBURSEMENT, ~~DIAGNOSIS RELATED GROUP (~~DRG~~)~~ PAYMENT RATE DETERMINATION

(1) The department's DRG prospective payment rate for inpatient hospital services is based on the classification of inpatient hospital discharges to DRGs. The procedure for determining the DRG prospective payment rate is as follows:

(a) Prior to October 1st of each year, the department will assign a DRG to each medicaid patient discharge in accordance with the current medicare grouper program version, as developed by 3M health information systems. The assignment of each DRG is based on:

(i) through (vi) remain the same.

(b) For each DRG, the department determines a relative weight, depending upon whether or not the hospital is a large referral hospital, which reflects the cost of hospital resources used to treat cases in that DRG relative to the statewide average cost of all medicaid hospital cases. The relative weight for each DRG is available upon request from Department of Public Health and Human Services, ~~Child and Adult~~ Health Resources Division, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

(c) remains the same.

(d) The relative weight for the assigned DRG is multiplied by the average base price per case to compute the DRG prospective payment rate for that medicaid patient discharge except where there is no weight assigned to a DRG. Referred to as "exempt", the unweighted DRG will be paid at the statewide cost to charge ratio as defined in ARM 37.86.2904.

(2) For those Montana hospitals designated by the department as of April 1, 1993, as having neonatal intensive care units, reimbursement for neonatal DRGs 385 through 389 ~~shall~~ will be actual allowable cost determined on a retrospective basis, with allowable costs determined according to ARM 37.86.2803. In addition, such facilities:

(a) ~~Such facilities shall~~ will be reimbursed on an interim basis during each facility's fiscal year. The interim rate ~~shall~~ will be a percentage of usual and customary charges, and the percentage ~~shall~~ will be the facility-specific cost to charge ratio, determined by the department in accordance with medicare reimbursement principles.

(b) may split bill when total charges reach $100,000. The

first interim split bill must total at least $100,000 in charges.

~~(b)~~(c) ~~Such hospitals shall~~ will not receive any cost outlier payment or other add-on payment with respect to such discharges or services.

(3) The Montana medicaid DRG relative weight values, average length of stay (ALOS), and outlier thresholds ~~and stop loss thresholds~~ are contained in the DRG table of weights and thresholds (2002). The DRG table of weights and thresholds is published by the department. The department adopts and incorporates by reference the DRG table of weights and thresholds (2002). Copies may be obtained from the Department of Public Health and Human Services, ~~Child and Adult~~ Health Resources Division, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

AUTH: Sec. 2-4-201, 53-2-201 and 53-6-113, MCA
IMP: Sec. 2-4-201, 53-2-201, 53-6-101, 53-6-111 and 53-6-113, MCA

37.86.2918 INPATIENT HOSPITAL ~~PROSPECTIVE REIMBURSEMENT~~, RE-ADMISSIONS AND TRANSFERS (1) This rule states the billing requirements applicable to inpatient hospital readmissions and transfers. Sections (2) and (3) apply to DRG hospitals only unless otherwise noted. Sections (4) and (5) apply to DRG, critical access, exempt out-of-state and border hospitals.

~~(1)~~(2) All re-admissions occurring within 30 days will be subject to review to determine whether additional payment as a new DRG or as an outlier is warranted. As a result of the re-admission review, the following payment changes will be made:

(a) ~~i~~If it is determined that complications have arisen because of premature discharge and/or other treatment errors, then the DRG payment for the first admission ~~shall~~ must be altered by combining the two admissions into one for payment purposes; or

(b) ~~i~~If it is determined that the re-admission is for the treatment of conditions that could or should have been treated during the previous admission, the department will combine the two admissions into one for payment purposes.

(c) A patient readmission occurring in an inpatient rehabilitation hospital within 72 hours of discharge must be combined into one admission for payment purposes, with the exception of discharge to an acute care hospital for surgical DRGs.

(d) All diagnostic services are included in the DRG payment. Diagnostic services that are performed at a second hospital because the services are not available at the first hospital (e.g., a CT scan) are included in the first hospital's DRG payment. This includes transportation to the second hospital and back to the first hospital. Arrangement for payment to the transportation provider and the second hospital where the services were actually performed must be between the first and second hospital and the transportation provider.

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

(4) Outpatient hospital services other than diagnostic services that are provided within the 24 hours preceding the inpatient hospital admission must be bundled into the inpatient claim.

(5) Diagnostic services (including clinical diagnostic laboratory tests) provided within 72 hours prior to the date of admission are deemed to be inpatient services and must be bundled into the inpatient claim.

AUTH: Sec. 2-4-201, 53-2-201 and 53-6-113, MCA
IMP: Sec. 2-4-201, 53-2-201, 53-6-101, 53-6-111 and 53-6-113, MCA

37.86.3001 OUTPATIENT HOSPITAL SERVICES, DEFINITIONS

(1) remains the same.

(2) "Conversion factor" means an adjustment equal to medicare's highest urban rate for Montana as published at 67 ~~Code of Federal Regulations (CFR)~~ Federal Register (FR) 43616 (June 28, 2002).

(3) through (8) remain the same.

(9) "Outpatient" means a person who:

(a) has not been admitted by a hospital as an inpatient~~, who~~;

(b) is expected by the hospital to receive services in the hospital for less than 24 hours~~, who~~;

(c) is registered on the hospital records as an outpatient; and

(d) ~~who~~ receives outpatient hospital services from the hospital, other than supplies or drugs alone, for nonemergency medical conditions ~~from the hospital~~.

(10) remains the same.

(11) "Outpatient prospective payment system" (OPPS) means medicare's outpatient prospective payment system mandated by the Balanced Budget Refinement Act of 1999 (BBRA) and the Medicare, Medicaid, SCHIP Benefits Improvement and Protection Act (BIPA) of 2000.

(12) through (12)(a)(i) remain the same.

(ii) serve primarily individuals being discharged from inpatient psychiatric treatment or inpatient psychiatric residential treatment; and

(iii) provide psychotherapy services consisting of at least individual, family, and group sessions at a frequency ~~are~~ designed to stabilize patients sufficiently to allow discharge to a less intensive level of care at the earliest appropriate opportunity, on average, after 15 or fewer treatment days.

(b) through (13) remain the same.

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

37.86.3007 OUTPATIENT HOSPITAL SERVICES, PROSPECTIVE PAYMENT METHODOLOGY, CLINICAL DIAGNOSTIC LABORATORY SERVICES

(1) Clinical diagnostic laboratory services, including

automated multichannel test panels (commonly referred to as "ATPs") and lab panels, will be reimbursed on a fee basis as follows with the exception of hospitals reimbursed under ARM 37.86.3005 and specific lab codes which are paid under ARM 37.86.3020:

(a) through (d) remain the same.

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

37.86.3009 OUTPATIENT HOSPITAL SERVICES, PAYMENT METHODOLOGY, EMERGENCY VISIT SERVICES (1) Emergency visits are emergency room services for which the ICD-9-CM presenting diagnosis code (admitting diagnosis code) or the diagnosis code (primary or secondary diagnosis code) chiefly responsible for the services provided is a diagnosis designated by the department as an emergency diagnosis in the medicaid emergency diagnosis list or the claim includes ~~a~~ an initial psychiatric evaluation CPT code or a level 4 or level 5 emergency CPT code. PASSPORT provider authorization is not required for these visits. For purposes of this rule, the department adopts and incorporates by reference the emergency diagnosis list effective August 1, 2003. The emergency diagnosis list is available upon request from the Department of Public Health and Human Services, ~~Child and Adult~~ Health Resources Division, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

(2) For emergency visits that are not provided by exempt hospitals or CAHs as defined in ARM 37.86.2901 and meet (1), reimbursement will be based on the ambulatory payment classifications (APC) methodology in ARM 37.86.3020, except for emergency room visits for medicaid clients from birth through two years of age on evenings and weekends.

(a) Evenings are defined as from 6 p.m. on Monday, Tuesday, Wednesday and Thursday until 8 a.m. of the following day.

(b) Weekends are defined as from 6 p.m. Friday until 8 a.m. on Monday.

(3) through (6) remain the same.

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

37.86.3020 OUTPATIENT HOSPITAL SERVICES, OUTPATIENT PROSPECTIVE PAYMENT SYSTEM (OPPS) METHODOLOGY, AMBULATORY PAYMENT CLASSIFICATION (1) Outpatient hospital services that are not provided by exempt hospitals or CAHs as defined in ARM 37.86.2901(4) and (8) will be reimbursed on a rate-per-service basis using the outpatient prospective payment system (OPPS) schedules. Under this system, medicaid payment for hospital outpatient services included in the OPPS is made at a predetermined, specific rate. These outpatient services are classified according to a list of APCs published annually in the Code of Federal Regulations (CFR). The rates for OPPS are determined as follows:

(a) through (d) remain the same.

(e) If the OPPS does not assign a fee or APC for a particular ~~APC~~ procedure code, but for which a medicaid fee has been assigned, the fee will be set in accordance with the resource based relative value scale (RBRVS) methodology found at ARM 37.85.212. If there is not a medicaid fee, the service will be reimbursed at hospital specific outpatient cost to charge ratio.

(e)(i) through (h) remain the same.

(2) The department adopts and incorporates by reference the OPPS schedules published by the centers for medicare and medicaid mervices (CMS) in 69 Federal Register 211, November 2, 2004, effective January 1, 2005. A copy may be obtained through the Department of Public Health and Human Services, Health Resources Division, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

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

37.86.3025 OUTPATIENT HOSPITAL SERVICES, REIMBURSEMENT FOR SERVICES NOT PAID UNDER THE AMBULATORY PAYMENT CLASSIFICATION SYSTEM (1) through (5) remain the same.

(6) For services provided on or after August 1, 2003, hospitals receiving a provider based status from CMS must send a copy of the CMS letter granting provider based status to the department's hospital program officer at Department of Public Health and Human Services, ~~Child and Adult~~ Health Resources Division, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951 and must receive department approval prior to billing as a provider-based clinic.

(a) through (7) remain the same.

(8) The department adopts and incorporates by reference the outpatient hospital fee schedule dated ~~August 1, 2003~~ January 1, 2005. A copy may be obtained through the Department of Public Health and Human Services, ~~Child and Adult~~ Health Resources Division, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

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

3. The Department of Public Health and Human Services (the department) is proposing to amend the above rules pertaining to Medicaid reimbursement of eyeglasses and of hospital inpatient and outpatient services. Except as noted below, the rule changes for all except those in ARM 37.86.2105 apply to hospitals reimbursed according to the diagnosis related groups prospective payment system (hereinafter "DRG Hospitals") and do not apply to critical access hospitals (CAHs) or exempt hospitals.

The proposed rule amendments (with the exception of those to ARM 37.86.2105) implement changes in the Medicaid hospital services program that are necessary to improve administrative

efficiency and the cost effectiveness of the program, thereby safeguarding the limited funding available for Medicaid services to low-income families and maximizing its effect.

The following are the proposed rule changes, along with the reasons why they are needed:

(a) ARM 37.86.2105 needs to be amended to incorporate the updated and increased fee to be paid to the department's eyeglass contractor, Walman Optical. The department considered the option of not increasing the fee as requested by the contractor but Walman Optical has incurred additional costs due to increases in crude oil that then impacted transportation costs. In addition, the state is pleased with the work that Walman has provided over the past nine years. In state fiscal year 2004, Medicaid reimbursed $166,829.80 for 11,159 frames. The department estimates the increase in the fee paid for frames would be an additional $9,000.00 per year. The other amendment to this rule changes the Division's name to it current name.

(b) ARM 37.86.2801(4) needs to be amended to allow Montana Medicaid the authority to retroactively approve services provided in hospitals located more than 100 miles outside the Montana border whenever the hospital can document that it did not know and did not have any basis to assume a patient was Medicaid eligible at the time of admission. The current rule requires prior authorization of the admission of a Montana Medicaid patient before such a facility can be reimbursed and does not allow exceptions. This rule change is needed to permit payment for some services under circumstances where the Medicaid client is admitted to an out-of-state hospital on an emergency basis.

(c) A new paragraph is proposed to be added to ARM 37.86.2905 stating that an exempt hospital's and critical access hospital's (CAHs) interim reimbursement is based on a hospital specific medicaid inpatient cost to charge ratio. Exempt hospitals and CAHs will be reimbursed the actual allowable costs determined according to ARM 37.86.2803. This is not a change in reimbursement methodology. The language was erroneously deleted on page 482 of the 2004 Montana Administrative Register, issue no. 4 and the department is taking this opportunity to correct the error.

(d) ARM 37.86.2901 is amended to include a definition for DRG hospitals. This is included in order to remove confusing references to out-of-state hospitals in some rules.

(e) ARM 37.86.2907(2) needs to be amended to permit DRG hospitals with neo-natal units to split bill when total charges reach $100,000. The typical billing practice when multiple hospitals provide a patient with services is to accept the claim from the discharging hospital and to require all the hospitals providing that patient with services to settle the reimbursement among themselves. Neo-natal intensive care is centralized in Montana and transfers are routine when this service is required; therefore, split billing is appropriate for this service. The reference to stop-loss thresholds in (3) of ARM 37.86.2907 is

removed because stop-loss thresholds have not applied since 1998 and the department is taking this opportunity to correct the error. The stop-loss thresholds became unnecessary in 1998 because the DRG system of billing had provided enough data by that date to accurately determine the rates and it was no longer necessary to provide the reimbursement protection of a stop-loss.

(f) ARM 37.86.2918 needs to be amended to clearly establish reimbursement practices that apply when a patient is readmitted within 30 days and to distinguish between the requirements applicable to DRG hospitals and those applicable to exempt hospitals and CAHs. Currently, a readmission for inpatient services occurring with 30 days of discharge is reviewed to determine if the diagnostic related group used to bill the claim is appropriate. No change to this practice is proposed. This practice does not apply to exempt hospitals and CAHs, however, because these types of hospitals are reimbursed at a percentage of charges. In other words, there is no DRG to review. The department is taking this opportunity to correct the error in wording.

This rule is also being amended to state how readmissions to inpatient rehabilitation facilities of DRG hospitals within 72 hours are billed. Current practice is to combine (bundle) the reimbursement for a readmission with the reimbursement for inpatient services provided within the prior 72 hours. These reimbursements occur with enough frequency that the department is taking this opportunity to state in rule this reimbursement procedure to assist hospitals.

This rule is also being amended to state the billing requirements for billing outpatient hospital services are provided up to 72 hours prior to admission. Current practice is to combine (bundle) the reimbursement for these services with reimbursement for in patient services if the patient is admitted to the hospital within the time period stated. Diagnostic services provided up to 72 hours prior to admission are bundled. All other outpatient services provided up to 24 hours prior to admission are bundled.

(g) The definition of "outpatient" in ARM 37.86.3001 needs to be amended to clarify that outpatient hospital services for supplies and drugs alone are not a covered service except in an emergency medical condition. The department pays a screening and evaluation fee for these claims in the emergency department and denies these claims in the outpatient department. This is not a change in current practice.

Also, the reference in (12)(a) to "acute level partial hospitalization" is proposed to be amended to provide clarification of what is required to qualify for the per diem rate for acute partial hospitalization. The intent of the change is to make acute partial hospitalization and subacute partial hospitalization consistent. Lack of consistency could lead to double billing under Medicaid, e.g., "acute partial" being billed while patient is also receiving individual, family or group therapy from a nonhospital staff person.

Finally, the citation in the definition of "conversion

factor" needs to be amended because it erroneously refers to the Code of Federal Regulations instead of the Federal Register.

(h) ARM 37.86.3007 needs to be amended to clarify that automated multichannel test panels (ATPs) and lab panels are clinical diagnostic laboratory services are reimbursed as such. The reference is being added to assist the reader of these rules in identifying how Montana Medicaid reimburses for ATP and lab panels.

(i) Amendments to ARM 37.86.3009 are proposed to remove some limitations on emergency room services for patients from birth through age two on evenings and weekends and on the initial psychiatric evaluation for all ages. These limitations on reimbursement are being removed because the use of the emergency room for these services is often medically necessary.

(j) The proposed amendment to ARM 37.86.3020(1)(e) refers to ambulatory payment classification (APC) in the determination of outpatient prospective payment system (OPPS) rates. Under OPPS, medicaid payment to a hospital is made at a predetermined and specific rate. Outpatient services are classified according to a list of APCs published annually in the Code of Federal Regulations (CFR). The APC system groups outpatient procedures into services that are clinically similar and require similar amounts of resources. This rule change allows the department to use the resource based relative value scale (RBRVS) to set a fee in the unusual circumstance where there is no APC for the procedure. The RBRVS also classifies provider services based on resources required to perform the service, an equitable measure.

Also, the OPPS rate schedule of the federal Centers for Medicare and Medicaid Services (CMS) is being adopted by reference, a measure needed to make the updated rate schedule with procedure codes legally applicable in Montana. The federal OPPS rate schedule is amended annually in the Federal Register.

(k) ARM 37.86.3025 states the Montana exceptions to the general rule of ARM 37.86.3020 that the federal OPPS schedule applies. In those cases, the department's outpatient fee schedule applies. This rule is proposed to be amended to update the reference date to the date of the most current APC outpatient hospital fee schedule, which is to the advantage of the hospitals, both because fees will typically increase and procedure coding will remain consistent with other insurance carriers, as required by the Federal Health Insurance Portability and Accountability Act (HIPAA).

Provider fee schedules, including those for APC hospitals, are posted on the department's website and are incorporated in Montana Medicaid's contracted billing computer program (the Medicaid Managed Information System, MMIS) to reimburse claims. The status of fees is noted at the beginning of the fee schedule. Those services marked with an "M" have a Montana Medicaid specific fee as described in ARM 37.86.3025 and indicate the Montana exceptions to the federal OPPS schedule.

(l) References throughout the rules to the Child and Adult Health Resources Division have been corrected to reflect the new division name, Health Resources Division.

Cumulative effective of rate changes:

The proposed changes in reimbursement are expected to have $98,669.08 annual increase on the hospital budget. The change in transfer reimbursement for out-of-state and critical access hospitals is a cost neutral change; the change is to interim reimbursement but not final reimbursement as these facilities are cost settled. Allowing neonate facilities to split bill has no financial impact. The only financial impact of this rule change is allowing claims for children from birth through age two on weekends and evenings and allowing the initial psychiatric evaluation code to pass through emergency edits.

There are approximately 82,000 persons in Montana eligible to receive hospital services. The estimated number of Medicaid-enrolled hospitals in the state of Montana is 58. The estimated number of enrolled hospitals within 100 miles of the border of Montana is 38. The estimated number of hospitals more than 100 miles from the nearest Montana border enrolled as providers to the Montana Medicaid program is 267. Therefore, the total number of hospitals that may be affected is 363.

4. These rules have no adverse impact and are intended to be applied retroactively to January 1, 2005.

5. Interested persons may submit their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to Gwen Knight, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 202951, Helena, MT 59620-2951, no later than 5:00 p.m. on December 30, 2004. Data, views or arguments may also be submitted by facsimile (406)444-9744 or by electronic mail via the Internet to dphhslegal@state.mt.us. The Department also maintains lists of persons interested in receiving notice of administrative rule changes. These lists are compiled according to subjects or programs of interest. For placement on the mailing list, please write the person at the address above.

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

Ellie Parker for
Rule Reviewer

Russ Cater for
Director, Public Health and Human Services

Certified to the Secretary of State November 22, 2004.

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

In the matter of the amendment of ARM 37.82.101 pertaining to medicaid eligibility	))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Interested Persons

1. On December 22, 2004, at 11:00 a.m., a public hearing will be held in the auditorium of the Department of Public Health and Human Services Building, 111 N. Sanders, Helena, Montana to consider the proposed amendment of the above-stated rule.

The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who need an alternative accessible format of this notice or provide reasonable accommodations at the public hearing site. If you need to request an accommodation, contact the department no later than 5:00 p.m. on December 13, 2004, to advise us of the nature of the accommodation that you need. Please contact Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210; telephone (406)444-5622; FAX (406)444-1970; Email dphhslegal@state.mt.us.

2. The rule as proposed to be amended provides as follows. Matter to be added is underlined. Matter to be deleted is interlined.

37.82.101 MEDICAL ASSISTANCE, PURPOSE AND INCORPORATION OF POLICY MANUALS (1) remains the same.

(2) The department adopts and incorporates by reference the state policy manuals governing the administration of the medicaid program, namely the Family Medicaid Manual and the SSI Medicaid Manual effective ~~January 1, 2004~~ February 1, 2005. The Family Medicaid Manual, the SSI Medicaid Manual and the proposed manual updates are available for public viewing at each local office of public assistance or at the Department of Public Health and Human Services, Human and Community Services Division, 1400 Broadway, P.O. Box 202952, Helena, MT 59620-2952. The proposed manual updates are also available on the department's website at www.dphhs.state.mt.us.

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

3. The Montana Medicaid Program is a joint federal-state program which pays medical expenses for eligible low income individuals. To qualify for the Montana Medicaid Program, an individual must meet the eligibility requirements set forth in ARM Title 37, Chapter 82. Additionally, the Family Medicaid

Manual and the SSI Medicaid Manual set forth information about the eligibility requirements for Medicaid which is more detailed than that in administrative rules. These state policy manuals are published by the Department to provide guidance to employees of the local Offices of Public Assistance who determine eligibility for Medicaid.

ARM 37.82.101 adopts and incorporates by reference the Medicaid policy manuals. By incorporating these manuals into the administrative rules, the Department gives interested parties and the public general notice and an opportunity to comment on policies governing Medicaid eligibility. Additionally, as a result of the incorporation of the manuals into the administrative rules, the policies contained in the Family Medicaid Manual and the SSI Medicaid Manual have the force of law in case of litigation between the Department and a Medicaid applicant or recipient concerning the applicant or recipient's eligibility for Medicaid.

ARM 37.82.101 currently adopts and incorporates by reference the Medicaid policy manuals effective January 1, 2004. The Department proposes to make some revisions to these manuals which will take effect on February 1, 2005. The proposed amendment to ARM 37.82.101 is therefore necessary in order to incorporate into the Administrative Rules of Montana the revised version of the policy manuals and to permit all interested parties to comment on the Department's policies and to offer suggested changes. Manuals and draft manual material are available for review in each local Office of Public Assistance and on the department's website at www.dphhs.state.mt.us. Following is a brief overview of the changes being made to each manual section for the Family Medicaid Manual and the SSI Medicaid Manual. It is estimated that changes to the Family Medicaid and SSI Medicaid Manuals could affect 83,286 Medicaid recipients.

Family Medicaid Manual

FMA 103-4 Verification and Documentation - This section is being revised to clarify that income must be verified at application and redetermination; it is not required to be verified at other times. This is necessary to eliminate confusion over existing policy and does not change the Department's policy on verification. Fiscal impact of this proposed change is expected to be zero.

This section is also being revised to reinstate the requirement that, as a condition of Medicaid eligibility, clients who are eligible for Medicaid must participate in the Health Plan Premium Payment program, which is authorized in 42 USC 1396e; 53-6-131, MCA; and ARM 37.82.424. In the Health Plan Premium Payment program, the Medicaid program will pay insurance premiums for Medicaid recipients who have access to private health insurance (usually through an employer), if the

Department determines that payment of the premium is cost-effective. Payment of the premium is considered cost-effective if it is projected that the amount paid for the premiums will be less than the amount Medicaid will save as a result of cost avoidance, i.e., as a result of health care expenses being paid by recipients' private insurance rather than by Medicaid.

The Department has decided to make participation in the Health Plan Premium Payment program mandatory because it is expected that doing so will result in savings to the Montana Medicaid program. Prior to 1999, when participation in the Health Plan Premium Payment program was mandatory, approximately 500 Medicaid recipients participated in it. Currently, based on voluntary participation, approximately 140 recipients participate. It is anticipated that the caseload will once again reach - and likely exceed - a level of 500. Therefore, by making participation in the Health Plan Premium Payment program a mandatory condition for eligibility, the state's Medicaid can realize cost-avoidance for potentially 300 plus individuals. Although it is not possible to calculate the actual dollar amounts to be realized, the savings to Medicaid could be significant.

To be in compliance with the requirement to participate in the Health Plan Premium Payment program, a Medicaid recipient must identify private insurance for which the recipient is eligible and provide information about that private insurance. The Medicaid recipient also must enroll in, or maintain enrollment in, the private insurance plan if the Department directs the recipient to do so after making a determination of cost-effectiveness.

It is important to note the participation in the Health Plan Premium Payment program is a condition of eligibility only for adults. Medicaid-eligible children would not be penalized for non-participation by their parents or guardians.

FMA 307-1 Third Party Liability/Health Insurance Premium Payment System (TPL/HIPPS):

This section is being revised to reinstate the requirement that, as a condition of Medicaid eligibility, clients who are eligible for Medicaid must participate in the Health Plan Premium Payment program. See the explanation of HIPPS under Section FMA 103-4 of the Family Medicaid Manual, above.

SSI Medicaid Manual

Although these changes include increases to the categorically needy income standards and the Pickle income standards and a statement of the SSI Standard Payment Amount, the increases are being made only to reflect the Social Security Administration's annual Cost of Living Adjustments (COLA). COLA is an automatic increase each year in Social Security retirement and disability

benefits and Supplemental Security Income (SSI) benefits which are based on the percentage increase in the Consumer Price Index. Federal law provides for COLA to prevent inflation from eroding Social Security and SSI benefits. The Medicaid categorically eligible income standards are based on the SSI income standards; hence, an increase in the SSI standards results in an increase in the Medicaid Standard. The proposed increases in the income standards are not expected to increase the number of individuals eligible for Medicaid.

The following sections were updated to incorporate federal benefit standards related to the SSI Program:

MA 001 Categorically Needy
MA 005 Nursing Home Residents
MA 011 Standard Payment Amounts (SPA)

The categorically needy standard will be updated from $564 to the SSI payment standard of $579 for an individual and from $846 to the SSI payment standard of $864 for a couple in MA 001, MA 005 and MA 011. These standards are required to match the federal standards as published by the Social Security Administration. These increases do not result in an increase in the number of eligible individuals, but only retain eligibility for those already receiving these benefits.

MA 006 Pickle Applicants - Pickle is a special mandatory category of Medicaid eligibility, defined at 42 CFR 435.135. Pickle-eligibles are those who are currently receiving Social Security benefits, who were eligible for both OASDI and SSI at the same time, and who lost their SSI eligibility at some time since April 1977 due to a cost of living increase (later amended to be a loss of SSI for any reason). A Pickle-eligible individual or couple's income is tested against an adjusted categorically needy standard that takes into account the cumulative increase in the Consumer Price Index since the time when the SSI ended. The adjusted categorically needy standard for Pickle-eligible individuals and couples is calculated based on the current year's SSI Standard Payment Amounts (a.k.a. categorically needy standard) and is adjusted backward for each year since July 1976 from that current standard by the cumulative increase in the Consumer Price Index. The chart is provided as an alternative to calculating each case individually by deducting the increase that caused closure of SSI and all COLA increases in that increase since the time of the original increases. The changes to this table do not result in increased numbers of individuals eligible under this category, but do result in continued eligibility for those already receiving or for those who would qualify and will apply in the future.

Unless otherwise noted, the following proposed changes are not expected to result in fiscal impacts. With the notable exception of the reinstatement of the Health Insurance Premium Payment participation requirement, most changes are intended to

be policy clarifications.

MA 103-1 Application, Eligibility Determination and Furnishing Assistance - Additional uses for the form HCS-455 for retroactive determinations and for services received prior to the date of eligibility determination that normally require pre-authorization have been added. References to "subtypes" of Medicaid have been removed in preparation for transition to a new computer system for eligibility determination. This section is also being revised to clarify that when doing an ex parte review of eligibility for future benefits, it may be necessary to request more current or additional information from a household.

MA 103-3 Verification and Documentation - This section is being revised to clarify that when requesting protected health information for an eligibility determination, form HPS-402 must be used in compliance with HIPAA regulations. This section is also being revised to clarify that tax appraisal values should not be used to determine the value of real estate when determining the value of a Medicaid applicant's resources, since the tax appraisal value is generally lower than the retail value of real estate. Additionally the revised section removes references to The Economic Assistance Management System (TEAMS), the Department's computer system for eligibility determination, in preparation for transition to a new computer system for eligibility determination.

Finally, this section is being revised to reinstate the requirement that, as a condition of Medicaid eligibility, clients who are eligible for Medicaid must participate in the Health Plan Premium Payment program. See the explanation of HIPPS under Section FMA 103-4 of the Family Medicaid Manual, above.

MA 105-1 Disability Determination Overview - Additional material is being added to clarify that determinations of disability made by SSA override determinations of disability made by Medicaid Eligibility Determination Services (MEDS), the Department's contractor which makes disability determinations in some cases. The revised section clarifies that if SSA has made an initial determination that the applicant is not disabled, a determination that the applicant is disabled by MEDS cannot override SSA's denial during the applicant's SSA appeals process. The procedure also is being revised to require the eligibility worker to send original release forms to MEDS, as some medical providers will not honor photocopies or facsimiles.

This clarification that SSA determinations of disability override determinations of disability made by MEDS may result in a small fiscal impact in that it may result in fewer referrals to MEDS because eligibility workers will now understand that they should not refer a case to MEDS after SSA has made a determination. The Department will realize a small savings

because the Department will pay its contractor less if MEDS makes fewer disability determinations. It is not possible to determine an estimate of the potential savings.

MA 305-1 Third Party Liability/Health Insurance Premium Payment System (TPL/HIPPS) - This section is being revised to reinstate the requirement that, as a condition of Medicaid eligibility, clients who are eligible for Medicaid must participate in the Health Plan Premium Payment program. See the explanation of HIPPS under Section FMA 103-4 of the Family Medicaid Manual, above.

MA 306-1 Managed Care Program - This section currently states that most Medicaid recipients, including persons receiving only Qualified Medicare Beneficiary (QMB) assistance, must make cost sharing payments for some Medicaid services. This is incorrect, as QMB-only recipients are sometimes exempted from cost sharing payments. The section is being revised to indicate that QMB-only recipients sometimes must participate in cost sharing payments and will state that further information about cost sharing requirements can be obtained by referring to the General Medicaid Handbook or calling the Medicaid Hotline. The revised section also removes reference to Medicaid soft cards and updates instructions to eligibility staff on procedure for replacement of a lost Medicaid eligibility hard card.

MA 402-1 Countable and Excluded Resources - The revised section corrects computerized eligibility determination system coding instructions for "home" under caption "Life Estates". It also increases from six months to nine months the period of time during which Social Security and Supplemental Security Income benefits paid retroactively to an individual can be excluded as a resource in determining that individual's eligibility for Medicaid. The increase in the exclusion period is mandated by Public Law 108-203, the Social Security Protection Act, which was passed in 2004. The revised section also outlines a new policy for loans made by a member of the Medicaid household to a person who is not a member of the household. This new policy requires that loans given by a household must meet certain criteria to ensure that the loan is collectable. For example, the loan agreement must be in writing and contain reasonable repayment requirements and/or must be secured by a lien. If a loan does not meet the criteria for collectibility, the amount loaned will be considered an inaccessible (and hence non-countable) resource to the Medicaid household. The Department will therefore treat the loan as an uncompensated transfer of assets and will evaluate it under asset transfer penalty policies for those requesting nursing home or HCBS waiver coverage.

The expansion of the exclusion period for retroactive SSA and SSI benefits may result in a small increase in the number of persons eligible for Medicaid, since persons who have not spent their retroactive benefits after six months will not be

determined ineligible for Medicaid due to excess resources as long as they spend them within nine months. It is not possible to estimate how many additional persons will be eligible for Medicaid due to this change. The change in the policy governing loans is expected to result in minor fiscal impact in the form of cost savings for the Medicaid program by closing a loophole used by some nursing home residents as a method of transferring assets in order to become eligible for Medicaid coverage. It is not possible to make an estimate of exact cost savings, as it is not known how often this loophole has been or would be used to achieve Medicaid eligibility for nursing home coverage.

MA 601-2 Financial Responsibility of Relatives - This revision corrects policy to state that deeming of a parent's income to a child ceases when the child reaches age 18, rather than age 21 as previously stated. This change is being made to comply with federal Medicaid law which does not permit deeming of parental income after a child reaches 18. It adds clarification that common-law marriage is recognized for spouse-to-spouse deeming requirements, and suggests that when individuals claim common-law marriage, a statement of common-law marriage signed by both spouses is included in the eligibility case file. In addition, it clarifies the meaning of a "full month" in the context of spouses who cease living together due to separation within the marriage.

MA 903-1 Resource Assessments - The community spouse resource maintenance allowance standards have been changed in compliance with 42 USC 1396r-5(g). In 1988 Congress enacted the Medicare Catastrophic Coverage Act of 1988 (the MCCA), which contained provisions changing the way Medicaid eligibility was determined for married persons seeking Medicaid to pay for nursing home care. The general rule is that a married person is not eligible for Medicaid unless the total countable resources (assets) of the person and the person's spouse have a value of less than $3,000. Prior to 1988, this rule was applied to married persons residing in nursing facilities. The fact that a married couple had to spend all their resources except $3,000 before the institutionalized spouse could qualify for Medicaid meant that the spouse who was not institutionalized but remained in the community, known as the "community spouse", had virtually no resources left to meet the community spouse's own needs. Congress therefore amended the Medicaid statute to allow the community spouse to keep more than $3,000 in resources. Similarly, Congress provided provisions to allow the community spouse to keep enough income to provide for the community spouse's own needs.

The MCCA, codified in 42 USC 1396r-5, provided effective January 1, 1989 for a minimum community resource allowance of $12,000 and a maximum community resource allowance of $60,000. Pursuant to 42 USC 1396r-5(f)(2), the community spouse was entitled to retain $12,000 or half of the total countable resources of the couple up to a maximum of $60,000, whichever was greater.

Section 1396r-5(g) provides that each year after 1989 the $12,000 minimum and the $60,000 maximum community resource allowance are increased by the same percentage as the increase in the consumer price index in order to adjust for inflation. Thus, by 2004 the minimum community resource allowance had increased to $18,552 and the maximum community resource allowance had increased to $92,760, the amounts currently specified in the SSI Medicaid Manual. The revised manual will increase the minimum community spouse resource allowance (which the Department calls the minimum community spouse resource maintenance allowance) from $18,552 to the new standard determined by the Centers for Medicare and Medicaid Services (CMS), which is $19,020 and will increase the maximum community spouse resource allowance (which the Department calls the maximum community spouse resource maintenance allowance) from $92,760 to the new standard determined by CMS, which is $95,100.

It is not expected that there will be a financial impact to the Medicaid program based on this change because the minimum and maximum community spouse resource maintenance allowance amounts are merely being adjusted for inflation, in accordance with federal law.

MA 904-1 Budgeting Process - This section currently indicates that the spousal income maintenance allowance and family income maintenance allowance may be deducted from the institutionalized spouse's income in determining Medicaid eligibility for an institutionalized spouse whose own countable income exceeds the cost of care at the residential medical facility in which the spouse resides. Congress provided in 42 USC 1396r-5(d) for a spousal income maintenance allowance and family income maintenance allowance to guarantee that the community spouse and certain dependents of the institutionalized spouse or community spouse such as minor children have a minimum amount of monthly income sufficient to provide for their shelter and heating expenses and other basic needs. If the community spouse's own income is not sufficient to cover these basic needs, a portion of the institutionalized spouse's income can be given to the community spouse to help provide for these needs. The amounts given to the community spouse are known as the spousal income maintenance allowance and family income maintenance allowance.

The manual is now being revised to provide that the spousal income maintenance allowance and family income maintenance allowance may not be deducted from the institutionalized spouse's income if the institutionalized spouse's own countable income exceeds the cost of care at the Medicaid rate at the residential medical facility where the institutionalized spouse resides. This change is being made to comply with the federal statute as clarified for DPHHS by CMS. CMS has notified the Department that these deductions are not allowed in determining an institutionalized spouse's eligibility for Medicaid, but may only be deducted from the institutionalized spouse's income in calculating the amount the institutionalized spouse must pay

toward all medical expenses in order to be found eligible for Medicaid coverage for services not related to the residential medical facility. This correction is not expected to result in measurable fiscal impact to the Medicaid program.

MA 904-2 Income Disregards for Institutionalized Spouses - As provided in 42 USC 1396r-5(d)(4)(B), the standard utility allowance is one factor used in determining the minimum amount of monthly income sufficient to provide for the community spouse's shelter and heating expenses and other basic needs. The manual has been revised to reflect an increase in the standard utility allowance, as this standard is based on the USDA Food Stamp program standard utility allowance which is increased annually and was most recently revised effective October 1, 2004. 42 USC 1396r-5(d)(3)(C) provides that the monthly maintenance needs allowance for the community spouse shall not exceed a maximum which was originally set at $1,500 in 1989 and which is increased each year by the same percentage as the increase in the consumer price index in order to adjust for inflation. The maximum monthly maintenance needs allowance currently is $2,319. This amount will be revised as soon as CMS announces the updated maximum.

Financial impact of these required changes cannot be anticipated at this time, as it is not known whether the maximum monthly maintenance needs allowance will be updated, or if so, to what amount, but this change would not result in fiscal impact exceeding 2004 projections of $84,240 annually in general fund, with a total financial impact to the Medicaid program of $312,000 annually.

MA 904-6 Long Term Care Insurance - Removes instructions to eligibility case managers to contact the regional policy specialist, removes reference to future TEAMS updates which will not take place in view of the development of a new computerized eligibility determination system, and updates examples for clarity, and adds information regarding a nursing home resident who fails the cost-of-care test outlined in MA 904-1.

MA 907-1 Montana State Hospital Residents - This section currently indicates that the community spouse income maintenance allowance and family income maintenance allowance are income deductions available to all MSH residents. This is incorrect because it is not in accordance with federal Medicaid law. The manual is therefore being revised to state that the community spouse income maintenance allowance and family income maintenance allowance are not available as income deductions unless the applicant's income passes the "Step 1" eligibility test described in Section MA 904-1. In "Step 1", the Medicaid applicant's countable income is compared to the Categorically Needy Income Standard for one person. If the applicant's income is less than the Categorically Needy Income Standard, the applicant is eligible for Medicaid without meeting an incurment, but if the applicant's income exceeds the income standard the

applicant must incur a specified amount of medical expenses before qualifying for Medicaid. The Department is not changing its policy in regard to the availability of the community spouse income maintenance allowance and family income maintenance as income deductions but is merely revising the manual to correctly state an existing policy. The revised section also updates the name of the contact person at DPHHS Fiscal.

MA 1002-2 Income Disregards for Waiver Spouses - The standard utility allowance has been increased in compliance with 42 USC 1396r-5(d)(4)(B) and (g). When CMS increases the maximum monthly maintenance needs allowance, which is currently $2,319, this standard will also be updated. See explanation of changes to section MA 904-2, Income Disregards for Institutionalized Spouses, for more information on these changes.

There is expected to be no financial impact due to these requirements because these changes are merely adjustments to take into account inflation.

MA 1001-1 Resource Assessments (Waiver) - The community spouse resource maintenance allowance standards have been changed in compliance with 42 USC 1396r-5. See explanation of changes to section MA 903-1, Resources Assessments, for more information on these changes.

It is not expected that there will be a financial impact to the Medicaid program based on this change because the minimum and maximum community spouse resource maintenance allowance amounts are merely being adjusted for inflation.

MA 1003-1 Medically Needy (Waiver) - This section currently suggests that there is a limit of $114 per month on the residential care deduction which can be used by Home and Community Based Services Waiver clients who live in group homes to meet their medically needy incurment. This is incorrect, as there is no dollar limit on the residential care deduction in accordance with federal Medicaid law. The statement regarding the $114 limit is therefore being removed.

4. Interested persons may submit their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210, no later than 5:00 p.m. on December 30, 2004. Data, views or arguments may also be submitted by facsimile (406)444-1970 or by electronic mail via the Internet to dphhslegal@state.mt.us. The Department also maintains lists of persons interested in receiving notice of administrative rule changes. These lists are compiled according to subjects or programs of interest. For placement on the mailing list, please write the person at the address above.

5. The Office of Legal Affairs, Department of Public

Health and Human Services has been designated to preside over and conduct the hearing.

Dawn Sliva for
Rule Reviewer

John Chappuis for
Director, Public Health and Human Services

Certified to the Secretary of State November 22, 2004.

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

In the matter of the repeal of ARM 37.106.312 pertaining to minimum standards for all health care facilities: blood bank and transfusion services	)))))	NOTICE OF PROPOSED REPEAL NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On January 1, 2005, the Department of Public Health and Human Services proposes to repeal the above-stated rule.

The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who need an alternative accessible format of this notice. If you need to request an accommodation, contact the department no later than 5:00 p.m. on December 20, 2004, to advise us of the nature of the accommodation that you need. Please contact Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210; telephone (406)444-5622; FAX (406)444-1970; Email dphhslegal@state.mt.us.

2. ARM 37.106.312 as proposed to be repealed is on page 37-25992 of the Administrative Rules of Montana.

AUTH: Sec. 50-5-103 and 50-5-404, MCA
IMP: Sec. 50-5-103, 50-5-204, and 50-5-404, MCA

3. The department proposes to repeal ARM 37.106.312 because the standards incorporated in this rule are obsolete and because the federal standards negate the need for state standards. The current rule references standards adopted in 1981. Blood bank and transfusion services are now under the jurisdiction of the Federal Drug Administration and governed by federal law. The proposed repeal would comply with 2-4-314(1), MCA, requiring each agency to biennially review its rules to determine if any new rule should be adopted or if any existing rule should be modified or repealed.

4. Interested persons may submit their data, views or arguments concerning the proposed action in writing to Gwen Knight, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 202951, Helena, MT 59620-2951, no later than 5:00 p.m. on December 30, 2004. Data, views or arguments may also be submitted by facsimile (406)444-9744 or by electronic mail via the Internet to dphhslegal@state.mt.us. The Department also maintains lists of persons interested in receiving notice of administrative rule changes. These lists are compiled according to subjects or programs of interest. For placement on the mailing list, please write the person at the address above.

5. If a person who is directly affected by the proposed action wishes to express data, views and arguments orally or in writing at a public hearing, that person must make a written request for a public hearing and submit such request, along with any written comments to Gwen Knight, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 202951, Helena, MT 59620-2951, by facsimile (406)444-9744 or by electronic mail via the Internet to dphhslegal@state.mt.us no later than 5:00 p.m. on December 30, 2004.

6. If the Department of Public Health and Human Services receives requests for a public hearing on the proposed action from either 10% or 25, whichever is less, of those who are directly affected by the proposed action, from the Administrative Rule Review Committee of the legislature, from a governmental agency or subdivision, or from an association having no less than 25 members who are directly affected, a hearing will be held at a later date and a notice of the hearing will be published in the Montana Administrative Register. Ten percent of those directly affected has been determined to be six based on the 61 facilities affected by rules covering blood banks.

Dawn Sliva for
Rule Reviewer

John Chappuis for
Director, Public Health and Human Services

Certified to the Secretary of State November 22, 2004.

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

In the matter of the amendment of ARM 6.6.1906 pertaining to operating rules for the Montana Comprehensive Health Association	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On September 23, 2004, the State Auditor and Commissioner of Insurance published MAR Notice No. 6-150 regarding a public hearing on the proposed amendment of the above-stated rule at page 2123 of the 2004 Montana Administrative Register, Issue No. 18.

2. The Department has amended ARM 6.6.1906 exactly as proposed.

3. No comments or testimony were received.

JOHN MORRISON, State Auditor
and Commissioner of Insurance

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

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

Certified to the Secretary of State on November 22, 2004.

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

In the matter of the amendment of ARM 6.6.3504 pertaining to contents of annual audited financial report	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On October 21, 2004, the State Auditor and Commissioner of Insurance published MAR Notice No. 6-156 regarding a public hearing on the proposed amendment of the above-stated rule at page 2432 of the 2004 Montana Administrative Register, Issue No. 20.

2. The Department has amended ARM 6.6.3504 exactly as proposed.

3. No comments or testimony were received.

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
Rules Reviewer

Certified to the Secretary of State on November 22, 2004.

BEFORE THE CLASSIFICATION REVIEW COMMITTEE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 6.6.8301 pertaining to updating references to the NCCI Basic Manual for new classifications for Social Services Operations and Bottling Operations	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On August 19, 2004, the Classification Review Committee (committee) published MAR Notice No. 6-148 regarding a notice of proposed amendment of the above-stated rule at page 1874, 2004 Montana Administrative Register, Issue No. 16. On September 2, 2004, the committee published MAR Notice No. 6-152, amending MAR Notice No. 6-148, at page 2045 of the 2004 Montana Administrative Register, Issue No. 17.

2. The Department has amended ARM 6.6.8301 exactly as proposed.

3. No comments or testimony were received.

4. This rule will be applied retroactively to October 1, 2004.

CLASSIFICATION REVIEW COMMITTEE

By: /s/ Tom Clarke
Tom Clarke
Review Committee Chairperson

By: /s/ Alicia Pichette
Alicia Pichette
Rules Reviewer

Certified to the Secretary of State on November 22, 2004.

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 10.57.201, 10.57.215, 10.57.216, 10.57.301 and 10.57.606 relating to educator licensure	))))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On August 5, 2004, the Board of Public Education published MAR Notice No. 10-57-234 regarding the public hearing on the proposed amendment of the above-stated rules concerning educator licensure at page 1661 of the 2004 Montana Administrative Register, Issue Number 15.

2. The Board of Public Education has amended the following rules exactly as proposed:

ARM 10.57.201 GENERAL PROVISIONS TO ISSUE LICENSES
10.57.215 RENEWAL REQUIREMENTS
10.57.216 APPROVED RENEWAL ACTIVITY
10.57.301 ENDORSEMENT INFORMATION
10.57.606 REPORTING OF THE SURRENDER, DENIAL, REVOCATION OR SUSPENSION OF A LICENSE.

3. No comments or testimony were received.

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

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

Certified to the Secretary of State November 22, 2004.

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

In the matter of the adoption of New Rule I (ARM 12.9.810) pertaining to hunting season extensions	))))	NOTICE OF ADOPTION

TO: All Concerned Persons

1. On August 19, 2004, the Fish, Wildlife and Parks Commission (commission) published MAR Notice No. 12-308 of the proposed adoption of New Rule I (ARM 12.9.810) pertaining to hunting season extensions at page 1887 of the 2004 Montana Administrative Register, Issue Number 16. On October 7, 2004, the commission published MAR Notice No. 12-310 providing another hearing on this rule at page 2341 of the 2004 Montana Administrative Register, Issue Number 19.

2. The commission has adopted New Rule I (ARM 12.9.810) with the following change, stricken matter interlined, new matter underlined:

NEW RULE I (ARM 12.9.810) HUNTING SEASONS EXTENSIONS

(1) The commission may determine that the extension of a hunting season may be an acceptable strategy to achieve deer or elk management objectives under the following conditions:

(a) through (c) remain as proposed.

(d) mild weather conditions during the fall hunting season result in a harvest that is at least ~~50~~25% below the five-year average for that check station.

(2) through (5)(c) remain as proposed.

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

3. One individual offered comments on several aspects of the rule. The following is a summary of this individual's comments, and they appear with the commission's responses:

COMMENT 1: The new rule states that the commission may extend a hunting season if elk populations are 20% or more over the current department Elk Plan population objectives. NEW RULE I (ARM 12.9.810)(1)(b). I am curious about how the proposed revision of Montana's Elk Plan will fit with the new rule.

RESPONSE: The percentage of 20% over the Elk Plan populations objectives came from the draft Elk Plan. In the draft plan, the figure of 20% is used as a trigger to determine when hunting seasons should change from a standard package to more liberal package. Elk management changes to more liberal hunting management, or package, when populations are high. The purpose of requiring that elk populations reach 20% over Elk Plan population objectives is to ensure that hunting season

extensions are not implemented when elk numbers are lower and the management package is conservative. Also, it is important to remember that the basis for elk management is the five week general hunting season, not hunting season extensions.

COMMENT 2: In NEW RULE I (ARM 12.9.810)(1)(c), who decides what "levels necessary to accomplish harvest management objectives" are, and how are these levels quantified?

RESPONSE: The levels that are necessary to accomplish harvest management objectives are quantified numerically in the draft Elk Plan in the annual elk harvest section. The department determined what these numbers should be through data collected by biologists and practical experience. These numbers also reflect input the department received from over 1200 landowners and over 2000 hunters in the form of comments offered on the draft Elk Plan at 23 public meetings and written comments submitted to the department. The Adaptive Harvest Management system (used in the draft Elk Plan) is an adaptive system by definition, and there is a feedback loop between harvest and population objectives. Under the draft Elk Plan, if elk populations increase, harvest objectives increase. So, in short, there is a direct tie between season extension criteria and the draft Elk Plan.

COMMENT 3: What will happen if it is not a severe winter, but there are game damage complaints occurring across multiple hunting districts?

RESPONSE: It is very unlikely that there would be game damage complaints occurring across multiple hunting districts in mild weather conditions. However, all the criteria of NEW RULE I (ARM 12.9.810)(1)(a) through (d) must be met before hunting seasons will be extended in mild weather. In the instance of numerous game damage complaints without winter weather conditions, there are other tools available to address these complaints. Under 87-1-225, MCA, and ARM 12.9.802 and 12.9.803, the commission may open a special season and implement a game damage hunt to address specific game damage complaints, regardless of weather conditions. Additionally, under ARM 12.9.805, the department may issue supplemental game damage licenses to landowners who qualify for game damage assistance.

COMMENT 4: Who is on the regional committee described in (5)(a) of the new rule, and why does the committee meet the fourth week of general big game season? Will the committee always meet the fourth week or will it meet only if conditions warrant a meeting?

RESPONSE: The regional committee is comprised of department personnel within a region who work in the field and have knowledge of hunting conditions and the harvest in a given year. The committee will meet annually on the fourth week of hunting season to determine if an extension of the hunting season is

warranted. By the fourth week of general big game season the department should have enough data from check stations to make an evaluation regarding the hunting success in a given area. A number of check stations have harvest records for many years. These records make it possible for the department to compare current data with past data and to determine if the harvest is below or above normal. Once this determination is made, the department can evaluate the remainder of the criteria and decide if an extension of hunting seasons is advisable.

COMMENT 5: I wonder if February 15 is too late in the season to end a hunting season that has been extended.

RESPONSE: It is not anticipated that a hunting season routinely would be extended to February 15. Probably, a season that ended this late would be unusual and the surrounding circumstances would be unique. This is the latest date that a hunting season could be held, and this date was included in the rule to maintain the maximum flexibility.

COMMENT 6: I strongly support the statement in paragraph four of the MAR Notice No. 12-308 that pertains to hunting access and think that this should be a factor in determining whether or not hunting seasons are extended. I am also strongly in support of the heads up look at the situation during the fourth week of hunting season, allowing a continuation of hunting without a break at the end of the general season. Overall, I think this is a positive step and encourage the commission to adopt this rule.

RESPONSE: The commission appreciates support for this rule.

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

By: /s/ Rebecca Dockter
Rebecca Dockter
Rule Reviewer

Certified to the Secretary of State November 22, 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	CORRECTED NOTICE OF AMENDMENT (SEPTAGE CLEANING AND DISPOSAL)

TO: All Concerned Persons

1. On October 20, 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. On October 7, 2004, the Department published the notice of amendment of the rules at page 2383, 2004 Montana Administrative Register, issue number 19.

2. This corrected notice of amendment is being published to reflect an amendment to an internal reference cite in ARM 17.50.803 that should have been amended in the adoption notice for MAR Notice No. 17-208 because of renumbering of sections. The amendment is shown below:

17.50.803 LICENSURE, LICENSE APPLICATION, ANNUAL RENEWAL

(1) through (5)(q)(iv) remain as adopted.

(6) During the term of a license, the licensee may, after fulfilling the requirements of ~~(2) of this rule~~ (5), add new disposal sites to the service area with the written approval of the department.

(7) through (13) remain as adopted.

Reviewed by:

DEPARTMENT OF ENVIRONMENTAL QUALITY

John F. North
JOHN F. NORTH
Rule Reviewer

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

Certified to the Secretary of State, November 22, 2004.

BEFORE THE DEPARTMENT OF TRANSPORTATION
OF THE STATE OF MONTANA

In the matter of the adoption of New Rules I through VI pertaining to acceptance and use of electronic records and electronic signatures	NOTICE OF ADOPTION

TO: All Concerned Persons

1. On August 19, 2004, the Department of Transportation published MAR Notice No. 18-105 pertaining to the proposed adoption of the above-stated rules relating to Electronic Records and Electronic Signatures, at page 1891 of the 2004 Montana Administrative Register, issue number 16.

2. The Department of Transportation has adopted rule I (18.4.110), rule II (18.4.111), rule III (18.4.112), rule IV (18.4.113), rule V (18.4.114) and rule VI (18.4.115) as proposed.

3. No comments or testimony were received.

DEPARTMENT OF TRANSPORTATION

/s/ James Currie
James Currie
Deputy Director

/s/ Lyle Manley
Lyle Manley, Attorney
Rule Reviewer

Certified to the Secretary of State, November 22, 2004.

BEFORE THE BOARD OF PUBLIC ACCOUNTANTS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of ARM 8.54.422, 8.54.423, 8.54.702, 8.54.703, 8.54.901, 8.54.902, 8.54.903, 8.54.904, 8.54.905 and 8.54.906 regarding examinations and professional quality monitoring; the adoption of NEW RULE I; and the repeal of ARM 8.54.706 related to composition of the screening panel	))))))))))	NOTICE OF AMENDMENT, ADOPTION AND REPEAL

TO: All Concerned Persons

1. On September 23, 2004, the Board of Public Accountants published MAR Notice No. 8-54-40 regarding the public hearing on the proposed amendment, adoption and repeal of the above-stated rules relating to examinations, monitoring and composition of the screening panel at page 2142 of the 2004 Montana Administrative Register, issue no. 18.

2. A public hearing on the proposed rule action was held on October 15, 2004. No members of the public attended, but the Board received written comments. The Board summarizes those comments and responds as follows:

Comment 1: A commenter suggested that in ARM 8.54.904(3) the terms "deleted" or "omitted" would be clearer than the term "redacted."

Response 1: The Board agrees that the term "deleted" is a more common term than the legal term "redacted", and has amended the rule accordingly. It is the intent of the Board that the identifying information be obscured, whether by obliterating using a heavy marker, covering with correction tape, the use of "white out" fluid, or some equally effective technique that hides or obscures the identifying information.

Comment 2: A commenter expressed support for the proposed rule changes.

Response 2: The Board acknowledges the comment.

3. After considering the comments, the Board amended ARM 8.54.422, 8.54.423, 8.54.702, 8.54.703, 8.54.901, 8.54.902, 8.54.903, 8.54.905, and 8.54.906 exactly as proposed.

4. After considering the comments, the Board amends ARM 8.54.904 as proposed but with the following changes, stricken matter interlined, new matter underlined:

8.54.904 FILING OF REPORTS (1) and (2) remain as proposed.

(3) The report submitted must have been issued within the period of time specified by the board. For reports submitted pursuant to (1)(c), the client's or employer's name and similar identifying information must be ~~redacted~~ deleted.

(4) remains as proposed.

AUTH: 37-50-203, MCA
IMP: 37-50-203, MCA

5. After considering the comments, the Board adopts NEW RULE I (ARM 8.54.427) exactly as proposed.

6. After considering the comments, the Board repeals ARM 8.54.706 exactly as proposed.

BOARD OF PUBLIC ACCOUNTANTS
GARY KASPER, LPA, CHAIR

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

/s/ MARK CADWALLADER
Mark Cadwallader,
Alternate Rule Reviewer

Certified to the Secretary of State November 22, 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 AMENDMENT

TO: All Concerned Persons

1. On October 7, 2004, the Department of Natural Resources and Conservation published MAR Notice No. 36-25-102 regarding the public hearing on the proposed amendment of ARM 36.25.117 concerning renewal of lease or license and preference right at page 2361 of the Montana Administrative Register, Issue Number 19.

2. The agency has amended ARM 36.25.117 with the following changes, stricken matter interlined, new matter underlined:

36.25.117 RENEWAL OF LEASE OR LICENSE AND PREFERENCE RIGHT (1) through (2)(a) remain as proposed.

(3) Unless the board decides on its own volition and sole discretion that a lease should be given to a better qualified applicant, a surface lessee or licensee who has strictly complied with the applicable conditions set forth in 77-6-113(1), MCA, or who does not have a history or pattern of lease violations, 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 (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) and (b) remain as proposed.

(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. Any individual conducting the hearing shall not have been involved in the original determination to revoke the lessee's preference right. 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) remains as proposed.

(4) ~~As set forth in 77-6-212, MCA, f~~For leases or licenses issued for a new lease or license term beginning in 1987 and thereafter, a lessee or licensee who subleases more than 1/3 of the land under the lease or license may not exercise the preference right at least renewal if he has subleased the land for more than ~~2~~ two years during the term of the lease or license. If such lessee or licensee subleases more than 1/3 of the land for more than ~~3~~ three years during the term of the lease, the department shall cancel the lease.

(a) through (8)(a) remain as proposed.

(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. In order to determine the best lessee possible, the director may request information from the bidder and the current lessee. This information may include:

(i) an intended grazing or cropland management plan for the new term of the lease;

(ii) experience associated with the classified use for the land;

(iii) other nonstate lands that are fenced and managed in common with the state land;

(iv) intended grazing or cropland improvements that will benefit the health and productivity of the state land;

(v) a weed management plan;

(vi) management goals and objectives and monitoring procedures to determine if they are being met;

(vii) the method or route used to access the state land; and

(viii) any other information the director deems necessary in order to provide a recommendation to the board.

(ix) The department may incorporate all or part of this information as terms and conditions in the new lease agreement.

(c) 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. 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) remains as proposed but is renumbered (d).

(9) and (10) remain as proposed.

AUTH: 77-1-209, MCA
IMP: 77-6-102, 77-6-205, ~~77-6-208,~~ and 77-6-210

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

COMMENT 1: The stated purpose of the amendment of ARM 36.25.117 arises from the recent judicial decision in Broadbent v. State ex rel. Board of Land Commissioners, Cause No. BDV-2003-361 (1st Judicial District 2004). In that case, the District Court held 77-6-205(1), MCA, was unconstitutional because it deprived the Board of Land Commissioners, as trustee of state school trust lands, of its duty and discretion to obtain the best lessee possible for the trust; and the statute improperly divided the trustees' loyalty between the trust beneficiaries and the incumbent lessees.

By the proposed rule amendment, the State Board of Land Commissioners adopts a "policy" to allow an incumbent lessee in good standing, a preference right to meet the high bid and retain the lease. However, there is no longer an express "preference right" in 77-6-205(1), MCA. Thus, it is improper for the Board of Land Commissioners to adopt a rule essentially re-stating the provisions of an unconstitutional statutory provision. When a statute is declared unconstitutional, it is void ab initio. See State v. Coleman, 185 Mont. 299, 605 P.2d 1000 (1979) and Brockie v. Omo Construction, 268 Mont. 519, 887 P.2d 167 (1994). It is axiomatic that a statute cannot be changed by administrative rules. See State ex rel. Swart v. Casne, 172 Mont. 302, 564 P.2d 983 (1977) and Michels v. Department of Social & Rehabilitation Services, 187 Mont. 173, 609 P.2d 271 (1980). An executive branch agency may not amend a statute and therefore cannot cure a constitutional defect in a statute through the adoption of administrative rules.

RESPONSE 1: The State Board of Land Commissioners recognizes that the statutory grant of an absolute preference right to an incumbent lessee, as contained in 77-6-205(1), MCA, has been extinguished by the Broadbent decision. The proposed rule amendment will grant a limited preference right to an incumbent lessee. However, the proposed rule provides, in all instances, that the board will retain the discretion to choose the best lessee possible for the operation of any state grazing or agricultural lease.

COMMENT 2: Section 2-4-305(3)(b), MCA, requires a rule to relate to a subject matter that is clearly and specifically included in a statute to which the grant of rulemaking authority extends. Section 2-4-305(6), MCA, requires a rule to be consistent with and not in conflict with a statute and to be reasonably necessary to effectuate the purpose of the statute. The sections of the Montana Code Annotated that are cited as implemented by the proposed rule amendment are 77-6-205, 77-6-208, and 77-6-210, MCA. Section 77-6-205, MCA, contains the preference right invalidated in Broadbent. Section 77-6-208, MCA, deals with the assignment of leases and subleases. These issues do not seem to be addressed in the proposed amendment and it is inappropriate to cite that section as implemented by the proposed amendment. However,

that section does address the possible loss of "the preference right" to renew the lease as provided in 77-6-212, MCA. That section incorporates the preference right provided for in 77-6-205, MCA, the unconstitutional provision. Section 77-6-210, MCA, deals with the cancellation of leases and does not seem to be addressed in the proposed amendment and it is inappropriate to cite that section as implemented by the proposed amendment.

RESPONSE 2: Unlike most administrative agencies, the State Board of Land Commissioners does not rely exclusively upon a direct legislative grant of rulemaking authority. As recognized in the Broadbent decision, the board exercises direct constitutional authority over state trust lands pursuant to Article X, Section 4 of the 1972 Montana Constitution. In any event, 77-1-209, MCA, unquestionably provides the necessary grant of legislative rulemaking authority to the board, as it states that:

> The board may prescribe rules relating to the leasing of state lands as it considers necessary in order that the use and proceeds of these lands may contribute in the highest attainable measure to the purposes for which they are granted to the State of Montana. . . .

Sections 77-6-102, 77-6-205 and 77-6-210, MCA, are properly cited as statutes to be implemented for this rule because: 1) the proposed rule provides greater detail for the implementation of 77-6-102, MCA, and for application of the remaining provisions of 77-6-205, MCA, which were unaffected by the Broadbent decision; 2) the proposed rule incorporates by reference the criteria set out in 77-6-210, MCA, to determine when the new preference policy will be applied.

The commenter is correct that 77-6-208(4), MCA, cannot be properly cited as the appropriate statute to be implemented because 77-6-208(4), MCA, refers to a statutory preference right which no longer exists. We agree with the commenter and the board has amended the final rule accordingly.

COMMENT 3: It should be required that 50% of the AUMs on a lease be used because the grass stand deteriorates without use.

RESPONSE 3: A requirement to use forage each year would not allow for rest of the rangeland resource in years of drought, after fire or when other situations warrant. The department prefers that lessees have the flexibility to adjust grazing patterns based on conditions in any given year.

COMMENT 4: There are no specific criteria used to determine if a lessee will be offered renewal of a lease and a preference right to match bids.

RESPONSE 4: Given the broad conditions and circumstances that exist in managing grazing and agricultural resources, the department did not believe adequate site specific criteria could be developed to cover the range of potential conditions or issues that are often encountered. Under the proposed rule, the basis for offering renewal will be the standard contained under 77-6-113(1), MCA. The determination for meeting those criteria will be done through the lease inspection that is performed prior to expiration. That inspection evaluates and considers numerous criteria including geographic area, precipitation zone, topography, range site, plant species composition, salinity, erosion, noxious weeds, riparian health, utilization, apparent trend, water availability and improvements. This information, plus a review of past management actions by the lessee will be used to determine if the intent of 77-6-113(1), MCA, is being met and if renewal should be offered to the existing lessee.

COMMENT 5: Continued rest of grazing lands is not sustainable and should not be allowed.

RESPONSE 5: Although this comment is beyond the scope of the proposed rules, it is generally recognized that continued nonuse of rangelands can result in stagnation and a decline in plant vigor over time.

COMMENT 6: The department should consider the economics of what a lessee provides to the community.

RESPONSE 6: Under 77-6-202(1) MCA, and Article X Sections 4 and 11, the duty of the State Board of Land Commissioners is to prudently generate the greatest long-term financial return for the individual trust beneficiaries, while protecting the long-term productivity of the resource. Because the board must act with undivided loyalty toward the best financial interests of the trust beneficiaries, it cannot divert trust resources for nontrust purposes. Thus, the board may not achieve nontrust societal goals with trust assets, without obtaining the full market value of those uses. However, under the Montana Environmental Policy Act, the board may properly analyze and recognize the general economic impacts of its actions in order to minimize significant impacts to the human environment

COMMENT 7: If the director designates a hearings officer, it should not be an individual involved in the decision to not renew the lease.

RESPONSE 7: The department agrees with this recommendation and the rule has been changed to reflect this comment at ARM 36.25.117(3)(c).

COMMENT 8: New lessees should be bonded.

RESPONSE 8: Under 77-6-207, MCA, leases are to be issued without bond, unless the State Board of Land Commissioners decides otherwise. When specific conditions might warrant bonding, the department will recommend so to the board. Although bonding might provide one means of ensuring receipt of a stream of revenue, the ultimate economic effect of requiring such bonds might be to reduce the monetary level of competitive bids, resulting in lower cumulative lease revenues for the trust beneficiaries. Trust revenues might simply be diverted to pay bond premiums.

COMMENT 9: There is no incentive to manage the land properly and make improvements to it if a preference right is not granted.

RESPONSE 9: The department and State Board of Land Commissioners recognize the importance of long-term stewardship and this is reflected in the new language of ARM 36.25.117(1).

COMMENT 10: Private leases without a preference right (on Indian reservations for example) are often mismanaged and abused by the end of their term.

RESPONSE 10: This comment is consistent with the basis for considering a preference right for existing lessees who manage the land properly.

COMMENT 11: The proposed rule is unfair to new bidders because there is no mechanism to verify that the existing lessee is in compliance with lease conditions. The department should require periodic reporting by lessee.

RESPONSE 11: As noted in an earlier response, the renewal inspection performed by the department is quite detailed and intended to identify problems or lease noncompliance. Additionally, although the comment did not specify the type or purpose for reporting, the department does require various types of reporting on an annual basis. If the department wishes to monitor grazing use on a lease, it is not uncommon to require the lessee to annually report livestock use (numbers, class and turn in/turn out dates). The department may also require a lessee to report the specific weed control activities that were made on the lease that year. All lessees of agricultural lands are required to report quantity and quality of the crops produced that year.

COMMENT 12: The department should post at all state land entry points: identify as state land, welcome public to the land, explain that proceeds benefit public schools, list the terms and conditions of each lease on that land, and let the public know where they can report violations. This would encourage public participation in monitoring state lands and the benefits from the land.

RESPONSE 12: Given that there are likely in excess of 10,000 parcels of state land, the department does not have the manpower or budget to implement such a recommendation. The public may always contact the department to comment on the condition of a lease or inquire about the terms and conditions of that lease, and they do so on a regular basis. The department follows up on these inquiries and works toward addressing any problems that are found.

COMMENT 13: Competitive bids should not be reduced.

RESPONSE 13: By law, the State Board of Land Commissioners has the authority to adjust competitive bids for the reasons set forth in 77-6-205(2), MCA.

COMMENT 14: Weed control should be a component of determining best lessee possible.

RESPONSE 14: The department agrees with the importance of weed management and it will continue to be an area of focus during lease inspections to determine if renewal should be offered and in general for managing all state lands.

COMMENT 15: The process should be open competitive bids without a preference right. More money would be generated.

RESPONSE 15: The State Board of Land Commissioners and the department must balance income to the trust with long-term protection of the resource. The rules recognize that a preference policy to retain good incumbent lessees generally promotes stewardship of the land, stability to lease revenues, and increases the productivity of the land. Lessees would generally be motivated to properly manage this land as it lends stability and certainty to their operation. Nonetheless, the Land Board retains the ultimate discretion, in any instance, to select the best lessee.

COMMENT 16: Adopt an interim rule to require bonding for the value of the improvements and require a hearing to determine the best lessee possible on all competitive bids by gathering information such as past history and future management proposals.

RESPONSE 16: The department does not have adequate information on the value of improvements in order to bond for them. Additionally, existing law (77-6-301, MCA, et seq.) prescribes the manner in which the value of improvements is to be settled. The department does not know of any prior circumstance where a former lessee has not been paid for the value set for the improvements.

If it’s determined a lease has been managed consistent with 77-6-113(1), MCA, and a bid is submitted but no hearing is requested by the lessee, the department does not believe

that a hearing is necessary to select the best lessee. If a lease is in compliance with 77-6-113, MCA, the department has concluded that it is being managed in a fashion by the existing lessee that will maintain or improve its productivity over time. However, in those situations where a hearing is requested to reduce the rental, the department and the board must make decisions that balance income to the trust with long-term resource protection. In those cases, evaluation of best lessee becomes appropriate. Based on this comment, the department has added new language to ARM 36.25.117(8)(b) that details the types of information the Director may request in order to recommend the selection of the best lessee. In any instance, the board retains the discretion to select the best lessee.

COMMENT 17: Pursue legislation to require a 10 year management plan for all leases.

RESPONSE 17: Legislative recommendations are beyond the scope of this rulemaking. However, management plans are typically required by the department staff when they believe it may be necessary to protect or recover the resource. Additionally, by requiring management plans on all leases, limited time and resources are diverted to collect and review plans for leases that are already being properly managed, and away from leases that should be the focus of ongoing review and monitoring.

COMMENT 18: No bids should be accepted on leases being considered for exchange or sale.

RESPONSE 18: By law, (77-6-205(1), MCA) bids on any expiring leases must be accepted.

COMMENT 19: The Montana Constitution does not allow for a preference right.

RESPONSE 19: In Broadbent v. State of Montana, the First Judicial District Court struck down the statutorily mandated preference right as unconstitutional because it interfered with the State Board of Land Commissioner's discretion to obtain the best lessee possible for the trust. The ruling does not prevent the board from offering a preference right to lessees as a matter of board policy.

COMMENT 20: Less than 5% of all leases have any site inspection performed on them.

RESPONSE 20: By law (77-6-101, MCA) the department is required to inspect leases at least once during the term. Additional follow up inspections may be done when conditions warrant. The information and data collected from these inspections are detailed in a previous response.

COMMENT 21: Under the weed audit, 57% of the leases should be canceled because they contain weeds.

RESPONSE 21: Weed infestations exist and are spread under a variety of conditions, many of which are beyond the control of the lessee (i.e., wildlife, climatic, recreational use, water ways, roads, etc.). Because of this, the presence of weeds on a lease does not necessarily indicate poor management by the lessee. In evaluating a lease with noxious weeds, the department's focus is on whether the lessee is actively managing the weeds to contain and further prevent their spread, with eradication the ultimate goal. However, once weeds become established, containment and eradication can often take years. Lastly, as was noted in the response to the audit, the department believes that erroneous conclusions were made both because of the sampling methods used, and how the data were extrapolated and presented. Department field staff has estimated that between 1 and 5% of grazing lands contain noxious weeds.

COMMENT 22: The department would have to look hard to find state land that wasn't being taken care of.

RESPONSE 22: The department has found that lands are generally well managed. However, it is anticipated that there will be leases each year that will not be renewed because of this new rule.

COMMENT 23: The State Board of Land Commissioners should state in the rule that the lands must be maintained in agricultural and grazing production and that sustained periods of nonuse without approval may be grounds for cancellation.

RESPONSE 23: The department does not believe this requirement should be a part of the rule. Through the renewal inspection, the department will identify any issues or problems associated with prolonged nonuse.

COMMENT 24: Other concurrent uses of state land should be bonded for weed control and against possible damage to the surface lessees improvements.

RESPONSE 24: Generally, any land use authorization issued by the department has conditions requiring weed control and for settlement for any damages to the leasehold interest. Additionally, bonding is required by the department or by the appropriate regulatory agency.

COMMENT 25: The State Board of Land Commissioners needs to address scenarios when no preference right exists and there is a tie among the high bidders and in situations when it appears the high bidder has intentions of misusing the land.

RESPONSE 25: In cases of tied bids, the department allows the high bidders to submit new bids in order to break the tie. If no party bids an additional amount, the high bidder is selected through a random drawing process as described in ARM 36.25.115. If the Land Board believes that issuing a lease to the highest bidder is not in the best interest of the state, they have the authority under 77-6-202, MCA, to reject the bid.

COMMENT 26: Leases containing farmsteads should be sold to the current lessee.

RESPONSE 26: This comment is beyond the scope of the proposed rule. The District Court ruling does not apply to farmstead and homesite leases which are currently not open to competitive bidding at renewal.

COMMENT 27: Isolated and small tracts should be disposed of to acquire better income producing land.

RESPONSE 27: This comment is beyond the scope of the proposed rule. This concept is being implemented by the Land Board and Department in the Land Banking program.

COMMENT 28: The Department should require a new lessee to post a bond or deposit in the full amount of the rental due for the lease term.

RESPONSE 28: The amount required for a bid deposit is set by law (77-6-203, MCA). Additionally, requiring the full rental be paid may act to chill bidding or reduce the amount the bidder might normally be willing to pay.

COMMENT 29: The Land Board should not eliminate an administrative hearing to challenge the Land Board’s award of a lease.

RESPONSE 29: The Department considers the informal hearing process before the Director as an adequate opportunity for a lessee to present information or arguments as to why the Department erred in concluding that the preference right should be lost.

COMMENT 30: In order for the current lessee to retain the lease, they should be required to bid at least 90% of the final lease rate.

RESPONSE 30: At renewal if the existing lessee has a preference right, they are not required to bid for the lease. If bids are submitted for the lease, they may retain it by matching the highest bid. If they believe the bid excessive, they may request a hearing before the director to present evidence why the high bid is not in the best interest of the state to accept.

COMMENT 31: There is no incentive for bidding because there is little chance of being successful and proving they are good stewards of the land.

RESPONSE 31: The basis for offering renewal of a lease is that it has been properly managed in the past. That history with the existing lessee offers the Department and Land Board reasonable assurances and certainty that proper management will continue into the future if the lessee maintains the lease. If a competitive bid results in a hearing before the director, the bidder is afforded the opportunity to present evidence as to why they should be selected as the new lessee. The Land Board retains the discretion, in any instance, to select the best lessee.

COMMENT 32: Cheaper state leases allow a cushion for a lessee to bid higher on private leases.

RESPONSE 32: This comment is beyond the scope of the proposed rules.

COMMENT 33: The transfer of leases because of land sales excludes the Land Board from having a say in who gets the lease.

RESPONSE 33: Assignment of state leases is provided for by 77-6-208(1), MCA, and is subject to the approval of the Department.

COMMENT 34: Annual income on leases should equal or exceed what the property taxes would be if the land was privately owned.

RESPONSE 34: This comment is outside the scope of the proposed rules. Equalization payments equal to the amount of taxes the land would generate are paid to counties where state land exceeds 6% of the land base.

COMMENT 35: Ag land should be on a cash basis.

RESPONSE 35: This comment is outside the scope of the proposed rules. The Department may covert a lease from a crop share to cash under 77-6-501(2), MCA.

COMMENT 36: If improvements are cost shared by the government, that money should become the state’s.

RESPONSE 36: By a separate administrative rule (ARM 36.25.125(1)), any improvements paid for by federal monies are not compensable to the former lessee.

COMMENT 37: Subleasing should cancel the preference right.

RESPONSE 37: The Department agrees and the rule reflects the concept at ARM 36.25.117(4).

COMMENT 38: Soil Bank, Conservation Reserve Program and Wetland programs need separate rules.

RESPONSE 38: The Department believes the rules adequately cover these programs.

COMMENT 39: If state land is in a weed control district, weed control history must be submitted at renewal.

RESPONSE 39: The Department does not believe this requirement needs to be included in the rule. The Department may require this information from the lessee at any time. Special requirements dealing with weed management are placed on leases when necessary.

COMMENT 40: The high bidder should get the lease if in the hearing the bid is determined reasonable.

RESPONSE 40: Under the proposed rules, the Land Board retains the discretion to select the best lessee for the lease.

COMMENT 41: A provision should be added to ARM 36.25.117(3)(b) that clarifies a lessee with a history or pattern of lease violations will not have the right to renew the lease.

RESPONSE 41: The Department agrees with the comment and has added language to (3).

COMMENT 42: The proposed ARM 36.25.117(8)(b) should include language that supports lessees who have used grazing leases for grazing purposes.

RESPONSE 42: Based on this and other comments, the Department has added language that allows the Director to request information from the bidder and the lessee at the hearing that will allow him to make a recommendation to the Land Board on who should be selected as lessee. This information may include grazing history.

COMMENT 43: The Department received numerous comments, both in writing and at the public hearings, supporting the proposed rules as a fair and equitable way to implement renewals of grazing and agricultural leases.

RESPONSE 43: The department thanks the public for the comments it has received both in support and for the proposed suggestions.

4. An electronic copy of this Notice of Adoption is available through the department's site on the World Wide Web at http://www.dnrc.state.mt.us. The department strives to make the electronic copy of this Notice of Adoption 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.

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 November 22, 2004.

BEFORE THE DEPARTMENT
OF PUBLIC SERVICE REGULATION
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 38.3.402 pertaining to Motor Carrier Application Fees, and adoption of New Rule I pertaining to Motor Carrier Protestant Filing Requirements	)))))	NOTICE OF AMENDMENT AND ADOPTION

TO: All Concerned Persons

1. On August 5, 2004, the Department of Public Service Regulation, Public Service Commission (PSC) published MAR Notice Number 38-2-177 regarding a public hearing on the proposed amendment of ARM 38.3.402 and adoption of New Rule I pertaining to motor carrier application and protest fees, at page 1739 of the 2004 Montana Administrative Register, issue number 15.

2. The PSC has adopted New Rule I (38.3.405) exactly as proposed and has amended ARM 38.3.402 with the following changes, stricken matter interlined, new matter underlined:

38.3.402 APPLICATION AND PROTEST FEES (1) Every application for operating authority and every protest to application for operating authority must be accompanied by the appropriate filing fee:

(a) through (c) remain as proposed.

AUTH: 69-12-201, MCA
IMP: 69-1-114, MCA

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

COMMENTS: Great Falls Historic Trolley and Tour de Great Falls comments that the proposed protest fee could tie up substantial operating funds, particularly for small motor carrier operations, and suggests a graduated-scale fee or other method of assessing protest fees in less burdensome manners and amounts.

Tucker Transportation and McGree Corporation, existing motor carriers, comment that operating revenues should not be required in a protest, as the motor carrier has already filed the information in annual reports to the PSC. Tucker and McGree also suggest existing carriers should not be required to pay a fee to protect existing motor carrier authorities.

Montana Solid Waste Contractors agrees protestants are simply protecting a property right and also notes that Class D motor carriers (solid waste) do not report revenues by service area and can lawfully preserve an entire service area by meeting the minimum service requirements in any part of the service area. Montana Solid Waste Contractors also notes attorneys

representing clients are generally not required to swear to statements in filings.

RESPONSE: The PSC determines that Montana law (69-1-114, MCA) requires it to charge fees commensurate with costs. There are several ways to assess fees. The one proposed by the PSC is reasonable. Whether a protest is by a small motor carrier or large motor carrier the cost involved is the same. Therefore, the fee should be the same.

Regarding reporting of revenues and annual reports, the rule is intended to require a statement of revenues for the specific area in which additional authority is proposed. Annual reports may not provide such information. If a motor carrier is not required to maintain revenues by specific area, then the revenues from that area should be estimated, with a basis such as number of shippers or customers served and average revenue per customer.

The PSC determines that protection of property rights is not a compelling argument for not charging a protest fee. The PSC recognizes the argument that Class D carriers can maintain an entire service area so long as the minimum service requirements are met for any part of the service area.

The PSC agrees that attorneys representing clients are generally not required to swear to statements in filings. The rule requires the client to swear to the truth of the information provided in the protest. The attorney is not required to swear to the truth of the information and likely could not do so in any event.

/s/ Bob Rowe
Bob Rowe, Chairman
Public Service Commission

/s/ Robin A. McHugh
Reviewed By: Robin A. McHugh

Certified to the Secretary of State November 22, 2004.

BEFORE THE DEPARTMENT
OF PUBLIC SERVICE REGULATION
OF THE STATE OF MONTANA

In the matter of the repeal of ARM 38.5.301 through 38.5.313 and ARM 38.5.701 and 38.5.702, all pertaining to municipality-owned utilities	)))))	NOTICE OF REPEAL

TO: All Concerned Persons

1. On August 5, 2004, the Department of Public Service Regulation, Public Service Commission (PSC) published MAR Notice Number 38-2-182 regarding a public hearing on the proposed repeal of ARM 38.5.301 through 38.5.313, 38.5.701 and 38.5.702 pertaining to municipal utilities, at page 1746 of the 2004 Montana Administrative Register, issue number 15.

2. The PSC has repealed ARM 38.5.301 through 38.5.313, 38.5.701 and 38.5.702, exactly as proposed.

3. No comments or testimony were received.

/s/ Bob Rowe
Bob Rowe, Chairman
Public Service Commission

/s/ Robin A. McHugh
Reviewed By: Robin A. McHugh

Certified to the Secretary of State November 22, 2004.

BEFORE THE DEPARTMENT
OF PUBLIC SERVICE REGULATION
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 38.5.3403 pertaining to operator service providers	)))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On August 5, 2004, the Department of Public Service Regulation, Public Service Commission (PSC) published MAR Notice Number 38-2-180 regarding a public hearing on the proposed amendment of ARM 38.5.3403 pertaining to operator service providers, at page 1744 of the 2004 Montana Administrative Register, issue number 15.

2. The PSC has amended ARM 38.5.3403 exactly as proposed.

3. No comments or testimony were received.

/s/ Bob Rowe
Bob Rowe, Chairman
Public Service Commission

/s/ Robin A. McHugh
Reviewed By: Robin A. McHugh

Certified to the Secretary of State November 22, 2004.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 42.31.101, 42.31.102, 42.31.107, 42.31.108, 42.31.109, 42.31.111, 42.31.121, 42.31.131, 42.31.201, 42.31.202, 42.31.204, 42.31.205, 42.31.221, 42.31.302, 42.31.303, 42.31.305, 42.31.308, 42.31.309, 42.31.310, 42.31.311, 42.31.312, 42.31.313, 42.31.325, 42.31.330, 42.31.335, 42.31.340, 42.31.345, 42.31.701, 42.31.703, and 42.31.705 and repeal of ARM 42.31.122, 42.31.213, 42.31.314, 42.31.315, 42.31.316, 42.31.317, 42.31.704, and 42.31.706 relating to cigarette and tobacco taxes	)	NOTICE OF AMENDMENT AND REPEAL

TO: All Concerned Persons

1. On August 19, 2004, the department published MAR Notice No. 42-2-737 regarding the proposed amendment and repeal of the above-stated rules relating to cigarettes and tobacco taxes at page 1925 of the 2004 Montana Administrative Register, issue no. 16.

2. A public hearing was held on September 20, 2004, to consider the proposed amendment and repeal. The department presented additional amendments to ARM 42.31.131, 42.31.202, and 42.31.221 at the hearing. Oral and written testimony received at the hearing is summarized as follows along with the response of the department:

COMMENT NO. 1: Mark Staples, representing the Montana Wholesale Distributors' Association (MWDA), thanked the department for its thorough work on a broad range of rules and the opportunity to participate in the informal discussions earlier this year.

Mr. Staples testified that it appears the legislature has left a gray area regarding what is meant by "little cigar," in as much as they have failed to define whether a "little cigar" is an OTP (other tobacco product) or cigarette. If that is the case, then the rules of statutory construction and rule enactment suggest that this issue be put on hold and be taken to the legislature for clarification rather than develop a rule that is going to have the impact that this one will. Namely, create an entirely new area of tax for which there is a serious question about whether a lawsuit could be filed retroactively by the manufacturers to collect the $17 per carton tax that will be created by this rule.

Mr. Staples supplemented his oral testimony with written

comments where he offered an amendment to ARM 42.31.201(3)(a). Mr. Staples stated that it appears the department is attempting to tax little cigars as cigarettes, rather than as "other tobacco products" as they do now, and have for years. To enact the change would exceed the department's rulemaking authority and, in fact, improperly take on the legislature's role as a tax-levying and rate-setting entity in Montana. There have been no legislative hearings on this matter, and the department should not, with just a few months until the legislature convenes, step into an area with such fiscal impact for Montana businesses, when it could more simply and safely defer the matter to its proper legislative authority for direction.

Federal law and the tobacco industry make a distinction between large and small cigars, while Montana has conflicting definitions of what constitutes a "cigarette." For these reasons alone, the department should stay out of this law-making area.

Section 16-10-103(3), MCA, defines a tobacco product as a cigarette only if " . . . the wrapper or cover of which is made of nontobacco paper or any other substance or material except tobacco" and provides for the current practice of taxation of little cigars at the tobacco tax rate of 25% of the wholesale cost.

Meanwhile 16-11-402(4), MCA, defines tobacco as a cigarette if it is " . . . tobacco, in any form, that is functional in the product, which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette; . . . ." This implies that little cigars should be taxed at the cigarette tax rate of $7.00 per carton and a MSA (Master Settlement Agreement) payment be made or an escrow payment of $3.35 per carton be made to the state of Montana.

The Montana law that most clearly speaks to the situation is 16-10-103(3), MCA, and it also clearly provides for the current practice of taxation of little cigars at the tobacco tax rate of 25% of wholesale cost. Although the statute is in conflict with 16-11-402(4), MCA, it is not the department's prerogative to reconcile that conflict, and in fact the attempt, via this rulemaking, to make 16-11-402(4), MCA, the dominant statute clearly exceeds rulemaking authority, and has no justification in law.

One more reason the department should wait the scant few months until the legislature convenes to deal with this issue is because of the real threat that this tax, if raised to cigarette tax levels, will not in fact produce the intended enhanced revenues for the state of Montana, but will rather lead to increased Internet and/or contraband sales. There are those who believe such threats to the legitimate taxation channels are mythological, but increasingly it has become clear in states like Washington and others surrounding Montana that the contraband and Internet problems are escalating and real indeed.

The Montana Wholesale Distributors' Association and its individual members firmly believe that this is an area that needs to be resolved by the Montana legislature, not by the department in rulemaking. To enact this rule now will not only unnecessarily drive sales and would-be taxes to contraband sources, but also very arguably exceeds the department's rulemaking authority.

RESPONSE NO. 1: At this time, the department has not implemented, and does not plan to implement, any rule changes regarding little cigars and the taxation thereof. This was brought up at this time simply to alert the industry that it is something the department has taken under review and consideration.

COMMENT NO. 2: Mr. Staples testified at the hearing that there was a difference of opinion regarding sales. Whether taxes should be imposed at the wholesaler's sale to the retailer or upon the receipt of the product. He noted that the department had a brief legal opinion that they were relying on pertaining to this subject. Mr. Staples stated he thought the opinion was counterbalanced by a reference that was not in the discussion of the legal opinion. That is the title of the statute that all of this comes from, which is 16-11-202, MCA, "Tax on Sale of Tobacco Other Than Cigarettes." Such is the emphasis that the application is to be at the retail level, that it was put in the title and then again in the first sentence the statute reemphasizes that these are to be considered direct taxes on the retail consumer. Mr. Staples stated that he respects the reference to other statutes to give definition to the sale, but he stated the opinion is remiss in that it did not take the title into consideration. The department is acting on the legal opinion that it sought and he appreciates the fact that they realize there is an inequity in terms of application between in-state and out-of-state wholesalers. The department is going to attempt to apply it to out-of-state wholesalers but it is pretty clear in practical effect that it can't be applied this way because the out-of-state wholesalers are going to do an estimate. Those wholesalers will have a time span between when their estimate comes in and they are just going to estimate what their sales are and nothing is going change. This will create an institutionalized inequity in the application of the law, which renders the law functionally unconstitutional. It is unconstitutional as written and unconstitutional as applied. There appears to be a serious problem with this issue that should be addressed by the legislature.

Mr. Staples referred to Mr. Ohler's legal opinion and what was referenced in that opinion regarding the wholesaler's sale without tax prepayment being a misdemeanor. He stated that section of the code would not make any sense if it were not meant for the sale to happen. The department is interpreting this to mean the wholesaler must pay the tax the

day they get the merchandise. This misdemeanor is not for a wholesaler's purchase without tax prepayment as a misdemeanor. This code applies to the wholesaler's sale. The wholesaler gets the merchandise, sits on it for a month - he hasn't sold it - he has bought it - he gets ready to sell it and fills the order, then he prepays the tax. That is what this collection of tax addresses. Mr. Ohler's opinion does not contradict that as a proposal. He (Mr. Ohler) says the sale is the wholesaler's sale. The department is taxing the wholesaler on the purchase. There is nothing in the opinion that precludes the wholesaler from purchasing from somebody, putting it in inventory, and not paying the state the tax. What it precludes them from doing is delivering it to a retailer and before they get the money from the retailer, giving the money to the state. Purchase is not warranted and Mr. Staples stated that he does not believe that it is what the legal opinion says either. The sale is the sale from the wholesaler to the retailer but there is still a gap there. The department is applying it as "pay the state when it is bought from the manufacturer," and he believes that is a leap of the law. Mr. Staples suggested that the department and the MWDA go to the legislature together to fix this problem.

Mr. Staples supplemented his oral testimony with written comments regarding the department's proposed amendment to ARM 42.31.202 stating that the MWDA recognizes that the department is trying via this rule to end the disparity in treatment between Montana wholesalers and out-of-state wholesalers, which unjustly enriches both the state and out-of-state wholesalers to the detriment of the Montana wholesalers. However, as the department acknowledged at the hearing, the practical effect is that the out-of-state wholesalers will continue to simply estimate what they sell by a certain date and submit that paperwork, so that in fact their practice of paying taxes based on sales (while Montana wholesalers have to pay based on purchases) will continue.

An opinion requested by the department and rendered by Dave Ohler, Chief Legal Counsel of the department, was placed in the record at the hearing. It answered the questions of what constitutes a "sale" for purposes of 16-11-203, MCA. However, it did not resolve the ultimate issue, which is the disparity between the way the law is being applied to Montana wholesalers and the way it is being applied, by necessity, to out-of-state wholesalers. The fact of the matter is that in practical application the Montana wholesalers are required to pay taxes based on their purchases while the out-of-state wholesalers are paying based on sales. Such disparity cannot survive a legal challenge.

The more equitable solution is to allow both parties to make their payments based on their sales. While Mr. Ohler's opinion would suggest that this is not a prerogative the department can entertain by rulemaking, the legislature will be in session in a few short months, and the MWDA certainly intends to bring the matter before the legislature.

This area too should be left alone by the department

until such time that the legislature can meet and, as part of an overall omnibus bill, either by the department and/or the wholesale and retail community, this area of inequity between in-state and out-of-state wholesalers can be addressed legislatively. For the department to enact such an impactive rule at this point may simply invite legal litigation redress, rather than legislative. That would be unfortunate.

RESPONSE NO. 2: At this time, the department does not plan on implementing any changes to the administrative rules regarding the payment or enforcement of other tobacco products (OTP) tax. The department looks forward to working with members of the industry. Specifically, the department is working with the Montana Wholesale Distributors' Association lobbyist, Mark Staples, in the development of a bill to address the issue.

COMMENT NO. 3: Mike Parker, President of Pennington's, Inc., Great Falls, Montana, testified at the hearing and thanked the department for its efforts and the opportunity to submit comments during the development stages of these rules. He noted that many of the suggestions offered by the Montana Wholesaler Distributors' Association had been included in the rules in this notice. Mr. Parker also submitted timely written comments to supplement his oral testimony.

Mr. Parker commented that the proposed amendment to ARM 42.31.131(3) dropped the provision for refund at the old tax rate for 90 days following the tax rate change and refunds at the new tax rate after 90 days. The effect of this change is that it requires proof forever, following a tax increase that the tax at the new rate was paid in order to receive a refund at the new rate. The problem with this is that retailers may buy from multiple wholesale suppliers. Wholesalers are required to pick up unsalable stale or damaged cigarettes according to the terms of some manufacturer contracts regardless of who made the original sale. Wholesalers can't determine the original source and can't prove conclusively whether the cigarette tax was paid at the old or new rate. Mr. Parker recommends the department restore the provision for a date certain following the tax rate change, increase the waiting period for refunds at the new rate to 180 days or more, and refund at the old rate during the waiting period unless proof can be provided that the tax at the new rate was paid on the original sale.

RESPONSE NO. 3: The department agrees with Mr. Parker's comments and has added the 180-day provision to ARM 42.31.131 and 42.31.221 regarding refunds of cigarette tax that are submitted following a change in the tax rate. As a result, refunds will be made at the old tax rate for the first 180 days following a tax increase unless documentation can be provided that shows that the new tax rate had been paid.

COMMENT NO. 4: Mr. Parker provided comments regarding

the proposed amendments to ARM 42.31.201(3)(a) because the amendment now eliminates the distinction between large and small cigars. The effect of this amendment is that it leaves the question of taxation of "little cigars" as "other tobacco products" or as "cigarettes." Little cigars are currently taxed as other tobacco products at a rate of 35% of the wholesalers' cost. Federal law and the tobacco industry make a distinction between large and small cigars. Montana law has conflicting definitions of what constitutes a cigarette; see 16-10-103(3) and 16-11-402(4), MCA. Mr. Parker suggests that resolving the statutory contradiction at the next legislative session would be the way to handle this issue. He further suggests the department leave the rule alone until that time and continue to tax little cigars as other tobacco products until the legislature can act.

RESPONSE NO. 4: See response to Comment No. 1.

COMMENT NO. 5: Mr. Parker commented on the proposed amendments to ARM 42.31.202. He stated that section (1) of this rule requires the wholesaler or retailer to remit the appropriate tax calculated at the statutory rate for all untaxed tobacco products purchased and delivered to Montana for retail sale less the statutory discount. At the present time, reporting is allowed on the basis of sales or optionally on the basis of purchases. Montana resident wholesalers have historically paid on the basis of their purchases and deducted sales out-of-state and out-of-state wholesalers have paid on the basis of their Montana sales. As drafted, the amendment contemplates out-of-state wholesalers paying on the basis of purchases. The effect of this amendment is that the out-of-state wholesalers will continue to pay on the basis of sales as they cannot determine which merchandise will be sold into Montana at the time of purchase and they have up to 45 days from the first of any month to figure it out. The change precludes in-state wholesalers from changing their method of payment from purchases to sales to benefit from financial effects of paying on the 15th of the month following the sale. Montana wholesalers are in effect penalized for maintaining inventories in the state. He suggests the solution would be to allow for payment on the basis of sales consistent to provide for equitable treatment for Montana and out-of-state wholesalers.

RESPONSE NO. 5: See response to Comment No. 2.

COMMENT NO. 6: Tom Ault, Hiline Wholesale, Wolf Point, Montana, testified at the hearing and stated that he is one of the smallest wholesalers in Montana. He stated that he buys products at the same minimums that the larger wholesalers buy and if he is lucky he can turn his merchandise around in 30 days. When he pays the tax on the purchases he might have the product four or five months before he sells it to a retailer. An out-of-state wholesaler would just pay it that month so

that wholesaler has a huge economic advantage over him. He stated that he feels he is paying Montana the money at least four or five months ahead of when the out-of-state wholesaler is required to pay. This makes a huge difference to a small wholesale business and should be cleaned up to make it fair for everyone.

RESPONSE NO. 6: See response to Comment No. 2.

COMMENT NO. 7: Stan Feist, Sheehan Majestic, Missoula, Montana, testified that this problem has cost them some opportunities in increased sales because there are times when the Swisher Sweet salesman or another manufacturer may offer them the opportunity to buy 10 to 15 cases of a product on promotion. There are times, because of their cash flow, that they don't buy them. They know that they have to prepay the tax and it might take them three or four months to sell that product so this practice handicaps them. Then the competition who is from out-of-state is offered the same opportunity as Sheehan Majestic and they can accept the offer on the cigars that Sheehan Majestic couldn't because the state wants its 25% up front from the in-state wholesaler.

RESPONSE NO. 7: See response to Comment No. 2.

COMMENT NO. 8: Gregory Wilson, Director Brand Integrity, Philip Morris USA, Inc., submitted written comments stating that Philip Morris USA, Inc., is the largest manufacturer of cigarettes in the United States and that they have an interest in the proposed amendments. Mr. Wilson stated that the comments submitted are intended to assist the department in its efforts to combat the illegal distribution of cigarettes and to promote compliance with Title 16, chapter 11, MCA, which sets forth the Montana cigarette tax provisions.

Mr. Wilson suggested the addition of a new section (3) to ARM 42.31.102, which reads as follows:

"(3) Each roll of stamps, or group of decals, shall have a separate serial number, which shall be legible at the point of sale. The department shall keep records identifying, by serial number, which wholesaler purchased each roll of stamps or group of decals. If the department permits wholesalers to purchase partial rolls or sheets, it shall ensure that stamps or decals bearing the same serial number are not sold to more than one wholesaler. Instead, the unsold remainder of any partial roll or sheet shall be retained for later purchase by the same wholesaler or shall be destroyed."

Mr. Wilson stated that the serial number requirement would make it possible for the department to identify which authorized person applied a tax insignia to any particular pack of cigarettes distributed in the state, thus enhancing the department's ability to enforce the various statutory requirements applicable to the sale and distribution of cigarettes. Thus, for example, if it is determined that stamps or decals have unlawfully been applied to cigarettes

not on the Montana department of justice approved list of brand families, the presence of identifying serial numbers on the stamps and decals will permit the department to identify the persons responsible for violating ARM 42.31.101 and 16-11-505, MCA.

RESPONSE NO. 8: The department appreciates and welcomes comments from Philip Morris USA, Inc. (PM USA) The department is currently operating in accordance within the parameters suggested by PM USA in the following manner:

(1) the department's rolls and sheets of stamps are individually identified by a separate serial number;

(2) the stamp's serial information is tracked through our GenTax computer system with each stamp sale; and

(3) the department does not allow partial purchases of stamp rolls or sheets, and any returned partial rolls or sheets of stamps are destroyed.

The department agrees with PM USA as to the importance and benefits of the information provided by tracking the stamps. However, the department does not believe that a change to the Montana code is necessary to cover the suggestions made by PM USA because those suggestions are addressed in the department's internal operating procedures.

COMMENT NO. 9: Mr. Wilson suggested amendments to ARM 42.31.103(1). He stated that he thought the words "furnished or sold to retailers" (relating to wholesale records) should be deleted and replaced with the words "acquired, furnished or sold." In addition, a new subsection (f) should be added to (1) which would read:

"The information specified in subparagraph (e) of ARM 42.31.107(1)."

This change ensures that wholesalers are required to maintain records to substantiate the information they would have to submit in their monthly reports under the amendment they proposed in Comment No. 8.

RESPONSE NO. 9: The department does not see the benefit of adding the word "acquired" to ARM 42.31.303(1)(d). The department believes the word "acquired" provides the same meaning as "furnished."

The tax reporting requirements are addressed in 16-11-118, MCA. Montana Code Annotated prohibits the department from reiterating statute in its administrative rules when the statute is clear.

COMMENT NO. 10: Mr. Wilson offered an amendment for the end of ARM 42.31.107(1), relating to the wholesaler reports as follows:

"Such reports shall include the following information, itemized or submitted separately for each place of business:

(a) the qualities of cigarettes, by brand style, on hand at the beginning and end of the reporting period;

(b) the quantities of cigarettes, by brand style and

transaction, that were received during the reporting period and the name and address of each person from whom those cigarettes were received;

(c) the quantities of cigarettes, by brand style and transaction, distributed or shipped into Montana, or between locations in Montana, during the reporting period, and the name and address of each person to who those cigarettes were distributed or shipped;

(d) the quantities of cigarettes, by brand style and transaction, distributed or shipped to any destination wherever located, including the quantities reported under subparagraph (c), during the reporting period, and the name and address of each person to whom those cigarettes were distributed or shipped; and

(e) the quantities of such cigarettes that bear tax insignia of Montana, the tax insignia of another state, or no tax insignia, as well as the quantities of Montana cigarette tax insignia not yet applied to cigarette packages on hand at the beginning and the end of the reporting period.

(2) Provided, that notwithstanding any other provision of law, including 2-6-101 through 2-6-111, MCA (relating to public records), the information in such reports relating to brand quantities shall be confidential and shall not be subject to public disclosure."

This amendment would establish a volume-based and brand-based reporting system for wholesalers that would help the department in creating enforcement mechanisms to track brand quantities through the distribution chain. Such a system would greatly facilitate the department's ability to identify the point, if any, at which cigarettes are improperly diverted in violation of applicable tax and other requirements.

RESPONSE NO. 10: The department’s cigarette tax reporting form, CT-205, currently captures the information suggested by PM USA in this comment.

This form, CT-205, requires reporting all brands and volumes distributed to and from the state of Montana. Furthermore, the collected data from form CT-205 also allows for cross-referencing with the Montana Attorney General’s non-participating manufacturers wholesaler (NPM) reports.

Therefore, the department should not attempt to reiterate 16-11-118, MCA, in ARM 42.31.107 and 42.31.303.

COMMENT NO. 11: Mr. Wilson suggested the department add a new (4) to ARM 42.31.107 that reads:

"(4) Each wholesaler shall submit to the department not later than 10 calendar days after the end of each month, a list of brand family setting forth the total number of nonparticipating manufacturer cigarettes, or the equivalent amount of nonparticipating manufacturer roll-your-own tobacco, on which the wholesaler precollected tax as provided in 16-11-113 or 16-11-203, MCA, and that the wholesaler sold during the period covered by such report. Each wholesaler shall maintain for at least five years, and shall make available to the

department, all invoices and documentation of sales of nonparticipating manufacturer cigarettes or nonparticipating manufacturer roll-your-own tobacco, and also any other information such wholesaler relied upon in preparing the lists required under this subsection (4). The information on nonparticipating manufacturer cigarettes and nonparticipating manufacturer roll-your-own tobacco described in this subsection (4) shall be made available to the attorney general and to other governmental agencies as provided in 16-11-507(2), and shall be available to the public for purposes of enforcement of sections 16-11-401 through 403, MCA, and sections 16-11-501 through 512, MCA. The terms "brand family" and "nonparticipating manufacturer" shall have the meaning assigned to such terms in 16-11-502, MCA."

The purpose of this new section is to ensure the department collects the type of information that will allow it to carry out its responsibilities to assist the Attorney General in applying the escrow enforcement provisions of Title 16, chapter 11, part 5, MCA (sections 16-11-501 through 16-11-512, MCA), which were enacted into law last year.

RESPONSE NO. 11: The department allows the wholesalers 15 days to prepare the required report. The 15-day allowance is consistent with the length of time the department allows for the OTP tax report (TP-101), and various other tax types that are administered by the department.

The nonparticipating manufacturers (NPM) of cigarettes and roll-your-own tobacco reporting requirements are administratively controlled by the Montana Attorney General's office. Title 16, chapter 11, part 5, MCA, authorizes the Attorney General's office administrative power to enforce the reporting and application of the escrow requirements. Currently, the Attorney General's office maintains the administration of NPM sales reports and manufacturers' brand family registrations. ARM 23.18.201 through 23.18.210 are the Attorney General's administrative rules that administer the statute for Title 16, chapter 11, part 5, MCA. The cigarette wholesaler's monthly NPM report requirement is required in ARM 23.18.207.

COMMENT NO. 12: Mr. Wilson suggested a new sentence be added to ARM 42.31.303(3), which would impose record-keeping requirements to retailers. The proposed sentence would read:

"These records must include invoices with respect to all purchases or other receipt of cigarettes and shall specify by brand and quantity all cigarettes and tobacco products purchased, received or sold; provided, that notwithstanding any other provision of law, including 2-6-101 through 2-6-111, MCA (relating to public records), the information in such records relating to brand quantities shall be confidential and shall not be subject to public disclosure."

The purpose of this amendment is to allow the department to establish a volume-based and brand-based reporting system that will allow the tracking of brand quantities through the

distribution chain down to the point of retail sale to consumers.

RESPONSE NO. 12: The department understands and appreciates the need to capture retail transactions and completely track the distribution chain down to the point of retail sale to consumers. ARM 42.31.213(2) currently requires retail businesses to maintain their purchase invoices for five years. This requirement should provide a full paper trail as needed by the department in order to regulate cigarette sales.

3. As a result of the comments received the department amends ARM 42.31.131, 42.31.202 and 42.31.221 with the following changes:

42.31.131 CIGARETTE TAX REFUNDS (1) through (3) remain as proposed.

(4) Refunds will be allowed for stale or damaged merchandise during the first ~~90~~ 180 days after a change in the tax rate at the previous rate of tax unless it can be verified conclusively that the new tax has been paid on the specific product for which such refund is claimed.

(5) through (7) remain as proposed.

AUTH: Sec. 16-11-103, MCA
IMP: Sec. 15-1-503, 16-11-112, and 16-11-156, MCA

42.31.202 PAYMENT OF TAX (1) The wholesaler or retailer shall remit the appropriate tax calculated at the statutory rate for all untaxed tobacco products purchased ~~and delivered to~~ FOR SALE IN Montana ~~for retail sale~~ less the statutory discount.

(2) through (4) remain as proposed.

AUTH: Sec. 16-11-103, MCA
IMP: Sec. 16-11-203, MCA

42.31.221 CREDITS FOR UNSAL~~E~~ABLE TOBACCO PRODUCTS OTHER THAN CIGARETTES (1) Credits of the statutory rate for tobacco products shall be granted in accordance with the provisions of 15-1-503, MCA, in cases where the tobacco products purchased and delivered become unsalable. A manufacturer's credit memo will be required for proof of returned merchandise. During the first ~~90~~ 180 days of a tax rate change, refund applications will be issued using the previous tax rate unless the department receives evidence that the tax paid on the application was paid at the new tax rate.

(2) remains as proposed.

AUTH: Sec. 16-11-103, MCA
IMP: Sec. 16-11-206, MCA

4. Therefore, the department amends ARM 42.31.131, 42.31.202 and 42.31.221 with the amendments listed above and amends 42.31.101, 42.31.102, 42.31.107, 42.31.108, 42.31.109, 42.31.111, 42.31.121, 42.31.201, 42.31.204, 42.31.205, 42.31.302, 42.31.303, 42.31.305, 42.31.308, 42.31.309,

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5. An electronic copy of this Adoption Notice is available through the Department's site on the World Wide Web at http://www.discoveringmontana.com/revenue, under "for your reference;" "DOR administrative rules;" and "upcoming events and proposed rule changes." The Department strives to make the electronic copy of this Adoption Notice conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems.

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

/s/ Don Hoffman
DON HOFFMAN
Acting Director of Revenue

Certified to Secretary of State November 22, 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 September 30, 2004. This table includes those rules adopted during the period September 1, 2004 through December 31, 2004 and any proposed rule action that was pending during the past six-month period. (A notice of adoption must be published within six months of the published notice of the proposed rule.) This table does not, however, include the contents of this issue of the Montana Administrative Register (MAR).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through September 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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