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 The Notice Section contains state agencies' proposed new, amended, or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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 contains final rule notices which show any changes made since the proposal stage. All rule actions are effective the day after publication of the adoption notice unless otherwise specified in the final notice. The Interpretation Section contains the attorney general's opinions and state declaratory rulings. Special notices and tables are found at the end of each register.

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

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

In the matter of the adoption of new rules I through X pertaining to aerial herding permits	))))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION

TO: All Concerned Persons

1. On July 20, 2005, at 7:00 p.m. a public hearing will be held at the Fish, Wildlife and Parks Headquarters, 1420 East 6th Ave., Helena, Montana, to consider the adoption of new rules I through X, pertaining to aerial herding permits.

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 alterative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m. on July 11, 2005, to advise us of the nature of the accommodation that you need. Please contact Sheryl McElravy, Fish, Wildlife and Parks, 1420 East Sixth Avenue, P.O. Box 200701, Helena, MT 59620-0701; telephone (406) 444-2452; fax (406) 444-4952; email smcelravy@mt.gov.

3. The proposed new rules provide as follows:

NEW RULE I AERIAL HERDING PERMITS: DEFINITIONS

(1) "Affected property holder" means person other than the permittee who owns, leases or manages land potentially affected by herding activities. This definition also applies to public land management agencies.

(2) "Department" means the department of fish, wildlife and parks.

(3) "Herd", "herding" or "aerial herding" means to use aircraft to move, drive or haze the wild animals specified by the permit.

(4) "Landowner" means person owning or managing privately owned land.

(5) "Permit" means written authorization issued by the department allowing a landowner to use aircraft to herd animals specified in the permit.

(6) "Permittee" means a person holding a permit issued by the department to use aircraft to herd animals specified in the permit.

AUTH: 87-3-126, MCA
IMP: 87-3-126, MCA

NEW RULE II WHEN AIRCRAFT HERDING PERMITS MAY BE ISSUED

(1) The department may issue a permit to use aircraft to herd ungulates, including deer, elk, and antelope, to a

landowner experiencing crop or private property damage, as long as the conditions in these rules are met.

(2) Permits must be issued for a specific time period, not to exceed one year.

AUTH: 87-3-126, MCA
IMP: 87-3-126, MCA

NEW RULE III WHEN AERIAL HERDING MAY NOT OCCUR

(1) Aerial herding authorized by permit may not occur during the following times:

(a) from May 1 through July 15 to protect animals during times of late gestation or early calving/fawning. The department may consider an exception to this date restriction if it determines that conditions at a specific site warrant granting an exception;

(b) during the seven day period prior to the opening date of any legal hunting season for the species being herded under the permit; or

(c) during any legal hunting season for the species being herded under the permit, including any commission sanctioned game damage hunts in the hunting districts where the landowner will use the permit.

AUTH: 87-3-126, MCA
IMP: 87-3-126, MCA

NEW RULE IV APPLYING FOR AIRCRAFT HERDING PERMITS

(1) A person desiring a permit shall apply to the department enforcement division in Helena which administers the permits.

(2) A completed permit application must include:

(a) a completed permit application form available from the department;

(b) written concurrence from affected property holders required under [NEW RULE V]; and

(c) any other information requested by the department in sufficient detail to allow the department to evaluate the nature and impact of the herding, including measures the applicant will use to mitigate potential injury or damage to affected property holders and members of the public.

AUTH: 87-3-126, MCA
IMP: 87-3-126, MCA

NEW RULE V CONCURRENCE FROM AFFECTED PROPERTY HOLDERS

(1) If permitted activities will move animals onto, across, or off any lands other than those owned by the permittee, including lands owned by state or federal land management agencies, the permittee shall obtain written concurrence from affected property holders on a form provided by the department.

(2) The written concurrence required in (1) must include the following:

(a) a statement that the affected property holder agrees to the specific actions authorized under the authority of the permit;

(b) the type of animals that may be moved;

(c) when the animals may be moved from, onto, or across the affected property holder's land;

(d) from which location on the affected property holder's land the animals may be moved;

(e) to which location on the affected property holder's land the animals may be moved;

(f) the route(s) on the affected property holder's land which may be used to move the animals; and

(g) to what extent, if any, the affected property holder may accept civil liability for any damages which may result from the aerial herding of the animals.

AUTH: 87-3-126, MCA
IMP: 87-3-126, MCA

NEW RULE VI REPORT REQUIREMENTS (1) In compliance with 16 USCS 742j-1, Federal Airborne Hunting Law, the permittee shall submit written quarterly reports to the department staff indicated on the permit. The reports shall include at a minimum the following information:

(a) date and time of each herding activity;

(b) type and location (section/range/township) of damage to property or crops;

(c) number and species of animals herded;

(d) description (section/range/township) of animal's location prior to being moved;

(e) location of travel route, depicted on a topographical map, used by animals while being moved;

(f) known injury to or death of animals being moved; and

(g) any damage to property of affected property holders.

AUTH: 87-3-126, MCA
IMP: 87-3-126, MCA

NEW RULE VII DEPARTMENT NOTIFICATION AND MONITORING (1) The permittee shall notify the department warden or other designated department staff as indicated on the permit prior to herding activities.

(2) Permittee shall allow the department access, upon reasonable notice when possible, to permittee's lands where herding activities may take place or have taken place for monitoring permit compliance.

AUTH: 87-3-126, MCA
IMP: 87-3-126, MCA

NEW RULE VIII GAME ANIMALS KILLED OR INJURED DURING AERIAL HERDING (1) Permittee shall notify the department staff indicated on the permit within six hours of completing

any aerial herding that results in the death or injury of any wildlife.

(2) The permittee shall field-dress and provide proper care of carcasses of any wild ungulates that are killed during the course of aerial herding to ensure that the carcass maintains fitness for human consumption until the department can take possession.

(3) Failure to comply with (2) may result in citation under 87-3-102, MCA, for waste of fish or game.

(4) A permittee who purposely, knowingly, or negligently causes death or injury of wild animals while acting under authorization of an aerial herding permit issued by the department may be held liable under criminal and civil statutes and may be subject to penalties, including monetary restitution as set forth in department sentencing guidelines.

AUTH: 87-3-126, MCA
IMP: 87-3-126, MCA

NEW RULE IX AERIAL HERDING LIABILITY (1) As acknowledged by the permittee’s signature on the permit application form, the permittee assumes all liability for the safe and legal operation of the aircraft under state and federal aircraft regulations, and all liability for any damage or injury to property, persons, or wild animals which may occur as a result of an aerial herding operation exercised under a permit.

AUTH: 87-3-126, MCA
IMP: 87-3-126, MCA

NEW RULE X PERMIT DENIAL, REVOCATION AND APPEAL

(1) Permits are issued at the department's discretion.

(2) A permit may be revoked if the permittee fails to comply with the terms of the permit. Revocation shall be communicated in writing between the department and the permittee.

(3) A person who has been denied a permit, denied renewal of a permit, or whose permit has been revoked may appeal this decision to the commission in writing within 30 days of mailing or hand delivery of the notice of the permitting decision. Persons not appealing within 30 days have waived their right to appeal.

(4) The commission shall issue a written decision on the appeal. The commission's decision is final.

AUTH: 87-3-126, MCA
IMP: 87-3-126, MCA

4. SB 178, passed in the 2005 Legislative Session, provides authority for a landowner to use an aircraft or helicopter for the purpose of herding, driving, or hazing wild animals damaging private property or crops on the property in question pursuant to a permit issued by the department. SB

178 was necessary because under federal statute, 16 USCS 742j-1, a person is prohibited from using an aircraft to harass any bird, fish, or other animal unless that person is "...employed by or is an authorized agent of or is operating under a license or permit of any State or the United States...". SB 178 states that "the Commission shall adopt rules for the issuance of the permit." The proposed rules address issues related to animal health and welfare, private property rights, liability (both civil and criminal), impacts affecting legal hunting activities, federal and state reporting requirements, and administrative processes for permit application, issuance, and revocation.

The commission believes that the proposed rules are necessary to create the administrative process for aerial herding permit application, issuance, and revocation. In addition, the proposed rules address potential liabilities and responsibilities involved when the department issues a permit to allow a landowner to use an aircraft or helicopter to herd, drive, or haze wild animals damaging private property or crops. Wild animals are unpredictable in their response to aircraft herding efforts. Generally, landowners have little or no formal training and experience in the use of aircraft to herd wildlife. There could be significant impacts to neighboring landowners and members of the public when a landowner attempts to herd, drive, or haze wild animals with an aircraft or helicopter. Impacts that could occur are potential damage to property, risk to human safety, and disruption of agricultural or recreational activities. The health and welfare of wild animals may be jeopardized when landowners attempt to use aircraft to herd, drive, or haze them. Herding of game animals immediately prior to the opening of legal hunting seasons may inhibit the ability of hunters to legally harvest animals that might otherwise have been available.

The proposed rules provide a framework of conditions within which permits may be issued to minimize risks to wildlife, adjacent landowners, and the public while also clearly identifying and assigning responsibilities for civil and criminal liability associated with activities authorized through issuance of a permit by the department.

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 Sheryl McElravy, Fish, Wildlife and Parks, 1420 East Sixth Avenue, P.O. Box 200701, Helena, MT 59620-0701; telephone (406) 444-2452; fax (406) 444-4952; email smcelravy@mt.gov, and must be received no later than July 28, 2005.

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

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

/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 June 20, 2005

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.8.504, 17.8.505, and 17.8.514 pertaining to air quality permit application, operation and open burning fees	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT (AIR QUALITY)

TO: All Concerned Persons

1. On August 3, 2005, at 10:30 a.m., the Board of Environmental Review will hold a public hearing in Room 111, Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Board will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board no later than 5:00 p.m., July 25, 2005, to advise us of the nature of the accommodation that you need. Please contact the Board Secretary at P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2544; fax (406) 444-4386; or email ber@mt.gov.

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

17.8.504 AIR QUALITY PERMIT APPLICATION FEES

(1) Concurrent with submittal of a Montana air quality permit application, as required in ARM Title 17, chapter 8, subchapters 7, 8, 9, or 10 ~~or ARM Title 17, chapter 8, subchapter 8~~, the applicant shall submit an application fee ~~of $500.~~ as provided in (1)(a) and (b):

(a) $3,000 for an application subject to the provisions of ARM Title 17, chapter 8, subchapters 8, 9, or 10 for a facility for which the department has not previously issued a Montana air quality permit; or

(b) $500 for an application not included in (1)(a).

(2) through (4) remain the same.

AUTH: 75-2-111, 75-2-220, MCA
IMP: 75-2-211, 75-2-220, MCA

17.8.505 AIR QUALITY OPERATION FEES (1) through (4)(b) remain the same.

(5) The air quality operation fee is based on the actual, or estimated actual, amount of air pollutants emitted by the facility during the previous calendar year and is an administrative fee of $~~400~~ 470, plus $~~21.58~~ 21.53 per ton of PM-10, sulfur dioxide, lead, oxides of nitrogen, and volatile organic compounds emitted.

(6) through (9) remain the same.

AUTH: 75-2-111, 75-2-220, MCA
IMP: 75-2-211, 75-2-220, MCA

REASON: Pursuant to 75-2-220, MCA, the Department assesses air quality permit application fees, annual air quality operation fees, and major open burning permit fees. In the aggregate, these fees must be sufficient to cover the Department's costs of developing and administering the permitting requirements of the Clean Air Act of Montana. Under ARM 17.8.510, the structure and the amount of the fees are to be determined and reviewed annually by the Board.

Although the costs of issuing air quality permits have increased annually, permit application fees have remained the same since calendar year 2000. It takes extra staff time to process permit applications for new facilities. Operating fees paid by existing facilities have traditionally subsidized a significant portion of the Department's costs of processing permit applications for new facilities, which initially do not pay operating fees. The proposed increase in the application fee for new major facilities will more accurately reflect the costs of processing these applications.

In 2000, the Board amended ARM 17.8.504 to substitute the current flat permit application fee of $500 for all emission sources for the previous fee of $500 for minor sources and a fee of $1,500 for major sources subject to subchapters 8, 9, or 10, which the Board had adopted in 1999. The Board eliminated the tiered system in favor of a flat fee for all applications because it can be difficult to determine, at the time of application, whether the major source permit application rules apply or not and this determination can delay processing of permit applications. At that time, the $1,500 fee for major sources represented the minimum cost related to processing a major source application. The Board now believes that restoring the tiered application fee system is necessary to more equitably apportion the Department's permit application costs according to the level of time required to process the application. The Board is proposing to restore the tiered application fee system and increase the application fee for new major sources to $3,000, which more accurately reflects the Department's present costs in processing a new major source permit application than the $1,500 fee adopted in 1999. The Department estimates that in fiscal year 2006 there will be one new permit application for a new major source subject to the provisions of ARM Title 17, chapter 8, subchapters 8, 9, or 10. This will result in a total increase of $2,500 in new permit application fees.

Air quality operation fees are required for all facilities that hold an air quality permit or that will be required to obtain an air quality permit pursuant to the Title V air quality operating permit program. The air quality operation fee is based on the actual, or estimated actual, amount of air pollutants emitted during the previous calendar year and includes an administrative fee plus a per-ton fee for tons of PM-10 (particulate matter with a diameter of 10 microns or less), sulfur dioxide, lead, oxides of nitrogen and volatile

organic compounds emitted.

The annual administrative fee has remained the same since calendar year 1999. The proposed increase is based upon increases in the Consumer Price Index since that year.

The amount of money the Department needs to generate through air quality operation fees depends on the legislative appropriation and the amount of carryover from the previous fiscal year. The emission component of the operation fee is also revised to account for changes in the total amount of pollutants emitted in the state in the previous calendar year.

This rulemaking would set the air quality operation fees to be billed in calendar year 2005. Air quality fees billed in 2005 will be based on emissions from calendar year 2004 and will fund the Department's activities in fiscal year 2006.

The legislative appropriation from fiscal year 2005 was $2,706,877. The amount of the carryover from fiscal year 2004 was $152,021. The total amount of pollutants reported for calendar year 2004 fees was 103,979 tons, and the per-ton component of the air quality operation fee was $21.58.

The appropriation for fiscal year 2006 is $2,827,047, an increase of $120,170 from this fiscal year. The projected carryover from fiscal year 2005 is $175,710. The total amount of pollutants reported for 2005 fees is 106,056 tons. Based upon the appropriation, the carryover, the projected permit application fees, and the emission inventory, to cover the Department's costs of developing and administering the air quality permitting program, it is necessary for the Board to decrease the per-ton charge to $21.53. Therefore, the Board is proposing to amend ARM 17.8.505(5) by replacing the per-ton charge of $21.58 with $21.53.

In calendar year 2004, the total amount of fees assessed was $2,463,228. The amount of fees that would be assessed to meet this fiscal year's appropriation would be $2,554,103, for an increase of $90,875. In calendar year 2005, fees would be assessed for 578 facilities.

17.8.514 AIR QUALITY OPEN BURNING FEES (1) through (3) remain the same.

(4) The air quality major open burning permit application fee shall be based on the actual, or estimated actual, amount of air pollutants emitted by the applicant in the last calendar year during which the applicant conducted open burning pursuant to an air quality major open burning permit required under ARM 17.8.610.

(a) The air quality major open burning permit application fee is the greater of the following, as adjusted by any amount determined pursuant to (4)(b):

(i) a fee calculated using the following formula:

tons of total particulate emitted in the previous appropriate calendar year,
multiplied by $~~7.67~~ 10.87; plus
tons of oxides of nitrogen emitted in the previous appropriate calendar year,

multiplied by $~~1.92~~ 2.72; plus
tons of volatile organic compounds emitted in the previous appropriate calendar year, multiplied by $~~1.92~~ 2.72; or

(ii) a minimum fee of $~~250~~ 350.

(b) remains the same.

AUTH: 75-2-111, MCA
IMP: 75-2-211, 75-2-220, MCA

REASON: The Board is proposing to amend ARM 17.8.514 by revising the fee required for major open burning permit applications for fiscal year 2006. Each year, in consultation with the Montana Airshed Group, which includes the major open burners in the state, the Department develops a budget reflecting the cost the Department will incur that fiscal year in operating its Smoke Management Program for major open burners. Fees assessed to individual burners are based upon the budget and the burner's actual, or estimated actual, emissions during the previous calendar year in which the burner conducted open burning pursuant to an air quality major open burning permit. For calendar year 2004, the major open burners reported 9,029.6 tons of emissions, compared to 14,370.0 tons for calendar year 2003, or a decrease of 5,340.4 tons.

The budget for operating the program for 13 major open burners in fiscal year 2006 is $41,741, compared to a budget of $45,629 for fiscal year 2005. The $3,888 budget decrease is due to an expected decrease of $12,000 for contracted meteorological services. Anticipated increases include $3,587 for salaries, $1,076 for benefits, $2,000 for meteorological equipment, $171 for travel, and $1,278 for indirect costs. Due to the decrease in the emission inventory, it is necessary to increase the per-ton charge. The Board is proposing to increase the permit fees from $7.67 per ton of particulate, $1.92 per ton of oxides of nitrogen, and $1.92 per ton of volatile organic compounds emitted to $10.87, $2.72 and $2.72, respectively.

The cumulative amount of the fees would equal the budget of $41,741. This amount would be distributed among the 13 major open burners.

Open burning fees were implemented in 1992, and the minimum open burning permit application fee has remained the same since that time. The proposed increase in the minimum fee is based upon changes in the Consumer Price Index between 1992 and 2005.

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 the Board Secretary at Board of Environmental Review, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana, 59620-0901; faxed to (406) 444-4386; or emailed to ber@mt.gov, no later than 5:00 p.m., August 10, 2005. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

5. Thomas Bowe, attorney for the Board, or another

attorney for the Agency Legal Services Bureau, has been designated to preside over and conduct the hearing.

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

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

Reviewed by: BOARD OF ENVIRONMENTAL REVIEW

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

Certified to the Secretary of State June 20, 2005.

BEFORE THE DEPARTMENT OF TRANSPORTATION
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 18.8.1101 pertaining to the movement of houses, buildings, extremely heavy machinery, and other large and unusual objects	))))))	NOTICE OF PROPOSED AMENDMENT NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons

1. On August 11, 2005, the department of transportation proposes to amend ARM 18.8.1101 which pertains to the movement of oversized loads.

2. The department of transportation 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 no later than 5:00 p.m. on July 11, 2005, to advise us of the nature of the accommodation that you need. Please contact Motor Carrier Services Division; Montana Department of Transportation; P.O. Box 4639; Helena, MT 59604-9927; telephone (406) 444-7638; TTD number (406) 444-7696; fax (406) 444-9263; e-mail mdtcontact@mt.gov.

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

18.8.1101 MOVEMENT OF HOUSES, BUILDINGS, EXTREMELY HEAVY MACHINERY, AND OTHER LARGE AND UNUSUAL OBJECTS (1) Movement by special permit of houses, buildings, heavy machinery and other large and unusual objects, which do not qualify under other rules and regulations of the department of transportation, shall be at the discretion of the department of transportation. Only the administrator of the motor carrier services division or his designee may impose ~~additional~~ other specific requirements in addition to those specified in other rules to ensure safety of the traveling public and protect department property.

(2) When a manufactured home, double wide mobile home, modular home, or modular building has been assembled, the department may allow the building to be moved as one unit, with housemoving equipment, as a building, under a special permit.

(3) Application shall be made upon an M.C.S. form 32-j or other form specified by the department of transportation. These forms are available from the Motor Carrier Services Division, 2701 Prospect Avenue, Helena, MT; by mail request to P.O. Box 4639, Helena, MT 59604-9927; by phone (406) 444-6130; or on-line at the department web site: www.mdt.~~state.~~mt.~~us~~gov.

(4) Any special permit must be approved by the Helena M.C.S. office. Special permits in this rule must be approved by the department and may require written approval of local jurisdictions, utility companies and private property owners

before the special permit may be issued. The administrator of the motor carrier services division may disapprove a 32-j application.

(5) The permittee shall furnish flag vehicles, flag persons, and such signs as required by the department of transportation. Whenever a move is proposed which requires using the opposite side of an interstate highway, traveling against traffic, or using the authorized crossover on interstate highways, the mover shall establish a work zone. Signing and traffic control must comply with the requirements of the Manual on Uniform Traffic Control Devices (MUTCD), ~~1988~~ 2003 edition, which is ~~hereby~~ incorporated by reference. Copies are available from the Motor Carrier Services Division, P.O. Box 4639, Helena, MT 59604-9927, (406) 444-6130.

(6) The permittee shall not delay traffic in excess of 10 minutes. The applicant shall make every possible effort to keep other traffic moving at all times.

(7) The permittee shall furnish such insurance as the department of transportation may require.

(8) The permittee shall be responsible for obtaining all necessary clearance or permits from city, county, or public utility.

(9) Advance notice of any movement may be required by the department of transportation.

(10) The permittee is responsible for damage to department property. Failure to correct damage to department property could result in revocation of permit privileges. Repairs not accomplished within 48 hours of completion of the move will be repaired by the department and expenses incurred by the department will be billed to the permittee.

(11) Convoys of a maximum of two buildings or loads will be allowed on a case-by-case basis, and an application must be submitted in writing to the administrator of the motor carrier services division. Additional restrictions may apply to assure safety and convenience for the traveling public and protection of public and private property.

(12) Class one dimensions and moving requirements consist of the following:

(a) ~~dimensions may~~ width exceeds 18 feet but does not exceed 34 feet ~~wide, 24 feet high, 120 feet overall length~~; or

(b) ~~weight does not require bridge bureau approval;~~ height exceeds 17 feet but does not exceed 24 feet; or

(c) length exceeds 150 feet but does not exceed 200 feet overall length; and

(d) the district administrator or his designee will approve or disapprove form 32-j ~~will be approved~~ in two working days;

~~(d) three flag vehicles are required. Additional flag vehicles may be required if road construction, route of travel, or other conditions impose a hazard;~~

(e) class one buildings or loads may be moved only during daylight hours, Monday through Friday. No travel is allowed on holidays or holiday weekends. No travel is allowed after 3 p.m. on Friday until sunrise on Monday on routes indicated on the

"red route restrictions" map. In the best interests of the traveling public, the administrator of the motor carrier services division may authorize travel at times other than those specified in this rule~~.~~; and

(f) the "red route restrictions" map is available from the Motor Carrier Services Division, P.O. Box 4639, Helena, MT 59604-9927, (406) 444-6130.

(13) Class two dimensions and moving requirements consist of the following:

(a) ~~dimensions~~ width exceeds 34 feet ~~wide,~~; or ~~24 feet high or if height of building and/or route requires utilities to cut power lines, 120 feet overall length;~~

(b) ~~weight requires approval of the department's bridge bureau;~~ height exceeds 24 feet, or if height of building or load or route requires utilities to cut power lines; or

~~(b)~~ (c) length exceeds 200 feet overall length; and

~~(c)~~ (d) route of travel requires establishment of a work zone;

~~(d)~~ (e) $15,000 bond must be on file in the Helena motor carrier services division;

~~(e)~~ (f) the district administrator or his designee will approve or disapprove form 32-j ~~will be approved within a maximum of 10 days;~~ in five working days; and

~~(f) four flag vehicles are required. Additional flag vehicles may be required if road construction, route of travel, or other conditions impose a hazard;~~

(g) travel is allowed during daylight hours only, from sunrise Monday until Friday at 3 p.m. In the best interests of the traveling public, the administrator of the motor carrier services division may authorize travel at times other than those specified in this rule.

(14) Class three moving requirements consist of the following:

(a) weight requires approval of the department's bridge bureau; and

(b) width does not exceed 18 feet;

(c) height does not exceed 17 feet;

(d) length does not exceed 150 feet; and

(e) the requirements of ARM 18.8.509, 18.8.510B, 18.8.511A, 18.8.602, and rules of this subchapter determine hours of travel and other restrictions applicable to a class three load.

(15) Flag vehicle requirements consist of the following:

(a) interstate highways, class one:

(i) width requires one front flag vehicle and two rear flag vehicles;

(ii) length requires one rear flag vehicle;

(b) noninterstate highways, class one:

(i) width requires two front flag vehicles and one rear flag vehicle;

(ii) length requires one front flag vehicle and one rear flag vehicle;

(c) interstate highways, class two:

(i) width requires one front flag vehicle and two rear

flag vehicles;

(ii) length requires one rear flag vehicle;

(iii) height, if height requires utilities to cut power lines, one front flag vehicle is required;

(d) noninterstate highways, class two:

(i) width requires two front flag vehicles and two rear flag vehicles;

(ii) length requires one front flag vehicle and one rear flag vehicle;

(iii) height, if height requires utilities to cut power lines, one front flag vehicle and one rear flag vehicle are required;

(e) noninterstate highways, class two:

(i) flag vehicles are required if the route analysis conducted by the department's bridge bureau determines that the load must be moved under conditions of ARM 18.8.602, and must cross structures at the centerline; and

(f) noninterstate highways, class three:

(i) flag vehicles are required if the load meets any of the requirements of ARM 18.8.511A and/or 18.8.601.

(16) Additional flag vehicles for all class one, class two and class three moves may be required if road construction, route of travel, or other conditions impose a hazard.

(17) A single 32-j application is required if the vehicle or load meets the requirements of more than one class. Example: a load that is 20 feet wide and requires a weight approval is a class one and a class three move.

AUTH: 61-10-155, MCA
IMP: 61-10-121, 61-10-122, and 61-10-124, MCA

REASON: The proposed amendments to the Rule are primarily needed to provide for over-length loads that are not covered by the existing Rule. More specifically, there are very long loads (primarily precast bridge beams) that certain carriers are proposing to move on the highways that do not exceed width limits; but, because of their length, need to be regulated. When this was brought to the Department's attention, it was determined that the existing classifications needed to be more clearly defined in the rules; therefore, the Department is also providing more detailed explanations of the classifications. The purpose is to amend flag vehicle requirements and to provide for the improved safety of the traveling public. There are also some proposed changes that are intended to make the Rule easier to read and understand.

4. Concerned persons may submit their data, views or arguments concerning the proposed amendment in writing to Dan Kiely, Montana Department of Transportation, Motor Carrier Services, P.O. Box 4639, Helena, MT 59604-9927. Any comments must be received no later than July 29, 2005.

5. If persons who are directly affected by the proposed amendment wish to express their data, views and arguments orally

or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments they have to Dan Kiely, Montana Department of Transportation, Motor Carrier Services, P.O. Box 4639, Helena, MT 59604-9927. A written request for hearing must be received no later than July 29, 2005.

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

7. The Department of Transportation maintains a list of interested persons who wish to receive notices of the rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding rules proposed by the Administration Division, Aeronautics Division, Highways and Engineering Division, Maintenance Division, Motor Carrier Services Division, and/or Rail, Transit and Planning Division. Such written request may be mailed or delivered to the Montana Department of Transportation, Legal Services, 2701 Prospect Ave., P.O. Box 201001, Helena, MT 59620-1001; faxed to the office at (406) 444-7206; e-mailed to lmanley@mt.gov; or may be made by completing a request form at any rules hearing held by the department.

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

By: /s/ Jim Lynch
Jim Lynch, Director
Department of Transportation

/s/ Lyle Manley
Lyle Manley, Rule Reviewer

Certified to the Secretary of State June 10, 2005

BEFORE THE BOARD OF LIVESTOCK
OF THE STATE OF MONTANA

In the matter of the proposed amendment of ARM 32.18.202 and 32.18.205 pertaining to sheep permits	)))))	NOTICE OF PROPOSED AMENDMENT NO PUBLIC HEARING CONTEMPLATED

To: All Concerned Persons

1. On July 30, 2005, the department of livestock proposes to amend ARM 32.18.202 and 32.18.205 pertaining to sheep permits.

2. The department of livestock will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, contact the department of livestock no later than 5:00 p.m. on July 21, 2005, to advise us of the nature of the accommodation that you need. Please contact Marc Bridges, 301 N. Roberts St., Room 308, PO Box 202001, Helena, MT 59620-2001; phone: (406) 444-7323; TTD number: 1-800-253-4091; fax: (406) 444-1929; e-mail: mbridges@mt.gov.

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

32.18.202 REQUIREMENTS FOR OBTAINING COUNTY LINE GRAZING PERMITS (1) Livestock moved under a county line grazing permit issued pursuant to ~~81-8-211(5)(d)~~ 81-3-211, MCA, must be hot iron branded with a brand recorded in Montana to the owner of the livestock.

(2) remains the same.

AUTH: Sec. 81-3-202, MCA
IMP: Sec. 81-3-211, MCA

REASON: The proposed amendment to ARM 32.18.202 is necessary to correct an inaccurate citation which currently exists in the rule. The correct statutory citation for transportation permits is Sec. 81-3-211, MCA.

32.18.205 SHEEP PERMIT BEFORE REMOVAL FROM COUNTY OR STATE (1) In any county of the state of Montana where the department of livestock~~,~~ must issue permits for sheep before removal from that county or state, as provided for in 81-5-112, MCA, any person removing or causing to be removed from the county or state any sheep or lambs must first obtain from a state stock inspector or deputy state stock inspector, a permit for removal.

(a) The permit must be issued on an approved department of livestock, brands enforcement division form. The owner or

his agent must sign the permit and certify as to approximate number and the description and brands or marks, breed and color.

(b) Department of livestock, brands enforcement division form shall, when used for a sheep permit, show destination in or out of the state of Montana.

(a) and (b) remain the same but are renumbered (2) and (3).

(4) A sheep permit may be issued for grazing purposes only, allowing the movement of sheep from one county to an adjoining county. The sheep grazing permit shall be issued under the following terms:

(a) only one permit is allowed in a 12-month period;

(b) permit is only valid for a period of eight months from date of issuance;

(c) permit must be issued by a state stock inspector; and

(d) permit may be used in lieu of the permit for removal required under this rule for movement across a county line.

(5) A state stock inspector may enter any premises where sheep have been transported and inspect any sheep moved under any sheep permit, as well as any sheep with which the transported sheep have commingled.

AUTH: Sec. ~~81-5-202~~ 81-5-112, MCA
IMP: Sec. 81-5-112, MCA

REASON: The proposed amendment to ARM 32.18.205 is necessary because under the present sheep permit system, it is difficult and at times impossible to track or trace back sheep movement. The proposed permit would provide the department and producers with documentation of sheep movement in the event of disease or theft. This change mirrors Sec. 81-3-203, MCA, for cattle, and complies with Sec. 81-5-112, MCA, for sheep. The proposed amendment will also delete a reference to Sec. 81-5-202, MCA, which has been repealed, and replace it with the correct rule authority citation of Sec. 81-5-112, MCA.

4. Concerned persons may submit their data, views or arguments concerning the proposed amendment in writing to Marc Bridges, 301 N. Roberts St., Room 308, PO Box 202001, Helena, MT 59620-2001, by faxing to (406) 444-1929, or by e-mailing to mbridges@mt.gov to be received no later than 5:00 p.m., July 28, 2005.

5. If persons who are directly affected by the proposed amendment wish to express their data, views and arguments orally or in writing at a public hearing, they must make a written request for a hearing and submit this request along with any written comments they have to the same address as above. The written request for hearing must be received no later than 5:00 p.m., July 28, 2005.

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

7. An electronic copy of this Proposal Notice is available through the Department's site at www.liv.mt.gov.

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

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

DEPARTMENT OF LIVESTOCK

/s/ Marc Bridges
Marc Bridges
Executive Officer
Board of Livestock
Department of Livestock

/s/ Carol Grell Morris
Carol Grell Morris
Rule Reviewer

Certified to the Secretary of State June 20, 2005.

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

In the matter of the amendment of ARM 37.86.3607 pertaining to case management services for persons with developmental disabilities, reimbursement	))))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Interested Persons

1. On July 20, 2005, at 1:30 p.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 July 11, 2005, 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.

37.86.3607 CASE MANAGEMENT SERVICES FOR PERSONS WITH DEVELOPMENTAL DISABILITIES, REIMBURSEMENT (1) Reimbursement for targeted case management services for persons with developmental disabilities 16 years of age or older is provided ~~to the developmental disabilities program of the department in accordance with (2) through (4)~~ as specified in section one, rates of reimbursement for the provision of developmental disabilities targeted case management services, of the Developmental Disabilities Program Manual of Service Reimbursement Rates and Procedures.

~~(a) This rule does not govern reimbursement provided to contract providers of case management services for the developmental disabilities program of the department.~~

~~(2) A unit of service is 1 contact in person or otherwise with or on behalf of the client.~~

~~(3) The interim reimbursement for each fiscal year is based on a per unit of service rate determined by dividing the estimated total costs on a statewide basis for the delivery of case management services for the fiscal year by the estimated total number of units of service to be delivered on a statewide basis during that fiscal year.~~

~~(4) The final reimbursement for each fiscal year is the actual total cost for delivery of the service for the fiscal year.~~

(2) The department adopts and incorporates by this reference section one, rates of reimbursement for the provision of developmental disabilities targeted case management services, in effect July 1, 2005, of the Developmental Disabilities Program Manual of Service Reimbursement Rates and Procedures, and published by the department as the Developmental Disabilities Program Manual of Service Reimbursement Rates and Procedures, section one, rates of reimbursement for the provision of developmental disabilities targeted case management services. A copy of section one of the manual may be obtained through the Department of Public Health and Human Services, Developmental Disabilities Program, 111 N. Sanders, P.O. Box 4210, Helena, MT 59604-4210.

AUTH: Sec. 56-6-113, MCA
IMP: Sec. 53-6-101, MCA

3. The Department is proposing to amend ARM 37.86.3607, Case Management Services for Persons with Developmental Disabilities, Reimbursement, to change the manner in which reimbursement is provided by the state for medicaid funded developmental disabilities targeted case management services. The proposed rule change would implement the adoption of a standard rate of reimbursement for medicaid funded developmental disabilities targeted case management services. This proposed change is part of an overall effort by the Department to reconfigure rate reimbursement for state funded developmental disabilities services. Currently, reimbursement for developmental disabilities targeted case management services, as is the case for most state funded developmental disabilities services, is based upon historical patterns of reimbursement that generally have been derived from the historical circumstances of service development and the individualized cost basis needs of each contracted for provider of targeted case management services. The purpose for the implementation of the proposed standard rate of reimbursement is to establish a common standard targeted case management service rate for all providers of this service based upon common cost factors affecting the cost of service delivery for the targeted case management providers. The new rate will allow for a consistently applied rate for the delivery of the service without variations based upon provider or other irrelevant factors.

The proposed rule change to ARM 37.86.3607 eliminates the current historical rates for developmental disabilities targeted case management services reimbursement and implements a rate of reimbursement based on actuarial studies of costs for service delivery. The new rate of reimbursement, along with the actuarial basis for the new rate of reimbursement, are presented in section one, "Rates of Reimbursement for the Provision of Developmental Disabilities Targeted Case Management Services for

Persons 16 Years of Age or Older", to be published July 1, 2005, of the Developmental Disabilities Program Manual of Service Reimbursement Rates and Procedures.

The proposed rate of targeted case management reimbursement is $98.34 per month. This rate has been derived by the establishment of a case management hourly rate ($25.44) which in turn has been multiplied by the average of case manager dedicated hours per consumer per month (4.09302), then divided by a caseload vacancy factor (0.95) and finally multiplied by 89.72% which is the derived percentage of case management activities that are reimbursable under the governing federal Medicaid authority. The methodology for deriving these sums and factors is set forth in the proposed section one of the Developmental Disabilities Program Manual, which is to be incorporated by reference. The current manual, inclusive of the methodology of rate calculation, is available for review as stated in this notice.

The targeted case management rate proposed in this notice was designed to be budget neutral and has been reviewed for budgetary impact. It is anticipated that the implementation of the new rate should be budget neutral. The current number of consumers for targeted case management services is approximately 2,702. There are currently four case management services providers in addition to the State of Montana. It is estimated that expenditures on targeted case management in Fiscal Year 2005 will be approximately $4,150.000.

The Department is currently calculating a potential increase to the proposed case management rate based upon a special appropriation by the 2005 Montana Legislature for an increase in wages for direct care provider staff. It is anticipated that upon final adoption of this proposed rule change there would be an increase in the proposed targeted case management rate as a result.

The Department has determined that the immediate imposition of the new targeted case management rate of reimbursement could potentially adversely affect many of the consumers served by the existing providers of targeted case management services. The adverse impact could arise in that certain existing providers may have a decline in reimbursement revenue. Consequently, the Department has proposed, subject to approval by the Centers for Medicaid and Medicare, a set of transitional rates for the existing providers. The transitional rates will be in effect from July 1, 2005 through June 30, 2008. Any new provider of targeted case management services, however, would receive reimbursement in accordance with the new rate.

The implementation of the transitional rates is intended to avoid a precipitous decline in the reimbursement available to certain providers under the existing contractual reimbursement amounts. The affected providers have indicated that spreading

the reduction in reimbursement over the three year time period is preferable and allows them time to adjust for any fiscal impacts. The transitional rates appear in section one of the manual.

The existing provisions and language in ARM 37.86.3607 that set forth aspects of the current reimbursement practice for targeted case management are proposed for deletion. These deletions are necessary to assure clear and consistent implementation of the new reimbursement rate for targeted case management.

The proposed rule changes provide for the incorporation by reference of a section of a proposed manual of service reimbursement rates and procedures for the Department's program of developmental disabilities services. The adoption and use of a comprehensive manual facilitates the implementation by the Department of the extensive rate changes for developmental disabilities services that are to be phased in over several years. The implementation of the targeted case management rate of reimbursement is the first measure in that effort. Section one of the manual, setting forth the targeted case management rates along with the rate methodology, is to have an effective date of July 1, 2005. The draft of section one may be obtained through the Department of Public Health and Services, Developmental Disabilities Program at 111 N. Sanders St. in Helena, MT, or by writing to that program at P.O. Box 4210, Helena, MT 59604-4210. In addition, copies of this section of the manual will be available at the public hearing on the proposed rule adoption.

Reimbursement for developmental disabilities targeted case management services has varied among the established providers. There was no singular methodology of derivation. The sums of reimbursement provided for on a contractual basis were historical artifacts. The Department has been advised by consumers, providers and the Centers for Medicare and Medicaid (CMS) to generally seek more equitable rates among the various providers of developmental disabilities services. The Department therefore has proceeded to obtain consultation and study towards the end of designing and implementing a standardized rate of reimbursement.

The options available to the Department with respect to the ongoing status of targeted case management rate reimbursement are three. The status quo, the current variation in reimbursement among the established targeted case management providers, could be maintained with the potential for the lower reimbursement levels provided to certain providers to impact some consumers adversely over time. CMS, acting in its federal oversight capacity for medicaid expenditures, conducts reviews of state programs funded with medicaid monies. In conducting a review of medicaid funded developmental disabilities services in Montana, CMS has directed the State to resolve inappropriate inequities in reimbursement. Thus the status quo approach is

not a feasible option.

The second option available to the Department is to pursue, as it proposes to do in this proposed rule, the establishment of a standard rate of reimbursement that resolves apparent concerns about inequities adversely affecting segments of consumers and that is constructed on calculable factors that rationally reflect major aspects of service delivery.

The third option is to reimburse providers of targeted case management on a cost basis. This approach to reimbursement would have merit over the current historically varied reimbursements. Cost basis reimbursement, however, is an intensive reimbursement methodology to manage for both the program and the providers. As compared to the standard rate approach, it necessitates more intensive accounting and reporting by the providers and, in turn, review and auditing by the Department to assure that costs are accounted for, correctly reported, and reimbursement appropriately paid out. It can be a more contentious process, as well as laborious. The Department does not desire to engage in this approach for those reasons.

Beginning in the late 1990s, the Department began to explore options and processes to enable consumers of developmental disabilities services to have opportunity to access provider services of their individual choice. Reimbursement for service delivery was contractually based and reflected historical circumstances of each provider. Lacking consistency and uniformity in reimbursement, the cost of service delivery can vary as between two similarly situated consumers based upon differing providers. It was becoming apparent that the old system of paying for services would no longer work. The developmental disabilities program convened a series of work and advisory groups made up of program staff, providers, consumers, family members of consumers, advocacy organizations, members of the Montana legislature and a legislative fiscal analyst. The principal advisory committee reached consensus that the Department should develop standard reimbursement rates for developmental disabilities services. The recommendations arising out of these review processes supported the Department's decision to implement the second option of a standardized reimbursement rate.

4. This rule will be applied retroactively to July 1, 2005. The implementation of the developmental disabilities targeted case management reimbursement rate has been scheduled for July 1, 2005 for some time. That date is also necessary for fiscal purposes. The rule adoption process, however, has been delayed even though the rate appeared to be ready for implementation and extensive discussions have been had with the current providers concerning the impacts and features of implementation. The development of the rate has necessitated further unanticipated work on the rate itself, related policy and procedural matters and on the memorialization of the rate

and other matters into section one of the written manual that is to be adopted by incorporation. The benefits of fee schedule implementation on July 1, 2005 appear to outweigh the possibility of minor potential adverse impacts on providers.

The Department does not believe that making the proposed rates retroactive to July 1, 2005 from the date of the final adoption of the proposed rule changes will have a significant adverse impact upon the providers of targeted management services.

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 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 July 28, 2005. Data, views or arguments may also be submitted by facsimile to (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.

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

Russ Cater for
Rule Reviewer

Robert E. Wynia, MD
Director, Public Health and Human Services

Certified to the Secretary of State June 20, 2005.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the proposed amendment of ARM 42.20.106; 42.20.108; 42.20.110; and 42.20.203 relating to property taxes	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On July 21, 2005, at 9:00 a.m., a public hearing will be held in the Director's Office (Fourth Floor) Conference Room of the Sam W. Mitchell Building, at Helena, Montana, to consider the amendment of the above-stated rules relating to property taxes.

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

2. The Department of Revenue will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Revenue no later than 5:00 p.m., July 11, 2005, to advise us of the nature of the accommodation that you need. Please contact Cleo Anderson, Department of Revenue, Director's Office, P.O. Box 7701, Helena, Montana 59604-7701; telephone (406) 459-2646; fax (406) 444-3696; or e-mail canderson@mt.gov.

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

42.20.106 DEFINITIONS The following definitions apply to this sub-chapter:

(1) remains the same.

(2) "Comparable properties" means properties that have similar utility, use, function, and are of a similar type as the subject property. Comparable properties must be influenced by the same set of economic trends, and physical, economic, governmental, and social factors as the subject property. Comparable properties must have the potential of a similar~~, if not identical,~~ use as the subject property. For any property that does not fit into this definition, the department will rely on the definition of comparable property contained in 15-1-101, MCA.

(a) Within the definition of comparable property in (1), the following types of property are considered comparable:

(i) remains the same.

(ii) ~~Duplexes are comparable only to other duplexes; triplexes are comparable only to other triplexes; fourplexes are comparable only to other fourplexes~~ Multi-family residences are comparable to other multi-family residences.

(iii) through (vii) remain the same.

(viii) Improvements and outbuildings necessary to the ~~function~~ operation of a ~~bona fide farm, ranch, or stock operation~~ qualified agricultural property are comparable to other improvements ~~necessary to the function of a bona fide farm, ranch, or stock operation~~ and outbuildings on qualified agricultural properties.

(ix) One-acre sites beneath ~~farm~~ improvements on land classified as non-qualified agricultural or forestland are comparable to ~~other one-acre sites beneath farm improvements and~~ residential tract land.

(x) ~~Owner occupied c~~Condominiums ~~of a similar number of units~~ are comparable to other ~~owner occupied~~ condominiums ~~of a similar number of units~~.

(xi) ~~Condominiums owned and operated for income-producing purposes can only be compared to other condominiums held for the same purpose and which have a similar number of units.~~

~~(xii)~~ Industrial improvements are comparable ~~only~~ to other industrial improvements.

~~(xiii)~~(xii) Industrial land is comparable ~~only~~ to other industrial land.

(3) and (4) remain the same.

(5) "Single-family residence with ancillary improvements" means:

(a) ~~A~~a structure originally constructed or converted for use and occupancy by a single-family unit and whose primary use is currently one of occupancy by a single-family unit~~.~~ ; and

(b) ~~A~~all supportive structures integral to the use of a single-family residence such as attached garages, sheds, and site improvements.

AUTH: Sec. 15-1-201, MCA

IMP: Sec. 15-1-101, 15-7-304, 15-7-306, and 15-24-1501, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.20.106 because the rule is inconsistent with the practice of the department when appraising comparable properties. The rule is too restrictive and the proposed amendments will allow the property assessment staff to be more flexible with these property appraisals.

42.20.108 INCOME APPROACH (1) through (6)(b)(vi) remain the same.

(c) Items that are not allowable expenses are:

(i) through (7)(d) remain the same.

AUTH: Sec. 15-1-201, MCA

IMP: Sec. 15-1-111, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.20.108 for housekeeping purposes only.

42.20.110 TAX EXEMPTION AND REDUCTION FOR THE

REMODELING, RECONSTRUCTION, OR EXPANSION OF CERTAIN COMMERCIAL PROPERTY (1) ~~The property owner of record or the property owner's agent must make application to the appropriate governing body to~~ To be eligible for tax exemption and tax reduction for remodeling, reconstruction, or expansion of existing commercial buildings or structures which are available pursuant to 15-24-1502, MCA, the property owner of record or the property owner's agent must make application to the appropriate governing body. The application to the affected governing body:

(a) ~~Application~~ will be made on a form available from the county commissioners of the affected county or, if the construction will occur within an incorporated city or town, on a form available from the city commission or the local governing body~~.~~ ; and

(b) ~~The application to the affected governing body~~ must be made prior to completion of a building permit or prior to commencement of construction.

(2) Failure to make application prior to completion of a building permit or prior to commencement of construction will result in the waiver of all construction period tax exemptions.

(3) Additionally, all subsequent tax reductions, if approved, will be calculated as of the date the building permit was completed, or as of the date construction began, whichever is earlier.

(2) through (8) remain the same but are renumbered (4) through (10).

AUTH: Sec. 15-1-201, MCA
IMP: Sec. 15-24-1502, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.20.110 for housekeeping purposes only. No substantive changes are proposed to the rule. The first paragraph of this rule was too long and confusing. These amendments will help clarify the requirements for property owners and their agents.

42.20.203 EXEMPTIONS FROM DISCLOSING SALE PRICE

(1) Certain types of property are exempt from the Realty Transfer Act provisions, which require the disclosure of sales information. Land that is currently classified by the department as ~~A~~agricultural land that will continue in an agricultural use is exempt from the sales disclosure provisions of the Act because the department is required by law to assess agricultural land on the basis of its productive ability rather than its market value. The exemption does not apply to parcels that fail to meet the requirements of 15-7-202, MCA. The other exempt transfers are sales that are not arm's-length transactions or involve sales to a government entity. Since these transactions are not reliable indicators of market value, the sales information is not useable for assessment purposes.

AUTH: Sec. 15-7-306, MCA

IMP: Sec. 15-7-307, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.20.203 to clarify that the exemption from disclosing sale price does not apply to parcels that are disallowed according to 15-7-202, MCA. For parcels that qualify under 15-7-202, MCA, sales information must be provided on the Realty Transfer Certificate (RTC) when it is filed. This allows the department staff to value the land at market value.

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

Cleo Anderson
Department of Revenue
Director's Office
P.O. Box 7701
Helena, Montana 59604-7701

and must be received no later than July 29, 2005.

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

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

7. The Department of Revenue maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request, which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding particular subject matter or matters. Such written request may be mailed or delivered to the person in 4 above or faxed to the office at (406) 444-3696, or may be made by completing a request form at any rules hearing held by the Department of Revenue.

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

/s/ CLEO ANDERSON	/s/ DAN R. BUCKS
CLEO ANDERSON	DAN R. BUCKS
Rule Reviewer	Director of Revenue

Certified to Secretary of State June 20, 2005

BEFORE THE PUBLIC EMPLOYEES' RETIREMENT BOARD
OF THE STATE OF MONTANA

In the matter of the proposed adoption of new rules I through III pertaining to implementation of detention officer transfer to sheriffs' retirement system	NOTICE OF DECISION ON PROPOSED RULE ACTION

TO: All Concerned Persons

1. On May 12, 2005, the Montana Public Employees' Retirement Board (Board) published MAR Notice No. 2-2-354 at page 725 of the 2005 Montana Administrative Register, issue no. 9, regarding the public hearing on the proposed adoption of rules for members of the Public Employees' and Sheriffs' Retirement Systems pertaining to a Public Employees' Retirement System member transferring membership service and service credit to the Sheriff's Retirement System, criteria for detention officer membership in the Sheriffs' Retirement System, and reporting requirements for sheriffs' department employees.

2. A public hearing on the notice of the proposed adoption of the above-stated rules was held on June 2, 2005.

3. The State Administration and Veterans Affairs legislative interim committee (SAVA) has voted to object to all the proposed rules.

4. The Board has decided that in light of legislative interim committee objection and recognizing the comments made, the Board will not at this time amend or adopt any of these rules as proposed. The Board may revise the proposals in light of legislative concerns and other considerations, and then re-notice the new proposals through the formal rulemaking process.

/s/ Carole Carey
Carole Carey, President
Public Employees' Retirement Board

/s/ Kelly Jenkins
Kelly Jenkins, General Counsel and
Rule Reviewer

/s/ Dal Smilie
Dal Smilie, Chief Legal Counsel and
Rule Reviewer

Certified to the Secretary of State on June 20, 2005.

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

In the matter of the adoption of NEW RULES I through XIII, the amendment and transfer of ARM 8.32.1712, and the repeal of ARM 8.32.1701, 8.32.1702, 8.32.1703, 8.32.1704, 8.32.1705, 8.32.1706, 8.32.1707, 8.32.1708, 8.32.1709, 8.32.1710, 8.32.1711, and 8.32.1713, pertaining to delegation	NOTICE OF ADOPTION, AMENDMENT AND TRANSFER, AND REPEAL

TO: All Concerned Persons

1. On January 13, 2005 the Board of Nursing published MAR Notice No. 8-32-64 regarding the public hearing on the proposed adoption and repeal of the above-stated rules relating to delegation, at page 30, of the 2005 Montana Administrative Register, issue no. 1.

2. A public hearing on the notice of proposed adoption and repeal on the above-stated rules was held on February 3, 2005.

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

Comment 1: The proponents of the adoption of the proposed new delegation rules and repeal of the current ones generally commented that the changes were long overdue, that the current delegation rules are redundant and confusing, and that the new rules preserve the essential role and function of nurses to assess, plan, implement and evaluate care and to coordinate and supervise the delivery of nursing care. Proponents further commented that the proposed New Rules recognize that unlicensed assistive personnel (UAPs) complement and do not replace licensed nurses. The commenters stated that the New Rules would help meet the public’s increasing need for accessible, affordable and quality health care, especially in Montana's rural communities. The commenters further stated that the role functions that separate nursing from other disciplines are not delegable and that delegable routine, technical tasks do not rise to the level of nursing.

Response 1: The Board agrees and has determined that the proposed rule changes will address the issues as presented.

Comment 2: A commenter stated that training of nurse-delegators is needed relating to the New Rules and that the Board needs to be instrumental in that training process.

Response 2: The Board will be involved in training nurses relative to the new delegation rules but the Board's contribution will not relieve chief nursing officers of their individual training responsibilities.

Comment 3: A number of opponents to the proposed new delegation rules expressed concern that facility administrators will coerce nurses to delegate nursing tasks to UAPs for budgetary and staffing reasons even when the nurses do not believe it is safe and appropriate to do so. The commenters asserted that the rules should be clear that delegation is patient specific, task specific and UAP specific.

Response 3: Delegation of nursing tasks to UAPs is never mandatory under the proposed New Rules. Rather, delegation is allowed only when done in conformity with the rules. Only a nurse who has personally assessed a patient may delegate and only when the nurse has determined it can be done safely. New Rule IV already mandates that delegation be task-specific, patient-specific and UAP-specific, so there can be no blanket delegation policy. The rule defines "delegator" as the nurse who makes the decision to delegate and thereby assumes accountability. It is unprofessional conduct pursuant to ARM 8.32.413(2)(l), for a nurse to delegate contrary to Board rules. Therefore, the Board concluded that the rules appropriately address concerns of coercion. The Board will affirmatively survey nurses (including floor nurses) both six months and 12 months after the effective date of the rules, to determine what problems, if any, nurses have had in applying the rules to the safe and effective care of patients.

Comment 4: Several opponents objected to the delegating nurses being liable for the performance of nursing tasks by untrained UAPs.

Response 4: The Board has no authority to make nurses legally liable (e.g., in tort for money damages) for harm caused by a UAP performing a delegated nursing task and the rules do not purport to create such a liability. Nor does the Board have authority to make nurses immune from tort liability or otherwise limit their legal liability. The Board only sets standards for nursing practice and defines what constitutes unprofessional conduct for license discipline purposes. Retention of accountability by the delegating nurse has always been a part of the delegation rules and that principle is being carried forward into the new delegation rules.

Comment 5: A commenter objected that floor nurses were under-represented on the task force that was formed to review the

current delegation rules and draft recommended changes for the Board's consideration.

Response 5: The Montana Nurses' Association, whose members include floor nurses, was represented on the task force. A Board member is a floor nurse, the nurse administrators on the task force had prior experience in bedside nursing, and nurses representing rural and metropolitan areas were also task force members. Floor nurses also had the same opportunity as others to participate in the rulemaking process by submitting comments to the Board during the comment period.

Comment 6: Numerous commenters opposed allowing delegation in all settings on the grounds that no other state allows it. In particular, the commenters objected to allowing delegation of nursing tasks to UAPs in acute care and long-term care settings. The commenters recommended the Board take a slower or incremental approach by expanding delegation to home health and community based settings first and assessing the impact before considering expansion of delegation to acute care and long-term care settings.

Response 6: Montana is not the first or only state to allow delegation of specific nursing tasks to UAPs without regard to setting. The Board reviewed the nursing rules in more than 40 states as well as other professional resources in drafting these rules. There were 18 states that had delegation rules relating to all settings or specifically to acute and long-term care settings. Some states expressly allow delegation in all settings while others are silent as to settings, i.e., neither expressly allowing nor prohibiting delegation in acute care and long-term care settings. Unlike Montana, some states do not limit the type of tasks that can be delegated and in that respect, Montana's delegation rules are more conservative than other states' rules. The Board deems its rules in general and, in particular, those rules providing for varying levels of supervision of UAPs based on setting, as recognition of the different acuity levels of patients in each setting. The Board notes that acute care and long-term care settings provide greater opportunity for UAPs to obtain immediate nursing assistance than do home health and community based settings.

Comment 7: Some commenters expressed concern that the new delegation rules effectively render LPN education and licensure obsolete.

Response 7: The Board disagrees with the comment, but also recognizes that current Board rules relating to LPN practice need to be reviewed and updated in recognition of the superior skills, training and abilities of LPNs as contrasted with unlicensed UAPs. A task force is in place for that purpose.

Comment 8: Some nurse educators and others commented that nursing students working as UAPs are not prepared to receive delegation of medication administration after having completed a "fundamentals of nursing" course. The commenters stated that there is no uniformity in the content of fundamentals of nursing courses from program to program. The commenters suggested that the rules need a definition of "good academic standing" and clarification of what is meant by "level of educational preparation" as relates to verification of nursing students' eligibility to receive delegation.

Response 8: The Board deems the comment well taken and has amended the rules accordingly. The Board is adding definitions of "fundamentals of nursing course" and "good academic standing" to New Rule II. Further, the Board is including in New Rule XIII the requirement that, before medication administration can be delegated to nursing students working as UAPs, the students must have satisfactorily completed a pharmacology course. The new definition of pharmacology course includes clinical application of the principles of pharmacology and demonstrated skills. New Rule V is being amended to clarify the verification of nursing students' level of educational preparation.

Comment 9: Several comments were received from nursing educators objecting to having to verify the competency of nursing student UAPs.

Response 9: The rules do not require nurse educators to verify the competency of nursing students working as UAPs to perform delegated tasks. Educators need only verify that the nursing student is currently enrolled in a nursing program and is not on academic probation. Verifying completion of the fundamentals of nursing and/or pharmacology courses by review of transcript and curriculum is a function of the chief nursing officer. Verifying competency of nursing students to perform delegated tasks is the responsibility of the delegating nurse.

Comment 10: Citing public safety considerations, several commenters opposed delegation of additional responsibilities to nursing students working as certified nurses' assistants (CNAs) because CNAs' workloads are already heavy.

Response 10: The comment reflects that there may be a misconception that was not anticipated. A nursing student may not simultaneously fulfill the role of a CNA and the role of a UAP receiving delegation of nursing tasks from licensed nurses as the roles are mutually exclusive. The Board has no authority or intent to expand or change the scope of a CNA's certification granted by the Department of Public Health and Human Services (DPHHS). Both the employer and the nursing student who happens to be certified by DPHHS as a CNA, must be clear and in agreement as to which role the student is being

hired to fulfill. The delegation rules require a facility's chief nursing officer to provide a written job description for the student nurse working as a UAP and to assure that the student is oriented to his/her role. The rules are intended to create an opportunity for nursing students to work as UAPs instead of CNAs and to perform delegated nursing tasks that CNAs cannot perform. The comment prompts the Board to further clarify the nursing student UAP role from the role of a nursing student fulfilling his/her education program's clinical experience requirements. Nursing students will not receive academic credit for their work as UAPs nor will they have faculty supervision while serving in the UAP role contemplated by these rules. Delegation must be consistent with the nursing students' level of preparation, i.e., a nursing student may not perform functions that have not been taught in their education program. Delegation is not contemplated by the Board to be "on the job training".

Comment 11: Numerous comments were received in opposition to published New Rule IX on the following grounds: 1) the rule represents an unlawful exercise of authority by the Board over EMTs who, by law, are under the jurisdiction of the Montana Board of Medical Examiners (BOME); 2) the rule unlawfully alters, restricts or diminishes the scope of practice of EMTs; and 3) the rule purports to make EMTs accountable to nurses instead of to physicians as contrary to Montana law. In addition, commenters stated the reference in the rule to "national certification" is erroneous.

Response 11: The Board readily acknowledges that the BOME has exclusive jurisdiction over EMTs. The New Rule does not represent an exercise of jurisdiction by the Board over EMTs and is not intended to usurp the authority of the BOME relative to EMTs. Pursuant to sections 50-6-201 and 50-6-302(4), MCA, and ARM 24.156.2701(9) and (10), the certification granted by the BOME to EMTs in this state is for pre-hospital and inter-hospital practice only. Thus, within the emergency department of a facility, an EMT has no certification/license and no scope of practice. Rather, in the emergency department setting, an EMT (unless dually licensed) is functioning as a UAP. Section 37-8-202(8), MCA, expressly authorizes the Board to adopt rules for delegation of nursing tasks by licensed nurses to unlicensed persons. The Board acknowledges that there is no "national certification" of EMTs and has written New Rule XI accordingly.

Comment 12: One commenter objected to the Board allowing unlimited nursing functions to be performed by UAPs.

Response 12: The proposed rules do not allow unlimited nursing functions to be performed by UAP delegates, but instead specify what nursing functions are delegable in specific situations and settings.

Comment 13: A comment was received that UAPs should not perform functions that require complex knowledge and expert judgment and skill. The commenter asserted that nursing should be done by licensed professionals, not by UAPs.

Response 13: The rules do not allow UAPs to perform functions that require complex knowledge and expert judgment and skill. UAPs complement the nursing staff but they are not nurses. The Board determined that properly regulated delegation can be effective in accomplishing the objective of safe patient care.

Comment 14: One commenter stated that unless UAPs become licensed and regulated, the UAPs' actions are subject to questioning at the bedside and in the courts.

Response 14: The Board has no legislative authority to license and regulate UAPs. The proposed delegation rules serve to regulate delegating nurses and chief nursing officers only.

Comment 15: A commenter suggested that the Board establish standardized educational requirements for UAPs because the Board previously insisted that another health care licensing board do the same for a different category of UAP.

Response 15: The Board has no legislative authority to establish or enforce educational standards for UAPs. The Board's position with respect to standardized education in the other matter to which the commenter referred, is consistent with the Board's understanding of the legislative authorization and direction in that instance.

Comment 16: Some school nurses objected to mandatory delegation in the school setting, stating that a nurse should exercise professional judgment in determining whether to delegate.

Response 16: The proposed rules do not mandate delegation in any situation or setting. The Board agrees that nurses must exercise professional judgment, consistent with the rules, in determining whether or not to delegate.

Comment 17: One commenter expressed concern that errors made by a nursing student working as a UAP would affect the student's subsequent nursing licensure.

Response 17: Qualifications for licensure are set by Board statutes and rules and candidates meeting the requirements receive licensure. Successful completion of an approved nursing program and passage of the national council licensing examination (NCLEX) are acceptable evidence of minimum competency to practice.

Comment 18: One commenter pointed out that if ARM 8.32.1712 is repealed, a definition of assignment will appear in the new rules but no substantive rule relating to assignment will remain. The commenter stated that the examples in current rule ARM 8.32.1712 are helpful for purposes of distinguishing delegation from assignment as it relates to self-administration of medication.

Response 18: The Board agrees and has amended the rule accordingly to not repeal, but retain the rule without substantive change and renumber ARM 8.32.1712.

Comment 19: Several commenters stated that consumers would be misled into believing they are receiving nursing care when care is being provided by UAPs. The commenters suggested that patient consent be required before a nursing task can be delegated to a UAP.

Response 19: The Board acknowledges the concern but declines to require patient consent. Following consideration of the comment, the Board has amended New Rule IV to require that patients are informed of the delegation decision.

Comment 20: Several commenters observed that some facilities may not have a designated chief nursing officer or may have a person in charge of nursing who is not a nurse.

Response 20: The designated chief nursing officer (regardless of position title) has an indispensable role in implementing safe delegation practices that are in conformity with these rules. The Board notes that delegation cannot occur in a facility that does not have a designated chief nursing officer and the Board has clarified that by amending both New Rules II and IV accordingly.

Comment 21: Comments were received that determining whether a patient is stable involves a diagnosis and assessing expected patient outcomes is a prognosis, which are functions outside the scope of a nursing license.

Response 21: The rules as proposed do not require that a patient be "stable" as a condition of delegating. The Board is amending the rules to allow delegation to a dialysis technician only when the adult patient is established, not stable. The condition of acute care patients is often unstable, but the Board has determined that once the delegating nurse has personally assessed a patient's nursing care needs, the delegating nurse may determine it is safe and appropriate to delegate certain tasks. Applying the nursing process involves an assessment of the patient that nurses are trained to perform and which is within the scope of professional nursing practice.

Comment 22: The Board members and other commenters stated that the configuration of New Rule IX as published is not user friendly and is difficult to follow and comprehend.

Response 22: Following consideration of the comments, the Board decided to not adopt New Rule IX. The text formerly included in New Rule IX has been divided into New Rules X, XI, XII and XIII as set forth in this notice. The separate rules provide the same substance as was previously included in New Rule IX, but in a much clearer and more user-friendly format. This amendment reduces the risk of misunderstanding the rule requirements and error in rule application, while preserving the essential character and content of the rule as published.

Comment 23: A commenter stated that the additional work required for delegating nurses to supervise UAPs creates an unsafe situation and a risk to patients.

Response 23: Delegation is not mandated in any setting by the proposed rules. The Board stresses that if delegation is unsafe because a delegating nurse does not have sufficient time to supervise the performance of the task by the UAP, then delegation in that instance must not occur.

Comment 24: One commenter requested clarification of whether a patient with dialysis-induced hypotension is "stable" for purposes of delegation to a dialysis technician under the proposed rules.

Response 24: The nurse who personally assesses the dialysis patient must make the determination of whether delegation can be done safely in accordance with the rules. Dialysis educators and available professional literature recognize and use the standards incorporated in the applicable New Rules regarding stability of dialysis patients as it relates to delegation to certified dialysis technicians. The Board has considered the comment and is writing New Rule XII accordingly, to require that delegation to a dialysis technician be for an "established" patient and not a "stable" patient.

Comment 25: A few commenters stated that employers should not be responsible for educating staff regarding delegation because the Board has no jurisdiction over the employers or ability to enforce such responsibilities.

Response 25: The Board would like to point out that the proposed rules impose no responsibilities or requirements on employers but only upon licensed nurses, i.e., chief nursing officers and nurse delegators. The Board and staff anticipate participating in the education process relating to the proposed rules.

Comment 26: Commenters stated that the phrase "within the level of education preparation" was unclear, in relation to advanced delegation to nursing students working as UAPs. The commenters questioned whether the Board intended that the delegated tasks be consistent with the scope of practice for which the nursing student is being educated, i.e., practical nursing or professional nursing, or that the types of delegable tasks would change as the student progressed through his/her education program?

Response 26: The Board intended to specify in the rules that the student may only receive delegation of tasks that he/she has been instructed in his/her education program to perform as confirmed by the chief nursing officer. The level of educational preparation would include tasks specific to the student's educational track and would necessarily change as the student's education progressed.

Comment 27: Commenters expressed concern that the terms EMT-I and EMT-P, as used in the proposed rule on advanced delegation, are names of licenses issued by the Board of Medical Examiners (BOME). The commenters stated that the Board cannot require that UAPs be licensed by the BOME as EMT-I or EMT-P, then purport to make those licensees answerable to nurses rather than physicians or to limit the scope of their EMT licenses. Further, the commenters opined that licensees may function in an unlicensed capacity, but not if the unlicensed capacity is dependent upon licensure as proposed by the Board.

Response 27: The Board agrees with the comments as summarized herein. The Board’s intent was to identify training, not required licensure, which would prepare certain individuals to receive delegation from a nurse of specific advanced nursing tasks in the emergency department. The Board has modified the language of the advanced delegation rule to address the commenters' concern by deleting terms that refer to licenses issued by the BOME. The modifications are not intended to substantively change the parameters or the effect of the rule as initially proposed and published.

Comment 28: Commenters suggested that the standards of practice for UAPs should be increased commensurate with the increased scope of the UAPs' duties. Commenters stated that decisions relating to regulation of delegation should be based on empirical evidence correlating delegation with improved patient outcomes and suggested that the use of delegation in acute care facilities is ill defined.

Response 28: The Board has no authority to set or enforce standards of practice for UAPs, but can only do so for nurses. In settings where delegation has been allowed under the current delegation rules, the Board observed no correlation between delegation and adverse patient outcomes. The Board

will affirmatively survey nurses both six months and 12 months after the proposed delegation rules become effective. The surveys will evaluate the nurses' experiences during the implementation of the rules and will monitor disciplinary actions for violations of the delegation rules. The Board has concluded that the proposed rules will protect patients through careful regulation of the delegation processes. The Board disagrees that the use of delegation in acute care is ill defined and asserts that it is clearly outlined in New Rule VI and published New Rule IX.

Comment 29: Two comments were received that the proposed requirements for supervision of the performance of delegated tasks in non-acute (home health) settings are inadequate and the rules are unclear what the standard for supervision is in acute care.

Response 29: The Board has determined that the requirement for supervision of delegation in non-acute (home-health) care settings is the regulatory standard for home health. The standard for supervision of delegation in acute care is clearly set out in New Rule VI.

Comment 30: Several commenters stated that the phrase "aerosol/inhalation" is a different route of medication administration than "per tube" (NG tube) and should therefore be listed separately in the rules.

Response 30: The Board agrees with the comment and has amended New Rule VIII and written XIII accordingly.

Comment 31: One commenter stated that the advanced delegation rule (proposed New Rule IX) should be clarified to reflect that the general criteria for delegation as stated in the other proposed New Rules also applies to delegation.

Response 31: The Board's rules on delegation are cumulative. The Board notes that it is implicit that the general delegation rules apply to acts of advanced delegation.

Comment 32: One commenter requested that the definition of "assignment" in New Rule II be clarified to show that UAPs have an area of responsibility and licensees have an area of accountability and scope of practice.

Response 32: The Board agrees with the comment and has amended the rule accordingly. The amendment comports with the Board's intent for licensee accountability and merely provides clarification.

Comment 33: Several commenters requested that the Board commit to seeking legislation in the next legislative session.

Response 33: The Board notes that the comments are not responsive to the proposed rule notice and the Board declines to address them as such at this time.

Comment 34: One commenter stated that the Board is breaching the Board's legal duty to protect nursing titles by allowing advanced delegation and its duty to protect nurses' practices (role and scope). The commenter asserted that the Board is allowing unlicensed persons to practice nursing and suggested that the rules should require immediate supervision of nursing students acting as UAPs.

Response 34: The Board rules do not allow any unlicensed person to use a title reserved to licensed nurses. Section 37-8-202(8), MCA, expressly authorizes the Board to adopt rules for the delegation of nursing tasks by licensed nurses to unlicensed persons. The Board's duty is to protect the public and the Board has concluded that the delegation rules do accomplish that protection. The proposed rules do require immediate supervision of nursing students performing advanced delegation.

Comment 35: Commenters expressed concern that hospitals may use delegation to staff fewer nurses thereby increasing patient to RN ratios. The commenters stated that there is no need for BON to open doors to litigation over patient safety and nurses' responsibility. The commenters asserted that chief nursing officers should be required to have a policy stating that UAPs cannot take the place of licensed nurses.

Response 35: The Board has no authority or control over facility staffing issues. It is not the Board's intent that nurses be replaced by UAPs and the proposed rules do not facilitate that outcome. For public safety purposes, delegation requires that the delegating nurse first assess the patient. Delegation continues to be patient specific, task specific and UAP specific, so there can be no blanket delegation of any nursing task to a UAP. The Board has concluded there is a need for greater flexibility in the ways nurses provide excellent care to patients. The proposed delegation rules provide greater flexibility without compromising patient safety. The Board determined the litigation comment is speculative and therefore declines to address the comment.

Comment 36: One commenter provided several comments relating primarily to formatting and organization of the proposed rules. Such comments included: 1) add to the definition of "indirect supervision" in New Rule II, that the delegating nurse must be readily available to the UAP in person or by telecommunication to make the definition consistent with other definitions of supervision in the rule and consistent with New Rule VI; 2) consolidate New Rule V and New Rule VI or put the content of both in New Rule IV(4); 3) reverse the order of

sections (2) and (3) in New Rule VI to maintain consistency between acute and non-acute settings; 4) clarify New Rule VIII (1) to refer to nursing specific knowledge and delete the duplicate reference in (1) to "assessment"; and 5) reformat New Rules VIII(2) and IX to be more user friendly and understandable. The commenter stated favorably that the New Rules require nurses to use the nursing process relating to delegation, which appropriately precludes development of a list of tasks that can uniformly be delegated for all patients. The commenter also noted that facilities could make delegation more restrictive than the Board rules allow.

Response 36: The Board agrees that the referenced language should be taken out of New Rule VI(1)(e)(iii) and inserted instead in the definition of "indirect supervision" in New Rule II, to make the definitions of supervision levels more consistent. The Board declines to consolidate New Rules V and VI or move the information to New Rule IV. The Board agrees to reverse the order of sections (2) and (3) in New Rule VI for clarity. The Board agrees that the requested changed to New Rule VIII(1) would clarify the rule. The Board agrees that reformatting section (2) of New Rule VIII and New Rule IX will enhance clarity and ease of use without substantively changing the content as proposed. The Board has amended the rules accordingly. See also Comment and Response 22.

Comment 37: A proponent of the New Rules stated that the current delegation rules no longer serve to protect the public and that the New Rules provide nurses with the greater flexibility needed to coordinate safe, appropriate, high quality and cost effective care. The commenter stated that application of the nursing process, which requires nursing knowledge and the judgment and skills of a licensed nurse, cannot be delegated and that workers in some other disciplines can be integrated safely under the rules into many settings as task-based and technical assistants.

Response 37: The Board agrees with the comment except the Board disagrees with the assertion that the current rules no longer serve to protect the public. The Board determined that the current delegation rules needed to be updated and clarified and promulgated the proposed rules as such.

Comment 38: One person commented that dialysis technicians are the predominant caregivers in most outpatient dialysis facilities. The commenter stated that the New Rules relating to advanced delegation to dialysis technicians are consistent with The American Nephrology Nurses' Association position statements.

Response 38: The Board agrees with the comments and has determined that nurses' ability to delegate to dialysis technicians in dialysis facilities will increase or at least

maintain the patients' access to safe and appropriate dialysis care in rural Montana.

Comment 39: Several commenters stated that the New Rules seem to meet the interests of facilities but not necessarily the interests of nurses. The commenter questioned whether the Board has the infrastructure to administer and implement the proposed rules or to provide essential education relating to them.

Response 39: The Board did not propose the adoption of the New Rules relating to delegation and the repeal of the current delegation rules in order to promote the interests of facilities. Adoption of the New Rules will provide nurses flexibility to utilize delegation where appropriate while carefully regulating delegation for the public's protection. During the rulemaking process, the vacant position of Board Executive Director was filled and the Board believes it is now positioned to assist in the education process relating to the New Rules and to evaluate the impact of the rules on public safety as they are implemented in settings where delegation was not previously allowed.

Comment 40: Two commenters stated that the rules should require that all patients be stable before delegation is permissible.

Response 40: The Board notes that patients in an emergency department are rarely "stable", but if a patient arrests there, it can be helpful to have a competent UAP available to do technical tasks so nurses can readily perform their non-delegable nursing functions. New Rule VI(1)(a) requires that a nurse consider the stability of the patient in making delegation decisions but does not require that the patient be stable.

Comment 41: One person commented that the rules would place another work responsibility (verification of competency and supervision) on nurses that may affect quality of patient care. The commenter also opined that the rules would result in more nurses leaving the acute care setting.

Response 41: The Board contends that if the time involved in the nurse's verification and supervision of a UAP would adversely affect patients' care, delegation should not occur. The Board has determined that only time will tell whether the expansion of delegation to acute care has the adverse impact of nurses leaving the acute care setting. The Board has found no evidence of a correlation between delegation and nurses leaving the profession or leaving a particular practice setting.

Comment 42: A comment was received that the New Rules create another category of nursing personnel without the protection

of a license. The commenter stated that the Board is wrongfully shifting its responsibility for educating the UAPs to RNs and suggested that all references to UAPs in New Rule IV should be changed to "nursing personnel". The commenter suggested that the rule requirement of the delegating nurse needing to visit a patient only monthly in community settings is inadequate. The commenter stated an opposition to the increased responsibility on nursing students under the New Rules and suggested that supervision rests on faculty as those legally responsible.

Response 42: The Board has no jurisdiction over UAPs. UAPs are not nurses, but within the rules, UAPs may perform limited delegated tasks. Education of nursing students must come from their education program and not from on-the-job training and the rules incorporate that principle. The Board will assist in the education of delegating nurses and chief nursing officers relating to the New Rules. Nurses must verify the UAPs' competency to perform tasks before delegating consistent with established practice standards and in accordance with the rules. The references to UAPs in New Rule IV are correct and appropriate. The frequency of nurse visits in community-based settings is a recognized standard for reimbursement purposes and is not a change from the current rule, although facilities can require more frequent visits. Nursing program faculty has no responsibility, legally or otherwise, over nursing students working as UAPs. Such work is performed in the context of an employer-employee relationship independent of the students' nursing education program.

Comment 43: Commenters stated that the New Rules are unclear as to how a staff nurse is to verify competency of a UAP. The commenters suggested that the definition of "competency" is confusing and should refer to demonstrated skills. The commenters additionally stressed the importance of retaining the phrase "and thereby assumes accountability" in the definition of "delegator" in New Rule II, as the commenters are concerned that nurses will be coerced by administrators to delegate when inappropriate. The commenters stated that the above language makes clear it is the delegating nurse who accepts accountability. Lastly, the commenters stated that the rules should require the nurse to assess the patient "immediately" before making the decision to delegate.

Response 43: The Board notes that verification of staff competency is part of generally accepted practice standards and is performed routinely by nurses. Verifying competency differs for every task and the Board believes inclusion in the rules of specific directions for verifying competency is not necessary. The Board agrees that the definition of "competency" should refer to demonstrated skills and has amended New Rule II accordingly. The Board agrees that the definition of "delegator" should not be changed and further agrees that the nurse who makes the decision to delegate is

accountable. The Board declines to require that the patient assessment be done immediately before the decision to delegate as that could create potential problems in the home health context and is overly cumbersome if, for example, a nurse had to re-assess a patient in order to delegate the administration of ibuprofen twice during that shift. The Board notes that the delegating nurse must exercise judgment with respect to the immediacy of the assessment that is necessary or advisable.

Comment 44: A commenter stated support of delegation to UAPs in the emergency department. The commenter stated that the proposed New Rules are not drafted tightly enough to prevent facilities from abusing the delegation concept.

Response 44: The Board does not believe nurses will delegate when in his/her assessment, delegation would not be in the patient's interest to do so. The Board concluded that the proposed rules are drafted to adequately regulate delegation and to prevent the abuse of delegation.

Comment 45: One commenter cautioned that a patient's stability can change quickly and UAPs do not have the knowledge to understand when presenting evidence requires an immediate change of action.

Response 45: The delegating nurse is required to perform a patient assessment prior to delegating. In the acute care setting, immediate supervision of the UAP in the performance of advanced delegation is required by the rules. Supervision is differentiated in the rules based on setting, which in turn relates to the acuity level of patients. The Board has determined that the proposed delegation rules adequately protect the public.

Comment 46: One commenter stated that there appears to be an inconsistency between New Rule VIII, nursing functions and tasks that may not be delegated, and New Rule IX(7)(e), tasks which may be within the nursing student's level of educational preparation.

Response 46: The Board agrees with the comment and is amending New Rule XIII to clarify what tasks cannot be delegated to a nursing student working as a UAP. See also Comment and Response 22.

Comment 47: One commenter stated that the definition of "assignment" in New Rule II is confusing because a UAP does not have an "area of accountability" or a "scope of practice."

Response 47: The Board agrees that the proposed definition could result in confusion and has amended the rule accordingly.

Comment 48: One commenter asserted that the proposed rules do not address RN to LPN delegation, but only nurse to UAP delegation.

Response 48: The new delegation rules implement section 37-8-202(8), MCA, authorizing the Board to adopt rules for the delegation of nursing tasks by licensed nurses to unlicensed persons. The proposed delegation rules do not allow delegation of any task to unlicensed UAPs that LPNs cannot already perform.

4. After consideration of the comments, the Board adopts NEW RULE I (ARM 8.32.1721), NEW RULE III (ARM 8.32.1723), and NEW RULE VII (ARM 8.32.1727) exactly as proposed.

5. After consideration of the comments, the Board has adopted NEW RULE II (ARM 8.32.1722), NEW IV (ARM 8.32,1724), NEW RULE V (ARM 8.32.1725), NEW RULE VI (ARM 8.32.1726), and NEW RULE VIII (ARM 8.32.1728), with the following changes, stricken matter interlined, new matter underlined:

NEW RULE II (ARM 8.32.1722) DEFINITIONS The following words and terms as used in this sub-chapter have the following meanings:

(1) and (2) remain as proposed.

(3) "Advanced delegation" means delegation of specified advanced nursing tasks to specified UAPs only as allowed in [NEW RULE ~~I~~X] and under immediate supervision.

(4) "Assignment" means giving to a UAP or licensee a specific task that the UAP or licensee is competent to perform and which is within the UAP's area of responsibility or a licensee's area of accountability or scope of practice.

(5) "Chief nursing officer" means the nurse ~~executive~~ who:

(a) through (6) remain as proposed.

(7) "Competency" means performance standards including demonstrated skills, knowledge, abilities and understanding of specific tasks that are required in a specific role and setting.

(8) through (11) remain as proposed.

(12) "Fundamentals of nursing course" means a nursing course that provides an introduction to the art and science of nursing practice and human care. Introduction to the concepts of clinical judgment, nursing principles, nursing process, communication skills, and the role of the nurse are included.

(13) "Good academic standing" means a student nurse who is currently enrolled and not on academic probation.

(12) remains as proposed but is renumbered (14).

~~(13)~~ (15) "Indirect supervision" means the nurse delegator is not on the premises but has previously given written instructions to the UAP for the care and treatment of the patient and is readily available to the delegatee either in person or by telecommunication.

(14) through (17) remain as proposed but are renumbered (16) through (19).

(20) "Pharmacology course" means a nursing course that introduces the student to the basic principles of pharmacology in nursing practice and the skills necessary to safely administer medications. Students will be able to demonstrate accurate dosage calculations, correct medication administration, knowledge of drug classifications and therapeutic and nursing implications of medication administration.

(18) through (20) remain as proposed but are renumbered (21) through (23).

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

NEW RULE IV (ARM 8.32.1724) CRITERIA FOR DELEGATION OF NURSING TASKS

(1) remains as proposed.

(2) Delegation may only be performed in settings which have a designated chief nursing officer.

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

(a) remains as proposed.

(b) verify the UAP's competency to perform the specific task for the specific patient and provide instruction as necessary followed by reverification of competency before delegating; ~~and~~

(c) provide supervision in accordance with [NEW RULE VI]~~.~~; and

(d) inform the patient of the decision to delegate.

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

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

NEW RULE V (ARM 8.32.1725) STANDARDS RELATED TO THE FACILITY'S CHIEF NURSING OFFICER REGARDING DELEGATION PRACTICES (1) through (1)(e) remain as proposed.

(i) current enrollment and good academic standing in a nursing education program approved by a state nursing board or a state nursing commission;

(ii) remains as proposed.

(iii) current level of educational preparation, with a minimum of satisfactory completion of a course in the fundamentals of nursing as documented by official educational institution transcript and by course description ~~in writing by the nursing education program~~;

(f) through (2) remain as proposed.

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

NEW RULE VI (ARM 8.32.1726) STANDARDS RELATED TO THE NURSE FUNCTIONING AS A DELEGATOR (1) through (1)(d) remain as proposed.

(e) setting~~.~~:

(i) and (ii) remain as proposed.

(iii) In nonacute settings, the delegating nurse shall provide, at a minimum, indirect supervision for any delegated nursing task. ~~while still remaining readily available to the delegatee either in person or by telecommunication.~~

~~(2)~~ (3) The delegating nurse is accountable ~~shall retain accountability~~ for the:

(a) through (d) remain as proposed.

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

(4) remains as proposed.

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

NEW RULE VIII (ARM 8.32.1728) GENERAL NURSING FUNCTIONS AND TASKS THAT MAY NOT BE DELEGATED (1) The following nursing functions require nursing ~~assessment,~~ knowledge, judgment, and skill and may not be delegated:

(a) through (e) remain as proposed.

(2) Nursing interventions, including but not limited to the following, require nursing knowledge, judgment, and skill and may not be delegated except as provided in [NEW RULES VII and X]:

~~(a) medication administration and related activities including:~~

(i) and (ii) remain as proposed but are renumbered (a) and (b).

(A) through (D) remain as proposed but are renumbered (i) through (iv).

~~(E)~~ (vi) per tube~~,~~;

(vii) by aerosol/inhalation; or

(F) remains as proposed but is renumbered (viii).

(iii) remains as proposed but is renumbered (v).

~~(iv)~~ (c) administration of topical:

~~(A)~~ (i) ~~topical~~ opiates;

~~(B)~~ (ii) ~~topical~~ cardiovascular medications;

~~(C)~~ (iii) ~~topical~~ anesthetic medications; or

~~(D)~~ (iv) ~~topical~~ systemic medications;

(v) through (vii) remain as proposed but are renumbered (d) through (f).

~~(b)~~ (g) insertion of peripheral ~~or central~~ IV catheters;

(h) insertion of central IV catheters;

(c) and (d) remain as proposed but are renumbered (i) and (j).

(i) through (v) remain as proposed.

~~(e)~~ (k) patient triage.

(3) and (4) remain as proposed.

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

6. After consideration of the comments, the Board has chosen not to repeal but amend and transfer ARM 8.32.1712, with the following changes, stricken matter interlined, new matter underlined:

~~8.32.1712~~ 8.32.1733 TASKS WHICH MAY BE ROUTINELY ASSIGNED TO AN UNLICENSED PERSON IN ANY SETTING WHEN A NURSE-PATIENT RELATIONSHIP EXISTS (1) The following are tasks that are not within the exclusive scope of a licensed nurse's practice and may be within the scope of sound nursing practice to be assigned to ~~an unlicensed person.~~ a UAP: ~~Assignment is defined at ARM 8.32.1703, and is determined by the licensed nurse if in her/his nursing judgment the health and welfare of the patient would be protected and the task could safely be assigned to an unlicensed person. Changes in the patient's condition may require that tasks assigned may need to be changed when they can no longer be safely performed by an unlicensed person.~~

(a) non-invasive and non-sterile treatments unless otherwise prohibited ~~in this section~~ by these rules~~,~~;

(b) through (h)(ii) remain the same.

(iii) opening the lid of the above-referenced container for the patient;

(iv) through (vi) remain the same.

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

7. The Board is not adopting New Rule IX as proposed based on comments from the public that the structure of the proposed rule as published was difficult to follow. The Board concurred and deemed that the risk of error arising from the structure of the rule warranted dividing it into four separate rules for purposes of clarity and ease of understanding. The division was done without substantively changing the text of the published and noticed rule. The restructuring of the rule does not represent a change in the Board's intent with respect to the published version of the rule.

NEW RULE X (ARM 8.32.1729) ADVANCED DELEGATION, GENERALLY (1) The board recognizes that certain UAPs are prepared by specialized education and training to receive delegation of advanced nursing tasks as provided in [NEW RULES XI, XII, and XIII.] Delegation of advanced nursing tasks must be from a nurse authorized to delegate the specified advanced nursing tasks, in settings and populations congruent with the UAPs' respective specialized education and training.

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

NEW RULE XI (ARM 8.32.1730) ADVANCED DELEGATION TO UAPS WORKING IN THE EMERGENCY DEPARTMENT (1) A UAP working in a

facility's emergency department may receive delegation of the advanced nursing tasks identified in this rule if:

(a) the delegation is made in the emergency department;

(b) the delegation is for a patient seeking emergency health care services; and

(c) the UAP:

(i) is under the immediate supervision of the delegating nurse;

(ii) possesses current national registry of emergency medical technicians (NREMT) registration at the intermediate or paramedic level; and

(iii) is competent to perform the advanced nursing tasks identified in this rule.

(2) A UAP working in the facility's emergency department may receive delegation of the following nursing tasks:

(a) insertion of peripheral IV catheters; and

(b) hanging, without additives, initial IV fluids including:

(i) lactated Ringer's (LR);

(ii) normal saline (NS);

(iii) 5% dextrose in sterile water (D5W);

(iv) 5% dextrose in normal saline (D5NS);

(v) 5% dextrose in .45% saline (D5 1/2NS); and

(vi) 5% dextrose in lactated Ringer's (D5LR).

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

NEW RULE XII (ARM 8.32.1731) ADVANCED DELEGATION TO UAPS WORKING IN THE DIALYSIS UNIT (1) A UAP working in a dialysis unit may receive delegation of advanced nursing tasks identified in this rule if:

(a) the delegation is made in an out-patient dialysis unit;

(b) the delegation is for an established adult dialysis patient who has been on dialysis for more than 30 days; and

(c) the UAP is:

(i) under the immediate supervision of the delegating nurse; and

(ii) is currently certified as a certified dialysis technician by either the:

(A) nephrology nursing certification commission (NNCC); or

(B) board of nephrology examiners - nursing and technology (BONENT).

(2) The UAP working in the dialysis unit may receive delegation of the following advanced nursing tasks:

(a) preparing dialysate according to established procedures and the dialysis prescription;

(b) assembling and preparing the dialysis extracorporeal circuit according to protocol and dialysis prescription;

(c) preparing and cannulating of mature fistula/graft. Maturity/stability of the graft will be established by a nurse prior to cannulation;

(d) initiating, delivering or discontinuing the dialysis treatment;

(e) obtaining a blood specimen via a dialysis line or a fistula/graft site; and

(f) administering the following medications under the immediate supervision of an RN:

(i) heparin, only in concentrations of 1:1000 units or less, in an amount prescribed by an individual authorized by Montana statute to so prescribe:

(A) to prime the extracorporeal circuit;

(B) to initiate treatment; and/or

(C) for routine administration throughout the treatment;

(ii) normal saline via the dialysis machine to correct dialysis-induced hypotension;

(iii) intradermal anesthetics, in an amount prescribed by an individual authorized by Montana statute to so prescribe, as an integral part of the vascular access cannulation procedure; and

(iv) oxygen by nasal cannula.

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

NEW RULE XIII (8.32.1732) ADVANCED DELEGATION TO UAP NURSING STUDENTS (1) A nursing student who is working as a UAP in any setting may receive delegation of the advanced nursing tasks identified in this rule if:

(a) the UAP nursing student is supervised at the level determined by the delegating nurse in accordance with these rules; and

(b) the nursing student is:

(i) currently enrolled in a state nursing board-approved nursing education program or a state nursing commission-approved nursing education program;

(ii) in good academic standing; and

(iii) whose satisfactory completion of a course in the fundamentals of nursing, as defined in [NEW RULE II], has been verified by the facility's chief nursing officer; and

(iv) as a condition of receiving delegation of medication administration, has satisfactorily completed a pharmacology course, as defined in [NEW RULE II] and completion has been verified by the facility's chief nursing officer.

(2) A UAP nursing student may receive delegation of the following advanced nursing tasks:

(a) calculation of medication dose;

(b) administration of medications:

(i) by mouth;

(ii) sublingually;

(iii) by subcutaneous injection;

(iv) by intramuscular injection;

(v) per tube;

(vi) by aerosol/inhalation; and

(vii) by suppository;

(c) administration of topical:
(i) opiates;
(ii) cardiovascular medications;
(iii) anesthetic medications; and
(iv) systemic medications;
(d) insertion of peripheral IV catheters;
(e) hanging, without additives, IV fluids including:
(i) lactated Ringer's (LR);
(ii) normal saline (NS);
(iii) 5% dextrose in sterile water (D5W);
(iv) 5% dextrose in normal saline (D5NS);
(v) 5% dextrose in .45 saline (D51/2NS); and
(vi) 5% dextrose in lactated Ringer's (D5LR);
(f) adjusting IV flow rates; and
(g) any other nursing tasks for which the student has received instruction within the nursing program, as confirmed by official transcript and course description, and allowed by facility job description.

(3) A UAP nursing student may not receive delegation of:
(a) the nursing assessment;
(b) development of the nursing diagnosis;
(c) establishment of the nursing care plan;
(d) development of the nursing care plan;
(e) evaluation of the patient's progress, or lack of progress, toward goal achievement;
(f) patient triage;
(g) medication administration by intravenous injection or drip;
(h) administration of:
(i) blood products;
(ii) chemotherapeutic agents; or
(iii) total parenteral nutrition (TPN), hypertonic solutions, or IV additives;
(i) insertion of:
(i) central IV catheters; or
(ii) nasogastric or other feeding tubes;
(j) removal of:
(i) endotracheal tubes;
(ii) chest tubes;
(iii) Jackson-Pratt drain tubes (JP tubes);
(iv) arterial or central catheters; or
(v) epidural catheters;
(k) ability to receive verbal orders from providers; and
(l) teaching or counseling a patient or a patient's family relating to nursing and nursing services.

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

8. After consideration of the comments, the Board has repealed ARM 8.32.1701, 8.32.1702, 8.32.1703, 8.32.1704, 8.32.1705, 8.32.1706, 8.32.1707, 8.32.1708, 8.32.1709, 8.32.1710, 8.32.1711, and 8.32.1713 exactly as proposed.

BOARD OF NURSING
KAREN POLLINGTON, RN,
CHAIRPERSON

/s/ KEITH KELLY
Keith Kelly, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

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

Certified to the Secretary of State June 20, 2005

BEFORE THE BOARD OF OIL AND GAS CONSERVATION
THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 36.22.1242 relating to privilege and license tax rates for oil and gas	))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On April 14, 2005, the Department of Natural Resources and Conservation published MAR Notice No. 36-22-107 regarding the proposed amendment of ARM 36.22.1242 concerning privilege and license tax rates on oil and gas at page 538 of the 2005 Montana Administrative Register, Issue No. 7.

2. The Department has amended ARM 36.22.1242 exactly as proposed.

3. No comments were received.

/s/ Anne W. Yates
ANNE W. YATES
Rule Reviewer

/s/ Terri H. Perrigo
Terri H. Perrigo
Executive Secretary
Board of Oil and Gas
Conservation

Certified to the Secretary of State June 20, 2005.

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

In the matter of the adoption of new rules I and II and the amendment of ARM 37.40.302, 37.40.307, 37.40.330 and 37.40.361 pertaining to nursing facility reimbursement	)))))	NOTICE OF ADOPTION AND AMENDMENT

TO: All Interested Persons

1. On April 28, 2005, the Department of Public Health and Human Services published MAR Notice No. 37-346 pertaining to the public hearing on the proposed adoption and amendment of the above-stated rules relating to nursing facility reimbursement, at page 630 of the 2005 Montana Administrative Register, issue number 8.

2. The Department has adopted rule II (37.40.305) as proposed.

3. The Department has amended ARM 37.40.302, 37.40.307 and 37.40.330 as proposed.

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

RULE I (37.40.304) NURSING FACILITY SERVICES (1) through (3)(e) remain as proposed.

(4) Payment for the services listed in ~~these rules~~ ARM 37.40.304 and 37.40.305 are included in the per diem rate determined by the department under ARM 37.40.307 or 37.40.336 and no additional reimbursement is provided for such services.

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

5. The Department has amended the following rule as proposed with the following changes from the original proposal. Matter to be added is underlined. Matter to be deleted is interlined.

37.40.361 DIRECT CARE WAGE REPORTING/ADDITIONAL PAYMENTS FOR DIRECT CARE WAGE AND BENEFITS INCREASES (1) remains as proposed.

(2) The department will pay medicaid certified nursing care facilities located in Montana that submit an approved request to the department~~,~~ a per day add-on payment in addition to the amount paid as provided in (1) as an add-on to their computed medicaid payment rate to be used only for wage and

benefit increases for direct care workers in nursing facilities.

(a) remains as proposed.

(b) To receive the direct care add-on, a nursing facility shall submit for approval a request form to the department stating how the direct care add-on will be spent in the facility. The facility shall submit all of the information required on a form to be developed by the department in order to continue to receive the additional add-on amount for the entire rate year. The form will request information including but not limited to:

(i) the number of full-time ~~employees~~ equivalents employed by category of authorized direct care worker that will receive the benefit of the increased funds;

(ii) through (vi) remain as proposed.

(c) A facility that does not submit a qualifying request for use of the funds distributed under (2), that includes all of the information requested by the department, within the time established by the department, or a facility that does not wish to participate in this additional funding amount shall not be entitled to their share of the funds available for wage and benefit increases for direct care workers.

(d) and (3) remain as proposed.

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

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

COMMENT #1: Where will funding for the wage add-on come from when the anticipated revenue from I-149 (I-149, the tobacco tax increase) is not generated to fund the multiple programs authorized by the legislature? The nursing facility 3% rate increase and the direct care wage funding come from the new taxes on tobacco. Nursing facilities are being encouraged to make permanent increases to their staffing costs to use the new wage funding. Earmarking this funding has created considerable expectations by facility staff that their paychecks will increase. The Governor's budget office has repeatedly expressed its concerns that the funding from Initiative 149 (I-149) may be inadequate to fund all the programs authorized by the legislature. If adequate funds are not available, the Budget and Program Planning Office may reduce, eliminate or otherwise modify the spending. Providers need to know that the funding needed to increase wages won't be removed after fiscal year 2007. Of course, the Department does not know what events may occur in the future, but the Department should discuss its policy and priorities for this funding source.

RESPONSE: The funding provided by the legislature for provider rate and the direct care wage increases was not appropriated as a one time expenditure and, as such, the legislature is making some commitment that they expect these increases to be built

into the base funding levels for the programs that are funded from the I-149 funding. The sustainability of the revenue from this funding source was discussed thoroughly by legislators during the 2005 legislative session. Their appropriation of these funds indicates that they believe I-149 is a viable source of funding for these increases over the next biennium and into the near future. All sources of funding provided by the legislature are subject to reevaluation as the fiscal situations of the state and federal government change. This source of funding will be no different than the other sources of funding that are appropriated for operation of programs each biennium through the legislative process. It is the Department's intent that these rate increases will be built into the base budgets for nursing facilities and the Department will make a request for continuation of funding for these increases during legislative requests for the Medicaid program in future biennia.

COMMENT #2: Our facility uses the Montana Hospital Association (MHA) annual salary survey when adjusting wages for all employees and we try to maintain all employees at least at the 50th percentile for our peer group or our region. The CNAs, LPNs and RNs as well as lab and x-ray technicians are the first groups we evaluate when making salary adjustments. Dietary and housekeeping/maintenance employees are groups in our facility that remain below the 50th percentile compared to similar job descriptions in facilities in our region and our peer group. We also cannot operate our facility without these employees. Residents must be fed and a livable environment must be maintained. Assuming that the nursing staff is the lowest paid group of employees in every facility and forcing the use of the wage add on only in this group in all places will increase that group above standards established in our facility that are market level wages for our area. This will cause animosity and decreased morale among all other employees. The Department should consider expanding the definition of direct care workers and should consider establishing a minimum salary guideline that is based on some acceptable regional industry standard so facilities have some discretion in using the add on for the truly lowest paid direct care workers.

RESPONSE: While the intent of these funds is to provide pay increases to staff that traditionally are considered the lowest paid workers in health care (CNAs and personal care aides), there is also a desire to provide increased funding for staff that are providing direct "hands on" care to vulnerable individuals in nursing facility and community settings. The funding designated for wage increases was computed by utilizing hours from RN, LPN and CNA, staffing reports to calculate the cost of a $1.00 increase in wages and benefits for these workers. We agree that not all facilities are compensating their workers the same and that there may be inequities that occur with this type of designated wage proposal.

The funding was derived only from hours for these three

categories of direct care workers in nursing facilities because the intent of the legislature is that only these categories of workers should receive benefit from the direct care wage funding. The legislature designated that CNAs should receive wage and benefit increases up to a $1.00 before any other category of worker. If there are funds left after this distribution, the next category of workers to receive wage and benefit increases should be LPNs and then RNs up to the amount of funding that will be provided by the Medicaid program.

There is also recognition that if after the $1.00 was provided to each of these categories of staff and the expected funding that will be provided on an annualized basis by the Medicaid program still has a balance, that a facility could submit a plan to direct any remaining funds to lower paid wage earners, such as housekeeping, laundry, etc. to utilize the funding to its fullest. Some facilities may decide to provide increases in excess of the $1.00 to the identified direct care workers if they have additional funds and that would be acceptable as well. We do believe that there are other sources of funding in the form of the 3% provider rate increases and increased revenue from the nursing facility bed tax that can and should be used in addition to the funds dedicated for direct care wage increases to ameliorate some of the inequities created by the direct care wage add-on funding.

COMMENT #3: Facilities may not be able to sustain the level of salary increase supported by the wage add-on when the additional Medicaid reimbursement disappears. Sometimes it would be appropriate to make a larger adjustment to the lowest end of the scale than for employees in that group at the top end of the scale. Other times it would be appropriate to pay differing amounts to the employees within the same group. Allowing facilities to determine the level of wage increase for employees within the identified groups will assure that the wage add-on can be implemented based on the individual needs of each facility. We have several staff members at the top of our pay ranges and want to be fair without creating havoc with our pay scales. It would be helpful if the Department would consider allowing the funding to be used for bonuses or some other cash payment so it does not become a long term wage benefit that facilities may have to decrease when the wage add-on goes away. Employee education is an area that is never sufficient in facilities and would also be a beneficial use of the wage add-on.

RESPONSE: Maintenance of the increased wage structure is required and the legislature has directed the Department to evaluate every six months whether the funds are being spent in accordance with each facility's approved wage plan, that the funds are being paid to workers in the approved categories and that the entry wage is being increased and being maintained at that increased level over time. The intent of the legislature is clear that these funds are to be used to provide for

increased wages and the associated benefits. As such, they cannot be distributed as bonuses or used for other sources. The Department will evaluate the proposals submitted by each facility to determine if they are in accordance with this legislative direction. If a facility would like the Department to consider some of the proposals outlined above that direct funds in a certain manner to classes of workers, we will evaluate their request and determine if it meets the intent for the wage distribution. Facilities will be required to submit their wage plan on the form provided by the Department and in accordance with the instructions on that form.

The sustainability of the revenue from this funding source was discussed thoroughly by legislators during the legislative process. For more detail please see the response to Comment #1. As stated in response to other comments, there are other sources of funding in the form of the 3% provider rate increases and increased revenue from the nursing facility bed tax that can and should be used in addition to the funds dedicated for direct care wage increases to ameliorate some of the inequities that may occur with the direct care wage funding and these sources of funds can be directed to education efforts for employees at the facilities' discretion.

COMMENT #4: The restriction of the funds being available for wage increases effective on or after July 1, 2005, does not match the fiscal year of many facilities that made wage adjustments for 2005 prior to that date. It would be more equitable if the Department would make the adjustments effective for the six-month period beginning January 1, 2005, which would help facilities that have a fiscal year that begins prior to July 1, 2005. Alternatively, the Department could measure the adjustment by comparing the six month period beginning July 1, 2005 to the same six month period in 2004, and so on.

RESPONSE: The Department will consider wage increases as meeting the legislative intent for this direct care wage add-on if the wage increases occur on or after July 1, 2005. Facilities will be able to report increases in wages that occur in the period July 1, 2005 through June 30, 2006, the end of the state fiscal year, to meet the documentation requirements for these funds. If increases occurred prior to July 1, 2005, the Department will not consider them as meeting the intent of the legislature and these increases cannot be used as documentation in support of receiving the $5.39 add-on to the nursing facility payment rate. The Department will be required to submit a report summarizing initial direct care wages paid on July 1, 2005, for the members of the legislative joint appropriations subcommittee on health and human services, and shall report again by July 1, 2006 and January 1, 2007 showing direct care wages paid at those points. The documentation must include initial wage rates, wage rates after the rate increases have been applied and wage rates every six months after the rate increases have been granted.

The legislature intended these funds to be used to provide for increases in wage levels above those that are already in place as of June 30, 2005. If a wage increase has already gone into place, the facility had already identified the funds that would be used to provide for this increase within the funding sources that they had available. As these funds will become available as an add-on to the facilities' Medicaid rate after July 1, there needs to be a plan identified that will utilize these new funds for wage increases in accordance with the priority of CNAs receiving wage increases first then LPNs and RNs in accordance with the legislative intent.

COMMENT #5: Proposed Rule I(4) (ARM 37.40.304), Nursing Facility Services, provides that payment for the services listed "in these rules" are included in the per diem rate and no additional reimbursement is provided for such services.

ARM 37.40.302(13) used the words "in this subsection" instead of "in these rules". The rules discuss services that are included in the rate as well as services that can be billed separately and are not included in the rate. Rule I (ARM 37.40.304) should be clarified to indicate that the services referred to in Rules I (ARM 37.40.304) and II (ARM 37.40.305) are included in the per diem rate, rather than "in these rules" that might be construed to include other sections.

RESPONSE: The Department agrees and has changed the rule to cite the specific rules that apply.

COMMENT #6: There appears to be a grammatical error in proposed ARM 37.40.361(2)(c), direct care wage reporting/additional payments for direct care wage and benefits increases. Perhaps the word "includes" in the second line should be "including".

RESPONSE: The Department agrees and has inserted the word, "that" before the word "includes" to fix the error.

COMMENT #7: Proposed ARM 37.40.361(2)(d), direct care wage reporting/additional payments for direct care wage and benefits increase, discusses retroactive adjustments to recover the direct care wage add-on for "nonparticipating" and "nonqualifying" facilities. We recommend that you remove the term "nonqualifying" or clarify its meaning. We are unaware of any Medicaid nursing facility that would not "qualify" for this payment. A facility could make payments for nonqualifying expenses but the facility itself qualifies for the payment. In addition, there should be clarification that if a facility spends the direct care wage money on both qualifying and nonqualifying expenses, that only the portion not spent for direct care wages is subject to recovery.

RESPONSE: The Department will retain the term "nonqualifying" in ARM 37.40.361(2)(d). A nonqualifying nursing facility is one

that has not met the requirements of ARM 37.40.361(2)(c) that states "a facility that does not submit a qualifying request for use of the funds distributed under (2) that includes all of the information requested by the Department, within the time established by the Department, or a facility that does not wish to participate in this additional funding amount shall not be entitled to their share of the funds available for wage and benefit increases for direct care workers".

COMMENT #8: Proposed ARM 37.40.361(2)(b)(i), direct care wage reporting/additional payments for direct care wage and benefits increase, calls for reporting the number of "full-time employees". The rule should use the term "full-time equivalents" instead, since part-time and full-time employees should benefit from these wage increases.

RESPONSE: The Department agrees and has changed the rule accordingly.

COMMENT #9: The Department's explanatory language and spreadsheets indicate that the patient contribution is being held constant at $24.15 per patient day. The data previously provided by the Department indicates that since 1995, the patient contribution portion of the rate has increased anywhere from $.50 to $1.00 each year. It is reasonable to expect that social security and other sources of patient contribution will increase from year to year. Therefore, the patient contribution should be updated to enable the 3% provider rate increase to apply to the total rate and not just the state/federal share of the rate.

RESPONSE: Patient contribution is a projection of the expected increase in the amount that individuals will have available to meet some of the cost of their care. The reimbursement calculation includes an amount that is representative of the estimated contribution that will be provided by patients toward meeting some of the cost of nursing facility care during the year. This amount is in addition to the state and federal funding levels. The patient contribution amounts in recent times have not risen at the level that the state and federal share has been appropriated during this biennium. Patient contribution trends have been lower than the actual COLA increase in this program on average over the last few years. Patient contribution for 2005 rate setting purposes was estimated at $24.88, but actual patient contribution for fiscal year 2005 from paid claims data is trending at approximately $23.91. We do not believe it would be prudent to increase patient contribution for rate setting purposes to more than the $24.15 amount at this time. The Department will continue to monitor patient contribution and will evaluate to see if any adjustments in reimbursement are warranted based upon this source of revenue in the second year of the biennium.

COMMENT #10: Who qualifies as "direct care staff"? While the legislators may have had in mind their intention to direct this money into the paychecks of low wage workers, namely nurse aides, actual use of the funds is more complicated. In previous one time wage increases, the Department determined that staff who worked in the laundry, kitchen, as social workers or in other therapist positions were considered direct care staff. The Department has released a letter stating that the available funding is limited to three types of staff: CNAs, LPNs and RNs. The direct care funds, once expended on these staff, may be spent on other low wage workers. Since the Department proposes to recover funds that don't meet legislative intent, the Department should include this policy clarification in the final rule filing, with a note that this definition of direct care staff is intended to apply only in this circumstance.

RESPONSE: The Department's definition of a direct care worker in the institutional setting is broader than the three levels of nursing staff for most purposes. The definition of "direct care worker" does include CNAs, RNs, LPNs, dietary/food service, activities, social services, housekeeping, laundry and social workers. In the past, the Department has had the flexibility to include other staff in the definitions of direct hands on care workers for lump sum and wage distribution proposals. The 2005 legislature has provided a more specific definition of the types of workers that could qualify as direct care workers for this allotment of wage funding. It is the intent of the legislature to provide increased funding to staff that are providing direct hands on care to vulnerable individuals in nursing facility and community settings and are typically the lowest paid workers.

Funds for wage increases in accordance with the legislative intent are prioritized for distribution to CNAs first, then LPNs, and then RNs. The direct care wage funds, once expended on these staff up to the $1.00 wage and benefit threshold, may then be directed or spent on other low wage workers. Facilities will be required to submit their wage plan on the form provided by the Department and in accordance with the instructions on that form. Included on that form is the definition of what constitutes a direct care worker for this distribution in addition to the other directions for submitting a qualifying direct care wage proposal. The Department will evaluate the proposals submitted by each facility to determine if they are in accordance with this legislative direction. Because the specific directions are on the form, the Department does not believe it is necessary to provide more clarification in ARM 37.40.361 for this distribution.

COMMENT #11: Does the nursing facility's routine cost of living adjustment (COLA) qualify for use of the wage funding? For example, a nursing facility may have increased its hourly wage by 2% or 3% on January 12, 2005. A competitor may plan such a pay raise on July 1, 2005. The competitor can now opt to use the direct care wage funds in lieu of the routine COLA, while

the nursing facility that began paying the higher wage may not be able to use the funding.

RESPONSE: A COLA that was effective before July 1, 2005 will not be counted for purposes of the direct care wage reporting requirement. The direct care wage and benefit funding is incorporated in the nursing facility reimbursement rates effective July 1, 2005. The Department will consider wage increases as meeting the legislative intent for this direct care wage add-on if the wage increases occur after July 1, 2005. Facilities will be able to report increases in wages that occur from the period July 1, 2005 through the end of the state fiscal year 2006 as meeting the documentation requirements for these funds. If the increases occurred prior to July 1, 2005, the Department will not consider them as meeting the intent of the legislature and these increases cannot be used as documentation in support of receiving the $5.39 add-on to the nursing facility payment rate.

COMMENT #12: Each nursing facility faces different employee benefit costs. The Department should count more benefits than those tied to wages. The Department should include employee health insurance and performance bonuses in addition to FICA, unemployment insurance and workers' compensation expenses as employee benefit costs. The new funding source may help the nursing facilities begin providing health coverage or to maintain existing plans. Since the incremental cost for our benefits for every $1 wage increase is $0.15 and not $0.25, are we accountable for initiating a weighted average wage increase of $1.00 or $0.75?

RESPONSE: The 2005 Montana legislature authorized the Department of Public Health and Human Services to distribute to nursing facilities an additional amount for wage and benefits increases for direct care workers in nursing homes. The legislature mandated that these funds be utilized by facilities to provide increases in wages and benefits for direct care workers, especially those that traditionally earn lower wages or are hard to recruit and retain because of the wage scales paid. The legislature intends that direct care salaries be raised $0.75 an hour and that benefits be raised $0.25 an hour. If the appropriation is insufficient to cover the full amount of intended increases, the lowest paid direct care worker wage rates must be increased first. Should the benefits not cost the facility $0.25 an hour, the wages should be increased accordingly to meet the intent of a $1.00 an hour wage increase for direct care workers in nursing facilities. If the benefit rate is higher than the 25% or $0.25 cents that is identified in the legislation, the facility should submit additional information to the Department with a plan for distribution and allow time for consideration prior to making such payments to employees. The intent of the legislation is to provide for wage and benefit increases and to increase the average entry wage. It is not directed toward providing health insurance or

performance bonuses. Other sources of funding the form of the 3% provider rate increase or increase in the nursing facility bed tax could be used to augment these increases.

COMMENT #13: Nursing facilities operated in conjunction with hospitals often use staff that works in both parts of the organization. While the nursing facility component has new funding for wages, no such funding has been provided to the hospital or any other clinical setting. The Department should allow a facility to use a shift differential or other adjustor to allow a higher wage for work at the nursing facility, but not require the wage be increased for work at the hospital or clinic.

RESPONSE: Direct care staff members that are physically employed at the nursing facility are eligible for the wage increase without consideration to the location of other shifts that they may perform in the hospital setting. The facility can provide a pay increase for such an employee to provide a $1.00 per hour wage increase for those hours worked in the nursing facility setting.

COMMENT #14: The Department must address whether it plans to measure total payroll, the average hourly wage rate or some other statistic to determine compliance with its policy. Nursing facilities need to know whether they are increasing the wage for existing staff, moving their pay ranges or a combination of the two. Further, the Department should determine whether the statistic measured is a statewide benchmark or a facility-specific measure. What criteria or statistics will the Department be using to measure, gauge and audit the distribution of funds?

RESPONSE: The Department issued a reporting form with specific instructions and explanations that will assist providers in meeting the intent of this legislation. Each facility will report wages before the July 1, 2005 increase and after July 1, 2005 to demonstrate that they have implemented the direct care wage initiative for the qualifying direct care workers. The Department will review each facility's wage proposal as it is submitted to ensure that it meets the requirements of this legislation. The Department will review a sample of payroll records for providers to ensure that the wage and benefit increases were disbursed and paid in accordance with the approved wage plans submitted by the facility and that entry wages as well as current active staff wages were increased and maintained at the increased level. Please refer to the direct care wage and benefits increase form for specific instructions. A copy of the form may be obtained by Department of Public Health and Human Services, Senior and Long Term Care Division, Nursing Facility Services Bureau, P.O. Box 4210, Helena, MT 59604-4210 or at www.dphhs.mt.gov/sltc/index.htm.

Russ Cater for
Rule Reviewer

Robert E. Wynia, MD
Director, Public Health and Human Services

Certified to the Secretary of State June 20, 2005.

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

In the matter of the adoption of new rule I and the amendment of ARM 37.80.101, 37.80.102, 37.80.201, 37.80.202, 37.80.205, 37.80.301, 37.80.306, 37.80.316, 37.80.502 and 37.80.602 pertaining to the child care subsidy, legally unregistered provider, and child care provider merit pay and star quality tiered reimbursement programs	)	NOTICE OF ADOPTION AND AMENDMENT

TO: All Interested Persons

1. On February 10, 2005, the Department of Public Health and Human Services published MAR Notice No. 37-342 pertaining to the public hearing on the proposed adoption and amendment of the above-stated rules relating to the child care subsidy, legally unregistered provider, and child care provider merit pay and star quality tiered reimbursement programs at page 217 of the 2005 Montana Administrative Register, issue number 3.

2. The Department has amended ARM 37.80.102, 37.80.202, 37.80.205, 37.80.301, 37.80.306, 37.80.316 and 37.80.502 as proposed.

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

RULE I [37.80.604] REQUIREMENTS FOR CHILD CARE FACILITY PARTICIPATION IN THE BEST BEGINNINGS STAR QUALITY TIERED REIMBURSEMENT PROGRAM (1) remains as proposed.

(2) In addition to the requirements set out in section 7-1 of the Child Care Manual, to participate in the best beginnings star quality tiered reimbursement program a primary child care provider must do the following to ensure quality:

(a) provide direct care and education services ~~for the same group of children during the day for a minimum of five hours per day and for the total number of hours the children are participating in the program~~ for an individual child for the majority of the time the child is in care;

(b) through (d) remain as proposed.

(3) remains as proposed.

AUTH: Sec. 52-2-704 and 53-4-212, MCA
IMP: Sec. 52-2-704, 52-2-721 and 53-4-212, MCA

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

37.80.101 PURPOSE AND GENERAL LIMITATIONS (1) through (12) remain as proposed.

(13) The child care assistance program will be administered in accordance with:

(a) remains as proposed.

(b) the Montana Child Care Manual in effect on ~~January~~ May 1, 2005. The Montana Child Care Manual, dated ~~January~~ May 1, 2005, is adopted and incorporated by this reference. The manual contains the policies and procedures utilized in the implementation of the department's child care assistance program. A copy of the Montana Child Care Manual is available at each child care resource and referral agency; at the Department of Public Health and Human Services, Human and Community Services Division, 1400 Broadway, P.O. Box 202952, Helena, MT 59620-2952; and on the department's website at www.dphhs.~~state.mt.us~~mt.gov.

AUTH: Sec. 52-2-704 and 53-4-212, MCA
IMP: Sec. 52-2-702, 52-2-704, 52-2-713, 52-2-731, 53-2-201, 53-4-211, 53-4-212, 53-4-601, 53-4-611 and 53-4-612, MCA

37.80.201 NONFINANCIAL REQUIREMENTS FOR ELIGIBILITY AND PRIORITY FOR ASSISTANCE (1) through (2)(b) remain as proposed.

(3) Child care assistance under this chapter for parents who are pursuing training or education is subject to the following limitations:

(a) remains as proposed.

(b) assistance is not available for education and training to a parent who has earned an educational certificate or degree within the past five years;

(c) through (e) remain as proposed.

(4) through (10)(b) remain as proposed.

AUTH: Sec. 40-4-234, 52-2-704 and 53-4-212, MCA
IMP: Sec. 52-2-704, 52-2-713, 52-2-721, 52-2-722, 52-2-723, 52-2-731, 53-2-201, 53-4-211, 53-4-212, 53-4-601 and 53-4-611, MCA

37.80.602 BEST BEGINNINGS QUALITY CHILD CARE MERIT PAY

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

(4) To receive a merit pay award, applicants may apply for one of three programs - merit pay I, infant toddler merit pay or higher education merit pay.

(a) Those participants completing and verifying ~~50~~ 23 hours of pre~~-~~approved early childhood training will receive a merit pay I award of ~~$300~~ $250. Those participants completing and verifying 50 hours of preapproved early childhood training will receive a merit pay I award of $500.

(b) and (c) remain as proposed.
(5) through (14) remain as proposed.

AUTH: Sec. 52-2-704 and 53-2-111, MCA
IMP: Sec. 52-2-704, 52-2-111, 52-2-112 and 52-2-711, MCA

5. The Department received many comments that requested changes in the Child Care Manual in effect on January 1, 2005. The changes to the Child Care Manual that the Department has approved in response to comments, as noted below in paragraph 6 of this notice, have been incorporated into a new May 1, 2005, edition of the manual. Therefore, ARM 37.80.101(13)(b), which incorporates the manual by reference, has been amended to incorporate the revised manual.

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

RULE I

COMMENT #1: In (3) of Rule I (ARM 37.80.604), Star Quality reimbursement is lost when a provider has been disqualified from participation in the Child and Adult Care Food Program (CACFP) for cause. The Montana Early Childhood Advisory Council (MECAC) has recommended eligibility for all quality programs be discontinued in this situation, not just for the Star Quality Program. The same reasoning behind making a provider ineligible for the Star Quality Program should make a provider ineligible for grants and merit pay.

RESPONSE: The Department concurs with the comments. However, Rule I (ARM 37.80.604) applies only to the Star Quality tiered reimbursement program. The other Best Beginnings quality programs that are available to licensed and registered child care providers are the Child Care Provider Grants Program, the Mini Grants Program, and the Infant Toddler Mini Grants Program. These programs are managed through a contractual process and the terms of eligibility are outlined in the respective RFP or application documents and detailed in the contract.

Other quality enhancement programs, such as Merit Pay and Infant Toddler Certified Caregiver stipends, are awarded to individuals, not facilities. The Department believes that employment at a facility that has been disqualified for cause should not preclude participation in either of these programs.

COMMENT #2: In (3), disqualifying a provider from participating in the Star Quality Program if the provider has been disqualified from the Child and Adult Food Program (CACFP) for cause is overreaching by the Department's early childhood program. Connecting these two programs is an abuse that will result in accomplishing targeted attacks against providers that the early childhood program cannot get the licensing program to

assist with.

RESPONSE: The Department disagrees with the comment. The requirements are within the Department's authority to implement the Star Quality Program through promotion of child care providers to the public that perform at a level that exceeds basic licensing/registration standards. If a provider is disqualified from the CACFP for cause, it means that the provider has been subjected to a thorough review process by the CACFP and has been unsuccessful in completing an extensive corrective action plan. Such programs have been removed from the CACFP for fraud. It would be irresponsible for the Department to promote providers disqualified from the CACFP Program for fraud to the public as providing exceptional services under the Star Quality Program.

COMMENT #3: Rule I(2)(a) (ARM 37.80.604), which would stiffen direct care and education service requirements, would make it difficult for many staff members to qualify as primary caregivers. In order to meet the current requirements, it is beneficial to qualify the maximum number of staff people possible as primary providers. If Rule I (ARM 37.80.604) is adopted as proposed, a number of problems will ensue:

a. Many part-time staff members would not be able to be considered as primary caregivers.

b. A director who covers lunch hours, bus rides, and substitute care while another primary caregiver is out would not be considered a primary caregiver.

c. It would create problems for child care centers especially, in that directors could not move staff about or assign them administrative duties.

d. The requirements would make it impossible for many staff to qualify as primary child care providers, and they would make it impossible for centers to comply with the licensure requirement to have each group of children supervised by a primary care giver at all times.

e. This provision could create increased burnout among staff if they are required to remain with a single group (or age group) of children, for extended periods each day. Director, teacher and caregiver choices would be limited.

f. This proposed rule attempts to assume responsibility for scheduling children and staff at child care centers in Montana.

g. This proposed rule precludes service to school age children because neither the children nor the caregivers attend five hours per day.

h. The rule could inadvertently require staff to work at least five hours per day and children to attend five hours per day.

i. If this rule is adopted as is, it will make it impossible for centers on the Star Program to meet licensure requirements of primary care providers with each group of children at all times.

j. The rule is neither attainable nor enforceable. As such, it will do nothing to raise the quality of care for children. If centers see it is not attainable, they will have two choices. The first choice is to not even try to comply with the rule. The second is to try to circumvent or manipulate the rule in some less than desirable way.

The proposed rule is not necessary to enforce the incentive program standards. The new rule will eliminate any desire on the part of current and future child care providers to participate in the program and will promote the receipt by a few select child care facilities in Montana of all of the funding and keep state workers in jobs that do not provide what is best for the children of Montana or child care providers. The department should reject all of proposed Rule I (ARM 37.80.604) and either fix the Star Quality Program or find a new method to reward its select child care providers.

RESPONSE: The intent of this proposed rule is to enhance the quality of care provided to Montana's children by recognizing child care providers who provide services that exceed licensing and registration standards through a payment rate that exceeds the regional market reimbursement rate paid on behalf of qualifying families. In addition, the Star Quality child care program serves to promote licensed and registered child care programs (to parents and the public) that have attained a higher level of quality service.

The Star Quality child care program is relatively new. Since its inception, a small number of unscrupulous child care providers have sought a higher rate of reimbursement without providing a higher level of quality services. The concept of developmentally appropriate practice emphasizes the importance of stable and reliable relationships between young children and their caregivers. Research shows that high quality programs strive to establish these types of relationships with the children they serve. High quality programs also employ teacher/caregivers who have received specialized training in early care and education or child development. Employing an individual who meets the qualifications of a primary caregiver does nothing to enhance a child's development if that person does not spend time with the child on a regular basis and for the majority of time that child is in care. This quality

indicator differentiates between the qualifications of a primary caregiver as defined in ARM 37.95.620 and the duties that connect a primary caregiver to a specific child for the majority of time the child is in care. The rule does not in any way modify the qualifications of a primary caregiver as defined in ARM 37.95.620.

That said, the Department recognizes the concerns expressed in the comment above and agrees that the language requiring care for a minimum of five hours of care per day and for the total number of hours the children are participating in the program would create an administrative burden for providers wishing to participate in the program and would be difficult to monitor and enforce. Therefore, the Department has amended (2)(a) to require only that the direct care and education be provided for an individual child for the majority of the time the child is in care.

ARM 37.80.201

COMMENT #4: ARM 37.80.201(3)(b) says that assistance is not available to a parent who has earned an educational certificate or degree within the last five years. To prevent confusion, this should say that assistance is not available for training or education to a parent. Parents doing postgraduate work who meet the other requirements should be eligible to have work hours covered. The same comment applies to section 2-3, page 3, of the Child Care Manual.

RESPONSE: The Department concurs with the recommendation. It is not the Department's intent to disqualify a parent who is engaged in ongoing training or educational activities once they have completed an educational certificate or degree if they remain otherwise eligible. If an income eligible parent were in the five-year exclusion period, child care would be allowed while the parent participated in work activities. Child care would not be covered while such a parent attended classes or other education and training activities. Therefore, the Department has amended both Child Care Manual Section 2-3 and (3)(b) of ARM 37.80.201 to make clear that only assistance for education and training activities is prohibited.

COMMENT #5: The provision in (6)(i) that TANF families must contact the resource and referral agency within 10 days does not match the Child Care Policy Manual's section 3, which has child care being referred by the WoRC office (Work Readiness Component of the Temporary Assistance to Needy Families (TANF) Program).

RESPONSE: The Department has reviewed the inconsistency between the manual and the rule and has edited the manual so that information is consistent. Those changes have been incorporated into the manual dated May 1, 2005.

ARM 37.80.202

COMMENT #6: ARM 37.80.202(14) updates the sliding fee scale, effective September 1, 2004. The notice explains the need to update the child care sliding fee scale with 2004 federal poverty guidelines and suggests that the change is legitimately retroactive because the "change is to the advantage of everyone affected". There is no mention of adding 1% and 2% bands, which reduces the benefits for some families.

RESPONSE: Bands #1 and #2 were in fact included in the notice of proposed rulemaking. Only the positive changes with regard to the sliding fee scale have been implemented retroactively. The addition and implementation of the 1 and 2% copayment bands on the sliding fee scale will be effectively implemented with the amendment of this rule. The date on the sliding fee scale in Section 1-5 of the Child Care Manual has been changed to coincide with the rule implementation date.

ARM 37.80.306

COMMENT #7: It is appropriate for (7) to state that legally unregistered providers are not paid for child care services provided while home schooling, but a similar rule should be applied to registered and licensed providers.

RESPONSE: The Best Beginnings Child Care Scholarship Program is intended to pay for day care or child care services while a parent is at work or otherwise participating in eligible activities. It is not intended to pay for school, educational services, or tuition for school age children if a parent chooses to home school or place a child in a private school. Although the Department concurs with this comment, it is not an appropriate modification to ARM 37.80.306, which applies only to legally unregistered providers. The Department will consider this proposed change in a future rule update.

ARM 37.80.602

COMMENT #8: The Quality Committee of the Montana Early Childhood Advisory Council (MECAC) recently completed a review of the Merit Pay 1 program performance. This program had been reduced due to budget constraints over the past two years. The Merit Pay 1 award has also been reduced. Feedback received by committee members is that the education requirement exceeds the incentive award; therefore, people are choosing not to participate. The Quality Committee recommends that the rule be amended to allow for a $250 incentive award in Merit Pay 1 for the completion of 23 hours of preapproved training and a $500 incentive award for the completion of 50 hours of preapproved training. The MECAC Quality Committee also recommends that the Child Care Manual section 7-5a be revised to reflect this change.

RESPONSE: The Department concurs with these recommendations and is amending (4)(a) of the rule accordingly, as well as section 7-5a of the manual, as noted below.

CHILD CARE MANUAL

COMMENT #9: Definitions are needed to specify what constitutes one overclaim or overpayment; e.g., is it per invoice, per month, or per review? For example, usually one month's worth of invoices are reviewed in determining an overpayment or overclaim, and all the payments for that month are considered as one overclaim. What if two months of invoices are turned in together with fraudulent billing? Would that be one overclaim because they were done at the same time or two overclaims because there were two months? The reverse may also be true. If the resource and referral agency discovers an overclaim or overpayment regarding one family, that overclaim could be set up while further records are requested, but there possibly could be a second overpayment or overclaim when the records are received for the same time as the first overclaim. Would that be part of the first strike or a second strike?

RESPONSE: For ease in reading, the manual's section 6-8 has been revised and now provides guidance on the investigation and audit process. This includes information on what constitutes an "instance" or "strike". Definitions for "overclaim" and "overpayment" have been also added to section 1-3 of the manual. Section 6-9, the "Corrections and Overpayments" section of the manual, has been revised to provide child care workers with directions for processing an overclaim assessment or an overpayment recovery.

COMMENT #10: The Child Care Manual contains typos and other errors that are new, as well as others that have been in the manual previously. As is the case with the Administrative Rules of Montana, the Child Care Policy Manual should be as correct as possible.

RESPONSE: The Department concurs. The manual has been edited for ease in reading as well as proofread for grammatical errors and typos.

COMMENT #11: In section 1-10, on page 3 of the draft manual, regarding provider sign in/sign out sheets, the policy states that parents must sign a child in and out, and the parents do agree to do so on their rights and responsibilities forms. However, if they choose not to do it, there is no apparent legal way to assess an overclaim (overpayment or repayment) against them. This would be because the family is or was eligible and the provider provided child care during the eligible hours but either didn't have the families sign the children in and out, or did it for them. Overpayment only addresses the period the provider was ineligible to receive payments, not whether they weren't following rules (such as having families sign their

children in and out).

RESPONSE: The Department believes that current policy regarding improper payment and fair hearings adequately addresses this situation. Sign in/sign out forms are a requirement for participation in the Best Beginnings child care scholarship program. If an audit reveals that appropriate records were not maintained, the Department has no basis for allowing the payment. If the parent and provider contend that eligible care was provided, both the parent and provider have the opportunity to appeal the decision that there was overpayment. Policies regarding sign in/sign out are addressed in manual section 1-8; the investigation and audit process is addressed in manual sections 6-8 and 6-9; and the fair hearing process is addressed in section 1-11.

COMMENT #12: It would be good to have a policy preventing a provider who is having to repay an overpayment from billing families for that amount.

RESPONSE: This issue is addressed in current rule ARM 37.80.301(2). The provider is responsible for informing parents who are receiving child care assistance under this chapter that the provider has lost their license, registration or payment number. The provider may not bill the household for payments denied by the department due to the provider's failure to comply with licensing, certification or registration requirements. A reference to this rule has been added to the policy manual in section 1-8.

Likewise, the Best Beginnings Child Care Scholarship program is intended to assist families to pay for child care while they are working, attending educational activities, or participating in other approved activities. Parents are responsible for paying their child care provider if they use services while they conduct personal business, such as shopping or attending recreational activities. In that case, providers are free to bill parents for time spent for child care that is outside state reimbursed services.

COMMENT #13: The definitions in section 1-3, page 4, and section 1-4a concerning a "child with special needs" hinge upon "medical records or appropriate documentation". Clarification is needed of what constitutes "appropriate documentation". A previous manual utilized the standard "written verification of the physical, emotional or mental disability from the appropriate authority."

RESPONSE: Because children with special needs vary greatly, the department cannot specify a list of all of the possible documents needed to support the subsidy determination. However, examples of possible supporting documentation have been added to manual sections 1-3 and 1-4a.

COMMENT #14: In section 1-4, pages 6 and 7, there is conflicting language. The chart lists the "Out-of-State" rate on page 6, but the text calls it "State Rate" on page 7.

RESPONSE: This conflict has been noted and the manual has been modified to use the term "out-of-state" rate consistently throughout its text.

COMMENT #15: In section 1-10, page 1, concerning "Child's Relationship to Care Provider", there is a typographical error. "Marriages" should be "marriage certificate".

RESPONSE: Section 1-10 now relates to "Timely Notice and Termination". For ease in reading, information related to the child's relationship to the care provider has been moved to section 1-8, "Provider Eligibility". In response to the above comment, the department has modified the language to read "marriage certificate" instead of "marriage". In addition, language has been added clarifying the status of individuals who may be paid for providing care and those who may not.

COMMENT #16: In section 1-10, pages 4-5, concerning overpayments, the language should match the relevant rule language in ARM 37.80.502 and section 1-9, pages 5-6.

RESPONSE: Section 1-10 now relates to "Timely Notice and Termination". The conflict of language within the administrative rules and the manual has been corrected. For ease in reading, information regarding overpayment processing is now addressed in Section 6-9, "Corrections and Overpayments".

COMMENT #17: In section 1-10, pages 5-6, concerning provider rights and responsibilities, the previous manual used the phrase "periodically review and sign..." a provider's rights and responsibilities sheet, while the draft version is changed to state "annually review and sign..." the same form. The previous language says that the Early Childhood Services Bureau (ECSB) will mail out new Provider Rights and Responsibilities forms to providers when the policy changes. The new proposed language does not specify who sends the forms to the providers, which is important because it represents a significant investment of postage and time.

RESPONSE: Manual section 1-10 now relates to "Timely Notice and Termination". For ease in reading, information regarding provider rights and responsibilities has been clarified and moved to section 1-8, "Provider Eligibility - Overview". Child care resource and referral agencies are responsible for updating the provider rights and responsibilities form on an annual basis. If a mass change to the provider rights and responsibilities is needed on a statewide basis, the ECSB will be responsible for distributing forms.

COMMENT #18: In manual section 2-1, on page 6, concerning

changes to a child care service plan, the resource and referral agency may accept changes over the phone. There is concern about this being the only occasion in which the resource and referral agency is not required to follow up the information with written documentation.

RESPONSE: For ease in reading, information regarding the protocol for accepting changes over the phone has been clarified and moved to section 6-5, "Change Reporting". This clarifies the circumstances in which receiving verbal information is adequate.

COMMENT #19: In manual section 2-2, on page 3, in the last example, and on page 7, regarding an incarcerated parent, there should be a definition of "intact family", to avoid a difference of opinion between a family and the resource and referral agency about what that phrase means.

RESPONSE: The Department agrees and has added a definition of "intact family" to section 1-3, "Definitions".

COMMENT #20: In manual section 2-3, on page 3, the language in the third bullet should read, "Master's and doctoral student's school hours do not qualify". That is implied by the first sentence in this section, and should be written out clearly. With the addition, work hours could be covered for these parents if they meet the other requirements.

RESPONSE: The Department concurs with this comment and has made the requested change.

COMMENT #21: In manual section 3-1, on page 6, concerning recertifying child care, there is an inaccurate statement. The recertification reminder is mailed to the family directly through the Child Care Under the Big Sky (CCUBS) computer software program, which creates and mails the notice automatically to the family.

RESPONSE: The Department agrees and has changed the language to indicate that the notice will be mailed to the family.

COMMENT #22: In manual section 3-1, page 9, at the first arrow, the language should be changed from "The CCR&R may notice the family..." to "The CCR&R will notify the family..."

RESPONSE: The Department concurs with this comment and has made the requested change.

COMMENT #23: In manual section 6-2, on page 5, numbers 1 and 2, the directions do not reflect the most recent changes in processing background checks. The Child Protective Services background checks are currently being sent to the Child and Family Services Division's state office. Criminal background checks are being sent to the DPHHS' Early Childhood Services

Bureau.

RESPONSE: The Department agrees and has revised section 6-2 to reflect the suggested changes. In addition, information in section 6-2 has been updated to more closely reflect the business practices involved in processing a legally unregistered provider application.

COMMENT #24: In manual section 6-3, on page 1, better wording in the last bullet would be "... set up certification plan for up to six months." TANF and Child Protective Services authorizations are done for spans of up to three months at a time. NonTANF authorizations are done to match seasonal jobs, students' semesters and breaks, etc.

RESPONSE: The Department has added clarification to section 6-3 to explain the process for determining the correct certification period.

COMMENT #25: In manual section 6-5, on page 11 of the draft manual, concerning changes in provider, the following comments were received:

a. There is a conflict in that a parent is to notify the resource and referral agency (CCR&R) within one business day after a change in provider, but the change becomes effective the date the agency is notified. For instance, the parent may start child care with a new provider on Friday and notify the CCR&R on Monday, the next business day. They will have notified the CCR&R within one business day of the provider change, as directed. According to this page, payment would start the date the notification is made--Monday--and the child care provider would not be paid for Friday through Sunday.

b. This section does not match with 1/1/05 policy manual section 6-6, pages 2 and 2-3.

c. There may be difficulty in implementing this policy, partially because of the education of parents and providers that will be needed. Also, one of the resource and referral agencies has systems in place to document the calls received in the office, but there is no way to document that no call was received. Therefore, when a parent discovers that their new child care provider was not paid, it will be their word versus that of the caseworker whether the parent called the resource and referral agency on time for their provider change.

RESPONSE: The Department disagrees with the comment, in that the Department will not pay for the new provider until the resource and referral agency knows about the change. The Department has reviewed section 6-5 and made the following changes:

a. Language has been reviewed and revised for congruency throughout the manual and with the ARM language.

b. Language has been added that directs CCR&R agencies to effect the payment change on the day it receives notification.

c. Clarification has been added regarding the correct use of certified enrollment days when a parent changes providers.

d. Clarification has been added regarding the process for accepting provider changes by phone.

COMMENT #26: Manual section 6-6, on page 3 at the second bullet, states that no more than 10 consecutive certified enrollment days may be billed at one time. There is further policy in section 6-8, page 5, concerning excessive absences, where certified enrollment day absences that are unexplained are limited to five. Either the section 6-8 information or a reference to it at 6-6 would help prevent confusion.

RESPONSE: Section 6-8 now relates to auditing and investigations. Information previously contained in section 6-8 has been clarified and moved to section 6-7, entitled "Invoice and Payment", setting out the process regarding billing for unexplained absences. Section 6-6 has been reviewed and language added that defines the difference between explained and unexplained absences. Language concerning the absent days policy has been reviewed and revised.

COMMENT #27: In section 6-6, on page 4, concerning extending child care hours, at the last arrow the text says the "individual authorizing the override shall use the upper comment lines to note the reason for the override". The commenting agency requires the caseworker doing the original release make this note on the invoice detail comment lines. However, it is impossible for the individual authorizing the override to make any changes to the invoice and then release the override, because the Department's CCUBS computer system will not allow it. As a suggestion, the language could be changed to read, "When an invoice requires an override, the reason for the override will be entered on the invoice upper comment lines before it is overridden."

RESPONSE: The Department concurs and has made this change to the language. For ease in reading, this information has been moved to section 6-3, entitled "Issuing the Child Care Certification Plan".

COMMENT #28: Section 6-8, on pages 2 and 3 concerning sign in/sign out sheets, says the parent must sign the sheet. This does not match the requirement in ARM 37.80.301(5), which states

"... parent or other individual authorized to deliver or pick up..."

RESPONSE: The Department concurs and language has been changed to assure conformity between the manual language and the ARM language. For ease in reading, this information has been moved to section 6-7, entitled "Invoice and Payment Process".

COMMENT #29: In manual section 6-8, on page 5 concerning excessive absences, there may be difficulties with this new policy where only the first five days of certified enrollment (CE) absences are paid for unexplained absences, noted as follows:

a. Up to 10 days of consecutive days may be billed at one time (Section 6-6, page 3) but, when resource and referral (CCR&R) workers are processing payments, they would not know if the absence was explained or not when blocks of CE absences are billed at the end of the month or authorization plan.

b. Providers may have an explanation for the absence, so they are billing for the ten days of CE absences. But, as noted in the example in section 6-6, page 3, occasionally parents will give providers a reason for the absence, such as illness, vacations, etc. but fail to notify the provider they are leaving that they are switching providers or leaving the area. Would the Resource and referral agency pay the ten CE days billed or only the five days since the family did not return?

RESPONSE: Section 6-8 now relates directly to "Auditing and Investigations". For ease in reading, information regarding absent days policy has been clarified and moved to section 6-6, entitled "Absent Days Policy - Maintaining the continuity of Care".

COMMENT #30: Manual section 6-8, on pages 6-7, has the previous Child Care Manual's directions for setting up direct payments for CCUBS payments. Resource and referral agency (CCR&R) workers were trained in Helena in 2004 with different instructions. Resource and referral agencies distribute and collect the direct deposit forms. The CCR&R then forwards the form to DPHHS' fiscal Office with the appropriate CCUBS identifying numbers.

RESPONSE: The Department concurs with the comment. The policy has been updated to reflect the current practice. Information concerning this topic is contained in section 6-7, entitled "Invoice and Payment Process".

COMMENT #31: Manual section 6-9, on pages 2 and 5, refers to adjusting the invoice for creating household overpayments. If an invoice adjustment is made, the overpayment option is created

only for the provider, not the parent. A parent's overpayment is created by manually entering the payment in the "Case Event Summary" screen or, if created by CCUBS, as a "Retroactive Change" (which may not be working now). The manual refers to the "CCUBS invoice adjustment.doc" flow chart, which contains no household overpayment information.

RESPONSE: The reference cited in the comment has been removed from the parent information portion of section 6-9. The process for household overpayments has been added to section 6-9.

COMMENT #32: In manual section 7-1, perhaps the new termination policy from ARM 37.80.502(c) should be added.

RESPONSE: Language regarding the termination policy has been added to section 7-1.

COMMENT #33: Concerning using the turnover rate as an eligibility requirement for participation in the Star Quality Program, referred to in manual section 7-1, the following observations have been made:

a. It is difficult for some facilities to achieve the appropriate turnover rate due to normal attrition; i.e., teachers leaving for a variety of reasons.

b. It is difficult for a Star rated facility to fire a teacher who is not performing adequately. This requirement penalizes programs for making appropriate staffing decisions.

c. Turnover rate is not a reliable measure of quality.

RESPONSE: The Department completed a review of the Star Quality Program performance for the past three years. Interviews were conducted with providers who were eligible to apply for a star, yet had not done so. Eligible providers cited the turnover rate requirement as a barrier to applying for a star rating. Therefore, the Department has eliminated the turnover rate requirement for participation in the Star Quality Program. New policy is included in section 7-1 regarding the use of a star rated facility's turnover rate as a quality outcome rather than a participation requirement.

COMMENT #34: Comment #9, while recommending an amendment to ARM 37.80.602 concerning merit pay, also included a recommendation that section 7-5a of the Child Care Manual be amended to conform to any change to ARM 37.80.602.

RESPONSE: Section 7-5a was also amended to incorporate the standards requested.

COMMENT #35: Several typographical errors were noted.

RESPONSE: The Department agreed. The errors were noted and corrected.

Russ Cater for
Rule Reviewer

Robert E. Wynia, MD
Director, Public Health and Human Services

Certified to the Secretary of State June 20, 2005.

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

In the matter of the amendment of ARM 37.86.1004 and 37.86.1006 pertaining to medicaid dental reimbursement and coverage	)))))	NOTICE OF AMENDMENT

TO: All Interested Persons

1. On May 12, 2005, the Department of Public Health and Human Services published MAR Notice No. 37-347 pertaining to the public hearing on the proposed amendment of the above-stated rules relating to medicaid dental reimbursement and coverage, at page 733 of the 2005 Montana Administrative Register, issue number 9.

2. The Department has amended ARM 37.86.1004 and 37.86.1006 as proposed.

3. No comments or testimony were received.

Eleanor A. Parker for
Rule Reviewer

Robert E. Wynia, MD
Director, Public Health and
Human Services

Certified to the Secretary of State June 20, 2005.

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

In the matter of the adoption of new rules I through III and the amendment of ARM 37.114.701, 37.114.702, 37.114.704, 37.114.705, 37.114.708, 37.114.709, 37.114.710, 37.114.715, 37.114.716, 37.114.720 and 37.114.721 pertaining to school immunization requirements	)	NOTICE OF ADOPTION AND AMENDMENT

TO: All Interested Persons

1. On April 14, 2005, the Department of Public Health and Human Services published MAR Notice No. 37-344 pertaining to the public hearing on the proposed adoption and amendment of the above-stated rules relating to school immunization requirements at page 541 of the 2005 Montana Administrative Register, issue number 7.

2. The Department has adopted rules I (37.114.703) and III (37.114.711) as proposed.

3. The Department has amended ARM 37.114.702, 37.114.704, 37.114.708, 37.114.710, 37.114.715, 37.114.716, 37.114.720 and 37.114.721 as proposed.

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

RULE II [37.114.712] DOCUMENTATION OF IMMUNIZATION STATUS OF PERSONS COMMENCING ATTENDANCE IN A POSTSECONDARY SCHOOL (1) through (1)(c) remain as proposed.

(2) Documentation of the proof of measles and rubella immunity required by ARM 37.114.709 must meet the following standards:

(a) through (b) remain as proposed.

(c) if a laboratory report is submitted to prove immunity, it must come from a CLIA approved laboratory report and:

(i) indicate that the person is immune to ~~either~~ measles and rubella~~, or rubella alone if the pupil was born prior to 1957~~;

(ii) through (3) remain as proposed.

AUTH: Sec. 20-5-407, MCA
IMP: Sec. 20-5-406, MCA

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

37.114.701 DEFINITIONS The following definitions, together with the definitions contained in 20-5-402, MCA, apply throughout this subchapter:

(1) through (19) remain as proposed.

(20) "Vaccine" means:

(a) if administered in the United States, an immunizing agent recommended by the ACIP and approved by the food and drug administration, U.S. public health service; or

(b) if administered outside of the United States, an immunizing agent:

~~(i) reviewed and approved by a local, state or federal public health official as equivalent to a vaccine recommended by the ACIP;~~

(ii) and (iii) remain as proposed but are renumbered (i) and (ii).

AUTH: Sec. 20-5-407, MCA
IMP: Sec. 20-5-402 and 52-2-703, MCA

37.114.705 REQUIREMENTS FOR UNCONDITIONAL ATTENDANCE AT A SCHOOL OFFERING ANY PORTION OF GRADES KINDERGARTEN THROUGH 12

(1) remains as proposed.

(2) Vaccines immunizing against diphtheria, pertussis~~,~~ and tetanus must be administered as follows:

(a) remains as proposed.

(b) A pupil or prospective pupil seven years old or older who has not completed the requirement in (2)(a) must receive additional doses of Td vaccine to reach a minimum of three doses of any combination of DTP, DTaP, DT~~,~~ or Td. ~~Neither DTP nor DTaP vaccine, each of which contains pertussis~~ Pertussis vaccine~~,~~ is not ~~recommended or~~ required for a pupil seven years of age or older;

(c) ~~Prior~~ Beginning with the 2006-2007 school year, prior to entering the seventh grade, a pupil must receive a dose of ~~Td~~ vaccine~~, unless~~ containing Td if the following criteria are met:

(i) at least a five year interval ~~has not~~ must have passed since the pupil's previous doses of DTP, DTaP, DT or Td;

(ii) the pupil is ~~not yet~~ 11 years of age or older; or

(iii) a dose of Td was not given to the pupil at seven years of age or older;

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

AUTH: Sec. 20-5-407, MCA
IMP: Sec. 20-5-403, 20-5-405 and 20-5-406, MCA

37.114.709 REQUIREMENTS FOR UNCONDITIONAL ATTENDANCE AT A POST-SECONDARY SCHOOL (1) through (2)(b) remain as proposed.

(3) If a prospective pupil was born prior to 1957, the school must receive either:

(a) remains as proposed.

(b) the evidence of date of birth before January 1, 1957, required by ARM 37.114.712(2) ~~and a CLIA approved laboratory report that meets the requirements of [Rule II(2)] and indicates the prospective pupil is immune to rubella~~.

(4) In the event of an outbreak of either measles or rubella, a pupil must provide the documentation required by either (2)(a) or (b) or be excluded from classes and other school sponsored activities until the local health officer indicates to the school that the outbreak is over. If the laboratory documentation required by (2)(b) is provided, the laboratory report need only show immunity to whichever of the two diseases is the cause of the outbreak.

(5) and (6) remain as proposed.

AUTH: Sec. 20-5-407, MCA
IMP: Sec. 20-5-403 and 20-5-406, MCA

6. The requirements of ARM 37.114.705(2)(b) and (c) were slightly reworded and restated to contain fewer negatives and to enhance clarity. The substance of the requirements remains unchanged.

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

COMMENT #1: Rule II(2)(c)(i) (ARM 37.114.712) allows a person born prior to 1957 who is requesting postsecondary school admittance to provide a laboratory report showing immunity to rubella, not measles. That should be deleted because some people that old did not develop immunity to measles and are therefore at risk if an outbreak of measles occurs.

RESPONSE: The Department agrees and has amended the provision accordingly.

COMMENT #2: The definition of a postsecondary pupil in ARM 37.114.701(16), by limiting that designation to a person who is registered for more than one-half of a full-time credit load, is insufficient in that someone who is unvaccinated and who attends even one class could present a health risk to the rest of the school.

RESPONSE: The definition in question is not a new one and has been in effect for many years. The postsecondary designation of a pupil as one carrying over a half-time credit load was the result of a compromise developed with the Montana university system in 1993. The Department had proposed a more inclusive epidemiological approach, which the university system vehemently opposed. As part of the compromise, a covered classroom setting now includes numerous classrooms at remote sites from the main campus, including workshops and computer classes. As a result, while the rule as it now stands may not prevent outbreaks, it

will and has reduced the number of susceptible students gathered on a campus.

COMMENT #3: In ARM 37.114.701(16)(c), the definition of "pupil", would be easier to read if the word "anyone" were substituted for "who is".

RESPONSE: The requested change was not made because the result would be ungrammatical when read together with the introductory phrase of ARM 37.114.701(16).

COMMENT #4: In ARM 37.114.701(20), the definition of "vaccine" now requires, in the case of a vaccine administered outside of the United States, evidence that it is reviewed and approved by a local, state or federal public health official. In addition, the proposed language requires a foreign student to provide identification of the immunization agent, which will be very difficult, if not impossible, for many of them. Foreign immunization records currently do not show such information. To date, there have apparently been no problems caused by the lack of identification of the immunizing agents used for foreign students. The proposed requirements are too onerous for institutions of higher education and will result in a decline in the number of international students coming to Montana.

RESPONSE: The Department agrees that requiring a public health official to review and approve the vaccine may unduly burden local health departments. It also agrees that requiring identification and approval of the immunizing agents presents an insurmountable problem to postsecondary institutions, at least at this point in time. Therefore, the Department has eliminated the language requiring health official approval and identification of an approved vaccine.

COMMENT #5: The definition of "vaccine" in ARM 27.114.701(20), as proposed, would put a large burden on health departments to review the appropriateness of foreign vaccines. Language should be added allowing a health official to delegate that responsibility to another health care provider, such as someone in a university health service.

RESPONSE: Since, as noted in the response to Comment #4, the requirement has been deleted, the requested amendment was not made.

COMMENT #6: The proposed amendment to ARM 37.114.705 to require Td vaccination prior to entry into the 7th grade should be postponed until the 2006-2007 school year. Heretofore, a safe pertussis (whooping cough) vaccine was unavailable for adolescents, although pertussis outbreaks have occurred recently. Recently, however, a new vaccine for adolescents containing both Td and pertussis vaccine has been approved by the Federal Drug Administration, but is not yet readily available. If students entering 7th grade in 2005 are required

to have the Td vaccine then, they will be medically precluded from having the newly-approved vaccine (Tdap), thereby remaining vulnerable to pertussis.

RESPONSE: The Department agrees and has postponed the required administration of Td-containing vaccine until the school year beginning in 2006. The delay will allow physicians to administer either Td (protecting against tetanus and diphtheria) vaccine or the new Tdap (protecting against tetanus, diphtheria, and pertussis) vaccine at that time.

COMMENT #7: The new Tdap vaccine should be required as of the 2006-2007 school year.

RESPONSE: The pertussis vaccine cannot be required as yet because 20-5-403(1)(a) of the Montana Code Annotated prohibits the Department from doing so, although its administration is legally within the discretion of a physician.

COMMENT #8: Requiring the tetanus and diphtheria booster is far less important than administering the pertussis vaccine, given the recent infant deaths from pertussis and the fact that the commentor had never seen a tetanus or diphtheria case.

RESPONSE: The Department agrees that a pertussis booster prior to 7th grade is very important, although it cannot legally require it yet. However, a booster against tetanus and diphtheria remains important because no vaccine preventable disease can be considered truly gone from our population. Since 1980, the department has received reports of one case of cutaneous diphtheria and one case of laryngeal diphtheria. Tetanus vaccination remains important to a population that spends a great deal of time in agriculture and out of doors in sports and leisure activities. Tetanus still occurs, although rarely. Since 1980, two adult and one neonatal tetanus cases have been reported.

COMMENT #9: Requiring two doses of measles, mumps and rubella vaccine (MMR), rather than, in the case of measles, separate measles vaccine, as current rules require, would result in some students having to get an additional MMR dose. In addition, during measles outbreaks, measles vaccine has been used primarily, rather than MMR. Consequently, measles vaccine, rather than MMR vaccine, should be required to meet the measles vaccination requirement.

RESPONSE: ACIP recommendations state that MMR vaccine is the vaccine of choice whenever protection against any of the three diseases (measles, mumps, and rubella) is required. In addition, the reference to MMR vaccine is not a change in policy. ARM 37.114.702 (formerly ARM 16.28.701A) has stated since its adoption in 1993 that "Only MMR...vaccine is acceptable for doses given after June 11, 1993, to meet the requirements of these rules for vaccination against either

measles, mumps, or rubella." While that particular language is proposed for deletion as out of date, the MMR requirement remains throughout the rules. The Department agrees with the ACIP's position and retains the MMR requirement.

COMMENT #10: ARM 37.114.705 currently allows vaccinations prior to entry in either middle or junior high schools. The proposed amendments require them at the 7th grade mark. Adolescent immunization should be triggered by entry into middle school rather than 7th grade as a way of avoiding confusing parents in districts with middle schools who have gotten used to that option.

RESPONSE: The more flexible wording used in the current version of ARM 37.114.705 has resulted in a great deal of confusion, because not all school systems have the same middle school arrangement. Therefore, there was no consistency when vaccine history records were being reviewed. Some counties gave the adolescent dose at 4th grade, while others did so at entrance to 9th grade. The current adolescent dose, containing a tetanus component, requires a five-year interval between the prekindergarten vaccine dose and the booster dose. In order to standardize the administration of the adolescent vaccine dose, the department is following the ACIP recommendations in existence since 1996, by requiring this dose at 11-12 years of age, or prior to entering the 7th grade.

COMMENT #11: Contrary to the proposed language for ARM 37.114.708, pertaining to preschools and kindergarten through 12th grade, students who provide laboratory evidence of immunity should not be excluded from school during an outbreak, as required by (5) of that rule.

RESPONSE: Apparently the commentor was referring to ARM 37.114.708 by mistake, since that rule contains no such language. ARM 37.114.709, which applies to postsecondary schools, does have such language, which applies only to students born prior to 1957. As noted in Comment #15 below, the Department has amended the proposed language in ARM 37.114.709 so that students in that age group may be excluded in case of an outbreak if proof of age is the only evidence of immunity they have submitted to the school.

COMMENT #12: In ARM 37.114.709(3)(b), it would be helpful to those using the rules to add language highlighting the fact that the date of birth in question is to be before January 1, 1957.

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

COMMENT #13: In ARM 37.114.709(3)(b), several commentors noted as unnecessary and inappropriate a requirement that a laboratory report be provided indicating rubella immunity even if proof of birth prior to 1957 is provided.

RESPONSE: The provision was erroneously included and has been deleted.

COMMENT #14: ARM 37.114.709(3) should not require proof of measles vaccination if a pupil was born prior to 1957.

RESPONSE: No change was necessary because the above provision does not require proof of vaccination if, in the alternative, proof of birth date is provided.

COMMENT #15: In the event of an outbreak of rubella or measles at a postsecondary school, ARM 37.114.709(4), as proposed, requires a pupil to show that they have been vaccinated in order to avoid exclusion from school until the outbreak is over. Pupils ought also to be able to avoid exclusion if they have a laboratory report showing they are immune. ARM 37.114.709(5) should also be amended accordingly.

RESPONSE: The Department agrees and has amended (4) as requested, including a provision allowing the laboratory report to show immunity to the disease causing the outbreak, not to both measles and rubella. ARM 37.114.709(5) was not changed because it applies only to students born prior to 1957 who have given the school proof of age but no other evidence of immunity, and who may not have developed immunity to measles or rubella.

COMMENT #16: Recommendations by the American Academy of Pediatrics (AAP), as well as those by the ACIP, should continue to be considered in determining the proper immunization standards and schedule.

RESPONSE: The current immunization schedule is the "Recommended Childhood and Adolescent Immunization Schedule of the United States" developed by the Advisory Committee on Immunization Practices (ACIP), but also approved by the American Academy of Pediatrics and the American Academy of Family Physicians. It is the schedule printed in the AAP's "Red Book, 26th Edition", pages 24-25. The Department acknowledges the importance of the guidance received from the AAP for requiring two doses of MMR vaccine prior to kindergarten entry. Of the 15 members of the ACIP, seven are pediatricians, one member is a director and nurse practitioner of the Children's Hospitals and Clinics in St. Paul, Minnesota, and the other doctors represent various disciplines such as ambulatory care and prevention, public policy, director of health disparities, infectious disease, etc. The Department readily acknowledges the invaluable guidance provided by the AAP and does not disregard that organization or its continued contribution to immunization standards.

COMMENT #17: In ARM 37.114.720, the word "department" should be defined and the address to which the required report is to be returned should be included in the rule.

RESPONSE: "Department" is already defined in ARM 37.114.701(5), and the address to which reports are to be returned is already provided to schools by the department in the form of self-addressed envelopes. Therefore, no changes were made in response to this comment.

COMMENT #18: Perhaps the specific date the rule amendments go into effect should be added to the text.

RESPONSE: There is no general need to include the effective date of the amended rules in the rules themselves because they, by law, become effective once published in the Montana Administrative Register. The one set of requirements that is delayed until the beginning of the 2006-2007 school year pertaining to the administration of the tetanus and diphtheria booster before the 7th grade is indeed specifically included.

Russ Cater for
Rule Reviewer

Robert E. Wynia, MD
Director, Public Health and Human Services

Certified to the Secretary of State June 20, 2005.

VOLUME NO. 51 OPINION NO. 3

APPROPRIATIONS - Aggregation of line item appropriations to satisfy contingent voidness clause in HB 22, 59th Legislative Assembly;
FEES - Applicability of contingent voidness clause in bill applying water use fee;
LEGISLATIVE BILLS - Applicability of contingent voidness clause in bill applying water use fee;
STATUTORY CONSTRUCTION - Applicability of contingent voidness clause in bill applying water use fee;
STATUTORY CONSTRUCTION - Consideration of legislative records in determining legislative intent;
STATUTORY CONSTRUCTION - Preference for construction that gives effect over one that renders void;
STATUTORY CONSTRUCTION - Use of singular includes plural absent demonstrated legislative intent to the contrary;
STATUTORY CONSTRUCTION - Inapplicability of statutory definition of term in separate statute where context suggests different meaning;
WATER AND WATERWAYS - Applicability of contingent voidness clause in bill applying water use fee;
MONTANA CODE ANNOTATED - Sections 1-2-102, -105(3), -107, 1-3-223, -232, 5-16-101, 17-7-102(11), 85-2-212 et seq.;
MONTANA LEGISLATIVE SERVICES BILL DRAFTING MANUAL 2004 - Sections 2-7, 2-8;
MONTANA LEGISLATIVE SESSION 59 - House Bills 2, 22.

HELD: More than $2 million has been appropriated in a line item from state sources other than the water adjudication account provided in HB 22, § 7, for the purposes of funding Montana's water adjudication program. Accordingly, HB 22 is not void pursuant to its contingent voidness provision.

June 13, 2005

The Honorable Brian Schweitzer
Governor of Montana
State Capitol
P.O. Box 200801
Helena, MT 59620-0801

Dear Governor Schweitzer:

You have requested my opinion on the following question:

> Has at least $2 million been "appropriated in a line item" for each fiscal year from state sources other than the water adjudication account provided for in section 7 of House Bill 22 passed by the 59th

> legislature for the purposes of funding Montana's water adjudication program?

Your question arises from the following situation. In the legislative interim following the 2003 legislative session, the Environmental Quality Council ("EQC"), a committee of the legislature, Mont. Code Ann. § 5-16-101, conducted a study of the state-wide water adjudication in progress under Mont. Code Ann. §§ 85-2-212 et seq. A major issue of concern in the study was the perceived delay in completion of the adjudication, which commenced in 1979.

In December, 2004, EQC issued a report of its findings. The report concluded, among other things, that additional funding through a new funding source was required to supplement existing funding levels, accelerate the adjudication process, and ensure its accuracy. EQC, Montana's Water--Where Is It? Who Can Use It? Who Decides?, Report to the 59th Legislature (December, 2004) at 74-80 (hereafter "Montana's Water"). At EQC's request, a bill was drafted and introduced in the 59th Legislative Assembly as HB 22 to implement some of the recommendations of the study. The bill provided, among other things, for the creation of a water adjudication account funded by a sliding scale schedule of fees to be paid by most persons and entities claiming water in the adjudication. HB 22, § 7.

As initially drafted, HB 22 contained a contingent voidness clause providing:

> Contingent voidness. If at least $2 million is not line item appropriated in any fiscal year from state sources other than the water adjudication account in [section 7] per year, for the purposes of funding Montana's water adjudication program, then [this act] is void.

(Emphasis added.) In drafting revisions prior to introduction, the language of this clause was changed to read as follows:

> Contingent voidness. If at least $2 million is not appropriated in a line item for each fiscal year from state sources other than the water adjudication account provided for in [section 7], for the purposes of funding Montana's water adjudication program, then [this act] is void.

(Emphasis added.) The revised language remained in the bill as passed.

The term "line item appropriation" has a well-understood meaning. An "appropriation" is "an authority from the law-making body in legal form to apply sums of money out of

that which may be in the treasury in a given year, to specified objects or demands against the state." State ex rel. Haynes v. District Court, 106 Mont. 470, 476-77, 78 P.2d 937, 941 (1938), quoting State ex rel. Bonner v. Dixon, 59 Mont. 58, 78, 195 P. 841, 845 (1921). The term "line item" is a reference to the organizational structure of the general appropriation bill, traditionally styled as House Bill 2. In the 59th Legislature, as in prior legislatures, HB 2 is divided into sections, departments, and programs. For each category of expenditure, such as personal services, equipment, and travel, the bill usually sets forth separate lines of appropriation stating the amounts appropriated for each category. See generally Board of Regents v. Judge, 168 Mont. 433, 440-51, 543 P.2d 1323, 1327-34 (1975) (describing line item appropriation process and holding that the legislature lacks the power to control management decisions of the Board of Regents through conditions enacted in line item appropriations in the University system budget). The process of line item appropriation therefore allows the legislature to direct appropriations within agencies to certain purposes.

It is clear that neither HB 2 nor any other appropriation measure passed by the 59th Legislative Assembly contains a single line item appropriation in excess of $2 million for a program entitled "water adjudication program." However, it is likewise clear that several separate line items in the budgets of various agencies are devoted to the operation of various aspects of the adjudication. The Departments of Fish, Wildlife, and Parks and Natural Resources and Conservation have reviewed HB 2 and determined that more than $2.5 million has been appropriated in various line items in the budgets of the Department of Natural Resources and Conservation, the Reserved Water Rights Compact Commission, the Water Court, and the Attorney General, all dedicated to some portion of the adjudication. If the use of the term "a line item" means that only a single line item exceeding $2 million in a single "water adjudication program" budget can satisfy the contingent voidness clause, then it appears HB 22 is void. If, on the other hand, the term is not limited to a single line item and permits the aggregation of any line items that support the adjudication, then it appears that the contingent voidness clause may be satisfied if the various appropriations identified by the agencies can be said to be "for the purposes of funding Montana's water adjudication program." I discuss each of these issues in turn.

I.

Use of singular or plural language in legislation is generally not a matter of substantive significance. The common law rule of interpretation, codified in Montana at Mont. Code Ann. § 1-2-105(3), is that "[t]he singular includes the plural and the plural the singular." See, e.g., Boyes v. Eddie, 1998 MT 311, ¶ 27, 292 Mont. 152, 158, 970 P.2d 91, 95 (reference to

"tax notice" in statute requiring mail notice of the potential for issuance of tax deeds permitted mailing of multiple notices together); Hauswirth v. Mueller, 25 Mont. 156, 161, 64 P. 324, 326 (1901) (reference to "time and place" of election allowed use of multiple polling places). The Legislative Services Division, in its instructions to bill drafters, incorporates this rule: "Use the singular instead of the plural when possible. The singular includes the plural." (See section 1-2-105(3), MCA.)." Legislative Services Division, Bill Drafting Manual 2004, § 2-8 at 15 (hereafter "Manual").

The rule is not absolute, however. Where the legislature intends that the use of the singular have limiting significance, the terminology used or the legislative history may overcome the general rule. See State v. Sand Hills Beef, 196 Mont. 77, 84-85, 639 P.2d 480, 484 (1981) (where legislature amended "supervising officer or officers" to read "supervising officer," legislative intent to limit reference to single officer was apparent and general rule not applied).

It would therefore appear that one asserting that the use of the term "a line item" in preference for the term "not line item appropriated" limits consideration to a single line item appropriation bears the burden to show that such an interpretation was clearly intended. In this case, the contrary appears to be true.

The change from the original language, which in my opinion clearly would have allowed aggregation of multiple line items, to the language that appeared in the enacted bill was made in the drafting process before the bill was introduced. It appears most likely that the legislative drafters modified the original proposed bill language to give effect to another rule of draftsmanship, the elimination where possible of the use of passive voice. Manual, § 2-7 at 15 ("Whenever possible, draft in the active voice instead of the passive.") In making this editorial change, the drafter applied § 2-8 and drafted the provision in the singular rather than the plural.

Pursuant to the Supreme Court's decision in Sand Hills Beef, consideration of legislative history is appropriate in determining whether the statutory preference for inclusion of the plural in the singular applies. In this case, there is no evidence that this change was intended to have substantive significance. The EQC report that gave rise to HB 22 provides good evidence of the intention of the legislature in putting forward the legislation. See Nichols v. School Dist. No. 3, 87 Mont. 181, 184, 287 P. 624, 625 (1930) (in considering legislative history, court may consider proceedings of the legislature as disclosed by its records). The report is quite clear about the intentions of the sponsoring committee with respect to the need to generate additional revenue to fund the adjudication and the use of additional fees for that purpose.

EQC first identified the problem, stating that "if the adjudication process is going to be sped up and made more accurate it will require additional funding." Montana's Water at 73. EQC then reviewed the funding of three separate agency budgets devoted to aspects of the adjudication--DNRC, the Water Court, and the Reserved Water Rights Compact Commission, observing that "[h]istorically, a majority of the funding has been directed to DNRC" and discussing the issue of moving funding between the DNRC budget and that of the Water Court. Id. at 77. EQC also observed that the pursuit of accuracy would require some method of bringing issue remarks before the Water Court for review, a function that the legislature ultimately assigned in part to the Attorney General in HB 782. EQC concluded its discussion of the issue of "the need for increased funding in the water adjudication program" by describing its proposal for a fee imposed on water right holders, a proposal that ultimately gave rise to the fee proposal in HB 22.

Against this backdrop, the suggestion that the legislature intended HB 22 to be nugatory in the absence of a single $2 million line item appropriation for the "water adjudication program" makes no sense. EQC was well aware that various agency budgets contributed to the success of the adjudication program. Its table setting forth current level expenditures, found in Montana's Water at 74, includes the budgets of DNRC, the Water Court, and the Compact Commission in setting forth the current level expenditures. EQC also considered the increased cost incurred in resolving the issue remark problem. Montana's Water at 75. As the legislature was presumptively aware, see Department of Revenue v. Burlington Northern, 169 Mont. 202, 211, 545 P.2d 1083, 1088 (1976) ("We must presume the legislature knew what it was doing and was cognizant of the statutes of Montana as then enacted."), in no prior year had any single annual budget line item devoted to the adjudication for any of these agencies exceeded even $700,000, let alone $2 million. And, there is no evidence that in considering HB 2 the legislature even considered any proposal for a single line item dedicated to the "water adjudication program" in excess of $2 million.

Thus, to reach the conclusion that HB 22 is void, one would have to assume that the legislature knew when it passed the bill that the fee provisions would never take effect at all. The law strongly presumes against such an intent. Voidness clauses are not favored. "An interpretation which gives effect is preferred to one which makes void." Mont. Code Ann. § 1-3-232.

> The object sought to be achieved by this legislation is a primary consideration in our interpretation of it. . . . The legislature does not perform useless acts. Section 1-3-223, MCA. An interpretation that gives effect is always preferred over an

> interpretation that makes the statute void or treats the statute as mere surplusage. Section 1-3-232, MCA.

American Linen Supply Co. v. Department of Revenue, 189 Mont. 542, 545, 617 P.2d 131, 133 (1980). Finally, the Montana Supreme Court "presumes that the legislature would not pass meaningless legislation." Montana Contractors' Ass'n v. Department of Highways, 220 Mont. 392, 395, 715 P.2d 1056, 1058 (1986).

For the foregoing reasons, it is my opinion that in evaluating the application of the contingent voidness clause found in § 15 of HB 22, the reference to "a line item" does not limit consideration to any single line item, but allows aggregation of all line items that are "for the purposes of funding Montana's water adjudication program." I now turn to the question of whether line items in HB 2 may be said to be for those purposes.

II.

It has been suggested that the word "program" in § 15 of HB 22 is limited to those "programs" within the definition of the term found in § 5 of HB 2, which in turn incorporates the definition found in Mont. Code Ann. § 17-7-102(11): "'Program' means a principal organizational or budgetary unit within an agency." HB 2, § 5 further provides that the term "program" is used in HB 2 in a manner that "is consistent with the management and accountability structure established on the statewide accounting, budgeting, and human resources system, and is identified as a major subdivision of an agency ordinally numbered with an Arabic numeral." The argument is then made that the Reserved Water Rights Compact Commission is not a "program" within that definition, and that the aggregation of appropriations would fail to exceed $2 million in any event if the Compact Commission's appropriations were not included. I find the initial premise of this argument--that "program" in HB 22, § 15 is the same as "program" in HB 2, § 5--unconvincing, and it is therefore unnecessary to consider whether the Compact Commission is a "program" under the other statutes.

The simple fact is that the definition of "program" for application to the provisions of HB 2 is largely irrelevant to the interpretation of the term in HB 22. The operative term in this case is "program" as used in HB 22, not HB 2. While definitional statutes are generally imported from place to place in the code, this rule does not apply "where a contrary intention plainly appears." Mont. Code Ann. § 1-2-107; see Richter v. Rose, 1998 MT 165, ¶¶ 17-20, 289 Mont. 379, 962 P.2d 583 ("contrary intention plainly appears" where definitions claimed to be imported in eminent domain

proceeding were all by their terms limited to application in other specific parts of the code).

As discussed above, EQC took the view that various budget authorizations, not just the one for the Water Court, made up the "adjudication program" for purposes of its analysis. Recall that the entire purpose of the new fee structure was to increase spending on the adjudication above its current level, and that EQC evaluated the current level by aggregating elements of three different agency budgets, those of DNRC, the Water Court, and the Compact Commission, and considering additional costs for other improvements designed to further the accuracy of the adjudication. The contingent voidness provision appears clearly to have been designed to make sure that the legislature continued at least the current level of funding, which EQC had calculated to be slightly more than $2 million, before the funding provided by the new fee would be available. The provision would thus guard against using the new fee simply to switch funding source by allowing the legislature to decrease funding from the general fund and replace it with funding from the new fee.

A narrow construction of the term "program" to exclude consideration of one of the very agencies that EQC included in its analysis would defeat the entire purpose of the legislation. The analysis concluding part I of this opinion applies with equal force here. The intention of the legislature controls the interpretation of the language it uses. Mont. Code Ann. § 1-2-102. In pursuing that intention, the objective of the legislation must be considered, and a construction that frustrates the achievement of that objective must be rejected. Willoughby v. Loomis, 264 Mont. 44, 52, 869 P.2d 271, 276 (1994). Here, the legislature in its consideration of HB 22 clearly did not intend that the term "program" be limited to those agency operations that meet the definitions found in HB 2 and Mont. Code Ann. § 17-7-102(11). Rather, it had a specific objective in mind--to increase the funding available for purposes of the adjudication above the level found in the current budgets of the agencies that were participating in that task. I therefore conclude that the term "Montana's water adjudication program" is not limited by the definition of "program" in HB 2, § 5, but rather may include any agency budget line item devoted to the advancement of the adjudication process.

THEREFORE, IT IS MY OPINION:

> More than $2 million has been appropriated in a line item from state sources other than the water adjudication account provided in HB 22, § 7, for the purposes of funding Montana's water adjudication program. Accordingly, HB 22 is not void pursuant to its contingent voidness provision.

Very truly yours,

/s/ Mike McGrath
MIKE McGRATH
Attorney General

mm/cdt/jym

NOTICE OF FUNCTION OF ADMINISTRATIVE RULE REVIEW COMMITTEE

Interim Committees and the Environmental Quality Council

Administrative rule review is a function of interim committees and the Environmental Quality Council (EQC). These interim committees and the EQC have administrative rule review, program evaluation, and monitoring functions for the following executive branch agencies and the entities attached to agencies for administrative purposes.

Economic Affairs Interim Committee:

- Department of Agriculture;
- Department of Commerce;
- Department of Labor and Industry;
- Department of Livestock;
- Office of the State Auditor and Insurance Commissioner; and
- Office of Economic Development.

Education and Local Government Interim Committee:

- State Board of Education;
- Board of Public Education;
- Board of Regents of Higher Education; and
- Office of Public Instruction.

Children, Families, Health, and Human Services Interim Committee:

- Department of Public Health and Human Services.

Law and Justice Interim Committee:

- Department of Corrections; and
- Department of Justice.

Energy and Telecommunications Interim Committee:

- Department of Public Service Regulation.

Revenue and Transportation Interim Committee:

- Department of Revenue; and
- Department of Transportation.

State Administration, and Veterans' Affairs Interim Committee:

- Department of Administration;
- Department of Military Affairs; and
- Office of the Secretary of State.

Environmental Quality Council:

- Department of Environmental Quality;
- Department of Fish, Wildlife, and Parks; and
- Department of Natural Resources and Conservation.

These interim committees and the EQC have the authority to make recommendations to an agency regarding the adoption, amendment, or repeal of a rule or to request that the agency prepare a statement of the estimated economic impact of a proposal. They also may poll the members of the Legislature to determine if a proposed rule is consistent with the intent of the Legislature or, during a legislative session, introduce a bill repealing a rule, or directing an agency to adopt or amend a rule, or a Joint Resolution recommending that an agency adopt, amend, or repeal a rule.

The interim committees and the EQC welcome comments and invite members of the public to appear before them or to send written statements in order to bring to their attention any difficulties with the existing or proposed rules. The mailing address is PO Box 201706, Helena, MT 59620-1706.

HOW TO USE THE ADMINISTRATIVE RULES OF MONTANA AND THE MONTANA ADMINISTRATIVE REGISTER

Definitions: Administrative Rules of Montana (ARM) is a looseleaf compilation by department of all rules of state departments and attached boards presently in effect, except rules adopted up to three months previously.

Montana Administrative Register (MAR) is a soft back, bound publication, issued twice-monthly, containing notices of rules proposed by agencies, notices of rules adopted by agencies, and interpretations of statutes and rules by the attorney general (Attorney General's Opinions) and agencies (Declaratory Rulings) issued since publication of the preceding register.

Use of the Administrative Rules of Montana (ARM):

Known Subject	1. Consult ARM topical index. Update the rule by checking the accumulative table and the table of contents in the last Montana Administrative Register issued.
Statute Number and Department	2. Go to cross reference table at end of each title which lists MCA section numbers and corresponding ARM rule numbers.

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies that have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through March 31, 2005. This table includes those rules adopted during the period April 1, 2005 through June 30, 2005 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 March 31, 2005, 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 2004 and 2005 Montana Administrative Registers.

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BOARD APPOINTEES AND VACANCIES

Section 2-15-108, MCA, passed by the 1991 Legislature, directed that all appointing authorities of all appointive boards, commissions, committees and councils of state government take positive action to attain gender balance and proportional representation of minority residents to the greatest extent possible.

One directive of 2-15-108, MCA, is that the Secretary of State publish monthly in the ***Montana Administrative Register*** a list of appointees and upcoming or current vacancies on those boards and councils.

In this issue, appointments effective in May 2005 appear. Vacancies scheduled to appear from July 1, 2005, through September 30, 2005, are listed, as are current vacancies due to resignations or other reasons. Individuals interested in serving on a board should refer to the bill that created the board for details about the number of members to be appointed and necessary qualifications.

Each month, the previous month's appointees are printed, and current and upcoming vacancies for the next three months are published.

IMPORTANT

Membership on boards and commissions changes constantly. The following lists are current as of June 17, 2005.

For the most up-to-date information of the status of membership, or for more detailed information on the qualifications and requirements to serve on a board, contact the appointing authority.

BOARD AND COUNCIL APPOINTEES FROM MAY 2005

Appointee	Appointed by	Succeeds	Appointment/End Date
Alternative Livestock Advisory Council (Fish, Wildlife, and Parks)			
Ms. Linda Nielsen	Governor	Smith	5/26/2005
Nashua			1/1/2007
Qualifications (if required): Board of Livestock representative			
Mr. Victor Workman	Governor	Lane	5/26/2005
Whitefish			1/1/2007
Qualifications (if required): Fish, Wildlife, and Parks Commission representative			
American Indian Monument and Tribal Flag Circle Advisory Council (Historical Society)			
Ms. Reno Charette	Governor	not listed	5/6/2005
Helena			0/0/0
Qualifications (if required): Indian Affairs State Coordinator			
Board of Architects (Labor and Industry)			
Mr. Bayliss Ward	Governor	Vogl	5/6/2005
Bozeman			3/27/2008
Qualifications (if required): registered architect with three years continuous practice			
Board of Pardons and Parole (Corrections)			
Mr. John Rex	Governor	Peterson	5/16/2005
Miles City			1/1/2007
Qualifications (if required): education or experience in criminology, education, psychiatry, psychology or law			
Board of Real Estate Appraisers (Labor and Industry)			
Mr. Peter Fontana	Governor	Andrews	5/26/2005
Great Falls			5/1/2008
Qualifications (if required): real estate appraiser			
Mr. Kraig Kosena	Governor	Mackay	5/26/2005
Missoula			5/1/2008
Qualifications (if required): real estate appraiser			

BOARD AND COUNCIL APPOINTEES FROM MAY 2005

Appointee	Appointed by	Succeeds	Appointment/End Date
Board of Review (Revenue)			
Mr. Marc Bridges	Governor	reappointed	5/6/2005
Helena			0/0/0
Qualifications (if required): Board of Livestock Executive Officer			
Director Dan R. Bucks	Governor	Hoffman	5/6/2005
Helena			0/0/0
Qualifications (if required): Department of Revenue Director			
Director Keith Kelly	Governor	Keating	5/6/2005
Helena			0/0/0
Qualifications (if required): Department of Labor and Industry Commissioner			
Board of Veterans Affairs (Military Affairs)			
Major General Randall Mosley	Governor	reappointed	5/6/2005
Helena			0/0/0
Qualifications (if required): Department of Military Affairs Adjutant General			
Building Codes Council (Labor and Industry)			
Director Robert Wynia	Governor	Gray	5/6/2005
Helena			0/0/0
Qualifications (if required): Department of Public Health and Human Services Director			
Capital Finance Advisory Council (Administration)			
Director Janet Kelly	Governor	Bender	5/6/2005
Helena			0/0/0
Qualifications (if required): Department of Administration Director			
Capitol Complex Advisory Council (Administration)			
Director Jeff Hagener	Governor	reappointed	5/6/2005
Helena			0/0/0
Qualifications (if required): Department of Fish, Wildlife, and Parks Director			

BOARD AND COUNCIL APPOINTEES FROM MAY 2005

Appointee	Appointed by	Succeeds	Appointment/End Date
Department of Corrections Advisory Council (Corrections)			
Sen. John Bohlinger	Governor	Ohs	5/6/2005
Billings			0/0/0
Qualifications (if required): Lieutenant Governor			
Economic Development Advisory Council (Commerce)			
Mr. Evan Barrett	Governor	Gibson	5/6/2005
Butte			0/0/0
Qualifications (if required): Chief Business Development Officer			
Flathead Basin Commission (Natural Resources and Conservation)			
Mr. Mike Volesky	Governor	O'Hair	5/25/2005
Helena			12/31/2008
Qualifications (if required): representative of the Governor's office			
Hearing Aid Dispenser Board (Labor and Industry)			
Mr. Stephen Kramer	Governor	Byorth	5/18/2005
Billings			7/10/2007
Qualifications (if required): otolaryngologist			
Information Technology Board (Administration)			
Rep. David Ewer	Governor	Swysgood	5/6/2005
Helena			0/0/0
Qualifications (if required): Office of Budget and Program Planning Director			
Interagency Coordinating Council for State Prevention Programs (Public Health and Human Services)			
Director Bill Slaughter	Governor	reappointed	5/6/2005
Helena			0/0/0
Qualifications (if required): Department of Corrections Director			

BOARD AND COUNCIL APPOINTEES FROM MAY 2005

Appointee	Appointed by	Succeeds	Appointment/End Date
Land Information Advisory Council (Administration)			
Mr. Mike Boyer	Director	not listed	5/6/2005
Glasgow			0/0/0
Qualifications (if required): Department of Administration Director designee			
Library Commission (State Library)			
Ms. Cindy Carrywater	Governor	Staffanson	5/22/2005
Hays			5/22/2008
Qualifications (if required): public representative			
Ms. Nora Smith	Governor	Randall	5/22/2005
Bozeman			5/22/2008
Qualifications (if required): public representative			
Montana Agriculture Development Council (Agriculture)			
Director Nancy K. Peterson	Governor	Peck	5/6/2005
Helena			0/0/0
Qualifications (if required): Department of Agriculture Director			
Director Anthony J. Preite	Governor	Simonich	5/6/2005
Helena			0/0/0
Qualifications (if required): Department of Commerce Director			
Montana Alberta Bilateral Advisory Council (Commerce)			
Director James A. Lynch	Governor	Galt	5/6/2005
Helena			0/0/0
Qualifications (if required): Department of Transportation Director			
Montana Cherry Advisory Committee (Agriculture)			
Mr. Oliver Dupuis	Director	not listed	5/3/2005
Polson			5/3/2007
Qualifications (if required): none specified			

BOARD AND COUNCIL APPOINTEES FROM MAY 2005

Appointee	Appointed by	Succeeds	Appointment/End Date
Montana Cherry Advisory Committee (Agriculture) cont.			
Mr. Barry Hansen Polson Qualifications (if required): none specified	Director	not listed	5/3/2005 5/3/2007
Mr. Jan Tusick Ronan Qualifications (if required): none specified	Director	not listed	5/3/2005 5/3/2006
Mr. Dick Wilson Kalispell Qualifications (if required): none specified	Director	not listed	5/3/2005 5/3/2008
Mr. Roberto Zavala Big Fork Qualifications (if required): none specified	Director	not listed	5/3/2005 5/3/2008
Montana Committee for the Humanities (Committee for the Humanities)			
Ms. Ellen Crain Butte Qualifications (if required): public representative	Governor	Cajune	5/23/2005 1/2/2009
Mr. James Shanley Poplar Qualifications (if required): public representative	Governor	Driscoll	5/23/2005 1/2/2009
Ms. Ruth Towe Billings Qualifications (if required): public representative	Governor	Murray	5/23/2005 1/2/2009
Mr. Bruce Whittenberg Billings Qualifications (if required): public representative	Governor	Knapp	5/23/2005 1/2/2009

BOARD AND COUNCIL APPOINTEES FROM MAY 2005

Appointee	Appointed by	Succeeds	Appointment/End Date
Montana Grass Conservation Commission (Natural Resources and Conservation)			
Mr. Steve Barnard	Governor	Hill	5/16/2005
Hinsdale			1/1/2008
Qualifications (if required): grazing district director			
Mr. Dan Teigen	Governor	Loehding	5/16/2005
Teigen			1/1/2008
Qualifications (if required): grazing district preference holder			
Montana Information Technology Act (Administration)			
Supt. Linda McCulloch	Superintendent	not listed	5/31/2005
Helena			5/31/2007
Qualifications (if required): none specified			
Montana Potato Commodity Advisory Committee (Agriculture)			
Mr. Ray Morkrid	Director	McCullough	5/20/2005
Ledger			5/20/2008
Qualifications (if required): none specified			
Mr. Sid Schutter	Director	reappointed	5/20/2005
Manhattan			5/20/2008
Qualifications (if required): none specified			
Mr. Roger Starkel	Director	Lake	5/20/2005
Ronan			5/20/2008
Qualifications (if required): none specified			
Montana Public Safety Communications Council (Administration)			
Mr. Jeff Brandt	Director	not listed	5/6/2005
Helena			0/0/0
Qualifications (if required): Department of Administration Director designee			

BOARD AND COUNCIL APPOINTEES FROM MAY 2005

Appointee	Appointed by	Succeeds	Appointment/End Date
Teachers' Retirement Board (Administration)			
Mr. Darrell Layman	Governor	Foster	5/26/2005
Glendive			7/1/2006
Qualifications (if required): retired teacher			
Traumatic Brain Injury Advisory Council (Public Health and Human Services)			
Ms. Ruby Clark	Governor	reappointed	5/18/2005
Poplar			1/1/2008
Qualifications (if required): family of survivor			
Ms. Tana Ostrowski	Governor	Lux	5/18/2005
Missoula			1/1/2008
Qualifications (if required): advocate for brain injured individuals			
Upper Clark Fork River Basin Remediation and Restoration Education Advisory Council (Justice)			
Director Richard Opper	Governor	Sensibaugh	5/6/2005
Helena			0/0/0
Qualifications (if required): Department of Environmental Quality Director			
Director Mary Sexton	Governor	Clinch	5/6/2005
Helena			0/0/0
Qualifications (if required): Department of Natural Resources and Conservation Director			
Youth Justice Advisory Council (Corrections)			
Mr. Steve Gibson	Director	not listed	5/6/2005
Helena			0/0/0
Qualifications (if required): Department of Corrections Director designee			
Youth Justice Council (Justice)			
Ms. Jennifer Kistler	Governor	Saunders	5/16/2005
Helena			6/20/2005
Qualifications (if required): youth representative			

BOARD AND COUNCIL APPOINTEES FROM MAY 2005

Appointee	Appointed by	Succeeds	Appointment/End Date
Youth Justice Council (Justice) cont.			
Mr. Michael-Ray Kleeman	Governor	Gilbert	5/16/2005
Helena			6/20/2005
Qualifications (if required): youth representative			

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2005 through SEPTEMBER 30, 2005

Board/current position holder	Appointed by	Term end
Aging Advisory Council (Public Health and Human Services)		
Ms. Mary Alice Rehbein, Lambert	Governor	7/18/2005
Qualifications (if required): public member		
Ms. Pauline Nikolaisen, Kalispell	Governor	7/18/2005
Qualifications (if required): public member		
Ms. Dorothea C. Neath, Helena	Governor	7/18/2005
Qualifications (if required): public member		
Board of Banking (Administration)		
Mr. Max Agather, Kalispell	Governor	7/1/2005
Qualifications (if required): public member		
Mr. Wayne Edwards, Denton	Governor	7/1/2005
Qualifications (if required): state bank officer of a small sized bank		
Board of Funeral Services (Commerce)		
Mr. John Michelotti, Billings	Governor	7/1/2005
Qualifications (if required): mortician engaged in a crematory operation		
Board of Hearing Aid Dispensers (Labor and Industry)		
Mr. John Delano, Helena	Governor	7/1/2005
Qualifications (if required): public member who uses a hearing aid		
Ms. Susan Kalarchik, Butte	Governor	7/1/2005
Qualifications (if required): licensed hearing aid dispenser with national certification in audiology		
Board of Investments (Administration)		
Mr. James Turcotte, Helena	Governor	7/1/2005
Qualifications (if required): Teachers' Retirement Board representative		

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2005 through SEPTEMBER 30, 2005

Board/current position holder	Appointed by	Term end
Board of Landscape Architects (Labor and Industry)		
Mr. David M. Hummel, Billings	Governor	7/1/2005
Qualifications (if required): public member		
Ms. Shelly Engler, Bozeman	Governor	7/1/2005
Qualifications (if required): landscape architect		
Ms. Janet Thomas, Hobson	Governor	7/1/2005
Qualifications (if required): public member		
Board of Medical Examiners (Labor and Industry)		
Dr. Kay E. Dorr, Nashua	Governor	9/1/2005
Qualifications (if required): public member		
Dr. Van Kirke Nelson, Kalispell	Governor	9/1/2005
Qualifications (if required): doctor of medicine		
Ms. Linda Melick, Lewistown	Governor	9/1/2005
Qualifications (if required): nutritionist		
Ms. Susan McRae, Dillon	Governor	9/1/2005
Qualifications (if required): public member		
Ms. Jennifer Krueger, Missoula	Governor	9/1/2005
Qualifications (if required): certified physician assistant		
Mr. Dwight E. Thompson, Harlowton	Governor	9/1/2005
Qualifications (if required): physician assistant-certified		
Dr. James D. Upchurch, Crow Agency	Governor	9/1/2005
Qualifications (if required): doctor of medicine		

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2005 through SEPTEMBER 30, 2005

Board/current position holder	Appointed by	Term end
Board of Nursing (Commerce)		
Ms. Kim Powell, Missoula	Governor	7/1/2005
Qualifications (if required): RN		
Board of Pharmacy (Commerce)		
Mr. Robert Mann, Plentywood	Governor	7/1/2005
Qualifications (if required): pharmacist		
Board of Physical Therapy Examiners (Labor and Industry)		
Mr. Jeff Swift, Great Falls	Governor	7/1/2005
Qualifications (if required): physical therapist		
Board of Private Security Patrol and Investigation (Labor and Industry)		
Dr. Raymond Murray, Missoula	Governor	8/1/2005
Qualifications (if required): representative of the Peace Officers Standards and Training Council		
Ms. Kathy Miller, Helena	Governor	8/1/2005
Qualifications (if required): public member		
Board of Professional Engineers and Land Surveyors (Labor and Industry)		
Mr. Daniel M. McCauley, Helena	Governor	7/1/2005
Qualifications (if required): professional engineer		
Mr. Jake Neil, Great Falls	Governor	7/1/2005
Qualifications (if required): professional engineer		
Board of Psychologists (Commerce)		
Ms. Nancy McLees, Bozeman	Governor	9/1/2005
Qualifications (if required): public member		

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2005 through SEPTEMBER 30, 2005

Board/current position holder	Appointed by	Term end
Board of Public Accountants (Labor and Industry)		
Mr. Michael Johns, Deer Lodge	Governor	7/1/2005
Qualifications (if required): certified public accountant		
Board of Radiologic Technologists (Labor and Industry)		
Ms. Carole V. Erickson, Missoula	Governor	7/1/2005
Qualifications (if required): public member		
Dr. Dennis Palmer, Helena	Governor	7/1/2005
Qualifications (if required): radiologist		
Ms. Jackie Barnes, Helena	Governor	7/1/2005
Qualifications (if required): permitholder		
Mr. John Rosenbaum, Havre	Governor	7/1/2005
Qualifications (if required): radiologic technologist		
Dr. John V. Hanson, Billings	Governor	7/1/2005
Qualifications (if required): physician who employs a radiologic technologist		
Board of Research and Commercialization (Commerce)		
Mr. John Youngberg, Bozeman	Governor	7/1/2005
Qualifications (if required): public member		
Board of Sanitarians (Labor and Industry)		
Mr. John Shea, Missoula	Governor	7/1/2005
Qualifications (if required): public member		
Board of Veterans' Affairs (Military Affairs)		
Mr. Charles Van Gorden, Valier	Governor	8/1/2005
Qualifications (if required): veteran		

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2005 through SEPTEMBER 30, 2005

Board/current position holder	Appointed by	Term end
Board of Veterinary Medicine (Commerce)		
Ms. Mary Hinebauch, Miles City	Governor	7/31/2005
Qualifications (if required): public member		
Dr. Linda Kauffman, Stevensville	Governor	7/31/2005
Qualifications (if required): veterinarian		
Commission on Community Service (Labor and Industry)		
Ms. Sherry Stevens Wulf, Kalispell	Governor	7/1/2005
Qualifications (if required): representative of volunteer agencies		
Mr. Bob Maffit, Helena	Governor	7/1/2005
Qualifications (if required): representative of the disabled community and an ex officio member		
Ms. Bea Ann Melichar, Billings	Governor	7/1/2005
Qualifications (if required): representative of senior programs		
Mr. John Allen, Helena	Governor	7/1/2005
Qualifications (if required): representative of the National Service Corporation and an ex officio member		
Ms. Nan LeFebvre, Helena	Governor	7/1/2005
Qualifications (if required): representative of the Department of Public Health and Human Services		
Rep. Margarett H. Campbell, Poplar	Governor	7/1/2005
Qualifications (if required): representative of tribal government		
Mr. Michael J. McGinley, Dillon	Governor	7/1/2005
Qualifications (if required): representative of local government		

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2005 through SEPTEMBER 30, 2005

Board/current position holder	Appointed by	Term end
Committee on Telecommunications Access Services for Persons with Disabilities (Public Health and Human Services)		
Mr. Edward Van Tighem, Great Falls Qualifications (if required): deaf	Governor	7/1/2005
Mr. Jack Sterling, Billings Qualifications (if required): representative of an independent local exchange company	Governor	7/1/2005
Ms. Char Harasymczuk, Billings Qualifications (if required): deaf	Governor	7/1/2005
Economic Development Advisory Council (Commerce)		
Ms. Kathie Bailey, Lewistown Qualifications (if required): public member	Governor	7/23/2005
Mr. James Klessans, Joliet Qualifications (if required): public member	Governor	7/23/2005
Ms. Linda Twitchell, Wolf Point Qualifications (if required): public member	Governor	7/23/2005
Electrical Board (Labor and Industry)		
Mr. Fred Talarico, Missoula Qualifications (if required): master electrician	Governor	7/1/2005
Enterprise Solutions Advisory Council (Administration)		
Mr. Tony Herbert, Helena Qualifications (if required): Tier 1/Administration	Director	9/30/2005
Mr. Rod Sundsted, Helena Qualifications (if required): Tier 2/Montana University System	Director	9/30/2005

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2005 through SEPTEMBER 30, 2005

Board/current position holder	Appointed by	Term end
Enterprise Solutions Advisory Council (Administration) cont.		
Mr. Terry Johnson, Helena	Director	9/30/2005
Qualifications (if required): Tier 1/Legislative Branch		
Ms. Barb Charlton, Helena	Director	9/30/2005
Qualifications (if required): Tier 4/Department of Commerce		
Ms. Cathy Muri, Helena	Director	9/30/2005
Qualifications (if required): Tier 1/Administration		
Ms. Jane Hamman, Helena	Director	9/30/2005
Qualifications (if required): Tier 1/Governor's Office		
Ms. Carleen Layne, Helena	Director	9/30/2005
Qualifications (if required): Tier 5/Montana Arts Council		
Ms. Frieda Houser, Helena	Director	9/30/2005
Qualifications (if required): Tier 5/Department of Agriculture		
Mr. Mick Robinson, Helena	Director	9/30/2005
Qualifications (if required): Tier 2/Department of Public Health and Human Services		
Mr. John McEwen, Helena	Director	9/30/2005
Qualifications (if required): Tier 1/Administration		
Mr. John Huth, Helena	Director	9/30/2005
Qualifications (if required): Tier 4/State Auditor		
Ms. Lisa Smith, Helena	Director	9/30/2005
Qualifications (if required): Tier 2/Judiciary		
Mr. Darrell Zook, Helena	Director	9/30/2005
Qualifications (if required): Tier 2/Department of Transportation		

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2005 through SEPTEMBER 30, 2005

Board/current position holder	Appointed by	Term end
Enterprise Solutions Advisory Council (Administration) cont.		
Ms. Gail Kramlick, Helena	Director	9/30/2005
Qualifications (if required): Tier 2/Office of Public Instruction		
Ms. Rhonda Schaffer, Helena	Director	9/30/2005
Qualifications (if required): Tier 3/Department of Corrections		
Mr. Steve Austin, Helena	Director	9/30/2005
Qualifications (if required): Tier 3/Department of Revenue		
Mr. Darrel Beaton, Helena	Director	9/30/2005
Qualifications (if required): Tier 3/State Fund		
Mr. Tom Livers, Helena	Director	9/30/2005
Qualifications (if required): Tier 4/Department of Environmental Quality		
Family Education Savings Program Oversight Committee (Commissioner of Higher Education)		
Auditor John Morrison, Helena	Governor	7/1/2005
Qualifications (if required): Commissioner of Insurance		
Mr. Donald Sterhan, Billings	Governor	7/1/2005
Qualifications (if required): public member with experience in investment management		
Information Technology Board (Administration)		
Ms. Sheila Stearns, Helena	Board of Regents	9/1/2005
Qualifications (if required): none specified		
Interagency Coordinating Council for State Prevention Programs (Public Health and Human Services)		
Mr. Marko Lucich, Butte	Governor	7/1/2005
Qualifications (if required): representative of prevention programs and services		

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2005 through SEPTEMBER 30, 2005

Board/current position holder	Appointed by	Term end
Interagency Coordinating Council for State Prevention Programs (Public Health and Human Services) cont.		
Mr. William Snell, Billings	Governor	7/1/2005
Qualifications (if required): representative of prevention programs and services		
Judicial Standards Commission (Justice)		
Ms. Barbara Evans, Missoula	Governor	7/1/2005
Qualifications (if required): public member		
Mental Disabilities Board of Visitors (Governor's Office)		
Ms. Kathleen Driscoll Donovan, Hamilton	Governor	7/1/2005
Qualifications (if required): consumer representative		
Ms. Cindy Dolan, Great Falls	Governor	7/1/2005
Qualifications (if required): consumer of mental health services		
Ms. Gay Moddrell, Kalispell	Governor	7/1/2005
Qualifications (if required): consumer of developmental disabilities services		
Montana Agriculture Development Council (Agriculture)		
Mr. Earl Bricker, Moore	Governor	7/1/2005
Qualifications (if required): engaged in agriculture		
Mr. Robert Hanson, White Sulphur Springs	Governor	7/1/2005
Qualifications (if required): engaged in agriculture		
Ms. Cathy Cottom, Dillon	Governor	7/1/2005
Qualifications (if required): engaged in agriculture		
Montana Consensus Council (Administration)		
Rep. Jon Sesso, Butte	Governor	7/1/2005
Qualifications (if required): public member		

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2005 through SEPTEMBER 30, 2005

Board/current position holder	Appointed by	Term end
Montana Consensus Council (Administration) cont.		
Dr. Nelson Wert, Townsend	Governor	7/1/2005
Qualifications (if required): public member		
Mr. LeRoy Not Afraid, Crow Agency	Governor	7/1/2005
Qualifications (if required): public member		
Ms. Phyllis Denton, Dillon	Governor	7/1/2005
Qualifications (if required): public member		
Montana Cooperative Agricultural Pest Survey Advisory Council (Agriculture)		
Ms. Sue Blodgett, Bozeman	Director	7/1/2005
Qualifications (if required): Montana State University Extension Service		
Ms. Holly Brosten, Kalispell	Director	7/1/2005
Qualifications (if required): Montana Grain Growers Association		
Ms. Robin Childers, Missoula	Director	7/1/2005
Qualifications (if required): Montana Nursery and Landscape Association		
Mr. Jack Lake, Ronan	Director	7/1/2005
Qualifications (if required): Montana Potato Improvement Association		
Mr. Bob Peterson, Bozeman	Director	7/1/2005
Qualifications (if required): Montana State University		
Mr. Greg Denitto, Missoula	Director	7/1/2005
Qualifications (if required): USDA Forest Service		
Mr. Gary Adams, Helena	Director	7/1/2005
Qualifications (if required): USDA APHIS PPQ		

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2005 through SEPTEMBER 30, 2005

Board/current position holder	Appointed by	Term end
Montana Cooperative Agricultural Pest Survey Advisory Council (Agriculture) cont.		
Mr. Steve Baril, Helena	Director	7/1/2005
Qualifications (if required): Montana Department of Agriculture		
Montana Historical Society Board of Trustees (Historical Society)		
Mr. Burton O. Bosch, Havre	Governor	7/1/2005
Qualifications (if required): public member		
Ms. Ana Brenden, Scobey	Governor	7/1/2005
Qualifications (if required): public member		
Mr. Timothy C. Fox, Helena	Governor	7/1/2005
Qualifications (if required): public member		
Ms. Shirley Groff, Butte	Governor	7/1/2005
Qualifications (if required): public member		
Montana Mint Committee (Agriculture)		
Mr. Clyde Fisher, Columbia Falls	Governor	7/1/2005
Qualifications (if required): representative of the mint industry research council		
Mr. Kirk Passmore, Kalispell	Governor	7/1/2005
Qualifications (if required): mint grower		
Montana Organic Commodity Advisory Council (Agriculture)		
Mr. David Oien, Conrad	Director	9/4/2005
Qualifications (if required): handler		
Ms. Judy Owsowitz, Whitefish	Director	9/4/2005
Qualifications (if required): producer		
Mr. Robert Boettcher, Big Sandy	Director	9/4/2005
Qualifications (if required): producer		

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2005 through SEPTEMBER 30, 2005

Board/current position holder	Appointed by	Term end
Montana Organic Commodity Advisory Council (Agriculture) cont.		
Mr. Randy Hinebauch, Conrad	Director	9/4/2005
Qualifications (if required): at large representative		
Montana Power Authority (Natural Resources and Conservation)		
Lt. Governor Karl Ohs, Harrison	Governor	7/2/2005
Qualifications (if required): representing irrigated agriculture and residential energy consumption		
Ms. Karen B. Fagg, Billings	Governor	7/2/2005
Qualifications (if required): member at large with academic or business credentials		
Montana Wheat and Barley Committee (Agriculture)		
Mr. Leonard Schock, Vida	Governor	8/20/2005
Qualifications (if required): representative of District VII and a Republican		
Mr. Daniel Kidd, Big Sandy	Governor	8/20/2005
Qualifications (if required): representative of District IV and a Republican		
Motorcycle Safety Advisory Committee (Office of Public Instruction)		
Ms. Michele Hand, Missoula	Governor	7/1/2005
Qualifications (if required): representative of a motorcycle group		
Teachers' Retirement Board (Administration)		
Mr. James Turcotte, Helena	Governor	7/1/2005
Qualifications (if required): public member		
Tourism Advisory Council (Commerce)		
Ms. Carolyn B. Valacich, Great Falls	Governor	7/1/2005
Qualifications (if required): representative of Russell Country		
Ms. A. Ramona Holt, Lolo	Governor	7/1/2005
Qualifications (if required): representative of Glacier Country		

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2005 through SEPTEMBER 30, 2005

Board/current position holder	Appointed by	Term end
Tourism Advisory Council (Commerce) cont.		
Ms. Michele Reese, Whitefish	Governor	7/1/2005
Qualifications (if required): representative of Glacier Country		
Mr. George Willett, Neihart	Governor	7/1/2005
Qualifications (if required): representative of Russell Country		
Mr. Scott Asche, Bozeman	Governor	7/1/2005
Qualifications (if required): representative of Yellowstone Country		
Mr. Mike Scholz, Big Sky	Governor	7/1/2005
Qualifications (if required): representative of the Montana Innkeepers Association		
Workers' Compensation Judge (Governor)		
Mr. Michael McCarter, Helena	Governor	9/6/2005
Qualifications (if required): none specified		