The Montana Administrative Register (MAR or Register), a twice-monthly publication, has three sections. The Proposal Notice Section contains state agencies' proposed new, amended, or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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 Adoption Section contains final rule notices which show any changes made since the proposal stage. All rule actions are effective the day after print 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 Secretary of State's Office, Administrative Rules Services, at (406) 444-2055.

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SPECIAL NOTICE AND TABLE SECTION

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 2.59.1701, 2.59.1703, 2.59.1705, 2.59.1706, 2.59.1707, 2.59.1709, and 2.59.1710 pertaining to the licensing and regulation of mortgage brokers, mortgage lenders, and mortgage loan originators; the repeal of ARM 2.59.1704, 2.59.1711, 2.59.1712, 2.59.1713, and 2.59.1715; and the adoption of NEW RULES I through VIII regarding license renewals for mortgage lenders as of July 1, 2009; new applicants for a mortgage loan originator license – temporary licenses; new applicants for a mortgage broker or mortgage lender license – temporary licenses; net worth requirement for mortgage brokers; unacceptable assets; proof of net worth; records to be maintained by mortgage lenders and financial responsibility	)	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT, REPEAL, AND ADOPTION

TO: All Concerned Persons

1. On September 3, 2009, at 10:00 a.m., a public hearing will be held in Room 342 of the Park Avenue Building, 301 S. Park, Helena, Montana, to consider the proposed amendment, repeal, and adoption of the above-stated rules.

2. The Department of Administration, Division of Banking and Financial Institutions, 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 Division of Banking and Financial Institutions no later than 5:00 p.m. on August 31, 2009, to advise us of the nature of the accommodation that you need. Please contact Christopher Romano, Division of Banking and Financial Institutions, P.O. Box 200546, Helena, Montana 59620-0546; telephone (406) 841-2928; TDD (406) 444-1421; facsimile (406) 841-2930; e-mail to cromano@mt.gov.

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

2.59.1701 DEFINITIONS For purposes of the Montana Mortgage Broker, Mortgage Lender, and Mortgage Loan Originator Licensing Act and this subchapter, the following definitions apply:

(1) remains the same.

~~(2) "Conviction" means a judgment of conviction or sentence entered upon a plea of guilty or nolo contendere or upon a verdict or finding of guilty of an offense rendered by a legally constituted jury or by a court of competent jurisdiction authorized to try the case without a jury.~~

~~(3) "Employed by" means:~~

(2) "Employing" means the entity for whom the individual works is liable for withholding payroll taxes pursuant to Title 26 of the United States Code.

~~(a) an individual performing a service for a mortgage broker liable for withholding taxes pursuant to Title 26 of the United States Code; or~~

~~(b) any individual acting as an independent contractor for a mortgage broker if that individual is under exclusive written agreement to broker loans only through their sponsoring mortgage broker or if the sponsoring mortgage broker undertakes accountability for the regulated mortgage loan activities of the independent contractor.~~

~~(4) "Fraud or dishonesty" means, but is not limited to:~~

~~(a) a conviction, under the laws, rules, or regulations of any state or the federal government, that relates to fraud or dishonesty; or~~

~~(b) a conviction that involves robbery, illegal gambling, receiving stolen property, counterfeiting, extortion, check, credit card, or computer violations set forth in criminal laws, deception, fraud, theft, embezzlement, defrauding a creditor, issuing a bad check, deceptive practices, deceptive business practices, misappropriation of funds or property, misrepresentation, omission of material facts, unauthorized use of property, forgery, identity theft, or money laundering.~~

~~(5) "Fraudulent or dishonest dealings" means, but is not limited to:~~

~~(a) a civil judgment, under the laws, rules, or regulations of any state or the federal government, that relates to fraud or dishonesty; or~~

~~(b) a civil judgment that involves deception, fraud, conversion, misappropriation of funds, misrepresentation, omission of material facts, forgery, unauthorized use of money or property, failure to pay taxes, or bad checks.~~

(6) and (7)(a) through (h) remain the same, but are renumbered (3) and (4)(a) through (h).

(i) any change which would ~~cause~~ have authorized the department not to issue a license, if it had occurred before licensure.

~~(8) "Mortgage broker entity" means corporation, limited liability corporation, partnership, limited liability partnership or any other organization other than a sole proprietorship.~~

(9) and (10) remain the same, but are renumbered (5) and (6).

(7) "Termination" means separation from employment for any reason. The term includes the circumstance of a loan originator when the employing entity's Montana license is suspended, revoked, or surrendered even though the loan originator may continue to be employed by the entity in another capacity or in another state.

~~(11)~~ (8) "Work in a related field" or "in a related field" means:

(a) for a ~~mortgage broker~~ designated manager, three years:

(i) as a mortgage broker, or a branch office manager of a mortgage broker business;

(ii) as a mortgage banker, or responsible individual or branch manager of a mortgage banking business;

(iii) as a ~~real estate~~ mortgage loan officer;

(iv) as a branch manager of a ~~real estate~~ mortgage broker or lender;

(v) as a mortgage loan originator; ~~or~~

(vi) as a state or federal regulator who examines compliance of residential mortgages of state or federally chartered financial institutions; or

~~(vi)~~ (vii) as a mortgage ~~broker~~ loan originator licensee in another state where the licensing standards are substantially similar to those in this state, as determined by the department; and

(b) for a mortgage loan originator, six months:

(i) as a loan originator in a mortgage broker business;

(ii) as a loan originator in a mortgage banking business;

(iii) as a ~~real estate~~ mortgage loan officer;

(iv) as a mortgage loan originator licensee in another state where the licensing standards are substantially similar to those in this state, as determined by the department;

(v) as a ~~real estate~~ mortgage loan processor;

(vi) as a ~~residential real estate~~ mortgage loan closing agent; or

(vii) remains the same.

AUTH: 32-9-125, 32-9-130, MCA
IMP: ~~32-9-103,~~ 32-9-109, ~~32-9-115,~~ 32-9-116, 32-9-117, 32-9-122, 32-9-123, 32-9-125, 32-9-133, MCA

STATEMENT OF REASONABLE NECESSITY: The department proposes to amend the first sentence of this rule to reflect the revised title of the Montana Mortgage Broker, Mortgage Lender, and Mortgage Loan Originator Licensing Act (the Act).

The department proposes to repeal the definitions of "conviction," "fraud or dishonesty," "fraudulent or dishonest dealings," and "mortgage broker entity" because these definitions are no longer needed under the Act. The terms "fraud or dishonesty" and "fraudulent or dishonest dealings" are no longer used in the Act. The terms "conviction" and "mortgage broker entity" are defined directly or indirectly in 32-9-120, MCA, and 32-9-103, MCA, respectively.

Subsection (4)(i) is being amended for clarification purposes because what might have caused the department to deny licensure is speculative but what would have authorized the department to do so is objective. "Termination" is being defined to eliminate confusion. Section 32-9-116, MCA, refers to actions that must be taken if a mortgage loan originator is "terminated." In this context, "terminated" does not mean fired for cause. It means separation from employment for any reason.

The department proposes to define "employing" to clarify that a mortgage loan originator employed by a single entity must be a W-2 employee of the entity. It has been common in the past for mortgage loan originators to be independent contractors for a company. This concept is inconsistent with the amendments to the Act required by the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (S.A.F.E. Act). Section 32-9-129, MCA, provides that a loan processor or

underwriter who is an independent contractor may not engage in mortgage loan originator activities unless licensed. To be licensed, the mortgage loan originator must be employed by one mortgage broker or one mortgage lender. Section 32-9-116, MCA. The mortgage broker or mortgage lender entity is responsible for the conduct of its mortgage loan originators. The designated manager is responsible for the conduct of the mortgage loan originators at the location at which the designated manager is the manager. Section 32-9-122, MCA. The amendments to the Act, read as a whole, make it clear that the legislative intent was to ensure that the entity is responsible for its employees' actions. Therefore, mortgage loan originators can no longer be independent contractors who are not subject to the control of the entity for whom they work.

The department proposes to amend the definition of "work in a related field" to reflect that an individual can no longer be licensed as a mortgage broker but only as a mortgage loan originator and that the three years of experience that was formerly a qualification for individual mortgage broker licensure will now qualify an individual to be identified as a designated manager under the Act. In addition, since under 32-9-109, MCA, "work in a related field" and "in a related field" mean the same thing, both phrases are being used in the definition.

The department proposes to amend the definition of "work in a related field" to include work as a mortgage loan officer at a financial institution. Under the Act, individuals working as registered mortgage loan originators for financial institutions (as a mortgage loan officer) are considered to be qualified by that experience to be a licensed mortgage loan originator working for a mortgage broker or mortgage lender.

2.59.1703 TRANSFER OF LOAN ORIGINATOR ~~OR MORTGAGE BROKER~~ LICENSE (1) Transfer of an individual mortgage ~~broker or~~ loan originator license must be approved by the department. To transfer an individual mortgage ~~broker or~~ loan originator license, the individual mortgage ~~broker or~~ loan originator shall obtain a relocation application from the department. The completed relocation application must be accompanied by a nonrefundable processing fee of $50.

(a) remains the same.

(b) If the lapse in employment occurs over a renewal period, the individual mortgage ~~broker or~~ loan originator license must be renewed as required by 32-9-117, MCA, to qualify for a transfer of the license. The relocation six-month time frame would remain in effect and would be from the date of termination from the previous licensed entity.

(2) If an individual mortgage ~~broker or~~ loan originator is terminated by a mortgage broker or lender, and within six months is re-employed by the same mortgage broker or lender, a request for reinstatement form must be filed with the department. The form is available from the department. There is a $10 processing fee for reinstatement. If the break in employment occurs over a renewal period, the individual mortgage ~~broker or~~ loan originator license must be renewed as required by 32-9-117, MCA, to qualify for reinstatement. The six-month time frame would remain in effect and would be from the date of termination.

AUTH: 32-9-130, MCA
IMP: ~~32-9-115,~~ 32-9-116, 32-9-117, ~~32-9-119,~~ MCA

STATEMENT OF REASONABLE NECESSITY: The department proposes to amend this rule to reflect that under the Act, an individual can only be licensed as a mortgage loan originator, not as a mortgage broker. An individual mortgage loan originator may work for either a mortgage broker or a mortgage lender entity.

2.59.1705 ~~LICENSING EXAMINATION AND~~ CONTINUING EDUCATION PROVIDER REQUIREMENTS (1) remains the same.

(2) To receive approval of a ~~licensing examination or~~ continuing education course, the ~~examination or~~ course provider must file an application with the department, which includes, but is not limited to the following items:

(a) remains the same.

(b) a complete list of all examiners or instructors for the course, including their qualifications and experience with ~~examinations and~~ teaching courses similar to the course submitted for approval;

(c) a complete set of the ~~examination or~~ curriculum materials. Materials will be retained by the department. Electronic format is acceptable;

(d) through (4) remain the same.

(5) Courses ~~and licensing examinations~~ must reflect the activities performed by ~~applicants or~~ licensees and must provide ~~applicants or~~ licensees with a basic knowledge of and competency in any of the following:

(a) through (d) remain the same.

(e) the Montana Mortgage Broker, Mortgage Lender, and Mortgage Loan Originator Licensing Act;

(f) and (g) remain the same.

~~(6) Appropriate subjects for licensing examinations may include:~~

~~(a) the Montana Mortgage Broker and Loan Originator Licensing Act;~~

~~(b) state and federal consumer protection acts;~~

~~(c) the federal Real Estate Settlement Procedures Act, Truth in Lending Act, Equal Credit Opportunity Act, Fair Credit Reporting Act, Fair Housing Act, Home Mortgage Disclosure Act, Community Reinvestment Act, and the regulations promulgated pursuant to these acts;~~

~~(d) trust account and recordkeeping requirements of the Montana Mortgage Broker and Loan Originator Licensing Act;~~

~~(e) real estate and appraisal law;~~

~~(f) arithmetical computation common to mortgage lending, including but not limited to:~~

~~(i) the computation of an annual percentage rate;~~

~~(ii) finance charges;~~

~~(iii) amount financed;~~

~~(iv) payment and amortization;~~

~~(v) credit evaluation; and~~

~~(vi) calculating debt-to-income; and~~

~~(g) ethics in the mortgage industry.~~

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

~~(8)~~ (7) The provider shall file an application with the department that includes a copy of examinations to be used, if any, in determining satisfactory comprehension

of the contents of the course and the grading scale to be used. Any new or revised courses, examinations, or grading scales to be used shall be submitted to the department for approval at least 60 days prior to use. Course materials may be submitted in electronic format. The department will consider ~~examinations and~~ continuing education disseminated by written or electronic means, including by the internet.

~~(9)~~ (8) The department shall review applications filed and determine whether to approve or deny the proposed provider. If the department approves the course or provider, the department shall issue a certificate of approval that will be effective ~~for two years from the date of issuance~~ until NMLS approves the continuing education courses and providers.

(10) and (11) remain the same, but are renumbered (9) and (10).

~~(12)~~ (11) The department may audit an approved course ~~or examination~~ at any time. If the course provider ~~or examination administrator~~ has not complied with the requirements of this rule, the department may suspend or terminate the approval and require the surrender of the certificate of approval.

(13) through (20) remain the same, but are renumbered (12) through (19).

AUTH: 32-9-130, MCA
IMP: ~~32-9-110,~~ 32-9-118, MCA

STATEMENT OF REASONABLE NECESSITY: The department proposes to remove references to prelicense testing from this rule because the S.A.F.E. Act requires that the NMLS approve and administer prelicense testing. Title V of the Housing and Economic Recovery Act of 2008 (Pub. L. 110-289, 1501-1517, 122 Stat. 2654, 2810-2824 [July 30, 2008]), and 32-9-110, MCA.

Certificates of approval issued to course providers after the effective date of these amendments will remain valid until the NMLS assumes the function of administering and approving continuing education courses. It is not known at this time when that will occur.

The department also proposes to reflect the revised name of the Act.

2.59.1706 ~~IRREVOCABLE LETTER OF CREDIT OR~~ SURETY BOND ~~(1) If using an irrevocable letter of credit, the letter of credit shall be from a financial institution acceptable to the department. The entity name on the application and on the irrevocable letter of credit must match exactly.~~

~~(2)~~ (1) ~~If using a surety bond, t~~The surety bond shall be issued by a surety company authorized to do business in the state of Montana. The bond, including any and all riders and endorsements executed subsequent to the effective date of the bond, shall be placed on file with the department. The entity name on the application and on the surety bond must match exactly. The bond shall be continuous and may be cancelled by the surety upon the surety giving 30 days written notice to the department of its intent to cancel the bond. Whether or not the bond is renewed, continued, reinstated, reissued, or otherwise extended, replaced, or modified, including increases or decreases in the penal sum, it shall be considered one continuous obligation, and the surety upon the bond shall not be

liable in an aggregate or cumulative amount exceeding the penal sum set forth on the face of the bond.

~~(3) The department or any person injured by a violation of this act may bring an action in a court of competent jurisdiction against the surety bond or approved alternative of the licensed mortgage broker who committed the violation or who employed or engaged the loan originator who committed the violation.~~

~~(a) An action against an irrevocable letter of credit must be commenced within one year after the expiration date of the relevant letter of credit or one year after the cause of action accrues, whichever occurs later. A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach.~~

~~(b) In the event valid claims of borrowers and bona fide third parties against a bond or irrevocable letter of credit exceed the amount of the bond or deposit, each claimant shall only be entitled to a pro rata amount, based on the amount of the claim as it is valid against the bond or irrevocable letter of credit, without regard to the date of filing of any claim or action.~~

~~(c) A judgment arising from a violation of the Montana Mortgage Broker and Loan Originator Licensing Act or a rule adopted under that act shall be entered for actual damages and in no case be less than the amount paid by the borrower to the licensed mortgage broker plus reasonable attorneys' fees and costs. In no event shall the surety bond or approved alternative provide payment for any trebled or punitive damages.~~

~~(d) Borrowers and bona fide third parties shall be given priority over the department and other persons in distributions in actions against the surety bond.~~

(2) ~~The r~~Remedies relating to the bond ~~provided under this rule~~ are cumulative and nonexclusive and do not affect any other remedy available at law.

AUTH: 32-9-130, MCA
IMP: 32-9-123, MCA

STATEMENT OF REASONABLE NECESSITY: The S.A.F.E. Act requires the state regulatory authority to establish a net worth or surety bond requirement for mortgage loan originators based on the dollar amount of loans originated by the mortgage loan originator. Section 32-9-123, MCA, implements the provisions of the S.A.F.E. Act and no longer allows letters of credit to be used in lieu of a surety bond. Therefore, the department proposes to remove all references to letters of credit from this rule.

Section 32-9-123, MCA, does not allow the department to bring an action on a surety bond on its own behalf, nor does it allow an injured person to bring an action against the bond. The department proposes to repeal (3) of this rule because it does not comply with 32-9-123, MCA.

Section 32-9-123, MCA, does not address the matters in (3); therefore, this section is being proposed to be repealed.

2.59.1707 REVOCATION, SUSPENSION, OR SURRENDER OF LICENSE

(1) A licensee may offer to surrender a license by delivering to the department written notice of the offer of surrender. ~~, but a~~ An offer of surrender or

accepted surrender does not affect the licensee's civil or criminal liability for acts initiated or committed ~~before the surrender~~ while licensed.

(2) The department may refuse to accept the offer of surrender of a license if:

(a) a final order has been issued in an enforcement action and the licensee has not fully complied with the order regardless of whether compliance is yet due;

(b) the licensee has violated, or is under investigation for a suspected violation of, the Montana Mortgage Broker, Mortgage Lender, and Mortgage Loan Originator Licensing Act or any rule in this subchapter;

(c) there is an enforcement action or complaint pending against the licensee; or

(d) the licensee has not made arrangements satisfactory to the department regarding loans in process at the time of the offer of surrender.

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

~~(3)~~ (4) In the event of a revoked, suspended, or surrendered mortgage broker, mortgage lender, or loan originator license, no fees will be refunded by the department.

AUTH: 32-9-130, MCA
IMP: 32-9-126, MCA

STATEMENT OF REASONABLE NECESSITY: The department proposes to amend this rule to reflect the new categories of licensees under the Act. Under the Act, an entity may be licensed as either a mortgage lender or mortgage broker. An individual may be licensed only as a mortgage loan originator.

Recently, the department has experienced several licensees, who, when they discovered they were under investigation for an alleged violation of the Act, surrendered their licenses. After surrendering the license, the entity did not pay fines imposed by department order as a penalty for violation of the Act. While technically the fine may not have been imposed or been due before the surrender of the license, the department believes the purpose of the offer of surrender was to evade prosecution and punishment for acts that were alleged to violate the Act. With the advent of the NMLS, all states will have immediate access to every other state's disciplinary actions against a particular licensee. This will increase the incentive for licensees to evade disciplinary action by surrender of a license. In order to prevent this evasion, the department must have the authority to refuse to accept a proffered surrender of a license if the department has reason to believe that the licensee seeks to evade some provision of the Act.

Recent experience has shown that lenders or brokers who suddenly surrender their licenses either to attempt to evade enforcement actions or due to adverse economic conditions, often have loan applications in process. Loans in process are loans in which an application has been taken, but the loan has not yet closed and funded. If a lender or broker ceases doing business suddenly, the borrowers who paid fees such as credit report fees or application fees will lose their money, or lenders will proceed to close and fund the loans without a license. The department views both of these alternatives as unacceptable. A lender or broker that ceases doing business must make arrangements for the loan to be taken over by a licensed entity so that the borrowers do not lose money and the loans are

completed by a licensed entity. In order to ensure that this happens, the department must be able to refuse the surrender of the license until appropriate arrangements have been made for loans in process.

2.59.1709 CONSUMER COMPLAINT PROCESS (1) A complaint form will be provided by the department. A complaint must be submitted in writing to the department. If the basis of the complaint relates to the Montana Mortgage Broker, Mortgage Lender, and Mortgage Loan Originator Licensing Act, it will be investigated by the department or designated party.

AUTH: 32-9-130, MCA
IMP: 32-9-130, MCA

STATEMENT OF REASONABLE NECESSITY: The department proposes to amend this rule to reflect the revised title of the Act.

2.59.1710 RECORDS TO BE MAINTAINED BY MORTGAGE BROKERS
(1) through (1)(m) remain the same.
(2) A mortgage broker shall maintain ~~at its principal Montana location~~ a trust account records file showing a sequential listing of checks written for each bank account relating to the licensee's business as a mortgage broker, showing at a minimum, check number, the payee, amount, date, and purpose of payment or deposit, including identification of the loan to which it relates, if any. The licensee shall reconcile the bank accounts monthly.
(3) through (3)(i) remain the same.
(j) the name of the individual mortgage ~~broker or~~ loan originator who originated the loan.

AUTH: 32-9-130, MCA
IMP: 32-9-121, 32-9-124, 32-9-125, MCA

STATEMENT OF REASONABLE NECESSITY: The Act repealed the brick-and-mortar requirement for licensees that existed under prior law. So, the department proposes to delete the phrase "at its principal Montana location" from this rule to comply with current law.
Mortgage brokers are entities under 32-9-103(21), MCA. Individuals are mortgage loan originators. The department, therefore, is deleting broker in reference to an individual to comply with current law.

4. The department proposes to repeal the following rules:

2.59.1704 LICENSE RENEWAL, found on ARM page 2-6134.

AUTH: 32-9-130, MCA
IMP: 32-9-115, 32-9-116, 32-9-117, 32-9-118, 32-9-123, MCA

STATEMENT OF REASONABLE NECESSITY: The department proposes to repeal ARM 2.59.1704 because new rules are being proposed in this rulemaking which create temporary licenses for mortgage lenders whose current licenses expire on September 30, 2009. Under the Act, current licensees holding a valid license as of July 1, 2009, must be licensed through the National Mortgage Licensing System (NMLS) by June 30, 2010. Mortgage lender entities holding a valid license as of July 1, 2009 must have the ability to continue to conduct business after their current licenses expire under a temporary license that will run from its issuance date until the entity becomes licensed through NMLS.

As of July 1, 2009, mortgage loan originators working for mortgage lenders must be individually licensed. Section 32-9-102, MCA. Prior Montana law did not require individuals working for licensed lenders to be licensed. NEW RULE II is being proposed in this rulemaking to allow mortgage loan originators working for mortgage lenders to be temporarily licensed until they become licensed through NMLS or April 1, 2010, whichever is earlier.

Section 32-9-105(4), MCA, provides that all new applicants after July 1, 2009, must be licensed through the NMLS by April 1, 2010. Licensees with current licenses as of July 1, 2009, must be licensed through the NMLS by June 30, 2010.

2.59.1711 CONTINUING EDUCATION, found on ARM page 2-6142.

AUTH: 32-9-130, MCA
IMP: 32-9-130, MCA

STATEMENT OF REASONABLE NECESSITY: The department proposes to repeal ARM 2.59.1711 because the S.A.F.E. Act requires all mortgage loan originators to meet certain minimum standards including continuing education. The S.A.F.E. Act requires that continuing education courses be taken in certain areas and controls the timeframe for taking continuing education credits. When the department transitions to the NMLS, the department will no longer be approving continuing education courses or providers. The continuing education credits must be submitted to the NMLS, not the department, in order for the applicant to become licensed through the NMLS.

2.59.1712 DESIGNATED MANAGERS, found on ARM page 2-6143.

AUTH: 32-9-130, MCA
IMP: 32-9-103, 32-9-122, MCA

STATEMENT OF REASONABLE NECESSITY: 32-9-122, MCA, defines designated manager and sets forth the responsibilities of a designated manager. Therefore, the department proposes to repeal ARM 2.59.1712 as it would unnecessarily repeat the statute.

2.59.1713 EXAMINATIONS, found on ARM page 2-6143.

AUTH: 32-9-130, MCA

IMP: 32-9-130, MCA

STATEMENT OF REASONABLE NECESSITY: Section 32-9-141, MCA provides that for the purpose of investigations, complaints, or examinations the department may review, investigate, or examine any licensee or person subject to the Act. Therefore, the department proposes to repeal ARM 2.59.1713 as it unnecessarily repeats the statute.

2.59.1715 GROUNDS FOR THE DENIAL OF AN APPLICATION, as found on ARM page 2-6144.

AUTH: 32-9-130, MCA
IMP: 32-9-115, 32-9-116, 32-9-130, MCA

STATEMENT OF REASONABLE NECESSITY: The department proposes to repeal ARM 2.59.1715 because 32-9-120, MCA, makes a material misstatement of fact or material omission of fact in the application grounds to deny the license or renewal. ARM 2.59.1715 unnecessarily repeats the statute.

5. The proposed new rules provide as follows:

NEW RULE I LICENSE RENEWALS FOR MORTGAGE LENDERS LICENSED AS OF JULY 1, 2009 - TEMPORARY LICENSES (1) A mortgage lender who held a valid license as a Montana residential mortgage lender as of July 1, 2009, and who applies for renewal of the license is eligible for a temporary license as provided in this rule.

(2) The term of the temporary license issued to a mortgage lender is from the date of issuance of the license until the earlier of:

(a) the granting of an unconditionally approved license status to the lender by Montana through the National Mortgage Licensing System (NMLS); or

(b) April 1, 2010.

(3) Mortgage lender applications for a temporary license must be submitted to the department by September 1, 2009, in order to assure the issuance of a temporary license to qualified renewal applicants before their current licenses expire on September 30, 2009. An application may be submitted after September 1, 2009, but if it cannot be processed in time for issuance of a temporary license by September 30, the renewal applicant's authority to engage in the business of mortgage lending expires on September 30 and incidences of unlicensed mortgage lender activity will be prosecuted by the department.

(4) An application for a temporary license must be submitted on a form prescribed by the department. Each mortgage lender shall license at least one main office and all branch offices at which Montana residential mortgage loans are originated. Each office must have a designated manager.

(5) The nonrefundable fee for a temporary mortgage lender license is $375 for the main office and $125 for each branch office.

(6) For each entity seeking temporary licensure as a mortgage lender, each of the persons listed in 32-9-113, MCA, shall submit an affidavit in a form prescribed

by the department swearing or affirming that they meet the requirements of 32-9-120(1)(a), (b), (c), and (g), MCA, as of the date of application.

(7) If an applicant for a temporary license does not maintain a physical office in Montana, the applicant must comply with 32-9-128, MCA.

AUTH: 32-9-114, MCA
IMP: 32-9-102, 32-9-105, 32-9-113, 32-9-120, 32-9-123, MCA

STATEMENT OF REASONABLE NECESSITY: Mortgage lenders were first licensed in Montana starting October 1, 2008. The licenses issued to mortgage lenders on or after October 1, 2008, expire on September 30, 2009. The Montana Residential Mortgage Lender Licensing Act found at 32-10-101 et seq., MCA, was repealed on July 1, 2009, when the Act became effective. Mortgage lenders who held a valid license as of July 1, 2009 will need a temporary license authorizing them to continue in business from October 1, 2009, until they become licensed by Montana through the NMLS, assuming the lender meets the criteria for licensure, or until June 30, 2010, whichever occurs first.

Formerly, loan originators working for licensed mortgage lenders were not required to be licensed. The Act requires that they become licensed. The implementation date for their licensure under NMLS is April 1, 2010. In order for a new applicant for loan originator licensure to qualify, the applicant must be employed by a licensed mortgage lender or licensed mortgage broker. This rule coordinates the licensure of mortgage lenders with the licensure of their loan originator employees so there need not be a gap or lapse in the ability of lenders and their loan originators to conduct business.

Mortgage lenders must be licensed on the NMLS by June 30, 2010; however, as a practical matter, mortgage lenders will have to transition on to NMLS and become licensed by Montana by April 1, 2010, in order to allow their loan originator employees to become licensed by April 1, 2010. Because of this, the term of the temporary license is from the date of issuance of the license to the earlier of April 1, 2010, or the granting of an unconditionally approved license status by the department through the NMLS.

The department will prorate the fee for this temporary license, which is available for six months, and charge one-half of the $750 yearly fee for renewal. Section 32-9-117, MCA, provides that an applicant shall pay one-half of the initial nonrefundable fee for any license period of less than six months. Because that provision of the statute was not amended by the Act, the department has set the fee for the temporary license at one-half the yearly fee.

Lenders will have to meet the substantive requirements of the Act to be licensed. These include qualifications of ultimate equity owners and control persons of the entity, licensing of branches, and appointing the department as the registered agent for service of process if the lender does not have a physical presence in Montana. References to those statutory requirements are included in the rule in this instance to lessen the burden on applicants and licensees who are dealing with a great number of substantive changes relative to licensing at this time.

NEW RULE II NEW APPLICANTS FOR A MORTGAGE LOAN ORIGINATOR LICENSE - TEMPORARY LICENSES (1) An individual who does not hold a valid license as a Montana residential mortgage loan originator or mortgage broker as of July 1, 2009, may apply for a temporary license as provided in this rule on a form prescribed by the department.

(2) The term of the temporary license issued to a mortgage loan originator is from the date of issuance of the license until the earlier of:

(a) the granting of an unconditionally approved license status by Montana to the mortgage loan originator through the NMLS; or

(b) April 1, 2010.

(3) The nonrefundable fee for a temporary mortgage loan originator license is $300.

(4) To be granted a temporary license, a mortgage loan originator applicant shall meet the requirements in 32-9-120(1)(a), (b), (c), (d), and (g), MCA.

(5) An applicant for a temporary mortgage loan originator license shall submit the information and documentation required by 32-9-127(1)(a), (b), and (c), MCA, to the department rather than to the NMLS.

(6) If an applicant for a temporary mortgage loan originator license does not maintain a physical office in Montana, the applicant shall comply with 32-9-128, MCA.

AUTH: 32-9-114, MCA
IMP: 32-9-102, 32-9-105, 32-9-120, 32-9-127, 32-9-128, MCA

STATEMENT OF REASONABLE NECESSITY: As of the July 1, 2009, (the effective date of the Act), all mortgage loan originators working for mortgage lenders have to be licensed to engage in origination activities in Montana. In addition, there must be a process by which an individual who was not licensed as of July 1, 2009, can become licensed until the individual is required to transition to NMLS and become licensed by Montana. This rule is intended to address these issues.

Since all individuals who did not hold a valid license as of July 1, 2009, must be licensed by Montana through the NMLS by April 1, 2010, the term of the temporary license must run from the date of its issuance to the earlier of the date when the individual is licensed by Montana through NMLS or April 1, 2010.

The division has set the fee for this temporary license at the rate for nine months of licensure. The annual fee for a mortgage loan originator license is $400 pursuant to 32-9-117, MCA. The department has prorated the fee to cover the actual period of licensure, which is nine months.

To be granted a temporary license, the applicant shall meet the requirements of 32-9-120, MCA, regarding qualifications and the requirements of 32-9-128, MCA, regarding the appointment of the department as registered agent for service of process if the individual is not physically located in Montana.

Individuals shall comply with the background, fingerprinting, and credit report requirements in 32-9-127, MCA, to allow the department to make the determination as to whether the applicant meets the financial responsibility, character, and general fitness standards for licensure.

NEW RULE III NEW APPLICANTS FOR A MORTGAGE BROKER OR MORTGAGE LENDER LICENSE - TEMPORARY LICENSES (1) An entity that did not hold a valid license as a Montana residential mortgage lender or Montana mortgage broker as of July 1, 2009, may apply for a temporary license as provided in this rule on a form prescribed by the department.

(2) Each entity shall license at least one main office and all branch offices at which Montana residential mortgage loans are originated. Each office must have a designated manager.

(3) The term of the temporary entity license is from the date of issuance of the license until the earlier of:

(a) the granting of an unconditionally approved license status by Montana to the entity through the NMLS; or

(b) April 1, 2010.

(4) The nonrefundable fee for a temporary mortgage broker license is $375 for the main office and $187.50 for each branch office. The nonrefundable fee for a temporary mortgage lender license is $562.50 for the main office and $187.50 for each branch office.

(5) For each entity seeking temporary licensure as a mortgage lender or broker, each of the persons listed in 32-9-113, MCA, shall submit the information and documentation required by 32-9-127(1)(a), (b), and (c), MCA, to the department rather than to the NMLS.

(6) For each entity seeking temporary licensure as a mortgage lender or broker, each of the persons listed in 32-9-113, MCA, shall meet the requirements in 32-9-120(1)(a), (b), (c), and (g), MCA.

(7) Applicants shall submit proof of compliance with the requirements of 32-9-123, MCA.

(a) Entities that elect to purchase a surety bond shall purchase a surety bond for $50,000 in order to receive a temporary license.

(b) If an applicant qualifies for the net worth requirement in lieu of surety bond, the entity shall comply with [New Rules IV, V, and VI].

(8) If an applicant for a temporary license does not maintain a physical office in Montana, the applicant shall comply with 32-9-128, MCA.

AUTH: 32-9-114, MCA

IMP: 32-9-102, 32-9-105, 32-9-113, 32-9-120, 32-9-123, 32-9-127, 32-9-128, MCA

STATEMENT OF REASONABLE NECESSITY: There must be a process by which an entity that was not licensed as of July 1, 2009, can become licensed until the entity transitions to the NMLS and becomes licensed by Montana through the NMLS. This rule is intended to establish that process.

Since all entities that did not hold a valid license as of July 1, 2009, must be licensed by Montana through the NMLS by April 1, 2010, the term of the temporary license must run from the date of its issuance to the earlier of the date when the entity is licensed by Montana through NMLS or April 1, 2010.

The department has prorated the annual fee for licensure of mortgage brokers, which is $500 for a main office and $250 for a branch, to cover the actual

period of licensure, which is nine months. The department has prorated the annual fee for licensure of mortgage lenders, which is $750 for a main office and $250 for a branch, to cover the actual period of licensure, which is nine months.

Each entity must show proof that they have met the requirements of 32-9-123, MCA. The department has set the initial bonding amount at $50,000. When the applicant applies for licensure through the NMLS, the applicant will be required to document the annual loan production for each of its mortgage loan originators and the surety bond amount will be set based on the annual loan production volume for all mortgage loan originators working for the entity the year preceding licensure. However, to lessen the burden on applicants and for the sake of clarity during the temporary licensing period, the department has elected not to require the submission of annual loan production volume and has instead set the bond at the middle range for bonds, that being $50,000. If the mortgage broker entity elects to utilize the net worth requirement in lieu of a surety bond, it must comply with [New Rules IV, V, and VI].

NEW RULE IV NET WORTH REQUIREMENT FOR MORTGAGE BROKERS

(1) If a mortgage broker chooses to utilize the net worth requirement in lieu of a surety bond, the mortgage broker shall maintain an adjusted net worth of assets acceptable to the department of the following amounts:

(a) $250,000 based on a loan production of less than $50 million per year;

(b) $500,000 based on a loan production of $50 million but less than $100 million per year;

(c) $1 million based on a loan production of more than $100 million per year.

(2) The mortgage broker shall maintain liquid assets of 20% of its adjusted net worth or $50,000, whichever is less.

(3) Liquid assets are cash and cash equivalents.

(a) Cash includes cash on hand, checking accounts, savings accounts, certificates of deposit (net of any early withdrawal penalty), and other cash equivalents with a federally-insured financial institution.

(b) Cash equivalents are readily marketable assets. Cash equivalents include but are not limited to:

(i) United States government securities at market value; and

(ii) stocks and bonds actively traded on a national United States security exchange with certificates issued in the name of the mortgage broker. These assets will be accepted at 90% of their 52-week low, as reflected at the time of submission of the audit.

(c) To be considered a liquid asset, the cash or cash equivalent must not be restricted or otherwise reserved for any purpose other than the payment of a current liability.

(d) A line of credit or letter of credit is not a liquid asset. Loans held for resale by the mortgage broker are not considered liquid assets.

(4) The computation of adjusted net worth is required for all mortgage brokers who utilize the net worth requirement, even if no loans were originated or serviced during the previous 12-month period. The required adjusted net worth must be maintained throughout the year. When the mortgage broker is a parent or a subsidiary of a parent, the adjusted net worth computation must focus on the assets

and liabilities of the individual entity with the net worth requirement, not the consolidated adjusted net worth of both entities.

(5) In calculating the adjusted net worth, the assets listed in [New Rule V] are unacceptable assets.

AUTH: 32-9-114, MCA
IMP: 32-9-123, MCA

STATEMENT OF REASONABLE NECESSITY: Section 32-9-123(3), MCA, states that in lieu of a surety bond, a mortgage broker may meet a minimum net worth requirement. That option has not been available in the past. The goal of the department in drafting these new rules is to fairly reflect assets that should count toward a net worth requirement. The net worth requirement is designed to protect borrowers or third parties who are financially injured by an act of a mortgage broker or loan originator. And, as we have seen recently with the implosion of many national mortgage brokers, even a high net worth can be fleeting. Therefore, the department seeks to ground its net worth requirement in actual assets with real value, not speculative or transient assets. The net worth requirement is based on the federal requirements for approval by the Department of Housing and Urban Development (HUD) to originate Federal Housing Administration home loans and the requirements for surety bonds or assets in lieu of bonds used by the federal government under the Federal Acquisition Regulation System.

[New Rule IV] set the minimum net worth for mortgage brokers based on the dollar amount of loans originated per year. The scaling of the net worth requirement to loan production volume is required by 32-9-123(2)(b), MCA, and the S.A.F.E. Act, 12 U.S.C. 1508(d)(6). The loan production period is one year because mortgage brokers are required to be licensed annually under 32-9-117, MCA, and the S.A.F.E. Act, 12 U.S.C. 1504 (a)(1).

Customarily, a portion of a net worth requirement must be held in liquid assets. In this case, the department has determined that a sufficient liquidity for net worth purposes is 20% of the adjusted net worth or $50,000, whichever is less. This is based on a similar requirement by HUD for supervised and nonsupervised mortgagees or loan correspondents. HUD requires that 20% of the adjusted net worth to be held in liquid assets. The department believes, based on its knowledge of its licensees, that 20% liquidity is sufficient to protect borrowers and allows licensees to function properly.

The classification of assets as cash or cash equivalents is based on the federal requirements for approval by the HUD to originate Federal Housing Administration home loans and the requirements for surety bonds or assets in lieu of bonds used by the federal government under the Federal Acquisition Regulation System. The department believes that cash should include cash on hand, as well as amounts in checking and savings accounts. In addition, cash is defined to include certificates of deposit as long as any early withdrawal penalties are deducted to reflect the amount of cash that would be received if the certificate of deposit were cashed in early.

Cash equivalents are substantially the same as cash. A cash equivalent must be readily convertible into cash. Government securities, like treasury bills, treasury

notes, treasury bonds, savings bonds, and zero coupon government bonds, are examples of cash equivalents. Because there is a readily definable and accessible market for these securities which does not vary widely, they are accepted at market value. Other stocks and bonds that are traded on a national United States security exchange are also acceptable as cash equivalents. However, since the market value of these securities can vary widely over time, they are accepted at 90% of their 52-week low value.

Credit cannot be an asset since it must be repaid. Nor can assets that are pledged elsewhere count toward net worth. Loans held for resale by a mortgage broker are not a liquid asset since they are held only briefly until they can be sold, not as an asset of the mortgage broker.

Since the net worth requirement is designed to protect borrowers and third parties who suffer a loss as a result of an act of the mortgage broker or loan originator, the net worth requirement must be maintained at all times throughout the year not just at renewal of the license and must be calculated while the mortgage broker is licensed, even if no loans were originated or serviced during that period.

NEW RULE V UNACCEPTABLE ASSETS (1) The following are unacceptable assets and may not be used in the computation of adjusted net worth:

(a) any asset or portion of an asset pledged to secure obligations of another mortgage broker, entity, or any person;

(b) an asset due from a control person or ultimate equity owner of the mortgage broker, from a related entity, their family members, or a related entity in which the control person or ultimate equity owner or family member has a financial or managerial interest;

(c) a business venture in an unrelated entity;

(d) the portion of an investment that reflects the ownership interest of the mortgage broker in a joint venture, affiliate, and/or other related entity which is carried at a value greater than equity, as adjusted. "Equity as adjusted" means the book value of the related entity reduced by the amount of unacceptable assets carried by the related entity;

(e) any intangible asset, such as goodwill, covenants not to compete, franchise fees, organizational costs, value placed on insurance renewals, or value placed on property management contract renewals;

(f) the value of any servicing contract not determined in accordance with Statement of Financial Accounting Standards (SFAS) No. 140, "Accounting for Transfers and Servicing of Financial Assets and Extinguishment of Liabilities;"

(g) any asset not readily marketable and for which appraised values are very subjective. Examples include, but are not limited to, antiques, artwork, and gemstones;

(h) any amount in excess of the estimated realizable or recovery value of mortgages in foreclosure, constructions loans, or property acquired through foreclosure based on the value of the appraisal at the time of foreclosure reduced by taxes, insurance, expenses of sale, and improvements to the property;

(i) any asset that is principally used for the personal enjoyment or benefit of a control person or ultimate equity owner and not for normal business purposes. This

includes automobiles and personal residences. "Principally used" means that any other use of the property must be solely incidental;

(j) that portion of contributed property, not otherwise excluded, in excess of the value as of the date of contribution determined by an independent appraiser;

(k) notes that have been 60 days or more delinquent in payments two or more times in the past two years or accounts receivable that are more than 30 days past due;

(l) foreign securities which are not traded on a United States security exchange;

(m) real property as follows:

(i) real property located outside the continental United States and its outlying areas;

(ii) real property that is a principal residence of a control person or ultimate equity owner;

(iii) real estate held for sale or investment if development will not start within two years from date of acquisition;

(iv) real property owned concurrently regardless of the form of cotenancy (including joint tenancy, tenancy by the entirety, and tenancy in common) except where all cotenants agree to act jointly; and

(v) life estates, leasehold estates, leasehold improvements, or future interests in real property;

(n) personal property;

(o) lines of credit or letters of credit; and

(p) speculative assets such as mineral rights.

AUTH: 32-9-114, MCA
IMP: 32-9-123, MCA

STATEMENT OF REASONABLE NECESSITY: Since the net worth requirement is designed to protect borrowers and third parties who suffer a loss as a result of an act of the mortgage broker or loan originator, the department has excluded certain assets that, in the experience of the financial examiners in the department, can be exaggerated or inflated to make a net worth appear to be greater than it actually is.

This rule identifies types of assets unacceptable to the department because their values are susceptible of being overstated. The unacceptable assets are based on the federal requirements for approval by HUD to originate Federal Housing Administration home loans.

NEW RULE VI PROOF OF NET WORTH (1) The applicant shall submit its most current certified public accountant-prepared audited financial statements for the period not more than 12 months prior to the submission of the application. The financial statements must be supplemented by a computation of adjusted net worth pursuant to this subchapter.

(2) All financial statements must be prepared in accordance with generally accepted accounting principals (GAAP). The audit must be performed in accordance with generally accepted auditing standards (GAAS) by a certified public

accountant authorized to perform audits in this state. The audit must be complete, original, and contain the auditor's report on the audit firm's letterhead stationery.

(3) Values of real property must be supported by an appraisal within the previous 12 months by an independent appraiser with the correct certification and licensure to give an accurate appraisal of the value of the property.

(4) For an ongoing business concern, a full set of financial statements is required including:

(a) balance sheet;

(b) income statement;

(c) cash flow statement;

(d) retained earnings statement;

(e) footnotes; and

(f) auditor's report containing an unqualified (clean) opinion.

(5) If the applicant is a new company and has had no revenues or cash flow, the income statement and cash flow statement are not required.

AUTH: 32-9-114, MCA
IMP: 32-9-123, MCA

STATEMENT OF REASONABLE NECESSITY: To ensure that the net worth requirement is adequately calculated and documented, the department will require CPA-prepared audited financial statements and computation of adjusted net worth. The financial statements must be prepared in accordance with generally accepted accounting principals using generally accepted accounting standards by a CPA. The proof of net worth rule is based on the federal requirements for approval by HUD to originate federal home loans.

To verify the valuation of property, an appraisal by a licensed appraiser with sufficient expertise in the particular area of appraising is required which must be within the audit period. The point of requiring accurate and independently verified valuations is to ensure that net worth is what the entity claims it is.

Since it is impossible to determine net worth without a full set of financial statements, full financial statements are being required, except in the case of start-up companies that do not have revenues or cash flow – they obviously cannot complete an income statement or cash flow statement.

NEW RULE VII RECORDS TO BE MAINTAINED BY MORTGAGE LENDERS (1) All licensees shall maintain and preserve financial records concerning business operations, transactions with customers, and escrow account transactions.

(2) Any books, accounts, or records required to be maintained by the department may be maintained in paper, electronic, or digital format approved by the department provided the records shall be made available to the department as required by the statutes and rules, and at the request of the department, the records shall be printed or transferred to a format that is usable by the department.

(3) A mortgage lender shall create and maintain the following records:

(a) copies of all disclosures required by 32-9-148, MCA;

(b) copies of all payroll records, including federal and state withholding tax forms, W-2s, and 1099 forms filed with the Internal Revenue Service by the licensee or its agent on behalf of individuals employed by the licensee or on behalf of individuals acting as independent contractors in the mortgage lending business;

(c) a general ledger and subsidiary records sufficient to produce, when requested by the department, an accurate monthly statement of assets and liabilities, and a cumulative profit and loss statement for the current operating year;

(d) all checkbooks, bank statements, deposit slips, and cancelled checks that pertain to the mortgage lending business of the licensee;

(e) supporting documentation for all expenses and fees paid by the mortgage lender on behalf of the customer; and

(f) copies of all credit report bills received from all credit reporting agencies for the most recent five-year period.

(4) Mortgage lenders shall maintain an employee file for each employee that contains all documents related to the hiring of the employee, including name, date of birth, position or title and responsibilities, starting date, and date and reason for termination of employees. For purposes of this rule, employee shall include employees, independent contractors, and consultants who are involved in loan origination, loan servicing, loan negotiations, investor solicitation, or who transact business with borrowers or lenders.

(5) Financial records must include, at a minimum:

(a) a record of all monies received from borrowers, such as a cash receipts journal, showing at least:

(i) name of payor;

(ii) date of receipt;

(iii) amount received;

(iv) purpose of receipt including identification of the loan to which it relates, if any; and

(v) disposition of all monies received including the date and place of deposit or, if not deposited, the date, name of the person who received the monies, and the manner in which the monies were transmitted;

(b) a sequential listing of all checks written for each bank account relating to the licensee's business, such as a cash disbursement journal, showing at least:

(i) name of the payee;

(ii) date of payment;

(iii) amount of the payment; and

(iv) purpose of the payment including identification of the loan to which it relates, if any;

(c) bank account activity source documents for every account maintained for the licensee's business including at least:

(i) receipted deposit tickets and if "less cash deposits" are made, an explanation of the use of the cash;

(ii) paid checks if available and if these items are truncated, a copy of a document authorizing the department to request and receive copies of processed items from the financial institution;

(iii) bank advices, including, but not limited to, debit and credit notices and overdraft notices; and

(iv) monthly or periodic statements;

(d) detail on wire transfers into or out of the account(s) including:

(i) the name of the person who is the payor or payee;

(ii) date;

(iii) amount;

(iv) purpose of receipt or payment; and

(v) identification of the loan to which it relates, if any; and

(e) a record or file of all monies owed by the licensee, such as an accounts payable journal.

(6) Mortgage lenders shall maintain all borrower and investor complaints except complaints unrelated to borrower or investor transactions. Complaint files shall include:

(a) copies or originals of all written complaints by borrowers and investors maintained in a separate complaint file by the individual's name in alphabetical order;

(b) a copy of the response;

(c) copies of correspondence related to the complaints; and

(d) a written disposition of the complaint.

(7) Mortgage lenders shall maintain residential borrower files that must include:

(a) a copy of each loan application form;

(b) a copy of each executed fee agreement, if prepared;

(c) in the case of residential or single family loans, a borrower acknowledged statement that a loan interest rate will float;

(d) a copy of the executed lock agreement, if used. The lock agreement must specify at a minimum:

(i) the date of the agreement;

(ii) the file identification and property address;

(iii) the lock-in rate;

(iv) the lock expiration date;

(v) a disclosure that the lock may be subject to change if any of the loan factors change;

(vi) the loan type (fixed, adjustable rate mortgage, other); and

(vii) a disclosure that if the lock expires, the rate and points are subject to change;

(e) the term of the loan;

(f) the loan fee and discount, if any;

(g) copies of all good faith estimates prepared pursuant to Regulation X (24 C.F.R. 3500);

(h) a copy of the executed authorization to release credit information form;

(i) a copy of final credit report, or the report relied upon for the loan decision, if other than the final credit report, received on the borrower including documentation of borrower payment history;

(j) all documents relating to the credit, underwriting, and pricing decisions of each loan file irrespective of whether the application has been denied, approved, or withdrawn;

(k) all notes and comments by anyone working on the loan file;

(l) a copy of the truth in lending disclosure statements made pursuant to Regulation Z (12 C.F.R. 226);

(m) a copy of the final U.S. Housing and Urban Development (HUD) settlement statement;

(n) a copy of all denial letters;

(o) a copy of all appraisals; and

(p) a copy of all disclosures, handbooks, and pamphlets required by federal law.

(8) Advertising records must be maintained for five years following the last date of publication of the advertisement. All licensees shall maintain copies of:

(a) all printed advertising published in newspapers, magazines, newsletters, or other media designed for mass distribution; and

(b) scripts, or audio- and videotapes, for advertising broadcast on radio or television.

(9) Escrow account records must be maintained as follows:

(a) a licensee shall deposit all trust funds received from a client into the escrow depository and shall keep such funds in the escrow depository until the written escrow instructions agreed to by all parties have been fulfilled;

(b) a licensee shall not comingle any monies received from a client for deposit into an escrow account with personal funds of the licensee. For purposes of this rule, the following shall not constitute commingling of trust funds with personal funds provided the funds are removed from the trust account within 30 days:

(i) earned, but untransferred, interest income accruing to the licensee pursuant to a written agreement with the client; or

(ii) earned, but untransferred, fees due the licensee;

(c) every deposit into a neutral escrow depository shall be accompanied by a letter of transmittal that shall include a written notation of the file identification assigned to the transaction on whose behalf the deposit is made. Compliance with this rule may be satisfied when a licensee has attached a copy of the client's check to the letter of transmittal.

(10) With respect to mortgage loans for which a commitment has been issued but the loan has not yet closed and funded, each mortgage lender shall maintain a pipeline report or reports, updated on a monthly basis, that provides the following information, both by state and in the aggregate:

(a) total number and dollar amount of such loans;

(b) type of loan (i.e., purchase money, refinance, etc.);

(c) total number and dollar amount of all such loans having a locked-in interest rate and total number and dollar amount of such loans whose interest rate is not locked in;

(d) the date the commitment was issued; and

(e) any fees collected from the borrower up to the date of commitment by any party to the mortgage transaction.

(11) For each line of credit to the lender, a mortgage lender shall maintain a report, or equivalent documentation, updated monthly, listing:

(a) each advancement of funds from the line of credit that reflects the date of the advancement;

(b) the name of the borrower;

(c) the date that the mortgage loan closed; and

(d) the date the funds were forwarded to satisfy its obligation for the advancement from the line of credit.

(12) Each mortgage lender shall maintain a list, by state, of the closing agents or attorneys that it uses that contains, at a minimum, the name, address, and telephone number of the closing agent or attorney.

(13) Mortgage lenders shall maintain a mortgage loan application log showing:

(a) the first and last name of the borrower(s);

(b) the property address (street, city, state, and zip code);

(c) the phone number of the borrower(s);

(d) the initial application date;

(e) the date the credit report was requested for the borrower(s);

(f) the loan amount;

(g) the status of the loan (pending, closed, withdrawn, cancelled, denied);

(h) the total fees received indirectly or directly by the mortgage lender at the closing of the loan;

(i) the total fees paid to the mortgage loan originator;

(j) the loan funding source;

(k) the service release premium; and

(l) the name of the individual mortgage loan originator who originated the loan.

(14) For borrower loans that are funded directly or indirectly by investors who are individuals, the following must be maintained by the lender:

(a) a copy of the written evidence of obligation and the instrument creating the investor's lien or assignment of the lien;

(b) a copy of documents evidencing that the instrument creating the lien or assignment has been recorded; and

(c) copies of guarantees, surety agreements, any recourse agreements or guarantees, and correspondence related to any statements made to the investor or any investment made by the investor.

AUTH: 32-9-130, MCA
IMP: 32-9-121, 32-9-125, 32-9-145, MCA

STATEMENT OF REASONABLE NECESSITY: The department seeks to define the books and records that must be maintained by licensees in this rule. In general, a mortgage lender must maintain all records concerning business operations, transactions with customers, and escrow account transactions to enable the department to verify compliance with the Act. The department does not have a preference as to the format in which the records are kept as long as they are accessible to the department for examination purposes.

Mortgage lenders must create and maintain records of all disclosures required by 32-9-148, MCA, as well as payroll records for its employees and independent contractors. In addition, lenders must create and maintain records that would allow the department to produce an accurate monthly statement of assets and liabilities, and a cumulative profit and loss statement for the current operating year.

Typically, the department would do this in an examination of a mortgage lender. In addition, the lender must maintain all records that would allow the department to do an examination including all checkbooks, bank statements, deposit slips, and cancelled checks that pertain to the mortgage lending business of the licensee, and supporting documentation for all expenses and fees paid by the mortgage lender on behalf of the customer; and copies of all credit report bills received from all credit reporting agencies for the most recent five-year period. The latter is used by examiners to ensure that each credit report pull has been properly authorized as required by the Fair Credit Reporting Act.

Mortgage lenders will be required to maintain a file on each employee or independent contractor they hire which includes hire date and termination date. This will allow department examiners to ensure that all individuals who should be licensed are, in fact, licensed. In addition, department examiners will be able to locate and speak to the individuals who did certain relevant actions in relation to a file or an investigation.

Financial records are necessary to allow examiners to trace money received from borrowers as well as money spent by the lender to ensure the funds are being used properly and are not being comingled with operating funds of the lender or other accounts. Examiners review the complaints made by borrowers and investors to ensure that the lender is not violating any provision of state or federal law.

Residential mortgage loan files are, of course, critical to the examination process. The mortgage loan file should contain all documents that evidence the loan and decisions made relative to the loan as well as notes and comments entered by anyone working on the loan file. Federal law requires that certain disclosure be made on an accurate and timely basis. In order to prove the disclosures were made on a timely and accurate basis, copies of the documents must be retained in the file.

Advertising records must be maintained in order to allow the department's examiners to determine whether the prohibitions in 32-9-124(2)(f) through (i), MCA, have been violated.

Escrow account records must be maintained to allow the examiners to audit the account to ensure that escrows are being properly calculated and used and that escrow funds are not being comingled with other funds. The language of 32-9-145, MCA, already prohibits comingling of escrow funds with any other funds. However, it is necessary to repeat this language in this rule in order to make clear that two items are not considered comingling. They are: earned, but untransferred, interest due to the lender pursuant to a written agreement with the client and earned, but untransferred, fees due to the lender.

The pipeline report of loans for which a commitment has been made but which have not been funded or closed is used by examiners to review the loans in process.

If the lender goes out of business, the report is also used to ensure that loans in the pipeline are transferred to a properly licensed entity before they are closed. If a lender surrenders its license, loans in process cannot be closed by the unlicensed entity and must be transferred to a properly licensed entity before they can be completed.

Lines of credit are used by some lenders as a source of funding their loans. If a lender uses the line of credit to fund loans, the department checks to make sure the lender is properly advancing funds from a line of credit to fund the loans made.

In the event of a complaint or an investigation, the department needs to know which closing agent or attorney the lender uses. The department can then subpoena the closing agent or attorney with the files to further its investigation.

The mortgage loan application log is used by examiners as a tool in the examination process. It gives the examiners the universe of loans that a lender has made or considered making. It allows the examiners to quickly scan the loans made to determine whether any loan draws their attention or requires further investigation. The application log can also be used as an examination tool in that the examiners may choose to pull every third or fifth loan in order to review the loan files. Or examiners may focus on a particular type of loan, or a loan originator, or a borrower, depending on the purpose and focus of the examination.

Recently, the department has experienced problems with lenders that use individual investors as a funding source. These lenders are called "hard money lenders". The lenders either make a direct loan from investor to borrower or, in some cases, aggregate investor funds to make loans to various borrowers. The investors are often relying on the lender to determine the creditworthiness of the borrower and ensure that the investor will have adequate collateral for the loan. The investors often believe that the lender should be making all required disclosures for them and ensuring that their investment will be safe. In several recent cases, the lenders were not determining the creditworthiness of borrowers or the adequacy of the collateral. In some cases, it was clear that the investor thought they had a different security interest than what they actually had.

To prevent these problems, if a lender uses individual investors to fund loans, the lender will be required to provide the investor with copies of documents showing the lien and the recording of the lien. The lender will also be required to maintain all statements and inducements made to investors to get them to invest as well as agreements with or guarantees made to investors This will allow the department to invest complaints and determine if investors are receiving adequate security for their investments.

NEW RULE VIII FINANCIAL RESPONSIBILITY (1) An applicant is not financially responsible when the applicant has shown a disregard in the management of the applicant's own financial condition. A determination that an applicant has not shown financial responsibility may include but is not limited to:

(a) current outstanding judgments, except judgments solely as a result of medical expenses;

(b) current outstanding tax liens or other government liens and filings;

(c) foreclosures within the past three years; or

(d) a pattern of seriously delinquent accounts within the past three years.

AUTH: 32-9-130, MCA
IMP: 32-9-120, 32-9-127, MCA

STATEMENT OF REASONABLE NECESSITY: Sections 32-9-120, MCA, and 32-9-127, MCA provide that the department may not issue or renew a mortgage loan originator license if the applicant has failed to demonstrate financial responsibility, character, and general fitness to command the confidence of the community. In this new rule, the department seeks to define the types of financial matters that will disqualify an applicant from licensure. The department has selected the four matters set forth above because it believes that an individual with any of the four financial issues listed above do not warrant a finding of financial responsibility. The four matters set forth above were identified by the Conference of State Bank Supervisors as criteria that should operate to disqualify an applicant from licensure. The Conference of State Bank Supervisors is a group of all state bank supervisors that regulate mortgage loan originators. The Conference has issued guidance to all states in certain important areas in an attempt to develop uniform standards for mortgage loan originators.

The reason that financial responsibility is important is that mortgage loan originators receive uniform residential loan applications and credit reports from borrowers. These two documents contain essentially all the relevant financial information about a borrower including name, address, social security number, account numbers, balances and where accounts are held, and all debts and assets of an individual. If a mortgage loan originator were tempted to commit identity theft, these two documents would provide all the information necessary to do so.

In addition, mortgage loan originators receive borrower funds that are intended to pay for credit reports and appraisal fees. These borrower funds are required to be placed into a trust account to be used only for their intended purpose. A mortgage loan originator who lacked financial responsibility might be tempted to misuse those funds for personal purposes rather than using the funds for their intended purpose.

The department views ensuring the financial responsibility of applicants as one of its central obligations under the S.A.F.E. Act and the Act.

6. 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 Kelly O'Sullivan, Legal Counsel, Division of Banking and Financial Institutions, P.O. Box 200546, Helena, Montana 59620-0546; faxed to the office at (406) 841-2930; e-mailed to kosullivan@mt.gov, and must be received no later than 5:00 p.m., September 14, 2009.

7. Kelly O'Sullivan, Legal Counsel, Division of Banking and Financial Institutions, has been designated to preside over and conduct the hearing.

8. An electronic copy of this proposal notice is available through the department's web site at http://doa.mt.gov/AdministrativeRules.asp. The department strives to make the electronic copy of the notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that if a discrepancy exists 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 works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

9. The Division of Banking and Financial Institutions maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this division. Persons who wish to have their name added to the mailing 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 division rulemaking actions. Such written requests may be mailed or delivered to Christopher Romano, Division of Banking and Financial Institutions, 301 S. Park, Ste. 316, P.O. Box 200546, Helena, Montana 59620-0546; faxed to the office at (406) 841-2930; e-mailed to cromano@mt.gov; or may be made by completing a request form at any rules hearing held by the department.

10. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. Senator Jeff Essman, the primary bill sponsor of SB 351 (2009), was contacted on May 19, 2009, by U.S. mail.

By: /s/ Janet R. Kelly
Janet R. Kelly, Director
Department of Administration

By: /s/ Michael Manion
Michael Manion, Rule Reviewer
Department of Administration

Certified to the Secretary of State August 3, 2009.

BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 4.12.3402 pertaining to raising the seed laboratory analysis fees	)))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On September 3, 2009 at 10:00 a.m., the Montana Department of Agriculture will hold a public hearing in Room 225 of the Scott Hart Building, 303 North Roberts at Helena, Montana, to consider the proposed amendment of the above-stated rule.

2. The Department of Agriculture will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, contact Department of Agriculture no later than 5:00 p.m. on August 28, 2009, to advise us of the nature of the accommodation that you need. Please contact Cort Jensen, Department of Agriculture, 303 North Roberts, P. O. Box 200201, Helena Montana, 59620-0201; telephone (406) 444-3144; fax (406) 444-5409; or e-mail agr@mt.gov.

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

4.12.3402 SEED LABORATORY ANALYSIS FEES (1) The Montana seed laboratory, Montana State University, Bozeman, Montana will test samples of seeds submitted for purity, germination, and miscellaneous tests. All samples of seed analyzed and tested shall be at the following rates:

FEE SCHEDULE
(All prices are in U.S. dollars)

KIND OF SEED	PURITY ONLY	GERMINATION ONLY	~~PURITY & GERMINATION~~ TZ ONLY
Bentgrasses, Redtop	$~~44.00~~55.00	$~~24.00~~30.00	$~~68.00~~44.00
Bluegrass, Alkaligrass	~~30.00~~38.00	~~24.00~~30.00	~~54.00~~44.00
Bluestems, Gamma, Galleta, & Indiangrass	~~70.00~~88.00	~~25.00~~31.00	~~95.00~~56.00
Bromegrass, Fescue, Orchardgrass & Ryegrass	~~25.00~~31.00	~~18.00~~23.00	~~43.00~~44.00
Canarygrass	~~24.00~~30.00	~~16.00~~20.00	~~40.00~~44.00
Cereals: i.e., (includes seed count)			

KIND OF SEED	PURITY ONLY	GERMINATION ONLY	~~PURITY & GERMINATION~~ TZ ONLY
barley*, wheat, rye, triticale, corn, spelt, emmer	~~15.00~~26.00	~~12.00~~15.00	~~27.00~~44.00
Flax	~~15.00~~19.00	~~12.00~~15.00	~~27.00~~56.00
Flowers	~~25.00~~31.00	~~25.00~~31.00	~~50.00~~56.00
Foxtails, creeping* & meadow	~~45.00~~56.00	~~25.00~~31.00	~~70.00~~44.00
Grama, blue, & sideoats	~~45.00~~56.00	~~25.00~~31.00	~~70.00~~56.00
Indian ricegrass* (includes dormancy)	~~20.00~~25.00	~~42.00~~53.00	~~62.00~~44.00
Legumes, large seeded	~~15.00~~19.00	~~15.00~~19.00	~~30.00~~44.00
Legumes, small seeded	~~15.00~~19.00	~~12.00~~19.00	~~27.00~~44.00
Millets	~~22.00~~28.00	~~18.00~~23.00	~~40.00~~44.00
Mustards, Rape	~~20.00~~25.00	~~15.00~~19.00	~~35.00~~44.00
Natives (Indigenous)	~~30.00~~38.00	~~25.00~~31.00	~~55.00~~56.00
Needlegrass* ~~(includes dormancy)~~	$~~20.00~~25.00	$~~42.00~~53.00	$~~62.00~~44.00
~~Oats (includes seed count)~~	~~16.00~~	~~12.00~~	~~28.00~~
Prairie sandreed	~~45.00~~56.00	~~25.00~~31.00	~~70.00~~44.00
Safflower & Sunflower	~~15.00~~19.00	~~15.00~~19.00	~~30.00~~44.00
Sage Brush	~~32.00~~54.00	~~25.00~~31.00	~~57.00~~56.00
Saltbushes	~~20.00~~25.00	~~25.00~~31.00	~~45.00~~56.00
Small Seeds (more than 2,500 seeds per gram)	~~35.00~~78.00	~~24.00~~30.00	~~59.00~~56.00
Sorghums, grain & Sudangrass	~~13.00~~16.00	~~15.00~~19.00	~~28.00~~44.00
Sugarbeets	~~13.00~~16.00	~~15.00~~19.00	~~28.00~~44.00
Timothy	~~18.00~~23.00	~~15.00~~19.00	~~33.00~~44.00
Tree	~~25.00~~31.00	~~25.00~~31.00	~~50.00~~56.00
Wheatgrasses*			
beardless, bluebunch, crested, intermediate, pubescent, slender, streambank, tall, & thickspike	~~30.00~~38.00	~~18.00~~23.00	~~48.00~~44.00
NewHY	30.00/hr	~~20.00~~25.00	~~30.00/hr plus~~ ~~20.00~~44.00
western	~~35.00~~50.00	~~25.00~~31.00	~~60.00~~44.00
White Wheat (includes ~~potassium hydroxide text &~~ seed count)	~~23.00~~29.00	~~12.00~~15.00	~~25.00~~44.00
Wildryes	~~30.00~~38.00	~~20.00~~25.00	~~50.00~~44.00
Wild Flowers	~~25.00~~31.00	~~25.00~~31.00	~~50.00~~56.00

KIND OF SEED	PURITY ONLY	GERMINATION ONLY	~~PURITY & GERMINATION~~ TZ ONLY
Vegetables	~~15.00~~19.00	~~12.00~~15.00	~~27.00~~44.00

MIXTURES:
(See hourly rate)

Tetrazolium Test (TZ): ~~$35.00~~44.00 except for labor intensive species - ~~$45.00~~56.00

*Laboratory analysis may report that the sample contains dormant seed.

(2) Fees for additional services provided by the seed laboratory:

Hourly rate	~~$30.00~~45.00 (for services including testing mixtures, excessively high inert (>5%) or time consuming samples)
Rush	$60.00 (expedite sample before routine samples)
BSMV	~~$45.00~~70.00 (Barley Stripe Mosaic Virus Test)
Seed ID	$10.00 ~~(per seed identification)~~or hourly
Dormancy	$18.00 (in addition to germination charges)
Utricle Fill	$20.00 ~~(in addition to germination charges)~~
FAX	$3.00 (to send analysis reports)
~~Phone~~	~~$3.00 (to send analysis reports)~~
Other State, USA, or Western Noxious Exam	$7.00 (in addition to normal rate)
Canadian Rules	~~$30.00/hr~~hourly (samples tested in accordance with Canadian rules)
ISTA Rules	~~$30.00/hr~~hourly (samples tested in accordance with ISTA rules)
Ascochyta test	~~$45.00~~65.00
Potassium Hydroxide (KOH)	$7.00
~~MSGA – Cereals~~	~~$7.00~~
~~Herbicide bioassay~~	~~$25.00~~
Clearfield/herbicide bioassay confirm	$50.00
Moisture	~~$10.00~~45.00
Seed count	~~$2.00~~8.00
~~ELIZA (per 3 strips)~~	~~$25.00~~
~~Credit card payment~~	~~5% handling fee~~
Grass envelopes	$0.50
Cereal envelopes	$0.60
Return sample	~~$3.00~~Postage due with minimum of - $5.00

AUTH: 80-5-139, MCA
IMP: 80-5-126, 80-5-128, MCA

Reason: The lab has experienced budget shortfalls in the last several years and the Montana Agricultural Experiment Station has determined not to allow any budget shortfalls in the amounts allowed in the past. According to information from MAES Director Jeff Jacobsen, the lab has cost MAES extra money in cost overrides seven of the last nine years, and he has stated that he will not allow that process to continue. Based on the previous year, the lab did 4239 samples creating an income of $195,236.50 (or $46.06 income per sample). Since the cost of doing business at the Seed Lab was $245,307.36, the actual cost per sample to break even was $57.86. If the lab did the same amount of samples this year, with the 25% fee increase, we could come close to meeting that $57.86 cost figure (4239 samples at last year's income + 25% would be $244,045). Prices were adjusted up for Moisture content, BSMV and Seed Count tests to more accurately reflect the cost of doing the tests themselves. All three of these test prices were raised more than the 25% increase figure used for the rest of the price increases. The lab is required to defray its operating costs through the testing fees it charges. The 25% price increase should allow the lab to defray the excessive budget cost overrides experienced in the last few years.

Economic Impact: Using last year's sample numbers (4239 samples submitted for testing), the fee increase could add $48,000 in income annually. Of immediate concern is the potential income increase for the last few months of FY09. Based on the number of samples submitted the final five months of the last fiscal year (in the final five months of FY 08, 1330 samples were received; based on the 15-year average, 1848 samples would be received during this time frame) the 25% fee increase could result in an extra $15,300 for last year's number or $21,200 if the 15-year average sample number is used from February through June. The average per-sample income should increase from $46.06 to approximately $57.58. The MAES Director has indicated that some modest lab operational cost overrides could be tolerated.

4. Concerned persons may submit their data, views, or arguments concerning the proposed action either orally or in writing at the hearing. Written data, views, or arguments may be submitted to: Cort Jensen at the Montana Department of Agriculture, 303 N. Roberts, P. O. Box 200201, Helena, MT, 59620-0201; telephone (406) 444-3144; fax (406) 444-5409; or e-mail agr@mt.gov, and must be received no later than 5:00 p.m., September 10, 2009.

5. Cort Jensen, Department of Agriculture, has been designated to preside over and conduct this hearing.

6. The Department of Agriculture maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request which includes the name, e-mail, and mailing address of the person to receive notices and specifies

for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to Montana Department of Agriculture, 303 N. Roberts, P.O. Box 200201, Helena, MT 59620-0201 or may be made by completing a request form at any rules hearing held by the Department of Agriculture.

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

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

/s/ Cort Jensen
Cort Jensen
Rule Reviewer

/s/ Ron de Yong
Ron de Yong
Director
Montana Department of Agriculture

Certified to the Secretary of State August 3, 2009.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.30.617 and 17.30.638 pertaining to outstanding resource water designation for the Gallatin River	NOTICE OF EXTENSION OF COMMENT PERIOD ON PROPOSED AMENDMENT (WATER QUALITY)

TO: All Concerned Persons

1. On October 5, 2006, the Board of Environmental Review published MAR Notice No. 17-254 regarding a notice of public hearing on the proposed amendment of the above-stated rules at page 2294, 2006 Montana Administrative Register, issue number 19. On March 22, 2007, the board published MAR Notice No. 17-257 regarding a notice of extension of comment period on the proposed amendment of the above-stated rules at page 328, 2007 Montana Administrative Register, issue number 6. On September 20, 2007, the board published MAR Notice No. 17-263 regarding a notice of extension of comment period on the proposed amendment of the above-stated rules at page 1398, 2007 Montana Administrative Register, issue number 18. On March 13, 2008, the board published MAR Notice No. 17-268 extending the comment period on the proposed amendment of the above-stated rules at page 438, 2008 Montana Administrative Register, issue number 5. On September 11, 2008, the board published MAR Notice No. 17-276 extending the comment period on the proposed amendment of the above-stated rules at page 1953, 2008 Montana Administrative Register, issue number 17. On February 26, 2009, the board published MAR Notice No. 17-276 extending the comment period on the proposed amendment of the above-stated rules at page 162, 2009 Montana Administrative Register, issue number 4.

2. During the initial comment period, the board received a number of comments opposing adoption of the proposed rule amendments on grounds that the amended rules would render a number of properties in the Big Sky area undevelopable. The draft environmental impact statement on the proposed rule amendments indicates that the rule amendments would not preclude full development in the Big Sky area if certain mechanisms, such as central sewers and advanced treatment, are implemented. However, the record did not indicate whether regulatory or other means to require or facilitate implementation of these mechanisms are feasible. At the close of the initial comment period, the board was notified that the original petitioners for this rulemaking and developers were discussing means of accomplishing this goal. For that reason, the board extended the comment period to July 2, 2007. During the second comment period, the board received comments indicating that the discussions had been continuing, that progress was being made, and that an engineering feasibility study was underway. The commentors requested further extension of the comment period. The board granted their request and extended the comment period to January 4, 2008. On January 4, 2008, the board received a comment indicating that the feasibility study

will be completed in May of 2008 and requesting that the comment period be further extended. The board has granted this request and extended the comment period to July 18, 2008. On July 2, 2008, the board received a comment indicating that the feasibility study would be completed in July and requesting a further extension of the comment period. The board granted this request.

On December 29, 2008, the board received a comment indicating that the feasibility study indicates that extending wastewater hookups for the Big Sky Water and Sewer district wastewater treatment plant along the Gallatin River would be more effective in protecting the Gallatin River than adoption of the proposed rules. The commentor requested that the comment period be extended during a public participation process and a search for funding. The board granted that request and extended the comment period to July 15, 2009.

On July 2, 2009, the board received a comment indicating that efforts to secure funding are ongoing and requesting that the board further extend the comment period. The board has granted this request.

3. Written data, views, or arguments may be submitted to Elois Johnson, Paralegal, Department of Environmental Quality, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana, 59620-0901; faxed to (406) 444-4386; or e-mailed to ejohnson@mt.gov, no later than November 20, 2009. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

4. The board will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking action or need an alternative accessible format of this notice. If you require an accommodation, contact the board no later than 5:00 p.m., August 24, 2009, 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 e-mail ber@mt.gov.

Reviewed by: BOARD OF ENVIRONMENTAL REVIEW

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

Certified to the Secretary of State, August 3, 2009.

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.50.403, 17.50.410, 17.50.501 through 17.50.503, 17.50.508, 17.50.509, and 17.50.513; the adoption of New Rules I through LI; and the repeal of ARM 17.50.505, 17.50.506, 17.50.510, 17.50.511, 17.50.526, 17.50.530, 17.50.531, 17.50.542, 17.50.701, 17.50.702, 17.50.705 through 17.50.710, 17.50.715, 17.50.716, and 17.50.720 through 17.50.726 pertaining to the licensing and operation of solid waste landfill facilities	)	AMENDED NOTICE OF PUBLIC HEARING AND EXTENSION OF COMMENT PERIOD ON PROPOSED AMENDMENT, ADOPTION, AND REPEAL (SOLID WASTE)

TO: All Concerned Persons

1. On February 26, 2009, the Department of Environmental Quality published MAR Notice No. 17-284 regarding a notice of public hearing on the proposed amendment, adoption, and repeal of the above-stated rules at page 164, 2009 Montana Administrative Register, issue number 4. The department is publishing this amended notice to provide notice of a second hearing, extend the public comment period, offer and receive evidence and comments on matters of stringency compared to comparable federal regulations or guidelines, and provide additional statements of reasonable necessity and offer and receive evidence and comments on these additional statements of reasonable necessity. These matters are set forth below in paragraphs 3 through 8.

2. The department will hold the second public hearing on November 4, 2009, at 10:00 a.m. in Room 111, Metcalf Building, 1520 East Sixth Avenue, Helena, Montana.

3. Section 75-10-107(1), MCA, prohibits the Department of Environmental Quality from adopting "(1) … a rule to implement this chapter that is more stringent than the comparable federal regulations or guidelines that address the same circumstances" unless "(2) … the department makes a written finding after a public hearing and public comment and based on evidence in the record that:

(a) the proposed state standard or requirement protects public health or the environment of the state; and

(b) the state standard or requirement to be imposed can mitigate harm to the public health or environment and is achievable under current technology."

Section 75-10-107(3), MCA, provides that the written finding "must reference information and peer-reviewed scientific studies contained in the record that forms

[sic] the basis for the department's conclusion. The written finding must also include information from the hearing record regarding the costs to the regulated community that are directly attributable to the proposed state standard or requirement."

4. Comments made by the public on MAR Notice 17-284 have raised questions concerning whether the following rule adoptions and amendments would make the state rules more stringent than comparable federal regulations or guidelines addressing the same circumstances, and whether they can be adopted or amended without the department making the written findings referred to in 75-10-107, MCA. The department has not determined that all of the rule adoptions and amendments in question are more stringent than comparable federal regulations or guidelines, but will offer and take testimony and other evidence and comments on whether the listed provisions are more stringent than comparable federal regulations or guidelines that address the same circumstances, whether the proposed state rules protect public health or the environment and are achievable under current technology, and whether peer-reviewed studies exist to justify more stringent rules, and on the costs of the proposed rules to the regulated community.

5. The following rules will be addressed at the hearing and during the comment period:

a. Requirements in the proposed amendments and new rules for an owner or operator to make a submission to the department and to obtain approval of that submission, except where the submission is required as part of a license application. Review-and-approval requirements that will be addressed at the hearing are found in:

ARM 17.50.509(3), concerning approval of operation and maintenance plan updates;

NEW RULE IV(1), concerning a demonstration that airplanes will be protected from birds within a lesser setback;

NEW RULE V, concerning approval of a demonstration regarding floodplains;

NEW RULE VI, concerning a demonstration allowing a landfill unit in wetlands;

NEW RULE VII, concerning a demonstration for an alternative setback for location in a fault area;

NEW RULE VIII, concerning a demonstration allowing location in a seismic area;

NEW RULE IX, concerning a demonstration that the structural components of a unit located in an unstable area will not be disrupted;

NEW RULE XVII(4)(c), concerning submission of a remediation plan for an exceedance of the concentration limit for explosive gases;

NEW RULE XXII, concerning exclusion of bulk or noncontainerized liquids, unless approved;

NEW RULE XXIV(1)(a), concerning a deed notation to be recorded by the owner of the land where a facility is located;

NEW RULE XXV(1), concerning a policy of general liability insurance;

NEW RULE XXVII(2)(a), concerning confining waste to areas where it can effectively be managed by supervision, fencing, signs, or similar means;

NEW RULE XXIX(1)(b), concerning the application at a Class IV landfill unit of an approved cover at least every three months;

NEW RULE XXXII(4), concerning a demonstration that the owner or operator meets the requirements for a small community exemption;

NEW RULE XXXIII(1), concerning design of a Class II or Class IV landfill unit;

NEW RULE XXXIV(4), concerning recirculation of leachate at a Class II landfill unit, and (5) and (6), concerning construction quality control (CQC) and construction quality assurance (CQA) manuals for assuring construction in accordance with design;

NEW RULE XXXVIII(4)(a), concerning a ground water monitoring plan, (b) an update to that plan, and (6) the number, spacing, and depth of ground water monitoring wells;

NEW RULE XXXIX(1), concerning a ground water sampling and analysis plan;

NEW RULE XL(5)(b), concerning implementing an assessment monitoring program if significant changes from background are found through drinking water detection monitoring, and (7), concerning avoiding assessment monitoring through a demonstration that another source caused the significant change;

NEW RULE XLI(5), concerning a return to detection monitoring if assessment monitoring reveals concentrations of all constituents in Appendix II to 40 CFR Part 258 to be at or below background values, (6), concerning continuation of assessment monitoring if such concentrations are above background values but below protection standards, and (7)(b), concerning a return to detection monitoring based on a demonstration that another source caused the ground water contamination;

NEW RULE XLII(1)(b), concerning an assessment of corrective measures;

NEW RULE XLIII(1)(b), concerning a selected remedy report addressing ground water contamination;

NEW RULE XLIV(1)(a), concerning a corrective action ground water monitoring program, (1)(c) concerning interim measures to correct ground water contamination, (3)(a) concerning impracticability of achieving ground water remediation goals, (3)(b) concerning implementation of alternate measures to protect health and the environment, and (3)(c) concerning implementation of alternate measures to control sources of contamination, (7) concerning certification that the remedy has been completed, and (8) concerning release from requirements for financial assurance for corrective action;

NEW RULE XLV(1)(b), concerning a hydrogeologic and soils work plan;

NEW RULE XLIX(4), concerning a closure plan for a Class II or Class IV landfill unit, (5) concerning closure construction plans, specifications, reports, and certifications, and (10) concerning certification of closure completion;

NEW RULE L(3), concerning a post-closure plan, (5) concerning a certification that post-closure care has been completed, (6), concerning necessary amendments to a closure or post-closure plan, and (7) concerning post-closure construction plans, specifications, reports, and certifications; and

NEW RULE LI(3), concerning closure and post-closure plans for a Class III

landfill unit.

b. Design requirements for a Class II landfill unit in NEW RULE XXXIV, such as the minimum slope of the base of the leachate collection layer or the maximum side slope on the liner, elements of an alternative liner, and CQC and CQA requirements for design and construction of a landfill unit.

c. Requirements for a Class II landfill unit that are not contained in 40 CFR Part 258, such as insurance requirements, in proposed new ARM 17.50.508(2) and NEW RULE XXV; intermediate cover requirements at a Class II landfill unit that will not receive waste for 90 days in NEW RULE XV(2)(c); updates to operating and maintenance plans in proposed new ARM 17.50.509(4); and a progress report on corrective action due by each April 1, in NEW RULE XLIV(1)(d).

d. Requirements for a Class II landfill unit that does not accept municipal solid waste, to the extent that they are more stringent than requirements in 40 Part 257. This includes all proposed amendments and adoptions that address a Class II landfill unit, because the definition in ARM 17.50.503 of Group II waste, which can be disposed of only at a Class II landfill unit, is broader than the definition of municipal solid waste in 40 CFR 258.2.

e. Requirements in NEW RULES XXXIII and XXXIV that a Class IV landfill unit have a liner, and other prescriptive design elements, other than those necessary to prevent contamination of a ground water drinking water source.

f. The requirement in NEW RULE XXIV that a deed notation for a Class II landfill unit must be recorded before the initial receipt of waste or within 60 days after the effective date of the requirement, rather than at closure.

g. Locational restrictions for a Class II landfill unit that are more stringent than those in 40 CFR Part 258, such as the inclusion in NEW RULE VIII of "landfill cover" and "gas control system" in a "containment system" that must be designed to resist the maximum horizontal acceleration in a seismic impact zone.

h. Locational restrictions for a Class III or Class IV landfill unit that are more stringent than 40 CFR Part 257, subpart A and B, regulations, respectively. This includes restrictions concerning locating a Class III landfill unit in wetlands (NEW RULE XI(1)(h), and restrictions concerning locating a Class III or Class IV landfill unit in the following areas: fault areas (NEW RULE VII); seismic areas (NEW RULE VIII); and unstable areas (NEW RULE IX); and other restrictions in NEW RULE XI.

i. Locational restrictions for a Class IV landfill unit, including: NEW RULE VII, concerning fault areas; NEW RULE VIII, concerning seismic areas; and NEW RULE IX, concerning unstable areas.

j. Certain operational requirements for a Class III or Class IV landfill unit that may not be required in 40 CFR Part 257, subpart A and B, regulations, respectively. Examples are: insurance requirements, in proposed new ARM 17.50.508(2) and NEW RULE XXV; requirements concerning updates to operating and maintenance plans in proposed new ARM 17.50.509(4); requirements concerning deed notations in NEW RULE XXVIII(1)(f) for a Class III landfill unit and in NEW RULE XXIX(1)(e) for a Class IV landfill unit; and bulk liquids restrictions in NEW RULE XXVIII for a Class III landfill unit and NEW RULE XXIX(2)(h) for a Class IV landfill unit.

k. Operational requirements for a Class III landfill unit, including: placement of six inches of cover at least every three months, in NEW RULE XXVIII(1)(b); and

requirements in NEW RULE XXVIII that make requirements for a Class II landfill unit concerning access, in NEW RULE XIX, and run-on and run-off control systems in NEW RULE XX, applicable to a Class III landfill unit.

l. Operational requirements for a Class IV landfill unit, including: control for aesthetics in NEW RULE XXIX(1)(a); exclusion of liquids, and other materials that may be "conditionally exempt small quantity generator wastes" that may be disposed of at a 40 CFR Part 257, subpart B, landfill unit, in NEW RULE XXIX(1)(c); waste screening requirements in NEW RULE XXIX(2)(a); and financial assurance requirements in NEW RULE XXIX(1)(d).

m. A requirement that a Class II or Class IV landfill unit undertaking ground water corrective action submit a progress report on corrective action by April 1 of each year, in NEW RULE XLIV(1)(d).

n. Closure and post-closure requirements in NEW RULE LI for a Class III landfill unit, and in NEW RULES XLIX and L for a Class IV landfill unit.

6. The department also intends to take comment and submit evidence on the approach it has proposed in new ARM 17.50.508(1)(aa), and in other proposed rule amendments and new rules, to require additional information and criteria when it determines that information or those criteria to be necessary to protect human health or the environment. Other examples of the use of that language are in: ARM 17.50.509(2)(k) and proposed new (2)(m), concerning plans for handling of special waste and concerning other plans as part of operation and maintenance plans, respectively; NEW RULE IX(1), concerning factors to be used to determine whether an area is unstable; NEW RULE XI, concerning additional locational requirements; NEW RULE XXVI(1)(c), concerning types of special waste; NEW RULE XXXIII(2) and (3), concerning an alternative design for a Class II or Class IV landfill unit, and the location of the relevant point of compliance for ground water protection standards, respectively; NEW RULE XXXIV(1)(d) and (3)(e), concerning design standards for a Class II or Class IV landfill unit, and leachate collection systems, respectively; NEW RULE XXXVIII(4)(a)(iv), concerning required elements of a ground water monitoring plan; NEW RULE XXXIX(1)(f), concerning procedures and techniques contained in a sampling and analysis plan; NEW RULE XLII(1)(b), concerning criteria to be addressed in the assessment of corrective measures to remediate an exceedance of a ground water protection standard; NEW RULE XLIII(4)(g), concerning selection of a remedy for exceedance of a ground water protection standard; NEW RULE XLV(2)(g), concerning the information required to be included in a hydrogeological and soils report; NEW RULE XLIX(4), concerning information required in a closure plan; and NEW RULE L(1)(e) and (3), concerning measures required as part of post-closure care or information required in a post-closure plan.

7. In preparing its response to comments on the February 26, 2009, notice of public hearing, the department identified areas where it believes supplements to the statements of reasonable necessity would be useful to provide the public with a better understanding of the reasons for the proposed amendments and new rules and to allow the public to submit comments on those supplements. Those supplemental statements follow:

a. For NEW RULE XXVIII(1), concerning operating criteria for a Class III landfill unit, the department proposed to make the requirements of a Class II landfill unit for protection of air quality (NEW RULE XVIII), access (NEW RULE XIX), and deed notations (NEW RULE XXIV) applicable to a Class III landfill unit. The reasons are as follows:

i. For air quality, the requirements set forth for a Class II unit are basically the same as those required in the federal regulations at 40 CFR 257.3-7 for all landfill units, including Class III landfills. Therefore, the department proposed to adopt the Class II standards for Class III landfill units;

ii. The requirements in NEW RULE XIX for access restrictions for a Class II unit are identical to the requirements in 40 CFR 258.25. The requirements in 40 CFR 257.3-8 for access, which apply to a Class III landfill unit, are more general. However, the department chose to adopt the Class II landfill unit access requirements for a Class III landfill unit because access to a Class III landfill unit poses physical risks to the public similar to the risks at a Class II unit, it is simpler to adopt a uniform standard, and a uniform standard will provide more guidance without being unnecessarily burdensome.

iii. For a deed notation: A deed notation is required in 40 CFR 258.60 for a Class II landfill unit when it closes. In the statement of reasonable necessity for proposed new ARM 17.50.508(1)(y) and for the adoption of NEW RULE XXIV, the department explained the reason for requiring a proposed deed notation with the application for a license for all landfill units. The department also explained the reason for requiring a deed notation to be recorded before any class of landfill unit accepts waste, and, for a landfill unit that is already operating, the department explained the reasons that a deed notation must be recorded within 60 days after the new rule takes effect. While the waste disposed of in a Class III or Class IV landfill unit does not pose as high a risk to ground water as waste in a Class II landfill unit, it still can pose risks for human health and the environment. The department has had to take, or threaten to take, enforcement actions against purchasers of land where a Class III landfill unit previously had been operated. These landfill units had not been properly closed with the proper amount of cover, and wetlands that had been filled with waste in violation of administrative rules had not been remediated. New purchasers bought these properties and claimed to be unaware that they had been run as landfill units. A Class III or Class IV landfill unit might not be properly closed if purchased before closure when no deed notation had been recorded. This could unnecessarily consume scarce department resources and subject the new owner to unforeseen liabilities. If a purchaser is not informed of, and bound by, restrictions in a deed notation, that purchaser might conduct activities that disturb the cover, liner, or other elements of a landfill unit exposing the waste to water, causing leachate to form, and allowing leachate to migrate down to contaminate a drinking water source. Therefore, it is reasonable to require that a deed notation for a Class III or Class IV landfill unit be recorded before the first acceptance of waste at a unit or, for a landfill unit that is already operating, within 60 days after the rule takes effect.

b. Concerning the requirements for review and approval by the department of

submittals by owners or operators that were discussed above at 5.a., the department believes that its review and approval are necessary to ensure that the requirements of the rules are met. When the submittals are part of a license application, the department's review and approval are necessary, because the department is charged by 75-10-224, MCA, with reviewing a license application to determine whether it meets the requirements of the law and rules. The federal Environmental Protection Agency (EPA) recognized that such review and approval were necessary when it issued its regulations concerning state licensing programs in 40 CFR Part 239. It required in 40 CR 239.6 that a state licensing program require, as a condition of a license to operate a landfill unit, compliance with the landfill unit regulations in 40 CFR Part 258.

c. When a submittal is for an action that is not subject to license approval, for example, remediation of a methane gas concentration that exceeds a standard, there may be no federal requirement for department approval. However, department review and approval is still necessary. It is wise for the department, as regulator, to conduct reviews before an activity can occur. Without department review, it is possible that the landfill unit owner or operator could fail to provide information or consider a factor that is required or appropriate to be considered under the rules, especially when the rules, frequently following federal language, are open-ended in that they often set minimum requirements, but indicate that more information or factors might be needed, by using such terms as "at least" or "at a minimum." The department has received many submittals for design and construction of landfill units under its existing rules, and has often found that the submittals do not adequately address the factors required to be addressed in the rules. After the department points out the deficiencies, an owner or operator can then submit corrections to make the submittal comply. In addition, it is inefficient for the owner or operator not to submit documents to the department for approval initially. The department believes that one of its functions as a regulator is to work with regulated entities to provide resources and guidance to help them develop submittals that satisfy the requirements of the law and rules. The department's staff has expertise from regulating landfill units around the state, and from being trained to protect the public interest by enforcing regulatory requirements. If no approval is required, regulated entities are less likely to request guidance from the department, and the department will then have to inform the entity after the fact if it considers a submittal to be insufficient. Then the department's remedy would be to commence an enforcement action or to revoke a license or deny a license application. The department believes that it would be more efficient for the regulated entity to make submittals for department review and approval before taking the action that is the subject of the submittal.

d. Department pre-approval is especially important for certification under NEW RULE XLIX(10), NEW RULE L(5), or NEW RULE XLIV that closure, post-closure care, or corrective action is complete. The reasons cited above for department approval are applicable to a certification that one of those processes has been completed. In addition, financial assurance is released when closure, post-closure care, or corrective action is certified by an independent professional engineer to be complete and that certification is approved by the department. It is critical for completion of those processes that the costs of completing them are

secured by financial assurance that is subject only to the control of the department while work remains to be done. Until the department has determined, through approval of a certification, that the required work has been completed, it is necessary that financial assurance be maintained.

e. The department proposed in NEW RULE XXIX to adopt operating criteria for a Class IV landfill unit. Many of the criteria were carried forward from existing rules. However, there was no previous requirement for a deed notation for a Class IV landfill unit. The department supplements the statements of reasonable necessity for the requirement of a deed notation as follows: The reasons for a deed notation for a Class IV landfill unit are the same as provided in 6.a.iii. above for a Class III landfill unit, except that the wastes in a Class IV landfill unit pose a greater threat to human health and the environment than the wastes in a Class III landfill unit.

8. 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 Elois Johnson, Paralegal, Department of Environmental Quality, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana 59620-0901; faxed to (406) 444-4386; or e-mailed to ejohnson@mt.gov, no later than November 23, 2009. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

9. John F. North, Chief Counsel, has been designated to preside over and conduct the hearing.

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

11. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

Reviewed by:

DEPARTMENT OF ENVIRONMENTAL QUALITY

/s/ David Rusoff
DAVID RUSOFF
Rule Reviewer

BY: */s/ Richard H. Opper*
Richard H. Opper, Director

Certified to the Secretary of State, August 3, 2009.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.30.201 pertaining to permit fees	))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT (WATER QUALITY)

TO: All Concerned Persons

1. On September 3, 2009, at 1:30 p.m., the Board of Environmental Review will hold a public hearing in Room 35, Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed amendment of the above-stated rule.

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 Elois Johnson, Paralegal, no later than 5:00 p.m., August 24, 2009, to advise us of the nature of the accommodation that you need. Please contact Elois Johnson at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail ejohnson@mt.gov.

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

17.30.201 PERMIT APPLICATION, DEGRADATION AUTHORIZATION, AND ANNUAL PERMIT FEES (1) The purpose of this rule is to ~~establish~~ provide fee schedules for use in determining fees to be paid to the department under 75-5-516, MCA. ~~Fees to be paid are the sum of the fees in the applicable schedules. There are three~~ The types of fees ~~imposed~~ provided under this rule are:

(a) ~~a permit~~ application fees for individual permits (Schedule I.A);

(b) application fees for non-storm water general permits (Schedule 1.B);

(c) application fees for storm water general permits (Schedule 1.C);

(d) application fees for other activities (Schedule 1.D);

~~(b)~~ (e) ~~a~~ degradation authorization fees (Schedule II); ~~and~~

~~(c)~~ (f) ~~an~~ annual ~~permit~~ fees for individual permits (Schedule III.A);

(g) annual fees for non-storm water permits (Schedule III.B); and

(h) annual fees for storm water general permits (Schedule III.C).

(2) For purposes of this rule, the definitions contained in ARM Title 17, chapter 30, subchapter 10 and subchapter 13 are incorporated by reference. The following definitions also apply in this rule:

(a) "domestic waste" means wastewater from bathrooms, kitchens, and laundry;

(b) "flow rate" means the maximum flow during a 24-hour period, expressed in gallons per day (gpd);

(c) "industrial waste," as defined in 75-5-103, MCA, means a waste substance from the process of business or industry or from the development of any

natural resource, together with any sewage that may be present;

(d) "major permit" means a Montana pollutant discharge elimination system permit for a facility that is designated by the department as a major facility pursuant to ARM Title 17, chapter 30, subchapter 13;

(e) "minor permit" means a Montana pollutant discharge elimination system permit for a facility that is not designated by the department as major pursuant to ARM Title 17, chapter 30, subchapter 13;

(f) "municipal separate storm sewer system" means a conveyance or system of conveyances, including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains, that discharges to surface waters and is owned or operated by the state of Montana, a governmental subdivision of the state, a district, association, or other public body created by or pursuant to Montana law, including special districts such as sewer districts, flood control districts, drainage districts and similar entities, and designated and approved management agencies under section 208 of the federal Clean Water Act, which has jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, and is:

(i) designed or used for collecting or conveying storm water;

(ii) not a combined sewer; and

(iii) not part of a publicly owned treatment works (POTW) as defined in ARM Title 17, chapter 30, subchapter 13;

(g) "new permit" means a permit for a facility or activity that does not have an effective permit;

(h) "non-traditional MS4" means a system similar to separate storm sewer systems in municipalities, such as systems at military bases, large educational, hospital, or prison complexes, and highways and other thoroughfares. The term does not include separate storm sewers in very discrete areas, such as individual buildings;

(i) "other wastes," as provided in 75-5-103, MCA, means garbage, municipal refuse, decayed wood, sawdust, shavings, bark, lime, sand, ashes, offal, night soil, oil, grease, tar, heat, chemicals, dead animals, sediment, wrecked or discarded equipment, radioactive materials, solid waste, and all other substances that may pollute state waters;

(j) "outfall" means a disposal system through which effluent or waste leaves the facility or site; and

(k) "renewal permit" means a permit for an existing facility that has an effective discharge permit.

~~(2)~~ (3) A person who applies for a permit, certificate, license, notice of intent, plan review, waiver, determination of significance, or other authorization required by rule under 75-5-201, 75-5-301, or 75-5-401, MCA, or for a modification or renewal of any of these authorizations, shall pay to the department ~~a permit~~ an application fee as determined under ~~(5) of this rule~~ (6).

~~(3)~~ (4) A person whose activity requires an application to degrade state waters under 75-5-303, MCA, and ARM Title 17, chapter 30, subchapter 7 ~~of this chapter~~ shall submit a degradation authorization fee with the application, as determined under ~~(6) of this rule~~ (7).

~~(4)~~ (5) A person who holds a permit, certificate, license, or other authorization

required by rule under 75-5-201 or 75-5-401, MCA, shall pay to the department an annual permit fee as determined under ~~(7) of this rule~~ (8).

~~(5)~~ (6) The fee schedules for new or renewal applications for, or modifications of, a Montana pollutant discharge elimination system permit under ARM Title 17, chapter 30, subchapter 11 or 13 ~~of this chapter~~, a Montana ground water pollution control system permit under ARM Title 17, chapter 30, subchapter 10 ~~of this chapter~~, or any other authorization under 75-5-201, 75-5-301, or 75-5-401, MCA, or rules promulgated under these authorities, ~~is~~ are set forth below as ~~s~~Schedules I.A, I.B, ~~and~~ I.C, and I.D. ~~Payment of the permit application fee is due upon submittal of the application.~~ Fees must be paid in full at the time of submission of the application. For new applications under Schedule~~s~~ I.A ~~or I.B~~, the annual fee from Schedule III.A for the first year must also be paid at the time of application. For new applications under Schedule I.B, the annual fee is included in the new permit amount and covers the annual fee for the calendar year in which the permit coverage becomes effective.

(a) Under Schedules I.A and I.B, the department shall assess a fee for each outfall. An application fee for multiple outfalls is not required if there are multiple outfalls from the same source that have similar effluent characteristics, unless the discharges are to different receiving waters or stream segments, or result in multiple or variable (flow dependent) effluent limits or monitoring requirements.

(b) For purposes of (6) and (7), if a resubmitted application contains substantial changes or deficiencies requiring significant additional review, the department shall require an application resubmittal fee under Schedule I.D. The resubmittal fee must be paid before any further review is conducted. The department shall give written notice of the assessment within 30 days after receipt of the resubmittal and provide for appeal as specified in (11). If the department does not receive a response to a deficiency notice within one year, the applicant shall submit a new application and associated fees in order for application processing to continue.

(c) The department may assess an administrative processing fee under Schedule I.D when a permittee makes substantial alterations or additions to a sediment control plan, waste management plan, nutrient management plan, or storm water pollution prevention plan.

(d) Application fees are nonrefundable except, as required by 75-5-516(1)(d), MCA, if the permit or authorization is not issued the department shall return a portion of the application fee based on avoided enforcement costs. The department shall return 25% of the application fee if the application is withdrawn within 30 days after submittal.

(e) Facilities with an expired permit must pay the new permit application fee for individual permit coverage as specified in Schedule I. A.

(f) Applications for new permits or permit renewals for sources that constitute a new or increased source, as defined in ARM 17.30.702(18), must pay a significance determination fee for each outfall in addition to the application fee.

(g) Discharges composed entirely of storm water from industrial activities or from mining and oil and gas activities, as defined in ARM 17.30.1105, may be incorporated into a permit application submitted under Schedule I.A. The application fee for each storm water outfall must be submitted to the department with the

application.

(h) The application fee for an individual permit for a municipal separate storm sewer system (MS4) is determined by population based on the latest decennial census from the United States Census Bureau. Applications for MS4 permits with co-permittees will receive a 10% reduction in the application fee.

Schedule I.A Application Fee for Individual Permits

Category	Renewal ~~Amount[(1)]~~ Fee	New Permit Fee
Publicly owned treatment works - major permit	$ ~~4,000~~ 4,800	$ 5,000
Privately owned treatment works - major permit	~~4,500~~ 5,000	5,000
Publicly owned treatment works - minor permit	~~1,000~~ 1,500	2,500
Privately owned treatment works - minor permit	~~2,500~~ 3,000	4,200
Ground water permit, domestic wastes flow rate - gallons per day	~~1,200~~	
0-10,000 gpd	1,200	2,500
10,001 to 30,000 gpd	1,500	2,500
more than 30,000 gpd	2,500	4,000
Ground water permit, industrial, or other wastes	~~1,500~~	
0-1,000 gpd	1000	1,500
1,001 to 5,000 gpd	1,500	2,500
5,001 to 10,000 gpd	2,500	3,500
more than 10,000 gpd	4,800	5,000
Concentrated animal feeding operation permit	600	600
Storm water permit construction, industrial, and mining, oil, and gas activities	2,000	3,200
Traditional storm water municipal separate storm sewer system (MS4) permit		
population greater than 50,000	9,000	11,000
population 10,000 to 50,000	7,000	9,000
population less than 10,000	6,000	8,000
Non-traditional MS4 permit	5,000	7,000
Other MS4 permits	4,000	5,000
Significance determination	4,000	5,000
Storm water outfall - (integrated)	1,000	1,500

~~[(1)] Per outfall, multiple storm water outfalls limited to a maximum of five outfalls.~~

Schedule I.B Application Fee for Non-Storm Water General Permits

Category	~~Amount~~[1] Renewal Fee	New Permit Fee (includes initial annual fee)
Concentrated animal feeding operation, ~~greater than 1,000 animal units~~	$ ~~450~~ 600	$ 1,200
~~Concentrated animal feeding operation less than 1,000 animal units~~	~~300~~	
Construction dewatering	~~300~~ 400	900
Fish farms	~~300~~ 600	1,200
Produced water	~~450~~ 900	1,200
Suction dredge	~~250~~	
resident of Montana	25	25
nonresident of Montana	100	100
Sand and gravel	~~450~~ 900	1,200
Domestic sewage treatment lagoon	~~500~~ 800	1,200
Disinfected water	~~500~~ 800	1,200
Petroleum cleanup	~~500~~ 800	1,200
~~Storm water associated with construction residential (single family dwelling)~~	~~250~~	
~~Storm water associated with construction commercial or public~~	~~450~~	
~~Storm water associated with industrial activities~~	~~500~~	
~~Storm water associated with mining, oil and gas~~	~~500~~	
~~Storm water municipal separate storm sewer system (MS4)~~	~~1,500~~	
Ground water remediation or dewatering	~~700~~ 800	1,400
Ground water potable water treatment facilities	~~700~~ 800	1,400
Other general permit, not listed above	~~400~~ 600	1,200

~~[1] Per outfall, multiple storm water outfalls limited to a maximum of five outfalls.~~

(i) Application fees in Schedule I.C for authorizations under the general permit for storm water associated with construction activities are based on the total acreage of disturbed land. Renewal application fees will not be required during the general permit renewal cycle, unless the authorization has been in effect for more than four years.

(j) Application fees in Schedule I.C for authorizations under the general permits for storm water associated with industrial activities and mining, oil, and gas activities are based on the total size of the regulated facility or activity in acres.

(k) Application fees in Schedule I.C for authorizations under a general permit for a municipal separate storm sewer system (MS4) are determined by population

based on the latest decennial census from the United States Census Bureau. Applications for MS4 permit coverage with co-permittees will receive a 10% reduction in the application fee.

(l) Modifications to authorizations under the general permit for storm water associated with construction activities will be processed under Schedule I.D as a minor modification if the modification is submitted within six months after the date of issuance of the authorization. Modifications, except for name changes, submitted six months or more after issuance of the authorization will be processed under Schedule I.C as a new permit application.

(m) Modifications, except for name changes, to authorizations under a general permit other than the general permit for storm water associated with construction activities must be processed under Schedule 1.B and I.C as a renewed application.

(n) A facility with a construction storm water no-exposure certification from the department must apply for and receive a new certification every five years in order to maintain a no-exposure status.

Schedule I.C Application Fee for Storm Water General Permits

Category	Renewal Amount	New Permit Amount
Storm water associated with construction		
1 to 5 acres	$ 900	$ 900
more than 5 acres, up to 10 acres	1,000	1,000
more than 10 acres, up to 25 acres	1,200	1,200
more than 25 acres, up to 100 acres	2,000	2,000
more than 100 acres	3,500	3,500
Storm water associated with industrial activities		
small - 5 acres or less	1,200	1,500
medium – more than 5 acres, up to 20 acres	1,500	1,800
large - more than 20 acres	1,800	2,000
Storm water associated with mining, oil, and gas		
small - 5 acres or less	1,200	1,500
medium - more than 5 acres, up to 20 acres	1,500	1,800
large - more than 20 acres	1,800	2,000
Traditional storm water municipal separate storm sewer system (MS4)		
population greater than 50,000	7,000	10,000
population 10,000 to 50,000	6,000	8,000
population less than 10,000	5,000	6,000
County MS4 permit	4,000	5,000
Non-traditional MS4 permit	2,000	3,000
Storm water no-exposure certification required once every five years	300	500
Storm water construction waiver		400

(o) The minimum application fee under Schedule I.D for federal Clean Water Act section 401 certification is $4,000 or 1% of the gross value of the proposed project, whichever is greater, and the maximum fee may not exceed $20,000.

Schedule I.~~C~~ D Application Fee for Other Activities

Category	Amount[(1)]
Short-term water quality standard, turbidity "318 authorization"	$ ~~150~~ 250
Short-term water quality standard, remedial activities and pesticide application "308 authorization"	~~250~~ 400
~~Storm water no exposure certification~~	~~100~~
~~Storm water construction waiver~~	~~100~~
Federal Clean Water Act section 401 certification	~~Varies[(2)]~~ See ARM 17.30.201(6)(o)
Review plans and specifications to determine if permit is necessary, pursuant to 75-5-402(2), MCA	~~½ Applicable Fee~~ 2,000
Major ~~amendment~~ modification	~~Application Fee~~ Renewal fee from Schedule I.A
Minor ~~amendment~~ modification, includes transfer of ownership	~~200~~ 500
Resubmitted application fee	$500
Administrative processing fee	$500

~~(1) Per outfall, multiple storm water outfalls limited to a maximum of five outfalls.~~

~~(2) Minimum fee is $350, or 1% of gross value of proposed project, not to exceed $10,000.~~

~~(a) An application fee for multiple discharge points is not required if there are multiple discharge points from the same source that have similar effluent characteristics, unless the discharges are to different receiving waters or stream segments, or result in multiple or variable (flow dependent) effluent limits or monitoring requirements.~~

~~(b) If a resubmitted application contains substantial changes causing significant additional review, the department may require an additional application fee to be paid before any further review is conducted. The additional fee must be calculated in the same manner as the original fee and based on those parts of the application that must be reviewed again because of the change. The department shall give written notice of the assessment within 30 days after receipt of the resubmittal and provide for appeal as specified in (10) below.~~

~~(6)~~ (7) The fee schedule for new or renewal authorizations to degrade state waters under ARM Title 17, chapter 30, subchapter 7 ~~of this chapter~~ is set forth in Schedule II. Payment of the degradation authorization fee is due upon submittal of the applications. For the domestic sewage treatment and industrial activity categories, the department shall assess a fee for each outfall. If an application for

authorization to degrade state waters is denied, the department shall return ~~any portion~~ 15% of the fee ~~that it does not use to review the application~~ submitted.

Schedule II Review of Authorizations to Degrade

Category	Amount
Domestic sewage treatment	~~$2,500[(1)]~~ 5,000
Industrial activity	5,000[(1)]
~~Subdivision, 1-9 lots~~	~~120/lot~~
~~Subdivision, 10+ lots~~	~~200/lot[(2)]~~

~~[(1)] Per outfall, limited to a maximum of five falls.~~
~~[(2)] Maximum fee is $5,000 per subdivision.~~

~~(a) For purposes of (5) and (6) above, if a resubmitted application or petition contains substantial changes potentially causing additional or different sources of pollution that require the application or petition to be reviewed again, the department may require an additional application fee to be paid before any further substantive review. The additional fee must be calculated in the same manner as the original fee and based on those parts of the application that must be reviewed again because of the change. The department shall give written notice of the assessment within 30 days after receipt of the resubmittal and provide for appeal as specified in (10) below.~~

~~(7)~~ (8) The annual permit fees ~~is~~ are set forth in Schedules III.A, ~~and~~ III.B, and III.C. No annual fee is required for activities listed in Schedule I.~~C~~D ~~under (5) of this rule~~.

(a) Under Schedules III.A and III.B, the department shall assess a fee for each outfall. An annual fee for multiple outfalls is not required if there are multiple outfalls from the same source that have similar effluent characteristics, unless the discharges are to different receiving waters or stream segments, or the discharges result in multiple or variable (flow dependent) effluent limits or monitoring requirements. For ground water permits, the department shall assess a fee based on the annual average daily flow in gallons per day for each outfall.

Schedule III.A Annual Fee for Individual Permits

Category	Minimum Fee[(1)]	Fee Per Million Gallons of Effluent per Day (MGD)
Publicly owned treatment works - major permit	~~$2,000~~ 3,000	~~$2,500~~ 3,000
Privately owned treatment works - major permit	3,000	3,000[(2)]
Publicly owned treatment works - minor permit	~~1,000~~ 1,500	~~$2,500~~ 3,000
Privately owned treatment works - minor permit	~~1,000~~ 1,500	3,000[(2)]
discharge of non-contact cooling water	800	800

only		
~~Privately owned treatment works - minor (3)~~	~~750~~	~~750~~
Ground water permit, domestic wastes	~~750~~	3,000
annual average daily flow - gallons per day		
0 to 10,000 gpd	1,300	
10,001 to 30,000 gpd	2,000	
more than 30,000 gpd	3,000	
Ground water permit, industrial, or other wastes	~~1,500~~	3,000(2)
0 to 1,000 gpd	2,000	
1,001 to 5,000 gpd	2,500	
5,001 to 10,000 gpd	2,800	
more than 10,000 gpd	3,000	
Concentrated animal feeding operation permit	600	
Storm water permit construction, industrial, and mining, oil, and gas activities	2,000	
Traditional storm water municipal separate storm sewer system (MS4) permit		
population greater than 50,000	3,000	
population 10,000 to 50,000	2,500	
population less than 10,000	2,000	
Non-traditional MS4 permit	1,500	
Other MS4 permits	1,500	
Storm water outfall - (integrated)	1,000	

~~(1) Per outfall, multiple storm water outfalls limited to a maximum of five outfalls.~~

~~(2) Except $750 per MGD if effluent is noncontact cooling water.~~

~~(3) Noncontact cooling water only.~~

Schedule III.B Annual Fee for Non-Storm Water General Permits

Category	Amount(1)
Concentrated animal feeding operation~~, greater than 1,000 animal units~~	~~$300~~ 600
~~Concentrated animal feeding operation, less than 1,000 animal units~~	~~250~~
Construction dewatering	~~250~~ 450
Fish farms	~~250~~ 450
Produced water	~~450~~ 750
Portable suction dredges	~~200~~
resident of Montana	25
nonresident of Montana	100

Sand and gravel production	~~450~~ 750
Domestic sewage treatment lagoon	~~500~~ 850
Disinfected water	~~450~~ 750
Petroleum cleanup	~~450~~ 750
~~Storm water associated with construction, residential (single family dwelling)~~	~~NA~~
~~Storm water associated with construction, commercial or public~~	~~450~~
~~Storm water associated with industrial activities~~	~~650~~
~~Storm water associated with mining, oil and gas~~	~~650~~
~~Storm water municipal separate storm sewer system (MS4)~~	~~650~~
Ground water remediation or dewatering	~~450~~ 800
Potable water treatment facilities	~~450~~ 800
Other general permit, not listed above	~~350~~ 800

~~(1) Per outfall , multiple storm water outfalls limited to a maximum of five outfalls.~~

(b) Annual fees in Schedule III.C for authorizations under the general permit for storm water associated with construction activities are based on the total acreage of disturbed land.

(c) Annual fees in Schedule III.C for authorizations under the general permits for storm water associated with industrial activities and for mining, oil, and gas activities are based on the total size of the regulated facility or activity in acres.

(d) Annual fees in Schedule III.C for authorizations under the general permit for municipal separate storm sewer systems (MS4s) are determined by population in an urbanized area as defined by the United States Census Bureau. The fees must be based on the latest available decennial census data.

Schedule III.C Annual Fee for Storm Water General Permits

Category	Amount
Storm water associated with construction	
1 to 5 acres	$ 700
more than 5 acres, up to 10 acres	800
more than 10 acres, up to 25 acres	1,200
more than 25 acres, up to 100 acres	2,000
more than 100 acres	3,000
Storm water associated with industrial activities	
small - 5 acres or less	1,000
medium - more than 5 acres, up to 20 acres	1,200
large - more than 20 acres	1,500
Storm water associated with mining, oil, and gas	
small - 5 acres or less	1,000
medium - more than 5 acres, up to 20 acres	1,200
large - more than 20 acres	1,500

Traditional storm water municipal separate storm sewer system (MS4)	
population greater than 50,000	5,000
population 10,000 to 50,000	4,000
population less than 10,000	2,500
County MS4 permit	1,200
Non-traditional MS4 permit	1,200

~~(a)~~ (e) A facility that ~~consistently discharges effluent at less than or equal to one-half of its effluent limitations and is in compliance with other permit requirements, using~~ maintains compliance with permit requirements, including effluent limitations and reporting requirements, as determined by the previous year's discharge and compliance monitoring data, is entitled to a 25% reduction in its annual permit fee. ~~Proportionate reductions in annual fee of up to 25% may be given to facilities that consistently discharge effluent at levels between 50% and 100% of their permit effluent limitations. The annual average of the percentage of use of each parameter limit will be used to determine an overall percentage.~~ A new permittee is not eligible for fee reduction in its first year of operation. A permittee with a violation of any ~~effluent limit~~ permit requirement during the previous year is not eligible for fee reduction.

~~(b)~~ (f) The annual permit fee is assessed for each ~~state fiscal~~ calendar year or portion of the calendar year in which the permit is effective. The fee for the ~~fiscal~~ previous calendar year must be received by the department ~~by no later than March 1 following the commencement of the fiscal year~~ not later than 30 days after the invoice date. The fee must be paid by a check or money order made payable to the state of Montana, ~~d~~Department of ~~e~~Environmental ~~q~~Quality.

~~(8)~~ (9) If a person who is assessed a renewal or annual fee under this rule fails to pay the fee within 90 days after the due date for payment, the department may:

(a) impose an additional assessment consisting of ~~15~~ 20% of the fee plus interest on the required fee beginning the first day after the payment is due. Interest must be computed at the rate of 12% per year, established under ~~15-31-510(3)~~ 15-1-216(4), MCA; or

(b) suspend the processing of the renewal application for a permit or authorization or, if the nonpayment involves an annual permit fee, suspend the permit, certificate, license, or other authorization for which the fee is required. The department may lift the suspension at any time up to one year after the suspension occurs if the holder has paid all outstanding fees, including all penalties, assessments, and interest imposed under this ~~subsection~~ rule.

~~(9)~~ (10) The department shall give written notice to each person assessed a fee under this rule of the amount of the fee that is assessed and the basis for the department's calculation of the fee. ~~This notice must be issued at least 30 days prior to the due date for payment of the assessment.~~ The fee is due 30 days after receipt of the written notice.

~~(10)~~ (11) Persons assessed a fee under this rule may appeal the department's fee assessment to the board within 20 days after receiving written

notice of the department's fee determination. The appeal to the board must include a written statement detailing the reasons why the permit holder or applicant considers the department's fee assessment to be erroneous or excessive.

(a) If part of the department's fee assessment is not in dispute in an appeal ~~filed under (10) above~~, the undisputed portion of the fee must be paid to the department upon written request of the department.

(b) The contested case provisions of the Montana Administrative Procedure Act, provided for in Title 2, chapter 4, part 6, MCA, apply to a hearing before the board under this ~~section~~ rule.

AUTH: 75-5-516, MCA
IMP: 75-5-516, MCA

REASON: Pursuant to 75-5-516, MCA, the board must prescribe fees to be assessed by the department for water quality permit applications, annual permit renewals, review of petitions for degradation, and for other water quality authorizations required under the Montana Water Quality Act, Title 75, chapter 5, MCA. Subject to specific statutory fee caps, the Act requires the board to adopt permit fees that are sufficient to cover the board and department costs of administering the permits and other authorizations required under the Act. Application fees are capped at $5,000 per discharge point, and annual fees are capped at $3,000 per million gallons per day. Section 75-5-516(1) and (2), MCA. The Act requires that annual fees cover department costs of administering the program after subtracting application fees, state general fund appropriations, and federal grants. Section 75-5-516(2), MCA.

Program administration costs have increased, but federal and state funding sources have not changed. EPA and state special funding for the program decreased 10% ($40,000) from FY 2002 through FY 2009, and it is currently unknown if a $60,000 state general fund appropriation will be available. Consequently, an increase in fees is necessary to defray a portion of the state's costs of maintaining the program. For the biennium the annual budget for the program is approximately $2.4 million. Revenues of approximately $2 million must be raised by permit fees. The $2 million in fees would affect approximately 1,900 permittees. The fee revenue will be supplemented by approximately $400,000 in special revenue funds and grants to cover the remaining costs of program administration.

Total fee revenue generated annually by the revised fees would be approximately $2 million. Applications are projected to generate approximately $255,000, and annual fees are projected to generate approximately $1.7 million. The $2 million in fees would affect approximately 1,900 permittees. The fee revenue will be supplemented by approximately $400,000 in special revenue funds and grants to cover the remaining costs of program administration.

In this rulemaking, the board is proposing to amend the current fee schedules in ARM 17.30.201. The four major proposed amendments to ARM 17.30.201 are: (1) increasing both the application and annual fees for permits and authorizations; (2) establishing fees based on volume discharged for ground water discharges; (3) establishing fees for administrative processing of permit related submittals; and (4)

adding explanatory text in the rules to clarify how fees are assessed under the fee schedules. The proposed amendments are necessary to implement the statutory requirement that fees recover costs of program administration, move the fee schedule toward a system that has more equity among fee payers than the current structure, and improve the readability of the rule and schedules.

In this statement of reasonable necessity, changes to the rule text are discussed first, followed by discussion of the amendments to the fee schedules.

The proposed amendments to (1) would make minor clerical changes and conform (1) to the new schedule format.

Proposed new (2) would add definitions associated with fee assessment. The definitions are necessary to clarify how the fee schedules apply.

The proposed amendments to existing (2), (3), and (4), (renumbered (3), (4), and (5)) would make minor clerical changes and add to the list of types of application for which fees are provided in the revised schedules. These amendments are necessary for clarity.

The proposed amendments to existing (5) (renumbered (6)) would make minor clerical revisions and provide that applications are incomplete without fees. The amendments clarify that the first annual fee is included in the new permit fee listed in Schedule I.B application fees.

Proposed new (6)(a) would clarify that the application fees in Schedules I.A and I.B are based on the number of outfalls and describes when multiple outfalls can be combined under a single fee. These provisions are necessary to provide clarity in the rule about the assessment process.

Proposed new (6)(b) would establish a review fee for resubmitted applications that have substantial changes or deficiencies requiring significant additional review. As set out in Schedule I.D, the resubmittal fee is $500. This new fee is necessary to recover additional review costs caused by changes or deficiencies in applications. This new subsection would also provide that a new application fee is required if an application has been denied for a year or more. In those situations, a complete re-review is often required, and the additional fee is necessary to recover the additional review costs.

Proposed new (6)(c) would provide for an administrative processing fee for review of substantial changes to certain management plans. As set out in Schedule I.D, the fee is $500. This new fee is necessary to address additional review and public notice costs pertaining to changes in management plans.

Proposed new (6)(d) would provide that application fees are nonrefundable except as provided by 75-5-516(1)(d), MCA. The statute provides that a partial refund, based on avoided enforcement costs, must be made for applications that are not issued. This proposed new subsection would establish the refund amount at 25% of the fee. This reflects the approximate average per-permit cost of enforcement actions. The proposed new subsection would also limit the refund to cases in which the permit application is withdrawn within 30 days. This provision is necessary to recover review costs, beyond those recovered in the application fee, for applications that are active more than 30 days but subsequently withdrawn.

Proposed new (6)(e) would require facilities with an expired individual permit to pay the new permit application fee upon reapplication. This is necessary to create an incentive for facilities to timely apply for renewal of permits, which avoids

administrative and enforcement costs associated with processing expired permit renewals.

Proposed new (6)(f) would require a fee for significance review of discharges from new or increased sources, as defined in water quality nondegradation requirements. Significance review is currently required in order to comply with the requirements of the Water Quality Act nondegradation provisions, but a separate fee is not currently in effect. The proposed review fee is necessary to recover review costs.

Proposed new (6)(g) would allow storm water discharges from industrial activities, or mining or oil and gas activities, to be incorporated into a non-storm water discharge permit application, at a lower fee. This new subsection is necessary to describe current practices that simplify the application process.

Proposed new (6)(h) and (k) clarify that fees for MS4 individual permits are based on population as determined by the latest U.S. decennial census. These new subsections are necessary to describe current fee calculation procedures and to comply with federal rules pertaining to MS4 permits.

Proposed new (6)(i) clarifies that application fees for authorizations under the general permit for storm water associated with construction activities are based on the total acreage of disturbed land. Renewal fees are not required when the general permit is reissued unless the facility's authorization has been in effect for more than four years. This new subsection is necessary to describe current procedures for fee assessment, to comply with federal rules pertaining to construction storm water permits, and to avoid unnecessary renewal fees for facilities who are authorized under a general permit and who are required to reapply when a new general permit is issued.

Proposed new (6)(j) clarifies that application fees for authorizations under the general permits for storm water associated with industrial activities and mining, oil, and gas activities are based on the total acreage of the regulated facility or activity. This new subsection is necessary to describe current procedures for assessing fees for these applications.

Proposed new (6)(l) and (m) explain how fees are assessed for modifications of general permit authorizations. Modifications to authorizations under the construction storm water general permit can be processed as a minor modification under Schedule I.D if submitted within six months of the authorization. Modifications after that, other than name changes, are subject to the new permit fee. The reason for this is that construction storm water modifications after six months tend to involve significant project extensions, which require the additional processing fee. For authorizations under the other storm water general permits, modifications are processed as renewal applications.

Proposed new (6)(n) would provide that a storm water no-exposure certification must be renewed every five years to remain effective. This new subsection is necessary to describe current procedures and to comply with federal rules pertaining to industrial storm water permits.

Proposed new (6)(o) would replace the former footnote for Schedule I.C pertaining to fees for 401 certifications. The minimum fee is proposed to be increased from $350 to $4,000. The new subsection is necessary to describe how fees are assessed for 401 certifications, and the fee increase is necessary to

recover review costs.

Existing (6) is being renumbered (7) and is proposed to be amended to make minor changes for clarity and to incorporate a former footnote. The amendments also propose that 15% of the application fee for applications to degrade will be returned if the application is denied. This percentage is necessary based on the expectation that applications to degrade will be complex and will require extensive department review time even if the application is ultimately denied.

Existing (7) is being renumbered (8) and is proposed to be amended. The proposed amendments are necessary to make minor changes for clarity and to incorporate a former footnote regarding outfalls.

The provisions in new (8)(a) regarding multiple outfalls are from the current rules and are not substantively altered.

Proposed new (8)(b) would clarify that annual fees for authorizations under the general permit for storm water associated with construction activities are based on the total acreage of disturbed land. This new subsection is necessary to describe current fee assessment procedures and to comply with federal rules pertaining to construction storm water permits.

Proposed new (8)(c) would clarify that annual fees for authorizations under the general permits for storm water associated with industrial activities and mining, oil, and gas activities are based on the total acreage of the regulated facility or activity. This new subsection is necessary to describe current procedures for assessing annual fees for these authorizations.

Proposed new (8)(d) would clarify that annual fees for MS4 general permit authorizations are based on population as determined by the latest U.S. decennial census. This new subsection is necessary to describe current procedures and to comply with federal rules pertaining to MS4 permits.

Existing (7)(a) is being renumbered (8)(e) and is proposed to be amended to modify the current provisions pertaining to reduction in annual fees for permit compliance. The current subsection provides a 25% reduction to facilities that discharge at half or less than half of their permitted limits. The amendments propose to provide the 25% reduction to all facilities that maintained compliance with all permit requirements in the previous calendar year. Administration of the current subsection has proven to be difficult and unfairly penalizes facilities that reduce pollutants by less than half the effluent limit, even if the reduction is achieved at a large cost. The current subsection is based on the statute at 75-5-516(2)(b)(ii), MCA. The proposed amendments are necessary to make administration of the fee reduction simpler. The proposed amendments meet the statutory requirement for fee reduction but extend the reduction to other permittees as well.

Existing (7)(b) is being renumbered (8)(f) and is proposed to be amended to change the annual fee assessment period from the fiscal year to the calendar year. This would not lead to a change in department practice. Annual fees are currently assessed on a calendar year basis. The reason for this is that annual fees are based on the volume and concentration of waste discharged into the state waters based on discharge data, and the discharge data is collected on a calendar year basis. Also, 75-5-516(2)(b)(ii), MCA, requires that the 25% reduction in the annual permit fee be based on the previous calendar year's discharge data. The amendment to the subsection is necessary to reflect current fee assessment

practices and to provide for more efficient administration of the annual fees.

Existing (8) and (9) are being renumbered (9) and (10) and are proposed to be amended to make minor changes to the existing rules pertaining to late fees and interest for unpaid permit fees. The amendments are for clarification and to correct an erroneous statutory reference. Section 75-5-516(5)(a), MCA, requires that interest be computed on unpaid fees as provided in 15-1-216, MCA. The current section erroneously refers to 15-31-510(3), MCA, which does not exist. The amendments also raise the late fee from 15% to 20%, which is the maximum allowed by the statute, and clarify that the late fees and interest apply to both permit renewal and permit annual fees that are overdue. The amendments are necessary to clarify how late fees and interest are assessed, and to conform the rule to the statute.

Existing (10) is being renumbered (11) and is proposed to be amended to correct an erroneous cross-reference, and make a minor clerical change. As provided by 75-5-516(8), MCA, the appeal process set out in this section applies to any fee assessed under this section. The proposed deletion of references elsewhere in this rule to the appeal process is intended to avoid duplicative language, and is not intended to limit the availability of appeals.

Fee Schedules

The proposed amendments to the fee schedules are necessary to implement the statutory requirement that fees recover costs of administration after special revenue and federal grant funds are used, and to move the fee schedule toward a system that has more equity among fee payers than the current structure.

The proposed amendments to the schedules delete the footnotes and replace them with new subsections. The reformatting does not change the meaning of the schedules or the rule.

The revisions to Schedule I.A increase the application fees for individual permits as shown and propose to add specific categories for ground water dischargers. Individual ground water discharge permit holders would be grouped, for fee purposes, by discharge volume. A fee for significance review is added, which is necessary to recover costs of determining whether permitted activities will result in nonsignificant changes in existing water quality.

The revisions to Schedule I.B, pertaining to general permit authorizations, increase the existing fees as shown. The new schedule includes a renewal amount for facilities with effective permit coverage and a slightly higher rate for facilities that have never had permit coverage. A new column has been added to address new permit coverage. This column includes the annual fee for the first year the permit coverage is effective. The existing categories for storm water general permits are deleted and moved in modified form to new Schedule I.C.

A new Schedule I.C is proposed that addresses application fees for storm water general permits. The proposed new fees are higher and are based on the size of the project or regulated activity. Larger facilities will pay a higher fee than smaller facilities. As provided in the proposed amendments to (6)(i), when a construction storm water general permit is reissued, renewal fees will not be required from authorization holders if their coverage has not been effective for more than four

years. The proposed new fee schedule eliminates the categories of commercial, public and residential storm water discharges. This amendment is necessary because review fees vary with acreage rather than the type of development.

The revisions to Schedule I.D increase application fees for other activities as shown and propose to move the storm water fees to new Schedule I.C.

The revisions to Schedule II propose to increase fees for review of domestic authorizations to the same level as for industrial authorizations. The amendments also eliminate differentiation based on the number of lots in a subdivision. Although no applications to degrade have been received since the process was created, these amendments are necessary because applications are expected to be complex and expected to require extensive department review time regardless of the type or size of the discharge.

The amendments to Schedule III.A increase annual fees for individual permits as shown. Fees for ground water discharge permits are based on the amount of the discharge.

The amendments to Schedule III.B increase annual fees for non-storm water general permits as shown. The amendments move storm water annual permit fees to the new Schedule III.C.

A new Schedule III.C is proposed that addresses annual fees for storm water general permits. The proposed new fees are higher than previous annual fees and are based on the size of the project or regulated activity.

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 Elois Johnson, Paralegal, Department of Environmental Quality, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana 59620-0901; faxed to (406) 444-4386; or e-mailed to ejohnson@mt.gov, no later than 5:00 p.m., September 10, 2009. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

5. Katherine Orr, 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, e-mail, 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 supply; 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. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered

to Elois Johnson, Paralegal, Department of Environmental Quality, 1520 E. Sixth Ave., P.O. Box 200901, Helena, Montana 59620-0901, faxed to the office at (406) 444-4386, e-mailed to Elois Johnson at ejohnson@mt.gov, or may be made by completing a request form at any rules hearing held by the board.

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

Reviewed by: BOARD OF ENVIRONMENTAL REVIEW

/s/ James M. Madden BY: */s/ Joseph W. Russell*
JAMES M. MADDEN JOSEPH W. RUSSELL, M.P.H.,
Rule Reviewer Chairman

Certified to the Secretary of State, August 3, 2009.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.38.101, 17.38.208, 17.38.225, 17.38.229, 17.38.231, and 17.38.513 pertaining to plans for public water or wastewater systems, treatment requirements, control tests, microbial treatment, sanitary surveys, and chemical treatment of water; the adoption of New Rules I through IV pertaining to ground water, initial distribution system evaluations, stage 2 disinfection byproducts requirements, and enhanced treatment for cryptosporidium; and the repeal of ARM 17.38.701 through 17.38.703 pertaining to licenses--private water supplies, disposal of excrement, and barnyards and stockpens	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT, ADOPTION, AND REPEAL (PUBLIC WATER AND SEWAGE SYSTEM REQUIREMENTS)

TO: All Concerned Persons

1. On September 3, 2009, at 3:00 p.m., the Board of Environmental Review will hold a public hearing in Room 35, Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed amendment, adoption, and repeal 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 Elois Johnson, Paralegal, no later than 5:00 p.m., August 24, 2009, to advise us of the nature of the accommodation that you need. Please contact Elois Johnson at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail ejohnson@mt.gov.

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

17.38.101 PLANS FOR PUBLIC WATER SUPPLY OR WASTEWATER SYSTEM (1) through (6) remain the same.

(7) Except as provided in (10)(a), ~~U~~upon receipt of a submittal or resubmittal under (4), the department shall provide a written response to the applicant within 60 days that either approves the submittal, approves the submittal with conditions, describes additional information that must be submitted to the department, or denies the ~~proposal~~ submittal.

(8) through (8)(b) remain the same.

(9) Except as provided in (10)(b), ~~U~~unless the applicant has completed the construction, alteration, or extension of a public water supply or wastewater system within three years after the department or a delegated unit of local government has issued its written approval, the approval is void and a design report, plans, and specifications must be resubmitted as required by (4) with the appropriate fees specified in this subchapter. The department may grant a completion deadline extension if the applicant requests an extension in writing and demonstrates adequate justification to the department.

(10) As provided in [Section 1, Chapter 449, Laws of 2009], the following requirements apply to regional public water supply systems for which a final engineering report has been approved by the United States Bureau of Reclamation. These requirements are in addition to the other requirements in this chapter, except where a rule specifically provides otherwise:

(a) Upon receipt of a submittal or resubmittal under (4) of plans, specifications, or deviation requests for the storage, pumping, and distribution portions of a regional public water supply system, the department shall provide a written response within 40 calendar days after a submittal and within 20 working days after a resubmittal. The department's response must approve the submittal, approve the submittal with conditions, describe additional information that must be submitted to the department, or deny the submittal.

(b) Portions of a regional public water supply system for which the department has reviewed and approved plans, specifications, or deviations under (4) are not subject to changes in department design or construction criteria for a period of 72 months after the department's approval. Unless the applicant has completed construction, alteration, or extension of the approved portions of the system within 72 months after the department's approval, the approval is void and a design report, plans, and specifications must be resubmitted under (4) with the appropriate fees specified in this subchapter. The department may grant a completion deadline extension if the applicant requests an extension in writing and demonstrates adequate justification to the department.

(c) Except as provided in (4) and (10)(b), the approval of a regional water system's standard construction contract documents and provisions for amendments to those documents remains in effect for the construction period of the project as contained in the final engineering report approved by the United States Bureau of Reclamation.

(10) through (17) remain the same, but are renumbered (11) through (18).

AUTH: 75-6-103, MCA
IMP: 75-6-103, 75-6-112, 75-6-121, MCA

REASON: The proposed amendments to ARM 17.38.101 incorporate new statutory requirements for the review of regional water supply systems. Section 1, Chapter 449, Laws of 2009. The new provisions will apply to regional water supply systems for which a final engineering report has been approved by the United States Bureau of Reclamation. For these projects, the statute requires a shorter time for department review of plans and specifications, a longer life for plan approvals after

the approvals are issued by the department, and a project-life approval for project documents other than design plans and specifications. All other requirements in the subchapter apply to these projects, except as specifically modified by these amendments.

Proposed new (10)(a) would implement the statutory requirement that the Department of Environmental Quality (DEQ) conduct review of submittals of plans and specifications in 40 calendar days, and conduct review of resubmittals in 20 working days. ARM 17.38.101(7) currently provides for a 60-day review period of all plan and specification submittals. The 60-day review period will remain in effect for all systems except for approved regional water supply systems that are subject to proposed new (10). Proposed new (10)(a) is necessary to implement the statute, and to expedite DEQ review of regional water supply projects.

Proposed new (10)(b) would implement the statutory requirement that DEQ approval of design and construction standards, and approval of deviations from those standards, not be subject to change for 72 months. When plans for public water or sewer projects are submitted to DEQ, they are subject to ARM 17.38.101(4), which requires that the plans comply with current DEQ design criteria as set out in rules and Department Circulars. After DEQ issues an approval of plans and specifications, the current rules allow the applicant 36 months to construct the approved project. During the 36-month period, the approved project design is not subject to changes in DEQ design criteria. ARM 17.38.101(9). For regional public water supply systems, Sec. 1, Ch. 449, L. 2009 requires a 72-month period in which approved plans, specifications, and deviations not be subject to change. The proposed amendment implements the statute by providing that DEQ-approved plans, specifications, and deviations for regional water supply systems will not be subject to changes in DEQ design standards if the approved portion of the project is constructed within 72 months. If construction is not completed within 72 months after approval of plans and specifications, the proposed amendment requires that plans be resubmitted for DEQ approval, with review fees. Upon resubmittal the plans must be reviewed in accordance with DEQ standards in effect at the time. Proposed new (10)(b) is necessary to implement the statute, and to provide a longer construction window for approved projects that may be extensive in scope.

Proposed new (10)(c) would implement the statutory requirement that DEQ approval of a regional water system's standard construction contract documents, and provisions for amendments to those documents, must remain in effect for the construction period of the project as contained in the final engineering report approved by the United States Bureau of Reclamation. The statutory provision that DEQ approval of construction documents last for the entire construction period must be construed in conjunction with the statutory requirement that DEQ approval of design and construction standards, and deviations from those standards, not be subject to change for 72 months. Proposed new (10)(c) would implement the two statutory provisions by providing for approval of standard construction contract documents for the entire construction period, but providing that specific design standards in those construction contract documents are subject to ARM 17.38.101(4) and 17.38.101(10)(b). If design standards are included in general contract documents approved by DEQ under proposed new (10)(c), the design standards must be updated if they are later submitted as part of plans and

specifications under ARM 17.38.101(4). After DEQ approval of the design standards under ARM 17.38.101(4), the standards are not subject to change for 72 months to allow for construction.

17.38.208 TREATMENT REQUIREMENTS (1) through (2)(e) remain the same.

(3) The board adopts and incorporates by reference 40 CFR 141.72, which sets forth treatment requirements for public water suppliers that use ~~filtered~~ surface water~~, except that the terms "undetectable" and "not detected" in 40 CFR 141.72(a)(4)(i) and 141.72(b)(3)(i) are replaced by the phrase "less than 0.2 mg/l by the DPD method or 0.1 mg/l by the amperometric titration method."~~

(4) through (4)(w) remain the same.

AUTH: 75-6-103, MCA
IMP: 75-6-103, MCA

REASON: The proposed amendment to ARM 17.38.208(3) removes department language that specifies a numeric disinfectant level that must be maintained throughout the distribution system of a system that supplies full-time chemical disinfection. This amendment will conform the rule to the federal rule, which allows systems to maintain a lower disinfectant residual. Because the amount of chemical disinfectant added may affect the formation of disinfection byproducts, the reduction in the disinfectant residual requirement may increase a system's ability to comply with the disinfection byproducts rule, which is adopted by reference in ARM 17.38.216(3).

17.38.225 CONTROL TESTS (1) To determine compliance with treatment requirements of this subchapter, to judge variations in water quality, to identify objectionable water characteristics, and to detect the presence of foreign substances which may adversely affect the quality of the water, control tests must be performed, recorded, and reported by water suppliers in accordance with procedures and reporting formats approved by the department.

(2) ~~At least two c~~Chlorine residual tests must be conducted daily~~, one at each entry point and one in the distribution system~~ by:

(a) ~~by a supplier of a public water supply system employing full time chlorination of a ground water source. The frequency of chlorine residual monitoring may be reduced by the department for noncommunity ground water water systems on a case-by-case basis~~ surface water systems and consecutive systems to a surface water system in accordance with the requirements in 40 CFR 141.72 and with the other requirements in this subchapter for chlorine residual monitoring for surface water supplies;

(b) ~~by a supplier of a public water supply system using a surface water source, who also shall comply with the other requirements in this subchapter for chlorine residual monitoring for surface water supplies~~ ground water systems in accordance with 40 CFR Part 141, subpart S; and

(c) ~~by a consecutive system that receives chlorinated water from its wholesaler~~ ground water systems required to maintain a residual in its distribution

system and by consecutive systems connected to those systems at each entry point to the distribution system and one in the distribution system. For consecutive systems, the entry point is the point at which the purchased water enters the distribution system of the consecutive system. The department may waive, on a case-by-case basis, the requirement for:

(i) through (7) remain the same.

AUTH: 75-6-103, MCA
IMP: 75-6-103, MCA

REASON: The proposed amendments to ARM 17.38.225 are necessary to accommodate the new federal ground water rule, which is adopted by reference in proposed New Rule I. The new ground water rule creates a third type of disinfecting system that must be accommodated under ARM 17.38.225: ground water systems that must achieve 4-log virus inactivation, prior to the first user, with no residual disinfectant requirement. The proposed changes are necessary to increase systems' ability to comply with the federal requirements adopted in proposed New Rule I, which the must be adopted in order for the department to retain primacy for the Safe Drinking Water Act requirements within the state of Montana.

17.38.229 MICROBIAL TREATMENT (1) Full-time disinfection with chlorine, chlorine dioxide, chloramines, or a disinfectant that maintains a residual is mandatory where the source of water is from lakes, reservoirs, or streams, or ground water sources under the direct influence of surface water, or where the water may be exposed to a potential source of contamination including, but not limited to:

(a) losses of pressure within the system that could result in backflow or infiltration conditions; ~~or~~

(b) substandard distribution, pumping, or storage facilities; or

(c) other circumstances where the department determines that the history and nature of contamination indicates a residual is required for a safe water.

(2) Full-time ~~disinfection of the water supply~~ microbial treatment that provides adequate inactivation or removal of harmful pathogens is mandatory whenever the water may be exposed to a potential source of contamination through:

(a) and (b) remain the same.

~~(3) Full time disinfection of the water in a ground water supply system is mandatory whenever the record of bacteriological tests of the system does not indicate a safe water under the criteria listed in ARM 17.38.207 and 17.38.215. Full time disinfection with chlorine, chlorine dioxide, chloramines, or a disinfectant that maintains a residual may be required where the history and nature of the contaminant indicate a residual is required to ensure safe water.~~

~~(4)~~ (3) Methods of full-time ~~disinfection~~ microbial treatment must be reviewed and approved by the department prior to the installation or use of any form of treatment.

~~(5)~~ (4) When the department determines a residual is required in the distribution system of a ground water system, ~~T~~the residual disinfectant concentration measured as free chlorine, total chlorine, combined chlorine, chlorine dioxide, or other department approved disinfectant(s)~~, in the distribution system of a~~

~~ground water supply system required by the department to use continuous disinfection with chlorine, chlorine dioxide, chloramines, or a disinfectant that maintains a residual~~ must not be less than 0.2mg/l using the DPD method or 0.1mg/l using the amperometric titration method. A heterotrophic bacteria concentration in water in the distribution system less than or equal to 500 per milliliter, measured as heterotrophic plate count (HPC), is an acceptable substitute for disinfectant residual for purposes of determining compliance with this rule.

AUTH: 75-6-103, MCA
IMP: 75-6-103, MCA

REASON: The proposed amendments to ARM 17.38.229 are necessary to maximize the tools that systems have available to comply with new requirements in the federal ground water rule, which is adopted by reference in proposed New Rule I. Previously, microbiological contaminants in ground water systems have been regulated only under the federal total coliform rule, and disinfection, otherwise known as "inactivation," was the only treatment option. New federal requirements under the ground water rule will allow ground water systems to consider nonchemical treatment, otherwise known as "removal," to resolve some compliance issues. The proposed amendments are intended to allow systems to comply with requirements established in the new federal rules, which the department must adopt in order to retain primacy for the Safe Drinking Water Act requirements within the state of Montana.

17.38.231 SANITARY SURVEYS (1) Public water supply systems must undergo an initial sanitary survey by June 29, 1994, for community systems and nontransient noncommunity systems, and by June 29, 1999, for transient noncommunity water systems. Thereafter, nontransient noncommunity and transient noncommunity water systems must undergo another sanitary survey at least once every five years, and ~~all other public~~ community water supply systems must undergo another sanitary survey at least once every three years except that the department may define a process by which a community system may be determined to be an outstanding performer and have its sanitary survey schedule reduced to no less frequently than every five years. The department must review the results of each sanitary survey to determine whether the existing monitoring frequency is adequate and what additional measures, if any, the system needs to undertake to improve drinking water quality.

(2) remains the same.

AUTH: 75-6-103, MCA
IMP: 75-6-103, MCA

REASON: The proposed amendments to ARM 17.38.231 are necessary to remove some department requirements that are more stringent than comparable federal requirements. When a primacy agency has regulations that are more stringent than comparable federal requirements, those more stringent requirements become the National Primary Drinking Water Regulations within that state and all

violations of those requirements must be reported to the United States EPA. The United States EPA reviews each primacy agency's compliance determinations to ascertain how well that agency has implemented the primacy agreement as well as to determine how well the regulated community is complying with the requirements. Because of current work loads and priorities, the increased burden placed on the department to conduct sanitary surveys at an increased interval has the potential to create violations not only for the department but also for regulated systems. The use of the federal requirements will reduce the department's workload and will potentially reduce the creation of both state and system violations that must be reported to EPA as a condition of primacy.

17.38.513 CHEMICAL TREATMENT OF WATER (1) Each load of water shall be dosed with enough chlorine to provide a free chlorine or total chlorine residual of 0.4 parts per million. The water hauler shall have DPD test kits to check the chlorine residual.

(2) remains the same.

AUTH: 75-6-103, MCA
IMP: 75-6-103, MCA

REASON: The proposed amendment to ARM 17.38.513 is necessary to clarify that some systems that disinfect are unable to measure a free chlorine residual and that that water still meets department requirements.

4. The proposed new rules provide as follows:

NEW RULE I GROUND WATER RULE (1) The board adopts and incorporates by reference 40 CFR Part 141, subpart S, which sets forth the requirements to ensure that systems using ground water sources are adequately protected.

AUTH: 75-6-103, MCA
IMP: 75-6-103, MCA

REASON: Proposed New Rule I is necessary to adopt new federal requirements. The department is required to adopt language comparable to the federal language as a condition of its primacy agreement with EPA. Public water systems that are subject to this new requirement are required to comply with the requirements regardless of whether Montana adopts comparable language or not. The federal Ground Water rule sets standards to ensure that ground water sources and their associated systems are protective of public health.

NEW RULE II INITIAL DISTRIBUTION SYSTEM EVALUATIONS (1) The board adopts and incorporates by reference 40 CFR Part 141, subpart U, which sets forth the requirements for determining monitoring locations and other requirements for subpart V compliance monitoring.

AUTH: 75-6-103, MCA
IMP: 75-6-103, MCA

REASON: Proposed New Rule II is necessary to adopt new federal requirements. The department is required to adopt language comparable to the federal language as a condition of its primacy agreement with EPA. Public water systems that are subject to this new requirement are required to comply with the requirements regardless of whether Montana adopts comparable language or not. The federal Initial Distribution System Evaluation rule sets standards to ensure that systems supplying full-time disinfection are monitoring in the correct locations and times to determine compliance with the disinfection byproducts rules.

NEW RULE III STAGE 2 DISINFECTION BYPRODUCTS REQUIREMENTS

(1) The board adopts and incorporates by reference 40 CFR Part 141, subpart V, which sets forth the requirements for monitoring and other requirements for achieving compliance with maximum contaminant levels based on running annual averages for disinfection byproducts.

AUTH: 75-6-103, MCA
IMP: 75-6-103, MCA

REASON: Proposed New Rule III is necessary to adopt new federal requirements. The department is required to adopt language comparable to the federal language as a condition of its primacy agreement with EPA. Public water systems that are subject to this new requirement are required to comply with the requirements regardless of whether Montana adopts comparable language or not. The federal Stage 2 Disinfection Byproducts rule is the newest round of requirements set to protect users of systems that provide disinfection with a disinfectant that may cause the creation of disinfection byproducts.

NEW RULE IV ENHANCED TREATMENT FOR CRYPTOSPORIDIUM

(1) The board adopts and incorporates by reference 40 CFR Part 141, subpart W, which establishes or extends treatment technique requirements in lieu of maximum contaminant levels for cryptosporidium.

AUTH: 75-6-103, MCA
IMP: 75-6-103, MCA

REASON: Proposed New Rule IV is necessary to adopt new federal requirements. The department is required to adopt language comparable to the federal language as a condition of its primacy agreement with EPA. Public water systems that are subject to this new requirement are required to comply with the requirements regardless of whether Montana adopts comparable language or not. The federal Enhanced Treatment for Cryptosporidium rule is the newest round of requirements set to protect users of surface water systems from cryptosporidium.

5. The rules proposed to be repealed are as follows:

17.38.701 LICENSES--PRIVATE WATER SUPPLIES (Located at page 17-3679, Administrative Rules of Montana. AUTH: 75-6-103, MCA; IMP: 75-6-103, 75-6-112, MCA)

17.38.702 DISPOSAL OF EXCREMENT (Located at pages 17-3679 and 17-3680, Administrative Rules of Montana. AUTH: 75-6-103, 75-6-112, MCA; IMP: 75-6-103, 75-6-112, MCA)

17.38.703 BARNYARDS AND STOCKPENS (Located at page 17-3680, Administrative Rules of Montana. AUTH: 75-6-103, 75-6-112, MCA; IMP: 75-6-113, MCA)

REASON: The proposed repeal of ARM 17.38.701, 17.38.702, and 17.38.703 is necessary because the department does not have statutory authority to enforce these rules under Title 76, chapter 6, part 1, MCA. The portions of these rules that the department does have statutory authority to regulate are codified in other sections of the Administrative Rules of Montana.

6. 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 Elois Johnson, Paralegal, Department of Environmental Quality, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana 59620-0901; faxed to (406) 444-4386; or e-mailed to ejohnson@mt.gov, no later than 5:00 p.m., September 10, 2009. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

7. Katherine Orr, attorney for the board, or another attorney for the Agency Legal Services Bureau, has been designated to preside over and conduct the hearing.

8. 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, e-mail, 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 supply; 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. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to Elois Johnson, Paralegal, Department of Environmental Quality, 1520 E. Sixth Ave., P.O. Box 200901, Helena, Montana 59620-0901, faxed to the office at (406) 444-4386, e-mailed to Elois Johnson at ejohnson@mt.gov, or may be made by completing a request form at any rules hearing held by the board.

9. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The rules in this notice are the first rules to implement HB 557 (2009), which required the Board of Environmental Review to adopt rules for the approval of regional water systems. The sponsor of HB 557 was contacted by a letter dated May 20, 2009, that the department was beginning to work on the substantive content of the rules. The sponsor of SB 102 was also contacted by letter of May 20, 2009, that the department was beginning to work on the rules to implement SB 102.

Reviewed by: BOARD OF ENVIRONMENTAL REVIEW

/s/ James M. Madden
JAMES M. MADDEN
Rule Reviewer

BY: */s/ Joseph W. Russell*
JOSEPH W. RUSSELL, M.P.H.,
Chairman

Certified to the Secretary of State, August 3, 2009.

BEFORE THE DEPARTMENT OF CORRECTIONS
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 20.7.507 pertaining to siting, establishment, and expansion of prerelease centers	))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On September 8, 2009, at 10:00 a.m., the Department of Corrections will hold a public hearing in Room 24 of the Department of Corrections Annex at 515 N. Sanders, Helena, Montana, to consider the proposed amendment of the above-stated rule.

2. The Department of Corrections will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Department of Corrections no later than 5:00 p.m. on September 3, 2009, to advise us of the nature of the accommodation that you need. Please contact Myrna Omholt-Mason, Department of Corrections, P.O. Box 201301, Helena, Montana, 59620-1301; telephone (406) 444-3911; fax (406) 444-4920; or e-mail momholt-mason@mt.gov.

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

20.7.507 PUBLIC INVOLVEMENT PROCESS (1) through (3) remain the same.

(4) The specific geographic area within the city, town, or county which the committee chooses must be in compliance with all applicable laws, codes, ordinances~~,~~ and existing conditions, covenants, restrictions of record, ~~and~~ zoning regulations~~.~~, or be capable of coming into compliance with applicable zoning regulation through the use of a zoning change, variance, conditional use permit, PUD, or other process set forth in the governing zoning regulations.

(5) remains the same.

AUTH: 53-1-203, MCA
IMP: 53-1-203, MCA

REASON: The Department of Corrections is requesting modification to the current language as zoning regulations generally do not list prerelease center as "permitted uses". Thus, even if a geographic area would be appropriate for a prerelease center with a variance or conditional use permit, the current language restricts that area from consideration, absent a change in zoning.

These proposed changes would permit the working committee to select a geographic area capable of complying with zoning regulations through the

processes set forth in the applicable zoning regulations, without requiring the city or county to amend their regulations.

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: Myrna Omholt-Mason, Department of Corrections, P.O. Box 201301, Helena, Montana, 59620-1301; telephone (406) 444-3911; fax (406) 444-4920; or e-mail momholt-mason@mt.gov, and must be received no later than 5:00 p.m., September 18, 2009.

5. Valerie Wilson, Department of Corrections, has been designated to preside over and conduct this hearing.

6. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to Myrna Omholt-Mason at the contact information listed in paragraph 2 or may be made by completing a request form at any rules hearing held by the department.

7. An electronic copy of this Proposal Notice is available through the department's web site at www.cor.mt.gov. The department strives to make the electronic copy of the Notice conform to the official version of the Notice, as printed in the Montana Administrative Register. However, the department advises that it will decide any conflict between the official version and the electronic version in favor of the official printed version. In addition, the department advises that the web site may be unavailable during some periods, due to system maintenance or technical problems.

8. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was contacted by regular mail on July 29, 2009.

/s/ Valerie Wilson
Valerie Wilson
Rule Reviewer

/s/ Mike Ferriter
Mike Ferriter
Director
Department of Corrections

Certified to the Secretary of State August 3, 2009.

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

In the matter of the amendment of ARM 24.141.301 definitions, 24.141.402 apprentice registration, 24.141.405 fee schedule, 24.141.501 electrician applications, 24.141.502 permits, 24.141.503 examinations, 24.141.504 licensure, 24.141.505 contractor licensing, 24.141.2102 continuing education, 24.141.2301 unprofessional conduct, and 24.141.2402 complaint procedure and the repeal of ARM 24.141.506, electrician qualifications	))))))))))))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT AND REPEAL

TO: All Concerned Persons

1. On September 3, 2009, at 10:00 a.m., a public hearing will be held in room B-07, 301 South Park Avenue, Helena, Montana to consider the proposed amendment and repeal of the above-stated rules.

2. The Department of Labor and Industry (department) will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the State Electrical Board (board) no later than 5:00 p.m., on August 28, 2009, to advise us of the nature of the accommodation that you need. Please contact Jason Steffins, State Electrical Board, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2329; Montana Relay 1 (800) 253-4091; TDD (406) 444-2978; facsimile (406) 841-2309; e-mail dlibsdele@mt.gov.

3. GENERAL STATEMENT OF REASONABLE NECESSITY: The board determined it is reasonable and necessary to amend the authority and implementation cites throughout the rules to accurately reflect all statutes implemented through the rules, to provide the complete sources of the board's rulemaking authority, and to delete references to repealed statutes. Where additional specific bases for a proposed action exist, the board will identify those reasons immediately following the specific rule.

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

24.141.301 DEFINITIONS (1) remains the same.

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

(2) "Journeyman level experience" is defined in 37-68-102, MCA. While serving an apprenticeship, hours of experience are not considered journeyman level experience.

~~(3) "Maintenance" means ordinary and customary in-plant or on-site installations, modifications, additions or repairs which shall be limited to relamping fixtures, replacing ballasts, trouble shooting motor controls, replacing motors, breakers, magnetic starters, in kind-for-kind manner. Also included are connection of specific items of specialized equipment that can be directly connected to an existing branch circuit panel by means of factory installed leads. If a new circuit is required to operate the equipment or if the size of the supply conductors needs to be increased, it shall be considered new work if permitted and inspected by the appropriate building code authority.~~

(3) "Legally obtained" means obtained in accordance with the laws and rules of the jurisdiction in which an applicant obtained the experience and within the statutes and rules of the Montana State Electrical Board.

~~(4)~~ (7) "Responsible electrician" means the person engaged in a full-time capacity ~~that~~ who is responsible for all licensed electrical work performed by the electrical contractor.

(5) "Montana State Electrical Code" means those sections and amendments of the National Electrical Code adopted by the Department of Labor and Industry's Building Standards Program.

(6) "National Electric Code" (NEC) means the code promulgated by the National Fire Protection Association, as amended and revised, adopted by the Department of Labor and Industry's Building Standards Program, and enforced by the board to set standards for electrical practice.

(5) remains the same but is renumbered (8).

AUTH: 37-1-131, 37-68-201, MCA
IMP: 37-68-102, ~~37-68-103,~~ 37-68-201, 37-68-304, 37-68-305, 37-68-312, MCA

REASON: The 2009 Montana Legislature enacted Chapter 257, Laws of 2009 (House Bill 374), an act generally revising electrician licensing laws. The board is adding (2) to and deleting (3) from this rule to comply with the 2009 statutory changes and to further implement the legislation.

The board is adding definitions of "legally obtained," "Montana State Electrical Code," and "National Electric Code" in response to licensees' questions and to clarify the meaning of key words and phrases used throughout the board's statutes and rules.

24.141.402 APPRENTICE REGISTRATION (1) and (2) remain the same.

(3) In order to be recognized by the board as an apprentice, an applicant shall ~~either:~~ present evidence of enrollment in an apprentice training program registered by the Apprenticeship and Training Program, Department of Labor and Industry in the State of Montana.

~~(a) present evidence of enrollment in an apprentice training program registered by the Apprenticeship and Training Program, Department of Labor and Industry, state of Montana; or~~

~~(b) present evidence directly to the board of the individual's enrollment in an apprentice training program which is equivalent to programs of the Montana Department of Labor and Industry.~~

AUTH: 37-68-201, MCA
IMP: 37-68-303, MCA

REASON: The board is amending this rule to require all apprentices registered with the board to be enrolled in an apprentice training program that is registered by the Montana Department of Labor and Industry's Apprenticeship and Training Program. Under current rule, the board would register someone who simply presented an out-of-state apprentice card, without having any knowledge of the particular apprentice training program. Following amendment, the Montana public will be better protected because the board is aware of the quality and parameters of the programs registered by the Montana Department of Labor and Industry's Apprenticeship and Training Program.

24.141.405 FEE SCHEDULE (1) through (5) remain the same.

(6) Temporary permit ~~20~~ 50

(7) and (8) remain the same.

AUTH: 37-1-134, ~~37-1-141,~~ 37-68-201, MCA
IMP: 37-1-134, 37-1-141, 37-1-304, 37-1-305, 37-68-304, ~~37-68-307,~~ 37-68-310, 37-68-311, 37-68-312, 37-68-313, MCA

REASON: The board determined it is reasonable and necessary to amend this rule and increase the fee for temporary permits. The fee increase is necessary to comply with the provisions of 37-1-134, MCA, and keep the board's fees commensurate with the costs of projected staff time required to process, investigate, and issue the increased number of temporary permits. The fee change will affect approximately 240 permit applicants and result in a $7200 estimated increase in annual revenue.

24.141.501 MASTER, JOURNEYMAN AND RESIDENTIAL ELECTRICIAN APPLICATIONS ~~(1) The practical experience requirement set forth in 37-68-304 and 37-68-305, MCA, shall be of such nature as is satisfactory to the board. The board will only accept electrical experience in the construction field. Maintenance work, as defined in ARM 24.141.301, which is exempt under 37-68-103, MCA, will not be accepted towards fulfillment of the practical experience requirement.~~

(1) Applicants seeking a master electrician license who are graduate electrical engineers shall comply with the practical experience requirements of 37-68-304, MCA.

~~(2) For the journeyman license, a maximum of 50% of the electrical experience in the construction field may be residential in nature. The balance must be either commercial, industrial, institutional or a combination thereof.~~

(2) Applicants seeking a master electrician license (other than graduate electrical engineers) shall comply with the journeyman level experience requirements as defined in 37-68-102, MCA.

(3) For ~~the~~ all applicants seeking a master electrician license, the practical and journeyman level experience must be either commercial, residential, industrial, institutional, or a combination thereof. No less than 20 percent, but no more than 50 percent of the practical or journeyman level experience may be obtained by residential work.

~~(4)~~ (6) An applicant shall have one year from the date of board approval to take the examination for which the application was approved. If the examination is not taken within that one year period, the applicant will be required to submit a new application~~, provide~~ with written verification and pay the applicable fees.

(4) An applicant for a journeyman electrician license shall comply with the requirements of 37-68-305, MCA. For the journeyman license, a maximum of 50 percent of the practical experience may be residential in nature. The balance must be either commercial, industrial, institutional, or a combination thereof.

(5) An applicant for a residential electrician license shall comply with the requirements of 37-68-305, MCA.

~~(5)~~ (7) ~~All applications~~ Applications that require board review must be filed 15 days prior to the next scheduled board meeting. All applications shall be approved, ~~or disapproved~~ tabled, or denied on a case-by-case basis as the board may deem proper.

AUTH: 37-1-131, 37-68-201, MCA
IMP: 37-1-131, ~~37-68-103, 37-68-201,~~ 37-68-302, 37-68-304, 37-68-305, ~~37-68-310,~~ MCA

REASON: The 2009 Montana Legislature enacted Chapter 257, Laws of 2009 (House Bill 374), an act generally revising electrician licensing laws. The bill was signed by the Governor on April 17, 2009, and will become effective October 1, 2009. The board is amending this rule to comply with the 2009 statutory changes and to further implement the legislation.

The board determined it is reasonably necessary to amend this rule to combine the experience requirements for all three licensure categories for simplicity and ease of use for applicants.

The board is also amending this rule to specify the percentage of residential experience required for journeyman and master license applicants. This amendment will ensure that the public is protected by requiring licensees in both categories to obtain some residential experience, since most electricians work on residential projects.

24.141.502 TEMPORARY PRACTICE PERMIT (1) A temporary practice permit may be issued to an applicant ~~for a residential or journeyman electrician license~~ upon completion of an application, submission of verification of experience

~~as required under 37-68-305, MCA~~, payment of the appropriate fees, and approval by the board or designated board representative. An applicant for a master electrician license may be issued a journeyman temporary practice permit.

(2) An ~~applicant for a residential or journeyman electrician license may act as an electrician in the category for which an application is approved, as long as the applicant is employed by a licensed electrical contractor and a temporary practice permit has been issued~~ active temporary practice permit allows an applicant to perform work while employed by a licensed electrical contractor.

(3) A temporary practice permit issued to an applicant for an electrician license shall expire ~~90~~ 60 days from the date of issuance or upon receipt of licensure examination results.

(4) A temporary practice permit does not allow ~~a journeyman applicant~~ an individual to act as a responsible electrician for a ~~limited~~ licensed electrical contractor~~, nor does it permit the applicant to obtain an electrical contractor license. A temporary practice permit allows an applicant only to work under a properly licensed electrical contractor~~.

~~(5) An applicant for licensure by endorsement or reciprocity may be issued a temporary practice permit under the conditions above. The temporary practice permit shall expire at such time as the board approves the application and a license is issued or the board denies the application.~~

(5) Applicants who fail an exam with a score of 69 percent or less are not eligible for a temporary practice permit.

(6) ~~A second~~ Subsequent temporary practice ~~permit~~ permits may be issued at the discretion of the board. ~~on a case-by-case basis, only to an applicant who has failed the examination with a score of 70 to 74%, is registered to take the next scheduled examination and upon receipt of:~~

~~(a) a letter from the applicant requesting a second temporary practice permit and submitting proof of registration to take the next scheduled examination; and~~

~~(b) a letter from the employer stating that the applicant is employed and under the supervision of a licensed journeyman or master electrician.~~

~~(7) If the applicant does not register for the examination within 90 days, the second temporary practice permit shall expire.~~

AUTH: 37-1-319, 37-68-201, MCA
IMP: 37-1-305, MCA

REASON: The board determined it is reasonably necessary to amend this rule to clarify the process for and limitations of temporary practice permits and to achieve consistency in terminology within the rules.

The board notes that it is not clear in the current rule whether master electricians can obtain temporary permits and is amending this rule to clarify that temporary permits are available to all applicants. The board concluded that many applicants who qualify for temporary licenses do not follow through with taking the licensure examinations within 90 days. In addition, most projects are completed within the 90-day period and temporary permit holders simply leave the state without taking the qualifying exam. The board determined that this is not a good process to ensure that minimally qualified electricians are providing such services to the public.

In addition, with the availability of the new electronic exams online, applicants can take the licensure exams at the latest one week after being approved. The board is therefore amending (3) to reduce the period for temporary practice permits from 90 days to 60 days.

24.141.503 EXAMINATIONS (1) The examination for the residential, journeyman's or master's license may be administered and graded by a third party. The examination passing grade for all examinations is 75 percent.

~~(1)~~ (2) ~~A person~~ An applicant who ~~has failed to pass~~ fails any examination for which the application was made, may, upon the payment of the appropriate fee, take the next scheduled examination. However, if the applicant fails the ~~test~~ exam a second time, ~~they~~ the applicant may not take the test again within a six-month period, and in addition, must~~:~~ provide proof of having attended at least one eight-hour electrical code seminar approved by the board, since the initial failure to pass.

~~(a) demonstrate to the board by a sworn statement that the applicant has conscientiously studied at least 20 hours in the areas of the examination that were failed;~~

~~(b) provide a signed and dated list of the books or materials studied, specifying the name, author, edition (or latest copyright year); and~~

~~(c) provide proof of having attended at least one eight-hour electrical code seminar approved by the board, since the initial failure to pass.~~

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

(a) remains the same.

(b) make reapplication to the board; and

~~(c) demonstrate to the board by the applicant's sworn statement that the applicant has conscientiously studied at least 40 hours in all the areas covered by the last exam, 30 hours of which shall have been devoted to those test areas wherein the applicant failed to achieve a passing score;~~

~~(d) provide a signed and dated list of the books or materials studied, specifying the name, author, edition (or latest copyright year); and~~

(e) remains the same but is renumbered (c).

~~(3)~~ (4) An applicant who ~~has failed~~ fails the master or journeyman examination two or more times may apply for and take a lower level licensing examination without obtaining the supplementary education and study hours as set forth in ~~(1)~~ (2) and ~~(2)~~ (3) of this rule.

~~(4)~~ (5) An applicant who fails to take an examination within 18 months from the date of the last examination that was failed will be required to submit a new application, provide written verification, and pay the applicable fees. Upon receipt of a new application, the board will require the applicant to submit the documentation required in ~~(1)~~ (2) ~~or~~ and ~~(2)~~ (3) depending on the number of times the applicant has failed the examination.

~~(5)~~ (6) All examinations are open book. Applicants may only use:

~~(a) Candidates may only use:~~

(i) through (iii) remain the same but are renumbered (a) through (c).

~~(6)~~ (7) An applicant for an examination who, due to a specific physical, mental, or sensory impairment, requires special accommodation in examination

procedures, must submit a written request to the board office for the specific accommodation needed, at least 15 days prior to the scheduled exam.

~~(7)~~ (8) Any ~~candidate~~ applicant who takes an examination and does not pass the examination may request a review of the examination.

(a) ~~The department~~ The board will not modify examination results unless the ~~candidate~~ applicant presents clear and convincing evidence of error in the grading of the examination.

(b) ~~The department~~ The board will not consider any challenge to examination grading unless the total of the potentially revised score would result in a passing score.

~~(8) The procedure for requesting an informal review of examination results is as follows:~~

~~(a)~~ (9) ~~The~~ A request for rescoring of an application must be made in writing to the board office and received within 20 days of the date of the examination and must request a rescore of the examination.

~~(b) The following procedures apply to review of the results of the examination:~~

~~(i)~~ (a) The candidate will be allowed two hours to review the examination and must identify the challenged examination questions and state specifically why the results should be modified, pursuant to the NEC and/or Montana statutes and rules supporting the applicant's position.

~~(ii) The candidate must identify the challenged questions of the examination and must state specific reasons why the results should be modified with the NEC code book and/or Montana statutes and rules supporting the candidates position.~~

~~(iii)~~ (b) ~~Within 15 days of the candidate's review, the department~~ The board will review the examination and ~~candidate's~~ the applicant's justification at the next regularly scheduled board meeting and notify the ~~candidate~~ applicant in writing of the ~~department's~~ board's decision.

~~(9)~~ (10) ~~Anyone~~ Any applicant determined by the board to be cheating on an examination or using inappropriate material/equipment during an examination will fail and be required to wait at least one year ~~and~~ before ~~reapply~~ reapplying for licensure and before being allowed to reexamine. All such reexaminations will be scheduled and administered by the ~~department~~ board in Helena, Montana~~, require a written examination fee, and the candidate will be required to apply and schedule the examination with the board office~~.

~~(10) Examination appeals must be submitted and reviewed by the full board at its next regularly scheduled meeting.~~

AUTH: 37-1-131, 37-68-201, MCA
IMP: 37-1-131, ~~37-68-201,~~ 37-68-304, 37-68-305, MCA

REASON: The 2009 Montana Legislature enacted Chapter 257, Laws of 2009 (House Bill 374), an act generally revising electrician licensing laws. The bill was signed by the Governor on April 17, 2009, and will become effective October 1, 2009. The board is adding (1) to set forth the minimum passing score for the electrical licensure examinations which was previously included in statute, but repealed by the 2009 legislation.

The board is amending this rule throughout to update grammar and language choices, eliminate repetitive language, and renumber sections for better organization and ease of use. The board is proposing to eliminate the requirements for retake applicants to provide sworn statements as to their examination study time and materials. The board determined that because courses are now available online, they are easily obtained and verified by the board. The board is removing the sworn statement requirements as outdated and unnecessary.

The board is amending (7) to require that applicants submit requests for exam accommodations to the board at least 15 days prior to the exam. Because the board bears the responsibility for providing accommodations and the board at times must request additional information to establish appropriate accommodations, it is reasonably necessary to require some advance notice of accommodation requests.

The board is amending (9) to clarify the process for applicants to request a rescoring of a failed examination. The board concluded that the previous informal review process may mislead applicants to think that it includes a review of all exam questions and correct answers. The rescoring process actually focuses the request on the specific challenged questions and protects the integrity of the entire exam. The board is also amending this rule to clarify that it is the board, not department staff, that conducts the rescoring and decides to adjust the score or not.

24.141.504 LICENSURE BY RECIPROCITY OR ENDORSEMENT

(1) The board may, on a case-by-case basis, enter into a reciprocity agreement with another state or jurisdiction whose requirements are substantially equivalent or greater than the standards of this state for purposes of issuing ~~a license as~~ a residential or journeyman electrician license.

(2) through (c) remain the same.

(d) provides official written verification directly from the other state(s) or jurisdiction(s) that the license has been held by the applicant for one year, that the license is active, that the license is in good standing, and that the test score received was equal to or greater than 75 percent.

(3) and (4) remain the same.

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

REASON: The board is amending this rule to clarify that the minimum acceptable test score is 75 percent.

24.141.505 ELECTRICAL CONTRACTOR LICENSING (1) remains the same.

(2) The board shall issue a limited electrical contractor license to an applicant who submits the required documentation listed in (1) above and ~~there is~~ designates as the responsible electrician, a licensed journeyman, ~~designated~~ on a form prescribed by the board ~~as the responsible electrician~~.

(3) The board shall issue an unlimited electrical contractor license to an applicant who submits the required documentation listed in (1) above and

designates as the responsible electrician, ~~there is~~ a licensed master, ~~designated~~ on a form prescribed by the board ~~as the responsible electrician~~.

(4) through (7) remain the same.

AUTH: 37-1-131, 37-68-201, MCA
IMP: 37-68-312, MCA

REASON: The board is amending this rule to correct sentence structure and grammatical errors.

24.141.2102 CONTINUING EDUCATION ~~(1) Each master, journeyman, and residential electrician license shall not be renewed unless the continuing education requirements imposed by this rule have been met, prior to the renewal date set by ARM 24.101.413. Any licensee who fails to fulfill the continuing education requirements imposed by this rule shall cause the license to lapse. It is unlawful for a person whose license has lapsed to perform electrical work in this state. For reinstatement after the license has lapsed, the applicant shall have completed the continuing education requirements, certified that fact to the board, and met all other renewal requirements.~~

(1) Eight hours of continuing education must be obtained for each year in the renewal cycle. Requisite hours may be obtained during any portion of the renewal cycle. A minimum of four of the eight annual hours shall be certified as covering NEC updates. Newly licensed graduates of approved apprenticeship programs are exempt from continuing education requirements in the first renewal cycle. Licensees changing from journeyman or residential to a higher level of licensure are not exempt from completing the required hours of continuing education.

~~(2) To receive credit for continuing education, the following requirements must be met:~~

(2) Licensees are responsible for maintaining a record of completion certificates for courses or seminars and the hours attended. A random audit of completion certificates may be performed by the board at any time.

~~(a)~~ (3) ~~Courses~~ Curricula for courses or seminars must ~~have prior approval of curriculum~~ be preapproved by the State Electrical Board or designated board representative. Requests for approval of courses or seminars must be made no later than 60 days prior to the date of the seminar. Each preapproved course shall be assigned a course approval number by the board to be listed on the certificate of completion. Board approval of said courses and seminars expires August 1 of each license renewal year.

(a) Curricula of courses or seminars shall address NEC updates, or other subjects related to the electrical industry. Basic electric courses or apprentice-type courses will not be approved. Course curricula must provide a breakdown of the type of credit hours (NEC or industry), which must be included in the completion certificate.

(b) Credits for courses or seminars will be given in a minimum of four-hour increments.

(b) remains the same but is renumbered (c).

~~(c) Representatives of the department or State Electrical Board shall be able to attend and monitor the courses or seminars without charge.~~

(i) through (v) remain the same.

(vi) certified electrical inspectors; ~~and~~ or

(vii) remains the same.

~~(d) Maintaining a record of completion certificates for courses or seminars and the hours attended shall be the responsibility of the licensee. An audit of completion certificates may be requested by the board or designated board representative at any time. A minimum of eight hours each licensed year must be obtained per renewal cycle. All of the requisite hours may be obtained during any portion of the renewal cycle. A minimum of four of the eight hours shall be verified as being on the National Electrical Code updates.~~

~~(e) Curriculum of courses or seminars shall be on the National Electrical Code updates, or other subjects related to the electrical industry. Approval of course curriculum shall be at the discretion of the board. Board approval will contain a breakdown for the course or seminar regarding type of credit hours (code or industry). The breakdown must be included on the completion certificate.~~

(e) Certificates must be verifiable online within 30 days of completion of the course.

~~(f) Credit for courses or seminars will be given in a minimum of four-hour increments.~~

~~(g) Request for approval of courses or seminars must be made no later than the board meeting next preceding the seminar.~~

~~(h) The board must be notified 15 days prior as to the time and place of every course or seminar.~~

~~(i) In general, courses should be designed for advancing knowledge or skills of trained individuals; basic courses or apprentice type courses will not be approved.~~

~~(j)~~ (d) Certificates required by ~~(d)~~ (3) ~~above~~ must contain the following:

(i) date of course;

(ii) ~~location~~ title of course;

~~(iii) title of course including date of prior approval by the board;~~

~~(iv) name of instructor;~~

(v) ~~name of sponsoring agency~~ breakdown of NEC and/or industry related credit hours~~;~~ .

(vi) and (vii) remain the same but are renumbered (iii) and (iv).

~~(viii) breakdown of code and/or industry related credit hours.~~

(4) Representatives of the department or members of the State Electrical Board shall be able to attend and monitor the courses or seminars without charge.

~~(3)~~ (5) Continuing education courses approved by another state which has a reciprocal licensing agreement with the board will be honored ~~toward renewal~~. The reciprocal state's course approval number, ~~and~~ date of course, and credit breakdown must appear on the completion certificate.

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

AUTH: 37-1-131, 37-1-319, 37-68-201, MCA
IMP: 37-1-131, 37-1-306, 37-1-319, ~~37-68-201,~~ MCA

REASON: The board determined it is reasonable and necessary to amend this continuing education (CE) rule for better organization, simplicity, and ease of use.

The board is amending (1) to clarify that new licensees recently graduated from an apprenticeship program are not subject to the CE requirements in the first renewal cycle. This requirement has caused confusion and new graduates have had difficulty trying to meet the annual requirement in the short time frame post-graduation.

The board is amending (3) to require that providers submit requests for course approval within a minimum of 60 days prior to the scheduled course. The board notes that there are currently over 600 approved course providers and numerous new requests are received constantly, nearly all via e-mail. Due to the changes in technology surrounding CE provision and the resultant workload increase for board staff, the board is amending this rule to require the 60-day period.

The board is amending this rule to no longer require that CE certificates include course location and names of instructors and sponsoring agencies because CE courses are often available online and the board obtains the information through the course approval process.

The board is adding to (3)(e) the requirement that CE certificates are verifiable online within 30 days of the seminar. The board determined it is reasonable to require providers to have online verification to shift away from licensees providing paper proof of CE completion and to expedite verification of CE completion. Following amendment, the board will no longer require providers to notify the board of every CE seminar's location and time. Due to the online availability of many CE courses, the board determined this requirement is outdated and unnecessary.

The board is amending (5) of this rule to address the requirement for honoring CE courses from states in reciprocal licensing agreements with Montana. Following amendment, out-of-state CE certificates must show the breakdown of code or industry credit hours for consistency with in-state certificates and to ensure minimum CE requirements are met.

24.141.2301 UNPROFESSIONAL CONDUCT (1) and (2) remain the same.

~~(3) For purposes of this rule, the term "Montana State Electrical Code" is defined as the edition of the National Electrical Code or any other model electrical code which is adopted and/or as it may be modified by the Department of Labor and Industry's Building Codes Bureau for use as a construction standard in and by Montana's electrical industry.~~

AUTH: 37-1-131, 37-1-136, 37-1-319, 37-68-201, MCA
IMP: 37-1-307, 37-1-316, 50-60-601, 50-60-603, 50-60-604, MCA

REASON: The board is striking (3) from this rule as the definition for the Montana State Electrical Code is being added to ARM 24.141.301 in this notice.

24.141.2402 COMPLAINT PROCEDURE (1) remains the same.

(2) Complaints must be in writing, and shall be filed on the proper complaint form prescribed by the ~~board~~ department.

(3) Upon receipt of a signed complaint form, the ~~board office~~ department shall log in the complaint and assign it a complaint number. The complaint shall then be sent to the licensee complained about for a written response. Upon receipt of the licensee's written response, both complaint and response shall be considered by the screening panel of the board for appropriate action including dismissal, investigation or a finding of reasonable cause of violation of a statute or rule. The ~~board office~~ department shall notify both complainant and licensee of the determination made by the screening panel.

(4) and (5) remain the same.

AUTH: 37-1-131, 37-68-201, MCA
IMP: 37-1-101, 37-1-131, 37-1-307, 37-1-308, 37-1-309, MCA

REASON: The board is amending this rule to clarify that the administrative processing of complaints is not a board function, but a function provided for the board by the department.

5. The rule proposed to be repealed is as follows:

24.141.506 MASTER ELECTRICIAN QUALIFICATIONS found at ARM page 24-12542.

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

REASON: The board is repealing this rule because the qualifications for master electricians are being added to ARM 24.141.501 elsewhere in this notice.

6. Concerned persons may present their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the State Electrical Board, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2309, or by e-mail to dlibsdele@mt.gov, and must be received no later than 5:00 p.m., September 11, 2009.

7. An electronic copy of this Notice of Public Hearing is available through the department and the board's site on the World Wide Web at www.electrician.mt.gov. The department strives to make the electronic copy of this Notice conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems, and that technical difficulties in accessing or posting to the e-mail address do not excuse late submission of comments.

8. The board maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this board. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies the person wishes to receive notices regarding all board administrative rulemaking proceedings or other administrative proceedings. The request must indicate whether e-mail or standard mail is preferred. Such written request may be sent or delivered to the State Electrical Board, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, faxed to the office at (406) 841-2309, e-mailed to dlibsdele@mt.gov, or made by completing a request form at any rules hearing held by the agency.

9. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was contacted on May 20, 2009, by telephone.

10. Anne O'Leary, attorney, has been designated to preside over and conduct this hearing.

STATE ELECTRICAL BOARD
JACK FISHER, PRESIDENT

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

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

Certified to the Secretary of State August 3, 2009

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 37.86.3501, 37.86.3505, 37.86.3506, and 37.86.3515 pertaining to case management services for adults with severe disabling mental illness	))))))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION AND AMENDMENT

TO: All Concerned Persons

1. On September 2, 2009 at 10:30 a.m., the Department of Public Health and Human Services will hold a public hearing in the auditorium of the Department of Public Health and Human Services Building, 111 North Sanders, Helena, Montana, to consider the proposed adoption and amendment of the above-stated rules.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Department of Public Health and Human Services no later than 5:00 p.m. on August 24, 2009 to advise us of the nature of the accommodation that you need. Please contact Rhonda Lesofski, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-4094; fax (406) 444-9744; or e-mail dphhslegal@mt.gov.

3. The rule as proposed to be adopted provides as follows:

<u>RULE I CASE MANAGEMENT SERVICES FOR ADULTS WITH SEVERE DISABLING MENTAL ILLNESS, SEVERE DISABLING MENTAL ILLNESS</u>

(1) "Severe disabling mental illness" means with respect to a person who is 18 or more years of age that the person meets the requirements of (1)(a), (b), (c), or (d). The person must also meet the requirements of (1)(e). The person:

(a) has been involuntarily hospitalized for at least 30 consecutive days because of a mental disorder at Montana State Hospital (Warm Springs campus) at least once;

(b) has recurrent thoughts of death, recurrent suicidal ideation, a suicide attempt, or a specific plan for committing suicide;

(c) has a DSM-IV-TR diagnosis of:

(i) schizophrenic disorder (295);

(ii) other psychotic disorder (293.81, 293.82, 295.40, 295.70, 297.1, 297.3, 298.9);

(iii) mood disorder (293.83, 296.22, 296.23, 296.33, 296.34, 296.40, 296.42, 296.43, 296.44, 296.52, 296.53, 296.54, 296.62, 296.63, 296.64, 296.7, 296.80, 296.89);

(iv) amnestic disorder (294.0, 294.8);

(v) disorder due to a general medical condition (293.01, 310.1);

(vi) pervasive developmental disorder not otherwise specified (299.80) when not accompanied by mental retardation;

(vii) anxiety disorder (300.01, 300.21, 300.3); or

(viii) posttraumatic stress disorder (309.81).

(d) has a DSM-IV-TR diagnosis of personality disorder (301.00, 301.20, 301.22, 301.4, 301.50, 301.6, 301.81, 301.82, 301.83, or 301.90); and

(e) has ongoing functioning difficulties because of the mental illness for a period of at least six months or for an obviously predictable period over six months, as indicated by at least two of the following:

(i) a medical professional with prescriptive authority has determined that medication is necessary to control the symptoms of mental illness;

(ii) the person is unable to work in a full-time competitive situation because of mental illness;

(iii) the person has been determined to be disabled due to mental illness by the social security administration;

(iv) the person maintains a living arrangement only with ongoing supervision, is homeless, or is at imminent risk of homelessness due to mental illness; or

(v) the person has had or will predictably have repeated episodes of decompensation.

AUTH: 53-2-201, 53-6-113, MCA
IMP: 53-2-201, 53-6-101, MCA

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

37.86.3501 CASE MANAGEMENT SERVICES FOR ADULTS WITH SEVERE DISABLING MENTAL ILLNESS, DEFINITIONS ~~(1) "Assessment" means an integrated examination of the client's strengths, status, aspirations, needs, and goals in the life domains of residence, health, vocation, education, community participation, leisure time, and economics.~~

~~(2) "Assistance in daily living" means the ongoing monitoring of how a client is coping with life on a day-to-day basis and the activities a case manager performs which support a client in daily life. Assistance with daily living skills includes, but is not limited to, assistance with shopping, monitoring symptoms related to medications, assistance with budgeting, teaching use of public transportation, monitoring and tutoring with regard to health maintenance, and monitoring contact with the family members.~~

~~(3) "Case planning" means the development of a written individualized case management plan by the case manager and the client.~~

~~(4) "Coordination, referral, and advocacy" means providing access to and mobilizing resources to meet the needs of a client. This may include but is not limited to:~~

~~(a) advocating on behalf of a client with a local human services system, the social security system, the disability determination unit, judges, etc.;~~

~~(b) making appropriate referrals, including to advocacy organizations and service providers, and insuring that needed services are provided; and~~

~~(c) intervening on behalf of a client who otherwise could not negotiate or access complex systems without assistance and support.~~

~~(5) "Crisis response" means immediate action by an intensive case manager or care coordination case manager for the purpose of supporting or assisting a client or other person in response to a client's mental health crisis. Crisis response must be made in a manner consistent with the least restrictive alternative measures or settings available for the client's condition. Crisis response may include contact with a client's family members if necessary and appropriate.~~

(1) "Case management" services means services furnished to assist Medicaid eligible individuals who reside in a community setting, or are transitioning to a community setting, in gaining access to needed medical, social, educational, and other services.

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

(3) "Medically necessary service" means a service or item reimbursable under the Montana Medicaid program, as provided in ARM 37.82.102:

(a) that is reasonably calculated to prevent, diagnose, correct, cure, alleviate, or prevent the worsening of conditions in a patient which:

(i) endanger life;

(ii) cause suffering or pain;

(iii) result in illness or infirmity;

(iv) threaten to cause or aggravate a handicap; or

(v) cause physical deformity or malfunction.

(b) A service or item is not medically necessary if there is another service or item for the individual that is equally safe and effective and substantially less costly including, when appropriate, no treatment at all.

(c) Experimental services or services that are generally regarded by the medical profession as unacceptable treatment are not medically necessary for purposes of the Montana Medicaid program.

(d) Experimental services are procedures and items, including prescribed drugs, considered experimental or investigational by the U.S. Department of Health and Human Services, including the Medicare program, or the department's designated review organization, or procedures and items approved by the U.S. Department of Health and Human Services for use only in controlled studies to determine the effectiveness of such services.

~~(7)~~ (4) "Severe disabling mental illness" is defined in [RULE I]. ~~means with respect to a person who is 18 or more years of age that the person meets the requirements of (7)(a), (b), or (c). The person must also meet the requirements of (7)(d). The person:~~

~~(a) has been involuntarily hospitalized for at least 30 consecutive days because of a mental disorder at Montana State Hospital (Warm Springs campus) at least once;~~

~~(b) has a DSM-IV diagnosis of:~~

~~(i) schizophrenic disorder (295);~~

~~(ii) other psychotic disorder (293.81, 293.82, 295.40, 295.70, 297.1, 297.3, 298.9);~~

~~(iii) mood disorder (293.83, 296.2x, 296.3x, 296.40, 296.4x, 296.5x, 296.6x, 296.7, 296.80, 296.89);~~

~~(iv) amnestic disorder (294.0, 294.8);~~

~~(v) disorder due to a general medical condition (310.1);~~

~~(vi) pervasive developmental disorder not otherwise specified (299.80) when not accompanied by mental retardation; or~~

~~(vii) anxiety disorder (300.01, 300.21, 300.3);~~

~~(c) has a DSM-IV diagnosis of personality disorder (301.00, 301.20, 301.22, 301.4, 301.50, 301.6, 301.81, 301.82, 301.83, or 301.90) which causes the person to be unable to work competitively on a full-time basis or to be unable to maintain a residence without assistance and support by family or a public agency for a period of at least six months or is obviously predictable to continue for a period of at least six months; and~~

~~(d) has ongoing functioning difficulties because of the mental illness for a period of at least six months or for an obviously predictable period over six months, as indicated by at least two of the following:~~

~~(i) a medical professional with prescriptive authority has determined that medication is necessary to control the symptoms of mental illness;~~

~~(ii) the person is unable to work in a full-time competitive situation because of mental illness;~~

~~(iii) the person has been determined to be disabled due to mental illness by the social security administration; or~~

~~(iv) the person maintains a living arrangement only with ongoing supervision, is homeless, or is at imminent risk of homelessness due to mental illness; or~~

~~(v) the person has had or will predictably have repeated episodes of decompensation.~~

AUTH: 53-2-201, 53-6-113, MCA
IMP: 53-2-201, 53-6-101, MCA

37.86.3505 CASE MANAGEMENT SERVICES FOR ADULTS WITH SEVERE DISABLING MENTAL ILLNESS, SERVICE COVERAGE (1) Case management services for adults with severe and disabling mental illness include:

(a) ~~assessment;~~ comprehensive assessment and periodic reassessment of an eligible individual to determine service needs, including activities that focus on needs identification for any medical, educational, social, or other services. These assessment activities include the following:

(i) taking client history;

(ii) identifying the needs of the individual, and completing related documentation; and

(iii) gathering information from other sources, such as family members, medical providers, social workers, and educators, if necessary, to form a complete assessment of the eligible individual.

(b) ~~case planning;~~ development (and periodic revision) of a specific care plan based on the information collected through the assessment that:

(i) specifies goals and actions to address the medical, social, educational, and other services needed by the eligible individual;

(ii) includes activities such as ensuring the active participation of the eligible individual and working with the individual (or the individual's authorized health care decision maker) and others to develop those goals;

(iii) identifies a course of action to respond to the assessed needs of the eligible individual.

(c) ~~assistance in daily living;~~ referral and related activities (such as making referrals and scheduling appointments for the individual) to help the eligible individual obtain needed services, including activities that link the individual with medical, social, and educational providers or other programs and services that address identified needs and achieve goals specified in the care plan; and

(d) ~~coordination, referral, and advocacy; and~~ monitoring and follow-up activities, including activities and contacts to ensure that the care plan is effectively implemented and adequately addresses the needs of the eligible individual. Activity may be with the individual, family members, service providers, or other entities or individuals and conducted as frequently as necessary, including at least one annual monitoring, to help determine whether the following conditions are met:

(i) services are being furnished in accordance with the individual's care plan;

(ii) services in the care plan are adequate to meet the needs of the individual; and

(iii) there are changes in the needs or status of the eligible individual. Monitoring and follow-up activities include making necessary adjustments in the care plan and service arrangements with providers.

~~(e) crisis response.~~

(2) ~~Intensive case~~ Case management services for adults with severe disabling mental illness are ~~case management services~~ provided by a licensed mental health center in accordance with these rules and the provisions of Title 50, chapter 5, part 2, MCA.

(3) ~~Care coordination case management services for adults with severe disabling mental illness are case management services, as specified in (1), provided in accordance with these rules by a licensed mental health center. Care coordination case management services may include telephone services.~~ Case management may include contacts with noneligible individuals that are directly related to the identification of the eligible individual's needs and care, for the purpose of helping the eligible individual access services, identifying needs and supports to assist the eligible individual in obtaining services, providing case managers with useful feedback, and alerting case managers to changes in the eligible individual's needs.

(4) "Case management" does not include the:

(a) direct delivery of a medical, educational, social, or other service to which an eligible individual has been referred;

(b) transportation; and

(c) Medicaid determination and redetermination.

(5) Delivery of case management may be provided outside of a clinical or mental health program setting.

AUTH: 53-2-201, 53-6-113, MCA
IMP: 53-2-201, 53-6-101, 53-6-113, MCA

37.86.3506 CASE MANAGEMENT SERVICES FOR ADULTS WITH SEVERE DISABLING MENTAL ILLNESS, SERVICE REQUIREMENTS

(1) Individuals receiving case management services are allowed the free choice of any qualified Medicaid provider when obtaining case management services. An individual cannot be compelled to receive case management services.

(2) Case management services cannot restrict an individual's access to other Medicaid services.

(3) Case management services will not duplicate payments made to public agencies or private entities under the Medicaid program and other program authorities.

(4) A provider may not condition receipt of case management services on the receipt of other Medicaid services, or condition receipt of other Medicaid services on receipt of case management services.

(1) through (4) remain the same but are renumbered (5) through (8).

(9) Case management services must be provided on a one-to-one basis, to an individual by one case manager.

(10) Providers of case management services are prohibited from exercising the agency authority to authorize or deny the provision of other services under Medicaid.

(11) Case management providers must maintain case records that document for all individuals receiving case management services as follows:

(a) the name of the individual;

(b) the dates of the case management services;

(c) the time of services;

(d) the name of the provider agency and the person providing the case management services;

(e) the nature, content, units of the case management services received, and whether the goals specified in the case plan have been achieved;

(f) whether the individual has declined services in the care plan;

(g) the need for, and occurrences of, coordination with case managers of other programs;

(h) a timeline for obtaining needed services; and

(i) a timeline for reevaluation of the plan.

(12) Providers must also meet recording requirements as identified in ARM 37.85.414 and 37.85.410.

AUTH: 53-2-201, 53-6-113, MCA
IMP: 53-2-201, 53-6-101, MCA

37.86.3515 CASE MANAGEMENT SERVICES FOR ADULTS WITH SEVERE DISABLING MENTAL ILLNESS, REIMBURSEMENT (1) Case management services for adults with severe disabling mental illness will be reimbursed on a fee per unit of service basis as follows: ~~. For purposes of this rule, a unit of service is a period of 15 minutes.~~

(a) the department will pay the lower of the following for case management services:

(i) the provider's actual submitted charge for services; or
(ii) the amount specified in the department's Medicaid fee schedule.
(b) a unit of service is a period of 15 minutes as follows:
(i) one unit of service is from 9 through 23 minutes;
(ii) two units of service are from 24 through 38 minutes;
(iii) three units of service are from 39 through 53 minutes;
(iv) four units of service are from 54 through 68 minutes;
(v) five units of service are from 69 through 83 minutes;
(vi) six units of service are from 84 through 98 minutes;
(vii) seven units of service are from 99 through 113 minutes; and
(viii) eight units of service are from 114 through 128 minutes.
(c) if a provider sees an eligible individual more than one time in a day, the entire time spent with the individual that day should be totaled and billed once with the correct number of units described in (b), which must be supported by documentation requirements described in ARM 37.86.3305;
(d) providers are discouraged from consistently billing one unit of service for an eight minute service, because one unit of service is meant to be a period of 15 minutes;
(e) reimbursement cannot be made to providers for time spent traveling to provide a service or travel on behalf of an eligible individual for the following:
(i) direct delivery of a medical, educational, social, or other service to which an eligible individual has been referred;
(ii) transportation for an eligible individual;
(iii) Medicaid eligibility determination and redetermination activities.
~~(2) Group care coordination services may not exceed a maximum of eight participants per group.~~
~~(3)~~ (2) The department may, in its discretion, designate a single provider ~~to provide intensive~~ of case management services in a designated geographical region. Any provider designated as the sole ~~intensive~~ case management provider for a designated geographical region must, as a condition of such designation, agree to serve the entire designated geographical region.
~~(4) The department will pay the lower of the following for case management services for adults with severe disabling mental illness:~~
~~(a) the provider's actual submitted charge for services; or~~
~~(b) the amount specified in the department's Medicaid Mental Health Fee Schedule adopted in ARM 37.86.2207.~~

AUTH: 53-2-201, 53-6-113, MCA
IMP: 53-2-201, 53-6-101, 53-6-113, MCA

5. The Department of Public Health and Human Services (the department) is proposing new Rule I, and amendments to ARM 37.86.3501, 37.86.3505, 37.86.3506, and 37.86.3515 pertaining to case management services for adults with severe disabling mental illness (SDMI). The amendments are necessary to conform the rules to federal law, to promote the free choice of providers, and to add two diagnoses to the definition of the term SDMI. The department is taking this opportunity to continue its reorganization of the rules pertaining to mental health

services for youth with SED into a single chapter, separating them from rules that pertain to adults with SDMI and reforming the rules in accordance with current administrative rule standards.

The department is taking this opportunity to propose a cross-reference to the term medically necessary service, an expansion of the term severe disabling mental illness, a redefinition of case management service coverage and requirements, and reorganization of certain reimbursement requirements for case management services to adults with SDMI.

The proposed amendments are described in detail below.

Rule I and ARM 37.86.3501

The department is proposing amendments to this rule containing definitions applicable to case management services for adults with SDMI. The proposed amendments would eliminate the definitions for assessment, assistance in daily living, case planning, coordination, referral and advocacy, and crisis response. These deletions are necessary to conform Montana case management services for adults to regulations adopted by the U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services effective December 4, 2007.

The department is proposing amendments to the definition of the term case management services to align it with the definition of case management in Section 6052 of the Deficit Reduction Act of 2005 (Public Law No. 109-171) and 42 CFR 440.169. For more information, please see the discussion of case management under ARM 37.86.3505 below.

The department is proposing to add a reference to ARM 37.82.102 in the definition of medically necessary service, a service or item reimbursable under the Montana Medicaid program. The definition is not contained within the Mental Health rule chapters and providers have reported difficulty finding ARM 37.82.102.

ARM 37.86.3501 and Rule I

The department is proposing an expansion and clarification of the term severe disabling mental illness (SDMI) to better identify individuals who are eligible for case management and other Medicaid services. An individual may meet the criteria for SDMI under any one of four indicators of mental illness plus ongoing difficulty functioning because of the mental illness for a period of at least six months. Existing language is not clear and providers expressed concern about possibly inconsistent interpretations of the term. The proposed amendments would expand the definition to include individuals who have demonstrated suicidal behavior or an intent to commit suicide. The department believes this is necessary to partially address Montana's high suicide rate. This addition will allow interventions to be reimbursed when an individual is at risk of self harm. The proposed expansion of covered diagnoses would include post traumatic stress disorder (PTSD). The department is

proposing the addition of PTSD because of the disorder's disabling effects. Suicidality and PTSD were implicitly deleted from the definition of SDMI in 2001 because of the department's need to restrict services. The department believes that reinstatement is now appropriate and fiscally responsible.

The department is taking this opportunity to update the reference to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition Text Revision (DSM-IV), current edition, "DSM-IV-TR". The proposed amendments would also update the codes of covered diagnoses to be consistent with the DSM-IV-TR. The department is also taking this opportunity to move the substantive provisions related to SDMI into a separate rule, proposed new Rule I. This would make ARM 37.86.3501 consistent with current administrative rule formatting standards by removing substantive provisions from the definitions rule and placing them in a separate rule.

ARM 37.86.3505

The department is proposing replacement language in ARM 37.86.3505 describing in detail the service coverage for case management services for adults with severe disabling mental illness. On December 4, 2007, the U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS) adopted regulations 42 CFT 440.169 and 42 CFR 441.18 implementing the case management services provision of Section 6052 of the Deficit Reduction Act of 2005 (Public Law No. 109-171) and clarifying the limitations on the targeted case management services that qualify for federal financial participation (FFP). CMS is the federal agency responsible for administering the Medicaid program. The proposed amendments to ARM 37.86.3505 would make the rules consistent with current federal law, with the exceptions noted in the discussion of ARM 37.86.3506, below.

Targeted case management services (TCM) include information gathering, arranging for medical, educational, or social services to meet identified needs, monitoring and follow-up to assure that a plan of care is implemented, and periodic reassessment and updating. Consequently, the department is proposing use of the term "comprehensive assessment" to replace the assessment function in this rule. The allowable comprehensive assessment and reassessment activities would be limited to taking an individual's history, identifying the needs of the individual, and gathering information from other sources to form a complete assessment of the eligible individual.

Development of a specific care plan would replace case planning in the proposed amendments. The specific elements of a care plan and periodic revisions would be listed. The department is also proposing that assistance in daily living be replaced by referral and related activities; that coordination, referral, and advocacy be replaced by monitoring and follow-up; and that crisis response be eliminated altogether as reimbursable case management services.

In harmony with 42 CFR 441.18, the term case management services would not include the direct delivery of a medical, educational, social or other service, transportation, or Medicaid eligibility determination and redetermination.

However, the department is proposing to specify that delivery of case management services may be provided outside a clinical or mental health program setting.

ARM 37.86.3506

The department is proposing amendments to this rule containing the service requirements for case management services. First, the department is proposing new assurances that individuals receiving case management services are allowed the free choice of any qualified Medicaid provider. The proposed assurances would specify that an individual cannot be compelled to receive case management services, that case management services cannot restrict an individual's access to other Medicaid services, that a case management services provider may not condition receipt of case management services on the receipt of other Medicaid services, or condition receipt of other Medicaid services on receipt of case management services.

The department is also proposing an amendment to specifically warn providers that case management services will not duplicate payments made to public agencies or private entities under the Medicaid program and other program authorities.

While these assurances and warnings are not new policies for the department, the department is proposing to publish them together in this rule to make them easy for the public to find and the department to administer.

On May 13, 2009, CMS published, at 74 Federal Register 21232, a proposed rule that, if adopted in its entirety, would rescind 45 CFR 440.169(c), the limitations on case management services for residents of public institutions; 441.18(a)(5), the requirement that case management services be provided on a one-to-one basis; 441.18(a)(6), the prohibition against providers of case management services authorizing or denying other services; 441.18(a)(8)(vi), requiring the state to use a reimbursement methodology that pays and calculates rates on a unit of service that does not exceed 15 minutes; 441.18(a)(8)(viii), the state plan requirements pertaining to case management services to residents of public institutions; 441.18(c)(1), denying federal financial participation in case management services that are an integral component of another covered service; 441.18(c)(4), denying federal financial participation in case management services that are an integral component of other non-Medicaid program services, 441.18(c)(5), denying federal financial participation in administrative activities that meet the definition of case management services; and removing references to programs other than foster care from 441.18(c)(2) and 441.18(c)(3).

In view of the proposed rescision of these requirements, the department is not proposing amendments to meet the requirements of 45 CFR 441.169(c),

441.18(c)(1), and 441.18(c)(5) at this time. The department is proposing amendments to meet the requirements of 45 CFR 441.18(a)(5), 441.18(a)(6), 441.18(a)(8)(vi), and 441.18(c)(4) because they are consistent with current and proposed targeted case management rules of Montana.

ARM 37.86.3515

The department is proposing amendments to this rule pertaining to reimbursement of case management services providers. A more detailed explanation of the 15-minute billing increment is proposed. This should answer many of the questions providers have about the appropriate number of units to bill and will, consequently, reduce the number and cost of billing errors.

The department is also proposing an amendment that would reorganize the existing billing requirements into this rule. Providers of case management services would be allowed to bill for services to individuals transitioning from an institution to a community setting for the last 60 days. Case management activities must be coordinated with and not duplicative of institutional discharge planning. They must be provided on a one-to-one basis, to an individual by one case manager.

In furtherance of the freedom of choice amendments to ARM 37.86.3506 above, the department is proposing that case managers be required to inform eligible individuals they have the right to refuse case management at the time of eligibility determination and annually thereafter at the time of assessment. The case manager would be required to document in the case record that the individual has been informed of his or her free choice rights and has refused services.

Options Considered

Since some of the case management amendments are necessary to comply with federal law, and the other proposed amendments are necessary for good management of the case management services program, no other options were considered.

Persons and Entities Affected

There are ten mental health centers providing targeted case management services to individuals 18 years of age and older and 5,500 individuals receiving adult case management services in the state of Montana. All could be affected by the proposed changes.

Fiscal and Benefit Effects

The department expects the addition of suicidality and PTSD to the disorders eligible for consideration in the definition of severe disabling mental illness (SDMI) to increase the number of individuals eligible for Medicaid mental health, mental health services plan (MHSP) and developmental disability services by about 4%.

The department does not expect the changes proposed in this notice to affect the level of TCM services Medicaid recipients would receive. No effects on state or federal Medicaid expenditures are expected.

6. The department intends to apply these rules retroactively effective July 1, 2009. Retroactive application will have no negative impact on providers or consumers.

7. 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: Rhonda Lesofski, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; fax (406) 444-9744; or e-mail dphhslegal@mt.gov, and must be received no later than 5:00 p.m., September 10, 2009.

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

9. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 7 above or may be made by completing a request form at any rules hearing held by the department.

10. An electronic copy of this Proposal Notice is available through the Secretary of State's web site at http://sos.mt.gov/ARM/Register. The Secretary of State strives to make the electronic copy of the Notice conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the Secretary of State works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

11. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

/s/ John Koch
Rule Reviewer

/s/ Anna Whiting Sorrell
Anna Whiting Sorrell, Director
Public Health and Human Services

Certified to the Secretary of State August 3, 2009.

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

In the matter of the amendment of ARM 37.86.4701, 37.86.4705, and 37.86.4706 pertaining to Medicaid covered organ and tissue transplantation	)))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On September 3, 2009 at 10:30 a.m., the Department of Public Health and Human Services will hold a public hearing in Room 207 of 111 North Sanders at Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Department of Public Health and Human Services no later than 5:00 p.m. on August 24, 2009, to advise us of the nature of the accommodation that you need. Please contact Rhonda Lesofski, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-4094; fax (406) 444-9744; or e-mail dphhslegal@mt.gov.

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

37.86.4701 ORGAN TRANSPLANTATION, DEFINITIONS (1) "Organ transplantation" means the implantation of a ~~living (viable) functioning~~ functional human organ ~~or organ system including bone marrow~~ for the purpose of maintaining all or a major part of that organ function in the recipient.

(2) "Tissue transplantation" means the implantation of functional, human tissue. For purpose of the transplantation rules, tissue transplants include only corneal, bone marrow, and peripheral stem cell transplants.

~~(2)~~ (3) Organ and tissue transplantation includes the transplant surgery and those activities directly related to the transplantation. ~~These activities must be performed at a transplant facility if required by Medicare.~~ These activities may include:

(a) evaluation of the patient as a potential transplant candidate;

(b) pre-transplant preparation including histo-compatibility testing procedures;

(c) post surgical hospitalization;

(d) outpatient care, including Federal Drug Administration (FDA) approved medications deemed necessary for maintenance or because of resulting complications.

~~(3) "Transplant facility" means a medical facility which:~~

~~(a) has received medicare certification as a transplant facility, unless medicare does not certify facilities to perform transplants of a particular organ or system; and~~

~~(b) participates in the Montana Medicaid program.~~

AUTH: 53-2-201, 53-6-113, MCA
IMP: 53-2-201, 53-6-101, 53-6-141, MCA

37.86.4705 ORGAN TRANSPLANTATION, REQUIREMENTS (1) This rule provides the requirements for ~~m~~Medicaid coverage of organ and tissue transplantations. The requirements in this rule are in addition to those contained in ARM 37.85.401, 37.85.402, 37.85.406, 37.85.407, 37.85.410, 37.85.412, 37.85.413, 37.85.414, and 37.85.415.

(2) General requirements for ~~m~~Medicaid coverage of transplantations are as follows:

~~(a) The transplantation must be medically necessary.~~

~~(b) Prior authorization for referral to an out-of-state facility for an evaluation and organ transplantation must be obtained from the department or its designated review organization.~~

~~(c) The transplant candidate must meet the patient selection criteria set forth by the department's designated review organization.~~

~~(d) The medicaid program covers only the following organ transplantation services for persons over the age of 21, subject to the provisions of (2)(e):~~

~~(i) allogenic and autologous bone marrow;~~

~~(ii) kidney, inclusive of thoracic duct drainage and dental exam;~~

~~(iii) cornea;~~

~~(iv) lymphocyte immune globulin preparation.~~

~~(e) For purposes of establishing organ transplant requirements and to more specifically defining coverage or non-coverage of various types of organ transplantations, the department hereby adopts and incorporates by reference the following sections of the Medicare Coverage Issues Manual (HCFA-Pub. 6) published by the health care financing administration of the United States department of health and human services. A copy of the incorporated sections of the Medicare Coverage Issues Manual (HCFA-Pub. 6) may be obtained from the Department of Public Health and Human Services, Health Policy and Services Division, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951. The incorporated sections are as follows:~~

~~(i) HCFA-Pub. 6, section 35-30, as amended through March 1992, pertaining to allogenic and autologous bone marrow transplantation;~~

~~(ii) HCFA-Pub. 6, section 35-50, as amended through September 1991, pertaining to non-coverage of the medical procedure cochleostomy with neurovascular transplant for treatment of meniere's disease;~~

~~(iii) HCFA-Pub 6, section 35-53.1, as amended September 1991, pertaining to pediatric liver transplantation;~~

~~(iv) HCFA-Pub. 6, section 35-58, as amended through April 1983, pertaining to thoracic duct drainage (TDD) as a covered service when furnished to a kidney~~

~~transplant recipient or individual approved to receive a transplant;~~

~~(v) HCFA-Pub. 6, section 35-82, as amended through January 1988, pertaining to non-coverage of pancreas transplantation;~~

~~(vi) HCFA-Pub. 6, section 35-87, as amended through May 1989, pertaining to heart transplants;~~

~~(vii) HCFA-Pub. 6, section 45-22, as amended through June 1988, pertaining to FDA approval and use of lymphocyte immune globulin preparations;~~

~~(viii) HCFA-Pub. 6, section 50-23, as amended through July 1990, pertaining to the safe and effective use of histocompatibility testing procedures; and~~

~~(ix) HCFA-Pub. 6, section 50-26, as amended through May 1989, pertaining to dental exam as part of a comprehensive workup prior to a renal transplant surgery.~~

(a) Medicaid will only cover medically necessary organ or tissue transplants.

(i) Services must comply with Medicare coverage guidelines for organ or tissue transplant service.

(ii) If Medicare coverage guidelines are not available, the department or the department's designated review organization will review the requested transplant surgery to determine whether the surgery is medically necessary and is not experimental or investigational.

(b) All cases presented for organ or tissue transplantation require prior authorization from the department's designated review organization, with the exception of corneal transplantation.

(c) Organ transplants must be performed in a Medicare certified center. If Medicare has not designated a certified center, the transplant must be performed by a program that is located in a hospital or parts of a hospital certified by the Organ Procurement and Transplantation Network (OPTN) for the specific organ being transplanted.

(3) ~~The medicaid program covers organ transplantation services for persons 21 years of age or less as determined medically necessary, subject to the provisions of ARM 37.86.4701 and (2)(a) through (2)(e) of this rule.~~ Services considered experimental and/or investigational are not a benefit of the Montana Medicaid Program.

(a) Experimental and/or investigational services include:

(i) Procedures and items including prescription drugs, considered experimental and/or investigational by the U.S. Department of Health and Human Services or any other appropriate federal agency.

(ii) Procedures and items, including prescribed drugs, provided as part of a control study, approved by the Department of Health and Human Services or any other appropriate federal agency to demonstrate whether the item, prescribed drug, or procedure is safe and effective in caring, preventing, correcting, or alleviating the effects of certain medical conditions.

(iii) Procedures and items, including prescribed drugs, which may be subject to question, but are not covered in (3)(a)(i) and (ii), will be evaluated by the department or the department's designated medical review organization to determine whether they are experimental and/or investigational.

AUTH: 53-2-201, 53-6-113, MCA

IMP: 53-2-201, 53-6-101, 53-6-113, 53-6-131, 53-6-141, MCA

37.86.4706 ORGAN TRANSPLANTATION, REIMBURSEMENT

(1) Reimbursement for physician services in organ transplantation is provided in accordance with the methodologies described in ARM 37.85.212 and 37.86.105.

(2) All hospital services for organ and tissue transplantation are reimbursed as provided for in ARM ~~46.12.509~~ 37.85.212, 37.86.2801, 37.86.2806, 37.86.2907, 37.86.2916, 37.87.3005, 37.87.3009, 37.87.3020, 37.87.3025, and 37.87.3037.

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

4. The Department of Public Health and Human Services (the department) is proposing the amendment of ARM 37.86.4701, 37.86.4705, and 37.86.4706 pertaining to Medicaid coverage of organ and tissue transplants. The proposed amendments are necessary to extend coverage of medically necessary organ and tissue transplantations to include all Medicare covered organ and tissue transplants to all Medicaid recipients. Prior to these proposed amendments, medically necessary transplants were covered services for Medicaid-eligible children through age 20 and were limited to bone marrow, kidney, cornea, and lymphocyte immune globulin for adults.

The department is taking this opportunity to update requirements for Medicaid coverage of transplant services and references pertaining to provider reimbursement.

The proposed amendments are described in detail below.

ARM 37.86.4701

The department is proposing amendments to this rule containing definitions of terms applicable to the transplant rules. The amendments would delete the reference to bone marrow in the definition of "organ transplantation" because it would be included in a new definition, "tissue transplantation". The department is proposing that "tissue transplantation" including corneal, bone marrow, and peripheral stem cell transplants be added to "tissue transplantation" throughout the subchapter.

ARM 37.86.4705

The department is proposing amendments that would update this rule containing coverage requirements and would remove all references to the Medicare Coverage Issues Manual (HCFA Pub. 6). The proposed amendments would make the rule interpretation and procedure coding advice provisions of ARM 37.85.412 and 37.85.413 available to providers of Medicaid transplantation services. These provisions have been created since this rule was last amended and the department

believes they should be added to the references in this rule to avoid confusion about their applicability.

The proposed amendments would except corneal transplantation from the requirement that transplantation services be authorized by the department's designated review organization before they can be provided.

We are also proposing to specify that the U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS), the federal agency responsible for administering the Medicare and Medicaid programs, is the agency that certifies transplant centers. The department is proposing the addition of a provision to address the possibility that Medicare has not designated a certified center for certain transplants. In such event, the department proposes that the transplant be performed in a facility certified by the Organ Procurement and Transplantation Network (OPTN) for the specific organ being transplanted.

The department is also proposing a methodology for determining whether a transplant procedure or drug is experimental or investigational and, therefore, not covered by Medicaid. The proposal would follow determinations by the U.S. Department of Health and Human Services or any other appropriate federal agency that a procedure or drug is experimental or investigational. Any procedure or drug provided as part of a control study, approved by the Department of Health and Human Services or any other appropriate federal agency would also be considered experimental or investigational. For procedures or drugs subject to question, but not determined experimental or investigational by the Department of Human Services or other federal agency, the department proposes that they be evaluated by the department or the department's designated medical review organization to determine whether they are experimental or investigational.

ARM 37.86.4706

The department is taking this opportunity to update the reimbursement of transplantation services. The amendments would remove an obsolete reference to repealed ARM 46.12.509 and substitute references to ARM 37.85.212, 37.86.2801, 37.86.2806, 37.86.2907, 37.86.2916, 37.87.3005, 37.87.3009, 37.87.3020, 37.87.3025, and 37.87.3037, setting forth reimbursement methodologies under the Prospective Payment System (PPS).

Options Considered

Since the proposed implementation of medically necessary transplantation benefits for persons over the age of 20 are the result of a policy decision, other options were not considered. The other proposed amendments are necessary to update these rules to reflect current department practices.

These proposed amendments are intended to have a positive effect on persons eligible for Montana Medicaid. They would be able to access transplantation

services through the Medicaid program with no age limit restrictions.

Estimated Financial and Budget Impacts

The total projected budget increase for the transplantation services proposed in these amendments for state fiscal year (SFY) 2010 is $5,369,536. Of this, the state share would be $1,722,010 and the federal share $3,647,526. For SFY 2011 the total increase is projected at $5,691,708. The state share would be $1,837,853 and federal share would be $3,853,855. The projections are based on the estimation that there will be ten adult transplants each fiscal year.

5. The department intends to apply these rules retroactively to October 4, 2008. A retroactive application of the proposed rules would not result in a negative impact to any affected party.

6. 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: Rhonda Lesofski, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; fax (406) 444-9744; or e-mail dphhslegal@mt.gov, and must be received no later than 5:00 p.m., September 10, 2009.

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

8. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 6 above or may be made by completing a request form at any rules hearing held by the department.

9. An electronic copy of this Proposal Notice is available through the Secretary of State's web site at http://sos.mt.gov/ARM/Register. The Secretary of State strives to make the electronic copy of the Notice conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the Secretary of State works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

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

/s/ John Koch
Rule Reviewer

/s/ Anna Whiting Sorrell
Anna Whiting Sorrell, Director
Public Health and Human Services

Certified to the Secretary of State August 3, 2009.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 42.19.406 relating to extended property tax assistance program (EPTAP)	)))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On September 2, 2009, at 8:30 a.m., a public hearing will be held in the Third Floor Conference Room (329) located in the East Wing of the Sam W. Mitchell Building, at Helena, Montana, to consider the amendment of the above-stated rule.

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., August 17, 2009, 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) 444-5828; fax (406) 444-3696; or e-mail canderson@mt.gov.

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

42.19.406 EXTENDED PROPERTY TAX ASSISTANCE PROGRAM

(1) The department will determine which taxpayers are potentially eligible for the extended property tax assistance program and will mail applications to those taxpayers. The department determines the taxpayers who are potentially eligible during the first year of the reappraisal cycle (tax year 2009 for the current cycle) based upon the following requirements set forth in 15-6-193, MCA:

(a) A potentially eligible property is limited to a qualified residence which means any class four residential dwelling in Montana that is a single-family dwelling unit, unit of a multiple-unit dwelling, trailer, manufactured home, or mobile home, and as much surrounding land, not exceeding one acre, as is reasonably necessary for use of such a dwelling. The dwelling must be actually occupied by itself or in combination with no more than one other class four residential dwelling in Montana for at least seven months each year;

(b) The qualified residence must be the same residence as was owned by the taxpayer on December 31, 2008;

(c) The taxable value of the qualified residence must have experienced greater than a 24% increase due to reappraisal; and

(d) The property taxes on the qualified residence must have increased by $250 or more between tax year 2008 and tax year 2009, based upon the tax year

2008 mill levy.

(2) An individual unit of a multiple-unit dwelling that meets the qualification requirements of (1)(a) through (1)(d) may be eligible for the benefits allowed under this program, provided that the owner of the individual unit meets the occupancy requirement in (1)(a). The department will mail one application form to the owner of a multiple-unit dwelling to determine if the owner meets the occupancy requirement on an individual unit, and if not, there will be no benefit granted to the owner of a multi-unit dwelling through this program.

(3) In order to receive the tax rate adjustment, the qualified residence property owner of record, the qualified residence property owner's agent, or a qualifying entity of a qualified residence must annually complete and forward an application to the Department of Revenue, P.O. Box ~~5805~~ 6169, Helena, Montana 59604-~~5805~~ 6169.

(a) In order for qualifying taxpayers to receive the tax rate adjustment for tax year ~~2003~~ 2009, the department ~~mailed letters~~ will mail applications to taxpayers ~~by~~ in ~~June 30~~ August~~, 2003~~ 2009, advising them that completed applications must be postmarked on or before ~~July 25, 2003~~ the due date preprinted on the application form, and returned to the department if they ~~want~~ wish to be considered for the tax rate adjustment. The preprinted due date will be 30 calendar days from the date of the application being mailed to the taxpayer by the department. This notification will also advise~~d~~ the applicants that applications postmarked after ~~July 25, 2003~~ the preprinted due date~~,~~ will not be considered for the tax rate adjustment.

(b) Beginning with tax year ~~2004~~ 2010 and all subsequent tax years, the completed applications must be postmarked on or before April 15 in order for applicants to receive the tax rate adjustment for the year the tax rate adjustment is sought. Applications postmarked after April 15 will not be considered for the tax rate adjustment provided for under this section.

(2) through (4) remain the same but are renumbered (4) through (6).

~~(5)~~(7) Income for an entity includes those shown in ~~(2)~~ (4) and also the income of any natural person or entity that is a trustee of, or controls, 25% or more of the entity.

(6) remains the same but is renumbered (8).

~~(7)~~(9) The completed application form must include:

(a) the applicant's social security number or federal identification number (FEIN); and

(b) copies of the applicant's federal individual, partnership, estates or trusts, or corporate income tax return for the tax year immediately preceding the year of the application. For example: complete copies (including all schedules) of the appropriate ~~2003~~ 2009 tax year return must accompany a ~~2004~~ 2010 application for the extended property tax assistance program, which is due by April 15, ~~2004~~ 2010.

~~(8)~~(10) Failure to provide the required information in ~~(2)~~ (4) through ~~(7)~~ (9) will result in the application being denied. All tax return information will be treated as confidential by the department.

(9) and (10) remain the same but are renumbered (11) and (12).

~~(11)~~(13) For tax year ~~2003~~ 2009, assessment notices will be prepared and mailed for all parcels of real property without regard to whether parcels qualify for the program as provided in this rule. The property reappraisal values are not

impacted by the provisions of the extended property tax assistance program, and in accordance with 15-7-102, MCA, the department will not issue or mail revised assessments for those parcels qualifying for the extended property tax assistance program.

~~(12)~~(14) Beginning with tax year ~~2004~~ 2010, and in accordance with 15-7-102, MCA, the department will not mail assessment notices for parcels when a valuation change is due solely to successful qualification for the extended property tax assistance program, since the market value of the property is not impacted by the program.

(13) and (14) remain the same but are renumbered (15) and (16).

AUTH: 15-1-201, MCA
IMP: 15-6-193, MCA

REASONABLE NECESSITY: The proposed amendments to this rule are made to reflect and clarify the direction of the 2009 Legislature relative to the Extended Property Tax Assistance Program (EPTAP) through its passage of HB 658. The significant changes to the EPTAP enacted with the passage of HB 658 included the definition of a "qualified residence", and reducing the benefit to land associated with a qualified residence from five acres previously, to one acre for this reappraisal cycle (January 1, 2009, through December 31, 2014). Other amended language is needed to clarify how the program is applied to multi-unit dwellings, and it is also necessary to clarify the administrative processing of applications for tax year 2009, and then also for the following five years of the reappraisal cycle. Dates are also amended to mesh with dates associated with this reappraisal cycle.

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; telephone (406) 444-5828; fax (406) 444-3696; or e-mail canderson@mt.gov and must be received no later than September 10, 2009.

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 www.mt.gov/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 web site accessible at all times, concerned persons should be aware that the web site 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 e-mail or mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding particular subject matter or matters. Notices will be sent by e-mail unless a mailing preference is noted in the request. 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 contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was contacted on July 22, 2009, by regular mail.

/s/ Cleo Anderson	/s/ Dan R. Bucks
CLEO ANDERSON	DAN R. BUCKS
Rule Reviewer	Director of Revenue

Certified to Secretary of State August 3, 2009

BEFORE THE SECRETARY OF STATE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 44.2.202, 44.2.203, 44.5.121, and repeal of 44.5.111 regarding fees and procedures pertaining to the Business Services Division	))))))	NOTICE OF PROPOSED AMENDMENT AND REPEAL NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons

1. On September 14, 2009, the Montana Secretary of State proposes to amend and repeal the above-stated rules.

2. The Secretary of State will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Secretary of State no later than 5:00 p.m. on August 31, 2009, to advise us of the nature of the accommodation that you need. Please contact Jorge Quintana, Secretary of State's Office, P.O. Box 202801, Helena, Montana, 59620-2801; telephone (406) 444-5375; fax (406) 444-4249; TDD/Montana Relay Service (406) 444-9068; or e-mail jquintana@mt.gov.

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

44.2.202 FEES FOR FACSIMILE TRANSMISSIONS OF DOCUMENTS

(1) The Secretary of State's Office, except the Business Services Division, shall charge $3 for the facsimile transmission of documents, ten pages or less. Documents exceeding ten pages shall cost $.50 for each additional page transmitted by facsimile machine to the requester.

(2) remains the same.

AUTH: ~~30-9-403, 35-1-1202~~ 2-15-405, 35-1-1307, MCA
IMP: ~~30-9-403, 35-1-1202~~ 2-15-405, 35-1-1206, MCA

REASON: This amendment is being proposed to eliminate any customer confusion regarding the fee charged for faxing because the Business Services Division charges a flat rate of $5.00 to avoid invoicing and to meet the requirement for paying at the time of service.

44.2.203 PRIORITY AND EXPEDITED HANDLING OF DOCUMENTS

(1) through (3) remain the same.

(4) The priority and expedite fees are in addition to the filing fee for the document being processed.

AUTH: 30-9A-526, 35-1-1307, 35-2-1107, MCA
IMP: 30-13-217, 35-2-1003, 35-12-521, MCA

REASON: The title is amended to add “AND EXPEDITED” and (4) is added to clarify fees charged by the Business Services Division.

44.5.121 MISCELLANEOUS FEES (1) remains the same.

(2) ~~Certified copy of any document~~ Copy per name for any business entity related document with or without certification 10.00

(3) Business Services documents or copies returned by fax 5.00

(a) priority handling ~~for all other documents/requests~~ per document or request 20.00

(b) through (4) remain the same.

AUTH: ~~2-6-103,~~ 2-15-405, ~~30-9A-525, 35-1-1206~~ 30-9A-526, 35-1-1307, 35-2-1107, 35-7-103, MCA
IMP: 2-6-103, 2-15-405, 30-9A-525, 30-13-320, 35-1-1206, 35-2-119, 35-2-1003, ~~35-7-101~~, 35-7-103, MCA

REASON: The amendment to (2) is proposed to eliminate customer confusion when a request is made for a noncertified copy of a business entity document. The fees were streamlined in 2008 to eliminate billing for most corporate filings. The fee change did not result in additional revenue to the Secretary of State's Office and fees continue to remain commensurate with costs. The amendment to (3) is proposed to eliminate customer confusion on how priority handling fees are applied to their documents.

4. The Secretary of State proposes to repeal the following rule:

44.5.111 FORMS, is found on page 44-220 of the Administrative Rules of Montana.

AUTH: 13-1-202, 13-19-104, MCA
IMP: 13-19-105, MCA

REASON: The Business Services Division allows business entities to draft their own charter documents or utilize the Secretary of State's available forms. The information contained in the existing rule only depicts a few of the hundreds of business entity documents filed, so the Business Services Division is proposing to repeal the rule in its entirety.

5. Concerned persons may submit their data, views, or arguments concerning the proposed actions in writing to: Jorge Quintana, Secretary of State's Office, P.O. Box 202801, Helena, Montana, 59620-2801; telephone (406) 444-5375; fax (406) 444-4249; or e-mail jquintana@mt.gov, and must be received no later than 5:00 p.m., September 10, 2009.

6. If persons who are directly affected by the proposed actions wish to express their data, views, or arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments to Jorge Quintana at the above address no later than 5:00 p.m., September 10, 2009.

7. If the agency receives requests for a public hearing on the proposed action from either 10% or 25, whichever is less, of the persons directly affected by the proposed action; from the appropriate administrative rule review committee of the Legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those directly affected has been determined to be 10,500 persons based on the number of Business Services clients impacted.

8. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 5 above or may be made by completing a request form at any rules hearing held by the department.

9. An electronic copy of this Proposal Notice is available through the Secretary of State's web site at http://sos.mt.gov/ARM/Register. The Secretary of State strives to make the electronic copy of this Notice conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the Secretary of State works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

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

/s/ Jorge Quintana
JORGE QUINTANA
Rule Reviewer

/s/ Linda McCulloch
LINDA MCCULLOCH
Secretary of State

Dated this 3rd day of August, 2009.

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

In the matter of the amendment of ARM 24.159.1006 and 24.159.1206 cosmetic procedure standards, and adoption of NEW RULE I nonroutine applications pertaining to nursing	)))))	NOTICE OF AMENDMENT AND ADOPTION

TO: All Concerned Persons

1. On February 26, 2009, the Board of Nursing (board) published MAR Notice No. 24-159-73 regarding the public hearing on the proposed amendment and adoption of the above-stated rules, at page 252 of the 2009 Montana Administrative Register, issue no. 4.

2. On March 19, 2009, a public hearing was held on the proposed amendment and adoption of the above-stated rules in Helena. Several comments were received by the March 27, 2009, deadline.

3. The board has thoroughly considered the comments and testimony received. A summary of the comments received and the board's responses are as follows:

COMMENT 1: One commenter opined that the proposed amendments to ARM 24.159.1006 and 24.159.1206 unnecessarily jeopardize patient safety by allowing advanced practice registered nurses (APRNs) to supervise licensed practical (LPNs) or registered nurses (RNs) in cosmetic procedures. The commenter stated that an APRN's education does not include the appropriate training to supervise cosmetic procedures and that cosmetic procedures should only be performed by licensed physicians or under a licensed physician's direct, on-site supervision.

RESPONSE 1: APRNs are allowed by law and administrative rule to supervise RNs and LPNs in all circumstances. Since certain APRNs possess the knowledge, skills and abilities to perform cosmetic procedures independently, it is within the APRN's scope of practice to supervise RNs and LPNs in performing these procedures. The board notes that APRNs and dermatologists both implement patient safety as a primary concern.

COMMENT 2: A commenter stated that the curriculum goals of the LPN education programs do not prepare the LPN to understand the complexity of cosmetic medical procedures and potential adverse events or complications.

RESPONSE 2: APRN education and training vastly exceeds that of LPNs. APRNs who have had the proper training and who maintain ongoing competency in the performance of specific cosmetic procedures are qualified to provide on-site

supervision of LPNs working within the APRNs' scope of practice. The board acknowledges that medical doctors may be trained and qualified to perform certain cosmetic procedures that are outside the APRN scope of practice.

COMMENT 3: One commenter suggested amendments to several sections of New Rule I, but offered no rationale for the suggested changes.

RESPONSE 3: The board concluded that the rule as proposed succinctly and clearly described the conditions under which a licensure application would be classified as nonroutine.

COMMENT 4: A commenter suggested replacing (1)(d) in New Rule I with a more narrow description of applicants whose use of alcohol or other mood-altering substances adversely affected the applicant's ability to practice a profession.

RESPONSE 4: Following discussion and noting that chemical dependency is a disorder requiring diagnosis, the board decided to amend (1)(d) to address applicants with physical or mental conditions or having used alcohol or mood-altering substances to the detriment of their nursing practice.

4. The board has amended ARM 24.159.1006 and 24.159.1206 exactly as proposed.

5. The board has adopted NEW RULE I (24.159.403), with the following changes, stricken matter interlined, new matter underlined:

NEW RULE I (24.159.403) NONROUTINE APPLICATIONS (1) through (c) remain as proposed.

(d) a physical or mental condition~~, including chemical dependency,~~ or the use of alcohol or other mood-altering substances that may adversely affect the applicant's ability to practice nursing;

(e) through (5) remain as proposed.

BOARD OF NURSING
KATHY HAYDEN, LPN, PRESIDENT

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

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

Certified to the Secretary of State August 3, 2009

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

In the matter of the amendment of ARM 24.171.401 fees, 24.171.502 qualifications, and the adoption of NEW RULE I pertaining to outfitters	))))	NOTICE OF AMENDMENT AND ADOPTION

TO: All Concerned Persons

1. On February 26, 2009, the Board of Outfitters (board) published MAR Notice No. 24-171-27 regarding the public hearing on the proposed amendment and adoption of the above-stated rules, at page 256 of the 2009 Montana Administrative Register, issue no. 4.

2. On March 19, 2009, a public hearing was held on the proposed amendment and adoption of the above-stated rules in Helena. Several comments were received by the March 27, 2009, deadline.

3. The board has thoroughly considered the comments and testimony received. A summary of the comments received and the board's responses are as follows:

COMMENT 1: Four commenters supported the adoption of New Rule I.

RESPONSE 1: The board appreciates all comments received regarding the board's rulemaking projects.

COMMENT 2: One commenter suggested the board amend New Rule I so the rule applies to existing fishing outfitter operations plans as well as new operations plans.

RESPONSE 2: The board concluded that allowing the general surface water reference in amendments to existing fishing outfitter operations plans falls within the board's intent in proposing the new rule. The board is amending the new rule accordingly.

4. The board has amended ARM 24.171.401 and 24.171.502 exactly as proposed.

5. The board has adopted New Rule I (24.171.505), with the following changes, stricken matter interlined, new matter underlined:

NEW RULE I (24.171.505) FISHING OUTFITTER OPERATIONS PLAN

(1) A fishing outfitter may include in a proposed or an existing operations plan, a general reference to "all surface waters governed by the Montana Stream Access Law, §23-2-302, MCA and accessible by public access points not requiring a

permit issued by a state or federal agency(ies)". Alternatively, the outfitter may include in ~~the~~ a proposed or existing operations plan specific surface waters governed by the Montana Stream Access Law and accessible by public access points not requiring a permit issued by a state or federal agency, by including detailed descriptions of those specific waters as provided in 37-47-304(2)(h) and (i), MCA.

(2) Surface waters accessible only by private land or access points requiring a permit issued by a state or federal agency(ies) may only be included in a fishing outfitter's proposed or existing operations plan by describing the waters in detail as provided in 37-47-304(2)(h) and (i), MCA. A copy of the permit(s) issued by the appropriate state or federal agency(ies) must be submitted to the board office with the outfitter's proposed operations plan or any amendment to an existing operations plan.

6. In order to make New Rule I (24.171.505) consistent with the style and formatting requirements of the Secretary of State, the section symbol in subsection (1) is interlined. Deletion of the section symbol is a typographical correction only, and does not change the meaning or intent of the rule.

BOARD OF OUTFITTERS
LEE KINSEY, CHAIRPERSON

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

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

Certified to the Secretary of State August 3, 2009

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

In the matter of the amendment of ARM 37.111.230 pertaining to trailer courts and tourist campgrounds	)))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On May 28, 2009 the Department of Public Health and Human Services published MAR Notice No. 37-474 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 859 of the 2009 Montana Administrative Register, Issue Number 10.

2. The department has amended the following rule as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined.

37.111.230 SERVICE BUILDINGS AND OTHER SERVICE FACILITIES FOR GENERAL SERVICES CAMPGROUNDS (1) A central service building must be provided for each general services campground ~~that has spaces designated for use by dependent recreational vehicles or tents~~. The central service building must be approved by the building authority and must contain toilets and other plumbing fixtures, as follows:

(a) and (b) remain as proposed.

(c) The service building must be conveniently located within a radius of 300 feet from all spaces designated for use by dependent recreational vehicle or tents ~~sites to be served~~.

(d) through (2)(c)(ii) remain as proposed.

AUTH: 50-52-102, MCA
IMP: 50-52-102, MCA

3. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

COMMENT #1: A number of commentors assert that the entire rule for trailer courts and campgrounds, ARM 37.111, subchapter 2 needs revision, not just rule ARM 37.111.230 pertaining to Service Buildings and Other Service Facilities for General Services Campgrounds.

RESPONSE #1: The department agrees that a revision of ARM 37.111, subchapter 2 is necessary. The revision will require thoughtful deliberation taking into consideration all stakeholders and a coordinated effort between state agencies, local

health jurisdictions, business owners, and the general public. The department intends to pursue a full revision as soon as possible.

COMMENT #2: A commentor recommends that the rule address cabins without water and sewer facilities in the same manner as dependent recreational vehicles and tents, providing a bathroom service building within a reasonable distance.

RESPONSE #2: Adding a requirement for service buildings to be provided for cabins without water and sewer is a significant change to what is currently proposed and would require publishing a new rule, legal review, Secretary of State review, public hearing, and public comment period to be completed again. To the department's knowledge, there are no cabins without water and sewer placed more than 300 feet from a bathroom service building. Because this concern is not known to be a current public health concern, the department will address this issue when a full revision to subchapter 2 is proposed. In regard to a full revision to subchapter 2, the department refers the commentor to its response to comment #1.

COMMENT #3: A commentor suggests shortening the language in ARM 37.111.230(1) by replacing "toilets and other plumbing fixtures" with "public fixtures" to make it more concise.

RESPONSE #3: The department considers the benefit of leaving the language to read "toilets and other plumbing fixtures" as potential healthful clarification.

COMMENT #4: A number of commentors agree with the proposed change to no longer require a bathroom service building to be within 300 feet of independent recreational vehicles, but asserts that campgrounds should have at least one bathroom service building available, especially if tents and dependent recreational vehicles could potentially use the independent recreational vehicle sites.

RESPONSE #4: The department agrees that general service campgrounds should be constructed with at least one bathroom service building, as provided in the current ARM 37.111.230. The department recognized that the use of independent recreational vehicle sites from dependent recreational vehicles is not practical. Additionally, campers with independent recreational vehicles may utilize a bathroom service building. The department made its correction to the proposed amendment to clarify the intent in ARM 37.111.230.

COMMENT #5: A number of commentors oppose requiring a bathroom service building in small campgrounds due to the construction cost.

RESPONSE #5: After discussion with both commentors, the department discovered that the commentors are not owners of general service campgrounds, and the proposed rule change will not effect them. Because general service campgrounds have been and are currently required to construct service buildings according to ARM 37.111.230, the proposed rule change will not add construction costs to existing campgrounds.

/s/ Shannon McDonald
Rule Reviewer

/s/ Anna Whiting Sorrell
Anna Whiting Sorrell, Director
Public Health and Human Services

Certified to the Secretary of State August 3, 2009

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

In the matter of the amendment of ARM 37.40.307 and 37.40.361 pertaining to Medicaid nursing facility reimbursement	))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On June 25, 2009, the Department of Public Health and Human Services published MAR Notice No. 37-476 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 997 of the 2009 Montana Administrative Register, Issue Number 12.

2. The department has amended ARM 37.40.307 as proposed.

3. The department has amended the following rule as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

37.40.361 DIRECT CARE AND ANCILLARY SERVICES WORKERS' WAGE REPORTING/ADDITIONAL PAYMENTS INCLUDING LUMP SUM PAYMENTS FOR DIRECT CARE AND ANCILLARY SERVICES WORKERS' WAGE AND BENEFIT 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 lump sum payment in addition to the amount paid as provided in ARM 37.40.307 and 37.40.311 to their computed Medicaid payment rate to be used only for wage and benefit increases or lump sum payments for direct care or ancillary services workers in nursing facilities.

(a) The department will determine the lump sum payments, twice a year commencing July 1, 2009, and again in six months from that date as a pro rata share of appropriated funds allocated for increases in direct care and ancillary services workers' wages and benefits or lump sum payments to direct care and ancillary services workers.

(b) To receive the direct care and/or ancillary services workers' lump sum payment, a nursing facility shall submit for approval a request form to the department stating how the direct care and ancillary services workers' lump sum payment will be spent in the facility to comply with all statutory requirements. The facility shall submit all of the information required on a form to be developed by the department in order to continue to receive subsequent lump sum payment amounts for the entire rate year. The form for wage and benefit increases will request information including but not limited to:

(i) the number by category of each direct care and ancillary services workers that will receive the benefit of the increased funds, if these funds will be distributed in the form of a wage increase;

(ii) through (v) remain as proposed.

(c) If these funds will be used for the purpose of providing lump sum payments (i.e. bonus, stipend or other payment types) to direct care and ancillary services workers in nursing care facilities the form will request information including, but not limited to:

(i) the number by category of each direct care and ancillary services worker that will receive the benefit of the ~~increases~~ increased funds;

(ii) through (3) remain as proposed.

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

4. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

COMMENT #1: We recommend that the department adjust its methodology to provide an increase in the state wide average reimbursement rate that more closely implements a full 2% rate increase. This will be consistent with the intent of the 2009 Montana Legislature as expressed by the funding for a 2% rate increase for Medicaid providers. This 2% increase can be achieved by adjusting patient days to reflect a more accurate projection of the number of Medicaid days that will be paid in fiscal year 2010. The result of taking this action will be to more properly allocate the legislative appropriation to reach at least the 2% increase in funding.

RESPONSE #1: The department has continued to evaluate Medicaid caseload trends for nursing facilities and the estimate of patient contributions to be used in computing the 2010 nursing facility rates, in addition to the funding levels appropriated by the 2009 Legislature. Based on this evaluation, we believe the number of Medicaid bed days will be slightly lower than projected in the proposed rule and the patient contribution estimates will be slightly higher. The department agrees with the commentors and will make these adjustments in calculating the final rates for fiscal year 2010. The department will also provide a 2% increase in the statewide average rate for fiscal year 2010.

COMMENT #2: We recommend that the department make wording changes to ARM 37.40.361 pertaining to funding available for wage and benefit increases to nursing facility workers. The title of the section should reflect that this funding is to be used for wages, benefits, or lump sum payments for both direct care and ancillary workers. The commentor suggested that references to the workers eligible for the payments should be consistent by using the term "direct care and ancillary services lump sum payment" or including language the "hereinafter referred to as _____". Also, that ARM 37.40.361(2)(c)(i) be corrected to read "the benefit of the increased funds" instead of "the benefit of the increases funds".

RESPONSE #2: The department has reviewed this comment and has provided clarifying language to ARM 37.40.361 consistent with this comment.

COMMENT #3: We support the funding available for direct care worker wages, and the distribution options that are presented in the rules to provide this funding to direct care and ancillary services workers for fiscal year 2010.

RESPONSE #3: The department received several comments stating that funding provided by the 2009 Legislature for direct care wage initiatives is an important factor allowing providers to continue to deliver quality care to Montana seniors. The department would like to reiterate that the funding for the 2% provider rate increase and the direct care and ancillary worker wage increases was allocated in House Bill 645 as a one-time appropriation. A one-time appropriation means it will not be included in the department's base budget after state fiscal year 2011. If the next Legislature does not take specific action to continue the wage initiative for direct care and ancillary workers or the provider rate funding, the funding levels will be returned to the state fiscal year 2009 levels.

5. The department intends to apply these rules retroactively to July 1, 2009. A retroactive application of the proposed rules does not result in a negative impact to any affected party.

/s/ John Koch
Rule Reviewer

/s/ Laurie Lamson
Anna Whiting Sorrell, Director
Public Health and Human Services

Certified to the Secretary of State August 3, 2009.

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

In the matter of the amendment of ARM 37.113.108 and 37.113.112 and the repeal of ARM 37.113.104 pertaining to the implementation of the Montana Clean Indoor Air Act (CIAA)	))))))	NOTICE OF AMENDMENT AND REPEAL

TO: All Concerned Persons

1. On June 25, 2009 the Department of Public Health and Human Services published MAR Notice No. 37-477 pertaining to the public hearing on the proposed amendment and repeal of the above-stated rules at page 1003 of the 2009 Montana Administrative Register, Issue Number 12.

2. The department has amended 37.113.108 and repealed 37.113.104 as proposed.

3. The department has amended the following rule as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

37.113.112 COMPLAINT PROCEDURE REGARDING SMOKING VIOLATIONS (1) An individual who believes that a violation of the Montana Clean Indoor Air Act or of 20-1-220, MCA has occurred may file a written or electronic complaint with the department or the local health board or its designee that describes the violation, and provides the date of the violation and is signed by the complaining party.

(2) through (5) remain as proposed.

AUTH: 50-40-110, MCA
IMP: 20-1-220, 50-40-104, 50-40-108, MCA

4. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

COMMENT #1: One commentor expressed concern that owners of establishments plan to build or are in the process of building nonenclosed shelters on their property to allow customers to smoke.

RESPONSE #1: ARM 37.113.101(2) defines an "enclosed room", and 50-40-103(2), MCA defines "enclosed public place". Smoking that occurs outdoors or under a nonenclosed shelter is not governed by the Clean Indoor Air Act. The

department does not have the statutory authority to regulate or investigate nonenclosed shelters where smoking is allowed unless these shelters fall under these definitions.

COMMENT #2: One person commented that highway rest areas are covered under the law as an enclosed public place and should be smoke free.

RESPONSE #2: The department agrees. Enclosed buildings on highway rest areas are enclosed public places and should be smoke free.

COMMENT #3: One commentor pointed out that 50-40-104(4) and (5)(a), MCA still contain language intended to expire on September 30, 2009. Specifically the language prohibits children under 18 from entering an establishment where smoking is allowed, and allows smoking in certain bars and casinos. The commentor suggested that the language should be repealed or addressed in administrative rules.

RESPONSE #3: The current rule changes are intended to reflect the requirements that apply after September 30, 2009 as reflected in the language of the statute. The department does not, however, have the authority to change or repeal the statute. The Montana State Legislature would need to repeal these sections of the law through the legislative process.

COMMENT #4: Under ARM 37.113.112(4) of the proposed rules, several commentors suggested investigations should be mandatory rather than permissive, and objected to the proposed change.

RESPONSE #4: The department believes it is important to allow local health departments or their designees the discretion to determine if an investigation is necessary and will keep the proposed language "may conduct an investigation" in this section. A local health department or their designee may receive complaint(s) that they deem are valid and do not feel an investigation is necessary. Or, a local health department or their designee may receive multiple complaints regarding a specific establishment during a short time period, and more than one investigation is not necessary.

COMMENT #5: The department received multiple written and oral comments regarding ARM 37.113.112(1) of the proposed rules which would have allowed for anonymous complaints. Multiple commentors objected to this change and one commentor supported this change.

RESPONSE #5: The department agrees that complaints where the complaining party is identified is more likely to be valid and will not make the proposed change.

COMMENT #6: The department received several comments recommending that ARM 37.113.104 of the rules not be repealed. This section describes the process

for bars and casinos to obtain a certification for exception to allow smoking in these establishments until September 30, 2009.

RESPONSE #6: The Montana Clean Indoor Air Act, 50-40-104, MCA, specifies that smoking in an enclosed public place, including bars and casinos, will be prohibited after September 30, 2009. ARM 37.113.104 is not valid under the statute after that date and must be repealed.

COMMENT #7: The department received several written comments recommending that smoking continue to be allowed in bars in Montana.

RESPONSE #7: As indicated in the department's response to comment #6, the Montana Clean Indoor Air Act prohibits smoking in any public place, including bars and casinos after September 30, 2009.

5. The department intends to apply these rules effective October 1, 2009.

/s/ Shannon McDonald
Rule Reviewer

/s/ Laurie Lamson for
Anna Whiting Sorrell, Director
Public Health and Human Services

Certified to the Secretary of State August 3, 2009

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

In the matter of the amendment of ARM 38.3.601 and 38.3.602, pertaining to motor carrier certificates, and repeal of ARM 38.2.318, pertaining to electronic copy of filings	)))))	NOTICE OF AMENDMENT AND REPEAL

TO: All Concerned Persons

1. On March 12, 2009, the Montana Department of Public Service Regulation published MAR Notice No. 38-2-203 relating to the amendment of the above-stated rules at page 319 of the 2009 Montana Administrative Register, Issue Number 5.

2. On April 29, 2009, a public hearing was held in Helena on the proposed amendment of the above-stated rules. No comments or testimony were received.

3. The department has amended ARM 38.3.601, 38.3.602, and repealed 38.2.318 exactly as proposed.

4. The department intends for the amendment and repeal of these rules to be applied retroactively to April 30, 2009.

/s/ Greg Jergeson
Greg Jergeson, Chairman
Public Service Commission

/s/ Robin A. McHugh
Reviewed by Robin A. McHugh

Certified to the Secretary of State, July 30, 2009.

COUNTIES - Budget authority with respect to hospital districts;
COUNTIES - Budget powers in light of Mont. Code Ann. §§ 15-10-420, 7-6-4035 and -4036;
HEALTH CARE FACILITIES - Authority of county commission with respect to hospital district budget;
HOSPITAL DISTRICTS - Authority of county commission with respect to hospital district budget;
LOCAL GOVERNMENT - County budget powers in light of Mont. Code Ann. §§ 15-10-420, 7-6-4035 and -4036;
STATUTORY CONSTRUCTION - Construction of related statutes to give effect to all;
STATUTORY CONSTRUCTION - Effect of later adopted statute on earlier statutes dealing with same subject;
STATUTORY CONSTRUCTION - Presumption that legislation is intended to change existing law;
MONTANA CODE ANNOTATED - Sections 2-9-316, 7-6-2527, -4001, -4015, -4035, -4036, 7-34-2131, -2132, -2133, 15-10-402, -420, (1)(a), (b), -425, 22-1-304, 67-10-402(1);
MONTANA LAWS OF 2001 - Chapters 278, 574, section 84;
OPINIONS OF THE ATTORNEY GENERAL - 49 Op. Att'y Gen. No. 16 (2001), 49 Op. Att'y Gen. No. 5 (2001), 48 Op. Att'y Gen. No. 3 (1999), 41 Op. Att'y Gen. No. 91 (1986).

HELD:

1. Subject to Mont. Code Ann. § 15-10-420, a board of county commissioners may levy mills to support a county hospital district, even if the district is newly created and no mills have previously been levied for district purposes.

2. For purposes of applying Mont. Code Ann. § 15-10-420 to a mill levy for a county hospital district under Mont. Code Ann. § 7-34-2133, the "governmental entity" levying the tax is the county, not the district.

3. Under Mont. Code Ann. § 15-10-420, county property taxes are limited by the number of mills required to raise the same amount of tax revenue as was raised in the immediately previous year, increased by (a) one-half of the average rate of inflation for the previous year, and (b) by any mills carried over from the previous year under Mont. Code Ann. § 15-10-420(1)(b). The amount of tax revenue raised in 1996, as provided in Mont. Code Ann. § 15-10-420, is no longer the limiting factor.

4. The commissioners may provide funding for a hospital district from the general mill levy or from (a) mills levied under Mont. Code Ann. § 7-34-2133, so long as the total number of mills

levied by the county under Mont. Code Ann. § 7-1-2133 and for all other purposes covered by § 420 stays within the cap provided by § 420; (b) from an additional mill levy amount approved by the voters under Mont. Code Ann. § 15-10-425; or (c) from bonds sold pursuant to Mont. Code Ann. § 7-34-2131 to defray the cost of "acquisition, furnishing, equipment, improvement, extension, and betterment of hospital facilities and to provide an adequate working capital for a new hospital."

5. Montana Code Annotated § 7-34-2133 does not obligate the county to fund the budget proposed by the county hospital district trustees without change.

July 30, 2009

Granite County Board of Commissioners
P.O. Box 925
Philipsburg, MT 59858-0925

Dear Commissioners:

You have requested my opinion regarding the funding of the newly created Granite County Hospital District. I have identified the issues presented as follows:

1. May a newly created hospital district levy mills to support its budget under the provisions of Mont. Code Ann. § 7-34-2133 where it has not previously levied mills?

2. How do Mont. Code Ann. § 15-10-420, as amended in 2001, and other statutory amendments enacted in 2001, affect the county mill levy for hospital purposes?

Your letter informs me that the voters of Granite County have approved the creation of a new hospital district and have elected the trustees of the district. Since the district is new entity, the county has not previously levied mills or budgeted funds needed to operate the district.

In 2001, the Montana Legislature made several changes in the funding of local government services. The most sweeping of these changes is found in 2001 Mont. Laws, ch. 574. Prior to 2001, Mont. Code Ann. § 15-10-420 ("§ 420") provided a complex process to limit local government tax revenues, taking into account the existence of numerous statutes that provide for special mill levies in specified amounts tied to specific purposes, as Mont. Code Ann. § 7-34-2133 does for hospital districts. The 2001 amendments to § 420 scrapped the existing process and replaced it with a mill levy cap. The cap encompasses almost all local government mill levies, including special levies, and limits the local government's mill

levies for almost all purposes to the number of mills needed to provide the same revenue as was raised in the prior year, indexed for inflation. The amended § 420 also allows a local government to carry mills forward to a subsequent year when the entire amount of revenue that might be raised under the cap has not been raised.

The same bill amended a large number of special mill levy statutes in two basic ways. These amendments eliminated numerical mill levy caps found in the special levy statutes. Section 84 of the bill amended Mont. Code Ann. § 7-34-2133 to eliminate the three mill limit for hospital districts. It also modified all of the special levy statutes, including Mont. Code Ann. § 7-34-2133, to make clear that all of the special levies were "subject to 15-10-420."

I.

In 49 Op. Att'y Gen. No. 5 (2001), Attorney General McGrath answered several questions posed by the city of Great Falls under § 420 relating to the city airport. One of the issues presented was whether the limit on mills was calculated by reference to specific programs for which the Legislature had provided levy authority, or by reference to the total number of mills levied by the city for all purposes.

In response to that question, Attorney General McGrath held that § 420 limited the total number of mills levied by a local government, regardless of the purpose for which it levies the mills. He stated:

> In calculating the city's mill levy for this year, it does not matter whether the city levied two mills, or for that matter any mills, for airport purposes under Mont. Code Ann. § 67-10-402(1) in any prior year. Under [§ 420], the city is authorized to levy a property tax for the airport, and as long as the city's total property tax collections covered by the mill levy cap in Mont. Code Ann. § 15-10-420(1)(a) do not exceed those assessed in the prior year, the airport levy is permissible. It is simply not relevant under this statutory scheme whether the city levied a tax under [the airport special tax levy statute] in any prior year.

(Emphasis added.) The ability of the county to levy mills for the hospital district therefore is not affected by the fact that the district is new or by the fact that no mills have been levied for the district in past years. Since the taxing authority in § 7-34-2133 is "subject to 15-10-420," it cannot be argued that the hospital levy is exempt from the mill levy limits.

II.

Under § 420, the "governmental entity" for purposes of calculating the mill limit is the commission, not the hospital district. Montana Code Annotated § 7-34-2133 requires "the board of county commissioners" to levy the tax, not the hospital district board, just as the tax levy for the Great Falls airport was levied by the city commission, not by the airport board.

III.

Moreover, under the 2001 amendment to section 420, the amount of taxes levied in 1996 is no longer a limiting factor. The 2001 amendment to section 420 specifically modified the reference to 1996 in Mont. Code Ann. § 15-10-402. As amended, § 420 provides that the limiting factor is now the tax revenue generated in the prior year, not in 1996. The Board of Commissioners may levy the maximum mills allowed by § 420.

Accordingly, there are several options by which a Board of Commissioners may fund a hospital district. If a hospital district exists or is created, the commissioners may provide funding from the general mill levy. They may also levy mills under Mont. Code Ann. § 7-34-2133, so long as the total number of mills levied by the County for the hospital and for all other purposes covered by § 420 stays within the cap provided by § 420. The county may also provide funding for the hospital from an additional mill levy amount approved by the voters under Mont. Code Ann. § 15-10-425. Finally, Mont. Code Ann. § 7-34-2131 allows a hospital district to issue bonds to defray the cost of "acquisition, furnishing, equipment, improvement, extension, and betterment of hospital facilities and to provide an adequate working capital for a new hospital."

IV.

One other point deserves mention. Montana Code Annotated § 7-34-2132 requires the hospital trustees to present the county commission a budget and to "certify the amount necessary and proper for the ensuing year." Montana Code Annotated § 7-34-2133 then provides that the commissioners "shall, annually at the time of levying county taxes, fix and levy a tax on the taxable value of all taxable property within the hospital district clearly sufficient to raise the amount certified by the board of hospital trustees under 7-34-2132." In light of the budget statutes adopted in 2001, an argument that this language obligates the Granite County Commissioners to fund the district trustees' proposed budget without change cannot be accepted.

First, that conclusion produces an absurd result. It would allow the hospital district board to prevent the local governing board from addressing other important governmental responsibilities. Since the county commission is responsible for the provision of numerous public services specified by law, see Mont. Code Ann. § 7-6-2527 (enumerating nonexclusive list of permissible county expenditure of property tax revenue), the Legislature cannot have intended to make hospitals a superior priority that could consume so much of the county budget that other needs would go unfunded. Compare Skinner Enters. v. Lewis & Clark County Bd. of Health, 286 Mont. 256, 271, 950 P.2d 733, 742) (1997) (construing statutes together avoids absurd results).

Second, other actions of the 2001 Legislature suggest that the overall intention of the Legislature was to vest the local government with the authority to approve the budgets of local boards and commissions. 2001 Mont. Laws, ch. 278, enacted

provisions that have been codified at Mont. Code Ann. §§ 7-6-4035 and -4036. Section 7-6-4035 provides, in pertinent part: "The proposed budget and mill levy for each board, commission, or other governing entity are subject to approval by the governing body." Section 7-6-4036 provides:

> The governing body shall fix the tax levy for each taxing jurisdiction within the county or municipality . . . after the approval and adoption of the final budget . . . at levels that will balance the budgets as provided in 7-6-4034. . . . Each levy . . . except for a judgment levy under 2-9-316 or 7-6-4015, is subject to 15-10-420.

The Legislature made these provisions part of the "Local Government Budget Act." Mont. Code Ann. § 7-6-4001.

Making the "proposed budget" of the hospital district subject to "approval" by the commissioners, as Mont. Code Ann. § 7-6-4035 requires, would be meaningless if the Hospital Board could nevertheless compel the commissioners to approve its budget proposal intact. It is presumed that the Legislature does not intend to require meaningless acts, Peris v. Safeco Ins., 276 Mont. 486, 492, 916 P.2d 780, 784 (1996) ("This Court presumes that the Legislature does not pass meaningless legislation."), and that a Legislative enactment is intended to change existing law, Cantwell v. Geiger, 228 Mont. 330, 333, 742 P.2d 468, 471 (1987) ("In construing a statute, this Court presumes that the Legislature intended to make some change in existing law by passing it.").

The net effect of the 2001 local government budget enactments is to ensure that local governing bodies have sufficient flexibility to provide necessary services within a balanced and limited budget. The conclusion that the county commissioners would be required to accept and budget for the proposed budgets of a hospital district is inconsistent with the flexibility provided by § 420 and the broad budget authority provided in the Local Government Budget Act.

The guidelines for the construction of statutes recognize that all statutes relating to a particular subject are to be read together in a way that gives effect to all, City of Billings v. Panasuk, 253 Mont. 403, 406, 833 P.2d 1050, 1052 (1992), and that the meaning of earlier statutes may be affected by later-adopted statutes dealing with the same subject matter, see State v. Marchindo, 65 Mont. 431, 443, 211 P. 1093, 1097 (1922) ("It is the rule of construction that, where a new remedy or mode of procedure is authorized by a new statute, and the new procedure is inconsistent with the former one, the latest expression of legislative will must govern; however, to the extent only as provided in the new Act.") These principles apply to the construction of Mont. Code Ann. § 7-34-2133 in light of the later adopted provisions of Mont. Code Ann. §§ 7-6-4035 and -4036.

In my opinion, the best way to provide meaning and effect to all of these statutes is to construe the later-adopted provisions of §§ 7-6-4035 and 7-6-4036 to control the interpretation of § 7-34-2133 and negate an interpretation that would require the

county commissioners to rubber-stamp the proposed budgets of hospital districts. Under the 2001 statutes, the commissioners have the authority to review and adjust the budgets proposed by hospital district trustees.

I am aware that other opinions of this office have held that a local governing body is obligated to fund the budget of a public library as proposed by the library trustees without change. 49 Op. Att'y Gen. No. 16 (2001); 48 Op. Att'y Gen. No. 3 (1999); 41 Op. Att'y Gen. No. 91 (1986). The soundness of the holdings in these opinions is an issue not squarely presented by your request. For that reason, I express no opinion here regarding the effect of the 2001 amendments to the local government budget laws to the funding of a public library, leaving those questions for consideration when this office receives a request that presents those issues for review.

THEREFORE IT IS MY OPINION:

1. Subject to Mont. Code Ann. § 15-10-420, a board of county commissioners may levy mills to support a county hospital district, even if the district is newly created and no mills have previously been levied for district purposes.

2. For purposes of applying Mont. Code Ann. § 15-10-420 to a mill levy for a county hospital district under Mont. Code Ann. § 7-34-2133, the "governmental entity" levying the tax is the county, not the district.

3. Under Mont. Code Ann. § 15-10-420, county property taxes are limited by the number of mills required to raise the same amount of tax revenue as was raised in the immediately previous year, increased by (a) one-half of the average rate of inflation for the previous year, and (b) by any mills carried over from the previous year under Mont. Code Ann. § 15-10-420(1)(b). The amount of tax revenue raised in 1996, as provided in Mont. Code Ann. § 15-10-420, is no longer the limiting factor.

4. The commissioners may provide funding for a hospital district from the general mill levy or from (a) mills levied under Mont. Code Ann. § 7-34-2133, so long as the total number of mills levied by the county under Mont. Code Ann. § 7-1-2133 and for all other purposes covered by § 420 stays within the cap provided by § 420; (b) from an additional mill levy amount approved by the voters under Mont. Code Ann. § 15-10-425; or (c) from bonds sold pursuant to Mont. Code Ann. § 7-34-2131 to defray the cost of "acquisition, furnishing, equipment, improvement, extension, and betterment of hospital facilities and to provide an adequate working capital for a new hospital."

5. Montana Code Annotated § 7-34-2133 does not obligate the county to fund the budget proposed by the county hospital district trustees without change.

Sincerely,

/s/ Steve Bullock
STEVE BULLOCK
Attorney General

sb/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 P.O. 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 or Register) 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

2. Go to cross reference table at end of each number and title which lists MCA section numbers and department 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, 2009. This table includes those rules adopted during the period April 1, 2009, through June 30, 2009, 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 include the contents of this issue of the Montana Administrative Register (MAR or Register).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through March 31, 2009, 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 2008 and 2009 Montana Administrative Register.

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

GENERAL PROVISIONS, Title 1

1.3.201 and other rule - Definitions - MAPA, p. 2418, 7

ADMINISTRATION, Department of, Title 2

I Waiver of In-State Office Requirement, p. 2320, 2621
2.2.101 Department of Administration's Procedural Rules, p. 1180
2.5.502 and other rule - Contract Security, p. 2310, 2616
2.59.401 Credit Union Supervisory and Examination Fees, p. 2323, 2620
2.59.1711 Continuing Education, p. 159, 735

(Public Employees' Retirement Board)
2.43.203 and other rules - Operation of the Retirement Systems and Plans Administered by the Montana Public Employees' Retirement Board, p. 1852, 2467, 78
2.43.1001 Adoption by Reference of the State of Montana Public Employee Defined Contribution Plan Document, January 1, 2008, Edition, p. 2396, 82
2.43.1801 Adoption by Reference of the State of Montana Public Employee Deferred Compensation Plan Document, January 1, 2008, Edition, p. 2393, 81
2.43.3502 and other rule - (Public Employees' Retirement Board) Investment Policy Statement for the Defined Contribution Retirement Plan -

17.38.101 and other rules - Public Water Supply - Incorporation by Reference of Current Federal Regulations and Other Materials in the Public Water Supply Rules - Consecutive System Coverage, p. 1731, 2625
17.40.318 and other rule - and the Department - Water Treatment Systems and Operators - Public Water and Sewage System Requirements - State Revolving Fund and Public Water and Sewer Projects Eligible for Categorical Exclusion From MEPA Review, p. 55, 412
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